COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Denver District Court Honorable Shelley I. Gilman, Judge Case No. 05CR674	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. JONATHAN ESTES, Defendant-Appellant	▲ **COURT USE ONLY** ▲
JOHN W. SUTHERS, Attorney General SUSAN E. FRIEDMAN, Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 303-866-5426 Registration Number: 34450 *Counsel of Record	Case No.: 06CA1613
ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

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

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

It contains 9,108 words.

The brief complies with C.A.R. 28(k):

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

SUSAN E. FRIEDMAN, 34450*
Assistant Attorney General
Appellate Division
Criminal Justice Section
Attorneys for the People of the State of Colorado
*Counsel of Record

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

STATUTES

RULES

STATEMENT OF THE CASE

On January 5, 2005, the People charged defendant with attempted first degree murder – after deliberation,[1] attempted aggravated robbery,[2] and a crime of violence sentence enhancer.[3] (v.1, p.1). A jury convicted on all counts. (Id., p.31-33). On June 23, 2006, Estes was sentenced to 40 years in the Department of Corrections for attempted murder, and a consecutive 5-year prison term for attempted aggravated robbery. (Id., p.73). This appeal followed.

STATEMENT OF FACTS

The charges against Estes arose from a November 5, 2004 shooting of Rodney Jones at the Regional Transportation District ("RTD") park-n-Ride in the Montbello neighborhood of Denver. RTD bus drivers Chantelle Humphrey and DeRoyce Davis witnessed the shooting, which occurred at around 4:00 p.m. while the park-n-Ride was full of school-aged kids. (v.14, p.58-73,108-120). Humphrey and Davis agreed that the victim's red sport-utility vehicle ("SUV") caught their attention because of its large wheels with silver rims and "spinner" hubcaps. (Id., p.57,112).

---

[1] §§ 18-3-102(1)(a); 18-2-101, C.R.S. (2008); F-2

[2] §§ 18-4-302(1)(b); 18-2-101, C.R.S. (2008); F-4

[3] § 18-1.3-406(2)(a)(I)(A), C.R.S. (2008); SE

Humphrey saw the incident develop, while Davis noticed the men just before the shooting began. Humphrey described three, small-sized, black men with short hair, who approached the passenger side of the red SUV and talk to Rodney Jones. (Id., p.58-60). Humphrey and Davis saw the men walk away and said that Jones got out of his SUV gesturing and shouting insults at them. (Id., p.61-62,113). Humphrey heard Jones saying things like "kiss my ass" and calling them "mother fuckers." (Id., p.65).

Humphrey testified that "the man in the red shirt" started shooting at and chasing Jones, who ran back to his SUV and drove off. (Id., p.67-68). Davis also told police that the shooter was wearing a red shirt.[4] (Id., p.118). Davis and Humphrey saw Jones bleeding as he drove away and that the men chased the SUV out of the parking lot and then ran into a nearby apartment complex. (Id., p.68,82,117).

Detective Tony Bruce arrived at 4530 Atchinson Way, about a half-mile from the park-n-Ride, where he found a man laying on the grass, covered in blood and holding his neck. (v.14, p.87-88). The man said he was Rodney Jones, and indicated that at a "light[-]skinned black male wearing a red shirt had shot him."

[4] At trial, Davis said he did not see who was firing. (v.14, p.117).

(Id., p.89). After medical help arrived, Bruce followed a trail of blood to some bushes and found a small plastic baggie of a substance he believed was crack. (Id., p.101-102).

Officer Eric Nebel rode with Jones in the ambulance and asked sporadic questions as the paramedics tried to insert a breathing tube in Jones's trachea. (v.11, p.25-26) Jones was able to relate that he was approached by two black males, 16-20 years old, thin, and light-complected, who pointed semiautomatic guns at him and said "give me your ride." (Id.). Jones said that a man wearing a red shirt, black pants, and a black bandanna shot him. (Id.).

Police had no suspects until a witness came forward in December during a domestic violence investigation involving defendant. (v.11, p.42). The reporting party, Nanette Calhoun (mother of Estes's girlfriend Jaqueela Young), told police what her daughter, her nephew Derrick Moore, and her niece Kawetta Summers had told her about the shooting. (v.2, p.19). Calhoun recalled that Estes was wearing a black hat, red shirt, a jacket, and some jeans when she saw him on the morning of the shooting. (Id., p.20).

Detective Erickson spoke to Young about the shooting and transcribed her statement. (Id., p.20-21; Box, Exhibit 52). The following day, Young reaffirmed her statement in a videotaped interview. (Box, Exhibit 44a). She confirmed that

the day of the shooting she called Estes to pick her up from work and he refused, saying he was "hot" (meaning police were after him) because he "shot some fool right through in the parking lot." (Id., p.3-4). Young confirmed that she believed Derrick Moore was with Estes at the time. (Id.). Later, she said Estes told her "no, I can't come get you right now 'cause we just got done bustin' up this boy at the Park and Ride [sic]." (Id., p.8). Young said "bustin' up" meant shooting. (Id., p.19).

Young recalled later asking Estes if he saw the shooting at the park-n-Ride, and he responded that the rims were clean on that guy's truck. (Id., p.4). When she and Estes saw the story on the news Young remarked, "I hope that man didn't die" and Estes responded, "I just wanted that fool's rims. I could've got some money for his rims." (Id., p.10). Young said, "you really shot that boy?" and Estes replied, "yeah, I think so." (Id., p.11). Young indicated that Estes told her that he was "gonna jack [Jones] for his rims," and that Jones showed him a gun and ran away when Estes started shooting. (Id., p.14-15). Estes said that he ran from the scene after the shooting, and said he thought one of the bus drivers might have seen him. (Id., p.18,24). Young believed that Estes had been at the park-n-Ride to buy or sell crack. (Id., p.21).

Young related that Estes called her and her mother snitches for calling the police and said he was "gonna shoot up [Calhoun's] house" and that he didn't care if his son was in there. (Id., p.20). Young indicated that she was "a little bit" afraid that Estes, who had beaten her in the past, would retaliate against them for talking about his involvement in the shooting. (Id., p.29-30).

After apprehending Estes, detectives put his photograph in a lineup, but neither Davis nor Humphrey could identify Estes. (v.11, p.206). Recorded phone calls from the jail revealed that Estes told Young that "if she didn't come to court nobody would be able to testify because all they had is her and Kawetta" and that they would not be able to play "her video." (v.11, p.188-191).

When Estes threatened her, Young said, "what are you going to do, beat me up again, kill me this time?" and Estes replied, "I'm going to beat the shit out of you, bitch." (Id., p.191-192). Estes told Young that if she didn't come to visit, he would "smoke her ass." (Id., p.195). Prior to trial, Young wrote two letters to the court recanting her statements and attempting to refuse to testify. (v.1, p.10-12,21). At trial, Young claimed that she did not remember the content of her statements to police and asserted that she lied to police for various reasons discussed below.

