SUMMARY
February 29, 2024

2024COA20

No. 21CA1699, *People v. Kirby* — Crimes — Reckless Vehicular Homicide — Reckless Manslaughter — Careless Driving Resulting in Death; Criminal Law — Prosecution of Multiple Counts for Same Act — Lesser Included Offenses

A division of the court of appeals considers as a matter of first impression whether reckless manslaughter, as defined in section 18-3-104(1)(a), C.R.S. 2023, and careless driving resulting in death, as defined in section 42-4-1402(1), C.R.S. 2023, are lesser included offenses of reckless vehicular homicide, as defined in section 18-3-106(1)(a), C.R.S. 2023. Applying the statutory elements test articulated in *Reyna-Abarca v. People*, 2017 CO 15, and deriving further support from the supreme court's ruling in *People v. Chapman*, 192 Colo. 322, 557 P.2d 1211 (1977), the division concludes that both reckless manslaughter and careless driving resulting in death are lesser included offenses of reckless vehicular

homicide under the statutory elements test and section 18-1-408(5)(a), C.R.S. 2023.

COLORADO COURT OF APPEALS **2024COA20**

Court of Appeals No. 21CA1699
Adams County District Court No. 18CR4280
Honorable Sean Finn, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Bryan Christopher Kirby,

Defendant-Appellant.

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

Division V
Opinion by JUDGE KUHN
Freyre and Yun, JJ., concur

Announced February 29, 2024

Philip J. Weiser, Attorney General, Trina K. Kissel, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Jeffrey A. Wermer, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Bryan Christopher Kirby, appeals his convictions and sentences for reckless vehicular homicide, reckless manslaughter, leaving the scene of an accident resulting in death, and careless driving resulting in death. His challenge requires us to decide for the first time whether reckless manslaughter and careless driving resulting in death are lesser included offenses of reckless vehicular homicide.

¶ 2 Applying the clarified statutory elements test from *Reyna-Abarca v. People*, 2017 CO 15, and deriving further support from the supreme court's ruling in *People v. Chapman*, 192 Colo. 322, 557 P.2d 1211 (1977), we hold that reckless manslaughter and careless driving resulting in death are both lesser included offenses of reckless vehicular homicide. Consequently, we vacate Kirby's convictions for the two lesser included offenses, and we remand the case to the trial court to correct his mittimus. In all other regards, we affirm.

I. Background

¶ 3 Early one morning, Kirby caused a deadly crash on E-470 in Adams County. According to the probable cause affidavit for his arrest, Kirby was driving at a high rate of speed in the left lane

before losing control, drifting into the right lane, and hitting the back of another vehicle. The force of the impact caused both vehicles to roll over several times on the highway and down an embankment. The driver of the other car suffered devastating injuries and died at the scene. Kirby, on the other hand, fled the scene of the crash without reporting it or assisting the victim.

¶ 4 A few days later, police identified Kirby as the perpetrator of the hit-and-run based on physical evidence recovered from the crime scene and a livestream video that Kirby had posted to Facebook shortly after the crash. During the seven-and-a-half-minute video, Kirby can be seen bragging about how fast he was driving; he reached speeds of up to 167 miles per hour and was going about 120 miles per hour just before crashing into the victim's car.

¶ 5 The prosecution charged Kirby with first degree extreme indifference murder and leaving the scene of an accident resulting in death. Kirby argued at trial that his conduct didn't rise to the level of first degree murder because he didn't intend to kill the victim. The jury convicted Kirby of reckless manslaughter — a lesser included offense of first degree murder. The jury also

convicted him of leaving the scene of an accident resulting in death, reckless vehicular homicide, and careless driving resulting in death.

¶ 6 The court sentenced Kirby to fifteen years in the custody of the Colorado Department of Corrections for the leaving the scene of an accident resulting in death conviction, and eight years each for his reckless manslaughter and reckless vehicular homicide convictions. The court also imposed a thirty-day jail sentence for the careless driving resulting in death conviction. All four sentences were imposed to run concurrently.

II. Analysis

¶ 7 On appeal, Kirby contends that the trial court reversibly erred by (1) continuing his jury trial past the statutory speedy trial deadline; (2) failing to merge the convictions for reckless manslaughter and careless driving resulting in death with his conviction for reckless vehicular homicide; (3) engaging in judicial factfinding of aggravating circumstances; and (4) failing to consider his character and rehabilitative potential at the sentencing hearing. We agree with Kirby on his second claim. Thus, we vacate his convictions and sentences for reckless manslaughter and careless driving resulting in death, remand the case to the trial court to

merge these offenses with his conviction for reckless vehicular homicide, and direct the court on remand to correct his mittimus. We disagree with Kirby's other claims.

A. Speedy Trial

¶ 8 Kirby first contends that the trial court violated his statutory right to a speedy trial by relying on the effects of the COVID-19 pandemic to continue his trial date past the speedy trial deadline. We disagree.

1. Additional Background

¶ 9 Kirby's six-month speedy trial timeframe started in July 2019 when he pleaded not guilty to his charges. *See* § 18-1-405(1), C.R.S. 2023. In October, that deadline was extended to April 22, 2020, after Kirby waived his speedy trial right in connection with resetting the trial.

