COLORADO COURT OF APPEALS

DATE FILED: August 29, 2013
CASE NUMBER: 2009CA1506

Court of Appeals No. 09CA1506
El Paso County District Court No. 07CR3795
Honorable David Lee Shakes, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Salvador Esquivel-Castillo,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE J. JONES
Carparelli and Booras, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced August 29, 2013

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Defendant, Salvador Esquivel-Castillo, appeals the district court's judgment of conviction entered on jury verdicts finding him guilty of felony murder and second degree murder. We affirm.

I. Background

According to the prosecution's evidence, on May 27, 2007, defendant punched his ex-girlfriend, J.F. (the victim in this case), and broke her jaw. J.F. reluctantly reported the assault to the police.

J.F. was last seen getting into defendant's car on July 11, 2007. J.F. did not go home to her infant son that night and did not show up at work the next morning. Her friends filed a missing persons report on July 12. The same day, the police arrested defendant at work, where he had been picking up his paycheck before attempting to flee to Mexico. The People charged him in a separate case, the appeal of which is also pending before this division in case number 09CA1505 (the assault case).

The police found J.F.'s body several days later, buried at the base of a cliff, on a ranch where defendant's ex-girlfriend, Diana Aragon, lived and where defendant often stayed. Defendant had previously told Ms. Aragon's nephew that if he ever killed someone,

he would bury the body somewhere on the ranch and let the coyotes eat it.

During the homicide investigation, the police found J.F.'s blood in the trunk of defendant's car. They also found vegetation in the undercarriage of defendant's car that matched the types of vegetation growing in the area where J.F's body had been found. They found more of that vegetation inside Ms. Aragon's washing machine, as well as men's clothing that appeared to have been recently washed.

During a recorded phone call from jail, defendant asked Ms. Aragon to find, wash, and throw away a pair of shoes for him. Ms. Aragon found the shoes, put them in a bag, and gave them to an unidentified person.

The People charged defendant with felony murder, second degree murder, and first degree kidnapping. After a month-long trial, a jury found defendant guilty of felony murder and second degree murder. The district court sentenced him to an aggregate term of life imprisonment, to be served consecutively to the thirty-two-year prison term he had received in the assault case.

II. Discussion

On appeal, defendant contends that (1) the jury instructions constructively amended the felony murder count; (2) the district court erroneously admitted statements that J.F. had made to various witnesses; (3) the court erroneously admitted a social worker's expert testimony; and (4) the court erroneously admitted evidence of defendant's gang affiliation. We address and reject each of these contentions in turn.

A. Constructive Amendment

The complaint and information charged defendant with one count of felony murder and one count of first degree kidnapping. The felony murder count alleged that defendant had caused J.F.'s death in the course of or in furtherance of "commit[ing] or attempt[ing] to commit kidnapping." The first degree kidnapping count alleged that defendant had committed kidnapping in violation of section 18-3-301(1)(a), C.R.S. 2012, by means of "forcibly seiz[ing] and carr[ying]" J.F. from one place to another with the intent to force her to make a concession or give up something of value.

Defendant's counsel moved for a bill of particulars, requesting that the People be required to identify "[t]he precise manner and circumstances in which each charge is alleged to have been committed." At a motions hearing, defendant's counsel specified that he wanted to know with more particularity the prosecution's theory on how J.F. had died. The court found that defendant had been provided with all the information that the People had with respect to J.F.'s death, and denied the motion.

At the jury instruction conference, defendant's counsel did not object to the court's proposed felony murder instructions.

The court then instructed the jury that, to satisfy the elements of felony murder, defendant must have "committed or attempted to commit Kidnapping, as defined in Instructions Nos 22 or 23." Instruction No. 22 tracked the statutory language for first degree kidnapping, providing that defendant must have: (1) forcibly seized and carried J.F. from one place to another; (2) knowingly enticed or persuaded J.F. to go from one place to another; or (3) knowingly imprisoned or forcibly secreted J.F. *See* § 18-3-301(1)(a)-(c). Instruction No. 23 tracked the statutory language for second degree kidnapping. *See* § 18-3-302(1), C.R.S. 2012.

