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SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Certiorari from the Colorado Court of Appeals Case No. 2019CA1308	
Petitioner ARNOLD R. MARTINEZ v. Respondent THE PEOPLE OF THE STATE OF COLORADO	
Megan A. Ring Colorado State Public Defender MEREDITH K. ROSE 1300 Broadway, Suite 300 Denver, CO 80203 Phone Number: (303) 764-1400 Fax Number: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #45304	Case Number: 2022SC272
REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit and formatting requirements set forth in C.A.R. 28(g).

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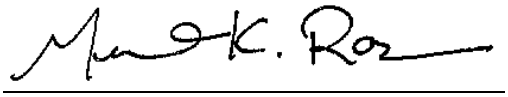

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND RULES

CONSTITUTIONAL AUTHORITIES

OTHER AUTHORITIES

ISSUES ANNOUNCED BY THE COURT

I. [REFRAMED] Whether an appellate court reviews a trial court's proximate cause determination for restitution purposes under an abuse of discretion standard.

II. Whether the prosecution proved this bike theft proximately caused the car damage for which the court awarded restitution.

ARGUMENT

I. Appellate courts should review de novo whether evidence was sufficient to establish proximate cause to support a restitution order.

In the Opening Brief, Mr. Martinez argues that because proximate-cause determinations require application of legal tests to historical facts, they should be reviewed as a mixed question of fact and law, with deference to historical facts and application of the law reviewed de novo. (OB p 7-26)

In response, the Answer Brief engages in hand waving. The People accuse Mr. Martinez of asking for "unprecedented" de novo review of the factfinder's ultimate determination. (AB p 6) The People claim that this Court would have to overrule many decisions of the court of appeals in order to agree with Mr. Martinez's proposed standard of review. (AB p 19) And the People contend that reviewing proximate cause as a mixed question of fact and law would be unworkable. (AB p 23)

But these concerns are overstated. The court of appeals already applies de novo review to determining causation in restitution cases,[1] and this Court has utilized the mixed-question approach in many other contexts where resolution on appeal turns on questions of both fact and law, including investigatory stops and violations of the public-trial right. *See People v. Smith*, 926 P.2d 186, 188 (Colo. App. 1996) (in evaluating whether investigatory stops violate the Fourth Amendment, "[a] reviewing court must perform *de novo* review of a trial court's determination that reasonable suspicion supported an investigatory stop. In so doing, a reviewing court must take care to review findings of historical fact for clear error and, at the same time, to give due weight to inferences drawn from such facts by the trial court and by the local police") (quoted with approval by *Valdez v. People*, 966 P.2d 587, 598 (Colo. 1998) (Kourlis, J., dissenting)); *People v. Jones*, 2020 CO 45, ¶ 14 ("We review a trial court's decision to close the courtroom as a mixed question of law and fact."). (See OB p 13-17)

Rather than overruling scores of cases, by adopting the mixed-question approach, this Court will be affirming the divisions that already apply de novo

[1] *See People v. Barbre*, 2018 COA 123, ¶ 25; *People v. Dyson*, 2021 COA 57, ¶ 15; *People v. Rice*, 2020 COA 143, ¶ 22 & n.3, *overruled on other grounds by People v. Weeks*, 2021 CO 75, ¶ 47 n.16; *People v. Stone*, 2020 COA 24, ¶ 7; *People v. Jaeb*, 2018 COA 179, ¶ 48; *People v. Ortiz*, 2016 COA 58, ¶ 26.

review and clarifying that, when it comes to historical facts, appellate courts must still defer to trial courts' findings.

Accordingly, this Court should hold that when evaluating a restitution order, historical facts are reviewed for clear error, but whether the evidence establishes proximate cause is reviewed de novo.

