COURT OF APPEALS, STATE OF COLORADO Appeal from the District Court of Douglas County, Honorable Nancy Hopf, Judge District Court Case Number 05CR177 Court Address: 2 East 14th Avenue Denver, CO 80203	**COURT USE ONLY** FILED IN THE STATE OF COLORADO 2008 MAY -7 P 12:01 CHRISTOPHER T RYAN CLERK COURT OF APPEALS
Plaintiff(s): PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee **Defendant(s): TRI NGUYEN** Defendant-Appellant	
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OPENING BRIEF	

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OPENING BRIEF	

Defendant-Appellant Tri Nguyen, by and through his attorney Patrick J. Mulligan, and pursuant to C.A.R. 4, hereby submit the Opening Brief in this case.

INTRODUCTION

Mr. Nguyen was the defendant at trial, and will be referred to by name or as the Defendant. The State of Colorado was the plaintiff at trial, and will be referred

to as the prosecution or as the state. Numbers in parentheses refer to the volume and page number of the record below.

ISSUES ON APPEAL

I. Did the trial court violate Mr. Nguyen's rights to confrontation and to present a defense when the court prevented the defense from introducing evidence of the other driver's history of major traffic violations?

II. Did the trial court commit reversible error when it refused to instruct the jury that the defective fence in the median of the highway could be considered as an intervening cause on the charge of vehicular homicide?

III. Should the mittimus be amended to reflect the trial court's order that the convictions on counts 3 through 5 merged with the convictions for counts 1 and 2?

IV. Was the evidence sufficient to sustain the conviction for vehicular homicide, where the death of the victim was the result of the second collision in the accident, and where numerous intervening causes interrupted the connection between the Defendant's conduct and the death of the victim?

STATEMENT OF THE CASE

Mr. Nguyen was originally charged, in Information filed in Douglas County Court, with Vehicular Homicide, Vehicular Assault, Manslaughter, Reckless

Driving, and Reckless Endangerment. (v1, p47) The prosecution later added a charge of Criminally Negligent Homicide. (v1, p137)

At trial, the jury returned guilty verdicts on all charges. (v2, p243-251) At the sentencing hearing, the court ruled that all remaining counts merged into the charges of Vehicular Homicide and Vehicular Assault, Counts 1 and 2. (v9, p18) The Court then sentenced Mr. Nguyen to four years in the Department of Corrections on each count, with the sentences to run concurrently. (v9, 32-33) Mr. Nguyen timely filed his Notice of Appeal, thus perfecting this appeal. (v2, p261)

Mr. Nguyen enrolled in and completed the Regimented Inmate Training Program, commonly referred to as "Bootcamp." After completion of the program, Mr. Nguyen appeared before the court for a hearing on his motion for reconsideration of sentence. After hearing argument on the motion, the court granted a 90 day reduction of sentence. (v3, p314)

STATEMENT OF THE FACTS

The criminal charges against Mr. Nguyen arose from a traffic accident. The accident involved three cars: Mr. Nguyen's, the car driven by Timothy Pott, and the vehicle driven by Ray Combest. According to witness Katherine Yoho, Mr. Nguyen's car was traveling in the same direction on Highway C-470 as the car

driven by Pott. (v6, p158-78) The two cars collided, and Pott's car then drove across the median into oncoming traffic. Pott's car struck the SUV driven by Mr. Combest, and Combest was killed. The parties stipulated that Combest died as a result of injuries sustained in the accident, and that Mr. Pott suffered serious bodily injury. (See, v6, p142)

The question at trial involved causation. More specifically, did the specific conduct of Mr. Nguyen cause, or was it the proximate cause, of the death of Ray Combest? The litigation of this question became quite complicated.

First, Mr. Nguyen had no alcohol or drugs in his system at the time of the accident. As a result, there was no allegation of DUI or DWAI. Rather, the prosecution charged Mr. Nguyen with Vehicular Homicide, based on the theory that his driving was reckless, and that this recklessness caused the death of the victim.

Curiously, the prosecution also charged Mr. Nguyen with Manslaughter. That charge was also predicated on the theory that the Defendant had recklessly caused the death of the victim. Counsel for Mr. Nguyen argued that the charges were duplicative, and that the prosecution was required to elect between the charges, all to no avail.

