

## Summaries of Published Opinions

December 5, 2019

**2019 COA 177. No. 16CA2086. People v. Compos.** *Criminal Law—Miranda—Custodial Interrogation—Criminal Act—False Identity—Motion to Suppress—Prior Bad Acts—Motion for Mistrial.*

Defendant was arrested for domestic violence crimes. Officers later discovered that

defendant had provided a false name and date of birth during the arrest. Defendant was charged with felony menacing, criminal impersonation, violation of bail bond conditions, and violation of a protection order. Defendant moved to suppress his statement to the officer about his name, and the trial court denied the motion. At trial, the prosecution relied on defendant's statement to support the charges

of criminal impersonation and false reporting to authorities. In a bifurcated hearing, a jury found defendant guilty of criminal impersonation and the lesser nonincluded offense of false reporting to authorities. Defendant later pleaded guilty to a single count of violating a protection order in exchange for dismissal of the remaining charges.

On appeal, defendant contended that the trial court erred by not suppressing his statement giving a false name because it had been obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). When an individual is interrogated in violation of *Miranda*, and the response to the questioning is itself a criminal act, *Miranda's* exclusionary rule does not bar admission of the statement at a subsequent trial involving charges based on the criminal act. Here, even assuming the question was asked in violation of *Miranda*, the trial court correctly denied the motion to suppress because defendant's false statement about his identity constituted a new crime.

Defendant next contended that the trial court violated his constitutional right to a fair trial by denying his motions for a mistrial after evidence of his prior bad acts was admitted. Under CRE 404(b), evidence of a defendant's prior crimes or bad acts is generally inadmissible to prove the character of a person to show that he acted in conformity therewith on a particular occasion. Here, the victim testified that defendant was "[j]ust pushing me around, yelling at me like he always did" and referenced defendant's "other pending cases." An ambiguous reference to a defendant's prior criminal misconduct or other bad acts does not warrant a mistrial. Further, based on properly admitted evidence, the jury was aware that



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defendant had engaged in prior misconduct with respect to the victim. Moreover, with respect to both statements, the reference to improper conduct was fleeting, so potential prejudice was minimized. Accordingly, the trial court did not abuse its discretion by denying defendant's motions for a mistrial.

The judgment was affirmed.

**2019 COA 178. No. 18CA1559. Sharon v. SCC Pueblo Belmont Operating Co. Torts—Personal Injury—Death of Plaintiff—Survival of Actions.**

Sharon suffered multiple ailments during his stay at the Belmont Lodge Health Care Center (Belmont Lodge) nursing facility. He sued SSC Pueblo Belmont Operating Co. (doing business as Belmont Lodge) and its affiliates SavaSeniorCare Consulting, LLC (Consulting) and SavaSeniorCare Administrative Services, LLC (Administrative Services) for negligence.

A jury ruled in Sharon's favor and awarded him noneconomic and punitive damages.

Defendants appealed, and Sharon died during that appeal. A Court of Appeals' division concluded that a joint venture did not exist between defendants and that Administrative Services didn't owe an independent duty of care to Sharon. Because it wasn't able to determine from the jury's verdict if the jury had found any particular defendant independently negligent, the division reversed the entire judgment and ordered a retrial of Sharon's negligence claim against only Belmont Lodge and Consulting. On remand, Belmont Lodge and Consulting moved for summary judgment and for a determination of a question of law, arguing that under Colorado's survival statute, the representatives could not recover noneconomic or punitive damages, which were the only damages Sharon had sought. After plaintiffs stipulated that they

sought only noneconomic and punitive damages, the court entered judgment for Belmont Lodge and Consulting.

On appeal, plaintiffs contended that the district court erred by applying the survival statute. Colorado's survival statute provides that a person's claims against another (except those for slander or libel) survive that person's death. However, a representative can recover damages for economic losses, but not noneconomic damages. Likewise, when a person recovers noneconomic damages in a personal injury action but then dies while the appeal is pending, and the judgment is reversed on appeal, those noneconomic damages are not recoverable by the estate or representative in a new trial because the prior recovery has been nullified and the survival statute bars recovery of such damages by or on behalf of a deceased plaintiff. Sharon's negligence claim survived his death,



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but the damages his representatives sought are not recoverable.

