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| COURT OF APPEALS,<br>STATE OF COLORADO<br><br>Ralph L. Carr Judicial Center<br>2 East 14th Avenue<br>Denver, Colorado 80203<br><br>Appeal; Teller District Court; Honorable Linda Billings-Vela; and Case Number 12CR64 | |
| Plaintiff-Appellee<br>THE PEOPLE OF THE<br>STATE OF COLORADO<br><br>v.<br><br>Defendant-Appellant<br>KEVIN RODERICK | |
| Douglas K. Wilson,<br>Colorado State Public Defender<br>JESSICA A. SCOTELLA<br>1300 Broadway, Suite 300<br>Denver, Colorado 80203<br><br>Phone: (303) 764-1400<br>Fax: (303) 764-1400<br>Email: PDApp.Service@coloradodefenders.us<br>Atty. Reg. #48932 | Case Number: 14CA474 |

# OPENING 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:

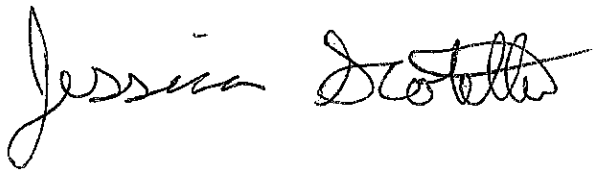
This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 7,715 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Defendant-Appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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.



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## INTRODUCTION

Mr. Roderick appeals his judgment of conviction for Menacing. The incident involved Mr. Roderick and his former supervisor engaging in a fist-fight at work.

Trial centered around two main issues: (i) who threw the first punch, and (ii) whether Mr. Roderick used a fire extinguisher in self-defense, or threatened the alleged victim, Mr. Churchill with it. Only Mr. Churchill and Mr. Roderick could testify as to who threw the first punch, each implicating the other. Mr. Roderick testified that he merely used a fire extinguisher as a barrier to protect himself from Mr. Churchill, whereas another employee testified that he heard Mr. Roderick tap Mr. Churchill on the back with the fire extinguisher and say "You want some more?" The jury hung on the Assault count (which was later dismissed), and found Mr. Roderick guilty of Menacing.

Mr. Roderick is entitled to a new trial because the prosecutor improperly penalized Mr. Roderick's exercise of his constitutional rights to be present at trial, testify, confront witnesses, due process, and be informed about and participate in his defense by using the exercise of those constitutional rights as the basis for a generic attack on his credibility. This was plain error. The impermissible attack violated Mr. Roderick's rights to a fair trial and an impartial jury.

A new trial is also warranted because the court excluded evidence of Mr. Churchill's habit of coming to work drunk, denying Mr. Roderick of his due process rights to present a defense and to a fair trial, and his right to testify.

## STATEMENT OF THE ISSUES PRESENTED

1. Whether it was plain error for the prosecutor to penalize Mr. Roderick's exercise of his constitutional rights to be present at trial, testify, confront witnesses, due process, and be informed about and participate in his defense by using the exercise of those constitutional rights as the basis for a generic attack on his credibility.
2. Whether the court violated Mr. Roderick's due process rights to present a defense and to a fair trial, and his right to testify, by excluding evidence of the alleged victim's habit of coming to work intoxicated.

## STATEMENT OF THE CASE

Mr. Roderick appeals his judgment of conviction pursuant to Colorado Appellate Rule 3. Mr. Roderick was charged with Second Degree Assault, Crime of Violence, and Menacing. R. CF, p. 24. The jury was split 7 to 5 in favor of acquittal on the Assault charge, resulting in the dismissal of it and the Crime of Violence sentence enhancer. *Id.* at 91; Supp. R. Tr. (November 7, 2013), p. 66; R. Tr. (November 18, 2013), p. 3. Mr. Roderick was convicted of Menacing (F5), Colo. Rev.

Stat. § 18-3-206(1)(a), (b) (2012). R. CF, pp. 24, 97. Mr. Roderick was sentenced to two years of supervised probation and 45 days in jail. R. Tr. (January 27, 2014), pp. 9-10.

## STATEMENT OF THE FACTS

Deputy Fisk testified that he received a call to respond to the Pikes Peak Regional Hospital around 7 a.m. on May 15, 2012. Supp. R. Tr. (November 5, 2013), p. 18. Deputy Fisk met and interviewed the alleged victim, Steven Churchill, and took photographs. *Id.* at 19, 21. Mr. Churchill told Deputy Fisk that he had been assaulted at work. *Id.* at 22. Mr. Churchill said that Mr. Roderick had come up behind him and said "Hey, Church" and struck him in the left eye after Mr. Churchill turned around. *Id.* Mr. Churchill was mostly lucid, but used language such as "I think" and "after that I don't know." *Id.* at 43-44, 47. Deputy Fisk then went to Mr. Churchill's and Mr. Roderick's workplace, Leo's Garage at Sanborn Western Camps in Teller County, Colorado. *Id.* at 22-23. Mr. Roderick had already left, so Deputy Fisk collected written statements from the other employees. *Id.* at 23-24, 41. No one had seen the fight. *Id.* at 24. Deputy Fisk took photos of blood at the scene. *Id.* at 24. Deputy Fisk arrested Mr. Roderick for Second Degree Assault. *Id.* at 32-33.

After meeting both men, Deputy Fisk testified that Mr. Churchill was significantly taller and significantly bigger than Mr. Roderick. *Id.* at 43. Mr. Churchill testified that he was a Golden Gloves Boxer in his youth, 35 years ago. *Id.* at 58.

