SUMMARY
March 30, 2023

2023COA28

No. 21CA0398, *People v. Larsen* — Constitutional Law — Fifth Amendment — Sixth Amendment — Fourteenth Amendment — Double Jeopardy — Right to Unanimous Jury Verdict — Due Process; Criminal Law — Postconviction Remedies — Conviction Obtained or Sentence Imposed in Violation of the Constitution; Jury Instructions — Modified Unanimity Instruction

A division of the court of appeals clarifies that, when multiple convictions are entered on multiple jury verdicts and some counts merge, the previously merged counts can be reinstated.

COLORADO COURT OF APPEALS **2023COA28**

Court of Appeals No. 21CA0398
El Paso County District Court No. 12CR2825
Honorable Jessica L. Curtis, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Emmett Andrew Larsen,

Defendant-Appellant.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE KUHN
Harris and Grove, JJ., concur

Announced March 30, 2023

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¶ 1 In 2013, a jury convicted defendant, Emmett Andrew Larsen, of one count each of sex assault on a child by one in a position of trust (SAOC-POT) as part of a pattern (Count 1) and SAOC-POT with a victim under fifteen years old (Count 2) for assaulting his then-ten-year-old granddaughter. The trial court sentenced Larsen to a controlling indeterminate prison term of eight years to life.

¶ 2 After his convictions were upheld on direct appeal, *People v. Larsen*, (Colo. App. No. 14CA0487, July 20, 2017) (not published pursuant to C.A.R. 35(e)), *as modified on denial of reh'g* (Oct. 26, 2017) (*cert. denied* June 25, 2018), Larsen sought habeas corpus relief from the federal district court. *Larsen v. Williams*, Civ. A. No. 18-cv-02669-JLK, 2019 WL 6173668 (D. Colo. Nov. 20, 2019) (unpublished order).[1]

¶ 3 In his habeas petition, Larsen argued, as relevant here, that the jury's findings and verdicts were insufficient to support his

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[1] This case's extensive factual and procedural histories are laid out in depth in the opinions by our court and the federal district court. *See People v. Larsen*, (Colo. App. No. 14CA0487, July 20, 2017) (not published pursuant to C.A.R. 35(e)), *as modified on denial of reh'g* (Oct. 26, 2017) (*cert. denied* June 25, 2018); *Larsen v. Williams*, Civ. A. No. 18-cv-02669-JLK, 2019 WL 6173668 (D. Colo. Nov. 20, 2019) (unpublished order).

conviction for Count 1, the pattern count. Specifically, Larsen contended that the question of whether the sex assault was committed as part of a pattern — in other words, whether there were two or more incidents of sexual contact — wasn't submitted to and found beyond a reasonable doubt by the jury. Thus, Larsen argued, that conviction violated his Sixth and Fourteenth Amendment constitutional rights to have any fact that increases the penalty for a crime submitted to a jury and proved beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 476, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 103 (2013).

¶ 4 The federal district court agreed with Larsen and concluded that he was entitled to habeas relief. However, the court observed that the proper remedy was unclear given Larsen's multiple convictions and the way they were entered on the mittimus. The federal district court concluded that the question of remedy was more appropriate for the state courts and therefore conditionally granted the writ of habeas corpus while instructing the state courts to "take action to remedy the constitutional violation detailed in [its] [o]rder within 90 days" or to release Larsen from custody. *Larsen*, 2019 WL 6173668, at *18.

¶ 5 Back in the postconviction court, the parties disagreed on how to interpret the mittimus from Larsen's sentencing and, in turn, how the court should comply with the federal district court's order.

¶ 6 The mittimus provided that Larsen "was found guilty after trial of:"

- "Count # 1," SAOC-POT as part of a pattern; and
- "Count # 2," SAOC-POT with a victim under fifteen years old, which "*merged into Count 1 for sentencing*."

(Emphasis added.)

¶ 7 The People contended that the trial court[2] couldn't legally merge the convictions because they were based on separate instances of contact. Thus, the People argued, either the court meant that it was sentencing Larsen *concurrently* on the two counts, not merging them, or the counts were improperly merged and the sentence was illegal. Based on all this, the People contended that the postconviction court should (1) keep Count 1

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[2] For the sake of clarity, we refer to the district court that oversaw Larsen's 2013 trial and sentenced him as "the trial court" and the district court that oversaw Larsen's case after his successful habeas petition as "the postconviction court."

but revert it to a lower class felony without the pattern enhancement and (2) resentence Larsen on both Counts 1 and 2.

