

Appendix C: *People v. Hagos*, 03CA0315 (Colo.App. Dec. 8, 2005)
 (unpublished)

People v Hagos, A

COLORADO COURT OF APPEALS

Court of Appeals No.: 03CA0315
City and County of Denver District Court No. 00CR3603
Honorable Morris B. Hoffman, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Abraham Hagos,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division II
Opinion by: JUDGE LOEB
Rothenberg and Dailey, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced: December 8, 2005

John W. Suthers, Attorney General, Elizabeth Rohrbough, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

David S. Kaplan, Colorado State Public Defender, Katherine Brien, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Defendant, Abraham Hagos, appeals the judgment of conviction entered on jury verdicts finding him guilty of first degree kidnapping, first degree burglary, felony menacing, and conspiracy. We affirm.

In 1997, defendant and his friend J.R. were selling drugs out of an apartment in Glendale. J.R. lived in the apartment, while defendant stayed there occasionally. Defendant supplied drugs for sale to J.R. and another friend, D.C.

R.L. also sold drugs for J.R. When J.R. supplied R.L. with a bad supply of cocaine, and then would not give him his money back, R.L. broke into the Glendale apartment and took a safe containing \$70,000 in cash and some drugs. Defendant and J.R. concluded that R.L. was responsible for the break-in after hearing reports that R.L. had been spending large sums of cash, including purchasing cars and motorcycles for his friends and his brother, B.L.

After unsuccessfully trying to locate R.L., defendant decided to threaten B.L. Defendant promised a cash reward to various persons to help him recover the stolen money and instructed D.C.

to bring him a particular gun with a laser sight and a pair of handcuffs.

On the evening of October 28, 1997, defendant, J.R., and eight others rushed into B.L.'s apartment. Some of the men assaulted B.L., striking him with guns and also kicking and beating him. At defendant's direction, B.L. was handcuffed and taken into the bedroom, where defendant hit B.L., turned off the lights, and threatened him with the gun, using the laser sight. Defendant also told the group to take anything they wanted from B.L.'s apartment, claiming the furnishings had been purchased with his money.

Defendant then had B.L. brought out of the building in handcuffs and taken to the Glendale apartment where the break-in had occurred. There, B.L. was beaten again, and he agreed that he would help look for his brother if his abductors would stop beating him. B.L. testified that he felt that defendant was trying to calm J.R. down from harming him further or killing him. In the end, the group discovered that R.L. had been arrested that night with \$10,000 on him. B.L. was released, but later signed over the motorcycles to defendant.

Later, defendant, J.R., and D.C. were charged with possession of drugs seized by law enforcement in December 1997 from another apartment shared by the three men. J.R. cooperated with the prosecution in the drug case, and defendant had J.R. killed a few weeks before trial in that case was to begin. In April 2002, defendant was convicted of first degree murder in connection with the death of J.R.

In 2000, while in custody on the first degree murder charge, defendant was indicted and charged with first degree kidnapping, first degree burglary, aggravated robbery, second degree assault, and conspiracy in connection with the October 1997 incident involving B.L. After a trial, the jury convicted defendant of first degree kidnapping, first degree burglary, felony menacing (a lesser included offense of second degree assault), and conspiracy to commit second degree kidnapping, first degree burglary, and felony menacing. This appeal followed.

I.

Defendant first contends that the trial court committed reversible error by failing to instruct the jury correctly on the elements of first degree kidnapping. We disagree.

Section 18-3-301(1), C.R.S. 2005, defines first degree kidnapping, in pertinent part:

Any person who does any of the following acts with the intent thereby to force the victim or any other person to make any concession or give up anything of value in order to secure a release of a person under the offender's actual or apparent control commits first degree kidnapping:

(a) Forcibly seizes and carries any person from one place to another

In Instruction No. 15, the elemental instruction on first degree kidnapping, the trial court instructed the jury, "The elements of the crime of First Degree Kidnapping are: (1) That the Defendant, . . . (3) forcibly, or otherwise, seized and carried any person from one place to another . . ." (emphasis added). Defendant did not object to this instruction at trial.

On appeal, defendant contends that, by including the words "or otherwise," the trial court **improperly expanded the asportation element** of first degree kidnapping and committed reversible error. The People concede that the words "or otherwise" were wrongly included in the jury instruction but argue that reversal of the conviction for first degree kidnapping is not required. We agree with the People.

