DATE FILED: March 19, 2021 3:30 PM
FILING ID: 3A29C27126076
CASE NUMBER: 2020CA35

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; Teller District Court; Honorable Scott Sells; and Case Number 2018CR330	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant PATRICK FRAZEE	
Megan A. Ring Colorado State Public Defender ALAN KRATZ 1300 Broadway, Suite 300 Denver, CO 80203 Phone Number: (303) 764-1400 Fax Number: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #27367	Case Number: 2020CA35
AMENDED 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:

> The brief contains 12,379 words and therefore complies with the Court's order that a brief not in excess of 12,500 words may be filed by Defendant-Appellant.

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.

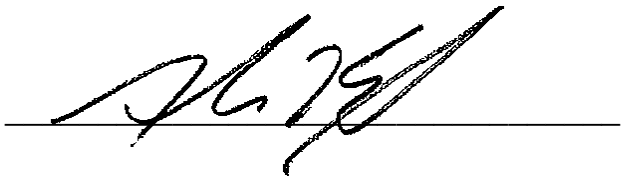


TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND RULES

CONSTITUTIONAL AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED

I. Whether reversible error resulted where, after learning late in the presentation of the government's case that at least three jurors had been discussing the case and formulated tentative opinions, the court failed to take adequate steps to preserve Mr. Frazee's constitutional right to a presumption of innocence and a fair trial by an impartial jury.

II. Whether reversible error resulted where a key prosecution witness, a law enforcement officer qualified as an expert on blood spatter, repeatedly testified that evidence at the alleged victim's condo, which consisted of small specks of blood mostly invisible to the naked eye, was "consistent" with the key prosecution witness's account of observing a horrific, bloody crime scene two days after the alleged homicide, and of what Mr. Frazee allegedly told her transpired there.

III. Whether the trial court erred in denying Mr. Frazee's motion to suppress unwarned statements made to a DHS caseworker while he was incarcerated in the Teller County Jail.

IV. Whether the trial court reversibly erred by permitting the State to repeatedly present irrelevant, unfairly prejudicial bad character evidence.

V. Whether the trial court reversibly erred in failing to exclude, pursuant to CRE 403 and due process of law, inherently unreliable jailhouse informant evidence.

VI. Whether, even if the evidence was not subject to exclusion, the trial court's refusal to grant a continuance to give the defense an adequate opportunity to investigate and meet the belatedly disclosed evidence was reversible error.

VII. Whether repeated, flagrant, and egregiously improper misconduct by the prosecutor deprived Mr. Frazee of his due process right to a fair trial by an impartial jury.

VIII. Whether the numerous errors in the aggregate show the absence of a fair trial.

IX. Whether the trial court erred in refusing to vacate the felony murder count where the State failed to present substantial and sufficient evidence of an intent to commit robbery being formed before or concomitant with the alleged homicide.

STATEMENT OF THE CASE

The State charged Frazee with two counts of first-degree murder,[1] three counts of solicitation-first-degree murder,[2] tampering with a deceased body,[3] and crime of violence counts. CF, p.646-648.

Following a trial, a jury entered guilty verdicts. CF, p.1105-1114; Tr. 11/18/19, p.84-86. The court merged the felony murder count and imposed a sentence of life without parole on the remaining first-degree murder count, and

[1] §18-3-102(1)(a)-(b) (F1), C.R.S.
[2] §§18-2-301; 18-3-102(1)(a) (F2).
[3] §18-8-610.5 (F3).

consecutive terms of 48 years on the three solicitation and 12 years on the tampering counts. 11/18/19, p.85-86.

STATEMENT OF THE FACTS

Frazee met the alleged victim, KB, in 2015. Their child, KF, was born in 2017. In 2018 KB moved into a condo with KF in Woodland Park, close to the Frazee residence in Florissant. In October they made plans to purchase a home so they could live together. 11/1/19, p.244.

On Thanksgiving, November 22, 2018, KB discussed Thanksgiving plans with her mother on the telephone. *Id.*, p.251. The mother received a text from her daughter on November 24 saying she would call, but did not hear from her after that. When the mother contacted Frazee, he told her that he and KB had parted ways because KB wanted her own space, and that KB wanted him to keep KF until KB decided what she wanted to do. *Id.*, p.256-58. The mother later contacted the Woodland Park Police Department (WPPD). *Id.*, p.261. KB's employer informed the WPPD that she had texted them to take time off work, saying she was going to visit her grandmother. *Id.*, p.262.

A WPPD officer, Dena Currin, went to KB's condo on December 2, looked through the window, and saw nothing unusual. 11/4/18, p.144. Currin contacted Frazee, who said he had last communicated with KB on November 25. *Id.*, p.149;

Ex. 3. Frazee told the police that he had last seen KB on Thanksgiving Day, that they had been growing apart, and that she wanted them to go their separate ways with equal custody of KF. He had given KB back some of her possessions, including her revolver. 11/5/19, p.85.

Video surveillance showed Frazee or his vehicle at various locations in Woodland Park on November 22. 11/6/19, p.114, 181-202. A neighbor's security camera showed an individual outside of KB's condo with her and KF, which a district attorney investigator opined was Frazee. 11/4/19, p.385, 390-94. Frazee told the police that, after they had last spoken on November 25, KB had sent him a text saying "Do you even love me anymore?" *Id.*, p.89. Police learned that the last "ping" from KB's phone indicated it was in Gooding, Idaho, on November 25. *Id.*, p.93.

Currin subsequently entered KB's condo with another officer. They saw no blood, no signs of a disturbance, and nothing unusual. 11/4/19, p.153, 163. Police returned to the condo on December 3 with a search warrant, and again found no signs of blood or anything unusual. *Id.*, p.181-82, 254. They also found no blood or anything unusual on December 4. *Id.*, p.254-257. The police then permitted KB's mother and brother to reside in the condo.

On December 6, police returned to the condo again after the brother said he saw some spots of blood on the outside of a toilet bowl in the upstairs bathroom. *Id.*, p.68, 260. A subsequent search found a number of microscopic bloodstains in the condo, including on the floor. Only the spots on the toilet were visible to the naked eye. *Id.*, 11/12/19, p.187. DNA testing of the stains showed that some matched KB's DNA, a substantial number of others contained mixtures of the DNA of KB and the condo's prior tenant, Susan Gorney, some contained mixtures which included unknown contributors, including unidentified male contributors, and still others contained mixtures that included the DNA of KB's mother and brother. *Id.*, 11/13/19, p.241-327. There was a relatively weak signal that Frazee might have contributed DNA to only one of the numerous stains. *Id.*, p.266. In addition, some profiles had to be rejected because they were contaminated with the DNA of people who responded to the scene. 11/14/19, p.20-23.

The State's primary witness was Krystal Lee, who had an on and off again romantic relationship with Frazee that began in 2006, and continued both before and after she married another man in Idaho. After KB's disappearance, law enforcement repeatedly contacted Lee. She repeatedly denied having any knowledge about KB's disappearance. 11/7/19, p.127, 130. The prosecution subsequently sent her a letter describing the prosecution's theory of what transpired with KB, and offering her a

plea bargain if Lee agreed to testify for the State. *Id.*, p.121. In exchange for her testimony implicating Frazee, the prosecution agreed that she could plead to tampering with evidence, a class six felony, would be eligible for probation, and, if sentenced to prison, would receive a maximum term of three years. *Id.*, p.51.

At trial, Lee now claimed that she had repeatedly lied to the police and her family, and that, on three different occasions, Frazee asked her to travel from Idaho to Colorado and kill KB because he was concerned she was harming KF. *Id.*, p.115, 127, 130-31. Lee stated that, on the first occasion in September 2018, she traveled to Woodland Park, bought a coffee drink, and went to KB's condo after Frazee had told her to mix it with drugs. 11/6/19, p.161-65. She testified that, despite the fact she was having "doubt" about Frazee's claim KB was abusing their daughter, she returned to Colorado again in October -- where, after Frazee allegedly gave her a pipe and told her to "take care of the problem," she went to KB's condo with the pipe but then returned with it to the Frazee residence. *Id.*, p.178, 183. Lee claimed that Frazee told her to come back to Colorado the next week with a baseball bat. *Id.*, p.189. She then again drove back to Colorado from Idaho with a baseball bat, went to KB's condo, and sat the bat on the ground. *Id.*, p.190.

Lee testified that Frazee called her several times on Thanksgiving night and told her she had a mess to clean up. *Id.*, p.199. She said she returned to Colorado

two days later and spent hours cleaning up KB's condo after purportedly observing large amounts of blood on the living room floor and walls, and a tooth on the floor. *Id.*, p.218-232. However, Lee's DNA was not found anywhere in the condo. 11/14/19, p.20.

