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

La Plata County District Court
1060 East 2nd Avenue, Durango, CO 81301
Case Number 19CR486
Honorable Suzanne Fairchild Carlson

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,
v.

BRADLEY CLARK,
Defendant - Appellant.

Case Number: 22CA33

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REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I certify that his brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements in these rules. The brief contains 5585 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\ *Eric A. Samler*

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I. EVIDENCE THAT MR. CLARK SET A 2007 DUMPSTER FIRE AND WAS ARRESTED FOR IT IS NOT "MOTIVE" EVIDENCE. IT IS PROPENSITY EVIDENCE.

A. Using the evidence of Mr. Clark's alleged past arson to show an alleged "interest" in fires to prove that he committed the current arson is not independent of the intermediate inference prohibited by CRE 404(b).

The People contend on appeal (and the district court ruled) that the evidence of the alleged prior arson provided proof of "motive." But simply calling something motive does not make it motive. The simple act of labelling something one of the allowed uses specified in the rule[1] does not make the evidence admissible. Whether a defendant's prior act satisfied the *Spoto*[2] analysis depends not on the label it was given but on the purpose and function it served.

The People argue that allegations about a defendant's past arson can be introduced to raise an inference that he has an "interest" in fires to thus prove he committed the current arson with which he is charged. The question before the Court is whether the past alleged arson is evidence of "motive" or is evidence of "propensity."

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[1] CRE 404(b)(2) limits admissibility to such things as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."
[2] *People v. Spoto*, 795 P.2d 1314 (Colo. 1990).

As used at the trial, the allegations about the prior arson were pure propensity evidence.

Before addressing the People's flawed "motive" analysis, the People's recitation of the *Spoto* test must be corrected.

The People misunderstand *Spoto* – particularly its third prong.

There are three basic reasons a court must tread carefully before allowing evidence of a defendant's prior "bad acts." Evidence of those acts may result in the jury "penaliz[ing] him for his past deeds or simply because he is an undesirable person." *Masters v. People*, 58 P.3d 979, 995 (Colo. 2002). It may result in the jury "overvalu[ing] the character evidence in assessing the guilt for the crime charged." *Ibid*. And "it is unfair to require an accused to be prepared not only to defend against immediate charges, but also to disprove or explain his personality or prior actions." *Ibid*. (citation omitted).

CRE 404(b) addresses these concerns by prohibiting "[e]vidence of any other crime, wrong, or act…to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character." CRE 404(b)(1).

To put this rule into practice Colorado Courts have long used the four-pronged *Spoto* test: Is the evidence material; is it logically relevant; is the

relevance independent of the inference that the defendant acted in conformity with his bad character, and does it survive a CRE 403 analysis. *Spoto, supra,* at 1318.

The People compress the first three prongs into two: whether the evidence is relevant and whether it is being admitted "for reasons other than to cast aspersions on the defendant's character." AB p. 4.

The question is not, as the People suggest, whether the evidence is being admitted only to label the defendant as a "bad person." Such evidence standing alone is never relevant as it does not "hav[e] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." CRE 401. Nor is the question whether bad character evidence proves *too little*; it is precisely because it proves *too much* that it is forbidden. Evidence that someone committed certain acts in the past tends to raise an inference that the person committed the present act. The flaw is that it is an unfair inference.

The People's framework ignores the third-prong requirement that the proffered "bad act" evidence be independent of the bad character inference: "whether the logical relevance is independent of the intermediate inference, prohibited by CRE 404(b), that the defendant has a bad character, *which would then be employed to suggest the probability that the defendant committed the crime*

charged because of the likelihood that he acted in conformity with his bad character." *Spoto*, 795 P.2d at 1318 (emphasis added.). It is this emphasized language that will help distinguish between "motive" evidence and "propensity" evidence.

Even for evidence that is material, logically relevant, and suggestive of an inference independent of the prohibited inference, *Spoto*'s fourth prong remains as a significant hurdle. When (as here), the probative value is far attenuated and the risk of the impermissive inference great, admission of the evidence is error.

With this framework, this Court must reject the People's arguments.

The People's argument does not overcome *Spoto*'s third prong.

