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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; Douglas County District Court Honorable Theresa Slade Case Number 2020CR671	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant SHARI DOOLEY	
Megan A. Ring, Colorado State Public Defender JULIA CHAMBERLIN 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #47181	Case Number: 2021CA1946

AMENDED 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, other than the 9,500 word limit. Counsel filed the original Opening Brief on July 20, 2022, at 18,346 words with a Request for Leave to File Opening Brief in Excess of 9,500 words. This Court granted in part and denied in part the motion, and ordered counsel to file an amended brief not to exceed 11,000 words. This Amended Opening Brief complies with this Court's order dated July 22, 2022.

Specifically, the undersigned certifies that:

> The brief does not comply with C.A.R. 28(g) because:
>
> It contains 10,995 words (which complies with this Court's July 22, 2022 order).

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 Defendant-Appellant, 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.

Julia Chambers

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STATEMENT OF THE FACTS AND CASE

The prosecution charged Shari Dooley with stalking[1] and two counts of violation of a protection order.[2] (CF, pp 91-93). In its bill of particulars, the prosecution specified the following acts it relied upon for conviction:

- Dooley left a note on Kevin Dooley's, her ex-husband's, car on July 23, 2019;
- Dooley drove by Kevin on February 29, 2020;
- Dooley affixed a tracking device to Kevin's car before February 29, 2020;
- Dooley called Kevin twice on May 5, 2020.

(*Id*. at 182-83, 209). The prosecution likewise filed a notice of intent to introduce res gestae and/or other act evidence. (*Id*. at 125-30). It sought to admit: Kevin filed for divorce from Dooley on June 17, 2019; Dooley left "harassing notes" along Kevin's bus route; she placed a tracking device on Kevin's car before September 21, 2019; she left a note on Kevin's car on July 13, 2019; she sent Kevin an email and attempted to call him on December 13, 2019; and she shoved a note down Kevin's shirt in Lakewood. (*Id*. at 125-30, 172-76).

Dooley retained a private attorney, but he moved to withdraw from her case before trial. (*Id*. at 30, 253). The court granted her attorney's motion without

[1] §18-3-602(1)(c),(5), C.R.S.
[2] §18-6-803.5(1)(a), C.R.S.

inquiring into the basis of the motion. (TR 6/8/21, pp 3-4; CF, p 262). The court also vacated a motions hearing addressing the prosecution's notice of intent to introduce res gestae and/or other act evidence because it mistakenly believed this hearing had occurred. (TR 6/21/21, pp 5-7). When the court vacated this hearing, Dooley hadn't been advised of her right to counsel under *People v. Arguello,* 772 P.2d 87 (Colo.1989).

At a hearing on July 12, 2021, Dooley appeared *pro se*. Although she applied for a public defender, she didn't qualify for one. (TR 7/12/21, p 3:7-9). She attempted to retain another attorney, but she couldn't afford one. (*Id*. at 3:11-21). During the court's *Arguello* advisement, Dooley maintained: "I would prefer a lawyer, but I cannot afford a lawyer because I support my brother, who is disabled." (*Id*. at 7:3-5).

At the pretrial readiness hearing, the court asked Dooley: "do you have an attorney?" (TR 7/26/21, p 3:15-16). She responded, "[n]o[.]" (*Id*. at 3:17). The court made no further inquiries. The prosecution then "confirm[ed]" the court admitted all of its res gestae/other act evidence. (*Id*. at 12:7-12). Despite never issuing a ruling on the matter, the court "recall[ed]" admitting "portions of it [as] res gestae and portions of it [as] 404(b)." (*Id*. at 12:13-22).

Dooley represented herself at trial. In opening statement, she said: "I'm here today defending myself. I have a lawyer. Three weeks ago, four weeks ago, he quit. I can't afford another attorney." (TR 7/27/21, p 105:20-23). The prosecution then admitted two protection orders—one issued on July 23, 2019, and the other on November 5, 2019—restraining Dooley from contacting Kevin. (EX 8-9, pp 9-18). It elicited testimony regarding the four acts in its bill of particulars. (TR 7/27/21, pp 128-39). It also admitted evidence about the res gestae/other act evidence designated in its notice of intent. (*Id*. at 109-18; 171-82). And it introduced pervasive other act evidence that it never included in its notice. (*Id*. at 119-28, 195:7-11; EX 17, pp 34-68).

Dooley's daughter, Danielle Dooley, testified that she accidentally called Kevin on May 5, 2020, from Dooley's phone. (TR 7/28/21, pp 79-82). And, to contest she purchased the tracking device found on Kevin's car, Dooley requested a brief continuance so she could retrieve voicemails and papers from Kevin. (TR 7/28/21, pp 53-54). She claimed this evidence would show Kevin "had information to purchase and to put things in [her] name[.]" (*Id*.) She attributed this late request to being "handed this case so late" and "learning last minute what to do and stuff." (TR 7/27/21, p 147:21-24).

Despite recognizing Dooley's proposed evidence might be admissible, the court denied her request for a continuance. (TR 7/28/21, pp 58-71). Dooley objected, stating: "I gave the first [attorney] all my money, and you could have overrode that hundred dollars to provide me the attorney but you didn't. You gave me legal aid or discounted attorneys, and they all want money up front too and I don't have that to provide them." (*Id*. at 67:16-24). Thus, Dooley didn't cross-examine Kevin, she didn't testify, and the court sustained any references to this proposed evidence in closing argument. (*Id*. at 105-06).

The jury convicted Dooley as charged, and the court sentenced her to six-years in Community Corrections. (CF, pp 367-73, 438).

SUMMARY OF THE ARGUMENT

1. When a retained attorney moves to withdraw, the court must hold a hearing on the matter in the defendant's presence and inquire into the foundation for the motion. Here, Dooley's counsel moved to withdraw from her case due to "an irremediable breakdown in the attorney client relationship." The court allowed her attorney to withdraw without holding a hearing on the matter. Reversal is required.

2. Before a defendant relinquishes her right to counsel, the court must find she knowingly, intelligently, and voluntarily did so. A court must carefully inquire of a defendant who, having indicated a desire for counsel, stands before the court

unrepresented. Here, after Dooley's counsel withdrew, she expressed desire for counsel but stated she couldn't afford one. Nor did she qualify for a public defender. Because Dooley never waived her right to counsel—let alone validly waived this right—reversal is required.

3. In determining whether to grant a continuance, the court must consider the circumstances of each case and balance the equities on both sides. Here, Dooley asked for a brief continuance so she could collect material defense evidence. The continuance wouldn't have delayed her trial, the prosecution never claimed this brief delay prejudiced it, and the court acknowledged the admissibility of Dooley's evidence. The court reversibly erred in denying Dooley's continuance.

4. A defendant should be tried only for the charged offense. Before admitting other act evidence, the prosecution must seek to admit this evidence, present an offer of proof, and obtain a ruling. Here, the prosecution introduced extensive other act evidence. While the court mistakenly believed it ruled on the admissibility of this evidence, it never did so. Because the court abdicated its gatekeeping role and admitted prejudicial other act evidence, reversal is required.

5. A simple variance occurs when the evidence proves facts materially different from those alleged in the charging document. Here, the prosecution filed a bill of particulars specifying four acts it relied upon for conviction. The prosecution,

however, intimated during closing that Dooley was guilty based on these four acts *plus* other additional conduct, and the instructions didn't clarify which acts the jury could rely upon for conviction. Plain error occurred.

ARGUMENT

I. The court abused its discretion, violated Crim.P. 44 and Dooley's right to choice of counsel, and reversibly erred when it allowed her attorney to withdraw.

A. Standard of review

This Court reviews a ruling on an attorney's motion to withdraw for an abuse of discretion. *People v. DeAtley*, 2014 CO 45, ¶13. Whether the court applied the correct legal standard is reviewed de novo. *Id*. "[I]f a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice [her]." Crim.P. 51. Because Dooley couldn't object to her attorney's withdrawal, the absence of an objection shouldn't prejudice her. *See* subsection (B).

