

The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
December 7, 2023

2023COA115

No. 20CA1717, *People v. Day* — Criminal Law — Insanity — Expert Mental Condition Evidence — Competency to Proceed — Cooperation with Competency Evaluator

In this appeal, the defendant challenges the trial court's refusal to admit evidence of her mental condition, which she argued was relevant to rebut the prosecution's theory that her post-incident conduct and demeanor was suggestive of her culpable mental state. Applying our supreme court's framework in *People v. Moore*, 2021 CO 26, a division of the court of appeals concludes that the court erred in denying the admission of some, but not all, of the defendant's proffered expert testimony. Concluding that the evidentiary error was not harmless beyond a reasonable doubt, the division reverses and remands for a new trial on all counts for which the defendant's culpability was at issue.

Court of Appeals No. 20CA1717
Lake County District Court No. 15CR26
Honorable Catherine J. Cheroutes, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Maria Laida Day,

Defendant-Appellant.

JUDGMENT AND ORDER REVERSED
AND CASE REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE FOX
Román, C.J., and Furman, J., concur

Announced December 7, 2023

Philip J. Weiser, Attorney General, Frank R. Lawson, Assistant Attorney
General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Andrew C. Heher, Deputy State
Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Maria Laida Day, appeals the judgment of conviction entered on jury verdicts finding her guilty of second degree murder, vehicular homicide, leaving the scene of an accident, and careless driving resulting in death. Day challenges the trial court's refusal to admit evidence of her mental condition, which she argued was relevant to rebut the prosecution's theory that her calm demeanor in the aftermath of the incident was suggestive of her culpable mental state. Applying our supreme court's framework in *People v. Moore*, 2021 CO 26, we conclude that the court erred in excluding some, but not all, of Day's proffered expert testimony. Further concluding that the evidentiary error was not harmless beyond a reasonable doubt, we reverse and remand for a new trial on all counts for which Day's culpability was at issue. Accordingly, we also reverse the trial court's restitution order and remand for further proceedings.

I. Background

¶ 2 This appeal concerns an incident in which Day (a driver) ran over her boyfriend, J.M. (a pedestrian), with her car. Trial testimony established that Day drove her mother and J.M. from their hometown of Leadville to go shopping in Frisco. When they

returned to Leadville, Day pulled over to let J.M. out of the car a few blocks before her mother's house. She pulled off on a narrow and unpaved Leadville street that ran directly in front of a small business. The business was situated about a foot above ground level, and an elevated concrete sidewalk with a metal handrail separated the business's front door from the street level. J.M. exited the car, and the parties agree that Day ran over J.M. with her car as she pulled away. The evidence suggested that J.M.'s head hit the concrete barrier during the collision. J.M. was eventually taken to the hospital, where he later died. The parties dispute whether the incident was an accident.

¶ 3 The prosecution charged Day with second degree murder, vehicular homicide, and leaving the scene of an accident resulting in death.¹ Day was tried approximately five years later. The delay was largely due to communication difficulties with the Colorado Mental Health Hospital in Pueblo (CMHHIP) and Day's deteriorating mental condition while in custody. Day was found incompetent by a state examiner and later restored to competency. Day's trial was

¹ Day's counsel later asked that the jury be given a careless driving resulting in death instruction.

also transferred to another venue after a jury could not be impaneled in Leadville, further delaying the trial.

¶ 4 The parties presented conflicting theories at trial. The prosecution asserted that Day intended to hit J.M. with her car. Prosecutors presented evidence that Day left the scene of the incident and waited approximately thirty minutes before calling 911. During those thirty minutes, surveillance video showed Day pulling up to her mother's residence, bringing her mother into the house, and then going back outside to inspect the damage to her car. Day apparently then drove around the vicinity of the incident before returning to her mother's house, where she called 911. When Day called 911, she admitted running over J.M. with her car.

¶ 5 Regarding Day's culpable mental state, the prosecution presented evidence that Day had physically abused J.M. in the past and threatened to kill him three days before the incident. Prosecutors also elicited testimony from several witnesses that Day exhibited a calm and detached affect after the incident.