Steven Churchill testified that he worked with Mr. Roderick for about 2 or 3 years prior to the incident on May 15. *Id.* at 51-52. Mr. Churchill testified that he got along with Mr. Roderick, and had never raised his voice to him. *Id.* at 52, 56. Mr. Churchill testified that on the morning of May 15, Mr. Roderick said "Hey, motherfucker," and when Mr. Churchill turned around, Mr. Roderick was already swinging, and punched him in the face. *Id.* at 52-53. Mr. Churchill testified that he vaguely remembered grabbing Mr. Roderick so that he would not hit him again. *Id.* at 53. Mr. Churchill testified that he then blacked out, and later "came to" standing at the shop sink. *Id.* at 53-54. His boss, Dave Peck, then took him to the hospital. *Id.* at 54.

Mr. Roderick testified that he arrived at work a little before 7 a.m. on May 15. Supp. R. Tr. (November 6, 2013), p. 137. Mr. Churchill walked by and said "Good morning" in an intimidating, surly manner. *Id.* at 137-39. Then, Mr. Churchill got in Mr. Roderick's face, shoved his head back, causing him to lose his balance, and said "You're out of here." *Id.* at 137. Mr. Roderick smelled whiskey on his breath. *Id.* at 140. When Mr. Roderick regained his balance, he punched Mr. Churchill in the

mouth and said "Don't ever lay a hand on me again." *Id.* at 137. Mr. Churchill then grabbed Mr. Roderick by the shoulders, and Mr. Roderick took Mr. Churchill to the ground. *Id.* Mr. Churchill continued to strike with his left hand, and Mr. Roderick, who was squatted on top of Mr. Churchill, struck several punches as hard and as quick as he could.[1] *Id.* at 137-38, 152. Mr. Roderick then backed off, and did not touch Mr. Churchill again. *Id.* at 138.

Mr. Churchill struggled to get back to his feet and lunged for Mr. Roderick several times. *Id.* at 141, 153. Mr. Roderick continued to tell him to "stay back, back off and stay down." *Id.* at 141. At one point, Mr. Churchill grabbed a glass Starbucks bottle of coffee, and slammed it on the ground. *Id.* Mr. Roderick believed that Mr. Churchill was not going to stop pursuing him, so he kept backing up until he bumped into a fire extinguisher. *Id.* Mr. Roderick grabbed the fire extinguisher and considered spraying it, but instead held onto it just to have something between himself and Mr. Churchill. *Id.* Mr. Roderick feared that Mr. Churchill might make his way to the office, where a shotgun and three rifles were kept. *Id.* at 147. At that point, Mr. Schlegel and Mr. Vant Hul entered the shop, and Mr. Schlegel helped Mr. Churchill over to the sink. *Id.* at 156.

[1] Consistent with this testimony, Deputy Fisk later transported Mr. Roderick to the hospital for his injured hand. Supp. R. Tr. (November 5, 2013), pp. 29-30.

Mr. Roderick collected his things, apologized to his co-workers for the mess, and went home. *Id.* at 142, 147-48. At trial, Mr. Roderick observed "I'm sorry for the way the world is, but it's not my fault but I'm still sorry." *Id.* at 148.

Paul Schlegel, a heavy equipment manager at Sanborn Western Camps, testified that he entered the shop, saw a bloody mess, and saw Mr. Churchill bent over the sink washing the blood off his face. *Id.* at 36-37. Mr. Schlegel testified that he heard someone say "Put it down," possibly referring to a fire extinguisher. *Id.* at 58. Mr. Roderick told him "I'm sorry you have to see this mess." *Id.* at 38.

Mr. Schlegel testified that Mr. Churchill was once the maintenance supervisor, but he no longer held that position. *Id.* at 40. Mr. Schlegel had gotten to know both Mr. Churchill and Mr. Roderick through work, and witnessed Mr. Churchill verbally abuse Mr. Roderick. *Id.* at 41. It was clear that Mr. Churchill did not like Mr. Roderick. *Id.* at 41-42. However, Mr. Roderick always "took it very well" and was professional. *Id.* at 61. Mr. Schlegel heard Mr. Churchill brag about being a boxing champion, about how he liked to fight, and how he used to get drunk and fight in Denver. *Id.* at 42. These events sounded more recent than 35 years ago. *Id.* at 42-43. Mr. Schlegel was asked whether Mr. Churchill was known to be a drinker, but the court sustained the prosecutor's objection on the grounds that the question sought impermissible character evidence. *Id.* at 43-56. Mr. Schlegel testified that it did not

appear that either Mr. Churchill or Mr. Roderick had been drinking that morning. *Id.* at 60.

Larry Vant Hul, the fleet manager and mechanic at Sanborn Western Camps, testified that when he arrived at work on May 15, he met Mr. Roderick outside the shop. *Id.* at 64. Mr. Roderick was "wound up" and said "Larry, you don't want to go in there, I made a mess, and I'm sorry about the mess." *Id.* at 65. Mr. Roderick also told him that Mr. Churchill had swung on him. *Id.* at 69. He entered the shop, saw blood on the floor with a trail to the bathroom, and saw Mr. Churchill standing over the sink. *Id.* at 65. Mr. Churchill seemed dazed. *Id.* at 65-66. Mr. Roderick indicated that he had quit and was gathering up his tools when Mr. Schlegel walked in. *Id.* at 66. Mr. Vant Hul testified that Mr. Roderick then picked up a fire extinguisher and lightly "tapped" Mr. Churchill on the back shoulder with it, and said "This isn't over yet" and "You want some more?" *Id.* Mr. Vant Hul testified that he told Mr. Roderick that it was over, and to put down the fire extinguisher. *Id.* Mr. Vant Hul testified that Mr. Churchill had blood on his clothes (*id.* at 65); however, even though Deputy Fisk examined and took photographs of the fire extinguishers in Leo's Garage, and collected one into evidence, there was no evidence of blood on any of them (Supp. R. Tr. (November 5, 2013), pp. 33-34, 37, 43).

