DATE FILED: June 21, 2022 10:37 PM
FILING ID: FC96B27A9BCAC
CASE NUMBER: 2022CA33

COLORADO COURT OF APPEALS
2 E 14th Avenue, Denver, CO 80203

La Plata County District Court No. 19CR486
Hon. Judge Suzanne Carlson

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff - Appellee,

v.

BRADLEY TODD CLARK,

Defendant - Appellant.

For the Defendant - Appellant Bradley Todd Clark:

Hollis A. Whitson, #32911
Eric A. Samler, #32349
Samler and Whitson, P.C.
1600 Stout Street, Suite 1400
Denver, Colorado 80202
303- 670-0575

Case Number:2022CA33

OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I certify that except for length this Opening Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements in these rules except for C.A.R. 28(g). The brief contains 9456 words.

The brief complies with C.A.R. 28(k): It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

/s/ *Hollis A. Whitson*

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE PROCEEDINGS 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The trial court committed reversible error (1) by allowing the People to introduce evidence that (a) Mr. Clark set a 2007 dumpster fire and was arrested for it, and (b) the police investigation focused on Clark as a result and (2) by introducing the arrest warrant affidavit including that information.. .... **4**

A. Standard of Review **4**

B. Additional Facts **6**

1. Pretrial Ruling: Clark's alleged "response" to a 2007 dumpster fire **6**

2. Pretrial Ruling: Detective's testimony that the 2007 dumpster fire is why police investigation focused on Mr. Clark **8**

3. Trial Evidence **10**

a. The statement in the search warrant affidavit **10**

b. Detective O'Toole's testimony about the 2007 arson charge **11**

c. Jeremiah Rush's testimony about the 2007 incident **12**

C. Argument 13

1. Legal Standards 13

2. Use of the 2007 incident to show that Mr. Clark has an "interest in fires" and that is why he set both fires and that is why police focused on him is not evidence of motive. It is propensity evidence 14

3. The Court abused its discretion by admitting Detective O'Toole's testimony about the prior arson arrest 24

a. The court's pretrial ruling about the "course of investigation" was an abuse of discretion 24

b. The court's during-trial "Rule of Completeness" ruling was wrong 29

4. The erroneous admission of the 2007 incident (including O'Toole's testimony about it and admission of the search warrant affidavit containing the information) requires reversal 31

II. Under the case facts, both criminal mischief and attempted first degree arson are lesser included offenses of second degree arson. Both must merge into the second degree arson conviction..37

A. Standard of Review 37

B. Argument 37

Criminal mischief is a lesser included offense of second-degree arson..38

Under these facts, attempted first-degree arson is a lesser included offense of second-degree arson 40

CONCLUSION **41**

TABLE OF AUTHORITIES

Bouiles v. People, 770 P.2d 1274 (Colo. 1989) 37

Davis v. People, 2013 CO 57, 310 P.3d 58 25

Hagos v. People, 2012 CO 63, ¶ 12, 288 P.3d 116, 119 32

Jones v. Basinger, 635 F.3d 1030, 1046 (7th Cir. 2011) 26

Kaufman v. People, 202 P.3d 542 (Colo. 2009). 22, 24

Magana v. People, 2022 CO 25, ¶18, 2022 WL 2112169. 37

Masters v. Gilmore, 663 F. Supp. 2d 1027 (D. Colo. 2009) . . . . 16 n. 2

Masters v. People, 58 P.3d 979, 998 (Colo. 2002) 15-17, 23

North Carolina v. Pearce, 395 U.S. 711, 717 (1969) 37

Overson v. State, 386 P.3d 1149 (Wyo. 2017) 26

Page v. People, 2017 CO 88, 402 P.3d 468 . . . . 4, 38

Patton v. People, 35 P.3d 124, 129 (Colo. 2001). 37

People v. Alemayehu, 2021 COA 69, ¶95, 494 P.3d 98, 116. 25-26

People v. Bobian, 2019 COA 183, ¶53, 461 P.3d 643, 653
(Berger, J., specially concurring) 25

People v. Baker, 2021 CO 29, 485 P.3d 1100, 1108 31-32

People v. Clark, 2015 COA 44, ¶20 15

People v. Copeland, 976 P.2d 334 (Colo. App. 1998) 21

People v. Cousins, 181 P.3d 365 (Colo. App. 2007) 16-17, 23

People v. Garner, 806 P.2d 366, 372 (Colo. 1991).. . . . . 14, 32

People v. Griffin, 224 P.3d 292 (Colo. App. 2009) 17, 23

People v. Hamilton, 2019 COA 101, ¶51 4

People v. Hoffman, 225 Mich.App. 103, 570 N.W.2d 146, 148 (1997) 15-16

People v. Larson, 97 P.3d 246, 249–50 (Colo.App. 2004) . . . . 18 n. 3

People v. Leonard, 872 P.2d 1325, 1328 (Colo. App. 1993). . . . . 18 n. 3

People v. Leske, 957 P.2d 1030, 1035 (Colo. 1998) 37

People v. Magana, 2022 CO 25 37

People v. Manyik, 2016 COA 42, ¶ 85, 383 P.3d 77, 91 29-30

People v. Novitskiy, 81 P.3d 1070, 1072 (Colo. App. 2003) 32

People v. Orozco, 210 P.3d 472, 477 (Colo. App. 2009). . . . . 18 n. 3

People v. Rath, 44 P.3d 1033, 1041 (Colo. 2002) 23

People v. Robinson, 226 P.3d 1145, 1152 (Colo.App. 2009) 27-28

People v. Rock, 2017 CO 84, 402 P.3d 472 . . . . 4, 38, 40-41

People v. Roman, 2017 CO 70, ¶14. 32

People v. Saiz, 32 P.3d 441, 451 (Colo. 2001). 31

People v. Spoto, 795 P.2d 1314 (Colo.1990) 3, 7-8, 14, 20, 22, 29

People v. Thompson, 2018 COA 83, ¶65, *aff'd*, 2020 CO 72. 17

People v. Trammell, 2014 COA 34, ¶ 10, 345 P.3d 945, 947-48. 4

People v. Welborne, 2018 COA 127, 457 P.3d 71 . . . . 4, 21, 38-39

People v. Williams, 2020 CO 78, 475 P.3d 593 . . . . 22, 36

People v. Wilson, 2012 COA 163M, ¶ 47, 411 P.3d 11, 20, *reversed on other grounds*, 2015 CO 54M, 351 P.3d 1126. 31

