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SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Certiorari to the Colorado Court of Appeals Case Number 2019CA1308	
Petitioner ARNOLD R. MARTINEZ v. Respondent THE PEOPLE OF THE STATE OF COLORADO	
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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

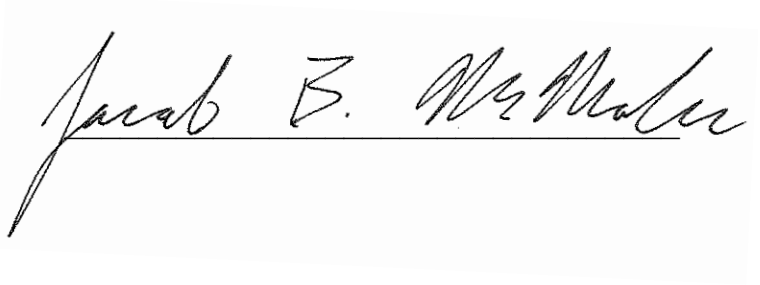
This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 9,027 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

> For each issue raised by the Petitioner, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



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INTRODUCTION

Proximate cause is a legal concept that restricts liability for criminal restitution. To ensure proximate cause is correctly and consistently applied, appellate courts should review de novo whether the prosecution presented sufficient evidence to prove that the defendant proximately caused the claimed loss. As with other mixed questions, appellate courts should defer to district courts' record-supported findings of historic fact, but appellate courts should decide de novo whether the legal standard is satisfied. Until this division's deviation, de novo review was the court of appeals' standard approach to restitution sufficiency issues.

Here, the lower courts misapplied proximate cause. After Arnold Martinez took a bicycle from an open garage, the bike's owner got in his car and gave chase. The district court ordered Mr. Martinez to pay restitution for body damage to the car, and the division affirmed under an abuse-of-discretion standard, but Mr. Martinez was not the proximate cause of this loss. The driver damaged his car by his independent intervening decision to turn in front of the bicycle as Mr. Martinez rode downhill. Mr. Martinez did not participate in the driver's grossly negligent decision to turn, which risked his safety for recovery of the bike. Because the driver's intentional conduct was the independent intervening cause of the car damage, this Court should vacate the restitution order.

ISSUES ANNOUNCED BY THE COURT

I. [REFRAMED] Whether an appellate court reviews a trial court's proximate cause determination for restitution purposes under an abuse of discretion standard.

II. Whether the prosecution proved this bike theft proximately caused the car damage for which the court awarded restitution.

STATEMENT OF THE CASE & FACTS

In December 2018, Chad and Shelley Tidd returned to their Boulder home and left their garage door open. (CF p.93.) Mrs. Tidd alerted her husband when she observed Mr. Martinez taking a bicycle from the garage. (*Id.* p.121.) Mr. Tidd got into his Mazda SUV and began chasing Mr. Martinez as he rode away. (*Id.* pp.93, 121.) A neighbor called 9-1-1. (*Id.* p.93.)

As Mr. Martinez rode downhill where the bike lane would be on Table Mesa Drive, Mr. Tidd pulled even with him. (*Id.* pp.93-94; TR 5/28/19 pp.9-12.) The chase lasted about a block and a half. (TR 5/28/19 pp.7-9, 12; Def.Ex.A (map).) Mr. Tidd pulled ahead of Mr. Martinez and turned his Mazda into the bicycle's path. (CF pp.93, 121, 124; TR 5/28/19 pp.10-11.) Mr. Martinez crashed into the Mazda's front-passenger-side panel. (CF pp.93-94; TR 5/28/19 pp.10-12; Def.Ex.B (photo of Mazda damage).) He fell off the bike, injured, but an unknown person picked him up, and he left the area. (CF p.93; TR 5/28/19 p.11:9-14; *see* TR 5/28/19 pp.24-

25, 27.) Mr. Tidd recovered the undamaged bicycle, a Yeti/S35 worth $6,000. (TR 5/28/19 pp.5-6; CF pp.86, 94, 98, 104, 121.)

The district attorney for the Twentieth Judicial District charged Mr. Martinez with second-degree burglary (F3), § 18-4-203(1), (2)(a), C.R.S.; criminal mischief (M1), § 18-4-501(1), (4)(c), C.R.S.; and violation of bail bond conditions (F6), § 18-8-212(1), C.R.S. (CF pp.30-31.)

A global plea disposition resolved this case and others. Mr. Martinez pled guilty in other cases to invasion of privacy (M1) and possession of burglary tools (F5); the State dropped other charges and this case. (TR 3/27/19 pp.3-6; *see* Supl.R. pp.1-8 (plea agreement).)

The plea agreement allowed the State to seek restitution for these events, *see People v. Roddy*, 2021 CO 74, ¶ 28 (contemplating such agreements and discussing *People v. Sosa*, 2019 COA 182), but Mr. Martinez made clear he was objecting. (Supl.R. p.1; TR 3/27/19 pp.5-6.)

The court accepted Mr. Martinez's guilty pleas in the other matters and dismissed these charges. (CF p.44; TR 3/27/19 pp.9-15.)

The State sought $2,393.84 in restitution for repairs to the Mazda, of which $500 was to reimburse Mr. Tidd's deductible and the remainder was for his auto

insurer. (CF pp.45-57.) Mr. Martinez objected because he did not proximately cause this loss. (*Id.* pp.63-65.) The district court set a hearing. (*Id.* pp.67, 72.)

The prosecution submitted its evidence before the hearing and stood on its written submission. (*Id.* pp.86-115; TR 5/28/19 pp.3-4.) This included Officer Ryan Scheevel's police report, according to which Mr. Tidd told police "that he got in his Mazda SUV and began chasing" Mr. Martinez. (CF p.93.) The report continued:

> Chad said that as he and the suspect were eastbound on Table Mesa, he pulled ahead of the suspect just west of Lehigh St. Chad said that while the suspect was on the road he pulled in front of the suspect in an attempt to get the suspect to stop. Chad said that the suspect ran directly into the front passenger side fender of his Mazda SUV causing the damage that I had observed.

(*Id.*)

At the hearing, the defense called Officer Scheevel. (TR 5/28/19 pp.4-5.) It was his understanding Mr. Tidd "pulled parallel and, then, in front of the bicycle and, then, turned into the path of the bicycle as it was on the south side of Table Mesa." (*Id.* pp.9-10; *see id.* pp.10-11 (Q. "Mr. Tidd described turning in front of the path of the bicycle; is that correct?" A. "That's correct.").) The road was "on a downgrade from west to east," meaning the chase was downhill. (*Id.* pp.8-10.) Mr. Tidd did not describe how Mr. Martinez impacted the Mazda. (*Id.* p.11:15-21.) Officer Scheevel testified that, if he were investigating this collision as a pure traffic accident, "it would be the driver [of the car] that's at fault as long as the bicyclist is

legally riding where he's supposed to be in the correct direction, which it appeared in this situation would have been the case if this were just purely a traffic accident." (*Id.* pp.13-14.) But this was not an ordinary roadway encounter; Mr. Tidd's reason for pursuing and turning was recovery of the bike. (*Id.* pp.14-15.)

