SUMMARY
March 3, 2022

2022COA28

No. 19CA1308, *People v. Martinez* — Criminal Law — Sentencing — Restitution — Victim — Insurers

A division of the court of appeals analyzes whether, under the 2000 amendments to the restitution statutes, an insurance company that indemnifies a policyholder for losses proximately caused by a felony, misdemeanor, or other offense specified in the restitution statutes is a "victim" entitled to restitution from the offender. In *People v. Oliver*, 2016 COA 180M, 405 P.3d 1165, a division of the court assumed, without conducting a statutory analysis, that the 2000 amendments did not alter prior case law holding that an insurance company can be a "victim" for purposes of restitution. The division concludes that, under these

circumstances, the insurance company is a “victim” under the post-2000 restitution statutes.

COLORADO COURT OF APPEALS **2022COA28**

Court of Appeals No. 19CA1308
Boulder County District Court No. 18CR2655
Honorable Judith LaBuda, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Arnold Roman Martinez,

Defendant-Appellant.

ORDER AFFIRMED

Division III
Opinion by JUDGE LIPINSKY
Gomez, J., concurs
J. Jones, J., specially concurs

Announced March 3, 2022

Philip J. Weiser, Attorney General, John T. Lee, First Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Jacob B. McMahon, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 The Colorado restitution statutes require an offender to "mak[e] the victim whole to the extent practicable." *People v. Courtney*, 868 P.2d 1126, 1128 (Colo. App. 1993). Offenders must "make full restitution to those harmed by their misconduct." § 18-1.3-601(1)(b), C.R.S. 2021. A crime victim is entitled to restitution for "losses or injuries proximately caused by [the] offender's conduct and that can be reasonably calculated and recompensed in money." § 18-1.3-602(3)(a), C.R.S. 2021. Because the statutory definition of "victim" includes other persons besides the direct victim of the crime, it is not always clear who, besides the direct victim, is a "victim" for purposes of the restitution statutes. And no cases have analyzed how the 2000 amendments to the restitution statutes impacted the statutory definition of "victim."

¶ 2 Today we decide that the 2000 amendments to the restitution statutes did not alter the prior case law allowing insurance companies that indemnify their policyholders for losses proximately caused by felonies, misdemeanors, or other offenses specified in the restitution statutes to obtain restitution from offenders.

¶ 3 Arnold Roman Martinez appeals the district court's order granting the prosecution's motion for restitution. We affirm.

I. Background Facts

¶ 4 The district court entered the restitution order to compensate the victim and his insurer for damage to the victim's car resulting from his collision with Martinez while Martinez was attempting to abscond with the victim's $6,000 bicycle. Officer Ryan Scheevel documented the facts of the attempted bicycle theft in his report.

¶ 5 The victim and his wife left their garage door open after returning home. When the victim's wife heard a noise in the garage, she looked into the garage. She screamed to her husband that a man was in the garage, stealing the bicycle.

¶ 6 The victim ran outside and saw a man, later identified as Martinez, riding off on the bicycle. The victim got into his car and chased Martinez. Another individual saw the victim pursuing Martinez and called 911.

¶ 7 The victim caught up with Martinez and pulled in front of him "in an attempt to get [him] to stop." Rather than stopping, however, Martinez "ran directly into the front passenger side fender" of the victim's car. Martinez got off the bicycle and walked up the street.

He then got into another car and drove away. The victim recovered the bicycle, which was undamaged. But the collision resulted in damage to the victim's car.

¶ 8 The prosecution charged Martinez with second degree burglary, criminal mischief, and violation of bail bond conditions. Martinez entered into a global plea agreement in which he pleaded guilty to offenses in another case and the prosecutor dropped the charges arising from the theft of the victim's bicycle. Under the plea agreement, Martinez agreed to pay restitution for damages caused by the theft.

¶ 9 The prosecutor filed a motion for restitution in the amount of $2,393.84, which represented the cost of repairing the victim's car. Martinez objected, arguing that his actions were not the proximate cause of the damage to the car.

¶ 10 The district court conducted a hearing on the restitution motion. At the hearing, Officer Scheevel testified that the victim told police officers he "pulled parallel with [Martinez] on the bicycle, and, then, pulled in front of [Martinez] . . . in [an] attempt to get [Martinez] to stop on the bicycle." He said he understood that the victim had turned his car in front of Martinez "to recover [the] bike."

