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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; Weld District Court; Honorable Shannon Lyons; and Case Number 2011CR1341	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant JARED COWEN	
Douglas K. Wilson, Colorado State Public Defender JULIA CHAMBERLIN 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1400 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #47181	Case Number: 2014CA2354

OPENING BRIEF OF DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 7,922 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Defendant-Appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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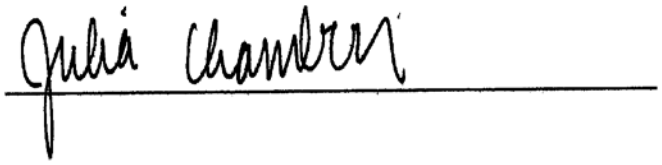

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2. Whether the trial court erred when it refused to instruct the jury that Mr. Cowen's affirmative defense must be evaluated under a subjective standard.
3. Whether the trial court reversibly erred in giving the prosecutor's tendered instruction when it was irrelevant, misleading, and lowered the prosecutor's burden of disproving Mr. Cowen's affirmative defense.

STATEMENT OF THE CASE

On September 1, 2011, the prosecutor charged Jared Cowen by Complaint and Information with two counts of fraud by check[1] for $9,327.65 (Count 1) and $13,158.00 (Count 2). CF, pp. 1-2, 290-91.

On February 26, 2014, Mr. Cowen endorsed mistake of fact as an affirmative defense. *Id.* at 141-42. On October 6, 2014, Mr. Cowen's four-day trial commenced. On October 9, 2014, the jury found Mr. Cowen guilty of Count 1 and acquitted him of Count 2. *Id.* at 290-91; R. Tr. 10/9/14, p. 81. On October 20, 2014, the prosecutor filed a notice of restitution for $22,485.65, which included the $13,158 charged in

[1] § 18-5-205(2),(3)(c), C.R.S. (F6).

Count 2. CF, pp. 294-96. Mr. Cowen objected. *Id.* at 301. After a joint restitution and sentencing hearing on October 24, 2014, the trial court imposed three years of supervised probation and $22,485.65 of restitution. R. Tr. 10/24/14, pp. 46-48.

STATEMENT OF THE FACTS

Mr. Cowen—owner of J&S Trucking—noticed his semi-truck smoking and "pushing" fluid while delivering a load of Subway bread. R. Tr. 10/8/14, pp. 122-23. On April 26, 2011, he brought his truck to Elite Diesel for a diagnostic and cost estimate. *Id.* at 125-27. Elite Diesel believed that they could finish the repairs in a week and it would cost approximately $19,000. *Id.* at 125-26.

About a week later, Elite Diesel notified Mr. Cowen that they needed to replace the truck's lower counter board. *Id.* at 128. Mr. Cowen researched the cost of this repair—and finding it only cost about $1,400—authorized it. *Id.* at 127, 183-84. Although Elite Diesel originally said that they could complete the truck's repairs in a week, the job stretched throughout most of May. *Id.* at 127. Shortly before Mr. Cowen picked up his truck, Elite Diesel informed him they performed an out-of-frame overhaul on his truck and the repair cost nearly doubled from $19,000 to over $37,000. *Id.* at 127-28. An average engine overhaul costs roughly $25,000 to $26,000. R. Tr. 10/7/14, p. 17. Elite Diesel "called and told [Mr. Cowen] that there was an AR on the motor and they had to strip it and do all sorts of stuff that [he] never heard

anybody ever doing." R. Tr. 10/8/14, p. 128. When Mr. Cowen learned the cost of repairs he "had to kick-start [his] heart." *Id.*

Despite the dramatic increase in repair cost, Elite Diesel refused to permit Mr. Cowen to set-up a payment plan even though Mr. Cowen and his brother, Ryan Cowen ("Ryan"), had previously done business with Elite Diesel without any payment problems. *Id.* at 133-34; R. Tr. 10/7/14, p. 61. Holly Lake, co-owner of Elite Diesel, issued Mr. Cowen an ultimatum; he either had to pay in full by noon on May 27, 2011, or she would remove the truck's engine. R. Tr. 10/8/14, pp. 134, 141; 10/7/14, p. 82.

Mr. Cowen quickly arranged financing, and borrowed $15,000 from Ryan and $13,158 from Landmark Financial. R. Tr. 10/8/14, pp. 133, 139, 153. Mr. Cowen paid the remainder of the repair cost—$9,327—from J&S Trucking's bank account. *Id.* at 154-55. Accordingly, Landmark Financial emailed Samara Weidner ("Weidner"), an employee of Elite Diesel, for a payment invoice on May 26, 2011. R. Tr. 10/7/14, pp. 62, 203. Ryan also accompanied Mr. Cowen to Elite Diesel on May 27, 2011, with $15,000 in cash. R. Tr. 10/8/14, pp. 46, 69-70.

On May 27, 2011, Mr. Cowen and Ryan drove to Elite Diesel from Colorado Springs and arrived after four p.m. *Id.* at 142. Mr. Cowen briefly surveyed the truck with Troy Lake ("Troy"), co-owner of Elite Diesel, and started the truck's engine. *Id.* at 142-43, 143. While Mr. Cowen did not notice anything unusual, Troy informed Mr.

Cowen about a problem with the truck's power steering and requested that he leave the truck for further repairs. *Id.* at 144. Mr. Cowen remarked, "[t]he truck wasn't completed is what was said, and they wanted me to pay for it and leave it there. And that is what kind of gave my brother the eerie feeling." *Id.* Mr. Cowen elected to repair this issue on his own. *Id.*

Ryan became increasingly suspicious about the repair work and told Mr. Cowen: "I don't know if we should do this. I don't – something is not right." *Id.* at 146. Mr. Cowen dismissed Ryan's suspicions, stating: "I trust [Elite Diesel]." *Id.* at 146-47. Mr. Cowen handed Weidner two checks: one for $13,158 and the other check for $9,327. *Id.* at 148; R. Ex. 1-2, pp. 1-2. While Ryan brought $15,000 in cash, he instead wrote a $15,000 check to leave a "paper trail." R. Tr. 10/8/14, p. 139.

