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<tr><td>THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

JAMALE D. TOWNSELL,

Defendant-Appellant.</td><td></td></tr>
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<tr><td colspan="2">OPENING BRIEF</td></tr>
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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:

1. The brief complies with the applicable word limits set forth in C.A.R. 28(g). It contains 9,475 words.
2. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A). For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Krista A. Schelhaas
Krista A. Schelhaas

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STATEMENT OF THE ISSUES

I. Whether the district court erred in admitting DNA match evidence absent statistical significance.

II. Whether the district court erred in denying Mr. Townsell's motion to exclude DNA match evidence due to late disclosure of the expert's report.

III. Whether the district court erred in denying Mr. Townsell's motion for mistrial after the prosecutor elicited evidence of his previous incarceration.

IV. Whether the district erred in admitting testimonial hearsay in violation of Mr. Townsell's constitutional right to confront witnesses.

V. Whether the evidence is sufficient to sustain the felony menacing and aggravated robbery convictions.

VI. Whether multiple trial errors resulted in cumulative error requiring reversal.

VII. Whether the district court erred in imposing consecutive sentences for the aggravated robbery convictions.

STATEMENT OF THE CASE AND FACTS

On June 15, 2013, an armed and masked man sprinted into the Bank of the West in Aurora and demanded money from the bank teller, K.K. The man hurdled the counter, opened the teller drawer, and took $1,104. (R. Ex. 1 (video); R. Tr. 3/12/14, p. 92, l. 23 – p. 93, l. 3; p. 93, ll. 15-18; p. 139, ll. 21-24). He ran back out the front door, got into a car, and drove away. (R. Tr. 3/12/14, p. 96, ll. 18-21). The robbery took twenty-eight seconds. (R. Ex. 1 (video)). The stolen getaway car was discarded in a parking lot several blocks from the bank. (R. Tr. 3/13/14, p. 11, ll. 5-9; p. 22, l. 20 – p. 23, l. 5).

Two bank employees were inside bank lobby that morning: K.K. and M.O. M.O. described the robber as 5'8" tall. (R. Tr. 3/12/14, p. 102, ll. 18-19). An eye-witness across the street from the bank testified that the robber was 5'9" tall. (*Id.* at p. 56, ll. 11-13). A patrol officer determined that the robber was 5'7" by observing the robber near the height chart on the bank's front door frame. (*Id.* at p. 176, ll. 17-20; p. 177, ll. 12-16). None of the prosecution witnesses testified that the robber was more than 5'9" tall. The only other physical description provided by witnesses was that the robber was left-handed. (*Id.* at p. 84, ll. 9-20; p. 110, ll. 14-20). Mr. Townsell is 6'2" and right-handed. (R. Tr. 3/17/14, p. 42, ll. 12-16; p. 65, ll. 11-14).

A GPS tracking device was hidden inside the money. (R. Tr. 3/12/14, p. 67, ll. 23-24). Officers tracked the GPS device and located the money in a bag discarded on the street. (R. Tr. 3/13/14, p. 84, l. 16 – p. 85, l. 13). The bag also contained a sweatshirt, cell phone with tape, shoe, and red bandana. (*Id.* at p. 85, ll. 8-13). Around the corner, officers found Mr. Townsell's wife, Ebony Ruffin, in her car. (R. Tr. 3/12/14, p. 211, l. 22 – p. 212, l. 14). In the trunk of her car, the officers found a gun and another shoe. (*Id.*).

The phone registered to Mr. Townsell called the phone registered to Ms. Ruffin before and four minutes after the robbery. (R. Tr. 3/14/14, p. 80, l. 7 – p. 81, l. 13). The People used an expert to introduce evidence tracking the phone calls and the GPS device. (*Id.* at pp. 42-158). Mr. Townsell's phone was tracked near the bank and Ms. Ruffin. (PR Ex. 111).

A DNA expert testified that Mr. Townsell's DNA profile matched items in the bag: the shoes, pantyhose, and bandana. (R. Tr. 3/17/14, p. 116, ll. 2-4; p. 117, ll. 3-4, 15-17). The expert testified that Mr. Townsell's DNA was part of a mixture found on the mask. (*Id.* at p. 117, ll. 18-25).

Mr. Townsell introduced evidence of an alternate suspect, Ms. Ruffin's brother, who was 5'7" and lived close to the getaway car owner. (R. Tr. 3/17/14, p. 42, ll. 7-11; p. 216, l. 19 – p. 217, l. 16; PR Ex. D). The GPS device was tracked

near Ms. Ruffin's sister's address shortly before Ms. Ruffin was arrested. (R. Tr. 3/17/14, p. 223, l. 11 – p. 224, l. 16).

Following a jury trial, Mr. Townsell was convicted of two counts of aggravated robbery, two counts of felony menacing, and theft. He was sentenced to twenty-two years for the aggravated robbery count involving K.K. and ten consecutive years for the aggravated robbery count involving M.O. (R. CF, p. 326; R. Tr. 5/12/14, p. 51, ll. 1-11). He also received concurrent sentences of six years for felony menacing involving K.K., two years for felony menacing involving M.O., and eighteen months for theft. (R. CF, p. 326-27; R. Tr. 5/12/14, p. 51, l. 12 – p. 52, l. 7).

Mr. Townsell appeals his judgments of conviction and sentence.

SUMMARY OF THE ARGUMENTS

The district court erred in allowing the DNA expert to testify that Mr. Townsell was a DNA "match" to the shoes, bandana, mask, and pantyhose without requiring any statistics to support her conclusion.

The district court erred in admitting DNA "match" evidence of the bandana, mask, and shoes because the expert's report was disclosed two weeks before trial. Prior to the disclosure, defense counsel was provided with a report stating that only the pantyhose were a "match."

The district court erred in denying Mr. Townsell's mistrial motion after a witness testified that Mr. Townsell was in jail in 2008 or 2009. A cautionary instruction could not cure the harm because the evidence was thin and the prosecutor elicited the witness's testimony.

The district court erred in admitting the testimonial hearsay of the primary eye-witness because Mr. Townsell had no prior opportunity to cross-examine the witness.

The evidence is not sufficient to sustain the felony menacing and aggravated robbery convictions as to M.O. because there was no evidence that the robber knew any other person was in the bank lobby.

Multiple trial errors occurred. Even if this Court determines that any of the individual errors were not reversible, the cumulative effect requires reversal.

The district court erred in imposing consecutive sentences for the aggravated robbery convictions because they were based on the same acts.