Because defendant did not object to the instruction at trial, we review for plain error. See People v. Miller, 113 P.3d 743 (Colo. 2005). Plain error requires reversal if, after a review of the entire record, a court can conclude with fair assurance that the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the conviction. People v. Miller, supra. “Moreover, an erroneous jury instruction does not normally constitute plain error where the issue is not contested at trial or where the record contains overwhelming evidence of the defendant’s guilt.” People v. Miller, supra, 113 P.3d at 750.

We first reject defendant’s argument that the claimed error here was structural. Errors that implicate constitutional rights may be divided into two classes, those which are structural error and those which are compatible with a harmless error or plain error analysis. Neder v. United States, 527 U.S. 1, 8-9, 119 S.Ct. 1827, 1833-34, 144 L.Ed.2d 35 (1999); People v. Miller, supra, 113 P.3d at 749. A structural error infects the entire trial process and affects “the framework within which the trial proceeds.” Neder v. United States, supra, 527 U.S. at 8, 119 S.Ct. at 1833; see People v. Miller,

supra. This type of error requires automatic reversal. People v. Boykins, ___ P.3d ___ (Colo. App. No. 03CA2278, Oct. 20, 2005).

However, structural error encompasses only a very limited class of cases, and an incorrect jury instruction, such as one that omits an element of the offense, does not necessarily render a criminal trial fundamentally unfair. See Neder v. United States, supra, 527 U.S. at 9, 119 S.Ct. at 1833; see also People v. Boykins, supra, ___ P.3d at ___. There is “a strong presumption that any errors that may have occurred are not structural, but rather are subject to a harmless or plain error analysis.” Bogdanov v. People, 941 P.2d 247, 253, amended, 955 P.2d 997 (Colo. 1997).

“When a trial court misinstructs the jury regarding an element of an offense, it commits constitutional trial error.” People v. Petschow, 119 P.3d 495, 498-99 (Colo. App. 2004). As noted, where, as here, a defendant does not object at trial to an omission or misdescription of an element, we proceed under a plain error analysis. People v. Miller, supra, 113 P.3d at 749.

Here, the record contains overwhelming, undisputed evidence that B.L. was seized and carried from his apartment by force. He was beaten, hit with a gun, threatened with a gun, handcuffed, and

ordered to walk to a car, which took him away from his apartment at gunpoint. It is also undisputed that the goal of these acts was to obtain B.L.'s cooperation in locating his brother, R.L. Further, the record shows that this entire scenario was planned and directed by defendant. Testimony from a number of witnesses shows that defendant organized the raid on B.L.'s apartment and offered others a reward to help him locate his missing money and drugs. Contrary to defendant's contention, although B.L. testified that defendant seemed to be trying to protect him, B.L. had no knowledge concerning the planning phase of the operation and thus did not dispute the overwhelming testimony from other witnesses that defendant organized and directed the group's actions. See People v. Miller, supra.

Accordingly, because the record contains overwhelming and undisputed evidence of defendant's participation in the forcible removal of B.L. from his apartment, we conclude the addition of the language "or otherwise" did not so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the conviction.

II.

Defendant contends that the trial court erred by refusing to give his tendered jury instructions on certain affirmative defenses. We disagree.

A defendant is entitled to an instruction on an affirmative defense if the record contains any credible evidence tending to establish the defense. Section 18-1-407(1), C.R.S. 2005; Cassels v. People, 92 P.3d 951, 956 (Colo. 2004). For the defendant to be entitled to such an instruction, the supporting evidence must tend to establish each of the elements of the affirmative defense. People v. Hendrickson, 45 P.3d 786, 790 (Colo. App. 2001).

The threshold determination whether some credible evidence exists to support an affirmative defense is a matter of law for the trial court to decide. People v. Hill, 934 P.2d 821, 826 (Colo. 1997). It is not error for the trial court to reject a proposed affirmative defense instruction if it is not grounded in, and supported by, the evidence. People v. Lucas, 992 P.2d 619, 625 (Colo. App. 1999).

A.

Defendant contends that the trial court erred by rejecting his tendered Instruction No. 7, based on § 18-1-604(1), C.R.S. 2005,

which stated that “[a] person shall not be legally accountable for behavior of another constituting an offense if he is a victim of that offense or the offense is so defined that his conduct is inevitably incidental to its commission.” We disagree.

