SUMMARY
February 22, 2024

2024COA19

No. 23CA0058, *People v. Brassill* — Sentencing — Restitution — Assessment of Restitution — Procedural Deadlines — Reasonable Diligence

In this restitution dispute, a division of the court of appeals concludes, for the first time in a published Colorado case, that the prosecution is obligated to exercise reasonable diligence to determine the amount of restitution before sentencing. The division also concludes that when the amount of restitution is reserved at sentencing, the court has the authority to enter a contemporaneous scheduling order requiring the prosecution to file a supplemental pleading within a period of less than ninety-one days that discloses the amount of restitution.

In this case, the prosecution failed to exercise reasonable diligence prior to sentencing and violated the court's scheduling

order by not timely filing the supplemental restitution information. But the division concludes that the sentencing court did not abuse its discretion by declining to deny restitution based on these violations, and therefore it affirms the restitution order.

COLORADO COURT OF APPEALS **2024COA19**

Court of Appeals No. 23CA0058
La Plata County District Court No. 21CR506
Honorable Suzanne F. Carlson, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Skylan M. Brassill,

Defendant-Appellant.

ORDER AFFIRMED

Division II
Opinion by JUDGE SCHUTZ
Fox and Martinez*, JJ., concur

Announced February 22, 2024

Philip J. Weiser, Attorney General, Brock J. Swanson, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Zobel Law, LLC, Cassandra Zobel, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Defendant, Skylan M. Brassill, appeals the district court's restitution order. In resolving Brassill's contentions, we conclude that the prosecution has an obligation to use reasonable diligence to determine the amount of restitution it will claim prior to the entry of the order of conviction. We also conclude that when a sentencing court enters an order that reserves the determination of the amount of restitution owed, the court may enter a contemporaneous scheduling order requiring the prosecution to identify the requested amount of restitution within a specified period that is less than ninety-one days.

¶ 2 Applying these principles, we conclude that the district court failed to expressly recognize the prosecution's obligation to exercise reasonable diligence to determine the amount of restitution before sentencing. We also conclude that the prosecution violated the court's scheduling order by not timely filing the supplemental restitution information. But we conclude that the court did not abuse its discretion by declining to deny restitution based on these violations. We therefore affirm the restitution order.

I. Factual Background and Procedural History

¶ 3 On November 30, 2021, Brassill stole a motorcycle and crashed it into a fence, resulting in the People filing multiple criminal charges against him. Brassill was arrested in March 2022, and on July 21, 2022, he pleaded guilty to first degree aggravated motor vehicle theft and vehicular eluding. The guilty plea did not mention restitution.

¶ 4 After advising Brassill, the district court accepted the plea and proceeded to immediate sentencing, where the following exchange occurred between the court and the prosecutor:

> THE COURT: Is there restitution . . . ?
>
> [PROSECUTOR]: We don't have a figure on that yet. I would assume that there is, given that there was three vehicles that were —
>
> THE COURT: Why don't we have any information? I mean, I think you can ask that I impose restitution and I can give you some time, but I think we need to start understanding why we don't have this sort of information when we go to sentencing.
>
> PROSECUTOR: Yes, Your Honor. I can get on that, and I would ask that you just allow the People time to get that information to you.
>
> THE COURT: Is there any particular reason we don't have it now?

> PROSECUTOR: Your Honor, I don't have a good excuse for why we don't have that.
>
> THE COURT: All right. I am going to order restitution be paid, with a figure to be supplied to the Court within [thirty] days so that if a hearing is requested, we have time to get that heard.

¶ 5 In response, Brassill's counsel made the following record:

> And then with regard to restitution, I think the Court probably understands (unintelligible) in the same way the defense does and that that number is to be brought to sentencing so the Court can enter its ruling, its order within [ninety-one] days. I understand the Court has ordered restitution in an amount to be determined, but I do need to make the record that it should have been brought today and that we would object to that.

While denying the objection, the court stated, "Well, I think it's unclear, so there is a danger, of course, with the [district attorney] agreeing to proceed, that the [s]upreme [c]ourt says that it should be interpreted the way you just said, but I don't read it that way."