¶ 10 Three weeks before the April trial date, the parties attended a pretrial conference where they announced their readiness to proceed. By that time, however, the federal and state governments had already started to impose restrictive measures intended to curb the effects of the COVID-19 pandemic. Recognizing this reality, the prosecution qualified its position on readiness:

> Obviously, there are extenuating circumstances I think we are all aware of. I will tell the Court as far our preparedness goes, there is one witness we have to fly in from out of state, Mr. [Ruben] Ramos, form[er]ly with the Colorado Bureau of Investigation. We do consider him a central witness.
>
> At this time there does not appear to be impediments getting him here. However, as the situation evolves, if there are airport shutdowns, things of that nature, we may have to revisit the issue.

¶ 11 In the days following the pretrial conference, the Governor of Illinois — the state where Ramos lived at the time — and multiple government agencies in Colorado issued various orders restricting the movement of people and limiting the size of gatherings. In response to these developments, the prosecution moved to continue the trial ten days before it was set to begin. The prosecution argued that a continuance was warranted under section 18-1-405(6)(g) because (1) Ramos, an expert witness in the case, couldn't travel to Colorado because Illinois had a stay-at-home order in effect; and (2) the COVID-19 virus, and the measures imposed to address it, constituted exceptional circumstances precluding effective administration of the trial.

¶ 12 After holding a hearing on March 31, the court agreed with the prosecution on both counts. It granted the continuance and reset the trial to July 2020, well after the then-effective April 22 speedy trial deadline.

¶ 13 The day after the April 22 deadline expired, Kirby moved the court to dismiss the case for violation of his statutory speedy trial right, arguing that the court erred by granting the continuance under section 18-1-405(6)(g)(I)-(II). When the court denied the motion, it reiterated that continuing the case was appropriate due to the pandemic and supplemented its rationale with the supreme court's ruling in *People v. Lucy*, 2020 CO 68.

¶ 14 Between July 2020 and July 2021, the court reset the trial date four more times. On two occasions, in October 2020 and February 2021, Kirby requested the continuance and waived his speedy trial right.[1] Finally, the case proceeded to a four-day jury trial on July 12-15, 2021, almost two years after Kirby pleaded not guilty.

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[1] Notably, Kirby argued in his February 2021 continuance request that COVID-19 presented a health risk to the parties, court personnel, witnesses, and prospective jurors.

2. Applicable Law and Standard of Review

¶ 15 Section 18-1-405 guarantees criminal defendants the right to a speedy trial. *People v. McMurtry*, 122 P.3d 237, 240 (Colo. 2005). Specifically, the statute requires that a defendant be brought to trial within six months of entering a plea of not guilty unless the time for trial is extended or tolled for one of several statutorily specified reasons. § 18-1-405(1). In turn, subsection (6) identifies the delays that toll the speedy trial deadline from running:

> In computing the time within which a defendant is brought to trial as provided in subsection (1) of this section, the following periods of time are excluded:
>
> . . . .
>
> (g) The period of delay not exceeding six months resulting from a continuance granted at the request of the prosecuting attorney, without the consent of the defendant, if:
>
> (I) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that this evidence will be available at the later date; *or*
>
> (II) The continuance is granted to allow the prosecuting attorney additional time in felony cases to prepare the state's case and additional time is justified because of

> exceptional circumstances of the case and the court enters specific findings with respect to the justification.

§ 18-1-405(6) (emphasis added); *see also Lucy*, ¶ 24 (concluding that subsection (6)(g)(I) applies in circumstances where material evidence is unavailable due to the public health crisis, the prosecution has exercised due diligence to obtain that evidence, and there are reasonable grounds to believe that the unavailable evidence will be available on the new trial date).

¶ 16 Whether a defendant's statutory speedy trial right has been violated is a matter of statutory interpretation that we review de novo. *People v. Nunez*, 2021 CO 31, ¶ 16. In contrast, we review the trial court's decision to grant a continuance under subsection (6) of the statute for an abuse of discretion. *Delacruz v. People*, 2017 CO 21, ¶ 20. The court abuses its discretion when it acts in a manifestly arbitrary, unfair, or unreasonable manner, or its decision is based on a misunderstanding or misapplication of the law. *People v. Marston*, 2021 COA 14, ¶ 21.

3. Discussion

¶ 17 Kirby only challenges the court's decision to continue his case past the April 22, 2020, speedy trial deadline. He contends that the

trial court erroneously relied on the effects of the COVID-19 pandemic to continue the case because (1) the prosecution failed to prove that Ramos — a forensic scientist who confirmed the presence of Kirby's blood at the crime scene — was an unavailable witness and that it had exercised due diligence in securing his presence and (2) subsection (6)(g)(II)'s plain language doesn't apply to delays caused by "generally applicable public health concerns."[2] We reject the first contention and thus need not reach the second.

