COURT OF APPEALS, STATE OF COLORADO 2 E. 14th Ave. Denver, CO 80203	DATE FILED: January 9, 2014 2:22 PM
Appeal from the District Court, Adams County Honorable Patrick T. Murphy, Judge Case Nos. 09CR1158 and 09CR2365	
Plaintiff-Appellee: THE PEOPLE OF THE STATE OF COLORADO **Defendant-Appellant:** VICTOR ARNOLD GABLER	**▲COURT USE ONLY▲** Case No. 11CA1553
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Reply Brief

CERTIFICATE OF COMPLIANCE

I hereby certify that this 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 brief complies with C.A.R. 28(g).

- ☐ It contains _____ words.
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☑ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Norman R. Mueller

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I. THE TRIAL COURT DENIED MR. GABLER HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY ADMITTING IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF THE DETAILS OF A HIGH SPEED CHASE IN KANSAS

The State first argues that the evidence of the details of the high speed chase in Kansas is relevant to show flight and therefore consciousness of guilt. The primary defect in the prosecution's argument is that the defense offered to stipulate that Mr. Gabler fled to Kansas and was arrested there. The defense-offered stipulation of flight was sufficient to meet the prosecution's need for any relevant evidence without the jury hearing the highly prejudicial details of the high speed chase, including the evidence implying that Mr. Gabler had stolen the vehicle and the evidence that he had endangered motorists and a Kansas State Highway Patrolman.

The State next argues that this evidence is *res gestae* evidence, as the trial court concluded. This contention is adequately addressed in Mr. Gabler's Opening Brief. Again, any relevancy issues were satisfied by the defense offering to stipulate to flight. There was never any dispute in this case that Mr. Gabler was the driver of a black Range Rover, nor was there any dispute that Mr. Gabler had undergone knee surgery in March 2009. Indeed, the accuser, L.M., confirmed the knee surgery. (4/12/11,p.127)

Alternatively, the prosecution argues that the details of the high speed chase were relevant under CRE 404(b). Evidence of other uncharged crimes, wrongs, or acts committed by the defendant is admissible "if, but only if, it is logically relevant for some reason apart from an inference that the defendant acted in conformity with a character trait, and if the probative value of the evidence for that other reason is not substantially outweighed by the other policy considerations of Rule 403." *People v. Rath*, 44 P.3d 1033, 1038 (Colo.2002). "The reasoning behind the exclusion of such evidence is three-fold. First, there is a concern that a jury will convict a defendant as a means of punishment for past deeds or merely because the jury views the defendant as undesirable. Second, there is a possibility that a jury will overvalue the character evidence in assessing the guilt for the crime charged. Third, 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 v. People*, 202 P.3d 542, 552 (Colo.2009) (internal citation and quotations omitted).

The Colorado Supreme Court has set forth a four-part test to determine the admissibility of uncharged misconduct evidence:

> First, the evidence must relate to a material fact; that is, a fact that is of consequence to determination of the action. Second, the evidence must be logically relevant, meaning it has any tendency to make the existence of [the material fact] more probable or less probable than it would be without the evidence. Third, the logical relevance must

> be independent of the prohibited intermediate inference that the defendant committed the crime charged because of the likelihood that he acted in conformity with his bad character. Fourth, the probative value of the evidence must substantially outweigh the danger of unfair prejudice.

Yusem v. People, 210 P.3d 458, 463 (Colo.2009) (brackets in original, internal citations and quotations omitted); *People v. Spoto*, 795 P.2d 1314, 1318 (Colo.1990).

Under the third prong of this analysis, the prosecution must articulate which specific material fact may be inferred from the proffered evidence apart from the prohibited inference. "Said differently, the prosecution must identify the specific purpose for which the evidence will be used and explain how the proffered evidence establishes that purpose independent of the inference forbidden by Rule 404(b)." *Yusem*, 210 P.3d at 464.

In addition, before uncharged misconduct evidence is admissible, the trial court must find by a preponderance of the evidence that the prior acts occurred and that defendant committed them. *See People v. Garner*, 806 P.2d 366, 373 (Colo.1991). The trial court "must also consider the strength of the evidence proving the commission of the other act, the similarities between the acts, the interval of time between the acts, the need for the evidence, and the degree to which the evidence will inflame the hostility of the jury." *People v. Villa*, 240 P.3d 343, 350 (Colo.App.2009).

