Summaries of Published Opinions

February 7, 2019

2019 COA 16. No. 14CA1958. People v. Ramirez. *Criminal Law—Jury Instructions—Waiver—Forfeiture.*

Defendant was convicted in one trial of charges stemming from four consolidated criminal cases. This case was remanded from the Supreme Court to reconsider the disposition of the conviction for first degree assault in light of *People v. Rediger*, 2018 CO 32.

On remand, defendant argued that the trial court's jury instruction on deadly physical force, which related to the charges of first degree assault, second degree assault, and third degree assault, was improper. It was error for the court to instruct the jury on deadly physical force because defendant was not accused of causing death. By giving an inapplicable instruction and incorporating it into the elemental instruction for first, second, and third degree assault, the court would have caused the jury to have an incorrect understanding of the elements of those charges. The prior Court of Appeals' division concluded that defendant had waived his contention of instructional error because his defense counsel stated he believed the instruction to be "a correct statement of the law," and therefore declined to consider it. Defense counsel apparently lacked awareness of the error. Under these circumstances, the Court of Appeals could not conclude that counsel intentionally relinquished a known right on defendant's behalf. Here, defense counsel's error in declining to object to the jury instruction amounted to a forfeiture, not a waiver. Accordingly, the trial court committed plain error.

The conviction of first degree assault was reversed and the case was remanded for a new trial solely as to that charge. In all other respects, the judgment was affirmed.

2019 COA 17. No. 16CA2198. People v. Burlingame. *Attempting to Influence a Public Servant—False Reporting—Outrageous Governmental Conduct—Work Product Privilege.*

Defendant alleged that she went out drinking one night with a coworker and then went with him to his home. She reported that later that evening the coworker's roommate raped her.

DNA evidence conclusively showed that it could not have been the roommate who had sexual contact with defendant; rather, the coworker had had sexual contact with defendant. Two prosecutors, a prosecutor's office investigator, and a police detective interviewed defendant about these results at her home. The interview was conducted in the presence of family members and friends and was recorded on video. During the interview, defendant became upset and told the investigators and prosecutors to leave, and they did. Prosecutors charged defendant with two counts of attempting to influence a public servant and one count of false reporting.

At a hearing, defendant argued that the videotape of the interview should be suppressed and the case should be dismissed because the government's conduct was outrageous. Prosecutors repeatedly used the work product privilege to block evidence showing why they chose to videotape the interview or that might explain their decision making process in filing the charges. The trial court dismissed the case against defendant based on a finding of outrageous government conduct.

On appeal, the People asserted that the trial court erred in concluding that there was outrageous government conduct warranting dismissal of the charges against defendant. Outrageous governmental conduct is conduct that violates fundamental fairness and shocks the universal sense of justice. Here, the trial court concluded, without evidentiary support, that videotaping the defendant was improper. Further, the prosecutor's proper use of the work product privilege cannot from the basis for a finding of outrageous conduct. In addition, the trial court found a violation of the Victim Rights Act without identifying the specific section violated, and the videotape shows that defendant was treated with respect and was not harassed or abused. While the government's behavior might be considered poor judgment or even legal error, the trial court's findings of fact do not support its conclusion that the government's conduct was outrageous. Because the trial court's findings of fact are not supported by the record, they were arbitrary and thus an abuse of discretion.

The order dismissing the case was reversed and the case was remanded with directions to reinstate the charges and to consider the motions still pending before it, including whether the interview should be suppressed because the totality of the circumstances surrounding it constituted psychological coercion.

2019 COA 18. No. 17CA0938. Martin Trust v. Board of County Commissioners of La Plata County. *Taxation—Property Tax—Residential Property—Vacant Land.*

The Martins bought two adjacent parcels of land in La Plata County. The east parcel (the residential parcel) contains the Martins' home on a .62-acre lot, and the west parcel (the adjacent lot) is an unimproved .72-acre lot that adjoins the residential parcel's western boundary. For tax year 2014, the Martin Family Partnership, LLLP (the partnership) held the title to the adjacent lot and the Martins held the title to the residential parcel as joint tenants. The partnership and the Martins thereafter transferred title to both parcels to the Martin Trust (the Trust), which held the titles for tax years 2015 to 2016.

