

Summaries of Published Opinions

May 2, 2019

2019 COA 61. No. 16CA0400. *People v. Tresco*. *Criminal Law—Second Degree Assault—Sixth Amendment—Appointed Counsel—Confrontation Rights—Expert Witness—Evidence—Sentencing—Gang Association.*

Tresco was charged with second degree assault for punching a man in the face and causing nerve damage. On the first day of trial, Tresco requested that his public defender be removed, but the trial court did not address the request, and the public defender represented Tresco at trial. The jury found Tresco guilty, and the trial court sentenced him to eight years in the custody of the Department of Corrections and three years of mandatory parole.

On appeal, Tresco argued that the trial court violated his Sixth Amendment rights by denying his counsel of choice. Because Tresco had appointed rather than private counsel, he did not have the right to counsel of his choice under the Sixth Amendment. Further, the record supported the court's finding on remand that there were no conflicts that would have prevented Tresco's counsel from effectively representing him. Therefore, Tresco was not entitled to have his appointed counsel removed.

Tresco next argued that the trial court violated his confrontation rights by erroneously admitting an expert's testimony on the victim's nerve damage. Because the prosecution gave Tresco's counsel a copy of the expert's notes and reports, Tresco had the opportunity to cross-examine the expert witness, and he failed to follow up on his discovery motion requesting that the prosecution provide him with a written summary of the expert's testimony, the trial court did not violate his confrontation rights

by admitting the expert's testimony on nerve damage.

Tresco also argued that the trial court erred in considering, in sentencing, video clips of Tresco from the television show *Gangland* as evidence of his previous gang affiliation. Evidence of gang affiliation is not per se inadmissible during sentencing if it relates to the nature of the offense and the defendant's character, not merely the defendant's abstract beliefs. Here, the evidence of Tresco's prior gang affiliation properly related to his character, as relevant to sentencing, because it shed light on his tendency toward aggression, rage, and assaultive behavior. Further, this evidence was not the dispositive factor in the court's sentencing decision.

The judgment and sentence were affirmed.

2019 COA 62. No. 16CA0446. *People v. Perez*. *Criminal Law—Sentencing—Restitution—Due Process—Privilege.*

Perez hosted a wedding at his ranch. An argument ensued among some of the wedding guests, and Perez ultimately broke a beer bottle on the victim's face. The victim had to be transported to the hospital via helicopter for medical treatment. Perez was convicted of second degree assault with a deadly weapon. At sentencing in 2013, the trial court reserved a restitution determination for 90 days. Ninety-four days after the order of conviction, the prosecution moved for an extension of time to request restitution. Perez did not object, and the court granted the motion. The court ultimately issued a restitution order in 2015.

On appeal, Perez argued that the trial court erred in ordering restitution more than 91 days after sentencing absent a showing of good cause. The statute does not require an explicit finding

of good cause but requires the trial court to find that there are extenuating circumstances to grant the prosecution more time to gather and submit the required documentation to determine restitution. Although the trial court did not make a finding that there were extenuating circumstances, the prosecution made sufficient assertions for a finding of extenuating circumstances to have been made. Therefore, the error was not substantial.

Perez also argued that the trial court erred in relying on, but not fully disclosing, otherwise confidential Crime Victim Compensation Board (CVCB) records in determining proximate cause for the purpose of restitution. The statute in effect at the time did not require the trial court to disclose otherwise privileged information to Perez in violation of the victim's privilege rights. Here, the court stated in its order that it provided defense counsel with all non-privileged information from the CVCB's records.

Perez further argued that the trial court's failure to disclose confidential information from the CVCB's records violated his right to due process. However, the constitutional right to due process does not override a claim of privilege. Because no published case law clearly supports Perez's right to obtain privileged documents, the trial court's decision not to provide them, even if error, could not have been obvious.

The restitution order was affirmed.

2019 COA 63. No. 17CA1372. *People v. Harrison*. *Criminal Law—Affirmative Defense—Immunity for Persons Suffering a Drug Overdose.*

Defendant and her friend entered a Burger King restaurant, ordered a meal, and sat down at a booth. After staff at the restaurant noticed defendant and her friend had not touched their food, were slumped over each other, and were otherwise unresponsive, they called 911 for assistance. Police arrived and defendant consented to a search of her purse and backpack, where police found heroin, methamphetamine, and drug paraphernalia. A jury convicted defendant of two counts of possession of a controlled substance and one count of possession of drug paraphernalia.

On appeal, defendant argued that the prosecution failed to disprove her affirmative

defense of immunity for persons suffering an emergency drug or alcohol overdose event under CRS § 18-1-711. Under this statute, immunity extends to both the person who called 911 and to the person who suffered the emergency drug or alcohol overdose event. Here, the evidence at trial was insufficient to disprove that a reasonable person in the manager's position would have believed that an emergency drug or alcohol overdose event may have been occurring. The prosecution did not meet its burden to prove the inapplicability of the affirmative defense.

The convictions were vacated.

2019 COA 64. No. 18CA0407. People v. Archuleta. *Criminal Law—Child Abuse Resulting in Death—Jury Verdict—Modified Unanimity Instruction.*

Archuleta took care of her 4-month-old grandson for a week. When the child's mother

dropped him off at Archuleta's house at the beginning of the week, he was healthy, but by the end of the week the child had suffered numerous injuries, including chemical burns to his face, mouth, and knee; a torn frenulum; broken ribs; and tweezer-induced pinch marks on various parts of his body. Several hours after the child's mother picked him up at the end of the week, she returned to Archuleta's house with the child. Archuleta noticed that the child did not appear to be breathing, so she attempted CPR and called 911. The baby died, and the autopsy revealed that the child had been suffering from dehydration and a bacterial infection that started as pneumonia and had spread to his blood. A jury convicted Archuleta of one count of child abuse resulting in death.

