DATE FILED: November 8, 2023 4:02 PM
FILING ID: C024A0B7AEE6C
CASE NUMBER: 2021CA1946

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 M. 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 LEAH SCADUTO 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone Number: (303) 764-1400 Fax Number: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Attorney Registration #52788	Case Number: 2021CA1946
REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

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

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

It contains 5,700 words.

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.

Leah Scaduto

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND RULES

ARGUMENT

I. THE COURT REVERSIBLY ERRED WHEN IT LET DOOLEY'S ATTORNEY WITHDRAW.

A. Because Dooley had no opportunity to object, this issue is treated as preserved.

"[I]f a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him." Crim.P. 51. Because Dooley had no opportunity to object to her attorney's withdrawal, the issue should be treated as preserved.

When Dooley's attorney withdrew, he violated Crim.P. 44's notice requirements, including informing Dooley she had "the right to object to withdrawal," and that "a hearing [would] be held and withdrawal [would] only be allowed if the court approves." Crim.P. 44(d)(1). The court didn't hold a hearing on the motion to withdraw, at which Dooley would have been asked for her position. *See People v. Edebohls*, 944 P.2d 552, 556 (Colo. App. 1996) ("[T]he trial court should then 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.").

The Government argues Crim.P. 51 does not apply because Dooley was present at hearings where the motion was discussed. AB, p.10. But the Government admits the motion did not comply with Crim.P. 44. AB, p.8. Even if it did, there's

no evidence Dooley received a copy. CF, p.253 (no notice to Dooley mentioned; served by ICCES, to which Dooley had no access). Dooley couldn't be expected to object when she was not informed of her right to do so as required by Crim.P. 44.

Because the court did not hold a hearing and Dooley was not informed of her right to object, Dooley had no opportunity to object, and her silence cannot prejudice her. *See* Crim.P. 51; *People v. Procasky*, 2019 COA 181, ¶44.

B. The court violated Dooley's right to counsel of choice.

The Government argues *People v. Cardenas* is distinguishable because (1) that defendant objected to his attorney's motion to withdraw, and (2) that court considered the motion to withdraw in chambers instead of in the courtroom. 2015 COA 94M; AB, p.10. But, as addressed above, Dooley's lack of objection cannot prejudice her. Crim.P. 51. And in *Cardenas*, the defendant objected because the court asked for his position—an opportunity Dooley was never afforded. *Cardenas*, ¶6. Further, the court here actually provided Dooley with less explanation of its ruling than the court in *Cardenas*. *Compare Cardenas*, ¶¶6-7, *with* TR 5/27/21; TR 6/8/21.

The Government mentions, without explanation, that when the court granted the motion to withdraw, Dooley was incarcerated and represented by the public defender. AB, p.9. Because this argument isn't developed, this Court should decline

to address it. *See People v. Lopez*, 2022 COA 70M, ¶¶39-41; *People v. Stone*, 2021 COA 104, ¶52. Regardless, the availability of another attorney does not undo depriving Dooley of her counsel of choice. *See Cardenas*, ¶¶6, 7 (public defender represented defendant after court let counsel withdraw); *Anaya v. People*, 764 P.2d 779, 780 (Colo. 1988) (defendant hired another attorney after disqualification of his chosen attorney).

Here, the court did not "make an inquiry into the foundation for the motion," or balance "the need for orderly administration of justice with the facts underlying the request." *Cardenas*, ¶11 (quotation omitted); *see also People v. Schultheis*, 638 P.2d 8, 15 (Colo. 1981) (listing factors). "[T]he record is devoid of any analysis by the court balancing the need for orderly administration and the facts underlying the request." *Cardenas*, ¶16.

By allowing Dooley's selected attorney to withdraw, without asking her position, with no record she received notice under Crim.P. 44, without a hearing, and without a record of any analysis by the court, the court abused its discretion and violated Dooley's right to counsel of choice. The error was structural, requiring automatic reversal. *Cardenas*, ¶¶18-20.

II. DOOLEY NEVER WAIVED HER RIGHT TO COUNSEL.

A. Although preservation is immaterial for structural errors, Dooley preserved this issue.

The Government argues because Dooley did not "object during the *Arguello* advisement" or agree to continue the trial to pursue another attorney, she didn't preserve this issue. AB, p.11. But preservation is immaterial here because the error is structural. *See Griego v. People*, 19 P.3d 1, 7 (Colo. 2001); *People v. Robles-Sierra*, 2018 COA 28, ¶52 n.10.

