DISTRICT COURT, OTERO COUNTY, COLORADO 13 West 3rd Street, Rm. 207 La Junta, CO 81050	
Plaintiff: PEOPLE OF THE STATE OF COLORADO v. **Defendant: JAMES ADAM PATRICK ASHBY**	FILED IN COMBINED COURT OTERO COUNTY, COLO. DEC 03 2015 ▲COURT USE ONLY▲
	Case No. 2014CR217 Division: A
ORDER RE: PEOPLE'S AMENDED MOTIONAND NOTICE OF PEOPLE'S INTENT TO INTRODUCE EVIDENCE OF OTHER ACTS AND/OR RES/GESTAE EVIDENCE (P-2)	

The Court, having considered The People's Amended Motion and Notice of People's Intent to Introduce Evidence of Other Acts and/or Res Gestae Evidence (P-2), and all responses thereto, and having considered the evidence and argument presented at the motions hearing held October 21st and 22nd, 2015, and being otherwise fully advised, makes the following findings and enters the following orders:

I. The Prior Acts Evidence

The People seek to introduce evidence of prior acts of the Defendant. At the October motions hearing, the People made offers of proof as to four specific instances of prior conduct. These instances are 1) an August 4th, 2013 incident occurring at 406 W. Spruce Street in Walsenburg; 2) a September 11th, 2009 incident occurring at the Anchor Motel in Walsenburg; 3) an October 18th, 2009 incident occurring in Walsenburg; and 4) an October 4th, 2014 incident

occurring in Rocky Ford. While the Rocky Ford incident began in one location, it involved two separate instances of conduct with two separate individuals. Therefore, the Court will refer to these as separate incidents: the Ramsey incident and the Starks incident.

A. August 4th, 2013 "Spruce Street" incident

This incident occurred at 406 West Spruce Street in Walsenburg, Colorado. Defendant responded to a call at that location, entered into the residence without legal justification and made several arrests. One person was slammed to the ground. This resulted in the filing of a complaint.

B. September 11th, 2009 "Anchor Motel" incident

Defendant parked a police car in front of a business. The business owner asked Defendant to move the police vehicle. Defendant confronted the business owner in a loud and aggressive manner, and threatened to arrest the business owner for being drunk in public.

C. October 18th, 2009 "Harassment Report" incident

A citizen attempted to report an incident of sexual harassment. Defendant responded to take the report and was rude and obstructive. The citizen filed a complaint.

D. October 4th, 2014 Rocky Ford "Ramsey" incident

Defendant received a report that someone was trying to fight others at Smith's pub in Rocky Ford. Defendant responded, but the people involved had left the bar. The officer later contacted three people in a parking lot at a taco stand who may have been involved in the pub incident: Ramsey, Hahn, and Starks. Defendant had an interaction with Starks, described below. Ramsey was later taken into custody, and was placed in a holding cell. Defendant claimed that Ramsey was disruptive and hitting the cell walls. Defendant entered the cell and when Ramsey refused to remove his shoes as he was asked, Defendant tackled Ramsey over a bench. Ramsey was injured. Ramsey was detained for several hours, but no charges were ever filed. An internal affairs investigation was completed, and department policy violations were found.

E. October 4th, 2014 Rocky Ford "Starks" incident

Starks was alone in the parking lot near the taco stand when he was approached by Ramsey and Hahn. An altercation between Starks, Ramsey, and Hahn was beginning as law enforcement pulled into the parking lot. Upon seeing the officer, Starks put his hands behind his back to indicate that he was cooperative. Defendant came up to Starks and grabbed Starks' thumb in an apparent attempt to handcuff Starks. There was a brief struggle between the two, and Defendant sprayed Starks with pepper spray. Starks ran off, but later turned himself over to another officer.[1]