On appeal, Archuleta argued that the trial court erred by failing to give a modified unanimity instruction. The trial court has a duty under

CRS § 16-10-108 to properly instruct the jury to ensure that a conviction is the result of a unanimous verdict. Here, the prosecution presented evidence of multiple acts of child abuse, any one of which could have independently established Archuleta's guilt, and argued to the jury that it could find Archuleta guilty under any of three theories of criminal liability in the child abuse statute. Thus, it was reasonably likely that jurors could have convicted Archuleta based on a particular theory that she caused an injury to the child but disagreed about the specific act that established child abuse under that theory. Because the prosecution did not elect which act or acts it was relying on to convict Archuleta, a modified unanimity instruction was necessary, and the trial court erred by failing to give such instruction. Further, this error was not harmless.

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

2019 COA 65. No. 18CA0418. O'Connell v. City and County of Denver. *Municipal Law—Historic District Designations—City and County of Denver—Charter—Landmark Preservation Code.*

Plaintiffs are property owners in a Denver neighborhood that the City Council of Denver and the City and County of Denver (collectively, defendants) designated as a historic district. Plaintiffs opposed the designation throughout the process and sued defendants after the final vote, alleging that the designation violated Denver City Charter section 3.2.9(E). The district court dismissed plaintiffs' claims based on failing to state a plausible claim for relief because the Charter provision did not apply to historic district designations.

On appeal, plaintiffs argued that the district court erred by ruling that historic district designations are not an exercise of the City Council's Charter section 3.2.9 powers. Charter section 3.2.9 clearly authorizes the City Council to draw districts and regulate and restrict what can be done to buildings, structures, and land within those districts. Creating a historic district pursuant to the landmark preservation code also establishes a new district and imposes regulations and restrictions on the activity described by Charter section 3.2.9. The Denver City Council's designation of a historic preservation district

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under the landmark preservation code is an exercise of the Council's City Charter section 3.2.9 authority. The district court therefore erred.

The judgment dismissing plaintiffs' complaint with prejudice was reversed, and the case was remanded with directions.

May 9, 2019

2019 COA 66. No. 15CA0634. People v. Sims. *Criminal Law—Sexual Assault—Murder—Amended Indictment—Subject Matter Jurisdiction—Statute of Limitations—Rape Shield Statute.*

The People charged defendant with murder, attempted murder, and sexual assault 18 years after he and three accomplices committed a brutal home invasion. The original indictment charged sexual assault under the 2012 version of the sexual assault statute. The prosecutor later moved to amend the indictment and filed a "superseding indictment," charging defendant under the 1994 version of the statute that was in effect at the time of the offense. A jury convicted defendant of all charges.

On appeal, defendant argued that the prosecution's filing of the superseding indictment divested the district court of subject matter jurisdiction over the charges contained in the original indictment, leaving the court with jurisdiction over only the updated sexual assault charge. Each count of an indictment operates as its own indictment, and the prosecutor may supersede any individual count. Further, the fact that the prosecutor labeled the second indictment a "superseding" rather than a "partially superseding" indictment was not dispositive. The superseding indictment did not deprive the court of jurisdiction over the original charges.

Defendant also argued that the sexual assault charge was barred by the statute of limitations. When defendant committed rape in 1994, the statute of limitations for sexual assault in violation of CRS § 18-3-402 was 10 years. However, the statute was amended to eliminate the statute of limitations in certain sexual assault cases where the identity of the defendant is determined, in whole or in part, by DNA evidence and the offense is reported to a law enforcement agency within 10 years after its

commission. The amended statute is applicable to offenses committed after July 1, 1991. Here, it is undisputed that DNA evidence played a role in establishing defendant's participation in the crimes. Therefore, the amended statute applied and extended the statute of limitations.

Defendant further contended that the district court erred in excluding testimony of the victim's roommate, under the rape shield statute, that the victim was a prostitute who had traded sex for drugs. However, because the victim's roommate had moved out of the victim's apartment almost a year before her sexual assault and murder, she could not testify about the victim's sexual conduct during the relevant period. Thus, the roommate's testimony that the victim was "prostituting herself" for drugs in 1993 did not make any fact of consequence more or less probable. Accordingly, the district court did not abuse its discretion in excluding the evidence.

The judgment was affirmed.

2019 COA 67. No. 16CA1834. People in the Interest of A.N. *Juvenile Law—Delinquency—Restitution—Interest Calculation.*

A.N., a juvenile, pleaded guilty to second degree aggravated motor vehicle theft. As part of his plea, he agreed to pay restitution to the victims. Later, A.N. received a Judicial Department letter notifying him that interest would be added to his restitution balance at a rate of 1% per month rather than assessed annually. A.N. filed a motion objecting to the notification. The trial court overruled the objection and denied the motion.

On appeal, A.N. argued that the trial court erred in concluding that the Judicial Department's method of calculating and assessing interest is consistent with the statute in effect at the time of the restitution order. The statute provides that defendants must pay interest equal to 12% annually. While the interest provision does not address the frequency with which the Judicial Department may calculate and assess interest, the trial court's interpretation of the restitution interest statute is consistent with legislative intent, and the statute allows the Judicial Department to compute and assess interest at a rate of 1% per month.

A.N. also argued that calculating and assessing interest monthly is inconsistent with the juvenile code's goal of rehabilitation of juveniles. The juvenile restitution statute provides that juveniles, like adults, must pay interest in accordance with law. The goals of rehabilitation and community protection are not inconsistent. Monthly interest, assessed to a juvenile in accordance with the restitution interest statute, does not thwart the rehabilitative purposes of the juvenile code.

A.N. further contended that the trial court's interpretation of the restitution interest statute renders that statute unconstitutionally vague, violating his due process. A.N. did not meet the heavy burden of proving that the statute is unconstitutional beyond a reasonable doubt.

The order was affirmed.

2019 COA 68. No. 16CA1988. People v. Galvan. *Criminal Law—Constitutional Law—Jury Instructions—Self-Defense—First Amendment—Freedom of Speech—Fighting Words—Provocation Exception—Prosecutorial Misconduct.*

Galvan and other people, including S.M. and her sister C.M. (the alleged victims), were on a "party bus" returning from Denver to Greeley. Galvan, C.M., and S.M. were highly intoxicated and began arguing on the bus. After returning to Greeley, they engaged in a physical confrontation during which C.M.'s nose and ankle were broken. A jury convicted Galvan of second degree assault against C.M.