The prosecution failed to articulate the specific purpose for which it was offering the evidence of the high speed Kansas case. Rather, the prosecution generically cited all of the purposes of 404(b). (V.1,p.126) The trial court, in turn, did not find the evidence admissible under 404(b) and failed to conduct the *Spoto* and *Garner* analysis.

The Supreme Court has ruled that CRE 404(b) requires a trial court to make pertinent findings regarding the admissibility of other bad act evidence "before permitting such evidence to come before the jury." *Garner*, 806 P.2d at 372, n.4. "Each step [of the *Spoto* analysis] must be satisfied before moving to the next." *People v. Cousins*, 181 P.3d 365, 370 (Colo.App.2007). Nevertheless, this Court has held that the failure of a trial court to *sua sponte* conduct the required analysis is not plain error, *People v. Thompson*, 950 P.2d 608, 614 (Colo.App.1997), nor is such a failure reversible error if the record supports the trial court's admission of the evidence. *People v. Novitskiy*, 81 P.3d 1070, 1073 (Colo.App.2003); *People v. Martinez*, 36 P.3d 154, 159 (Colo.App.2001). Other courts, however, disagree. *United States v. Ciesiolka*, 614 F.3d 347, 357 (7th Cir.2010) (district court abused discretion in failing to propound reasons for admission of 404(b) evidence); *Stafford v. Rocky Hollow Coal Co.*, 482 S.E.2d 210, 216-17 (W.Va.1996) (reversible error to admit evidence of prior bad acts without performing the

mandatory Rule 404(b) inquiry); *State v. McGinnis*, 455 S.E.2d 516 (W.Va.1994) (same).

As discussed above, the only potential relevance of Defendant's arrest in Kansas was evidence concerning flight, to which Defendant offered a stipulation. The details of the chase served only to tell the jury that Mr. Gabler should be punished for his bad acts in Kansas or merely to convince the jury that Defendant was undesirable and therefore deserving of punishment.

Finally, the admission of this evidence was not harmless error. Defendant's conviction of stalking in 09CR1158 when the evidence was insufficient as a matter of law (*see* Argument III) demonstrates the harmful nature of this error. Even if the evidence related to the misdemeanor charges of third-degree assault, obstruction of telephone service and violation of a protection order was substantial and sufficient, the evidence supporting the other stalking charge and the vehicular eluding charge presented a much closer case. The jury's acquittal on the charge of robbery says nothing about the harm and prejudice caused by this evidence, since the evidence was essentially undisputed that Mr. Gabler took the phone that he had purchased from a table and did not commit robbery from L.M. with regard to the phone.

In short, the admission of this prejudicial evidence concerning the high speed chase of Mr. Gabler by the Kansas Highway Patrol cannot be said to have been harmless error and Mr. Gabler is entitled to a new trial.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CORRECTLY INSTRUCT THE JURY ON THE MENS REA REQUIRED FOR WITNESS INTIMIDATION

A. Instruction 23 Incorrectly Stated the Law

The crux of the State's analysis is that the witness intimidation offense defined by § 18-8-704(1)(d) is special, and its mens rea does not require a nexus between threat and potential testimony, because the statute's language expresses the legislature's "reasonable intent to criminalize the intentional infliction of harm on victims ***just before*** they are expected to testify." Answer Brief at 27-28 (emphasis supplied). The State is mistaken.

The State's thesis is undone by the plain language of subsection (d), which does not contain the temporal limitation of 'just before expected to testify.' It is also undone by a string of precedents holding that the entirety of § 18-8-704 is directed to criminalizing the intentional infliction of harm on victims or witnesses for the specific purpose of affecting probable testimony, *e.g., People v. Proctor*, 194 Colo.172, 570 P.2d 540, 541 (1977) (crime is established by proof of a present attempt, by threat of harm or injury, to influence someone to withhold testimony at some future time); *People v. Rester*, 36 P.3d 98, 102 (Colo.App.2001) (victim need not yet be under subpoena at the time of the threat to establish the offense).

In fact, the entirety of § 18-8-704 is directed to harms caused *prior to* testimony. *See People v. Gardner*, 919 P.2d 850, 854 (Colo.App.1995) (crimes of

intimidation defined by § 18-8-704 and retaliation defined by § 18-8-706 punish different conduct: the former addresses intimidation prior to testimony and the latter addresses retaliation in response to testimony given).

