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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT OCT 23 2007 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 03CA1982	▲ **COURT USE ONLY** ▲
JANINE BLOOM, Petitioner, v. THE PEOPLE OF THE STATE OF COLORADO, Respondent.	Case No.: 06SC597
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STATEMENT OF THE ISSUES FOR REVIEW

1. Whether Petitioner's constitutional rights were violated when a prosecution witness testified that the only witness to support Petitioner's defense had failed a polygraph examination regarding his statements to the police in the summer of 2002.

2. Whether the trial court erred and violated Petitioner's constitutional rights when it found her competent to proceed to trial without conducting a meaningful competency evaluation.

STATEMENT OF THE CASE

Janine Chandos Bloom ("Petitioner") was accused of smothering her infant son (v. 1, p. 19). On March 4, 2003, the People charged her with Count I: first-degree murder after deliberation; and Count II: first-degree murder, knowingly causing the death of a child under twelve years of age by one in a position of trust (v. 1, pp. 19-23). At trial, lesser offenses were also added (v. 13, pp. 70-71).

On August 28, 2003, a jury convicted Petitioner on Count II, and acquitted her on Count I, and rejected the lesser offenses (v. 14, pp. 2-3). On the same day, the trial court sentenced her to the mandatory sentence of life imprisonment without the possibility of parole (v. 14, p. 15). Petitioner appealed.

COURT OF APPEALS' OPINION

In People v. Janine Chandos Bloom, No. 03CA1982 (Colo. App. May 25, 2006) (Not Published Pursuant To C.A.R. 35(f)), a division of the court of appeals affirmed the judgment, making the following conclusions:

1. Considering the proper factors, and the circumstances before the court, the trial court did not abuse its discretion by denying Petitioner's motion for mistrial after a witness stated that another witness had failed a polygraph test. The division declined to address Petitioner's Confrontation Clause argument because the trial court did not admit the polygraph evidence.

2. The trial court did not abuse its discretion in its final determination that Petitioner was competent to stand trial because its findings were supported by the record. The trial court properly declined to order a competency evaluation at the state hospital because Petitioner's showing of incompetence was weak, and the issue was raised on the eve of trial, allowing no time for the evaluation. The rule of the case doctrine did not limit the trial court's discretion to change its prior order for a competency evaluation because changed conditions rendered the prior order unsound.

3. Petitioner was not entitled to any relief regarding the *preliminary* finding because the trial court held a hearing on its *final* determination.

STATEMENT OF THE FACTS

On June 30, 2002, police arrived at Petitioner's apartment to investigate her report that her six-month-old son, Christopher Young, had died in the early morning hours (v. 6, p. 4). The police observed that the baby was lying on his back on the bedroom floor (v. 11, p. 163). The apartment was sparsely furnished, with no furniture in the bedroom where the baby was found, but rather, only piles of clothes and a pallet of blankets on the floor (v. 11, pp. 203-05).

Petitioner's husband of one month, Jeffery McAllister, was in the hospital when the death occurred (v. 12, pp. 43-44). Jeremy Ellis, McAllister's army buddy and the couples' bisexual sex partner, was the only other person present at Petitioner's apartment on the night of the death (v. 11, pp. 227, 260, 235).

On June 30 and July 22, 2002, the police conducted videotaped interviews with Petitioner in which she denied any responsibility for the baby's death (Defense Exhibits 22, 23).

On June 30, 2002, Ellis gave a videotaped interview in which he told the police that Petitioner arrived home late in the evening and put the baby to sleep in the bedroom; thereafter, they watched television until 3 a.m. (Exhibit A). The baby was still breathing when Ellis took Petitioner's car to Safeway, got lost, and returned home about one and one-half hours later to find Petitioner asleep (id.). He

took a bath and fell asleep in the tub, and when he awoke, Petitioner woke up and they went outside to smoke and talk about visiting McAllister in the hospital (Exhibit A). Petitioner then went into the bedroom to check on the baby, ran out of the bedroom screaming, and called 911 (id.). Petitioner told him that she had removed a plastic garbage bag from the baby's head; he stated that he "probably moved the bag" (id.).

On June 17, 2002, in a second videotaped police interview, Ellis admitted that he was bisexual, that he was sexually involved with McAllister, and that he had had sex with Petitioner on the night in question (v. 11, pp. 226-27; Exhibit B). He claimed that the rest of his earlier statement was true (id.).

On February 11, 2003, the Army's Central Investigation Detachment ("CID") conducted an interview with Ellis in an effort to close the police investigation and send him to Iraq (v. 11, p. 289). Ellis gave a written statement to the CID that differed from his police interviews (Exhibit 24). He stated that Petitioner called him out of the bathroom to check on the baby, who was not breathing, and she looked at him with an "odd sad sort of smile" on her face and stated, "I killed my baby." (id.). He motioned with one hand to show how Petitioner had demonstrated to him how she had smothered the baby (Exhibit 17).

The following day, Ellis contacted CID and added that Petitioner told him that she "put her hand over [the baby's face]" that he thought was possibly to "make him pass out," and stated that "she wished it was the SIDS [Sudden Infant Death Syndrome]" (Exhibit 25). Also on that day, Ellis again interviewed with police, basically repeating this account (Exhibit 17). He also revealed that he had been trying to protect Petitioner with the first account, and believed that if he had come forward he would have been "done for" (id.).

At trial, Ellis testified that he had stated the true account of events at the June 30, 2002, and that the only discrepancy was that he had omitted that he and Petitioner had had sex (v. 11, pp. 242, 251-252, 258, 269, 288). He claimed that he had changed his story when he made the CID statements and the final police interview because he did not want the investigation opened up again (v. 11, p. 290). Ellis's fingerprint was found on a plastic garbage bag that police seized from the bedroom (v. 13, p. 33).

Josh Gouge, Petitioner's ex-boyfriend, testified that Petitioner made several incriminating remarks after the death, including written remarks in a suicide note that she wrote at his house (v. 12, pp. 111-19).

The coroner who performed the autopsy on Christopher testified that he was 26 inches long, weighed 22 pounds, and was of "abnormal width" (v. 13, p. 40).

He initially concluded that the death was a sudden, unexpected death, and he had no explanation for it because there was nothing medically wrong with the baby (v. 13, p. 41). Thus, one possibility was Sudden Infant Death Syndrome, but the other possibility was asphyxia by smothering (v. 13, p. 47). He testified that under normal circumstances the baby would have been able to breathe with the plastic garbage bag over his head, similar to breathing under a blanket (v. 13, p. 42). He found a small, linear abrasion on the baby's cheek that occurred prior to the baby's death (v. 13, pp. 51, 52). The coroner later changed his finding to the other possibility that he could not rule out, asphyxia by smothering, based on Ellis's statement that Petitioner had smothered the baby (v. 13, pp. 44, 48, 56-57). He stated that typically, there is no physical evidence if a baby has been smothered because infants are easy to smother with just one hand held over the nose and mouth for 20 to 30 seconds (v. 13, pp. 44-45).

A forensic expert testified that when a plastic bag is used to suffocate a child, the bag would commonly have traces of amylase found in the saliva, and it is also common to find amylase on items that have had any close contact with the mouth area (v. 13, pp. 59-60). The expert did not find any traces of amylase or saliva on the plastic bag in this case (v. 13, p. 60).

A fingerprint expert testified that Ellis's left thumb print was found on the inside of the opening of the black plastic trash bag (v. 13, p. 33). Since the bag was very thin and pliable, Ellis had applied some pressure to make the print, and did not make the print by simply tossing the bag aside (v. 13, p. 36).

The prosecution's theory of the case was that Petitioner was a manipulative mother who did not have the time to fit her child into her lifestyle, and who used love and sex to manipulate the men in her life (v. 13, p. 80). The prosecution also argued that the baby would have had to roll four and one-half turns to get from the middle of the pallet to where he was found on the floor (v. 13, p. 88).

The defense theory was that the cause of death was undetermined, that no one, including Petitioner, knew how the baby died, and that Ellis was fabricating Petitioner's admission to the crime to prevent any further investigation involving him (v. 13, pp. 103-114).