As to the first degree kidnapping count, the court instructed the jury that defendant must have "forcibly seized and carried" J.F. *See* § 18-3-301(1)(a).

The jury verdict form for the felony murder count told the jury to elect which type of kidnapping had been committed. The jury found that defendant had "knowingly enticed or persuaded [J.F.] to go from one place to another."

On appeal, defendant contends that the jury instructions on felony murder worked an impermissible variance from the charge because he was not on notice that he would have to defend against a claim that he had kidnapped J.F. by means of enticing or persuading her. We are not persuaded.

Our case law recognizes two types of variances: simple variance and constructive amendment. *People v. Rodriguez*, 914 P.2d 230, 257 (Colo. 1996). A simple variance occurs where the charging terms are unchanged, but the evidence at trial proves facts materially different from those alleged in the complaint. *Id.*; *People v. Gallegos*, 260 P.3d 15, 26 (Colo. App. 2010). A constructive amendment occurs where the jury instructions change an element of the charged offense, thereby altering the substance of the

charging instrument. *Rodriguez*, 914 P.2d at 257; *People v. Duran*, 272 P.3d 1084, 1095 (Colo. App. 2011). Although a simple variance does not require reversal unless it prejudices the defendant's substantive rights, a constructive amendment is reversible per se. *People v. Pahl*, 169 P.3d 169, 177 (Colo. App. 2006); *People v. Huynh*, 98 P.3d 907, 911 (Colo. App. 2004); *see Rodriguez*, 914 P.2d at 257. Defendant contends there was a constructive amendment of the charge. (He does not contend there was a simple variance.)

It is questionable whether defendant preserved this contention. His counsel did not object to the jury instructions on this basis. But, his counsel did argue in moving for a judgment of acquittal at the close of the evidence that the prosecution could only pursue the "forcibly seized and carried" theory of kidnapping in connection with the murder charge. We need not decide whether defendant preserved this contention because we conclude there was no constructive amendment.

The harm of a constructive amendment is that the instructions impermissibly broaden the bases for conviction, effectively subjecting the defendant to the risk of conviction for an

offense that was not charged in the charging instrument. *Rodriguez*, 914 P.2d at 257; *see also United States v. Roe*, 606 F.3d 180, 189 (4th Cir. 2010) (constructive amendment where a jury instruction "'broadens the bases for conviction beyond those charged in the indictment'") (quoting *United States v. Malloy*, 568 F.3d 166, 178 (4th Cir. 2009)).

Defendant asserts that when the People elect to specify a particular section of a statute in the charging document, they are bound by that choice. *See Casadas v. People*, 134 Colo. 244, 247, 304 P.2d 626, 628 (1956). However, with respect to the felony murder count, the complaint did *not* cite a particular part of the kidnapping statute. Defendant was therefore on notice that he would need to defend against the crime of kidnapping generally, including all statutory forms of kidnapping. *Cf. People v. Raymer*, 626 P.2d 705, 707 (Colo. App. 1980) ("[T]he term 'robbery,' as used in the felony murder statute, is to be construed as meaning this type of felony in its generic sense, including all types of robbery as defined in the statutes.").

Defendant also argues that, because the felony murder count did not specify a particular type of kidnapping as the predicate

crime, the first degree kidnapping count was incorporated into the felony murder count. We disagree.

The first count of the complaint did not specifically incorporate by reference the other count. *See People v. Melillo*, 25 P.3d 769, 777 (Colo. 2001) ("In order for a count to incorporate another count we have held that it must contain a *clear reference* to the latter."); *People v. Steiner*, 640 P.2d 250, 252 (Colo. App. 1981) ("Although one count in an information may, by proper reference, incorporate the allegations more fully set forth in another count, such reference must be clear, specific, and leave no doubt as to what provision is intended to be incorporated."). Defendant does not cite any authority for the proposition that we can infer such an incorporation.

