

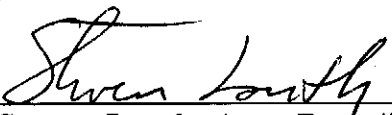
<p>COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80203-2115 (303) 837-3785</p> <hr/> <p>DISTRICT COURT, BOULDER COUNTY STATE OF COLORADO, HON. JUDGE THOMAS MULVAHILL, CASE NUMBER: 09CR1563</p> <hr/> <p>AUSTIN CHIRICO, Defendant- Appellant</p> <p>vs.</p> <p>PEOPLE OF THE STATE OF COLORADO, Appellee</p> <hr/> <p>Attorney: Steven Louth 507 Canyon Boulevard, Suite 105 Boulder, Colorado 80302 Phone Number: 303-442-2297 FAX Number: 303-938-1305 E-mail: steve@stevelouth.com Atty. Reg. #: 17968</p>	<p>σ COURT USE ONLY σ</p> <hr/> <p>CASE NUMBER: 2010CA1240</p>
<p>APPELLANT'S OPENING BRIEF</p>	

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:

1. The brief complies with C.A.R. 28(g). It contains 5,200 words.
2. 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 an entire document, where the issue was raised and rule on.



Steven Louth, Atty, Reg. # 17968

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STATEMENT OF THE ISSUES

I. A trial court reversibly errs when it instructs the jury as to matters that do not have a sufficient basis in the evidence. The first issue presented is whether the trial court erred when it instructed the jury about the right of a private person to make an arrest when a crime has been, or is being, committed by the arrested person in the presence of the person making the arrest.

II. A trial court reversibly errs when its instructions to the jury include a misstatement of law or are erroneous. The second issue presented is whether the trial court erred when it instructed the jury that a defendant is presumed to know a person could employ lawful force against him if the defendant committed a crime in the person's presence.

STATEMENT OF THE CASE AND FACTS

This case arises from an incident which took place in the early morning hours of August 30, 2009. On August 29, Jonathan Kanaber, the alleged victim in the case, spent the hours between 8:00 p.m. and 1:00 a.m. that evening binge drinking at a party near Pennsylvania Avenue and 10th Street in Boulder, Colorado. [Transcript of Jury trial, 04/26/10, pp. 10-11]. Mr. Kanaber testified at jury trial that he consumed four shots of Smirnoff Vodka and at least four 12 ounce beers at

the party. *Id.* At some point in the evening, specifically due to the fact he had been drinking, Mr. Kanaber decided to spend the night at the home. *Id.* at 12.

Around 1:30 a.m., Mr. Kanaber decided to go to sleep, so he went up the stairs of the two-level home. *Id.* Mr. Kanaber planned to sleep on the floor of a large closet. *Id.* at 13. The closet was located in a bedroom which had a window facing the home's front yard and Pennsylvania Avenue. *Id.* at 13-14. At approximately 2:30 a.m., Mr. Kanaber heard a noise coming from outside the home that he described as, "a breaking, crunching sound...." *Id.* Five to ten seconds after hearing the sound, Mr. Kanaber looked out the window. *Id.* at 15. However, Mr. Kanaber struggled to see anything. *Id.* at 14. There are no street lights in the area and, being approximately 2:30 a.m., it was very dark outside. *Id.* at 19. Also, Mr. Kanaber is nearsighted and was not wearing his prescriptive eyewear. *Id.*

Although he could barely see, Mr. Kanaber said he could make out that the fence was "tilted in a way it shouldn't be" and a person in a "black button shirt (was standing) in the vicinity." *Id.* at 14. Despite a written statement made on the night of the incident to the contrary, Mr. Kanaber stated under oath during his testimony that he never saw this person, or any person, kick the fence. *Id.* at 15-16.

Upon seeing the person standing near the tilted fence, Mr. Kanaber ran out of the house to confront the individual. *Id.* at 17. However, when Mr. Kanaber got

outside, he noticed there were actually four or more people standing in the area and more than one person was wearing a black shirt. *Id.*; [Transcript of Jury Trial, 04/27/10, pp. 74]. Mr. Kanaber stormed up to these individuals, started calling them profane names, and accused them of breaking the fence. [Transcript of Jury Trial, 04/26/10, pp. 65].

