SUMMARY
March 16, 2023

2023COA24

No. 20CA0251, *People v. Cross* — Criminal Law — Sentencing — Probation — Presentence Report

A division of the court of appeals considers whether the district court erred by denying the defense motion for a continuance of the sentencing hearing where the probation department failed to provide defense counsel with the required presentence report "[n]o less than seventy-two hours prior to the sentencing hearing," in violation of section 16-11-102(1)(a)(IV), C.R.S. 2022. The probation department timely provided the presentence report to the court and the prosecutor.

The division holds that, when the probation department fails to provide defense counsel with the presentence report by the deadline specified in the presentence investigation statute, and the

defendant did not otherwise receive the report by that time, the defendant is entitled to a continuance of the sentencing hearing.

The division further determines that, unless the prosecution proves that the error was harmless, the appropriate remedy when a district court denies the defense's request for a continuance under these circumstances is reversal of the sentence and a remand for resentencing.

Accordingly, the division concludes that the court abused its discretion by denying the defense's motion for a continuance and thus deprived the defendant of his statutory right to a timely presentence report. The division affirms the judgment of conviction in part and reverses it in part, and remands the case for resentencing.

COLORADO COURT OF APPEALS **2023COA24**

Court of Appeals No. 20CA0251
Jefferson County District Court No. 18CR4025
Honorable Christopher C. Zenisek, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jerald Arthur Cross,

Defendant-Appellant.

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

Division IV
Opinion by JUDGE LIPINSKY
Fox and Schock, JJ., concur

Announced March 16, 2023

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¶ 1 Colorado law recognizes that a trial court should receive relevant and accurate information about a convicted criminal defendant before imposing the defendant's sentence. Section 16-11-102(1)(a)(I), C.R.S. 2022, and Crim. P. 32(a)(1)(I) require that "the probation officer" make an investigation and produce a "written report to the court before the imposition of sentence." In making its sentencing decision, the trial court "shall give careful consideration to the information supplied by the probation officer." *Wolford v. People*, 178 Colo. 203, 207-08, 496 P.2d 1011, 1013 (1972).

¶ 2 The parties must also receive this information. Section 16-11-102(1)(a)(IV) specifies that, following a felony conviction, the probation department must provide the presentence report, "including any recommendations as to probation," to the prosecution and defense counsel (or to the defendant if he or she is unrepresented) "[n]o less than seventy-two hours prior to the sentencing hearing." The statute contains no exceptions to the seventy-two-hour requirement, does not say whether a court possesses the discretion to shorten that period, and does not specify the remedy if the probation department fails to provide

defense counsel with a copy of the presentence report within that period.

¶ 3 In this case, the court proceeded with the sentencing hearing of defendant, Jerald Arthur Cross, even though the probation department failed to provide defense counsel with the presentence report "[n]o less than seventy-two hours prior to the sentencing hearing." At the hearing, defense counsel advised the court that he was unaware of the contents of the presentence report until he obtained a copy of it after the statutory deadline, and he asked for a continuance, which the court denied. We determine that the court reversibly erred by proceeding with the sentencing hearing under these circumstances.

¶ 4 But before we reach this issue, we consider, and reject, Cross's arguments for reversal of his conviction.

I. Background

¶ 5 In response to a 911 call, police officers arrived at the home where Cross lived with his long-term romantic partner (the victim). The officers found the victim bleeding from two gunshot wounds to her head. Cross was attempting to perform CPR on her. The victim died from the gunshot wounds.

¶ 6 Cross admitted to the officers that he "did it." At trial, however, his lawyer argued that Cross had fired the gun accidentally.

¶ 7 Cross was charged with first degree murder. The jury convicted him of second degree murder with a crime of violence sentence enhancer. The trial court sentenced Cross to forty years in the custody of the Department of Corrections (DOC).

II. Analysis

¶ 8 Cross presents three arguments on appeal. He contends that the trial court abused its discretion by (1) admitting evidence of his prior acts of domestic violence against the victim; (2) admitting hearsay evidence of his controlling and abusive behavior toward the victim; and (3) denying defense counsel's request to continue the sentencing hearing even though the probation department did not provide defense counsel with the presentence report by the deadline set forth in section 16-11-102(1)(a)(IV).

