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COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Weld County District Court Honorable Shannon Lyons, Judge Case No. 11CR1341	
Plaintiff-Appellee, THE PEOPLE OF THE STATE OF COLORADO , v. Defendant-Appellant, JARED COWEN.	▲ **COURT USE ONLY** ▲ Case No. 14CA2354
CYNTHIA H. COFFMAN, Attorney General ETHAN ZWEIG, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 N Broadway, Floor Denver, CO 80203 Telephone: 720-508-6455 FAX: E-Mail: AG.Appellate@coag.gov Registration Number: 44794 *Counsel of Record	

PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It is less than 30 pages.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

> In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Ethan E. Zweig
Signature of attorney or party

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STATEMENT OF THE FACTS AND CASE

The defendant, Jared Cowen, owns J&S Trucking (R. Tr. 9/7/14, p. 28). In May 2011, his truck broke down and he took it to Elite Diesel for repairs (R. Tr. 10/8/14, p. 121). Elite Diesel made extensive repairs that totaled $37,485 (R. Tr. 10/7/14, pp. 9-17).

Cowen wrote two checks totaling $22,485.65 to Elite Diesel (R. Jury Trial Exhibits, pp. 1-2). One for $9,327.65 and another for $13,158 (R. CF. Jury Trial Exhibits, pp. 1-2). His brother paid the remaining balance (*see* R. Tr. 10/8/14, pp. 69-70). Cowen admitted that he did not have sufficient funds to cover either check (R. Tr. 10/8/14, p. 180). Bank records confirmed that he had insufficient funds (R. Tr. 10/7/14, pp. 132-33). With respect to the $13,158 check, Cowen claimed that he believed he had secured a loan from a financing company named Landmark Financial for the amount of the check (R. Tr. 10/8/14, p. 133). He also claimed that Elite Diesel had agreed to wait to cash the checks until the financing had gone through (R. Tr. 10/8/14, p. 154). Neither claim was true (R. Tr. 10/7/14, p. 167; R. Tr. 10/8/14, pp. 244-45).

Because Elite Diesel believed it had been paid in full, it released the truck to Cowen (R. Tr. 10/7/14, pp 29-30). Cowen's checks did not clear (R. Tr. 10/7/14, p. 83). Cowen issued a stop payment on the checks after the truck was released (R. Tr. 10/7/14, p. 83). Elite Diesel was never paid (R. Tr. 10/7/14, p. 83).

Cowen was charged with two counts of check by fraud (one count for each check he wrote) (R. CF. p. 1). He was found guilty of one count and acquitted of the other count that involved the alleged loan from Landmark Financial (R. CF. pp. 290-91). He was sentenced to three years of probation (R. CF. p. 311).

SUMMARY OF THE ARGUMENT

The trial court properly ordered Cowen to pay restitution for the acquitted conduct because the evidence showed by a preponderance of the evidence that his actions directly caused the monetary loss suffered by Elite Diesel.

The trial court properly refused Cowen's tendered mistake of fact instruction because Cowen was not entitled to a mistake of fact

affirmative defense and, in any event, the mistake of fact instruction given to the jury encompassed what was in Cowen's tendered instruction.

The trial court properly instructed the jury on the permissive inference that Cowen knew he had insufficient funds to cover the checks he wrote. The instruction properly stated the law and, absent a stipulation from the defense, the prosecution was required to prove his knowledge beyond a reasonable doubt.

ARGUMENT

I. The trial court properly ordered restitution for the convicted and the acquitted conduct.

Cowen claims that the trial court improperly ordered him to pay restitution for the conduct he was acquitted of. The People disagree.