ARGUMENTS

I. The District Court Erred in Admitting DNA Match Evidence Without Requiring Any Statistical Significance

A. Standard of Review

A district court's evidentiary rulings are reviewed for an abuse of discretion.

People v. Marks, 2015 COA 173, ¶ 23.

B. Preservation

This issue is not preserved. A district court's unpreserved evidentiary errors are reviewed for plain error. *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005). Plain error review addresses error that is obvious and substantial and that so undermines the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *Id*. at 750.

C. Legal Standards Governing DNA Evidence

DNA evidentiary rulings are governed by CRE 403 and 702. *People v. Wilkerson*, 114 P.3d 874, 877 (Colo. 2005); *Marks*, ¶ 24. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." CRE 702. Evidence admitted under CRE 702 must be reliable and relevant. *Wilkerson*, 114 P.3d at 877; *Marks*, ¶ 24.

A DNA "match, unaccompanied by its statistical significance, is essentially meaningless." *Fishback v. People*, 851 P.2d 884, 893 n.18 (Colo. 1993), *abrogated on other grounds by People v. Shreck*, 22 P.3d 68 (Colo. 2001). Statistical significance is "usually expressed in terms of the likelihood that the

crime scene samples came from a third person who has the same DNA profile as the suspect." *Id.* at 888. Under CRE 702, a declared DNA match requires that the expert demonstrate "the reliability of the method of reaching statistical or numerical conclusions related to the underlying evidence." *Wilkerson*, 114 P.3d at 877. An independent analysis is "necessary to show that statistical or numerical results are also relevant and reliable." *Id.*

A DNA match result that is not accompanied by statistical probability data is irrelevant. *Marks*, 2015 COA 173, ¶¶ 30-31. As noted by the *Marks* Division and other jurisdictions, "[w]ithout the probability assessment, the jury does not know what to make of the fact that the patterns match: the jury does not know whether the patterns are as common as pictures with two eyes, or as unique as the Mona Lisa." *United States v. Yee*, 134 F.R.D. 161, 181 (N.D. Ohio 1991), *aff'd sub nom. United States v. Bonds*, 12 F.3d 540 (6th Cir. 1993); *accord United States v. Davis*, 602 F. Supp. 2d 658, 679 (D. Md. 2009).

The Colorado Supreme Court's language requiring that statistics accompany any evidence that a suspect matches DNA found at a crime scene is clear. In *Fishback*, the supreme court stated that DNA evidence without statistical significance is "meaningless," and the statistical significance of a match is the "pivotal element of DNA analysis." *Fishback*, 851 P.2d at 893 n.18 (quoting

People v. Barney, 8 Cal. App. 4th 798, 817 (1992)). In *Wilkerson*, the supreme court relied on *Fishback* to require relevant and reliable statistical and numerical calculations. *Wilkerson*, 114 P.3d at 877.

Other divisions of this Court have applied the supreme court's language. In *Marks*, the division concluded that the mandate requires statistical probability data for a conclusion that a defendant is a "match," is "included," "cannot be excluded," and to cases where there is "no conclusion." *Marks*, ¶¶ 30-31, 42 (also collecting cases from other jurisdictions). In *People v. Jimenez*, 217 P.3d 841, 867 (Colo. App. 2008), the division highlighted the *Fishback* requirement that DNA match evidence include statistical significance.

The DNA match evidence used against Mr. Townsell required statistical probability data.

D. Application

The DNA expert repeatedly stated that Mr. Townsell's DNA was a "match" to the shoes, pantyhose, bandana, and mask. (R. Tr. 3/17/14, p. 116, ll. 2-4; p. 117, ll. 3-4, 15-17; p. 117, l. 25-p. 118, l. 2). However, the expert did not provide statistics to support her conclusions. She made one statement regarding the left shoe, saying "I still get a statistic that is more rare than 1 in 300 billion." (*Id.* at p. 116, ll. 20-21). However, she did not provide statistics for any other items or

explain what that statistic meant. Therefore, the DNA match evidence, absent statistical significance, was irrelevant and erroneously admitted.

E. Plain Error

This error was obvious. The Colorado Supreme Court's rule requiring statistical probability for DNA match evidence has been in place since 1993. *See Fishback*, 851 P.2d at 893; *see also Wilkerson*, 114 P.3d at 877; *People v. Lee*, 18 P.3d 192, 197 (Colo. 2001); *Jimenez*, 217 P.3d at 867. It was subsequently discussed and applied in published cases. *See People v. Cook*, 197 P.3d 269, 275 (Colo. App. 2008) (an error is obvious when it is based on a clear and long-established rule).

This error was substantial. The expert repeatedly stated that Mr. Townsell's DNA was a match. (R. Tr. 3/17/14, p. 112-117). The prosecutor highlighted this evidence in closing. First the prosecutor stated, "The clothes and the shoes and the mask and the things he wore inside the bank were collected within about an hour or less, and those were tested to confirm a DNA profile that matched. He was the profile match for those items." (R. Tr. 3/18/14, p. 22, ll. 6-9). He went on to highlight the DNA evidence:

> You heard about the testimony from -- or about the analysis that [the DNA expert] did. She told you about the methods that she uses in the lab to collect DNA profiles from items and how she

> compared that to the sample that she received from Mr. Townsell. Jamale Townsell was a match to those items tested. She explained that the number of items that were sent for her review and analysis at the lab and that she had collected full DNA profiles from items like the glove, the shoes, the bandana, the mask and the pantyhose. She talked about comparing those to the known sample, and she testified that he was the source of that DNA, and that she was able to get full DNA profiles from those
> samples.

(*Id.* at p. 29, ll. 8-20). The prosecutor focused on the DNA evidence to discount the fact that Mr. Townsell did not match the robber's physical description: "You might ask during deliberation should we require a perfect physical description[?] . . . [B]ut your common sense will tell you that the same mask that he used to try and hide from the cameras and essentially from you is the mask that went to the lab that provided the profile and matched Mr. Townsell's DNA." (*Id.* at p. 29, l. 25 – p. 30, l. 14).

The error so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *See Miller*, 113 P.3 at 150. Significantly, identity was the key trial issue. Mr. Townsell did not match the description of the robber. Every witness described the robber between 5'7" and 5'9" tall. (R. Ex. 112 (911 call); R. Tr. 3/12/14, p. 56, ll. 11-13; p. 86, ll. 1-2; p. 102, ll. 18-19; p. 175, ll. 12-15). The officer testified that he was able to gauge

the robber's height by the height chart on the bank's front door frame and by observing objects in the building as the robber moved past them. (R. Tr. 3/12/14, p. 176, ll. 11-20). The surveillance video and photographs show the robber's head far below the six foot marker on the bank's door frame. (R. Ex. 1 (video); PR. Exs. 3, 4, 22).

