

The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
July 3, 2024

2024COA67

No. 23CA0450, *Peo v Martinez Rubier* — Sentencing — Restitution — Assessment of Restitution — Procedural Deadlines — Extenuating Circumstances Affecting Prosecutor’s Ability to Determine Restitution

A division of court applies the reasoning in *People v. Brassill*, 2024 COA 19, ___ P.3d ___, in considering the novel question of whether a trial court errs by extending the prosecutor’s deadline to present restitution information pursuant to section 18-1.3-603(2)(a), C.R.S. 2023, in the absence of a request for such extension of time or any representation that the restitution information is unavailable to the prosecutor before sentencing. The division holds that, although the court erred by granting the prosecution the extension of time, the error was harmless because the court determined the amount of restitution within ninety-one

days following the date of the order of conviction, as section 18-1.3-603(1)(b) requires.

Court of Appeals No. 23CA0450
Phillips County District Court No. 21CR29
Honorable Justin B. Haenlein, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Eredelio Martinez Rubier,

Defendant-Appellant.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE LIPINSKY
Freyre and Schutz, JJ., concur

Announced July 3, 2024

Philip J. Weiser, Attorney General, Brock J. Swanson, Senior Assistant
Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, John P. Finnegan, Deputy
State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 The Colorado restitution statute requires that, with limited exceptions, every order of conviction include one of four types of restitution orders. § 18-1.3-603(1), C.R.S. 2023; *People v. Weeks*, 2021 CO 75, ¶ 3, 498 P.3d 142, 148. For decades, section 18-1.3-603 has set forth the deadlines for a prosecutor’s submission of a restitution request and the court’s entry of a restitution order. But over time, prosecutors and judges developed practices that strayed from the statutory timetable. *Weeks*, ¶ 1, 498 P.3d at 147.

¶ 2 After lamenting that “[o]ld habits die hard,” the Colorado Supreme Court clarified in *Weeks* that, consistent with the statute, a trial court must determine the amount of restitution within ninety-one days of the judgment of conviction in the absence of a showing of good cause to extend that time period. *Id.* at ¶¶ 1, 4-5, 498 P.3d at 147-48. The court further noted that section 18-1.3-603(2)(a) specifies that a prosecutor must present restitution information to the court “prior to the order of conviction or within ninety-one days, if it is not available prior to the order of conviction.” § 18-1.3-603(2)(a); *see also Weeks*, ¶ 6, 498 P.3d at 148.

¶ 3 *Weeks* did not provide the final word on the meaning of the restitution statute, however. Subsequent appeals have presented novel questions regarding interpretation of the restitution statute in light of *Weeks*. Today we examine such a question: whether a trial court errs by extending the prosecutor’s deadline to present restitution information within the time specified in section 18-1.3-603(2)(a) when the prosecutor neither requests an extension of time for submission of the information nor demonstrates that the restitution information was unavailable before the sentencing hearing.

¶ 4 We hold that such a ruling constitutes error but that, in this case, the error is harmless because the court entered the restitution order within the ninety-one-day deadline specified in section 18-1.3-603(1)(b) and the record shows that the extension of time did not result in prejudice to the defendant.

¶ 5 Nevertheless, we reverse the restitution order entered against defendant, Eredelio Martinez Rubier, in this case for another reason: the trial court erred by proceeding with a second restitution hearing in Martinez Rubier’s absence without a showing that he had waived his right to attend.

I. Background

¶ 6 A police officer arrested Martinez Rubier after observing a glass pipe with suspected methamphetamine in Martinez Rubier's car. The officer transported Martinez Rubier to the Phillips County Sheriff's Office for booking. According to the officer, while being booked, Martinez Rubier swallowed "an unknown crystal-like substance wrapped inside of a clear plastic bag . . . appear[ing] to be . . . methamphetamine."

¶ 7 Martinez Rubier was charged with introduction of contraband in the first degree, tampering with physical evidence, unlawful possession of a controlled substance, and unlawful use of a controlled substance.

¶ 8 On September 20, 2022, Martinez Rubier entered into a plea agreement addressing these charges and the charges pending against him in three other cases. Under the plea agreement, (1) Martinez Rubier pleaded guilty to criminal mischief, a class 1 misdemeanor; (2) the other charges in this case and all charges in two of his other cases were dismissed; (3) his probation in a fourth case was revoked; and (4) he stipulated to a nine-month jail sentence.