Although unnecessary, Dooley preserved this issue. Contrary to the Government's assertion, Dooley objected during the *Arguello* advisement—Dooley said she'd "prefer a lawyer." TR 7/12/21, p.7:3. The court told Dooley she could keeping looking for an attorney and said they could set the case for an appearance of counsel "if you think that there's some hope that you're going to be able to hire an attorney." *Id.* pp.7:23-8:9. Dooley asked the court to do so, confirming her continued desire for representation. *Id.* p.8:12-13.

The Government appears to argue Dooley's objection to the prosecution's eleventh-hour continuance request supersedes her statements that she wanted an attorney. AB, p.11. Dooley's position on the continuance request does not affect whether she validly waived her right to counsel. Dooley was left without an attorney because the court violated her right to counsel of choice and Crim.P. 44. She'd given

all her money to her attorney, who withdrew, so she couldn't hire another. TR 7/12/21, p.3:11-21; TR 7/28/21, p.67:20; CF, p.272. She did not qualify for a public defender, despite her lack of any liquid assets and an income almost equal to her monthly expenses. CF, pp.271-272. Thus, a continuance wouldn't have provided Dooley an attorney.

B. Dooley did not expressly waive her right to counsel.

The Government claims Dooley expressly waived her right to counsel, citing the July 12 hearing. AB, p.16. It isn't clear which response the Government believes constitutes an express waiver.

It cannot be Dooley's comment that she "guess[ed]" she was "representing herself," since she couldn't afford an attorney. TR 7/12/21, p.3:23; *see People v. Rawson*, 97 P.3d 315, 322 (Colo. App. 2004) (defendant did not waive his right to counsel where he "told the court that he 'guessed' he was ready to proceed to trial pro se"); *King v. People*, 728 P.2d 1264, 1266, 1269 (Colo. 1986) (no waiver where court asked if defendant wanted to proceed without counsel, and defendant responded, "I guess so, yes, until he can come up here"). This comment was not an express waiver, and it preceded the *Arguello* advisement and other statements expressing Dooley's desire for an attorney.

The court did not end the advisement by asking Dooley if she waived her right to counsel; it acknowledged Dooley's continuing desire for counsel and warned her that *eventually* failure to find an attorney could be a waiver. TR 7/12/21, pp.7:21-8:4. Noting that eventually her actions may impliedly waive her right to counsel indicates the court didn't believe Dooley had waived her right to counsel. *See also id.* p.8:23-24.

Dooley never expressly waived her right to counsel. To the contrary, she "repeatedly sought the assistance of counsel"—first her private attorney, then the public defender, and finally several attorneys from the court's low pay/slow-pay list. *See King*, 728 P.2d at 1270; *see also People v. Munsey*, 232 P.3d 113, 128 (Colo. App. 2009) ("Here, defendant expressly told the court several times that she could not afford to continue to retain her counsel or to hire new counsel. At no time did defendant say that she did not *want* counsel."); *People v. Campbell*, 58 P.3d 1148, 1158 (Colo. App. 2002) ("[D]efendant never expressly waived his right to counsel… To the contrary, he repeatedly told the trial court he wanted and needed a lawyer and did not want to represent himself.").

C. Dooley did not impliedly waive her right to counsel.

The Government argues only that Dooley expressly waived her right to counsel on July 12, apparently conceding the record does not support an implied

waiver. AB, pp.16-18; *People v. Jackson*, 2020 CO 75, ¶60 (Government's failure to address argument was implicit concession).

Nor could Dooley's actions constitute an implied waiver, given that "[c]ourts indulge every reasonable presumption against a waiver of a fundamental right." *King*, 728 P.2d at 1268. Dooley cannot be said to have "knowingly and willingly undertook a course of conduct that evinces an unequivocal intent to relinquish or abandon [her] right to legal representation." *Id.* at 1269. "If anything, the record demonstrates that [Dooley] throughout the proceedings sought and welcomed legal assistance." *Id.* at 1269. Thus, Dooley did not impliedly waive her right to counsel.