Other factors played a role in the accident. Because Mr. Pott was driving in the same direction as Mr. Nguyen, and because it was Pott who eventually drove across the intersection into oncoming traffic, his blood was tested for the presence of drugs or alcohol. The test came back positive for THC, indicating that Pott had smoked or otherwise ingested marijuana at some point prior to the accident. At trial, Pott admitted smoking marijuana, but denied using on the day of the crash. Regrettably, there was no reliable way to test the veracity of Pott's claim. (v7, p123) Whenever he had last used the drug, however, there was enough of it in his system to show up in his bloodstream after the accident.

In addition to his drug usage, Mr. Potts had very substantial history of traffic accidents and violations. Prior to trial, counsel for Mr. Nguyen moved to introduce evidence of the significant driving history of Mr. Potts. (v1, p107) The defense notice was in direct response to the prosecution's notice of intent to introduce Mr. Nguyen's history of traffic violations pursuant to Colorado Rules of Evidence Rule 404(b). The trial court denied the defense motion.

The defense was permitted to introduce evidence of yet another factor in the accident. As Mr. Pott's vehicle careened across the median that divided the west bound lanes from the east bound lanes of highway C-470, it went under and through a protective cable barrier or fence that was designed to prevent cars from

crossing the median. In fact, the cable was designed to prevent exactly what happened in this accident. Because the barrier failed in its precise purpose, defense counsel argued that it constituted an intervening cause in the accident. (v8, p5-15) The trial court rejected the defense argument, and refused to instruct the jury that the defective fence could be an "intervening cause" of the accident. (v8, p17)

Mr. Nguyen did not testify in his own behalf. Through counsel, however, and in his initial statements to law enforcement, Mr. Nguyen acknowledged his role in the accident. The defense theory was that Mr. Nguyen's conduct was not reckless, as he did not consciously disregard a substantial risk that his conduct would cause the death of another person. Instead, according to the defense, Mr. Nguyen's driving was at most negligent, meaning that he failed to perceive such a risk, and his driving was therefore careless and not reckless.

The jury returned guilty verdicts on manslaughter, vehicular homicide, vehicular assault, and the remaining charges. Because the jury never heard some of the most compelling evidence in this case, and because other legal rulings rendered the process unfair, Mr. Nguyen appeals his convictions.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. NGUYEN'S RIGHTS TO PRESENT A DEFENSE AND TO CONFRONTATION WHEN IT RULED

THAT THE DEFENSE COULD NOT INTRODUCE EVIDENCE OF THE SERIOUS TRAFFIC AND CRIMINAL HISTORY OF ONE OF THE OTHER DRIVERS INVOLVED IN THE ACCIDENT.

Standard of Review: In general, the admissibility of evidence is a matter of some discretion with the trial court, and is viewed under an "abuse of discretion" standard. *See, e.g., People v. Boykins, 140 P.3d 87 (Colo. App. 2005)* The court's discretion is limited, however, by the constitutional rights to present a defense and to confront and cross-examine the witnesses. *U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16, 25.*

Citation to the Record: Defense argument for admission of the evidence under Rules 404, 405, and 406 of the Colorado Rules of Evidence: (v5, p41-59) Trial court order denying Mr. Nguyen's motion to introduce evidence of Pott's driving history. (v5, p.14 of hrg. Dated May 8, 2006).

A. The trial court's order denying the admission of the other driver's history of serious traffic violations resulted in a violation of Mr. Nguyen's right to present defense evidence.

A defendant in a criminal case is guaranteed the fundamental constitutional right to present a defense. *U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16, 25; Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct., 989, 94 L.Ed. 2d 40*

(1987); Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 18 L.Ed.2d 330 (1972); Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); People v. Bueno, 626 P.2d 1167 (Colo. App. 1981).

In addition, the accused in a criminal case is entitled to an instruction on his theory of the case whenever there is any evidence to support it. *See, United States v. Ruiz, 59 F.3d 1151 (11th Cir. 1996); People v. Dillon, 655 P.2d 841 (Colo. 1982); People v. Moya, 182 Colo. 290, 512 P.2d 1155 (1973).* This is true no matter how improbable, unreasonable, or unbelievable his contention may be. *People v. Marquez, 692 P.2d 1089 (Colo. 1984); People v. Rivera, 710 P.2d 1127 (Colo. App. 1985).* It is thus critical that the jury be given an unequivocal instruction which directs its attention to the accused's theory of the case. *Payne v. People, 110 Colo. 236, 132 P.2d 441 (1942).* Such an instruction should be given even when the theory consists of nothing more than an explanation of events which, if believed by the jury, would absolve the Defendant from criminal liability. *People v. Weiss, 717 P.2d 511, 512 (Colo. App. 1985).*