The prosecution contended, "[I]t is completely foreseeable if you go into someone's garage, steal a bicycle, attempt to bike away from them with their property, that when you're committing a burglary, someone might pursue and attempt to stop you." (*Id.* p.17:10-13; *id.* p.17:17-19 ("[A]ssume that that person might attempt to not let you simply walk away with their property.").)

The defense argued Mr. Tidd unlawfully took matters into his own hands because his opportunity to use force in self-help was over once the bike theft was completed. (*Id.* p.19:4-13.) "[T]here was no option for Mr. Martinez other than to hit Mr. Tidd's car because he was coming down a hill on a bicycle and was cut off very abruptly by a car that he ran into." (*Id.* p.19:21-24.) Mr. Tidd's intentional act of turning was the independent intervening cause of the damage to the Mazda. (*Id.* pp.27-28.)

The district court decided Mr. Martinez proximately caused this loss and ordered restitution as requested. (*Id.* pp.30-38; CF pp.118-25.)

Mr. Martinez appealed, but the division affirmed. *People v. Martinez*, 2022 COA 28, *reh'g denied* (Mar. 24, 2022). The division disagreed, however, about how to review the district court's proximate cause determination. The majority said abuse-of-discretion review applied, *id.* ¶¶ 14, 31, while Judge Jones argued for clear-error review, *id.* ¶¶ 53, 61 (J. Jones, J., specially concurring).

This Court partly granted Mr. Martinez's certiorari petition.

SUMMARY OF THE ARGUMENT

Appellate courts should review de novo whether the evidence is sufficient to prove proximate cause and sustain the restitution order. When reviewing restitution orders, appellate courts should defer to trial courts' record-supported findings of historic fact, but appellate courts should review de novo whether the evidence establishes proximate cause. This mixed-question approach applies in many contexts and should apply here. This division offered no persuasive reason for abuse-of-discretion review. The practice of other divisions shows de novo review of sufficiency issues is administrable in the restitution context, and this Court has decided proximate cause as a matter of law. De novo review of proximate cause ensures this Court ultimately declares which causes give rise to liability and ensures consistent application of this legal limitation. This Court should reverse the division.

Mr. Tidd's decision to turn his Mazda was the independent intervening cause of this damage. After Mr. Martinez's theft of the bicycle, the Mazda was intact. Causing this damage took Mr. Tidd's intentionally turning his Mazda into the bike's downhill path. The decision to turn was at least grossly negligent, and Mr. Martinez did not participate in that dangerous choice to risk his safety for property recovery. Mr. Tidd's driving was the independent intervening cause of the damage to his Mazda. The trial court erred by awarding this restitution.

ARGUMENT

I. Appellate courts, while deferring to trial courts' record-supported findings of historic fact, should decide de novo whether the evidence is sufficient to establish proximate cause and sustain the restitution order.

A. In selecting the right standard, this Court's review is de novo.

Determining the proper standard of review is a legal question that this Court decides de novo. *See Howard-Walker v. People*, 2019 CO 69, ¶ 22. Regarding preservation, this issue arose with the division's creation of a published split of authority, discussed below.

B. Proximate cause limits criminal restitution.

As relevant here, restitution refers to victim losses or injuries, reasonably calculated and recompensed in money, that are "proximately caused by an offender's conduct." § 18-1.3-602(3)(a), C.R.S.; *see Cowen v. People*, 2018 CO 96, ¶ 20.

Proximate cause "is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011) (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 42, p.273 (5th ed. 1984) (hereinafter "Prosser")); *id.* at 701 (explaining that, to prevent infinite liability, "courts and legislatures appropriately place limits on the chain of causation that may support recovery"); *see Vanderbeek v. Vernon Corp.*, 50 P.3d 866, 872 (Colo. 2002) ("[P]roximate cause serves as a very real limit on liability."); *see also Paroline v. United States*, 572 U.S. 434, 444-45 (2014) (noting that the "concept of proximate causation is applicable in both criminal and tort law, and the analysis is parallel in many instances" (citing 1 W. LaFave, *Substantive Criminal Law* § 6.4(c), p.471 (2d ed. 2003))).

"In the criminal law, the gist of the concept is the not-so-complex principle that persons normally should be deemed responsible for the natural and probable consequences of their acts." *People v. Rostad*, 669 P.2d 126, 128 (Colo. 1983); *see United States v. Calderon*, 944 F.3d 72, 95 (2d Cir. 2019) ("The central goal of a proximate cause requirement is to limit the defendant's liability to the kinds of harms he risked by his conduct, the idea being that if a resulting harm was too far outside the risks his conduct created, it would be unjust or impractical to impose liability." (citing Prosser at 281)); *see also Vanderbeek*, 50 P.3d at 872 n.4.

Proximate cause is one of "two separate but related assertions" involved in showing causation. *Paroline*, 572 U.S. at 444. There must be both "the 'cause in fact' and the 'legal' or 'proximate cause' of the plaintiff's injury." *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 2020 CO 51, ¶ 27 (citing Prosser at 272-73).

Causation in fact refers to but-for causation. *Id.* ¶ 28; *see id.* ¶ 66 (Hart, J., dissenting in part) (illustrating breadth of but-for causation: "but for a defendant's grandmother's birth, for instance, the defendant's tortious conduct would never have happened").

"[O]nce it has been established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question of whether the defendant should be legally responsible for that injury." *Id.* ¶ 27 (maj. op.) (quoting Proser at 272-73). Although "[e]very event has many causes," under the law "only some of them are proximate." *Paroline*, 572 U.S. at 444.

This Court has characterized proximate cause as "a cause which in natural and probable sequence produced the claimed injury. It is a cause without which the claimed injury would not have been sustained." *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (quoting CJI Criminal, 9:10, 9(3) (1983)); *accord Stout v. Denver Park & Amusement Co.*, 287 P. 650, 650 (Colo. 1930); *see Denver & R. G. R. Co. v. Sipes*, 55 P. 1093, 1095 (Colo. 1899) (defining proximate cause as "that cause which, in

natural and continued sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred" or "that cause which immediately precedes and directly produces an effect, as distinguished from a remote, mediate, or predisposing cause" (quotations omitted)); *see also Burlington & M. R. Co. v. Budin*, 40 P. 503, 504 (Colo. App. 1895) ("Immediate; nearest; next in order." (quotations omitted)).

