Ex-A.

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: June 1, 2021 CASE NUMBER: 2010CR10309
Certiorari to the Court of Appeals, 2016CA869 District Court, Denver County, 2010CR10309	
Petitioner: Alan Eugene DeAtley, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2021SC137
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 1, 2021.

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Ex-E

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: January 28, 2021 CASE NUMBER: 2016CA869
Denver District Court 2010CR10309	
Plaintiff-Appellee: The People of the State of Colorado, **v.** **Defendant-Appellant:** Alan E DeAtley.	Court of Appeals Case Number: 2016CA869
OPINION MODIFIED & ORDER DENYING PETITION FOR REHEARING	

The Court accepts the oversized petition for rehearing.

The **PETITION FOR REHEARING** filed in this appeal by:

Copy Sent

Jonathan S. Willett, for Alan Eugene DeAtley, Defendant-Appellant,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, DENIED. OPINION MODIFIED AND PETITION FOR REHEARING IS **DENIED**.

Issuance of the Mandate is stayed until: February 26, 2021 Cert filed

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

DATE: January 28, 2021

BY THE COURT:
Furman, J.
Welling, J. — Corrupt ruling, he is Conflicted
Pawar, J.

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Ex - H

16CA0869 Peo v DeAtley 12-17-2020

COLORADO COURT OF APPEALS

DATE FILED: December 17, 2020
CASE NUMBER: 2016CA869

Court of Appeals No. 16CA0869
City and County of Denver District Court No. 10CR10309
Honorable Martin F. Egelhoff, Judge

The People of the State of Colorado,

Petitioner-Appellee,

v.

Alan Eugene DeAtley,

Defendant-Appellant

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE WELLING
Furman and Pawar, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 17, 2020

a part of the Extortion as D.A. Gov., Ex Gov Ritter. "Pay to Play Scheem" by Ritter and his People pay or else! His Works $1,000,000 we did not pay!

Philip J. Weiser, Attorney General, Kevin E. McReynolds, Assistant Attorney General, Denver, Colorado for Petitioner-Appellee

Law Office of Jonathan S. Willett, Jonathan S. Willett, Boulder, Colorado, for Appellant

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¶ 1 Defendant, Alan Eugene DeAtley, appeals his conviction and sentence. We affirm.

I. Background

¶ 2 According to the evidence presented at trial, DeAtley engaged in a racketeering enterprise in which he sold fraudulent conservation easement tax credits to unsuspecting buyers on over 500 acres of land that he purchased.

¶ 3 Colorado's conservation easement program grants tax credits to landowners who agree to give up development rights. The tax credits are based on the value of the easement, which, in turn, is based on the value of the land. Landowners aren't required to use the tax credits themselves and instead can, if they choose, sell them on a secondary market. A tax credit can be used only once and it must be used in the same year as the conservation easement is donated.

¶ 4 In 2001, DeAtley purchased 506 acres of land for $130,000. That same year, he encumbered the property with a conservation easement, protecting the natural character of the property. He then purportedly donated the conservation easement to a nonprofit called the Confederated Tribes, which was based in Oregon. He

then divided the 506 acres into fifteen different lots. Using forged appraisals, DeAtley inflated the value of each plot of land, thereby inflating the value of the tax credits to all but the first purchaser to exercise the credit. DeAtley sold the same easement tax credits multiple times, rendering the credits worthless. DeAtley made approximately $3.5 million in profits by selling these fraudulent conservation easement tax credits.

¶ 5 In 2010, a grand jury returned an indictment against DeAtley, charging him with a violation of the Colorado Organized Crime Control Act (COCCA), as well as twenty-four predicate felony offenses, including conspiracy, theft, forgery, and tax evasion. DeAtley's three-week trial was held in 2016.

¶ 6 A jury found DeAtley guilty of violating COCCA, two counts of conspiracy, fifteen counts of forgery, three counts of theft, and one count of tax evasion. DeAtley was sentenced to eighty-three years in the custody of the Department of Corrections. The trial court also imposed restitution in the amount of $5,280,540.25.

II. Analysis

¶ 7 DeAtley contends that the trial court reversibly erred by (1) giving the jury a defective forgery instruction; (2) permitting an

unlawful variance to the indictment, reducing the People's burden by giving the jury an instruction on complicity; (3) admitting notes regarding the conspiracy and a co-conspirator statement about the notes; (4) denying DeAtley's motion to dismiss/suppress on the basis that it was untimely; (5) imposing consecutive prison sentences; and (6) entering a restitution order without a hearing.[1]

¶ 8 We address each contention, in turn, below.

A. Forgery and Complicity Jury Instructions Claims

¶ 9 For the first time on appeal, DeAtley contends that the trial court erred by giving two erroneous jury instructions.