The trial court found there was no evidence from which reasonable jurors could conclude that defendant’s conduct was incidental. We agree. The record supports the conclusion that defendant was heavily involved in the planning and execution of the charged crimes. Even by defendant’s own theory of defense, he was not a victim, nor was his role in planning the crimes or his presence at the scene incidental to the commission of the crimes, regardless of whether he tried to prevent B.L. from being further abused or killed. Accordingly, the trial court did not err in rejecting this instruction.

B.

Defendant argues that the trial court erred by rejecting his tendered Instruction No. 9, which stated, tracking the language of § 18-1-604(2), C.R.S. 2005, that

[i]t is an affirmative defense to a complicity charge if, prior to the commission of the offense, the defendant terminated his effort to promote or facilitate its

commission and either gave timely war[n]ing to law enforcement authorities or gave timely [warning] to the intended victim.

The trial court found no evidence to support this defense and therefore rejected the tendered instruction. We perceive no error.

Section 18-1-604(2) requires that a defendant give timely warning either to law enforcement authorities or to the intended victim of the crime. There is no evidence in the record that defendant ever warned B.L., the victim, or warned law enforcement authorities. Accordingly, we perceive no error in the court's rejection of tendered Instruction No. 9.

C.

Defendant also contends that the trial court erred by rejecting his tendered Instruction No. 10 on the affirmative defense of choice of evils. Again, we disagree.

The choice of evils defense is set forth in § 18-1-702(1), C.R.S. 2005, which states that “conduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no conduct of the actor.”

A defendant asserting this affirmative defense admits the doing of a charged act, but seeks to justify it. People v. Fontes, 89 P.3d 484, 486 (Colo. App. 2003). “The defendant must offer proof of the sudden and unforeseen emergence of a situation requiring his or her immediate action to prevent an imminent injury.” People v. Fontes, supra, 89 P.3d at 486. The evidence should be presented to the court outside of the presence of the jury, and the court must determine whether, as a matter of law, there is sufficient justification for the alleged conduct. People v. Shepherd, 43 P.3d 693, 696 (Colo. App. 2001). Also, “[a] defendant who has a reasonable legal alternative as a means to avoid the threatened injury is foreclosed from asserting a choice of evils defense,” and must show that “the criminal conduct at issue did not exceed that reasonably necessary to avoid the impending injury.” People v. Fontes, supra, 89 P.3d at 486. If the defendant’s offer of proof does not entitle him to assert a choice of evils defense, then the trial court does not err by refusing to give a choice of evils instruction. People v. Fontes, supra, 89 P.3d at 487.

Here, the trial court found that a choice of evils instruction was not warranted by the evidence. The court interpreted

defendant's choice of evils argument to be that defendant committed the charged offenses as a necessary and emergency measure to recover his stolen drugs and drug money. Although defendant did not correct the court's interpretation of his defense at trial, he now argues on appeal that the choice of evils defense was actually based on the alleged necessity of his illegal conduct as an emergency measure to prevent harm, and possibly death, to the victim, B.L.

Even assuming the characterization of the choice of evils defense as articulated by defendant on appeal, we nevertheless conclude that there was no credible evidence to support such a defense here and that it was inapplicable to this case. First, there is no evidence that the situation at B.L.'s apartment was "occasioned or developed through no conduct of the defendant." To the contrary, there is overwhelming and undisputed evidence that defendant's conduct helped to create the situation. Second, defendant made no offer of proof to the court justifying a choice of evils instruction. Third, defendant certainly had a reasonable legal alternative to avoid the threatened injury to B.L., as he could have called the police at any time. Fourth, defendant never admitted

that he committed the charged acts, and, thus, the defense itself was simply inapplicable. Therefore, we conclude that the trial court did not err in refusing to give a choice of evils defense instruction.

D.

We also reject defendant's assertion that, because the trial court rejected tendered Instructions Nos. 7 and 9, he was deprived of his constitutional right to have his theory of the case presented to the jury.

An instruction embodying a defendant's theory of the case must be given by the trial court if the record contains any evidence to support the theory. People v. Nunez, 841 P.2d 261, 264 (Colo. 1992). The instruction must be given even if "the only supporting evidence is highly improbable testimony by the defendant." People v. Nunez, supra, 841 P.2d at 265; see People v. Saavedra-Rodriguez, 971 P.2d 223, 228 (Colo. 1998). "It is for the jury and not for the court to determine the truth of the defendant's theory." People v. Fuller, 781 P.2d 647, 651 (Colo. 1989).