C. This Court has decided proximate cause as a matter of law.

Where the parties contest what happened, proximate cause is "a question of fact for the jury at trial," *Westin Operator, LLC v. Groh*, 2015 CO 25, ¶ 33 n.5, *see Wagner*, ¶ 30, but where "the facts are undisputed and reasonable minds could draw but one inference from them, causation becomes a question of law for the court," *Gibbons v. Ludlow*, 2013 CO 49, ¶ 13 (quotations omitted); *see Pioneer Const. Co. v. Richardson*, 490 P.2d 71, 74 (Colo. 1971) (summing up prior holdings "that in the absence of conflicting testimony the determination of proximate cause is for the court"); *Sipes*, 55 P. at 1095 (explaining that "[w]hen the facts are undisputed, the question whether a certain act is the proximate cause of an injury is one of law for the court").

This Court has thus decided proximate cause as a matter of law. In *Vanderbeek v. Vernon Corp.*, 50 P.3d 866 (Colo. 2002), this Court "h[e]ld as a matter

of law that Petitioners' wrongful attachment of Respondent's funds proximately caused" the Respondent to pay more for stock and acquire fewer shares because the stock price went up during the attachment period. *Id.* at 873; *see also People In Interest of S.N. v. S.N.*, 2014 CO 64, ¶ 22 (observing that "in negligence cases, reviewing courts have removed the issue of causation from the jury in response to both motions for summary judgment and motions for a directed verdict" (footnotes omitted)); *e.g.*, *Ridenour v. Diffee*, 297 P.2d 280, 282 (Colo. 1956) ("Defendant's negligence under the facts here presented was clearly the proximate cause of the plaintiffs' injuries and as such it became a question of law for the court.").

In mass-shooting cases where plaintiffs sue landowners, courts have terminated those suits by concluding as a matter of law that the shooter's intervening acts prevent the landowner's alleged negligence from being the cause of the plaintiffs' injuries. *See Nowlan v. Cinemark Holdings, Inc.*, No. 12-CV-02517-RBJ-MEH, 2016 WL 4092468, at *3 (D. Colo. June 24, 2016) (building on ruling from Columbine High School shooting to grant summary judgment for movie-theater chain against claims by victims of James Holmes).

In another such case, *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 2020 CO 51, this Court divided over whether the plaintiffs' premises-liability claim survived summary judgment, but there was no disagreement that this Court could,

on an appropriate record, decide causation as a matter of law. *Id.* ¶¶ 19-21, 27-31, 36; *id.* ¶ 39 ("[O]ur ruling is limited to the specific facts of this case, based on the summary judgment record before us."); *id.* ¶ 74 (Hart, J., dissenting in part).

Even where the parties disputed historic facts, this Court has resolved proximate cause as a legal matter. In *Radetsky v. Leonard*, 358 P.2d 1014 (Colo. 1961), where a driver hit a woman crossing the street, the pedestrian claimed she was in the unmarked crosswalk, while the driver contended she was several feet away from it. *Id.* at 1015-16. Even assuming the pedestrian was three feet outside the crosswalk, this Court determined "such was not a proximate cause of the accident. It was defendant's negligence in not keeping a proper lookout that was the sole proximate cause." *Id.* at 1017.

Thus, contrary to the suggestion that appellate courts should review proximate cause determinations for clear error as findings of historic fact, *see Martinez*, ¶ 60 (J. Jones, J., specially concurring), this Court has used findings of historic fact to decide proximate cause as a matter of law. And, as discussed below, other divisions have consistently reviewed de novo whether the prosecution's evidence was sufficient to prove proximate cause.

D. Appellate courts reviewing restitution orders should defer to trial courts' record-supported findings of historic fact, but appellate courts should review de novo whether the prosecution presented sufficient evidence to establish proximate cause.

Where a defendant's sufficiency challenge to a restitution order implicates the district court's findings of historic fact (e.g., the speed of a vehicle, the position of a person), an appellate court should review those findings for clear error, but whether the prosecution's evidence was sufficient to prove proximate cause and sustain the restitution order should be reviewed de novo.

1. *This mixed-question approach applies in many similar, law-application contexts.*

In *People v. Matheny*, 46 P.3d 453 (Colo. 2002), this Court clarified the standard for reviewing custody determinations under *Miranda v. Arizona*, 384 U.S. 436 (1966). Wrestling with whether custody determinations are "primarily factual or primarily legal," *Matheny* recognized they are "a little of both." 46 P.3d at 459. Deciding whether a person is in custody "involves relating the legal standard of conduct to the facts established by the evidence." *Id.* (quotations omitted). This task—law application—"is analytically distinct from the other two tasks courts typically engage in," which are "law declaration," the special province of appellate courts, and "fact identification," the prerogative of the factfinder. *Id.*

Matheny concluded "appellate courts should not defer to a lower court's judgment when applying legal standards to the facts found by the trial court," and thus held "that whether a person is in custody should be reviewed by appellate courts de novo." *Id.* If supported by competent evidence in the record, an appellate court defers to the trial court's findings of historic fact (e.g., the officer's tone of voice, the size of the room), but "application of the controlling legal standard to the facts established by the evidence . . . is a matter for de novo appellate review." *Id.* at 462.

Matheny partly grounded de novo review in the importance of protecting constitutional rights, *id.* at 461-62 (noting other constitutional mixed questions, such as Fourth Amendment reasonableness determinations, are reviewed de novo); *see also People v. Coke*, 2020 CO 28, ¶ 10, but this approach—reviewing historic factual findings for clear error while reviewing de novo the legal conclusion of whether the given standard was satisfied—applies beyond the constitutional context.

Sovereign immunity presents a mixed question of law and fact. *Maphis v. City of Boulder*, 2022 CO 10, ¶ 14. In *Maphis*, where the plaintiff tripped over a sidewalk deviation, this Court deferred to the trial court's factual findings but decided de novo "whether the condition of the sidewalk on which Maphis tripped constitute[d] a 'dangerous condition,'" under the immunity statute. *Id.* ¶¶ 1, 14-16, 22; *see also Springer v. City & Cty. of Denver*, 13 P.3d 794, 798 (Colo. 2000).

In *Wagner*, this Court noted that "[w]hether an injured plaintiff should be classified as a trespasser, a licensee, or an invitee is a question of law to be decided by the court." *Wagner*, ¶ 24 (maj. op.). That case featured no dispute about the plaintiffs' invitee status, *id.*, but an appellate court's de novo application of those legal categories should rely only on the trial court's record-supported historic findings about the plaintiff's relationship to the property.

