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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Ave.
Denver, CO 80203

District Court, Adams County
Honorable Patrick T. Murphy, Judge
Case Nos. 09CR1158 and 09CR2365

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

VICTOR ARNOLD GABLER,

Defendant-Appellant.

▲ **COURT USE ONLY** ▲

Case No. 11CA1553

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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 less than 9500 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.

Or

The opponent did not address standard of review or preservation. The brief contains statements concerning both the standard of review and preservation of the issue for appeal.

/s/Kevin E. McReynolds

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STATEMENT OF THE ISSUES

I. Whether the trial court abused its discretion by admitting evidence that Gabler fled Colorado and engaged in a chase with police in another jurisdiction a day after eluding police in a similar chase in Colorado.[1]

II. Whether the trial court reversibly erred by instructing the jury on the statutory elements of witness intimidation instead of incorporating an additional element from another part of this statute.

III. Whether no rational juror could reasonably infer that Gabler stalked L.M. by approaching her, placing her under surveillance and calling/texting her just days after he physically assaulted her in her home.

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[1] The jury convicted Gabler of vehicular eluding for the chase that took place in Colorado (*see* Vol. 1 p. 231).

IV. Whether the trial court abused its discretion and committed plain error by denying Gabler's *pro se* motion for new trial in which he claimed the district attorney violated a pre-trial agreement not to charge him as a habitual criminal in exchange for his waiver of the preliminary hearing for class five felonies.

STATEMENT OF THE CASE AND FACTS

This case involves Victor Gabler, who was tried in a consolidated trial on charges that resulted from his stalking, intimidation and assault of his ex-girlfriend, L.M.

09CR1158 (filed April 22, 2009)

On April 3, 2009, Gabler physically assaulted L.M. in her home, took her phone and threatened to kill her (*see* CD 4/12/11 pp. 37-42). L.M. escaped and called police from a neighbor's house and Gabler disappeared (*see id.* pp. 42-43).

Just days after the assault, Gabler repeatedly contacted L.M. by phone and then, on the morning of April 16, he waited for her outside

her work, followed her and got out of his vehicle and banged on her driver's side window while she was stopped at a light (*see id.* pp. 54-57).

Given this incident and Boulder County's recent warrant for Gabler's arrest on unrelated charges, police asked L.M. for help apprehending Gabler (*see id.* pp. 58-60; 4/13/11 p. 41; Vol. 1 p. 7; 6/10/11 pp. 28-29). That same afternoon, Gabler showed up where L.M. told him she would be, but he recognized the unmarked police cars waiting for him and eluded police after a brief chase (*see* CD 4/12/11 pp. 60-61; 4/13/11 pp. 43-44, 84-87; Vol. 1 pp. 9-10).

The next day, police tried to convince Gabler to turn himself in while simultaneously attempting to track his location (*see* Vol. 1 p. 10). They learned Gabler had fled Colorado and police contacted Kansas authorities, who arrested Gabler after another high speed chase (Vol. 1 pp. 11-12).

In 09CR1158, the Adams County district attorney charged Gabler with robbery, stalking, vehicular eluding, obstruction of telephone service and third degree assault (Vol. 1 pp. 1-4).

09CR2365 (filed August 19, 2009)

Gabler was extradited from Kansas and held in the Boulder County Jail (*see* CD 6/10/11 pp. 28-29). In violation of a protective order, Gabler continued to contact L.M. from the Boulder County Jail until his release on August 14, 2009 (*see* CD 4/12/11 pp. 73-74; Env. Trial Exhibit 28; Vol. 2 pp. 326-28). Once released, Gabler began threatening to kill L.M. and her boyfriend for getting him into trouble (*see* Vol. 2 pp. 326-28, 340-42; CD 4/12/11 pp. 79-87).

In 09CR2365, the district attorney charged Gabler with additional counts of stalking, violation of a protective order and witness intimidation (Vol. 2 pp. 326-28, 356). Gabler was arrested on August 16, 2009 and remained in custody through trial and sentencing (*see id.* pp. 385-86; CD 4/12/11 p. 86).

Consolidated Trial and Appeal

At trial, Gabler attacked L.M.'s credibility and presented evidence suggesting his March 2009 knee surgery made it physically impossible for him to have attacked her in the way she described. Gabler also

argued that the prosecution had failed to prove his guilt for robbery and vehicular eluding.

After a four-day trial, the jury acquitted Gabler of the robbery charge in 09CR1158, but convicted him of the other charges (Vol. 1 pp. 229-39). The trial court then convicted him as a habitual criminal in both cases and sentenced him accordingly.

On appeal, Gabler contends the trial court erred by: (1) improperly admitting evidence of his April arrest; (2) misinstructing the jury on witness intimidation; (3) improperly denying his motion for judgment of acquittal for the stalking charge in 09CR1158; and (4) denying his *pro se* motion for new trial challenging the habitual counts in 09CR1158.

These claims fail because they are either legally incorrect or belied by a record that includes overwhelming evidence of Gabler's guilt.

SUMMARY OF THE ARGUMENTS

The trial court did not abuse its discretion by allowing the prosecution to introduce evidence of Gabler's flight from Colorado and chase with Kansas police because it was relevant *res gestae* or C.R.E.

404(b) evidence and its admission was harmless in light of the overwhelming evidence of Gabler's guilt.

The trial court correctly instructed the jury on the statutory elements of witness intimidation from the subsection Gabler was charged with violating. By respecting the legislature's choice of language instead of re-writing the statute to include additional elements, the trial court properly applied Colorado's principles of statutory construction.

In addition to correctly convicting Gabler for stalking L.M. in August 2009 (09CR2365), the jury did not irrationally convict Gabler for stalking L.M. in April 2009 (09CR1158) because he repeatedly followed, approached, surveilled or contacted L.M. starting just days after he physically assaulted her.

Finally, the trial court did not abuse its discretion or commit plain error by denying Gabler's *pro se* motion for new trial. In that motion, Gabler challenged his habitual charges in 09CR1158 based on his alleged agreement, two years earlier, to waive the preliminary hearing on class five felony charges. This claim fails because Gabler cannot

show that he detrimentally relied on this alleged agreement and, in any event, this agreement was void for lack of consideration – Gabler never had a right to a preliminary hearing in 09CR1158.

ARGUMENTS

I. The Trial Court Did Not Err by Admitting Evidence Regarding Gabler's Flight from Colorado and His Apprehension.

Gabler contends the trial court reversibly erred by admitting limited evidence that he was arrested after a high speed chase a day after he had eluded Colorado police by speeding away through a residential neighborhood (*see* Opening Brief pp. 5-9).

