06CA1518 Peo v. Hoang 02-16-2012

COLORADO COURT OF APPEALS

Court of Appeals No. 06CA1518
Jefferson County District Court No. 05CR1008
Honorable Margie L. Enquist, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Ricky Cuong Hoang,

Defendant-Appellant.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE J. JONES
Casebolt and Hawthorne, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced February 16, 2012

John W. Suthers, Attorney General, Emmy A. Langley, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Kimberly K. Caster, Littleton, Colorado, for Defendant-Appellant

Defendant, Ricky Cuong Hoang, appeals the judgment of conviction entered on jury verdicts finding him guilty of two counts of second degree kidnapping, two counts of first degree burglary, six counts of aggravated robbery, one count of robbery of an at-risk adult, one count of theft of $15,000 or more, one count of conspiracy to commit second degree kidnapping, and eleven crimes of violence. We affirm the judgment and remand the case to the district court to correct the mittimus.

I. Background

According to the prosecution's evidence, defendant organized an armed robbery involving five other men. Four of the men broke into a house, and defendant and another man drove the getaway vehicles. The robbers left with jewelry and approximately $100,000 in cash.

Defendant divided the jewelry and money among the six men, who then split up. Two of the men, C.L. and another man, went to the airport, where police officers arrested them after airport security agents discovered ski masks, gloves, jewelry, and large amounts of cash in C.L.'s bags and on the two men's persons. Police later

arrested defendant in Hawaii.

The People charged defendant with thirty-four criminal counts related to the robbery. They dismissed eight of the charges before trial.

The People tried defendant jointly with C.L. A jury found defendant guilty of all but two of the charges on which he was tried, and C.L. guilty of all but one of the twenty-six counts on which he was tried (except that it found him guilty of third degree, not second degree, assault). The district court sentenced defendant to a total of 180 years in the custody of the Department of Corrections.

II. Mittimus

Initially, we note that the mittimus states that the jury found defendant guilty of a crime of violence predicated on the second degree assault charge. But the record shows that the jury found defendant not guilty of second degree assault, and consequently did not consider the associated crime of violence count. Therefore, we remand the case to the district court to delete that charge from the mittimus.[1]

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[1] The error did not affect defendant's sentence because the court did not impose a sentence for the crime of violence at issue.

III. Defendant's Contentions

On appeal, defendant contends that (1) the delay in preparing the record for appeal and the omissions therein deprived him of his due process rights to a speedy and meaningful appeal; (2) the district court abused its discretion by denying his motion to sever his trial from C.L.'s; and (3) the court abused its discretion by requiring him to stand trial in ankle shackles. We address and reject each contention in turn.

A. Speedy and Meaningful Appeal

1. Background

Defendant filed his notice of appeal on July 26, 2006, and filed an amended notice on August 23, 2006. He then moved for multiple extensions of time to transmit the appellate record because the assigned court reporter could not complete the transcripts by the scheduled deadlines. On May 30, 2008, while granting one of the extension motions, we said that we would entertain a motion to remand the case to the district court to settle or correct the record if further extensions were necessary.

On January 15, 2009, defendant moved for a remand to

correct the record. He asserted that one witness's testimony had not been transcribed, that one transcript was out of order and inaccurately attributed one witness's statements to another witness, and that approximately fifty bench conferences during the trial had not been transcribed. On March 3, 2009, we granted the motion.

On remand, the district court held two hearings to reconstruct the record. At the first hearing, the court reordered the out-of-order transcript by reference to the time stamps thereon. It rejected the assertion that approximately fifty bench conferences had not been recorded (and thus not transcribed), finding that only two or three such conferences had not been recorded. The remainder were "discussions held off the record that were not bench conferences, [where] there was nothing substantive discussed, and [were] either a discussion between co[-]counsel, a discussion between the DA and defense counsel, or a discussion between defense counsel and their clients." The court also went through the record to address defense counsel's additional concerns regarding inaccuracies or omissions therein.

After the first hearing, the court issued an order correcting or supplementing parts of the record or finding, and explaining why, no further record was necessary.

The court held a second hearing after a transcript of a witness's previously missing testimony was produced. It corrected several inaccuracies in that transcript and addressed any remaining issues. In an order following the hearing, the court noted, "All counsel agree that [the] record [will be] complete upon conclusion of [the ordered corrections]."

On February 5, 2010, defendant moved to recertify the case for appeal.

