SUMMARY
April 18, 2024

**2024COA38**

**No. 21CA2075, *People v. Burdette* — Crimes — DUI; Criminal Law — Limitation for Collateral Attack Upon Trial Court Judgment; Constitutional Law — Sixth Amendment — Right to Counsel; Jurisdiction of Courts — Subject Matter Jurisdiction**

In this felony DUI case, a division of the court of appeals considers whether an alleged denial of a defendant's Sixth Amendment right to counsel in two prior drinking-while-driving cases divested the convicting courts of subject matter jurisdiction, rendering the defendant's collateral attacks timely. The division concludes that a violation of a defendant's Sixth Amendment right to counsel does not strip a trial court of its subject matter jurisdiction. Defendant's reliance on an eighty-six-year-old opinion from the Supreme Court saying that the right to counsel is "jurisdictional" does not comport with the Supreme Court's and Colorado courts' narrower definition of "jurisdiction" today,

including subject matter jurisdiction. Therefore, the trial courts entering the defendant's prior convictions did not lose subject matter jurisdiction when they allegedly violated the defendant's Sixth Amendment right to counsel, rendering the defendant's collateral attacks untimely.

The division also considers and rejects the defendant's contentions that the district court erred by denying his motion to dismiss for violation of his right to a speedy trial, that the district court erred by failing to suppress his blood test results, that the prosecution presented insufficient evidence to show that he was convicted on three prior occasions, and that prosecutorial misconduct during closing argument warrants reversal. Accordingly, the division affirms the district court's judgment.

COLORADO COURT OF APPEALS **2024COA38**

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Court of Appeals No. 21CA2075
Arapahoe County District Court No. 19CR3149
Honorable Ben L. Leutwyler III, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

William Scott Burdette,

Defendant-Appellant.

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JUDGMENT AFFIRMED

Division III
Opinion by JUDGE SULLIVAN
Dunn and Pawar, JJ., concur

Announced April 18, 2024

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¶ 1 Section 42-4-1702(1), C.R.S. 2023 imposes a time limit for defendants to collaterally attack their convictions for certain alcohol- and drug-related traffic offenses. No time limit applies, however, if the convicting court lacked subject matter jurisdiction. § 42-4-1702(2)(a). Defendant, William Scott Burdette, relies on an eighty-six-year-old United States Supreme Court opinion that says compliance with the Sixth Amendment's right to counsel is an "essential jurisdictional prerequisite." *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938). Because he was erroneously denied his constitutional right to counsel in two 1990 driving while ability impaired (DWAI) cases, Burdette argues, the courts in those cases lacked subject matter jurisdiction and the resulting convictions cannot be used to elevate his new driving under the influence (DUI) conviction to a felony.

¶ 2 *Zerbst* is in tension with later decisions from the Supreme Court and Colorado courts narrowing the definition of "jurisdiction," including subject matter jurisdiction. Yet no published Colorado appellate decision has resolved this tension or otherwise clarified how or whether *Zerbst* impacts a trial court's subject matter jurisdiction. Reconciling these decisions, we hold that the denial of

a defendant's Sixth Amendment right to counsel does not strip the court of subject matter jurisdiction. As a result, we affirm the district court's decision that Burdette's collateral attacks are untimely. Because we also disagree with Burdette's other contentions, we affirm the judgment.

## I. Background

¶ 3 In October 2019, Burdette drove his truck onto his neighbor's property and almost hit the neighbor's granddaughter. The neighbor became concerned that Burdette was driving while intoxicated because earlier in the day he had seen Burdette getting alcohol, stumbling around, and barely able to walk. While calling the police, the neighbor saw Burdette drive up the street and nearly strike another vehicle.

¶ 4 When law enforcement arrived, Burdette was backing his truck into his driveway. The first responding officer noted Burdette smelled of alcohol, had slurred speech, and seemed confused. A second responding officer, who led the investigation, also observed indicia of alcohol consumption, including slurred speech, watery and bloodshot eyes, and an odor of an unknown alcoholic beverage.

¶ 5 Burdette refused sobriety roadsides maneuvers and the officers placed him under arrest for DUI. After the lead officer read Burdette Colorado's express consent law, Burdette opted to take a blood test. Burdette was transported to the Arapahoe County Detention Facility, where his blood test was completed approximately three hours after law enforcement last observed him driving. The test showed Burdette's blood alcohol content (BAC) was 0.241, well above the legal limit.

