People v French, S.

COLORADO COURT OF APPEALS

Court of Appeals Nos.: 04CA2383 & 05CA1328
Jefferson County District Court No. 01CR451
Honorable Jack W. Berryhill, Judge

The People of the State of Colorado,

Plaintiff-Appellee and Cross-Appellant,

v.

Scott Michael French and Cross-Appellee,

Defendant-Appellant.

JUDGMENT AFFIRMED, ORDER AFFIRMED IN PART, REVERSED IN PART, AND CASE REMANDED WITH DIRECTIONS

Division II
Opinion by: JUDGE BERNARD
Taubman and Roy, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: August 14, 2008

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Defendant, Scott Michael French, appeals the judgment entered on a jury verdict finding him guilty of one count of securities fraud and one count of computer crime. Defendant also appeals, and the prosecution cross-appeals, certain aspects of the trial court's restitution order.

We affirm defendant's conviction, affirm the restitution order in part and reverse it in part, and remand to the trial court to modify part of the restitution order.

I. Background

The following facts are undisputed. Defendant was the owner and manager of Pacific Ventures Incorporated (PVI) and several sub-offices, including Tri-State Investments (TSM), which were located in California. PVI and TSM were Independent Sales Offices (ISOs) for Capital Funding and Financial Group, Inc. (Capital Funding) which sold partnership interests in Kidztime TV Inc. (Kidztime), located in Colorado.

Kidztime was created by owners and associates of an affiliate of the Children's Cable Network (CCN). Kidztime was intended to provide non-violent television programming for children on various cable stations in different geographic locales throughout the United

States. Each Kidztime franchise was set up as an independent partnership, and partnership meetings were held via telephone conferences.

Capital Funding paid sales commissions to its ISOs, including PVI and TSM, for selling general partnership interests in Kidztime and CCN. The ISOs would contact Kidztime and Capital Funding with sales leads. People interested in becoming partners were then provided with a sales brochure which included information about the partnership and a partnership agreement. The brochure was known as the "green brochure." Computers were used as part of this process.

A typical investment was $10,000 for one partnership unit of one affiliate of Kidztime. A typical affiliate would raise $500,000-$750,000. Cable television programming would be leased, and programming would begin.

In 1997, one of the victims (the victim) contacted Dan McGrath (McGrath), who was a salesman for PVI and worked under defendant's supervision. The victim and his wife were interested in purchasing a partnership interest in Kidztime. McGrath told him that defendant would contact him. Defendant spoke with the victim

over the phone, and answered specific questions about Kidztime. McGrath then sent the victim the green brochure and the victim invested $10,000 in Kidztime.

Under the terms of the partnership agreement, approximately eighty-five percent of the money raised was dedicated to fundraising expenses and the costs of acquiring the programming. The remaining fifteen percent would serve as working capital for the affiliate.

The premise of the business model was that local affiliates would generate revenue through advertising, which would fund the ongoing costs of the programming and leasing access. However, very few advertisements were sold. Because of this, the affiliates quickly ran out of money and could not continue to pay the leased access costs. After the advertising plan failed, the operators of the organization attempted to conduct event-based marketing by sponsoring reading programs and then holding awards ceremonies in the hope that advertisers would pay to sponsor such an event. However, very little money was generated from the event-based marketing, and the affiliates ran out of money.

Defendant was one of fourteen codefendants charged in an eighty-five-count grand jury indictment. He was charged with one count of violating the Colorado Organized Crime Control Act (COCCA), three counts of securities fraud, one count of conspiracy to commit securities fraud, one count of computer crime, one count of employment of unlicensed sales representatives, and one count of transacting business as a broker without a license.

The prosecution filed an amended indictment, and later filed a second amended indictment. Defendant pled not guilty to the charges.

In March 2002, defendant filed a motion for a bill of particulars, alleging that the second amended indictment lacked sufficient information. The prosecution filed a bill of particulars, and later filed an amended bill of particulars, which included the evidence the prosecution intended to introduce at trial.