This claim fails because the trial court did not abuse its discretion by admitting this relevant, *res gestae*, or C.R.E. 404(b) evidence and, in any event, the admission of this evidence was harmless.

A. Standards of Review.

The People agree that trial courts are accorded considerable discretion in deciding questions governing the admissibility of evidence, and they have broad discretion to determine the relevancy of evidence,

its probative value, and its prejudicial impact. *People v. Ibarra*, 849 P.2d 33, 38 (Colo. 1993).

Similarly, the trial court is "accorded great discretion in deciding whether to admit evidence of other acts under C.R.E. 404(b) [and t]hat discretion is abused only if the ruling is manifestly arbitrary, unreasonable, or unfair." *People v. Cousins*, 181 P.3d 365, 370 (Colo. App. 2007) (citing *People v. Rath*, 44 P.3d 1033, 1041 (Colo. 2002)).

The People also agree that Gabler preserved this evidentiary claim by opposing the admission of evidence about his apprehension in Kansas (*see* Opening Brief p. 6; Vol. 1 pp. 102-03, 137-39; CD 3/25/11 p. 6, 4/11/11 p. 5, 14; 4/12/11 pp. 22-23).[2] The trial court overruled these objections, but agreed to limit the Kansas evidence and exclude potentially unfairly prejudicial details (*see* CD 4/11/11 pp. 14-15; 4/12/11 pp. 24-28).

Though Gabler failed to identify the applicable error standard, his evidentiary claim is reviewed for harmless error. Accordingly, even if

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[2] The People do not agree that Gabler's complaints about the admission of the evidence preserved any constitutional claims (*see* Opening Brief p. 5).

the trial court's evidentiary ruling was manifestly arbitrary, unreasonable, or unfair, any such error must be "disregarded as harmless whenever there is no reasonable probability that it contributed to the defendant's conviction." *Crider v. People,* 186 P.3d 39, 42 (Colo. 2008). This standard must account for an error's impact in light of the evidence as a whole. *Krutsinger v. People*, 219 P.3d 1054, 1063 (Colo. 2009).

B. Evidence of Gabler's continued flight from police and the circumstances of his apprehension was relevant and admissible.

Colorado Rule of Evidence 401 provides: "'[r]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." C.R.E. 401. "Relevant evidence need not prove conclusively the proposition for which it is offered . . . but it must in some degree advance the inquiry." *People v. Greenlee*, 200 P.3d 363, 366 (Colo. 2009) (internal quotation and citation omitted).

"Relevant evidence 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.'" *Id.* at 367 (quoting C.R.E. 403). This rule "strongly favors the admission of relevant evidence, so the evidence should be given its maximum probative value and minimum prejudicial effect." *Id.* "Evidence is unfairly prejudicial where it introduces into the trial considerations extraneous to the merits, such as bias, sympathy, anger or shock." *Id.*

Res gestae is a theory of relevance that applies to certain evidence that is relevant because of its special relationship to the charged crime. *Id.* at 368. Where evidence is admissible under the general principles of relevancy, a court need not consider if it is *res gestae*. *Id.*

Res gestae evidence, which can include another offense, is evidence that is "related to the charge on trial, that helps to 'provide the fact-finder with a full and complete understanding of the events surrounding the crime and the context in which the charged crime occurred.'" *People v. Skufca*, 176 P.3d 83, 86 (Colo. 2008) (quoting *People v. Quintana*, 882 P.2d 1366, 1373 (Colo. 1994)). *Res gestae* evidence is generally "linked in time and circumstances to the charged

crime, it forms an integral and natural part of the crime, or it is necessary to complete the story of the crime for the jury." *Id.* Importantly, *res gestae* evidence is not subject to the C.R.E. 404(b) analysis. *Id.*

C.R.E. 404(b) establishes both a rule limiting the admission of certain evidence and an exception to that rule. *Cousins*, 181 P.3d at 369. C.R.E. 404(b) provides for the exclusion of evidence of prior acts used to prove a person's character and show to how he or she acted in conformity with that character, but the exception to this rule allows the admission of evidence of prior acts for other purposes. *Id.* Specifically, C.R.E. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

The exception in C.R.E. 404(b) "is inclusionary, meaning evidence is admissible, subject to satisfying certain conditions, if it is relevant to an issue *other than* a defendant's propensity to commit a crime because

of his character." *Cousins*, 181 P.3d at 369 (emphasis added); *see Rath*, 44 P.3d at 1039 (stating that the inclusive exceptions to C.R.E. 404(b) "only requires the exclusion of evidence of other crimes, wrongs or acts offered for the purpose of proving the character of a person in order to show that he acted in conformity therewith").

To determine if the prior act evidence is admissible under C.R.E. 404(b), Colorado courts apply the four-part *Spoto*[3] test: (1) "whether the proffered evidence relates to a material fact"; (2) "is the evidence logically relevant"; (3) "whether the logical relevance is independent of the intermediate inference, prohibited by C.R.E. 404(b), that the defendant has a bad character, which would then be employed to suggest the probability that the defendant committed the crime charged because of the likelihood that he acted in conformity with his bad character"; and (4) "whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." 795 P.2d at 1318. To admit prior act evidence, the trial court must be satisfied that it satisfies each of these conditions. *See id.*

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[3] *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990).

A trial court's decision to admit such evidence can be affirmed "on any ground supported by the record, even if that ground was not articulated or considered by the trial court." *Cousins*, 181 P.3d at 370 (citing *Quintana*, 882 P.2d at 1371).

1. Factual background.

After Gabler assaulted L.M. on April 3, 2009, Northglenn police talked with her about helping them lure Gabler to a location where they could arrest him (*see* CD 4/12/11 pp. 37-50, 58, 121, 155-62; 4/13/11 pp. 29-36, 57-63). The need for an arrest plan became urgent on April 16, 2009 after Gabler followed L.M. from work and Boulder police asked for help arresting Gabler on a separate warrant (*see* CD 4/12/11 56-58; 4/13/11 pp. 77-80, 41).

Based on police instructions, L.M. told Gabler she had an appointment at a Kaiser location that afternoon (CD 4/12/11 pp. 58-60). Police from several jurisdictions, including a Boulder detective, waited near this location (CD 4/13/11 pp. 41-44, 81-85).

A black Range Rover matching the description of Gabler's latest vehicle approached the Kaiser location, then suddenly changed

directions and sped off (*see id.* pp. 43-44, 84-85). The officers followed, but most lost Gabler when he ran a red light (*see id.* p. 44). Detective Gesi radioed for a marked patrol car and continued the pursuit in his unmarked silver detective vehicle (*see id.* pp. 84-86, 132). When Gabler turned into a residential neighborhood at high speed, Detective Gesi broke off the pursuit for the sake of public safety (*see id.* pp. 86-87).