¶ 11 At the conclusion of the hearing, the court ordered Martinez to pay the requested amount of restitution — $500.00 to the victim for his insurance deductible and the remaining $1,893.84 to the victim's insurer, GEICO, which had covered the victim's loss.

II. Discussion

¶ 12 Martinez contends that the district court erred by (1) determining that he was the proximate cause of the damage to the victim's car; and (2) awarding restitution to GEICO. We disagree with both contentions.

A. Martinez's Theft Was the Proximate Cause of the Damage to the Victim's Car

1. Standard of Review

¶ 13 Although the parties agree that the prosecution bears the burden of proving the amount of restitution and causation by a preponderance of the evidence, *see People v. Henry*, 2018 COA 48M, ¶ 15, 439 P.3d 33, 36, they disagree on the standard of appellate review.

¶ 14 The trial court's interpretation of the statutory reference to "losses . . . proximately caused by [the] offender's conduct," § 18-1.3-602(3)(a), is an application of the law that triggers abuse of

discretion review. *See People v. Reyes*, 166 P.3d 301, 302 (Colo. App. 2007) ("A trial court has broad discretion in determining the terms and conditions of a restitution order, and its ruling will not be disturbed absent an abuse of discretion."). "[A] trial court abuses its discretion when it misconstrues or misapplies the law." *Id.* Thus, we apply the abuse of discretion standard in reviewing the district court's determination that Martinez's actions proximately caused the victim's losses. *See People v. Henson*, 2013 COA 36, ¶¶ 9-20, 307 P.3d 1135, 1138-39 (holding that the trial court did not abuse its discretion by awarding restitution in the form of the wages the victim lost while investigating the theft of her purse).

2. The Meaning of "Proximate Cause" in the Restitution Statutes

¶ 15 "Restitution must be considered as a part of every criminal conviction." *People v. Sosa*, 2019 COA 182, ¶ 14, 487 P.3d 1203, 1206. In light of the statutory reference to "proximate[] cause," § 18-1.3-602(3)(a), "[a] defendant may not be ordered to pay restitution for losses that did not stem from the conduct that was the basis of the defendant's conviction." *People v. Rivera*, 250 P.3d

1272, 1274 (Colo. App. 2010). "Proximate cause in the context of restitution is defined as a cause which in natural and probable sequence produced the claimed injury and without which the claimed injury would not have been sustained." *Id.*

¶ 16 In contrast, "unlawful conduct that is broken by an independent intervening cause cannot be the proximate cause of an injury." *People v. Clay*, 74 P.3d 473, 475 (Colo. App. 2003). "An independent intervening cause 'is an act by an independent person or entity that destroys the causal connection between the defendant's act and the victim's injury and, thereby becomes the cause of the victim's injury.'" *Id.* (quoting *People v. Saavedra-Rodriguez*, 971 P.2d 223, 225-26 (Colo. 1998)). "To qualify as an independent intervening cause, an event must be unforeseeable and one in which the accused does not participate." *Id.*

¶ 17 A victim's negligence may serve as an independent intervening cause if it rises to the level of gross negligence. "Simple negligence is foreseeable and does not constitute an independent intervening cause; gross negligence is not foreseeable and thus may serve as an independent intervening cause." *People v. Sieck*, 2014 COA 23, ¶ 9,

351 P.3d 502, 504. Grossly negligent, and therefore unforeseeable, conduct is "abnormal human behavior that constitutes 'an extreme departure from the ordinary standard of care.'" *People v. Smoots*, 2013 COA 152, ¶ 10, 396 P.3d 53, 55 (quoting *People v. Lopez*, 97 P.3d 277, 282 (Colo. App. 2004)), *aff'd sub nom. Reyna-Abarca v. People*, 2017 CO 5, 390 P.3d 816.

