

# Summaries of Published Opinions

July 12, 2018

**2018 COA 94. Nos. 14CA2506 & 14CA2511. People v. Liggett.** *Competency to Proceed—Stay of Appellate Proceedings—Jurisdiction—Restoration Proceedings—Right to Counsel—Waiver.*

This is a direct appeal of two cases, first degree murder after deliberation and revocation of probation (based on the murder conviction). Based on Liggett's incompetence, his counsel requested an indefinite stay of the appellate proceedings, a stay of the ruling on Liggett's request to terminate counsel's representation and to dismiss the appeal, and a remand of the cases to the district court for competency restoration proceedings.

On appeal, Liggett's counsel contended that the direct appeal should be stayed indefinitely because proceeding while Liggett is incompetent will violate his Sixth Amendment right to counsel and his Fifth and Fourteenth Amendment rights to due process of law. An incompetent defendant's direct appeal should proceed, despite incompetence, if the defendant is provided a postconviction remedy to raise issues not raised in the direct appeal due to his incompetence. The Court of Appeals held that Liggett must be permitted to raise in a postconviction motion any matter not raised in the direct appeal due to his incompetence.

The People contended that the direct appeal divested the district court of jurisdiction and that the appeal and restoration proceedings cannot occur simultaneously. They also argued that the district court has no authority to order the Department of Corrections, in whose custody Liggett resides, to restore him to competency. The People agreed that Liggett is incompetent and that an incompetent defendant cannot waive the right to counsel on direct appeal.

Thus, Liggett's incompetence precludes the Court from ruling on his pending requests to terminate counsel and dismiss the appeal, and a limited remand to restore Liggett's competence is necessary.

A stay of the ruling on Liggett's requests to terminate counsel and dismiss the appeal was granted. The request for indefinite stay of the appellate proceedings was denied. The request for limited remand to restore Liggett to competence was granted and the case was remanded to the district court for that limited purpose.

**2018 COA 95. No. 15CA1176. People v. Lujan.** *Right to Public Trial—Constitutional Law—Sixth Amendment—Rebuttal—Residual Hearsay Exception—Other Acts Evidence.*

The victim, defendant's live-in girlfriend, was beaten, strangled, and left on the ground outside a friend's apartment in 1999. In 2013, the People charged defendant with first degree murder. On the first day of trial, defendant conceded that he was responsible for the victim's death, but he argued that he was guilty only of reckless manslaughter. After jury deliberations had started, the trial judge closed the courtroom to read limiting instructions to the jury, over defendant's objection. The jury found defendant guilty of second degree (knowing) murder.

On appeal, defendant contended that his conviction must be reversed because closing the courtroom to read limiting instructions upon the jury's request violated his right to a public trial and his right to be present. A criminal defendant's right to a public trial is guaranteed by both the U.S. and Colorado Constitutions. Here, the trial court sua sponte excluded all but the jury, the bailiff, the reporter, and itself from the courtroom. In this case, the closure was total,

intentional, and unjustified, and defendant's Sixth Amendment right was violated.

Defendant also contended that the court committed three evidentiary errors. First, a law enforcement officer testified for the People that in all of their interactions, defendant had never seemed upset or remorseful about the victim's death. Defendant contended that because the prosecution opened the door to his demeanor, and the testimony did not involve hearsay, he was entitled to elicit rebuttal testimony as part of his right to present a defense. Exclusion of the rebuttal testimony was an abuse of discretion because the court misapplied the law in concluding that the evidence was hearsay. On the other hand, the court did not abuse its discretion in admitting statements made by the victim to two witnesses before her death under the residual hearsay exception because the court found that these statements were sufficiently trustworthy. The court also did not abuse its discretion in allowing defendant's ex-wife and his former girlfriend to testify about defendant's specific acts while in their individual relationships, finding that defendant had committed such acts and the evidence was related to a material fact with logical relevance independent of the prohibited inference of defendant's bad character. Further, the court provided an appropriate limiting instruction.

The judgment was reversed and the case was remanded for a new trial.

**2018 COA 96. No. 15CA1368. People v. Lindsey.** *Competency—Jury Instructions—Unanimity Instruction.*

Lindsey persuaded six individuals to invest \$3 million in new technology that would allegedly use algae-based bioluminescent energy to light signs and panels. Lindsey told his investors that he had contracts to sell his new technology. Neither the technology nor the contracts ever existed, and Lindsey allegedly spent the money on repaying other investors and on personal expenses. A jury convicted Lindsey of eight counts of securities fraud and four counts of theft.

On appeal, Lindsey contended that the trial court erred in refusing to order a competency evaluation where the issue was raised by his counsel's motion before trial. Here, the trial court

failed to comply with the statutory procedure. The motion was facially valid, and the trial court abused its discretion in concluding that a facially valid motion on competency did not fall under the competency statute.

Lindsey next argued that the trial court erred by (1) instructing the jury that “any note” constitutes a security, and (2) giving an improper unanimity instruction. As to the first argument, Lindsey’s trial was conducted before *People v. Mendenhall*, 2015 COA 107M. In the event of retrial, the trial court and parties should apply *Mendenhall*’s four-factor test in crafting new jury instructions. As to the second contention, regarding Count 6, which included three separate transactions, the unanimity instruction should be modified to specify that the jury must agree unanimously that defendant committed the same act or that defendant committed all of the acts included within the period charged.

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

**2018 COA 97. No. 16CA1652. Lopez v. City of Grand Junction.** *Negligence—Colorado Governmental Immunity Act—Waiver—Independent Contractor—Maintenance Work.*

The underground maintenance of a public traffic light in Grand Junction breached a natural gas line. Gas from the ruptured line leaked into the surrounding ground and a sewer main and migrated to a house, resulting in an explosion. Lopez, Pierson, and Gimmeson (plaintiffs) brought negligence claims against the City of Grand Junction (City) for their resultant personal injuries and property damage. Plaintiffs’ complaint alleges, among other things, that the City breached its duty of care to safely maintain its utility, electric, and sewer lines. As pertinent here, the complaint alleged that the City contracted with Apeiron Utility Construction (Apeiron) to upgrade utility lines that powered a traffic light; during this maintenance project Apeiron ruptured a gas line; and the leaking gas resulted in the house explosion. The complaint further alleged that Apeiron’s conduct should be imputed to the City. The City moved to dismiss these negligence claims for lack of jurisdiction under CRCP 12(b)(1), asserting governmental immunity under the Colorado Governmental

Immunity Act (CGIA). The court granted the motion.

On appeal, plaintiffs contended that the district court erroneously concluded that Apeiron’s conduct in maintaining the traffic light was not attributable to the City for purposes of waiving the City’s immunity under CRS § 24-10-106(1) (f). For purposes of the immunity waiver in CRS § 24-10-106(1)(f), a public entity maintains a public facility even if it hires an independent contractor to perform the maintenance. Here, plaintiffs met their burden to establish a waiver of immunity as to their negligence claims against the City.

Plaintiffs next asserted that the district court erred when it dismissed their negligence claim against the City as to its operation and maintenance of its sewer main. Plaintiffs asserted that the City’s failure to keep the main free of invasive roots was a failure to maintain that

waived liability under the CGIA. Based on the record, plaintiffs failed to meet their burden to prove a waiver.

The dismissal of plaintiffs’ negligence claim against the City as to its operation and maintenance of its sewer main was affirmed. The dismissal of the negligence claims against the City for Apeiron’s maintenance work on the traffic light was reversed and the case was remanded.

