COURT OF APPEALS STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
District Court of Jefferson County Honorable Margie Enquist, Judge Case No. 05CR977	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. CONG T. LAM, Defendant-Appellant.	▲**COURT USE ONLY**▲ Case No. 06CA1525
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PEOPLE'S ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

It contains 9,493 words.

It does not exceed 30 pages.

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For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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STATEMENT OF THE FACTS[1]

On the morning of March 15, 2005, Cong Lam, Charles Slater, Kin Fong and Man Hao Luong, broke into the house of Thu Amy Ho ("Amy"), and Chong Nguyen ("Chong") (3/3/06[2],pp.41-42,72-74; 3/8/06,pp.8,63,83,145;4/5/06,p.18) and took jewelry and approximately $100,000 in cash at gunpoint (4/5/06,pp.13,39,43;4/6/06,pp.93, 204;4/17/06,p.75). Also living in the house were their three children, Jennifer, Victor, and Whitney, and Chong's mother (3/8/06,pp.32,138; 4/4/06,p.312;4/5/06,pp.8,11). When the intruders came into the house, Amy, Chong, and Jennifer were home sleeping (4/5/06,pp.16). Chong's mother was gone, and the two other children had already left for school (4/4/06,pp.312-13). Three of the four intruders were wearing masks (3/8/06,p.8;4/5/06,p.12). After entering Amy and Chong's bedroom, the intruders told Amy they were going to rob her and pointed a gun to her

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[1] Defendant does not comply with C.A.R. 28(a)(3) because he failed to cite to the record in his statement of facts and statement of the case (OpeningBrief,pp.6-8). *Cf. O'Quinn v. Baca*, 250 P.3d 629, 631-32 (Colo. App. 2010); *Castillo v. Koppes-Conway*, 148 P.3d 289, 291 (Colo. App. 2006).

[2] This brief will refer to the dates of the hearings.

mouth (3/8/06,pp.8,11;4/5/06,pp.12,19). One intruder put a gun to Chong's head, and another intruder hit him multiple times in the head and shocked him with a taser: Chong fell to the floor unconscious and the intruders duct taped his arms together (3/3/06,p.41;3/8/06,pp.37,63; 4/5/06,pp.18,115-19,172). The intruders duct taped Amy's wrist, mouth, and hair (3/8/06,pp.11-12,37;4/5/06,pp.19-20,209), took a Rolex watch, necklace, and ring from Chong's body, and jewelry from Chong and Amy's bedroom (4/5/06,pp.39,117). An intruder kicked in Jennifer's bedroom door, told her to "Get the fuck up," dragged her into her parents' bedroom, duct taped her hands behind her back, and duct taped her mouth shut (3/8/06,pp.15-16,36;4/5/06,pp.30,125,163,166,168, 208-09). She was told she would be killed if she called the police (4/5/06,p.166).

After Amy, Chong and Jennifer were tied up, the intruders ransacked the house looking for cash profits from the family's restaurant (3/3/06,pp.41;4/5/06,p.9). Amy refused to tell them where she had hidden any money, so defendant threatened to rape her, and dragged her through her house at gunpoint (4/5/06,pp.20,22). As a

result, Amy gave the intruders money that was hidden under the sink in the kitchen (3/8/06,p.14;4/5/06,pp.27,29). After finding that money, the intruders refused to leave and demanded more money (5/22/07,p.235). The intruders forced Amy and Jennifer from room to room looking while defendant continued to point a gun at Amy (3/8/06,pp.17-19;4/5/06,pp.33-34,181-85). When they could not find more money, defendant got on Jennifer's back, held a knife to her hand and threatened to cut off the fingers on Jennifer's left hand if Amy did not tell them where she had hidden more money (3/8/06,p.41; 4/5/06,pp.35-36,186-87). Because of a birth defect, Jennifer was missing her right hand (4/5/06,pp.30,158). When defendant began sawing, Amy gave defendant the money in her purse (4/5/06,pp.36,188). Soon after, defendant, communicating by radio with Ricky Hoang (3/28/06,p.16; 4/5/06,pp.26-27,177) and Tusheng Huang, learned that a car was in front of the Nguyen house, and left the house through the backyard (3/28/06,p.49;4/5/06,pp.40-41;4/6/06,pp.123-24). While leaving, shoeprints matching defendant and Slater's shoes were left in the snow

(3/3/06,p.51;4/10/06,pp.80, 90;4/5/06,p.194; 4/17/06,amended,pp.38,244-46,251,266; 4/18/06,pp.40,44).

Tusheng drove all four of the men to the Super 8 motel in Lakewood (4/6/06,pp.124-25). At the hotel, Hoang divided the money and jewelry among the six conspirators (Defendant, Charles Slater, Man Hao Luong, Kin Fong, Tusheng Huang, and Ricky Hoang) (3/8/06,p.271;3/28/06,p.49; 4/6/06,pp.127,130). Afterward, defendant and Charles Slater left for the airport (5/22/07,p.166; 5/23/07,p.253; 5/24/07,p.86), and Man Hao Luong, Ricky Hoang, and Kin Fong left for Reno in Hoang's car (3/28/06,p.50;4/6/06,pp.129-30).[3]

In the airport security line, defendant was stopped and his bag was searched: transportation security authorities found ski masks that matched the masks worn by the intruders, approximately $20,000, and jewelry (3/3/06,pp.78-79,81;3/8/06,pp.176-82;4/5/06,pp.72,123-24;4/6/06,pp.151,153,156). While being questioned by agents in the security area of the airport, defendant said he was traveling with Slater

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[3] Hoang was later found and arrested in Honolulu (4/17/06,amended,p.34).

(3/8/06,pp.184-86). Because defendant and Slater had both missed their originally booked flight, both men were re-booked onto a later flight (3/8/06,p.103). After defendant was allowed to leave the security area and proceed to his airline gate, authorities determined the jewelry matched the jewelry taken from the Nguyen house (3/3/06,pp.45-46). Slater and defendant were re-contacted at their gate, and Slater allowed agents to search him: authorities found bundles of money in his socks and shorts (3/8/06,p.187). Slater told authorities that the money came from the "tooth fairy" (3/8/06,p.190). The men were soon taken into custody (*see e.g.,* 3/3/06,p.48).

Later, it was revealed that, a few days before the home invasion, Slater, Fong, defendant, and Man Hao Luong traveled by car to Colorado from California in Hoang's car because they knew Hoang was organizing a burglary (3/8/06,p.186; 3/28/06,p.12; 4/6/06,pp.51, 54, 88). Hoang traveled to Colorado from California by airplane ahead of the rest of the group (3/28/06,p.23;4/6/06,p.79). He had learned about the money in the Nguyen house from Tusheng, who was Amy and Chong's

nephew's ex-wife's brother and lived in Colorado (3/28/06,pp.30-31;4/5/06,p.115;4/6/06,pp.86-88, 93).

STATEMENT OF THE CASE

As a result of the aforementioned events, defendant was charged with two counts of second degree kidnapping (F2), two counts of first degree burglary (F3), six counts of aggravated robbery (F3), robbery of an at-risk adult (F3), aggravated robbery-menace (F3), second degree assault (F4), theft over $15,000 (F4), conspiracy to commit second degree kidnapping (F3), and twelve crime of violence sentence enhancers (Lam,v.1,pp.1-10,234,237-38,270-78). Hoang was similarly charged (Hoang,v.1,pp.1-20,218).