David Peck, a maintenance worker at Sanborn Western Camps, testified that when he arrived at work on May 15, he saw Mr. Churchill bleeding into the sink. Supp. R. Tr. (November 6, 2013), pp. 73-74. Mr. Peck *did not* see Mr. Roderick reach for a fire extinguisher, pick one up, tap Mr. Churchill on the back with it, or hear Mr. Roderick challenge Mr. Churchill. *Id.* at 80. The prosecutor reminded Mr. Peck that he told the police that Mr. Roderick was cussing at Mr. Churchill, but Mr. Peck said nothing about cussing in his original statement to the police on the date of the altercation. *Id.* at 75-78. Mr. Peck also confirmed that there was tension in the workplace between Mr. Churchill and Mr. Roderick. *Id.* at 80-81.

Travis Sneed, an equipment operator, testified that when he arrived at work on May 15, he saw blood on the floor, and that Mr. Roderick was angry. *Id.* at 104. Mr. Roderick was putting his things in his truck, and said "Sorry, guys, but I'm too old for this stuff. You don't swing on me, and I don't put up with that stuff." *Id.* at 106.

Samantha Peck, the assistant director of an affiliate of the Sanborn Western Camps, testified that as she entered Leo's Garage on the morning of May 15, she noticed a pool of blood, saw that Mr. Churchill's face was swollen, and saw that there was blood on him and his clothes. *Id.* at 107-08. She saw Mr. Roderick moving his things into his truck. *Id.* at 109. She testified that he was upset, and said that "he wasn't gonna put up with this," something to the effect of "being old-timers and not

needing this," that "these things happen every once in a while," and that "[n]o one takes a swing on me." *Id.* at 110, 113. He came back later and was calmer, and said that he was really sorry and offered to help clean up. *Id.* at 110. Mr. Roderick did begin to clean up the spilled coffee and broken glass. *Id.* at 111, 112-13.

Victor Ornelas, a maintenance employee at Sanborn Western Camps from about February to early May 2012, testified that it was unclear whether Mr. Churchill was Mr. Ornelas's supervisor, because Mr. Churchill was "supposed to be weeded out [be]cause of his problems," and as a result, Mr. Ornelas reported to Mr. Peck, who was supposed to be the new supervisor. *Id.* at 125-127. Mr. Ornelas did not believe Mr. Churchill had the right to terminate him. *Id.* at 131. The conflict with Mr. Churchill regarding whether he was the "No. 1 supervisor" or the "No. 2 supervisor" resulted in Mr. Ornelas quitting Sanborn Western Camps after only 90 days of work. *Id.* at 130-131. Mr. Ornelas testified that the majority of interactions between Mr. Churchill and Mr. Roderick were "pretty negative," and that Mr. Churchill was verbally abusive to him and Mr. Roderick. *Id.* at 127-28.

Dr. Ballenger noted several facial fractures in the x-rays of Mr. Churchill. *Id.* at 11. Dr. Lee testified the injuries to Mr. Churchill were consistent with someone being punched in the face, and were serious bodily injury. *Id.* at 25, 29. Dr. Lee also testified that Mr. Churchill lacked a clear memory, and that a person can have no

memory of an incident due to a "blackout" head injury, or because they are very drunk. *Id.* at 23-24, 34-35.

The jury was deadlocked 7 to 5 in favor of acquittal on the Second Degree Assault charge (Supp. R. Tr. (November 7, 2013), p. 66; R. CF, p. 91), but found Mr. Roderick guilty of Menacing (R. CF, p. 97).

## SUMMARY OF THE ARGUMENT

The key issue at trial was Mr. Roderick's credibility. It was plain error for the prosecutor to penalize Mr. Roderick's exercise of his constitutional rights to be present at trial, testify, confront witnesses, due process, and be informed about and participate in his defense by using it as a basis for a general attack on his credibility. This "foul blow" cost Mr. Roderick his constitutional rights to a fair trial and an impartial jury. *See* U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *Berger v. United States*, 295 U.S. 78, 88 (1935) ("[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones."); *Wilson v. People*, 743 P.2d 415, 418 (Colo. 1987) (same).

Along with Mr. Roderick's credibility, the other key issue was self-defense—what was in Mr. Roderick's mind at the moment he picked up the fire extinguisher? Did Mr. Churchill pose a continuing threat? Evidence of the alleged victim's habit of coming to work drunk would have helped explain why Mr. Roderick reasonably

believed he needed to act in self-defense even after he initially hit Mr. Churchill in self-defense. The court violated Mr. Roderick's due process rights to present a defense and to a fair trial, and his right to testify, by keeping this evidence from the jury.

## ARGUMENT

### I. It Was Plain Error For The Prosecutor To Penalize Mr. Roderick For Exercising His Constitutional Rights to Attend Trial, Testify, Confront Witnesses, Due Process, and Be Informed of and Participate in His Defense

*A. Standard of Review*

Where, as here, there is "no contemporaneous objection . . . to the asserted error or defect, appellate review is limited to determining whether the error or defect rises to the level of 'plain error.'" *Wilson*, 743 P.2d at 419. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Colo. R. Crim. P. 52(b).

