SUMMARY
April 22, 2021

2021COA53

No. 18CA1139, *People v. Grant* — Criminal Procedure — Discovery and Procedure Before Trial — Disclosure to the Defense — Prosecutor's Obligations

Crim. P. 16(I)(a)(1)(VIII) requires the prosecution to disclose to the defense "[a]ny written or recorded statements of the accused . . . and the substance of any oral statements made to the police or prosecution by the accused." This obligation extends to information "in the possession or control" of "any others" who have been part of a case's investigation and who, "with reference to the particular case[,] have reported" to the prosecution. Crim. P. 16(I)(a)(3). In this case, the division is asked to determine if, pursuant to the Rule, the prosecution was required to disclose a written report containing a statement the defendant made to an out-of-state police

officer during his post-arrest booking. The division answers this question "yes."

COLORADO COURT OF APPEALS **2021COA53**

Court of Appeals No. 18CA1139
El Paso County District Court No. 17CR4200
Honorable Barbara L. Hughes, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Eric William Grant,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division A
Opinion by CHIEF JUDGE BERNARD
Román and Fox, JJ., concur

Announced April 22, 2021

Philip J. Weiser, Attorney General, Majid Yazdi, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Casey J. Mulligan, Alternate Defense Counsel, Mary Claire Mulligan, Alternate Defense Counsel, Boulder, Colorado, for Defendant-Appellant

¶ 1 In Colorado, discovery in a criminal case — the process by which the prosecution and the defense exchange information — is governed by Crim. P. 16. Among other things, the Rule imposes deadlines for this exchange so that the parties can be prepared for trial. For example, as is pertinent to this case, the prosecution must provide the defense with any statements that the defendant made to the police no later than twenty-one days after either the defendant first appears in court or the prosecution files charges.

¶ 2 The Rule also requires the prosecution to give the defense information that has been gathered by police departments that have (1) participated in the investigation of the case; and (2) reported to the prosecution about the case. Crim. P. 16(I)(a)(3). But what if the police department that meets these criteria is located more than a thousand miles away? The Rule does not make any exceptions for geographic distance, or for departments that have never before reported to Colorado prosecutors, or for departments that have just a small amount of information about a case. Therefore, if the two requirements of Crim. P. 16(I)(a)(3) are met, then the prosecution is obligated to turn over information from out-of-state police departments to the defense.

¶ 3 This appeal involves a seemingly straightforward application of Crim. P. 16(I)(b)(3). The Philadelphia police arrested a fugitive from Colorado, and, while being booked, the fugitive made a statement that was potentially inculpatory. But the Philadelphia police did not inform the Colorado police or the Colorado prosecution about the statement until the seventh day of the fugitive's Colorado trial. In turn, the trial court was faced with the decision of whether the prosecution had violated Crim. P. 16(I)(b)(3) by making this admittedly late disclosure, and, if so, what to do about it.

¶ 4 We used the word "seemingly" in the previous paragraph because, although it appears that Crim. P. 16(I)(b)(3) was violated (and that is what the trial court concluded), the Attorney General argues it was not. Rather, the Attorney General, relying on a nearly forty-year-old opinion from a division of this court, which, in turn, harkened back to an almost fifty-year-old supreme court opinion, contends that the prosecution's disclosure requirements are limited to information in the possession of police departments that are located in the county or district where the case is to be tried.

¶ 5 We respectfully disagree with the Attorney General's contention because we conclude that, although the opinion from a

division of this court was decided years after the operative language of Crim. P. 16 took effect, it nonetheless relied on a case that construed an old version of the Rule. And, as our supreme court pointed out in 1984, the current version of the Rule clearly applies to out-of-state police departments that meet the two requirements of Crim. P. 16(I)(b)(3). So we decide, as we will explain in more detail below, that there was a discovery violation in this case.

¶ 6 But that is not the end of the inquiry. Once a court determines that a discovery violation occurred, what should it do? For reasons that we shall explain, we further conclude that the trial court in this case crafted an appropriate sanction that eliminated the prejudice that flowed from the Rule violation.