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in denying a motion for mistrial when a prosecution witness revealed that Jeremy Ellis had failed a polygraph examination. The inadvertent polygraph reference was not an attempt to discredit Ellis's testimony, the reference was never repeated, and the trial court's striking of the polygraph statement and giving a curative instruction cured any prejudice.

The trial court did not abuse its discretion when it found Petitioner competent to proceed without ordering a competency evaluation by the state hospital. The record indicates that Petitioner understood the proceedings and assisted in her defense, and there was no evidence that she was suffering from a mental disease or defect that would have rendered her incompetent to proceed.

The law of the case doctrine does not apply because trial court was entitled to change its ruling in its discretion based on the changed condition that Dr. Moran was refusing to perform the competency evaluation for ethical reasons. Further, the trial court's ruling was based on a "factual error," i.e., the belief that the treating physician at the jail would be willing to conduct a competency evaluation.

Finally, Petitioner was not entitled to an independent examination because that request was untimely.

ARGUMENT

I. The trial court did not abuse its discretion in denying a motion for mistrial when a prosecution witness revealed that Jeremy Ellis had failed a polygraph examination.

Petitioner contends that the trial court violated his constitutional rights to due process of law and to a fair trial, to confront witnesses, and to a fair and impartial jury when it denied her motion for mistrial in regard to a witness's polygraph statement (Opening Brief, p. 5). In the alternative, Petitioner contends that the standard of review is whether the trial court abused its discretion by failing to grant the mistrial (id.).

A. Evidence admitted at trial.

1. Petitioner's out-of-court statements.

Petitioner's two videotaped police interviews conducted on June 30, 2002, and July 22, 2002, were published to the jury (People's Exhibit 23, 22). In addition, witnesses testified to several incriminating statements made by Petitioner after the crime.

Detective Robert Jaworski testified that he conducted a follow-up videotaped interview with Petitioner on July 22, 2002 (v. 13, p. 9). The videotape was admitted and published to the jury (v. 13, p. 10; Exhibit 23). He testified that Petitioner stated she was at Gouge's house every night after she returned from

Texas, but when confronted with inconsistent facts, said that she was definitely not there on one of those nights (v. 13, p. 12).

He testified that Petitioner's stated that the plastic bag was over the baby's head and his arms were holding it down over his face, but that was inconsistent with her statement in earlier interviews where she placed the bag farther down on the child (v. 13, p. 13). She told him that she found the baby at around 8:30 a.m., and this was odd because the 911 call came in at 9:19 a.m. (id.). He asked Petitioner about this discrepancy, in addition to the timing of when she checked on the baby (v. 13, pp. 13-14). In the bedroom where the baby was found, there was a digital clock radio that was on, and in the front room there was a wall clock with hands on it (v. 13, pp. 15, 25; People's Exhibit 8, 5A). Detective Jaworski also testified that he learned in his training that phrases such as "honest to God," "I swear to God, and "honestly," are indications of deception (v. 13, pp. 15-16). He noted that during the interview, Petitioner used these phrases on a number of occasions (v. 13, p. 15).

Jeffrey McAllister testified that he married Petitioner for Christopher's benefit (v. 12, pp. 47-48). He was not present when Christopher died because he had been in the army hospital with a sinus infection since the night Petitioner got back from Texas, which was a week before the crime (v. 12, p. 40). He had two

conversations with Petitioner when she was in the hospital after her suicide attempt, and she said, "I felt like I killed him" and "I think I killed him" (v. 12, p. 45). In mid-July he asked her for a divorce, and the marriage was annulled in late August (v. 12, pp. 47-48).

In March of 2003, he gave a written statement to Detective Firpo stating that Ellis told him that Petitioner ran out of the bedroom and said, "I killed my baby," and told Ellis that they had to "put their stories together to have a good story to tell the police" (v. 12, pp. 49-50). McAllister was aware that Ellis had his own Jeep parked at Fort Carson that he would drive from there to the apartment, and he never once got lost (v. 12, pp. 52-53).

On June 30, 2002, Detective Gabriel Firpo interviewed Ellis, and then interviewed him again in February after he had changed his story at the army interview (v. 12, pp. 70-71). Detective Firpo introduced Petitioner's handwritten suicide note where she said goodbye to McAllister, Ellis, and Gouge, and then stated, "Please, some day maybe y'all can forgive me for killing our little boy" (v. 12, p. 73; Exhibit 20).

Since the first video on June 30 was poor quality, Detective Larsen went over some of Petitioner's statements (v. 12, p. 83). She said she had used two to three different babysitters for Christopher, she came home at 1:30, put the baby to

sleep, talked with Ellis, around 3 a.m. he left to get food, she waited until his return at 4 a.m., they checked the baby together, they talked, then fell asleep on the couches, then woke up at 8:30 or 8:45 and found the baby dead (v. 12, p. 86). Toward the end of the video, Petitioner blurbs out "Our stories aren't corroborating each other, are they?" and then asks if Ellis had been "convicted of anything" (v. 12, p. 86). The remark took him by surprise because it "came out of nowhere," and he began to suspect criminal activity (v. 12, p. 87).

Valerie Haskins testified that on June 29, 2002, she went to work at her bartending job while Petitioner babysat at her home; she had Christopher with her, whom she had picked up from her mother's home in Texas the week before (v. 11, pp. 151-53, 156). Ms. Haskins arrived home from work at about 1:30 or 2:00 a.m., packed Christopher's diaper bag, and chatted briefly with Petitioner before she left (v. 11, pp. 155-56, 160). Ms. Haskins stated that Christopher was so chubby that he could not crawl, roll, or sit up, and there was no plastic bag in his diaper bag (v. 11, pp. 156, 160).

Kenneth Rinhart, Ms. Haskins' husband, testified that he saw Petitioner when she left his home around 2 a.m., and he noticed that Christopher's cough was better (v. 11, pp. 208-09). The next time he saw Petitioner was the following day, when she told him that Christopher suffocated in a Wal-Mart bag that his children

put in the diaper bag (v. 11, pp. 209-11). Rinhart had watched his wife pack the diaper bag, and he knew for sure that there was no plastic bag in it, and he did not have black plastic bags in his house (v. 11, p. 212). Petitioner was upset and crying while talking of Christopher's death, but then turned the tears off "like a faucet," and invited him to a house party that she was having that night (v. 11, pp. 213-14). He declined to go because a party was inappropriate under the circumstances (id.).

Deputy Karl Herndon testified that he received a call at about 9:24 a.m. on June 30th to respond to Petitioner's home where a six-month-old child was not breathing (v. 11, p. 162). The fire department performed CPR on Christopher, and then pronounced him dead (v. 11, p. 163). Deputy Herndon overheard Petitioner telling the fireman about the night before. She arrived home between 2:30 and 3:30 a.m., the baby woke up, she made a makeshift bed and put him down, talked to Ellis about an hour, checked on him at about 4:30 a.m., then fell asleep on the couch (v. 11, pp. 164-66). She later awoke at 8:30 a.m., checked on the baby, went out to the balcony to smoke, came back in and spoke with Ellis about visiting her husband at the hospital, checked the baby again, found a plastic bag over his head, and removed it (v. 11, 164-167).

When Deputy Herndon conducted a one-on-one interview with Petitioner she gave a slightly different story (v. 11, pp. 169, 183-84). The discrepancy was that she told the fireman that she had checked on the baby before and after she smoked, whereas with his interview she stated that she had checked on him only once and he had the bag over his head (v. 11, p. 170). She stated that Christopher could roll over, but he had never rolled out of his bed before (v. 11, pp. 185-86). She was very upset and crying, and stated to several people that she was "sorry," and "didn't mean to hurt him" (v. 11, pp. 164, 167-68, 186-87).

Grace Kendrick testified that she was the nurse assigned to sit in Petitioner's room in the hospital and watch that she did not harm herself (v. 12, pp. 148-49). She overheard Petitioner say in a telephone conversation, "I know I killed my baby. I know it was wrong. I'm not crazy, and no, I'm not giving you a divorce" (v. 12, p. 151). When confronted with this statement during her second police interview on July 22, 2002, Petitioner looked startled, but did not deny that she had had the telephone conversation (Exhibit 22). She stated that she was bisexual, and then stated that she resumed her relationship with Gouge because she only married McCallister to make Gouge jealous, and she was discontent with the fact that McCallister was bisexual (Exhibit 22).