II. CRE 404(b) and the *Spoto* Test

Pursuant to CRE 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." CRE 404(b). Evidence of prior acts may be admissible, however, "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . ." *Id.* When considering the admissibility of prior acts evidence, a court must analyze the evidence under the four part *Spoto* test. *See People v. Spoto*, 795 P.2d 1314 (Colo. 1990). In order for prior acts evidence to be admitted, it must 1) relate to a material fact; 2) be logically relevant (i.e., have the tendency to make the existence of the fact more or less probable than it would be without the evidence); 3) have a logical relevance independent of the prohibited intermediate inference that defendant has a bad character; and 4) have probative value not substantially outweighed by the danger of unfair prejudice. *See id.* at 1318. A court must also find by a preponderance of the evidence that, based on all the evidence before it, that the prior act occurred and defendant was the person who committed it. *See People v. Garner*, 806 P.2d 366, 373 (Colo. 1991).

[1] In the offer of proof, the People stated that Ramsey was the person who was pepper sprayed and then fled the scene. However, in the reports and statements provided by the People in support the offer of proof, there appears to be no dispute that it was Starks who was pepper sprayed and then fled.

A. The People's Evidential Hypothesis

A proponent of 404(b) evidence is required to articulate "a precise evidential hypothesis" in order to "identify the specific purpose for which the evidence will be used and explain how the proffered evidence establishes that purpose independent of the forbidden by CRE 404(b)." *Yusem v. People*, 210 P.3d 458, 463-64 (Colo. 2009) (citing *People v. Rath*, 44 P.3d 1033 (Colo. 2002)). In their motion, the People argue that the prior acts evidence shows a lack of mistake on the part of Defendant, as well as a culpable mental state. At the motions hearing, the People's precise evidential hypothesis for each incident was that these incidents demonstrate a "pattern of practice" or modus operandi on the part of Defendant. Specifically, that Defendant conducted himself in a pattern or practice where his response to minimal contact was escalated far beyond what would be reasonable, and in many cases became confrontational and assaultive. The People cite *People v. Cook*, 22 P.3d 947 (Colo. Ct. App. 2000) in support of their argument as to modus operandi, as well as *People v. Bolton*, 859 P.2d 311 (Colo. Ct. App. 1993), *overruled on other grounds by Close v. People*, 48 P.3d 528 (Colo. 2002), and *People v. Masters*, 33 P.3d 1191 (Colo. Ct. App. 2001), for the proposition that prior incidents need not be exactly identical to later incidents.

The People also hypothesize that the Rocky Ford incidents show a pattern of conduct on the part of the officer that shows a state of mind and the reckless disregard for the rights of detained individuals. They argue that it shows Defendant's state of mind regarding violation of police procedures.

B. Defendant's Arguments

Defendant argues that the proposed evidence offered in this case is exactly the type of evidence forbidden by CRE 404(b), and it does not meet the second, third, and fourth prongs of the *Spoto* analysis. Defendant analogizes the instant case to *Yusem v. People*, and provides a thorough analysis of the proposed evidence under the standards required by *Spoto* and *Yusem*.

III. Analysis

A. Evidentiary Purpose of the Prior Acts Evidence

The prosecution must show evidence of prior acts establishes a legitimate evidentiary purpose "independent of the inference forbidden by CRE 404(b)." *See Yusem*, 210 P.3d at 464. The People identified demonstration of a modus operandi, or a pattern of practice as a purpose for the prior acts evidence outside of the prohibited bad character inference. The People also assert that the evidence may be used for the purpose of showing Defendant's state of mind, specifically a tendency to escalate a minimal contact beyond reason and become confrontational and aggressive.

1. Identity

The cases cited by the People found prior act evidence showing a modus operandi admissible because the prior act evidence helped, at least in part, to establish identity. *See People v. Cook*, 22 P.3d 9951-52; *People v. Bolton*, 859 P.2d at 320. Identity, however, is not an issue where a defendant presents a theory of self defense, because such a defense negates a challenge to identity. *See Kaufman v. People*, 202 P.3d 542, 554 (Colo. 2009). Because identity is not in question here, there is no need to reason to introduce evidence linking similar prior acts with the charged crime in order to show that they likely were committed by the same person. In this case, establishing identity is not a legitimate evidentiary purpose for admission of the prior acts evidence, and such evidence will not be admitted for that purpose.

