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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Ave.
Denver, CO 80203

Arapahoe County District Court
Honorable Kurt A. Horton, Judge
Case No. 13CR2039

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

JAMALE D. TOWNSELL,

Defendant-Appellant.

▲ **COURT USE ONLY** ▲

Case No. 14CA1225

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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 those rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limit set forth in C.A.R. 28(g). It contains 9,479 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(b). It contains, under a separate heading before the discussion of each issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal, and if not, why not.

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/ Brock J. Swanson

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STATEMENT OF THE CASE AND FACTS

I. Introduction

The defendant, Jamale D. Townsell, appeals the judgement of conviction and sentence entered on jury verdicts finding him guilty of two counts of aggravated robbery, two counts of felony menacing, and one count of theft. He was sentenced to 32 years in prison.

On appeal, the defendant contends that (1) the trial court plainly erred in admitting evidence of DNA matches without statistical significance, (2) the trial court should have excluded some of the DNA matches because they were not timely disclosed, (3) the trial court abused its discretion in denying his motion for mistrial after a witness testified that the defendant was married in jail, (4) the trial court erred in admitting a victim's statements because they were hearsay and testimonial, (5) there was insufficient evidence that the defendant menaced or robbed one of the victims, (6) the cumulative effect of the alleged errors require reversal, and (7) the trial court erred in finding that it did not have discretion to impose concurrent sentences for his aggravated robbery convictions. Because the record and applicable law

support the judgment of conviction and sentence, they should be affirmed.

II. Jury Trial

The defendant was charged with two counts of aggravated robbery, two counts of felony menacing, theft, and possession of a weapon by a previous offender. CF, pp 3-6. The possession charge was bifurcated and not tried with the others.

At trial, the prosecution presented evidence of the following.

A man armed with a handgun and wearing a mask entered a bank. TR 3/12/14, pp 93-95, 162-66. Inside the lobby of the bank were M.O., a financial services consultant who was sitting at a desk, and K.K., a bank teller. TR 3/12/14, pp 92-93, 163-64. The man said, "nobody fucking move" and "give me the money bitch," and took all of the money from K.K.'s cash register, $1,104. TR 3/12/14, pp 93-96, 139, 163-64. He also took a GPS tracker hidden in a pile of bills. *See, e.g.*, TR 3/12/14, pp 129-32. The robbery was recorded. Env 1, EX 1 (admitted and published at TR 3/12/14, pp 70-72, 75-76).

Outside the bank, a witness suspected that the bank was being robbed and noted the make and plate number of the robber's car, which he provided to the police. TR 3/12/14, pp 37-39. That car was later found abandoned, but still running, a short distance from the bank. TR 3/13/14, pp 21-30. The car had been stolen. *See, e.g.*, TR 3/13/14, pp 46-48.

Using the GPS tracker, the police apprehended the defendant's wife in her car. TR 3/12/14, pp 199-211; TR 3/13/14, pp 13-21. In the trunk was a handgun and a right shoe. TR 3/12/14, pp 208-12, 228-31; TR 3/13/14, pp 127-29. A short distance from the car, in the middle of the street, was the matching left shoe and a bag containing, among other things, the stolen money, the GPS tracker, a homemade mask, pantyhose, a red bandana, a cell phone, and other items matching those used by the robber. TR 3/12/14, pp 231-36; TR 3/13/14, pp 84-88, 102-27.

DNA testing found the defendant's DNA on the right and left shoes, pantyhose, red bandana, and homemade mask. TR 3/17/14, pp 115-18. The defendant had called his wife both shortly before and

shortly after the robbery, and an expert testified that the defendant's phone was in the area of the robbery when it occurred. TR 3/14/14, pp 69-93.

The defendant did not testify. He presented a defense arguing that the robbery was committed by his wife's brother, who better matched the height description given by witnesses, and that he could not have committed the offense based on evidence showing he was in other places before and after the robbery occurred. TR 3/12/14, pp 18-33 (opening statement); TR 3/18/14, pp 34-50 (closing argument); CF, p 294 (theory-of-the-case instruction).

The jury found the defendant guilty. CF, pp 298-302; TR 3/18/14, pp 84-87. The trial court sentenced the defendant to 22 years in prison for aggravated robbery of K.K and to 10 years in prison for aggravated robbery of M.O., to run consecutively, and to 6 years in prison for menacing K.K., to 2 years in prison for menacing M.O., and to 18 months in jail for theft, to run concurrently. CF, pp 326-27; TR 5/12/14, pp 50-52.

This appeal followed.

Additional facts relevant to the defendant's contentions are set forth in the argument section below.

SUMMARY OF THE ARGUMENT

The trial court properly admitted expert testimony of DNA matches accompanied by testimony explaining the statistical significance of those matches. Even assuming any error, it does not warrant relief under the plain error standard because there was a strategic reason for counsel not to object, because the defendant did not dispute at trial that his DNA was found on the items, and because reversal on the grounds that the astronomical odds the defendant was not the source of the DNA found on the items were not adequately conveyed to the jury would impugn, rather than uphold, the dignity of the court.

The defendant abandoned any claim that there was a discovery violation related to the disclosure of the DNA matches by not securing a ruling after the trial court reserved ruling. In any event, there was no discovery violation because the matches were timely disclosed, and the

defendant's failure to request a continuance discredits any claim of prejudice.

The trial court properly denied the defendant's motion for a mistrial after a witness testified that the defendant married his wife in jail. The defendant invited any error by eliciting that fact. In any event, the trial court properly concluded that a curative instruction was appropriate, and any error was not so prejudicial as to require a new trial.

The trial court properly admitted K.K.'s statements. The trial court properly found that they were not hearsay because they were excited utterances, and the defendant has not established that they were plainly testimonial. Rather, the record indicates that most, if not all, of the statements were not testimonial. To the extent any of the statements were improperly admitted, any error does not require reversal because they were cumulative, related to undisputed facts, or were exculpatory.

There was sufficient evidence that the defendant menaced and robbed M.O. The prosecution did not have to prove that the defendant

knew M.O. was present, but even if did, there was sufficient evidence to support that inference. And the prosecution proved that the money was taken from the presence of M.O. because he was sufficiently close to the cash register and the robber that he, as a bank employee, could have retained control of the money on behalf of the bank if not for the threat posed by the defendant and his gun.

