COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Morgan County District Court Honorable Kevin L. Hoyer, Judge Case Number 10CR156	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. JOSHUA PATRICK BENITEZ Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson, Colorado State Public Defender JON W. GREVILLIUS, # 41168 1290 Broadway, Suite 900 Denver, Colorado 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 11CA1074
JOSHUA BENITEZ'S OPENING BRIEF	

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CERTIFICATE OF COMPLIANCE	

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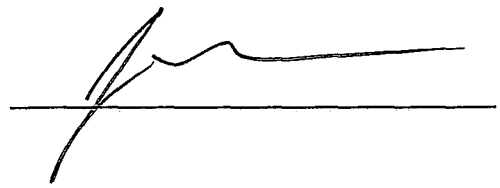

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INTRODUCTION

Defendant-Appellant was the defendant in the trial court and will be referred to by name or as the Defendant. Plaintiff-Appellee, the State of Colorado, will be referred to as the prosecution or the State. Numbers in parentheses refer to the volume and page number of the record on appeal. References to the motions hearing, trial, and sentencing hearing are by date of the proceeding and .pdf page number on the record CD.

STATEMENT OF THE ISSUES PRESENTED

I. Did the trial court erroneously admit evidence of Mr. Benitez's prior incarcerations in jail as relevant to his motive to menace Padgett, who was a deputy at the jail during his incarcerations, where the court explicitly stated that it did not know, based on the evidence presented at the motions hearing, whether Mr. Benitez recognized Padgett, and the court later found, based on evidence at trial, that it was "really pretty abundantly clear" that Mr. Benitez did not recognize Padgett during the incident?

II. The prosecutor may not present evidence of a defendant's post-arrest silence as substantive evidence of guilt and doing so violates the defendant's right against self-incrimination. Mr. Benitez did not testify at trial and the prosecutor twice elicited testimony from arresting officers that Mr. Benitez made no statements

following his arrest and he did not mention that he had been chased back to his car. Did admission of this testimony violate Mr. Benitez's right against self-incrimination?

III. Did the district court erroneously admit irrelevant and unfairly prejudicial repeated testimony concerning a substantial amount of ammunition in the car as well as testimony that Mr. Benitez has a .22 magnum bullet in his pocket, which could not be used in his rifle?

IV. Did the trial court commit cumulative error by admitting all of the above evidence against Mr. Benitez?

STATEMENT OF THE CASE

The prosecution charged Joshua Benitez with one count of menacing[1] and one count of prohibited use of a weapon.[2](vI,9-10). A jury convicted him of menacing and of one count of prohibited use of a weapon while intoxicated,[3] which was added at defense counsel's request.(3/8/11,154-55). The jury could not reach a verdict on count two (prohibited use of a weapon) and the court dismissed the charge at the prosecution's request.(3/8/11,233). The district court then sentenced Mr. Benitez to two years in the Department of Corrections.(vI,108;4/8/11,16-17).

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[1] § 18-3-206(1)(a), C.R.S. 2010 [F5].
[2] § 18-12-106(1)(a) [M2].
[3] § 18-12-106(1)(d) [M2].

He timely filed his notice of appeal.

STATEMENT OF THE FACTS

Joshua Benitez and Rinaldo Jasso decided to rent a movie and drink some beer following their day of work loading scrap metal at Mr. Benitez's grandmother's farm.(3/7/11,140). They went to McDonald's later that night to get a movie from the Redbox.(3/7/11,152). Jasso went to pick out a movie and Mr. Benitez went inside the McDonalds to the restroom.(3/7/11,104,152). Inside, Brian Padgett (Padgett) was eating dinner with his parents and children.(3/7/11,50). Padgett is a Morgan County Sheriff's deputy at the county jail who was off-duty and not in uniform at this time.(3/7/11,47). Marvin Padgett, Padgett's father, testified that Mr. Benitez was staring him down as Mr. Benitez left the McDonald's.(3/7/11,105). Marvin also testified that Mr. Benitez walked out the door and stared at Marvin for ten to fifteen seconds.(3/7/11,106). Mr. Benitez then went to the window where everyone was eating and put his back to it and looked over his shoulder at the group several times.(3/7/11,59,106).

Padgett testified that he saw this and that Mr. Benitez then jogged back to a car about twenty to twenty-five yards away.(3/7/11,60-61). Padgett stated that Mr. Benitez got inside the car and then pointed a rifle at him for "a few seconds."(3/7/11,66). Mr. Benitez then allegedly put the rifle behind him in the

car.(*Id.*). At this point, Padgett left the restaurant, without saying anything to his family, and ran up to Mr. Benitez and confronted him and identified himself as a police officer.(3/7/11,66-68,109). Padgett's family members did not see the alleged incident. Mr. Benitez denied pointing a rifle at Padgett and refused Padgett's demands that he get out of the car.(3/7/11,68). Padgett said that both Mr. Benitez and Jasso, who was also in the car, were drunk.(*Id.*). Mr. Benitez did not appear to believe that Padgett was in law enforcement.(*Id.*). Padgett then pulled Mr. Benitez out of the car and restrained him on the ground.(3/7/11,69).

Padgett called 911 and told his father, who had followed him outside the McDonald's, to open the car and grab the rifle, which Marvin Padgett did.(3/7/11,69-70,116). The rifle was a .22 Winchester.(3/8/11,18). Jasso testified that Marvin Padgett prevented him from using his cell phone to call 911 and that Mr. Benitez had been followed back to the car.(3/7/11,158). Police responded and took both Jasso and Mr. Benitez into custody.(3/8/11,69).

Padgett testified that, after confronting Mr. Benitez, he believed that he recognized Mr. Benitez "from somewhere."(3/7/11,74). He then told the jury that, when he returned to work at the jail two days later, he pulled the files and realized that Mr. Benitez had previously been jailed there.(3/7/11,74-75). Padgett twice agreed, however, that Mr. Benitez did not seem to know who he was.(3/7/11,68,82-83).

Mr. Benitez was then charged and convicted as described above.

SUMMARY OF THE ARGUMENT

Reversal is required due to the erroneous admission, and improper use, of three different pieces of evidence.

First, the court erroneously admitted evidence that Mr. Benitez had been previously incarcerated at the Morgan County Jail. The prosecutor failed to establish that Mr. Benitez recognized or knew Padgett as a deputy at the jail. The trial court correctly noted that, without this evidence, the evidence of prior incarcerations would be irrelevant as to showing motive to menace. The trial court also found, following evidence and argument at the hearing that it did not know whether Mr. Benitez recognized Padgett, based on the evidence presented, but nonetheless later ruled the evidence admissible in its written Order. In the Order, the trial court, like the prosecutor at the hearing, failed to articulate how, even if Mr. Benitez recognized Padgett, prior incarceration, alone, was relevant to motive.