The prosecution dismissed the conspiracy count in October 2003.

Nine of the fourteen codefendants entered into plea agreements prior to trial. Defendant and the remaining codefendants were tried in 2004. The jury convicted defendant of

one count of securities fraud and one count of computer crime, and acquitted him of all other counts. Defendant was sentenced to twenty-four months work release, eight years probation, and two hundred hours of community service. The court also ordered defendant to pay $435,000 in restitution.

II. Grand Jury Indictment

Defendant contends the grand jury indictment lacked sufficient specificity with respect to the computer crime charge, and he was thus unable to ascertain which transactions and overt acts were attributed to him. We disagree.

A criminal indictment serves two purposes. First, it must give the defendant sufficient notice of the crime so that he or she may prepare a defense. Second, it must define the acts constituting the crime with sufficient particularity that the defendant may raise the indictment's resolution as a bar to any subsequent proceedings. These purposes are accomplished when the indictment states the essential facts that make up the offense. *People v. Tucker,* 631 P.2d 162, 163 (Colo. 1981).

Here, the elements of computer crime are established by section 18-5.5-102(1), C.R.S. 2007, which provides:

> (1) A person commits computer crime if the person knowingly: . . .
>
> > (b) Accesses any computer, computer network, or computer system or any part thereof for the purpose of devising or executing any scheme or artifice to defraud; or
> >
> > (c) Accesses any computer, computer network, or computer system, or any part thereof to obtain, by means of false or fraudulent pretenses, representations, or promises, money; property; services; passwords or similar information through which a computer, computer network, or computer system or any part thereof may be accessed; or other thing of value; or
> >
> > (d) Accesses any computer, computer network, or computer system, or any part thereof to commit theft . . . .

The amended indictment tracked the language of the statute, adding pertinent facts, including the names of the victims, when the crime occurred, and the purposes for which the computer was used. It described the means by which the offense could be committed. Thus, we conclude the indictment was sufficient, because section 16-5-201, C.R.S. 2007, states:

> Every indictment . . . shall be deemed sufficient technically and correct which states the offense in the terms or language of the statute defining it . . . . [The indictment shall

> include] the name of the person charged, and the time and place of committing the same, with reasonable certainty. . . .

As charged, the second amended indictment provided defendant with adequate notice of the crime he faced to enable him to prepare a defense; and it was charged with sufficient particularity that defendant will be able to raise his conviction as a bar to any subsequent proceedings.

III. Motions for Separate Trial

Defendant contends the trial court erred in failing to grant his motions for severance. We disagree.

As is pertinent here, defendant filed three motions requesting that the trial court sever his trial from that of his codefendants. The trial court denied each of them.

If a defendant is not entitled to a severance as a matter of right, a motion for severance is addressed to the sound discretion of the trial court, whose decision will be affirmed absent a showing of abuse of discretion and actual prejudice to the moving party. *People v. Johnson*, 30 P.3d 718, 725 (Colo. App. 2000).

Factors to be considered in determining whether denial of a severance constitutes an abuse of discretion include: (1) whether

the number of defendants or the complexity of evidence is such that the jury will confuse the evidence and the law applicable to each defendant; (2) whether, despite admonitory instructions, evidence admissible against one defendant will improperly be considered against another; and (3) whether defenses are antagonistic. *Id.* at 725-26.

Considering these factors, we conclude the trial court's denial of a severance was not an abuse of discretion. First, we disagree with defendant's contention that the case was too complicated for defendant to be tried with the codefendants. Although the case was complex, the jury was instructed to consider the evidence against each defendant separately. There is a strong presumption that the jury followed the trial court's instructions. *People v. Moody*, 676 P.2d 691, 697 (Colo. 1984); *People v. Lesh*, 668 P.2d 1362, 1365 (Colo. 1983). That the jury was able to do so is evidenced by its decision to acquit defendant of certain charges and convict him of others, and to convict each of the defendants of different crimes. We cannot say the trial court abused its discretion in finding the jury would follow its limiting instructions.

