Summaries of Published Opinions

October 3, 2019

2019 COA 150. No. 18CA1613. People v. N.T.B. *Evidence—Admissibility—Authentication—Hearsay—Business Records Exception—Cloud Storage.*

Dropbox flagged a cloud-storage account that it suspected contained child pornography. It provided the National Center for Missing and Exploited Children (the Center) with a video and an account identification number, email address, account activity log, and Internet protocol (IP) address tied to the upload. The Center forwarded this information to local police, who traced the Dropbox account to defendant and traced the IP address to Comcast. Defendant was charged with three counts of sexual exploitation of a child.

Defendant moved in limine to exclude the Dropbox and Comcast records (the records) because the prosecution had not endorsed a records custodian to testify as to the CRE 803(6) authentication requirements nor provided an affidavit and notice under CRE 902(11). The trial court held that the records were business records that it could not admit without testimony or an affidavit from the custodians, and even if the prosecution could have authenticated these records, they contained inadmissible hearsay. The court granted defendant's motion to dismiss and sealed the case.

On appeal, the district attorney challenged the trial court's pretrial order dismissing all charges against defendant, asserting that the investigating officer's testimony provided a sufficient foundation from which the jury could reasonably find that the records were documents generated by the business entities. Where a law enforcement investigator has personal knowledge that proffered evidence was produced in response to a search warrant, courts have allowed the investigator to authenticate that evidence. Here, the prosecutor made an offer of proof that the investigating detective would testify that he caused search warrants to be issued and served on Dropbox and Comcast; these entities provided him with the records in response to the warrants; and defendant acknowledged to the detective that he owned a Dropbox account tied to his work email address. Thus, the investigating detective had sufficient personal knowledge indicating that the records were authentic. However, the records may have included human-generated input and interpretation, and thus include statements that constitute hearsay. Because the prosecution did not list a custodian to provide the necessary CRE 803(6) foundation, the trial court properly excluded the records as inadmissible hearsay.

The ruling was approved.

2019 COA 151. No. 19CA0244. People in the Interest of I.J.O. *Juvenile Law—Dependency and Neglect—Termination of Parental Rights—Interstate Compact on Placement of Children—Home Study—Reasonable Efforts.*

The Adams County Human Services Department (Department) filed a petition in dependency and neglect regarding 8-year-old I.J.O. The Department alleged that the child's father was unstable and was planning to take the child back to Ohio to live with mother. The juvenile court adjudicated I.J.O. dependent and neglected and adopted a treatment plan for mother. Pursuant to the Interstate Compact on Placement of Children (ICPC), Ohio authorities conducted a home study and disapproved mother's home based on her extensive history with the Ohio child protection agency and her and her boyfriend's drug use. Based on this determination, the Colorado caseworker concluded that the child could not be lawfully placed with mother. The caseworker did not make any drug treatment recommendations, and the Department did not provide mother with any assistance in obtaining therapy to reintegrate with the child. The Department subsequently moved to terminate mother's rights and the juvenile court granted the motion.

On appeal, mother contended that the juvenile court erred by relieving the Department of its obligation to exercise reasonable efforts to rehabilitate mother and to reunify the family based solely on the ICPC home study. When an out-of-state natural parent fails an ICPC home study, the Department is obligated to make reasonable efforts to help that parent rectify the problems so that a home study can be passed. Here, it is unclear whether the juvenile court concluded that conducting the home study itself was sufficient reasonable efforts.

The case was remanded for the limited purpose of allowing the court to clarify its findings supporting the termination of mother's parental rights.

October 10, 2019

2019 COA 152. No. 16CA0048. People v. Knox. *Criminal Law—Attempt to Influence a Public Servant—Criminal Extortion.*

Diedrichs-Giffin was turning left in her car when she heard a "bang" as defendant forcefully placed her hands on the hood of the car. Defendant declined to contact law enforcement. Diedrichs-Giffin provided defendant her insurance and contact information and defendant walked away, apparently uninjured. Later that day, defendant sent Diedrichs-Giffin a series of text messages asking for money in exchange for not filing a court action. Six days later, defendant walked to an area close to where the incident occurred and called 911, claiming that she had just been hit and the driver refused to wait for police. Defendant later

admitted to lying to police about the timing. A jury found defendant guilty of criminal extortion, false reporting, and three counts of attempt to influence a public servant.