¶ 6 Pursuant to the court's order, the prosecution was required to file information regarding the specific amount of claimed restitution by August 20, 2022. The prosecution did not abide by that deadline, instead providing such information for the first time on September 13, 2022, when the prosecution filed its restitution

motion. The prosecution requested that Brassill be ordered to pay $13,798.34 in restitution. This total consisted of

- $4,404.38 for victim T.M., who owned the damaged fence, based on a repair estimate dated July 27, 2022;
- $8,993.00 for victim J.N., the owner of the motorcycle, based on an estimate dated August 9, 2022; and
- $400.96 invoiced by the Colorado Department of Transportation (CDOT) on June 10, 2022.

¶ 7 Brassill objected to the restitution request, asserting that the prosecution was required to request an amount of restitution at sentencing unless the information supporting the request was unavailable. In addition, Brassill argued that the prosecution was required to, but did not, make diligent efforts to ensure the information was available at sentencing. Brassill asserted that these failures violated the prosecution's obligations under section 18-1.3-603(2)(a), C.R.S. 2023. Brassill also asserted that the prosecution failed, without good cause, to comply with the court's deadline for filing the restitution amount. Brassill requested that the court deny restitution or, alternatively, set a hearing. The court set a hearing.

¶ 8 At the hearing, the prosecutor explained that he did not have repair estimates at the time of sentencing. The prosecutor acknowledged that the CDOT invoice was available six weeks before sentencing, and based on that fact, he withdrew any claim to restitution for CDOT's expenditure.

¶ 9 Defense counsel noted that the prosecution had eight months between the underlying incident and the sentencing hearing to secure the estimates and provide them to the court. Defense counsel asserted that "[the prosecutor] had an obligation to diligently seek out restitution information." Counsel also noted that the repair estimate for T.M.'s fence was obtained six days after the sentencing hearing and the repair estimate for J.N.'s motorcycle was obtained nineteen days after sentencing, suggesting that the estimates could have been available if the prosecutor had made timely inquiries of the victims.

¶ 10 In response, the prosecutor noted that T.M. lived out of state and "it took us a while to track her down." The prosecutor provided no information regarding when the efforts to locate T.M. started. With respect to J.N., the prosecutor conceded, "I don't have a record for what attempts were made."

¶ 11 The court denied the restitution requested for CDOT because that amount was known to the prosecution and not presented at sentencing. But the court ordered restitution for the amounts requested on behalf of T.M. and J.N. The court made no findings concerning the delay in obtaining an estimate for T.M., but with respect to J.N., it noted that the community was experiencing long waits for auto body repairs.[1] *See id.*

¶ 12 The district court expressed frustration with the prosecutor for not complying with its order to submit the restitution amount within thirty days. The court stated that any future violation of its orders setting deadlines for the filing of a restitution request would result in the summary denial of the request. But the court noted that section 18-1.3-603 provides ninety-one days to enter a restitution order and since only ninety days had passed, it would excuse the tardy filing for "this one time only." Brassill filed a motion to reconsider the restitution order, which the court denied.

[1] We are unable to locate any evidentiary support for this finding.

II. Legal Authority and the Arguments on Appeal

A. Standard of Review

¶ 13 Statutory interpretation is a question of law that we review de novo. *People v. Gallegos*, 2013 CO 45, ¶ 7.

¶ 14 When interpreting a statute, our primary purpose is to ascertain and give effect to the General Assembly's intent. *Cowen v. People*, 2018 CO 96, ¶ 12. "To do so, we look first to the language of the statute, giving its words and phrases their plain and ordinary meanings." *McCoy v. People*, 2019 CO 44, ¶ 37. "We read statutory words and phrases in context, and we construe them according to the rules of grammar and common usage." *Id.*

¶ 15 Our interpretation of a statute "must also endeavor to effectuate the purpose of the legislative scheme." *Id.* at ¶ 38. Therefore, we must "read that scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts, and we must avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results." *Id.*

¶ 16 "[I]f the language in a statute is clear and unambiguous, we give effect to its plain meaning and look no further." *Cowen*, ¶ 12. "Only if the statutory language is susceptible to more than one

reasonable interpretation and is therefore ambiguous may we resort to extrinsic aids of construction to address the ambiguity and decide which reasonable interpretation to accept based on the legislature's intent." *Id.*

¶ 17 "[D]istrict courts have the inherent authority to manage their dockets through scheduling orders." *People v. Owens*, 2014 CO 58, ¶ 16. They also have broad discretion to impose appropriate sanctions for the violation of their scheduling and discovery orders. *See, e.g.*, *Kallas v. Spinozzi*, 2014 COA 164, ¶ 18 ("Trial courts have broad discretion to manage the discovery process, including the ability to impose sanctions.").