Mr. Cowen and Weidner discussed the truck's payment, and Mr. Cowen informed her "[t]hat money won't be transferred until after the holiday, and it'd give me time to put money in it, but there is not money in [J&S Trucking's] bank account." *Id.* at 147. Mr. Cowen told Weidner he could pay for the repair costs in numerous separate T-Cheks[2] or she could wait for him to deposit the T-Cheks into J&S Trucking's bank account. *Id.* Although Weidner disputed it, Mr. Cowen testified that

[2] T-Cheks are a common way for truck drivers to be paid, as they have a code for certified funds and can be deposited like checks. R. Tr. 10/8/14, p. 57; R. Ex. A, pp. 14-15.

Weidner agreed to receive the payment in one check, and to deposit the checks on Thursday "just to make for sure." *Id.* at 147, 157, 245. Contrary to Weidner's testimony, she sent Landmark Financial an invoice for payment on May 31, 2011, or four days after speaking with Mr. Cowen. R. Tr. 10/7/14, pp. 62-63.

On the drive home, Mr. Cowen's truck broke down: "it started to roar pretty good and it started shimmying and the clutch started moving in and out and it just didn't feel right." R. Tr. 10/8/14, p. 162. Besides the issues with the truck's power steering, the mechanic failed to set the clutch properly and the engine was missing safety bolts. *Id.* at 64-65, 72, 145-46. Ryan informed Troy of the problems, and Troy said he would examine the truck but he never promised to fix it. *Id.* at 66, 74. The mechanic who repaired Mr. Cowen's truck no longer works at Elite Diesel. R. Tr. 10/7/14, pp. 54-55.

Because the estimated repair costs almost doubled and the truck still did not function properly, Mr. Cowen "thought it was in the best interest of [his] company to stop payment [on both the $13,158 and $9,327 checks] until it was fixed." R. Tr. 10/8/14, p. 165; R. Ex. 4, p. 13. He also sent Elite Diesel a letter detailing his complaints. R. Tr. 10/8/14, pp. 165-66. Mr. Cowen cancelled a job the next week because he did not feel comfortable with the truck's condition. *Id.* at 164-65.

After Mr. Cowen picked up the truck, Gary Novotny ("Gary")—who Mr. Cowen purchased the truck from—repossessed the truck for late payments. *Id.* at 100. Gary then called Landmark Financial and informed them he had repossessed the truck, and Landmark Financial halted the loan process. R. Tr. 10/7/14, pp. 167-68. However, Mr. Cowen did not know that Gary repossessed his truck because Gary, without notice, trespassed on his property and seized the truck. *Id.* at 210; R. Tr. 10/8/14, p. 166. Mr. Cowen did not issue the stop order on the checks because of the truck's repossession. R. Tr. 10/8/14, p. 167. Elite Diesel filed a police report against Mr. Cowen on June 2, 2011. R. Tr. 10/7/14, p. 232.

SUMMARY OF THE ARGUMENT

1. A trial court cannot impose restitution as a condition of probation for losses that did not result from the defendant's criminal conduct. The purpose of restitution is to make a victim of criminal conduct whole, and it cannot serve as a substitute for civil damages. Here, the trial court reversibly erred when it imposed restitution on an acquitted charge where the jury found that Mr. Cowen did not intend to defraud Elite Diesel. As the jury found that Mr. Cowen committed no criminal act in Count 2, the trial court's imposition of restitution for this acquitted count constituted a gross abuse of discretion and must be reversed.

2. A trial court must instruct the jury on all matters of the law. If a defendant tenders an instruction embodying his theory of the case, the court must give it if the record contains any evidence to support the theory. Here, the trial court failed to give Mr. Cowen's instruction that informed the jury they should evaluate his affirmative defense under the subjective standard rather than reasonable person standard. As Mr. Cowen presented evidence to support this instruction and it was a correct statement of the law, the trial court reversibly erred when it failed to instruct the jury accordingly.
3. A trial court should not give instructions that are irrelevant, that emphasize certain evidence, and that are misleading and diverting to the jury. The court must decide which issues of law have been raised by the evidence, and the jury should only resolve factual disputes. Here, the trial court gave a permissive inference instruction telling the jury to consider whether Mr. Cowen had knowledge of insufficient funds in his account. As this evidence was undisputed, and therefore irrelevant, misleading, and diverting, the trial court reversibly erred.

ARGUMENT

I. The trial court reversibly erred when it required Mr. Cowen to pay restitution on an acquitted charge as a condition of his probation, when this restitution was not caused by Mr. Cowen's criminal conduct.

a. Standard of Review

The prosecutor filed a notice of restitution, and defense counsel objected. CF, pp. 294-301. After holding a hearing on the matter, the trial court granted the prosecutor's full amount of restitution. R. Tr. 10/24/14, pp. 32, 48.

The trial court has broad discretion in determining the terms and conditions of restitution. *People v. Pagan*, 165 P.3d 724, 729 (Colo. App. 2006). A trial court's restitution order will be reversed on appeal if it abused its discretion. *People v. Montanez*, 300 P.3d 940, 942 (Colo. App. 2012). If the trial court misconstrues the law then it "necessarily abuse[s] its discretion." *People v. Wadle*, 97 P.3d 932 (Colo. 2004).

b. Relevant Facts

After trial, the jury acquitted Mr. Cowen of Count 2 (fraud by check for $13,158). R. Tr. 10/9/14, p. 81. Thus, the prosecutor charged Mr. Cowen with two counts of fraud by check, the case was fully tried, and the jury acquitted Mr. Cowen of Count 2. Yet, the prosecutor requested $22,485.65 in restitution "for the full amount of the two checks, understanding the defendant was acquitted as to one of the checks." CF, pp. 294-96. Mr. Cowen objected. *Id.* at 301.