While checking side streets for Gabler, Detective Gesi received a call from L.M. who said Gabler just accused her of setting him up and bragged he had recognized the unmarked police vehicles waiting for him and escaped the gold and silver vehicles (*see id.* pp. 87-89; 4/12/11 pp. 60-61).

Early the next day, Gabler's emailed L.M. threatening to kill himself and she informed Detective Gesi (*see* CD 4/12/11 p. 61-62). Detective Gesi began emailing directly with Gabler to discuss the charges and to convince Gabler to turn himself in (CD 4/13/11 pp. 91-105). In these messages Gabler stated he would only surrender if police dropped the false stalking charge and argued they could not prove eluding because none of the vehicles had identified themselves as police

(*see id.* pp. 99-103). Police tracked Gabler's mobile phone and determined he was on I-70 traveling east into Kansas (*see id.* pp. 105-06, 45-47). Detective Gesi contacted Kansas patrol for help arresting Gabler (*see id.* p. 107).

Kansas State Trooper Phillips was paroling I-70 in west Kansas when he saw a black Ranger Rover matching the information about Gabler (CD 4/12/11 pp. 141-42). He checked the Colorado license plate and found it did not match the vehicle (*see id.* p. 142). When another Kansas trooper turned onto the highway to provide backup, Gabler accelerated and police activated lights and sirens and pursued (*see id.* p. 143). After about eight miles, Gabler rear-ended another SUV and then fled on foot (*see id.* pp. 144-46). Trooper Phillips followed Gabler over a barbed wire fence and across a wheat field, where Gabler finally surrendered when Phillips threatened to use a taser (*see id.* pp. 146-47).

After he was arrested, Gabler waived his *Miranda* rights and told Trooper Phillips he had been texting with a detective in Colorado who wanted him to turn himself in over false stalking charges his girlfriend had made (*see id.* pp. 148, 10-12).

As part of his defense at trial, Gabler presented evidence he had knee surgery in March 2009 and argued he was not physically capable of assaulting L.M. in the way she claimed he did on April 3, 2009 (CD 4/12/11 pp. 95, 127; 4/13/11 pp. 137, 195).

2. Trial proceedings.

The prosecution presented pretrial offers to introduce evidence regarding Gabler's apprehension in Kansas as *res gestae* or C.R.E. 404(b) evidence (*see* Vol. 1 pp. 126-29). Gabler's counsel objected to this evidence as irrelevant and prejudicial (*see id.* pp. 136-37, 102-03).

After several discussions about this issue, on the second day of trial, the court heard Trooper Phillips proposed testimony outside the presence of the jury and concluded it was admissible *res gestae* evidence (*see* CD 4/12/11 pp. 24-25). Specifically, the trial court found significant facts from Gabler's vehicular eluding in Colorado on April 16, 2009 tied directly to police locating him in Kansas and his arrest and statements to Trooper Phillips (*see id.* 24-26). The trial court did, however, limit this evidence by excluding any mention of Gabler driving a stolen car, Gabler's statements that he was going to buy heroin, or that Boulder

police had asked Kansas police to turn over the laptops and multiple credit cards and IDs found in the Range Rover (*see id.* pp. 25-28).

3. Analysis.

Gable contends the trial court reversibly erred because the evidence detailing his high-speed chase, crash and arrest in Kansas was unduly prejudicial and too attenuated to constitute *res gestae* evidence (*see* Opening Brief pp. 8-9). This argument fails for four reasons:

First, the evidence was relevant to show Gabler's consciousness of guilt on all of the Colorado charges. *See People v. Summitt*, 132 P.3d 320, 323-26 (Colo. 2006) ("evidence of flight and concealment to avoid arrest can be admissible to show consciousness of guilt, but only if it can be shown the defendant was aware he or she was being sought") (internal citations and quotations omitted). Accordingly, the trial court's admission of this flight evidence can be affirmed without addressing the *res gestae* or C.R.E. 404(b) analyses (*see* Vol. 1 p. 226 (instruction No. 28 on the limited use of flight evidence). *See Greenlee*, 200 P.3d at 368.

Second, all of this evidence is *res gestae* evidence because it related to the charges and defenses at trial and showed: (1) Gabler's identity as the driver of the black Range Rover that eluded police in Colorado; (2) his knowledge that he was eluding police when sped away from the unmarked cars in Colorado; and (3) his physical ability to run and climb – undermining his claim that a March 2009 knee surgery made him physically incapable of assaulting L.M. in the way she described.

Moreover, because evidence of Gabler's arrest fit within the timeline of the other evidence directly between Detective Gesi's communications with Gabler and Gabler's statements to Trooper Phillips, it helped to provide the jury "with a full and complete understanding of the events surrounding the crime[s] and the context in which the charged crime[s] occurred." *Skufca*, 176 P.3d at 86 (internal citations and quotations omitted); *see also People v. Abeyta*, 728 P.2d 327, 330 (Colo. App. 1986) ("no error is committed by permitting the jury to view the criminal episode in the context in which it happened").

Third, even if not *res gestae*, this evidence was properly admissible under C.R.E. 404(b) because: (1) Gabler's flight from Colorado and physical ability to run from police were relevant to material facts in this case – *e.g.*, whether knew he had eluded police the previous day and could have physically assaulted L.M. as she claimed; (2) this evidence was logically relevant because it helped to show whether elements of the charged offenses were more likely; (3) this relevance was independent of whether Gabler was simply a bad person because it went to his identity as the one who eluded police, his state of mind in committing the vehicular eluding offense, and his consciousness of guilt of the other April offenses; and (4) the probative value of this evidence was not substantially outweighed by the danger of *unfair* prejudice, particularly because the trial court excluded less relevant details of Trooper Phillips's testimony to avoid any such issues.

