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Court of Appeals, State of Colorado 2 East 14th Ave., Denver, CO 80203 Direct Appeal; Arapahoe County District Court; Honorable Kurt A. Horton; Case Number 13CR2039	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. JAMALE D. TOWNSELL, Defendant-Appellant.	
Attorney for Defendant-Appellant Krista A. Schelhaas (Alternate Defense Counsel) Schelhaas Law LLC PO Box 621355 Littleton, CO 80162 (303) 803-4750 kschelhaas@comcast.net Attorney Reg. No. 36616	Case No. 14CA1225
REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28(g). It contains 5,186 words.
2. C.A.R. 28(k) does not apply to this brief. The opening brief contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

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

A. Standard of Review

The People misconstrue the plain error standard of review by labeling plain error a discretionary form of relief. (Answer Brief, p. 8-9). Colorado plain error review is clear: a case must be reversed for plain error "if the error 'so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction.'" *Hagos v. People*, 2012 CO 63, ¶ 14, 288 P.3d 116, 120 (quoting *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005)). Thus, when an error is obvious and substantial, the reviewing court must reverse. *People v. Pollard*, 2013 COA 31M, ¶¶ 24-47, 307 P.3d 1124, 1129-34.

B. Expert Testimony

The expert did not provide statistics to support her statements that Mr. Townsell's DNA matched the shoes, pantyhose, bandana, and mask. (TR 3/17/14, p 116: 2-4; p 117: 3-4, 15-17; p 117: 25 – p 118: 2). Before discussing any evidence in the case, the expert made one statement regarding "source attribution" and stated, "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." (*Id.* at p 101: 7-9). However,

the expert did not provide accompanying statistics to support her conclusions that the DNA was a match to the evidence in this case.

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. Preservation

The People contend that this issue is not preserved because Mr. Townsell did not continue to object to the evidence, and because he failed to request a continuance. This contention is belied by the record.

Mr. Townsell objected to the late disclosure of the DNA evidence multiple times throughout the trial. (TR 3/13/14, p 199: 4-16; 3/14/14, p 6: 15 – p 9:24, pp 35-40). The district court was fully aware of the issue and was "concerned with the number of apparently late disclosures by the People." (TR 3/14/14, p 24: 21-23).

The district court also ruled that a continuance was not possible because of the Uniform Mandatory Disposition of Detainer's Act deadline and the speedy trial deadline. (*Id.*)

B. Waiver

The People also argue that Mr. Townsell waived this claim. The following cases cited by the People in support of their position are inapposite.

In *People v. Wood*, 230 P.3d 1223, 1227 (Colo. App. 2009), *aff'd*, 255 P.3d 136 (Colo. 2011), the defendant sought to introduce impeachment evidence. The trial court held that the evidence was not automatically admissible but opined that admissibility could develop under other theories as the trial progressed. Because defense counsel did not later seek to introduce the evidence under another theory, the objection was waived. *Id.*

In *People v. Tallwhiteman*, 124 P.3d 827, 833-34 (Colo. App. 2005), defense counsel declined an invitation by the trial court to address the admissibility of impeachment evidence in the event his client decided to testify. The defendant did not testify and defense counsel did not request a ruling as to whether the impeachment evidence would be admissible if the defendant chose to testify. *Id.*

In *People v. Ridenour*, 878 P.2d 23, 28 (Colo. App. 1994), defense counsel did not request a ruling on a motion to continue in order to secure the presence of a witness. Instead, defense counsel stipulated to a statement of the witness being read to the jury. Thus, the motion to continue was waived. *Id.*

In *People v. Hise*, 738 P.2d 13, 16-17 (Colo. App. 1986), the trial court reserved ruling on how far the prosecution could go in the presentation of particular evidence. Defense counsel never objected when the evidence was admitted. Defendant also offered some of the challenged evidence himself. *Id.*

And finally, *Vanderpool v. Loftness*, 2012 COA 115, ¶ 26, 300 P.3d 953, 961, is a civil case where the trial court never ruled on the plaintiff's motions in limine. Counsel filed motions but did not request rulings on the motions. *Id.*

Here, however, Mr. Townsell lodged the objection during trial, and continued to argue his position during the subsequent discussions of the evidence. Mr. Townsell's position was clear and the record demonstrates that the district court understood that position.

