COURT OF APPEALS STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
District Court of Denver County Honorable William Hood, Judge Case No. 07CR6091	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff - Appellee, v. WILLIAM DION WEBSTER, Defendant - Appellant.	▲ **COURT USE ONLY** ▲ Case No. 09CA2304
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PEOPLE'S ANSWER BRIEF

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

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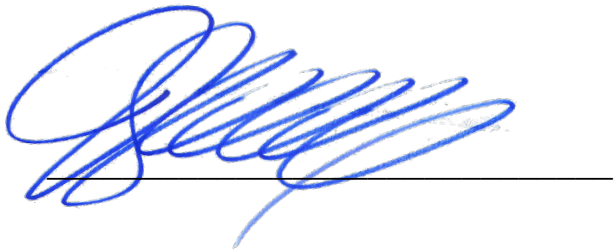

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STATEMENT OF THE FACTS AND OF THE CASE

Defendant, William Webster, directly appeals his convictions on one count each of first degree kidnapping (F-1), first degree assault (F-3), second degree burglary (F-3), and impersonating a peace officer (F-6). Defendant was sentenced to life without parole for the kidnapping, and to lesser, concurrent sentences on the other counts (v1, pp 1-1B, 103-05, 133, 197-98; 9/10/09, pp10-11).

According to the prosecution's evidence, Jess Odom, a recovering crack addict, was temporarily living with his grandparents in October 2007 (4/28/09, pp242-43).[1] At about 10 p.m. on October 4, at a street corner in east Denver, Shane Snyder, a.k.a "Angel D," asked Jess for a ride to a home a "couple blocks" away. Jess agreed (4/28/09, pp69-70, 244-47).

In reality, Snyder's destination was several miles away. However, on the way, Snyder and Jess smoked crack provided by Snyder (4/28/09, pp246-47, 250). Once they arrived, Snyder invited his friend "Victor" –

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[1] Transcripts, which were scanned to a CD, are cited by date.

whose real name is Leslie Detaine – to join them. The three drove around and smoked crack. When the crack ran out, Jess drove to his grandparents' home, grabbed some cash, and bought more crack. By the time the crack ran out again a second time, it was getting light out; they had smoked "the whole night." Jess drove back to his grandparents' home and grabbed an electric drill to pawn (4/28/09, pp70-74; 250-52).

As they looked for an open pawn shop on 17th Avenue, Snyder suddenly told Jess to park. Snyder got out and offered defendant marijuana for crack. In short order, defendant – who called himself "Mike" – got in Jess's truck, and the four men began passing a crack pipe around (4/28/09, pp75-80, 256-259).

Eventually, Jess pawned the drill for more cash, and defendant then directed Jess to defendant's home near 30th and Colorado Blvd. Defendant went inside and returned with more crack, which Jess paid for with the drill money. The four men smoked this batch – and one more defendant obtained near a grocery store – at various locations until late afternoon (4/28/09, pp80-87, 261-67).

At about this time, Jess was tired and had simply "had enough." Hoping to get rid of everyone in the truck and go home, he drove toward Detaine's home. Because Jess kept falling asleep, Snyder took over driving. During the drive, defendant began insisting that Jess get money for the crack he had smoked. At Detaine's home, things started to get "ugly"; defendant started hitting Jess and calling him a "punk" for trying to avoid paying for the crack he had smoked (4/28/09, pp266-74). At one point, Jess escaped the truck and tried to tell a passing motorist that the others were trying to steal his truck. However, after Detaine left the group, defendant and Snyder coaxed Jess back in the truck by offering him the keys. Believing that things had finally "calmed down," he proceeded to drive to defendant's home (4/28/09, pp87-93, 272-74).

When they arrived at defendant's home, defendant suddenly hit Jess in the face, cutting his eyebrow. Defendant again accused Jess of trying to cheat defendant out of payment for crack. When Jess tried to escape, defendant, who was twice his size, pulled Jess back and kept hitting him, calling Jess a "white devil." Jess eventually offered up his

truck and a shotgun kept at his grandparents' home to stop the beating (4/28/09, pp274-78, 281). At some point, defendant went inside his home, telling Snyder to watch Jess. By the time defendant returned – carrying two pairs of surgical-style rubber gloves – Jess had fallen asleep in the truck's small rear seat. Defendant and Snyder then headed toward the grandparents' home, planning to rob them (4/28/09, pp93-102). When they could not find the house, defendant beat Jess until he gave them accurate directions and described the home's interior layout, including the location of electric and phone junction boxes (v/28/09, pp101-02, 223-25).

At the home, defendant pushed Jess inside, and up to Jess's bedroom, by Jess's shirt. Then defendant put on a pair of the gloves, and tied Jess's hands and feet. He then directed Snyder to put on the other pair of gloves and hog-tie Jess's feet to his hands (4/28/09, pp286-288). Snyder did so, but left the ties loose. Meanwhile, defendant woke the grandparents and ordered them into the bathroom across the hall, telling them that he was a police detective, that Jess had been caught selling cocaine, and that the home was being searched for guns. The

grandmother noticed that defendant was wearing gloves (4/28/09, pp108-09, 288-91; 4/29/09, pp28-34, 45-46, 52-53, 61-63).

Defendant decided they had to "murk" – that is, murder – Jess and his grandparents. Snyder was unwilling to kill anyone, telling defendant he would not "let that go down." Believing that Snyder was now plotting against him, defendant began beating Snyder, and threatening to kill him, too, if he didn't follow instructions (4/28/09, pp102-08, 110-14, 293). Defendant then put a pillow over Jess's head, threatened Snyder to "do it right," and then started to leave to kill the grandparents (4/28/09, pp111-13). Snyder persuaded defendant to watch him kill Jess, and then pretended to suffocate Jess with a pillow, while Jess was "fake screaming." But defendant, seeing that Snyder was not "pushing for real," approached to take over. Snyder panicked and raced out of the house (4/28/09, pp113-14, 292-93).

Seeking help from the grandparents' neighbors, Snyder eventually snuck in the open back door of a home around the block. When police responded to the homeowners' call, Snyder told them that defendant

had harmed Jess and was chasing Snyder (although he minimized his own role in previous events) (4/28/09, pp116-25, 168-85, 216-17, 228-37).

