Appendix A

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: February 1, 2021
Certiorari to the Court of Appeals, 2018CA1777 District Court, Douglas County, 2012CR271	
Petitioner: Thomas Mark Hild, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2020SC767
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 1, 2021.

Appendix B

18CA1777 Peo v Hild 07-30-2020

COLORADO COURT OF APPEALS DATE FILED: July 30, 2020

Court of Appeals No. 18CA1777
Douglas County District Court No. 12CR271
Honorable Theresa M. Slade, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Thomas Mark Hild,

Defendant-Appellant.

ORDERS AFFIRMED

Division VII
Opinion by JUDGE BROWN
Fox and Navarro, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced July 30, 2020

Philip J. Weiser, Attorney General, Melissa D. Allen, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Thomas Mark Hild, Pro Se

¶ 1 A jury convicted Thomas Mark Hild of theft, conspiracy to commit theft, second degree burglary, third degree burglary, conspiracy to commit burglary, criminal mischief, and conspiracy to commit criminal mischief. A division of this court affirmed Hild's convictions on direct appeal. *See People v. Hild*, (Colo. App. No. 13CA1361, Mar. 3, 2016) (not published pursuant to C.A.R. 35(f)).

¶ 2 Hild now appeals the postconviction court's summary denial of his Crim. P. 35(c) motion. We affirm.

I. Background

¶ 3 In March 2012, a jewelry store in Parker, Colorado, was burglarized. Based on video surveillance and car registration records, police first linked Charles Williams and Daniel Delgado to the burglary. Williams' then-girlfriend told police that Williams confessed to the burglary and that she had helped Williams pawn the stolen jewelry.

¶ 4 After searching Williams' phone records, police discovered several calls between Williams and Hild during the time frame of the burglary. Based on Hild's Department of Motor Vehicles records, police determined he matched the description of a male suspect shown with Williams in the surveillance video. When questioned,

Hild denied being involved in the burglary but admitted to meeting up with Williams near the jewelry store to purchase marijuana. Police searched Hild's vehicle and found drywall tools like those used in the burglary.

¶ 5 Hild's criminal history revealed convictions for four prior burglaries of businesses.

¶ 6 After a jury found Hild guilty of all the substantive charges, the trial court found him guilty of four habitual criminal counts and sentenced him to forty-eight years in Department of Corrections' (DOC) custody.

II. Discussion

¶ 7 On appeal, Hild contends that the postconviction court erred by summarily denying his Crim. P. 35(c) motion. Specifically, he asserts that his trial counsel was ineffective for failing to (1) seek a plea bargain; (2) call certain lay and expert witnesses; (3) object to penitentiary packets admitted during the habitual criminal trial; (4) seek a continuance to investigate late-disclosed physical evidence; (5) object to admission of a recorded conversation between Williams and his girlfriend as hearsay; and (6) adequately advise

him regarding his right to testify and object to the trial court's *Curtis* advisement.[1] We reject each contention in turn.

A. Standard of Review

¶ 8 We review de novo the summary denial of a motion for postconviction relief under Crim. P. 35(c). *People v. Chipman*, 2015 COA 142, ¶ 25. A postconviction court may summarily deny a Crim. P. 35(c) motion if (1) the motion, files, and record clearly establish that the defendant is not entitled to relief; (2) the allegations, even if true, do not provide a basis for relief; or (3) the claims are bare and conclusory in nature. *Id.*; *People v. Venzor*, 121 P.3d 260, 262 (Colo. App. 2005).

B. Ineffective Assistance of Counsel

¶ 9 A criminal defendant is constitutionally entitled to effective assistance of counsel. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16; *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ardolino v. People*, 69 P.3d 73, 76 (Colo. 2003). To prevail on a

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[1] Hild has abandoned all other claims asserted in his postconviction motions. *People v. Rodriguez*, 914 P.2d 230, 249 (Colo. 1996) (A defendant's "failure to specifically reassert on this appeal all of the claims which the district court disposed of . . . constitutes a conscious relinquishment of those claims which he does not reassert."); *People v. Osorio*, 170 P.3d 796, 801 (Colo. App. 2007).

claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687; *Dunlap v. People*, 173 P.3d 1054, 1062-63 (Colo. 2007).