B. Restitution

¶ 18 Colorado's restitution statute imposes time-sensitive obligations on the court and the prosecution. *See* § 18-1.3-603.

¶ 19 The statute mandates that every "order of conviction" must include one of four types of restitution orders. § 18-1.3-603(1); *People v. Weeks*, 2021 CO 75, ¶ 3. As relevant here, section 18-1.3-603(1)(b) requires an order of conviction to include "[a]n order that the defendant is obligated to pay restitution, but that the specific amount of restitution shall be determined within the ninety-one

days immediately following the order of conviction, unless good cause is shown for extending the time period by which the restitution amount shall be determined."

¶ 20 Thus, the statute places an obligation on the sentencing court to ensure that restitution is resolved within ninety-one days from the entry of the order of conviction. *Weeks*, ¶ 5, makes clear that this deadline applies to the sentencing court.

¶ 21 The statute also imposes obligations on the prosecution:

> The court shall base its order for restitution upon information presented to the court by the prosecuting attorney, who shall compile such information through victim impact statements or other means to determine the amount of restitution and the identities of the victims. Further, the prosecuting attorney shall present this information to the court prior to the order of conviction or within ninety-one days, if it is not available prior to the order of conviction. The court may extend this date if it finds that there are extenuating circumstances affecting the prosecuting attorney's ability to determine restitution.

§ 18-1.3-603(2)(a). A prosecutor's fulfillment of this obligation is integral to the court's timely resolution of restitution. In explaining the obligation, the supreme court emphasized that the prosecutor "must file the 'information' in support of a motion for restitution —

i.e., 'the amount' of the proposed restitution — before the judgment of conviction or, if that information isn't yet available, no later than ninety-one days after the judgment of conviction." *Weeks*, ¶ 6 (quoting § 18-1.3-603(2)).

¶ 22 Historically, neither sentencing courts nor prosecutors fully embraced these obligations. Instead, the parties and court typically followed a practice described in *Weeks*:

> On the day of the sentencing hearing, the prosecution informs the court that it has not yet filed a motion for restitution and that it would like to reserve the issue for ninety-one days. Without objection from the defense, the court grants the request and reserves restitution for ninety-one days. The court then provides that, if the prosecution files a timely motion for restitution, the defense may file an objection and ask for an evidentiary hearing. After the sentencing hearing, the mittimus simply reflects that restitution has been reserved for ninety-one days.

Id. at ¶ 1. This practice often led to prolonged delays in resolving restitution issues.

¶ 23 The supreme court condemned these "old habits" because they frustrate the legislative intent embodied in the restitution statute:

> In enacting subsection (1)(b), the legislature was clearly concerned with the length of time it was taking trial courts to finalize restitution

> orders and, by extension, how long victims were waiting to receive restitution. *See* § 18-1.3-601(1)(e), C.R.S. (2021) ("An effective criminal justice system requires *timely* restitution to victims of crime . . . in order to lessen the financial burdens inflicted upon them, to compensate them for their suffering and hardship, and to preserve the individual dignity of victims." (emphasis added)); *see also* § 18-1.3-601(1)(g)(II) ("The purposes of this part 6 are to facilitate . . . [t]he effective and *timely* assessment, collection, and distribution of restitution . . . ." (emphasis added)).
>
> . . . .
>
> We infer from the restitution statute that the legislature expects litigants and judges to be prepared to address the issue of restitution at sentencing hearings.

Weeks, ¶¶ 43, 46.

¶ 24 The court observed the historical delays were caused by the fact that the sentencing court's and the prosecution's deadlines expire ninety-one days after the entry of the order of conviction, which typically happens at the sentencing hearing. To alleviate the inherent tensions between these two deadlines, the supreme court instructed that "at a sentencing hearing, the trial court judge should be prepared to put in place a plan that enforces the prosecution's deadline in subsection (2) and adheres to the court's

deadline in subsection (1)(b)." *Id.* at ¶ 8. The court noted that, "[o]f course, if the prosecution fails to timely submit the proposed amount of restitution . . . the mittimus should be updated to reflect that no restitution is required." *Id.* at ¶ 9.

