SUMMARY
July 14, 2022

2022COA73

No. 20CA0629, *People v. Crabtree* — Crimes — DUI — Prior Convictions; Regulation of Traffic and Vehicles — Penalties for Traffic Offenses Involving Alcohol and Drugs — Felony Offenses

In *Linnebur v. People*, 2020 CO 79M, the Colorado Supreme Court clarified that, in a prosecution for felony driving while under the influence, the fact of a defendant's prior alcohol-related convictions must be proved to the jury beyond a reasonable doubt. But in a trial that pre-dated *Linnebur*, can a trial court plainly err by failing to so require? A division of the court of appeals answers this question, "yes" — at least where the trial court's decision was supported by *People v. Gwinn*, 2018 COA 130, and occurred before *People v. Viburg*, 2020 COA 8M, or *Linnebur*. Relying on *Johnson v. United States*, 520 U.S. 461 (1997), and its Colorado progeny, the

division concludes that such an error can meet the "obviousness" prong of plain error review in such circumstances.

COLORADO COURT OF APPEALS **2022COA73**

Court of Appeals No. 20CA0629
Boulder County District Court No. 17CR1238
Honorable Andrew R. Macdonald, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Charles James Crabtree,

Defendant-Appellant.

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

Division V
Opinion by JUDGE FOX
Freyre and Gomez, JJ., concur

Announced July 14, 2022

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¶ 1 Defendant, Charles James Crabtree, appeals his conviction for felony driving while under the influence (DUI). Although Crabtree's 2019 trial predated *People v. Viburg*, 2020 COA 8M, and *Linnebur v. People*, 2020 CO 79M, we agree with him that the trial court plainly erred by not requiring that the People prove the fact of his prior alcohol-related driving convictions to the jury beyond a reasonable doubt. Thus, we reverse his conviction for felony DUI and remand for further proceedings. However, because we reject Crabtree's challenge to his waiver of his right to counsel, we affirm his underlying conviction for misdemeanor DUI.

I. Background

¶ 2 On June 12, 2017, a tow truck driver reported to police that Crabtree, the driver of a car he was towing out of a ditch, appeared to be intoxicated.

¶ 3 Deputy Brittan Kuhlman responded and found Crabtree sitting in the front seat of his running car drinking a can of beer. Kuhlman approached the vehicle and noticed that Crabtree had bloodshot eyes and trouble understanding what the he was saying.

¶ 4 Kuhlman asked Crabtree to get out of the car. Crabtree was unable to keep his balance, so Kuhlman asked him to sit on the bumper of the tow truck. Kuhlman smelled alcohol on Crabtree's breath, and Crabtree admitted to having consumed an alcoholic drink earlier in the day.

¶ 5 Two other officers responded to the scene — Trooper John Owens and Trooper JD Smith. Like Kuhlman, Owens and Smith also noticed that Crabtree had bloodshot, watery eyes and that his breath smelled of alcohol.

¶ 6 Crabtree refused to take a chemical test or submit to voluntary roadside sobriety tests. He was arrested and charged with DUI (fourth or subsequent offense).

¶ 7 Crabtree waived his right to counsel after the trial court gave him an advisement pursuant to *People v. Arguello*, 772 P.2d 87, 92 (Colo. 1989). He proceeded to trial pro se.

¶ 8 At trial, in March 2019, Crabtree testified that his friend had been driving his vehicle and crashed it into a ditch: he was merely a passenger. He further testified that his friend fled the scene after they got into a "tiff," leaving him to wait nearly two hours for the

tow truck — and police — to arrive. He denied drinking and driving and disputed the responding officers' trial testimony.

¶ 9 A jury rejected Crabtree's defense and convicted him as charged. In a subsequent hearing, the court found by a preponderance of the evidence that Crabtree had four prior alcohol-related driving convictions; accordingly, it elevated his misdemeanor DUI conviction to a class 4 felony. The court sentenced Crabtree to three years of probation and one year in jail, which it suspended pending his successful completion of probation.

