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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Lake County District Court
Honorable Catherine J. Cheroutes, Judge
Case No. 15CR26

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

MARIA LAIDA DAY,

Defendant-Appellant.

▲ **COURT USE ONLY** ▲

Case No. 20CA1717

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ANSWER BRIEF

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The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

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☒In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Frank R. Lawson
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INTRODUCTION

The defendant, Maria Laida Day, struck and killed her boyfriend with a car. A jury found her guilty of second-degree murder, vehicular homicide, leaving the scene of an accident, and careless driving. On appeal, she contends the trial court erred in excluding mental condition evidence relevant to her demeanor immediately after the incident. She further contends her restitution order should be summarily vacated because it was untimely or, in the alternative, based on insufficient evidence.

STATEMENT OF THE FACTS AND CASE

Defendant and the victim, John Martinez, had been in a relationship for roughly four years prior to the hit-and-run.[1] (TR 2/6/20, p 163/741:6-8.) The relationship was in decline and far from healthy. (CF, pp 187-97.)

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[1] The transcripts for this case are compiled in a single PDF document which begins with the latest proceedings and progresses toward the earliest. For sake of clarity, the People cite the page number specific to the hearing, followed by the page number specific to the consolidated PDF document.

Two years prior to the incident, Martinez's mother noticed scratches on her son's neck, a bump on his forehead, and a badly swollen eye. Martinez explained that defendant had beat him up after becoming jealous the night before. He prevented his family from calling the police. (CF, p 190; TR 1/31/20, pp 191/1009:19-192/1010:4.)

Three months before the incident, defendant approached Martinez's brother while he was heading into work. She was angry, intoxicated, and looking for Martinez, stating: "Where the hell is that bastard? When I find him, I'm going to kick his ass and fuck him up good." She then slammed her car door and sped away. (CF, p 191; TR 2/3/20, pp 15/593-17/595.)

Three days before the incident, defendant twice looked for Martinez at the house he was sharing with his sister while he was out. On the first go around, defendant asked the sister's boyfriend, "Where's John? That motherfucker." Several hours later, she returned with a rose and proceeded to peel the petals off one at a time while stating aloud: "This one's for being late, that motherfucker. This one's for cheating on me, that motherfucker. This one is for being the worst fuck

I've ever had." Defendant then placed the last petal at the base of the door and said, "I'm going to kill that motherfucker." (CF, p 191; TR 2/3/20, pp 31/609-33/611.)

On the day at issue, defendant struck Martinez with her car. (CF, pp 2-3.) She then promptly left the scene. (Env, EX 189, 1. James St., 2. Driveway; EX, p 55 (diagram).) Although defendant would eventually call 911, it was thirty minutes later and only after emergency personnel had already arrived. (Env, EX 123.) Martinez later succumbed to his injuries. (TR 1/31/20, p 44/862:12-24.)

The incident developed as follows: Earlier in the day, defendant took her elderly mother and Martinez from Leadville to Frisco to go shopping. (CF, pp 188-89; Env, EX 124, 03:15-05:00.) Before returning home, Martinez purchased alcohol along with two flowers for defendant and her mother. (Env, EX 124, 05:20-05:55.) Martinez drank a bottle of the alcohol and fell asleep. (Env, EX 124, 05:55-07:10.) When he awoke,

Martinez and defendant began to argue.[2] (Env, EX 124, 10:20-10:50, 12:20-12:50.)

At 4:02 PM, defendant's car was captured on a home surveillance camera running through a stop sign roughly one block away from the location of the hit-and-run. (Env, EX 189, "1. James St.") Defendant's mother initially told authorities that around this point defendant yelled at Martinez to get out of the car. (Env, EX 124, 10:50-11:05, 12:50-13:30.) This corresponded with testimony from a witness at an adjacent business who heard a car door slam followed by the car "taking off." (TR 1/29/20, pp 186/1428-189/1431.)

At 4:04 PM, another home surveillance camera captured defendant pulling into the home of her sister one block away from the

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[2] During interviews with various authorities after the incident, defendant's mother recalled defendant and Martinez arguing prior to the hit-and-run. Because of the mother's age and declining health, a deposition was taken to preserve her testimony prior to trial. At the deposition, she could not recall making any of the prior statements. (Env, EX 124, 08:50-17:35.) However, the deposition was presented to the jury, in which the prior statements were elicited as inconsistent to her then-existing recollection of events. (TR 2/3/20, pp 224/802-227/805.)

hit-and-run, with damage to the front right bumper. (Env, EX 189, "2. Driveway.") Defendant quickly walked her mother into the house, then returned to the car where she looked at and touched the damage before driving away. (Env, EX 189, "3. Driveway," "4. Driveway.")

At 4:09 PM, defendant's car was recorded driving in the vicinity of the hit-and-run. (Env, EX 189, "5. James St.") However, authorities were not made aware of the incident until roughly 4:27, when a passerby called 911. (Env, EX 122.) Police and other emergency personnel arrived two minutes later. (Env, EX 189, "6. James St.") Roughly five minutes after that, defendant returned to her sister's house, where she called 911 and admitted to hitting "a guy" with her car. (Env, EX 189, "7. James St.," "8. Driveway"; Env, EX 123.) When police contacted defendant, she presented as unusually calm and nonchalant. (Env, EX 189, "9. James St."; TR 1/30/20, p 33/1051:3-11.)

Subsequent investigation indicated that Martinez had been propelled into a barrier located roughly ten feet away from the street, where his head struck with sufficient force that hair remained stuck to the concrete. (EX, p 55; TR 1/30/20, pp 129/1147:2-20.) Damage to the

car and injuries to the victim — including a crushed pelvis — indicated that it proceeded to move on top of Martinez before it too struck the barrier. (TR 1/30/20, p 156/1174:5-12; TR 1/31/20, pp 38/856:3-13, 39/857:20-40/858:3, 82/900:21-83/901:5; *see also* EX, pp 76-83.) There was no evidence of any loss of control on the roadway, nor evidence of a vehicle braking, nor evidence of any evasive maneuver. (TR 1/30/20, p 131/1149:3-11.)

Defendant was charged with second-degree murder, leaving the scene of an accident, vehicular homicide, and two crime of violence sentence enhancers. (CF, pp 98-100.) She pleaded not guilty on the theory that the hit-and-run was an accident tethered to a "jumpy" transmission. (TR 1/29/20, pp 165/1407:18-21, 176/1418:3-20.) But expert testimony thoroughly refuted any notion of a faulty vehicle. (TR 1/31/20, pp 123/941-148/966.) And a combination of the investigation, the couple's prior history, surveillance footage, and victim injuries undermined any reasonable belief that defendant's actions were made unknowingly. (*See* TR 2/6/20, pp 132/271-139/278.)

Accordingly, the jury found defendant guilty as charged and further convicted her for a lesser non-included offense of careless driving resulting in death. (CF, pp 1060-63.) The trial court sentenced her to a controlling term of 35 years in the Department of Corrections, then imposed restitution covering burial expenses, lost wages, and therapy incurred by the victim's family in the total amount of $13,096.50. (CF, pp 1173, 1281-82.) Defendant now appeals from both the judgment of conviction and restitution order.