Meanwhile, defendant continued trying to kill Jess. After suffocation failed, defendant beat his head against some furniture until he blacked out. Jess's grandparents, who had been hearing Jess moan, finally left the bathroom to discover Jess hog-tied, his head covered with a plastic grocery bag, and with several stab wounds to his neck (4/28/09, pp293-295, 298-308; 4/29/09, pp7-9, 33-35, 63-64; P.exh. 2-3, 7-14, 28-29).[2] Defendant had taken a shotgun, a credit card, and cash from the grandparents (4/29/09, pp42-44, 66).

A central issue was the identity of "Mike." On one hand, Jess vacillated between two photographs, one of which was defendant, and his grandparents did not identify anyone (4/23/09, p6; 4/28/09, pp311-14; 4/29/09, pp38-41, 55-56, 61-63, 195-98, 229, 234). Snyder, on the other hand, identified defendant, but was testifying under a plea agreement (4/28/09, pp127, 131-32, 202-03). But Snyder also gave

[2] The parties stipulated that Jess's injuries qualified as "serious bodily injury" (4/29/09, pp4-5).

police a slip of paper upon which "Mike" had written a phone number that traced to the home of defendant and his girlfriend, where defendant was arrested (4/28/09, pp119-21; 4/29/09, pp183-87; P.exh. 31). Finally, police found the fingertip of a surgical glove police in Jess's room (4/29/09, pp11-16, 80-83; P.exh. 9, 21, 34). An expert testified that DNA in the glove tip was a mixture whose major contributor matched defendant's DNA markers. According to the expert, the chance of a such a match by a random person was less than 1 in 108 trillion (4/29/09, pp118-124, 165, P.exh. 23).

SUMMARY OF THE ARGUMENT

1. The trial court properly concluded that defendant's *Miranda* waiver and police statement were voluntary. Det. Palombi's asking defendant if he wanted to discuss the case was not interrogation requiring *Miranda* warnings. Regardless of whether defendant knew the full scope of the interview, the trial court properly concluded that defendant was not misled about it. In any event, defendant's knowledge about the scope of the interview does not affect his otherwise valid

waiver. Finally, Det. Palombi's use of a single deception during the interview does not, standing alone, render defendant's statements involuntary.

2. Any confrontation violation was harmless. Susan Berdine, an expert who did not testify at trial, only prepared cellular material found on a piece of the surgical glove for DNA analysis. The expert who actually did the comparison testified at trial. Thus, even assuming that the confrontation clause and §16-3-309(5) required Berdine's in-person testimony, any prejudice from her absence did not so undermine confidence in the reliability of the verdict as to constitute plain error.

3. The trial court chose an appropriate remedy for the untimely completion, by the Denver Police Crime Lab ("DPCL"), of the DNA comparison showing that defendant was the likely source of DNA on the surgical glove. The prosecution requested a DNA profile on the surgical glove shortly after defendant was bound over to district court. Even if the prosecution could have submitted defendant's known DNA for comparison earlier, the vast majority of the delay in getting the comparison was the DPCL's huge backlog of "priority" DNA requests.

In any event, the trial court offered to continue trial more than 30 days but still within the existing speedy trial deadline. It was defense counsels' conflicting schedule that prevented them from accepting such a date.

4. Any error in defendant's absence from a pretrial conference covering the prosecution's motion to amend two counts was expressly waived by defense counsel. Alternatively, defendant had no due process right to attend a conference over a purely legal matter. If he had such a right, his absence did not rise to the level of plain error.

5. There was no reversible error in the timing of the trial court's modified *Allen* instruction. Before giving the instruction, courts should ask the jury whether further deliberations would be productive. This ensures that holdout jurors will not view themselves as captives and vote to convict for the wrong reason. A failure to ask that question is harmless where, as here, the trial court already has reason to know that further deliberations, in light of the non-coercive modified *Allen* instruction, will not be coercive, and the jury remains deadlocked even after the instruction.

ARGUMENT

I. The trial court properly concluded that defendant's *Miranda* waiver and police statement were voluntary.

Defendant first challenges the admission of his videotaped police interview. Specifically, he argues that: (1) his *Miranda* waiver was invalid because it was preceded by un-*Mirandized* interrogation (op. br. at 11-12, 16-18); and (2) police deception about the subject of the interview, and about the strength of evidence against defendant, rendered the entire interview involuntary (op. br. at 13-18). Except for the issue of preservation, the people address these claims separately.

A. Defendant's appellate arguments are preserved

The People agree that defendant preserved his appellate arguments via his motion to suppress (v1, pp7-9) and arguments at the suppression hearing (6/26/08, pp4-12). Consequently, any error in admitting any of defendant's police statements is reviewed for harmlessness. Crim. P. 52(a); *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005). When, as here, an alleged error directly implicates a constitutional right, an error is harmless when the prosecution shows,

beyond a reasonable doubt, that there is no reasonable probability that the error affected the verdict. *Chapman v. California*, 386 U.S. 18, 23-24 (1967); *Arteaga-Lansaw v. People*, 159 P.3d 107, 110 (Colo. 2007).

B. The *Miranda* waiver was valid.

1. Appellate review of *Miranda* waivers

The People disagree with defendant's assertion that appellate courts review a *Miranda* waiver's validity *de novo*, because "the appellate court is in as good a position as the trial court to review police interrogation videotapes…" (op. br. at 9) (citing *People v. Madrid*, 179 P.3d 1010 (Colo. 2008)). *Madrid* observed that appellate and trial courts are in similar positions *regarding recorded statements* when "there are *no disputed facts outside the recording* controlling the issue of suppression." *Id.* at 1014 (emphasis added). A trial court's factual findings regarding events other than a recorded statement are upheld if supported by the record, even if the appellate court might have found differently had it been the fact-finder. *Id.* at 1013 (citing *People v.*

Gennings, 808 P.2d 839, 844 (Colo.1991)); *People v. Thomas*, 853 P.2d 1147, 1149 (Colo. 1993).

That said, the People agree that "the legal effect of [trial court factual findings] constitutes a question of law which is subject to *de novo* review." *Madrid*, 179 P.3d at 1014.

2. Law governing waiver of *Miranda* rights

Before an individual may be subjected to custodial interrogation, he must be advised that he has the right to remain silent, anything he says may be used against him, he has the right to have a lawyer present during the interrogation, and if he cannot afford a lawyer, one will be appointed for him. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *People v. Redgebol*, 184 P.3d 86, 93 (Colo. 2008). If a defendant waives these rights, his subsequent statements are admissible against him during the prosecution's case-in-chief. *See People v. Mangum*, 48 P.3d 568, 571 (Colo. 2002). The prosecution bears the burden of proving by a preponderance of the evidence that a defendant's waiver of these rights

was knowing, intelligent, and voluntary. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986); *People v. Clayton*, 207 P.3d 831, 834-35 (Colo. 2009).