The County Assessor classified the adjacent lot as vacant land for tax years 2014 to 2016, and the Trust sought to have it reclassified as

residential. It appealed the Assessor's decision to the Board of Equalization of La Plata County and the Board of County Commissioners of La Plata County (collectively, the Boards). The Boards denied both appeals. The Trust appealed those decisions to the Board of Assessment Appeals (BAA). The BAA upheld the County Assessor's 2014 classification of the adjacent lot as vacant land, finding that the parcels were not under common ownership because they were separately titled and the owners were "separate and distinct legal entities." For the 2015 to 2016 classifications, the BAA partially granted the Trust's appeal, stating it was persuaded by the Trust's claim that there would be a loss of views if a residence was constructed on the adjacent lot. But the BAA determined that only two-thirds of the adjacent lot was used as a unit in conjunction with the residential parcel for maintaining views from that parcel, and on that basis, it ordered that only the two-thirds portion of the adjacent lot be reclassified as residential.

On appeal, the Trust contended that the BAA erred when it concluded that the adjacent lot was vacant land for tax year 2014 and partly vacant land for tax years 2015 to 2016. Conversely, the Boards contended that the BAA erred when it reclassified the adjacent lot as residential land for tax years 2015 to 2016. The majority concluded that for two contiguous parcels of land to both qualify as "residential land" (1) one parcel must have a residence on it, (2) the other must have a man-made structure or water rights that are an integral part of the use of the residence on the neighboring parcel, and (3) the land must be used as a unit in conjunction with the residential improvements on the parcels. Further, the requirement that contiguous parcels be used as a unit does not include the "use" of vacant land by looking across it at objects beyond the land. Here, there is no evidence that there are any structures on the adjacent lot that are an integral part of the residence on the residential parcel. Therefore, the adjacent lot does not qualify as residential land.

The BAA's order for tax year 2014 denying residential land designation regarding the adjacent lot was affirmed, and the order for tax years 2015 to 2016 granting such designation for the adjacent lot was reversed. The case was remanded for issuance of an order consistent with the majority's opinion.

2019 COA 19. No. 17CA1257. Parks III v. Edward Dale Parrish LLC. *Torts—Malpractice—Abuse of Process—Breach of Fiduciary Duty—Attorney Fees—Expert Witness.*

Parrish and Edward Dale Parrish LLC (defendants) represented plaintiff in two cases, a

partition case and a dissolution case, against plaintiff's former, long-term girlfriend. Plaintiff was not satisfied with the results. After he failed to pay Parrish for his legal services, Parrish filed a notice of attorney's lien in the partition case. In response, plaintiff filed this case against defendants, alleging that they provided negligent representation and breached their fiduciary duty to him in both cases. Defendants counterclaimed for breach of contract (seeking an award of fees incurred in previously representing plaintiff) and abuse of process (based on plaintiff bringing this case).

At the close of plaintiff's evidence, defendants moved for directed verdicts on all of his claims. The district court concluded that the breach of fiduciary duty claim was duplicative of the negligence claim and dismissed that claim. Plaintiff moved for a directed verdict on the counterclaims, which the court denied. The jury returned verdicts for defendants on all claims and counterclaims. The court also awarded defendants costs for their expert witness. Plaintiff moved for judgment notwithstanding the verdict (JNOV). This motion was deemed denied when the district court did not timely act on it.

On appeal, plaintiff first contended that the district court erred in denying his motion for directed verdict and motion for JNOV on defendants' abuse of process counterclaim. Bringing a malpractice case to obtain a result that such an action is designed to achieve doesn't constitute an improper use of process, regardless of the motive. Here, the district court erred in reasoning that the jury could find an abuse of process if it found merely that defendants didn't provide negligent representation. Given the lack of evidence of any improper use of process, the district court should have granted plaintiff's motion for a directed verdict or motion for JNOV on the abuse of process counterclaim.