On appeal, Galvan argued that the trial court erred in instructing the jury on the provocation exception to self-defense. Galvan's invitation for S.M. and C.M. to "come and get it" and "watch [their] backs" were fighting words not protected by the First Amendment. The words, combined with Galvan's conduct and physical movements, were likely to provoke a violent reaction. Therefore, there was at least some evidence that Galvan provoked C.M. Further, the provocation instruction was not defective because it did not specify to which victim it applied. Therefore, the trial court did not err in instructing the jury on the provocation exception.

Galvan next contended that the trial court abused its discretion in refusing to give his

tendered instruction on “no duty to retreat.” Here, the instruction containing the no retreat language tracked the model jury instruction that addressed that principle of law. Consequently, the jury was correctly instructed.

Galvan further argued that the trial court erred by allowing the prosecutor to suggest to potential jurors that the alleged victims had rights to a fair trial that were equal to Galvan’s constitutional rights to due process and a fair trial. If the prosecutor’s remarks implied such an equivalence, the trial court should not have permitted the statements. Nevertheless, any error was harmless because the jury was properly instructed on Galvan’s constitutional right to a fair trial and on the presumption of innocence, so the prosecutor’s statements did not substantially influence the verdict or fairness of the proceedings.

The judgment was affirmed.

2019 COA 69. No. 17CA0279. People v. Neckel.
Criminal Law—Civil Procedure—Trespass—Process Server—Jury Instructions—Affirmative Defenses—Defense of Premises—Defense of Person.

A process server (the victim) drove to Neckel’s house to serve him papers. The victim parked in Neckel’s driveway and knocked on the door. There was no immediate response, so he left a note with his contact information and turned away. As the victim was walking back toward his car, Neckel opened the door and began threatening the victim with a large metal pipe and demanded that the victim get off his land. Neckel then jacked up the victim’s car, preventing him from leaving. Both men called 911 in the midst of the altercation. Neckel was convicted of felony menacing and second degree criminal tampering.

On appeal, Neckel asserted that the trial court committed plain error when it failed to correct what he contended were four misstatements that the victim’s actions were not trespass made by the victim while testifying and the prosecutor during closing arguments. Neckel contended that because there were “No Trespassing” signs posted near one of his driveway entrances and on an outbuilding near his house, the victim became a trespasser the moment he drove onto

Neckel’s property. There is an implicit license for law enforcement and citizens to approach homes, and under CRS § 18-1-701 the victim was essentially immune from trespass laws as long as he was working to serve Neckel with papers under the Rules of Civil Procedure. Further, a sign alone does not revoke the implied license to approach the front door of a house. Based on the implied license and the statute, the victim’s entry onto Neckel’s land to effect service was legal. And while Neckel revoked the implied license when he began interacting with the victim, to the extent the victim’s conduct was consistent with the laws governing execution of legal process, it remained statutorily privileged.

Neckel next contended that the trial court reversibly erred by refusing his tendered jury instructions on two issues. On the first, the tendered instruction stated that Neckel had no duty to retreat before defending his premises. Neckel’s attorney asked the trial court to instruct the jury on the affirmative defenses of defense of premises and defense of person. Relying on the pattern instructions for those affirmative defenses, the trial court granted that request. Because “no retreat” is inherent in both the concept of defense of premises and in the pattern instruction that was provided to the jury, the trial court did not abuse its discretion in rejecting the additional “no retreat” instruction that Neckel’s counsel tendered.

The second issue, which encompassed two instructions, was Neckel’s proposed definition of “unlawful trespass.” Neckel contended the additional definitions were necessary to correct the four alleged misstatements described above. However, these statements were accurate, so the trial court appropriately declined to provide any additional definition.

The judgment was affirmed.

2019 COA 70. No. 18CA0186. People in the Interest of J.V.D. Juvenile’s Waiver of Right to Counsel—Constitutional Law.

J.V.D. received a notice to appear on an allegation of second degree criminal trespass committed when he was 16. He appeared with his mother. The juvenile court advised J.V.D. that he had the right to counsel and a public defender would be appointed if he was

financially qualified. J.V.D. asked if he could represent himself. After cautioning him that the proceedings could be complicated, the court stated that he had the right to represent himself.

J.V.D. then debated his right to a jury trial with the juvenile court. The court offered to appoint a guardian ad litem (GAL), but J.V.D. declined. A week later, the prosecution filed a delinquency petition charging first degree criminal trespass. The petition was mailed to J.V.D.’s mother but returned unclaimed. At the plea hearing, J.V.D. asked many questions and the court again suggested he should have an attorney. The prosecutor asked for a GAL to be appointed. J.V.D. objected and the court did not appoint a GAL.

The matter was set for trial. J.V.D. objected at the outset of the trial but proceeded pro se with his mother. He was not invited to give an opening statement and did not testify or call any witnesses. His mother asked some questions, made some objections, and made closing arguments. J.V.D. and his mother made clear that they had not accessed any of the exhibits or the police report before trial. The juvenile court adjudicated J.V.D. delinquent and sentenced him to one to two years in the custody of the Department of Youth Corrections.

As an initial matter on appeal, the People argued that the case should not be reviewed because J.V.D. may only challenge the waiver in a postconviction proceeding or, alternatively, it should be reviewed for plain error. J.V.D. argued for review of the waiver as a denial of his constitutional right to counsel. The Court of Appeals concluded that where the challenge relies solely on facts on the record, as here, an appellate court can address waiver on direct appeal.

J.V.D. was represented by counsel on appeal and contended that he did not effectively waive his right to counsel at trial. A juvenile facing delinquency proceedings is afforded the right to counsel but does not have the right to self-representation. In Colorado, a juvenile court must appoint counsel unless the juvenile has retained his own counsel or has made a knowing, intelligent, and voluntary waiver of his right to counsel. While no Colo-

rado decision expressly addresses a juvenile's waiver of counsel, the protections afforded to a juvenile must at a minimum be equivalent to those afforded to an adult defendant. A court considering whether a juvenile's waiver of a constitutional right is effective must apply a totality of the circumstances test, considering factors such as the juvenile's age, previous court experience, education, background, intelligence, and capacity to understand the nature of his rights and the consequences of waiving those rights. Under CRS § 19-2-706(2)(c), the court must make specific findings before accepting a juvenile's waiver.