We are not persuaded to the contrary by *People v. Palmer*, 87 P.3d 137 (Colo. App. 2003); *People v. Auman*, 67 P.3d 741 (Colo. App. 2002), *rev'd*, 109 P.3d 647 (Colo. 2005); and *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002), on which defendant relies for the proposition that other counts may provide notice of the predicate crime for felony murder. Those cases involved alleged defects in the forms of particular charges, specifically, alleged

failures to give notice of the crimes committed. In each case, the court held that the surrounding circumstances, including other charges, could be considered in determining whether the defendant was prejudiced by the alleged defect in form. None of these cases concerned an alleged constructive amendment of the charge. As noted, the law in this area recognizes that a charge is not limited by another charge unless the former charge expressly incorporates the latter charge.

B. Testimony Concerning the Victim's Statements

Defendant contends that the district court erroneously admitted statements that J.F. had made to various witnesses because (1) the forfeiture by wrongdoing doctrine did not apply, and therefore any testimonial hearsay statements were inadmissible under the Confrontation Clause of the Sixth Amendment to the United States Constitution[1]; and (2) all of the statements in question were inadmissible hearsay. We are not persuaded.

[1] Because defendant does not mention the state constitution or make any argument expressly relying on it, we regard his contention as limited to relying on the federal Constitution. *See People v. Mershon*, 874 P.2d 1025, 1030 n.2 (Colo. 1994).

1. Forfeiture by Wrongdoing

a. Background

The People filed a pretrial notice of intent to introduce J.F.'s statements to certain witnesses, arguing that defendant had forfeited his right to confront J.F. by killing her. Defendant objected. At a motions hearing, defendant's counsel argued that the forfeiture by wrongdoing doctrine did not apply because the prosecution had not proven that defendant had caused J.F.'s unavailability with the intent to prevent her from testifying. Defendant's counsel further argued that J.F.'s statements to various witnesses were testimonial and inadmissible hearsay.

The court determined that the preponderance of the evidence showed that (1) J.F. was unavailable; (2) defendant was involved in rendering J.F. unavailable; and (3) defendant had made J.F. unavailable with the intent to prevent her from testifying. Although the court noted that it did not have "specific evidence" that defendant's purpose in rendering J.F. unavailable was to frustrate the legal system, it based its ruling on two pieces of evidence presented at the hearing.

First, Kristen Bernier, J.F.'s case worker, testified that J.F. said defendant had told her that she had "ruined his life." The court found that defendant's statement related to the fact that J.F., after a long history of abuse, had for the first time reported defendant to the police. The court also determined that this statement was not materially different from the defendant's statement, "She set me up," in *Vasquez v. People*, 173 P.3d 1099, 1105 (Colo. 2007) (district court reasonably deduced from this statement that the defendant intended to silence the victim as a witness).

Second, Bobette Lopez, J.F.'s friend and co-worker, testified that J.F. said she had told defendant that she had reported him to the police for breaking her jaw and was going to call the immigration authorities.

The court later supplemented its findings on the forfeiture by wrongdoing doctrine in light of the trial testimony of Jennifer Bergere, a woman who had purchased drugs from defendant. Ms. Bergere testified that during the weeks before J.F.'s death, defendant had repeatedly said that he was going to kill J.F. because she had caused him "a lot of drama." The court noted that, had Ms.

Bergere's testimony been available at the time of the court's forfeiture ruling, "it would [have] be[en] further evidence . . . of the intent of [defendant] to prevent [J.F.] from testifying."[2]

b. Standard of Review and Applicable Law

We review a claim of a Confrontation Clause violation de novo. *People v. Hagos*, 250 P.3d 596, 620 (Colo. App. 2009); *see Vasquez*, 173 P.3d at 1103 (finding of forfeiture by wrongdoing reviewed de novo). Where a defendant's confrontation right has been violated, we must reverse unless the error was harmless beyond a reasonable doubt. *Hagos*, 250 P.3d at 620.