Plaintiff next contended that the district court erred in dismissing as duplicative his breach of fiduciary duty claim relating to the partition case. Where the professional negligence claim and breach of fiduciary duty claim arise from the same material facts and the allegations pertain to an attorney's exercise of professional judgment, the breach of fiduciary duty claim should be dismissed as duplicative. Here, plaintiff alleged that Parrish breached his fiduciary duty by entering into a stipulation without his consent. The same allegation underlies in part the negligence claim and implicates Parrish's exercise of professional judgment. Therefore, the district court didn't err in dismissing the breach of fiduciary duty claim.

Plaintiff also contended that the district court erred in denying his motion for a directed verdict on defendants' breach of contract counterclaim. Defendants claimed that plaintiff breached a contract by failing to pay them attorney fees. Plaintiff argued that defendants had to prove the reasonableness of the fees they sought through expert testimony, and because defendants didn't present any such testimony, the claim necessarily fails. When breach of contract damages are unpaid attorney fees, laypersons can determine the reasonableness of fees without an expert's help. Here, Parrish testified about the services rendered, the reasonableness of the time spent on the services, and the fees charged for the services, and the jury considered the bills to plaintiff. Thus, the jury had sufficient evidence to assess the reasonableness of the claimed fees.

The judgment in favor of defendants on the abuse of process counterclaim was vacated. The judgment was affirmed in all other respects. The case was remanded for the district court to enter judgment in plaintiff's favor on the abuse of process counterclaim and to amend the judgment as to damages accordingly.

2019 COA 20. No. 18CA0548. In re Interest of Arguello v. Baslick. *Adult Guardianship—Court Visitor—Judicial Appointment of Permanent Guardian—Conflict—Visitor's Report.*

Arguello is an adult resident of Pueblo who suffers from dementia, developmental disability, and mental health illness. The court appointed Baslick as emergency guardian when medical decisions needed to be made and family was unavailable. Baslick works for Colorado Bluesky Enterprises, Inc. (Bluesky), which provides Arguello with case management services. Soon after Baslick's appointment, several individuals petitioned the court to be appointed permanent guardian.

The court appointed a court visitor to prepare a visitor's report concerning all prospective guardians. The first visitor's report did not recommend Baslick because of her employment with Bluesky and the existence of a potential conflict of interest under CRS § 15-13-310(4), which precludes a long-term care provider from also serving as a guardian. After several hearings and finding no suitable guardian from among the petitioners, the court sua sponte appointed the Arc of Pueblo (ARC) as the permanent guardian. Bluesky and Baslick moved for reconsideration, and the district court denied the motion.