**2018 COA 98. No. 17CA1153. People in the interest of D.C.C.** *Dependency and Neglect—Uniform Parentage Act—Exclusive, Continuing Jurisdiction.*

The Weld County Department of Human Services (Department) filed a petition in dependency or neglect and for a determination of paternity. The petition named A.M.G. as the father of the child and advised him that

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paternity might be determined in the action pursuant to the Uniform Parentage Act (UPA). No one disputed paternity. Before the filing of the dependency and neglect proceeding, stepmother had filed a motion for allocation of parental responsibilities in a domestic relations court. The domestic relations court ordered father to complete genetic testing in this case, but he didn't get tested before the dependency and neglect case. The domestic relations court then certified the issues of legal custody and parental rights and responsibilities to the dependency and neglect court.

Father failed to appear at his adjudicatory hearing in August 2016, and the district court entered a default decree adjudicating the child dependent or neglected. Father appeared for the first time at a hearing in February 2017, and the court appointed counsel and ordered genetic testing. Meanwhile, the Weld County Child Support Services Unit had filed a petition for support in another division of the juvenile court in November 2016. Father had failed to appear in that case as well and failed to appear for the genetic testing that was also ordered in that case.

In April 2017, the dependency and neglect court informed the parties that the magistrate in the child support case had entered an order finding that father wasn't a legal parent of the child and declared stepmother to be the child's legal parent. The dependency and neglect court was unsure if this was proper, but ultimately decided that the child support court's parentage order was final because no one had sought review. The court dismissed A.M.G. from the case as the father.

On appeal, father argued that the dependency and neglect court erroneously relied on the order from the child support court that he wasn't the child's legal father. He argued that after the dependency and neglect court adjudicated the child, it maintained exclusive, continuing jurisdiction over the child until the case was closed or the child reached age 21. Under the Children's Code, the juvenile court has exclusive, original jurisdiction in both dependency and neglect proceedings and proceedings to determine parentage. The Court of Appeals held that once a child has

been adjudicated dependent or neglected, all matters related to the child's status must be addressed in the open dependency and neglect case, where parents are afforded procedural and substantive due process protections that aren't available under the UPA.

The order dismissing father from the petition in dependency or neglect was reversed and the case was remanded.

**2018 COA 99. No. 17CA1635. Moore v. Executive Director of Colorado Department of Corrections.** *CRCP 106.5—Parole Board Decisions—Subject Matter Jurisdiction.*

Moore, an inmate in the custody of the Colorado Department of Corrections (DOC), filed a CRCP 106.5 petition against defendants, the DOC's executive director and the warden of the prison facility where Moore was housed. Moore said he was challenging a parole board decision to defer his parole for abuses of discretion. Defendants moved to dismiss for lack of jurisdiction and for naming improper parties. The district court granted the motion, although it was not clear on what grounds.

On appeal, Moore contended that the district court erred in dismissing the action. He continued to argue that he was entitled to review under CRCP 106.5 and that the legal authority supporting defendants' dismissal was no longer valid. CRCP 106.5 does not apply to inmate actions seeking judicial review of parole board decisions. The rule's scope is limited to review of quasi-judicial decisions within the ultimate authority of the executive director and the facility wardens. It does not apply to parole board decisions because the DOC's executive director and prison facility wardens do not have authority over those decisions.

Dismissal was also required because the petition and complaint sought a level of judicial review that exceeded the district court's subject matter jurisdiction. The parole board's decision-making discretion is plenary and not subject to judicial review. Courts have the power to review the parole board's actions only if the parole board fails to exercise its statutory duties, and that review is in the nature of mandamus relief under CRCP 106(a)(2).

The judgment was affirmed.

**July 26, 2018**

**2018 COA 101. No. 15CA0127. People v. Loris.** *Criminal Law—Possession—Intent to Distribute—Controlled Substance—Manslaughter—Habitual Criminal Statute—Sentencing—Drug Felonies—Gross Disproportionality.*

Defendant sold methamphetamine to three individuals. As part of the deal, she agreed to accept a handgun for the drugs. After the parties had been drinking and smoking methamphetamine, defendant handled the gun and it went off. The bullet struck the victim in the head, killing him. Defendant pleaded guilty to possession with intent to distribute a controlled substance, manslaughter, and four habitual criminal counts. The four habitual criminal counts were based on prior state felony convictions. Applying the habitual criminal sentence multiplier, the district court sentenced defendant to concurrent sentences of 32 years for possession with intent to distribute and 24 years for manslaughter.

On appeal, defendant contended that her 32-year sentence raises an inference of gross disproportionality and therefore requires a remand for an extended proportionality review. Here, defendant's triggering offense of possession with intent to distribute a controlled substance was per se grave or serious. Defendant's underlying conviction for conspiracy to distribute a controlled substance is also a per se grave or serious offense. The gravity of defendant's offenses as a whole compared to the severity of her 32-year habitual criminal sentence does not merit a remand for an extended proportionality review. Defendant's 32-year sentence does not raise an inference of gross disproportionality.

Defendant also contended that the district court lacked authority under the habitual criminal statute to sentence her to a 32-year sentence for a level 2 drug felony. The sentence multiplier of the habitual criminal statute applies to convictions "for any felony." The district court had authority to sentence defendant to a term of 32 years under the habitual criminal statute.

The sentence was affirmed.

**2018 COA 102. No. 15CA0528. People v. Murray.** *Criminal Law—Trespass—Burglary—*

*Assault—Landlord–Tenant Agreement—Evidence—Doctrine of Completeness—Credibility.*

Defendant's ex-girlfriend (the victim) asked him to come to her house to help with an errand. The couple had dated "on and off" for about two years, and defendant had stayed frequently at the house, but the two had broken up about two-and-a-half weeks earlier. Defendant entered the victim's house, and the two got into an argument. The victim told defendant to leave. Defendant threatened the victim, ripped off her clothes, and tried to sexually assault her. At that moment, a friend of the victim showed up. Defendant chased him into the street. The victim locked the door behind defendant and called 911. Defendant yelled at the victim to let him back in the house, but she refused. He then broke a window on the front door trying to get back inside. Defendant was found guilty of first degree burglary, trespass, third degree assault, false imprisonment, attempted sexual assault, attempted second degree burglary, and criminal mischief.

On appeal, defendant contended that the court provided an inaccurate jury instruction defining "enters unlawfully" and "remains unlawfully," and that it abused its discretion by refusing his tendered instruction explaining those concepts. The basis for defense counsel's objection to the prosecutor's added instruction and for his requested instruction was his argument that defendant wasn't on the premises unlawfully because he lived there. However, defendant failed to present any evidence of a landlord-tenant agreement between him and the victim, and he didn't pay rent. Therefore, defendant was not a tenant and didn't have a possessory interest in the premises other than that the victim allowed. The district court did not need to provide the type of instruction that defense counsel tendered.

Defendant further contended that the district court erred by denying his motions for a judgment of acquittal based on insufficiency of the evidence. The record contains sufficient evidence to support the jury's finding that defendant knowingly entered or remained in the victim's house unlawfully with the intent to assault and sexually assault the victim, and that he attempted to sexually assault the victim.

Defendant also contended that the district court erred by ruling that if he introduced certain of his recorded statements pursuant to the doctrine of completeness, his credibility would be implicated, and the prosecution could use his Montana deferred judgment to impeach his credibility. He argued that as a result of these rulings, the district court infringed on his right to a fair trial and to confront witnesses, because he was dissuaded from introducing his statements and cross-examining the prosecution's investigator. Defendant's statements were self-serving and were inadmissible under the doctrine of completeness. Further, defendant waived his contention that his testimony couldn't be impeached by the Montana judgment. Alternatively, had defendant not waived this issue, the Montana judgment constituted an admissible felony conviction, and any error wasn't plain.

The judgment was affirmed.