One of the individuals was cowering in some bushes adjacent to the sidewalk. *Id.* at 55. This individual was later identified as the Defendant, Austin Chirico. Mr. Kanaber grabbed Mr. Chirico by the collar of the shirt, got right into his face, and repeatedly called him a “fucking pussy.” *Id.* at 25; [Transcript of Jury Trial, 04/27/10, pp. 95]. Mr. Chirico tried to shrug off Mr. Kanaber’s grasp and walk away, but Mr. Kanaber continued to grab him. *Id.* at 95. Mr. Kanaber acknowledged that he was possibly singling out the one person who did not want a confrontation. [Transcript of Jury Trial, 04/26/10, pp. 66].

Somehow, after Mr. Kanaber grabbed Mr. Chirico’s shirt, they ended up on the ground wrestling. *Id.* at 28. Mr. Kanaber described it as, “basically just grabbing each other and trying to throw each other to the ground...and there were a few punches, but nothing really serious.” *Id.* at 29. Sometime during the tussle Mr. Kanaber sustained injuries to his head. [People’s Exhibits 13-19]. Mr. Kanaber assumed one of the people standing nearby kicked him in the head, but he was unsure. [Transcript of Jury Trial, 04/26/10, pp.33].

The altercation lasted between 10-15 seconds and was over almost immediately. *Id.* at 29. It is unclear what happened directly afterward, there is some debate as to whether Mr. Kanaber and a group of his friends followed Mr. Chirico down the street, or if they immediately returned to the house. [Transcript of Jury Trial, 04/27/10, pp. 56-57]. What is clear is that the Boulder Police Department was called and Mr. Chirico was charged with 2nd Degree Assault in violation of C.R.S.A. § 18-3-203(1)(g).

The case went to jury trial on April 26 and 27, 2010. At trial, Mr. Chirico sought to use the theory of self defense. [Chirico File, pp. 46]. After the Defense's case was presented, the People tendered a jury instruction that read:

A person who is not a peace officer may arrest another person when any crime has been or is being committed by the arrested person in the presence of the person making the arrest.

A private person acting on his own account is justified in using reasonable and appropriate physical force upon another when and to the extent that he reasonably believes it necessary to effect an arrest.

A person is considered to be "in the presence" when the arrestor observes an act which is in itself sufficiently indicative of a crime in the course of commission. [Jury Instructions, pp. 19].

The People sought to include this instruction because it believed there was evidence that Mr. Chirico committed a crime when he allegedly damaged the fence and this would have allowed Mr. Kanaber to use lawful force against him. [Jury Trial Transcript, 04/27/10, pp. 150]. Defense counsel objected to the inclusion of

this instruction, but was overruled and the instruction went to the jury. [Transcript of Jury Trial, 04/27/10, pp. 148:2-152:19].

Next, the prosecution tendered a jury instruction that read:

Because every person is presumed to know the law, it is presumed that the Defendant knew the person could employ lawful force against him if the Defendant committed a crime in the person presence. [Jury Instructions, pp. 20].

The prosecution justified including this instruction under *People v. Hayward*, 55 P.3d 803 (Colo. App. 2002). Again, Defense Counsel objected to including the instruction, but was overruled and the instruction was tendered to the jury. [Transcript of Jury Trial, 04/27/10, pp. 154:16-157:20].

Following closing arguments, the included instructions were read to the jury and jury deliberations began. While the jury deliberated, a question relating to the jury instructions in controversy arose. [Juror Questions, pp. 1]. The jury asked the trial court, “What is the obligation of a person making a citizens (sic) arrest? Does he need to identify himself or the action of citizens (sic) arrest?”

When the jury returned with a verdict, they found Mr. Chirico not guilty of Second Degree Assault, but convicted him of the lesser included offense of Third Degree Assault (C.R.S.A. § 18-3-204(1)(a)). [Chirico File, pp.2]. On June 11, 2010, Mr. Chirico was sentenced to 60 days jail and two years probation. [Chirico

File, pp. 63]. As a condition of his probation, Mr. Chirico was ordered to pay \$15,625.13 in restitution to Mr. Kanaber. *Id.* at 66.

