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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Douglas County District Court
Honorable Theresa Slade, Judge
Case No. 20CR0671

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

SHARI DOOLEY,

Defendant-Appellant.

▲ **COURT USE ONLY** ▲

Case No. 21CA1946

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PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief does not comply with C.A.R. 28(g) or C.A.R. 28.1 because it exceeds the word and/or page limit. *However*, the brief complies with this Court's order dated July 22, 2022, which permitted an Answer Brief containing up to 11,000 words.

It contains **10,996** words.

The brief complies with the standard of review requires set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

> In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32.

/s/ Jacob R. Lofgren

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STATEMENT OF THE CASE AND OF THE FACTS

Shari Leigh Dooley, the defendant, stalked and harassed her ex-husband (K.D.) in Douglas County over the course of several months from July 23, 2019, to May 5, 2020. Specific to this case, Dooley: (1) left a letter on K.D.'s vehicle in July 2019; (2) placed a tracking device on K.D.'s vehicle which was found on February 29, 2020; (3) followed and waved at K.D. and a friend as they walked to lunch in February 2020; and (4) called K.D. on May 5, 2020 (TR 7/27/2021, pp 108-09, 114-16, 128-45, 166-70, 183-91; TR 7/28/2021, pp 14-47).

Dooley was charged with: (1) stalking; (2) violation of a criminal protection order; and (3) violation of a civil protection order. All counts were charged as acts of domestic violence (CF, pp 1-2, 10-11, 91-93).

A jury convicted Dooley as charged and found each act was an act of domestic violence (CF, pp 367-73; TR 7/28/2021, pp 116-20). The trial court imposed a controlling six-year sentence to be served in community corrections (CF, p 438; TR 10/18/2021, pp 23-28).

SUMMARY OF THE ARGUMENT

First, the trial court properly allowed Dooley's privately retained attorney to withdraw. Dooley was aware of counsel's request and the reasons for it, and she never indicated any objection to it.

Second, the trial court properly advised Dooley before permitting her to represent herself at trial. Dooley indicated she did not intend to retain a new attorney; she told the court that she intended to represent herself; and she gave appropriate responses when the trial court gave her a thorough *Arguello*[1] advisement.

Third, the trial court properly denied Dooley's midtrial request for a continuance after she failed to articulate which specific items that she wished to retrieve from her home and failed to provide a legal basis to support the admissibility of these unspecified information.

Fourth, the trial court properly admitted other act evidence at trial for limited purposes consistent with CRE 404(b). The court also

[1] *People v. Arguello*, 772 P.2d 87 (Colo. 1989).

properly instructed the jury on the limited purposes for that evidence. And the prosecution did not misuse that evidence in opening statement.

Fifth, the prosecution's use emails sent by Dooley to K.D. did not result in a simple variance between the charging document and the charges proved at trial, and there was no lack of jury unanimity in the verdicts after the prosecution proved a continuous course of conduct supporting a conviction for stalking.

ARGUMENT

I. The trial court did not violate Dooley's right to her counsel of choice.

Dooley asserts the trial court abused its discretion when it allowed her privately retained counsel to withdraw before trial (OB, pp 7-12).

A. Review is for an abuse of discretion.

As Dooley appears to acknowledge, she did not preserve this issue (*see* OB, p 7). Indeed, Dooley never objected at any point; rather, she waived her right to counsel (*see* Argument II).

The People agree that this Court reviews "a trial court's ruling on an attorney's motion to withdraw for an abuse of discretion." *People v. DeAtley*, 2014 CO 45, ¶13. "To constitute an abuse of discretion, the trial court's decision must be manifestly arbitrary, unreasonable, or unfair." *Id.* "A trial court also commits an abuse of discretion by misapplying the law." *People v. Maestas*, 199 P.3d 713, 716 (Colo. 2009).

To the extent it is at issue, "[w]hether the trial court applied the correct legal standard in ruling on defense counsel's motion to withdraw is a question for de novo appellate review." *DeAtley*, ¶13.

B. Relevant background.

Privately retained defense counsel entered his appearance on August 3, 2020 (CF, p 30). Counsel represented Dooley over the next several months, including through Dooley's various failures to appear, arrests, and bond revocations (*see, e.g.,* TR 1/7/2021; TR 1/11/2021; TR 1/19/2021; TR 3/1/2021; TR 3/9/2021; TR 3/10/2021; TR 4/19/2021).

On March 9, 2021, after Dooley left mid-hearing, counsel noted his difficulty communicating with her, stating: "There's nothing else I can do without Ms. Dooley being here. . . . I'm between a rock and a hard place too in dealing with an unruly client" (TR 3/9/2021, p 17:6-11).

A few months later (on May 27, 2021), defense counsel moved to withdraw, explaining "that circumstances have developed in the course of representation that have caused an irremediable breakdown in the attorney client relationship which prevents undersigned counsel from providing effective assistance of counsel" (CF, p 253). On that same date, defense counsel appeared for a hearing and advised the court (presided over by a senior judge) of the pending motion to withdraw,

and the court noted that it would leave that motion for consideration by the judge assigned to the case (TR 5/27/2021, pp 3-10).

On June 8, 2021, Dooley appeared in court following her arrest on an outstanding warrant (TR 6/8/2021, pp 3-8). At that hearing, a public defender appeared with Dooley, who was in custody (TR 6/8/2021, pp 3-4). The public defender noted retained counsel's pending motion to withdraw (TR 6/8/2021, pp 3-4). The trial court granted that motion (TR 6/8/2021, pp 3:24-4:1; *see* CF, p 262 (stamped "GRANTED")).

Following that hearing, Dooley posted bond; she applied for the public defender but did not qualify (TR 6/21/2021, pp 3-7; TR 6/28/2021, pp 3-6; TR 7/12/2021, pp 3-4). When asked her intention, Dooley said: "I guess I'm representing myself" (TR 7/12/2021, p 3:22-23). Hearing that, the court provided an *Arguello* advisement, and Dooley proceeded without counsel from that point on (TR 7/12/2021, pp 3-9).

Two weeks later (at trial readiness), Dooley announced she was ready to proceed to trial, and she even stipulated to the admission of certain evidence in order to avoid a continuance (TR 7/26/2021, pp 3-11).

Dooley represented herself at trial (TR 7/27/2021; TR 7/28/2021).

C. The trial court properly granted retained counsel's motion to withdraw.

"The right to counsel is guaranteed by the Sixth Amendment to the U.S. Constitution." *DeAtley*, ¶14 (citing U.S. Const. amend. VI). "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." *Id.* (citing *King v. People*, 728 P.2d 1264, 1268 (Colo. 1986)). "A defendant also has the constitutional right to self-representation." *Id.* (citing Colo. Const. art. 2, § 16; *Arguello*, 772 P.2d at 92).

The right to select an attorney of choice is central to the adversary system and of substantial importance to the judicial process, and thus, "[t]his choice is afforded great deference." *Id.*, ¶15 (citations omitted); *see Anaya v. People*, 764 P.2d 779, 781 (Colo. 1988). That said, "the right to an attorney of choice is not absolute[,]" and, "under certain circumstances, this right must give way to other important considerations[.]" *DeAtley*, ¶15 (citations omitted).

Where, as here, an attorney moves to withdraw from a criminal case, the request is governed by Crim. P. 44. *People v. Cardenas*, 2015 COA 95M, ¶8 (citing *DeAtley*, ¶13). "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.' " *DeAtley*, ¶15 (quoting Crim. P. 44(c)).

"Pursuant to Crim. P. 44(d)(2), '[n]o hearing shall be conducted without the presence of the defendant unless the motion [to withdraw] is made subsequent to the failure of the defendant to appear in court as scheduled.' " *Cardenas*, ¶12 (quoting Crim. P. 44(d)(2)).