The People also cite several extra-jurisdictional cases to support their assertion that Mr. Townsell waived this claim by failing to request a continuance. (Answer p. 20). However, the district court ruled that a continuance was not an available remedy here. (TR 3/14/14, p 24: 21-25). Mr. Townsell's speedy trial rights were discussed multiple times during argument on the discovery violation. Defense counsel stated, "My client doesn't want to waive his speedy trial rights because he's sitting in jail, he can't make bond." (*Id.* at p 23:14-16). Defense counsel explained:

> [T]he argument, well, gosh, he exercised his rights under the Uniform Mandatory Detainer's Act, that gives us a pass to not comply with the rules anymore, I don't believe that is accurate because the right to a speedy trial is not statutory, it's constitutional, Your Honor. And, quite frankly, if the prosecution delays bringing somebody when there's a warrant issued and then delays bringing them to court so that speedy

> trial issues become speedy trial issues, that's not on the defendant, that's why they have the Uniform Mandatory Detainer's Act is to avoid that type of issue and to avoid that type of delay.

(*Id.* at p 21: 4-15).

Additionally, in response to the prosecutor's argument that the deadlines could be met, the district court ruled, "I do not have much time on UMDDA." (*Id.* at p 37: 7).

C. Discovery Violation

The People assert that the report was "properly disclosed as soon as it came into the possession of the prosecution." (Answer Brief, p. 22). However, the report was dated February 14, 2014, and was not disclosed until just before the March 11, 2014, trial. (TR 3/14/14, p 6:18-21). The district court was troubled by the fact that the People made many late disclosures in the case, including the DNA report. (TR 3/14/14, p 24: 21-23).

D. Prejudice

As defense counsel explained to the district court, the "disclosure violation fundamentally changed the way I was looking at this case." (TR 3/14/14, p 8: 11-13). Defense counsel explained:

> So as I told the Court, 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.

(*Id.* at p 7: 16 – 8: 2).

Because of the late disclosure, defense counsel did not have an opportunity to secure a defense expert to separately test other items involved in the robbery or otherwise challenge the DNA.

The discovery violation is crucial in this case because the physical description of the robber does not match Mr. Townsell. Indeed, the DNA evidence was the only evidence used to identify Mr. Townsell in this case. This is significant given the fact that the clothing items that would have been closest to the robber's skin were not tested for DNA. For example, 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." (TR 3/12/14, p 246: 8-11; Env 1, EX 69-70). The prosecution did not check for DNA or fingerprints on the t-shirt, phone, or tape. (TR 3/17/14, p 64: 22 – p 65: 1; p 131: 10-15). The DNA expert did not test the gloves or any of

the other recovered items. (*Id.* at p 129: 9-18).

If the expert report would have been properly disclosed, Mr. Townsell could have secured his own expert to test those additional items and counter the prosecution expert's decision not to test those additional items. Particularly in this case where an alternate suspect matched the physical description of the robber, Mr. Townsell was prejudiced by the late disclosure.

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

A. Clarification of Facts

The People's statement of additional facts is misleading. Mr. Townsell did not "elicit from [Ruffin's mother] that he and his wife got married 'inside the jail.'" (Answer Brief, p. 25). Instead, defense counsel simply asked the witness, "Is [Ebony Ruffin] married to Jamale Townsell?" (TR 3/17/14, p 173: 18-19). The witness responded, "If it's legal inside the jail, yes." (*Id.* at l. 20). Defense counsel then moved quickly to a new topic to avoid highlighting the answer. (*Id.* at ll. 21-22)

This fact is important to the analysis. The "jail" reference in this initial statement is ambiguous. It is not clear from the witness's statement what "legal

inside the jail" actually meant. The witness did not specify who was "inside the jail" and whether she meant her daughter, or Mr. Townsell. Although the inference was present, it was not clear from the statement that the witness was referring to the actual ceremony or marriage occurring inside the jail.