To draw on another area of the law, whether the government satisfied the Indian Child Welfare Act's "active efforts requirement is a mixed question of fact and law" where courts review "factual findings for clear error. But whether those findings satisfy ICWA's active efforts requirement is a question of law that [courts] review de novo." *People v. V.K.L.*, 2022 CO 35, ¶ 20 (citations omitted); *see People In Interest of A.S.L.*, 2022 COA 146, ¶¶ 1, 7-8 (relying on *V.K.L.* to conclude that whether the government satisfied its statutory obligation to make reasonable reunification efforts is a mixed question subject to de novo review); *see also S.N.*, ¶ 21 (stating that "[w]hether a child is dependent and neglected is a mixed question of fact and law because resolution of this issue necessitates application of the dependency and neglect statute to the evidentiary facts" and distinguishing evidentiary facts—the raw, historical data underlying the controversy—from legal conclusions that settle the parties' rights and liabilities).

In the water-law context, this Court "accept[s] the water court's factual finding unless clearly erroneous, and review[s] de novo whether those factual findings suffice to satisfy the statutory requirement." *Application for Water Rights*, 2013 CO 41, ¶ 48 (citations omitted); *see Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 219 P.3d 774, 779 (Colo. 2009) ("Whether an applicant has met the legal standards for a conditional appropriation presents mixed questions of law and fact that we review de novo."); *see also Farmers Reservoir & Irrigation Co. v. Pub. Servs. Co. of Colo.*, 2022 CO 22, ¶ 30.

While deferring to a trial court's factual findings, this Court reviews de novo whether sufficient evidence supports a condemnee's damages award. *Jagow v. E-470 Pub. Highway Auth.*, 49 P.3d 1151, 1158 (Colo. 2002).

In a law-declaring decision, this Court held in *LeHouillier v. Gallegos*, 2019 CO 8, that the client-plaintiff in legal-malpractice suits bears the burden of proving the collectability of the inner case's would-be judgment. *Id.* ¶ 4. In other words, "the collectability of the underlying judgment is essential to the causation and damages elements of a client's professional negligence claim against her attorney." *Id.* ¶ 22. *LeHouillier* did not have to decide whether that client-plaintiff had shown collectability, *id.* ¶¶ 4, 47-51, but to ensure consistent application of that standard, it

would make sense for appellate courts to decide de novo whether, on the given evidence, the standard has been met.

That is what this Court did in *Qwest Services Corporation v. Blood*, 252 P.3d 1071 (Colo. 2011), which declared "on de novo review" that the evidence was sufficient to show the corporation's failure to act was "willful and wanton," thus satisfying a statutory exemplary-damages requirements. *Id.* at 1076, 1092.

This Court should hold that appellate courts defer to trial courts' record-supported factual findings when reviewing restitution orders, but appellate courts review de novo whether sufficient evidence establishes proximate cause.

2. *De novo review ensures consistent application of the statute's proximate cause limitation, an important protection for defendants.*

Through de novo appellate review, like cases will be treated alike. Applying clear-error or abuse-of-discretion review to proximate cause determinations means rulings will inevitably differ on similar or identical fact patterns. If an appellate court must uphold a trial court's ruling whenever it has some evidentiary support, what constitutes proximate cause will diverge as trial judges draw different liability limits. *See Paroline*, 572 U.S. at 462 (noting that "[r]estitution orders should represent an application of law, not a decisionmaker's caprice" (quotations

omitted)). Appellate courts should harmonize disparate outcomes by deciding de novo whether the legal standard was satisfied.

De novo review ensures consistent application of the law's proximate cause limitation as district courts have no discretion to award restitution where proximate cause is not proven. *See* §§ 18-1.3-602(3)(a), (d), 18-1.3-603(2)(b), C.R.S.; *Cowen*, ¶ 20; *cf. United States v. Winchel*, 896 F.3d 387, 389 (5th Cir. 2018) (stating that, because statute authorizes restitution "only to the extent it is shown that the defendant in question proximately caused the victim's losses," a restitution order "necessarily exceeds the statutory maximum" if it is not limited to proximately caused losses); *see also United States v. Zander*, 794 F.3d 1220, 1233 (10th Cir. 2015) (stating that an excessive restitution order is an illegal sentence).

De novo review also ensures this Court ultimately declares the meaning of proximate cause, a legal concept about appropriately limiting the chain of liability-supporting causation. *McBride*, 564 U.S. at 701; *see Moore v. W. Forge Corp.*, 192 P.3d 427, 436 (Colo. App. 2007) (explaining that the language of causation is about placing legal limits on liability); *see also Wagner*, ¶ 66 (Hart, J., dissenting in part) ("[P]roximate cause is ultimately a question based in policy judgments and common sense: Given the circumstances, is it fair to hold the defendant responsible for the results of his conduct?"); *cf. Edge Telecom, Inc. v. Sterling Bank*, 143 P.3d 1155,

1158-59 (Colo. App. 2006) (explaining that enforcement of a contract's forum-selection clause depends on trial court's factual findings but review is de novo because enforcement implicates legal questions, public policy, and fairness).

De novo review of criminal restitution orders protects an essential component of due process—that sufficient proof support the property-depriving order. *See* U.S. Const. amends. V, XIV; Colo. Const. art. II, § 25; *McCoy v. People*, 2019 CO 44, ¶ 20. When the evidence is insufficient, an appellate court should not affirm simply because there was some evidence for the trial court's conclusion or because the trial court reasonably but mistakenly thought proximate cause was proven. De novo appellate review holds the prosecution to its burden.

The prosecution's burden to prove causation for restitution is only a preponderance of the evidence, not beyond a reasonable doubt as for offense elements, *see People v. Stone*, 2020 COA 24, ¶ 6, but the inquiry is much the same: after the prosecution has presented its evidence, the reviewing court examines "the record de novo to determine whether the evidence was substantial and sufficient to sustain the conviction," or here, the restitution order, *McCoy*, ¶ 31; *see Martinez v. People*, 2015 CO 16, ¶ 22 (discussing sufficiency analysis).

De novo review of sufficiency claims is an important backstop in a system that otherwise provides defendants few procedural protections. *See People v. Weeks*,

2021 CO 75, ¶¶ 1-2 (discussing trial courts' routine non-compliance with restitution law's timeliness requirement); *see also People v. Hernandez*, 2019 COA 111, ¶¶ 53-60 (rejecting due process facial challenge to confidentiality provision for records of Crime Victim Compensation Board).

Restitution's goals are compensatory and rehabilitative but also punitive. *See* § 18-1.3-601, C.R.S.; *see also Paroline*, 572 U.S. at 456. Defendants do not receive civil process, yet a criminal restitution order is also "a final civil judgment in favor of the state and any victim." § 18-1.3-603(4)(a)(I), C.R.S. The judgment is non-dischargeable in bankruptcy. *Id.*; *see In re Dampier*, Adv. No. 15-01028, 2017 WL 1327634, at *4 (10th Cir. BAP (Colo.) Apr. 11, 2017), *aff'd*, 722 F. App'x 855 (10th Cir. 2018). Given these important consequences and the importance of consistently applying the statute's causal restriction, restitution orders should receive de novo appellate review when defendants challenge the sufficiency of the evidence for proximate cause.

