COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203	
Denver District Court Honorable Shelley I. Gilman Case Number 05CR674	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. JONATHAN ESTES Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson, Colorado State Public Defender ARI KRICHIVER, #37780 1290 Broadway, Suite 900 Denver, CO 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 06CA1613

REPLY BRIEF OF DEFENDANT-APPELLANT

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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The reply brief complies with C.A.R. 28(g).

Choose one:

☑ It contains 2,529 words.

☐ It does not exceed 18 pages.

Signature of attorney or party

In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant submits the following Reply Brief.

ARGUMENT

I. The trial court denied Mr. Estes his right to confront the witnesses against him and reversibly erred by admitting statements Mr. Jones purportedly made to police shortly after the shooting.

A. The admission of Mr. Jones' statements was error.

The state asserts that Mr. Jones' statements were non-testimonial because they occurred "in the midst of an ongoing emergency." (Answer Br.,p12) The state relies on the fact that Mr. Jones was suffering from a "life-threatening injury." (*Id.*) The state also concedes that, in order to be non-testimonial in this situation, there must be "an ongoing emergency that the declarant's statements seek to resolve." (*Id.* at 13 (citing *Davis v. Washington*, 547 U.S. 813, 822, 826-30 (2006))) The state fails to suggest how Mr. Jones' recollection of the recent shooting did anything to alleviate, treat, or otherwise "resolve" the ongoing emergency (i.e. his life-threatening injury). Furthermore, there is nothing to suggest that the statements elicited by Officer Nebel were used "to assist police officers in their efforts to assess the present situation ...." *Raile v. People*, 148 P.3d 126, 130 (Colo. 2006) (citing *Davis*, 546 U.S. at 821). This is particularly true in light of the fact that, as mentioned in the Opening Brief, at the

time that Officer Nebel questioned Mr. Jones the police had already obtained a description of the assailant. (Opening Br.,p10)

The court's reasoning in *State v. Alvarez*, 143 P.3d 668 (Ariz. Ct. App. 2006)), is instructive specifically because of the factual disparities between this case and *Alvarez*. As in this case, in *Alvarez* police came upon a severely injured individual and provided assistance. *Id.* at 673. The individual had a brief conversation with a police officer during which he gave the officer his name and a brief explanation of what had happened, and he repeatedly asked for a doctor. *Id.* at 669. However, in direct contrast to the circumstances in this case, the court in *Alvarez* concluded that the statements were non-testimonial because: (1) the record did not suggest that the individual, semi-conscious at the time, was aware that he was talking to a police officer; (2) the individual did not identify any of his assailants; (3) the individual provided no details of what had happened; and (4) the individual never specifically implicated the defendant. *Id.* at 673.

Here, all of the information elicited by Officer Nebel related to the specific details of what happened and detailed descriptions of Mr. Jones' assailant. (*See* v11,p25-26) Mr. Jones' comments had no bearing on the alleged ongoing emergency (i.e. Mr. Jones' precarious medical condition), and the only reasonable interpretation of Officer Nebel's purpose was to investigate a possible crime. *See State v. Mechling*,

633 S.E.2d 311, 323 (W. Va. 2006) (victim's statements were testimonial where "[o]bjectively viewed, the purpose of the deputies' interrogation was to investigate a possible crime ...").

The court's decision in *Lewis v. United States*, 938 A.2d 771 (D.C. 2007), was recently relied on, and contrasted, by the Court of Appeals of Maryland to support that court's holding that the victim's statements were testimonial. *State v. Lucas*, 965 A.2d 75 (Md. 2009). The court's reasoning in *Lucas* provides further useful instruction on what constitutes a testimonial statement. In *Lucas*, responding to a domestic violence call, police found what turned out to be the assailant on the steps of an apartment, and the victim standing at the threshold of the apartment. *Id.* at 77. One officer stayed with the assailant while another officer spoke with the victim, asking her why the police were called and why she was crying. *Id.* At one point, the assailant spun away from police and fled on foot, only to be apprehended shortly thereafter. *Id.* at 78.

In considering the formality of the questioning of the victim, and thus whether it suggested the statements were testimonial, the court relied on the following factors: (1) the interview's location; (2) whether the declarant was actively separated from the defendant; (3) whether the statements were for the purpose of using in an investigation; (4) and whether the statements "deliberately recounted, in response to

police questioning, how potentially criminal past events began and progressed." *Id.* at 85 (citing *Davis v. Washington*, 547 U.S. 813, 830 (2006)). After considering these factors, the court concluded that the questioning was "formal enough" to render the statements testimonial. *Id.* The court reasoned that: (1) the victim spoke of past events, not events as they were happening; (2) the victim was protected by police and "no longer under any apparent imminent danger[;]" and (3) the officer's "initial inquires were not necessary to 'know whom they [were] dealing with in order to assess the situation, the threat to their own safety, and possible danger to'" the victim. *Id.* at 85-86 (quoting *Davis*, 547 U.S. at 832).