¶ 6 Day alleged that the incident was an accident, and that she initially did not realize she had run over J.M., primarily because she was preoccupied with getting her mother home. Instead, she

theorized that a defect in her car caused it to lurch forward, run over what she believed was a rock (or a cement brick), and hit the concrete barrier. Day's theory was that she only realized she had hit J.M. when he did not get up as first responders arrived at the scene. Day also presented evidence that J.M. was severely intoxicated, and that his level of intoxication could have caused him to fall to the ground before Day ran over him.

¶ 7 The jury found Day guilty of second degree murder, vehicular homicide — and the lesser nonincluded offense of careless driving resulting in death — and leaving the scene of an accident. The trial court sentenced Day to thirty-five years in the custody of the Department of Corrections.

¶ 8 On appeal, Day asserts that the trial court erred by excluding evidence of her mental condition that she claims was relevant to explain her post-incident conduct. Day also challenges the court's authority to order restitution after the ninety-one-day statutory deadline, and she asserts that insufficient evidence supported the award.

II. Mental Condition Evidence

¶ 9 Day first asserts that the trial court erroneously excluded evidence that her mental illness could have caused her to experience disorganized thoughts and problem-solving difficulties, which she offered to explain her detached affect and her failure to call 911 immediately after the incident.

A. Applicable Law and Standard of Review

¶ 10 Section 16-8-107(3)(a), C.R.S. 2023, prohibits admission of evidence “relevant to the issue of insanity” unless the defendant pleads not guilty by reason of insanity (NGRI). Section 16-8-101.5(1), C.R.S. 2023, extends the legal status of “insanity” to

(a) A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong . . . ; or

(b) A person who suffered from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable mental state that is an essential element of a crime charged

Only those “severely abnormal mental conditions that grossly and demonstrably impair a person’s perception or understanding of reality” qualify as a “mental disease or defect” within the meaning of the insanity statute. § 16-8-101.5(1)(b), (2)(c). Thus, both of the

above forms of insanity “require that, at the time of the alleged offense, the defendant suffered from a severely abnormal mental condition that grossly and demonstrably impaired [her] perception or understanding of reality.” *Moore*, ¶ 27.

¶ 11 Relevant evidence is that which has “any tendency to make the existence of any fact that is of consequence to . . . the action more probable or less probable than it would be without the evidence.” CRE 401. Thus, evidence that is relevant to the issue of insanity tends to prove or disprove (i.e., is probative of) the issue of insanity, and is inadmissible absent an NGRI plea. *Moore*, ¶ 33.

¶ 12 But section 16-8-107(3)(b) provides that

[r]egardless of whether a defendant enters a plea of not guilty by reason of insanity . . . the defendant shall not be permitted to introduce evidence in the nature of expert opinion concerning his or her mental condition without having first given notice to the court and the prosecution of his or her intent to introduce such evidence and without having undergone a court-ordered examination.

Thus, evidence of “less-severe mental illness” that is not relevant to insanity “remains admissible, absent an insanity plea, if it otherwise conforms to the statutory requirements and the rules of evidence.” *Moore*, ¶ 5; *see also People v. Wilburn*, 2012 CO 21, ¶ 20;

People v. Vanrees, 125 P.3d 403, 409 (Colo. 2005). Section 16-8-107(3) distinguishes between expert testimony offered to show that the defendant *could not* form the requisite mental state and expert testimony offered to show that, on the occasion in question, she *did not* form the requisite mental state. *People v. Rosas*, 2020 CO 22, ¶ 8 (citing *Wilburn*, ¶ 21); *see also Hendershott v. People*, 653 P.2d 385, 391 (Colo. 1982); Crim. P. 11(e)(1).

¶ 13 “Under the plain language of the insanity statutes, the *probative effect* of the mental condition evidence is what governs, not the *purpose* for which it is offered.” *Moore*, ¶ 34. Thus, trial courts must determine whether the proffered testimony relating to a mental condition is probative of, or tends to prove, insanity as statutorily defined. *See id.* at ¶¶ 38, 44. “The court must parse any proffered mental condition evidence, line by line if necessary, to distinguish what is probative of insanity under this exacting definition from what is not.” *Id.* at ¶ 5.

