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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Ave.
Denver, CO 80203

City and County of Denver District Court
Honorable Judge Ann B. Frick
Case No. 14CR6552

Plaintiff-Appellee,

THE PEOPLE OF THE STATE OF COLORADO,

v.

Defendant-Appellant,

GABRIEL A. TRESCO.

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Case No. 16CA400

PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. The undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g). It contains 7.398 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b). In response to each issue raised, the appellee must provide under a separate heading before the discussion of the 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 or 28.1, and C.A.R. 32.

/s/John T. Lee

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INTRODUCTION

David Tresco, the defendant, appeals his conviction and sentence for assault in the second degree. He argues that the trial court erred in denying him his counsel of choice, allowing an expert to testify about nerve damage, and admitting and considering during sentencing a statement the defendant made during an episode of Gangland. As the applicable law and facts supports the trial court's judgment, this Court should affirm the defendant's judgment of conviction and sentence.

STATEMENT OF THE CASE

I. Proceedings below.

On December 26, 2014, the People charged the defendant with assault in the second degree. (R. CF, p. 9.) Following trial, the jury found the defendant guilty as charged. (R. Tr. 12/2/15, p. 178.) The trial court sentenced him to 8 years in the Department of Corrections. (R. Tr. 1/22/16, p. 37; R. CF, p. 45.) He filed this direct appeal.

II. Statement of the facts.

Inside JD's bar, the defendant and his girlfriend were arguing and yelling at each other. (R. Tr. 12/2/15, p. 82.) An employee asked the two if everything was okay, they said yes, but the defendant's girlfriend continued to push the defendant. (*Id.* at 84.) The two continued to fight for several minutes, until the defendant's girlfriend left the bar. (*Id.* at 85.) The defendant left a few minutes later. (*Id.*)

Louis Covillo worked at Denver Parks and Recreation and part-time at JD's bar as security. (R. Tr. 12/1/15 p.m., p. 160.) When he parked his car outside JD's, he heard someone scream, "There's that SOB." (*Id.* at 164.) Mr. Covillo assumed there was a problem going on in the bar's parking lot, so he tried to get out of his car quickly to make sure that no one would get hurt. (*Id.* at 165.) When he stepped out of the car, the defendant came around and sucker punched him in the face with "everything he had." (*Id.* at 165, 170.)

Mr. Covillo tried restraining the defendant, until another security guard came out of the bar, and got in-between them. (*Id.* at 168-69.) After they were separated, the defendant started laughing. (R. Tr.

12/2/15, p. 91.) He said that "it was a mistake, he thought [Mr. Covillo] was somebody else." (*Id.*) The defendant tried to shake Mr. Covillo's hand, and said he was sorry because he had mistaken him for someone else. (*Id.*) One of the JD employees could smell alcohol on the defendant. (*Id.* at 92.)

Due to the punch, Mr. Covillo suffered three fractures, one to his orbital wall, his zygoma, and his maxillary bone. (R. Tr. 12/1/15 p.m., p. 126.) According to the doctor that treated him, each fracture constituted serious bodily injury. (*Id.* at 125.)

At trial, the defense conceded that the victim was assaulted. (*Id.* at 107.) And the defendant admitted that the victim "suffered bodily injury as a result of facial fractures." (*Id.* at 108.) The defense instead claimed that the defendant had been misidentified and that someone else had hit the victim. (*Id.* at 105-07.) Likewise, during closing, the defense explained "there's no denying that Mr. Covillo was injured. You saw pictures of that, video of it, and you heard Dr. Fallon testify about the injuries that Mr. Covillo had." (*Id.* at 159.)

SUMMARY OF THE ARGUMENT

The defendant argues that the trial court violated his right to his counsel of choice mandating reversal of his conviction. But that misconstrues the issue raised below. The defendant never argued that he had hired a new attorney to represent him. Instead, the record indicates that the defendant wanted to potentially make a request for substitute counsel. As the defendant does not actually raise that claim, this Court should not address it. If it does, however, neither at trial nor on appeal has the defendant established a conflict of interest entitling him to substitute counsel. A remand is not required.

In a similar vein, the defendant wrongly objects that the trial court erred in allowing the expert to testify about the victim's nerve damage. The defendant bases on his argument on his contention that the People should have disclosed that particular opinion below. But as the trial court found, the defendant abandoned that request by failing to secure a timely ruling. In addition, the defendant received the necessary information to confront the witness and disclosure of that specific conclusion was not necessary. In any event, as the defendant

repeatedly conceded at trial that the victim suffered serious bodily injury based on the various fractures that resulted from the assault, any error in admitting evidence that he potentially suffered nerve damage was harmless.

In the end, the defendant is left with his claim that the trial court erred in in admitting a statement he made during an episode of Gangland. Although the defendant argues that the video violated his right to association, the case he cites for the proposition indicates otherwise. In addition, the trial court properly admitted the video as it was relevant to the defendant's character. In any event, as the trial court did not rely on the video in imposing sentence, the defendant's argument fails as a factual matter.