Here, as we have concluded, the trial court did not err in rejecting defendant's tendered Instructions Nos. 7 and 9. Further,

the court gave a jury instruction embodying defendant's theory of the case:

Abraham Hagos admits that he was with [J.R.] and others on October 28, 1997, when [B.L.] was taken from his apartment. Abraham Hagos claims his conscious objective that night was to protect [B.L.] from [J.R.] and to act as a mediator between them. He claims his objective was not to get money back for himself or for [J.R.]

The court also gave an instruction on defendant's affirmative defense of abandonment of conspiracy. Therefore, the jury was adequately informed of defendant's theory of the case, and we perceive no error justifying reversal of the convictions.

III.

Defendant next contends that the trial court erred by rejecting his tendered special credibility instructions. We disagree.

Defendant's tendered Instructions Nos. 20 through 25 would have instructed the jury to consider the testimony of accomplices and compensated or immunized witnesses with greater caution than that of an ordinary witness. The trial court rejected these tendered instructions and found that a general credibility instruction was appropriate. We perceive no error.

Under Colorado law, special credibility instructions normally are to be avoided because they unduly focus the attention of jurors upon a particular witness. People v. Rubanowitz, 688 P.2d 231, 244 (Colo. 1984).

CJI-Crim. 4:06 states that the testimony of an accomplice should be acted upon “with great caution” when there is no other evidence than the testimony of that witness. A jury may convict on the uncorroborated testimony of an accomplice if it is instructed to review the testimony with great caution. People v. Martinez, 187 Colo. 413, 416, 531 P.2d 964, 965 (1975). However, status as an accomplice goes to credibility, not to competency, even when the accomplice has been promised immunity from prosecution for his testimony. People v. Martinez, supra. When there is corroboration of the testimony, it is not reversible error to refuse to give a special credibility instruction. People v. Martinez, supra, 187 Colo. at 417, 531 P.2d at 966. If the jury is given a standard credibility instruction, and the testimony is corroborated, that is sufficient. People v. Loggins, 709 P.2d 25, 28 (Colo. App. 1985); see also People v. Small, 631 P.2d 148, 161 (Colo. 1981).

Here, a number of witnesses testified who were alleged accomplices of defendant and who were immunized and compensated. The trial court gave the jury the general credibility instruction set forth in CJI-Crim. 3:06. The status of each of the subject witnesses, as an accomplice, and as immunized or compensated, was clear, and defendant cross-examined each such witness on his or her status and credibility. Further, each witness's testimony was corroborated by other witnesses and by physical or documentary evidence. Therefore, we perceive no error in the trial court's refusal to give defendant's special credibility instructions.

IV.

Defendant also contends that the trial court erred by failing to give the jury an instruction based on CJI-Crim. 7:01 concerning the prosecution's burden of proof with respect to defendant's affirmative defense of abandonment of conspiracy. We disagree.

Because defendant failed to request such an instruction or to object to the court's instructions on this basis, we review for plain error. See People v. Miller, supra; People v. Petschow, supra.

CJI-Crim. 7:01 states that the prosecution must prove the defendant's guilt beyond a reasonable doubt as to the affirmative

defense as well as to all the elements of the crime charged, and that if the jury is not convinced beyond a reasonable doubt of defendant's guilt after considering the evidence of the affirmative defense and all other evidence, it must return a verdict of not guilty.

In People v. Bielecki, 964 P.2d 598 (Colo. App. 1998), a division of this court held that the trial court's failure to give the jury an instruction based on CJI-Crim. 7:01 was not error because the instructions given by the court contained the same information as that pattern jury instruction. People v. Bielecki, supra, 964 P.2d at 608. The division concluded that, when viewed as a whole, the jury instructions "adequately informed the jury that the prosecution had to disprove the affirmative defense of insanity beyond a reasonable doubt." People v. Bielecki, supra, 964 P.2d at 608.

Here, the trial court gave the jury defendant's requested Instruction No. 25 concerning the affirmative defense of abandonment of conspiracy. The court did not give a specific instruction based on CJI-Crim. 7:01. However, the jury was instructed that abandonment is an affirmative defense to the conspiracy charges and that the prosecution had the burden of proof beyond a reasonable doubt as to all the elements of each

crime charged. Additionally, as in Bielecki, the elemental instructions on the conspiracy charges directed the jury that it could make a finding of guilt only without the affirmative defense of abandonment, as set forth in Instruction No. 25.