C. The Parties' Contentions

¶ 25 Brassill presents two arguments in support of his contention that the restitution order violates section 18-1.3-603 and *Weeks*. First, he argues that the phrase "not available prior to the order of conviction" in subsection (2)(a) should be interpreted as applying to restitution information that is not available despite the prosecution's exercise of diligent efforts to obtain the information. In this regard, he points to case law in analogous situations that requires the prosecution to show that it exercised reasonable diligence to fulfill its legal obligations. *See, e.g.*, *People v. Arguello*, 737 P.2d 436, 438 (Colo. App. 1987) ("Unavailability in the constitutional sense is established by the prosecution when it shows that good faith, reasonable efforts have been made to produce the witness for trial, but without success."); *People v. Lucy*, 2020 CO 68, ¶ 26 (To obtain a continuance under the public health exception to the speedy trial statute due to the unavailability of

material evidence, "the prosecution must show that material evidence is unavailable despite the exercise of due diligence.").

¶ 26 Second, in addition to the prosecution's failure to make a reasonable effort to obtain the restitution amount prior to sentencing, Brassill also notes that the prosecution failed to comply with the court's order requiring it to disclose the amount of requested restitution within thirty days. Given these circumstances, Brassill asserts that the court erred as a matter of law by approving the restitution order.

¶ 27 In response to Brassill's first argument, the People assert that the prosecution has no obligation to make any effort to determine the amount of restitution prior to the sentencing hearing. They point to the phrase "not available at the time of sentencing" and argue that it requires the prosecutor to present restitution amounts only if they have it in hand when appearing at the sentencing hearing. The People point to a dictionary definition of "available" as "present or ready for immediate use." Merriam-Webster Dictionary, https://perma.cc/B7XX-CGHC. Applying this definition, the People argue that the district court "correctly concluded that the

prosecution was not required to make diligent efforts to obtain restitution information prior to sentencing."

¶ 28 In further support of their position, the People point to the final sentence of subsection (2)(a), which provides that "[t]he court may extend this date if it finds that there are extenuating circumstances affecting the prosecuting attorney's ability to determine restitution." § 18-1.3-603(2)(a). The People argue that this sentence was intended to apply only to the request for an extension beyond ninety-one days, but not to the prosecutor's duty to "present this information to the court prior to the order of conviction." Thus, they continue, the statute does not impose any obligation to use reasonable diligence to gather restitution information prior to sentencing.

¶ 29 With respect to Brassill's second contention, the People argue that the court had no authority to enter the scheduling order and therefore the prosecution was not required to comply with it.

III. Analysis

A. The Prosecution's Obligation Prior to Sentencing

¶ 30 We agree with Brassill that the restitution statute requires the prosecution to exercise reasonable diligence to determine the

amount of restitution and present it to the court at or before the sentencing hearing. The statute states expressly that the "prosecuting attorney shall present this information to the court prior to the order of conviction." § 18-1.3-603(2)(a). As Brassill points out, it would be contradictory for the legislature to impose this affirmative obligation without a corresponding expectation that the prosecution act with reasonable diligence to fulfill it. This conclusion is amplified by the final clause of the same statutory sentence, which states that the prosecution may take up to ninety-one days after the order of conviction "if [restitution information] is not available prior to the order of conviction." Read in its entirety, we conclude that the statute requires the prosecution to use reasonable diligence to obtain restitution information and present it at or before sentencing.

¶ 31 We are not persuaded otherwise by the People's arguments. While correctly quoting one of the definitions that Merriam-Webster provides for "available," the People do not mention or address the fact that the same dictionary also defines "available" as "accessible, obtainable," such as in "articles *available* in any drugstore." Merriam-Webster Dictionary, https://perma.cc/B7XX-CGHC. This

definition suggests that "available" broadly includes not just those things that are presently in hand, but also those that are readily accessible or obtainable through the exercise of reasonable diligence.

¶ 32 This interpretation is strengthened by the recognition that subsection (2)(a) does not use the word "available" in isolation; instead it is preceded by the word "not." § 18-1.3-603(2)(a). We are unaware of any case from our appellate courts that has interpreted the phrase "not available." But we do have the benefit of supreme court guidance on the meaning of the comparable term "unavailable."

¶ 33 The speedy trial issue in *Lucy* required the court to interpret the word "unavailability" as used in section 18-1-405(6)(g)(I), C.R.S. 2023. There the court stated

> Because the word "unavailability" is not defined in section 18-1-405, we may discern its plain and ordinary meaning by consulting a recognized dictionary. *Cowen v. People*, 2018 CO 96, ¶ 14, 431 P.3d 215, 218–19. Merriam-Webster Dictionary defines "unavailable" as "not possible to get or use." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/*unavailable*; [https://perma.cc/U7PF-P2QS]. Thus, if the prosecution cannot get or use evidence

> material to its case . . . then that evidence is unavailable for purposes of subsection (6)(g)(I).