¶ 14 We review a trial court’s evidentiary rulings for an abuse of discretion. *Id.* at ¶¶ 26, 44 n.5. A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or based on an erroneous understanding of the law. *Yusem v. People*,

210 P.3d 458, 463 (Colo. 2009); *People v. Dominguez*, 2019 COA 78, ¶ 13. “[W]e review trial errors of constitutional dimension that were preserved by objection for constitutional harmless error.” *Hagos v. People*, 2012 CO 63, ¶ 11. Thus, we reverse unless the People can prove the error was harmless beyond a reasonable doubt. *Id.*

B. Additional Background

¶ 15 Forgoing an NGRI defense, Day pleaded not guilty. The defense nevertheless hired an expert, Dr. Karen Fukutaki, to assess Day’s mental state. Dr. Fukutaki’s report concluded that, while Day was competent to proceed, her failure to take her prescribed antipsychotic medication in the two days before the incident could have caused her to experience disorganized thoughts and impaired judgment.

¶ 16 Shortly thereafter, Day gave notice of her intent to present mental condition evidence under section 16-8-107(3)(b). The trial court ordered CMHHIP to conduct a mental condition evaluation. CMHHIP reported that Day twice refused to complete the examination and asked the court for direction. Before the court could weigh in, another attempted examination revealed that CMHHIP misunderstood the purpose of the evaluation, contributing

to Day's confusion and alleged uncooperativeness. The court issued another order clarifying the scope of the evaluation CMHHIP was to conduct. CMHHIP did not conduct the subject evaluation and instead returned Day to the county jail.

¶ 17 While in jail, Day's mental state deteriorated, and defense counsel raised concerns about her competency. The trial court ordered a competency evaluation. While the evaluator concluded that Day was competent to proceed, he did not conduct the mental condition evaluation the court had ordered.

¶ 18 The trial court reissued its order requiring CMHHIP to conduct a mental condition evaluation under section 16-8-107(3)(b). In the interim, Day's mental condition again deteriorated, and defense counsel again raised concerns about competency. The court ordered another competency evaluation.

¶ 19 This time, the evaluator found Day incompetent to proceed. But the evaluator reached the conclusion "with limited confidence" based on Day's demeanor during the evaluation. The evaluator explained that Day was "a bit" hostile, believed the court order for the evaluation was out of date, and appeared to have a conversation with the empty room when the evaluator stepped out. Having found

Day incompetent, the evaluator nevertheless concluded, “I cannot offer an opinion regarding how Ms. Day’s mental health may or may not have influenced her behaviors around the time of the alleged offense given her refusal to provide any information regarding the case.”

¶ 20 Day was again admitted to CMHHIP, where she was restored to competency after approximately seven months. CMHHIP did not conduct a mental condition evaluation after Day was restored to competency, as the trial court had ordered.

¶ 21 As trial approached, the defense endorsed Dr. Fukutaki as an expert witness. After the first jury trial resulted in a mistrial, the parties tried to schedule the new trial around Dr. Fukutaki’s schedule. Before the second trial, the prosecution moved to exclude Dr. Fukutaki’s testimony under CRE 403 and section 16-8-107(3)(a).

¶ 22 During a hearing on the motion, the trial court requested that the defense submit an offer of proof and a proposed limiting instruction. The court found that “the defense did comply with the statutory requirements of [section] 16-8-107(3)(b)” and that “there is no issue about compliance with the statute itself.” After reviewing

the defense’s proffer and limiting instruction, the court issued a written order concluding that the evidence was inadmissible because Day failed to cooperate during a CMHHIP evaluation and that Dr. Fukutaki’s testimony was relevant to an NGRI defense.

¶ 23 At trial, four witnesses testified to Day’s flat demeanor after the incident, and the prosecution relied heavily on that testimony in closing argument as proof of Day’s culpable mental state. A juror, curious for more information about Day’s demeanor, submitted a question: “At any given time at [the] hospital, did Ms. Day ask to see [J.M.] and if so did she show emotion?” The witness replied that Day never asked to see J.M. at the hospital.