The cumulative effect of the alleged errors did not deprive the defendant of his due process right to a fair trial.

The trial court properly imposed consecutive sentences on the aggravated robbery convictions because there were multiple victims and because they were not necessarily supported by identical evidence.

ARGUMENT

I. The trial court properly admitted expert testimony of DNA matches.

The defendant contends that the trial court plainly erred in admitting the expert's opinion that the DNA found on the items used in the robbery matched the defendant's DNA. The People disagree.

A. Standard of Review

The People agree that this issue is not preserved.

An appellate court reviews the admission of expert testimony only for abuse of discretion. *People v. Friend*, 2014 COA 123M, ¶ 26. The trial court's decision will be disturbed only if it is manifestly erroneous. *Id.*

The People also agree that unpreserved contentions are reviewed only for plain error. *See People v. Miller*, 113 P.3d 743, 748-49 (Colo. 2005). An appellate court may reverse under that standard only if the defendant shows that the trial court committed an obvious and substantial error that so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *Id.*

Whether to grant relief for a plain error is discretionary. *See* Crim. P. 52(b) (stating that plain errors "*may* be noticed" (emphasis added)); *People v. Triantos*, 55 P.3d 131, 134 (Colo. 2002) ("[U]se of the term 'may' is indicative of a grant of discretion or choice among alternatives."); *Quintana v. People*, 200 Colo. 258, 259, 613 P.2d 1308,

1309 (1980) (holding that use of the term "may" in Crim. P. 36 "indicates that the decision to correct the error is discretionary rather than mandatory"); *see also, e.g.*, *United States v. Olano*, 507 U.S. 725, 735 (1993). A reviewing court should exercise that discretion only if the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *Hagos v. People*, 288 P.3d 116, 120 (Colo. 2012) (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)); *accord Olano*, 507 U.S. at 736.

B. Analysis

To be relevant and admissible, evidence that a DNA comparison resulted in a match must ordinarily be accompanied by an explanation of the significance of that match. *See 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); *People v. Marks*, 374 P.3d 518, 524 (Colo. App. 2015). The defendant asserts that the trial court plainly erred because it admitted the matches without any evidence of their statistical significance. He is incorrect.

Without objection, a laboratory agent from the Colorado Bureau of Investigation was qualified as an expert in forensic DNA analysis. TR 3/17/14, pp 94-95. She explained that, if two profiles matched, she performed "statistical calculations analysis to see how rare that profile is or how often I would find that profile in the population." TR 3/17/14, pp 99-100. She further explained that if that statistical analysis showed that a profile was so rare that it would not be found in more than 1 in 300 billion people, she could say that the individual was the source of the profile:

> So we can get statistics that are very rare, and so low that we can call it source attribution. And what that means is if we get a statistic that is less than 1 in 300 billion, we can say that individual contributed that DNA, so they are the source from a DNA profile for that particular item.

TR 3/17/14, p 101:6-11.

The expert then testified that the defendant's profile both matched *and* was the source for the DNA profiles developed on the right and left shoes, pantyhose, red bandana, and dark knit hat with holes in it. TR 3/17/14, pp 115-18. Thus, the expert communicated to the jury

that each of those matches involved a profile that only 1 in 300 billion or more people would be expected to have. Indeed, the expert specifically noted that even for the lone match where not all of the loci in the profile were able to be compared, the statistical significance remained greater than 1 in 300 billion:

> Q And what was the result of that comparison?
>
> A It was a match at 13 of the 15 locations, and I can say Mr. Townsell was the source of the DNA profile from the left shoe as well.
>
> Q And even though you had 13 loci to compare on People's Number 34, you are still able to make that identification statement?
>
> A Yes, I am. I still get a statistic that is more rare than 1 in 300 billion.

TR 3/17/14 p 116:13-21.

Because the expert informed the jury of the statistical significance of each match, the testimony was properly admitted.

Even assuming arguendo the trial court in some way erred, it did not plainly error.

For unpreserved evidentiary claims, "[w]hat is often overlooked in the rote application of the plain error standard is that, without

objection, it is almost impossible to conclude that the trial court committed error at all." *State v. Rawnsley*, 104 A.3d 198, 202 (N.H. 2014) (quoting *United States v. Smith*, 459 F.3d 1276, 1299-300 (11th Cir. 2006) (Tjoflat, J., concurring)). "It is one thing to say that evidence, if objected to, should have been excluded; it is quite another to say that admission of evidence over no objection is error in some abstract sense." *Id.* (quotation omitted). "The problem with the second scenario is that defense counsel can waive evidentiary restrictions, and often has legitimate strategic reasons for doing so." *Id.* (quotation omitted). "Under those circumstances, reviewing admission of evidence for plain error can serve to transform defense counsel's strategic decisions into trial court errors." *Id.* (quotation omitted). "In this way, trial counsel's sound strategy becomes plain error at appellate counsel's urging." *Id.* (quotation omitted).

"The decision of whether to object to inadmissible evidence is an aspect of trial strategy that counsel may make on behalf of a defendant." *Id.*; *see also, e.g.*, 3 W. LaFave et al., Criminal Procedure § 11.6(a), at 183-84 (3d ed. 2007); *Henry v. Mississippi*, 379 U.S. 443, 451-

52 (1965). The trial court "is not required to act sua sponte to override seemingly plausible strategic choices on the part of counselled defendants." *United States v. LeMoure*, 474 F.3d 37, 44 (1st Cir. 2007) (quotation omitted). Thus, where defense counsel "may have had strategic reasons for not objecting" to the challenged evidence, the trial court does not plainly err in failing to intervene sua sponte. *Rawnsley*, 104 A.3d at 202; *see also, e.g.*, *LeMoure*, 474 F.3d at 44; *United States v. Lin*, 101 F.3d 760, 770 (D.C. Cir. 1996); *cf. Romero v. People*, 393 P.3d 973, 976-77 (Colo. 2017) (holding that, because "[t]here are many reasons a defendant may want a jury to have unfettered access to recordings," a trial court does not plainly err in failing to restrict access sua sponte); *People v. Gladney*, 194 Colo. 68, 72, 570 P.2d 231, 234 (1977) (holding that failing to give a limiting instruction sua sponte is not reversible error because "Defense counsel, for strategic or tactical reasons, may consider that such an instruction would be more harmful than beneficial"), *reaffirmed in Davis v. People*, 310 P.3d 58, 63-64 (Colo. 2013).