Perez v. People, 2015 CO 45, ¶27, 351 P.3d 397, 404 23

Pernell v. People, 2018 CO 13, ¶ 22, 411 P.3d 669. 32

Reyna-Abarca v. People, 2017 CO 15 . . . . 4, 37-38

State v. McFarland, 721 S.E.2d 62, 72 (W.Va. 2011). 15

Stull v. People, 140 Colo. 278, 284, 344 P.2d 455, 458 (1959). 32

Tevlin v. People, 715 P.2d 338, 342 (Colo. 1986) 32

Thompson v. State, 491 P.3d 1033 (Wyo. 2021) 26

United States v. Alonzo, 991 F.2d 1422, 1427 & n. 5 (8th Cir.1993) 27

United States v. Brown, 767 F.2d 1078, 1084 (4th Cir.1985) 26

United States v. Cass, 127 F.3d 1218 (10th Cir.1997). 25

United States v. Hamann, 33 F.4th 759 (5th Cir. 2022) 25

United States v. Lopez-Medina, 596 F.3d 716, 735 (10th Cir. 2010) 30

United States v. Moussaoui, 382 F.3d 453, 481 (4th Cir. 2004) 30

Woellhaf v. People, 105 P.3d 209, 14 (Colo.2005) 37

Whalen v. United States, 445 U.S. 684, 688 (1980). 37

Yusem v. People, 210 P.3d 458 (Colo. 2009) 3, 18-20, 22

Statutes, Court Rules, and Constitutional Provisions

§ 16-10-301(1), C.R.S. . . . . 18 n. 3

§ 18-2-101, C.R.S. 2

§ 18-4-102, C.R.S. 2, 39-40

§ 18-4-102(1), C.R.S. 2, 39

§ 18-4-103, C.R.S. 40

§ 18-4-103(1), C.R.S. 2, 39

§ 18-1-408(5)(a), C.R.S. 38

§ 18-4-501(1), C.R.S. 2

§ 18-4-501(1),(4)(f), C.R.S. 2

CRE 106 . . . . 3, 10-11, 29-30

CRE 401 . . . . 13, 25, 29

CRE 403 25

CRE 403 . . . . 13, 15, 24-25, 29

CRE 404(b) 3-7, 13-25, 32

Crim. P. 52(a) 31

U.S. Const., amends. V, XIV 37

Colo. Const. art II § 18. 37

Other Authorities

2 McCormick on Evidence (4th ed.) §249, at 104 27

2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence,
§ 404.22 [3], at 404–115 (Joseph M. McLaughlin, ed., Matthew Bender
2d ed.2011) 15

ISSUES PRESENTED

I. The trial court committed reversible error (1) by allowing the People to introduce evidence that (a) Mr. Clark set a 2007 dumpster fire and was arrested for it, and (b) the police investigation focused on Clark as a result and (2) by introducing the arrest warrant affidavit including that information.

II. Under the case facts, both criminal mischief and attempted first-degree arson are lesser included offenses of second-degree arson. Both must merge into the second-degree arson conviction.

STATEMENT OF PROCEEDINGS

On October 5, 2019, around 8:30 p.m. a fire broke out in the "Chip Aisle" (Aisle 7) of the City Market in Durango. A customer (Sean Gainey) approached a cashier (Jaylene Yazzie) advising her there was a fire in the chip aisle and that he did not start it. TR 8/23/21 p. 248; 259:9-17. When the fire was reported, Clark was at one of the self-checkout stands. TR 8/24/21 pp 506-07. The fire caused the sprinkler system and fire alarm system to go off. TR 8/23/21 pp 25-51. It was determined that the ignition point of the fire was in the tortilla chip section and that the fire was deliberately set. TR 8/24/21 pp. 384; 436; 510. At the time of the fire there were about fifty people in the store.

The police reviewed surveillance footage from the security cameras in the store and observed there was a shopping cart near the suspected ignition point of the fire for about approximately forty-six seconds. TR 8/24/21 pp 499-512

(narrating People's Exh. 44). Police focused their investigation on an individual (police believed was Clark) on a surveillance video appearing to go directly from that aisle to a self-checkout stand and make purchases (determined to be Clark's purchases). TR 8/24/21 pp. 499-508. Less than a minute later, a different man told a cashier the chips were on fire, and he didn't start it. TR 8/24/21 pp. 516-17.

Police learned Clark was arrested in 2007 for suspected arson related to a dumpster fire.[1] As explained in Issue I, following pretrial litigation (CF 95, 110, 201, 258, 266, 328; TR 7/9/2020, pp. 24-36, 39-43), the court admitted details about the 2007 incident as evidence of "motive" and to explain why the investigation focused on Mr. Clark as a suspect. During trial, over objection, the court admitted the arrest warrant affidavit containing information about the 2007 arson arrest.

Mr. Clark was charged and convicted of attempted first-degree arson (§§18-4-102(1), 18-2-101, C.R.S.), second-degree arson (§18-4-103(1), C.R.S.), and criminal mischief (§18-4-501(1),(4)(f)), C.R.S.). The court imposed four years imprisonment on each count, served concurrently and payment of restitution and costs. CF 709, 743, 800.

[1] Those charges were dismissed within a month.

SUMMARY OF THE ARGUMENT

Over objection, the prosecution introduced evidence that Mr. Clark allegedly set a dumpster fire in 2007, he was arrested, and police used it in the search warrant affidavit in this case. The affidavit was introduced without redacting out the 2007 arson arrest information. The court believed the 2007 incident proved motive by showing Clark's "interest in fires," the police needed to explain why they focused on Clark as a suspect and that admission of the entire affidavit was required under the Rule of Completeness following counsel's cross-examination about unrelated statements it contained. In closing arguments, the People twice asked the jury to consider the prior incident in determining that Clark was responsible for the fire.

The Court abused its discretion because the 2007 incident was not true "motive" evidence. It was propensity evidence prohibited by CRE 404(b), *People v. Spoto,* 795 P.2d 1314 (Colo.1990) and *Yusem v. People,* 210 P.3d 458 (Colo. 2009). The scant probative value was overwhelmed by unfair prejudice. That police believed it showed Clark probably lit the City Market fire investigation did not render the evidence admissible. In such a short trial, repeated references to the 2007 incident and the patently improper use of that other act evidence cannot be deemed harmless.

In *People v. Welborne,* 2018 COA 127, this Court ruled criminal mischief is a lesser-included offense of first-degree arson. Under that same rationale, it is a lesser included offense of second-degree arson. The conviction for criminal mischief must merge with the conviction for second-degree arson.

The conduct that formed the basis for the attempted first-degree arson conviction also formed the basis for the second-degree arson conviction. After *Reyna-Abarca v. People,* 2017 CO 15, *People v. Rock,* 2017 CO 84, and *Page v. People*, 2017 CO 88, the attempted first degree-arson count is a lesser included offense of, and must merge into, the second-degree arson count.

If this Court does not reverse the convictions, it should amend the mittimus to reflect only one conviction (second-degree arson).

ARGUMENT

I. The trial court committed reversible error (1) by allowing the People to introduce evidence that (a) Mr. Clark set a 2007 dumpster fire and was arrested for it, and (b) the police investigation focused on Clark as a result and (2) by introducing the arrest warrant affidavit including that information.

A. Standard of Review

This issue is subject to review for abuse of discretion, *People v. Hamilton*, 2019 COA 101, ¶51, which occurs when the ruling is manifestly arbitrary, unreasonable or unfair, or based on a misapprehension of the law. *People v. Trammell*, 2014 COA 34, ¶10.

The prosecution filed a CRE 404(b) notice announcing its intention to introduce evidence of a 2007 dumpster fire that a witness would testify he believed Clark had started. CF 95 (exhibits 1-8). The defense filed a written objections and supplements. CF 110, 201, 258. On July 9, 2020, during a pretrial hearing, the defense objected to the evidence. TR 7/9/2020, pp. 24-36, 39-43. On July 23, 2020, the court filed a written order permitting evidence of "Defendant's response to the 2007 dumpster fire" to show "motive." CF 267.

On May 26, 2021, the defense filed a Motion in Limine to exclude law enforcement testimony that they investigated Mr. Clark because he had a prior incident. CF 328. On June 8, 2021, the Court denied that motion. CF 378. On June 10, 2021, the defense moved to reconsider. CF 381. The next day, the court denied that motion. CF 394.

At trial, the defense objected at trial to

> **(1) admission of the search warrant affidavit** which states that law enforcement found that Clark "was arrested by Durango Police Department for a criminal attempt of second-degree arson on 09/12/2007." Exhibits folder, "Jury Trial 8-23-21-8-31-21," p. 6, ¶2. **Objections**: TR 8/24/21, pp. 614-615:24-1; 617:2-9; 618:2-4, 10-13; 623:7-17; 624:1-4, 625:2-9; 625-626:25-2; 628:2-22; TR 8/25/21, pp.