A. Applicable Facts

The trial court found by a preponderance of the evidence that the prosecution had proved fraud by check as to both checks written by Cowen based on the facts that:

- Cowen wrote two checks;

- the jury found Cowen guilty as to one check and restitution for that charge was mandatory;

- the only reason Cowen wrote the second check was to distinguish which funds were coming out of his personal account and which funds related to Landmark Financial;

- both checks were to be paid by Cowen or his business;

- Cowen knew at the time he wrote both checks that he did not have sufficient funds in his account for either check to clear;

- Cowen did not have sufficient funds on the day he wrote the checks or at any reasonable time after writing the checks;

- with respect to the second check, Cowen knew he had not obtained the loan from Landmark Financial when he wrote the check because there had been no closing and no paperwork signed;

- even though there was some evidence that Cowen did not understand he would not receive the loan "[t]he fact of the matter is he didn't have the loan and he knew he didn't have the loan, and the Court is absolutely convinced of that fact, by far more than a preponderance of the evidence;"

- "[K]nowing that that he did not have funds coming from Landmark Financial on the date the he wrote the check, the Defendant nevertheless wrote those checks. He knew Elite Diesel Services did not receive the funds that they were entitled to for

the repairs on the trucks, he did not contact Elite Diesel Services to make future payment arrangements;" and

- there were "some rather minor defects with the repair work that was done but it [did not] justify not paying for all of the repair work altogether

(R. Tr. 10/24/14, pp. 27-32).

Because the evidence at trial showed by a preponderance of the evidence that Cowen's actions were the direct result of the losses suffered by Elite Diesel, the trial court ordered restitution for the full amount of $22,485.65 (R. Tr. 10/14/14, p. 32).

At trial, the only dispute was whether Cowen intended to defraud Elite Diesel (opening brief, p. 15). It was undisputed that Cowen wrote two checks totaling $ 22,485.65 (*see e.g.* R. Jury Trial Exhibits, pp. 1-2). Both checks were drawn on Cowen's business's account (R. Jury Exhibits, pp. 1-2). The jury found Cowen guilty with respect to the first check (R. CF. p. 291). Cowen would never have had the money in his account to cover the $13,158 even if he had actually obtained the loan from Landmark Financial because Landmark would have sent the money directly to Elite Diesel (R. Tr. 10/7/14, p. 165). On the date

Cowen wrote the $13,158 check, he did not have an official agreement with Landmark Financial to loan him any money (R. Tr. 10/7/14, p. 167; R. Jury Exhibits, p. 2). Nevertheless, he gave the check to Elite Diesel (R. Tr. 10/7/14, p. 28). Cowen never told Elite Diesel that the funds might not be available right away (R. Tr. 10/7/14, p. 29). Because Elite Diesel believed it had been paid, it released the truck to Cowen (R. Tr. 10/7/14, pp 29-30). The checks did not clear (R. Tr. 10/7/14, p. 83). Cowen issued a stop payment on the checks so Elite Diesel was never paid for the amount of the checks (R. Tr. 10/7/14, p. 83).

B. Preservation and Standard of Review

A trial court is afforded broad discretion in determining the appropriate terms and conditions of restitution orders. *People v. Smith*, 181 P.3d 324, 325 (Colo. App. 2007). Absent a gross abuse of discretion, a court's ruling will not be disturbed on appeal. *Id.* Where competent evidence supports the trial court's findings of fact, such findings are entitled to deference and can only be set aside if determined to be clearly erroneous or unsupported by the record. *People v. Platt*, 81 P.3d 1060, 1065 (Colo. 2004).

C. Law and Analysis

The People's burden of proof in a restitution hearing is by a preponderance of the evidence. *People v. Pagan*, 165 P.3d 724, 729 (Colo. App. 2006). This standard is met when "the existence of a contested fact is more probable than its nonexistence." *People v. Taylor*, 618 P.2d 1127, 1135 (Colo. 1980).

Under Colorado's restitution scheme, a district court is required to consider restitution as a part of every judgment of conviction. *See* § 18-1.3-603(1), C.R.S. (2015); *Roberts v. People*, 130 P.3d 1005, 1007 (Colo. 2006) (restitution is a crucial element of sentencing). The General Assembly declared restitution to be "a mechanism for the rehabilitation of offenders," "a deterrent to future criminality," and a means "to lessen the financial burdens inflicted upon [victims and their families], to compensate them for their suffering and hardship, and to preserve the individual dignity of victims." § 18-1.3-601(1)(c)-(e), C.R.S. (2015). Accordingly, the General Assembly specifically stated that the restitution statute was to be liberally construed to accomplish these

goals. § 18-1.3-601(2), C.R.S. (2015); *People v. Lassek*, 122 P.3d 1029, 1036 (Colo. App. 2005).