¶ 9 As relevant here, the plea agreement specified that Martinez Rubier “agrees to pay the restitution, including dismissed cases and counts.” Below this language, a box was checked next to the statement, “The People hereby motion [sic] the Court to order the Defendant to pay restitution, with the amount to be determined within 91 days. The People will file a report requesting the specific amount.”

¶ 10 At the sentencing hearing conducted the same day on which Martinez Rubier entered his guilty plea, the court accepted the plea agreement and imposed sentence. Consistent with the terms of the plea agreement, the court ordered Martinez Rubier “to pay restitution with an amount to be determined within 91 days unless good cause is shown for . . . extension of that time period.” The prosecutor did not request an extension of time to submit the restitution information and did not represent that such information was unavailable. Nonetheless, the court granted the prosecutor a twenty-eight-day extension of time “to file any requests for restitution” and ordered Martinez Rubier “to respond to any request” within twenty-one days following the date of the

prosecutor's filing. In addition, at the sentencing hearing, the court set a restitution hearing for December 20, 2022.

¶ 11 The prosecutor filed a restitution request for \$1,179 ten days after the sentencing hearing. The requested restitution arose from an aggravated vehicle theft charge in one of the dismissed cases.

¶ 12 In support of the request, the prosecutor submitted a document entitled "Restitution Request," signed by Tiffany Brettrager, a "Restitution Representative" of Progressive Insurance Company. In the request, Brettrager stated that Progressive and its insured had incurred damages in the amount of \$1,179 "to repair our insured's vehicle" due to the actions of "MARTINEZ RUBIER, ADALBERTO (EREDELIO)." Progressive requested restitution in this amount and submitted a receipt for \$1,179 in towing charges. (None of the prosecutor's documents showed the cost of repairing any damage to the vehicle, however.)

¶ 13 The record indicates that Progressive sent the documents to the district attorney's office by email on July 7, 2022 — more than two months before the sentencing hearing. The prosecutor sought an additional \$13.50 in restitution for service of process costs.

¶ 14 Defense counsel timely objected to the prosecutor’s request for restitution, arguing that the supporting documents failed to show that Martinez Rubier’s conduct was the proximate cause of the claimed loss.

¶ 15 Martinez Rubier did not appear at the restitution hearing conducted on December 20, 2022 (the first restitution hearing). The court continued the hearing to January 24, 2023.

¶ 16 At the restitution hearing conducted on January 24, 2023 (the second restitution hearing), Martinez Rubier again did not appear, but defense counsel argued that, although the People “submitted some documents,”

the Court needs to find causation for these damages, needs to find that these damages actually exist to award any restitution in this case, and simply submitting a few documents isn’t enough to do that. We need some sort of testimony from someone who has knowledge of what occurred to make a restitution finding

¶ 17 The court disagreed, stating that “nothing specifically in the restitution statute . . . requires in-person testimony. The only issue is that the People have to prove by preponderance of the evidence the amount of restitution.” It concluded that, “based on the

documents and really not hearing anything else, I'll find that the People have proven the restitution in this matter by preponderance of the evidence." The court then ordered Martinez Rubier to pay restitution in the amount requested.

¶ 18 Martinez Rubier appeals the restitution order.

II. Analysis

¶ 19 Martinez Rubier contends that the court reversibly erred by

- (1) granting the prosecution an extension of time to submit the restitution information and later ordering him to pay restitution, even though the prosecutor did not request the extension or represent that the restitution information was unavailable at the time of sentencing, and the record showed that Progressive provided the restitution information to the district attorney's office more than two months before the sentencing hearing;
- (2) proceeding with the second restitution hearing in Martinez Rubier's absence; and
- (3) finding that the prosecutor proved that Martinez Rubier's conduct was the proximate cause of the claimed loss

based solely on the documents Progressive sent to the district attorney's office.

We address these contentions below.

A. The Prosecutor's Statutory Obligation to Provide Restitution Information Before Sentencing

¶ 20 Martinez Rubier contends that the court reversibly erred by granting the prosecutor an extension of time to submit the restitution information because “the record shows that the [restitution] information was available to the prosecution before sentencing, and yet the prosecutor did not provide it” at or before the sentencing hearing, in violation of section 18-1.3-603(2)(a). Rather, even though the prosecutor did not request the extension of time and the court did not inquire into the availability of the information, the court “ordered [the prosecutor] to file any requests for restitution within 28 days” of the sentencing hearing.