At the restitution hearing, the prosecution relied upon *Pagan*, 165 P.3d 724, to support its position that a court may impose restitution on an acquitted count. R. Tr. 10/24/14, p. 11. The prosecutor asserted that he met his burden of proving restitution, arguing that "Mr. Cowen went in there, wrote these two checks, not only knowing that he did not have the money in there but also that he had the specific intent to get his truck out the door." *Id.* at 11-12. The prosecutor grouped the two separate counts together, asserting: "by essentially using these two checks together, the smaller amount and the larger amount . . . the Defendant still proximately caused the loss of that full amount." *Id.* at 15.

Defense counsel argued that *Pagan*, 165 P.3d 724, and *People v. Smith*, 181 P.3d 324, differ from the facts here and "restitution is a criminal penalty and may not be used as a substitute for a civil action for damages." *Id.* at 20-22. Further, she asserted that the jury "found that Mr. Cowen, when applying the facts that they had in front of it and the elements in the affirmative defense, could not find beyond a reasonable doubt that he was guilty of this because he didn't act with any intent." *Id.* at 26.

The trial court, despite finding that defense counsel did "a good job of saying, look . . . [Mr. Cowen] thought [he] was going to get the loan," imposed the restitution for the acquitted charge because it was "absolutely convinced" that Mr. Cowen intended to defraud Elite Diesel. *Id.* at 29. As such, the court imposed $22,485.65 in

restitution, including $13,158 for the check the jury found Mr. Cowen did not fraudulently issue. *Id.* at 32.

c. Analysis

The jury acquitted Mr. Cowen of fraud by check for $13,158. However, the trial court imposed restitution for this acquitted charge as a condition of Mr. Cowen's probation. Under § 18-1.3-601(1)(b), C.R.S., restitution must be tied to a defendant's criminal conduct; if there is no criminal conduct then there is no victim to compensate. A criminal trial cannot serve as a remedy for civil grievances, and "restitution is intended to make the victim whole, [it] is not a substitute for a civil action for damages." *People v. Catron*, 678 P.2d 1, 2 (Colo. App. 1983) (citing *People v. King*, 648 P.2d 173 (Colo. App. 1982)). While trial courts have broad discretion to impose restitution, trial courts cannot abrogate a jury's acquittal and impose restitution for non-criminal conduct. Since the jury found that Mr. Cowen did not intend to defraud Elite Diesel of $13,158, the trial court abused its discretion by ordering Mr. Cowen to pay restitution based on this non-criminal conduct.

Restitution is defined as "any pecuniary loss suffered by a victim . . . 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. The Colorado legislature declared: "*Persons found guilty* of causing such suffering and

hardship should be under a moral and legal obligation to make full restitution to those harmed by their misconduct[.]" § 18-1.3-601(1)(b), C.R.S. (emphasis added). Because restitution promotes victim compensation, it cannot serve this function if a court imposes restitution for a non-criminal act.

A division of this Court in *People v. Estes*, 923 P.2d 358, 360 (Colo. App. 1996), for example, reversed a restitution order because it included losses sustained by a victim from non-criminal conduct. In *Estes*, the defendant engaged in a relationship with a married woman ("victim"), who loaned the defendant $9,000 in order to purchase a vehicle. *Id.* at 359. Afterwards, the defendant threatened to reveal their relationship to the victim's family if she did not give him additional money. *Id.* at 360. The victim paid the defendant $44,000 before notifying the authorities. *Id.* The defendant subsequently pled guilty to felony theft, and the trial court sentenced him to eight years of intensive supervised probation and $56,000 in restitution to the victim. *Id.* This restitution amount included the $9,000 automobile loan, the $44,000 extorted payments, and $3,000 for family counseling. *Id.*

On appeal, the defendant challenged the $9,000 included in the restitution order "because the loan was not the result of criminal conduct." *Id.* The court noted that the restitution statute intends "to make the victim whole and it specifically allows for repayment of the actual pecuniary damage the victim sustained as the direct result

of the defendant's criminal conduct." *Id.* (citing *People v. Philips*, 732 P.2d 1226 (Colo. App. 1986)). This Court rejected the state's argument that *People v. Borquez*, 814 P.2d 382 (Colo. 1991), permits a restitution order to include losses sustained by a victim from non-criminal conduct. *Id.* Rather, this Court found that *Borquez* "stands for the proposition that a restitution order may properly include losses to a victim resulting from a series of *uncharged criminal actions* of defendant." *Id. See Borquez*, 814 P.2d at 384 (the defendant admitted criminal responsibility to a "party immediately and directly aggrieved by [him]" even for the uncharged conduct.) As the victim did not loan the defendant $9,000 as a result of his criminal activity, the trial court necessarily abused its discretion when it imposed restitution for this amount. *Id.* Further, while this Court noted that the defendant may still owe the victim $9,000, "it was improperly included in the amount of restitution." *Id.*