Second, the defenses were not antagonistic. Defenses are not antagonistic where they do not specifically contradict each other. *Johnson*, 30 P.3d at 726.

> Where joint defendants merely deny participation in the crime and do not present evidence or testimony that the other defendant solely responsible, mere arguments of counsel suggesting that other defendants were responsible for the crime does not establish the existence of antagonistic defenses.

Id.

Defendant and his codefendants denied participation in the crime, but they did not present evidence or testimony that the others were solely responsible. *See id.* Thus, this case is distinguishable from *Eder v. People*, 179 Colo. 122, 124-25, 498 P.2d 945, 946 (1972), on which defendant relies, in which each defendant claimed that the drugs at issue belonged not to him, but to the other.

Finally, we reject defendant's contention that the codefendants might have testified on his behalf had they not been tried together as speculative. There is no basis in the record for concluding the codefendants would have been willing to testify for defendant or that such testimony would have been exculpatory.

Accordingly, we find the trial court did not abuse its discretion or cause actual prejudice to defendant by denying his motions for separate trial.

IV. Mistake of Law Defense

Defendant next contends the trial court erred by striking his motion to present a mistake of law defense and by rejecting his proposed jury instruction on this defense. We are not persuaded.

We review a trial court's decision to strike an affirmative defense, such as mistake of law, de novo. *People v. Renander*, 151 P.3d 657, 659 (Colo. App. 2006).

A mistake of law defense relates to the mistaken belief that conduct does not, as a matter of law, constitute a criminal offense. *People v. Lesslie*, 24 P.3d 22, 25 (Colo. App. 2000). Such mistaken belief is not a defense unless the conduct is permitted by a statute or ordinance binding in Colorado; an administrative regulation, order, or grant of permission by an official authorized or empowered to make such a grant; or an official written interpretation of the statute or law relating to the offense, made by a public servant empowered with the responsibility of administering, enforcing, or interpreting the law. § 18-1-504(2)(a)-(c), C.R.S. 2007; *Lesslie*, 24

P.3d at 25. If such interpretation is by judicial decision, it must be binding in the State of Colorado. § 18-1-504(2)(c).

Here, defendant contends that he was entitled to a mistake of law instruction because, based on opinions rendered by district court judges in Colorado, he reasonably believed that the partnership interests he was selling were not subject to regulation as securities. We disagree for two reasons.

First, proof of knowledge that an investment is a security is not required for a conviction of willful securities fraud. *People v. Rivera*, 56 P.3d 1155, 1162-63 (Colo. App. 2002). Accordingly, defendant was not entitled to raise the defense of mistake of law on this issue. *See Lesslie*, 24 P.3d at 25.

Second, the decisions upon which defendant relies were district court cases. Although a final district court order binds the parties, *People v. Grangruth*, 990 P.2d 697, 699 (Colo. 1999), it does not bind other district courts, this court, or the supreme court. *See State v. Pena*, 911 P.2d 48, 56-57 (Colo. 1996). Thus, because neither defendant, Kidztime, nor CCN was a party to the district court cases in which the orders were written, those orders did not

satisfy the express statutory condition contained in section 18-1-504(2)(c) that the judicial interpretation be binding in Colorado.

V. Business Records

Defendant contends the trial court erred in admitting two exhibits because they were not properly authenticated as self-authenticating business records under CRE 902(11). We disagree.

Whether a proper foundation has been established is a matter within the sound discretion of the trial court, whose decision will not be disturbed absent a clear abuse of that discretion. *People v. Huehn*, 53 P.3d 733, 736 (Colo. App. 2002).