II. Waiver of Right to Counsel

¶ 10 Crabtree first contends that his conviction must be reversed because he represented himself without validly waiving his right to counsel. We disagree.

A. Additional Background

¶ 11 While Crabtree was in custody, the court appointed a public defender to represent him. Leading up to trial, and while represented by counsel, Crabtree filed numerous pro se motions and documents that were mostly incomprehensible.

¶ 12 As early as March 2018, Crabtree began requesting that the court dismiss his court-appointed counsel. The court, however,

refused to rule on his request until he completed a competency evaluation.

¶ 13 At defense counsel's request, the trial court ordered a competency evaluation, and Crabtree was found competent to proceed in April 2018. The evaluator concluded that "[t]here was no evidence of a major mental illness . . . and [Crabtree] did not present with any cognitive deficits that would render him incapable of demonstrating adjudicative competence." The evaluator also noted that, "although he asserted odd beliefs about his case and the legal system in general, his beliefs appear to be related to the Sovereign Citizen movement rather than any delusional belief system."

¶ 14 A month later, the trial court granted defense counsel's request for a second competency evaluation. Despite finding that Crabtree "exhibit[ed] significant symptoms of mental illness" in his "bizarre" and "delusional" thought process, the second evaluator also found Crabtree competent to proceed.

¶ 15 In June 2018, at a pretrial hearing, Crabtree, through counsel, renewed his request to proceed pro se. Defense counsel requested

that the court give Crabtree an *Arguello* advisement. The court asked Crabtree if he wanted to represent himself, wanted to have advisory counsel appointed, and understood his right to counsel. Crabtree responded affirmatively to the first and second inquiries but gave nonresponsive answers to the third.

¶ 16 Next, the court asked Crabtree if he understood the charge and potential sentence. Crabtree again provided nonresponsive answers and said he had not seen the complaint; the court then read the complaint at Crabtree's request. The court again asked Crabtree if he understood the charges, and Crabtree responded, "It's all hearsay, sir." The court then explained to Crabtree that the DUI count, as charged, was a class 4 felony, punishable by up to six years in prison, which could be increased to as much as twelve years if there were aggravating circumstances. The court asked Crabtree if he understood the possible penalties, and, after initially denying that he understood, Crabtree eventually said, "Yes, sir."

¶ 17 The court then continued the *Arguello* advisement:

> Court: Do you have any legal training?
>
> [Crabtree]: No, sir.
>
> Court: How far have you gone in school?

[Crabtree]: I'm not sure it's relevant.

. . . .

Court: Are you under the influence of any drugs, medication or alcohol that would impair your ability to understand what we are doing today?

[Crabtree]: Of course not.

The Court: Do you want to talk to [defense counsel] anymore before you make your decision about representing yourself?

[Crabtree]: No, sir.

Court: Do you understand that . . . criminal law is complicated. Do you understand that an attorney trained in this field would be helpful in representing you?

[Crabtree]: I understand positive law. I understand natural law. I understand common law. I understand trust law. I understand commercial law.

Court: Okay. . . . I asked you if you understood criminal law.

[Crabtree]: That's ambiguous, sir.

Court: Do you understand that you have a right to remain silent and anything that you say could be used against you in court?

[Crabtree]: I understand that I have the right to defend myself.

Court: You do. Do you understand you have the right to remain silent?

[Crabtree]: That would be assuming that I have counsel, sir.

Court: No. That's regardless of whether you have counsel. You always have a right to remain silent. Do you understand that?

[Crabtree]: Okay, sir. Everything will be for the record. Yes, under oath, under penalty of perjury.

Court: You are asking that I appoint counsel to advise you and assist you even though you're representing yourself?

[Crabtree]: I can seek it myself, sir.

Court: You don't want me to appoint you an attorney to advise you?

[Crabtree]: I wouldn't mind someone to speak to . . . I wouldn't mind to speak to [defense counsel].