On appeal, defendant contended that the district court erred in concluding that police officers are public servants under CRS § 18-8-306. The Court of Appeals determined that the statute is ambiguous and construed it to include police officers in the public servant category.

Defendant also contended that her convictions for attempting to influence a public servant violate her right to be free from double jeopardy. A defendant may be charged with multiple offenses of attempting to influence a public servant arising from a single criminal episode when the discrete offenses were separated in time and location and comprised separate volitional departures. Here, defendant's report to the dispatcher and her accounts to two officers were three separate incidents because each took place at distinct times, were recited to different public servants, and were separated by intervening events. Therefore, the evidence supports defendant's convictions.

Defendant further argued that the prosecution failed to meet its burden of proving that she committed three attempts to influence a public servant because (1) the prosecution failed to prove that police officers are public servants, and (2) she did not have the necessary mens rea to influence the dispatcher. As stated above, police officers are public servants. As to the mens rea requirement, when the dispatcher responded to defendant's call and dispatched police officers and emergency responders, the dispatcher was working for the police department in accordance with her official duties. Viewing the evidence in the light most favorable to the prosecution, reasonable jurors could conclude that the dispatcher was a public servant and defendant intended to influence the dispatcher's actions, not merely convey information.

Defendant further argued that her threats of litigation to cause economic hardship were insufficient to prove she committed criminal extortion. The threat of litigation does not constitute criminal extortion. Defendant's threat to sue Diedrichs-Giffin did not suggest that she intended to act unlawfully; instead, she gave Diedrichs-Giffin the option to settle her alleged claim to avoid litigation.

The judgment was affirmed in part and the criminal extortion conviction was vacated.

2019 COA 153. No. 18CA0915. In re Parental Responsibilities Concerning N.J.C. *Family Law—Uniform Parentage Act—Child Support—Gross Income—Deferred Compensation—Joint Trial Management Certificate—Attorney Fees.*

Mother and father are the unmarried parents of N.J.C. In the initial paternity proceeding concerning N.J.C., father's child support calculation was based on his salary as a cardiologist for his own medical practice. Subsequently, father accepted another job with a $150,000 annual salary and $200,000 of yearly deferred compensation in a nonqualified plan. Mother moved to increase child support and asked the magistrate to include the deferred compensation as income to father. The magistrate modified father's child support obligation by including in father's income his salary and nominal dividend and interest income but not the deferred compensation. The juvenile court judge adopted the magistrate's decision not to include the deferred compensation.

On appeal, mother argued that the juvenile court erred in rejecting her argument that deferred compensation in a nonqualified plan is income for child support purposes if it is being earned during a period when a parent is obligated to pay child support. Deferred compensation is income only if the parent can use it to pay his or her expenses, including child support. Here, father could not contribute to the plan, had no control over the funds, and had no guarantee he would ever receive the funds. Accordingly, father's deferred compensation

plan is not income, and the magistrate correctly excluded it from father's gross income when modifying child support.

Mother also contended that the magistrate abused her discretion by not reallocating to father 90% of the parental responsibilities evaluations (PRE) costs and refusing to consider her request for attorney fees related to father's motion to modify parenting time. Mother did not make any argument concerning the reallocation of PRE fees in her opening brief, so she abandoned the argument, and the Court of Appeals declined to consider it. The magistrate did not abuse her discretion in refusing at the child support hearing to consider mother's request for attorney fees in connection with the parenting time hearing because mother failed to comply with the magistrate's order by specifying in the Joint Trial Management Certificate that she sought such relief.

Mother further contended that the magistrate abused her discretion by requiring the parties to pay their own attorney fees in connection with her motion to modify child support. Under CRS § 19-4-117, the court must order parties to pay reasonable attorney fees in proportions and at times determined by the court. Here, the magistrate considered relevant factors concerning the parties' financial circumstances. The record supports the magistrate's decision for both parties to bear their own fees, and the order was not manifestly arbitrary, unreasonable, or unfair. However, mother was entitled to attorney fees that she paid on appeal.

