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SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 09CA1506	
SALVADOR ESQUIVEL-CASTILLO, Petitioner, v. THE PEOPLE OF THE STATE OF COLORADO, Respondent.	▲ **COURT USE ONLY** ▲ Case No. 13SC904
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RESPONDENT'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).

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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/ Melissa D. Allen
Signature of attorney or party

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Whether expanding the definition of the predicate crime of kidnapping in the jury instructions for felony murder to include methods not included in the substantive kidnapping charge acted as a constructive amendment of the charges.

STATEMENT OF THE FACTS

Defendant was JF's ex-boyfriend and the biological father of her baby boy. He broke JF's jaw in two places when he punched her on both sides of her mouth on May 27, 2007 (04/09/09, pp. 200-06; 04/10/09, pp. 135-36; 04/13/09, pp. 11-12; 04/13/10, pp. 74-77, 81). JF was reluctant to identify defendant as the perpetrator of the assault because she was afraid of him (04/10/09, pp. 133-43).

JF had last been seen getting into defendant's car the evening of July 11, 2007 (04/13/09, pp. 26-27, 142; 04/14/09, pp. 93-99, 134). She uncharacteristically did not go home to her son that night, and likewise failed to show up for work the next morning (04/14/09, pp. 136-39).

Defendant was arrested for the May assault on July 12, 2007, the same day JF's friends filed a missing persons report (04/13/09, pp. 39-

41; 04/14/09, pp. 139-40). The police arrested him at work, when he picked up his last check so that he could flee to Mexico (04/08/09, pp. 121-22; 04/09/09, pp. 211-15; 04/10/09, pp. 117-20; 04/13/10, pp. 20-22, 26, 129-30).

JF's body was found several days later on a dairy ranch, near a trailer in which defendant's ex-girlfriend Diana Aragon (the mother of two of his other sons) lived, and defendant often stayed. JF had been buried at the foot of some bluffs (04/08/08, pp. 145-46; 04/13/09, p. 89; 04/14/09, pp. 172-75, 178; 04/15/09, pp. 190-95; 04/17/09, p. 8). Vegetation growing around the area where JF's body was discovered was found in the undercarriage of defendant's car, and in Diana Aragon's washing machine, along with recently-washed men's clothing (04/17/09, pp. 89-97, 101; 04/21/09, pp. 58-59).

Defendant had previously told Aragon's nephew that if he were to kill someone, he would bury the body out on the ranch and let the coyotes eat it (04/16/09, p. 124). After his arrest, he told a cellmate that he had "killed his old lady" because "she broke it off," which prevented him from getting his citizenship and green card (04/22/09, pp. 142, 148).

JF's blood was found in defendant's trunk liner, as well as on some zip ties that were hidden in the trunk (04/14/09, pp. 186-88; 04/23/09, pp. 38-39, 166; 04/24/09, p. 72). Several calls defendant made to Aragon from jail were intercepted and recorded while defendant awaited trial (04/14/09, pp. 42-44, 48). In one of those calls he asked Ms. Aragon to locate and wash a pair of black shoes and then throw them away (04/22/09, pp. 41-46; 04/23/09,, pp. 121-22). She eventually found the shoes and got rid of them (04/22/09, pp. 96-97).

Defendant admitted to breaking JF's jaw but minimized his conduct and put much of the blame for the altercation on JF (04/27/09, pp. 22-27, 35-37). He further claimed that JF had died of a drug overdose on July 11, 2007, and that he "didn't know what to do," so he threw her over the cliff and buried her (04/27/09, pp. 75-85).

STATEMENT OF THE CASE

Defendant was charged with felony murder as follows:

COUNT I-MURDER IN THE FIRST DEGREE (F-1)

> Between and including July 11, 2007 and July 12, 2007, SALVATOR ESQUIVEL-CASTILLO

> unlawfully and feloniously, acting alone or with one or more persons, **committed or attempted to commit kidnapping** and, in the course of or in furtherance of that crime, or in the immediate fight therefrom, the death of [JF], a person, other than one of the participants, was caused by anyone; in violation of section 18-3-102(1)(b), C.R.S.

(Court File, pp. 28-29) (emphasis added).

