ADVANCE SHEET HEADNOTE
September, 9, 2024

24 CO 61

No. 23SC97, *Bock v. People*—Constructive Amendment—Standards of Review—Plain Error Review—Structural Error Review.

A criminal defendant argues that the jury instructions given at his trial deviated from the charges against him such that they constituted a constructive amendment of his charges, creating a structural error and requiring reversal. The supreme court holds that constructive amendments are reviewed for plain, rather than structural, error. Further, the supreme court holds that the error in this case was not plain because it did not undermine the trial's fundamental fairness.

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

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24 CO 61

Supreme Court Case No. 23SC97
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA2184

Petitioner:

Jamie Edward Bock,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
September 9, 2024

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

JUSTICE HART delivered the Opinion of the Court.

¶1 Jamie Edward Bock was charged with nine counts of theft for conduct that occurred between November 2014 and November 2016, under a provision of the theft statute that punishes single acts of theft. Although proof of aggregation is only required under a different portion of the theft statute, the trial court instructed the jury that Bock could not be convicted of four of those counts unless the prosecution proved that multiple acts of theft had been committed within six months of each other.

¶2 Bock argues that this jury instruction resulted in an impermissible, constructive amendment of his charge. He further argues that the constructive amendment constituted a structural error requiring reversal. We agree on the first point; the erroneous jury instruction was a constructive amendment of the charge. However, we disagree that the constructive amendment was a structural error requiring automatic reversal. Instead, we review the constructive amendment for plain error.

¶3 We conclude that Bock did not satisfy his burden for reversal because he received sufficient notice of the amendment to mount a defense, and the People's burden of proof was not materially lessened so as to categorically prejudice Bock. Accordingly, we affirm the court of appeals' decision and uphold Bock's convictions.

I. Facts and Procedural History

¶4 Several homeowners hired Bock to do substantial construction work, and each gave him an initial payment for the work. For some of the projects, Bock bought the building materials and started the work. On others, he did not do any work. On four projects, Bock requested and received additional funds from the homeowners. He did not complete any project or refund any money.

¶5 The People charged Bock with nine counts of theft in five cases that were joined into a single trial. The original charging documents only alleged that Bock had violated section 18-4-401(1)(a), C.R.S. (2023), the provision of the theft statute punishing exclusively single acts of theft. The People never expressly indicated that they were proceeding under section 18-4-401(4)(a)–(b), which permits aggregation of thefts for punishment.

¶6 Before trial, Bock asked the People for a bill of particulars including "the specific value alleged to have been stolen for each charge, the specific dates for each charge, and the specific subsection of the theft statute that he is being prosecuted under for each charge." The People submitted (and later amended) a bill of particulars that included:

- trial count 1 (count 1 in case number 16CR1477), involving six alleged thefts stemming from six checks dated between November 2014 and April 2015;

- trial count 2 (count 2 in case number 16CR1477), involving five alleged thefts stemming from five checks dated between July 2015 and September 2015;
- trial count 5 (count 1 in case number 17CR1777), involving two alleged thefts stemming from two checks dated in December 2016;
- trial count 6 (count 2 in case number 17CR1777), involving four alleged thefts stemming from four checks dated between July 2016 and November 2016;

¶7 The bill of particulars further indicated that each of the remaining counts for trial involved only a single instance of alleged theft for each party from whom Bock had taken money.[1]

¶8 The case proceeded to trial. After the parties completed their presentation of the evidence, the trial court read the jury instructions. Notably, the court instructed the jury on the elements of trial count 1, as follows:

> 1. That the defendant,
>
> 2. in the State of Colorado, between and including November 23, 2014 and December 10, 2015,
>
> 3. knowingly,
>
> 4. obtained, retained, or exercised control over anything of value of another,

[1] The bill of particulars did not respond to Bock's request for identification of "the specific subsection of the theft statute that he is being prosecuted under for each charge." Bock did not challenge this omission.

5. without authorization or by threat or deception,

6. intended to deprive the other person permanently of the use or benefit of the thing of value, and

7. *committed within a period of six months those thefts charged in the same count*.

(Emphasis added.) The court's instructions on the elements of trial counts 2, 5, and 6 were substantially similar, only changing the names of the alleged victims and the dates the offenses were allegedly committed. Bock's counsel did not object to the jury instructions or their inclusion of the aggregation language requiring the thefts to be committed within six months of each other.

¶9 The jury convicted Bock of all nine counts, and the trial court sentenced him to a total of twenty years in the Department of Corrections.

¶10 Bock appealed, arguing, among other things, that the trial court had reversibly erred by providing jury instructions that constructively amended the charges against him. While the division concluded that the difference between the charges and the jury instructions amounted to a constructive amendment, it ultimately held that reversal was not required. *People v. Bock*, No. 19CA2184, ¶ 10 (Dec. 8, 2022).

