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COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Conejos County District Court Honorable Pattie P. Swift & Honorable Robert W. Ogburn, Judges Case No. 10CR72	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. NATHAN VIGIL, Defendant-Appellant.	▲ **COURT USE ONLY** ▲ Case No. 12CA0015
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PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g).

It contains **9,398** words.

The brief complies with C.A.R. 28(k).

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

/s/ Carmen Moraleda

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STATEMENT OF THE CASE

The prosecution charged defendant, Nathan Vigil, with first-degree aggravated motor vehicle theft (F4), theft (F4), and second-degree burglary (F4) (CD #1, R. CF, pp. 9-11, 33-34). The jury acquitted defendant of first-degree aggravated motor vehicle theft and theft, and convicted him of the lesser-included offense of second-degree aggravated motor vehicle theft (F6) and second-degree burglary (F4) (*id.* at 126-29). The trial court sentenced defendant to six years in the Department of Corrections, after finding that probation had not worked in the past and that this was defendant's tenth felony conviction (*id.* at 139; CD #4, R. Tr. 11/16/11, pp. 11-13).

STATEMENT OF THE FACTS

On November 27, 2010, a pickup truck and a motorcycle were stolen from a farm belonging to CC (CD #4, R. Tr. 10/5/11, pp. 248, 252). CC kept the motorcycle in a shop he had on the farm premises, and the pickup in a "lean-to" shed that was attached to one of the two shops on the farm (*id.* at 248-49, 252-53; *see also* CD #1, R. People's Ex. 1-8, 11).

CC also noticed that several other structures on the farm premises had been burglarized, specifically a camper trailer and a tractor (CD #4, R. Tr. 10/5/11, pp. 253, 260-61). A flat-screen TV had been stolen from the camper trailer, and a CD player and radio from the tractor (*id.* at 253, 260-61).

That same day, Mr. and Mrs. V found defendant in possession of CC's pickup, which was "loaded with stuff" including a motorcycle that was covered with a tarp in the back of the pickup (*id.* at 230-31, 233, 238, 241-44). Defendant had stopped at Mr. and Mrs. V's home seeking help after the pickup broke down (*id.* at 231-32, 242). Not knowing the pickup was stolen, Mr. V drove defendant to a nearby location so defendant could get parts for the pickup (*id.* at 241). Unsuccessful in finding the parts, they drove back to the Vs' home, and, at defendant's request, Mr. V towed the pickup over to "La Jara Trading Post" where defendant's uncle lived (*id.* at 243).

Later in the day, CC confirmed that the pickup he had seen earlier parked next to La Jara Trading Post was his, and called the police (*id.* at 272, 279-80). The bed of the pickup was empty (CD #4, R.

Tr. 10/6/11, p. 10). CC observed numerous shoeprints in the lean-to where he kept his pickup (CD #4, R. Tr. 10/5/11, pp. 264-67). The police officer investigating the crimes noticed that all the shoeprints under the lean-to were from the same set of shoes (CD #4, R. Tr. 10/6/11, pp. 33-34).

In the course of his investigation, the officer spoke with the Vs, and was led to defendant, who was in the custody of the Alamosa County Sheriff's Office on unrelated charges ("Alamosa case") (*id.* at 37, 43-45) (*see also* DOC offender search, attached as an appendix). There, the officer noticed that the sole of defendant's shoes, which the Alamosa sheriff kept at the time of defendant's booking, matched the shoeprints left on the farm premises under the lean-to (*id.* at 45-46; *see also* CD #1, R. People's Ex. 8-11, 13-14). The shoes and photographs of the shoeprints were sent to the Colorado Bureau of Investigation (CBI) for testing, whose result was inconclusive (CD #4, R. Tr. 10/6/11, pp. 65-66, 90-92).

Subsequently, defendant was charged, tried, and convicted as set forth above.

SUMMARY OF THE ARGUMENT

The prosecution proceeded throughout trial on the theory that defendant had also burglarized the lean-to where the pickup was kept, and the evidence proved only the burglary of the lean-to, not of the other buildings. Thus, defendant's rights to notice, due process, and a unanimous verdict were not violated, because he was on notice that the burglary count included the lean-to. Any error in not providing the jury with an additional unanimity instruction was not plain error, and otherwise the record supports that the jury verdict was unanimous.

The trial court did not abuse its discretion in allowing the investigating officer to testify that the shoeprints under the lean-to visually matched defendant's shoes. Assuming error, it was harmless because the jury also heard evidence that the CBI could not make a positive match, and the jury could independently reach its own conclusion based on its observation of the evidence.

The trial court properly denied defendant's motion to suppress the shoeprint evidence as a sanction for an alleged discovery violation,

because no such violation occurred, as acknowledged by defense counsel at trial.

Regarding the claims above, defendant fails to prove that any errors, separately or cumulatively, deprived him of a fair trial.

The victim-owner's testimony regarding the value of his pickup, as well as the photographs introduced at trial, sufficiently supported the jury's finding that the pickup's value was at least $1,000.

The trial court did not abuse its discretion in denying defendant's challenge for cause to Juror A, because this juror indicated he could be fair. *If* the trial court erred in denying the challenge for cause, because this juror served on the jury, defendant would be entitled to reversal and a new trial.

Defendant waived any claims regarding prospective Juror K because he did not object to the prosecution's challenge for cause to that prospective juror or the trial court's ruling granting the challenge. In any event, under *People v. Novotny*, 2014 CO 18, an erroneous ruling on a challenge for cause, even one adversely impacting a defendant's ability to shape the jury through peremptory challenges, is a non-

structural error and thus no longer subject to automatic reversal. And because defendant does not contend that the trial court's erroneous grant of the prosecution's challenge for cause led to a biased juror or resulted in an unfair trial, any error was harmless.

ARGUMENT

I. Defendant's rights to notice, due process, and a unanimous verdict were not violated, because the prosecution proceeded *throughout* trial on the theory that defendant had also burglarized the "lean-to."

Defendant contends that the prosecution unconstitutionally expanded the burglary charges against him because it initially had limited the charges to the burglary of the "camper trailer, tractor, and shop," not the "lean-to" that was attached to the shop (OB, pp. 7-15). He also argues for the first time on appeal that a unanimity instruction was required (*id.* at 7, 13).

A. Standard of Review

The People agree, in part, this issue is preserved. Defendant filed a bill of particulars regarding the theft and burglary charges (CD #1, R.

CF, pp. 23-24). Defense counsel also raised the issue on the first day of trial, as explained below (CD #4, R. Tr. 10/5/11, p. 18).