2. Intent

Prior acts evidence showing a modus operandi can be used to establish intent. S*ee People v. Rath*, 44 P.3d 1033, 1041 (Colo. 2002. Evidence of prior similar transactions shows intent when, for example, "[t]he evidence tended to show that when the defendant did certain things, in a certain way, a number of times in the past, he did so with a criminal purpose, and he took

affirmative action to accomplish that purpose." *Id.* Put another way, "demonstration of [a] pattern of using a particular technique to accomplish a particular end" is a permissible use of evidence as to intent that can be separated from the inference of bad character. *Id.*

In *People v. Willner*, defendant was convicted of first degree murder after defendant shot and killed one of two people in the process of repossessing his truck. *See People v. Willner*, 879 P.2d 19, 20 (Colo. 1994). At trial, the defendant claimed self defense, and evidence of two other prior transactions was admitted. *See id.* at 20-21. In the first prior incident, defendant ran out of his home with a gun and fired shots in order to stop repossession of his vehicle. *See id.* at 25. In the second prior incident, defendant chased after a person who had stolen a Christmas tree from the lot in which defendant was working; during the chase, defendant fired six shots at the tires of the vehicle carrying the stolen tree. *See id.* at 26. The purpose of offering evidence of the prior incidents was to prove the defendant's intent, "and that he did not act impulsively, but rather intentionally after deliberation." *See id.* Both incidents satisfied all four prongs of *Spoto*, and the prior acts evidence was properly admitted. *See id.* at 27.

Intent is not at issue as far as being an element of the charged crime in this case, as it was in *Willner*. Nor do the People assert that they seek to admit evidence of prior acts in order to demonstrate intent via a particular pattern used in the past to accomplish a particular end, as in *Rath*. As stated, the People's argument instead relies on the pattern of practice or modus operandi showing the Defendant's state of mind.

3. State of Mind

The People explain that the prior acts evidence shows Defendant conducting himself in a pattern or practice where his response to minimal contact requiring police involvement was escalated far beyond that of what would be reasonable, and in many cases has become confrontational and assaultive. Although the People only vaguely explain this use in their motion, it appears that they would use the prior acts evidence to show Defendant's state of mind for the purpose of rebutting the claim of self defense. Rebutting a claim of self defense can be a proper evidentiary purpose for admission of prior acts evidence showing state of mind. *See, e.g.*, *Yusem v. People*, 210 P.3d at 465 (felony menacing); *People v. Douglas*, 969 P.2d 1201, 1203 (Colo. 1998) (felony menacing); *People v. Willner*, 879 P.2d 19, 27 (Colo. 1994) (first degree

murder). As this may be a proper evidentiary purpose for admission of prior acts evidence in this case, the Court will therefore perform the *Spoto* analysis assuming the evidence would be used for this purpose.

B. *Spoto* Analysis

Spoto 1: Relation to a Material Fact

Defendant concedes that the first prong of the *Spoto* test has been met as to all prior acts evidence, because Defendant's mental state is a fact that must be proven in order to convict, and thus the evidence relates to a material fact.

Spoto 2: Logical Relevance

Defendant's state of mind, more specifically his reasonable beliefs as to the necessity of the use of force and proper degree of force, is an ultimate fact in question. Defendant's use of excessive force or overreaction to a minor incident in the past therefore does have the tendency to make the existence of this fact more or less probable than it would be without the evidence. If Defendant escalated a conflict in the past beyond reasonable bounds, that evidence has some tendency to make it more probable that he escalated this conflict rather than acted in self defense in this case.