The reasoning of *Lucas* and its reliance on *Davis* is applicable to the circumstances in this case. The factors the court found in *Lucas* to conclude that the questioning was "formal enough" are also present in this case. As the state concedes, the only apparent emergency was Mr. Jones' dire medical condition. (Answer Br.,p12) However, there is nothing to suggest that Officer Nebel played any role in dealing with Mr. Jones' medical treatment, or that the statements elicited by Officer Nebel assisted Mr. Jones' treatment in any way.

B. The trial court's error is not harmless beyond a reasonable doubt.

i. *Mr. Jones' statements were important.*

Mr. Jones' statements were important because they corroborated Ms. Young's statement to the police. The only direct evidence of what the shooter said was Mr. Jones' statement. The state implicitly concedes that a key issue at trial was Ms. Young's credibility. (Answer Br.,p18) Mr. Jones' statement that the shooter said "give me your ride" is the *only* evidence corroborating Ms. Young's statement to the police that Mr. Estes told her he "wanted that fool's rims." The state asserts that these two statements contradict each other, but ignores that, as a practical matter, it is not possible to steal "rims" in broad daylight in a crowded parking lot without also taking the "ride."

ii. The cross-examination of Officer Nebel had no bearing on the material portions of Mr. Jones' statements.

The state asserts that adequate cross-examination was permitted because defense counsel was able to elicit the following information from Officer Nebel: (1) Officer Nebel did not confirm Mr. Jones' stated reason for being at the park-n-ride; and (2) Mr. Jones did not say anything about the crack found in his yard or that Mr. Jones got out of his car to yell at this assailants just before the shooting. (Answer Br.,p18) However, none of this information has any bearing on the validity of the

material portions of Mr. Jones' statements, namely the description of the shooter and what the shooter said regarding Mr. Jones' "ride" or "rims."

iii. The state's case was not strong and relied entirely on the credibility of a witness that admitted she lied.

As discussed in the Opening Brief, there was no physical evidence connecting Mr. Estes to the shooting. (Opening Br.,p16) Furthermore, the eyewitnesses' physical descriptions of the shooter suggested it was not Mr. Estes. The key issue was whether the jury believed Ms. Young's initial statement to the police or her testimony at trial. As the state recognizes, "[t]he case against [Mr.] Estes relied in large part on Young's initial statements to police …." (Answer Br.,p18)

As a note, regarding whether Mr. Jones' statements were important, the state argues they were not. (Answer Br.,p15) However, as to whether the state's case was strong overall, the state notes that "[s]everal of [Ms.] Young's statements were corroborated by other evidence." (*Id.* at 18) The state omits the fact that the "other evidence" that corroborates Ms. Young's statement, and therefore apparently bolsters the state's case, is Mr. Jones' statements.

C. Conclusion

The trial court's admission of Mr. Jones' statements violated Mr. Estes' constitutional rights and was error. Furthermore, "there is a reasonable probability

that [Mr. Estes] could have been prejudiced by the error." *Raile*, 148 P.3d at 134. Therefore, the trial court's error cannot be deemed harmless and mandates reversal.

II. The trial court reversibly erred by admitting into evidence and playing to the jury a videotaped interview of Ms. Young that was inadmissible hearsay under the rules of evidence.

A. The trial court's admission of the entire videotape was error.

Mr. Estes does not contest the admission of portions of Ms. Young's videotaped interview. The majority of the state's argument on this issue, however, relates to whether any portion of the videotaped interview was admissible. (Answer Br.,p22) The state only briefly addresses Mr. Estes' actual argument that, although portions of the videotape may have been admissible as prior inconsistent statements, the trial court erroneously admitted the entirety of the tape, which included both admissible and inadmissible statements. (Opening Br.,p19 ("[n]o statute or rule of evidence, however, allowed the prosecution to play the *entire* videotape of the interview to the jury" (emphasis added))) The state asserts that the trial court properly admitted the otherwise inadmissible statements because: (1) Ms. Young "could not recall the vast majority of her interview[,]; (2) based on the holding in *People v. Elie*, 148 P.3d 359 (Colo. App. 2006), the jury had a right to hear all of Ms. Young's statements; and (3) the trial court acted within its discretion pursuant to C.R.E. 611(a) in admitting the entire videotape. (Answer Br.,p24-25)

The state's reliance on *Elie* is misplaced because it omits a crucial portion of the holding in *Elie*. The state cites *Elie* for the proposition that a trial court may admit an entire video, even the otherwise inadmissible portions, to allow the jury to consider all of the witness' statements. (Answer Br.,p25) However, the plain language of the holding in *Elie* is not this simple. Rather, such an interpretation is only applicable "if the impeachment is general and not limited to specific facts ...." *Elie*, 148 P.3d at 362. In contrast, where as here, "the impeachment goes only to specific facts, then only prior consistent statements regarding those specific facts are relevant and admissible." *Id.*; *compare People v. DelGuidice,* 606 P.2d 840, 844 (Colo. 1979) (the defendant's request to play the entire videotaped interview was properly denied where the state only used a portion of it for impeachment purposes); *with People v. Halstead*, 881 P.2d 401, 403 (Colo. App. 1994) (entirety of victim's videotaped statement to police was properly admitted where the defendant's cross-examination of the victim included over thirty references to the victim's statements, covered nearly every aspect of the crime, and therefore constituted a general attack on the victim's credibility).