SUMMARY OF THE ARGUMENT

All jury instructions must be supported by sufficient evidence. For a private person to make an arrest, the arrestee must be committing, or have committed, a crime in the presence of the person conducting the arrest. In this case, there was no evidence in the record that Mr. Chirico committed a crime in Mr. Kanaber's presence. Mr. Kanaber stated during his testimony that he never saw Mr. Chirico break the fence and there was no other evidentiary support.

Even if Mr. Kanaber witnessed Mr. Chirico commit a crime in his presence, there was no evidence presented to the trial court that he attempted to conduct an arrest. Therefore, it was an error for the trial court to instruct the jury about the right of a private citizen to make an arrest. The fact that the jury submitted a question specifically about a citizen's ability to conduct an arrest illustrates that this error was harmful and misleading.

Further, the trial court erred when it instructed the jury about a defendant's presumed knowledge that a person could employ lawful force against him if the defendant committed a crime in the person's presence. In tendering this jury instruction, the court relied on *People v. Hayward*. The application of *Hayward* to

this case was erroneous. *Hayward* dealt with an unlawful intrusion into a dwelling, where here, it is uncontroverted that Mr. Chirico never entered a dwelling or property of another. The entire incident occurred in a public street. The instruction was harmful and misleading because it misstated the law to the jury. This is apparent when looking at the question the jury submitted to the court regarding a citizen's arrest.

ARGUMENT

- I. The trial court erred when it issued a jury instruction stating a citizen may make an arrest when a crime has been or is being committed by the arrested person in the presence of the person making the arrest because the instruction was not based in the evidence.**

- A. Issue raised and ruled on.**

At jury trial, the People tendered a jury instruction regarding a person's right to make a citizen's arrest. [Transcript of Jury Trial, 04/27/10, pp. 147:25-148:1].

The proposed instruction read:

A person who is not a peace officer may arrest another person when any crime has been or is being committed by the arrested person in the presence of the person making the arrest.

A private person acting on his own account is justified in using reasonable and appropriate physical force upon another when and to the extent that he reasonably believes it necessary to effect an arrest.

A person is considered to be "in the presence" when the arrestor observes an act which is in itself sufficiently indicative of a crime in the course of commission. [Jury Instructions pp. 19]

In response, the Defendant argued the proposed instruction had no basis in the evidence and made a timely objection. [Transcript of Jury Trial, 04/27/10, pp. 148:2]. The trial court found there was minimal, but sufficient evidence that criminal mischief may have occurred, and tendered the instruction to the jury. [Transcript of Jury Trial, 04/27/10, pp. 151:10-152:19].

B. Standard of Review

If there is a contemporaneous objection when a jury instruction is given, the standard of review is whether the trial court erred and, if so, whether the error was harmless or affected the substantial rights of the defendant. *Lybarger v. People*, 807 P.2d 570, 581 (Colo. 1991). An instructional error is harmless only when a reviewing court can determine with fair assurance that the error did not substantially influence the verdict or impair the fairness of the trial. *Id.* “The People bear the burden of proving that the error was harmless beyond a reasonable doubt.” *People v. Melendez*, 80 P.3d 883, 887 (Colo. App. 2003), *affirmed* 102 P.3d 315 (Colo. 2004).

C. Discussion

- i. The trial court erred in issuing the citizen’s arrest jury instruction because Mr. Kanaber did not witness events that permitted him to make a citizen’s arrest under C.R.S.A. § 16-3-201.**

Whether an instruction should be given to the jury is a matter committed to the sound discretion of the trial court. *People v. Walden*, 224 P.3d 369, 378 (Colo.App.2009) (citing *People v. Renfro*, 117 P.3d 43, 48 (Colo. App. 2004)). However, the instruction still needs to be supported by sufficient evidence. *People v. Walden*, 224 P.3d 369, 378 (Colo. App. 2009) (citing *Cassels v. People*, 92 P.3d 951, 955 (Colo.2004)).

According to Colorado Revised Statutes section C.R.S.A. § 16-3-201, “a person who is not a peace officer may arrest another person when any crime has been or is being committed by the arrested person in the presence of the person making the arrest.” For a private person to use force to make an arrest, the person must have witnessed the arrestee’s alleged crime. *People v. Joyce*, 68 P.3d 521, 523(Colo. App. 2002). The “presence requirement” is met, for the purposes of C.R.S.A §16-3-201, if the person making the arrest observes acts which are in themselves sufficiently indicative of a crime in the course of commission. *People v. Olguin*, 528 P.2d 234, 236 (1974) (citing *U.S. v. Viale*, 312 F.2d 595 (2nd Cir. 1963)).