Here, Dooley contends that: (1) privately retained counsel's motion to withdraw was insufficient on its face; and (2) the trial court failed to hold a hearing on that motion (OB, pp 11-12).

Initially, the People acknowledge that privately retained counsel's motion did not strictly comply with Crim. P. 44(d)(1), and that the court did not hold a specific hearing on the motion. Nevertheless, the motion advised Dooley that retained counsel wished to withdraw and explained

the grounds for that request (*see* CF, p 253).[2] And when the motion was referenced at two hearings in Dooley's presence, she never objected to it (*see* TR 5/27/2021, pp 3-10; TR 6/8/2021, pp 3-4).[3] In fact, Dooley never objected to counsel's request to withdraw at any time or indicated that she wanted retained counsel to remain on the case.[4] Moreover, when the court granted the motion on June 8, 2021, Dooley was in custody *and was represented by the public defender* (TR 6/8/2021, pp 3-4).

On this record, Dooley has failed to establish that the trial court erred by granting privately retained counsel's motion to withdraw.

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[2] The motion noted an "irremediable breakdown in the attorney client relationship" (CF, p 253), which was consistent with counsel's earlier comment that he was "between a rock and a hard place too in dealing with an unruly client" (TR 3/9/2021, p 17:6-11).

[3] The court did not grant the motion to withdraw on the eve of trial; rather, the motion was granted on June 8, 2021. Dooley's trial began *several weeks later* on July 27, 2021. *Compare People v. Schulteis*, 638 P.2d 8, 10, 13 (Colo. 1981), *with People in the Interest of M.M.*, 726 P.2d 1108, 1121 (Colo. 1986).

[4] Dooley had ample time to voice an objection to counsel's withdrawal before trial, but she never did so. Instead, when Dooley discussed her desire to be represented, she noted efforts to retain another attorney, and her desire to get the case behind her (*see, e.g.,* TR 6/21/2021, pp 3-7; TR 6/28/2021, pp 3-6; TR 7/12/2021, pp 3, 8-9; TR 7/26/2021, pp 3-10).

Arguing the contrary, Dooley relies on *Cardenas* (OB, pp 11-12). But what happened here is not what happened there, let alone "[w]orse than [what occurred] in *Cardenas*" (*see* OB, p 11). There, when retained counsel moved to withdraw, the defendant objected, and, when the court then considered the request, it did so in chambers outside the presence of the defendant. *Cardenas*, ¶¶5-7.

Here, by contrast, Dooley never objected to her counsel's request to withdraw, and the court's consideration of counsel's motion occurred in the courtroom, albeit in a limited fashion. And contrary to her claim that she "wasn't present to object" (OB, p 11), Dooley attended hearings where the motion was referenced, including when the court granted the motion (*see* TR 5/27/2021, pp 3-10; TR 6/8/2021, pp 3-4). Beyond that, Dooley eventually waived her right to counsel in order to get to trial as soon as possible (*see* Argument II).

Accordingly, *Cardenas* is distinguishable and does not dictate the result here.

II. The trial court properly found Dooley waived her right to counsel.

Dooley asserts the trial court erred in finding she waived her right to counsel (OB, pp 13-20).

A. This Court defers to the trial court's findings of fact but assesses the trial court's legal conclusions de novo.

The People disagree that this issue was preserved (*see* OB, p 13). Dooley never objected during the *Arguello* advisement, and she did not ask for more time to retain private counsel; rather, she said she would represent herself, and indicated a desire to move forward quickly, even objecting to the prosecution's request for a continuance (*see* TR 7/12/2021, pp 3:7-23, 7:21-9:4; TR 7/26/2021, pp 3-13).

The People agree that whether a defendant effectively waived the right to counsel is a mixed question of fact and law. *People v. Lavadie*, 2021 CO 42, ¶22. This Court "accept[s] the trial court's findings of historic fact if those findings are supported by competent evidence, but [it will] assess the legal significance of the facts de novo." *People v. Coke*, 2020 CO 28, ¶10 (quoting *People v. Davis*, 2019 CO 24, ¶14).

B. Relevant background.

After Dooley's privately retained counsel withdrew, she applied for a public defender, but she failed to qualify because her income was too high (TR 7/12/2021, p 3:7-9). Further, the court denied Dooley's request for a state paid professional (JDF 208), which showed she possessed $56,000 in assets and had a monthly income of $2,220 (CF, pp 270-77). Given this, the court asked Dooley if she planned to hire an attorney; she replied that she did not have the money to do so, and thus, she intended to represent herself (TR 7/12/2021, p 3:7-23). Hearing this, the court told Dooley it had to give her an *Arguello* advisement, and it did so (TR 7/12/2021, pp 3:24-8:25).

At the trial readiness conference, the court again inquired as to whether Dooley had retained counsel, and she responded that she had not (TR 7/26/2021, pp 3:15-17).[5] Dooley did not request additional time

[5] Dooley asserts the "appearance of counsel" hearing that the court set after the *Arguello* advisement "never occurred" (OB, p 14). The record reflects: (1) Dooley failed to appear on July 19, 2021, because she was in custody in Jefferson County (TR 7/19/2021, pp 3-4); (2) Dooley appeared in custody with the assistance of a public defender on July 21, 2021, for a bond setting (TR 7/21/2021, pp 3-4); and (3) the trial court inquired as

to do so or indicate that she planned to do so; instead, she expressed her desire to move forward with the trial, even objecting to a continuance request by the prosecution and stipulating to the admission of certain evidence to ensure the trial would proceed forward as scheduled (*see* TR 7/26/2021, pp 3-13).

C. Dooley's waiver was voluntary, knowing, and intelligent.

Criminal defendants have the right to reject counsel and represent themselves. *People v. Crabtree*, 2022 COA 73, ¶20 (citing *Lavadie*, ¶23; *Arguello*, 772 P.2d at 92), *cert. granted on other grounds* 2023 WL 2372560 (Colo. Mar. 6, 2023). "[S]triking a balance between" a defendant's right to counsel and right to self-representation "requires a delicate touch: the right to self-representation cannot be 'too quickly

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to whether Dooley had counsel at the start of the trial readiness hearing on July 26, 2021 (TR 7/26/2021, pp 3:15-17). Thus, while the court may not have held a standalone hearing for the "appearance of counsel," the record shows the court addressed that issue, and, reviewed as a whole, the record belies the notion that the court failed to afford Dooley an adequate opportunity to retain counsel prior to trial.

provided,' nor the right to counsel 'too vigorously shielded.' " *Id.* (quoting *United States v. Pryor*, 842 F.3d 441, 451 (6th Cir. 2016)).

"[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 (quoting *Arguello*, 772 P.2d at 92). "Thus, before a defendant is allowed to proceed pro se, the defendant first must effect a valid waiver of the right to counsel." *Arguello*, 772 P.2d at 93.

"A defendant's waiver of counsel is effective only if (1) the defendant is competent to waive the right and (2) the waiver is made voluntarily, knowingly, and intelligently." *Lavadie*, ¶26 (citing *People v. Davis*, 2019 CO 24, ¶15; *Arguello*, 772 P.2d at 93-95).[6] "A waiver is voluntary if it is 'not extracted by threats or violence, promises, or undue influence.' " *Id.* (quoting *Davis*, ¶18).

For a waiver to be knowing and intelligent, the record must show that "the defendant understood the nature of the charges, the statutory

[6] Dooley does not allege that she was not competent to waive her right to counsel; thus, that aspect of the analysis is not at issue.

offenses included within them, the range of allowable punishments, the possible defenses to the charges and circumstances in their mitigation, and all other facts essential to a broad understanding of the whole matter." *Id.*, ¶28 (citing *Arguello*, 772 P.2d at 94).