643:8-14. **Ruling:** TR 8/24/21, p. 617:10-20, 619:3-4, 623:18-19, 627:11-20, 627-628:25-1, 628-629:23-11; TR 8/25/21, pp. 643:19-20.

(2) testimony of Detective O'Toole that, in 2007, Clark was arrested for arson. TR 8/24/21, pp. 619:23-24, 620:6-7, 622-623:19-6, 623-624:25-4, 625:2-9, 625-626:25-2. The Court stood by its pretrial ruling and stated that the defense "very strong attack" on the "entire investigation" made the "probative value very high" and convinced the court that the probative value outweighs the prejudicial effect. TR 8/25/21, p. 643-44:22-5. The Court agreed to give a limiting instruction. TR 8/24/21, p. 629:18-21; TR 8/25/21, p. 642:1-6. Because the defense objected to the material having been brought up on redirect for the first time, the Court permitted the defense to do a re-cross on the issue. TR 8/24/21, p. 627:21.

B. Additional Facts

1. *Pretrial Ruling: Clark's alleged "response" to a 2007 dumpster fire*

As the trial court explained in its written order granting in part, denying in part the prosecution's CRE 404(b) motion to admit the evidence, the prosecution offered three evidentiary hypotheses for admission:

> (1) motive, by showing Clark's "interest" in watching fires burn,
>
> (2) to rebut his alternate suspect defense by explaining why the police focused on him, and
>
> (3) by arguing the "doctrine of chances," to prove the actus reus, i.e., that the fire was in fact an arson.

See CF, p. 266, ¶4. The district court rejected purposes (2) and (3) because neither of those purposes was independent of the inference prohibited by CRE 404(b) and the probative value was outweighed by unfair prejudice. CF 267 (¶¶3, 4, 5).

The district court permitted the evidence under evidentiary hypothesis (1): "Defendant's response to the 2007 dumpster fire is admissible to show Defendant's motive." CF 267, ¶5. See CF 394: "The 2007 incident is admissible for the purpose of establishing motive. The prosecution argued that Defendant's motive in starting the fire is an interest in fire and a desire to watch it burn. In both the 2007 case and in the present matter, Defendant allegedly attempted to watch the fires he set inconspicuously."

Regarding *Spoto* prong one, the district court found the evidence was material on the issue of motive, i.e., Mr. Clark's "attraction to fire." The Court found Mr. Clark watched the 2007 dumpster fire "through a cracked door, rather than reacting by perhaps calling the police or extinguishing the fire himself." CF 267, ¶2. The Court found this supported "the prosecution's argued interest in fires

motive" because his watching the dumpster fire is "similar in nature" to his "monitoring the fire on the chip aisle" because in both he "stay[ed] close by to watch his alleged handiwork, which demonstrates an interest in fire and its aftermath." CF 266-267.

On *Spoto* prong two, the district court found that this "interest in fires," made it more likely that he started the fire in this case. CF 267, ¶2. On *Spoto*'s third prong – independence from the prohibited propensity purpose – the district court found that showing "why he started the fire in this case" was not a propensity purpose. CF 267, ¶2. On *Spoto*'s fourth prong, the court found the probative value "high because without it there is seemingly no explanation as to why he would start a chip fire at City Market." CF 267, ¶2. Without even discussing the prejudice, the Court then tersely stated: "The probative value is not substantially outweighed by the danger of unfair prejudice." CF 267, ¶2.

2. *Pretrial Ruling: Detective's testimony that the 2007 incident is why police investigation focused on Mr. Clark*

On May 26, 2021, defense counsel requested that the court disallow testimony or evidence that law enforcement ran a background check on Mr. Clark and found a prior arson case and then used that information to obtain warrants and ultimately to arrest and prosecute Mr. Clark, including using the prior incident to

identify him as a suspect. CF 329, ¶9. Defense counsel argued that permitting, for example, Detective O'Toole to testify that she used the information as propensity would make it "impossible for a jury to use the 404(b) evidence for its limited purpose as deemed by this Court." CF 329, ¶10; TR 6/2/2021, pp. 12-15. The Court denied the motion. CF 378. Expressing some ambivalence, TR 6/2/2021, p. 14:15-20, 16:10-12 ("I don't know that there needs to be a whole lot of this, but there does probably have to be some segue. I don't know."), the Court left it at "ask[ing] the prosecution to not overplay it and stating, "I don't think it needs to be the focus of things." TR 6/2/2021, pp. 17:13-22. See also TR 6/2/2021, p. 18:3 ("hopefully it's not going to be overplayed"). The Court seemed to find it relevant to explain why Detective O'Toole was looking at Mr. Clark at all: "I do think there has to be probably some amount of testimony about it from Detective O'Toole because otherwise it doesn't—you know, there has to be some sort of explanation as to why she goes there. … There does have to be a link, though, right?" TR 6/2/2021, pp. 17-18. See TR 6/2/2021, p. 18:19-20 (the lead investigator "has to explain her investigation"). The Court ruled that it would give a limiting instruction "anytime that it comes up." TR 6/2/2021, pp. 18:2, 19:16-17.

3. Trial Evidence

a. <u>*The statement in the Affidavit for search warrant*</u>

During cross-examination of the lead detective, defense counsel pointed out discrepancies between the search warrant affidavit and the detective's testimony on three distinct points: (1) that Mr. Clark was not the only man still checking out his groceries while the fire was burning, TR 8/24/21, pp. 559-560, (2) the detective wrote that she saw on the video a "cart and feet," and she should have said "cart and/or feet", TR 8/24/21, pp. 593-594, (3) she did not correct a discrepancy in the affidavit about whether a grocery cart showing Mr. Clark's leg was an "arm's length" from the "ignition point," when she should have clarified that the location of the cart was not the location of the fire. TR 8/24/21, pp. 600-604.

Following this cross-examination, the prosecution moved to introduce the entire search warrant affidavit under CRE 106, the Rule of Completeness. TR 8/24/21, p. 615:18-21. Defense counsel objected because a proper foundation had not been laid with respect to the specific discrete statements covered in cross-examination; those statements were not confusing, misleading, or out of context. TR 8/24/21, pp. 615-616, 617:2-9, 618:2-4, 618:10-13, 628:6-22, esp. 628:6-8 ("the whole paragraph comes in, not the whole document, to give context, proper context, to the statement."); TR 8/25/21, p. 643:8-14. The Court disagreed, ruling

the Rule of Completeness permitted introduction of the entire Affidavit because the defense implication is that "there's sort of been a fraud on the court and admitted the affidavit "[s]o [the jurors] can see, you know, what was incorrect and what was not." TR 8/24/21, p. 617:10-20. The court found that the Rule of Completeness permitted introduction of the entire Affidavit because the defense attack was extensive, and the court believed "it's fair to admit the entire affidavit and the jury can decide." TR 8/24/21, pp. 628-629. See also TR 8/24/21, pp. 619:3-4, 623:18-19, 627-628; TR 8/25/21, p. 642:10-17.

The search warrant affidavit was admitted, and the jury directed to the language: "Sergeant Sweetwood informed me that Mr. Clark had a previous arrest for arson." TR 8/25/21, pp. 647-648; Exhibits folder, Jury Trial 8-23-21-8-31-21, p. 3. As described below, the court gave a limiting instruction.

b. *Detective O'Toole's testimony about the 2007 arson charge*

The prosecutor began Detective O'Toole's re-direct examination with:

> Q Over the course of your investigation, did you discern if any of the people in Aisle 7 had previously been arrested for attempted arson?
>
> A I did.
>
> Q And who was that?
>
> A Bradley Clark.

TR 8/24/21, p. 619:16-24.