SUMMARY OF THE ARGUMENT

I. The trial court did not reversibly err in precluding expert testimony concerning defendant's mental condition immediately after the incident. Defendant never completed the court-ordered examination required by statute before such evidence may be admitted. The testimony as proffered fell squarely within the contours of an insanity defense requiring an NGRI plea. Any probative value would have been substantially outweighed by the risk of unfair prejudice. And even

assuming error, the testimony's exclusion was harmless beyond a reasonable doubt.

II. Defendant's three challenges to his restitution order are flawed. First, defendant waived the court's 91-day deadline to determine the compensable amount. In the alternative, the alleged violation resulted in a non-jurisdictional defect that did not prejudice the defense. Second, any shortcoming in the information provided to the court in advance of the evidentiary hearing also resulted in a non-jurisdictional defect that did not prejudice the defense. Vacatur is neither required nor justified. Third, defendant did not present a non-speculative evidentiary hypothesis supporting an in-camera review of the confidential CVCB records. But even were this Court to disagree, the proper remedy would be a remand for the trial court to conduct an in-camera review, after which it may determine whether further recourse is necessary.

ARGUMENT

I. The trial court exercised appropriate discretion in excluding expert testimony that defendant may have suffered from a mental illness or defect that affected her perception of the events upon which the charges were based.

Defendant sought to introduce expert testimony concerning a potential mental illness or defect that would purportedly rebut an inference of guilt tethered to her behavior immediately after the incident. Perceiving several flaws in defendant's request, the trial court precluded the expert's testimony. For the reasons set forth below, that ruling was correct.

A. Standard of Review

The People agree the issue is preserved. (CF, pp 775-80, 832-34, 848-50, 853-66, 868-71; TR 11/7/19, pp 19/2071-31/2083.)

The admission of expert testimony falls within the sound discretion of the trial court. *Venalonzo v. People*, 2017 CO 9, ¶ 15. A ruling will not be disturbed unless manifestly arbitrary, unreasonable, or unfair. *People v. Ramirez*, 155 P.3d 371, 380 (Colo. 2007). To the extent the court's analysis requires interpretation of relevant statutory

provisions, that interpretation is conducted de novo. *People v. Griego*, 2018 CO 5, ¶ 25.

Should this Court discern error in the trial court's ruling, the People agree that a constitutional harmless error review should follow. *Golob v. People*, 180 P.3d 1006, 1013 (Colo. 2008). "A constitutional error is harmless when the evidence properly received against a defendant is so overwhelming that the constitutional violation was harmless beyond a reasonable doubt." *Bartley v. People*, 817 P.2d 1029, 1034 (Colo. 1991).

B. Additional Background

Defendant never alleged insanity as a theory of defense to the charges she faced. Instead, on October 15, 2015, she entered a standard plea of not guilty. (TR 10/5/15, p 2/3290:9-23.)

On January 7, 2016, however, defendant provided notice "pursuant to section 16-8-107(2)(b)" of her "intent to introduce expert

testimony regarding her mental condition" on the date of the offense.[3] (CF, p 142.) This was followed three weeks later by an oral motion that defendant be evaluated at a state mental hospital for a possible mental health condition. (CF, p 329.) Shortly after, the trial court ordered an in-patient evaluation be conducted at the Colorado Mental Health Institute at Pueblo (CMHIP). (CF, p 230.)

A space for defendant's evaluation became available on August 30, 2016. (CF, p 329.) However, the proceedings had to be stalled to address whether the evaluation should be tape recorded pursuant to section 16-8-106(1)(b). (CF, pp 329-68.) Once the matter was resolved, defendant refused to complete the examination twice. (CF, p 370.) This resulted in the prosecution filing a motion to preclude any assertion of a mental defect defense for failing to comply with section 16-8-106(2)(c): "If the defendant does not cooperate with ... personnel conducting the examination, the court shall not allow the defendant to call any

[3] This was the wrong statutory provision, which caused some confusion later down the road. However, the mishap was eventually cleared up and a corresponding order issued. (CF, pp 380-91.)

psychiatrist, forensic psychologist, or other expert witness to provide evidence at the defendant's trial concerning the defendant's mental condition[.]" (CF, p 371-75.)

Two months later, CMHIP was able to begin an evaluation, but the staff psychiatrist refused to offer a formal opinion. (CF, pp 376-79.) Perceiving a disconnect between the requested evaluation absent a "not guilty by reason of insanity" plea (NGRI), the psychiatrist terminated the examination pending "further instructions" from the court. (CF, p 379.) Clarification came through an order correctly citing section 16-8-107(3)(b): "Regardless of whether a defendant enters a plea of not guilty by reason of insanity pursuant to section 16-8-103, the defendant shall not be permitted to introduce evidence in the nature of expert opinion concerning his or her mental condition without having first given notice to the court and the prosecution of his or her intent to introduce such evidence and without having undergone a court-ordered examination pursuant to section 16-8-106." (CF, pp 380-91.)

Before the examination could be resumed, however, defense counsel filed a separate request for a court ordered competency

evaluation pursuant to section 16-8.5-102. (CF, pp 404-06.) This motion did not implicate evidence to be admitted at trial, but the defendant's ability to proceed. (TR 8/16/17, pp 2-20.) Accordingly, the case was stayed pending the exam. (CF, p 420.)

On December 4, 2017, CMHIP concluded that defendant was competent to proceed. (CF, pp 430-38.) At a hearing three days later, the defense accepted the competency determination but noted that a "mental condition evaluation" was not included. (TR 12/7/17, p 3/2699:3-25.) The defense explained that the purpose of the mental condition evaluation was to "render an opinion as to how Ms. Day's mental status and mental illness would [have] impacted or could [have] impacted her behavior right after the incident in this case." (TR 12/7/17, p 3/2699:3-25.)

Accordingly, the court issued another order in which it conveyed the precise purpose of the additional evaluation to be carried out by CMHIP:

> The Court has received notice from the defense that evidence in the form of expert testimony will be presented at the jury trial in this case for the

> purpose of contextualizing Ms. Day's reaction and conduct immediately following the event at issue in this case. Pursuant to C.R.S. 16-8-107(3)(b) an evaluation by a court-appointed state doctor is required as a prerequisite to the defense offering this evidence at trial. Defense counsel has filed notice of their intent to provide expert testimony as to how Ms. Day's serious and persistent mental illness could affect her perception of, and behavioral reaction to, the event at issue in this case. Defense counsel asserted that this expert evidence is necessary to rebut the prosecution's attempts to portray Ms. Day's conduct immediately after the event as proof of the absence of accidental conduct in the causation of the death of the alleged victim.

(CF, pp 440-41.)