ARGUMENT

I. The defendant did not raise a counsel of choice claim at trial and a remand is not necessary.

A. Standard of review.

The People largely disagree with the defendant's proposed standard of review. Although the defendant argues that the trial court

violated his right to counsel of choice, the record establishes that the defendant raised a potential issue regarding whether he wanted to move for substitute counsel. (R. Tr. 12/1/15 a.m., pp. 35-36.) Therefore, the People disagree with the defendant that he preserved any claim that he wanted to be represented by a retained counsel of choice.

To the extent this Court reviews the defendant's counsel of choice claim, it should be reviewed only for plain error. *See, e.g., People v. Ujaama*, 302 P.2d 296, 304 (Colo. App. 2012). Plain error is "strong medicine" that provides a basis for "relief only on rare occasions." *Id.* The defendant bears the burden of showing that the error was obvious and substantial, and a reviewing court will only reverse under plain error review if the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *Id.* at 305.

And to the extent this Court decides to address the defendant's claim as the denial of a request for new counsel, that issue is reviewed only for abuse of discretion. *People v. Bergerud*, 223 P.3d 686, 696 n.4 (Colo. 2010). Even if the trial court erred, remand or reversal is not

required unless the defendant was prejudiced. *Id.* at 696. There is a split between divisions of this Court as to the nature of the prejudice inquiry. *See People v. Kelling*, 151 P.3d 650, 654-56 (Colo. App. 2006) (creating split). As discussed further below, any error is harmless unless the defendant establishes that he received ineffective assistance of counsel. *See, e.g.*, *People v. Fisher*, 9 P.3d 1189, 1193 (Colo. App. 2000); *People v. Bolton*, 859 P.2d 303, 309 (Colo. App. 1993); *see also People v. Whitlock*, 2014 COA 162, ¶ 22.

B. Factual background.

Right before jury selection, defense counsel advised the trial court that the defendant had some paperwork about a "grievance he has filed with the attorney regulation counsel that he would like to show the Court." (R. Tr. 12/1/15 a.m., p. 35.) The trial court asked if the defendant was "intending to now file a motion on the morning of trial to require disqualification of counsel." (*Id.*) The defendant stated, "I would like for you to review that first to see which way I should go, because I don't really know--." (*Id.* at 35-36.)

The trial court told the defendant it could not give him legal advice. (*Id.* at 36.) The trial court explained that the document would only be relevant if the defendant was requesting that his attorney be withdrawn on the morning of trial, and the defendant asked to "proceed with that, Your honor." (*Id.*) The trial court stated it would "have to go through the elements of *People v. Brown*," but because the jury had come up to the courtroom, the prosecutor asked to address the issue after jury selection. (*Id.*) The trial court agreed. (*Id.*)

But following jury selection, other than making a record regarding a witness, neither the parties nor the trial court addressed the defendant's earlier complaint about his attorney. (*Id.* at 96-99.)

The day before sentencing, on January 21, 2016, the defendant filed a "motion to dismiss counsel for neglect and ineffectiveness." (R. CF, pp. 41-43.) The defendant asserted that there was a breakdown of communication, his counsel misled him regarding several of his trial rights, dismissed witnesses he wanted her to call at trial, proceeded with a trial strategy he disagreed with, and failed to challenge the juror

pool. (*Id.*) The defendant also stated that he had never applied for or qualified for the public defender. (*Id.*)

Yet at the sentencing hearing the next day, in voicing his complaints against his attorney, the defendant acknowledged that at the time of his pretrial conference hearing, he was "going through some problems being kind of homeless . . . ." (R. Tr. 1/22/16, p. 30.) Still, the defendant asserted that had his attorney not misadvised him about his right to waive speedy trial, he thought that he would have been able to hire a trial attorney to represent him. (*Id.* at 30.) Although the defendant stated that he mentioned it in his motion, he acknowledged that he "did not mention [his attorney's] deception to [the Court] or the prior judge in Courtroom 5c when it occurred." (*Id.* at 31.)

The defendant also asserted that he was dissatisfied with his counsel's trial strategy. (*Id.*) In his view, because his attorney could not champion his cause, she should have withdrawn. (*Id.* at 32.) The defendant stated that he wanted to pursue a heat of passion defense based on his claim that the victim had groped his fiancée that night. (*Id.* at 29, 31.)

The prosecutor clarified for the record that, contrary to the defendant's statement, he had waived his speedy trial right on May 29th and then again on July 10th. (*Id.* at 34; R. CF, pp. 25; R. Tr. 7/10/15, p. 5.) As for the defendant's proposed heat of passion defense, the prosecutor pointed out that there was absolutely no evidence that the victim had groped the defendant's fiancée. (R. Tr. 1/22/16, p. 34.) Accordingly, there was no heat of passion as there was no highly provoking act by the victim. (*Id.*)

The trial court agreed that there was "absolutely no evidence" of provocation. (*Id.* at 36.) Instead, the evidence established that, just as the victim had pulled his car into the parking lot, the defendant hit him. (*Id.*) The trial court also noted that the defendant was "obviously intelligent" and "worked at a law firm for a while." (*Id.* at 35.) The trial court imposed sentence without addressing the defendant's dissatisfaction with his attorney.