D. Any purported waiver was invalid.

The Government argues the advisement adequately informed Dooley of her rights and the risks of self-representation. AB, p.16. But the differences between the advisement and *Arguello*'s recommendations weren't merely differences of form—the court skipped five out of fourteen recommended questions. *Compare* TR 7/12/21, pp.3-8, *with People v. Arguello,* 772 P.2d 87, 98 (Colo. 1989). Critically, the court did not inform Dooley she could consult with the public defender before deciding to represent herself, or that she could ask the court to appoint counsel to advise her. TR 7/12/21, pp.3-8. These questions were particularly important given

that Dooley had repeatedly expressed her desire for an attorney and applied for a public defender.

The court also skipped the questions about appointing an attorney for indigent defendants. *Compare* TR 7/12/21, pp.3-8, *with Arguello*, 772 P.2d at 98. Although Dooley's application for a public defender was denied, she told the court she couldn't afford an attorney, even from the court's low-pay/slow-pay list. TR 7/12/21, pp.3:10-21, 7:3-5. This information put the court "on notice" and triggered its "obligat[ion] to engage in a more searching investigation" regarding Dooley's ability to afford an attorney. *See People v. Alengi*, 148 P.3d 154, 160 (Colo. 2006); *Munsey*, 232 P.3d at 127.

The record confirms Dooley's purported waiver was not knowing, intelligent, and voluntary. Dooley was often confused, unable to conduct voir dire or most cross-examinations, and couldn't introduce exculpatory evidence. TR 7/26/21, p.9:6-12; TR 7/27/21, pp.160:25-161:2, 170:21-22; TR 7/28/21, p.47:19-20; OB, pp.21-24. To avoid a last-minute continuance after her daughter traveled from out of state, Dooley stipulated to the admission of the tracking device, the crux of the Government's case against her. TR 7/26/21, pp.7:15-11:22. She subpoenaed no witnesses. TR 7/27/21, p.147:19-24. She conducted no voir dire and used none of her peremptory challenges. *Id.* pp.77:23-79:12. After the court refused to let her recall K.D. to give

her time to collect impeachment evidence, Dooley declined to cross-examine him because she "prefer[red] not to see him again." TR 7/27/21, pp.146:21-157:10, 159:10-161:4. Neither did Dooley understand what information would constitute a defense to the charges against her. TR 7/27/21, pp.154:18-158:25.

Ultimately, Dooley couldn't present exculpatory evidence she possessed because the court refused to grant her a recess. Unable to explain herself to the court in legal terms, eventually Dooley gave up:

> I give up. That's what I do, I give up. So whatever you're going to hand me, hand me because I give up. I can't explain it anymore. I'm not good at explaining things. I don't know what to tell you.
>
> I have evidence on my behalf that would say that what I'm saying is the truth, that I have evidence to prove that, and I'm being denied to go get it. No, it's not your fault. It's not the Court's fault. It's my fault I left it. It's my fault.
>
> TR 7/28/21, pp.73:23-74:7.

Depriving Dooley of her right to counsel without a valid waiver undermined not just the constitutional protections the Framers erected against an overzealous government, but the reliability and fairness of the criminal system Dooley faced—alone. Without an attorney, though there was good reason to doubt her guilt, she "face[d] the danger of conviction because [she did] not know how to establish [her] innocence." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

In sum, Dooley was not the sophisticated defendant courts have found validly waived their right to counsel. *Compare Arguello*, 772 P.2d at 96, *King*, 728 P.2d at 1267 & n.3, and *People v. Stanley*, 56 P.3d 1241, 1245 (Colo. App. 2002), *with People v. Schupper*, 2014 COA 80M, ¶¶47-51, and *People v. Smith*, 881 P.2d 385, 389 (Colo. App. 1994).

Under these circumstances, the Government cannot meet its burden to prove Dooley's waiver was knowing, intelligent, and voluntary. *See King*, 728 P.2d at 1268. Forcing Dooley to represent herself violated her right to counsel.

E. The issue isn't whether Dooley was eligible for appointed counsel, but whether she validly waived her right to counsel. Because she did not, reversal is required.