A defendant is entitled to a new trial when a prosecutor's remarks, in the context of the entire record, undermine "the fundamental fairness of the trial itself [and] cast serious doubt on the reliability of the judgment of conviction." *Wilson*, 743 P.2d at 421.

*B. Argument*

Prosecutorial misconduct may violate the constitutional rights to a fair trial and an impartial jury. *See* U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) ("The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.") (internal quotation omitted); *Berger*, 295 U.S. at 89 (awarding new trial where prosecutorial misconduct had a probable effect on the jury "which cannot be disregarded as inconsequential"); *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010)(holding that prosecutorial misconduct violated the defendant's rights to due process and a fair trial by an impartial jury).

To ensure these rights are protected, prosecutors are held to higher standards of ethical responsibility because of their role as the sovereign's representative, and because their arguments are "likely to have significant persuasive force with the jury." *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005); *Berger*, 295 U.S. at 88 ("The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."). Further, juries have confidence in the prosecutor's obligations, and thus put special weight on "improper suggestions,

insinuations, and, especially, assertions of personal knowledge . . . ." *Id.* The prosecutor's duty to stay within ethical bounds has constitutional underpinnings. *Domingo-Gomez*, 125 P.3d at 1048.

While closing argument "may properly include the facts in evidence and any ***reasonable*** inferences drawn therefrom," (*Domingo-Gomez*, 125 P.3d at 1048 (emphasis added)), counsel is prohibited from arguing unreasonable or false inferences. *See* American Bar Association, ABA Standards for Criminal Justice: Prosecution Function, 3-6.8(a) (4th ed., 2015) ("The prosecutor may argue all ***reasonable*** inferences from the evidence in the record, unless the prosecutor knows an inference to be false.") (emphasis added). Thus, counsel may point to "circumstances which may raise questions or cast doubt on a witness's testimony," but may not draw unreasonable inferences from the evidence as to the credibility of a witness. *See Wilson*, 743 P.2d at 418.

It has long been recognized that the State may not comment on a defendant's decision to exercise their constitutional rights. *Griffin v. California*, 380 U.S. 609, 615 (1965) (holding that the Fifth and Fourteenth Amendments forbid "comment by the prosecution on the accused's silence"); *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966) ("[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The

prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."); *Martinez v. People*, 244 P.3d 135, 141 (Colo. 2010) (prosecution commenting on a defendant's presence at trial "transforms a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility" (quoting *Portuondo v. Agard*, 529 U.S. 61, 76 (2000)(Ginsburg, J., dissenting))). Further, it is improper to argue that a defendant tailored testimony merely on the basis of their presence at trial, without any specific references to the record. *Martinez*, 244 P.3d at 141.

Defendants have the constitutional rights to attend trial, testify, confront witnesses, due process, and to be informed about and participate in their defense. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25; Colo. R. Crim. P. 43(a) ("The defendant shall be present . . . at every stage of the trial . . . ."); Colo. R. Crim. P. 16(a)(1)(I) (right to pre-trial discovery of witness statements); *Illinois v. Allen*, 397 U.S. 337, 338 (1970) (right to be present at trial); *Germany v. People*, 599 P.2d 904, 906 (Colo. 1979) (same); *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987) (Fifth Amendment, Sixth Amendment, and due process rights to testify); *People v. Curtis*, 681 P.2d 504, 509-10 (Colo. 1984) (due process right to testify); *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004) (right to confront witnesses); *People v. Fry*, 92 P.3d 970, 975 (Colo. 2004) (same); *Strickland v. Washington*, 466 U.S. 668, 684-85, 688 (1984) (Sixth

Amendment right to be informed about and participate in defense); *Hutchinson v. People*, 742 P.2d 875, 881 (Colo. 1987) (same); *In re Gault*, 387 U.S. 1, 33 (1967) (due process right to notice of charges); *People v. Garcia*, 940 P.2d 357, 362 (Colo. 1997) (same), *as modified on denial of reh'g* (Aug. 4, 1997).

The Colorado Supreme Court has held that it is improper for the prosecutor to comment on a defendant attending trial if the prosecutor generally suggests that the defendant tailored testimony to that of other evidence, without specific reference to instances where the defendant did so. *Martinez*, 244 P.3d at 141 ("We therefore hold that prosecutors are ***prohibited*** from making generic tailoring arguments.") (emphasis added).

In *Martinez*, the prosecutor asked the defendant the following question during cross-examination: "[Y]ou've had the advantage of sitting in court today and listening to all the testimony, as well as yesterday; is that correct?" *Id.* at 137. During rebuttal closing, the prosecutor argued that the defendant was not credible due to his "advantage" of being able to listen to what the other witnesses had to say. *Id.* at 137-38. The prosecutor focused on the defendant's mere presence at trial, and did not reference any evidence in the record of tailored testimony. *Id.* at 142. On appeal, the Colorado Supreme Court held that arguments of "general tailoring" are improper, and raise "constitutional concerns." *Id.* at 141.