While divisions of this Court in *Pagan*, 165 P.3d 724, and *Smith*, 181 P.3d 324, found that a trial court may impose restitution for acquitted charges, nothing in these cases warrant a different result here. For instance, in *Smith*, the prosecutor charged the defendant with one count of criminal mischief resulting in aggregate damages of $500 or more but less than $15,000 because the defendant threw a rock through the victim's restaurant's window. 181 P.3d at 324-25. However, the jury convicted the defendant of one count of criminal mischief causing aggregate damages of $100 or

more but less than $500. *Id.* at 325. While the prosecutor sought $3,050 in restitution, the trial court denied this request because it would "set[] aside the jury verdict in this matter." *Id.* This Court reversed the trial court's restitution order, finding that "restitution is not limited by the jury's findings but includes the pecuniary loss suffered by the victim including, but not limited to, all out-of-pocket expenses and other losses or injuries *proximately caused by an offender's conduct*." *Id.* at 327 (emphasis added). This Court's holding comports with the plain language of § 18-1.3-601(1)(b), C.R.S., because the jury found the defendant guilty of the underlying criminal conduct—i.e. the throwing of the rock—that ultimately caused $3,050 in damages. Thus, the defendant's restitution was the direct result of his criminal conduct.

Additionally, in *Pagan*, the defendant was charged with one count of theft of $15,000 or more and one count of theft from an at-risk adult of $500 or more but less than $15,000. 165 P.3d at 726. While the underlying facts that formed the basis for both charges are unclear, the trial court noted that both "charges involved the same victim, the same set of facts, and the same financial loss . . ." *Id.* at 729. After deliberations, the jury acquitted the defendant of theft of $15,000 or more, but convicted him of theft of an at-risk adult. *Id.* at 726. The trial court imposed $15,000 of restitution, and the prosecution appealed. *Id.* at 729. This Court noted that the jury's acquittal did not "constitute a finding that defendant did not steal property

worth more than $15,000[,]" but rather that the jury did not find beyond a reasonable doubt that he stole property "worth over $15,000." *Id.* at 731. Because the jury found the defendant criminally culpable for the same conduct that formed the basis for the restitution, the trial court could impose restitution for a greater amount than the jury's finding. *Id.* Accordingly, this Court vacated the restitution sentence and remanded it for further proceedings. *Id.* at 732. Moreover, *Pagan* does not apply here because it solely addressed whether collateral estoppel and double jeopardy barred an award of restitution over $15,000, not whether the restitution was tied to the defendant's criminal conduct. *Id.* at 728-31.

Here, the prosecutor charged Mr. Cowen with two counts of fraud by check, and the jury acquitted him of Count 2. CF, pp. 290-91. Importantly, these two counts were factually distinct. In Count 1, Mr. Cowen testified that Weidner verbally agreed to deposit the $9,327.65 check after he transferred sufficient funds into J&S Trucking's bank account. R. Tr. 10/8/14, pp. 147, 157. The record reflects that Mr. Cowen had insufficient funds in J&S Trucking's bank account on the date that he handed Weidner this $9,327.65 check. *See* R. Tr. 10/8/14, pp. 180-81; 10/7/14, pp. 131-33; R. Ex. 3, pp. 3-12.

On the other hand, Count 2 factually differed from Count 1 because the record reflects that Mr. Cowen believed that Landmark Financial would loan him $13,158 for

the truck repairs. For instance, Elite Diesel acknowledged that Landmark Financial had previously loaned J&S Trucking money for truck repairs on May 3, 2011, and June 1, 2011. R. Tr. 10/7/14, pp. 92-94. Mr. Cowen also testified that he believed Landmark Financial would loan him $13,158. R. Tr. 10/8/14, p. 153. In accordance with this belief, Mr. Cowen approached Landmark Financial for a loan to repair his truck, Landmark Financial contacted Elite Diesel for a copy of the bill, and Landmark Financial told Mr. Cowen that "we could potentially look at doing the difference, which would be $13,158.17[.]" R. Tr. 10/7/14, pp. 156-57. On May 26, 2011, a Landmark Financial employee requested an invoice for payment from Elite Diesel for Mr. Cowen's truck repair. *Id.* at 62, 203. On May 31, 2011, Elite Diesel emailed the payment invoice to Landmark Financial. *Id.* at 63. Thus, Elite Diesel's invoice to Landmark Financial on May 31, 2011 (four days after Mr. Cowen handed Weidner the $13,158 check), directly contradicted Weidner's testimony that she never agreed to withhold depositing the checks until Mr. Cowen had sufficient funds. *Id.* at 62-63; R. Tr. 10/8/14, p. 245.

At trial, the sole disputed element was whether Mr. Cowen intended to defraud Elite Diesel. R. Tr. 10/9/14, p. 17. Ultimately, the jury found that Mr. Cowen intended to defraud Elite Diesel for $9,327.65, but not for $13,158. *Id.* at 81. The jury, in rendering its verdict, did not find criminal conduct because Mr. Cowen believed

Landmark Financial would loan him $13,158, thus negating his intent to defraud Elite Diesel. Here, unlike in *Pagan* and *Smith*, the jury did not find criminal conduct underlying Count 2. Yet, the trial court unilaterally found that Mr. Cowen acted criminally and intended to defraud Elite Diesel for $13,158. R. Tr. 10/24/14, p. 29. Thus, the trial court abused its discretion when it made a finding of criminal culpability in Count 2 when the jury had not done so and imposed restitution accordingly. Here, the trial court, unlike in *Pagan* and *Smith*, erroneously imposed restitution that was not directly caused by Mr. Cowen's criminal conduct.

Similar to the rule espoused in *Estes*, other jurisdictions have similarly prohibited courts from imposing restitution that is not the direct result of the defendant's criminal conduct. For instance, in *State v. Bausch*, 416 A.2d 833 (N.J. 1980), the New Jersey Supreme Court addressed whether a district court can impose restitution on an acquitted charge. As in Colorado, New Jersey courts have authority to impose restitution as a condition of probation "to the aggrieved parties for the damage or loss caused by his offense . . . ." *Id.* at 836 (citing N.J.S.A. 2A:168-2). While New Jersey courts have "inherent power" to impose restitution, it cannot do so if the defendant has not committed a crime. *Id.* at 837.