Thus, the court should have granted Mr. Benitez's motion in limine. In the alternative, it should have precluded admission of the incarcerations at trial after Padgett testified that Mr. Benitez did not appear to recognize or know him. Padgett's testimony preceded admission of the prior incarceration evidence and the court later stated that it was "really pretty abundantly clear" that Mr. Benitez did not recognize

Padgett. The jury was permitted to use this evidence without a limiting instruction and the evidence's admission amounted to reversible error.

Second, the prosecution violated Mr. Benitez's right against self-incrimination and right to due process under the federal and Colorado constitutions. The prosecution twice elicited testimony that Mr. Benitez remained silent following his arrest and did not tell arresting officers that he had been chased back to his car. This testimony was plainly improper and requires reversal.

Finally, the court permitted testimony, from three different witnesses, that there was a box of ammunition in the car and the prosecutor repeatedly referred to this in closing. The evidence was irrelevant and unfairly prejudicial and its admission constituted reversible error.

Even if, however, the above errors' harm was not individually enough to require reversal in this case, the collective harm from admission of all of the above evidence warrants reversal as cumulative error.

ARGUMENT

I. Admission of evidence that Mr. Benitez had been previously incarcerated in the Morgan County jail constituted reversible error because it had no bearing on whether Mr. Benitez menaced Padgett and its admission prejudiced his right to a fair trial and violated CRE 402, 403, and 404(b).

A. Relevant Facts

The prosecution sought to admit evidence that Mr. Benitez was incarcerated at the Morgan County jail as relevant to motive to menace Padgett, who was a sheriff's deputy there.(vI,31). Following a hearing, the trial court stated that it did not know, based on the hearing testimony, whether Mr. Benitez recognized Padgett.(12/2/10,70). It became clear at trial, however, that Padgett did not believe that Mr. Benitez recognized or knew who he was, and the prosecutor abandoned its theory of motive.(3/8/11,188). The prior incarceration evidence was nonetheless admitted and no contemporaneous and specific limiting instruction was given.

i. Padgett testified, at the motions hearing, that Mr. Benitez "did neither acknowledge" nor "deny" that Padgett was a sheriff's deputy, and the court stated, at the end of the hearing, that it did not know whether Mr. Benitez recognized Padgett.

After the alleged incident took place, Padgett believed that he had seen Mr. Benitez before at some point.(12/2/10,36). Two days later, when he returned to work at the Morgan County jail, Padgett looked into whether Mr. Benitez had been an inmate at the jail and discovered that he had been.(*Id.*,37). Padgett, however, could not

recall any specific incident at the jail involving Mr. Benitez or a specific time when the two would have interacted.(*Id.*,38).

Nonetheless, the prosecution sought to admit evidence that Mr. Benitez had been an inmate at the Morgan County jail while Padgett was working there because it believed this helped established a motive for pointing the gun at Padgett.(v1,31). The matter went to a hearing where the prosecution presented Padgett's testimony that he recognized Mr. Benitez from the jail.(12/2/10,31-32). Defense counsel objected during Padgett's testimony as to relevance because there was no specific testimony that Padgett actually recognized Mr. Benitez, and the court responded:

> Okay. But I guess if Mr.— even if Sergeant Padgett didn't recognize Mr. Benitez, he is not the one that committed the menacing. It's whether Mr. Benitez recognized Sergeant Padgett. I mean, it might be a stretch, but I'll overrule the objection so we can hear testimony regarding that.

(*Id.*,32-33).

During the incident, Padgett was not in uniform, wearing a badge, or carrying a weapon but identified himself as a sergeant from the jail.(*Id.*,11,39,42). He testified that, during the whole encounter, Mr. Benitez said nothing that indicated that he recognized him from the jail.(*Id.*,30). The prosecutor followed up with:

> Q [prosecutor]: And again, back to when you identified yourself as a sheriff, did [Mr. Benitez] act as if he didn't believe that you were a deputy, or did he act as if he knew you were a deputy? Did he have any—

> A [Padgett]: Just kind of ignored what I was asking him to do by exiting the vehicle.
>
> Q: *So he did neither acknowledge it nor did he deny it?*
>
> A: *Right.*

(*Id.*,35) (emphasis added). The prosecutor never asked Padgett whether it appeared to him that Mr. Benitez recognized him. Instead, the prosecution established that Mr. Benitez never asked to see a badge and never accused Padgett of not being a cop.(*Id.*,41). Similarly, the prosecution stated "he [Mr. Benitez] didn't act like he didn't recognize you, did he?"(*Id*). Padgett said "no" in response.(*Id.*).

At the end of the hearing, the court stated:

> I guess it is just a question of: If this happened, did Mr. Benitez point the gun at Sergeant Padgett because he knew Sergeant Padgett and knew him from being a Morgan County sheriff's deputy, or did he just do it as a random person? It could have just been anyone. *I don't know. And I guess I don't know, based on the testimony that's been presented today, whether I have enough information.*

(*Id.*,70) (emphasis added). In its Order on the motion in limine, however, the court stated that "[a]fter recognizing Sergeant Padgett and for reasons unknown, the defendant then engaged in the criminal behavior that resulted in his arrest."(v1,46). The court then determined that the evidence of prior incarcerations was admissible.(v1,46-47).

ii. **Padgett twice testifies at trial that Mr. Benitez did not believe that Padgett was a sheriff's deputy.**

Padgett testified at trial that, after identifying himself as a police sergeant, Mr. Benitez did not believe that Padgett was who he said he was.(3/7/11,68). The following colloquy then took place during cross-examination:

> Q [defense counsel]: Okay. When you got to the car, you-—you actually mentioned it a few moments ago, you were yelling at Mr. Benitez that you were a police sergeant, correct?
>
> A [Padgett]: Yes.
>
> Q: Okay. But now you said on direct that he didn't believe you; is that correct?
>
> A: He would not comply with my orders.
>
> Q: Okay. But, actually, your testimony was, "He didn't believe who I was"; do you remember saying that?
>
> A: Okay. Okay. Yes.

(*Id.*,82-83). At sentencing, the court found that it was "really pretty abundantly clear" that Mr. Benitez did not know or recognize Padgett and that it was just a "random act of stupidity."(4/8/11,12-13). The prosecution also effectively conceded, during closing argument, that it had not established motive:

> You did not see the element of motive. I don't have to prove to you why he did what he did. Speculation. Not my job. You can't speculate about it.