¶ 18 Kirby argues that Ramos was an available witness because the stay-at-home orders in Colorado and Illinois didn't preclude Ramos from travelling to Colorado. Specifically, he notes that Ramos's travel qualified for an exception under the Illinois stay-at-home order allowing travel for essential governmental functions. Maybe

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[2] Kirby also contends that instead of granting a continuance, the trial court should have declared a mistrial under section 18-1-405(6)(e), C.R.S. 2023, or Crim. P. 24(c)(4). However, Kirby didn't ask the court to declare a mistrial under subsection (6)(e) at the March 31 hearing. Nor did he make a similar request under Crim. P. 24(c)(4) when that rule became effective after the trial court had already made its decision. Thus, Kirby failed to preserve this issue. And to the extent Kirby alleges the court erred by not declaring a mistrial sua sponte, we disagree. As the People point out, a court is not required to declare a mistrial when a continuance is appropriate under the speedy trial statute.

so. But we don't think the trial court abused its discretion by concluding that Ramos's presence couldn't be secured.

¶ 19 For starters, it's not clear whether Ramos was authorized to travel under the "essential governmental functions" exception in the order. The order's language suggests that this exception applied to activities unrelated to his function as a witness in criminal proceedings:

> 10. *Essential Governmental Functions*. For purposes of this Executive Order, all first responders, emergency management personnel, emergency dispatchers, court personnel, law enforcement and corrections personnel, hazardous materials responders, child protection and child welfare personnel, housing and shelter personnel, military, and other governmental employees working for or to support Essential Businesses and Operations are categorically exempt from this Executive Order.
>
> Essential Government Functions means all services provided by the State or any municipal, township, county, subdivision or agency of government and needed to support the continuing operation of the government agencies or to provide for or support the health, safety and welfare of the public, and including contractors performing Essential Government Functions. Each government body shall determine its Essential Governmental Functions and identify

> employees and/or contractors necessary to the performance of those functions.

Ill. Exec. Order 2020-10 (Mar. 20, 2020), https://perma.cc/H7G2-GQNU. This exception doesn't expressly cover travel to another state to testify as a witness in a criminal proceeding. And given the context of the order as a whole, the exception focuses on permitting key Illinois governmental employees to continue their work in support of critical Illinois governmental functions. We don't perceive error in the trial court's conclusion that this exception didn't apply to Ramos.[3]

¶ 20 Kirby further says that the trial court erred by concluding that Ramos wasn't available because "Colorado's stay-at-home orders authorized travel for the continued function of Colorado's criminal courts." But that doesn't change the analysis here at all given the

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[3] While Kirby argues for the first time on appeal that Ramos's travel would have been deemed "essential travel" under the Illinois order because it was "required by law enforcement or court order," he didn't present that argument to the trial court. The record shows, as the People point out, that Kirby only argued for the applicability of the "essential governmental functions" exception discussed above. Regardless, the essential travel exception does not persuade us that the trial court erred given our remaining analysis.

court's conclusion that Ramos wasn't allowed to travel out of his home state under a separate executive order.

¶ 21 Apart from the significance of the specific terms in the Colorado and Illinois stay-at-home orders to the court's determination, Kirby's argument disregards the larger context of the court's ruling and the circumstances that existed at the time the court granted the continuance. As the court explained in extensive detail during the hearing, it viewed proceeding with the April 6 trial as irresponsible considering the rising rate of infections, serious illness, and deaths; heightened public concern over the spread of COVID-19; and the court's inability to ensure social distancing within the courtroom and compliance with other restrictive measures. These concerns applied equally to Ramos, who would have had to fly in from another state during a time of nationwide disruption in key operations. It would also have required Ramos to engage in extensive travel, risking exposure to a virus whose effects were still largely unknown at the time.

¶ 22 We thus perceive no error in the trial court's ruling that Ramos wasn't an available witness within the meaning of section 18-1-405(6)(g)(I).

¶ 23 We also disagree with Kirby's contention that the prosecution failed to establish that it had exercised due diligence in securing Ramos's presence. The record shows that the prosecution was in contact with Ramos, it had purchased plane tickets for him and Ramos had accepted the same, and he had accepted the prosecution's subpoena by email and was willing to attend the trial.

¶ 24 Further, the record doesn't support Kirby's argument that these "facts weigh *against* due diligence because the prosecution decided unilaterally that Ramos could not attend the trial despite Ramos's willingness to obey the subpoena." During the continuance hearing, the prosecutor said,

> [W]e did speak to Mr. Ramos. . . . [W]e asked him about his ability to travel and his interpretation, and frankly ours, of the stay-at-home order issued by the Governor [of Illinois] is that his travel is actually not permitted under the stay-at-home order in order to come for trial.

Thus, based on this record, we can't say the prosecution unilaterally determined that Ramos wouldn't be able to attend the trial.

¶ 25 In sum, the trial court concluded that

> [t]he prosecuting attorney has exercised reasonable diligence to obtain these witnesses, who are no longer available as a result of the stay-at-home orders that are the result of the COVID-19 situation. There's no reason to believe those witnesses will not be available at a later time and the Court believes that [the subsection (6)(g)(I)] exception applies.[4]

¶ 26 We, in turn, conclude that the trial court didn't err by continuing the case under section 18-1-405(6)(g)(I). And because a continuance may be granted under either subsection, we need not address Kirby's contention that the continuance was not authorized under subsection (6)(g)(II). *See Delacruz*, ¶ 19.