In this case, counsel for Mr. Nguyen provided notice of their intent to introduce evidence of the driving history of one of the other drivers in the accident, Timothy Pott. (v1, p107) According to the offer of proof from the defense, the

history included some 16 driving convictions (later shown to be at least 20), including convictions for DWAI, 6 speeding convictions, a conviction for failing to yield the right of way, and numerous other convictions which were likely reduced from more serious charges. Id.

Of note, the "Notice" from the defense of the intent to introduce so-called Rule 404(b) evidence was submitted in response to the prosecution's notice to introduce evidence of prior driving convictions of Mr. Nguyen. (v1, p68) The prosecution asserted that evidence of the Defendant's prior driving history was relevant and admissible to show, among other things, intent, absence of mistake, modus operandi, and "other purposes." (v1, p69) Upon receipt of the Defendant's motion, however, the prosecution withdrew its motion to introduce such evidence against Mr. Nguyen. (v5, p41)

Prior to trial, the court held a hearing to determine whether any of the "prior transaction" evidence would be admissible at trial. After hearing argument, the court ruled that the defense could not introduce, either through cross-examination or directly, evidence of the prior driving history of Timothy Pott. (v5, p14) The trial court's ruling was erroneous, and resulted in a violation of Mr. Nguyen's fundamental constitutional rights to present a defense and to confrontation. His

convictions must therefore be reversed. *U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16, 25.*

At the hearing on the defense motion to introduce evidence of the driving history of Mr. Pott, defense counsel articulated numerous theories in support of the motion. First, counsel argued that the evidence was admissible as habit evidence, pursuant to C.R.E. 406. Counsel noted that Pott had had received 20 traffic tickets, including at least 9 for convictions for speeding-related driving, as well as a DUI offense in which Pott had a Blood Alcohol Content of .151, nearly twice the legal limit. (v5, p41-42) Pott had accumulated over 60 points against his license, including two separate suspensions of his privilege to drive. Id. Under these circumstances, the evidence demonstrated that Mr. Pott had a habit of driving illegally and in excess of the speed limit, and such evidence should have been admitted to show that he acted in conformity with his habit. *See, People v. Bloskas, 646 P.2d 907 (Colo. 1982); People v. Yazzie 188 F.3d 1178 (10th Cir. 1999).*

Defense counsel then argued that the evidence of Pott's driving history was admissible pursuant to C.R.E. 404(b). (v5, p48) Counsel explained that the evidence would show that as the Defendant attempted to change lanes, his car struck Pott's car. The critical question at trial would be whether Pott accelerated as

Mr. Nguyen changed lanes, in an effort to prevent Nguyen from pulling in front of him. If Pott did accelerate in this fashion, he would be the cause of the accident, and not Mr. Nguyen. (V5, p48-50) Evidence of Pott's lengthy history of aggressive and illegal driving was thus admissible to show Pott's modus operandi, and to show that Pott's driving was the proximate cause of the accident. (v5, p49)

Finally, Mr. Nguyen asserted, through counsel, that evidence of Mr. Pott's driving history was admissible pursuant to CRE 405. Counsel explained that Pott's character trait of illegal and aggressive driving was analogous to a history of aggressive behavior, from which it could be inferred that he was the "initial aggressor." (v5, p50) *See, People v. Jones, 635 P.2d 904 (Colo. App. 1981).* Trial counsel again explained that the defense theory was that Pott actually sped up as Mr. Nguyen tried to change lanes, thereby causing the accident that led to Pott's injuries and the death of the other victim's death. (v5, p59) The evidence of Pott's driving history was thus specifically tied to the defense theory, and satisfied the requirement of a "precise evidential hypothesis" pursuant to *People v. Spoto 795 P.2d 1314 (Colo. 1990).*

After taking the matter under advisement, the trial court eventually denied Mr. Nguyen's motion to introduce evidence of Pott's driving history. (v5, p.14 of hrg. Dated May 8, 2006). The court ruled the evidence inadmissible under CRE

403 and 404(b), finding that the evidence "is really propensity evidence." *Id.* The trial court's ruling was erroneous, and resulted in a violation of Mr. Nguyen's rights to confrontation and to present a defense. *U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16, 25.*