2. Jeremy Ellis's testimony and out-of-court statements.

Ellis's three videotaped police interviews conducted on June 30, 2002, July 17, 2002, and February 12, 2003, were published to the jury (Defense Exhibits A, B, People's Exhibit 17). In addition, Ellis testified at trial.

Ellis testified that he had been convicted as an accessory to Christopher's murder, but was granted immunity for his testimony for purposes of his sentencing and appeal (v. 11, pp. 223-24). The trial court gave the jury a limiting instruction to consider the conviction only in assessing Ellis's credibility (v. 11, p. 225). Ellis was McAllister's best friend from Fort Carson where they served in the military, and he planned to move into the new apartment shared by McAllister and Petitioner (v. 11, pp. 226-28). On June 29, 2002, he traveled from Fort Kiley, Kansas to Petitioner's apartment, arriving at sunset (v. 11, pp. 228-30). He met Christopher for the first time when Petitioner arrived home with him that night (v. 11, p. 233). He played with Christopher for twenty minutes, Petitioner put him to bed, and he went to take a shower because Petitioner told him that he "stunk" (v. 11, pp. 235-36). When he finished his shower, Petitioner told him to look in on the baby, and commented on how "peaceful" he looked (v. 11, p. 237). He then got dressed, went into the living room, and talked about getting food (v. 11, p. 238).

They had sex, Ellis took Petitioner's car to Safeway, got lost, and when he finally returned with the food, Petitioner was asleep on the couch (v. 11, pp. 238-40). He put the food away, dozed off on the loveseat, got up, took a bath, fell asleep in the bath, went to smoke a cigarette, and Petitioner woke up and followed him out to the balcony (v. 11, p. 240). They talked about going to see McAllister in the hospital, whether to get a babysitter or take the baby with them "if he was awake," and when she went to check on him she came back screaming to call 911 (v. 11, p. 241). She called 911, but was hysterical, so Ellis took the phone and tried to perform CPR until the paramedics arrived, but Christopher was blue and stiff (v. 11, p. 243). He admitted that he had first claimed that he had not touched the bag, but changed his story and said he had "moved the bag from under his shoulders" when his fingerprint was found on the bag (v. 11, p. 244). He admitted that in his February 11, 2003 interview with Central Investigations Detachment, he told a different story, and reduced it to writing (v. 11, pp. 246-47; Exhibit 24). The defense then went through the statement, word-for-word, and Ellis identified where he had lied (v. 11, pp. 249-55). He also went through the next statement on February 12, 2003 'things he left out of the 2/11 statement" to show where he had lied, and was impeached with statements he made to McAllister (v. 11, pp. 258-60, 261-63; Exhibit 25).

Ellis admitted to the inconsistency of stating in the first video that the baby was warm, and in the second video that the baby was cold (v. 12, pp. 13-14). Also, he said in both interviews that he went to Safeway to use Petitioner's Safeway card, but the cash receipt showed that he did not use the card (v. 12, pp. 15-18; Exhibit 26). He agreed there was a discrepancy regarding the bag, i.e, he first said he never saw the bag at all, but when Detective Firpo told him that bags were "printable," he said he "might have grabbed the bag. I might have moved him" (v. 12, p. 23). He agreed that it was impossible that Christopher could have gotten to the bag by himself because he could not crawl or roll, and there was no bag anywhere around him (v. 12, p. 24). In the Detective Jaworski video, Ellis said, "I can't believe she's trying to pin it on me," and he believed she was trying to accuse him of murder (v. 12, p. 25). He admitted at trial and videotape that he was bisexual (v. 12, p. 27). At the end of the video, Ellis agreed to take a polygraph test (Exhibit B).

3. Josh Gouge's testimony and the polygraph statement.

Pretrial, the prosecutor stipulated to the suppression of the results of Ellis's polygraph tests (v. 6, p. 27).

Josh Gouge testified that he met Petitioner in the spring of 2001 when she was pregnant with Christopher, who was born on December 26, 2001, and then they began dating in January 2002 (v. 12, pp. 96-97). The two got back together after Petitioner broke up with McAllister, and now Petitioner is the mother of Gouge's infant daughter (v. 12, p. 94). They broke up sometime between the end of March and beginning of May (v. 12, p. 99). Petitioner married McAllister on May 25, 2002 (v. 12, p. 101). Two weeks before June 30, 2002, Gouge and Petitioner began a sexual relationship again and planned to get back together (v. 12, pp. 103-04). When Petitioner got back from Texas, she stayed at Josh's apartment for at least one night (v. 12, p. 107). On July 2002, in an interview with Detective Jaworski, Gouge stated that Christopher could roll over and crawl (v. 12, p. 108). When Petitioner stayed at his house the night of June 30, she stated, "I killed Christopher, I didn't see that black bag" (v. 12, p. 111). The story she told him was after she put the baby to bed, Ellis went to get food, they both stayed up, smoked a cigarette, went to bed, woke, and found the baby with a bag on his face (v. 12, pp. 111, 113). She then admitted to him that she had had sex with Ellis, so Gouge got angry and went straight to bed (v. 12, p. 112). Gouge woke up at 8 a.m. to Petitioner vomiting, and he discovered that she had ingested two bottles of his pills, and had written a suicide note; he took her to the hospital (v. 12, pp. 114-15).

Sometime later that summer, she became pregnant with his child (v. 12, p. 117). On August 30, 2002, he kicked her out, and when he was packing up her things, he found her journal and turned it over to police (v. 12, pp. 118-19). In a journal entry for August 11, 2002, she states that she might be pregnant and asks God to forgive her, prevent her from getting convicted for Christopher's death, not let them take the new baby away, and promises to "take better care" of the new baby (v. 12, pp. 120-23; Exhibit 21a). She moved back in with Gouge until November, and then they separated for good (v. 12, p. 125). She moved to Texas, and told Gouge, "If you don't stand by me, you're going to lose custody of the child I'm carrying" (v. 12, p. 126). Gouge told Detective Jaworski that Petitioner made little changes in the story about the night of the baby's death, such as whether she had smoked at all, or how many cigarettes, and whether she had eaten (v. 12, p. 127). The prosecutor then asked whether Petitioner was saying "derogatory" things about Ellis, and when Gouge replied in the affirmative, the prosecutor then asked, "What was she saying?," and Gouge replied: "That Ellis failed his polygraph the first time" (v. 12, p. 128). The defense objected and the trial court immediately issued the following cautionary instruction:

> Members of the jury, you are instructed to disregard that statement. It is hearsay and entirely inadmissible, and there is no foundation for that whatsoever, so you're to disregard that statement in entirety.

(v. 12, p. 128). The prosecutor then immediately directed Gouge back to the information he was trying to elicit "let's specifically talk about Ellis and drugs," after which Gouge answered that Petitioner had wondered if Ellis may have slipped her a date rape drug and that was why she did not wake up if someone had "done something" to Christopher (v. 12, p. 128). Gouge admitted that when talking about the death, Petitioner would always blame either the black bag or Ellis (v. 12, p. 129).

The next day, the defense requested a mistrial (v. 13, p. 3). The trial court denied the motion, finding that it had immediately instructed the jury to disregard the statement; it would give a written instruction that the jury is not to consider evidence that the court has stricken; the reference was not to the defendant's polygraph; and the jury could assess Ellis's credibility for themselves (v. 13, p. 6).

B. The standard of review is abuse of discretion.

The People agree with Petitioner's alternative assertion that the standard of review is abuse of discretion. A mistrial is a drastic remedy and is warranted only when prejudice to the accused is so substantial that its effect on the jury cannot be

remedied by other means. People v. Kerber, 64 P.3d 930, 933 (Colo. App. 2002) *disapproved on other grounds by* Domingo-Gomez v. People, 125 P.3d 1043 (Colo. 2005). A trial court's decision to deny a motion for mistrial will not be reversed absent an abuse of discretion, which occurs when the decision is manifestly arbitrary, unreasonable, or unfair. Id.