**2018 COA 103. No. 15CA0633. People v. Donald.** *Criminal Law—Bond Conditions—Failure to Appear—Mens Rea.*

Defendant was arrested and charged with a felony. During his court appearance, the judge set bond and announced his court date. Defendant subsequently posted bond and was released from jail. The bond paperwork provided that, as a condition of his release, defendant was prohibited from leaving Colorado without court approval. Defendant failed to appear in court, and he was arrested in Mississippi five weeks later. A jury convicted defendant of knowingly violating a condition of bond by leaving Colorado and knowingly failing to appear for trial or other proceedings.

On appeal, defendant contended that the prosecution failed to establish beyond a reasonable doubt that he knew of his court date and knowingly failed to appear. However, defendant was present when the court announced the court date, and there was sufficient evidence to permit the jury to reasonably infer that defendant was aware of the court date and that he knowingly failed to appear.

Defendant also contended that the prosecution failed to establish beyond a reasonable doubt that he knew of the bond condition that

prohibited him from leaving Colorado. Here, there was no evidence that the bond condition was announced or discussed in open court; it was set forth only in the bond paperwork. The prosecution failed to present any evidence showing that defendant had personally signed the bond paperwork or that he was otherwise aware of the bond condition that prohibited out-of-state travel. Therefore, the evidence was insufficient to establish defendant's knowledge of the specific bond condition therein beyond a reasonable doubt.

The judgment and sentence were affirmed in part and vacated in part.

**2018 COA 104. No. 15CA1811. People v. Yeadon.** *Criminal Law—Driving Under Restraint—Failure to Report an Accident or Return to the Scene—Possession—Methamphetamine—Evidence—Prosecutorial Misconduct—Drug Offender Surcharge—Illegal Sentence—Double Jeopardy.*

Police officers responded to a rollover crash where the driver had abandoned the vehicle. The car had been reported stolen two weeks earlier. After an expert matched Yeadon's DNA to the deployed driver's airbag in the crashed vehicle, a jury found Yeadon guilty of driving under restraint, failure to report an accident or return to the scene, and possession of less than two grams of a controlled substance (methamphetamine), which was found in the crashed vehicle. The district court sentenced Yeadon to 16 months in the custody of the Department of Corrections and, 11 days later, imposed a \$1,250 drug offender surcharge.

On appeal, Yeadon contended that the prosecution presented insufficient evidence to support his conviction for possession. Here, the Colorado Bureau of Investigation expert testified that Yeadon was the major source of the DNA found on the driver's side airbag and that such evidence suggested that he was sitting in the driver's seat when the airbag deployed. Therefore, the prosecution presented sufficient evidence that Yeadon was the driver of the car at the time of the crash. Further, the evidence showed that Yeadon was in close proximity to the bag of methamphetamine and the scale found on the front seat, and that he fled from



the accident. There was sufficient evidence to support Yeadon's conviction for possession of less than two grams of a controlled substance.

Yeadon also argued that certain statements made by the prosecutor during closing argument constituted misconduct. However, the prosecution's comments were reasonably supported by the evidence and did not improperly affect the verdict.

Yeadon further argued that the district court's late imposition of the drug offender surcharge violated his right against double jeopardy. Because CRS § 18-19-103(1) mandates that the drug offender surcharge be imposed in all cases in which a defendant is convicted of a drug offense, failure to impose the surcharge renders a sentence illegal. Yeadon's sentence did not include the surcharge and was not accompanied by a district court finding of his financial inability to pay, so the sentence was contrary to the statute and illegal, and the district court was required to correct defendant's sentence by including the surcharge. The late imposition of the surcharge was a permissible correction to an illegal sentence and thus did not violate Yeadon's double jeopardy rights.

The judgment and sentence were affirmed and the case was remanded with directions.

**2018 COA 105. No. 16CA1963. People v. Senette.** *Criminal Law—Witness—Subpoena—Motion for Continuance—Bench Warrant.*

The prosecution charged defendant with aggravated robbery and menacing against a single victim, M.T. When M.T., who was a necessary witness and was under subpoena, did not appear at trial, the prosecution requested that the trial court issue a bench warrant and grant a brief continuance to secure the M.T.'s attendance. The trial court denied both requests and, at defendant's request, dismissed the charges.

On appeal, the People argued that the trial court erred by denying its motion for a continuance and dismissing the case. The trial court abused its discretion in denying the continuance because it (1) misapplied the law regarding the issuance of a bench warrant as a remedy to procure the attendance of a missing witness, and (2) failed to consider the

factors relevant to the prosecutor's motion to continue. Those factors included whether the prosecutor was diligent in securing the witness's attendance, whether a continuance would be effective in securing the witness's attendance, and the prejudice that a continuance would cause both parties.

The People also contended that the trial court erred in dismissing the charges after denying the continuance. Because the trial court erred in denying the motion for continuance, and the dismissal of the charges was a direct result of that erroneous decision, the trial court erred in dismissing the case.

The order was reversed and the case was remanded.

**2018 COA 106. No. 16CA2011. John Doe 1 v. Colorado Department of Public Health and Environment.** *Open Meetings Law—State Public Body—Administrative Procedure Act—Colorado Open Records Act—Attorney Fees and Costs—Medical Marijuana—CRS § 24-4-106(8)—Final Agency Action.*

The Colorado Constitution authorizes physicians to recommend the medical use of marijuana for patients with debilitating medical conditions. The Colorado Department of Public Health and Environment (CDPHE) is designated as "the state health agency" to administer Colorado's medical marijuana program and is required to promulgate rules to administer the program. CDPHE created the medical marijuana registry to meet its requirement to establish a confidential registry of patients who are entitled to receive medical marijuana cards.

CDPHE has discretion to refer physicians to the Colorado Medical Board (the Board) for violations of medical marijuana laws. The Board, which is entirely separate from CDPHE and is housed under the Department of Regulatory Agencies, determines whether such violations exist.

Wolk, the CDPHE executive director, and Riggins, the state registrar and director of the Medical Marijuana Registry (collectively, the Department) referred John Does 1 through 9 (collectively, the Doctors) to the Board for investigation of unprofessional conduct involving

the Doctors' certification of patients for the use of medical marijuana. The Department based its referrals on its medical marijuana policy (the Policy).

The Doctors then submitted Colorado Open Records Act (CORA) requests to the Department and the Board, seeking public records about, among other things, the Policy. The Department responded to the request, but withheld certain documents. The Doctors then brought this action against the Department and the Board, alleging violations of Colorado's Open Meetings Law (OML) and the State Administrative Procedure Act (APA) and seeking injunctive and declaratory relief. The district court dismissed the claims against the Board and granted summary judgment on the Doctors' OML and APA claims against the Department and, as a result, declared the Policy void.

On appeal, the Department argued for reversal of the summary judgment, contending that the entire agency cannot constitute a "state public body" under the OML, so the OML doesn't apply. Under the OML's plain language, the Department is not a state public body. Thus, the district court erred in granting summary judgment on the Doctors' OML claim against the Board.

The Doctors challenged the dismissal of their OML claim against the Board. However, they did not allege that the Board had authority to enact or implement the Policy, or that it had enacted the Policy. Thus, even accepting as true the Doctors' allegations that Board employees attended meetings to discuss and develop the Policy, the complaint failed to allege facts showing a link between the meetings and the Board's policy-making powers. Thus, the Board is not subject to the OML.

The Doctors also challenged the denial of their request for attorney fees and costs under the OML. Given the case disposition, the Court of Appeals rejected the request.