C. Law and analysis.

1. The defendant did not raise his right to counsel of choice.

"The right to counsel is guaranteed by the Sixth Amendment to the U.S. Constitution." U.S. Const. amend. VI; *see People v. Alengi*, 148 P.3d 154, 159 (Colo. 2006). "This right encompasses both the right to a retained attorney for a defendant who is financially able to pay for legal representation and the right to a court-appointed counsel for an indigent defendant faced with the prospect of incarceration." *People v. DeAtley*, 2014 CO 45, ¶ 14 (citing *King v. People*, 728 P.2d 1264, 1268 (Colo. 1986)). Although "the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant," the Sixth Amendment also encompasses "the right to select and be represented by one's preferred attorney." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

But the right to counsel of one's choice is "circumscribed in several important respects." *Id.* One "important respect[ ]" that circumscribes the right in this case is that "a defendant may not insist on

representation by an attorney he cannot afford . . . ." *Id.* In other words, "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006); *accord People v. Coria*, 937 P.2d 386, 389 (Colo. 1997) (an indigent defendant has a constitutional right to counsel in a criminal case, "but not an absolute right to demand a particular attorney."). Therefore, while indigent criminal defendants have a statutory right to have counsel appointed at the expense of the state under Colorado law, there is no right to have particular counsel appointed. *Hodges v. People*,158 P.3d 922, 927 (Colo. 2007); *People v. Cardenas,* 62 P.3d 621, 623 (Colo. 2002); *see also Caplin & Drysdale v. United States*, 491 U.S. 617, 626 (1989) ("Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond the individual's right to spend his own money to obtain the advice and assistance of counsel."). Moreover, the right to be represented by counsel of one's own choosing is limited to the extent that it impinges upon the public's right to the effective and efficient administration of justice. *See, e.g., People v.*

Brown, 2014 CO 25, ¶ 20 (recognizing that even when the defendant has retained counsel, a trial court has discretion to balance the defendant's Sixth Amendment right to counsel of choice against the demands of fairness and efficiency).

Here, the defendant never asserted that he had obtained a counsel of his own choosing that he wanted to represent him. At most, he indicated that he potentially wanted to request that his public defender withdraw from his case. (R. Tr. 12/1/15, a.m. pp. 35-36.) A motion to remove court-appointed counsel, without more, is not a request to be represented by counsel of choice. *See, e.g., State v. Turner*, 37 A.3d 183, 199 (Conn. App. 2012) (rejecting the defendant's argument that the denial of his motion requesting his attorney withdraw was a cognizable choice of counsel claim). Indeed, the defendant never asserted that he had retained or even contacted substitute counsel. *Cf. United States v. Sexton,* 473 F.2d 512 (5th Cir.1973) (holding that denial of request for continuance to allow retained counsel to prepare for trial did not deny defendant effective assistance of counsel when defendant had waited more than two months to retain an attorney, court-appointed counsel

appeared competent and defendant's motion failed to state when retained counsel would be ready); *People v. Segoviano,* 725 N.E.2d 1275, 1283 (Ill. 2000) (holding that a court does not abuse its discretion in denying a defendant's motion for new counsel if the motion does not "contain a representation that substitute counsel had been secured, much less an averment that such substitute counsel was ready and willing to enter an appearance in the case"); *State v. Wadsworth*, 282 P.3d 1037, 1038-39 (Utah App. 2012) (holding that because a defendant's right to retain counsel of his choice may not be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, the trial court did not violate that right by making the substitution of counsel conditional on new counsel's entering an appearance before pervious counsel withdrew). Because the defendant never actually raised a counsel of choice claim before or during trial, the defendant's argument fails.

Indeed, although the defendant cites a myriad of cases, those cases actually involved an issue of counsel of choice. *See Gonzalez-Lopez*, 548 U.S. at 142; *Anaya v. People*, 764 P.2d 779, 780 (Colo. 1988)

(addressing what standard applied when defendant's original counsel of choice was erroneously disqualified by trial court); *People v. Cardenas*, 2015 COA 94M, ¶ 20 (holding that trial court violated the defendant's right to counsel of choice when it permitted his counsel of choice to withdraw outside of his presence); *United States v. Brown*, 785 F.3d 1337, 1338 (9th Cir. 2015) (involving a defendant that wanted to discharge his retained attorney and be represented by a court-appointed attorney for whom he financially qualified); *United States. v. McKeighan*, 685 F.3d 956, 965 (10th Cir. 2012) (addressing whether trial court erred in disqualifying defendant's counsel of choice); *Hyatt v. Branker*, 569 F.3d 162, 171 (4th Cir. 2009) (involving defendant that had retained counsel); *United States v. Bender*, 539 F.3d 449, 454 (7th Cir. 2008) (same); *Benitez v. United States*, 521 F.3d 625, 635-36 (6th Cir. 2008) (addressing defendant's claim whether the trial court should have inquired further into his motion for substitute counsel); *United States v. Guerrero*, 546 F.3d 328, 333 (5th Cir. 2008) (addressing defendant's claim that the trial court erred in disqualifying his counsel of choice); *cf. United States v. Mosley*, 505 F.3d 804, 811 (8th Cir. 2007)