Here, an objection would only have led to further clarifying the astronomical odds that the DNA matches could be attributed to someone else. Defense counsel could have strategically concluded that the prudent course was not to emphasize that fact. Because there was a potential strategic motivation for not objecting, the trial court did not obviously err in failing to intervene sua sponte. *See, e.g.*, *Romero*, 393 P.3d at 977; *Rawnsley*, 104 A.3d at 201-02.

Any error also did not undermine the fundamental fairness of the trial because the defendant did not dispute that his DNA was on the items; rather, he argued that his wife and brother-in-law had used the defendant's clothes to commit the robbery. *See, e.g.*, TR 3/18/14, p 40:18-20 (closing argument); *cf. Neder v. United States*, 527 U.S. 1, 17 (1999) (stating that an erroneous jury instruction that omits an element of the crime is harmless if the element was uncontested); *Griego v. People*, 19 P.3d 1, 8 (Colo. 2001) (following *Neder*); *People v. Warrick*, 284 P.3d 139, 147 (Colo. App. 2011) (no plain error in allowing officer's testimony that the defendant was the person shown in a photograph where the defendant did not dispute the point).

And, in any event, exercising this Court's discretion to reverse under plain error because the astronomical odds that the defendant was not the source of the DNA found on the items was not adequately conveyed to the jury would impugn, rather than uphold, the dignity of the court. To the extent that information was not conveyed, it could only have inured to the benefit of the defendant.

II. The defendant abandoned any claim that there was a discovery violation.

The defendant contends that the DNA matches for the shoes, red bandana, and dark knit hat should not have been admitted at trial because they were not timely disclosed. The People disagree.

A. Standard of Review

The People disagree that this issue is preserved. While the defendant asserted that the DNA matches had not been timely disclosed, *see, e.g.*, TR 3/14/14, pp 6-9, 19-20, he never secured a final ruling from the trial court. *See, e.g.*, C.A.R. 28(a)(7)(A) (requiring an appellant who is asserting that an issue was preserved to indicate "the precise location in the record where the issue was raised *and where the*

court ruled" (emphasis added)). As discussed below, the issue is therefore not only unpreserved, but abandoned and waived.

Whether the defendant waived any error is a question of law addressed de novo. *See, e.g.*, *Stackhouse v. People*, 386 P.3d 440, 442 (Colo. 2015); *People v. Foster*, 364 P.3d 1149, 1155 (Colo. App. 2013). If reviewable, the People agree that an appellate court reviews the trial court's resolution of discovery issues only for abuse of discretion. *See People v. Robles*, 302 P.3d 269, 273 (Colo. App. 2011), *aff'd* 302 P.3d 229 (Colo. 2013). The trial court's ruling will be disturbed only if it was manifestly arbitrary, unreasonable, or unfair. *Id.* The ruling will not be disturbed unless the defendant establishes that he suffered prejudice. *Id.* Because this issue was not preserved, reversal is permitted only if the trial court plainly erred. *Miller*, 113 P.3d at 749-50.

B. Additional Facts

Because the defendant asserted his rights under the Uniform Mandatory Disposition of Detainers Act, CF, p 17, the trial proceeded on an expedited basis and began less than four months after the

defendant first appeared in court, CF, pp 360-64. After the third day of trial, the defendant asserted that, although the DNA matches for the right and left shoes, red bandana, and dark knit hat with holes in it had been disclosed several weeks prior to trial, the disclosure had not occurred 35 days prior to trial.[1] TR 3/13/14, p 199:4-16; TR 3/14/14, pp 6-9, 19-20. The defendant stated that he was not alleging the prosecution had acted in bad faith. TR 3/14/14, p 9:5-6. The defendant requested that the DNA evidence be excluded. TR 3/14/14, p 9:7-8. The defendant did not request a continuance or any other alternative sanction.

The prosecution responded by indicating that the matches had been disclosed in reports that were provided well in advance of trial which showed that the same DNA profile had been developed from all of those items and that when the profile from one of those items, the pantyhose, had been entered into the CODIS database, it had matched the defendant's profile. TR 3/14/14, pp 12-16; *see also* Supp CF, pp 33-

[1] The defendant conceded that the DNA match for the pantyhose had been timely disclosed.

39 (DNA Reports dated August 26, 2013). The prosecution explained that, to avoid referencing CODIS, it had then obtained a DNA sample directly from the defendant and had that sample compared to the items to confirm those results. TR 3/14/14, pp 12-14. That confirmation report was not completed until within 35 days of trial and was immediately disclosed to the defendant when it was completed. TR 3/14/14, pp 13-14; *see also* Supp CF, pp 40-42 (DNA Report dated February 14, 2014). The prosecution noted that the defendant had never requested a continuance, that a continuance could have been granted to give the defendant 35 days prior to trial without requiring the defendant to waive any of his speedy trial rights, and that the defendant had instead waited until after the third day of trial to raise the issue. TR 3/14/14, pp 24, 36-37.

The trial court reviewed the DNA reports and stated that they appeared to support the prosecution's position that the matches had been timely disclosed. TR 3/14/14, pp 33-34. The parties continued to argue the issue. TR 3/14/14, pp 34-37. The trial court reserved ruling so that it could further review the reports. TR 3/14/14, p 35:14-16

("[A]nything further on the DNA I'm not able to make a ruling on that now, but I think I have a better understanding of what the argument is."), p 37:18-25 ("I think I'm understanding the arguments a little bit better now on the DNA . . . . I'll be able to address that over the recess here.").

Later, evidence of all the DNA matches was presented without objection. TR 3/17/14, pp 87-144.

C. Analysis

The defendant waived his claim that the DNA matches were not timely disclosed. In any event, there was no discovery violation, and the defendant was not prejudiced.