¶ 7 A jury convicted defendant, Eric William Grant, of first degree murder, first degree assault, aggravated robbery, and conspiracy to commit aggravated robbery. He appeals. We affirm.

I. Background

¶ 8 One day in July 2017, the owner of an automobile repair shop in Colorado Springs was talking with a customer. A third man wearing a yellow construction vest and a hard hat entered the back door, announcing, "Springs Utilities." As the customer turned to

leave, a fourth man, wearing an orange construction vest and a baseball cap, grabbed him from behind and put a gun to his head. The man in the yellow vest then ordered the owner to open the business's safe. When the owner hesitated, the man in the yellow vest struck him in the head with a pistol, knocking him to the ground.

¶ 9 The two robbers ransacked the shop. On his way out, the one wearing the yellow vest kicked the owner repeatedly, kicked and pistol-whipped the customer, and stole the latter's wallet and watch. The customer sustained serious injuries. The owner died at the scene.

¶ 10 After a portion of the surveillance video recorded during the incident was released to the public, a person came forward and identified defendant as the robber who wore the yellow vest. A jury eventually found him guilty of first degree murder after deliberation, first degree felony murder, first degree assault, aggravated robbery, and conspiracy to commit aggravated robbery.

II. Analysis

¶ 11 Defendant asserts that the trial court erred when it allowed (1) the prosecution to introduce a statement that he made to an

out-of-state police officer even though the defense was not informed of its existence until the seventh day of trial; (2) a detective to testify that, in his opinion, defendant was one of the suspects in the surveillance video; and (3) testimony about another similar crime that he had committed months before the robbery. We disagree with each of these contentions.

A. Standard of Review

¶ 12 We review each of these contentions for an abuse of discretion. *People v. Bueno*, 2013 COA 151, ¶ 10 (discovery issues, including sanctions for discovery violations); *Campbell v. People*, 2019 CO 66, ¶ 21 (evidentiary issues); *Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009)(evidence of other crimes). A court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair, *People v. Lee*, 18 P.3d 192, 196 (Colo. 2001)(discovery issues); *Campbell*, ¶ 21 (evidentiary issues); *Yusem*, 210 P.3d at 463 (evidence of other crimes), or when it misapplies the law, *Rains v. Barber*, 2018 CO 61, ¶ 8.

B. Statement to Philadelphia Police

1. Additional Background

¶ 13 Once defendant was identified as a suspect, it took the Colorado Springs police nearly three months to track him down. They eventually learned that he had been hiding in Philadelphia, where he was arrested in October 2017. When the Philadelphia officers asked him if he had identification, he remarked, "I'm on the run from Colorado and you think I'm going to have identification? I want as little contact with you guys as possible and I definitely don't want you to know who I am."

¶ 14 But the prosecution and the Colorado Springs police did not learn about this statement until the trial's seventh day. During a recess, the prosecutor told the court and defense counsel that the prosecution had just received a report from a Philadelphia detective containing the statement.

¶ 15 Defense counsel promptly asked the court to prevent the prosecution from introducing the statement into evidence as a sanction for not giving it to the defense before trial within the time parameters established by Crim. P. 16.

¶ 16 She then explained the potential prejudice to defendant of admitting his statement to the Philadelphia police. First, she said that the statement would undermine defendant's theory of defense, mistaken identity, which the defense had laid out during its opening statement. Second, she asserted that, had the statement been disclosed before trial, the defense would have asked the court to suppress it for Fifth Amendment reasons.

¶ 17 But she did not ask the court to continue the trial or to declare a mistrial.

¶ 18 The court agreed that the mid-trial disclosure of the Philadelphia statement violated Crim. P. 16, but it found that the prosecution had not intentionally kept the statement from the defense. So it decided that, as a sanction to remedy the Rule violation, it would hold a hearing outside of the jury's presence to decide whether to suppress the statement on Fifth Amendment grounds. Defense counsel replied, "Judge, that's what we're asking for."

¶ 19 At the end of the hearing, the court denied the motion to suppress. The Philadelphia detective then testified before the jury about defendant's statement.

2. Law and Application

a. Was There a Discovery Violation?