Court: [Defense counsel] isn't going to be your advisory counsel. They don't do that. They either represent you or they don't.

[Crabtree]: So with that . . . being said . . . I would be able to consult with them. However, I reserve the power and right and authority.

Court: That's the way it works with an advisory counsel.

[Crabtree]: Yes.

Court: Do you understand that you have the right to represent yourself, but by so doing, you take a great risk of not properly presenting your case?

[Crabtree]: Always I swear to tell the truth and nothing but.

Court: Do you understand that risk you are taking by representing yourself?

[Crabtree]: Sir, no one was harmed. I don't understand risk.

. . . .

Court: I'm going to find that I advised you to the extent that I can. Do you understand you have a right to confront witnesses against you and cross-examine them?

[Crabtree]: Of course. Thank you.

Court: Do you understand you have a right to have witnesses of your own come to court and that you could issue subpoenas to make them come if you need to?

[Crabtree]: Yes.

Court: Is it your decision to represent yourself?

[Crabtree]: To represent the defendant, yes.

Court: [Defense counsel], you're withdrawn from the case.

. . . .

> Court: We are going to go ahead, Mr. Crabtree, and appoint you an advisory lawyer. We will have that lawyer get in touch with you.

¶ 18 Crabtree did not subsequently request counsel and represented himself from June 2018 until the end of his trial. Throughout the proceedings, Crabtree was uncooperative and continued to make bizarre and nonsensical statements. In his opening brief, he, through counsel, cites several examples:

- After again requesting to proceed pro se at a May 2018 pre-trial hearing, Crabtree said, "I object, sir. I'm a living man." He later told the court, "There's the defendant. I authorize you as trustee, state judiciary to set off and discharge this matter using my private exemption. I tried to address the Court respectfully, Your Honor. Administratively, I filed papers, but no, sir, the corporation will not allow me to exercise freedom of speech of due process."
- At trial, when asked to indicate his appearance for the record, Crabtree responded, "Postmaster full colon Charles hyphen James full colon Crabtree. I have my claim of the live life. I am here, present, ready to perform."

- When the court again offered Crabtree advisory counsel at trial, he replied, "I'm here to perform correct sentence structure . . . . I'm here to perform correct sentence structure parse syntax grammar, sir."
- At the post-trial hearing concerning his prior convictions, Crabtree began by telling the court,

> I have authority to be here under the bills of the lading. All courthouses are foreign vessels in dry dock. I tried to approach the Court respectfully yesterday and bring aware that I have the knowledge of correct sentence structure parse syntax grammar as well as the laws, rules, and regulations according to such. If you will notice I have my federal oath basically for correct sentence structure parse syntax structure. The light of the courtroom is claimed by federal judge by the flag of the correct sentence structure parse syntax grammar . . . .

B. Standard of Review

¶ 19 Whether a defendant effectively waived the right to counsel is a mixed question of fact and law. *People v. Lavadie*, 2021 CO 42, ¶ 22. We "accept the trial court's findings of historic fact if those findings are supported by competent evidence, but we assess the

legal significance of the facts de novo." *People v. Coke*, 2020 CO 28, ¶ 10 (quoting *People v. Davis*, 2019 CO 24, ¶ 14).

C. Applicable Law

¶ 20 The United States and Colorado Constitutions guarantee criminal defendants the right to counsel at all critical stages of a criminal proceeding. *See* U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16. Defendants, however, have a corollary right to reject counsel and represent themselves. *Lavadie*, ¶ 23; *Arguello*, 772 P.2d at 92. "Honoring these contrasting rights has been a persistent challenge for courts," as affording one right too much weight risks offending the other. *Lavadie*, ¶ 24. Indeed, striking a balance between the two requires a delicate touch: the right to self-representation cannot be "too quickly provided," nor the right to counsel "too vigorously shielded." *United States v. Pryor*, 842 F.3d 441, 451 (6th Cir. 2016).