SUMMARY OF THE ARGUMENT

No confrontation clause violation occurred when the court admitted the victim's statements during the ambulance ride, since the statements were not testimonial because a reasonable objective witness would have concluded Jones was still in danger under the totality of the circumstances, and the primary purpose of the questioning was to enable police to meet an ongoing emergency – i.e. the armed suspects at large.

Alternatively, any confrontation violation was harmless beyond a reasonable doubt because, assuming the full damaging potential Jones's statements, they were not crucial to the prosecution's case, and were both cumulative of and contrary to other eyewitness testimony. Additionally, Jones's credibility was otherwise attacked through cross-examination about the statements' omissions and inconsistencies and Jones's criminal background. Finally, the overall strength of the case was strong, relying on Estes's detailed confession to Young which was significantly corroborated by eyewitness testimony. The statements were not emphasized in closing argument, and they had no bearing on the key issue – Young's credibility.

No error occurred when the trial court admitted Young's videotaped interview because the requirements of section 16-10-201 and CRE 801(d)(1)(A)

were satisfied because Young appeared at trial, had the opportunity to explain or deny the statements, and was discussing Estes's and others' statements directly to her. Thus, the statement was properly admitted as substantive, non-hearsay evidence.

No abuse of discretion occurred when the trial court found that Estes failed to make the requisite showing for a new trial because the court applied the proper legal standards and the record supports its findings.

ARGUMENT

I. Estes's right to confrontation was not violated by the admission of Jones's statements to police because they were uttered during an ongoing emergency, or alternatively, any error was harmless beyond a reasonable doubt.

A. Standard of review

The People agree that confrontation clause claims are reviewed de novo, *see Bernal v. People*, 44 P.3d 184, 198 (Colo. 2002), and that defense counsel preserved the issue for review. Confrontation clause errors require reversal unless harmless beyond a reasonable doubt. This is not an analysis of whether a guilty verdict would have been rendered without the error, but what effect the error had on this verdict. *Raile v. People*, 148 P.3d 126, 133 (Colo. 2006).

B. Procedural history

The parties litigated the admissibility of Jones's statements prior to trial. (v.10). Defense counsel accepted the prosecutor's offer of proof (Appendix A), except for the claim that Jones thought he was going to die when he made the statements. (Id., p.7-11). The court deferred ruling until trial. (Id., p.17).

At trial, the court – relying on *People v. King*, 121 P.3d 234 (Colo. App. 2005) – found that Jones's statements were non-testimonial. (v.14, p.6-8). Noting that not all conversations with police are interrogation, the court found that "under the circumstances" it was "highly unlikely and improbable that Jones made the statements with the anticipation that they would be used later in a prosecution." (Id.). The court found that Jones made the statements just after he was shot and was in pain and deteriorating quickly, and held that the questions were asked "primarily to locate a suspected perpetrator." (Id.).

The court further found that the statements fell within the excited utterance exception to the hearsay rule, because they occurred shortly after the shooting, and Jones was agitated, still under the excitement of the event, and "notably, in great pain" when he made the statements. (Id.). Finally, the court found that Jones was unavailable because he had "deteriorated to the point that he is no longer competent." (Id.).

At trial, Denver Police Officer Tony Bruce testified that he found Jones lying on the ground, clutching his neck, "panicking," and "very much in pain." (v.14, p.88). Bruce asked for and Jones gave his name and date of birth, and when asked who shot him, Jones said "a light[-]skinned black male wearing a red shirt." (Id., p.89). Bruce testified that his main concern was taking care of Jones until medical help arrived. (Id., p.90). He agreed that his conversation with Jones was "pretty limited," reiterating that Jones was "in a lot of pain" and "very panicked." (Id., p.105).

Officer Eric Nebel testified that when he arrived medical personnel were "frantically" attending to Jones, who was bleeding profusely. (v.11, p.23). Because of the seriousness of Jones's injury, Nebel rode in the ambulance with Jones, and obtained a few details about the shooting. As pertinent here, Jones said that he was waiting for his daughter to get off the bus, that the men who pointed guns at him said "give me your ride," and were black men, aged 16-20 years, around 5'7", with thin builds, light skin, and semiautomatic handguns. (Id., p.24-25). He also indicated that the shooter wore a red shirt, black pants, and a black bandanna. (Id.).

Nebel described the conversation as "very sporadic" because ambulance personnel were trying to treat Jones's injuries throat, and indicated that he had to

re-ask some questions because he got answers "in bits and pieces." (Id., p.26). He testified that Jones was "in a lot of pain." (Id.).

C. Legal analysis

Generally, testimonial hearsay statements may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Raile, supra* at 130 citing *Crawford v. Washington*, 541 U.S. 36 (2004). "[E]vidence is testimonial, at a minimum, if it is given 'at a preliminary hearing, before a grand jury, or at a former trial; and [in] police interrogations.'" *Compan v. People*, 121 P.3d 876, 880 (Colo. 2005) quoting *Crawford, supra* at 68. The "perimeter" of testimony also encompasses, as pertinent here, statements made under circumstances such that an objective witness would believe his or her statements would be used at a later trial. *Raile, supra* at 130 n.7 citing *Davis v. Washington*, 547 U.S. 813, 822 (2006).

Statements yielded by police interrogations are testimonial when they are "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 547 U.S. at 826, cited in *Raile, supra* at 130. Yet, "statements made during an ongoing emergency to assist

police officers in their efforts to assess the present situation are non-testimonal and do not offend the Confrontation Clause. *Id.* citing *Davis*, 547 U.S. at 822. "The proper perspective" considers the purpose of the interrogation and applies a modified objective reasonable witness test, "whether, from the point of view of an objective reasonable witness, the declarant's statements were made in response to that ongoing emergency." *Raile*, 148 P.3d at 130, citing *Davis*, 547 U.S. at 826.

At least three factors aid this inquiry: (1) the extent to which the statement is made to identify current conditions, (2) whether the questioning was tailored to resolve the ongoing danger or to gather facts about a passed emergency, and (3) the level of formality exhibited during the police officer and declarant's interaction. *Id.* at 826–828, cited in *Raile*, *supra* at 131.

Here, Estes apparently concedes that Jones's statements to Officer Bruce were non-testimonial. (Opening Brief ("OB"), p.14). Estes contends that Jones's statements to Officer Nebel were not made during an ongoing emergency because by the time Jones was in the ambulance, "the exigency [of not knowing whether the assailant was still on the scene] had passed." (Id.).

Applying the entire above analysis, however, Jones's statements to Nebel did occur during an ongoing emergency because: (1) Jones's statements identified current conditions, i.e., that he had just been shot at the nearby park-n-Ride; (2)

Nebel's questions were tailored to elicit the facts and circumstances of the shooting that had just occurred, and (3) the interaction between Nebel and Jones was not a formal interview because Jones was bleeding profusely, in pain, and being frantically treated for extremely serious injuries.