¶ 6 The prosecution charged Burdette with felony DUI, § 42-4-1301(1)(a), C.R.S. 2023, alleging he had been convicted of DWAI in Arapahoe County on three prior occasions — once in 1995 and twice in 1990. Burdette pleaded not guilty.

¶ 7 Before trial, Burdette filed a motion to suppress his 1990 and 1995 DWAI convictions, but he later withdrew the motion as to his 1995 conviction. Burdette argued that his 1990 convictions were invalid because he was denied his right to counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963). According to Burdette, the denial of his right to counsel stripped the convicting courts of subject matter jurisdiction. The district court denied Burdette's motion,

reasoning that Burdette's collateral attacks were untimely under section 16-5-402(1), C.R.S. 2023.[1]

¶ 8 Also before trial, the COVID-19 pandemic triggered a global health crisis that limited the capacity of the Arapahoe County courthouse to hold jury trials. From December 2020 through May 2021, the district court declared three mistrials in this case because public health restrictions prevented the court from safely assembling a fair jury pool. Burdette filed a motion to dismiss based on a violation of his right to a speedy trial, which the district court denied.

¶ 9 Trial commenced on July 20, 2021. Burdette conceded he was driving under the influence on the day in question but maintained he was not a repeat offender. The jury found him guilty of felony DUI.

¶ 10 Burdette raises several contentions on appeal. He argues (1) the district court erred by declining to suppress evidence of his two 1990 DWAI convictions; (2) the district court erred by denying his

[1] The court did not mention the separate time limit that applies to collateral attacks against convictions for certain alcohol- and drug-related traffic offenses. *See* § 42-4-1702(1), C.R.S. 2023.

motion to dismiss for violation of his right to a speedy trial; (3) the district court erred by failing to suppress his blood test results; (4) the prosecution presented insufficient evidence to show that he had been convicted of DWAI on three prior occasions; and (5) prosecutorial misconduct in closing argument warrants reversal. We address each contention in turn.

## II. Timeliness of Burdette's Collateral Attack

¶ 11 Burdette contends the district court erred by determining that his collateral attacks against his 1990 convictions were time barred. Leaning on *Zerbst*, he argues that the 1990 convictions were obtained in violation of his Sixth Amendment right to counsel, and that compliance with the right to counsel is an "essential jurisdictional prerequisite." 304 U.S. at 467. According to Burdette, because his right to counsel implicates the court's subject matter jurisdiction, no time bar precludes his collateral attack.

### A. Standard of Review

¶ 12 Burdette's challenge involves the interpretation of a constitutional provision and statute that potentially affect the subject matter jurisdiction of Colorado's trial courts. We review questions of constitutional and statutory interpretation de novo.

*People v. Wolf*, 2017 CO 4, ¶ 3; *McCoy v. People*, 2019 CO 44, ¶ 37. Whether a court has subject matter jurisdiction is a question of law that we also review de novo. *People v. Lopez*, 2020 COA 119, ¶ 20.

B. Applicable Law

¶ 13 This case requires us to evaluate the relationship between a statutory time limit on collateral attacks, principles of subject matter jurisdiction, and the Sixth Amendment right to counsel.

¶ 14 Section 42-4-1702(1) requires that a collateral attack on a conviction for certain alcohol- and drug-related traffic offenses be "commenced within six months after the date of entry of the judgment." *See People v. Jiron*, 2020 COA 36, ¶ 24, *cert. granted, judgment vacated on other grounds, and case remanded*, No. 20SC344, 2021 WL 96460 (Colo. Jan. 11, 2021) (unpublished order). Although the time limits differ, the statute is similar to the time bar governing collateral attacks against criminal convictions more generally. *See* § 16-5-402(1); *Jiron*, ¶ 25 (cases interpreting

section 16-5-402 "can fairly be assumed to apply" to the time bar in section 42-4-1702).[2]

¶ 15 Time limitations on collateral attacks, like section 42-4-1702(1)'s, avoid litigation of stale claims and prevent frustrating "statutory provisions directed at repeat, prior, and habitual offenders." *People v. Robinson*, 833 P.2d 832, 835 (Colo. App. 1992). However, the six-month time bar is subject to several exceptions. § 42-4-1702(2). One of those exceptions, relevant here, states the six-month time limit does not apply to "[a] case in which the court entering judgment did not have jurisdiction over the subject matter of the alleged infraction." § 42-4-1702(2)(a); *see also* § 16-5-402(2)(a). We interpret "jurisdiction over the subject matter of the alleged infraction" to refer to the court's subject matter jurisdiction. *See People v. Loveall*, 231 P.3d 408, 412 (Colo. 2010)

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[2] Section 16-5-402(1), C.R.S. 2023, imposes an eighteen-month limit on collaterally attacking a misdemeanor conviction. The parties and the district court below did not address section 42-4-1702(1)'s shorter six-month limit on collaterally attacking convictions for certain alcohol- and drug-related traffic offenses. Although Burdette's challenge is time barred if either statute applies, we conclude that section 42-4-1702(1) governs because it applies to alcohol offenses specifically. *See* § 2-4-205, C.R.S. 2023; *People v. Munoz*, 857 P.2d 546, 549 (Colo. App. 1993).