The trial court applied the incorrect standard of review in excluding the proffered evidence. The trial court ruled, in essence, that the evidence of Mr. Pott's driving history was inadmissible under Rule 404(b) of the Colorado Rules of Evidence. The standard under Rule 404(b), however, was not the only applicable standard in this case. The trial court failed to analyze the admissibility of the evidence under rules 405 and 406, and failed to analyze the constitutional dimensions of the issue. Denying Mr. Nguyen the opportunity to present relevant evidence in support of his theory of defense resulted in a violation of his fundamental constitutional right to present defense evidence, and requires reversal of his convictions. *U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16, 25.*

B. The trial court's ruling resulted in a violation of Mr. Nguyen's right to confront and cross-examine one of the key witnesses against him.

The accused in a criminal case has a fundamental constitutional right to confront and cross-examine the witnesses against him. *U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16.* The right to confrontation necessarily includes

the right introduce certain extrinsic evidence which impeaches the credibility of the prosecution's key witnesses. *See, Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 102 L.Ed.2d 523 (1988); People v. Merritt, 842 P.2d 162, 166 (Colo. 1992); People v. Bowman, 669 P.2d 1369 (Colo. 1983); People v. Owens, ___ P.3d ___, 2007 WL 1438674 (Colo. App.); People v. Golden, 140 P.3d 1 (Colo. App. 2005); State v. Colton, 227 Conn. 231, 630 A.2d 577 (1993); Rankin v. State, 41 S.W.3d 335 (Tex.App.2001).*

In *Merritt* and *Bowman*, the Colorado Supreme Court ruled that the trial court unduly restricted the scope of the defendant's cross-examination of key prosecution witnesses. In each case, the violation of the defendant's right to confrontation required reversal of the resulting conviction.

In *Golden* and in *Owens*, meanwhile, divisions of this Court ruled that the trial courts erred in excluding evidence of the alleged victim's romantic or sexual relationships. In each case, the resulting violation of the defendant's constitutional right to confront and cross-examine required that the conviction be reversed.

In the present case, the same violation requires the same result. Here, the defense sought to cross-examine Timothy Pott, the listed victim on the vehicular

assault charge. Mr. Nguyen's vehicle collided with Pott's car, and Pott then went through the median, striking the car driven by Combest, who was killed.

The defense theory, at least prior to the trial court's ruling, was that Pott caused the initial collision with Mr. Nguyen. In support of the theory, the defense sought to introduce evidence of Pott's lengthy driving record, which included various episodes of reckless or aggressive driving, and numerous citations for speeding. As set forth above, such evidence was admissible as defense evidence, in support of Mr. Nguyen's basic theory of defense.

The evidence was also admissible, however, as impeachment evidence, in support of Mr. Nguyen's right to confrontation. The prosecution chose to call Mr. Pott to the stand. Pott's lengthy and substantial driving record became part of the case at the point that the prosecution chose to call him. The prosecution may not be permitted to "sanitize" a witness, when the truth about the witness may cast a serious doubt as to his credibility.

The trial court's ruling prohibiting the cross-examination of the state's witness on the issue of his numerous serious prior traffic offenses resulted in a violation of Mr. Nguyen's rights to confront and cross-examine the witnesses against him. His convictions must therefore be reversed. *U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16.*

II. THE MITTIMUS MUST BE AMENDED TO REFLECT THE COURT'S ORDER THAT THE CONVICTIONS FOR RECKLESS DRIVING, MANSLAUGHTER, AND RECKLESS ENDANGERMENT MERGED WITH THE VEHICULAR HOMICIDE ARE AND VEHICULAR ASSAULT CONVICTIONS.

Standard of Review: For Double Jeopardy purposes, if the acts of the defendant are not distinct offenses, they merge into a single conviction. *People v. Mintz, 165 P.3d 829 (Colo. 2007); People v. Abiodun 111 P.3d 462 (Colo. 2005); People v. Woellhaf, 105 P.3d 209 (Colo. 2005)*

Citation to Record: Defense argument and prosecution concession and agreement: (v9, p16-18). Trial court ruling merging offenses: (v9, p18)

In this case, Mr. Nguyen was charged with both Reckless Manslaughter and with Vehicular Homicide. The charges were based upon the exact same conduct, arising out of the same episode. The charges were both based upon the death a single victim. Under these circumstances, the conviction for reckless manslaughter must be vacated.