The contested issue appears to be whether a reasonable objective witness would have concluded under the totality of the circumstances that Jones remained in danger when he made the statements. Here, that witness would have observed a panicked man, covered in blood and wrestling with paramedics as they tried to insert a breathing tube in this throat. This life-threatening injury is sufficient to establish that Jones was in the midst of an ongoing emergency. *Cf. State v. Alvarez*, 143 P.3d 668, 674 (Ariz. Ct. App. 2006) (concluding obviously injured victim faced ongoing emergency). Further, although Nebel and Jones were safely inside the ambulance leaving the scene, two armed men remained at large in the vicinity of Jones's house and the nearby, crowded, Montbello park-n-Ride, posing a threat to public safety.[5] *See Davis*, 547 U.S. at 829 (recognizing "police officers can and will distinguish almost instinctively between questions necessary to secure

[5] Humphrey testified that the park-n-Ride was "crowded" with "a lot of schoolkids" from local high schools. (Id., p.53). DeRoyce Davis testified that the shooting occurred as school let out, and described the atmosphere as "chaos." (Id., p.109).

their own safety or the safety of the public"); *cf. State v. Reardon*, 860 N.E.2d 141, 144 (Ohio App. 2006) (concluding ongoing emergency existed in part because fleeing assailants jeopardized neighborhood safety).

It is of no consequence that the shooting was "over" when Jones spoke with Nebel in the ambulance. In *Davis*, "'the events described were over' by the time [the declarant] recounted them to the 911 operator." *Davis*, 547 U.S. at 842, n.6 (Thomas, J., concurring in part and dissenting in part). If emergencies were limited to the rare situation in which declarants are speaking to police while simultaneously under attack, then the resulting statements would almost always be testimonial—a stricture the Supreme Court rejected. *See Davis*, 547 U.S. at 832 ("Such exigencies may often mean that 'initial inquiries' produce non-testimonial statements."). Nothing in *Davis* requires ongoing *criminal activity*—just an ongoing *emergency* that the declarant's statements seek to resolve. *See id.* at 822, 826–830; *Raile*, 148 P.3d 130–33.

Estes's reliance on *Lewis v. United States,* 938 A.2d 771 (D.C. 2007), is misplaced because it fails to recognize a crucial fact absent from the instant case. In *Lewis*, the emergency had ended because police detained the defendant, whom the declarant identified as her attacker. Thus, statements made after the defendant

was in custody were deemed testimonial because the "exigencies of the initial situation had subsided." *Id.* at 782.

Here, no suspect had been apprehended when the statements were made. Thus, the objective or primary purpose of the questions was "to enable police assistance to meet an ongoing emergency." *Davis*, 547 U.S. at 828. Accordingly, Jones's statements to Nebel during the ambulance ride were non-testimonial, and admission of the statements was not error because non-testimonial hearsay does not implicate the confrontation clause. *Raile*, 148 P.3d at 130 citing *Davis*, 547 U.S. at 822.

D. Harmless error

Any error in admitting Jones's ambulance statements was harmless beyond a reasonable doubt. When assessing whether denial of the right to confrontation constituted harmless error, a reviewing court must consider – assuming that the damaging potential of the statement was fully realized – whether it nonetheless can say that the error was harmless beyond a reasonable doubt. *People v. Harris*, 43 P.3d 221, 230 (Colo. 2002).

The following factors should be reviewed: (1) the importance of the declarant's statement to the prosecution's case; (2) the statement's cumulative nature; (3) the presence or absence of corroborating or contradictory evidence on

the material points of the witness's testimony; (4) the extent of the cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case. *Harris*, *supra*.

1. Importance of the statements

Jones's statements were not crucial to the prosecution's case. In closing argument, neither side mentioned Jones's statements. (v.2, p.64-91). The sole mention of Jones's statements was during rebuttal closing argument:

> Some of the last words Rodney Jones says are, There's a guy in a red shirt with a black bandanna. He calls it a black bandanna. ..on December 30 ... [Detective Erickson] says ... What did [Estes] have on that day? [Jaqueela Young] says either a red or black shirt, some black pants, and a black hat. Give that whatever weight you want. Add it in for however you feel. That's just a little bit more for you to consider.

(Id., p. 93-94).

Jones's statements were not especially damaging to Estes, as they were limited to a very basic description of his assailants. His description of their skin color, height, weight, and clothing did neither identified the assailants nor led police to Estes. In closing, defense counsel emphasized the fact that no eyewitnesses could identify Estes as the shooter, calling the red shirt "non-descript" and asking, "How many people are walking around right now with red

shirts on in the city?" (v.2, p.76). In rebuttal, the prosecutor referred to the witnesses's descriptions and stated, " I'm not asking you to hang your hat on people who just saw something." (Id., p.91).

2. The statements were cumulative/corroborated

To the extent that Jones's statements were probative of Estes's identity, they were cumulative of other eyewitness testimony. Chantelle Humphrey, an RTD employee, described the assailants as black, 5'8" tall, and testified that the shooter wore a red shirt and dark blue pants. (v.14, p.60, 67). DeRoyce Davis, another RTD employee, testified that the assailants were young and black, and that the shooter wore red and black. (Id., p.114,116). Nanette Calhoun testified that when she saw Estes that morning, he was wearing a black hat, red shirt, a jacket, and jeans. (v.2, p.20).

3. The statements were contradicted by other evidence

Jones's statements were inconsistent with some eyewitness testimony. Humphrey could hear Jones's insults, but never heard anyone say "give me your ride," as Jones claimed. (v.14, p.77). She also clarified that the men were 5'8" *or taller*, contradicting Jones's estimate of 5'7". (Id., p.80).

Davis recalled that the three men were "different sizes," the larger man being approximately 5'9" and the "little guy" being 5'8" and the other guy "in between." (Id., p.119-120). On cross-examination, Davis admitted that he told police that the shooter was 5'5"–5'6" and weighed about 120 pounds, and confirmed that the shooter was shorter than Estes, who is "about 6 feet" tall.[6] (Id., p.125).

In closing argument, defense counsel used Davis's description of the shooter to support his mistaken identity defense. (v.2, p.84). Counsel also pointed out that Jones's statement referred to the men trying to get the *car*, contradicting Young's testimony that Estes wanted Jones's *rims*.[7] (Id., p.85).

4. Adequate cross-examination was otherwise permitted

Estes attacked Jones's credibility by cross-examining Officer Nebel about omissions and inconsistencies in the statements, and Jones's criminal background. Specifically, Nebel testified that he never confirmed that Jones was at the park-n-

---

[6] Although Davis estimated the man's weight at 120 pounds, he indicated that the man was "not much lighter" than Defendant, and that his estimation was "rough." (v.14, p.125).

[7] On appeal, Estes argues the reverse, claiming that, "give me your ride" was prejudicial because it *corroborated* Young's testimony that Estes told her that he "wanted that fool's rims." (OB, p.16).

Ride to pick up his daughter. (v.11, p.31). Nebel also agreed that Jones did not tell him anything about the crack found in Jones's yard or that the assailants were walking away when Jones got out and yelled at them just before he was shot. (Id., p.32-34). The jury heard from Nebel that Jones had two felony drug possession convictions. (Id., p.34).