3. *Other divisions prove de novo review is administrable.*

Before and since this division's deviation from the standard, divisions of the court of appeals have conducted de novo review.

In *People v. Barbre*, 2018 COA 123, the defendant pled guilty to theft and drug possession for stealing pain medications from the pharmacy where she worked.

Id. ¶ 2. The district court awarded the pharmacy restitution. *Id.* ¶ 8. On appeal, the defendant raised "inextricably intertwined" arguments about amount and causation—"namely, that the prosecution did not sufficiently prove that she caused $10,553.80 in loss to the pharmacy." *Id.* ¶ 12.

The parties disputed the standard of review, and the division concluded that restitution "was not a discretionary ruling subject to an abuse of discretion review." *Id.* ¶¶ 13-15. Older cases reciting the abuse-of-discretion standard, the division explained, were grounded in prior statutory regimes, under which district courts had discretion to order and waive restitution based on fairness considerations. *Id.* ¶¶ 16-20; *see Martinez*, ¶¶ 53-57 & n.1 (J. Jones, J., specially concurring) (criticizing majority's adoption of abuse-of-discretion review for similar reasons); *see also Barbre*, ¶ 14 (noting division found no statement from this Court "that criminal restitution orders are reviewed for an abuse of discretion").

Rejecting abuse-of-discretion review as a default, *Barbre* cautioned that "the appropriate standard of review necessarily will depend on which of a wide variety of restitution issues district courts decide and we are asked to review." *Id.* ¶ 24. Because the *Barbre* defendant challenged "the district court's conclusion that the prosecution proved by a preponderance of the evidence that she caused $10,553.80 in loss to the pharmacy," the challenge was "to the sufficiency of the evidence." *Id.*

¶ 25. "Consequently," *Barbre* reviewed "de novo whether the evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, establishes by a preponderance of the evidence that the defendant caused that amount of loss." *Id.*; *see id.* ¶ 26 (stating a different standard might apply where the issue was valuation of unique stolen property).

Support for this de novo approach comes from *Cumhuriyet v. People*, 615 P.2d 724 (Colo. 1980). That defendant pled guilty to theft for using a stolen credit card, but the district court ordered restitution for a purchase at another branch of the victimized store. *Id.* at 725. This Court showed no deference in setting aside the restitution order because there was "no indication that the defendant made the [other] purchase." *Id.* at 726; ("[A] defendant should not be forced to repay a victim when there has been no indication that the damage or injury sustained by the victim was inflicted by the defendant."); *see Barbre*, ¶ 37 (characterizing *Cumhuriyet* as holding "that the evidence was insufficient").

Barbre provided the most thorough analysis to date, but it was not the first division to conclude de novo review applied. *See People v. Ortiz*, 2016 COA 58, ¶ 26; *Barbre*, ¶¶ 13, 25 (citing *Ortiz*).

Months after *Barbre*, other divisions reviewed sufficiency issues in restitution orders de novo. *People v. Jaeb*, 2018 COA 179, ¶¶ 45-48; *People In Interest of A.V.*, 2018 COA 138M, ¶¶ 20, 31-32.

Years later, in *People v. Stone*, 2020 COA 24, another division weighed in, and although *Stone* said restitution orders are generally reviewed for an abuse of discretion, it agreed sufficiency issues receive de novo review. *Id.* ¶ 7 (citing *Barbre*); *see also People v. Rice*, 2020 COA 143, ¶¶ 22-24 & n.3 (agreeing de novo review applies), *overruled on other grounds by Weeks*, ¶ 47 n.16.

In *People v. Dyson*, 2021 COA 57, where the defendant argued "that the evidence was insufficient to show that his conduct was the proximate cause of the victim's need for [medical] procedures," *id.* ¶ 11, the division recognized that "[w]hether there was sufficient evidence to support a restitution award is a matter we review de novo," *id.* ¶ 15.

In 2022, without acknowledging these cases, this division adopted abuse-of-discretion review. *See Martinez*, ¶ 14 (maj. op.).

But this stance has not proven persuasive. *See People v. Moss*, 2022 COA 92, ¶ 9 (noting the defendant and the State relied on *Barbre* to assert de novo review); *id.* ¶ 10 (agreeing that whether the prosecution met its burden of proof is reviewed de novo); *see id.* ¶ 11 n.3 (disagreeing with and declining to follow *Martinez*).

4. *This division offered no persuasive reason for deviating from de novo review.*

Here, the division said the trial court's "interpretation" of the statute's proximate cause reference was "an application of the law that triggers abuse of discretion review." *Martinez*, ¶ 14 (citing *People v. Reyes*, 166 P.3d 301, 302 (Colo. App. 2007)). *But see People v. Gonzales*, 987 P.2d 239, 242 (Colo. 1999) ("While we defer to a trial court's findings of disputed fact, the application of a legal standard to historical fact is a matter for *de novo* appellate review.").

The division cited *Reyes*, which recited the abuse-of-discretion standard, but in practice *Reyes* seemed to review the proximate cause issue without deference: "*We conclude* that the victim's expense of installing the interior locks, as a prophylactic against future break-ins, was not proximately caused by defendant's conduct, and, consequently, does not qualify for a restitution award." 166 P.3d at 304 (emphasis added); *id.* ("[W]e perceive no causal connection . . . .").

The division also cited *People v. Henson*, 2013 COA 36, *see Martinez*, ¶ 14, but in *Henson*, the standard of review was not at issue. That defendant "argue[d] that the district court *abused its discretion* in awarding restitution for the victim's lost wages . . . because there was no evidence that the victim had actually lost wages." *Henson*, ¶ 13 (emphasis added); *id.* (noting defendant did not otherwise challenge wages award). *Henson* affirmed the restitution order because there was

evidence that the victim earned $450/day and lost 6.5 days of work investigating the theft. *Id.* ¶¶ 13-20. The division's cited cases are not binding and are weak authority for abuse-of-discretion review.