An objection and extensive arguments ensued (see Standard of Review, supra, for record citations). The court recessed for the day and upon return, the same questions were asked. TR 8/25/21, pp. 646-647 ("was anyone in Aisle 7 around the time of the fire, had any of them previously been arrested for attempted arson?"). O'Toole testified that charges were filed and then dismissed and agreed with the prosecutor's statement that was one of the reasons for her focus on Mr. Clark. TR 8/25/21, p. 647-648. The court instructed the jury: "You may only consider evidence of the 2007 arrest of Mr. Clark for attempt of second-degree arson in relation to how the investigation in this case proceeded and not for any other purpose." TR 8/25/21, p. 647:17-21.

c. *Jeremiah Rush's testimony about the 2007 incident*

Just before Jeremiah Rush testified, the Court told the jury: "you may only consider evidence of the 2007 dumpster fire to assess whether Defendant's motive to set the fire in this case was an interest in fire, as argued by the prosecution." TR 8/25/21, p. 680:20-23. This instruction was substantially repeated at the close of evidence. CF 465 (Instruction 16)

On September 10, 2007, Rush lived in the same condominium complex as the Clark family. He believed he saw Mr. Clark trying to light a fire in a dumpster.

TR 8/25/2021, p. 688:7-9. As Rush returned to his apartment at about 11:00 p.m. after having drinks with his friends, he saw Clark put something in the dumpster that was either smoking or in flames. TR 8/25/2021, p. 690:16-22. As Clark walked back to his apartment, the two made eye contact. TR 8/25/2021, pp. 691:9, 692:5-8. Rush opened the dumpster, pulled out a burning item, and put the fire out. TR 8/25/2021, p. 691:12-15. Only after he put out the fire, did he hear Clark's door close. He looked over toward Clark's apartment and saw a silhouette. TR 8/25/21 pp. 692:12-19.

Days later, Rush contacted the police. Rush testified that, shortly afterward, Clark questioned Rush in an apparent attempt to intimidate and convince Rush he had not seen what he had reported. TR 8/25/21 pp. 693-94. The case was later dismissed. See TR 8/25/21, p. 661:18-25.

C. Argument

1. Legal Standards

Even if evidence is relevant under CRE 401, the court should exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice." CRE 403. CRE 404(b) excludes evidence of other crimes, wrongs, or acts to show the person "acted in conformity therewith." Such evidence may be admissible for another purpose, such as proving motive, CRE 404(b)(2), which was the purpose

the trial court sanctioned here. CF 267.

In assessing the admissibility, courts apply a four-part test:

- The other conduct evidence must relate to a material fact.
- the evidence must be logically relevant by tending to make that material fact more probable.
- the logical relevance of the evidence must be independent of the intermediate inference prohibited by CRE 404(b), and
- the probative value of the evidence cannot be substantially outweighed by the danger of unfair prejudice caused by admitting the evidence.

Spoto, *supra; People v. Garner*, 806 P.2d 366, 372 (Colo. 1991).

As described in more detail below, the evidence fails the four-prong test:

Evidence that, twelve years before the charged conduct, the defendant committed a similar incident may be material, and it may make more probable that the accused would commit the same offense later. (*Spoto's* first and second prongs). However, the evidence in this case failed the third and fourth Spoto prongs: it is material and probative precisely because of the impermissible intermediate inference of propensity, and the scant probative value was far outweighed by the unfair prejudice.

2. Use of the 2007 incident to show that Mr. Clark has an "interest in fires" and that is why he set both fires and that is why police focused on him is not evidence of motive. It is propensity evidence.

Motive has been defined as "the impetus that supplies the reason for a person to commit a criminal act. Evidence of other crimes may be admitted to show that the defendant had a reason to commit the act charged, and from this motive it may be inferred that the defendant did commit the act." 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, §404.22 [3], at 404–115 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed.2011) (footnotes omitted)(as quoted in *State v. McFarland,* 721 S.E.2d 62, 72 (W.Va. 2011)).

In *People v. Clark*, 2015 COA 44, ¶20, this Court noted that

> The distinction between admissible evidence of motive and inadmissible character evidence ''is often subtle.'' *Masters v. People*, 58 P.3d 979, 998 (Colo. 2002) (quoting *People v. Hoffman*, 225 Mich.App. 103, 570 N.W.2d 146, 148 (1997)). In certain situations, evidence that would be otherwise labeled inadmissible character evidence 'establishes more than character or propensity' because it 'tends to show why the defendant perpetrated a seemingly random and inexplicable attack.' *Id*. at 999 (quoting *Hoffman,* 570 N.W.2d at 149). Subject to CRE 403, this evidence is admissible because, without it, 'the jurors may have found it difficult to believe... that [the] defendant committed the depraved and otherwise inexplicable actions.' *Id.* (quoting *Hoffman,* 570 N.W.2d at 149–50).

To understand the distinction between admissible "motive" evidence and inadmissible character/propensity evidence that is not independent from the

impermissible intermediate inference of propensity, a deeper delve into the Colorado Supreme Court's decision in *Masters,* as well this Court's decision in *People v. Cousins*, 181 P.3d 365 (Colo. App. 2007) is warranted.

In *Masters,* the trial court permitted evidence of defendant's misogyny, as demonstrated by his drawings and writings, to prove "motive" for the sexual homicide Masters was alleged to have committed.[2] The trial court relied on a Michigan case (*People v. Hoffman*, *supra*) allowing defendant's misogyny as "motive for his unprovoked, cruel, and sexually demeaning attack on his victim" (*id.,* 149) and on a New Jersey case that allowed evidence of a defendant's animosity towards Black people to explain his motive for a random attack on an elderly Black man. *State v. Crumb*, 277 N.J.Super. 311, 649 A.2d 879, 884 (1994). Crumb told a fellow inmate "that he is a skinhead and that skinheads don't like people of another color." Papers seized from the defendant's papers that said things like "White Power," "die [N-----] Scum," and "Kill them [F------ N-----s]." *Id.,* 649 A.2d at 881. Similarly, this Court in *Cousins, supra*, allowed two past acts of violence towards women as "establish[ing] defendant's animus toward women as a

[2] This Court should keep in mind that Timothy Masters was wrongfully convicted and imprisoned for almost ten years before he was exonerated and released, *see Masters v. Gilmore*, 663 F. Supp. 2d 1027 (D. Colo. 2009), thus showing the very real danger: such evidence can contribute to a wrongful conviction.

motive for his attack on the victim" because the defendant's attack "appeared to be an 'inexplicable act of random violence.'" *Cousins,* at 372 (quoting *Masters*, at 998). During one of the prior attacks, the defendant had said, "That's why I hate women." *Cousins*, at 369, 372. In *People v. Griffin*, 224 P.3d 292 (Colo. App. 2009), to disprove the defendant's claim of accident or self-defense, the court admitted Griffin's notebook entries suggesting an animus towards white people.

Allowing evidence of a clearly stated animus toward a particular group of people to explain why a defendant may have committed a crime against a member of that group is evidence of bad character. For that reason, sometimes, gang affiliation is used to prove motive because gangs have animosity towards rival gangs. An argument can be made that "hate crime motivation" and "rival gang animosity" are more closely aligned with what is usually understood as "motive." But the evidence in Mr. Clark's case is unrelated to any "hate crimes motivation."

CRE 404(b) "motive" evidence has also been accepted in financial fraud cases, *e.g*., to show that a defendant used similar false promises and deceptive practices to counter an instant claim of mistake. See *People v. Thompson*, 2018 COA 83, ¶65, *aff'd*, 2020 CO 72. Prior act motive evidence is admissible in child

sex assault cases to show sexual gratification.[3] But none of these examples are similar to the evidence admitted in Mr. Clark's case.