Authentication of a document is a condition precedent to its admissibility, and this condition is satisfied by a showing that the document is what the proponent claims it to be. CRE 901(a); *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612, 617 (Colo. App. 2003). A business record is self-authenticating when: (1) the record would be admissible under CRE 803(6); (2) the record is accompanied by an affidavit of its custodian or other qualified person certifying that the record was made by a person with knowledge, in the course of regularly conducted activity; and (3) it

was the regular practice of the party to make such a record. CRE 902(11); *Henderson*, 70 P.3d at 617.

CRE 803(6) authorizes the admission of business records made by

> a person with knowledge, if [the records are] kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with [CRE] 902(11).

Fed. R. Evid. 803(6) is identical to CRE 803(6). Thus, when interpreting our rule, we may look for guidance to cases interpreting the federal counterpart. *See Lannon v. Taco Bell, Inc.*, 708 P.2d 1370, 1374 (Colo. App. 1985), *aff'd*, 744 P.2d 43 (Colo. 1987).

In *FDIC v. Staudinger*, 797 F.2d 908, 910 (10th Cir. 1986), the Court of Appeals concluded that Fed. R. Evid. 803(6) did not require the party offering a business record to produce the record's author. Rather, a foundation for the business record hearsay exception may be established by anyone who demonstrates sufficient knowledge of the record keeping system that produced the document.

Here, the office manager of Capital Funding satisfied this requirement through his affidavit, in which he stated he was competent to testify about the business records at Capital Funding. In his capacity as an office manager, he kept the books, supervised the payroll, and was familiar with business records.

A securities investigator obtained records from Capital Funding's custodian of records using a subpoena. The investigator's affidavit stated the records he received were business records kept in the ordinary course of business because he was told that the records were kept in connection with Capital Funding and Kidztime. *See United States v. Lawrence*, 934 F.2d 868, 870-72 (7th Cir. 1991)(records were sufficiently authenticated when defendants admitted to investigators that their businesses had made the records, the records were produced in response to the government's subpoenas, and the records were identified by the investigators).

Thus, we conclude that the trial court did not abuse its discretion by admitting the exhibits containing the business records.

VI. Other State Actions

Next, defendant contends the trial court should have excluded, under CRE 404(b), the prosecution's evidence that other states had commenced enforcement actions against Kidtztime and Capital Funding, because such testimony was inadmissible character evidence. We are not persuaded.

Trial courts are accorded considerable discretion in deciding questions concerning the admissibility of evidence. *People v. Ibarra*, 849 P.2d 33, 38 (Colo. 1993). Absent an abuse of discretion, a trial court's evidentiary rulings will be affirmed. To show an abuse of discretion, an appellant must establish that, under the circumstances, the trial court's decision to admit the evidence was manifestly arbitrary, unreasonable, or unfair. *Id.*

CRE 404(b) provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Here, the prosecution submitted a summary of actions taken by securities commissions in other states against Kidztime, Capital Funding, and the ISOs, including cease and desist orders.

This evidence was admissible under CRE 404(b) because it showed defendant had knowledge of actions taken against Kidztime, but failed to disclose such actions to its potential investors.

The evidence was also admissible to show defendant's plan in defrauding investors. At trial, the CEO of Kidztime and Capital Funding testified that employees were instructed not to contact customers in states in which cease and desist orders had been entered. This testimony supported the inference that defendant was aware that the activity in which he was engaged was illegal.

Accordingly, we conclude that the trial court did not abuse its discretion when it admitted evidence of the enforcement actions in other states.

VII. Inconsistent Verdicts

Defendant contends his conviction for count sixty-four should be reversed because it is inconsistent with his acquittal of count two. We disagree.

In *People v. Frye*, 898 P.2d 559, 570 (Colo. 1995), our supreme court adopted the following rule:

> [C]onsistency among verdicts on several counts of an indictment or information is unnecessary where a defendant is convicted on

> one or more counts but acquitted on others. As long as sufficient evidence supports each of the guilty verdicts, state courts generally have upheld such convictions irrespective of their rational incompatibility with the acquittals.