> It's not part of the elements. It doesn't matter why he did what he did. All that matters is that he pointed a firearm, a deadly weapon, at Sergeant Padgett and his family. He aimed a firearm.
>
> Again, there's no element of why. It's not my job to prove to you why he did it. There is no element. You don't need to wonder about that. That can just leave your mind.

(3/8/11,188).

Regardless, the prosecution elicited testimony, after Padgett testified that Mr. Benitez did not believe that Padgett was who he claimed to be, that Mr. Benitez had been incarcerated in the Morgan County jail.(3/7/11,74-75). The court, while stating in its Order that "introduction of this evidence will be limited by the court so as to lessen its prejudicial effect," provided no contemporaneous limiting instructions telling the jury how it may use the evidence of prior incarcerations.(v1,46). The jury was, instead, provided with a generic limiting instruction in the jury instructions, which read: "[t]he court admitted certain evidence for a limited purpose. You are again instructed that you cannot consider that evidence except for a limited purpose for which it was admitted."(v1,82).

B. Standard of Review

This issue is preserved. Defense counsel filed a motion in limine, which went to hearing, and challenged Mr. Benitez's prior incarcerations as irrelevant, unfairly prejudicial, and as impermissible under CRE 404(b).(v1,27;12/2/10,63-67).

Improperly admitted evidence can amount to constitutional error depriving the defendant of a right to fair trial and an impartial jury. *See Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005); *see also* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25. Constitutional errors require reviewing courts to reverse unless the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

The court of appeals reviews a district court's order denying a motion in limine and its decision to admit evidence for an abuse of discretion. *See People v. Muniz*, 190 P.3d 774, 781-82 (Colo. App. 2008). "A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or based on an erroneous understanding or application of the law." *Id.* at 782 (citations omitted). But, whether the evidence was admitted for a proper purpose under CRE 404(b) is a question of law subject to de novo review. *See United States v. Bell*, 516 F.3d 432, 440 (6th Cir. 2008) (citations omitted) (noting that, under FRE 404(b), whether the trial courts admitted evidence for a proper purpose is subject to de novo review).

C. Law and Analysis

Evidence that Mr. Benitez had previously been incarcerated in Morgan County should not have been admitted against him at trial. The evidence was irrelevant because it did not tend to make it more probable that Mr. Benitez menaced Padgett and the evidence was highly prejudicial to Mr. Benitez. The prosecution failed to establish that Mr. Benitez knew or recognized Padgett at the motions hearing and it later became apparent that Mr. Benitez, in fact, did *not* recognize Padgett. Evidence of prior incarcerations, therefore, served no permissible purpose at trial and its admission at trial constituted reversible error.

Evidence that does not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is inadmissible at trial. CRE 401-402. The evidence's relevance cannot depend on conjecture or speculation. *People v. Quintana*, 665 P.2d 605, 611 (Colo. 1983) ("Evidence that is so remotely related to an issue as to afford only conjectural inferences should not be admitted.") (citing *People v. Botham*, 629 P.2d 589 (Colo. 1981)). Even relevant evidence is inadmissible, however, if the danger of unfair prejudice, misleading the jury, or confusion of issues substantially outweighs its probative value. CRE 403.

If evidence of prior criminality or other bad acts is at issue, its relevance cannot depend on an inference that the defendant acted in conformity with his bad character or propensity to commit a crime. *Yusem v. People*, 210 P.3d 458, 466 (Colo. 2009). "It is elementary that in a criminal trial to a jury, evidence of a defendant's criminal activity, which is unrelated to the offense charged, is inadmissible. When reference is made in the presence of the jury to such criminal activity, a mistrial is normally required." *People v. Goldsberry*, 509 P.2d 801, 803 (Colo. 1973) (citing *Edmisten v. People*, 490 P.2d 58 (Colo. 1971)). The prosecution, as the proponent of evidence of other wrongs or acts, must establish, by preponderance of the evidence, all antecedent facts related to admissibility. *People v. Garner*, 806 P.2d 366, 370, 372 (Colo. 1991).

(i) ***The district court should have granted Mr. Benitez's motion in limine to exclude unfairly prejudicial evidence of prior incarcerations because its relevance required speculation that: (1) Mr. Benitez recognized Padgett, even though Mr. Benitez gave no indication that he recognized Padgett; and (2) Mr. Benitez's having been incarcerated provided him with motive to menace Padgett.***

The prosecution failed in its duty to show that the prior incarceration evidence was relevant. *See* CRE 402, 404(b); *Yusem v. People*, 210 P.3d 458, 464 (Colo. 2009); *Garner*, 806 P.2d at 370; *see also* CRE 104(a). Because the evidence failed to establish that Mr. Benitez knew Padgett from the jail, and that he therefore had a motive to menace Padgett, it should have been excluded. The prosecution also failed to establish how Mr. Benitez would have a motive to menace Padgett even if he did

recognize Padgett from the jail. Moreover, the danger of unfair prejudice from the prior incarceration evidence substantially outweighed any probative value of evidence because the evidence's theory of relevance required a substantial amount of speculation.

(1) *Padgett's testimony established that Mr. Benitez said nothing to indicate that he recognized Padgett from the jail and the prosecution failed to show that Mr. Benitez recognized Padgett.*

The district court correctly observed that, if Mr. Benitez did not recognize Padgett from the jail, the prior incarceration evidence would be irrelevant.(12/2/10,32-33,70). At the very least, therefore, the prosecution had to show that Mr. Benitez knew that Padgett was a deputy at the jail. *See Yusem*, 210 P.3d at 464 (noting that the proponent of other act evidence must show that the evidence is relevant).

Evidence at the hearing showed that Padgett believed that he recognized Mr. Benitez from somewhere and later learned that he had been jailed in Morgan County jail while Padgett worked there.(12/2/10,35). He did not indicate, however, that he recognized Mr. Benitez during the incident.(*Id.*,36). But, Padgett testified that Mr. Benitez said nothing that led him to believe that Mr. Benitez knew or recognized him.(*Id.*,30). Additionally, Mr. Benitez was non-compliant with Padgett's commands even though he identified himself as a sheriff's deputy.(*Id.*,35).

The prosecution attempted to establish that Mr. Benitez knew Padgett because he would have protested and vocalized disbelief that Padgett was a sheriff's deputy.(*Id.*,68). It presented no evidence in support of this assertion except that Padgett was not in uniform and that Mr. Benitez had previously been arrested.(*Id.*). The prosecution ignored the fact that Mr. Benitez resisted Padgett's efforts to subdue him and was non-compliant with Padgett's demands. In fact, the prosecution's line of questioning— which was apparently trying to show that the issue of knowledge was inconclusive or that there was a lack of evidence showing that Mr. Benitez did not recognize Padgett— suggests that the prosecution understood that Padgett's testimony could not directly support its argument that Mr. Benitez recognized Padgett.