Defendant, however, did not object during the direct examination of Mr. C, where the prosecution elicited specific testimony regarding the burglary of the lean-to where he kept his pickup (*see* R. Tr. 10/5/11, pp. 265, 268, 278; *see also* CD #4, R. Tr. 10/6/11, pp. 162-63, 170, 172). The People also note that defendant objected to the prosecution's closing argument regarding the burglary of the lean-to *after* the prosecution had concluded its argument (*see* CD #4, R. Tr. 10/6/11, pp. 162-63, 170, 172). Defendant, however, does not raise a prosecutorial misconduct claim.

As to the applicable standard of review, to the extent defendant raises a variance claim (*see* OB, p. 7), the People agree that this Court reviews such claims de novo. *See People v. Pahl*, 169 P.3d 169, 177 (Colo. App. 2006). However, the decision whether to grant or deny a bill of particulars, and to what extent, lies within the discretion of the trial court. *People v. District Court*, 603 P.2d 127, 128 (Colo. 1979); *Imboden v. People*, 90 P. 608, 616 (Colo. 1907) ("where the exercise of such

discretion has not been abused, it will not be reviewed by the appellate court").

The People agree that this Court reviews de novo whether the trial court was required to give a unanimity instruction, if the defendant preserved the issue, *People v. Torres*, 224 P.3d 268, 278 (Colo. App. 2009), but because defendant did not request a unanimity instruction below, this Court reviews this claim for plain error, *People v. Vigil*, 251 P.3d 442, 447 (Colo. App. 2010).

B. Facts

The prosecution charged defendant with an amended count of second-degree burglary, which read as follows:

> On or about November 27, 2010, Nathan Richard Vigil unlawfully, feloniously, and knowingly broke an entrance into, entered, or remained unlawfully after a lawful or unlawful entry in the building or occupied structure of [CC], located at [address], in [Colorado], with the intent to commit therein the crime of Theft; in violation of section 18-4-203(1), C.R.S.

(CD #1, R. CF, p. 33).

Defendant filed a bill of particulars regarding both the theft and burglary counts (*id.* at 23-24). On the first day of trial, as previously

noted, the parties discussed the bill of particulars, and specifically which "buildings" had been charged in the burglary count (CD #4, R. Tr. 10/5/11, pp. 17-20). The prosecution noted that there were multiple buildings at the farm; that a DVD and TV were taken from the camper trailer; a radio was taken from the tractor; and the motorbike was taken from a shop, which was next to the camper trailer (*id.* at 18-20). The trial court asked defense counsel whether that took care of the bill of particulars, to which defense counsel seemed to acquiesce (*see id.* at 18-20).

At trial, the prosecution elicited extensive testimony regarding the burglary of the lean-to. Specifically, the following colloquy took place during Mr. C's direct examination:

> **Prosecution**: [I]n addition to the motorcycle, were there any other vehicles missing?
>
> **Mr. C**: Yes . . . a Toyota pickup. It was an extended cab Toyota pickup.
>
> **Prosecution**: What color was that?
>
> **Mr. C**: It was red, maroon, maroonish red.
>
> **Prosecution**: And, Mr. [C], where was that

truck supposed to be?

Mr. C: If you look at the picture . . . you'll see that there's a shop . . . on the south side of this picture; and there is a *lean-to*. That's what we call it. Just a shed that's up against the shop, and that pickup was located in the third bay. There's four bays there, and it was located in the third bay of this lean-to.

. . .

Prosecution: [I]n reference to the footprints that you're speaking of . . . where did you see these foot tracks?

Mr. C: Well, they were most visible around where the Toyota pickup had been parked, because under that *lean-to* that's up against . . . the shop, that dirt is really soft dirt. And you could see the footprint perfect. You could even read the make of the shoe and everything.

. . .

Mr. C: . . . This is what I referred to as the *lean-to* that's up against my shop, my south shop; and that was the location of the Toyota pickup. That's where I had it parked before it [became] missing.

(*id.* at 252-53, 264-65, 268, 278 (emphasis added); *see also* CD #1, R. People's Ex. 1, 5-6, 8, 11). Defense counsel did not object to that testimony (*see* CD #4, R. Tr. 10/5/11, pp. 252-268).

The investigating officer testified, also without objection, that the pickup had been park underneath the lean-to, and explained where the lean-to was located (CD #4, R. Tr. 10/6/11, pp. 14, 17-18).

During closing argument, according to the evidence properly admitted at trial the prosecution argued that the evidence that defendant unlawfully entered or remained in the "lean-to" was sufficient to meet the burden regarding the second-degree burglary charge (*id.* at 162-63). It elaborated that:

> There's no door in that lean-to where the pickup truck was. He could have entered that lean-to without having to break anything, but he is still inside the lean-to, and he has still entered. He did not have permission to do that. There was no permission given, so he's remaining unlawfully there.

(*id.* at 163).

After the prosecution concluded its closing, defense counsel stated that, when they discussed the burglary charge, the lean-to was not one of the buildings (*id.* at 170, 172). The trial court reasoned that the language of the instruction was also written in terms of "entered or remained in" a building and that someone had entered the lean-to (*id.*

at 172). The trial court told defense counsel that he was "free to argue" that the lean-to did not qualify as a building, since they did not have "a definition of building" (*id.*).

C. Law

Bill of Particulars. The purpose of a bill of particulars is to enable a defendant to prepare his defense in cases where the indictment is so indefinite in its statement of a particular charge that it does not afford the defendant a fair opportunity to procure witnesses and prepare for trial. *Erickson v. People*, 951 P.2d 919, 921 (Colo. 1998). When addressing such motions, the trial court considers whether the requested information is necessary for the defendant to prepare his defense and to avoid prejudicial surprise. *Id.*; *District Court*, 603 P.2d at 129. The purpose of a bill of particulars is to define more specifically the offense charged, *see People v. Pineda*, 40 P.3d 60, 66 (Colo. App. 2001), not to disclose in detail the evidence upon which the prosecution expects to rely, *Balltrip v. People*, 401 P.2d 259, 262 (Colo. 1965). Where the defendant can obtain adequate information through the

charging document, preliminary hearing, and discovery process, a bill of particulars is not necessary. *See Pineda,* 40 P.3d at 66.