¶ 10 First, he contends that the court erred when it gave a forgery instruction, arguing that the instruction didn't require the jury to decide whether forged IRS forms and related appraisals constituted

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[1] In the introduction of his opening brief, DeAtley also conclusorily asserts that his convictions for seven of the theft counts — counts eleven, twelve, sixteen, seventeen, eighteen, nineteen, and twenty — must be vacated because the statute of limitations had expired and the court lacked jurisdiction. While he raises this issue in the introduction of his opening brief, he failed to brief the issue or otherwise develop the argument. C.A.R. 28(a)(7)(B) requires the brief to set forth "appellant's contentions and reasoning, with citations to the authorities and parts of the record on which the appellant relies." Because this contention is undeveloped, we won't review it. *Castillo v. Koppes-Conway*, 148 P.3d 289, 292 (Colo. App. 2006).

very poor

instruments that "evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status."

¶ 11 Second, he contends that the court erred when it gave a complicity instruction, arguing that doing so created a variance by instructing the jury on complicity, which wasn't included in the indictment. Re: Zamzow

¶ 12 We reject both contentions.

1. Additional Factual Background

¶ 13 During trial, the prosecution presented evidence that DeAtley and his co-conspirators forged numerous documents, including land appraisals and certain IRS forms. DeAtley's theory of defense was that he didn't alter or forge any documents with the intent to defraud. The elemental instruction for forgery provided:

Not true

> The elements of the crime of forgery are:
> (1) That the defendant,
> (2) In the State of Colorado between and including May 27, 2005 and October 1, 2008,
> (3) With intent,
> (4) To defraud
> (5) Falsely made, completed, altered, or uttered a written instrument,
> *(6) Which was purposed to be, or which was calculated to become or to represented if completed, US Treasury Forms 8283 and Valuation Letters and Appraisals.*

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(Emphasis added.)

¶ 14 The jury instruction regarding complicity provided:

> Complicity is not a separate crime. Rather, it is a legal theory by which one person may be found guilty of a criminal offense that was committed in whole or in part by another person. To be found guilty as a complicitor, the prosecution must prove each of the following circumstances beyond a reasonable doubt:
>
> (1) A crime must have been committed.
>
> (2) Another person must have committed all or part of the crime.
>
> (3) The Defendant must have had knowledge that the other person intended to commit all or part of the crime.
>
> (4) The Defendant must have had the intent to promote or facilitate the commission of the crime.
>
> (5) The Defendant must have aided, abetted, advised, or encouraged the other person in the commission or planning of the crime.

¶ 15 Defense counsel didn't object to either final jury instruction when specifically asked by the court.

2. Legal Principals

¶ 16 We review de novo whether instructions accurately informed the jury of the law. *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009). Where a defendant doesn't object to an erroneous jury instruction, we reverse only if there was plain error. *People v.*

Rediger, 2018 CO 32, ¶ 40. Under that standard, reversal is only required when the error is both obvious and substantial. *Hagos v. People*, 2012 CO 63, ¶ 14.

3. Analysis

a. The Trial Court Didn't Plainly Err When it Gave the Jury a Forgery Instruction that Didn't Ask the Jury to Determine Whether the Tax Forms Were Written Instruments

¶ 17 The jury instruction regarding forgery required the jury to determine whether the prosecution proved that DeAtley forged documents, namely documents whose information was included in IRS Form 8283. Form 8283 is a federal IRS tax form for a noncash charitable contribution. When a person who purchases a tax credit wants to use that credit, that person is required to file income taxes with the Colorado Department of Revenue, provide an appraisal, and include a Form 8283. Thus, these forms for various taxpayers were introduced at trial as evidence of the fraudulent tax credit transactions. DeAtley provided the completed forms to the buyers in packets, which included information about their tax credit purchase.

¶ 18 On appeal, DeAtley contends that the trial court was required to provide an additional instruction — one requiring the jury to

determine whether the forms and valuations themselves constituted an "instrument." He argues on appeal that the tax returns weren't "instruments" because they didn't bear a direct relationship to the tax credit claimed and therefore couldn't evince forgery.

¶ 19 But the issue of whether the forms were instruments wasn't in dispute at trial. A jury instruction is not plainly erroneous if the issue isn't contested at trial. *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005). The forms fit squarely within the definition of an "instrument" as provided under section 18-5-101(9), C.R.S. 2020.[2] DeAtley was charged with felony forgery under section 18-5-102(1)(c), C.R.S. 2020. As relevant here, a person commits felony forgery

> if, with intent to defraud, such person falsely makes, completes, alters, or utters a written

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[2] A written instrument is defined as

> any paper, document, or other instrument containing written or printed matter or the equivalent thereof, used for purposes of reciting, embodying, conveying, or recording information, and any money . . . *or any evidence of symbol of value, right, privilege or identification,* which is capable of being used to the advantage or disadvantage of some person.

§ 18-5-101(9), C.R.S. 2020 (emphasis added).

> instrument which is or purports to be, or which is calculated to become or to represent if completed:
>
> . . . .
>
> (c) A deed, will, codicil, contract, assignment, commercial instrument, promissory note, check, or other instrument which does or may evidence, create, transfer, terminate, *or otherwise affect a legal right, interest, obligation, or status* . . . .

§ 18-5-102(1) (emphasis added). Under this comprehensive statutory scheme, forgery rises to a felony when the instrument is of a type specified in section 18-5-102(1). To satisfy subsection (1)(c), a document must affect a legal right or status, such as a tax form included with tax credit transactions. *See People v. Cunefare,* 102 P.3d 302, 310 (Colo. 2004). Because the forms were used to provide evidence of the transaction, the forms fall squarely within the definition of an instrument. And DeAtley didn't contend otherwise at trial.