But before the evaluation could occur, defendant's *competency to proceed* had to be raised anew. (CF, pp 445-46.) On June 20, 2018, CMHIP returned an evaluation attempting to address both defendant's competency and her mental condition relevant to the offense. (CF, pp 457-62.) Regarding the former, the staff psychologist determined that defendant was currently incompetent to proceed. (CF, p 462.) Regarding the latter, the psychologist could not opine on defendant's mental condition immediately after the offense because defendant was

again uncooperative during the evaluation. (CF, p 462.) The psychologist explained:

> [Defendant] presented as somewhat hostile during the evaluation. She continually challenged the validity of the court order and the statute specifying what types of cases are video recorded. This presentation [was] similar to [defendant's] presentation during prior hospitalizations. It appears that she has some underlying personality pathology that makes it difficult to interact in social situations.

Furthermore,

> [Defendant] was not cooperative with the evaluation. As such, I was unable to ask her questions regarding adjudicative competency and the time around the alleged offense in order to provide any context to her behaviors and explore any possible active symptoms around that time.

(CF, p 461).

Defendant was returned to competency in March of 2019. (CF, pp 499-506.) This was confirmed through a second evaluation completed the following May pursuant to section 16-8.5-103(3). (CF, pp 511-27.) None of these evaluations, however, provided a mental condition or status examination pertinent to section 16-8-107(3)(b). (CF, pp 471, 484, 505-06, 527.)

Afterwards, the defense didn't follow up. (*See* CF, p 530.) Instead, it endorsed the CMHIP staff psychologist (Dr. Joshua Hatfield) along with a private neurologist (Dr. Karen Fukutaki) who had previously evaluated defendant in November of 2015 upon defense counsel's request. (CF, pp 231-41, 563-64, 596, 619.) Notably, the private neurologist's evaluation was based almost entirely on defendant's self-reporting, and consisted only of speculation as to whether defendant was experiencing a mental issue or defect around the time of the hit-and-run:

> Ms. Day's denial that she has ever experienced psychotic symptoms is in marked contrast to the overt psychotic symptoms she reported has exhibit in jail and at CMHIP. It raises significant questions as to whether her account of her mental state on the day of the accident is accurate. She appeared to have no insight into her mental illness or the reason she has been prescribed Abilify.
>
> She *might* not have appeared overtly psychotic after being off Abilify for two days, but *could* have been experiencing some thought disorganization that impaired her judgment and problem-solving abilities. She *might* have been experiencing some difficulty in her perception of reality that *might* have impacted her ability to recognize the

> severity of the situation and Mr. Martinez's need for immediate medical attention. Thought disorganization, impairment in problem-solving ability, and anxiety *might* have accounted for her having left the scene and having delayed contacting the police. It *might* also have accounted for her appearing to be under the influence to the police.

(CF, p 240 (emphasis added).)

On October 3, 2019, the prosecution filed a motion seeking to exclude the proffered expert testimony or, in the alternative, to allow the mental condition evidence subject to defendant entering an NGRI plea.[4] (CF, pp 775-80.) In response, defendant asserted that her intent was not to claim "she was so diseased or defective in mind [as to be] incapable of forming the culpable mental state on the alleged date of the offense," but to "provide expert testimony as to how [her] serious and persistent mental illness could affect her perception of, and behavioral reaction to, the event at issue in this case." (CF, pp 832-34.)

[4] Prior to this motion, the matter proceeded to an initial trial. However, a mistrial had to be declared and a new trial set in a different county because the venire was familiar with the alleged crime, expressed a preconceived attitude toward law enforcement, or knew the parties such that fairness could not be assured. (TR 8/13/19, pp 182/2301-184/2303.)

Concerned that defendant's proffer overlapped with an insanity defense, the trial court required she provide an offer of proof and corresponding limiting instruction. (TR 11/7/19, pp 26/2078-28/2080.) The ensuing pleading did not address Dr. Hatfield, but specified that Dr. Fukutaki would discuss the following topics:

- Defendant suffered from a "psychotic thought disorder" which impacts "an individual's capacity for complex thought organization and problem-solving cognitive functions."
- Defendant "had been prescribed Abilify, an atypical anti-psychotic," which she reported not having taken for two days leading up to the alleged offense.
- Based on defendant's self-reporting, "[s]he might have been experiencing some difficulty in her perception of reality that might have impacted her ability to recognize the severity of the situation and Mr. Martinez's need for immediate medical attention."
- Finally, "[t]hought disorganization, impairment in problem-solving ability, and anxiety might have accounted

> for [defendant] having left the scene and having delayed contacting the police. It might also have accounted for her appearing to be under the influence to the police."

(CF, pp 853-54.)

In response, the prosecution presented the results of interviews it had since conducted with both Dr. Fukutaki and Dr. Hatfield. (CF, pp 856-59.) Importantly, Dr. Fukutaki explained that: (1) she could not confirm whether defendant had been prescribed Abilify, much less when or how she was using it; (2) she could not offer any concrete opinion as to whether or not defendant was thinking clearly around the time of the incident; and (3) she perceived the circumstances surrounding defendant's 911 call as reflecting psychosis for which it would be difficult to distinguish a relevant timeframe (i.e., whether the psychosis began before or after the hit-and-run). (CF, pp 856-57.)

As for Dr. Hatfield, he explained that he could not offer an opinion as to defendant's mental condition relevant to events before, during, or after the incident because defendant never cooperated with the corresponding evaluations. (CF, pp 858-59.)

On December 18, 2019, the trial court entered an order excluding the expert testimony at trial absent an NGRI plea. (CF, pp 868-71.) First, the court noted that no evaluation conducted pursuant to section 16-8-107(3)(b) had been completed, and that "on this basis alone the Court can deny the introduction of the defendant's mental condition." (CF, p 869). Second, the court expressed the following concerns with Dr. Fukutaki's testimony as proffered:

> a. The proposed testimony from Dr. Fukutaki is based upon the Defendant's self-report regarding her medication.
>
> b. Dr. Fukutaki's assessment is speculative. Dr Fukutaki[ ] states herself that the Defendant "might not have appeared overtly psychotic . . . but could have been experiencing some though disorganization" and that she "might have been experiencing some difficulty in her perception."
>
> c. If the Defendant's mental condition as a result of her unmedicated state[] rendered her psychotic, having disorganized thinking, and such difficulty in her perception such that she would not "recognize the severity of her situation" then this Court struggles to see how that is any different than the defendant being "incapable of accurately comprehending the surrounding circumstances accurately and making a reasoned decision about an appropriate course of action."

> d. Finally, even if the mental condition evidence were appropriate to explain the "post-event conduct" there is no way for the Court, much less the jury to not be unduly prejudiced in considering this evidence as it relates to the Defendant's conduct during the offense. They are inseparable.

(CF, pp 870-71.)

In sum, Dr. Fukutaki's testimony relied on defendant's own self-reporting, resulting in an opinion tethered primarily to speculation. The opinions necessarily overlapped with an insanity plea. And there was no way to temporally separate the mental diagnosis (i.e., before versus after the incident), rendering any probative value substantially outweighed by the risk of unfair prejudice.