(describing section 16-5-402(2)(a) as the "subject matter jurisdiction exception").

¶ 16 Subject matter jurisdiction concerns a court's authority to deal with a "class of cases in which it renders judgment," *Wood v. People*, 255 P.3d 1136, 1140 (Colo. 2011), not its authority to enter a "particular judgment within that class," *People in Interest of J.W. v. C.O.*, 2017 CO 105, ¶ 24. "Generally, when courts have the power to adjudicate issues in the class of suits to which a particular case belongs, a court's interim orders and final judgments, whether right or wrong, are not subject to collateral attack for lack of subject matter jurisdiction." *E.J.R. v. Dist. Ct.*, 892 P.2d 222, 224 (Colo. 1995).

¶ 17 The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also* Colo. Const. art. II, § 16. An uncounseled conviction that violates the Sixth Amendment cannot be used as a predicate for a punishment enhancement under a state recidivist statute. *People v. Germany*, 674 P.2d 345, 349 (Colo. 1983) (citing *Burgett v. Texas*, 389 U.S. 109 (1967)). Our supreme court has recognized, however,

that a state may impose reasonable time limits on the assertion of federal constitutional rights. *People v. Wiedemer*, 852 P.2d 424, 437 (Colo. 1993).

¶ 18 In *Zerbst*, a habeas corpus case, the Supreme Court described the Sixth Amendment right to counsel as an "essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." 304 U.S. at 467. The Court stated that a federal court "no longer has jurisdiction to proceed," and that jurisdiction "may be lost," if the constitutional right to counsel is not honored. *Id.* at 468. The *Zerbst* Court did not specify whether its use of "jurisdictional prerequisite" refers to a court's subject matter jurisdiction.

C. Additional Background

¶ 19 Burdette testified at a hearing on his motion to suppress evidence of his 1990 DWAI convictions that he did not recall being represented by counsel in his prior cases. He explained that he would have accepted a public defender's representation, had it been offered, due to the seriousness of the charges. Burdette's motion to suppress asserted it was "common practice" in Arapahoe County until the late 1990s that a public defender was not appointed in a

misdemeanor case unless the defendant had tried and failed to negotiate settlement terms with the district attorney.

¶ 20 The district court determined that Burdette's collateral challenge was time barred under section 16-5-402(1). The court rejected Burdette's argument that the statute's subject-matter-jurisdiction exception applied, reasoning that violating a defendant's constitutional right to counsel does not deprive the convicting court of subject matter jurisdiction.

D. Analysis

¶ 21 Burdette does not dispute that Colorado trial courts generally possess subject matter jurisdiction over misdemeanor DWAI cases. Indeed, with exceptions not pertinent here, Colorado county courts hold concurrent original jurisdiction with district courts in "[c]riminal actions for the violation of state laws which constitute misdemeanors or petty offenses." § 13-6-106(1)(a), C.R.S. 2023. Burdette's two 1990 misdemeanor DWAI cases fall within this broad category. *See* § 42-4-1202(1)(b), (d), (i), C.R.S. 1989.

¶ 22 Instead, Burdette relies on *Zerbst* to argue that the trial courts entering his 1990 DWAI convictions lost subject matter jurisdiction because he was denied his Sixth Amendment right to counsel. For

three reasons, we disagree with Burdette's argument and conclude that the denial of the Sixth Amendment right to counsel does not divest the court of its subject matter jurisdiction.

¶ 23 First, Burdette's argument, if adopted, would require us to evaluate the specific factual circumstances underlying his two 1990 DWAI cases to determine whether the convicting courts lacked subject matter jurisdiction — in particular, whether *he* was denied counsel. But the fact-specific nature of Burdette's proposed analysis contravenes our supreme court's recent precedent regarding subject matter jurisdiction. Determining whether a court possesses subject matter jurisdiction requires looking to the court's authority to act in "the *class* of cases in which it renders judgment, not its authority to enter a particular judgment within that class." *C.O.*, ¶ 24; *accord Loveall*, 231 P.3d at 413 (explaining failure to comply with statutory requirement that the defendant and all counsel sign a deferred judgment and sentence stipulation did not divest the court of subject matter jurisdiction because it did not limit the court's "power to entertain a category of cases").