5. The prosecution's case was strong overall

The case against Estes relied in large part on Young's initial statements to police, which she later recanted and then denied at trial. Several of Young's statements were corroborated by other evidence. *See* Statement of Facts, *supra*. The level of detail in Young's statement also supported its veracity and reliability. *Id.* As noted earlier, neither party emphasized Jones's statements during closing argument, as his statements had little probative value. Additionally, Jones's statements had virtually no bearing on Young's credibility – which was the key issue in the case.

Accordingly, under the totality of the circumstances, any error in admitting Jones's statements to Officer Nebel was harmless beyond a reasonable doubt because the evidence did not affect the outcome of the trial.

II. Admission of a recanting witness's entire videotaped interview as both impeachment and substantive evidence was not an abuse of discretion because it was not hearsay and complied with § 16-10-201 and CRE 801.

A. Standard of review

The People agree that a trial court's admission of evidence is reviewed for an abuse of discretion. *See People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002). The People agree that the defendant objected to showing the videotape to the jury, but contend that the grounds relied upon are unclear. Before Young's testimony, defense counsel advised the court, "I'm probably going to object to the transcript coming in at all... I think it ...depends on how she testifies and what she testifies to...if she agrees that she made the statements, then obviously it would be improper to play the tape." (v.11, p.5-6). After the parties agreed on specific redactions, the prosecutor indicated that, if necessary, she intended to play the tape and provide the transcript to assist the jury where parts of the interview, as defense counsel conceded, are "difficult...to hear." (Id., p.16-17). Defense counsel stated, "my view is that [the video and transcript] should not go back with the jury." (Id., p.17). The court emphasized that it may have a different opinion at trial, as it is "always difficult to rule in an artificial setting," but ruled that the video would be admissible. (Id., p.14-15,16).

After Young's testimony, the prosecutor asked to play the videotape and defense counsel renewed his objection, stating, "I don't think she flat out denies everything...there are a lot of things that she doesn't remember... she says, ['']If it's in there, I must have said it['']...there's been sufficient impeachment with the transcript." (Id., p.100).

The trial court ruled that both denial of and inability to recall statements can justify impeachment, and that the only "logical way" to proceed was to play the entire tape rather than conducting a "piecemeal" impeachment of each statement. (Id., p.101). Defense counsel stated, "Understood." (Id.).

Later, the trial court made a further record of its ruling, indicating that the videotape was admissible not only for impeachment, but "to show the context of the interview" and the participants' demeanor "based on the witness's testimony," and for "substantive purposes." (Id., p.224).

On appeal, Estes claims that the trial court lacked the discretion to admit the videotape because no statute or rule of evidence authorized its admission. (OB, p.21). Indirectly, Estes also appears to claim that the trial court should have, sua sponte, borrowed the procedures from the child hearsay statute, § 13-25-129, C.R.S. (2008), which require a hearing outside the presence of the jury to determine the reliability of the proffered hearsay. (Id., p.20). Estes's pretrial

objection – that the videotape and transcript should not go back to the jury – has apparently been abandoned on appeal.

Accordingly, the only claim that has been preserved for review is the generalized claim that no statute or rule authorizes the admission of the videotape, even though the § 16-10-201, C.R.S. (2008), was cited as authority for admitting the videotape as substantive evidence. (v.11, p.224). Inferentially, the preserved claim appears to be that the entire videotape was hearsay because it was not a prior inconsistent statement under CRE 801(d)(1)(A), and should not have been admitted under § 16-10-201.

This evidentiary error is reviewed for non-constitutional harmless error, i.e., whether the error substantially influenced the verdict or affected the fairness of the trial proceedings. *Yusem v. People*, ___P.3d___, (Colo. 6/22/2009) citing *Masters v. People*, 58 P.3d 979, 1002 -1003 (Colo. 2002).

Because Estes never challenged the videotape on reliability grounds below, this claim may only be considered under the plain error standard of review. Crim.P. 52(b). Plain error occurs only when, after review of the entire record, the appellate court concludes that the error undermined the fundamental fairness of the trial. *People v. Miller*, 113 P.3d 743, 749-750 (Colo. 2005).

B. Legal analysis

1. Admission of the videotape was proper

Estes urges that "nothing in the Colorado statutes or rules of evidence authorized the admission of the videotape" of Detective Erickson's interview of Young. (OB, p.21). Evidently, Estes has overlooked section 16-10-201, which states:

> Where a witness in a criminal trial has made a previous statement inconsistent with his testimony at the trial, the previous inconsistent statement may be shown by **any otherwise competent evidence** and **is admissible not only for the purpose of impeaching the testimony of the witness, but also for the purpose of establishing a fact** to which his testimony and the inconsistent statement relate, if:
>
> (a) The witness, while testifying, was given an opportunity to explain or deny the statement or the witness is still available to give further testimony in the trial; and
>
> (b) The previous inconsistent statement purports to relate to a matter within the witness's own knowledge.

§ 16-10-201 (emphasis added).

CRE 801, which was adopted after section 16-10-201, also "removes the hearsay impediment to the admissibility of prior inconsistent statements for substantive purposes" by treating statements made under certain conditions as non-

hearsay. *People v. Saiz*, 32 P.3d 441, 445, n.1 (Colo. 2001). CRE 801(d)(1)(A) provides, as pertinent here, that:

> **(d) Statements Which Are Not Hearsay.** A statement is not hearsay if –
>
> **(1) Prior Statement by Witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony...

Citing no authority, Estes claims that "the proper procedure for admitting those prior inconsistent statements called for the prosecution to confront Ms. Young specifically with each statement she denied or did not recall making." (OB, p.19). However, the majority of Young's direct and redirect examinations consisted of the prosecutor confronting Young with specific statements that she either denied or did not recall. (v.11, p.46-101,118-123). Estes has not identified which, if any, statements the prosecutor allegedly failed to present to Young. Appellants are required to inform the court—and the appellee—of exactly which parts of the record concern their arguments. *See Mauldin v. Lowery*, 255 P.2d 976, 977 (Colo. 1953) (appellate courts are not required to search appellate record to figure out which parts concern the appellant's claims); C.A.R. 28(a)(4) ("The arguments shall contain . . . citations to the . . . parts of the record relied on."). Accordingly, the merit of this contention is not apparent.

Next, Estes claims that the prosecution should not have been permitted to play "the entire videotape" for the jury, urging that "context" and "demeanor" are not exceptions to the hearsay rule. (Id.). However, because prior inconsistent statements are not hearsay, no exception is required. *See* CRE 801(d)(1)(A).

Here, the videotaped interview met the requirements of § 16-10-201 and CRE 801(d)(1)(A), and was thus admissible as competent, non-hearsay, substantive evidence. It is undisputed that Young was given the opportunity to explain or deny her statements, and that she was available to give further testimony at trial. Similarly, the substance of the statement included her own observations and experiences, and things that she claimed Estes and others told her.