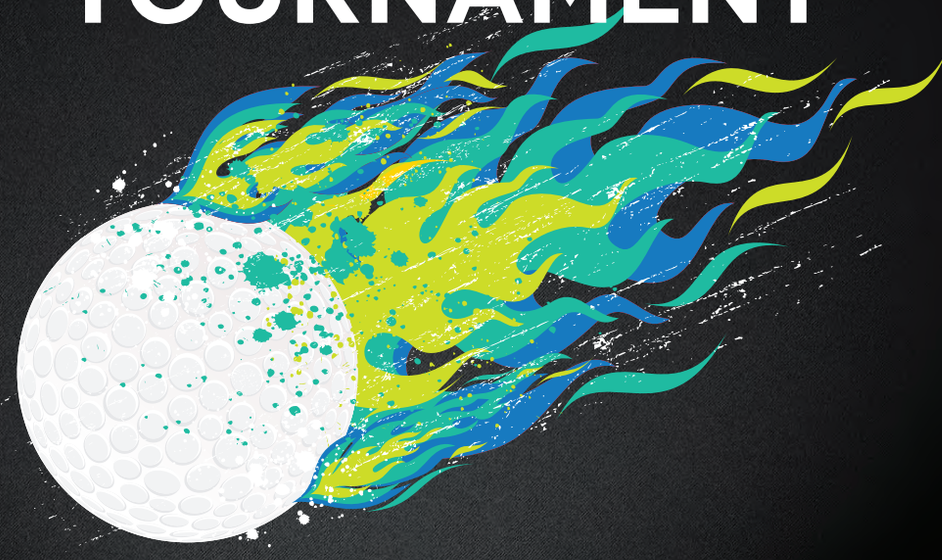
On appeal, Bluesky argued that it is not a long-term care provider under the statute and the court erred in applying the statutory prohibition to Baslick. Here, while Bluesky may not fall "squarely" within the definition of a long-term care provider, the facts demonstrate a potential conflict of interest between Bluesky and Baslick that rendered her unsuitable as a guardian for Arguello. Bluesky provides substantial assistance to Arguello in the form of case management services. As guardian, Baslick would be able to recommend increased funding for Arguello and thereby generate revenues for Bluesky. She would also have oversight of Bluesky's case management services and could be hesitant, as a Bluesky employee, to question Bluesky's actions. Accordingly, the district court's conclusion is supported by the record, and the court acted within its discretion in finding that Arguello's best interests would not be served by appointing Baslick.

Bluesky next contended that the court violated the statutory mandate in CRS § 15-14-305(1) by appointing ARC without first appointing a visitor and receiving a report. The court is required to appoint a visitor for every petition for guardianship filed, and all prospective guardians must undergo the statutory vetting process set forth in CRS §§ 15-14-304 and -305 before appointment may occur. The trial court erred in sua sponte appointing a guardian who did not go through this process.

The order appointing ARC as guardian for Arguello was reversed, and the case was remanded to appoint a visitor and follow the statutory procedure to appoint a guardian for Arguello. The order was otherwise affirmed.

DENVER BAR ASSOCIATION

GOLF TOURNAMENT



June 7

1 p.m. Shotgun Start

Broken Tee Golf Course | 2101 W Oxford Ave, Englewood

$80 per player and $65 for law students.

ALL PROFITS BENEFIT **METRO VOLUNTEER LAWYERS**

This year the tournament will be played in a scramble format (four-person teams), where awards will be given for team low gross and team net. After you've finished golfing, join us in the clubhouse for complimentary appetizers and drinks.

Visit denbar.org for more information.

DENVER BAR ASSOCIATION℠

February 21, 2019

2019 COA 21. No. 15CA0576. People v. Cooper. *Criminal Law—Evidence—"Blind" Expert Testimony—Relevance—Prejudice—Unanimity.*

Cooper and L.K. were in an intimate relationship and lived together. They had a physical altercation that resulted in Cooper being charged with, among other things, third degree assault and harassment. At trial, over Cooper's repeated objections, the prosecution presented extensive testimony from a "blind" expert witness about the characteristics of domestic violence relationships and the "power and control wheel," a tool developed purportedly to explain how an abusive partner can use power and control to manipulate a relationship. A jury convicted Cooper of third degree assault and harassment.

On appeal, Cooper asserted that the trial court erred in admitting the blind expert witness testimony both on reliability and relevance grounds. Expert testimony should be admitted only when the expert's opinions will help the factfinder. A blind or "cold" expert knows little or nothing about the facts of a particular case, often has not met the victim, and has not performed any forensic or psychological examination of the victim (or the defendant). Here, no evidence presented to the jury proved or suggested that before the charged incident Cooper had assaulted L.K., had physically or non-physically abused L.K., or had exercised improper control over L.K. physically, emotionally, or economically. The only way the jury could have found there was a pattern of abuse was from the testimony of the blind expert, who purportedly knew nothing about the facts of the case. There was no record evidence that related to the vast majority of the blind expert's opinions, and the trial court abused its discretion in admitting this testimony. This error was not harmless.