C. The Trial Court Abused Its Discretion

¶ 24 We conclude that the trial court’s order denying Day’s proffered mental condition evidence constituted an abuse of discretion in two ways. First, the court’s written order faulted Day for failing to “cooperate” with a mental condition examination conducted while she was incompetent. Section 16-8-107(3)(b) provides that a defendant must undergo a court-ordered examination before she can present mental condition evidence. Section 16-8-106(2)(c), C.R.S. 2023, requires that a defendant

“cooperate” during the examination. But section 16-8.5-105(2), C.R.S. 2023, warns against admission of a defendant’s noncooperation in competency evaluations at subsequent hearings when the lack of cooperation was the result of “a mental disability.”

¶ 25 Here, the trial court faulted Day for failing to cooperate with the evaluator on the day she was found incompetent. The evaluator’s conclusion that Day did not cooperate was based largely on her somewhat hostile demeanor and suspicion of the trial court’s order, on the same day she was observed responding to internal stimuli. On these facts — where the defense’s years-long effort to complete Day’s examination was met with unreasonable delay from CMHHIP, where Day’s mental state deteriorated in jail during those unreasonable delays, and where CMHHIP had multiple opportunities to conduct the appropriate examination while Day was competent — we conclude that the trial court erred, as a matter of law, by premising its conclusion on what happened during the evaluation in which Day was found incompetent and exhibited symptoms of her previously diagnosed mental illness. *See* § 16-8.5-105(2) (prohibiting the use of alleged noncooperation against a defendant when that behavior was caused by a mental disability);

§ 16-8.5-101(12), C.R.S. 2023 (defining “incompetent to proceed” as an inability “to consult with the defendant’s lawyer with a reasonable degree of rational understanding in order to *assist in the defense*”) (emphasis added); *see also Hendershott*, 653 P.2d at 393-94. This is especially so where the prosecution made no objection to Dr. Fukutaki’s testimony before the first trial in Leadville, and where the trial court previously found that the defense had fully complied with section 16-8-107(3)(b)’s procedural requirements. While the record reveals that the court and the parties used their best efforts to have an evaluation done, we cannot hold CMHHIP’s failure to complete the evaluation against Day on these facts.

¶ 26 Second, the trial court abused its discretion by failing to parse the proffered evidence to “distinguish what is probative of insanity under this exacting definition from what is not,” as *Moore*, ¶ 5, requires. The court rejected the offer of proof for four reasons: (1) the offer was based on Day’s self-reporting; (2) the doctor’s opinions were speculative; (3) one piece of testimony — that Day may have been unable to “recognize the severity of the situation” — was too closely related to the legal status of insanity; and (4) admission of the evidence would mislead the jury because Day’s mental condition

during the offense and her mental condition afterward were interrelated. The court also emphasized that most cases regarding mental condition evidence involved intellectual disability rather than mental illness. *See People v. Flippo*, 159 P.3d 100, 105 (Colo. 2007) (concluding that “mental condition,” as used in section 16-8-107(3)(b), unambiguously includes a defendant’s intellectual disability, even though such disability did not rise to the level of insanity); *Wilburn*, ¶¶ 28-29 (concluding that a defendant’s learning disability, which did not rise to the statutory level of a mental disease or defect that required an insanity plea, constituted a “mental condition” for purposes of triggering the requirements of section 16-8-107(3)(b)).

¶ 27 We disagree with the court’s analysis for several reasons. The court’s first and second points go to the evidence’s weight, not its admissibility. *See Moore*, ¶ 48 (rejecting an argument for exclusion of mental condition evidence based on supposed efficacy of evidence at trial because that issue “remains a question of fact for the jury to resolve”); *People v. Lehmkuhl*, 117 P.3d 98, 104 (Colo. App. 2004) (where an expert lacks certain additional knowledge or training

within the field of qualification, such deficiency goes to weight not admissibility).

¶ 28 The court’s third point takes a single piece of Dr. Fukutaki’s testimony and uses it to justify denying *all* of Dr. Fukutaki’s testimony — an analytical framework that *Moore* has since rejected. *Moore*, ¶ 5; see also *People v. Hardin*, 2016 COA 175, ¶ 30 (“A court’s failure to exercise discretion can be an abuse of discretion.”). As to point four, the court reasoned that the purposes for which the evidence *was offered* and the improper purpose for which it *could be used* were easily confused. *Moore* has since unambiguously instructed that we are not to consider the purpose for which the evidence is used, but instead must only determine the relevancy that each piece of evidence has to the statutory definition of insanity. *Moore*, ¶ 34.