Counsel's argument below that Young did not deny all of her statements does not defeat the admissibility of the videotape. A witness's inability to remember a statement is tantamount to a denial that he made the statement. *People v. Pepper*, 568 P.2d 446 (Colo. 1977).

A comparison of the transcript of the videotape and Young's trial testimony reflects that Young either denied or could not recall the vast majority of her interview with Detective Erickson. (v.11, p.46-101,118-123). When asked what she did remember, Young recalled telling Erickson only two things: (1) that she never "filed charges" after Estes hit her, and (2) that she said she did not remember

anything about "the incident about Mr. Estes." (Id., p.63-64). When confronted with her written statement, which was discussed at the beginning of the videotaped interview, Young would initially deny the statements, then assert that she did not recall making the statements, and on several occasions, state, " If I said it, it's a lie." (Id., p.65-67,70-78,81).

Accordingly, most of the statements in the videotape qualified as prior inconsistent statements under section 16-10-201 and CRE 801(d)(1)(A), and the trial court did not abuse its discretion by permitting the prosecution to impeach Young with her videotaped interview. *See People v. Elie*, 148 P.3d 359, 363 (Colo. App. 2006) (no abuse of discretion in admitting entire videotape; "it was proper for the jury to consider all the statements [the witness] had given in order to compare and contrast the differences among them").

To the extent that the videotape may have contained some statements that do not qualify as "inconsistent," the trial court had the discretion to permit the entire tape to be played rather than requiring each statement to be addressed individually and then impeached with a snippet of video.[8] *See* CRE 611(a) (trial courts "shall exercise reasonable control over the mode and order of interrogating witnesses and

[8] Reference to the "entire videotape" does not include the portions that the trial court ordered redacted due to the potential for unfair prejudice.

presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time); *Cf. People v. Scarlett*, 985 P.2d 36, 41 (Colo. App. 1998) (trial court reasonably exercised its discretion to promote courtroom efficiency by excepting toxicologist from sequestration order to prevent delay of completing defendant's testimony before toxicologist could perform calculations based thereon).

Finally, Estes's complaint that the trial court improperly considered "demeanor" and "context" because they are not exceptions to the hearsay rule is misplaced. First, the videotape was not hearsay. Second, the trial court properly considered these theories of relevance as part of the CRE 403 analysis that precedes admission of all evidence. *Cf. People v. Saiz*, 32 P.3d 441, 450 (Colo. 2001) (concluding that exclusion of a videotaped statement was not an abuse of discretion, the Court considered whether the videotape contained "any obvious nonverbal conduct or changes in intonation or expression that would have given a different meaning to ...transcribed words.").

Moreover, it is well-settled that jurors may evaluate a witness's demeanor when assessing the witness's credibility. *See People v. Constant*, 645 P.2d 843, 846 (Colo. 1982) ("even though "demeanor" is not technically evidence, the jury is

not only permitted but also affirmatively instructed to consider it in assessing witness credibility.").

Estes has not demonstrated that the trial court's decision to play the redacted videotape for the jury was manifestly arbitrary, unreasonable, or unfair. Accordingly, no abuse of discretion occurred. *See People v. Greenlee*, 200 P.3d 363, 366 (Colo. 2009).

Alternatively, the incidental admission of a few statements – which Estes has failed to specify – that may not have been "inconsistent" was harmless in light of the fact that significant number of cumulative, damaging statements were properly admitted through the oral impeachment of Young with her written statement and the transcript of her videotaped interview. *See People v. Brown*, 555 P.2d 1163, 1164 (Colo. 1976) (Any error in introducing evidence over accused's objections was harmless error in criminal proceeding in which such evidence was merely cumulative of other overwhelming and competent evidence of accused's guilt).

2. Reliability

For the first time on appeal, Estes claims that the trial court abused its discretion by failing to make any findings regarding the reliability of the videotaped interview. (OB, p.20). As discussed above, this claim is reviewed for

plain error. Plain error addresses error that is both "obvious and substantial" and has "so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction." *Miller*, *supra* at 749-750.

Estes's claim – that the trial court should have sua sponte treated the videotape as if it were child hearsay and applied the admissibility prerequisites of section 13-25-129 – is misplaced and does not constitute plain error. First, the language of the child hearsay statute specifies that it applies only to "evidence not otherwise admissible by a statute or court rule that provides an exception to the objection of hearsay." § 13-25-129(1), C.R.S. (2008). Here, the prior inconsistent statements were admissible pursuant to both statute and rule. Thus, no further analysis was necessary and the trial court did not err by failing to evaluate the reliability of the evidence.

Second, the absence of a preliminary reliability finding – not required by an existing rule or statute – prior to admitting the videotape does not satisfy the requirement that the error be "obvious." *See People v. Taylor*, 159 P.3d 730, 738 (Colo. App. 2006) ("Plain error is error that is so clear-cut, so obvious, a competent trial judge should be able to avoid it without benefit of objection.").

Finally, Estes has not shown how admission of the videotape undermined the fundamental fairness of the proceeding and cast doubt on the reliability of the

verdict. While the ability to observe Young's demeanor during the videotaped interview undoubtedly aided the jury in its determination of the facts, it was not the sole piece of evidence supporting the prosecution's version of events. Young shared Estes's incriminating statements with her mother, who testified consistently and did not recant, and dictated the written statement obtained the day before the videotaped interview. Additionally, most of the incriminating information from the videotape was presented without objection through impeachment if Young's direct testimony with the transcript of the video.

As an aside, Estes's claim that reversal is required because the court failed to find the videotape reliable is illogical in light of Young's claim that she lied to Detective Erickson. First, Young claimed to lie because her mother threatened to call social services and take away Young's children if she did not falsely implicate Estes in the shooting. (v.11, p. 61-62,68). Second, she claimed that she lied to protect her cousin Ray after her mother told her that Ray was being arrested for the shooting, and because she was angry with Estes for hitting her and spending the night with Young's female cousin, who also has a child with Estes. (Id., p.77-78). A reliability determination is unnecessary and potentially counterproductive to Estes's defense, which was supported by the argument that Young's statement in the videotaped interview was unreliable.

In any event, Estes has failed to demonstrate that admission of the video without a predetermination of its reliability was plain error, and reversal on this ground is unwarranted.

III. The trial court did not abuse its discretion by denying Estes's motion for a new trial because the evidence was not newly discovered and would not have resulted in an acquittal.

A. Standard of review

The People agree that a trial court's denial of a motion for a new trial is reviewed for an abuse of discretion. *See People v. Rodriguez*, 914 P.2d 230, 293 (Colo. 1996). The People disagree that the erroneous denial of a motion for a new trial based on newly discovered evidence amounts to a due process violation. *See Farrar v. People*, 208 P.3d 702, 706 (Colo. 2009) ("the Supreme Court has never suggested that newly discovered evidence impeaching a guilty verdict implicates due process of law.").