¶ 8 Defense counsel, on the other hand, argued that (1) Count 1 had to be vacated based on the constitutional issues identified by the federal court; and (2) Count 2 couldn't be reinstated because the trial court had merged it into Count 1, and, as a result, the count was vacated. Defense counsel therefore sought Larsen's immediate release.

¶ 9 Ultimately, the postconviction court vacated Count 1, the pattern count, "leaving one conviction in place" for Count 2.[3] In doing so, the postconviction court concluded that there was a separate verdict and conviction for Count 2, which was not impacted by the issues with Count 1. The postconviction court then sentenced Larsen on Count 2 to time served and twenty years to life of sex offender intensive supervision probation (SOISP).

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[3] While this case was in the postconviction court, the presiding judge retired, and a new judge took over. Both judges, in separate hearings, determined that Larsen had been and should remain convicted of Count 2. We describe the district court judges' conclusions in the singular for ease of reference.

¶ 10 On appeal, Larsen contends that the postconviction court erred by sentencing him on Count 2 because (1) that count was vacated and couldn't be reinstated, and (2) the trial court had erred by not requiring the prosecution to elect the act of sexual assault underlying that count. We affirm the judgment and hold that, when a defendant is convicted of multiple counts on multiple jury verdicts and some of the counts merge, the merged counts can be reinstated. We also remand the case for correction of the mittimus.

I. Reinstatement of Count 2

A. Standard of Review

¶ 11 Larsen's challenges to the reinstatement of Count 2 raise questions of law that we review de novo. *See Fransua v. People*, 2019 CO 96, ¶ 11 ("We . . . review questions of law de novo."); *People v. Firm*, 2014 COA 32, ¶ 6 ("We review de novo constitutional challenges to sentencing determinations."); *People v. Wood*, 2019 CO 7, ¶¶ 29-31, 33, 36 (reviewing state court's modification of a mittimus in light of a successful habeas petition de novo); *Crespin v. People*, 721 P.2d 688, 690-91 (Colo. 1986) (reviewing the denial of defendant's Crim. P. 35(c) motion seeking relief from a constitutionally infirm offense de novo).

B. The Conviction

¶ 12 As an initial matter, for the sake of clarity, we note that Larsen's conviction for Count 2 was for SAOC-POT where the victim is less than fifteen years of age, a class 3 felony. *See* § 18-3-405.3(1), (2)(a), C.R.S. 2022. This is how both the original 2014 mittimus and the 2021 post-habeas-petition mittimus describe Count 2. And although the complaint lists Count 2 as "SAOC-POT" (without the victim-age specification in the title), the narrative for that count describes that the sexual assault was on a "victim less than fifteen years of age." Additionally, the complaint alleges that this assault was in violation of the specific subsection of the SAOC-POT statute that deals with victims less than fifteen: section 18-3-405.3(2)(a).

¶ 13 Similarly, although the jury verdict and form describe Count 2 as "SAOC-POT" (again without the victim-age specification), the jury instructions provided that, to convict Larsen of SAOC-POT, the jury had to find that the prosecution proved each of the following elements beyond a reasonable doubt:

> 1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly subjected a child,

4. not his spouse,

5. to any sexual contact, and

6. *that person was less than fifteen years of age*, and

7. the defendant was in a position of trust with respect to the victim.

(Emphasis added.)

¶ 14 Although the mittimus reflects otherwise, it is apparent from the postconviction court's oral rulings that Count 2 is the conviction the court reinstated and on which Larsen was then sentenced. *See People v. Mendenhall*, 2015 COA 107M, ¶ 84 (if the language of the mittimus is inconsistent with the sentencing court's oral ruling, the oral ruling reflects the governing ruling; the mittimus should be corrected). It is also apparent that the postconviction court vacated Count 1. On appeal, the People suggest that one way this court could affirm the outcome below is by re-entering judgment on Count 1. But the prosecutor didn't object when the postconviction court vacated Count 1. Instead, the

prosecutor opted to proceed to sentencing on Count 2 rather than to retry Larsen on Count 1. And the People did not cross-appeal the postconviction court's decision to vacate Count 1. Thus, under these circumstances, the People cannot revive Count 1 on appeal. *Forgette v. People*, 2023 CO 4, ¶¶ 28-30 (holding that waiver extinguishes error and thus appellate review); C.A.R. 4(b)(6)(A); *People v. Chetelat*, 833 P.2d 771, 773 (Colo. App. 1991) (noting the People must cross-appeal an order vacating a sentence to obtain appellate review).

