SUMMARY
June 18, 2020

2020C0A96

No. 17CA2003, *People v. Kern* — Crimes — Stalking — Tampering with a Motor Vehicle — Throwing Missiles from a Vehicle — Littering of Public or Private Property; Criminal Law — Prosecution of Multiple Counts for Same Act — Lesser Included Offenses

A division of court of the appeals considers a defendant's challenges to his multiple convictions and sentences related to his stalking of his ex-wife. Addressing a novel issue, the division holds that littering is not a lesser included offense of throwing a missile at a vehicle. Therefore, the defendant's convictions for those offenses should not be merged. Additionally, the division concludes that the concurrent sentencing requirement of section 18-1-408(3), C.R.S. 2019, does not apply to fines imposed as punishment for conviction. In support of the latter conclusion, the division recognizes that the Colorado Supreme Court's decision in *People v.*

Blair, 195 Colo. 462, 579 P.2d 1133 (1978), remains good law and binding precedent.

COLORADO COURT OF APPEALS **2020C0A96**

Court of Appeals No. 17CA2003
Mesa County District Court No. 16CR5204
Honorable Lance P. Timbreza, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

David Scott Kern,

Defendant-Appellant.

JUDGMENT AND SENTENCE AFFIRMED

Division I
Opinion by JUDGE NAVARRO
Dailey and Gomez, JJ., concur

Announced June 18, 2020

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Megan A. Ring, Colorado State Public Defender, Julia Chamberlin, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant David Scott Kern appeals the judgment of conviction and sentence entered on jury verdicts finding him guilty of one count of stalking, two counts of tampering with a motor vehicle, six counts of throwing a missile at a vehicle, and six counts of littering. We reject his challenges to the evidence supporting his convictions. In addition, as a matter of first impression, we conclude that the littering counts are not lesser included offenses of the throwing a missile counts. Finally, we recognize that the concurrent sentencing requirement of section 18-1-408(3), C.R.S. 2019, does not apply to fines. Accordingly, we affirm the judgment and sentence.

I. Factual and Procedural History

¶ 2 Kern's ex-wife, I.P., discovered plastic bags filled with foreign substances on her residential property on multiple days in 2016. On April 10, she found several bags on her driveway and front lawn. One had been thrown against the driver's side of her truck, releasing a chemical that melted some of the truck's plastic components and stripped its paint. I.P. linked the chemical's strong ammonia smell with Kern's work at a sheet metal company.

¶ 3 On April 11, the truck's passenger-side door was damaged in the same way: a patch of paint and part of its running board were dissolved, and, once again, a bag containing the distinctive-smelling liquid was nearby. Splatter marks indicated that this bag had been thrown from the street. The total damage to the truck from these two incidents was over $4000.

¶ 4 The following day, I.P.'s husband, D.P., installed surveillance cameras around the house. On April 18, May 29, June 10, and June 13, I.P. and D.P. discovered more bags on and around the driveway. Some contained the corrosive ammonia-smelling substance, while others were filled with used motor oil, a viscous "goo," nails, a vibrator, an eyebolt, and wire. Some contents had splattered onto the vehicles parked there overnight, some stained the concrete, and others killed the nearby grass. On each of these last four dates, the cameras recorded Kern's distinctive GMC 2000 vintage primer-gray two-door pickup truck driving by and objects being launched from its window.

¶ 5 On other occasions around the same time, D.P. captured photographs of Kern driving by the house on his motorcycle and in his truck. For instance, D.P. caught a close-up image of Kern

looking towards the house as he drove by in his truck around 1:00 a.m. Additionally, Kern pulled up next to I.P. and D.P. at a traffic light and flipped them off.

¶ 6 The police eventually arrested Kern, and he was charged with multiple offenses. A jury returned the guilty verdicts mentioned earlier, and the trial court sentenced him to seven years in prison for stalking and four years in prison for each tampering count, all to run concurrently. The court also imposed fines totaling $4500 on the other counts.