C. Relevant Law and Analysis

The exclusion of the expert testimony was an appropriate exercise of the trial court's discretion and a correct application of the controlling law.

1. The expert testimony could not be admitted without the completion of a court-ordered examination.

"Although a defendant is entitled to present evidence in his or her defense, the manner in which the evidence is presented may be controlled by statute." *People v. Flippo*, 159 P.3d 100, 106 (Colo. 2007) (citing *Taylor v. Illinois*, 484 U.S. 400, 411 (1988)). In Colorado, a defendant who wishes to introduce expert testimony about her mental condition must comply with section 16-8-107. *Id.* Pursuant to that statute, a defendant must provide notice *and* permit a court-ordered examination before offering expert testimony regarding the effect of her mental condition on a relevant issue at trial. § 16-8-107(3)(b). "[F]ailure to comply with the procedural prerequisites of the statute may prevent such evidence from being admitted." *Flippo*, 159 P.3d at 106; *see also People v. Bondurant*, 2012 COA 50, ¶ 39.

Here, defendant provided notice that she sought a court-ordered mental condition examination pursuant to section 16-8-107(3)(b). And the trial court entered an order for CMHIP to conduct such an examination. However, defendant never completed that examination.

As a result, expert testimony concerning defendant's mental condition immediately following the incident could not be admitted at trial. *Flippo*, 159 P.3d at 106; *Bondurant*, ¶ 39; *see also People v. Roadcap*, 78 P.3d 1108, 1112 (Colo. App. 2003) (rejecting an argument that the mental condition statute does not apply to expert testimony concerning post-incident behavior submitted only to rebut unfavorable inferences drawn from evidence elicited by the prosecution).

Defendant's offer of proof concerning Dr. Fukutaki's anticipated testimony underscores the importance of the statutory requirement. The privately retained expert's opinions were based on defendant's self-reporting and, therefore, required speculation. Thus, any probative value would not have been tethered to either a scientific or factual foundation. Indeed, the prosecution's subsequent interview with Dr. Fukutaki confirmed that her cross-examination would have exposed those limitations, and that she herself was not comfortable forming an opinion concerning defendant's "post event conduct." (CF, pp 857-58.)

In arguing for a contrary conclusion, defendant contends the trial court "narrowly constru[ed] her conduct as noncooperation" to preclude

the expert testimony. (Opening Brief, p 32.) Focusing on "noncooperation," she casts the ruling as creating an unfair and inequitable result. But the argument misses the mark.

Defendant's behavior precluded an examination on at least three separate occasions. The first two occurred while she had been deemed competent to proceed, whereas the third took place on an occasion in which she had been deemed incompetent. Perhaps construing the latter as noncooperation would appear harsh. But the trial court's ruling cannot be so limited.

After defendant was restored to competency, she never requested to complete the mental condition examination. We don't know what would have happened had she done so. All the record can support is that a court-ordered examination pursuant to section 16-8-107(3)(b) had been repeatedly attempted but never completed. And without that examination or an NGRI plea, the admission of corresponding testimony was foreclosed by statute.

Contrary to defendant's argument on appeal, the absence of the examination was not attributable to the prosecution or the court. Thus,

the case does not reflect the unfairness or inequity that defendant alleges. The court simply upheld the controlling statutory requirements.

2. Even so, the decision to exclude that evidence reflected an appropriate exercise of discretion.

Section 16-8-107(3)(a) states that "[i]n no event shall a court permit a defendant to introduce evidence relevant to the issue of insanity, as described in section 16-8-101.5, unless the defendant enters a plea of not guilty by reason of insanity[.]" As relevant here, section 16-8-101.5(1), provides two definitions of insanity:

> (a) A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act . . .; or
>
> (b) A person who suffered from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable mental state that is an essential element of the crime charged[.]

The statute further defines "mental disease or defect" as "only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality

and that are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance." § 16-8-101.5(2)(c). "Thus, both forms of insanity — whether it be the incapacity to distinguish right from wrong or the inability to form a culpable mental state — require that, at the time of the alleged offense, the defendant suffered from a severely abnormal condition that grossly and demonstrably impaired [her] perception or understanding of reality." *People v. Moore*, 2021 CO 26, ¶ 27.

In *Moore*, the defendant offered mental condition evidence to support a theory of self-defense. *Id.* at ¶ 29. Relying on this purpose, the district court found the evidence admissible. *Id.* But on certiorari review, the supreme court clarified that evidence probative of insanity must be excluded regardless of purpose. *Id.* at ¶ 34. It then explained how that determination is to be made. *Id.* at ¶ 44. First,

> the trial court should determine whether the proposed testimony, in whole or in part, is *probative* of what the legislature has defined as insanity. That is, whether any of the proposed testimony tends to prove that the defendant (a) was so diseased or defective in mind at the time of the commission of the act as to be incapable of

> distinguishing right from wrong, or (b) suffered from a condition of mind caused by mental disease or defect that prevented the defendant from forming a culpable mental state that is an essential element of a crime charged.

Second,

> [t]o implicate the definition of mental disease or defect, the defendant's mental condition must be "severely abnormal" so that it "grossly and demonstrably impair[s] [the defendant's] perception or understanding of reality."

Third,

> [e]vidence that tends to prove insanity is inadmissible, absent an NGRI plea, regardless of the defendant's ostensible purpose in offering it, while evidence that doesn't tend to prove insanity may be admitted to support a defendant's [theory of defense] so long as such evidence otherwise conforms to the statutory requirements and the rules of evidence.

Id.

While the trial court in this matter did not have the benefit of *Moore* before making its determination, the ruling clearly comports with the supreme court's guidance.

a. The proffered evidence was probative of insanity.

According to defendant's offer of proof, Dr. Fukutaki would have testified that defendant suffered from a "psychotic thought disorder" impairing her "capacity for complex thought organization and problem-solving cognitive functions." She would have explained that defendant reported being prescribed Abilify to treat the condition, which she described as "an atypical anti-psychotic." She would then note that defendant claimed not to have taken the medication in the two days preceding the hit-and-run, and explain how this would have affected defendant's "post-event appreciation of the result of her conduct." (CF, p 853.)

In other words, Dr. Fukutaki's testimony was to support an inference that defendant suffered from an abnormal mental condition rendered severe by the decision not to take her prescribed medication, which then impaired her perception or understanding of reality at the time of the offense. Such evidence is inadmissible absent an NGRI plea.

In arguing for a contrary conclusion, defendant submits that "Dr. Fukutaki did not diagnose Day with a severely abnormal mental disease, and her proposed testimony did not establish Day suffered a psychotic break from reality." (Opening Brief, p 34.) But this is exactly what the testimony would have indicated. (CF, p 871.) Indeed, defendant's trial counsel confirmed that the evidence was directed toward "the effect of Ms. Day's mental illness on her mental perception/processing of, and behavioral reaction to, the event upon which the charges were based." (CF, p 833.)

b. This extends to each statement attributed to the expert witness.