Cooper also contended that the trial court erred in not instructing the jury on the requirement of unanimity. Here, the evidence "does not present a reasonable likelihood that jurors may disagree on which acts the defendant committed" regarding the third degree assault charge. Therefore, Cooper was not entitled to a unanimity instruction.

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

2019 COA 22. No. 16CA0236. People in the Interest of D.C. *Juvenile Law—Delinquency—Public Indecency—Members of the Public.*

D.C. and E.L. were committed to the Division of Youth Corrections (DYC). During their DYC science class, D.C. exposed one of his testicles to E.L. As a result, D.C. was adjudicated delinquent for committing an act that, if committed by an adult, would constitute public indecency.

On appeal, D.C. argued that insufficient evidence supported the adjudication because the prosecution failed to establish that the DYC classroom in which D.C. exposed his testicle was a "public place" under the public indecency statute. A person commits public indecency by knowingly exposing his genitals to the view of another under circumstances that are likely to cause affront or alarm "in a public place or [in a place] where the conduct may reasonably be expected to be viewed by members of the public." Here, other students and a teacher were present when D.C. exposed himself. Therefore, sufficient evidence established that D.C. exposed his genitals in a public place under the indecency statute.

The adjudication was affirmed.

2019 COA 23. No. 16CA0737. People v. Denhartog. *Criminal Law—First Degree Assault of a Peace Officer—Threaten—Prior Acts Evidence—Merger—Lesser Included Offense—Prosecutorial Misconduct.*

A motorcycle patrol officer observed defendant speeding and pulled him over. The officer parked about 12 feet behind defendant's vehicle. As the officer prepared to dismount from his bike, defendant suddenly reversed his vehicle and drove into the motorcycle, pushing the bike backward and causing the officer to fall and sustain minor injuries. Defendant left the scene and broke into an unoccupied apartment, where he damaged the tenant's belongings and set fire to contraband he was carrying. Defendant was charged with 15 felony, misdemeanor, and traffic offenses. As relevant here, the jury convicted him of first degree assault of a peace officer, two counts of second degree assault, vehicular eluding, first degree criminal trespass, and second degree burglary.

On appeal, defendant argued that the evidence was insufficient to support his conviction for first degree assault because the prosecution failed to prove he used the vehicle to threaten the officer. "Threaten" means to express a purpose or intent to cause harm or injury. To obtain a conviction for first degree assault of a peace officer, the prosecution had to prove that, by use of a deadly weapon, defendant expressed a purpose or intent to cause injury or harm to the officer or the officer's property. Here, the act of suddenly hitting the officer's motorcycle, without more, did not constitute a threat. Accordingly, the evidence was insufficient to sustain the first degree assault conviction.

Next, defendant contended that the trial court erred in admitting evidence under CRE 404(b) of his prior assault of a peace officer. The prior and current incidents were similar enough that the prior act evidence was admissible for the nonpropensity purpose of rebutting defendant's defense that his conduct was accidental rather than intentional. Thus, the evidence was relevant to establish defendant's intent to commit assault. The district court did not abuse its discretion.

Defendant also contended that his assault and eluding convictions should be reversed due to prosecutorial misconduct during closing argument. However, the prosecutor did not err in commenting on the strength of defense counsel's arguments and using the facts in evidence to support his argument. Although the prosecutor improperly appealed to the emotions of the jury and misstated one piece of evidence during his closing argument, the two instances of misconduct were not egregious and did not warrant reversal.

Defendant further contended, the People conceded, and the Court of Appeals agreed that his two convictions for second degree assault must merge for multiplicity.

Lastly, defendant contended that first degree criminal trespass is a lesser included offense of second degree burglary and therefore these convictions must merge. However, the Supreme Court has expressly held that first degree criminal trespass is not a lesser included offense of second degree burglary.