The People disagree with Petitioner's first assertion that she preserved her constitutional argument, In response to the inadmissible evidence, defense counsel stated only, "Objection, Judge," and after the trial court instructed the jury to disregard the statement, the prosecutor elicited admissible testimony as he had originally intended (v. 12, p. 128). The following morning, defense counsel requested a mistrial on the grounds that the parties had "agreed that the results would not be coming in and are not admissible." (v. 13, p. 3). Thus, the defense sought the remedy of a mistrial only, and thereby waived any Confrontation Clause objection on appeal. See Hinojos-Mendoza, 2007 WL 2581700 (Colo. Sept. 10, 2007) (defense counsel can waive confrontation right through strategic decisions).

In any event, the Confrontation Clause does not apply because the statement was non-hearsay because it was not offered for its truth. Rather, the prosecution was attempting to show that Petitioner made derogatory statements about Ellis in regard to drugs, and not that any of the statements were true. See Crawford v.

Washington, 541 U.S. 35 (2004) (*admission of hearsay* implicates Confrontation Clause). In addition, the court of appeals properly declined to address Petitioner's *Crawford* argument because Gouge's polygraph statement was not admitted at trial. Bloom, supra, slip op. at 29.

To the extent that Petitioner contends that a reference to polygraph results violates due process, she is wrong. See Maldonado v. Wilson, 416 F.3d 470, 477-78 (6th Cir. 2005) (federal circuits reject claims that implying the results of a polygraph render the defendant's trial fundamentally unfair, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments, and the United States Supreme Court has never held that such statements violate due process).

C. The *Kerber* test.

Polygraph evidence is per se inadmissible in a criminal trial. People v. Dunlap, 975 P.2d 723 (Colo. 1999). However, the mere reference to such testing does not require a mistrial. See e.g., People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002) (trial court did not abuse its discretion in denying mistrial where jury was inadvertently informed defendant had taken a lie detector test, but was not told result of the test).

In Kerber, 64 P.3d a933-934, the court applied the following factors as guidance to determine whether reversal was warranted: (1) whether the defendant

objected or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than only the fact that a test was conducted. In Kerber, a mistrial was not warranted because the court immediately gave a cautionary instruction when a witness blurted out that he had tried to pass a polygraph for five days because it was an inadvertent and unsolicited answer to the prosecutor's properly asked question; the prosecutor made no other references to the testing; the reference did not bolster the witness's testimony; both parties relied on the witness in part; and there was no testimony about why this witness was given the test. Id.

Therefore, the Kerber test is based on two concerns: (1) whether the prosecutor committed misconduct by deliberately eliciting a polygraph reference in "an attempt" to bolster a witness's credibility (or in this case, to discredit a witness's credibility), and then repeated the references; and (2) whether the result of the polygraph reference caused prejudice by actually bolstering (or discrediting) the witness's testimony to the extent that it could not be cured by the trial court's instruction to disregard it.

As set forth below, Petitioner's claim fails under the Kerber test because the only factor that weighs in Petitioner's favor is that the results of the test were

revealed, and when weighed together with the factors of proper prosecutorial conduct and the trial court's cautionary instruction, there is no showing of prejudice sufficient for reversal.

1. The inadvertent polygraph reference was not an attempt to discredit Ellis's testimony, nor was the reference ever repeated.

The prosecution did not know that Gouge knew of the polygraph test because it was not in the reports of Gouge's pre-trial interviews (v. 13, p. 5). Rather, the prosecutor was trying to elicit that the defendant had told Gouge that it was possible that Ellis had slipped a drug in her drink on the night in question, and that was why she did not awaken when the baby was dying (v. 12, p. 128; v. 13, p. 5). The prosecutor was not trying to discredit Ellis, but rather he was trying to show that Petitioner was trying to blame the death on Ellis. The very next question the prosecution asked was, "And, in fact, what you told the detective is, she would always blame either the black bag or Ellis for Christopher's death?," and Gouge answered in the affirmative (v. 12, p. 129).

In addition, the prosecution did not engage in any misconduct by repeating the reference, and in fact, did quite the opposite. The reference to the polygraph test was not repeated by anyone once Gouge blurted it out. The only other

reference in the trial to a polygraph was at the end of Ellis's second videotaped interview where he stated he was willing to take a polygraph (Defense Exhibit B). The videotape was played for the jury earlier in the trial (v. 12, p. 4). The videotape was entered into evidence as a defense exhibit, and the defense lodged no objection to the polygraph reference, ostensibly because a witness's willingness to take a polygraph test bolsters his credibility. See United States v. Martino, 648 F.2d 367, 390 (4th 1981) (witness's willingness to take polygraph test constitutes bolstering of his testimony). It was only when the negative reference was blurted out at trial that the defense objected.

To the extent that the Petitioner argues that there was a second reference at trial, she is wrong. In Petitioner's second videotaped interview on July 22, 2003, she agreed to take a "voice stress analysis" test. However, the prosecution stated on the record that it had "edited around" the reference when publishing the video to the jury (v. 12, p. 80; Defense Exhibit 23). Thus, the jury never heard the reference. There is no evidence in the record that Petitioner ever took the test.

As such, since the prosecutor did not elicit the polygraph reference at all, much less attempt to discredit Ellis's testimony, and the prosecutor did not repeat the reference, there was no prosecutorial misconduct. Kerber, supra; see also

United States v. Blaze, 143 F.3d 585, 594 (10th Cir. 1998) (a single unsolicited reference to polygraph does not usually warrant reversal).

Finally, the witness was not a police officer, detective, or other state authorized agent who would have had personal knowledge of Ellis's polygraph test, thereby minimizing any prejudice. Blaze, 143 F.3d at 594, quoting United States v. Walton, 908 F.2d 1289, 1293 (6th Cir. 1990) ("Where the witness is not a government official, the question is not whether the witness intended to prejudice the jury or bolster his credibility but whether the reference was harmless.").

2. The trial court's striking of the polygraph statement and giving a curative instruction cured any prejudice.

As noted above, the prosecutor did not elicit the polygraph reference, and the reference was never repeated. Generally, in these circumstances, a trial court's curative instruction is sufficient to avoid a mistrial. See United States v. Wallace, 32 F.3d 921 (5th Cir. 1994) (where the government had nothing to do with the witness's outburst, the unsolicited reference to polygraph test was cured by trial court's instruction); United States v. Holman, 680 F.2d 1340 (11th 1982) (objection to polygraph evidence hinges on whether judge's instructions sufficed to remedy its effect).

In addition, the supreme court presumes that a jury follows the trial court's instructions. Medina v. People, 114 P.3d 845, 856 (Colo. 2005).

It is also significant to the prejudice determination that the reference was not repeated. See United States v. Kiszewski, 877 F.2d 210 (2nd Cir. 1989) ("isolated" statement was consumed by over 1200 pages of transcript and any prejudicial effect was neutralized by court's strong and timely corrective instruction).

Further, the prejudicial impact was minimized because the reference was not to Petitioner's polygraph. United States v. Walton, 908 F.2d 1289 (6th Cir. 1990) (where such a polygraph reference is not to a defendant, an instruction to disregard the reference is sufficient if it meets the non-constitutional error test); United States v. Miller, 874 F.2d 1255, 1263 (9th Cir. 1989) (where a polygraph reference is not to a defendant failing or refusing to take a polygraph, an instruction to disregard the reference is sufficient to cure any potential prejudice if it meets the non-constitutional error test).