The order was affirmed. The case was remanded for consideration of mother's appellate attorney fees request.

2019 COA 154. No. 18CA0990. Nesbitt v. Scott. *Eminent Domain—Private Condemnation—Attorney Fees—Written Fee Agreement—CRCP 121, § 1-22(2)(b).*

Kathryn, Rodney, and Vicki Scott (collectively, the Scotts) granted Rita Nesbitt, trustee of the Rita A. Nesbitt Trust, permission to construct a roadway across their land. When a disagreement arose as to the size and character of the roadway, the Scotts revoked Nesbitt's permission, but Nesbitt continued to build the roadway. The dispute led to protracted litigation, including an action in trespass and private condemnation proceedings, that lasted nearly a decade and involved two Court of Appeals' reversals. Ultimately, the trial court awarded the Scotts $400,431.85 in attorney fees and $35,066.25 in costs.

On appeal, Nesbitt argued that the trial court abused its discretion by awarding the Scotts attorney fees and costs because they failed to attach a written fee agreement or other materials evidencing the fee agreement to their motion for attorney fees and costs, as required by CRCP 121, § 1-22(2)(b). In a condemnation proceeding, when a petitioner is not authorized by law to condemn real property, the court must award reasonable attorney fees and costs to the property owner who participated in the proceedings, including appellate fees incurred in any appeal from the underlying case. While CRCP 121, § 1-22(2)(b) requires "any" documentation that supports a motion for attorney fees and costs to accompany the motion, it does not specify that a particular type of supporting documentation must accompany the motion. Therefore, the trial court did not abuse its discretion in awarding the Scotts attorney fees and costs.

Nesbitt also contended that she should not have to pay the award associated with the summary judgment motion that was ultimately unsuccessful because the motion "unnecessarily increased the length of the case." In assessing attorney fees and costs, the trial court did not find the Scotts' 2012 summary judgment motion to be groundless, frivolous, untimely, or in bad faith. Further, the Scotts were ultimately successful on the merits. Therefore, the trial court did not abuse its discretion in awarding attorney fees and costs associated with the 2012 motion.

The award of attorney fees and costs was affirmed.

October 17, 2019

2019 COA 155. No. 17CA0356. People v. Quezada-Caro. *Felony DUI—Prior Convictions—Jury Determination—Sentence Enhancer—Equal Protection—Theory of Defense.*

An officer on patrol around 2:35 a.m. found defendant asleep in the driver's seat of his vehicle with vomit on his shirt and drool leaking from his mouth. The officer eventually woke defendant and arrested him. A consensual blood draw showed that defendant's blood alcohol level was 0.207, and he was charged with felony DUI and DUI per se.

Before trial, defendant moved for a ruling that prior impaired driving convictions are an element of a felony DUI charge that must be proved to a jury beyond a reasonable doubt. The district court concluded that prior convictions are a sentence enhancer that the court would determine after trial. Defendant was convicted of both counts, and at a separate hearing the court found, beyond a reasonable doubt, that defendant had three prior Colorado DUI convictions and at least two prior California DUI convictions. He was sentenced to six years in the custody of the Department of Corrections, suspended upon the successful completion of 15 years of probation.

On appeal, defendant argued that he was entitled to have a jury determine beyond a reasonable doubt whether he had prior convictions for impaired-driving offenses. However, based on the plain language of CRS § 42-4-1301(1)(a), proof of prior DUI convictions is a sentence enhancer, not an element of a felony DUI offense.

Defendant also argued that even if prior convictions are a sentence enhancer, they should still be proved to a jury beyond a reasonable doubt. Prior convictions are facts that have already been determined by a jury beyond a reasonable doubt or admitted by a defendant in a knowing and voluntary plea agreement. Therefore, prior convictions need not be proven to a jury beyond a reasonable doubt.

Lastly, defendant argued that if prior convictions are considered as a sentence enhancer, CRS § 42-4-1301(1)(a) violates his right to equal protection because it proscribes the same conduct as CRS § 42-4-1307(6) but exposes him to substantially greater penalties. The statutes do not violate defendant's right to equal protection because they proscribe different conduct for which the legislature may impose different penalties. Thus, there was no violation of defendant's right to equal protection.