The case was remanded to (1) vacate the conviction and sentence for first degree assault and for entry of a judgment of acquittal on that charge; (2) merge the convictions for second degree assault and vacate the conviction entered under CRS § 18-3-203(1)(c); and (3) resentence defendant. The judgment was otherwise affirmed.

2019 COA 24. No. 17CA1623. In re the Interest of Ray v. People. *Mental Health—Certification for Short-Term Treatment—Physician—National Instant Criminal Background Check System—Firearm Prohibitions—Court Order.*

Ray voluntarily sought mental health treatment from a hospital. After he was admitted, a physician certified Ray for involuntary short-term mental health treatment under CRS § 27-65-107, finding that he was a danger to himself or others and would discontinue mental health treatment absent such a certification. That certification caused Colorado officials to report Ray to the National Instant Criminal Background Check System (NICS) as a person subject to federal firearm prohibitions. The certifying physician terminated the mental health certification days after it was entered, and Ray was discharged from the hospital. Ray petitioned the probate court for removal from the NICS. The probate court denied the petition.

On appeal, Ray argued that because he was involuntarily certified by a physician, rather than a court, Colorado officials should not have reported his certification to the NICS. Colorado law requires certain persons and entities to make NICS reports for persons with respect to whom a court has entered an order for involuntary certification for short-term mental health treatment. The plain meaning of the term "court order" does not encompass certification by a professional person. Therefore, the certification made by the physician does not meet the plain definition of a court order.

The order was reversed and the case was remanded for the probate court and the parties to take reasonable steps to cause any record of Ray's certification submitted by them under CRS § 13-9-123(1)(c) to be rescinded.

2019 COA 25. No. 17CA1996. Estate of Yudkin v. Shtutman. *Probate—Family Law—Common Law Marriage.*

Yudkin, the decedent, died intestate. Yudkin's ex-wife Shtutman sought informal appointment as the personal representative of his estate. Appellant Dareuskaya objected to Shtutman's appointment, claiming that she was Yudkin's common law wife and thus had priority as the personal representative. After an evidentiary hearing, the magistrate, sitting in probate,

found that even though Yudkin and Dareuskaya agreed to be married, cohabitated for eight years, and had a reputation in their community as a married couple, no common law marriage existed because they did not file joint tax returns and other indicia of a common law marriage were absent.

On appeal, Dareuskaya argued that the magistrate erred in concluding a common law marriage did not exist despite finding that the couple cohabitated and had a reputation in the community as married. Under *People v. Lucero*, 747 P.2d 660 (Colo. 1987), if there is an agreement to be married and the parties cohabitate and have a reputation in the community as husband and wife, a common law marriage has been established. Further, any actions taken (or not taken) by the parties after those essential factors are established are legally irrelevant. Here, the magistrate specifically found that Yudkin and Dareuskaya agreed to be husband and wife and that cohabitation and reputation in the community were established. The magistrate's determination that no common law marriage was proven was an abuse of discretion.

The magistrate's order rejecting Dareuskaya's claim of a common law marriage was reversed and the case was remanded.

2019 COA 26. No. 17CA2304. Wagner v. Planned Parenthood Federation of America, Inc. *Premises Liability—Summary Judgment.*

Dear drove into the parking lot of the Colorado Springs clinic operated by Planned Parenthood of the Rocky Mountains (PPRM), a member of Planned Parenthood Federation of America, Inc. (PPFA) and shot several people in the parking lot, two of whom died. He then entered the clinic and wounded several more people. When police arrived he engaged in a lengthy gun battle, killing one officer and wounding five others.

Plaintiffs were the victims or survivors of other victims killed by Dear. Plaintiffs alleged they were invitees of PPRM under Colorado's Premises Liability Act (CPLA). They also filed a common law negligence claim against PPFA, asserting PPFA controlled PPRM. The trial court granted summary judgment in favor of PPRM and PPFA on both claims.