"Because there is a strong presumption against finding a waiver of a fundamental constitutional right, the trial court 'has the duty to make a careful inquiry about the defendant's right to counsel and his ... desires regarding legal representation.' " *Crabtree*, ¶23 (quoting *People v. Alengi*, 148 P.3d 154, 159 (Colo. 2006)). At a minimum, the trial court's advisement must probe the defendant's awareness of her right to counsel and the risks of self-representation. *Id.* (quoting *Alengi*, 148 P.3d at 159). To guide this inquiry, trial courts are encouraged to use the "*Arguello* advisement." *See id.*

Even if a trial court departs from that suggested advisement, a defendant's waiver may remain valid if the totality of the circumstances supports the validity of the waiver. *Id.* (quoting *Arguello*, 772 P.2d at 96); *accord Lavadie*, ¶36. "The totality of the circumstances includes the 'whole record,' including the defendant's conduct at trial." *Crabtree*,

¶24 (citing *Arguello*, 772 P.2d at 96); *accord Lavadie*, ¶39. This standard affords trial courts necessary flexibility in inquiring about " 'a defendant's basic understanding of his constitutional rights regarding representation.' " *Crabtree*, ¶24 (quoting *Lavadie*, ¶¶33, 39).

Here, despite her protestation that she never expressly waived her right to counsel (OB, p 17), Dooley did just that (TR 7/12/2021, pp 3:24-8:25). Indeed, while the trial court's advisement may not have been a word-for-word recitation of the advisement in *Arguello*, the advisement given addressed Dooley's rights and the risks of self-representation as directed by *Arguello*, *compare* (TR 7/12/2021, pp 3-8) *with Arguello*, 772 P.2d at 97-98, and Dooley's responses showed she was aware of her rights and was voluntarily, knowingly, and intelligently choosing to represent herself, *see, e.g., Alengi*, 148 P.3d at 160.

Arguing the contrary, Dooley relies heavily on *King v. People*, 728 P.2d 1264 (Colo. 1986), asserting she did not waive her right to counsel either expressly or impliedly. In effect, Dooley claims the court failed to adequately inquire into her financial indigency when she indicated she wished to be represented but lacked financial resources (OB, pp 16-20).

In seeking court-appointed counsel, the defendant carries the burden to prove indigency by a preponderance of the evidence. *People v. Hebert*, 2016 COA 126, ¶9 (citing *People v. Schupper*, 2014 COA 80M, ¶34). "When determining whether the defendant has met that burden, the district court should consider the defendant's complete financial situation[.]" *Id.* (citing *Schupper*, ¶26). The trial court's determination is reviewed for an abuse of discretion. *Id.*, ¶8 (citing *Schupper*, ¶21).

Here, Dooley failed to qualify for a public defender, and the court denied her application for a state paid professional, which showed she had $56,000 in assets and a monthly income of $2,200 (CF, pp 270-77). Beyond that application, Dooley offered few, if any, details to counter the court's indigency determination; rather, she briefly noted that she cared for a disabled brother before saying she intended to represent herself (TR 7/12/2021, pp 3-9).[7] On this record, Dooley failed to carry her burden to show indigency, and the court did not err by not *further*

[7] Arguing otherwise, Dooley highlights a comment uttered in the middle of trial (OB, p 14 (citing TR 7/28/2021, p 67:16-24)). But this comment shows little more than her disagreement with the court's lack-of-indigency finding.

inquiring into the specifics of her financial status. *See Alengi*, 148 P.3d at 161-62; *but see People v. Greer*, 2022 CO 5, ¶¶31-45; *People v. Munsey*, 232 P.3d 113, 125-27 (Colo. App. 2009).

Accordingly, the trial court properly found Dooley waived her right to counsel, and reversal is not required under any standard.

If this Court concludes the existing record is insufficient to assess whether Dooley was properly denied appointed counsel, the appropriate remedy is not automatic reversal; rather, this Court should remand for a hearing to assess Dooley's eligibility for appointed counsel. *See, e.g., Hebert*, ¶¶1, 5-12; *Munsey*, 232 P.3d at 128.

III. The trial court properly denied Dooley's request for a continuance in the middle of trial.

Dooley asserts the trial court abused its discretion when it denied her mid-trial request for a continuance (OB, pp 21-28).

A. Review is for an abuse of discretion.

The People agree that this Court generally reviews a trial court's denial of a continuance for a "gross abuse of discretion." *People v. Smith*, 275 P.3d 715, 721 (Colo. App. 2011); *see People v. Ahuero*, 2017 CO 90, ¶¶11-12 (noting the broad discretion afforded to trial courts in addressing continuance requests). "A trial court abuses its discretion in denying a motion to continue if, under the totality of the circumstances, its ruling is manifestly arbitrary, unreasonable, or unfair." *People in Interest of D.J.P.*, 785 P.2d 129, 131 (Colo. 1990).

However, the People disagree that this issue was preserved (*see* OB, p 21). True, Dooley requested a continuance, but she abandoned or effectively withdrew that request when she became frustrated by questions aimed at understanding the basis for it (*see* TR 7/28/2021, pp 52-63, 67-79, 86-87). Thus, Dooley abandoned her request because she

did not persist in it and failed to receive a ruling on it (*see* TR 7/28/2021, pp 73:19-74:10). Alternatively, if reviewed, review should be for plain error only. *See generally People v. Carter*, 2021 COA 29, ¶34 (reviewing a waived claim "in the alternative" for plain error).

B. Relevant background.

On the first day of trial, K.D. (the victim) testified about finding a tracking device on his car while residing with his daughter in Douglas County (*see* TR 7/27/2021, pp 128-45).

Following K.D.'s testimony, Dooley indicated her desire to offer evidence (consistent with her opening statement) that K.D. had access to her personal accounts and could have set up the tracking device on his own car; however, she advised that she did not yet have a copy of a relevant voicemail from K.D., and, thus, she wished to recall K.D. later in the trial (TR 7/27/2021, pp 145-51; *see* TR 7/27/2021, pp 105:8-11 (opening statement)). Dooley said the voicemail would be ready for her to pick up the next morning at 8:00, and, when asked, she agreed that she would be unable to arrive at the courthouse by 8:30 a.m. the next day if she retrieved it (TR 7/27/2021, pp 150-51). Hearing that, the

court inquired as to Dooley's precise request, and Dooley shifted gears to a discussion of other potential exhibits (TR 7/27/2021, pp 151:2-4).[8]

After the court determined these exhibits would not be admitted, Dooley declined to cross-examine K.D. (TR 7/27/2021, pp 159-61). Next, in response to a juror question, K.D. indicated he did not have access to Dooley's email accounts (TR 7/27/2021, pp 163:23-164:4).

There was no further discussion of the voicemail issue on the first day of trial, and Dooley did not make any specific request with respect to it (*see* TR 7/27/2021, pp 150-60).

The second day of trial commenced at 8:45 a.m. (TR 7/27/2021, pp 204:15-22). On that date, Detective Kristen Donoho testified about the tracking device recovered from K.D.'s car, explaining that it was traced back to Dooley (TR 7/28/2021, pp 12-49). Dooley declined to cross-examine the detective (TR 7/28/2021, pp 47:17-20, 49:1-3).

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[8] Dooley had several written letters with her; however, after reviewing them, the trial court determined they lacked relevance (TR 7/27/2021, pp 145-60). Those letters are not part of the record because Dooley did not submit copies of them (*see* TR 7/28/2021, pp 86-87). In any event, Dooley does not challenge that ruling on appeal.

Following Detective Donoho's testimony, the prosecution rested (TR 7/28/2021, p 49:9-11). During the ensuing break, Dooley indicated that she was inclined to testify on her own behalf, but she requested "a continuance until later this afternoon based upon Detective Donoho's testimony so that I could gather evidence in my favor regarding that testimony" (TR 7/28/2021, p 52:1-9). The court asked Dooley for "a little bit more information" (TR 7/28/2021, p 52:10-11).