The probative value is at best speculative. Its only evidentiary value was to establish not simply that Clark *watched* the prior fire, but that he *lit* it. That is propensity evidence, pure and simple.

In *Yusem v. People, supra,* the defendant, an off-duty sheriff's deputy, was charged with felony menacing for threatening the driver of a van with a firearm. Yusem claimed self-defense, claiming the van driver was threatening to run him over. The People were allowed to introduce a prior incident when the defendant, while wearing plain clothes and a holster with his service revolver, "yelled at and caused an apartment manager to feel intimidated." *Id.,* at 460. The People argued that just like in the prior incident, Yusem was using his weapon while motivated to intimidate and control another person. *Id*., at 462. In a decision later reversed by the Colorado Supreme Court, this Court reasoned that the evidence was admissible

---

[3] The rule in sex assault cases is because "the concept of motive in a sexual assault case may also address other relevant factors such as why a particular type of behavior is involved or why a particular victim is selected for the assault." *People v. Leonard*, 872 P.2d 1325, 1328 (Colo. App. 1993); *accord*, *People v. Orozco*, 210 P.3d 472, 477 (Colo. App. 2009)(prior child sexual abuse acts are admissible to show the motive was "sexual arousal, gratification, or abuse"); *People v. Larson*, 97 P.3d 246, 249–50 (Colo.App. 2004)(same). See also §16-10-301(1), C.R.S. (explaining special need for prior acts in sex offense trials). Of course, this is not a child sexual assault case and these special exceptions do not apply here.

because the jury had to determine whether the defendant acted "knowingly" and whether he reasonably believed he had to use force for protection:

> the fact that Yusem had displayed his gun in an angry confrontation with the apartment manager was probative—independent of the inference of bad character—of why Yusem pulled his gun from its holster and to whether his beliefs about use of force were reasonable.

Id., at 462 (summarizing this Court's ruling). The Supreme Court disagreed. To the extent the prior incident showed Yusem's intent (i.e., motive) in brandishing his weapon was to intimidate the other person (not to defend himself), this proposition was not independent of the improper inference:

> A jury cannot reasonably conclude that Yusem was more likely to menace the van driver and less likely to act in self-defense without relying on the inference that Yusem bullied someone in the past while wearing a gun and so likely bullied someone again by brandishing a gun. Thus, the inference, at best, that may be drawn from the prior act is impossible to distinguish from the inference that Yusem has a bad character.

Id., at 466. The Supreme Court, finding the potential for unfair prejudice was "overwhelming," reversed Yusem's conviction. *See id*., at 468-469.

The district court's stated reason for allowing the evidence—because twelve years before Mr. Clark allegedly set a fire and watched the aftermath, this supposedly shows that he probably set this fire to watch the aftermath – does not differ from what the Supreme Court ruled inadmissible in *Yusem.* These are generic arson allegations, with no unique distinctive features (and in fact, the 2007

and 2019 incidents are quite dissimilar). That Mr. Clark allegedly "watched" in the 2007 case is not remarkable; the allegation was that he was essentially caught in the act and not surprisingly, he observed the person who caught him to see what would happen.

The evidence asks the jury to conclude that because Mr. Clark acted in a particular way in 2007, he must have acted the same way here. To paraphrase the Supreme Court's words from *Yusem, supra*: "A jury cannot reasonably conclude" that [Clark] was more likely to [have lit the City Market fire]…without relying on the inference" that he lit the prior fire. "Thus, the inference, at best, that may be drawn from the prior act is impossible to distinguish from the inference that [Clark] has a bad character." *See Yusem,* at 466. The evidence in this case fails *Spoto*'s third prong because its evidentiary value is not independent from the prohibited intermediate inference.

While motive may be an element of third-degree "intent to defraud" arson, see §18-4-104(1), C.R.S., a person's reason for committing first degree arson, attempted first degree arson, second degree arson, or criminal mischief is not a finding the jury must make. Nor is it something the People must prove. While the district court and the People cabined the evidence of the prior incident into the "motive box" the inference the People wanted the jury to make (as evidenced by

their closing arguments, TR 8/27/21 pp. 1279-80, pp. 1311-1312 (quoted below)) was because Mr. Clark in 2007 had started a fire, appeared to watch it burn and watch someone extinguish it, and then denied any involvement, he must have done the same here for the same reasons. Thus, the prior bad acts evidence became the People's theory of the case. That is pure and simple propensity evidence. Calling it "motive" does not change that fact.

A prosecutor cannot use a prior arson to prove the accused's disposition toward arson and, in turn, use the accused's antisocial disposition toward arson as evidence that the accused committed an arson twelve years later. Nor can the prosecutor use the motive for a prior arson (e.g., liking to watch fires) to prove that the accused is a person who likes to watch fires, so he must have committed the arson in the instant case so he could watch a fire. Regardless of how it is packaged, this is propensity evidence.

Evidence of Mr. Clark's involvement in a prior arson twelve years earlier to show he has an "interest in fires" to prove that is why he set this fire is the precise use prohibited by CRE 404(b). Unlike other act evidence which may show a financial motive for committing arson (*e.g. People v. Welborne, supra*, ¶3) or a vengeful motive for committing arson (*e.g. People v. Copeland*, 976 P.2d 334 (Colo. App. 1998)); here, the "motive" identified by the court and the People (an

"interest in fires") is not only not separate from the prohibited inference—***it is the prohibited inference.*** The purpose and effect of the evidence was to suggest that because Mr. Clark started a fire in the past, this shows he likes to start fires, which means he started this one.

The trial court's admission of the prior incident as "motive" is unprecedented and, if sanctioned by this Court, would cause the exception to swallow the rule that propensity evidence is prohibited. Evidence of the 2007 incident was not admissible under CRE 404(b) and relevant case law, *e.g., Yusem, supra, Kaufman v. People*, 202 P.3d 542 (Colo. 2009), *People v. Williams*, 2020 CO 78.[4]

The evidence also failed *Spoto*'s fourth prong. The probative value was scant to nil. The vague "interest in fires" proposition in this case applies to many, if not most people, as evidenced by such activities as setting campfires, lighting candles, watching fireworks, etc. It is common knowledge that many people watch fires when they see them. See discussion, CF 383 (defense motion)("'attraction to

---

[4] For all of the above reasons, the district court was correct to rule the 2007 incident inadmissible (1) to refute Clark's mistaken identity/alternate suspect defense – i.e., that another person could have done it and the police focused too quickly on Mr. Clark –because the probative value of use of the prior incident for that purpose was substantially outweighed by the danger of unfair prejudice, and (2) under the "doctrine of chances" because such a use was propensity evidence. See CF 267.

fire' can have regular, everyday meaning"). There is "nothing remotely unique or uncommon" about watching a dumpster fire burn on September 10, 2007 and then, *twelve years later*, watching another fire burn on October 5, 2019. It does not prove motive and, even if it did, the probative value would be scant.

In contrast to the documentary evidence found at the defendants' homes in *Masters, Cousins*, and *Griffin*, there was not "any single piece of information related to a motive or intent or 'attraction to fire'" –nothing on Clark's laptop, no search history, no statements. Nothing. See CF 203-204 (defense motion). The only evidence that Mr. Clark allegedly "likes to watch fires" was this account that he watched one in 2007.