Fourth, even if the trial court's admission of some of this evidence was manifestly arbitrary, unreasonable, or unfair, its admission during the course of a four-day trial could not have led the jury to improperly

convict Gabler in this case because there was other, overwhelming evidence of his guilt, including:

- Testimony and physical evidence that he assaulted L.M. in her home on April 3, 2009 and prevented her from calling for help (*see* CD 4/12/11 pp. 37-50, 155-62; 4/13/11 pp. 29-36, 57-63; Env. Trial Exhibits 1-22, 26);
- Evidence that Gabler repeatedly contacted L.M. in the days after assaulting her, including by following her and approaching her on April 16, 2009 (*see* CD 4/12/11 pp. 53-57; Env. Trial Exhibit A; CD 4/14/11 p. 82 (noting Gabler sent L.M. over 90 text messages during this period));
- Evidence that Gabler attempted to surveil/approach L.M. again at the Kaiser location and then accused L.M. of setting him up after he recognized the unmarked cars as police and eluded them by driving at high speed (*see* CD 4/13/11 pp. 79-89, 41-45; 4/12/11 pp. 60-61);

- Evidence from the bookend events around his Kansas arrest, his emails with Detective Gesi and his statements to Trooper Phillips (*see* CD 4/13/11 pp. 91-105; 4/12/11 p. 148);
- Recordings and testimony that Gabler continued to stalk, threaten and harass L.M. both before and after his August 2009 release from Boulder County Jail, where he was in custody after his extradition from Kansas (*see* Env. Trial Exhibits 28, 30; CD 4/12/11 pp. 73-76, 79-86; 4/13/11 pp. 14-17, 146-48, 155-67;; 6/10/11 pp. 28-29).

Finally, the jury's acquittal on the robbery charge in 09CR1158 further demonstrates that any error was harmless because it shows the jury carefully examined the evidence, followed the instructions to consider each charge separately, and did not base its verdicts on any improper bases.

II. The Trial Court Did not Reversibly Err by Instructing the Jury on the Statutory Elements of Witness Intimidation.

Gabler contends the trial court reversibly erred by instructing the jury with the statutory elements for witness/victim intimidation as

opposed to giving Gabler's proposed instruction that included additional language from a different subsection of the statute. (Opening Brief pp. 9-16).

This argument fails because the trial court correctly instructed the jury on the elements of witness/victim intimidation under the subsection under which the prosecution charged Gabler.

A. Standard of review.

The People agree that Gabler preserved this issue by objecting to the prosecution's witness/victim intimidation instruction and submitting a competing instruction that incorporated additional language he argued should be "read into" the offense (*see* Opening Brief pp. 11-12; CD 4/14/11 pp. 4-7; Vol. 1 p. 193).

The People also agree this Court reviews jury instructions *de novo* to determine whether the instructions as a whole accurately informed the jury of the governing law (*see* Opening Brief p. 10). *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009). Importantly, however, the trial court retains discretion in formulating the jury instructions so long as

they are correct statements of the law and fairly and adequately cover the issues. *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006).

Because Gabler's claims of instructional error are based his interpretation of Colorado's witness/victim intimidation statute, this Court should apply a *de novo* standard of review to these underlying statutory interpretation issues. *See People v. Garcia*, 113 P.3d 775, 780 (Colo. 2005).

If the trial court erred by instructing the jury on the statutory elements for witness/victim intimidation, the People agree this error is reviewed under the constitutional harmless error standard (*see* Opening Brief p. 9). *Greigo v. People*, 19 P.3d 1, 8 (Colo. 2001). An error "is harmless beyond a reasonable doubt 'if there is no reasonable possibility that it affected the guilty verdict.'" *People v. Orozco*, 210 P.3d 472, 476 (Colo. App. 2009).

B. The trial court correctly instructed the jury on the elements for witness/victim intimidation.

Trial courts are obligated to correctly instruct the jury on the applicable law. In formulating such instructions, courts look to pattern

jury instructions and applicable statutes. *See, e.g., People v. Laurson*, 15 P.3d 791 (Colo. App. 2000) (affirming an instruction that tracked the language of the statute and pattern jury instruction).

Here, the prosecution charged Gabler with witness intimidation under § 18-8-704(1)(d), C.R.S. (2011) (*see* Vol. 2 p. 356; Vol 1 p. 221). The parties agree the prosecution's elemental instruction strictly conformed to the statutory language of this subsection (*see* Opening Brief p. 10). *Compare* § 18-8-704(1)(d) *with* Vol. 1 p. 221 (Instruction No. 23).

On appeal, Gabler contends the trial court reversibly erred by giving this instruction because it is based on a misinterpretation of section 18-8-704(1)(d) (Opening Brief pp. 12-14). Specifically, Gabler argues that because the subsections (a), (b) and (c) of the witness/victim intimidation statute require proof that the offender specifically intended to influence witness/victim testimony, the trial court erred by not inferring this requirement also applied to subsection (d) (*see id.*).

But this argument improperly asks this Court to rewrite the plain language of witness/victim intimidation under subsection 18-8-704(1)(d)

rather than interpreting it according to our Supreme Court's rules of statutory construction.

When interpreting a statute, this Court must give effect to the legislature's purpose and intent by examining the plain and ordinary meaning of the statutory language. *People v. Madden*, 111 P.3d 452, 457 (Colo. 2005). Additionally, courts must "respect the legislature's choice of language" and "not add words to the statute or subtract words from it." *Turbyne v. People*, 151 P.3d 563, 567-68 (Colo. 2007). Thus, courts should not read language into a statute that the General Assembly chose not to include after adding it to other statutory provisions. *See, e.g., Colo. Dep't of Revenue v. Hibbs*, 122 P.3d 999, 1005 (Colo. 2005) (refusing to rewrite one subsection of a statute to require proof of a specific type of verification that appears in another subsection because the legislature was fully aware of the term and, if it had intended its use elsewhere, it would not have selected different language); *People v. Jaramillo*, 183 P.3d 665, 671 (Colo. App. 2008) (refusing to apply a narrower definition of bodily injury from a separate statute because the legislature clearly knew how to draft such a

definition and the court must respect its choice of language); *see also Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001) (citing the interpretive canon *expressio unius exclusio alterius* ("the inclusion of certain items implies the exclusion of others") and concluding that because the legislature had included a particular remedy in one statute but not in another, the legislature could not have intended the particular remedy in the latter).

The witness/victim intimidation statute provides four different means of committing this offense in subsections (a) through (d):

> (1) A person commits intimidating a witness or victim if, by use of a threat, act of harassment as defined in section 18-9-111, or act of harm or injury to any person or property directed to or committed upon a witness or a victim to any crime, a person he or she believes has been or is to be called or who would have been called to testify as a witness or a victim, a member of the witness' family, a member of the victim's family, a person in close relationship to the witness or victim, a person residing in the same household with the witness or victim, or any person who has reported a crime or who may be called to testify as a witness to or victim of any crime, he or she intentionally attempts to or does:
>
> (a) Influence the witness or victim to testify falsely or unlawfully withhold any testimony; or

(b) Induce the witness or victim to avoid legal process summoning him to testify; or

(c) Induce the witness or victim to absent himself or herself from an official proceeding; or

(d) Inflict such harm or injury prior to such testimony or expected testimony.