Dooley said she did not have certain things helpful to her defense downloaded yet, and she needed time to return to her home to download those items (TR 7/28/2021, pp 52-56). The court asked Dooley to explain why she had not previously prepared these items, "[w]hat was new" in Detective Donoho's testimony, and what items were not in discovery (TR 7/28/2021, pp 52-56). Dooley noted a desire to download certain voicemails from K.D. which purportedly showed he had access to the information necessary to purchase the tracking device in her name (TR 7/28/2021, pp 52-56). When asked, Dooley asserted this material was *different* than the materials she discussed in opening statement (TR 7/28/2021, pp 52-56).

The prosecution objected, noting Dooley's materials would likely be inadmissible under the hearsay rules even if she was given an opportunity to retrieve them (TR 7/28/2021, p 56:4-9).

The court pressed Dooley for specific details so it could consider her continuance request. She said she had letters, text messages, and voicemails which showed K.D. had access to her usernames, emails, and phone numbers (TR 7/28/2021, pp 56-59). The court responded that, as it stood, the items identified by Dooley would be inadmissible as they would constitute hearsay (TR 7/28/2021, p 58:7-22). Given that, the court denied the request for a continuance (TR 7/28/2021, pp 60:1-19).

Dooley then shifted tact, indicating that she wanted to present "background checks" of certain witnesses which she had saved to her computer (TR 7/28/2021, pp 60-61). The court did not change its ruling (TR 7/28/2021, p 61:9-11).

The prosecution supplemented the record, noting (1) everything it had discussed with Detective Donoho during direct examination was in discovery, and (2) out of an abundance of caution, it gave Dooley a full

copy of discovery at the trial readiness conference; thus, Dooley could not claim "factual surprise" (TR 7/28/2021, pp 62-63).

After a recess, the court asked Dooley if she planned to testify or present evidence, and Dooley reiterated her request for a continuance or a mistrial to "gather that evidence on my behalf" (TR 7/28/2021, p 67:2-9). Dooley said she needed "a few hours" to "gather that information[,]" and complained that the court could have provided her with an attorney after her privately retained attorney withdrew (TR 7/28/2021, pp 67-68).

The court advised Dooley that her failure to adequately prepare for trial did not support her request for a continuance but offered her an opportunity to explain any special circumstances which prevented her from bringing any necessary documents with her (TR 7/28/2021, pp 68-69). Dooley responded that her disabled brother required extra care on the prior evening, and she said she had requested a three-day jury trial, "so basically I really have until tomorrow to present my case" (TR 7/28/2021, pp 69-70).

The court advised Dooley that it would not delay the trial "without good cause" and asked Dooley to articulate what good cause might be in

this situation (TR 7/28/2021, pp 70-71). In response, Dooley reiterated many of her earlier comments (TR 7/28/2021, pp 71-73). When the court sought details, Dooley became frustrated and "g[a]ve up" because she was "not good at explaining things" (TR 7/28/2021, pp 73-74). At that point, the court took a break so Dooley could collect her thoughts (TR 7/28/2021, pp 74-75). Before the break, the court explained:

> Here are the questions that I need to answer. I have to find good cause to delay this trial. Good cause is not I didn't know, I was in jail, I can't afford an attorney, I'm representing myself, I didn't know the law, I didn't know this thing was in discovery. Those things aren't good cause. They may have been good cause before the trial began but it's not right now.
>
> So far I haven't heard any grounds for a mistrial. If something unusual happened that was out of your routine, why I didn't hear about it this morning is probably important for me to know. So that's going to be a follow-up question that I have.
>
> And, secondarily, assuming that I say that you can go get this information, I've got to have some belief that this isn't a waste of time. So I need you to be able to articulate to me what it is that you forgot and how you think that's either relevant or admissible or both.

(TR 7/28/2021, pp 74:18-75:11).

When the trial resumed, Dooley indicated that she did not intend to testify but she would be calling a witness (TR 7/28/2021, p 76:2-10). Notably, she did not offer responses to the court's questions or persist in her request for a continuance (*see* TR 7/28/2021, pp 76:2-10).

Later, Dooley complained about the lack of a continuance (TR 7/28/2021, pp 86-87).

C. Dooley's request for a continuance was not sufficiently supported.

"When considering a motion to continue, 'the trial court must consider the peculiar circumstances of each case and balance the equities on both sides.' " *Smith*, 275 P.3d at 721 (quoting *People v. Fleming*, 900 P.2d 19, 23 (Colo. 1995)). Further, "the trial court must consider the 'prejudice to the moving party if the continuance is denied and whether that prejudice could be cured by a continuance, as well as the prejudice to the opposing party if the continuance is granted.' " *Id.* at 721-22 (quoting *D.J.P.*, 785 P.2d at 132). "A defendant must show that the denial of the continuance resulted in actual prejudice." *Id.* at 722 (citing *People v. Alley*, 232 P.3d 272, 274 (Colo. App. 2010)).

Here, Dooley asserts the court refusing to grant a continuance in the middle of trial (OB, pp 25-28). As support, she relies on the claims addressed above (*see* Arguments I and II), as well as variations of the arguments that the trial court rejected below. Her arguments do not demonstrate that the trial court abused its discretion.

The trial court's questions (and the lack of a continuance) show that it operated within the range of reasonable options available to it under the circumstances presented here. Indeed, the court gave Dooley multiple opportunities to explain what exactly she wanted to retrieve from her home, and it asked her to explain how those items would be admissible (*see* TR 7/28/2021, pp 52-63, 67-79, 86-87). At one point, the court even outlined the questions that it needed answered to establish "good cause" for a continuance before giving Dooley a few minutes to collect her thoughts (TR 7/28/2021, pp 74:18-75:11).

But Dooley offered little explanation for her failure to adequately prepare for trial. More to the point, she never *specifically* identified what information she wished to retrieve, and she never offered a legal basis for the admissibility of any information. At best, Dooley offered

generalities, and the generalities she offered suggested the items that she wanted to retrieve from her home *in the middle of trial* would be inadmissible in any event. Given this, the court had no basis to grant even a short continuance. And Dooley does little, if anything, to remedy these deficiencies on appeal.

Despite this, Dooley seemingly asks this Court to substitute its own assessment of the circumstances for that of the trial court. But that is not the appropriate standard. Instead, the question is whether the trial court's decision fell within the "range of reasonable options." *See People v. Archer*, 2022 COA 71, ¶23. It did. Thus, even if this Court may have reached a different decision in the first instance, Dooley has not established an abuse of discretion occurred.

Accordingly, Dooley fails to show that the trial court's decision to deny her midtrial request for a continuance fell outside the wide range of reasonable options available to the court, much less that any "actual prejudice" resulted from the denial of her request.

To the extent Dooley cites *People v. Gagnon*, 703 P.2d 661, 662-63 (Colo. App. 1985), her reliance on that case is misplaced (OB, p 27).

In *Gagnon*, the defense sought a continuance to secure identifiable evidence—that is, proof of the victim's felony conviction which would soon become final, so he could admit that conviction for impeachment purposes. *Id.* Such evidence would have been admissible, and there was no prejudice to the court or prosecution by permitting a short continuance. *Id.* Thus, this Court concluded it was prejudicial error to deny the defendant's request for a short continuance. *Id.*

But this case is not that case. First, by her own admission, Dooley wanted a continuance to gather information available to her *before her trial began*, but that she failed to bring to court. Second, Dooley did not identify the *specific* information that she wished to retrieve, and she did not articulate the admissibility of that information.

Accordingly, *Gagnon* does not dictate the result here, and this Court should not be persuaded by Dooley's reliance on it. *See generally People v. Sauser*, 2020 COA 174, ¶¶17-24 (distinguishing *Gagnon* for different reasons).