2. Analysis

Excessive delay in resolving an appeal may violate a defendant's due process rights. *People v. Brewster*, 240 P.3d 291, 297 (Colo. App. 2009); *People v. Rios*, 43 P.3d 726, 732 (Colo. App. 2001). To determine whether such a violation has occurred, a court must consider "(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right to appeal; and (4) any prejudice to the defendant resulting from the delay." *Brewster*,

240 P.3d at 297; *accord People v. Whittiker*, 181 P.3d 264, 270 (Colo. App. 2006). Loss of a portion of the trial record does not automatically require reversal. *Brewster*, 240 P.3d at 296; *People v. Carmichael*, 179 P.3d 47, 53 (Colo. App. 2007), *rev'd on other grounds*, 206 P.3d 800 (Colo. 2009). Rather, to prevail on a due process claim arising from an incomplete record, the defendant must demonstrate specific prejudice resulting from the loss. *People v. Rodriguez*, 914 P.2d 230, 301 (Colo. 1996); *Brewster*, 240 P.3d at 297.

The People concede that defendant has made a threshold showing as to the first and third factors. As to the remaining factors, they argue that (1) the delay is partly attributable to defendant because he did not move for a remand to correct the record for more than seven months after we said that we would entertain such a motion; and (2) defendant has not shown that he suffered prejudice as a result of the delay. We agree that defendant has not made the requisite showing of prejudice, and therefore we do not consider the reason for the delay.

To determine the prejudicial effect of appellate delay on a

direct appeal in which the defendant raises other contentions of trial error, a court must focus on whether the delay has impaired the defendant's appeal. *Brewster*, 240 P.3d at 297; *Whittiker*, 181 P.3d at 271. A delay has impaired an appeal where (1) "the defendant is unable to present, or an appellate court is unable to review and resolve, the defendant's substantive contentions on the existing record[;] or [(2)] the defendant can show that 'a prompt resolution of his appeal would have yielded a different outcome.'" *Brewster*, 240 P.3d at 297 (quoting in part *Whittiker*, 181 P.3d at 271).[2]

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[2] We reject defendant's contention that we should also consider the factors set forth in *Rios*, 43 P.3d 726, and *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994), to determine whether prejudice resulted from the delay. *See Rios*, 43 P.3d at 732-33 (assessing prejudice "in light of the interests that the right to a speedy disposition of an appeal is intended to protect . . . (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern of a convicted person awaiting the outcome of an appeal; and (3) limiting the possibility that the grounds for appeal or defenses in case of reversal and retrial might be impaired"); *accord Harris*, 15 F.3d at 1559. As the division in *Whittiker* recognized, a court considers the *Rios* factors only where the defendant asserts appellate delay in a collateral action. 181 P.3d at 271. In a direct appeal with additional contentions of trial error, the *Rios* factors "are rendered meaningless by the resolution of the defendant's substantive contentions." *Id.* (noting that if the appellate court rejects the defendant's substantive contentions, he cannot show that he suffered oppressive incarceration or undue anxiety as a

Initially, we reject defendant's argument that he need not show specific prejudice arising from the incomplete record because his appellate counsel was not his trial counsel, and "cannot now be required to conjure up specific prejudice from an event she did not participate in." We first observe that defendant does not assert that his trial counsel was unavailable to speak with his appellate counsel or to testify at the reconstruction hearings.[3] Further, and in any event, in *Rodriguez*, 914 P.2d at 300-01, the supreme court "decline[d] to adopt a rigid approach [to whether an incomplete record entitles a defendant to a new trial] that turns on whether the defendant is represented by new counsel on appeal . . . ." Instead,

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result of the delay); *see United States v. DeLeon*, 444 F.3d 41, 58-59 (1st Cir. 2006).

However, even if we were to consider the *Rios* factors, because we reject all of defendant's contentions on appeal, we would nonetheless conclude that the delay did not prejudice defendant. *See Rios*, 43 P.3d at 733 ("Incarceration is not 'oppressive,' and thus does not support a claim of prejudice . . . if the absence of a meritorious appeal establishes that the defendant is rightfully incarcerated."); *accord United States v. Hawkins*, 78 F.3d 348, 351 (8th Cir. 1996); *see also Harris*, 15 F.3d at 1565 ("A petitioner has no reason to be anxious or concerned about the time it takes to adjudicate an appeal that is without merit.").

[3] Indeed, at the first reconstruction hearing, counsel for C.L. (who had also sought to correct the record) indicated that she had been in contact with defendant's trial counsel, although she had since

the court held, "to obtain relief on a due process claim arising from an incomplete record, a defendant must *always* demonstrate specific prejudice resulting from the state of that record." *Id.* at 301 (emphasis in original).