In his testimony, Mr. Kanaber did not state he witnessed a crime being committed, or that he witnessed acts which are in themselves sufficiently indicative of a crime in the course of commission. On the night of the incident, Mr. Kanaber went to the window because he heard the sound of wood breaking.

[Transcript of Jury trial, 04/26/10, pp. 13-14]. When Mr. Kanaber got to the window, he could only “vaguely” see outside due to the darkness. *Id.* at 14. It was 2:30 a.m. and there were no street lights in the area. *Id.* at 19. Mr. Kanaber also testified that he is nearsighted, and he was not wearing his prescriptive eyewear at the time of the incident. *Id.* According to Mr. Kanaber, he only saw from the window that the fence was tilted and a person in a black shirt was standing next to it. *Id.* at 14. At trial, Mr. Kanaber affirmed he had no recollection of seeing anyone kick the fence. *Id.* at 16.

The trial court found there was enough circumstantial evidence to find a crime had been committed. [Jury Trial Transcript, 04/27/10, pp. 151: 15-18]. Specifically, the court found there was evidence that “criminal mischief or damaging personal property” had occurred. *Id.* at 152: 7-10.

The foremost element of criminal mischief is that the defendant knowingly damaged the real or personal property of another in the course of a single criminal episode. Colo. Jury Instr., Criminal 17:01. Here, there is no evidence in the record that the fence was broken in the course of a criminal episode. In fact, the damage to the fence appears to be more consistent with a person falling into it. [Chirico People’s Exhibits, 1, 2]. Mr. Kanaber’s testimony does not describe criminal mischief, nor did he claim to have witnessed the crime. There is no indication that

anyone, let alone Mr. Chirico, knowingly damaged the fence during a single criminal episode.

Even if the evidence supported that criminal mischief occurred, it is not enough to justify including a citizen's arrest jury instruction. The crime needed to occur in Mr. Kanaber's presence. According to Mr. Kanaber's testimony, it is apparent that he did not observe acts sufficiently indicative of a crime in the course of commission. As mentioned above, Mr. Kanaber did not see who broke the fence, how it was broken, or if it was broken on purpose. Without evidence that Mr. Kanaber witnessed acts sufficiently indicative of a crime in the course of commission, it was error to give the jury instruction.

- ii. Alternatively, if Mr. Kanaber did witness acts indicative of a crime in the course of commission, there was no evidence Mr. Kanaber attempted to make an arrest.**

Even if Mr. Kanaber witnessed acts indicative of a crime in the course of commission, there still would have needed to be evidence that he attempted to make an arrest for the jury instruction to be supported by the evidence. Mr. Kanaber's actions were not actions traditionally associated with an arrest. An arrest occurs when a reasonable person would understand a situation to constitute a restraint on his freedom of movement to the degree which the law associates with a formal arrest. *U.S. v. Corral-Franco*, 848 F.2d 356 (5th cir. 1998); *People v. Turtura*, 921 P.2d 40 (Colo. 1996). When determining if an arrest has occurred,

some of the pertinent factors to consider are: the time, place, and purpose of the encounter; the words used by the person conducting the arrest; the person conducting the arrest's tone of voice and general demeanor in requesting the defendant to accompany him to the police station; the statements of the person conducting the arrest to others present during the encounter; and the manner in which the defendant was escorted to the police station. *People v. Pancoast*, 659 P.2d 1348, 1351 (Colo. 1982); *People v. Bookman*, 646 P.2d 924, 929 (Colo.1982).

Here, the confrontation between Mr. Kanaber and Mr. Chirico took place in a public street in the early morning hours, when it was pitch black outside. Mr. Kanaber's purpose for initiating the encounter was not to detain Mr. Chirico, but to confront him. [Transcript of Jury Trial, 04/26/10, pp. 61].

During his testimony, Mr. Kanaber never mentioned making statements associated with detaining Mr. Chirico or making an arrest that evening. In fact, the concept of citizen's arrest was never brought up during the trial, except in the jury instructions. The words Mr. Kanaber used during the encounter are not statements that most people would associate with an arrest. Although he mentioned he suspected Mr. Chirico and his group of damaging the fence and wanted them to fix it, most of Mr. Kanaber's words were inflammatory and accusatory. In fact, Mr. Kanaber recognized the words he used could incite violence. *Id.* at 65. Insults and threats are not words a reasonable person associates with a formal arrest.