Mr. Townsell is 6'2" tall. (R. Tr. 3/17/14, p. 42, ll. 12-16). This difference represents a five to seven inch height discrepancy and also the difference between a smaller than average-sized man, and a taller than average-sized man.

Additionally, the robber was left-handed, and Mr. Townsell is right-handed. The robber used his left hand to hold the gun and later changed hands to use his left hand to grab the money, displaying left-hand dominance. (R. Tr. 3/12/14, p. 84, ll. 11-13; p. 110, ll. 15-20). The investigator testified that after witnessing Mr. Townsell several times, he observed that Mr. Townsell was right-handed. (R. Tr. 3/17/14, p. 207, l. 16 – p. 208, l. 1).

Next, the DNA evidence of the primary item worn by the robber — the stocking cap — contained a mixture of DNA. (*Id.* at p. 107, ll. 11-15). But the expert and the prosecutor continually highlighted that Mr. Townsell was a DNA "match." (*Id.* at p. 117, ll. 18-25). The jurors asked many questions in this case trying to understand the relevance of the DNA evidence. (R. Tr. 3/17/14, p. 144, l.

7 – p. 148, l. 11).

"[J]urors place great emphasis on DNA evidence—so much so that the evidence has long enjoyed a status of 'mythic infallibility' for juries . . . [and] [i]n the absence of statistics about the probability of DNA patterns, jurors are likely to assume that the probability of a random matching pattern is exceedingly low." *Marks*, ¶ 41.

Finally, Mr. Townsell provided both alibi and alternate suspect evidence in his defense. Remarkably, the alternate suspect was Ms. Ruffin's brother and matched the physical description given by the eye-witnesses. (PR Ex. D). The defense investigator testified that the car used in the robbery was stolen from a location that was close to one of the alternate suspect's addresses. (R. Tr. 3/17/14, p. 216, l. 15 – p. 217, l. 3).

Under these circumstances, where the primary evidence connecting Mr. Townsell to the crime was the DNA expert's testimony that he "matched" the DNA profile of items found at the crime scene, the error in admitting the DNA evidence without statistical significance so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *See Miller*, 113 P.3 at 150.

II. The District Court Erred in Denying Mr. Townsell's Motion to Exclude DNA Match Evidence Based on the Late Disclosure of the Expert's Report

A. Standard of Review

A district court's decision whether to impose a sanction for a discovery violation is reviewed for an abuse of discretion. *Lee*, 18 P.3d at 196.

B. Preservation

This issue is preserved. Defense counsel objected to the late disclosure, specifically objecting to the admission of "any DNA evidence other than the pantyhose." (R. Tr. 3/14/14, p. 9, l. 8).

C. Discussion

Pursuant to Crim. P. 16(I)(a)(1)(III) and (b)(3), "[a]ny reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons," must be made available to the defendant "as soon as practicable but not later than 35 days before trial."

In fashioning a remedy for a discovery violation, courts must consider the prejudice to the party, the reason for the delay, and the feasibility of curing the prejudice. *Lee,* 18 P.3d at 196. The ultimate "goal must be to cure any prejudice resulting from the violation." *Id.* Courts should also consider the defendant's

speedy trial rights. *Id.* at 198 n.4.

Defense counsel received the expert's updated report less than two weeks before trial. (R. Tr. 3/14/14, p. 6, ll. 15-19). In the report, the expert concluded for the first time that "[t]o a reasonable degree of scientific certainty and in the absence of an identical sibling, Townsell is the source of the DNA profiles developed from" the pantyhose, red bandana, and right shoe." (R. Supp. CF, p. 41). The report also stated that "Townsell is the source of the DNA profile developed from" the left shoe, and "Townsell is the source of the major component of the DNA profile developed from" the hat. (*Id.*). This report was created February 14, 2014, and provided to defense counsel just a "couple of weeks before trial." (R. Tr. 3/14/14, p. 6, ll. 18-21; R. Supp. CF, p. 41). The prior report stated only that the DNA profile from item number 2.1, the pantyhose, matched Mr. Townsell's profile. (R. Supp. CF, pp. 34, 38). Though the prior report listed the collection of other items, it did not specify a match to those items. (*Id.* at p. 38).

Defense counsel explained:

> I knew that there was a DNA match on a pair of pantyhose and I think I told the Court that, and that report did come to me more than 30 days in advance and, frankly, DNA from pantyhose which nobody has identified as being used in a robbery and a husband's DNA being on his wife's pantyhose is something that argument with the jury or presentation with the jury I can deal with, but the laboratory report now saying the

> same items that were tested now are also involving other items that were seized, if you will, from Ebony Ruffin's general possession from the Pontiac and the bag that was left outside, that was not released until within the last two weeks of trial. So there's another disclosure issue and, frankly, I think Rule 16 is pretty clear that this type of stuff needs to be before 30 days.

(R. Tr. 3/14/14, p. 7, l. 16 – p. 8, l. 5).

The district court was "concerned with the number of apparently late disclosures by the People." (*Id.* at p. 24, l. 21-23). The court also recognized that a continuance would not be possible because of the Uniform Mandatory Disposition of Detainer's Act deadline. (*Id.*). The court ultimately allowed the evidence, determining that the information was disclosed in the earlier report even though it did not specify that Mr. Townsell was a match to the other items. (*Id.* at p. 34, ll. 8-15). The court found that the report stated that the items were tested, were indicative of the same unknown male donor, and were the same profile as the pantyhose. (*Id.*).

Importantly, the earlier report made no definitive conclusion as to the other items. This late disclosure prejudiced Mr. Townsell. Defense counsel was not timely notified that the expert would be testifying as to the mask, shoes, and bandana. Mr. Townsell's defense was hampered because the only item previously

disclosed as a DNA match was the pantyhose. As defense counsel explained, no evidence connected the pantyhose to the robbery. Additionally, Mr. Townsell's speedy trial deadline was April 13, 2014. (R. Tr. 1/6/14, p. 4, ll. 22-24).

The DNA evidence severely prejudiced Mr. Townsell because it was the only evidence used to identify him as the robber. Mr. Townsell did not match the description given by any eye-witness. Nor did he match the characteristics viewable on the surveillance video. This late endorsement coupled with the lack of statistical significance of the proffered match evidence painted a slanted view of the evidence.

Because the late disclosure prejudiced Mr. Townsell, the district court erred in failing to exclude the DNA evidence. He is entitled to a new trial.