The court noted that restitution rehabilitates a criminal defendant and makes him "understand that his wrongful conduct has caused damage to a victim and, in a

broader sense, to society." *Id.* at 838. Thus, restitution is only justified if a defendant's rehabilitation occurs through compensating a victim. *Id.* On the contrary, restitution cannot be imposed if a jury acquits a defendant of wrongdoing:

> In the event of a trial, it would be unseemly to require restitution, for the defendant would have been acquitted of the offense. To impose restitution as a probationary condition would contradict the acquittal and could, if the condition were violated, result in the defendant's incarceration. Thus, it would appear as if the defendant were being imprisoned for an offense for which he had not been convicted.

Id. The court also highlighted the difference between a defendant's acquittal and a guilty plea. *Id.* at 839. When a defendant pleads guilty to a charged offense, New Jersey courts may consider facts underlying the charged offense when fashioning a sentence and whether imposing restitution promotes the defendant's rehabilitation. *Id.*

Other jurisdictions also prohibit the imposition of restitution not directly caused by a defendant's criminal conduct. *See McMahon v. State*, 643 S.E.2d 236, 238 (Ga. Ct. App. 2007) ("It is true that a defendant cannot be ordered to pay restitution for a count on which he was acquitted or not charged"); *People v. Goulart*, 273 Cal.App. 3d 71 (Cal. Ct. App. 1990) ("It is obvious that unless the act for which the defendant is ordered to make restitution was committed with the same state of mind as the offense of which he was convicted, this salutary rehabilitative effect cannot take place"); *State v. Lewis*, 214 P.3d 409 (Ariz. Ct. App. 2009) (a trial court "'may impose

restitution only on charges for which a defendant has been found guilty, to which he has admitted, or for which he has agreed to pay'"); *Campbell v. State*, 5 S.W.3d 693 (Tex. Crim. App. 1999) ("A trial court may not order restitution for an offense for which the defendant is not criminally responsible").

As such, the trial court abused its discretion when it imposed $13,158 in restitution that was not the direct result of Mr. Cowen's criminal conduct. This Court should reverse the trial court's restitution order and remand it to the trial court for further proceedings.

II. The trial court reversibly erred when it denied Mr. Cowen's proposed instruction, and the prosecutor cannot show that the error was harmless beyond a reasonable doubt.

a. Standard of Review

Mr. Cowen tendered a proposed instruction, which informed the jury they should evaluate his affirmative defense under the subjective standard. CF, p. 238; R. Tr. 10/8/14, pp. 230-33. At the jury instruction conference, the trial court denied it. *Id.* at 233.

Appellate courts review jury instructions de novo to determine whether the instructions as a whole properly informed the jury of the correct law. *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009). Here, the trial court's denial of Mr. Cowen's proposed instruction violated his constitutional rights, including his right to present a

defense and his right to due process of law. U.S. Const. amends. V, XIV; Colo. Const. art. II, §§ 16, 25; *Crane v. Kentucky*, 476 U.S. 683 (1986); *People v. Salazar*, 272 P.3d 1067 (Colo. 2012). When a defendant preserves a constitutional claim for review by tendering a jury instruction, his claim is subject to constitutional harmless error analysis. *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005). Thus, the error must be harmless beyond a reasonable doubt. *Id.* at 748.

b. Relevant Facts

Mr. Cowen endorsed mistake of fact as an affirmative defense. CF, pp. 141-42. At the jury instruction conference, the trial court found "based on the evidence presented in this case, the defendant has presented a scintilla of evidence to warrant this instruction." R. Tr. 10/8/14, p. 229. The court limited Mr. Cowen's affirmative defense instruction ("Instruction #14") to the "with intent to defraud" element of fraud by check. *Id.* at 229-30; § 18-5-205(2), C.R.S. (2014). Instruction #14 provides in part:

> The defendant's conduct was legally authorized if:
>
> 1. The defendant engaged in the prohibited conduct under a mistaken belief, and
>
> 2. Due to the mistaken belief he did not form the particular mental state of "with intent," which is required in order to commit the offense.

> The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.
> . . .

CF, p. 281.

Mr. Cowen also tendered an instruction that told the jury to evaluate his affirmative defense under the subjective standard. CF, p. 238 (citing *People v. Bornman*, 953 P.2d 952, 954 (Colo. App. 1997)). This proposed instruction provides:

> With regard to the affirmative defense of mistake of fact, the jury must apply a subjective standard. That is, if Mr. Cowen entertained an honest belief, no matter how wrong or unreasonable that belief was, that he would have sufficient funds to cover the checks, he is not guilty of Fraud by Check. The jury should not assess whether a reasonable person would have similarly believed under the same circumstances.

CF, p. 238.

The prosecutor objected, arguing it "overemphasiz[ed]" Mr. Cowen's affirmative defense, it was duplicative of Instruction #14, Instruction #14 never informed the jury that the "reasonable person" standard applied, and it incorporated Mr. Cowen's "argument that no matter how wrong or unreasonable that belief was . . ." it negated Mr. Cowen's intent to defraud. R. Tr. 10/8/14, pp. 230-31. Instead, the prosecutor erroneously wanted the jury "to go back and say, look, you know, [Mr.

Cowen] said it was this. Do we believe that, is that *reasonable* for us, you know." *Id.* at 231 (emphasis added).