In fact, as later shown at trial, the prosecution could not establish that Mr. Benitez knew Padgett because it was "really pretty abundantly clear" that Mr. Benitez did not know or recognize him.(3/7/11,68,82-83;4/8/11,12-13). Thus, the prosecution's theory of relevance was based on speculation, shown to be incorrect at trial, which the district court recognized at the close of the motions hearing by stating:

> I guess it is just a question of: If this happened, did Mr. Benitez point the gun at Sergeant Padgett because he knew Sergeant Padgett and knew him from being a Morgan County sheriff's deputy, or did he just do it as a random person? It could have just been anyone. *I don't know. And I guess I don't know, based on the testimony that's been presented today, whether I have enough information.*

(*Id.*,70) (emphasis added).

The prosecution was required to establish that the evidence of prior incarcerations was relevant and it failed to do so. *See People v. Garner*, 806 P.2d 366, 372 (Colo. 1991). Padgett's testimony that Mr. Benitez was non-compliant and that he gave no indication that he recognized Padgett established, instead, that he did not recognize Padgett. The prosecution's conjecture and attempts to prove recognition by showing that Mr. Benitez did not act like he did not recognize Padgett failed to establish the necessary fact that Mr. Benitez knew Padgett. At most, the prosecution's evidence was inconclusive, as the trial court recognized.

The prosecution therefore failed to show that the prior incarcerations were relevant and the district court's conclusion in its order that Mr. Benitez recognized Padgett was clearly unsupported by the record.

(2) *The fact of prior incarceration, alone, did not tend to show that Mr. Benitez had a motive to menace Padgett.*

The prosecution failed to articulate how the prior incarcerations were relevant as to motive to menace. Even assuming that the prosecution showed that Mr. Benitez knew who Padgett was, the theory of relevance was still entirely unclear and the prosecution failed to demonstrate how the evidence's relevance did not depend on the assumption that Mr. Benitez was vengeful because he had been incarcerated under Padgett's watch. "[W]hen the prosecution seeks to admit any evidence which suggests

that the defendant is a person of bad character, it must be prepared to meet the defendant's objection by satisfying the third step of the *Spoto* test. In other words, it must be prepared to explain why the logical relevance of that evidence does not depend on the inference that the defendant acted in conformity with his bad character." *People v. Griffin*, 224 P.3d 292, 297 (Colo. App. 2009).

It was clear that, aside from possibly having seen Mr. Benitez at the Morgan County jail, Padgett had no contact with Mr. Benitez that Padgett could recall.(12/2/10,29). For instance, Padgett testified that he never had to discipline or write Mr. Benitez up.(*Id.*). Thus, it was nothing but the bare fact that Mr. Benitez was incarcerated and that Padgett was a sheriff's deputy at the jail that supposedly made it more likely that Mr. Benitez would have a motive to menace Padgett. This connection was never explained further and failure to establish the connection invited the jury to speculate as to what Mr. Benitez would have to have done to be angry at Padgett. The prosecution's theory of relevance thus assumed that Mr. Benitez hated law enforcement because he had previously been arrested. This inference is impermissible and, without linking prior incarceration to motive, the prior incarceration evidence was irrelevant.

(3) *The district court correctly recognized that the evidence was, at most, inconclusive as to whether Mr. Benitez recognized Padgett and it should have, therefore, granted Mr. Benitez's motion in limine.*

The district court erred in denying Mr. Benitez's motion in limine. The amount of conjecture necessary to have given the evidence any probative value as to motive to commit the crime is substantial. First is the assumption that Mr. Benitez recognized Padgett, which the prosecution thought was shown by: *Padgett's* recognizing Mr. Benitez from being locked up in the jail years before, Mr. Benitez's failure to vocalize a disbelief that Padgett was a sheriff's deputy, Padgett's being in plain clothes, and Mr. Benitez's failure to "act" as if he did not recognize Padgett. This assumption has to be made in spite of Padgett's hearing testimony that Mr. Benitez said nothing that indicated that he knew Padgett and that Padgett testified that Mr. Benitez continued to resist his efforts to subdue Mr. Benitez despite identifying himself as law enforcement.

Second, relevance depends on the assumption that Mr. Benitez's having been incarcerated in Morgan County jail, and presumably having seen Padgett, made it more likely that he had a motive to menace Padgett. This assumption has to be made in the face of the fact that Padgett never disciplined or wrote Mr. Benitez up and there is no evidence as to why Mr. Benitez would be upset with him or have reason to menace. No evidence, besides incarceration, connected the dots and showed any

tendency to make it more likely that Mr. Benitez would have motive to menace Padgett. The district court implicitly recognized this, despite denying Mr. Benitez's motion, by finding that: "[a]fter recognizing Sergeant Padgett *and for reasons unknown*, the defendant then engaged in the criminal behavior that resulted in his arrest."(v1,46) (emphasis added).

Under CRE 402, therefore, the evidence should not have been admitted, given the number of assumptions needed to give the evidence even minimally probative value. *People v. Quintana*, 665 P.2d 605, 611 (Colo. 1983) ("Evidence that is so remotely related to an issue as to afford only conjectural inferences should not be admitted.") (citing *People v. Botham*, 629 P.2d 589 (Colo. 1981)). The evidence provided at the hearing failed to establish that Mr. Benitez knew or recognized Padgett and it failed to show how the fact of prior incarceration was relevant to motive to menace. Rather, evidence at the hearing suggested that Mr. Benitez did not know who Padgett was and the court should have therefore granted the motion in limine. The evidence was therefore irrelevant and completely unrelated to the charges and its admission amounted to reversible error. *See People v. Goldsberry*, 509 P.2d 801, 803 (Colo. 1973).

(4) *Even if relevant, admission of the prior incarceration evidence amounts to reversible error because the evidence was unfairly prejudicial and violated Mr. Benitez's right to a fair trial and an impartial jury.*

As the prosecutor correctly argued in closing, "motive" is not an element of menacing and is something that the prosecution did not need to show.(3/8/11,188). To any extent Mr. Benitez's prior incarcerations had some probative value, the value was extremely limited given the number of assumptions required. *See Yusem v. People*, 210 P.3d 458, 467-68 (Colo. 2009) (quoting *Vialpando v. People*, 727 P.2d 1090, 1096 (Colo. 1986)), which established that the importance of the "fact of consequence" and the "strength and length of the chain of inferences" required to establish the fact are factors in the CRE 403 analysis); *People v. Franklin*, 782 P.2d 1202, 1206 (Colo. App. 1989) ("Here, the declarant's statements have some probative value to evidence deliberation before arriving at an intent to kill the victim, but such inference follows only if a number of speculative assumptions about the statements are made.").