For *Miranda* purposes, "interrogation" means not only express questioning, but also any words or actions that a reasonable officer should know are reasonably likely to elicit an incriminating response. *People v. Taylor*, 41 P.3d 681, 690 (Colo. 2002) (citing *Rhode Island v. Innis*, 446 U.S. 291, 301 (1981)).

Miranda is a prophylactic rule designed to foster voluntary statements. *People v. Taylor*, 41 P.3d 681, 693 (Colo. 2002); *see also United States v. Pettigrew*, 468 F.3d 626, 635 (10th Cir. 2006) (quoting *Oregon v. Elstad*, 470 U.S. 298, 307 (1985)). But an un-*Mirandized* statement is not necessarily the product of the coercion or undue influence that *Miranda* was designed to curtail. *Elstad*, 470 U.S. at 310, 314. Therefore, a *Mirandized* statement which follows an un-*Mirandized* statement need not always be suppressed as the "fruit" of the prior, unwarned statement. *Taylor, supra* (citing *Elstad*, 470 U.S. at 311-14, 318 (rejecting the argument that once the "cat is out of the bag," any subsequent statement must be suppressed regardless of

intervening *Miranda* warnings)). Specifically, where an officer's failure to "Mirandize" a suspect prior to asking him a question is an "oversight" that may have resulted from "confusion as to whether [the officer's] brief exchange [with the suspect] qualified as custodial interrogation," a subsequent, post-*Miranda* statement need not be suppressed. *Taylor*, 41 P.3d at 694 (quoting *Elstad*, 470 U.S. at 309); *see also Missouri v. Siebert*, 542 U.S. 600, 615 (2004) (under *Elstad*, a pre-*Miranda* conversation that is "a good faith *Miranda* mistake" does not require suppression of post-Miranda interrogation). By contrast, a conscious decision to conduct "systematic" and "exhaustive" interrogation with "psychological skill" before giving *Miranda* warnings may require suppression. *Siebert*, 542 U.S. at 615-16.

3. Analysis

Defendant's receipt and waiver of *Miranda* rights is included in the recording (6/19/01, pp44-48; P.exh. 25, 2:49-4:30). He contends, however, that he was interrogated *before* the recorded interview began. Defendant does not challenge the admission of any pre-*Miranda* statement; in fact, he did not make incriminating statement until after

he was Mirandized (6/19/08, p57; 6/26/08, p14). Nevertheless, defendant argues that this pre-*Miranda* interview rendered his subsequent *Miranda* waiver involuntary under *Siebert* (op. br. at 11-12, 18). The People disagree.

The suppression evidence was that defendant was arrested for a parole violation (6/19/08, pp53, 58-59). Just prior to the recorded interview, Det. Palombi approached defendant in his cell, introduced himself, told him that he was investigating this case, and asked defendant if he wanted to give "[his] side of what happened" (or something similar). Defendant agreed, and they went to the interview room (6/19/08, pp53-57). Det. Palombi did not recall whether, at that time, he described "this case" as a robbery (6/19/08, pp56-59). He did not think that anything else was said until the formal interview began (6/19/08, p57).

Defendant argues that the brief exchange in or near defendant's cell was "interrogation." However, applying *Taylor* and *Innis*, p13 *supra*, no reasonable officer would expect a jailee to give an incriminating response just because the officer asked whether the jailee

wanted to tell "[his] side of what happened." Det. Palombi simply introduced himself to defendant and *initiated* – but did not *conduct* – an interview. Moreover, after defendant agreed to an interview, Det. Palombi asked no questions until he read, and defendant waived, the *Miranda* rights. Because Det. Palombi's initial question was not "interrogation," there was no *Miranda* violation prior to the recorded interview. *See, e.g. United States v. Thompson*, 496 F.3d 807, 811 (7th Cir. 2007).

Second, even if Det. Palombi's single question constituted interrogation at all, it was interrogation by inadvertence. Det. Palombi could clearly have asked asking if defendant was willing to discuss the case. That Det. Palombi asked a slightly different question – whether defendant wanted to give "his side of what happened" – hardly evidences a conscious decision to conduct an un-Mirandized interrogation "in a calculated way to undermine the *Miranda* warning." *Siebert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment). At worst, Det. Palombi's question was a good faith *Miranda* mistake, *Elstad*, 470 U.S. at 315-16, and it did not yield any incriminating

response (pp14-15, *supra*). There is no reason to believe that the *Miranda* warnings given two minutes later were ineffective. *Siebert*, 542 U.S. at 611-12; *id.* at 617-18 (Breyer, J., concurring); *see People v. Lucas*, 232 P.3d 155, 160 (Colo. App. 2009) (*Siebert* plurality announced five-part test for determining whether pre-*Miranda* questioning rendered subsequent warnings ineffective) (citing *Siebert*, 542 U.S. at 615). As such, Det. Palombi's single pre-*Miranda* question does not invalidate defendant's subsequent *Miranda* waiver.

Defendant also asserts that his *Miranda* waiver was involuntary because Det. Palombi "essentially misled" him about the crimes Palombi was investigating (op. br. at 14, 16). Specifically, defendant argues that in *Colorado v. Spring*, 479 U.S. 564, 576 n.8 (1987), the Court suggested that an affirmative misrepresentation by police about the scope of an interrogation may affect the validity of a subsequent *Miranda* waiver. However, *Colorado v. Spring* actually undercuts his argument.

In *Colorado v. Spring*, the defendant was arrested on federal firearms charges, waived his *Miranda* rights, and was then questioned

about a Colorado murder. Law enforcement had not told him that the interrogation would cover the murder. *Colorado v. Spring*, 479 U.S. at 575 n.7 (quoting *People v. Spring*, 713 P.2d 865, 871 (1985)). Our supreme court held that the defendant's lack of knowledge about the scope of the interrogation rendered his *Miranda* waiver invalid. *People v. Spring*, 713 P.2d at 874.

The United States Supreme Court reversed. Noting that there had been no affirmative misrepresentation about the scope of the interview, the Court held that "mere silence" by law enforcement about the subject of an interrogation is not "trickery" sufficient to undermine an otherwise valid *Miranda* waiver. *Colorado v. Spring*, 479 U.S. at 576 & n.8. The Court further held that "a suspect's awareness of all possible subjects of questioning in advance of interrogation is *not relevant* to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." *Id.* at 577 (emphasis added).