The order was affirmed.

**2019 COA 179. No. 18CA2085. Evans v. Evans.**  
*Domestic Relations—Real Property—Spurious Lien—Spurious Document—Magistrates.*

Wife petitioned the court to modify her dissolution of marriage decree by allocating husband's previously undisclosed business assets. Ruling without the parties' consent, a district court magistrate granted wife's petition and ordered husband to pay wife half of the value of the assets in monthly installments. Husband petitioned for district court review of the magistrate's order. Less than a week after husband filed the petition, wife recorded a summary of the magistrate's order (the Abstract) with the Douglas County Clerk and Recorder. After discovering the Abstract months later, hus-

band petitioned the district court to invalidate the Abstract as a "spurious lien" or "spurious document." The trial court denied the petition.

On appeal, husband argued that the district court erred in finding that the Abstract was not a spurious lien because in a non-consent case, the underlying magistrate's order is merely an unenforceable recommendation and not a lien. Magistrates have the authority to modify permanent orders in dissolution of marriage proceedings without the parties' consent, and the magistrate's order was enforceable when entered, even though husband timely appealed it. The magistrate was authorized to act on behalf of the district court when she entered the order, and her order is an order of the district court. Thus, any lien imposed by the magistrate's order could not have been spurious. Finally, unlike a typical money judgment, the magistrate's order created an equitable lien to

secure husband's payment obligation to wife, so wife did not require a transcript of judgment or other separate document to create a lien against husband's property.

Husband also argued that the district court erred in finding that the Abstract was not a spurious document. The Abstract accurately summarizes the language of an enforceable court order and thus is not a spurious document.

The order was affirmed. The case was remanded to the district court for findings on the amount of reasonable attorney fees and other costs awardable to wife and wife's attorney.

**December 12, 2019**

**2019 COA 180. No. 16CA2168. People v. Meils.**  
*Criminal Law—Sexual Exploitation of a Child—Evidence—Alternate Suspect Theory—Prosecutorial Misconduct—Expert Testimony—Lay Testimony—Double Jeopardy.*

Defendant's wife, H.M., found on defendant's work phone four photos of her 10-year-old daughter naked and two videos of her daughter undressing. Defendant was convicted of four counts of sexual exploitation of a child and one count of invasion of privacy for sexual gratification.

On appeal, defendant contended that the trial court denied him his right to present a complete defense by excluding evidence supporting his alternate suspect theory. However, overwhelming evidence supported defendant's conviction, so any error in the trial court's exclusion of the proffered evidence did not substantially affect the trial's outcome and was harmless.

Defendant also argued that the trial court erred by allowing the prosecutor to commit misconduct by misstating critical evidence and asking the jury to draw an inference based on the absence of evidence that had been excluded. As to the first alleged instance of misconduct, the court alleviated any improper argument with a curative instruction. As to the second statement, the prosecutor used the evidence to draw a reasonable inference to explain why H.M. confronted defendant. The prosecutor's remaining remarks, though inartful, did not constitute plain error.

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Defendant further contended that the trial court erred in admitting expert testimony in the guise of lay witness testimony by an investigative technician, and unhelpful testimony by a detective. Given that the images the witnesses testified about had already been admitted into evidence, any error in admitting this testimony did not affect the outcome of the trial and was therefore harmless.

Lastly, defendant argued that his multiple convictions for sexual exploitation of a child violate his right to be free from double jeopardy because CRS § 18-6-403(3) prescribes alternative methods of committing the same offense. This statute is written in the disjunctive; it lists a series of acts referencing the same subject, governed by a common mens rea, and alternative ways of committing the same offense. Thus, a defendant cannot be convicted of both possession and creation of sexually exploitative materials for a

single incident. Here, there was no indication that the prosecution intended to demonstrate that count 1 occurred at a different time than counts 2, 3, and 4. Thus, counts 2, 3, and 4 must merge into count 1 because it is the most serious of the charges.

