SUMMARY
May 16, 2024

24COA52M

No. 20CA1987, *People v. Sloan* — Constitutional Law — Sixth Amendment — Right to Public Trial

A division of the court appeals holds, in the first reported Colorado case to do so, that a defendant is not denied a public trial so long as members of the public are permitted to attend, even though the court experienced technical problems with the livestreaming of the proceedings.

COLORADO COURT OF APPEALS **24COA52M**

Court of Appeals No. 20CA1987
City and County of Denver District Court No. 19CR4299
Honorable John W. Madden IV, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jeffrey Sloan,

Defendant-Appellant.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE LIPINSKY
Welling and Gomez, JJ., concur

Opinion Modified
Petition for Rehearing GRANTED IN PART
AND DENIED IN PART

Announced May 16, 2024

Philip J. Weiser, Attorney General, William G. Kozeliski, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Adrienne R. Teodorovic, Alternate Defense Counsel, Denver, Colorado, for Defendant-Appellant

OPINION is modified as follows:

Page 22, ¶ 53 currently reads:
The prosecution's evidence established that the officers abandoned their pursuit of the Jeep several minutes before, and about a mile from the location of, the collision.

Opinion now reads:
The prosecution's evidence established that the officers abandoned their pursuit of the Jeep shortly before, and about a mile from the location of, the collision.

¶ 1 During the COVID-19 pandemic, courts throughout the country employed videoconferencing technology, such as Webex, to honor defendants' right to a public trial while protecting the participants and the public from infection in the courtroom. *See People v. Roper*, 2024 COA 9, ¶ 1, ___ P.3d ___, ___. As the pandemic raged, some courts excluded all members of the public from their courtrooms, while others conducted hybrid proceedings, in which a limited number of members of the public were permitted to sit in the courtroom while others had the option of watching a video feed. Despite acknowledging the challenges trial courts faced during the pandemic, the supreme court held that the public health crisis did not alter the principle that "the exclusion of even a single individual from the courtroom, regardless of the reason for the exclusion, constitutes a partial closure that implicates the Sixth Amendment." *People v. Turner*, 2022 CO 50, ¶ 23, 519 P.3d 353, 359.

¶ 2 The judicial branch's livestreaming technology did not always function perfectly. In this case, the court set aside seats for the public in the courtroom and provided for remote viewing of the trial through Webex. But during the early phases of the trial, problems

with the Webex feed limited what remote viewers could hear and see.

¶ 3 As a matter of first impression in Colorado, we hold that a courtroom is not closed, despite problems with the livestreaming technology that preclude remote observers from hearing and seeing the entire trial, so long as the court makes seats in the courtroom available for members of the public and no member of the public who wishes to watch the trial is turned away.

¶ 4 Jeffrey Sloan appeals the judgment of conviction entered on jury verdicts finding him guilty of two counts of first degree assault, two counts of vehicular homicide, failure to fulfill duties after involvement in an accident involving death, and vehicular eluding resulting in death.

¶ 5 We reverse Sloan's conviction for class 3 felony vehicular eluding resulting in death due to an instructional error and affirm his other convictions. We remand for further proceedings consistent with this opinion and for correction of the mittimus to remove the reference to the counts dismissed before trial.

I. Background Facts and Procedural History

¶ 6 The jury could reasonably have found the following facts.

¶ 7 In June 2019, a Jeep ran a red light and broadsided a sedan at the intersection of Colorado Boulevard and Colfax Avenue in Denver. The accident resulted in the deaths of the sedan driver and his passenger. The driver of the Jeep fled on foot.

¶ 8 Police officers subsequently identified the Jeep as the vehicle they had been pursuing only minutes before the accident. The officers had abandoned their pursuit for safety reasons, consistent with Denver Police Department policy, after the Jeep accelerated away from them and ran a stop sign. To signal that they had abandoned the pursuit, the officers turned off their vehicle's overhead lights and pulled off into a parking lot.

¶ 9 Sloan was charged with two counts of first degree assault, two counts of vehicular homicide, failure to fulfill duties after involvement in an accident involving death, vehicular eluding resulting in death, failure to fulfill duties after involvement in an accident resulting in serious bodily injury, and vehicular eluding resulting in serious bodily injury. At the prosecution's request, the trial court dismissed two of the counts — failure to fulfill duties after involvement in an accident resulting in serious bodily injury and vehicular eluding resulting in serious bodily injury — before

trial. At trial, Sloan solely pursued a mistaken identity theory of defense; he argued that the prosecutors had not proved beyond a reasonable doubt that he was the driver of the Jeep.

¶ 10 A jury found Sloan guilty on all remaining counts. The trial court sentenced Sloan to seventy-two years in the custody of the Department of Corrections. The sentence on the vehicular eluding resulting in death count was ten years, to run consecutively to the sentences on the other counts.

II. Analysis

¶ 11 Sloan contends that the trial court reversibly erred by (1) failing to fix technical problems with Webex during his trial; (2) incorrectly instructing the jury on the vehicular eluding resulting in death sentence enhancer; and (3) including on the mittimus convictions on the two counts that the court had dismissed.

A. The Webex Problems at Sloan's Trial

1. Additional Facts

¶ 12 Sloan's trial occurred in August 2020, during the COVID-19 pandemic. To protect the health of all participants and the court staff, the court conducted the in-person trial with social distancing

in the courtroom. The court made a limited number of seats available for members of the public who wished to attend the proceedings in person, and it livestreamed the trial on Webex.

¶ 13 The Webex feed had technical problems during jury selection, however. Persons observing the trial remotely through Webex could not hear the potential jurors or counsel. Moreover, the live feed only showed the judge and not the entire courtroom.

¶ 14 Defense counsel brought these issues to the court's attention through numerous objections. The court acknowledged and explained the ongoing technological issues, noting, for example, that "the only microphone transmitting the jury selection process over Webex was the microphone on the Court's computer." Sloan argues that "the trial court violated [his] right to a public trial when it failed to ensure the [Webex] feed was functioning properly to allow observers to hear and see the jury selection proceedings."

2. Standard of Review

¶ 15 "We review a trial court's decision to close the courtroom as a mixed question of law and fact." *People v. Jones*, 2020 CO 45, ¶ 14, 464 P.3d 735, 739 (citing *People v. Hassen*, 2015 CO 49, ¶ 5, 351 P.3d 418, 420). Accordingly, "we accept the trial court's findings of

fact absent an abuse of discretion, but we review the court's legal conclusions de novo." *Id.* (quoting *Hassen*, ¶ 5, 351 P.3d at 420).