¶ 24 Second, *Zerbst*'s use of "jurisdictional prerequisite" to describe the constitutional right to counsel does not refer to a court's subject

matter jurisdiction. When *Zerbst* was decided, the Supreme Court often used the concept of "jurisdictional defects" imprecisely to describe "merits based" constitutional errors. *Brown v. Davenport*, 596 U.S. 118, 150 (2022) (Kagan, J., dissenting) (quoting Ann Woolhandler, *Demodeling Habeas*, 45 Stan. L. Rev. 575, 630 (1993)). This includes violations of a defendant's Sixth Amendment right to counsel as discussed in *Zerbst*. *See id.* at 150 n.1. But the Supreme Court has since recognized that its past use of "jurisdictional" was "less than meticulous," *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004), and has endeavored to "bring some discipline" to its use going forward. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *see also United States v. Cotton*, 535 U.S. 625, 630 (2002) (stating the Court's prior "elastic concept of jurisdiction is not what the term 'jurisdiction' means today"); *Gosa v. Mayden*, 413 U.S. 665, 689 n.5 (1973) (Douglas, J., concurring) (recognizing *Zerbst* used "jurisdiction" in "an innovative way").

¶ 25 The Supreme Court now applies the term "jurisdictional" only to "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)" implicating a court's adjudicatory authority. *Reed Elsevier, Inc. v. Muchnick*, 559

U.S. 154, 160-61 (2010) (quoting *Kontrick*, 540 U.S. at 455). As a result, the Court no longer characterizes the constitutional right to counsel as jurisdictional. *See, e.g.*, *Alabama v. Shelton*, 535 U.S. 654 (2002) (evaluating alleged Sixth Amendment violation without describing the right to counsel as jurisdictional or as affecting a court's subject matter jurisdiction). Based on the Supreme Court's more recent decisions narrowing the definition of "jurisdictional," we cannot agree with Burdette that the denial of a defendant's Sixth Amendment right to counsel deprives a court of subject matter jurisdiction over the charged crimes.

¶ 26 Third, our supreme court has likewise clarified that its past use of "jurisdiction" to describe a merits-based constitutional defect does not mean that a court is stripped of subject matter jurisdiction. *See People v. McMurtry*, 122 P.3d 237, 241 (Colo. 2005) (explaining the "improper denial of a constitutional speedy trial claim does not involve subject matter jurisdiction," despite prior precedent using the term "jurisdiction"). Other courts have echoed this approach, rejecting jurisdictional arguments similar to Burdette's. *See, e.g.*, *United States v. Nunez-Hernandez*, 43 F.4th 857, 860 n.3 (8th Cir. 2022); *State ex rel. Ogle v. Hocking Cnty.*

*Common Pleas Ct.*, 2023-Ohio-3534, ¶¶ 15-22, 227 N.E.3d 1202, 1205-07; *State v. Maine*, 255 P.3d 64, 73 (Mont. 2011). We agree with the reasoning of these courts.

¶ 27 We are not persuaded otherwise by Burdette's argument that *Custis v. United States*, 511 U.S. 485 (1994), cemented *Zerbst*'s holding. In *Custis*, the Supreme Court held that a defendant has no right to collaterally attack the validity of a previous state court conviction used to enhance their sentence under the Armed Career Criminal Act, with the "sole exception of convictions obtained in violation of the right to counsel." *Id.* at 487. But *Custis* did not abrogate a state's ability to set time limits on collateral attacks, even when the defendant's collateral attack alleges that their constitutional right to counsel was violated.[3] *See Jiron*, ¶ 30; *see also People v. Vigil*, 955 P.2d 589, 591 (Colo. App. 1997) ("[*Custis*] did not in any way require state courts to ignore or abrogate any

[3] Nothing in this opinion precludes a prosecutor from exercising discretion to refrain from using a constitutionally infirm conviction as a predicate for elevating a charge under a habitual offender statute, even when a time bar prevents a collateral attack. *See People v. Pichon*, 929 P.2d 3, 5 (Colo. App. 1996) ("The prosecutor has wide latitude in charging decisions and . . . is never obligated to file the most serious available charges.").

statutes of limitation governing a federal defendant's right to pursue such collateral attacks in the state courts."). *Custis* therefore does not support Burdette's argument.