3. The District Court's Ruling

¶ 18 The district court's restitution order included the following findings, which tracked Officer Scheevel's testimony:

- After the victim's wife alerted the victim that Martinez was stealing the bicycle, the victim pursued Martinez in his vehicle.
- The victim "drove in his vehicle parallel to" Martinez.
- When Martinez "did not stop the bicycle, [the victim] pulled his car in front of [Martinez] in an attempt to stop" Martinez.
- When the victim pulled over, Martinez, "on the bicycle, hit [the victim]'s vehicle on the passenger side fender above the front tire."

¶ 19 The court concluded that the victim's act of "pulling his vehicle in front of [Martinez] while [Martinez] was riding [the victim]'s bicycle" was not an independent intervening cause of the damage to the car. The court said it was foreseeable that "the victim would attempt to prevent [Martinez] from taking his property by pulling in front of [Martinez] when [Martinez] failed to stop or pull over." It noted that Martinez "was clearly participating in the event as he was riding [the victim]'s bicycle parallel to [the victim]'s car while he was in the act of stealing the bicycle."

¶ 20 The court further said that the victim's act of pulling in front of Martinez constituted, at most, "simple negligence." According to the court, the victim's actions "would not constitute gross negligence as he was pulling his vehicle in front of [Martinez] anticipating that [Martinez] would stop and thus cease the theft of the bicycle." The court concluded that Martinez's theft of the bicycle was the proximate cause of the damage to the victim's car.

4. The District Court Did Not Abuse Its Discretion by Determining that Martinez's Theft Was the Proximate Cause of the Damage to the Victim's Car

¶ 21 Martinez contends that the victim's conduct constituted an independent intervening cause and, thus, the district court erred by

concluding that Martinez's theft was the proximate cause of the damage to the victim's car. We are not persuaded.

¶ 22 Martinez argues that, because the victim chose to pursue him and allegedly intentionally crashed into Martinez, the victim's behavior was grossly negligent and thus not foreseeable. But the record does not support Martinez's contention that the victim "intentionally caused the collision."

¶ 23 We agree with the district court that the evidence presented at the hearing demonstrated that the victim's action in turning in front of the bicycle thief was not grossly negligent as a matter of law. Officer Scheevel — the sole witness at the restitution hearing — testified that the victim pulled up parallel to Martinez on the bicycle and then "turned into the path of the bicycle" "in [an] attempt to get [Martinez] to stop." Martinez presented no evidence that the victim intentionally hit Martinez or that Martinez was unable to stop before colliding with the victim's car. The record is devoid of evidence that, as Martinez argues, the victim chose to "elevate his property's recovery over Mr. Martinez's safety."

¶ 24 Martinez makes the critical concession that he "could reasonably [have] expect[ed] pursuit" after stealing the bicycle. If

the victim's pursuit was foreseeable, it was also foreseeable that, upon reaching Martinez, the victim would take steps to recover his bicycle, such as attempting to force Martinez to stop. It defies logic to claim that, once the victim's car was parallel to Martinez, the victim would simply back off and allow Martinez to speed away on the victim's $6,000 bicycle. And it further defies logic to assert that, upon catching up with the fleeing thief, the victim would intentionally damage his own property. As noted above, the evidence does not show the victim intended to collide with Martinez; rather, he expected Martinez to surrender the purloined bicycle.

¶ 25 Martinez further argues that the victim's "dangerous act of self-help" was grossly negligent because, had the victim been charged with a crime for intentionally colliding with Martinez, the victim's actions would not have been justified under the defense of property statute. In support, he primarily relies on *People v. Oslund*, 2012 COA 62, 292 P.3d 1025, and *People v. Goedecke*, 730 P.2d 900 (Colo. App. 1986).

¶ 26 These cases are distinguishable. *Oslund* and *Goedecke* were not proximate cause cases. Rather, they considered whether, under the facts presented, a defendant who had physically attacked a thief

was entitled to a self-defense jury instruction, *see Oslund*, ¶¶ 24-26, 292 P.3d at 1029, or a defense of property jury instruction, *see Goedecke*, 730 P.2d at 901.

¶ 27 In *Oslund*, the division held that the trial court had correctly decided that the defendant was not entitled to a self-defense instruction because, by the time the defendant found and beat the thief, the "defendant could no longer *prevent* the theft" — the "theft was completed when [the thief] not only exercised control of the property, but moved it away from an area within defendant's control." *Oslund*, ¶¶ 24-25, 292 P.3d at 1029. In arguing that the defendant should be convicted of aggravated robbery for punching the thief and taking other items from him, the prosecutor noted that "when defendant and his brother 'came out [of the house] there was nobody running down the street.'" *Id.* at ¶ 21, 292 P.3d at 1029.