The crime of witness intimidation necessarily demands proof not only that that the prohibited act was directed against a protected person, but that the act was done with the specific intent to influence a witness's potential testimony. This nexus of act and intent to influence actual or potential testimony is one of the hallmarks of the language and legislative scheme of the Victim and Witness Protection Act of 1984, § 18-8-701 *et. seq.*, which has always included the crimes defined by § 18-8-704. *People v. Hickman*, 988 P.2d 628, 644-45 (Colo.1999). Instruction 23 incorrectly states the law because it does not adequately describe the nexus of act and specific intent that is required to establish witness intimidation under § 18-8-704(1)(d). No other instruction given to the jury addressed this issue or cured this error.

Even if trial courts have substantial discretion in formulating jury instructions, *see, e.g., People v. Pahl*, 169 P.3d 169, 183 (Colo.App.2006), this discretion is secondary to the trial courts' primary duty to correctly and completely instruct the jury on the elements of every offense and the controlling principles of the law. *People v. Garcia*, 28 P.3d 340, 343 (Colo.2001). The trial court errs when, as here, it does not provide complete and correct instructions. *Id*.

B. The Instructional Error Was Not Harmless

The State concedes that the instructional error in Mr. Gabler's case must be reviewed under the constitutional harmless error standard. Answer Brief at 23, citing *Griego v. People*, 19 P.3d 1, 8 (Colo.2001) (holding that the omission of an element from a jury instruction or the misdescription of an element, when preserved for appeal, is subject to harmless constitutional error review). On review, therefore, "[t]he correct inquiry is whether the verdict is surely unattributable to the error, not whether the evidence was sufficient to support a guilty verdict without the error." *Id*. Moreover, on review it is the prosecution's burden to show that the error was harmless beyond a reasonable doubt. *People v. Butler*, 224 P.3d 380, 386 (Colo.App.2009).

But in its argument—presented as a single sentence, in a single footnote—the State applies the wrong test and does not satisfy its burden of persuasion.

The State argues the instructional error was "harmless" because by finding Mr. Gabler guilty of witness intimidation, the jury showed it believed "L.M.'s testimony that [Mr.] Gabler threatened her life" on August 14, 2009 as retribution "for getting him charged for the April offenses." Answer Brief at 28, n.4. Not only is this claim not supported by the record, it does not even try to answer the constitutional harmless error question.

First, to the record. L.M.'s testimony in support of the witness intimidation charge was brief. Contrary to the State's naked assertion[1], L.M. never testified that Mr. Gabler's August threats were retribution for getting him charged in April. In fact, as will be shown below, it appears the prosecution made only a brief, half-hearted effort to elicit this evidence *but failed*. It was L.M.'s testimony that Mr. Gabler's threats on August 14 were linked to her persistent refusal to let him speak to their son.

L.M. testified that Mr. Gabler made calls demanding to speak to their son beginning August 14 and she described him as furious and threatening when she did not comply. (4/12/11,pp.80-86) The prosecution's inquiry on this topic ended with these two questions and answers:

> **District Attorney**: Ms. Marquez, I have to ask you, when Mr. Gabler stated calling you out of jail on August 14, 2009, how did you feel?
>
> **Answer**: Very threatened, very scared. I mean, his demeanor on the phone was that he was coming after me.
>
> **District Attorney**: Okay. Did you ask him why he was coming after you?
>
> **Answer**: I just asked him why he can't just leave me alone, just leave me be. *You know, just take care of himself, and just leave us alone*.

(4/12/11,pp.86-87) (Emphasis supplied.) The prosecution made no further effort to show Mr. Gabler's threats related to the April charges, let alone that they were intended to influence L.M. as a witness to those charges. Consequently, and

[1] Although footnote 4 purports to describe testimony it does not cite to the record.

contrary to the State's contention, a finding on this issue of intent could not be implicit in the jury's verdict because the jury did not receive evidence on this issue.

This gap in the record underscores the effect of the instructional error on Mr. Gabler's trial. Because the prosecution was not required by the instructions to prove a nexus between Mr. Gabler acts and a specific intent to influence L.M. as a potential witness, the prosecution did not really try to present testimony to prove that nexus.