Here, while the record supports a finding that J.V.D.'s waiver was voluntary, it was not knowing and intelligent. J.V.D. was insufficiently advised that the prosecution had entered a petition with felony charges, and was not advised that counsel would be appointed regardless of his mother's willingness or ability to pay; and the court did not inquire into the reasons J.V.D. did not want counsel, did not assess his education, background, or maturity, did not explain the risks of self-representation, and did not explain the range of allowable punishments or collateral consequences of a felony conviction. The People conceded that the juvenile court did not make the required CRS § 19-2-706(2) inquiries and findings. Considering the totality of the circumstances, J.V.D.'s waiver was invalid and ineffective, and his right to counsel was violated.

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

2019 COA 71. No. 18CA0560. People in the Interest of Z.C. Dependency and Neglect—Indian Child Welfare Act—Notice.

This dependency and neglect action was before the Court of Appeals for the second time on the adequacy of notice under the Indian Child Welfare Act (ICWA).

The El Paso County Department of Human Services (the Department) initially conceded that eight tribes had not received proper notice, and the case was remanded directing the juvenile court to ensure ICWA compliance. On remand, the Department sent notices to the eight tribes identified in the limited remand order. The supplemental record showed that

all eight notices contained the required ICWA information. Signed and dated return receipts showed that four of the tribes received the notices. Two tribes returned receipts that were signed but not dated, though the Department's date stamps showed they were processed at least 14 days before the hearing. One tribe's return receipt was not signed or dated, and the record does not include a return receipt from one tribe. The juvenile court found that all eight tribes received adequate notice and that the child was not an Indian child, and terminated mother's rights.

On appeal, mother contended that the juvenile court and the Department failed to comply with the ICWA notice requirements. Here, the juvenile court properly concluded that the ICWA notice requirement was satisfied as to (1) the four tribes that provided timely signed and dated return receipts, and (2) the two tribes whose signed but not dated receipts were shown by the Department's date stamps to have been received at least 14 days before the hearing. However, the juvenile court erred when it found that the tribe that returned an unsigned and undated return receipt and the tribe for which there was no receipt had received adequate notice. ICWA regulations required the Department to make continuing inquiries to verify the child's membership status, but there was no evidence in the record that the Department attempted to contact these two tribes after it sent the notices.

After the juvenile court entered its findings, one of the two tribes for which there was not a signed and dated receipt sent a letter saying the child was not a member or eligible for membership in the tribe, and the letter was a part of the supplemental record on appeal. Thus, the juvenile court's error as to this tribe was harmless.

The case was remanded for the limited purpose of complying with the ICWA by contacting the one remaining tribe to determine whether the child is an Indian child and making further findings.

2019 COA 72. No. 18CA1628. People in the Interest of H.T. Dependency and Neglect—Dispositional Order.

Father requested that the Larimer County Department of Human Services (the Department) pay for his recommended treatment in this dependency and neglect proceeding concerning his daughter H.T. The Department responded that it was unable to pay for the treatment per its policy. The juvenile court found that father was financially unable to pay for the treatment and ordered the Department to either pay for the treatment or modify or eliminate requirements from the treatment plan so father had a reasonable opportunity to comply. Father agreed to entry of a formal adjudication and the juvenile court entered an initial dispositional order approving and adopting a treatment plan. The Department acknowledged the court's order that it pay for treatment but maintained its objection.

The Department filed a notice of appeal of the juvenile court's order directing it to pay for father's treatment, and the Court of Appeals issued an order to show cause why it shouldn't be dismissed for lack of a final, appealable order.

CRS § 19-1-109 provides that an order decreeing a child to be neglected or dependent is final and appealable after the entry of the disposition pursuant to CRS § 19-3-508. The Court construed the statute to mean that adjudicatory orders are final and appealable but dispositional orders, by themselves, are not. Because this was an appeal of solely an initial dispositional order, it was not final and appealable.

The appeal was dismissed.

May 16, 2019

2019 COA 73. No. 16CA0858. People v. Porter. Criminal Law—Sentencing—Extended Proportionality Review—Habitual Criminal—Juvenile Criminal History—Eighth Amendment.

While defendant was a juvenile, he was charged in three Denver cases for two armed robberies and a sexual assault. He pleaded guilty to one charge in each case and received concurrent sentences. Just months after being released from custody in the Department of Corrections, defendant robbed and attempted to sexually assault a casino worker. A jury found him guilty of first degree burglary, aggravated

robbery, attempted sexual assault, theft, and vehicular eluding. The district court adjudicated him a habitual offender and sentenced him to 112 years to life. Defendant requested an extended proportionality review. The district court ruled that an extended review was not necessary and conducted an abbreviated review.

On appeal, defendant contended that the district court erred by adjudicating him a habitual offender because the prosecution didn't prove beyond a reasonable doubt that his three juvenile felony convictions arose out of separate and distinct criminal episodes. Each of defendant's convictions stemmed from a crime defendant committed in a different location, with a different victim, and at least six days apart from the other crimes. The district court found that the juvenile felony convictions didn't arise from the same episode, and the evidence supported this finding. Therefore, the court did not err in adjudicating defendant a habitual offender based on these convictions.

Defendant also argued that because he was a juvenile at the time of his prior convictions, he was entitled to an extended proportionality review of his sentence. Defendant conceded his underlying offenses were per se grave or serious, and a person sentenced for such offenses wouldn't ordinarily be entitled to an extended proportionality review. Further, a defendant's age at the time of his prior convictions doesn't impact whether he's entitled to an extended proportionality review under the Eighth Amendment. Thus, the district court did not err by conducting only an abbreviated review.

The sentence was affirmed.

2019 COA 74. No. 16CA2176. People v. Trujillo. *Criminal Law—Domestic Violence—Sentencing—Treatment Program—Jail—Prison.*

Defendant pleaded guilty to third degree assault. Under the plea agreement, he stipulated that the crime involved an act of domestic violence, the court would sentence him to two years in jail, and he would complete a court-certified domestic violence treatment program. The trial court accepted the plea and sentenced defendant accordingly. Defendant then filed a Crim. P. 35(a) motion alleging that the treatment order was illegal and asking the

trial court to vacate it. The trial court denied the motion.