Count 2 charged defendant with first degree kidnapping, as follows:

> COUNT 2-FIRST DEGREE KIDNAPPING (F-1)
>
> > Between and including July 11, 2007 and July 12, 2007, SALVATOR ESQUIVEL-CASTILLO unlawfully, feloniously, and **forcibly seized and carried** [JF] from one place to another with the intent thereby to force the victim or another person to make a concession or give up anything of value in order to secure the release of the victim who was under the actual or apparent control of the defendant.
> >
> > Further, the victim suffered bodily injury; in violation of section 18-3-301(l)(a),(2), C.R.S.

(Court File, pp. 28-29) (emphasis added).

I. Motion for judgment of acquittal after case in chief

After the People rested, defense counsel moved for a motion for judgment of acquittal (04/24/09, pp. 100-03). After the prosecutor responded, defense counsel stated as follows:

> [The prosecutor] is asking this court to greatly expand the law of kidnapping. The law of kidnapping is clear. It has to be with force, and you have to carry and seize someone from one place to another. And nowhere in any of the law that I'm aware of is there anything of kidnapping with mind control; that I've got this person to do whatever I want and the fact that she's coming with me is somehow kidnapping and that I'm forcing and seizing her. Kidnapping is a physical crime with force and seizure. . . .

(*Id*., p. 109).

The court pointed out that kidnapping can be committed in more than one way, including enticing or persuading a person to go from one place to another (*Id*.). The defense responded:

> Except they have not charged it that way. **We have to look at the Information as presented and as charged against [defendant] at this point**. . . . [I]f we look at Count 1, "Acting alone, [he] committed or attempted kidnapping in the course or furtherance of that crime." [In Count

> 2], [f]irst degree kidnapping, they stated, "Forcibly seized and carried [JF] from one place to another." If we look at the Information provided by the People, that's the charges that [they are] going forward to this jury on.

(*Id*., p. 110) (emphasis added).

In response, the prosecutor noted:

> [T]he definition of kidnapping is the definition that the Court cited. Just because Count 2 is charged [with specificity to one subsection] doesn't mean that's the nature and the theory of the kidnapping [for felony murder – Count 1]. Kidnapping in and of itself is kidnapping, and there [are different] ways to commit kidnapping. Under felony murder, it doesn't say it has to be first degree kidnapping under the statute. It says kidnapping.
>
> As far as that being our theory, that's not correct. We charged it as attempt[] to commit kidnapping or committed kidnapping, and in the course . . . or furtherance [of] that crime, [or] immediate flight therefrom, [JF] died.

(*Id*.)

The court then asked the prosecutor, "Is what you just argued that the jury could find the Defendant not guilty of first degree kidnapping in Count 2, but there would still be first degree kidnapping under the enticement and persuasion theory that would support a conviction

under Count 1?" (*Id.*, p. 111). The prosecutor responded, "Or second degree kidnapping, Judge. You can commit kidnapping in several different ways. Just because we charged [it] that [way in] Count 2, it doesn't mean that's the only way that kidnapping can be committed [for felony murder in Count 1]" (*Id.*, pp. 111-12).

As the parties discussed the issue further, the court asked the defense about the alternate ways first degree kidnapping could be committed (*Id.*, p. 114). Defense counsel asked the court for clarification on whether it was asking about Count 1 or Count 2 (*Id.*). The court indicated it was asking with regard to Count 2, to which defense counsel replied:

> **As regards to Count 2, it hasn't been charged that way. They specifically have chosen in the Information forcibly seized and carried in Count 2**. So I don't think the entices or persuades . . . relates to Count 2.
>
> If we're talking about [Count] 1 . . . [i]f you're looking at the first degree kidnapping . . . one, when she goes into Wendy's, she's no longer being forcibly seized or carried.
>
> Two, in regards to section B on first degree kidnapping . . . if you were to believe that he was wooing her or enticing her back into the car, . . .

> there is no evidence that his intent [i]n doing that was to then at that point hold her until somebody gave a concession. There's no evidence of that.
>
> If we go on to their argument that this could be second degree kidnapping, again, once she goes into the Wendy's, there is no evidence that she was knowingly seized and carried. Seized and carried. We're not talking about mental control or coercion.
>
> **There is no kidnapping under [the] law that would support the felony murder charge.**

(*Id.*, pp. 115-16) (emphasis added).