¶ 16 The erroneous denial of a public trial constitutes structural error. *Hassen*, ¶ 7, 351 P.3d at 420 (citing *Hagos v. People*, 2012 CO 63, ¶ 10, 288 P.3d 116, 119).

3. Relevant Law

¶ 17 "Both the United States and the Colorado Constitutions guarantee criminal defendants the right to a public trial." *Id.*; *see* U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16. The right to a public trial extends to the jury selection process. *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam). This right "is for the benefit of the accused"; it encourages public participation, which in turn "keep[s] . . . triers keenly alive to a sense of their responsibility and to the importance of their functions" and "safeguards the integrity of the factfinding process." *Jones*, ¶¶ 16-17, 464 P.3d at 739-40 (first quoting *Waller v. Georgia*, 467 U.S. 39, 46 (1984); and then quoting *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606 (1982)).

4. The Problems with Webex Did Not Deny Sloan the Right to a Public Trial

¶ 18 We hold that no closure of the courtroom occurred because, despite the problems with the livestreaming of the proceedings, any member of the public who wished to attend the trial in person was able to do so. As stated above, the record reflects that the court made a limited number of seats available for members of the public at all phases of Sloan's trial and no member of the public who wished to watch the trial was turned away from the courtroom. (Sloan does not challenge the court's decision to limit seating in the courtroom to achieve social distancing.)

¶ 19 In a case predating the Webex era, a division of this court held that "[t]he public trial right is concerned with the public's presence during (or access to) the trial. So where no one is excluded from the courtroom, it simply isn't implicated." *People v. Robles-Sierra*, 2018 COA 28, ¶ 18, 488 P.3d 337, 341. This principle has been applied to trials conducted during the COVID-19 pandemic. *See People v. Kocontes*, 302 Cal. Rptr. 3d 664, 740 (Ct. App. 2022) (holding that no courtroom closure occurred during a trial where "the number of seats available to the public was decreased to comply with [the

Centers for Disease Control and Prevention's] social distancing guidelines [and] [t]he record includes no evidence that . . . any member of the public was prevented from entering the courtroom").

¶ 20 The principle articulated in *Robles-Sierra* applies when the court opens the trial to the public and attempts, with limited success, to allow members of the public to observe all phases of the trial remotely. *Cf. Roper*, ¶ 10, ___ P.3d at ___ (holding that the "exclusion of all members of the public from the courtroom, despite their being able to view the trial in a separate courtroom via a live audio and video stream," constituted a partial closure). No Colorado case holds that an otherwise open courtroom closes if the livestreaming of the proceedings does not function properly. *See People v. Gonzalez-Quezada*, 2023 COA 124M, ¶ 66, 546 P.3d 142, 155 ("[I]f a courtroom remains open during the subject legal proceedings, the partial cessation of virtual proceedings does not amount to a closure of the courtroom for purposes of the constitutional right to a public trial."). In contrast, a trial court's removal of the entire public from the physical courtroom constitutes a nontrivial partial closure, even if members of the public can view the proceedings through a live video and audio stream. *People v.*

Bialas, 2023 COA 50, ¶ 15, 535 P.3d 999, 1003 (*cert. granted* Mar. 11, 2024).

¶ 21 We decline Sloan's invitation to expand the law governing courtroom closures to situations where any member of the public who wished to watch the trial in person was able to do so, but people observing the trial remotely could not hear or see the entirety of the proceedings.

¶ 22 A court's use of livestreaming technology does not grant a defendant a constitutional right to uninterrupted livestreaming throughout the trial in cases where members of the public have the option of attending the court proceedings in person and no member of the public is turned away. Thus, we hold that a court's decision to allow members of the public the choice to observe the trial in person or through a tool such as Webex does not mean the courtroom closes when problems with the livestreaming technology preclude remote observers from hearing and seeing the entire trial.

¶ 23 For these reasons, we conclude that Sloan's right to a public trial was not violated and, therefore, hold that the livestreaming problems do not require reversal of his convictions.

B. The Jury Instruction and the Verdict Form Concerning the Vehicular Eluding Resulting in Death Sentence Enhancer

¶ 24 Sloan asserts that the court erred by giving an instruction and related verdict form (jointly, the enhancer instruction) on the vehicular eluding resulting in death sentence enhancer (the sentence enhancer) that directed the jurors to decide whether "the *accident* resulted in death" rather than whether "*vehicular eluding* . . . result[ed] in death," as the statute requires, § 18-9-116.5(2)(a), C.R.S. 2023 (emphasis added). The jury's finding that the sentence enhancer applied increased Sloan's conviction for vehicular eluding from a class 5 felony to a class 3 felony and increased the corresponding sentence.

¶ 25 We agree with Sloan that the court plainly erred by giving the enhancer instruction.

1. Standard of Review

¶ 26 "On review, we consider jury instructions de novo to determine if they are correct recitations of the law and 'accurately inform[] the jury of the governing law.'" *Garcia v. People*, 2022 CO 6, ¶ 16, 503 P.3d 135, 140 (quoting *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011)). "A jury instruction should substantially track the language

of the statute describing the crime; a material deviation from the statute can result in reversible plain error, depending on the facts of the case." *People v. Weinreich*, 119 P.3d 1073, 1076 (Colo. 2005). We review not only whether the jury instructions faithfully track the law but also whether the instructions are confusing or may mislead the jury. *Id.* (citing *People v. Janes*, 982 P.2d 300, 303-04 (Colo. 1999)).

¶ 27 We review all nonstructural errors not preserved by objection for plain error. *See Hagos*, ¶ 14, 288 P.3d at 120. Plain error is error that is "obvious and substantial." *Id.*

2. Applicable Law

¶ 28 Section 18-9-116.5(1) provides that

> [a]ny person who, while operating a motor vehicle, knowingly eludes or attempts to elude a peace officer also operating a motor vehicle, and who knows or reasonably should know that he or she is being pursued by said peace officer, and who operates his or her vehicle in a reckless manner, commits vehicular eluding.

¶ 29 "Vehicular eluding is a class 5 felony; except that *vehicular eluding that results in . . . death* to another person is a class 3 felony." § 18-9-116.5(2)(a) (emphasis added). Because "the offense of vehicular eluding does not require proof of a resulting death, the

'death of another person' factor in the vehicular eluding statute is a sentence enhancer." *People v. Avila*, 944 P.2d 673, 677 (Colo. App. 1997).