B. Relevant facts

Attorney Richard Schwartz entered his appearance in Dooley's case on August 3, 2020. (CF, p 30). At a hearing on March 1, 2021, without Dooley present, Schwartz explained his family experienced "emergency health issues[,]" but he wasn't trying "to withdraw[.]" (TR 3/1/21, p 6:3-14).

On May 27, 2021, however, Schwartz moved to withdraw. (CF, p 253). He alleged "circumstances" "caused an irremediable breakdown in the attorney client relationship[.]" (*Id*.) At a hearing in front of a different judge, Schwartz explained he moved to withdraw and "I believe that [Dooley]'s going to have to file a new application with the public defender's office." (TR 5/27/21, p 3:13-18). The judge didn't rule on Schwartz's motion. (*Id*. at 6:5-8).

At the next hearing on June 8, 2021, a public defender appeared on Dooley's behalf and explained "there is a motion to withdraw from the…prior attorney." (TR 6/8/21, p 3:8-12). The presiding judge responded: "the Court will grant the motion to withdraw and note the entry of appearance by the Public Defender's Office." (*Id*. at 3-4; CF, p 262).

Dooley appeared *pro se* at the next hearing. The court asked: "[D]o you have an attorney?" (TR 6/21/21, p 3:7). She denied having one, but expressed her desire for a public defender. (*Id*. at 3:8-22). A few weeks later, the court stated: "I see that you did apply for the Public Defender but you have too much of an income. Have you hired a private attorney?" (TR 7/12/21, p 3:7-9). Dooley replied, "[n]o ma'am. I cannot afford it." (*Id*. at 3:10). The court queried: "Have you taken a look at that low pay/slow pay list the courts have available?…Have you contacted any of those folks?" (*Id*. at 3:11-15). She insisted that she had and she "d[id]n't have the money

they want to get started[.]" (*Id*. at 3:16-21). The court then gave Dooley an *Arguello* advisement. (*Id*. at 3-8). Dooley maintained: "I would prefer a lawyer, but I cannot afford a lawyer because I support my brother, who is disabled." (*Id*. at 7:3-5).

C. Law and analysis

A defendant has the right to representation by counsel of her choice. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §16; *Powell v. Alabama*, 287 U.S. 45 (1932); *People v. Hoskins*, 2014 CO 70, ¶19. "This right encompasses both the right to a retained attorney for a defendant who is financially able to pay for legal representation and the right to a court-appointed counsel for an indigent defendant faced with the prospect of incarceration." *DeAtley*, ¶14.

Crim.P. 44 governs how an attorney must withdraw from a case. Subject to exceptions not relevant here, Rule 44 requires that the court hold a hearing on a motion to withdraw in the defendant's presence. Crim.P. 44(d)(1),(2). "When a retained defense attorney files a motion to withdraw under Crim.P. 44(c), the trial court necessarily must make an inquiry into the foundation for the motion when balancing the need for orderly administration of justice with the facts underlying the request." *People v. Cardenas*, 2015 COA 94M, ¶11 (internal quotation omitted).

The importance of these requirements heighten when counsel seeks to withdraw based on an alleged conflict of interest. *People v. Schultheis*, 638 P.2d 8,

13-15 (Colo.1981). When a conflict arises implicating the confidentiality of an attorney-client relationship, the attorney must make a record outside the presence of the court and the prosecutor to protect this confidentiality. *Id*. The judge conducting the *ex parte* hearing must seek from the defendant "a narrative response, on the record, indicating his or her understanding of the right to conflict-free representation and a description of the conflict at issue." *People v. Edebohls*, 944 P.2d 552, 556 (Colo. App. 1996). The judge must also advise a defendant about the circumstances surrounding the withdrawal to ensure that the withdrawal doesn't violate her right to due process. *S. & W. Steel Bldg. Erection Co. v. Owens*, 568 P.2d 107, 108 (Colo.1977).

When balancing the orderly administration of justice with the facts underlying a request to withdraw, the court must consider: "the timing of the motion, the inconvenience to witnesses, the period of time elapsed between the date of the alleged offense and trial, and the possibility that any new counsel will be confronted with the same irreconcilable conflict." *Schultheis*, 638 P.2d at 15. The court is justified in granting a motion to withdraw only if it reasonably believes the lawyer-client relationship has deteriorated to where counsel cannot effectively aid the defendant. *Id.*

In *People v. Cardenas*, for instance, defense counsel moved to withdraw citing an "irreconcilable difference[] of opinion[.]" *Id*. ¶5. The defendant objected, and a different judge conducted an *ex parte* hearing on the matter outside the defendant's presence. *Id.* ¶¶6-7. The judge didn't inquire of the defendant before granting the motion even though he was in the courtroom. *Id*. ¶7. *Cardenas* concluded the court abused its discretion because it conducted the hearing outside the defendant's presence and the record was devoid of any balancing analysis. *Id.* at ¶¶13, 16.

Here, within two months of trial, Schwartz moved to withdraw from Dooley's case because of "an irremediable breakdown in the attorney client relationship[.]" (CF, p 253). Schwartz failed to notify Dooley that she had a right to object to his withdrawal, a hearing would be held and withdrawal would only be granted if the court approves, Dooley had the obligation to appear at all scheduled court dates, and if the request to withdraw was granted, Dooley must hire other counsel, request the appointment of counsel, or elect to represent herself. Crim.P. 44(d)(1)(III)-(VI).

Worse than in *Cardenas*, the court never held a hearing on the motion to withdraw. Because the court failed to do so, Dooley wasn't present to object to Schwartz's withdrawal. The court never balanced the need for orderly administration of justice with the facts underlying the withdrawal request. Schwartz never made a

record about the conflict during an *ex parte* hearing. The court didn't seek "a narrative response" from Dooley indicating that she understood her right to conflict-free representation. Nor did the court advice Dooley regarding the circumstances surrounding the withdrawal to ensure that it didn't violate her right to due process.

Not only did the court fail to balance Dooley's right to counsel of choice against other competing interests, but it didn't consider her right to choice of counsel at all. Because the court didn't inquire of Dooley and failed to balance the competing interests, it had no reasonable basis for concluding that the lawyer-client relationship deteriorated to where Schwartz couldn't effectively represent Dooley. Thus, the court abused its discretion in allowing Schwartz to withdraw.

Allowing counsel to withdraw without complying with Crim.P. 44 violated Dooley's right to choice of counsel. *Cardenas*, ¶¶19-20. "[V]iolation of a defendant's right to counsel of choice is structural error." *Id*. ¶19. Reversal is required. *Id*. ¶20.

II. Dooley invalidly waived her right to counsel where the court failed to adequately advise Dooley of her rights and she repeatedly expressed her desire for counsel.

A. Standard of review

Whether a defendant effectively waived the right to counsel is a mixed question of fact and law. *People v. Lavadie*, 2021 CO 42, ¶22. Complete deprivation of counsel is structural error. *Hagos v. People*, 2012 CO 63, ¶10. Dooley, who appeared *pro se*, repeatedly requested the assistance of counsel. (TR 7/12/21, p 7:3-5; 7/27/21, p 105:20-23).

B. Relevant facts

Dooley retained counsel to represent her, but the court permitted her attorney to withdraw from her case without applying the correct legal standard. At a hearing on July 12, 2021, the court stated Dooley applied for a public defender "but [she] ha[d] too much of an income" and asked whether she hired private counsel. (TR 7/12/21, p 3:7-9). Dooley replied: "No, Ma'am. I cannot afford it." (*Id*. at 3:10). The court inquired whether Dooley looked at the "low pay/slow pay lists" of attorneys. (*Id*. at 3:11-12). Dooley contacted "a few of them[,]" but she "d[i]dn't have the money they want to get started[.]" (*Id*. at 3:13-21).

The court then gave an *Arguello* advisement (*Id*. at 3-8). Dooley maintained: "I would prefer a lawyer, but I cannot afford a lawyer because I support my brother,

who is disabled." (*Id*. at 7:3-5). At Dooley's behest, the court reset the hearing "for an appearance of counsel." (*Id*. at 8:6-15). This hearing never occurred.