"Even though Rule 404(b) has no requirement of similarity, its probative value may include factors such as the other acts' 'distinctiveness' and 'their relationship to the charged offense in terms of time and similarity.'" *Perez v. People*, 2015 CO 45, ¶27 (quoting *People v. Rath*, 44 P.3d 1033, 1041 (Colo. 2002). In virtually every aspect, the two events were dissimilar: the 2007 event was outside, at night, in a dumpster (a contained receptacle). The witness testified that Clark – in plain view of anyone who might see him – threw away something that might have been smoking (meaning it is possible combustion was unintended), and then allegedly watched while concealing himself. The City Market fire occurred

during the day, inside a building, and uncontained, and Mr. Clark did not conceal his person in any way. As noted, they were twelve years apart. There was no connection and no substantial similarity between the two incidents.

Apart from proving propensity, i.e., that Clark allegedly liked to watch fires, the evidentiary value was nonexistent. Yet, the unfair prejudice was overwhelming. To paraphrase the Colorado Supreme Court: "This tenuous connection, however, is outweighed by the substantial prejudicial effect …. From the [2007 incident], the jury was free to conclude that [Clark] was an evil individual, eager to [commit arson] again and dangerous to the community at large." *Kaufman*, at 559.

3. The court abused its discretion by admitting Detective O'toole's testimony about the prior arrest.

a. ***The Court's ruling about the "course of investigation" was an abuse of discretion***

The trial court abused its discretion in allowing Detective O'Toole's testimony about the 2007 arrest to explain her investigation.[5] For that purpose, the testimony had virtually no probative value and was substantially outweighed by the unfair prejudice. CRE 403.

[5] As detailed above, the court made a pretrial ruling and then renewed it during trial. CF 378; TR 6/2/2021, p. 14:15-20, 16:10-12, 17:13-22, 18:3; TR 8/25/2021, pp. 642:12-17, 643-44:22-5. See also record citations, *supra*.

This Court should reject the court's "course of investigation" reasoning. The course-of-investigation mantra "is not a blank check authorizing the admission generally of otherwise improper testimony by police officers." *People v. Alemayehu*, 2021 COA 69, ¶95; *U.S. v. Cass*, 127 F.3d 1218 (10th Cir.1997). See *People v. Bobian*, 2019 COA 183, ¶53 (Berger, J., specially concurring)("Given this likelihood of misuse, the [course-of-investigation] exception should only apply when the course of the police investigation is relevant at trial. Even then, a trial court must exercise sound discretion to limit such otherwise inadmissible evidence solely to the purposes underlying the course-of-investigation exception."). See also *U.S. v. Hamann*, 33 F.4th 759 (5th Cir. 2022)(observing that the Fifth Circuit has "repeatedly warned the government against backdooring inadmissible hearsay via an explaining-the-investigation rationale" and calling errors of this sort "a recurring problem" resulting in vacation of at least six convictions).

In *Davis v. People*, 2013 CO 57, ¶¶1, 17, the Colorado Supreme Court held that a law enforcement officer may testify about his perception of a witness's credibility during an investigative interview if the testimony is offered to provide context for the officer's interrogation tactics and investigative decisions, rather than as a comment on the witness's credibility. But that context has to be relevant to an issue in the case, and it is still subject to considerations under CRE 401, 402, 403,

and 404. In *Alemayehu*, this Court declined to reverse the conviction but added the above admonition: that it is not a blank check, and the evidence is not automatically admissible in every case.

The need for an explanation of why any officer in this case "did what she did next" is slight. Such testimony has virtually no probative value in a case like this. *U.S. v. Brown*, 767 F.2d 1078, 1084 (4th Cir.1985)(error to admit out-of-court statements as "background" where statements implicated defendant in charged crime and "effect of the evidence could only have been a substantial bolstering of the government's case by inadmissible hearsay"); *Thompson v. State*, 491 P.3d 1033 (Wyo. 2021)(the court erred in admitting "course of investigation" testimony; none of the details in officers' testimony were necessary to explain their investigation); *Jones v. Basinger,* 635 F.3d 1030, 1046 (7th Cir. 2011)("statements offered to show 'background' or 'the course of the investigation' can easily violate a core constitutional right, are easily misused, and are usually no more than minimally relevant," and urging courts "asked to admit such statements for supposed non-hearsay purposes" to be "on the alert for such misuse"); *Overson v. State*, 386 P.3d 1149 (Wyo. 2017)(reversing conviction because "background of investigation" testimony went too far).

Courts and commentators have recognized that out-of-court statements should not be admitted to explain why a law enforcement agency began an investigation if the statements present too great a danger of prejudice. *E.g.*, *U.S. v. Alonzo*, 991 F.2d 1422, 1427 & n. 5 (8th Cir.1993)("district court must control and limit the use of background hearsay statements" to avoid possible prejudice and because of the "seriously prejudicial" nature of certain background hearsay, the trial court cannot simply rely on cautionary instructions to prevent prejudice).

McCormick has criticized the "apparently widespread abuse" of the claim that out-of-court statements are being provided not for the truth of the matter asserted, but only as "background" or "course of the investigation," or "to show why this officer did what he did":

> In criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct. His testimony that he acted 'upon information received,' or words to that effect, should be sufficient. Nevertheless, cases abound in which the officer is allowed to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to give the information upon which he acted. The need for the evidence is slight, the likelihood of misuse great.

2 McCormick on Evidence (4th ed.) §249, at 104 (citations omitted). Even when the Court has allowed the testimony it has recognized the likelihood of misuse. *People v. Robinson*, 226 P.3d 1145, 1152 (Colo.App. 2009)("We recognize the

danger that a jury might well misuse evidence offered to explain the background for an investigation or police actions.").

The prosecution's redirect examination questions about whether any other person at the grocery store had a prior arson arrest (TR 8/24/21, p. 619:16-24; TR 8/25/21, pp. 646-647) and whether that information was in the Affidavit and a reason she focused on Mr. Clark (TR 8/25/21, p. 647-648) were not responsive to the cross-examination. The testimony was an unmistakable use of the prior conviction to distinguish Mr. Clark from other potential perpetrators and to say he is guilty because of the prior incident. This impermissible use was far beyond what the court had approved in its (already erroneous) pretrial ruling and far afield from the defense cross-examination.

This Court should reject the trial court's mid-trial conclusion that, because defense counsel's cross-examination questions amounted to an attack that the entire affidavit was a "fraud" upon the court, the probative value of the "course-of-investigation" testimony was "very high at this point based upon that attack" and outweighed the prejudicial effect. TR 8/25/2021, pp. 642:12-17, 643-44:22-5. There is no support for the notion that whenever the defense cross-examines on particular facts in the investigation – here, things like other people were also at the check-out stand, the distances between relevant items at the store, or the possibility

that someone else could have been responsible[6] -- that somehow authorizes admission of otherwise inadmissible other acts evidence under the guise of "course-of-investigation" testimony. Such a rule would mean prior charges or convictions would essentially always be admissible if the accused defends the case, because a defense always means that the government got it wrong and failed to find the correct perpetrator. For all of the same reasons discussed above with respect to *Spoto*'s fourth prong, the testimony was inadmissible under CRE 403.

b. *The court's during-trial "Rule of Completeness" ruling was an abuse of discretion.*

The court's trial ruling –that defense counsel's cross-examination on discrete statements in the search warrant affidavit somehow required "completing" by introduction of the entire affidavit, including the statement about the 2007 arrest– was also incorrect. CRE 106 did not authorize admission of the part of the search warrant affidavit concerning the 2007 arrest. Admission of that information violated CRE 401 and CRE 403.