§ 18-8-704(1). While all four types of acts require that an offender threaten, harass, harm or injure a witness/victim that the offender believes will be called to testify, subsections (a), (b), and (c) directly connect the offender's intent to the testimony itself (*see id.*; *see* 4/14/11 pp. 5-7).

By contrast, the legislature chose different language for subsection (d), which requires that offender intend his threats, harassment or acts to inflict harm or injury before the witness/victim testifies or is expected to testify. *See* § 18-8-704(1)(d).

This difference in the statutory language demonstrates a clear legislative choice. The General Assembly's nexus language in subsections (a), (b) and (c) shows that it clearly understood how

to directly link the threat/harassment to the witness/victim testimony, and had it intended to do so, it could have included such language in subsection (d). Moreover, this distinction is consistent with the legislature's reasonable intent to criminalize the intentional infliction of harm on victims just before they are expected to testify.

Accordingly, this Court should respect the General Assembly's choice of language and not entertain Gabler's speculative claim that the legislature must have intended something other than what it wrote. *See also People v. Jones*, 140 P.3d 325, 329 (Colo. App. 2006) (applying the statutory language of subsection 18-8-704(1)(d) in affirming a conviction for witness intimidation).[4]

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[4] Additionally, even if the trial court did err by not re-writing subsection (d) as Gabler requested, any such instructional error was harmless because the jury's verdict shows it believed L.M.'s testimony that Gabler threatened her life for getting him charged for the April 2009 offenses and would have convicted him even under Gabler's proposed instruction.

III. Rational Jurors could Reasonably Find Gabler Guilty of Stalking.

Gabler contends the trial court erred in denying his motion for judgment of acquittal regarding the April 2009 stalking charge (09CR1158) because he only physically approached L.M. once (following her from work on April 16) and his repeated phone calls and text messages "were not unwanted . . . as a matter of law" (Opening Brief pp. 18-19).

These arguments fail because, as the jury found, Gabler's repeated contacts with L.M. days after assaulting her on April 3, 2009 reasonably caused her emotional distress.

A. Standards of review.

The People do not fully agree with Gabler's standard of review. While courts consider the sufficiency of the evidence *de novo*, they must additionally give deference and a presumption of validity to a jury's verdict by applying a "daunting standard" to these types of challenges: "construe[ing] the record in the light most favorable to the prosecution to determine whether any rational juror could have found guilt proven

beyond a reasonable doubt." *People v. McBride*, 228 P.3d 216, 226 (Colo. App. 2009).

The People also do not fully agree that Gabler preserved this issue because his motion for judgment of acquittal only argued about the witness intimidation charge (*see* 4/13/11 pp. 177-78).[5] But Gabler's failure to specifically challenge his April stalking charge is immaterial because sufficiency of the evidence claims can be raised for the first time on appeal. *See McBride*, 228 P.3d at 226 (recognizing the "daunting standard" for such claims "is so high, and the consequences for the rare defendant able to satisfy it so severe, that we apply it even where (as here) a defendant failed to preserve the challenge by raising it in the trial court").

[5] The trial court denied this motion (*see* 4/13/11 pp. 180-81).

B. There was sufficient evidence for a rational juror to conclude that Gabler repeatedly contacted L.M. in a manner that would cause a reasonable person emotional distress.

The proper analysis for sufficiency of the evidence is the *Bennett*[6] test, which considers "whether the relevant 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 mind that the defendant is guilty of the charge beyond a reasonable doubt." *Clark v. People*, 232 P.3d 1287, 1291, 1288-89 (Colo. 2010) (internal quotations and citations omitted). Importantly, it does not matter that a reviewing court might have reached a different conclusion, but only that there is a logical connection between the facts established and the conclusion inferred. *Id.* at 1291-92; *Bennett*, 515 P.2d at 469 (stating the prosecution need not "exclude every reasonable hypotheses other than guilt" or disprove the defendant's theory in order for there to be sufficient evidence).

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[6] *People v. Bennett*, 183 Colo. 125, 515 P.2d 466 (1973).

At trial, the jury concluded Gabler stalked L.M. between April 7, 2009 and April 17, 2009 by repeatedly following, approaching, placing under surveillance or making any form of contact with L.M. in a manner that would cause a reasonable person serious emotional distress and that this contact actually caused L.M. emotional distress (*see* Vol. 1 pp. 207, 230 (elemental instruction and verdict form)).

Gabler contends this verdict was based on insufficient evidence because he only physically accosted L.M. once during this period and the fact that L.M. responded to some of his dozens of texts and phone calls shows these contacts "were not unwanted on the part of [L.M.]" (Opening Brief p. 19).

But these arguments misapply the *Bennett* test by inappropriately weighing the evidence and requiring the prosecution to disprove Gabler's theory that his more than repeated calls and text messages starting just days after he physically assaulted her in her home could not have caused her emotional distress because she occasionally responded (*see* 4/14/11 pp. 64-73 (Gabler's closing argument making this same point)). Instead, the *Bennett* test only requires that the evidence

presented a logical connection between the facts and the jury's conclusion.

Here, there was sufficient evidence from which a rational juror could infer that Gabler repeatedly followed, approached, placed under surveillance or contacted L.M. in a manner that reasonably caused her emotional distress, including:

- Evidence that Gabler was waiting outside L.M.'s workplace on April 16, followed her, and then approached L.M. and banged on her driver's side window while she was at a stoplight[7] – demonstrating Gabler was surveilling L.M. and made contact with her in a way that would cause a reasonable person distress (CD 4/12/11 pp. 56-57, 68-69; 4/13/11 pp. 77-79);
- Evidence that Gabler appeared at the Kaiser location where L.M. told him she would be that same afternoon –

[7] L.M. testified that Gabler stuffed clothing through the window when she partially lowered it to tell Gabler to leave her alone (*See* CD 4/12/11 pp. 68-69).

demonstrating that Gabler was surveilling L.M. later that same day and attempted to make contact again, but instead ended up fleeing from police (*see* CD 4/13/11 pp. 79-87, 41-45);[8]

- Evidence that Gabler contacted L.M. immediately after eluding police at the Kaiser location and accused her of setting him up – again contacting her in a manner that that would cause a reasonable person distress (*see id.* pp. 87-89; 4/12/11 pp. 60-61);
- Evidence that Gabler contacted L.M. the next morning and threatened to kill himself – again contacting her in a manner that that would cause a reasonable person distress (CD 4/12/11 p. 61; 4/13/11 pp. 90-91);
- Evidence that Gabler repeatedly called and texted L.M. starting just days after he assaulted her in her home while