One day before trial, the court inquired whether Dooley hired an attorney. (TR 7/26/21, p 3:15-16). She replied she didn't. (*Id*. at 3:17). No further inquiry took place. Dooley therefore represented herself during trial. During opening statement, Dooley told the jury: "I'm here today defending myself. I have a lawyer. Three weeks ago, four weeks ago, he quit. I can't afford another attorney." (TR 7/27/21, p 105:20-23). And, when objecting to the court's denial of her motion to continue, *see* Issue III, Dooley said she made "a hundred dollars too much" to qualify for a public defender, she gave Schwartz "all [her] money," and the court refused to "over[i]de that hundred dollars to provide" her with an attorney. (TR 7/28/21, p 67:16-24).

C. Law and analysis

A defendant has the right to counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Arguello*, 772 P.2d at 92; U.S. Const. amends. VI; XIV; Colo. Const. art. II, §16. Not only does this include the right to court-appointed counsel for an indigent defendant, but also the right to a retained attorney for an indigent defendant. *King v. People*, 728 P.2d 1264, 1268 (Colo.1986). To be indigent, "the defendant need not be destitute; rather, it is sufficient that the defendant lack the necessary funds, on a

practical basis, to retain competent counsel." *Nikander v. Dist. Court*, 711 P.2d 1260, 1262 (Colo.1986).

"[T]he right to self-represent is conditioned on the requirement that defendants demonstrate an intelligent understanding of the consequences of so doing." *Lavadie*, ¶25 (internal quotations and citations omitted). Thus, before proceeding *pro se*, waiver of counsel must occur. *Id.* A defendant may waive this right expressly or impliedly. *King*, 728 P.2d at 1268. A waiver is only effective if it is made voluntarily, knowingly, and intelligently. *Lavadie*, ¶26. A waiver is knowing and intelligent when "the record clearly shows that the defendant understands the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Arguello*, 772 P.2d at 94 (internal quotation omitted).

"Because there is a strong presumption against finding a waiver of a constitutional right, a court has the duty of careful inquiry into the reasons given for not having counsel and the defendant's understanding of the many risks of self-representation." *People In Int. of J.V.D.*, 2019 COA 70, ¶16.

When determining whether a defendant validly waived her right to counsel, courts apply "a flexible, totality-of-the-circumstances test" based on the particular facts and circumstances. *Lavadie*, ¶43; *Arguello*, 772 P.2d at 95. In *People v. Arguello*, our supreme court adopted a list of questions from the *Colorado Trial Judges' Benchbook* "that a trial judge should ask the defendant before allowing the defendant to waive the right to counsel." *Id*. at 95-96. A court's failure to substantially comply with this requirement, however, doesn't "automatically render the waiver invalid, but is an exception which should rarely be invoked." *Id*. at 96. And "a court must make careful inquiry of a defendant who, having previously indicated a desire to retain counsel, stands before the court on the day of trial unrepresented." *King*, 728 P.2d at 1269.

1. Dooley didn't expressly or impliedly waived her right to counsel.

In *King v. People*, the court concluded the record "fail[ed] to satisfactorily establish that the defendant effectively waived his constitutional right to counsel." 728 P.2d at 1269. The court first determined that the defendant never expressly waived his right. Rather, the defendant initially informed the court of his intent to retain counsel and later stated he couldn't afford private counsel and therefore contacted the public defender's office. *Id*.

Additionally, *King* found the record "woefully inadequate to establish an implied waiver." *Id*. "If anything, the record demonstrates that the defendant throughout the proceedings sought and welcomed legal assistance." *Id*. *King* noted the defendant attempted to retain private counsel but couldn't afford one. *Id*. The court also only gave the defendant thirty-one days to hire private counsel. *Id*. When the defendant failed to do so, he attempted to contact the public defender's office. *Id*. "Despite the defendant's unequivocal desire for counsel, the trial court remained inflexibly unwilling to engage in any inquiry about the defendant's financial condition and his desire for a court-appointed attorney." *Id*. at 1270.

King held that the court, "before forcing the defendant to trial without the benefit of counsel, had the duty to make a careful inquiry about the defendant's financial condition, the defendant's understanding of his right to counsel, and his desires regarding legal representation." *Id*. Where the court failed to so inquire, "there is simply no basis to conclude…the defendant impliedly waived his constitutional right to counsel." *Id*. *King* reversed the defendant's convictions. *Id*.

Similarly here, Dooley never expressly waived her right to counsel. Rather, Dooley retained private counsel. The court, however, permitted Dooley's counsel to withdraw shortly before trial without applying the correct legal standard. Similar to *King*, Dooley informed the court she couldn't afford another attorney—even from

the "low pay/slow pay list"—because she cared for her disabled brother. Dooley then applied for a public defender, but she didn't qualify for one because she made a hundred dollars too much. "At no time did [Dooley] expressly forego h[er] right to legal representation." *King*, 728 P.2d at 1269.

Additionally, the record here is "woefully inadequate to establish an implied waiver." *Id*. Stronger than the facts in *King* where the defendant intended to hire private counsel, Dooley actually did so. Her attorney withdrew shortly before trial, leaving her with just forty-nine days to obtain replacement counsel. Dooley intended to hire a new attorney, but she couldn't afford one because she cared for her disabled brother. And—when her attempts to hire new counsel proved futile—Dooley applied for a public defender. Dooley narrowly missed the financial cutoff to qualify for one.

As in *King*, Dooley repeatedly sought the assistance of counsel—first private counsel and, after he withdrew, the public defender's office. Despite Dooley's unequivocal desire for counsel, the court abdicated its duty "to make a careful inquiry about [Dooley's] financial condition, [her] understanding of [her] right to counsel, and [her] desires regarding legal representation." *King,* 728 P.2d at 1270. Although Dooley didn't qualify for a public defender, she nevertheless "lack[ed] the necessary funds, on a practical basis, to retain competent counsel." *Nikander,* 711 P.2d at 1262. The court erroneously allowed her attorney—who she gave "all" her

money—to withdraw from her case before trial. She couldn't afford a discounted attorney. Nor did she qualify for a public defender. Thus, Dooley's current financial status didn't afford her equal access to the legal process. *Id*. at 1263. Despite Dooley's requests for counsel and her inability to hire one, the court "remained inflexibly unwilling to engage in any inquiry about [Dooley's] financial condition and h[er] desire for a court-appointed attorney." *King*, 728 P.2d at 1270.[3] Thus, Dooley didn't impliedly waive her right to counsel. *Id*.

2. Even if Dooley impliedly waived her right to counsel, she did not validly do so.

"[B]efore a reviewing court can find a valid implied waiver based on conduct, there must be ample, unequivocal evidence in the record that the defendant was advised properly in advance of the consequences of his actions." *Arguello*, 772 P.2d at 97. This didn't occur here.

The court never asked Dooley whether she understood that a free attorney would be provided to her if she couldn't afford one. It never asked whether she understood that the court would appoint counsel if she wanted one. It never asked

[3] The court "retain[ed] jurisdiction to determine whether [Dooley] [wa]s indigent based on all the information available." CJD 04-04(II)(D), *Appointment of State-Funded Counsel in Criminal Cases and For Contempt of Court*, https://www.courts.state.co.us/Courts/Supreme_Court/Directives/04-04%20Amended%20effective%20July%201,%202018%20Attachment%20B%20Amended%20March%202022%20WEB.pdf.

whether Dooley was under the influence of any drug, medication or alcohol that affected her understanding of the proceedings. It never asked whether she wanted to consult with the public defender before forgoing her right to counsel. It never asked Dooley whether she requested that the court appoint counsel to advise her. And it never advised Dooley that an attorney trained in criminal law could help prepare her case. *Id*. at 98.

Dooley couldn't have validly waived her right to counsel without proof she was adequately informed to understand the consequences of her actions. *People v. Rawson*, 97 P.3d 315, 323 (Colo. App. 2004). The court failed to provide Dooley with sufficient information to understand the gravity of waiving counsel. Nor did the court make any findings regarding Dooley's waiver of counsel. Because the court's inquiry inadequately established that Dooley was aware of the dangers and disadvantages of self-representation, she didn't validly waive her right to counsel. *Id*. at 319-22.