¶11 The majority concluded that Bock's constructive amendment claims were subject to plain error review; meaning that reversal was required only if the trial court's error in allowing the constructive amendment was both obvious and "so

undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *Id.* at ¶ 12 (citing *Hagos v. People*, 2012 CO 63, ¶ 14, 288 P.3d 116, 120). It reasoned that "regardless of Bock's understanding of the original complaint, the bill of particulars placed him on notice that he would have to mount a defense" to the aggregated theft charge. *Id.* at ¶ 27. Furthermore, the majority held that because the plain language of the statute "requires the prosecution to prove *all of the thefts* aggregated into a single count," the constructive amendments actually "elevated the People's burden of proof instead of lessening it." *Id.* at ¶ 30.

¶12 Writing separately, Judge Schutz agreed that plain error was the appropriate standard of reversal but disagreed with the outcome of the majority's plain error analysis. *Id.* at ¶ 83 (Schutz, J., concurring in part and dissenting in part). He concluded instead that the constructive amendments had undermined the fundamental fairness of Bock's trial on those counts. *Id.* at ¶ 113. In Judge Schutz's view, "defense theories are not developed in a vacuum," and thus, neither he nor the majority could know "how this case would have proceeded had Bock actually been apprised of the aggregation theory he was facing." *Id.* at ¶ 121.

¶13 Bock petitioned this court for certiorari review, which we granted.[2]

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

II. Analysis

¶14 A constructive amendment occurs when a jury instruction "changes an essential element of the charged offense and thereby alters the substance of the charging instrument." *People v. Rediger*, 2018 CO 32, ¶ 48, 416 P.3d 893, 903 (quoting *People v. Rodriguez*, 914 P.2d 230, 257 (Colo. 1996)). We agree with both parties and the court of appeals that the jury instructions constructively amended the charges against Bock. However, we disagree that a constructive amendment is a structural error. We thus review the constructive amendment for plain error, and we hold that Bock has not proved reversible plain error.

¶15 A person commits theft under subsection (1)(a) when he

> knowingly obtains, retains, or exercises control over anything of value of another without authorization or by threat or deception; receives, loans money by pawn or pledge on, or disposes of anything of value or belonging to another that he . . . knows or believes to have been stolen, and . . .[i]ntends to deprive the other person permanently of the use or benefit of the thing of value . . . .

§ 18-4-401(1)(a). Several discrete acts of theft may be charged as a single offense, but only if they occurred "pursuant to one scheme or course of conduct." § 18-4-401(4)(b).

> Whether the constructive amendment in the theft instruction constituted structural error, or, alternatively, plain, reversible error.

¶16 The People charged Bock under section 18-4-401(1)(a) with four counts of aggregated theft, representing multiple takings against the same victim under a single criminal episode. The jury instructions, however, pointed to section 18-4-401(4)(a)–(b), including all the takings from all the victims within a six-month period. Unlike the original charges, the jury instructions were not based on individual thefts, nor did they include an aggregation with a single-criminal-episode element. Thus, the instructions altered the substance of the charge and amounted to a constructive amendment. But, was this constructive amendment a structural error?[3]

¶17 We have repeatedly emphasized that structural errors are a "limited class of fundamental constitutional error." *People v. Novotny*, 2014 CO 18, ¶ 20, 320 P.3d 1194, 1201; *see also People v. Crabtree*, 2024 CO 40M, ¶ 26, 550 P.3d 656, 664 (discussing the limited class of errors). Structural errors "require automatic reversal without individualized analysis of how the error impairs the reliability of the judgment of conviction." *Hagos*, ¶ 10, 288 P.3d at 119. The reason for limiting the class of structural errors parallels the reasons for foregoing individualized analysis of the harm. An error is structural only if (1) its impact is essentially

[3] Because this case presents a question of law, we review it de novo. *Howard-Walker v. People*, 2019 CO 69, ¶ 22, 443 P.3d 1007, 1011.

unmeasurable or (2) it always causes fundamental unfairness. *James v. People*, 2018 CO 72, ¶ 15, 426 P.3d 336, 339.

¶18 Very few errors fall into this category. The Supreme Court has explained that structural error includes only those egregious violations that taint the entire trial. *Weaver v. Massachusetts*, 582 U.S. 286, 295–96 (2017); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). We have found structural error, for example, when (1) a defendant was sentenced for a crime different from that on which a jury's guilty verdict was based, *Medina v. People*, 163 P.3d 1136, 1142 (Colo. 2007); (2) a jury was improperly instructed on an element of a crime, *Cooper v. People*, 973 P.2d 1234, 1242 (Colo. 1999); and (3) a defendant was deprived of counsel, *Hagos*, ¶ 10, 288 P.3d at 119.

¶19 Constructive amendments do not fall in this class.[4] Constructive amendments can broaden or narrow indictments, thus sometimes producing prejudice and sometimes producing no prejudice at all.