IV. The trial court did not commit plain error when it admitted other act evidence.

Dooley asserts the trial court abused its discretion by admitting "pervasive other act and/or res gestae evidence" (OB, pp 29-45).

A. Plain error review applies.

The People agree that this Court generally reviews the admission of other act evidence for an abuse of discretion. *People v. Cross*, 2023 COA 24, ¶9 (quoting *Rojas v. People*, 2022 CO 8, ¶16). Similarly, to the extent Dooley raises such a claim, prosecutorial misconduct claims are reviewed for " 'a gross abuse of discretion resulting in prejudice and a denial of justice.' " *People v. Rhea*, 2014 COA 60, ¶42 (quoting *People v. Moody*, 676 P.2d 691, 697 (Colo. 1984)).

However, the People disagree that Dooley preserved this issue (*see* OB, p 29). Indeed, when the trial court indicated that it had ruled on the request to admit other act evidence, Dooley raised no objections, and she did not object when it was admitted at trial (*see, e.g.,* TR 7/26/2021, pp 12-13; TR 7/27/2021, pp 108-28, 171-81, 187-95; TR 7/28/2021, pp 29-

40). Thus, reversal is required only if plain error occurred.[9] *See People v. Conyac*, 2014 COA 8M, ¶¶77-79. To be plain, an error must be "obvious and substantial." *Hagos v. People*, 2012 CO 63, ¶14.

B. Relevant background.

Before trial, Dooley filed a motion for a bill of particulars, as well as a motion to dismiss for violation of double jeopardy. Taken together, the motions asserted Dooley was being charged with the same conduct for which she had already been convicted in Park County (CF, pp 94, 95-96, 185-97).

The prosecution responded to both motions (CF, pp 180-84, 208-13). In the bill of particulars, the prosecution asserted the following incidents supported the charges:

- Dooley left a "love bomb" letter on K.D.'s truck in July 2019;
- Dooley followed K.D. and his friend as they walked to lunch in February 2020;

[9] If this Court concludes the issue is preserved, the People disagree with Dooley that a constitutional harmless error standard of reversal applies (*see* OB, pp 29, 43-44). Instead, the ordinary harmless error standard applies. *See Yusem v. People*, 210 P.3d 458, 469-70 (Colo. 2009).

- Dooley placed a tracking device on K.D.'s truck which was discovered on February 29, 2020; and
- Dooley called K.D. on May 5, 2020

(CF, pp 180-84; *see also* CF, pp 208-13 (articulating how these incidents differed from those supporting the convictions in other cases)).

The prosecution also filed a notice of its intent to introduce other act evidence (CF, pp 125-31 (notice), 132-79 (attachments)). Therein, it proposed introducing the following evidence:

- K.D. filed for divorce from Dooley in Park County, Colorado on June 17, 2019;
- An investigation by the Park County Sheriff's office revealed that: (1) Dooley placed a tracking device on K.D.'s car in September 2019; (2) Dooley left a note on K.D.'s car on July 13, 2019; and (3) Dooley left harassing notes along K.D.'s school bus route;
- Dooley attempted to contact K.D. via email and telephone on December 13, 2019; and

- Dooley confronted K.D. and stuffed a note into his shirt in Lakewood on July 21, 2019

(CF, pp 125-31).

Evidence of the divorce was offered as res gestae to offer context for the relationship between K.D. and Dooley, and/or under CRE 404(b) to show evidence of motive and absence of mistake or accident (CF, p 129). Evidence of the acts in Park County and Lakewood was offered under CRE 404(b) to show a common scheme or plan, identity, motive, and absence of mistake or accident (CF, p 129).

Ultimately, the trial court denied Dooley's motion to dismiss, finding: "Based upon all of the information provided to the Court, the People have established the facts which they intend to present to the jury to prove the crimes of stalking in Douglas County are separate and distinct from those in Park County" (CF, p 217).

The court did not issue a written ruling concerning the request to admit other act evidence; instead, the other act evidence was discussed at several hearings prior to trial:

- On March 1, 2021, Dooley failed to appear, and the court refused to consider the outstanding CRE 404(b) motion without her present (TR 3/1/2021, pp 3-6).
- On March 9, 2021, Dooley appeared virtually (but ultimately dropped off early), and the court reset the trial dates and set a motions hearing to consider the outstanding motion to admit other act evidence (TR 3/9/2021, pp 8:13-17, 13:25-14:19).
- On May 27, 2021, the court continued the motions hearing on the outstanding request to admit other act evidence on the request of defense counsel, who had filed a motion to withdraw (TR 5/27/2021, pp 2-10).
- On June 21, 2021, Dooley appeared pro se. The court vacated the upcoming motions hearing, noting it had denied the motion to dismiss, which it believed resolved any outstanding issues regarding other act evidence as well (TR 6/21/2021, pp 3-7).
- On July 26, 2021, at a trial readiness conference, the prosecution asked for clarification on the other act evidence, and the court verified the evidence was admissible, explaining:

> Yes, that information is part and parcel to the charges that were -- that were filed in this case. So it's my recollection of the order was that it was res gestae -- most of it was. But then I broke that out, and I can't recall what day that was that we talked about 404(b), but there's -- there's portions of it that are res gestae and portions of it that were 404(b).

(TR 7/26/2021, pp 12:7-13:9). Dooley raised no objections to the court's ruling or summary of the proceedings.

Consistent with the trial court's ruling, the prosecution introduced evidence of other acts at trial (*see, e.g.,* TR 7/27/2021, pp 108-28, 171-81, 187-95; TR 7/28/2021, pp 29-40).

Prior to deliberations, the jury received the following instruction:

> You have heard evidence of a tracking device and contact between [K.D.] and the Defendant in Park County. You have also heard evidence of contact between [K.D.] 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 (Instruction No. 10); *see* TR 7/28/2021, p 89:13-15).

Dooley agreed to that instruction (TR 7/28/2021, pp 4-5, 61-66, 86).

C. The other act evidence was properly admitted.

Dooley claims the trial court erred in nine ways when it admitted other act evidence (*see* OB, pp 36-44). Each claim is addressed in turn.

1. The trial court did not plainly err by not holding a hearing specific to the other act evidence.

Dooley first contends the trial court erred by failing to hold a hearing on the admissibility of the other act evidence (OB, pp 36-37).

The admissibility of evidence of other acts in cases of domestic violence is governed by section 18-6-801.5, C.R.S. (2023), and CRE 404(b). *People v. Moore*, 117 P.3d 1, 3 (Colo. App. 2004). "Before such evidence is admissible, the trial court must find by a preponderance of the evidence that the prior acts occurred and that the defendant committed them." *Id.* That said, an evidentiary hearing is *not* required before admitting other act evidence; rather, the "trial court possesses the discretion to make this determination in any reasonable manner." *People v. Groves*, 854 P.2d 1310, 1313 (Colo. App. 1992); *see Moore*, 117

P.3d at 3. Indeed, "[t]he prosecution may satisfy the burden based on an offer of proof." *People v. Davis*, 218 P.3d 718, 727 (Colo. App. 2008).

Here, while the record reflects some confusion by the trial court and the parties as to whether a hearing was ever held, the record shows that parties submitted written motions which, at a minimum, touched on this issue (*see* CF, pp 94, 95-96, 125-31, 180-84, 185-97, 208-13), and the court considered those arguments as they related to this issue (*see* TR 6/21/2021, pp 3-7; TR 7/26/2021, pp 12:7-13:9). Most notably, the prosecution filed notice of its intent to introduce other act evidence which was supported by documents showing that Dooley committed the other acts alleged (*see* CF, pp 125-31 (notice), 132-79 (attachments)).