3. Reversal is required.

Since Dooley never waived her right to counsel, the court violated her right to counsel. *Arguello*, 772 P.2d at 97. Structural error therefore occurred and reversal is required. *Id*.

III. The court abused its discretion, violated Dooley's constitutional rights, and reversibly erred when it denied her request for a brief midtrial continuance so she could retrieve evidence.

A. Standard of review

Dooley requested a brief continuance, which the court denied. (TR 7/27/21, pp 146-51; 7/28/21, pp 52-74). This Court reviews a denial of a motion for continuance for an abuse of discretion. *People v. Brown*, 2014 CO 25, ¶19. Whether the court violated Dooley's constitutional rights is reviewed de novo. *People v. Ortega*, 2015 COA 38, ¶8.

B. Relevant facts

The court scheduled Dooley's trial for three days. (TR 7/27/21, p 15:9-10). The prosecution anticipated concluding trial early, (*id*. at 15:11-21), and Dooley's trial only lasted two days.

In opening statement, Dooley denied placing a tracking device on Kevin's car: "I did not track him. I've got it on voice mail where he said, yes, that he has my account numbers. He uses my email." (*Id*. at 105:8-11). During trial, Kevin denied purchasing or owning the tracking device and claimed he never saw it before. (*Id*. at 137-38). A juror asked Kevin: "Do you have access to [Dooley's] email accounts?" (*Id*. at 164:2-3). He replied, "[n]o[.]" (*Id*. at 164:4).

Dooley asked to recall Kevin because she didn't download a voicemail from her phone where Kevin "admits that he has [her] account information" for the credit card "used to purchase" the tracking device. (*Id*. at 146:21-25). She explained that she brought her phone to a shop last Friday and the voicemail should be downloaded and transcribed by "this afternoon[.]" (*Id*. at 147:5-15). She didn't subpoena Kevin because she was "learning last minute what to do and stuff." (*Id*. at 147:21-24).

The court reminded Dooley that it "h[e]ld [her] to the same standard as an attorney[.]" (*Id*. at 148:22-23). Dooley responded, "I'm doing the best I can." (*Id*. at 148:24-25). She blamed her lack of preparation on caring for her disabled brother "24/7[.]" (*Id*. at 149:1-5). The court took a brief recess so Dooley could ascertain when the voicemail would be ready. (*Id*. at 149-50). Dooley informed the parties that the voicemail would be available at "8:00 a.m." (*Id*. at 150:17-20). The court remarked, "[s]o you won't even make it here by 8:30." (*Id*. at 150:23-24). The court continued: "So what are you asking then?" (*Id*. at 151:2). Dooley said, "I could submit some of the paperwork that I have I guess."[4] (*Id*. at 151:3-4). The court, however, excluded this paperwork. (*Id*. at 151-60). Dooley therefore didn't ask

[4] The paperwork contained notes between Kevin and Dooley about their marriage disintegrating, Dooley taking "the fall for" Kevin, and Kevin praising Dooley's character. (TR 7/27/21, pp 148-60).

Kevin any questions. And the court didn't require the parties to appear until 8:45 a.m. the following morning. (*Id*. at 204:15-22).

The next day, Detective Kristen Donoho testified that the phone number, email address, user name, and credit card number attached to the account used to purchase the tracking device belonged to Dooley. (TR 7/28/21, pp 22-23).

Afterwards, Dooley stated that she wanted to testify but she requested a continuance "so that [she] could gather evidence in [her] favor regarding [Donoho's] testimony." (*Id*. at 52:5-9). She claimed that she didn't know what Donoho's testimony entailed and she had papers and voicemails from Kevin "that will help my defense." (*Id*. at 52-53). She insisted that the voicemails differed from the one discussed yesterday and they would prove Kevin "had information to purchase and to put things in my name[]" and he had access to her credit cards and email address. (*Id*. at 53-54). Because Dooley left this information at her house, she requested a brief two-and-a-half hour continuance to retrieve them. (*Id*.) She also renewed her request to pick up the voicemail that the parties discussed the previous day. (*Id*. at 54-55).

The prosecution objected, arguing this evidence "would be inadmissible hearsay." (*Id*. at 56:5-9). The court recognized "[a]rguably some [of the evidence] might be an inconsistent statement, but you haven't laid the proper foundation for

that inconsistent statement." (*Id*. at 58:20-22). Dooley requested time to research how to lay the proper foundation, but the court stated: "The only way for that to happen at this stage is a mistrial based upon who I understand you have subpoenaed." (*Id*. at 58-59). The court denied Dooley's request, finding a lack of "good cause for [Dooley] not to come to court prepared[.]" (*Id*. at 60:1-18). Dooley, however, only received the discovery information from the prosecution the day before trial. (*Id*. at 62-63).

After a brief recess, the court asked Dooley: "have you had enough time to decide if you want to testify and/or present evidence?" (*Id*. at 67:4-5). She responded, "I'm going to ask for a continuance or a mistrial either one so that I can gather that evidence on my behalf." (*Id*. at 67:6-9). The court denied her request. (*Id*. at 67-71).

Dooley didn't present this evidence, she didn't testify, and the court sustained any references to this proposed evidence in closing argument. (*Id*. at 105:6-13).

C. Law and analysis

A defendant has a right to confront and cross-examine witnesses against her. U.S. amend. VI, XIV; Colo. Const. art. II, §§16, 25; *Pointer v. Texas*, 380 U.S. 400, 403-04 (1965); *People v. Hampton*, 696 P.2d 765, 774 (Colo.1985). She also has the right to testify. *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972); *People v. Curtis*, 681

P.2d 504, 509-10 (Colo.1984); U.S. Const. amend. VI, XIV; Colo. Const. art. II, §25. Excluding "relevant and competent" defense evidence "is a severe sanction, implicating as it does the defendant's right to present a defense and ultimately the right to a fair trial." *Hampton*, 696 P.2d at 778. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§16, 25; *Morgan v. Illinois*, 504 U.S. 719, 727 (1992); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

When determining whether to grant a continuance, the court "must consider the peculiar circumstances of each case and balance the equities on both sides." *People v. Fleming*, 900 P.2d 19, 23 (Colo.1995). The court should consider the timeliness of the request, prejudice if the continuance is denied, whether a continuance will cure the prejudice, prejudice to the ready-to-proceed party, and whether a request for continuance was intended to delay the proceedings. *Johnson v. People*, 384 P.2d 454, 459 (Colo.1963); *People in the Interest of D.J.P.*, 785 P.2d 129, 132 (Colo.1990); *People v. Bakari*, 780 P.2d 1089, 1093 (Colo.1989).

Weighing these factors here, the court abused its discretion in denying Dooley's request for a continuance. Dooley's attorney withdrew from her case within two months of trial, and the court granted his withdrawal without applying the correct legal standard. Dooley maintained she couldn't afford new counsel and requested the assistance of a court-appointed attorney. The court, however, forced

Dooley to represent herself even though she never waived her right to counsel. And the prosecution only provided Dooley with a copy of the discovery information *one day* before trial.

Against this backdrop, Dooley asked for a brief continuance so she could collect defense evidence. She attributed this late request to being "handed this case so late[,]" she was "learning last minute what to do and stuff[,]" she cared for her disabled brother, she didn't anticipate Donoho's testimony, and she was "locked up" for six days before trial. (TR 7/27/21, pp 147-49; 7/28/21, pp 52-53, 63:3-4).

Although the timing of Dooley's request may not have been ideal, the court originally set aside three days for trial and her case concluded early. Dooley also could have retrieved one voicemail before court even started on the second day of trial. Thus, her motion to continue wouldn't have impeded the court's busy docket. Nor did Dooley's requested continuance delay the proceedings. To the contrary, she wanted her trial finished so she could "move on with [her] life[.]" (TR 7/26/21, p 8:5-9). Additionally, the brief continuance would have cured any prejudice to Dooley and enabled her to obtain defense evidence. And the prosecution never claimed it would suffer any prejudice.