Lee claimed that Frazee also gave her instructions on how to dispose of property found in the condo. *Id.*, p.232, 243. She stated that, after the alleged clean-up, she bought some food and went to Frazee's residence, where he allegedly told her how he killed KB with a baseball bat. *Id.*, p.247. Lee claimed that, according to Frazee, he was angry at KB when, after he complained of stomach pain the previous evening, she was late in bringing him medicine. *Id.*

According to Lee, Frazee told her that he put KB's body and the bat in a plastic tote. *Id.*, p.251-52. They subsequently went to a location called Nash Ranch, where they retrieved a tote, and drove back to the Frazee residence. There they allegedly burned the tote, along with items taken from the condo, after placing them in a steel water trough. *Id.*, p.260-63. Lee claimed that Frazee told her to take KB's cell phone back to Idaho and make it seem as though KB still had the phone by sending texts and photos. *Id.*, p.267.

The photographic evidence did not corroborate Lee's testimony. There were no photographs showing the man outside of KB's residence on Thanksgiving holding

a bat, or carrying a large plastic tote. There was no photographic or video evidence supporting Krystal Lee's testimony about going to the condo to clean up the alleged crime scene.

After searching the area where the tote was allegedly burned, investigators found burned plastic material, but no physical evidence that a body had been burned there. 11/8/19, p.165, 207-08; 11/12/19, p.217, 227. They also found a tooth fragment at a different location on the property. 11/8/19, p.212. A prosecution witnesses opined that the fragment was probably from a human. However, no evidence was presented as to whom it belonged. 11/13/19, p.200, 277.

SUMMARY OF THE ARGUMENT

After it discovered, mid-trial, that jurors had been prematurely discussing the case and formed tentative opinions of guilt, the trial court reversibly erred by failing to adequately safeguard Frazee's constitutional rights.

Reversible error resulted where a police officer testified at length about how evidence found at the alleged victim's condo was "consistent" with a prosecution witness's statements about her observations of the scene two days after the alleged homicide, and what Frazee allegedly told her occurred there.

The trial court reversibly erred in refusing to suppress unwarned statements made to a DHS caseworker while Frazee was incarcerated in the Teller County Jail.

Reversible error resulted where, throughout the trial, the State presented irrelevant and unfairly prejudicial bad character evidence.

Reversible error resulted from the admission of inherently unreliable jailhouse informant evidence and, alternatively, the court's unreasoning refusal to grant a continuance to adequately investigate the belatedly disclosed evidence.

Frequent, flagrant, and egregiously improper prosecutorial misconduct undermined Frazee's right to a fair trial, including (1) indoctrination of the prospective jurors to the notion that offering a witness a plea bargain in exchange for incriminating testimony "solves" the criminal case, (2) improperly questioning the key prosecution witness about her plea bargain to indicate that State had verified the truthfulness of her testimony, and, (3) in closing argument, using the word "lie," misstating the law, and vouching for the credibility of a police officer's testimony.

The numerous foregoing errors in the aggregate show the absence of a fair trial.

There was insufficient evidence to support the felony murder count.

ARGUMENT

I. Reversible Error Resulted Where, After Learning Late In The Presentation of the Government's Case That At Least Three Of The Jurors Had Been Discussing The Case And Formulated Tentative Opinions, The Court Failed To Take Adequate Steps To Preserve Frazee's Constitutional Right To A Presumption Of Innocence And A Fair Trial By An Impartial Jury.

Standard of Review

The issue is preserved and reviewed de novo. 11/13/19, p.148-50; *People v. Newman*, 2020 COA 108, ¶10; *People v. Ortega*, 2015 COA 38, ¶8.

Discussion

A. Applicable Facts

Throughout trial, the court admonished the jury not to discuss the case or form opinions prior to deliberations. *E.g.*, 11/1/19, p.78, 166-67, 208, 277. However, after a prosecution witness testified as to various bloodstains found in KB's condo that tested positive for the presence of blood, one of the jurors, Juror 5, reported overhearing three other jurors "talking about the trial." 11/13/19, p.148. The court acknowledged that defense counsel shared its concern over the juror misconduct, and first questioned Juror 5, who reported that the three jurors "were discussing previous witnesses again. What else is yet to come? What do they expect to happen next." *Id.*, p.150. He said they also praised the professionalism

of the prosecution witness, saying, "we can sit here and listen to her all day," and speculated that the next prosecution witness would "prove DNA." *Id.*, p.151.

The court next questioned the three jurors who engaged in misconduct. Juror 4 said the three were "anticipati[ng] … the [prosecution's] case," but claimed he could be fair and impartial. *Id.*, p.155. Juror 6 told the court that they had praised the "attractiveness" of the prosecution witness, and expressed "hope that some things would come together" in the prosecution's case, including the presentation of additional evidence about a tooth fragment found on the Frazee property. *Id.*, p.157-158. Juror 9 also indicated that they had talked about hoping for additional DNA evidence. *Id.*, p.160-61.

The trial court did not invite the lawyers to question any of the four jurors. The court did not question any of the jurors about the specific concerns that arose from the jurors' comments, including the jurors' ability to put improper discussions aside, refrain from further premature discussion and formation of tentative opinions, and apply the presumption of innocence. When the jury was called back in, the court merely thanked the jurors for their "hard work and patience," giving no further instruction or admonishment. *Id.*, p.163.

B. Analysis

The federal and state constitutions prohibit pre-deliberation discussion by the jury about a criminal case. *See* U.S. Const. amends. V,VI,XIV; Colo. Const. art. II, §§ 16,25; *In re Winship*, 397 U.S. 358, 364 (1970); *People v. Flockhart*, 2013 CO 42, ¶¶12-15; *People v. Preciado-Flores*, 66 P.3d 155, 166 (Colo. App. 2002) (discussing the numerous reasons why such premature deliberations undermine the accused's right to a fair trial and to placing the burden on the State to overcome the presumption of innocence by proving the elements beyond a reasonable doubt). Where the record establishes that premature discussion actually occurred, the juror misconduct is thus of constitutional magnitude. *Flockhart*, ¶¶15, 19-25 & n.4.

Here, at least one improper discussion occurred, involving at least three jurors. This discussion included statements of admiration for the prosecution witness's "attractiveness" and professionalism. Even more troubling, it included expressions of "hope" that the State's case would "come together" with the presentation of additional evidence of guilt. Thus, the substance of the improper discussion indicates that the three jurors had formed premature, tentative opinions of guilt, and were hoping for additional evidence from the State to support these opinions. The record further establishes that this discussion was so improper that

another juror who overheard it felt compelled to report the misconduct to the trial court. Thus, the error is constitutional.

Moreover, while the trial court was aware of the threat to Frazee's constitutional rights posed by the misconduct, it failed to adequately dispel the threat. The court erred, first, in concluding that the responses it received alleviated any concern. After hearing the responses, which included statements suggesting that one or more jurors had *already* reached a tentative opinion of guilt – and were hoping for the prosecution to present further evidence to validate their opinions -- the court merely solicited generic statements from the jurors that they could be fair and impartial. The court did *not* admonish the jurors who had committed misconduct for disobeying the court's instructions, remind them that Frazee had pled not guilty and had to be presumed innocent throughout the trial unless and until the prosecution proved the elements of the charged offenses beyond a reasonable doubt, or elicit assurances that these jurors could follow these instructions despite their prior disobedience. Nor did the court specifically ask them whether, in light of their prior misconduct, they could disregard any prior discussions and afford Frazee his constitutional rights by applying the presumption of innocence throughout the trial. Thus, the court's inquiry failed to adequately address the concerns over the three jurors' ability to follow the court's instructions

on the presumption of innocence and the prohibition against premature deliberations. *See People v. Harmon*, 284 P.3d 124, 128-129 (Colo. App. 2011) (where court received information one juror might have formed premature opinion of guilt, "it was incumbent on the trial court to take some action to … avoid the possibility of allowing a biased juror to sit on Harmon's jury"); *see also Morgan v. Illinois*, 504 U.S. 719, 735 (1992) (recognizing that "general questions of fairness and impartiality" are inadequate when they leave "the specific concern unprobed"); *People v. Harlan*, 8 P.3d 448, 463 (Colo. 2000).

Second, the court's questioning raised more questions than it answered, particularly about the other jurors' possible exposure to, and participation in, premature discussions, and any possible prejudice resulting therefrom. The court did not ask any of the four, questioned jurors whether there had been other premature discussions by the three jurors and, if so, the nature of those discussions. The court did not ask them whether other jurors may have overheard or actively participated in premature deliberations. And the court did not question any of the remaining twelve jurors at all, and so was in the dark about their exposure to, or participation in, premature deliberations. Finally, the court did not address the jury as a whole to remind them of the presumption of innocence, admonish them to disregard any premature discussions or expressions of opinion regarding the

prosecution's case, and, henceforth, refrain from discussing the case or forming any such opinion prior to retiring to deliberate as a group.