Variance. An indictment or information is substantively sufficient if it tracks the language of the pertinent statute. *People v. Carlson*, 72 P.3d 411, 415 (Colo. App. 2003). There are two types of variances between the charge in the indictment and the charge of which a defendant is convicted. *People v. Rodriguez*, 914 P.2d 230, 257 (Colo. 1996). A *simple variance* occurs when the charged elements are unchanged, but the evidence presented at trial proves facts materially different from those alleged in the indictment. *Pahl*, 169 P.3d at 177. A *constructive amendment* occurs when an essential element of the charged offense is changed, thereby altering the substance of the charging document. *See id.; People v. Foster,* 971 P.2d 1082, 1087 (Colo. App. 1998). A simple variance does not require reversal unless it prejudices the defendant's substantial rights, but a constructive amendment is reversible per se. *Pahl,* 169 P.3d at 177. A reviewing court considers the surrounding circumstances when determining

whether a simple variance in an information caused prejudice. *Id.* at 178.

Unanimity Instructions. Unanimity means that each juror agrees that each element of the crime charged has been proved to that juror's satisfaction beyond a reasonable doubt. *People v. Linares-Guzman*, 195 P.3d 1130, 1134 (Colo. App. 2008). Although the jury must agree on all elements of the crime, the jury is not required to unanimously agree on the evidence or theory by which a particular element is established. *People v. Palmer*, 87 P.3d 137, 140 (Colo. App. 2003).

A trial court should give a unanimity instruction "where there is evidence of multiple acts, any one of which would constitute the offense charged." *Melina v. People*, 161 P.3d 635, 636 (Colo. 2007). A trial court, however, need *no*t give a unanimity instruction when a defendant is charged with crimes occurring in a single transaction. *Id.; see also Torres,* 224 P.3d at 278 (same).

Second-Degree Burglary. The second-degree burglary statute provides that, "A person commits second degree burglary, if the person

knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property." § 18-4-203(1), C.R.S. (2014). A person "enters unlawfully" or "remains unlawfully" in or upon premises when the person is not licensed, invited, or otherwise privileged to do so. § 18-4-201(3), C.R.S. (2014).

In turn, "building" means:

> [A] structure which has the capacity to contain, and is designed for the shelter of, man, animals, or property, and includes a ship, trailer, sleeping car, airplane, or other vehicle or place adapted for overnight accommodations of persons or animals, or for carrying on of business therein, whether or not a person or animal is actually present.

§ 18-4-101(1), C.R.S. (2014).

D. Analysis

Here, the complaint charged defendant with the burglary of a building belonging to the victim, CC, provided the specific address and location of the farm, and further stated that defendant had the intent to commit the crime of theft when he unlawfully entered the premises (CD

#1, R. CF, p. 33). The "lean-to", as a matter of law, qualified as a building under the statutory definition because it was a structure which had the capacity to contain, was designed to contain, and in fact contained the victim's property, namely, the pickup truck. *See* § 18-4-101(1); *see also Sanchez v. People*, 349 P.2d 561, 562 (Colo. 1960) ("Rather than limiting the definition of a building to a structure with walls and a roof . . . we believe it was the legislative intent that a building is a structure which has the capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property.") (internal quotations omitted). Further, it is undisputed that defendant was not licensed, invited, or otherwise privileged to lawfully enter or remain on the farm premises. *See* § 18-4-201(3).

While the prosecution did not specifically mention the "lean-to" shed that was attached to the shop when they discussed defendant's request for a bill of particulars (*see* CD #4, R. Tr. 10/5/11, pp. 18-19), the prosecution elicited specific and extensive testimony regarding the lean-to during the direct examination of the victim (*id.* at 252-53, 264-65, 268, 278). Defendant raised no objection, (*see id.*), nor did he cross-

examine the victim on the topic at all (*see id.* at 285-95). As noted in the facts, the officer also testified regarding the lean-to, without objection.

The victim's trial testimony afforded defendant an opportunity to defend against the charges of the burglary of the lean-to, and specifically apprised him that the "building" charged in the complaint also included the lean-to. At a minimum, that testimony alerted defendant of the burglary of the lean-to and of the prosecution's theory, to which he could have objected or alerted the trial court that he was *not* on notice. But he did not. Therefore, the trial court did not abuse its discretion in not requiring that the bill of particulars include specific language of the burglary of the lean-to. *See People v. Mandez*, 997 P.2d 1254, 1267 (Colo. App. 1999) (where the defendant was sufficiently apprised of the offense against which he had to defend, there was no error in the trial court's acceptance of the bill of particulars).

Concerning defendant's "variance" claim, no constructive amendment occurred because the essential elements of the burglary charge were not changed. *See Pahl*, 169 P.3d at 177; *Foster,* 971 P.2d at

1087. Nor did a simple variance occur either, because the prosecution did not present evidence that proved facts *materially* different from those alleged in the complaint. *Pahl*, 169 P.3d at 177; *see also, e.g.*, *Rodriguez*, 914 P.2d at 258 (the specification of the particular manner in which the defendant committed the crime represents further evidentiary details which the indictment need not state).

But even if a simple variance occurred, defendant fails to show prejudice. Defendant cannot demonstrate how he was taken by surprise at trial by the evidence of the burglary of the lean-to, yet failed to object to that testimony or cross-examine the victim at all on the topic. Otherwise, defendant does not meaningfully argue he would have challenged the prosecution's case differently and produced different evidence in his defense. *See Pahl*, 169 P.3d at 178. Besides, defendant knew he was charged with stealing the pickup, and it was uncontroverted that the victim kept it in the lean-to. Therefore, any simple variance did not prejudice defendant.

Lastly, defendant's unanimity claim also fails. While unanimity instructions are required where "there is a reasonable likelihood that

jurors may disagree upon which act a defendant committed," *People v. Allman*, 2012 COA 212, ¶ 40, a unanimity instruction need not be given when a defendant is charged with a crime encompassing incidents occurring in a single transaction. *Torres*, 224 P.3d at 278; *see also Vigil*, 251 P.3d at 447 (concluding that jurors need not agree on the evidence or theory by which a particular element is established, or the theory that supports a single conviction); *cf. People v. Simmons,* 973 P.2d 627, 630 (Colo. App. 1998) (unanimity instruction required where the defendant had menaced two people, but the information charged only *one* count, and prosecutor argued to the jury that the single menacing charge had *two possible victims*, and the jury instruction did not identify a particular victim).

Here, defendant was charged with crimes encompassing incidents occurring in a single transaction. The record supports that the jury must have unanimously agreed that defendant had burglarized the lean-to with the intent to steal the pickup. Indeed, the jury acquitted defendant of the theft of the motorbike, TV, radio, and DVD player, which strongly suggests that the jury did not find that defendant had

burglarized the trailer, shop, and tractor, where those items were kept (CD #1, R. CF, pp. 33, 128). In turn, the jury found defendant guilty of the theft of the pickup, which necessarily shows that the jury unanimously agreed that defendant had burglarized the lean-to where the pickup was parked.