Next, a reasonable person also would not associate Mr. Kanaber's tone of voice and demeanor with those of someone conducting an arrest. Mr. Kanaber described his emotions that night as "upset" and "angry" and said at one point he "spiked." *Id.* at 25. These emotions illustrate his volatile and aggressive demeanor and are not characteristics a reasonable person associates with a law enforcement officer.

A reasonable person would not relate the demeanor of an intoxicated person screaming profanities at them with a formal arrest. Mr. Kanaber testified, "I started off the night with a few shots, and then with two shots, and then had another two shots after about an hour later. Um, and then just had beer for the rest of the night, probably about one an hour." He also testified that he did not start drinking until 8:00 p.m. and continued to drink for the rest of the evening. Although, he did indicate that at 11:00 p.m. he just tried to have a beer in his hand. Given his testimony, Mr. Kanaber drank at least four shots of vodka and four or more beers in the six hours leading up to the altercation. On the night of the incident Mr. Kanaber weighed 170 pounds. [Transcript of Jury Trial, 04/26/10, pp.21]. According to ----, and given Mr. Kanaber's weight and the amount of alcohol he consumed, it is probable that Mr. Kanaber was legally under the influence of alcohol at the time the altercation took place. Mr. Kanaber's drunken demeanor and angry tone of voice during his encounter with Mr. Chirico do not point to a

formal arrest, nor did Mr. Kanaber even request Mr. Chirico accompany him to the police station.

Above all, Mr. Kanaber never informed Mr. Chirico he was conducting an arrest or planned on calling the police. Mr. Kanaber also failed to inform the other people in the street with Mr. Chirico that was his intention. Finally, Mr. Kanaber did not escort Mr. Chirico to the police station.

Considering the above factors and the evidence presented to the trial court, a reasonable person in Mr. Chirico's position would not believe he was under arrest. In fact, it is evident Mr. Kanaber did not even attempt to arrest Mr. Chirico. If Mr. Kanaber intended to conduct an arrest, he would have acted in accordance with the way a reasonable person views an arrest. Meaning, he would have done something that would make a reasonable person believe his freedom of movement was being restrained to the degree which the law associates with a formal arrest. Instead, Mr. Kanaber went outside to confront a person he suspected of damaging the fence. When he got out there he found a group of people. He then screamed obscenities at this group of people and, eventually, assaulted one of them and a fight ensued. [Transcript of Jury Trial, 04/26/10, pp. 25; Transcript of Jury Trial, 04/27/10, pp. 95].

In addition, to execute an arrest, "a person must be advised that he is being arrested and the reason therefore unless that person either knows or has reason to

know that he is being arrested and why.” *People v. Olguin*, 528 P.2d 234, 236 (Colo. 1974) (citing *Schindelar v. Michaud*, 411 F.2d 80 (10th Cir. 1969)).

In *Olguin*, security guards suspected two men of trying to steal a type-writer from a hospital. *Olguin*, 528 P.2d at 235. When the security guards stopped the two men, one of the men was carrying a large object covered by a coat. *Id.* The large object was identified as a type-writer. *Id.* After the security guards confirmed their suspicions, one armed security guard watched the suspects as they sat on a planter in front of the hospital while the other went inside the hospital and called police. *Id.* at 236. The security guards were in uniform, carrying weapons and wearing badges. *Id.*

The defendants argued the security guards’ action constituted an illegal arrest, but the court disagreed. *Id.* at 236. The decision stated a person must be advised he is being arrested and the reason therefore, unless that person either knows or has reason to know he is being arrested and why. *Id.* at 238. The court then ruled a lawful arrest took place because it was evident the guards intended the defendants remain, and the defendants had every reason to believe they were not free to leave. *Id.* at 238.