On appeal, defendant argued that the legislature did not intend for CRS § 18-6-801(1)(a) to apply to jail sentences. CRS § 18-6-801(1)(a) states that a trial court must, in addition to any sentence it may impose, order a defendant who has committed a crime of domestic violence to complete a domestic violence treatment program. CRS § 18-6-801(2) provides an exception where if the court sentences a defendant to prison, it cannot order the defendant to complete a domestic violence treatment program. Because the trial court in this case sentenced defendant to jail, the exception does not apply.

The Court of Appeals also rejected defendant's contentions that the trial court placed him on court probation and lacked jurisdiction over him after he had finished his jail sentence.

The order was affirmed.

2019 COA 75. No. 17CA0628. People v. Chalchi-Sevilla. *Criminal Procedure—Postconviction Remedies—Sixth Amendment—Right to Counsel—Ineffective Assistance of Counsel.*

A jury found defendant guilty of, among other charges, first degree felony murder and attempted aggravated robbery. The trial court sentenced him to life in the custody of the Department of Corrections without the possibility of parole. Defendant later filed a pro se Crim. P. 35(c) motion raising two claims of ineffective assistance of his trial counsel and requesting that postconviction counsel be appointed to represent him. The postconviction court issued a written order denying the motion without appointing counsel or holding an evidentiary hearing.

On appeal, defendant argued that the postconviction court erred in denying his Crim. P. 35(c) motion without appointing counsel or holding an evidentiary hearing. Defendant asserted that his trial counsel gave him incorrect or misleading advice by not advising him about parole eligibility. The postconviction court can only rely on the record to determine whether the record refutes a defendant's allegations. Here, the postconviction court speculated about the plea offer, and even if the postconviction court's belief about the nature of the plea was

correct, its analysis failed to account for defendant's eligibility for earned time credit. Further, there is nothing in the record about the factual circumstances of trial counsel's discussions with defendant about the prosecution's plea offer or the criminal defense bar's standard of practice at the time for advising defendants about parole. An evidentiary hearing is required to develop the record to resolve these issues. Thus, the postconviction court erred when it declined to appoint counsel and conduct an evidentiary hearing.

The order was reversed and the case was remanded with directions to appoint postconviction counsel, allow counsel to supplement the motion, and conduct an evidentiary hearing.

2019 COA 76. No. 18CA0500. In re Marriage of Aragon. *Family Law—Attorney Fees—Lodestar Amount—Income—Workers' Compensation Settlement—Maintenance—Child Support.*

Wife moved to modify child support and maintenance awarded under the permanent orders in the parties' divorce. Wife also asked that the issue of attorney fees be reopened and husband be ordered to pay her fees and costs. The district court calculated husband's income by prorating his workers' compensation settlement (less attorney fees owed to his workers' compensation attorney and the amount set aside for future medical expenses) over 12 months and adding in his other income. The court attributed no income to wife. It ordered husband to pay wife child support and maintenance and 75% of wife's requested fees and costs.

On appeal, husband first contended that the district court erred in awarding wife attorney fees because (1) claim preclusion barred the award, (2) the award was not supported by adequate findings, and (3) the court failed to hold a hearing and determine the reasonableness of wife's requested fees by using the lodestar method. Claim preclusion doesn't bar the reopened fee determination based on these reserved financial issues because the court hadn't entered a final judgment. Here, both parties and the Court of Appeals agreed that the trial court didn't make adequate findings to support the award under CRS § 14-10-119. But the parties stipulated that the court would rule on wife's motion without a

hearing, so husband is not entitled to a hearing. On remand, the district court should determine a lodestar amount as the starting point when evaluating wife's fee request.

Husband also contended that the district court erred by determining his income from his workers' compensation settlement by allocating the amount over 12 months. Income for the purposes of child support and maintenance includes workers' compensation benefits. In calculating a spouse's income for maintenance and child support purposes when a spouse receives a lump-sum workers' compensation payment and the payment is for wages lost over a discernable period of time, the payment should be amortized over that period, absent exceptional circumstances. Here, husband's workers' compensation settlement represented 165.34 weeks of lost wages, and the settlement amount should be allocated consistently with these terms in determining husband's income for child support and maintenance purposes.

Husband further argued that the court abused its discretion by failing to impute income to wife. However, the record shows that wife cared for the parties' five children (ranging in ages from 2 to 16), one of the children had been diagnosed with autism and ADHD, and wife doesn't have a work permit to allow her to work legally in this country. Thus, the trial court did not abuse its discretion.

The order awarding wife attorney fees was vacated and the case was remanded for additional attorney fees findings. The order determining child support and maintenance was affirmed as to wife's income and reversed as to husband's income, and the case was remanded for recalculation of husband's income and redetermination of child support and maintenance.

2019 COA 77. No. 18CA0741. West Colorado Motors, LLC v. General Motors, LLC. Civil Procedure—Remedial Revival Statute—Statute of Limitations—Tolling—Subject Matter Jurisdiction.

Plaintiff West Colorado Motors, LLC, d/b/a Autonation Buick GMC Park Meadows (Park Meadows), sued defendant, General Motors, LLC (GM), concerning GM's approval of the relocation of another dealership (Alpine) into

Park Meadows' alleged territory. The original lawsuit was terminated for lack of subject matter jurisdiction. Park Meadows then sought statutory damages for GM's allegedly unreasonable approval of Alpine's relocation, and damages for breach of the dealership agreement. The district court granted GM's motion to dismiss the claims as time barred.

On appeal, Park Meadows argued that the district court should have applied CRS § 13-80-111, the remedial revival statute, to its request for statutory damages. CRS § 13-80-111 is not itself a source of subject matter jurisdiction. The defect in subject matter jurisdiction that led to the dismissal of Park Meadows' statutory claim cannot be cured by refile, so the remedial revival statute does not apply to that claim.

Park Meadows also argued that that district court should have revived its claim for breach of contract because it was based on the same cause

of action as its first complaint and otherwise satisfied the requirements of the remedial revival statute. Here, Park Meadows waited more than three years after the alleged breach to seek judicial relief and thus did not demonstrate the diligence necessary to revive its breach of contract claim. Further, Park Meadows' breach of contract claim was not based on the same cause of action as its original lawsuit, which sought only injunctive relief. Although the same event triggered both lawsuits, Park Meadows' claim for breach of contract did not arise from the same set of operative facts as its demand for relief under the original action.