C. Postconviction Court Proceeding

¶ 15 Larsen challenges the reinstatement of Count 2 on the grounds that neither Crim. P. 36 nor Crim. P. 35(a) provides authority for reinstating a previously vacated count. We see no error.

¶ 16 Once Larsen's case was back in the postconviction court, after the habeas proceedings were complete, defense counsel filed a motion asking the postconviction court to "comply with" the federal district court's order. As defense counsel observed in this motion, the federal court instructed the state courts to "craft a remedy to the constitutional violation" it found or release Larsen. Thus, we

conclude that Larsen's motion asking the postconviction court to comply with the federal district court's order is properly construed as a Crim. P. 35(c) motion. *See People v. Collier*, 151 P.3d 668, 670 (Colo. App. 2006) ("The substance of a postconviction motion controls" what type of motion it is, and "[m]otions under Crim. P. 35(c) are the proper postconviction route in which to challenge convictions or sentences as unconstitutional.").

¶ 17 Crim. P. 35(c)(3) authorizes a court to correct a violation of a defendant's constitutional rights by vacating, setting aside, or correcting the defendant's sentence, or "mak[ing] such order as necessary to correct a violation of his constitutional rights." Thus, once Larsen filed his Crim. P. 35(c) motion, the postconviction court was acting within its authority when it vacated Count 1 and entered the conviction and sentenced Larsen on Count 2. *See Crespin*, 721 P.2d at 690-91 (reviewing a Crim. P. 35(c) motion and ruling that, for a constitutionally infirm conviction to be corrected, the defendant should be retried or resentenced on a lesser included offense).

D. Reinstatement

¶ 18 Larsen argues that the postconviction court erred by sentencing him on Count 2 because it was "purposefully merged" into Count 1; thus, Larsen contends, Count 2 was vacated and "no conviction existed for which . . . Larsen could be lawfully sentenced." We are unpersuaded.

¶ 19 In making this argument, Larsen relies primarily on our supreme court's decision in *People v. Wood*, 2019 CO 7. But *Wood* doesn't go this far.[4]

¶ 20 In *Wood*, our supreme court considered what impact multiple guilty verdicts and their reflection on a defendant's mittimus have on the defendant's double jeopardy rights. The defendant in *Wood* was found guilty of (1) second degree murder; (2) first degree felony murder (with aggravated robbery as the predicate felony); and

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[4] To the extent Larsen raises other challenges to the reinstatement of Count 2, they are conclusory and insufficiently developed. We therefore decline to address them. *See Fisher v. State Farm Mut. Auto. Ins. Co.*, 2015 COA 57, ¶ 18 (Appellate courts "generally decline to address arguments presented" in a "conclusory manner that are lacking citations to any supporting authority."), *aff'd*, 2018 CO 39; *People v. Gingles*, 2014 COA 163, ¶ 29 (An appellate court will decline to address issues when presented in a "contradictory, cursory, and undeveloped manner.").

(3) aggravated robbery, all related to the killing of the same victim. The trial court imposed a single sentence — life imprisonment — on the three counts and issued a mittimus that provided,

> The Defendant . . . was found Guilty, . . . by the Court, of the offense(s) of[:]
>
> Count 1, Murder in the First Degree, (convicted of second degree murder) F-2
>
> Count 2, Murder in the First Degree [felony murder], . . . [and]
>
> Count 3, Aggravated Robbery . . .
>
> . . . .
>
> It is now the Judgment and Sentence of the Court that . . .
>
> Counts 1, 2 & 3 are merged and defendant is sentenced to life[.]

Wood, ¶ 10.

¶ 21 Upon Wood's petition for federal habeas relief, the United States Court of Appeals for the Tenth Circuit determined that he was "simultaneous[ly] convict[ed] [of] first and second degree murder," which violated his double jeopardy rights. *Id.* at ¶¶ 1-2, 13 (quoting *Wood v. Milyard*, 721 F.3d 1190, 1195 (10th Cir. 2013)). The Tenth Circuit therefore instructed that the first degree

conviction must be vacated while the second degree conviction could stay in place. *Id.* at ¶ 1.

¶ 22 The case then made its way back to the Colorado Supreme Court, where that court concluded that the Tenth Circuit "misunderstood the original mittimus." *Id.* at ¶ 4. Specifically, the court observed that, because the trial court merged the two murder convictions, the merged count was vacated; thus, the defendant was convicted of only one count of murder, and "there was no other murder conviction to be vacated," as instructed by the Tenth Circuit. *Id.* at ¶¶ 4-5.