Defendant further contended that the district court erred when it failed to construe the instruction he tendered on the definition of "drove" as a theory of defense instruction. Here, defendant's tendered instruction did not set forth a theory of defense, but explained a term used in an elemental instruction. Because defendant did not tender a theory of defense instruction, the trial court was not obligated to create one on his behalf.

The judgment was affirmed.

2019 COA 156. No. 17CA2134. People v. Harmon. *Fourth Amendment—Motor Vehicle Search and Seizure—Passenger.*

Defendant was a passenger in a vehicle that was lawfully stopped by the police. During the stop, the officer recognized defendant from previous contacts involving illegal drugs. The officer directed the car's occupants to exit the vehicle while a canine unit performed a drug sniff of the vehicle's exterior. The officer asked the vehicle occupants whether they had guns, knives, drugs, or drug paraphernalia on them, and specifically asked defendant what was in her purse. Defendant admitted to having a "hot rail tube" in her purse, which is used to snort methamphetamine. Meanwhile, the dog alerted to the odor of a controlled substance in the vehicle, but a vehicle search turned up nothing. The officer then searched defendant's purse based on her admission about the hot rail tube and found it and a plastic container containing a Xanax pill and methamphetamine. Before trial, defendant sought to suppress the evidence found in her purse. The trial court denied her motion.

On appeal, defendant argued that the officer violated her right against unreasonable seizure when he brought her to an alley alone to interrogate her about drugs. She conceded that as a passenger in the vehicle she was lawfully seized by the traffic stop, but contended that the seizure became unconstitutional when the officer left the vehicle and other passengers to interrogate her about drugs. Here, the vehicle was stopped in or adjacent to the alley, and everyone remained nearby during the stop. Defendant was within five to 10 feet of the vehicle at all times and did not challenge the distance between her and her companions. Under these circumstances, the officer's direction to defendant to "step over here" was merely incidental to the ongoing lawful seizure, and defendant's physical separation from the other vehicle occupants did not rise to the level of a separate seizure. Further, the officer's questions of defendant did not convert the encounter into an unlawful seizure because they did not prolong the traffic stop. Thus, police did not violate defendant's Fourth Amendment rights, and the trial court correctly denied her motion to suppress.

The Court of Appeals also rejected defendant's arguments that reversal is required because the trial court (1) clearly erred in finding that the dog alerted to her rather than the vehicle, and (2) analyzed the wrong Fourth Amendment event (the search of her purse).

The judgment was affirmed.

2019 COA 157. No. 18CA2073. People in the Interest of K.N.B.E. *Dependency and Neglect—Termination of Parental Rights—Due Process—Expert Testimony—Indian Child Welfare Act.*

Mother is a member of the Northern Cheyenne tribe (the Tribe). The Denver Department of Human Services (Department) filed a petition in dependency and neglect alleging that mother tested positive for marijuana and amphetamine when she was admitted to the hospital just before her twins (the children) were born, the children were in the hospital for nearly a month after being born to address problems stemming from prematurity and drug exposure, and mother was homeless and had nowhere to take the children when released from the hospital. The Tribe accepted the children for enrollment and intervened in the case. The juvenile court appointed a guardian ad litem for mother.

Mother admitted to the petition and the juvenile court adjudicated the children dependent and neglected and adopted a treatment plan.

Pursuant to the Indian Child Welfare Act (ICWA), the Department retained an expert to determine whether allowing mother to retain custody of the children was likely to result in their serious emotional or physical harm. The Department's expert spoke with mother on the telephone. The Department later moved to terminate mother's parental relationships with the children. Mother's counsel filed a motion in limine seeking to exclude the Department's expert's testimony and report from the termination hearing, arguing that because the expert had obtained information from mother during an interview that took place without her counsel or guardian ad litem there to assist her, allowing the expert to testify and introduce his report would violate mother's right to due process. The juvenile court denied the motion, and following a hearing, terminated mother's parental rights.

