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COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Adams County District Court Honorable Jill-Ellyn Straus, Judge Case No. 10CR52	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. JESUS JIMENEZ-AYALA, Defendant-Appellant.	▲ **COURT USE ONLY** ▲ Case No. 12CA120
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PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

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

It contains 9498 words.

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

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.

/s/ Katherine A. Hansen

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STATEMENT OF THE CASE AND FACTS

On January 4, 2010, the defendant, his brother Michael, Jose Lopez-Gutierrez, and "Jorge" Torres-Reyes met and discussed doing "a job" involving obtaining drugs at a residence known to have drugs inside (R. Tr. 9/8/11, pp230,253; 9/9/11, p33,86,103,131; People's Exhibit 70, pp38-41,44,). The defendant agreed to participate because he needed the money (R. Tr. 9/9/11, pp104,131; People's Exhibit 70, pp44-45).

At around 8:00 p.m., the four men got into a car and drove to a home at 7979 Mona Court (R. Tr. 9/8/11, p233; 9/9/11, pp50-51). The residence was home to SC and MP, and MP's children: CR, VR, JR, ER, and AR (R. Tr. 9/7/11, pp52,66,88,122).

When they arrived, Jorge got out of the car, opened the trunk, and gave them black shirts, ski masks, surgical gloves, and weapons (R. Tr. 9/6/11, p196; 9/7/11, pp19,98-99; 9/8/11, pp238,253-254; 9/9/11, p46; People's Exhibit 70, pp47,49,102). Jorge, Miguel, and the defendant all had long guns; Jose was given a pistol (R. Tr. 9/8/11, p238; 9/9/11, p50;

People's Exhibit 70, pp77-78). The four men were to use code names during this home invasion robbery: Eagle 1, 2, 3, and 4 (R. Tr. 9/8/11, p237; 9/9/11, pp51,166).

At the home were eight-year-old CR, fourteen-year-old JR, ten-year-old VR, and seventeen-year-old AR, and SC (R. Tr. 9/6/11, pp174-175; 9/7/11, p89). The four men approached the house, wearing ski masks and all armed, and knocked on the door (R. Tr. 9/6/11, pp175,199; 9/7/11, pp71,76; 9/8/11, pp240-241). At this point, AR, CR, and VR were in a back living room; JR was downstairs in her basement bedroom (R. Tr. 9/6/11, p175; 9/7/11, pp15,38,69).

CR answered the door (R. Tr. 9/6/11, p178; 9/7/11, pp15,69,89). The men pushed CR aside and entered (R. Tr. 9/7/11, p69; 9/8/11, pp243-244; 9/9/11, p51). CR ran back into the living room, screaming that there were "guys with guns" and masks, so the three children went downstairs into JR's basement bedroom and locked the door (R. Tr. 9/6/11, pp179-180; 9/7/11, pp15-16,38-39,70,72,90-92). JR called 911 (R. Tr. 9/6/11, p179; 9/7/11, pp16,39,75,92).

Meanwhile, one masked man, likely the defendant, encountered SC, and held him at gunpoint in an upstairs room (R. Tr. 9/8/11, p246). The defendant remained upstairs holding SC at gunpoint, while Jorge, Michael, and Jose went downstairs into the basement and banged on the door (R. Tr. 9/6/11, p179; 9/7/11, pp39,73-74; 9/8/11, pp247-249; 9/9/11, p51). The men threatened to shoot through the door, so AR opened the door (R. Tr. 9/6/11, p180; 9/7/11, pp17,39-40,77,93; 9/8/11, p248). The men barged into the room (R. Tr. 9/6/11, p180; 9/8/11, p249).

At this point, AR saw the three men, likely Jorge, Michael, and Jose, wearing ski masks and carrying two "big guns" and a pistol (the man she described carrying the pistol was Jose) (R. Tr. 9/6/11, p181; 9/7/11, p17). The men were pointing the guns at the children (R. Tr. 9/6/11, pp181-182; 9/7/11, pp6,41,95; 9/9/11, pp45-46).

The men stated that if they had called the police, then they would kill them (R. Tr. 9/6/11, p189; 9/7/11, p40). The men then stated, in Spanish, that they wanted the "work," which is a reference to drugs (R. Tr. 9/7/11, pp45,59; 9/9/11, pp44,90).

The men asked who was upstairs, and AR told them it was her step-dad SC (R. Tr. 9/6/11, p182; 9/7/11, p18). AR indicated that she could provide what they were looking for, and it was in the garage (R. Tr. 9/8/11, p251; 9/9/11, pp45,88). They told her to go upstairs, and while she did so, Michael followed her and pushed her with a gun in her back (R. Tr. 9/6/11, p182; 9/7/11, pp19,35,41,96-97; 9/8/11, pp251-253). The other two men (Jorge and Jose) stayed in the basement with JR, CR, and VR (R. Tr. 9/7/11, p19; 9/8/11, p254).

When she got upstairs to the living room, she saw that the defendant still had SC on the floor and was holding a gun to him (R. Tr. 9/6/11, pp183-184; 9/7/11, p6). SC insisted that there were no more drugs in the residence, that they had already been taken away (Exhibit 70, pp54-56,63). He indicated that the drugs had been in the "tires," that he was only paid to load up the tires with marijuana, and the drugs were gone (People's Exhibit 70, pp54-56).

Michael and the defendant then walked AR and SC to the garage at gunpoint (R. Tr. 9/6/11, pp184-186; 9/7/11, p6). The other two gunmen remained downstairs (R. Tr. 9/6/11, pp184-185).

In the garage, Michael was talking to SC, and she was on the other side of the garage with the defendant (R. Tr. 9/6/11, p186; People's Exhibit 70, p96)). Michael told her that they had just come from Arizona where they had killed a family, so they weren't afraid to make them disappear (R. Tr. 9/6/11, pp187-189). Both men had their guns pointed at SC and AR (R. Tr. 9/6/11, pp187-188).

While they were in the garage, they all heard police sirens (R. Tr. 9/6/11, p187). When the gunmen in the basement heard the sirens, Jorge directed the three children to walk upstairs, and he led the way though the kitchen, and towards the door to the back yard (R. Tr. 9/7/11, pp46-47,81). JR was hit by a stray bullet, so she fell to the floor (R. Tr. 9/7/11, pp47-48). CR, VR, and Jose stayed downstairs (R. Tr. 9/7/11, pp82,99; 9/8/11, pp255-256; 9/9/11, p45).