¶ 23 The supreme court's holding in *Wood* resolved only that a mittimus reflecting multiple guilty verdicts and *one* resulting *conviction* doesn't violate a defendant's double jeopardy rights. *Id.* at ¶¶ 36-37. The court did not, as Larsen suggests, conclude that a merged count could never be reinstated or that doing so would necessarily violate a defendant's double jeopardy rights.

¶ 24 Instead, the court observed that "[n]othing in double jeopardy jurisprudence prohibits the documentation of guilty verdicts in a mittimus, judgment of conviction, or sentencing order." *Id.* at ¶ 25. The purpose of documenting guilty verdicts and convictions, even

when they merge, is for situations exactly like the one here — where one conviction is found infirm, the unimpacted jury verdicts can be reinstated. And courts, including our supreme court, have regularly reinstated lesser included convictions that were merged or improperly vacated. *See, e.g.*, *Doubleday v. People*, 2016 CO 3, ¶ 34 (instructing the court of appeals to vacate defendant's conviction for felony murder and reinstate the previously merged second degree murder conviction); *People v. Leske*, 957 P.2d 1030, 1046 (Colo. 1998) (reversing court of appeals' judgment vacating a conviction of sexual assault on a child and instructing that the conviction be reinstated); *United States v. Silvers*, 90 F.3d 95, 99, 101-02 (4th Cir. 1996) (holding that the "district court's action [in a federal habeas proceeding] of reinstating [defendant's] previously-vacated [lesser included] conspiracy conviction, after vacating his [continuing criminal enterprise] conviction on grounds that did not affect the conspiracy conviction, was appropriate, and did not violate the Double Jeopardy Clause"); *United States v. Ward*, 37 F.3d 243, 251 (6th Cir. 1994) (remanding for resentencing on a previously vacated lesser included conviction after the greater offense was vacated); *United States v. Cabaccang*, 481 F.3d 1176, 1184 (9th Cir. 2007)

(concluding that a previously vacated conviction was correctly reinstated after the greater conviction was ultimately vacated); *United States v. West*, 201 F.3d 1312, 1312 (11th Cir. 2000) (per curiam) (remanding for the district court to reinstate a previously vacated conspiracy conviction that had been vacated only because it was a lesser included offense of a conviction that was later vacated).

¶ 25 Thus, we reject Larsen's contention that, because Count 2 was previously merged and "vacated," it couldn't be reinstated.

¶ 26 Larsen also contends, without explanation or legal citation, that Count 2 couldn't be reinstated because doing so would violate his double jeopardy rights. This argument is conclusory, *see People v. Wiseman*, 2017 COA 49M, ¶ 48 ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990))). Nevertheless, we conclude that reinstating Count 2 didn't violate the Double Jeopardy Clause. *See United States v. Wilson*, 420 U.S. 332, 353-54 (1975) (holding that the reinstatement of a jury's verdict of conviction that had erroneously been vacated after a post-trial

motion didn't violate the Double Jeopardy Clause because the reinstatement didn't subject the defendant to a new trial or multiple punishments); *Silvers*, 90 F.3d at 99, 101-02 (relying on the Supreme Court's decision in *Wilson* to hold that district court's reinstatement, in a federal habeas proceeding, of defendant's previously vacated lesser included conspiracy conviction did not violate the Double Jeopardy Clause).

II. Unanimity

¶ 27 Larsen also contends that his conviction on Count 2 violates his right to a unanimous verdict because the trial court did not require the People to specify on which alleged sexual contact the count was based.[5] We are not persuaded.

A. Background

¶ 28 At trial, the People presented evidence, as relevant to this appeal, that Larsen touched his granddaughter on three occasions: (1) once he touched her breasts over her clothes; (2) once he

[5] Although Larsen already had a direct appeal, *Larsen*, No. 14CA0487, he didn't have the opportunity or any reason to raise the unanimity issue at that time because Count 2 had merged into Count 1.

touched her breasts under her clothes; and (3) once he touched her vaginal area.

¶ 29 During the discussion regarding jury instructions, defense counsel requested that the People elect which act they intended to rely upon for each of the charges. The trial court denied counsel's request, saying it would give "the unanimity instruction in lieu thereof." The unanimity instruction provided that "[e]ach verdict [the jurors] reach must be unanimous [and,] [i]n reaching each verdict, [the jurors] must unanimously agree to the specific act which underlies the verdict."