The point of the Rule of Completeness is to avoid misleading the jury with incomplete information. See *People v. Manyik*, 2016 COA 42, ¶85 ("If admitting

[6] See e.g. TR 8/24/21, pp. 559-560, 593-594, 600-604 (referenced and described, *supra*).

only one part of a written or recorded statement would be unfair or misleading, the rule of completeness favors admission of other parts of the statement."); *see U.S. v. Lopez-Medina*, 596 F.3d 716, 735 (10th Cir. 2010) (holding that the purpose of the identical federal version of the rule "is to prevent a party from misleading the jury by allowing into the record relevant portions of [evidence] which clarify or explain the part already received")(*quoting U.S. v. Moussaoui*, 382 F.3d 453, 481 (4th Cir. 2004)). Defense counsel's impeachment of the Detective on prior inconsistent statements in the search warrant affidavit about topics that had nothing to do with the 2007 arrest did not need "completing" by admission of the 2007 arrest information. The affidavit statement about the prior arrest neither "completed" nor "corrected" the cross-examination testimony of the Detective, who was not asked about the 2007 incident.

The defense did not ask the detective about the prior arrest. She impeached the detective with items included in and omitted from the affidavit regarding (1) somebody else who was also in the chip aisle at the relevant time during the fire checked out and left the store after Clark, (2) she had written that the video shows Clark's feet and cart but it would have been more accurate to have written feet "and/or" cart, (3) the distance of the cart from the ignition point and its visibility on the videotape. TR 8/24/2021, pp. 560-561:1-5, 592-594, 602-603. The

detective usually verified that the information was accurate, not that it was inaccurate or incomplete. *E.g.*, TR 8/24/2021, p. 595:8 ("It's accurate."), 603:2-5 (as to distance, the affidavits were truthful but "approximates," not "exacts").

Rule 106 is subject to the same considerations of relevancy and prejudice under CREs 401 and 403 as all other evidence. *People v. Wilson,* 2012 COA 163M, ¶47 (upholding the trial court's admission of only 90 seconds of a recorded phone call, instead of the entire 20 to 30-minute call), *reversed on other grounds*, 2015 CO 54M; *People v. Saiz*, 32 P.3d 441, 451 (Colo. 2001). For the same reasons argued above, injecting evidence of the 2007 arson arrest impermissibly injected overwhelming prejudice while providing virtually no legitimate probative value. The fact that O'Toole believed Mr. Clark was guilty because of his prior arson arrest was simply not relevant, even after the defense cross-examination. Any scant probative value was substantially outweighed by the risk of unfair prejudice.

4. The erroneous admission of the 2007 incident (including O'Toole's testimony about it and admission of the search warrant affidavit containing the information) requires reversal.

Admission of the evidence was not harmless. The error affected Mr. Clark's substantial rights. See Crim. P. 52(a). This Court "review[s] preserved non-constitutional errors for harmless error. *People v. Baker*, 2021 CO 29, ¶38, citing

Hagos v. People, 2012 CO 63, ¶12. This Court "'must reverse if the error 'substantially influenced the verdict or affected the fairness of the trial proceeding.'" *Ibid* (quoting *Tevlin v. People,* 715 P.2d 338, 342 (Colo. 1986)). In making that determination, this Court assess whether "the People have shown that 'there is no reasonable possibility that [the error] contributed to the defendant's conviction.'" *Baker*, ¶38 (quoting *Pernell v. People,* 2018 CO 13, ¶22). "While the strength of the evidence supporting a verdict is often an important consideration, so too is the specific nature of the error in question and the nature of the prejudice or risk of prejudice associated with it." *People v. Roman*, 2017 CO 70, ¶14.

The nature of the risk of prejudice here is overwhelming. As Colorado Courts have long recognized,

> '[E]vidence of similar acts has inhering in it damning innuendo likely to beget prejudice in the minds of jurors....' *Stull v. People*, 140 Colo. 278, 284, 344 P.2d 455, 458 (1959); see *People v. Garner, supra* (reasons set forth in *Stull* for excluding other crime evidence remain applicable after adoption of CRE 404(b)). Other crimes or bad acts evidence exposes a defendant to the risk of being found guilty based on bad character rather than evidence relating to the charged offense. *People v. Garner, supra*.

People v. Novitskiy, 81 P.3d 1070, 1072 (Colo. App. 2003). The "specific nature of the error in question" has a high risk of prejudice that by its very nature "affected the fairness of the trial proceedings." *Hagos*, ¶12.

The way in which the prosecutor introduced the evidence was misleading and makes it impossible to say there was no reasonable probability the verdict was unaffected. By asking Detective O'Toole if "over the course of [his] investigation" whether he "discern[ed] if any of the people in Aisle 7 had previously been arrested for attempted arson," the prosecutor suggested that the detective had investigated the history of every person in the store (or at least in Aisle 7). See TR 8/24/21, p. 619:16-24. Of course, it is highly doubtful he did that. But the implication that he did was misleading and contributed to the prejudice from the erroneous admission of this evidence.

Because of the timing of the re-direct examinations and the objections, the jury heard the information twice: once as the last question of the day on August 24, 2021, and again as the first question of the day on August 25, 2021. TR 8/24/21, p. 619:16-24; TR 8/25/21, pp. 646-647. There is independent proof that this issue was important to jurors: jurors directed questions to Detective O'Toole (TR 8/25/21, pp. 669:17-23, 671-672; CF 419-420, 423, 425), and to Mr. Rush (CF 426. TR 8/25/21, p. 706:14-20) on the subject.

The prosecutor reminded jurors about the 2007 incident late in the trial, during testimony of the next-to-last rebuttal witness. Following Detective Newman's testimony about the charged incident, a juror asked: "Was Mr. Clark's

motive or possible motive for this crime determined?" TR 8/27/21, p. 1233:7-8. The detective hypothesized a "potential" motive related to some layoffs at the grocery store. TR 8/27/21, p. 1233:9-20. On follow-up, over objection, the prosecutor asked if the detective knew Mr. Clark's motive for lighting the alleged 2007 dumpster fire, and the detective said he did not know. See TR 8/27/21 pp.1237-1238.

Twice in closing arguments, the People asked the jury to consider the 2007 incident as evidence that Clark started the fire for which he was currently charged. TR 8/27/21 pp. 1279-80, 1311-1312. The People made an impassioned plea to jurors to consider the 2007 incident:

> So why? How are Mr. Davis and I supposed to prove why? How are we supposed to figure that out? What's inside somebody's head? The only way you can try to figure that out is through circumstantial evidence. …
>
> So, what kinds of related facts do you have at your disposal to try to figure this out? You've got Jay Rush, a competitive cyclist, went that night to Lady Falc's, has a couple of stouts, racing home, gets home. It's late at night. There's his neighbor that he recognizes his gait, he recognizes his face, sees him in front of his apartment where he and his family live, and he's carrying something.
>
> It's either smoking or it's on fire. He's not sure, it's been 14 years, doesn't remember all the particulars. It's either smoking or on fire. Puts it into the dumpster directly in front of his apartment, and then watches. They make eye contact. Mr. Rush is positive this is his neighbor; somebody he recognizes because he lives next to. He infers that the defendant is watching him put the fire out.

> He doesn't come help him. This is in front of where his family lives. He's setting a dumpster fire. Why? Who knows? No idea. How would we know that? What we know is that he likes to watch. He watches Jay Rush stomp it out. He doesn't like the fact that Mr. Rush has told the police about his actions.
>
> So, he goes up, gets in his face at the threshold of his apartment, his neighbor, 'You didn't see what you thought you saw.' What's that about? Jay Rush is another good Samaritan preventing that dumpster from going up in flames. While we don't know exactly what is in the defendant's head, why he set that fire, the defendant set that fire.

TR 8/27/21 pp. 1279-80.

