DATE FILED: May 27, 2014 1:59 PM

COURT OF APPEALS, STATE OF COLORADO 2 East 14th Ave. Denver, CO 80203	
Morgan County District Court Honorable Charles M. Hobbs, Judge Case No. 11CR52	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. LORENZO CAMACHO, Defendant-Appellant.	▲ **COURT USE ONLY** ▲ Case No. 12CA0237
JOHN W. SUTHERS, Attorney General JAY C. FISHER, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 9th Floor Denver, CO 80203 Telephone: (720) 508-6468 E-Mail: AGAppellate@state.co.us Registration Number: 44350 *Counsel of Record	

PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does comply 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 does comply with C.A.R. 28(g).

It contains 8,833 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/ Jay C. Fisher

TABLE OF CONTENTS

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

TABLE OF AUTHORITIES

Statutes

Rules

Constitutional Provisions

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

On March 10, 2011, the defendant, Lorenzo Camacho, was charged in Morgan County with possession of (or attempt to possess) marijuana with intent to sell or distribute – five to one hundred pounds, and possession of more than 12 ounces of marijuana. (CF, pp. 7-9; R, Tr. 10/11/11, p. 36).

The defendant was tried before a jury on October 11-12, 2011. He was found guilty on both counts on October 12, 2011. (CF, pp. 91-92; R, Tr. 10/12/11, pp. 99-100).

On December 22, 2011, the defendant was sentenced to a total of five years imprisonment followed by three years mandatory parole. (R, Tr. 12/22/11, p. 12).

This appeal followed.

STATEMENT OF FACTS

On March 7, 2011, at approximately 4:30 p.m., a Colorado State Patrol officer pulled over the defendant's van in Morgan County for failing to signal a turn. (R, Tr. 10/11/11, pp. 154, 155-56, 162). The defendant was in the passenger seat, and another individual named Reyes Chavez Rojo was driving the van. (R, Tr. 10/11/11, pp. 155, 163).

Neither individual said he could speak English fluently. (R, Tr. 10/11/11, pp. 157). Neither occupant was able to produce a driver's license. (R, Tr. 10/11/11, pp. 157). However, the defendant produced identification indicating that he was a Mexican national. (R, Tr. 10/11/11, pp. 157-58). The defendant also indicated that he was the owner of the van. (R, Tr. 10/11/11, pp. 158-59).

After an interpreter arrived on-scene, the driver indicated that he had no identification. (R, Tr. 10/11/11, p. 237). He also indicated that the pair was traveling from New Mexico to South Dakota. (R, Tr. 10/11/11, pp. 160, 163, 237).

Police asked for consent to search the van, and the defendant agreed. (R, Tr. 10/11/11, pp. 165-66). A drug dog was called to the scene, and he hit at three points on the van. (R, Tr. 10/11/11, pp. 167, 169, 171-73, 226). The search of the van revealed 51 pounds of marijuana concealed inside the vehicle. (R, Tr. 10/11/11, pp. 179, 214-15; 10/12/11, p. 15). Neither occupant either admitted to or denied ownership of the marijuana found in the van. (R, Tr. 10/11/11, p. 239).

SUMMARY OF THE ARGUMENT

The prosecution's use of the defendant's post-arrest, pre-*Miranda* silence was proper to refute defense counsel's argument that the codefendant pled guilty and took ownership of the marijuana. The trial court properly denied the defendant's challenge for cause as to juror L.H. because she ultimately stated she could weigh the defendant's case on the evidence and law. The defendant's motion to continue was properly denied by the trial court because the defendant was not surprised by the confidential informant information, and the motion was made on the day of trial. The defendant's right to testify was not chilled by the prospective use of 404(b)/res gestae evidence because the prosecution had the right to rebut any evidence that the defendant did not know marijuana was in his van. The trial court did not plainly err in admitting the state trooper's testimony about discarded items in the van and a child's car seat because the testimonial evidence he provided did not require qualification as an expert. The defendant's double jeopardy claim is waived. The cumulative error claim should be dismissed as improperly raised.

ARGUMENT

I. The prosecution did not violate the defendant's right to silence.

The defendant contends that the prosecution impermissibly referred to his post-arrest, pre-*Miranda* silence at multiple times throughout the trial via the testimony of numerous state's witnesses, and during closing argument. (Opening Brief, pp. 4-16). The defendant's argument must fail.

A. Standard of Review

The People disagree the issue has been preserved on any basis, let alone constitutional grounds. No specific and contemporaneous objection was lodged when the allegedly-objectionable questions, testimony, and closing argument were offered at trial by the prosecution. Thus, any alleged error on these specific grounds would be reviewed under plain error. *People v. Miller*, 113 P.3d 743, 748, 749 (Colo. 2005) (errors are preserved by contemporaneous objection, and "even [unobjected to] constitutional errors are subject to a plain error standard of review.")