B. Merger

¶ 27 Kirby contends that reckless manslaughter and careless driving resulting in death are lesser included offenses of reckless

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[4] Kirby contends that the prosecution failed to satisfy the requirements of subsection (6)(g)(I) as to another out of state witness, Eric Perry. But apart from making a fleeting reference to that witness at the continuance hearing, the prosecution's request for continuance — and the court's analysis — revolved around Ramos's availability. Consequently, Perry's availability, or lack thereof, wasn't the primary issue the court considered in granting the continuance. Nor does Perry's availability change our conclusion here.

vehicular homicide and, thus, that the trial court reversibly erred by failing to merge his convictions. We agree.

1. Applicable Law and Standard of Review

¶ 28 The Double Jeopardy Clauses of the United States and Colorado Constitutions provide that an accused shall not be twice placed in jeopardy for the same offense. U.S. Const. amends. V, XIV; Colo. Const. art. II, § 18.

¶ 29 Merger gives effect to double jeopardy and seeks to protect a defendant from being punished twice for a single criminal act. *People v. Henderson*, 810 P.2d 1058, 1060 (Colo. 1991). Under this doctrine, "a defendant may not be convicted of two offenses for the same conduct if the lesser offense is included in the greater." *Page v. People*, 2017 CO 88, ¶ 9; *see* § 18-1-408(1)(a), C.R.S. 2023. This means that if the defendant is found guilty of both a greater offense and its lesser included offense, then the trial court must merge the lesser included offense into the conviction for the greater offense. *Page*, ¶ 9.

¶ 30 In determining whether two convictions should be merged, we apply the statutory elements test (also called the clarified strict elements test) that our supreme court announced in *Reyna-Abarca*.

This test provides that "an offense is a lesser included offense of another offense if the elements of the lesser offense are a subset of the elements of the greater offense, such that the lesser offense contains only elements that are also included in the elements of the greater offense." *Reyna-Abarca*, ¶ 64; *see* § 18-1-408(5)(a) (providing that one offense is a lesser included of the other if "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged"). Therefore, "one offense is not a lesser included offense of another if the lesser offense requires an element not required for the greater offense." *Reyna-Abarca*, ¶ 60.

¶ 31 Section 18-1-408(5)(c) provides that one offense may also be included in another

> if it differs from the offense charged *only* in the respect that (1) a less serious injury or risk of injury, a lesser kind of culpability, or both a less serious injury or risk of injury and a lesser kind of culpability suffice to establish its commission; and (2) no other distinctions exist. If any other distinctions exist, then subsection 408(5)(c) is inapplicable.

Pellegrin v. People, 2023 CO 37, ¶ 34.

¶ 32 "Whether two convictions must merge is a question of law that we review de novo." *Thomas v. People*, 2021 CO 84, ¶ 19. But because Kirby didn't preserve his double jeopardy claim, we may reverse only if entering convictions for multiple offenses constituted plain error. *Reyna-Abarca*, ¶ 47. An error is plain if it was both obvious and substantial, such that it so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *Hagos v. People*, 2012 CO 63, ¶ 14.

2. Reckless Manslaughter

¶ 33 Kirby argues, and the People concede, that the trial court erred by failing to merge his convictions for reckless manslaughter and reckless vehicular homicide. We agree.

¶ 34 Reckless manslaughter requires proof that a person (1) recklessly; (2) caused the death; (3) of another person. § 18-3-104(1)(a), C.R.S. 2023. Reckless vehicular homicide requires proof that (1) a person operated or drove a motor vehicle; (2) in a reckless manner; and (3) such conduct proximately caused the death of another. § 18-3-106(1)(a), C.R.S. 2023.

¶ 35 A comparison of the statutory definitions of the two offenses reveals that every element of reckless manslaughter — reckless mental state, proximate causation, and the resulting death of another person — is also an element of reckless vehicular homicide. Thus, we hold that reckless manslaughter is a lesser included offense of reckless vehicular homicide. The trial court erred by not merging Kirby's convictions for these two crimes. *See Reyna-Abarca*, ¶ 64.

¶ 36 We next consider whether this error was plain. The People concede that it was, and we agree. In *Reyna-Abarca*, ¶ 81, the supreme court opined "that when a defendant's double jeopardy rights are violated for failure to merge a lesser included offense into a greater offense, such a violation requires a remedy." And because "the People . . . presented no compelling arguments as to why any double jeopardy errors that may have been committed . . . did not rise to the level of plain error," the court concluded that the error in not merging multiple convictions in that case was plain. *Id.* at ¶ 82. We find the same considerations applicable here. *See People v. Snider*, 2021 COA 19, ¶¶ 72-74 (relying on *Reyna-Abarca* to conclude that a double jeopardy error was plain absent a

persuasive argument to the contrary); *see also People v. Welborne*, 2018 COA 127, ¶ 25 (same). Consequently, we vacate Kirby's conviction and sentence for reckless manslaughter and remand the case to the trial court to merge this conviction into his conviction for reckless vehicular homicide and to correct Kirby's mittimus.

3. Careless Driving Resulting in Death

¶ 37 Kirby further contends that careless driving resulting in death is a lesser included offense of reckless vehicular homicide under section 18-1-408(5) — specifically paragraphs (a) and (c) — and the statutory elements test.