Hoang and Defendant were tried together from April 3, 2006 to April 20, 2006 (*see e.g.*, Hoang,v.1,pp.278-89), during which defendant's attorney argued that defendant was never in the Nguyen house (4/18/06,p.202) and Hoang's attorney argued Hoang was not involved in the burglary, and was in Colorado to help Tusheng move to Hawaii (4/18/06,p.204). After trial, Hoang was convicted on all counts, except

second degree assault (4/20/06,pp.14-17), and defendant was convicted on all counts, except the jury found him guilty of third degree assault, as a lesser offense of second degree assault (4/20/06,pp.17-20). Hoang and defendant were thereafter each sentenced to a total of 180 years in prison (Hoang,v.1,pp.236-38;Lam,v.1,pp.290-92;6/16/06,pp.15-18).[4] This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court properly denied defendant's motions to suppress because:

(1) Defendant has no standing to challenge the search of his carry-on bag.

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[4] Luong was arrested after Hoang and Lam (4/17/06,amended,p.162). He was later tried and convicted of similar charges in Jefferson County case 05CR3824. In July of 2007, Luong was sentenced to 96 years in prison, and his case is currently pending on appeal in case number 07CA1604. Slater pleaded guilty and was sentenced to 50 years in prison in Jefferson County Case 05CR978 (*see also* 6/16/06,p.7), and Fong, after testifying against Luong, Hoang, and Lam, was sentenced to six years in prison in Jefferson County Case 05CR1256 (*cf.* 4/18/06,p.188). Tusheng was sentenced to twelve years in prison in Jefferson County Case 05CR3825.

(2) Even assuming defendant has standing, the officers had a reasonable suspicion to detain defendant and diligently pursued the investigation.

(3) Even assuming defendant has standing *and* was illegally detained before the search of his carry-on bag, he consented to the search.

(4) The photo array used for Jennifer and Amy's out-of-court identification of defendant was not impermissibly suggestive.

(5) Even assuming the photo array was suggestive, Amy and Jennifer's identification was reliable.

The court appropriately decided defendant had to wear concealed shackles during trial because the record indicates defendant posed a safety risk.

ARGUMENT

I. The trial court properly denied defendant's motion to suppress his statements and the evidence obtained from the search of his carry-on bag.

The defendant contends his detention at the airport was unreasonable and therefore all evidence obtained after his initial detention should be suppressed (OpeningBrief,pp.9,25).

A. Standard of review and preservation of the issue.

The People agree that, "a reviewing court, in the context of a suppression motion, defers to a trial court's findings of fact, but analyzes de novo the trial court's application of legal standards to those facts as a question of law." *People v. Kazmierski*, 25 P.3d 1207, 1210 (Colo. 2001).

The People agree that defendant preserved this argument (Lam, v.1,pp.159-62;3/8/06,pp.210-11), which was denied after motions hearings (3/8/06,p.223).

B. Relevant facts.

Defendant filed a motion to suppress the statements he made while at the airport (Lam,v.1,pp.159-60) and a motion to suppress the stop, contact and arrest of defendant at the airport (Lam,v.1,pp.161-63). The second motion asserted there was no reasonable suspicion to detain defendant and thus "all evidence obtained as a result must be suppressed as fruits of the poisonous tree" (Lam,v.1,p.162).

Motions hearings were held on March 3, 2006 and March 8, 2006.

Joseph Kautzman testified that, on March 15, 2005, he was working for the Department of Homeland Security Transportation Security Administration ("TSA") at Denver International Airport ("DIA") (3/3/06,pp.5-6) when he received a radio call informing him that an individual, later determined to be defendant, was stopped because he was carrying approximately $20,000 in cash (3/3/06,pp.6-7, 17). When Kautzman reached the screening points, defendant was sitting in the open "waiting area" (3/3/06,pp.7, 15). Kautzman explained the waiting area was "a curtain-type place...an open area" (3/3/06,p.8).

Kautzman testified that when he contacted defendant at 11:15 a.m., an airline coordinator was re-booking defendant on a 2:29 p.m. flight because he was about to miss his 11:35 a.m. flight (3/3/06,pp.16, 25,31). Kautzman remembered that when he approached defendant, he asked him why he was carrying so much money, to which defendant told him he always carries a large amount of money (3/3/06,pp.17-18). Kautzman testified that during his encounter with defendant, defendant never asked him to leave (3/3/06,p.35). He stated he interacted with defendant for approximately ten to twenty minutes (3/3/06,p.36).

Detective Kelly England testified that on March 15, 2005 he called Detective Driscoll-Rael who told him she had been called by TSA because an Asian male (defendant) traveling with a large amount of cash and jewelry was contacted (3/3/06,p.43). While England was talking to Driscoll-Rael, Investigator Greaser stood behind him and described the jewelry taken from the Nguyen house, which matched the description of the jewelry found in defendant's bag (3/3/06,pp.45-46). England remembered Driscoll-Rael told him defendant was traveling

with an African-American male, and Greaser told him an African-American man had been involved in the burglary (3/3/06,pp.45-46).

Police **Officer Jennifer Rowe** testified that she was assigned to the south screening area when a TSA employee informed her there was an Asian male, later determined to be defendant, in the screening area who had $20,000 cash in his bag (3/8/06,pp.89,93,104). She testified that when she learned of the cash, she made several phone calls to which DEA Agent Lee and Detective Driscoll-Rael responded (3/8/06,pp.102,105). Rowe testified that TSA alerted her defendant was in the security lane around 11:00 a.m. and she contacted him five minutes later (3/8/06,p.100). Rowe testified that when someone enters the airport with a large amount of cash, it is regular policy to ask questions about the origin of the money (3/8/06,p.104). She estimated that before she was alerted about defendant, he was with TSA officials, at a minimum, for as long as it would take for the cash to be found, for the screener to advise the supervisor, and for the supervisor to advise her (3/8/06,p.116).

She testified defendant was selected to go through the "selectee lane" and persons who go through the selectee lane automatically have their luggage searched (3/8/06,pp.94-96). She walked over to the area where defendant and his luggage were located and was shown the cash (3/8/06,p.93). She testified the area was stanchioned off by black metal poles connected by a ribbon (3/8/06,p.97). She remembered the area was private because it was protected from the general travel population by a fabric screen, but "still pretty open" (3/8/06,p.106). However, she told defendant he was free to go back into the main general seating area and, as a result, he moved into the general area (3/8/06,p.106). She testified she never told defendant he was not free to leave (3/8/06,p.107). She recalled he requested to proceed to his 11:35 a.m. flight at 11:30 a.m., but she told him he was going to miss the flight and she would arrange for him to be re-booked (3/8/06,p.107). As a result, he did not demand to leave (3/8/06,pp.107-08). She later had a customer service representative re-book him onto a 2:30 p.m. flight (3/8/06,p.103).

Rowe recalled that she asked defendant where he got the cash, and he responded he had won it gambling and had come to collect it (3/8/06,p.100). She asked him where he was going, and he said Oakland (3/8/06,p.100).