Lucy, ¶ 31. This definition of unavailable — "not possible to get or use" — is contrary to the People's suggestion that "not available" merely requires the prosecution to produce what is presently in hand, regardless of whether it was "possible to get or use" the evidence through the exercise of reasonable diligence.

¶ 34 But in addition to these various definitions, our interpretation of the phrase "not available" in subsection (2)(a) is informed by the directives that the supreme court provided to prosecutors in *Weeks*. While repeatedly emphasizing the legislature's expectation that the court and parties be prepared to resolve restitution at sentencing, the supreme court recognized that a sentencing court's ability to fulfill the legislature's intent necessarily depends on the prosecution's timely fulfillment of its obligations under subsection (2)(a). Thus, the supreme court noted,

> what the deadline in subsection (2) controls is the timeframe within which the prosecution must submit the proposed amount of restitution. § 18-1.3-603(2). Pursuant to subsection (2), the prosecution *must* file that information before the judgment of conviction or, if it isn't yet available, within ninety-one days of the judgment of conviction.

Weeks, ¶ 31 (emphasis added); *see also* § 18-1.3-603(2)(a) ("[T]he prosecuting attorney *shall* present this information to the court prior to the order of conviction or within ninety-one days, if it is not available prior to the order of conviction.") (emphasis added).

¶ 35 To drive the point home, the court stated,

> We reiterate that, by the time of the sentencing hearing, the prosecution should know whether it is seeking restitution, even if the information related to the proposed amount isn't yet available. If, following entry of a preliminary restitution order under subsection (1)(b), the prosecution conducts *further investigation* and has a change of heart vis-à-vis its request for restitution, it should notify the court and the defendant of that decision.

Weeks, ¶ 44 n.14 (emphasis added). The supreme court's use of the phrase "further investigation" obviously suggests that, in fulfilling its obligation under subsection (2)(a), the prosecution will investigate the issue of restitution before the sentencing hearing and present at the hearing the amount of restitution if that information is available through the exercise of reasonable diligence.

¶ 36 Moreover, we must interpret the meaning of "available" in the context in which it is used in the statute. In the clause preceding

the "not available" language in subsection (2)(a), the legislature mandated that the prosecution "shall" present the information prior to the entry of the order of conviction. If we were to interpret "available" to mean "only if the prosecution happens to have it in hand at the time of sentencing," we would be converting the word "shall" to mean "may." We are not at liberty to ignore or transpose the language used by the legislature. *See Reid v. Berkowitz*, 2013 COA 110M, ¶ 38.

¶ 37 Nor are we persuaded that the third and final sentence of subsection (2)(a) supports a conclusion that the legislature did not intend to require the prosecution to exercise reasonable diligence in gathering restitution information and presenting it at the sentencing hearing. In the first instance, the last sentence of section 18-1.3-603(2)(a) refers to the court's authority to "extend this date," which obviously refers back to the second sentence. But the second sentence speaks to two distinct timeframes concerning the prosecution's duty. The first is the prosecution's obligation to "present [restitution] information to the court prior to the order of conviction"; the second timeframe — separated from the first by the word "or" — is "within ninety-one days, if it is not available prior to

the order of conviction." § 18-1.3-603(2)(a). Thus, the language of the third sentence referring to the court's authority to "extend this date" arguably applies to both the first and second timeframes.

¶ 38 But even if we accept the People's argument that the last sentence gives the sentencing court the authority to extend only the ninety-one-day deadline, that does not support the conclusion that the prosecution has no obligation to use reasonable diligence to meet the first deadline. It would be irrational and contrary to the clear purposes of the restitution statute for the legislature to require the prosecution to demonstrate extenuating circumstance to justify an extension of the second timeframe, while at the same time excusing the prosecution from exercising reasonable diligence to gather the necessary information that would avoid altogether the delay associated with that second timeframe.

¶ 39 Requiring the prosecution to use reasonable diligence is consistent with the legislature's expectation that judges and litigants "be prepared to address the issue of restitution at sentencing hearings." *Weeks*, ¶ 46. The prosecutor's reasonable diligence also furthers the State's interest in timely compensating

victims, which is the core purpose of the restitution statute. § 18-1.3-601(1)(e), C.R.S. 2023.