3. The Court Erred by Misstating the Language of the Sentence Enhancer in the Enhancer Instruction

¶ 30 We agree with Sloan that the language in the enhancer instruction referring to an "*accident* . . . resulting in death," rather than "*vehicular eluding* that results in . . . death to another person," misstated the key phrase in section 18-9-116.5(2)(a). (Emphasis added.) For the sentence enhancer to apply, the jury had to find, among other facts, that (1) Sloan was engaged in vehicular eluding at the time of the accident and (2) the victims' deaths resulted from the eluding. *See* § 18-9-116.5(2)(a). This error in the instruction misdirected the jurors' attention to the ramifications of the accident, rather than to whether the victims' deaths resulted from the act of eluding.

¶ 31 The People argue that the enhancer instruction did not misstate the law because "[Sloan's] acts, which constituted the eluding, were linked in time and circumstance to the 'accident' that resulted in death." But mere "link[age] in time and circumstance"

between an act of eluding and an accident resulting in the victims' deaths cannot be squared with the statutory language providing that the sentence enhancer only applies if the vehicular eluding itself "result[ed] in death to another person." § 18-9-116.5(2)(a).

¶ 32 This is a critical distinction. As Sloan notes, a person cannot be convicted of vehicular eluding unless the person knew or reasonably should have known that "he or she is being pursued" by a "peace officer also operating a motor vehicle." § 18-9-116.5(1).

4. The Court Plainly Erred by Giving the Jury the Enhancer Instruction

¶ 33 Because Sloan's counsel did not object to the erroneous language in the enhancer instruction, we consider whether the court's error was plain.

a. The Error Was Obvious

¶ 34 An error is obvious if it contravened "(1) a clear statutory command; (2) a well-settled legal principle; or ([3]) Colorado case law." *People v. Pollard*, 2013 COA 31M, ¶ 40, 307 P.3d 1124, 1133 (citations omitted).

¶ 35 We agree with Sloan that the error was obvious. Directing the jury to consider whether "the accident resulted in death" rather

than whether the "vehicular eluding . . . result[ed] in death" contravened the clear statutory language concerning the sentence enhancer. § 18-9-116.5(2)(a). Criminal convictions must be premised on violation of the elements specified in the statute. This principle applies to the vehicular eluding statute, as the People note. *See People v. McMinn*, 2013 COA 94, ¶ 26, 412 P.3d 551, 558-59 ("[T]he unit of prosecution for vehicular eluding must be defined . . . in terms of *discrete volitional acts* of eluding that have endangered the public.") (emphasis added). It also applies to sentence enhancers. *See Caswell v. People*, 2023 CO 50, ¶ 38, 536 P.3d 323, 332 (holding that, except for sentence-enhancing facts relating to a prior conviction, "a fact that increases the sentence for a crime beyond the statutory maximum must be proved to a jury beyond a reasonable doubt").

b. The Error Was Substantial Even Though Trial Counsel Did Not Contest Whether the Victims Died as a Result of Vehicular Eluding

¶ 36 We next turn to whether the error was substantial. An error is substantial if it "so undermine[d] the fundamental fairness of the trial itself . . . as to cast serious doubt on the reliability of the judgment of conviction." *Pollard*, ¶ 40, 307 P.3d at 1133 (quoting

Hagos, ¶ 14, 288 P.3d at 120). "[A]n erroneous jury instruction does not normally constitute plain error where the issue is not contested at trial or where the record contains overwhelming evidence of the defendant's guilt." *Thompson v. People*, 2020 CO 72, ¶ 54, 471 P.3d 1045, 1057 (quoting *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005)).

¶ 37 The People contend that the error was not plain because Sloan's sole theory of defense was mistaken identity, and his trial counsel did not contest whether the victims' deaths resulted from vehicular eluding.

i. The "Not Contested" Analysis Applies to Errors in Instructions on Sentence Enhancers

¶ 38 For purposes of considering the impact that the lack of a contested issue has on our plain error analysis, there is no material distinction between an instruction on an element of a charged offense and an instruction on a sentence enhancer. Of course, the two types of instruction are materially different — Sloan could have been convicted of vehicular eluding if the jury found that the prosecutor had proved all elements of such offense beyond a reasonable doubt, regardless of whether the vehicular eluding

resulted in death. But under the vehicular eluding statute, the penalty for the offense increases if the vehicular eluding resulted in bodily injury or death to another person. *See* § 18-9-116.5(2)(a). Such increase in penalty, premised on a factor that is not an element of the offense, is the mark of a sentence enhancer. *See Avila*, 944 P.2d at 677.

¶ 39 As we explain in Part II.B.4.c below, courts may consider, as part of their plain error review, whether, in light of the relative strength of the evidence presented at trial, the fact that trial counsel did not contest an issue signifies that the error lacked sufficient magnitude to call into question the fundamental fairness of the trial and the reliability of the judgment of conviction. This rationale applies equally to elemental and sentence enhancer instructions.

ii. Sloan's Trial Counsel Did Not Contest Whether the Victims Died as a Result of Vehicular Eluding

¶ 40 The defense theory at trial was mistaken identity — that the officers arrested, and the prosecution charged, the wrong person. The jury would have acquitted Sloan on all charges had it believed he was not the driver of the Jeep. In light of the sweeping scope of

the mistaken identity theory, the defense did not also present arguments tailored to the specific charged offenses or focus on whether the evidence proved the elements of those offenses.

¶ 41 But the defense's strategic decision not to contest whether the victims died as a result of vehicular eluding does not necessarily mean that defense counsel conceded this point. *See People v. Lozano-Ruiz*, 2018 CO 86, ¶¶ 6-8, 429 P.3d 577, 578 (noting that, while the defendant "did not *contest* that sexual penetration occurred, in that he never challenged the evidence suggesting that it had," he still "did not *concede*" the point).

c. The Fact that Sloan's Trial Counsel Did Not Contest Whether the Victims Died as a Result of Vehicular Eluding, Without More, Does Not Mean the Error in the Enhancer Instruction Was Not Plain

¶ 42 A court cannot conduct a meaningful plain error review without considering whether the unchallenged error "cast[] serious doubt upon the basic fairness of the trial itself." *Wilson v. People*, 743 P.2d 415, 419-20 (Colo. 1987). "[T]he appropriate standard for plain-error review is whether an appellate court, after reviewing the entire record, can say with fair assurance that the error so undermined the fundamental fairness of the trial itself as to cast

serious doubt on the reliability of the judgment of conviction." *Id.* at 420.

¶ 43 This holds true even if trial counsel did not contest the underlying issue. For example, in *People v. Cowden*, a theft case, trial counsel did not contest whether the stolen items had a sufficient value to support a conviction for felony theft. 735 P.2d 199, 202 (Colo. 1987). The defense argued only that "the theft statute denied the defendant equal protection of law." *Id.* at 201.