In any event, even if a unanimity instruction was required, defendant fails to meet his burden of establishing that the trial court committed plain error and that it seriously prejudiced him. *People v. Ujaama*, 2012 COA 36, ¶¶ 41-43. Because the evidence proved only the burglary of the lean-to where the pickup was kept, the record supports that the jury's verdict was necessarily unanimous. Thus, no prejudice resulted to defendant.

II. The trial court did not abuse its discretion in admitting the investigating officer's opinion that the shoeprints at the scene matched defendant's shoes.

Defendant contends that the trial court erred in admitting the officer's testimony regarding the shoeprint evidence because it constituted impermissible expert testimony (OB, pp.15-26).

A. Standard of Review

The People agree this issue is preserved (*see* CD #4, R. Tr. 10/6/11, p. 46). The People also agree that this Court reviews a trial court's evidentiary rulings for an abuse of discretion. *See People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002). The People disagree that any error is subject to the constitutional harmless error standard of review. Rather, the evidentiary ruling here is subject to review under the nonconstitutional harmless error standard of review. *See Fletcher v. People*, 179 P.3d 969, 976 (Colo. 2007) ("A ruling wrongfully admitting or excluding evidence is not reversible but is considered harmless when the error did not substantially influence the verdict or impair the fairness of the trial.").

Also, defendant did not argue below, as he does on appeal, that the admission of this evidence violated his rights to due process, a fair trial, and to a defense. Thus, his constitutional claim is not preserved, and should not be considered here. *People v. Cordova*, 293 P.3d 114, 118 (Colo. App. 2011); *People v. Flockhart*, 2013 CO 42, ¶ 20 ("Only those errors that specifically and directly offend a defendant's

constitutional rights are constitutional in nature.") (internal quotations omitted).

B. Facts

The officer testified that he observed many shoeprints under the lean-to that were from the same set of shoes (CD #4, R. Tr. 10/6/11, pp. 28, 33). He took several photographs of the shoeprints to document the evidence, and used a scale to measure the length of the shoeprints (*id.* at 28-29, 33). The officer also testified that at the Alamosa County Sheriff's Officer, he personally examined and photographed defendant's shoes (*id.* at 43-45). He noticed that the "print of [defendant's] shoes visually matched the prints that were out on [the] scene." (*id.* at 46).

The officer also testified that he submitted the shoes and a disk with the photographs of the shoeprints to the CBI for comparison, and the results were "inconclusive" (*id.* at 65-66, 90-92).

C. Law and Analysis

Under CRE 701, lay opinion testimony is admissible if it is based on the perceptions of the witness, helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and not

based on scientific, technical, or other specialized knowledge within the scope of CRE 702 (testimony by experts).

Officer testimony becomes objectionable when what is essentially expert testimony is improperly admitted under the guise of lay opinions. *Stewar*t, 55 P.3d at 123. Police officers may, however, properly offer lay testimony under CRE 701 based upon their perceptions and past experiences. *Id.* "[W]hen an officer's opinions require the application of, or reliance on, specialized skills or training, the officer must be qualified as an expert before offering such testimony." *Id.* In distinguishing lay-opinion testimony from expert-opinion testimony, the critical inquiry is whether a witness's testimony is based upon "specialized knowledge" or a "process of reasoning familiar in everyday life." *People v. Rincon*, 140 P.3d 976, 982-83 (Colo. App. 2005).

Here, the officer's opinion was based on a visual comparison of the shoeprints left under the lean-to and defendant's shoes. Nothing in his testimony reveals that the officer used any scientific, technical, or other specialized knowledge in reaching his conclusion that the shoeprints

"visually matched." Worth noting is the fact that the officer did not testify that the shoeprints at the crime scene were *actually* made by, or could have been made by, defendant's shoes. He simply testified that, in his opinion, they visually matched.

Therefore, because the officer's conclusion was based upon his firsthand observation, rationally based upon his perceptions, and he did not rely on any specialized or technical knowledge, his opinion did not constitute improper expert testimony. *See Rincon*, 140 P.3d at 983; *see also People v. Lucero*, 75 Cal. Rptr. 2d 806, 809 (Cal. App. 1998) (holding that officer's testimony that the defendant's shoe appeared the same as the shoeprint was admissible lay testimony); *Smith v. State*, 725 So. 2d 922, 926 (Miss. App. 1998) (officer's testimony that the shoeprint on the back door had the same pattern as that found on the defendant's shoes was admissible lay testimony because it required no specialized knowledge); *Trice v. State*, 853 P.2d 203, 214 (Okla. Crim. App. 1993) (officer's lay testimony that bloody shoeprints were consistent with the soles of the defendant's shoes was permissible because it was rationally based upon the officer's perceptions).

Contrary to defendant's contention, the officer's testimony was helpful to the jury. Defendant contends that because the jury was able to look at the photographs and the shoes, it was able to make its own comparison and reach its own conclusion. While this is true, the jury, unlike the officer, did not observe firsthand the shoeprints left at the scene, did not take the photographs of the shoeprints, and did not have the opportunity to visit and observe the crime scene. Thus, unlike the officer, the jury was not personally familiar with the crime scene and the shoeprints.

Further, the officer's opinion was helpful to a clear understanding of his entire testimony, and explained the steps he took, the observations he made, and the conclusions he reached. Also, the officer's testimony provided the necessary evidentiary foundation for admission of the shoeprint evidence because he personally investigated the case and documented the evidence.

Assuming any error in the admission of the officer's testimony, it was harmless because, as defendant acknowledges, the jury was able to make its own comparison and reach its own conclusion. Further, the

jury also heard evidence that the CBI, the expert entity, could not make a positive match. Thus, there is no reasonable possibility that the officer's opinion that the shoeprints matched defendant's shoes could have substantially influenced the jury's verdict, particularly in light of the CBI's inconclusive result and the jury's ability to view the evidence and reach its own conclusion. *See People v. Summitt*, 132 P.3d 320, 327 (Colo. 2006) ("In regard to evidentiary trial error, harmless error analysis requires an inquiry into whether, viewing the evidence as a whole, the contested evidence substantially influenced the verdict or affected the fairness of the trial proceedings.").

III. The trial court did not abuse its discretion when it found no discovery violation, because the prosecution had disclosed the CBI report to defendant's counsel, albeit in defendant's Alamosa case.

Defendant contends that the trial court erred in denying his motion to suppress the shoeprint evidence as a sanction for the prosecution's withholding of the CBI inconclusive report regarding the shoeprint evidence (OB, pp. 26-36).