She testified that after she checked with Denver Police Department employees to see if they had knowledge of crimes that might fit with what they found in defendant's suitcase, and police could not determine anything, defendant continued to his re-booked flight (3/8/06,p.109). She estimated it took approximately 45 minutes to one hour to re-book defendant, and testified he was on his way to his next flight around 12:15 to 12:30 p.m. (3/8/06,p.103). However, shortly after defendant left for the concourse, Denver Police Department's robberies section contacted her because they had spoken to other counties in the metro area and had learned of the Nguyen home invasion (3/8/06,p.110).

DEA agent Mark Lee testified that on March 15, 2005, he received a call from the Denver Police Department indicating a passenger in screening was traveling with a large amount of cash (3/8/06,p.167). When he received the call, he drove 100 miles per hour

to the airport, and responded to DIA screening area in approximately 35 minutes (3/8/06,pp.167,195-96). He testified he reached DIA at approximately 12:15 and when he arrived he contacted the passenger, later determined to be defendant, who was in the "outside area of the screening" (3/8/06,pp.168-69). He described the outside area as unsecured and stated, "you can walk in and out of it freely as you want" (3/8/06,p.168). When he contacted defendant, Lee testified he was wearing casual clothing and had a visible badge exposed around his neck (3/8/06,p.170). He explained he contacted defendant because "unexplained large amounts of currency is usually a sign of a drug courier" (3/8/06,p.171). He testified that after he identified himself, defendant told him he was willing to talk to him, and defendant gave him his identification card (3/8/06,p.172). Defendant also gave him permission to search his bag (3/8/06,p.174). Lee recalled he did not promise defendant anything to receive consent to search the bag, did not have a firearm drawn, and did not threaten defendant in any way (3/8/06,p.182).

Detective Rael and Task Force Officer Scott Cooper helped him search and, in defendant's backpack, they found jewelry, three ski masks, gloves, currency, and clothing (3/8/06,pp.174-75,177). Lee also testified he found $3700 on defendant's person (3/8/06,p.175). Lee recalled the jewelry weighed about one pound and was "all in a ball in a bag," which he found "real odd" and that defendant told him he did not know the jewelry was in his bag but though it must be his girlfriend's (3/8/06,p.176). Lee remembered that when he took the ski masks out of defendant's bag, defendant attempted to move the ski masks between his legs to conceal them (3/8/06,p.178). Lee retrieved the masks and asked about them, to which defendant responded, "it's cold in Colorado" and said they were needed to keep his nose warm (3/8/06,p.178). Lee asked defendant why he needed three ski masks and Lam did not respond (3/8/06,pp.178-79). Defendant also told Lee he had won the cash in a football bet with a guy named "John," whose last name defendant did not know (3/8/06,p.179). Lee testified he was a football fan and knew the NFL Football league was not playing in March (3/8/06,p.179). As a result, Lee decided to seize the cash, and gave

defendant a receipt (3/8/06,pp.180-81). After giving defendant the receipt, Lee recalled that, for the first time, defendant asked if he was allowed to leave, and Lee told him, "Yes, you are" and released Lam (3/8/06,pp.182-83).

At the end of the hearing, **the prosecutor** argued, "there's a reduced expectation of privacy at [DIA] because someone is submitting their baggage for inspection by another individual," and argued the search of Lam's bag was consensual (3/8/06,p.207). He noted the only time defendant asked Lee if he was free to go, Lee answered affirmatively (3/8/06,p.208). Accordingly, the prosecutor argued defendant had consented to the entire encounter (3/8/07,p.208).

Defense counsel argued the initial detention of Lam was in violation of the Fourth Amendment and the Colorado Constitution and the evidence found in defendant's luggage and the subsequent statements and contact were "fruits of that initial contact" (3/8/06,p.209). She argued the length of Lam's detention, which was approximately two hours, was extraordinary (3/8/06,pp.210-211), there

was no reasonable suspicion to contact Lam, and the contact was not consensual (3/8/06,p.211).

The court found Lam was selected for intensive screening on a random basis resulting in the search of his belongings (3/8/06,p.215). As a result of this search, the screeners found a large amount of cash, and notified a supervisor who notified DEA, according to policy (3/8/06,p.215). The court found, "people in our airports, especially in this day and age, have a lesser expectation of privacy" (3/8/06,p.215). The trial court further found, "everyone in this courtroom is familiar with signs that indicate that your bags are subject to search, and those signs are posted all over the airport" (3/8/06,p.216). The court further found:

> The Court finds that Mr. Lam intended to access the airport. He knew that he would have to go through screening in order to do that. He made the decision to carry on this bad instead of checking it thereby consenting—well, whether it was searched either on his person or searched through the metal detectors at the screening after the—after the metal detectors, there certainly is consent to search at that point. So the court is going to find obviously there was nothing but a consensual search in their initial view of his bags.

(3/8/06,p.217). The court addressed the issue of whether it was reasonable for authorities to detain defendant to investigate the cash:

> The Court is going to find that [detaining Lam was] reasonable police behavior. Suppression is supposed to be a remedy to deter police contact that is inappropriate and should not occur, and the Court does not find that these screeners in contacting DEA and others, especially in light of the testimony we heard today and at the prior hearing that Denver is becoming quite a gateway for drugs and drug couriers, and that is certainly indicia that this person may be a drug courier with a large amount of cash. So that contact—I'm sorry, contacting DEA was reasonable for them to do. He was then—it's not clear to me actually how long he was going through this special screening and how long he was seated on the benches waiting for DEA. According to the testimony today he was being screened, that was taking about 30 minutes. This Denver Police Officer was making phone calls, and once she contacted people and spoke with Mr. Lam, she determined that his flight was scheduled to leave in five minutes and thus his boarding pass would no longer be valid. She did take steps to rebook his flight. Once Mr. Lam's boarding pass was no longer valid under airport policy, he was not allowed to proceed forward.
>
> This court heard no testimony that he asked to leave or asked to go out of the airport. In fact, he indicated that he wanted to continue on his flight and rebook his flight to Oakland indicating

> his desire to go through the screenings process and get into the airport and be able to take the flight would be to complete that process.
>
> The Court heard testimony that it took a while for that flight to be re-booked and for him to get through that secondary screening. He was segregated for a portion of that time but then asked to be placed back in the public area because he felt he was standing out, and they accommodated him.

(3/8/06,pp.217-19). The court then addressed Lam's contact with Lee:

> The Court is going to find that [Lee's] contact with [Lam] was consensual. He approached, he identified himself. He asked whether he could search his bags. There was no force. There [were] no threats. There was no coercion. He asked Mr. Lam about the money, where he had gotten the money, and Mr. Lam indicated he had gotten it in a football bet with a John, last name unknown, and had come to collect. As the agent testified, there were no football games that would have been occurring during this time period. He was asked whether his items could be searched.