On the other hand, evidence of prior incarcerations was highly prejudicial to Mr. Benitez's case and the prejudice substantially outweighed the evidence's probative value. "The prejudice injected by an implication of prior criminality on the part of a defendant cannot ordinarily be considered harmless." *People v. Adams*, 708 P.2d 813, 815 (Colo. App. 1985). Courts recognize that "it is unfair to require a defendant to defend not only against the crime charged, but moreover, to disprove the prior acts or

explain his or her personality." *Kaufman*, 202 P.3d 542, 552 (citing *Masters v. People*, 58 P.3d 979, 995 (Colo. 2002)). To minimize the potential for unfair prejudice, courts are required to issue to the jury a proper limiting instruction. *See People v. Garner*, 806 P.2d 366, 374 (Colo. 1991); *People v. Goldsberry*, 509 P.2d 801, 803 (Colo. 1973). The district court here recognized this duty and indicated that it would provide an instruction but did not in the end.(v1,46).

The jury in this case heard about Mr. Benitez's prior incarcerations and was never instructed to consider the evidence only for purposes of showing motive. The district court's generalized instruction did nothing to minimize the prejudice and the jury was left to use the evidence for purposes of propensity. *See People v. Spoto*, 795 P.2d 1314, 1321 (Colo. 1990) ("In the absence of a focus on a particular purpose for which the testimony might arguably be relevant, the Court's instruction did nothing to alleviate the risk that the jury would use the testimony for the prohibited purpose of inferring that Spoto has a bad character and acted in conformity therewith in shooting Berg."). A proper limiting instruction would have told the jury only to consider the evidence for purposes of showing motive and would have helped in limiting the harm because the jury would then, at least, have been implicitly instructed to not use the evidence at all.

The harm resulting from the erroneous denial of the motion in limine was substantial. The prosecution elicited testimony of prior incarcerations and, because it became clear that the evidence was irrelevant as to motive (because the evidence showed that Mr. Benitez did not know who Padgett was), the danger that the jury would use it for prohibited purposes escalated. *See People v. Yusem*, 210 P.3d 458, 469 (Colo. 2009); *see also People v. Garner*, 806 P.2d 366, 372 (Colo. 1991) (noting that the policy of first subjecting CRE 404(b) evidence to CRE 104(a) is to prevent questions of admissibility of other act evidence being resolved after the evidence is presented to the jury). The prosecution tried to abandon its theory of motive during closing, presumably because it recognized that it could not establish motive, but nonetheless mentioned the evidence in rebuttal noting that Padgett recognized Mr. Benitez "from somewhere" and realized that he had been incarcerated, which was irrelevant.(3/8/11,187-88,206-07). Thus, the prosecution effectively told the jury not to use the incarceration evidence for purposes of determining motive but the jury was never instructed that it could not then use the evidence.

Admission of the prior incarceration evidence, its use by the prosecution in its case-in-chief and in closing, and the court's failure to issue a limiting instruction prevented Mr. Benitez from receiving a fair trial by an impartial jury. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25. Evidence in this case was not

overwhelming. Padgett was the only witness who testified that Mr. Benitez menaced and he testified that Mr. Benitez pointed the rifle at him. But, the jury could not reach a verdict on count two, which required it to find that Mr. Benitez knowingly aimed the rifle at Padgett.(v1,88,94,97). Admission of evidence of prior incarcerations therefore was not harmless and reversal is required.

(ii) ***Assuming, however, that the district court did not improperly deny Mr. Benitez's Motion in Limine, admission of the evidence amounted to reversible error because it became "really pretty abundantly clear" at trial that Mr. Benitez did not know or recognize Padgett and the court failed to issue a limiting instruction to the jury regarding the prior incarceration evidence.***

The trial court was on notice as to the issue at hand; it recognized that a salient issue in the admissibility analysis was whether Mr. Benitez recognized Padgett.(12/2/10,33,70). Admitting evidence of the prior incarcerations constituted reversible error after Padgett testified, during trial, that Mr. Benitez did not seem to know who he was. Once this fact was established, it was clear that the evidence had absolutely no probative value and was no longer relevant to motive. This much was effectively conceded by the prosecution during closing when it abandoned its theory of motive.(3/8/11,188).

The error was both plain and obvious because it is axiomatic that unrelated prior criminality is generally inadmissible as substantive evidence of guilt. *See, e.g., People v. Goldsberry*, 509 P.2d 801, 803 (Colo. 1973). Because the prosecutor admitted

evidence of prior criminality and discussed it in closing, even though it effectively told the jury not to consider it for motive, the evidence's admission affected Mr. Benitez's substantial rights because the jury was left with free reign to apply the incarceration evidence.(*Id.*,206-07) ("He recognized him, so he was curious. Is that motive? I don't know, because we can't speculate. But Mr. Padgett was just saying he knew him from somewhere."). The jury was left with evidence of prior criminality to use in its verdict without any limiting instruction provided and this prevented Mr. Benitez from having a jury that could only consider evidence properly before it. And, there was not overwhelming evidence of guilt in this case. *Supra.* Reversal is therefore required.

II. Testimony that Mr. Benitez remained silent following his arrest was irrelevant, unfairly prejudicial, and violated his right against self-incrimination and his right to due process under the Colorado and Federal constitutions.

A. Relevant Facts

Mr. Benitez did not testify at trial.(3/8/11,135). The prosecution called Jasso who testified, on direct, that three people were following Mr. Benitez as he returned to the car.(3/7/11,158-59). At trial, the prosecution twice elicited testimony from arresting officers that Mr. Benitez remained silent following his arrest.(3/8/11, 15-16,67).

First, the prosecution questioned Officer Kaber, who was the first uniformed officer to respond:

> Q [prosecution]: Okay. Now, once you got out of your vehicle, what did you do?
>
> A [Officer Kaber]: I assisted Sergeant Padgett in—we handcuffed Mr. Benitez.
>
> Q: And did Mr. Benitez make any statements to you?
>
> A: He did not.
>
> Q: Did he make any statements about any guys chasing him?
>
> A: He did not.

