SUMMARY
June 8, 2023

2023COA49

No. 20CA1678, *People v. Babcock* — Criminal Law — Sentencing — Restitution — Procedural Deadlines — Waiver; Courts and Court Procedure — Jurisdiction of Courts — Subject Matter Jurisdiction

A division of the court of appeals concludes that, when the Colorado Supreme Court held in *People v. Weeks*, 2021 CO 75, that a sentencing court loses the authority to impose restitution after ninety-one days absent an express finding of good cause, it did not mean that the court loses subject matter jurisdiction. Thus, the division holds that because the deadline is not jurisdictional, a defendant waives any challenge to the timeliness of the restitution award by requesting a hearing on restitution outside the ninety-one-day period.

COLORADO COURT OF APPEALS **2023COA49**

Court of Appeals No. 20CA1678
Adams County District Court No. 19CR2947
Honorable Kristan K. Wheeler, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Zachary Eugene Babcock,

Defendant-Appellant.

ORDER AFFIRMED

Division II
Opinion by JUDGE TOW
Taubman* and Berger*, JJ., concur

Announced June 8, 2023

Philip J. Weiser, Attorney General, Marixa Frias, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Jessica A. Pitts, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 Defendant, Zachary Eugene Babcock, appeals the trial court's restitution order, asserting that the trial court lacked authority to enter a restitution order more than ninety-one days after sentencing without a timely and express finding of good cause to extend that deadline. The People contend that Babcock waived his right to challenge the timeliness of the restitution order by requesting a hearing date outside the ninety-one-day period before the expiration of that deadline. Answering a question not addressed by the Colorado Supreme Court in *People v. Weeks*, 2021 CO 75, ¶ 24, we conclude that a defendant can waive the right to have restitution determined within the statutory time constraints and that Babcock did so by requesting a hearing outside the ninety-one-day period. We therefore address Babcock's challenge to the sufficiency of the evidence to support the restitution award and conclude the evidence was sufficient. Accordingly, we affirm the restitution order.

I. Background

¶ 2 On December 19, 2019, Babcock pleaded guilty to child abuse resulting in serious bodily injury as part of a deferred judgment and sentence agreement. When the court accepted the plea, it reserved

restitution for ninety-one days. Eighty-two days later, on March 10, 2020, the prosecution filed its motion to impose restitution with supporting documentation, requesting $12,258.83 in restitution for medical bills. On March 18, 2020 — ninety days after the court accepted the plea — defense counsel objected to the restitution request and asked that a restitution hearing be set in June — which would fall outside the ninety-one-day period — because of "the current pandemic the world is facing." The next day, the trial court set the hearing for June 11, 2020. Thereafter, the June hearing was continued because of COVID-19. Ultimately, the hearing was held on August 14, 2020, and the trial court imposed $12,258.83 in restitution.

II. Timeliness

A. Standard of Review and Applicable Law

¶ 3 This appeal calls for us to interpret the restitution statute, section 18-1.3-603, C.R.S. 2022. That presents a legal issue that we review de novo. *Weeks*, ¶ 24.

¶ 4 Every order of conviction for a felony "shall include consideration of restitution," which must take one or more of four prescribed forms: (1) an order to pay a specific amount; (2) an order

that the defendant is obligated to pay restitution, but deferring the establishment of the actual amount owed; (3) an order that the defendant is obligated to pay the actual costs of specific future treatment for the victim; or (4) a finding that no victim suffered a pecuniary loss and thus no restitution is owed. § 18-1.3-603(1). If the court reserves the determination of restitution, the statute provides that the amount of restitution "shall be determined within the ninety-one days immediately following the order of conviction, unless good cause is shown for extending the time period by which the restitution amount shall be determined." § 18-1.3-603(1)(b). For purposes of the restitution statute, an order of conviction for a felony includes the court's acceptance of a plea of guilty. *People v. Roddy*, 2021 CO 74, ¶¶ 18-21 (treating the acceptance of a deferred judgment and sentence agreement as an "order of conviction" for purposes of the statutory restitution deadlines); *see also* § 18-1.3-602(2), C.R.S. 2022.

¶ 5 The ninety-one-day "deadline in subsection (1)(b) refers to the court's determination of the restitution amount the defendant must pay, not to the prosecution's determination of the proposed amount of restitution." *Weeks*, ¶ 5. And "this deadline may be extended

only if, before the deadline expires, the court expressly finds good cause for doing so." *Id.* If the court fails to comply with this deadline, it loses the authority to award restitution. *See id.* at ¶¶ 7, 45.