Under the doctrine of forfeiture by wrongdoing, a defendant can lose his Sixth Amendment right to confront a witness where (1) the witness is unavailable; (2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3)

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[2] Although we agree with defendant that, in deciding whether a statement is admissible, "the preferred procedure . . . is to require the prosecution to establish the foundational requirements for the admission of [the statement] prior to any offer of the statement into evidence before the jury," *People v. Montoya*, 753 P.2d 729, 734 (Colo. 1988), defendant has not shown that he suffered any prejudice from the court's supplementary findings. Ms. Bergere's testimony did not alter the court's ruling in any way. Rather, the court merely noted that her testimony, had it been available at the pretrial hearing, would have bolstered the court's previous determination that defendant had forfeited his confrontation right.

the defendant acted with the intent to deprive the criminal justice system of evidence. *Vasquez*, 173 P.3d at 1103-04; *People v. Moreno*, 160 P.3d 242, 247 (Colo. 2007) ("To deprive a criminal defendant of the protection of the Confrontation Clause, his wrongful conduct must also be designed, at least in part, to subvert the criminal justice system by depriving that system of the evidence upon which it depends.").

At an evidentiary hearing outside the presence of the jury, the prosecution must prove the elements of forfeiture by wrongdoing by a preponderance of the evidence. *Vasquez*, 173 P.3d at 1104. We will not disturb the district court's factual findings following such a hearing unless they are clearly erroneous. *Id.*

c. Analysis

It is undisputed that the first two elements of the doctrine of forfeiture by wrongdoing were met here. We therefore address only the third element: whether defendant rendered J.F. unavailable with the intent to prevent her from testifying.

Defendant argues that *Giles v. California*, 554 U.S. 353 (2008), decided after his trial, limited the scope of the forfeiture by wrongdoing doctrine to circumstances where a defendant's sole

purpose for killing a witness was to prevent the witness from testifying. Courts in other jurisdictions, however, have explicitly rejected such an interpretation of *Giles*. *See, e.g.*, *United States v. Jackson*, 706 F.3d 264, 268 (4th Cir. 2013) ("The [*Giles*] Court made no mention of any requirement that the defendant's desire to silence the witness be the sole or primary motivation for his misconduct."); *People v. Banos*, 100 Cal. Rptr. 3d 476, 493 (Cal. Ct. App. 2009) ("[N]othing in *Crawford*, *Davis*, *Giles I* or *Giles II* suggests that the defendant's *sole* purpose in killing the victim must be to stop the victim from cooperating with authorities or testifying against the defendant. It strikes us as illogical and inconsistent with the equitable nature of the doctrine to hold that a defendant who otherwise would forfeit confrontation rights by his wrongdoing . . . suddenly regains those confrontation rights if he can demonstrate another evil motive for his conduct."); *State v. Supanchick*, 263 P.3d 378, 383 (Or. Ct. App. 2011) ("[T]he Court's opinion in *Giles* does not suggest that [a defendant's] sole or even primary purpose in making the victim unavailable must have been to prevent the victim from reporting defendant to the authorities or testifying against him."). We agree with those courts.

Defendant also argues that the statement, "she ruined my life," could have meant any number of things. However, the court interpreted this statement in light of all of the evidence that had been presented over the course of a two-day hearing, which included evidence that defendant had a history of abusing J.F., and that defendant had told J.F. that she had ruined his life sometime after he had broken her jaw and before she went missing. Given that context, it was reasonable for the court to infer that defendant's statement referred to J.F. having finally reported defendant to the authorities.

Defendant also argues that Ms. Lopez was not credible because she testified to matters that had not been previously disclosed to defense counsel. The court, however, noted that "things are frequently elicited in cross-examination, as this was, that the People haven't heard before."[3] In any event, the district court was in a far superior position to determine Ms. Lopez's

[3] Defendant asserts that Ms. Lopez's testimony was elicited during direct examination. Some of it was, but her specific testimony that the victim had told her she had told defendant the police were looking for him "[f]or breaking [the victim's] jaw" was elicited by defendant's counsel on cross-examination.

credibility, and it expressly found her credible. *See People v. Poe*, 2012 COA 166, ¶ 14 ("It is the fact finder's role to weigh the credibility of witnesses, [and w]e may not substitute our judgment for that of the jury and reweigh the evidence or the credibility of witnesses.") (internal quotation marks omitted).