¶ 44 On appeal, Cowden challenged a jury instruction, to which his trial counsel had not objected, that omitted the element of value. *Id.* at 202. The supreme court noted that the evidence introduced in support of one of the theft counts (the subject theft count) showed that the item at issue had a value below the threshold for felony theft. *Id.* at 202-03.

¶ 45 The supreme court held that the error in the instruction was plain and reversed Cowden's conviction on the subject theft count, even though his trial counsel had not "contested" the element of value. The court concluded that reversal was required because, "[h]ad the jury been properly instructed, it is reasonably possible

that the defendant would have been acquitted" of the subject theft count. *Id.* at 202.

¶ 46 In *Thompson v. People*, 2020 CO 72, 471 P.3d 1045, a securities fraud and theft case, the supreme court conducted a similar analysis. The *Thompson* court considered, among other issues, whether the court had given the jury an instruction containing an erroneous definition of "security." *Id.* at ¶ 53, 471 P.3d at 1057. Thompson's trial counsel had not contested whether the promissory notes Thompson had sold were securities, however, and argued instead that he had not engaged in fraud. *Id.* at ¶¶ 56-57, 471 P.3d at 1057-58.

¶ 47 The supreme court concluded that any error in the definitional instruction did not "so undermine[] the fundamental fairness of the trial so as to cast serious doubt on the reliability of the judgment of conviction," *id.* at ¶ 57, 471 P.3d at 1057-58, after explaining that the challenged instruction tracked "almost verbatim" the statutory definition of "security," *id.* at ¶ 55, 471 P.3d at 1057. For this reason, the supreme court's conclusion that the error was not plain did not rest solely on the fact that counsel had not contested whether the note was a security. Rather, the court's conclusion

primarily rested on its determination that the definitional instruction tracked the statutory language.

¶ 48 *Thompson* confirms that an appellate court conducting a plain error review must examine whether the instructional error related to the uncontested issue "so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction," *id.* at ¶ 54, 471 P.3d at 1057, regardless of whether the defense did or did not contest the related issue at trial.

¶ 49 Similarly, in *Auman v. People*, 109 P.3d 647, 665 (Colo. 2005), the supreme court discussed how the plain error standard of review applies regardless of whether the underlying issue was contested at trial. The court explained that, if the evidence of the defendant's guilt "is not overwhelming, and if there existed an evidentiary dispute" as to an element of the offense, "then it is likely that [the defendant's] substantial rights were affected, and a reasonable possibility exists that the improper instruction contributed to [the defendant's] conviction." *Id.* Under these circumstances, "serious doubt would be cast upon the fairness of [the defendant's] trial and the reliability of [the defendant's] convictions, and reversal would be required." *Id.*

¶ 50 The courts applied this approach in *People v. Villarreal*, 131 P.3d 1119 (Colo. App. 2005), and *Espinoza v. People*, 712 P.2d 476 (Colo. 1985). In those cases, the determination that the instructional error was not plain rested on a more robust analysis than simply examining whether the challenged instruction related to an issue contested at trial: the courts further considered whether the evidence introduced at trial overwhelmingly supported the defendant's conviction. *See Villarreal*, 131 P.3d at 1124-25 (noting that defense counsel had solely relied on a mistaken identity theory at trial but nonetheless concluding that the challenged error in an elemental instruction was not plain because the evidence was overwhelming); *Espinoza*, 712 P.2d at 478-79 (determining that the court did not plainly err by giving a flawed instruction on the culpable mental state for the charged offenses because the evidence was overwhelming, even though trial counsel had not contested whether the assailant acted knowingly).

d. The Error Undermined the Fundamental Fairness of Sloan's Trial and Cast Serious Doubt on His Sentence for Class 3 Felony Vehicular Eluding Resulting in Death

¶ 51 Consistent with these cases, although Sloan's trial counsel did not contest whether the victim's deaths resulted from vehicular

eluding, we nonetheless examine whether the error in the enhancer instruction "undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability" of Sloan's sentence for class 3 felony vehicular eluding resulting in death. *See Pollard*, ¶ 40, 307 P.3d at 1133.

¶ 52 Not only was the evidence linking the victims' deaths to vehicular eluding far from overwhelming, but the prosecution's own evidence contradicted the prosecution's argument that Sloan committed class 3 felony vehicular eluding resulting in death. *Cf. Villarreal*, 131 P.3d at 1124-25; *Espinoza*, 712 P.2d at 478-79.

¶ 53 The prosecution's evidence established that the officers abandoned their pursuit of the Jeep shortly before, and about a mile from the location of, the collision. No evidence introduced at trial contradicted this testimony. Yet, as noted above, the enhancer instruction erroneously permitted the jurors to convict and the court to sentence Sloan for vehicular eluding resulting in death based on the *accident*, rather than *vehicular eluding* having resulted in death.

¶ 54 For these reasons, regardless of whether defense counsel contested whether the victims died as a result of vehicular eluding,

the evidence that Sloan committed class 3 felony vehicular eluding resulting in death was by no means overwhelming and there was "an evidentiary dispute" regarding a link between the victims' deaths and the vehicular eluding. *Auman*, 109 P.3d at 665. Thus, we have a "serious doubt" whether Sloan received a fair trial on this offense and regarding the reliability of his conviction for class 3 felony vehicular eluding resulting in death. *Id.*

¶ 55 Moreover, as a consequence of the error in the enhancer instruction, the jury was not asked to find, and did not find, whether the pursuit was ongoing at the time of the fatal collision. The enhancer instruction "material[ly] deviat[ed] from the statute," *Weinreich*, 119 P.3d at 1076, because it failed to draw the critical distinction between causing a fatal accident while eluding police officers and causing a fatal accident after the eluding has ended.

¶ 56 By shifting the jury's focus from whether the victims' deaths resulted from the vehicular eluding to whether their deaths resulted from the accident, the enhancer instruction tasked the jury with answering a question that could not enhance vehicular eluding from a class 5 felony to a class 3 felony. In other words, the jury returned a verdict on a non-existent sentence enhancer. *See id.* at

1078-79 (holding it was plain error for the court to give an erroneous jury instruction because "[t]he instruction the trial court gave . . . deviated materially from the current statute and permitted the jury to convict [the defendant] of a non-existent offense").

¶ 57 For these reasons, we conclude that the court's error in providing the flawed enhancer instruction was substantial. Because the error was obvious and substantial, it was plain. We therefore reverse Sloan's conviction for class 3 felony vehicular eluding resulting in death.

C. Correction of the Mittimus

¶ 58 Sloan and the People agree that, before trial, the trial court dismissed the counts for failure to fulfill duties after involvement in an accident resulting serious bodily injury and vehicular eluding resulting in serious bodily injury, so those counts should not appear as convictions on the mittimus. We agree and remand to the trial court for correction of the mittimus.