The denial of Dooley's motion to continue substantially impaired her ability to present a defense, confront and cross-examine Kevin, and testify on her own

behalf. In *People v. Gagnon*, 703 P.2d 661, 662-63 (Colo. App. 1985), this Court found the court erred in denying the defendant's motion to continue his trial until after the victim's felony convictions became final. *Gagnon* recognized the defendant could have used the victim's convictions "for impeachment purposes." *Id*. at 663. In a menacing case, the victim's credibility was crucial "and the opportunity of the defendant to discredit that testimony was an essential part of his case." *Id*. Further, the "short continuance" wouldn't have prejudiced the prosecution or the court. *Id*. Thus, the defendant "sustained his burden of demonstrating substantial prejudice." *Id*.

Similarly here, Dooley requested a "short continuance" to obtain material impeachment evidence. The prosecution claimed the tracking device "goes back to [Dooley's] phone number. Goes back to her email. Her name is on the credit card that paid for it." (TR 7/27/21, p 101:22-24). And Kevin denied purchasing the tracking device, owning this device, and having access to Dooley's email accounts.

Dooley could have confronted Kevin with evidence showing he had access to her credit card accounts, usernames, email accounts, and phone number. Evidence showing that Kevin—rather than Dooley—purchased the tracking device would have undercut an element of stalking: whether Dooley placed Kevin under surveillance. (CF, pp 91-92). This evidence also would have cast doubt on whether

the remaining charged acts—leaving a note on Kevin's car, driving past him, and calling his phone—would cause a reasonable person to suffer serious emotional distress. As in *Gagnon*, Kevin's testimony was crucial and Dooley's opportunity to discredit his testimony was an essential part of her defense.

After laying the proper foundation, Dooley could have admitted Kevin's prior inconsistent statements as impeachment evidence or she could have testified and introduced them as substantive evidence. *People v. Saiz*, 32 P.3d 441, 445 (Colo.2001). The court agreed. While Dooley didn't place Kevin under subpoena, the court never released Kevin from the prosecution's subpoena. And Dooley—a *pro se* litigant—asked to "reserve to call" and "recall" Kevin. (TR 7/27/21, pp 145-51). The court could have permitted Dooley to recall Kevin, placed Kevin under Dooley's subpoena, or modified/extended the prosecution's subpoena. C.R.C.P. 45.

Because this evidence "might well have led to [Dooley's] acquittal, it follows that it was an abuse of discretion to deny [her] a continuance." *People v. McCabe*, 546 P.2d 1289, 1291 (Colo. App. 1975). Reversal is required.

IV. The court abused its discretion, violated Dooley's right to due process, and reversibly erred when it admitted pervasive other act and/or res gestae evidence.

A. Standard of review

The prosecution moved to admit prior bad act and/or res gestae evidence, (CF, pp 125-30), defense counsel objected and requested a hearing on the matter, (TR 3/9/21, pp 8:13-17, 14:6-7; 5/27/21, pp 6-8), and the court admitted the evidence, (TR 7/26/21, p 12:7-24). Dooley's request for a hearing and the court's ruling preserved this issue. *People v. McFee*, 2016 COA 97, ¶31. If this Court disagrees, then the plain error standard of review applies. *Hagos*, ¶14. "Plain error is obvious and substantial." *Id*.

This Court reviews evidentiary rulings and prosecutorial misconduct claims for an abuse of discretion. *Yusem v. People*, 210 P.3d 458, 463 (Colo.2009); *People v. Strock*, 252 P.3d 1148, 1152 (Colo. App. 2010). Whether the court's ruling violated Dooley's constitutional rights is reviewed de novo. *People v. Burlingame*, 2019 COA 17, ¶11.

B. Relevant facts

Pretrial motions

Defense counsel moved to dismiss Dooley's case on double jeopardy grounds, arguing Dooley stood convicted of the same conduct alleged here as in Park County Cases 2019CR97, 2019M318, and 2020M12. (CF, pp 95-96, 185-87). He likewise moved for a bill of particulars. (*Id*. at 94). The prosecution filed a bill of particulars, notice of intent to introduce res gestae and/or other act evidence, and a response to Dooley's motion to dismiss. (*Id*. at 125-30, 180-84, 208-13).

In its bill of particulars, the prosecution specified the following acts supported Counts 1-3:

- Dooley left notes on Kevin's car in July 2019;
- Dooley followed Kevin in February 2020;
- Dooley placed a tracking device on Kevin's car before February 29, 2020;
- Dooley called Kevin on May 5, 2020.

(*Id*. at 182-83).

The prosecution moved to introduce the following evidence as res gestae and/or other act evidence:

- Kevin filed for divorce from Dooley in Park County Case 2019DR33;

- Park County Incident Report #S19-0906: Dooley affixed a tracking device on Kevin's car before September 21, 2019, she left a note on Kevin's car on July 13, 2019, and she placed notes along Kevin's bus route;
- Park County Incident Report #S19-1176: Dooley sent Kevin an email on December 13, 2019, and attempted to call him;
- Lakewood Incident #LK19121770: When Kevin exited a meeting on July 21, 2019, Dooley shoved two notes down his shirt.

(*Id*. at 125-30, 132-37, 142-44, 172-79).

The prosecution alleged the divorce proceedings constituted res gestae evidence, Dooley's motive, and her lack of mistake or accident. (*Id*. at 129). It offered Incident #S19-0906 to show "a common scheme or plan, identity, motive and absence of mistake or accident." (*Id*.) Whereby Incident #S19-1176 showed Dooley's "identity and absence of mistake or accident." (*Id*.) And Incident #LK19121770 demonstrated "a common scheme or plan" and Dooley's awareness of Kevin's "typical locations." (*Id*.)

Additionally, the prosecution argued it relied on four "distinct occurrences comprising a separate set of conduct from Park County cases 2019CR97, 2019M318 and 2020M12." (*Id*. at 208-12). The prosecution specified those incidents in its bill of particulars.

The court denied Dooley's motion to dismiss, (*id*. at 217), but it never issued a written ruling on the prosecution's notice of intent to introduce res gestae and/or other act evidence.

Pretrial hearings

The parties repeatedly raised the prosecution's notice of intent to introduce res gestae and/or other act evidence at pretrial hearings. On March 9, 2021, defense counsel noted the parties "haven't dealt with the 404(b) motion by the prosecution" and requested a hearing on the matter. (TR 3/9/21, p 8:13-17). The court set one for May 27, 2021. (*Id*. at 14:6-10).

A different judge appeared at the May 27, 2021, hearing. Because defense counsel moved to withdraw from Dooley's case, he requested the CRE 404(b) motion "be argued by the public defender's office." (TR 5/27/21, p 4:14-21). The judge continued the motions hearing until July 2, 2021. (*Id*. at 10:10-11).

Dooley appeared *pro se* at the next hearing on June 21, 2021. The court vacated Dooley's motions hearing because "there are no motions filed." (TR 6/21/21, pp 5-6). Intervening, the prosecution stated: "I think that there was a motion filed, and it was legal argument on a 404(b) motion that had not been litigated." (*Id*. at 6:4-6). The court responded, "[w]e have had that argument whether or not that

was charge conduct or res gestae….It was all intertwined with a motion to dismiss on double jeopardy, some res gestae, and a written order." (*Id*. at 6-7).

The day before trial, the prosecution stated: "I just want to confirm that the Court did grant the 404(b) that was in the People's motion." (TR 7/26/21, p 12:7-12). The court recalled that it did, finding "there's portions of it that are res gestae and portions of it that were 404(b)." (*Id*. at 12:16-22).

Other act evidence elicited at trial

Starting with opening statement, the prosecution directed the jury's attention to the other act evidence. (TR 7/27/21, pp 99-100, 102-03). On direct-examination, Kevin testified extensively about uncharged misconduct. For instance, he discussed how Dooley left him "derogatory" signs on his bus route, he found a tracking device belonging to Dooley near his car in September 2019, he discovered a note Dooley wrote for him on their bathroom mirror, and Dooley sent him "vulgar" and "threatening" text messages. (*Id*. at 109-28).