¶ 21 We hold that the court erred by extending the prosecutor's deadline for submitting the restitution information in the absence of the prosecutor's request for an extension of time or any showing that the restitution information was not available to the prosecutor

before sentencing, but that such error was harmless and, therefore, does not warrant vacating the sentencing order.

1. Preservation and Standard of Review

¶ 22 The parties agree that this issue was not preserved and that Martinez Rubier’s challenge to the court’s grant of the extension of time is in the nature of a Crim. P. 35(a) claim. But they part ways as to the type of Crim. P. 35(a) claim that Martinez Rubier asserts. Martinez Rubier argues that the court’s grant of the extension of time resulted in the imposition of an illegal sentence. *See* Crim. P. 35(a) (noting that an illegal sentence claim seeks “correct[ion] of a sentence that was not authorized by law or that was imposed without jurisdiction”). The People contend that, assuming Martinez Rubier did not waive his challenge to the extension of time, his argument constitutes an illegal manner claim. *See id.* (noting that the court “may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence”). (We address — and reject — the People’s waiver argument in Part II.A.3 below.)

¶ 23 For purposes of determining the appropriate standard of review, it is of no consequence whether Martinez Rubier is

challenging an illegal sentence or the imposition of a sentence in an illegal manner. Both types of claim fall under Crim. P. 35(a), for which “[t]here is no preservation requirement.” *Fransua v. People*, 2019 CO 96, ¶ 13, 451 P.3d 1208, 1211. Accordingly, even though Martinez Rubier did not preserve his argument regarding the court’s grant of the extension of time for the prosecutor’s submission of the restitution information, we do not review such argument for plain error. *Cf. Hagos v. People*, 2012 CO 63, ¶ 14, 288 P.3d 116, 120 (noting the general rule that appellate courts review unpreserved errors in criminal cases for plain error).

¶ 24 The plain error standard of review applies to errors in criminal cases noticed on appeal that were not brought to the attention of the trial court. Crim. P. 52(b). We reverse under the plain error standard of review only if the error was obvious and substantial, meaning the error “so undermined the fundamental fairness of the [proceeding] itself so as to cast serious doubt on the reliability” of the outcome. *People v. Crabtree*, 2024 CO 40, ¶ 43, ___ P.3d ___, ___ (quoting *Wilson v. People*, 743 P.2d 415, 420 (Colo. 1987)).

¶ 25 In addition, the parties agree that we review the court’s interpretation of the restitution statute de novo. *See Weeks*, ¶ 24,

498 P.3d at 151. “In construing a statute, our primary purpose is to ascertain and give effect to the legislature’s intent.” *McCoy v. People*, 2019 CO 44, ¶ 37, 442 P.3d 379, 389 (citing *Doubleday v. People*, 2016 CO 3, ¶ 19, 364 P.3d 193, 196). “To do so, we look first to the language of the statute, giving its words and phrases their plain and ordinary meanings.” *Id.*

2. The Law

¶ 26 As relevant here, section 18-1.3-603(1) requires that an order of conviction include “[a]n order of a specific amount of restitution be paid by the defendant, § 18-1.3-603(1)(a), or “[a]n order that the defendant is obligated to pay restitution, but that the specific amount of restitution shall be determined within the ninety-one days immediately following the order of conviction, unless good cause is shown for extending the time period by which the restitution amount shall be determined,” § 18-1.3-603(1)(b). (The supreme court equates the date of the “order of conviction” with the date of the sentencing hearing. *See Weeks*, ¶ 44, 498 P.3d at 156 (“The prosecution should make a motion for restitution before or during the sentencing hearing.”).)

¶ 27 Section 18-1.3-603(2)(a) provides that “[t]he court shall base its order for restitution upon information presented to the court by the prosecuting attorney, who shall compile such information through victim impact statements or other means to determine the amount of restitution and the identities of the victims.” The prosecutor is required to “present this information to the court prior to the order of conviction or within ninety-one days, *if it is not available prior to the order of conviction.*” *Id.* (emphasis added). “The court may extend this date *if it finds that there are extenuating circumstances affecting the prosecuting attorney’s ability to determine restitution.*” *Id.* (emphasis added); *see also Weeks*, ¶ 31, 498 P.3d at 153. Such findings “must be made expressly and before the court’s deadline expires.” *Weeks*, ¶ 40, 498 P.3d at 155.