The harassment report incident does not involve the use of force. At worst, it demonstrates a dismissive attitude towards a citizen and her attempt to report a crime. However, the facts of this incident do not suggest an escalation or overreaction into aggressiveness. It is not clear how Defendant's rude or obstructive behavior while taking a relatively routine harassment report has any tendency to make the ultimate facts in this case more or less probable. Thus, the harassment report incident does not meet the second prong of the *Spoto* test.

The Spruce Street, Anchor Motel, Ramsey, and Starks incidents do all involve, at least on some level, an escalation or aggressive reaction by Defendant. An instance of escalation or aggressive reaction in the past does tend to make the possibility of an escalation or aggressive reaction in this case more probable. For that reason, these three incidents meet the second prong of the *Spoto* test.

Spoto 3: Logical Relevance Independent of the Prohibited Intermediate Inference that Defendant has a Bad Character

"Evidence of prior acts is inadmissible 'if the logical relevance of the proffered evidence depends upon an inference that a person who has engaged in such misconduct has a bad character and the further inference that the defendant therefore engaged in the wrongful conduct at issue.'" *Yusem*, 210 P.2d at 466 (quoting *Spoto*, 795 P.2d at 1318).

In *People v. Douglas*, a trial court did not err in admitting evidence of two prior "incidents in which the defendant used a gun, when not threatened by the use of force by another, in order to rebut defendant's claims of self-defense and defense of premises." *People v. Douglas*, 969 P.2d 1201, 1201 (Colo. 1998). The defendant was charged with felony menacing after an incident at defendant's home where he pointed a loaded gun at a man and his son who had come to his home to talk to him about a loan; defendant argued that in using the weapon he acted in self defense. *See id.* at 1202. In one prior incident, defendant held a gun to his girlfriend's head, and also threatened her with the gun through the window of a vehicle. *See id.* at 1203. In the second prior incident, Defendant pointed a gun at and threatened to kill his neighbor after breaking down the neighbors' fence and entering their backyard. *See id.*

Evidence of these prior acts was "probative of the disputed issue of [defendant's] mens rea regarding his self-defense claims." *Id.* at 1206. The evidence had independent relevance aside from an inference of bad character because it showed that the defendant "previously threatened others by use of a gun without provocation and in the absence of any danger to himself." *Id.* The court identified the question before the jury as whether defendant "had the requisite intent of self-defense to justify or excuse his actions," that is, did he "use the gun in order to defend himself from what he reasonably believed to be the use or imminent use of unlawful physical force . . . or did he act only to menace his victims?" *Douglas*, 969 P.2d at 1207. This state of mind, because it was necessary to avoid criminal liability via the claim of self-defense, had logical relevance independent of the forbidden character inference. *See id.*

In contrast to *Douglas* and *Willner*, evidence of a prior act was not admissible in *Yusem v. People*. *See Yusem*, 210 P.3d at 470. In *Yusem*, the defendant was charged with felony menacing and prohibited use of a weapon. *See id.* at 461-62. The charged crime involved defendant aiming

a gun at the driver of a vehicle in the apartment complex where he lived. *See id.* at 461. The defendant was a law enforcement officer and always wore a gun in a holster. *See id.* The prior act evidence involved an incident in which the defendant angrily yelled at an apartment manager in her office over a water damage complaint. *See id.* at 462. During this exchange, defendant had the gun in its holster on his hip, but he did not brandish, touch, or refer to the gun in any way. *See id.* However, the manager was intimidated by the gun during the incident. *Id.* at 462.