1. The defendant waived this claim.

If the court reserves ruling on an issue, the defendant must object contemporaneously when the issue later arises in order to preserve the issue, otherwise it is abandoned and will not be addressed. *People v. Wood*, 230 P.3d 1223, 1227 (Colo. App. 2009), *aff'd*, 255 P.3d 1136 (Colo. 2011); *People v. Tallwhiteman*, 124 P.3d 827, 834 (Colo. App. 2005); *People v. Ridenour*, 878 P.2d 23, 28 (Colo. App. 1994); *People v. Hise*,

738 P.2d 13, 16-17 (Colo. App. 1986); *see also Feldstein v. People*, 159 Colo. 107, 111, 410 P.2d 188, 191 (1966) ("[I]t is incumbent on the moving party to see to it that the court rules on the matter he urges. The trial court should be afforded the opportunity to so rule; otherwise, the matter will ordinarily not be considered on writ of error."); *Vanderpool v. Loftness*, 300 P.3d 953, 961 (Colo. App. 2012) (and cases cited therein). Here, the trial court reserved ruling, and the defendant did not secure a final ruling from the trial court or object when the DNA evidence was presented. Under these circumstances, the claim was abandoned.

Moreover, the defendant waived any claim by failing to request a continuance. *See, e.g.*, *United States v. Sepulveda*, 15 F.3d 1161, 1178 (1st Cir. 1993); *Miller v. State*, 648 P.2d 1015, 1018 n.1 (Alaska 1982); *Thompson v. State*, 585 S.E.2d 125, 130 (Ga. App. 2003); *People v. Robinson*, 623 N.E.2d 352, 358 (Ill. 1993); *Jenkins v. State*, 627 N.E.2d 789, 799 (Ind. 1993).

2. There was no discovery violation.

The prosecution must timely provide the defendant with various materials in its possession, including the results of scientific tests. Crim. P. 16(I)(a)(1)(III); *see also People v. Lee*, 18 P.3d 192, 196 (Colo. 2001). The prosecution should disclose such evidence "as soon as practicable but not later than 35 days before trial." Crim. P. 16(I)(b)(3); *see also Lee*, 18 P.3d at 196. If the prosecutor obtains additional material or information subject to disclosure after complying with this obligation, "he or she shall promptly notify the other party or his or her counsel of the existence of such additional material." Crim. P. 16(III)(b); *Lee*, 18 P.3d at 196. Here, there was no discovery violation for two reasons.

First, the information the defendant claimed had not been timely disclosed, that his DNA had been found on the shoes, red bandana, and dark knit hat, was disclosed in the reports which the defendant conceded were timely. Supp CF, pp 33-39. Informing the defendant that the same profile was found on the pantyhose, shoes, red bandana, and dark knit hat, Supp CF, p 38, and that the profile from the

pantyhose had been matched to the defendant, Supp CF, pp 34, 36, told the defendant that the profile developed from all of those items had been matched to the defendant.

Second, the subsequent report was properly disclosed as soon as it came into the possession of the prosecution. The report was not subject to disclosure 35 days prior to trial under Crim. P. 16(I)(b)(3) because, not having yet been completed, it was not within the possession or control of the investigators or prosecuting attorney at that time. *See* Crim. P. 16(I)(a)(1), (3). The prosecution properly disclosed the report to the defendant as soon as it was obtained. *See* Crim. P. 16(III)(b).

3. The defendant was not prejudiced.

Even if evidence is not timely disclosed, "a trial court should avoid excluding evidence as a means of remedying a discovery violation because the attendant windfall to the party against whom such evidence would have been offered defeats, rather than furthers, the objectives of discovery." *Lee*, 18 P.3d at 197. In the absence of willful misconduct or a pattern of neglect necessitating a deterrent sanction,

"any prejudice resulting from a violation should be cured by a less severe sanction, such as a continuance, whenever possible." *Id.* at 196-97. Thus, exclusion would not have been an appropriate sanction in this case even if there were a violation. And even if the confirmation testing were excluded, it would not have precluded introducing the information based on the CODIS match that was admittedly timely disclosed.

The defendant's failure to request a continuance discredits any claim that he was unprepared to present a defense due to the late disclosure. *See, e.g.*, *Salazar v. People*, 870 P.2d 1215, 1224 (Colo. 1994); *People v. Greer*, 262 P.3d 920, 931 (Colo. App. 2011); *People v. Lemons*, 824 P.2d 56, 57 (Colo. App. 1991). Nor is there any evidence in the record or any explanation by the defendant showing how an earlier disclosure would have led to a more effective defense. *See Salazar v. People*, 870 P.2d 1215, 1220 (Colo. 1994) (affirming where the defendant presented no evidence of how the delay in disclosing evidence harmed him; mere argument and speculation was insufficient to show

prejudice). Rather, as noted above, the defendant did not contest that his DNA was on the items.

III. The trial court properly denied the defendant's motion for a mistrial.

The defendant contends that the trial court erred in denying his motion for a mistrial. The People disagree.

A. Standard of Review

The People agree that the defendant's claim is preserved. The defendant moved for a mistrial, and the trial court denied that motion, finding that any prejudice could be appropriately remedied by a curative instruction. TR 3/17/14, pp 193-97. But, as discussed below, the defendant did not preserve, and indeed invited, the basis for that mistrial motion. TR 3/17/14, pp 173, 191-92.

The People agree that a trial court's denial of a motion for mistrial is reviewed only for an abuse of discretion. *People v. Salas*, 2017 COA 63, ¶ 9. The appellate court must defer to any factual findings if they are supported by the record. *Id.* at ¶ 47. Any error does not permit reversal if it is harmless. *Id.* at ¶ 10. The defendant has the burden of

showing prejudice. *See, e.g.*, *People v. Vigil*, 718 P.2d 496, 500 (Colo. 1986); *People v. Faussett*, 2016 COA 94M, ¶ 52.

B. Additional Facts

The defendant called his wife's mother as a witness. The defendant elicited from that witness that he and his wife got married "inside the jail." TR 3/17/14, p 173:20. The defendant did not assert that the testimony was unresponsive or ask that it be struck. Other evidence had already established that the defendant and his wife were married at the time of the offense. *See, e.g.*, TR 3/17/14, p 18:16-17 (defendant's phone number listed in wife's phone under the name "Hubby").

During cross-examination, after the witness denied telling a detective that the defendant and her daughter lived together, the prosecution further questioned the witness about the defendant's marital status at the time of the offense, and during those responses the witness again mentioned, without objection, that they were married in jail:

Q But you denied telling Detective Hansen that Jamale and Ebony lived together in an apartment in Aurora?