1. Standard of Review

¶ 59 Crim. P. 36 permits courts to correct both "'errors made by the clerk' — such as in entering a judgment or a sentence — as well as any 'mistakes apparent on the face of the record, whether made by

the court or counsel during the progress of the case.'" *People v. Wood*, 2019 CO 7, ¶ 39, 433 P.3d 585, 595 (quoting *People v. Glover*, 893 P.2d 1311, 1316 (Colo. 1995)); *see also People v. McLain*, 2016 COA 74, ¶ 26, 411 P.3d 1037, 1041 ("[Crim. P. 36] authorizes the district court to amend a judgment to conform to the sentence imposed."), *overruled on other grounds by People v. Weeks*, 2021 CO 75, 498 P.3d 142.

2. The Mittimus Must Be Corrected to Remove the Reference to the Dismissed Counts

¶ 60 The record confirms that the dismissed counts should not appear as convictions on the mittimus. Because the jury did not convict Sloan on the dismissed counts, they should be removed from the mittimus.

III. Disposition

¶ 61 Sloan's conviction for class 3 vehicular eluding resulting in death is reversed and his other convictions are affirmed. The case is remanded to the trial court for further proceedings consistent with this opinion and for correction of the mittimus to remove the reference to the counts dismissed before trial.

JUDGE WELLING and JUDGE GOMEZ concur.

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¶ 5 We reverse Sloan's conviction for class 3 felony vehicular eluding resulting in death due to an instructional error and affirm his other convictions. We remand for further proceedings consistent with this opinion and for correction of the mittimus to remove the reference to the counts dismissed before trial.

I. Background Facts and Procedural History

¶ 6 The jury could reasonably have found the following facts.

¶ 7 In June 2019, a Jeep ran a red light and broadsided a sedan at the intersection of Colorado Boulevard and Colfax Avenue in Denver. The accident resulted in the deaths of the sedan driver and his passenger. The driver of the Jeep fled on foot.

¶ 8 Police officers subsequently identified the Jeep as the vehicle they had been pursuing only minutes before the accident. The officers had abandoned their pursuit for safety reasons, consistent with Denver Police Department policy, after the Jeep accelerated away from them and ran a stop sign. To signal that they had abandoned the pursuit, the officers turned off their vehicle's overhead lights and pulled off into a parking lot.

¶ 9 Sloan was charged with two counts of first degree assault, two counts of vehicular homicide, failure to fulfill duties after involvement in an accident involving death, vehicular eluding resulting in death, failure to fulfill duties after involvement in an accident resulting in serious bodily injury, and vehicular eluding resulting in serious bodily injury. At the prosecution's request, the trial court dismissed two of the counts — failure to fulfill duties after involvement in an accident resulting in serious bodily injury and vehicular eluding resulting in serious bodily injury — before

trial. At trial, Sloan solely pursued a mistaken identity theory of defense; he argued that the prosecutors had not proved beyond a reasonable doubt that he was the driver of the Jeep.

¶ 10 A jury found Sloan guilty on all remaining counts. The trial court sentenced Sloan to seventy-two years in the custody of the Department of Corrections. The sentence on the vehicular eluding resulting in death count was ten years, to run consecutively to the sentences on the other counts.

II. Analysis

¶ 11 Sloan contends that the trial court reversibly erred by (1) failing to fix technical problems with Webex during his trial; (2) incorrectly instructing the jury on the vehicular eluding resulting in death sentence enhancer; and (3) including on the mittimus convictions on the two counts that the court had dismissed.

A. The Webex Problems at Sloan's Trial

1. Additional Facts

¶ 12 Sloan's trial occurred in August 2020, during the COVID-19 pandemic. To protect the health of all participants and the court staff, the court conducted the in-person trial with social distancing

in the courtroom. The court made a limited number of seats available for members of the public who wished to attend the proceedings in person, and it livestreamed the trial on Webex.

¶ 13 The Webex feed had technical problems during jury selection, however. Persons observing the trial remotely through Webex could not hear the potential jurors or counsel. Moreover, the live feed only showed the judge and not the entire courtroom.

¶ 14 Defense counsel brought these issues to the court's attention through numerous objections. The court acknowledged and explained the ongoing technological issues, noting, for example, that "the only microphone transmitting the jury selection process over Webex was the microphone on the Court's computer." Sloan argues that "the trial court violated [his] right to a public trial when it failed to ensure the [Webex] feed was functioning properly to allow observers to hear and see the jury selection proceedings."

2. Standard of Review

¶ 15 "We review a trial court's decision to close the courtroom as a mixed question of law and fact." *People v. Jones*, 2020 CO 45, ¶ 14, 464 P.3d 735, 739 (citing *People v. Hassen*, 2015 CO 49, ¶ 5, 351 P.3d 418, 420). Accordingly, "we accept the trial court's findings of

fact absent an abuse of discretion, but we review the court's legal conclusions de novo." *Id.* (quoting *Hassen*, ¶ 5, 351 P.3d at 420).

¶ 16 The erroneous denial of a public trial constitutes structural error. *Hassen*, ¶ 7, 351 P.3d at 420 (citing *Hagos v. People*, 2012 CO 63, ¶ 10, 288 P.3d 116, 119).

3. Relevant Law

¶ 17 "Both the United States and the Colorado Constitutions guarantee criminal defendants the right to a public trial." *Id.*; *see* U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16. The right to a public trial extends to the jury selection process. *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam). This right "is for the benefit of the accused"; it encourages public participation, which in turn "keep[s] . . . triers keenly alive to a sense of their responsibility and to the importance of their functions" and "safeguards the integrity of the factfinding process." *Jones*, ¶¶ 16-17, 464 P.3d at 739-40 (first quoting *Waller v. Georgia*, 467 U.S. 39, 46 (1984); and then quoting *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606 (1982)).

4. The Problems with Webex Did Not Deny Sloan the Right to a Public Trial

¶ 18 We hold that no closure of the courtroom occurred because, despite the problems with the livestreaming of the proceedings, any member of the public who wished to attend the trial in person was able to do so. As stated above, the record reflects that the court made a limited number of seats available for members of the public at all phases of Sloan's trial and no member of the public who wished to watch the trial was turned away from the courtroom. (Sloan does not challenge the court's decision to limit seating in the courtroom to achieve social distancing.)