In *Moore*, the supreme court suggested a "court must parse any proffered mental condition evidence, line by line if necessary, to distinguish what is probative of insanity under this exacting definition from what is not." *Id.* at ¶ 4. Relying on this premise, defendant presents an alternative request that the matter be remanded for the trial court to conduct a more exacting analysis. But a review of the record confirms a remand is unnecessary.

Each assertion identified in Dr. Fukutaki's offer of proof served to substantiate a claim that defendant suffered from a severely abnormal mental condition that impaired her perception and understanding of the reality of the events for which she was charged:

- Defendant suffered from a psychotic thought disorder for which she had purportedly been prescribed an atypical anti-psychotic medication.
- Had defendant not taken that medication as claimed, her condition would have impaired her ability to accurately perceive and respond to the circumstances at issue.
- While defendant cast the evidence's purpose as going to her "post-event appreciation of the result of her conduct," it was inextricably intertwined with the hit-and-run.

Because each of these assertions was contained within the trial court's determination, further analysis is unnecessary.

It must also be noted that defendant did not present this argument to the trial court. Thus, a remand on this ground is subject to plain error review. *Hagos v. People*, 2012 CO 63, ¶ 14. Under this

standard, defendant bears the burden of showing that the basis for reversal was substantially prejudicial. *People v. Boykins*,140 P.3d 87, 95 (Colo. App. 2005). For the reasons presented above and below, she cannot do so.

3. Even had the testimony strayed beyond the topic of insanity, its probative value was substantially outweighed by the risk of unfair prejudice.

There was yet another hurdle barring the admission of the mental condition evidence. Assuming Dr. Fukutaki's testimony carried potential relevance, the trial court recognized its probative value was likely substantially outweighed by the risk of unfair prejudice. (TR 11/7/19, pp 25/2077:25-26/2078:5.) Accordingly, it ordered an offer of proof to facilitate a CRE 403 analysis. (TR 11/7/19, pp 27/2079:17-28/2080:16.) The court's ensuing findings confirm this hurdle was not met. (CF, p 871.)

On one hand, Dr. Fukutaki's testimony would not have implicated defendant's mental state *during* the hit-and-run, but to her response *after*. (CF, p 855.) Moreover, the viability of this testimony was

thoroughly undercut by the fact Dr. Fukutaki relied on defendant's self-reporting, her conclusions required speculation, and she herself perceived those conclusions as offering nothing material to the case. (CF, p 857.)

On the other hand, the testimony would have improperly bled into the jury's consideration of defendant's mental state at the time of the offense. It would have unavoidably implicated a theory of insanity that the jury was not to consider. And the prosecution would have been without a court-ordered examination to rebut defendant's speculative assertions largely because she refused to cooperate when the opportunity was before her. (CF, p 871.)

Weighed together, the evidence's probative value was substantially outweighed by the risk of unfair prejudice.

4. But even assuming error, the evidence's exclusion was harmless beyond a reasonable doubt.

Although Dr. Fukutaki's testimony was not elicited at trial, the record allows us to understand exactly how the evidence would have played out.

On direct examination, defendant would have elicited the statements contained within the offer of proof. (CF, p 853.) This would be accompanied by a limiting instruction precluding the jury from considering that evidence for any purpose other than her post-event conduct. (CF, p 855.)

On cross-examination, the prosecution would confirm that the expert's opinion was based on self-reporting without further evidentiary support. The expert would acknowledge that her assertions relied on speculation, and that she could not offer an opinion as to defendant's mental state at the time of incident. (CF, pp 856-57.)

Thus, Dr. Fukutaki's testimony carried scant weight whereas the remaining evidence overwhelmingly established that defendant knowingly murdered the victim. She was historically abusive in the relationship. (CF, pp 289-300.) Her mother's prior inconsistent statements indicated that there was an argument immediately before the hit-and-run. (Env, EX 124.) The crime scene investigation and victim injuries thoroughly undermined any notion of an accident. (TR 1/30/20, pp 108/1126-156/1174; TR 1/31/20, pp 10/828-61/879.)

Surveillance footage showed defendant's awareness of the damage and decision to stall before calling the police. (Env, EX 189.) And her assertion that the incident stemmed from a faulty transmission was refuted by an expert in automotive mechanics. (TR 1/31/20, p 148/966:1-10.)

In sum, the circumstances rendered any error harmless beyond a reasonable doubt.

II. The trial court's restitution order should be affirmed.

Moving on to restitution, defendant contends the trial court's order was untimely, rested on insufficient evidence, and should have been preceded by an in-camera review of Crime Victim Compensation Board (CVCB) records. The People address each argument in turn.

A. A restitution order is not automatically void for having been entered beyond the statutory timeline.

The trial court entered restitution more than 91 days after sentencing. Although this implicates a statutory violation, it is not jurisdictional in nature. Thus, this Court must consider whether

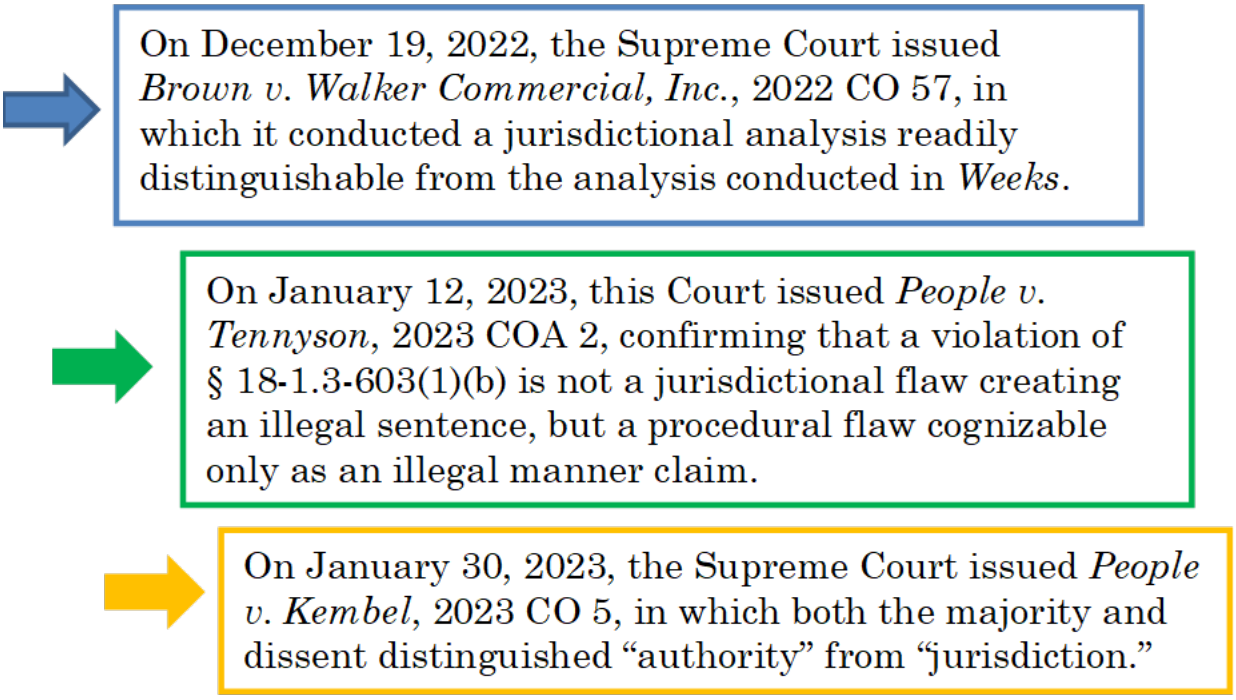
defendant waived his challenge. And if waiver does not apply, vacatur remains inappropriate absent prejudice.