A. Standard of Review

The People agree that defendant preserved this issue (CD #4, R. Tr. 10/6/11, pp. 50, 54-55). The People also agree that this Court reviews discovery-related rulings, including whether to issue sanctions, for an abuse of discretion. *See People v. District Court*, 790 P.2d 332, 338 (Colo. 1990); *People v. Diaz*, 53 P.3d 1171, 1177 (Colo. 2002) (Crim. P. 16(III)(g) provides the trial court with discretion to issue sanctions for discovery violations). Errors in this context are reviewed for nonconstitutional harmless error. *See People v. Herdman*, 2012 COA 89, ¶ 65.

B. Facts

As previously mentioned, the CBI issued a report concluding that no positive match could be made between defendant's shoes and the shoeprints at the scene. On the second day of trial, the parties addressed the alleged discovery violation extensively. Defendant's shoes had been submitted to the CBI in connection with defendant's Alamosa case (CD #4, R. Tr. 10/6/11, p. 51). The prosecution disclosed to defendant that the shoes had been sent to the CBI for comparison,

which defense counsel acknowledged at trial (*id.* at 52). Counsel complained that no results were ever sent to him (*id.*). The investigating officer revealed that the CBI did not fax any reports to his office, but that two days before trial, he spoke on the phone with the CBI evidence custodian who informed him that the results were inconclusive (*id.* at 53-54). The prosecution had also not been informed of the results (*id.* at 56).

The trial court determined that it would not suppress the evidence (*id.* at 56). It suggested that the parties address the issue by stipulation, the officer's testimony regarding his conversation with the CBI custodian, or by having the custodian testify by phone (*id.*). A recess was taken so defense counsel could reach the custodian and have her testify, to which the prosecution did not object (*id.* at 56-57).

After the recess, the prosecution confirmed that on January 10, 2011, he disclosed the officer's cover letter to the CBI requesting the testing of the shoeprint evidence (*id.* at 58). Further, during the break the prosecution spoke with the prosecutor in defendant's Alamosa case, who told the prosecutor in this case that trial counsel here was also

defendant's counsel in the Alamosa case (*id.* at 59). The prosecution in this case further confirmed that the CBI report was actually disclosed to defense counsel in connection with the Alamosa case, and that defense counsel was in possession of the document (*id.* at 60-61, 63). Defense counsel eventually admitted that he did have the CBI report, but that the Alamosa case was 400-pages thick, implicitly acknowledging that he had not had the chance to review the discovery (*id.* at 63).

As a result, the trial court found that there was no discovery violation, and therefore it would not suppress the evidence as a sanction (*id.* at 63-64). As noted previously, the court allowed the parties to address the issue, and, after a conference between counsel outside the hearing of the jury, the officer testified as set forth above (*id.* at 65-66).

C. Law and Analysis

Under Crim. P. 16(I)(a)(1)(III), the prosecution shall make available to the defense, "Any reports or statements of experts made in connection with the particular case, including results of . . . scientific tests, experiments, or comparisons."

Here, the record shows that the prosecution disclosed the CBI report to defense counsel, and defense counsel acknowledged this at trial (CD #4, R. Tr. 10/6/11, pp. 63-64). The record also establishes that the prosecution did not know that the CBI custodian informed the officer orally of the test results two days earlier, nor did the prosecution know there was a written report (*see id.* at 56, 62). Therefore, as the trial court ruled, no discovery violation occurred, much less a willful one.

Further, any "technical" noncompliance with the rule does not constitute reversible error, and the evidence was not improperly withheld, because defense counsel had knowledge that the shoeprint evidence had been sent for testing (*id.* at 52, 58). *See People v. Graham*, 678 P.2d 1043, 1048 (Colo. App. 1983) ("Evidence is generally not improperly withheld if the defense has knowledge of it.").

Assuming that the trial court abused its discretion, defendant fails to show prejudice. *See 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."). Even in the

event that a discovery violation is found, the decision whether to impose a sanction is also within the discretion of the trial court. *People v. District Court*, 793 P.2d 163, 167 (Colo. 1990). Here, as set forth above, the trial court allowed the parties to address the issue of the CBI report by stipulation, the officer's testimony, or by calling the CBI custodian to testify (CD #4, R. Tr. 10/6/11, pp. 56, 64-65*).* *See People v. Lee*, 18 P.3d 192, 197 (Colo. 2001) ("If at all possible, a trial court should avoid excluding evidence as a means of remedying a discovery violation because the attendant windfall to the party against whom such evidence would have been offered defeats, rather than furthers, the objectives of discovery."). After defense counsel and the prosecution conferred on the issue off the record, the officer testified that the CBI report was inconclusive (CD #4, R. Tr. 10/6/11, pp. 65-66). As such, defendant fails to show prejudice, because the evidence allegedly not disclose was ultimately presented to the jury for its consideration. *Salazar*, 870 P.2d at 1220; *see also People v. Robles*, 302 P.3d 269, 274 (Colo. App. 2011) ("even if the court abuses its discretion, we will disturb its decision only if the defendant establishes that he suffered

prejudice"). Further, the record supports that both counsel had stipulated that the officer would testify as he did. Thus, defendant waived any claim of error regarding the officer's testimony. *See, e.g. People v. Foster*, 2013 COA 85, ¶¶ 25, 37, 40 (the doctrine of invited error, "akin to waived error," precludes appellate review of alleged errors that were invited or injected by a party's affirmative conduct).

Because the record shows that the prosecution did not commit a discovery violation, and the jury ultimately heard the evidence, defendant also fails to show a *Brady* violation under *Brady v. Maryland*, 373 U.S. 83 (1963), because he cannot show prejudice (*see* OB, pp. 35-36). *See People v. Bueno*, 2013 COA 151, ¶ 12 ("There are three components to a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."); *People v. Bloom*, 577 P.2d 288, 292 (Colo. 1978) (without a showing of prejudice, the defendant is not entitled under *Brady* to a reversal of his convictions).

IV. Because no error, separately or cumulatively, deprived defendant of a fair trial, he is not entitled to relief under the doctrine of cumulative error.

The defendant contends that even if this Court finds the errors individually harmless, reversal is required because of their cumulative effect (OB, pp. 37-38).

Under the cumulative error doctrine, individual errors, though individually harmless, may in the aggregate result in an unfair trial. *People v. Roy*, 723 P.2d 1345, 1349 (Colo. 1986); *People v. Jenkins*, 83 P.3d 1122, 1130 (Colo. App. 2003). The doctrine mandates that a defendant *demonstrate* the existence of numerous errors, not merely allege that they occurred. *People v. Rivers*, 727 P.2d 394, 401 (Colo. App. 1986).