Colorado has recognized the fundamental principle that a defendant may be convicted of only one offense for the killing of a single person. Multiple

convictions for the same conduct, against the same victim, violate a defendant's due process rights and the prohibition against double jeopardy. *U.S. Const., Amend. V, XIV; Colo. Const., Art. II, Sec. 18. See, People v. Lowe 660 P.2d 1261, 1269 -1271 (Colo.,1983); People v. Delgado-Elizarras, 131 P.3d 1110 (Colo. App. 2005); People v. Lopez, 97 P.3d 223 (Colo. App. 2004), aff'd, 113 P.3d 713 (Colo. 2005); Patton v. People, 35 P.3d 124 (Colo. 2001); See also, People v. Mintz, 165 P.3d 829 (Colo. 2007); People v. Abiodun 111 P.3d 462 (Colo. 2005); People v. Woellhaf, 105 P.3d 209 (Colo. 2005).* In *Lowe*, the Colorado Supreme Court ruled that convictions for both First Degree Murder-After Deliberation and for Felony Murder, based upon the same act, and upon a single victim, could not stand. The same principle applies with equal force in this case.

Here, counsel for Mr. Nguyen repeatedly objected to the duplicative charging of both offenses, base upon a single incident with a single victim. Defense counsel repeatedly argued that the court was required to compel the prosecution to elect between the charges, and that the charges effectively merged. (See, v. 8, p18-22) The trial court overruled the objections, and erroneously concluded that the problem could be "solved" by imposing concurrent sentences. The trial court's ruling was incorrect.

At the sentencing hearing, however, trial counsel again raised the legal objection to the duplicative nature of the convictions, and noted that counts 3, 4, and 5 all merged with counts 1 and 2. (v9, p16-17) The prosecution agreed, and specifically chose not to object to the merger of the offenses. (v9, p18) The trial court also agreed, and ordered that the convictions on counts 3, 4, and 5 merged into the convictions for counts 1 and 2. (v9, p18) The court went onto sentence Mr. Nguyen only on counts 1 and 2, for concurrent sentences of 4 years and 2 years to the Department of Corrections.

On both the original and the amended mittimus, however, a number of inaccuracies still appear. First, the mittimus inaccurately reflects that the defendant pled guilty to all five charges. (v2, p259) Then, the mittimus reflects that "counts 3-6 are merged with this sentence." Id. Not only is the number of counts inaccurate, but the phrasing suggests that the convictions for counts 3, 4, and 5 were intact, and only the sentences merged. The amended mittimus contains the same inaccuracies, but was amended to reflect the 90 day credit the court afforded to Mr. Nguyen upon completion of the Regimented Inmate Training Program. (v3, p314)

The infliction of double punishment, or the imposition of multiple convictions, for identical conduct, violates the prohibition against double jeopardy.

Here the trial court properly ordered the merger of the convictions for counts 3 through 5 into counts 1 and 2. This means that only convictions for counts 1 and 2 should be reflected in the mittimus, and that the other convictions should be vacated. This Court should therefore order that the mittimus be corrected to reflect that the Defendant was convicted at trial of counts 1 and 2, and that the remaining convictions are vacated. *U.S. Const., Amend. V, XIV; Colo. Const., Art. II, Sec. 18; People v. Mintz, supra; People v. Abiodun, supra; People v. Woellhaf, supra.*

III. THE TRIAL COURT ERRONEOUSLY REFUSED TO INSTRUCT THE JURY THAT THE DEFECTIVE CABLE FENCE IN THE MEDIAN OF THE HIGHWAY, WHICH FAILED TO PREVENT THE SECOND COLLISION, COULD BE AN INTERVENING CAUSE OF THE EVENTUAL ACCIDENT.

