ADVANCE SHEET HEADNOTE
May 6, 2024

2024 CO 25

No. 22SC673, *Whiteaker v. People*—Double Jeopardy—Lesser-included Offenses—Plain Error—Remedies.

The supreme court explicitly overrules *People v. Garcia*, 940 P.2d 357 (Colo. 1997) and holds that first degree criminal trespass of a dwelling is a lesser-included offense of second degree burglary. The court also confirms that when a defendant is convicted of both a greater offense and a lesser-included offense in violation of double jeopardy principles, the remedy on appeal is automatic reversal of the judgment of conviction as to the lesser-included offense and merger of the two offenses, such that only the greater remains.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 25

Supreme Court Case No. 22SC673
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA1339

Petitioner:

Taunia Marie Whiteaker,

v.

Respondent:

The People of the State of Colorado.

Judgment Reversed
en banc
May 6, 2024

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JUSTICE HOOD delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ, JUSTICE GABRIEL**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE HOOD delivered the Opinion of the Court.

¶1 This case is a bit of an outlier. Unlike most cases we see, the parties here agree on the answer to the question presented—whether first degree criminal trespass of a dwelling is a lesser-included offense of second degree burglary.[1] Both parties say it is, and we so hold. Petitioner Taunia Marie Whiteaker's overlapping convictions therefore violate the double jeopardy clauses of the federal and state constitutions. End of story?

¶2 Not quite. While the parties agree about the error, they dispute the remedy. The prosecution urges traditional plain error review: leave Whiteaker's convictions intact, the state says, because the district court's error wasn't obvious. Whiteaker counters that double jeopardy sentencing errors *always* require reversal and merger of the greater offense with the lesser-included offense, even if the error wasn't obvious to the district court. We agree with Whiteaker. Double jeopardy sentencing errors require automatic reversal even when the error isn't obvious to

[1] We granted certiorari to review the following issue:

> Whether the clarified elements test announced in *Reyna-Abarca v. People*, 2017 CO 15, 390 P.3d 816, and applied in *People v. Rock*, 2017 CO 84, 402 P.3d 472, abrogated the holding in *People v. Garcia*, 940 P.2d 357 (Colo. 1997), *as modified on denial of reh'g* (Aug. 4, 1997), that first degree trespass of a dwelling is not a lesser-included offense of second degree burglary.

the district court. Therefore, Whiteaker's convictions for trespass and burglary merge.

I. Facts and Procedural History

¶3 One winter night in 2019, Whiteaker and her stepdaughter, A.W., got into a heated argument. A.W. left and went to her grandmother's house. (A.W.'s grandmother is Whiteaker's mother-in-law.) Whiteaker responded by sending a barrage of fiery text messages to her husband and mother-in-law, apparently in search of A.W. Once Whiteaker confirmed that A.W. was at her grandmother's house, Whiteaker drove there and stormed in through the unlocked front door. The ensuing physical altercation between Whiteaker, her husband, and her mother-in-law led to this case.

¶4 Whiteaker was convicted of second degree burglary, first degree criminal trespass, third degree assault, and harassment. The trial judge entered each conviction on the mittimus and sentenced Whiteaker to three years of probation for each count, to run concurrently.

¶5 Whiteaker appealed and argued, among other things, that the district court reversibly erred by failing to merge her conviction for first degree criminal trespass into her conviction for second degree burglary.

¶6 A division of the court of appeals rejected this argument. *People v. Whiteaker*, 2022 COA 84, ¶ 19, 519 P.3d 1127, 1132. The division relied on our statement in

People v. Garcia, 940 P.2d 357, 362 (Colo. 1997), that "first degree criminal trespass is not a lesser included offense of second degree burglary" to conclude that the district court was not required to merge the two offenses. *Whiteaker*, ¶¶ 15–18, 519 P.3d at 1131–32. The division reasoned that even though our subsequent opinions have cast doubt on *Garcia*, "it is the prerogative of the supreme court alone to overrule its cases," and in the division's view, we have not explicitly overruled *Garcia*. *Id.* at ¶ 17, 519 P.3d at 1132 (quoting *DIA Brewing Co. v. MCE-DIA, LLC*, 2020 COA 21, ¶ 63, 480 P.3d 703, 714 (Fox, J., dissenting), *aff'd on other grounds sub nom. Schaden v. DIA Brewing Co.*, 2021 CO 4M, 478 P.3d 1264).

