

Summaries of Published Opinions

April 5, 2018

2018 COA 46. No. 15CA0413. *People v. Fortson*. *Sexual Assault on a Child—Prosecutorial Misconduct—Character Evidence—Other Acts Evidence.*

A jury found Fortson guilty of one count of sexual assault on a child and one count of sexual assault on a child as a part of a pattern of abuse.

On appeal, Fortson contended that the prosecutor improperly referenced and elicited evidence of other acts of sexual assault and sexual misconduct for propensity purposes and that she did so without first seeking to admit the evidence, presenting an offer of proof, or obtaining a ruling. The prosecutor committed misconduct when she repeatedly introduced, referenced, and argued to the jury that defendant previously committed uncharged sexual assaults against four other girls and the victim. The prosecutor did not seek the admission of the alleged uncharged sexual assaults for a proper purpose and improperly used this evidence for propensity purposes. The prosecutor's pervasive misconduct undermined the fundamental fairness of the trial and cast serious doubt on the reliability of the judgment.

The judgments of conviction were reversed and the case was remanded.

2018 COA 47. No. 15CA1175. *People v. Short*. *Sexual Assault on Child—Testimony—Credibility—Rule of Completeness—Exculpatory Statement—Hearsay Exceptions—Sentence.*

A jury found Short guilty of sexual assault on a child and sexual assault on a child as a pattern of abuse.

On appeal, Short contended that the testimony of three witnesses improperly bolstered

the victim's credibility. Short did not object to any of this testimony. It was not improper for the therapist to testify as an expert as to the typical demeanor and behavioral traits displayed by a sexually abused child. It was also not improper for the detective to testify concerning his observations about child victim disclosures; he rendered no opinion about whether a child's difficulty in disclosing something made it more or less likely that he or she was telling the truth. Finally, although the grandmother's testimony that the victim "normally would not lie about something like that" was improper, it did not warrant reversal.

Short also argued that the trial court erroneously compelled him to forgo admitting an exculpatory part of a statement he gave to the police by telling him that, if that part of the statement was admitted, the prosecution would be permitted to expose the jury to the fact that he had previously been convicted of a felony. The trial court properly determined that Short's otherwise inadmissible self-serving hearsay was admissible under the rule of completeness to qualify, explain, or place into context the evidence proffered by the prosecution. However, a defendant's exculpatory statement to the police admissible under the rule of completeness is not subject to impeachment under CRE 806. Although the trial court erred, the error was harmless.

Short also contended and the People conceded that only one judgment of conviction and sentence should have been imposed in this case. The trial court incorrectly entered separate convictions for sexual assault on a child and sexual assault on a child as a pattern of abuse. The pattern of abuse count acts only as a sentence enhancer.

The judgment was affirmed in part and

vacated in part, and the case was remanded with directions.

2018 COA 48. No. 16CA0826. *People v. Henry*. *Restitution—Victim Compensation Board—Rebuttable Presumption—In Camera Review.*

A jury convicted defendant of third degree assault. The trial court imposed a two-year jail term and ordered defendant to pay \$900 in restitution. Defendant objected to the amount, requesting additional documentation to support the restitution request and a hearing. The court denied the request for additional documentation and granted the hearing request. After an evidentiary hearing, the court upheld its order regarding the restitution amount because defendant failed to offer any evidence rebutting the compensation board director's testimony.

On appeal, defendant contended that the record did not contain sufficient evidence to support the trial court's decision to order him to pay \$230 in restitution to the compensation board for the victim's lost wages. CRS § 18-1.3-603(10)(a) creates a rebuttable presumption: once the compensation board has established that it paid a victim a set amount, the defendant has the burden of introducing evidence to show that the amount paid was not the direct result of his criminal conduct. Here, the prosecution proved by a preponderance of the evidence that the victim had lost \$230 in wages and that the compensation board had paid that amount to her, and defendant did not rebut the presumption.

Defendant also asserted that the trial court should have conducted an in camera review of the compensation board's records. Because defendant's request for an in camera review was speculative and not based on an evidentiary hypothesis, the court did not err in denying

defendant's request for an in camera review. The order was affirmed.