B. Relevant Facts

During the testimony of Trooper Gary Cutler, he stated that the defendant and the driver "never said anything to us (the police) -- to us or each other at any point" after they were handcuffed. (R, Tr. 10/11/11,

p. 174). He also testified that the defendant made "no statements" denying ownership or knowledge of the marijuana found in his van. (R, Tr. 10/11/11, p. 175). No objection was lodged to this testimony. *Id.*

Trooper Cutler later testified that the defendant was advised of his *Miranda* rights on March 9th, when he was formally interviewed by the police. (10/11/11, p. 179). Prior to any further testimony on this subject, the defendant lodged an objection and the trial court ruled the prosecution could only inquire about whether the defendant was read his rights, but nothing further. (R, Tr. 10/11/11, pp. 179-80). There was no evidence introduced that the defendant invoked his rights at this interview. *Id.*

During cross-examination, the defendant elicited from Trooper Cutler that he never tried to stop the police from searching the vehicle. (R. Tr. 10/11/11, pp. 198-99, 202-03). No objection was lodged to this testimony. *Id.* In redirect, Trooper Cutler testified from his experience that people in possession of narcotics will make statements to police denying ownership; however, in the defendant's case, he made no statements whatsoever. (R, Tr. 10/11/11, pp. 208-09). No objection was lodged to this testimony. *Id.*

Another officer who assisted in the search of the defendant's vehicle, Corporal Kenneth Nelson, testified at trial. (R, Tr. 10/11/11, p. 209). He said that, based on his experience, some vehicle occupants make statements denying ownership of drugs when they are recovered from cars wherein the suspects were traveling; however, the defendant made no such statement in his case. (R, Tr. 10/11/11, pp. 216-17). No objection was lodged to this testimony. *Id.*

The police interpreter, Officer Luis Vasquez, testified that neither the defendant nor the van driver made a statement after they were informed they were being charged, and neither man made any statement either admitting or denying ownership of the marijuana. (R, Tr. 10/11/11, pp. 235, 239). No objection was lodged to this testimony. *Id.*

During closing argument, the prosecution made repeated reference that the defendant never made any statement denying knowledge or ownership of the marijuana recovered from his van. (R, Tr. 10/12/11, pp. 60, 61, 61-62, 67-68, 72-73). Again, no objection was lodged to any of these statements. *Id.*

During his portion of closing argument, defense counsel noted that the defendant had a constitutional right to silence, the prosecution had commented on this right, the defendant had invoked his right, and he never made any statement saying the marijuana was not his. (R, Tr. 10/12/11, pp. 74-75).

The prosecution in rebuttal stated that it never made any comments about any invocation of the defendant's constitutional rights. (R, Tr. 10/12/11, pp. 85-86). Instead, the prosecution was highlighting the defendant's pre-*Miranda* silence after the marijuana was discovered. *Id.* Again, no objection was lodged to any of these statements made by the prosecution in closing argument. *Id.*

C. Law and Analysis

Neither the United States Supreme Court nor the Colorado Supreme Court has explicitly ruled on whether a defendant's pre-arrest silence is admissible as substantive evidence. *See, e.g., Griffin v. California*, 380 U.S. 609, 615 (1965) (a prosecutor cannot comment on a defendant's decision not to testify at trial and cannot use that silence as evidence of guilt), and *Jenkins v. Anderson*, 447 U.S. 231 (1980) (a prosecutor may use a defendant's pre-arrest silence to impeach his

testimony). In his concurring opinion in *Jenkins v. Anderson*, Justice Stevens stated that pre-arrest silence is an evidentiary issue because the privilege against compelled self-incrimination is irrelevant to a citizen's decision to remain silent when that citizen is under no official compulsion to speak. *Id.* at 241.

Divisions of this Court have adopted the *Jenkins* opinion's logic to issues of pre-arrest silence for impeachment purposes. *See People v. Chavez*, 190 P.3d 760 (Colo. App. 2007), and *People v. Quintana*, 996 P.2d 146 (Colo. App. 1998) (post-arrest, pre-Miranda silence can be used to impeach the defendant's testimony, although it is irrelevant as substantive evidence of guilt if the defendant does not testify).

Further, the use of post-arrest, pre-*Miranda* silence does not violate a defendant's constitutional rights. *People v. Taylor*, 159 P.3d 730 (Colo. App. 2006). Moreover, in *People v. Quintana*, the supreme court specifically held that post-arrest silence is not so lacking in probative value as to render it inadmissible for any purpose. 665 P.2d 605, 611 (Colo. 1983). The *Quintana* court also held that the Fifth Amendment privilege against self-incrimination does not impart a general constitutional right of silence. *Id.* Thus, commenting on a

defendant's post-arrest silence is permissible where it goes not to substance but to impeach his credibility. *People v. Taylor*, 159 P.3d 730 (Colo. App. 2006) (no error admitting evidence of post-arrest, pre-Miranda silence for credibility purposes); *People v. Moran*, 983 P.2d 143, 145 (Colo. App. 1999); see also *Anderson v. Charles*, 447 U.S. 404, 408-09 (1980) (questions not designed to draw meaning from silence are proper).

"In some situations, however, where the normal reaction is to speak out in response to a statement, silence may have some probative value … Also, the failure to assert a fact under circumstances in which it would have been natural to assert it has been construed to be the equivalent of a statement of the nonexistence of the fact." *Quintana*, 665 P.2d at 610.

In the defendant's case, while he did not testify at trial, he did at least imply, if not outright assert, through counsel's argument that he had no knowledge that the marijuana was in his van. (10/12/11, pp. 76-77, 80). The defendant also tried to raise this in opening statements by saying that the van's driver, Mr. Chavez, pled guilty, thus claiming ownership of the marijuana. (10/11/11, p. 152). The prosecution was

thereafter allowed to use his post-arrest, pre-*Miranda* silence to impeach his defense and show that a reasonable person would deny ownership of 51 pounds of marijuana in his vehicle when found by police, and the defendant's silence, when confronted with this fact, leads to an inference that he knew the marijuana was present in the van. *People v. Davis*, 312 P.3d 193, 199 (Colo. App. 2010) (silence may be used to refute statements made by defense counsel). In essence, the prosecution was allowed to impeach the credibility of his theory of defense with this relevant defense. There was no error requiring reversal of his convictions.