[8] L.M. did not ask Gabler to meet her at the Kaiser location, but instead told him where she would be and, as police expected of a stalking suspect, Gabler came after her (*see* CD 4/13/11 pp. 79-89).

threatened to kill her – demonstrating Gabler made repeated contact with L.M. under circumstances that would cause a reasonable person emotional distress (*see* CD 4/12/11 pp. 54-55; 4/14/11 p. 82 (noting Gabler sent L.M. over 90 text messages and she responded sporadically); Env. Trial Exhibit A);[9]

- L.M.'s testimony that she only responded to Gabler's calls and texts in an effort to convince him not hurt her and to turn himself in to police – while Gabler contends this testimony was not credible, this was a factual issue for the jury and not something this Court should second-guess on appeal (*see* CD 4/12/11 pp. 54-55, 109-10; Vol. 1 p. 203 (jury instruction on witness credibility). *See, e.g, Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (referring to "the

[9] Gabler incorrectly argues this Court should re-weigh this evidence because he believes his contacts were "not unwanted" (Opening Brief p. 19). This is irrelevant because his opinion of whether the victim wanted him to contact her is not an element of stalking (*see* Vol. 1 p. 207). § 18-3-602(1)(c), C.R.S. (2013).

responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts"); *People v. Dash*, 104 P.3d 286, 289 (Colo. App. 2004) (recognizing that only testimony that is "so palpably incredible and so totally unbelievable" can be rejected on appeal); *see also People v. Ramirez*, 30 P.3d 807, 809 (Colo. 2001) (testimony is legally incredible when it concerns "facts which the witness physically could not have observed or events that could not have happened under the laws of nature." Conversely, testimony that is merely biased, inconsistent, or conflicting is not incredible as a matter of law");

- Evidence that L.M. was afraid of Gabler and relieved when he was finally taken into custody, though he renewed his stalking and intimidation of L.M. from the Boulder County jail leading to the charges in 09CR2365 (*see* CD 4/12/11 pp. 62-63, 73-76, 79-87; 4/13/11 pp. 14-17, 146-48, 155-56, 159-61, 164-69; Envelope Trial Exhibits 28, 30).

Accordingly, the evidence here was sufficient to show logical connection between the Gabler's contacts and surveillance of L.M. and the jury's conclusion that he was stalking her.

IV. The Trial Court Did Not Abuse its Discretion and Commit Plain Error by Not Vacating Gabler's Habitual Criminal Charges in 09CR1158.

Finally, Gabler's appellate counsel raises a novel claim: that Gabler's habitual criminal convictions in 09CR1158 should be vacated because, two years earlier, he agreed to waive the preliminary hearing on the class five felony charges to which these sentence enhancements applied (Opening Brief pp. 20-23).

But Gabler cannot show the trial court abused its discretion and plainly erred in rejecting this unpreserved claim because Gabler did not detrimentally rely on this alleged agreement and it was void for lack of consideration as Gabler never had a right to a preliminary hearing in 09CR1158.

A. Standards of review.

The People agree the trial court's decision below is reviewed for abuse of discretion, though for a different reason than Gabler states

(Opening Brief p. 20). This standard of review applies because Gabler raised a version of his current claim in a *pro se* motion for new trial alleging prosecutorial misconduct. *See People v. Reed*, 2013 COA 113 at ¶¶ 14-16 (Aug. 1, 2013) (applying an abuse of discretion standard in affirming a trial court's denial of a motion for new trial based on prosecutorial misconduct).[10]

Gabler contends he preserved his current claim because he raised it in his *pro se* motion for new trial and his counsel had previously objected to the prosecution amending the Information to add the habitual counts he challenges on appeal (Opening Brief p. 20). While the statement contains kernels of truth, it gives an inaccurate impression that Gabler timely raised his current objection. He did not.

1. Procedural history.

After Gabler's apprehension in Kansas, the prosecution filed the information against him in 09CR1158 charging him with class five felonies for stalking and vehicular eluding (*see* Vol. 1 pp. 1-4; *see* CD

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[10] The People also agree that this Court should apply a *de novo* standard to the extent it must interpret the meaning of the alleged June 3, 2009 agreement (*see* Opening Brief p. 20).

6/10/11 pp. 28-29).[11] In addition to showing probable cause for these charges, the arrest warrant affidavit also stated that Gabler had an outstanding warrant from Boulder (Vol 1 p. 7; *see also* CD 4/13/11 p. 41 (a Boulder detective contacted Northglenn police for help arresting Gabler on April 16, 2009); 6/10/11 pp. 28-29 (testimony of Gabler's parole officer)). Gabler was extradited from Kansas and held in the Boulder County Jail, where he continued to contact L.M. by phone both before and after his August 14, 2009 release – resulting in the new charges in 09CR2365 (*see* CD 6/10/11 pp. 28-29; 4/12/11 pp. 73-74, 79-87; Env. Trial Exhibit 28; Vol. 2 pp. 326-28). Before his release from Boulder, Gabler requested a preliminary hearing and then agreed to waive it in exchange for the district attorney not filing habitual counts (*see* Vol. 1 p. 15 (dated 6/3/09); CD 6/10/11 pp. 28-29). Gabler was not arraigned in 09CR1158 for more than a year because he serially requested evaluations for competency and sanity (*see* Vol. 1 pp. 279-84, 290). In the interim, he did not raise his current claim.

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[11] Gabler was also charged with a class 4 felony for robbery and a pair of misdemeanors (*see* Vol. 1 pp. 1-4). These offenses are not relevant to the current analysis.

Motion to Add Habitual Counts (September 2009)

After filing the charges in 09CR2365, the prosecution filed a motion to add habitual criminal charges in 09CR1158 (*see* Vol. 1 pp. 20-22 (motion to amend dated 9/22/09); Vol. 2 pp. 326-28). The court set a hearing on this motion, but Gabler's counsel requested a competency exam (*see* CD 10/22/09 p. 2). Based on this request, the court deferred ruling on the prosecution's motion to add habitual counts in 09CR1158 (*see id.* p. 6). Gabler's counsel stated he was aware of the habitual counts and thanked the court for deferring (*id.* p. 7).

Gabler did not raise any claim that the prosecution had agreed not to pursue habitual charges based on his waiver of a preliminary hearing.