Here, the two crimes at issue are composed of different elements. Defendant was acquitted of count two, securities fraud under section 11-51-501(1)(c), C.R.S. 2007. That statute states:

> It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly: . . . To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

He was convicted of count sixty-four, securities fraud under section 11-51-501(1)(b), C.R.S. 2007. That statute states:

> It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly: . . . To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

We reject defendant's argument that, because the evidence supporting counts two and sixty-four is identical – sale of securities to the victim – his conviction under count sixty-four is logically inconsistent with his acquittal under count two.

> [V]erdicts are not inconsistent where each offense involved separate and distinct elements, even where the same evidence was used to support each charge, for a jury could find "from the very same evidence that the element of one crime was present while at the same time finding that the elements of another charged crime [were] absent."

Frye, 898 P.2d at 568 (quoting *People v. Mayfield*, 184 Colo. 399, 403, 520 P.2d 748, 750 (1974)). Relying on this precedent, we conclude that defendant's conviction for count sixty-four should not be reversed because he was acquitted of count two.

VIII. Motions for Judgment of Acquittal

Defendant contends the trial court erred by denying his mid-trial and post-trial motions for judgment of acquittal. Defendant argues the prosecution failed to provide sufficient evidence to convict him of computer crime and securities fraud, and his motions should therefore been granted. We disagree.

The trial court's ruling on a motion for judgment of acquittal will not be disturbed absent an abuse of discretion. *People v. Manzanares*, 942 P.2d 1235, 1238 (Colo. App. 1996).

When reviewing a ruling on a motion for judgment of acquittal, we are to determine whether the relevant evidence, both direct and

circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is sufficient to support the conclusion by a reasonable person that the defendant is guilty of the charged offense beyond a reasonable doubt. *People v. Widhalm*, 991 P.2d 291, 294 (Colo. App. 1999).

If the motion is made after entry of a guilty verdict or on appeal as a challenge to the sufficiency of the evidence supporting the jury's verdict, the court must defer to the jury's credibility determinations and its resolution of conflicting evidence. *People v. Ramirez*, 30 P.3d 807, 808-09 (Colo. App. 2001).

In *People v. Blair*, 195 Colo. 462, 477, 579 P.2d 1133, 1144-45 (1979), our supreme court evaluated the quantum of evidence necessary to establish that a defendant indirectly made an untrue statement of material fact in a securities fraud prosecution:

> There are, of course, limits as to how much connection with the transaction is necessary to constitute "indirectly" making a misrepresentation. Where, however, there is evidence, such as is present in this case, of a general mode of doing business over which the defendant has strong overall control, it is not difficult to find that the defendant indirectly makes those representations which are conveyed by his sales representatives. This is especially true where there is evidence that the

> defendant, as here, both fails to disclose and makes affirmative misrepresentations to those salesmen.

Here, the evidence, viewed in a light most favorable to the prosecution, shows that defendant had control over PVI, and PVI employed Dan McGrath, who sold a partnership share in Kidztime to the victim. The victim testified that he spoke with defendant over the phone about purchasing a general partnership in Kidztime. Defendant answered specific questions about the company, spoke in positive terms about the nature of the investment, and informed the victim that McGrath would contact him to finalize the investment.

The evidence shows that, in his professional capacity, defendant had apparent and implied authority over the sale of partnership shares to investors. The evidence establishes defendant knowingly conducted and participated in the Kidztime enterprise, thus using other persons to engage in the pattern of securities fraud. It was reasonable for the jury to infer from such evidence, that defendant made untrue statements of material fact to the victim regarding the sale of Kidztime partnership interests in

violation of the section of the securities fraud statute under which he was convicted, section 11-51-501(1)(b). *Id.*

The evidence also shows that a jury could have concluded that defendant unlawfully used a computer or computer system for the purpose of committing securities fraud. Capital Funding's office manager testified that computers were used to communicate with actual and prospective investors. Computers were also used in communications between Capital Funding and the various ISOs that defendant managed.