The police arrived and were beginning to establish a perimeter around the house (R. Tr. 9/7/11, p133; 9/8/11, p18). Deputy Hernandez went to the back of the house (R. Tr. 9/7/11, p136). When he got halfway through the yard, he saw a man exit out of the French doors on the back of the house (this was likely Jorge); he directed the man to stop

but he did not comply and fled through the yard (R. Tr. 9/7/11, pp48,137).

Subsequently, Deputy Hernandez saw two masked man in or near the garage doorway, one or both of which opened fire, striking him in the leg with shotgun pellets (R. Tr. 9/6/11, pp190-191; 9/7/11, pp136-139,142,162). AR was inadvertently shot by the gunfire, likely through the garage door (R. Tr. 9/6/11, pp192,194).

Both Michael and the defendant were able to flee the area, and the defendant dropped his mask, gloves, gun, and jacket as he did so (People's Exhibit 70, pp58,62,93-94,107-108). Jose fled out of the basement window, dropping his pistol and mask in the window well (R. Tr. 9/7/11, pp82,117; 9/8/11, pp257-258; 9/9/11, p47). Jose was located hiding under a car across from the victims' driveway (R. Tr. 9/8/11, pp90-91,96,258).

About 9:30 p.m., Officer Larson observed the defendant about a mile away from the victims' home (R. Tr. 9/8/11, pp102,107). The defendant was eventually taken into custody and transported to the police station. There, he made statements to the police, ultimately

admitting his involvement in this offense (R. Tr. 9/9/11, pp100-116; People's Exhibit 70).

Several black ski masks were found on the property, one of which contained the defendant's DNA, and two others included the defendant's DNA as a minor contributor (R. Tr. 9/12/11, p p49-58). The police also recovered three shotguns (R. Tr. 9/8/11, pp92,96,135). Inside the garage was a tire that had metal compartments inside, which contained marijuana remnants (R. Tr. 9/8/11, pp120-121).

The defendant was charged with two counts of first degree burglary, two counts of second degree kidnapping (victims: AR & SC); ten counts of attempt to commit aggravated robbery(victims: JR, AR, CR, VR, SC), conspiracy to commit first degree burglary, conspiracy to commit aggravated robbery, second degree assault (victim: Deputy Hernandez), and four crime of violence counts (v1, pp1-11).

Following a jury trial, the defendant was convicted of first degree burglary (both counts), second degree kidnapping (victim: AR), attempted aggravated robbery (deadly weapon, all victims, five counts), attempted aggravated robbery (kill, maim, or wound, all victims, five

counts), conspiracy to commit first degree burglary, conspiracy to commit aggravated robbery, second degree assault, and criminal trespass (PR, v1, pp156-185; R. Tr. 9/13/11, pp57-63). The jury also made findings that the defendant used, possessed, or threatened the use of a deadly weapon during the commission of the crimes of burglary, attempted aggravated robbery (kill, maim, wound) relating to victim AR, and conspiracy (two counts) (PR, v1, pp156-158,171,179; R. Tr. 9/13/11, pp57-63). He was found not guilty of second degree kidnapping involving SC (PR, v1, p162; R. Tr. 9/13/11, p59). He was thereafter sentenced to a total of 86 years in prison (v1, pp195-196; R. Tr. 11/30/11, pp15-18).

SUMMARY OF THE ARGUMENT

The trial court properly denied the motion to suppress, as there was sufficient facts presented to establish reasonable suspicion for the detention, and probable cause for the arrest. The evidence was sufficient to support the defendant's convictions for kidnapping, attempted aggravated robbery, and second degree assault. The trial

court properly denied the instruction on abandonment, as there was no credible evidence to support it.

ARGUMENT

I. The trial court properly denied the defendant's motion to suppress evidence and statements, as the defendant was not subjected to an unlawful detention or arrest.

The defendant first contends that the trial court erred in denying his motion to suppress, because he was subjected to a detention and subsequent arrest without reasonable suspicion and probable cause.

A. Factual background.

Prior to trial, the defendant filed a motion to suppress evidence, arguing that he was detained without reasonable suspicion (v1, pp35-36). At a hearing, the following evidence was introduced.

On January 4, 2010, at about 9:30 p.m., Officer Larson was dispatched to 7979 Mona Court to assist with a transport following an officer-involved shooting. When he arrived, he was told that the transport had already been taken care of. He was then briefed as to what had occurred, and that some calls had come in regarding

"suspicious parties in the area" (R. Tr. 3/18/11, p38). He was advised that the suspects were last seen running from the scene (R. Tr. 3/18/11, p 43). The description of these suspects were Hispanic males in their early 20's, wearing all black (R. Tr. 3/18/11, pp39,43). Because he believed that these parties would be on foot, he began driving slowly through the general area (R. Tr. 3/18/11, p39).

About 15 minutes later, at about the 7700 block of Durango, around a mile and a quarter from the residence where the offense occurred, he observed the defendant (R. Tr. 3/18/11, pp39-40,43). At that point it was very cold outside, however, the defendant was wearing a t-shirt on that had grease or road debris on the right shoulder, and his pants were wet from the bottom to the lower shin, as well as his shoes (R. Tr. 3/18/11, pp39-40).

Officer Larson pulled his patrol car over (about 15-20 feet away from the defendant) and contacted him, asking him "if he had a second to talk," and then asking what he was doing in this area at that time of night without a jacket (R. Tr. 3/18/11, pp40,44,46). At this point, the officer's patrol lights were not on (R. Tr. 3/18/11, p 45). The defendant

stated that he was out having a cigarette (R. Tr. 3/18/11, p41). Officer Larson asked him where he lived, and the defendant indicated that he did not live in the area but he was at his sister's house and he was taking a walk to smoke a cigarette (R. Tr. 3/18/11, p41).

Officer Larson had contacted "command," advised them of his observations, and was told to detain the defendant (R. Tr. 3/18/11, p41). He then patted the defendant down for officer safety, and did not find any weapons, nor did he find cigarettes or a lighter (R. Tr. 3/18/11, p42). Officer Larson was then directed by "command" to transport the defendant to the substation, where he was interviewed at 4:33 a.m., and made incriminating statements to the police following a Miranda advisement and waiver (R. Tr. 3/18/11, p42; People's Exhibit 70).