In rebuttal, the People again implored the jury to consider the prior incident:

> Then let's talk about Jay Rush and the dumpster fire, because Mr. Rush's perception of what happened 14 years ago, 14 years ago, 'Well, was the bag smoking or was it flaming?' 'You know, I don't quite remember, that was a long time ago.' But what he does remember is 'Yeah, it was the defendant, who lived right across the street from me. I came home from riding a bike.'
>
> He's taking in information, perceiving what he's seeing. 'Is that guy seriously doing what I think he's doing right now?' And yeah, he takes the stuff. He's like 'What just happened?' And again, it's this like to watch. The defendant goes back over, like Jay described, to underneath where his door is, and as Jay takes out the flaming objects and stomps them out, realizing he needs to do something to intervene, the defendant is watching him shut the door and then comes and tells Jay 'You didn't see what you thought.'
>
> It's in his face. And when asked 'Did that upset you,' Jay said, 'Yeah, I told him 'I'll kick your ass, get out of my face.'' Because Jay knows what he saw. It doesn't matter if the bag was smoking or if it was actually flaming. Jay saw what he saw and who did it. Because

> where there's smoke, there's fire. It was a flaming bag. Jay saw it. He put it out. The defendant did it.

TR 8/27/21 pp. 1311-1312.

This Court should find that the error was not harmless based on the weakness of the prosecution’s case. The evidence is wholly circumstantial and consists mainly of the argument that Clark was in the store, may have been in the aisle at some point, and had a prior arson arrest.

It would be impossible to conclude that the 2007 incident did not contribute to the conviction. Because “a substantial amount of evidence of prior criminal conduct was presented with little value other than demonstrating that the defendant had [committed arson] in the past, it cannot be said that there is no reasonable probability the jury’s [verdict] was affected by the erroneous admission of that evidence.” *People v. Williams, supra*, ¶24. The People cannot show there is no reasonable possibility that the erroneous admission of the 2007 incident to prove “motive” did not contribute to Clark’s conviction. This Court should reverse the convictions and remand for a new trial at which the 2007 incident is inadmissible.

II. Under the case facts, both criminal mischief and attempted first-degree arson are lesser included offenses of second-degree arson. Both must merge into the second-degree arson conviction.

A. Standard of review.

This unpreserved double jeopardy claim is reviewed for plain error. *Reyna-Abarca, supra*. This Court reviews *de novo* whether multiple convictions violate the constitutional protection against double jeopardy. *Magana v. People*, 2022 CO 25, ¶18.

B. Argument

An accused may not be placed in jeopardy twice for the same offense or subjected to multiple punishments for the same offense. U.S. Const., amends. V, XIV; Colo. Const. art II §18. *Bouiles v. People*, 770 P.2d 1274 (Colo. 1989); *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969); *Woellhaf v. People,* 105 P.3d 209, 14 (Colo.2005); *Whalen v. U.S.,* 445 U.S. 684, 688 (1980). The legislature may authorize multiple punishments for the same criminal conduct, but only if it does so specifically. *Patton v. People,* 35 P.3d 124, 129 (Colo. 2001); *People v. Leske,* 957 P.2d 1030, 1035 (Colo. 1998).

Colorado statutes provide if one offense is included in another offense, a defendant may not be convicted of both. One offense is included in another "when [i]t is established by proof of the same or less than all the facts required to establish

the commission of the offense charged." §18-1-408(5)(a), C.R.S. An offense is a lesser included offense if its elements "are a subset of the elements of the greater offense, such that the lesser offense contains only elements that are also included in the elements of the greater offense." *Reyna-Abarca,* ¶64; *People v. Rock, supra; Page v. People*, 2017 CO 88.

In *Rock,* the Court addressed the situation in which there are alternative ways of committing the lesser offense when not all ways would satisfy the elements of the greater (there, second-degree trespass and second-degree burglary):

> To the extent that a lesser offense is statutorily defined in disjunctive terms, effectively providing alternative ways of being committed, any set of elements sufficient for commission of that lesser offense that is necessarily established by establishing the statutory elements of a greater offense constitutes an included offense.

Rock, ¶16. In other words, "[a]n offense can also be included in another under the statutory elements test when there are multiple ways to commit the lesser, not all of which are included within the greater." *Page*, ¶11.

Criminal mischief is a lesser included offense of second-degree arson.

In *People v. Welborne*, *supra*, this Court applied the statutory elements test from *Reyna-Abarca*, *Rock*, and *Page* to conclude that Criminal Mischief is an included offense of First Degree Arson.

Section 18-4-501(1) requires proof that the person "knowingly damages the real or personal property of one or more other persons, including property owned by the person jointly with another person or property owned by the person in which another person has a possessory or proprietary interest, in the course of a single criminal episode." Under §18-4-102(1), first-degree arson is committed when a person "knowingly sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys, or causes to be damaged or destroyed, any building or occupied structure of another without his consent." This Court determined that while

> [c]riminal mischief can be committed in multiple ways, not all of which are included in first degree arson...[w]hen a defendant knowingly burns another person's building or occupied structure without that person's consent, however, the defendant commits both criminal mischief and first-degree arson.

Welborne, ¶15.

That same rationale applies when the property burned is not a "person's building or occupied structure" but "any property of another" under §18-4-103(1), C.R.S. If this Court does not reverse Mr. Clark's convictions, it must merge the criminal mischief conviction into the Second-Degree Arson conviction.

Under these facts, attempted first-degree arson is a lesser-included offense of second-degree arson.

The jury was instructed that to convict on attempted first-degree Arson, it must find Clark knowingly engaged in conduct constituting a substantial step toward the commission of first-degree arson. CF 454. First-degree arson is committed by knowingly setting fire to burning or causing to be burned, damaged, or destroyed, any building or occupied structure of another. CF 455, §18-4-102. To convict on second-degree arson, the jury had to find he "knowingly, set fire to, burned, or caused to be burned, or by the use of any explosive damaged or destroyed, or caused to be damaged or destroyed, any property of another, other than a building or occupied structure." CF 456, §18-4-103.

In *People v. Rock*, the Court made clear that "[f]or purposes of limiting multiple convictions according to section 18-1-408(1) and (5), or "statutory merger," a lesser offense can be "included" in a charged offense only with reference to the charged conduct." *Id.,* ¶17. The *Rock* Court "did not intend to suggest...that merger of convictions according to subsections 408(1) and (5) is a consequence of the statutory elements of the respective offenses alone." *Ibid.* After observing "[m]ultiple convictions for two separate offenses the elements of one of which constitute a subset of the elements of the other can clearly stand if the offenses were committed by distinctly different conduct," the Court concluded that

"[t]o the extent we have generally referred to one offense's inclusion in another as a justification for precluding a defendant from suffering judgments of conviction for both, implicit in this proposition has always been the limitation to convictions based on the same conduct." *Rock,* ¶¶17-18.

Mr. Clark was convicted of committing one act, i.e., setting fire to the City Market tortilla chip display. That singular act established the second-degree arson conviction and was the conduct constituting a substantial step toward the commission of first-degree arson. Thus, under the Supreme Court's formulation in *Rock*, the conviction for attempted first-degree arson must merge into the conviction for second-degree arson.

CONCLUSION

Because the People cannot show that there is no reasonable possibility that the evidentiary errors contributed to Clark's conviction, this Court should reverse his convictions on all counts.

If this Court does not reverse the convictions, this Court should merge both the criminal mischief conviction and the attempted first-degree arson into the second-degree arson conviction.

Respectfully submitted this 21st day of June 2022.

/s/ *Eric A. Samler*
Eric A. Samler, #32349
Hollis A. Whitson, #32911

CERTIFICATE OF SERVICE

I certify that on the 21st day of June, 2022, I served this Opening Brief through Colorado Courts E filing System to the Appellate Division Office of the Colorado Attorney General.

/s/ *Eric A. Samler*
Eric A. Samler