The upshot of the People's evidence is merely an attenuated series of inferences. They state that in 2007 Mr. Clark was accused of lighting a bag on fire, placing it in a dumpster, and then allegedly observing the aftermath from a distance. From this they ask the jury (and this Court) to infer that Mr. Clark is a "bad person" -- person who enjoys lighting illegal fires. They then urge a secondary inference. They argue this alleged "pure enjoyment of lighting illegal fires" (presumed from the prior act itself) provides a "motive" as to why Mr. Clark would have started this fire. They then urge a third inference: that because Mr.

Clark enjoys lighting illegal fires, he must have lit *this* illegal fire. The People dress this up as evidence of motive:

- Mr. Clark lit the prior illegal fire,
- Mr. Clark watched the prior illegal fire burn;
- Mr. Clark derived enjoyment from lighting and watching the prior illegal fire;
- Thus (the inference chain goes) he seems to enjoy lighting and watching illegal fires in general;
- He must have wanted to light another illegal fire and watch it burn;
- Because he enjoys lighting illegal fires and watching them burn, he probably lit this illegal fire.

Their argument is that because Mr. Clark committed arson in the past, he committed this arson. But this is precisely what CRE 404(b(1) prohibits—using evidence of an alleged prior bad act (the 2007 arson) to prove bad character ("pure enjoyment of lighting illegal fires") to suggest he acted in conformity with this character trait when he started the fire here. **The logical relevance of the prior act is not independent of the intermediate inference prohibited by CRE 404(b).** To the contrary, the People are asking the jury to find that because he committed the prior arson, he must have committed this one.

Interposing the notion that a defendant enjoyed committing the prior act or intentionally committed the prior act does not make that prior act "motive evidence." It is not different than saying a defendant enjoyed committing a past robbery and was motivated by his desire for money, and then asking the jury to conclude that the defendant's desire for money proves motive in the current robbery.

This is not motive. It is propensity. The logical relevance is not independent of the impermissible inference that Mr. Clark had a particular character trait and that he acted in conformity with that trait. This is precisely what CRE 404(b)(1), *People v. Spoto*, and decades of cases from this Court and the Colorado Supreme Court prohibit.

The People's attempt to distinguish *Yusem v. People*, 210 P.3d 458 (Colo. 2009) not only falls short, but it also proves Mr. Clark's point. The People argue that the evidence in *Yusem* (the defendant's tendency toward aggression or bullying) was "far too general to constitute a "motive" in any real sense)(AB, p. 11 citing *Yusem,* at 467), but here, the prior arson incident showed a "predilection" to behave in a certain way which, they argue, is "separated from the improper inference that the defendant had a bad character." AB, p.13 (quoting *Yusem*). But

what is a "predilection" but a "predisposition, proclivity or propensity." https://www.thesaurus.com/browse/predilection.

There is no meaningful distinction between using a prior arson to argue

- "the defendant commits arson, as evidenced by the fact he committed a prior one, therefore he committed this one" and
- "the defendant ***likes to*** commit arson, as evidenced by the fact he committed a prior one, therefore he committed this one."

The People seem to acknowledge that the evidence does show a propensity to perform a particular act or act in a particular way and that in this case Mr. Clark acted in conformity with this character trait.[3] This differs greatly from the evidence in *People v. Clark*, 2015 COA 44 (gang affiliation) or *People v. Snyder*, 874 P.2d 1076 (Colo. 1994)(prior sexual assaults of the same underaged victim.) Thus, the probative value of the prior incident is (by the People's own admission) ***not*** independent of the intermediate inference prohibited by CRE 404(b)—namely that Mr. Clark has a particular character trait (deriving pleasure from "lighting bags on fire and watching that fire spread") and that he acted in conformity with that trait .

[3] According to the People "the evidence … provides the potentially only window into a crime's true psychological cause."

The People urge this court to treat as "motive" a defendant's "pure enjoyment" when he committed a prior crime. The People say this is equivalent to motives like vengeance or financial gain. AB 14. With no case-law support, they say that "the effect is the same making it more likely that Defendant caused the fire" AB, 14. This misses the point.