1. Standard of Review

The People agree that although the timeliness issue was not preserved, it is cognizable under Crim. P. 35(a) as an illegal manner claim. *People v. Tennyson*, 2023 COA 2, ¶ 2. Thus, the merits are subject to de novo review. *Fransua v. People*, 2019 CO 96, ¶ 13 ("It makes no sense to require preservation of a claim on direct appeal when an identical claim could be raised without preservation after the conclusion of the direct appeal.").

However, this does not mean a violation results in automatic vacatur. In *People v. Weeks*, 2021 CO 75, our supreme court held section 18-1.3-603(1)(b) imposes an obligation on the trial court to determine the amount of restitution within 91 days of sentencing absent an express and timely finding of good cause. At first blush, the court's conclusion that the district court lacked "authority" to enter restitution beyond the statutory timeline suggests a violation requires

the order be automatically vacated. *See Weeks*, ¶ 45. But recent opinions have clarified that summary vacatur is not the correct path:



Instead, a violation of the statutory timeline for determining the amount of restitution results in a non-jurisdictional flaw that is only reversible if the defendant suffers prejudice. *See People in Interest of Lynch*, 783 P.2d 848, 852 (Colo. 1989) (explaining that a non-jurisdictional defect requires the court assess the gravity of the violation was such that it undermined confidence in the fairness and outcome of the proceedings); *People v. Dominguez*, 2021 COA 76, ¶ 12

(recognizing that an illegal manner claim raised on direct appeal requires reversal "unless the error is harmless").

Indeed, several federal circuit courts have made this prejudice requirement explicit when addressing equivalent violations of the federal Restitution Act. *United States v. Zakhary*, 357 F.3d 186, 192-93 (2d Cir. 2004) ("Absent a defendant's clear showing that his substantial rights have been prejudiced by a § 3664(d)(5) delay, it would in fact, defeat the statutory purpose to invoke [the statutory timeline] in order to avoid paying restitution to the victims of his crime."); *United States v. Vandeberg*, 201 F.3d 805, 814 (6th Cir. 2000) (similar conclusion); *United States v. Grimes*, 173 F.3d 634, 639 (7th Cir. 1999) (same).

Here, the court determined restitution more than 91 days after sentencing without an express and timely finding of good cause. Undoubtedly, this implicates *Weeks*. But the fact of the violation does not itself end the analysis. *See People v. Roddy*, 2021 CO 74, ¶ 31.

This Court must consider whether defendant waived the violation she now challenges on appeal. *See People v. Sprinkle*, 2021 CO 60, ¶ 17 ("[S]ubject matter jurisdiction cannot be waived or consented to by the

parties, but non-jurisdictional procedures can be."). And if waiver does not apply, the Court must weigh whether the violation created prejudice warranting vacatur. *See Chostner v. Colo. Water Quality Control Comm'n*, 2013 COA 111, ¶ 42 (a non-jurisdictional statutory violation constitutes only harmless error absent a showing of actual prejudice).

2. Relevant Law and Analysis

a. The violation presents a non-jurisdictional flaw.

Like an illegal sentence, a jurisdictional flaw may be remedied at any time. Indeed, it must be. *See United States v. Henry*, 709 F.2d 298, 307-08 (5th Cir. 1983) (the court's power to correct an illegal sentence at any time springs "from the court's want of jurisdiction to impose the illegal sentence in the first place"). But for the reasons articulated in *Tennyson*, a violation of the 91-day timeline does not result in an "illegal sentence." For overlapping reasons, a violation also does not implicate a jurisdictional concern.

Subject matter jurisdiction concerns the court's authority to address the class of cases in which it renders judgment, not its

authority to enter a particular judgment within that class. *Meggitt v. Stross*, 2021 COA 50, ¶ 39. Thus, the supreme court's opinion in *Weeks* should not be confused as addressing subject matter jurisdiction. *See Brown*, ¶ 35 (while a statute may limit the time in which an action may be brought, this does not deprive a court of jurisdiction); *see also Wilkins v. United States*, 598 U.S. ___, *3-4 (2023), 2023 WL 2655449 (reinforcing the distinction between jurisdictional and non-jurisdictional claims). And its reference to "authority" should not be confused as implicating jurisdictional concerns that would require automatic vacatur. *See People v. McMurtry*, 122 P.3d 237, 240-42 (Colo. 2005) (while an errant statutory speedy trial ruling may result in a court acting in excess of its statutory authority, such error does not divest the court of jurisdiction to accept a guilty plea in a case over which it lawfully presided).

Instead, the court must look to the specific language employed by the legislature to determine whether it intended for a statutory limitation period to be jurisdictional. *Brown*, ¶ 37. Here, the language of section 18-1.3-603(1)(b) does not meet this mark.

First, the legislature may have been concerned with the length of time it was taking to finalize restitution orders. *Weeks*, ¶ 43. But it did not indicate that time was of the essence. Instead, it prescribed a 91-day timeframe with the understanding that further delay could be justified where good cause is "shown." § 18-1.3-603(1)(b).

Second, the legislature did not use negative language to deny express authority beyond the statutory timeframe. As the supreme court explained in *Meza v. People*, 2018 CO 23, ¶ 11, "the statutory scheme does not explicitly limit the circumstances under which a sentencing court may postpone until after conviction a final determination of the specific amount of restitution owed by the defendant."

Third, applying the 91-day deadline in such a wooden and formalistic fashion would directly conflict with the Restitution Act's overarching purpose of ensuring that "[p]ersons found guilty of causing … suffering and hardship … be under a moral and legal obligation to make full restitution to those harmed by their misconduct." § 18-1.3-601(1)(b), C.R.S. (2022). Indeed, a contrary conclusion leads to

manifest injustice for the very victims that the statute endeavors to protect.

