Exhibit A

Colorado Court of Appeals

Judgment and Order Affirmed

17CA1826 Peo v Jackson 09-02-2021

COLORADO COURT OF APPEALS

DATE FILED: September 2, 2021

Court of Appeals No. 17CA1826
Larimer County District Court No. 16CR1854
Honorable Julie Kunce Field, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jheshua Daniel Jackson,

Defendant-Appellant.

JUDGMENT AND ORDER AFFIRMED

Division I
Opinion by JUDGE YUN
Freyre and Graham*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced September 2, 2021

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

¶ 1 Jheshua Daniel Jackson appeals his judgment of conviction and asks us to vacate part of the district court's restitution order. We affirm the judgment and order.

I. Background

¶ 2 The victim, a freshman at Colorado State University, left a gym bag in a locker at the campus gym and returned after his workout to find it gone. His wallet and keys were in the bag.

¶ 3 Camera footage from the gym showed Jackson entering the men's locker room, exiting it dressed in different clothes, and turning in the victim's wallet (later found to be missing certain items) at the front desk. Jackson later used the victim's credit card to buy food and a mojito at a local restaurant, where he was also caught on camera.

¶ 4 The People charged Jackson with (1) identity theft, a class 4 felony in violation of section 18-5-902(1)(a), C.R.S. 2020; (2) criminal possession of a financial device, a class 1 misdemeanor in violation of section 18-5-903(1), (2)(a), C.R.S. 2020; (3) theft between $50 and $300, a class 3 misdemeanor in violation of section 18-4-401(1), (2)(c), C.R.S. 2020; and (4) second degree

criminal trespass, a class 3 misdemeanor in violation of section 18-4-503(1)(a), C.R.S. 2020.

¶ 5 Before trial, Jackson fired his court-appointed attorney, waived his right to counsel, and chose to represent himself. In the middle of trial, however, he changed his mind and asked for a lawyer. The district court denied his request for reappointment of counsel, denied his request for a continuance, and ultimately — after repeated warnings — had him removed from the courtroom for disruptive behavior.

¶ 6 Jackson was convicted as charged and sentenced to four years of supervised probation and 180 days of work release with 102 days of presentence confinement credit. He was also ordered to pay $277.27 in restitution. He was represented by counsel at sentencing and at the restitution hearing.

II. Analysis

¶ 7 Jackson contends that the district court erred by (1) refusing to reappoint counsel; (2) denying his request for a continuance; and (3) removing him from the courtroom. He also contends that part of the restitution order must be vacated. After describing the facts

underlying the first three issues, we address each contention in turn.

A. Additional Facts

1. Waiver of Right to Counsel

¶ 8 The court initially appointed the public defender's office to represent Jackson. Early on, Jackson informed the court that he wanted to proceed pro se. At an appearance on September 23, 2016, devoted to a discussion of converting Jackson's bond to a personal recognizance bond, the court asked whether it was still his wish to represent himself and whether he was making that choice of his own volition. Jackson replied that it was and he was. The prosecutor stated that he did not object to a personal recognizance bond and added that he had given Jackson his business card and "told him that throughout the process if he does want an attorney, at that point he's certainly entitled to request it."

¶ 9 Jackson appeared twice more with appointed counsel. Then, at a status conference on November 22, 2016, Jackson fired his counsel and told the court he would proceed pro se. Defense counsel, in turn, moved to withdraw. The court inquired into Jackson's understanding of his right to counsel, the complexities of

criminal law, his right to remain silent, his right to confront and cross-examine the witnesses against him, and his right to compel witnesses to appear and testify on his behalf. The court further inquired into Jackson's educational background and legal training, and it asked whether he was under the influence of any drugs, medication, or alcohol. Finally, the court reviewed the charges and possible penalties and warned Jackson that his liberty was at risk.

¶ 10 Jackson replied that he understood his rights and the complexities of criminal law, that he held a college degree and was a trained paralegal, and that he was not under the influence of any substances. He then told the court that although he understood that this case was "a criminal action brought against [him]," he did not understand "what jurisdiction" he was in. The court explained that this was an action "brought by the people of the state of Colorado with the allegation that the charges that I read against you occurred in the county of Larimer, state of Colorado." The court then asked Jackson whether he wished to represent himself or to have his appointed attorney continue to represent him, and Jackson confirmed that he wished to represent himself. The court found that Jackson had waived his right to counsel "knowingly and

voluntary and based on complete information," and it granted defense counsel's request to withdraw.