The judgment was affirmed as to count 1. The convictions on counts 2, 3, and 4 were vacated and the case was remanded for correction of the mittimus.

**2019 COA 181. No. 17CA2054. People v. Procasky.** *Criminal Law—Jury Instructions—Evidence—Eluding a Police Officer—Possession of a Deadly Weapon on School Grounds—Right to be Present—Merger.*

Butler contacted 911 to report the driver of a vehicle (defendant) who Butler believed had fired shots at his vehicle while he was driving on the interstate. Police officers arrived at the

vehicle and engaged their lights and sirens. The vehicle continued for two blocks before turning into a school parking lot, where defendant was arrested without incident. The officers searched his car and discovered a 9mm Smith & Wesson pistol with a live round in the chamber under the front passenger seat. The pistol's loaded magazine was found in the center console, and several 9mm bullets were on the ground near the driver's side door. The officers found two rifles and four boxes of ammunition in the trunk. Defendant was found guilty of attempted first degree assault, felony menacing, possession of a weapon on school grounds, prohibited use of a weapon, reckless endangerment, eluding a police officer, and a crime of violence sentence enhancer.

On appeal, defendant contended that the trial court plainly erred by failing to provide a specific intent element for the jury instruction on

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attempted first degree assault. The trial court's failure to provide the specific intent element in the attempted first degree assault instruction constituted error. But when considered together, the jury instructions clearly instructed the jury regarding the required mens rea for attempted first degree assault. Therefore, there was no plain error.

Defendant also argued that the prosecution produced insufficient evidence to sustain a conviction for eluding a police officer. Here, in response to a police officer's signal to pull over, defendant drove for two blocks on a two-lane residential road, without accelerating, before turning into a parking lot. Defendant's actions did not constitute sufficient evidence to convict for vehicular eluding.

Defendant further argued that he did not commit the felony of possessing a deadly weapon on school grounds. Pulling into a school parking lot with a gun in the vehicle in response to a police officer's directive is not sufficient evidence to prove unlawful conduct for purposes of CRS § 18-12-105.5.

Defendant further contended that his convictions for felony menacing and attempted first degree assault should be merged because proof of attempted first degree assault necessarily establishes felony menacing. Felony menacing is not a lesser included offense of first degree assault, and felony menacing and attempted first degree assault do not merge.

Lastly, defendant contended that the trial court violated his constitutional right to be present at his trial when it communicated with the deliberating jury while he was outside the courtroom. Here, while the jury deliberated, the trial court returned to the bench in response to an issue about the jury's access to physical evidence recovered during the search. The prosecutor and defense counsel stipulated that, if the jury wanted access to this evidence, it could view the magazine, pistol, and live rounds individually, but not all together. No prejudice was caused by defendant's absence during this stage of the trial. Thus, any error stemming from defendant's absence was harmless beyond a reasonable doubt.

The convictions for eluding a police officer and possession of a deadly weapon on school

grounds were reversed. The remaining convictions were affirmed. The case was remanded for amendment of the mittimus.

**2019 COA 182. No. 17CA2225. People v. Sosa.**  
*Criminal Law—Sentencing—Restitution.*

Salas and Trujillo were arrested for a drive-by shooting at a bar where two men were injured and one man was killed. Salas's girlfriend, Sosa, admitted that she knew there was an outstanding warrant for the men and that she had been camping out with them since the shooting. Sosa was charged with accessory to first or second degree murder. To facilitate a plea agreement, the prosecution added a second count of accessory to second degree murder heat of passion. Sosa pleaded guilty to the second count, and the first count was dismissed. The prosecution moved for Sosa to be ordered to pay restitution jointly and severally with her co-defendants. The district

court granted the motion. Sosa timely objected to the amount of the restitution order. After a hearing the court denied the objections.