(not addressing denial of counsel of choice, only listing errors that the United States Supreme Court had identified as structural); *People v. Ragusa*, 220 P.3d 1002, 1010 (Colo. App. 2009) (holding that attorneys' conduct, which was compounded by the court permitting defendant to be excluded from the proceedings, effectively and wrongfully deprived her of a knowing exercise of her choice of counsel).

But in this case, any purported error by the trial court relates to the trial court's failure to inquire into the defendant's request to have his attorney withdraw. However, as the defendant does not pursue that argument on appeal, that claim should not be addressed. *See, e.g., People v. Allman*, 321 P.3d 557, 562 (Colo. App. 2012) (holding that an appellate court will not review "[a]bsent a developed record and specific allegations . . ."); *see also People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990) (holding that a court will not review an argument not raised in the Opening Brief or raised for the first time in a reply brief); *People v. Hall*, 59 P.3d 298, 301 (Colo. App. 2002) (same).

2. In the event this Court addresses the actual claim raised below, any error was harmless.

"[W]hen an indigent defendant voices objections to court-appointed counsel, the trial court has the obligation to inquire into the reasons for the dissatisfaction." *Bergerud*, 223 P.3d at 694 (quotation omitted). "Before a substitution of counsel is warranted, the court must establish that the defendant has some well founded reason for believing that the appointed attorney cannot or will not completely represent him." *Id.* (quotation omitted). When reviewing the denial of a defendant's request, relevant considerations include: "(1) the timeliness of the motion, (2) the adequacy of the court's inquiry into the defendant's complaint . . . , (3) whether the attorney-client conflict is so great that it resulted in a total lack of communication or otherwise prevented an adequate defense, [and (4)] the extent to which the defendant substantially and unreasonably contributed to the underlying conflict with his attorney." *Id.* at 695 (quotations and citations omitted).

Here, while the trial court stated that it would address the defendant's concern about his counsel after jury selection, the trial court appears to have failed to return to the issue. However, the defendant raised his complaints following trial. And those complaints did not justify substitute counsel.

Most of the defendant's complaints related to trial strategy. While the defendant's attorney pursued a defense of mistaken identification, the defendant wanted to argue heat of passion. But there was no basis for that defense. In determining whether to appoint substitute counsel, the court may consider whether any new counsel will be confronted with similar difficulties. *People v. Rubanowitz*, 688 P.2d 231, 243 (Colo. 1984). The defendant has provided no basis establishing that other counsel would not have made the same decisions. In any event, disagreements regarding defense counsel's strategic decisions are not grounds for new counsel. *See, e.g.*, *Bergerud*, 223 P.3d at 704 (concluding that trial court's determination that disagreement with strategic decisions entrusted to defense counsel did not amount to a well-founded reason to appoint new counsel was "unassailable"); *People*

v. Gonyea, 195 P.3d 1171, 1173 (Colo. App. 2008) (concluding that any conflict resulting from a disagreement over strategy did not amount to a well-founded reason to appoint new counsel); *People v. Garcia*, 64 P.3d 857, 864 (Colo. App. 2002) ("The conflict between defendant and the public defender's office was a disagreement over strategy, and therefore was not a well-founded reason for believing that the appointed attorney cannot or will not completely represent him") (quotation omitted).

In his written motion, the defendant also asserted that there was a breakdown in communication. But he never stated how or to what degree. There is no basis in the record indicating that the relationship between the defendant and his attorney deteriorated to the point where counsel was unable to provide effective assistance. The trial court was justified in refusing to appoint new counsel absent indication that there was a complete breakdown in communication. *See, e.g., Gonyea*, 195 P.3d at 1173.

3. Any error was not prejudicial.

While the Colorado Supreme Court has held that a defendant must be prejudiced by the denial of a request for new counsel in order to

require reversal, it has not resolved what level of prejudice needs to be shown where the defendant continues to be represented by counsel. *See Bergerud*, 223 P.3d at 696.

The trial court should provide substitute counsel if the defendant establishes good cause because, if it does not and the defendant proceeds to waive his right to counsel, the voluntariness of the waiver is vitiated by the court's action, and the defendant's right to the effective assistance of counsel is thereby violated. *See, e.g.*, *People v. Arguello*, 772 P.2d 87, 94 (Colo. 1989) (requiring the trial court to inquire into the reasons for a defendant's dissatisfaction with counsel and adopting the good cause standard for substitution because while "[a] request for new counsel is ordinarily not a waiver of the right to counsel, . . . an unwarranted request or a request made without good cause may lead to waiver of the right").