The Department also argued that the district court erred in finding that the APA applied to the Department referrals because they are not a "final agency action" under the APA. Subject to an exception under CRS § 24-4-106(8), only final agency action is subject to review. The referrals were not final; they didn't determine anything,

and it is uncertain whether an investigation will result in a finding of a violation or any other action. The Doctors sought to enjoin the referrals under the CRS § 24-4-106(8) exception, which allows interlocutory review of agency actions in which a party will suffer irreparable harm. But to fit under the exception, the referrals must be a “proceeding” under the APA, which they are not. The district court erred in granting summary judgment on the Doctors’ APA claims against the Department based on the referrals.

The Doctors further argued that the Policy itself was a final agency action that did not comply with the APA’s rulemaking requirements. Here, the Policy was not binding and did not confer any power the Department did not already have, so it fell within the APA’s exception to the notice and hearing rulemaking requirements.

The Doctors also objected to the dismissal of the APA claims against the Board. However, they developed no argument in their opening brief about how the APA applies to the Board, and their discussion of the APA in their reply brief was too late.

The Doctors next argued that the district court erred in denying an award for attorney fees and costs associated with their request to obtain access to public documents under CORA. A party requesting an order to show cause for the disclosure of public records is not entitled to attorney fees and costs if the requesting party has filed a lawsuit against a state public body and the records relate to the pending litigation and are otherwise discoverable under the rules of civil procedure, which was the case here. The district court did not err in denying attorney fees and costs under CORA.

The judgment was affirmed in part and reversed in part, and the case was remanded with directions.

**2018 COA 107. No. 17CA0744. Prospect Development Company, Inc. v. Holland & Knight, LLP.** *CRCP 12(b)(5)—Matters Outside the Bare Allegations of the Complaint—CRCP 12(b)(5)—Statute of Limitations—Affirmative Defense.*

Prospect Development Company, Inc. (Prospect) owned and sold undeveloped lots

near Crested Butte. It relied on Holland & Knight, LLP (H&K) to prepare federally mandated property reports for prospective buyers. These reports stated that Prospect was responsible for the costs of constructing roads, sewage systems, and other infrastructure. They also stated that individual lot purchasers would not be responsible for these costs. The reports neglected to disclose that the special district in which the lots were located would purchase the infrastructure from Prospect using property tax revenue from the lots, effectively passing the cost of the infrastructure on to the lot owners.

In 2010, several lot owners complained they were not notified before they purchased that they would ultimately pay for the cost of infrastructure through property taxes. H&K assured Prospect that the reports complied with applicable law. Nevertheless, Prospect entered into a tolling agreement with the lot owners in 2010, agreeing to stay the running of any limitations period applicable to claims the lot owners might have against Prospect. In 2011, H&K withdrew from representing Prospect. In 2013, the lot owners sued Prospect based on its failure to make the required disclosures, and Prospect settled with them in 2015. Also in 2015, Prospect entered into a tolling agreement with H&K to toll claims that Prospect might have against H&K. Prospect sued H&K in 2016, alleging professional negligence. H&K did not answer the complaint but moved to dismiss under CRCP 12(b)(5), arguing that the statute of limitations barred the claims. H&K attached several exhibits from the underlying litigation between the lot owners and Prospect to support its assertion that the claims had accrued in 2011. Prospect opposed the motion and argued the trial court should disregard the exhibits, or, alternatively, if it did consider the exhibits, it should convert the motion to one for summary judgment and allow Prospect to present its own evidence. The district court granted the motion to dismiss, ruling the claims were time barred.

On appeal, Prospect argued that the district court erred by considering matters outside of the complaint in granting the CRCP 12(b)(5) motion. A defense based on a statute of limitations is an affirmative defense. H&K’s motion was based on a statute of limitations defense. Thus, in

ruling on H&K’s motion, the district court was not allowed to consider matters outside the bare allegations of the complaint. Here, the district court erred in considering two documents from the underlying litigation that were not part of the bare allegations of the complaint. If the district court wished to consider these documents, it was required to convert H&K’s motion to one for summary judgment. This error was not harmless because when viewed in the light most favorable to Prospect, the complaint’s allegations, and those in two documents that the complaint referred to, established that Prospect’s claims were timely.

The order was reversed and the case was remanded.

**2018 COA 108. No. 17CA0939. Twilight Ridge, LLC v. Board of County Commissioners of La Plata County.** *Property Tax—CRS § 39-1-102(14.4)(a)—Used as a Unit—Vacant Land.*

The Robinsons are the sole members of Twilight Ridge, LLC (Twilight), a Colorado limited liability company. In 2013 Twilight purchased two contiguous platted parcels of land in La Plata County. The first parcel has a home on it (the Residential Parcel). The second parcel is a 0.763 acre buildable but undeveloped lot (the Subject Parcel).

The La Plata County Assessor classified the Subject Parcel as vacant land. Twilight appealed the decision for the 2014 to 2015 tax years to the Board of County Commissioners of La Plata County, and it appealed the decision for the 2016 tax year to the Board of Equalization for La Plata County, arguing to both bodies (collectively, the County) that the Subject Parcel should be reclassified as residential land. The County upheld the County Assessor’s classification.

Twilight appealed to the Board of Assessment Appeals (BAA). At a consolidated hearing, Mr. Robinson testified that he and his wife bought the two parcels together so that the Subject Parcel would give them privacy, serve as a buffer to prevent any potential house built on the subject property from impeding their views, and provide a place for their grandchildren to play when they visited. Further, although he was currently offering only the Residential Parcel for sale, Robinson intended to sell both

parcels together.

Twilight also offered testimony by the Colorado Division of Property Taxation's deputy director, who was designated by the Property Tax Administrator (PTA) to testify regarding the Division's policies as embodied in the PTA's Assessors' Reference Library (ARL). The County provided the testimony of its appraisers, who had visited the parcels and seen no activity or evidence of use on the Subject Parcel when she visited. The La Plata County Assessor also testified that using the Subject Parcel as a place for children to play and protect a view were "incidental" uses and not the "integral" use of the Subject Parcel in conjunction with the residential improvements that would warrant classifying it as residential. The BAA upheld the County's classification.

On appeal, Twilight argued that the BAA misconstrued the "used as a unit" element of CRS § 39-1-102(14.4)(a) and made clearly erroneous findings of fact. The BAA's conclusion that Twilight did not satisfy its burden of proving that the Subject Parcel was used as a unit with the residential parcel is consistent with the ARL and the testimony at the hearing that "used as a unit" contemplates integral, not merely incidental, use.

The orders were affirmed.

**2018 COA 109. No. 17CA1230. Boudette v. State.** *Crim. P. 41(e)—Standing—Motion for Return of Property.*

Boudette was a caretaker of a farm during the owner's absence. An officer of the Southwest Drug Task Force obtained a search warrant from the Montezuma District Court. The officer signed an affidavit that accompanied the warrant. The affidavit stated that law enforcement believed the owner and his son used the farm as an illegal marijuana growing operation. The warrant described the items to be seized.

While the owner was away, law enforcement executed the warrant and allegedly seized property owned by Boudette, including a cellphone; a computer; notebooks; antique muskets; titles to his truck, motorcycles, and trailer; British pounds; Euros; and Boudette's passport. No charges were ever filed against Boudette.

Boudette filed a motion for return of his

property citing Crim. P. 41(e). He stated the warrant was insufficient on its face; the property seized was not described in the warrant; and there was not probable cause to believe the existence of the grounds on which the warrant was issued. He served the motion on the district attorney. The district court, sua sponte, issued an order dismissing Boudette's case for lack of standing because he filed a criminal motion and there was no criminal case against him.

On appeal, Boudette contended that he has standing to bring his claim. Boudette alleged an injury-in-fact, the unlawful seizure of his property, and harm to a legally protected interest, because Crim. P. 41(e) permits him to bring a claim for the return of his unlawfully seized property. Although there was no criminal complaint filed against Boudette, Rule 41(e) is still applicable because (1) the Colorado Rules of Criminal Procedure govern all criminal proceedings, which include proceedings before a criminal complaint or information has been filed, and (2) Rule 41(e) does not require that a person be a criminal defendant to file a motion under that rule.