The order was affirmed.

May 23, 2019

2019 COA 78. No. 15CA1178. People v. Dominguez. Criminal Law—Hearsay—Verbal Acts—

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Expert Testimony—Lay Witness—Prosecutorial Misconduct—Lesser Included Offense—Merger.

Dominguez had an altercation with his daughter's relatives, and one of them called the police. An agent attempted to initiate a traffic stop of Dominguez's truck, but he sped away. The agent later located Dominguez's abandoned truck, found him nearby, and arrested him. A search of Dominguez's truck produced methamphetamine and other drug-related items. Dominguez was found guilty of possession of a controlled substance with intent to distribute, possession of drug paraphernalia, vehicular eluding, reckless driving, and driving under restraint. The court sentenced him to 12 years in prison.

On appeal, Dominguez contended that the trial court erred in admitting text messages discovered on his cell phone because they were inadmissible hearsay. The text messages

stated, "can you do 2 for 1500 if I got all of it" and "can you do 2 for 1600." These were properly admitted verbal acts. Further, any prejudice from admitting the text messages did not outweigh their probative value.

Dominguez next contended that the trial court erred in allowing two agents to offer expert testimony under the guise of lay testimony. Because the agents testified based on their training and experience, their testimony was improper expert opinion and the trial court abused its discretion in admitting it. However, any error was harmless given the overwhelming admissible evidence against Dominguez.

Dominguez also contended that the prosecutor committed reversible misconduct in rebuttal closing argument by misstating the law on reasonable doubt. Even assuming the prosecutor misstated the law, there was no error because the prosecutor's comment occurred

only once during closing argument and the court properly instructed the jury on reasonable doubt, both verbally and in writing.

Dominguez further argued that as a lesser included offense, his reckless driving conviction must merge with his vehicular eluding conviction. Here, Dominguez committed two separate and temporally distinct instances of reckless driving. Therefore, the trial court did not err in declining to sua sponte merge these convictions.

The judgment was affirmed.

2019 COA 79. No. 17CA0204. People v. Ross. *Criminal Law—Solicitation for Child Prostitution—Specific Intent Crime—Burden of Proof—Mens Rea—Jury Instruction—Lesser Included Offense.*

Two girls under age 18 used a website to place advertisements announcing their willingness to perform sex acts in exchange for money. The advertisements stated that the girls were at least 19 years old. In response to the advertisements, defendant texted the girls and negotiated a price that he would pay in exchange for sex acts. The police arrested defendant and he admitted texting the girls to solicit sex, but he claimed he thought he was contacting adult females.

As relevant to this appeal, the prosecution charged defendant with four counts of soliciting for child prostitution, two for each girl. After the prosecution's case-in-chief, the defense moved for judgment of acquittal on all four counts, arguing that the prosecution failed to prove that defendant had solicited a meeting for the purpose of child prostitution. The court concluded that the jury could reasonably conclude one girl was underage based on a photograph of her in the advertisements and denied the motion as to that girl. But there was no such evidence for the second girl, so the trial court entered a judgment of acquittal on the two counts naming the second girl.

During the instruction conference, the defense asked the court to instruct the jury on the lesser included offense of soliciting for prostitution under CRS §§ 18-7-202(1)(a) and (b), and the court agreed. On the remaining counts, the court instructed the jury that the prosecution needed to prove that defendant

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was soliciting a prostitute for purposes of child prostitution. The jury hung on these counts and at the prosecutor's request the court declared a mistrial. Before retrial on the remaining counts, the case was resolved by defendant's pleading guilty to two misdemeanor counts of soliciting another for prostitution.

The prosecution appealed under CRS § 16-12-102(1) to resolve a question of law, contending that the trial court was mistaken when it decided that, to prove the crime of soliciting for child prostitution, the prosecution had to show that the person whom defendant was soliciting was a child. CRS § 18-7-407 states that in criminal prosecutions under CRS §§ 18-7-402 to -407, it is not a defense that the defendant did not know the child's age or reasonably believed the child to be 18 years of age or older. The prosecution argued that because of CRS § 18-7-407, it did not have to prove that defendant had any culpable mental state in connection with the solicited person's age because soliciting for child prostitution is a strict liability crime.

Although the crime of soliciting for child prostitution is a specific intent crime, it is not a strict liability crime regarding the victim's age. Further, although CRS § 18-7-407 prevents a defendant from raising the defense that he believed that the prostitute was of legal age, the prosecution must prove that the defendant had the specific intent of soliciting for child prostitution. Therefore, the court did not err in dismissing the two soliciting for child prostitution counts naming the second girl because the prosecution presented no evidence to prove that defendant had the specific intent of soliciting for child prostitution.

The prosecution also contended that the trial court erred when it instructed the jury on the lesser offense of soliciting for prostitution. Here, the jury could have rationally acquitted defendant of the greater offense of soliciting for child prostitution if it had found that he did not intend to solicit a child. And the jury could have rationally found him guilty of the lesser offense of soliciting for prostitution if it had found that his intent was merely to solicit another for prostitution. Therefore, the court did not err.

The trial court's rulings were approved.

2019 COA 80. No. 17CA2318. *In re Marriage of Olsen. Family Law—Dissolution of Marriage—In Vitro Fertilization—Embryos—Property Allocation.*

The parties' dissolution of marriage resolved all issues but the disposition of two pre-embryos that are cryogenically frozen for possible future use. The district court concluded that the parties did not have an agreement on the disposition of the pre-embryos in the event of divorce, except to submit the issue to a court if they could not agree. In further proceedings, the district court balanced the parties' interests and concluded that the pre-embryos should be awarded to wife so that she could donate them to another couple.

On appeal, husband contended that the district court erred in applying the balancing of interests test because it weighted wife's interest in donating the pre-embryos, based on wife's moral belief that the pre-embryos are human lives, more heavily than his interest in avoiding procreation. Here, although the court properly weighed most of the factors in *In re Marriage of Rooks*, 2018 CO 85, it erred by weighting too heavily wife's personal beliefs vis-à-vis husband's constitutional right to avoid procreating.