A. Evidentiary Issues

1. Standard of Review

¶ 9 "We review a trial court's evidentiary rulings for an abuse of discretion." *Rojas v. People*, 2022 CO 8, ¶ 16, 504 P.3d 296, 302.

"A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law." *People v. Johnson*, 2021 CO 35, ¶ 16, 486 P.3d 1154, 1158 (citations omitted). Under this standard, "we ask not whether we would have reached a different result but, rather, whether the trial court's decision fell within the range of reasonable options." *People v. Archer*, 2022 COA 71, ¶ 23, 518 P.3d 1143, 1149-50 (quoting *Hall v. Moreno*, 2012 CO 14, ¶ 54, 270 P.3d 961, 973).

2. The Prior Act Evidence

a. The Evidence of Cross's Prior Acts Admitted at Trial

¶ 10 Cross argues that the court abused its discretion by admitting — through the testimony of the victim's brother and three of her friends, including Christine Watkins — the following evidence of Cross's prior acts of domestic violence against the victim and their fraught relationship over the last three years of the victim's life (the subject testimony):

- About three years before the victim's death, Cross and the victim had a physical altercation in which Cross pushed the victim, injuring her neck. Following the altercation, the victim went to the home of Watkins and

Watkins's partner, described the incident to them, and told them she feared Cross. The victim and Cross later reconciled.

- Approximately ten months before the victim's death, she told her brother that "it's happening again," referring to "something of a physical nature" between Cross and the victim.
- A few months later, the victim told a friend that, if Cross "hit her again," she would call the police to have Cross removed from the couple's home.
- Two weeks before she died, the victim reaffirmed her plan to ask the police to remove Cross from their home if he again became physically violent toward her.

¶ 11 At the time the witnesses provided the subject testimony and again at the conclusion of the trial, the court instructed the jury that it could only consider the subject testimony for the limited purpose of determining Cross's motive. At the same points during the trial, the court told the jury it could also consider Watkins's subject testimony in assessing Cross's defense that the shooting was accidental.

b. Relevant Law

¶ 12 CRE 404(b) provides that evidence of "any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character," but that such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." We apply CRE 404(b) in conjunction with CRE 403, which cautions that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice."

¶ 13 A court analyzing the admissibility of prior act evidence must first determine, by a preponderance of the evidence, whether the defendant committed those acts. *People v. Vasquez*, 2022 COA 100, ¶ 74, 521 P.3d 1042, 1056. Cross does not dispute that he committed the acts described in the subject testimony.

¶ 14 Next, the court must undertake the four-part analysis for admissibility of prior act evidence outlined in *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990). Under *Spoto*, evidence of prior acts is admissible if it (1) relates to a material fact; (2) is logically relevant;

(3) has a logical relevance independent of the prohibited intermediate inference that the defendant has a bad character; and (4) does not result in unfair prejudice to the defendant that substantially outweighs the probative value of the evidence. *Id.*

¶ 15 Because Cross does not dispute that the subject testimony related to material facts and was logically relevant, we focus our analysis on the third and fourth prongs of *Spoto*. Under the third prong of *Spoto*, "a high degree of similarity" between the prior acts and "the defendant's behavior in the charged offense" is one factor that may support the admissibility of the prior acts. *Yusem v. People*, 210 P.3d 458, 467 (Colo. 2009) ("[T]he lack of similarity between [the defendant's] prior act and the charged offense . . . supports our conclusion that the prior act evidence is not relevant independent of the inference [of the defendant's character as] a bully.").