To begin with, the People's evidence doesn't satisfy the second *Spoto* prong or at best, barely does so. Proof someone lit and watched the aftermath of a dumpster fire proves nothing about "pure enjoyment." Evidence of why the person lit something, put it in a dumpster, and watched the police response is simply conduct and without more proves neither the motivation for that conduct nor the motivation for the alleged conduct here.

Second, even if somehow the prior conduct proved motive for the prior or for this crime, at best that would make the evidence relevant. *But relevance alone does not make the evidence admissible.* That would merely address the first two *Spoto* steps. The evidence still fails *Spoto* step three, because the relevance is not independent of the intermediate inference prohibited by CRE 404(b), i.e., that because Mr. Clark allegedly committed an arson in the past, he must be an arsonist, making it probable he committed this arson.

The People's argument is that because Mr. Clark did "A," he must have enjoyed doing "A." so he must be "B" and because he is "B" he must have done "C." They then denominate B as motive and conclude that because A proves motive and because motive is a permissible use of a prior act then the prior act is admissible. But what they call "motive" is really criminality or propensity. What their argument is that the prior incident proves that he is a criminal (an arsonist) and therefore he committed this arson.

This does not differ from saying that because of a past drug deal, the defendant is a drug dealer and that is why he committed the charged drug deal. That's what drug dealers do.

There is a reason "motive" (the reason someone does something) of this type should be treated differently than other "motives" such as vengeance or financial gain. Being angry with the victim of the crime and wanting revenge, or seeking financial gain is not a prior bad act. When vengeance is the motive, the inference that jury is being asked to draw is that because the defendant was angry with the victim, he committed a crime against the victim. When financial gain is the motive, the inference the jury is being asked to draw is that because the defendant was facing financial difficulties, he committed the crime to resolve those financial difficulties. Here, the inference to be drawn is that because Mr. Clark is an arsonist

(as proved by his alleged commission of a prior arson), he must have committed this arson. Distilled to its essence, this is pure and simple inadmissible propensity evidence.

The People's attempt to interject "motive" into the analysis cannot change the true nature of the propensity evidence. The evidence does not survive *Spoto*'s third prong and therefore does not even reach *Spoto*'s fourth prong. If it did, it would fail the test. The unfair prejudice – a decision based on an improper basis (the prior incident) -- is undeniable. See discussion, *infra*.

The cases cited by the People are not persuasive.

Masters v. People

The People, citing *Masters v. People,* 58 P.3d 979 (Colo. 2002), argue that evidence of the prior arson was admissible because, it explained "the seemingly inexplicable." *Id.,* at 991. But in *Masters,* evidence of the defendant's alleged motive was derived not from his prior acts but from his journal entries, written statements, and drawings. The issue was not an alleged prior act by Mr. Masters, but expert testimony about his writings and drawings, which supposedly provided an insight into Mr. Masters' thoughts and fantasies. The *Masters* Court reasoned that

> permitting Dr. Meloy to explain the relevance of fantasy to sexual homicides and identify examples of Defendant's written productions

> that fell within the five categories of rehearsal 'put into context the physical evidence surrounding the death of Ms. Hettrick and is valuable information that the jury is entitled to consider.' Without the testimony of a specialist in this area, lay jurors would be tremendously disadvantaged in attempting to understand Defendant's motivation for killing Ms. Hettrick.

Id. at 992. *Masters* is distinguishable. Here, the People were not proving motive; they were inferring the motive to commit a prior crime from the fact of its commission, and then asking the jury to use that prior conduct for an improper propensity purpose.

The *Masters* decision should serve as a cautionary tale to allowing such evidence to "explain the seemingly inexplicable." As it turned out, the testimony allowed in that case contributed to the conviction and decade-long incarceration of an innocent young man. See Opening Brief, p. 16, ftn. 2 (which the Answer Brief ignores). Perhaps the *Masters* Court should have heeded its own warning that the "jury [may] overvalue the character evidence in assessing the guilt for the crime charged" *Masters*, 58 P.3d at 995, citing *State v. Loebach,* 310 N.W.2d 58, 63 (Minn.1981).

People v. Delsordo

The People cite *People v. Delsordo*, 2014 COA 174, ¶14 but fail to acknowledge that the Court in *Delsordo* found the evidence inadmissible and reversed Ms. Delsordo's convictions.