A He asked me about Ebony. No, I asked him. He wouldn't tell me anything. And they -- because they took the baby carriage out of the car, and I told him I already had one. I was worried about how I was going to get the clothes. And he said that they were over there. But, no, I didn't tell him -- well, I told him he was married. So I guess he figured because of the first thing I asked is, "Where is her husband?"

Q And when did Ebony and Jamale Townsell get married?

A God only knows. It was in 2000, and I'm trying to think -- 2008 -- -9. She might have told me. She took me out for Easter dinner, and as we were leaving the theater, she said, "Guess what mom? I'm married." That's all. That's how I learned about it.

Q There wasn't a ceremony that you attended?

A No.

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

A I guess they got married in jail while he was still in jail. Like I said, it was Easter Sunday. The three girls took me out to lunch, and I was told when they were leaving the theater.

TR 3/17/14, pp 191-92.

After cross-examination was completed, the defendant moved for a mistrial, asserting that the prosecution had intentionally elicited that the defendant had previously been in jail. TR 3/17/14, pp 193-95. The prosecution asserted that it was properly inquiring into the issue of the defendant's marital status and that it had not intentionally elicited the testimony that the defendant was previously in jail. TR 3/17/14, pp 193-95. The trial court found that "[i]t did not appear to the Court that the People were intending to elicit that particular response as opposed to something that arguably would be relevant on marital relations, marital privilege, bias, motive." TR 3/17/14, pp 195-96. It concluded that the drastic remedy of a mistrial was not warranted, but a curative instruction would be appropriate if the defendant wanted one. TR 3/17/14, p 196:2-4.

At the defendant's request, the trial court instructed the jury after the witness finished testifying that it could not consider the evidence that the defendant was married in jail, and then confirmed with each juror that they could follow that instruction:

> [L]adies and gentlemen, 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.

TR 3/17/14, p 202:6-18.

C. Analysis

"A mistrial is the most drastic of remedies, and is only warranted where the prejudice to the accused is too substantial to be remedied by other means." *Salas*, ¶ 9 (quotations omitted). "Generally, the erroneous admission of evidence is remedied by instructing the jurors to disregard it." *Id.* at ¶ 14. "Absent evidence to the contrary, [appellate courts] presume jurors follow such an instruction." *Id.*

Here, it was the defendant who injected the fact that he was married in jail into the trial when he elicited that testimony and did not contemporaneously ask that it be struck. Thus, he invited any error. *See, e.g.*, *People v. Wittrein*, 221 P.3d 1076, 1082 (Colo. 2009); *see also Foster*, 364 P.3d at 1158-59.

In any event, the trial court found, with record support, that the prosecution did not act intentionally, the jury was instructed to disregard the testimony and confirmed that it could do so, the references were brief, the underlying details were not mentioned, and the prosecution did not mention the testimony in its arguments. Under these circumstances, the trial court did not abuse its discretion in concluding that reversal was not required. *See e.g.*, *Salas*, ¶¶ 11-18; (distinguishing *People v. Goldsberry*, 181 Colo. 406, 509 P.2d 801 (1973) and other cases where the improper evidence had been intentionally elicited); *People v. Everett*, 250 P.3d 649, 662-63 (Colo. App. 2010) (concluding that any prejudice from a prosecutor's fleeting and ambiguous reference to the defendant's prior incarceration was speculative); *People v. Salazar*, 920 P.2d 893, 897 (Colo. App. 1996)

(upholding trial court's denial of mistrial after witness mentioned that defendant had recently been released from prison); *see also Callis v. People*, 692 P.2d 1045, 1053 (Colo. 1984) (concluding that trial court's failure to excise defendant's reference to being on federal probation from his confession was harmless because the evidence did not delineate the nature of his past criminal conduct and there was substantial evidence of the defendant's guilt); *People v. Lowe*, 184 Colo. 182, 189, 519 P.2d 344, 348 (1974) (holding that a witness's reference to the defendant's prior incarceration did not require a mistrial where the nature and details of the prior charges were not given and there was no further reference to the issue; "We do not agree with appellant's arguments that any reference to a defendant's incarceration on other charges is per se prejudicial and requires a new trial. Rather, each must be evaluated on its own facts.").

IV. The trial court properly admitted K.K.'s statements.

The defendant contends that the trial court erred in admitting K.K.'s statements because they were hearsay and testimonial. The People disagree.

A. Standard of Review

The People agree in part and disagree in part with the defendant's statements concerning preservation and the standard of review. The defendant objected on hearsay grounds to an officer testifying about what K.K. said when she was initially contacted by the police. TR 3/12/14, pp 158-62. Thus, that claim is preserved. But the defendant did not object on any grounds to questioning about a written statement K.K. later prepared. TR 3/12/14, pp 165-66. Thus, that claim is not preserved. The People agree that the defendant's confrontation claim is unpreserved.

"A trial court's evidentiary rulings are reviewed for abuse of discretion and will not be disturbed unless the ruling is manifestly arbitrary, unreasonable, or unfair." *Warrick*, 284 P.3d at 141.

"Whether a statement is testimonial is a question of law subject to de novo review." *Id.* at 144.

Preserved evidentiary claims permit reversal only if the defendant can show that they are not harmless. *See e.g.*, *Faussett*, ¶ 52. Unpreserved evidentiary contentions are reviewed only for plain error. *See, e.g.*, *People v. Munoz-Casteneda*, 300 P.3d 944, 953 (Colo. App. 2012). Unpreserved constitutional claims should either not be reviewed, *Greer*, 262 P.3d at 929; *Id.* at 936 (J. Jones, J., specially concurring) ("[A] claim which requires development of a factual record and factual findings should not be reviewable on appeal."), or should be reviewed only for plain error, *see People v. Barry*, 349 P.3d 1139, 1154 (Colo. App. 2015).

B. Analysis

K.K. was unavailable to testify at trial because of a medical issue. TR 3/12/14, p 158:20-25. The defendant asserts that the trial court therefore erred in admitting some of her statements. But the trial court properly found that her initial statements to the police were excited utterances, and none of her statements were obviously testimonial.