This gap in the record supports the conclusion that the instructional error in this case was neither "harmless" in light of the evidence (the standard that frames the State's footnoted argument, inapplicable to this issue) nor harmless beyond a reasonable doubt. The applicable constitutional harmless error standard requires this court to reverse Mr. Gabler's conviction *unless* the prosecution on appeal proves the instructional error harmless beyond a reasonable doubt. To meet this burden the prosecution must dispel the reasonable possibility that the incomplete instruction might have contributed to Mr. Gabler's conviction. The factually unsupported argument presented in footnote 4 does not come close to satisfying this burden. Mr. Gabler's conviction for witness intimidation must therefore be vacated.

III. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION OF THE STALKING CHARGE IN CASE NO. 09CR1158

The State does not seriously dispute the legal standards this Court will apply to decide Mr. Gabler's challenge to his stalking conviction. Whether raised first in the trial court or not, a challenge to the sufficiency of the evidence to sustain a conviction is reviewed de novo. *People v. McBride*, 228 P.3d 216, 226 (Colo.App.2005).

The Court will have to determine whether the evidence, both direct and circumstantial, when viewed as a whole and in a light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable fact finder that the Defendant is guilty of the crime charged beyond a reasonable doubt. While the prosecution will receive the benefit of any reasonable inference that might fairly be drawn from the evidence and witness credibility remains within the province of the jury, verdicts in criminal cases may not be based on guessing, speculation, or conjecture. *People v. Duncan*, 109 P.3d 1044, 1045-46 (Colo.App.2004). If the prosecution does not present evidence to support every element of the offense beyond a reasonable doubt, a conviction cannot be sustained. *Id*.

The prosecution did not present sufficient evidence to support the stalking conviction because the hundreds of texts and telephone contacts in April that preceded Mr. Gabler's single unwanted contact with L.M. on the morning of April 16, 2011(when they were stopped in traffic) were willingly reciprocated by L.M, and the telephone or text contacts thereafter were encouraged by her police

handlers. The love letters written by L.M. to Mr. Gabler after his arrest place her actions and her testimony in context. *See* Opening Brief at 19-20.

Thus, contrary to the State's characterization, the evidence does not support the conclusion that Mr. Gabler appeared "outside the Kaiser location" on the afternoon of April 16 unwanted and uninvited. Rather, the testimony establishes Mr. Gabler's appearance at Kaiser was in response to an invitation from L.M., suggested by police. Officer Gesi testified he had encouraged L.M. to "make Mr. Gabler believe that she wanted to meet him for lunch" so that police, who had not been able to track him down, could show up at the appointed place and time to arrest him. Instead of making the suggested plan to meet for lunch, L.M. told Mr. Gabler she would be at Kaiser. (4/13/11,p.80-81) Mr. Gabler arrived, saw the police vehicles, and drove quickly away. Any subsequent contact between L.M. and Mr. Gabler between April 16 and 17 is rooted in L.M.'s encouragement, which was itself encouraged by the police.

The record shows the prosecution did not to present evidence of two or more occurrences of specific acts of stalking, as required to prove the charged offense. *People v. Herron*, 251 P.3d 1190, 1194 (Colo.App.2010). Mr. Gabler's conviction for stalking therefore cannot be sustained and must be vacated.

IV. MR. GABLER'S SENTENCES AS A HABITUAL CRIMINAL IN CASE NO. 09CR1158 MUST BE VACATED BECAUSE THE PROSECUTION AGREED NOT TO FILE HABITUAL CRIMINAL COUNTS IN THAT CASE

A. Preservation; Standard of Review

The State disputes the applicable standard of review. It contends Mr. Gabler did not preserve this specific challenge to his habitual criminal sentence and that for this reason his claim can only be reviewed under the plain error standard.

The Answer Brief recites years of superfluous procedural detail to support this thesis. But buried in these details are the core procedural facts that establish the issue presented for appeal was raised in the trial court and thereby preserved for appeal:

- On June 3, 2009, an Adams County deputy district attorney made an express written promise to Mr. Gabler (then represented by the public defender) not to file habitual counts in exchange for his waiver of preliminary hearing. (v.1,p.15) *See* Exh. A to Opening Brief.
- A few months later on September 22, 2009, when Mr. Gabler was represented by new appointed counsel, *the same deputy district attorney* moved to add criminal habitual counts. (v.1,pp.22-22)
- Mr. Gabler, filing pro se following his conviction but before sentencing, explicitly brought the promise and breach to the trial court's attention through his written motion for new trial. (v.1,p.249,¶9(G),p.256)
- The trial court stated that it had reviewed Mr. Gabler's pro se motion and all the documents and pleadings submitted, and it denied Mr. Gabler's motion without a hearing. (v.1,p.258)

While an additional record could have been made, nothing more was required to preserve this issue for appeal. Mr. Gabler asserted that the prosecution had violated its promise and demanded relief in the trial court, he presented evidence to support his demand, the trial court ruled on the issue and denied relief.