(3/8/06,p.219). Accordingly, the court ruled, in pertinent part:

> The Court is going to find that the nature, scope, and time of that detention was reasonable. Somewhat consensual. Some of it was not necessarily consensual. The time between when he didn't have a boarding pass—the time until he had a boarding pass was not necessarily consensual. Not because of the officers, but because of policy that people are not allowed into

> the airport without a boarding pass and ID and that is broadcast through the airport every three minutes, I think, so everyone is certainly aware of that...In terms of the statements to Agent Lee, the Court is going to find that he was not in custody. And I think one of the biggest keys to whether or not he's in custody is when he asks whether he's free to leave, he's allowed to leave. That is the only time he asks whether he could leave is after he has spoken with Agent Lee.

(3/8/06,pp.221-22). The court also found that "under *Terry* and subsequent cases that questions concerning who the person is, where they're going, what they're doing, are permitted under that line of cases" (3/8/06,p.237). For these reasons, the court denied defendant's motions to suppress (3/8/06,p.223).

C. Defendant has no standing to challenge the search of his carry-on bag because he had no reasonable expectation of privacy.

The Fourth Amendment to the United States Constitution proscribes all unreasonable searches and seizures. U.S. Const. amend. IV. However, a person must have a reasonable expectation of privacy in a place searched or the items seized before he or she may contest the validity of the search. *See Katz v. United States*, 389 U.S. 347, 351-52

(1967); *People v. Curtis*, 959 P.2d 434, 437 (Colo. 1998). The burden of establishing a protected Fourth Amendment privacy interest rests squarely with an individual defendant. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980). "Fourth Amendment rights are personal [and] ...may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174 (1969).

Before an individual can challenge a search and seizure, he must establish that he had a "legitimate expectation" of privacy in the area searched or the items seized. *Rakas v. Illinois*, 439 U.S. 128 (1978); *People v. Flockhart*, ___ P.3d ___, 2009 WL 4981910 at *10 (Colo. App. No. 07CA0312, Dec. 24, 2009). In making this "standing" determination, a reviewing court should consider whether an individual has a possessory or proprietary interest in the areas or items which are the subject of the search. *People v. Naranjo*, 686 P.2d 1343, 1345 (Colo. 1984).

A person who submits a bag through security, forfeits his reasonable expectation of privacy to that bag. *See e.g., Kjolhede v. State*, 333 S.W. 3d 631, 634 (Tex. App.2009) (no standing when TSA

officer opened defendant's suitcase and found cocaine); *see also Turner v. State,* 132 S.W. 3d 504, 507 (Tex. App.2004) ("*all* passengers boarding aircraft are subject to a search of themselves and *all* property that they attempt to bring aboard"); *Shapiro v. State,* 390 So. 2d 344, 347-48 (Fla. 1980); *People v. Waring,* 174 A.D. 2d 16, 20 (N.Y. 1992) (airport searches and seizures reasonable under the Fourth Amendment because "it is difficult to see how anyone could assert a reasonable expectation of privacy in a package which is being brought onto an airplane or through an airport sterile area"); *State v. Hanson,* 34 P.3d 1, 4 (Hawai'i. 2001); *cf. Chandler v. Miller*, 520 U.S. 305, 323 (1997) (blanket suspicionless searches may be reasonable at an airport); *but see e.g., People v. Heimel,* 812 P.2d 1177, 1182 (Colo. 1991) ("We add here, by way of a caveat, that...the scope of any physical search of a carry-on item must be directed to determining whether the potential passenger is carrying an object that is potentially dangerous to air

commerce)[5]; *State v. Salit*, 613 P.2d 245, 251-52 (Alaska 1980).

Here, because defendant submitted his bag through security, he had no reasonable expectation of privacy over the bag and therefore no standing to challenge the search of the bag, especially considering the trial court noted there are signs throughout the airport indicating a carry-on bag is subject to search (3/8/06,p.216).[6] *See also People v. Lee*, 93 P.3d 544 (Colo. App. 2003) (defendant had no reasonable expectation of privacy in jail telephone calls where a video, handbook, and posted signs gave notice that the calls were monitored and recorded).

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[5] *Heimel* was announced before September 11, 2001, and courts have distinguished security measures in airports after that date. *Kjolhede*, 333 S.W. 3d at 634; *cf.* 49 U.S.C. §44901 (2007).

[6] In *Moody v. People*, 159 P.3d 611, 615-17 (Colo. 2007), our supreme court held that appellate courts are not precluded from taking up the issue of standing sua sponte where there is a complete and factually-developed lower court record.

D. Even assuming defendant has standing, defendant's detention was legal because, once the cash was found, officers had a reasonable suspicion to detain defendant and diligently pursued the investigation.

Colorado has recognized three types of citizen-police encounters: 1) arrest; 2) investigatory stop; and 3) consensual interview. *People v. Melton*, 910 P.2d 672, 676 (Colo. 1996). Arrests and investigatory stops are seizures and implicate constitutional protections; therefore, they must be justified, respectively, by probable cause and reasonable articulable suspicion of criminal activity. *People v. Brown*, 217 P.3d 1252, 1256 (Colo. 2009), citing *People v. Marujo*, 192 P.3d 1003, 1006 (Colo. 2008); *People v. Paynter*, 955 P.2d 68 (Colo. 1998). A defendant has the burden of going forward with evidence of an impermissible seizure; specifically, defendant must show: 1) the point at which he was seized within the meaning of the Fourth Amendment; and 2) the seizure was unconstitutional. *Outlaw v. People,* 17 P.3d 150, 155 (Colo. 2001).

As a preliminary matter, the People note this Court could easily determine, on *de novo* review that, as the trial court found, a portion of

defendant's contact was consensual, including his contact with Lee, which led to the search of his bag and statements about the origins of the contents of his bag (3/8/06,p.219-22). Notably, before asking Lee if he could leave (after the search of the bag), defendant did not ask to leave or exit the airport and instead, at all times, expressed a desire to go through the screenings process to reach the airport terminal (3/8/06,p.218). Accordingly, defendant was not seized during his contact with Lee, and the evidence obtained, including the contents of his bag and statements he made to Lee should not be suppressed. *Brown*, 217 P.3d at 1256.

However, regardless of whether the contact became an investigatory stop, such stop was supported by reasonable suspicion. The determination of whether reasonable suspicion exists to justify an investigatory stop focuses on whether, based on the totality of the circumstances, there are specific, articulable facts known to the officer which, taken together with reasonable inferences from those facts, create a reasonable suspicion of criminal activity to justify the intrusion into a defendant's personal security. *People v. Salazar*, 964 P.2d 502,

505 (Colo. 1998); *see Brown*, 217 P.3d at 1256. "Reasonable suspicion is both a qualitatively and quantitatively lower standard than probable cause." *People v. King*, 16 P.3d 807, 813 (Colo. 2001). In other words, reasonable suspicion requires "considerably less than proof of wrongdoing by a preponderance of the evidence." *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

Furthermore, in determining whether an investigatory stop's scope is reasonable, the Colorado Supreme Court has identified 4 non-exclusive factors to consider: 1) the length of the detention; 2) whether the officers diligently pursued the investigation during the detention; 3) whether the suspect was required to move from one location to another; and 4) whether the police acted unreasonably in failing to recognize or pursue a less intrusive means of detention. *People v. Rodriguez*, 945 P.2d 1351, 1362 (Colo. 1997); *see also People v. Garcia*, 11 P.3d 449, 454-55 (Colo. 2000).