The Government tries to distinguish *King* by reframing the issue as whether Dooley was entitled to appointed counsel. AB, pp.16-17. But the issue is whether Dooley validly *waived* her right to counsel. *See Schupper*, ¶¶20-54 (analyzing whether defendant was entitled to court-appointed counsel separately from waiver); *Munsey*, 232 P.3d at 126-128 (same); *People v. Hebert*, 2016 COA 126 (discussing whether defendant was entitled to appointed counsel, not waiver); *People v. Greer*, 2022 CO 5 (same). The Government's arguments on this issue are thus irrelevant. The issue Dooley raised was whether she validly waived her right to counsel, and the remedy is reversal. *See Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

III. THE COURT REVERSIBLY ERRED BY DENYING DOOLEY'S REQUEST FOR A BRIEF RECESS TO RETRIEVE EVIDENCE.

A. Dooley did not abandon her request for a continuance.

The Government argues Dooley abandoned her request for a continuance. AB, pp.19-20. But the Government cites no authority for this proposition. It isn't this Court's job to "make or develop a party's argument when that party has not endeavored to do so itself." *Lopez*, ¶40 (quotation omitted). This Court should decline to address this argument. *See Stone*, ¶¶51-52.

Even if this Court were to address the Government's argument, Dooley did not abandon her request for a continuance. Dooley asked for a continuance three times. TR 7/27/21, pp.146:19-150:24; TR 7/28/21, pp.52:5-17, 67:6-24. Each time, the court denied her request. TR 7/27/21, pp.149:22-150:1; TR 7/28/21, pp.58:7-8, 59:1-3, 60:1-19; 61:9-11; 74:18-75:11. The Government itself admits "the court denied the request for a continuance," and "did not change its ruling" when Dooley persisted in her request. AB, p.23.

Further, it's clear both Dooley and the court understood the court denied Dooley's request. Dooley repeatedly referred to the court denying her continuance request, and the court never corrected her. TR 7/28/21, pp.67:12-15, 73:23-74:7, 87:2-12.

These facts are a far cry from scenarios where a party has abandoned a motion by "not requesting a ruling" and thus waived the issue for appellate review. *Compare People v. Ridenour*, 878 P.2d 23, 28 (Colo. App. 1994); *People v. Douglas*, 2015 COA 155, ¶40.

Dooley preserved this issue.

B. The court abused its discretion by denying Dooley's request for a brief continuance to gather evidence.

The Government argues Dooley did not explain the admissibility of the evidence she sought to retrieve. AB, pp.27-28. But Dooley repeatedly described the evidence as voicemails, letters, and text messages that would prove K.D. had access to her email account, credit card, and other information tying her to the tracking device. TR 7/27/21, pp.105:9-11, 146:21-25; TR 7/28/21, pp.53:10-17, 54:5-12, 54:22-55:14, 57:3-58:1, 72:11-15, 73:10-12.

The court incorrectly ruled this evidence was not admissible, despite acknowledging it was a prior inconsistent statement. TR 7/28/21, p.58:7-22. It believed Dooley's failure to lay a foundation under CRE 613 precluded its admission, but the evidence was independently admissible under §16-10-201 C.R.S. Section 16-10-201 does not require confronting the declarant with the statement during their testimony, if "the witness is still available to give further testimony in the trial" and the statement "purports to relate to a matter within the witness's own

knowledge." K.D. was available: the court never released him from the prosecution's subpoena, and he watched the trial. TR 7/27/21, pp.161:3-5, 165:18-21; TR 7/28/21, pp.80:7-14, 127:14-20.

The Government tries to distinguish *People v. Gagnon* by blaming Dooley for her "failure to adequately prepare for trial" and for failing to articulate how the evidence was admissible. AB, pp.27-29; 703 P.2d 661 (Colo. App. 1985). But Dooley was given discovery on *the first day of trial*. TR 7/28/21, pp.62:14-63:7. She cannot be faulted for not anticipating a witness's testimony when she was not provided discovery before trial. And despite her lack of legal knowledge, Dooley *did* articulate a theory of admissibility for the evidence—that they were K.D.'s prior inconsistent statements and gave him the opportunity to put the tracking device in her name. *See e.g.*, TR 7/28/21, p.54:1-7.

Nor is the Government's citation to *People v. Sauser* persuasive. 2020 COA 174; AB, p.29. In *Sauser*, the division distinguished *Gagnon* because the evidence defense sought a continuance to investigate may not have existed and would not have "materially impact[ed] the prosecution's ability to disprove an affirmative defense." *Sauser*, ¶23. Here, the evidence Dooley sought to retrieve existed, she just didn't have it with her. And the evidence would have undercut the prosecution's case

against her by discrediting K.D. and making it less likely she put the tracking device on his car. *See* OB, pp.27-28.