¶ 40 The prompt resolution of restitution also serves the interest of prosecutors and defendants. Litigants in criminal cases are frequently interested in resolving the charges by plea agreements, which are often finalized days or hours before the defendant appears in court. In such circumstances, if the prosecution has not used reasonable diligence to determine the amount of restitution, a provision is often included in the plea paperwork stating that "the defendant is obligated to pay restitution, but the specific amount of restitution will be reserved for a future date," or words to that effect.

¶ 41 The restitution statute expressly permits this option. § 18-1.3-603(1)(b). But it is clearly intended as the exception to the primary objective of resolving restitution at the time of sentencing. By not resolving restitution at sentencing, the victim is deprived of the psychological benefits of finality of the proceedings; the defendant is required to agree to pay an unknown amount of restitution; and the prosecutor, defense counsel, and the sentencing court are required to expend additional time and public resources resolving financial disputes that could have been

completed before sentencing through the exercise of reasonable diligence.

¶ 42 In reaching this conclusion, we are also mindful of the People's argument that delaying the determination of the amount of restitution until after sentencing actually promotes efficiency. More specifically, the People note that prosecutors do not always know what charges a defendant will plead guilty to until right before sentencing. They also note that a defendant does not always plead to all charges involving all victims. If forced to make reasonably diligent efforts to determine restitution before the entry of the plea agreement, the argument continues, prosecutors may end up spending time determining an amount of restitution that is never awarded. We find the argument unpersuasive.

¶ 43 Lawyers in all types of litigation spend time and energy preparing for issues that ultimately may not be presented to the court. That preparation is part of the litigation process even if there may be some inefficiencies. Regardless, these diligent efforts are required by the statute. And if prosecutors have restitution information early, it can become part of plea agreements and avoid subsequent litigation about the amount of restitution and how the

dismissal of some charges impacts the restitution the court may order.

¶ 44 Moreover, the supreme court made clear in *Weeks* that the prosecution, at the time of sentencing, must inform the trial court whether restitution will be requested. This necessarily requires the prosecutor to ask potential victims whether they have suffered any compensable loss due to the crime. It is hardly a significant burden for a prosecutor to ask how much that sum is, or to explain to the victim what steps need to be taken to quantify the claimed losses. And, of course, in those cases in which that information is not available despite the exercise of reasonable diligence, the statute authorizes the court to take up to ninety-one days to resolve that issue.

¶ 45 In sum, we conclude that subsection (2)(a) requires a prosecutor to use reasonable diligence to inquire about the amount of restitution that all victims will be seeking before the sentencing hearing. In declining to recognize that obligation, we conclude that the district court erred as a matter of law.

B. The Prosecutor Failed to Exercise Reasonable Diligence

¶ 46 Although the district court did not address whether the prosecutor used reasonable diligence to determine the amount of restitution before sentencing, based on the undisputed facts, we determine as a matter of law that the prosecutor did not. Recall that at the sentencing hearing, the prosecutor told the court that he assumed there was restitution. But when pressed by the court why he did not have that information available, the prosecutor stated, "I can get on that, and I would ask that you just allow the People time to get that information to you." When the court asked whether there was a particular reason why he didn't have that information, the prosecutor responded, "Your Honor, I don't have a good excuse for why we don't have that."

¶ 47 From these statements, it is manifest that the prosecutor failed to exercise reasonable diligence to obtain the amount of restitution before the sentencing hearing.

¶ 48 We recognize that the district court revisited the prosecutor's delays at the end of the restitution hearing. Recall that at this hearing the prosecutor stated that he did not have the specific information at sentencing because it took some time to gather the

information from the victims. But the prosecutor also conceded that he had no record of what attempts were made to contact J.N. before the hearing. He also stated that it took a while to track down T.M. but did not state when those efforts commenced, or why he was able to obtain an estimate from T.M. within six days of the sentencing hearing.

¶ 49 The district court did not find that the prosecutor's actions constituted reasonable diligence, either before or after the sentencing hearing. Indeed, the court appeared to base its decision on repair delays caused by COVID-19, which was not addressed by the prosecutor or supported by any evidence. Moreover, T.M.'s claimed losses did not relate to auto repairs, but rather to a damaged fence. None of these circumstances justify a finding that the prosecutor used reasonable diligence to determine the specific amount of restitution for T.M. and J.N. before the sentencing hearing. Thus, we conclude that the undisputed evidence demonstrates that the prosecution failed to exercise reasonable diligence before the entry of the order of conviction.