The prosecution also introduced Dooley's emails to Kevin from July 5, 2019, until December 27, 2019. (EX 17, pp 34-68). One email provided: "l will find you wherever you go. I DON'T GIVE UP NO MATTER WHAT THE OBSTACLES." (*Id*. at 65). It likewise admitted an email dated October 10, 2019, from Dooley to

Kevin and another man stating, "[l]et's see how you two like being threatened to do something or else." (EX 3, p 3).

The prosecution then called a witness to testify about how he found a tracking device near Kevin's car in September 2019. (TR 7/27/21, pp 171-81). Additionally, Kevin's and Dooley's daughter, Raeleigh Spencer, testified about an incident where Dooley came to her door on July 13, 2019, and "yelled profanities[.]" (*Id*. at 187-92). She also received "nasty" messages from Dooley that made her "worried" about her family's safety. (*Id*. at 191-92). She attempted to get a protection order against Dooley. (*Id*. at 191:10-12). Spencer further claimed Dooley's friends "looked a little rough[.]" (*Id*. at 194-95). She discussed another incident where she took Kevin's car to Bear Creek Lake and Dooley "hounded" Kevin for being at the lake "even though he was not there." (*Id*. at 193-94). And she alleged "things would go missing from [her] house" like money. (*Id*. at 195:7-9).

Donoho likewise testified that Dooley repeatedly called Kevin in February 2020. (TR 2/28/21, pp 29-34). Donoho also spoke with officers from other police departments to confirm Kevin's past "reports" and learn about "any prior history" between Dooley and Kevin. (*Id*. at 36-37). Through Donoho, the prosecution introduced Exhibit 8, which showed that in Park County Case No. 2019CR97, the prosecution charged Dooley with stalking—emotional distress. (*Id*. at 38-40; EX 8,

p 9). She pled guilty to harassment and the court sentenced her to probation and domestic violence treatment. (*Id*.)

At the conclusion of trial, the court gave the following limiting instruction:

> You have heard evidence of a tracking device and contact between Kevin Dooley and the Defendant in Park County. You have also heard evidence of contact between Kevin Dooley and the Defendant in Lakewood at a meeting.
>
> This evidence was presented for the purpose of showing a common scheme or plan, lack of mistake, and identity of the Defendant only. You may not consider it for any other reason.

(CF, p 385).

The prosecution likewise referenced the other act evidence in closing argument. (TR 7/28/21, pp 96-97, 100-02).

C. Law and analysis

Due process guarantees every defendant the right to a fair trial by an impartial jury. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§16, 23, 25; *Morgan*, 504 U.S. at 727; *Oaks v. People*, 371 P.2d 443, 447 (Colo.1962). "A jury that has been misled by inadmissible evidence or argument cannot be considered impartial." *Harris v. People*, 888 P.2d 259, 264 (Colo.1995).

Other act evidence isn't admissible to prove a person's character to show that on a particular occasion the person acted in conformity therewith. CRE 404(b). Our

supreme court has devised the following test to determine the admissibility of other act evidence: whether the proffered evidence relates to a material fact; whether the evidence is logically relevant; whether the logical relevance is independent of the impermissible propensity inference; and whether the probative value isn't substantially outweighed by the danger of unfair prejudice. *People v. Spoto*, 795 P.2d 1314, 1318 (Colo.1990); §18-6-801.5, C.R.S.

Here, the court erred in admitting this other act evidence for the following reasons:

1. *The court abused its discretion by failing to hold a hearing on the admissibility of the other act evidence.*

In *People v. Groves*, 854 P.2d 1310, 1313 (Colo. App. 1992), this Court concluded that a court need not hold an evidentiary hearing on the admissibility of other act evidence. A court, however, must consider all of the evidence and decide whether the defendant committed the act. *Id*. *Groves* concluded that where the parties presented evidence, and the court considered the evidence and made the requisite *Spoto* findings, the court didn't abuse its discretion in declining to hold an evidentiary hearing. *Id*.

Here, unlike *Groves*, the court didn't allow Dooley to present evidence despite her requests for a hearing, it considered no evidence, and it made no *Spoto* findings. Indeed, the court vacated the motions hearing because it erroneously believed the

parties had "argument [regarding] whether or not that was charge conduct or res gestae." (TR 6/21/21, pp 5-7). The court's refusal to hold a hearing—where it set one and believed the hearing occurred—was manifestly arbitrary, unreasonable, and unfair.

2. The court abdicated its gatekeeping function.

While this Court affords deference to a court's evidentiary determinations, appellate courts "may not simply accept the lower court's rulings in all circumstances." *People v. Welsh*, 80 P.3d 296, 304 (Colo.2003). A court should explain how the evidence is relevant and "to what extent that probative value might be outweighed by any unfair prejudice to the defendant. Where a trial court fails to adequately perform this gate-keeping task, [appellate courts] may overturn its decision as an abuse of discretion." *Id*. (internal citations omitted).

Here, the court didn't consider whether the other act evidence occurred, the relevancy of this evidence, whether the evidence's probative value was substantially outweighed by unfair prejudice, or the admissibility of the evidence under *Spoto*. The court abused its discretion by failing to adequately perform its gatekeeping task.

3. *The court abused its discretion in admitting other act evidence despite the prosecution never seeking to admit this evidence, presenting an offer of proof, or obtaining a ruling.*

The prosecution's notice of intent failed to include numerous instances of uncharged misconduct introduced at trial, including:

- Dooley wrote Kevin a note on their bathroom mirror;
- Dooley sent Kevin "vulgar" and "threatening" text messages;
- Dooley sent "disturbing" emails to Kevin;
- Dooley emailed Kevin and another man on October 10, 2019;
- Dooley came to Spencer's door on July 13, 2019, and "yelled profanities";
- Dooley sent "nasty text messages and Facebook messages" to Spencer;
- Spencer became concerned with her and her children's safety and attempted to obtain a protection order against Dooley;
- Dooley associated with friends who were "rough around the edges";
- Dooley tracked Kevin's car to Bear Creek Lake;
- Dooley took money from Spencer's home;
- Dooley called Kevin in February 2020;
- Donoho confirmed Kevin's prior "reports" against Dooley.

The court admitted this uncharged misconduct even though the prosecution never sought to admit this evidence, presented an offer of proof, or obtained a ruling.

People v. Fortson, 2018 COA 46M, ¶22. The irrelevant and inflammatory evidence implied Dooley's bad character, failed the *Spoto* test, and wasn't tempered by any limiting instruction. The prosecution never articulated an evidentiary hypothesis for admissibility and the court made no requisite *Spoto* findings. The court's admission of Dooley's uncharged misconduct without exercising any discretion constituted an abuse thereof. *People v. Hardin*, 2016 COA 175, ¶30.

4. The court abused its discretion in admitting the other act evidence under the res gestae doctrine.

Because the court abdicated its gatekeeping role, the basis for admitting the other act evidence remains unclear. Nonetheless, the court recalled admitting "most" uncharged misconduct under the res gestae doctrine. (TR 7/26/21, p 12:16-22).

Our supreme court, however, has abolished the res gestae doctrine. *Rojas v. People*, 2022 CO 8, ¶¶4, 24. When determining the admissibility of uncharged misconduct, a court "must first determine if the evidence is intrinsic or extrinsic to the charged offense." *Id*. ¶52. If the other act evidence is intrinsic, then the court must evaluate the evidence under CRE 401-403. *Id*. But if the extrinsic evidence suggests the defendant's bad character, then it's only admissible under CRE 404(b). *Id*.

Here, the court erred in admitting the uncharged misconduct as res gestae. The court should have determined whether the uncharged misconduct was intrinsic or

extrinsic to the charged offense. None of the uncharged misconduct here directly proved the charged offenses or was contemporaneous therewith. Because the uncharged misconduct was extrinsic to the charged crimes and invited a propensity inference, CRE 404(b) governed its admission. *Rojas*, ¶54. The court therefore abused its discretion by admitting the evidence without the required *Spoto* analysis.