The court abused its discretion by denying Dooley a short continuance. *See* OB, pp.25-26. The prosecution would have suffered no prejudice, while Dooley would have been able to present exculpatory evidence in her defense. *See People v. McCabe*, 546 P.2d 1289, 1291-1292 (Colo. App. 1975). The court should have "considered the harsh consequences" of its ruling, particularly because the continuance wouldn't have required a mistrial or even pushed the trial past its scheduled end date. *See People v. Bakari*, 780 P.2d 1089, 1092-1093 (Colo. 1989); TR 7/28/21, p.70:2-8. The court thus abused its discretion.

IV. THE COURT REVERSIBLY ERRED WHEN IT ADMITTED PERVASIVE OTHER ACT AND/OR RES GESTAE EVIDENCE.

A. Dooley preserved this issue.

The Government argues this issue was not preserved because Dooley did not object when the court said it had already ruled on the 404(b) motion. AB, pp.30-31. But the Government's reliance on *People v. Conyac* is misplaced. 2014 COA 8M, ¶¶77-79; AB, p.31. In *Conyac*, before trial the defendant said the prosecution had provided no notice of other act evidence, and he did not expect any at trial. *Conyac*, ¶78. When the challenged evidence was elicited, defendant objected, but only on

relevance grounds. *Id.* The division found the defendant did not preserve the objection under CRE 404(b). *Conyac*, ¶79.

Here, defense counsel objected to the prosecution's proffered other act evidence and repeatedly requested a hearing and ruling. TR 3/1/21, p.5:10-24; TR 3/9/21, pp.8:13-17, 14:6-7; TR 5/27/21, pp.4:18-8. The court definitively ruled on the objection, admitting the evidence. TR 7/26/21, pp.12:7-13:9. The issue was preserved. *See* CRE 103(a).

B. The court abused its discretion by failing to hold a hearing.

The court's ruling was not made in a "reasonable manner." AB, p.37. The Government attempts to construe Dooley's pleadings on the double jeopardy issue as presenting her argument against the admission of the other act evidence. *Id.* They did not. CF, pp.94-96, 185-197. The only party whose arguments the court received was the prosecution. CF, pp.125-130. The Government's assertion to the contrary isn't supported by the record.

The court did not let Dooley present arguments on the other act evidence, instead considering only the prosecution's position in its ruling. The court's refusal to hold a hearing was thus an abuse of discretion. *See People v. Groves*, 854 P.2d 1310, 1313 (Colo. App. 1992) (no abuse of discretion in ruling on offers of proof where "the trial court gave each party the opportunity to present all of the evidence

in the case in offers of proof[,]…the trial court considered all of the evidence," and the court made the requisite findings); *People v. Moore*, 117 P.3d 1, 3 (Colo. App. 2004)(same).

C. The court abdicated its gatekeeping function.

Although the Government concedes the court made no express findings regarding the other acts evidence, it argues the court did so implicitly by admitting the evidence. AB, p.38. But in each case cited by the Government, the court made *some* findings or acknowledged the proper standard. *See People v. McGraw*, 30 P.3d 835, 838 (Colo. App. 2001) (court explicitly made *Spoto*[1] findings before admitting other act evidence); *People v. Warren*, 55 P.3d 809, 814 (Colo. App. 2002) (court "acknowledged the applicability of the *Garner-Spoto* test and explicitly determined that the evidence was relevant to prove defendant's knowledge and was not unduly prejudicial"). The court here never even mentioned *Spoto.* TR 6/21/21, pp.6-7; TR 7/26/21, p.12:7-22.

By failing to hold a hearing, address Dooley's objections, provide any reasoning for its decision, or make any findings, the court "fail[ed] to adequately perform [its] gate-keeping task" and abused its discretion. *People v. Welsh*, 80 P.3d 296, 304 (Colo. 2003).

[1] *People v. Spoto*, 796 P.2d 1314, 1318 (Colo. 1980).

D. The court abused its discretion by admitting other act evidence outside the prosecution's notice.

The Government appears to argue the other act evidence was properly admitted as res gestae. AB, p.40. Of course, as the Government later concedes, that doctrine has been abolished. AB, p.41; *Rojas v. People*, 2022 CO 8.