Our supreme court has since observed that *Colorado v. Spring* "expressly direct[s]" courts to "discount or deem irrelevant" a failure of

police to inform a suspect about "all possible subjects of questioning" before a *Miranda* waiver. *People v. Humphrey*, 132 P.3d 352, 356 (Colo. 2006) (quoting *Spring*, 479 U.S. at 577); *id.* at 358 (trial court erroneously believed that police must ensure that a suspect is aware of the subject of the interrogation). A proper *Miranda* warning is sufficient to advise a suspect that he can stop answering questions, or obtain counsel, when the questions veer away from the subject he believed would be discussed. *Id.* (suspect's knowledge that assault victim died bore "no relation to her ability to comprehend her constitutional rights"; "[t]he only question that concerns us … is whether the *Miranda* advisement was sufficient or if more was needed" to ensure that the suspect understood her rights before and during interrogation); *see also People v. Vickery*, 229 P.3d 278, 282 (Colo. 2010).[3]

[3] It follows that defendant's reliance on *People v. Chase*, 719 P.2d 718 (Colo. 1986), *People v. Kaiser*, 32 P.3d 480 (Colo. 2001), and *People v. Hopkins*, 774 P.2d 849 (Colo. 1989) (op. br. at 15), is misplaced. *Chase* was decided before *Colorado v. Spring*, and neither *Kaiser* nor *Hopkins* mentions a suspect's awareness of the subject of a police interview.

Here, the trial court properly found that defendant was not misled about the scope of the interrogation (6/26/08, pp 15, 19). Specifically, the court found that Det. Palombi told defendant he was investigating the case, but did not indicate "what the case was" (6/26/08, p15). This fits with Det. Palombi's consistent inability to remember what he told defendant about the subject of the interview (6/19/08, pp55-59). On the recording, Det. Palombi told defendant that he was investigating a robbery after defendant waived *Miranda* rights (6/26/08, p16; P.exh. 25, 3:05-3:30). On these facts, the trial court correctly concluded that Det. Palombi was not required to advise defendant more specifically about potential charges (6/26/08, p19 (citing *Humphrey*)). Because defendant said he understood the *Miranda* advisement (P.exh. 25, 3:45), nothing more was necessary to establish a valid *Miranda* waiver.[4]

[4] Even if Det. Palombi had mentioned only robbery, that offense was part and parcel of the conduct resulting in all the other charges. This is not a case in which the suspect expects to answer questions about one criminal episode, and is then asked about questions involving an entirely different episode. Defendant takes the untenable position that police failure to advise of *each and every potential charge* – especially the most serious offenses – arising from a single course of conduct would invalidate an otherwise valid *Miranda* waiver (op. br. at 16).

C. Defendant's statements were voluntary

Defendant argues that his statements were involuntary because Det. Palombi misled him to believe that Jess had identified him as "Mike" (op. br. at 13, 17). The People disagree.

1. Appellate review of claims of coercion

Due process requires that to introduce a defendant's statement, the prosecution must show by a preponderance of the evidence that the statement was voluntary. *People v. Miranda-Olivas*, 41 P.3d 658, 660 (Colo. 2001). A trial court's finding of voluntariness is reviewed de novo, but its factual conclusions will be affirmed if supported by the record. *People v. Flippo*, 134 P.3d 436, 442 (Colo. App. 2005), *rev'd on other grounds*, 159 P.3d 100 (Colo. 2007).

2. Exclusion of coerced police statements

"Coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Id.* (quoting *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)). "Coercive activity" includes not

only physical abuse or threats, but also subtle forms of psychological coercion if they play a "significant role" in inducing the statement. *Miranda-Olivas*, 41 P.3d at 660-61 (quotation omitted). The ultimate question is whether the suspect's will was overborne. *Id*. at 661. A suspect's mental condition is not determinative by itself, but "the deliberate exploitation of a person's weaknesses by psychological intimidation" can constitute coercion. *Id*.

D. Analysis

1. Defendant's statements were voluntary

Factors bearing on voluntariness include, but are not limited to: (1) whether the defendant was in custody or was free to leave and was aware of his situation; (2) whether *Miranda* warnings were given prior to any interrogation and whether the defendant understood and waived his rights; (3) whether the defendant had the opportunity to confer with counsel or anyone else prior to the interrogation; (4) whether the challenged statement was made during the course of an interrogation or was instead volunteered; (5) whether any overt or implied threat or

promise was directed to the defendant; (6) the method and style employed by the interrogator in questioning the defendant and the length and place of the interrogation; (7) the defendant's mental and physical condition immediately prior to and during the interrogation; and (8) the defendant's educational background, employment status, and prior experience with law enforcement and the criminal justice system. *Gennings*, 808 P.2d at 844 (the "*Gennings* factors"). However, an appellate court may not find a statement involuntary if the record "'is devoid of any suggestion that police resorted to physical or psychological pressure to elicit [it].'" *Ferguson*, 227 P.3d 510, 514 (Colo. 2010) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *People v. Jordan*, 891 P.2d 1010, 1015-16 (Colo. 1995)).

Gennings factor six arguably covers police deception regarding the evidence against a suspect. However, this Court has held that a single police misrepresentation about the evidence against a suspect does not render his or her statement involuntary. *People v. Zamora*, 940 P.2d 939, 942 (Colo. App. 1996); *People v. Speer*, 216 P.3d 18, 22 (Colo. App. 2007) (quoting *Zamora*), *rev'd on other grounds*, 255 P.3d 1115 (Colo.

2011). These cases acknowledge that, while courts generally do not "condone" misrepresentations about the evidence against a suspect, the "overwhelming majority" of courts recognize that "ruses are a sometimes necessary element of police work," and hold that deception, standing alone, does not render a statement invalid. *E.g. Zamora*, 940 P.2d at 942. Both cases also distinguish *People v. Freeman*, 668 P.2d 1371 (Colo. 1983). *E.g. Speer*, 216 P.2d at 23. In Freeman, officers repeatedly misrepresented both the strength of evidence against the defendant and the potential punishment. In addition, they "alternately berated [and] reassured]" the suspect, such that the combined effect of police conduct rendered the defendant's confession involuntary.

This case falls far close to *Speer* and *Zamora* than *Freeman*. As such, the trial court properly concluded that defendant's statements were voluntary.

II. Any confrontation violation was harmless.

Defendant argues next that introduction of a report prepared by a non-testifying expert from the Denver Police Crime Lab ("DPCL") violated his right to confrontation (op. br. at 19-24).