On appeal, Sosa contended that the district court abused its discretion by ordering her to pay joint and several restitution for the victims' losses because she was not the proximate cause of those losses. Colorado's restitution statutes do not authorize a trial court to order a defendant to pay restitution for pecuniary losses caused by conduct for which a defendant was never criminally charged. Here, Sosa was not charged with and did not plead guilty to any crime based on conduct she engaged in before or as a participant in the shooting. Therefore, she has not been found guilty of, nor did she plead guilty to, a crime based on such conduct, and she cannot be deemed an "offender" as to any uncharged crime. Consequently, the district court was not authorized to order Sosa to pay

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restitution for losses proximately caused by the shooting.

The prosecution argued that requiring Sosa to pay restitution for losses caused by conduct for which she was not criminally charged does not violate her procedural due process right. However, Sosa was never charged with murder, so she did not agree to pay restitution proximately caused by the murder. The plea agreement in this case does not support the district court's restitution award.

The restitution order as to Sosa was reversed and the case was remanded for the district court to determine what losses, if any, were proximately caused by the conduct for which Sosa was charged.

**December 19, 2019**

**2019 COA 183. No. 16CA0746. People v. Bobian.** *Criminal Law—Expert Testimony—Prosecutorial Misconduct.*

Defendant was involved in a fight at a party during which he struck the victim on the head with a hatchet. Defendant was found guilty of attempted second degree murder and first degree assault.

On appeal, defendant contended that the trial court erred by admitting the testimony of the State's lead detective about blood patterns and tool markings without qualifying him as an expert. The detective's reference to the blood evidence as "cast-off" required specialized knowledge that an ordinary person would not have, and he purported to rely on his training in blood pattern analysis. Therefore, the detective's testimony was expert testimony and was improperly admitted. However, the error was harmless because it was undisputed that defendant struck the victim with the hatchet; the only dispute was whether he did so in self-defense, which the blood pattern on the door did not answer. The detective's testimony that he looked at the marks on the apartment

door to see if they matched the witnesses' statements was similarly harmless because it did not help with proving or disproving self-defense.

Defendant next contended that multiple incidents of prosecutorial misconduct warranted reversal. A review of the record showed there was no error that would warrant reversal.

Defendant also argued that the trial court's combined errors amounted to cumulative error. Based on the above conclusions, the cumulative effect of the asserted errors would not warrant reversal.

The judgment was affirmed.

**2019 COA 184. No. 16CA1171. People v. Gregory.** *Criminal Law—Sentencing—Restitution—Civil Settlement Agreement.*

At age 17 defendant drove while intoxicated and crashed his vehicle, killing passengers B.B. and R.P. and seriously injuring a third passenger. Defendant pleaded guilty, as an adult, to two counts of vehicular homicide. Thereafter, defendant's insurance company settled with the deceased victims' families and the living victim. Each of the deceased victims' families received \$500,000 and, in exchange, released defendant, his parents, and his insurance company from all claims stemming from the incident. The court sentenced defendant, and the prosecution requested restitution. The court ordered defendant to pay restitution to R.P.'s family and to reimburse the Crime Victim Compensation Program (CVCP) for payments made to B.B.'s and R.P.'s families for funeral expenses. Defendant filed an objection to the order, and the court issued an amended order removing the payment to R.P.'s family.

On appeal, the People contended that the district court lacked authority to change its original restitution order. While the court's authority to increase restitution previously ordered is limited, its authority to decrease restitution is not similarly limited. Therefore, the court had authority to decrease the restitution amount ordered when it finally determined that R.P.'s family was compensated by the settlement agreement.

Defendant contended that the court erred by denying him a setoff for the CVCP payments



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made to the victims' families for funeral expenses because the agreements discharged his liability for these costs. The People contended that the district court erred by granting defendant a setoff for R.P.'s family's travel expenses and psychologist fees based on the settlement agreement between defendant's insurer and R.P.'s family. Here, defendant showed that the settlement agreement covered R.P.'s family's travel expenses and psychologist fees, but the district court erred by not considering that the settlement agreements also covered the CVCP payments made to the victims' families for funeral expenses.