A. The mixed-question approach is the best standard to evaluate a lower court's proximate-cause determination.

As discussed in the Opening Brief, determining proximate cause involves resolving both factual and legal questions, much like determining custody for the purposes of a *Miranda* advisement, *see People v. Matheny*, 46 P.3d 453, 459 (Colo. 2002), or evaluating reasonable suspicion for an investigatory stop, *see Smith*, 926 P.2d at 188. Accordingly, while the basic facts underlying the analysis must be found by the trial court, review of the application of the law should be de novo. De novo review by appellate courts ensures consistent application of proximate-cause determinations by trial courts. *See, e.g., Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 2019 CO 51, ¶ 20 (in condemnation proceedings, "having an appellate tribunal look to and set standards around the varied circumstances in which takings arise helps generate the uniformity and workload reduction for which the bifurcated role between trial and appellate courts was, in part, created"). And it protects the

due-process interests of courts and defendants in ensuring that a defendant is held financially liable only when he is truly responsible for an injury. (OB p 17-19)

The People disagree, arguing that the existence of proximate cause is a question of fact. (AB p 19) Certainly, whether a defendant's actions proximately caused an injury involves *analysis* of the facts. But proximate cause is ultimately a legal question because it requires application of a legal standard to the facts. "As a general proposition, findings of fact should be reviewed for clear error, and legal conclusions should be reviewed de novo. . . . [F]act questions usually call for proof and legal questions usually call for argument." *Id.* ¶¶ 18-20 (internal punctuation omitted). It is not enough for the prosecution to establish that a defendant was the "cause in fact" of damages—he must also be the "'legal' or 'proximate cause' of the plaintiff's injury." *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 2020 CO 51, ¶ 27.

Thus, to determine proximate cause means to answer legal questions, like whether the defendant's criminal conduct was closely related enough to an injury to assign him liability, whether there was an independent intervening cause of the damage, and whether this intervening act was reasonably foreseeable. *See Carousel Farms*, ¶ 20 (whereas trial judge is essential to answer "fact" questions requiring proof, "whether the uses are public tends toward legal pronouncement, and calls for

argument—in other words, the 'legal' part of takings' mixed review" (internal punctuation omitted)). Determining these legal questions does not call for deference to a trial court's analysis when the appellate court is better situated to apply the law.

The People also assert that review in this case shouldn't be de novo because it is inaccurate to call Mr. Martinez's claim a sufficiency challenge. (AB p 14) The People contend that Mr. Martinez is contesting the trial court's finding instead.

Mr. Martinez's argument is that there was insufficient evidence that he was the proximate cause of damage to Mr. Tidd's Mazda. This is a failure-of-proof claim; the prosecution may have proved that he stole the bicycle, but it didn't prove that without Mr. Tidd's intervening action, the damage to the Mazda would have occurred.

This contention squares with the way the issues were presented in *Barbre* and *Rice*. In *Barbre*, the defendant argued that the prosecution did not sufficiently prove that she caused the amount of loss awarded—the entire quantity of pills that went missing from the pharmacy over a one-year period. ¶ 27. The division viewed this as a challenge to the sufficiency of the evidence and applied de novo review. *Id.* ¶¶ 13-25. In *Rice*, the division rejected the People's request for abuse of discretion review because the defendant argued that the prosecution failed to prove proximate cause, which was a sufficiency challenge subject to de novo review. ¶ 22 & n.3;

accord Jaeb, ¶ 48, (defendant's claim "that the prosecution failed to prove that he caused the damage" was "a sufficiency determination that should be reviewed de novo"); *Cumhuriyet v. People*, 615 P.2d 724 (Colo. 1980) (reversing restitution judgment where evidence of defendant's responsibility for uncharged theft was insufficient).

Whether the prosecution established that Mr. Martinez caused the injury at issue is necessarily a challenge to the sufficiency of the prosecution's proof.

Next, the People complain that the Opening Brief fails to explain how proximate cause as a mixed question of fact and law will be presented on appeal. (AB p 23) To clarify, the trial court resolves questions of historical fact: here, whether Mr. Martinez removed the bike from the Tidd's property and their presence (TR 5/28/19 p 35:1-2); whether Mr. Tidd pulled parallel to Mr. Martinez and then pulled in front of him (id. p 35:23-36:1); that Mr. Martinez did not pull over (id.); and how far Mr. Martinez rode the bike before Mr. Tidd caught up to him, for example.