Here, as in *Martinez*, the prosecutor attacked Mr. Roderick's credibility merely on the basis of his presence at trial, both during cross-examination and again during closing arguments. On cross-examination of Mr. Roderick, the following exchange occurred:

> **Q.** So you had mentioned, when your lawyer was questioning you, what Mr. Schlegel said in his statement; is that correct? You were quoting out of Mr. Schlegel's statement?
>
> **A.** On what part?
>
> **Q.** About whether or not he came to the shop before you.
>
> **A.** Yes.
>
> **Q.** So you've read his statement?
>
> **A.** Yes, I should have all that you have.
>
> **Q.** So you've read everyone's statement prior to coming to court?
>
> **A.** I think so, yeah.
>
> **Q.** And you've been sitting here watching everyone testify; is that correct?
>
> **A.** Yes, ma'am.
>
> **Q.** So you have the luxury of knowing exactly what everyone has testified to this date?
>
> **A.** Yes, ma'am.

Supp. R. Tr. (November 6, 2013), pp. 148-49. During the State's rebuttal closing argument, the prosecutor stated:

> And we also discussed how Mr. Roderick had the luxury of sitting here listening to every single person testify. He mentioned looking at Paul Schlegel's statement before this trial, so he has the luxury of looking at everything in the file. He knows how everyone is gonna testify, therefore, it's pretty easy for him to put on this and to kinda work around the evidence, because the photos don't lie certainly.
>
> ***
>
> But just for the sake of argument, I'm gonna step aside and talk about the defendant's version of the story; of course, the defendant being biased and working around the facts, but we're gonna go through that.

Supp. R. Tr. (November 7, 2013), pp. 45-47. These comments penalized Mr. Roderick for exercising his constitutional rights to be present at his trial, testify, confront witnesses, due process, and to be informed about and participate in his own defense. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25; Colo. R. Crim. P. 43(a); Colo. R. Crim. P. 16(a)(1)(I); *Allen*, 397 U.S. at 338; *Germany*, 599 P.2d at 906; *Rock*, 483 U.S. at 51-52; *Curtis*, 681 P.2d at 509-10; *Crawford*, 541 U.S. at 68-69; *Fry*, 92 P.3d at 975; *Strickland*, 466 U.S. at 684-85, 688; *Hutchinson*, 742 P.2d at 881; *In re Gault*, 387 U.S. at 33; *Garcia*, 940 P.2d at 362. Contrary to the prosecutor's assertion, these are constitutional rights, not "luxuries" that enable a defendant to craft a convincing (albeit untrue) story. Asserting such an implication impermissibly

penalized Mr. Roderick for exercising his constitutional rights. Further, the implication that a defendant is less credible for exercising these rights is not a reasonable inference from the evidence, and is thus an improper argument. *See Wilson*, 743 P.2d at 418.

As in *Martinez*, the prosecutor did not tie the tailoring arguments to any evidence in the record. And here, the prosecutor not only commented on Mr. Roderick's rights to attend trial, testify, and confront witnesses, but also his constitutional and statutory rights to be informed about the case. *See* Colo. R. Crim. P. 16(a)(1)(I) ("The prosecuting attorney ***shall*** make available to the defense . . . statements of all witnesses . . . .") (emphasis added); *Strickland*, 466 U.S. at 684-85, 688 (Sixth Amendment right to be informed about and participate in defense); *Hutchinson*, 742 P.2d at 881 (same); *In re Gault*, 387 U.S. at 33 (due process right to notice of charges); *Garcia*, 940 P.2d at 362 (same). Thus, the misconduct here was more egregious than the misconduct in *Martinez*, and more obvious.

This error was plain. *See People v. Pollard*, 2013 COA 31M, at ¶¶ 39-41 (holding it was plain error to allow prosecution to comment on defendant's refusal to consent to a search as evidence of guilt, because is it a "well-settled legal principle that a person should not be penalized for exercising a constitutional privilege"), *as modified on denial of reh'g* (May 9, 2013). With a Colorado Supreme Court decision—decided

almost three years prior to the trial in this case—explicitly prohibiting the exact argument the prosecutor made here, it should have been "obvious" to the trial court that the argument was improper.

### *C. The Comments Penalizing Mr. Roderick For Exercising His Constitutional Rights to Attend Trial, Testify, Confront Witnesses, Due Process, and Be Informed of and Participate In His Defense Constitute Reversible Plain Error*

Whether a prosecutor's improper questioning and closing argument is harmful error must be evaluated considering the totality of the circumstances, including the strength of admissible evidence supporting the verdict, the specific nature of the error, and the nature of the prejudice or risk associated with it. *Martinez*, 244 P.3d at 142-43.

The court in *Martinez* held that, while the generic tailoring arguments made by the prosecution were improper, the error was harmless. *Id.* at 143. The court reasoned that the prejudice of a generic tailoring argument was minimized because the record included at least four instances where the defendant did in fact tailor his testimony, including the defendant's comments on the testimony of prior witnesses, the defendant's express and implied accusations of witnesses lying, and express incorporation of the testimony of prior witnesses. *Id.* at 142-43. Thus, the jury would have understood the context of the prosecutor's remarks, even though the specific instances of tailoring were not mentioned in closing arguments. *Id.* at 143.

Additionally, there was video evidence in the record that directly contradicted the defendant's version of events, calling his credibility into question. *Id.*

The case at hand is distinguishable from *Martinez*, because here, Mr. Roderick did not comment on the prior testimony of other witnesses. He did not state or imply that any witnesses lied. His sole comment about another witness was that he could not remember whether or not Mr. Schlegel had come into the shop before him on May 15, 2012, but he did remember that Mr. Schlegel had said in his witness statement that he had arrived at work around 7 a.m. Supp. R. Tr. (November 6, 2013), p. 138. Thus, the prosecutor's improper remarks do "cast[] serious doubt upon the basic fairness of the trial itself." *Wilson*, 743 P.2d at 419-20.