¶7 Judge Kuhn disagreed. He specially concurred because he believed our opinion in *Reyna-Abarca v. People*, 2017 CO 15, 390 P.3d 816, abrogated our lesser-included-offense holding in *Garcia*. *Whiteaker*, ¶ 60, 519 P.3d at 1139 (Kuhn, J., specially concurring). Although he "d[id] not see *Garcia*'s holding as continuing to be directly controlling," *id.* at ¶¶ 59–60, 519 P.3d at 1139, he nevertheless agreed with the majority that both convictions should survive because the district court's unpreserved error in failing to merge the two offenses was not plain, *id.* at ¶ 62, 519 P.3d at 1139–40. In Judge Kuhn's view, the error wasn't plain because it wasn't "obvious error for the trial court to have acted consistently with" *People v. Denhartog*, 2019 COA 23, ¶ 78, 452 P.3d 148, 160—a binding court of appeals

decision expressly holding that *Garcia* remained good law after *Reyna-Abarca*. *Whiteaker*, ¶ 62, 519 P.3d at 1139–40.

¶8 Whiteaker now urges us to more expressly abandon *Garcia* and vacate her conviction for first degree criminal trespass.

II. Analysis

A. Standard of Review

¶9 We review interpretations of our cases de novo, *see Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 28 (Colo. 2006), and we "review de novo a defendant's claim that a conviction violates the constitutional protection against double jeopardy," *Garcia v. People*, 2023 CO 41, ¶ 13, 530 P.3d 1200, 1203.

B. *Reyna-Abarca* Abrogated *Garcia*

¶10 The state and federal constitutions prohibit placing someone in jeopardy twice for the same offense. U.S. Const. amends. V, XIV; Colo. Const. art. II, § 18. As relevant here, these "[c]onstitutional double-jeopardy protections preclude the imposition of multiple punishments when the General Assembly has not 'conferred specific authorization for multiple punishments.'" *Page v. People*, 2017 CO 88, ¶ 8, 402 P.3d 468, 470 (quoting *Woellhaf v. People*, 105 P.3d 209, 214 (Colo. 2005)). And the General Assembly has not authorized multiple punishments in the form of two convictions for the same conduct when the lesser

offense is included in the greater offense. *Id.* at ¶ 9, 402 P.3d at 470. Accordingly, multiplicitous convictions run afoul of double jeopardy principles.

¶11 To determine whether a lesser offense is included in a greater offense for double jeopardy purposes, we look to the legislature. Section 18-1-408(5)(a), C.R.S. (2023), provides that an offense is included in another if "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged." In applying this statutory language, we have employed what we have variously termed the "strict elements," "statutory elements," or "subset" test. *Reyna-Abarca*, ¶¶ 53–54, 390 P.3d at 824; *Thomas v. People*, 2021 CO 84, ¶ 24, 500 P.3d 1095, 1101. The competing labels sometimes add to the confusion. In the interest of alleviating some of that confusion, we will refer to the current section 18-1-408(5)(a) test for determining whether an offense is included in another for double jeopardy purposes as the "clarified subset" test.

¶12 In *Garcia*, we articulated the former subset test this way: "one offense is a lesser included of another offense when all of the essential elements of the lesser offense comprise a subset of the essential elements of the greater offense, such that it is *impossible* to commit the greater offense without also committing the lesser." 940 P.2d at 360 (emphasis added). Although *Garcia* used the term "subset," in practice it didn't honor the conventional meaning of that term. Potential elemental distinctions controlled even when the greater offense still completely subsumed

the lesser. This meant that when it was possible to commit a greater offense in a manner that didn't satisfy the elements of the lesser offense, the lesser was not an included offense.

¶13 Applying that test in *Garcia*, we declared that "first degree criminal trespass is not a lesser included offense of second degree burglary." *Id.* at 362. That's because it is possible to commit second degree burglary without necessarily committing first degree criminal trespass. Specifically, first degree trespass requires entering a "dwelling" while second degree burglary may be satisfied by entering a "building," which is a broader category that need not be a dwelling. *Compare* § 18-4-502(1)(a), C.R.S. (2023), *with* § 18-4-203(1), C.R.S. (2023).