¶ 20 Accordingly, we discern no plain error in the trial court's omission of an additional instruction. *See People v. Underwood,* 53 P.3d 765 (Colo. App. 2002).

b. Complicity

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¶ 21 Next, DeAtley contends that because the complicity theory of criminal culpability wasn't included in the original indictment, giving the jury a complicity instruction constituted an improper variance. We aren't persuaded.

¶ 22 An indictment "must be sufficient to advise the accused of the charges, to give him fair and adequate opportunity to prepare his defense, and to ensure that he isn't taken by surprise because of evidence offered at . . . trial." *People v. Madden*, 111 P.3d 452, 456 (Colo. 2005) (quoting *People v. Cooke*, 186 Colo. 44, 46, 525 P.2d 426, 428 (1974)). "The notice requirement is also intended to protect the defendant from further prosecution for the same offense." *Id.* Thus, if a variance between an indictment and the jury instructions either violates this notice requirement or subjects a defendant to multiple prosecutions, reversal is required. *Id.* at 456-57. If the evidence presented establishes that two or more persons were jointly engaged in the commission of a crime, then it is appropriate for the trial court to instruct the jury on complicity. *People v. Calvaresi*, 198 Colo. 321, 325, 600 P.2d 57, 60 (1979). The premise of DeAtley's argument is that complicity must have also been included in the indictment charging document. But

complicity doesn't need to be separately delineated in the charging document. *People v. Jimenez*, 217 P.3d 841, 871 (Colo. App. 2008) (concluding that the prosecution need not include complicity in the charging document).[3] Accordingly, the court's instruction on complicity didn't create an impermissible variance, and the trial court didn't plainly err by giving the jury a complicity instruction. *Id.*

B. The Notebook and Davis's Statement

¶ 23 DeAtley contends the trial court violated his Confrontation Clause rights when it (1) admitted a notebook with notes that detailed the transactions of his conservation easement scheme; and (2) admitted testimony that during an interview, a co-conspirator admitted the notebook was his.

1. Additional Factual Background

¶ 24 An investigator went to the headquarters of the Confederated Tribes. There he found documents related to DeAtley's conservation

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[3] To the extent DeAtley urges us to cut a different path than the division in *People v. Jimenez*, 217 P.3d 841 (Colo. App. 2008), doing so wouldn't be a basis for reversal. This is so because we can't conclude that it was obvious error for the trial court to follow existing case law. *People v. Fortson*, 2018 COA 46M, ¶ 167 (concluding it isn't obvious error to follow then-existing case law).

scheme, including a notebook. The notebook contained handwritten notes detailing the day-to-day activities of the conservation easement scheme during 2007. The notebook was later identified as being the notebook of DeAtley's co-conspirator, Rick Davis. Davis ran the office of the Confederated Tribes.

¶ 25 The agent who found the notebook later interviewed Davis. During the interview, the agent picked up the notebook. According to the agent, when Davis saw the notebook, he spontaneously said, "those are my notes" and "I've been looking for those." Davis didn't testify at trial.

¶ 26 At trial, the prosecution attempted to introduce both the notebook and Davis's statement to the agent. Defense counsel objected to the admission of both the notebook and Davis's statement as hearsay and as a violation of the Confrontation Clause. The trial court overruled DeAtley's hearsay and confrontation objections, finding that the prosecution had met its burden to admit the notebook as a nontestimonial co-conspirator statement, and admitted Davis's statement as foundation for the admission of the notebook. DeAtley contends that both rulings were erroneous.

2. Legal Principles

¶ 27 The United States and Colorado Constitutions grant defendants the right to confront witnesses against them. U.S. Const. amend. VI; Colo. Const. art. II, § 16. Generally, this right is violated where the prosecution introduces testimonial hearsay evidence, unless the declarant is unavailable and the defendant had the prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

¶ 28 Colorado's constitutional protection of the right to confront witnesses extends only to testimonial statements. *Nicholls v. People*, 2017 CO 71, ¶ 22 (concluding that a testimonial statement is one made "under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"). A statement is testimonial if it was made or created with the "primary purpose of creating an out-of-court substitute for trial testimony." *People v. McFee*, 2016 COA 97, ¶ 34 (quoting *Ohio v. Clark*, 576 U.S. 237, 245 (2015)); *Nicholls*, ¶ 17.

¶ 29 A statement is hearsay if it is made by someone other than the witness and is offered to prove the truth of the matter asserted. CRE 801(c). A hearsay statement generally isn't admissible unless

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it falls within an exception to this rule. And even an otherwise admissible hearsay statement is inadmissible if its admission would violate a defendant's confrontation rights. *Crawford*, 541 U.S. at 59 n.9; *People v. Robinson*, 226 P.3d 1145, 1151 (Colo. App. 2009).

¶ 30 We review a Confrontation Clause challenge de novo. *People v. Phillips*, 2012 COA 176, ¶ 85. If there is a Confrontation Clause violation, then reversal is required unless the error is harmless beyond a reasonable doubt. *Blecha v. People*, 962 P.2d 931, 941-42 (Colo. 1998).