In addition, although the reference indicated the results of the test, it did not indicate what questions were asked and which answers were "failing" answers. For instance, there were various lies that were exposed during trial, such as Ellis's admission that he lied about having sex with Petitioner the first time. See Thornburg v. Mullin, 422 F.3d 1113 (10th Cir. 2005) (prejudicial impact of

polygraph statement limited because it did not indicate what portion of testimony the polygraph found truthful, and there was other evidence corroborating his testimony, and other evidence against defendant); Thornburg v. Mullin, 422 F.3d 1113 (10th Cir. 2005); United States v. Miller, 874 F.2d at 1262-633 (crucial to a finding of insufficient prejudice is that specific questions and answers given during the exam were not put into evidence because there was nothing to indicate to the jury what particular statements the polygrapher had reference to when he told the defendant that there were indications he was lying); United States v. Tedder, 801 F.2d 1437 (4th Cir. 1986) (no mistrial despite waiver of curative statement even though jury may have assumed that witness's mention of polygraph buttressed his credibility because they did not hear the test's result and they observed him during lengthy direct and cross examination).

Also, the trial court's curative instruction dissipated any potential prejudice to Petitioner because the jury did not need the result of the polygraph examination to judge Ellis's credibility. The jury had observed Ellis's three videotaped interviews, and observed him during lengthy direct and cross-examination at trial. As such, the reference to the exam was not critical to the jury's evaluation of his credibility.

Moreover, just because Ellis was a primary witness does not mean that the outcome of his trial hinged on the credibility of his trial testimony. Even though Ellis's trial testimony was evidence exculpating Petitioner, there was strong evidence of his lack of credibility. He admitted on the stand that several of his statements were false. Petitioner's own out-of-court statements that she had killed her baby, and her lack of credibility in denying the involvement showed her inconsistent statements. As such, there was no special reason to believe the polygraph inference was any more critical in assessing the Ellis's credibility.

Finally, there is nothing in the record to suggest that the jury failed to follow the trial court's instructions to disregard the polygraph reference. On Wednesday, August 20, 2003, the trial in this case commenced wherein the jury heard from many witnesses before the prosecution rested its case at close to 5:00 p.m. on Friday, August 22, 2003 (v. 12; v. 13). The trial court excused the jury and instructed it to return on the following Monday, August 25, 2003 to begin its deliberations (id.). The jury deliberated for three days, and then on the fourth day asked to see transcripts of trial testimony, which the trial court refused (v. 14, p. 2). The jury finally returned a verdict at approximately noon on Thursday, August 28, 2003 (v. 14, pp. 2, 8). Thus, the deliberations took longer than the trial.

At sentencing later that afternoon, the trial court responded to Petitioner's remark that she had no reason to kill her baby:

> But 12 jurors listened to the evidence. They spent three days pouring over every detail of that evidence. I've not seen a jury work as this jury did. It's clear they agonized over the decision but they found that the prosecution had proven beyond a reasonable doubt that you were responsible for the death of the child.

(v. 14, p. 14).

Accordingly, when viewing all the evidence presented at trial, and the circumstances of the polygraph reference, the trial court's striking of the statement and giving a curative instruction cured any prejudice of revealing the results of the polygraph. See Kerber, supra; see also State v. Edwards, 412 A.2d 983 (Me. 1980) (when results revealed, new trial is warranted if it is substantially prejudicial to the defendant in the context of all the evidence).

II. The trial court did not abuse its discretion when it found Petitioner competent to proceed to trial without ordering a competency evaluation by the state hospital.

Petitioner contends that the trial court erred and violated her constitutional rights when it failed to conduct a meaningful competency evaluation but found her competent to proceed (Opening Brief, p. 30).

A. The standard of review

1. Abuse of discretion

Respondent disagrees with Petitioner that the standard of review is constitutional harmless error (Opening Brief, p. 30). Petitioner's argument in the trial court, on direct appeal, and on certiorari review is that the trial court failed to follow statutory procedures when it failed to order a mental competency evaluation before determining that she was competent to stand trial (Opening Brief, p. 49).

As such, the standard of review is abuse of discretion. Because the trial court is in the best position to observe the defendant's general demeanor, its determination of competency will be upheld absent an abuse of discretion. People v. Stephenson, 165 P.3d 860, 866 (Colo. App. 2007). To establish an abuse of discretion, the defendant must establish that under the circumstances the trial court's decision was manifestly arbitrary, unreasonable, or unfair. Id., citing People v. Ibarra, 849 P.2d 33 (Colo. 1993).

The trial judge who has had the opportunity of observing the defendant, his actions, and his general demeanor, has substantial discretion in determining whether an issue respecting his competency has been raised. People v. Morino, 743 P.2d 49, 52 (Colo. App. 1987) *citing* Maggio v. Fulford, 462 U.S. 111 (1983).

2. Due process

Since Petitioner did not raise a due process violation in the trial court, that claim is reviewed for plain error, and not constitutional harmless error.

It is true that putting a defendant on trial while she is incompetent violates her right to due process. Drope v. Missouri, 420 U.S. 162 (1975); Jones v. Dist. Court, 617 P.2d 803 (Colo. 1980). However, Petitioner must first show that the trial court violated the statutory procedures, and then show that the violation caused the defendant to be tried while she was incompetent. She has not made either showing.

The legal conclusions of the trial court are subject to de novo review and reversal if the court applied an erroneous legal standard or came to a conclusion of constitutional law that is inconsistent with or unsupported by the factual findings. People v. Syrie, 101 P.3d 219, 222 (Colo. 2004) (no abuse of discretion in failing to order second competency evaluation).

B. The defense request for a competency determination

On March 4, 2003, the first pre-trial hearing, defense counsel indicated that Petitioner had agreed to continue the preliminary hearing (v. 2, p. 6). There was no allegation that Petitioner was incompetent to proceed.

On April 11, 2003, the second pre-trial hearing, the trial court engaged in a colloquy with Petitioner regarding her request to waive her preliminary hearing, after which it found that she had knowingly and voluntarily waived her right to a preliminary hearing (v. 3, p. 3). There was no allegation that Petitioner was incompetent to proceed.

On May 12, 2003, defense counsel requested that the trial court, Judge Kennedy presiding, order the jail to provide Petitioner with the antidepressant drug "Lexipro" that the hospital prescribed after the birth of her child several weeks prior, because she had a history of postpartum depression (v. 4, p. 3). The court denied the request absent an opportunity for the jail to respond (v. 4, p. 4). There was no allegation that Petitioner was incompetent to proceed.

On May 23, 2003, the trial court accepted Petitioner's not guilty pleas and defense counsel again requested that the trial court order the jail to provide Petitioner's medication (v. 5, p. 44). The trial court scheduled the trial for August 19, 2003, and promised to contact the jail's chief and ask that a physician check on Petitioner's medical care (v. 5, pp. 46-47). There was no allegation that Petitioner was incompetent to proceed, but defense counsel did state, "we may have competency issues that come up, and certainly that's going to delay these proceedings" (v. 5, p. 44).

On July 7, 2003, defense counsel stated that she had met with Petitioner extensively in regard to the prosecution's plea offer, and Petitioner indicated that she wanted some time to consider it, but otherwise the defense was ready to proceed with the motions hearing (v. 6, p. 2). After motions were heard, defense counsel warned the trial court that she would probably move for a continuance of the trial date at the next hearing because she needed to do additional investigation (v. 6, p. 31). There was no mention of Petitioner's medication issue, and there was no allegation that Petitioner was incompetent to proceed (id.).

On July 28, 2003, a suppression hearing was held, after which defense counsel requested a continuance of the trial date (v. 7, 7/28/03, p. 40). Defense counsel stated three reasons for the continuance: (1) she had another trial set for that day that was approaching the speedy trial deadline; (2) she was still trying to obtain some necessary records from Texas; and (3) the jail had not yet provided Petitioner with the Lexipro, but rather would only provide her with Prozac, which she refused to take (v. 7, 7/28/03, p. 41). Defense counsel stated that she believed Petitioner could not make it through the trial without the Lexipro, and that the jail had not medically evaluated her for the Lexipro (v. 7, 7/28/03, p. 42). She also stated that Petitioner had "not been in this court one day without breaking down into tears" and she needed to "be able to have the assistance of [Petitioner] and

have her competent to proceed to trial. I'm not sure that she's at the point of incompetency, but I'm concerned as we proceed through the trial that it could get there. . ." (v. 7, 7/28/03, p. 43).