II. Admission of References to a Restraining Order

¶ 7 Kern contends that the trial court erred by admitting into evidence his statements about a "restraining order" against him.[1] According to Kern, any probative value of this evidence was substantially outweighed by the danger of unfair prejudice. We need not decide whether the court erred because the alleged error was harmless.

[1] Kern called the putative order a "restraining order"; so we will do the same. Colorado statutes, however, use the phrase "protection order." *See, e.g.*, § 13-14-100.2, C.R.S. 2019.

A. Additional Background

¶ 8 In a pretrial interview, Kern told a police officer that he had driven by I.P.'s house "a few times." That evidence was admitted at trial during the officer's testimony.

¶ 9 In the same interview, Kern referred to a restraining order he said I.P. had obtained against him that required him to stay 1500 feet away from her. Citing CRE 401 and CRE 403, defense counsel objected to admitting the references to the restraining order. The prosecutor argued that the "existence of a restraining order is certainly relevant as a response to the victims having gone through this experience with the Defendant." The trial court overruled the defense objection, concluding that the statements were Kern's admissions and their probative value was not substantially outweighed by their prejudicial effect.

¶ 10 Defense counsel asked for "the standard limiting instruction," and the court instructed the jury as follows:

> You are going to hear statements by Mr. Kern which include an issue of staying fifteen hundred feet from a residence. That evidence is not being offered for proof that there was a restraining order in place. And you should not speculate as to why there may or may have not been a restraining order in place. The issue is

> merely statements of the Defendant and how it relates to the matter about which the deputy is testifying.

¶ 11 The court then admitted a redacted audio recording of the interview in which Kern mentioned various topics, including a restraining order and being restrained. The prosecutor played the recording for the jury, and the jurors received a transcript to assist them in following it. The transcript, however, was not admitted into evidence and was not given to the jury during deliberations.

B. Legal Framework and Standard of Review

¶ 12 Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401. All relevant evidence is admissible unless otherwise provided by constitution, statute, or rule. CRE 402. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." CRE 403. Still, Rule 403 strongly favors the admissibility of relevant evidence. *People v. Gibbons*, 905 P.2d 604, 607 (Colo 1995).

¶ 13 Where the defendant objected to the admission of evidence, we review any error for harmless error. *Yusem v. People*, 210 P.3d 458, 469 (Colo. 2009). "Under this standard, reversal is required unless the error does not affect the substantial rights of the accused." *Id.* If a reviewing court can say with fair assurance that, in light of the entire record, the error did not substantially influence the verdict or impair the fairness of the trial, the error may properly be deemed harmless. *People v. Johnson*, 2019 COA 159, ¶ 48.

C. Analysis

¶ 14 According to the prosecutor's argument in the trial court as we understand it, the references to a restraining order were relevant to the stalking count to show that Kern knowingly caused distress to I.P. when he continued to go by her house. *See* § 18-3-602(1)(c), C.R.S. 2019 (stalking is committed when a person knowingly and repeatedly approaches, contacts, places under surveillance, or makes any form of communication with another person in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person to suffer serious emotional distress). Yet this could be true only if a restraining order was actually in place. The trial court, however, explicitly

instructed the jury that it could not infer from this evidence that such an order was in place and could not speculate about why there may or may not have been such an order. We presume that the jury followed the instruction. *See Bondsteel v. People*, 2019 CO 26, ¶ 62. As a result, the instruction diminished the probative value of the references to a restraining order.

¶ 15 By the same token, however, the instruction negated the evidence's potential for unfair prejudice. Kern argues that the existence of a restraining order might have implied a "judicial imprimatur" on I.P.'s allegations against him. But the instruction directed the jurors not to infer that such an order existed. Thus, the instruction rendered the references to a restraining order both irrelevant (mostly) *and* not prejudicial.[2]

¶ 16 Moreover, the references in the recording were relatively brief and vague. No other evidence mentioned a restraining order, and the prosecutor did not mention the order again during the trial.