Defendant next contends that he is unable to present all of his possible substantive contentions on appeal because the fifty bench conferences that were not recorded may have given rise to issues requiring appellate review. However, the district court found, with record support, that only two or three such conferences had not been recorded, not fifty. *See People v. Holt*, 233 P.3d 1194, 1197 (Colo. 2010) (appellate court defers to the district court's findings of fact where they are supported by the record); *People v. Montoya*, 259 P.3d 555, 557 (Colo. App. 2011) (same). And, as to the remaining two or three conferences, defendant does not suggest what errors may have occurred therein. His mere speculation that some unspecified errors may have occurred, or that "rulings could have been made" concerning his severance and shackling contentions, is insufficient to establish that the failure to record those conferences prejudiced him. *See Rodriguez*, 914 P.2d at 301 ("[the defendant's]

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lost that counsel's current phone number.

bare assertion that the incomplete record prejudiced counsel's ability to prepare [his] appeal does not amount to a showing of specific prejudice"); *Whittiker*, 181 P.3d at 271 (the defendant failed to show that the delay impaired the presentation of "any *specific* substantive contention" (emphasis added)); *see also United States v. Kelly*, 535 F.3d 1229, 1242-43 (10th Cir. 2008) (the defendant's "amorphous concerns regarding possible gaps in the appellate record" did not amount to a showing of specific prejudice where he offered no clue as to the nature of the errors that might have occurred in the purported gaps); *cf. Knoll v. Allstate Fire & Cas. Ins.*, 216 P.3d 615, 618 (Colo. App. 2009) ("We cannot simply assume that the missing transcript would demonstrate reversible error.").

Finally, we reject defendant's contention that a prompt resolution of his appeal would have yielded a different outcome because, if the reconstruction hearings had been held closer to the trial, the district court and the prosecution may have better recollected what was discussed at the unrecorded bench conferences. The court did not find that its memory would have been better had the reconstruction hearings been held closer to the

trial, saying only, "[I]f this record had been completed earlier, it may or may not have alleviated some of the[] issues, because all those gaps would still be there. Maybe our memories would have been fresher, maybe not." And, with regard to correcting the record's gaps or inaccuracies, the court said that it had taken "copious notes throughout th[e] entire trial" and that "the actual record itself . . . is pretty good." Though defendant points to several instances during the first reconstruction hearing in which the court could not recall what had happened at a particular moment, in each instance either the prosecutor, documents counsel had submitted, or the context in the record clarified what had transpired. *Cf. Whittiker*, 181 P.3d at 271-72 (a prompt resolution would lead to a different outcome where the delay effectively precludes review of a contention); *Muwwakkil v. Hoke*, 968 F.2d 284, 285 (2d Cir. 1992) (no prejudice where the defendant produced no evidence that a prompt disposition of the appeal would have yielded a different outcome).[4]

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[4] The prosecutor said several times that he could not specifically recall what had happened at a particular moment, but that he could say what had probably occurred based on his or the court's routine practice in conducting trials. *See* CRE 406 (evidence of

Therefore, we conclude that the delay in preparing the appellate record and the omissions therein did not deprive defendant of his due process rights to a speedy and meaningful appeal.

B. Severance

Defendant contends that the district court erred by denying his motions for (1) a mandatory severance, (2) a discretionary severance, and (3) a severance on statutory speedy trial grounds.[5] We address and reject each contention in turn.

1. Standard of Review

We review the district court's ruling on a motion to sever codefendants' trials for an abuse of discretion, and we will not overturn the decision absent a showing of an abuse of discretion and actual prejudice to the moving party. *See Peltz v. People*, 728 P.2d 1271, 1279 (Colo. 1986); *People v. O'Neal*, 32 P.3d 533, 539 (Colo. App. 2000); *People v. Hernandez*, 829 P.2d 392, 393 (Colo.

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routine practice is relevant to prove that a person acted in conformity with the routine practice).

[5] Contrary to the People's interpretation of defendant's opening brief, we perceive defendant as raising only a statutory, not a constitutional, speedy trial contention.

App. 1991).

2. Mandatory Severance

A court must grant a severance as a matter of right where there is material evidence that is admissible against one codefendant but not against the other, and that evidence is prejudicial to the defendant against whom the evidence is not admissible. *O'Neal*, 32 P.3d at 539; *People v. Johnson*, 30 P.3d 718, 724 (Colo. App. 2000); *see* § 16-7-101, C.R.S. 2011; Crim. P. 14. Evidence is prejudicial for the purpose of a mandatory severance where it is "'so inherently prejudicial that the jury could not have limited its use to its proper purpose.'" *Peltz*, 728 P.2d at 1277 (quoting *People v. Gonzales*, 198 Colo. 450, 454, 601 P.2d 1366, 1369 (1979)); *accord Johnson*, 30 P.3d at 725.

Defendant contends that because the prosecution alleged that C.L., but not defendant, had been in the house during the robbery, "all of the evidence about the actual crime that occurred in the house involving the injuries to the victims and subsequent robbery was inadmissible against [him]." He also asserts that evidence concerning the arrests and custodial statements of C.L. and the

other co-conspirators was inadmissible against him.