The defendant relies heavily in his argument upon the holding in *People v. Welsh*, 58 P.3d 1065, 1068-69 (Colo. App. 2002), to claim error in his trial. However, *Welsh* is inapplicable because, in that case, the defendant's post-arrest silence was admitted as substantive evidence. In the instant matter, the defendant's post-arrest, pre-Miranda silence was admitted to impeach defense counsel's theory of the case – that is, Mr. Chavez was the owner of the marijuana because he pled guilty. In fact, the prosecution thought this point was so important that it specifically addressed the issue of the codefendant's purported plea in

rebuttal closing argument, leading to a lengthy objection and discussion with the trial court. (10/12/11, pp. 86-89). *Welsh* should not serve as the basis for reversal of the defendant's convictions.

Furthermore, if this Court were to conclude that the prosecution was in error for asking such questions and making references in closing argument to same (including any reference to the defendant's post-*Miranda* silence (Opening Brief, pp. 14-15)), it was not plain error or constitutional harmful error. *People v. Auman*, 67 P.3d 741, 758 (Colo. App. 2002) (both constitutional harmless error and plain error standards are "quite similar in practice"). The evidence showed that the defendant and codefendant were driving the defendant's van from New Mexico, where the two men had allegedly been working on mobile homes for the past one to two weeks, to South Dakota where the defendant lived; however, they had no luggage (except for one backpack) in the vehicle whatsoever. (10/11/11, pp. 160, 162, 163, 194, 198, 237, 242). As already mentioned above, the defendant never contested that he owned the van containing the marijuana. The evidence also showed that the van contained numerous water bottles, fast food wrappers and oil quart containers, leading to a reasonable inference that the

defendant was living out of his van. (10/11/11, pp. 162-63, 164, 193-94). This would also lead to an inference that the van was in the control and custody of the defendant at all times (including whenever it was packed with 51 pounds of marijuana). The trial jury was specifically instructed that it was allowed to make factual inferences from the evidence as a whole. (10/12/11, pp. 50-51). The trial jury was also specifically instructed on the concepts of "complicitor" to a crime and "possession" as well. (10/12/11, pp. 53-54, 56-57). Considering the record as a whole, there was no plain error in allowing the prosecution's questions and closing argument. This Court should affirm.

II. The trial court properly denied the defendant's challenge for cause to juror L.H.

The defendant contends that the trial court erred in denying his challenge for cause to juror L.H. because she never stated she could follow the instructions and law of the court. (Opening Brief, pp. 17-24). There was no reversible error.

A. Standard of Review

The People agree with the defendant's standard of review. The trial court's decision to deny a challenge for cause in the jury selection process or decision to excuse a juror will not be disturbed absent an

abuse of discretion. *Medina v. People*, 114 P.3d 845, 856 (Colo. 2005). A court abuses its discretion only if its decision is manifestly arbitrary, unreasonable, or unfair. *People v. Diaz-Garcia*, 159 P.3d 679, 683 (Colo. App. 2006).

The defendant preserved this issue because he challenged the juror for cause and exhausted all of his peremptory challenges (10/11/11, pp. 131-32, 134-35).

B. Relevant Facts

During voir dire, L.H. stated that, based on her upbringing, she would feel uncomfortable judging another person. (R, Tr. 10/11/11, pp. 101-02).

Defense counsel questioned the jurors regarding the state's burden of proof and the credibility of witnesses via a hypothetical using a confidential informant. (R, Tr. 10/11/11, pp. 121-24). L.H. stated that she understood the prosecution's burden of proof in a criminal trial is "beyond a reasonable doubt"; however, L.H. also said that, if she heard evidence that a confidential informant ("C.I.") was facing conviction for his or her third time and was helping police to gather information on a

crime, she would think "more likely than not" that the C.I. was involved in criminal activity. (R, Tr. 10/11/11, pp. 121-23, 126-28).

L.H. said that she held very strong beliefs, and felt it was "possible" that her beliefs might outweigh the court's instructions. (R, Tr. 10/11/11, p. 129). However, she refined this answer by saying that she was unsure if they would get in the way because the evidence she heard may affect her beliefs. (R, Tr. 10/11/11, pp. 129-30).

The defendant moved to dismiss L.H. for cause. (R, Tr. 10/11/11, p. 130). The prosecution rehabilitated L.H. by confirming that if she was "selected to be on the jury that [she] would be able to follow the law the judge gave [her] regardless of [her] strong feelings." However, she stated that she would ultimately have to be on the jury to truly understand how she would react in this situation. *Id.*

At a bench conference on the defendant's challenge for cause to L.H., defense counsel conceded that L.H.'s situation was not the typical one seen at trial; however, he said it was a situation the trial court should not "take a chance on" because she did not provide "unequivocal" answers in voir dire. (R, Tr. 10/11/11, p. 131). The prosecution stated

that L.H., in her opinion, stated she "she can follow the law regardless of her feelings one way or the other." *Id.*

The trial court ruled that L.H. said "she can follow the instructions and that she will follow the law," and denied the challenge for cause. (R, Tr. 10/11/11, pp. 131-32).

The defendant used a peremptory challenge to remove L.H. (R, Tr. 10/11/11, p. 133).