2018 COA 49. No. 17CA0405. Preferred Professional Insurance Co. v. The Doctors Company. *Medical Malpractice—Primary Insurance Policy—Excess Insurance Policy—Equitable Subrogation—Bad Faith.*

A medical malpractice suit was filed against Dr. Singh and other parties. The Doctors Company (TDC), the primary insurer, defended Dr. Singh in the suit as required by its primary liability policy. Preferred Professional Insurance Company's (PPIC) insurance policy was an "excess policy," which would cover any losses that exceeded TDC's \$1 million coverage up to an additional \$1 million. As an excess insurer, PPIC did not have any duty to defend Dr. Singh in the suit. The plaintiff in the medical malpractice suit offered to settle the case with Dr. Singh for \$1 million, the amount of TDC's policy limits. Dr. Singh conveyed his desire to accept the settlement offer to both insurers, but TDC declined to settle the case. PPIC told Dr. Singh he should accept, and it paid the \$1 million settlement. PPIC then filed suit against TDC for equitable subrogation to recover the amount paid. The district court granted summary judgment in PPIC's favor without addressing TDC's argument that PPIC was required to prove that TDC refused to settle in bad faith.

On appeal, TDC contended that the district court erred as a matter of law because an equitable subrogation claim brought by an excess insurer against the primary insurer to recover the amount paid in settlement can only be derivative of the insured's rights. Thus, PPIC's refusal to plead and present evidence that TDC acted in bad faith in declining to settle required dismissal of PPIC's claim. An excess insurer seeking recovery under equitable subrogation for a primary insurer's failure to settle a case against their mutual insured "steps in the shoes of the insured" and must plead and prove the primary insurer's bad faith. Here, without an assertion that TDC acted in bad faith, PPIC's equitable subrogation claim is not legally viable.

The order granting summary judgment for PPIC was reversed and the case was remanded for entry of judgment of dismissal in TDC's favor.

2018 COA 50. No. 17CA0952. People in re C.Y. *Dependency and Neglect—Recusal—Disqualification.*

In this dependency and neglect proceeding, during the termination hearing, the judge realized she had served as a guardian ad litem (GAL) on a different case involving mother's oldest child. The judge declined to recuse herself from the case over mother's objection and terminated mother's parental rights.

On appeal, mother contended that the judge erred by not recusing herself from the termination hearing based on her having served as the GAL of mother's older child in 2005. The Code of Judicial Conduct requires judges to disqualify themselves in any proceeding in which their impartiality might reasonably be questioned. Here, both the GAL and the Department of Human Services discussed the 2005 case and urged the court to rely on it when ruling on the termination motion, which the court did. Under these circumstances, the judge created the appearance of impropriety by presiding over the case and abused her discretion by not recusing herself.

The judgment was reversed and the case was remanded for a new termination hearing before a different judicial officer.

April 19, 2018

2018 COA 51. No. 14CA1181. People v. Figueroa-Lemus. *Deferred Judgment—Crim. P. 32(d)—Jurisdiction—Immigration Consequences—Ineffective Assistance of Counsel—Withdrawal of Plea.*

As relevant to this appeal, defendant pleaded guilty to possession of a schedule II controlled substance. The parties stipulated to a two-year deferred judgment. The court accepted the deferred judgment and sentenced defendant to two years of probation. About five months later, defendant filed a Crim. P. 32(d) motion to withdraw his guilty plea, arguing that his counsel failed to advise him of the clear immigration consequences of the plea and claiming that if he had been properly advised, he would have rejected the offer. After an evidentiary hearing, the district court denied the motion.

On appeal, the People argued that the Court

of Appeals did not have jurisdiction to review the trial court's order because the motion challenged a non-final judgment. Although a deferred judgment may not be subjected to either Crim. P. 35 or direct review while it is still in effect, a defendant may challenge an unrevoked deferred judgment under Crim. P. 32(d). Further, the Court had jurisdiction to review the district court's denial of a motion to withdraw a guilty plea because that motion challenged a deferred judgment still in effect.