However, the prosecution tried defendant under a complicity theory. To establish defendant's guilt under that theory, it had to prove, in part, that C.L. and the other co-conspirators had committed the robbery. *See People v. Corpening*, 837 P.2d 249, 251 (Colo. App. 1992) (to establish a complicitor's guilt, the prosecution must prove, in part, that the other person committed the crime); *see also* § 18-1-603, C.R.S. 2011 ("A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense."); *People v. Scheidt*, 182 Colo. 374, 382, 513 P.2d 446, 450 (1973) ("before a defendant may be convicted as an accessory, the jury must be convinced . . . that his accomplice, as the principal, is also guilty of the crime"). Consequently, much of the evidence showing that C.L. and the other co-conspirators had committed the alleged crimes was admissible against defendant. *See Scheidt*, 182 Colo. at 382, 513 P.2d at 450-51; *Corpening*, 837 P.2d at 251; *cf. Peltz*, 728 P.2d at

1279 n.6 (evidence establishing a codefendant's guilt as a principal is admissible against another defendant alleged to be a co-conspirator).[6]

As to the remaining evidence, where the prosecution offers

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[6] Contrary to defendant's contention, K.F., one of the co-conspirators who testified at defendant and C.L.'s trial, testified extensively as to defendant's organization of and complicity in the robbery. For example, K.F. testified that defendant told him to drive defendant's vehicle to the robbery from California with several of the other co-conspirators; met the other co-conspirators at a restaurant before the robbery; gave detailed instructions to the other co-conspirators on how to perform the robbery; drove one of the getaway vehicles during the robbery; paid to rent the hotel room where the co-conspirators met after the robbery; divided the money and jewelry among the co-conspirators; and drove to Reno with K.F. and two other people after the robbery.

Further, contrary to defendant's newly raised assertion at oral argument, there was evidence corroborating K.F.'s testimony. For example, a police officer testified that, a few days before the robbery, he pulled over a vehicle being driven by one of the co-conspirators that was registered to defendant in California. A friend of one of the co-conspirators testified that he had told police that, before the robbery, he had heard defendant and the co-conspirator say that they had "friends coming in from California, including a black guy" (one of the co-conspirators was black). The owner of the restaurant where K.F. said the co-conspirators had met testified that he had identified defendant in a lineup as having met at least one of the co-conspirators at the restaurant three times the week of the robbery. And an employee of the hotel where the co-conspirators met after the robbery testified that the registration indicated that K.F. had checked into the hotel, and that she remembered that he had been accompanied by two men, one of whom was an asian male who had long hair highlighted blond at the tips (defendant had dyed hair tips at the time of the robbery).

evidence of a codefendant's criminal involvement under a complicity theory, that evidence is admissible against the other codefendant so long as its use is properly limited. *See Scheidt*, 182 Colo. at 382, 513 P.2d at 451. However, limiting instructions are required only if they are requested at the time the prosecution presents the evidence. *See id.* Absent such a request, "'the evidence [i]s admissible for all purposes . . . even though it may tend to show that the defendant is guilty . . . .'" *Id.* at 383, 513 P.2d at 451 (quoting *Johnson v. People*, 174 Colo. 413, 416, 484 P.2d 110, 111 (1971)).

Here, though the district court gave limiting instructions as to certain testimony concerning the searches and arrests of C.L. and the other co-conspirator at the airport,[7] the record reflects that defendant did not request limiting instructions as to the other evidence he now alleges was inadmissible against him. Consequently, that evidence was admissible against him. *See*

[7] We do not address defendant's contentions that the instructions were ineffective because he first raises those contentions in his reply brief. *See People v. Dubois*, 216 P.3d 27, 28 (Colo. App. 2007), *aff'd*, 211 P.3d 41 (Colo. 2009); *People v. Salinas*, 55 P.3d 268, 270 (Colo. App. 2002).

Scheidt, 182 Colo. at 383, 513 P.2d at 451 (district court had no duty to give limiting instruction where the defendant did not request it); *cf. People v. Gladney*, 194 Colo. 68, 72, 570 P.2d 231, 234 (1977) (failure to give limiting instruction where not requested is not reversible error); *People v. Rivera*, 56 P.3d 1155, 1168 (Colo. App. 2002) (failure to give limiting instruction sua sponte was not plain error).

As to the airport-related testimony (assuming without deciding that it was material), given the clarity of the court's limiting instructions, the court's provision of those instructions shortly before the testimony at issue, and the relative brevity of that testimony, we conclude that the testimony was not so inherently prejudicial that the jury could not have limited its use to determining C.L.'s guilt alone. *See Peltz*, 728 P.2d at 1277 (mandatory severance unnecessary where the limiting instruction was precise, comprehensible, and given immediately after the testimony, and that testimony was only a brief part of the trial); *Johnson*, 30 P.3d at 725 ("there is a strong presumption that the jury followed the trial court's limiting instructions"); *cf. People v.*

Pappadiakis, 705 P.2d 983, 986 (Colo. App. 1985) ("The fact that there may be a stronger case against one defendant than against a co-defendant does not mandate a severance."), *aff'd sub nom. Peltz v. People*, 728 P.2d 1271 (Colo. 1986).

Therefore, we conclude the district court did not abuse its discretion by denying defendant's motion for a mandatory severance.