¶ 20 In every criminal case, the parties are obligated to disclose certain information to each other before trial. "By permitting the prosecution and defense to obtain relevant information prior to trial," our supreme court has explained, "[the discovery rules] promote fairness in the criminal process by reducing the risk of trial by ambush." *Lanari v. People*, 827 P.2d 495, 499 (Colo. 1991). The disclosure requirements are spelled out in Crim. P. 16.

¶ 21 As is relevant to this case, the prosecution must provide the defense with certain "material and information which is within the possession or control of the prosecuting attorney," including any police and arrest reports concerning the pending case, as well as "[a]ny written or recorded statements of the accused . . . and the substance of any oral statements made to the police or prosecution by the accused." Crim. P. 16(I)(a)(1)(I), (VIII). The prosecution must disclose this information, with exceptions that do not apply in this case, "as soon as practicable but not later than 21 days after the defendant's first appearance at the time of or following the filing of charges." Crim. P. 16(I)(b)(1).

¶ 22 Getting to the core of the issue before us, the prosecution's disclosure obligations apply to information "in the possession or control" of "any others" who have been part of a case's investigation and who, "with reference to the particular case[,] have reported" to the prosecution. Crim. P. 16(I)(a)(3). Simultaneously, Crim. P. 16(I)(b)(4) makes it incumbent on the prosecution to "ensure" that information flows between the prosecutor's office and "the various investigative personnel" so that the prosecution will have "all material and information relevant to the accused and the offense charged" in its possession.

¶ 23 The Attorney General contends that there was no discovery violation in this case because the Philadelphia police report had not been "within the possession or control" of the Colorado Springs Police Department or the prosecution before the trial's seventh day. What is more, the Attorney General asserts that the Philadelphia police did not "participate in the investigation or evaluation of the case." We disagree on both fronts.

¶ 24 To support these positions, the Attorney General cites *People v. Garcia*, 690 P.2d 869, 874 (Colo. App. 1984), in which the division held that there was no discovery violation when a

defendant's inculpatory statements that had solely been in the possession of a Texas police department were not timely disclosed. The division reasoned that, even though statements that are in the possession of a police department are generally within the prosecution's possession for the purposes of Crim. P. 16, the scope of this requirement was geographically limited to "police in the county or district of trial." *Id.*

¶ 25 We are not bound by *Garcia*. *People v. Thomas*, 195 P.3d 1162, 1164 (Colo. App. 2008)(one division of the court of appeals is not bound by the decision of another). We next explain why we respectfully choose to part company with *Garcia*'s result and rationale.

¶ 26 *Garcia* was based on an older version of Crim. P. 16, rather than the version applicable to this case. The older version did not include the language, which is presently found in Crim. P. 16(I)(a)(3), referring to information "in the possession or control" of "any others" who have been part of a case's investigation and who, "with reference to the particular case[,] have reported" to the prosecution.

¶ 27 How do we know that *Garcia* was based on an older version of the discovery rule? Because the division grounded its rationale in *Dickerson v. People*, 179 Colo. 146, 151-52, 499 P.2d 1196, 1199 (1972). And the division cited *Dickerson* for the proposition that, "[a]lthough statements within the possession of the police have been deemed to be" in the prosecution's possession, "such statements are within [the prosecution's] possession only if the police who possess the statements are the police in the county or district of trial." *Garcia*, 690 P.2d at 874.

¶ 28 *Dickerson* involved a version of Crim. P. 16 that was in effect at the time of Dickerson's trial. Crim. P. 16(b) (1961) simply required the prosecution to produce statements in its possession or control. So it is no wonder *Dickerson* concluded that "written statements . . . kept in the files" of a Texas police department were "outside the [prosecution's] possession and control" for the purposes of Crim. P. 16(b) (1961). 179 Colo. at 151-52, 499 P.2d at 1199.