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[2] The instruction's last sentence seemed to say that the jury could consider the references to a restraining order to give context to the statements of Kern and the officer in the interview. In any case, the instruction as a whole directed the jury not to consider those references as proof that such an order existed.

Although Kern points out that the jurors asked during deliberations to see the transcript of the police interview (which the court declined to give them), this fact does not mean that the jurors focused on the references to a restraining order. Kern also talked about other matters in the interview, including admitting that he had driven by I.P.'s house multiple times.

¶ 17 Finally, the evidence against Kern was considerable. It included (1) multiple videos of Kern's distinctive truck driving by the house and objects being thrown from its window; (2) a close-up photograph of Kern driving his truck past the house; (3) I.P.'s testimony that the ammonia-smelling material found in some bags was reminiscent of the chemicals with which Kern worked at the sheet metal factory; (4) Kern's admission that he drove by the house multiple times; and (5) evidence that Kern flipped off I.P. in traffic around the time of these acts of vandalism.

¶ 18 Consequently, we can say with fair assurance that the admission of the challenged evidence did not substantially influence the verdict or impair the fairness of the trial.

III. Sufficiency of Evidence Supporting the Felony Convictions for Tampering With a Motor Vehicle

¶ 19 Kern contends that the prosecution failed to prove beyond a reasonable doubt that he caused $1000 or more in damages to I.P.'s truck as to each count of tampering with a motor vehicle. Reviewing de novo, we disagree. *See McCoy v. People*, 2019 CO 44, ¶ 34.

A. Applicable Law

¶ 20 To determine whether the evidence was sufficient to support a guilty verdict, we evaluate whether the evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, was substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt. *People v. Perez*, 2016 CO 12, ¶ 8.

> Our inquiry is guided by five well-established principles: (1) we give the prosecution the benefit of every reasonable inference that might fairly be drawn from the evidence; (2) the credibility of witnesses is solely within the jury's province; (3) we may not serve as a thirteenth juror to determine the weight of the evidence; (4) a modicum of relevant evidence will not rationally support a conviction beyond a reasonable doubt; and (5) verdicts in

> criminal cases may not be based on guessing, speculation, or conjecture.

People v. Procasky, 2019 COA 181, ¶ 18.

¶ 21 To prove tampering with a motor vehicle as charged here, the prosecution had to prove that, with criminal intent and without the owner's knowledge or consent, Kern scratched, marred, marked, or otherwise damaged the motor vehicle. § 42-5-103(1)(c), C.R.S. 2019. This offense is a class 1 misdemeanor if the damage is less than one thousand dollars. § 42-5-103(2)(a). It is a class 5 felony, however, if the damage caused is one thousand dollars or more but less than twenty thousand dollars. § 42-5-103(2)(b); *cf. Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005) (recognizing that, except for the fact of a prior conviction, facts supporting the increase of a sentence beyond the statutory maximum must be admitted by the defendant or tried to a jury and proved beyond a reasonable doubt, unless the defendant has stipulated to judicial factfinding).

B. Analysis

¶ 22 The first tampering count was based on the April 10 incident in which I.P.'s truck's driver side was damaged by the chemical thrown against it, while the second count was based on the April 11

incident in which the passenger side was damaged in the same way. D.P. and I.P. testified that the total damage from the two incidents was more than $4000. In addition, the jury saw photographs of the truck showing similar damage after each incident, and testimony indicated that the damage was similar on both days.

¶ 23 Sergeant Tim Orr testified that he found a plastic bag emitting a "strong chemical odor" near the driver side of the truck on April 10, and the truck had "[c]hunks of paint that were basically melted off from her car from some kind of chemical." That is, the paint on the driver's door "was bubbled pretty bad," exposing the steel underneath. Inspecting the truck after the second incident, Orr said he saw the "[s]ame kind of bubbled up paint from the previous day," showing penetration of the chemical "all the way down."