We conclude that when viewed as a whole, the instructions given by the trial court adequately informed the jury that the prosecution had to disprove the affirmative defense of abandonment beyond a reasonable doubt. Thus, it was not error, let alone plain error, for the court to fail to give an instruction based on CJI-Crim. 7:01. See People v. Bielecki, supra.

V.

Defendant contends that the trial court erred by not properly responding to the jury's questions concerning complicitor liability. We are not persuaded.

The jury was given Instruction No. 14 concerning complicitor liability:

A person is guilty of an offense committed by another person if he is a complicitor. To be guilty as a complicitor, the following must be established beyond a reasonable doubt:

1. A crime must have been committed.

2. Another person must have committed all or part of the crime.
3. The defendant must have had knowledge that the other person intended to commit all or part of the crime.
4. The defendant must have had the intent to promote or facilitate the commission of the crime.
5. The defendant must have aided, abetted, advised, or encouraged the other person in the commission or planning of the crime.

The jury was also given Instruction No. 27, a standard instruction concerning culpable mental states.

During deliberation, the jury sent the following questions to the trial court:

[W]e are stuck on the complicity instruction. If we find the person did not have the intent to commit a crime does the complicity instruction overrule that decision meaning if we have a reasonable doubt about the intent of the defendant but no reasonable doubt on the complicity instruction do we say he is guilty[?]

The court conferred with both counsel and asked for their input. The court properly determined that simply referring the jury back to the initial instructions was inadequate and proposed a response outlining complicity as an alternative form of liability and expanding on the culpability element. Defendant asked the court to wait until the next day to respond to the jury, but proposed that the answer to the question should be no, because every element had to

be proved beyond reasonable doubt. The court decided to respond to the jury at that time, but rewrote the culpability requirement at defendant's request. The court then gave the jury the following response to its questions:

Complicity is an alternative form of liability. A person may be guilty as a principal — that is, by committing a prohibited act with the required culpable mental state — by being a complicitor. But complicity also requires culpability, as described in Instruction No. 14. Under Instruction No. 14, you may find Defendant guilty as a complicitor only if you find that the prosecution has proved each of the five elements in that Instruction beyond a reasonable doubt. Among those five elements are some that require various kinds of culpability. Element number two requires that another person must have committed all or part of a crime; thus, that other person must have had the culpable mental state required of that particular crime. Element three requires that Defendant must have had knowledge that the other person intended to commit all or part of the crime. And finally, element four requires that Defendant must have intended to promote or facilitate the commission of the crime.

When a jury inquires about the meaning of a particular instruction, the court should provide a supplemental instruction sufficient to clarify the jury's uncertainty. Leonardo v. People, 728 P.2d 1252 (Colo. 1986); People v. Harding, 983 P.2d 29, 32 (Colo. App. 1998).

Section 18-1-603, C.R.S. 2005, states, “A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.” The two requirements for complicitor liability are that “(1) the complicitor has the culpable mental state required for the underlying crime committed by the principal; and (2) the complicitor assists or encourages the commission of the crime committed by the principal with the intent to promote or facilitate.” Grissom v. People, 115 P.3d 1280, 1284-85 (Colo. 2005)(quoting Bogdanov v. People, supra, 941 P.2d at 251).

We conclude that the court’s response, when read in conjunction with the court’s instruction on complicitor liability, adequately responded to the jury’s questions, as it encompassed the concept of alternative liability and both kinds of culpability necessary for complicitor liability. See Bogdanov v. People, supra, 941 P.2d at 254.

We also reject defendant’s assertion that the court erred by not defining the term “culpability” in its response to the jury. If a

word is one with which reasonable persons of common intelligence would be familiar, and its meaning is not so technical or mysterious as to create confusion in jurors' minds as to its meaning, an instruction defining it is not required. People v. Leonard, 872 P.2d 1325, 1329 (Colo. App. 1993).

VI.

Defendant next contends that the trial court reversibly erred by admitting other acts evidence under CRE 404(b) for the limited purpose of showing defendant's motive, by failing to give a contemporaneous limiting instruction at the time such evidence was admitted, and by not properly limiting the jury's use of the challenged evidence in the written instructions. We disagree.

A.

We first reject defendant's contention that the trial court erred by admitting evidence of other acts under CRE 404(b).

The prosecution initially asked that evidence be admitted that defendant was involved in the distribution of illegal narcotics and that R.L. had stolen drugs and \$70,000 in cash from him about a week before the kidnapping. The prosecution maintained this evidence was admissible either as *res gestae* or under CRE 404(b).