¶ 11 As the court began to discuss the next steps, Jackson interjected with another question about jurisdiction. The court replied,

> Okay. Mr. Jackson, let me tell you. This Court has authority over this criminal action based on Article VI of the Colorado Constitution, Section 1 and Section 9. The Court has subject matter jurisdiction under Article VI of the Colorado Constitution, Section 9 and CRS 18-1-201. The Court has personal jurisdiction over you under CRS 13-1-124. And the Colorado Rules of Criminal Procedure would apply to the proceedings in this case.

¶ 12 At the arraignment, on December 23, 2016, Jackson again questioned the court's jurisdiction. The court again explained the sources of its authority over criminal cases and its subject matter and personal jurisdiction. The court also reminded Jackson that it had previously appointed an attorney for him based on its finding that he was indigent and stated that it "would be willing to continue to appoint an attorney for you if you determine that is what — how you would like to proceed." Jackson said the court was not answering his questions.

¶ 13 At Jackson's next appearance, on January 24, 2017, the court asked whether he wished to continue representing himself, and Jackson confirmed that he did.

2. Jackson's Conduct During Trial and Reassertion of Right to Counsel

¶ 14 At the start of voir dire, the court informed the jury that Jackson was representing himself, as was his right, and that his self-representation could not be considered for any purpose.

¶ 15 During the second witness's testimony, the court asked Jackson whether he had any objections to the admission of the video recording from the campus gym. Jackson said he had "objections to quite a bit" and accused the court of refusing to answer his questions about jurisdiction and of not giving him a fair trial. The court asked him — for the ninth time that day — to keep his voice down, and reminded him that it had answered his jurisdictional questions before trial. When Jackson continued to insist that the court was refusing to answer his questions, the court advised him that he was out of order and attempted to excuse the jury. Before all the jurors could exit the courtroom, Jackson

exclaimed that "maybe representing myself is not the best idea right now, because I'm being railroaded left and right."

¶ 16 The prosecutor moved for a mistrial. The court found that Jackson's conduct was inappropriate but did not warrant a mistrial. It warned Jackson that if he continued to speak when it was not his turn, he would be held in contempt. Before proceeding with the next witness, the court advised the jury to disregard any comments Jackson made regarding his decision to represent himself.

¶ 17 At the conclusion of the third witness's testimony, during which the video recording from the restaurant where Jackson used the victim's credit card was admitted into evidence, Jackson said, "At this time I am requesting counsel . . . because I understand I will not get a fair trial." The court excused the jury and reminded Jackson that he had had "a great number of opportunities to address those issues outside the presence of the jury and with this Court through the several months that this case has . . . been pending." The court again warned Jackson that if he continued to raise issues in front of the jury that had been resolved pretrial, it

would hold him in contempt and have him removed from the courtroom.

3. Jackson's Request for a Continuance and Removal from the Courtroom

¶ 18 At the start of the second day of trial, Jackson said,

> I'm not entering the jurisdiction. As a matter of fact, I'm putting a motion to continue because I can no longer represent myself. I've contacted legal shield and they told me to contact them today. I retained Rick Borgenson, et cetera, et cetera. Thank you very much.

Jackson further claimed that he could not continue with the trial because he was "not adequate enough to handle these proceedings in their secret jurisdiction." After the court reminded Jackson that he had elected to represent himself, the following exchange occurred:

> MR. JACKSON: Have I waived my rights?
>
> THE COURT: You waived your right to counsel. That's very clear.
>
> MR. JACKSON: I also retained them, yes.
>
> THE COURT: Okay.
>
> MR. JACKSON: I've also said that I preserve my right.

> THE COURT: You've retained counsel this morning online, is that what you're saying?
>
> MR. JACKSON: I've actually retained them a little while back, but now I'm electing to go ahead and use them.
>
> THE COURT: Mr. Jackson, it's too late. We're in the middle of trial.
>
> MR. JACKSON: I'm sorry. You're telling me that you're going to proceed with a proceeding where I am not qualified to represent myself, is that what you're saying?
>
> THE COURT: Mr. Jackson, we're proceeding with this trial today.

¶ 19 The court warned Jackson that, if he continued to raise issues in the presence of the jury on which the court had already ruled, it would hold him in contempt, have him removed from the courtroom, and determine that Jackson's own conduct had caused him to voluntarily absent himself from the trial. After Jackson stated that he intended to respect the proceedings, the jury entered the courtroom, and the court invited Jackson to continue his cross-examination of the penultimate witness. Instead of doing so, Jackson stated that he could no longer represent himself. While the court again attempted to excuse the jury, Jackson continued to state that he was asking for an attorney and had retained counsel.

The court held Jackson in contempt and had him removed from the courtroom.

¶ 20 After considering its options, the court concluded that it could not permit Jackson back into the courtroom due to his repeated disregard of the court's orders. As a result, court staff set up an audio feed in a room downstairs from the courtroom so that Jackson could listen to the proceedings and provided him with pen and paper so that he could write down any objections or questions and have them sent up to the court. Jackson then sent word to the court that he was able to hear the proceedings but that he was not going to listen.