The judgment was reversed and the case was remanded to rebalance the parties' interests.

2019 COA 81. Nos. 18CA0049 & 18CA0760. *Scholle v. Delta Air Lines, Inc. Torts—Personal Injuries—Workers' Compensation—Collateral Source Rule—Damages.*

Scholle, a United Airlines (United) employee, was driving a luggage tug in the course of his employment when Moody, a Delta Air Lines, Inc. (Delta) employee who was driving another luggage tug, collided with him. Scholle sustained injuries and missed work. United, a self-insured employer under Colorado's workers' compensation system, paid for Scholle's medical expenses and some of his lost wages.

As relevant to this appeal, Scholle sued Delta to recover for injuries related to the tug collision. Delta admitted liability but disputed Scholle's claimed damages. At trial, a jury returned a verdict for Scholle of approximately \$1.5 million, but the trial court granted Delta's motion for new trial due to Scholle's attorney's misconduct. At the second trial, the court admitted evidence of the medical expenses paid by United but

excluded evidence of the amounts billed by the medical providers, and awarded \$259,176, including \$194,426 in economic damages, in favor of Scholle. The court later entered a setoff order reducing Scholle's economic damages award by the amount that Delta had already paid to settle United's subrogation claim (a separate action), effectively reducing the amount owed to Scholle for economic damages to zero.

On appeal, Scholle contended that the trial court erred by admitting evidence of the amount of medical expenses paid by his workers' compensation insurer (United), rather than the amounts billed by his medical providers. He argued that the payments were collateral source benefits and, therefore, the pre-verdict evidentiary component of the collateral source rule prohibited their admission into evidence. Under the collateral source rule, evidence of the amounts paid by Scholle's workers' compensation insurer should have been excluded because the workers' compensation benefits paid to or on behalf of Scholle were collateral source payments. Delta's settlement of United's subrogation claim did not alter that fact. Rather, the settlement simply entitled Delta to a setoff against any damages awarded to Scholle. The collateral source rule also allows the plaintiff to present evidence of the higher medical expenses actually billed by his or her medical providers. Here, the court considered evidence of the amounts paid by United for Scholle's medical treatment (reimbursed to United by Delta through a separate action) and excluded evidence of the higher amounts billed by medical providers. The trial court erred by admitting evidence of the amounts paid by the insurer and not allowing Scholle to present evidence of the amounts actually billed by his medical providers.

Scholle also contended that the trial court erred by striking two of his expert witnesses. Pursuant to CRCP 37(c), however, Scholle failed to establish that his late expert witness disclosures were either substantially justified or harmless. The trial court did not abuse its discretion.

Scholle further argued that the trial court erred in granting a new trial. Here, the trial court detailed various instances of Scholle's

attorney's misconduct, which led the court to mistakenly admit evidence that further led to an improperly inflated verdict. The trial court did not abuse its discretion in granting a new trial on this basis. Further, the trial court (1) properly limited the scope of the second trial, and (2) correctly ordered that the second trial should be to the court, because all parties to the remaining case had waived jury trial.

The portions of the judgment awarding economic damages in the form of Scholle's lost wages and awarding noneconomic damages were affirmed. The portion of the judgment awarding economic damages in the form of Scholle's medical expenses was reversed and the case was remanded for a new trial limited to determining those damages. The orders striking witnesses, granting a new trial, limiting the scope of damages, and striking a jury were affirmed.

2019 COA 82. No. 18CA0541. In re Estate of King. CRS § 15-11-301(1)(c)—Omitted Spouse.

King divorced his wife after executing his estate. He thereafter obtained a \$5 million life insurance policy and designated Julie, whom he was dating, as beneficiary of \$4 million and another woman as beneficiary of the remaining \$1 million. King then married Julie. He did not amend his will or trust documents, but eight months later he amended his life insurance beneficiary to add Julie's new last name. King passed away two months later.

Julie filed a petition for an omitted spouse share, contending she was unintentionally disinherited from King's estate and therefore entitled to \$163,000 plus half the balance of the estate. The magistrate concluded that Julie was not an omitted spouse.

On appeal, Julie argued that the magistrate impermissibly shifted the burden of proof to her by requiring her to show that the substantial amount she received was not intentionally transferred in lieu of a testamentary provision. Here, Julie demonstrated that she was not provided for in the will. The burden then shifted to the estate to present evidence that Julie was provided for by transfers she received outside of the will, which it did through evidence of life insurance, joint accounts, and retirement

plan transfers. Julie then sought to rebut this evidence by arguing there was no evidence that King intended those transfers to be in lieu of a testamentary provision. The record supported the magistrate's determination that Julie was not an omitted spouse. Other record evidence further supported this conclusion, including (1) the prior codicils and amendment to the trust, which showed that King knew of these procedures; (2) the redesignation of Julie as a beneficiary after the marriage; (3) the significant amount of the proceeds; (4) the short duration of the marriage; and (5) the joint bank account money that Julie also received.

The order was affirmed.

2019 COA 83. No. 18CA0589. In re Marriage of Tooker. Post-Dissolution of Marriage Proceedings—Exclusion of Tuition Assistance and Book Stipends from Gross Income—Modification of Maintenance.

The parties, Jennifer and Mark Tooker, filed post-dissolution of marriage modification proceedings. While these were pending, the juvenile court determined that Mark was the legal father of Jennifer's biological child A.C.T.J. In calculating his income for purposes of child support and maintenance, the district court excluded Mark's veterans' education benefits for tuition assistance and a book stipend. The district court ordered Mark to pay child support for A.C.J.T. and terminated his maintenance obligation.

On appeal, Jennifer argued that the district court erred in excluding Mark's tuition assistance and book stipend benefits from his income for purposes of calculating maintenance and child support. To be includable as gross income for purposes of maintenance and child support, benefits an individual receives must be available for the individual's discretionary use or to reduce daily living expenses. Here, neither the tuition assistance nor the book stipend was available for Mark's general living or other discretionary expenses, so the district court properly excluded them from gross income for purposes of calculating maintenance and child support.