The Government's conclusory assertion that the evidence served a proper purpose under CRE 404(b), showing motive, intent, knowledge, identity, and the absence of mistake or accident, "does not an argument make," and this Court should decline to consider it. *Lopez*¸ ¶40. The challenged evidence spans different victims and different alleged acts—including an allegation that Dooley stole from her daughter and associated with unsavory characters. OB, p.38. The evidence didn't serve a proper purpose under CRE 404(b), and was part of neither the prosecution's notice nor the court's 404(b) ruling. *See People v. Fortson*, 2018 COA 46M, ¶¶23-25.

The Government next contends that even if the evidence was improperly admitted, it was harmless because it was "far less egregious than the charged acts." AB, p.40. But the challenged evidence included that "Dooley tracked [K.D.]'s car to Bear Creek Lake," the same crime for which Dooley was charged. OB, p.38; *see People v. Kembel*, 2023 CO 5, ¶84 (Gabriel, J., dissenting) (potential prejudice to defendant is obvious when the jury hears about prior convictions for the same

charge). Further, much of the evidence was more indicative of bad character than the substantive allegations—including that she stole from her own daughter, that her daughter was so concerned for her family's safety she sought a protection order, and that she associated with unsavory characters around her grandchildren. OB, p.38. This is precisely the kind of "damning innuendo likely to beget prejudice in the minds of jurors." *Rojas*, ¶22 (quotation omitted).

By letting the prosecution introduce prejudicial and unnoticed other act evidence, the court abused its discretion. *People v. Hardin*, 2016 COA 175, ¶30.

E. The court abused its discretion by admitting the evidence as res gestae.

The Government contends the court actually admitted the other act evidence under CRE 404(b), because it gave a limiting instruction to the jury at the end of the case. AB, p.42. But the limiting instruction didn't address the unnoticed other act evidence. OB, p.38; CF, p.385. Further, the court failed to give contemporaneous limiting instructions. OB, pp.41-42. The court abused its discretion by admitting the extrinsic evidence "without the required *Spoto* analysis and accompanying procedural safeguards." *Rojas*, ¶54.

F. The court abused its discretion under CRE 403.

The noticed other act evidence did not have substantial probative value. AB, p.43. The allegation that Dooley placed a tracker on K.D.'s car was particularly

weak: it was found in a parking lot, not on or even directly under K.D.'s car, and law enforcement never investigated the subscriber information. CF, pp.135-136. Because "the chain of inferences derived from the prior act evidence [was] weak," so too was the probative value of the evidence. *Yusem v. People*, 210 P.3d 458, 468 (Colo. 2009).

While the Government disputes the other act evidence was a significant part of the trial, the record supports Dooley's characterization. AB, p.44; OB pp.40-41. Four out of the five prosecution witnesses testified about the other act evidence. TR 7/27/21, pp.109-28, 171-95; TR 7/28/21, pp.36, 48. Evidence that Dooley associated with unsavory characters and stole from her daughter had no relevance apart from maligning her character. The evidence had "an undue tendency to suggest a decision on an improper basis… such as sympathy, hatred, contempt, retribution, or horror." *People v. District Court*, 785 P.2d 141, 147 (Colo. 1990). Thus, the danger of unfair prejudice substantially outweighed the probative value of the evidence, and its admission was an abuse of discretion.

G. The court erred by failing to give contemporaneous limiting instructions.

The Government argues the limiting instruction given at the end of trial was sufficient, and the focus of the trial was not the other act evidence. AB, pp.45-46. But the limiting instruction at the end of trial didn't encompass the unnoticed other

act evidence. OB, p.38; *cf. People v. Butson*, 2017 COA 50, ¶25 (instruction limited the jury's consideration of the challenged evidence). And the focus of the trial was not the charged conduct, but the other act evidence. OB, pp.40-41; Section IV.F, *supra*.

The Government's reliance on *Moore* is misplaced. AB, pp.45-46; 117 P.3d at 3. In *Moore*, the court gave a contemporaneous limiting instruction during the testimony of a third witness and informed the jury that it applied to the prior witnesses. *Id*. at 4. Here, the court didn't give a contemporaneous limiting instruction during the testimony of any of the witnesses who offered other act evidence. *Rojas*, ¶56.

The court's failure to give a contemporaneous instruction was error.