¶ 28 Accordingly, because we conclude that a violation of a defendant's constitutional right to counsel does not strip the convicting court of its subject matter jurisdiction, Burdette's collateral attacks against his 1990 DWAI convictions were not exempted from the time bar in section 42-4-1702(1). The jury therefore properly considered Burdette's prior convictions when deciding whether he committed felony DUI.

## III. Speedy Trial

¶ 29 Burdette next contends that the district court violated his statutory right to a speedy trial when it granted multiple mistrials due to the COVID-19 pandemic. For the first time on appeal, he also argues that a 2020 addition to Crim. P. 24 is unconstitutional because it violates the separation of powers doctrine. We address both contentions in turn, starting with his constitutional challenge.

### A. Constitutionality of Crim. P. 24(c)(4)

¶ 30 In the spring of 2020, amid the societal disruptions caused by the global COVID-19 pandemic, our supreme court added

paragraph (c)(4) to Crim. P. 24, providing guidance on when a district court may declare a mistrial due to a public health crisis. Rule Change 2020(07), Colorado Rules of Criminal Procedure (Amended and Adopted by the Court En Banc, Apr. 7, 2020), https://perma.cc/9T3K-FSTF. Crim. P. 24(c)(4) provides:

> At any time before trial, upon motion by a party or on its own motion, the court may declare a mistrial in a case on the ground that a fair jury pool cannot be safely assembled in that particular case due to a public health crisis or limitations brought about by such crisis. A declaration of a mistrial under this paragraph must be supported by specific findings.

*See also People v. Sherwood*, 2021 CO 61, ¶ 3 (describing the addition of Crim. P. 24(c)(4)).

¶ 31 According to Burdette, Crim. P. 24(c)(4) violates the separation of powers doctrine because it usurps the General Assembly's authority to promulgate substantive rules governing mistrials. He argues that our supreme court exceeded its power to promulgate procedural rules because Crim. P. 24(c)(4) creates an "unprecedented expansion" of what constitutes a mistrial.

¶ 32 "Whether a rule adopted by the supreme court is constitutional is a question of law that we review de novo." *People*

*v. Eason*, 2022 COA 54, ¶ 16. Burdette's challenge to the rule's constitutionality is unpreserved, limiting our review to plain error. *See Hagos v. People*, 2012 CO 63, ¶ 14. Plain error is obvious and substantial, *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005), and we need not decide if the district court actually erred if the alleged error is not obvious, *People v. Vigil*, 251 P.3d 442, 447 (Colo. App. 2010). An alleged error is obvious if it contravenes (1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law. *Scott v. People*, 2017 CO 16, ¶ 16.

¶ 33 At the outset, we note we are not working on a blank slate. In *Eason*, ¶ 21, announced after the trial in this case, a division of this court concluded that Crim. P. 24(c)(4) is a procedural rule that does not violate the separation of powers doctrine. The division explained that, even if "some aspect of public policy" underlies the rule, "it doesn't conflict with any legislative (or executive) expression of public policy and is therefore lawful." *Id.*

¶ 34 We conclude the district court did not commit an obvious error by failing to declare Crim. P. 24(c)(4) unconstitutional on its own motion. At the time of the mistrials, no clear statutory command, settled legal principle, or Colorado case law suggested Crim. P.

24(c)(4) violated the separation of powers doctrine. To the contrary, shortly before trial in this case, the General Assembly approved legislation that bolstered Crim. P. 24(c)(4)'s objective by authorizing trial courts to exclude an additional period from the speedy trial calculation to account for any "restriction, procedure, or protocol" related to the COVID-19 pandemic. Ch. 277, sec. 1, § 18-1-405, 2021 Colo. Sess. Laws 1600. The legislation expressly referenced the supreme court's new rule, instructing trial courts to consider whether a Crim. P. 24(c)(4) mistrial had already been granted when deciding whether to exclude an additional period due to COVID-19 restrictions. *See id.* Thus, the only statutory guidance available to the district court at the time was largely consistent with Crim. P. 24(c)(4), not in conflict with it. *See People v. McKenna*, 196 Colo. 367, 373, 585 P.2d 275, 279 (1978) ("[L]egislative policy and judicial rulemaking powers may overlap to some extent so long as there is no substantial conflict between statute and rule.").

¶ 35 In light of this legislation, we cannot say the district court plainly erred by failing to declare Crim. P. 24(c)(4) unconstitutional under the separation of powers doctrine.