3. Analysis

a. The Court Didn't Err by Admitting the Notebook

¶ 31 First, DeAtley contends that notes from the notebook were "testimonial" hearsay and the court violated his confrontation rights by admitting them. Specifically, he contends that the notes "replaced the live testimony of Rick Davis and pieced together every dissociated piece of admissible evidence the People presented without affording the Defendant a right to confront and cross-examine Rick Davis." We disagree.

¶ 32 As a threshold matter, we conclude the court didn't err in determining that the notebook wasn't hearsay. Davis was a

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co-conspirator and notes in the notebook were made in 2007 — during the course of the conspiracy. Therefore, the notebook was the statement of a co-conspirator made during the course of the conspiracy. And "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" isn't hearsay. CRE 801(d)(2)(E).

¶ 33 Next, we must determine whether the notebook's contents are testimonial. A testimonial statement is made for the primary purpose of using it as evidence. *Phillips*, ¶ 67. Whether a statement is testimonial depends on context. For example, the statement of a co-conspirator to police during an interrogation would be testimonial. *People v. Vigil*, 127 P.3d 916, 921 (Colo. 2006).

¶ 34 But courts have consistently found statements to be nontestimonial where they were created for administrative or business purposes. *See People v. Espinoza*, 195 P.3d 1122, 1126 (Colo. App. 2008) ("proofs of service" attached to the defendant's driving record weren't created in response to an interrogation but served a routine administrative function); *People v. Pollard*, 2013 COA 31M, ¶ 48 (concluding that the notes of a nontestifying

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criminologist in a report authored by the criminologist who testified wasn't testimonial because the verification was done for administrative purposes).

¶ 35 The notebook contained day-to-day business records of and notes concerning the operation of conservation easement scheme. The notes were made contemporaneously with the events described; as such, they were made years before the investigation began. There was no evidence that Davis intended to use these notes to aid any prosecution, as the notes were made long before the arrest and subsequent trial. *See McFee*, ¶ 47 (concluding that the most crucial question is whether the statement was intended to aid in the prosecution of the defendant and to serve as a substitute for the declarant's trial testimony). Further, there was no evidence that the notebook was created or maintained at the request of any government or law enforcement official. *Id.* Based on this, we conclude that the notebook was nontestimonial. Because we conclude that the notebook wasn't testimonial, we also conclude the court's admission of the notebook didn't violate DeAtely's confrontation clause rights. *Id.*

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b. Admitting Davis's Interview Statement Identifying the Notebook as His, While Erroneous, Was Harmless Beyond a Reasonable Doubt

¶ 36 Second, DeAtley contends that the court erred when it admitted Davis's statement that the notebook was his. The agent who found the notebook and interviewed Davis testified as follows:

> [Prosecutor]: When that interview began, where was that notebook located?
>
> [Agent]: It was in the room with us, but it was off to the side.
>
> [Prosecutor]: At some point in the interview, did you grab that notebook and show it to Mr. Davis?
>
> [Agent]: I did.
>
> [Prosecutor]: What was Mr. Davis' reaction?
>
> [Agent]: Hi[s] eyes got kind of bright and he said these are my notes.
>
> . . . .
>
> [Prosecutor]: You said his eyes got wide [sic], were there any other physical movements?
>
> [Agent]: He kind of like giggled. He smiled. He was excited to the see the binder and notebook.
>
> . . . .
>
> [Agent]: He kind of sat up and said, oh, those are my notes.

> [Prosecutor]: Did he say anything immediately after those are my notes?
>
> . . . .
>
> [Agent]: He said those are my notes. Notes I've been looking for.

¶ 37 At trial, defense counsel objected to the admission of Davis's statement that the notebook was his, arguing it was testimonial hearsay and therefore violated DeAtley's confrontation rights. The trial court ruled that the present sense impression hearsay exception, CRE 803(1), applied to the agent's testimony regarding Davis's statement.

¶ 38 We review the trial court's evidentiary rulings for an abuse of discretion. *People v. Greenlee*, 200 P.3d 363, 366 (Colo. 2009); *People v. Mapps*, 231 P.3d 5, 11 (Colo. App. 2009). Because the parties agree that defendant preserved the issue with contemporaneous objections, any errors of a constitutional dimension must be harmless beyond a reasonable doubt. *Hagos*, ¶ 11. We will reverse if there is a reasonable possibility that the error may have contributed to the conviction. *Id.*

¶ 39 As a threshold matter, we must determine whether the trial court abused its discretion in admitting the hearsay statement.