¶ 29 *Garcia* followed up the citation to *Dickerson* by citing *Ortega v. People*, 162 Colo. 358, 426 P.2d 180 (1967), *superseded by rule as stated in People ex rel. Shinn v. Dist. Ct.*, 172 Colo. 23, 469 P.2d 732 (1970). *Ortega*, however, held, unremarkably, that "statements in

the possession of the police in the county or district of the trial are within the 'possession or control' of [the prosecution] so as to meet the requirement" of the then-applicable Crim. P. 16(b) (1961). *Id.* at 362, 426 P.2d at 182. It did not address the issue of information in the possession of an out-of-state police department.

¶ 30 The present-day language addressing information "in the possession or control" of "any others" who have been part of a case's investigation and who, "with reference to the particular case[,] have reported" to the prosecution was added and became effective in 1974. *See* Crim. P. 16(I)(a)(4) (1974). *Garcia* does not acknowledge this amendment, so it obviously did not analyze what effect the amendment would have had on the facts of the case. Instead, the defendant apparently chose to rely on *People v. McKnight*, which merely states that "Crim. P. 16 requires that every statement made by the accused which is in the [prosecution's] possession or control . . . must be disclosed . . . ." 626 P.2d 678, 680-81 (Colo. 1981); *see Garcia*, 690 P.2d at 873-74. *McKnight* also does not address the 1974 amendment.

¶ 31 But, just two months after the division decided *Garcia*, our supreme court referred specifically to the Rule's amendment in

Chambers v. People, 682 P.2d 1173, 1180 n.13 (Colo. 1984). It first observed that the prosecution's duty to disclose information was *not* "limited to reports in the physical possession of the district attorney's office or the local law enforcement agency primarily responsible for the investigation of the case." *Id.* Rather, pointing to the amendment, the court noted that the prosecution's "duty of disclosure extends to material and information in the possession or control of all law enforcement agencies which 'have participated in the investigation . . . and [which] either regularly report, or with reference to the particular case have reported,'" to the prosecution. *Id.* (quoting Crim. P. 16(I)(a)(4) (1984)).

¶ 32 Relying on *Chambers* and on our analysis of the history of the pertinent language in Crim. P. 16, we conclude that *Garcia*'s reasoning does not apply to this case. We therefore reject the prosecution's assertion that there was no discovery violation.

¶ 33 The record establishes that the Philadelphia police both participated in the investigation of this case and reported to the prosecution about the case, thereby satisfying both requirements of Crim. P. 16(I)(a)(3). Specifically, in addition to assisting the Colorado Springs Police Department in tracking defendant down

and arresting him, the Philadelphia police provided the Colorado Springs police and the prosecution with other police reports and with a firearm that they had seized from defendant incident to his arrest.

¶ 34 The Attorney General asserts that the Philadelphia police booking procedure after defendant's arrest, during which defendant made the statement in question, was not part of the investigation of this case. But the Attorney General does not support this assertion with any Colorado precedent or with any precedent from another jurisdiction.

¶ 35 The definition of the word "investigation" tells us that defendant's arrest and booking by the Philadelphia police were part of the investigation of this case. An investigation is "[t]he activity of trying to find out the truth about something, such as a crime." Black's Law Dictionary (11th ed. 2019). Naturally, tracking down suspects is part of "trying to find out the truth" about any crime. *Id.* So in a case, such as this one, in which an out-of-state law enforcement agency tracks down a fugitive pursuant to an arrest warrant for a Colorado crime, places the fugitive under arrest, searches him, and asks him standard booking questions, we think

that the agency was engaged in the "investigation" of the Colorado crime.

¶ 36 This reasoning is consistent with how Maryland has construed its Crim. P. 16(I)(a)(3) analogue. In *Thomas v. State*, 919 A.2d 49 (Md. 2007), for example, a Maryland sheriff's department enlisted the help of an FBI unit to execute a warrant for the defendant's arrest. Following the arrest, the defendant remarked to one of the FBI agents that "God has forgiven me." *Id.* at 53. The statement, however, was not timely disclosed. Although the Maryland Court of Appeals decided the appeal on other grounds, it observed that the agent had "participated in the investigation" of the case, noting that "he arrested [the defendant], and he wrote a report in the matter." *Id.* at 56. *See also Bailey v. State*, 496 A.2d 665, 667 (Md. 1985)(an out-of-state police officer who arrested the defendant after a chance encounter on the New Jersey Turnpike "participated in the investigation" of the case).