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

**August 9, 2018**

**2018 COA 110. No. 13CA1604. People v. Monroe.** *Criminal Law—Self-Defense—Duty to Retreat—Jury Instructions—Prosecutorial Misconduct.*

Monroe boarded a city bus and sat down next to Faulkenberry. The two almost immediately began to argue. Eight to 10 minutes after the dispute began, Monroe stabbed Faulkenberry in the neck. At trial, Monroe did not testify, but her counsel asserted that Monroe had been acting in self-defense. During closing and rebuttal arguments, the prosecution made several references to Monroe's ability to retreat from the situation. Defense counsel's objections to these statements were overruled. The jury was formally instructed regarding the duty to retreat. Monroe was convicted of attempted first degree murder and first degree assault. The trial court adjudicated her a habitual criminal and sentenced her to concurrent prison terms

of 96 years on the attempted murder count and 48 years on the assault count.

On appeal, Monroe argued that the trial court committed reversible error when it permitted the prosecution to argue that the jury should consider Monroe's failure to retreat when deciding whether she had acted in self-defense. A person who reasonably perceives an imminent use of unlawful physical force by another may use force in defending himself or herself without first retreating and does not have to consider whether a reasonable person in the situation would choose to retreat rather than to resort to physical force in defense. Here, the prosecution raised the issue of the availability of retreat five times during its closing and rebuttal arguments, and the prosecution's argument inappropriately imposed a duty to retreat. The trial court permitted the jury to believe that it could consider whether a reasonable person would have retreated, in direct contravention of its instruction that no such duty exists. Thus, the trial court abused its discretion. Further, although the trial court and the prosecutors themselves repeatedly stated that Monroe had no duty to retreat, there was a reasonable probability that the jury was misled and that the misleading arguments contributed to the verdict, so the error was not harmless.

The judgment was reversed and the case was remanded for a new trial.

**2018 COA 111. No. 14CA0478. People v. Halaseh.** *Criminal Law—Theft—Aggregated Theft—Evidence—Jury Instructions.*

Defendant assisted his father in setting up a joint bank account for depositing his father's Supplemental Security Income (SSI) checks from the Social Security Administration (SSA). A month later, defendant's father left the United States to live in Jordan and never returned. Though the SSI application and award notice informed defendant's father that he had to report to the SSA if he left the United States for more than 30 days, he never reported. From January 2008 to January 2011, the SSA deposited checks monthly into the joint account, and defendant withdrew the funds to pay for household expenses. When the SSA realized that defendant's father had

been outside the country for years, defendant confessed to SSA's agents that it was wrong for him to take the funds. Defendant received a letter from the SSA informing him that \$24,494 had been overpaid to his father. Defendant was convicted of a single count of theft of \$20,000 or more from the SSA.

On appeal, defendant contended that the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt that he committed theft. Here, the prosecution presented sufficient evidence for a reasonable juror to find beyond a reasonable doubt that defendant committed theft from the SSA, including evidence that defendant helped his father apply for SSA benefits, set up a joint account with his father, and admissions that he knew retaining the funds after his father left for Jordan was wrong.

Defendant also argued that the court failed to properly instruct the jury (1) on the definition of the word "another" in the theft statute, and (2) on its requirement to find that the "aggregate value" exceeded \$20,000 within one of the prescribed units of prosecution. There is no statutory requirement to define "another," and the SSA's possessory or proprietary interest in the funds was not a disputed issue in this case. Although the trial court plainly erred when it instructed the jury that it could find defendant guilty of stealing \$20,000 or more, the error was

harmless because a proper jury instruction would not have changed the jury's findings.

Defendant also contended that the prosecution failed to prove that he took \$20,000 or more within any prescribed unit of prosecution permitted under the theft statutes in effect on the offense dates. The People conceded and the Court of Appeals concluded that the trial court erred by entering judgment for a class 3 felony theft on the jury's verdict.

The judgment of conviction for one class 3 felony theft count was vacated and the case was remanded to the trial court to enter judgment of conviction for four class 4 felony theft counts and to resentence defendant accordingly.

**2018 COA 112. No. 15CA1365. People v. Jones.**  
*Criminal Law—Make-My-Day Statute—Mens Rea—Self-Defense—Use of Physical Force—Jury Instructions.*

Late one night Jones opened the unlocked door of an apartment located in a large, gated apartment complex. He turned on the hall light and walked into one of the bedrooms. The apartment was occupied by two brothers and their two cousins (the homeowners). Jones and the homeowners had never met each other. Jones and the occupants fought until Jones was finally subdued. At trial, Jones argued that he had entered the apartment by mistake, and when the homeowners used force against him,

he justifiably defended himself using the knife he carried for protection. A jury convicted Jones of one count of second degree assault and one count of third degree assault.

On appeal, Jones contended that the trial court erred in instructing the jury that the make-my-day statute is triggered upon any unlawful entry into a dwelling, rather than upon a "knowingly" unlawful entry, and as a result the erroneous make-my-day instruction negated his otherwise valid claim of self-defense. When the make-my-day statute applies it operates as a bar to a trespasser's claim of self-defense, so if it applied here, Jones would not be justified in using physical force against the homeowners. An instruction clarifying the meaning of "unlawful entry" is necessary where the evidence supports a theory that the defendant accidentally entered the dwelling or otherwise entered without the requisite mental state. Here, the trial court erred in failing to instruct the jury that the make-my-day statute's unlawful entry element requires that the unlawful entry be made knowingly. Additionally, the instructional error was not harmless. The evidence supported Jones's theory that he entered the apartment accidentally under the mistaken belief that he was entering the apartment of his cousin, who lived in the complex. Therefore, the language of the make-my-day instruction improperly abridged Jones's claim of self-defense and created a reasonable

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probability that the jury could have been misled in reaching a verdict.

The judgment of conviction was reversed and the case was remanded for a new trial.

**2018 COA 113. No. 15CA1713. *People v. Davis*.** *Criminal Law—Juvenile—Motion to Suppress—Waiver—Right to Testify—Sentencing—Eighth Amendment.*

When Davis was 17 years old, he and McGrath robbed the victim, McGrath's former coworker. The victim was transporting money to a bank from the restaurant at which he and McGrath had worked. In the course of the robbery, the victim was shot and killed. Davis was convicted of first degree murder after deliberation, felony murder, aggravated robbery, aggravated motor vehicle theft, conspiracy to commit first degree murder, and conspiracy to commit aggravated robbery. As required by statute, the trial court sentenced him to life in the custody of the Department of Corrections with the possibility of parole after 40 years (LWPP-40) on the murder after deliberation count. Additionally, the trial court imposed a consecutive sentence of eight years and one day on the aggravated robbery count. The sentences imposed for the remaining counts were ordered to run concurrently with the sentences to life plus eight years and a day. The felony murder conviction was merged with the conviction for murder after deliberation. Davis filed two Crim. P. 35(c) motions, which the district court denied in a series of orders.

On appeal, Davis contended that the trial court violated his constitutional rights when it denied his motion to suppress statements he made during police interrogation, arguing that the Denver detective violated his right to counsel by continuing an interrogation after he asked for an attorney. Davis' statements were admissible because although Davis had previously asked for an attorney, he had voluntarily reinitiated the interrogation by asking the Denver detective whether McGrath had been arrested. Even assuming that the trial court erred in denying the motion, any error was harmless beyond a reasonable doubt in light of the relative insignificance of the statements to the People's case and the substantial evidence of guilt.