¶ 24 Viewing this evidence in the light most favorable to the prosecution, we conclude that it is sufficient to support a conclusion by a reasonable mind that Kern caused at least $1000 in damage on April 10 and did so again on April 11. *See Perez*, ¶ 24. We disagree with Kern that such a conclusion would be based on "pure speculation." Instead, we perceive a logical and

convincing connection between the facts established — the truck sustained over $4000 in total damage from the two comparable incidents — and the conclusion inferred — the truck sustained at least $1000 in damages in each incident. *Clark v. People*, 232 P.3d 1287, 1292 (Colo. 2010).

IV. Littering is Not Included in Throwing a Missile at a Vehicle

¶ 25 Kern next contends that his convictions for littering represent lesser included offenses of his convictions for throwing missiles at a vehicle. He maintains, therefore, that the trial court's failure to merge the littering convictions with the throwing missiles convictions violated his double jeopardy rights and constituted plain error. Addressing a novel issue, we disagree.

A. Standard of Review

¶ 26 We review de novo whether a conviction violates the constitutional prohibition against double jeopardy. *People v. Welborne*, 2018 COA 127, ¶ 7. Because Kern did not preserve this issue, we may reverse only if plain error occurred. *Id.*

B. Analytical Framework

¶ 27 Constitutional double jeopardy protections preclude imposing multiple punishments for the same offense when the General

Assembly has not authorized multiple punishments. *Id.* at ¶ 8. The legislature has determined that, when a defendant's conduct establishes the commission of more than one offense, he or she may be prosecuted for each such offense. *See* § 18-1-408(1). If one offense is included in the other, however, the defendant may not be convicted of both. § 18-1-408(1)(a). As relevant here, one offense is included in another charged offense when "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged." § 18-1-408(5)(a); *see Reyna-Abarca v. People*, 2017 CO 15, ¶ 51.

¶ 28 Under our supreme court's interpretation of the statute, there are two ways in which an offense may be included in another for purposes of section 18-1-408(5)(a) and the Double Jeopardy Clause. *Welborne*, ¶¶ 11-12. First, a lesser offense is included in the greater offense when "there are multiple ways to commit the greater and proof of the commission of at least one of which necessarily proves commission of the lesser." *Id.* at ¶ 12 (quoting *Page v. People*, 2017 CO 88, ¶ 10). Second, "[a]n offense can also be included in another under the statutory elements test when there are multiple ways to commit the lesser, not all of which are

included within the greater." *Id.* (quoting *Page*, ¶ 11). "[A]ny set of elements sufficient for commission of that lesser offense that is necessarily established by establishing the statutory elements of a greater offense constitutes an included offense." *Id.* (quoting *People v. Rock*, 2017 CO 84, ¶ 16).

1. Offenses At Issue

¶ 29 As charged here, a person commits the class 1 petty offense of throwing a missile at a vehicle if he or she (1) knowingly, (2) projects, (3) any missile, (4) at or against, (5) any vehicle or equipment designed for the transportation of persons or property, other than a bicycle. § 18-9-116(1), C.R.S. 2019. "[M]issile" means "any object or substance." § 18-9-116(3).

¶ 30 A person commits the class 2 petty offense of littering if he or she (1) deposits, throws, or leaves; (2) any litter; (3) on any public or private property or in any waters. § 18-4-511(1), C.R.S. 2019. "[L]itter" means "all rubbish, waste material, refuse, garbage, trash, debris, or other foreign substances, solid or liquid, of every form, size, kind, and description." § 18-4-511(3)(a). The phrase "public or private property" as used in this statute "includes, but is not limited to, the right-of-way of any road or highway, any body of

water or watercourse, including frozen areas or the shores or beaches thereof, any park, playground, or building, any refuge, conservation, or recreation area, and any residential, farm, or ranch properties or timberlands." § 18-4-511(3)(b).