However, when the prosecutor pushed the witness on cross-examination, the witness's meaning became clear for the jury: "I guess they got married in jail while he was still in jail." (*Id.* at pp 191: 25 – 192: 1). The date of the prior incarceration was also clear at that point because the prosecutor had just elicited testimony that the marriage occurred in 2008. (*Id.* at p 191:17).

B. Mistrial for Prior Criminality References

The Colorado Supreme Court has repeatedly made clear that references to a defendant's prior criminality create reversible error. *People v. Goldsberry*, 181 Colo. 406, 409, 509 P.2d 801, 803 (1973); *see also Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1090-91 (Colo. 2011) ("inadmissible evidence of the defendant's criminal activity" cannot be cured by an instruction when proof of guilt is not overwhelming); *Edmisten v. People*, 176 Colo. 262, 275-77, 490 P.2d 58, 64-65 (1971) (when evidence is not overwhelming, introduction of prior criminality evidence causes reversible error and cannot be cured by an instruction).

The prosecutor's questioning leading to the witness's clear and damaging

statement "while [Mr. Townsell] was still in jail" highlights the concerns first articulated by the *Goldsberry* Court and repeatedly discussed by the Colorado Supreme Court and other divisions of this Court. First, the statement was clear and unambiguous. There was no question what the witness meant; she testified that Mr. Townsell was in jail. Second, the statement was clearly about a prior incident because the prosecutor elicited that the marriage occurred in 2008 (TR 3/17/14, p 191: 14-17). Third, the statement was elicited by the prosecution. As explained by trial counsel, this "whole issue of the date of marriage was waiting for a ticking time bomb" after the witness's initial nonresponsive answer. (*Id.* at p 193: 5-6).

These concerns are exactly those expressed by the supreme court. It was clear from the record that the witness would respond to the prosecutor's question as she did. Likewise, in *Goldsberry*, the supreme court explained, "It appears from the record of this case that the district attorney was fully cognizant that the prosecution witness would respond in the manner he did and thus, expose to the jury inadmissible and highly prejudicial evidence." 181 Colo. at 411, 509 P.2d at 804.

Here, the prosecutor continued to push the witness for details of the wedding ceremony. The prosecutor asked "There wasn't a ceremony that you attended?" (TR 3/17/14, p 191: 21). The witness replied, "No." (*Id.* at l. 22). The prosecutor

continued to push "Were they -- do you know whether there was a ceremony or married under common law?" (*Id.* at ll. 23-24). At this point the witness responded, "I guess they got married in jail while he was still in jail. Like I said, it was Easter Sunday." (*Id.* a p 191: 25 – 192: 1). Given this record, it is clear that the prosecutor knew the witness would respond as she did. A mistrial is required.

In contrast to the cases cited by the People, this reference was not fleeting, ambiguous, or speculative. And the impact on the jury was significant given the evidence in this case.

C. Prejudice

The prejudice to Mr. Townsell is substantial. Identity was the primary jury issue. The robber's physical characteristics do not match Mr. Townsell. The robber is left-handed and at most 5'10" tall. Mr. Townsell is right-handed and 6'2" tall. (TR 3/17/14, p 42: 12-16). With such glaring discrepancies in the physical description, the jury's knowledge of prior criminality weighs heavily against Mr. Townsell. In this case, like in *Goldsberry*, "it is conceivable that but for its exposure [to Mr. Townsell's prior incarceration], the jury may not have found the defendant guilty." *Goldsberry*, 181 Colo. at 410, 509 P.2d at 803; *see also Qwest Servs. Corp.*, 252 P.3d at 1091.