In our case, however, no evidence was presented at trial that Mr. Chirico knew, or had reason to know, he was being arrested by Mr. Kanaber, or why he was being arrested. Unlike *Olguin*, where two armed professional security guards

wearing uniforms and badges conducted the arrest, here an intoxicated 23 year old rushed at Mr. Chirico, yelling obscenities. Further, instead of taking place inside a hospital, this arrest took place on a darkened street at approximately 2:30 a.m. Finally, the security guard in *Olguin* detained the suspects by watching them sit on a planter until the police arrived; in our case, Mr. Kanaber got inches away from Mr. Chirico's face, grabbed him by the shirt collar, and continued to scream obscenities at him.[Transcript of Jury Trial, 04/26/10, pp. 25; Transcript of Jury Trial, 04/27/10, pp. 95]. In the heated situation present in this case, Mr. Chirico had more reason to believe he was being assaulted than arrested.

Since Mr. Chirico neither knew nor had reason to know he was being arrested, Mr. Kanaber, to effectuate a citizen's arrest, needed to advise Mr. Chirico that he was being arrested and the reason why. *Olguin*, 528 P.2d at 236. Mr. Kanaber never testified to doing this, and there is no evidence in the record, direct or circumstantial, indicating he advised Mr. Chirico of the arrest. Mr. Kanaber testified he told Mr. Chirico and his group to fix the fence. [Transcript of Jury Trial, 04/26/10, pp. 23]. He never indicated to Mr. Chirico or anyone else that he was restricting their freedom of movement because he suspected them of committing a crime.

The citizen's arrest instruction given to the jury at trial was not supported by the evidence presented at trial. Mr. Kanaber did not witness events that would

permit him to make a citizen's arrest under Colorado law. And even if Mr. Kanaber did witness criminal mischief, his actions do not meet the factors laid out that describe a successful formal arrest. In addition, Mr. Kanaber's actions would not lead a reasonable person to know or have reason to know he was attempting to make an arrest of Mr. Chirico. Therefore, the issuance of this jury instruction constituted an error by the trial court.

An error at trial is harmless if it "does not affect substantial rights" of the defendant. Crim. P. Rule 52(a). Where the error is not of constitutional dimension, the error "will be disregarded if there is not a reasonable probability that the error contributed to the defendant's conviction." *Tevlin v. People*, 715 P.2d 338, 342 (1986). "The proper inquiry in determining a harmless error question is whether the error substantially influenced the verdict or affected the fairness of the trial proceedings." *Id.*

The submission of the citizen's arrest instruction to the jury substantially influenced the verdict and contributed to Mr. Chirico's Third Degree Assault Conviction. The instruction factored into the jury's decision making. The jury specifically asked the trial court, "What is the obligation of a person making a citizen's arrest? Does he need to identify himself or the action of citizen's arrest?" [Chirico Juror Questions, pp.1]. This question shows that the improper instruction factored into the verdict because a citizen's ability to make an arrest weighed so

heavily into the jury's deliberation that they sought further guidance on it from the court. If one is left in grave doubt as to an errors impact on the verdict or the fairness of the trial, the conviction cannot stand. *DeBella v. People*, 223 P.3d 664, 667 (Colo. 2010). As a result, the conviction should be overturned and the case should be remanded for a new trial.

II. The trial court committed an error when it instructed the jury that “a defendant is presumed to know that a person can use lawful physical force against him when he commits a crime in his presence.”

A. Issue raised and ruled on.

At jury trial, the People tendered a jury instruction regarding the defendant's presumed knowledge that the alleged victim could use lawful force against him.

[Transcript of Jury Trial, 04/27/10, pp. 154:1-10]. The proposed instruction read:

Because every person is presumed to know the law, it is presumed that the defendant knew the person could employ lawful force against him if the defendant committed a crime in the person's presence. [Jury Instructions, pp. 21].

In response, the Defendant argued the proposed instruction was an attempt to extend the law and objected to the instruction's inclusion. [Transcript of Jury Trial, 04/27/10, pp. 154:16-20]. The trial court, relying on *People v. Hayward*, overruled the objection and tendered the instruction to the jury. [Transcript of Jury Trial, 04/27/10, pp. 157:14-20].

B. Standard of review.

If there was a contemporaneous objection when a jury instruction was given, the standard of review is whether the trial court erred and, if so, whether the error was harmless or affected the substantial rights of the defendant. *Lybarger v. People*, 807 P.2d 570, 581 (Colo. 1991). Instructional error is harmless only when a reviewing court can determine with fair assurance that the error did not substantially influence the verdict or impair the fairness of the trial. *Id.* Jury instructions are reviewed de novo to determine whether the instructions as a whole accurately informed the jury of the governing law. *Fishman v. Kotts*, 179 P.3d 232, 235 (Colo. App. 2007).