2. Residual Hearsay Exception

a. Background

At the motions hearing on the People's notice of intent to introduce J.F.'s statements, the court ruled that the statements at issue (those directly implicating defendant) were admissible under CRE 807, the residual exception to the hearsay rule. The court made the following general findings regarding the circumstantial guarantees of trustworthiness of those statements:

- J.F.'s jaw had in fact been broken;
- J.F. had been reluctant to identify defendant;
- J.F. had no motive to lie;
- J.F. knew that by admitting that she was in an abusive relationship with defendant, she risked having the Department of Human Services (DHS) remove her son from her care; and

- J.F.'s ability to perceive and identify the perpetrator had not been impaired.[4]

b. Applicable Law and Standard of Review

Where a defendant forfeits his right to confront a witness, the witness's testimony must still be admissible under the Colorado Rules of Evidence. *Vasquez*, 173 P.3d at 1106; *Hagos*, 250 P.3d at 622.

For a statement to be admissible under the residual hearsay exception, the party offering it must establish that (1) the statement is supported by circumstantial guarantees of trustworthiness; (2) the statement is offered as evidence of material facts; (3) the statement is more probative on the points for which it is offered than any other evidence which reasonably could be procured; (4) the general purposes of the rules of evidence and the interests of justice are best served by the admission of the statement; and (5) the adverse party had adequate notice in advance of trial of the intention of the proponent of the statement to offer it into evidence.

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[4] The court made more specific findings as to each witness, some of which we note below. The court also ruled that certain statements at issue were admissible under other hearsay exceptions, which we note below as well.

Vasquez, 173 P.3d at 1106; *People v. Fuller*, 788 P.2d 741, 744 (Colo. 1990) (establishing five prerequisites for admissibility under CRE 807's predecessor rule, former CRE 804(b)(5)).

The proponent of a hearsay statement must establish circumstantial guarantees of the statement's trustworthiness by a preponderance of the evidence. *People v. Blackwell*, 251 P.3d 468, 475 (Colo. App. 2010).[5] A court should consider "the nature and character of the statement, the relationship of the parties, the probable motivation of the declarant in making the statement, and the circumstances under which the statement was made." *People v. Sandoval-Candelaria*, ___ P.3d ___, ___, 2011 WL 2186433, *1 (Colo. App. No. 07CA0759, May 26, 2011) (*cert. granted* Oct. 1, 2012).

The district court has considerable discretion in applying the residual hearsay exception, and we will not disturb the court's ruling absent a showing of an abuse of that discretion. *Fuller*, 788 P.2d at 744; *People v. Carlson*, 72 P.3d 411, 420 (Colo. App. 2003).

c. Analysis

The district court made detailed findings on the record regarding the circumstantial guarantees of trustworthiness of J.F.'s

[5] This is the only prong of the test that defendant argues on appeal.

statements. As noted, the court found that, with respect to each of the witnesses at issue, J.F. had no motive to lie. To the contrary, by revealing that she was staying in an abusive relationship with her boyfriend, she risked having DHS take protective action for her son. The court also found that J.F.'s jaw had in fact been broken, and that J.F. had been reluctant to identify defendant as the perpetrator. Furthermore, the court found that J.F. had personal knowledge of the events she had described, and that her ability to perceive and identify were not in question. These findings are supported by the record, and are sufficient to justify admission of the statements under the residual exception.

It is true that, with respect to J.F.'s statements to her younger sister, Jessica Keske, J.F. did not run the same risk of DHS involvement as she had when making statements to police officers and social workers. However, J.F. had called her sister from the hospital while she was awaiting treatment for her broken jaw, and she was still crying and upset from the incident. Because J.F. was still under the stress of excitement, her statements to her sister arguably were admissible as excited utterances under CRE 803(2). *See Cheney v. Hailey*, 686 P.2d 808, 812-13 (Colo. App. 1984)

(declarant's statements were admissible under the excited utterance exception where he had made the statements upon arrival at the hospital after a car accident and was still upset and crying); *see also People v. Lagunas*, 710 P.2d 1145, 1148 (Colo. App. 1985) ("While temporal proximity of the statement to the event is important, contemporaneity of the act and assertion is not required."). In any event, the district court did not abuse its discretion in determining that the excited nature of J.F.'s statements, combined with her lack of a motive to lie, provided adequate circumstantial guarantees of trustworthiness for her statements to Ms. Keske to be admissible under the residual hearsay exception.