2. Analysis

¶ 31 Statutory construction presents a legal question we review de novo. *People v. Dinkel*, 2013 COA 19, ¶ 6. Our task in construing a statute is to ascertain and give effect to the General Assembly's intent. *Id.* In determining legislative intent, we begin with the statute's plain language. *Id.* at ¶ 7. We look to the statutory design as a whole, giving effect to the language of each provision and harmonizing apparent conflicts where possible. *Id.* We read statutory words and phrases in context and construe them according to their common usage. *Id.* If the statute is unambiguous, we simply apply its meaning without further statutory analysis. *Id.*

¶ 32 Kern was charged with six counts of throwing a missile at a vehicle, each based on a different date. He was also charged with six counts of littering, one count for each of the same six dates.

¶ 33 In essence, Kern argues that littering is a lesser included offense of throwing a missile because, by projecting a missile at or against a vehicle, a person necessarily throws or leaves litter on public or private property. The People disagree because, in their view, the littering offense applies only to real property. We need not decide whether the People are right because, even assuming (without deciding) that littering applies to personal property too, littering is not a lesser offense of throwing a missile at a vehicle.

¶ 34 Under the plain terms of the statute defining throwing a missile, the offense is completed once a person knowingly projects a missile at a vehicle — regardless of where the missile lands. The littering offense, however, is completed only if the object later lands on property. Even if the object ends up on property, the two offenses would occur sequentially, not simultaneously. In fact, given this temporal distinction, a person can commit the throwing a missile offense without also committing the littering offense. For instance, consider the following hypothetical scenarios:

(1) Joe knowingly projected a ball at a car, but Mary caught the ball before it hit or landed on property. Joe would be guilty of throwing a missile but not littering.

(2) More gravely, Joe knowingly projected a bullet into a car with Mary in it, and the bullet lodged in Mary. Joe would be guilty of throwing a missile (among other offenses) but not littering.

¶ 35 In sum, because proof of the throwing a missile offense does not necessarily establish the littering offense, littering is not a lesser included offense. *See Page*, ¶¶ 10-11. Accordingly, Kern's littering convictions should not be merged into his throwing a missile convictions.

V. Imposing Prison Sentences and Fines For Different Offenses Supported By Identical Evidence

¶ 36 Lastly, Kern argues that the trial court erred by imposing both prison sentences and fines for multiple offenses supported by identical evidence: the two tampering with a vehicle counts (prison sentences), the six throwing a missile at a vehicle counts (fines), and the six littering counts (fines). He says those punishments violate the concurrent sentencing requirement of section 18-1-408(3). He is mistaken.

¶ 37 As an initial matter, we need not resolve the parties' dispute about whether Kern adequately preserved this claim because we do not discern any error.

¶ 38 The trial court 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." *Allman v. People*, 2019 CO 78, ¶¶ 22-23 (quoting *Juhl v. People*, 172 P.3d 896, 899 (Colo. 2007)). When multiple offenses are charged together and supported by identical evidence, however, typically "the sentences imposed shall run concurrently." § 18-1-408(3) (excepting a case where multiple victims are involved); *see People v. Aldridge*, 2018 COA 131, ¶ 47.

¶ 39 Kern argues that, under section 18-1-408(3), his prison sentence for each tampering count must be served concurrently with the fine for each throwing a missile count and littering count committed on the same day because they were all supported by the same evidence (throwing a baggie filled with the chemical that

damaged the truck).[3] This means, he says, that he can receive either a prison sentence or a fine for each incident but not both, and he cannot receive more than one fine for each incident. Similarly, with respect to the other throwing a missile convictions and littering convictions, he maintains that he may receive only one fine for each, but not two. In other words, Kern contends that fines should be treated the same as sentences to incarceration for purposes of section 18-1-408(3).