(*Id.*, 15-16). The prosecutor then used the same line of questioning on Officer Malave, who arrived after Mr. Benitez had been handcuffed:

> Q [prosecution]: Okay. Now, you said you placed, um, the suspect [Mr. Benitez] in your patrol car?
>
> A [Officer Malave]: Yes, ma'am.
>
> Q: Did he make any statements to you?
>
> A: No.
>
> Q: Okay. He didn't say anything about people chasing him?
>
> A: No.

(*Id.*,67). Defense counsel did not object during this line of questioning.

B. Standard of Review

Admission of testimony and evidence is normally subject to the trial court's discretion but whether admission of evidence violates fundamental constitutional rights is reviewed de novo. *See, e.g., Merritt v. People*, 842 P.2d 162, 166-67 (Colo. 1992). Defense counsel did not object to the prosecution's questioning. This Court must therefore review for plain error. *See Wend v. People*, 235 P.3d 1089, 1097 (Colo. 2010). "Plain error review maximizes deference to the trial court, but it does not excuse the appellate court from its responsibility to address errors that prejudice the defendant." *Id.*

C. Law and Analysis

The United States and Colorado Constitutions provide the accused a right against self-incrimination. *See* U.S. Const. amends. V, XIV; Colo. Const. art. II, § 18. The right grants the defendant a right to remain silent and a guarantee that the exercise of this right will not be held against him or her. *See Griffin v. California*, 380 U.S. 609, 613-14 (1965). Because the right against self-incrimination is provided by the Fifth Amendment and the Colorado Constitution, rather than by the *Miranda* warnings, evidence of pre-arrest and post-arrest silence is inadmissible. *See United States v. Burson*, 952 F.2d 1196, 1200-01 (10th Cir. 1991); *People v. Rogers*, 68 P.3d 486, 492 (Colo. App. 2002) ("[U]se of a defendant's pre-arrest silence as substantive

evidence of guilt is impermissible, because '[a]n accused's right to silence derives, not from *Miranda,* but from the Fifth Amendment itself.' ") (quoting *State v. Easter*, 922 P.2d 1285, 1290 (Wash. 1996)); *People v. Welsh*, 58 P.3d 1065, 1069-71 (Colo. App. 2002) (noting that there is a split of authority in the federal circuits on whether evidence of pre-arrest silence is admissible and adopting the tenth (and other) circuit's reasoning).

> [T]he use of pre-arrest silence when the defendant does not testify impermissibly burdens the privilege guaranteed by the Fifth Amendment and thus is inadmissible in the prosecution's case-in-chief as substantive evidence of guilt or sanity. No evidentiary inference of consciousness of guilt or sanity can trump a Fifth Amendment right.

Welsh, 58 P.3d at 1071 (citing *Coppola v. Powell*, 878 F.2d 1562 (1st Cir. 1989)).

Allowing evidence of the defendant's silence undermines the point of the privilege against self-incrimination because it would force a defendant to make a choice between self-accusation, perjury, or having to explain silence to the jury. *See Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000) (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964)). "Prosecutorial comment which has the effect of creating an inference of guilt by reference to the defendant's silence during custodial interrogation effectively penalizes the defendant for exercising a constitutional privilege." *People v. Ortega*, 597 P.2d 1034, 1036 (Colo. 1979).

At trial, a prosecutor is therefore forbidden from commenting on a defendant's silence at trial or following arrest because such comments deprive the defendant of the right to due process. *See* U.S. Const. amends V, XIV; Colo. Const. art. II, §§ 18, 25; *Doyle v. Ohio*, 426 U.S. 610, 619 (1976); *People v. Reynolds*, 575 P.2d 1286, 1292 (Colo. 1978) ("It is the duty of the prosecutor, in his role as an officer of the court, scrupulously to avoid making or inducing comments at trial that will prejudice the defendant for exercising his Fifth Amendment rights."). Also, allowing the prosecution to "impair[] the 'sense of fair play' " by commenting on the defendant's silence lessens its burden of proving each element of the crime beyond reasonable doubt. *Combs*, 205 F.3d at 285, *cited with approval in Welsh*, 58 P.3d at 1071.

Moreover, evidence of silence following arrest lacks probative value because not speaking to police may result from many sources, including fear, intimidation, knowing that one is not obligated to speak with police, or an unwillingness to incriminate one's self or another. *See People v. Quintana*, 665 P.2d 605, 610-11 (Colo. 1983) ("Due to the many possible explanations for the defendant's postarrest silence, we hold that in the circumstances of this case evidence of his failure to make a statement to the arresting officers was so ambiguous and lacking in probative value as to be inadmissible as substantive evidence when offered to disprove the affirmative defense of duress."); *see also United States v. Hale*, 422 U.S. 171, 180 (1975) ("Not only

is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, . . . it also has a significant potential for prejudice.").

The Colorado Supreme Court addressed a situation very similar to the present case in *People v. Ortega*, 597 P.2d 1034 (Colo. 1979). Thomas Ortega and a companion took tools and other items from a truck that had recently been involved in a crash and brought them to Ortega's home. *See id.* at 1035. Police got a warrant and went to Ortega's home where he agreed to answer questions after being advised of his *Miranda* rights. *See id.* Ortega admitted to police that he and his companion had removed the items from the truck. *See id.* Ortega's companion later arrived during questioning and told police that they removed the tools for safekeeping only. *See id.* Ortega's theory of defense at trial was just that: he and his companion had intent to permanently deprive the owner of the items removed because they took them for safekeeping only. *See id.*

During his opening argument, the prosecutor told the jury that Ortega could have told police his intentions or turn the property over immediately when the police arrived. *See id.* Later, during rebuttal closing, after defense counsel argued that Ortega's willingness to speak with police showed a lack of criminal intent, the prosecutor argued that Ortega's failure to tell the officers on the scene that he was holding the items for safekeeping contradicted his defense. *See id.* at 1036.

The *Ortega* Court held that allowing the prosecutor's comments amounted to plain error and violated Ortega's right to due process and his privilege against self-incrimination. *See id.* The court observed that the prosecutor's comments were made for the jury to consider Ortega's failure to offer exculpatory statements as evidence undercutting his defense and showing guilt. *See id.* at 1037. In spite of the maxim that "a prosecutor is entitled to rebut or explain adverse inferences suggested by the defense as flowing from the defendant's custodial statements," the court held that Ortega's defense and defense counsel's comments did not allow the prosecution to comment on his failure to tell police that he was holding the items for safekeeping. *See id.* at 1037.