¶ 19 In a case predating the Webex era, a division of this court held that "[t]he public trial right is concerned with the public's presence during (or access to) the trial. So where no one is excluded from the courtroom, it simply isn't implicated." *People v. Robles-Sierra*, 2018 COA 28, ¶ 18, 488 P.3d 337, 341. This principle has been applied to trials conducted during the COVID-19 pandemic. *See People v. Kocontes*, 302 Cal. Rptr. 3d 664, 740 (Ct. App. 2022) (holding that no courtroom closure occurred during a trial where "the number of seats available to the public was decreased to comply with [the

Centers for Disease Control and Prevention's] social distancing guidelines [and] [t]he record includes no evidence that . . . any member of the public was prevented from entering the courtroom").

¶ 20 The principle articulated in *Robles-Sierra* applies when the court opens the trial to the public and attempts, with limited success, to allow members of the public to observe all phases of the trial remotely. *Cf. Roper*, ¶ 10, ___ P.3d at ___ (holding that the "exclusion of all members of the public from the courtroom, despite their being able to view the trial in a separate courtroom via a live audio and video stream," constituted a partial closure). No Colorado case holds that an otherwise open courtroom closes if the livestreaming of the proceedings does not function properly. *See People v. Gonzalez-Quezada*, 2023 COA 124M, ¶ 66, 546 P.3d 142, 155 ("[I]f a courtroom remains open during the subject legal proceedings, the partial cessation of virtual proceedings does not amount to a closure of the courtroom for purposes of the constitutional right to a public trial."). In contrast, a trial court's removal of the entire public from the physical courtroom constitutes a nontrivial partial closure, even if members of the public can view the proceedings through a live video and audio stream. *People v.*

Bialas, 2023 COA 50, ¶ 15, 535 P.3d 999, 1003 (*cert. granted* Mar. 11, 2024).

¶ 21 We decline Sloan's invitation to expand the law governing courtroom closures to situations where any member of the public who wished to watch the trial in person was able to do so, but people observing the trial remotely could not hear or see the entirety of the proceedings.

¶ 22 A court's use of livestreaming technology does not grant a defendant a constitutional right to uninterrupted livestreaming throughout the trial in cases where members of the public have the option of attending the court proceedings in person and no member of the public is turned away. Thus, we hold that a court's decision to allow members of the public the choice to observe the trial in person or through a tool such as Webex does not mean the courtroom closes when problems with the livestreaming technology preclude remote observers from hearing and seeing the entire trial.

¶ 23 For these reasons, we conclude that Sloan's right to a public trial was not violated and, therefore, hold that the livestreaming problems do not require reversal of his convictions.

B. The Jury Instruction and the Verdict Form Concerning the Vehicular Eluding Resulting in Death Sentence Enhancer

¶ 24 Sloan asserts that the court erred by giving an instruction and related verdict form (jointly, the enhancer instruction) on the vehicular eluding resulting in death sentence enhancer (the sentence enhancer) that directed the jurors to decide whether "the *accident* resulted in death" rather than whether "*vehicular eluding* . . . result[ed] in death," as the statute requires, § 18-9-116.5(2)(a), C.R.S. 2023 (emphasis added). The jury's finding that the sentence enhancer applied increased Sloan's conviction for vehicular eluding from a class 5 felony to a class 3 felony and increased the corresponding sentence.

¶ 25 We agree with Sloan that the court plainly erred by giving the enhancer instruction.

1. Standard of Review

¶ 26 "On review, we consider jury instructions de novo to determine if they are correct recitations of the law and 'accurately inform[] the jury of the governing law.'" *Garcia v. People*, 2022 CO 6, ¶ 16, 503 P.3d 135, 140 (quoting *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011)). "A jury instruction should substantially track the language

of the statute describing the crime; a material deviation from the statute can result in reversible plain error, depending on the facts of the case." *People v. Weinreich*, 119 P.3d 1073, 1076 (Colo. 2005). We review not only whether the jury instructions faithfully track the law but also whether the instructions are confusing or may mislead the jury. *Id.* (citing *People v. Janes*, 982 P.2d 300, 303-04 (Colo. 1999)).

¶ 27 We review all nonstructural errors not preserved by objection for plain error. *See Hagos*, ¶ 14, 288 P.3d at 120. Plain error is error that is "obvious and substantial." *Id.*

2. Applicable Law

¶ 28 Section 18-9-116.5(1) provides that

> [a]ny person who, while operating a motor vehicle, knowingly eludes or attempts to elude a peace officer also operating a motor vehicle, and who knows or reasonably should know that he or she is being pursued by said peace officer, and who operates his or her vehicle in a reckless manner, commits vehicular eluding.

¶ 29 "Vehicular eluding is a class 5 felony; except that *vehicular eluding that results in . . . death* to another person is a class 3 felony." § 18-9-116.5(2)(a) (emphasis added). Because "the offense of vehicular eluding does not require proof of a resulting death, the

'death of another person' factor in the vehicular eluding statute is a sentence enhancer." *People v. Avila*, 944 P.2d 673, 677 (Colo. App. 1997).

3. The Court Erred by Misstating the Language of the Sentence Enhancer in the Enhancer Instruction

¶ 30 We agree with Sloan that the language in the enhancer instruction referring to an "*accident* . . . resulting in death," rather than "*vehicular eluding* that results in . . . death to another person," misstated the key phrase in section 18-9-116.5(2)(a). (Emphasis added.) For the sentence enhancer to apply, the jury had to find, among other facts, that (1) Sloan was engaged in vehicular eluding at the time of the accident and (2) the victims' deaths resulted from the eluding. *See* § 18-9-116.5(2)(a). This error in the instruction misdirected the jurors' attention to the ramifications of the accident, rather than to whether the victims' deaths resulted from the act of eluding.

¶ 31 The People argue that the enhancer instruction did not misstate the law because "[Sloan's] acts, which constituted the eluding, were linked in time and circumstance to the 'accident' that resulted in death." But mere "link[age] in time and circumstance"

between an act of eluding and an accident resulting in the victims' deaths cannot be squared with the statutory language providing that the sentence enhancer only applies if the vehicular eluding itself "result[ed] in death to another person." § 18-9-116.5(2)(a).

¶ 32 This is a critical distinction. As Sloan notes, a person cannot be convicted of vehicular eluding unless the person knew or reasonably should have known that "he or she is being pursued" by a "peace officer also operating a motor vehicle." § 18-9-116.5(1).

4. The Court Plainly Erred by Giving the Jury the Enhancer Instruction

¶ 33 Because Sloan's counsel did not object to the erroneous language in the enhancer instruction, we consider whether the court's error was plain.

a. The Error Was Obvious

¶ 34 An error is obvious if it contravened "(1) a clear statutory command; (2) a well-settled legal principle; or ([3]) Colorado case law." *People v. Pollard*, 2013 COA 31M, ¶ 40, 307 P.3d 1124, 1133 (citations omitted).