The prosecutor objected to the continuance, and candidly remarked that he did not understand the competency issue (v. 7, 7/28/03, p. 43).

Defense counsel reiterated the problem that she had another trial scheduled for the same day as Petitioner's (id. at 44). Defense counsel further stated that she had discussed the problem with Petitioner, who said she "would prefer to be completely ready and have us have all the records that we're trying to obtain and determine whether they will be necessary or not and be fully prepared, rather than trying to do it in a hurried, last-minute fashion . . . and is willing to waive speedy trial." (id. at 44-45).

The trial court denied the continuance, finding that a case involving the death of a child must be resolved promptly for public interest reasons, and the jail's commander reported that Petitioner was refusing to take the medication that was available (v. 7, 7/28/03, p. 45). The court found that Petitioner's decision to refuse the medication was a choice she had to live with, and the court could not interfere with the jail's administration of their facility (id.).

On July 31, 2003, the defense filed a motion for a competency evaluation, alleging that Petitioner could not assist in her defense because she was very emotional, crying and upset, her baby born in March had been taken from her, she was prescribed Lexipro for postpartum depression, but the jail would not administer it, and the mental health treatment she had had after her suicide attempt was not continued in the jail (v. 1, pp. 56-57). The motion did not allege that Petitioner did not understand the proceedings or the charges against her (id.).

On August 1, 2003, the trial court held a hearing on the motion (v. 7, 8/1/03, p. 2). Defense counsel cited § 16-8-110, C.R.S. (2007) and § 16-8-111, C.R.S. (2007), and argued that the jail had not provided Petitioner with her antidepressant medication, and she had a history of ADHD, PTSD, and postpartum depression (v. 7, 8/1/03, p. 2). Defense counsel stated that her concern was not that Petitioner was not aware of the proceedings or the charges, but that she was unable to assist in her defense in a way that was meaningful (v. 7, 8/1/03, p. 3). She stated, "I feel that I really don't have another option except to raise competency at this point" in order to get the medication so that Petitioner would be able to get through the trial (v. 7, 8/1/03, p. 3). She requested that the state hospital perform a competency evaluation (id.).

The prosecution objected because it was two and one-half weeks before trial, and the defense had not articulated how Petitioner was not able to help in her defense (v. 7, 8/1/03, p. 4). Defense counsel responded that Petitioner was "extremely emotional throughout the proceedings" had "completely broken down" at the prior motions hearing, and that she was not able to process the information regarding the trial or the plea bargain due to her emotional state (v. 7, 8/1/03, p. 5). She then stated, "This is not my first preference in trying to get this done," and "I don't think I have a choice at this point." (id.).

C. Judge Kennedy's preliminary finding of competency.

1. Preliminary Burden of Proof

Petitioner contends that Judge Kennedy erroneously imposed a burden of proof of a preponderance of the evidence at the preliminary stage of the competency hearings, and thereby shirked his duty to order a competency evaluation (Opening Brief, pp. 49-50).

As a threshold matter, the court of appeals correctly determined that even if the Judge Kennedy misunderstood the burden of proof at the preliminary stage, the mistake had no effect on the competency proceedings. Slip op. at 15. Judge Kennedy's preliminary finding had no significance because it did not automatically

become a final determination, but rather, the statutory procedures were followed for a hearing and a final determination by another judge, as Petitioner requested. See § 16-8-111(2), C.R.S. (2007).

Further, a careful review of Judge Kennedy's findings does not clearly demonstrate that he misunderstood the burden of proof:

> Well, I'm not satisfied that you've established a basis even to conduct a competency evaluation. I have observed [Petitioner] in court repeatedly.
>
> I've seen no indication that she is suffering from any mental disease or defect which would preclude her from participating meaningfully in this trial.
>
> I also sat through hours of interviews with [Petitioner] that were done within a short time after the death of her child, and certainly at that time saw no evidence on those tape-recorded interviews of any type of mental illness at all that would affect her competency in this case. In addition, at your request, I did speak to the jail personnel at the jail, and they represented to me that [Petitioner] chose not to take the medication which had been prescribed to her.
>
> So at this point in time, I am not going to set this matter for a competency evaluation. You have not made a sufficient showing. I will set the matter for hearing next week. If you wish, we can bring in personnel from the jail and have a hearing.
>
> It is your burden to establish by a preponderance of the evidence that she is incompetent, and you have not done sufficient assertion [sic] even to order a competency evaluation to the Court.

(v. 7, 8/1/03, p. 6).

It appears the court stated the burden of the final determination of competency, and then noted that the threshold showing for a competency examination had not "even" been met, meaning that it was a lesser burden than the preponderance standard.

In any event, the defense made no specific objection to the trial court's reference to the burden of proof, but rather, agreed to this course of action (v. 7, 8/1/03, p. 7). The court stated that it would make a preliminary determination after the hearing as to whether there was a genuine issue as to competency (v. 7, 8/1/03, p. 10). The granting of a hearing itself shows that the trial court was not "shirking" its duty to follow the statutory procedures.

2. Preliminary Finding

On August 8, 2003, the trial court held the hearing, at which the defense requested that the final determination be made by another judge (v. 8, pp. 3-4). The defense called a licensed practical nurse from the jail, who testified that she would "recommend" a competency evaluation because of Petitioner's mood swings, crying, and the nature of the charges (v. 8, pp. 4-5, 16, 18). Petitioner had been meeting with the jail's mental health providers, both before and after her pregnancy, because of her depression (v. 8, p. 7). Because of the fetus, the jail could not provide her with medication while she was pregnant (v. 8, p. 11). After

the baby was born, Petitioner had mood swings, sometimes cheerful, sometimes crying, and was being mistreated by other inmates (v. 8, p. 13).

The nurse had no psychological training and was unqualified to state an opinion as to competency (v. 8, p. 19). She testified that Petitioner had refused to take Prozac or meet with the jail psychiatrist, expressed fear as to her safety regarding other inmates, and had chosen a different ward to reside in (v. 8, pp. 22-23). Petitioner had not attempted suicide in jail, but had expressed concern regarding other inmates' suicide attempts (v. 8, p. 30). The mental health personnel had not viewed Petitioner's behavior as cause to send her to the state hospital for a 72-hour mental health evaluation (v. 8, p. 30).

Petitioner did not testify.

At the conclusion of the hearing, the defense argued that the trial court did not have enough information to make a preliminary finding without a "full blown competency evaluation" (v. 8, pp. 38-39). The trial court asked why the defense had not requested the competency evaluation until their motion for continuance was denied, and the defense replied that they thought the continuance would be granted, and also the mental health concerns had just recently come to fruition (v. 8, pp. 39-40).

Judge Kennedy entered the following findings: (1) Petitioner had been attentive and speaking with her counsel at all but the first court proceeding; (2) she was able to communicate effectively and understand her rights at the preliminary hearing, and during the long hours of the videotaped police interviews; (3) although she had been upset at times, there was no evidence that she failed to understand the proceedings; (4) she had refused to take her medication; and (4) the defense officially raised the competency issue only after their motion for continuance was denied, 18 days before trial (v. 8, pp. 47-48).

Judge Kennedy then entered a preliminary determination that Petitioner was competent to proceed, set the matter for hearing on the final determination in Judge Kane's court, and ordered that Dr. Michele Moran, the jail psychiatrist, perform the competency evaluation for that hearing (v. 8, pp. 49-50).

D. Judge Kane's final determination of competency

On Friday, August 15, 2003, Dr. Moran testified before Judge Kane in regard to her fifty-minute psychiatric evaluation of Petitioner (v. 9, p. 7). On direct examination, defense counsel elicited the following pertinent remarks from Dr. Moran in regard to that evaluation:

> [Petitioner] was able to talk about how concerned she was about the potential consequences and social stigma and disruption in the relationships she had had as a consequence of the charges against her.
>
> [Petitioner] was clear in informing me and wanted to tell me she knew exactly what she was charged with, and she had not committed the crime. And again, I tried to caution her to try to stay away from the criminal aspects of the case because I am trying to just provide mental psychiatric support service. She was very clear to let me know that she felt that her mental status was good, and she was able to make rational decisions.
>
> [Petitioner] was aware that she would be facing considerable jail time. She is aware that she is accused of murder.
>
> I think [Petitioner] portrays herself as very capable of understanding what was going on and working for her defense. She was clear that she was accused of something she had not done. She was traumatized by finding the baby dead. She intended to fight her case and try to obtain the best possible result.