1. The trial court properly found that K.K.'s initial statements to the police were excited utterances.

Police responded to the bank about five minutes after the robbery. TR 3/12/14, p 156:8-11. An officer asked K.K. to describe the robber. TR 3/12/14, p 157:15-18. The defendant objected to the officer testifying about K.K.'s responses, arguing that they were hearsay, and the prosecution argued that they should be admitted as excited utterances. TR 3/12/14, pp 158-62. As foundation, the prosecution elicited that, when K.K. made the statements, she was still upset, petrified, crying, and having trouble breathing or articulating herself. TR 3/12/14, pp 157, 161-62. The trial court found that it was "not too distant in time and sufficient foundation" had been laid for the excited utterance exception. TR 3/12/14, p 162:16-19.

The officer testified that K.K. gave a very general description of the robber, including that he was wearing a homemade mask that had

holes cut into it. TR 3/12/14, pp 162-65.[2] K.K. was so distraught that the officer had a hard time getting her to answer questions. TR 3/12/14, p 163:9-11. K.K. briefly described what had happened and said that the robber had pointed a gun at her and at M.O. TR 3/12/14, pp 163-64.

An excited utterance 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). It does not appear that the defendant challenges the trial court's finding that these statements were properly admitted under the excited utterance exception. Indeed, the defendant concedes "[t]he record establishes that K.K. witnessed a startling event and that she was distressed when she made the statements." Opening Br. p 27. Because the defendant does not challenge their admission as excited utterances on appeal, this Court should hold that the trial court did not err in admitting them.

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[2] The record indicates that the officer's memory of K.K.'s verbal statements was not refreshed with the later written statement. *Compare* TR 3/12/14, p 165:8 (refreshing officer's memory about K.K.'s verbal statements with page 96 of discovery), *with* TR 3/12/14, p 165:23 (refreshing officer's memory about K.K.'s written statement with page 50 of discovery).

See People v. Thompson, 2017 COA 56, ¶ 161. In any event, the record supports the trial court's ruling. *See, e.g.*, *People v. Green*, 884 P.2d 339, 341-42 (Colo. App. 1994) (upholding admission of robbery victim's initial statements to the police under the excited utterance exception where the officers arrived shortly after the robbery and the victim was "'panicked,' 'out-of-breath,' 'excited,' 'nervous,' and 'angry'").

While the officers were still at the bank, K.K. prepared a written statement. TR 3/12/13, p 165:14-17. The prosecution asked one question about that statement: "was she more specific in that statement in terms of the holes that were cut in the mask?" TR 3/12/14, p 165:18-19. The defendant did not object, and the officer testified that K.K. had written "[j]ust eye holes were cut out." TR 3/12/14, p 166:5.

As discussed above, where defense counsel "may have had strategic reasons for not objecting" to the challenged evidence, the trial court does not plainly err in failing to intervene sua sponte. *E.g.*, *Rawnsley*, 104 A.3d at 202. Here, defense counsel could have strategically decided not to object because doing so would have led to further evidence showing that K.K. continued to suffer from the effects

of the robbery when she wrote the statement. Indeed, defense counsel had already expressed concern that the amount of such evidence already admitted was prejudicing the defendant. TR 3/12/14, pp 157-60. Defense counsel further could have concluded that the information elicited did not warrant an objection because it was essentially cumulative to the evidence already admitted.

Even if the trial court did err in admitting that statement, it did not so undermine the fundamental fairness of the trial as to require reversal. The officer had already testified that K.K. described the mask as homemade, with holes cut in it. Indeed, nearly all of K.K.'s statements were cumulative and related to undisputed issues. In particular, M.O. also testified that the defendant pointed the gun in his direction. TR 3/12/14, p 95:3-8. And, as noted above, it was essentially undisputed that the mask had been used in the robbery; the defendant's theory was that it had been used by someone else.

As the defendant notes in his brief, some of K.K.'s statements supported the defendant's theory of defense. *See* Opening Br. pp. 31-32 (noting that K.K.'s testimony contradicted a significant prosecution

argument). The defendant appears to assert that he was prejudiced because that evidence could have been more convincing if it was offered in person. But because K.K. was unavailable to testify, the alternative was not live testimony, but rather exclusion of that exculpatory evidence.

Under these circumstances, any error in admitting K.K.'s statements was not prejudicial. *See, e.g.*, *People v. Joyce*, 68 P.3d 521, 524 (Colo. App. 2002) (holding that admission of hearsay was not plain error where it was cumulative).

2. The statements were not plainly testimonial.

A statement is testimonial only if, "in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony." *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015) (quotations omitted).

Statements made to a police officer may or may not be testimonial. *See, e.g.*, *Michigan v. Bryant*, 562 U.S. 344, 378 (2011) (concluding

statements made to police officers were not testimonial). "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Clark*, 135 S. Ct. at 2179 (quotation omitted). "[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry." *Bryant*, 562 U.S. at 363. Even in the absence of an ongoing emergency, other factors may also indicate that the statements were not testimonial, including the informality of the situation and whether the standard rules of hearsay recognize the statements as reliable. *Clark*, 135 S. Ct. at 2180.

As an initial matter, this Court should not review the defendant's argument on appeal because he failed to develop a record showing that the statements were obviously testimonial. *See e.g.*, *People v. Duran*, 382 P.3d 1237, 1239 (Colo. App. 2015) ("[T]he party asserting error must affirmatively show that it occurred."); *People v. O'Connell*, 134 P.3d 460, 465 (Colo. App. 2005) (defining the obvious prong of plain error).

The existing record indicates that most, if not all of the challenged statements were non-testimonial because they were elicited for the primary purpose of addressing the ongoing emergency related to apprehending a fleeing, armed bank robber. The statements were made in an informal setting, at the bank, and, as discussed above, were generally admissible as an excited utterance under the hearsay rules because they arose in a situation where the declarant was unlikely to have fabricated the content of the statements. *See Bryant*, 562 U.S. at 361-62 (explaining that the logic of the primary purpose rule during ongoing emergencies mirrors the justification for the excited utterance exception).

In any event, as discussed above, any error in admitting K.K.'s statements does not require reversal. *See, e.g.*, *Arteaga-Lansaw v. People*, 159 P.3d 107, 110 (Colo. 2007) (holding that confrontation violation was harmless beyond a reasonable doubt where statements were either cumulative or related to undisputed issues).

V. There was sufficient evidence that the defendant menaced and robbed M.O.

The defendant contends that there was insufficient evidence that he menaced or robbed M.O. The People disagree.