Under these circumstances, our supreme court has made clear that a mistrial

was required. *Goldsberry*, 181 Colo. at 410, 509 P.2d at 803.

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

A. Clarification of Facts

The People conflate Mr. Townsell's statements in the opening brief to suggest that "defendant does not challenge [the statements] as excited utterances on appeal." (Answer Brief, p. 34). The People's statement is false. Mr. Townsell argued in the opening brief that although K.K. witnessed a startling event, her written statements were the product of reflective thought and occurred long after any initial spontaneous statements. (Opening Brief, pp. 27-28).

Mr. Townsell continued to argue in the opening brief that "K.K.'s statements to the officer were made in response to questioning and after reflective thought; they were not excited utterances." (*Id.* at p. 28). Thus, contrary to the People's contention, Mr. Townsell continues to argue that K.K.'s statements were not excited utterances.

B. Testimonial Statements

The People assert that the statements were not "obviously testimonial." (Answer Brief, p. 38). However, as explained in the opening brief at pages 28 and 29, K.K.'s statements, formalized in a written statement, were testimonial because

they were "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 v. People*, 148 P.3d 126, 132 (Colo. 2006).

Formal written statements to police are testimonial. *Raile*, 148 P.3d at 132. This is because — like K.K. here — the witness is no longer in danger or in need of police help. Instead, the witness does "what a witness would do on direct examination" and what K.K. did here: "she recounted how potentially criminal events began and progressed. In short, [she] was 'testifying' to the police officer in the same way that she would have testified in court." *Id.* at 132. As explained by the supreme court:

> There was nothing in either the police questions or [the witness's] answers that would or could resolve a then-existing problem. [The witness's] statements were made in response to a police interrogation whose primary purpose was to investigate possible crimes that had already been completed. Objectively considered, there was no ongoing emergency at the time that [the witness] spoke to [the officer]. [The witness's] statements were testimonial.

Id. at 133.

C. Harmfulness

The impact of K.K.'s statements was significant in this case, particularly

because of the discrepancies in the identity evidence.

Also significant, however, is the fact that K.K. was the only witness to state that the robber pointed the gun at M.O. The prosecutor asked, "Who did [K.K.] say the gun had also been pointed at?" (TR 3/12/14, p 163: 24-25). The officer responded, "[M.O.] who was another bank employee." (*Id.* at p 164: 1). Contrary to the People's assertion, M.O. did not say that the gun was pointed at him. M.O. specifically testified that the gun "was not aimed." (*Id.* at p 95: 6). M.O. stated that the gun was "pointed in [his] direction" because the robber was "getting money out and holding [the gun] with the other hand" but it "was not aimed." (*Id.* at ll: 5-8). There is an important difference between a gun being "pointed in the direction of" something and being "pointed at" or "aimed" at someone. Mr. Townsell had a constitutional right to confront K.K. on this issue.

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

A. Menacing

The People assert that sufficient evidence exists for the felony menacing conviction. In doing so, however, they (1) misapply the knowingly mens rea, and (2) misstate the facts of the case. Both issues will be addressed in turn.

1. Knowingly

First, the People argue that "anyone who saw [a robber] engaging in a robbery" is a victim of menacing and "menacing does not require proof that the defendant consciously identified each of the victims who could be affected." (Answer Brief, p. 42). These statements misstate the intent element for felony menacing.

Felony menacing requires that the actor "knowingly place[ ] or attempt[ ] to place another person in fear of imminent serious bodily injury." § 18-3-206(1)(a), C.R.S. While this standard does not necessarily require subjective fear on the part of the alleged victim, it does require that the defendant act knowingly — "that he was aware that his conduct was such that it was practically certain to place the victim in fear of imminent serious bodily injury." *People v. Saltray*, 969 P.2d 729, 731 (Colo. App. 1998). When an actor does not know that another person is present, he or she cannot be aware that his or her conduct is practically certain to cause fear.