After hearing the evidence and the arguments of counsel, the court reiterated the facts as outlined above. The court found that the initial contact with the defendant was made about 10-15 minutes after the suspects fled the residence. The incident had involved a home invasion perpetrated by "four youthful Hispanic individuals dressed in black" (R. Tr. 3/18/11, pp79-80). The court noted that Officer Larson

was in the general vicinity when he saw the defendant, who appeared to have some grease or debris on his shirt, and his pants and shoes were wet. He also matched the general description of the males involved. The defendant was not wearing clothing appropriate for the weather , which was extremely cold (R. Tr. 3/18/11, p80).

The court then found that the defendant was patted down because there was information that weapons were involved in the incident, and an officer had been shot. The court ruled that this pat-down was justified (R. Tr. 3/18/11, p80).

The court noted that although the defendant indicated that he was just having a cigarette, when patted down, no cigarettes or lighters were located. The court noted that the officer was ordered to detain the defendant "because the individual fit the description or comported with the description of the individuals seen fleeing the location of the home invasion" (R. Tr. 3/18/11, pp80-81). Because the defendant's statements were inconsistent with the circumstances, "he suspected the individual might be involved in a home invasion and took him into custody and transported him to the Adams County Sheriff's Department" (R. Tr.

3/18/11, p82). The court noted that at the station, the defendant was properly advised of his *Miranda* rights, and validly waived his rights and gave a voluntary statement to the police (R. Tr. 3/18/11, p82).

The court then indicated that it had reviewed the search warrant affidavit (R. Tr. 3/18/11, p82). This affidavit indicated that at the time the defendant was contacted, the police as a whole knew that a home invasion robbery had occurred involving four males wearing ski masks and carrying guns (v1, p56). The police knew that there had been an exchange of gunfire between these men and the police, and that the men had fled on foot (v1, pp56-57). The court found that "evidence seized from the defendant was not in violation of any constitutional right under the Fourth Amendment" (R. Tr. 3/18/11, p84).

B. Standard of review and preservation of claim.

In reviewing a suppression order, this Court defers to the trial court's findings of fact, which shall not be overturned if supported by competent evidence in the record. *People v. Gothard,* 185 P.3d 180, 183 (Colo. 2008). This Court then applies a de novo standard of review to

ascertain whether the trial court's legal conclusions are supported by sufficient evidence and whether it has applied the correct legal standard. *Id.* Unless there is a reasonable possibility that the evidence contributed to the conviction, any error is harmless. *People v. Melanson*, 937 P.2d 826, 833 (Colo. App. 1996).

The People agree with the defendant that his claims are preserved.

C. The defendant was lawfully detained and arrested.

1. The initial contact was a consensual encounter;[1] the defendant was only arguably seized at the point he was patted down, and the seizure was supported by reasonable suspicion.

The Fourth Amendment to the United States Constitution proscribes all unreasonable searches and seizures. U.S. Const. amend. IV. In proceeding on a motion to suppress based upon an illegal detention, a defendant must show: 1) the point at which he was seized within the meaning of the Fourth Amendment; and 2) that the seizure was unconstitutional. *Outlaw v. People*, 17 P.3d 150, 155 (Colo. 2001). A trial court must take into account the totality of the circumstances

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[1] Although the trial court did not specifically find that the encounter prior to the pat-down was a consensual encounter, it did not conclude that it was not. In any event, because the facts are undisputed, this Court can consider on appeal whether the encounter was consensual. *See Moody v. People*, 159 P.3d 611, 616 (Colo. 2007) (reviewing court can reach legal conclusion where there exists a "factually complete and straightforward record"); *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006) (where essential facts are not in dispute, a party may defend the trial court's judgment on any ground supported by the record).

known to police officers at the time of intrusion, along with any rational inferences that may be drawn from them. *People v. Garcia*, 11 P.3d 449, 453 (Colo. 2000).

"[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). Law enforcement officers do not implicate the protections afforded by the Fourth Amendment by merely approaching an individual on the street or in another public place. *People v. Milligan*, 77 P.3d 771, 775 (Colo. App. 2003).

A consensual encounter is a contact in which the voluntary cooperation of the citizen is elicited through non-coercive questioning. *Milligan, supra.* The test for determining if the encounter is a consensual one is whether a reasonable person under the circumstances would believe he was free to leave and/or to disregard the official's request for information. *Milligan, supra; People v. Melton*, 910 P.2d 672, 676 (Colo. 1996); *People v. Paynter*, 955 P.2d 68 (Colo. 1998).

Here, the initial contact between the defendant and the officer was a consensual encounter. *See People v. Dickinson*, 928 P.2d 1309, 1310 (Colo. 1996) (law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place). First, the officer simply approached the defendant on a public street, about 15-20 feet away, and asked if he would talk with him. *Cf. Paynter, supra* (officer approached parked car and asked occupants what they were doing); *People v. Cascio*, 932 P.2d 1381 (Colo. 1997) (two officers approached the occupants of a parked van). His patrol car did not have its lights or siren on. *Cf. People v. Marujo*, 192 P.3d 1003, 1008 (Colo. 2008) (single patrol car in the vicinity did not have its lights or sirens activated).

There was also nothing about the officer's words or his conduct which would indicate to a reasonable person that compliance was required. Indeed, it was made quite clear that the officer "asked" the defendant if he would talk with them, rather than demand that he do so. The officer then asked several questions about the defendant's presence in the area, but did not do so in an intimidating or threatening

manner. The officer did use any physical restraint, no guns were drawn, nor were any other words or gestures used to convey to the defendant that he was not free to leave. *Cf. People v. Scheffer*, 224 P.3d 279, 285 (Colo. App. 2009) (neither officer removed his gun from his holster or otherwise displayed a weapon); *Cascio*, *supra* (deputies did not act in a threatening manner).

Furthermore, the officer did not position himself or his patrol car in such a way as to prevent or alter the defendant's course of travel. *Compare Cascio, supra* (position of the patrol car relative to the motorist's vehicle is an important consideration in determining whether an encounter is consensual; *with Outlaw, supra* (defendant seized when officers required him to alter his direction of travel as they followed him in their patrol car by driving on the sidewalk and in wrong lane of traffic for a long distance, summoning the defendant to their car).

