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District Court, El Paso Hon. Barbara Hughes, Judge Case No. 17CR4200	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee v. ERIC WILLIAM GRANT, Defendant-Appellant.	▲ **COURT USE ONLY** ▲ Case No.: 18CA1139
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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 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

> It contains 7,770 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

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> ☐**For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

> ☐**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/ Majid Yazdi

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INTRODUCTION

Defendant, Eric William Grant, appeals his convictions for first degree murder, first degree assault, and aggravated robbery, claiming the trial court erred in (1) failing to exclude, as a sanction for discovery violation, his inculpatory statement, (2) admitting opinion testimony by a detective identifying him in the surveillance video, and (3) admitting evidence of a similar robbery under CRE 404(b) without finding that the prosecution had proven by a preponderance of the evidence that he had committed it. Defendant also claims he is entitled to a new trial under the cumulative error doctrine.

STATEMENT OF THE CASE AND FACTS

On July 13, 2017, around 7:40 a.m., two men disguised as utility workers entered Full Throttle Auto Service in Colorado Springs through its back door, announcing: "Springs Utilities." TR 5/31/18, pp 152-53. They encountered George Maldonado, the owner, and Spencer Massey, a friend and customer, in the back of the store. The man wearing a

yellow-green vest and hard hat told Maldonado to open up the safe and struck him with his gun when Maldonado asked what they wanted, causing him to fall down to the ground, and kicked him. *Id*. at 156-57. The same man also struck Massey, who had been forced to lie down on the ground, with a gun. *Id*. at 159:6-15. He also took Massey's wallet and watch and kicked him "pretty hard." *Id*. at 159-60, 176-77. The two men went to the front of the store and took money from the cash register and left the shop after tying the victims' hands behind their back. *Id*. at 160-62. After the robbers left, Massey managed to free his hands and call 911. *Id*. at 172:11-14; People's Exh. 124. Maldonado died from "blunt force head trauma" shortly after the arrival of paramedics, while Massey suffered serious injuries to his face due to being pistol whipped. TR 5/31/18, pp 84:4-14, 90:2-5; 6/5/18, pp 106-07.

After footage from the surveillance video was released, People's Exhs. 362, 370, numerous people identified Derrick Davis ("Chili" or "Chili Dog") and Defendant ("E") as the robbers. Davis was identified by Cleave Watson, a family friend, TR 6/1/18, pp 207-08, Thomas

Hearn, a friend who worked with Davis on vehicles, *id*. at 239-42, Carmelia Davis, Derrick Davis's sister, 6/4/18, pp 10-12,[1] and Raymond Rogan, Sr., *id*. at 37-38. Surveillance videos from some neighboring businesses showed Davis's truck, which had distinctive custom rims and body damage with oxidation on its hood and roof, driving by several times, with the last time, which occurred after the robbery, at a higher rate of speed.[2] TR 6/1/18, pp 100-101, 138:9-24, 147-48, 197-98; People's Exhs. 249-51, 360-61, 370-74.

Davis was apprehended in Minnesota a few days after the robbery. TR 6/5/18, pp 25-29. His girlfriend, Adrienne Berkness, who was with him at the time of his arrest, told a Minnesota detective that Davis had gotten into some trouble, it was his idea to go to Minnesota,

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[1] Carmelia Davis learned of the robbery and murder from a childhood friend who called her and said: "It looks like your brother and somebody else on T.V. for murder." TR 6/4/18, p 10:14-16.

[2] The video footage showed the truck slowing down at a point that provided a clear view of the alleyway leading to Full Throttle's back door. TR 6/1/18, pp 142-43.

and the man with a yellow shirt in the surveillance video "appeared" to be Davis. *Id*. at 75-76.

About four hours after the robbery, Defendant left a phone message for his parole officer (Mike Bohlen) that he was going to Pennsylvania to take care of some estate issues related to his mother, who had passed away a month earlier.[3] TR 6/5/18, pp 117-18. On July 16, he left a voice mail for Bohlen, stating that he was extending his stay by one day, and on July 19 he sent a text, informing him that he had a new phone number. Bohlen never heard back from Defendant. *Id*. at 121-22. Bohlen identified Defendant as the person with the green shirt in the video surveillance. *Id*. at 123-24.

Nicole Mayfield, an admissions representative at Intellitec College, who had worked with Defendant "quite a while to get him into school," believed the man in the surveillance video wearing a yellow

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[3] Defendant had gone to Pennsylvania on June 17 for his mother's funeral. TR 6/5/18, pp 119-20.

vest "could be" Defendant, which gave her "chills."[4] TR 6/6/18, pp 6-7, 8:8-9, 18-19.