In *People v. Omar*, 2023 COA 13, ¶ 35, a division of this Court suggested that allowing an extension for "good cause" or "extenuating circumstances" could be treated as negative language denying the exercise of *authority* beyond the time period prescribed. But, as discussed above, the Court needs to exercise caution before conflating "authority" and "jurisdiction." *Kembel*, ¶¶ 39 n.10, 77 (distinguishing "authority" from "jurisdiction"); *McMurtry*, 122 P.3d at 241 (same). When addressing jurisdiction, any legislative limitation on the court's subject matter jurisdiction must be explicit. *Wood v. People*, 255 P.3d 1136, 1140 (Colo. 2011); *see also Aviado v. Indus. Claim Appeals Off.*, 228 P.3d 177, 182 (Colo. App. 2009) (while the use of "shall" in a statute generally indicates that a provision is mandatory, statutory time limitations imposed on public bodies are often construed as directory rather than mandatory).

In this regard, the People have found no precedent for stretching the district court's *authority* based on good cause or extenuating

circumstances as "negative language" divesting the court of *jurisdiction*. Indeed, this language renders the restitution timelines at issue more flexible than those found to be non-jurisdictional in *Omar* and other circumstances. *Compare* § 18-1.3-407(5)(c) *with* § 18-1.3-603(1)(b); *see also Moland v. People*, 757 P.2d 137, 142 (Colo. 1988) (construing the statutory timelines in section 16-5-402 as non-jurisdictional despite statutory language that is far closer to the jurisdictional touchstones at issue).

b. Waiver applies.

Recognizing that a violation of section 18-1.3-603(1)(b) is not jurisdictional, but instead results in the sentence being imposed in an unlawful manner (i.e., a procedural flaw), carries several consequences.

First, a corresponding postconviction claim must be raised within 126 days after sentencing or the issuance of an appellate mandate. Crim. P. 35(a), (b).

Second, a defendant may waive the statutory violation even if doing so was not knowing or intelligent. *See People in Interest of B.H.*, 2021 CO 39, ¶¶ 68-69 (where the waiver of a constitutional right must

"knowing and intelligent," the same is not true of a statutory right); *Finney v. People*, 2014 CO 38, ¶ 16 ("Waiver of statutory rights must be voluntary, but need not be knowing and intelligent."); *People v. Sevigny*, 679 P.2d 1070, 1075 (Colo. 1984) ("[A] waiver of statutory . . . rights need not comport with the standards applicable to a waiver of basic constitutional rights — that is, an intentional relinquishment or abandonment of a right or privilege adequately understood by the defendant.").

Third, a timely raised claim is not reversible if harmless. *Dominguez*, ¶ 12; *see also Protest of McKenna*, 2015 CO 23, ¶ 21 (refusing to vacate a water court's resolution of an abandonment proceeding for violating a non-jurisdictional timeline because "any delay in the 2010 abandonment list did not prejudice McKenna"); *Lynch*, 783 P.2d at 851-52 (noting that a violation of a non-jurisdictional timeline requires the court evaluate the gravity of the deviation and any prejudice caused by the deviation); *People v. Heimann*, 186 P.3d 77, 79 (Colo. App. 2007) (declining to reverse a district court's probation revocation ruling that violated a statutory timeline because the

defendant had "not indicated that he was affected in any way by the timing of the proceedings"); *cf. Zakhary*, 357 F.3d at 191 ("[A] district court's failure to determine identifiable victims' losses within ninety days after sentencing, as prescribed by [the federal Restitution Act], will be deemed harmless error to the defendant unless he can show actual prejudice from the omission.").

While the first consequence was controlling in *Tennyson*, the second and third consequences are controlling here.

The People begin with waiver. As discussed above, waiver of a statutory right must be voluntary, but it need not be knowing and intelligent. *People v. Moody*, 676 P.2d 691, 695 (Colo. 1984). Instead, waiver is established wherever the defendant engaged in conduct inconsistent with asserting the rights, such as participating in setting the hearing outside the deadline or requesting a continuance. *Reyes v. People*, 195 P.3d 662, 667 (Colo. 2008) ("In this jurisdiction, we have long held that requesting a further continuance is an affirmative action constituting a waiver of whatever right to discharge for a prior speedy trial violation a defendant may have had at the time."). *B.H.*, ¶ 70; *see*

also People v. Mascarenas, 666 P.2d 101, 106 (Colo. 1983), *superseded by statute*, § 16-14-104(2), C.R.S. (2023); *People v. Martin*, 707 P.2d 1005, 1007 (Colo. App. 1985), *aff'd*, 738 P.2d 789 (Colo. 1987).

Here, the prosecution presented an initial motion for restitution with CVCB summaries on April 8, 2020. (CF, pp 1068-71.) Four months later, at sentencing, the prosecution requested an additional 90 days to submit the final restitution amount: "[W]e are in the process of gathering the final bills that were incurred, and we would ask that restitution remain open for 90 days so the People can submit further documentation." (TR 8/19/20, pp 19/76:20-20/77:1.) Recognizing that a restitution hearing would likely be necessary, the court granted the request then solicited the defense's position toward setting the hearing. (TR 8/19/20 p 56/113:13-21.) Counsel expressly requested that the hearing be set beyond the 91-day timeline set forth by the statute:

> [DEFENSE COUNSEL]: We have our calendars now. I'd like to go ahead and calendar a date. I think we should probably set that pretty far out, given the 90-day allowance for additional requests.

(TR 8/19/20, p 56/113:22-25.)

With defendant's consent, the restitution hearing was initially set for December 3, 2020. With defendant's consent, the hearing was later continued to January 8, 2021. (CF, p 1258.) And, again, with defendant's consent, the court issued a written order after hearing the evidence and argument. (TR 1/8/21, p 54/54:15-24; CF, pp 1278-83.) The determination was made 159 days after sentencing — 68 days beyond the statutory timeline.

In sum, defendant engaged in conduct inconsistent with the claim she now alleges on appeal. Given that the timeline at issue is non-jurisdictional in nature, her conduct amounted to waiver.

c. Following the same logic, the violation is not reversible if harmless.

Even were this Court to find the issue properly before it, vacatur remains inappropriate. Though the restitution order was untimely, recourse requires a finding of prejudice that is not present here.

The Court may ask: "But how are we to give effect to *Weeks*?" At the outset, the People are not trying to relitigate *Weeks*. The goal is to properly construe the opinion, thereby honoring the language actually

employed while ensuring the holding may coexist with other legal tenets. That is, under *Weeks*, trial courts are to determine the compensable amount of restitution within 91 days of sentencing absent an express and timely finding of good cause. Under *Tennyson* — as supported by *Sanoff v. People*, 187 P.3d 576 (Colo. 2008) — a failure to do so results in the order being imposed in an unlawful manner. Under *Dominguez* — as bolstered by federal precedent addressing analogous timeliness allegations under the Federal Restitution Act — reversal of such a claim is not appropriate if the error was harmless. In short, prejudice must be weighed.

This leads to another potential question: "Didn't *Weeks* result in reversal without a prejudice analysis?" The only sustainable answer is "no." The factual background lays out the circumstances resulting in prejudice:

- Weeks conceded a portion of the requested amount within 91 days of sentencing while imploring the trial court not to let the issue linger.

- Nonetheless, the district court deferred ruling for close to a year.
- The record provided no discernible basis other than a lack of attention, culminating in a grossly out of time obligation.