5. The court abused its discretion in admitting the other act evidence under CRE 403.

Courts should exclude other act evidence if its probative value is substantially outweighed by the danger of unfair prejudice. *Yusem*, 210 P.3d at 467-69. "When character evidence is offered to show action in conformity therewith, this danger substantially outweighs its probative value for this purpose." *Id*. at 468 (internal quotation omitted).

Here, the logical relevance of the other act evidence depended upon a prohibited propensity inference, a fact determinative of the CRE 403 inquiry. *Id*. *See* subsection (9). Assuming this evidence had some relevance, its probative value was substantially outweighed by the danger of unfair prejudice. The prosecution heavily relied upon Dooley's uncharged misconduct to prove her guilt. It repeatedly referenced the other act evidence in opening statement. (TR 7/27/21, pp 99-100, 102-03). It admitted thirty-five pages of exhibits dedicated to Dooley's uncharged misconduct. (EX 2, p 3; EX 17, pp 34-68). Numerous witnesses testified about other

act evidence. (TR 7/27/21, pp 109-28, 171-95; 7/28/21, pp 9-34, 36-37). And the prosecution used this evidence in closing to argue Dooley's guilt. (TR 7/28/21, pp 90:22-23, 94-95, 97:3-25, 100-02, 109-10).

By devoting such a significant time to Dooley's uncharged misconduct, the prosecution "simply flood[ed] the courtroom with other-crimes evidence[.]" *United States v. Chaimson*, 760 F.2d 798, 813 (7th Cir. 1985) (Cudahy, J., concurring). The prosecution "creat[ed] a sideshow and sen[t] the trial off track." *Duran v. Town of Cicero, Ill.*, 653 F.3d 632, 645 (7th Cir. 2011). Because the danger of unfair prejudice substantially outweighed the probative value of this pervasive evidence, the court abused its discretion in admitting it.

6. The court erred in failing to give a contemporaneous limiting instruction.

"Upon admitting evidence of other acts or transactions into evidence" the court "shall direct the jury as to the limited purpose for which the evidence is admitted and for which the jury may consider it." §18-6-801.5(5). A contemporaneous limiting instruction is required because other act "evidence tends to create a prejudice in the minds of the jury[.]" *Stull v. People*, 344 P.2d 455, 459 (Colo.1959)(internal quotation omitted).

The domestic violence other act statute mandates that courts give a contemporaneous limiting instruction. The court didn't do so. Given the

pervasiveness of the other act evidence admitted during trial, the jury likely formed prejudices against Dooley before receiving the final instructions.

7. The limiting instruction given to the jury at the conclusion of trial was deficient.

The court "should repeat the limited-purpose instruction in its general charge to the jury at the conclusion of the evidence." *People v. Garner*, 806 P.2d 366, 374 (Colo.1991); §18-6-801.5(5).

Here, the court told the jury that it could only consider evidence about "a tracking device and contact between Kevin Dooley and the Defendant in Park County" and "contact between Kevin Dooley and the Defendant in Lakewood at a meeting" for the enumerated limited purposes. (CF, p 385). This limiting instruction, however, failed to limit the jury's consideration of the uncharged misconduct detailed in subsection (3). Because the limiting instruction didn't cover all of the other act evidence, the jury likely used Dooley's uncharged misconduct to infer her bad character. Thus, the limiting instruction didn't mitigate the harm.

8. The court erred in admitting Dooley's prior conviction with no accompanying safeguards.

Evidence of a defendant's prior conviction is generally inadmissible because of its highly prejudicial effect. *Harper v. People*, 817 P.2d 77, 85 (Colo.1991). "Even in the limited circumstances permitting admission of prior convictions…stringent

standards apply and cautionary instructions must accompany the introduction of such prior convictions." *Id*.

Here, the court erred in admitting Dooley's Sentence Order from Park County Case No. 19CR97 because it revealed that she plead guilty to harassment after being charged with the same crime alleged here—stalking. (EX 8, p 9). This conviction likely caused jurors to believe that Dooley had a propensity to commit the charged crime. The court therefore abused its discretion in admitting Dooley's conviction without accompanying safeguards.

9. The court abused its discretion by permitting the prosecution to use the other act evidence for propensity.

If the prosecution admits other act evidence, it cannot "exploit [the prohibited propensity] inference but must restrict its use of the evidence to the purposes for which it was admitted." *Yusem*, 210 P.3d at 464 n.8 (internal quotation omitted).

Here, although the court purportedly admitted the other act evidence to show a common scheme or plan, lack of mistake, and Dooley's identity, (CF, p 385), the prosecution used this evidence for a propensity purpose in opening statement:

> Order after order no contact, no surveillance. Tracking device in Park County. Tracking device in Douglas County. Phone call, phone call, phone call. A whole bunch of emails too. You'll get to see the emails that she sent to him through this span from July of 2019 all the way through.

(TR 7/27/21, p 103:14-20). The prosecution contended that because Dooley tracked and called Kevin in violation of a protection order before, she did so here. The court abused its discretion in permitting the prosecution to exploit the prohibited propensity inference.

D. Prejudice

Because the court admitted unduly prejudicial and pervasive other act evidence without contemporaneous limiting instructions, this evidence violated Dooley's right to due process. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *People v. Butler*, 224 P.3d 380, 386 (Colo. App. 2009).

If a constitutional violation occurred, then the constitutional harmless error analysis applies. *Hagos*, ¶11. Reversal is required unless the error was harmless beyond a reasonable doubt. *Id*. If this court disagrees, reversal is required if the error affects the substantial rights of the parties. *Yusem*, 210 P.3d at 469-70. The prosecution must prove harmlessness. *Hagos*, ¶11; *James v. People*, 2018 CO 72, ¶19.

Individually and cumulatively, the errors deprived Dooley of her right to a fair trial by an impartial jury and require reversal of her convictions. The evidence against Dooley wasn't overwhelming and she contested calling Kevin on May 5, 2020, and placing a tracking device on his car. Absent the admission of this

pervasive uncharged misconduct, it was unlikely the jury would have found the charged acts would cause a reasonable person to suffer serious emotional distress. The prosecution also heavily relied upon the other act evidence to prove Dooley's guilt.

If this Court determines plain error review applies, then the errors were substantial for the reasons discussed above. The errors were likewise obvious under Colorado case law, *e.g.*, *Yusem*, *supra*, *Fortson*, *supra*, and statutory authority, CRE 404(b), §18-6-801.5(5). Reversal is required.

V. The court's instructions and the prosecution's closing argument, which failed to specify the acts relied upon in the bill of particulars, violated Dooley's rights to notice of the charges against her and to a unanimous verdict, and warrant reversal of her convictions.

A. Standard of review

Whether an instruction subjected a defendant to the risk of conviction for an uncharged offense is reviewed de novo. *People v. DeGreat*, 2018 CO 83, ¶15. This Court likewise reviews de novo whether the court had to give a unanimity instruction. *People v. Torres*, 224 P.3d 268, 278 (Colo. App. 2009). Because Dooley didn't object, the plain error standard of review applies. *Hagos*, ¶14.

B. Relevant facts

Dooley incorporates the facts from Issue IV here. The prosecution charged Dooley with stalking and two counts of violation of a protection order between July 23, 2019, and May 5, 2020. (CF, pp 91-93). It likewise filed a bill of particulars specifying the four acts it relied upon for conviction. (*Id*. at 182-83).

At trial, the prosecution admitted thirty-four pages of Dooley's emails to Kevin from July 5, 2019, until December 27, 2019. (TR 7/27/21, pp 120-28; EX 17, pp 34-68). Kevin claimed he had "difficult[ly]" reliving some of the emails during trial because they were "very disturbing[.]" (TR 7/27/21, pp 123-28). The prosecution asked Kevin: "All the phone calls, all the emails, trackers, contact, the driving by with the car, are all those actions things that as far as you understand are prohibited by those protection orders?" (*Id*. at 144:21-25). He replied, "[y]es[.]" (*Id*. at 145:1).