The People cite language in *Saltray* to support their position that a defendant does not need to know a victim is present to commit menacing. The quoted language states that if the defendant "knew his actions, if discovered, would place the victim in fear . . . then the intent element of the offense may be established."

Id. at 732. This language, however, is used to address a contention that the victim must be aware of the defendant's actions. *Id.* 731-32. The division held that while the victim need not be aware, the defendant must be aware. Indeed, the language repeats the knowing requirement: "that *defendant knew* his actions" would place the victim in fear. *Id.* at 732 (Emphasis added.)

2. Facts

Second, the People erroneously state that "both M.O. and K.K. testified that the defendant pointed his gun at M.O." (Answer Brief, p. 42). The People's assertion is belied by the record. M.O. testified that the gun was "not aimed" at him but rather "pointed in [his] direction" because the robber switched hands to get the money out of the drawer. (TR 3/12/14, p 95: 5-8). M.O. "was not concerned about the gun." (*Id.* at l. 18). M.O.'s lack of concern for the gun in this case is important because it demonstrates that the robber paid no attention to M.O.

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. Because of the video surveillance, this Court is in the same position as the jury to view the speed at which the robber ran, the robber's far distance from M.O., and

the complete lack of any knowledge by the robber that M.O. was present. *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 video shows that 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. (Env. 1, EX 1). In fact, 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.

B. Robbery

The People ask this Court to decline to follow Colorado case law interpreting the robbery statute. The case law interpreting "presence of another" is well reasoned and applicable to the facts here.

"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).

When there is no trial evidence to establish that an employee has access to or could exercise control over the item taken, the evidence is insufficient to support a robbery conviction. *See Ridenour*, 878 P.2d at 27. Thus, in *Ridenour*, because the employee did not have physical possession of the money taken, "he could have been the victim of a robbery only if he had the right to exercise control over that money." *Id.* The employee's testimony did not establish the right to exercise control over the money so the conviction was vacated. *Id.*

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. (TR 3/12/14, p 93: 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. (Env. 1, EX 1). M.O. testified that the robber left the bank "just as fast as he came in . . . [and] ran out the front door." (TR 3/12/14, p 96: 17-19).

The evidence is also 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 a "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: 13-18). Thus, like in *Ridenour*, the evidence here is insufficient to sustain the conviction. *Ridenour*, 878 P.2d at 27.

Under these facts, the evidence is insufficient to sustain the burglary and menacing convictions involving M.O.

VI. Multiple Trial Errors Resulted in Cumulative Error Requiring Reversal

Mr. Townsell relies on the authorities and arguments set forth in the opening brief.

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

A. Identical Evidence

A "single volitional act" involving multiple victims is supported by identical evidence and does not require consecutive sentencing. *People v. Espinoza*, 2017 COA 122, ¶ 40. Another division of this Court announced *Espinoza* after the opening and answer briefs were filed in this case. *Espinoza* is dispositive of the issue here. In *Espinoza*, the defendant's "ten attempted murder convictions were supported by identical evidence, despite naming different victims, because the same evidence formed the basis of each conviction." *Id.* at ¶ 26. Therefore the division held that "separately named victims do not create separate crimes of violence under section 18-1.3-406(1)(a)[, C.R.S.] when identical evidence supports each conviction, and in such circumstances, a court retains discretion to impose concurrent sentences under section 18-1-408(3)[, C.R.S.]." *Id.*

The People contend that the convictions were not based on identical evidence because "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." (Answer Brief, p. 52). This argument is problematic.

First, there was no admissible evidence to support the statement that the gun

was "pointed at" M.O. As discussed earlier, M.O. testified that the gun was not pointed at him, and K.K.'s statement violated the Confrontation Clause so it cannot be used to support the People's position here.