The trial court found that the evidence was not *res gestae*, but that it met the test for admission under CRE 404(b).

“The Colorado Rules of Evidence strongly favor the admission of relevant evidence. A trial court has substantial discretion in deciding the admissibility of evidence, and its ruling will not be disturbed absent an abuse of discretion.” People v. McGraw, 30 P.3d 835, 838 (Colo. App. 2001). “An abuse of discretion occurs only if the trial court’s evidentiary ruling is manifestly arbitrary, unreasonable, or unfair.” People v. McGraw, supra, 30 P.3d at 838.

CRE 404(b) states:

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

Generally, unless provided otherwise, all relevant evidence is admissible. CRE 402; People v. Spoto, 795 P.2d 1314, 1318 (Colo. 1990). However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. CRE 403; People v. Spoto, supra.

For other act evidence to be admissible under CRE 404(b), it must (1) relate to a material fact, which is of consequence to the determination of the action; (2) be logically relevant tending to make the existence of the material fact more or less probable; (3) be relevant independent of the inference that the defendant has a bad character and acted in conformity with that character in committing the crime; and (4) have probative value that is not substantially outweighed by the danger of unfair prejudice. People v. Spoto, supra, 795 P.2d at 1318; People v. McGraw, supra, 30 P.3d at 838.

Before admitting other act evidence, the trial court must be satisfied by a preponderance of the evidence that the other acts occurred and the defendant committed the acts. People v. Garner, 806 P.2d 366 (Colo. 1991); People v. McGraw, supra.

Here, the trial court carefully went through the Spoto analysis and concluded that the prosecution's proposed evidence was admissible under CRE 404(b). The court first found the evidence that defendant was dealing drugs, and that he had drugs and \$70,000 in a safe that were allegedly stolen by B.L.'s brother, was related to the material fact of motive. Next, the court found the evidence was logically relevant because the whole reason for the

kidnapping was to locate B.L.'s brother (and the money and drugs). Third, the court found the logical relevance of the evidence was independent of propensity, because it was not being admitted to demonstrate defendant's bad character as a drug dealer, but to show his motive for the charged offenses. Finally, the court found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The court found that probative value was very high because it explained why defendant did not report his stolen goods to the police, but took matters into his own hands, which outweighed the possible risk that it would be taken as evidence of propensity.

We perceive no abuse of discretion in the court's analysis and its decision to admit the challenged evidence under CRE 404(b). Further, we agree with the People that a finding that defendant committed the other acts was implicit in the trial court's ruling that the evidence was admissible. See People v. McGraw, supra.

We also conclude that the trial court did not abuse its discretion by admitting evidence of items, including drugs and cash, found during the search of the apartment shared by defendant, J.R., and D.C. in December 1997. Defendant did not

object to this testimony when it was proffered by the prosecution, and we agree with the People that the presence of drugs and cash at the apartment shortly after the crimes charged here was cumulative of and corroborated by other properly admitted evidence that defendant was a drug dealer and probative of his motive for the crimes charged in this case. The evidence about the drug arrest, even if improperly admitted, formed only a small part of the testimony at trial and did not add any new prejudicial information about defendant's involvement with drugs. Hence, its admission did not affect defendant's substantial rights.

B.

Defendant also argues that the trial court committed reversible error by failing to give a contemporaneous limiting instruction at the time the CRE 404(b) evidence was admitted and by giving an inadequate limiting instruction in the written instructions after the close of evidence. We perceive no reversible error.

When the trial court made its pretrial ruling that the evidence could come in under CRE 404(b) to show motive, the court stated that it intended to give a contemporaneous limiting instruction at

trial. However, when the evidence was admitted, the trial court did not give such an instruction, nor did defendant request one or object to the trial court's failure to give an oral instruction to the jury.

In its written instructions to the jury, the trial court instructed the jury as follows:

Members of the Jury, certain evidence may be admitted for a limited purpose and for a particular purpose and for no other.

Testimony or evidence that you heard concerning the Defendant selling illegal drugs is such evidence. That evidence may be used as evidence for the limited purpose of showing motive. And you should consider it for no other purpose.

This stock jury instruction was modeled on CJI-Crim. 2:02.