Wagman v. Knorr

The People believe *Wagman v. Knorr*, 195 P. 1034 (Colo. 1921) is instructive as to the importance of motive evidence. That case helps explain what is motive:

> Motive is a state of mind; e. g., fear, love, jealousy, anger, hatred, apprehension of danger, nervous excitement. The previous relations of the parties to any transaction may have been enough to excite motive, and, if they tend to do so, however faintly, they are relevant. In the admission or rejection of such evidence something must be left to the discretion of the trial court (*Com. v. Ferrigan*, 44 Pa. 386); the weight and effect of such evidence being, of course, for the jury. We cannot say that Wagman's previous conduct with plaintiff's wife and sister, under all the circumstances and in the peculiar position in which he found himself, had no effect upon his state of mind or conduct at the time of the encounter, and therefore cannot say that the admission of the evidence in question was error or abuse of discretion.

Id., at 1035.

This reinforces Mr. Clark's point. Motive explains why a person did a particular thing at a particular time. Propensity evidence explains why in general a person might do a particular thing.

State v. Crumb and United States v. Goodwin

Neither *State v. Crumb*, 649 A.2d 879 (N.J. Super. Ct. App. Div. 1994)(racial bias as motive) nor *United States v. Goodwin*, 457 U.S. 368, (1982) (addressing whether a presumption of prosecutorial vindictiveness was justified) advance the

People's argument as to why here the prior incident was admissible for a proper purpose.

United States. v. Cunningham

The passages the People cite and quote from *United States v. Cunningham,* 103 F.3d 553, 556 (7th Cir. 1996) is incomplete and misleading. Right after the passage quoted by the People, the *Cunningham* Court stated that "the greater the overlap between propensity and motive, the more careful the district judge must be about admitting under the rubric of motive evidence that the jury is likely to use instead as a basis for inferring the defendant's propensity, his habitual criminality, even if instructed not to." *Id.*, at 556–57.

The *Cunningham* Court cites *State v. Carty,* 644 P.2d 407, 412 (Kan. 1982), an arson case in which the Kansas Supreme Court stated the obvious—"One's disposition or propensity to commit a crime is not a material fact for which other crimes evidence is admissible; to the contrary, the statute expressly declares that such evidence is inadmissible for that purpose." In *Carty,* the defendant had stated to the police that he may have started a prior fire because he was depressed. The Court concluded that

> The issue here was whether or not Carty set the two fires charged, not whether he was depressed or exhilarated, sad, or happy, when he did so. We conclude that motive was not substantially in issue, and that

> the trial court erred in admitting evidence of the arson in Texas for the sole purpose of establishing motive.

Id. at 412.

United States v. Awan

The People cite *United States v. Awan*, 607 F.3d 306 (2d Cir. 2010), but that case, which addresses what the government must prove for the terrorism enhancement to apply under the Sentencing Guidelines, has nothing to do with whether evidence of other acts was admissible. *People v. Cousins*, 181 P.3d 365 (Colo. App. 2007) (evidence of past acts of misogyny to proves animus toward women to explain current crime) falls into to the motive category and not the propensity category.

Bell v. People

Bell v. People, 406 P.2d 681, 685 (Colo. 1965), a case decided decades before the Rules of Evidence were adopted, concerned whether evidence of the defendant' crime spree that occurred just before his killing of a police officer was admissible to show the defendant motive for killing the officer. It is not persuasive nor relevant to the issue this Court must decide.

The People do not present a single case precedent (and undersigned counsel have found none) supporting their theory that *Spoto*'s third prong can be circumvented by arguing the inference that a prior crime proves that the defendant

enjoys committing that type of crime, based on that inference, the jury can infer that he committed this crime.

B. That, based on Mr. Clark's prior arson arrest, the police believed he had a propensity to commit arson did not somehow make the evidence admissible. It is still propensity evidence prohibited by CE 404(b) and it is still inadmissible under CRE 403.

The People seem to argue that Mr. Clark's arrest for the 2007 incident was admissible to explain why the police focused on Mr. Clark as a suspect.[4] The People argue it was admissible as rebuttal because the defense criticized the police investigation. These arguments fail. The arrest is inadmissible for the same reasons that the underlying facts were inadmissible.