But where the defendant instead proceeds with counsel, the denial of the motion for new counsel does not in and of itself violate the defendant's right to the effective assistance of counsel. Thus, constitutional error occurs, and the defendant is prejudiced, only if the

defendant establishes ineffective assistance of counsel. *See, e.g.*, *id.* at 92 ("The right to counsel guarantees only competent representation, and does not necessarily include 'a meaningful attorney-client relationship.'") (quoting *Morris v. Slappy*, 461 U.S. 1, 14 (1983)); *Fisher*, 9 P.3d at 1193 (concluding that where "defendant does not . . . assert that his counsel was ineffective, any deficiency in the court's inquiry into the issue would be harmless error"); *Bolton*, 859 P.2d at 309 (concluding that the trial court's failure to inquire into the defendant's allegations was harmless where he did not assert that counsel provided ineffective assistance, even though "each of the allegations in defendant's motion, if established, would constitute 'good cause' for substitution of counsel"); *see also, e.g.*, *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) ("As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'") (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)); *United States v. Zillges*, 978 F.2d 369, 373 (7th Cir. 1992) (applying the standard set forth in *Strickland*); *United States*

v. Calderon, 127 F.3d 1314, 1343 (11th Cir. 1997); *United States v. Graham*, 91 F.3d 213, 221-22 (D.C. Cir. 1996). *But see United States v. Lott*, 310 F.3d 1231, 1251-53 (10th Cir. 2002) (applying harmless beyond a reasonable doubt standard); *Kelling*, 151 P.3d at 656 (rejecting requirement that the defendant has to show ineffective assistance of counsel).

But under any standard, the record demonstrates that reversal is not required. The defendant has failed to indicate how the outcome would have been different had the trial court granted his motion.

4. If the trial court's inquiry was insufficient, the appropriate remedy is to remand for further factual development.

Alternatively, if this Court concludes that the trial court's inquiry was insufficient or that the current record does not sufficiently show that any error was not prejudicial, then the appropriate remedy is to remand for further factual development. *Bergerud*, 223 P.3d at 706. Similarly, in the event this Court concludes that the defendant raised a viable claim that he should have been granted a continuance to pursue

his counsel of choice, this Court should remand the case to the trial court with directions to determine whether it should have granted a continuance for the defendant to obtain counsel of choice. *See, e.g., People v. Stidham*, 338 P.3d 504 (Colo. App. 2014).

II. Any error in allowing the expert to testify about nerve damage was harmless as there was no dispute that the victim suffered serious bodily injury; regardless, the evidence was properly admitted.

A. Standard of review.

The People disagree with the defendant's proposed standard of review. The defendant challenges the admission of evidence. A trial court's evidentiary rulings are reviewed for an abuse of discretion. *See, e.g., People v. Stewart,* 55 P.3d 107, 122 (Colo. 2002); *People v. Veren,* 140 P.3d 131, 136 (Colo. App. 2005). A trial court abuses its discretion if its ruling is manifestly arbitrary, unreasonable, or unfair, or based on an erroneous view or application of the law. *Stewart,* 55 P.3d at 122; *People v. Bondurant,* 2012 COA 50, ¶ 79; *People v. Esparza–Treto,* 282 P.3d 471, 480 (Colo. App. 2011).

The People agree that the defendant preserved his objection. (R. Tr. 12/1/15 p.m, p. 120.) But while an erroneous evidentiary ruling may rise to the level of constitutional error, it is only so when the error "deprived the defendant of any meaningful opportunity to present a complete defense." *People v. Conyac*, 2014 COA 8M, ¶ 92. A defendant's right to present a defense is violated "only where the defendant was denied virtually his only means of effectively testing significant prosecution evidence." *Id.* (citing *Krutsinger v. People*, 219 P.3d 1054, 1062 (Colo. 2009)). As that was not the case here, his claim should be reviewed on for harmless error. Under that standard, a reviewing court may not reverse a conviction if it "can say with fair assurance that, in light of the entire record of the trial, the error did not substantially influence the verdict or impair the fairness of the trial." *See Stewart,* 55 P.3d at 124.

B. Factual background.

On July 9, 2015, the defendant filed a motion for a written summary of anticipated expert testimony and the underlying facts and data supporting the opinions of any purported expert witnesses. (R. CF,

pp. 26-28.) On July 10, 2015, at a pretrial hearing, the defense advised the trial court that it had one evidentiary motion filed it wanted considered. (R. Tr. 7/10/15, p. 2.) The defense did not advise the trial court that it was awaiting a ruling in its motion for anticipated expert testimony. The parties set a motions hearing for September 18, 2015. (*Id.* at 7.) At that hearing, the defendant did not raise any issues regarding his outstanding motion regarding his motion for additional information regarding any potential expert witnesses. (R. Tr. 9/18/15.) At a pretrial readiness conference on November 19, the defendant again did not raise the issue of any outstanding issue regarding his July 9, 2015 motion. (R. Tr. 11/19/15.)