¶ 16 In weighing the admissibility of prior act evidence in criminal prosecutions involving domestic violence, we must also consider the General Assembly's guidance in section 18-6-801.5(1), C.R.S. 2022. The statute provides that "domestic violence is frequently cyclical in nature, involves patterns of abuse, and can consist of harm with

escalating levels of seriousness," and, therefore, "evidence of similar transactions can be helpful and is necessary" in some such cases. § 18-6-801.5(1). Under the statute, a court is authorized to admit "evidence of any other acts of domestic violence between the defendant and the victim" to establish "a common plan, scheme, design, identity, modus operandi, motive, or guilty knowledge or for some other purpose." § 18-6-801.5(2)-(3).

¶ 17 Divisions of this court have followed section 18-6-801.5(1) by affirming trial courts' admission of evidence of prior acts of domestic violence involving the same victim in an ongoing relationship in appeals of convictions for crimes involving domestic violence. For example, in *People v. McBride*, where the defendant was convicted of first degree murder and first degree assault for shooting his romantic partner in the face, a division of this court upheld the trial court's admission of evidence of the defendant's prior acts of domestic violence against the victim — punching, beating, and choking her, and threatening her with a knife and a shotgun. 228 P.3d 216, 220, 227 (Colo. App. 2009).

¶ 18 The division noted that the prosecutor had tied the evidence of the prior acts of domestic violence "with sufficient specificity" to the

charged act, so that the prior acts "properly could be considered independently of the prohibited inference that defendant had a bad character." *Id.* at 227. The division concluded that the prior act evidence was admissible because it "bore directly on whether the shooting was intentional (as the prosecution contended) or accidental (as defendant maintained)." *Id.*

¶ 19 Similarly, in *Vasquez*, where the defendant had allegedly killed his romantic partner by pouring gasoline on her and lighting her clothing on fire, the division held that the trial court had not erred by admitting "evidence of an argument between defendant and the victim that resulted in defendant damaging the victim's television." *Vasquez*, ¶¶ 5, 76-77, 521 P.3d at 1048, 1056-57. The division held that the television incident was "plainly admissible under section 18-6-801.5" to rebut the defendant's contention that the victim's death was an accident. *Id.* at ¶¶ 76-77, 521 P.3d at 1056-57.

c. The Court Did Not Abuse Its Discretion by Admitting Evidence of Cross's Prior Acts of Domestic Violence

¶ 20 The trial court did not abuse its discretion by admitting the subject testimony for the limited purpose of establishing Cross's

motive for shooting the victim or by admitting Watkins's subject testimony for the purpose of rebutting Cross's defense that he shot the victim accidentally.

¶ 21 First, the requirement that the prior act evidence "have relevance independent of an inference of conformity with bad character" does not "'demand the absence of the inference' entirely." *People v. Denhartog*, 2019 COA 23, ¶ 42, 452 P.3d 148, 157 (quoting *People v. Snyder*, 874 P.2d 1076, 1080 (Colo. 1994)). Rather, *Spoto* holds that "the evidence cannot be relevant *only* to show a propensity to commit crimes." *Id.*

¶ 22 Further, section 18-6-801.5 (which Cross and the People acknowledge applies because this case involves domestic violence) demonstrates that the General Assembly placed its finger on the scale in favor of admitting evidence of prior acts of domestic violence in prosecutions involving domestic violence, and that such evidence is admissible to establish motive, guilty knowledge, or another purpose specified in the statute, so long as such evidence otherwise satisfies CRE 404(b). As *McBride* teaches, under the third prong of *Spoto*, acts of "defendant's violent behavior toward the

same victim in an ongoing relationship" are admissible in domestic violence cases. *McBride*, 228 P.3d at 227.

¶ 23 Under Cross's reasoning, evidence of prior acts of domestic violence could never be admitted in cases involving domestic violence because the prior acts necessarily highlight the defendant's bad character and suggest that the defendant acted in conformity with that bad character when he committed the offenses for which he is standing trial. But this argument cannot be squared with the General Assembly's directive in section 18-6-801.5(3).