As a result, the trial court lacked the necessary information to ascertain whether a new trial was required to safeguard Frazee's constitutional rights. Reversal is required. *See United States v. Resko*, 3 F.3d 684, 689-93 (3d Cir. 1993) (where responses to questionnaire provided by trial court provided insufficient information for the trial court to meaningfully determine if premature discussions by jurors was prejudicial, a new trial was required); *Winebrenner v. United States*, 147 F.3d 322, 327, 329 (8th Cir. 1945); *People v. Clark*, 2015 COA 44, ¶ 245; *State v. McLeskey*, 69 P.3d 111, 116 (Idaho 2003); *Commonwealth v. Kerpan*, 498 A.2d 829, 832 (Pa. 1985); *State v. Washington*, 438 A.2d 1144, 1147–49 (Conn. 1980); *cf. Harper v. People*, 817 P.2d 77, 86 (Colo. 1991).

II. Reversible Error Resulted Where A Key Prosecution Witness, A Law Enforcement Officer Admitted As An Expert On Blood Spatter, Repeatedly Testified That Evidence At KB's Condo, Which Consisted Of Small Blood Stains Mostly Invisible To The Naked Eye, Was "Consistent" With Krystal Lee's Account Of Observing A Horrific, Bloody Crime Scene Two Days After the Alleged Homicide, And Her Account Of What Frazee Allegedly Told Her Transpired There.

Standard of Review

Whether a trial court's evidentiary decision comports with the rules of evidence is an issue of law reviewed de novo. *See People v. Dominguez*, 2019 COA 78, ¶13. The issue is reviewed for plain error.

Discussion

A. Applicable Facts

The State's case was largely built upon the testimony of Krystal Lee, who testified that Frazee told her how he killed KB, and described the blood she purportedly saw when she went to clean the condo. 11/6/19, p.221-22; 11/7/19, p.17.

After Lee testified, Jonathyn Priest, an experienced officer with the Denver Police, was admitted as a prosecution expert on blood spatter and crime scene reconstruction. *Id.*, 11/15/19, p.21-26. On direct, the State repeatedly asked Priest if Lee's statements were "consistent" with the evidence actually found in the condo. The prosecution even played a video depicting Lee walking through the condo and

commenting on what she had purportedly seen, and the instructions she said Frazee had given her. *See* Ex.27.

The prosecutor asked Priest a number of questions about whether Lee's description of the scene was "consistent" with the evidence and her statements as to what Frazee said to her. Priest opined that microscopic specks of blood found on the fireplace were "consistent" with someone being hit with a bat. *Id.*, p.35. After discussing the specks of blood found on the floorboards, which were also not visible to the naked eye, the prosecutor asked him about what Lee said Frazee told her: "If we have evidence that's presented that Patrick Frazee said he beat [KB] with a bat, would that be consistent with what you see here?" *Id.*, p.65. Priest replied, "Oh, absolutely." *Id.* He testified that, given Lee's testimony, "we had multiple strikes, well in excess of the minimum number of two," and opined that the victim was hit "10, 15 [times], somewhere in there. Could be more." *Id.*, p.66. Asked if the largely invisible bloodstains found at the scene "are consistent with it being a crime scene," Priest replied, "Very much, yes." *Id.*, p.68. He stated, "There is nothing here that tells me that the death was accidental. This is very consistent with what I would expect to see in a homicide." *Id.*, p.69.

On cross-examination, Priest acknowledged that a "large part" of his opinions were simply based on Krystal Lee's statements as to what she allegedly

saw and what Frazee purportedly told her. *Id.*, p.82. On redirect, the prosecutor then engaged in the following colloquy:

> Q. Counsel asked you about things that were based on Krystal Lee versus not. Let me ask. Is there anything that you saw that was inconsistent with the description that Krystal Lee gave of this crime scene?
>
> A. No.
>
> Q. Or inconsistent with the description Krystal Lee gave of what Patrick Frazee told her occurred at this crime scene?
>
> A. No.
>
> Q. Were the floorboards consistent with what she told you?
>
> A. Very much.
>
> Q. Was every single drop of blood that you could see either tested or untested consistent with what she told you?
>
> A. Yes. Well, what she described. She told me nothing.
>
> Q. You're correct. I'm sorry.
> Was the cleaning that she described consistent with what you found?
>
> A. Yes.
>
> Q. Was the couch -- blood on the couch consistent with what was described?

A. Yes.

Q. Was the blood on the baby gate consistent with what was described?

A. Yes.

Id., p.85-86. The prosecutor asked whether "anything that you saw in that scene that would make you question the description that Krystal Lee gave of either what she was told happened during the event or what she told you she did in terms of seeing it and cleaning it," to which Priest replied, "No. Her description of her observations were very consistent with what was left behind in my observations based on my experience and background." *Id.*, p.86.

B. <u>Law and Analysis</u>

An accused has a constitutional right to a determination of guilt or innocence by an impartial jury based solely on evidence properly introduced at trial. *See* U.S. Const. amends. V,VI,XIV*;* Colo. Const. art. II, §§ 16,23,25; *Irvin v. Dowd*, 366 U.S. 717 (1961); *Oaks v. People*, 371 P.2d 443, 447 (Colo. 1962). Consequently, no witness may, either directly or indirectly, opine that another witness was telling the truth on a specific occasion. *See* CRE 608,702,403; *Venalonzo v. People*, 2017 CO 9, ¶¶32-33 (such testimony is "especially problematic where the outcome of the case turns on that witness's credibility").

Here, the jurors would have necessarily interpreted Priest's testimony vouching for Lee's statements about her observations of the alleged crime scene, and what Frazee said transpired there, as an extended expert opinion on the truthfulness of her statements. The expert opinions were offered to show that, despite the absence of significant physical evidence corroborating the State's theory that Frazee brutally murdered KB with a baseball bat inside her condo, Lee's description of a horrific, bloody scene – as well as her statements that Frazee had told her how he brutally murdered KB -- were the truth. The bulk of Priest's testimony was, "in effect, nothing less than the [officer] telling the jury that the witness was truthful in her accounts of the relevant events." *People v. Bobian*, 2019 COA 183, ¶41 (Berger, J., specially concurring).

The error was obvious and affected a substantial right. The linchpin of the State's case was the inculpatory testimony of Lee, whose credibility was attacked not only by the evidence of her plea deal but the substantial evidence that she had repeatedly lied on prior occasions. Given the trust jurors place in law enforcement testimony,[4] a reasonable possibility exists that the error contributed to the convictions.

[4] *See People v. Veren*, 140 P.3d 131, 140 (Colo. App.2005) (noting that "the public holds police officers in great trust").

III. The Trial Court Erred in Denying Frazee's Motion to Suppress Statements Made To A Department of Human Services Caseworker While He Was Incarcerated In The Teller County Jail.

Standard of Review

The issue is preserved. CF, p.730-33; 8/23/19, p.55-60. The court's legal conclusions are reviewed de novo, and its factual findings will be overturned if clearly erroneous. *See People v. Gutierrez*, 2020 CO 60, ¶11.

Discussion

A. Applicable Facts

Frazee filed a pretrial motion to suppress statements made to Mary Longmire, a caseworker/administrator for the Teller County Department of Humans Services (DHS), after his arrest and while he was incarcerated at the Teller County Jail. The prosecution acknowledged that, prior to questioning Frazee at the jail on December 26, 2018, Longmire contacted the police chief of the Woodland Park Police Department (WPPD) to obtain information about the criminal investigation. CF, p.767. The State further acknowledged that the questioning of Frazee included asking him to provide "a timeline of events that took place on Thanksgiving, throughout the weekend and up to Wednesday, November 28th." *Id.*, p.768.

Longmire testified at the suppression hearing that, on December 21, 2018, she received a referral from the WPPD. She then met with WPPD officers, and

was granted temporary physical custody and emergency legal custody of KF. 8/23/19, p.15-16. She interviewed KF's relatives before questioning Frazee at the jail. *Id.*, p.16-17, 51.

During this meeting she told Frazee that "he had been arrested for the murder of KF's mother and that there was not an appropriate caregiver due to his incarceration." *Id.*, p.18. With knowledge that Frazee was represented by counsel, Longmire returned to the jail on December 26, and questioned Frazee in a video advisement room for 60-90 minutes without notifying his counsel or advising him of his rights. *Id.*, p.22, 24-25, 42, 45-46. After asking standard questions, she questioned Frazee about events surrounding November 22, 2018. *Id.*, p.30-38, 51. She then prepared a 16-page written Assessment Summary, which had been provided to her by the district attorney, and gave the summary to the district attorney's office and law enforcement. *Id.*, p.49-50. She had Frazee sign a release informing him that what he told her would be shared with government agencies, including the police and district attorney. *Id.*, p.44, 49

Two days later, on December 28, 2018, the State filed charges against Frazee. CF, p.435-39.