¶ 37 Crim. P. 16(I)(b)(1) required the prosecution to provide the defense with defendant's statement "as soon as practicable but not later than 21 days after the defendant's first appearance at the time of or following the filing of charges." We conclude that the record

supports the trial court's determination that the prosecution had violated Crim. P. 16 because the prosecution did not inform the defense that this statement existed before the trial's seventh day. (Even if defendant's statement to the Philadelphia police was somehow not covered by Crim. P. 16(I)(b)(1), the prosecution was still required to provide it to the defense "not later than 35 days before trial." Crim. P. 16(I)(b)(3).)

b. Did the Trial Court Abuse Its Discretion in Fashioning a Sanction for the Discovery Violation?

¶ 38 If the prosecution does not comply with its discovery obligations, Crim. P. 16(III)(g) sets out a list of possible sanctions that the court may impose, such as (1) ordering the prosecution to "permit the discovery or inspection of materials not previously disclosed"; (2) granting a continuance; (3) prohibiting the prosecution "from introducing in evidence the material not disclosed"; or (4) crafting a different sanction as the court "deems just under the circumstances."

¶ 39 Sanctions for discovery violations "serve the dual purposes of protecting the integrity of the truth-finding process and deterring prosecutorial misconduct." *People v. Acosta*, 2014 COA 82, ¶ 12

(quoting *People v. Zadra*, 2013 COA 140, ¶ 15). Accordingly, a court should impose the least severe sanction that ensures compliance with the discovery rules and protects the defendant's right to due process. *People v. Palmer*, 2018 COA 38, ¶ 25. In doing so, the court should consider (1) the reason for the delay; (2) any prejudice a party suffered because of the delay; and (3) the feasibility of curing any prejudice through a continuance or recess during the trial. *Zadra*, ¶ 16.

¶ 40 When fashioning an appropriate sanction, "a trial court should 'be cautious not to affect the evidence to be introduced at trial or the merits of the case any more than necessary,' and should, if at all possible, 'avoid excluding evidence as a means of remedying a discovery violation.'" *Acosta*, ¶ 15 (quoting *Lee*, 18 P.3d at 197). Instead, the court should seek to impose "a less severe sanction, such as a continuance, whenever possible." *Lee*, 18 P.3d at 197; *see also People v. Daley*, 97 P.3d 295, 298 (Colo. App. 2004)("In the absence of willful misconduct or a pattern of neglect demonstrating a need for modification of a party's discovery practices, a court should use sanctions only as a means to cure the prejudice resulting from the discovery violation.").

¶ 41 We conclude, for the following reasons, that the trial court did not abuse its discretion when it chose the sanction of holding a suppression hearing, instead of barring the prosecution from introducing the Philadelphia statement, as the remedy for the prosecution's discovery violation. *See Acosta*, ¶ 15. In other words, we conclude that the court's decision was not manifestly arbitrary, unreasonable, or unfair. *See Lee*, 18 P.3d at 196; *Bueno*, ¶ 10.

¶ 42 First, the court did not find that the prosecution had engaged in willful misconduct or that it had demonstrated a pattern of neglect. *See Daley*, 97 P.3d at 298. Rather, the court found that the prosecution and the Colorado Springs police had not known about the Philadelphia statement before the seventh day of trial.

¶ 43 Second, defendant did not ask the court to continue the trial or to declare a mistrial as a sanction for the discovery violation, undercutting his contention that he had been significantly prejudiced by the prosecution's late disclosure of the Philadelphia statement. *People v. Brown*, 313 P.3d 608, 617 (Colo. App. 2011); *see also People v. Anderson*, 837 P.2d 293, 299 (Colo. App. 1992)("[Any] claim by the defendant at the appellate level that he was unfairly surprised and unable to prepare adequately for

cross-examination is thoroughly discredited by his failure to move for a continuance at the trial level." (quoting *People v. Graham*, 678 P.2d 1043, 1047-48 (Colo. App. 1983))).