Kerry Julien, who was on parole at the time of the robbery, identified both Davis and Defendant in the surveillance video a few days after the robbery. TR 6/6/18, pp 158-59. He knew Davis from childhood and was friends with him, and had met Defendant, whom he knew as "E," through the brother of Defendant's girlfriend shortly before the robbery. *Id*. at pp 146-49, 153-54, 227-28. Julien also testified that when he met Defendant, Defendant had told him that "being able to get in and out of places was easy because he would use his vest, his hard hat," and "implied that he would use his weapon and maybe hit 'em in the head or something like that." *Id*. at pp 157:4-23, 158-59, 162-63, 228:2-9. Later, when Julien and Defendant were housed in the same jail, Defendant told him that "the only thing that he

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[4] Mayfield had told Detective Bichel that Defendant was "definitely" on the video and that she was "100 percent sure . . . based on his lips, his beard, his arms, the back of his head, everything," but at trial testified that she did not recall having made those statements and that Bichel was mistaken. TR 6/6/18, p 19:3-19, 21:7-10.

was really concerned about was whether or not Chili was gonna not say anything and whether or not, um, fingerprints could be found off of somethin' that was dropped," which he explained was "a clip."[5] *Id*. at 176-77. Defendant also sent a message to Davis through Julien, stating: "I don't know you." *Id*. at 179:4-13.

Quincy Harding, who had seen Defendant in early June at Planet Fitness, testified that Defendant was "[d]efinitely the same person" seen in the video surveillance. TR 6/11/18, pp 46-50.

Phone records and cell tower information showed that at 7:43 a.m. on July 13—i.e., during the course of the robbery—a call was made from Defendant's phone to Davis' phone in the vicinity of Full Throttle. TR 6/8/18, pp 230-31.

Defendant was charged with first degree murder (after deliberation), felony first degree murder, aggravated assault, robbery, and conspiracy to commit first degree murder and aggravated robbery.

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[5] Full Throttle employees found the gun magazine under a ladder near the back door and notified the police on September 27, 2017. TR 6/1/18, pp 149-50; People's Exhs. 75, 329-33.

CF, pp 3-5. His theory of defense was misidentification, primarily based on the argument that a tattoo on his left arm is not visible in the surveillance video. TR 5/31/18, pp. 23-25; 6/11/18, pp. 203:16-25, 209-10. The jury acquitted Defendant of conspiracy to commit first degree murder, but found him guilty on the remaining counts. TR 6/12/18, pp 2-3. The court imposed a life sentence without the possibility of parole. TR 6/14/18, p 9:6-14.

SUMMARY OF THE ARGUMENT

The prosecution's disclosure during trial of Defendant's statement to Philadelphia police during his arrest and processing did not constitute a discovery violation, as the statement was not within the possession or control of the prosecution. Nor did the trial court abuse its discretion in refusing to exclude the statement as a sanction for a discovery violation, given its finding of the absence of any bad faith and its curing of any prejudice by allowing Defendant to move for the suppression of the statement. Moreover, the admission of the statement, even if error, was harmless, as the statement did not

amount to an admission of guilt and the evidence of Defendant's guilt at trial was overwhelming.

The court did not abuse its discretion by admitting testimony by the leading detective that one of the two men shown in the surveillance video of the robbery is Defendant. Contrary to Defendant's assertion, the detective's testimony was relevant and helpful to the jury and did not amount to expert testimony. Additionally, the admission of this evidence, even if error, was harmless, as numerous other witnesses identified Defendant in the video surveillance and the evidence of his guilt was overwhelming.

The court did not abuse its discretion by admitting evidence of a similar robbery under CRE 404(b). Contrary to Defendant's assertion, the prosecution proved and the court found, by a preponderance of the total evidence presented, that the two robberies were committed by the same person, and that Defendant was the perpetrator in both cases.

Defendant is not entitled to relief under the cumulative error doctrine, as the court did not commit the alleged errors.

ARGUMENT

I. The trial court did not err by refusing to exclude, as a sanction for alleged discovery violation, Defendant's statement made during his arrest and processing by Philadelphia police, which became known to the prosecution only during trial.

A. Preservation and Standard of Review

The People agree that the issue is preserved, and the standard of review is abuse of discretion. Op. Br., pp 8-9; TR 6/7/18, pp 127-29; 6/8/18, pp 4-9.

Appellate courts "review both a district court's resolution of discovery issues and its decision to impose sanctions for discovery violations for an abuse of discretion." *People v. Mendez*, 2017 COA 129, ¶ 32. A court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or based on a misapplication or misunderstanding of the law. *People v. Maestas*, 2014 COA 139M, ¶ 11.

"Absent a showing of prejudice resulting from the discovery violation, there is no reversible error." *People v. Acosta*, 2014 COA 82, ¶ 16 (citing *People v. Zadra*, 2013 COA 140, ¶ 20); *see also Salazar v.*

People, 870 P.2d 1215, 1220 (Colo. 1994)) ("Failure to comply with discovery rules is not reversible error absent a demonstration of prejudice to the defendant.").

B. Background

Defendant was apprehended in Philadelphia on October 9, 2017. TR 6/7/18, p 139:20-25. At the police station, Detective Timothy Bass interviewed Defendant for the sole purpose of filling out, as part of the arrest paper work, a Biographical Information Report (229 Form). *Id.* at 146-47; Defendant's Exh. K. The "Activity Sheet" associated with Defendant's arrest, contained the following note: "*During the completion of the 75-229, Eric Grant was asked if he had identification. Grant's reply was; 'I'm on the run from Colorado and you think I'm going to have identification?, I want as little contact with you guys as possible and I definitely don't want you to know who I am[.]' " TR 6/7/18, pp 149:15-23, 155-56; Defendant's Exh. L.

Another Philadelphia police officer, Detective George Pirrone, was responsible for providing the relevant arresting information to

Detective Steve Aulino of the Colorado Springs Police Department, who was in charge of collecting information from the Philadelphia Police Department. TR 6/7/18, pp 114-15, 118-19, 123.