II. Jury instructions

At the conclusion of the evidence, the court instructed the jury that, as to the felony murder count, the jury had to determine whether the victim had been forcibly seized and carried from one place to another, **or** knowingly enticed or persuaded to go from one place to another, **or** knowingly imprisoned or forcibly secreted, **or** simply seized and carried from one place to another (Court File, pp. 505-07; 04/30/09, p. 83) (Instructions 21-23) (emphasis added). With respect to the elements of the first degree kidnapping charge, the jury was specifically instructed that defendant had to have forcibly seized and carried the

victim (Court File, p. 508). Likewise, the verdict form for the felony murder count required the jury to elect the manner in which the underlying kidnapping had been perpetrated (Court File, pp. 520-21).

The court went through the instructions with counsel in order to give both parties the opportunity to make objections on the record (04/30/09, p. 82). Defense counsel objected to the court giving an instruction on evidence of flight (*Id.*, pp. 82-83). He did not object to the court's proposed felony murder instructions (*Id.*, pp. 83-84).

III. Closing argument

During closing argument, the defense attorney commented on all the different ways kidnapping could be committed with respect to the felony murder charge, and why the jury should find that the prosecution had failed to prove all of them. Specifically, she stated as follows:

> Let's see, it was about 8:00 or so, 10:30 at night, if you believe that she came walking out there that night. Oh, 10:30 that night he decides I'm going to **force** you. I'm going to **hold** you here. I'm going to **hide** you. **Look at the language of those <u>charges</u>**. Kidnapping. I'm going to **hold** you and I'm going to keep you here for ransom,

> and the ransom is a green card. I'm going to hold you here until somebody gives me a green card. How ridiculous is that ladies and gentlemen?
> . . . .
> Does it make any sense that he's going to kidnap [JF] and **hold her and secret her** until she gives him the green card?

(05/01/09, pp. 25-26) (emphasis added).

IV. Verdicts

The jury found defendant guilty of Count 1, felony murder, and indicated that defendant "knowingly enticed or persuaded [JF] to go from one place to another" as the specific method of kidnapping for the predicate offense (Court File.pdf, pp. 520-21). It found defendant not guilty of Count 2, first degree kidnapping "seized and carried from one place to another" (*Id.*, p. 522). Lastly, it found defendant guilty of second degree murder.

V. Post-trial motion for judgment of acquittal

Several days after the jury returned its verdicts, defendant filed a motion for judgment of acquittal as to the felony murder charge, in which he alleged that the information was deficient (Court File, pp. 539-41). The prosecution filed a response (Court File, pp. 542-546), and the

trial court addressed the motion at the sentencing hearing on June 19, 2009, stating in pertinent part, as follows:

> I've looked at what I'll say is a rough draft of the transcript and there isn't any, that I can tell, objection to the [felony murder] instruction. I do recall that we discussed this in chambers. I recall a discussion about whether these alternate theories should be instructed as to Count 2. And I ruled that that would not be permissible [because] the people had alleged a particular theory in count 2. And it would be improper to expand that to – to the other potential theories of kidnapping.
>
> With regard to Count 1, I do recall a discussion, but I don't recall an objection. But I guess most importantly the record doesn't indicate that there was an objection. . . . I think the issue that's before us right now is whether the constitutional right of the defendant was impacted when an essential element of the charging document is alleged to have been altered after the trial has begun.
>
> . . . .
>
> [W]hen a count of an information in a criminal case identifies with particularity the exact section of the statute [on] which the prosecution is based, no other statute can be substituted for the one selected in the charging information.
>
> So that is consistent with my finding that it would have been improper to instruct the jury on count 2 with regard to the alternate theories of

kidnapping. However, with regard to the facts in this case, what is alleged in count number 1 as the underlying felony for the felony murder is kidnapping. Not first degree kidnapping, not kidnapping with a particular theory, and not second degree kidnapping

. . . .

I don't find any authority for the proposition that the defendant could assume that what was alleged in count 2 would control what was alleged in count 1 when count 2 was not incorporated by reference into Count 1. The language of count 2 is first degree kidnapping. The language of count 1 is just a generic kidnapping. So first, I find that it was not error to instruct the jury as we did. If it was error then I'm to look at whether or not the defense made an objection. I find that they did not. They did not make an objection to count number 1.

So the analysis is whether then plain error has occurred. . . .

I note that the defendant has been defended by very competent trial counsel in this case. And if such a material change in the nature of the case had occurred, it would seem to me that the record would be very, very clear that the defendant had objected to it . . . .