In declining to suppress the statements, the trial court found that *Miranda* warnings were not required because "Ms. Longmire is not a police officer, peace

officer or law enforcement officer." CF, p.781. The court also found that there was no custodial interrogation. *Id.*[5]

Longmire testified at trial that, prior to the questioning, law enforcement had informed her that Frazee had been charged with KB's murder, and asked her to "assess the allegations." *Id.*, 11/14/19, p.55-56. During the course of her questioning, Frazee talked about how he and KB had been separated since KF's birth, and said that KB never wanted to smooth things over and just brushed everything under the rug. *Id.*, p.59. He told Longmire that, in August 2018, KB went to California for "rehab" for depression and alcohol dependence. *Id.*, p.60. He said they had heated discussions over money**.**

Longmire also testified as to Frazee's statements concerning the events surrounding the date of the alleged offenses. He told Longmire that, on Wednesday, November 21, KB met him to pick up KF, and, as they drove to the Nash Ranch, they had a heated discussion about going their separate ways with shared custody of KF. *Id.*, p.65. He said that, in the early morning hours of November 22, KB brought him some medication at his house after he became sick to his stomach, then returned to her condo with KF.

[5] The court also denied Frazee's motion to reconsider in light of *People v. Dyer*, 2019 COA 161. CF, p.982-83; 10/30/19, p.297-99.

Frazee told her that, around 9 or 9:30 a.m. on November 22, they communicated and agreed to have him pick up KF around 12:30 p.m. He said he picked up KF at the appointed time at KB's residence, and that KB sent him a text the next day asking him to keep their child. *Id.*, p.67. KB told him Saturday morning that she wanted to go to church by herself and rejected his offer to bring KF back to her. *Id.*, p.68. He said KB became "heated" and "lost it" later that day. *Id.*, p.69. He said they talked again on Sunday morning, November 25, at which time they agreed he would continue to keep KF. *Id.*, p.70. He said that he later received a text from KB that said, "Do you even love me," and that he received no response to his reply. *Id.*, p.70-71. He said that he stopped trying to contact KB on November 28. *Id.*, p.71-72.

B. <u>Law and Analysis</u>

Pursuant to the Fifth and Fourteenth Amendments, the prosecution may not present, in its case-in-chief, statements derived from custodial interrogation unless the suspect was properly and adequately advised of his constitutional rights. *See Dickerson v. United* States, 530 U.S. 428, 432 (2000); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

The trial court erred, first, in concluding, as a matter of law, that Longmire did not constitute law enforcement for purposes of *Miranda*. In *Mathis v. United*

States, 391 U.S. 1 (1968), the Court held that *Miranda* applied to statements made to an IRS agent conducting a "routine tax investigation." Although an IRS agent is not a law enforcement officer, the Court focused on the fact that statements made during such tax investigations frequently end up being used in subsequent criminal prosecutions:

> It is true that a "routine tax investigation" may be initiated for the purpose of a civil action rather than criminal prosecution ... But tax investigations frequently lead to criminal prosecutions, just as the one here did ... And, as the investigating revenue agent was compelled to admit, there was always the possibility during his investigation that his work would end up in a criminal prosecution.

Id. at 4. *See also Estelle v. Smith*, 451 U.S. 454, 467 (1981) (statements obtained without *Miranda* warnings through court-ordered psychiatric examination held inadmissible in penalty proceeding of capital case: When the psychiatrist "went beyond simply reporting to the court … and testified for the prosecution … his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting"); *People v. Stamus*, 902 P.2d 936, 938 (Colo. App. 1995) (*Miranda* warnings were required before statement by inmate during disciplinary proceeding).

In its findings, the trial court failed to mention the numerous circumstances demonstrating Longmire's close working relationship with law enforcement and the prosecution. The records establishes that (1) Longmire's involvement began

with a referral from the police, (2) she advised Frazee prior to questioning that what he told her would be shared with government agencies, including the police and district attorney, and (3) perhaps most critically, she used a written Assessment Summary which had been personally handed to her by the district attorney for completion and return to the district attorney and law enforcement. Under these circumstances, Longmire was effectively an agent of law enforcement for purposes of *Miranda*. *See Blanton v. State*, 172 P.3d 207 (Okla. Crim. App. 2007) (DHS worker was acting as agent of law enforcement, for purposes of *Miranda*, where she was called in to assist law enforcement and was required to report findings to district attorney); *People v. Wilhelm*, 34 A.D.3d 40, 822 N.Y.S.2d 786 (2006) (child protective service workers were functionally so involved in cooperation and coordination with the police and the District Attorney's office that their questioning of the defendant in custody constituted state action and violated the defendant's right to counsel); *State v. Oliveira*, 961 A.2d 299 (R.I. 2008) (investigator for Department of Children, Youth, and Family was acting as agent for law enforcement); *State v. Helewa*, 537 A.2d 1328, 1329-1332 (N.J. App. 1988); *cf. Dyer*, 2019 COA 161, ¶ 19 (Fourth Amendment applied to intrusion by Department of Human Services caseworkers).

Moreover, Frazee was in custody. In its written order, the trial court applied the factor-based test in *People v. Dennison*, 918 P.2d 1114 (Colo. 1996), for determining whether a person is in custody "in a prison or jail setting." CF, p.780. The court thereby applied an incorrect legal standard, as the test in *Dennison* applies when a person is incarcerated for one offense, and is questioned "for a separate offense committed while incarcerated." *Id.* at 1116; *see also People v. J.D.*, 989 P.2d 762, 768 (Colo. 1999); *People v. Stanley*, 56 P.3d 1241, 1246 (Colo. App. 2002). Here, Longmire did not question Frazee about a matter unrelated to the offense for which he was confined in the Teller County Jail. With full awareness that he had been arrested for the murder of KB, she questioned him about the offense for which he had been arrested and confined; in particular, the events surrounding November 22, 2018, the date on which the State alleged the murder occurred.

Accordingly, Frazee was in custody for purposes of *Miranda* if a reasonable person in his position would believe himself to be deprived of his freedom of action to the degree associated with a formal arrest. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *Effland v. People*, 240 P.3d 868, 873-74 (Colo. 2010). It is beyond dispute that, at the time of the questioning on December 26, 2018, Frazee had been formally arrested and confined in the Teller County Jail for KB's murder.

8/23/19, p.4, 18. He was therefore in custody when questioned by Longmire about the circumstances surrounding KB's disappearance. *See, e.g., People v. Matheny*, 46 P.3d 453, 467 (Colo. 2002) (defendant in custody for *Miranda* purposes once officer placed him under arrest); *accord People v. Begay*, 2014 CO 41, ¶ 27.

The State cannot meet its heavy burden of proving the admission of the statements was harmless beyond a reasonable doubt, i.e., that there was no reasonable possibility that the error contributed to the convictions. *See People v. Mendenhall*, 2015 COA 107M, ¶¶ 42, 49. As discussed previously, the State presented no evidence of a corpus delecti, and evidence of only minute, largely invisible-to-the-naked-eye, stains of blood in KB's condo -- which included blood matching not only KB but also the prior tenant of the condo. Since the physical evidence of guilt was far from overwhelming, credibility was a critical issue in the case, particularly that of Lee.

In closing argument, the prosecution thus relied extensively upon Frazee's statement to Longmire in arguing that Lee should be believed because Frazee's statements were not "credible." 11/18/19, p.32. After discussing Longmire's testimony, the prosecutor argued, "Is Frazee's story credible? No. He says he never saw her after the 22nd, but yet their phones are together, on the 22nd, the 23rd, and the 24th. He says, 'I picked up [KF] in the alley, in the parking area,' and

he's on the camera 11 times. He says he was home for Thanksgiving dinner by 4:30. Well, we know that phone records and video show that he was still in Woodland Park at 4:30." *Id.* The prosecutor argued that Frazee told Longmire he talked to KB on Sunday, November 25, when Lee's testimony was that she was "dead on the 22nd." *Id.*, p.70.

Given the prominence the prosecution gave to Longmire's testimony to argue that the jury should resolve the credibility issue by believing Lee's testimony, the State cannot prove that there was no reasonable possibility that the improperly admitted statements did not contribute to the convictions. *See People v. Allen*, 199 P.3d 33, 38 (Colo. App. 2007).

IV. The Trial Court Reversibly Erred By Permitting The State To Repeatedly Present Irrelevant, Unfairly Prejudicial Bad Character Evidence.