The Court of Appeals rejected the People's further arguments that (1) because the CVCP was not a party to and is not bound by the agreements, defendant is liable for the CVCP payments regardless of whether the agreements covered funeral costs; and (2) if defendant does not pay restitution, the agreements violate public policy because the statutory scheme favors ordering restitution.

The restitution order was reversed and the case was remanded for further proceedings.

**2019 COA 185. No. 18CA2143. Andrews v. Miller.** *Colorado Rules for Magistrates—Consent—Notice.*

Plaintiffs entered into a written contract with Miller and Interior Living Designs LLC (defendants) for floor covering materials. Plaintiffs filed a complaint for civil theft, for breach of contract, and to pierce the corporate veil, alleging that the materials were never fully delivered. Defendants filed a motion to dismiss and compel arbitration (the motion). The magistrate denied the motion, purporting to act with the parties' consent based on the lack of any objection to the magistrate's previous order addressing delay reduction. Defendants moved for district court review, which the magistrate also denied.

Defendants appealed the magistrate's ruling, arguing that the parties did not consent to the magistrate ruling on the motion. Here, because the magistrate's delay reduction order did not inform the parties that they were required to consent to any particular function being performed by the magistrate, discussed only what the magistrate "may" do, and did not mention

"consent," it was insufficient under C.R.M. 5(g). Further, because the magistrate did not have the parties' consent, and motions to dismiss are not listed in C.R.M. 6(c)(1) (No Consent Necessary), the magistrate lacked jurisdiction to rule on the motion under C.R.M. 6(c)(2).

The denial of the motion was reversed and the case was remanded for further proceedings.

**December 26, 2019**

**2019 COA 186. No. 18CA2261. Gunderson v. Weidner Holdings, LLC.** *Uniform Commercial Code—Negotiable Instruments—Statute of Limitations—Summary Judgment.*

Weidner disbursed two lump sums of money through his company, Weidner Holdings, LLC, to his daughter and her husband (the Gundersons) for a real estate purchase. The Gundersons executed two promissory notes for these sums: a \$739,000 note, secured by a deed of trust, and an unsecured \$150,000 note. The notes were explicitly payable on demand and bore a nominal annual interest rate of 0.75%, but they did not require periodic payments of interest or principal. The Gundersons made no payments on the notes.

Thereafter, the Gundersons asked Weidner to forgive the notes so they could sell the property encumbered by the larger note and purchase property in Montana. Weidner declined but agreed to release the deed of trust and take a subordinated security interest in the Montana property. The Gundersons moved to Montana and soon began dissolution of marriage proceedings.

After the Gundersons filed for divorce in Montana, Weidner and his company (collectively, defendants) called the two notes due against Mr. Gunderson only. Defendants' demand was made almost eight years after the notes were executed. In response, Mr. Gunderson filed suit in Colorado district court, seeking a declaratory judgment that the money was a gift. He also argued that the statute of limitations barred enforcement of the notes. Defendants asserted counterclaims, and Mr. Gunderson moved for summary judgment. The district court granted the motion, concluding that defendants' claims were time barred.

On appeal, defendants argued that CRS § 4-3-118(b), the Uniform Commercial Code's (UCC) statute of limitations for payable-on-demand negotiable instruments, applied rather than CRS § 13-80-103.5, the general statute of limitations applicable to liquidated debts. Where there is a conflict over the applicable statute of limitations, courts should apply the specific rather than a general statute of limitations. Here, both promissory notes met the definition of a negotiable instrument under the UCC, and the fact that one was secured by a deed of trust does not defeat its negotiability. Thus, the Court of Appeals concluded that CRS § 4-3-118(b) applies. And because it is undisputed that the promissory notes are demand notes on which no principal or interest has been paid, and suit was filed within 10 years of the notes' execution and within six years of the demand, the action is not time barred.

The summary judgment was reversed and the case was remanded for further proceedings. **CL**

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