Further, the improper attack on Mr. Roderick's credibility is especially prejudicial in this case, where Mr. Roderick's credibility was crucial to his defense. Mr. Roderick's claim of self-defense, and his state of mind regarding the continued danger of Mr. Churchill at the moment when Mr. Roderick picked up the fire extinguisher, were the key issues the jury had to consider for the Menacing charge.

Finally, the evidence of guilt was hardly overwhelming. The evidence against Mr. Roderick on the Menacing charge came down to the testimony of one of his co-workers. And Mr. Roderick had a compelling self-defense account: he was significantly smaller than Mr. Churchill (Supp. R. Tr. (November 5, 2013), p. 43); Mr.

Churchill was a former Golden Gloves boxer who was known to brag about getting drunk and getting into fights (*id.* at 58; Supp. R. Tr. (November 6, 2013), p. 42); Mr. Churchill was intoxicated (*id.* at 140); Mr. Churchill started the altercation with fighting words ("You're out of here") and by shoving Mr. Roderick's head back, knocking him off balance (*id.* at 137); and Mr. Churchill, even after sustaining several strikes to the face, attempted to lunge at him, and did slam a glass container on the ground (*id.* at 141, 153). Mr. Roderick's testimony was compelling enough to hang the jury on the Assault charge. Given all this testimony, a jury could reasonably believe Mr. Roderick's testimony that he picked up the fire extinguisher as a further act of self-defense, not to menace Mr. Churchill.

The prosecution's attack on Mr. Roderick's credibility arising from his exercise of his constitutional rights to be present at trial, testify, confront witnesses, due process, and be informed of and participate in his defense was categorically improper. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25; Colo. R. Crim. P. 43(a); Colo. R. Crim. P. 16(a)(1)(I); *Martinez*, 244 P.3d at 141; *Allen*, 397 U.S. at 338; *Germany*, 599 P.2d at 906; *Rock*, 483 U.S. at 51-52; *Curtis*, 681 P.2d at 509-10; *Crawford*, 541 U.S. at 68-69; *Fry*, 92 P.3d at 975; *Strickland*, 466 U.S. at 684-85, 688; *Hutchinson*, 742 P.2d at 881; *In re Gault*, 387 U.S. at 33; *Garcia*, 940 P.2d at 362. A defendant's decision to attend and testify at his own trial is in no way probative of his guilt

because "[i]f a defendant appears at trial and gives testimony that fits the rest of the evidence, ***sheer innocence could explain his behavior completely***." *Portuondo*, 529 U.S. at 85 (Ginsburg, J., dissenting) (emphasis added). Given the importance of Mr. Roderick's credibility to this case, the improper comments "cast[] serious doubt upon the basic fairness of the trial itself," requiring a new trial. *Wilson*, 743 P.2d at 419-20; *see* U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *Berger*, 295 U.S. at 89; *Darden*, 477 U.S. at 181.

## II. The Court Erred In Excluding Evidence of the Alleged Victim's Habit of Coming to Work Drunk

### *A. Standard of Review*

Constitutional violations are reviewed *de novo*. *United States v. Serrano*, 406 F.3d 1208, 1214 (10th Cir. 2005) ("We review Defendant's claim that the government violated his constitutional right to present a defense de novo."); *People v. Matheny*, 46 P.3d 453, 459 (Colo. 2002). Short of that, evidentiary rulings are reviewed for an abuse of discretion. *People v. Muniz*, 190 P.3d 774, 781 (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.* (citations omitted).

Counsel below argued that evidence of Mr. Churchill's drinking was admissible as habit evidence. Supp. R. Tr. (November 6, 2013), pp. 43-46; 48 ("Your Honor, I'm

trying to establish under Rule 406 that Mr. Churchill . . . had a particular habit, and that that habit is relevant to prove that the conduct of Mr. Churchill on May 15 was in conformity with that habit or routine practice."); 49-52; 87-93. Counsel made an offer of proof that four witnesses (presumably in addition to Mr. Roderick) would testify that Mr. Churchill had a habit of coming to work smelling like alcohol, or being under the influence. *Id.* at 54. At least one witness would have testified that Mr. Churchill came to work under the influence of alcohol *more often than not*. *Id.* at 55. The court excluded evidence of Mr. Churchill's habit of drinking, reasoning that the evidence was "absolutely impermissible, irrelevant character evidence" under CRE 404(2), and that it was not CRE 406 habit evidence, and finally that it was improper *res gestae* evidence. *Id.* at 45, 86.

*B. Argument*

Defendants are guaranteed the due process rights to a fair trial and the opportunity to present evidence in their defense. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25; *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."); *Hendershott v. People*, 653 P.2d 385, 391, 393 (Colo. 1982) (due process violation to prohibit defense evidence, and noting "[a] reasonable doubt as to guilt may arise not only from the prosecution's

case, but also from defense evidence casting doubt upon what previously may have appeared certain"); *People v. Hampton*, 696 P.2d 765, 778 (Colo. 1985) ("The exclusion of relevant and competent evidence offered in defense of a criminal charge is a severe sanction, implicating as it does the defendant's right to present a defense and ultimately the right to a fair trial.").

The right to present a defense includes the right to call witnesses and testify. *Chambers*, 410 U.S. at 302 ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."); *Rock*, 483 U.S. at 51-52 (Fifth Amendment, Sixth Amendment, and due process rights to testify); *Curtis*, 681 P.2d at 509-10 (due process right to testify); *Hampton*, 696 P.2d at 774 (same); *People v. Scearce*, 87 P.3d 228, 234 (Colo. App. 2003) (defendant entitled to present the facts through his own testimony).