¶ 40 We are not persuaded, however, because Kern's interpretation does not fit the statute's language, which says that sentences based on identical evidence shall "run" concurrently. The verb "run" applies naturally to multiple prison sentences of specified duration; when they run concurrently, each sentence runs at the same time. *See* Merriam-Webster Dictionary, https://perma.cc/9UDK-22LZ ("Run" may mean "to continue in force, operation, or production"; or "to have a specified duration, extent, or length."). But how does a fine *run* in any sense of the word? We think the legislature would

[3] In both instances, the baggies fell to the ground, which might have constituted separate evidence supporting the littering charges. For purposes of our discussion, however, we will assume that identical evidence supported all the offenses.

have chosen different language if it had intended the concurrent sentencing requirement of section 18-1-408(3) to apply to fines.

¶ 41 In any event, we are not writing on a clean slate. Our supreme court has already held that section 18-1-408(3)'s "concurrent sentencing doctrine" does not apply to fines. *People v. Blair*, 195 Colo. 462, 475, 579 P.2d 1133, 1143 (1978). In *Blair*, the defendant was both placed on probation and ordered to pay fines for multiple offenses supported by identical evidence. *Id.* at 465, 579 P.2d at 1136-37.[4] The *Blair* court concluded that imposing a fine for each offense did not violate the concurrent sentencing doctrine because

> *[t]he interests involved in allowing a person to serve actual jail sentences concurrently are quite different from those involved in the payment of fines.* In fact, in common usage, the word "sentencing" refers only to actual jail sentences, while fines are commonly considered "punishment" rather than "sentence." In fact, the judgment granting probation states that the defendant's "sentence" is suspended. We, therefore, determine that although the defendant was to

[4] Under the statutes in effect at the time of the defendant's crimes, probation was not expressly within the statutory sentencing alternatives. Therefore, to grant probation, a sentencing court had to suspend imposition or execution of the sentence. *See People v. Dist. Court*, 673 P.2d 991, 996 n.6 (Colo. 1983).

> be concurrently "sentenced" this has no effect on his fines for separate counts.

Id. at 475, 579 P.2d at 1143 (emphasis added).

¶ 42 Kern does not assert that *Blair* is distinguishable from this case, and we are bound to follow supreme court decisions unless they have been overruled or abrogated. *See In re Ramstetter*, 2016 COA 81, ¶ 40. But Kern maintains that *Blair* is no longer good law in light of legislative changes and more recent cases from our state supreme court and the United States Supreme Court. In particular, he insists that Colorado law "has changed dramatically since *Blair*'s holding." For three reasons, we are not convinced.

¶ 43 First, no legislative change allows us to disregard *Blair*. Section 18-1-408(3) has not been amended in any relevant way since the *Blair* court construed it. *See* § 18-1-408, C.R.S. 1973.[5] Thus, Kern relies on other statutory changes occurring after *Blair* that, he says, reveal the legislature's later recognition that a fine is

[5] In 1985, the legislature amended this statute in two ways not relevant here. First, it substituted "shall" for the previous term "must," such that the statute now reads: "the sentences imposed shall run concurrently." § 18-1-408(3), C.R.S. 2019. Second, the legislature added the exception for a case of multiple victims. *See* Ch. 147, sec. 1, § 18-1-408(3), 1985 Colo. Sess. Laws 661.

a sentence. *See, e.g.*, §§ 18-1.3-701 to -703, C.R.S. 2019 (within the article governing "sentencing" is part 7, which relates to "fines and costs"). He argues that "[b]efore 1985, Colorado's sentencing scheme did not contemplate criminal fines," and he cites a statute that supposedly introduced fines for felonies committed after July 1, 1985. *See* § 18-1.3-401(1)(a)(III)(A), C.R.S. 2019 (providing that a fine may be imposed "in addition to, or in lieu of, any sentence to imprisonment, probation, community corrections, or work release"). But these provisions are consistent with the *Blair* court's statement that fines are a form of punishment. *See Blair*, 195 Colo. at 475, 579 P.2d at 1143.