On appeal, plaintiffs argued it was error to grant summary judgment in favor of PPFA because there was a genuine issue of material fact whether PPFA's control over PPRM created a duty of care owed by PPFA to plaintiffs. This was a nonfeasance case, where the existence of a duty is recognized only in situations involving a limited group of special relationships between the parties. Here, the trial court correctly found that no such special relationship existed, that PPFA merely exercised discretion and not control over PPRM, and that it was not the owner or possessor of the land associated with the clinic. The court did not err in concluding that PPFA owed no duty to plaintiffs and in granting PPFA's summary judgment motion.

Plaintiffs next argued that the trial court erred in concluding as a matter of law that Dear's actions were the predominant cause of the injuries and deaths and in granting summary judgment to PPRM on that basis. Plaintiffs claimed they tendered sufficient evidence to raise genuine issues of material fact whether PPRM knew of reasonable security measures that would have prevented harm to the victims, and PPRM was sufficiently aware of the potential for criminal conduct against its clinics to prepare for the types of offenses Dear committed. Here, it was undisputed that the injured parties were invitees and PPRM was a landowner under the CPLA. The issue before the Court of Appeals was whether there was a genuine dispute of fact whether PPRM knew or should have known of the danger faced by the invitees. Plaintiffs presented evidence suggesting the risk of an active shooter incident in a Planned Parenthood facility like PPRM, especially one providing abortions, was not unknown. The Court found that there was enough of a dispute on this issue of material fact that it should go to a jury.

The summary judgment in favor of PPFA was affirmed. The summary judgment in favor of PPRM was reversed and the case was remanded.

2019 COA 27. No. 17CA0842. People v. Slaughter. *Equal Protection—Felony Strangulation—Charging Options.*

The prosecution charged defendant with second degree assault by strangulation under CRS § 18-3-203(1)(i) for allegedly strangling the victim with his hands. The People later moved to add a new count under the crime of violence sentencing statute, CRS § 18-1.3-406(2)(a)(I)(A), based on their assertion that defendant used his hands as a deadly weapon. The trial court dismissed the charged sentence enhancer as violating defendant's equal protection rights. The People filed this interlocutory appeal.

Under the Colorado Constitution, if criminal statutes provide different penalties for identical conduct, a person convicted under the statute with the harsher penalty is denied equal protection unless there are reasonable differences between the proscribed behaviors. A prosecutor charging an accused with felony strangulation has multiple charging options under the Colorado criminal statutes. The crime can be charged under the first degree assault statute, CRS § 18-3-202(1)(g), which requires proof that the accused caused serious bodily injury to the victim. If the prosecution does not want to prove serious bodily injury, it can charge the accused under the second degree assault statute, CRS § 18-3-203. This statute has two charging options, (1)(b) or (1)(i), neither of which would require proof of serious bodily injury. Under (1)(b) proof of use of a deadly weapon is required. Unless charged with a crime of violence sentence enhancer, a strangulation charge under subsection (1)(i) would not require proof of use of a deadly weapon. The penalty available for strangulation charged under (1)(i) if charged as a crime of violence under CRS § 18-1.3-406(2)(a)(I)(A) is substantially more severe than if an accused is charged under (1)(b), even though both would require proof of use of a deadly weapon.

Though prosecutors have discretion in charging decisions, the prosecution is not permitted to charge an accused in a way that would result in an equal protection violation if the defendant were found guilty and sentenced to a harsher penalty than another accused might receive for identical assault conduct. Here, the combination of the prosecution's charge against defendant under CRS § 18-3-203(1)(i) and the crime of violence sentence enhancer under CRS § 18-1.3-406(2)(a)(I)(A) renders these statutory provisions unconstitutional as

applied to defendant. Thus, the prosecution's motion to charge defendant with a crime of violence sentence enhancer should have been denied, and the trial court did not err.

The order was affirmed.