¶ 28 *Goedecke* is even more distinguishable than *Oslund*. In that case, the division held that the defendant was not entitled to a defense of property instruction because the defendant encountered the thief "[s]ome time" after the theft and assaulted him after the stolen property had been destroyed. *Goedecke*, 730 P.2d at 901.

As the division explained, "force was [not] necessary to *prevent* an attempted theft." *Id.*

¶ 29 Here, the victim attempted to stop a theft in progress. The victim did not need to "find and catch" Martinez, *see Oslund*, ¶ 3, 292 P.3d at 1027. After the victim's wife shouted that someone was stealing the bicycle, the victim immediately gave chase. The theft was still underway when Martinez tried to speed away on the bicycle with the victim in pursuit. The record reflects that the victim caught up with Martinez approximately a block and a half from the victim's home, demonstrating that Martinez was never out of the victim's sight.

¶ 30 Finally, because the evidence does not show that the victim intentionally struck Martinez, we are not persuaded that Martinez did not participate in the collision. Rather, Martinez participated in the collision with the victim's car by refusing to stop. *See Sieck*, ¶ 10, 351 P.3d at 504 (concluding there was no independent intervening cause where, "in the absence of the defendant's conduct," the victim's negligent behavior "would not have caused the injuries").

¶ 31 Thus, the district court did not abuse its discretion by determining that Martinez was the proximate cause of the damage to the victim's car.

B. GEICO Was a "Victim" for Purposes of the Restitution Statutes

1. Standard of Review

¶ 32 Martinez admittedly did not preserve his argument that, under the 2000 amendments to the restitution statutes, insurance companies like GEICO are no longer "victims" entitled to awards of restitution. He urges us to consider this argument, which he characterizes as a challenge to an illegal sentence, under Crim. P. 35(a). *See People v. Bowerman*, 258 P.3d 314, 317 (Colo. App. 2010) (holding that defendant's "argument challeng[ing] the amount of restitution she should be obligated to pay . . . constitutes a claim that her sentence was imposed in an illegal manner"); *Fransua v. People*, 2019 CO 96, ¶ 13, 451 P.3d 1208, 1211 ("There is no preservation requirement for a [Crim. P.] 35(a) claim. It makes no sense to require preservation of a claim on direct appeal when an identical claim could be raised without preservation after the conclusion of the direct appeal."). The People contend that we must review Martinez's argument regarding GEICO for plain error.

¶ 33 We need not resolve whether plain error review applies to the argument, however, in light of our determination that the trial court did not err by awarding restitution to GEICO as a "victim" under the restitution statutes. We reach that conclusion after considering Martinez's statutory argument de novo. *See Dubois v. People*, 211 P.3d 41, 43 (Colo. 2009) (holding that interpretation of the restitution statutes is "a question of law and therefore subject to de novo review").

2. The Statutory of Definition of "Victim"

¶ 34 For purposes of the restitution statutes, "victim" means

> any person aggrieved by the conduct of an offender and includes but is not limited to the following:
>
> . . . .
>
> Any person who has suffered losses because of a contractual relationship with, including but not limited to, an insurer, or because of liability under section 14-6-110, C.R.S. [2021], for a person described in subparagraph (I) or (II) of this paragraph (a).

§ 18-1.3-602(4)(a)(III). (Section 14-6-110 involves liability for family expenses and does not apply here.) Subparagraphs (I) and (II) describe categories of direct victims of crime. "Person" means "any

individual, corporation, . . . limited liability company, partnership, association, or other legal entity." § 2-4-401(8), C.R.S. 2021. The restitution statutes do not define "contractual relationship," however.