In the present case, Benitez made no statements to police following his arrest and completely exercised his right to remain silent.(3/8/11,67). Thus, this case presents a more egregious constitutional violation than in *Ortega* where the defendant voluntarily spoke with police following his arrest. Additionally, the prosecution in this case elicited testimony that Mr. Benitez was silent following arrest to combat its own witness's testimony that the prosecution, itself, elicited.(v1,49,51;3/8/11, 15-16, 67). This would have been improper even had Jasso been a defense witness. *Cf. James v. Illinois*, 493 U.S. 307, 313 (1990) (holding that the rule allowing illegally obtained evidence to be used for impeachment at trial may not be used to impeach defense

witnesses). Mr. Benitez did not testify at trial and, therefore, evidence of his silence was used to establish his guilt. *See People v. Quintana*, 665 P.2d 605, 609 (Colo. 1983) ("With the defendant having elected not to testify at trial, the only conceivable purpose for admitting the evidence of his postarrest silence was not to impeach his credibility but to substantively prove that he was not acting under duress at the time of the burglary."). While defense counsel anticipated Jasso's testimony and used it during opening statements,(3/7/11, 43-44), this did not permit the prosecution to produce evidence of Mr. Benitez's post-arrest silence. *See People v. Ortega*, 597 P.2d 1034, 1037-38 (Colo. 1979).

As in *Ortega*, the prosecution's evidence that Mr. Benitez failed to offer exculpatory information to the officer was used as substantive evidence of guilt and constituted plain error. *See id.* at 1036. The prosecution twice asked arresting officers whether Mr. Benitez made any statements following arrest and whether he ever mentioned being chased by someone.(3/8/11,15-16,67). Because Mr. Benitez did not testify, this line of questioning was plainly improper and it violated his constitutional rights against compelled self-incrimination and robbed him of his right to due process. *See Doyle v. Ohio*, 426 U.S. 610, 619 (1976); *People v. Welsh*, 58 P.3d 1065, 1069-71 (Colo. App. 2002). The testimony was also irrelevant and unfairly prejudicial. *See Quintana*, 665 P.2d at 609. It is well-settled that comments on or evidence of a

defendant's pre and post-arrest silence are improper. Admitting the evidence therefore was plainly erroneous and it affected Mr. Benitez's substantial rights by allowing the prosecutor to use his silence to show guilt and to lower its burden of proof. Because the evidence in this case was not overwhelming, *supra*, reversal is required.

III. The district court erred by admitting irrelevant and unfairly prejudicial testimony that Mr. Benitez had 286 bullets in a partially opened box in the car as well as a .22 magnum bullet in his pocket, which could not be used in his rifle, and admission of this testimony and the box of ammunition constituted reversible error.

A. Relevant Facts

Officer Kaber testified that he found a .22 magnum bullet in Mr. Benitez's pocket, which could not be used in Mr. Benitez's rifle.(3/18/11,19). Kaber also testified that the rifle was unloaded when he retrieved it at the scene.(*Id.*). He found a box with between two and three hundred rounds inside of it, which were capable of being shot in the rifle, inside the car.(3/18/11,19-20). Kaber later confirmed that the box had 286 rounds inside.(3/18/11,30). He also found between fifteen and twenty rounds lying on the floorboard.(3/18/11,19-20).

During Jasso's direct, the prosecution elicited vague evidence that there was a box that "looked like a milk carton" and contained bullets for the rifle.(3/7/11,167).

Sergeant Sharp later testified that Jasso reported that Mr. Benitez was trying to load the rifle just before Padgett confronted him.(3/8/11,92).

After Kaber testified about locating the rifle, and after it was admitted into evidence, the prosecutor introduced into evidence a bullet found in the car and defense counsel objected:

> MS. MEZA [defense counsel]: Your Honor, I'm going to object to relevance of this item. I don't think that it's relevant and doesn't go towards any material issue in the case.
>
> THE COURT: All right. Ms.—
>
> MS. WIARD [prosecution]: Your Honor, it's a bullet that fits the .22 Winchester. It's one of the bullets found in the back seat of the vehicle, definitely goes to relevance.

(3/8/11,27). The district court overruled the objection and admitted the evidence.(*Id.*). Kaber then testified that he found the box of bullets on the passenger side floorboard and a "loose bullet" in the back seat "like kind of where the rifle was grabbed to be put."(3/8/11,29). The court admitted the box of ammunition into evidence.(3/8/11,31-32). Kaber then testified that he found an empty box of ammunition in the car and this box was also admitted into evidence.(3/8/11,33-34).

Later, the prosecution called Sergeant Cantin to the stand and asked what he found in the car:

A [Cantin]: I located several .22 caliber bullets on the floor in the front seats, about a half-empty box of .22 caliber bullets on the front floorboard between the driver and passenger seat.

MS. HARABURDA [defense counsel]: Your Honor, I will object at this point to cumulative. We have had several officers testify about the bullets that were found, and, frankly bullets are not an element that go to menacing. We have heard this testimony over and over. I will just object to cumulative, at this point, and ask him to move on.

THE COURT: All right. Ms. Wiard?

MS. WIARD: Your Honor, this is from a different perspective, this is a different officer, Sergeant Cantin. He has a different perspective, being a sergeant. He would see things, perhaps, differently. I'm not suggesting that they go to the elements. I'm just asking his perspective on what he saw.

MS. HARABURDA: Which would be cumulative, Your Honor.

THE COURT: Well, I'll overrule the objection, at this point, as long as we don't spend too much time going over the same things.

(3/8/11,118-19).

B. Standard of Review

Where unfairly prejudicial evidence is admitted over objection, the appellate court must review for harmless error. *People v. Summitt*, 132 P.3d 320, 327 (Colo. 2006). Where evidence is admitted without objection, courts review for plain error.

See People v. Mandez, 997 P.2d 1254, 1267 (Colo. App. 1999). Defense counsel objected to the admission of exhibit three, which was a single bullet found in the back of the car and apart from the box of ammunition, on relevance grounds.(3/8/10,27). Defense counsel thus alerted the court as to its position that evidence of ammunition in the car was irrelevant. It repeated its objection during Cantin's testimony, noting that it was cumulative and that the ammunition was not relevant to any material issues in the case.(*Id.*,118-19). As to relevance of the ammunition, this Court must review for harmless error. CRE 103(a)(1) (specific objections not required if the basis for the objection was "apparent from the context . . . ."); CRE 103(a)(2) ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."). Whether the evidence was unfairly prejudicial must be reviewed for plain error. *See Mandez*, 997 P.2d at 1267.

Whether the trial court erred in admitting the evidence is reviewed for an abuse of discretion. *See People v. Muniz*, 190 P.3d 774, 781-82 (Colo. App. 2008).