C. Law And Analysis

A defendant has a constitutional right to a fair trial, including an impartial jury. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16.

To ensure a defendant's right to a fair trial, a court must excuse biased or prejudiced persons from the jury. *People v. Young*, 16 P.3d 821, 824 (Colo. 2001). Section 16-10-103(1)(j),C.R.S. (2013), requires courts to sustain challenges for cause where "[t]he existence of a state of mind in the juror evinc[es] enmity or bias toward defendant or the state." *See also* Crim. P. 24. The statute further provides that:

> No person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

Id. Thus, in determining whether a potential juror should be disqualified for bias, a court must consider whether the juror will render a fair and impartial verdict according to the law and the evidence presented at trial. *Young*, 16 P.3d at 824. In other words, the trial court must grant a challenge for cause when that juror is "unable or unwilling to accept the basic principles of criminal law and to render a fair and impartial verdict based on the evidence admitted at trial and the court's instructions." *People v. Lefebre*, 5 P.3d 295, 299 (Colo. 2000).

Notably, a prospective juror's expression of concern or indication of preconceived belief does not automatically require exclusion for cause. *People v. Russo*, 713 P.2d 356 (Colo. 1986). Accordingly, where a juror is able to put aside his personal opinion or preconceived notion as to the defendant's guilt or innocence, and render a verdict based upon the evidence presented and the law at issue, a defendant's right to a fair trial is not violated. *People v. Drake*, 748 P.2d 1237, 1243 (Colo. 1988); *People v. Schmidt*, 885 P.2d 312, 314 (Colo. App. 1994); *People v. Frantz*, 114 P.3d 34, 41 (Colo. App. 2004) ("A prospective juror who makes a statement suggesting actual bias may sit on the jury if he or she agrees to set aside any preconceived notions and make a decision based on the

evidence and the court's instructions."); *People v. Vecchiarelli-McLaughlin*, 984 P.2d 72, 76 (Colo. 1999).

The trial court may give considerable weight to the prospective juror's statement that he or she can fairly and impartially serve on the jury, and a juror must only be dismissed when he or she cannot set aside his or her preconceived beliefs and decide the case based on the evidence and the court's instructions. *People v. Sandoval*, 733 P.2d 319, 321 (Colo. 1987); *People v. Carrillo*, 946 P.2d 544, 547 (Colo. App. 1997), *aff'd* 974 P.2d 478 (Colo. 1999); *Lefebre*, 5 P.3d at 301; and *Carrillo*, 974 P.2d at 486.

Juror L.H. stated that if she was "selected to be on the jury that [she] would be able to follow the law the judge gave [her] regardless of [her] strong feelings." (R, Tr. 10/11/11, p. 130). Thus, the trial court's conclusion that "she can follow the instructions and that she will follow the law" is supported by evidence in the record.

The defendant notes that L.H. claimed she was uncomfortable sitting in judgment of others, and that her strong beliefs may interfere with honoring the trial judge's instructions and law. (Opening Brief, p. 23). However, such beliefs are not grounds for automatic exclusion from

the jury. *Russo*, supra. Even a biased juror may sit if he or she can put aside any biases and weigh the case on the law and evidence. Ultimately, L.H. confirmed for the court that she could do this.

The defendant also cites to L.H.'s responses to the hypothetical scenario to argue that she was biased and could not "apply the proper burden of proof" to the evidence. (Opening Brief, pp. 23-24). However, the defendant's argument itself acknowledges that L.H. stated the correct legal standard to apply to any such evidence in the defendant's trial: i.e., beyond a "reasonable doubt." (R, Tr. 10/11/11, p. 128). L.H. understood the correct law, and presumably would have applied it in the defendant's trial if seated. L.H. ultimately stated that she would be able to follow the law the judge gave her regardless of any strong feelings she may hold. Under the totality of the circumstances, the court properly exercised its discretion in denying the challenge for cause, and the trial court's ruling should be affirmed.

Because the jury that ultimately sat was impartial, even if the trial court erred in denying the defendant's challenges for cause—which it did not do—reversal is not required. *See People v. Novotny*, 2014 CO 18, ¶¶ 17-27 (Colo. 2014); *see also Rivera v. Illinois*, 129 S.Ct. 1446,

1450 (2009); *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) (if jury that ultimately sits is impartial, defendant's Sixth and Fourteenth Amendment rights not violated); *accord United States v. Martinez-Salazar*, 528 U.S. 304 (2000). Because this challenged juror did not sit on the jury, any error was harmless.

III. The trial court properly denied the defendant's motion to continue.

The defendant alleges that the trial court abused its discretion when it denied his motion to continue the trial so that he could further investigate the prosecution's confidential informant (CI) evidence and the defendant's involvement in drug dealing. (Opening Brief, pp. 24-32). There was no reversible error.

A. Standard of Review

The People agree the standard of review is abuse of discretion. In determining whether a court abused its discretion in denying a motion for continuance, appellate courts should consider the totality of the circumstances facing the trial court at the time the motion was made. *People v. Crow*, 789 P.2d 1104, 1106 (Colo. 1990); *People v. Wells*, 776 P.2d 386, 389 (Colo. 1989). In determining whether to grant a continuance, a trial court must consider the peculiar circumstances of

each case and balance the equities of each party. *People v. Fleming*, 900 P.2d 19, 23 (Colo. 1995). Late motions for continuance deserve less consideration, in part because witnesses will be inconvenienced. *People v. Apodaca*, 998 P.2d 25, 28-29 (Colo. App. 1999).