A. Background

At trial, Shawn O'Toole, a DPCL expert in DNA analysis, explained that Susan Berdine, another DPCL expert, detected: (1) "cellular material" suitable for DNA analysis on two items found in Jess's room: (1) the piece of the surgical glove; and (2) the pillow found in Jess's room (4/29/09, pp112-16). O'Toole then explained that he personally did the DNA analysis on Berdine's samples from both the glove and pillow. He concluded that defendant was the major contributor to the glove's DNA, but not the DNA on the pillow (4/29/09, pp118-24; P.exh. 22-23). Although defendant requested that prosecution experts (*i.e.*, Berdine) testify in person per §16-3-309 (v1, pp91-92), he did not object at trial to admission of Berdine's written report (4/29/09, pp112-24, P.exh. 36).

B. Standard of review

The People agree with defendant that plain error applies to defendant's confrontation claim based on admission of Berdine's report (op. br. at 19).

Although the right to confront witnesses is constitutional, §16-3-309, which requires the defendant to request in-person testimony from prosecution experts, is a reasonable prerequisite to exercising that right. *Hinojos-Mendoza v. People*, 169 P.3d 662, 668-69 (Colo. 2007); *see also Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2541 (2009). A timely request for live testimony from an expert preserves the right to confront the technician, while the absence of a timely request waives that right. *Cropper v. People*. 251 P.3d 434, 437 (Colo. 2011). Similarly, when defendant invokes the statute, but then fails to object to evidence that arguably violates the statute, he has essentially abandoned the earlier invocation. *E.g., People v. Ridenour*, 878 P.2d 23, 28 (Colo. App. 1994) (by not requesting a ruling on his motion to continue, the defendant abandoned the motion); *accord United States v. Sides*, 944 F.2d 1554, 1559 (10th Cir. 1991) (notwithstanding motions in limine, parties must re-raise objections with particularity when the issue becomes ripe). Thus, any error in admission of Berdine's test results is unpreserved, and requires reversal only if defendant satisfies the tests

for plain error. Crim. P. 52(b); *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005).

Plain error occurs when an error was "obvious" at the time of trial and "undermined the fairness of trial so as to cast serious doubt on the reliability of the judgment of conviction." *Miller*, *supra.*

To qualify as "obvious," an error must be "so placed as to easily or inevitably [be] perceived or noticed," or "so simple and clear as to be unmistakable" to the trial court, even without the benefit of an objection. *E.g., People v. Robles*, 2011 WL 1195773 *6 n.4 (Colo. App. March 31, 2011); *People v. O'Connell*, 134 P.3d 460, 463-65 (Colo. App. 2005).

An obvious error "casts serious doubt" on the reliability of judgment when there is a reasonable possibility that it contributed to the conviction. *Miller, supra; Lehnert v. People*, 244 P.3d 1180, 1185 (Colo. 2010).

C. Analysis

Even assuming that admission of Berdine's results was obvious error under §16-3-309 and *Hinojos-Mendoza*, defendant's two-sentence

attempt to satisfy the prejudice prong of plain error is unpersuasive. Specifically, defendant argues that admission of Berdine's results "could not have been harmless" because "DNA was a … major contributor to the convictions" (op. br. at 24). The People disagree for two reasons.

First, the DNA match was not critical in identifying "Mike." After all, Snyder gave "Mike's" phone number to police, who traced it to defendant's home (4/28/09, pp119-21; 4/29/09, pp183-87; P.exh. 31). No juror could fail to conclude that defendant was the man who gave Snyder that number.

Second, Berdine's report *did not encompass any DNA results*. As discussed above, Berdine only determined that the surgical glove contained "cellular material" *that could be subjected to DNA analysis* (p25, *supra*). It was O'Toole who actually performed the DNA analysis, and he personally testified to the result at trial. That Berdine found and forwarded material that O'Toole tested hardly undermines confidence in the reliability of the verdict.

A similar analysis applies to the human blood Berdine found on pillow. Neither Berdine nor O'Toole matched that blood to defendant,

and therefore, the blood did not place defendant at the crime scene. Thus, the blood was only cumulative evidence of Jess's injuries – including pictures and a stipulation that they qualified as serious bodily injury (4/28/08, pp301-07; 4/29/09, pp4-5; P.exh. 2-3, 14).

In sum, defendant has failed to demonstrate that any error in admitting Berdine's report should undermine this Court's confidence in the reliability of the jury's verdicts.

III. The trial court chose an appropriate remedy for the untimely completion of the DNA comparison showing that defendant was the likely source of DNA on the surgical glove.

Defendant argues that the trial court should have excluded O'Toole's DNA comparison, or imposed other sanctions, because the comparison was not completed 25 days before trial. The People disagree; the trial court's remedy was appropriate.

A. Background

Defendant was charged in October 2007 and bound over to district court in January 2008 (v1, pp1-2). The prosecution requested a DNA profile on the surgical glove's fingertip sometime in February

2008, and Berdine forwarded samples to the DNA unit on February 12 (6/19/08, pp5-6; P.exh. 36). Thereafter, the prosecution consistently prodded police for the results. However, the DPCL did not complete the profile until June 19, 2008, at which time the prosecution sought a saliva sample from defendant for comparison per Crim. P. 16(II)(a)(1) and 41.1 (6/19/08, pp3-4, 7). Six days later, on June 27, 2008, the comparison arrived. The prosecution acknowledged that the July 21 trial date was only 25 days away (7/1/08, p3).

Over the course of several hearings, defendant objected both to DPCL's delay in completing a DNA profile, and to the prosecution's failure to get a sample of defendant's DNA before June 19, 2008. As a remedy, defendant sought, *inter alia*, exclusion of all DNA evidence (6/19/08, pp3-5; 6/26/08, pp26-27; 7/1/08, pp4-7). The prosecution explained DPCL's delay, stating that the lab receives about 1500 requests for DNA profiles per year, and each takes an average of a week to complete. Although the prosecution asked DPCL to put this case on "high priority," June 19 was the earliest that DPCL could complete a DNA profile (6/26/08, pp24-25).

The trial ruled that disclosure of the DNA comparison 25 days before trial was a discovery violation, but exclusion was inappropriate. Specifically, it found that: (1) "testing should have been in a much more timely fashion"; (2) the prosecution should have obtained defendant's sample sooner; but also (3) exclusion of the DNA match was "much too drastic a remedy," because there was no "bad faith or willful misconduct or a pattern of negligence" on the prosecution's part, and a continuance within the existing speedy trial period would cure any prejudice (7/1/08, pp10-12; *see also* 6/19/08, pp6, 8-10). The court then promised to set the trial in September – still within the existing speedy trial deadline – although it had "no dates available" (7/1/08, pp12-14). Thereafter, defendant moved for a continuance because the defense's other cases precluded a trial of this case within the speedy trial period (7/1/08, pp13-16).