B. Procedural history

Estes filed a motion for a new trial alleging newly discovered evidence that he claims would have affected the outcome of the trial. (v.1, p.65). First, he claimed that after trial, Jaqueela Young surreptitiously recorded a conversation with her cousin Derrick Moore in which Moore allegedly confessed to the

shooting. (Id.). Second, he cited evidence that another witness, Kawetta Summers, had never been served with a subpoena, and that this evidence undermined the prosecutor's allegations at trial that Summers failed to appear and that Young had been present when Summers was served. (Id., p.66).

At the hearing on the motion, the court indicated that it had listened to the recording of the conversation between Young and Moore, but had difficulty hearing it. (v.9, p.5). Defense counsel provided a partial transcript (Appendix B), representing "what [counsel's] intern was able to hear on her own." (Id.; Envelope #2, Court's Exhibit 1).

Jaqueela Young testified at the post-trial hearing. She confirmed that she recorded her conversation with Moore about the shooting. (v.9, p.7). Young claimed that Moore volunteered that "the gun [Moore] had was snapped in half by my big homey, so I don't understand how they found him guilty." (Id., p.8). Young claimed that when she asked Moore who shot the victim, Moore said, "I did." (Id., p.9). Young also testified about an unrecorded conversation with her other cousin, Ray House, who allegedly told Young that he was at the Park & Ride during the shooting, and gave her a version of events "similar" to Moore's account. (Id., p.12,23). Initially, Young claimed that she did not have this information

before trial. (Id., p.13). On redirect, however, Young testified that Moore told her on the night of the shooting that he had been the shooter. (Id., p.25).

Regarding the subpoena of Summers, Young admitted during cross-examination that she was present in a different room when the prosecutor and investigator served the subpoena on Danielle Estes (believing it was Summers), but maintained that she did not know that Estes produced identification for Kawetta Summers. (Id., p.20). During re-cross-examination, Young admitted that when the prosecutor came to Danielle Estes's house to serve Kawetta Summers, Young initially said that nobody else was in the apartment even though Danielle was in the other room. (Id., p.25-26).

During argument, defense counsel conceded that "if [Moore] had told [Young] that [he was the shooter] before, that was never something that was revealed to counsel or to the Court through her testimony." (Id., p.60).

The trial court reviewed the evidence and stated the correct legal standard – a four-part test articulated in *People v. Mason*, 997 P.2d 1245 (Colo. App. 1999) judgment affirmed in *Mason v. People*, 25 P.3d 764 (Colo. 2001). (Id., p.78-81). The court concluded that Estes failed to show that the evidence was "newly discovered," because of Young's testimony that she had known of Moore's confession since the night of the shooting and because Young discussed Moore's

involvement with Detective Erickson before Estes was charged with the shooting. (Id., p.82).

Next, the court found that Estes and his attorney failed to exercise due diligence to discover all possible evidence favorable to Estes before and during the trial. (Id., p.83). The court noted that Young had the information since the crime occurred and that there was no evidence that defense counsel either interviewed or subpoenaed Moore prior to or during trial. (Id.).

The court agreed that another person confessing to the crime constitutes material evidence, but expressed concern as to whether the evidence qualified as "more than cumulative or impeaching," due to Young's highly contested credibility. (Id.). The court found that if Young had testified about Moore's alleged confession at trial, the evidence would have been cumulative of Young's testimony urging the jury to minimize or disbelieve her initial statements implicating Defendant as the shooter. (Id., p.84).

For the same reasons, the court found that a new trial including this evidence would not likely result in an acquittal. (Id.). The court added that although no physical evidence corroborated Estes's statements to Young, the statements themselves were damaging, including statements from his telephone conversations with Young at the jail. (Id., p.85). The court found that Moore's alleged

confession "would not cause a reasonable jury to have a reasonable doubt about the defendant's guilt," because Moore did not exonerate Estes and the jury already knew that there were three men present at the shooting. (Id.). Finally, the court opined that, had the evidence been admitted, the prosecution would have presented the case under a complicity theory of liability, and found that the jury verdict would have been the same. (Id.).

Regarding the evidence of whether Kawetta Summers was served with a subpoena, the court found that it was "a peripheral issue in this case," and that the jury was correctly informed that Summers had been uncooperative. (Id.). The court agreed that, if the prosecution had known that Estes's sister pretended to be Summers, it would have been even more damaging to his case. (Id., p.86). The court denied the motion for a new trial. (Id.).

C. Legal analysis

Motions for a new trial based on newly discovered evidence are looked on with great disfavor, and denials of such motions will not be overturned absent a clear abuse of discretion. *Rodriguez*, *supra* at 293; *People v. Gutierrez*, 622 P.2d 547, 559 (Colo. 1981).

To succeed on a motion for new trial based on newly-discovered evidence, a defendant must show that: (a) the evidence was discovered after the trial; (b) the

defense exercised due diligence to discover all possible evidence favorable to the defendant prior to and during trial; (c) the newly-discovered evidence is material to issues involved and not merely cumulative or impeaching; and (d) the newly-discovered evidence is of such character as probably to bring about acquittal if presented at another trial. *Gutierrez*, 622 P.2d at 547.

Trial courts are uniquely situated to assess credibility, and in that process, the court may consider the credibility of the witness recanting under oath and the circumstances surrounding the earlier accusations. *People v. Schneider*, 25 P.3d 755, 762 (Colo. 2001).

An appellate court's deference to the trial court's assessment of credibility "recognizes the trial court's unique role and perspective in evaluating the demeanor and body language of live witnesses, and serves to discourage an appellate court from second-guessing those judgments based on a cold record." *Cf. Carrillo v. People*, 974 P.2d 478, 485-86 (Colo. 1999) (trial court's credibility assessment of prospective jurors is given deference); *People v. Arevalo*, 725 P.2d 41, 46 (Colo. App. 1986) (since the factors of credibility and appearance which are determinative of bias are best observed at the trial court level, it is left to the trial court's sound discretion).

The trial court may consider the relationships between the defendant and the witnesses presented in the motion for new trial, and it is reasonable for the trial court to regard their statements as having questionable reliability and, thus, to deny the motion based on those relationships. *See People v. Board*, 656 P.2d 712, 714 (Colo. App. 1982) (trial court properly found not credible the recantation of defendant's brother-in-law, and the supporting testimony of the defendant's ex-wife and trial attorney).

1. Alleged confession by Derrick Moore

No abuse of discretion occurred when the trial court ruled that Estes failed to make the requisite showing to obtain a new trial because the court applied the proper legal standards and the record supports the court's factual findings.

First, this evidence is not "newly discovered." Young testified that Moore confessed to her on the night of the shooting. The fact that Young never revealed this fact to police or to defense counsel does not render the confession "new evidence" for the purposes of a motion for a new trial. Furthermore, the alleged confession does not refute and may support the conclusion that Estes was present for the shooting. Evidence within the defendant's knowledge prior to trial does not constitute newly discovered evidence. *Gutierrez, supra* at 560, n.12; *People v. Gallegos*, 528 P.2d 229 (Colo. 1974).