Standard of Review

The defense objected to the admission of bad character evidence from KB's mother, Krystal Lee, Joseph Moore, and Kayla Daugherty. 11/1/19, p.225; 11/6/19, p.109; 11/8/19, p.268; 11/12/19, p.272-75. A court's decision concerning the admission of evidence is generally reviewed for abuse of discretion, and a court abuses its discretion when its ruling is based on an erroneous understanding or application of the law. *People v. Komar*, 411 P.3d 978, 988 (Colo. 2015). A court's evidentiary rulings violate due process of law when the erroneously-admitted

evidence is "'so unduly prejudicial that it renders the trial fundamentally unfair.'" *Bloom v. People*, 185 P.3d 797, 806 (Colo. 2008) (quoting *Payne v. Tennessee*, 501 U.S. 808, 809 (1991)); *People v. Butler*, 224 P.3d 380, 386 (Colo. App. 2009).

Discussion

A. Applicable Facts

Before trial, the prosecution promised not to introduce any bad character evidence at trial. 8/23/19, p.61-62. However, the prosecution proceeded to do precisely the opposite. The prosecutor first elicited such evidence from KB's mother. When the mother was asked about KB's feelings for the Frazees, the court overruled the defense objection to this line of inquiry, finding only that such character evidence was admissible under the residual hearsay exception, but not addressing its relevance or admissibility under CRE 403. 11/1/19, p.224-26.

Thus given free rein, the prosecution elicited testimony from KB's mother that Frazee's mother, Sheila, had called KB a "hooker." *Id.*, p.226. When KB became pregnant with KF and, for a time, this fact was withheld from the Frazee family, KB's mother testified that Sheila confronted KB, called her a liar, and threw her out of the house. *Id.*, p.227.

The State continued presenting such character evidence through Krystal Lee. After Frazee, who raised border collies, gave her a dog in December 2008, Lee

testified that he threatened to come to Idaho and kill the dog if she did not pay money she owed him. 11/6/19, p.109. When the defense objected to this testimony, the court merely told the prosecution to be "careful," but did not sustain the objection or order the jury to disregard the testimony. *Id.*, p.110.

Lee proceeded to testify that, in March 2016, she became pregnant with Frazee's child. Lee stated that, upon hearing the news, Frazee was unhappy, called the unborn baby a "bastard," and implied she should get an abortion, telling her, "you're a baby killer or you're not." *Id.*, p.123.

Lee did, in fact, subsequently abort the child, but lied to Frazee and said she had a miscarriage. *Id.*, p.124. She said that she told Frazee how she believed she would lose custody of the children she had with her husband if she moved to Colorado. The prosecutor then expressly asked her if Frazee had a "colorful way to ask you about what you were going to do with your children," to which she responded, "Yeah. He had asked me what I was going to do with my shit loads." *Id.*, p.125.

The State continued to present bad character evidence through Joseph Moore, who had known Frazee for many years. Moore testified about how, when KB was helping Frazee move some of his cattle, he "berated her horribly" for not doing her job properly. The court again overruled the defense objection, after

which Moore repeated that Frazee berated KB "horribly," and ""yelled at her, cussed at her terribly." 11/8/19, p.268-270.

Moore also testified in narrative fashion about a time when Frazee called him and told him how, when KB was supposed to be in Grand Junction, she called Frazee, had him take her to the hospital, and gave birth to KF. Moore said that, according to Frazee, that was when he first learned of KB's pregnancy with KF. *Id.*, p.272. The prosecutor effectively acknowledged that this line of inquiry was intended to show Frazee's bad character, arguing that its purpose was to show how Frazee "taint[ed] her in the eyes of everybody around her." *Id.*, p.273.

Moore went on to testify that, on one of their trips to shoe horses, Frazee told him, "You know, kids go missing all the time from playgrounds and school yards." *Id.*, p.276. Moore said that he did not believe Frazee's statement that he was just kidding. *Id.* Moore said Frazee also once told him he had met someone who was a hit man for the mob, and that he had "clients" spying on KB and taking photos to acquire evidence that she should not have custody of KF. *Id.*, p.277-81. He said he had a photo which depicted KF sitting alone inside a running car while KB was in the liquor store. *Id.*

More character evidence was presented through Kayla Daugherty, who utilized Frazee's farrier services and stated that she had a sexual relationship with

Frazee in 2016. Over defense objection, the court permitted Daugherty to testify that, in 2015 Frazee told her that Teller County is a vast area in which to "get rid of someone." *Id.*, 11/12/19, p.272-75,279-81,288.

The prosecution continued to elicit character evidence through Katherine Donahue, for whom Frazee had performed farrier services. Donahue testified that Frazee came to her residence in 2017 with a two-month old baby. He purportedly told Donahue that he had only learned KB was pregnant when she called him and said she was having the baby. *Id.*, p.326. The prosecution elicited from Donahue testimony that Frazee never said anything "good" or "kind" about KB, said "not nice" things about her, and accused KB of having "lots of problems" and not being "a good mother." *Id.*, p.326-28, 335.

The State's campaign to paint Frazee as a contemptible individual continued with the presentation of evidence that, after KB went missing, he did not search for her, attend a candlelight vigil, or post messages of concern on her Facebook page. After KB went missing, a candlelight vigil was held in the community, at which members of the media were present. *Id.*, 11/4/19, p.13. The prosecution elicited testimony from KB's mother that Frazee never told her he looked for KB and did not attend the candlelight vigil. *Id.*, p.31.

The court also admitted various passages from KB's Facebook page. *Id.*, 11/14/19, p.101-02; P.Ex. 82-83, 85. The prosecutor then elicited testimony from Gregg Slater, an agent with the Colorado Bureau of Investigation, that Frazee had not posted any messages of concern or sympathy on this page:

> Q. So at the very beginning of these Facebook records, do you see many people posting directly onto [KB]'s page we're looking for you, we hope you're safe, where are you, things of that nature?
>
> A. The public site, yes.
>
> Q. And there was a lot of people that may not have even known [KB]?
>
> A. Yes.
>
> Q. Did you ever see anything like that from Patrick Frazee?
>
> A. No.
>
> Q. In your review of these Facebook messages between [KB] and Patrick, did you ever see a text, a Facebook message, anything in those records from Patrick to [KB] after she was reported missing?
>
> A. No.

Id., p.106-07.

B. Law and Analysis

The State may not present evidence of the accused's bad character, "for the purpose of proving that he acted in conformity therewith on a particular occasion." CRE 404(a); *see Michelson v. United States*, 335 U.S. 469, 475–76 (1948); *Masters v. People*, 58 P.3d 979, 1005 (Colo. 2002); *People v. Serra*, 2015 COA 130, ¶ 62. Thus, "when the prosecution seeks to admit any evidence which suggests that the defendant is a person of bad character … it must be prepared to explain why the logical relevance of that evidence does not depend on the inference that the defendant acted in conformity with his bad character." *People v. Griffin*, 224 P.3d 292, 297 (Colo. App. 2009).

Here, the evidence was offered for the purpose of showing bad character. With respect to the evidence of Sheila Frazee's bad character, namely, her calling KB a hooker and liar and throwing her out of the house, the prosecution engaged in wholesale speculation that the relationship between KB and Sheila "may" have resulted in a deterioration of Frazee's relationship with KB – and that this deterioration somehow gave rise to a motive for murder. But there was no evidence of such a deterioration as a result of any enmity between KB and Sheila. In fact, KB's mother acknowledged that, prior to KB's disappearance, the relationship between KB and Sheila had *mended*. 11/1/19, p.227.

Thus, this evidence had little, if any, probative value with respect to the status of KB and Frazee's relationship at the time of her disappearance. Conversely, given the language purportedly used by Frazee's mother against the alleged victim, the danger of unfair prejudice was high.

There was also no valid explanation given for presentation of the bad character evidence through Krystal Lee. This character evidence, which included testimony that Frazee had threatened to kill Lee's dog if she did not repay a debt, called her unborn baby a "bastard" and suggested she abort it, and referred to her own children as "shit loads," had little probative value independent of the prohibited character inference, but carried a high degree of unfair prejudice by painting Frazee as a cruel and abusive individual.

And no credible explanation was given with respect to the bad character evidence presented through Joseph Moore. The evidence that Frazee had yelled and cussed at KB for doing a poor job with the cattle, that Frazee had lied to him about when he first learned of KB's pregnancy -- which the prosecutor conceded was offered to show Frazee's desire to "taint" KB – and of Frazee's statements about children going missing, having connections to a "hit" man with organized crime, and of having people "spying" on KB over custody matters, also had little probative value except to paint Frazee as a person of bad character.

Similarly, the court erred in admitting the testimony from Daugherty that Frazee had told her, over three years before the charged offense, that Teller County was a vast area in which to get rid of someone. The court found that the evidence showed Frazee's "knowledge" of Teller County. 11/12/19, p.280. But the court gave no explanation as to how, given the State's speculation that Frazee killed KB and burned her body at the Frazee residence, such "knowledge" was material. Moreover, even if it were, Frazee's knowledge of the county in which he grew up was never in dispute, and presentation of the evidence was wholly unnecessary to show his knowledge of the county. *See Yusem v. People*, 210 P.3d 458, 468 (Colo. 2009) (evidence improperly admitted where purpose for which it was admitted was not contested and could be easily established without the prior act evidence).