Secondly, the theory of defense as I understood it from the defendant's testimony was that no kidnapping of any kind had taken place. That [JF] voluntarily got herself to the Powers Ranch that evening. So in the context of this case, I find

> that there was not a reasonable possibility that the allegedly erroneous instruction contributed to the conviction. So I conclude; therefore, that first, with regard to the motion for judgment of acquittal, the evidence is sufficient to sustain the convictions found by the jury.
>
> Second, there is no error with regard to how the jury was instructed with regard to [Count 1]. Third, if there was error, that issue was not objected to . . . . And finally, if I were to find that the instruction was erroneous, I further find there was not a reasonable probability or possibility that the erroneous instruction contributed to the conviction under the particular facts and theories of this case. So for that reason, the motion for judgment of acquittal is denied.

(06/19/09, pp. 8-11).

SUMMARY OF THE ARGUMENT

A variance occurs when the charge contained in the charging instrument differs from the charge of which a defendant is convicted. Here, there was no variance, because Count 1, felony murder, charged defendant with kidnapping *generally* as the predicate crime. Thus, defendant was aware that he would have to defendant against any type of kidnapping with respect to Count 1.

The specificity of the first degree kidnapping charge in Count 2 has no bearing on what was charged in Count 1, because for one count to incorporate another count, there must be a clear reference to the other count. Here, the information did not incorporate Count 2 into Count 1, so there was no reason to look to any other charges to determine exactly what was charged in Count 1.

Defendant's reliance on cases in which a substantive defect in the charge is alleged, is misplaced. In those cases, the court looked to other charges to determine whether the defendants were prejudiced by the alleged defect in form. It did not look to the other counts to limit or inform what the defendants were charged with under the charge the defendants were challenging.

Here, the charging document provided constitutional notice of the crime instructed, and the jury instructions did not subject defendant to the risk of conviction for an offense that was not originally charged. Thus, no constructive amendment occurred.

ARGUMENT

The jury instructions did not constructively amend the charging document, because the predicate offense for the felony murder charge in Count 1 was kidnapping *generally*, and in no way did that count incorporate or refer to the first degree kidnapping charge in Count 2.

A. Standard of review

The People disagree with defendant's recitation of the standard of review, and disagree that defendant properly preserved this issue (OB, pp. 6-8). Defendant's motion for judgment of acquittal at the end of the prosecution's case-in-chief specifically addressed the different ways in which first degree kidnapping could be carried out with respect to the felony murder count (04/24/09, pp. 113-15). The defense attorney also acknowledged that while the felony murder count charged, as the predicate offense, kidnapping *generally*, it was specifically charged as "forcibly seized and carried" as to the first degree kidnapping charge (04/24/09, pp. 114-15). Lastly, defendant failed to object to the jury instructions when given the opportunity to do so on the record (04/30/09, pp. 82-84).

Because defendant failed to timely raise his variance claim in the trial court, review is for plain error. Crim. P. 52(b); *People v. Weinreich*, 98 P.3d 920, 923 (Colo. App. 2004) (applying plain error review to unpreserved challenge to a constructive amendment), *aff'd*, 119 P.3d 1073 (Colo. 2005); *People v. Simmons*, 973 P.2d 627, 629 (Colo. App. 1998) (reviewing for plain error where record was unclear whether defendant had objected); *see also United States v. Gonzalez Edeza*, 359 F.3d 1246, 1250 (10th Cir. 2004) (reviewing for plain error unpreserved claim of constructive amendment). Plain errors are those that "so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction." *People v. Miller*, 113 P.3d 743, 748-49 (Colo. 2005).

B. Law and analysis

A variance occurs when the charge contained in the charging instrument differs from the charge of which a defendant is convicted. *People v. Rodriguez*, 914 P.2d 230, 257 (Colo. 1996). There are two types of variance: a simple variance, which occurs when the charged elements are unchanged, but the evidence presented at trial proves

facts materially different from those alleged in the information; and a constructive amendment, which changes an essential element of the charged offense and thereby alters the substance of the charging instrument. *People v. Pahl*, 169 P.3d 169, 177-178 (Colo. App. 2006); *People v. Huynh*, 98 P.3d 907, 911 (Colo. App. 2004).