Gabler's Pre-trial Objections to the Habitual Counts

Nearly a year later, and after the habitual counts had been added in the parallel case (09CR2365),[12] the prosecution reminded the court

[12] The trial court agreed to add the habitual counts in 09CR2365 over Gabler's objection that he intended to collaterally attack his prior convictions (*see* CD 3/12/10p pp. 2-3). As in 09CR1158, Gabler did not

about the pending motion to add habitual counts in 09CR1158 (*see* CD 7/28/10 p. 6). Gabler's counsel responded with separate motions to dismiss: one seeking to dismiss all charges for alleged bail violations and the other seeking to dismiss/exclude the habitual counts in 09CR1158 on grounds that Gabler should be allowed to collaterally attack his prior convictions on competency grounds (*see* Vol. 1 pp. 89-91; 106-08). Neither motion raised Gabler's current claimed agreement with the prosecution not to file habitual charges (*see id.*).

At the hearing on these motions, Gabler's counsel additionally argued that the habitual charges should be dismissed as a sanction for the alleged bail violations (*see* CD 8/23/10 pp. 4-5). Again, Gabler did not raise his current claimed agreement to challenge the habitual counts (*see id.*). The trial court took the matter under advisement and then denied Gabler's motions in a written order (*see id.* p. 5; Vol. 1 pp. 118-20).

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object to these charges based on any alleged agreement with the prosecution.

Three months later, the parties again argued about whether to grant the prosecution's pending motion to add habitual charges in 09CR1158 (*see* CD 12/22/10 pp. 42-43, 48-49). Gabler's counsel reiterated his previous objections and moved to bar these charges as untimely (*see id.* pp. 46-47, 49; Vol. 1 pp. 134-35). While reserving Gabler's collateral attack claim until after trial, the court overruled Gabler's other objections and added the habitual charges in 09CR1158 (*see* CD 12/22/10 pp. 49-50).

Yet again, Gabler did not raise any claim that adding the habitual counts would violate an agreement with the prosecution.

Gabler's Post-trial Objections to the Habitual Counts

On April 14, 2011, the jury convicted Gabler of stalking and vehicular eluding in 09CR1158 (*see* Vol. 1 pp. 230-31). The following week, the trial court held a motions hearing on Gabler's remaining objections to the habitual criminal charges (*see* CD 4/21/11).

As before, Gabler's counsel argued he should be permitted to collaterally attack his prior convictions because a 2004 competency evaluation discussed his mental health issues and created a justifiable

excuse for his failure to challenge these convictions within the statute of limitations (*see id.* pp. 4-6).

The trial court denied this motion, finding no excusable neglect because the 2004 evaluation showed that Gabler understood the nature of the proceedings, the criminal justice system and that he met the fitness requirements for competency (*see id.* pp. 8-10).

It was at this point, after he had been convicted and the trial court rejected his long-standing objections to the habitual charges, that Gabler filed his handwritten *pro se* motion for new trial (*see* Vol. 1 pp. 241-57 (dated 4/28/11)). Among dozens of other allegations, Gabler argued that the prosecutor had committed misconduct by violating an agreement not to charge him as a habitual criminal if he waived his right to preliminary hearing (*see id.* p. 249).

After reviewing the record, the trial court denied this motion without a hearing (*id.* p. 258). Though the trial court mentioned the denial of this *pro se* motion at the habitual criminal trial, neither Gabler nor his counsel raised his preliminary hearing claim when arguing against the habitual charges (*see* CD 6/10/11 pp. 4, 33-39, 41).

2. Resulting reversal standards.

Contrary to Gabler's apparent belief, his untimely *post-hoc* challenge to the habitual charges after his conviction did not preserve this error for the purposes of appellate review. *See, e.g., People v. McNeely*, 222 P.3d 370, 374-75 (Colo. App. 2009) (holding a claim first raised in a motion for new trial is unpreserved and thereby subject only to plain error review).

Colorado law requires that objections "be both specific and timely . . .[and i]t does not suffice to give trial courts a post-hoc opportunity to consider an alleged error". *See People v. Randell*, 2012 COA 108 ¶ 83 (July 5, 2012) (internal citation and quotation omitted).

As this Court held in *McNeely*, both Colorado law and federal practice demonstrate that objections that are first raised in a motion for new trial are forfeited and reviewed only for plain error. 222 P.3d at 374-75 (*citing, e.g. United States v. Brandao*, 539 F.3d 44, 57 (1st Cir. 2008) (applying plain error to instructional objections raised in a new trial motion); *United States v. Hernandez*, 327 F.3d 1110, 1114 (10th Cir. 2003) (applying plain error to closing argument objections raised in

a new trial motion); *United States v. Tiller*, 302 F.3d 98, 105 (3d Cir. 2002) (same); *United States v. Hill*, 60 F.3d 672, 675 (10th Cir. 1995) (recognizing that objecting for the first time in a new trial motion "does not make up for" the lack of "a contemporaneous objection at trial")).

The application of plain error review is particularly appropriate in this case because Gabler's claim was raised in a *pro se* motion for new trial while he was represented by trial counsel. As a result, the trial court could properly deny his *pro se* motion without considering its merits, just as this Court did when rejecting Gabler's *pro se* motion to deny the People any further extensions of time (*see* Order Re: No further Continuances (dated 9/16/13) ("The Court does not consider pro se pleadings from parties who are represented by counsel")).

Under plain error review, this Court only reverses if: (1) the error "is so clear-cut, so obvious, that a competent trial judge should be able to avoid it without the benefit of objection" *People v. Taylor*, 159 P.3d 730, 738-39 (Colo. App. 2006); and (2) the error "so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the

reliability of the judgment of conviction." *Hagos v. People*, 2012 CO 63 ¶ 18 (Nov. 5, 2012).

Gabler bears the burden of persuasion under the plain error standard of review. *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005).

B. The trial court did not commit plain error by refusing to enforce an invalid agreement on which Gabler did not detrimentally rely.

Preliminary hearings are "'held for the limited purpose of determining if probable cause exists to believe the crime or crimes charges were committed by the defendant." *People v. Pena*, 250 P.3d 592, 595 (Colo. App. 2009) (internal quotation and citation omitted). As our Supreme Court has recognized, preliminary hearings were "created as a screening device to afford the defendant an opportunity to challenge the sufficiency of the prosecution's evidence to establish probable cause before an impartial judge." *People ex rel. Farina v. District Court*, 184 Colo. 406, 409, 521 P.2d 778, 779 (1974).

Colorado law provides that a person charged "with a class four, five or six felony is not entitled to a preliminary hearing unless the

felony charged requires mandatory sentencing, is a crime of violence, or is a sexual offense." *Pena*, 250 P.3d at 595 (citing §§ 16-5-301(1)(a), (1)(b)(I), C.R.S. (2009); Crim. P. 5(a)(4), 7(h)(1)). Gabler's class five felony convictions for stalking and vehicular eluding in 09CR1158 do not fall within these exceptions.