Restitution must cover any pecuniary loss suffered by a victim proximately caused by an offender's conduct. § 18-1.3-602(3)(a), C.R.S. (2015). Proximate cause is a cause which in natural and probable sequence produced the claimed injury and without which the claimed injury would not have been sustained. *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002); *People v. Clay*, 74 P.3d 473, 475 (Colo. App. 2003); *see also People in Interest of D.S.L.*, 134 P.3d 522, 527 (Colo. App. 2006). The losses must result from the conduct upon which the defendant's criminal conviction is based. *People v. Brigner*, 978 P.2d 163, 164 (Colo. App. 1999).

When considering whether there is sufficient evidence of proximate cause to support an order of restitution, a court may consider both uncharged and acquitted conduct that has been proven by a preponderance of the evidence. *Pagan*, 165 P.3d at 730; *People v. Steinbeck*, 186 P.3d 54, 60 (Colo. App. 2007)(the defendant need not be charged with a specific act to be ordered to pay restitution for the

damages of his conduct); *People v. Estes*, 923 P.2d 358, 360 (Colo. App. 1996)(a restitution order may properly include losses to a victim resulting from a series of uncharged criminal actions of defendant). A proximate cause does not have to be the only cause or the last or nearest cause; it is sufficient if the natural and probable way of some act or failure to act caused some or all of the injury. *People v. Marquez*, 107 P.3d 993, 996 (Colo. App. 2004). Indeed, there can be more than one proximate cause to a loss or injury. *See People v. Lopez*, 97 P.3d 277, 280 (Colo. App. 2004).

Cowen's only claim of error is that the trial court abused its discretion because "it unilaterally found that Mr. Cowen acted criminally and intended to defraud Elite Diesel for $13,158" (Opening Brief, p. 16). The claim fails for many reasons.

First, a "criminal conviction establishing the defendant's culpability is not required to impose restitution." *Pagan*, 165 P.3d at 731.

Second, an order of restitution is not a finding of criminality because it is a "final civil judgment in favor of the state and any victim." § 18-1.3-603(4)(a), C.R.S. (2015).

Third, the jury's acquittal on count two "merely established that the prosecution failed to prove *beyond a reasonable doubt* that [Cowen committed fraud by check]. The trial court was still free to reach a contrary conclusion for restitution purposes under the applicable burden of proof, a preponderance of the evidence." *Pagan*, 165 P.3d at 731 (emphasis in original).

Fourth, Cowen has not argued there was a lack of evidence to prove by a preponderance of the evidence that his actions were the proximate cause of Elite Diesel's loss and he has not challenged the findings of fact by the trial court his opening brief. Further, contrary to his contention that each check involved distinct facts, the record establishes that the only reason Cowen wrote two checks was because he told Elite Diesel that he had financed the $13,158 "so he wanted the checks separate just for that fact that way he would know that

everything was okay" (R. Tr. 10/7/14, p. 25). The checks were both for the repairs. There are no distinct facts.

And fifth, the trial court's findings are supported by the record. Cowen's claim fails.

II. The trial court properly denied Cowen's tendered mistake of fact instruction because he was not entitled to a mistake of fact affirmative defense instruction and the tendered instruction was duplicative of the instruction given to the jury.

Cowen claims that the trial court improperly refused his tendered mistake of fact instruction. The People disagree.

A. Applicable Facts

At the jury instruction conference, Cowen tendered the following instruction:

> 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.

(R.CF. p. 262; R. Tr. 10/8/14, pp. 225-33).

The instruction was based on language in *People v. Bornman*, 953 P.2d. (Colo. App. 1997) (R. CF. p. 262; R. Tr. 10/8/14, pp. 225-33). The trial court refused the instruction because it already planned to give the jury an instruction that stated the same thing: "Well, the Court agrees it is not a reasonable person standard. It is what the defendant subjectively believes, but that is a specific legal instruction the Court is already giving in the affirmative defense instruction" (R. Tr. 10/8/14, p. 233).