## B. COVID-19-Related Mistrials

¶ 36 We next turn to Burdette's argument that the district court violated his statutory right to a speedy trial. We perceive no error.

¶ 37 We review the district court's denial of a motion to dismiss for violation of the defendant's speedy trial rights as a mixed question of law and fact. *People v. Curren*, 2014 COA 59M, ¶ 13. We will not disturb the court's factual findings if they are supported by the record. *Id.* But we review de novo the court's application of the controlling legal standard. *Id.* We review the court's decision whether to declare a mistrial for an abuse of discretion. *Eason*, ¶ 29.

¶ 38 Colorado's speedy trial statute requires that a defendant be brought to trial within six months from the entry of a not guilty plea. § 18-1-405(1), C.R.S. 2023. This deadline may be tolled in some circumstances, including, as relevant here, for the "period of delay caused by any mistrial, not to exceed three months for each mistrial." § 18-1-405(6)(e); *see Sherwood*, ¶¶ 1, 41 (explaining that a tolled period acts as a "time-out" on the speedy trial clock).

¶ 39 In this case, the district court declared a mistrial on December 8, 2020, without objection from Burdette, because the pandemic

prevented a jury from convening safely. The court reset trial for March 1, 2021, and calculated the new speedy trial deadline as May 17, 2021.

¶ 40 But three months later, conditions had not improved. The court declared a second mistrial on March 2, this time over Burdette's objection. The court found that, "[b]ut for the COVID-19 pandemic," trial would have moved forward. The court explained that the courthouse had only one space large enough to safely assemble a jury due to the "requirements of public health officials," including "social distancing requirements." That space was already fully booked with other trials. The court ruled that it would toll the speedy trial deadline for ninety days; trial was reset for May 3. The court declared a third mistrial for the same reasons on April 30, over Burdette's objection, and again made findings that social distancing requirements and limited available courthouse space prevented the trial from going forward. The court again ruled that it would toll the speedy trial deadline for ninety days, and it reset the trial for May 17.

¶ 41 The prosecution alerted the court the following week that one of its witnesses would be out of town during the May 17 trial

setting. The court found good cause to continue the trial based on the witness's unavailability and reset the trial for July 19. Burdette moved to dismiss the case for violating his speedy trial rights. The district court denied the motion and trial finally commenced on July 20.

¶ 42 We conclude that the district court did not err in denying Burdette's motion to dismiss. Crim. P. 24(c)(4) authorizes the district court to declare a mistrial if a fair jury pool cannot be safely assembled due to a public health crisis like the COVID-19 pandemic. The district court made findings, summarized above, that the second and third mistrials were caused solely by the COVID-19 pandemic; specifically, the court was unable to safely assemble a jury due to social distancing requirements imposed by public health officials. Such requirements constitute a "limitation[] brought about" by the COVID-19 pandemic. Crim. P. 24(c)(4).

¶ 43 Contrary to Burdette's argument, the second and third mistrials were not caused by mere "docket congestion." Although a limited number of trials were able to proceed in the one courthouse space large enough to accommodate socially distanced jurors, the court found that space was unavailable due to other scheduled

trials. *See Eason*, ¶ 34 (rejecting similar "docket congestion" argument where courthouse was limited to one jury trial per week due to public health orders imposed during the COVID-19 pandemic).

¶ 44 When declaring the second mistrial on March 2, the district court found that seventy-six days remained in the speedy trial period. The court tolled the deadline for the two additional mistrial periods, neither of which exceeded three months. Thereafter, Burdette's trial commenced within the seventy-six days that remained in the speedy trial period. Accordingly, Burdette was brought to trial within the speedy trial period.[4]

## IV. The Blood Test Results

¶ 45 Next, Burdette contends that the district court violated Colorado's express consent statute by not suppressing his blood test results. He argues the court should have suppressed the results because the blood test was not taken within two hours of driving as contemplated by the statute. We are not persuaded.

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[4] Having so concluded, we need not address the parties' competing arguments on whether the district court properly granted a continuance due to a prosecution witness's unavailability for the May 17 trial setting.

¶ 46 We review questions of statutory interpretation de novo. *People v. Null*, 233 P.3d 670, 679 (Colo. 2010). Our primary purpose is to ascertain and give effect to the General Assembly's intent, giving the selected words their plain and ordinary meaning. *Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007). We do not add or subtract words from the statutory language chosen by the General Assembly. *Id.*

¶ 47 Burdette acknowledges that he did not raise this argument before the district court. We therefore review his unpreserved claim that evidence should have been suppressed for plain error. *See Phillips v. People*, 2019 CO 72, ¶¶ 11-15, 22.