Police cannot testify they arrested a defendant because he had committed the same type of crime in the past. It doesn't matter that the defense attacked the police investigation: the answer can never be that the police failure to investigate was excusable because the defendant is a known arsonist with a prior arson arrest. And the People do not cite a single example where propensity evidence of a prior arrest was admitted on their theory and upheld on appeal.

The People's citations do not further their cause:

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[44] The People's perception that Mr. Clark has not challenged evidence of the arrest, see AB, p. 24 n. 2, is incorrect. The Opening Brief's CRE 404(b)/CRE 403 challenge to the admissibility of the alleged prior arson facts applies equally to evidence of the event and the arrest for that event. [See OB, p. 24-36].

- *People v. Welsh*, 80 P.3d 296 (Colo. 2003): Pre-arrest silence wasn't relevant and violated CRE 403. The CSC affirmed this Court's reversal of a conviction.
- *People v. Cobb*, 962 P.2d 944 (Colo. 1998): Discovery sanctions against the defense weren't appropriate. Conviction reversed.
- *People v. Orozco*, 210 P.3d 472, 477-78 (Colo.App. 2009); *People v. Victorian*, 165 P.3d 890 (Colo.App. 2007); *People v. Heredia-Cobos*, 2017 COA 130: Child sex assault cases in which the defense was that the alleged events were made up. Prior acts admissible under §16-10-301(1), which recognizes "a greater need" to admit evidence of a defendant's other sexual acts and finds that "normally the probative value of such evidence will outweigh any danger of unfair prejudice."

None of the People's cases suggest that in a criminal case in which the defense attacks the police investigation, the police can testify that they suspected the defendant because she or he had a prior conviction or arrest for the same crime.

Citing non-CRE 404 (b) cases, the People suggest that CRE 403 favors the admission of evidence. *See, e.g., AB*, p. 25, citing *People v. Medina*, 51 P.3d 1006,

1017 (Colo. App. 2001)(concerning admission of photographs of the deceased in a murder case) and *Monfore v. Phillips*, 778 F.3d 849 (10th Cir. 2015)(a medical malpractice case about the patient's tobacco and alcohol use).[5] That is merely a reiteration of the generic abuse of discretion standard that says nothing about admission of the evidence here: that police believed that Mr. Clark committed this offense because they knew he committed a prior arson.

"It would be difficult to conceive of an evidential hypothesis according to which prior drug dealing by the defendant could be meaningfully probative of either a lack of … incompetence or perjury on the part of the police, and none was offered by either the prosecution or the court. Quite the contrary, an awareness that the defendant was known to be a drug dealer would arguably suggest that the police had a reason to believe him deserving of punishment, whether the evidence in this case was sufficient or not." *People v. Williams*, 2020 CO 78, ¶23. That the prior incident was used to shore up the police investigation does not dislodge the CRE 404(b) and CRE 403 challenges to this conviction.

[5] The People also cite a plea bargain case containing no issue under either Rule 403 or Rule 404(b). *United States v. Fonseca*, 49 F.4th 1, 10 (1st Cir. 2022).

C. This Court should reject the "background of investigation" and "Rule of Completeness" theories to (1) O'Toole's testimony about her belief that Mr. Clark was guilty because he had a prior arson arrest and (2) testimony about and admission of the arrest affidavit.

On appeal, the People do not defend the evidence on the general "background of police investigation" theory. See OB, pp. 24-30. They argue only that admission was justified because of the defense cross-examination.

Evidence that Mr. Clark had a prior incident and the police and court therefore legitimately believed that meant he committed this incident was not made admissible by counsel's questioning about other aspects of the police investigation or asking about other statements in the arrest affidavit. Counsel did not ask whether police knew about the prior incident.

The portions of the transcript cited in the Answer Brief show a cross-examination about the videos, whether and when O'Toole reviewed them, and similar topics. Evidence completing that topic would have had to be specific to that issue – when and whether the Detective reviewed the videotapes, and what they revealed. Evidence that Mr. Clark committed a prior arson (or that police believed he had) does not "complete" the questioning about the videotapes. As defense counsel argued, if the material admitted under CRE 106 were about the video, that

would fall within CRE 106, but this testimony and evidence did not. See Tr. 8/24/2021, p. 643:8-14.