Here, there was reasonable suspicion to detain defendant. Defendant was randomly selected for intensive screening which revealed $20,000 of cash in his bag, after which authorities were alerted

pursuant to policy. It is well-settled that evidence of a defendant's possession of large amounts of cash may be probative of his involvement in drug distribution or dealing activities, especially in Denver which, as the trial court found, is becoming a "gateway for drugs"(3/6/08,p.217). *See People v. Loggins*, 981 P.2d 630, 636 (Colo. App. 1998) (defendant's possession of a "large sum of money" probative of drug distribution); *United States v. Martinez*, 938 F.2d 1078, 1083 (10th Cir. 1991) (large amount of cash considered a "tool of the trade"). Therefore, stopping defendant because he was carrying $20,000, and contacting DEA was reasonable (3/6/08,p.217). *See U.S. v. Chhien,* 266 F.3d 1, 8 (1st Cir. 2001) (carrying a large, unexplained amount of cash-- $2,000-- supports reasonable suspicion, especially in certain circumstances); *cf. Maryland v. Pringle,* 540 U.S. 366, 372 n. 2 (2003) (appeals court erred in not considering $763 in defendant's glove box as a factor in establishing probable cause); *U.S. v. Sokolow,* 490 U.S. 1, 9-10 (1989) (carrying $4,000 in cash onto an airplane is not alone proof of illegal conduct, but it is a factor in establishing reasonable suspicion); *Hampe v. Tipton*, 899 P.2d 325, 328 (Colo. App. 1995) ("[T]here can be circumstances in which

wholly lawful conduct may justify the suspicion that criminal activity is afoot.").

Furthermore, the scope of the detention was reasonable. The motions hearing revealed that defendant entered security screening for his 11:35 a.m. flight at approximately 11:00 a.m., after which he underwent security measures for approximately 30 minutes (3/8/06,p.217). After, defendant was re-booked onto his next flight which took approximately 45 minutes to 1 hour (3/8/06,p.103). Meanwhile, Agent Lee was contacted, and left for the airport around 11:40 a.m., driving at 100 mph and arriving around 12:15 p.m. (3/8/06,pp.167-69,195-96). Defendant left for the gate around 12:30 p.m. (3/8/06,p.103), which gave him sufficient time to board his next flight at 2:30 p.m. Therefore, after initially contacting defendant, officers quickly worked to re-book defendant on his next flight while waiting for the DEA agent, who was speeding to reach the airport. In addition, after authorities contacted defendant and could not immediately connect the contents of his bag to criminal activity, they allowed him proceed (3/8/06,p.110). As a result, the length of the detention was

reasonable, as it was the time required for the officers to diligently complete their initial investigation of defendant. *See United States v. Sharpe*, 470 U.S. 675, 686 (1985); *see also Garcia*, 11 P.3d at 455. Moreover, when defendant asked to be placed back into the public screening area, officers accommodated him. *See Rodriguez*, 945 P.2d at 1362. Although on appeal, defendant asserts that, "The single most important fact in Mr. Lam's detention is that he missed his flight," missing a flight does not automatically indicate a Fourth Amendment violation, especially considering that defendant entered security only 35 minutes before his flight and was soon after re-booked onto the next flight. *See State v. Peters,* 941 P.2d 228, 231 (Ariz. 1997).

Accordingly, even assuming the contact with defendant was not consensual, the detention of defendant was not illegal, and the resulting evidence should not be suppressed.

E. Even assuming that defendant has standing and was illegally detained, he consented to the search of his bag and his consent was not the result of his detainment.

When illegal police conduct precedes a defendant's consent to search, a court must determine whether defendant's later consent dissipated the taint of the police illegality, such that the evidence obtained is admissible, or whether the consent was fatally tainted by the police illegality, such that the evidence is inadmissible under the fruit of the poisonous tree doctrine. *See Rodriguez*, 945 P.2d at 1364. "Evidence obtained by a purported consent is admissible 'only if it is determined that the consent was *both* voluntary and not an exploitation of the prior illegality.'" *Id.*, quoting *United States v. Melendez-Garcia*, 28 F.3d 1046, 1055 (10th Cir. 1994)). In determining whether the consent was an exploitation of the prior police illegality, the court must consider the temporal proximity of the consent to the illegality, the presence of any intervening circumstances, and the purpose and flagrancy of the police misconduct. *Id.* The prosecution bears the burden of proving

both voluntariness and attenuation when seeking admission of evidence discovered during a consent search. *Id.*

Here, even assuming there was an illegal detention, defendant consented to the search, and his consent was not the result of his detention. *See People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006) ("On appeal, a party may defend the trial court's judgment on any ground supported by the record"). As the court found, signs are apparent throughout the airport indicating a bag may be searched (3/8/06,p.216). *Lee,* 93 P.3d at 548. Accordingly, defendant gave implied consent to search his bag once he entered the airport, and especially when he put his bag through airport security. *Heimel*, 812 P.2d at 1180-82 ; *U.S. v. DeAngelo,* 584 F.2d 46, 47-48 (4th Cir. 1978) (implied consent of luggage search is deduced from airport signs giving notice of inspection by x-ray), *cert. denied,* 440 U.S. 95 (1979). This consent occurred before he came in contact with the officers; therefore, it was sufficiently attenuated. *See Rodriguez*, 945 P.2d at 1364.

Furthermore, defendant's explicit consent to Agent Lee was sufficiently attenuated. When defendant consented, Agent Lee was not

threatening defendant, did not have a weapon drawn, and defendant was sitting in an open area. Thus, the consent was voluntary, and not in response to police misconduct. Accordingly, his consent was valid and the evidence obtained from his bag should not suppressed. *See Rodriguez*, 945 P.2d at 1364.

II. The trial court correctly admitted the pretrial identifications of defendant by Jennifer and Amy because the photo lineup was not impermissibly suggestive and, even assuming it was, the identification was nevertheless reliable.

Defendant argues the trial court erred in denying his motion to suppress out-of-court identifications (OpeningBrief,p.26).

A. Standard of review and preservation of the issue.

The constitutionality of a pretrial identification procedure presents a mixed question of law and fact. While the trial court's findings of historical fact are entitled to deference, the legal conclusion reached from those historical facts is subject to de novo review. *Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002).

The People agree that this issue is preserved by written motion (Lam,v.1,pp.138-40) and during hearings on March 3, 2006, and March 8, 2006, after which the motion was denied (3/8/06,pp.238-44).

B. Relevant facts.

On December 19, 2005, the defendant filed a "Motion to Suppress: Photographic Lineup Impermissibly Suggestive" (Lam,v.1,pp.138-40). Hearings were thereafter held.

1. March 3, 2006 hearing.

Investigator Jamie Greaser testified the photo array lineup she showed to witnesses, lineup B[7], contains defendant in position #4 (3/3/06,pp.95,103). She testified she was not present when the lineup was shown to the witnesses (3/3/06,p.104). On the same day of the burglary she met with Amy and Amy told her that one of the intruders, a Vietnamese male, did not wear a mask during the home invasion (3/3/06,p.73). She testified every person in the lineup was an Asian male with a thin mustache and brown hair, and wearing an orange shirt against the same background (3/3/06,pp.105-06). She testified

[7] A copy of the lineup is attached to this brief.