¶ 10 A defendant must prove each prong of the *Strickland* test by a preponderance of the evidence. *People v. Garner*, 2015 COA 174, ¶ 17. If a defendant fails to establish either prong of the *Strickland* analysis, a court may deny the ineffective assistance claim without addressing the other prong. *People v. Washington*, 2014 COA 41, ¶ 20.

¶ 11 Counsel's performance is deficient when it falls "below an objective standard of reasonableness." *Dunlap*, 173 P.3d at 1062 (quoting *Strickland*, 466 U.S. at 688). Courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Garner*, ¶ 15 (quoting *Strickland*, 466 U.S. at 689). Determining whether counsel's performance meets this standard requires "every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the

conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

¶ 12 To establish that counsel's deficient performance prejudiced the defense, a defendant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Dunlap*, 173 P.3d at 1063 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694).

1. Failure to Seek a Plea Bargain

¶ 13 Hild contends that trial counsel was ineffective for failing to seek a plea bargain. We disagree.

a. Additional Background

¶ 14 In Hild's pro se motion for postconviction relief, he alleged that trial counsel was ineffective for not communicating a plea offer to him. The postconviction court appointed counsel to advise whether this claim had merit.[2] After investigating the claim, postconviction

[2] At the same time the postconviction court appointed counsel to investigate this claim, it summarily denied all other claims in Hild's postconviction motion. The date of this order was July 27, 2017.

counsel informed the court that the claim did not have merit; postconviction counsel's investigation revealed that there was never an offer made, so trial counsel had not failed to communicate an offer to Hild.

¶ 15 However, postconviction counsel filed a supplemental motion for postconviction relief, arguing that Hild's trial counsel had performed deficiently by failing to seek a plea bargain. Hild asserts that he would have accepted a plea had one been available. The postconviction court summarily denied the claim, finding that counsel was not required to seek a plea offer and therefore counsel had not performed deficiently.[3]

b. Applicable Law

¶ 16 The Sixth Amendment guarantee of effective assistance of counsel is not simply a trial right; rather, it extends to all critical stages of a criminal prosecution. *Key v. People*, 865 P.2d 822, 825 (Colo. 1994). Plea negotiations are considered a critical stage and a defendant is entitled to competent and effective representation during such negotiations. *Lafler v. Cooper*, 566 U.S. 156, 162

[3] On August 29, 2018, the postconviction court issued a second order denying Hild's request for postconviction relief.

(2012); *Missouri v. Frye*, 566 U.S. 134, 140 (2012); *Carmichael v. People*, 206 P.3d 800, 805 (Colo. 2009).

¶ 17 In the plea bargain context, defense counsel does not ordinarily have a duty to initiate plea negotiations. *People v. Sherman*, 172 P.3d 911, 913 (Colo. App. 2006). But in some circumstances, failure to initiate plea negotiations may constitute ineffective assistance of counsel. *Id.* In evaluating such a claim, the postconviction court should examine whether, "in light of the particular facts and circumstances of the case, defense counsel's failure to initiate plea negotiations fell below an objective standard of reasonableness." *Id.* In assessing prejudice, the court should consider whether a defendant has shown a reasonable probability that had defense counsel initiated plea negotiations (1) the prosecution would have made a plea offer; (2) the defendant would have accepted the offer; and (3) the court would have approved the offer. *Id.* at 914.

c. Analysis

¶ 18 The postconviction court concluded that "trial counsel was under no obligation to seek a plea agreement on behalf of [Hild]." Even assuming that trial counsel *was* required to initiate plea

negotiations under these circumstances, *see id.* at 913, the claim fails because Hild does not allege sufficient facts to establish prejudice under the *Sherman* test. He does not allege that the prosecution would have made a plea offer had his counsel sought one. He does not allege any corroborating evidence that he would have accepted a plea offer. *Carmichael*, 206 P.3d at 807 (explaining the second prong of the *Sherman* test requires some objective, corroborating evidence that the defendant would have accepted the plea offer; the defendant's testimony alone does not suffice). And he does not allege that the trial court would have approved the offer. *Sherman*, 172 P.3d at 913.