When other act evidence qualifies for admission under one of the exceptions to the general rule of exclusion, the trial court should instruct the jury at the time as to the limited purpose for which the evidence is being received and should repeat the limiting instruction in the general jury instructions. Section 18-6-801.5(5), C.R.S. 2005; People v. Garner, supra, 806 P.2d at 370.

However, if the trial court neglects to give a contemporaneous oral limiting instruction, plain error is not automatically established. People v. Moore, 117 P.3d 1, 3 (Colo. App. 2004).

Plain error occurs when an error so undermines the fundamental fairness of a trial as to cast serious doubt on the reliability of the judgment of conviction. People v. Moore, supra, 117 P.3d at 4.

Giving the proper instruction at a different time, such as in the written instructions at the close of the evidence, can prevent the court's failure to give a contemporaneous limiting instruction from casting a serious doubt on the reliability of the defendant's conviction. People v. Moore, supra.

Although it is the better practice to give a contemporaneous limiting instruction, where, as here, the defendant does not request such a limiting instruction, the failure to do so sua sponte is not reversible error. See People v. Copeland, 976 P.2d 334, 338 (Colo. App. 1998), aff'd, 2 P. 3d 1283 (Colo. 2000); People v. Harris, 892 P.2d 378, 382 (Colo. App. 1994).

Here, because the court's written instruction closely followed CJI-Crim. 2:02, we conclude that the court's failure to give a

contemporaneous oral instruction was not reversible error, as the jury was made aware of the limited purpose of the evidence.

We also reject defendant's assertion, made for the first time on appeal, that the trial court had a duty to define the term "motive" in its written instruction and committed plain error by not doing so sua sponte. Contrary to defendant's contention, "[M]otive' is a word with which reasonable persons of common intelligence would be familiar and not so technical as to create confusion in jurors' minds as to its meaning. Hence, the trial court was not required to define the word for the jury." People v. Leonard, *supra*, 872 P.2d at 1329.

VII.

Defendant contends that the trial court erred by admitting into evidence a cassette tape containing a portion of a conversation between J.R. and defendant, in which they discussed the kidnapping of B.L., and a transcript of that portion of the conversation. We are not persuaded.

Prior to trial, the prosecution indicated its intent to introduce a portion of the audiotaped telephone conversation between defendant and J.R. in which they discussed the kidnapping of B.L. Defendant objected on the grounds of hearsay, lack of probative

value, prejudice, CRE 404(b), and CRE 608. The trial court overruled defendant's objections, finding that (1) the conversation was relevant and probative because it discussed and was connected to the crimes alleged in the case; (2) the conversation was not CRE 608 character evidence or CRE 404(b) prior bad acts evidence; (3) the statements on the tape were not hearsay, but were admissible as admissions by a party-opponent; and (4) the probative value of the conversation outweighed any unfair prejudice.

A trial court has substantial discretion when determining the admissibility of evidence, and a reviewing court will not overturn the ruling absent an abuse of discretion. People v. Gibbens, 905 P.2d 604, 607 (Colo. 1995). To constitute an abuse of discretion, the court's action must be manifestly arbitrary, unreasonable or unfair. People v. Gibbens, supra.

A.

Defendant first argues that the trial court erred by overruling his hearsay objection to the statements on the tape. We disagree.

Under CRE 801(d)(2), an admission by a party opponent is not hearsay. The statement must be offered against a party and be either the party's own statement, CRE 801(d)(2)(A), or an adoptive

admission, that is, “a statement of which the party has manifested an adoption or belief in its truth.” CRE 801(d)(2)(B).

Underlying the adoptive admission exemption from normal hearsay concepts is an assumption that it would be reasonable to expect any person who hears a statement accusing him or her of misconduct to deny it. People v. Green, 629 P.2d 1098, 1100 (Colo. App. 1981). In determining whether a defendant has adopted another’s incriminating statement, a trial court should consider whether (1) the statement is such that an innocent defendant would normally be induced to respond; (2) the defendant heard and understood the statement made in his presence; and (3) he could have denied or objected to the statement without emotional or physical impediment. People v. Sweeney, 78 P.3d 1133, 1135 (Colo. App. 2003). Although adoptive admissions are troubling in criminal cases because one must draw an inference from a defendant’s silence, in a noncustodial setting silence in the face of an accusation of wrongdoing gains probative weight when it occurs in circumstances where the silent party could be expected to disagree or object. People v. Sweeney, supra.

Here, in the conversation on the tape, J.R. asked defendant whether he was going to handcuff him, and then if he was going to “pull a Billy,” apparently referring to B.L. Defendant’s repeated response was, “Am I like that?”