On appeal, mother contended that the juvenile court should have excluded the Department's expert's testimony and report because her interview with the expert violated her procedural due process rights. Under the ICWA, parental rights may not be terminated as to an Indian child unless evidence, including testimony of a qualified expert witness, establishes beyond a reasonable doubt that the parent's continued custody of the child is likely to result in serious emotional or physical harm to the child. But a party to a dependency and neglect proceeding is not entitled to the same due process rights as a defendant in a criminal proceeding, and an indigent parent's right to court-appointed counsel in a termination of parental rights proceeding is statutory, not constitutional. Thus, if a respondent parent has an opportunity to appear through counsel and present evidence and cross-examine witnesses, the parent's due process rights aren't violated. Here, mother had counsel at the termination hearing who cross-examined the Department's expert and presented a report and testimony from mother's own expert. Mother's due process rights were sufficiently protected.

The judgment was affirmed.

2019 COA 158. No. 18CA2088. Peoples v. Industrial Claim Appeals Office. *Workers' Compensation—Overpayment—Attempt to Recover.*

Claimant sustained admitted work-related injuries in February 2010. His employer, the Colorado Department of Transportation (CDOT), began paying him temporary total disability (TTD) benefits in March 2010. In May 2012, the Social Security Administration (SSA) determined that claimant qualified as disabled under its provisions and awarded him social security disability insurance (SSDI) benefits. Claimant received a lump sum payment for September 2010 through April 2012 and thereafter received a monthly benefit. Claimant promptly and timely advised CDOT of his SSDI award.

Consistent with the Colorado Workers' Compensation Act, which mandates that SSDI benefits first be deducted from workers' compensation disability benefits, CDOT revised its general admission of liability to reflect an overpayment and began taking a $78 deduction from claimant's ongoing TTD payments. When claimant reached maximum medical improvement (MMI) in April 2013, his TTD payments totaled $83,569.36. The parties agree that this amount exceeded the $75,000 applicable statutory cap on benefits. CDOT filed a final admission of liability (2013 FAL) that included a calculated overpayment of $17,632.79, which reflected the offsets. Because claimant's TTD benefits ended at MMI and his benefits had already exceeded the statutory maximum, he received no ongoing benefits and CDOT could no longer deduct the overpayment from future disability payments. The 2013 FAL later automatically closed.

Claimant's case was reopened four years later so he could receive needed surgery. In November 2017, CDOT filed an amended FAL modifying claimant's scheduled permanent impairment and noted its payment of $4,000 for disfigurement. It again listed the $17,632.79 it had included in its 2013 FAL as an overpayment.

Claimant then applied for a hearing, seeking an additional disfigurement award for scars left by his most recent surgery. He noted the overpayment from 2013 but stated that the claim was no longer valid because there was a one-year time limit on recovery. The administrative law judge (ALJ) determined that by including the overpayment in its 2013 FAL, CDOT satisfied the requirement of attempting to recover it within one year of its discovery. The ALJ awarded claimant $2,175 for disfigurement, which it credited against the overpayment, and ordered claimant to repay the recalculated remaining overpayment. A panel of the Industrial Claim Appeals Office (the Panel) affirmed.

On appeal, claimant contended that the Panel erred by requiring CDOT to do nothing more than set forth the overpayment amount on the 2013 FAL. Under CRS § 8-42-113.5(1)(b.5), an employer that cannot offset its overpayment by deducting from ongoing disability payments must seek an ALJ's order of repayment within one year of learning of its entitlement to an overpayment. Here, CDOT failed to seek recovery before the statute of limitations expired, so it was barred from seeking recovery of the overpayment. The 2013 FAL did not satisfy the statute's requirements for recovery.

The Panel's order was set aside and the case was remanded for issuance of a new order.

October 24, 2019

2019 COA 159. No. 16CA0152. People v. Johnson. *Constitutional Law—Fourth Amendment—Searches and Seizures—Warrantless Search—Exclusionary Rule—Impeachment Exception—Evidence.*

Defendant's girlfriend Griego was shot to death in the apartment defendant shared with his sister Carrethers and her husband. Defendant was found next to Griego's body. He was unconscious due to alcohol and drugs. Defendant was transported to the hospital. Once there, and while still unconscious, officers collected swabs from his hands and face that tested positive for gunshot residue (GSR). After regaining consciousness, defendant denied killing Griego.