Davis also argued that reversal is required because he never executed an on-the-record waiver of his right to testify. Where the trial court's on-the-record advisement includes the five essential elements set forth in *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984), as occurred here, the record conclusively demonstrates that defendant made a valid waiver of the right to testify. Further, Davis did not present any evidence to show that despite the *Curtis* advisement, his waiver was nonetheless invalid. Thus, the district court did not err in concluding that Davis knowingly, voluntarily, and intelligently waived his right to testify.

Davis next contended that his sentence of LWPP-40 together with a sentence of eight years plus one day is unconstitutional. LWPP-40 is a constitutional sentence, and the trial court did not abuse its discretion in sentencing Davis to eight years and one day to run consecutively to his LWPP-40 sentence. Further, Colorado's parole system provides juveniles sentenced to LWPP-40 a meaningful and realistic opportunity for release based on demonstrated maturity and rehabilitation.

The orders were affirmed.

**2018 COA 114. No. 15CA2008. *People v. McGlaughlin*.** *Civil Procedure—Student Attorney—Sixth Amendment—Right to Counsel.*

McGlaughlin pleaded guilty to third degree assault and violation of a protection order. He was represented by a law student extern practicing under CRCP 205.7. Thereafter, McGlaughlin moved to vacate his plea and the resulting convictions claiming that he was deprived of his Sixth Amendment right to effective assistance of counsel when he was represented only by a law student, not a licensed lawyer, at his plea hearing. The postconviction court denied McGlaughlin's Crim. P. 35(c) motion without a hearing, concluding that the record disproved McGlaughlin's claim.

On appeal, McGlaughlin argued that his plea was constitutionally invalid under the Sixth Amendment because he was not represented by a licensed lawyer at a critical stage of his criminal case. When a criminal defendant is represented by a student attorney under CRCP 205.7, a supervising attorney must be physically

present in the courtroom during all critical stages of the criminal case. If the supervising attorney is not present during a critical stage, the defendant is denied his Sixth Amendment right to counsel. The record here did not clearly establish that the supervising attorney was present during defendant's plea hearing.

The order was reversed and the case was remanded to the postconviction court for an evidentiary hearing and further findings.

**2018 COA 115. No. 16CA0875. *People v. Joosten*.** *Criminal Law—Jury Instructions—Theory of the Case—Evidence—Burglary.*

After Joosten and his girlfriend broke up, Joosten moved out of their shared apartment, but continued to frequently spend the night there and keep some of his belongings there. Joosten subsequently returned to the apartment and kicked down the door, which hit the girlfriend's new roommate in the face. After the girlfriend escaped, Joosten went back into his girlfriend's room, where he cut up her driver's license and bank card and cut the cords of her hair dryer and curling iron. The trial court denied Joosten's tendered theory of the case instruction regarding the burglary charge. A jury convicted Joosten of second degree burglary, first degree criminal trespass, one count of third degree assault, and two counts of class 3 misdemeanor criminal mischief.

On appeal, Joosten first contended that the evidence was insufficient to convict him of second degree burglary because the prosecution failed to prove that he (1) relinquished his possessory interest in the apartment; (2) knew his invitation to enter the apartment was revoked; and (3) knew his entry was unlawful. Here, there was sufficient evidence to support Joosten's burglary conviction, including the fact that he always knocked before entering, did not have a key to the apartment, and kicked down the door on the occasion in question.

Joosten also argued that the court erred in rejecting his theory of the case instruction. A criminal defendant is entitled to a theory of the case instruction. None of the exceptions to that rule were applicable in this case. The trial court erred when it refused Joosten's tendered instruction and failed to work with Joosten's

counsel to craft a permissible instruction. But the error was harmless given the evidence regarding the manner of Joosten's entry into the apartment.

Lastly, Joosten contended and the Attorney General conceded that the mittimus incorrectly reflects that the jury convicted him of two counts of class 2 misdemeanor criminal mischief. The Court of Appeals agreed that the mittimus is incorrect.

The judgment of conviction was affirmed. The case was remanded for correction of the mittimus.

**2018 COA 116. No. 16CA1951. In re the Marriage of Morgan.** *Dissolution of Marriage—Relocation—Parenting Time.*

In this dissolution of marriage proceeding, mother notified the magistrate well before the permanent orders hearing that she wished to move with the children to California. She sought orders that would name her the children's primary residential parent and decision-maker. Dr. Albert was appointed as an expert to conduct a parental responsibilities evaluation (PRE). He recommended that the children be allowed to relocate to California with mother and that she should have sole decision-making responsibility. At father's request, the magistrate appointed Lieberman to perform a supplemental PRE. Lieberman recommended that the children remain in Colorado with father with shared decision-making responsibilities with mother. After a two-day evidentiary hearing, the magistrate ordered the children to remain in Colorado, finding that their best interests would be served if the parents exercised equal parenting time with mutual decision-making responsibilities.

On appeal, mother contended that the magistrate erred by entering a parenting time order requiring her to remain in Colorado. When, as here, a parent indicates before permanent orders that she intends to move, a district court has no statutory authority to order her to live in a specific location. Mother's admission that she would not "abandon" her children and move without them did not relieve the magistrate of his obligation to make the difficult decision to allocate parenting time with mother in California and father in Colorado.

Mother also contended that the magistrate erred in ordering mutual decision-making responsibilities over her objection and in the absence of credible evidence that the parents could work together. However, the magistrate reviewed the evidence and did not abuse his discretion in finding that the parties could make joint decisions and in ordering joint decision making.

The part of the judgment allocating parenting time was reversed and the case was remanded with directions. The judgment was otherwise affirmed.

**2018 COA 117. No. 17CA1211. In re the Marriage of Williams and Tibbetts.** *Dissolution of Marriage—Post-Decree—Parenting Time—18 Years of Age.*

In this post-dissolution of marriage action father moved to have the parenting plan terminated to allow the parties' 16-year-old child to determine her own parenting time schedule. A district court magistrate denied father's request, and while the appeal was pending, the child turned 18 years of age. On father's petition for review to the district court, the court adopted the order.

Father filed his opening brief the day before the child turned 18. Mother moved to dismiss the appeal, contending that because the child is now an adult, the parenting time issues father raises on appeal cannot be resolved. Once the parties' child turned 18, she attained the right to make her own decisions, including whether to visit her parents, rendering the issues father raises on appeal moot.

The appeal was dismissed.

**2018 COA 118. Nos. 18CA0664 & 18CA0665. People v. Soto-Campos and People v. Flores-Rosales.** *Criminal Law—Grand Jury Indictment—Probable Cause Review—CRS § 16-5-204(4)(k)—Sentence Enhancer.*

The prosecution filed a grand jury indictment against several defendants, including Soto-Campos and Flores-Rosales, for their alleged involvement in a heroin distribution enterprise. Defendants' attorneys filed motions requesting that the district court conduct a probable cause review under CRS § 16-5-204(4)

(k) for count 61, Special Offender—Within 1000 Feet of a School. After review, the court dismissed that count. The prosecution then asked the court to reconsider, arguing that defendants were not entitled to probable cause review of the sixty-first count because it was a sentence enhancer, not a substantive offense. The district court denied the motions.

On appeal, the People contended that the district court erred in conducting the probable cause review because, considering legal principles governing preliminary hearings, the sixty-first count is a "stand-alone" sentence enhancer, and thus not subject to review under CRS § 16-5-204(4)(k). CRS § 16-5-204(4)(k) is not limited to substantive offenses, but instead broadly requires a district court to dismiss "any indictment" based on a probable cause finding that lacks record support. Therefore, the district court properly reviewed the sixty-first count under CRS § 16-5-204(4)(k) and did not abuse its discretion in dismissing this count for lack of record support.