¶ 38 In response, the People don't address Kirby's arguments under subsection (5)(a) and the statutory elements test but instead assert that (1) any error in failing to merge the convictions wasn't plain because "[c]areless driving's elements are not obviously a subset of vehicular homicide's elements under *Reyna-Abarca*," and (2) the two convictions should not merge under subsection (5)(c) because they differ in more than one respect. We disagree.

¶ 39 We begin by identifying the elements of the two offenses. Under section 42-4-1402(1), C.R.S. 2023, a person is guilty of careless driving if (1) the person drove a motor vehicle, bicycle,

electrical assisted bicycle, electric scooter, or low-power scooter; (2) in a careless and imprudent manner, without due regard for the width, grade, curves, corners, traffic, and use of the streets and highways and all other attendant circumstances. *See also* COLJI-Crim. 42:15 (2022). Careless driving is defined in the traffic code. It's a class 2 misdemeanor, but it becomes a class 1 misdemeanor if the person's conduct causes a bodily injury or death to another. § 42-4-1402(2). In turn, reckless vehicular homicide, as we already noted, requires proof that (1) a person operated or drove a motor vehicle; (2) in a reckless manner; and (3) such conduct proximately caused the death of another. § 18-3-106(1)(a).

¶ 40 Comparing the elements of these two offenses, we note the following distinctions: (1) the careless driving statute lists several means of transportation beyond a motor vehicle, including a bicycle, electrical assisted bicycle, electric scooter, or low-power scooter; (2) the required mental state for vehicular homicide is recklessness, whereas a person engages in careless driving by driving "in a careless and imprudent manner"; (3) to drive "in a careless and imprudent" manner, the person must act "without due regard for the width, grade, curves, corners, traffic, and use of the

streets and highways and all other attendant circumstances," § 42-4-1402(1), a requirement not found in the reckless vehicular homicide statute; and (4) unlike reckless vehicular homicide, causing the death of another person is not an element of careless driving, but rather a sentence enhancer. In connection with the last distinction, we don't consider sentence enhancers when determining whether one offense is a lesser included of another. *See Thomas*, ¶ 1 n.1; *see also People v. Wambolt*, 2018 COA 88, ¶ 64 n.7.

¶ 41 Kirby contends that careless driving resulting in death is a lesser included offense of reckless vehicular homicide under the statutory elements test despite the distinctions noted above. He argues that "[d]riving recklessly subsumes driving in a careless and imprudent manner without due regard to the width, grade, curves, corners, traffic, and use of the streets and highways and all other attendant circumstances." We agree.

¶ 42 For starters, the fact that careless driving may be committed in more ways than reckless vehicular homicide doesn't defeat Kirby's lesser included offense claim. For one offense to be included in the other, it is sufficient that a single alternative way of

committing the lesser offense be contained in the statutory definition of the greater offense. *People v. Rock*, 2017 CO 84, ¶ 16 ("To be an included offense, it is enough that any particular set of elements sufficient for conviction of [the lesser included] be so contained [in the greater offense]."). And here, while the careless driving statute provides for multiple alternative ways of committing the offense, it also shares at least one common conveyance with the vehicular homicide statute: a motor vehicle. Thus, the conveyance required for one of the offenses is a subset of those required for the other. *Id.*

¶ 43 The requisite mental state for commission of careless driving also constitutes a subset of the reckless mental state in the vehicular homicide statute. The careless driving statute penalizes a particular type of driving, that done "in a careless and imprudent manner" — which is manifested by the person's disregard of the road conditions. § 42-4-1402(1). Kirby argues that acting in a reckless manner encompasses this type of carelessness. For this proposition, he relies on, among other authorities, *Chapman*, 192 Colo. 322, 557 P.2d 1211.

¶ 44 In *Chapman*, the supreme court held that careless driving was the lesser included offense of reckless driving, another offense defined in the traffic code. *Id.* at 325, 557 P.2d at 1214. The court reasoned that a careless and imprudent state of mind indicates the absence of due care and is, thus, equivalent to criminal negligence. *Id.* at 325, 557 P.2d at 1213. And because recklessness is also a form of negligence, though of a much higher degree and analogous to gross negligence, the court concluded that "it is apparent that one who commits reckless driving necessarily has been guilty of careless driving, for the greater degree of negligence includes the lesser." *Id.* at 325, 557 P.2d at 1214.

¶ 45 We find the supreme court's reasoning in *Chapman* persuasive and apply it here. True, the court there considered whether carelessness was subsumed by recklessness under the reckless driving statute in the traffic code. We, on the other hand, consider whether the requisite mental state for careless driving is a subset of recklessness under the criminal code, not the traffic code. *Compare* § 42-4-1401, C.R.S. 2023 (defining driving in a reckless manner as driving in "a manner as to indicate either a wanton or a willful disregard for the safety of persons or property"), *with* § 18-1-501(8),

C.R.S. 2023 ("A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists.").