3. Discretionary Severance

Where a severance is not mandatory, a severance motion is entrusted to the district court's sound discretion. *People v. Backus*, 952 P.2d 846, 850 (Colo. App. 1998). In exercising its discretion, the district court must consider "(1) whether the number of defendants or the complexity of evidence is such that the jury will confuse the evidence and the law applicable to each defendant; (2) whether, despite admonitory instructions, evidence admissible against one defendant will improperly be considered against another[;] and (3) whether the defenses are antagonistic." *Peltz*, 728 P.2d at 1277-78; *accord Backus*, 952 P.2d at 850. "Defenses are not antagonistic where they do not specifically contradict each

other." *Johnson*, 30 P.3d at 726; *accord People v. Escano*, 843 P.2d 111, 115 (Colo. App. 1992); *see People v. Maass*, 981 P.2d 177, 184 (Colo. App. 1998) (defenses are antagonistic where one codefendant bases his assertion of innocence on the guilt of the other codefendant).

Here, there were only two codefendants and, as noted, most of the evidence was admissible against both. Though the case was complex, the prosecution tried defendant and C.L. on identical charges, and all of the charges arose from the robbery. Consequently, there was little likelihood that the jury would confuse the evidence and law applicable to each defendant. *See Pappadiakis*, 705 P.2d at 986 (denial of discretionary severance was proper where the codefendants were identically charged and the charges arose from a single criminal episode); *People v. Vigil*, 678 P.2d 554, 557 (Colo. App. 1983) (issues were not complex where each defendant was charged with the same offense); *see also People v. Carrillo*, 946 P.2d 544, 551 (Colo. App. 1997) (where the codefendants mutually participated in the crime, such mutual participation is a logical basis for refusing to sever), *aff'd*, 974 P.2d

478 (Colo. 1999).[8]

As to the second factor, we have already concluded that the testimony for which the district court gave limiting instructions was not so inherently prejudicial that the jury could not have limited its use to its proper purpose. *See Vigil*, 678 P.2d at 557.

Finally, defendant's theory of defense was that he was not involved in the robbery, as was C.L.'s. Neither defendant attempted to implicate the other.[9] Therefore, their defenses were not antagonistic. *See People v. Montoya*, 942 P.2d 1287, 1292 (Colo.

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[8] We also observe that though the People charged both defendant and C.L. with second degree assault, the jury found defendant not guilty of that charge, and C.L. guilty of the lesser included offense of third degree assault. These verdicts indicate that the jury was not confused by any difference in the evidence or law pertaining to those charges.

[9] In her opening statement, defendant's counsel said that the jury should not find defendant guilty in part because the prosecution's evidence concerning the robbery pertained only to C.L., not defendant. *See Johnson*, 30 P.3d at 726 ("where joint defendants merely deny participation in the crime and do not present evidence or testimony that the other defendant was solely responsible, mere arguments of counsel suggesting that the other defendant was responsible for the crime do not establish the existence of antagonistic defenses"). However, in closing argument, she argued that C.L. was also innocent, stating, "[C.L.] said at the airport that he was in Colorado to collect a gambling debt. Yes, sir, he was. Yes, he was. He was there to collect a debt and that's what he did." Consequently, we do not view defendant as having attempted to implicate C.L. in the robbery.

App. 1996) (defenses were not antagonistic where both defendants asserted that they did not participate in the crime and neither attempted to blame the other); *People v. Manners*, 713 P.2d 1348, 1352 (Colo. App. 1985) (where both defendants generally denied participation in the crime, the defenses were not antagonistic); *People v. Durre*, 713 P.2d 1344, 1347 (Colo. App. 1985) (defenses were not antagonistic where the defendants did not attempt to implicate each other).[10]

Accordingly, we conclude that the district court did not abuse its discretion by denying defendant's motion for a discretionary severance.

4. Severance on Statutory Speedy Trial Grounds

Under section 18-1-405(1), C.R.S. 2011, a criminal defendant must be brought to trial within six months after entering a plea of not guilty. However, in calculating the speedy trial deadline

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[10] Defendant contends the defenses were antagonistic because there was a "battle of finger-pointing" between C.L. and two of the other co-conspirators who testified at C.L. and defendant's trial. However, we only consider whether C.L. and defendant attempted to implicate each other in determining whether their defenses were antagonistic. *Cf. Maass*, 981 P.2d at 185 (defenses were not so antagonistic as to necessitate a severance where "the jury was not required to find [the] defendant guilty in order to find the

pursuant to that section, a court must exclude, as relevant here:

> (c) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance;
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> . . .
>
> (f) The period of any delay caused at the instance of the defendant; [and]
>
> . . .
>
> (h) The period of delay between the new date set for trial following the expiration of the time periods excluded by paragraphs . . . (c) . . . and (f) . . . not to exceed three months . . . .

§ 18-1-405(6), C.R.S. 2011.