Second, the district court did not order consecutive sentencing based on a finding that the gun was pointed in two different directions or on a finding that there were separate incidents here. Instead, the district court ordered consecutive sentencing based on an erroneous belief that consecutive sentencing is required whenever there is more than one victim. Indeed, the district court determined that the "circumstances arise out of the same incident." (TR 5/12/14, p 50: 12). The district court highlighted the key evidence: "it was a single bank robbery occurring within approximately 60 seconds." (*Id.* at p 49:17-18). The district court clarified, "The Court is not confronted with the circumstances in [*Marquez v. People*, 2013 CO 58, 311 P.3d 265], where there was a crime spree occurring over 12 to 24 hours, but rather a single incident." (*Id.* at ll: 18-21). But the district court "believe[d] that consecutive sentencing [was] required" because "there are clearly different victims." (*Id.* at p 50: 10-16).

However, under section 18-1-408(3), multiple counts can be supported by identical evidence while involving multiple victims. This is because the statute mandates concurrent sentencing for counts based on identical evidence but

provides an exception for multiple victims. If incidents involving multiple victims could never be supported by identical evidence, the exception would be unnecessary. *See Espinoza*, ¶ 41(to give effect to the plain language of both statutes, some evidence beyond the existence of multiple victims must exist to establish a 'separate crime'").

The Colorado Supreme Court has

> made clear that a criminal episode for purposes of . . . mandatory concurrent sentencing when the separate offenses arising from such an episode are actually proved by identical evidence, contemplates . . . only those offenses, arising either from the same conduct or connected in such a manner that their prosecution will involve substantially interrelated proof.

Marquez, 2013 CO 58, ¶ 17, 311 P.3d at 271. Crimes that involve "interrelated proof" are those "that occur in the same or closely related place, and acts that form part of a schematic whole." *Id.* at ¶ 17, 311 P.3d at 271-72.

The convictions here arise from the same conduct and involve interrelated proof. As explained by the district court, the facts involved one sixty-second episode. The robber entered the bank, sprinted past M.O. without acknowledging his presence in any way, 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.

In *Espinoza*, 2017 COA 122, ¶ 40, another division of this Court addressed this issue. The *Espinoza* Division concluded that where "a single volitional act" threatened the lives of multiple victims, the evidence required to prove the multiple counts was identical and consecutive sentencing was not required. Therefore, consecutive sentencing was not required for the single act of setting a fire that threatened the lives of multiple victims. *Id.*

Likewise, here, consecutive sentencing was not required for the single act of running into the bank and demanding money from the teller.

B. Abuse of Discretion

The district court abused its sentencing discretion because it misapplied the law. *See People v. Garrison*, 2017 COA 107, ¶ 30 (a court abuses its discretion when it misunderstands or misapplies the law); *see also Espinoza*, ¶ 41 (trial court erred when it found that consecutive sentences were mandatory).

The record demonstrates that the district court would have imposed a

concurrent sentence if it felt it had the authority to do so. The district court first discussed whether it had discretion to order consecutive sentences and held that it had such authority: "Here, multiple victims are involved. So, the Court clearly has discretion to sentence the defendant consecutively on Count 1 and Count 2." (TR 5/12/14, p 46: 17-19). If the district court had intended to impose consecutive sentencing based on its discretion to do so, it would have stopped the analysis at that point and simply imposed consecutive sentences. However, the district court then stated, "[t]he question is whether the Court is required to impose consecutive sentencing pursuant to [section] 18-1.3-405, the crime of violence statute." (*Id.* at p 47: 2-4). The district court concluded "consecutive sentencing is required in this case." (*Id.* at p 50: 15-16). Because the district court abused its discretion in concluding that consecutive sentencing was mandated by the statute, the consecutive sentence should be vacated.

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 9th day of November 2017, a true and correct copy of the foregoing REPLY BRIEF was filed through the Integrated Colorado Courts E-Filing System (ICCES), with a copy checked to be sent to BROCK J. SWANSON, Office of the Attorney General, Criminal Division.

s/ Krista A. Schelhaas
Krista A. Schelhaas