¶ 19 Accordingly, the postconviction court did not err by summarily denying this claim of ineffective assistance of counsel.

2. Failure to Call Certain Lay and Expert Witnesses

¶ 20 Hild contends that trial counsel was ineffective for failing to call (1) his brother; (2) a cell phone expert; and (3) a video surveillance expert as witnesses at trial. We disagree.

a. Applicable Law

¶ 21 Generally, the decision to call certain witnesses and what questions to ask those witnesses are matters of trial strategy. *See*

Davis v. People, 871 P.2d 769, 773 (Colo. 1994) ("Whether to call a particular witness is a tactical decision, and, thus, a matter of discretion for trial counsel."); *People v. Bradley*, 25 P.3d 1271, 1275 (Colo. App. 2001) ("Mere disagreement as to trial strategy will not support a claim for ineffective assistance of counsel.").

b. Hild's Brother

¶ 22 First, Hild contends that trial counsel was ineffective for failing to call Hild's brother as a witness. Hild explains that his brother would have rebutted Detective Ryan Wolff's "key testimony" that Hild admitted to being in the area of the jewelry store on the day of the burglary to buy marijuana from Williams. Hild alleges that his brother would have testified that Hild never made such statements to the detective and explained why Hild was in possession of dry wall tools like those used in the burglary.

¶ 23 However, trial counsel's thorough cross-examination of Detective Wolff suggested to the jury that Hild did not admit to being near the jewelry store on the date of the burglary and that the reason Hild was in possession of dry wall tools was because of his work as a contractor. Hild does not explain how his brother's testimony on these two points would have altered the outcome of

the proceeding in light of counsel's cross-examination and the other evidence of guilt.

¶ 24 *Strickland*'s performance prong requires that the defendant show that counsel's representation fell below an objective standard of reasonableness. *Dunlap*, 173 P.3d at 1062. Indulging a strong presumption that counsel's performance was reasonable, as we are required to do, *id.* at 1063, we conclude that Hild has not made this showing. We also conclude that Hild has not demonstrated the requisite prejudice under *Strickland*. *Id.*

¶ 25 The postconviction court did not err by summarily denying this claim of ineffective assistance of counsel.

c. Cell Phone Expert

¶ 26 Second, Hild argues that his trial counsel was ineffective for failing to call "readily available" experts to refute the People's cell phone evidence. He contends that a rebuttal expert could have testified that cell phone signals are not always routed to the closest tower, so "merely because a signal went through a certain tower is not necessarily indicative of the person being in the immediate area." He does not identify an expert who would have testified this way.

¶ 27 At trial, the People offered evidence that Hild's cell phone was in the vicinity of the jewelry store that was burglarized at the time of the burglary. However, one of the People's witnesses admitted that a cell phone signal does not always hit the closest tower for a variety of reasons. On cross-examination, trial counsel further questioned the reliability of the People's cell phone evidence.

¶ 28 The postconviction court determined that "it was well established at trial the phone tower signal is not entirely reliable, so there [was] no reason to believe rebuttal expert testimony would beneficially highlight the signal as unreliable evidence" and concluded that there was no deficient performance that prejudiced Hild. We agree.

¶ 29 The point Hild contends should have been made through rebuttal expert testimony was made at trial. The People's own witness admitted it. Hild failed to show a reasonable probability that his trial counsel's failure to call a rebuttal cell phone expert to present cumulative evidence would have altered the outcome of the proceeding. *See Dunlap*, 173 P.3d at 1063; *see also Davis*, 871 P.2d at 773 (There is no ineffective assistance when counsel decides not

to pursue certain sources of information but, instead, to "rely on other sources of information.").