Unlike a simple variance, a constructive amendment effectively subjects a defendant to the risk of conviction for an offense that was not originally charged in the charging instrument. *Rodriguez*, 914 P.2d at 257. Thus, a constructive amendment is per se reversible error. *Huynh*, 98 P.3d at 911. A simple variance is not grounds for reversal unless it is material to the merits of the case or prejudicial to the defendant. § 16-10-202, C.R.S. (2014); *Pahl*, 169 P.3d at 178. A reviewing court considers the surrounding circumstances when determining whether a simple variance in an information caused prejudice. *People v. Rice*, 198 P.3d 1241, 1246 (Colo. App. 2008).

Here, there was neither a constructive amendment nor a simple variance.[1] Thus, no error, let alone plain error, occurred.

The felony murder count substantively tracked the language of the statute, and specified the underlying predicate offense of kidnapping. It did not reference a specific type or subsection of the kidnapping statute, but rather put defendant on notice that he would have to defend against kidnapping and attempted kidnapping *generally* with respect to Count 1 (Court File, p. 29). In contrast, Count 2 specifically referenced a particular manner in which defendant was alleged to have kidnapped JF, thus putting defendant on notice that *as to that charge*, he needed to defend only against that method of kidnapping (*Id*).

Defendant contends that because the prosecution chose to specify one alternative for the first degree kidnapping charge in Count 2, he was only charged with that particular manner of committing kidnapping as it related to Count 1 as well (OB, pp. 14). However, defendant's claim fails at the outset because it rests on the premise that

[1] Defendant does not contend there was a simple variance.

Count 2 informs what was charged in Count 1. This Court rejected that premise more than a decade ago in *People v. Melillo*, 25 P.3d 769 (Colo. 2001). There, this Court held that for one count to incorporate another there must be a clear reference to the other count. Here, because the information did not incorporate Count 2 into Count 1, and in fact referenced kidnapping **generally** in the felony murder count, defendant's claim fails. *See Melillo*, 25 P.3d at 777; *People v. Steiner*, 640 P.2d 250, 252 (Colo. App. 1981) ("Although one count in an information may, by proper reference, incorporate the allegations more fully set forth in another count, such reference must be clear, specific, and leave no doubt as to what provision is intended to be incorporated.").

Defendant attempts to distinguish *Melillo* because the **facts** of that case were "quite different" (OB, p. 17). However, *Melillo*'s significance has nothing to do with its facts; *Melillo* is dispositive here because of the way the counts were **charged**. As noted, the law in this area recognizes that a charge is not limited by another charge unless the former expressly incorporates the latter. Here, no such

incorporation occurred, so the specificity of the charge in Count 2 is irrelevant to Count 1.

Defendant also relies on several cases for the proposition that other counts in an information may provide notice of the predicate crime for felony murder. However, the cases he cites, *People v. Palmer*, 87 P.3d 137 (Colo. App. 2003); *People v. Auman*, 67 P.3d 741 (Colo. App. 2002), *rev'd*, 109 P.3d 647 (Colo. 2005); and *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002), all deal with a fundamentally different issue. Those cases involved alleged defects in the forms of particular charges, specifically, alleged failures to give notice of the crimes committed. In each case, the court held that the surrounding circumstances, including other charges, could be considered in determining whether the defendant was prejudiced by the alleged defect in form. In none of those cases did the defendants argue what defendant argues here, which is that the jury instructions changed what he was charged with in the first place or that counts in the charging document limited or informed what was charged in the other counts.

In *Auman*, the defendant asserted that the information charging her with felony murder did not provide adequate notice of the predicate felony, which was burglary. *Auman*, 67 P.3d at 750. The court found that the language in the felony murder count followed the language of the felony murder statute, which lists "burglary" as one of the predicate felonies. Accordingly, the information sufficiently advised defendant that she had to defend against burglary. *Id.* Furthermore, she was charged with both first and second degree burglary, so she was aware that either one could become the basis for her felony murder conviction. *Id.* at 751.