¶ 35 We agree with Sloan that the error was obvious. Directing the jury to consider whether "the accident resulted in death" rather

than whether the "vehicular eluding . . . result[ed] in death" contravened the clear statutory language concerning the sentence enhancer. § 18-9-116.5(2)(a). Criminal convictions must be premised on violation of the elements specified in the statute. This principle applies to the vehicular eluding statute, as the People note. *See People v. McMinn*, 2013 COA 94, ¶ 26, 412 P.3d 551, 558-59 ("[T]he unit of prosecution for vehicular eluding must be defined . . . in terms of *discrete volitional acts* of eluding that have endangered the public.") (emphasis added). It also applies to sentence enhancers. *See Caswell v. People*, 2023 CO 50, ¶ 38, 536 P.3d 323, 332 (holding that, except for sentence-enhancing facts relating to a prior conviction, "a fact that increases the sentence for a crime beyond the statutory maximum must be proved to a jury beyond a reasonable doubt").

b. The Error Was Substantial Even Though Trial Counsel Did Not Contest Whether the Victims Died as a Result of Vehicular Eluding

¶ 36 We next turn to whether the error was substantial. An error is substantial if it "so undermine[d] the fundamental fairness of the trial itself . . . as to cast serious doubt on the reliability of the judgment of conviction." *Pollard*, ¶ 40, 307 P.3d at 1133 (quoting

Hagos, ¶ 14, 288 P.3d at 120). "[A]n erroneous jury instruction does not normally constitute plain error where the issue is not contested at trial or where the record contains overwhelming evidence of the defendant's guilt." *Thompson v. People*, 2020 CO 72, ¶ 54, 471 P.3d 1045, 1057 (quoting *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005)).

¶ 37 The People contend that the error was not plain because Sloan's sole theory of defense was mistaken identity, and his trial counsel did not contest whether the victims' deaths resulted from vehicular eluding.

i. The "Not Contested" Analysis Applies to Errors in Instructions on Sentence Enhancers

¶ 38 For purposes of considering the impact that the lack of a contested issue has on our plain error analysis, there is no material distinction between an instruction on an element of a charged offense and an instruction on a sentence enhancer. Of course, the two types of instruction are materially different — Sloan could have been convicted of vehicular eluding if the jury found that the prosecutor had proved all elements of such offense beyond a reasonable doubt, regardless of whether the vehicular eluding

resulted in death. But under the vehicular eluding statute, the penalty for the offense increases if the vehicular eluding resulted in bodily injury or death to another person. *See* § 18-9-116.5(2)(a). Such increase in penalty, premised on a factor that is not an element of the offense, is the mark of a sentence enhancer. *See Avila*, 944 P.2d at 677.

¶ 39 As we explain in Part II.B.4.c below, courts may consider, as part of their plain error review, whether, in light of the relative strength of the evidence presented at trial, the fact that trial counsel did not contest an issue signifies that the error lacked sufficient magnitude to call into question the fundamental fairness of the trial and the reliability of the judgment of conviction. This rationale applies equally to elemental and sentence enhancer instructions.

ii. Sloan's Trial Counsel Did Not Contest Whether the Victims Died as a Result of Vehicular Eluding

¶ 40 The defense theory at trial was mistaken identity — that the officers arrested, and the prosecution charged, the wrong person. The jury would have acquitted Sloan on all charges had it believed he was not the driver of the Jeep. In light of the sweeping scope of

the mistaken identity theory, the defense did not also present arguments tailored to the specific charged offenses or focus on whether the evidence proved the elements of those offenses.

¶ 41 But the defense's strategic decision not to contest whether the victims died as a result of vehicular eluding does not necessarily mean that defense counsel conceded this point. *See People v. Lozano-Ruiz*, 2018 CO 86, ¶¶ 6-8, 429 P.3d 577, 578 (noting that, while the defendant "did not *contest* that sexual penetration occurred, in that he never challenged the evidence suggesting that it had," he still "did not *concede*" the point).

c. The Fact that Sloan's Trial Counsel Did Not Contest Whether the Victims Died as a Result of Vehicular Eluding, Without More, Does Not Mean the Error in the Enhancer Instruction Was Not Plain

¶ 42 A court cannot conduct a meaningful plain error review without considering whether the unchallenged error "cast[] serious doubt upon the basic fairness of the trial itself." *Wilson v. People*, 743 P.2d 415, 419-20 (Colo. 1987). "[T]he appropriate standard for plain-error review is whether an appellate court, after reviewing the entire record, can say with fair assurance that the error so undermined the fundamental fairness of the trial itself as to cast

serious doubt on the reliability of the judgment of conviction." *Id.* at 420.

¶ 43 This holds true even if trial counsel did not contest the underlying issue. For example, in *People v. Cowden*, a theft case, trial counsel did not contest whether the stolen items had a sufficient value to support a conviction for felony theft. 735 P.2d 199, 202 (Colo. 1987). The defense argued only that "the theft statute denied the defendant equal protection of law." *Id.* at 201.

¶ 44 On appeal, Cowden challenged a jury instruction, to which his trial counsel had not objected, that omitted the element of value. *Id.* at 202. The supreme court noted that the evidence introduced in support of one of the theft counts (the subject theft count) showed that the item at issue had a value below the threshold for felony theft. *Id.* at 202-03.

¶ 45 The supreme court held that the error in the instruction was plain and reversed Cowden's conviction on the subject theft count, even though his trial counsel had not "contested" the element of value. The court concluded that reversal was required because, "[h]ad the jury been properly instructed, it is reasonably possible

that the defendant would have been acquitted" of the subject theft count. *Id.* at 202.

¶ 46 In *Thompson v. People*, 2020 CO 72, 471 P.3d 1045, a securities fraud and theft case, the supreme court conducted a similar analysis. The *Thompson* court considered, among other issues, whether the court had given the jury an instruction containing an erroneous definition of "security." *Id.* at ¶ 53, 471 P.3d at 1057. Thompson's trial counsel had not contested whether the promissory notes Thompson had sold were securities, however, and argued instead that he had not engaged in fraud. *Id.* at ¶¶ 56-57, 471 P.3d at 1057-58.

¶ 47 The supreme court concluded that any error in the definitional instruction did not "so undermine[] the fundamental fairness of the trial so as to cast serious doubt on the reliability of the judgment of conviction," *id.* at ¶ 57, 471 P.3d at 1057-58, after explaining that the challenged instruction tracked "almost verbatim" the statutory definition of "security," *id.* at ¶ 55, 471 P.3d at 1057. For this reason, the supreme court's conclusion that the error was not plain did not rest solely on the fact that counsel had not contested whether the note was a security. Rather, the court's conclusion

primarily rested on its determination that the definitional instruction tracked the statutory language.