In general, all relevant evidence is admissible. *See* CRE 402. Relevant evidence is any "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. While relevant evidence may be excluded where the "probative value is substantially outweighed by the danger of unfair prejudice," (CRE 403), "a reviewing court must afford the evidence the maximum probative value attributable by a reasonable fact finder and the minimum unfair

prejudice to be reasonably expected" and thus favor admission. *People v. Rath*, 44 P.3d 1033, 1043 (Colo. 2002).

It is particularly important in self-defense cases for the jury to be informed of all relevant evidence. *See People v. Jones*, 675 P.2d 9, 14 (Colo. 1984) ("[T]he totality of circumstances . . . must be considered by the trier of fact in evaluating the reasonableness of the accused's belief in the necessity of defensive action and the reasonableness of force . . . ."). This is especially true regarding the defendant's state of mind, because "reasonable belief rather than absolute certainty is the touchstone of self-defense." *Id.* at 13. "Apparent necessity, if well grounded and of such a character as to appeal to a reasonable person, under like conditions and circumstances, as being sufficient to require action, justifies the application of the doctrine of self-defense to the same extent as actual or real necessity." *Id.* at 14 (quoting *Young v. People*, 107 P. 274, 275-76 (Colo. 1910)).

Further, where there is a dispute over whether the alleged victim was the initial aggressor, the behavior of the alleged victim takes on heightened importance. *See id.* at 16 (evidence of character for violence admissible because the inference that the victim was the initial aggressor was more probable with this evidence than without it); *Sowards v. People*, 408 P.2d 441, 442 (Colo. 1965) ("Here [the victim's] character, temperament and status (which defendant's other evidence showed was that of a

large, aggressive, drinking man trying to create trouble), as well as his reason for acting as he did . . . were important to enable the jury to arrive at a proper verdict.").

"Evidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit . . . ." CRE 406. Habit is "a person's regular practice of responding to a particular kind of situation with a specific type of conduct," for example, the "habit of bounding down a certain stairway two or three steps at a time, of patronizing a particular pub after each day's work, or of driving in his automobile without a seat belt." *People v. T.R.*, 860 P.2d 559, 562 (Colo. App. 1993) (quoting *McCormick on Evidence* § 190 at 574–55 (3rd ed. 1984)).

Here, the relevance of Mr. Churchill's habit of coming to work drunk was highly relevant to the assertion of self-defense. As habit evidence, testimony regarding Mr. Churchill coming to work drunk was relevant to show that he was drunk on May 15, 2012. If Mr. Churchill was drunk that morning, it could help explain why he attacked Mr. Roderick without provocation, and continued to pursue Mr. Roderick even after he had been hit.

The evidence was further relevant to Mr. Roderick's state of mind, which is crucial in a self-defense case. If Mr. Roderick knew that Mr. Churchill was likely drunk on the morning of the incident, his belief that he needed to resort to self-

defense is more credible. In particular, if Mr. Churchill was drunk, it is more reasonable to conclude that Mr. Roderick was still in danger and needed to protect himself with a fire extinguisher.

Nevertheless, the court held that the evidence was inadmissible as habit evidence, character evidence, and under a *res gestae* analysis. Supp. R. Tr. (November 6, 2013), pp. 45, 86. The court erred in each prong of its analysis.

*First*, the evidence is properly admissible to prove that on the morning of May 15, 2012, Mr. Churchill was acting in conformity with his habit of coming to work intoxicated. Defense counsel made an offer of proof that at least four witnesses could testify to this habit—one of whom would testify that Mr. Churchill came to work intoxicated more often than not. Such frequency of a behavior is sufficient to qualify as a habit. *See T.R.*, 860 P.2d at 562 (giving an example of a habit of someone patronizing a particular pub after each day's work); *New Jersey v. Kately*, 637 A.2d 214, 218 (N.J. Super. Ct. App. Div. 1994) ("[Defendant's] nightly drinking was properly admitted as habit evidence because it was relevant and it described with specificity his routine practice of drinking in a particular situation.").

*Second*, the court erred in holding that the evidence was character evidence, not habit evidence. Divisions of this Court have explained the difference between habit and character evidence. *First*, in *People v. T.R.*, a case involving a car crash, the Court

of Appeals held that the trial court properly admitted evidence of the victim's habit of driving carefully, but improperly admitted some character evidence. 860 P.2d at 562. The court held that "cautions [the victim] habitually took while proceeding through this intersection were properly admitted as habit" but that testimony that the victim was a "cautious driver" was character evidence. *Id.* *Second*, in *People v. Trujillo*, the defendant argued that she did not commit theft because the victim had given permission to make purchases with her debit card. 2015 COA 22, ¶ 2. The court held that the victim's testimony that she never gave her debit card to anyone was properly admitted as habit evidence. *Id.* at ¶ 13. The court noted that while it was "possible to infer from this testimony that the resident had a careful and guarded character with respect to her debit card," the testimony was not character evidence because it was not a "generalized description of her disposition or a general trait, such as carefulness or guardedness." *Id.* Instead, the court determined the testimony was habit evidence because it "described her regular response to the situation of needing people to buy things for her—her habit was to never give them her debit card." *Id.* Likewise, here, the testimony sought to be elicited was not a "generalized description of [Mr. Churchill's] disposition or a general trait," instead, the testimony would have established Mr. Churchill's regular response to the situation of going to work in the morning, which was to go to work drunk. *See* Supp. R. Tr. (November 6, 2013), p. 55

(offer of proof that witness would testify that Mr. Churchill came to work under the influence more often than not).