3. GEICO Is a "Victim" Under Section 18-1.3-602(4)(a)(III)

¶ 35 Martinez argues that, because the statutory definition of "victim" refers to someone "who has suffered losses because of a contractual relationship *with*, including but not limited to, *an insurer*," it excludes GEICO and other insurers. *See* § 18-1.3-602(4)(a)(III) (emphasis added). Martinez asserts that only a policyholder can enter into a "contractual relationship with . . . an insurer" and, thus, section 18-1.3-602(4)(a)(III) only encompasses direct victims who are policyholders. He reasons that GEICO is ineligible for restitution because "there is no evidence that [GEICO] is in a contractual relationship *with* an insurer; [GEICO] is the insurer."

¶ 36 Martinez's interpretation of section 18-1.3-602(4)(a)(III) cannot be squared with the plain meaning of the section, however. Setting aside the inapplicable clause in section 18-1.3-602(4)(a)(III), the section defines a "victim" as "[a]ny person who has suffered losses

because of a contractual relationship with . . . an insurer" for a direct victim.

¶ 37 Martinez does not dispute that a "contractual relationship with . . . an insurer" includes insurance contracts, like the victim's policy with GEICO. *See Bailey v. Allstate Ins. Co.*, 844 P.2d 1336, 1339 (Colo. App. 1992) ("[T]he relationship between an insurer and an insured is initially and fundamentally based on the insurance contract."). Rather, he argues that section 18-1.3-602(4)(a)(III) only refers to policyholders.

¶ 38 But Martinez's contention is at odds with the language the General Assembly chose when drafting the statute. Using the example of "an insurer" in the statute, the plain meaning of section 18-1.3-602(4)(a)(III) is that *any person* who suffers losses *because of an insurance contract for a policyholder who was a direct victim* is itself a "victim." *See People v. Oliver*, 2016 COA 180M, ¶ 32, 405 P.3d 1165, 1174. The reference to "contractual relationship with . . . an insurer" does not limit section 18-1.3-602(4)(a)(III) to policyholders. Martinez's interpretation of section 18-1.3-602(4)(a)(III) would require us to rewrite "[a]ny person who has suffered losses because of a contractual relationship with . . .

an insurer" to say "[a]ny person who suffered losses because such person *entered into a contractual relationship* with . . . an insurer." We must enforce statutes as written. *Dove Valley Bus. Park Assocs., Ltd. v. Bd. of Cnty. Comm'rs*, 923 P.2d 242, 248 (Colo. App. 1995), *aff'd on other grounds*, 945 P.2d 395 (Colo. 1997).

¶ 39 A direct victim's insurer falls within the category of persons who suffer losses *because of* an insurance policy for a policyholder who was a direct victim. *Id.* If a direct victim files a claim for a covered loss with the victim's insurer, the insurer is contractually required to indemnify the policyholder and thereby incurs a loss of its own. Indeed, a division of this court held in *Oliver* that section 18-1.3-602(4)(a)(III) applies to insurers. *Oliver*, ¶ 32, 405 P.3d at 1174 ("There is no dispute that an insurer can be a victim for purposes of restitution under section 18-1.3-602(4)(a)(III).").

¶ 40 Thus, an insurance company that indemnifies a policyholder because the policyholder was the victim of a felony, misdemeanor, or other specified offense can be a "victim" for purposes of the restitution statutes. Although GEICO is an insurance company, it is nonetheless a "victim" because it paid the cost of repairing the damage to the victim's car above the $500 deductible.

¶ 41 We disagree with Martinez's interpretation of section 18-1.3-602(4)(a)(III) for four additional reasons.

¶ 42 First, we reject Martinez's contention that the 2000 version of the restitution statutes reflects the General Assembly's intent to exclude insurers, such as GEICO, from the definition of "victim."

¶ 43 In the 1985 amendments to the restitution statutes, the definition of "victim" included "the party immediately and directly aggrieved by a defendant . . . as well as others who have suffered losses because of a contractual relationship with such party." Ch. 140, sec. 1, § 16-11-204.5(4), 1985 Colo. Sess. Laws 630. Under this version of the statute, "courts were allowed to order payments made to victims' insurers as well as to direct victims." *People v. Woodward*, 11 P.3d 1090, 1092 (Colo. 2000); *see also People v. Lunsford*, 43 P.3d 629, 631 (Colo. App. 2001) (affirming the district court's restitution order requiring payment to the victims' insurer under the 1985 version of the statute); *People v. Rogers*, 20 P.3d 1238, 1240 (Colo. App. 2000) (holding that the 1985 version "on its face allow[ed] for recovery of the losses claimed by the victim's insurer"). Martinez concedes that insurers could be "victims" under the 1985 version of the statute.