¶ 28 The supreme court underscored in *Weeks* that section 18-1.3-603(2)(a) “clearly envisions that any motion for restitution must be made before or during the sentencing hearing, even if the information supporting the motion isn’t yet available and the prosecution needs additional time to provide it.” *Id.* at ¶ 30, 498 P.3d at 152; *see also People v. Brassill*, 2024 COA 19, ¶ 30, ___ P.3d ___, ___ (“[T]he restitution statute requires the prosecution to

exercise reasonable diligence to determine the amount of restitution and present it to the court at or before the sentencing hearing.”).

3. Martinez Rubier Did Not Waive His Challenge to the Order Extending the Prosecutor’s Time to Submit the Restitution Information

¶ 29 As a threshold matter, the People argue that Martinez Rubier waived his argument that the court erred by extending the prosecutor’s time to submit the restitution information because Martinez Rubier “agreed as part of the plea agreement that the prosecution would file a report requesting the specific amount of restitution within 91 days of sentencing.” We disagree.

¶ 30 Whether a party waived an argument is a question of law that we review de novo. *Richardson v. People*, 2020 CO 46, ¶ 21, 481 P.3d 1, 5.

¶ 31 The plea agreement does not say what the People claim it says. The reference in the plea agreement to “the amount [of restitution] to be determined within 91 days” speaks to *the court’s* deadline to set the amount of restitution. *See Weeks*, ¶ 5, 498 P.3d at 148 (The “deadline in subsection (1)(b) refers to the court’s determination of the restitution amount the defendant must pay, not to the prosecution’s determination of the proposed amount of

restitution.”); § 18-1.3-603(1)(b) (“[T]he specific amount of restitution shall be determined within the ninety-one days immediately following the order of conviction”).

¶ 32 Further, the next sentence in the plea agreement — “The People will file a report requesting the specific amount” — does not contain a deadline for the prosecutor’s submission of the restitution information. Nothing in the plea agreement sets such a deadline or says the prosecutor is exempt from the unambiguous mandate in section 18-1.3-603(2)(a) that the prosecuting attorney present the restitution information “prior to the order of conviction or within ninety-one days, *if it is not available prior to the order of conviction.*” (Emphasis added.) Moreover, the plea agreement does not state that the restitution information was not currently available to the prosecutor.

¶ 33 For these reasons, we agree with Martinez Rubier that the People’s reading of the plea agreement “stretches the agreement’s language too far.” Accordingly, by entering into the plea agreement, Martinez Rubier did not intentionally relinquish his right to obtain the restitution information from the prosecutor by the statutory

deadline. *See People v. Rediger*, 2018 CO 32, ¶ 39, 416 P.3d 893, 902.

¶ 34 Thus, we hold that Martinez Rubier did not waive his argument that the court lacked the authority to grant the prosecutor an extension of time to submit the restitution information in the absence of the prosecutor’s request for an extension of time and any showing that such information was “not available prior to the order of conviction.” § 18-1.3-603(2)(a).

4. The Court Erred by Extending the Prosecutor’s Deadline to Provide the Restitution Information

¶ 35 Turning to the merits of Martinez Rubier’s challenge to the court’s ruling granting the prosecutor an additional twenty-eight days to submit the restitution information, we agree that the court erred by doing so because the prosecutor never represented that the information was not available before the sentencing hearing.

¶ 36 The analysis in *Brassill* informs our review of Martinez Rubier’s argument. In that case, the prosecutor requested additional time to provide the restitution information but did not provide “a good excuse for why” he did not have the information at the time of sentencing. *Brassill*, ¶ 4, ___ P.3d at ___. Nonetheless,

the court granted the prosecutor’s request and set a new deadline for submission of the restitution information. *Id.* After receiving the restitution information, the court entered its restitution order on the ninetieth day following sentencing. *Id.* at ¶ 56, ___ P.3d at ___.

¶ 37 On appeal, Brassill argued, as does Martinez Rubier, that the subsequent “restitution order violate[d] section 18-1.3-603 and *Weeks.*” *Id.* at ¶ 25, ___ P.3d at ___.