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Certainly, the agent's testimony regarding Davis's statement was hearsay because it was an out of court statement used to prove the truth of the matter asserted (i.e., provenance of the notebook). CRE 801(c) (defining hearsay as a "statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

¶ 40 But we conclude that the trial court didn't abuse its discretion when it admitted the hearsay statement under the present sense impression exception. The present sense impression exception allows a court to admit an out of court statement if it is a "spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition." CRE 803(1). Colorado law requires that a statement be instinctive and spontaneous to constitute a present sense impression. *See People v. Czemerynski,* 786 P.2d 1100, 1100 (Colo. 1990) (holding an immediate identification of the caller during a telephone conversation was admissible as a present sense impression). "Spontaneity is the most important factor governing trustworthiness." *Id.* at 1107; *see Denver City Tramway Co. v. Brumley,* 51 Colo. 251, 116 P. 1051 (1911); *People v. Jones,* 665

P.2d 127 (Colo. App. 1982), *aff'd*, 681 P.2d 504 (Colo. 1984). According to the agent, Davis's statement was a spontaneous reaction to the event — namely, seeing his notebook. The agent even testified that Davis giggled, an involuntary reaction, and, without prompting, said that the notebook was his and that he had been looking for it. *Czemerynski*, 786 P.2d at 1100. Thus, the trial court didn't abuse its discretion in concluding that Davis's statements fell within the present sense impression exception to the rule against hearsay.

¶ 41 Next, we must determine whether the statements were testimonial. The Attorney General contends that they weren't. But the statements were made during a formal interview with police. This setting would have alerted Davis that his statements may be used to support an investigation of — and possible sanctions against — himself, DeAtley, and other co-conspirators. *People v. Cohen*, 2019 COA 38, ¶ 31 (concluding that statements made to officials were testimonial where the declarant knew they could be used at trial); *see also People v. Cevallos-Acosta*, 140 P.3d 116, 129 (Colo. App. 2005) (the declarant's intent should be considered when determining whether a statement is testimonial). Thus, we reject

the Attorney General's argument and conclude that Davis's out of court statements were testimonial.

¶ 42 Because the agent's testimony regarding Davis's statement was testimonial, its admission violated the DeAtley's confrontation rights. *People v. Fry*, 92 P.3d 970, 980 (Colo. 2004).[4] This is because even though the statements were subject to a hearsay exception, they didn't meet the requirements for testimonial hearsay subject to an exception under the Confrontation Clause.[5]

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[4] To be clear, the trial court didn't err by considering these statements for the limited purpose of determining the admissibility of the notebook. Indeed, CRE 104(a) permits a court to determine whether evidence is admissible outside of the presence of the jury. So, based on CRE 104(a) and our hearsay analysis, the trial court wouldn't have erred had it received the agent's testimony regarding Davis's statements about the notebook outside of the jury's presence and considered that evidence as foundation for the admission of the notebook.

[5] While we acknowledge that there is an exception to the Confrontation Clause for testimonial hearsay, invoking that exception requires that the prosecution demonstrate the unavailability of the declarant, as well as establish that the evidence possesses particularized guarantees of trustworthiness. *People v. Fry*, 92 P.3d 970, 980 (Colo. 2004). During trial, the prosecution didn't demonstrate why Davis was unavailable and the trial court didn't inquire further. Because the prosecution didn't meet the first prong, we don't need to review the statements' trustworthiness.

¶ 43 Having concluded that constitutional error occurred in this instance, we now must determine whether this error was harmless beyond a reasonable doubt. *Bogdanov v. People*, 941 P.2d 247, 252 (Colo. 1997) (describing constitutional errors which may be included if they are harmless beyond a reasonable doubt), *overruling recognized by Grissom v. People*, 115 P.3d 1280 (Colo. 2005). Under this standard, we reverse if there is a reasonable possibility that the error might have contributed to the conviction. *See Hagos*, ¶ 11. In determining whether a constitutional error was harmless beyond a reasonable doubt, an appellate court should examine a "number of factors," including

> the importance of the witness' testimony to the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradictory evidence on the material points of the witness' testimony, the extent of the cross-examination otherwise permitted, and the overall strength of the prosecution's case.

Merritt v. People, 842 P.2d 162, 169 (Colo. 1992). We conclude that the admission of Davis's statements was harmless beyond a reasonable doubt for three reasons.

¶ 44 First, Davis's statements were cumulative of other evidence linking Davis to the notebook. *People v. Carter*, 2015 COA 36, ¶ 51 (concluding that any evidentiary error was harmless beyond a reasonable doubt because the People presented ample other evidence tying defendant to the charged crimes), *aff'd*, 2017 CO 59M. Specifically, Davis's name was included in the notes. Additionally, Davis was the office administrator of the Confederated Tribes, where the notebook was found — giving rise to the inference that Davis was the owner and author of the notebook. *Id.* Simply put, without the admission Davis's statements, the jury would still have ample evidence connecting Davis to the notebook. Thus, the impact of the admission of Davis's statements about the provenance of the notebook was de minimis.

¶ 45 Second, the statements related to an ancillary issue — whose notebook was it. Even without Davis's statements linking himself to the notebook, the notebook on its face was clearly contemporaneous documentation of the conservation easement scheme during 2007.

¶ 46 Third, this was a passing statement in a lengthy trial. The trial lasted three weeks; this testimony occupied less than a page of

transcript. Against the length of the trial and weight of the evidence, these statements are "so unimportant and insignificant" that we can conclude beyond a reasonable doubt that they didn't contribute to DeAtley's guilty verdict. *Chapman v. California*, 386 U.S. 18, 22 (1967).

¶ 47 Thus, we conclude that the constitutional error in admitting statement was harmless beyond a reasonable doubt. *Hagos*, ¶ 11.