Standard of Review: Because the issue of an independent intervening cause is treated as an affirmative defense in cases of vehicular homicide, there need only be a "scintilla" of evidence in support of the defense in order to warrant an instruction to the jury. *People v. Lopez, 97 P.3d 277, (Colo. App. 2004).*

Citation to record: Defense argument and request for instruction: (v8, p5-15). Trial court ruling: (v8, p17)

In a vehicular homicide case, an independent intervening cause may be responsible for the death of the victim, and thus relieve the defendant of responsibility for the death. *See, e.g., People v. Lopez, 97 P.3d 277, (Colo. App. 2004)* An intervening cause is one that interrupts the natural sequence of events following the defendant's act, and intervenes to become the cause of the death. *See, People v. Lopez, supra; People v. Saavedra-Rodriguez, 971 P.2d 223 (Colo. 1998); People v. Calvaresi, 188 Colo. 277, 534 P.2d 316 (1975).*

In order to constitute an intervening cause, the person or entity must satisfy three elements: 1. the defendant must not participate in the intervening cause; 2. the intervening cause is one but for which the death would not have occurred; and 3. the intervening cause must not have been reasonably foreseeable. *People v. Lopez, supra.* Because an intervening cause is treated like an affirmative defense, however, there need only be a mere "scintilla" of evidence in support of the defense in order to have it submitted to the jury. *People v. Lopez, supra.*

In this case, there were actually two collisions. Mr. Nguyen's car initially collided with the car driven by Mr. Pott. As set forth above, Mr. Nguyen asserted that Mr. Pott, who had a horrible driving record and tested positive for marijuana, was responsible for the initial collision. After the first collision, Mr. Potts drove across the median, crashed through a cable barrier or fence, and hit the car driven

by Mr. Combest, causing his death. The accident investigation revealed that the cable fence failed in its express purpose, which was to prevent a car from going all of the way through the median and into oncoming traffic. (v7, p97-99)

At the close of the evidence, trial counsel argued that the fence was an intervening cause of the second accident, and that the jury must had to be so instructed. (v8, p.5-15) The trial court rejected the argument, and refused to instruct the jury on the defective fence as an intervening cause. (v8, p17) The trial court's ruling was erroneous, and violated Mr. Nguyen's rights to due process and to a trial by jury. *U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16, 23.*

The evidence in this case indicated that the cable fencing was placed in the median for the express purpose of preventing a car from careening across the median and into oncoming traffic. (v7, p97-99) Even if Mr. Nguyen were responsible for the initial collision with Mr. Pott, the second collision, between Pott and Combest, never should have happened. In fact, Mr. Nguyen had nothing to do with the defective fence, the death of Mr. Combest would not have occurred but for the defective fence, and the failure of the fence to do what it was designed to do was not foreseeable. All of the elements necessary for the jury instruction on intervening cause were thus satisfied. There was more than a mere "scintilla" of evidence to support the instruction, especially in light of the fact that it was the

second collision, and not the first, that resulted in the death of Mr. Combest. Under these circumstances, the trial court's refusal to instruct the jury on intervening cause was error, and requires reversal of Mr. Nguyen's conviction for vehicular homicide. *U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16, 23.*

IV. THE EVIDENCE WAS INSUFFICIENT, IN QUANTITY AND QUALITY, TO SUSTAIN THE CONVICTION FOR VEHICULAR HOMICIDE.

Standard of Review: Whether a rational trier of fact might accept the evidence, taken as a whole and in the light most favorable to the prosecution, as sufficient to support a finding of guilt beyond a reasonable doubt. *Kogan v. People, 756 P.2d 945 (Colo.1988).*

In order to obtain a conviction in a criminal case, the prosecution must present proof beyond a reasonable doubt as to each element of the offense. *Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).* Proof of the material elements of a crime may not rest on surmise, speculation, conjecture, or guesswork. *Gallegos v. People, 176 Colo. 191, 489 P.2d 1301 (1971); People v. Gonzales 666 P.2d 123 (Colo. 1983); People v. Triggs, 190 Colo. 386, 547 P.2d*

1282 (1976); People v. Allen, 628 P.2d 153 (Colo. App. 1981). Any inference drawn by the jury must be based upon fact, as a conviction may not be obtained by stacking inference upon inference. *United States v. Hanson, 41 F.3d 580, 582 (10th Cir. 1994); People v. Ayala, 770 P.2d 1265 (Colo. 1989).* Thus, where the evidence is insufficient to support a verdict of guilty, it is the trial judge's duty to set aside such verdict. *People v. LaVoie, 155 Colo. 551, 395 P.2d 1001 (1964); People v. Emeson, 179 Colo. 308, 500 P.2d 368 (1972).*

Because it is incumbent upon the trial judge to intervene where the evidence is insufficient, prior to the submission of the case to the jury, the Colorado Supreme Court has frequently approved the granting of a defendant's motion for judgment of acquittal. *See, e.g., People v. Paris, 182 Colo. 148, 511 P.2d 893 (1973)* (ruling for judgment of acquittal approved where insufficient competent evidence of value was presented); *People v. Ray, 626 P.2d 167 (Colo. 1981)* (judgment of acquittal approved where only evidence linking defendant to burglary was a single fingerprint on the inside of a milk chute).