In *Richardson*, the defendant contended that the information was insufficient as to the burglary charge, because it did not fully advise him of the charges he was facing and prevented him from adequately preparing for trial. 58 P.3d at 1044. There, the burglary charge included specific underlying offenses – assault, robbery and false imprisonment – as well as the language "or other crimes against a person or property." *Id.* The defendant argued that inclusion of the latter language, which tracked the general language of the second

degree burglary statute, allowed the prosecution to "to introduce evidence of any number of underlying crimes of which he was not apprised." *Id.* at 1045. The court of appeals found that even if the additional language constituted a defect in form, the defendant had failed to demonstrate any resulting prejudice because he had sufficient notice of the elements and factual basis for the underlying charges prior to trial. *Id.*

Palmer argued that because the elements of burglary were not specified within the felony murder count, the information did not provide adequate notice of the predicate felony of burglary, and the trial court therefore lacked jurisdiction. *Palmer*, 87 P.3d at 139. The court found that the information was substantively sufficient, and also rejected the defendant's argument that there was an error in form resulting in prejudice, because the information included the predicate crime for the felony murder charge (even though the burglary charge did not specify the underlying crime that defendant intended to commit "therein").

Thus, in all three cases, the defendants alleged that the charge was substantively defective, or if it was not, it was not specific enough to defend against. That is completely different than what defendant argues here, which is that the kidnapping he was charged with as the predicate crime for felony murder was changed or amended by the jury instructions at trial. In other words, the error that the above-defendants alleged is not the error that defendant asserts before this Court, and is not even included within the issue on which this Court granted certiorari. Further, in those cases, the court of appeals looked to other charges to determine whether the defendants were prejudiced. It did not look to other counts to limit or inform what the defendants were charged with under the charge the defendants were challenging, which is what defendant seeks to do in this case.

People v. Petschow, 119 P.3d 495 (Colo. App. 2004), a constructive amendment case, does not command a different result. There, the defendant challenged three of his four aggravated motor vehicle theft (AMVT) convictions because the instructions for those three charges added an alternative element that was not included in the original

charging document. *Id*. at 503. Specifically, the three counts charged the defendant with AMVT on the basis that he retained possession or control of the motor vehicle for more than 24 hours. *Id*. at 504. However, the jury instruction also allowed the jury to convict if the defendant "used the motor vehicle in the commission of another crime, other than a traffic offense." *Id*.

The court of appeals held that

> [t]he instruction at issue here not only defined the offense stated in the charging document, but also incorporated an alternative element that defined an uncharged crime. The additional element pertains to a crime that arises under a separate subsection of the statute that criminalizes auto theft and requires factual findings related to actions, times, and places not encompassed in the original charges. The addition of this element occurred after all evidence had been received in the case. Thus, because the constructive amendments added an uncharged crime, they were not merely technically changes; they were substantive and prejudicial.

Id. (internal citations omitted).

That is not what happened here. The charging document charged defendant with kidnapping generally as the predicate crime for felony

murder. Consequently, defendant was put on notice that he would have to defendant against any manner of kidnapping or attempted kidnapping with respect to the felony murder count. From the language in the charging document, defendant cannot contend that he was only prepared to defend against allegations that he forcibly seized and carried JF with respect to the felony murder count. *See People v. Madden*, 111 P.3d 452, 457 (Colo. 2005). Defendant's argument to the contrary, once again, rests on looking to Count 2 to inform Count 1, which is prohibited by this Court's precedent.

The charging document provided constitutional notice of the crime instructed. Defendant was given notice that he would need to prepare a defense with respect to Count 1 to allegations of any type of kidnapping (or attempted kidnapping). Furthermore, the jury instructions properly defined each of those methods of kidnapping (to which defendant did not object). Thus, no constructive amendment occurred.

Assuming for arguments sake this Court determines otherwise, reversal is warranted only if the record demonstrates that the variance affected defendant's substantial rights, and so undermined the

fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *Miller*, 113 P.3d at 750. The record fails to do so here.

Defendant's theory of the case from his own testimony was that no kidnapping of any kind took place; rather, JF died of an accidental drug overdose after voluntarily getting herself to the ranch that evening (04/27/09, pp. 75-85). He has failed to demonstrate that the alleged variance here impaired his ability to defend against the charge. *See Miller*, 113 P.3d at 750 (the defendant bears the burden to prove prejudice under the plain error standard). Therefore, assuming any error occurred, reversal of his conviction is not required.

CONCLUSION

For the foregoing reasons and authorities, this Court should affirm the ruling of the court of appeals.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **RESPONDENT'S ANSWER BRIEF** upon **ERIC A. SAMLER**, via Integrated Colorado Courts E-filing System (ICCES) on December 15, 2014.

/s/ Tiffiny Kallina