¶ 38 In its analysis of a prosecutor’s statutory obligation to provide restitution information prior to sentencing, the division said that

it would be contradictory for the legislature to impose this affirmative obligation without a corresponding expectation that the prosecution act with reasonable diligence to fulfill it. This conclusion is amplified by the final clause of the same statutory sentence, which states that the prosecution may take up to ninety-one days after the order of conviction “if [restitution information] is not available prior to the order of conviction.” Read in its entirety, we conclude that *the statute requires the prosecution to use reasonable diligence to obtain restitution information and present it at or before sentencing.*

Id. at ¶ 30, ___ P.3d at ___ (emphasis added). The division concluded that, by extending the prosecutor’s deadline to submit

the restitution information without a showing that the prosecutor had exercised reasonable diligence to obtain such information, the district court improperly disregarded the prosecutor's obligation to "use reasonable diligence to inquire about the amount of restitution that all victims will be seeking before the sentencing hearing." *Id.* at ¶ 45, ___ P.3d at ___. Thus, the division concluded that the "district court erred as a matter of law" by granting the prosecutor additional time to file the restitution information. *Id.*

¶ 39 Following the logic of *Brassill*, in this case, the court erred by granting the prosecutor additional time to submit the restitution information, even though the prosecutor did not ask for the extension of time or inform the court that such information was "not available prior to the order of conviction." § 18-1.3-603(2)(a); *see Brassill*, ¶ 30, ___ P.3d at ___. Unlike in this case, in which the prosecutor provided *no indication* that he needed more time to marshal the necessary information to support a restitution request, the prosecutor in *Brassill* had at least tepidly told the court that "[w]e don't have a figure" on restitution yet. *See Brassill*, ¶ 4, ___ P.3d at ___.

¶ 40 The supreme court held in *Weeks* that “a request for an extension of the prosecution’s deadline should be made and resolved before or during the sentencing hearing.” *Weeks*, ¶ 8, 498 P.3d at 148. A court may extend that deadline only if it expressly finds “extenuating circumstances” that affect “the prosecution’s ability to determine the proposed amount of restitution.” *Id.* at ¶¶ 31, 40, 498 P.3d at 153, 155; § 18-1.3-603(2)(a).

¶ 41 In this case, the court granted the prosecutor an extension of time that the prosecutor had not sought and to which the prosecutor was not entitled in the absence of a showing that the restitution information was “not available prior to the order of conviction.” § 18-1.3-603(2)(a). For this reason, we hold that the court erred by directing the prosecutor “to file any requests for restitution within 28 days” of the sentencing hearing.

5. The Court’s Error in Granting the Extension of Time Was Harmless

¶ 42 The parties disagree whether we consider harmless in analyzing the court’s extension error.

¶ 43 Martinez Rubier maintains that lack of harm is of no consequence to our analysis because the court’s error resulted in a

sentence “not authorized by law” and we must vacate any restitution order entered without authority. According to Martinez Rubier, the court’s failure to require the prosecution to provide the restitution information at the time of sentencing, in violation of section 18-1.3-603(2)(a), deprives the court of authority to enter a restitution order, even if the court enters the order within the ninety-one-day deadline specified in section 18-1.3-603(1)(b).

¶ 44 Notably, in *Weeks*, the supreme court did not conduct a harmlessness analysis because the trial court had entered the restitution order without authority. *Weeks*, ¶ 47, 498 P.3d at 157. As the *Brassill* division noted in its analysis of *Weeks*, the supreme court did not consider harmlessness because the trial court in *Weeks* had lost its authority to act on the restitution request upon the expiration of the ninety-one-day statutory deadline. See *Brassill*, ¶ 57, ___ P.3d at ___.

¶ 45 But a court’s entry of a restitution order without authority “is not harmless” because a restitution order is a “final civil judgment” that necessarily affects the defendant’s substantial rights. *People v. Mickey*, 2023 COA 106, ¶¶ 7-8, 543 P.3d 430, 432 (quoting § 18-1.3-603(4)(a)(I)); see also *Crabtree*, ¶ 27, ___ P.3d at ___ (“For

preserved trial errors, whether constitutional or unconstitutional, reversal hinges on an appropriate case-specific, outcome-determinative analysis (i.e., constitutional or nonconstitutional harmless error review).”); *People v. Roberson*, 2023 COA 70, ¶¶ 31-32, 537 P.3d 825, 831 (rejecting the People’s argument that harmless error review applies to a defendant’s challenge to a restitution order entered after the ninety-one-day statutory deadline because, as stated in *Weeks*, the court lacks authority to enter a restitution order following the expiration of the ninety-one-day statutory deadline) (*cert. granted* Apr. 8, 2024).