¶ 24 The court reasonably determined that the logical relevance of Cross's prior acts "is independent of an inference of bad character because [the prior acts] show[] that the relationship may [have] be[en] volatile and one leading to violence." Indeed, as the court noted, the prior act evidence placed the shooting in perspective: it showed that Cross had previously reacted in an angry and controlling manner after overhearing the victim's plans to leave him, the physical violence had reoccurred during the months leading up to the victim's death, and the victim was once again planning to leave Cross. A reasonable juror could logically infer Cross's motive from this evidence, independent of any intermediate character

inference. Further, such evidence, coupled with the evidence establishing that Cross attempted to control the victim's access to her friends and family and emotionally abused her, tended to make it more probable that Cross knowingly killed the victim and that the gun did not discharge accidentally.

¶ 25 Second, we disagree with Cross's argument that the challenged prior act evidence was inadmissible under the fourth prong of *Spoto* because its admission resulted in unfair prejudice to Cross that substantially outweighed its probative value. Although the challenged prior act evidence concerned events that occurred as long as three years before the shooting, the evidence was substantially similar to the evidence establishing that, shortly before the victim's death, Cross had physically abused her and she had talked about leaving him if the abuse did not stop. The evidence showed that Cross's acts of domestic violence targeting the victim were ongoing. Thus, the trial court did not err by determining that the challenged prior act evidence was "highly probative of the relationship dynamic" between Cross and the victim, and the consistent volatility of their relationship.

¶ 26 Moreover, although the evidence was prejudicial to Cross, it was not unfairly so. To the contrary, it was prejudicial for the same reason it was probative — because it suggested that the shooting was not an accident. The allegations of Cross's physical and emotional abuse of the victim would not unduly inflame the passions of the jury in the context of the allegation that Cross shot the victim twice in the head. *See People v. Dist. Ct.*, 785 P.2d 141, 147 (Colo. 1990) (noting that evidence is not "unfairly prejudicial simply because it damages the defendant's case," but rather because it has "an undue tendency to suggest a decision on an improper basis, . . . such as sympathy, hatred, contempt, retribution, or horror"); *cf. People v. Brown*, 2014 COA 130M, ¶ 22, 342 P.3d 564, 568 (concluding that the trial court abused its discretion by admitting prior act evidence that was "qualitatively different, more severe, and more inflammatory than the evidence concerning the charged offenses").

¶ 27 Therefore, we conclude that the court did not abuse its discretion by admitting the challenged prior act evidence.

3. Hearsay Regarding Cross's Controlling Behavior

a. Admission of the Hearsay

¶ 28 Cross contends that the court erred by admitting portions of the victim's brother's testimony that constituted inadmissible hearsay. The testimony concerned the victim's expressions of fear that Cross would overhear her telephone calls with her brother and react violently after hearing those conversations.

¶ 29 Specifically, during direct examination, the victim's brother testified that the victim told him she would speak to him on her cell phone from the downstairs area of the house because Cross had difficulty walking up and down stairs and would have difficulty overhearing her when she spoke in that area of the house. The victim's brother explained that the victim told him that, when she and her brother "needed to talk about specific issues, she would actually wait for [Cross] to leave the house, and then go downstairs and call [her brother], because she was afraid of [Cross's] reaction [and] that he might be standing at the top of the stairs listening."

¶ 30 At a pretrial motions hearing, the court ruled that such testimony did not communicate a "statement" that constituted hearsay and was admissible. Cross contends that the court erred

by admitting the testimony. Although Cross does not argue that the testimony was irrelevant, he nonetheless asserts it was inadmissible because it was hearsay, as it concerned information that the victim's brother had obtained through his discussions with the victim and not through his own observations. He also contends that the testimony was not admissible under the state-of-mind hearsay exception in CRE 803(3). We disagree.

b. Relevant Law

¶ 31 Hearsay is "a statement other than one made by the declarant while testifying at the trial . . . offered in evidence to prove the truth of the matter asserted." CRE 801(c). It is inadmissible unless an exception to the hearsay rule applies. CRE 802.