H. The limiting instruction given was deficient.

Dooley did not waive this issue. Dooley was representing herself because the court violated her right to counsel. *See* Sections I, II, *supra*. In *People v. Carter*, the division found defense counsel waived an instructional issue. 2021 COA 29, ¶¶30-33. But the division specifically relied on evidence in the record that counsel knew about the issue and made "a decision to go along with it." *Carter*, ¶33. The same cannot be said of Dooley. Any failure to object to the deficiency in the limiting instruction resulted from her lack of knowledge of the law and her rights. She

repeatedly told the court she wasn't familiar with the "procedures of court and criminal proceedings because [she had] never been in trouble before." TR 7/28/21, p.56:12-14; TR 7/27/21, pp.148:24-149:9. Waiver is the "*intentional* relinquishment of a *known* right or privilege." *People v. Rediger*, 2018 CO 32, ¶39. Dooley didn't know her rights, much less intentionally relinquish them.

The Government argues the instruction was sufficient because the unnoticed other act evidence was an insignificant part of the trial. AB, p.47. Not so. The unnoticed evidence comprised thirty-two out of the sixty-eight pages of PDF exhibits. EX, pp.34-65, 68. And the prosecution referenced the unnoticed evidence at length in closing. TR 7/28/21, pp.90:22-23, 95:6-8, 97:9-17, 97:24-25, 98:3-4, 101:19-24, 109:2-7.

The limiting instruction was deficient. The jury was not instructed about any permissible purpose, if one existed, for the unnoticed other act evidence. The court abused its discretion.

I. The court erred by admitting Dooley's prior conviction.

The Government claims because the exhibit included the protection order, there was no error in its admission. AB, p.48. But if the only relevance was the protection order, the prosecution could've just admitted the protection order. EX, pp.11-12. At a minimum, the court should have redacted the highly prejudicial

information that Dooley was previously charged with the same crime, the references to two additional criminal cases with no relevance to the violation of a protection order charge and the fact that they were dismissed pursuant to a plea agreement, and the conditions of her probation, including drug testing. EX, pp.9-10; *see Kembel*, ¶84. The court erred by admitting this unredacted exhibit.

J. The court abused its discretion by letting the prosecution use the other act evidence for propensity purposes.

The comments in the prosecution's opening statement were not proper references to the anticipated evidence. AB, p.50. They implied because Dooley put a tracking device on K.D.'s car before, she also did so this time. And the prosecution repeated this theme in closing by arguing that even without the two calls on May 5, 2020, the jury "still [had] everything else, each and every other thing repeated more than two," including instances of surveillance. TR 7/28/21, p.102:19-21; *see also People v. Herron*, 251 P.3d 1190, 1194 (Colo. App. 2010) (stalking conviction requires at least two or more occurrences of the specified acts, like placing the victim under surveillance).

Finally, the evidence against Dooley was not overwhelming. AB, p.51. There was no explanation of how Dooley would have managed to, undetected, remove the tracking device from K.D.'s car, take it to a location to charge it, and return it to the car without being seen. The battery was charged almost every day, sometimes twice

a day, during daylight hours. Ex. 12(Location Logs). Dooley admitted she contacted K.D., but insisted she did not put the tracking device on his car. TR 7/28/21, pp.103-106; *see also* OB, pp.27-28, 44-45. But she couldn't present evidence that K.D. could've bought the tracking device with her information, because the court erroneously denied her a recess. *See* Section III, *supra*.

By allowing this improper argument, the court abused its discretion. *See Yusem*, 210 P.3d at 464 n.8.

V. THE COURT AND PROSECUTION VIOLATED DOOLEY'S RIGHTS TO NOTICE OF THE CHARGES AGAINST HER AND TO A UNANIMOUS VERDICT.

A. A simple variance occurred and requires reversal.

The Government argues the prosecution did not rely on the emails to support a conviction. AB, pp.54-55. The record doesn't support this contention. The prosecution argued the jury could rely on the emails to support the violation of a protection order and stalking charges. *See* OB, p.47; TR 7/28/21, pp.101:14-20, 108:23-110:4. The prosecution quoted the emails directly during closing. TR 7/28/21, pp.94:22-95:8 (quoting EX, pp.51-52), 109:19-22 (quoting EX, p.52), 109:22-23 (quoting EX, p.64), 109:23-24 (quoting EX, p.65). It argued even if the jury did not believe Dooley surveilled K.D., it could convict on repeated communications alone. *Id.* p.91:2-20. Many emails were sent within the charged date range and after a protection order went into effect. EX, pp.16, 47-68; CF, p.378.