Here, defendant pled not guilty on June 20, 2005, thereby creating a speedy trial deadline of December 20, 2005. When defendant entered his plea, defense counsel stated:

> Bottom line is [defendant] would like to enter a plea of not guilty today, however, to kind of accommodate the scheduling in this case what the DA would like to do so we don't have any objection is to continue this . . . for a setting date on the same time the other co-defendants are set for arraignment so we can accommodate everybody's calendar[.]

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codefendant was not involved").

The other codefendants were arraigned on August 15, 2005.[11]

On August 22, 2005, defendant filed (1) a motion requesting the presiding judge's recusal, and (2) a motion to sever his trial from that of the other codefendants. The recusal motion did not say when defendant had entered his not guilty plea, providing only, "While the instant case has been pending in this division for more than two months, the defendant was just arraigned last week when he appeared for the first time in front of this court." On August 24, 2005, the judge recused himself and the case was reassigned.

On November 2, 2005, the district court denied defendant's motion for a severance on speedy trial grounds. In doing so, it excluded from defendant's statutory speedy trial period: (1) the two-month period of delay caused by defense counsel's filing of an untimely motion to recuse, *see* § 18-1-405(6)(f); Crim. P. 21(b)(1); and (2) a reasonable period of delay due to the prosecution joining defendant's trial with that of the other codefendants, *see* § 18-1-405(6)(c).

As to the first exclusion, the court found that defendant's

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[11] The prosecution initially sought to try defendant with C.L. and two other co-conspirators, C.S. and K.F. C.S. and K.F. reached plea

recusal motion had not accurately informed the district court about when he had entered his not guilty plea, thereby causing the court to grant the motion though defense counsel had filed it beyond the applicable ten-day time limit. *See* Crim. P. 21(b)(1) (motion to recuse must be filed within ten days after the case has been assigned to a court absent a showing of good cause as to why the motion was not filed within the ten-day period); *see also People v. Thoro Products Co.*, 45 P.3d 737, 747 (Colo. App. 2001) (test for good cause is whether the motion was filed as soon as possible after the occurrence or discovery of facts forming the motion's basis), *aff'd*, 70 P.3d 1188 (Colo. 2003). The court therefore attributed to defendant the two-month period of delay between entering his not guilty plea and moving for a recusal. *See* § 18-1-405(6)(f).

As to the second exclusion, the court found that there was good cause for not granting a severance based on

> the nature of the offense[s], the victims having to testify more than once, the complexity of the case, judicial economy . . . expert testimony, risk of inconsistent verdicts, the fact that following trials may inure to [the] benefit of some Defendants that don't have that benefit of whoever has to go to trial first.

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agreements with the prosecution before trial.

The court then interpreted subsections 18-1-405(6)(c) and (h) as requiring it to first determine a reasonable period of delay due to the joinder of trials, and then to set the trial within three months of the expiration of that reasonable period. The court found that the period of delay in the case was reasonable, and set the joint trial for April 3, 2006.

Defendant first contends that the court improperly attributed the recusal-based delay to him because, contrary to the court's finding, the recusal motion accurately informed the court about the relevant prior timeline. We conclude, however, that the motion was inaccurate in two respects. First, it erroneously stated that defendant had "appeared for the first time in front of this court" at the August 15 arraignment, though the same judge who presided over that arraignment had also presided over the earlier hearing in which defendant pled not guilty. *See* Crim. P. 21(b)(1) (recusal motion must be filed within ten days after "a case has been assigned to a court").[12] Second, though the motion indicated that

[12] We also observe that defendant's trial counsel conceded that the recusal motion "may have been filed late" under Crim. P. 21(b)(1), though she still argued that the district court should not consider that error in determining defendant's speedy trial period.

defendant was arraigned on August 15, defendant was in fact arraigned at the time he pled not guilty, regardless of defense counsel's request to continue the setting date until the codefendants' arraignment. *See Black's Law Dictionary* 123 (9th ed. 2009) (defining arraignment as "[t]he initial step in a criminal prosecution whereby the defendant is brought before the court to hear the charges and to enter a plea"). Consequently, because the record supports the district court's finding that the court granted the late-filed motion due to the inaccurate timeline therein, we conclude that the court did not abuse its discretion by attributing the two-month period of delay to defendant. *See* Crim. P. 21(b)(1); *cf. People v. Arledge*, 938 P.2d 160, 166 (Colo. 1997) (where recusal motion was brought and denied in a timely manner, no delay was chargeable to the defendant); *People v. Goodpaster*, 742 P.2d 965, 967 (Colo. App. 1987) (the defendants' contention that no delays were chargeable to them was without merit where they successfully moved to recuse the judge and the special prosecutor). Because defendant's trial began within three months of the expiration of the excluded two-month period, it follows that the court did not abuse

its discretion by denying defendant's motion to sever on speedy trial grounds. *See* § 18-1-405(6)(f), (h).[13]

However, even if we were to conclude that the district court incorrectly attributed the delay caused by the late-filed recusal motion to defendant, we would nonetheless conclude that it properly denied his severance motion under subsections 18-1-405(6)(c) and (h).