Before trial, defendant moved to exclude the GSR evidence collected from him without a warrant. The trial court granted the motion, but informed defendant that if he offered evidence of Carrethers's positive GSR test, he would open the door for the prosecution

to admit his positive test. Based on the trial court's ruling, defendant elected not to offer the evidence of Carrethers's GSR test. The jury found defendant guilty of first degree murder in the death of Griego. He was also convicted of felony menacing for pointing a gun and threatening to kill a man who was with Griego the day of the murder.

On appeal, defendant contended that the trial court improperly required him to choose between exercising his right to present a complete defense and his right to exclude evidence seized in violation of the Fourth Amendment. The exclusionary rule's impeachment exception permits the use of constitutionally excluded evidence to impeach a defendant's own untruthful testimony, but the exception does not permit the use of otherwise suppressed evidence to contradict obviously untruthful testimony, so long as the defendant does not provide such testimony. Here, defendant should have been permitted to offer truthful evidence related to the GSR testing conducted on individuals other than himself without fear of opening the door to the unconstitutionally obtained evidence related to his GSR test. Therefore, the trial court erred, and the error was not harmless.

Defendant also contended that the trial court abused its discretion by excluding evidence that Carrethers murdered her husband. Approximately five weeks after Griego's murder, Carrethers fatally stabbed her husband in self-defense. The trial court did not abuse its discretion in concluding that Carrethers's involvement in the death of her husband was not relevant to her motive or bias in this case or to defendant's alternate suspect defense. Further, any minimal relevance there may have been was outweighed by the danger of unfair prejudice.

Defendant further claimed that the trial court erred by admitting evidence of statements Carrethers claimed she heard Griego make. Because these statements would have had no impact on the jury's guilty verdict on the menacing charge, any error that may have occurred by admitting them was harmless.

The menacing conviction was affirmed. The first degree murder conviction was reversed and the case was remanded for a new trial on that charge.

2019 COA 160. No. 17CA0495. People v. Shanks. *Criminal Law—Expert Testimony—Historical Cell Site Data—Evidence*—Shreck *Hearing—Identification—Due Process—Alternate Suspect Defense.*

Defendant and two codefendants were charged with numerous offenses arising from a home invasion and victim assault. A jury convicted defendant as charged, and he was sentenced to 28 years in the custody of the Department of Corrections.

On appeal, defendant argued that the district court erred by admitting expert witness testimony analyzing historical cell site data without first holding a hearing to determine the reliability of the science behind such analysis. The use of historical cell site data to determine the general geographic location of a cell phone is widely accepted as reliable and does not require a hearing pursuant to *People v. Shreck*, 22 P.3d 68 (Colo. 2001). Here, because the evidence offered at trial was within the bounds of reliable historical cell site data analysis, it was properly admitted to identify defendant's general location when the crime was committed.

Defendant also contended that the district court erred by denying his motion to suppress the victim's out-of-court identification of him and in admitting the victim's in-court identification. The photo array presented to the victim contained pictures of six men arranged in two rows of three, with defendant in the middle of the bottom row. The men all appeared to be African American with similar ages, clothing, and haircuts, similarly placed cheekbones, and some facial hair. The photo array itself was not impermissibly suggestive, and the district court did not abuse its discretion by

admitting it. Further, the victim's subsequent in-court identification was not inherently unreliable because it was not preceded by an impermissibly suggestive pretrial identification procedure, and there was nothing suggestive about the in-court identification.

Defendant further contended that the district court violated his rights to due process, to present a defense, and to a fair trial by denying his alternate suspect defense. Defendant claimed that Davis, rather than defendant, was the other assailant. Although defendant told the district court on the morning of trial that one of his codefendants would provide a direct link between Davis and the crime, the codefendant testified that Davis was not involved. Thus, the evidence created only an unsupported inference or possible ground for suspicion that Davis committed the charged crimes. And even assuming the district court erred by precluding certain alternate suspect evidence, any such error was harmless. Under these circumstances, the district court did not abuse its discretion.

Defendant also argued that the district court erred by admitting references to his nickname, "Capone," which is a gang name and thus created unfair prejudice. However, no evidence was presented that defendant was in a gang, and the nickname was used merely for identification because it was the name by which most of the witnesses knew defendant. Therefore, the district court did not abuse its discretion.