B. Analysis

¶ 6 The People contend that (1) the restitution statute's ninety-one-day deadline is not jurisdictional, and (2) Babcock waived "any timeliness challenge to the determination of restitution outside the ninety-one-day deadline by expressly requesting that the court set a . . . hearing for restitution more than three months after expiration of the ninety-one[-]day deadline." We agree with both contentions.

1. Authority

¶ 7 We agree with the People that the restitution statute's ninety-one-day deadline is not jurisdictional.

¶ 8 Subject matter jurisdiction "concerns the court's authority to deal with the *class* of cases in which it renders judgment, not its authority to enter a particular judgment within that class." *People in Interest of J.W. v. C.O.*, 2017 CO 105, ¶ 24; *see also Minto v. Lambert*, 870 P.2d 572, 575 (Colo. App. 1993) (noting that there is

often "confusion about subject matter jurisdiction because of a blurring of the distinction between the appropriate exercise of power and the absence of power"). But not all mandatory statutory time limits are jurisdictional. *See, e.g.*, *People v. McMurtry*, 122 P.3d 237, 241-42 (Colo. 2005) (holding that the statutory right to a speedy trial within six months of pleading not guilty is not jurisdictional). When the legislature intends to impose a limit on the court's jurisdiction, it must do so explicitly. *Wood v. People*, 255 P.3d 1136, 1140 (Colo. 2011). A jurisdictional defect cannot be waived, but a nonjurisdictional deadline can be. *Id.*; *see also People v. Sprinkle*, 2021 CO 60, ¶ 17.

¶ 9 In *Weeks*, the supreme court stated that a trial court loses "authority" to order restitution more than ninety-one days after sentencing absent an express good cause finding to extend the deadline. *Weeks*, ¶ 45. Notably absent from *Weeks* — and from the statutory provision itself — is the use of the word "jurisdiction."

¶ 10 In *People v. Turecek*, 2012 COA 59, ¶¶ 20, 25, *overruled in part by Weeks*, 2021 CO 75, a division of this court determined that the statutory deadline for imposing restitution is not jurisdictional.

> To say that a court lacks authority to order belated restitution does not use "authority" in a jurisdictional sense, but only in the same sense in which a court lacks "authority" to impose a sentence above the statutory maximum. Such action is an error of law, reversible on appeal, but it is not jurisdictional.

Id. at ¶ 20 (quoting *Dolan v. United States*, 560 U.S. 605, 626 (2010) (Roberts, C.J., dissenting)). Although in *Weeks* the supreme court overruled *Turecek*, the court did so only "[t]o the extent that [it was] inconsistent with" *Weeks*. *Weeks*, ¶ 47 n.16. We read nothing in *Weeks* that would be inconsistent with *Turecek*'s jurisdictional analysis. Indeed, the fact that the discussion in *Weeks* is restricted to a sentencing court's authority — rather than its jurisdiction — indicates that the supreme court did not intend to abandon its long adhered-to distinction between the two.

¶ 11 We thus conclude that *Weeks* did not overrule *Turecek*'s jurisdictional analysis. The ninety-one-day period remains a nonjurisdictional deadline and, as such, it can be waived. We therefore turn to the People's contention that Babcock waived his right to have restitution determined within ninety-one days by requesting a hearing date outside the ninety-one days.

2. Waiver

¶ 12 "Constitutional and statutory rights can be waived or forfeited." *Richardson v. People*, 2020 CO 46, ¶ 24. With respect to either a constitutional right or a statutory right, waiver is "the intentional relinquishment of a known right or privilege." *Id.* (quoting *People v. Rediger*, 2018 CO 32, ¶ 39).

¶ 13 Defense counsel requested a hearing outside the ninety-one-day period before *Weeks* was decided. But at the time, the restitution statute stated, as it does now, that "the specific amount of restitution shall be determined within the ninety-one days immediately following the order of conviction, unless good cause is shown for extending the time period by which the restitution amount shall be determined." § 18-1.3-603(1)(b), C.R.S. 2019. And before defense counsel requested that the hearing be set outside the ninety-one-day period, at least one published decision by a division of this court resolved the timeliness issue largely as the supreme court did later in *Weeks*. *See Turecek*, ¶ 25 (holding that the deadline applies to the court's determination of restitution and reversing the order); *see also People v. Perez*, 2020 COA 83, ¶¶ 18-27 (discussing the historical view that the deadline in section

18-1.3-603(1)(b) applies to the court), *overruled in part by Weeks*, 2021 CO 75, *cert. granted, judgment vacated, and case remanded*, (Colo. No. 20SC559, Dec. 6, 2021) (unpublished order). Therefore, at the time defense counsel requested that a restitution hearing be set outside the ninety-one-day period, he was asking the trial court to act outside the timeframe proscribed by statute and case law. By doing so, he intentionally relinquished a known right.[1] *See Rediger*, ¶ 39.