2019 COA 28. No. 18CA0930. People v. Melnick. *Postconviction Remedies—Parole Revocation Appeal—Successive Claims.*

Defendant pleaded guilty to sexual assault and two misdemeanors, third degree assault and menacing, and was sentenced. He was later granted parole. Defendant's parole was subsequently revoked and he was remanded to the custody of the Department of Corrections for 540 days. The Appellate Board of the Colorado State Board of Parole (the parole board) denied his appeal of that decision. Defendant then filed a Crim. P. 35(c) motion in which he asserted numerous claims relating to his parole revocation. The postconviction court denied the motion without a hearing, finding the challenges raised to the parole board were not properly brought pursuant to Crim. P. 35(c).

On appeal, defendant argued that the parole board improperly refused to consider him for parole within 180 days after his parole was revoked, as required by CRS § 17-2-201(14). Rule 35 does not encompass this type of claim and Colorado appellate courts have consistently declined to review such claims under that rule. Thus, the postconviction court properly denied this claim.

Defendant next argued that the hearing officer was biased and had prejudged his appeal. This challenge is aimed at the lawfulness of the revocation and is explicitly governed by Rule 35(c)(2)(VII) and is cognizable. The postconviction court concluded that defendant's appeal to the parole board had the same preclusive effect that a direct appeal would have had. But the parole statute explicitly provides for judicial review of parole revocation under CRS § 18-1-410(1)(h), so defendant's claim is not barred as successive. A Rule 35 motion may be denied without a hearing if the record clearly establishes that the defendant's allegations are without merit and do not warrant relief. A defendant is not required to set forth evidentiary support for his allegations in a Rule 35 motion, but must only assert facts that if true would provide a basis for relief. Here, defendant asserted that the hearing officer prejudged his case by partially completing electronically a preprinted disposition form and printing it five days before the hearing. This allegation cannot be resolved without testimony from the hearing officer.

Defendant also asserted that he was denied the opportunity to present witnesses and evidence. He identified witnesses and the general subject of their testimony in exhibits attached to his postconviction motion. Defendant also alleged that he was denied the benefit of potentially exculpatory evidence. He claimed law enforcement officials destroyed the cell phone that contained text messages that would have corroborated his claim that his work supervisor had provided false information, which led to his termination from employment and, in turn, to his parole violation. If these allegations were established after a hearing, defendant's parole revocation may have been unlawful. Defendant is entitled to a hearing and the appointment of counsel.

The order was affirmed as to the denial of defendant's challenge to the parole board's failure to provide him a new parole hearing within 180 days. The remainder of the order was reversed and the matter was remanded with instructions to appoint counsel for defendant and to conduct a hearing.

2019 COA 29. No. 87CA1230. Neppl v. Colorado Department of Revenue. *Driver's License Revocation—Express Consent—Supervision of Blood Draw.*

A police officer stopped defendant's vehicle after he twice failed to use his turn signal. The officer noticed signs of intoxication and defendant admitted to drinking four beers. Defendant failed to satisfactorily perform voluntary roadside maneuvers and the officer advised him of his options under the express consent law. Defendant chose a blood test, which showed a blood alcohol content of .188 grams of alcohol per 100 milliliters of blood. The Colorado Department of Revenue subsequently issued defendant a notice of license revocation. Defendant requested a hearing, and the hearing officer sustained the revocation. The district court affirmed.

On appeal, defendant argued that the statute requires on-the-spot supervision, and the paramedic's supervisor was not present and supervising him when he conducted the blood draw. Under the plain language of the express consent statute, CRS § 42-4-1301.1(6), a paramedic does not have to be directly supervised by a doctor at the time of the blood draw. Also, the record established that the paramedic was supervised by a doctor. Here, the paramedic was authorized to draw defendant's blood. Even assuming the statute did require a doctor's supervision of a paramedic, "under the supervision" is not synonymous with "on-the-spot" supervision. Further, even if the blood draw did not strictly comply with statutory requirements, such deficiency would go to the weight of the test results, not the admissibility.

The judgment was affirmed. 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.