III. The District Court Erred by Denying Mr. Townsell's Mistrial Motion After the Prosecutor Elicited Evidence of Mr. Townsell's Previous Incarceration

A. Standard of Review

A trial court's denial of a motion for mistrial is reviewed for an abuse of discretion. *People v. Cousins*, 181 P.3d 365, 373 (Colo. App. 2007). When inadmissible evidence is introduced, a court should exercise its discretion to declare a mistrial by considering the nature of the inadmissible evidence and the

value of a cautionary instruction. *People v. Vigil*, 718 P.2d 496, 505 (Colo. 1986). If the evidence is highly prejudicial and the evidence of guilt is not overwhelming, a mistrial must be declared. *People v. Goldsberry*, 181 Colo. 406, 410, 509 P.2d 801, 803 (1973).

B. Preservation

This issue is preserved. Defense counsel moved for a mistrial after the witness testified that Mr. Townsell was previously incarcerated. (R. Tr. 3/17/14, p. 193, ll. 2).

C. Facts

In response to a question whether Mr. Townsell was married to Ebony Ruffin, Ruffin's mother responded, "[i]f it's legal inside the jail, yes." (*Id.* at p. 173, ll. 18-20). Defense counsel quickly changed topics. On cross-examination, the prosecutor asked when Mr. Townsell and Ms. Ruffin were married. (*Id.* at p. 191, ll. 14-15). Ruffin's mother answered that it was 2008 or 2009. (*Id.* at l. 17). The following exchange occurred:

Prosecutor: There wasn't a ceremony that you attended?

Witness: No.

Prosecutor: Were they -- do you know whether there was a ceremony or married under common law?

Witness: I guess they got married in jail while he was still in jail.

(*Id.* at p. 191, l. 21– p. 192, l. 1).

Defense counsel moved for a mistrial, stating, "I am going to move for a mistrial. On direct examination this witness talked about if you can call getting married in jail a marriage. It was clear that the whole issue of the date of marriage was waiting for a ticking time bomb." (*Id.* at p. 193, ll. 2-6).

The trial court denied the motion and instructed the jury:

> I had advised you earlier as part of the Court's voir dire that there would -- at times be instances where the Court would instruct you to disregard something that might be stated by a witness. I do want to address that now. The witness has -- this witness here testified -- had identified the place of marriage between Mr. Townsell and Ms. Ruffin Townsell; namely, that was the jail. I want you to put that entirely out of your mind as if the testimony and the question had never been asked and the response never given. And are you able to do that? I'm looking now for your nods on this. So it's as if you had never heard that. And I see nods from members of the jury.

(*Id.* at p. 202, ll. 6-18).

D. Discussion

"[E]vidence of a defendant's criminal activity, which is unrelated to the offense charged, is inadmissible." *Goldsberry*, 181 Colo. at 409, 509 P.2d at 803. "Improper reference to a defendant's prior conviction or imprisonment during trial, notwithstanding a cautionary instruction, requires a mistrial." *People v. Moore*,

701 P.2d 1249, 1252 (Colo. App. 1985). This is because "[e]vidence of criminal activity other than that for which the defendant is being tried has an inherent tendency to prejudice the jury against the defendant and induce it to find him guilty on the basis of his past activities rather than on the basis of the crime charged." *People v. Elmarr*, 2015 CO 53, ¶ 35, 351 P.3d 431.

Evidence of a defendant's prior criminal acts should be excluded because, (1) "there is a concern that a jury will convict a defendant as a means of punishment for past deeds or merely because the jury views the defendant as undesirable," . . . (2) "there is a 'possibility that a jury will overvalue the character evidence in assessing the guilt for the crime charged,'" . . . (3) "it is unfair to require a defendant to defend not only against the crime charged, but moreover, to disprove the prior acts or explain his or her personality." *Kaufman v. People*, 202 P.3d 542, 552 (Colo. 2009) (quoting *Masters v. People*, 58 P.3d 979, 995 (Colo. 2002)).

The supreme court noted the highly prejudicial nature of prior criminality and held that when the evidence of guilt is not overwhelming, a cautionary instruction cannot cure the prejudice and a mistrial is required. *Goldsberry*, 181 Colo. at 410, 509 P.2d at 803.

The reference to Mr. Townsell's prior incarceration could not be cured by

the trial court's instruction. As stressed earlier, the robber's physical description does not match Mr. Townsell. The height difference is significant because there is a five to seven inch height discrepancy. That is the difference between a smaller than average-sized man, and a taller than average-sized man. And the description was consistent among all of the witnesses; no one described the robber as being even close to six feet tall. Mr. Townsell is 6'2" tall. (R. Tr. 3/17/14, p. 42, ll. 12-16).

Additionally, the robber was left-handed, and Mr. Townsell is right-handed. The robber's left-hand dominance was significant because he first used his left hand to hold the gun and later changed hands so that he could also use his left hand to grab the money. (R. Tr. 3/12/14, p. 110, ll. 17-20). However, the investigator testified that he met with Mr. Townsell "several times," witnessed Mr. Townsell write and sign documents with his right hand, and at the time he witnessed the signature, he was not aware that "left hand versus right hand may be an issue." (R. Tr. 3/17/14, p. 207, l. 16 – p. 208, l. 1). The investigator also testified that the People's discovery showed that Mr. Townsell is right-handed. (*Id.* at p. 208, ll. 2-5).

No evidence connected the pantyhose to the robbery. (R. Tr. 3/12/14, p. 57, ll. 6-12; p. 250, ll. 23-25). The prosecutor's theory that the pantyhose were worn

under the stocking cap seems highly implausible. The robber could not have moved with such quickness and agility while wearing a pair of *dark grey* pantyhose to cover his head and also a dark stocking cap with small eyeholes. Vision under those circumstances would be nearly impossible. The pantyhose inside the bag that contained other items not related to the robbery were not relevant to the robbery.

In the bag with the money, the police found a "t-shirt that had a wire cell phone ear piece duct taped to the inside of a t-shirt." (R. Tr. 3/12/14, p. 246, ll. 8-11). The prosecution did not check for DNA or fingerprints on the t-shirt, phone, or tape. (R. Tr. 3/17/14, p. 64, l. 22 – p. 65, l. 1; p. 131, ll. 10-15). The DNA expert did not test the gloves or any of the other recovered items. (*Id.* at p. 129, ll. 9-18). Especially when considering the alternate suspect evidence, the evidence of guilt was thin, and the reference to Mr. Townsell's prior incarceration was highly prejudicial.

