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COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Adams County District Court Honorable Thomas R. Ensor, Judge Case No. 14CR862	
Plaintiff-Appellee, THE PEOPLE OF THE STATE OF COLORADO, v. Defendant-Appellant, JAHMAL ALI PRICE.	▲ **COURT USE ONLY** ▲ Case No. 14CA2391
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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 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 9,092 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ John T. Lee

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STATEMENT OF THE CASE

I. Proceedings Below

On March 26, 2014, the People charged Jahmal Ali Price, the defendant, with two counts of assault, criminal impersonation, possession of a weapon by a previous offender ("POWPO"), carrying a concealed weapon, second degree criminal trespass, and resisting arrest. (R. Court File, p. 6) The People dismissed the assault charges. (*Id.* at 63-65.) Following trial, a jury convicted the defendant of all the other charges and the lesser included offense of false reporting to authorities. (*Id.* at 110-16.) He was sentenced to 18 months in the Department of Corrections. (*Id.* at 116-17.) He filed this direct appeal.

II. Statement of the Facts

The police received a report early in the morning that there was a "car prowler in progress" outside an apartment complex. (R. Tr. 11/3/14, p. 87.) The report detailed that there was a black male in a leather jacket jiggling door handles on cars to see if the doors were unlocked. (*Id.* at 87.) Although several officers went and briefly investigated the scene, they stopped searching to help with an unrelated driving incident

for approximately twenty minutes. (*Id.* at 88-89.) When one of the officers returned to the area near the apartment building, she saw the defendant walking alone on the sidewalk. (*Id.* at 89, 92.)

Because he matched the description, the officer pulled her car up next to the defendant and asked if she could talk with him. (*Id.* at 89, 93.) The defendant gave her a fake name and date of birth. (R. Tr. 11/4/13, pp. 94, 114.) The officer then received consent from the defendant to search his backpack. (R. Tr. 11/4/13, p. 96.) But when she put the backpack on the ground, the defendant grabbed the backpack and ran away. (R. Tr. 11/4/13, p. 96.)

After unsuccessfully trying to locate the defendant, the police requested assistance from the K-9 unit. (*Id.* at 48.) The K-9 unit found the defendant's backpack by a tree. (*Id.* at 53.) Inside the backpack, there was a gun and paperwork belonging to the defendant. (*Id.* at 59, 111.)

The police later found the defendant hiding in the garage of a residential home. (*Id.* at 150.) The home owner never gave the defendant permission to enter the garage. (*Id.* at 82.)

The defendant argued that they should acquit him because his acts were in response to "excessive force." (*Id.* at 45.)

SUMMARY OF THE ARGUMENT

A person does not have a legitimate expectation of privacy in abandoned property. In this case, the police found the defendant's backpack sitting out in the open behind a church. It was abandoned. The defendant argues that any abandonment was not voluntary because it was the product of an illegal seizure. However, at the time the defendant abandoned the backpack, he was not complying with any unlawful authority. Thus, his abandonment of the backpack was not the product of any illegal police action. Regardless, the defendant's claim also fails because there had not been any illegal police action. And even if there was, his impressible conduct in resisting arrest attenuated any illegal conduct of the officer so that exclusion of his backpack is not appropriate

A defendant is not entitled to substitute counsel based on disagreements over trial strategy. Although the defendant focuses on

his trial counsel's statement that there was a complete breakdown of communication, that statement was made two weeks *after* the trial court denied the defendant's request for substitute counsel. At the time the defendant made his request for substitute counsel, he only asserted that he and his counsel were disagreeing over matters of trial strategy. Thus, the trial court did not abuse its discretion in denying the defendant's substitution of counsel motion. To the extent the defendant argues that the trial court erred in not revisiting the issue of substitute counsel when the defendant's trial attorney announced there was a breakdown in communications when discussing the defendant's request to go pro se, the trial court did not abuse its discretion in failing to inquire further when the defendant affirmatively stated that he wanted to keep his attorneys. Regardless, any error to inquire further was harmless, and a remand is not necessary.

A defendant is barred from challenging errors he invited. The defendant expressly agreed to the admission of evidence establishing that he was convicted of aggravated attempted assault and that there was an active warrant out for his arrest for probation violations on that

charge. Thus, invited error forecloses review. In any event, the challenged evidence was directly relevant to the charges against the defendant.

A trial court properly joins two charges when they involve interrelated proof. Here, evidence establishing the defendant was a previous offender with a weapon was directly relevant both to his POWPO and criminal impersonation charges. While the defendant contends that the trial court should have severed the counts because the People could have proved the criminal impersonal charge with different evidence under a different theory, the People are allowed to prove its case as it sees fit. Moreover, considering the trial court's limiting instruction, any error was harmless.

The People agree that this Court should remand this case for a correction of the mittimus. The mittimus mistakenly provides that the defendant pled guilty; it should say that he was found guilty after trial.

ARGUMENT

I. The trial court correctly denied the defendant's motion to suppress the search of his backpack.

A. Standard of Review

The People agree with the defendant's proposed standard of review. In reviewing the district court's refusal to grant a suppression motion, a reviewing court "accept[s] the district court's findings of fact absent clear error and review[s] de novo the district court's determination of reasonable expectation of privacy under the Fourth Amendment." *People v. Galvadon*, 103 P.3d 923, 927 (Colo. 2005), citing *People v. Miller*, 75 P.3d 1108, 1111-12 (Colo. 2002). "To claim protection of the Fourth Amendment, a defendant has the burden of demonstrating that he is entitled to protection." *Galvadon*, 103 P.3d 923 at 927-28.

The defendant preserved his claim by moving to suppress the search of his backpack both by motion and at the suppression hearing. (PR Court File, pp. 20-21, 31; R. Tr. 9/19/14, pp. 68-70.) Any error in admitting evidence that should have been suppressed does not require reversal if it was harmless beyond a reasonable doubt. *Bartley v. People*,

817 P.2d 1029, 1034 (Colo. 1991). An error "is harmless beyond a reasonable doubt if there is no reasonable possibility that it affected the guilty verdict." *People v. Orozco*, 210 P.3d 472, 476 (Colo. App. 2009) (quotation omitted).