The People agree the issue has been preserved for appellate review.

B. Relevant Facts

On June 16, 2011, the defendant filed a motion to disclose information related to confidential informants. (CF, pp. 27-28).

A hearing was held on the motion on June 28, 2011. (R, Tr. 6/28/11). The defendant suspected that confidential informants were being used in that jurisdiction based on the large number of marijuana cases being prosecuted, and the arrests were being initiated by the Colorado State Patrol specifically. (R, Tr. 6/28/11, p. 2-3). The prosecution asserted there was no confidential informant used in the defendant's case. (R, Tr. 6/28/11, p. 3).

On September 28, 2011, the prosecution filed a notice of intent to introduce 404(b) evidence, and revealed they had just learned the existence of two confidential informants (CIs) who worked with the FBI

and the U.S. Attorney's office providing information on the defendant. (CF, pp. 44-48). The federal authorities declined to identify the CIs, but the prosecution asserted the information was provided to the defense on the Friday prior to September 26, 2011. (CF, p. 44-45).

The defense filed an objection to the evidence on September 28, 2011, claiming his right to a fair trial was prejudiced because of the late disclosure and lack of detail. (CF, pp. 49-50).

On October 4, 2011, the prosecution subsequently amended its evidence notice to include res gestae as a basis for admitting the CI evidence. (R, pp. 52-63). The amended notice provided the names of the CIs: MH and RSB, as well as factual details of the CI's information related to the defendant. (CF, pp. 60, 62).

On October 11, 2011, the trial court heard the prosecution's notice regarding the CI evidence, and the prosecution stated its intent to use three witnesses: one FBI agent and two CIs (MH and RSB). (R, Tr. 10/11/11, p. 12). The evidence would be used in rebuttal in the event the defendant took the stand and testified that he had no knowledge there was any marijuana in the van. (R, Tr. 10/11/11, p. 12-14). The

proposed evidence would show the CIs bought marijuana from the defendant in the past. *Id.*

The defendant argued that admission of this evidence violated his constitutional rights, would shift the burden of proof, was hearsay because it was offered for the truth of the matter asserted, and was not admissible res gestae evidence. (R, Tr. 10/11/11, p. 16).

The trial court ruled that the two CIs would be allowed to testify in rebuttal in the event the defendant testified that he had no knowledge the marijuana was in the van. (R, Tr. 10/11/11, pp. 21, 22).

The defendant thereafter asked the judge to continue the trial so he could investigate the CIs. (R, Tr. 10/11/11, pp. 23). In denying the motion, the trial court found that the defendant was aware of the evidence before trial, and defense counsel would be afforded the opportunity to interview the CIs in advance of testifying. (R, Tr. 10/11/11, pp. 23-24, 25).

When the state rested its case, the defendant again objected to the trial court's ruling on the CI evidence, and stated that he would not testify on his behalf and would not put up the codefendant as a witness

for fear of facing the prosecution's rebuttal evidence. (R, Tr. 10/12/11, p. 18).

C. Legal Analysis

To establish that a trial court erred in denying a defendant's motion for continuance based on the prosecution's untimely discovery disclosure, a defendant must show he was prejudiced by the late production of the information. *Salazar v. People*, 870 P.2d 1215, 1219-20 (Colo. 1994); *People v. Zadra*, 2013 Colo. App. LEXIS 1673, p. *P20 (Colo. App. 2013). *See also People v. Chambers*, 900 P.2d 1249, 1252-53 (Colo. App. 1994).

In the defendant's case, he failed to show he was diligent in pursuing the information that he had received prior to trial related to the two CIs. The record shows the defendant had the names of the two CIs at least one week prior to trial. Yet the only effort the defendant made to investigate the CIs was to obtain their criminal histories. (R, Tr. 10/11/11, p. 23). The trial court found the defendant was not surprised by the prosecution's information, which was an accurate assessment of the situation. (R, Tr. 10/11/11, pp. 23-24). The trial court's denial of the defendant's continuance motion was correct.

Furthermore, the defendant has not shown prejudice because the trial court did not give the prosecution unfettered ability to use the CI information. The trial court clearly ruled that this evidence would only come into the trial if the defendant testified that he had no knowledge of any marijuana in the van. The defendant, in fact, did not testify. Consequently, no CIs testified. When this fact is combined with defense counsel's injecting into the trial that the codefendant pled guilty and admitted ownership of the marijuana (R, Tr. 10/11/11, p. 152) (and thus implying that the codefendant was the culpable party), there is no way the defendant can show prejudice on this point. The trial court's ruling should be affirmed.

The defendant argues that his continuance request was not intended to delay the proceedings, and the nature of the new information required the trial court to grant a continuance. (Opening Brief, pp. 31-32). However, the record does not indicate that the defendant requested a continuance when he filed his objection to the 404(b) evidence notice. Instead, he waited until the morning of the first day of trial to seek a continuance. The defendant cannot show prejudice because he cannot show that he acted diligently. The trial court's

discretion in denying the continuance motion is afforded greater deference under these circumstances. *Apodaca*. The trial court's ruling should be affirmed.

IV. The defendant's constitutional right to testify on his behalf was not chilled.

The defendant alleges that the trial court's ruling allowing the CI to potentially testify on rebuttal chilled his right to testify on his own behalf. (Opening Brief, pp. 32-34). There was no error.