¶ 21 After Jackson was removed from the courtroom, the remainder of the proceedings consisted of a few questions to the penultimate witness on redirect; the brief testimony of the final witness, the bar manager at the restaurant where Jackson used the victim's credit card, confirming that she was able to get video off the security system and that the initials on the disc containing the video recording were hers; and the prosecutor's closing statement.

B. Reappointment of Counsel

¶ 22 Jackson contends that the district court reversibly erred and violated his constitutional right to counsel by accepting his waiver of his right to counsel and later denying his request for reappointment of counsel during trial. We disagree.

1. Standard of Review

¶ 23 Whether a defendant effectively waived the right to counsel, and therefore can exercise the right to self-representation, is a mixed question of fact and law that we review de novo. *People v. Lavadie*, 2021 CO 42, ¶ 22. In ascertaining the validity of a waiver, we look at the totality of the circumstances. *Id.* at ¶ 43. Once a valid waiver has been made, we review a district court's decision granting or denying a defendant's request to reappoint counsel for an abuse of discretion. *People v. Price*, 903 P.2d 1190, 1193 (Colo. App. 1995). A district court abuses its discretion "when its decision is manifestly arbitrary, unreasonable, or unfair, or is based on an erroneous understanding or application of the law." *People v. Johnson*, 2016 COA 15, ¶ 29.

2. Law

¶ 24 The United States and Colorado Constitutions guarantee a criminal defendant the right to counsel at all critical stages of his criminal case. *See* U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16. A criminal defendant has a corollary constitutional right to reject counsel and represent himself. *People v. Arguello*, 772 P.2d 87, 92 (Colo. 1989). "[A]n accused who elects to proceed *pro se* relinquishes many of the traditional benefits associated with the right to counsel, including the Sixth Amendment right to the effective representation of counsel." *Downey v. People*, 25 P.3d 1200, 1203 (Colo. 2001).

¶ 25 Although a court must honor a defendant's request for self-representation, it must first satisfy itself "that the defendant knows what he is doing and that his choice is made with eyes open to the consequences." *People v. Smith*, 881 P.2d 385, 388 (Colo. App. 1994). Thus, before a defendant is allowed to proceed pro se, the court must conduct "a specific inquiry on the record to ensure that the defendant is voluntarily, knowingly and intelligently waiving the right to counsel." *Arguello*, 772 P.2d at 95. For a waiver to be knowing and intelligent, the record must show that the

defendant understands "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Id.* at 94 (citation omitted). In *Arguello*, our supreme court recommended that a trial court ask the defendant the fourteen questions outlined in the Colorado Trial Judges' Benchbook before allowing the defendant to waive the right to counsel. *Id.* at 95-96.

¶ 26 Once a defendant makes a valid waiver of his constitutional right to counsel, he must then accept responsibility for the results. *People v. Woods*, 931 P.2d 530, 535 (Colo. App. 1996). A trial court has no duty to reappoint counsel "merely because the defendant has become dissatisfied with his performance." *Id.* And having chosen self-representation, "a defendant cannot 'whipsaw' the court between this constitutional right and his or her own ineffectiveness at trial." *Price*, 903 P.2d at 1192; *see also United States v. Smith*, 895 F.3d 410, 421 (5th Cir. 2018) ("We have held that a defendant is 'not entitled . . . repeatedly to alternate his position on counsel in order to delay his trial or otherwise obstruct the orderly

administration of justice.'" (quoting *United States v. Taylor*, 933 F.2d 307, 311 (5th Cir. 1991))).

3. Valid Waiver

¶ 27 Jackson argues that his waiver was insufficient because the district court did not advise him that he was waiving his right to seek reappointment of counsel during trial if he became dissatisfied with his performance. But nothing in *Arguello* requires such an advisement. Rather, guided by the questions outlined in the Colorado Trial Judges' Benchbook, the district court reviewed the charges and the range of possible punishments; inquired into Jackson's understanding of his rights, his educational background, and his legal training; and confirmed that he was not under the influence of any substances that would affect his understanding of the proceedings. *See Arguello*, 772 P.2d at 95-96, 98. The court thus complied with *Arguello*'s requirements, and Jackson's responses demonstrated that his waiver was voluntary, knowing, and intelligent.