The division did not rely on federal practice, but circuit courts often recite abuse-of-discretion review as the standard in restitution appeals. Still, reviewing factual findings for clear error and legal conclusions de novo generally accords with federal practice. *See United States v. Chin*, 965 F.3d 41, 59 (1st Cir. 2020); *United States v. Goodrich*, 12 F.4th 219, 227-28 (2d Cir. 2021); *United States v. Bryant*, 655 F.3d 232, 253 (3d Cir. 2011); *United States v. Ritchie*, 858 F.3d 201, 206 (4th Cir. 2017); *United States v. Kim*, 988 F.3d 803, 811 (5th Cir. 2021); *United States v. Ruiz-Lopez*, 53 F.4th 400, 404 (6th Cir. 2022); *United States v. Alverez*, 21 F.4th 499, 502-03 (7th Cir. 2021); *United States v. Reichow*, 416 F.3d 802, 804 (8th Cir. 2005); *United States v. Lazarenko*, 624 F.3d 1247, 1249 (9th Cir. 2010); *United States v. Anthony*, 22 F.4th 943, 950 (10th Cir. 2022); *United States v. Speakman*, 594 F.3d 1165, 1169 (10th Cir. 2010); *United States v. Rothenberg*, 923 F.3d 1309, 1327 (11th Cir. 2019); *Wesby v. District of Columbia*, No. 20-7117, 2021 WL 5262578, at *3 (D.C. Cir. Nov. 9, 2021).

"Abuse of discretion" may obscure more than it illuminates. "A district court abuses its discretion if it orders a restitution amount based on an erroneous view of

the law or on a clearly erroneous assessment of the evidence." *Anthony*, 22 F.4th at 950 (quotations omitted); *see also In re Natural Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1017 (10th Cir. 2017) (stating in attorney-fees context that the abuse-of-discretion standard "requires reviewing the district court's legal conclusions de novo and its factual findings for clear error").

Regardless of federal practice, this Court should side with the court of appeals' de novo consensus. This division did not provide persuasive reasons for breaking with the weight of authority. When reviewing restitution orders for sufficiency of the evidence, appellate courts review the trial court's factual findings for clear error but decide de novo whether the evidence establishes proximate cause.

II. The trial court erred by requiring Mr. Martinez to pay this restitution because Mr. Tidd's intentional act of turning his Mazda was the independent intervening cause of the car damage.

The prosecution's restitution request argued but-for causation: "If not for the Defendant's act of theft, Mr. Tidd would not have been forced to chase the Defendant, and his car would not have been subsequently damaged." (CF pp.87-88.) But Mr. Tidd damaged his Mazda by intentionally turning the vehicle into the bike's downhill path. Mr. Martinez was not the proximate cause of this loss. Regardless of the standard of review, this Court should vacate the restitution order.

A. An independent intervening cause breaks the chain of causation.

"Unlawful conduct that is broken by an independent intervening cause cannot be the proximate cause of injury to another." *People v. Stewart*, 55 P.3d 107, 121 (Colo. 2002); *see People v. Sieck*, 2014 COA 23, ¶ 8 (explaining restitution obligation relieved where there is an independent intervening cause). "An independent intervening cause is an act of an independent person or entity that destroys the causal connection between the defendant's act and the victim's injury and, thereby becomes the cause of the victim's injury." *People v. Saavedra-Rodriguez*, 971 P.2d 223, 225-26 (Colo. 1998); *id.* at 228 (describing break of "the natural chain of causation flowing from the defendant's act").

"To qualify as an intervening cause, an event must be unforeseeable and one in which the accused does not participate." *Stewart*, 55 P.3d at 121.

B. Mr. Martinez's theft of the bicycle did not dent the Mazda. Mr. Tidd's independent intervening decision to turn his Mazda caused this loss.

1. *Mr. Tidd's intentionally turning the Mazda into the bike's path was at least grossly negligent and thus not foreseeable.*

Proximate cause "depends largely on the question of the foreseeability of harm." *Wagner*, ¶ 30 (maj. op.); *see id.* ¶ 78 (Hart, J., dissenting in part) (agreeing that foreseeability delineates extent of liability). "For an independent intervening

cause to relieve a defendant of liability it must not be reasonably foreseeable." *Saavedra-Rodriguez*, 971 P.2d at 226.

Simple negligence is foreseeable and thus does not break the causal chain. *Stewart*, 55 P.3d at 121; *see also Dubois v. People*, 211 P.3d 41, 42, 45-47 (Colo. 2009) (holding that, where defendant committed vehicular eluding against one officer, police response was reasonably foreseeable such that restitution was allowed for injury to responding officer); *People v. Calvaresi*, 534 P.2d 316, 319 (Colo. 1975) (explaining that attending physician's negligent treatment of victim not an intervening cause of homicide because medical negligence can reasonably be foreseen); *Sieck*, ¶¶ 10-11 (stating that victim's failure to wear a seatbelt not an independent intervening cause of victim injuries caused by defendant's driving); *People v. Clay*, 74 P.3d 473, 474-75 (Colo. App. 2003) (holding that, even though car owner could have picked up car sooner, restitution for tow lot charges was appropriate where defendant stole and then abandoned car).

"[G]ross negligence is sufficiently extraordinary to be classified as unforeseeable." *Saavedra-Rodriguez*, 971 P.2d at 226; *see id.* at 225-26 (explaining that liability relieved where grossly negligent medical treatment "disrupts the natural and probable sequence of events following the defendant's act" such that the victim's death would not have occurred without the improper treatment); *People v.*

Gentry, 738 P.2d 1188, 1190 (Colo. 1987) (explaining gross negligence is an intervening cause because it is unforeseeable).

Here, the district court ruled it was foreseeable that Mr. Tidd would pursue Mr. Martinez (CF p.124; TR 5/28/19 p.35:2-13), a ruling not disputed on appeal, *see* COA OB pp.7-8, 15.

But the district court erroneously concluded that it was also foreseeable that Mr. Tidd "would attempt to prevent Defendant from taking his property by pulling in front of Defendant when Defendant failed to stop or pull over when Mr. Tidd was driving parallel to him." (CF p.124; TR 5/28/19 pp.35-36.) The district court said Mr. Tidd's act of turning was simple negligence "if anything," but contrary to the district court, Mr. Tidd's "taking his car and angling it in front of the bicycle so the bicycle would be forced to stop" was at least grossly negligent. (TR 5/28/19 p.37:7-12, 21-25.)

The division erred by ruling that "turning in front of the bicycle thief was not grossly negligent as a matter of law." *Martinez*, ¶ 23. The foreseeability of pursuit does not mean "it was also foreseeable that, upon reaching Martinez, the victim would take steps to recover his bicycle, such as attempting to force Martinez to stop." *Id.* ¶ 24.

This is not a case where a bicyclist collided with a car because the driver negligently drifted into the bike lane. The prosecution's theory was never that Mr. Tidd's hand slipped on the wheel. The evidence does not show simple negligence. Mr. Tidd turned his Mazda into the bike's path intentionally. (TR 5/28/19 pp.7, 9-11; CF pp.93, 121, 124.) That decision to elevate recovery of his property over Mr. Martinez's safety was at least grossly negligent. "Gross negligence is willful and wanton conduct, that is, action committed recklessly, with conscious disregard for the safety of others." *Hamill v. Cheley Colo. Camps, Inc.*, 262 P.3d 945, 954 (Colo. App. 2011). Pursuing and alerting authorities was a normal response, but intentionally turning into the bike's path prioritized property recovery over human safety. Reasonable people understand no one should be injured or killed over a stolen bike. Mr. Tidd's decision to turn was at least grossly negligent. *See Calvaresi*, 534 P.2d at 319 ("[G]ross negligence is abnormal human behavior.").