¶ 44 In 1996, the General Assembly further amended the definition of "victim" to include a direct reference to insurers as a subset of those persons or entities that could receive restitution "because of a contractual relationship with [a direct victim]." Ch. 288, sec. 4, § 16-11-204.5(4), 1996 Colo. Sess. Laws 1779.

¶ 45 When the General Assembly enacted the 2000 version of the restitution statutes, it relocated the reference to the direct victim to the end of the definition: "Any person who has suffered losses because of a contractual relationship with, including but not limited to, an insurer, . . . *for a person described in subparagraph (I) or (II) of this paragraph (a).*" Ch. 232, sec. 1, § 16-18.5-102(4)(a)(III), 2000 Colo. Sess. Laws 1031-32 (emphasis added); *see also* Ch. 318, sec. 2, § 18-1.3-602, 2002 Colo. Sess. Laws 1420 (relocating the restitution statutes from title 16 to title 18). Martinez contends that, through this mere reshuffling of words, the General Assembly sought to accomplish the significant policy change of removing insurers entirely from the category of "victims" because, as noted above, he says an insurer cannot enter into a "contractual relationship with an insurer."

¶ 46 (The 2000 version also replaced the reference to "person or entity" with "person." As explained *supra* Part II.B.2, the definition of "person" includes corporations, limited liability companies, partnerships, associations, and other legal entities. *See* § 18-1.3-602(8), C.R.S. 2021. This was not a material change to the statute.)

¶ 47 A comparison of the 1985 amendment, the 1996 amendment, and the 2000 version of the statutes demonstrates that each change to the definition of "victim" expanded it:

1985 amendment	1996 amendment	2000 version
"because of a contractual relationship with [the direct victim]"	"because of a contractual relationship with [the direct victim], including, but not limited to, an insurer"	"because of a contractual relationship with, including but not limited to, an insurer, . . . for a [direct victim]"

¶ 48 The 2000 version of the definition of "victim" replaced "a contractual relationship *with*" the direct victim, which first appeared in the 1985 amendment, with the broader "a contractual relationship with, including but not limited to, an insurer . . . *for*" a direct victim. 2000 Colo. Sess. Laws at 1031-32 (emphases added). There is a material distinction between "a contractual relationship

with" a direct victim and "a contractual relationship . . . for" a direct victim. Thus, instead of applying only to a person suffering losses because the person's contractual relationship *with* a direct victim (such as an insurer that sold a policy to the direct victim), the 2000 version applies to any person suffering losses because of any contractual relationship *for* a direct victim, regardless of whether the direct victim is a party to that contractual relationship. *See* § 18-1.3-602(4)(a)(III). The expanded definition, unlike the previous definitions, encompasses obligations to indemnify the direct victim's loss because of a contract to which the victim is not a party. This language reflects the General Assembly's intent that the 2000 version broaden the definition of "victim" — not constrict it.

¶ 49 Second, the 1996 amendments to the restitution statutes not only added a specific reference to "an insurer" to the definition of "victim," but also inserted the phrase "including, but not limited to," immediately before "an insurer." 1996 Colo. Sess. Laws at 1779. This demonstrates that, in the post-1985 changes to the restitution statutes, the General Assembly intended to expand the contractual relationship language found in the 1985 amendment. *See People v. Roggow*, 2013 CO 70, ¶ 20, 318 P.3d 446, 451 ("The phrase

'includes, but is not limited to' suggests an 'expansion or enlargement' and a 'broader interpretation.'").

¶ 50 Third, Martinez's statutory argument runs afoul of principles of statutory construction. "We liberally construe the restitution statute to accomplish its goal of making victims whole for the harms suffered as the result of a defendant's criminal conduct." *Sosa*, ¶ 14, 487 P.3d at 1206 (quoting *Rivera*, 250 P.3d at 1274). Limiting the scope of section 18-1.3-602(4)(a)(III) to policyholders would also render it superfluous because direct victims who are also policyholders are already defined as "victims" in section 18-1.3-602(4)(a)(I) and (II). Such an interpretation would be inconsistent with the rule that "we avoid [statutory] constructions that render any words or phrases superfluous." *People v. Burgandine*, 2020 COA 142, ¶ 7, 484 P.3d 739, 741.