But like review of whether a defendant was legally in custody and whether he was interrogated, legal questions are reviewed de novo, such as: was Mr. Tidd negligent or grossly negligent? Were his actions an independent intervening cause

that cut off the chain of causation? And ultimately, can Mr. Martinez be held responsible for the damage to the Mazda?

B. The court of appeals already applies de novo review to sufficiency of the evidence in the context of restitution.

Despite the People's protestations to the contrary, Colorado courts are already using de novo review to assess whether the prosecution has proved its case when it comes to restitution.

For example, *Barbre*, ¶ 24, recognized that the correct standard of review in restitution disputes depends on which of a wide variety of restitution claims a defendant makes—abuse of discretion cannot simply be used as a default standard of review. Because the defendant there challenged whether she caused the entire amount of the loss, the division applied de novo review to the question of causation. *Id.* ¶ 25.

The People argue that this Court would have to overrule a number of cited cases if it chooses de novo review over abuse of discretion. (AB p 19) But some of the cases the People point to, claiming they used the abuse-of-discretion standard, are inapposite.

People v. Perez, 2017 COA 52M, ¶¶ 5-7, did recite the abuse-of-discretion standard, but it also invoked the standards of review for the legality of a sentence (de novo), questions of statutory interpretation (de novo), and questions of law (de

novo). Then the division rejected the defendant's claim that the trial court erred by failing to make an express proximate-cause finding. *Id.* ¶ 8. The division found "no reversible error" in the trial court's lack of express finding because the trial court impliedly found the defendant to be the proximate cause. The division concluded that "[t]he crime for which Perez pleaded guilty arose from acts that injured the victim, and we discern no error in the court's rejection of his arguments to the contrary," without revisiting the standard of review. *Id.* ¶ 12.

People in Interest of D.I., 2015 COA 136, ¶ 7, used the abuse of discretion standard because that's what the defendant argued. Then the division vacated the restitution order because the defendant had not proximately caused the damage at issue. *Id.* ¶ 13. Similarly, the standard of review was not at issue in *People v. Henson*, 2013 COA 36, ¶ 13. (See OB p 24-25)

Because there is a split of authority at the court of appeals, this Court's decision will inevitably affirm some of the lower court's cases while overruling others. That's why this Court's guidance is necessary.

II. Mr. Tidd's intentional act of turning his Mazda in front of Mr. Martinez was an independent intervening cause of the car damage, and the trial court erroneously ordered Mr. Martinez to pay restitution.

Mr. Martinez argues that Mr. Tidd damaged his car by intentionally turning it into the bicycle's downhill path, and therefore Mr. Martinez was not the proximate cause of Mr. Tidd's loss. Regardless of which standard of review this Court applies, this Court should vacate the restitution order. (OB p 26-39)

A. Mr. Tidd's intentional act of turning the Mazda into the bike's path was at least grossly negligent and therefore not foreseeable.

As discussed in the Opening Brief, proximate cause depends on the foreseeability of the injury. While simple negligence is foreseeable, gross negligence is extraordinary and breaks the causal chain. (OB p 27-28)

The People contend that Mr. Tidd's pulling in front of Mr. Martinez was not just foreseeable but "foreseen." (AB p 41) But the People point to nothing in the record to indicate that Mr. Martinez had any idea that Mr. Tidd was going to cut him off as he rode down Table Mesa Drive. The record just doesn't support that assertion.

The People reason that if it was foreseeable that Mr. Tidd would pursue Mr. Martinez, then it was foreseeable that Mr. Tidd would take steps to recover the bike, including forcing Mr. Martinez to stop by pulling his car in front of him and damaging the Mazda. (AB p 42) By this reasoning, if Mr. Tidd had crashed his car

into a concrete barrier during pursuit, Mr. Martinez would be liable for that damage as well. And if Mr. Tidd had taken out a gun and shot at Mr. Martinez, hitting the bicycle, a passing car, or a pedestrian, Mr. Martinez would be liable for those injuries, too. But that's not how proximate cause works. Instead, Mr. Tidd's intentional act of pulling in front of Mr. Martinez, which was grossly negligent in endangering Mr. Martinez and Mr. Tidd's own property, cut the causal chain. Mr. Martinez cannot be held liable for damage to the Mazda based on Mr. Tidd's behavior in this circumstance.