Donahue's testimony should have also been excluded. Her characterization of Frazee as lying about when he learned of KB's pregnancy, never saying anything "good" or "kind" about her, and calling her a bad mother with lots of problems, was classic bad character evidence carrying minimal probative value on any material fact, while painting Frazee as a dishonest and contemptible individual.

The evidence of Frazee's failure to participate in the candlelight vigil, or post sympathetic messages on KB's Facebook page, was also classic bad character

evidence. It had scant probative value other than to paint Frazee as an unfeeling, deplorable individual.[6]

Throughout trial the prosecution sought to paint Frazee as a cold, dishonest, detestable and uncaring individual deserving of punishment. In so doing, the State engaged in the very conduct CRE 404 is designed to prevent: "parading evidence before the jury merely to paint a picture of [Frazee] as a bad person." *Kaufman v. People*, 202 P.3d 542, 555 (Colo. 2009). The evidence "presented the grave danger that it would be employed by the jury to infer bad character and action taken in conformity with bad character." *Yusem*, 210 P.3d at 469.

The State's proof was largely dependent on questions of credibility, particularly that of Krystal Lee – whose credibility was subject to attack and highly suspect. Thus, the State cannot prove that there is no reasonable possibility the repeated presentation of inadmissible and unfairly prejudicial bad character evidence tipped the scales in the State's favor.

[6] Indeed, had Mr. Frazee attended the vigil or posted sympathetic messages the prosecution would doubtless have sought to argue that this evidence contradicted his statements that KB's disappearance was the result of her having decided to go away on her own.

V. The Trial Court Reversibly Erred In Failing To Exclude, Pursuant To CRE 403 And Due Process Of Law, Inherently Unreliable Jailhouse Informant Evidence.

Standard of Review

Frazee preserved the issue, which is reviewed de novo. 11/14/19, p.242-46; *see People v. Fernandez*, 687 P.2d 502, 504 (Colo. App.1984) (whether evidence is relevant to show consciousness of guilt is a question of law). Where the admission of evidence renders the trial fundamentally unfair, it is constitutional error. *Bloom v. People*, 185 P.3d 797, 806 (Colo. 2008) (quoting *Payne v. Tennessee*, 501 U.S. 808, 809 (1991)); *see also Montana v. Egelhoff*, 518 U.S. 38 (1996); *People v. Butler*, *supra*.

Discussion

A. Applicable Facts

Near the end of its case, the State announced its intent to present the testimony of a jailhouse informant named Jacob Bentley, that Frazee had wanted Bentley and his gang to kill various witnesses, along with "letters" provided by Bentley which were allegedly written by Frazee. 11/14/19, p.228,234-38.

Over defense objection, the trial court found the evidence was relevant to show "consciousness of guilt," and was "not unfairly prejudicial." *Id.*, 11/15/19, p.9.

Bentley testified that, while he was incarcerated in the county jail with Frazee from September 26 to October 12, 2019, Frazee repeatedly asked him to "murder the witnesses" in his case, with "[o]ne in particular, Krystal Lee." *Id.*, p.95-96. The court admitted fourteen notes Bentley claimed were written by Frazee, which Bentley said were instructions and suggestions on how to accomplish the killings. Ex. 86; *id.*, p.98. Bentley admitted to having watched a television show about the case acquiring information about it while in jail.

The prosecution then called Slater, the State's final witness, who read aloud various portions of the letters, in which the author said that various individuals, whom Slater identified, needed to disappear until after the trial, and wanted to see Krystal Lee, who is described as a "fucking dirty ass cunt bitch," with a "bullet in her head." *Id.*, p.119-135.

B. Law and Analysis

When the trier of fact is improperly influenced by inadmissible evidence or argument, including evidence of an accused's other crimes, wrongs, or acts offered to show bad character and action taken in conformity therewith, "it is no longer impartial" and the defendant is deprived of his constitutional right to a fair trial by an impartial jury. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 23; § 16-10-301, C.R.S. (2020); CRE 403-404; *Payne v. Tennessee*, *supra; People v.*

Spoto, 795 P.2d 1314, 1318 (Colo. 1990); *Oaks v. People*, 371 P.2d 443, 446–47 (Colo. 1962); *People v. Nardine*, 2016 COA 85, ¶ 79. So-called "death threat" evidence must satisfy the *Spoto* requirements to be admissible to show a defendant's consciousness of guilt. *See People v. Medina*, 51 P.3d 1006, 1013 (Colo. App.2001); *People v. Eggert*, 923 P.2d 230, 234 (Colo. App.1995); *Fernandez*, 687 P.2d at 504. Thus, the evidence must logically relate to a material fact and have relevance that does not depend on an intermediate inference of bad character. Finally, even if otherwise admissible, exclusion is required where the probative value of the evidence is substantially outweighed by its prejudicial impact. *See Spoto, supra*; *Yusem v. People*, 210 P.3d 458, 467 (Colo. 2009).

The Bentley evidence had minimal probative value independent of bad character. The defense case was built on the fact that Krystal Lee lacked credibility and had fabricated her allegations in order to avoid punishment for her own actions. Thus, the evidence from Bentley had little probative value to show consciousness of guilt because Frazee had an equally powerful motive to prevent Lee and her supporters from giving false testimony – a motive consistent with a consciousness of innocence. Indeed, the author of the notes expressly states a desire to "defend" his "innocence" by preventing Lee, and those sympathetic to her, from giving false testimony. 11/15/19, p.128-29, 132-33. Thus, "the chain of

inferences derived from the prior act evidence is weak" to show consciousness of guilt as to the charged offenses. *Yusem*, 210 P.3d at 468.

The probative value of such evidence from jailhouse informants, who have disproportionate incentives to fabricate and falsely implicate cellmates, is further diminished due to its lack of reliability. *See On Lee v. United States*, 343 U.S. 747, 757 (1952) (calling the use of such problematic evidence a "dirty business" raising "serious questions of credibility"); *United States v. Cervantes–Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) ("It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence"); *United States v. Levenite*, 277 F.3d 454, 461 (4th Cir. 2002) (use of jailhouse snitch testimony creates "fertile fields from which truth-bending or even perjury [can] grow, threatening the core of a trial's legitimacy"); *State v. Marshall*, 882 N.W.2d 68, 82 (Iowa 2016) (discussing studies demonstrating that "jailhouse informants have played a significant role in convicting innocent persons," and concluding that the use of jailhouse informants "raises substantial questions of reliability"); *see generally* Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 Wake Forest L. Rev. 1375, 1376-77 (2014) (stating that no other evidence is "more intrinsically untrustworthy than the allegations of a jailhouse snitch").

Moreover, such evidence involves an extreme, inherent danger of unfair prejudice. The purpose of CRE 403 is to protect a defendant's constitutional right to a fair trial by excluding evidence which has an undue tendency to suggest a decision made on an improper basis, by, for example, injecting extraneous considerations "such as the jury's bias, sympathy, anger or shock." *People v. District Court*, 869 P.2d 1281, 1286 (Colo. 1994). Contrary to the trial court's determination, evidence of a defendant's "threats on witnesses can be highly prejudicial" because it "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause [a] decision on something other than the established propositions in the case") *United States v. Thomas*, 86 F.3d 647, 654 (7th Cir. 1996); see Covey, at 1375 (citing research showing that, even when made aware of an informant's incentives to falsely implicate the defendant, jurors "give such testimony far more weight than is due"). Here, given that Bentley was one of the State's final witnesses in a high-profile case, and his claim that Frazee sought to have him murder numerous prosecution witnesses, the prejudice was magnified. The trial court thus erred in failing to exclude this highly questionable and prejudicial evidence.

As previously discussed, the State's case was heavily dependent on the credibility of a single witness, Krystal Lee, whose credibility was suspect. Thus,

the State relied on the informant evidence in closing argument to argue that Frazee should be convicted because he "knew" he was guilty of the charges. 11/18/19, p.44. Under these circumstances, the State cannot show that the error was harmless.

VI. Even If The Jailhouse Informant Evidence Was Not Subject To Exclusion, The Trial Court's Refusal To Grant Frazee A Continuance To Give The Defense An Adequate Opportunity To Investigate And Meet The Belatedly Disclosed Evidence Was Reversible Error.

Standard of Review

Frazee preserved the issue, which is reviewed for an abuse of discretion. 11/14/19, p. 247-49; *People v. Hardin*, 2016 COA 175, ¶ 30.