Defendant’s own statements were admissions by a party-opponent and, thus, were properly admitted under CRE 801(d)(2)(A). J.R.’s statements were properly admitted as an adoptive admission under CRE 801(d)(2)(B). Defendant did not deny the truth of those statements, and he obviously heard them. Normally, he would have been expected to deny J.R.’s assertions, and he had no constraining factors preventing him from doing so. Thus, we conclude J.R.’s statements qualified as adoptive admissions.

J.R.’s statements were also properly admitted for the purpose of putting defendant’s responses into context, making them intelligible to the jury, and making them recognizable as admissions. See People v. Isom, ___ P.3d ___ (Colo. App. No. 03CA2518, Dec. 1, 2005)(there is no right of confrontation or hearsay preclusion when statements are offered to provide context

for the declarant's statements); see also United States v. Wills, 346 F.3d 476, 490 (4th Cir. 2003).

We thus conclude the trial court did not abuse its discretion by admitting the statements on the tape over defendant's hearsay objection.

B.

Defendant also contends that certain of his comments on the tape were irrelevant, were unduly prejudicial under CRE 403, and should have been redacted. We perceive no abuse of discretion.

The trial court weighed the prejudicial and probative value of the tape and found that, as redacted by the prosecution, the probative value outweighed any unfair prejudice. When defendant renewed his CRE 403 objection at trial concerning certain of his comments on the tape, the court found that it was not appropriate to require the prosecution to shorten and redact the tape further and narrow the probative value to reduce prejudicial impact, given its previous finding that the probative value of the evidence outweighed any unfair prejudice. Defendant did not ask the trial court to give a cautionary instruction to minimize or nullify any further prejudicial effect of defendant's comments.

CRE 403 requires that a trial court “apply its discretionary authority . . . to ensure that the probative value of the evidence is not substantially outweighed by unfair prejudice.” Masters v. People, 58 P.3d 979, 992 (Colo. 2002)(quoting People v. Shreck, 22 P.3d 68, 79 (Colo. 2001)). We assume the maximum probative weight of the admitted testimony and its minimum prejudicial value. Masters v. People, supra, 58 P.3d at 993. The trial court is accorded considerable discretion in this determination, and we will not disturb its ruling on appeal absent an abuse of discretion. Masters v. People, supra, 58 P.3d at 1001.

Under the circumstances here, we perceive no abuse of discretion by the trial court.

C.

Defendant argues for the first time on appeal that his constitutional right to confront and cross-examine witnesses against him was violated by the admission of J.R.’s statements on the tape. We disagree.

A defendant’s right to confront the witnesses against him is guaranteed by both the Sixth Amendment of the United States Constitution and article II, section 16 of the Colorado Constitution,

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); People v. Fry, 92 P.3d 970, 974 (Colo. 2004). However, a defendant may forfeit his or her right of confrontation by misconduct, and may not benefit from his or her wrongful prevention of future testimony from a witness. Crawford v. Washington, *supra*; People v. Moore, *supra*, 117 P.3d at 5 (no confrontation violation where victim was unavailable to testify because of her death, which was the result of defendant's actions).

In the present case, J.R. was unable to testify because he had been killed in November 1998. Contrary to defendant's argument, the record demonstrates that defendant was convicted by a jury of first degree murder for the death of J.R. Accordingly, the admission of the tape recording did not violate defendant's confrontation rights.

VIII.

Defendant contends cumulative error mandates reversal of his convictions. We disagree.

A new trial may be ordered when the aggregate effect of numerous formal irregularities denied the defendant a fair trial. However, when, as here, there is no individual error or the

individual errors do not show an absence of a fair trial, reversal for cumulative error is not justified. People v. Carlson, 72 P.3d 411, 420 (Colo. App. 2003).

IX.

Finally, defendant asserts that the trial court erred by denying his motion for a new trial. We disagree.

Crim. P. 33(c) allows the trial court to grant a defendant a new trial if required in the interests of justice. The trial court's decision whether to grant or deny a new trial will only be disturbed if the trial court abused its discretion. People v. Ramirez, 18 P.3d 822, 826 (Colo. App. 2000).

All defendant's arguments for a new trial have been addressed and rejected on appeal, and thus we perceive no error in the trial court's denial of defendant's motion for a new trial.

The judgment is affirmed.

JUDGE ROTHENBERG and JUDGE DAILEY concur.