Simply contacting the defendant and asking brief questions about his presence in the area, under the circumstances presented here, was not a detention but a consensual encounter. *See Scheffer*, *supra* at 284;

Melton, *supra* (officers approached in a non-threatening manner and asked rather than demanded his name and address).

Because there is no evidence that the pat-down of the defendant was done pursuant to his consent, the defendant was arguably "seized" at that point. However, this seizure, and the pat-down itself, was supported by reasonable suspicion of criminal activity.

An investigatory stop may be employed when an officer has a specific and articulable basis in fact for suspecting that criminal activity has taken place. *People v. Rodriguez*, 945 P.2d 1351, 1358 (Colo. 1997); *People v. Altman*, 938 P.2d 142, 144 (Colo. 1997). The determination of whether reasonable suspicion exists to justify an investigatory stop focuses on whether, based on the totality of the circumstances, there are specific, articulable facts known to the officer which, taken together with reasonable inferences from those facts, create a reasonable suspicion of criminal activity to justify the intrusion into a person's personal security. *People v. Salazar*, 964 P.2d 502 (Colo. 1998); *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (court should consider totality of the circumstances, not analyze each factor separately to assess

whether it might be consistent with innocent behavior); *People v. May*, 886 P.2d 280, 282 (Colo. 1994) (noting that, although each piece of information may not have amounted to reasonable suspicion, the combination of the three satisfied the reasonable suspicion standard); *People v. Archuleta*, 980 P.2d 509, 514-515 (Colo. 1999) (same).

Here, the information known to Officer Larson when he patted down the defendant included the following:[2]

- A home invasion robbery had occurred about an hour prior at a residence a mile away, making it reasonable to believe that the

[2] Under the fellow officer rule, it is proper to consider the information known to the police as a whole at the time the stop occurred and Officer Larson was directed by "command" to detain the defendant. *See Grassi v. People*, 2014 CO 12 (Colo. 2014) (fellow officer rule pools the collective knowledge of officers engaged in a coordinated investigation; it is not necessary that the officer making the stop be advised of the details supporting the fellow officer's direction to stop a suspect). And the trial court considered the search warrant affidavit when ruling on the motions to suppress, which is also in the record on appeal. As such, it is proper to consider the evidence at the hearing as well as information in the search warrant affidavit (at least information that clearly was known at the time of the stop) when assessing the legal question of whether there was reasonable suspicion to detain and probable cause to arrest.

defendant could have reached that destination in that period of time;

- This crimes involved the use of weapons and an exchange of gunfire;
- The suspects in that crime were described as four Hispanic males, in their 20's, and wearing black, which matched the defendant's description;
- The suspects were last seen fleeing the residence on foot, and the defendant was seen on foot and not associated with any vehicle;
- The defendant was seen wearing a t-shirt with road debris and grease, suggesting that he had recently laid on the ground, perhaps under or near a car;
- The defendant's pants were wet up through the shins, as well as his shoes, suggesting he had been travelling through snow or lying in snow, rather than just walking down the street;
- The defendant was not wearing a coat or jacket, despite the extremely cold temperature outside.

The totality of these circumstances provided reasonable suspicion that the defendant was one of the four men involved in the home invasion robbery. As such, the defendant was lawfully detained.

In addition, the pat-down search for weapons was entirely appropriate in this case. During an investigatory stop, an officer may take steps to ensure his or her own safety and that of any fellow officers. *People v. Smith*, 13 P.3d 300, 305 (Colo. 2000) (hereinafter "*Smith I*"). This means that an officer may take physical control of or seize a suspect, and conduct a pat-down for weapons. *People v. Hardrick*, 60 P.3d 264, 268 (Colo. 2002); *People v. Jackson*, 948 P.2d 506, 507 (Colo. 1997); *Smith*, *supra*; *People v. Smith*, 312 P.3d 1173, 1177 (Colo. App. 2010) (hereinafter "*Smith II*"). The appropriate inquiry is whether such use of force was a reasonable precaution for the protection and safety of the investigating officers. *Smith I*, *supra*; *Smith II, supra*. Here, because the offense the defendant was suspected of committing involved the use of weapons and an exchange of gunfire with the police, it was entirely appropriate for the officer to pat down the defendant to ensure that he did not have a weapon.

2. The defendant was arrested at the point he was placed into custody and transported to the police station; this arrest was supported by probable cause.

Because the detention was justified by reasonable suspicion and the pat-down was reasonable for officer safety, the defendant was not "under arrest" until he was placed in custody and transported to the police station. At this point, there was probable cause for the arrest.

In order to make a warrantless arrest, there must be objective facts and circumstances available to a reasonably cautious officer at the time of arrest to justify the belief that: (1) an offense has been or is being committed; (2) by the person arrested. *People v. Brown*, 217 P.3d 1252, 1256 (Colo. 2009); *People v. King*, 16 P.3d 807, 813 (Colo. 2001); *People v. Washington*, 865 P.2d 145, 147 (Colo. 1994). The totality of the circumstances must be considered when making this determination. *Id.*

Probable cause is measured by a common-sense, nontechnical standard of reasonable cause to believe, with due consideration being given to a police officer's experience and training in determining the

significance of his observations to the ultimate issue of probable cause. *King*, *supra*; *Washington*, *supra*.

Probable cause is measured in terms of "probabilities similar to the factual and practical questions of everyday life upon which reasonable and prudent persons act." *People v. Flowers,* 128 P.3d 285, 287 (Colo. App. 2005), *quoting People v. MacCallum,* 925 P.2d 758, 762 (Colo. 1996). The amount and quality of information necessary for probable cause to make a warrantless arrest is significantly less than what is necessary to prove an accused's guilt at trial. *Washington, supra; People v. Rogers*, 68 P.3d 486, 489 (Colo. App. 2002).

Probable cause does not require proof beyond a reasonable doubt. *Washington*, *supra* (the amount and quality of information necessary for probable cause to make a warrantless arrest is significantly less than what is necessary to prove an accused's guilt at trial). It was not necessary that the officers know ***for certain*** that the defendant was one of the four men involved in the home invasion robbery; the officers need only to have facts and circumstances to justify a reasonable belief

that an offense had been committed by the person arrested. *Brown, supra*.