¶ 32 One such exception allows the admission of statements reflecting "the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive design, mental feeling, pain, and bodily health), but not including a statement of memory or belief." CRE 803(3). "A victim's statements to the effect that she was, at the time, afraid of another fall squarely within the state of mind hearsay exception under CRE 803 because they refer not to past events or conditions, but to the victim's then

existing state of mind." *People v. Rogers*, 68 P.3d 486, 493 (Colo. App. 2002).

c. The Court Did Not Err by Admitting the Challenged Testimony of the Victim's Brother

¶ 33 Although we agree with Cross that the challenged testimony qualifies as hearsay, we conclude that it was admissible under the state-of-mind exception in CRE 803(3). Cross argues that the prosecutor did not take the position in the trial court that the evidence was admissible under this exception to the hearsay rule. But Cross's assertion is incorrect; at the motions hearing, the prosecutor argued the evidence would "show [the victim's] state of mind and her plan to deal with the arguments [with Cross] . . . by retreating downstairs." In any event, we may affirm the trial court's decision to admit the evidence "on any ground supported by the record, whether relied upon or even considered by the trial court." *People v. Dyer*, 2019 COA 161, ¶ 39, 457 P.3d 783, 792.

¶ 34 We are not persuaded by Cross's argument that the testimony of the victim's brother "referred to discussions of [the victim's] behavior and mindset as they had already occurred before the conversation, not to [the victim's] then existing state of mind." The

testimony reflected the victim's statements that, at the time, she feared Cross's reaction if he learned about her telephone call with her brother.

¶ 35 Accordingly, the court did not err by admitting the testimony of the victim's brother that Cross challenges as inadmissible hearsay.

B. Sentencing Hearing

1. Additional Facts

¶ 36 At the sentencing hearing, defense counsel made two requests for a continuance, for separate reasons.

¶ 37 First, defense counsel argued that a continuance was necessary because the presentence report lacked important information about Cross's work history, family history, and character. Defense counsel explained that, during Cross's interview with the probation department, Cross had been willing to "discuss all matters save for the facts of the case" but invoked his Fifth Amendment right against self-incrimination regarding questioning on those facts. But, according to defense counsel, the department "would not conduct any type of interview" unless Cross agreed to "fully participate." Defense counsel said that he had "anticipated

[the department] would attempt to gather the information" regarding Cross's work history, family history, and character "through other sources that were also available to them." But, according to defense counsel, the probation department "did nothing" to obtain this information. Defense counsel "didn't find out about this until late, because . . . [the probation department] didn't send [him] the report." Acknowledging that members of the victim's family were present in the courtroom and were prepared to testify, defense counsel proposed that "any party who wishes to address the Court about sentencing be allowed to do that today, rather than have to come back," and that the court allow the defense to present its evidence concerning sentencing at a later date.

¶ 38 The court denied defense counsel's request for a continuance. While the court acknowledged that Cross possessed a Fifth Amendment right not to discuss the facts of the case, it explained that a continuance was not required to alleviate any "shortcomings" in the report because the defense could provide the missing information at the hearing. In its oral ruling, the court stressed that individuals who planned to speak on behalf of the victim were

waiting in the courtroom. The court, however, did not refer to defense counsel's suggestion that the prosecution witnesses be allowed to testify that day and that the court set another hearing date at which the defense witnesses could testify.

¶ 39 Following this ruling, the defense made a second request for a continuance on the grounds that the probation department had not provided the presentence report to defense counsel "[n]o less than seventy-two hours prior to the sentencing hearing," in violation of section 16-11-102(1)(a)(IV). The court files confirm that the probation department e-filed and e-served the report on the prosecutor through the Colorado courts' electronic filing system by the statutory seventy-two-hour deadline, but inexplicably never e-served the report on defense counsel. (Documents uploaded to the e-filing system are e-served on the other parties at the time of e-filing unless the filer checks the "I will serve the documents on my own" box or deselects the "E-Service" box for those parties.) Defense counsel reported that he had obtained a copy of the presentence report less than seventy-two hours before the sentencing hearing.