Defense counsel argued this proposed instruction correctly stated the law and explained that "what [the jury is] assessing in terms of a mistake of fact is not whether they would feel that situation is a mistake of fact for an objective person but whether it was a mistake of fact with the subjective standard of Mr. Cowen." *Id.* at 232. Defense counsel also believed this instruction would assist the jury and prohibit them from evaluating Mr. Cowen's affirmative defense based on their own life experiences. *Id.* at 232-33. While the trial court agreed this proposed instruction correctly articulated the law, it denied the proposed defense instruction because it concluded that the Instruction #14 encompassed the subjective standard. *Id.* at 233.

c. Analysis

A trial court must instruct the jury on all matters of the law. *People v. Garcia*, 28 P.3d 340, 343-44 (Colo. 2001). If the evidence raises an affirmative defense, the trial court must properly instruct the jury on it under the circumstances. *People v. Silva*, 987 P.2d 909 (Colo. 1999). Also, "an instruction embodying a defendant's theory of the case *must be given* by the trial court if the record contains any evidence to support the theory." *People v. Nunez*, 841 P.2d 261, 264 (Colo. 1992) (emphasis in original). A trial court must correct the defendant's theory of defense instruction or incorporate its

substance into other instructions. *People v. Bruno*, 342 P.3d 587, 592 (Colo. App. 2014) (citing *Nunez*, 841 P.2d at 265).

A defendant's mistake of fact should be evaluated under the subjective standard rather than a reasonable person standard. For example, in *People v. R.V.*, the trial court, over defendant's objection, instructed the jury that the defendant must "reasonably belie[ve]" that the vehicle had been abandoned under the mistake of fact statute. 606 P.2d 1311, 1313 (Colo. App. 1979), *rev'd on other grounds*, 635 P.2d 892 (Colo. 1981). A division of this Court found that the statute did not require a defendant's mistake of fact to be reasonable, and the trial court's insertion of the word "reasonable" modified the statute to include a reasonable standard rather than a subjective one. *Id.* Similarly, in *Bornman*, 953 P.2d at 954, this Court again recognized that the mistake of fact statute requires a defendant have a "good faith belief" rather than a reasonable belief.

In a case analogous to the one here, the trial court's failure to instruct the jury on the defendant's theory of defense in a fraud by check case denied him a fair trial. *People v. Meller*, 524 P.2d 1366 (Colo. 1974). There, the defendant gave his landlord's agent a $700 check and asked him to deposit it later when he had sufficient funds. *Id.* at 1367. At trial, the defendant admitted that he had insufficient funds in his account when he wrote the check, but he testified that he never intended to defraud his

landlord. *Id.* Thus, the Colorado Supreme Court found that the defendant's testimony, if true, would transform the transaction into one where the landlord extended credit to the defendant. *Id.* At the jury instruction conference, defense counsel tendered an instruction "dealing with the specific intent to defraud," which the court construed to be "in the nature of a theory of the case instruction." *Id.* As the evidence entitled the defendant to a theory of the case instruction, the trial court erred by failing to instruct the jury accordingly.

Here, Mr. Cowen similarly admitted that he had insufficient funds when he issued the checks, but he testified that he never intended to defraud Elite Diesel because he entered into a verbal agreement with Weidner to deposit the checks after he transferred funds into his account and after he received Landmark Financial's loan. Mr. Cowen presented evidence supporting this defense, such as how Elite Diesel sent Landmark Financial two invoices and how he normally received payments in T-Cheks. R. Tr. 10/7/14, pp. 62-63; R. Tr. 10/8/14, p. 147. Thus, if true, Cowen's situation also became one where Elite Diesel extended him credit.

Consistent with Mr. Cowen's theory of defense, he tendered an instruction akin to a theory of defense instruction which stated that: "if Mr. Cowen entertained an honest belief, no matter how wrong or unreasonable that belief was, that he would have sufficient funds to cover the checks, he is not guilty of Fraud by Check." CF, p.

238. This instruction informed the jury they should evaluate Mr. Cowen's affirmative defense under a subjective standard rather than a reasonable standard. As the reasonableness of Mr. Cowen's affirmative defense was at issue during trial (see section (d) below), this proposed instruction espoused the correct legal standard, and Mr. Cowen presented evidence entitling him to this defense instruction, the trial court reversibly erred when it denied it.

d. The error was not harmless beyond a reasonable doubt.

The trial court's error was not harmless beyond a reasonable doubt because it lowered the prosecutor's burden of disproving Mr. Cowen's affirmative defense and it abrogated Mr. Cowen's right to present a meaningful defense. U.S. Const. amends. VI, XIV, § 1; Colo. Const. art. II, §§ 23, 25; § 18-1-407(1), C.R.S. (2014); *Crane*, 476 U.S. 683; *People v. Ferguson*, 43 P.3d 705, 708 (Colo. App. 2001) (instructional error not harmless because the jury could hold defense to a higher standard in establishing affirmative defense than required by law).

Under Mr. Cowen's affirmative defense, the jury needed to find that Mr. Cowen subjectively believed—not reasonably believed—that he would have sufficient funds to cover the checks. Here, the record supports that the jury could have found that Mr. Cowen had a subjective belief rather than a reasonable belief that Weidner extended him credit for the $9,327.65 check. For instance, Mr. Cowen explained that

in the trucking business, he regularly receives payments in T-Cheks which cannot be used like regular checks. R. Tr. 10/8/14, p. 155. On May 27, 2011, Mr. Cowen had approximately twenty-five to thirty T-Cheks, which made it difficult for him to pay Weidner in one lump sum. *Id.* at 156-57. Mr. Cowen briefly discussed paying Weidner in T-Cheks, but because he had so many T-Cheks he believed that it would be easier to write Elite Diesel one check and deposit the T-Cheks later into J&S Trucking's bank account. *Id.* at 157. Weidner agreed. *Id.*