C. Motion to Dismiss

¶ 48 On December 29, 2015, less than three weeks before trial, DeAtley filed a motion to dismiss, arguing that the Department of Revenue had violated section 39-21-113, C.R.S. 2020, when it provided tax records to the prosecution and the grand jury. The trial court denied the motion as untimely. DeAtley acknowledged his delay, but requested the delay be excused because he had recently changed legal counsel.

¶ 49 The People contend that the trial court acted within its discretion when it denied DeAtley's motion to dismiss. Because DeAtley filed a motion to dismiss more than eight months after the deadline for filing motions and five years after his indictment, we agree with the People.

1. Additional Factual Background

¶ 50 In October 2010, DeAtley was indicted on various charges of criminal fraud, tax evasion, and racketeering. Several years passed with trial delays, including DeAtley's withdrawal of counsel. *See People v. DeAtley*, 2014 CO 45, ¶¶ 1-3, 9 (detailing the litigation delays and counsel turnover). DeAtley's trial was set for May 2013. DeAtley delayed finding new counsel. He appeared without counsel at several hearings in 2014. DeAtley retained counsel in January 2015 and the court reset the jury trial for June 2015. The trial court set a deadline for motions of April 10, 2015. DeAtley filed several motions to continue trial, and, by this time, trial had been reset to January 2016 — almost three years after its original date. The trial court acknowledged these various delays, stating, "you know the history of this case . . . having trial dates and having things blow up and be kicked down the road and lawyers getting off the case . . . ."

¶ 51 On January 13, 2016, the trial court denied the motion as untimely, as it was filed 263 days after the motions deadline and the delay wasn't based on excusable neglect. In rejecting DeAtley's excuse for the delay — that he needed to retain new counsel — the

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trial court concluded that because DeAtley had raised this issue in previous litigation, his lack of counsel wasn't sufficient to support a demonstration of excusable neglect.

2. Legal Principles

¶ 52 In its discretion, a trial court may enlarge the time period for filing motions, and may, upon a motion for enlargement of time, permit a particular motion to be filed "after expiration of the specified period if the failure to act on time was the result of excusable neglect." *See* Crim. P. 45(b)(1)-(2). We review a trial court's decision to reject a motion as untimely for an abuse of discretion. *People v. Johnson*, 2013 COA 122, ¶¶ 38-41 (affirming the trial court's decision to reject a motion to dismiss as untimely where defendant filed it after the motions deadline and failed to demonstrate excusable neglect).

3. Analysis

¶ 53 DeAtley contends that the trial court abused its discretion by rejecting his motion to dismiss because any untimeliness should have been excused based on his lack of representation.

¶ 54 The trial court required parties to file motions by April 10, 2015 — DeAtley filed his motion to dismiss 263 days after that

deadline. DeAtley contends that the trial court erred in rejecting his untimely motion because his lack of representation constituted excusable neglect. We disagree with his contention for two reasons.

¶ 55 First, in DeAtley's prior litigation, the supreme court concluded that the trial court's finding — that DeAtley intentionally caused delays in the trial — was supported by the record. *See DeAtley*, ¶ 10. In ruling that the motion was untimely, the trial court recognized this and indicated that DeAtley had a history of delaying litigation and changing counsel. Second, DeAtley filed a similar argument in prior litigation and had sufficient information to file a timely motion, even without counsel. *Id.* Thus, DeAtley's excuse that he needed to find counsel is insufficient to demonstrate excusable neglect.

¶ 56 Under these circumstances, we can't say that the trial court abused its discretion in denying DeAtley's motion as untimely. *Johnson*, ¶¶ 38-41.

D. Sentencing

¶ 57 DeAtley contends that the trial court improperly balanced the sentencing criteria when it imposed his prison sentence. The People contend that the court didn't abuse its discretion when it

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imposed consecutive prison sentences because it reasonably found the aggravating factors outweighed mitigating factors and sentenced DeAtley within the presumptive range for each of his convictions. Again, we agree with the People.

1. Additional Factual Background

¶ 58 During sentencing, the court sentenced DeAtley to a total of eighty-three years in the custody of the Department of Corrections. The court imposed consecutive prison terms within the presumptive range for each of his convictions as follows:

- sixteen years for COCCA (count one);
- six years for conspiracy (counts two and three merged);
- ten years for each theft (counts four, five, and six);
- two years for each forgery (counts seven through twenty-one); and
- one year for the tax evasion conviction (count twenty-four).

¶ 59 During sentencing, DeAtley argues that he should receive a probationary sentence instead, contending that probation would allow him to earn money towards paying restitution. But when asked by the court, DeAtley couldn't provide a plan for how he would repay his victims.

¶ 60 In imposing DeAtley's sentence, the court indicated it had reviewed the victims' statements and their interest in repayment. The court also took into consideration DeAtley's age and lack of prior felony convictions. But the court also recognized that DeAtley had engaged in the years-long fraud scheme and had no concrete plan suggesting any means or ability to make any meaningful repayment.