Defendant argued that his guilty plea was not made knowingly, voluntarily, and intelligently because his counsel never informed him of the clear immigration consequences of the plea. Here, the record supports the district court's finding that defendant's criminal attorney and immigration attorney both told defendant on multiple occasions that a guilty plea to a drug felony would result in deportation. Because counsel's performance was not deficient, the district court did not abuse its discretion when it denied the Crim. P. 32(d) motion.

Defendant also argued that counsel should have advised him that he would be held in custody during the removal proceeding. The Court found no authority that would require counsel to give this advice, and defendant failed to explain how such an advisement would have affected his decision to accept the plea offer.

The order was affirmed.

2018 COA 52. No. 14CA1392. People v. Margerum. *Assault—Menacing—Sixth Amendment—Confrontation Clause—Cross-Examination—Probationary Status.*

Defendant was alone in a friend's apartment with the friend's girlfriend, E.S. When E.S. rejected defendant's sexual advances, defendant became angry and forced E.S. onto the bed, climbing on top of her and kissing and groping her. Then defendant tried to remove E.S.'s clothing. Eventually he stopped and let E.S. leave the apartment. Defendant then texted his sister, T.M., to come to the apartment. He told her he had a bag of clothes he wanted to give her. T.M. went to defendant's apartment with her son. Without warning, defendant grabbed her around the neck and began choking her. Defendant then pinned T.M. underneath him

and began groping her body. T.M. grabbed a glass candleholder and hit defendant on the back of the head, which allowed her to escape with her son. A jury convicted defendant of unlawful sexual contact without physical force as to E.S., and third-degree assault and menacing with a deadly weapon as to T.M.

On appeal, defendant argued that the trial court violated his rights under the Confrontation Clause by not allowing him to cross-examine E.S. concerning her probationary status. A witness's probationary status alone does not implicate a defendant's constitutional right to cross-examine the witness on potential bias or motive. Rather, some logical connection between the probationary status and the witness's motive for testifying is required. Here, at the time of defendant's trial, E.S. was serving a one-year probation in another county for a forgery conviction. Defendant pointed to no other facts that would logically connect E.S.'s probationary status with her testimony at his trial. Accordingly, the trial court did not err in denying defendant's request to cross-examine E.S. regarding her probationary status because these facts do not show that E.S.'s testimony might have been influenced by a promise or expectation of leniency in exchange for favorable testimony.

Defendant next argued that there was insufficient evidence to support his menacing conviction. He contended that (1) the menacing statute requires that a defendant place the victim in fear before any actual injury, and (2) the conduct underlying his menacing conviction cannot be the same single act as the conduct underlying his assault conviction. The statute does not require that the victim be placed in fear before she is injured; it is thus irrelevant whether the victim is injured before, during, or after she is placed in fear of imminent bodily harm, if defendant's actions place or attempt to place her in such fear. Defendant presented no basis to depart from established law that a person can commit two crimes with one act. The evidence supports defendant's menacing conviction.

The judgment was affirmed.

2018 COA 53. No. 15CA0121. People v. Bryant. *Assault—Expert Testimony—Jury*

Instructions—Miranda Warning—Voluntary Statements—Evidence.

While high on PCP, defendant assaulted two teenagers. After defendant's arrest, police officers interviewed him and he admitted that he was under the influence of PCP, which he initially referred to as "sherm." Defendant told officers that they could retrieve the substance from his sock, which they did. Before trial, defendant filed several motions to suppress. The court denied all of the motions, ruling that defendant's statements were made voluntarily and that he had validly waived his *Miranda* rights. Defendant was convicted of unlawful possession of a controlled substance and two counts of third degree assault.

On appeal, defendant contended that the trial court erred by ruling that his statements to the police were voluntary. He argued that the police exploited his intoxicated state during their interrogation. Here, by the time they reached the police station, defendant was calm, coherent, and cooperative. The interview lasted no more than 15 minutes; there was no evidence that defendant's demeanor changed during the interview; and there was no evidence of psychological coercion. The trial court did not err by finding that defendant's statements to police were voluntary.