Here, defendant fails to demonstrate that any error occurred. Even assuming that one or more of the alleged errors actually occurred, the record does not support that they, individually or cumulatively, resulted in an unfair trial. *See People v. Buckner*, 228 P.3d 245, 252

(Colo. App. 2009). Therefore, reversal is not warranted under the doctrine of cumulative error.

V. The evidence was sufficient for the jury to conclude that the pickup was worth $1,000.

A. Standard of Review

The People agree that defendant preserved this claim (CD #4, R. Tr. 10/6/11, pp. 129-30). The People also agree that this Court reviews de novo sufficiency of the evidence claims. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005).

B. Law and Analysis

Sufficiency of the Evidence. When assessing the sufficiency of the evidence, a reviewing court must determine whether the relevant evidence, when viewed as a whole in the light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charges beyond a reasonable doubt. *See People v. Roggow*, 2013 CO 70, ¶ 13. The prosecution is entitled to the benefit of every reasonable inference that may fairly be drawn from the evidence, *People v. San Emerterio*, 839 P.2d 1161, 1164 (Colo. 1992), even if the record also contains evidence to the contrary, *see People v.*

Gonzales, 666 P.2d 123, 128 (Colo. 1983). A reviewing court must defer to the jury's determinations of the credibility of witnesses, the weight of the evidence, and its resolutions of conflicting evidence. *Gonzales,* 666 P.2d at 128.

The prosecution must prove the value of the stolen items beyond a reasonable doubt. *People v. Schmidt*, 928 P.2d 805, 809 (Colo. App. 1996). An owner is always competent to testify as to the value of his property. *People v. Paris*, 511 P.2d 893, 894 (Colo. 1973); *People v. McCoy*, 764 P.2d 1171, 1176 (Colo. 1988); *Rodriguez v. People*, 450 P.2d 645, 647 (Colo. 1969) ("An owner is always competent to testify as to value. Obviously one not in the business of selling such items but putting them to use does not have them appraised from time to time in anticipation of their loss or that he may some day be called upon to testify as to their value on a particular date."). This rule reflects the common experience than an owner is familiar with his property and knows what is worth. *State v. Baker*, 437 A.2d 843, 848 (Conn. 1980). The testimony, however, must relate to the value of the property at the time of the commission of the crime. *Paris,* 511 P.2d at 894; *see also*

McCoy, 764 P.2d at 1175 ("The general rule is that 'the test of value is the reasonable market value of the stolen article at the time of the commission of the alleged offense.'").

Here, the owner of the pickup testified that if he were to buy his pickup, he "would give a thousand dollars for it" (CD #4, R. Tr. 10/5/11, p. 291). *See In re Estate of Beren*, 2012 COA 203, ¶ 46 (fair market value refers to the price that would be agreed on by a willing seller and a willing buyer under no compulsion to sell or buy); *see also People v. Evans*, 612 P.2d 1153, 1155-56 (Colo. App. 1980) (value of a stolen item is measured by what the owner could expect to receive for it, its face value).

While the owner also stated during his redirect that the pickup could be less than $1,000 (CD #4, R. Tr. 10/5/11, p. 297), it was for the jury to ultimately decide, with the benefit of the photographs of the pickup, whether it was worth $1,000 or less (CD #1, R. People's Ex. 5). *See State v. Reilly*, 674 S.W.2d 530, 533 (Mo. 1984) ("The owner of stolen property need not be experienced in valuating such property in order to express an opinion."); § 18-4-415, C.R.S. (2014) (photographs of stolen

property are competent evidence). Hence, there was sufficient evidence in the record to support the jury's determination.

People v. Moore, 226 P.3d 1076 (Colo. App. 2009), relied upon by defendant, is factually distinguishable. In *Moore*, the division concluded that the evidence of value of stolen property, mostly *collectible coins* and *expensive jewelry*, was legally insufficient because the majority of the victims' valuation testimony was based on "speculation, guesses, assumptions, purchase prices many decades old, evidence *not* admitted a trial [such as an old appraisal of some of the items], and on items *never* recovered or found in the defendant's possession." 226 P.3d at 1084-85 (emphasis added).

Unlike in *Moore*, the stolen item here was a farm pickup truck, as opposed to rare or unique items. *See Moore v. State*, 321 S.E.2d 413, 415 (Ga. App. 1984) (owner's testimony regarding value of "everyday items," coupled with jury's awareness of the value of such items, is sufficient to allow jury to make reasonable deductions exercising its own knowledge and ideas). *See State v. Browne*, 854 A.2d 13, 36 (Conn. App. 2004) (where stolen items are not "so unusual," the jury is able to

apply "its experience in the affairs of life" to accord proper weight to the owner's testimony); *Reilly*, 674 S.W.2d at 533 ("an owner's opinion can be substantial evidence of an item's worth").

Remedy. Where a conviction for an offense is invalidated on grounds of insufficient evidence, but the evidence is sufficient to uphold a conviction on a lesser-included offense, the appropriate remedy is to remand the case to the trial court with directions to enter judgment and sentence on the lesser-included offense. *People v. Jamison*, 220 P.3d 992, 995 (Colo. App. 2009).

Here, if this Court concludes that the evidence of value was insufficient, the People agree with defendant that the proper remedy is to remand the case for entry of judgment on aggravated motor vehicle theft as a misdemeanor. *See* § 18-4-409(4)(b), (c), C.R.S. (2014) (aggravated motor vehicle theft is a class 6 felony if the value of the motor vehicle involved is $1,000 or more but less than $20,000, but a class 1 misdemeanor if the value of the motor vehicle is less than $1,000); *Jamison*, 220 P.3d at 995.

VI. The trial court did not abuse its discretion in denying defendant's challenge for cause to Juror A.

A. Standard of Review

The People agree this issue is preserved. The defense challenged Juror A for cause, the trial court denied the challenge, and defendant exhausted his peremptory challenges (CD #4, R. Tr. 10/5/11, pp. 96, 183, 190).

The People agree that his Court reviews a trial court's ruling on a challenge for cause for an abuse of discretion. *Carrillo v. People*, 974 P.2d 478, 487 (Colo. 1999); *People v. O'Neal*, 32 P.3d 533, 535 (Colo. App. 2000). Because Juror A served on the jury (*see* CD #1, R. CF, p. 157 (Jury Question signed by Juror A), if the trial court erred in denying the challenge for cause, the People agree that reversal and a remand for a new trial would be required. *See Morrison v. People*, 19 P.3d 668, 670-71 (Colo. 2000); *see also People v. Marciano*, 2014 COA 92, ¶¶ 10, 18 (concluding that where the challenged juror sat on the jury, the defendant's right to an impartial jury was violated) (citing *Morrison*).