¶14 Twenty years later, we revisited the analytical framework for these kinds of issues in *Reyna-Abarca*. We began by acknowledging that we "ha[d] not been consistent in defining this strict elements test." *Reyna-Abarca*, ¶ 54, 390 P.3d at 824. Then we listed cases that applied versions of the test that "ha[d] proved unworkable in certain circumstances, as, for example, when a greater offense (e.g., felony murder) can be committed in multiple ways." *Id.* at ¶¶ 54–55, 390 P.3d at 824–25. We listed *Garcia* among the cases that had employed "unworkable" tests. *Id.* at ¶ 54, 390 P.3d at 824. Seeking to "adopt a standard that can be applied readily and uniformly in all cases," *id.* at ¶ 59, 390 P.3d at 825, we announced the following test: "an offense is a lesser included offense of another offense if the elements of

the lesser offense are a subset of the elements of the greater offense, such that the lesser offense contains only elements that are also included in the elements of the greater offense," *id.* at ¶ 64, 390 P.3d at 826.

¶15 To clarify this new test, we pointed to our opinion in *Meads v. People*, 78 P.3d 290 (Colo. 2003). *Reyna-Abarca*, ¶ 65, 390 P.3d at 826. In *Meads*, we held that second degree aggravated motor vehicle theft was not a lesser-included offense of felony theft because it was possible to commit felony theft without committing motor vehicle theft. 78 P.3d at 295–96. That's because the motor vehicle theft statute requires theft of a "motor vehicle" while felony theft may be committed by taking "anything of value," which need not be a motor vehicle. *Id.* at 295; *see also* § 18-4-409(4), C.R.S. (2023); § 18-4-401(1), C.R.S. (2023).

¶16 In *Reyna-Abarca*, we "disavow[ed]" our holding in *Meads*, explaining that "[u]nder the clarified version of the strict elements test that we adopt today, the result in *Meads* would have been different because . . . a 'motor vehicle' is always a thing of value under the felony theft statute." *Reyna-Abarca*, ¶ 67, 390 P.3d at 827. In other words, because at least one way to take a "thing of value" is to take a "motor vehicle," the elements of motor vehicle theft are a subset of the felony theft elements.

¶17 We applied this "clarified articulation of the strict elements test" to the offenses then before us: DUI, vehicular assault-DUI, and vehicular homicide-DUI.

Id. at ¶ 69, 390 P.3d at 827. Though the latter two offenses could be committed in ways that would not constitute DUI (thus failing the test used in *Garcia* and *Meads*), we concluded that DUI was a lesser-included offense. *Id.* at ¶ 76, 390 P.3d at 827. We reasoned that the elements of DUI always constitute a subset of the elements of both vehicular assault-DUI and vehicular homicide-DUI such that those offenses "can be committed by proof of [DUI's] elements plus certain others." *Id.* at ¶¶ 77–78, 390 P.3d at 827. This left no room for the survival of the test we applied in *Garcia*.

¶18 After *Reyna-Abarca*, it no longer matters whether the greater offense can be committed in a way that wouldn't encompass the lesser offense. An offense is a lesser-included offense if at least one of the ways to commit the greater offense necessarily establishes all the elements of the lesser offense. *See Page*, ¶ 10, 402 P.3d at 470. We have applied this clarified test repeatedly. *See id.* at ¶¶ 13–19, 402 P.3d at 471–72*; People v. Rock*, 2017 CO 84, ¶¶ 19–21, 402 P.3d 472, 478–79; *Friend v. People*, 2018 CO 90, ¶¶ 37–43, 429 P.3d 1191, 1197–98.

¶19 And we apply it again now. Whiteaker asserts, the prosecution concedes, and we agree that *Reyna-Abarca* abrogated our holding in *Garcia* that first degree criminal trespass is not a lesser-included offense of second degree burglary. *Reyna-Abarca*'s clarified subset test produces the opposite result we reached in *Garcia*.