Discussion

A. Applicable Facts

Confronted with the Bentley evidence, the defense requested a continuance of two weeks should the court find it to be admissible. Counsel argued that the continuance was necessary because the defense had not had an opportunity to investigate the newly disclosed evidence by, for example, reviewing the housing logs and interviewing jail personnel to investigate whether it was even possible for Bentley to have the types of communications he alleged to have with Frazee, or acquire the letters from him. Counsel also stated that the defense needed to investigate whether Frazee was making phone calls for Bentley, as he claimed, and

whether he had access to Frazee's property. 11/14/19, p.247-48. The defense also requested the continuance in order to investigate Bentley's purported ties with the prison gang, and obtain information concerning his history, including copies of his DOC records and convictions. *Id.*, p.248-49.

The court asked the prosecution to produce, by the next morning, evidence that Bentley and Frazee were housed in the same pod. *Id.*, p.249-50. However, the court stated it would only consider continuing the trial for a "day or two." *Id.*, p.250.

The next morning, a Friday, the court ruled that the evidence was admissible, and that the prosecution could call Bentley that day. *Id.*, 11/15/19, p.4-11. The court now denied *any* continuance beyond postponement of Bentley's cross-examination to Monday – which defense counsel rejected on the ground that such a delayed cross would weaken its effectiveness. *Id.*, p.11-13.

B. Law and Analysis

"No mechanical test exists for determining whether the denial of a request for a continuance constitutes an abuse of discretion." *People v. Roybal*, 55 P.3d 144, 150 (Colo. App.2001). Rather, the reviewing court must examine the circumstances of each case, including the reasons given for the continuance. *See People v. Hampton*, 758 P.2d 1344, 1353 (Colo. 1988). However, "an unreasoning

and arbitrary insistence upon a trial date in the face of a justifiable request for delay can amount to an abuse of discretion and … a violation of an accused's right to the effective assistance of counsel." *Id.* (citing *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983)). Denial of a continuance can also violate a defendant's constitutional right of confrontation and to present a defense. *See Krutsinger v. People*, 219 P.3d 1054, 1061 (Colo. 2009) (citing *Crane v. Kentucky*, 476 U.S. 683, 690–91 (1986)); U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25.

Here, the trial court gave no justification for denying the requested continuance, and refused to even delay the direct examination of Bentley until Monday so as to allow the defense to engage in immediate cross-examination after his direct testimony.[7] The prosecution, moreover, did not claim that the requested continuance would prejudice the State. By arbitrarily and unreasoningly insisting that the trial proceed without giving the defense sufficient time to meet this newly

[7] Defense counsel correctly argued that a delay in the cross-examination of Bentley would undermine its effectiveness. *See United States v. Inadi*, 475 U.S. 387, 410 (1986) (Marshall, J., dissenting) (noting that the "right to immediate cross-examination … has always been regarded as the greatest safeguard of American trial procedure"); *Phillips v. Neil*, 452 F.2d 337, 348 (6th Cir. 1971); *New York Life Ins. Co. v. Taylor*, 147 F.2d 297, 305 (D.C. Cir. 1944).

disclosed evidence, the court abused its discretion. *See People v. Stewart*, 2017 COA 99, ¶¶ 36-37 (court abused its discretion in denying continuance where "there were several justifiable reasons for the request and no perceivable prejudice to the prosecution in granting the request").

The error was prejudicial. The State relied heavily on Bentley's testimony and the letters purportedly written by Frazee. After Bentley testified, CBI agent Slater also testified at length, and as the prosecution's last witness, as to the contents of the letters set forth in Ex. 86, including reading portions aloud, identifying names and phone numbers, and offering his own interpretations as to the meaning of certain statements and references. 11/15/19, p.118-134. In closing argument, the prosecutor told the jury that the evidence from Bentley "demonstrates that Patrick Frazee knows he's guilty. He is conscious that he is guilty, because there's no other reason you want to kill all of the witnesses in the case." *Id.*, 11/18/19, p.44.

The error precluded the defense from being able to adequately investigate the belatedly-disclosed evidence, and so undermined its ability to effectively cross-examine the witnesses and challenge the authenticity and reliability of the letters. Defense counsel had little time to explore and investigate Bentley's history of inculpating cellmates, or present helpful evidence to the jury in assessing the

overall reliability and trustworthiness of jailhouse informant testimony. *See, e.g.*, *Stewart*, ¶ 37 (denial of continuance was prejudicial where the delay might have helped defense acquire testimony that would have helped corroborate his theory of defense); *cf. State v. Leniart*, 215 A.3d 1104, 1138-39 (Conn. 2019) (trial court erred in denying helpful testimony of defense expert about questionable reliability of testimony by jailhouse informants as a class). Indeed, after Slater's detailed testimony repeating statements in the letters and offering opinions as to their meaning and how they were inculpatory, defense counsel did not even cross-examine him at all. Under these circumstances, where the court enforced an arbitrary, blanket denial of any reasonable continuance to meet this newly disclosed evidence, the error was prejudicial and undermined the fairness of the proceedings.

VII. Repeated, Flagrant, And Egregiously Improper Misconduct By The Prosecutor Deprived Frazee Of His Due Process Right To A Fair Trial By An Impartial Jury.

Standard of Review

Prosecutorial misconduct amounts to plain error if, alone or cumulatively, it undermines the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the jury's verdict. *Domingo-Gomez v. People*, 125 P.3d 1043, 1053 (Colo. 2005).

Discussion

A prosecutor's responsibility "differs from that of the usual advocate; his duty is to seek justice, not merely to convict." *Young v. United States*, 481 U.S. 787, 803 (1987); *see Berger v. United States*, 295 U.S. 78, 88 (1935) (prosecutor may "strike hard blows," but not "foul ones"). Unethical remarks are particularly harmful to a defendant's right to a fair trial by an impartial jury because they carry "the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985); *People v. Davis*, 280 P.3d 51, 52 (Colo. App. 2011); *see* U.S. Const. amends. VI,XIV; Colo. Const. art. II, §§ 16,25; *Harris v. People*, 888 P.2d 259, 267 (Colo. 1995).

During the course of Frazee's trial, multiple instances of prosecutorial misconduct undermined his right to a fair trial by an impartial jury.

Voir Dire

The State's misconduct began early, before the presentation of evidence. During voir dire, the State devoted a large portion of its time to improper examination of potential jurors designed, under the guise of eliciting information, to indoctrinate the jurors to the State's point of view and conception of the law. Specifically, the prosecutor sought to indoctrinate the jurors to the view that

offering a witness a plea bargain in exchange for testimony incriminating the accused is not only a necessary law enforcement tactic, but a practice that "solves" the criminal case:

> [Prosecutor]: Do you understand one of the necessary things in law enforcement is to sometimes have a confederate plead guilty, get a stipulated sentence, in order to get information from them to solve the case? Do you understand that?"
>
> [Prospective Juror L.]: Yes.
>
> [Prosecutor]: You've heard of that before? Is that a new concept to you?
>
> [Prospective Juror L.]: You -- you're talking about a plea bargain?
>
> [Prosecutor]: Yeah. Is that a new concept to you –
>
> [Prospective Juror L.]: No, it's not.
>
> [Prosecutor]: -- that sometimes plea bargains are given in order to get information to find other defendants?
>
> [Prospective Juror L.]: It's not new to me, no.
>
> [Prosecutor]: Ms. [T.], new, to you?
>
> [Prospective Juror T.]: No.
>
> [Prosecutor]: Ms. [C.], is that a new concept to you? Have you ever heard that concept before, of giving a – a necessary tool of law enforcement and prosecution is to give a confederate -- have them plead guilty to a particular charge, stipulate to a sentence, and demand information from them?
>
> [Prospective Juror C.]: No, it's not new to me. I'm familiar with it.

[Prosecutor]: Is that a new concept to anybody?

11/1/19, p.33-34.

It is well-settled that the only proper purpose of voir dire examination "is to determine the bias or prejudice of a potential juror." *People v. Shipman*, 747 P.2d 1, 3 (Colo. App.1987). It is therefore improper for a prosecutor to use voir dire as a means of indoctrinating jurors to the party's point of view and conception of the law. *See People v. Saiz*, 660 P.2d 2, 4 (Colo. App.1982) (condemning the use of voir dire to select a jury "as favorable to the party's point of view as indoctrination through the medium of questions on assumed facts and rules of law can accomplish," and to "attempt to impart to the jurors a conception of the law highly favorable to one side of the case") (citation omitted); accord *People v. Krueger*, 2012 COA 80, ¶ 50; ABA, Standards for Criminal Justice Standard 3–5.3(c) (2d ed. 1980)).

Here, the prosecutor's voir dire discussion was designed to indoctrinate the jurors with the idea that the testimony of a witness who has been given a beneficial plea deal in exchange for incriminating testimony should be believed because this practice is a legitimate tool of law enforcement and such witnesses "solve" the case. The prosecutor thereby

sought to indoctrinate the jurors -- prior to hearing Krystal Lee's testimony for themselves and making their own credibility determination – to the view that her story would be truthful notwithstanding her deal with the State. The State also effectively conveyed to the jurors that it had verified Lee's story, and could guarantee her truthfulness, because her testimony "solved" the case. Given that Lee's testimony was the linchpin of the prosecution's case, a reasonable possibility exists that this obvious, flagrant misconduct contributed to the convictions.