¶ 46 But the court entered the restitution order in this case before the ninety-one-day statutory deadline expired. Therefore, unlike the trial court in *Weeks*, the court in this case possessed the authority to enter the restitution order. Martinez Rubier does not cite, and we are unaware of, any reported Colorado case holding that a court lacks the authority to enter a restitution order by allowing *any* deviation from the restitution timetable specified in section 18-1.3-603, so long as the court ultimately enters its restitution order within the ninety-one-day deadline set forth in section 18-1.3-603(1)(b). We therefore disagree with Martinez

Rubier that the court’s error resulted in a sentence that is “not authorized by law” and, for that reason, requires vacatur of the restitution order.

¶ 47 Because the court entered its restitution order within the ninety-one-day statutory deadline, we hold that it never lost the authority to enter the restitution order, even though it erred by granting the prosecutor an unrequested extension of time to submit the restitution information. *See Brassill*, ¶ 58, ___ P.3d at ___ (“[T]he district court was not deprived of the authority to act . . . because ultimately the court was able to enter an order within its ninety-one-day deadline. Thus, this case is distinguishable from *Weeks* because the district court never lost its authority to act on the restitution issue.”). For this reason, we do not vacate the restitution order as unauthorized. *Cf. Mickey*, ¶¶ 11-12, 543 P.3d at 432; *Roberson*, ¶¶ 14-15, 31-32, 537 P.3d at 828, 831 (vacating a restitution order entered after the statutory deadline where the court “simply set” the restitution hearing date beyond the ninety-one-day deadline for entering a restitution order without inquiring into whether good cause existed for extending the deadline).

¶ 48 Accordingly, we must consider whether the court’s grant of the unrequested extension of time resulted in prejudice to Martinez Rubier. In weighing whether a trial court’s violation of a statutory deadline requires reversal of the defendant’s conviction, we consider the gravity of the court’s deviation from the statutory provisions, “including a consideration of due process concerns,” and any prejudice to the defendant caused by the deviation. *People in Interest of Lynch*, 783 P.2d 848, 852 (Colo. 1989).

¶ 49 Martinez Rubier does not argue that the delay in the prosecutor’s submission of the restitution information caused him prejudice. For example, he does not claim that defense counsel’s untimely receipt of the restitution information hampered counsel’s ability to challenge the alleged link between Martinez Rubier’s actions and the damage to the vehicle noted in Progressive’s “Restitution Request” or the reasonableness of the \$1,179 figure. *See, e.g., Brassill*, ¶ 56, ___ P.3d at ___ (noting examples of possible prejudice to the defendant, “such as faded memories or the loss of other material evidence during the period of delay,” when the prosecutor submits untimely restitution information). In addition, the record establishes that the court’s error in granting the

prosecutor an unrequested extension had no impact on Martinez Rubier's due process rights:

- He received notice of the requested amount of restitution only ten days after the sentencing hearing and four months before the court entered the restitution order.
- Martinez Rubier had two months before the first restitution hearing to prepare to challenge the requested amount of restitution.
- The court provided Martinez Rubier with notice of the date of the first restitution hearing.
- At the first restitution hearing, the court continued the proceedings when Martinez Rubier failed to appear and defense counsel said he was not familiar with the case for which the prosecutor was seeking restitution.
- The court entered the restitution order on the date of the second restitution hearing, within the ninety-one-day statutory deadline.

¶ 50 Martinez Rubier does not dispute any of these facts. Rather, he merely asserts that the court's order was "not akin to sanctioning a discovery violation, as the State argues," and that

adhering to the deadline set forth in section 18-1.3-603(2)(a) “preserves the integrity of the judicial system by confirming the finality of judgments.”