¶ 44 Relatedly, defendant received one of the sanctions for which he asked: the suppression hearing. When the court stated that it would hold the suppression hearing, defense counsel said, "Judge, that's what we're asking for." This response indicates that the defense was satisfied with the sanction that the court had chosen.

¶ 45 Third, the court imposed a sanction "as a means to cure the prejudice resulting from the discovery violation." *Daley*, 97 P.3d at 298; *see also Salazar v. People*, 870 P.2d 1215, 1220 (Colo. 1994)(absent a showing of prejudice to the defendant, a failure to comply with discovery rules is not a reversible error).

¶ 46 Defendant asserts that allowing the prosecution to introduce the Philadelphia statement sabotaged a two-part claim that defense counsel had made during her opening statement: (1) the only statements from defendant that the jury would hear during the trial were those he had made to an acquaintance; and (2) "You're not going to [be] hearing about any statements by [defendant] saying, 'I

did this. I committed this crime.'" Defendant submits that counsel's two-part claim was a "big part" of her opening statement.

¶ 47 But our review of counsel's opening statement indicates that the two-part claim was not the centerpiece. The opening statement made a variety of other claims, such as that defendant was not the person shown on the surveillance video because that person did not have defendant's tattoos; there was doubt about the accuracy of cell tower location information, which the prosecution relied upon to show that defendant's cellphone was in the vicinity of the automobile repair shop around the time of the robbery; there was little physical evidence pointing to defendant as one of the robbers; and there were reasons why the jury should not believe defendant's accomplice, who had been endorsed as a prosecution witness.

¶ 48 Next, defendant's statement to the Philadelphia police — "I'm on the run from Colorado and you think I'm going to have identification? I want as little contact with you guys as possible and I definitely don't want you to know who I am." — was not an unequivocal admission that he had participated in the robbery. Indeed, defendant did not mention the robbery or his participation in it. And, while a juror could infer that defendant was "on the run"

because he had participated in the robbery, there was also testimony that could support an inference that defendant was "on the run" for some other reason.

C. Detective's Identification Testimony

1. Additional Background

¶ 49 On the trial's eighth day, a detective testified about his efforts to identify the robbers. (This was the second time that this detective had testified during the trial. He first testified on the trial's fourth day.)

¶ 50 As is relevant to our analysis, the detective said that he had watched the surveillance video "several dozen times" and paid "a lot of attention." He added that he had looked at the photograph on defendant's driver's license, had met face-to-face with him during the investigation, and had watched him during several court hearings. The prosecutor then asked him if, based on those observations, he had an opinion about whether defendant was one of the robbers shown in the surveillance video. Defense counsel objected.

¶ 51 During the ensuing bench conference, defense counsel argued that, because defendant had not changed his appearance in the

time between the robbery and the trial, the detective's answer to the prosecutor's question was irrelevant, and it would invade the jury's province as the trial's fact finder. The court overruled the objection.

¶ 52 The detective then said that, in his opinion, defendant was the robber in the yellow vest.

¶ 53 Defendant now contends the court erred because of the reasons counsel raised at trial and for a new reason that he did not preserve at trial: the detective's testimony was improper expert testimony offered in the guise of lay testimony. (Because this new reason was not preserved, we would review any error that we find to determine whether it was plain. *Hagos v. People*, 2012 CO 63, ¶¶ 12-14; Crim. P. 52(b). Since we conclude, for the reasons that we explain below, that there was no error at all, we have no need to discuss the plain error standard further.)

¶ 54 We are not persuaded by either contention. Instead, we conclude that the trial court did not abuse its discretion because its decision to admit the detective's testimony was not manifestly arbitrary, unreasonable, or unfair. *See Campbell*, ¶ 21.

2. Law and Application

¶ 55 Was the detective's testimony the wolf of expert testimony admitted in the sheep's clothing of lay testimony? To answer that question, we look to CRE 701 and CRE 702 to distinguish between the two.

¶ 56 CRE 701 states that lay witnesses may offer their opinions if they are "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of [CRE] 702."