¶ 28 Jackson also argues that a valid waiver was not obtained because the waiver occurred pretrial and the court was required to readminister the *Arguello* advisement during trial after Jackson

reasserted his right to counsel. But Jackson fails to identify — nor are we aware of — any Colorado law supporting his position. And the out-of-state cases that he relies on, *People v. Baker*, 440 N.E.2d 856 (Ill. 1982), and *Panagos v. United States*, 324 F.2d 764 (10th Cir. 1963), do not support his position. Rather, those cases hold that, after a defendant validly waives his right to counsel, the trial court is not required to renew the offer of counsel or ascertain whether the defendant has changed his mind at sentencing. *Baker*, 440 N.E.2d at 859; *Panagos*, 324 F.2d at 765 ("[I]f a waiver of the right to counsel had been properly made, the trial court should not be required at each subsequent proceeding to again ask the defendant whether he knew his rights and was again willing to waive them."). Neither case involved a defendant's attempt to reassert the right to counsel or discussed what the trial court should do in such a situation.

¶ 29 Jackson further argues that his pretrial waiver "did not include a knowing and intelligent waiver of the right to regain counsel" because of the prosecutor's and the court's assurances that he could continue to request counsel. Specifically, Jackson argues that — because of (1) the prosecutor's statement on

September 23, 2016, that he "told [Jackson] that throughout the process if he does want an attorney, at that point he's certainly entitled to request it," and (2) the court's statement on December 23, 2016, that it "would be willing to continue to appoint an attorney" for Jackson if he wished — he "did not understand his initial waiver as waiving his right to regain counsel at a subsequent stage of the proceedings." But the prosecutor's statement was made very early in the proceedings, while Jackson was merely considering waiving his right to counsel. Nothing in the prosecutor's statement suggested that Jackson would be entitled to reassert his right to counsel in the middle of trial. And after Jackson's waiver, the district court did indeed give him several opportunities to change his mind, including on December 23. But the court's offer four months before trial to appoint an attorney for Jackson did not guarantee that the court would be willing to do so at every subsequent stage of the proceedings, including in the middle of trial.

¶ 30 Accordingly, because a district court must honor a defendant's constitutional right to proceed pro se once the court is satisfied that the defendant knows what he is doing and understands the

consequences, *see Smith*, 881 P.2d at 388, and the district court here made sufficient record findings that Jackson understood the consequences of proceeding pro se and knowingly made his choice, we conclude that Jackson validly waived his right to counsel.

4. Right to Reappointment of Counsel

¶ 31 Alternatively, Jackson argues that United States and Colorado Constitutions guarantee that a criminal defendant who has validly waived the right to counsel may reassert that right at any time. He contends that our supreme court has acknowledged a pro se defendant's constitutional right to have counsel reappointed. *See People v. Romero*, 694 P.2d 1256, 1265 n.5 (Colo. 1985). We disagree, as Colorado and federal case law suggests the opposite: there is no constitutional guarantee of the reappointment of counsel in the middle of trial after a valid pretrial waiver. *See, e.g.*, *People v. Wilson*, 397 P.3d 1090, 1095 (Colo. App. 2011) ("Once a defendant validly waives his right to counsel, he has no unconditional right to withdraw the waiver."), *aff'd*, 2015 CO 37; *Price*, 903 P.2d at 1193 (concluding that trial courts in Colorado are "not compelled to grant a criminal defendant's request to withdraw a valid waiver of the right to counsel"); *Robyn v. Butler*, 111 F. App'x 447, 447-48 (9th

Cir. 2004) (recognizing that while a "defendant has both the right to counsel and the right to self representation, a request for either form of representation must be timely made," and holding that the defendant's "Sixth Amendment rights were not violated by the trial court's denial of [his] request to revoke his waiver of counsel and have counsel appointed after the trial was underway"). And the district court certainly owed no duty to reappoint counsel in the middle of trial "merely because the defendant ha[d] become dissatisfied with his performance." *Woods*, 931 P.2d at 535. Thus, Jackson lost the right to effective representation of counsel when he made a valid waiver of his right to counsel and elected to proceed pro se. *See Downey*, 25 P.3d at 1203.

¶ 32 The federal cases on which Jackson relies stand for the proposition that a defendant who validly waived his right to counsel may be entitled to reassert that right at a separate, post-trial proceeding. *See, e.g.*, *Rodgers v. Marshall*, 678 F.3d 1149, 1160 (9th Cir. 2012) (recognizing a "substantial practical distinction between delay on the eve of trial and delay at the time of a post-trial hearing" and concluding that "a defendant's *post-trial* revocation of his waiver should be allowed unless the government can show that

the request is made 'for a bad faith purpose'") (citations omitted), *rev'd on other grounds*, 569 U.S. 58 (2013); *Taylor*, 933 F.2d at 311 (noting that "a defendant's rights to waive counsel and to withdraw that waiver are not unqualified" and that a defendant is not entitled to "alternate his position on counsel in order to delay his trial," but concluding that the district court erred when it refused to reappoint counsel to represent the defendant at sentencing). Here, although the district court did not allow Jackson to reassert his right to counsel in the middle of trial, it did reappoint counsel for Jackson during post-trial proceedings. This is consistent with the approach outlined in the federal cases.