The instructions informed the jury that Dooley was "charged with committing the crimes of Stalking – Emotional Distress and Violation of a Protection Order, in Douglas County, Colorado, between and including July 23, 2019 and May 5, 2020." (*Id*. at 378). The court told the jury they could use "evidence of a tracking device and contact between Kevin Dooley and the Defendant in Park County[]" and "evidence of contact between Kevin Dooley and the Defendant in Lakewood at a

meeting[]" for the enumerated limited purposes. (*Id*. at 385). No modified unanimity instruction was given.

During closing, the prosecution argued Dooley was guilty based on her emails to Kevin:

- "Did she accidentally do something? She accidentally sent him all those emails. Did she accidentally call him? Did she accidentally drop a tracker underneath his car? No." (TR 7/28/21, p 90:21-25).
- "We've also got a whole bunch of emails that have already started and are continuing. A whole bunch of emails. That's that protection order. No contact." (*Id*. at 97:14-17).
- "Those emails they're still coming[]"after Dooley's and Kevin's divorce was finalized on September 27, 2019. (*Id*. at 97:18-25).
- "Those emails are still coming[]" after the second protection order issued on November 14, 2019. (*Id*. at 98:1-6).

The jury verdict forms didn't specify which acts the jury relied upon for conviction. (CF, pp 367-73).

C. Law and analysis

A defendant has the right to be notified of the charges against him. *People v. Madden*, 111 P.3d 452, 455 (Colo.2005); U.S. Const. amends. VI, XIV; Colo. Const.

art. II, §§16, 25. A defendant also has the right to a jury trial and a unanimous verdict. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *Duncan v. La.*, 391 U.S. 145, 147-50 (1968); *Griego v. People*, 19 P.3d 1, 7 (Colo.2001); Crim.P. 23(a)(8); Crim.P. 31(a)(3); §16-10-108, C.R.S. And a defendant has a right to present a defense. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§16, 25; *Crane*, 476 U.S. at 690; *Hampton*, 696 P.2d at 778.

A bill of particulars "enable[s] the defendant to properly prepare his defense in cases where the indictment…is nonetheless so indefinite in its statement of a particular charge that it does not afford the defendant a fair opportunity to procure witnesses and prepare for trial." *People v. Dist. Court*, 603 P.2d 127, 129 (Colo.1979). "[T]he facts expected to be proven by the prosecution must be divulged in the bill of particulars, and proof at trial is thereby limited to those facts." *People v. Stratton*, 677 P.2d 373, 376 (Colo. App. 1983).

1. *A simple variance occurred because the prosecution's evidence proved facts materially different from those in the bill of particulars.*

An information must sufficiently advise a defendant of the charges against him "so that he can adequately defend himself and be protected from further prosecution for the same offense." *People v. Rodriguez*, 914 P.2d 230, 256-57 (Colo.1996). "The prosecution cannot constitutionally require a defendant to answer

a charge not contained in the charging instrument." *Id*. at 257. A simple variance "occurs when the evidence presented at trial proves facts materially different from those alleged in the charging document." *People v. Smith*, 2018 CO 33, ¶25.

In *People v. Simmons*, 973 P.2d 627, 628-30 (Colo. App. 1998), a simple variance occurred where the defendant was charged with menacing his sister's boyfriend, the prosecution alleged in closing he menaced his mother *or* his sister's boyfriend, and the instruction generally provided that he menaced "another person." Because "of the prosecutor's comments in closing and the general nature of the jury instruction on felony menacing, it [wa]s impossible to determine whether the jury unanimously agreed as to a particular victim." *Id*. at 630. Further, the general instruction allowed the jury to conclude the defendant menaced his sister's boyfriend *or* his mother "and the prosecutor's comments, in effect, invited the jury to convict without regard to the identity of the victim." *Id*. Plain error therefore occurred. *Id*.

Here, similar to *Simmons*, a simple variance occurred because the prosecution limited its proof to four acts in the bill of particulars, (CF, pp 182-83), the prosecution intimated during closing that Dooley was guilty of these four acts *plus* other uncharged misconduct (emails Dooley sent Kevin), (TR 7/28/21, pp 90:21-25, 97:14-25, 98:1-6, 101:19-20), and the general instructions didn't clarify which acts the jury could rely upon for conviction, (CF, pp 389-90). Nor did the limiting

instruction ameliorate this issue because the prosecution didn't elucidate whether these emails occurred in Park County or Lakewood. (CF, p 385).

Thus, the prosecution's argument and the elemental instructions expanded the acts specified in the bill of particulars. As in *Simmons,* "it is impossible to determine whether the jury unanimously agreed as to" a particular act and/or acts which supported Dooley's convictions. *Simmons,* 973 P.2d at 630. Since the allegations Dooley faced materially differed from the allegations in the bill of particulars, this error violated her right to notice of the charges against her.

2. The court erred in failing to ensure Dooley's verdict was unanimous.

A court must ensure "the jury is properly instructed on the law and that a conviction on any count is the result of a unanimous verdict." *People v. Rivera*, 56 P.3d 1155, 1160-61 (Colo. App. 2002). When "the prosecution presents evidence of multiple discrete acts, any one of which would constitute the offense charged, and there is a reasonable likelihood that jurors will disagree regarding which act was committed," the court may compel the prosecution to selection the transaction on why it relies for conviction. *People v. Archuleta*, 2020 CO 63M, ¶21. Alternatively, the court must instruct the jury that to convict the defendant they must unanimously agree that the defendant committed the same act/acts included within the period charged. *Id*. ¶22.

When determining whether the jury's verdict violated Dooley's right to a unanimous verdict, this Court must consider whether the evidence was sufficient to support distinct and separate acts. *Quintano v. People*, 105 P.3d 585, 590-92 (Colo.2005). Relevant factors include whether the prosecution treated Dooley's acts as legally separable, whether the acts occurred at different locations or were separated by intervening events, and whether the acts constituted a "new volitional departure in his course of conduct." *Id*. at 592.

Here, the prosecution advanced *twenty* distinct and separate acts as proof of the stalking and violation of a protection order charges: the four acts specified in the bill of particulars and the sixteen emails Dooley sent Kevin during the charged date range. The prosecution treated these acts as legally separable. (TR 7/28/21, pp 91:2-20, 95:20-22). Different evidence supported each act; most acts occurred during separate months in distinct locations. And Dooley formed a new volitional intent with each act. Thus, each of the twenty acts could, itself, constitute the sole basis for the charged offenses.

The court, however, never gave a modified unanimity instruction nor did it require the prosecution to make an election. The jury's verdict doesn't reflect what act and/or acts formed the basis for the convictions. Without a modified unanimity instruction or an election, the jury could have convicted Dooley while disagreeing

about which act and/or acts constituted the basis for stalking and the violation of a protection orders. The court therefore violated Dooley's statutory and constitutional rights.

D. Prejudice

The simple variance and unanimity errors were obvious under clear statutory authority and Colorado case law. *See Simmons, supra*; *People v. Devine*, 74 P.3d 440, 443 (Colo. App. 2003); §16-10-108; Crim.P. 23(a)(8); Crim.P. 31(a)(3).

The errors were likewise substantial. It is impossible to determine whether the jury unanimously agreed as to an act and/or acts of contact, surveillance, communication, etc. Some jurors, based upon the prosecution's closing argument, may have found Dooley guilty solely based on her emails to Kevin (all uncharged acts). While Dooley mounted a defense against the phone calls on May 5, 2020, and she attempted to show she didn't purchase the tracking device, she had no defense to the emails. And the jury likely relied upon Dooley's emails when finding that her acts caused Kevin serious emotional distress because he became visibly upset when "reliv[ing]" them. (TR 7/27/21, p 128:5-9). Reversal is required.

CONCLUSION

Dooley requests this Court reverse her convictions.

MEGAN A. RING
Colorado State Public Defender

JULIA CHAMBERLIN, #47181
Deputy State Public Defender
Attorneys for Shari Dooley
1300 Broadway, Suite 300
Denver, Colorado 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on August 9, 2022, a copy of this Amended Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Jillian J. Price of the Attorney General's office through their AG Criminal Appeals account.