The jury was instructed that Cowen was innocent if he engaged in the prohibited conduct under a subjective mistaken belief and therefore did not form the requisite mental state:

> The evidence presented in this case has raised the affirmative defense of "mistaken belief of fact" as a defense to Fraud by Check.
>
> The defendant's conduct was legally authorized if:
>
> 1. the defendant engaged in the prohibited conduct under a mistaken belief, and
>
> 2. due to this mistake belief he did not form the particular mental state of "with

> intent[to defraud]," which is required in order to commit the defense.
>
> The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. . . . [I]f you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of Fraud by Check. In that even, you must return a verdict of not guilty to those offenses.

(R. CF. p. 281).

B. Preservation and Standard of Review

The People agree this claim is preserved. The People also agree that jury instructions are reviewed de novo to determine whether they accurately informed the jury of the governing law. *People v. Alvarado-Juarez*, 252 P.3d 1135, 1137 (Colo. App. 2010). However, a trial court has broad discretion to formulate jury instructions as long as they are correct statements of the law. *People v. Oram,* 217 P.3d 883, 893 (Colo. App. 2009), *aff'd,* 255 P.3d 1032 (Colo. 2011).

The People do not agree that the standard of reversal is the constitutional harmless beyond a reasonable doubt. If an error occurred reversal is not required if the error was harmless. *People v. Walden*, 224

P.3d 369, 378-79 (Colo. App. 2009) ("[O]ur analysis focuses only on how the court's denial of defendant's request for a mistake of fact instruction impacted his conviction on the trespass count. Because defendant properly preserved his objection, we review the trial court's ruling under a harmless error standard."). Because Cowen was acquitted of Count 1 his claim can only be considered with respect to Count 2. *Id*. at 378.

C. Law and Analysis.

The trial court did not err in refusing Cowen's tendered instruction because it was duplicative of the instruction given. Indeed, the language of the trial court's instruction directed the jury to consider Cowen's subjective belief by stating his conduct was legally authorized if he had a mistaken belief and due to this mistaken belief he did not form the particular mental state of "with intent to defraud," which is required in order to commit the defense. The determination of an individual's intent necessarily requires the consideration of his subjective belief. Thus, the trial court properly refused Cowen's tendered instruction as duplicative. "The trial court need not give a

supplemental instruction if it is already encompassed in another instruction." *People v. Oram*, 217 P.3d 883, 894 (Colo. App. 2009).

In any event, the trial court did not err because Cowen was not entitled to a mistake of fact affirmative defense instruction. *See id*. at 894 (no error in refusing to give tendered affirmative defense instruction when defendant not entitled to it). Indeed, under section 18-5-205(2), C.R.S. (2015), "[a]ny person, knowing he has insufficient funds with the drawee, who, with intent to defraud, issues a check for the payment of services, wages, salary, commissions, labor, rent, money, property, or other thing of value, commits fraud by check."

The effect of both instructions (tendered and given), if the jury were to have believed Cowen had a subjective mistaken belief that he had the funds to cover the check in Count 2 or even some agreement for "credit" with Elite Diesel, would merely be to negate the requisite "intent to defraud" element in the crime of check by fraud. But, the prosecution was already required to prove beyond a reasonable doubt that Cowen intended to defraud Elite Diesel when he wrote the check in Count 2. By proving that element, the prosecution would necessarily

negate any defense that Cowen had a subjective mistake belief that authorized the conduct. *See Walden*, 224 P.3d at 379. Thus, Cowen's tendered instruction and even the instruction given "was unnecessarily duplicative of the elements the prosecution was already required to prove beyond a reasonable doubt." *Id*. The nature of the crime of check by fraud rendered both of the instructions meaningless. For the same reasons any error was harmless.

III. The trial court properly instructed the jury on the permissive inference of Cowen's knowledge of a lack of funds under section 18-5-205(8)(b), C.R.S. (2015).

Cowen claims that the trial court improperly instructed the jury on the permissive inference of his knowledge of lack of funds under section 18-5-205(8)(b), C.R.S. (2015). The People disagree.

A. Applicable Facts

The trial court instructed the jury as follows:

> 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.
>
> You must bear in mind that you may but are not required to make this inference. The prosecution always has the burden of proving each element of the offense charged beyond a reasonable doubt. The defendant is never required to present any evidence, and has not burden of prove or disprove anything.