Lastly, having found no errors, the Court of Appeals rejected defendant's contention that the cumulative effect of the errors raised in this appeal warrants reversal.

The judgment was affirmed.

2019 COA 161. No. 17CA0558. People v. Dyer. *Criminal Law—Constitutional Law—Fourth Amendment—Searches and Seizures—Warrantless Search—Dependency and Neglect—Jury Instructions.*

Dyer's mother called the Department of Human Services (DHS) and alleged that Dyer was neglecting her 7-year-old daughter, S.D., who suffered from a seizure disorder. DHS caseworkers tried to contact Dyer and her daughter at their home but were unsuccessful. The caseworkers then sought and received an order to investigate but did not obtain a search warrant. After repeated attempts to contact Dyer and her daughter, the police went to Dyer's home without the caseworkers. Though the order to investigate did not authorize their entry without Dyer's consent, police told Dyer that they needed to enter the house to check on S.D. Dyer objected but eventually allowed the officers to enter the home. Once inside, police officers inspected the home and called 911 to transport S.D. to the hospital based on what they observed to be a seizure. Caseworkers and paramedics arrived and entered the home. The caseworkers inspected the home and talked to Dyer and her husband. Later, at the hospital, Dyer was interviewed by a police officer and a caseworker, and months later, Dyer gave another statement to police. Dyer and her husband were charged with child abuse.

Before trial, Dyer moved to suppress much of the evidence obtained by police, caseworkers, and paramedics on the day they came to her home, alleging they had entered her home illegally. The trial court ruled that the officers' initial entry into Dyer's home was illegal and therefore suppressed the officers' observations from inside the home. The court found, however, that the caseworkers' and paramedics' entries were legal and admitted their observations from inside the home. The court also admitted Dyer's interview with the officer and caseworker at the hospital, as well as her later police interview, holding that these statements were noncustodial and voluntary. A jury found Dyer guilty of child abuse.

On appeal, Dyer argued that the trial court erred by failing to suppress the caseworkers' and paramedics' observations from inside her home and the statements she made at the hospital. DHS caseworkers are governmental officials and therefore subject to the Fourth Amendment. Here, the caseworkers entered Dyer's home without a warrant or consent. The warrantless entry was not justified by any exception to the warrant requirement; it was thus illegal and required suppression of all evidence obtained as a direct result of that illegal entry.

Dyer also contended that she was entitled to an instruction distinguishing medical neglect from child abuse. Here, the jury instructions properly identified the elements of child abuse and did not include the terms "medical neglect" or "neglect." Therefore, there was no error in denying Dyer's request for this instruction.

Dyer also argued that the trial court erred by failing to give a modified unanimity instruction that would have required the jurors to agree on the specific acts or omissions she committed. Here, the prosecution alleged that Dyer committed child abuse by engaging in a continuing course of conduct. Consequently, the jurors did not need to agree on the acts or omissions constituting the course of conduct, and the trial court properly declined to give Dyer's requested instruction.

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

2019 COA 162. No. 18CA1131. State of Colorado v. 5 Star Feedlot Inc. *Criminal Unlawful Taking—Mens Rea—Summary Judgment—Actus Reus.*

5 Star Feedlot Inc. (5 Star) operates a cattle feedlot near the South Fork of the Republican River and Hale Ponds. It stores its wastewater from the feedlot in containment ponds built and maintained in compliance with Colorado Department of Health and Environment regulations. A severe rainstorm hit the feedlot and surrounding areas, and approximately 500,000 gallons of wastewater escaped from one of the ponds and flowed overland and into the South Fork of the Republican River. Several days later the State of Colorado, Department of Natural Resources, Parks and Wildlife Commission and Division of Parks and Wildlife (the State) recovered 379 dead fish from the Republican River and Hale Ponds.

The State sued 5 Star for taking wildlife in violation of state law. Both sides moved for summary judgment. The district court granted the State's motion, concluding that 5 Star "took" the fish and was strictly liable for the killings. The court ordered 5 Star to pay the State $625,755.