¶ 51 Fourth, Martinez's statutory argument is inconsistent with the purposes of the restitution statutes, which include rehabilitating offenders and deterring future criminality. § 18-1.3-601(1)(c)-(e). Under Martinez's reading of the statute, offenders would have an incentive to target insured victims to avoid paying restitution, as the offenders' liability would be limited to the amount of the

policyholders' out-of-pocket payments. It defies common sense that the restitution statutes would grant a windfall to offenders whose victims had the foresight to purchase insurance coverage. *See Pineda-Liberato v. People*, 2017 CO 95, ¶ 35, 403 P.3d 160, 166 ("The[] purposes [of the restitution statutes] would be undermined were [the defendant] allowed to avoid her restitution obligation as she seeks to do here."); *People in Interest of P.J.N.*, 664 P.2d 245, 246 (Colo. 1983) (holding, in a juvenile delinquency case interpreting an adult probation statute, that "directing payment to the insurance company which has made expenditures on behalf of its insured avoids the realization of a windfall by either the delinquent or the victim"); *see also People v. Hove*, 91 Cal. Rptr. 2d 128, 132 (Ct. App. 1999) ("[T]he Legislature could rationally conclude that the criminal restitution scheme should always require the offender to pay the full cost of his crime, receiving no windfall from the fortuity that the victim was otherwise reimbursed . . . .").

III. Conclusion

¶ 52 The order is affirmed.

JUDGE GOMEZ concurs.

JUDGE J. JONES specially concurs.

JUDGE J. JONES, specially concurring.

¶ 53 I agree with the result reached by the majority and almost all of its analysis. I take issue, however, with one aspect of the analysis: the majority cites *People v. Henson*, 2013 COA 36, ¶ 9, for the proposition that we review the district court's determination that Martinez proximately caused the damage to the victim's car for an abuse of discretion. As I see it, the proper standard of review for that factual determination is clear error. That the cases don't expressly say so seems to be a result of many years of rote repetition and uncritical analysis.

¶ 54 In *Henson*, the division said, "[w]e review the district court's restitution order for an abuse of discretion." *Id.* The division then apparently applied that standard to the issues of the amount of restitution owed and whether the victim's losses were proximately caused by the defendant. And it did so even after acknowledging that the prosecution bears the burden of proving both the amount of restitution and proximate cause by a preponderance of the evidence. *Id.* at ¶ 11. What accounts for this application of the abuse of discretion test to issues subject to a factual burden of proof?

¶ 55 The *Henson* division cited *People v. Rivera*, 250 P.3d 1272, 1274 (Colo. App. 2010), as authority for applying the abuse of discretion test. That case says that "[a] trial court has broad discretion to determine the terms and conditions of a restitution order." *Id.* If one looks at the cases *Rivera* cites for that proposition, and then looks at the cases those cases cite, and so on down the line, one discovers that this language has its genesis in a line of authority dealing with *discretionary* conditions of *probation*.[1]

¶ 56 The supreme court's decision in *Cumhuriyet v. People*, 200 Colo. 466, 615 P.2d 724 (1980), appears to be the destination to which this path leads. In that case, the court considered whether

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[1] *Rivera* cites *People v. Reyes*, 166 P.3d 301, 302 (Colo. App. 2007). *Reyes* cites *People v. Harman*, 97 P.3d 290, 294 (Colo. App. 2004), *overruled on other grounds by People v. Weeks*, 2021 CO 75. *Harman* cites *People v. Davalos*, 30 P.3d 841 (Colo. App. 2001), and *People v. Duvall*, 908 P.2d 1178 (Colo. App. 1995), both of which dealt with restitution as a condition of probation. *Davalos* cites *People v. Estes*, 923 P.2d 358 (Colo. App. 1996), which also involved restitution as a condition of probation. *Estes* and *Duvall* both cite *People v. Dillingham*, 881 P.2d 440 (Colo. App. 1994), a probation case. *Dillingham* cites *People v. Quinonez*, 701 P.2d 74 (Colo. App. 1984), *aff'd in part and rev'd in part*, 735 P.2d 159 (Colo. 1987), and former section 16-11-204(1), C.R.S. 1986, which governed conditions of probation. *Quinonez* cites *Cumhuriyet v. People*, 200 Colo. 466, 615 P.2d 724 (1980), and *People v. Lowery*, 642 P.2d 515 (Colo. 1982), both probation cases.