Evidence of the prior act was found to satisfy both the first and second prongs of the *Spoto* test, however, it did not meet the third prong. *See Yusem*, 210 P.3d. at 465-66. The People's contention was that the "evidence is relevant to prove Yusem's mental state – whether he intended to menace the victim or acted in self-defense – and therefore is independent of the prohibited inference that Yusem has a bad character and acted in conformity with that character." *Id.* at 466. The Supreme Court disagreed, stating that "[a] jury cannot reasonably conclude that Yusem was more likely to menace the van driver and less likely to act in self-defense without relying on the inference that Yusem bullied someone in the past while wearing a gun and so likely bulled someone again by brandishing a gun." *Id.* "[T]he inference, . . . that may be drawn from the prior act is impossible to distinguish from the inference that Yusem has a bad character." *Id.*

The *Yusem* court distinguished *Willner* and *Douglas* because the prior acts evidence in *Douglas* and *Willner* "demonstrated the defendant's tendency to use a gun in a particular manner in specific circumstances, and therefore rebutted the claim that the defendant acted in self defense when similar circumstances arose." *Id.* at 467. The specific tendency rebutting the claim of self defense in *Douglas* and *Willner* was a tendency to threaten "people with a gun without provocation and in the absence of danger to himself." *Id.* at 466. *Douglas* and *Willner* also involved "multiple prior acts, which helped to reinforce the tendency the evidence was offered to prove." *Yusem*, 210 P.3d at 467. The "high degree of similarity" of the prior acts to the charged crime in *Douglas* and *Willner* "may have made it easier for the jury to identify the probative value of the evidence." *Id.* "[B]ecause the prior acts demonstrated a specific tendency, the relevance of the evidence could be separated from the improper inference that the defendant had a bad character." *Id.* In contrast, the prior act evidence in *Yusem* did "not show a specific tendency that can be separated from the prohibited inference that Yusem bullied in the past and therefore menaced in this case." *Id.*

In this case, the only the Starks incident bears a strong similarity to the act alleged in this case. Defendant was the sole officer on scene at the beginning of the incident. There was a physical struggle between the Defendant and Starks. While Defendant did not use a gun in the Starks incident, pepper spray, which is a weapon of sorts, was used. Whether or not the use of the pepper spray was excessive in the circumstances was questioned. This incident also occurred closer in time to the alleged crime than the Anchor motel, harassment report, and Spruce Street incidents. The Starks incident does have bearing on Defendant's reaction to a physical threat and the need for self defense – to a specific tendency to escalate to the use of pepper spray when faced with a one on one situation with a person believed to be a suspect who does not immediately comply with orders given by Defendant. The logical relevance of this evidence is independent of the bad character inference.

The other prior acts are not overly similar to the current act, nor are they similar to each other. The Spruce Street incident involved entry into a residence and excessive physical force, but there was no use of a weapon by either Defendant or the others involved in the incident. Further, Defendant was called to the scene on the basis of a 911 call. The Anchor Motel incident did not involve the use of weapons by either person, or the use of excessive physical force. The harassment report incident did not involve use of force, unlawful entry, or threats of arrest. The Ramsey incident involved use of force, but no gun was involved and the use of force occurred mainly while Ramsey was in custody at the police department. None of these incidents involve the use of a weapon against the officer, or use of a gun by the officer. The tendency that might be shown from all of the prior acts might be stated in this way: when faced with minor provocation in the line of duty, Defendant overreacts. These incidents do not show Defendant's tendency to react in a particular manner in specific circumstances.

The dissimilarity between these incidents themselves and the charged crime take away from the independent value of the evidence. Attempting to show that Defendant acted in a certain way in these different unrelated circumstances binds any legitimate purpose with the forbidden inference as to bad character more closely, rather than separating it. The prior act evidence does not show that, in extremely similar circumstances occurring previously, defendant acted not in self defense, but with an intent to use excessive force. Instead, a showing that Defendant overreacted or escalated the situation in four completely isolated and factually disparate incidents reinforces the impermissible suggestion about the Defendant's character. As explained in *Yusem*,

multiple similar prior incidents help to reinforce the tendency prior acts evidence is offered to prove; multiple dissimilar prior incidents do not reinforce the tendency. *See Yusem*, 210 P.3d at 467.

