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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; Teller District Court; Honorable Linda Billings-Vela; and Case Number 12CR64	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant KEVIN RODERICK	
Douglas K. Wilson, Colorado State Public Defender JESSICA A. SCOTELLA 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #48932	Case Number: 14CA474

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:

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

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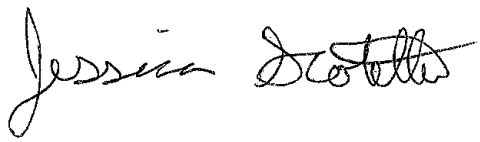
I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



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In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Mr. Roderick submits the following Reply Brief.

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. Argument

The prosecutor's comments in this case were precisely the type of "generic tailoring" arguments prohibited by *Martinez v. People*, 244 P.3d 135, 137-38 (Colo. 2010); the prosecutor's statements in *Martinez* are indistinguishable from those here. (*See* OB, pp. 15-18 (comparing the statements in *Martinez* to the statements in this case)).

Mr. Roderick testified on direct examination that, while he did not know whether his co-worker, Paul Schlegel, arrived at work before he did on the day of the incident, Mr. Schlegel usually arrived around 6 a.m. (Supp. R. Tr. (November 6, 2013), p. 138). Mr. Roderick mentioned that Mr. Schlegel said in his statement that he arrived at work around 7 a.m. that day. *Id.* In her first questions on cross-examination, the prosecutor elicited that Mr. Roderick read all the witness statements in the case. *Id.* at 148.

The State asserts that the prosecutor's comments were the type of "specific tailoring" permitted by *Martinez*, but only points to the fact that Mr. Roderick testified that he reviewed the witness statements to support its argument that the prosecutor did not "generically challenge[]" Mr. Roderick's testimony based on his mere presence at trial. (AB, p. 8). The fact that Mr. Roderick testified that he read discovery—his constitutional and statutory right—does not transform a generic tailoring argument into a specific one. Indeed, pointing out that Mr. Roderick read discovery is just as improper as commenting on his presence at trial. (OB, p. 18).

In fact, Mr. Roderick's testimony was simply that he thought Mr. Schlegel usually arrived around 6 a.m., even though Mr. Schlegel said in his statement that he arrived a little before 7 a.m. on the day in question. (Supp. R. Tr. (November 6, 2013), p. 138). This testimony was not tailored. Because the prosecutor did not point out any specific instances in which Mr. Roderick tailored his testimony, the prosecutor's argument was a generic tailoring argument made in violation of *Martinez*. (*See* OB, pp. 12-19).

B. *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*

The State argues that the comments, if improper, did not rise to the level of plain error because the comments were "in direct response to defense counsel's

opening salvo," which was that the alleged victim was not credible, a bully, and the initial aggressor, and that Mr. Roderick's version of events was the only version that made sense. (AB, pp. 7-9). It is unclear how defense counsel's argument that Mr. Roderick acted reasonably in self-defense made the impermissible tailoring argument any less prejudicial.

The State argues that the court's generic jury instruction ("Your decision must be made by applying the rules of law, which I give you, to the evidence presented at trial. Neither sympathy nor prejudice should influence your decision." (Supp. R. Tr. (November 7, 2013), p. 10)), which the jury presumably followed, removed any prejudice arising from the comments. (AB, p. 8). A generic instruction that the jury should decide the case on evidence and law, not emotion, does not mitigate the prejudice of commenting on the exercise of constitutional rights. (*See* OB, pp. 13-15).

The State does not address the argument that an attack on Mr. Roderick's credibility was especially prejudicial in a self-defense case. (OB, p. 20). Nor does the State address the underwhelming nature of the evidence against Mr. Roderick compared to the strength of his self-defense claim. *Id.* at 20-21. The State claims that the jury's failure to convict on the assault charge indicated that the comments were not overly damaging. (AB, p. 9). This fails to recognize that a jury with doubts would

likely have *more* doubts without the improper tailoring evidence and argument from the prosecution. (OB, p. 21).

For these reasons, and for the reasons stated on pages 19-22 of the Opening Brief, the prosecutor's general tailoring argument was reversible plain error. Mr. Roderick is entitled to a new trial.

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

A. Argument

The State asserts, without analysis, that the evidence was character evidence, not habit evidence. (AB, p. 15). As argued in the Opening Brief, the offer of proof—which included that a witness would testify that Mr. Churchill came to work under the influence of alcohol *more often than not*—was sufficient to lay a foundation that the frequency of Mr. Churchill's drinking at work met the standard of CRE 406. (OB, pp. 23, 27). Indeed, in its section heading, the State refers to the excluded evidence as Mr. Churchill's drinking ***habits***. (AB, p. 10). Because the evidence went to actions Mr. Churchill habitually took (coming to work drunk more often than not), and not to his character (that he was a drunk), the evidence was habit evidence, not character evidence. (OB, pp. 27-28, citing *People v. T.R.*, 860 P.2d 559, 562 (Colo. App. 1993); *People v. Trujillo*, 2015 COA 22, ¶ 13).

Contrary to the State's assertion that it is irrelevant whether Mr. Churchill habitually came to work drunk or was drunk on the day in question (AB, pp. 15-16), it is especially important in a self-defense case, where there is a dispute as to which party was the initial aggressor, for the jury to be informed of all relevant evidence to assess the reasonableness of the defendant's belief in the necessity of acting in self-defense and the reasonableness of the force. (OB, pp. 25-26). The State also argues that there was no evidence that Mr. Churchill was violent or aggressive when he was drunk. (AB, p. 16). However, one witness testified that Mr. Churchill bragged about getting drunk and getting into fights. (Supp. R. Tr. (November 6, 2013), p. 42). And had evidence of Mr. Churchill's habit of coming to work drunk been admitted, defense counsel could have developed testimony regarding Mr. Churchill's behavior when he was drunk. (OB, p. 31).

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

The State argues that the evidence was not prejudicial because Mr. Roderick did not testify that Mr. Churchill was drunk, that he believed Mr. Churchill was still drunk, or that he believed he was still in danger because Mr. Churchill was drunk. (AB, p. 17). Mr. Roderick did testify that he smelled whiskey on Mr. Churchill's breath that morning. (Supp. R. Tr. (November 6, 2013), p. 140). That fact, combined with the testimony of four witnesses that Mr. Churchill had a habit of coming to work

drunk, could have led the jury to conclude that Mr. Roderick reasonably thought he was in continued danger of an angry, drunken person and needed to further protect himself. (OB, pp. 31-32). Had the jury known the whole story, it might have believed that Mr. Roderick was reasonable in picking up a fire extinguisher to defend himself against further attacks. *Id.*

CONCLUSION

For all these reasons, and for the reasons stated in the Opening Brief, Mr. Roderick respectfully requests that this Court remand for a new trial.

DOUGLAS K. WILSON
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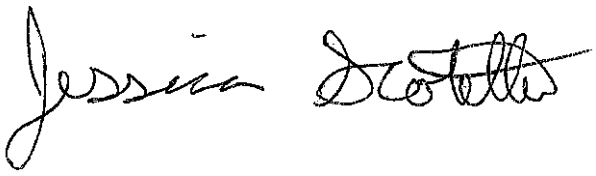

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CERTIFICATE OF SERVICE

I certify that, on May 19, 2017, a copy of this Reply Brief was electronically served through Colorado Courts E-Filing on Rebecca A. Adams of the Attorney General's office.