5. Abuse of Discretion

¶ 33 Lastly, Jackson contends that even if he lacked a constitutional right to the reappointment of counsel, the district court nonetheless abused its discretion by denying his request because it did not make a sufficient record of its consideration of factors including his pro se performance, the request's timing, his familiarity with criminal proceedings, and his history of mental illness.

¶ 34 However, Jackson does not contend that his "performance [was] so inept as to demonstrate a fundamental inability to provide meaningful self-representation." *Price*, 903 P.2d at 1192. Concerning the timing, the court explicitly stated that it was "too late" for Jackson to reassert his right to counsel because "[w]e're in the middle of trial." As to his familiarity with criminal proceedings, Jackson told the court he was a trained paralegal and that he understood his rights and the complexities of criminal law. And he provides no facts and raises no argument regarding mental illness.

¶ 35 Under these circumstances, given that a district court has no duty to reappoint counsel after a pro se defendant becomes dissatisfied with his performance, *see Woods*, 931 P.2d at 535, the district court was not required to make further record findings. We thus conclude that the district court did not abuse its discretion in declining to reappoint counsel for Jackson.

C. Denial of Continuance

¶ 36 Jackson argues that the district court reversibly erred by denying his request for a continuance. We disagree.

1. Standard of Review

¶ 37 We review a district court's denial of a continuance for an abuse of discretion. *People v. Brown*, 2014 CO 25, ¶ 19.

2. Law

¶ 38 The Sixth Amendment affords a criminal defendant "the right to be represented by counsel of his or her choice." *People v. Travis*, 2019 CO 15, ¶ 8. This right is not absolute, however, and "there are times when 'judicial efficiency or "the public's interest in maintaining the integrity of the judicial process," may be deemed more important than the defendant's interest in being represented by a particular attorney.'" *Id.* (citations omitted). In *Brown*, our supreme court directed that, "when deciding whether to grant a motion to continue a criminal trial for substitution of defense counsel, a trial court must weigh . . . eleven factors pertaining to judicial efficiency and integrity against the defendant's Sixth Amendment right to counsel of choice." *People v. Sifuentes*, 2019 COA 106, ¶ 9. Those factors are:

(1) the defendant's actions surrounding the request and apparent motive for making the request;

(2) the availability of chosen counsel;

(3) the length of continuance necessary to accommodate chosen counsel;

(4) the potential prejudice of a delay to the prosecution beyond mere inconvenience;

(5) the inconvenience to witnesses;

(6) the age of the case, both in the judicial system and from the date of the offense;

(7) the number of continuances already granted in the case;

(8) the timing of the request to continue;

(9) the impact of the continuance on the court's docket;

(10) the victim's position, if the victims' rights act applies; and

(11) any other case-specific factors necessitating or weighing against further delay.

Brown, ¶ 24.

¶ 39 "*Brown* does not apply in every case," however, because a request for a continuance for substitution of defense counsel may be insufficient to invoke a defendant's Sixth Amendment right to counsel of choice. *Sifuentes*, ¶ 10. Unless the right to counsel of choice is at issue, the findings articulated in *Brown* are not required. *Id.*

¶ 40 In *Travis*, for example, our supreme court held that when the defendant "informed the court on the morning of trial that she wanted a continuance so that she could 'look for and pay for an attorney,' she did not trigger the assessment required by *Brown*." *Travis*, ¶ 13. The defendant's expression of "a general interest in retaining counsel" was too "vague" to implicate her right to be represented by counsel of her choosing, *id.* at ¶¶ 14, 17, and application of the *Brown* factors "would require an unrealistic level of speculation by the trial court," *id.* at ¶ 15.

¶ 41 Similarly, in *People v. Flynn*, 2019 COA 105, ¶¶ 15-16, a division of this court held that the findings set forth in *Brown* were not required when the defendant identified an attorney by name in his requests for a continuance, but there was no indication that the attorney was available, or willing, to take the defendant's case. Under those circumstances, the division concluded, the trial court had no way to "even begin to . . . consider[]" the length of a continuance necessary to accommodate counsel — and with the length of the delay unknown, the court "would be hard-pressed to fully consider other *Brown* factors, such as the potential prejudice to the prosecution and the inconvenience to witnesses." *Id.* at ¶ 14.