¶20 Under the clarified subset test, first degree criminal trespass comprises a subset of the elements of second degree burglary and is thus a lesser-included offense. *See Page*, ¶ 10, 402 P.3d at 470. Second degree burglary occurs when a "person knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property." § 18-4-203(1). If the building is a dwelling, the offense is elevated to a class three felony. § 18-4-203(2)(b)(I). As relevant here, first degree criminal trespass occurs when a defendant "[k]nowingly and unlawfully enters or remains in a dwelling of another." § 18-4-502(1)(a). Under the existing statutory scheme for these offenses, first degree criminal trespass is *always* a lesser-included offense of second degree burglary because one of the ways to commit second degree burglary satisfies all the elements of first degree criminal trespass.

¶21 Whiteaker was convicted of both a greater and a lesser-included offense in violation of the double jeopardy clauses of the U.S. and Colorado constitutions. *See People v. Rigsby*, 2020 CO 74, ¶ 14, 471 P.3d 1068, 1072. Thus, we turn to the contested question of remedy.

C. Double Jeopardy Sentencing Errors Trigger Automatic Reversal

¶22 In the past, we've stated that we review unpreserved double jeopardy claims such as this one for plain error. *Reyna-Abarca*, ¶ 47, 390 P.3d at 823. "An

error is plain if it is obvious and substantial and so undermines the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *People v. Rediger*, 2018 CO 32, ¶ 48, 416 P.3d 893, 903. The prosecution concedes that the district court erred by entering multiplicitous convictions on the mittimus, but it still argues that the error wasn't plain because the district court had no way of realizing that *Garcia* was a dead letter. On the contrary, binding precedent from another division of the court of appeals informed the district court that *Garcia* lived on even after *Reyna-Abarca*. *See Denhartog*, ¶ 78, 452 P.3d at 160.

¶23 Fair enough, but it doesn't matter whether the error here was, or should have been, obvious to the district court. When we've encountered multiplicitous convictions in the past, we've increasingly concluded that as a matter of law, such errors "require[] a remedy." *Reyna-Abarca*, ¶ 81, 390 P.3d at 828; *see also Friend*, ¶¶ 45–47, 429 P.3d at 1198 (quoting *Reyna-Abarca*'s "requires a remedy" language and providing one, without any analysis about whether the error was obvious); *Rigsby*, ¶ 14, 471 P.3d at 1072 (noting that "the error that did occur was one of multiplicity, which violates the Double Jeopardy Clauses of the federal and state constitutions and requires a remedy").[2]

[2] Even before this line of cases, we bypassed the obviousness portion of plain error review to provide a remedy in *Lucero v. People*, 2012 CO 7, 272 P.3d 1063 ("*Lucero II*"). There, a defendant was "punished . . . for three separate counts of theft when

¶24 Today we affirm the principle that double jeopardy sentencing errors are treated differently: when a defendant establishes that a trial court entered multiplicitous punishments in violation of double jeopardy principles, merger is the remedy.[3]

¶25 The prosecution argues that despite this recent trend in our caselaw, we should correct course and turn back. The state points out that even if we applied this automatic reversal rule in *Reyna-Abarca*, we applied a traditional plain error analysis in *Scott v. People*, 2017 CO 16, ¶¶ 16–18, 390 P.3d 832, 835, which we released the same day. While we acknowledge the tension between these two cases, we subsequently embraced automatic reversal for double jeopardy

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the legislature provided that he be punished for only one." *Id.* at ¶ 24, 272 P.3d at 1066. In that case, as here, the division found that the error wasn't plain because it wasn't obvious. *People v. Lucero*, No. 05CA2142, slip op. at 27 (Nov. 12, 2009) ("*Lucero I*"). We, however, went ahead and "correct[ed] Lucero's illegal sentence to conform to the statute" by reversing the division, merging the three convictions into one, and remanding for resentencing consistent with that opinion. *Lucero II*, ¶¶ 26–27, 272 P.3d at 1066–67. We did so without any obviousness analysis and on the principle that punishment beyond legislative authority must be corrected. *Id.* at ¶ 20, 272 P.3d at 1065.