Here, there can be no question that there was probable cause to believe a crime had been committed. The question is whether there was probable cause to believe that the defendant was involved in that crime. In addition to the facts as outlined above, which arguably alone provide probable cause to believe that the defendant was involved, the officer learned additional information following the pat-down that justified the arrest. Specifically, in addition to the fact that the defendant was found on foot, matching the description of the suspects, in a location near the scene of the crime, at night in extremely cold temperatures wearing clothes that were inappropriate for the weather and in a condition to suggest that he had been involved in a flight and evasive (hiding) positions, the defendant also voluntarily provided the officer with an explanation for his current circumstances which was proven false by the pat-down search (i.e., he said that he was out smoking when he had no smoking materials on his person).

Furthermore, the defendant was contacted in an area after "suspicious persons" were reported in that area, and although it cannot be determined whether the defendant was indeed the person seen and reported by others in that area, he was in the same vicinity and no other individuals were present. As such, there were articulable facts and circumstances to justify the officer's belief that the defendant was one of the persons involved in the home invasion robbery. Indeed, allowing the defendant to leave at that point, where all facts indicated that he was involved, would have been unreasonable and irresponsible. The arrest was lawful, and the court therefore properly denied the motion, concluding that no constitutional violations had occurred. *Cf. People v. Griego*, 983 P.2d 99, 101 (Colo. App. 1998) (officer's initial observations prior to investigatory stop, combined with events that occurred after the stop initiated, ripened into probable cause); *People v. Huynh*, 98 P.3d 907, 913 (Colo. App. 2004) (probable cause to arrest arose when, following the officers development of reasonable suspicion, the officers were able to confirm their suspicion by comparing the

appearance of the suspects and their car to the individuals and car depicted in the bulletin).

D. The evidence obtained and used at trial (i.e., the DNA evidence and the statements) was attenuated from any illegality.

Although the trial court found that the defendant was lawfully detained, even if this Court disagrees, this Court may still uphold the conviction on grounds that the evidence obtained following the detention (i.e., DNA through the buccal swabs and the defendant's statements at the police station) was attenuated from any illegality. S*ee Moody, supra* (appellate courts have the discretion to affirm decisions, particularly denial of suppression motions, on any basis for which there is a record sufficient to permit conclusions of law, even though they may be on grounds other than those relied upon by the trial court); *Aarness*, *supra* (same).

The "fruit of the poisonous tree" doctrine provides that evidence derived from information acquired by the police through unlawful means is inadmissible in criminal prosecutions. *People v. Schrader*, 898

P.2d 33, 37 (Colo. 1995). However, the courts have "declined to adopt a 'per se' or 'but for' rule that would make inadmissible any evidence … which somehow came to light through a chain of causation that began with an illegal arrest." *New York v. Harris*, 495 U.S. 14, 17 (1990).

There are three exceptions to the exclusionary rule: independent source, attenuation, and inevitable discovery. *People v. Diaz*, 53 P.3d 1171, 1176 (Colo. 2002). The attenuation exception applies here.

To determine whether evidence was obtained as a direct result of police illegality, or is sufficiently attenuated to justify its admission, the reviewing court should consider whether that evidence was "come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *People v. Rodriguez*, 945 P.2d 1351, 1364 (Colo. 1997). The resolution of this question turns on an assessment of three factors: 1) the temporal proximity of the arrest and the confession; 2) the purpose and flagrancy of the official misconduct, and 3) the presence of intervening circumstances. *People v. Lewis*, 975 P. 2d 160, 173 (Colo. 1999).

Here, the DNA evidence was obtained through the defendant's voluntary consent to a buccal swab (R. Tr. 3/18/11, pp28-32). Indeed, the defendant reinitiated the issue of consenting to such a search after initially indicating his refusal (which was based on his misunderstanding of the procedure). The defendant was taken into custody around 9:45 p.m., and the interview did not begin until 4:33 a.m. (People's Exhibit 70, p3). The defendant made statements following a full and proper *Miranda* advisement and waiver, and there is nothing that suggests that the statements were anything but voluntary.

Here, there was not a strong temporal proximity between any illegality in the arrest and the voluntary consent to the swabs and the defendant's statements. There is no evidence of any bad faith or police misconduct. And the difference in time, location, and police officers involved creates sufficient intervening circumstances to purge any taint of the illegality and render the evidence admissible. *See People v. Ashton*, 661 P.2d 291, 295 (Colo. App. 1982) (consent attenuated from any illegality); *compare Perez v. People*, 231 P.3d 957 (Colo. 2010) (no

attenuation where the defendant gave a confession immediately following an illegal search, and the confession occurred at the site of the search).

E. Any error was harmless.

Finally, even if error occurred here by the admission of the DNA match to the defendant's ski mask, the admission of this evidence was harmless because it was but a small link in the chain tying the defendant to these crimes. The DNA match only proved that the defendant was present, a fact which he did not deny. And overwhelming evidence was otherwise presented of his involvement and his conduct during the crime.

Further, any error in admitting the defendant's statements was also harmless because the evidence was not overly incriminating (i.e., in the statement the defendant repeatedly minimized his involvement), other evidence of his involvement was overwhelming, and the statements allowed him to argue that he was hesitant to be involved and did not agree to or know of many of the crimes committed by the other participants. *See e.g., People v. O'Neill*, 803 P.2d 164 (Colo. 1990)

(where instruction for crime of kidnapping included element of force, reversal of conviction not required because error inured to benefit of defendant).

II. The evidence was sufficient to support the defendant's kidnapping, attempted aggravated robbery, and second degree assault convictions.

The defendant next claims, for separate reasons, that the evidence was insufficient to support his convictions for kidnapping of AR, attempted aggravated robbery, and second degree assault.

A. Standard of review and preservation of claims.

The standard of review of the sufficiency of the evidence is de novo. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005). The People agree that the defendant's sufficiency claims are preserved (R. Tr. 9/12/11, pp77-125).