¶ 57 In contrast, CRE 702, which addresses expert testimony, provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

¶ 58 As our supreme court has explained, "the critical factor" for figuring out the difference between lay testimony and expert testimony is "the basis for the witness's opinion." *Venalonzo v.*

People, 2017 CO 9, ¶ 22. Drilling down more deeply, the difference is found in "the nature" of the witness's experiences that "could form" the witness's opinion, not in whether the witness simply draws upon "personal experiences to inform" the witness's testimony. *Id.*

¶ 59 So, if a witness provides testimony that could be expected to be based on an ordinary person's experiences or knowledge, then the witness is offering lay testimony. *Id.* at ¶ 23. If, instead, the witness provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony. *Id.*

¶ 60 With respect to police officers, they "may testify as lay witnesses 'based on their perceptions and experiences.'" *People v. Bryant*, 2018 COA 53, ¶ 60 (quoting *People v. Stewart*, 55 P.3d 107, 123 (Colo. 2002)). But, "[w]here an officer's testimony is based not only on his or her perceptions, observations, and experiences, but also on the officer's specialized training or education, the officer must be properly qualified as an expert before offering testimony that amounts to expert testimony." *Id.* (quoting *People v. Veren*, 140 P.3d 131, 137 (Colo. App. 2005)).

¶ 61 In this case, defendant points out that, when the detective first testified during the trial's fourth day, he answered the following question "yes": "[I]s it part of police training to be able to look at a photograph and be able to look at a person's face and see if there are similarities and features that appear in both?" As a result, defendant continues, the detective's identification testimony was expert testimony, and, because he had not been qualified as an expert, the trial court should not have admitted it.

¶ 62 But that question was asked and answered *four days* before the detective offered his identification testimony in a different context. And recognizing people in videos and photographs is something ordinary people do all the time without any specialized knowledge, experience, or training. *See People v. Howard-Walker*, 2017 COA 81M, ¶ 67 ("No specialized knowledge is required to recognize an individual in a video."), *rev'd on other grounds*, 2019 CO 69. We therefore conclude that the detective's testimony was lay testimony, not expert testimony, so the trial court did not err when it allowed the detective to testify about his identification of defendant.

¶ 63 Next, we conclude that the detective's testimony was relevant and that it did not invade the jury's province.

¶ 64 A lay witness may testify about the identity of a person depicted in a surveillance video "if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the [video] than is the jury." *Robinson v. People*, 927 P.2d 381, 384 (Colo. 1996). "Moreover, the lay witness need only be personally familiar with the defendant, and the intimacy level of [that familiarity] goes to the weight to be given to the witness' testimony, not to the admissibility of such testimony." *Id.* "Additionally, the defendant's appearance need not have changed from the time of the [video] to the time of trial, so long as the lay opinion testimony is helpful to the jury." *Id.*

¶ 65 Citing *People v. McFee*, 2016 COA 97, defendant contends the jury was in the same position as the detective to form an opinion about who was on the video because (1) his appearance had not changed from the date of the video to the time of trial; (2) the jurors were able to observe him during the trial; and (3) the court gave the jury unfettered access to the surveillance video during deliberations.

¶ 66 This case is, however, distinguishable from *McFee*. In that case, the division thought that the jury "was in precisely the same position" as a testifying detective to listen to and to interpret an audio recording of the defendant. *Id.* at ¶ 76. In contrast, in this case, the detective not only watched the surveillance video "several dozen times," which was not true of the jury when he testified, but he also had a face-to-face interaction with defendant which the jury had not witnessed. We therefore conclude that (1) there was "some basis" for the trial court to find that the detective was in a better position to identify defendant in the surveillance video than the jury was, *see Robinson*, 927 P.2d at 384; (2) the detective's "explanation of the basis for his opinion was helpful to the jury even if the jury could have undertaken the same analysis," *People v. Vigil*, 2015 COA 88M, ¶ 67 (officer testified about his comparison of the defendant's shoes with shoeprints that he had seen at the crime scene), *aff'd*, 2019 CO 105; and (3) defendant's assertion that he had not changed his appearance between the robbery and the trial is not compelling, *see Robinson*, 927 P.2d at 384.