¶ 48 Under Colorado's express consent statute, drivers are "deemed" to have consented to providing a breath or blood sample "when so requested and directed by a law enforcement officer having probable cause to believe" they were driving in violation of DUI or related laws. § 42-4-1301.1(1), (2)(a)(I), C.R.S. 2023. If a law enforcement officer requests a test, the driver "must cooperate" so that "the sample of blood or breath can be obtained within two hours of the person's driving." § 42-4-1301.1(2)(a)(III).

¶ 49 Nothing in the express consent statute's text mandates the test result's suppression in a later criminal trial for DUI if law enforcement does not obtain the sample within two hours of driving.[5] This makes sense because the prosecution "doesn't need to prove a specific BAC to meet its burden of proof" in a criminal trial for DUI. *People v. Montoya*, 2024 CO 20, ¶ 31; *see also* § 42-4-1301(1)(f), C.R.S. 2023 (defining DUI without reference to a specific BAC level within two hours of driving). The "within two hours" language is instead intended only to ensure "timely cooperation by equivocating drivers." *Stumpf v. Colo. Dep't of Revenue*, 231 P.3d 1, 3 (Colo. App. 2009). It "does not impose any condition on an officer's testing *request*." *Id.*

¶ 50 Burdette nonetheless asserts that *Null*, 233 P.3d 670, requires suppression of test results obtained more than two hours after driving. But the core issue in *Null* was whether the statutory exception for "extraordinary circumstances" excused law

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[5] We express no opinion on whether test results obtained more than two hours after driving must or should be suppressed in a criminal prosecution for "DUI per se," § 42-4-1301(2)(a), C.R.S. 2023, or in a license revocation hearing for "Excess BAC 0.08" or "Excess BAC underage," § 42-2-126(2)(b), (2)(d), C.R.S. 2023.

enforcement's failure to honor the defendant's right to receive his chosen test. *See id.* at 678-79 (discussing § 42-4-1301.1(2)(a.5)(I)). Nothing in *Null* suggests that law enforcement's failure to obtain a blood or breath sample within two hours of driving demands suppression of those test results in a later criminal trial for DUI.

¶ 51 Accordingly, the district court did not err, plainly or otherwise, by failing to suppress the results of the blood test obtained more than two hours after Burdette drove his vehicle.

## V. Sufficiency of the Evidence

¶ 52 Burdette also contends the prosecution's evidence was insufficient to prove the validity of his three prior DWAI convictions or that he was the defendant in the prior cases. We conclude the prosecution met its burden.

¶ 53 We review sufficiency challenges de novo, determining whether the evidence is sufficient in both quality and quantity to sustain the conviction. *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010). We afford the prosecution the benefit of every reasonable inference that may be drawn from the evidence. *People v. Donald*, 2020 CO 24, ¶ 19. "If there is evidence upon which one may reasonably infer an

element of the crime, the evidence is sufficient to sustain that element." *People v. Chase*, 2013 COA 27, ¶ 50.

¶ 54 To prove identity in habitual criminal cases, the prosecution must establish an "essential link" between the prior conviction and the defendant. *Gorostieta v. People*, 2022 CO 41, ¶ 26. This requires the prosecution to present "some documentary evidence combined with specific corroborating evidence of identification" connecting the defendant to the prior conviction. *Id.* The fact that defendants in present and prior cases possess the same name and date of birth, without other corroborating evidence, is generally insufficient. *Id.* at ¶ 28.

¶ 55 To establish felony DUI, the prosecution was required to prove beyond a reasonable doubt that Burdette had at least three prior convictions, arising out of separate and distinct criminal episodes, for DUI, DUI per se, or DWAI. § 42-4-1301(1)(a).

¶ 56 In this case, the arresting officer testified at trial that he ran Burdette's name and date of birth through a criminal background database and a Division of Motor Vehicles (DMV) database. He testified the information from the databases showed Burdette had three prior drinking-and-driving convictions.

¶ 57 The prosecution also admitted the certified DMV records for a William Scott Burdette, which showed his full legal name, address, hair color, eye color, height, weight, date of birth, driver's license number, partial social security number, picture, and fingerprint. The DMV records custodian's certificate stated that a "search of our records has revealed that this is the only subject with this name and date of birth." The DMV records revealed the William Scott Burdette in the records had three prior DWAI convictions, one entered in 1995 and two in 1990, all in Arapahoe County. The arresting officer testified that the full name, picture, date of birth, height, and weight in the DMV records all matched Burdette's. The officer testified he reviewed these records after Burdette's arrest and that they corroborated his understanding that Burdette had three prior DWAI convictions.