The court further analyzed the proffered evidence as *res gestae*, holding that without a further record establishing "a nexus or context" between Mr. Churchill's drinking and the ill will between Mr. Churchill and Mr. Roderick, the evidence was not relevant as *res gestae*. *Id.* at 86-87, 93-94 ("[U]nder a *res gestae* as opposed to just a pure 404(2) analysis, once relevancy is established, then the Court may allow that in, and there may be witnesses that are subject to recall based on that, but, again, there has to be a nexus, not just a generalized somehow we learned about this during the course of our investigation that this stuff was going on. And I just haven't heard the nexus yet."). Yet *res gestae* is simply an alternative theory of relevance, which recognizes that some evidence is relevant because of its "unique relationship to the charged crime." *People v. Greenlee*, 200 P.3d 363, 368 (Colo. 2009). Once relevance is established, *res gestae* does not present any bar to admission. *See id.* ("We conclude there is no need to consider an alternative theory of relevance, such as *res gestae*, where the evidence is admissible under general rules of relevancy."). Here, as stated above, the evidence was relevant habit evidence. And as the court later conceded, the evidence could be relevant under a CRE 403 analysis, and would not be unfairly prejudicial, confusing, or misleading. Supp. R. Tr. (November 6, 2012), p. 94. The

court erred in holding that relevance under *res gestae* needed to be established before the evidence was admissible. *See Greenlee*, 200 P.3d at 368.

Thus, the court erred in excluding relevant habit evidence, in violation of Mr. Roderick's due process rights to present a defense and to a fair trial, and his right to testify. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25; *Chambers*, 410 U.S. at 294 (due process right to present defense); *Hendershott*, 653 P.2d at 391 (same); *Hampton*, 696 P.2d at 778 (exclusion of defense evidence implicates the defendant's right to present a defense and the right to a fair trial); *Rock*, 483 U.S. at 51-52 (Fifth Amendment, Sixth Amendment, and due process rights to testify); *Curtis*, 681 P.2d at 509-10 (due process right to testify); *Hampton*, 696 P.2d at 774 (same); *Scearce*, 87 P.3d at 234 (defendant entitled to present the facts through his own testimony).

### *C. Excluding The Evidence of Mr. Churchill's Habit of Coming to Work Drunk Was Not Harmless Beyond a Reasonable Doubt*

Reversal is required where a constitutional error is not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Golob v. People*, 180 P.3d 1006, 1010 (Colo. 2008) (holding that the exclusion of defense expert testimony was not harmless beyond a reasonable doubt). The burden is on the State to show the error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24.

Short of that, evidentiary rulings are reviewed for harmless error. *Yusem v. People*, 210 P.3d 458, 469 (Colo. 2009). Under harmless error, "reversal is required

unless the error does not affect the substantial rights of the accused." *Id.* The sufficiency of evidence is immaterial to this inquiry—rather, the proper inquiry is whether, in light of the entire record, the error did not substantially influence the verdict or impair the fairness of the trial. *Id.*

As stated above, testimony regarding Mr. Churchill's habit of coming to work drunk was relevant to show that he was drunk on May 15, 2012. The evidence was further relevant to Mr. Roderick's state of mind—if Mr. Roderick knew that Mr. Churchill was likely drunk, his assertion of self-defense is more credible. In particular, if Mr. Churchill was drunk, it is more reasonable that Mr. Roderick continued to believe that he was still in danger, even after he had hit Mr. Churchill in self-defense.

Further, if the court had not excluded evidence of Mr. Churchill's habit, defense counsel could have elicited testimony from Mr. Roderick and other witnesses regarding Mr. Churchill's behavior when he was under the influence (*e.g.*, he was angry, violent, or irrational when drunk), which would have further supported Mr. Roderick's reasonable use of self-defense.

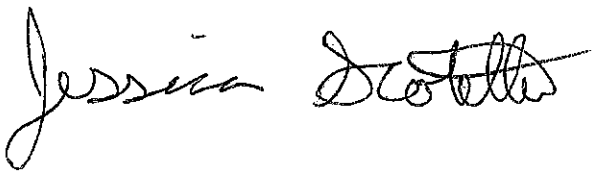
The jury was presented a tough case and faced a difficult decision. Clearly the jury struggled with whether Mr. Roderick's actions were justified under self-defense. R. CF, p. 94 (note from the jurors stating "Our major problem is defining the idea of self defense."); Supp. R. Tr. (November 7, 2013), p. 66 ("[T]he Court is accepting the

representation by the jury leader . . . that you are unable to reach a verdict as to . . . Assault in the Second Degree."). Had the jury known the whole truth, it might have found that Mr. Roderick acted in self-defense, not just in striking Mr. Churchill, but also when he picked up a fire extinguisher to protect himself. Thus, the exclusion of relevant evidence "may have unfairly tipped the scales in favor of the People." *Yusem*, 210 P.3d 458, 470. Such an error was not harmless beyond a reasonable doubt, and requires a new trial.

## CONCLUSION

For all the reasons stated above, Mr. Roderick respectfully requests that this Court remand for a new trial.

DOUGLAS K. WILSON
Colorado State Public Defender



JESSICA A. SCOTELLA, # 48932
Deputy State Public Defender
Attorneys for Kevin Roderick
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on February 26, 2016, a copy of this Opening Brief of Defendant-Appellant was electronically served through ICCES on L. Andrew Cooper of the Attorney General's office through their AG Criminal Appeals account.