With respect to Jennifer Beasler, a medical social worker who spoke with J.F. at the hospital, the court ruled that J.F.'s statements identifying defendant as the person who had broken her jaw were also admissible under CRE 803(4), the exception for statements made for purposes of medical diagnosis or treatment. The court reasoned that the identity of the perpetrator was relevant to Ms. Beasler's decisions whether to refer J.F. for domestic violence

and related mental health counseling. We perceive no abuse of discretion.

C. Social Worker's Testimony

Defendant moved to exclude expert witness testimony on domestic violence. The court ruled that there was a sufficient foundation for evidence concerning battered woman's syndrome, and that expert testimony on why a victim might stay in an abusive relationship would be helpful to the jury. The court also ruled that the probative value of such evidence was not outweighed by the danger of any unfair prejudice. The court therefore denied the motion.

At trial, the prosecutor moved to have Jennifer Rivera, a social worker, qualified as an expert on "domestic violence, victim offender dynamics, and offender behavior characters [sic]." Defendant's counsel objected, arguing that Ms. Rivera "has no personal knowledge as to any of the facts in this matter, and I don't think that her testimony is relevant." The court overruled the objection, and accepted Ms. Rivera as an expert "in the area of domestic violence dynamics, victim offender behavior, and characteristics."

Ms. Rivera testified at the outset that she did not know defendant or J.F. personally, or have any specific information about the facts of this case. She then testified generally about typical behavior of domestic violence offenders, the cycle of violence, and the reasons why victims stay in abusive relationships.

On appeal, defendant contends that the district court abused its discretion by admitting Ms. Rivera's testimony because it was irrelevant and unreliable.

Defendant did not object to the reliability of Ms. Rivera's testimony in the district court, however. Thus, the People were not put on notice that they would need to develop a factual record with respect to reliability, and the district court did not rule on that issue. Therefore, we address only defendant's relevance argument. *See People v. Greer*, 262 P.3d 920, 936 (Colo. App. 2011) (J. Jones, J., specially concurring) (observing that claims requiring development of a factual record may be unreviewable even for plain error); *cf. People v. Romero*, 745 P.2d 1003, 1017 (Colo. 1987) (adequate findings are necessary for meaningful appellate review of the reliability of a witness's posthypnotic testimony); *People v. Prieto*, 124 P.3d 842, 849 (Colo. App. 2005) ("[I]n the absence of a

reliability challenge below, we assume that defendant accepted as reliable the scientific principles underlying the proffered expert testimony.").

The district court has broad discretion to determine the admissibility of expert testimony, and we will not overturn its decision unless it is manifestly erroneous. *Golob v. People*, 180 P.3d 1006, 1011 (Colo. 2008); *People v. Jimenez*, 217 P.3d 841, 866 (Colo. App. 2008). "This deference reflects the superior opportunity of the trial judge to gauge both the competence of the expert and the extent to which his opinion would be helpful to the jury." *People v. Ramirez*, 155 P.3d 371, 380 (Colo. 2007).

To be admissible under CRE 702, expert testimony must be both relevant and reliable. *People v. Rector*, 248 P.3d 1196, 1200 (Colo. 2011); *People v. Shreck*, 22 P.3d 68, 77 (Colo. 2001); *People v. Davis*, 2012 COA 56, ¶ 42.

In determining relevancy under CRE 702, a district court should consider whether the testimony would be useful to the jury – that is, "whether there is a logical relation between the proffered testimony and the factual issues involved in the case." *Ramirez*, 155 P.3d at 379; *accord Shreck*, 22 P.3d at 77.

If the court determines that an expert's testimony is admissible under CRE 702, it "should also apply its discretionary authority under CRE 403 to ensure that the probative value of the evidence is not substantially outweighed by unfair prejudice." *Shreck*, 22 P.3d at 79; *accord Davis*, ¶ 42.