¶ 29 Finally, the trial court’s conclusion that most cases admitting evidence under section 16-8-107(3)(b) relate to intellectual disability was misplaced. While *Flippo* and *Wilburn* do relate to intellectual disability evidence, several other cases applying the statute relate to mental illness more broadly. See *Moore*, ¶ 51; *People v. Lane*, 2014 COA 48, ¶ 27; *People v. Herdman*, 2012 COA 89, ¶ 26; *People v.*

Bondurant, 2012 COA 50, ¶ 37; *People v. Roadcap*, 78 P.3d 1108, 1112 (Colo. App. 2003); *People v. Anderson*, 70 P.3d 485, 488 (Colo. App. 2002); *Hendershott*, 653 P.2d at 389 n.2. This rationale, too, fails to support the court’s order.

D. Applying *Moore*

¶ 30 While we recognize the trial court did not have the benefit of *Moore*’s guidance in issuing its order, we are now bound by *Moore*’s framework, which requires courts to parse through the proffered evidence, “line by line if necessary,” to determine whether each piece is probative of insanity as statutorily defined. *Moore*, ¶ 5. We undertake that analysis here.

¶ 31 The defense proposed the following testimony in an offer of proof:

1. Day had been previously diagnosed with a psychotic thought disorder.
2. Psychotic thought disorders impact an individual’s capacity for complex thought organization and problem-solving.
3. Day was prescribed Abilify, an atypical antipsychotic.

4. Day reported not having taken her Abilify for two days before the incident.
5. If Day was off her medication for two days, she could have experienced some thought disorganization that impaired her judgment and problem-solving abilities.
6. Thought disorganization, impairment in problem-solving ability, and anxiety might have accounted for Day's flight from the scene and delay in calling 911.
7. Day might have been experiencing some difficulty in her perception of reality that could have affected her ability to recognize the severity of the situation and J.M.'s need for immediate medical attention.

¶ 32 The question *Moore*, ¶ 45, poses — whether the proffered testimony “tends to prove insanity,” — is simple in theory but harder to answer in practice. We nevertheless conclude that the first six points of testimony are not probative of insanity as statutorily defined and were thus admissible as Day proposed. But the last point is sufficiently probative of insanity such that Day needed to plead NGRI to introduce it.

¶ 33 The first six pieces of proffered evidence — in essence, that Day had been diagnosed with a psychotic thought disorder that she controlled with medication, that Day had not taken her medication for two days before the incident, and that Day might have subsequently experienced some thought disorganization and cognitive impairment — are not suggestive of the type of mental disease or defect contemplated in the insanity statute. See § 16-8-101.5(2)(c) (A mental disease or defect is a “severely abnormal mental condition[] that grossly and demonstrably impair[s] a person’s perception or understanding of reality.”); *Moore*, ¶ 50 (a mental illness must match that statutory definition for the proffered testimony of the diagnosis to be relevant to insanity); see also *Lane*, ¶ 27; *Roadcap*, 78 P.3d at 1112. Further, none of these pieces of evidence tend to prove that *at the time of the offense*, Day suffered from a “severely abnormal mental condition that grossly and demonstrably impaired [her] perception or understanding of reality,” as *Moore* seems to require. *Moore*, ¶ 27. If anything, the first six pieces of evidence tend to prove that Day began to experience, at most, some minor cognitive dysfunctions after failing

to take her medication for two days for a condition that she largely controlled with medication.

¶ 34 In contrast, the evidence that Day’s condition could have prevented her from accurately perceiving reality or recognizing the severity of “the situation” is probative of insanity as statutorily defined. *See Rosas*, ¶¶ 11, 23, 28 (concluding that evidence of a defendant’s bipolar disorder with psychotic features that impaired his perception of reality during the commission of the offense was “clearly relevant to the issue of insanity” and inadmissible under section 16-8-107(3)(a)). As the trial court astutely observed, Day’s ability to perceive the severity of “the situation,” in contrast with her ability to perceive the severity of her actions, is perhaps a distinction without a difference. *See People v. Gonzales-Quevedo*, 203 P.3d 609, 613-14 (Colo. App. 2008) (evidence that a defendant’s post-traumatic stress disorder rendered him unable to understand the circumstances surrounding the incident was inadmissible absent a plea of NGRI).