B. Factual Background

Consistent with the testimony presented, the trial court found that, around 3:00 a.m. in the morning, the police received a report of a possible car prowler that was a black male in a leather jacket. (R. Tr. 9/19/14, p. at 70; *see id.* at 7; PR Env. 1, People's Ex. 1.) After arriving at the scene, Officer C left for approximately 20 minutes for an unrelated matter, before returning to the area where she saw the defendant who matched the description. (R. Tr. 9/19/14, p. at 70; *see id.* at 13, 15, 16.) Officer C activated the lights in her patrol car for traffic safety reasons because she was in a lane of traffic, and then contacted the defendant and asked if he would talk to her. (*id.* 72; *see id.* at 14) He agreed, and she asked him questions during what was a consensual encounter. (*Id.* at 72; *see id.* at 14-15.) In the alternative, the contact was also a valid investigatory stop. (*Id.* at 73.)

After the defendant agreed to let her search his backpack, the defendant "lunged" at her, engaged in a struggle for the backpack, and then ran from the officer. (*Id.* at 74 *see id.* at 17-18.) At that point, there was "potentially an assault on an officer, [and] certainly there was a resisting arrest, and there were further criminal offenses that had been committed in the presence of the officer at that time." (*Id.* at 74.) Accordingly, from that time forward, the police had probable cause to arrest. (*Id.* at 75)

The officer relayed the information to other officers, and they then searched for the defendant. (*Id.* at 75 *see id.* at 20-21.) During the search, they found a backpack that had "been abandoned." (*Id.* at 75; *see id.* at 22, 37-39.) Because the defendant left his backpack in a public area, he had no standing to "object to the search of his backpack . . ." (*Id.* at 75.)

C. Law and Analysis

1. The defendant did not have a legitimate expectation of privacy in his abandoned backpack.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV; *accord Terry v. Ohio*, 392 U.S. 1, 9 (1968); *People v. Daverin*, 967 P.2d 629, 631 (Colo. 1998). But 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. *See Katz v. United States*, 389 U.S. 347, 351-52 (1967); *People v. Curtis*, 959 P.2d 434, 437 (Colo. 1998). In making this "standing" determination, a reviewing court should consider whether an individual has a possessory or proprietary interest in the items which are the subject of the search. *People v. Naranjo*, 686 P.2d 1343, 1345 (Colo. 1984).

Although the defendant contends that he was subject to an illegal stop and therefore the search of his backpack should have been suppressed, as the trial court found, the defendant lacked standing to

the search and seizure of his backpack because he abandoned the property.

The Fourth Amendment only applies when a defendant has a legitimate expectation of privacy in the place or property searched. *See People v. Sotelo*, 336 P.3d 188, 191 (Colo. 2014). The touchstone of the legitimate-expectation-of-privacy standard is reasonableness. *Id.* A "person must exhibit an actual, subjective expectation of privacy" and "society must recognize that expectation as objectively reasonable." *Id.*; *accord Smith v. Maryland*, 442 U.S. 735, 740 (1979).

A warrantless search and seizure of abandoned property is not unreasonable because "when individuals voluntarily abandon property, they forfeit any expectation of privacy in it that they might have had." *United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir.), *cert. denied*, 464 U.S. 859, 78 L. Ed. 2d 163, 104 S. Ct. 184 (1983); *accord United States v. Austin,* 66 F.3d 1115, 1118 (10th Cir. 1995); *People v. Morrison*, 583 P.2d 924, 926, 196 Colo. 319, 322 (1978); *Smith v. People*, 167 Colo. 19, 22, 445 P.2d 67, 68 (1968). "The test for abandonment is whether an individual has retained any reasonable expectation of privacy in the

object. Abandonment is akin to the issue of standing because a defendant lacks standing to complain of an illegal search or seizure of property which has been abandoned." *United States v. Garzon,* 119 F.3d 1446, 1449 (10th Cir. 1997) (quotations and citations omitted).

Here, the record amply supports the trial court's finding that the defendant abandoned the backpack. The evidence established that it was found sitting next to a tree in public where anyone could have accessed it. And while the officer that discovered the backpack searched 50 yards north of the location, he was unable to locate the defendant. The defendant did not have a subjectively or objectively reasonable expectation of privacy in his abandoned backpack. *See, e.g., Smith*, 167 Colo. at 22, 445 P.2d at 68 ("When all dominion and control over the bag was surrendered by this act of the defendant his capacity to object to search and seizure was at an end"); *accord United States v. Hoey*, 983 F.2d 890, 892 (8th Cir. 1993); *United States v. Morgan*, 936 F.2d 1561, 1570 (10th Cir. 1991); *United States v. Thomas*, 864 F.2d 843, 846 (D.C. Cir. 1989).

2. The defendant's abandonment was not the product of any illegal police action.

The defendant nevertheless argues that even if he did abandon the property, the abandonment was not voluntary because it was the product of police misconduct. (O.B. p. 18) citing *United States v. Flynn*,, 309 F.3d 736, 738 (10th Cir. 2002) ("In order to be effective, abandonment must be voluntary. It is considered involuntary if it results from a violation of the Fourth Amendment."). The defendant contends that because the backpack was "discarded during flight from an unlawful show of authority, the evidence should be suppressed as fruit of the poisonous tree." (O.B. p. 19.) There are at least four problems with that argument.

a. There was never any illegal police action because the encounter was consensual.

First, the defendant's argument stumbles at the gate because the defendant did not abandon his backpack during the course of an unlawful seizure. As the trial court found, the encounter was consensual. "Consensual encounters are not seizures; they are requests

for 'voluntary cooperation' and do not implicate the Fourth Amendment." *People v. Jackson*, 39 P.3d 1174, 1179 (Colo. 2002) (abrogated in part on other grounds by *Brendlin v. California*, 127 S. Ct. 2400 (2007)); *People v. Wiley*, 51 P.3d 361, 363 (Colo. App. 2001).