2. Legal Principles

¶ 61 The court has discretion to grant a defendant probation "unless, having regard to the nature and circumstances of the offense and to the history and character of the defendant," it determines that "imprisonment is the more appropriate sentence for the protection of the public." § 18-1.3-203(1), C.R.S. 2020. The probation statute lists numerous factors that, "while not controlling the discretion of the court, shall be accorded weight" when determining whether probation is appropriate. § 18-1.3-203(2). These factors are comprehensive. Some trial courts concentrate on the offense committed, while others require the court to consider the character, history, situation, and attitude of the defendant himself. *Id.*

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¶ 62 The probation statute gives courts guidance and discretion in choosing to grant probation. However, it requires a choice between prison and probation. The court must look at both the defendant and the crimes committed and, using its discretion and the statutory guidance, choose whether "the ends of justice and the best interest of the public, as well as the defendant" will be best served by probation, § 18-1.3-202(1)(a), C.R.S. 2020, or whether "imprisonment is the more appropriate sentence for the protection of the public," § 18-1.3-203(1). The legislature intended to allow courts to choose only one or the other. Probation is an alternative to prison. *Allman v. People*, 2019 CO 78, ¶ 33.

¶ 63 The sentencing court generally has broad discretion when imposing sentences, and "[w]hen a defendant is convicted of multiple offenses, the sentencing court has the discretion to impose either concurrent or consecutive sentences." *Juhl v. People*, 172 P.3d 896, 899 (Colo. 2007); *see also Misenhelter v. People*, 234 P.3d 657, 660 (Colo. 2010). But when those multiple convictions are based on identical evidence, the court must impose concurrent sentences. § 18-1-408(2)–(3), C.R.S. 2020 (requiring concurrent sentences for offenses "based on the same act or series of acts

arising from the same criminal episode" that "are supported by identical evidence"). In construing section 18-1-408(3), "we have consistently analyzed 'identical evidence' by considering whether the acts underlying the convictions were sufficiently separate." *Juhl*, 172 P.3d at 902. "[W]hether the evidence supporting the offenses is identical turns on whether the charges result from the same act, so that the evidence of the act is identical, or from two or more acts fairly considered to be separate acts, so that the evidence is different." *Id.*

3. Analysis

¶ 64 DeAtley contends that the trial court abused its discretion for three reasons: (1) it failed to consider that this was his first offense and that his employment would offer him the ability to pay his victims; (2) it improperly considered DeAtley's lack of ties to Colorado and whether he could be supervised in a different state; (3) it improperly imposed consecutive sentences where the convictions were based on a single scheme. DeAtley preserved this claim by arguing for probation, based on his interest in repaying his victims (stating specifically that it would be very difficult to pay

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restitution while incarcerated). We review this claim for an abuse of discretion.

¶ 65 First, the court didn't abuse its discretion in concluding that probation wasn't appropriate for DeAtley, despite the fact that this was his first felony offense. While DeAtley argued that he should receive a probationary sentence over custodial, the trial court found that his reliance on his ability to repay the victims was insufficient. The court concluded that DeAtley's only source of income was his fraudulent scheme and found no evidence that "DeAtley has any realistic intention of paying restitution."

¶ 66 Further, the court determined that probation wasn't possible for DeAtley because of the concern he would reoffend while on probation. They therefore didn't agree that probation, or living under supervision in a different state, would meet the aims of sentencing. The trial court wasn't required to go "point-by-point" through the factors relevant to its sentencing decision. *People v. Martinez*, 179 P.3d 23, 26 (Colo. App. 2007). The court gave its reasonable explanation for its sentencing decision, which was sufficient. *Id.*

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¶ 67 Finally, DeAtley wasn't entitled to concurrent sentences because his convictions weren't based on identical evidence. § 18-1-408(3) (mandating that where convictions are supported by identical evidence, the court must impose concurrent sentences). Because there were fifteen different victims and various acts of fraud and forgery against the various victims, section 18-1-408(3) grants the trial court the discretion to impose consecutive sentences. So the trial court didn't abuse its discretion in imposing consecutive sentences. *See People v. Fuller*, 791 P.2d 702, 708 (Colo. 1990) ("[I]f the sentence is within the range required by law, is based on appropriate considerations as reflected in the record, and is factually supported by the circumstances of the case, an appellate court must uphold the sentence.").

E. Restitution

¶ 68 Lastly, DeAtley contends the court erred by entering restitution without a hearing. The People contend that the sentencing court reasonably imposed restitution on DeAtley after hearing from the parties at sentencing. We agree with the People.

1. Additional Factual Background

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¶ 69 Prior to sentencing, DeAtley filed a written request for a restitution hearing. At the April 7, 2016, sentencing hearing, DeAtley objected to the prosecution's restitution request, raising concerns about the settlements between the victims and the Colorado Department of Revenue regarding their tax credits. Specifically, DeAtley contended that because he didn't know the details of the settlements the victims received from the Colorado Department of Revenue, they couldn't agree on the total victim loss. The court imposed a restitution amount of $6,895,433.25, requesting that defense counsel file any objections to that within ninety days.

¶ 70 On April 8, 2016, the court imposed the following restitution, totaling $6,894,433.25:

- $3,644,625 in individual victims' losses;
- $1,614,893.25 of pre-judgment interest at eight percent; and
- $21,022 in Department of Revenue tax evasion loss.