(R. CF. p. 280).

Cowen objected to the instruction. He argued that it improperly highlighted the evidence that he knew he had insufficient funds and that the instruction was unnecessary because he had admitted he knew he had insufficient funds when he wrote the checks:

> This [instruction] is pointing to a specific piece of evidence despite the fact that there's already overwhelming evidence in the record that the bank accounts didn't have [sufficient funds] . . . [so the instruction] doesn't really add any dimension, [it] is just sort of redundant of common sense based on the facts of this case.

(R. Tr. 10/9/14, p. 14).

The prosecution said the instruction was fair and a correct statement of the law (R. Tr. 10/9/14, p. 17). It also stated "I understand everyone can say it is easy to say now that this has been proved, but it is my burden and you never know what the jury is going to be hung up on back there. So I'm requesting the instruction be given as written" (R. Tr. 10/9/14, p. 17).

The trial court ruled that it would give the instruction:

> The Court is going to grant the instruction. The reason is this instruction does not create a rebut[able] presumption [that] the defendant knew he had insufficient funds. The rebut[able] presumption has already been created by the evidence. This instruction states to the jury that they "may, which means they're permitted to do so, "infer" that . . . and, therefore, that they are permitted to draw an inference but they're not required to draw that inference and are not required to presume.

(R. Tr. 10/9/14, pp. 17-18).

The trial court also agreed that there was overwhelming evidence to establish Cowen knew he had insufficient funds: "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. He's admitted to that on the witness stand" (R. Tr. 10/9/14, p. 17).

B. Preservation and Standard of Review

The People agree this claim is preserved. The People also agree that jury instructions are reviewed de novo to determine whether they accurately informed the jury of the governing law. *Alvarado-Juarez*, 252 P.3d at 1137. However, a trial court has broad discretion to formulate jury instructions as long as they are correct statements of the law. *Oram,* 217 P.3d at 893.

C. Law and Analysis

As an initial matter, because Cowen concedes that the evidence of his knowledge of insufficient funds was "overwhelming" and "not in dispute" his claim fails because any error was harmless. Indeed, both Cowen and the trial court agreed that this evidence was overwhelming. Cowen's brief repeatedly cites to testimony where he admitted he knew he did not have sufficient funds and cites to bank records that corroborated his own testimony (opening brief, pp. 29-30).

In any event, the jury was properly instructed on the *permissive* inference under section 18-5-205(8)(b), C.R.S. (2015). *People v. Felgar*, 58 P.3d 1122, 1125 (Colo. App. 2002); *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987); *see also* COLJI-Crim 5-2:04 (2015).

Cowen's assertion that the jury did not have to decide whether he knew had insufficient funds is wrong (opening brief, p. 32). Cowen never stipulated to that fact. The prosecution is required to prove every element of the crimes charged. Here, one of the elements was that Cowen knew he had insufficient funds in his account when he wrote the checks (R. CF. p. 281). Absent a stipulation, the jury had to decide if that element had been proven beyond a reasonable doubt.

Further, Cowen's defense was that he did not intend to defraud Elite Diesel, not that he lacked knowledge of insufficient funds (opening brief, p. 30). He concedes his knowledge was undisputed. Therefore, the instruction was not "destructive" of his defense (opening brief, p. 30).

Cowen was not unfairly prejudiced when the prosecution argued that the fact that he knew he did not have sufficient funds was evidence that he intended to defraud Elite Diesel. First, he was acquitted of one

of the check by fraud charges. Second, the fact that Cowen knew he did not have sufficient funds in his account when he wrote the checks was directly relevant to his intent to defraud Elite Diesel. It is reasonable to infer Cowen intended to defraud Elite Diesel because he wrote checks to the company knowing he did not have the money in his account. Prosecutors may comment on evidence admitted at trial, as well as all reasonable inferences that can be drawn from that evidence. *People v. McMinn*, 2013 COA 94, ¶ 61. Cowen's claim fails.

CONCLUSION

For the foregoing reasons and authorities the trial court's judgment and order should be affirmed.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **Julia Chamberlin**, Deputy State Public Defender, via Integrated Colorado Courts E-filing System (ICCES) on May 31, 2016.

/s/ Cortney Jones