The orders were affirmed.

**August 23, 2018**

**2018 COA 119. No. 14CA1955. People v. Lopez.** *Criminal Law—Theft—At-Risk-Adult—Challenge for Cause—Jury—Presumption of Innocence—Sentence Enhancer.*

Defendant and the 70-year-old victim had been neighbors in a mobile home park. While visiting the victim in his trailer, defendant asked to use the bathroom, took a gun that was hanging on the bathroom wall and put it into his backpack, and then left the premises. The jury convicted defendant of theft from an at-risk adult under CRS § 18-6.5-103(5).

On appeal, defendant contended that the trial court erred when it denied his challenge for cause to prospective juror H.S. Defense counsel challenged H.S. for cause because she seemed confused about the presumption of innocence and expressed anti-gun views. H.S.'s comments about the presumption of innocence revealed confusion rather than evinced a bias or inability to follow and apply the law, and she was articulate in explaining her views. When she did not respond to the

court's final questions, it was reasonable for the court to conclude that she would follow the law. Thus, the trial court did not abuse its discretion in denying defendant's challenge for cause to H.S.

Defendant also contended that the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt that he committed any element or portion of the theft in the presence of the victim. Defendant argued that the theft was completed when he took possession of the gun in the bathroom and outside the presence of the victim. CRS § 18-6.5-103 enhances the penalties for theft when any element or portion of the offense is committed in the presence of an at-risk person, which is any person 70 years of age or older. "Portion of the offense" means conduct taken in furtherance of the crime that occurs in temporal proximity to an element of the offense and is physically close to the victim. Here, immediately after taking possession of the gun, defendant left the bathroom and walked a few feet away from the victim as he left the trailer, and defendant spoke with the victim before leaving with the gun. Therefore, defendant committed a portion of the theft in the victim's presence.

Defendant also argued that the trial court abused its discretion when it rejected his tendered jury instruction on "presence" and declined to issue an alternate instruction defining the term. Providing the jury with defendant's instruction, which required proof of additional elements not found in the charged crime, would have been an inaccurate instruction. The trial court did not abuse its discretion.

The judgment was affirmed.

**2018 COA 120. No. 15CA0526. People v. Richardson.** *Criminal Law—Evidence—Attempted Assault—Judge's Spouse as Juror—Demonstrative Evidence—Expert Witness.*

Sheriff's deputies attempted to serve Richardson with an arrest warrant, which led to a police standoff. When officers deployed tear gas into the basement crawl space where Richardson was hiding, Richardson fired a gun at the police. Methamphetamine was later found on Richardson's person. Richardson was ultimately found guilty of possession of a controlled substance,

violation of bail bond conditions, two counts of attempted second degree assault, and three counts of attempted third degree assault.

On appeal, Richardson argued that there was insufficient evidence to support his convictions for attempted second degree assault and attempted third degree assault. However, the evidence that Richardson fired a gun at SWAT members while they were all in the basement was sufficient for the jury to conclude that Richardson attempted second and third degree assault against the SWAT team members.

Richardson also argued that it was reversible error for the judge to preside over a case in which his spouse was in the venire and allowed to remain on the jury. There is no Colorado statute or case that makes it an error for a judge's spouse to serve on a jury in which the judge presides. Although it would have been prudent for the judge to excuse his spouse or to recuse himself from the case, reversal here was not warranted because the evidence was sufficient to support the conviction, and the record did not demonstrate that the jury service of the judge's wife resulted in a fundamentally unfair trial or caused serious doubt as to the reliability of the conviction.

Richardson next argued that the trial judge incorrectly denied his challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), as untimely. Here, the trial court was correct in holding that the *Batson* challenge was untimely.

Richardson also argued that three hand-drawn diagrams were not fair and accurate representations of the alleged crime scene and thus were not admissible as demonstrative evidence. Here, the challenged exhibits were a fair and accurate representation of the alleged crime scene. Further, the judge did not unreasonably limit defense counsel's questions on the accuracy of the diagrams where counsel had ample opportunity to highlight these purported inaccuracies during voir dire and on cross-examination.

Richardson further argued that the trial court reversibly erred in allowing the crime scene investigator to testify as an expert without being qualified as such. Even if the error was obvious, it was not substantial, and the court did not plainly err in allowing the investigator

to testify, absent a contemporaneous objection, as a lay witness.

The judgment was affirmed.

**2018 COA 121. No. 16CA0039. People v. Jamison.** *Criminal Law—Jury Instructions—Lesser Nonincluded Offense—Evidence—Prosecutorial Misconduct—Merger—Double Jeopardy—Possessing Contraband—Introducing Contraband by Making.*

Jamison was an inmate at a Department of Corrections detention facility. During a random search of his cell, a corrections officer found an altered toothbrush behind Jamison's mattress. The toothbrush had been sharpened at one end and a razor blade had been affixed to the other end. Jamison was found guilty of introducing contraband in the first degree and possessing contraband in the first degree.

On appeal, Jamison contended that the trial court erred in refusing to instruct the jury on the two lesser nonincluded offenses, second degree introducing contraband and second degree possession of contraband. However, there was no evidence that the altered toothbrush could cut fence or wire, which was needed to convict Jamison of either second degree offense. Thus, the trial court did not abuse its discretion in rejecting the defense-tendered instructions on the lesser nonincluded offenses.

Jamison also argued that the trial court erred in permitting the prosecutor to refer to the toothbrush as a dangerous instrument and to elicit testimony to the same effect. Although the prosecutor's pervasive references to the toothbrush as a dangerous instrument were largely improper, there was no basis for reversal because the evidence against Jamison was overwhelming.

Finally, Jamison contended that his convictions for introducing contraband in the first degree and possessing contraband in the first degree should have merged at sentencing. First degree possession of contraband is a lesser included offense of first degree introducing contraband by making, and the convictions should have merged. The trial court erred in entering convictions for both offenses.

The conviction for introducing contraband in the first degree was affirmed. The conviction

for possessing contraband in the first degree was vacated and the case was remanded for correction of the mittimus.

**2018 COA 122. No. 16CA1801. People v. All-gier.** *Criminal Law—Burglary—Possession of a Weapon by a Previous Offender—Evidence—Hearsay—Prosecutorial Misconduct.*

During a burglary, several firearms were stolen. M.S., a suspect in the burglary, told police that he had seen defendant, a previous offender but not one of the burglars, in the back seat of a vehicle next to a box containing some of the stolen firearms. M.S. also said that the firearms might be found at an apartment associated with defendant. The police went to the apartment, seized three of the stolen firearms, and arrested defendant. A jury convicted defendant of possession of a weapon by a previous offender (POWPO).

On appeal, defendant argued that the trial court plainly erred in admitting into evidence the three firearms that were the basis for the POWPO charge, in addition to photographs of them. The prosecution is generally entitled to prove the elements of its case against a defendant by evidence of its own choice. Further, the firearms were accurately described in the photographs admitted into evidence, and defendant did not object to the photographs. Therefore, there was no error in admitting the firearms as the instrumentality of the crime.

Defendant also contended that the trial court erred in admitting hearsay statements of a witness, which improperly bolstered testimony. Here, the court allowed the detective who had interviewed M.S. about the burglary to testify as to that interview. The trial court sustained defendant's objection to the detective's more general statements about what M.S. had said, limiting the testimony to whether M.S. changed his story in any significant way. There was no risk of bolstering from this limited testimony.

Defendant further contended that the trial court plainly erred in allowing the prosecutor to mischaracterize the evidence and the law during closing argument. Here, the prosecutor's statements were few in an otherwise lengthy summation and when read in conjunction with the prosecutor's other statements, any error was not glaring.