From the testimony, it was also clear that the previous jail time was not related to the current charges. The mother testified that the marriage occurred in 2008 or 2009, and she repeated three times that Mr. Townsell was in jail during the wedding. (R. Tr. 3/17/14, p. 191, l. 14 – p. 192, l. 3). Therefore, this was not a fleeting or ambiguous reference to prior criminality but a clear instance of prior

incarceration for an unrelated crime.

Finally, the jury was instructed, "The credibility of a witness may be discredited by showing that the witness has been convicted of a felony. A previous conviction is one factor that you may consider in determining the credibility of the witness. You must determine the weight to be given to any prior conviction when considering the witness's credibility." (R. CF, p. 282). Coupled with the introduction of the inappropriate prior incarceration evidence, this instruction compounded the error.

Because the evidence of guilt was far from overwhelming, identity was the key jury issue, and the jurors heard evidence that Mr. Townsell was previously incarcerated, the error could not be cured with an instruction. The jurors would not be able to remove from their minds the impermissible inference that if Mr. Townsell was jailed for prior criminal acts, it is more likely he was the robber here. *See Goldsberry*, 181 Colo. at 410, 509 P.2d at 803 (Where prior criminality "evidence is so highly prejudicial, as here, it is conceivable that but for its exposure, the jury may not have found the defendant guilty. In a case like this where the evidence of guilt is not overwhelming and the proof of at least one of the essential elements of the crime charged is entirely circumstantial, the trial court's cautionary instruction to disregard it will not suffice.")

E. Prosecutorial Misconduct

A motion for a mistrial must be granted "where the prosecutor intentionally elicited improper character evidence." *People v. Everett*, 250 P.3d 649, 662 (Colo. App. 2010). A prosecutor has a duty to "see that justice is done by seeking the truth by the presentation of proper evidence." *Goldsberry*, 181 Colo. at 411, 509 P.2d at 804. When the record shows that the prosecutor was aware that a witness's response would "expose to the jury inadmissible and highly prejudicial evidence[, that] conduct in this regard is not to be condoned." *Id.*

The timeline reveals that the prosecutor was aware her questions would elicit a response regarding Mr. Townsell's prior incarceration. First, the witness referenced the jail wedding on direct examination. (R. Tr. 3/17/14, p. 173, l. 20). Defense counsel quickly averted the subject. At that point, it was not clear that the witness meant previous jail time; the jury could have inferred that she was referencing a time when Mr. Townsell was held pending the current trial.

On cross-examination, however, the prosecutor first asked when the wedding occurred. (*Id.* at p. 191, ll. 14-15). After learning that it was in 2008 or 2009, the prosecutor pushed for the details of the ceremony. (*Id.* at ll. 16-17). The prosecutor asked, "There wasn't a ceremony that you attended?" (*Id.* at l. 21). The witness responded, "No." (*Id.* at l. 22). The prosecution pushed for an answer by

asking, "Were they -- do you know whether there was a ceremony or married under common law?" (*Id.* at ll. 23-24). The witness responded, "I guess they got married in jail while he was still in jail." (*Id.* at p. 191, l. 25 – p. 192, l. 1).

The prosecutor argued that she was trying to determine whether the marriage was a common law marriage, she did not ask where the marriage occurred, she was trying to elicit information about cohabitation, and the witness was a runaway witness. (*Id.* at p. 193, l. 17-18, 23-24; p. 194, l. 12-15; p. 195, ll. 6-9).

The record belies the prosecutor's arguments. The prosecutor specifically asked about the ceremony and whether the mother attended the ceremony. (*Id.* at p. 191, ll. 21-22). Even after the mother replied that she did not attend the ceremony, the prosecutor continued to ask about the ceremony. (*Id.* at ll. 23-24). She did not ask about cohabitation but asked when and where the ceremony occurred. (*Id.*) Because the witness testified on direct that the wedding occurred in jail, the prosecutor was aware that questions about the ceremony would elicit a response about jail.

As aptly explained by trial counsel:

> [T]his witness was here under the prosecution's subpoena. The date of the marriage was the least important thing that could have been asked on the cross-examination, and the prosecutor just kept on going over it until we got this witness to say that my client had been in

> jail. And it clearly was eliciting that, and there is no way for me to stand up and object because the cat was out of the bag. And I think it was purposefully elicited, so I'm asking for a mistrial.

(*Id*. p. 193, ll. 7-15).

The trial court found that the prosecutor's questions were relevant to marital privilege. (*Id*. at p. 195, ll. 18-19). However, marital privilege was not an issue and specifically, no marital privilege question was related to this witness. And the finding does not support the prosecutor's stated reasons for the questions. The prosecutor argued that she expected an answer relating to cohabitation.

The record shows that the prosecutor was aware her questions would elicit a response about Mr. Townsell's incarceration and the trial court abused its discretion by denying the mistrial motion.

IV. The District Court Reversibly Erred in Admitting Testimonial Hearsay in Violation of Mr. Townsell's Constitutional Right to Confront Witnesses

A. Standard of Review

Appellate courts review de novo a defendant's contention that the trial court violated his or her Confrontation Clause rights. *Bernal v. People*, 44 P.3d 184, 198 (Colo. 2002).

B. Preservation

Trial counsel objected to the witness's statements as hearsay but did not specifically lodge a Confrontation Clause objection. (R. Tr. 3/12/14, p. 159, ll. 17-25; p. 162, ll. 13-19). Unpreserved Confrontation Clause contentions are reviewed for plain error. *People v. Barry*, 2015 COA 4, ¶ 65, 349 P.3d 1139, 1154.

C. Facts

On the eve of trial, the People informed the court that the bank teller, K.K., was unavailable medically. (R. Tr. 2/28/14, p. 19, ll. 7-24). Her statements were introduced at trial through the responding officer's testimony. Through the officer, K.K.'s statements about the robber's appearance, clothing, and gun were admitted. (R. Tr. 3/12/14, p. 162, l. 20 – p. 166, l. 13). K.K.'s statements about the robber's actions and how he pointed the gun at her and M.O. were also admitted. (*Id.* at p. 163, l. 12 – p. 164, l. 1). During his testimony, the officer referred to K.K.'s written report to refresh his recollection of her statements. (*Id.* at p. 165, ll. 4-7).

Defense counsel objected on hearsay grounds and argued that the statements were too far removed from the startling event to be excited utterances. (*Id.* at p. 160, ll. 6-10). The district court overruled the objections. (*Id.* at p. 162, ll. 16-19).

D. Confrontation Clause

The United States and Colorado Constitutions guarantee persons accused of

crimes the right to confront the witnesses against them. *See* U.S. Const. amends. VI , XIV; Colo. Const. art. II, § 16; *Crawford v. Washington,* 541 U.S. 36, 49 (2004); *People v. Fry*, 92 P.3d 970, 974 (Colo. 2004).