A. Standard of Review

The People disagree that the issue has been preserved for appellate review. While the defendant objected to the trial court's ruling on the CI evidence issue on other grounds (10/11/11, pp. 23, 24-25), he never specifically objected that his right to testify on his behalf would be impermissibly chilled by use of the CI evidence.

Thus, any alleged error with regard to this claim is reviewed for plain error. *People v. Miller*, 113 P.3d 743, 748, 749 (Colo. 2005) (errors are preserved by contemporaneous objection, and "even [unobjected to] constitutional errors are subject to a plain error standard of review.")

B. Statement of Facts

After the prosecution rested, the defendant was advised he had the right to testify, and that no one could prevent him from doing that. (R, Tr. 10/12/11, p. 20, 21-22). He was advised that if he did testify, he would be subject to cross-examination and if he had any felony convictions, and he could be impeached with those convictions as well. (R, Tr. 10/12/11, pp. 20-21). He was also advised that he could be cross-examined about any matters that were "relevant and material to the case." (R, Tr. 10/12/11, p. 21).

The defendant initially stated that he wanted to testify. (R, Tr. 10/12/11, p. 22). However, after further consultation with his attorney, the defendant stated that he did not want to testify. (R, Tr. 10/12/11, p. 23). He further stated that his decision not to testify was freely and voluntarily made. *Id.* The defendant did not claim at this point that his decision was based on the court's ruling regarding the CI evidence. *Id.*

C. Law And Analysis

"Not all burdens placed on the defendant's choice of whether to testify constitute impermissible penalties on his exercising his constitutional right to testify on his behalf." *People v. Myrick*, 638 P.2d

34, 38-39 (Colo. 1981) (court's advisement that certain matters were inadmissible as direct evidence but could be raised on cross-examination if defendant testified did not impermissibly chill right to testify because reviewing court would not presume that trial court would allow defendant to be subjected to improper cross-examination) (quoting *People v. Henry*, 578 P.2d 1041 (Colo. 1978)).

A defendant's right to testify may be impermissibly burdened "when a court erroneously rules that certain evidence is admissible against [a defendant] . . . ." *People v. Skufca*, 176 P.3d 83, 86 (Colo. 2008); see also *People v. Kreiter*, 782 P.2d 803, 805 (Colo. App. 1989).

The defendant's right to testify was not chilled. The prosecution anticipated that the defendant would deny both knowledge of the marijuana in the van and any involvement in the marijuana trade. The prosecution had a right to rebut any evidence presented by the defendant to show that he committed the crimes specified in the complaint. *People v. Johnson*, 189 Colo. 28, 30 (1975). Thus, the trial court's decision that the CI evidence would come in through rebuttal if the defendant testified was a correct evidentiary ruling by the trial court.

The defendant was advised that he would be subject to cross-examination, and that cross-examination would include any relevant and material issues. This would include his denial of knowledge regarding marijuana. The defendant made a knowing and voluntary waiver of that right. His ability to testify in his own favor was not chilled.

The defendant again makes issue with the claim that he was not afforded "the opportunity to investigate [the CI evidence] and determine whether it was rebuttable," which precipitated his decision not to testify. (Opening Brief, p. 34). This argument lacks merit. Again, the defendant failed to show diligence in investigating the CI evidence prior to trial, stating that he only obtained the criminal histories of the two CIs in the week leading up to trial. Furthermore, the defendant was afforded the opportunity to interview the two CIs prior to trial, and ascertain their credibility at that point. Thus, the trial court did not plainly err by allowing the CI evidence for rebuttal purposes, the defendant's right to testify was not chilled, and this Court should affirm.

V. There was no plain error in admitting the trooper's testimony about the condition of the defendant's van, and inferences drawn therefrom, at trial.

The defendant contends the trial court plainly erred by admitting Trooper Cutler's testimony about the condition of his van and allowing him to make inferences from the same testimony. (Opening Brief, pp. 34-40). There was no reversible error.

A. Standard of Review

The People agree that the issue has not been preserved for appellate review by contemporaneous objection, and that the standard of review is plain error. Any alleged error where the defendant fails to lodge a contemporaneous objection would be reviewed under plain error. *Miller*.

"'Plain' in this context is synonymous with 'clear' or 'obvious.' Plain error is error that is so clear-cut, so obvious, that a competent trial judge should be able to avoid it without benefit of objection." *People v. Beilke*, 232 P.3d 146, 152 Colo. App. 2009).

B. Relevant Facts

During his direct testimony at trial, Trooper Cutler testified that: "Some of the things that I was seeing and hearing from Mr. Camacho

wasn't really -- didn't seem like everything was up front for me. I had extensive training that has allowed me to know certain things. So when we have items on the floor like water bottles, quarts of oil, fast food bags. And at one point I did ask them if they had any luggage. And he said they didn't." (R, Tr. 10/11/11, p. 162). No objection was lodged to this testimony. *Id.*

The prosecution later asked the officer what the fast food wrappers, water bottles and oil quart containers were indicative of, and he responded:

> When you have a lot of items that are in there it looks like somebody's basically living out of their car, which means that when we're looking at that, we see that it's somebody who doesn't really want to stop somewhere very often. They're heading somewhere. And so they want to get to their destination fast as they can.
>
> So if you got water bottles, they're drinking the water while they're going down the road. They stop for fast food just to grab it, and then they eat on the way. And you want to have anything that would help you if you got a car that needs oil, extra water, things like that. You want to have these things in your vehicle so that you don't have to stop anywhere any longer than you have to.