¶ 21 "Because defendants who manage their own defense relinquish 'many of the traditional benefits associated with the right to counsel,'" *Lavadie*, ¶ 25 (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)), "the right to self-represent is conditioned on the

requirement that defendants demonstrate 'an intelligent understanding of the consequences of so doing,'" *id.* (quoting *Arguello*, 772 P.2d at 92). "Thus, before a defendant is allowed to proceed pro se, the defendant first must effect a valid waiver of the right to counsel." *Arguello*, 772 P.2d at 93.

¶ 22 "A defendant's waiver of counsel is effective only if (1) the defendant is competent to waive the right and (2) the waiver is made voluntarily, knowingly, and intelligently." *Lavadie*, ¶ 26. As pertinent here,

> [a] waiver is knowing and intelligent if the record clearly shows that the defendant understood the nature of the charges, the statutory offenses included within them, the range of allowable punishments, the possible defenses to the charges and circumstances in their mitigation, and all other facts essential to a broad understanding of the whole matter.

Id. at ¶ 28.

¶ 23 Because there is a strong presumption against finding a waiver of a fundamental constitutional right, the trial court "has the duty to make a careful inquiry about the defendant's right to counsel and his . . . desires regarding legal representation." *People v. Alengi*, 148 P.3d 154, 159 (Colo. 2006). Per *Arguello*, the trial

court must "probe, at a minimum, the defendant's awareness of the right to counsel and the defendant's understanding of the many risks of self-representation." *Alengi*, 148 P.3d at 159; *accord Arguello*, 772 P.2d at 94-95. To facilitate this inquiry, the court in *Arguello* "recommended the trial judge engage in a dialogue with the defendant according to the guidelines set forth in the *Colorado Trial Judges' Benchbook*" (an "*Arguello* advisement"). *Alengi*, 148 P.3d at 159. Still, the *Arguello* court emphasized that "[a] court's failure to comply substantially with this requirement does not automatically render the waiver invalid" if the totality of the circumstances supports the validity of the waiver. 772 P.2d at 96; *accord Lavadie*, ¶ 36. The totality of the circumstances includes the "whole record," including the defendant's conduct at trial. *See Arguello*, 772 P.2d at 96 ("From the record of the trial, it is apparent that Arguello did not understand how to have witnesses subpoenaed, did not know how to voir dire the jury, and did not understand how to submit appropriate jury instructions.").

¶ 24 The supreme court has reaffirmed its support for "the trial court's consideration of the totality of the circumstances in

determining whether a defendant's waiver of the right to counsel was valid." *Lavadie*, ¶ 39. That standard, the court said, "necessarily gives trial courts some flexibility" in inquiring about "a defendant's basic understanding of his constitutional rights regarding representation." *Id.* at ¶¶ 33, 39. Thus, "we continue to look to a flexible, totality-of-the-circumstances test to determine if a defendant has validly waived his right to counsel." *Id.* at ¶ 43.

D. Analysis

¶ 25 Crabtree suggests that "his repeated rambling statements [throughout the proceedings], made of words senselessly strung together," can only indicate that he "simply did not have a rational or factual understanding of the proceedings against him, or indeed, a grip on reality." Accordingly, he argues, a review of the totality of the circumstances shows that he was unable to knowingly and intelligently waive his right to counsel.[1]

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[1] Crabtree does not develop any argument regarding the voluntariness of his waiver; he contends only that it was not knowing or intelligent. Nor does the record reveal anything that would suggest his waiver was "extracted by threats or violence, promises, or undue influence." *People v. Lavadie*, 2021 CO 42, ¶ 27 (quoting *People v. Davis*, 2015 CO 36M, ¶ 18). Thus, in determining

¶ 26 At first blush, many of his statements appear to be, as the trial court put it, "gibberish." But the People offer another explanation for Crabtree's behavior aside from an alleged mental deficiency. The People argue that his statements — while seemingly nonsensical — do not suggest an inability to understand the proceedings, but rather track the beliefs of one who ascribes to the "sovereign citizenship" movement. Accordingly, and because he was given a proper advisement, the People argue that the record shows Crabtree's waiver was knowing and intelligent. Looking at the entirety of the proceedings — as we must, *see Lavadie*, ¶ 43 — we agree with the People that Crabtree validly waived his right to counsel.