B. General standards for sufficiency of the evidence claims.

A challenge to the sufficiency of the evidence requires a reviewing court to determine whether the evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable

to the prosecution, is substantial and sufficient to support a conclusion by a reasonable person that the defendant is guilty of the crime charged beyond a reasonable doubt. *Kogan v. People*, 756 P.2d 945 (Colo. 1988); *People v. Dash*, 104 P.3d 286, 289 (Colo. App. 2004).

In applying this test, the prosecution must be given every reasonable inference that can be fairly drawn from the evidence. *People v. Padilla*, 113 P.3d 1260, 1261 (Colo. App. 2005). If there is evidence upon which one may reasonably infer the elements of the crime, the evidence is sufficient. *People v. Montano*, 578 P.2d 1053 (Colo. 1979).

C. Second degree kidnapping of AR.

The defendant contends that there was insufficient evidence to support his conviction for kidnapping AR because he was not the person who forced her to walk up the stairs, and there was no evidence that he knew what was going on downstairs so there was no showing that he had the intent to promote or facilitate the kidnapping and aided, abeted, advised or encouraged the kidnapper to do so.

Under §18-3-302(1), C.R.S. (2013), "[a]ny person who knowingly seizes and carries any person from one place to another, without his

consent and without lawful justification, commits second degree kidnapping." To be criminally liable for the crime of kidnapping as a complicitor, the prosecution must show that the defendant, with the "intent to promote or facilitate the commission of the offense," aid[ed], abet[ed], advise[d], or encourage[d] the other person in planning or committing the offense." §18-1-603, C.R.S. (2013).

Because complicity is not a substantive offense, the "intent" referred to in the complicity statute is not defined according to §18-1-501(5), C.R.S. (2013). *People v. Wheeler*, 772 P.2d 101, 103 (Colo. 1989). Instead, the words "with intent to promote or facilitate" retain their common meaning. *Grissom v. People*, 115 P.3d 1280, 1284 (Colo. 2005); *Wheeler, supra.*

Accomplice liability extends to even unintentional crimes committed by the principal when the complicitor and the principal are acting in a "common enterprise." *Grissom, supra.* A "common enterprise" exists where parties are acting in concert to commit a threshold crime. *Id.* Even if a principal ultimately commits a more serious crime than the complicitor initially intended, the complicitor

can be held liable for the crime committed by the principal. *Id.*; *see also People v. Fisher*, 904 P.2d 1326, 1331 (Colo. App. 1994) ("It is not necessary that the complicitor know all of the specifics of the crime which the principal intends to commit. He simply must have knowledge that the principal is engaging in criminal activity and must intend to aid in that criminal conduct"), *citing People v. Close*, 867 P.2d 82 (Colo. App. 1993).

Here, there is no question that sufficient evidence was presented that all four men entered the home to rob the occupants of the marijuana that they believed was inside. They brought weapons and wore clothing to facilitate that crime as well as their escape. As such, these men were involved in a "common enterprise" and therefore the defendant was liable for all crimes committed by the men in the course of committing that crime.

Indeed, the jury could have reasonably concluded that the defendant was aware that individuals in the house would be held at gunpoint, and moved to different locations in an attempt to locate the drugs. Even if he was not the individual who forced AR upstairs at

gunpoint, he was involved in this common enterprise and as such, was criminal responsible for those actions.

Finally, the jury could have found the defendant guilty based on his actions of walking AR and SC out to the garage at gunpoint. The evidence was sufficient to support the defendant's kidnapping conviction as either a principal or a complicitor, and as such, that conviction must stand.

D. Attempted aggravated robbery.

The defendant next complains that the evidence was insufficient to support his attempted aggravated robbery convictions because: 1) there was no marijuana in the residence, therefore there was nothing to be taken and the defendant could not have engaged in a "substantial step" towards aggravated robbery; 2) there was no marijuana in the residence, so the "thing of value" to be taken was not within any of the victims' reach, inspection, observation, or control; 3) even if the defendant could be convicted of attempting to commit aggravated robbery based on the "nonexistent" marijuana that was formerly in the

garage, because the child victims – CR, JR, and VR – were in the basement, they never had any control over or claim to the marijuana.

Robbery is committed where a person "knowingly takes anything of value from the person or presence of another by the use of force, threats, or intimidation." §18-4-301(1), C.R.S. (2013). A robbery is considered aggravated where, as charged here, during the course of the robbery or the immediate flight therefrom, the defendant: 1) by the use of force, threats, or intimidation with a deadly weapon knowingly put the person robbed or any other person in reasonable fear of death or bodily injury; and 2) had present a confederate, aiding or abetting the perpetration of the robbery, armed with a deadly weapon, with the intent, either on the part of the defendant or confederate, if resistance is offered, to kill, maim, or wound the person robbed or any other person. §18-4-301(1)(b),(c), C.R.S. (2013).

Under §18-2-101(1), C.R.S. (2013):

> A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is

> any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense. ***Factual or legal impossibility of committing the offense is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be [.]***

(emphasis added).

As noted above, there was sufficient evidence presented that the defendant and three other men engaged in a plan to enter the victims' residence and steal marijuana at gunpoint. There was ample evidence that the men believed that there was marijuana in the residence. And in fact, although the marijuana that they expected was apparently removed prior to their arrival, there was evidence presented that marijuana had been at the residence and residue was still present.

The defendant's conduct of entering the home at gunpoint, holding SC at gunpoint to locate the drugs, and then walking SC and AR to the garage at gunpoint to look for the drugs (which is apparently where AR indicated that they would be) was sufficient to establish a substantial step towards committing the crime of aggravated robbery. The absence

of the marijuana is of no moment, because the fact that marijuana could not have been stolen because it was no longer present is not a defense to this attempt crime. *See* §18-2-101(1); *People v. Duran*, 272 P.3d 1084, 1094 (Colo. App. 2011) (the fact that the victim was already dead when the second group of gunshots was fired by the defendant did not support a defense to attempted murder as impossibility is not a defense to an attempt crime); *see also* §18-1-504(1), C.R.S. (2013) ("A person is not relieved of criminal liability for conduct because he engaged in that conduct under a mistaken belief of fact").

Contrary to the defendant's claim on appeal, the fact that three of the named victims, CR, JR, and VR, were in the basement did not establish they never had any control over or claim to the marijuana, thereby precluding a conviction for attempted aggravated robbery as to those victims. There is no question that a defendant can be convicted of multiple counts of robbery based on a single taking from multiple victims. *People v. Borghesi*, 66 P.3d 93, 103 (Colo. 2003).