Under the Confrontation Clause, testimonial hearsay statements must be excluded when (1) the declarant is unavailable to testify, and (2) the defendant had no previous opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 49; *People in Interest of R.A.S.*, 111 P.3d 487, 489 (Colo. App. 2004).

E. Hearsay

The district court allowed K.K.'s statements as excited utterances. An excited utterance, a hearsay exception, is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." CRE 803(2). The proponent of an excited utterance must show (1) the event was sufficiently startling to render normal reflective thought processes of the observer inoperative; (2) the statement was a spontaneous reaction to the event; and (3) direct or circumstantial evidence exists to allow the jury to infer that the declarant had the opportunity to observe the startling event. *People v. Compan*, 100 P.3d 533, 536 (Colo. App. 2004), *aff'd*, 121 P.3d 876 (Colo. 2005).

The record establishes that K.K. witnessed a startling event and that she was distressed when she made the statements. However, she also created a written

statement that contained many details about the robber. (R. Tr. 3/12/14, p. 165, ll. 14-17). Those statements were the product of reflective thought and occurred after any initial spontaneous statements. Some of the statements were made long after the robbery. (*Id.* at pp. 164-166). The officer relied on K.K.'s written statement and used that written statement to refresh his memory during his testimony. (*Id.* at p. 165, ll. 4-8, 20-23).

In *People v. Stephenson,* 56 P.3d 1112, 1116 (Colo. App. 2001), another division of this Court concluded that even though it was "clear that [the declarant] was distressed at the time of the statement" and was speaking quickly with a "frantic air in the room bordering on panic," it was error to admit the statements as excited utterances because she had "independent interludes of reflective thought" that removed the spontaneity from her statements. *Id.* at 1116.

Similarly, here, K.K.'s statements to the officer were made in response to questioning and after reflective thought; they were not excited utterances. However, even if this Court determines that the statements were admissible as excited utterances, the statements must be excluded if they are testimonial. *See People v. Hagos,* 250 P.3d 596, 622 (Colo. 2009) (statements made to officers following bus stop shooting were testimonial even though they were also excited utterances).

F. Testimonial

Crawford held that, at a minimum, statements are testimonial if the declarant made them during a police interrogation. *Crawford*, 541 U.S. at 52. "When circumstances objectively indicate that the primary purpose of the interrogation is either to elicit statements that establish or prove past events, or to elicit statements that are potentially relevant to a later criminal prosecution, the statements elicited are testimonial." *Raile v. People*, 148 P.3d 126, 130 (Colo. 2006). Important factors include whether the statements are describing past events or events as they are actually happening, whether the statements are a call for help made during an emergency, and whether the officers are gathering information about the suspect. *Id.* at 130-31.

K.K.'s statements were testimonial because there was no longer an ongoing emergency inside the bank and the officers were gathering information about the suspect. K.K. answered questions about the robber's clothing and gun. She gave specifics about the mask, the eyeholes, the color of the gun, and the robber's statements. She also formalized her observations into a written statement. Statements like these are "an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Davis v. Washington*, 547 U.S. 813, 831 (2006); *accord Raile*, 148

P.3d at 132.

G. Unavailability and Opportunity for Examination

The People asserted that K.K. was medically unavailable. The trial court did not make specific findings regarding her availability. However, Mr. Townsell was not given a prior opportunity to examine K.K. Because her statements were testimonial hearsay and she was not subject to prior examination, Mr. Townsell's Confrontation Clause rights were violated. In *R.A.S.*, the parties stipulated that the victim was unavailable. *R.A.S.*, 111 P.3d at 488. However, because defendant did not have an opportunity to cross-examine the witness, the victim's statements violated the defendant's rights under the Confrontation Clause. *Id.* at 490.

H. Harmfulness

The introduction of the statements here, and the inability of Mr. Townsell to cross-examine K.K., was reversible error.

The error was obvious because it is based on the long-standing constitutional right to confront witnesses. Additionally, it is the most basic type of testimonial hearsay: an eyewitness's account of what happened at the crime scene and recited for the responding officer. *See Crawford*, 541 U.S. at 53 (primary objective of the Confrontation Clause is testimonial hearsay, and statements to "officers fall squarely within that class").

The error was substantial because K.K. was the closest witness and her statements about the robber's build and appearance were vital to the robber's identity. K.K. was the only witness to describe the "homemade looking mask" and the "eyeholes cut out." (R. Tr. 3/12/14, p. 165, ll. 9-13). This fact was important to the jury because the jury previously asked M.O. questions about whether the mask was homemade and M.O. was unable to answer the questions. (*Id.* at p. 112, ll. 6-15).

K.K. also told the officer that the robber wore jeans. (*Id.* at p. 162, l. 24). This is important because the pants recovered and admitted at trial were sweatpants, not jeans, and K.K.'s description of jeans corroborates the testimony of the man who witnessed the robber leaving the bank. (*Id.* at p. 54, ll. 2-5; R. Tr. 3/13/14, p. 120, ll. 15; Exh. 42). The size of the sweatpants in exhibit 42 was 2XL. (R. Tr. 3/13/14, p. 120, ll. 21-24). The People stressed the size of the sweatpants in closing argument to support their position that the robber was tall. The prosecutor argued, "The XXL clothing, the sweatshirt and the pants, and you can see them in the video as this man moves athletically and especially through this crime scene. He's not some little 5'7" guy that's completely lost in a man's XXL." (R. Tr. 3/18/14, p. 52, ll. 4-7).

The physical description of the robber, given by every eye witness, was of a

man 5'7" to 5'9" tall. At 6'2", Mr. Townsell does not come close to matching the physical description. Thus, the cross-examination of the closest eye-witness was crucial.

Additionally, K.K. was the only witness to state that the robber pointed the gun at M.O. (R. Tr. 3/12/14, p. 163, l. 14). M.O. testified that the gun was not aimed at him and M.O. is not visible on the surveillance video until after the robber leaves. (*Id.* at p. 95, ll. 3-8; R. Ex. 1).

Under these circumstances, and given the significant discrepancies in the identity evidence, the error so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *See Miller*, 113 P.3 at 150.

V. The Evidence is Not Sufficient to Sustain the Convictions of Felony Menacing and Aggravated Robbery as to M.O.

A. Standard of Review

Claims challenging the sufficiency of the evidence are reviewed de novo. *People v. Perez,* 2016 CO 12, ¶ 8, 367 P.3d 695, 697. Appellate courts review de novo to determine whether the evidence "was both 'substantial and sufficient' to support the conclusion by a reasonable mind that the defendant was 'guilty beyond a reasonable doubt.'" *Id.* (quoting *Dempsey v. People*, 117 P.3d 800, 807 (Colo.