¶ 40 Defense counsel argued that, because he had not received the report by the statutory deadline, he needed, and was entitled to, additional time to prepare witnesses and statements to provide the court with the information missing from the presentence report. In addition, defense counsel asserted that Cross was "entitled by law to a continuance" in light of his untimely receipt of the presentence report because "the statute doesn't say the defendant has to show prejudice" from the untimely receipt. But defense counsel nevertheless also said that Cross would be prejudiced if forced to proceed with the sentencing hearing that day because defense counsel was surprised by the material omissions from the report. Further, defense counsel said that, if the court expected defense counsel to "fill in the gaps" in the report by providing information that "probation normally [provides]," he would "need some time to prepare and find out which of [Cross's relatives] wants to testify . . . on [sentencing] matters."

¶ 41 The court denied this request for a continuance, as well. It noted that, although the probation department had not provided defense counsel with the presentence report more than seventy-two hours before the sentencing hearing, defense counsel had access to

it when the department uploaded it to the e-filing system. The court further said that, because the defense obtained the presentence report "close" to seventy-two hours before the hearing, it was not "persuaded that there is prejudice in missing the timeframe." (The court asserted that defense counsel obtained the report approximately sixty-eight hours before the hearing. The parties do not dispute this figure.)

¶ 42 In addition, the court interpreted section 16-11-102(1)(a)(IV) to mean it had the discretion to deny the defense's request for a continuance after "fully evaluat[ing] all factors" for granting a continuance, even though the probation department had not provided the presentence report to defense counsel by the statutory deadline. Lastly, the court said that although it wanted "to be sure that all parties can prepare and present everything that's needed," it was "also mindful of the need for some closure, and for people in the victim's family to express what they need to express to the Court, for the Court to achieve some resolution." Thus, the court concluded, "I think what I have before me is a discretionary, difficult, close call, that weighed, albeit slightly, in favor of the prosecution, so we will move forward with sentencing." As noted,

the court made no mention of defense counsel's suggestion that the witnesses in the courtroom be permitted to testify that day and that the court permit the defense to present its evidence at a later date.

¶ 43 The court proceeded with the hearing. Two individuals made statements on behalf of the victim, Cross's son spoke on behalf of his father, and Cross addressed the court. The court then imposed the forty-year sentence.

2. Relevant Law

¶ 44 Section 16-11-102(1)(a)(IV) requires the probation department to provide copies of the presentence report to the prosecuting attorney and defense counsel "[n]o less than seventy-two hours prior to the sentencing hearing." *Accord* Crim. P. 32(a)(3)(II). (A party can request an earlier delivery deadline, in which case the department "shall provide the presentence report at least seven days prior to the sentencing hearing." § 16-11-102(1)(a)(IV).)

¶ 45 The "obvious purpose" of these timing requirements is "to provide the defendant with notice of the information the court is to consider and to allow him or her to contest it at the sentencing hearing, notice and opportunity to be heard being the essence of procedural due process of law." *People v. Pourat*, 100 P.3d 503, 505

(Colo. App. 2004). In *People v. Wright*, the supreme court held that the defendant was entitled to a new "full sentencing hearing" because the probation department had failed to provide defense counsel with the presentence report "[w]ithin a reasonable time prior to sentencing," as required by the version of section 16-11-102(1) in effect at the time. 672 P.2d 518, 521-22 (Colo. 1983) (quoting § 16-11-102(1), C.R.S. 1982).

¶ 46 In *Wright*, defense counsel did not receive the presentence report until the morning of the sentencing hearing and told the court he was surprised to learn that the probation department and the prosecution were recommending imposition of an enhanced sentence. *Id.* In response, the trial court postponed the sentencing hearing to that afternoon. *Id.* At the rescheduled hearing, defense counsel said he needed further time to "obtain character evidence, to investigate certain statements in the presentence report attributed to defendant's prior parole officer, or to discover and present statistics concerning other enhanced sentences imposed in the jurisdiction." *Id.* The trial court denied the request for a further continuance of the sentencing hearing. *Id.* In reversing, the supreme court noted defense counsel's assertion that the untimely

presentence report contained "inaccurate and irrelevant" information and determined that "[t]he brief postponement did not provide defendant a reasonable opportunity to present character evidence in mitigation of punishment, as required under the statute." *Id.* at 522. Under the circumstances, the trial court's refusal to grant defense counsel a further continuance of the sentencing hearing "unduly abridged defendant's rights to present evidence in rebuttal to the information and recommendations contained in the presentence report." *Id.*