¶ 30 The postconviction court did not err by summarily denying this claim of ineffective assistance of counsel.

d. Video Surveillance Expert

¶ 31 Third, Hild argues that trial counsel was ineffective for failing to call an expert to testify to the "unreliability of the video surveillance evidence, i.e., not only couldn't Mr. Hild be identified from said [evidence], but given the angle of the camera, it is difficult to distinguish anything reliable about the other party in said [evidence]." He does not identify a witness who would have testified this way.

¶ 32 At trial, no witness identified Hild from the surveillance video; rather, the video was used to establish that two men — Williams and another man — burgled the jewelry store. Other circumstantial evidence established that Hild was that second man. Moreover, the surveillance video was played for the jurors, who could judge for themselves whether the man in the video was Hild. So, we fail to see a reasonable probability that trial counsel's failure to present a witness to say that Hild could not be identified in the video would

have affected the outcome of the proceedings. *See Dunlap*, 173 P.3d at 1063.

¶ 33 The postconviction court did not err by summarily denying this claim of ineffective assistance of counsel.

3. Failure to Object to Penitentiary Packets

¶ 34 Hild contends that trial counsel was deficient for failing to object to admission of penitentiary packets during the habitual criminal trial. We disagree.

a. Additional Background

¶ 35 During the trial on the habitual offender counts, the prosecution introduced penitentiary packets (pen packs) into evidence to prove Hild's prior felony convictions. Trial counsel did not object. The prosecution also called Andrea Smith, who was qualified as an expert in fingerprint classification and identification to testify that the fingerprints in the pen packs matched Hild's fingerprints.

¶ 36 The trial court found, based at least in part on the pen packs, that the records and testimony submitted by the People proved four of the habitual criminal counts beyond a reasonable doubt.

b. Applicable Law

¶ 37 In habitual criminal proceedings, the People bear the burden of proving beyond a reasonable doubt that the accused is the person named in the prior convictions. *People v. Strock*, 252 P.3d 1148, 1155 (Colo. App. 2010); *see also* § 18-1.3-803(4)(b), C.R.S. 2019. Identity may be proved by various methods, including by expert testimony linking the defendant's fingerprints to those obtained during prior convictions. *People v. Bernabei*, 979 P.2d 26, 30 (Colo. App. 1998).

¶ 38 By statute, the prosecution may submit authenticated copies of records of a defendant's prior felony convictions and incarcerations as prima facie evidence of the fact of the convictions and the defendant's identity. § 18-1.3-802, C.R.S. 2019; *Campbell v. People*, 2020 CO 49, ¶ 14 n.3. These records are commonly called a pen pack. *Campbell*, ¶ 14 n.3. A pen pack is a certified record containing the mittimus, fingerprints, and photograph of inmates discharged from DOC. *Bernabei*, 979 P.2d at 30.

c. Analysis

¶ 39 The postconviction court summarily denied this claim, explaining trial counsel was not ineffective for failing to object to

admissible evidence. We agree that the pen packs were admissible evidence. § 18-1.3-802 ("Identification photographs and fingerprints that are . . . part of the records kept at the place of such party's incarceration or by any custodian authorized by the executive director of the department of corrections after sentencing for any of such former convictions and judgments, shall be prima facie evidence of the identity of such party and may be used in evidence against him or her."); *see also Campbell*, ¶ 14 n.3. And we agree that trial counsel does not render deficient performance by failing to object when there is no basis for an objection. *See People v. Bossert*, 722 P.2d 998, 1011 (Colo. 1986).

¶ 40 The postconviction court did not err by summarily denying this claim of ineffective assistance of counsel.

4. Failure to Seek a Continuance to Investigate Late-Discovered Physical Evidence

¶ 41 Hild contends that trial counsel was ineffective by failing to seek a continuance to further investigate late-disclosed test results related to a hair found at the crime scene. He argues that the evidence would have allowed him to advance an alternate suspect defense at trial. We disagree.

a. Additional Background

¶ 42 At a pretrial hearing three days before trial, the People asked the court to grant a continuance, in part based upon recent consumptive testing of a hair from the scene of the crime. Hild's trial counsel acknowledge having just received the results from that test but stated that it did not change his readiness to proceed to trial. The court denied the continuance.