Defendant also contended that his statements should have been suppressed because police failed to obtain a valid waiver of his *Miranda* rights. Defendant contended that he was so intoxicated and confused when he was advised of his *Miranda* rights that he did not make a knowing and intelligent waiver of those rights. The record supports the trial court's finding that defendant was not intoxicated when he waived his *Miranda* rights. The trial court did not err by finding that defendant validly waived his *Miranda* rights.

Defendant also contended that the trial court reversibly erred by allowing Officer Fink to testify as a lay witness regarding the meaning of the term "sherm." This testimony was not based on Officer Fink's personal knowledge or investigation of defendant's case, but was based on his training and experience as a police officer. Although the trial court erred by allowing Officer Fink to testify as a lay witness,

the error was harmless because the testimony was cumulative of other evidence presented at trial that served to prove the "knowingly" element of the possession charge.

Defendant next contended that the trial court erred by improperly instructing the jury. First, the instruction that voluntary intoxication was not a valid defense to the charged crimes could not have confused the jury, particularly because it was a brief and correct statement of the law. Second, the pattern instruction on mens rea was legally correct and informed the jury to apply a subjective standard rather than on objective standard. There was no error in the manner in which the trial court instructed the jury.

The judgment was affirmed.

2018 COA 54. No. 15CA1816. People v. Butcher. *Restitution—Post-Judgment Interest—Crim. P. 52(b)—Plain Error.*

A jury convicted Butcher of two counts of securities fraud and two counts of theft from at-risk adults, and he was ordered to pay restitution.

On appeal, Butcher argued that the trial court erred in its award of prejudgment and post-judgment interest in its amended restitution order. The Court of Appeals reviewed the appeal for plain error and found that the trial court erred by calculating post-judgment interest from the date of conviction rather than from the date of the operative restitution order. However, although this error was obvious, it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

The Court exercised its discretion under Crim. P. 52(b) and affirmed the order.

2018 COA 55. No. 16CA1909. Paradine v. Goei. *Wage Claim Act—Corporations—Piercing the Corporate Veil.*

Plaintiff served as the chief financial officer and vice president of administration for Aspect Technologies, Inc. (Aspect), a corporation. Defendant Goei was the chief executive officer. Plaintiff sued Goei and Aspect, raising a claim under the Colorado Wage Claim Act (the Act), for fraud, and for breach of contract. He alleged that defendants owed him unpaid wages. The trial court granted Goei's motion for judgment

on the pleadings and dismissed the three claims against him individually with prejudice.

On appeal, plaintiff asserted that he was not barred from piercing the corporate veil and holding Goei personally liable under the Act. The Act does not categorically bar a plaintiff from piercing the corporate veil to hold an individual liable for unpaid wages. Plaintiff's fraud claim made allegations in support of his request that the trial court pierce the corporate veil to impose liability on Goei, and plaintiff's breach of contract claim incorporated the allegations in the fraud claim. Because plaintiff pleaded sufficient facts to establish a plausible claim that plaintiff could pierce the corporate veil, the trial court erred when it granted Goei's motion to dismiss on the pleadings.

The judgment was reversed and the case was remanded with directions.

2018 COA 56. No. 17CA0098. Peña v. American Family Mutual Insurance Co. Uninsured Motorist—Denial of Liability—Denial of Coverage—CRCP 12(b)(5) Dismissal.

Peña was involved in a three-car collision. Both Peña and Garner, another driver involved in the accident, were insured by defendant American Family Mutual Insurance Company (American Family). Peña sent a letter to American Family asserting a claim under the uninsured motorist provisions of her policy. American Family denied Peña's claim, asserting that Garner was not responsible for the damage to her vehicle and Garner had coverage at the time of the accident, so Peña's uninsured motorist property damage (UMPD) provision would not apply.

Peña sued Garner and American Family in separate actions. In this action, she sued American Family under CRS § 10-3-1115 for the unreasonable delay and denial of benefits due under the UMPD provisions of her policy. American Family moved to dismiss, arguing that Peña's complaint failed, as a matter of law, to state a claim upon which relief could be granted because Peña's UMPD coverage applied only if American Family, as Garner's insurer, denied coverage, rather than liability, for Garner in connection with the accident. The district court agreed with this interpretation of

Peña's policy and the distinction made between denial of coverage and denial of liability. But because American Family had only denied liability and the issue of liability had not yet been determined, the court concluded that Peña's UMPD coverage did not apply at that point and the lawsuit was premature. The district court dismissed the case without prejudice.