3. Standard of Review

¶ 47 We review a trial court's ruling on a motion for a continuance for an abuse of discretion. *People v. Finney*, 2012 COA 38, ¶ 46, 328 P.3d 205, 215, *aff'd*, 2014 CO 38, 325 P.3d 1044. "A court abuses its discretion if it misinterprets or misapplies the law." *People v. Chavez*, 2020 COA 80M, ¶ 8, 486 P.3d 377, 378. "The proper interpretation of a sentencing statute presents a question of law, which we review de novo." *Id.* We thus review de novo whether the trial court misinterpreted or misapplied section 16-11-102. If the trial court erred, we reverse unless the People prove "that the error did not substantially influence the [sentence] or affect the

fairness of the [sentencing] proceedings." *James v. People*, 2018 CO 72, ¶ 19, 426 P.3d 336, 341.

4. The Court Erred by Denying Cross's Request for a Continuance

¶ 48 We agree with Cross that the court abused its discretion by denying his motion for a continuance of the sentencing hearing because it misinterpreted and misapplied section 16-11-102(1)(a)(IV). There is no dispute that the probation department failed to provide the presentence report to defense counsel "[n]o less than seventy-two hours prior to the sentencing hearing," as the statute requires. By violating section 16-11-102(1)(a)(IV), the department deprived Cross of a statutory right.

¶ 49 Thus, we must consider the remedy the trial court must provide for a violation of the seventy-two-hour requirement. (We do not address whether the court would have possessed the authority to grant the probation department an extension of time to provide the presentence report to the attorneys if the department advised the court it was unable to comply with the seventy-two-hour statutory deadline.)

¶ 50 The court proceeded with the sentencing hearing in reliance on language in section 16-11-102(1)(a)(IV) requiring a court to "reset the sentencing hearing" if the department is unable to comply with a seven-day deadline (where one of the attorneys had requested the report seven days before the sentencing hearing). The court interpreted such language to mean that it possessed the discretion to "fully evaluate all factors" and to deny Cross's request to remedy the probation department's violation of the statutory seventy-two-hour deadline by continuing the sentencing hearing.

¶ 51 But the reference to "reset the sentencing hearing" appears in the portion of subparagraph (IV) addressing a scenario in which "either the defense or the district attorney" requested that the probation department provide the presentence report at least seven days prior to the sentencing hearing, and the probation department informed the court it could not meet that deadline. § 16-11-102(1)(a)(IV). Under those circumstances, the court "shall grant the probation department additional time to complete the report and shall reset the sentencing hearing so that the hearing is held at least seven days after the probation department provides the report." *Id.*

¶ 52 Setting aside whether the "reset the sentencing hearing" language applies when no attorney has requested the presentence report seven days before the sentencing hearing, the probation department did not inform the court it could not provide the report "[n]o less than seventy-two hours prior to the sentencing hearing" or request an extension of time to provide it to the attorneys. Instead, as we explain above, the department timely provided the presentence report to the court and the prosecutor, but not to defense counsel. It is of no consequence that defense counsel could have accessed the presentence report on the e-filing system once the probation department submitted it electronically. Defense counsel did not know at the time that the department had filed the report. The statute does not require a defense lawyer to whom the probation department failed to provide a presentence report by the statutory deadline to check the e-filing system every few minutes. The statute places the burden on the department to "provide" the presentence report to defense counsel — not merely "finish" it or make it "accessible" — by the deadline.