A. Standard of Review

The People agree that this issue is substantially preserved. TR 3/17/14, pp 155, 158-62; TR 3/18/14, pp 3-7. The People also agree that this issue presents a question of law, which is reviewed de novo. *See Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010).

B. Analysis

When reviewing the sufficiency of evidence, an appellate court must determine whether any rational trier of fact might accept the evidence, taken as a whole and in the light most favorable to the prosecution, as sufficient to support a finding of guilt beyond a reasonable doubt. *Id.* at 1291-92; *People v. Sprouse*, 983 P.2d 771, 777 (Colo. 1999). "[I]t will be assumed that the jury adopted that evidence, or any reasonable inferences therefrom, which supports its verdict." *People v. Widhalm*, 991 P.2d 291, 294 (Colo. App. 1999).

1. There was sufficient evidence that the defendant menaced M.O.

The defendant contends that there was insufficient evidence he knowingly menaced M.O. because there was no evidence that he knew M.O. was in the bank. *See* § 18-3-206(1)(a), C.R.S. (2016) (requiring proof that defendant acted "knowingly").

"The prosecution need only prove the defendant was aware that his or her conduct was practically certain to cause fear." *People v. Shawn*, 107 P.3d 1033, 1035 (Colo. App. 2004). The prosecution does not need to show "that the defendant had a conscious objective to cause such fear in the victim," *Id.*, or that "the victim actually [heard or was] cognizant of any threat from defendant," *People v. Saltray*, 969 P.2d 729, 732 (Colo. App. 1998).

Here, the defendant's claim fails for two reasons. First, the prosecution was not required to prove that the defendant knew M.O. was present. As outlined above in the statement of the case and the facts, there was ample evidence from which the jury could have concluded that the defendant knew his actions were practically certain

to cause fear for anyone who saw him engaging in the robbery. Felony menacing does not require proof that the defendant consciously identified each of the victims who could be affected by those actions. Rather, "if there is evidence from which the jury could reasonably find that defendant knew his actions, if discovered, would place the victim in fear of imminent serious bodily injury by use of a deadly weapon, then the intent element of the offense may be established." *Id.*

Second, even if it were necessary to prove that the defendant knew M.O. was present, there was sufficient evidence for the jury to draw that inference. The bank lobby was not large, M.O. was not concealed, and both M.O. and K.K. testified that the defendant pointed his gun at M.O. *See, e.g.*, Env 1, Ex 1; TR 3/12/14, pp 95, 163.

2. There was sufficient evidence that the defendant robbed M.O.

The defendant contends that there was insufficient evidence he knowingly took anything from the presence of M.O. *See* § 18-4-301(1), C.R.S. (2016) (requiring proof that the defendant took anything of value "from the person or presence of another").

"'[P]resence' in the context of robbery is not so much a matter of eyesight as it is one of proximity and control: the property taken in the robbery must be close enough to the victim and sufficiently under her control that, had the latter not been subjected to violence or intimidation by the robber, she could have prevented the taking." *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983) (quotation omitted). "[P]roperty 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." *Id.* "[T]he 'presence' element is broad enough to encompass the situation where the victim of the robbery, against whom the force, threats, or intimidation is directed, is present in one room of a family home and the taking occurs within another room." *Id.*

Here, as discussed above, M.O. was sufficiently close to the cash register and the robber that he, as a bank employee, could have retained control of the money on behalf of the bank if not for the threat posed by the defendant and his gun. Thus, there was sufficient

evidence that the defendant took the money from M.O.'s presence. *See id.* (upholding robbery conviction where there was evidence that defendant used force against the victim in one room then took items from another room).

To the extent divisions of this Court have suggested that, where the thing of value is not in the victim's physical possession, the prosecution must establish that the victim was exercising or had a right to exercise control over the thing, *see People v. Williams*, 297 P.3d 1011, 1018 (Colo. App. 2012), this Court should decline to follow that precedent because it is not well reasoned. The first division to require that showing adopted it from the common law, not the statutory language or history. *See People v. Benton*, 829 P.2d 451, 453 (Colo. App. 1991). Thus that requirement not only conflicts with *Bartowsheski*'s interpretation of the relevant statutory language, but also with subsequent pronouncements by the Colorado Supreme Court recognizing that the criminal code has entirely abrogated the common law for crimes committed in Colorado. *See Oram v. People*, 255 P.3d 1032, 1036 (Colo. 2011). In any event, the evidence that M.O. was an

employee at the bank was sufficient to permit an inference that he was authorized to prevent others from taking the bank's money. *See Benton*, 829 P.2d at 453 (vacating robbery conviction for customer of store where cash register was robbed but affirming convictions for two employees).

VI. The cumulative effect of the alleged errors did not deprive the defendant of his due process right to a fair trial.

The defendant contends that the cumulative effect of the alleged errors he presents in his opening brief requires reversal. The People disagree.

A. Standard of Review

The defendant does not address preservation or the standard of review.

For cumulative error to warrant a new trial, the defendant must show that the combined errors deprived him of his due process right to a fundamentally fair trial. *People v. Roy*, 723 P.2d 1345, 1349 (Colo. 1986); *see also, e.g.*, *People v. Stewart*, 2017 COA 99, ¶ 39 ("We will reverse for cumulative error where, although numerous individual allegations of error may be deemed harmless and not require reversal,

in the aggregate those errors show prejudice to the defendant's substantial rights and, thus, the absence of a fair trial." (quotation omitted)); *People v. Whitman*, 205 P.3d 371, 387 (Colo. App. 2007) ("A conviction will not be reversed if the cumulative effect of any errors did not substantially prejudice the defendant's right to a fair trial."). The defendant did not argue in the trial court that the cumulative effect of the alleged errors identified in his opening brief violated due process. Thus, that argument is not preserved.

Because the defendant's argument is unpreserved, it should not be reviewed, *see, e.g.*, *Greer*, 262 P.3d at 929 (refusing to review unpreserved due process claim); *Id.* at 936 (J. Jones, J., specially concurring) ("[A] claim which requires development of a factual record and factual findings should not be reviewable on appeal."), or should be reviewed only for plain error, *see, e.g.*, *Reyna-Abarca v. People*, 2017 CO 15, ¶ 37. If reviewed, whether a defendant has been deprived due process of law is a question of law reviewed de novo. *See Quintano v. People*, 105 P.3d 585, 592 (Colo. 2005); *People v. Nave*, 689 P.2d 645,

647 (Colo. App. 1984) ("[T]he existence of due process is a question of law.").