Lastly, defendant contended that the aggregate impact of numerous errors denied his right to a fair trial. Here, the Court of Appeals found only unpreserved errors that were not plain. Accordingly, defendant was not deprived of a fair trial.

The judgment was affirmed.

**2018 COA 123. No. 16CA2226. People v. Barbre.** *Criminal Law—Sentencing—Restitution—Burden of Proof—Preponderance of the Evidence.*

Defendant stole several types of prescription pain medication while working at a pharmacy. She pleaded guilty to one count of theft and one count of possession of a controlled substance occurring over a nearly year-long period. The district court sentenced her to two years of probation and ordered restitution.

On appeal, defendant challenged the amount of restitution, contending that the prosecution did not sufficiently prove that she caused a loss in the amount of \$10,553.80. Here, the court specifically relied on defendant's admission that she had stolen thousands of pills over a one-year period and the pharmacy's automated system for tracking inventory. Viewed in the light most favorable to the prosecution, the evidence was sufficient.

The order was affirmed.

**2018 COA 124. No. 17CA0653. Thibodeau v. Denver County Board of Commissioners.** *Revaluation of Taxes—Incorrect Original Valuation—Equal Protection—Colorado Constitution's Uniformity Clause.*

Thibodeau purchased a residence in 2013. Earlier that year, the property was valued at \$803,800 for ad valorem tax purposes. In 2014, it was revalued at \$1,169,700. Thibodeau unsuccessfully protested the increase with the City and County of Denver Assessor's Office before petitioning for abatement from the Denver County Board of Commissioners, sitting as the Denver County Board of Equalization (BOE). He argued that it was error to reassess the property in an intervening year because no unusual condition existed. The BOE rejected his claim and upheld the reassessment.

Thibodeau appealed to the Board of Assessment Appeals (BAA), which concluded that the

mischaracterization of the property's condition as average, rather than good, had led to an incorrect 2013 assessment, and therefore the assessor was permitted to correct the assessment in the intervening year.

On appeal, Thibodeau argued that the BAA erred in upholding the reassessment because CRS § 39-1-104(11)(b)(1) only allows redeterminations in intervening years when unusual conditions exist, and no unusual conditions existed. CRS § 39-1-104(11)(b)(1) authorizes assessors to correct incorrect property assessments in intervening years to set the value at what it would have been set in the assessment year had the mistake not occurred. Further adjustments cannot be made absent proof of an unusual condition. Here, the assessor's records indicated that the property had not been remodeled since its construction in 1938. But after the assessment was completed in 2013, the property was listed for sale with pictures and a description showing renovations and remodeling. Thibodeau did not present evidence that the BOE's corrected value was incorrect. Conversely, there was competent evidence that the original assessment was incorrect due to a misidentification of the condition of the property. Accordingly, the assessor was permitted and required to correct the assessment in 2014.

Thibodeau also argued that the BOE's off-cycle reassessment violated the Equal Protection Clause of the U.S. Constitution. Here, no fundamental right or suspect class was implicated. The assessment was based on discovery of an incorrect determination of the property's condition, not because of the property's sale, and similarly situated properties also undergo the sales verification process. The Court of Appeals found no equal protection concerns.

Thibodeau further argued that the revaluation violated the Colorado Constitution's Uniformity Clause. The protections of this clause are coextensive with the federal Equal Protection Clause, and because there was no equal protection violation, this argument failed as well.

The order was affirmed.

**2018 COA 125. No. 17CA0663. Forfar III v. Wal-Mart Stores, Inc.** *Insurance—Collateral*



*Source Rule—Medicare Benefits—Premises Liability.*

Forfar, a Medicare beneficiary, slipped and fell at a Wal-Mart store. He filed a premises liability case. Before trial, Wal-Mart moved to exclude evidence of Forfar's medical expenses owed under agreements he had with his medical providers. Forfar moved in limine to exclude evidence that he had received Medicare benefits. The trial court ruled that Wal-Mart could not present evidence to the jury as to the amount of the Medicare limits and that Forfar could not present evidence of private contracts between himself and any third-party medical providers. Forfar was allowed to present evidence of the reasonable value of medical services, for which he sought \$72,636. After trial, Wal-Mart moved to reduce the damages under CRS § 13-21-111.6, arguing that the economic damages awarded for medical expenses should be reduced to Medicare accepted rates. The trial court denied the motion, holding that Medicare benefits fall within the contract exception to the collateral source rule in CRS § 13-21-111.6. The judgment entered on a jury verdict included \$44,000 in economic damages for the reasonable value of medical services that Forfar had received.

On appeal, Wal-Mart contended that the trial court should have reduced the damages, arguing that the amounts paid by Medicare are dispositive of the necessary and reasonable value of medical services provided to Forfar. Pre-verdict, the collateral source rule, CRS § 10-1-135(10)(a), bars evidence of collateral source benefits, and the correct measure of damages is the reasonable value of medical services. A benefit is not excluded from the definition of a collateral source simply because it comes from a government program. The trial court properly held Medicare benefits to be a collateral source inadmissible as evidence based on CRS § 10-1-135(10)(a).

Wal-Mart also challenged the trial court's holding that Medicare benefits fall within the contract exception to the collateral source rule. Post-verdict, the trial court is required to reduce a plaintiff's verdict by the amount the plaintiff "has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company

or fund." The exception to this prohibits trial courts from reducing a plaintiff's verdict by the amount of indemnification or compensation that the plaintiff has received from "a benefit paid as a result of a contract entered into and paid for by or on behalf of the plaintiff." Medicare benefits fall within the contract exception to the collateral source rule of CRS § 13-21-111.6. The trial court properly applied the contract exception to Medicare benefits.

Wal-Mart further contended that the trial court violated the Supremacy Clause by failing to apply the Medicaid statutes and regulations over the collateral source rule, asserting that no person may be liable for payment of amounts billed in excess of Medicare approved charges. The Medicare statutes Wal-Mart relies on do not preempt Colorado law holding it liable for the reasonable value of Forfar's medical services.

The Court of Appeals declined to award Forfar attorney fees because the issues presented by Wal-Mart were novel and supported by some out-of-state authority.

The judgment was affirmed.


**2018 COA 126. No. 17CA0741. Marchant v. Boulder Community Health, Inc. Hospital Lien Statute—Statutory Penalties—Summary Judgment.**

Marchant's daughter was struck by an automobile and received medical treatment from Boulder Community Health, Inc. (BCH) for which she was billed \$27,681.10. Cardon Outreach, LLC (Cardon), as agent for BCH, filed a statutory lien in that amount "upon the net amount payable . . . as damages on account of such injuries," without first billing the daughter's insurance company. BCH subsequently made an insurance adjustment to reduce the bill and billed the insurer, which paid \$6,999.36, leaving a balance of \$777.74. Cardon amended the lien to that amount. Marchant paid the balance, and the lien was released. Later, Marchant, as guardian of her daughter, filed an amended complaint alleging violation of the hospital lien statute, CRS § 38-27-101, regarding her right to seek damages of twice the amount of the hospital lien filed.

The parties filed cross-motions for determination of a question of law, and the trial court

ruled that CRS § 38-27-101(7) only provides standing for a lawsuit if the plaintiff is subject to an improper lien at the time the legal action is filed. The trial court granted defendants' motion for summary judgment.

On appeal, plaintiff contended that the trial court misinterpreted the hospital lien statute. The parties agreed that when the lien was filed it violated the hospital lien statute. However, the lien did not violate the statute at the time the lawsuit was commenced. The statute clearly applies only to liens that violate the statute at the time a complaint is filed. Thus, the statute does not allow plaintiff to seek damages.

The judgment was affirmed. 

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