Further, the trial court found, albeit in a short oral order, that the evidence was admissible as res gestae and/or under CRE 404(b) (TR 7/26/2021, pp 12:7-13:9). While the court did not explicitly adopt the prosecution's rationale, the ruling was consistent with that rationale (*compare* TR 7/26/2021, pp 12:7-13:9 *with* CF, pp 125-31).

Accordingly, the court's ruling was made in a "reasonable manner" in that it was supported by the motions before it; thus, the court did not

abuse its discretion, much less commit plain error, by not holding a formal hearing before admitting evidence of other acts.

Regardless, if any error occurred in not holding a specific hearing, it was harmless (and not plain) because that evidence was admissible (*see* Argument IV(C)(3)-(5)).

2. The trial court did not abdicate its gatekeeping function.

In a spin on the previous argument, Dooley next contends that the trial court abdicated its gatekeeping function (OB, p 37).

First, by admitting the evidence, the court implicitly found the other acts occurred and Dooley committed them. *See People v. McGraw*, 30 P.3d 835, 838 (Colo. App. 2001). And the record fully supports that finding (*see* CF, pp 125-31 (notice), 132-79 (attachments)).

Second, the admission of the evidence also included an implicit finding that the probative value of the evidence was not substantially outweighed by any unfair prejudice. *See McGraw*, 30 P.3d at 838.

Third, while the court did not make express findings, it had the prosecution's notice before it, and found the evidence was admissible as

res gestae and/or under CRE 404(b) (TR 7/26/2021, pp 12:7-13:9). And the court admitted the evidence for limited purposes consistent with CRE 404(b), and it instructed the jury accordingly (*see* CF, p 385). *See, e.g., People v. Warren*, 55 P.3d 809, 814-15 (Colo. App. 2002).

Thus, the trial court did not abdicate its gatekeeping function.

3. The trial court did not plainly err by not sua sponte prohibiting vague references to other acts not listed in the prosecution's notice.

Dooley contends that the trial court erred by admitting evidence of various other acts not listed in the pretrial notice (OB, pp 38-39). She did not object to the admission of any of this at trial; thus, review is for plain error. *See People v. Salyer*, 80 P.3d 831, 838 (Colo. App. 2003).

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show that he or she acted in conformity therewith. Such evidence is admissible, however, for other purposes, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* (citing CRE 404(b)).

Plain error did not occur here. Similar to the acts listed in the pretrial notice, the other acts at issue provided necessary context for the relationship between Dooley and K.D. and served a proper purpose under CRE 404(b)—that is, showing motive, intent, knowledge, identity, and the absence of mistake or accident (*see* OB, p 38).

Even if they did not, the acts that Dooley claims were improperly admitted "w[ere] not of such nature as would create overmastering hostility in the jury toward defendant." *See Salyer*, 80 P.3d at 838-39. Indeed, Dooley raised no objections to the admission of these acts at trial, and most, if not all, of these acts were far less egregious than the charged acts, including Dooley placing a tracking device on K.D.'s car. *See People v. Herron*, 251 P.3d 1190, 1198 (Colo. App. 2010) (res gestae evidence was "vastly overshadowed" by the evidence supporting the charged offenses); *see also People v. Daley*, 2021 COA 85, ¶131 ("[T]he evidence of the crimes for which Daley was convicted was a much more prejudicial basis for which the jury could judge her negatively.").

Accordingly, the trial court's failure to intervene sua sponte to stop brief references to other acts was not error, much less plain error.

4. The trial court did not plainly err by admitting evidence as res gestae.

In *Rojas v. People*, 2022 CO 8, our supreme court abolished the res gestae doctrine and clarified the application of CRE 404(b). In doing so, the court adopted "an intrinsic-extrinsic distinction, with extrinsic acts falling under [CRE 404(b)] and intrinsic acts falling outside the Rule's scope." *Id.*, ¶44; *see id.*, ¶52 (summarizing the holding).

As our supreme court recognized, the courts that had previously adopted that approach "narrowed the definition of intrinsic evidence to two acts: (1) those that directly prove the charged offense and (2) those that occur contemporaneously with the charged offense and facilitate the commission of it." *Id.*, ¶44 (citing cases). "Evidence of acts that are intrinsic to the charged offense are exempt from [CRE 404(b)] because they are not 'other' crimes, wrongs, or acts. Accordingly, courts should evaluate the admissibility of intrinsic evidence under [CRE 401-403]." *Id.*, ¶52. However, if evidence is extrinsic and "suggests bad character (and thus a propensity to commit the charged offense), it is admissible

only as provided by [CRE 404(b)] and after a *Spoto*[10] analysis." *Id.* But "if extrinsic evidence does not suggest bad character, [CRE 404(b)] does not apply and admissibility is governed by [CRE 401-403]." *Id.*

Before trial, the trial court indicated "most" of the proposed other act evidence was admissible under a res gestae theory, but some parts were admissible under CRE 404(b) (TR 7/26/2021, pp 12:7-13:9). But, after that evidence was admitted, the court instructed the jury that it was admitted for limited purposes consistent with CRE 404(b) (CF, p 385). Given this, the jury was not permitted to consider the incidents in the pretrial notice without limitation; rather, the jury was instructed to consider it only for limited purposes appropriate under CRE 404(b).

Accordingly, to the extent the court initially indicated that other act evidence would be admitted as res gestae, it was not admitted under that theory at trial, and, thus, no discernable error occurred even after *Rojas* did away with res gestae as a theory of admissibility.[11]

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[10] *People v. Spoto*, 795 P.2d 1314 (Colo. 1990).

[11] To the extent that Dooley's claim includes the unlisted "other acts" discussed in subsection (3), and to the extent any of those acts were

5. The probative value of the evidence was not substantially outweighed by any unfair prejudice.

Dooley contends that the other act evidence was inadmissible under the fourth prong of the *Spoto* test (OB, pp 40-41).

Here, the other act evidence had substantial probative value in that it showed Dooley's identity, common scheme or plan, and lack of mistake. More specifically, that Dooley had committed nearly identical acts against K.D. in prior instances demonstrated her common scheme of contacting and tracking K.D., and, in at least one instance, directly contradicted her assertion that she (or her daughter using her phone) mistakenly called K.D. on May 5, 2019 (*see* TR 7/28/2021, pp 80-82).

Conversely, any unfair prejudice stemming from the other acts, including Dooley's emails to K.D., was minimal. While the prosecution certainly introduced and referenced the other acts, the core of the case focused on the acts which occurred *in Douglas County* and which were substantially more damning than the other acts, let alone anything

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admitted as res gestae, no plain error occurred for the reasons previously stated (*see* Argument IV(C)(3)).

written in Dooley's emails. In short, if there was any prejudice at all, it was not "unfair" prejudice, and it did not "substantially outweigh" the significant probative value of the evidence. *See People v. Dist. Ct.*, 785 P.2d 141, 147 (Colo. 1990) (evidence is not "unfairly prejudicial simply because it damages the defendant's case," but rather because it has "an undue tendency to suggest a decision on an improper basis, . . . such as sympathy, hatred, contempt, retribution, or horror").

Finally, the People disagree with Dooley's characterization that the prosecution devoted "significant time" to the other acts evidence or "flood[ed] the courtroom" with it (OB, p 41). To the contrary, the other acts evidence was a limited part of the trial, and it was used only for proper purposes. Indeed, the trial focused on the acts giving rise to the charges with the other acts serving only a limited role in establishing Dooley's common scheme and lack of mistake (*see* TR 7/27/2021, pp 108-09, 114-16, 128-45, 166-70, 183-91; TR 7/28/2021, pp 14-47).

Accordingly, the trial court did not err by admitting the evidence, much less commit plain error by doing so. *See, e.g., Cross*, ¶¶25-27.