Amy told her that she did not remember the Vietnamese man who burglarized her house because "he did not let her look at him too much" but that when shown the photo lineup, Amy indicated she was positive defendant was the Vietnamese intruder (3/3/06,p.109). Greaser testified she was told Jennifer was shown the lineup separately and chose defendant's photo as a "possible" intruder (3/3/06,p.110). She was told two of the employees at the motel thought they recognized the person in the photo in position number two when shown the lineup (3/3/06,p.110).

Defense counsel argued that the lineup was impermissibly suggestive because not all of the individuals in the lineup appeared to be Asian (3/3/06,pp.122-23). She further added since the lineup had only six photographs, it must be closely scrutinized (3/3/06,p.122).

The prosecutor noted the backgrounds in all the photos were the same color (3/3/06,p.124). He argued that in the lineup containing defendant's photo, all individuals were "similarly dressed, against the same neutral background, all similar in appearance" and the same age, therefore "there [was] nothing about the Cong Lam photograph which

so—which would so stand out from all the other photographs that would suggest to someone that he's a likely person" (3/3/06,p.125). The prosecutor also pointed out the fact that the hotel employees picked the incorrect photo supported the proposition that Lam's photo was not suggestive (3/3/06,p.125).

The court agreed with defense counsel that not all the individuals in the photo lineup appeared to be of Asian descent (3/3/06,p.126). As a result, the court found the lineup contained "some impermissible suggestibility" and found it was therefore the prosecution's burden to disprove the second prong of *Bernal* (3/3/06,p.126). The motions hearing was continued to March 8, 2006 (3/3/06,p.127).

2. March 8, 2006 motions hearing.

During the hearing, **Amy** testified that when the intruders entered her bedroom, her bedroom was "pretty bright" (3/8/06,p.9). She recalled three of the four intruders were wearing masks (3/8/06,p.8), and testified she could "very clearly" see the man who was not wearing a ski mask, who was also the man who held a gun to her head

(3/8/06,pp.9,12). She described him as Asian, in his thirties, about five feet six inches, medium build, and approximately 150 or 160 pounds (3/8/06,pp.9-10). She said she was one to two feet away from the man while he held a gun to her head, and saw his face again when he tied her up, when he dragged her into the area, when he dragged her to her daughter's room, and when he dragged her to her son's room (3/8/06,pp.12-15,18). She recalled the kitchen was "pretty bright" when she saw the unmasked intruder's face and that she tried to look at him "the whole time" except for when he instructed her not to (3/8/06,pp.14,21). She remembered the men were in her house for about an hour (3/8/06,p.20). She recalled that when she was shown the lineup containing defendant's photograph, she identified defendant's photo as the unmasked man (3/8/06,p.22). She indicated she was positive defendant's photo depicted the unmasked intruder (3/8/06,p.23).

Jennifer testified one of the intruders was an unmasked Asian man with hair that came to a point on his forehead (3/8/06,pp.33-34). She described the man in his late twenties, approximately five foot six inches to five foot eight inches, with dark black hair, a mustache, and

brown or black eyes (3/8/06,pp.35-36). She testified that when she saw the intruder's face, she was two to three feet away from him, and there was "good lighting" (3/8/06,p.37). She estimated she had contact with him for about twenty minutes in her parent's bedroom, twenty to forty minutes in her grandmother's room, and twenty minutes in her brother's room (3/8/06,pp.38-40). She recalled that when he threatened to cut off her fingers, she got a good view of his face (3/8/06,p.42). She testified she paid attention to the unmasked Asian man because he appeared to be the leader of the group (3/8/06,pp.42-43). She testified that when shown the photo array, she recognized defendant's photo right away (3/8/06,p.46). She said she checked that his photo was a "possible" depiction of the unmasked Asian intruder because she read the lineup form wrong, but was "100 percent positive" defendant's photo depicted the unmasked Asian man (3/8/06,p.46). She indicated she came to this conclusion because she "saw his face clearly and [ ] knew for sure that was him," not because the photo depicted an Asian man with pointy hair (3/8/06,p.58-59). She testified that the morning after

the home invasion, when she identified defendant in the photo lineup, she was still in a state of shock (3/8/06,p.47).

Kin Fong testified he drove with defendant, whom he called Jimmy, from California to Denver (3/8/06,pp.81-82). He recalled they went into a family's home while in Denver (3/8/06,p.82) and that Jimmy took off his mask while in the home (3/8/06,p.83). He testified defendant's photo in the photo lineup depicted Jimmy (3/8/06,p.80).

Investigator Gary Burger testified that on March 16, 2005 at 9 a.m., he showed the photo array containing defendant's photo, in position #4, to Amy and Amy indicated she was positive that defendant was one of the intruders (3/8/06,pp.122,124-26). He recalled he also met separately with Chong and Jennifer and showed them the photo array containing defendant's photo; Chong indicated defendant's photo depicted a person who looked like the person who had "thrown him to the ground and put the gun in his mouth" (3/8/06,p.128), and Jennifer indicated defendant's photo "looked familiar to someone who was [at her house] yesterday" (3/8/06,p.132).

Investigator Jamie Greaser testified she interviewed Amy on the same day as the home invasion and Amy described the unmasked Asian intruder as having a medium build, 150 to 160 pounds, five-six to five-seven, normal-type hair, Vietnamese, and in his early thirties (3/8/06,pp.141-42). Greaser also interviewed Jennifer who said the unmasked intruder had hair that "pointed down in the middle of his forehead," had a mustache, was approximately five-six to five-eight, and in his late twenties (3/8/06,pp.142-43). Jennifer recalled that the man was wearing K-Swiss tennis shoes (3/8/06,p.143).

Greaser testified that she showed the photo array containing defendant's picture to Kin Fong, and that Fong was "positive" defendant's picture depicted "Jimmy" and that Jimmy was the man who had taken off his mask while inside the Nguyen home (3/8/06,pp.145, 149).

Greaser testified the custody report for defendant indicated that defendant is five-six, 140 pounds, with black hair and black eyes (3/8/06,pp.147-48).

The prosecutor argued the court should not suppress the identification of defendant through the photo lineup because he had met his burden showing that, under the totality of the circumstances, the procedure did not create a very substantial likelihood of misidentification (3/8/06,p.223). He argued Amy viewed the intruder, whom she identified as defendant, in different rooms, at different distances, over a considerable amount of time (3/8/06,p.223). He further argued Amy's description of defendant was accurate, and that she indicated she was positive defendant's photo depicted a man who was in her house (3/8/06,p.225). He noted that when Amy identified defendant's photo, only one day has passed (3/8/06,p.225).

Regarding Jennifer's identification, the prosecutor noted that Jennifer testified that she was able to see the intruder's face, and gave a physical description that matched defendant's mug shot "to a tee" (3/8/06,pp.226-27). The prosecutor also noted Jennifer identified the shoes that the intruder was wearing, which were the same shoes defendant was wearing at the airport (3/8/06,p.228).