¶ 48 *Thompson* confirms that an appellate court conducting a plain error review must examine whether the instructional error related to the uncontested issue "so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction," *id.* at ¶ 54, 471 P.3d at 1057, regardless of whether the defense did or did not contest the related issue at trial.

¶ 49 Similarly, in *Auman v. People*, 109 P.3d 647, 665 (Colo. 2005), the supreme court discussed how the plain error standard of review applies regardless of whether the underlying issue was contested at trial. The court explained that, if the evidence of the defendant's guilt "is not overwhelming, and if there existed an evidentiary dispute" as to an element of the offense, "then it is likely that [the defendant's] substantial rights were affected, and a reasonable possibility exists that the improper instruction contributed to [the defendant's] conviction." *Id.* Under these circumstances, "serious doubt would be cast upon the fairness of [the defendant's] trial and the reliability of [the defendant's] convictions, and reversal would be required." *Id.*

¶ 50 The courts applied this approach in *People v. Villarreal*, 131 P.3d 1119 (Colo. App. 2005), and *Espinoza v. People*, 712 P.2d 476 (Colo. 1985). In those cases, the determination that the instructional error was not plain rested on a more robust analysis than simply examining whether the challenged instruction related to an issue contested at trial: the courts further considered whether the evidence introduced at trial overwhelmingly supported the defendant's conviction. *See Villarreal*, 131 P.3d at 1124-25 (noting that defense counsel had solely relied on a mistaken identity theory at trial but nonetheless concluding that the challenged error in an elemental instruction was not plain because the evidence was overwhelming); *Espinoza*, 712 P.2d at 478-79 (determining that the court did not plainly err by giving a flawed instruction on the culpable mental state for the charged offenses because the evidence was overwhelming, even though trial counsel had not contested whether the assailant acted knowingly).

d. The Error Undermined the Fundamental Fairness of Sloan's Trial and Cast Serious Doubt on His Sentence for Class 3 Felony Vehicular Eluding Resulting in Death

¶ 51 Consistent with these cases, although Sloan's trial counsel did not contest whether the victim's deaths resulted from vehicular

eluding, we nonetheless examine whether the error in the enhancer instruction "undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability" of Sloan's sentence for class 3 felony vehicular eluding resulting in death. *See Pollard*, ¶ 40, 307 P.3d at 1133.

¶ 52 Not only was the evidence linking the victims' deaths to vehicular eluding far from overwhelming, but the prosecution's own evidence contradicted the prosecution's argument that Sloan committed class 3 felony vehicular eluding resulting in death. *Cf. Villarreal*, 131 P.3d at 1124-25; *Espinoza*, 712 P.2d at 478-79.

¶ 53 The prosecution's evidence established that the officers abandoned their pursuit of the Jeep several minutes before, and about a mile from the location of, the collision. No evidence introduced at trial contradicted this testimony. Yet, as noted above, the enhancer instruction erroneously permitted the jurors to convict and the court to sentence Sloan for vehicular eluding resulting in death based on the *accident*, rather than *vehicular eluding* having resulted in death.

¶ 54 For these reasons, regardless of whether defense counsel contested whether the victims died as a result of vehicular eluding,

the evidence that Sloan committed class 3 felony vehicular eluding resulting in death was by no means overwhelming and there was "an evidentiary dispute" regarding a link between the victims' deaths and the vehicular eluding. *Auman*, 109 P.3d at 665. Thus, we have a "serious doubt" whether Sloan received a fair trial on this offense and regarding the reliability of his conviction for class 3 felony vehicular eluding resulting in death. *Id.*

¶ 55 Moreover, as a consequence of the error in the enhancer instruction, the jury was not asked to find, and did not find, whether the pursuit was ongoing at the time of the fatal collision. The enhancer instruction "material[ly] deviat[ed] from the statute," *Weinreich*, 119 P.3d at 1076, because it failed to draw the critical distinction between causing a fatal accident while eluding police officers and causing a fatal accident after the eluding has ended.

¶ 56 By shifting the jury's focus from whether the victims' deaths resulted from the vehicular eluding to whether their deaths resulted from the accident, the enhancer instruction tasked the jury with answering a question that could not enhance vehicular eluding from a class 5 felony to a class 3 felony. In other words, the jury returned a verdict on a non-existent sentence enhancer. *See id.* at

1078-79 (holding it was plain error for the court to give an erroneous jury instruction because "[t]he instruction the trial court gave . . . deviated materially from the current statute and permitted the jury to convict [the defendant] of a non-existent offense").

¶ 57 For these reasons, we conclude that the court's error in providing the flawed enhancer instruction was substantial. Because the error was obvious and substantial, it was plain. We therefore reverse Sloan's conviction for class 3 felony vehicular eluding resulting in death.

C. Correction of the Mittimus

¶ 58 Sloan and the People agree that, before trial, the trial court dismissed the counts for failure to fulfill duties after involvement in an accident resulting serious bodily injury and vehicular eluding resulting in serious bodily injury, so those counts should not appear as convictions on the mittimus. We agree and remand to the trial court for correction of the mittimus.

1. Standard of Review

¶ 59 Crim. P. 36 permits courts to correct both "'errors made by the clerk' — such as in entering a judgment or a sentence — as well as any 'mistakes apparent on the face of the record, whether made by

the court or counsel during the progress of the case.'" *People v. Wood*, 2019 CO 7, ¶ 39, 433 P.3d 585, 595 (quoting *People v. Glover*, 893 P.2d 1311, 1316 (Colo. 1995)); *see also People v. McLain*, 2016 COA 74, ¶ 26, 411 P.3d 1037, 1041 ("[Crim. P. 36] authorizes the district court to amend a judgment to conform to the sentence imposed."), *overruled on other grounds by People v. Weeks*, 2021 CO 75, 498 P.3d 142.

2. The Mittimus Must Be Corrected to Remove the Reference to the Dismissed Counts

¶ 60 The record confirms that the dismissed counts should not appear as convictions on the mittimus. Because the jury did not convict Sloan on the dismissed counts, they should be removed from the mittimus.

III. Disposition

¶ 61 Sloan's conviction for class 3 vehicular eluding resulting in death is reversed and his other convictions are affirmed. The case is remanded to the trial court for further proceedings consistent with this opinion and for correction of the mittimus to remove the reference to the counts dismissed before trial.

JUDGE WELLING and JUDGE GOMEZ concur.