¶ 30 The instruction continued as follows:

> Before you may convict [Larsen] of Sexual Assault on a Child by One in a Position of Trust[, Count 2], and Sexual Assault on a Child by One in a Position of Trust-Pattern of Abuse, [Count 1], *you must unanimously agree which act of sexual contact has been proven beyond a reasonable doubt.*

(Emphasis added.)

¶ 31 The jurors completed the verdict forms, indicating that they found Larsen guilty of both counts. Additionally, the jurors answered an interrogatory in which they indicated, as relevant here, that they found beyond a reasonable doubt that Larsen committed

the second alleged contact — i.e., that Larsen assaulted his granddaughter by touching her breasts under her shirt.

B. Relevant Law and Analysis

¶ 32 A defendant has the right to a jury trial and a unanimous jury verdict. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 25; *People v. Archuleta*, 2020 CO 63M, ¶ 20 (first citing § 16-10-108, C.R.S. 2022; then citing Crim. P. 23(a)(8); and then citing Crim. P. 31(a)(3)).

¶ 33 When the prosecution presents evidence of multiple discrete acts that could constitute the charged crime — in this case, the alleged sexual contacts between Larsen and his granddaughter that could constitute sexual assault on a child — it "may be compelled to select the transaction on which [it is] relying for a conviction." *Archuleta*, ¶ 21. If, however, the prosecution does not elect, the defendant can receive a modified unanimity instruction advising the jurors that, to find the defendant guilty, they must unanimously agree that the defendant committed the same act or acts. *Id.* at ¶ 22. If the modified unanimity instruction sufficiently cures any harm from the prosecution's failure to individualize the counts charged in the information, then any failure to elect does not cause

a due process violation. *Quintano v. People*, 105 P.3d 585, 595 (Colo. 2005).

¶ 34 We review de novo whether a defendant's due process rights were violated by the prosecution's failure to elect the specific act it is relying on for a conviction. *Id.* at 592. Because Larsen preserved this error by requesting that the People elect in this case, we will reverse unless the error was harmless beyond a reasonable doubt. *See People v. Perez-Hernandez*, 2013 COA 160, ¶ 58.

¶ 35 Here, the trial court provided a modified unanimity instruction that explicitly told the jury that, to find Larsen guilty of Count 2, the jurors "must unanimously agree which act of sexual contact has been proven." We presume the jury followed the court's instructions. *See Johnson v. People*, 2019 CO 17, ¶ 16. And not only is there a unanimous jury verdict finding Larsen guilty of this count, but, as Larsen notes in his brief, the jury also expressly found in an interrogatory response that one of the alleged acts of sexual contact — the under-the-shirt breast contact — occurred. Thus, in addition to the jury finding beyond a reasonable doubt that all the elements of Count 2 were proved, we also know that the jury unanimously found beyond a reasonable doubt that at least one of

the acts of sexual contact occurred. Under these circumstances, we conclude that Larsen's due process rights weren't violated by the entry of conviction on Count 2. *See People v. Ramos*, 2017 COA 100, ¶ 24 (instructing the district court to enter a conviction for a single count of theft where the interrogatories demonstrated the prosecution proved the essential elements of that offense); *People v. Sepulveda*, 65 P.3d 1002, 1004 (Colo. 2003) (holding that "because the jury verdict on first-degree murder, absent the tainted element of 'after deliberation' established all of the elements of second-degree murder," it was proper on remand for "the trial court to enter a conviction for that charge").

III. Mittimus

¶ 36 Our review of the mittimus shows that it incorrectly states that Larsen "pled guilty" to one count each of child sexual assault as part of a pattern and child sexual assault with a victim under fifteen years old. But Larsen pleaded not guilty and was instead convicted by a jury of these charges. Additionally, the mittimus shows that Larsen is still convicted of and sentenced on Count 1. But, as discussed, Larsen's conviction on Count 1 was vacated. Thus, the mittimus should reflect the verdict after trial for only

Count 2 and the corresponding sentence: time served and twenty years to life of SOISP.

¶ 37 We therefore remand this case to the district court to correct these clerical errors. *See* Crim. P. 36 (clerical mistakes in judgments may be corrected by the court at any time); *Mendenhall*, ¶ 84.

IV. Disposition

¶ 38 The judgment of conviction for Count 2, SAOC-POT with a victim less than fifteen years of age, a class 3 felony under section 18-3-405.3(2)(a), is affirmed. The case is remanded to the trial court with directions to correct the mittimus to reflect that Larsen was convicted after trial and that Count 1 was vacated.

JUDGE HARRIS and JUDGE GROVE concur.