¶ 44 Moreover, the statutes cited by Kern are similar to those in place when *Blair* was decided. That is, at the time of *Blair*, Colorado statutes referred to a fine as a sentence in some contexts. Section 16-11-101(1)(e), C.R.S. 1978 — titled "Alternatives in sentencing" — provided that a defendant "may be sentenced to the payment of a fine or to a term of imprisonment or to both a term of imprisonment and the payment of a fine." In addition, article 11, part 5 of the Code of Criminal Procedure governed "Sentences to Payment of Fines — Costs" and required courts to issue judgments

against offenders for any fines imposed. § 16-11-501, C.R.S. 1978. Notwithstanding those provisions, the *Blair* court held that the concurrent sentencing requirement of section 18-1-408(3) does not apply to fines. Because Colorado law after *Blair* has not changed as dramatically as Kern contends, we may not use those changes as reason to ignore *Blair*.

¶ 45 Second, we disagree with Kern's suggestion that the supreme court in *People v. Turner*, 644 P.2d 951 (Colo. 1982), overruled *Blair*. In *Turner*, *id.* at 954, the supreme court held that probation was a sentence within the meaning of former section 16-7-403(2), C.R.S. 1973 (1978 Repl. Vol. 8), and thus a trial court could grant a defendant probation upon the revocation of a deferred judgment and sentence. Along the way, the supreme court also said in dicta that one "form[] of punishment" authorized by Colorado statute was "a sentence to the payment of a fine." *Turner*, 644 P.2d at 953 (citing §§ 16-11-101(1)(e), -502, C.R.S. 1973 (1978 Repl. Vol. 8 and 1981 Supp.)). As noted, the fine-related statutes cited in *Turner* were in place when *Blair* was decided but did not affect the *Blair* court's interpretation of section 18-1-408(3). Because *Turner* did

not mention *Blair* or apply section 18-1-408(3), we cannot conclude that the *Turner* dicta effectively overruled *Blair*.

¶ 46 Third, Kern's reliance on United States Supreme Court cases is misplaced. In *Southern Union Co. v. United States*, 567 U.S. 343, 349-50 (2012), the Court held that the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to fines. Therefore, the Sixth Amendment right to a jury trial generally requires a jury determination of any fact increasing a defendant's fine. *See also People v. Sandoval*, 2018 CO 21, ¶ 7. This holding was premised on the fact that a fine is punishment. *See S. Union Co.*, 567 U.S. at 349-50. Similarly, the Court has held that the Excessive Fines Clause of the Federal Constitution applies to the states, in part because a fine is punishment. *Timbs v. Indiana*, 586 U.S. ___, ___, 139 S. Ct. 682, 689 (2019). Kern does not dispute, however, that he was afforded a jury trial on all counts, nor does he claim that any fine here violates the Excessive Fines Clause. And the Court's decisions accord with the *Blair* court's recognition that fines are a form of punishment.

¶ 47 Equally important, the Court's holdings about a defendant's rights under the Federal Constitution have little bearing (if any) on

the meaning of section 18-1-408(3), a question of state law. Nothing in the cases cited by Kern indicates that the Federal Constitution requires our legislature to treat a fine the same as a prison sentence for purposes of the concurrent sentencing doctrine. Moreover, double jeopardy principles "do not prevent the General Assembly from specifying multiple punishments based on the same criminal conduct." *Reyna-Abarca*, ¶ 49 (recognizing that the power to prescribe the punishments to be imposed on those found guilty of criminal offenses rests exclusively with the legislature). Finally, the decisions cited by Kern shed no light on what our legislature intended when it enacted section 18-1-408(3) decades earlier.

¶ 48 For all these reasons, we may not refuse to follow *Blair*. Therefore, imposing prison sentences on the counts of tampering with a motor vehicle as well as fines on the counts of throwing a missile at a vehicle and littering did not violate section 18-1-408(3).

VI. Conclusion

¶ 49 The judgment is affirmed.

JUDGE DAILEY and JUDGE GOMEZ concur.