¶ 42 Accordingly, when a defendant requests a continuance in order to be represented by private counsel, "the crux is the definiteness of the retention." *Sifuentes*, ¶ 12. "A defendant's right to counsel of choice is invoked when the defendant's retention of private counsel is substantially definite, in name and in funds." *Id.*

3. Discussion

¶ 43 Jackson argues that the district court erred by denying his request for a continuance without making the findings set forth in *Brown*. Here, however, no private attorney entered an appearance, showed up in court, or filed a motion, nor did Jackson indicate that an attorney would do so. Rather, Jackson initially told the court that he had "contacted" Legal Shield and been told to "contact them" that day, and then that he had "retained Rick Borgenson, et cetera, et cetera."[1] When the court reminded him that he had waived his right to counsel, Jackson said that he had "actually retained [counsel] a little while back," but now he was "electing to go ahead and use them."

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[1] No attorney by that name appears on the Colorado Supreme Court's Office of Attorney Regulation Counsel website, *Attorney Search & Disciplinary History*, https://perma.cc/AP3E-WXCS.

¶ 44 These vague and seemingly contradictory statements, the credibility of which the district court was in the best position to assess, were insufficient to implicate Jackson's Sixth Amendment right to be represented by counsel of his choosing. *See Travis*, ¶ 17. Jackson's statements gave the district court no way to begin to consider the length of a continuance necessary to accommodate counsel, let alone the other *Brown* factors. *See Flynn*, ¶ 14. Thus, because Jackson's retention of private counsel was not "substantially definite," *Sifuentes*, ¶ 12, his request for a continuance did not trigger the assessment required by *Brown*, and the district court did not abuse its discretion by denying the continuance without applying the *Brown* factors.

D. Removal from the Courtroom

¶ 45 Jackson argues that the district court violated his right to be present in court and his right to counsel when he was removed from the courtroom. We disagree.

1. Standard of Review

¶ 46 "Whether a trial court violated a defendant's right to be present is a constitutional question that is reviewed de novo." *People v. Wingfield*, 2014 COA 173, ¶ 13. We also review de novo

whether a defendant was deprived of his constitutional right to counsel. *People v. Bergerud*, 223 P.3d 686, 693 (Colo. 2010).

2. Right to Be Present in Court

¶ 47 "A defendant has a right to be present at every critical stage of a criminal trial." *Wingfield*, ¶ 17. However, a defendant may waive this right by persisting in disruptive conduct. *Illinois v. Allen*, 397 U.S. 337, 343 (1970). A defendant can lose his right to be present at trial

> if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

Id. The decision of whether to remove a persistently disruptive defendant from the courtroom is committed to the trial judge's discretion. *Id.*

¶ 48 In Colorado, Crim. P. 43(b)(2) provides that a defendant is deemed to have waived his right to be present if, "[a]fter being warned by the court that disruptive conduct will cause him to be removed from the courtroom, [he] persists in conduct which is such as to justify his being excluded from the courtroom." *See People v.*

Cohn, 160 P.3d 336, 341 (Colo. App. 2007) ("[A] defendant may forfeit the right to be present by persisting in disruptive conduct after being warned by the court that further similar conduct will result in removal.").

¶ 49 Here, Jackson demonstrated consistent disregard for the district court's orders and repeatedly disrupted the proceedings despite multiple warnings that such behavior would result in his removal from the courtroom. He persistently questioned the court's jurisdiction, expressed in front of the jury his dissatisfaction with his decision to represent himself, made speeches to the jury, and refused to keep his voice down. The district court was not required to allow Jackson's disruptive activities to prevent his trial and thus "allow him to profit from his own wrong." *Allen*, 397 U.S. at 350 (Brennan, J., concurring). We therefore conclude that Jackson forfeited his Sixth Amendment right to be present at trial, and the district court did not err by removing him from the courtroom.

3. Right to Counsel

¶ 50 "Constitutional error occurs when a defendant is deprived of the presence of counsel at critical stages of the proceedings where there is more than a minimal risk that counsel's absence will

undermine the defendant's right to a fair trial." *Cohn*, 160 P.3d at 342. In *Cohn*, a division of this court held that the exclusion of a pro se defendant from the courtroom during the exercise of peremptory challenges was constitutional error. *Id.* at 341. The division reasoned that,

> [b]ecause the trial court was unable to make videoconferencing arrangements, defendant was not aware of what occurred while he was absent. He was denied the opportunity to exercise his own peremptory challenges. Thus, there was . . . more than minimal risk that his absence undermined his right to a fair trial.

Id. at 343.

¶ 51 The division suggested two ways that the trial court could have avoided the constitutional error. First, the trial court could have "appoint[ed] standby counsel to be ready to step in should the trial court find it necessary . . . to exclude the defendant from the courtroom." *Id.* at 345. Alternatively, once the defendant was removed from the courtroom, the trial court could have given him "access to videoconferencing equipment or similar technology, thus providing [him] with the means to observe and participate, while reducing [his] disruptive influence on the trial." *Id.*

¶ 52 Here, after Jackson was removed from the courtroom, court staff set up an audio feed and provided him with pen and paper so that he could listen to the proceedings and send objections or questions to the court. Jackson instead sent word to the court that he was not listening. Because Jackson was able to listen and participate, although he chose not to, *Cohn* is distinguishable. Under these circumstances, Jackson's absence from the courtroom did not violate his right to counsel.