Trial

In its direct examination of Krystal Lee, the prosecutor continued to engage in improper vouching of her claims. The prosecutor asked her if telling the truth was "the number one part" of her plea agreement before questioning her about whether had been "easy" for her to tell the truth:

[Prosecutor:] So when you come to Colorado on December 20th, did you provide a full statement?

A Yes, I did.

[Prosecutor:] And on December 21st, did you continue to provide a full statement?

A Yes, I did.

[Prosecutor:] And did you tell the truth?

A Yes, I did.

[Prosecutor:] Was it easy?

A (Shakes head.)

THE COURT: I'm sorry, was that a no?

A No, it wasn't easy.

[Prosecutor:] Is it easy to -- tell the truth in this courtroom?

A No.

[Prosecutor:] Why is it hard?

(Pause.)

A It's hard.

[Prosecutor:] It's just hard?

A (Nods head.)

11/7/19, p.8-9.

The prosecutor thus did not merely question Lee about the provision of her plea agreement calling for her to tell the truth, but sought to impress upon the jury the belief that her testimony was truthful because it was "hard" for her to give it. Further, given the prosecutor's prior discussion in voir dire about how such plea deals are a tool for "solving" the case, the prosecutor necessarily conveyed to the jury that, despite the fact that she had

repeatedly lied to the police and changed her story only after being given a plea bargain that drastically minimized her criminal liability, the State had verified the truthfulness of her statements. This was patently improper. *See People v. Coughlin*, 304 P.3d 575, 583-84 (Colo. App. 2011) (prosecutorial use of "truthfulness" part of plea agreement "becomes impermissible vouching" when prosecutor indicates the State has verified the truthfulness of witness's testimony, amounting to a guarantee of the witness's veracity). For reasons previously discussed, there was a reasonable possibility that the obvious error contributed to the convictions.

Closing Argument

The prosecutorial misconduct continued in closing argument. First, the prosecutor called Frazee's explanation of events a "lie" before misstating the law by telling the jurors they could find KB was killed after deliberation solely from the evidence of the fire on the Frazee property. The prosecutor argued,

> What does "after deliberation" mean in this case? Lie. A lie. He'd been planning for months.
>
> ….
>
> And if you don't think the Defendant had a plan in advance to do this, then look at Kyle Ritchie and Sam Dygert, who were helping the Defendant, unknowingly. He manipulated them like he manipulates everyone else, to build a fire on his property, to drag a trough from the lower end of the property to

> a higher area that had never been in that spot before, to have Kyle Ritchie and Sam Dygert pile up pallets so he could burn things.

11/18/19, p.33-34.

The characterization of Frazee's statements as a "lie" was obvious, flagrant misconduct of constitutional magnitude. *See Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). The prosecutor's argument that, even if the jurors did not think Frazee had any "plan in advance" to kill KB, they could nonetheless infer "after deliberation" from the evidence of a fire, was a flagrant misstatement of the law. *See Stafford v. People*, 388 P.2d 774, 778 (Colo. 1964) (evidence that the defendant buried the body, repeatedly lied concerning the disappearance of the victim, went under an assumed name and, while awaiting trial, escaped from jail, was relevant to show consciousness of guilt but not premeditation and deliberation). Given that credibility was the key issue for the jury's consideration, there is a reasonable possibility that the prosecutor's improper opinions contributed to the convictions.

Next, the prosecutor improperly vouched for the testimony of Priest, who had repeatedly offered expert opinions vouching for the truthfulness of Krystal Lee:

> But it's [Krystal Lee] that told you what happened in this case. … [Lee] told you the amount of blood that was on that floor. *Jonathyn Priest. Do you believe Jonathyn Priest? He seemed to really know what he was talking about, explaining this case to you*.

11/18/19, p.69 (emphasis added).

By stating that Priest "seemed to really know what he was talking about" in "explaining this case to you," the prosecutor personally assured the jurors of Priest's veracity and expertise, and implied possession of outside information and experience with the witness which supported his testimony. *See Wilson v. People*, 743 P.2d 415, 418-19 (Colo. 1987); *People v. Jones*, 832 P.2d 1036 (Colo. App.1991); ABA Prosecution Function Standard 3-6.8(b) (Feb. 2015).

As discussed in Issue II, Priest was a highly experienced law enforcement officer, admitted as an expert on blood spatter and "crime scene reconstruction," from whom the prosecution elicited improper testimony that Krystal Lee – the prosecution's key witness -- told the truth. Under these circumstances, the prosecutor's argument vouching for Priest's testimony undermined the trial's fundamental fairness so as to cast doubt on the judgment's reliability.

Cumulative Effect

Even assuming arguendo that no single instance of misconduct, standing alone, mandates reversal, its cumulative effect constituted plain error necessitating reversal. *See e.g*. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25; *Wilson*, 743 P.2d at 419-21; *Jones*, 832 P.2d at 1038.

VIII. The Numerous Errors In The Aggregate Show The Absence Of A Fair Trial.

Standard of Review

The issue is a question of law and is reviewed de novo. *Howard-Walker v. People*, 2019 CO 69, ¶ 22.

Discussion

The Due Process Clauses of the United States and Colorado Constitutions require a new trial "when numerous errors in the aggregate show the absence of a fair trial, even if individually the errors were harmless or did not affect the defendant's substantial rights." *Id.*, ¶ 23 (quoting *Oaks v. People*, 371 P.2d 443, 447 (Colo. 1962)).

The numerous trial errors discussed above went directly to credibility, including that of Lee, the prosecution's key witness. Accordingly, even if none of

the individual errors require reversal, in the aggregate they show the absence of a fair trial.

IX. The Trial Court Erred In Refusing To Vacate The Felony Murder Count Where The State Failed To Present Substantial And Sufficient Evidence Of An Intent To Commit Robbery Being Formed Before Or Concomitant With The Alleged Homicide.

Standard of Review

The issue is reviewed de novo *See McCoy v. People*, 2019 CO 44, ¶¶ 2, 26.

Discussion

Due process of law requires the prosecution to prove the existence of each and every element of the charged offense beyond a reasonable doubt. *See* U.S. Const. amend. XIV; Colo. Const. art. II, §25; *In re Winship*, 397 U.S. 358 (1970); *Johnson v. People*, 2019 CO 17, ¶ 10. The State must present evidence that is sufficient in both quantity and quality. *See Jackson v. Virginia*, 443 U.S. 307 (1979); *People v. Gonzalez*, 666 P.2d 123 (Colo. 1983). A mere modicum of relevant evidence is insufficient, as is evidence requiring guessing, speculation, or conjecture. *People v. Perez*, 2016 CO 12, ¶ 25.

In the felony murder count, the State alleged the predicate offense of robbery, CF, p.647, which required presentation of substantial and sufficient evidence that Frazee formed the culpable mental state for robbery either before or concomitant with the homicidal act. *See* §18-3-102(1)(b), C.R.S.; *People v.*

Kittrell, 786 P.2d 467, 469 (Colo. App. 1989); *see also, e.g.*, *State v. Darris*, 648 N.W.2d 232, 237-239 (Minn. 2002); *State v. Buggs*, 995 S.W.2d 102, 108 (Tenn. 1999).

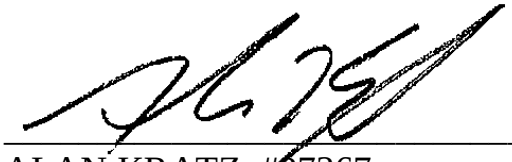
The State argued that Frazee committed felony murder because he took KB's cell phone, arguing that he had planned "in advance" to use the phone "to manipulate the evidence." 11/18/19, p.36.

No evidence was presented, however, of such a pre-existing plan. The State's star witness, Lee, testified that two *days* after the alleged homicide Frazee called and asked her to take KB's purse to make it "look like she had left on her own." *Id.*, 11/6/19, p.243. Lee further testified that it was after she cleaned up the condo and returned to the Frazee property that he formulated a plan to have her use KB's phone to mislead authorities. *Id.*, p.251-52, 266-67. Accordingly, the State's theory that Frazee had planned to take the phone before the homicide was based on nothing more than guessing, speculation and conjecture.

CONCLUSION

For the reasons and authorities set forth in Issues I-VIII, the judgment of conviction should be reversed. For the reasons and authorities set forth in Issue IX, the felony murder conviction must be vacated.

MEGAN A. RING
Colorado State Public Defender



ALAN KRATZ, #27367
Deputy State Public Defender
Attorneys for PATRICK FRAZEE
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on March 19, 2021, a copy of this Amended Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on L. Andrew Cooper of the Attorney General's office through their AG Criminal Appeals account.