Jennifer also argued that the court erred in refusing to impute additional potential income

to Mark when determining his gross income, based on his timber ownership. The district court did not abuse its discretion in declining to impute non-employment related income related to possible future timber sales.

Jennifer further argued that the district court failed to make sufficient findings of fact and conclusions of law in modifying Mark's maintenance. Here, the court's findings sufficiently supported its determination that substantial and continuing changed circumstances made the initial maintenance award unfair.

The order was affirmed.

May 30, 2019

2019 COA 84. No. 16CA1145. People v. Lawrence. Criminal Law—Theft—Securities Fraud—Evidence—Investment Contract—Jury Instructions—Expert Testimony—Amended Theft Statute—Sentencing—Retroactive Application.

D.B. was working as a cashier at a casino when she met Lawrence, who told her that he ran his own security and surveillance company. D.B. asked him if he was hiring. Lawrence told her she couldn't work for him until she completed hundreds of hours of training, but he was seeking investors in the business. Despite knowing that it would be a long time before she could work for the company, D.B. purchased 30% of the company for \$9,000, which she deposited into Lawrence's personal bank account. D.B. repeatedly asked Lawrence about training to become an employee, but Lawrence stopped responding to her calls. D.B. filed a complaint with the Colorado Division of Securities, which found that Lawrence spent all of the money on personal expenses, gambling, and entertainment within one month of D.B.'s deposits. Lawrence was later convicted of two counts of securities fraud and one count of theft.

On appeal, Lawrence contended that there was insufficient evidence to support his convictions for securities fraud, because the transaction did not involve a security and was not an investment contract. The prosecution had to prove that Lawrence made a false or misleading statement in connection with the offer, sale, or purchase of a security. An "investment contract," which requires the investor to expect profits

solely from the promoter's efforts, is a security. Here, the evidence was sufficient for the jury to conclude that D.B. expected to profit solely from Lawrence's efforts.

Lawrence also contended that there was insufficient evidence to support his theft conviction because there was no evidence that he intended to permanently deprive D.B. of her property. Because Lawrence used the money from D.B. for his personal expenses rather than business expenses, the jury could infer that Lawrence intended to permanently deprive D.B. of her money. Accordingly, the evidence was sufficient to support the conviction for theft.

Lawrence also argued that the trial court erred by not instructing the jury that it must find that he knew D.B.'s investment was a security. Proof of Lawrence's knowledge that D.B.'s investment was a security was not required for a conviction of willful securities fraud. Therefore, the trial court did not err.

Lawrence further argued that the trial court erred by admitting the expert testimony of Colorado's Securities and Exchange commissioner because the testimony usurped the jury's role as fact finder. The commissioner testified that an investment contract qualifies as a security and the transaction at issue qualified as an investment contract. The court allowed the commissioner to testify about materiality only generally, and the commissioner gave no opinion as to whether Lawrence committed any of the crimes charged. Further, the court instructed the jurors that they did not have to accept any expert testimony and the jury instructions were the sources of the law they had to apply. Therefore, the trial court did not abuse its discretion by admitting this testimony.

Lawrence also contended that the trial court erred by excluding evidence that he contends was exculpatory. Here, the trial court acted within its discretion in finding that it would be misleading to tell the jury that two law enforcement agencies initially decided that Lawrence's conduct was a civil, not a criminal, matter. The trial court also did not err in excluding documents that were hearsay.

Lastly, Lawrence argued that he was entitled to the maximum benefit under an amendment to the theft statute. When Lawrence committed his crimes, it was a class 4 felony to steal something

valued between \$1,000 and \$20,000. But before trial the theft statute was amended so that same range could be a class 1 misdemeanor up to a class 5 felony, depending on the value of the items stolen. Here, the amount of Lawrence's theft is disputed because there is conflicting evidence as to whether he used some of D.B.'s money for legitimate business expenses, such as registering the business, renting an office, and creating a website. Therefore, further proceedings are necessary to determine the classification for the theft.

The convictions for securities fraud were affirmed. The theft conviction was reversed and the case was remanded. On remand, the prosecution may elect to retry Lawrence for theft or request that the trial court enter a conviction and resentence Lawrence for class 1 misdemeanor theft based on the jury's finding that he stole an item of at least \$1,000.

2019 COA 85. No. 18CA1478. People in the Interest of L.R.B. Juvenile—Post-Termination of Parental Rights—Pre-Adoption Proceedings—Indian Child Welfare Act—Collateral Order Doctrine—Final Appealable Order—Jurisdiction—Foster Parents—Standing.


In this post-termination of parental rights proceeding, the Montezuma County Department of Social Services and the children's guardian ad litem stipulated to the Navajo Nation's request to transfer jurisdiction to the tribal court for pre-adoptive and adoptive placement proceedings. It was undisputed that the children are registered members of the Navajo Nation and, therefore, Indian children under the Indian Child Welfare Act (ICWA). The children's former foster parents had filed petitions to adopt the children and opposed the transfer. After a contested hearing, the juvenile court denied the Navajo Nation's request to transfer jurisdiction.

As an initial matter, the Court of Appeals concluded that a juvenile court's order denying a tribe's request to transfer jurisdiction to a tribal court is a final, appealable order based on the collateral order doctrine.

Next, the Court concluded that the former foster parents lacked standing in the dependency and neglect case to oppose the Navajo Nation's motion to transfer jurisdiction because (1)

they no longer had intervenor status, because the children were removed from their home following the termination of parental rights; (2) they did not have a constitutionally protected liberty interest in the continuation of their relationships with the children; and (3) civil joinder rules did not confer standing in this dependency and neglect proceeding.

On the merits, the Court examined the relevant ICWA and Children's Code provisions. In the absence of good cause to deny transfer and upon request by either parent or the Indian custodian or the Indian child's tribe, the state court must transfer jurisdiction to the tribal court. Here, because no party with standing opposed the transfer, no party met the burden of opposing transfer of jurisdiction. Accordingly, the juvenile court erred by denying the Navajo Nation's motion to transfer jurisdiction.

The juvenile court's order denying the Navajo Nation's motion to transfer jurisdiction was reversed. The case was remanded with directions to transfer jurisdiction to the Navajo Nation's tribal court and vacate and dismiss the former foster parents' petitions to adopt. 

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