D. Other Acts Evidence

1. Additional Background

¶ 67 About four months before the robbery in this case, a homeowner in Colorado Springs was attacked in a similar way. According to the homeowner, a man wearing a safety vest and a hard hat came to his townhome one morning claiming there was a gas leak in a neighboring unit. After the homeowner escorted the man to the basement to look at his furnace, the man pulled out a pistol and ordered the homeowner to get on the ground. The intruder then struck the homeowner in the head with the pistol. There was a struggle, during which the pistol was fired several times. The homeowner eventually disarmed the intruder, who fled.

¶ 68 The homeowner later told the police that one of the few details he could remember about the intruder's physical appearance was that he had a beard. Later, when shown a photographic lineup containing defendant's picture, the homeowner could not positively identify him as the intruder. But, when he saw the surveillance video from the robbery in this case on the television news, he thought that the man in the yellow vest was the intruder who had attacked him.

¶ 69 The prosecution filed a motion asking to introduce evidence of this earlier attack to assist in establishing defendant's identity as one of the robbers of the automobile repair shop. The defense objected. After holding a hearing, the trial court granted the prosecution's motion, and the homeowner testified about the earlier attack at defendant's trial in this case.

2. Law and Application

¶ 70 CRE 404(b) states that a court should not admit evidence of other crimes "to prove the character of a person . . . to show that he acted in conformity therewith." Evidence of other acts may be admissible, however, for another purpose, such as proving the identity of a person who committed a crime. *Id.*

¶ 71 Before a trial court determines that evidence of other crimes is admissible under CRE 404(b), the court, based on all the evidence before it, must "be satisfied by a preponderance of the evidence that the other crime occurred and that the defendant committed the crime." *People v. Garner*, 806 P.2d 366, 373 (Colo. 1991).

¶ 72 In this case, although the court, in its written order, found by a preponderance of the evidence that a person had attacked the homeowner, the order did not specifically address the question of

whether there was proof by a preponderance of the evidence that defendant was the attacker. Defendant contends that this lack of a finding amounts to reversible error.

¶ 73 We disagree because trial courts "can determine that [a] prior act occurred and that the defendant committed the act without making explicit findings on the record." *People v. Davis*, 218 P.3d 718, 727-28 (Colo. App. 2008); *People v. Warren*, 55 P.3d 809, 814 (Colo. App. 2002). Rather, "[w]hile the better practice may be for a trial court to make explicit that it has found by a preponderance of the evidence that the defendant committed the other act, [*Garner*] requires only that the court be 'satisfied' of that fact." *People v. McGraw*, 30 P.3d 835, 838 (Colo. App. 2001).

¶ 74 It is clear from the court's order that it implicitly found that defendant attacked the homeowner because it cited *Garner* and it decided to admit the evidence. *See id.* The court referred to other evidence that linked defendant to the attack, such as its finding that a call had been made on defendant's cell phone from the vicinity of the homeowner's townhome about sixteen minutes before the homeowner called the police to report the attack. It also observed that, although the homeowner did not identify defendant

when the police showed him a photographic lineup containing defendant's picture, he thought that the bearded man wearing the yellow vest in the surveillance video from the automobile repair shop was his bearded attacker.

¶ 75 We therefore conclude that the court did not abuse its discretion when it admitted the evidence describing the attack on the homeowner because that decision was not manifestly arbitrary, unreasonable, or unfair. *See Yusem*, 210 P.3d at 463.

E. Cumulative Error

¶ 76 Under the cumulative error doctrine, we will reverse a conviction if multiple errors "collectively prejudice the substantial rights of the defendant, even if any single error does not." *Howard-Walker v. People*, 2019 CO 69, ¶ 25. But we have concluded that the trial court did not commit any errors, so there cannot be cumulative error. *See People v. Shanks*, 2019 COA 160, ¶ 76 (the cumulative error doctrine only applies if numerous errors were actually made, not merely alleged).

¶ 77 The judgment of conviction is affirmed.

JUDGE ROMÁN and JUDGE FOX concur.