The key question in determining whether a person has been "seized" is whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave or otherwise refuse the officer's request." *People v. Marujo*, 192 P.3d 1003, 1006 (Colo.2008); *accord United States v. Mendenhall*, 446 U.S. 544, 554 (1980). That is because, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *Mendenhall*, 446 U.S. at 553-54 (internal quotation omitted). Factors a court may consider that indicate a seizure include, but are not limited to, the following:

(1) whether there is a display of authority or control over the defendant by activating the siren or any patrol car overhead lights;

(2) the number of officers present;

(3) whether the officer approaches in a non-threatening manner;

(4) whether the officer displays a weapon;

(5) whether the officer requests or demands information;

(6) whether the officer's tone of voice is conversational or whether it indicates that compliance with the request for information might be compelled;

(7) whether the officer physically touches the person of the citizen;

(8) whether the officer's show of authority or exercise of control over an individual impedes that individual's ability to terminate the encounter;

(9) the duration of the encounter; and

(10) whether the officer retains the citizen's identification or travel documents.

Marujo, 192 P.3d at 1007.

Here, the encounter was consensual. The record provides that Officer C did not activate her siren, was the only officer present, approached the defendant in a non-threatening manner by asking if he "mind[ed] if she talked to him, and did not display her gun. (R. Tr. 9/19/14, pp. 14-16.) *See People v. Dickinson*, 928 P.2d 1309, 1310 (Colo. 1996) (law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place). Officer C asked the defendant if she could check to see whether he had anything illegal or dangerous on his person or in his backpack, and the defendant said it was "fine." *See Marujo*, 192 P.3d at 1008 (encounter consensual when officer asked and did not order defendant to submit to a pat down). And before trying to search the backpack, after patting down the defendant, Officer C again asked the defendant if "he minded" if she searched his backpack. (R. Tr. 9/19/14, p. 17.) There was no evidence presented that Officer C ever threatened the defendant.

The encounter remained consensual until the defendant lunged at the officer, grabbed his backpack, and then resisted arrest. At that

point, the officer had probable cause to arrest the defendant. *See, e.g.*, §§ 18-8-103 to -104, C.R.S. (2015).

Accordingly, the record supports the trial court's determination that the encounter was consensual and then ultimately supported by probable cause, and the defendant's subsequent flight and abandonment of his backpack were not the product of any illegal police action. *See, e.g., People v. Walters*, 249 P.3d 805, 810-11 (Colo. 2011) (encounter was consensual when it "was not so intimidating as to demonstrate that a reasonable person would believe that he was not free to leave if he did not respond").

b. The encounter was also justified as an investigatory stop supported by reasonable suspicion.

Unlike consensual encounters, an investigatory stop constitutes a seizure which implicates the search and seizure protections of the Fourth Amendment of the United States Constitution and article II, § 7 of the Colorado Constitution. *People v. Morales*, 935 P.2d 936, 939 (Colo. 1997). However, an investigatory stop is valid if: 1) the police have a

reasonable suspicion that criminal activity has taken place, is in progress, or is about to occur; 2) the purpose of the intrusion is reasonable; and 3) the scope and character of the intrusion are reasonably related to its purpose. § 16-3-103(1), C.R.S. (2015); *People v. Archuleta*, 980 P.2d 509, 512 (Colo. 1999); *People v. Barrus*, 232 P.3d 254, 270 (Colo. App. 2009).

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 justifying an intrusion into a defendant's personal security. *People v. Salazar*, 964 P.2d 502, 505 (Colo. 1998). "Reasonable suspicion is both a qualitatively and quantitatively lower standard than probable cause. That is, it can be supported both by less information and by less reliable information than is necessary to establish probable cause." People v. *King*, 16 P.3d 807, 813 (Colo. 2001). Therefore, an investigatory stop is justified if the totality of the circumstances show that the police had "some minimal

level of objective suspicion (as distinguished from a mere hunch or intuition) that the person to be stopped is committing, has committed, or is about to commit a crime." even than the 'fair probability' standard for probable cause." *People v. Polander*, 41 P.3d 698, 703 (Colo. 2001).

Here, the defendant was seen near the apartment building within a half hour of the report that there was a car prowler pulling on car handles. The defendant matched the description given of a black man in a leather jacket wearing a backpack. And as the trial court emphasized, the report and the stop happened at a late hour. Under these circumstances, Officer C had reasonable suspicion to support the investigatory stop, and it remained until she had probable cause to arrest once the defendant grabbed his backpack and resisted arrest. *People v. Smith*, 620 P.2d 232, 235-36 (Colo. 1980) (proximity to robbery scene and race of the driver justified stop); *see also People v. Mascarenas*, 726 P.2d 644, 646 (Colo.1986) (proximity to burglary scene and evasive actions justified stop); *People v. Jackson*, 742 P.2d 929 (Colo. App. 1987) (proximity to location, evasive actions, and late hour justified stop). Because there was not an illegal seizure, the defendant's

subsequent abandonment of the backpack was not the result of an involuntary police seizure.

3. The defendant's abandonment of his backpack was attenuated from any illegal seizure.

The defendant incorrectly contends that any evidence discovered subsequent to an illegal search must be suppressed. *See* O.B. pp. 9, citing *United States v. Brown*, 448 F.3d 239 (3d Cir. 2006) and *People v. Archuleta*, 980 P.2d 509 (Colo. 1999). The fruit of the poisonous tree doctrine provides that evidence obtained by the police through unlawful means is inadmissible. *People v. Prescott*, 205 P.3d 416, 422 (Colo. App. 2008); *see also Brown*, 448 F.3d at 245; *Archuleta*, 980 P.2d at 514-15. However, this doctrine is not simply a "but for" analysis of the evidence obtained following unlawful police action. *Prescott*, 205 P.3d 416 at 422. Under the attenuation doctrine, evidence obtained by the police through unlawful means is admissible if the prosecution shows that any connection between the illegality and the evidence "has become so attenuated as to dissipate the taint." *People v. Lewis*, 975 P.2d 160, 170 (Colo. 1999) (quoting *Wong Sun v. United States*, 371 U.S. 471, 491

(1963)). Attenuation is not an exact science, but generally, the temporal proximity between the illegal seizure and the evidence, the presence of intervening circumstances, and the flagrancy of the police misconduct are relevant. *Id.* at 173.