¶ 51 In our view, however, the court’s error was, as the People argue, “akin to a violation of a discovery deadline, as it only involved the timing of notice and the disclosure of information prior to a hearing.” As the People correctly note, we impose sanctions for violations of the discovery rules in criminal cases commensurate with the circumstances, including consideration of whether the defendant was prejudiced. *People v. Lee*, 18 P.3d 192, 196 (Colo. 2001).

¶ 52 Of course, a prosecutor’s failure to comply with the timetable set forth in section 18-1.3-603(2)(a), and a court’s tolerance of such failure, can impact the crime victim, as well as the defendant. Prosecutors, defense counsel, and judges alike must remain mindful of the General Assembly’s declaration that “[a]n effective criminal justice system requires timely restitution to victims of crime and to members of the immediate families of such victims in order to lessen the financial burdens inflicted upon them, to

compensate them for their suffering and hardship, and to preserve the individual dignity of victims.” § 18-1.3-601(1)(e), C.R.S. 2023.

¶ 53 But in this case, the prosecutor’s provision of the restitution information after the date of the sentencing hearing did not defer recompense to the victim because the court ultimately entered the restitution order within the ninety-one-day statutory deadline.

¶ 54 In sum, in the absence of any showing of prejudice to Martinez Rubier, we do not vacate the court’s restitution order on this ground, even though the court erred by granting an unrequested extension of time for submission of the restitution information.

B. Rubier’s Absence from the Restitution Hearings

1. Additional Facts

¶ 55 Martinez Rubier attended the sentencing hearing conducted on September 20, 2022. At that hearing, the court set a restitution hearing for December 20, 2022, noting that, “[i]f no request for restitution is filed, that hearing will be vacated, or if no response to the request for restitution is filed, that will be granted and the hearing will be vacated.”

¶ 56 Because the People filed a restitution request and Martinez Rubier responded to it, the court proceeded with the first restitution hearing. Martinez Rubier did not appear, however.

¶ 57 Upon learning that Martinez Rubier was not in attendance, the court asked defense counsel for his “position on moving forward in light of the fact that [Martinez Rubier]’s not here?” Defense counsel said that Martinez Rubier “has a right . . . to be present at a restitution hearing.” Further, defense counsel noted that, although Martinez Rubier could “waive that right,” counsel could not waive it for him because counsel and Martinez Rubier had not discussed a waiver. In response, the prosecutor said that Martinez Rubier’s “willful failure to appear, unless information comes to light to the contrary, implies as a waiver.”

¶ 58 The court observed that it did not “know why he’s not here and it sounds like [defense counsel] doesn’t know why he’s not here.” Nevertheless, the court noted that defense counsel was entitled to a continuance of the hearing because he had not represented Martinez Rubier in, and was not familiar with the facts underlying, the case involving the alleged vehicle damage. (As noted above, by entering into the plea agreement, Martinez Rubier

resolved the charges filed against him in three other pending criminal cases.)

¶ 59 The court warned defense counsel that, “if you have contact with your client, you can tell him that I will proceed [with the continued restitution hearing] whether he’s here or not at that time. So I intend to proceed with the hearing at that time.” The court then continued the restitution hearing to January 24, 2023.

¶ 60 Martinez Rubier did not appear at the second restitution hearing. The court proceeded without him.

2. Preservation and Standard of Review

¶ 61 “Alleged violation of a defendant’s due process right to be present at all critical stages of a criminal proceeding is a constitutional question reviewed de novo.” *People v. Hernandez*, 2019 COA 111, ¶ 10, 487 P.3d 1095, 1099. Restitution hearings are a critical stage. *Id.* at ¶ 22, 487 P.3d at 1100 (“[S]entencing is a critical stage of a criminal proceeding.’ And [r]estitution is part of the district court’s sentencing function in criminal cases.” (first quoting *People v. Luu*, 983 P.2d 15, 19 (Colo. App. 1998); and then quoting *People v. Vasseur*, 2016 COA 107, ¶ 16, 409 P.3d 524, 527-28)).

¶ 62 If defense counsel neither preserves nor waives an error regarding the court’s decision to proceed with a critical stage in the defendant’s absence, “plain error review applies.” *Id.* at ¶ 11, 487 P.3d at 1099 (citing *Hagos*, ¶ 14, 288 P.3d at 120). The parties disagree whether the plain error standard of review applies to Martinez Rubier’s contention that the court erred by proceeding with the second restitution hearing in his absence. As the People note, at the second restitution hearing, defense counsel did not object to proceeding with the hearing without Martinez Rubier. Martinez Rubier responds that “[a] renewed objection by defense counsel would have been futile and was unnecessary given that the issue had been brought to the court’s attention” at the first restitution hearing, “nothing in the record indicates that any circumstances had changed,” and the court said at the first restitution hearing that it would “proceed whether [Martinez Rubier] was here or not at” the second restitution hearing.