the district court had properly ordered restitution as a condition of probation. It applied former section 16-11-204, C.R.S. 1979, which addressed conditions of probation. That statute said, expressly, that the district court had "discretion" to impose conditions of probation. § 16-11-204(1). And that statute said that restitution was a condition that a court "may" impose. § 16-11-204(2)(e). So at that time, ordering restitution as a condition of probation was indeed a discretionary call. I can therefore understand why cases addressing restitution as a condition of probation under the former statute reviewed for an abuse of discretion — particularly because the question in those cases was often whether restitution was an appropriate condition.

¶ 57 But that statutory regime hasn't existed for quite some time. About twenty years ago, the General Assembly enacted section 18-1.3-603, C.R.S. 2021, which *requires* the court to impose restitution in connection with any sentence (subject to certain exceptions not applicable to this case). And restitution *must* include any "losses or injuries proximately caused by an offender's conduct . . . that can be reasonably calculated and recompensed in money." § 18-1.3-602(3)(a), C.R.S. 2021. Proximate cause in this context means "a

cause which in natural and probable sequence produced the claimed injury and without which the claimed injury would not have been sustained." *Rivera*, 250 P.3d at 1274; *accord People v. Clay*, 74 P.3d 473, 475 (Colo. App. 2003).

¶ 58 As noted, the prosecution must prove the amount of restitution and proximate cause by a preponderance of the evidence. *Henson*, ¶ 11; *People in Interest of K.M.*, 232 P.3d 310, 312 (Colo. App. 2010); *People v. Harman*, 97 P.3d 290, 294 (Colo. App. 2004), *overruled on other grounds by People v. Weeks*, 2021 CO 75. In attempting to meet that burden, the prosecution may present presentence reports and "any other evidence . . . with respect to damages." *People v. Carpenter*, 885 P.2d 334, 336 (Colo. App. 1994).

¶ 59 Thus, the current statutory regime contemplates (1) mandatory imposition of restitution and (2) determination of the amount and proximate cause using an evidentiary burden indistinguishable from that applicable to damages and causation in civil cases. What's more, the test for proximate cause in this context isn't meaningfully distinguishable from the test for causation in fact in the civil context, which has always been

regarded as a factual question. *See Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 2020 CO 51, ¶¶ 28-29 (causation in fact is established "if the negligent conduct in a 'natural and continued sequence, unbroken by any efficient, intervening cause, produce[s] the result complained of, and without which the result would not have occurred'"; "[c]ausation in fact is typically a question for the jury" (quoting *N. Colo. Med. Ctr., Inc. v. Comm. on Anticompetitive Conduct*, 914 P.2d 902, 908 (Colo. 1996))); *see also People v. Hernandez*, 2019 COA 111, ¶ 40 (recognizing that "the proximate cause issue to be resolved at the restitution hearing raised a question of fact").

¶ 60 The bottom line is that we should treat proximate cause for restitution purposes as a question of fact. And the law is crystal clear that an appellate court reviews findings of fact for clear error, not an abuse of discretion. *See, e.g.*, *Gallegos Fam. Props., LLC v. Colo. Groundwater Comm'n*, 2017 CO 73, ¶ 17; *People v. Minor*, 222 P.3d 952, 956 (Colo. 2010); *People v. DeBorde*, 2016 COA 185, ¶ 23. A factual finding is clearly erroneous only if it has no support in the record. *Sanchez-Martinez v. People*, 250 P.3d 1248, 1254 (Colo.

2011); *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1384 (Colo. 1994); *People v. Nelson*, 2014 COA 165, ¶ 17.

¶ 61 In sum, I believe we should review the district court's factual finding that Martinez's conduct proximately caused the damage to the victim's car for clear error. And applying that test, I conclude that the district court's finding isn't clearly erroneous, for the reasons explained by the majority.