For a robbery conviction, the thing of value must be taken from the "person or presence" of the victim. §18-4-301(1). From the

"presence" has been interpreted as being within the "control" of the victim, i.e., when it is so within the victim's reach, inspection or observation that he or she would be able to retain control over the property but for the force, threats, or intimidation directed by the perpetrator against the victim. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Williams*, 2012 COA 165 (Colo. App. 2012); *People v. Clemons*, 89 P.3d 479, 482 (Colo. App. 2003); *People v. Ridenour*, 878 P.2d 23, 27 (Colo. App. 1994) (individual must be exercising, or have the right to exercise, control over the article taken); *People v. Benton*, 829 P.2d 451, 452-453 (Colo. App. 1991).

Here, the victims in the basement lived in the residence with their siblings, mother, and mother's boyfriend. There is no indication that they did not have the ability to move about the property. As such, the jury could have reasonably concluded that even though they were in the basement, the drugs could have been taken from a location where they had a right to control and prevent a taking. Unquestionably, they were prevented from thwarting any taking because they were held at gunpoint in the basement.

Moreover, a victim need not be aware of the taking for a robbery to occur. *Bartowsheski, supra* at 244 ("presence" encompasses the situation where the victim of the robbery, against whom the force, threats, or intimidation is directed, is present in one room of a family home and the taking occurs within another room); *People v. Villalobos*, 159 P.3d 624, 627 (Colo. App. 2006).

A family member who resides in a home with others can be expected to have control over other items in the house such that they have the ability to prevent others from taking them. *Cf. Williams, supra* (wife had interest in protecting her husband and their property, therefore robbery as to wife was properly found where defendant took money from husband's pockets). As such, the evidence in this case was sufficient to show that the defendant attempted to take marijuana from the "presence" of all of the residents of the home. These convictions must stand.[3]

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[3] Although the defendant briefly states that this lack of proximity also precluded a conviction for conspiracy to commit aggravated robbery, that crime was complete once the men agreed to commit the robbery and committed an overt act in furtherance of that plan; i.e., drove to the

E. Second degree assault.

The defendant argues that the evidence was insufficient to support his conviction for second degree assault of Deputy Hernandez, because there was no proof that he was the person who shot the deputy, or that he knew who shot the deputy and that he intended to promote or facilitate this assault and did anything to aid, abet, advise, or encourage that offense.

A person commits second degree assault, as charged here, when the prosecution show that, "[w]ith intent to cause bodily injury to another person, he causes serious bodily injury to that person or another." §18-3-203, C.R.S. (2013). A defendant can be held criminally liable as a complicitor where he has the "intent to promote or facilitate the commission of the offense," and he aided, abeted, advised, or encouraged the other person in planning or committing the offense. §18-1-603.

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residence, put on ski masks and passed out weapons, and entered the home at gunpoint. §18-2-201, C.R.S. (2013). As such other issues involving the taking are irrelevant to this conviction.

As with the kidnapping count discussed above, accomplice liability extends to even unintentional crimes committed by the principal when the complicitor and the principal are acting in a "common enterprise." *Grissom, supra*. There was sufficient evidence presented here that the defendant engaged in a common enterprise with the three other men to commit an aggravated robbery inside the victims' residence and use deadly force, if necessary. The defendant would have known that due to the presence of weapons and the nature of the crimes being committed, a shooting might occur. Indeed, even the defendant admitted that he was "close" when the shooting began (People's Exhibit 70, p65).

Whether he or his brother shot Deputy Hernandez, the defendant was criminally liable for that conduct as a member of this criminal enterprise. *Grissom, supra*. As such, this conviction must stand as well. *Cf. Harris v. People*, 139 Colo. 9, 13-14 (Colo. 1959) (defendant liable for assault on victim where he engaged in conduct of stealing hubcaps from automobiles with other individuals, and another participant in the crime committed an assault during an attempt to evade capture for those crimes); *Fisher, supra* (where victim was

seriously injured by one of the other individuals involved in the robbery, the defendant was properly held responsible for that serious bodily injury whether or not he knew that someone else intended to inflict it).

III. The trial court properly rejected the defendant's tendered instruction on the affirmative defense of abandonment.

The defendant last contends that the trial court erred in rejecting his tendered instruction on the affirmative defense of abandonment as it relates to his convictions for attempted aggravated robbery. He claims that his statements to the police demonstrated his intent to abandon the crime and were sufficient to warrant the instruction.

A. Factual background.

At the conclusion of the evidence, the defendant tendered an instruction on the affirmative defense of abandonment and renunciation with regard to the offense of attempted aggravated robbery (PR, v1, pp76-78; R. Tr. 9/12/11, pp145-148). The defendant argued that the instruction was warranted based on his statement to the police wherein he said he "wanted to leave, he tried to leave, he tried to get his brother

to leave," and that he "may have went around to the back" (R. Tr. 9/12/11, p146).

The court denied the request, ruling:

> And under the *O'Shaughnessy* case, although it can occur at various stages, the evidence in this case would be that the crime itself -- at least some of the crimes themselves -- are complete upon the defendant's entry into the home armed with a weapon and the first child being menaced and threatened with that weapon.
>
> The testimony, further, is that the kidnapping defense -- the kidnapping offense is also completed when the testimony is -- when [AR] came up the stairs she observed the fourth gunman, who is, presumably, from the evidence, the defendant standing over [SC] with the gun in hand, and the defendant's own statement that he goes to the garage with [AR] and [SC]. The crimes are completed, and that is according to the defendant's own statement.
>
> There is no abandonment. He enters the home; he uses the weapon; he takes the victims into the garage. There has to be some scintilla of evidence that he walked away from these crimes. And in this particular case, there is zero evidence that he walked away from these offenses. Under *O'Shaughnessy* the abandonment defense is not available when it comes a point -- when it is too late for the act or to withdraw from a criminal attempt. It's not available once a defendant has put in motion forces that he or she is powerless to

> stop. He may not have been able to stop what any one or two or three of his cohorts were doing, but that was at the point where he was already in the home with the weapon.
>
> …
>
> And with that, the Court would find that the evidence that the defendant himself states that he is in the garage with [AR] and [SC] -- which is where the only evidence of the drugs is found -- the Court would find that he is not entitled to it as to the attempted robbery.