It was the trial court and prosecutor – not the defense – who broadened the topic to whether there had "sort of been a fraud on the Court." Tr. 8/24/2021, p. 283:10-12, 287:21-24, 294-295; Tr. 8/25/2021, p. 10:14-17. The defense was trying to paint a picture of shoddy police work in certain areas, but Mr. Clark's prior record was *not* one of those areas.

On appeal, the People urge this Court to adopt a rule that the "tenor of cross-examination" can make admissible the police's belief that the defendant's propensity means he probably did this offense. The 29-year-old Sixth Circuit case supports Mr. Clark, not the People. (AB, p. 34, citing *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 729 (6th Cir. 1994)). The Sixth Circuit ruled that plaintiff's cross-examination of one expert (Heaslip) on essentially every topic in Heaslip's report justified admission of the complete report, but as to the second expert (Morgan), only portions of the report were admissible. The Court limited application FRE 106 to the two specific statements in Morgan's report that had been inquired into on cross-examination. Four additional statements in the Morgan report were not "within the scope of plaintiff's cross-examination and …. do not appear to have been admissible even for a limited purpose." *Id.,* at 730.

The People fail to cite a single case making a defendant's past criminal record admissible simply because the police investigation is challenged. The People's proposed end-run around CRE 404(b) should be rejected.

The testimony and arrest affidavit exacerbate the CRE 404(b) and CRE 403 errors inherent in admission of the evidence about the prior incident. They add details. More important, they legitimize using the evidence for propensity. The testimony and affidavit show jurors that the police and the court issuing the arrest warrant all believed that Mr. Clark was guilty because of his propensity. Any reasonable juror would believe that it was okay to use this evidence and testimony in the same way.

D. Any marginal probative value of the attenuated inferences that a prior arson might show an alleged "interest in fires" to prove Mr. Clark committed the current arson (or that the police believed he did) was far outweighed by the unfair prejudice.

" 'Rule 403 does much of the heavy lifting in the admissibility analysis by excluding other-act evidence that may be slightly probative through a non-propensity theory but has a high likelihood of creating unfair prejudice by leading a jury to draw conclusions based on propensity.'" *United States v. Rudolph*, 607 F. Supp. 3d 1153, 1159 (D. Colo. 2022)(*quoting United States v. Gomez*, 763 F.3d 845, 856 (7th Cir. 2014)). Such is the case here. Even if the Rule 404(b) evidence

about the prior dumpster fire "had relevance independent of a propensity inference, the proffered evidence nonetheless carries tremendous risk that the jury will impermissibly, despite any limiting instructions, assume that [the prior dumpster fire] mean[s] that he is an inveterate [arsonist]." *Rudolph*, at 1159.

The People argue that an appellate court can never find unfair prejudice under *Spoto* and CRE 403 if the jury receives a limiting instruction. AB, pp. 26-27. That is obviously wrong. The *ineffectiveness* of the instruction matters. The degree of the risk of misuse matters. Where, as here, there is no legitimate purpose (other than to show that police believed he was an arsonist and that's why this prosecution was brought), and there is no escape from the "damning innuendo" that courts have long warned about, a "limiting" instruction is no more effective here than in *Yusem* (limiting instruction given), *Kaufman* (limiting instruction given about evidence of other weapons), and other cases in which the trial court was found to have abused its discretion notwithstanding a contemporaneous instruction.

E. The incorrect admission of the 2007 incident (including O'Toole's testimony about it and admission of the search warrant affidavit containing the information) was not harmless and requires reversal.

Mr. Clark devotes five pages of the Opening Brief to his argument that the error could not have been harmless. See OB, pp. 31-36. The People, arguing only there was no error, mount no response and make no harmless error argument.