The preliminary hearing statute provides an additional exception whereby defendants not otherwise entitled to a preliminary hearing can demand one if "in custody for the offense for which the preliminary hearing is requested." *Pena*, 250 P.3d at 595 (quoting § 16-5-301(1)(b)(II)). This exception is designed "to ensure that person held in custody on charges for which no probable cause exists will be released swiftly." *Id.* (quoting *People v. Taylor*, 104 P.3d 269, 271 (Colo. App. 2004)).

Importantly, however, a defendant who is in custody based on other charges does not obtain a right to demand a preliminary hearing under § 16-5-301(1)(b)(II) by virtue of appearing in court to face a new criminal complaint. *See id.* at 595-96. In *Pena*, a defendant was being held in Pueblo County Jail when he was transported to a court

appearance in El Paso County on new criminal charges. *Id.* at 594, 595-96. While in El Paso County, the defendant requested a preliminary hearing. *Id.* Because he was not transported from Pueblo County Jail, defendant did not appear at the preliminary hearing. *Id.* at 594. The trial court then dismissed the El Paso County charges because defendant's right to preliminary hearing had been violated. *Id.*

This Court reversed because the defendant never had a right to a preliminary hearing. *Id.* at 594-95. Specifically, the *Pena* court held the defendant was in the custody of Pueblo County at the time he demanded a preliminary hearing and his temporary custody in El Paso to appear in his new case "does not constitute 'custody for the offense for which the preliminary hearing is requested' for the purposes of section 16-5-301(1)(b)(II)." *Id.* at 596; *see also Taylor*, 104 P.3d at 272 (holding a trial court erred in granting a request for preliminary hearing on a class five felony where the defendant remained in the primary custody of another judicial district).

Here, Gabler contends the trial court reversibly erred and violated his due process rights because he "reasonably relied to his detriment"

on his agreement with the prosecution to waive his preliminary hearing right in 09CR1158 in exchange for the prosecution's promise not to file habitual criminal charges (Opening Brief pp. 22-24).[13] This claim is without merit for two independent reasons:

First, Gabler's alleged agreement to waive his preliminary hearing right is void for lack of consideration because, like the defendant in *Pena*, Gabler never had a right to a preliminary hearing in 09CR1158. *See People v. Johnson*, 999 P.2d 825, 829 (Colo. 2000) (recognizing that courts apply "contract principles when interpreting defense and prosecution obligations under plea agreements"); *see also, e.g., United States v. Sensi,* No. 12-565-cr, 2013 U.S. App. LEXIS 19423 at *6 (2d Cir. 2013) (applying the contract principle of consideration in evaluating the validity of a plea agreement); *United States v. Modafferi*, 112 F.Supp.2d 1192, 1201 (D. Haw. 2000) (same).

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[13] In addition to not preserving this claim, Gabler also appears to be asking for a different remedy than he did below: resentencing as opposed to a new trial (*compare* Opening Brief p. 24 *with* Vol. 1 pp. 241-57).

Both at the time he requested a preliminary hearing and when he agreed to waive his "right" to this hearing, Gabler was in the primary custody of another judicial district – Boulder County (*see* Vol. 1 p. 7; CD 6/10/11 pp. 28-29). Before the Information was even filed in 09CR1158, Gabler's parole officer issued a Boulder warrant for his arrest and Boulder detectives asked Northglenn police for help arresting him (*see* CD 6/10/11 pp. 27-29; 4/13/11 p. 41; Vol. 1 p. 7). Moreover, after Gabler's apprehension in Kansas, he was extradited and placed into the custody in the Boulder County Jail until after his parole period ended on August 1, 2009 (*see* CD 6/10/11 pp. 28-29; CD 4/12/11 pp. 73-76 (L.M.'s testimony that Gabler called her in August 2009 from the Boulder County Jail); Env. Trial Exhibit 28 (audio of Gabler's August calls from Boulder jail)). Gabler was released from Boulder County Jail on August 14, 2009 and later arrested for the new charges in 09CR2365 (*see* CD 4/12/11 pp. 79-87; Vol. 2 pp. 326-28, 340-42). That Gabler was never in custody for 09CR1158 is further confirmed by the fact that he did not receive a single day of presentence confinement credit for this case (*see* Vol. 1 pp. 261-62 (mittimus for 09CR1158); *see also* Vol. 2 pp.

385-86 (mittimus for 09CR2365 showing Gabler received 670 days of presentence confinement credit for the period between his arrest (August 16, 2009) and sentencing (Jun 17, 2011)).

Thus, because Gabler did not have a right to a preliminary hearing in 09CR1158, he cannot show the trial court plainly erred by not enforcing an agreement based on his waiver this non-existent right.

Second, even if the alleged waiver agreement was not void *ab initio*, Gabler cannot show he "reasonably relied to his detriment" on the June 3, 2009 agreement. Under Colorado law, plea bargains may be enforced absent a defendant's express agreement so long as he can show he reasonably relied on the government's promise to his detriment. *See, e.g. People v. Macrander*, 756 P.2d 356, 359-62 (Colo. 1988).[14]

Here, Gabler failed to identify anything in the record to support his conclusory claim that he "reasonably relied to his detriment" on the June 3, 2009 agreement (*see* Opening Brief pp. 22-24). This is perhaps unsurprising because the record instead shows no detrimental reliance:

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[14] The People believe the present case is distinguishable from *Macrander* and the other detrimental reliance cases because the alleged waiver agreement here was void *ab initio* for lack of consideration.

- Gabler did not to rely on this alleged agreement in any of his pre-trial motions or hearings in which he specifically opposed the addition of the habitual charges in 09CR1158;
- Gabler did not rely on this agreement by timely requesting any relief after the prosecution's alleged breach (*i.e.* the September 2009 motion to amend), despite the fact he was not arraigned in this case until October 2010; and
- Unlike the defendant in *Macrander*, Gabler cannot show any "detrimental" reliance because he had no right to a preliminary hearing in 09CR1158 and he was never held for this case so his liberty was not restrained.

According, Gabler failed to carry his burden showing the trial court's plainly erred by not specifically enforcing a void agreement on which he did not rely (let alone even mention) until after conviction.

CONCLUSION

For these reasons, this Court should affirm the trial court's judgment.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **NORMAN R. MUELLER** and **RACHEL A. BELLIS** via Integrated Colorado Courts E-filing System (ICCES) on November 25, 2013.

/s/ C. D. Moretti