The office manager testified that lists of potential investors were sent to her using Capital Funding's computer system. She would then send the potential investors the green brochure. Defendant received a commission from sales generated as a result of these contacts. Thus, it was reasonable for the jury to infer from such evidence that defendant committed computer crime in violation of section 18-5.5-102(1), C.R.S. 2007.

IX. Jury Instructions

Defendant next argues the trial court improperly defined a security interest in the jury instructions. We disagree.

A trial court has discretion to determine the form and style of the instructions to be given to the jury. *Williams v. Chrysler Ins. Co.*, 928 P.2d 1375, 1377 (Colo. App. 1996). An appellate court will not overturn a trial court's decision on a jury instruction absent an abuse of discretion, which occurs when the trial court's decision is manifestly arbitrary, unreasonable, or unfair. *Id.*

The trial court has a duty to instruct the jury correctly on all matters of law for which there is sufficient evidence to support giving an instruction. *Cassels v. People*, 92 P.3d 951, 955 (Colo. 2004).

Here, the trial court rejected defendant's tendered jury instruction on the definition of a security interest. Instead, the trial court provided the jury an instruction containing the statutory definitions of "investment contract" and "security." The instruction also stated:

> The fact that an investment takes the form of a general partnership does not necessarily mean that it is not a security. . . . The determination of whether a general partnership is an investment contract, and therefore a security, is to be made on the basis of substance, or economic reality of the transaction, not form; and such determination must be made beyond a reasonable doubt.

An instruction that tracks the language of the relevant statute is ordinarily sufficient. *People v. Goldfuss*, 98 P.3d 935, 939 (Colo. App. 2004). We do not agree with defendant that reversal is required here because the trial court did not also give his tendered instruction, which stated: "During the relevant time periods in this case, there was a strong presumption that an interest in a general partnership was not a security under the Colorado Securities Act."

The jury instruction read to the jury properly tracked the language of the relevant statute. Thus, we conclude the court properly instructed the jury regarding the definition of a security. *See Joseph v. Viatica Mgmt., LLC*, 55 P.3d 264, 266 (Colo. App. 2002); *Griffin v. Jackson*, 759 P.2d 839, 842 (Colo. App. 1988)("[W]hether a particular transaction involves a security depends not on the name or form of the instrument, but on the substantive economic realities underlying the transaction.").

X. Expert Testimony

Defendant contends his due process rights were violated because the trial court did not require the prosecution's expert witness, a professor, to answer specific questions asked by defense

counsel, and because the expert's testimony improperly impinged upon the court's responsibility to instruct the jury about the law. We are not persuaded.

A. Responses to Questions

Our review of the record indicates that the expert answered all of defense counsel's questions, and did not refuse to answer any of them, although, at several points, the expert indicated he did not understand a question. Defendant did not raise an objection with the court that any of the expert's answers were not responsive to his questions during the expert's testimony. *See People v. Abbott*, 690 P.2d 1263, 1269 (Colo. 1984) (when a defendant believes he or she is prejudiced by an unresponsive answer, the defendant must object, move to strike it, or request the court to instruct the jury to disregard it). Thus, we examine defendant's claim to determine whether this was plain error, meaning error that "so undermined the fundamental fairness of the trial itself . . . as to cast serious doubt on the reliability of the judgment of conviction." *People v. Miller*, 113 P.3d 743, 749-50 (Colo. 2005) (quoting *People v. Sepulveda*, 65 P.3d 1002, 1006 (Colo. 2003)).

To the extent any of the expert's answers may not have been responsive to particular questions, we conclude that such unresponsiveness did not undermine the trial's fairness to the point that serious doubt is cast on the conviction's reliability.