¶ 46 But we don't view this distinction as dispositive here because, as Kirby notes, at least one division of our court has held that recklessness under the reckless driving statute is equivalent to — and included in — its criminal code counterpart. *See People v. Pena*, 962 P.2d 285, 289 (Colo. App. 1997) ("The fact that an actor's disregard is described in [the criminal code] as 'conscious' and in the [reckless driving statute] as 'willful and wanton' does not alter the concept of 'recklessness' or create two distinct elements for the purpose of determining whether one offense is included in the other."). Thus, carelessness in the careless driving statute, which, under *Chapman*, is analogous to criminal negligence, is subsumed by the element of "in a reckless manner" in the vehicular homicide statute. *See* § 18-1-503(3) ("If a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts *recklessly*, knowingly, or intentionally.") (emphasis added).

¶ 47 Each element of careless driving resulting in death is a subset of the elements of reckless vehicular homicide. We thus hold that careless driving resulting in death is a lesser included offense of reckless vehicular homicide. Accordingly, the trial court erred by not merging Kirby's convictions for these two offenses.

¶ 48 We also conclude that the court's error was plain and, thus, reversible. In arguing otherwise, the People say that the error wasn't obvious because no appellate court has decided that careless driving resulting in death is a lesser included offense of reckless vehicular homicide. The People are right that no Colorado appellate case has directly addressed this issue. *See People v. Zweygardt*, 2012 COA 119, ¶ 9 n.2 (recognizing that no Colorado appellate court has addressed the issue and electing not to decide whether an instruction identifying careless driving resulting in death as a lesser included offense of reckless vehicular homicide was proper); *People v. Balkey*, 53 P.3d 788, 790 (Colo. App. 2002) (noting that the trial court instructed the jury on careless driving resulting in death as a lesser included offense of reckless vehicular homicide but not deciding the issue); *People v. Richardson*, 184 P.3d 755, 758 (Colo. 2008) (same); *People v. Tarr*, 2022 COA 23, ¶ 10 (referring to

careless driving resulting in death as a lesser nonincluded offense of the vehicular homicide charge). But that doesn't mean that the error here isn't reversible.

¶ 49 True, the supreme court has held that for an error to be obvious, the error "must contravene (1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law." *Scott v. People*, 2017 CO 16, ¶ 16 (citation omitted). But in concluding that the double jeopardy error in that case wasn't obvious and, thus, not plain, the court relied on the fact that a division of our court had rejected the precise double jeopardy claim the defendant raised for the first time on appeal. *Id.* at ¶ 18. Thus, the *Scott* court couldn't "say that it was obvious error for the trial court to have acted consistently with that [earlier] case" from our court. *Id.*

¶ 50 Unlike in *Scott*, however, neither the supreme court nor our court has decided whether careless driving resulting in death is included in reckless vehicular homicide. So at the time of Kirby's trial, there was no precedent binding the trial court on this question. And as we already noted above, the supreme court concluded in *Reyna-Abarca*, ¶ 81, "that when a defendant's double

jeopardy rights are violated for failure to merge a lesser included offense into a greater offense, such a violation requires a remedy."

¶ 51 Following *Reyna-Abarca*, then, we conclude that the failure to merge the convictions was plain error. Consequently, we vacate Kirby's conviction and sentence for careless driving resulting in death and instruct the trial court on remand to merge that conviction with his conviction for reckless vehicular homicide and to correct his mittimus. Because we conclude that careless driving resulting in death is a lesser included offense of reckless vehicular homicide under the statutory elements test and section 18-1-408(5)(a), we need not reach Kirby's alternative argument that these offenses must merge under subsection (5)(c).

C. The Trial Court's Finding of Aggravating Circumstances

¶ 52 Kirby next claims that the trial court erred by determining the presence of aggravating circumstances and sentencing him outside the presumptive range for leaving the scene of an accident resulting in death (class 3 felony), reckless vehicular homicide (class 4

felony), and reckless manslaughter (class 4 felony).[5] Because we vacate Kirby's conviction for reckless manslaughter, we only consider whether the court erred by sentencing him in the aggravated range for the other two convictions. We conclude that it didn't.

1. Applicable Law and Standard of Review

¶ 53 A trial court may impose a sentence up to twice the maximum of the presumptive sentencing range if it finds — and makes detailed findings in the record about — extraordinary aggravating circumstances. § 18-1.3-401(6), (7), C.R.S. 2023. The United States Supreme Court has held that, other than a prior conviction, any fact that increases a defendant's sentence beyond the maximum presumptive range must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see also Blakely v. Washington*, 542 U.S. 296, 301 (2004).

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[5] The presumptive sentencing range for a class 3 felony is four to twelve years in the custody of the Department of Corrections. § 18-1.3-401(1)(a)(V)(A.1), C.R.S. 2023. A class 4 felony has a presumptive range of two to six years. *Id.*

¶ 54 The Colorado Supreme Court has further clarified this rule, stating that a finding of aggravation must be based on at least one of the following four kinds of facts: (1) facts found by a jury beyond a reasonable doubt; (2) facts admitted by the defendant; (3) facts found by a judge after the defendant stipulated to judicial factfinding; and (4) facts regarding the defendant's prior convictions. *Lopez v. People*, 113 P.3d 713, 719 (Colo. 2005); *Mountjoy v. People*, 2018 CO 92M, ¶ 15. The first three types of facts are known as "*Blakely*-compliant," and the fourth type is known as "*Blakely*-exempt." *People v. Huber*, 139 P.3d 628, 630 (Colo. 2006).