¶ 43 At trial, the jury was told that a hair was found at the scene that did not match Hild; rather, it "came back to some unknown female." It was later determined that the hair belonged to a woman with a connection to Williams.

b. Applicable Law

¶ 44 A defendant is entitled to pretrial investigation by counsel sufficient to reveal potential defenses and facts relevant to guilt or penalty. *Davis*, 871 P.2d at 773. Counsel's strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. *Ardolino*, 69 P.3d at 76. "A particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a

heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691.

c. Analysis

¶ 45 The postconviction court concluded that the identity of the person to whom the hair belonged was not material. The court noted that, on direct appeal, the division found that there were many facts establishing that Hild participated in the burglary, including (1) co-defendant Williams' statement to his then-girlfriend implicating Hild; (2) the girlfriend's admission to pawning items for Williams; (3) Hild's admission to meeting Williams behind the strip mall during the relevant time frame allegedly to purchase marijuana; (4) the surveillance video that showed an unknown man with Williams at the scene of the crime, which matched the description of Hild; (5) cell phone records showing numerous phone calls between Williams and Hild in Parker during the relevant time frame; (6) dry wall tools found in Hild's vehicle, including a dry wall saw; (7) the fact that a marijuana transaction does not take several hours; and (8) Hild's previous knowledge and method of burglarizing businesses.

¶ 46 We agree with the postconviction court that Hild fails to establish either deficient performance or prejudice here. *See Davis*, 871 P.2d at 773 ("Mere disagreement as to trial strategy . . . will not support a claim of ineffectiveness."). Had trial counsel obtained a continuance to determine the identity of the person whose hair was found at the crime scene, he would have discovered that the hair belonged to a woman with some connection to Williams. We do not see how that evidence would have allowed Hild to advance an alternate suspect defense. The second suspect in the surveillance video was a man, not a woman. Accordingly, an argument that the second suspect was a female associate of Williams' rather than Hild would have made little sense — particularly in light of the other circumstantial evidence linking Hild to the crime.

¶ 47 The postconviction court did not err by summarily denying this claim of ineffective assistance of counsel.

5. Failure to Object to Hearsay

¶ 48 Hild contends that trial counsel performed deficiently by failing to object to the admission of recorded conversations between Williams and his then-girlfriend on the basis that the statements

were testimonial and their admission violated the Confrontation Clause.

¶ 49 At trial, recorded jail telephone calls between Williams and his girlfriend were admitted into evidence over Hild's trial counsel's objection. A division of this court reviewed the admissibility of the evidence on direct appeal and concluded the recordings were properly admitted under the Confrontation Clause and CRE 804(b)(3). *See Hild*, No. 13CA1361, slip op. at 25.

¶ 50 To the extent Hild challenges the admissibility of the recorded conversations, the postconviction court properly found Crim. P. 35(c)(3)(VI) bars this claim as successive. Under this rule, "[t]he court shall deny any claim that was raised and resolved in a prior appeal or postconviction proceeding on behalf of the same defendant." Crim. P. 35(c)(3)(VI). Although there are exceptions to the rule, none applies here.

¶ 51 To the extent Hild argues his counsel should have made a different objection, the record clearly establishes he is not entitled to relief. *Chipman*, ¶ 25. Regardless of the words trial counsel used to object to admission of this evidence, the division on direct appeal considered and rejected the arguments Hild makes now.

¶ 52 The postconviction court did not err by summarily denying this claim of ineffective assistance of counsel.