¶ 53 Further, even when the absence of counsel at a critical stage of the proceedings results in the deprivation of a constitutional right, it is amenable to harmless error analysis. *Id.* at 344. "[A] constitutional error is harmless when the 'evidence properly received against a defendant is so overwhelming' that such error was harmless beyond a reasonable doubt." *Id.* (citation omitted). Here, Jackson was excluded from the courtroom very near the end of the trial. And the evidence against him was overwhelming. Video recordings of him at the gym and the restaurant were admitted into evidence; the bartender who served him at the restaurant testified and identified him as the person who signed a credit card receipt with the victim's name; and the receipt was also admitted into

evidence. Under these circumstances, any error resulting from Jackson's removal from the courtroom was harmless beyond a reasonable doubt.

E. Restitution

¶ 54 Jackson contends that the restitution order must be vacated in part, on the ground that it imposes restitution for conduct with which he was not charged. We disagree.

1. Additional Facts

¶ 55 The amended theft count charged Jackson with taking "things of value, namely: a VISA CREDIT CARD, $80.00 CASH, a FOOTBALL TICKET, FOOD, and ALCOHOLIC BEVERAGES of [the victim] and [the restaurant], with the value of fifty dollars or more but less than three hundred dollars, in violation of section 18-4-401(1),(2)(c),(6), C.R.S."

¶ 56 At trial, the victim testified that his gym bag contained his wallet, body spray, deodorant, and keys, including his car key, residence hall key, and dorm room key. He testified that he had ID, gift cards, credit cards, a football ticket, and eighty dollars in cash in his wallet. He testified that he got his wallet back but that it was missing certain items including the credit card Jackson used at the

restaurant, the football ticket, and the eighty dollars in cash. He testified that he did not get back his gym bag or any of his keys.

¶ 57 After trial, the court appointed counsel for Jackson. Defense counsel filed an objection to the proposed restitution award, claiming that no documentation supported the alleged costs of the missing items and requesting a hearing.

¶ 58 At the restitution hearing, the victim repeated his trial testimony regarding the stolen items, including that he had eighty dollars in cash in his wallet, and testified that he had to get a new student ID as a result of this case. He testified that it cost $102.27 to replace his car key, $40 total to replace his residence hall and dorm room keys, $25 to replace his student ID, and $20 to replace his gym bag. He presented receipts for these items, as well as a credit card receipt showing that the football ticket (which he did not replace) had cost $10.

¶ 59 Defense counsel argued that there was insufficient evidence that the victim had eighty dollars in cash in his wallet and that Jackson should not have to pay the car key's replacement cost because the video from the campus gym showed that the car key was returned to the front desk. The district court found the victim's

testimony credible and ordered $277.27 in restitution for the car key, residence hall and dorm keys, student ID, gym bag, football ticket, and cash.

2. Standard of Review

¶ 60 We generally review a district court's restitution order for an abuse of discretion. *People v. Sosa*, 2019 COA 182, ¶ 10. However, we review de novo "issues of law, such as statutory interpretation of the criminal restitution statute" and the district court's authority to impose restitution. *People v. McCarthy*, 2012 COA 133, ¶ 6; *Sosa*, ¶ 11.

3. Law

¶ 61 In Colorado, with one exception not applicable here, "[e]very order of conviction of a felony [or] misdemeanor . . . offense . . . shall include consideration of restitution." § 18-1.3-603(1), C.R.S. 2020. Restitution is "any pecuniary loss suffered by a victim," including "all out-of-pocket expenses, interest, loss of use of money, anticipated future expenses . . . , and other losses or injuries 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. "One purpose of restitution is to

make the victim whole to the extent practicable." *People in Interest of A.V.*, 2018 COA 138M, ¶ 23. A victim is considered "whole" when he is put in the financial position he would have been in had the crime not occurred. *People v. Reyes*, 166 P.3d 301, 304 (Colo. App. 2007). The restitution statutes should be liberally construed to accomplish this goal. § 18-1.3-601(2), C.R.S. 2020.