Defense counsel argued Amy and Jennifer did not get a good look at defendant, and the only identifying factor they could identify was the "pointy peak" on his forehead, and in the lineup there was only one person with a pointy peak (3/8/06,pp.233-34).

The court found the lineup was not "per se unduly suggestive" but that "there are individuals in the lineup that don't look extremely Asian to the Court" (3/8/06,pp.238-39). It said, "It's possible that they are more Asian than we know and just don't look as Asian as the next person" (3/8/06,p.240). However, the court noted each of the individuals had short, dark hair, with mustaches, dark eyes and hair, and were dressed the same, wearing the same orange jail garb (3/8/06,p.239).

The court also found that Amy saw the intruder immediately when he came into her room and she was with him for a substantial period of time (3/8/06,p.237). Although she gave a fairly general description, the court found she had a fairly lengthy opportunity to view defendant (3/8/06,p.238). Accordingly, the court ruled Amy could testify in trial about her observations (3/8/06,p.238).

Regarding Jennifer, the court found she was with defendant for more than forty minutes and watched him because he appeared to be the leader (3/8/06,p.240). The court found Jennifer's description of the intruder matched the description of defendant when he was contacted at DIA (3/8/06,p.240). Although the court recognized the discrepancy that Jennifer, right after the burglary, indicated it was "possible" that defendant's photo depicted an intruder, and indicated during the hearing that she was positive, it noted the discrepancy goes to the weight, not admissibility of her identification (3/8/06,pp.240-41). The court noted, "There's certainly not a high likelihood of misidentification when everything she said about [defendant] was accurate down to his K-Swiss tennis shoes" (3/8/06,p.245). Accordingly, the court found Jennifer's identification admissible (3/8/06,pp.240-41,244). The court also ruled Fong could testify about his identification (3/8/06,p.244).

3. Trial

During the trial, Amy identified defendant as the unmasked intruder (4/5/06,pp.12, 14-16), and testified that she correctly identified defendant's photo in the photo array (4/5/06,p.51). She testified she was

"certain" and "positive" that defendant was the man who came into her bedroom (4/5/06,pp.52,54). Jennifer also identified defendant as the unmasked intruder (4/5/06,p.175), and the leader of the group, who gave orders to the other intruders (4/5/06,pp.176-77). She testified that when she was shown the photo array containing defendant's photo, she was positive defendant's picture depicted the unmasked intruder even though she only marked "possible" (4/5/06,p.222). She testified she marked "possible" instead of "positive"' because she was nervous and in shock (4/5/06,p.223).

C. Relevant law and analysis.

In examining the constitutionality of pre-trial identification procedures, a court must engage in a two-tiered analysis: first, the court must determine whether the procedure was unnecessarily suggestive, which defendant has the burden of proving; second, if defendant's burden is met, the burden shifts to the People to show that despite the improper suggestiveness, the identification was nevertheless reliable under the totality of the circumstances. *Bernal,* 44 P.3d at 191. The two tiers must be analyzed separately, and it is

only necessary to reach the second tier if the court first determines that the procedure was impermissibly suggestive. *Id.*

In evaluating whether a photo lineup was unnecessarily suggestive, relevant factors to consider include the size of the array, and the details of the photographs themselves. *People v. Borghesi*, 66 P.3d 93, 103-04 (Colo. 2003). Slight differences in appearance between suspects do not render a lineup impermissibly suggestive. *People v. Borrego*, 668 P.2d 21, 23 (Colo. App.1983). An identification may be so tainted as to require exclusion only if defendant "fairly leaps out" as one who is different from others in the line-up shown to witnesses. *People v. Bolton*, 859 P.2d 311, 319 (Colo. App.1993) (state not required to provide exact replicas of defendant for a line-up).

However, a photo line-up is proper if the photos are matched by race, approximate age, hair type, and a number of other characteristics, and does not include a photo of defendant that is unique in a manner directly related to an important identification factor expressed by the witness. *Borghesi*, 66 P.3d at 104; *Bernal*, 44 P.3d at 191-92; *People v. Kemp*, 885 P.2d 260, 263 (Colo. App.1994).

Regarding the second tier of the analysis, the factors to be considered in determining whether, despite an impermissibly suggestive procedure, the identification was nonetheless reliable are: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's prior description of the criminal; 4) the level of certainty demonstrated by the witness at the identification; and 5) the length of time between the crime and the identification. *Bernal,* 44 P.3d at 192 (citing *Neil v. Biggers,* 409 U.S. 188, 199 (1972)).

Here, defendant asserts the photo array was impermissibly suggestive because only two photographs depicted individuals of Asian descent and only the defendant's photo had a "tussle" of hair in the front (OpeningBrief,p.33). However, all the individuals in the array had short, dark hair, with mustaches, dark eyes and hair, and were dressed in the same orange jail garb (3/8/06,p.239). Although the court initially found the array contained some "impermissible suggestibility" because not all of the photos appeared to depict individuals of Asian descent, the court later acknowledge it was possible the individuals were more Asian

than originally presumed (3/3/06,p.126;3/8/06,p.140). Furthermore, the photos all depict men with short hair, and three of the men have hair hanging over their forehead (lineup b,appendix). Moreover, the photo admonition informed the witnesses that hairstyles could change; thus, the witnesses may not have been looking for the hairstyle they remembered in identifying defendant (see e.g., People'sExh82,92).

However, even assuming the array was suggestive, Amy and Jennifer's identifications were nevertheless reliable.

Amy saw defendant up close, in good lighting, and for a substantial amount of time. Because she was dragged by defendant against her will, she likely paid close attention to him. When asked to identify an intruder the morning after the burglary, she identified defendant with certainty. Although the court found her physical description of defendant was general, it was accurate. Accordingly, the court correctly admitted Amy's identification. *Biggers,* 409 U.S. at 199.

As the trial court found, Jennifer observed defendant for more than forty minutes and watched him closely because he appeared to be the leader of the intruders. Even though defendant asserts her

depiction lacked detail (OpeningBrief,p.37), the court found, "everything she said about [defendant] was accurate down to his K-Swiss tennis shoes" (3/8/06,p.245). Although the morning after the invasion of her home, she chose defendant's photo possibly depicting an intruder, she explained she was still in shock. Moreover, the jury was informed of her less than certain identification, and could make its own determination about whether she was actually not certain, or in shock. Accordingly, the court correctly admitted Jennifer's identification.

Moreover, even assuming, arguendo that the lineup was unduly suggestive and Jennifer and Amy's identifications were not reliable, admitting the pretrial identifications was harmless beyond a reasonable doubt. To find constitutional harmless error, a court must be confident beyond a reasonable doubt that the guilty verdict actually rendered in this trial was surely unattributable to the error. *Bernal v. People,* 44 P.3d 184 (Colo. 2002).