[3] Double jeopardy sentencing errors shouldn't be confused with structural errors. *See Reyna-Abarca*, ¶ 46, 390 P.3d at 823 (rejecting the argument that double jeopardy multiplicity issues constitute structural error). Nor are they trial errors as we've defined that term because failure to merge a lesser-included offense into the greater does not "occur 'during the presentation of the case to the jury,'" *Griego v. People*, 19 P.3d 1, 7 (Colo. 2001) (quoting *Cooper v. People*, 973 P.2d 1234, 1242 (Colo. 1999)). Thus, double jeopardy sentencing errors comprise a category of errors adjacent to, but separate from, the established structural-error/trial-error dichotomy.

sentencing errors in both *Friend* and *Rigsby*. We therefore reject the prosecution's argument that *Scott* prevents us from also doing so here.

¶26 But rather than simply counting friends and foes among our precedent, let's discuss guiding principles. First, our North Star in this setting: The legislature defines offenses and prescribes punishments. *Allman v. People*, 2019 CO 78, ¶ 30, 451 P.3d 826, 833; *Rigsby*, ¶ 31, 471 P.3d at 1077. Courts impose sentences "only to the extent permitted by statute." *Allman*, ¶ 30, 451 P.3d at 833 (explaining that "[w]ithout statutory authority . . . court[s] ha[ve] no inherent powers to impose" punishment). Before a court may impose multiple punishments for multiple convictions based on the same behavior, the legislature must authorize as much. And "[i]n this way, 'the Double Jeopardy Clause simply embodies the constitutional principle of separation of powers by ensuring that courts do not exceed their own authority by imposing multiple punishments not authorized by the legislature.'" *Friend*, ¶ 14, 429 P.3d at 1194 (quoting *Woellhaf*, 105 P.3d at 214); *see also People v. Rodriguez*, 914 P.2d 230, 287 (Colo. 1996) (stating that the purpose of merger "is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments" (quoting *Jones v. Thomas*, 491 U.S. 376, 381 (1989))).

¶27 Here, the district court had no authority to sentence Whiteaker for both burglary and trespass—a greater offense and its lesser-included offense. *See* § 18-1-408(1)(a); *People v. Wood*, 2019 CO 7, ¶ 23, 433 P.3d 585, 592. And without statutory authority, the resulting sentence was illegal. *See Lucero v. People*, 2012 CO 7, ¶ 20, 272 P.3d 1063, 1065 ("*Lucero II*") ("Sentences that are inconsistent with the statutory scheme outlined by the legislature are illegal."); *see also Whalen v. United States*, 445 U.S. 684, 688–89 (1980) ("[I]f Congress has not authorized cumulative punishments . . . , the petitioner has been impermissibly sentenced.").

¶28 When such error occurs, we have "the power *and the duty* to correct" the error. *Lucero II*, ¶ 20, 272 P.3d at 1065 (emphasis added). Indeed, "[t]he double jeopardy clauses *require us* to vacate the lesser-included offense *because* our legislature has not provided for separate punishment under these circumstances." *Patton v. People*, 35 P.3d 124, 133 (Colo. 2001) (emphases added) (remanding to the trial court to vacate the lesser-included offense, without any standard of reversal analysis). Thus, the remedy we impose is grounded in our duty to enforce the bounds of punishment established by the legislature. *Cf. United States v. Catrell*, 774 F.3d 666, 669 (10th Cir. 2014) ("[A] prison sentence exceeding a statutory maximum [is] an 'illegal sentence' that 'trigger[s] per se, reversible, plain error.'"

(third alteration in original) (quoting *United States v. Gonzalez-Huerta*, 403 F.3d 727, 739 n.10 (10th Cir. 2005))).[4]

¶29 Moreover, automatic reversal in this narrow context promotes the interests of justice. The prosecution acknowledges that Whiteaker was given an illegal, unconstitutional punishment. The just result is readily apparent and easily achievable: Merge the lesser-included offense into the greater and remand for correction of the mittimus. *See Rigsby*, ¶ 35, 471 P.3d at 1077. And that's our solution here.

III. Conclusion

¶30 We reverse the judgment of the court of appeals and remand this case to the court of appeals to instruct the district court to amend the mittimus to reflect merger of Whiteaker's conviction for first degree criminal trespass into her conviction for second degree burglary.

[4] The automatic reversal requirement for double jeopardy sentencing errors we announce today would have applied with equal force if Whiteaker's claim had been preserved and our review was for harmless error.