C. Discussion.

The purpose of jury instructions is to focus the jury on the specific issues and to provide it with the applicable law. *Meier v. McCoy*, 119 P.3d 519, 524 (Colo. App. 2004). Trial courts have a duty to correctly instruct juries on all matters of law. *People v. Garcia*, 28 P.3d 340, 343 (Colo. 2001). Jury instructions must be reviewed as a whole when determining whether they properly instructed the jury. *Meier*, 119 P.3d at 524. An instruction that misleads or confuses the jury constitutes error. *Id.*

At trial, the prosecution tendered a jury instruction tenuously based on a ruling in *Hayward*. The jury instruction stated, “Because every person is presumed

to know the law, it is presumed that the defendant knew the person could employ lawful force against him if the defendant committed a crime in the person's presence." [Jury Instructions, pp. 21].

Citing C.R.S.A. § 18-1-704.5, also known as the "make my day law", the court in *People v. Hayward* stated, "a trespasser who is subjected to lawful physical force by the owner or occupant of property or premises has no privilege to use physical force in self-defense because the privilege under section 18-1-704 applies only when the defendant faces unlawful force." *Hayward*, 55 P.3d at 806. Additionally, "because every person is generally presumed to know the law, see *Dikeman v. Charnes*, 739 P.2d 870 (Colo. App. 1987) it is presumed that defendant knew the victim could employ lawful force against him if he unlawfully entered her dwelling." *Id.*

The "make my day law," only applies when a person has made an unlawful entry into a dwelling. C.R.S.A. § 18-1-704.5(2). The decision in *Hayward* did not purport to address all the situations lawful force could be used against someone or a person's presumed knowledge of those situations. The case expressly dealt with unlawful entry onto property, and therefore, its reasoning should not have been relied on when forming jury instructions for this case.

Here, there was no evidence proffered to show Mr. Chirico entered a dwelling or property. The altercation took place in a public street. [Transcript of

Jury Trial, 04/26/10, pp. 17] Whereas in *Hayward*, the defendant went to his ex-wife's home, possibly brandishing a knife, with full knowledge a restraining order prohibited him from being at her residence. *Hayward*, 55 P.3d at 804. In our case, Mr. Chirico was hiding when Mr. Kanaber rushed at him, screamed profanities at him, got inches away from his face, and grabbed him by the shirt collar.

[Transcript of Jury Trial, 04/26/10, pp. 17, 65].

The difference in settings distinguishes these two cases. The right to be secure in one's home has long been recognized. *See* U.S. Const. Amend. IV. In fact, the Supreme Court of the United States has "stressed 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'" *Oliver v. U.S.*, 466 U.S. 170, 178 (1984) (citing *Payton v. New York*, 445 U.S. 573, 601 (1980)). Because the sanctity of the home is so ingrained in American tradition, a reasonable person would know when he unlawfully invades the sanctity of another's home, the person can use lawful force to protect the home. *See Hayward*, 55 P3d at 806. However, the same can not be said of a public street.

This erroneous instruction substantially affected the verdict. As mentioned in the previous argument, the jury specifically asked the trial court about a person's rights and obligations when making a citizen's arrest. [Juror Questions, pp.1].

Conclusion

For the foregoing reasons and authorities, Mr. Chirico respectfully requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted:

A handwritten signature in cursive script, appearing to read "Steven Louth", is written over a horizontal line.

Steven Louth, #17968

CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that on the 28th day of October, 2010, pursuant to C.A.R. 25, I delivered by hand, a true and correct copy of Appellant's Notice of Appeal to the following:

Colorado Court of Appeals
101 West Colfax Avenue, Suite 800
Denver, CO 80203-2115

Justina A. Eckhardt

CERTIFICATE OF MAIL DELIVERY

I HEREBY CERTIFY that on the 27th day of October 2010, pursuant to C.A.R. 25, I sent by United States mail, a true and correct copy of Appellant's Opening Brief to the following:

Office of the Attorney General
1525 Sherman Street
Denver, CO 80203

Justina A. Eckhardt