Second, Estes cannot show that evidence that Moore was the trigger man was unknowable through the exercise of due diligence. *Farrar*, 208 P.3d at 706; *Gutierrez*, 622 P.2d at 559-560. In addition to the Young and Estes' knowledge, the written statement in which Young first implicated Estes states that Derrick Moore was at the park-n-Ride and was "involved" in the shooting. (Box, Exhibit 52). Thus, the possibility that Moore fired the gun was strongly implied by the facts known when Estes was charged. At trial, Nanette Calhoun testified that, six months before trial, her daughter told her that Estes was innocent and that Derrick Moore was the shooter. (v.2, p.23-24). Had defense counsel interviewed Young and Calhoun, counsel could have presented testimony suggesting that Moore was the shooter.

Third, it was undisputed that the evidence was material in the sense that, if believed by the jury, it would be probative to some degree of the extent of Estes's involvement in the shooting.

Finally, the record supports the conclusion that the evidence was not "of sufficient consequence for reasons other than its ability to impeach, or cast doubt upon, the evidence already presented at trial." *Farrar, supra* at 707. The bulk of the evidence against Estes came from Young's written and oral statements to the police. At trial, Young claimed that she did not recall the majority of these

statements, and stated on multiple occasions that she had lied to the police. Her testimony about Moore's "confession" would not have bolstered her credibility in any way. Rather, it would simply be one more version of events that Young did not tell the police.

The existence of the recorded conversation does not alter this analysis. The intelligible portions of the recording are too vague to establish Moore as the shooter – especially given the lag time between the questions and the allegedly responsive answers. Moreover, the circumstances under which this evidence came to light detract from its credibility. This is not a true "mistaken identity" case where an unknown party comes forward years later and confesses to the crime. This is a case where a recanting witness who has a vested interest in seeing her husband and child's father exonerated comes forward after the verdict, suddenly claiming that one of the men who *participated* in the shooting, has confessed *to her* that he shot the victim. It is extremely doubtful that this evidence would have affected the outcome of the trial.

Finally, the trial court's additional finding – that even if the evidence conclusively proved that Morris was the shooter, Estes would likely be convicted under a complicity theory of liability – was not error under *Mason v. People, supra.*

In *Mason*, the defendant pled guilty to the offense. The trial court, in its analysis of whether the newly discovered evidence – another person's confession to the crime – justified withdrawal of the plea, considered the fact that the confession did not exonerate the defendant, who would remain liable for the victim's death " under a complicity theory, a conspiracy theory, [and] a felony murder type of theory." *Mason v. People*, 25 P.3d at 768. Citing the trial court's "extensive findings," the Court affirmed the trial court's determination that admission of the newly discovered evidence in a retrial would not bring about an acquittal. *Id.* at 768-769.

Accordingly, even though Estes was not initially tried under a complicity theory of liability, it was not error for the trial court to consider whether the evidence would strongly support his conviction as a complicitor. In support of its conclusion, the court noted the eyewitness testimony that there were three men involved and Young's statement to police that she believed that Estes and Moore had been together at the time of the shooting. Assuming, arguendo, that this portion of the ruling was error, the trial court's denial of the motion for a new trial may be affirmed on the remaining grounds discussed above. *See People v. Hilton*, 902 P.2d 883, 887 (Colo. App. 1995) (a correct decision will not be disturbed on review even though the reason for the decision may appear to be incorrect).

2. Failure to subpoena Kawetta Summers

The record supports the trial court's rejection of this ground for a new trial in similar ways. At the time of the hearing, the court did not have the benefit of the trial transcript, and apparently the parties did not recall the specifics of Young's testimony on the issue of whether Summers had been served with a subpoena. However, this court may properly consider Young's transcribed testimony in support of the trial court's ruling. *See People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006) (on appeal, a party may defend the trial court's judgment on any ground supported by the record, whether relied upon or even considered by the trial court).

The alleged "new" evidence is that Summers was never served, which Estes claims refuted the prosecutor's attack on Young's veracity by asking about her alleged "refusal to admit that Ms. Summers had been served in her presence." (OB, p.27). The trial transcript reveals two important facts: (1) Young's trial testimony strongly suggested that Danielle Estes had posed as Summers and accepted the subpoena, and (2) Young maintained that she never saw the subpoena being served because she was in another room. During Young's direct testimony, the following exchange occurred:

Prosecutor: At approximately 11:30 on Saturday morning who was in that apartment?

Young: I don't remember the time. When you came, it was me and my sister-in-law.

Prosecutor: And who is your sister-in-law?

Young: Danielle Estes.

Prosecutor: Are you telling me the person that was served and represented herself as Kawetta Summers is not Kawetta Summers?

Young: You guys know everything, I guess.

Prosecutor: So the person who was served and gave a name of Kawetta Summers is not Kawetta Summers?

Young: I didn't see anybody served. The person there was Danielle Estes.

(v.11, p.55). On re-direct, this exchange occurred:

Prosecutor: Well, you were with Kawetta on Saturday, right?

Young: Yeah.

Prosecutor: And you were with Kawetta when she got served on Saturday, right?

Young: She didn't get served.

Prosecutor: So it's still your statement that wasn't the person that was in the apartment with you that day?

Young: Yeah.

Prosecutor: Even though she presented an I.D. to officers there at the scene saying she was Kawetta?

Young: She gave you an I.D.?

Prosecutor: Uh-huh.

Young: Yeah. This wasn't her.

(Id., p.147).

To impeach Young's claim that Summers was not in the apartment when the subpoena was served, Investigator Robert Fuller testified that he believed that he had served Kawetta Summers that day because he recognized her voice, she provided identification that said she was Summers, and that she was the same person who Detective Erickson had previously interviewed. (Id., p.153-155). Fuller did not testify as to whether Young had been in the same room when he served the person he thought was Summers.

As with Moore's alleged confession, Young knew this information at the time of trial. Defense counsel was present for the Young's testimony that Estes, rather than Summers, had been served. Accordingly, the only "newly discovered evidence" is Fuller's admission during the hearing that he was mistaken. Nevertheless, while Fuller's admission did not exist at the time of trial, defense counsel could have (but chose not to) argue at trial that Young's version was correct and the Fuller must have been mistaken. Estes has failed to show that the truth about who was served was evidence that was unknowable through the exercise of due diligence.

Finally, the record supports the trial court's conclusion that the issue was "peripheral," and therefore neither material nor "of sufficient consequence for reasons other than its ability to impeach, or cast doubt upon, the evidence already presented at trial." *Farrar, supra* at 707. Estes urges that the absence of Fuller's admission was prejudicial because "the prosecution used the supposed certainty that Ms. Summers had been served to argue that Ms. Young was a liar and could not be believed." (OB, p.27-28). However, as noted above, Young herself told the jury that she was a liar on several occasions. Obviously, the jury rejected Young's trial testimony as incredible. It is unlikely that support for Young's version of the subpoena serving incident would have persuaded the jurors to believe Young's trial testimony and thus acquit Estes.