¶ 71 DeAtley didn't stipulate to the $3,644,625 in individual victim losses and again requested a hearing. In objecting, DeAtley contended that further discovery was necessary because the victims

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had reached outside settlements with the Department of Revenue, reducing their tax liability. He specifically contended that the settlement would reduce the amount of restitution he had to pay but he hadn't received documents evidencing exactly how much. DeAtley conceded, however, that the victims' losses were indeed $3,644,625. But he further objected to attorneys' fees, prosecution costs, and interest. The prosecution later abandoned their request for attorneys' fees and that was later removed from the total.

¶ 72 In so ruling, the court stated:

> The Court is going to make a preliminary finding at this point fixing restitution in the sum of $5,259,518 with the following provisos. First of all, that number is based upon what appears to be the Court's -- appears that the parties' agreement with respect to the amounts these individuals actually paid to Mr. DeAtley. It doesn't account for what they were liable for to the Department of Revenue, but what they actually paid to Mr. DeAtley, and the prosecution's numbers and the defense numbers match up. In addition to that, the Court imposes interest at the rate of eight percent in the amount of $1,614,893.25. The basis for that ruling is as follows: That this restitution statute specifically provides both for loss of use of money as well as interest. I think that these folks have lost a substantial amount of the loss of use of their money by having paid this money to Mr. DeAtley years and years ago. I think under the -- both the

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> spirit and the letter of this restitution statute, interest is appropriate.
>
> . . . .
>
> I'm also going to order restitution of $21,022 to the Department of Revenue for the loss based upon the tax evasion conviction. The Court is denying the request for prosecution expenses in the sum of $8,314.

¶ 73 The trial court required any objections to be filed within ninety days. DeAtley didn't file a written objection.[6]

2. Legal Principles

¶ 74 Section 18-1.3-603, C.R.S. 2020, provides that every criminal conviction shall include consideration of restitution as part of the sentence. *See People v. Stotz*, 2016 COA 16, ¶ 86, *abrogation recognized by People v. Knapp*, 2020 COA 107. Restitution is "any pecuniary loss suffered by a victim . . . proximately caused by an offender's conduct and that can be reasonably calculated and recompensed in money." § 18-1.3-602(3)(a), C.R.S. 2020.

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[6] On May 17, 2016, thirty-nine days after the court set the restitution amount, the court granted DeAtley's counsel's motion to withdraw, which was filed on May 6, 2016. Although the motion indicated that the court should appoint the public defender, the public defender was never notified and never entered an appearance.

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Proximate cause is "a cause which in natural and probable sequence produced the claimed injury and without which the claimed injury would not have been sustained." *People v. Henry*, 2018 COA 48M, ¶ 15 (quoting *People v. Rivera*, 250 P.3d 1272, 1274 (Colo. App. 2010)). In a restitution proceeding, the prosecution bears the burden of proving by a preponderance of the evidence that a person's losses are attributable to the defendant's acts. *People v. Hernandez*, 2019 COA 111, ¶ 14. Pre-judgment interest is required to compensate victims for their loss of use of their money. *Roberts v. People*, 130 P.3d 1005, 1007 (Colo. 2006).

¶ 75 Trial courts have broad discretion in determining the appropriate terms and conditions of restitution orders. Absent a gross abuse of discretion, the trial court's ruling won't be disturbed on appeal. *People v. Duvall*, 908 P.2d 1178, 1179 (Colo. App. 1995).

3. Analysis

¶ 76 DeAtley contends that the sentencing court improperly ordered restitution without a hearing, even though he objected during sentencing. We disagree that the court erred.

¶ 77 DeAtley conceded the principal amount of the victims' losses and had the opportunity to contest pre-judgment interest and the

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tax evasion losses. He didn't challenge these amounts. Thus, the court didn't abuse its discretion because DeAtley failed to timely assert any objection regarding the restitution amounts.

See Res of action

III. Conclusion

¶ 78 For the reasons set forth above, we affirm.

JUDGE FURMAN and JUDGE PAWAR concur.

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Ex-D

District Court City and County of Denver, Colorado 520 West Colfax Avenue Denver, CO 80204	DATE FILED: February 2, 2021 4:49 PM CASE NUMBER: 2010CR10309
THE PEOPLE OF THE STATE OF COLORADO Plaintiff v. **ALAN DEATLEY** Defendant	▲ **COURT USE ONLY** ▲ Case Number: **2010 CR 10309** Division Courtroom: 2A

ORDER: MOTION FOR APPEAL BOND, ALTERNATIVELY, FOR MEDICAL FURLOUGH WITH REQUEST FOR FORTHWITH RULING

THIS MATTER comes before the Court on Defendant's Motion for Appeal Bond, Alternatively, for Medical Furlough with Request for Forthwith Ruling filed December 15, 2020. The Court, having reviewed the motion, the Court's file, and the statutory factors relating to the grant of an appeal bond, hereby **DENIES** Defendant's motion.

SO ORDERED this 2nd day of February 2021. Time? 30 days?

appeal to C.of A.?

BY THE COURT:

JSG

Jay S. Grant
District Court Judge

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