On appeal, 5 Star argued that the district court erred by imposing liability on it because it didn't knowingly "take" any fish. The culpable

mental state of "knowingly" is implied in CRS § 33-6-109(1)'s prohibition on hunting, taking, or having in one's possession wildlife belonging to the State, and the term "take" also requires knowing conduct. The State can only establish liability by proving all elements of culpability under the predicate criminal offenses. Here, the State presented no evidence that 5 Star acted knowingly.

5 Star also contended that to prove a violation of CRS § 33-6-109(1), the State had to prove that it committed a voluntary act, which the State failed to do. Criminal culpability requires a voluntary act or omission to perform an act. Here, the State didn't argue below or present any evidence to the district court showing that 5 Star performed a voluntary act or failed to perform an act that it had a legal duty to perform.

The summary judgment was reversed and the case was remanded for entry of summary judgment in favor of 5 Star.

2019 COA 163. No. 18CA1447. Murray v. Kim. *Civil Procedure—Time Limit for Service.*

Murray, through counsel, filed a complaint against Kim asserting claims for negligence and negligence per se that arose from a car accident. The next day the district court issued an order that contained case deadlines and stated, in all capital letters, that failure to comply with the deadlines could result in dismissal without further notice. One deadline required Murray to file a return of service of process within 63 days of filing the complaint pursuant to CRCP 4(m). Murray's counsel did not submit proof of service by that time, and the court dismissed the case without prejudice. The statute of limitations on the claims expired 12 days later.

Murray's counsel filed a motion to reinstate the case 243 days later. The district court granted the motion the same day. Kim then moved to dismiss the case as barred by the statute of limitations. The district court denied the motion, finding that Murray had established excusable neglect. The case went to trial, and a jury returned a verdict in Murray's favor.

On appeal, Kim argued that the district court lacked discretion under CRCP 60(b) to vacate its earlier dismissal for failure to comply with Rule 4(m). Relief under Rule 60(b)(1) for excusable neglect is available only if sought within 182 days of the final judgment. After that deadline, a court lacks authority to reinstate a case or provide further relief for excusable neglect. Murray wasn't entitled to relief for excusable neglect because her counsel didn't seek reinstatement within this window. Further, the dismissal order was not void under subsection (b)(3), because the court had jurisdiction over the subject matter and over plaintiff, and the court was required to dismiss the complaint under Rule 4(m) for lack of timely service. Nor was it void under subsection (b)(5), because the circumstances of this case are not covered by that provision. The district court erred by granting relief.

The judgment was reversed and the case was remanded with instructions to dismiss it with prejudice.

October 31, 2019

2019 COA 164. No. 18CA0720. In re the Marriage of Blaine and He. *Dissolution of Marriage—Uniform Premarital and Marital Agreements Act—Property Disposition—Separate Property—Interspousal Transfer Deed.*

During the parties' two-year marriage, husband conveyed a home in California (the home) to wife in an interspousal transfer deed (the deed) as her sole and separate property. The sole issue for permanent orders was husband's claim that wife had borrowed $346,500 from him in various increments during the marriage and used the funds primarily toward the purchase of the home and she should be ordered to repay him. The court set aside the home as wife's separate property, found that its value during the marriage had increased by $82,939, and awarded that amount to husband.

On appeal, husband argued that the district court abused its discretion by failing to set aside the deed. Husband contended that wife breached her spousal fiduciary duty and was required to establish that he signed the deed freely and voluntarily with knowledge of the facts and understanding the deed's effects. Assuming that a fiduciary duty existed in relation to the deed, husband testified that he read and understood the deed before signing it, signed the deed voluntarily, and acknowledged that the deed made the home wife's separate property. Thus, husband's own testimony established that he entered into the transaction freely and voluntarily, with full knowledge of the facts and complete understanding of the transaction's effect. Further, the deed was a valid agreement notwithstanding that there was no marital agreement pursuant to the Uniform Premarital and Marital Agreements Act. The district court did not err under these circumstances in setting aside the home as wife's separate property,

Husband also contended that the district court abused its discretion under CRS § 14-10-113(1) by not dividing $73,000 of the borrowed funds that remained in wife's bank account at dissolution. However, the parties stipulated that each would receive all of the funds in their respective bank accounts, and the court adopted their stipulation.

The judgment was affirmed.

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