6. The trial court did not plainly err by not giving a contemporaneous limiting instruction when no such instruction was requested.

"Section 18-6-801.5 requires a trial court to instruct the jury on the limited purposes for which the evidence of prior acts of domestic violence is being admitted." *People v. Torres*, 141 P.3d 931, 935 (Colo. App. 2006) (citing *Moore*, 117 P.3d at 3). Leaning on this language, Dooley asserts reversible error occurred here.

However, Dooley never objected to the lack of a contemporaneous limiting instruction; thus, "reversal is not warranted in the absence of plain error." *Moore*, 117 P.3d at 3. And "plain error is not established simply because the trial court was required by statute to provide contemporaneous limiting instructions." *Id.* (citing *People v. Underwood*, 53 P.3d 765, 772 (Colo. App. 2002)).

No plain error occurred here because the trial court provided the jury with a written instruction at the close of the evidence concerning the limited purposes for which the other act evidence had been admitted (*see* CF, p 385). Beyond that, the other act evidence was not the focus of

the trial; rather, the trial appropriately focused on the incidents which occurred *in Douglas County*, including the discovery of the tracking device on K.D.'s vehicle *in Douglas County*.

Given this, the lack of a contemporaneous limiting instruction did not cast a serious doubt on the reliability of Dooley's conviction; thus, no plain error occurred. *See, e.g., Torres*, 141 P.3d at 935; *Moore*, 117 P.3d at 3-4; *see also, e.g., People v. Butson*, 2017 COA 50, ¶¶22-25 (no plain error where no contemporaneous instruction was requested); *People v. Bondsteel*, 2015 COA 165, ¶¶81-89 (same), *aff'd* 2019 CO 26.

7. Dooley waived any claim about the limiting instruction in the written jury instructions, and, regardless, the instruction was sufficient.

Dooley claims the trial court's written instruction was insufficient because it "didn't cover all of the other act evidence" (OB, p 42).

First, assuming Dooley's cursory argument provides a sufficient basis for this Court's review, Dooley waived any complaint about the written instruction. Here, the record reflects specific discussions about the written limiting instruction which Dooley participated in without

raising any objections or requesting any changes or additions to that instruction (TR 7/28/2021, pp 4-5, 61-66, 86). *See, e.g., Carter*, ¶30 (defense counsel waived objection to an instruction where counsel "expressly indicated that she had been through the instructions to determine which ones she . . . objected to").

Second, the written instruction covered the other acts discussed at trial as presented in the pretrial notice (*compare* CF, pp 125-31, 132-79 *with* CF, p 385). To the extent Dooley identifies several other offhand comments made by witnesses at the trial (and to the extent that those comments referenced "other acts"), those acts were not discussed in any significant depth, much less in such detail that the trial court, acting sua sponte, should have required that they be itemized and included in the written instruction. This is especially true given that Dooley did not object to any testimony about them and, again, did not ask that they be included in the written instruction.

Accordingly, Dooley waived any claim that the limiting instruction was deficient, and, regardless, the instruction given was sufficient.

8. The trial court did not plainly err by admitting evidence of Dooley's prior conviction.

Despite the lack of any objection below, Dooley contends the trial court erred when it admitted a copy of the sentence order from a prior conviction for harassment because it showed she had been charged with stalking previously (OB, pp 42-43).[12] But Dooley ignores the context for the admission of that exhibit—that is, it showed that she was subject to a mandatory protection order – *a copy of which was part of the exhibit* – at the time that she committed her offenses in Douglas County, and it was admitted at trial for that purpose (TR 7/28/2021, pp 37-42; *see* EX#8 (pdf, pp 9-14)). Indeed, the prosecution did not ask any questions about any charges or convictions listed in the sentence order; rather, it focused on the portion of the sentence order referencing the mandatory protection order before asking questions about that protection order (TR 7/28/2021, pp 37-42). Thus, Exhibit 8 went to prove a charged offense –

[12] When the prosecution moved to admit Exhibit 8, Dooley said she had "[n]o objection." Seeking clarification, the court asked Dooley if she had no objection "[t]o the entire packet," and Dooley reiterated her position: "No objection" (TR 7/28/2021, p 39:10-19).

violation of a protection order – because it went directly to Dooley's knowledge of the existence of that order. *See* § 18-6-803.5(1)(a), C.R.S. (2023) (requiring proof that the restrained person has actual knowledge of the contents of the protection order).

Because Dooley did not object to the admission of that exhibit or request any redactions, and because Exhibit 8 was used for the limited and proper purpose of proving Dooley's knowledge that she was subject to a protection order, no error occurred here, much less plain error.

9. The prosecution's opening statement was not improper.

Dooley contends the prosecution improperly used the other act evidence for a propensity purpose during opening statement with the following comment:

> 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 7/27/2021, p 103:14-20).

Dooley did not object to this comment; thus, her misconduct claim is reviewed for plain error. *See People v. Garcia*, 2023 COA 58, ¶54.

When reviewing claims of prosecutorial misconduct, this Court engages in a two-step analysis. *Id.*, ¶53; *see Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). "First, [this Court] determine[s] whether the prosecutor's conduct was improper based on the totality of the circumstances." *Garcia*, ¶53. "Second, [this Court] decide[s] whether such actions warrant reversal under the proper standard of review." *Id.*

Here, the prosecution's opening statement summarized what it believed the evidence would show about Dooley's conduct toward K.D., and it did so by outlining the anticipated evidence, including the other act evidence (TR 7/27/2021, pp 98-104). This was a proper opening statement. *See People v. Manyik*, 2016 COA 42, ¶26.

The paragraph that Dooley now complains about for the first time on appeal was little more than a short oratorical flourish at the end of that summary serving as transition into the prosecution's next point about the evidence supporting the emotional distress K.D. suffered.—an element of stalking, a charged offense (TR 7/27/2021, p 103:14-20). *See*

id., ¶27 (noting oratorical flourishes may be used so long as they are not calculated to inflame the passions or prejudices of the jury).

Despite Dooley's assertion, that brief oratorical flourish did not imply, much less expressly state that Dooley must be guilty this time because she was guilty before, nor did it make that point so explicitly that the court should have intervened sua sponte to stop it.

In any event, the comment identified by Dooley was not pervasive; rather, it was isolated and brief and occurred early in the case. And the prosecution did not repeat it during closing argument; instead, the prosecution's argument explicitly stated that the other act evidence, including the Park County incidents, could be used only for limited purposes (TR 7/28/2021, pp 100:14-19, 101:14-20). And, again, the jury received a written limiting instruction to that end (CF, p 385). Beyond that, there was overwhelming evidence to support Dooley's guilt.

Accordingly, no prosecutorial misconduct occurred, much less such obvious and egregious misconduct as to warrant reversal for plain error. *See, e.g., Manyik*, ¶¶35-42.

V. Dooley received adequate notice of the charges against her, and the jury returned unanimous verdicts convicting her of the charged offenses.

Dooley asserts the trial court's instructions and the prosecution's closing argument violated her right to notice of the charges against her and failed to ensure a unanimous verdict (OB, pp 45-52).

A. Plain error review applies.

The People agree that this Court reviews variance and unanimity concerns de novo. *See People v. Rail*, 2016 COA 24, ¶48 (variance); *People v. Hines*, 2021 COA 45, ¶48 (unanimity). But this issue was not preserved (*see* OB, p 45); thus, if any error occurred, reversal is required only if the error was plain. *See Hagos*, ¶14.

B. Relevant background.

For acts committed in Douglas County between July 23, 2019, and May 5, 2020, Dooley was charged with: (1) stalking; (2) violation of a criminal protection order; and (3) violation of a civil protection order (CF, pp 1-2, 10-11, 91-93). As set forth above, the jury heard evidence of four specific incidents supporting these charges. The jury also heard evidence of various other acts admitted for a limited purpose.