"Police pursuit or investigation at the time of abandonment does not of itself render the abandonment involuntary." *United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir. 1983). The abandonment must be a "*result* of a Fourth Amendment violation." *United States v. Ojeda-Ramos,* 455 F.3d 1178, 1187 (10th Cir. 2006) (emphasis added). In the instant case, the defendant successfully was able to retrieve his backpack and run away from the officer. The record provides that Officer C lost sight of the defendant at the church. (R. Tr. 9/19/14, p. 21.) Thus, the defendant's decision to abandon his backpack out in the open behind the church was not the result of any Fourth Amendment violation because, at that time, he was not submitting to any police authority. *See United States v. Harris,* 313 F.3d 1228, 1235 (10th Cir. 2002) (holding police officer did not seize defendant when he began asking him for his identification because defendant "did not submit" to

the officer's authority); *Latta v. Keryte,* 118 F.3d 693, 700 (10th Cir. 1997) (defendant not seized during police pursuit because it "did not cause [him] to submit to the authority or succeed in stopping him"); *see also California v. Hodari D.,* 499 U.S. 621, 629 (1991) (defendant not seized when he tossed crack cocaine from his person while engaged in a foot chase with the police because an officer's assertion of authority does not constitute a seizure unless the suspect actually submits to the authority).

4. Even assuming an invalid seizure, the defendant's own illegal conduct intervened to attenuate the backpack from any illegal police action.

"A defendant may not respond to an unreasonable search or seizure by a threat of violence against the officer and then rely on the exclusionary rule to suppress evidence pertaining to that criminal act." *People v. Brown*, 217 P.3d 1252, 1257 (Colo. 2009). "[W]here a defendant responds to an alleged Fourth Amendment violation with a physical attack or threat of attack upon the officer making the illegal arrest or search, courts have consistently held that evidence of this new crime is

admissible." *People v. Doke*, 171 P.3d 237, 239 (Colo. 2007). Such conduct creates "independent and intervening criminal action dissipate[ing] the taint of the prior [police] illegality." *Id.* at 240. Based on Officer C's testimony at the suppression hearing, the trial court found that the defendant attempted to assault the officer. Thus, the defendant's unlawful response to any illegal seizure in resisting arrest sufficiently attenuated any illegal conduct of the officer so that exclusion of his backpack is not appropriate. *See id.*

5. Any error was harmless to the charges not related to the gun found in the backpack.

The backpack and the gun found inside of it was not relevant to the charges of second degree criminal trespass, resisting arrest, or false reporting to authorities. And while evidence of the gun related to one of the People's theories as to his guilt on the criminal impersonation charge, the People's alternative theory that the defendant gave false information for the benefit of avoiding being arrested on a warrant was overwhelming. Thus, even if the trial court erred in admitting evidence regarding the backpack and its contents at trial, any error was

harmless as to those charges. *See People v. Delgado-Elizarras*, 131 P.3d 1110, 1112-13 (Colo. App. 2005) (erroneous admission of evidence was harmless where there was overwhelming evidence that defendant, convicted of attempted murder, pointed a gun and fired at victim); *People v. Pahlavan*, 83 P.3d 1138, 1141 (Colo. App. 2003) (erroneous admission of evidence was harmless where there was overwhelming evidence of guilt and evidence was only a small part of prosecution's case).

II. The defendant's allegations did not set forth sufficient grounds to require the appointment of substitute counsel.

A. Standard of Review

The People agree with the defendant that the denial of a defendant's request for new counsel is reviewed only for an abuse of discretion. *People v. Jenkins*, 83 P.3d 1122, 1125 (Colo. App. 2003). The People also agree that when a trial court fails to properly inquire into the asserted reasons, a defendant is generally entitled to a remand for a hearing on his allegations. *See People v. Kelling*, 151 P.3d 650, 653 (Colo. App. 2006).

The People agree and disagree in part with the defendant's statement of preservation. With respect to the trial court's order denying the defendant's request for substitution counsel on September 30, 2014, the People agree that he raised the claim through "his motion to dismiss ineffective assistance of counsel" and then requesting new counsel at a hearing on his motion. (PR Court File, p. 62; R. Tr. 9/30/14, p. 3.)

The People disagree that he preserved his claim that the trial court should have inquired further as to whether he wanted substitute counsel at the October 14, 2014 hearing. (R. Tr. 10/14/14, pp. 3-4.) The trial court held that hearing to discuss whether the defendant wanted to go pro se. And to the extent the defendant argues that the trial court should have addressed whether he wanted substitute counsel at that hearing, the defendant expressly advised the trial court that he wanted to keep his two appointed attorneys. (R. Tr. 10/14//14, p. 4.) Thus, his affirmative conduct waived his claim on appeal. *See People v. Gross*, 2012 CO 60M, ¶ 8; *People v. Zapata*, 779 P.2d 1307, 1309 (Colo. 1989);

People v. Wittrein, 221 P.3d 1076, 1082 (Colo. 2009); *People v. Rediger*, 2015 COA 26, ¶ 64; *People v. Foster*, 2013 COA 85, ¶¶ 25, 34.