The preservation of error cases cited by the State address instructions and objectionable closing arguments, which are governed by specific procedural rules. These case are inapposite and their holdings are not on point. *See People v. McNeely*, 222 P.3d 370, 374-75 (Colo. App.2009) (applying Crim.P. 30, which requires that challenges to jury instructions must be raised before they are given to the jury, and only objections so raised will be considered in a motion for new trial or are preserved for appellate review); *People v. Randell*, 2012 COA 108, ¶ 83 (citing *McNeely*, faulting counsel for failing to lodge specific contemporaneous objections to improper closing argument).

B. Due Process Requires the Enforcement of the Prosecutorial Promise Not to File Habitual Criminal Charges in 09CR1158

The State argues that Mr. Gabler is not entitled to enforcement of the broken prosecutorial promise, contending there was no consideration for the explicit agreement to not file habitual criminal charges in 09CR1158. The State's contention is that Mr. Gabler did not have a right to a preliminary hearing and thus forfeited nothing in return for the prosecutorial commitment to not pursue habitual criminal charges.

The State bases this argument on a tortured discussion of trial court proceedings related to the fact that Mr. Gabler was also apparently being detained for unrelated charges in Boulder County. Since he was in custody of Boulder County, the State argues Mr. Gabler must not have been in custody in this case.

And since under the State's argument, the charged offenses did not otherwise entitle him to a preliminary hearing, Mr. Gabler did not have a right to a preliminary hearing to waive.

The State's factual premise—that Mr. Gabler was not in custody in this case at the time the waiver of preliminary hearing was executed—is simply wrong. The register of actions shows that Mr. Gabler initially was held with no bond in this case, that a bond of $10,000 was set at the advisement hearing on May 11, 2009, and that bond was not posted until August 14, 2009. (V.1,p.324) Minute orders confirm that Mr. Gabler appeared pro se in custody at his advisement on May 11. (V.1,p.269) Two days later, Mr. Gabler appeared with the public defender and his case was continued until June 3, for purposes of the preliminary hearing and possible bond reduction. (V.1,p.270) On June 3, Mr. Gabler again appeared in custody (V.1,p.271) and waived his preliminary hearing in writing, in return for the promise of the prosecutor to not file habitual criminal charges.

The record is clear that Mr. Gabler was in custody in this case on June 3, 2009 when he waived his right to a preliminary hearing, and that he had the right to a preliminary hearing on that day pursuant to § 16-5-301(1)(b)(II), C.R.S. (2011) ("Any defendant accused of a class 4, 5, or 6 felony who is not otherwise entitled to a preliminary hearing . . . shall receive a preliminary hearing . . . if the defendant

is in custody for the offense for which the preliminary hearing is requested.").[2] Indeed, there would have been no need to waive the preliminary hearing if the parties and the court had not understood that Mr. Gabler was entitled to a preliminary hearing.

The State also argues that Mr. Gabler did not rely on the prosecutor's promise. That argument is refuted by the undisputed fact that Mr. Gabler waived his preliminary hearing in return for the explicit and enforceable agreement that he would not face habitual criminal charges in this case. *People v. Macrander*, 756 P.2d 356 (Colo.1988) (defendant's waiver of preliminary hearing in reliance on plea agreement constituted detrimental reliance sufficient to prevent prosecution from subsequently rescinding agreement).

Prosecutors, as representatives of the government, must be held to the promises they make. This basic tenet of due process requires that the habitual criminal charges against Mr. Gabler in case number 09CR1158 must be dismissed.

CONCLUSION

Mr. Gabler's conviction for stalking in case number 09CR1158 must be vacated. In addition, the judgment must be reversed and a new trial ordered on the

[2] That Mr. Gabler did not receive any presentence confinement credit demonstrates only that he will be entitled to receive some when he is properly resentenced.

remaining charges with directions that habitual criminal charges may not be pursued against Mr. Gabler in case number 09CR1158.

Dated: January 9, 2014.

Respectfully submitted,

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I certify that on January 9, 2014, a copy of the foregoing *Reply Brief* was served *via* ICCES upon the following:

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