C. The District Court's Scheduling Order

¶ 50 Despite the absence of prosecutorial diligence prior to sentencing, the district court entered an order stating that restitution was owed but reserved the determination of the final amount for ninety-one days. To facilitate the timely resolution of the reserved restitution, the court entered a scheduling order requiring the prosecutor to file a supplement to the motion setting forth the specific amount requested within thirty days. Brassill notes that the prosecution failed, without cause, to comply with this deadline and that such failure provides additional grounds to vacate the restitution order.

¶ 51 In response, the People argue that

> The district court abused its discretion in setting a deadline of less than [ninety-one] days for the prosecution to file its restitution request because the statute does not require the prosecution to ask permission to use all [ninety-one] days or permit the court to shorten that deadline.

This argument directly conflicts with *Weeks*, in which the supreme court stated, "Thus, at a sentencing hearing, the trial court judge should be prepared to put in place a plan that enforces the

prosecution's deadline in subsection (2) and adheres to the court's deadline in subsection (1)(b)." *Weeks*, ¶ 8.

¶ 52 The district court's scheduling order setting the thirty-day deadline was exactly the type of order *Weeks* contemplated. By setting the thirty-day deadline, the court allowed enough time for defense counsel to consider the information submitted and file an appropriate response, while still affording the court the time necessary to schedule and hold an evidentiary hearing and enter an appropriate order within ninety-one days. Thus, not only was the district court acting within its discretion in setting the thirty-day deadline, it was complying with the supreme court's directive in *Weeks*.

¶ 53 If we were to accept the People's argument, it would return us to the "old habits" the supreme court condemned. *See id.* at ¶ 1. The prosecution could simply delay filing the specific amount of restitution requested until the ninety-first day. If the court did not immediately act on the filing, it would lose the authority to award restitution. And even if the court did manage to see and act on the filing on the ninety-first day, it would be required, by necessity, to delay the resolution of restitution until after the ninety-one-day

deadline to afford time for the defendant's response, a hearing, and the preparation and filing of the court's order. This is exactly the practice that *Weeks* decried. We therefore reject the People's argument that the district court lacked authority to enter an order requiring the prosecution to submit the specific amount of restitution within thirty days of sentencing.

¶ 54 The prosecutor clearly failed to comply with that authorized order. Even though the prosecution knew the amount of economic losses claimed by T.M. and J.N. with nineteen days of sentencing, it did not file the supplemental request until fifty-four days after the sentencing hearing. When asked to explain the failure to obey the court's order, the prosecutor stated,

> I don't have a reasoning for that, but what I would put forth towards the Court is that the [*People v. Roddy*, 2021 CO 74,] and *Weeks* cases that [defense counsel] has cited here, they don't necessarily give a time requirement for prosecution to submit restitution requests. They just indicate that Your Honor needs to order restitution within [ninety-one] days of sentencing, and we can still do that here.

This argument reflects the same misapprehension summarized above. The prosecutor did not even attempt to argue that his failure was the product of excusable neglect; rather, the argument

reflects a belief that prosecutors are free to ignore a court's scheduling order so long as they file a supplement disclosing the specific amount requested within ninety-one days of sentencing. That belief is wrong.

¶ 55 *Weeks* expressly authorizes, indeed urges, sentencing courts to enter the type of scheduling order entered by the court in this case. The prosecutor's failure to comply with that order was in defiance of the district court's inherent authority and contrary to the directives in *Weeks*. *Weeks*, ¶ 8; *see also Owens*, ¶ 16; *People v. Jasper*, 17 P.3d 807, 812 (Colo. 2001) ("[T]he setting of deadlines for pretrial matters constitutes an integral part of a trial court's case management authority.").

D. Remedy

¶ 56 Despite the prosecutor's failure to comply with the restitution statute, the People assert that any error was harmless. This is so, the People argue, because the restitution order was entered on the ninetieth day following sentencing. The People also note that Brassill has failed to identify any prejudice created by the delays, such as faded memories or the loss of other material evidence during the period of delay. *See* Crim. P. 52(a) ("[A]ny error, defect,

irregularity, or variance which does not affect substantial rights shall be disregarded.").