Mr. Cowen told Weidner he did not have sufficient funds in his account when he wrote the check, but he would "transfer money from different accounts and off [of his] T-Cheks." *Id.* at 147, 155. Mr. Cowen testified that if he did not believe that he had $9,327 in funds, he would "have asked for a different amount of a loan, either from Landmark or perhaps from [his] brother[.]" *Id.* at 156-57. Mr. Cowen did not postdate the check because he took Weidner's "word on face value, you know, and [he] never, never thought that it would be like this. [He] never – good ol' people, you know, that is where [he] figured it come from." *Id.* at 158. Thus, Mr. Cowen did not believe that he needed to postdate the check because Weidner agreed that she would not deposit the check until after he transferred sufficient funds into his account. *Id.*

Under Mr. Cowen's affirmative defense, if he had an honest belief about a mistaken fact—no matter how unreasonable—it negated his intent to defraud Elite

Diesel. Here, the jury could have found that Mr. Cowen had a subjective belief that he would have sufficient funds to cover the checks based on his conversation with Weidner that she would not deposit the check until he had an opportunity to transfer funds into J&S Trucking's bank account. As such, the trial court's error was not harmless beyond a reasonable doubt because it lowered the prosecutor's burden of disproving Mr. Cowen's affirmative defense and it abrogated Mr. Cowen's constitutional right to present a defense.

III. The trial court reversibly erred in giving Instruction # 13, over Mr. Cowen's objection, because it was irrelevant and misleading to the issues in Mr. Cowen's case.

a. Standard of Review

Mr. Cowen objected to Instruction #13. R. Tr. 10/8/14, pp. 221-24; 10/9/14, pp. 4-19. An appellate court reviews jury instructions as a whole de novo to determine whether the jury was accurately instructed on the law. *Lucas*, 232 P.3d at 162. A trial court reversibly errs when jury instructions create a reasonable possibility that the jury was improperly misled in reaching a verdict. *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006). Jury instructions should be reviewed as a whole to determine whether an instruction was so misleading to cause reversible error. *Silva*, 987 P.2d at 915 (citing *People v. DeHerrera*, 697 P.2d 734 (Colo. 1985)).

b. Relevant Facts

At the jury instruction conference, the prosecutor tendered Instruction #13. CF, p. 280; R. Tr. 10/8/14, pp. 221-23. Instruction #13, a permissive inference, provides in part:

> In any prosecution for fraud by check, except in the case of a postdated check or order, you may infer that the defendant had knowledge of insufficient funds if on presentation within thirty (30) days after issue, he had insufficient funds upon deposit with the bank or other drawee to pay the check or order.
>
> You may consider this evidence, together with all of the other evidence in this case, in determining whether or not the defendant had knowledge of insufficient funds. It is entirely your decision to determine what weight should be given to this evidence.
>
> . . .

CF, p. 280.

Mr. Cowen objected to Instruction #13 because it improperly highlighted evidence—Mr. Cowen's knowledge of insufficient funds—that was not useful to the jury during deliberations. R. Tr. 10/8/14, pp. 221-22. The trial court overruled Mr. Cowen's objection. *Id.* at 223.

Mr. Cowen renewed his objection, arguing that his knowledge of insufficient funds in his account "is not an issue in dispute." R. Tr. 10/9/14, p. 8. Further, defense counsel argued "there hasn't been any defense evidence to contest the status of the account and whether the account itself reflected sufficient funds." *Id.* Thus,

Instruction #13 was irrelevant because there was "overwhelming evidence in the record regarding the balance of the account." *Id.*

The trial court overruled Mr. Cowen's objection because it found the law warranted it. *Id.* at 16-17. § 18-5-205(8)(b), C.R.S. (2015). Yet, the trial court acknowledged its redundancy:

> I think [defense counsel] is probably right. I don't think that is where this case is at. I think the case is on the intent to defraud element. I think the People have probably established very convincingly beyond all reasonable doubt that this defendant knew he had insufficient funds on the date he posted this check. [Mr. Cowen]'s admitted to that on the witness stand. So [the prosecutor] can have this instruction if you want to. But if you want a bulletproof set of jury instructions, you might want to remove it.

R. Tr. 10/9/14, p. 17.

c. Analysis

While the jury should resolve issues of fact, the court must first decide which issues have been raised by the evidence. *People v. Nerud*, 2015 COA 27, ¶ 43. A trial court should not instruct juries on principles of law that have no bearing on the issues at trial, incorrect or misleading statements of law, nor doctrines or principles "based upon fanciful interpretations of the facts unsupported by the record." *People v. Alexander*, 663 P.2d 1024, 1032 (Colo. 1983) (citing *Gill v. People*, 139 Colo. 401, 339 P.2d 1000 (1959); *People v. Gomez*, 632 P.2d 586 (Colo. 1981); *People v. Truesdale*, 190

Colo. 286, 546 P.2d 494 (1976)). Courts should also not "give instructions which tend 'to mislead or divert the minds of the jury from the real factual issues,'" or instructions that emphasize certain evidence. *Houser v. Eckhardt*, 168 Colo. 226, 230-31, 450 P.2d 664, 667 (1969); *Krueger v. Ary*, 205 P.3d 1150, 1157 (Colo. 2009).