6. *Curtis* Advisement

¶ 53 Hild makes three arguments related to his *Curtis* advisement: (1) the trial court's *Curtis* advisement was deficient; (2) trial counsel was ineffective by failing to object to the deficient *Curtis* advisement; and (3) trial counsel failed to properly advise Hild regarding his right to testify. We reject these contentions.

a. Applicable Law

¶ 54 Criminal defendants have a constitutional right to testify in their own defense. *Moore v. People*, 2014 CO 8, ¶ 10; *People v. Curtis*, 681 P.2d 504, 512 (Colo. 1984). A defendant may waive the constitutional right to testify as long as the waiver is knowing, voluntary, and intelligent. *Curtis*, 681 P.2d at 514.

¶ 55 The trial court ensures that a waiver of the fundamental right to testify is knowing, voluntary, and intelligent by advising the defendant — on the record and outside the presence of the jury — of five concepts: (1) a defendant has the right to testify; (2) if he or she wants to testify, no one can prevent him or her from doing so; (3) if a defendant testifies, the prosecution will be allowed to

cross-examine him or her; (4) if the defendant has been convicted of a felony, the prosecutor will be entitled to ask about it; and (5) if the felony conviction is disclosed to the jury, then the jury can be instructed to consider it only as it bears upon the defendant's credibility. *Id.* at 514-15.

¶ 56 Although failure to give a proper *Curtis* advisement is error, there is no prescribed litany or formula that must be followed in advising the defendant of the right to testify. *See People v. Blehm*, 983 P.2d 779, 787 (Colo. 1999); *People v. Gray*, 920 P.2d 787, 790 (Colo. 1996); *People v. Chavez*, 853 P.2d 1149, 1152 (Colo. 1993).

¶ 57 With respect to prior convictions, a defendant is sufficiently advised so long as he is informed that prior convictions are admissible only to impeach his credibility. *Gray*, 920 P.2d at 792-93. This is true even where habitual counts are charged because "[a]n advisement regarding the prosecution's continuing duty to prove a defendant's prior convictions merely repeats, in a slightly different form, the instruction concerning the permissible use of prior convictions." *Id.* at 793. Accordingly, if a defendant is sufficiently advised regarding the permissible limited use of prior

convictions, no additional advisement is necessary for a defendant facing habitual charges. *See id.*

b. Analysis

¶ 58 As relevant here, the trial court advised Hild "that if a felony conviction is disclosed to the jury, the jury can then be instructed to consider it only as it bears upon your credibility[.]" The court then immediately asked Hild whether he understood this, to which Hild responded, "Yes."

¶ 59 Hild argues that he "had nothing to lose by testifying" and that the only reason he did not testify was because he believed that if he had admitted to having committed prior felonies while testifying on his own behalf during his burglary trial, that admission would have been allowed as proof of prior convictions at the bifurcated habitual criminal trial. Hild contends that the trial court should have advised him that, if he chose to testify, his prior convictions could not be used against him in the habitual criminal phase of the trial. We disagree.

¶ 60 We conclude that the trial court adequately advised Hild that if a felony conviction was disclosed to the jury, "the jury can be instructed to consider it only as it bears upon [Hild's] credibility."

See Curtis, 681 P.2d at 514. Hild was not entitled to a specific or further advisement regarding the use of such convictions during subsequent habitual criminal proceedings. *See Gray*, 920 P.2d at 793.

¶ 61 Because the *Curtis* advisement was not deficient, trial counsel was not ineffective for failing to object to it. And, Hild offers no authority to support his contention that trial counsel was required to provide Hild with a more comprehensive advisement regarding his right to testify than is constitutionally required under *Curtis*. So, we reject that contention as well.

¶ 62 The postconviction court did not err by summarily denying these claims.

7. Other Contentions

¶ 63 To the extent Hild believes he raises any other contentions on appeal, we conclude they are conclusory. He does not support them with any meaningful argument or citation to authority, so we do not address them. *See, e.g.*, *People v. Mendoza*, 313 P.3d 637, 645 (Colo. App. 2011) (Because defendant "does not support his assertion with any meaningful argument[,] . . . we do not address it."); *People v. Osorio*, 170 P.3d 796, 800 (Colo. App. 2007) (affirming