Where the evidence is insufficient to sustain a conviction, and the trial court has failed to grant a judgment of acquittal, the appellate courts must intervene to reverse the conviction. *See, e.g., People v. Baca 180 Colo. 166, 503 P.2d 348 (1972)* (Conviction for assault to commit murder reversed where there was

insufficient evidence that the defendant had the specific intent to murder the victim); *People v. Simien, 656 P.2d 698 (Colo. 1983)*(Conviction for first degree burglary reversed where there was inadequate evidence to support a conclusion by a reasonable mind that the trailer in question had actually been entered); *People v. Codding, 191 Colo. 168, 551 P.2d 192 (1976)*(Conviction for felony theft reversed where evidence on the element of value was insufficient); *People v. Moore, 841 P.2d 320 (Colo. App. 1992)* (Conviction for first degree burglary reversed based on insufficient evidence); *People v. Leonard, 43 Colo. App. 471, 608 P.2d 832 (1980)* (conviction for felony theft reversed where evidence on element of value insufficient).

In this case, Mr. Nguyen was convicted of both vehicular assault, for the injuries sustained by Mr. Pott, and for vehicular homicide, for the death of Mr. Combest. While the evidence may have sustained the conviction for the former charge, the evidence was insufficient, especially on the element of causation, to sustain the conviction for vehicular homicide. The conviction must therefore be reversed and vacated.

As described above, the traffic accident in this case was actually two separate accidents. First, the cars driven by Pott and Mr. Nguyen, which were traveling in the same direction, collided. This accident happened as Mr. Nguyen

changed lanes. Although Mr. Nguyen does not concede or agree that he caused this initial collision, there was evidence from which the jury could have concluded that Mr. Nguyen caused this accident, and thereby caused the injuries to Mr. Pott.

The second accident, however, is a far different matter. After colliding with Mr. Nguyen, Mr. Pott careened wildly to the left, into and across the median that divided highway C-470. Pott crashed through the barrier or fence which was supposed to prevent this type of accident, and slammed head on into the card driven by Mr. Combest, resulting in the death of Combest.

The conduct of Mr. Pott, and the resulting death of Mr. Combest, cannot be properly blamed upon Mr. Nguyen. First, as described above, Mr. Pott had a lengthy and documented history of illegal and aggressive driving. The history included convictions for DUI, as well as numerous speeding violations. Pott had his license revoked or suspended on at least two occasions. As noted above, the jury was erroneously deprived of access to this evidence. Armed with this information, however, the jury would likely have returned a verdict of not guilty to vehicular homicide.

Second, the jury did hear and was allowed to consider the fact that Mr. Pott had the chemical compound for marijuana in his bloodstream at the time of the accident. The existence of an intoxicating substance in Pott's blood clearly made it

more likely that Pott's judgment and ability to drive were impaired at the time of the accident. But for the apparently impaired driving of Mr. Pott, the second collision, and the death of Mr. Combest, would not have occurred.

Finally, the death of Mr. Combest would not have occurred, but for the defective barrier or fence that was designed to prevent the exact type of accident seen in this case. As described above, Mr. Pott drove directly across and through the median that divided the highway, and into the car driven by Mr. Combest. The driving of Pott, and the failure of the barrier, caused the death of Mr. Combest. Mr. Nguyen cannot and should not be held accountable for the death, when abundant evidence points to the intervening causes as the cause of the death of Mr. Combest.

Under these circumstances, the evidence was insufficient to sustain the conviction for vehicular homicide. That conviction should therefore be reversed and vacated. *U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16, 25.*

CONCLUSION

For the reasons and authorities set forth in Arguments I and II, the convictions in this case should be reversed, and this case remanded to the district court for a new trial. For the reasons and authorities set forth in Argument III, the mittimus should be corrected to reflect the merger of the convictions. For the

reasons and authorities set forth in Argument IV, the conviction for vehicular homicide should be reversed and vacated.

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CERTIFICATE OF MAILING

I hereby certify that on 5/7/08, I mailed a copy of the foregoing Opening Brief to the Office of the Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO, 80203.