¶ 14 Finally, to the extent Babcock contends that he also had a right to have the trial court make an express finding of good cause to extend the deadline within the original ninety-one days, and he did not waive that right, we disagree. The requirement that the trial court make an express finding of good cause to extend the deadline within the original ninety-one days is a "statutory procedure outlined in *Weeks*" that allows the trial court to retain its authority to impose restitution beyond the original ninety-one-day period. *See People v. Tennyson*, 2023 COA 2, ¶¶ 2, 25-29. It is not a defendant's right.

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[1] The People do not argue that this was an invited error.

¶ 15 Accordingly, we conclude that Babcock waived his challenge to the timeliness of the restitution order, and we therefore do not address the merits of that challenge. *See Rediger*, ¶ 40 (stating that waiver "extinguishes error, and therefore appellate review").

III. Sufficiency of the Evidence

¶ 16 We disagree with Babcock's contention that insufficient evidence supported the restitution award for the medical bills because the People failed to prove (1) that his conduct proximately caused the losses incurred and (2) the amount of restitution.

A. Standard of Review

¶ 17 Both parties agree that we review de novo Babcock's sufficiency challenge to the restitution order, including his challenge to the court's determination that Babcock proximately caused the losses incurred. *See People v. Barbre*, 2018 COA 123, ¶ 25 ("[T]he appropriate standard is to review de novo whether the evidence . . . establishes by a preponderance of the evidence that the defendant caused that amount of loss."). We note, however, that the appropriate standard of review is far from clear. *See People v. Moss*, 2022 COA 92, ¶ 11 (pointing out the different standards of review used in reviewing sufficiency challenges to restitution

orders); *People v. Martinez*, 2022 COA 28, ¶ 14 (applying the abuse of discretion standard of review in reviewing the district court's determination that the defendant's action proximately caused the victim's losses) (*cert. granted* Oct. 24, 2022); *Martinez*, ¶ 60 (J. Jones, J., specially concurring) (reasoning that proximate cause for restitution purposes is a question of fact and as such should be reviewed for clear error). But because the parties do not raise this issue, and because our outcome would be the same under any of these approaches, we do not delve into the differences that may exist among these standards. *See Moss*, ¶ 11.

¶ 18 Electing to apply the standard invoked by both parties, we review the record de novo to determine whether the evidence was sufficient in both quantity and quality to support a restitution award. *Barbre*, ¶ 25; *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005). In doing so, we evaluate "whether the evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, establishes by a preponderance of the evidence that the defendant caused that amount of loss." *Barbre*, ¶ 25. "As with a sufficiency challenge to a conviction, however, '[w]e will not disturb a district court's findings and conclusions if the

record supports them, even though reasonable people might arrive at different conclusions based on the same facts.'" *Moss*, ¶ 11 (quoting *People v. Dyson*, 2021 COA 57, ¶ 15). "Thus, our de novo determination is whether the prosecution presented sufficient evidence to convince a reasonable fact finder by a preponderance of the evidence of the amount of restitution owed." *Id.*

B. Applicable Law

¶ 19 Individuals convicted of criminal behavior must "make full restitution to those harmed by their misconduct." § 18-1.3-601(1)(b), C.R.S. 2022. Restitution "means any pecuniary loss suffered by a victim . . . proximately caused by an offender's conduct . . . that can be reasonably calculated and recompensed in money." § 18-1.3-602(3)(a). "Proximate cause in the context of restitution is defined as 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. Rivera*, 250 P.3d 1272, 1274 (Colo. App. 2010). The prosecution must prove by a preponderance of the evidence that the defendant's conduct proximately caused the victim's loss and the amount of that loss. *People v. Henry*, 2018 COA 48M, ¶ 15.

C. Analysis

1. Proximate Cause

¶ 20 We disagree with Babcock's contention that the People failed to prove by a preponderance of the evidence that he proximately caused I.B.'s injuries, which resulted in the medical bills.

¶ 21 Babcock said that I.B., then two years old, threw a tantrum because she did not want to go to bed, and in the process, she launched herself from his arms and hit her chin on the bed's railing. I.B. was sluggish the following morning and was throwing up by the afternoon. Babcock later found I.B. unconscious on the floor and shook her to wake her up.