As outlined in the Opening Brief, there was substantial evidence presented about the 2007 incident (TR 8/25/21 680-709)(eyewitness testimony) and repeated references in closing arguments to the 2007 incident (TR 8/27/21 pp. 1279-80, 1311-1312), when the prosecutor implored the jury to consider the 2007 incident in deciding whether there was proof beyond a reasonable doubt of Mr. Clark's guilt. Under these circumstances, the error cannot be considered harmless. *See Delsordo*, ¶23 (holding that incorrect admission of other-act evidence was not harmless where the prosecution relied heavily on it.); *People v. Williams*, 2020 CO 78, ¶24.

Evidence of past criminality casts a "damning innuendo likely to beget prejudice in the minds of juries." *Rojas v. People*, 2022 CO 8, ¶22, 504 P.3d 296, 303 (internal citation omitted). Accord, *People v. Hamilton*, 2019 COA 101, ¶95. The evidence about the prior arson was devasting.

Mr. Clark need not show it is more likely than not that the error caused the conviction, but "only a probability sufficient to undermine confidence in the

outcome of the case." *People v. Casias*, 2012 COA 117, ¶63; *People v. Brown*, 2014 COA 130M, ¶6. He has done so. Because there is a reasonable probability that the error substantially influenced the verdicts, this Court must reverse the convictions. *People v. Williams*, 2020 CO 78, ¶24.

II. THE CONVICTIONS FOR ATTEMPTED FIRST-DEGREE ARSON AND SECOND-DEGREE ARSON MUST MERGE.

The People argue that because first degree arson requires that another's building or occupied structure be burned and that second-degree arson involves the burning of another's property other than another's building or occupied structure was not burned, "no set of statutory elements can satisfy both offenses." Citing *Page v. People*, 2017 CO 88, ¶¶9–11, they theorize that the offenses do not merge. AB p. 41. The People conclude this by comparing the elements of a completed first-degree arson with the elements of a *completed* second-degree arson. The People's argument misses the point.

The difference between first-degree arson and second-degree arson is what was burned, but here the claim is that Mr. Clark *attempted* to set fire to the City Market by setting the bags of chips on fire. An attempt is a noncompleted offense. Here, the "conduct constituting the substantial step toward the commission of the

offense" of first-degree arson was the lighting of the bags of chips on fire. If the burning bags of chips had caught the building on fire, there would have been a completed first-degree arson, not an attempted first-degree arson. Accepting the jury's verdict as correct, Mr. Clark attempted to burn the building of another (here City Market) by lighting property of another (City Market) which was located inside the building of another (City Market.) The Court in *People v. Rock*, 2017 CO 84 made clear that it "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." *Rock,* ¶17. The Court must also consider the charged conduct. *Ibid.* The Court in *Rock* concluded "[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.

The People are correct that the Court in *Rock* stated that "[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." *Rock*, ¶18. Here, though, the conduct was one distinct act—lighting a bag of chips on fire. All the elements of second-degree

arson (burning the person property of another) are subsumed within the attempted first-degree arson. Accepting the jury's findings, Mr. Clark took a substantial step toward burning a building or occupied structure belonging to City Market by lighting on fire personal property belonging to City Market.

C.R.S. § 18-1-408(1)(a),(5)(a), which provides that "one offense is included in the other … 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" lends direct support to both the Court's reasoning in *Rock, supra* and to Mr. Clark's argument here.

Mr. Clark was convicted of committing one act—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*, only one conviction can stand.

First degree arson is an F3 unless an explosive device is used. C.R.S. § 18-1-402. Thus, an attempt to commit that act would be an F4. The level of offense of second-degree arson depends on the value of the property involved. It ranges from a petty offense to a F2. C.R.S. § 18-1-403)(2). Here, both the second-degree arson

conviction and the attempted first-degree arson conviction were both F4's and thus for sentencing purposes it does not matter which offense remains after merger.

CONCLUSION

For the reasons stated in Issue I of the Opening and Reply Briefs, this Court should reverse Mr. Clark's convictions and remand for a new trial. If this Court does not do so, it must merge the criminal mischief conviction and the attempted first-degree arson conviction in the second-degree arson conviction.

Respectfully submitted this 3rd day of July 2023.

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CERTIFICATE OF SERVICE

I certify that on July 3, 2023, a copy of this Reply Brief was served through the Colorado Court E-filing System: Appellate Division, Attorney General's Office

s/ Eric A. Samler