(v. 9, pp. 19-20). Dr. Moran opined that based on psychological testing Petitioner had an "adjustment disorder," which cannot be treated with medication (v. 9 p. 21). Dr. Moran's opinion was that Petitioner did not need antidepressants, and in addition, it was very clear that Petitioner did not want "medication intervention" (v. 9, p. 21).

On cross-examination, Dr. Moran stated that she had no concerns regarding Petitioner's competency, and Petitioner had communicated with her "very

effectively," during the evaluation (v. 9, pp. 26-27). Specifically, the mental status evaluations indicated that Petitioner was not confused, had no memory lapses or delusional beliefs, was not impaired by her moods, and could cooperate with her defense (v. 9, p. 27). Even though the evaluation was not specifically focused on competency to stand trial, the same "red flags" that are relevant to a competency determination are also relevant to the "medication selection." (id.). For instance, Petitioner had no thought disorder requiring an anti-psychotic drug, and had not become disorganized by severe depression as to require antidepressants; she was able to link one concept to the next (v. 9, p. 28).

Petitioner did not testify.

At the conclusion of Dr. Moran's testimony, defense counsel asked Judge Kane for a specific competency evaluation, since it was ordered but not performed (v. 9, pp. 30-31). In support, she noted Petitioner's mood swings and significant mental health history, including her suicide attempt, PTSD, and one report that she "may be bipolar" (v. 9, p. 32).

Judge Kane accepted Dr. Moran's testimony that Petitioner was competent, but then stated, "however procedurally, Judge Kennedy did order Dr. Moran to address the issue of legal competency. . ." and thus he ordered Dr. Moran to conduct a competency evaluation over the weekend (v. 9, p. 36).

On Monday afternoon, August 18, 2003, Judge Kane held a hearing for the final competency determination, at which he indicated that Dr. Moran had refused to do the competency evaluation for "medical ethical" reasons, and thus he retracted his order to do the evaluation (Supp. v., pp. 2-3). Earlier that morning, the Colorado Supreme Court had denied a C.A.R. 21 motion challenging that decision (id.). Defense counsel noted that trial was set for the following day, again requested that the State Hospital conduct a competency evaluation, and informed the Judge Kane that she had a conflicting murder trial that was to begin the next day as well (Supp. v., p. 5). The prosecutor argued that the defense had failed to meet its burden to show a "threshold" of incompetency, and thus it objected to continuing the trial (Supp. v., p. 7).

Judge Kane declined to order a competency evaluation and found Petitioner competent to proceed, and relying on § 16-8-111, C.R.S. (2007), the court file in its entirety, the transcripts of Judge Kennedy's hearings, and Dr. Moran's testimony regarding the mental evaluation, entered the following findings:

- He was not persuaded that the burden of proof had been met to show that Petitioner was not competent to proceed, and thus declined to order a competency evaluation.
- Regardless of the lack of a competency evaluation, he was persuaded that Dr. Moran's medical evaluation included sufficient evidence with regard to Petitioner's competency to proceed.

- Dr. Moran testified that Petitioner had trouble focusing, but not to the extent that she was incompetent to proceed. There were mood swings, but that was understandable under the circumstances. She testified that there was no PTSD, no biological mental history, no blackouts, or memory deficits. She testified to certain medical problems, none of which were indicators of incompetence to proceed.
- Dr. Moran viewed Petitioner as capable of working with her counsel, and alleged that she did not do it and wanted to fight her case, was traumatized by finding her baby, concerned by social stigma and understood the charges that caused the stigma.
- Dr. Moran's overall opinion was that Petitioner's mental status was good, she was able to engage in rational proceedings, and her thought processes were appropriate and linear.

(v. 9, pp. 10-11). Defense counsel then objected for the record that "we were not given the opportunity to select an examiner" to present evidence at the hearing (v. 9, p. 12). The next day, August 29, 2003, the matter proceeded to trial.

E. Petitioner's actions during trial

During the trial, the defense did not indicate to the trial court any difficulties with Petitioner's participation in her defense, or her cooperation with defense counsel. During the *Curtis* advisement, Petitioner answered the trial court's inquiries indicating that she understood her right to testify, she had no questions about it, she had discussed the decision with her attorneys several times, she had sufficient time to make the decision, and she had decided, "I'm not going to get on

the stand, sir" (v. 13, pp. 64-68). Petitioner did not testify at trial, and the jury convicted her.

At sentencing, the prosecutor made a record in regard to competency, stating that throughout the course of trial, a paralegal witnessed Petitioner writing notes to her counsel, and when Petitioner would disagree with the facts that were introduced in evidence, she would shake her head, and she was clearly cognizant (v. 14, pp. 11-12). The defense objected that there was no evidence that Petitioner understood what was being said, and the paralegal was not an expert evaluator (v. 9, p. 11). Petitioner exercised her right to allocution, stating that she did not commit the crime, and instead blaming it on Ellis (v. 14, pp. 9-10).

F. The trial court properly declined to order a competency evaluation at the state hospital.

1. The preliminary finding

Under Colorado statutes, a person is incompetent to proceed if he is "suffering from a mental disease or defect which renders him incapable of understanding the nature and course of the proceedings against him or of participating or assisting in his defense or cooperating with his defense counsel." § 16-8-102(3), C.R.S. (2007); see also Jones, 617 P.2d at 803 (same); Drope v. Missouri, 420 U.S. at 171 (same); Dusky v. United States, 362 U.S. 402, 402-03

(1960) ("sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.").

The question of competency is raised if the judge has a reason to believe that the defendant is incompetent to proceed, or by motion of either the prosecution or defense made in advance of the commencement of the particular proceeding, or later for good cause shown. § 16-8-110, C.R.S. (2007). However, a defendant is initially presumed to be competent, and she is not entitled to a competency examination merely by making a demand for one. People v. Seigler, 832 P.2d 980, 982 (Colo. App. 1991).

Past counseling or treatment is insufficient to trigger an inquiry into the defendant's competency to stand trial. People v. Woods, 931 P.2d 530 (Colo. App. 1996). Due process does not require courts "to accept without questioning a lawyer's representations concerning the competence of his client." People v. Morino, 743 P.2d at 51 (quoting Drope, 420 U.S. at 162. See also People v. Eddmonds, 578 N.E.2d 952, 960 (Ill. 1991) (counsel's assertions not enough to raise bona fide doubt).

"Rather, it is only if such representations, either alone or in conjunction with other evidence, raise 'bona fide doubt' of the defendant's competence that a court

must address the issue." People v. Kilgore, 992 P.2d 661, 664 (Colo. App. 1999) ; Morino, 743 P.2d at 51; cf. People v. Walker, 635 N.E.2d 684, 691 (Ill. App. Ct. 1994) ("some doubt" of defendant's fitness to stand trial is not enough).

Once there is sufficient doubt of competency, due process requires that a court observe the procedures in § 16-8-111. Morino 743 P.2d at 51. Under § 16-8-111, the trial court must suspend the criminal proceedings, make a preliminary finding as to competence, and notify the parties of the time in which to request a hearing to challenge the finding, or order a competency evaluation. Id.; Matthews, 662 P.2d 1108 (Colo. App. 1983).

However, the trial court enjoys substantial discretion in determining whether a bona fide competency issue is raised based on its firsthand observations of the defendant, i.e., her actions and her general demeanor. People v. Bolton, 859 P.2d 303, 307 (Colo. App. 1993).