B. Standard of review

The People agree with defendant that a trial court's ruling on discovery matters, including request for sanctions for violations of discovery rules, is reviewed for abuse of discretion. *People v. Lee*, 18

P.3d 192, 196 (Colo. 2001). Abuse of discretion is a legal question, regularly reviewed as a matter of law. *People v. Moore*, 226 P.3d 1076, 1091 (Colo. App. 2009) (citing *Cook v. District Court*, 670 P.2d 758, 761 (Colo. 1983)).

The People agree that defendant's attempt to exclude DNA evidence as a remedy for the discovery violation (see op. br. at 25) preserved his appellate claim.

C. Analysis

The prosecution must disclose the results of scientific tests or comparisons "as soon as practicable but not later than thirty days before trial." Crim. P. 16(I)(b)(3). However, a trial court may extend this deadline for good cause. Crim. P. 16(V)(b)(3).

Appellate courts owe "great deference" to a trial court's choice of remedies for a discovery violation, "[b]ecause of the multiplicity of considerations involved and the uniqueness of each case." *Lee*, 18 P.3d at 196 (citing *People v. Castro*, 854 P.2d 1262, 1265 (Colo. 1993)). However, a trial court must choose a remedy that furthers the purpose of discovery rules – namely, protecting the integrity of the truth-finding

process and deterring discovery-related misconduct. *Id.* Thus, in the absence of willful misconduct or a pattern of neglect, deterrence takes a back seat to the "paramount interest" of finding the truth. *Id.* at 196-97.

Under these principles, the choice of remedies turns on: (1) the reason for the delay in providing the requisite discovery; (2) any prejudice a party has suffered as a result of the delay; and (3) the feasibility of curing such prejudice by way of a continuance. *Id.* at 197. Ultimately, a trial court should impose "the least severe sanction" that will ensure that there is full compliance with its discovery orders. *Id.*

Here, the trial court found that the delay in getting the profile from the latex glove contributed to the late arrival of the comparison with defendant's DNA. While that is true, the People disagree with the trial court's conclusion that this delay was attributed to the prosecution (e.g., 6/19/08, pp6, 8-10). On the contrary, the prosecution timely requested the profile and prodded DPCL to complete it.

Admittedly, the prosecution failed to seek a saliva sample from defendant earlier than June 2008. But the DNA comparison, which was

due 30 days before trial (on or about June 21), arrived on June 27. Thus, such failure by the prosecution delayed receipt of the final comparison by only six days. The vast majority of the delay was caused by DPCL backlog.

Further, defendant has failed to show prejudice. He insists that the late arrival of the final comparison forced him to waive the speedy trial deadline and continue the trial. However, as just noted, he received the final DNA comparison only six days after the 30-day deadline. That six days cannot have been the reason the defense could not hire an expert or set a hearing under *People v. Shreck*, 22 P.3d 68 (Colo. 2001). Indeed, the trial court accommodated the defense's desire to do those things by offering a new trial date more than thirty days later, but still within the speedy trial deadline. It was defendant who sought a continuance, because defense counsel's other cases precluded trial within the existing deadline. Under these circumstances, the continuance was attributable to defendant, not the prosecution or trial court. *People v. Duncan*, 31 P.3d 874 (Colo. 2001).

In sum, the prosecution was responsible for only a tiny part of the delay in the arrival of the inculpatory DNA comparison. Even so, the trial court bent over backwards to ensure defendant a fair trial within the speedy trial period. This was appropriate. Exclusion of the DNA comparison because of the DPCL's backlog would have been overkill, Lee*, supra*, and the record belies defendant's claim of prejudice.

IV. Any error in defendant's absence from a pretrial discussion of proposed amendments to the information was either waived or not plain.

Defense counsel expressly waived defendant's personal presence for a pretrial conference on the prosecution's motion to amend two counts (op. br. at 32-34). The amendment conference also addressed "housekeeping matters," but defendant only complains about his absence from the discussion of the proposed amendments. See op. br. at 31 (argument heading IV asserts that structural error occurred when the court permitted amendment of the charges in defendant's absence); op br. at 36-37 (challenging defendant's absence from the amendment conference).

A. Law and standard of review

Before addressing the standard of review, it will helpful to discuss a defendant's constitutional right to attend his or her trial. The right is primarily grounded in the Confrontation Clause of the Sixth Amendment, which guarantees the right to be present at trial to secure the opportunity for full and effective cross-examination of witnesses. *E.g., United States v. Gagnon*, 470 U.S. 522, 526 (1985). Where confrontation is not at issue, there is a due process right to "presence," but that right is not absolute. It extends only to all "critical stages" of trial. *Id.* (right to presence inheres "whenever [a defendant's] presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.... The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only") (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 108 (1934)); *People v. White*, 470 P.2d 424, 458 (Colo. 1994); *Luu v. People*, 841 P.2d 271, 275 (Colo. 1992).

Gagnon, Snyder, and subsequent opinions have defined "critical stage" in terms of what it is not: Due process "does not require the defendant's presence when his presence would be useless, or the benefit nebulous." *White, supra*; *Gagnon, supra*; *People v. Garcia*, 251 P.3d 1152, 1156 (Colo. App. 2010); Crim. P. 43(c) (a defendant's presence is not required at a conference or argument on a question of law); *Esnault v. People,* 980 F.2d 1335, 1337 (10th Cir. 1992) (due process does not require the defendant to be present "when presence would be useless, or the benefit but a shadow").

Because defendant was absent from a conference, rather than an evidentiary hearing, he correctly limits his argument to the due process right to attend the trial (op. br. at 36) (quoting *Snyder*). With that in mind, the People demonstrate that defendant's appellate claim is not reviewable because it was waived below.

1. This claim was waived in the trial court

Courts distinguish between "forfeiture" and "waiver" of a claim of alleged error. "'Whereas forfeiture is the failure to make the timely

assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Plain error is available only for claims that have been inadvertently "forfeited" rather than affirmatively "waived." *People v. Mumford*, 2010 WL 961644, *5 (Colo. App. 2010), *cert. granted on other grounds*, (Colo. No. 10SC295, Nov. 30, 2010) (citing *Olano*).

Whether an attorney can waive a defendant's right to be present is a question of law reviewed *de novo*. *People v. Richardson*, 181 P.3d 340, 346-47 (Colo. App. 2007).