¶ 22 At the restitution hearing, Babcock testified that he was anxious and was not as gentle as he could have been in shaking I.B. when he found her unconscious. The evidence presented at the restitution hearing showed that Babcock was taking care of I.B. by himself around the time she exhibited symptoms.

¶ 23 I.B. was taken to a medical center by ambulance the evening Babcock shook her. She had a brain bleed and was airlifted to a children's hospital.

¶ 24 Dr. Daniel Lindburg treated I.B. and concluded I.B.'s injuries — a subdural hematoma and retinal hemorrhaging — were inconsistent with Babcock's account that I.B. had fallen. Although Dr. Lindburg could not place the cause of the injuries within an exact timeframe, he said that vomiting is a symptom of a head injury and loss of consciousness is a significant event likely following an abuse incident. Dr. Lindburg said that I.B.'s injuries were caused by abuse. He explained that it is possible that there were multiple incidents of abuse or one incident.

¶ 25 A police officer interviewing Babcock told him that I.B.'s injuries were caused by I.B. being shaken, but it is unclear why the police officer thought that. And while Dr. Lindburg said that I.B. would have started showing symptoms almost immediately after being shaken, or soon thereafter, this statement appears to be *in response* to the police officer's theory that shaking was the cause of her injuries — not the predicate for that theory. Indeed, I.B. was already showing symptoms of abuse — vomiting and loss of consciousness — before Babcock shook her.

¶ 26 In other words, nothing in the record of the restitution hearing indicates that Dr. Lindburg thought that I.B.'s injuries stemmed

solely from Babcock shaking her when he found her unconscious. Rather, Dr. Lindburg's opinion was that I.B.'s head injuries were inconsistent with Babcock's account and were instead caused by one or more incidents of abuse. And Babcock was the only person taking care of I.B. when she started exhibiting symptoms of having been abused.

¶ 27 Thus, based on the evidence presented, the prosecution provided sufficient evidence to enable the trial court to find by a preponderance of the evidence that Babcock's conduct proximately caused I.B.'s need for the medical treatment referenced in the medical bills.

2. Restitution Amount

¶ 28 Babcock also contends that the People did not prove the amount of restitution by a preponderance of the evidence. The People contend that Babcock waived his challenge to the amount of restitution because at the restitution hearing, defense counsel said, "I believe it's clear that the dispute here is proximate cause. It is not the amount of money . . . which was tendered in the Prosecution's restitution exhibit, which, I believe is approximately twelve thousand dollars." In other words, Babcock acknowledged at

the hearing that the evidence of the *amount* of restitution was sufficient. Whether this was a waiver or a concession, he cannot now be heard to make the exact opposite argument.

¶ 29 But even if we assume the challenge is properly before us, we agree with the People that they proved the amount of restitution by a preponderance of the evidence.

¶ 30 The prosecutor submitted documents showing the amount paid for I.B.'s medical bills through March 9, 2020, totaling $12,258.83.[2] The bills showed the date of service, medical provider, claim type, diagnosis code, diagnosis description, billed amount, and amount paid.

¶ 31 No record evidence from the restitution hearing calls into question the accuracy of these amounts.[3] The trial court was

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[2] Babcock's contention that the prosecution only sought restitution for medical bills through March 9, 2019, based on the prosecutor's mistake in saying "2019" at the hearing, is unavailing given the written request the prosecutor submitted before the hearing, which sought restitution for medical bills through March 9, 2020, and the supporting medical bills, which contained dates in 2020.

[3] To the extent Babcock contends that the People were required to have doctors and employees from the agency that paid I.B.'s medical bills testify, we disagree. The rules of evidence are not applicable at restitution hearings, and the court is permitted to rely on hearsay and documentary evidence. *People v. Vasseur*, 2016

therefore justified in relying on the medical bills in determining the amount of restitution. *See People v. Welliver*, 2012 COA 44, ¶ 6 (concluding that the court was justified in relying on the presentence report to determine the amount of restitution when the defendant did not object to the amount).

IV. Disposition

¶ 32 The restitution order is affirmed.

JUDGE TAUBMAN and JUDGE BERGER concur.

COA 107, ¶¶ 20-21; *see also People in Interest of A.V.*, 2018 COA 138M, ¶ 35 ("[T]he prosecution may rely solely on documentary evidence to meet its burden."). And Babcock never objected to the prosecutor proceeding this way.