Although Detective Pirrone believed he must have included Form 229 as part of the documents sent to the Colorado Springs Police Department, neither Detective Aulino nor the prosecution had seen it until the morning of the seventh day of trial when they talked to Pirrone, who was testifying on that day. *Id*. at 121-22, 123-24. Upon learning of the existence of this document, Detective Aulino went through all the Philadelphia reports that he had received but did not find it. *Id*. at 125-26. Aulino also testified that, although he had several conversations with Philadelphia detectives after Defendant's arrest, they never mentioned that he had made a statement. *Id*. at 126:5-11.

Defense counsel acknowledged that the existence of the biographical report containing Defendant's statement "was as news to [the prosecution] as it was to [the defense,]" that no "malfeasance,

secreting, [or] bad faith" existed, and that "it probably wasn't sent" to Detective Aulino. *Id*. at 128-29. She argued, however, that a discovery violation had nevertheless occurred, and the only remedy was the exclusion of the statement. *Id*. at 128-29. Regarding prejudice, defense counsel argued that the defense strategy, as stated in the opening statement, was based on the absence of any inculpatory statement, except for Defendant's alleged statement to Julien, and that if the defense had known about the statement, it would have moved for its suppression. *Id*. at 127:3-15. Defense counsel also argued that a mistrial would not remedy the situation, as it would put the defense "in a weaker position for a second trial because now all of the witnesses had] been exposed to [its] cross-examination and [would] be better prepared to handle [defense counsel] in the future at a second trial." *Id*. at 128:2-12.

The court concluded that the exclusion of the statement was not warranted, given the absence of malfeasance or bad faith, and that granting Defendant a suppression hearing would remedy the problem.

Id. at 133-34. Following a suppression hearing, at which Detectives Bass, Pirrone, and Aulino, and a defense investigator (Francisco Salazar) testified, the court took the matter under advisement. *Id*. at 138-183. The following day, the court denied Defendant's motion to suppress. TR 6/8/18, pp. 4-9. Defendant's statement was admitted through Detective Bass. *Id*. at 32:11-23.

In his closing argument, the prosecutor made two brief references to Defendant's statement. TR 6/11/18, pp 220:4-5 ("Statements in Philadelphia, 'I'm on the run. I'm on the run from Colorado.' "), 220-21 ("And what the Defendant wants is just what he wanted in Philadelphia, not to be known. 'I'm on the run. I don't have identification. I don't want you to know who I am.' ").

On appeal, Defendant claims the suppression "hearing did nothing to cure the unfair damage resulting from the defense relying on the discovery provided before trial in preparing its entire theory and strategy of defense, only to learn near the close of evidence about inculpatory statements [he] allegedly made to the police." Op. Br., p 18.

C. Analysis

As relevant here, the prosecution is required to disclose any "[p]olice, arrest . . . reports" and "the substance of any oral statements made to the police . . . by the accused" that is "within the possession or control of the prosecuting attorney." Crim. P. 16(I)(a)(1)(I), (VIII).

"Discovery sanctions serve the dual purposes of protecting the integrity of the truth-finding process and deterring prosecutorial misconduct." *Acosta*, ¶ 12 (citing *Zadra*, ¶ 15). "A trial court should impose the least severe sanction that will ensure full compliance with its discovery orders and protect the defendant's right to due process." *Id*.

"When determining an appropriate sanction for a discovery violation, a trial court should consider '(1) the reason for the delay; (2) any prejudice a party suffered because of the delay; and (3) the feasibility of curing any prejudice through a continuance or recess during trial.' " *Id*. at ¶ 13 (quoting *Zadra*, ¶ 16); *see also People v. Castro*, 854 P.2d 1262, 1265 (Colo. 1993).

"In considering sanctions, a trial court should 'be cautious not to affect the evidence to be introduced at trial or the merits of the case any more than necessary,' and should, if at all possible, '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.' " *Id.*, ¶ 15 (quoting *Lee*, 18 P.3d at 197). "[E]xclusion is a drastic remedy and therefore is strongly disfavored, especially since in many cases it may well determine the outcome of the trial." *People v. Cobb*, 962 P.2d 944, 949 (Colo. 1998); *see also Lee*, 18 P.3d at 194-98 (holding that the trial court abused its discretion by excluding DNA evidence when the record did not support a finding that the prosecutor had willfully violated discovery rules).

"When imposing a sanction that is not designed primarily to deter improper behavior, 'the goal must be to cure any prejudice resulting from the violation.' " *Acosta*, ¶ 16 (quoting *Lee*, 18 P.3d at 197. "Absent

a showing of prejudice resulting from the discovery violation, there is no reversible error." *Id*. (citing *Zadra*, ¶ 20).