Ms. Young's interview with Detective Erickson on December 30, 2004, was over 30 minutes long, and the transcript is over 30 pages. (*See* People's Ex.44a) At trial, the state questioned Ms. Young about specific statements she made to Detective

Erickson. Specifically, the state relied on the following statements Ms. Young made to Detective Erickson:

- Mr. Estes said he "shot some fool" (v11,p71)
- Mr. Estes said he just wanted Mr. Jones' rims (v11,p74)
- Ms. Young asked Mr. Estes if he really shot Mr. Jones, and Mr. Estes said "yes" (v11,p75)
- Mr. Estes wondered why Mr. Jones drove off if he had been shot (v11,p78-79)
- Mr. Estes said he ran away from the scene (v11,p81)
- Mr. Estes said that Mr. Jones was flashing a gun (v11,p82-83)
- Mr. Estes said he was going to treat Ms. Young's mom like a snitch (v11,p85)
- Mr. Estes was afraid because he thought a bus driver might have seen him (v11,p91)

Just as in *DelGuidice*, the state made no showing that the remainder of the videotaped statements, other than the portion utilized by the state during its examination of Ms. Young, constituted prior inconsistent statements and was not hearsay. 606 P.2d at 844.

The state's reliance on C.R.E. 611 is similarly misplaced. It is illogical to suggest that it would have taken longer to play only a portion of the videotape instead of the whole video. Rather, it is only because the state failed to adequately prepare for its examination of Ms. Young that the trial court believed it would be more convenient to play the entire videotape. Furthermore, the state could have utilized the transcript of the interview just as effectively.

B. The trial court's error was not harmless.

The erroneous admission of the entirety of Ms. Young's interview was an abuse of discretion. The state recognizes that the key issue at trial was Ms. Young's credibility. (Answer Br.,p18) As discussed in the Opening Brief, the state repeatedly relied on the erroneously admitted portions of the videotape in its closing argument, urging the jury to utilize those statements to consider Ms. Young's demeanor and, accordingly, her credibility. (Opening Br.,p21) Furthermore, the trial court's stated reason for allowing the entire videotape to be played – that it was the only logical way to proceed – was arbitrary, unreasonable, and unfair as it is in direct conflict with the rules of evidence. (*See* v2,p101); C.R.E. 402 (irrelevant evidence is not admissible); C.R.E. 802 (hearsay is not admissible). Although the state correctly points out that the jury is entitled to evaluate a witness' demeanor when assessing the witness' credibility, it is axiomatic that this may only be done through the presentation of relevant, admissible evidence.

III. The trial court erred and denied Mr. Estes due process of law by denying Mr. Estes' motion for a new trial based on newly discovered evidence.

In arguing that the evidence of Mr. Moore's confession is not newly discovered, the state notes that Ms. Young testified at trial that Mr. Moore confessed to her. (Answer Br.,p36) The state now wants to *rely* on the same testimony which, according to its trial strategy, it vehemently argued at trial was a lie. (*See* v2,p67,69,74)

The state further overlooks the fact that, in convicting Mr. Estes, the jury must not have believed Ms. Young's trial testimony. In addition, Ms. Young's testimony that Mr. Moore confessed is inherently different than a confession from Mr. Moore's own lips.

In arguing that defense counsel failed to exercise due diligence, the state asserts in conclusory fashion the possibility that Mr. Moore was the shooter was "strongly implied by the facts known when [Mr.] Estes was charged[,]" and that defense counsel could have presented testimony "suggesting" Mr. Moore was the shooter. (Answer Br.,p37) However, there can be no question that defense counsel could not have obtained *an actual confession* from Mr. Moore. Further, direct evidence that another person was the shooter (i.e. an explicit confession) is more persuasive and of different character than evidence *implying* or *suggesting* that another person was the shooter. *See Farrar v. People*, 208 P.3d 702, 707 (Colo. 2009) (to be sufficient to mandate a new trial, newly discovered evidence must be "affirmatively probative of the defendant's innocence").

CONCLUSION

For the reasons and authorities presented here and in the Opening Brief, Mr. Estes requests this Court reverse his convictions.

DOUGLAS K. WILSON
Colorado State Public Defender

ARI KRICHIVER, #37780
Deputy State Public Defender
Attorneys for JONATHAN ESTES
1290 Broadway, Suite 900
Denver, CO 80203
303-764-1400

CERTIFICATE OF SERVICE

I certify that, on September 1, 2009, a copy of this Reply Brief of Defendant-Appellant was served on Susan E. Friedman of the Attorney General's Office by emailing a copy to AGAppellate@state.co.us: