CERTIFICATION OF WORD COUNT: 5,686

COURT OF APPEALS, STATE OF COLORADO Court Address: Colorado State Judicial Building 2 East 14th Avenue, Suite 300 Denver, Colorado 80203	
Appeal from the District Court, El Paso County Honorable Gilbert A. Martinez, District Judge Case No. 04CR5770, Division 10	
Plaintiff-Appellee: THE PEOPLE OF THE STATE OF COLORADO **Defendant-Appellant:** TODD WILLIAM NEWMILLER	▲ **COURT USE ONLY** ▲
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I. RESPONSE TO PEOPLE'S STATEMENT OF THE CASE

Brad Orgill was the possible killer under the defense theory. Substantial evidence supported that theory. To undercut that theory, the People minimize the fight between Brad Orgill and the victim, Anthony Madril, which occurred immediately before Madril died. The People also attempt to imply that Madril and Todd Newmiller confronted each other. But the record belies the People's position.

First, the People describe Orgill and Madril's conflict as a "brief fight," *see* Answer Brief at 3, but the record shows a violent fight. Orgill approached the pickup and immediately fought Madril. 15 R. at 58:5-59:9. Orgill got hit in the eye, fell down, then got up and started swinging. 15 R. at 59:14-61:1; Ex. 258 (photo of Orgill's black eye). Madril and Orgill threw punches, fell down, and "rolled" with each other on the ground. 12 R. at 103:21-105:2. Charles Schwartz said they were fighting hard in front of the truck, and he heard Madril yell, "It's on, let's go, Chaz, let's go, let's fight, let's rumble." *Id.* at 134:1-135:2, 135:25-136:2. As soon as Chisum Lopez got back in the pickup truck, within a half second, he and Schwartz heard the rear passenger tire pop. *Id.* at 100:25-101:4; 18 R. at

75:15-20. It is undisputed that Newmiller stabbed the tire. At that time, Madril and Orgill were fighting 8 to 10 feet in front of the pickup. 12 R. at 102:23-103:7. Schwartz saw Madril and Orgill fall and moved the pickup forward toward them. *Id.* at 106:2-4. Lopez said Orgill was 4 to 5 feet in front of the truck, lying on the ground with Madril. 18 R. at 76:17-77:8. Schwartz then pulled Madril into the truck and Madril said, "I've just been stabbed." 12 R at 106:2-7, 109:16-21. The record evidence is clear that Madril and Orgill were fighting hard in front of the pickup and immediately after that fight ended Madril told Schwartz he'd just been stabbed.

In contrast, there was no evidence of a confrontation between Madril and Newmiller. Newmiller was not engaged in or near Madril and Orgill's fight. 12 R. at 144:4-25; 18 R. at 72:12-16, 103:23-104:5. Lopez testified that "within a half second" of getting out of the truck, he was immediately confronted by Todd Newmiller. 18 R. at 92:10-19. He never saw Newmiller in a confrontation with or anywhere near Anthony Madril. *Id.* at 72:12-16; 103:23-104:5. Lopez said that while Todd Newmiller "was in his face," out of the corner of his eye he saw someone heading from the jeep toward Madril, who was on the driver's side of the

pickup. *Id.* at 97:22-98:3. Lopez and Newmiller squared off, but Lopez said Newmiller never threw a punch or otherwise touched him. *See id.* at 72:23-73:1. Thus, the record shows a violent fight between Madril and Orgill, but no confrontation between Newmiller and Madril.

The People also noted that when Orgill, Newmiller, and Michael Lee went back to Orgill's house, both Newmiller and Orgill "had a good amount of blood on them," and "Orgill thought that someone's 'nose had exploded on him.'" Answer Brief at 4. The People fail to mention that none of Newmiller's clothing had the victim's blood on it, while Orgill's did. 18 R. at 142:20-143:4, 137:8-138:3, 143:24-144:6; 16 R. at 138:12-140:24. The blood on Newmiller's jacket, which the state declined to test, but which the defense did test, was Newmiller's own blood, not the victim's. 19 R. at 86:15-25, 90:6-15. By contrast, the blood on Orgill's jacket and hiking boot was the victim's blood. 18 R. at 137:8-138:3, 143:24-144:6.

Because the record showed a violent fight between Madril and Orgill, and the victim's blood on Orgill, the remaining physical evidence took on much greater significance in the case. Therefore, it was critical for law enforcement to properly

preserve the physical evidence. Unfortunately, critical evidence was lost or destroyed, in violation of Newmiller's right to a fair trial.

II. SUMMARY OF ARGUMENT

Newmiller established that the substance on the knife was destroyed by state action, the substance possessed an exculpatory value that was apparent before it was destroyed, and he was unable to obtain comparable evidence by other reasonably available means. Therefore, the destruction of the substance violated due process.

Because some evidence supported the contentions raised in Newmiller's proposed theory of defense instructions, the court erred in excluding those contentions from the instruction given. In addition, those contentions did not unduly emphasize particular evidence, but instead provided the full theory of defense. Newmiller therefore was entitled an instruction that included those components of the defense theory.

The prosecutor's misconduct in closing arguments was neither fair comment nor fair response to the defense closing or opening statement. Instead, the prosecutor improperly accused defense counsel of misrepresenting the facts,

vouched for the credibility of witnesses, and inflamed the passions of the jury. Under the circumstances, the prosecutorial misconduct was plain error.

The trial court rejected a minimum sentence on the ground that Newmiller "took somebody's life, and that life can never be brought back." But in every second degree murder conviction a life has been taken. The fact of the victim's death is thus not a proper consideration in determining sentence. Therefore, the sentence rests on an improper consideration and must be vacated.

Finally, the cumulative effect of the trial court's errors requires reversal.

III. ARGUMENT

A. The destruction of evidence violated due process.

The People argue that Newmiller fails to satisfy any of the three prongs of the test to establish a due process violation for failure to preserve exculpatory evidence. *See* Answer Brief at 8-13. The People ignore the record and misconstrue Newmiller's arguments.

Under the three-part test, a due process violation occurs where (1) the evidence was destroyed by state action; (2) the evidence possessed an exculpatory value that was apparent before it was destroyed; and (3) the defendant was unable

to obtain comparable evidence by other reasonably available means. *People v. Enriquez,* 763 P.2d 1033, 1035-36 (Colo. 1988); *People v. Braunthal*, 31 P.3d 167, 173 (Colo. 2001). The record belies the People's position that Newmiller did not establish any of the three prongs.

First, the trial court concluded the evidence "certainly had to be destroyed by state action. They're the only ones who seemed to have had it after it was photographed." 5 R. (2/27/06 tr.) at 84:11-13. The People concede that "the substance disappeared from the knife while in the custody of law enforcement." Answer Brief at 11. But the People speculate, without any record support, that "the substance may have simply oxidized or chemically altered to non-detectable form by exposure to air in the envelope." *Id.* There is no basis for the People's speculation.

Instead, the record shows the substance was on the knife when Det. Richer examined it. In the afternoon of November 20, 2004, Det. Richer seized the knife from Newmiller's jacket pocket. 5 R. (2/27/06 tr.) at 12:9-23; 14 R. at 130:20-24, 131:24-132:22, 133:24-134:19, 137:11-19. Richer took the knife and other items seized from Newmiller back to the sheriff's office. 14 R. at 135:21-25. He

photographed the knife. 5 R. (2/27/06 tr.) at 13:17-24; Exs. 119-121. He put on rubber gloves to examine the knife. But he did not put paper or anything else underneath the knife to collect anything that might fall off. 5 R. (2/27/06 tr.) at 13:25-14:5. The knife was photographed lying on carpet, with nothing to preserve falling debris. *See* Exs. 119-121; Ex. KK; Envelope #6, Hearing Exs. 1, 3.

Det. Richer testified there was "some kind of substance sort of shellacked onto the blade." The substance appeared to "be from a liquid state." 5 R. (2/27/06 tr.) at 14:17-25. It was in higher concentration along the serrated edge and most dense near the hilt of the knife. *Id.* at 15:1-7. In his report, however, Richer described the substance as "various forms of debris and material," but did not use the word "shellacked." *Id.* at 15:20-16:1. He said the substance was very dark, but nowhere in his report did he say it was possibly blood. *Id.* at 16:9-19. He admitted that if something "looked like it was blood," he called it "blood" in his report. *Id.* at 19:10-15. For example, a knife found in the seat of Schwartz's pickup truck had a reddish-brown substance on it. Richer said it looked like blood. 14 R. at 164:12-25. In contrast, when describing the knife seized from Newmiller, he did not call the substance on it blood. *Id.* at 165:1-3.

Brad Orgill testified that when they wiped the knife with a tissue, he saw a flaky, black-type residue, "maybe the tire." 15 R. at 69:16-70:3.[1] He saw no blood or anything red. *Id.* at 114:9-115:12. There is no evidence in the record of any visible blood on the knife.

Det. Richer examined the knife a second time, with Det. Nohr, just before the knife was placed into evidence. 5 R. (2/27/06 tr.) at 17:20-25. The detectives looked at the substance and discussed what to do with it: "It's kind of shellacked on the blade. It's not coming off. We looked at that time to see whether or not we should take a sample of it. It was on there to such a degree that we didn't think we could do it without scraping the knife, so we left it alone." 14 R. at 176:10-15.

The substance was still on the knife when it was placed in evidence. *Id.* at 176:16-18. According to the detectives, the evidence remained sealed until it was turned over to CBI. *See* 16 R. at 54:9-21. The sheriff's office sent the evidence in the case to the CBI in early February 2005. *Id.* at 53:17-21. But on May 5, 2005, Rebecca Strub of the CBI notified Det. Nohr that one item was missing—the knife

[1] Det. Richer also testified that at the scene he saw "denigrating rubber from the tire," which he described as almost a "granular substance." 12 R. at 20:7-24. He could not tell whether the debris came from the inside or outside of the tire. *Id.* at 34:7-17. That debris was not collected. *Id.* at 34:20-25.

seized from Newmiller. Det. Nohr then personally transported the knife to the CBI. *Id.* at 53:22-54:12.

The knife was in the custody of law enforcement continuously from the time it was seized until Strub examined it at the CBI lab. *See* 5 R. (2/27/06 tr.) at 84:10-13. When Strub examined the knife, she found no trace evidence, no dark substance, debris, or residue. 5 R. (2/27/06 tr.) at 38:17-39:11; 45:3-10; 49:9-11. The substance thus disappeared while in police custody, between Det. Richer and Det. Nohr's examination of the knife and Strub's examination at CBI. The trial court thus concluded, "it certainly had to be destroyed by state action." *Id.* at 84:11-13. Accordingly, Newmiller satisfies the first prong of the *Enriquez* test.

Newmiller also satisfies the second prong. The evidence had an exculpatory value that was apparent at the time it was destroyed. The People argue there was no exculpatory value because the "detectives had no idea what the substance was, and thus had no reason to know whether it possessed inculpatory or exculpatory value." Answer Brief at 12. The People assert that "since it was undisputed that the defendant used the knife to stab the tire after Madril's stabbing, it is difficult to

discern what value evidence of tire rubber on the knife would have had." *Id.* The People fail to fully analyze the effect of the destroyed evidence.[2]

When Det. Richer examined the knife and saw the dark substance, he did not call it blood. He conceded that if something looked like blood, he called it blood in his report. 5 R. (2/27/06 tr.) at 19:10-15. Thus, the substance did not appear to be blood to him.

In the photographs, the substance does not appear at all to be blood. The clearest picture of the substance is Defendant's Exhibit KK. That photograph shows a dark grey to blackish substance that seems to reflect light. It has no red or reddish coloring whatsoever. *See* Ex. KK. The color of the substance stands in stark contrast to the blood found on the knife seized from the front seat of Schwartz's pickup truck. *See* Exs. 159-161; 14 R. at 199:14-200:6. The blood on the knife seized from the pickup is a reddish color and looks like blood. Richer called that substance blood. But that substance looks nothing like the dark

[2] The People argue "there was no suggestion that law enforcement acted in bad faith." Answer Brief at 12. But that argument assumes the destroyed evidence had no apparent exculpatory value. *See id.* at 10-11; *People v. Apodaca*, 998 P.2d 25, 30 (Colo. App. 1999). That is not the case. The evidence was exculpatory and therefore Newmiller need not demonstrate bad faith. *See Enriquez, supra.*

substance on the knife seized from Newmiller. *Compare* Exs. 159-161 *with* Ex. KK. Thus, the dark substance does not look like blood, a key fact the defense could have used at trial to show that Newmiller stabbed the tire but did not stab Madril. That fact alone demonstrates an exculpatory value that was apparent when the detectives examined the knife.

At the time they examined the knife, the police knew that witnesses claimed Newmiller said he stabbed the tire. The police knew the knife was suspected of being the murder weapon, but they also knew the knife had no visible blood on it (in contrast to the knife found in Schwartz's truck). They knew the puncture in the tire had no visible blood on it. They knew the pocket of Newmiller's jacket from where the knife was taken had no visible blood. The substance thus supported the defense theory that the knife was used to stab the tire, but not to stab Madril. That evidence is exculpatory, and the exculpatory value was apparent when the detectives examined the knife. Because the exculpatory value was apparent before, and therefore when, the evidence was destroyed, Newmiller satisfies the second prong.

Newmiller also satisfies the third prong because he could not obtain comparable evidence by other reasonably available means. The People argue that comparable evidence was available because "the defense was able to cross-examine the detectives and the CBI agents about the substance." Answer Brief at 13. That argument lacks merit. First, the substance was not on the knife when the CBI agents examined it.[3] Therefore, the CBI agents had no knowledge of the substance, and Newmiller could not effectively cross-examine them about the substance, other than to establish the absence of the substance on the knife when the agents examined it.

Second, cross-examining the detectives on the substance was not nearly as effective as showing the substance itself to the jury, so the jury could see the substance on the knife the prosecution claimed was the murder weapon and see that the substance did not look like blood. Det. Richer testified that he and Nohr left the substance on the knife, expecting it to be tested at the CBI. *See* 5 R. (2/27/06 tr.) at 32:16-22. The testimony the defense could obtain from cross-

[3] In addition, a CBI lab agent stabbed the tire with the knife, 16 R. at 85:5-11, further damaging the evidentiary integrity of the knife and any substance on it.

examination does not have nearly the persuasive effect of seeing the alleged murder weapon with no visible blood present.

The photographs of the knife are also a pale substitute for the substance itself. Two-dimensional photographs cannot reveal the three-dimensional detail of the substance. Nor do photographs enable the jury to take a closer inspection of the substance or view it at different angles and under different lighting. The photographs do not show what the substance was made of, or whether anything was underneath it.

Had the substance not disappeared, the defense could have shown whether any blood was found underneath or on top of the substance. The trial court recognized this problem. At the hearing on the motion to dismiss, the court asked defense counsel, "Don't you get to the same point by other comparable evidence even without the testing, at least halfway there if they believe the testimony of the witnesses?" 5 R. (2/27/06 tr.) at 73:9-11. The court then answered its own question: "We don't get the order [of the substance and the trace blood on the knife]." *Id.* at 73:13-15. Thus, though the trial court did not expressly address the third prong, its comments indicate it did not believe comparable evidence was

available. The defense lost the ability to determine the sequence of events, that is, whether the trace blood or the substance was deposited on the knife first. That sequence was critical to whether or not the knife was used to stab Madril. No comparable evidence was available to show that sequence.

In addition, the prosecution argued that Newmiller cleaned the knife. The defense lost the ability to refute that when the substance was lost. The defense could not show the jury what the material was or when or how it got on the knife, and therefore could not demonstrate that it was not cleaned.

The photographs of the knife taken by the CBI after the substance disappeared are of little, if any, use. First, their quality is so poor they provide no reasonable basis for comparison with the photographs taken before the substance disappeared. *See* Ex. 283. The three photographs are on a single page. The lighting is poor and the focus is poor. The pictures are not useful for either comparison or cross-examination because they lack the clarity necessary to effectively examine a witness about them. Second, the photographs provide no evidence about the substance because by the time the photographs were taken the substance had disappeared.

The substance itself was the critical piece of evidence, and without the substance, the defense suffered severe prejudice. Losing the substance meant the defense could not subject the substance to microscopic examination or forensic testing. The defense could not test the substance to determine exactly what it was, or to determine the presence or absence of blood in, on, or underneath the substance. Without the substance itself, the defense lacked a key piece of exculpatory evidence and also lost the ability to produce, through testing and analysis, additional exculpatory evidence. While the original photographs provide a view of the substance, that evidence is far from comparable to the substance itself. Nor is it comparable to having the knife with the substance on it to show to the jury or use to cross-examine witnesses. Therefore, comparable evidence was not available to the defense.

This case stands in contrast to *Braunthal*. In *Braunthal*, the destroyed evidence was a videotape of a bank teller station showing the defendant (another teller at the bank) with her hand in the cash drawer. The supreme court concluded that still photographs taken from the videotape were comparable evidence to the tape itself. 31 P.3d at 174-75. The still photographs served the same purpose as

those in the videotape, they just lacked the quality of motion. But they still visually depicted what transpired, and thus were comparable to the videotape. *See id.*

Here, the other evidence available is not comparable. The photographs showing the substance vary in quality and appearance. *Compare* Ex. KK (which was also Hearing Ex. 2) *with* Env. #6, Hearing Ex. 1. The photographs and cross-examination could not replace the substance itself. And because the substance disappeared before it could be tested, the defense completely lost the ability to test the substance for further exculpatory value. Accordingly, comparable evidence was not available, and Newmiller satisfies the third prong.

Because Newmiller satisfies the three-prong test, he has established a due process violation. *See Enriquez, supra; Braunthal, supra.* The proper remedy for that violation is dismissal, or, at a bare minimum, reversal and a re-trial at which the knife and any testimony about it are suppressed.

B. It was reversible error to reject the theory of defense instructions.

The People argue the trial court properly rejected Newmiller's proposed instructions because they contain assertions unsupported by the evidence or unduly emphasize particular evidence. While a trial court may refuse to give an instruction that is argumentative, unduly emphasizes particular evidence, or is unsupported by the evidence, *see People v. Merklin*, 80 P.3d 921, 927 (Colo. App. 2003), the refused instructions here did not fall into any of those categories.

As noted in the Opening Brief, the refused instructions set forth three additional points not covered by the court's instruction: (1) Todd Newmiller did not confess to stabbing Madril; (2) there was no visible blood on the knife when it was examined at Orgill's house; and (3) any blood that was discovered on the knife was transferred there from Brad Orgill.

The People argue it would have been inappropriate to include the defense position that the statement "I stabbed one of them" was a reference to stabbing the tire. According to the People, since defendant did not testify, there is no evidence of what the statement meant. *See* Answer Brief at 15. But the People ignore the supporting evidence, and fail to view the record in the light most favorable to the

defense. *See Cassels v. People*, 92 P.3d 951, 955 (Colo. 2004) (when considering whether a defendant is entitled to requested instructions, the court views the evidence in the light most favorable to the defendant).

Joel Newmiller testified that Todd Newmiller said, "Don't worry about it. I slashed their tire and I stabbed one of them." Joel perceived the statement as an effort by Todd Newmiller to calm him (Joel) down, and Joel said it in fact calmed him. 11 R. at 36:23-37:6, 96:11-15. Both Michael Lee and Brad Orgill denied hearing Todd Newmiller say he stabbed someone. Orgill remembered him saying something about stabbing a tire. And Jason Melick testified that he heard Todd say "don't worry." Viewed in the light most favorable to the defense, this evidence shows that Todd Newmiller confessed to stabbing a tire, not Anthony Madril.

In finding this component unsupported by the evidence, the trial court applied the wrong legal standard. The court concluded there was not "ample evidence to support it." 20 R. (3/15/06 tr.) at 104:6-13. But "ample evidence" is not the standard. Instead, a defendant needs only a "scintilla" of supporting evidence to entitle him to a theory of defense instruction. *See People v. Saavedra-Rodriguez*, 971 P.2d 223, 228 (Colo. 1998). There was more than a "scintilla" of

supporting evidence here, and thus the court erred in rejecting that component of the theory of defense instruction.

The People also contend that instructing on this component of the theory of defense inappropriately emphasized the evidence. Answer Brief at 15. But the trial court never concluded the tendered instructions unduly emphasized the evidence, so the People's contention finds no support in the trial court's findings. *See* 20 R. (3/15/06 tr.) at 103:20-104:24. The instructions did not "unduly emphasize" specific evidence, but instead simply provided the full theory of defense that Newmiller stabbed the tire but not Madril.

The trial court also erred in not including in its instruction the defense theory that no blood was visible on the knife when it was examined at Orgill's house, and that any blood on it was transferred from Orgill. Contrary to the People's assertions, record evidence supports both points, as noted in the Opening Brief, at 32-33. The defense instruction was crucial here, where the substance on the knife, which did not look like blood, disappeared. Including these points would not have unduly emphasized the evidence, but instead would have given the full theory of defense—a theory hampered by the destruction of key evidence in police custody.

Finally, the fact that defense counsel could argue its theory in closing argument does not remedy the failure to give a proper theory of defense instruction. Closing argument is not a substitute for a theory of defense instruction. Defense counsel can always argue its theory in closing argument, yet the law still requires a trial court to give a theory of defense instruction when any evidence supports the theory. *See Saavedra-Rodriguez, supra.*

Closing argument does not carry the legal weight of a proper theory of defense instruction. The jury instructions required the jury to follow the law as set forth in the instructions, not in the lawyers' comments. *See* 2 R. at 287 (Jury Instruction #1). Thus, the jury was told to follow the instructions, not the arguments of counsel. That defense counsel could argue the defense theory did not remedy the trial court's error in refusing to give a proper and complete theory of defense instruction, to which Newmiller was entitled. The trial court's failure was reversible error.

C. Prosecutorial misconduct was plain error.

Responding to Newmiller's argument that it was improper to accuse defense counsel of misrepresenting the facts, the People argue it is not always improper for

a prosecutor to accuse defense counsel of misrepresenting facts and that doing so is not the same as denigrating defense counsel. *See* Answer Brief at 19. But the People fail to acknowledge that here the trial court found the prosecution's statement to be improper. *See People v. Roadcap*, 78 P.3d 1108, 1114 (Colo. App. 2003). Immediately after the statement, the court interrupted, had counsel approach, and warned the prosecutor against saying the defense closing was a lie. 20 R. (3/15/06 tr.) at 79:8-80:2.

The People also note that defense counsel did not object to the comment. *See* Answer Brief at 19. But since the trial court *sua sponte* interrupted the prosecutor there was no need to object. And while it is true defense counsel did not ask for a curative measure at the bench conference, it was error for the trial court to fail to admonish the prosecution in front of the jury. From the jury's perspective, all that occurred was the prosecutor accused the defense of misrepresenting the facts; the trial court asked counsel to approach the bench; a bench conference occurred; counsel returned to their tables; and the prosecutor resumed his closing argument, without admonishment or comment from the court. The trial court did nothing to correct the misdeed the prosecution committed in

front of the jury. The court thereby left the prosecution's accusation unchallenged, to Newmiller's prejudice.

Next, the People claim the prosecution did not improperly vouch for the credibility of witnesses or express personal opinions of the witnesses' truthfulness. Instead, the People argue the prosecutor was simply drawing reasonable inferences from the evidence. *See* Answer Brief at 22-23. The People contend the prosecutor "did not say that he believed Orgill's and Lee's testimony, he merely commented on the circumstances that their testimony was truthful." *Id.* at 22. But contrary to the People's contention, the prosecutor crossed the line when he said, "How do you believe those two [Orgill and Lee]? *Because they're not exaggerating. They're not making stuff up after the fact."* 20 R. (3/15/06 tr.) at 27:9-11 (emphasis added). The emphasized quotation was a pure expression of the prosecutor's personal belief, not a comment on the evidence. It is the same as if the prosecutor said "I don't believe these guys are exaggerating. It's my opinion they are telling the truth."

The prosecutor again crossed the line in stating that Brad Orgill, the alternate suspect and key prosecution witness, "could have done a heck of a lot better job

[framing one of his friends], but he didn't. You know why? *Because he came in here and told the truth.*" 20 R. (3/15/06 tr.) at 90:4-8 (emphasis added). Had the prosecutor stopped after "but he didn't," the argument might have been fair comment. But the prosecutor went on to inject his own personal belief into the argument, saying in effect, "It is my opinion Brad Orgill came in here and told the truth." And the prosecutor did so without referring to any evidence of Orgill's truthfulness, relying instead only on his own personal belief. While the line between fair comment and improper expression of personal belief can be uncertain, the prosecutor crossed it here.

Nor was the prosecution's misconduct justified as a response to defense counsel's opening statement and closing argument. The prosecutor could argue the credibility of witnesses to rebut defense counsel's contrary arguments, but had to base his arguments on the evidence, not on personal opinion. Here, the prosecutor did not rely on the evidence, but instead his own personal opinion on the witnesses' credibility. His expressions of personal opinion were not necessary to the rebuttal and constituted prosecutorial misconduct.

Finally, the prosecution's last statement in rebuttal, calling Madril "our victim" and stating, "The sins in the dark by a dark man carrying a dark knife need to go and have some punishment for them," was highly improper. Contrary to the People's contention, the statement was not "oratorical embellishment." Instead, the prosecutor told the jury to punish Newmiller for his "sins." The prosecutor appealed to raw emotion and a sense of vengeance, and inflamed the passions of the jury in an emotionally-charged case. While the trial court did tell the jury to disregard the statement on punishment because punishment was up to the court, the court did not chastise the prosecutor or otherwise remedy the effort to inflame the jury.

The misconduct was particularly egregious because the bulk of it occurred in rebuttal closing, where the risk of improperly affecting or influencing the jury is greatest. *See Domingo-Gomez v. People*, 125 P.3d 1043, 1052 (Colo. 2005). Under the circumstances, the misconduct was plain error mandating a new trial.

The People also argue there was no misconduct in the failure to turn over, until the second day of trial, the November 2004 reports of Officers Shive and Lucky or the 911 tape. But the trial court found misconduct and sanctioned the

prosecution by not permitting Officer Shive to testify. That remedy, however, was inadequate to cure the prejudice. Officer Shive's reports included key witness interviews of Charles Schwartz and Phu Ha. *See* 3 R. at 620-26. By the time the prosecution turned over the reports, Phu Ha had already testified. The trial court's remedy thus did not fully cure the damage to the defense. In conjunction with the prosecutorial misconduct in closing argument, Newmiller was denied a fair trial.[4]

D. The trial court based its sentence on an improper consideration.

Contrary to the People's contention, the trial court sentenced Newmiller based on an improper consideration, namely that the defendant "took somebody's life." In all second degree murder convictions, the defendant has been convicted of "taking somebody's life." Therefore, that fact alone cannot be a factor for consideration in sentencing. Instead, it is a prerequisite to conviction. Had Madril

[4] Astonishingly, in September 2007, after the Opening Brief was filed in this case, Newmiller received additional discovery, specifically, Det. Frady's report of his first interview with Charles Schwartz, the driver of the pickup truck that Madril rode in, and a key witness at trial. The interview occurred November 20, 2004, and the report was written March 3, 2006, during the trial. The prosecution thus turned over the report nearly three years after the interview and a year and a half after the trial. Such late disclosure is inexcusable.

not died, there could be no second degree murder conviction. Thus, relying on that "factor" in determining sentence was improper.

In imposing a 31-year sentence, the court rejected a minimum sentence (16 years) *expressly because* the defendant "took somebody's life, and that life can never be brought back." 5 R. (5/24/06 tr.) at 132:3-6. The link between the court's discussion of "the taking of a life" and its rejection of a minimum sentence was direct and indisputable. The court thus rejected a minimum sentence for an improper reason, contrary to the General Assembly's authorization of a 16-year sentence as an appropriate sentence for the crime.

The People assert that "not all class two felonies carrying a 16 to 48 year sentencing range involve the death of another person, and it was entirely appropriate for the trial court to consider the nature of the offense and the harm caused in reaching the sentencing decision." Answer Brief at 29. But while the trial court may properly take into account the nature of the offense and harm caused, the court may not conclude that a minimum sentence is inappropriate simply because the prosecution has proven a necessary element of the offense. The trial court here could legitimately take into account the *nature* of Madril's

death, the circumstances surrounding his stabbing, and the like. The trial court could not, however, use the *fact* of Madril's death as a basis for rejecting a minimum sentence.

Sentencing is by nature discretionary and thus this court reviews only for an abuse of discretion. Applying an improper legal standard, however, can be an abuse of discretion. *See People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004). The trial court rejected out of hand a minimum sentence on a basis that was legally improper. On this record, this court cannot know whether the trial court would have imposed a 31-year sentence had it not concluded that "taking somebody's life" necessitated rejecting a minimum sentence. Because of that uncertainty, the sentence cannot stand. Criminal sentences, even in the presumptive sentencing range, must be based on appropriate considerations reflected in the record. *See People v. Roadcap*, 78 P.3d at 1114. Here, the trial court's sentence rested on an improper consideration, and therefore re-sentencing is required.

E. Cumulative error requires reversal.

Newmiller agrees that in order for there to be cumulative error, there must be more than one error by the trial court. But Newmiller disagrees that there was

no cumulative error here. Taken as a whole, the trial errors had the cumulative effect of denying Newmiller a fair trial. Under the cumulative error doctrine, reversal is required. *People v. Botham*, 629 P.2d 589, 603 (Colo. 1981).

IV. CONCLUSION

Todd Newmiller's conviction should be reversed and the case dismissed. At a minimum, Newmiller should receive a new trial at which the knife and any testimony about it are suppressed.

Respectfully submitted on this 16th day of November, 2007.

ISAACSON ROSENBAUM P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of November, 2007, a true and correct copy of the foregoing, was served, via United States first-class mail, proper postage affixed, addressed to the following:

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