Here, there was no discovery violation, as Defendant's statement at issue was not within the possession or control of the Colorado Springs Police Department or the prosecution. "Although statements within the possession of the police have been deemed to be 'within the possession or control of the district attorney,' such statements are within the prosecuting attorney's possession or control only if the police who possess the statements are the police in the county or district of trial." *People v. Garcia*, 690 P.2d 869, 874 (Colo. App. 1984) (citing *Dickerson v. People*, 499 P.2d 1196 (Colo. 1972) (written statements in the files of the Criminal Investigation Department at Fort Bliss, Texas, were "outside the possession and control of the district attorney [of Pueblo County]" and, therefore, could not have been produced pursuant to Crim. P. 16(b)) (brackets added in *Garcia*)); *see also Ortega v. People*, 426 P.2d 180, 182 (Colo. 1967) (holding "that statements in the possession of the police in the county or district of the trial are within

the 'possession or control' of the prosecuting attorney so as to meet the requirement of Rule 16") (citing *Battalino v. People*, 199 P.2d 897 (Colo. 1948)); *Garcia*, 690 at 874 (finding no discovery violation where "despite its diligent efforts to secure written reports from Laredo detailing defendant's . . . statements," the Jefferson County district attorney "was not in the [sic] possession or control of those statements," which "were exclusively possessed by the Laredo authorities").

Nor did the Philadelphia police conduct any investigation regarding Defendant's involvement in the robbery or obtain Defendant's statement at issue in the course of such investigation. Detective Bass testified that his interaction with Defendant was not for the purpose of investigating the Colorado Springs homicide, he did not ask him any questions about it, and Defendant made the statement at issue when Bass simply asked him if he had identification. TR 6/7/18, pp 147:15-18, 149:7-23. Detective Pirrone also denied that by "going after a fugitive" he would also be "investigating the underlying case." *Id*. at 170:19-23.

Defendant argues that a discovery violation occurred because "[t]he prosecution team was in regular contact with the Philadelphia police about this matter; and the prosecution's request to continue the trial due to problems obtaining evidence from that agency shows that the prosecution was already aware that complete provision of information from that agency was an issue." Op. Br., p 16. In support of this argument, he claims "[o]n April 25, 2018, the prosecution moved to continue the jury trial, asserting that, despite trying for months, it had been unable to obtain physical evidence relating to Mr. Grant's case from the Philadelphia Police Department." *Id*. at 9. Defendant's argument fails for two reason.

First, the prosecution's request for a continuance on April 25, 2018, was not based on its inability to *obtain* evidence from the Philadelphia police; rather, it was based on the fact that the Colorado Springs Police Department had received the physical evidence from Philadelphia that same week, which did not allow sufficient time for the "DNA and serology analysis" to be performed, and because, "[e]ven if

the analysis [was] rushed, results and reports [could not] be completed until a few weeks before trial, leaving very little time for the defense to prepare for them." CF, p 322.

Second, the delay in obtaining evidence from Philadelphia concerned only physical evidence, not any reports containing Defendant's statements to police. Thus, the prosecution had no reason to believe that the Philadelphia police were in possession of any such statement that had yet to be disclosed.

Assuming, arguendo, a discovery violation had occurred, any prejudice to Defendant was sufficiently cured by the court's ruling granting his request for a suppression hearing. At trial, defense counsel argued that the late discovery of Defendant's statement was prejudicial for two reasons: (1) her reference in her opening statement to the absence of Defendant's admission of guilt to the police; and (2) Defendant's loss of the opportunity to move for the suppression of the statement. TR 6/7/18, p 127:3-15.

As to the first assertion of prejudice, the only reference to the absence of statement by Defendant was the following statement: "You're not going to [be] hearing about any statements by Mr. Grant saying, 'I did this. I committed this crime.' Oh wait, There's Kerry Julian [sic]. Well, let's talk about him." TR 5/31/18, p 28:2-4. Thus, contrary to defense counsel's argument, the absence of Defendant's statement was not a "big part" of her opening statement. *Id.* at 127:3-5. Moreover, Defendant's statement at issue did not contradict defense counsel's opening statement that there was no statement by him saying: "I did this. I committed this crime." While Defendant's statement that he was "on the run from Colorado" showed his awareness of being pursued by police, it did not amount to an admission of having committed the crime in this case.

As to the prejudice resulting from Defendant's loss of the ability to move for the suppression of his statement, the court adequately cured it by allowing him to do so before its admission. Defendant does not challenge the court's ruling on his suppression motion, nor does he

allege that the late disclosure harmed his ability to prevail on his motion to suppress. Defendant complains that "there was no way for the defense to investigate the circumstances surrounding the statements, including whether there were any recordings of the statements and whether there was equipment that could've recorded [his] interaction with the police." Op. Br., p 17. However, at the suppression hearing, the police officers involved in Defendant's arrest testified in detail regarding the circumstances surrounding his arrest and booking, during which he made the statement at issue.

Defendant's case is analogous to *Zadra*, in which some handwritten notes by the defendant were disclosed for the first time during a CBI agent's testimony on the final day of trial. *Zadra*, 2013 COA 140, ¶ 13. The court denied defendant's motion to dismiss the case as a sanction for the late disclosure of the handwritten notes but suspended the agent's testimony to allow defense counsel to review the notes before completing the cross-examination of the agent. *Id.* On appeal, a division of this Court upheld the court's ruling, concluding

that there was no prejudice given that the notes "were no surprise to defendant" since she "had written them and had given them to investigators," defense "counsel obtained the notes in time to briefly review them and use them in the cross-examination of" the agent, and "[t]he notes were not exculpatory." *Id*. at ¶ 20. Similarly, here Defendant was aware of his own statement to Detective Bass, and the statement was not exculpatory. Further, he was afforded a suppression hearing, during which the detectives involved in his arrest and processing testified extensively regarding the circumstances under which he had made the statement, thus curing any prejudice from the late disclosure of the statement.

For the first time on appeal, Defendant claims he was also prejudiced by the late disclosure because "the defense asked no questions during jury selection concerning statements attributed by the police to defendants." Op. Br., p 17. He fails to show, however, how this lack of inquiry could have affected the outcome of his trial.

Therefore, the late disclosure of Defendant's statement did not constitute a discovery violation because the statement was not within the possession or control of the prosecution. Moreover, any discovery violation was not prejudicial, as the statement did not amount to an admission of guilt in this case and the evidence of Defendant's guilt was overwhelming.

II. The trial court did not err in admitting testimony by a detective that Defendant is one of the robbers seen in the surveillance video.

A. Preservation and Standard of Review

The People agree that Defendant's claim that the testimony at issue was not "helpful to the jury" is preserved, while his claim that the testimony was inadmissible "expert opinion in the guise of lay opinion testimony" is unpreserved. Op. Br., pp 20, 25-26.

Appellate courts review a trial court's evidentiary rulings for an abuse of discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002). Preserved nonconstiutional errors are reviewed for harmless error. *Hagos v. People*, 2012 CO 63, ¶ 12. Under this standard, reversal is

warranted only if the error "substantially influenced the verdict or affected the fairness of the trial proceedings." *Id.* (quoting *Tevlin v. People*, 715 P.2d 338, 342 (Colo. 1986)).

Unpreserved claims are reviewed for plain error only. *People v. Vecellio*, 2012 COA 40, ¶ 54. "Under the plain error standard, the defendant bears the burden to establish that an error occurred, and that at the time the error arose, it was so clear cut and so obvious that a trial judge should have been able to avoid it without benefit of objection." *People v. Conyac*, 2014 COA 8M, ¶ 54. Reversal is required if the error was so grave that it "undermined the fundamental fairness of the trial itself" so as to "cast serious doubt on the reliability of the conviction." *Id.*

B. Background

Defendant filed a pre-trial motion to exclude identification. CF, pp 34-38. Specifically, he sought the exclusion of testimony by Kerry Julien that one of the suspects on the surveillance video is Defendant, arguing that "[t]here is no basis to believe that Kerry Julian [sic] is

‘more likely to correctly identify the defendant from the photograph than is the jury.’ ” *Id*. at 36, ¶ 9 (quoting *Robinson v. People*, 927 P.2d 381 (Colo. 1996)). Following a hearing, the court denied Defendant's motion. TR 4/13/18, pp 42-44. [6]

At trial, Detective Aulino testified that he had watched the surveillance video “[s]everal dozen times,” paying “a lot of attention” to the suspects, had looked at Defendant's D.M.V. photo “numerous times,” and had met him “face-to-face” after he was extradited to Colorado, and had seen him at several court hearings. TR 6/8/18, pp 75-76. He was then asked: “Based on your observations of the video and your observations of the Defendant, Eric Grant, in person and in D.M.V. photographs, do you have an opinion as to whether the person in the video is the Defendant or not?” *Id*. at 76:14-17. Defense counsel objected, arguing that “whether or not this is Eric Grant . . . is the

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[6] Defendant subsequently filed another motion to exclude identification regarding testimony by another witness (Quincy Harding). CF, pp 425-27. In that motion, Defendant also requested a reconsideration of the order denying his previous motion regarding testimony by Julien. *Id*. at 426-27. The court also denied this motion. TR 5/30/18, pp 19-24, 32-34.

province of the jury," and that Aulino's opinion testimony would not be "useful and relevant" because there had been no "drastic change" in Defendant's appearance since the time of his D.M.V. photo. *Id*. at 76-77. The court overruled the objection, finding that under the case law, "there doesn't have to be change in an appearance" to make such opinion testimony admissible. *Id*. at 78:2-3. Detective Aulino then testified that in his opinion Defendant is the person who is in the surveillance video. *Id*. at 78:5-15.

C. Analysis

Defendant claims Aulino's testimony that Defendant was one of the two suspects seen in the surveillance video (1) violated CRE 701, because it was not "helpful to the jury," and (2) was "expert opinion in the guise of lay opinion testimony." Op. Br., pp 25-26. Neither claim has merit.

"Under CRE 701, a lay witness may testify to opinions or inferences so long as they are (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness's

testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." *People v. McFee*, 2016 COA 97, ¶ 73. "A lay witness may testify regarding the identity of a person depicted in a surveillance photograph (or, for that matter, a video), 'if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the [video] than is the jury.' " *People v. Howard-Walker*, 2017 COA 81M, ¶ 66, *as modified on denial of reh'g* (July 27, 2017), *rev'd*, 2019 CO 69, ¶ 66 (quoting *Robinson v. People*, 927 P.2d 381, 382 (Colo. 1996)); *see also McFee*, ¶ 75 (same).