B. Law and Analysis

A trial court must grant a challenge for cause if a prospective juror is unable or unwilling to accept the basic principles of criminal law and to render a fair and impartial verdict based on the evidence admitted at trial and the court's instructions. *People v. Mack*, 33 P.3d 1211, 1217 (Colo. App. 2001). The ultimate question is whether the juror is willing and able to be fair and follow the instructions. *See People v. Veloz*, 946 P.2d 525, 530 (Colo. App. 1997).

The trial court is in the best position to assess the state of mind of a juror through personal observation and the evaluation of what may appear to be inconsistent responses to difficult questions. *Id.* at 531. In evaluating a challenge for cause, the trial court must consider the prospective juror's entire testimony, and the court is entitled to give considerable weight to the juror's assurances that he or she can be fair and impartial. *People v. Sandoval*, 733 P.2d 319, 321 (Colo. 1987); *Veloz*, 946 P.2d at 531.

Here, Juror A stated that he had done "quite a bit of" work for the victim's family, and that he got along great with them (CD #4, R. Tr.

10/5/11, p. 94). When defense counsel asked if the business relationship would make it difficult for him to render an impartial verdict, Juror A responded, "I can't say that. I really can't. I'd like to say no . . . but I don't know." (*id.* at 95). Juror A also stated that he possibly would be doing business with the victim's father in the future (*id.*).

After defense counsel challenged Juror A for cause, the trial court rehabilitated the juror as follows: "Can you evaluate [the victim's] testimony just like all the other witnesses who will testify in this case?" (*id.* at 96). Juror A responded, "I think I could." (*id.*). The trial court denied the challenge (*id.*).

Where a potential juror during voir dire expresses concerns or indicates preconceived beliefs, automatic dismissal is not required if he can be rehabilitated. *People v. Fleischacker*, 2013 COA 2, ¶ 27 (noting that, [d]uring voir dire, jurors often express concern or indicate preconceived beliefs."); *People v. Drake*, 748 P.2d 1237, 1243 (Colo. 1988) ("A prospective juror's expression of concern or indication of the presence of some preconceived belief as to some facet of the case does not automatically mandate exclusion of such person for cause.").

While Juror A indicated a source of *potential* bias in favor of the victim, he told the trial court he believed he could assess the victim's testimony like the testimony of any other witness. *See People v. Shover*, 217 P.3d 901, 907 (Colo. App. 2009) (an appellate court accords "great deference" to a trial court's handling of challenges for cause, "recognizing its unique role and perspective in evaluating the prospective juror's credibility, demeanor, and sincerity"). Juror A's response and commitment, together with the juror's demeanor and all the other physical cues, imperceptible through the cold record, justified the trial court's use of its discretion in denying the challenge, because the juror's response indicated that he could be fair and equally weigh all the witnesses' testimony. *See Veloz*, 946 P.2d at 530 (the trial court is in the best position to assess the state of mind of a juror through personal observation and the evaluation of what may appear to be inconsistent responses to difficult questions); *People v. Arevalo*, 725 P.2d 41, 46 (Colo. App. 1986) (the factors of credibility and appearance which are determinative of bias are best observed at the trial court level).

The supreme court's decision in *Carrillo*, *supr*a, supports that the trial court's denial here did not constitute an abuse of discretion. There, the challenged juror had a personal relationship with, and had worked for, the victim's father, who was also a prosecution witness in the case; had preconceived opinions about the case based on his prior knowledge of some of the facts; and stated that if he were one of the defendants, "he would not want himself on the jury." 974 P.2d at 487.

Despite that, the supreme court concluded that the juror's personal and business relationship with the victim's father did not require ipso facto the juror's dismissal, even though the juror had also openly stated that "if he were one of the defendants, he would not want himself on the jury." *Id.* at 487. The supreme court emphasized the deference due to the trial court because it "is the only judicial officer able to assess fully the attitudes and state of mind of a potential juror by personal observation of the significance of what linguistically may appear to be inconsistent or self-congratulatory responses to difficult questions." *Id.* It also noted that the juror did not "articulate a clear expression of bias" to justify a reversal. *Id.* at 488.

Noting that "although it would have been better practice for the trial judge to question [the juror] in order to fully explore his feelings," the supreme court concluded that the trial court acted within its discretion, because the record did not demonstrate that the juror had a state of mind evincing bias against the defendant. *Id.*

More so here than in *Carrillo*, the trial court acted within its discretion in denying the challenge because the record supported that the juror could be fair. First, like in *Carrillo*, Juror A did not articulate a "clear expression of bias" in favor of the victim. In answering counsel's question whether it would be difficult for him to render an impartial verdict, he simple answered, "I can't say that. I'd like to say no. But I don't know." (CD #4, R. Tr. 10/5/11, p. 95). Second, unlike in *Carrillo*, where the trial court did *not* ask the juror whether "he would assess [the victim's father's] credibility any differently than any other witness," 974 P.2d at 487-88, the trial court here specifically did so. Juror A unhesitantly answered he could do it. It was for the trial court to assess Juror A's credibility and sincerity based on the personal observation of the juror, not for this Court on the basis of a cold record.

See People v. Young, 16 P.3d 821, 824 (Colo. 2001) (the *Carrillo* standard serves to discourage an appellate court from second-guessing the trial court based on a cold record).

Contrary to defendant's contentions, it was not necessary that Juror A stated "with absolute certainty" that he would set aside all potential bias. *See Fleischacker,* ¶ 27 ("It is not necessary that a prospective juror state with *absolute certainty* that he or she will set aside all potential bias.") (emphasis added). A juror's commitment to "try" to put his or her biases aside and expression of a "belief" that he or she can be fair are deemed sufficient to deny a defendant's challenge for cause. *Id.; see also People v. Valdez*, 183 P.3d 720, 725 (Colo. App. 2008) (rejecting the defendant's contention that the juror's use of the words "try" and "feel" was insufficiently definite to show he would set aside preconceived notions and decide the case on the evidence and instructions); *Shover*, 217 P.3d at 907 (same); *see also Morrison*, 19 P.3d at 673 (denial of for-cause challenge of a juror who was allegedly predisposed to find the defendant guilty was *not* an abuse of discretion because none of the juror's statements suggested that "she would be

unable to afford the defendant the presumption of innocence or that she would fail to render her verdict based on the evidence"). Juror A's assurance that he could do it provided a basis for denying the challenge. *See also People v. Richardson*, 58 P.3d 1039, 1043-44 (Colo. App. 2002) (trial court properly denied challenge for cause where juror, despite having strong emotional reactions to the subject matter of the case, affirmed that she would do her best to set aside her experiences).