Contrary to the Government's argument, the record reflects the prosecution relied on the emails as an independent basis to convict.

Further, the variance prejudiced Dooley. OB, p.52. The Government argues the jury heard evidence of "far worse acts," specifically the tracking device. AB, p.55 n.14. But Dooley denied putting the tracking device on K.D.'s car. TR 7/28/21, p.105:6-8. She never disputed sending the emails. *Id.* p.103:19-23. The jury could've sidestepped resolving the factual dispute about whether Dooley placed the tracker by relying entirely on the emails, which caused K.D. to become visibly upset. TR 7/27/21, p.128:5-16. There was thus a real risk that the jury convicted based on the emails. Had she known the Government was relying substantively on the emails, she may have objected to their admission or otherwise mounted a defense to them. *Id.* p.123:12-15.

The Government's attempts to distinguish *People v. Simmons* are misplaced. AB, p.56; 973 P.2d 627 (Colo. App. 1998). Although *Simmons* is described as a unanimity case, the issues are closely related, and other variance cases have cited it. *See People v. Smith*, 2018 CO 33, ¶34; *People v. Foster*, 971 P.2d 1082, 1087 (Colo. App. 1998). Part of a variance's prejudice to the defendant is the risk it creates "of a non-unanimous verdict." *Smith*, ¶34. And the Government's argument that the

prosecution did not rely on the emails to support a conviction isn't supported by the record, as discussed above.

Because "a review of the entire record establishes a reasonable possibility that the improper instruction contributed to the defendant's conviction," plain error occurred. *See Smith*, ¶25.

B. The court failed to ensure the verdict was unanimous.

The emails were not part of a "single criminal transaction of stalking." AB, p.58. The bill of particulars did not include the emails. CF, pp.180-183. And unlike the cases cited by the Government, here the prosecution treated the acts as legally separable, arguing in closing the jury could consider each category of act as an independent basis for conviction, because each was repeated at least twice. *Compare* TR 7/28/21, pp.91:2-20, 102:19-21: *with People v. Hines*, 2021 COA 45, ¶56; *People v. Wagner*, 2018 COA 68, ¶21; *People v. Wester-Gravelle*, 2020 CO 64, ¶¶39-40.

The Government's citation to *People v. Herron* is similarly unpersuasive. AB, p.58. In *Herron*, the three acts forming the basis of stalking conviction were not legally separable because each conviction required at least two acts. 251 P.3d 1190, 1194 (Colo. App. 2010). Here, the prosecution alleged many more than four acts. OB, p.51. The acts spanned almost a year—a year filled with intervening events like

moves, finalizing their divorce, selling their familial home, imposition of two protection orders, and multiple criminal cases. EX, pp.34-68; CF, pp.125-179, 182-183; *see also Quintano v. People*, 105 P.3d 585, 591 (Colo. 2005).

The error was obvious and substantial. The Government argues it was unlikely jurors convicted based on the emails instead of "*Dooley's more damning acts*," but this argument again ignores that the emails were undisputed, as opposed to the allegation that Dooley put a tracking device on K.D.'s car. AB, p.59. Because Dooley challenged some of the alleged acts and not others, there was a "rational basis for some jurors to predicate guilt on one act while other jurors based it on another." *Thomas v. People*, 803 P.2d 144, 155 (Colo. 1990).

Nor does the instruction that the jury's verdict should be unanimous as to all parts remedy the harm, as it did in *Wester-Gravelle*. AB, p.59. In *Wester-Gravelle*, the prosecution's case turned on whether the jury believed the defendant had committed *all* the acts forming the basis of the conviction. *Wester-Gravelle*, ¶¶39-40. Because the way the prosecution argued the case didn't give rise to a "reasonable likelihood that the jurors would have disagreed about which" of the acts the defendant committed, any potential harm was remedied by the general unanimity instruction. *Id.* Here, where there was a real chance the jury convicted based on different acts, the general unanimity instruction was insufficient.

Because the court failed to ensure Dooley's conviction was unanimous, reversal is required.

CONCLUSION

Dooley requests this Court reverse her convictions.

MEGAN A. RING
Colorado State Public Defender

Leah Scaduto

LEAH SCADUTO, #52788
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 November 8, 2023, a copy of this Reply Brief was electronically served through Colorado Courts E-Filing on Jacob R. Lofgren of the Attorney General's Office.

K. Root