C. No simple variance occurred, and no concern exists regarding unanimity.

For the first time on appeal, Dooley raises arguments on interrelated issues. First, Dooley argues "[a] simple variance occurred because the prosecution's evidence proved facts materially different from those in the bill of particulars" (OB, pp 48-50). Second, Dooley contends "the [trial] court erred in failing to ensure [her] verdict was unanimous" (OB, pp 50-51). Each claim is addressed in turn.

1. No simple variance occurred.

"Colorado courts recognize two types of variances from the charging instrument: a constructive amendment and a simple variance." *Rail*, ¶49 (citing *People v. Vigil*, 2015 COA 88M, ¶30).

"[A] simple variance occurs when the elements of the charged crime remain unchanged, but the evidence presented at trial proves facts materially different from those alleged in the indictment." *Id.*, ¶51 (cleaned up). "A simple variance requires reversal only if it prejudices the defendant's substantial rights." *Id.*; *see People v. Huynh*, 98 P.3d 907, 912 (Colo. App. 2004).

Dooley asserts a simple variance occurred when the prosecution introduced various emails that Dooley sent to K.D. and then referenced them in closing argument which permitted the jury to convict her for acts other than those alleged in the bill of particulars (OB, pp 48-50).

First, the People reiterate that Dooley raised no objections to the introduction of the emails at trial, much less asserted that they so departed from the allegations in the bill of particulars as to undermine the jury's consideration of the charges.[13]

Second, despite Dooley's claim, the prosecution did not rely on the emails to support a conviction. True, the prosecutor's closing argument briefly referenced the emails at points. But the thrust of the argument focused on the acts alleged in the bill of particulars and detailed those incidents, including Dooley placing a tracking device on K.D.'s vehicle in Douglas County, Dooley following K.D. and his friend, Dooley placing a letter on K.D.'s vehicle in Douglas County, and Dooley calling K.D. on

[13] The emails, as highlighted through direct examination, showed that Dooley continuously contacted and threatened K.D. (*see* TR 7/27/2021, pp 122-28). This likely explains the prosecution's decision to introduce the emails, as well as the lack of any objection to them.

May 5, 2020, despite no contact orders (*see* TR 7/28/2021, pp 89-103, 107-110). In short, while the emails were referenced, the prosecution did not use them as a significant basis to convict.

Third, as noted above, a simple variance requires reversal only where there is prejudice to a defendant's substantial rights. *See Rail*, ¶¶51, 54. Here, if any variance occurred, Dooley fails to show any prejudice resulted. Indeed, she does not allege any "surprise" from the introduction of the emails at issue, and she does not suggest she would have responded to the prosecution's case any differently had the emails been listed in the bill of particulars. Given this, Dooley has not shown prejudice occurred, much less such obvious and substantial prejudice as to require reversal for plain error.[14] *See, e.g., Rail*, ¶54; *see also, e.g., People v. Snider*, 2021 COA 19, ¶54 (no plain error occurred).

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[14] Dooley's prejudice argument asserts the jury likely relied upon the emails to support a conviction because K.D. became "visibly upset" when he reviewed them at trial (OB, p 52). But the jury heard far more damning evidence of far worse acts—chiefly, Dooley placed a tracking device on K.D.'s vehicle and followed him. Given this, there is little, if any, likelihood that the jury used the emails to convict Dooley. Beyond that, K.D. was clear that Dooley's course of conduct caused him emotional distress, not any one act (TR 7/27/2021, pp 142-44).

Finally, Dooley misplaces her reliance on *People v. Simmons*, 973 P.2d 627 (Colo. App. 1998). Initially, *Simmons* concerned unanimity, not a question of variance, and it offers little guidance here. *See Snider*, ¶53 (distinguishing *Simmons*); *People v. Smith*, 2018 CO 33, ¶34 (distinguishing *Simmons*). But even setting that aside (and unlike in *Simmons*), the prosecution here did *not* use closing argument to argue at length that facts other than those alleged in the charging document supported a conviction. *Compare Simmons*, 973 P.2d at 628-30 *with* (TR 7/28/2021, pp 89-103, 107-110).

Accordingly, no simple variance occurred, much less one requiring reversal under plain error review.

2. No concern exists regarding jury unanimity.

"A defendant has the right to a jury trial and a unanimous jury verdict." *People v. Larsen*, 2023 COA 28, ¶32. "But unanimity is required 'only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged and not with respect to alternative

means by which the crime was committed.' " *Hines*, ¶49 (quoting *People v. Archuleta*, 2020 CO 63M, ¶20).

"When the prosecution presents evidence of multiple distinct acts, any one of which could constitute the offense charged, and the jury could reasonably disagree regarding which act was committed," the trial court has two options: (1) it must "require the prosecution to elect the transaction on which it relies for the conviction"; or (2) it must "instruct the jury that it must unanimously agree that the defendant committed the same act or all of the acts." *Id.*, ¶50 (citing *People v. Greer*, 262 P.3d 920, 925 (Colo. App. 2011)). "But if the defendant is charged with crimes occurring in a single transaction or involving a continuing course of conduct, and the prosecution proceeds at trial on that basis, neither a prosecutorial election nor a modified unanimity instruction is required." *Id.* (citing *Greer*, 262 P.3d at 925).

Here, despite the lack of any request below, Dooley now contends that the trial court erred by not requiring the prosecution to make an election as to the acts it relied upon to support her convictions and/or by

failing to give a modified unanimity instruction because the prosecution presented evidence of several discrete acts (OB, pp 50-52).

But neither election nor a modified unanimity instruction were required here because the prosecution alleged and established that Dooley engaged in a continuing course of conduct which constituted a single criminal transaction of stalking (and of violating two protection orders). *See Hines*, ¶¶51-57; *see, e.g., People v. Wagner*, 2018 COA 68, ¶¶15-24 (concluding the defendant's multiple acts were all part of a single course of conduct and supported only one conviction for stalking); *Herron*, 251 P.3d at 1193-95 (same).

Accordingly, the trial court did not err by not requiring election or by not giving a modified unanimity instruction. *See, e.g., Hines*, ¶57.

Regardless, if any error here, it was not obvious or substantial.

Dooley argues otherwise, primarily focusing, again, on the court's admission of her emails. But as argued above, Dooley's emails played a minor role in the trial, and the prosecution instead focused on the four acts articulated in the bill of particulars (*see* TR 7/28/2021, pp 89-103, 107-110). Given this, there is little, if any, chance that Dooley's emails

played a significant role in the jury's verdicts, much less that any juror relied exclusively on the emails *and none of Dooley's more damning acts* to support a guilty verdict. Put simply, the record leaves little support for the idea that, if the emails had not been admitted, the jury's verdicts would not have been unanimous.

Beyond that, the jury was instructed that its verdict must be unanimous and the jurors "must agree to all parts of it" (CF, p 397 (Instruction No. 21)). *See People v. Wester-Gravelle*, 2020 CO 64, ¶¶11, 38 (holding any error in failing to give a modified unanimity instruction was not "obvious" for purposes of plain error review where the trial court had given this same instruction).

Accordingly, if any error occurred, reversal is not required. *See People v. Villarreal*, 131 P.3d 1119, 1128 (Colo. App. 2005) (the failure to give a modified unanimity instruction may be harmless if a reviewing court is convinced that the verdict was nevertheless unanimous); *see also, e.g., Wester-Gravelle*, ¶¶36-37 (holding any error was not obvious because separate acts were charged and tried as a single transaction).

CONCLUSION

For the foregoing reasons and authorities, this Court should affirm the defendant's convictions.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **LEAH C. SCADUTO** and all parties herein via Colorado Courts E-filing System (CCES) on August 31, 2023.

/s/ Tiffiny Kallina

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