¶ 57 As a starting point, we note that in remedying a sentencing court's violation of its obligation under section 18-1.3-603(1)(b), the supreme court in *Weeks* vacated the restitution order because it was entered after the court lost its authority to act on the restitution request. *Weeks*, ¶ 47. It did so without conducting a harmlessness analysis. *Id.* at ¶¶ 45-47. And at least one division of this court has concluded that, even if a prejudice analysis is conducted, a sentencing court's failure to comply with the ninety-one-day deadline will always be harmful because its subjects a defendant to a financial obligation that the sentencing court had no authority to enter. *People v. Mickey*, 2023 COA 106, ¶ 6 ("[A] harmless error analysis would be futile when reviewing a restitution order entered without authority.").

¶ 58 But as the People point out, the district court was not deprived of the authority to act in this case because ultimately the court was able to enter an order within its ninety-one-day deadline. Thus, this case is distinguishable from *Weeks* because the district court never lost its authority to act on the restitution issue.

¶ 59 Moreover, although the district court did not recognize the prosecutor's obligation to use reasonable diligence to determine the amount of restitution prior to sentencing, it is clear from the court's exchange with the prosecutor that the court was generally aware of its responsibility to manage the restitution issues. *Weeks* was announced about eight months before the sentencing hearing, and it is apparent that the court was making efforts to change the prosecutor's practices going forward. While not expressly referencing the exercise of diligent efforts, the court also made it clear that it expected the prosecution to change its practices to ensure that it was in the best position to resolve restitution at sentencing.

¶ 60 Yet the district court elected not to deny the restitution motion. Instead, the court invoked the statutory option of declaring restitution open while setting forth a procedure to ensure that it could resolve restitution within the ninety-one-day period. And because the statute permitted this delay, the court still had the authority to address restitution at a subsequent date. Under these circumstances, we cannot say that the court abused its discretion by declining to award no restitution.

¶ 61 The prosecution's failure to exercise reasonable diligence prior to the sentencing hearing was compounded by its disregard of the court's scheduling order. But the violation of a scheduling order does not deprive the court of the authority to resolve restitution. As the People concede, the violation of such an order may be grounds for the entry of sanctions. And in some circumstance — for example, if the violation prejudices the defendant or reflects the prosecution's persistent disregard for the court's scheduling orders or the prosecution's obligation to act with reasonable diligence — the severe sanction of denying the restitution request may be an appropriate exercise of the court's discretion.

¶ 62 In this case, however, it is clear that the court was attempting to break "old habits" and to establish practices that implement the letter and intent of the restitution statute and the supreme court's directives in *Weeks*. The district court made clear to the prosecutor that, going forward, absent good cause for failing to timely comply with these obligations, the court would summarily deny tardy restitution requests. But given that the court had apparently not yet provided the prosecution with notice of this potential sanction, we cannot say that the court abused its discretion by declining to

summarily deny restitution in this case. *See, e.g.*, *People v. Dist. Ct.*, 664 P.2d 247, 252 (Colo. 1983) (trial courts have broad discretion in fashioning remedies for the violation of a discovery order).

¶ 63 In reaching this result, we remind both trial courts and prosecutors of the essential roles they play in ensuring that restitution issues are timely resolved in accordance with section 18-1.3-603 and *Weeks*. The current flood of litigation over these issues will largely be avoided if the prosecution fulfills its obligation to use diligent efforts to gather and present the information necessary to resolve restitution at the sentencing hearing, coupled with the court's establishment of case management practices that ensure such obligations are fulfilled. And, of course, in the limited circumstances in which restitution cannot be resolved at sentencing despite the prosecution's diligent efforts, subsections (1)(b)-(d) of section 18-1.3-603 provide the court with sufficient options to efficiently and timely resolve any lingering issues.

E. Equal Protection and Due Process

¶ 64 Finally, Brassill argues that the district court's decision to excuse the prosecution's failure to obey its scheduling order in this

case, while also stating that it will deny restitution for similar violations in the future, denied him his right to due process and equal protection. Although he cites the Fourteenth Amendment, Brassill fails to cite any authority holding that a court's decision not to impose a sanction in a particular case, while stating that it may do so in a future case, violates either the guarantee of due process or equal protection under the law. *See People v. Larsen*, 2023 COA 28, ¶ 19 n.4 (we generally do not address arguments presented in a conclusory fashion and without supporting citations). In addition, Brassill provides no reasoned analysis to support these conclusory assertions. *See id.* Accordingly, we decline to address these issues further.

IV. Disposition

¶ 65 The order is affirmed.

JUDGE FOX and JUSTICE MARTINEZ concur.