(R, Tr. 10/11/11, p. 164). No objection was lodged to this testimony. *Id.*

The trooper also testified that his suspicion was heightened by the presence of a child's seat in the van (despite the fact that there was no child present), the vehicle having out of state plates, and the fact that there were two males operating the automobile. (R, Tr. 10/11/11, pp. 164-65).

The trooper was later asked to identify a photograph of the defendant's van, and he testified: "[t]his was the first stuff that I noticed in the vehicle. You got water bottles and drink cans there, along with the quarts of oil. Not something I standardly see when stopping vehicles. This was another indicator to me when I saw the fast food and just eating in the vehicle and looked like they had been there for a while." (R, Tr. 10/11/11, p. 185). No objection was lodged to this testimony. *Id.*

During cross-examination, the defendant did not question Trooper Cutler at all about the discarded items inside the van; however, he briefly questioned him about the presence of the car seat and whether the trooper inquired if the defendant was a parent. (R, Tr. 10/11/11, pp. 190-205, 192).

During redirect examination about the discarded items in the van, the trooper testified that he had specialized drug interdiction training from a June 2010 course where he was taught what to look for in vehicles transporting illegal narcotics. (R, Tr. 10/11/11, pp. 206-07).

Trooper Kenneth Nelson testified at the defendant's trial and commented positively on Trooper Cutler's experience in drug interdiction: "[w]ell, I'm not as versed as Trooper Cutler is on narcotics trafficking or criminal interdiction." (R, Tr. 10/11/11, pp. 211, 216).

During closing argument, the prosecution referenced the empty water bottles, discarded fast food wrappers, empty quart containers of oil, and the presence of a child's car seat with no child being present as raising the trooper's suspicion that the defendant and the van driver were engaged in illegal activity. (R, Tr. 10/11/11, pp. 59-60).

C. Law and Analysis

Trooper Cutler was not qualified as an expert under CRE 702. Therefore, the analysis of this issue turns on whether the testimony was proper under CRE 701. *See People v. Veren*, 140 P.3d 131, 136 (Colo. App. 2005).

CRE 701 makes lay opinions admissible if they are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of CRE 702. *People v. Tillery*, 231 P.3d 36, 42 (Colo. App. 2009).

Such testimony is proper when it "results from a process of reasoning familiar in everyday life." *Id., citing Veren*, *supra* at 137. The critical inquiry is whether a witness's testimony is based upon specialized knowledge, or whether the opinion is "one which could be reached by any ordinary person," i.e., "whether ordinary citizens can be expected to know certain information or to have had certain experiences." *People v. Warrick*, 2011 WL 5089464, *7 (Colo. App. 2011).

Finally, certain basic information about a subject may fall within the scope of lay opinion testimony even if a more detailed discussion of the same area would require more specialized knowledge. *See Veren*, *supra* at 139 (concluding that certain basic information about drugs may properly fall within the scope of lay opinion testimony, although a

police officer's testimony regarding drug manufacturing required specialized knowledge); *People v. Caldwell*, 43 P.3d 663, 667 (Colo. App. 2001) (limited testimony about the officer's observations about the entry locations of bullets and the path they traveled inside the vehicle was a proper subject for lay witness testimony).

Police officers "regularly, and appropriately, offer testimony under Rule 701 based on their perceptions and experiences." *Stewart, supra* at 123*; Warrick, supra; People v. Tallwhiteman*, 124 P.3d 827, 832 (Colo. App. 2005). Just because the officer's rational perception is based on his past experiences as a police officer does not render his testimony expert under CRE 702. *Stewart, supra* at 123*; see also Scognamillo v. Olsen,* 795 P.2d 1357, 1361-1362 (Colo. App. 1990) (quoting *McNelley v. Smith,* 368 P.2d 555 (Colo. 1962) ("The basis for admissibility [of expert testimony] under CRE 702 is ... not that the witness possesses skill in a particular field but that 'the witness can offer assistance on a matter not within the knowledge or common experience of people of ordinary intelligence'")); *see also United States v. Novaton,* 271 F.3d 968, 1008 (11th Cir. 2001) (emphasizing that a witness does not fall outside of Rule 701 simply because his or her rational perception is based on past

experience); *United States v. Myers,* 972 F.2d 1566 (11th Cir. 1992) (police officer's testimony that red mark was caused by a stun gun was not expert testimony because it was rationally based upon his personal perception of the victim's back and his 19 years of experience on the police force).

"[Only] when an officer's opinions *require* the application of, or reliance on, specialized skills or training, [then] the officer must be qualified as an expert before offering such testimony." *Stewart, supra* at 123 (emphasis added); *see also Veren, supra*. Furthermore, the rules do not distinguish between expert and lay *witnesses,* but rather between expert and lay *testimony*. *Veren, supra* at 136. Simply because a witness has specialized training in the field does not automatically render him or her an expert witness, particularly where they could have offered the same testimony without that specialized training. *People v. Mollaun*, 194 P.3d 411, 419-d420 (Colo. App. 2008); *see also People v. Souva*, 141 P.3d 845, 850 (Colo. App. 2005) (the fact that the witness was a certified addictions counselor did not cause her testimony, that an individual was under the influence of drugs, to become expert testimony).

Here, Trooper Cutler's testimony was not based on any specialized knowledge requiring his endorsement as an expert. An average person seeing copious amounts of fast food trash, water bottles and empty oil containers in a vehicle could deduce that an individual was spending an excessive amount of time in the car or even living in it. An average person would also view these same vehicle occupants suspiciously if these individuals had no luggage present. Also, an average person could draw an inference that the presence of a car seat without a child being present in an automobile being driven by two males is a ruse to deflect suspicion. These observations are the type that can be made by ordinary persons, based on common life experiences. There was no plain error in admitting this testimony.