Weeks, ¶¶ 13-15, 45.

If prejudice was not implicated, there would be no reason for the Court to have included these facts in the opinion. If automatic vacatur is required, those facts would be superfluous.

But that's not all. On the very same day as *Weeks*, the supreme court issued *Roddy* in which it remanded for a division of this Court to weigh the efficacy of a belated good cause finding. Again, if a violation of subsection (1)(b) was meant to result in automatic vacatur — language never used in the *Weeks* opinion — the remand and accompanying instructions in *Roddy* would make no sense. The division could not resurrect what would have to be construed as an illegal sentence.

To be sure, *Roddy* ultimately resulted in vacatur. But under the facts of the case, prejudice was implicated. Like Weeks, Roddy sought a

prompt resolution. Nonetheless, it took over a year to litigate. While this wasn't the prosecutor or the court's fault, it couldn't be attributed to the defense either. And it was repeatedly cited by the defense as causing unnecessary delay. *See People v. Roddy*, 2020 COA 72, ¶ 18.

So, how can prejudice be determined? *Weeks* and *Roddy* lay the foundation. A timely defense request for a prompt resolution weighs in favor of prejudice. But if there is no such request, the Court should look to the source of the delay. If the delay is instigated by the defense — which was not the case in either *Weeks* or *Roddy* — that weighs against prejudice. And if the extent of the delay corresponds with a justifiable basis (i.e., a proactive resolution), that too should weigh against prejudice.

By embracing this analysis, this Court is avoiding manifest injustice to victims when tethered only to a delay that was requested by the defense. Such a conclusion is supported by the overarching purpose of the Restitution Act, *see* § 18-1.3-601(2), and further bolstered by federal precedent, *see Zakhary*, *supra*. And, finally, a prejudice analysis is not contradicted by the plain language of *Weeks*. On the contrary,

such an analysis applies the actual language used in *Weeks* while aligning with other legal tenets to which this court is bound.

B. The prosecution established defendant's liability to the CVCB.

Framed as a sufficiency challenge, defendant contends the prosecution failed to "trigger" the statutory presumption in favor of the CVCB because it relied on payment summaries that did not disclose the identity or location to the treatment providers or assert that doing so would pose a threat to the victim's family members. Again, the People recognize the potential violation, but perceive the consequences differently.

1. Standard of Review.

While the People are inclined to agree the issue raises a legal question subject to de novo review, the alleged violation is not akin to a sufficiency challenge implicating double jeopardy concerns.

Documents submitted to a CVCB for compensation are "confidential" under section 24-4.1-107.5(2). As a result, "a defendant generally cannot obtain access to them." *People v. Henry*, 2018 COA

48M, ¶ 28. Along this vein, the General Assembly has created a rebuttable presumption that "the amount of assistance provided and requested by the [CVCB] is … a direct result of the defendant's criminal conduct and must be considered by the court in determining the amount of restitution ordered." § 18-1.3-603(10)(a).

Within this framework, the conditions contained within paragraphs (I) and (II) of section 18-1.3-603(10)(b) do not "trigger" the statutory presumption in favor of the CVCB — they follow from it. First, the General Assembly placed those conditions in a paragraph separate and distinct form its declaration of the statutory presumption. Second, that paragraph is subsequent to the declaration. Third, the contents of that paragraph logically flow from the existence of the presumption:

> (10)(b) The amount of assistance provided [by the CVCB] is established by either:
>
> (I) A list of the amount of money paid to each provider; or
>
> (II) If the identity or location of a provider would pose a threat to the safety or welfare of the victim, summary data reflecting what total payments were made for [funeral and final

> disposition expenses, mental health counseling, wage or support losses, or other expenses]."

§ 18-1.3-603(10)(b).

Stated slightly differently, section 18-1.3-603(10)(b) facilitates the manner in which the CVCB may present its information while protecting the confidentiality of its records. Given the statutory presumption, neither manner is particularly complex. Nonetheless, a list of providers is required absent a finding that such list would pose a safety threat.

Does this distinction matter? Not necessarily on the merits — a violation is a violation. But placing the argument within the correct context refutes any request for summary vacatur. The alleged violation does not trigger the statutory presumption but may result in the sentence being imposed in an unlawful manner, which is not reversible if harmless. *Compare Tennyson*, ¶ 39, and *People v. Bowerman*, 258 P.3d 314, 315-17 (Colo. App. 2010), *with Dominguez*, ¶ 12.

2. Analysis

While the trial court's determination incorporated the statutory presumption afforded the CVCB, it did not rest on the CVCB

summaries alone. The court also received testimony from the victim compensation administrator for the judicial district. The administrator explained both the CVCB's purpose and process for evaluating victim claims. She then confirmed the statutory process was followed in this case, and that the CVCB payments aligned with compensable claims. (TR 1/8/21, pp 21/21-37/37.)

In sum, the CVCB summaries described the relevant payments made to the victim's family. Those payments were compensable by statute and aligned with the circumstances of this case. And the amount was clearly reasonable for their loss. Taken together with the administrator's testimony, the record was sufficient to establish the awarded amount by a preponderance of the evidence.

Defendant has never alleged that the lack of a list identifying the victims' treatment providers prejudiced this process. Nor could she. Her only arguments were (1) that the named relatives were not contemplated by statute for economic support and therapy, and (2) the burial expenses had been covered by insurance. Neither implicate the

identity of the treatment providers. Thus, the alleged violation provides no traction for reversal.

But even so, the appropriate remedy would not be outright vacatur, particularly where — as here — the defendant never objected to the omission in the first place. Instead, the matter may be remanded for further proceedings. *See* § 18-1.3-601(2) (the Restitution Act is to be liberally construed to ensure victims are made whole). The CVCB may be ordered to disclose a list of the providers with an opportunity for defendant to amend his defense accordingly.[5] If the amendment does not justify recourse, the order should remain intact.

C. The trial court did not err in electing not to conduct an in-camera review.

Lastly, defendant challenges the trial court's decision not to conduct an in-camera review of CVCB documents. Of course, such review must be preceded by a *non-speculative* evidentiary hypothesis. § 24-4.1-107.5(3). Here, the only viable hypothesis was that the burial

[5] In contrast to a sufficiency challenge, the alleged violation pertains primarily to notice, which is capable of remedy through remand.

expenses had been covered by insurance. (CF, pp 1163-68.) However, the insurance payout went to an individual who neither sought nor obtained reimbursement from the CVCB. (CF, p 1282.) Thus, the theory did not support an in-camera review of CVCB records.

But even should this Court disagree, the appropriate remedy is not vacatur, but a remand for an in-camera review followed by (if necessary) a new evidentiary hearing. *See Zoll v. People*, 2018 CO 70, ¶ 12.

CONCLUSION

For the foregoing reasons and authorities, the People respectfully ask this Court to affirm defendant's judgment of conviction and restitution order.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **LYNN NOESNER** via Colorado Courts E-filing System (CCES) on April 14, 2023.

/s/ Michael Rapp