At trial, the People called Dr. Fallon as its first witness. (R. Tr. 12/1/15 p.m., p. 109.) Dr. Fallon was the physician that treated the victim. (*Id.* at 111-12.) Without objection, the trial court admitted Dr. Fallon as an expert in the area of "emergency medicine." (*Id.* at 110.) The prosecutor later asked Dr. Fallon if he had concerns over nerve damage due to the victim's facial fractures. (*Id.* at 119.) The defendant objected. (*Id.* at 120.)

Outside the presence of the jury, the defendant asserted that as part of discovery, he had received physician's notes, orders, a CT scan, and a radiologist report. (*Id.*) However, there was no information about nerve damage. (*Id.*) Therefore, allowing the witness to testify about nerve damage violated the defendant's right to confrontation. (*Id.*)

The trial court asked the defense if it had ever secured a ruling from the judge previously assigned to the case on its motion requesting additional discovery about any expert testimony. (*Id.* at 121.) The prosecutor explained that nobody ever brought the motion to the court's attention, and an order had never been issued. (*Id.* at 122.) The prosecutor clarified that the defendant had received all the reports. (*Id.* at 121.) According to the prosecutor, any additional observations Dr. Fallon made that were based on the information in the report were not required discovery as it was merely the doctor's "full explanation of what's already in the medical records." (*Id.*) In addition, while the defense could have tried to speak to the doctor, they failed to do so. (*Id.*)

The trial court overruled the defendant's objection. (*Id.* at 122.) The trial court found that the defense had abandoned the motion by

failing to secure a timely ruling. (*Id.* at 123.) Regardless, Dr. Fallon's testimony was based on the records that were produced. (*Id.*)

Dr. Fallon testified that anytime there was a series of facial fractures, "you always have to ensure that there's not nerve or muscle damage." (*Id.* at 123.) But in offering his opinion that the victim suffered serious bodily injury, Dr. Fallon based his conclusion on the three fractures the victim sustained due to the punch. (*Id.* at 126.)

C. Law and analysis.

1. Any error was harmless.

This Court need not address the merits of the defendant's claim, because he cannot carry his burden of establishing prejudice. *See Blecha v. People*, 962 P.2d 931, 942 (Colo. 1998) (in reviewing for harmless error, an appellate court should examine the importance of the testimony to the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradictory evidence on the material points of the witness' testimony, the extent of the cross-examination otherwise permitted, and the overall strength of the prosecution's case).

First, the evidence regarding potential nerve damage was relevant to the victim's injuries. But as to the question of whether the victim suffered serious bodily injury, the defendant conceded in opening that he had. (R. Tr. 12/1/15 p.m., pp. 107-08). Rightly so, as the evidence overwhelming established that the victim suffered serious bodily injury due to the fact that he had three fractured bones. (*Id.* at 125-26.) Any error was harmless.[1] *See People v. Jaramillo,* 183 P.3d 665, 669 (Colo. App. 2008) (any error in admitting the contested testimony was harmless because it was cumulative of other testimony not challenged on appeal); *People v. Allee,* 77 P.3d 831, 835 (Colo. App. 2003) (same); *see also People v. Russell*, 2014 COA 21M, ¶¶ 27-28) (even if officer's testimony that defendant was high on methamphetamine, based on his familiarity with the symptoms of methamphetamine intoxication, had

[1] Similarly, Dr. Fallon only testified that he was concerned about possible nerve damage; he did not testify that he believed the victim suffered serious bodily injury due to any nerve damage. (*Id.* at 119, 122.)

been inadmissible expert testimony, any error was harmless because other witnesses corroborated the defendant's symptoms and there was overwhelming evidence, including the defendant's admission, that she had used methamphetamine); *In the Interest of D.I.*, 2015 COA 136, ¶¶ 33-34 (even assuming officer's description of methods by which victim's car could be stolen was inadmissible expert testimony, it was harmless where the defendant was found in the stolen car with a punched ignition); *People v. McMinn*, 2013 COA 94, ¶ 49 (officer, unqualified as an expert, improperly opined that defendant's truck was traveling at about 26 mph and could have killed someone, but the error was harmless where the testimony was "little more than" a conclusion that a truck traveling at that speed is capable of killing someone, "a fact that would be obvious to any layperson."); *see also People v. Stroud*, 2014 COA 58, ¶16 (Colo. App. 2014) (error was harmless in light of overwhelming evidence).

Second, the defendant's failure to request a continuance belies any claim that he was surprised or prejudiced by the doctor's testimony. *See Chambers v. People,* 682 P.2d 1173, 1180 (Colo. 1984) (any claim that

prejudice resulted from the prosecutor's failure to disclose an expert report "is convincingly belied by the defendant's failure to seek a continuance"); *People v. Anderson,* 837 P.2d 293, 299 (Colo. App. 1992) ("[Any] claim by the defendant at the appellate level that he was unfairly surprised and unable to prepare adequately for cross-examination is thoroughly discredited by his failure to move for a continuance at the trial level.") (quoting *People v. Graham,* 678 P.2d 1043, 1047-48 (Colo. App. 1983)).