Defendant contends that the denial under these subsections was an abuse of discretion because (1) there was no good cause not to grant a severance; (2) there was "no legal basis" for the court's interpretation of subsections 18-1-405(6)(c) and (h); and (3) the period of delay under subsection 18-1-405(6)(c) was not reasonable.

The district court listed numerous reasons why there was good cause not to sever the trials. Defendant offers no argument as to why those reasons do not constitute good cause. *See Backus*, 952 P.2d at 849 (good cause not to sever where the case was complex

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[13] We recognize that the initial ten-day period within which defense counsel could have timely filed the recusal motion may not have been properly attributable to defendant. However, even if we were to exclude those ten days from the two-month period of delay, we would nonetheless conclude that the court properly denied the severance motion because the trial began within three months of

due to the number of potential witnesses and nature of the evidence); *cf. Hernandez*, 829 P.2d at 393 (abuse of discretion where the district court made no finding of good cause not to sever the trials and there were no facts which would support such a finding).

The court's interpretation of subsections 18-1-405(6)(c) and (h) comports with the plain language of those subsections, and defendant offers no alternative interpretations. *See* § 18-1-405(6)(c), (h); *see also People v. Witty*, 36 P.3d 69, 75 (Colo. App. 2000) (under subsection 18-1-405(6)(h), a court may extend the speedy trial deadline up to three months if the delay in setting the new trial is reasonable); *accord People v. Platt*, 170 P.3d 802, 806 (Colo. App. 2007), *aff'd*, 201 P.3d 545 (Colo. 2009).

Finally, under the aforementioned interpretation, the district court had three months beyond the reasonable period of delay caused by the joinder within which to set the trial date. As noted, it set the trial for approximately three months and two weeks after defendant's original speedy trial deadline. Consequently, the period of delay caused by the joinder was as little as two weeks. *See* § 18-

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the shortened period's expiration. *See* § 18-1-405(6)(f), (h).

1-405(1), (6)(c), (h); *People v. Reynolds*, 159 P.3d 684, 686 (Colo. App. 2006) ("The two-week period of delay was unquestionably reasonable . . . ."). Even if we were not to consider the three-month period, the court stated, "Th[e] case was certainly put on a fast track once it got here and we tried to accommodate." And the court attempted to set a trial date earlier than April 3, but the other codefendants' counsel's schedules did not permit an earlier setting. Therefore, we would nonetheless conclude that the resultant 104-day delay between defendant's initial speedy trial deadline and the day his trial began was reasonable. *See People v. Runningbear*, 753 P.2d 764, 768-69 (Colo. 1988) (subsection 18-1-405(6)(c) "recognizes the scheduling problems posed by joining defendants with different speedy trial periods"; finding a ninety-eight-day delay between granting of severance motion and trial was reasonable); *see also Reynolds*, 159 P.3d at 686-87 (speedy trial right not violated where the court could not reset the case for one earlier week due to court obligations, and no other earlier date was acceptable to the codefendants' counsel).

Therefore, we conclude the district court did not abuse its

discretion by denying defendant's motion for a severance on speedy trial grounds.

C. Shackles

Defendant contends that the district court abused its discretion by requiring him to stand trial in ankle shackles.[14] We are not persuaded.

1. Background

On the first day of trial, before voir dire, C.L.'s counsel objected to defendant and C.L. standing trial in shackles, arguing that there had been "no problems with [C.L.] or [defendant] in the courtroom." The court responded that the deputies "feel that [shackling is] necessary, and I'm going to defer to them."[15] C.L.'s counsel then expressed concern that the potential jurors might see the shackles. The court said it would not use the first row in the

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[14] Defendant suggests in his opening brief that he stood trial in wrist, not ankle, shackles. However, when C.L.'s trial counsel objected to the shackles, she objected to the "chains on the ankles." There is no indication in the record that C.L. or defendant wore wrist shackles.

[15] Specifically, the court later noted that "there have been some independent statements made by [defendant] according to the deputies, that give them some concern for safety [along with] previous assaultive behavior."

section on defendants' side of the courtroom where the potential jurors were to be seated, "so that should eliminate any ability to see [defendant's and C.L.'s] feet at all." When C.L.'s counsel continued to object, the court commented that it was attempting to satisfy the deputies' safety concerns in the least obtrusive manner possible and that the alternative was to require defendant and C.L. to wear security belts that would create a "huge lump" visible to the jury.