2005), and *People v. Bennett*, 183 Colo. 125, 130, 515 P.2d 466, 469 (1973)).

B. Preservation

This issue is preserved. Defense counsel moved for a judgment of acquittal for the felony menacing and aggravated robbery counts involving M.O., stating, "all of the physical evidence as well as the testimony would suggest that the bank robber did not even realize that [M.O.] was present during any of this. So there is no evidence that anything was taken from him directly or that there were any further movements or pointing of the gun towards him." (R. Tr. 3/17/14, p. 155, ll. 12-17).

C. Menacing

Mr. Townsell was convicted of two counts of felony menacing under section 18-3-206, C.R.S. Section 18-3-206(1) provides: "A person commits the crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury." Menacing is a felony when the suspect uses a deadly weapon. § 18-3-206(1)(a).

Felony menacing requires a knowing mental state that is "satisfied when the offender is aware that he is placing or attempting to place another person in fear of imminent serious bodily injury by the use of a deadly weapon, regardless of whether or not the offender had a conscious objective to cause such fear in the

other person." *People v. Crump*, 769 P.2d 496, 499 (Colo. 1989). A conviction requires that the suspect "be aware that his conduct is practically certain to cause the result." § 18–1–501(6), C.R.S.; *People v. Dist. Court*, 926 P.2d 567, 571 (Colo. 1996).

The focus in a felony menacing case is on the intent and actions of the defendant. *People v. Lopez*, 2015 COA 45, ¶ 24. A victim's observations and reactions are "relevant considerations in determining whether the defendant had the requisite *mens rea* to commit [menacing]." *People v. Zieg*, 841 P.2d 342, 343 (Colo. App. 1992).

The evidence is insufficient to sustain a conviction for felony menacing as to M.O. because there is no evidence that the robber saw M.O. or knew M.O. was present. This is important because a felony menacing conviction requires that the defendant be aware that his conduct is practically certain to cause fear. However, the video shows the robber run into the bank straight to the teller and speak only to the teller. The robber does not look in the direction of M.O. or interact with him in any way. The robber could not have been aware that his conduct would place someone in fear if he was not aware of that person's presence.

M.O.'s reaction to the robbery is important because M.O. stated that he was not concerned about the gun and was not afraid. (R. Tr. 3/12/14, p. 95, ll. 14-18).

After the robber left, M.O. calmly walked away from his desk, locked the bank doors, and called 911. (*Id.* at p. 97, ll. 7-11). His voice is so calm during the 911 call that the district court concluded that the 911 call could not be an excited utterance even though the call occurred only seconds after the incident. ((R. Ex. 112); R. Tr. 3/12/14, p. 144, ll. 17-21).

Additionally, this Court is in a position to view the videotaped surveillance and see the speed at which the robber ran past the area where M.O.'s desk was located. *See People v. Al-Yousif*, 49 P.3d 1165, 1171 (Colo. 2002) ("video's existence enables [appellate court] to undertake this review not just from the 'cold record,' but—at least in part—in precisely the same manner as the trial court"). The robber's head was covered by a hood, he ran straight forward, and he could not have peripheral vision to the distance where M.O. was seated. (R. Ex. 1). M.O. is only visible in camera angle two, and the view from that angle shows that the robber could not have known M.O. was at his desk. (*Id.*).

Therefore, even though felony menacing does not require proof of an alleged victim's subjective fear, it requires that the defendant knowingly place another in fear. And when the alleged victim's actions demonstrate that he was not afraid because the suspect was not paying any attention to the victim, the intent requirement is not satisfied.

D. Robbery

For similar reasons, the robber did not knowingly take anything from the presence of M.O.

"A person who knowingly takes anything of value from the person or presence of another by the use of force, threats, or intimidation commits robbery." § 18-4-301, C.R.S. "Property is taken from the 'presence of another' when it is so within the victim's reach, inspection or observation that he or she would be able to retain control over the property but for the force, threats, or intimidation directed by the perpetrator against the victim." *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983). To take property from someone's "presence," that person "must be exercising, or have the right to exercise, control over the article taken." *People v. Benton*, 829 P.2d 451, 453 (Colo. App. 1991).

There is no evidence that the robber knowingly took anything from the presence of M.O. The robber sprinted straight past M.O. while M.O. was seated at his desk in another area. (R. Tr. 3/12/14, p. 93, ll. 15-18). M.O. testified that "[s]omeone dressed in all dark clothing ran past me, jumped the teller counter, took the money out of [K.K.'s] drawer and then ran down the line again and ran back out of the bank." (*Id.*) The robber did not turn his head towards M.O. or interact with M.O. in any way. (*Id.*) The surveillance video shows that the robber did not

look in M.O.'s direction. (R. Ex. 1). M.O. testified that the robber left the bank "just as fast as he came in . . . [and] ran out the front door." (R. Tr. 3/12/14, p. 96, ll. 17-19).

Likewise, the evidence is insufficient to sustain the conviction because there is no evidence that M.O. had any right to control the money in K.K.'s drawer. M.O. testified that he was "financial services consultant" and was "[r]esponsible for personal and business checking accounts, savings accounts, loans, money markets, auto loans[,]" but he did not testify that he had any right to control the money in K.K.'s drawer. (*Id.* at p. 92, ll. 13-18).

In *People v. Ridenour*, 878 P.2d 23, 27 (Colo. App. 1994), another division of this Court held that a movie ticket taker "did not have physical possession of the money taken" and "no evidence showed that he had the right to exercise control over that money." Therefore, the "the evidence presented could not support the finding that he was in possession of or had control over the money taken—an element necessary to be established in order to prove that he was the victim of an aggravated robbery." *Id.* Similarly, here, there was no evidence that M.O. had control over the money taken.

The evidence is insufficient to sustain the burglary and menacing convictions involving M.O.

VI. Multiple Trial Errors Resulted in Cumulative Error Requiring Reversal

When the combined effect of all of the trial errors prevents a defendant from receiving a fair trial, reversal is required. *People v. Reynolds*, 194 Colo. 543, 552, 575 P.2d 1286, 1294 (1978). "A cumulative error analysis aggregates all trial errors that individually have been found harmless, and therefore not reversible, and analyzes whether their cumulative effect is such that they can no longer be deemed harmless." *People v. Clark*, 214 P.3d 531, 543 (Colo. App. 2009), *aff'd*, 232 P.3d 1287 (Colo. 2010).