On appeal, Peña contended that the district court erred in dismissing her case. She argued that the district court erred in not considering whether American Family unreasonably delayed or denied her claim before dismissing her action. Because American Family denied liability but not coverage, her policy's UMPD provision was inapplicable, and there were no benefits that could have been delayed or denied. Peña had no claim as a matter of law. The district court's determination that Peña's lawsuit was premature was in error because Peña will never have a claim against American Family under her policy for unpaid UMPD benefits from the accident; Garner's insurer has not denied coverage, which is the circumstance that would trigger Peña's UMPD coverage. If Garner is ultimately found liable, Peña will have a claim against American Family under the liability provisions of his policy.

The judgment was affirmed.

2018 COA 57. No. 17CA0404. People in re L.M. Dependency and Neglect—Juvenile Court—Termination of Parent-Child Legal Relationship.

The juvenile court found by a preponderance of the evidence that father had sexually abused L.M. and that M.M. was suffering secondary trauma as a result of the abuse. The court adjudicated L.M. and M.M. dependent and neglected. The court granted temporary custody to mother and prohibited father from having any contact with the children during the pendency of the case.

Father's treatment plan was predicated on his guilt, but he was later acquitted in the criminal case. The juvenile court could not find that the assault allegations had been established by clear and convincing evidence and further concluded that it could not discount the possibility that no abuse occurred. Even so, the juvenile court terminated father's parental rights, finding there were no less drastic alternatives because

the children continued to experience trauma specific to father, which he did not recognize.

On appeal, father challenged the finding that there were no less drastic alternatives to terminating his parental rights. When considering termination under CRS § 19-3-604(1)(c), the court must also consider and eliminate less drastic alternatives. The determination of whether there is a less drastic alternative to termination is influenced by a parent's fitness to care for his or her child. Here, there is no indication in the record that father was offered treatment or a path to becoming a fit parent other than to acknowledge sexual abuse of L.M. It was error to terminate his parental rights.

Although not raised on appeal, the Court of Appeals also determined that the juvenile court failed to make the required inquiry of father under the Indian Child Welfare Act.

The judgment was reversed and the case was remanded with instructions that before considering termination of parental rights, the court must adopt an appropriate treatment plan under CRS § 19-3-508(1)(e)(I) that relates to the children's trauma and is reasonably calculated to render father a fit parent. If the court again considers termination of father's parental rights, it must confirm whether he knows or has reason to know or believe that the children are Indian children.

2018 COA 58. No. 17CA0460. People in re E.R., a/k/a E.M. Dependency and Neglect—Admissibility of Evidence under CRE 803(4)—Indian Child Welfare Act.

The child was born prematurely and spent six weeks in the hospital. The Mesa County Department of Human Services (Department) sought and received emergency custody after the hospital reported that it could not locate his parents to take him home. The Department later filed a petition in dependency and neglect. At a shelter hearing, the court granted the Department's request to return the child to his parents' care under the Department's supervision.

Three months later the court held an adjudicatory trial. As the sole basis for adjudication, the court found that the child had tested positive for a schedule II controlled substance at birth

and that the positive test did not result from mother’s lawful use of prescribed medication. The court relied on testimony from a physician specializing in neonatal care who had cared for the child immediately after his birth.

On appeal, mother argued that certain test results to which the child’s physician testified were inadmissible hearsay under CRE 803(4). CRE 803(4) creates a hearsay exception for statements that are made for purposes of medical diagnosis or treatment; describe medical history, symptoms, or the inception or cause of symptoms; and are reasonably pertinent to diagnosis or treatment. Here, the testifying physician was qualified, without objection, as an expert in neonatology and pediatrics. He gave comprehensive testimony regarding the child’s symptoms and treatment and mother’s positive toxicology screen for methamphetamine. The physician’s testimony conformed to the requirements of CRE 803(4).