For example, in *Meller* (as discussed above in Issue II), the Colorado Supreme Court found that the prosecutor's tendered—and admitted—instruction constituted plain error because it was "confusing" and "destructive" to the defendant's theory of defense. 524 P.2d at 1368. In a fraud by check case, the prosecutor submitted an instruction stating that he did not have to prove beyond a reasonable doubt the "exact date [of the offense] as alleged in the information." *Id.* at 1367-68. This instruction conflicted with defendant's theory of defense that he lacked intent to defraud his landlord because he postdated the check. *Id.* at 1368. Thus, this instruction was "confusing" because "if it told the jury anything, [it] told them that the postdating of the check was not important." *Id.*

Here, Instruction #13 similarly confused and misled the jury because the evidence was undisputed that Cowen had insufficient funds in his account when he issued the checks to Elite Diesel. For instance, the prosecutor asked Mr. Cowen: "looking at both of these checks again, you said that when you filled out these checks, you did not have sufficient funds in your account to cover either of those checks; is

that correct?" R. Tr. 10/8/14, p. 180. Mr. Cowen replied, "No, I did not." *Id.* The prosecutor again queried: "And you knew that fact as you were writing them; correct?" Cowen responded, "Yeah, I told [Weidner]." *Id.* at 180-81. A Farmers State Bank custodian of records also testified that Mr. Cowen had insufficient funds in his account when he issued these checks. R. Tr. 10/7/14, pp. 132-33. The prosecutor also introduced Mr. Cowen's bank records into evidence, which reflected that he had insufficient funds. *Id.* at 131; R. Ex. 3, pp. 3-12. Even the trial court acknowledged, "I think the People have probably established very convincingly beyond all reasonable doubt that this defendant knew he had insufficient funds on the date he posted this check." R. Tr. 10/9/14, p. 17.

At trial, Mr. Cowen's theory of defense was that he never intended to defraud Elite Diesel because he verbally agreed with Weidner that she would deposit the checks only after he transferred sufficient funds into his account. Thus, Instruction #13 was misleading and destructive to Mr. Cowen's theory of defense because it improperly highlighted his knowledge of insufficient funds—an uncontroverted fact. Instruction #13 also instructed the jury to draw a permissive inference that was not at issue during the trial. Thus, Instruction #13 diverted the jury from the real issue at trial—whether Mr. Cowen intended to defraud Elite Diesel. Instead, Instruction #13 drew the jury's attention to the prosecutor's theory that Mr. Cowen knew he had

insufficient funds which also proved his intent to defraud Elite Diesel. *See* R. Tr. 10/9/14, p. 25.

Accordingly, Instruction #13 was irrelevant to the issues at trial, it confused and mislead the jury, and it improperly highlighted the prosecutor's theory of the case. As such, the trial court reversibly erred when it gave Instruction #13.

d. Instruction #13 created a reasonable possibility that the jury was improperly misled in reaching a verdict.

The trial court's error created a reasonable possibility that the jury was improperly misled in reaching a verdict because the prosecutor used Instruction #13 to argue that Mr. Cowen intended to defraud Elite Diesel and the jury was confused during deliberations.

During closing argument, the prosecutor asserted that the jury should consider Mr. Cowen's knowledge of insufficient funds as evidence of his "intent to defraud" under § 18-5-205(2), C.R.S:

> The other primary parts of the elements of fraud by check are these mental states. And there are really two mental states at issue here in this case, knowledge and intent. Did he know that there were insufficient funds in his checking account when he wrote the checks. And, two, did he have the intent to defraud Elite Diesel when he filled out those checks.
>
> The knowledge and intent requirements are different and they are defined differently and they're in your instructions, *but they really go hand in hand here. The evidence that*

> *supports one really supports the other as well, and you'll see that as we go through and talk about it.* All of the evidence in this case and the surrounding circumstances prove those two elements to you.

R. Tr. 10/9/14, p. 25 (emphasis added).

Here, the prosecutor began his argument by properly instructing the jury that the two elements—knowledge and intent—are separate and distinct, but then he confusingly argued that they go "hand in hand" and "one really supports the other as well." Next, the prosecutor then drew the jury's attention to Instruction #13:

> You also have this instruction on the permissive inference. What that tells you is that you may infer, although you need not, but you may infer that looking at the date the check was deposited, which was basically that night, was when the check was placed in the night drop there at the bank, and that being within 30 days after issue, that same day that the check was written here, the defendant had insufficient funds.

Id. at 27-28.

However, the jury did not need to decide this issue because Mr. Cowen admitted it during trial. Then, the prosecutor used Instruction #13 to mislead the jury on the elements of fraud by check: "Specifically here, [intent to defraud] means that the defendant wrote checks to Elite Diesel with the intent that Elite Diesel would accept them as payment in full that day, allowing him to drive off the lot with his

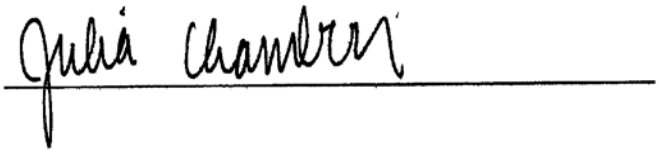
vehicle, *knowing that he didn't have the money for the repairs*. That is what intent to defraud means in this case." *Id.* at 29 (emphasis added).

Not only did the prosecutor mislead the jury on the elements of fraud by check, but the jury expressed confusion over Instruction #13 during deliberations. The jury asked: "Is the intent to defraud by check defined as writing a check knowing you don't have the funds?" CF, p. 286 (emphasis in original). Next, the jury posited: "Does it make any difference if there is a verbal agreement to post-pone deposit?" *Id.* Here, the jury's questions highlighted its confusion about the separate mental states of fraud by check and how it should consider Mr. Cowen's mistake of fact defense. Accordingly, Instruction #13 improperly misled the jury, and Mr. Cowen's conviction must be reversed.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Mr. Cowen respectfully requests this Court reverse the decision of the trial court.

DOUGLAS K. WILSON
Colorado State Public Defender



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CERTIFICATE OF SERVICE

I certify that, on November 17, 2015, a copy of this Opening Brief of Defendant-Appellant was electronically served through ICCES on Catherine P. Adkisson of the Attorney General's office through their AG Criminal Appeals account.