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[4] Divisions of the court of appeals have been split on whether constructive amendment is structural error. *Compare People v. Rail*, 2016 COA 24, ¶ 50, 457 P.3d 608, 617 ("A constructive amendment is per se reversible."), *and People v. Foster*, 971 P.2d 1082, 1087 (Colo. App. 1998) ("A variance that broadens an indictment constitutes a constructive amendment and is reversible per se."), *with People v. Carter*, 2021 COA 29, ¶¶ 14, 48–57, 486 P.3d 473, 477, 483–84 (concluding that "a constructive amendment isn't a structural error" and then reviewing the defendant's unpreserved constructive error claim for plain error), *and People v. Garcia*, 2023 COA 58, ¶¶ 45–49, 536 P.3d 847, 856–57 (same). We settle that question today.

¶20 For instance, in *People v. Weeks*, 2015 COA 77, 369 P.3d 699, while the court of appeals found a constructive amendment, it also concluded there was no prejudice. In that case, the defendant was charged with causing a child's death through a pattern of "cruel punishment, mistreatment, or an accumulation of injuries." *Id.* at ¶ 51, 369 P.3d at 709 (alteration omitted). The jury instructions, however, included two other elements: malnourishment and lack of proper medical care. *Id.* ¶¶ 48, 50–51, 369 P.3d at 708–09. Because nothing suggested that the defendant had engaged in a pattern of malnourishment or lack of proper medical care, the division determined that the defendant was not prejudiced by the constructive amendment. *Id.* at ¶ 55, 369 P.3d at 709.

¶21 In *Rediger*, however, this court determined that a constructive amendment did prejudice the defendant because it lessened the People's burden. ¶ 51, 416 P.3d at 904. In that case, the defendant was charged with

> willfully imped[ing] the staff or faculty of [an educational institution] in the lawful performance of their duties or willfully imped[ing] a student of the institution in the lawful pursuit of his educational activities through the use of restraint, abduction, coercion, or intimidation or when force and violence [were] present or threatened.

Id. at ¶ 49, 416 P.3d at 903 (second and fourth alterations in original). The jury instruction, in contrast, only required the People to prove that the defendant "willfully den[ied] to students, school officials, employees, and invitees . . . [l]awful use of the property or facilities of [an educational] institution." *Id.* at ¶ 50,

416 P.3d at 904 (alterations in original). This court concluded the difference between the charging document and the jury instructions prejudiced the defendant because it materially lessened the People's burden and substantially undermined the fairness of the trial. *Id.* at ¶¶ 51–52, 416 P.3d at 904. As these cases demonstrate, constructive amendments will sometimes, but not always, prejudice a defendant. Appellate courts can conduct that evaluation.

¶22 Moreover, a constructive amendment "does not *necessarily* render a criminal trial fundamentally unfair." *Neder v. United States*, 527 U.S. 1, 9 (1999). For instance, a defense could apply equally to the charged and amended counts. *See, e.g.*, *Collins v. State*, 305 So. 3d 1262, 1265–67 (Miss. Ct. App. 2020) (noting that the constructive amendment did not affect the trial's fairness because the amendment would not change the defense's theory). Or a constructive amendment can make the prosecution's case *harder* to prove. *See, e.g.*, *United States v. Kilmartin*, 944 F.3d 315, 326 (1st Cir. 2019) (concluding that there was no prejudice because the constructive amendment "had the effect of adding another element that the government was required to prove beyond a reasonable doubt"). In these circumstances, the constructive amendment does not necessarily make the criminal trial unfair. Certainly, there could be circumstances in which a constructive amendment would cast doubt on the fundamental fairness of the trial,

and courts must have the tools to address those circumstances. But automatic reversal is too blunt a tool. Review for plain error is a much better fit.

¶23 Having concluded that constructive amendments are not structural error, we proceed to review the amendment that occurred here for plain error.[5]

¶24 An error is plain only if it is obvious, substantial, and so undermined the trial's fundamental fairness as to cast doubts on the reliability of the conviction. *Hagos*, ¶ 14, 288 P.3d at 120. In other words, the defendant can prove plain error by demonstrating substantial prejudice. *See Rediger*, ¶ 52, 416 P.3d at 904.

¶25 The constructive amendment here did not undermine the fundamental fairness of the trial or substantially prejudice Bock. While Bock was charged only with violations of the single theft provision of the theft statute, he was informed before trial, through the bill of particulars, of the precise dates and sums that formed the basis of the claims that would be presented at trial, including the fact that some of those claims would be for multiple, aggregated thefts. He could not reasonably claim surprise or lack of notice that would prevent him from defending against the aggregated claims at trial. In fact, repeated conversations between

[5] Bock urges us to adopt a standard that would presume prejudice—requiring the People to prove that no prejudice had been caused by the constructive amendment instead of requiring Bock to demonstrate prejudice. Because we conclude that there was no prejudice here, we do not consider whether there might be circumstances in which a presumption of prejudice would be appropriate.

counsel and the court throughout trial demonstrate that he was aware of the aggregated claims. Moreover, the jury instructions ultimately raised the prosecution's burden of proof, requiring them to prove the additional element that the individual thefts occurred within six months of each other.

III. Conclusion

¶26 We hold that constructive amendments are reviewed for plain, rather than structural, error. We further hold that the error wasn't plain because it did not undermine the trial's fundamental fairness. Accordingly, we affirm.

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