In *Mumford*, this Court observed that, contrary to *dictum* in a few prior cases, *e.g., People v. Curtis*, 681 P.2d 504, 511 (1984), counsel may waive a defendant's presence at a hearing (other than trial); the defendant need not do so personally. *Mumford, supra* (citing cases). This is correct. As discussed above, the due process right to attend a criminal trial is not absolute, but extends only to the trial's critical stages. Pp38-39, *supra*. Because the right to attend a particular hearing depends on whether the hearing is a critical stage of trial,

attendance at such hearings is not in the class of "fundamental" rights that the defendant must waive personally, and not through counsel. *See Arko v. People*, 183 P.3d 555, 558 (Colo. 2008) (only the defendant can decide whether to plead guilty or stand trial, whether to try his case to a jury, and whether to testify). Further, as discussed below, the hearing at issue was not a critical stage. Accordingly, this claim is waived.

2. Alternatively, the claim is reviewed for plain error

In any event, any error here would be reversed only if defendant satisfies the plain error standard. *Mumford*, *supra*. He must show that any error was obvious and so undermines the fundamental fairness of trial as to cast doubt on the reliability of the judgment. *Id*. (quoting *Miller*, 113 P.3d at 750) (quoting *People v. Sepulveda*, 65 P.3d 1002, 1006 (Colo. 2003)).

B. Analysis

As discussed above, the due process right to attend one's trial is not absolute, but extends to all "critical stages," meaning, those

hearings bearing a reasonably substantial relation to the fullness of the defendant's opportunity to defend against the charge. Pp38-39, *supra*. The defendant bears the burden of showing how his or her absence from a portion of a proceeding affected his ability to defend against the charges. *Garcia*, 251 P.3d at 1156; *People v. Gallegos*, 226 P.3d 1112, 1120 (Colo. App. 2009). A defendant generally cannot make this showing when the proceeding is purely administrative, *White*, 870 P.2d at 458-59; *People v. Anderson*, 183 P.3d 649, 651 (Colo. App. 2007), or when the issues concern questions of law. Crim. P. 43(c)(2); *Arko*, 183 P.3d at 557-58 (decisions regarding jury instructions are for defense counsel, rather than the defendant); *Mumford*, *supra* at *6 (same); *accord Larson v. Tansy*, 911 F.2d 392 (10th Cir. 1990) (defendant's presence is "rarely essential" to discussion of purely legal matters, such as jury instructions); *United States v. Moe*, 536 F.3d 825, 830 (8th Cir. 2008) (a defendant is unlikely to "contribute any expertise on such matters," and thus, the defense cannot be affected by his or her absence) (citing *United States v. Rivera*, 22 F.3d 430, 438-39 (2d Cir. 1994)); *United States v. Vasquez*, 732 F.2d 846, 848-49 (11th Cir. 1984).

Under these cases, the discussion of the prosecution's motion to amend two counts was not a critical stage. Prosecution amendments to an information may be permitted before trial "as to form or substance," Crim. P. 7(e), and are reviewed for abuse of discretion. *People v. Thomas*, 832 P.2d 990, 992 (Colo. App. 1991). Generally, an amendment should be allowed when the defendant had prior, actual notice of its underlying facts. *Id*. (amendment proper where defendant had actual notice of the motion four days prior to trial, failed to request a continuance, and failed to show prejudice, misunderstanding, or surprise); *People v. Butler*, 929 P.2d 36, 39 (Colo. App. 1996). Thus, it is typically defense counsel, and not defendant personally, who addresses the propriety of proposed amendments. Even if defendant personally opposed an amendment for lack of notice of the underlying fact, defense counsel's knowledge of the fact *via* discovery, is controlling.

Moreover, defendant has failed to show that the amendment conference in this case is different from the typical case. One amendment proposed to substitute "theft" for "robbery" as the offense underlying the burglary count, and the court rejected it (4/29/09, pp7-9).

The other proposed to insert "sharp object" into the first degree assault count. The court allowed it because the defense knew, through discovery, that Jess had been stabbed in the neck (4/19/09, pp9-11). Because defendant fails to identify a single, personal contribution he could have made to the amendment conference, the conference was not a critical stage at which his attendance was required. *E.g., Arko, supra; Larson, supra.*

For the same reason, even if defendant's presence was required, his absence was not obviously wrong, and did not rise to the level of plain error prejudice. *Luu* (absence from closing arguments was harmless); *Mumford*, *supra* at *5 (absence from "evidentiary and instructional issues not plain error because it had "no effect on the outcome"); *see also People v. Vega*, 870 P.2d 549, 554 (Colo. App. 1993) (absence from court's response to jury instructions harmless, where defense counsel attended). The lack of any indication that defendant's absence from the amendment conference negatively impacted his defense means that any error was not reversible.

V. There was no reversible error in the timing of the trial court's modified *Allen* instruction.

Next, defendant challenges the trial court's decision to give the jury a "modified *Allen*" instruction, before asking the jury whether further deliberations would be productive. That procedure, he argues, coerced a guilty verdict on at least one count (op. br. at 40-41). The People disagree.

A. Background

The jury began deliberations at about 2:30 p.m. on April 30, 2009, recessed at about 5 p.m., and resumed at about 8:30 a.m. the next day (4/30/09, pp118, 121-22). After lunch on May 1, the jury informed the judge that it was "hung" on three counts, and asked whether it had to reach verdicts on all six counts. The trial court proposed to simply direct the jury to continue deliberating. Although the prosecution initially suggested asking the jury about which counts were unresolved, it withdrew the suggestion. Defendant took no position, and the court

gave the proposed response at 2:10 p.m. (5/1/09, pp2-4, TC exh. 1).[5] The jury deliberated through May 1 and resumed on May 4 (5/1/09, p7).

At 10:55 a.m. on May 4, the jury inquired about the elemental instructions for some offenses (5/4/09, pp2-12); the court's response is not at issue here.