B. Admissibility of Testimony

Trial courts are vested with broad discretion to determine the admissibility of expert testimony. *People v. Ramirez*, 155 P.3d 371, 380 (Colo. 2007). This deference reflects the superior opportunity of the trial judge to gauge both the competence of the expert and the extent to which the opinion would be helpful. *Id.* As such, a trial court's exercise of its discretion will not be overturned unless manifestly erroneous. *City of Aurora ex rel. Utility Enterprise v. Colo. State Engineer*, 105 P.3d 595, 612 (Colo. 2005).

Here, the professor testified to the definition of a security, and he answered questions regarding when a general partnership interest may be deemed a security interest. Divisions of this court have held that, in securities fraud cases, a trial court does not err by permitting an expert witness to testify on an ultimate issue of fact for the jury as to what constitutes a security interest. *See, e.g.*, *People v. Pahl*, 169 P.3d 169, 182 (Colo. App. 2006); *People v.*

Prendergast, 87 P.3d 175, 182-83 (Colo. App. 2003); *Rivera*, 56 P.3d at 1163-64.

In addition, the court instructed the jury that it was not bound by expert testimony, and the jury was free to reject witness's opinions. *See Rivera*, 56 P.3d at 1164 (whatever an expert or lay witness opines with respect to an ultimate issue, the jury retains its authority to determine the facts from the evidence and accept or reject the opinion).

We recognize that expert testimony may impermissibly usurp the trial court's or the jury's roles when expressing opinions. *See Pahl*, 169 P.3d at 181-82. However, the professor's testimony here did not cross that line, particularly because the expert testified that the jury, not the expert, was ultimately responsible for deciding whether the partnership interests were securities.

XI. Alleged Jury Misconduct

Defendant contends the trial court erred in denying his motion for mistrial based on jury misconduct, which occurred when a juror spoke with a prosecution witness outside of the courtroom. We are not persuaded.

A new trial is required "where there is a reasonable possibility that the verdict was tainted by the introduction of outside information or influences into the jury deliberations." *Wiser v. People*, 732 P.2d 1139, 1143 (Colo. 1987). The question whether there exists a reasonable possibility that extraneous communications with a jury influenced its verdict is a matter of law, which we review de novo. *People v. Martinez*, 70 P.3d 474, 476 (Colo. 2003).

A jury's use of insignificant extraneous information does not require reversal. *People v. Whitman*, ___ P.3d ___, ___ (Colo. App. No. 04CA1428, Nov. 29, 2007). If the extraneous information is prejudicial to the defendant, there is reversible error. *People v. Wadle*, 77 P.3d 764, 766 (Colo. App. 2003), *aff'd*, 97 P.3d 932 (Colo. 2004). If the extraneous information would not have resulted in prejudice to the defendant, the conviction will be upheld. *Wiser*, 732 P.2d at 1143.

We conclude there is no reasonable possibility that the interaction between the alternate juror and the prosecution's witness had any effect on the verdict. They conversed in the parking lot about the witness's heart bypass surgery. Both

submitted affidavits that stated their conversation was unrelated to the trial, and did not extend beyond the parking lot. Further, the alternate juror did not participate in deliberations, and therefore could not have influenced the outcome of the jury verdict.

XII. Restitution Amount

Defendant contends the restitution amount should not have exceeded $18,000. On cross-appeal, the prosecution contends the trial court abused it discretion when it awarded restitution in the amount of $435,000, as opposed to the full amount of restitution owed to the victims. We disagree with both contentions.

A trial court's decision fixing the amount of restitution will not be disturbed if it is supported by the record. *People v. Rivera*, 968 P.2d 1061, 1068 (Colo. App. 1997).

Section 18-1.3-205, C.R.S. 2007, provides that the trial court is required, as a condition of every sentence to probation, to order the defendant to "make full restitution" pursuant to the provisions of sections 18-1.3-601 to -103 and 16-18.5-101 to -110, C.R.S. 2007.

"Restitution," as defined in section 18-1.3-602(3)(a), C.R.S. 2007, is "any pecuniary loss suffered by a victim . . . [that is]

proximately caused by an offender's conduct and that can be reasonably calculated and recompensed in money."