¶ 55 We review de novo constitutional challenges to the trial court's sentencing determinations. *Villanueva v. People*, 199 P.3d 1228, 1231 (Colo. 2008). But because Kirby didn't preserve this issue in the trial court, we will vacate his sentences only if we conclude that the court's error was plain and so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the

sentences.[6] *People v. Sandoval*, 2018 CO 21, ¶ 11; *see also People v. Banark*, 155 P.3d 609, 611 (Colo. App. 2007).

2. Discussion

¶ 56 Kirby contends the trial court erred by judicially finding the presence of aggravating circumstances and sentencing him outside the presumptive range because of (1) his prior criminal history and (2) the serious nature of the crime.

¶ 57 The court found that

> [t]he aggravation in this case comes from really two places. One being the aggravated nature of the driving in this case. The aggravated nature of leaving the scene. The aggravated nature of all of that. And, of course, Mr. Kirby . . . ha[s] a history that is aggravating as well. I have to take that into account.

¶ 58 After making these findings, the court concluded that

> [t]he sentence on leaving the scene of an accident involving death charge will be in the

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[6] We are not persuaded by Kirby's argument that he preserved this issue merely by requesting a sentence within the presumptive range when he did not object to having the court decide sentencing facts. *See People v. Banark*, 155 P.3d 609, 611-12 (Colo. App. 2007) (expressing doubt that the defendant preserved his *Blakely* challenge where he asked for a sentence within the presumptive range but "did not mention *Blakely*, *Apprendi*, or, more generally, defendant's right to have a jury decide the facts upon which the court relied in aggravating defendant's sentence").

> aggravated range. Based on that it will be 15 years in the Department of Corrections. The reckless manslaughter charge and the vehicular homicide charge will be sentenced in the aggravated range, though concurrently with [the leaving the scene of an accident resulting in death charge]. The sentence for those charges will be eight years.

¶ 59 Kirby claims that the court's factfinding of aggravation violated his constitutional right for a jury to determine beyond a reasonable doubt any fact used to increase his sentence beyond the statutory maximum. We disagree. It is a well-established rule that a trial court may rely on the fact of a defendant's prior conviction to find aggravation and impose a sentence outside the presumptive statutory range. *Apprendi*, 530 U.S. at 490; *Mountjoy*, ¶ 15; *Lopez*, 113 P.3d at 730 ("Whether prior convictions are extraordinary aggravating circumstances is a determination made by the judge alone."). And here, the trial court determined that Kirby's prior convictions — for conspiracy to commit first degree assault, conspiracy to commit first degree burglary, and driving while ability impaired — constituted an aggravating factor meriting the enhanced sentences. We perceive no error in that determination.

¶ 60 True, the trial court also found that the serious nature of Kirby's conduct was aggravating. The court noted that "[i]t was obviously aggravating[,] the speeds that were involved" and the fact that Kirby fled the scene of the crash without trying to assist the victim or report the incident. The People candidly concede "that the record does not contain evidence that Kirby knowingly, voluntarily, and intelligently waived his *Blakely* rights to use th[ese] fact[s] for aggravated sentencing." Consequently, although Kirby admitted to driving at high speeds and leaving the scene of the crash, the court erred by considering these facts to find aggravation. *See Villanueva*, 199 P.3d at 1233-34 ("[The] longstanding principles of Sixth and Fourteenth Amendment jurisprudence 'compel the conclusion that *Blakely* does not permit a sentencing court to use a defendant's factual admissions to increase his sentence unless the defendant first effectuates a knowing, voluntary, and intelligent waiver of his *Blakely* rights.'") (alteration omitted) (citation omitted).

¶ 61 Nonetheless, we conclude that Kirby's sentence is statutorily and constitutionally sound because the court's consideration of his prior criminal history — a *Blakely*-exempt factor — was sufficient to support the finding of aggravation. An aggravated sentence can be

supported by a single *Blakely*-exempt or *Blakely*-compliant factor. *People v. Glasser*, 293 P.3d 68, 80 (Colo. App. 2011); *see also Lopez*, 113 P.3d at 731.

¶ 62 Kirby also broadly challenges Colorado Supreme Court precedent and the prior conviction exception on a number of grounds. He acknowledges that "the Colorado Supreme Court has upheld the constitutionality of [section 18-1.3-401(6)]" and "the validity of the prior conviction exception" in *Lopez* and *Mountjoy*. He argues, however, that those decisions "contravene *Apprendi* [and] its progeny," and that under the Supreme Court's jurisprudence, any fact that tends to increase the sentence — including a defendant's criminal history — must be determined by a jury. Accordingly, Kirby urges us to disregard "the incorrect holdings of the Colorado Supreme Court" and follow the decisions of the United States Supreme Court on the issue, specifically *United States v. Gaudin*, 515 U.S. 506 (1995).