To the extent the defendant argues that the effect of any errors found by this Court should be analyzed for cumulative harmlessness under Crim. P. 52(a), as some divisions of this Court have suggested in dicta, *see, e.g.*, *People v. Howard-Walker*, 2017 COA 81M, ¶ 118, this Court should reject that request. Such an analysis critically ignores that even if some or all of the underlying errors were brought to the attention of the trial court, the trial court was never given any opportunity to consider whether the cumulative effect of those alleged errors warranted a new trial. It also conflicts with the authorities, including those cited above, permitting reversal only if the defendant can establish the trial was unfair. It appears that the Colorado Supreme Court has only found reversible error when the cumulative effect of multiple errors denied a defendant his or her constitutional right to a fair trial. *See, e.g.*, *People v. Reynolds*, 194 Colo. 543, 552, 575 P.2d 1286, 1294 (1978); *Oaks v. People*, 150 Colo. 64, 68-69, 371 P.2d 443, 446-47 (1962).

B. Analysis

The defendant has not explained how the alleged errors cumulatively deprived her of a fair trial. *See People v. Lientz*, 317 P.3d 1215, 1222 (Colo. App. 2012) ("[P]arties must do more than make conclusory assertions; they must present reasoned analysis."). For the reasons explained above, the trial court did not err, and any errors were not so prejudicial as to require reversal. *See Roy*, 723 P.2d at 1349.

VII. The trial court properly imposed consecutive sentences on the aggravated robbery convictions.

The defendant contends that the trial court erred in concluding that consecutive sentences were required for his aggravated robbery convictions. The People disagree.

A. Standard of Review

The People agree that this issue is preserved. The defendant argued that consecutive sentences were not required for his convictions for aggravated robbery because they were based on identical evidence, and the trial court rejected that argument, finding that the convictions

were not based on identical evidence. Supp CF, p 45; TR 5/12/14, pp 18-22, 29-36, 45-50.

The People also agree that the trial court's ruling is reviewed only for abuse of discretion. *People v. Muckle*, 107 P.3d 380, 382 (Colo. 2005); *People v. Glasser*, 293 P.3d 68, 78 (Colo. App. 2011). The interpretation of mandatory sentencing laws is a question of law reviewed de novo. *See People v. Torrez*, 316 P.3d 25, 31 (Colo. App. 2013).

B. Analysis

The defendant asserts that his convictions for aggravated robbery could be sentenced concurrently because they are based on identical evidence. But consecutive sentences were required both because there were multiple victims and because the convictions were not necessarily based on identical evidence.

1. The sentences must run consecutively because there were multiple victims.

Two statutory provision address whether the defendant's sentences for aggravated robbery, which are crimes of violence, must

run consecutively or concurrently. Under section 18-1.3-406(1)(a), C.R.S. (2016), "[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." And under section 18-1-408(3), C.R.S. (2016), "[w]hen two or more offenses are charged . . . and they are supported by identical evidence, . . . the sentences imposed shall run concurrently; except that, where multiple victims are involved, the court may, within its discretion, impose consecutive sentences."

Other divisions of the court of appeals have interpreted these provisions to be consistent, holding "that the crime of violence statute is subject to the requirements of subsection 408(3)." *People v. Torrez*, 316 P.3d 25, 34 (Colo. App. 2013). Because there were multiple victims, concurrent sentences were not required under section 18-1-408(3); therefore, consecutive sentences were required under section 18-1.3-406(1)(a). *See Marquez v. People*, 311 P.3d 265, 269 (Colo. 2013) (noting this overlapping application of the crime-of-violence and multiple victims sentencing provisions); *People v. Trujillo*, 114 P.3d 27, 33 (Colo.

App. 2004) (holding that consecutive sentences were required where there were multiple victims); *see also People v. Laurson*, 15 P.3d 791, 798 (Colo. App. 2000) ("Even if we assume, without deciding, that the convictions for attempted aggravated robbery and first degree assault were based upon identical evidence, the statute specifically authorizes the imposition of consecutive sentences because two separate victims were involved.").

2. The convictions were not necessarily based on identical evidence.

Whether convictions are based on identical evidence is a question of fact to be decided by the trial court. *Muckle*, 107 P.3d at 383. The trial court's finding must be upheld if there is any evidence in the record to support it. *Id.* "A sentencing court is mandated to impose concurrent sentences only when the evidence will support no other reasonable inference than that the convictions were based on identical evidence." *Juhl v. People*, 172 P.3d 896, 900 (Colo. 2007); *Muckle*, 107 P.3d at 384. "[T]he mere possibility that identical evidence may support two convictions" is insufficient to require concurrent sentences. *Juhl*,

172 P.3d at 900; *Muckle*, 107 P.3d at 384. "[W]hether the evidence supporting the offenses is identical 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*, 172 P.3d at 902.

Here, the convictions were not necessarily based on identical evidence. For example, the jury could have found that M.O. was threatened when the gun was pointed at him while K.K. was threatened when the gun was pointed at her. *See e.g.*, *People v. Bass*, 155 P.3d 547, 554 (Colo. App. 2006) (concluding that convictions for attempted robbery and use of a stun gun were not based on identical evidence because the attempted robbery conviction could have been based on evidence of force and threats besides the use of the stun gun). Accordingly, the trial court properly imposed consecutive sentences.

3. If the sentence cannot be affirmed, then the case should be remanded for resentencing.

"If a trial court's erroneous assumption of what the law required influenced its decision to impose a certain sentence, we must vacate the

sentence in its entirety and remand for resentencing." *People v. Lacallo*, 338 P.3d 442, 451 (Colo. App. 2014) (quotation omitted). At resentencing the trial court can restructure the entire sentence to impose an appropriate total sentence. *See People v. Johnson*, 363 P.3d 169, 178 (Colo. 2015).

CONCLUSION

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

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **KRISTA A. SCHELHAAS** and all parties herein via Colorado Courts E-filing System on August 31, 2017.

/s/ Tiffiny Kallina