The Court also rejected mother’s contention that even if the test results were admissible it was error for the trial court to rely on them because they were only admitted as the basis of the expert’s testimony under CRE 703, not as substantive evidence. The trial court admitted the results under both CRE 803(4) and 703 and they were therefore substantive evidence on which the court could rely to conclude that the child had testified positive for a controlled substance at birth.

Mother also argued that the trial court erred when it determined that the Indian Child Welfare Act (ICWA) does not apply to this proceeding because the child had been returned to mother’s home. The ICWA applies to a child custody proceeding even when, following a shelter hearing, the child is returned to the mother’s home, because the hearing could have resulted in foster care placement. The trial court did not conduct the proper ICWA inquiry.

The part of the judgment adjudicating the child dependent or neglected was affirmed. The dispositional order was reversed and the case was remanded for the purpose of conducting a proper ICWA inquiry.

2018 COA 59. No. 17CA0634. Franklin Drilling and Blasting Inc. v. Lawrence Construction

Co. Construction Law—Public Works Trust Fund Statute—Civil Theft Statute—Directed Verdict—Culpable Mental State.

Lawrence Construction Company (Lawrence) was the general contractor on a Colorado Department of Transportation (CDOT) road project. Franklin Drilling and Blasting Inc. (Franklin) was a subcontractor. Lawrence was paid in full by CDOT but refused to pay Franklin. Franklin sued Lawrence on a variety of claims, and all but the claim for civil theft were arbitrated in favor of Franklin.

Following arbitration, the parties tried the civil theft claim to the court. Franklin alleged that Lawrence violated the Public Works Trust Fund statute (trust fund statute). The trial court granted Lawrence’s motion for directed verdict, finding that Franklin had not proved that Lawrence intended to permanently deprive Franklin of the monies it was owed. The court also awarded Lawrence costs.

Franklin appealed the judgment in favor of Lawrence on the civil theft claim and the costs awarded to Lawrence. The Court of Appeals first concluded that CRCP 50 is unavailable when a trial is to the court. Instead, the governing rule is CRCP 41(b). Under that standard, the court must find that upon the facts and the law the plaintiff has shown no right to relief.

As relevant here, the theft statute, CRS § 18-4-401(1), provides two ways that Lawrence could possess the culpable mental state required for civil liability: knowing use (CRS § 18-4-401(1)(b)), or intent to deprive (CRS § 18-4-401(1)(a)). On the knowing use element, the Court focused on the “res” created when the government entity (CDOT) pays monies to the contractor to be held in trust for its subcontractors and suppliers. When the res is exhausted before payment to the subcontractor, a violation of the trust fund statute, and perhaps the civil theft statute, may be established. Here, the evidence Franklin presented at trial established that at various relevant times the bank account into which Lawrence deposited the CDOT payments had a zero or negative balance. The trial court’s findings do not resolve the “knowingly uses” alternative mental state, and the trial court erred by not addressing this element of the civil theft claim.

Franklin also argued that the trial court’s ruling in Lawrence’s favor regarding the intent to deprive element was unsupported by the record. The trial court made extensive findings regarding Lawrence’s intent to permanently deprive. Reasonable minds could differ about whether Franklin proved that Lawrence intended to permanently deprive Franklin of the CDOT funds, so the Court could not conclude that the trial court findings and conclusion were “so manifestly against the weight of evidence as to compel a contrary result.”

The Court denied Franklin’s request for attorney fees because it did not enter judgment in Franklin’s favor.

The judgment was affirmed to the extent the trial court determined that Franklin failed to prove Lawrence’s culpable mental state under CRS § 18-4-401(1)(a). It was reversed and the case was remanded with directions for the trial court to determine whether Lawrence possessed the culpable mental state defined by CRS § 18-4-401(1)(b). **CL**

These summaries of published Court of Appeals opinions are written by licensed attorneys Teresa Wilkins (Englewood) and Paul Sachs (Steamboat Springs). They are provided as a service by the CBA and are not the official language of the Court; the CBA cannot guarantee their accuracy or completeness. The full opinions, the lists of opinions not selected for official publication, the petitions for rehearing, and the modified opinions are available on the CBA website and on the Colorado Judicial Branch website.