The term "victim" is defined in section 18-1.3-602(4)(a), C.R.S. 2007, as "any person aggrieved by the conduct of an offender."

Section 18-1.3-205 requires trial courts to impose mandatory restitution payments for the benefit of the party immediately and directly aggrieved by a defendant who is convicted of a criminal act. *People v. Borquez*, 814 P.2d 382, 384 (Colo. 1991). Such payments are based on the actual, pecuniary damages sustained by the victim. *Id.* "'Payment of restitution is authorized only as to the victim of a defendant's conduct, and only for the actual pecuniary damage the victim sustained as the direct result of the defendant's conduct.'" *Id.* (quoting *People v. Deadmond*, 683 P.2d 763, 774 (Colo. 1984)).

A. Defendant's Contention

We do not agree with defendant's argument that the restitution amount was erroneous because it included victims' losses for which he was not directly responsible. If a victim sustains damages as a result of the defendant's conduct, the damages are recoverable regardless of whether the victim was

named in the indictment. *People v. Lunsford*, 43 P.3d 629, 630-31 (Colo. App. 2001).

Here, the evidence showed that defendant had authority over PSI and TVM, which were responsible for fraudulent sales of security interests. The trial court's restitution order concerned the victims who suffered losses investing their money through PSI or TVM.

B. Prosecution's Contention

However, we are also not persuaded by the prosecution's argument that defendant should have been required to pay the full amount of losses sustained by every Colorado victim.

The evidence presented at trial established that there were Colorado victims who had invested in Kidztime through affiliates other than PVI or TSM, which defendant neither managed nor controlled.

Accordingly, we conclude that the trial court did not err by ordering restitution of $435,000 based only on the victims who were directly and indirectly affected by defendant's authority and actions associated with PVI and TSM.

XIII. Joint and Several Liability

On cross-appeal, the prosecution contends that the trial court erred by failing to order defendant and codefendants Bruce Robb and Wesley Craig Nelson to be jointly and severally liable for the entire restitution amount. We disagree.

Section 18-1.3-603(5), C.R.S. 2007, states: "If more than one defendant owes restitution to the *same* victim for the same pecuniary loss, the orders for restitution shall be joint and several obligations of the defendants." (Emphasis supplied.)

Here, the trial court directed defendant and his codefendants to pay restitution to different victims. These obligations did not overlap among victims. Accordingly, the defendants were not jointly and severally liable.

XIV. Collection of Restitution

On cross-appeal, the prosecution contends the trial court erred by ordering that the court's clerk forward collected restitution funds to the Attorney General's office to distribute pro rata to victims. We agree.

Section 18-1.3-602(1), C.R.S. 2007, defines a "collections investigator," or a person who collects court-ordered restitution from defendants, as

> a person employed by the judicial department whose primary responsibility is to administer, enforce, and collect on court orders or judgments entered with respect to fines, fees, restitution, or any other accounts receivable of the court, judicial district, or judicial department.

See also §§ 16-18.5-104, -105, C.R.S. 2007 (initial collections investigation and monitoring).

The Attorney General's Office is not part of the judicial department. *Compare* Colo. Const. art. IV, § 1 (attorney general is a member of the executive department), *with* Colo. Const. art. IV, § 1 (vestment of judicial power). Thus, the trial court erred by requiring the office of the Attorney General to assume the duties of an employee of the judicial department. *See* Colo. Const. art. III ("[N]o person . . . charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others . . . .").

We therefore reverse the trial court's order requiring the Attorney General to bear the responsibility of distributing the restitution monies among the victims, and remand to the trial court to require the collections investigator and the court's clerk to perform this task.

The judgment is affirmed. The trial court's restitution order is reversed to the extent it sends the restitution funds to the Attorney General for distribution, the order is otherwise affirmed, and the case is remanded to the trial court to modify the order as directed.

JUDGE TAUBMAN and JUDGE ROY concur.