A defendant's history of mental illness, in the absence of bizarre conduct or an inability to understand the proceedings or assist in her defense, is not enough to raise bona fide doubt. See United States v. Teague, 956 F.2d 1427, 1431 (7th Cir. 1992) (no hearing required where, 4 months before trial, defendant suffered from various mental disorders); United States v. Collins, 949 F.2d 921, 924 (7th Cir. 1991) (defendant's psychiatric history, motion for hearing, or claimed

incompetence insufficient to overcome presumption of competence); United States v. Burns, 811 F. Supp. 408, 415 (E.D. Wis. 1993) (nervous breakdown and psychiatric treatment not enough); People v. Damico, 722 N.E.2d 194, 201, 211 (Ill. App. Ct. 1999) (no bona fide doubt where defendant had a sociopathic personality, a history of treatment, and psychotropic medication, and was extremely disruptive); Bryant v. State, 563 S.W.2d 37, 46 (Mo. 1978) (no bona fide doubt where psychiatrist diagnosed defendant with hysterical personality disorder, since he understood proceedings and cooperated with counsel).

A defendant's competence to stand trial is a question of fact, and the Supreme Court will uphold a trial court's competency determination absent an abuse of discretion. People v. Palmer, 31 P.3d 863, 865-66 (Colo. 2001). Further, since the law presumes that a defendant is competent to stand trial, the burden to prove incompetency rests with the accused. Id.

Here, Judge Kennedy never harbored any concerns regarding Petitioner's competence to proceed. Instead, he repeatedly found that Petitioner was competent, and that the defense had failed to make a threshold showing of incompetence. As such, Petitioner's showing was so weak, Judge Kennedy was not required to observe the procedures in § 16-8-111. However, the judge chose to

err or the side of caution and observe those procedures anyway, and he thereafter followed the statutory requirements.

2. The final determination

A psychiatrist's report is not determinative of competency; rather, competency is a judicial determination based on the totality of the circumstances. People v. Zapotocky, 869 P.2d 1234, 1244 (Colo. 1994) (competency to stand trial is a matter for judicial determination and is not a finding to be made solely on the basis of a psychiatrist's report).

Colorado courts have declined to adopt a rigid analysis of competency based on any particular list of factors. See Palmer, 31 P.3d at 869 (factor such as amnesia, in itself, does not constitute incompetency). "Instead, a [Colorado] trial court should engage in a fact-specific inquiry which encompasses a review of the totality of the circumstances of a particular case." Palmer, 31 P.3d at 870. If a review of the record indicates that the defendant was able to understand the proceedings against him and assist in his defense, the trial court did not abuse its discretion in finding him competent. Id.

In sum, the totality of the circumstances must specifically demonstrate that a defendant is not capable of understanding the nature and course of the proceedings, cannot assist in the defense, or is incapable of cooperating with

defense counsel. Stephenson, 165 P.3d at 864; People v. Kilgore, 992 P.2d 661 (Colo. App. 1999).

Here, the record indicates that Judge Kennedy properly found that Petitioner had the ability to understand the proceedings and assist in her defense.

Defense counsel never represented that Petitioner "suffered from a particular mental disease or defect that would render her incompetent to proceed," which is definition of incompetence to proceed. § 16-8-102(3), C.R.S. (2007). "Mental disease or defect" means only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality; except that it does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. § 16-8-102(4.7), C.R.S. (2007).

Further, the trial court had no reason to doubt Petitioner's competence to stand trial as the proceedings progressed. Petitioner demonstrated an ability to understand the nature and object of the proceedings against her, and was able to assist in her defense. See Woods, 931 P.2d at 530. Thus, contrary to defense counsel's pretrial concerns, Petitioner apparently "made it through the trial" without the Lexipro, a medication that Dr. Moran had determined was not needed or wanted by Petitioner.

Nonetheless, Petitioner contends that she was entitled to a specific competency evaluation under the statutes (Opening Brief, p. 53).

However, the plain language of the first subsection of the statute shows that the ordering of an evaluation prior to the preliminary finding is completely discretionary with the trial court. See § 16-8-111(1), C.R.S. (2007) ("If the court *feels* that the information available to it is inadequate. . .it *may* order a competency evaluation or such other investigation as it deems advisable.") (emphasis added). Here, the evaluation conducted by Dr. Moran fit squarely within the "such other investigation" language.

Further, the plain language of the second subsection of the statute shows that the ordering of an evaluation prior to the final determination is completely discretionary with the trial court. See § 16-8-111(2), C.R.S. (2007) ("the court shall hold a hearing and *may* commit the defendant for a competency examination prior to the hearing") (emphasis added).

Since the ordering of an evaluation is completely discretionary with the trial court, Petitioner's argument fails on the legal merits.[1]

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[1] Petitioner argues that the prosecutor waived any argument that an evaluation was unnecessary by conceding the issue at trial (Opening Brief, p. 50). However, a reviewing court is not bound by the People's concessions regarding the law. People v. Backus, 952 P.2d 846, 850 (Colo. App. 1998).

G. Law of the Case Doctrine

Nonetheless, Petitioner contends that the trial court was bound by the rule of the case doctrine to follow its order for a competency evaluation (Opening Brief, pp. 56-57).

Since Petitioner did not object to the trial court's ruling during the trial court proceedings on this ground, it may only be reviewed for plain error. People v. Kruse, 839 P.2d 1, 3 (Colo. 1992). There was no such error here.

"Prior relevant rulings by a trial court in the same case are generally to be followed by that court unless to do so would result in error or unless changed conditions make the prior ruling no longer sound." People v. Vialpando, 954 P.2d 617, 624 (Colo. App. 1997).

This rule is discretionary unless the order at issue is final. People v. Janke, 852 P.2d 1271, 1274 (Colo. App. 1992). The doctrine "is not a limit on a court's power to revisit an issue if the court feels such review is necessary." People v. Warren, 55 P.3d 809, 813 (Colo. App. 2002); see also Buckley Powder Co. v. State, 70 P.3d 547 (Colo. App. 2002) (law of the case doctrine overcome when the former ruling will result in manifest injustice, when it is no longer sound because of changed conditions, or when it is the result of a legal or factual error).

Even when pretrial proceedings concern substantive matters, the resultant ruling may be changed during trial regardless of the rule of the case doctrine. See Pearson v. Dist. Court, 924 P.2d 512, 515 (Colo. 1996).

Here, the ruling was not final, and the trial court was entitled to change its ruling in its discretion based on the changed condition that Dr. Moran was refusing to perform the competency evaluation for ethical reasons. Further, the trial court's ruling was based, in essence, on a "factual error," i.e., the trial court's and the parties' belief that the treating physician at the jail would be willing to conduct a competency evaluation.

Accordingly, the law of the case doctrine did not bind the trial court to enforce the order for a competency evaluation.

H. Independent Examination

Petitioner finally asserts that she was denied her right to an independent examination under § 16-8-108, C.R.S. (2007) (Opening Brief, p. 57).

The trial court has complete discretion to decide the circumstances of the evaluation based on docket concerns. See Jones v. District Court, 617 P.2d 803, 807, n.5 (Colo. 1980) ("We recognize the court's need for discretion in designating the place and length of such examination, particularly in view of previously scheduled hearing and trial dates for a given case.").

Petitioner's request under § 16-8-108 came the day before trial, at the final determination hearing, and thus it was untimely. See § 16-8-108(1), C.R.S. (2007) (". . .the court, upon timely motion, shall order that the examiner chosen by the defendant be given reasonable opportunity to conduct the examination").

Petitioner cites Palmer, 31 P.3d at 871, for her argument that she had "good cause" for a second evaluation because Dr. Moran had never performed the ordered competency evaluation. However, that case found that since the record supported the trial court's determination that the defendant was competent to stand trial, the defendant had not shown good cause by alleging that the first psychiatrist applied the incorrect legal standard in concluding that he was competent. Id. The court noted in a footnote that the competency determination was a matter for *judicial determination* and is not a finding to be made solely on the basis of a psychiatrist's report. Id. at n.10.

Accordingly, Petitioner's claim that she was entitled to an independent competency examination fails on the legal merits.

CONCLUSION

For the foregoing reasons and authorities, the Respondent respectfully requests that this Court affirm the opinion by the Colorado Court of Appeals.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon ANNE STOCKHAM, Deputy State Public Defender, by delivering copies of same in the Public Defender's mailbox at the Colorado Court of Appeals office this 22nd day of October 2007.