"Moreover, the lay witness need only be personally familiar with the defendant, and the intimacy level of the witness' familiarity with the defendant goes to the weight to be given to the witness' testimony, not the admissibility of such testimony." *Robinson*, 927 P.2d at 384. "Additionally, the defendant's appearance need not have changed from the time of the photograph to the time of trial, so long as the lay opinion testimony is helpful to the jury." *Id.* Thus, "although the witness must

be in a better position than the jurors to determine whether the image captured by the camera is indeed that of the defendant, this requires neither the witness to be 'intimately familiar' with the defendant nor the defendant to have changed his appearance." *Id.*

Here, Detective Aulino's face-to-face interaction with Defendant provided "some basis" for the court's finding that he was in a better position than the jury to correctly identify Defendant. *See Robinson*, 927 P. 2d at 384 (holding that detective's "personal familiarity" with defendant based on a prior "face-to-face" contact with him "was sufficient to be helpful to the jury") (citing *United States* v. *Jackson*, 688 F.2d 1121, 1125 (7th Cir. 1982) (finding lay opinion testimony helpful although the witness had personally seen defendant only one time at a Christmas party).

Defendant contends that since the jurors "had seen [him] on a constant basis for several hours a day during the six days of trial preceding Aulino's opinion testimony" and "had unrestricted access to the surveillance video and could watch it as many times as they wanted

to," they were "in the same position as the detective to review the video and form an opinion as to whether the bearded suspect in the video was [him]." Op. Br., pp 24-25. First, the jurors did not have the face-to-face contact that Detective Aulino had. Second, the mere fact that the jurors *could* watch the surveillance video "as many times as they wanted to" does not mean that they actually did watch it as many times as Aulino. Third, just because the jurors could evaluate the evidence themselves does not mean a witness' evaluation would not be helpful. *See People v. Vigil*, 2015 COA 88M, ¶ 67 (sergeant's testimony comparing the shoeprints to defendant's shoes "was helpful to the jury even if the jury could have undertaken the same analysis"), *as modified on denial of reh'g* (Aug. 13, 2015), *aff'd*, 2019 CO 105, ¶ 67; *see also People v. Maglaya*, 6 Cal. Rptr. 3d 155, 158 (Cal. App. 2003) (officer's lay testimony comparing shoes and shoeprints was helpful to the jury "since the jury would otherwise have to make its own tedious comparison of shoes and prints"); *Frederick v. State*, 37 P.3d 908, 937 (Okla. Crim. App. 2001) (same).

Defendant also asserts that Aulino's testimony was not helpful to the jury because "[t]here was no evidence that [his] appearance had changed in any significant way since before the Full Throttle robbery." Op. Br., p 24. First, under *Robinson*, the absence of change in appearance is not relevant to a determination of the admissibility of testimony at issue.[7] *See Robinson* (finding officer's identification of the defendant helpful to the jury even though the defendant had not changed his appearance); *see also Jackson*, 688 F.2d at 1125 (lay "testimony was useful to the jury even without evidence of a change in the defendant's appearance because it [was] based upon [the witness]'s opportunity to compare the person in the bank surveillance photograph with every person she had ever met, whereas the jury could only compare the person in the surveillance photographs to the defendant").

[7] Defendant's pre-trial motion to exclude Julien's identification, in fact, acknowledged that under *Robinson* "the defendant need not have changed his appearance from that of the person depicted in the video or photograph." CF, p 35.

Second, as defense counsel acknowledged in closing, the suspect identified as Defendant on the surveillance video of the robbery "took the care and effort to disguise himself," by wearing a hat, sunglasses, and gloves, TR 6/11/18, p 209:16-18, which made it more difficult for the jury to correctly identify him.

Third, Defendant's appearance had in fact changed. As defense counsel argued in closing, comparing the surveillance video and video of Defendant at Safeway six days after the robbery showed differences in the length of his beard. TR 6/11/18, p 207:15-24.

Defendant's claim that Aulino's testimony was expert opinion in the guise of lay opinion is equally invalid. The sole basis of this claim is that, four days before his testimony at issue, Aulino had testified that it was "part of police training to be able to look at a photograph and be able to look at a person's face and see if there are similarities and features that appear in both[.]" Op. Br., p 21 (quoting TR 6/4/18, p 96:21-25). However, Aulino did not base his opinion that Defendant was one of the two robbers seen in the surveillance video on any

specialized knowledge or training. Indeed, he was specifically asked what his opinion was "[b]ased on [his] observations of the video and [his] observations of the Defendant, Eric Grant, in person and in D.M.V. photographs[.]" TR 6/8/18, p 76:14-17.

Finally, Aulino's testimony at issue was cumulative, as at least four other witnesses (Bohlen, Mayfield, Julien, and Harding) testified that Defendant was one of the robbers in the surveillance video. Defendant fails to show how Aulino's testimony differed from testimony by these witnesses, which he is not challenging.

Therefore, the court did not abuse its discretion in admitting Aulino's testimony that Defendant was one of the robbers seen in the surveillance video, and any error in the admission of this evidence is not reversible under the harmless or plain error standards.

III. The trial court did not err in admitting under CRE 404(b) evidence of a similar robbery attempted three months earlier.

A. Preservation and Standard of Review

The People agree that the issue is preserved, and the standard of review is abuse of discretion. Op. Br., p 27; CF, pp 53-58, 63-66, 384-87.

"Trial courts are accorded substantial discretion when deciding whether to admit evidence of other acts." *Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009) (citing *Douglas v. People*, 969 P.2d 1201, 1205 (Colo.1999)). Appellate courts "review a trial court's decision in this area for abuse of discretion and will only disturb that ruling on appeal if it was manifestly arbitrary, unreasonable, or unfair." *Id*. (citing *Masters v. People*, 58 P.3d 979, 1001 (Colo. 2002)).