¶ 27 A division of this court recently described the "sovereign citizenship" belief system as follows:

> Those who affiliate with "Sovereign Citizenship" believe in a particular interpretation of the common law and believe they are not subject to governmental statutes, proceedings, or jurisdictions. They believe the individual, a "flesh and blood" man (denoted in lowercase letters)[,] is separate from a legally

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whether he validly waived his right to counsel, we address only whether the waiver was knowing and intelligent.

> fictitious commercial entity imposed upon them by issuance of a birth certificate and other official documents (as governmental documents usually denote names in all capital letters). Through this fictitious entity, they believe, the United States government perpetrates fraud, making the individual a "creditor" of the fictitious entity.

People v. Anderson, 2020 COA 56, ¶ 17 n.4; *see also Lavadie*, ¶ 7 n.1 ("The 'sovereign citizen' movement is an ideology that 'rejects the legitimacy of United States jurisdiction over its adherents.'" (quoting *Pryor*, 842 F.3d at 445 n.2)). The arguments advanced by these groups are "generally incoherent, legally, and vary greatly among different groups and different speakers within those groups. They all rely on snippets of 19th Century court opinions taken out of context, definitions from obsolete legal dictionaries and treatises, and misplaced interpretations of original intent." *United States v. Mitchell*, 405 F. Supp. 2d 602, 605 (D. Md. 2005) (citation omitted).

¶ 28 Crabtree himself acknowledges in his opening brief that he adheres to the movement. And, though apparently nonsensical, many of the statements he cites as evidence of his lack of understanding appear to be merely expressions of that belief system.

¶ 29 For example, he emphasizes that he repeatedly interjected, when speaking to the court, the following phrase: "correct sentence structure parse syntax grammar." Though "gibberish" to us, this appears to be a nod to "the 'Parse-Syntax-Grammar' language invented by . . . a member of the 'sovereign citizen' movement . . . to burden federal courts 'with a frivolous line of litigation.'" *Swartz v. SPX Corp.*, Civ. A. No. 4:15-CV-00393, 2015 WL 12159211, at *3 n.3 (M.D. Penn. Dec. 10, 2015) (citation omitted) (unpublished opinion); *see also Alvarez v. Sitts*, 2020 WL 5027131, *1 (D. Or. Aug. 25, 2020) (plaintiff, a "sovereign citizen" adherent, wrote his amended complaint "in the same combination of what plaintiff calls 'plain language' and 'CORRECT-SENTENCE-STRUCTURE-COMMUNICATIONS-PARSE-SYNTAX-GRAMMAR'").

¶ 30 The record is replete with such examples that track the language of the "sovereign citizen" movement. For instance, as Crabtree himself highlights, when defense counsel informed the court that Crabtree wanted to proceed pro se in May 2018, Crabtree stated, "I object. I'm here in propria persona," and when the court asked him to approach the podium, he said, "I object, sir. I'm a

living man." (Emphasis added.) He went on to say, "I tried to address the Court respectfully, Your Honor. Administratively, I filed papers, but no, sir, *the corporation* will not allow me to exercise freedom of speech of due process." (Emphasis added.) Other examples include the following:

- At another hearing, Crabtree told the court, "I'm sorry, sir. I don't consent. I don't have any proof of claim that the statutes apply to me, *a living man*." (Emphasis added.)
- At another pretrial hearing addressing Crabtree's pro se motions, Crabtree said, "Objection, Your Honor. I am a man. I'm here to establish that I am a living *the flesh and blood man*. I wish for remedy." (Emphasis added.)
- At trial, Crabtree said, "I'm sorry, sir, you have an affidavit of *corporate* denial. I can't find any existence of the State of Colorado." (Emphasis added.) And, "I have put on the record the evidence of my live life of the *distinction and difference between myself and the Defendant*." (Emphasis added.) "I thought that you knew law . . . . *My law of the creator*." (Emphasis added.)