Numerous trial errors occurred: DNA match evidence was admitted without statistical significance data, late disclosure of the DNA expert witness's report prejudiced Mr. Townsell, the prosecution elicited testimony that Mr. Townsell was previously incarcerated, and testimonial hearsay was admitted in violation of Mr. Townsell's constitutional rights. The combined effect of these errors — even if this Court determines that any of them are individually harmless — deprived Mr. Townsell of a fair trial.

VII. The District Court Erred in Concluding That Consecutive Sentences Were Required for the Aggravated Robbery Convictions

A. Standard of Review

A sentencing court's decision to impose consecutive sentences is reviewed

for an abuse of discretion. *People v. Glasser*, 293 P.3d 68, 78 (Colo. App. 2011). A court abuses its discretion when it misapplies the law. *People v. Montanez*, 2012 COA 101, ¶ 8, 300 P.3d 940.

B. Preservation

This issue is preserved. Defense counsel provided a written sentencing memorandum and also argued at the sentencing hearing that the evidence supporting the convictions was identical and did not mandate consecutive sentencing. (R. Tr. 5/12/14, p. 20, ll. 21-25; R. Supp. CF, p. 45).

C. Discussion

"A person convicted of two or more separate crimes of violence arising out of the same incident shall be sentenced for such crimes so that sentences are served consecutively rather than concurrently." § 18-1.3-406(3), C.R.S. However, "the crime of violence statute is subject to the requirements" of section 18–1–408(3), C.R.S. *People v. Torrez*, 2013 COA 37, ¶ 54, 316 P.3d 25, 34–35 (citing *People v. O'Shaughnessy*, 275 P.3d 687, 697 (Colo. App. 2010), *aff'd*, 2012 CO 9, 269 P.3d 1233).

Section 18-1-408(3) provides in pertinent part, "If more than one guilty verdict is returned as to any defendant in a prosecution where multiple counts are tried . . . the sentences imposed shall run concurrently; except that, where multiple

victims are involved, the court may, within its discretion, impose consecutive sentences."

Sections 18–1–408(3) and 18-1.3-406(3) must be construed together. *People v. Jurado*, 30 P.3d 769, 773 (Colo. App. 2001). "[C]rimes of violence are 'separate' within the meaning of [former section 18-1.3-406(3)], and thus require consecutive sentencing, when the evidence supporting the convictions is not 'identical' within the meaning of § 18–1–408(3)." *Jurado*, 30 P.3d at 773. This analysis "turns on whether the charges result from the same act, so that the evidence of the act is identical, or from two or more acts fairly considered to be separate acts, so that the evidence is different." *Juhl v. People*, 172 P.3d 896, 902 (Colo. 2007). "[W]hen the same act or acts give rise to both charges," the evidence supporting those crimes is considered identical. *People v. Dixon*, 950 P.2d 686, 689 (Colo. App. 1997). The evidence must be analyzed to "determine if the separate convictions were based on more than one distinct act and if so, whether those acts were separated by time and place." *Juhl*, 172 P.3d at 901.

Here, the evidence supporting the convictions for aggravated robbery was identical because it was based on the same acts. The robber entered the bank, sprinted past M.O., ran straight to the counter, and demanded and left with money from K.K.'s drawer. If this Court determines that the evidence was sufficient to

support the count involving M.O., then the same actions of demanding the money with the use of a gun and removing the money from K.K.'s drawer met the elements of taking anything of value from the presence of both M.O. and K.K. There were no additional or different actions used to support the conviction involving M.O. Nor were there additional or different actions used to support the conviction involving K.K.

The district court, however, imposed consecutive sentences for the aggravated robbery convictions because it determined that discretionary concurrent sentencing based on multiple victims was not applicable. After hearing argument from counsel and analyzing the case law, the court concluded, "I do believe a consecutive sentencing is required in this case." (R. Tr. 5/12/14, p. 50, ll. 15-16). The district court based this conclusion on the fact that "there are clearly different victims in the case and, therefore, not identical evidence." (*Id.* at p. 50, ll. 10-11).

In some cases, the fact of multiple victims will mean that the evidence is not identical. For example, in *People v. Ellis*, 30 P.3d 774, 781–82 (Colo. App. 2001), the defendant fired three separate shots from his gun, and the separate shots warranted separate counts of attempted extreme indifference murder. And in *People v. Esparza-Treto*, 282 P.3d 471, 489 (Colo. App. 2011) (J. Taubman, dissenting), Judge Taubman addressed a consecutive sentencing contention in his

dissent that was not addressed by the majority. He noted that identical evidence might support most elements but because one of the elements was serious bodily injury, different evidence was required to prove the serious bodily injury for each victim. *Id.*

In this case, however, there was no separate injury, and no separate actions that differentiated the aggravated robbery conviction as to M.O. from the aggravated robbery conviction as to K.K. Therefore, consecutive sentencing was not required in this case. The district court erred in concluding that consecutive sentencing was mandated.

The record demonstrates that the district court would have exercised its discretion to impose concurrent sentences. (R. Tr. 5/12/14, p. 50, ll. 14-16). The court requested argument on the issue and fully analyzed the question before concluding that consecutive sentencing was mandatory. (*Id.* at p. 35, ll. 9-16; p. 45, l. 13 – p. 50, l. 16). Therefore, Mr. Townsell requests that this Court vacate his consecutive sentence for the aggravated robbery conviction involving M.O., and remand for the district court to amend the mittimus and impose the sentence to run concurrent to the sentence for the conviction involving K.K. *See People v. Dotson*, 55 P.3d 175, 182 (Colo. App. 2002) (remanding to correct mittimus to reflect concurrent rather than consecutive sentence).

CONCLUSION

WHEREFORE, Mr. Townsell respectfully requests that this Court vacate the aggravated robbery and felony menacing convictions involving M.O., reverse his judgments of conviction, and remand for a new trial. Alternatively, Mr. Townsell requests that this Court vacate his sentence for count two and remand to the district court to impose a concurrent sentence, and grant such other relief as the Court deems necessary.

Respectfully submitted,

s/ Krista A. Schelhaas
Krista A. Schelhaas, #36616

CERTIFICATE OF SERVICE

I certify that on the 8th day of August 2016, a true and correct copy of the foregoing OPENING BRIEF was filed through the Integrated Colorado Courts E-Filing System (ICCES), with a copy checked to be sent to the Office of the Attorney General, Criminal Division.

s/ Krista A. Schelhaas
Krista A. Schelhaas