Mr. Martinez argues that the record below doesn't demonstrate that Mr. Tidd was simply negligent, but that he acted intentionally, and that his action constituted gross negligence at the very least. (OB p 30) *See Hamill v. Cheley Colo. Camps, Inc.*, 262 P.3d 945, 954 (Colo. App. 2011) ("Gross negligence is willful and wanton conduct, that is, action committed recklessly, with conscious disregard for the safety of others."). The People disagree, claiming that the Opening Brief "appears to argue" that Mr. Tidd intended to damage his own car. (AB p 45) That's not what the Opening Brief says—the record doesn't go that far, and the record doesn't need to in order to provide enough evidence that Mr. Tidd was an independent intervening cause of the car accident. The Opening Brief simply argues that Mr. Tidd turned his Mazda into Mr. Martinez's path *intentionally*, that this decision imperiled Mr.

Martinez, the bike, and the car, and that Mr. Tidd was at least grossly negligent. (OB p 30-31)

Mr. Martinez points out the restitution statute's definition of "victim" to demonstrate that a person who chooses to commit a wrong during the course of a criminal episode should not be able to recover restitution for the damage that he himself created. (OB p 31) *See* § 18-1.3-602(4)(b), C.R.S. (2022) ("'Victim' shall not include a person who is accountable for the crime or a crime arising from the same conduct, criminal episode, or plan . . . ."). The People fret about this Court reaching an argument that isn't presented in the grant of certiorari, but as explained in the Opening Brief, this Court does not need to conclude that Mr. Tidd committed a crime in order to hold that it was *his* actions that damaged the car, and not Mr. Martinez's. (OB p 31-32)

The People retort that a criminal act can be foreseeable, but the authorities they rely on are far afield from the facts in this case. (AB p 47) In *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 2020 CO 51, ¶ 38, the question was whether an "extreme act of violence"—the mass shooting at a Planned Parenthood by Robert Dear—was foreseeable given that the facility had been threatened before. This Court held open the possibility that Planned Parenthood's allegedly insufficient security measures may have contributed to the plaintiffs' injuries. And *Armed and*

Dangerous: Tort Liability for the Negligent Storage of Firearms, 32 Conn. L. Rev. 1189, 1231 (2000), merely argues that "[p]hysical harm caused by the criminal misuse of stolen guns is a reasonably foreseeable risk of unsafe storage," a scenario not at issue here.

The People also criticize the Opening Brief for highlighting the policy concerns of extending restitution liability to victims to recover for their own dangerous and retaliatory conduct. (AB p 51) But courts should take care not to encourage self-help measures like those taken by Mr. Tidd because they can lead to tragic outcomes. Earlier this year in Denver, a man used an app on his cellphone to track his stolen Audi.[2] When the police did not respond quickly enough, he told dispatchers that he was armed and had to act, making "threats to protect his property with a weapon."[3] When he found the car, the man shot and killed Elias Armstrong, the 12-year-old boy sitting behind the steering wheel. The Denver District Attorney's Office declined to file charges against the owner of the Audi, doubtful

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[2] *See* Kieran Nicholson, *Man Using App to Track Stolen Vehicle in Denver Fatally Shoots 12-Year-Old in Gunfire Exchange*, Denver Post, Feb. 7, 2023, *available at* https://www.denverpost.com/2023/02/07/fatal-denver-shooting-elias-armstrong/.

[3] *See* Shelly Bradbury, *Man Who Tracked Stolen Car, Killed Boy in Denver Was Previously Arrested After Driving Police-Style Vehicle with Lights, Siren*, Denver Post, April 18, 2023, *available at* https://www.denverpost.com/2023/04/18/denver-stolen-car-tracked-shooting-elias-armstrong-jack-reed/.

that they could prove his guilt beyond a reasonable doubt as he had a valid self-defense claim.[4]

A holding by this Court that it is reasonably foreseeable for property owners to use force to recover their property may encourage the kind of vigilantism that makes everyone less safe.