¶ 53 In deciding the appropriate remedy for the probation department's failure to provide the presentence report to Cross's

counsel "[n]o less than seventy-two hours prior to the sentencing hearing," we follow the reasoning of *Wright*, even though the division in that case considered an earlier version of section 16-11-102(1)(a). The differences between the two versions of the statute are irrelevant to our analysis of *Wright* because those differences merely affect the deadline and not the consequences of missing that deadline. We caution, however, that the discussion of "reasonable time" in *Wright* was tied to the language of the presentence report statute in effect at the time. 672 P.2d at 521-22 (quoting § 16-11-102(1), C.R.S. 1982). For this reason, we do not consider whether counsel for Cross received the report "[w]ithin a reasonable time," *see id.*, but, instead, whether he received the report at least seventy-two hours in advance of the sentencing hearing, as the statute now provides.

¶ 54 We hold that, when the probation department fails to provide defense counsel with the presentence report within the time specified in the presentence investigation statute, and the defendant did not otherwise receive the report by that time, the defendant is entitled to a continuance of the sentencing hearing. A continuance is necessary because a late presentence report

"abridge[s] [the] defendant's rights to present evidence in rebuttal to the information and recommendations contained in the presentence report." *Id.* at 522. We do not address whether a defendant would also be entitled to a continuance if the probation department did not provide the presentence report to defense counsel by the statutory deadline but defense counsel nonetheless received the report before such deadline.

¶ 55 The People argue that the probation department's failure to serve the report on defense counsel did not warrant a continuance because Cross was not prejudiced. The People argue that "at most, [Cross] would have been entitled to a four-hour continuance" and "nothing in the record supports that counsel would have been able [to call witnesses] but for the delayed service." But this assertion is premised on an incorrect legal standard and misapplies the defendant's burden of proof on appeal. If Cross had moved for a continuance after timely receiving the report from the probation department, we would consider the totality of the circumstances to determine whether the trial court abused its discretion by denying the continuance, and Cross would bear the burden of showing prejudice. *See Finney*, ¶¶ 45-47, 328 P.3d at 215. Here, however,

we need not consider the totality of the circumstances because we have already determined that the court abused its discretion by misapplying the statute and thereby abridging Cross's right to timely receipt of the report from the probation department.

¶ 56 Given our conclusion that the court erred by denying Cross's request for a continuance, we must reverse his sentence unless the People meet their burden of showing that the error "did not substantially influence" Cross's sentence or that it did not "affect the fairness" of the sentencing proceeding. *James*, ¶ 19, 426 P.3d at 341. At the sentencing hearing, defense counsel asserted that he was surprised to discover the material omissions from the report and that he would need more time to marshal evidence to fill in the gaps. The People respond that "[n]othing about [the missing information] was likely relevant to — much less mitigating of — the crime" and that "nothing in the record supports that counsel would have been able [to call witnesses] but for the delayed service" on the day of the scheduled sentencing hearing. But these speculative assertions do not prove that the error was harmless. The missing information fell within the categories of facts ordinarily provided in a presentence report that are "of great importance to the trial

judge's ultimate sentencing decision." *People v. Valencia*, 906 P.2d 115, 118 (Colo. 1995). This is particularly true where, as here, the trial court possesses significant discretion in sentencing; the court could have sentenced Cross to the custody of the DOC for anywhere between sixteen and forty-eight years. *See* § 18-3-103(4), C.R.S. 2022; § 18-1.3-406, C.R.S. 2022; § 18-1.3-401, C.R.S. 2022.

¶ 57 Accordingly, we reverse Cross's sentence and remand for resentencing. At the resentencing hearing, Cross may present additional evidence relevant to the court's sentencing decision. The court may, in its discretion, allow the witnesses who testified at the prior sentencing hearing to testify again, or the court may rely on the witnesses' prior testimony in making its sentencing decision. In light of our holding, we need not reach Cross's alternative argument that he was entitled to a continuance of the sentencing hearing because the presentence report was incomplete.

III. Disposition

¶ 58 The judgment is affirmed insofar as Cross challenges his conviction. It is reversed as to Cross's sentence, and the case is remanded with directions to conduct further sentencing proceedings at which the defense may present additional evidence,

and the court may, in its discretion, allow the witnesses who testified at the earlier hearing to testify again.

JUDGE FOX and JUDGE SCHOCK concur.