C. Law and Analysis

Evidence must both be relevant and not unfairly prejudicial. CRE 401-403. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence." CRE 401. However, "[f]acts collateral to or bearing so remotely upon an issue that they afford only conjectural inference should not be admitted into evidence." *People v. Roybal*, 55 P.3d 144, 150 (Colo. App. 2001) (citing *People v. Botham*, 629 P.2d 589 (Colo. 1981)). Additionally, relevant evidence must be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." CRE 403.

In this case, the prosecution needed to prove that Mr. Benitez used a "deadly weapon" in order to convict him of menacing. § 18-3-206(1)(a), C.R.S. 2010. An unloaded firearm per se qualifies as a "deadly weapon" under the felony menacing statute. *Williams v. People*, 687 P.2d 950, 954-55 (Colo. 1984); *People v. McPherson*, 619 P.2d 38, 39-40 (Colo. 1980). As to the remaining counts, the prosecution needed to prove that he aimed a firearm at Padgett or that he possessed a "firearm" while under the influence of alcohol. § 18-12-106(1)(a),(d), C.R.S. Under Colorado law, this does not require that the gun be loaded but that it is "capable or intended to be capable of discharging bullets, cartridges, or other explosive charges." § 18-1-901(3)(h), C.R.S. Thus, the prosecutor did not need to prove that Mr. Benitez's rifle was loaded for any of the counts.

Padgett never testified to seeing Mr. Benitez load or attempt to load the rifle and he did not testify to ever seeing the ammunition during the incident. Thus, the evidence of ammunition in this case served no relevant purpose. *See McPherson*, 619 P.2d at 40 ("The victim does not know whether the firearm is unloaded, and the victim's apprehension and consequent reactions will be the same as if the firearm were loaded."). The prosecutor argued to the jury that it did not need to show that the rifle was loaded because an unloaded gun is a "deadly weapon," and that it had met its case by showing that Mr. Benitez pointed the rifle at Padgett knowingly placing or attempting to place him in fear of serious bodily injury.(3/8/11,185). The prosecutor added that:

> When you point a rifle at someone, what's your intention?
>
> By use of a deadly weapon. Do we have a deadly weapon? A .22 pump-action Winchester rifle is a deadly weapon. It's a firearm.
>
> . . . .
>
> And one of the number one items of what is a deadly weapon? "A firearm, whether"—notice—"loaded or unloaded." Is a firearm capable of producing death in the manner it is used or intended to be used? . . .
>
> We know that the pump-action Winchester—there was ammunition in the front seat. We also know that it wasn't loaded. But does it matter? No. Whether loaded or unloaded.

. . . .

> But we know for sure that he aimed it directly at Sergeant Padgett. That's all we need to know. That he knowingly aimed a firearm. And we know that.

(*Id.*,185-86,187-88). Additionally, the prosecution correctly recognized that the rifle did not even need to be functional that day because it simply needed to be "intended to be capable of discharging bullets."(*Id.*,186). And defense counsel never argued to the jury that the rifle did not meet the statutory requirement of a "deadly weapon."

The presence of the ammunition did not tend to make it more likely that Mr. Benitez knowingly or attempted to place Padgett in fear of serious bodily injury. § 18-3-206(1)(a), C.R.S. Nor did the ammunition evidence make it more or less likely that Mr. Benitez knowingly aimed the rifle at Padgett or make it more or less likely that he possessed it while under the influence of alcohol—which was never specifically contested by the defense. §§ 18-12-106(1)(a),(d).

Limited evidence that Mr. Benitez was attempting to load his rifle did not add probative value to evidence of a box of ammunition or the .22 magnum bullet found in his pocket because the prosecution introduced into evidence a single bullet, which was found near where the rifle was placed, and this bullet could have been fired from the rifle.(3/8/11,27,29). The bullet found in Mr. Benitez's pocket and the separate box of ammunition did not make any fact of consequence more or less likely. *See*

Kaufman v. People, 202 P.3d 542, 555 (Colo. 2009) ("Contrary to the People's argument, the fact that a person collects knives or other weapons does not tend to make it more probable that the person is experienced with the use of knives and intends to use a knife to cause serious injury to others.").

Even if the box of ammunition and pocketed bullet had some probative value, the danger of unfair prejudice substantially outweighed it. A significant collection of ammunition painted a bad picture of Mr. Benitez's character. *Cf. id.* (noting that use of knife collection evidence cast Kaufman as a "bad person.").

The prosecution continually referenced the presence of ammunition during closing argument.(3/8/11,180,181,182,186). It also unduly emphasized this evidence by presenting it on three different occasions, the third of which was to get a "different perspective" from a sergeant as opposed to an officer because "[h]e would see things, perhaps, differently."(3/8/11,118-19). The jury, however, was never instructed by either the prosecution or the court how to apply this evidence and what it was relevant to show. *See United States v. Wolff*, 370 F. App'x 888, 898 (10th Cir. 2010) ("To minimize any possible unfair prejudice, the district court instructed the jury that Defendant's 'possession of firearms was lawful' and that it could 'only consider his possession of firearms to the extent, if any, that such possession either made the threat contained in the letter more likely a true threat or that he possessed the firearms

with the intent to intimidate or impede . . . official officers and employees of the United States.' ").

The ammunition evidence, which was repeatedly stressed, was irrelevant, unfairly prejudicial, and significantly harmful. Its repeated admission and use require reversal because the evidence did nothing but paint Mr. Benitez as a bad person.

IV. Admission of evidence of prior incarcerations, silence following arrest, and possession of a substantial amount of ammunition in the car, taken together, require reversal for cumulative error.

"A cumulative error analysis aggregates all trial errors that individually have been found harmless, and therefore not reversible, and analyzes whether their cumulative effect is such that they can no longer be deemed harmless." *People v. Clark*, 214 P.3d 531, 543 (Colo. App. 2009) *aff'd*, 232 P.3d 1287 (Colo. 2010) (citation omitted). The above errors injected a significant amount of collateral and highly prejudicial evidence in this case. Thus, even if the above errors do not individually require reversal, taken together, they require reversal in aggregate because the jury was exposed to a substantial amount of irrelevant and unfairly prejudicial evidence.

CONCLUSION

Erroneous admission of Mr. Benitez's prior incarcerations, his post arrest silence, and possession of a significant amount of ammunition constituted reversible error.

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CERTIFICATE OF SERVICE

I certify that, on December 21, 2011, a copy of this Opening Brief of Defendant-Appellant was served on Catherine P. Adkisson of the Attorney General's Office by emailing a copy to AGAppellate@state.co.us.