(R. Tr. 9/12/11, pp147-148).

B. Standard of review and preservation of claim.

To present an affirmative defense for jury consideration, a defendant must present "some credible evidence" on the issue involving the claimed defense. *O'Shaughnessy v. People*, 269 P.3d 1233 (Colo. 2012); *People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005). Whether a defendant meets this burden of going forward is a question of law for the trial court, and the appellate court reviews the sufficiency of the defendant's evidence de novo. *O'Shaughnessy, supra; Garcia, supra.* In doing so, this Court must review the record as a whole to determine

whether it contains any evidence tending to establish the affirmative defense. *Id*.

Because the prosecution has the burden of disproving an affirmative defense that is supported by the evidence and submitted to a jury, any error in failing to so instruct the jury is tantamount to a failure to instruct on an element of the offense. *See People v. Hill*, 934 P.2d 821 (Colo. 1997). Elemental omissions and mis-descriptions are considered trial errors, subject to constitutional harmless error review. *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005). Trial error is considered harmless if there is no reasonable possibility that it affected the guilty verdict. *Arteaga-Lansaw v. People*, 159 P.3d 107, 110 (Colo. 2007); *Griego v. People*, 19 P.3d 1, 9 (Colo. 2001).

By tendering the abandonment instruction, the defendant preserved this claim for this Court's review.

C. The court properly rejected the instruction.

Under §18-2-101(1), a person commits criminal attempt if "he engages in conduct constituting a substantial step toward the

commission of the offense." A substantial step is any conduct "which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense." *Id.*; *see also O'Shaughnessy*, *supra.*

It is an affirmative defense to an attempt charge "that the defendant abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting the complete and voluntary renunciation of his criminal intent." §18-2-101(3), C.R.S. (2013).

Hence, although the crime of attempt is complete once the actor takes a substantial step toward the commission of the crime, the affirmative defense of abandonment applies if the actor completely and voluntarily renunciates his criminal intent thereafter. *O'Shaughnessy, supra* at 1235. As the trial court correctly ruled here, there was no evidence that the defendant did so in this case.

The defendant claims that the following statements he made during his police interview supported the instruction:

- They were knocking, yes and I saw everything there and I said, no. I would tell my brother, let's go, let's go man. For real, lets go, no… Well I regretted it when I saw the lady.
- I told him, I told him, I'm not liking this. I also have a family and I would not want the same to happen to them.
- I would tell him, lets go man; this really isn't good because I have a bad feeling.

(People's Exhibit 70, pp52-53,56).

As the trial court correctly concluded, these comments did not warrant an abandonment instruction. The defendant was merely expressing hesitation about committing the crimes, and verbally attempting to get his brother to not commit the crime. None of these comments demonstrate that the defendant engaged in any conduct in an attempt to abandon the crime. In light of the fact that he acknowledged that even despite his hesitation and his comments to his brother, he proceeded to enter the house with a weapon and participated in the crime through the point at which they were at the garage, it cannot be said that these comments established

circumstances *manifesting* the complete and voluntary renunciation of his criminal intent.

He also claims that the evidence supported his decision to leave and abandon any further involvement, based on the following comments:

> That's when I told my brother, no ah brother, lets get out of here. This isn't right. Then the lady went out to the garage, I don't know who went out, and when he went out I grabbed him and told him, hey lets go. Well then, I left out the back.

(People's Exhibit 70, p56). Based on these comments, it is unclear that the defendant is stating that he left the scene of the crime. His comment "I left out the back" could have been a reference to having left the back of the house on his way to the garage, and the physical logistics of the residence required exiting the back of the house to walk several steps to the entrance to the garage. This theory is consistent with the testimony from AR as to what occurred.

In any event, even if the defendant's comments are interpreted as having left the location entirely once AR and SC went out to the garage,

at that point, all of the crimes except for the second degree assault (for which abandonment does not apply) had been committed. Indeed, "[o]nce the attempt has been completed by putting into motion forces the actor can no longer stop, it cannot be abandoned." *O'Shaughnessy, supra*. At that point, the entry had been made, the victims held and moved at gunpoint, the drugs demanded, several parties had moved towards the garage, and the police were on their way and sirens were heard nearby. The defendant's claim that he left at that point would not support an abandonment defense, as the forces had been put in place, the burglary, kidnapping, and attempted robbery had occurred, and the only thing left was to attempt to escape. Fleeing the scene of an attempted robbery is not abandonment.

"Renunciation and abandonment are not voluntary and complete so as to be a defense to prosecution under this article if they are motivated in whole or in party by … [a] belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or another or which makes more difficult the consummation of the crime." §18-2-401(1)(b), C.R.S. (2013). The defendant's alleged

attempt to leave at the point he claims to have left were an attempt to avoid detection or apprehension, and cannot support an abandonment defense. Under the circumstances presented here, the court properly rejected the abandonment instruction. *Cf. O'Shaughnessy, supra* at 1237 ("the defendant's mere withdrawal - particularly when faced with resistance by the victim - before completing the murder or the robbery is insufficient evidence of abandonment"); *People v. Traubert*, 625 P.2d 991, 993 (Colo. 1981) (abandonment instruction not warranted where the defendant was leaving the scene of the crime because he and his partner had been detected and police officers were in view).

D. Any error was harmless.

As noted above, trial error is considered harmless if there is no reasonable possibility that it affected the guilty verdict. *Arteaga-Lansaw, supra; Griego, supra*. As such, even if this Court disagrees with the trial court that the evidence was insufficient to warrant an abandonment instruction, it must surely conclude that the evidence supporting the defense was so weak that there is no reasonable possibility that the failure to instruct the jury on the defense

contributed to the verdict. And, the evidence of the defendant's voluntary involvement in these crimes was overwhelming.

CONCLUSION

For the foregoing reasons and authorities, the People respectfully request that this Court affirm the defendant's judgment of conviction and sentence.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon JOSEPH P. HOUGH, Deputy State Public Defender, via Integrated Colorado Courts E-filing System (ICCES) on May 30, 2014.

/s/ C. D. Moretti