In the event this Court determines that the defendant did not waive his challenge at that hearing, plain error review would apply to the defendant's claim on appeal that the trial court should have investigated further as to whether the defendant should receive substitute counsel. *See Martinez v. People*, 2015 CO 16, ¶ 14 ("Plain error review is equally applicable when a party alters the grounds for his objection on appeal"); *accord People v. Ujaama*, 302 P.2d 296, 304 (Colo. App. 2012) (plain error applies when objection raised at trial was made "on grounds different from those raised on appeal"); *People v. Watson*, 668 P.2d 965, 967 (Colo. App. 1983). Plain error is "strong medicine" that provides a basis for "relief only on rare occasions." *Ujaama*, 302 P.2d at 305. A defendant must show that an error was "so clear cut, so obvious, a trial judge should be able to avoid it without benefit of objection." *Id.* at ¶ 42. A defendant also has the burden of establishing that the error was "seriously prejudicial," that is, "so grave that it undermines the fundamental fairness of the trial itself so as to

cast serious doubt on the reliability of the conviction." *Id.* at ¶ 43. "Plain error review allows the opportunity to reverse convictions in cases presenting particularly egregious errors, but reversals must be rare to maintain adequate motivation among trial participants to seek a fair and accurate trial the first time." *Hagos v. People*, 288 P.3d 116, 122-23 (Colo. 2012).

B. Factual Background

The defendant filed a motion to dismiss based on ineffective assistance of counsel. (R. Court File, p. 63.) In what appears to be a pre-printed form, the defendant asserted that he had not been fully informed of all of his rights, that he believed additional information was discoverable that had not been pursued by counsel, that he felt additional defense methods were required, and that the defendant and counsel had reached insurmountable differences. (*Id.* at 62.) The defendant requested the court to appoint him new counsel. (*Id.*)

The trial court addressed the motion on September 30, 2014. (R. Tr. 9/30/14.) The defendant told the trial court he did not "feel like" his counsel was representing him the way he needed to be represented. (R

Id. at 3.) When the trial court asked the defendant to explain, the defendant responded that he would like to keep that information between him and his future lawyer. (*Id.*) The trial court advised the defendant he would not address the motion unless the defendant could tell him what the conflict was because the trial court believed defense counsel was providing effective assistance up to that point. (*Id.* at 4.) The defendant explained that he was "asking for things that [his counsel is] not interested in doing." (*Id.*) The trial court denied the motion finding that his attorney had the right to make "the calls" and was providing "effective assistance." (*Id.*)

Two weeks later, at a pre-trial hearing, the trial court explained that it had received an email from one of the defendant's two attorneys asking for a *Bergerud* hearing, the court was "not sure exactly what the issue is," and asked the parties to explain. (R. Tr. 10/14/14, p. 3.) One of the defendant's attorneys stated that they requested a hearing "pursuant to Mr. Price's recent request to go pro se." (*Id.* at 3.) When his attorneys went to talk to him, there had been a complete "breakdown in communication" to the point where he was unable to assist in his

defense. (*Id.*) Counsel asked the court to inquire into the defendant's intent to go pro se or to have a "Bergerud hearing." (*Id.*)

The trial court asked the defendant if he wanted to act as his own attorney, and the defendant responded that he had thought about it, and he did not want to start his case over or restart it, so the answer was "no." (*Id.* at 4.) The trial court asked the defendant if he wanted his two appointed attorneys to continue to represent him, and the defendant responded, "I guess, yeah." (*Id.*)

The defendant then asked if there was a motion he could file to dismiss the case before trial because he "didn't do it," and the trial court advised the defendant that his attorneys had already filed motions challenging the charges and a suppression motion. (*Id.* at 5.) The defendant told the trial court that it "was just trying to figure it out" because it "was bothering" him that he was being charged for something he "didn't do," and he just wanted "to see what motions" he could file. (*Id.* at 7.) The trial court told the defendant that would be the purpose of trial, and encouraged the defendant to work with his attorneys to

hold the People to their burden of proof, and the defendant told the court that he would and "appreciate[d] it." (*Id.* at 7.)

C. Law and Analysis

1. The trial court correctly rejected the defendant's request for substitute counsel at the September 30, 2014 hearing.

When a defendant objects to court-appointed counsel, the trial court must inquire into the reasons for dissatisfaction. *People v. Arguello*, 772 P.2d 87, 94 (Colo. 1989). If the defendant can establish good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict, the trial court must substitute new counsel. *Id.* The right to counsel guarantees only competent representation and does not necessarily include "a meaningful attorney-client relationship." *Arguello*, 772 P.2d at 92.

"Before substitution of counsel is warranted, the court must establish that the defendant has some well-founded reason for believing that the appointed attorney cannot or will not completely represent him. *Id.* at 694. When reviewing the denial of a defendant's request for

substitute counsel, relevant considerations include: (1) timeliness of the defendant's request; (2) adequacy of the court's inquiry into the defendant's complaint; (3) whether the attorney-client conflict is so great that it resulted in a total lack of communication or otherwise prevented an adequate defense; and (4) whether the defendant substantially contributed to the underlying conflict with his attorney. *Id.* But the court recognized that "before substitution of counsel is warranted, the court must establish that the defendant has some well-founded reason for believing that the appointed attorney cannot or will not completely represent him." *Id.* at 694 (internal quotation omitted).

Here, the trial court provided the defendant with an opportunity to present his arguments and never imposed any limits on his ability to present additional complaints. The defendant only stated that there were "things I asked for, he's not doing for me. I'm asking for things that he's not interested in doing." (R. Tr. 9/30/14, p. 11.) But disagreements pertaining to matters of trial preparation, strategy, and tactics do not establish good cause for substitution of counsel. *Kelling*, 151 P.3d at 653. And the defendant never asserted that there had been

a complete breakdown of communications. *See, e.g., People v. Thornton*, 251 P.3d 1147, 1151 (Colo. App. 2010); *People v. Buckner*, 228 P.3d 245, 249 (Colo. App. 2009) (concluding that defendant's concerns about number of visits from counsel did not warrant appointment of new counsel); *People v. Apodaca*, 998 P.2d 25, 28 (Colo. App. 1999).