2. The defendant abandoned his claim.

In the event this Court reaches the defendant's claim, the trial court correctly held that the defendant waived his claim. Litigants bear the responsibility of seeking rulings on the motions they file; because the defendant failed to timely seek a ruling on his motion, he abandoned any entitlement to a hearing. *See, e.g., Feldstein v. People*, 410 P.2d 188, 191 (Colo. 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.") (abrogated on other grounds by *Deeds v. People*, 747 P.2d 1266, 1271 (Colo. 1987)); *People v. Cevallos-Acosta*, 140 P.3d 116, 122 (Colo. App. 2005) (defendant abandoned his challenge for cause by failing to request that the trial court grant or deny it before exercising a peremptory challenge to excuse the juror); *People v. Young*, 923 P.2d 145, 149 (Colo. App. 1995) (concluding, where defendant had failed to request a ruling from the trial court, that defendant had waived the issue on appeal); *People v. Ridenour*, 878 P.2d 23, 28 (Colo. App. 1994) (by failing to request ruling on his motion to continue trial and accepting stipulation, defendant waived right to assert error); *cf. Mamula v. People*, 847 P.2d 1135, 1138 (Colo. 1993) (holding that defendant abandoned Crim. P. 35(b) motion under the rule because he failed "to take reasonable efforts to secure an expeditious ruling on" it). As the trial court found and as set forth above, the defendant failed to secure a ruling on his request for a written summary of any expert witness's opinions despite having had numerous opportunities to do so at the various pretrial hearings. His claim was abandoned. *See, e.g., People v. Rediger*, 2015 COA 26, ¶ 54

("[W]aiver occurs when a defendant specifically removes claims from the trial courts consideration by intentionally relinquishing or abandoning a known right.").

3. There was no discovery violation.

In any event, there was no error. Crim. P. 16 does not require the prosecution to automatically provide the defense with a written summary of the expert's testimony. *Compare* Crim. P. 16(I)(a)(1)(III) (requiring the prosecution to disclose "[a]ny reports or statements of experts"), *with* Crim. P. 16(I)(a)(3) (providing that a court may, in the interest of justice, order the prosecution "to provide a written summary of the testimony describing the witness's opinions and the bases and reasons therefor, including results of physical or mental examination and of scientific tests, experiments, or comparisons").

Here, it was undisputed that the prosecution disclosed the expert's notes and reports. (R. Tr. 12/1/15 p.m., p. 120.) The trial court never found good cause requiring the People to provide the defense with a written summary of the expert's opinion. Accordingly, there was no discovery violation, there was no constitutional violation, and the trial

court appropriately overruled the defendant's objection. *See, e.g.*, *People v. Evans*, 886 P.2d 288, 291 (Colo. App. 1994) (holding that there was no discovery violation where the prosecution disclosed the expert's report but not the readouts printed by the instruments used to reach the test results; also noting that "defendant had the test results four months before trial and failed to file a motion indicating that the results were incomplete or inadequate").

III. The trial court properly admitted the Gangland video during sentencing.

A. Standard of review.

The People disagree with the defendant's proposed standard of review. Although he argues that the trial court violated his First Amendment rights, he challenges the trial court's sentencing decision. Sentencing is by nature discretionary. *People v. Roadcap*, 78 P.3d 1108, 1114 (Colo. App. 2003). A trial judge has broad discretion when imposing a sentence, and the sentence imposed will not be overturned in the absence of a clear abuse of discretion. *People v. Fuller*, 791 P.2d 702, 708 (Colo. 1990). Only in exceptional cases will an appellate court

substitute its judgment for that of the trial court in sentencing matters. *Id.* If the sentence is within the range required by law, is based on appropriate considerations as reflected in the record, and is factually supported by the circumstances of the case, an appellate court must uphold the sentence. *Id.*

The defendant objected to the admission of the Gangland video on relevancy grounds. (R. Tr. 1/22/16, p. 4.) To the extent the defendant argues on appeal that he preserved his claim that admission and consideration of the video violated his rights under the First Amendment, that claim was never made and should not be reviewed. *See, e.g., People v. Cagle*, 751 P.2d 614, 619 (Colo. 1988) (constitutional issues first raised on appeal will not be addressed). In the event this Court considers that claim, plain error review applies. *See Martinez v. People*, 2015 CO 16, ¶ 14 ("Plain error review is equally applicable when a party alters the grounds for his objection on appeal."). Under the plain error standard, the defendant bears the burden of showing that the error was obvious and substantial, and a reviewing court will only reverse 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*, 288 P.3d 116, 120 (Colo. 2012).