A useful comparison comes from *People v. Jaeb*, 2018 COA 179. That defendant, convicted of theft for stealing a trailer in rentable condition that needed repairs when it was recovered, contested proximate cause because the police might have damaged the trailer while hauling it away. *Id.* ¶¶ 1, 45-50. *Jaeb* affirmed the restitution order and reasoned that, even if the police did cause the damage, the defendant's actions necessitated the hauling. *Id.* ¶¶ 50-51. Implicit in *Jaeb's*

acceptance that police damaged the trailer was an assumption that they did do so negligently, while hauling it away in good faith. *Jaeb* would be a different case if the police caused damage intentionally. *See also Speakman*, 594 F.3d at 1168, 1172-74 (remanding for further proceedings in wire-fraud case where district court awarded Merrill Lynch, defendant's former employer, restitution for arbitration payout it made, the basis of which the record left unclear, because "it would be odd to consider Merrill Lynch a victim of Mr. Speakman's fraud if the reason it suffered harm was because of its own intentional conduct"); *id.* at 1174 (stating "any intentional act that Merrill Lynch may have taken would be a superseding cause of its liability that would break the causal chain between Mr. Speakman's actions and Merrill Lynch's loss sustained in the arbitration").

The restitution statute excludes from the "victim" definition "a person who is accountable for the crime *or a crime* arising from the same conduct, criminal episode, or plan." § 18-1.3-602(4)(b), C.R.S. (emphasis added). Mr. Tidd's decision to turn was not only grossly negligent but his driving also likely violated several criminal statutes. *See* § 18-3-203(1)(d), C.R.S. (second-degree assault by means of a deadly weapon); *Stewart*, 55 P.3d at 117 (noting a motor vehicle may be a deadly weapon); *see also* § 18-3-205(1)(a), C.R.S. (vehicular assault); § 42-4-1008.5, C.R.S. (crowding or threatening bicyclist); § 42-4-1401, C.R.S. (reckless driving);

§ 42-4-1402, C.R.S. (careless driving). This Court, however, need not declare Mr. Tidd guilty of any offense to hold that his intentional act of turning his Mazda into the bike's path was at least grossly negligent and thus unforeseeable.

The lower courts placed erroneous attention on Mr. Tidd's presumed subjective goal of recovering his property undamaged. (TR 5/28/19 pp.35-36; CF p.124.) *Martinez*, ¶ 24. But "proximate cause is determined by an objective standard, and the actor's particular state of mind is not relevant to this issue." *Rostad*, 669 P.2d at 128. What matters is not what Mr. Tidd hoped would happen but rather that he intentionally turned his Mazda into the bike's path. That decision broke the causal chain of foreseeable consequences from the bike theft and caused this damage to the Mazda.

Holding it is foreseeable that property owners will forcibly use their cars to recover stolen bicycles would make less safe the parties to these thefts, others on the road, and the public. *See Wagner*, ¶¶ 78-81 (Hart, J., dissenting in part) (discussing real-world consequences stemming from where this Court limits foreseeability). Bike thefts are commonly committed by children. *See, e.g.*, *People v. Jiminez*, 651 P.2d 395, 396 (Colo. 1982) (juvenile allegedly entered victim's open garage and rode off with bicycle). The law of restitution should not extend so far that victims recover for their dangerous, retaliatory conduct.

Colorado's defense-of-property statute balances lawful violence and public safety, but Mr. Tidd's use of force was not foreseeable because it exceeded the law's limits. The defense-of-property statute provides:

> A person is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary **to prevent** what he reasonably believes to be **an attempt** by the other person to commit theft, criminal mischief, or criminal tampering involving property, but he may use deadly physical force under these circumstances only in defense of himself or another as described in section 18-1-704.

§ 18-1-706, C.R.S. (emphases added). Here, because the bike theft was completed, the law did not allow for Mr. Tidd's use of force.

Two cases illustrate the illegality of Mr. Tidd's untimely force. In *People v. Oslund*, 2012 COA 62, and *People v. Goedecke*, 730 P.2d 900 (Colo. App. 1986), individuals had their property taken and argued the defense-of-property statute justified their later use of force against the thieves. *Oslund*, ¶¶ 3-4, 14-20; *Goedecke*, 730 P.2d at 901. In *Oslund*, the host of a party screamed when she came upon someone stealing from the defendant's car. *Oslund*, ¶ 3. Ten to fifteen minutes later, the defendant returned to the party and reported he had punched the thief after he refused to return the property. *Id.* ¶ 4. In *Goedecke*, the defendant offered food stamps as partial payment for a debt, but the creditor tore them up and drove away. 730 P.2d at 901. "Some time later," the creditor came upon the defendant, who

assaulted the creditor. *Id.* The defense-of-property law did not apply in these cases because the defendants were not acting to *prevent* thefts. *Id.*; *Oslund*, ¶¶ 23-26.

The lower courts tried to distinguish *Oslund* and *Goedecke* factually and legally. On the facts, the district court said those defendants "went and sought out the thieves some time or some distance after the thefts had occurred," whereas Mr. Tidd gave instantaneous pursuit, after his wife alerted him. (CF pp.121, 124.) *See Martinez*, ¶ 29 (contending Mr. Tidd "attempted to stop a theft in progress"). But *Oslund* and *Goedecke* did not turn on sight lines, and this theft was just as complete as those thefts: Mr. Martinez "not only exercised control of the [bike], but moved it away from an area within [Mr. Tidd's] control." *Oslund*, ¶ 24. Mr. Tidd "could no longer *prevent* the theft." *Id.* ¶ 25 (citing *Goedecke*, 730 P.2d at 901). He "was trying to apprehend [Mr. Martinez] and recover the [bike]." *Id.*; *id.* ¶ 24 (rejecting "fresh pursuit" argument).

On the law, the lower courts pointed out *Oslund* and *Goedecke* concerned submission of jury instructions. (TR 5/28/19 pp.33-34; CF p.123.) *Martinez*, ¶ 26. But the defense-of-property statute regulates people's real-world use of force, and because Mr. Tidd exceeded the statute, his unlawful actions were not foreseeable. Moreover, the procedural difference supports Mr. Martinez. The *Oslund* and *Goedecke* defendants could not satisfy the "some evidence" standard to have the jury

instructed on defense of property, *see Oslund*, ¶ 15; *Goedecke*, 730 P.2d at 901, but here the prosecution had a preponderance burden to prove proximate cause, which it cannot carry if Mr. Tidd was the independent intervening cause of his Mazda's damage.