¶ 35 Thus, under *Moore*’s framework, we conclude that the only piece of testimony that was probative of insanity, and thus inadmissible, was the testimony regarding Day’s ability to perceive

reality or the severity of the situation. Everything else fell short of being probative of insanity and was thus admissible. *See Moore*, ¶ 52 (proffered testimony relating to psychosis was likely inadmissible while testimony about paranoid ideation, hyper-vigilance, and agitation stemming from a trauma disorder was likely admissible).

¶ 36 And we are unpersuaded by the People’s argument that the evidence was otherwise inadmissible under CRE 403 because its probative value was substantially outweighed by the risk of unfair prejudice. We are bound by *Moore’s* guidance, which measures admissibility of mental condition evidence by its relatedness to insanity, not its proposed purpose. And any prejudice resulting from the lack of a CMHHIP evaluation can be remedied on remand by the trial court’s reordering of the proper examination before the testimony is presented on retrial. *See* § 16-8-107(3)(b).

E. The Error Was Not Harmless Beyond a Reasonable Doubt

¶ 37 The parties agree that we must apply the constitutional harmless error standard of reversal, which requires us to reverse unless we can determine that the claimed error was harmless beyond a reasonable doubt. *See Hagos*, ¶ 11. Unlike the

nonconstitutional harmless error standard, which requires reversal only if the claimed error affects the substantial rights of the parties, this standard requires us to reverse if there is a reasonable possibility that the error could have contributed to the conviction. *Id.* at ¶¶ 11-12.

¶ 38 We cannot say that the court's error in refusing to admit the mental condition evidence was harmless under the exacting constitutional harmless error standard. *See id.* The prosecution relied heavily on Day's post-incident calm and unfeeling demeanor and her failure to immediately call 911 to prove her culpable mental state. Day was denied an opportunity to rebut that argument with evidence that her mental illness could have contributed to what others perceived as an abnormal reaction to the incident. By ruling that all of Dr. Fukutaki's proffered testimony was inadmissible, the court precluded Day from presenting any credible evidence to rebut the prosecution's theory of her culpability. *See People v. Johnson*, 2021 CO 35, ¶ 17 (holding that interference with a defendant's ability to present a complete defense is of constitutional dimension). We cannot speculate as to how the admission of some of the above testimony may, or may not, have affected the jury's decision, nor

can we conclude that the claimed error was harmless beyond a reasonable doubt.²

¶ 39 Because Day was denied the opportunity to rebut an argument central to the prosecution’s case, we reverse Day’s convictions for which her culpable mental state was at issue for a new trial where the referenced portions of Dr. Fukutaki’s testimony are presented. Before retrial, the parties may invoke the procedures outlined in section 16-8-107(3)(b) so that the contemplated evaluation may be completed.

III. Restitution

¶ 40 Day also appeals the trial court’s January 25, 2021, restitution order. She argues that the court erred by entering the order more than ninety-one days after the entry of the judgment of conviction. Day also asserts that insufficient evidence supported the restitution award. Because we reverse the judgment of

² This analysis should not be read to endorse Day’s theory of harm that the court’s order required Day to “switch gears” and hire an accident reconstructionist. Day has claimed that Dr. Fukutaki’s testimony was rebuttal evidence, and we are unpersuaded by Day’s argument that she was only forced to pursue a different theory of defense after her motion to admit Dr. Fukutaki’s testimony was denied.

conviction as to all charges for which Day's culpability was at issue, we reverse the restitution order and remand for further proceedings.

IV. Disposition

¶ 41 We reverse Day's judgment of conviction as to each count for which her culpable mental state was at issue and remand for a new trial consistent with this opinion. Because we are unable to determine from the appellate briefs the parties' respective positions on whether the evidence relates to some, or all, of Day's convictions, the trial court may, on remand, solicit briefing from the parties and determine which charges are subject to retrial. We also reverse the court's restitution order.

CHIEF JUDGE ROMÁN and JUDGE FURMAN concur.