B. Mr. Martinez did not participate in Mr. Tidd's decision to turn the Mazda.

An independent intervening cause is both unforeseeable and one in which the accused does not participate. *People v. Stewart*, 55 P.3d 107, 121 (Colo. 2002). Here, Mr. Tidd's decision to turn the car occurred *after* Mr. Martinez had stolen his bicycle, and it was the decision to turn that caused the damage to the Mazda, not Mr. Martinez's theft of the bike. (See OB p 36-39) Therefore, Mr. Martinez did not participate in the act that caused the damage to the car.

The People disagree, contending first that Mr. Martinez triggered the chain of events by stealing the bicycle. (AB p 38) But that is true of every "but-for" cause of an injury and does not account for the requirement that a cause be "proximate" before assessing restitution. *See Paroline v. United States*, 572 U.S. 434, 448 (2014)

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[4] *See also* Katy Barber, *San Antonio Man Tracks Stolen Truck with Airtag, Kills Suspected Thief*, mySanAntonio.com, April 1, 2023, *available at* https://www.mysanantonio.com/news/local/article/san-antonio-airtag-shooting-17871230.php.

("[P]roximate cause forecloses liability in situations where the causal link between conduct and result is so attenuated that the so-called consequence is more akin to mere fortuity. For example, suppose the traumatized victim . . . needed therapy and had a car accident on the way to her therapist's office. *The resulting medical costs, in a literal sense, would be a factual result of the offense. But it would be strange indeed to make a defendant pay restitution for these costs*." (emphasis added)). Simply because Mr. Martinez's theft of the bicycle eventually led to the car accident does not mean that he "inextricably participated" in the intervening act.

Second, the People claim that Mr. Martinez participated by riding his bike into the car while trying to get away. (AB p 38) But again, there is no evidence or finding that Mr. Martinez intentionally collided with Mr. Tidd's car. The record shows that it's more likely that, as he traveled downhill on the bike, Mr. Martinez hit the car because Mr. Tidd put it directly in his way. As Officer Scheevel testified:

> [I]f this were purely a traffic accident, *it would be the driver that's at fault* as long as the bicyclist is legally riding where he's supposed to be in the correct direction, which it appeared in this situation would have been the case if this were just purely a traffic accident.

(TR 5/28/19 p 13:22-14:2 (emphasis added))

The People also fault Mr. Martinez's reliance on *Snyder v. Colorado Springs & C.C.D. Ry. Co.*, 85 P. 686, 686-87 (Colo. 1906), claiming that it is inapposite

because the case was decided in the context of assessing duty, not liability under the restitution statute. (AB p 40 n.12) That's a mischaracterization. In *Snyder*, the trial court granted a directed verdict in favor of the defendant in a tort action because the plaintiff did not prove that the defendant was the proximate cause of his injuries. Affirming, this Court explained, "It is apparent from the record in this case that the proximate cause of the injury to plaintiff was the action of the irritated passenger, and that this cause could not be anticipated by defendant or its agents." *Id.* at 687.

The same is true here. The record established that Mr. Tidd's decision to turn his car intentionally in front of Mr. Martinez was the direct and proximate cause of the damage to his Mazda, a cause that could not be anticipated by Mr. Martinez. As Mr. Martinez did not participate in this action, the trial court erred by ordering him to pay restitution for damage to the car.

CONCLUSION

This Court should hold that appellate review of the sufficiency of the evidence supporting a trial court's proximate-cause determination is de novo. Because Mr. Tidd was the independent intervening cause of the damage to his own car, Mr. Martinez respectfully asks this Court to vacate the restitution order.

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CERTIFICATE OF SERVICE

I certify that, on May 22, 2023, a copy of this Reply Brief was electronically served through Colorado Courts E-Filing on John T. Lee of the Attorney General's office.

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