During the trial, defendant characterized his relationship with J.F. as a "happy relationship." He blamed much of their fighting on their mutual use of methamphetamine. To the extent that defendant attempted to argue that J.F. was not a victim of domestic violence, we conclude that Ms. Rivera's testimony about the typical dynamics of an abusive relationship was relevant. *See People v. Glasser*, 293 P.3d 68, 78 (Colo. App. 2011) ("[E]xperts may testify concerning whether a victim's behavior or demeanor is consistent with the typical behavior of victims of abuse."); *People v. Johnson*, 74 P.3d 349, 353 (Colo. App. 2002) (holding that expert opinion evidence regarding battered woman's syndrome and the cycle of violence was relevant and helpful to the jury to explain why victims sometimes recant their stories).

Although other parts of Ms. Rivera's testimony were arguably irrelevant, defendant makes only a conclusory allegation of

prejudice.[6] We do not perceive any prejudice. Therefore, we conclude that, although some of Ms. Rivera's testimony may have gone too far afield, reversal is not required.

D. Gang Affiliation Evidence

Defendant filed a motion in limine to exclude evidence of his gang membership on the grounds that it was irrelevant. The prosecution argued that defendant's gang membership was relevant to explain the reluctance of certain witnesses to testify. With respect to Lou Nonay, defendant's fellow inmate, the prosecution argued that the fact that Mr. Nonay was afraid of retaliation by defendant's gang was relevant to restoring Mr. Nonay's credibility in light of his significant criminal history.

The court ruled that evidence of defendant's gang membership "is proper testimony to explain the reluctance of witnesses to testify

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[6] During the prosecutor's lengthy direct examination of Ms. Rivera, defendant's counsel objected only three times. None of these objections was on the grounds of relevance. Absent an objection from defendant's counsel, we cannot say that the court had a duty to intervene sua sponte to limit Ms. Rivera's testimony (though that may have been an appropriate course of action here). *Cf. People v. Freeman*, 47 P.3d 700, 704 (Colo. App. 2001) (because the defendant did not request a limiting instruction, the district court did not err in failing to give such an instruction sua sponte).

and, related to that, their fear of retribution generally by someone from the same gang as [defendant]." The court gave a limiting instruction each time defendant's gang membership was referred to at trial. At the close of the evidence, the court instructed the jury as follows:

> During the course of the trial you heard certain evidence concerning gang membership by the defendant. You are reminded that membership in a gang is not itself a crime. Guilt of the crimes charged may not be inferred from mere association in a gang. Therefore, your decision shall not be affected by evidence, without more, that the defendant was a member of a gang. Whether the defendant is a member of a gang and how gang membership might be relevant to this case are matters for you to determine. You are expected to carefully and impartially consider all of the evidence, and follow the laws as stated in these instructions.

Defendant contends that the district court erred by admitting evidence of his gang membership because such evidence was irrelevant and unfairly prejudicial.[7] Specifically, he challenges Mr.

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[7] Defendant also contends that the court's admission of this evidence constituted improper character evidence, in violation of CRE 404(b). He did not raise this objection in the district court, however. And, in any event, we are not persuaded that evidence of defendant's gang affiliation, offered for the limited purpose of explaining a witness's reluctance to testify, is in the nature of 404(b) evidence. *See United States v. Santiago*, 46 F.3d 885, 890 (9th Cir. 1995) (evidence that witness is reluctant to testify and fearful of gang retaliation, without specifying any acts of

Nonay's testimony about his gang affiliation, as well as the testimony of a gang expert called by the prosecution to rebut defendant's claim that he was not in a gang.

Evidence is relevant if it tends to make the existence of any fact of consequence to the determination of the action more or less probable. CRE 401. However, relevant evidence may be excluded if the danger of unfair prejudice from its admission substantially outweighs its probative value. CRE 403.

A district court has broad discretion to determine the relevance of evidence, and we will not overturn the court's ruling on relevance unless that ruling was arbitrary, unreasonable, or unfair. *People v. Villalobos*, 159 P.3d 624, 630 (Colo. App. 2006). In reviewing the court's determination, "we assume the maximum probative value that a reasonable fact finder might give the evidence and the minimum unfair prejudice to be reasonably expected." *People v. James*, 117 P.3d 91, 94 (Colo. App. 2004).