¶ 31 Accordingly, although nonsensical, we are not persuaded that Crabtree's use of "gibberish" necessarily indicated that he was incapable of effecting a knowing and intelligent waiver. *See United States v. Brown*, 669 F.3d 10, 18 (1st Cir. 2012) (determining that the defendant's words and behavior, though often "bizarre," did not evidence a confusion about the legal proceedings against him, but rather "reflected firmly held, idiosyncratic political beliefs punctuated with a suspicion of the judiciary"). In fact, despite his efforts to depict himself as unable to understand the proceedings, a review of the full record paints a different picture.

¶ 32 Take, for example, his responses during cross-examination. Crabtree claimed that a friend had been driving his car, not him. When the prosecutor asked if he had called the friend to testify, he responded, "You have to prove a case. I don't have to defend anything." Then he rhetorically said, "Did you call her as a witness?" He also claimed that Kuhlman had lied when he testified that he saw Crabtree holding a beer while in the driver's seat of his vehicle. Such answers evinced at least a basic understanding of the charges and proceedings against him.

¶ 33 Moreover, when Crabtree cross-examined Owens, Crabtree asked him, "[Y]ou didn't actually witness any driving?" Owens responded, "No, sir, I didn't." And in response to a jury question about why he did not agree to a blood test, he answered, "This is an adversarial system. Um, I kind of learned that the hard way. Um, everybody has a job, let them do their job." These statements, too, suggest he had an adequate understanding of the proceedings.

¶ 34 Finally, in his closing statement, Crabtree argued that the officers were not credible, they had not seen him actually drinking and driving, and the prosecution had failed to prove the elements of DUI. In doing so, he again exhibited that he understood the charges against him and possible defenses he could claim.

¶ 35 Additionally, the trial court advised Crabtree consistently with *Arguello*. While he was nonresponsive to some questions, he answered enough positively to affirm that, on the whole, he had a sufficient understanding of the proceedings to validly waive his right. And, in any event, "[a] court's failure to comply substantially with this requirement does not automatically render the waiver invalid" if, as here, the totality of the circumstances supports the

validity of the waiver. *Arguello*, 772 P.2d at 95-96; *accord Lavadie*, ¶ 36.

¶ 36 In sum, contrary to Crabtree's assertion, his use of "gibberish" at trial does not compel us to find that his waiver of counsel was not knowing or intelligent. Rather, considering the substance of his statements, and viewing them in light of his more lucid comments later in trial, we are satisfied that his "gibberish" was not necessarily indicative of an inability to understand the proceedings, but merely the expressions of an adherent of the "sovereign citizen" movement. Though he was certainly mistaken about some aspects of the law, his comments during the trial and in response to the trial court's *Arguello* advisement showed he had a sufficient understanding of the proceedings to effect a valid waiver.[2]

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[2] True, in *Lavadie*, ¶ 49, the court found that a "sovereign citizen" adherent did not effectively waive his right to counsel because, in response to the trial court's *Arguello* advisement, he "repeatedly gave unresponsive answers, reasserted his sovereign citizen beliefs, or refused to participate in the proceeding." Here, though, Crabtree gave enough positive answers to convey that he understood the right he was waiving. And, also unlike *Lavadie*, his responses to the *Arguello* advisement, coupled with his conduct during trial, amounted to more than a "few facts" suggesting that his waiver was knowing and intelligent. *Lavadie*, ¶ 49. Thus, *Lavadie* is readily distinguishable.