Later that day, but while the potential jurors were absent from the courtroom, defendant's counsel told the court that she and C.L.'s counsel had ascertained that jurors would be able to see defendants in shackles when (1) walking into the courtroom, (2) sitting in the second row, and (3) seeing defendants stand.[16] The court responded that for the remainder of the trial (1) the jurors

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[16] Though the potential jurors had already been in the courtroom, defense counsel said that they had determined the shackles would be visible in "the place where the jurors *would be*." (Emphasis added.) Counsel did not indicate that the shackles had been visible to the potential jurors when they had been in the courtroom earlier that day. Nor did counsel poll the potential jurors to ascertain whether they had in fact seen the shackles. *See People v. Cardwell*, 181 Colo. 421, 428-29, 510 P.2d 317, 321 (1973) (no evidence the jurors had seen the defendant in shackles where defense counsel did not poll the jurors to determine whether they had).

would enter and exit the courtroom through a back entrance, (2) the jurors would sit in the jury box, and (3) defendants would not have to stand for the jury. The court later reconsidered its decision regarding standing for the jury, after it "was informed by the deputies that these defendants were shackled all afternoon when we were rising and sitting for the jury, and I had no indication that they were in shackles, nor did the reporter." The court found that any noise the shackles created at these times would not be noticeable because "there's enough shuffling and enough noise."

2. Analysis

A criminal defendant has a constitutional right to remain free of physical restraints that are visible to the jury. *Deck v. Missouri*, 544 U.S. 622, 628 (2005). Because requiring a defendant to appear before the jury in visible restraints undermines the presumption of innocence, such restraints are permissible only where the district court determines, in the exercise of its discretion, that the restraints "are justified by a state interest specific to a particular trial." *Id.* at 629, 631; *see Eaddy v. People*, 115 Colo. 488, 491, 174 P.2d 717, 718 (1946); *People v. Knight*, 167 P.3d 147, 153 (Colo.

App. 2006). "To implicate the concerns set forth in *Deck*, there must be evidence that a juror actually saw a defendant in [the restraints]." *State v. Green*, 307 S.W.3d 197, 200 (Mo. Ct. App. 2010); *see also Mendoza v. Berghuis*, 544 F.3d 650, 654 (6th Cir. 2008); *State v. Dixon*, 250 P.3d 1174, 1181 (Ariz. 2011); *State v. Sparks*, 68 So. 3d 435, 480 (La. 2011); *cf. Deck*, 544 U.S. at 634 (the record made clear that the jurors were aware of the shackles).

We review the district court's decision to require a defendant to stand trial in visible restraints for an abuse of discretion. *See Deck*, 544 U.S. at 629; *Knight*, 167 P.3d at 154; *see also People v. Tafoya*, 703 P.2d 663, 666 (Colo. App. 1985).[17]

Defendant contends that the district court abused its discretion by allegedly delegating the decision about whether he should wear shackles to the deputies, and by failing to make

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[17] Defendant argues that our "threshold inquiry" is whether the decision substantially influenced the verdict or affected the fairness of the trial – in other words, the standard of review for harmless error. *See People v. Robles*, ___ P.3d ___, ___, 2011 WL 1195773, *7 (Colo. App. No. 06CA0934, Mar. 31, 2011) (*cert. granted* Sept. 12, 2011). However, we need only consider whether an alleged abuse of discretion was harmless if we first determine that such an abuse occurred. *See id.* As explained below, we conclude that the court did not abuse its discretion.

sufficient findings justifying the shackles' use. We need not address these contentions, however, because there is no evidence that any juror saw or heard the shackles and, consequently, no indication that their use undermined defendant's presumption of innocence. *See United States v. Baker*, 432 F.3d 1189, 1246 (11th Cir. 2005) (where shackles are not visible, they do not so undermine the presumption of innocence in the jurors' minds as to be inherently prejudicial); *People v. Letner*, 235 P.3d 62, 106 (Cal. 2010) (appellate courts do not presume that jurors saw the restraints).

Therefore, we conclude that the district court did not abuse its discretion by requiring defendant to stand trial in shackles. *See Cardwell*, 181 Colo. at 428-29, 510 P.2d at 321 (district court properly denied the defendant's motion requesting that he not be transported to and from the courtroom in handcuffs and shackles where the sheriff used reasonable precautions to prevent the jurors from seeing the defendant in restraints, there was no evidence that the jurors had seen him in the handcuffs, and defense counsel did not poll the jurors to ascertain whether they had seen the defendant

in the shackles); *cf. People v. Dillon*, 655 P.2d 841, 846 (Colo. 1982) (no error in denying a mistrial where the defendant did not demonstrate that the jurors had seen him in restraints); *People v. Trujillo*, 169 P.3d 235, 239 (Colo. App. 2007) (same as *Dillon*).

IV. C.A.R. Compliance

Defendant's reply brief employs a font for its footnotes that is too small. *See* C.A.R. 32(a)(1). We remind counsel of her obligation to comply fully with this court's appellate rules.

The judgment is affirmed and the case is remanded for the district court to remove the crime of violence charge predicated on the second degree assault charge from the mittimus.

JUDGE CASEBOLT and JUDGE HAWTHORNE concur.