B. Background

Shortly after the release of the footage from the Full Throttle robbery, another victim, Ricky Williams reported that the bearded man in the surveillance video is the person who, pretending to be a utility worker, entered his house and attempted to rob him on March 29, 2017.

According to Williams, in that incident, wearing a bright green construction style vest, a hard hat, and gloves, the bearded man came to his door, claiming that he needed to check on a carbon monoxide leak. CF, p 53, ¶ 1. After being led to the basement, the man brandished a gun and told Williams: "You know what this is." *Id.* When the intruder attempted to restrain Williams with a zip tie, Williams resisted. During the ensuing struggle, the gun discharged repeatedly. Ultimately, Williams was able to take the gun away, and the intruder fled. *Id.* During a photo line-up, Williams did not positively identify Defendant as the intruder, although he hesitated on his photo twice. *Id.* at 53, ¶ 4.[8] Defendant's phone record showed that his phone was used in the vicinity of Williams' house approximately 16 minutes before the incident was reported. *Id.* at 53-54, ¶¶ 2, 5.

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[8] At trial, Williams testified that during the photo line-up he was "pretty close to a hundred [percent]" sure that Defendant's photo matched the intruder, but he did not make a positive identification because he thought he "had to be 100 percent" certain. TR 6/11/18, pp 78:6-11, 80-81.

The prosecution filed a notice to present evidence of the March incident under CRE 404(b), or as res gestae. CF, pp 53-57. Defendant objected, arguing the evidence was not relevant because Williams "*never identified [him]* as the person who attacked him." *Id*. at 65 (emphasis in original). After additional arguments at a hearing, the court issued a written order, finding evidence of the March incident admissible under CRE 404(b) "for the limited purpose of establishing identity." *Id*. at 384-87; TR 4/13/18, pp 63-67.

At trial, Williams testified regarding the March incident and identified Defendant as the intruder. TR 6/11/18, p 83:2-4.

C. Analysis

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" CRE 404.

Under the *Spoto*/*Garner* test, "when considering the admissibility of other act evidence under CRE 404(b) . . . a trial court must find (1) that it relates to a material fact; (2) that it is logically relevant, *i.e.*, that it has a tendency to make the existence of the fact more or less probable than it would be without the evidence; (3) that its logical relevance is 'independent of the intermediate inference, prohibited by CRE 404(b), that the defendant has a bad character, which would then be employed to suggest the probability that the defendant committed the crime charged'; and (4) that 'the probative value of the evidence is [not] substantially outweighed by the danger of unfair prejudice.' " *Kaufman v. People*, 202 P.3d 542, 552 (Colo. 2009) (quoting *People v. Garner*, 806 P.2d 366, 373 (Colo. 1991)).

"Evidence is logically relevant if it has 'any tendency to make the existence of [a material fact] more probable or less probable than it would be without the evidence.' " *People v. Lahr*, 2013 COA 57, ¶ 15 (brackets in original) (quoting CRE 401) (citing *Yusem*, 210 P.3d at 463; *Spoto*, 795 P.2d at 1318).

"Courts properly admit modus operandi evidence when there are 'striking similarities' between the uncharged misconduct and the charged crime." *People v. Williams*, 2016 COA 48, ¶ 28.

Before admitting other-crime evidence, "the trial court, *on the basis of all the evidence before it*, must be satisfied by a preponderance of the evidence that the other crime occurred and that the defendant committed the crime." *Garner*, 806 P.2d at 373-74 (emphasis added) (concluding the court of appeals erred in holding "that the trial court was required to determine the admissibility of other-crime evidence by analyzing the evidence related to the other crime separately and independently of other evidence rather than by considering all the evidence in the case"). "A fact is established by a preponderance of the evidence when, upon consideration of all the evidence, the existence of that fact is more probable than its nonexistence." *Id*. at 370.

Here, substantial evidence showed that Defendant was the bearded man in the surveillance video of the Full Throttle robbery, Williams was certain that the bearded man was the intruder who

attempted to rob him, Defendant's phone was used in the vicinity of Williams' house shortly before that incident, Defendant was charged with the crimes arising from the March incident,[9] and there were "striking similarities" between the two incidents: In both incidents, the perpetrators disguised themselves as utility workers to enter the property, used firearms to overcome resistance, and restrained their victims by tying their hands behind them.[10] This evidence, as the court properly concluded, met the requirements of CRE 404(b) for the admission of the March incident to establish Defendant's identity as the

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[9] At the time of the court's ruling on the admissibility of CRE 404(b) evidence in this case, Defendant had been charged (case 17CR6081) with attempted murder and attempted robbery arising from the Williams incident on March 29, 2017. TR, 4/13/18, pp 63-64. At the motions hearing, defense counsel referred to the preliminary hearing in that case, stating that she had no objection to the court's taking judicial notice of the preliminary hearing in that case when ruling on the CRE 404(b) issue. *Id*. at 67:12-15. Following the hearing, the prosecution filed police reports of the March incident as attachments to its CRE 404(b) motion. CF, pp 226-99.