While the defendant's argument on appeal focuses on his counsel's statement that there was a "complete breakdown" in communication, that statement was two weeks *after* the trial court's ruling. R. Tr. 10/14/14, p. 3. A statement made by counsel after the trial court made its ruling provides no basis for a finding that the trial court abused its discretion. *See, e.g., Moody* v. *People*, 159 P.3d 611, 614 (Colo. 2007) (holding that in reviewing a trial court's order, a reviewing court will look at the facts and circumstances presented at the time the order was made); *People v. Gouker*, 665 P.2d 113, 117 (Colo. 1983); *People v. Salyer*, 80 P.3d 831, 835 (Colo. App. 2003). Rather, because the only reason offered by the defendant at the time the trial court made its ruling "lacked some well-founded reason for believing that the appointed attorney [could not] or [would] not competently represent

him," the record supports the trial court's order denying the defendant's request for substitute counsel. *See People v. Krueger*, 296 P.3d 294, 299 (Colo. App. 2012).

2. The trial court did not commit any error in failing to inquire into whether the defendant wanted substitute counsel when addressing the defendant's later motion to proceed pro se.

Neither the defendant nor defense counsel ever clearly asked the trial court to address whether to appoint the defendant substitute counsel at the October 14, 2014 hearing. Defense counsel told the trial court he scheduled the hearing "pursuant to Mr. Price's request to go pro se. (R. Tr. 10/14/14, p. 3.) Counsel then asked the court to inquire into the defendant's intent to go pro se *or* to have a "Bergerud hearing." (R. Tr. 10/14/14, p. 3) (emphasis added.) The trial court decided to inquire into the defendant's intent to proceed pro se, and during the inquiry, the defendant expressly advised the trial court that he wanted to keep his appointed attorneys and did not want to restart or delay the process any longer. Accordingly, in the absence of a specific request for

substitute counsel by the defendant or his attorneys, and considering the defendant's affirmative assertion that he wanted to keep his two attorneys, the trial court did not abuse its discretion in failing to inquire as to whether he wanted substitute counsel. *See, e.g., People v. Hoover*, 165 P.3d 784, 802 (Colo. App. 2006) ("If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion") (internal quotation omitted).

While the defendant may argue that the sequence of the trial court's questions precluded him from requesting substitute counsel, the record refutes any such contention. Although the trial court did ask the defendant if he wanted to go pro se, the trial court's question did not suggest that it would not consider a request to appoint the defendant substitute counsel. In addition, the record provides that at that time the defendant was aware that he could request substitute counsel as he had asked to do so before. And immediately following his discussion with the court about proceeding with his attorneys, the defendant immediately

made a request to the trial court regarding whether he could file a motion to dismiss the charges against him. (R. Tr. 10/14/14, p. 4.)

For the same reasons, any error was also not obvious. *United States v. Frady*, 456 U.S. 152, 163 (1982) (an error is obvious when the trial judge is "derelict in countenancing it, even absent the defendant's timely assistance in detecting it.").

3. Any error in failing to inquire further was harmless.

Regardless, any error was harmless. A court's failure to inquire is harmless and does not require further proceedings when a defendant has otherwise placed in the record his or her reasons for dissatisfaction with counsel, those reasons would not qualify as good cause for substituting counsel, and the defendant has not identified any other reason for dissatisfaction that would have been elicited through a formal inquiry. *See Kelling*, 151 P.3d at 654; *People v. Arko*, 159 P.3d 713, 719 (Colo. App. 2006), *rev'd on other grounds*, 183 P.3d 555 (Colo. 2008). In the first hearing, the defendant told the trial court he was having difficulties with his attorneys because they were not filing the

motions he wanted. And the record at the second hearing reveals that what was "bothering" the defendant was that he wanted to file motions leading to his release because he was being held for something he "didn't do." (R. Tr. 10/14/14, p. 6.) As matters of trial strategy do not establish good cause for substitution of counsel, any error was harmless. *See, e.g., People v. Bergerud*, 223 P.3d 686, 704 (Colo. 2010) (concluding that trial court's determination that disagreement with strategic decisions entrusted to defense counsel did not amount to a well-founded reason to appoint new counsel was "unassailable").

4. In the event this Court determines that the trial court's inquiry was insufficient, the proper remedy is to remand for further factual development.

If this Court concludes that the trial court's inquiry was insufficient or that the current record does not sufficiently show that any error was not plain, then the appropriate remedy is to remand for further factual development. *Bergerud*, 223 P.3d at 706.

III. The trial court properly admitted the exhibit including another judgment order from Tennessee and a warrant for the defendant's arrest.

A. Standard of Review

The People agree that trial courts exercise considerable discretion in deciding questions concerning the admissibility of evidence, and its rulings will not be disturbed absent an abuse of discretion. *E.g.*, *Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009); *People v. Hogan*, 114 P.3d 42, 51 (Colo. App. 2004); *see also People v. Hoover*, 165 P.3d 784, 802 (Colo. App. 2006) ("Discretion is abused only where no reasonable person would take the view adopted by the trial court.").

The People disagree with the defendant that his claim is reviewable. At trial, the defendant told the trial court he had "no objection" to admitting the exhibit. (R. Tr. 11/3/14, p. 118.) His affirmative acquiescence to the instruction waived his claim. *See Rediger*, 2015 COA 26, ¶ 64; *People v. Butler*, 251 P.3d 519, 522-23

(Colo. App. 2010) (defendant's affirmative acquiescence to trial court's changes in jury instructions precluded review on appeal).

In the event this Court determines the defendant did not waive any error, the People agree that plain error review should apply. *See Martinez*, 2015 CO 16, ¶ 14.

B. Factual Background

During trial, without objection, the People admitted Exhibit 13, certified records of court documents from Tennessee. (R. Tr. 11/3/14, p. 118; PR. Env. 2, People's Ex. 13.) The packet contained copies of judgments of convictions for two different cases, one for theft, and one for attempted aggravated assault. (PR. Env. 2, People's Ex. 13.) The exhibit also included a warrant for the defendant's arrest for violating his probation in the attempted aggravated assault case. (*Id.*) The witness that authenticated the documents also testified that both of the defendant's conviction for theft and aggravated robbery were felony convictions. (R. Tr11/3/14, pp. 119-20.) The defendant did not object to the testimony.