As explained in Argument I, on the same day as the home invasion, defendant was found at the airport with jewelry from the Nguyen home. Furthermore, Fong identified defendant's photo in the

photo array with 100% certainty and defendant does not challenge Fong's identification on appeal (*see e.g.*, 4/17/06,p.48;People'sExh34). Also, defendant was otherwise associated with Slater, Fong and Luong because on the way to Denver from California, Trooper Wyatt issued a traffic ticket to Slater, and checked the other occupants' identification cards (4/6/06,pp.59-61, 74-75; 4/10/06,pp.24-29). Wyatt was able to match the identification cards of Slater, Luong, Fong and defendant to the the occupants of the vehicles (4/10/06,p.24). Additionally, while in the jail, defendant made a phone call during which he stated he had been stopped in the airport with money, and that the FBI had "only caught 2 people...they're following me everywhere you know, be careful back there," further indicating his involvement and consciousness of guilt (People's Exh 104, 4/11/06,p.173). Accordingly, even assuming that the court erred in admitting Amy or Jennifer's identifications, the error was harmless beyond a reasonable.

III. The trial court correctly determined it was appropriate for defendant to wear concealed shackles during trial.

A. Standard of review and preservation of the issue.

The People disagree with defendant's standard of review. Abuse of discretion is the standard of review for questions of courtroom security. *People v. James*, 40 P.3d 36, 42 (Colo. App.2001); *People v. Melanson*, 937 P.2d 826, 835 (Colo. App.1996).

The People agree defendant preserved his objection (*see* 4/3/06,pp.5-6).

B. Relevant facts.

During the pretrial hearing, the prosecutor asked the court not to shackle defendants in a way that the jury could see (3/28/06,p.99). Hoang's defense counsel informed the court that she had looked into why defendants were previously shackled and informed the court it was because of "complications" between defendant and Slater (3/28/06, pp.99-100). Defendant's counsel objected to defendant being shackled in "any way" and the court assured counsels that the security deputies

know how to shackle defendants "so the jury doesn't see" (3/28/07,p.101).

Before trial began, on April 3, 2006, defendant's counsel objected to defendant's ankle chains (4/3/06,p.5). She stated, "I think probably where he's sitting in this particular courtroom, assuming he doesn't have to get up or anything, they jury will not be able to see [the ankle chains], but I think they do restrict his movement. I think they're absolutely not necessary...and I request that he not be chained during trial" (4/3/06,p.5). The following exchange, in pertinent part, then occurred:

> **The Court**: We are not going to use the first row upstairs behind you, so that should eliminate any ability to see [defendants'] feet at all. They won't have to stand in that courtroom. I am going to ask everyone to rise and introduce themselves and their clients to the prospective panel this morning, so make sure that your clients arrange themselves so they can do that without it becoming obvious.
>
> **Hoang's Defense Counsel**: You can hear the chains.
>
> **The Court**: Well, that's why I'm wondering, you know, if they can just sit and stand. I couldn't hear anything coming in this morning, but I

> wasn't really paying attention. So if they could make sure that they're seated, so all they have to do is stand and not walk for this morning, okay?
>
> **Defendant's Defense Counsel**: As long as –my objection, Your Honor, I think it's a real due process violation.
>
> **The Court**: Well, the other solution would be to put those belts on, and speaking with the deputies, they've indicated to me that there's a huge lump, then, in the back, and the jury knows that there's something up... So I'm trying to do the least obtrusive manner that I can and still satisfy these deputies' security concerns. I understand there have been some independent statements made by Mr. Hoang, according to the deputies, that give them some concern for safety...

(4/3/06, pp.5-6). Defendant's counsel also indicated that it was defendant who made statements arousing security concerns (4/3/06,p.7).

The next day, at the conclusion of the prosecution's first two witnesses, the court, referring to the shackles stated, "everything went very smoothly" and, "we will continue through the rest of the trial without any changes as to the shackles" (4/4/06,p.329). Because Hoang's counsel still insisted the shackles made noise, the court indicated it would not ask anyone to rise, and said "If I see someone rising, I will say, 'remain seated'" (4/4/06,p.330). However, the next

day, the court observed it could not tell defendants were shackled when they stood, so it decided the parties could rise when the jury entered and left (4/5/06, pp.4-5).

C. Relevant law and analysis.

"The presumption of innocence requires that every defendant be brought before the court with the appearance, dignity, and self-respect of a free and innocent person, except as is otherwise required for the safety and decorum of the court." *Melanson*, 937 P.2d at 835. Thus, the court must permit only those restraints which the court determines, in its discretion, are necessary to ensure that defendant remains in custody, will not endanger court personnel or others in the courtroom, and will not disrupt the trial. *Lucero v. Lundquist*, 580 P.2d 1245 (Colo. 1978). The United States Supreme Court has approved the use of visible shackles where the particular security concerns justify their use. *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007 (2005).

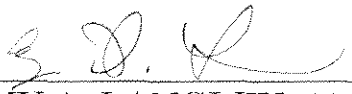
Here, the trial court was made aware of statements that defendant made, after which, the trial court determined the shackles were necessary for security reasons (4/3/06,pp.5-6). Therefore, the trial

court did not abuse its discretion in ruling the shackles had to be worn. Moreover, there is nothing in the record indicating the shackles were actually seen by the jury, as the court took proper precautions to hide them from the jury (see e.g.,4/3/06,p.47) and, after observing the trial for a while, made a finding they were unnoticeable (4/5/06, pp.4-5). Accordingly, there was no prejudice to defendant resulting from the use of concealed shackles.

CONCLUSION

Based on the aforementioned arguments and authorities, the defendant's conviction should be affirmed.

JOHN W. SUTHERS
Attorney General



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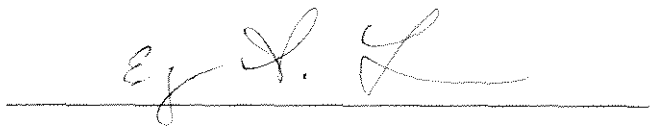
AG ALPHA: QIZM-DAAA
AG File: Q:\AP\APLANGEA\ASSIGNED CASES\ASIAN ROBBERY\LAM.AB.DOCX

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 15th day of August 2011 addressed as follows:

Alison Ruttenberg
ADC Appointed Counsel
PO BOX 19857
Boulder, CO 80308



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Jefferson County Sheriff's Office

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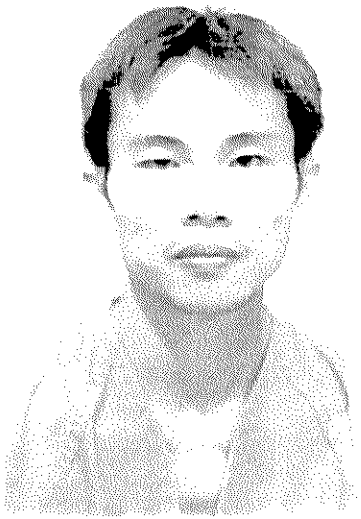

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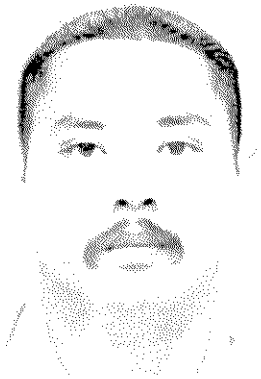

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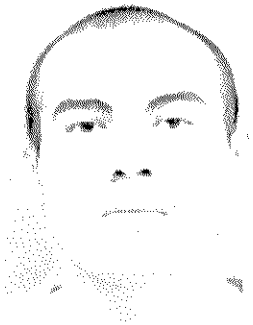

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APPENDIX