Other than the Starks incident, the People have not adequately explained how the rest of the proffered evidence establishes the stated purpose of showing Defendant's reactionary state of mind independent of the inference forbidden by CRE 404(b). The People argued that Defendant was in a state of mind – that of escalating an innocuous contact to a point beyond reasonable into assaultive and injurious contact - during the prior acts, and that evidence of that pattern is "indicative that his behavior in this case was inappropriate." H'rg Tr. 109. This is precisely the inference that CRE 404(b) forbids, i.e., because Defendant is the type of person who unreasonably escalates a conflict, as shown by these prior acts, he is likely to have unreasonably escalated this conflict. A jury could not reasonably conclude that Defendant was more likely to respond over-aggressively and less likely to act in self-defense without relying on the inference that Defendant responded aggressively in the past and so likely did it again. The prior acts do not have a logical relevance independent of the forbidden character inference, and the third prong of the *Spoto* test is not met as to the harassment report, Spruce Street, Anchor Motel, and Ramsey incidents.

Spoto 4: CRE 403

Under the fourth *Spoto* prong, a court must evaluate the probative value of the proffered evidence against the danger of unfair prejudice under CRE 403. "The admission of prior act evidence always has a potential for prejudice, . . . so it is only unfair prejudice substantially outweighing the probative value which permits exclusion. . . ." *Yusem*, 210 P.3d at 467 (citations omitted). But, where the relevance of prior acts evidence is reliant on the forbidden character inference, "the unfair prejudice of the evidence overwhelms the probative value." *See id.* at 468.

Admission of the prior act evidence creates a high likelihood of injecting collateral issues into this case. The subjective question of whether or not Defendant responded appropriately to a particular situation is central to each of the prior incidents. The jury could easily be confused or led astray in attempting to determine whether or not the Defendant used excessive force, made an unlawful entry into a residence, or otherwise responded appropriately

in the previous situations. There is great danger that extensive evidence of the prior acts would remove the focus from the facts of the case actually before the jury.

The probative value of the Anchor Motel and harassment report prior act evidence is quite low, because they are so factually dissimilar from the instant case, and do not involve the use of physical force on either side. These incidents offer very little information as to Defendant's state of mind in a self defense situation such as the one at issue here. Even if the evidence of these incidents had met the second and third prongs of the *Spoto* test, the probative value is so minimal that it is substantially outweighed by the danger of unfair prejudice. Prior acts evidence of the Anchor Motel and harassment report do not meet the fourth prong of the *Spoto* test.

Because the Spruce Street and Ramsey incidents involved use of force by Defendant, which is relevant to the claim of self defense, they have some probative value. However, because the logical relevance of this evidence is dependent on an inference of bad character, the prejudicial nature of the evidence overwhelms the probative value.

The Starks incident, because it is more factually similar, and occurred closer in time to the current incident, has a higher probative value. Defendant's tendency to use pepper spray is probative of his state of mind when faced with a similar situation in this case. Because this is the only incident offered where self defense involving the use of a weapon against a single person is at issue, the danger of prejudice does not outweigh the probative value of evidence of the Starks incident. Evidence of the Starks incident therefore meets the fourth prong of the *Spoto* test.

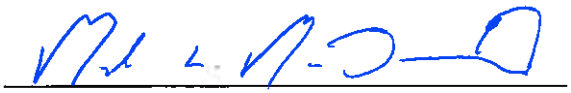
III. Conclusion

Evidence of prior acts related to the October 4th, 2014 Starks incident meets all four prongs of the Spoto test, and is admissible under CRE 404(b). The People's Motion is therefore GRANTED as to evidence of prior acts relating specifically to the Starks incident.

Because the evidence of the harassment report, Anchor Motel, Spruce Street, and Ramsey incidents offered by the People do not satisfy the four part *Spoto* test, the evidence is not admissible under CRE 404(b). The People's motion is therefore DENIED as to evidence of those prior acts.

Done and Signed this 3rd day of December, 2015.

BY THE COURT



District Court Judge