At about 1 p.m. on May 4, the jury informed the court that it could not resolve all six counts, and was at "an impasse." The court proposed giving a modified *Allen* instruction, CJI-Crim. §38:14. Defendant objected that this note, and the note from the previous day, showed that the jury was hopelessly deadlocked, and that a modified *Allen* instruction would be coercive. The prosecution suggested – and the defense appeared to agree – that the court should first ask the jury whether further deliberations would be productive (5/4/09, pp13-16, 21; TC exh. 4). The trial court declined to inquire because: (1) the jury's communications so far implied that the jury had made progress over the last day of deliberations, and could continue to do so; and (2) "any kind" of colloquy ran risked inappropriate comments. The court then gave the

[5] "TC exh." refers to Trial Court exhibits.

modified *Allen* instruction, over defendant's objection (5/4/09, pp16-21, 28-30; TC exh. 4).[6]

Later that day, the jury informed the court that it was deadlocked and had "no hope of reaching an [*sic*] verdict." (5/4/09, p31; TC exh. 5). Defendant took no position on the appropriate response. The court asked the jury whether it had reached unanimous verdicts on some counts, and if so, which ones. The jury responded that it had reached agreement on four of the six counts (5/4/09, pp31-36). The court then read the jury's verdicts (5/4/09, pp37-38), polled the jury, and declared a mistrial on the two unresolved counts, namely attempted first degree murder and robbery (5/4/09, p43).

Defendant does not challenge any of the court's actions except for giving the modified *Allen* instruction.

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[6] The parties also discussed asking the jury whether, if it was deadlocked on a greater offense, it could agree on a lesser offense, but the court ruled that there was insufficient evidence to justify that inquiry (5/4/09, pp15-21). That ruling is not at issue here.

B. Standard of review

When the jury informs a court that it cannot agree on a verdict, the court may not give an instruction with a potentially coercive effect. However, it may give a so-called "modified *Allen*" instruction. *See, e.g. People v. Gibbons*, 2011 WL 4089964 *2 (Colo. App. Sept. 15, 2011) (noting that the instruction is based on *Allen v. People*, 660 P.2d 896, 898 (Colo. 1983)). A modified *Allen* instruction should inform the jurors that:

> (1) they should attempt to reach a unanimous verdict; (2) each juror should decide the case for himself or herself after impartial consideration with the others; (3) they should not hesitate to re-examine their views and change their opinions if convinced they are incorrect; and (4) they should not surrender their honest convictions solely because of the opinions of other jurors or for the purpose of returning a verdict.

Gibbons, supra (quoting *People v. Grace*, 55 P.3d 165, 170 (Colo. App. 2001) (citing *Allen*, 660 P.2d at 898); CJI–Crim. 38:14 (1983)); *see also Gibbons, supra* at *4 (quoting *People v. Schwartz*, 678 P.2d 1000, 1012 (Colo. 1984) (quoting Chief Justice Directive dated Sept. 22, 1971)).

The People agree with defendant that the decision to give the instruction is reviewed for abuse of discretion. *Gibbons, supra* (citing *Schwartz*). They also agree that defendant's appellate argument is preserved.[7] Accordingly, any error would require reversal unless the prosecution establishes that it was harmless – that is, any error did not substantially and injuriously affect or influence the verdict. *People v. Roldan*, 2011 WL 174248 *8 (Colo. App. Jan. 20, 2011) (Bernard, J. specially concurring).

C. Analysis

Defendant does not challenge the modified *Allen* instruction given here, because it tracked the stock instruction that has been approved as non-coercive. *Gibbons, supra* at *3. Instead, he argues that giving a non-coercive instruction, without first asking the jury whether further deliberations would be productive, is coercive.

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[7] Although the defense did not request that the court inquire about the likelihood that further deliberations would be productive, it did agree with that the prosecution's request for such an inquiry (5/4/09, pp13-16).

The 1971 Chief Justice Directive authorizing the modified *Allen* instruction stated that it must be preceded by a determination that there is a likelihood of progress towards a unanimous verdict with further deliberations. *Gibbons, supra* at *4-5 (quoting *Schwartz*, 678 P.2d at 1012). The purpose of the inquiry before giving the instruction is to ensure that directing the jury to deliberate further does not constrain the "free and untrammeled deliberative process that expresses the conscientious conviction of each individual juror." *People v. Ragland*, 747 P.2d 4, 5 (Colo. App. 1987). When a jury has deliberated long and hard without agreement, there is a "compelling concern" that a trial court not force it to continue fruitlessly until it ultimately returns a coerced verdict – that is, a verdict representing "something less than free exercise of the judgment of each juror." *Id.* at 5-6. Put differently, it makes no sense to ask a jury to continue deliberations – with or without additional instructions – until the court knows that the jury can deliberate further with minimal risk of a coerced verdict.

It is no surprise, therefore, that the absence of such an inquiry is harmless where the instruction given is not coercive and the court already knows that there is no risk that further deliberations will yield a "compromise verdict." *Ragland*, 747 P.2d at 6; *People v. Raglin*, 21 P.3d 419, 423 (Colo. App. 2000).

Here, as in *Ragland* and *Raglin*, the absence of a pre-instruction inquiry was harmless. First, the court's modified *Allen* instruction itself was non-coercive as a matter of law. Second, the events preceding it showed that the jury could continue to deliberate. Its first note simply asked about the procedure if, "*for example*," it could only agree on three of six counts (TC exh. 1) (emphasis added). The second two notes, issued the next day, asked two questions about the elements of some offenses. The trial court correctly took to those questions as a sign that the jury was considering issues it had not reached the previous day (5/4/09, pp14, 16, 20; TC exh. 2-3). Finally, the fifth note – which immediately preceded the instruction – stated that the jury was at an "impasse" and could not reach a decision on all six counts. The modified Allen instruction was given at about 1:50 p.m. Shortly thereafter – the

record does not say exactly when – the jury informed the court that it had had "no movement" on either side and that there was "no hope" of reaching a verdict (TC exh. 5).

Defendant argues that the jury's guilty verdict on four counts suggests that some jurors changed their minds about at least one offense. After all, he says, they had agreed on only three counts the previous day. However, the fact that the jury remained deadlocked on two counts, even after the modified *Allen* instruction was given, shows that no jurors had returned compromise verdict. No juror would "cave" – that is, elect to convict just to end deliberations – on only one of three counts, because that act of compromise would not necessarily end deliberations. Thus, the jury's failure to agree on two counts means that no juror voted to convict on any count just to end deliberations. Any error in the absence of a formal inquiry about further deliberations was harmless.

CONCLUSION

For these reasons, the convictions must be affirmed.

JOHN W. SUTHERS
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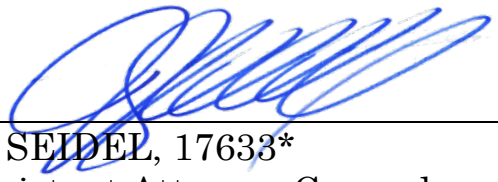

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 19th day of October 2011 addressed as follows:

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