¶ 58 In addition to the certified DMV records, the prosecution admitted certified court records from the Arapahoe County Combined Court showing three prior drinking-and-driving convictions for a William Burdette (in two of the three cases, a "William S Burdette"). While the court records did not precisely match the DMV records in all respects, the major details generally

synced up. The defendant's name and date of birth in the court records matched both Burdette's and those in the certified DMV records. In addition, the court records reflect filing dates that align with the offense dates listed in the DMV records — all three court cases were filed shortly after the offense dates. Finally, the sentencing dates in the court records generally line up with the conviction dates listed in the DMV records. In two cases, the dates are identical, while in the third they are one day apart.

¶ 59 Taken together, and giving the prosecution the benefit of every reasonable inference, the jury could have reasonably inferred from this evidence that Burdette was the same William Burdette who had been convicted of three prior alcohol-related offenses. Accordingly, we conclude the prosecution submitted sufficient evidence to prove beyond a reasonable doubt that Burdette committed felony DUI.

## VI. Prosecutorial Misconduct

¶ 60 Finally, Burdette contends the prosecutor committed misconduct during rebuttal closing argument by giving his personal opinion that the certified court records were accurate. He argues that the prosecutor implied to the jury that he had knowledge of

facts not admitted into evidence. We perceive no error requiring reversal.

¶ 61 Burdette admits he did not object to the prosecutor's closing argument. If a defendant did not contemporaneously object, we review allegations of prosecutorial misconduct for plain error. *People v. Rhea*, 2014 COA 60, ¶ 43. To rise to plain error, the "misconduct must be flagrant or glaring or tremendously improper, and it must so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *Id.* (quoting *People v. Weinreich*, 98 P.3d 920, 924 (Colo. App. 2004)). This standard recognizes that the "lack of an objection may demonstrate the defense counsel's belief that the live argument, despite its appearance in a cold record, was not overly damaging." *Domingo-Gomez v. People*, 125 P.3d 1043, 1054 (Colo. 2005) (citation omitted). Prosecutorial misconduct in closing argument rarely constitutes plain error. *Rhea*, ¶ 43.

¶ 62 We evaluate claims of improper argument in the context of the argument as a whole and in light of the evidence before the jury. *People v. Strock*, 252 P.3d 1148, 1153 (Colo. App. 2010). A prosecutor enjoys "wide latitude in the language and presentation

style used to obtain justice." *Domingo-Gomez*, 125 P.3d at 1048. Because closing arguments delivered "in the heat of trial are not always perfectly scripted, reviewing courts accord prosecutors the benefit of the doubt when their remarks are ambiguous or simply inartful." *People v. Samson*, 2012 COA 167, ¶ 30. Prosecutors must be mindful, however, not to inject their personal opinions about the evidence's credibility. *People v. Walters*, 148 P.3d 331, 334 (Colo. App. 2006). Nor may the prosecutor refer to facts not in evidence. *Id.*

¶ 63 Here, the prosecutor made the following statement regarding the certified court records during rebuttal closing: "By my looking at [the court records], and from what we went through — and nothing that I saw presented in — in the argument that counsel has made here, was that there's really anything inaccurate in those documents themselves; what they're guilty of, if anything, is missing information."

¶ 64 While the prosecutor's statement arguably could be interpreted as crossing into the realm of his personal opinion, the court's failure to correct it does not rise to the level of plain error. The statement was properly tethered to the evidence before the jury

("what we went through" and "those documents themselves"), not information outside the admitted evidence. The prosecutor's statement was also a direct reply to defense counsel's attack on the accuracy of the court records. *See People v. Wallace*, 97 P.3d 262, 269 (Colo. App. 2004) ("A prosecutor is afforded considerable latitude in replying to an argument by defense counsel."). Moreover, any arguable expressions of the prosecutor's personal opinion were brief and isolated. *See People v. Smith*, 685 P.2d 786, 790 (Colo. App. 1984).

¶ 65 Accordingly, reviewing the argument in context and in light of the evidence before the jury, the prosecutor's comments were not so flagrant that they cast serious doubt on the verdict's reliability.

## VII. Disposition

¶ 66 The judgment is affirmed.

JUDGE DUNN and JUDGE PAWAR concur.