Therefore, on this record, the trial court's denial of defendant's challenge for cause to Juror A was not "arbitrary, unreasonable, or unfair." As such, its decision was not an abuse of discretion, and therefore reversal is unwarranted. *See Fleischacker,* ¶ 28; *see also People v. Harlan*, 8 P.3d 448, 462 (Colo. 2000) (we will overturn the trial court's resolution of a challenge for cause only if the record presents *no* basis for supporting it).

VII. Defendant waived any claims regarding prospective Juror K, and, in any event, he fails to show prejudice under *Novotny*.

Defendant also contends that the trial court erred by granting the prosecution's challenge for cause to prospective Juror K (OB, pp. 45-46).

A. Standard of Review

The People disagree that defendant preserved any claims regarding prospective juror K. While he asserts that he preserved this issue by questioning the juror regarding his ability to be fair (*see id.* at 43), defendant did *not* object below to the prosecution's challenge for cause or to the trial court's ruling granting the challenge (CD #4, R. Tr. 10/5/11, pp. 203-05). As such, he waived all matters pertaining to the qualifications and competency of prospective juror K. *See* Crim. P. 24(b)(2) ("All matters pertaining to the qualifications and competency of the prospective jurors shall be deemed waived by the parties if not raised prior to the swearing in of the jury to try the case[.]"). Therefore, this Court should not address this claim.

In any event, the claim fails on the merits, and any error in granting the prosecution's challenge for cause to prospective Juror K was harmless under *Novotny*. *See Novotny*, ¶¶ 2, 20.

B. Defendant's claim fails on the merits.

The record supports that the trial court did not abuse its discretion in granting this challenge for cause. Prospective Juror K

very openly stated that he did not have a good impression of law enforcement in Conejos, that Conejos law enforcement had a reputation for "heavy-handedness, favoritism, and racism," and that his "tendency [was] for [his] heart to be in favor of the defendant." (CD #4, R. Tr. 10/5/11, p. 202). He also stated that, although he did not know the defendant, he would "like to let him off. I would like to think the best of most people," and that he was "predisposed to let him or his mouthpiece have their say" (*id.* at 202-03). This record supports that the trial court did not abuse its discretion in granting the challenge. *See People v. Wilson,* 2014 COA 114, ¶ 11 (a trial court abuses its discretion only if there is "no evidence in the record to support its decision").

C. Any error in granting the prosecution's challenge for cause was harmless.

In *Novotny*, the supreme court overruled *People v. Lefebre*, 5 P.3d 295 (Colo. 2000), and *People v. Macrander*, 828 P.2d 234 (Colo. 1992), and held that "reversal of a criminal conviction for other than structural error, in the absence of express legislative mandate or an appropriate case specific, outcome-determinative analysis, can no longer be

sustained." *Novotny*, ¶ 27; *see also People v. Alfaro*, 2014 CO 19, ¶ 7. *Novotny* also held that "allowing a defendant fewer peremptory challenges than authorized, or than available to and exercised by the prosecution, does not, in and of itself, amount to structural error." *Novotny,* ¶ 27; *Alfaro*, ¶ 7 ("a good faith but mistaken deprivation of any of a defendant's peremptory challenges, in whatever form that deprivation may take, is not, in itself, grounds for reversal").

Thus, an erroneous ruling on a challenge for cause, even one adversely impacting a defendant's ability to shape the jury through peremptory challenges, is no longer subject to automatic reversal. *Novotny*, ¶¶ 1-2. Instead, as with any other trial error, it is subject to harmless error analysis. *See id.* at ¶¶ 20-21. The harmless-error standard requires "some outcome-determinative analysis," evaluating the likelihood that the error affected the outcome of the proceedings. *Id.* at ¶ 20; *see also Rivera v. Illinois*, 556 U.S. 148, 158-59 (2009); *United States v. Martinez-Salazar*, 528 U.S. 304, 317 (2000); *Ross v. Oklahoma*, 487 U.S. 81, 86-88 (1988) (if jury that ultimately sits is

impartial, defendant's Sixth and Fourteenth Amendment rights are not violated).

Here, defendant does not argue that the trial court's erroneous grant of the prosecution's challenge to prospective Juror K led to a biased juror or an unfair trial. In fact, the record supports that defendant was tried by a fair and impartial jury. As such, any error did not affect defendant's substantive rights and was harmless under *Novotny*'s outcome-determinative analysis.

CONCLUSION

For the foregoing reasons and authorities, the People respectfully request that this Court affirm defendant's convictions and sentence.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **RACHEL C. FUNEZ**, Deputy State Public Defender, via Integrated Colorado Courts E-filing System (ICCES) on September 29, 2014.

/s/ C. D. Moretti

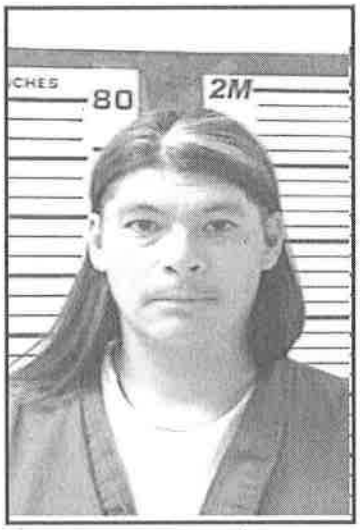
PEOPLE'S APPENDIX
(DOC Offender Search)

Colorado Department of Corrections Friday, September 19, 2014, 2:48 pm

OFFENDER SEARCH

New Search | Death Row | Par. Board | Search Tips | Disclaimer

BACK



VIGIL, NATHAN R

Name:	VIGIL, NATHAN R	DOC Number:	96383
Age:	37	Est. Parole Eligibility Date:	11/03/2018
Ethnicity:	AM. INDIAN	Next Parole Hearing Date:	Aug 2018
Gender:	MALE		
Hair Color:	BROWN	This offender is scheduled on the Parole Board agenda for the month and year above. Please contact the facility case manager for the exact date.	
Eye Color:	BROWN		
Height:	6' 03"	Est. Mandatory Release Date:	11/03/2027
Weight:	235	Est. Sentence Discharge Date:	
		Current Facility Assignment:	STERLING CORRECTIONAL FACILITY

CURRENT CONVICTIONS

Sentence Date	Sentence	County	Case No.
11/16/2011	18M-18M	CONEJOS	10CR72
11/16/2011	6Y-6Y	CONEJOS	10CR72
03/07/2012	12Y-12Y	ALAMOSA	10CR276