¶ 37 The record shows that the trial court did just about everything in its power to urge Crabtree to keep his court-appointed counsel. It was put in the unenviable position of having to navigate the balance between Crabtree's right to counsel and his right to self-representation: it was only at Crabtree's steadfast insistence that the court dismissed his defense counsel. Because Crabtree's decision was made knowingly and intelligently, his waiver of his right to counsel was valid, and we discern no error in the trial court's decision to honor his right to self-representation.[3]

III. Proof of Prior Convictions

¶ 38 In September 2018, a division of our court held in *People v. Gwinn*, 2018 COA 130, ¶¶ 39-56, that in a prosecution for felony DUI, the fact of a defendant's prior convictions is merely a sentence enhancer that need not be submitted to a jury or proved beyond a

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[3] Crabtree raises two related contentions, neither of which is availing. He contends that because he alleged that a conflict of interest existed between himself and court-appointed counsel, the court erred by not (1) conducting a conflict hearing and (2) substituting counsel. In addition to waiving counsel, the record shows Crabtree did not actually allege any such conflict; he alleged only a conflict "between defend[ant] and [the] court" — an apparent expression of his "sovereign citizen" views. Nor did he ever request a substitution of counsel. Thus, we reject these contentions.

reasonable doubt. During Crabtree's March 2019 trial, *Gwinn* remained controlling and settled law. The trial court thus followed the procedure sanctioned by *Gwinn*: it found by a preponderance of the evidence that Crabtree had been convicted of at least three prior alcohol-related driving offenses and adjudicated Crabtree a felony DUI offender.

¶ 39 Then, in January 2020, another division of our court disagreed with *Gwinn* and reached a contrary conclusion. *Viburg*, ¶ 28. The *Viburg* division held that the fact of a defendant's prior convictions is a substantive element of felony DUI to be tried to a jury and found beyond a reasonable doubt, not a sentence enhancer to be found by the court. *Id.*

¶ 40 In November 2020, our supreme court resolved the division split in *Linnebur*, ¶ 31. Consistent with *Viburg*, the court concluded, once and for all, that prior alcohol-related convictions are an element of felony DUI. *Linnebur*, ¶ 31.

¶ 41 Given *Linnebur*'s holding, it is clear that the trial court erred here by not submitting the issue to the jury. But, without the benefit of *Viburg* or *Linnebur*, can it be said that the court *plainly*

erred? In other words, may an error that is not "obvious" at the time of trial become so while the case is on appeal, entitling a defendant to the benefit of a change in law? That is the question Crabtree, having failed to preserve this issue, poses to us now. *See Hagos v. People*, 2012 CO 63, ¶ 14 (we review all unpreserved errors for plain error).

¶ 42 Crabtree contends that divisions of this court have already concluded that the answer to this question is "yes." The People counter that our supreme court conclusively decided in *Scott v. People*, 2017 CO 16, that the answer is "no." We agree with Crabtree.[4]

¶ 43 In *Johnson v. United States*, 520 U.S. 461 (1997), the Supreme Court held that, under the plain error test announced in *United States v. Olano*, 507 U.S. 725 (1993), "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate

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[4] In the following analysis and canvass of the relevant law, we borrow liberally from Judge Richman's opinion in *People v. Houghton*, (Colo. App. No. 19CA2192, Jan. 27, 2022) (not published pursuant to C.A.R. 35(e)), an unpublished opinion that deftly and thoroughly addressed the same issue.

consideration," with "plain" being synonymous with both "clear" and "obvious." *Johnson*, 520 U.S. at 467-68. The Court reasoned that to hold otherwise "would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." *Id.* at 468.

¶ 44 In *People v. O'Connell*, 134 P.3d 460, 464-65 (Colo. App. 2005), a division of this court explored the scope of the *Johnson* rule's applicability — a rule that it considered "well established." Relying on a series of federal circuit court cases, the division concluded that the *Johnson* rule does not apply where the applicable law is *unsettled* at the time of trial. *Id.* at 465.

¶ 45 About a year later, in a case involving law that, as in *Johnson*, was *settled* at the time of trial but clearly contrary to the law on appeal, another division of this court held that the *Johnson* rule applied and applied to postconviction cases as well as to direct appeals. *People v. Versteeg*, 165 P.3d 760, 767 (Colo. App. 2006).