After the witness finished testifying, outside the presence of the jury, defense counsel stated that he did not think that the other judgment of conviction for the aggravated assault was relevant given that "we're just going on the theft of property." (R. Tr. 11/3/14, p. 122.) The trial court explained that there was no objection to that testimony, and the prosecutor pointed out that the defendant's attorney had been given the opportunity to look at the documents for a few minutes. (*Id.* at 122.) Defense counsel did not make any further argument, and the trial court said, it was "not planning on taking any action on that." (*Id.* at 122.)

In closing, the People argued to the jury that it should find the defendant guilty of criminal impersonation because he gave fake identifying information to obtain the benefit of avoiding arrest on the warrant and because he knew he should not have been "carrying that weapon because he had a prior felony conviction." (R. Tr. 11/4/14, p. 33.)

C. Law and Analysis

1. There was no error in admitting the evidence, and certainly no plain error.

Evidence is logically relevant if has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401. In a criminal case, "relevant evidence ultimately tends to make it more probable or less probable that a criminal act occurred (actus reus), that the defendant was the perpetrator (identity), and that the defendant acted with the necessary criminal intent (mens rea)." *People v. Cordova*, 293 P.3d 114, 119 (Colo. App. 2011). A trial court is given broad discretion to determine the relevance and relative probative value and unfair prejudicial potential of evidence. *See People v. Saiz*, 32 P.3d 441, 446 (Colo. 2001).

The People charged the defendant with POWPO. (R. Court File, p. 7.) To prove that charge, the People needed to show that the defendant knowingly possessed or carried a firearm subsequent to his conviction for a felony in another state. § 18-12-108(1), C.R.S. (2015). Although the

complaint only identified that the defendant was carrying a weapon while being previously convicted of theft of property in Tennessee, the defendant's conviction for aggravated robbery in Tennessee also could have also proved that charge. *See People v. Rodriguez*, 914 P.2d 230, 257 (Colo. 1996) (holding that a simple variance occurs when the elements of the charged crime remain unchanged, "but the evidence presented at trial proves facts materially different from those alleged in the indictment," and is generally not reversible unless it prejudices a defendant's substantial rights). The trial court did not abuse its discretion in admitting the evidence, and any incremental prejudice from the judgment's inclusion in that document providing that the defendant was charged with aggravated robbery does not rise to the level of plain error. *See Hagos*, 288 P.3d at 120; *People v. Williams*, 297 P.3d 1011, 1016 (Colo. App. 2012).

Similarly, while the defendant contends that the trial court should have excluded evidence that he "violated the conditions of his probation," that information comes from the warrant the People admitted at trial. Any error in admitting the warrant was not obvious.

As explained above, the defense repeatedly conceded that the People could prove the criminal impersonation charge on the theory that he had an active warrant for his arrest. (R. Tr. 11/3/14, p. 6.) And right before the People admitted the exhibit, the witness established that the defendant had an active "AEGIS" warrant, but did not know what that acronym meant. (*Id.* at 115.) Accordingly, while defense counsel at a previous hearing had stated that the defendant had an open warrant in Arapahoe County (R. Tr. 10/30/14), it would not have been obvious to the trial court that the Tennessee Warrant was not the active warrant the witness described. And in any event, even if the testimony regarding the AEGIS warrant referred to the Arapahoe County warrant, because there was no evidence presented that the Tennessee warrant was not active, it also could have served as direct evidence to prove the criminal impersonation charge. There was no obvious error. *See, e.g., People v. Pollard*, 307 P.3d 1124, 1133 (Colo. App. 2013) (a plain error must be "so clear-cut, so obvious, that a trial judge should be able to avoid it without benefit of objection.").

Additionally, to the extent the defendant argues that the trial court should have given a curative instruction telling the jury to disregard the evidence or to consider it only for a limited purpose after he raised his belated concern, any failure by the trial court to do so was not plain error. *See Davis v. People*, 310 P.3d 58, 63 (Colo. 2013) ("Unless a limiting instruction is either required by statute or requested by a party, a trial court has no duty to provide one sua sponte.").

Finally, any error in admitting the documents was also not substantial. The evidence establishing the defendant's guilt was overwhelming. And the defendant has not established that any error so undermined the fundamental fairness of the trial as to cast doubt on the reliability of the judgment. *See, e.g., Ujaama*, 302 P.2d at 305 (a plain error's effect must be "seriously prejuidical" and so "grave" that it undermines the fundamental fairness of the trial itself).

2. There was no prosecutorial misconduct requiring reversal

In the alternative, the defendant argues that this Court should reverse based on prosecutorial misconduct because "the error in

admitting a defendant's prior conviction is so prejudicial." (O.B. p. 35.) But as explained above, because the evidence was relevant to prove the charges against the defendant, there was no prosecutorial misconduct and the trial court did not err in admitting the evidence. Moreover, for the same reasons discussed, any prosecutorial misconduct was not obvious or substantial. *See, e.g., People v. Carter*, 2015 COA 24M, ¶ 53 *("*Prosecutorial misconduct rarely constitutes plain error."); *see also People v. Cordova*, 293 P.3d 114, 122-23 (Colo. App. 2011) ("[T]he witness's single reference to 'gang' and the prosecutor's statements, when viewed in the totality of the circumstances, did not so undermine the trial's fundamental fairness as to cast serious doubt on the reliability of the judgment of conviction").

IV. The trial court correctly denied the defendant's motion to sever the POWPO charge from the criminal impersonation charge.

A. Standard of Review

The People agree a "motion for severance of counts is generally addressed to the sound discretion of the trial court, whose decision will be reversed only upon a showing of abuse of discretion." *People v.*

Smith, 121 P.3d 243, 246 (Colo. App. 2005). "To establish an abuse of discretion, the defendant must show more than the fact that separate trials might have afforded him a better chance of acquittal. The defendant must show actual prejudice, and not just the differences inherent in any trial of different offenses." *People v. Robinson*, 187 P.3d 1166, 1175 (Colo. App. 2008). "The important inquiry is whether the trier of fact will be able to separate the facts and legal theories applicable to each offense." *People v. Pickett*, 571 P.2d 1078, 1082 (Colo. 1977).