[10] During the Full Throttle robbery, George Maldonado's hands were tied behind his back with some orange nylon strap "similar to a thin rachet strap." TR 5/31/18, pp 59:4-6, 113-14; TR 6/1/18, p 64:14-18; People's Exhs. 113, 114,166, 347.

perpetrator of the Full Throttle robbery. *See People v. Madonna*, 651 P.2d 378, 386 (Colo. 1982)(prior act of fraudulently obtaining narcotic drug "involved features markedly similar to the offense charged," including a bogus telephone call from a phony physician to a pharmacist, a forged prescription, and the solicitation of a stranger to pick up the prescription); *People v. Ridenour*, 878 P.2d 23, 28 (Colo. App. 1994)("striking similarities" between charged and prior acts included that armed robber entered movie theater office, told employees to lie on the floor, and ordered assistant manager to give him cash from safe; robber pulled telephone cord out of wall; robber wore an earpiece with a wire running down his shirt and warned employees that he had a police scanner and would know if they called the police; robber told employees to wait in office for five minutes after he left); *People v. Casper*, 631 P.2d 1134, 1135 (Colo.App.1981)(evidence that accused recently robbed another store in the same dry cleaning chain in a "strikingly similar" manner properly admitted as modus operandi on the issue of identity).

Defendant contends that, while the court found the prosecution had met its burden of proving that the March incident had occurred, it "was silent on the other burden from *Garner* . . . that the prosecution must meet: to prove by a preponderance of the evidence that [he] committed the other act." Op. Br., p 31. He then asserts that "[t]he prosecution failed to prove this condition precedent by a preponderance of the evidence," because "when the police . . . showed Williams the lineup containing [his] picture, Williams did not identify [him] as the man who had tried to rob him." *Id*. Defendant's claim is without merit.

First, as held in *Garner*, whether the prosecution has met its burden of showing "that the other crime occurred and that the defendant committed the crime" is determined based on "all the evidence in the case," not only "the evidence related to the other crime separately and independently of other evidence[.]" *Garner*, 806 P.2d at 373-74. Thus, Williams' failure to make a positive identification of Defendant in a photo line-up does not support Defendant's assertion that "the prosecution failed to prove to the trial court by a

preponderance of the evidence that it was [he] who committed the March 29 attempted robbery[.]" Op. Br., p 32. *See State v. Brown*, 160, 608 P.2d 299 (Ariz. 1980) (in prosecution for armed robbery where the defense was mistaken identity, trial court did not abuse its discretion in admitting evidence of a prior robbery *allegedly* committed by defendant to establish his identity, as similarities between the crimes were sufficient to raise an inference that the same person committed both robberies).

Second, although the court referred to the prosecution's obligation to prove "that the prior acts actually occurred" without also referring to its obligation to prove "that the defendant committed the crime," CF, p 384, ¶ 3, it did address that requirement when analyzing the logical relevance of the March incident. Specifically, the court noted that "[w]hile the victim in the attempted murder/burglary case did not identify defendant Grant as the perpetrator in a photo line-up, Williams believed one of the persons in the media release was the individual who assaulted him." *Id.* at 386, ¶ 5(2). The court also cited the fact that

Defendant's phone records linked him to that incident. *Id.* The court then found "the prior act, March 29, 2017 event, is logically relevant to show the identity of the Defendant in the present case." *Id.* Thus, contrary to Defendant's assertion, the court was not "silent" on the prosecution's burden of proving that he committed the other act.

Finally, any error in the admission of the evidence of the March incident was harmless. The testimony related to that incident comprised a small part of a two-week trial, with more than fifty witnesses testifying. Moreover, in its closing argument, the prosecution made only brief and passing references to Williams' testimony, while extensively discussing the surveillance video and testimony of witnesses who identified Defendant in that video. TR 6/11/18, pp 188-89, 195:21-24, 220:6-10. Thus, it cannot be said that evidence of the March incident "substantially influenced the verdict or affected the fairness of the trial proceedings." *Hagos*, ¶ 12.

IV. Defendant is not entitled to relief under the cumulative error doctrine, because the court did not commit any error.

A. Preservation and Standard of Review

A claim of cumulative error is reviewed de novo and need not be preserved. *See Howard-Walker v. People*, 2019 CO 69, ¶ 26 & n.2.

B. Analysis

"[N]umerous formal irregularities, each of which in itself might be deemed harmless, may in the aggregate show the absence of a fair trial, in which event a reversal would be required." *Id.* at ¶ 24 (quoting *Oaks v. People*, 150 Colo. 64, 371 P.2d 443, 446 (1962) (alteration in original)).

However, "[c]umulative error applies only if the trial court committed numerous errors; defendant's mere assertions of error are insufficient to warrant reversal." *People v. Blackwell*, 251 P.3d 468, 477 (Colo. App. 2010) (citing *People v. Rivas*, 77 P.3d 882, 893 (Colo. App. 2003)); *see also People v. Whitman*, 205 P.3d 371, 387 (Colo. App. 2007) ("The doctrine of cumulative error requires that numerous errors be committed, not merely alleged").

Here, as discussed above, the court did not err in its evidentiary rulings. Therefore, reversal is not warranted.

CONCLUSION

For the foregoing reasons and authorities, this Court should affirm Defendant's judgment of conviction.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **CASEY J. MULLIGAN** and all parties herein via Colorado Courts E-filing System (CCES) on April 30, 2020.

/s/ Tiffiny Kallina