B. Factual background.

At sentencing, defense counsel advised the court that the prosecutor intended "to play a Gangland video from 2010 where Mr. Tresco was on an episode . . . ." (R. Tr. 1/22/16, p. 3.) The defendant objected that the video was irrelevant to sentencing. (*Id.* at 4.) However, if the court was to watch the video, defense counsel asked that it play the video first, and then hear from two defense witnesses that were there to speak on the defendant's behalf and would directly address what was presented in the video. (*Id.*) The prosecutor argued that in the video, the defendant used language that the court would "find interesting in determining what his sentence should be in this case." (*Id.* at 3.) Specifically, the defendant talked about an assault he committed on a taxi driver and how that person was lucky to be alive. (*Id.*) In the video, he was "glad to tell the whole world about his gang affiliations and his violent nature." (*Id.*) Thus, the evidence was

relevant to the statutory sentencing factor of the defendant's character. (*Id.* at 4.)

The trial court explained there was "broad latitude of what's admissible at a sentencing hearing, so I'll allow it and accord it whatever weight I think is appropriate, and we'll have it played now." (*Id.* at 5.) The defendant called two witnesses that asserted the defendant had made a conscious decision to get out of gang life, and that he would be better served by treatment rather than a prison sentence. (*Id.* at 6-15.)

In asking for a sentence in the 12 to 16 year range, the prosecution emphasized such a sentence was appropriate given the defendant's criminal history, the nature of the assault, and the danger he posed to the community. (*Id.* at 21-22.)

In imposing sentence, the trial court explained that the defendant was blaming everyone else. (*Id.* at 35.) The defendant attempted to justify his conduct under heat of passion based on the victim having groped his fiancée at the time of the incident, but there was absolutely no evidence of that. (*Id.* at 36.) The trial court believed that the

defendant had "sincerely and genuinely [] renounce[d] gang life." (*Id.* at 36.) Still, the defendant "committed a very violent act." (*Id.* at 37.) Accordingly, "given everything, including [his] background and the facts of this case, 8 years in the Department of Corrections" was the appropriate sentence. (*Id.* at 37.)

C. Law and analysis.

A sentencing court must consider the nature and elements of the offense, the character and rehabilitative potential of the offender, any aggravating or mitigating circumstances, and the public interest in safety and deterrence. *People v. Campbell,* 58 P.3d 1080, 1086-87 (Colo. App. 2002). While a sentencing court may find one aggravating factor more compelling than another, it abuses its discretion when it places "undue emphasis on any one of these factors to the exclusion of the others." *Id.* at 1087.

The defendant argues the "Supreme Court of [the] United States drew a clear line in *Dawson v. Deleware*, preventing trial courts from violating criminal defendants' First and Fourteenth Amendment rights to freedom of association by considering evidence of unrelated gang

membership at sentencing." (OB p. 18 (citing *Dawson v. Delaware*, 503 U.S. 159, 166 (1992)).

As an initial matter, that is not what the United States Supreme Court said. Instead, the Court explained that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment. *Dawson*, 503 U.S. at 164. Indeed, in "many cases, for example, associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society." *Id.* at 166.

Likewise, this Court has explained, a sentencing court is largely unconstrained as to the evidence it may consider during the sentencing phase of criminal proceedings. *People v. Tallwhiteman*, 124 P.3d 827 (Colo. App. 2005). The range is broad as to both the information considered relevant and the quality of such information. While a sentence may not be based on materially untrue evidence, a sentencing court may, in evaluating the nature of the offense and the character of the offender, consider conduct for which the offender was never

charged, conduct for which charges were filed but later dismissed as part of a plea agreement, or even conduct for which the offender was charged and subsequently acquitted. *Id*; *see also People v. Beatty*, 80 P.3d 847, 856 (Colo. App. 2003) (determining defendant's sentence, the court considered the evidence in this case that defendant had been involved in an incident with the victims the week before the shooting, wanted to kill the father, and did not care whether others would be hurt in this "classic drive-by shooting.").

Here, the evidence was relevant to an issue before the court. The evidence was not admitted to punish the defendant based on his right to association. Instead, the evidence was admitted to show the defendant's character and a prior act of violence. As character and past behavior are relevant sentencing considerations, the trial court correctly admitted the video. *See Tallwhiteman*, 124 P.3d at 837.

Moreover, the record also provides that the trial court did not rely on the defendant's gang membership in imposing sentence. Instead, the trial court expressly stated that it believed the defendant had put his gang life behind him. The trial court based its sentence on concerns

regarding the nature of the defendant's crime, protection of the community, and the defendant's failure to accept responsibility for his criminal act. The defendant's claim fails and he is not entitled to a new sentencing hearing. *See, e.g., People v. Maestas*, 224 P.3d 405, 409-10 (Colo. App. 2009) ("If the sentence is within the range required by law, is based on appropriate considerations as reflected in the record, and is factually supported by the circumstances of the case, an appellate court must uphold the sentence.").

CONCLUSION

For the foregoing reasons and authorities, the defendant's judgment of conviction and sentence should be affirmed.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **NSWER BRIEF** upon **KATAYOUN A. DONNELLY** and all parties herein, via Colorado Courts E-filing System on July 31, 2017.

/s/ Tiffiny Kallina