B. Factual Background

The defendant filed a written motion requesting the trial court to sever or bifurcate the POWPO charge from the other charges. (R. Court File, pp. 25-27.) At a preliminary hearing, the trial court explained that with respect to the POWPO charge, it would "bifurcate the hearing, as opposed to severing the trial." (R. Tr. 9/19/14, p. 6.)

At the preliminary hearing held right before trial, the People advised the trial court that it wanted to prove the benefit element of

criminal impersonation by presenting evidence that the defendant gave a false name because he knew he was illegally in possession of a weapon as a previous offender. (R. Tr. 10/30/14, p. 6.) The People suggested bifurcating the trial so that the jury would consider the criminal impersonation and the POWPO charge together after the other charges were resolved by the jury. (*Id.*) Defense counsel noted that he might have an evidentiary objection to the People's theory, but regarding bifurcation, "I guess I see some sense in that," so he did not have "any objection to bifurcating the criminal impersonation as well." (*Id.*) The trial court decided that the trial would proceed in two bifurcated proceedings with the first case covering the second degree trespass, resisting arrest, and concealed weapon, and in the second, the jury would consider the POWPO and the criminal impersonation charge. (*Id.* at 7.)

But right before trial, the trial court explained that it would rather have the jury consider the POWPO and criminal impersonation charges first. (R. Tr. 11/3/14, p. 5.) The defense objected, and asked the court just to bifurcate the POWPO charge. (*Id.*) Although the trial court

expressed concern that evidence regarding the POWPO charge was relevant to proving the criminal impersonation charge and should not be separated, defense counsel argued that the People could prove the criminal impersonation charge under a different theory. (*Id.*)

Defense counsel clarified that it did not want the court to sever the trial, but wanted "to bifurcate" the criminal impersonation charge from the POWPO charge. (R. Tr. 11/3/14, p. 8.) The trial court denied the request to sever the POWPO and criminal impersonation charges. (*Id.* at 9.9.) Defense counsel said he would continue to object during trial to preserve the issue, but the trial court told him there was no need, and it noted that the defendant had entered a continuing objection. (*Id.*)

C. Law and Analysis

The mandatory joinder rule requires that all offenses based on the same act or series of acts arising from the same criminal episode must be prosecuted by separate counts in a single prosecution. Crim. P. 8(a)(1); *see also* § 18-1-408(2), C.R.S. (2015). "[A] criminal episode for purposes of mandatory joinder in a single prosecution . . . contemplates

all those offenses, but only those offenses, arising either from the same conduct or connected in such a manner that their prosecution will involve substantially interrelated proof." *Marquez v. People*, 311 P.3d 265, 271 (Colo. 2013). Proof of different crimes is interrelated if the proof of one crime forms a substantial portion of proof of the other. *People v. Rogers*, 742 P.2d 912, 919 (Colo. 1987).

Crim. P. 14, however, provides that if a joinder of offenses will prejudice the defendant, the trial court may order separate trials on the counts charged. *People v. Rosa*, 928 P.2d 1365, 1369 (Colo. App. 1996) "[W]here a defendant is charged with a substantive offense and with possession of a weapon by a previous offender, the court should consider all procedural safeguards, including an order for separate trials or a bifurcated procedure." *People v. Cousins*, 181 P.3d 365, 374 (Colo. App. 2007). "The reason for these measures is to protect defendants from the impermissible inference that they committed the crime charged because they had been previously been convicted of other crimes." *Id.*

But appellate review of a motion for severance will be overturned only upon a showing of abuse of discretion. *People v. Aalbu,* 696 P.2d

796, 806 (Colo. App. 1985). "An abuse of discretion will be found where it is demonstrated that the joinder caused actual prejudice to the defendant . . . and that the trier of fact was not able to separate the facts and legal principles applicable to each offense." *Id.*

Here, the defendant is unable to establish that he suffered any prejudice. Even had the charge of criminal impersonation been tried separately from the POWPO charge, evidence that the defendant was a convicted felon with a weapon would still have been admissible on the criminal impersonation charge as probative of the defendant's motive to give false identifying information. *See, e.g., People v. Greenlee*, 200 P.3d 363, 368 (Colo. 2009). Although the defendant maintains that the People could have proved that element under a different theory, the People have the right to prove the elements of its case against a criminal defendant as it sees fit. *Martin v. People*, 738 P.2d 789, 794 (Colo. 1987).

Likewise, the defendant is unable to demonstrate that the jury was not able to separate the facts and legal principles to each offense. The trial court instructed the jury that:

> You have heard testimony regarding an allegation that Mr. Price has a felony conviction in Tennessee. You are instructed that this evidence shall only be used in your determination as to the charge of Possession of a Weapon by a Previous Offender.
>
> You are further instructed that no inferences shall be made regarding this testimony as to Mr. Price's character or that he has a propensity to commit offenses.

(PR Court File, p. 102.)

Because there is no evidence in the record that the jurors did not follow this instruction, this Court must presume that they did, and the trial court did not abuse its discretion in refusing to sever the POWPO charge from the criminal impersonation charge. *See Cousins*, 181 P.3d at 374.

V. The People agree that this case should be remanded to correct the mittimus.

A. Standard of Review

The defendant did not preserve his claim, and he does not propose a standard of review. However, a court can correct a clerical mistake at any time. *See* Crim. P. 36.

B. Law and Analysis

Under Crim. P. 36, "[c]lerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders." The People agree that this Court should remand the case back to the trial court with instructions to correct the mittimus to provide that the defendant was found guilty after trial and not that that he pled guilty.

CONCLUSION

For the foregoing reasons and authorities, the judgment and orders of the trial court should be affirmed and this case should be remanded with instructions to correct the mittimus.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **KRISTA A. SCHELHAAS**, via Integrated Colorado Courts E-filing System (ICCES) on May 2, 2016.

/s/ Tiffiny Kallina