¶ 62 In *Sosa*, ¶ 1, a division of this court held that, absent a specific plea agreement in which the defendant agrees to pay restitution arising out of uncharged conduct, "Colorado's restitution statutes do not authorize a trial court to order a defendant to pay restitution for pecuniary losses caused by conduct for which [the] defendant was never criminally charged." After her boyfriend was involved in a drive-by shooting, the defendant in *Sosa* pleaded guilty to being an accessory to the crime of heat of passion second degree murder. *Id.* at ¶¶ 2-5. Because the "offense of accessory describes conduct that occurs *after* some underlying crime has already been committed by another person," *id.* at ¶ 32, the division held that the district court was not authorized to order the defendant to pay restitution for losses (such as the victims' medical bills and lost wages) that were proximately caused by the shooting

and would have been sustained regardless of the defendant's involvement after the shooting, *id.* at ¶¶ 36-37.

4. Discussion

¶ 63 Jackson argues that, because restitution may not be imposed for losses caused by conduct for which the defendant was not criminally charged, the district court was not authorized to order restitution for items not specifically listed in the information. Thus, according to Jackson's argument, because the amended information charged him with taking "things of value, namely: a VISA CREDIT CARD, $80.00 CASH, a FOOTBALL TICKET, FOOD, and ALCOHOLIC BEVERAGES . . . with the value of fifty dollars or more but less than three hundred dollars," the district court erred by ordering restitution for the victim's car key, residence hall and dorm keys, student ID, and gym bag.

¶ 64 This case does not present an issue of uncharged conduct. To the extent that the amended information did not list some of the stolen items, those specific items were not an element of the offense. § 18-4-401(1)(a); *see* § 18-4-401(6). Rather, Jackson was charged with and convicted of theft of "anything of value" of at least fifty but less than three hundred dollars. § 18-4-401(1). At trial,

the victim testified regarding all of the items that were stolen. In turn, the jury was instructed that, to prove theft, the prosecution had to prove that Jackson knowingly "obtained, retained, or exercised control over anything of value of another, without authorization or by threat or deception, and intended to deprive the other person permanently of the use or benefit of the thing of value." *See* § 18-4-401(1)(a). Based on the evidence presented at trial, the jury found Jackson guilty of theft, and further found that the "value of the thing involved in the theft [was] fifty dollars or more but less than three hundred dollars."

¶ 65 The fact that some of the stolen items were not specifically listed in the amended information does not mean that Jackson was ordered to pay restitution for uncharged conduct. Rather, the information serves to put a defendant on notice of what he must defend against. *See People v. Allen*, 167 Colo. 158, 160, 446 P.2d 223, 223-24 (1968); *People v. Joseph*, 920 P.2d 850, 852 (Colo. App. 1995) (noting that the information must "inform the defendant of the charges against him or her so as to enable the defendant to prepare an effective defense"). Jackson does not dispute that he had notice of all the items in the victim's gym bag for which

restitution was ultimately awarded. Significantly, Jackson did not object to the victim's trial testimony that some of the stolen items were the car key, residence hall and dorm keys, and gym bag. To the extent the failure to list these items constituted a defect in the information, the defect may be waived by the defendant in the absence of a timely objection. *See Joseph*, 920 P.2d at 853; *People v. Thompson*, 542 P.2d 93, 96 (Colo. App. 1975) (not published pursuant to C.A.R. 35(f)).

¶ 66 Jackson further argues that the imposition of restitution for items not specifically listed in the information violated his jury trial right under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). Not so. In *Apprendi*, 530 U.S. at 490, the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely*, 542 U.S. at 303, the Court held that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. Here, after hearing testimony related to all the stolen

items, the jury found Jackson guilty of theft and found that the "value of the thing involved in the theft [was] fifty dollars or more but less than three hundred dollars." The district court was thus authorized to impose its restitution order of $277.27 based solely on the facts reflected in the jury's verdict.

III. Conclusion

¶ 67 The judgment and order are affirmed.

JUDGE FREYRE and JUDGE GRAHAM concur.

People v. Jackson

Court of Appeals of Colorado, Division One

September 2, 2021, Decided

Court of Appeals No. 17CA1826

Reporter
2021 Colo. App. LEXIS 1248 *; 2021 WL 4067280

The People of the State of Colorado, Plaintiff-Appellee, v. Jheshua Daniel Jackson, Defendant-Appellant.

Notice: DECISION WITHOUT PUBLISHED OPINION

Subsequent History: Writ of certiorari denied *Jackson v. People, 2022 Colo. LEXIS 677, 2022 WL 3022065 (Colo., July 25, 2022)*

Decision reached on appeal by *People v. Jackson, 2022 Colo. App. LEXIS 1277 (Colo. Ct. App., Aug. 25, 2022)*

Prior History: [*1] Larimer County District Court No. 16CR1854. Honorable Julie Kunce Field, Judge.

Judges: Opinion by JUDGE YUN. Freyre and Graham*, JJ., concur.

Opinion by: YUN

Opinion

JUDGMENT AND ORDER AFFIRMED

End of Document

* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.