¶ 63 We see no basis to depart from our supreme court's precedents here. The Supreme Court has not overruled our supreme court's decisions on the constitutionality of section 18-1.3-401(6) or its decision in *Mountjoy*. Nor has the Supreme

Court rejected the prior conviction exception under its own jurisprudence. So while we must follow the Supreme Court on matters of federal law, s*ee People v. Delgado*, 2019 COA 55, ¶ 23, we see no such controlling rulings here. Thus, it is our supreme court's prerogative alone to overrule its own decisions in this arena. *People v. Novotny*, 2014 CO 18, ¶ 26. We therefore decline Kirby's invitation to revisit these precedents.

D. Consideration of Kirby's Character and Rehabilitative Potential

¶ 64 Last, Kirby claims that the trial court erred by failing to consider his character and rehabilitative potential before sentencing him. We again disagree.

1. Standard of Review and Applicable Law

¶ 65 We review a trial court's sentencing decision for an abuse of discretion. *People v. Herrera*, 2014 COA 20, ¶ 16. We defer to the trial court on sentencing decisions because the court's familiarity with the facts of the case places it in the best position to impose a sentence that reflects a balance of the relevant considerations. *People v. Torrez*, 2013 COA 37, ¶ 71.

¶ 66 In exercising its sentencing discretion, however, the court must consider the nature of the offense, the character and rehabilitative potential of the offender, the deterrent effect of the sentence, and the protection of the public. *Herrera*, ¶ 17; *see also* § 18-1-409(1), C.R.S. 2023. In reaching its decision, the court only needs to provide a reasonable explanation for the sentence imposed and need not engage in a point-by-point discussion of every factor it considers. *Torrez*, ¶ 74. While the court may not unduly emphasize one factor to the exclusion of others, it may properly find certain factors to be more compelling than the others. *Id.* at ¶¶ 73-74.

2. Discussion

¶ 67 Kirby centers his claim on the following statements the court made during the sentencing hearing:

> It is hard to even know where to start. The tragedy in this case is so deep. And I guess the place that I have to start is with something that I think everybody acknowledges. And that is that I am here to judge what happened over the course of this case. *I am not here to judge Mr. Kirby, despite the fact I have been given a lot of information about what happened in Mr. Kirby's life*. That has been enlightening, of course. And I have been given a lot of

> information about [the victim], who seemed a kind and obviously cherished man.
>
> . . . .
>
> The fact that you [Mr. Kirby] have been willing to come to court and stand for these charges is demonstrative of some degree of redemption. *Redemption is not my business*.

(Emphasis added.) Kirby contends that the italicized statements show that the court refused to consider his character and rehabilitative potential, two statutorily mandated sentencing factors. We perceive no error.

¶ 68 Kirby presented mitigation evidence at the hearing. His friends and family submitted letters on his behalf, highlighting his positive character traits, his sincere regret for what had happened, and his commitment to becoming a productive member of the community. Kirby's mother and sister addressed the court and shared additional information about his background, the regret he had exhibited for his actions, and the steps he had taken toward redemption. And Kirby also made a statement, extending his apologies to the victim's family and expressing his profound repentance for his actions.

¶ 69 After considering the entire sentencing hearing, we conclude that the trial court gave due regard to Kirby's mitigation evidence before sentencing him. True, the court did say that it wasn't there "to judge Mr. Kirby" and that "[r]edemption [wasn't its] business." But when viewed in context of the whole sentencing hearing, these statements don't reflect a lack of consideration for Kirby's character or rehabilitative potential. To the contrary, the record shows that the court commended Kirby's willingness to take full accountability for his actions:

> I appreciate, Mr. Kirby, that you recognize how aggravated this was. And I appreciate the fact that you recognize the tragedy, the tragedy to [the victim's] friends and family, the tragedy to your friends and family.

And just after saying that "[r]edemption [wasn't its] business," the court added:

> The fact you showed up when homicide charges were filed, knowing you were going into custody, I respect that, but it is inconsistent with what you did that night. The fact that you are on bond and walking in the courtroom knowing you would be going through the side door for a long period to the Department of Corrections, I respect that.

¶ 70 The court also acknowledged that Kirby was sincerely regretful for his actions:

> I respect the fact that during the course of this trial you were moved. I could see you were moved at times during this trial. I believe that you feel regret. I don't think you are putting that on for me. I see it.

Considered in context, we don't interpret the court's statement as saying that it wouldn't consider Kirby's rehabilitative potential. Instead, we interpret the court as saying that, even if Kirby was taking accountability for his actions and demonstrating some level of redemption, that accountability and remorse didn't negate Kirby's conduct from the night of the crash.

¶ 71 The trial court was familiar with the facts of this case and had discretion to balance the competing considerations and find certain factors more compelling than the others. *See Torrez*, ¶¶ 71, 74. And the record shows that the court here weighed various factors, both in favor of and against Kirby, and found that the aggravating nature of his conduct outweighed the mitigating evidence that he had presented. We perceive no abuse of discretion under these circumstances.

III. Disposition

¶ 72 We vacate Kirby's convictions for reckless manslaughter and careless driving resulting in death, and we direct the trial court on remand to (1) merge those two convictions into his conviction for reckless vehicular homicide and (2) correct his mittimus. The judgment is affirmed in all other regards.

JUDGE FREYRE and JUDGE YUN concur.