In any event, the defendant cannot show prejudice from this testimony because he made no claims either before or after trial that he was somehow surprised by Trooper Cutler's testimony. Trooper Cutler was identified to the defendant as a prosecution witness well in advance of trial. (CF, p. 9). When the prosecution tendered into evidence photos of the defendant's van, he made no claim that he was not provided such evidence in advance of trial. The defendant has made no discovery

violation claims to either the trial court or this Court. In fact, the defendant did not think the discarded item evidence was significant because he asked no questions of Trooper Cutler on cross-examination about the empty water bottles, discarded fast food wrappers, and empty quart containers of oil, and only asked one question of him about the presence of a child's car seat. Thus, his claim that he would have "obtained his own expert to refute the items' significance" (Opening Brief, p. 40) is belied by his own conduct at trial. The presumption must be the defendant was not surprised by Trooper Cutler's testimony or afforded an opportunity to evaluate it before trial. No plain error occurred, and this Court should affirm.

VI. This Court should not review the double jeopardy claim.

The defendant next argues that double jeopardy requires merger of the defendant's two convictions because they arose from the same evidence. (Opening Brief, pp. 40-41). This Court should not review the allegation.

A. Standard of Review

The People disagree with the defendant that the issue can be examined de novo on appellate review. An appellate court should

decline to review constitutional issues raised for the first time on appeal. *People v. Greer*, 262 P.3d 920, 929 (Colo. App. 2011).

The People assert that the defendant did not object to the imposed sentence to the trial court.

B. Relevant Facts

At trial, Trooper Cutler testified that he pulled a total of ten bricks of marijuana out of the passenger side door frame, and all the packages were a foot long and were 2-3 inches in width and height. (10/11/11, pp. 172-73). He also testified that police recovered eleven bricks of marijuana from the driver's side door frame. (10/11/11, p. 178). Officers conducting the search then recovered 18 bricks of marijuana from the rear door frame on the passenger's side. (10/11/11, pp. 178-79). The 39 recovered bricks weighed 51 pounds. (10/11/11, p. 179).

When sentencing the defendant, the trial court sentenced him to five years for possession with intent to distribute marijuana – 5 to 100 pounds. (12/22/11, p. 12). The trial court thereafter sentenced the defendant to 18 months to be served concurrently for possession of

marijuana – more than 12 ounces. (12/22/11, p. 12). The defendant voiced no objection to the imposed sentence. (12/22/11, pp. 12-14).

C. Law and Analysis

Divisions of this Court have held that a defendant may not raise unpreserved issues of double jeopardy on direct appeal. *People v. Greer*, 262 P.3d 920, 929 (Colo. App. 2011) (majority opinion) ("[o]ur supreme court continues to state that appellate courts should not reach constitutional arguments for the first time on appeal."); *People v. Tillery*, 231 P.3d 36, 52-59 (Colo. App. 2009) (Bernard, J., specially concurring) (double jeopardy claims not raised below should not be addressed on appeal); *People v. Cooper*, 205 P.3d 475, 478 (Colo. App. 2008) (same); and *People v. Novitskiy*, 81 P.3d 1070, 1073 (Colo. App. 2003) (same). The Colorado Supreme Court expressly declined review on this issue in *People v. Simon*, 266 P.3d 1099, 1105 n.6 (Colo. 2011) ("[w]e declined *Tillery*'s request for certiorari review of the court of appeals' decision to apply plain error review.")

In the defendant's case, he took no efforts to have the trial court remedy what he saw as an error of constitutional dimension involving his sentencing. Instead, he now approaches the appellate court to

remedy this perceived error. This Court should decline to review the issue.

Alternatively, the evidence showed that a smaller quantity of marijuana was recovered from the passenger side door frame of the defendant's vehicle. The packaging and location of this quantity from the remainder could lead to a reasonable inference that it was intended for personal use by the vehicle's occupants. Thus, there was sufficient evidence to support the separate convictions and no double jeopardy violation occurred. *People v. Valencia*, 169 P.3d 212, 219-220 (Colo. App. 2007).

VII. The defendant's cumulative error argument has not been properly presented to this Court.

A. Relevant Facts

In his brief to this Court, the defendant claimed under the "Statement Of The Issues Presented" a ground of: "[d]o the cumulative errors require reversal?" (Opening Brief, p. 1). However, no separate argument was presented inside the body of the brief on this issue.

B. Law and Analysis

"The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations

to the authorities, statutes, and parts of the record relied on…" C.A.R. 28 (2013). The defendant did not set out any argument on his cumulative error claim. Thus, this claim of error should be dismissed accordingly. *People v. Cooper*, 205 P.3d 475, 477 (Colo. App. 2008).

CONCLUSION

Based on the foregoing reasons and authorities, the judgments of conviction should be affirmed.

JOHN W. SUTHERS
Attorney General

/s/ Jay C. Fisher
JAY C. FISHER, 44350*
Assistant Attorney General
Appellate Division
Criminal Justice Section
Attorneys for Plaintiff-Appellee
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within People's Answer Brief upon Rebecca Freyre, Deputy State Public Defender, via Integrated Colorado Courts E-filing System (ICCES) on May 27, 2014.

/s/ C. D. Moretti