Additionally, if the evidence had conclusively shown that Estes's sister pretended to be Summers, the prosecution would have argued that she did so to prevent Summers from testifying against Estes, implying that Summers had incriminating evidence against Estes and undermining his mistaken identity defense. Accordingly, the trial court did not abuse its discretion by denying Estes's motion for a new trial.

CONCLUSION

For the foregoing reasons and authorities, Defendant's convictions should be affirmed.

JOHN W. SUTHERS
Attorney General

SUSAN E. FRIEDMAN, 34450*
Assistant Attorney General
Appellate Division
Criminal Justice Section
Attorneys for the People of the State of Colorado
*Counsel of Record

AG ALPHA: QFOV DABB
AG File: Q:\AP\APFRIESE\ESTES\ESTES BRIEFGOOD LSS COPY.DOC

-APPENDIX A-

had happened.

THE COURT: In Vigil the Court found that a Dr. questioning a child, during the course of medical examination, was not the functional equivalent of a police interrogation, because the Dr. was not a governmental official who produced the child's statement for the purpose of developing testimony for trial, because the police officer involved in producing the statement -- because they found the police officer -- I don't know if you want to take testimony. I don't know the factual circumstances.

MS. GREENE: I am happy -- I don't know how the Court wants to proceed. I think Mr. Vallejos and I don't disagree as to the circumstances under which these circumstances came out.

THE COURT: Do you want to tell me a stipulation?

MS. GREENE: Why don't I make a proffer and see if Mr. Vallejos agrees with that.

THE COURT: Okay.

MS. GREENE: What happened is Rodney Jones was shot at a parking lot at 47th and Albrook, basically he lives at 4530 Atchinson Street, approximately eight blocks down the road.

After being shot in the neck he drove that eight blocks and basically collapsed in his front lawn, or found in his front lawn by members of the Denver Police Department, bleeding profusely from the neck. The first officer to get to the scene was an officer named Tony Bruce.

Officer Bruce was just trying to find out information in order to air a description of the person who did this. He asked him just basic questions: what his name was, and what his date of birth was, and that kind of thing. He stated to officer, a light-skinned black guy, wearing a red shirt shot me. At that time officer Bruce aired that information.

Medical personnel arrived basically very quickly, as did officer Nebel. Officer Nebel wound up, as soon as medical personnel had him able to get into an ambulance, he rode down in the ambulance with him, and we are talking within minutes of the shooting happening. I don't think either disagrees this is a startling event. I know Mr. Vallejos may have issue about the time or reflection, et cetera, of the statements made to officer Nebel as he was trying to find out what happened -- was that he was -- I will quote from the statement, if that is

all right with the Court. "I went with the ambulance down to Denver Health Medical Center. The victim was identified as Rodney Jones. Mr. Jones related --

THE COURT: You have to go slower.

THE WITNESS: -- that he was at the RTD Park and Ride to pick up his daughter. The victim was inside his daughter -- license number 0966J when he was approached by two black males. The males were described as 16 to 20 years old, approximately five foot seven, with a thin build. One was wearing a red shirt with black pants and black bandanna, the other was wearing a black shirt and black bandanna. Both were light complected. The victim stated that they told him quote "give me a ride" end quote and pointed a semi-automatic handgun at him. The victim attempted to drive away, but was shot by the suspect wearing the red shirt. The victim drove to his house at 4530 Atchinson Street, where he collapsed in his yard.

THE COURT: Nothing to proffer about the victim's demeanor at the time he gave the statement?

MS. GREENE: I am happy to do that.

What I discussed with officer Nebel is that he was being -- they were attempting to put a trach down his throat. He was extremely agitated.

He was bleeding profusely from the neck at the time. He was receiving medical care. He thought he was going to die, is basically what he thought. I have been told by officer Bruce and officer Nebel, that is what he honestly believed, he was going to die.

THE COURT: Do you accept that offer?

MR. VALLEJOS: Well --

THE COURT: Or do you want to hear the testimony?

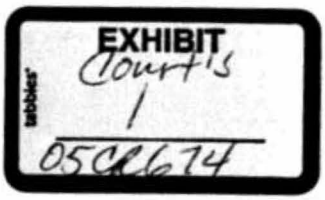
MR. VALLEJOS: I accept the officer, for the most part. About the part he thought he was going to do die, I am not sure I agree with that, because I never saw anything in discovery that indicates he made any statement that he thought he was going to die.

Absent that, about what he told officer Nebel in the ambulance, it is almost as if she was reading from my notes. I don't have any quarrel about what the content of the statement was. But what they stated to me, Judge, is that the statement -- he is telling him what his license plate number is, he is telling him how people are dressed, what clothes they are wearing, what color their clothes are. There is a lot of reflection there. I think those have to be statements made in response to

- APPENDIX B -

garcia, patricia

From: Michael Vallejos [Michael.Vallejos@state.co.us]
Sent: Thursday, June 22, 2006 2:38 PM
To: garcia, patricia
Cc: 'Adrienne Greene'
Subject: AudioRecordingEstes.doc



Estes, Jonathan

S1 Enhanced Audio Recording of Derek Moore & Jaqueela Young
Duration—16:01

Time	Speaker	Content
5:24	Young	The lawyers quit in the middle because {the didn't have no case?}. It was all up to the jury to believe him or not....{something about a video}...
5:41	Young	I was talking about how he hit me and stuff and they was like {awful?}
5:45	Young	But they don't have no evidence...he could win on appeal. He's just gotta go to prison and that's that even before he get an appeal
5:58	Young	But he had four charges at first.
	Moore	Did he?
	Young	And then they dropped it after {unintelligible}...aggravated armed robbery....
7:47	Young	But he [the victim] drove off though, right?
8:05	Moore	He [the victim] kept tryin' to stick his hand out the window so I cocked my shit again.
8:59	Young	So you didn't even know that you shot him [the victim]?
	Moore	No, we didn't know.
For the remainder of recording, Young and Moore are discussing whether the victim had a gun.		

S2 Enhanced Audio Recording of Derek Moore & Jaqueela Young
Duration—15:45

8:44	Moore	I really did not murder this dude. I don't know why you don't believe me about that.
8:56	Young	Johnny told you I snitched on you?
	Moore	Mm-hm.
12:02	Young	We was just gonna pin it all on Johnny so Ray{?} could get out.
12:33	Young	I covered you the whole time.
13:10	Moore	When I was in jail they came and asked me what did I know about Mr. Estes. What do you mean what do I know?
14:22	Moore	And then all of a sudden, I called my mom, like Mom, don't put my gun in the trash can. I'm about to come get it right now. And she was like, well [someone] got it.
At this point, it seems like Moore and Young are talking about the gun but it is totally unintelligible.		

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon ARI KRICHIVER, Deputy State Public Defender, by emailing copy of same to pdapp.service@coloradodefenders.us in the Public Defender's Office this 20th day of July 2009.