Evidence that a witness fears gang retaliation is admissible to explain his change in statement or reluctance to testify. *People v.*

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intimidation by the defendant, does not qualify as Fed. R. Evid. 404(b) evidence).

Chavez, 2012 COA 61, ¶ 32; *Villalobos*, 159 P.3d at 630; *James*, 117 P.3d at 94.

We conclude that evidence of defendant's gang affiliation was relevant to establish certain witnesses' fear of retaliation and to explain their reluctance to testify.[8]

With respect to the gang expert called on rebuttal, we note that defendant's counsel made no objection to this witness's testimony at trial. And in addition to the relevance of his testimony to explain other witnesses' fear of retaliation, his testimony was also proper impeachment evidence in light of defendant's denial that he was a gang member. *See People v. Sasson*, 628 P.2d 120, 123 (Colo. App. 1980) (cross-examination of the defendant regarding his former drug addiction was proper for the purpose of challenging the defendant's direct examination testimony implying that he had no familiarity with drugs).

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[8] In addition to Mr. Nonay, the prosecution also sought to introduce evidence of defendant's gang membership to explain the reluctance of Diana Aragon's nephew, Brian Aragon, to testify. Defendant has waived any argument with respect to the testimony of Mr. Aragon, however, because he did not raise it in his opening brief. *See People v. Dubois*, 216 P.3d 27, 28 (Colo. App. 2007) (declining to address issues that the defendant raised for the first time in his reply brief).

Mr. Nonay does not appear to have demonstrated a reluctance to testify in the usual manner – that is, by either refusing to talk to authorities or by changing his statements. *Cf. Villalobos*, 159 P.3d at 629-30 (evidence of gang affiliation admitted to explain witness's denial at trial of statements he had previously made to police); *James*, 117 P.3d at 93-95 (evidence of gang affiliation admitted to explain witnesses' uncooperative attitudes, "losses" of memory, and changed statements). Rather, the prosecution argued that, even though Mr. Nonay had not changed his statements, his fear of retaliation from defendant's gang was relevant to his credibility, which defendant had attacked.

Courts in other jurisdictions have held that shoring up a witness's credibility is a proper reason for admitting gang affiliation evidence. *See, e.g.*, *State v. Vang*, 774 N.W.2d 566, 580 (Minn. 2009) ("Evidence of a witness's fear of testifying and purported threats against that witness are relevant to determine witness credibility . . . ."); *People v. Bahamonte*, 932 N.Y.S.2d 62, 62 (N.Y. App. Div. 2011) (questioning witnesses about their reluctance to testify appropriate in light of defendant's attacks on their credibility); *cf. People v. Burgener*, 62 P.3d 1, 28 (Cal. 2003) (noting

in the context of threats made by the defendant against a witness that "[e]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible").

Regardless, we conclude that defendant has not shown that he was prejudiced by the admission of this evidence. Each time that evidence of defendant's gang affiliation was introduced during trial, the court instructed the jurors that they were not permitted to infer guilt from such an association. The court again provided this limiting instruction at the close of all the evidence. We presume the jury followed this instruction. *See James*, 117 P.3d at 94-95.

Absent a showing that defendant was prejudiced by the admission of this evidence, we perceive no reversible error.

III. C.A.R. Compliance

C.A.R. 28(a)(4) and (b) require that each party's principal brief include a summary of the argument. The People's answer brief does not comply with this requirement, as their purported summary merely states the negative of defendant's contentions of error. A proper summary should include the major points of reasoning as to each issue. *Portercare Adventist Health Sys. v. Lego*, ___ P.3d ___,

___, 2010 WL 3584394, *7 (Colo. App. No. 09CA0900, Sept. 16, 2010), *rev'd on other grounds*, 2012 CO 58.

The judgment is affirmed.

JUDGE CARPARELLI and JUDGE BOORAS concur.

Court of Appeals

STATE OF COLORADO
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CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(I), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Janice B. Davidson
Chief Judge

DATED: December 26, 2012

Notice to self-represented parties*: The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Bro Bono Program page at http://www.cobar.org/index.cfm/ID/21607.*