Mr. Tidd's untimely use of force was unforeseeable. *See People v. Scearce*, 87 P.3d 228, 231 (Colo. App. 2003) (noting "basic public policy that even rightful owners should not be permitted to use force to regain their property, once it has been taken" (alterations and quotations omitted)). "Where society has provided a means to obtain prompt and impartial review of legal disputes, the necessity for self-help remedies is radically dissipated and society need no longer tolerate such efforts." *People v. Lanzieri*, 25 P.3d 1170, 1175 (Colo. 2001) (quotations omitted).

Even if the bike theft was not completed and somehow continued during the chase, the defense-of-property statute still would not allow Mr. Tidd to use his Mazda as he did. The law requires "reasonable and appropriate physical force," but crashing a car into a bike thief is excessive and amounts to the kind of "deadly physical force" that can only be used in defense of persons. § 18-1-706, C.R.S.

The division thought it "defie[d] logic" that Mr. Tidd "would simply back off and allow Martinez to speed away." *Martinez*, ¶ 24. But Mr. Tidd's decision to cause a collision and create new harms was the wrong choice. Mr. Tidd could have

followed Mr. Martinez, provided information to police, and been reimbursed for his pursuit expenses. (*See* TR 5/28/19 p.27:3-6.)

Had Mr. Tidd let Mr. Martinez go, there would have been no damage to the Mazda. In that scenario, Mr. Martinez's restitution would entail returning the bike or paying to replace it, but Mr. Tidd would also be entitled to compensation for the time he was unable to use his bike, *see People v. Suttmiller*, 240 P.3d 504, 508 (Colo. App. 2010) (noting that even where stolen property is returned "the owner may recover from the thief as damages for the temporary loss of use of the item *at least* the replacement rental value of the item"). This is the legally appropriate resolution, not Mr. Tidd's dangerous act of self-help. Turning the Mazda was at least grossly negligent and thus not foreseeable.

2. *Mr. Martinez did not participate in Mr. Tidd's decision to turn the Mazda.*

An independent intervening cause is unforeseeable and "one in which the accused does not participate." *Stewart*, 55 P.3d at 121.

In *Stewart*, this Court held that an intervening-cause instruction was unwarranted. *Id.* There, it was disputed how the victim first landed on the hood of the defendant's vehicle. *Id.* at 112-13. The prosecution thought the victim was hit by the vehicle and propelled into the air; the defense maintained the victim jumped onto the hood. *Id.* This Court reasoned that even if the victim jumped and was

grossly negligent for doing so, that did not break the causal chain. *Id.* at 121. The defendant's offense—second-degree assault with a deadly weapon—occurred "after the alleged jump, when [the victim] fell to the ground" and the defendant drove forward over the victim's head. *Id.*; *see id.* (explaining that earlier jumping did not cause defendant's subsequent volitional act of driving forward); *see also Auman v. People*, 109 P.3d 647, 662-63 (Colo. 2005) (rejecting intervening-cause instruction where defendant, a passenger in a high-speed chase, claimed driver could have been fleeing for reasons unforeseeable to her (such as the car being stolen or his being high) because those reasons pre-dated her burglary and the chase).

Here, the intervening act, Mr. Tidd's act of turning, occurred *after* the bike theft. Mr. Martinez did not participate in Mr. Tidd's post-theft decision to risk his safety and turn the Mazda into the bike's path. That decision caused this damage, and the trial court erred by ordering this restitution. *See Paroline*, 572 U.S. at 455 (stating "bedrock principle that restitution should reflect the consequences of the defendant's own conduct").

At the hearing, the prosecution argued Mr. Martinez participated because he "started this incident." (TR 5/28/19 p.18:8.) But the completed bike theft posed no danger to Mr. Tidd's Mazda. Causing this damage took Mr. Tidd's decision to turn.

The district court said Mr. Martinez participated "because he was riding the victim's bike down the side of the road and was refusing to pull the bike over to the side of the road." (*Id.* p.37:17-19; CF p.124.) But just as theft of the bike did not damage the Mazda, neither did Mr. Martinez's riding in the would-be bike lane. This damage required Mr. Tidd to turn his Mazda, and Mr. Martinez did not participate in that critical decision.

The division said Mr. Martinez "participated in the collision with the victim's car by refusing to stop," *Martinez*, ¶ 30, but if the collision counts, Mr. Martinez would have "participated" even if Mr. Tidd had run him over.

The prosecution did not present evidence about the post-turn gap between the Mazda and the bike or rely on a last-clear-chance theory. *See* COA AB pp.16-17 ("[N]othing in the record indicates that the defendant could *not* have stopped the bicycle without hitting the car." (emphasis added)). There was no accusation Mr. Martinez rode the bike in an unsafe manner. The prosecution argued this damage flowed from the theft. (CF pp.87-88.) The evidence does not show, and the district court made no finding, that Mr. Martinez could have stopped or otherwise avoided the collision after Mr. Tidd turned into his path. The district court found Mr. Tidd was driving parallel to Mr. Martinez, and when Mr. Martinez did not pull over, Mr. Tidd pulled in front of him. (CF p.124.) Mr. Tidd damaged his Mazda because he

intentionally cut off Mr. Martinez as he rode downhill. (*See* TR 5/28/19 p.28:17-19.)

Mr. Martinez is responsible for the foreseeable consequences of the bike theft, but when the theft was complete, the Mazda was intact. Mr. Martinez did not participate in Mr. Tidd's (at least) grossly negligent decision to turn his Mazda. On its own, and even with pursuit, the bike theft would not result in damage to the Mazda. It took Mr. Tidd's dangerous, intentional action to cause this damage. *See Snyder v. Colorado Springs & C.C.D. Ry. Co.*, 85 P. 686, 686 (Colo. 1906) ("The law will not look back from the injurious consequence, beyond the last sufficient cause, and especially that, where an intelligent and responsible human being has intervened between the original cause and the resulting damage." (quotations omitted)); *id.* at 686-87 (affirming judgment for defendant-railroad where its conductor on a crowded train pressed the plaintiff into a passenger, who became upset and threw the plaintiff from the train, because the railroad was not responsible for the passenger's extreme action); *id.* at 686 ("If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." (quotations omitted)). The trial court erred by ordering restitution for the Mazda repairs.

CONCLUSION

This Court should reverse and hold that appellate sufficiency review of a restitution order's proximate cause determination is de novo, and this Court should vacate the restitution order here because Mr. Tidd was the independent intervening cause of the damage to his Mazda. Mr. Martinez did not proximately cause this loss.

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CERTIFICATE OF SERVICE

I certify that, on January 17, 2023, a copy of this Opening Brief was electronically served through Colorado Courts E-Filing on John T. Lee of the Attorney General's Office.