¶ 46 Another division followed suit in *People v. Moore*, 321 P.3d 510 (Colo. App. 2010), *aff'd in part and vacated in part*, 2014 CO 8, presupposing that the *Johnson* rule applies when the applicable law

is settled at the time of trial, but concluding that "[i]f the law is unsettled at the time of trial, 'plain error analysis will be conducted using the status of the law at the time of trial.'" *Id.* at 513 (quoting *O'Connell*, 134 P.3d at 464-65).

¶ 47 Accordingly, after *O'Connell*, *Versteeg*, and *Moore*, the rule was clear: *Johnson* governs plain error review in Colorado when the applicable law was settled at the time of trial but not when the applicable law was not settled at the time of trial.

¶ 48 Then, in *Henderson v. United States*, 568 U.S. 266, 273-75 (2013), the Supreme Court resolved the "settled versus unsettled" debate in the federal context, holding that so long as an error is obvious at the time of appeal, it does not matter whether the law was settled or unsettled at the time of trial; an appellate court should apply the current law. In reaching this conclusion, the Court hearkened back to Chief Justice Marshall, who once wrote,

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court

> must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of the law, the judgment must be set aside.

Id. at 271 (quoting *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)).

¶ 49 Since *Henderson*, our supreme court has repeatedly granted certiorari to consider whether to adopt its rule (and, by extension, the rule announced in *Johnson*), but it has declined to reach the issue every time. *Romero v. People*, 2017 CO 37, ¶ 1 n.1; *Garcia v. People*, 2019 CO 64, ¶ 28; *Howard-Walker v. People*, 2019 CO 69, ¶ 49; *Campbell v. People*, 2020 CO 49, ¶ 38; *Thompson v. People*, 2020 CO 72, ¶ 53. While divisions of this court may have implicitly rejected *Henderson*, *see, e.g.*, *People v. Valdez*, 2014 COA 125, ¶ 27 ("[W]here the law is unsettled [at the time of trial], the trial court's alleged error with respect to the law cannot constitute plain error."), none, to our knowledge, has rejected *Johnson*.

¶ 50 And this case is a *Johnson* case. At the time of Crabtree's trial — post-*Gwinn* and pre-*Viburg* — it was settled law that he was not entitled to have his prior convictions for alcohol-related driving

offenses tried to a jury beyond a reasonable doubt. Thus, it would have been futile for Crabtree to have requested as much. But now, after *Linnebur*, the procedure employed in Crabtree's trial is clearly contrary to the law. Thus, we conclude that Crabtree has satisfied the "obviousness" prong of plain error review and is able to benefit from the change in law applicable on appeal. *See Hagos*, ¶ 14 (plain error is (1) obvious and (2) substantial).

¶ 51 We are not, as the People contend, forced by *Scott* to evaluate the obviousness of the error in this case at the time of trial instead of at the time of appeal. For one thing, *Scott* does not squarely address the issue. Moreover, each of the post-*Henderson* supreme court cases referenced above was decided after *Scott*, with one of those cases stating, "we decline to decide whether to adopt *Henderson* and continue to leave that question open." *Campbell*, ¶ 41. Therefore, *Scott* does not control the outcome here and we opt to follow *Johnson*.

¶ 52 Moreover, we reject the prosecution's suggestion that Crabtree has not shown prejudice: the differing burden of proof alone was sufficient to prejudice him.

¶ 53 Because Crabtree has established that the trial court plainly erred, we reverse his felony DUI conviction and remand the case to the trial court. On remand, the People may elect to retry him for felony DUI. *See People v. Viburg*, 2021 CO 81M, ¶ 23. If the People choose not to, the court is instructed to sentence Crabtree on his misdemeanor DUI conviction.

IV. Conclusion

¶ 54 The judgment is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

JUDGE FREYRE and JUDGE GOMEZ concur.