¶ 63 We conclude that Martinez Rubier did not preserve his due process argument because defense counsel did not contemporaneously object at the second restitution hearing to proceeding in Martinez Rubier’s absence; did not, at the first

restitution hearing, make a continuing objection to conducting any restitution hearing without him; and did not otherwise challenge the court's assertion at the first restitution hearing that it would move forward with the second restitution hearing even if Martinez Rubier did not appear.

¶ 64 It is through objections that a court is alerted to an issue requiring its attention. *Martinez v. People*, 244 P.3d 135, 139 (Colo. 2010) (“At trial, the purpose of an objection is not only to express disagreement with a proposed course of action, but also to ‘afford [] the judge an opportunity to focus on the issue and hopefully avoid the error.’” (quoting *Am. Fam. Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 325 (Colo. 2009))). The objection must be contemporaneous; “[w]here a claim of error is not preserved by a contemporaneous objection, we may reverse only if plain error occurred.” *People v. Dominguez-Castor*, 2020 COA 1, ¶ 85, 469 P.3d 514, 529; *cf. People v. Dunlap*, 975 P.2d 723, 745 n.15 (Colo. 1999) (addressing the court's grant of a continuing objection to the admission of evidence with questionable relevance but noting that continuing objections are generally inappropriate for preserving error).

¶ 65 A renewed objection at the second restitution hearing would not have been futile because the circumstances had changed since the first restitution hearing. As noted above, at the first restitution hearing, the court told defense counsel, “if you have contact with your client,” to advise him that the court would proceed with the continued hearing regardless of whether he appeared. For this reason, the court may have assumed at the second restitution hearing, perhaps incorrectly, that defense counsel had communicated with Martinez Rubier following the first restitution hearing, defense counsel had advised Martinez Rubier of the court’s admonition, and Martinez Rubier had made a conscious decision not to appear. But the record does not support these possible assumptions the court may have drawn in the absence of an objection from Martinez Rubier. Therefore, we review for plain error.

3. The Law

¶ 66 Defendants have a due process right to be present at their restitution hearings. *Hernandez*, ¶ 19, 487 P.3d at 1100; *see also* Crim. P. 43(a) (“The defendant shall be present at the preliminary hearing, at the arraignment, at the time of the plea, at every stage of

the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.”). “[A] defendant may waive that right when the record as a whole shows the waiver was knowing, intelligent, and voluntary.” *People v. Rodriguez-Morelos*, 2022 COA 107M, ¶ 69, 522 P.3d 213, 225 (*cert. granted in part* Sept. 25, 2023).

Defense counsel cannot unilaterally waive a defendant’s right to be present at the defendant’s restitution hearing. *Hernandez*, ¶ 19, 487 P.3d at 1100.

¶ 67 In *Hernandez*, the division held there was no valid waiver where “the record does not show that [the absent defendant] even knew of the restitution hearing, much less that he authorized his counsel to waive his presence.” *Id.* at ¶¶ 27-29, 487 P.3d at 1101 (holding that defendants have a due process right to be present for the imposition of restitution and that proceeding with a restitution hearing in the absence of a defendant who had not waived the right to appear constituted plain error).

¶ 68 In contrast, in *Rodriguez-Morelos*, the division held that the record as a whole demonstrated that the defendant had made a knowing, intelligent, and voluntary waiver of his right to be present

at either of his restitution hearings. *Rodriguez-Morelos*, ¶¶ 73-77, 522 P.3d at 225-26. At the first restitution hearing, defense counsel advised the court that she “had a hard time getting in contact” with the defendant. *Id.* at ¶ 71, 522 P.3d at 225. When the court inquired whether the defendant had received notice of the hearing, defense counsel responded, “I don’t know.” *Id.* At the second restitution hearing, the court asked defense counsel, “[D]o you have any information regarding [defendant], whether he knew of the hearing and chose not to be present and indicated to you he was not coming . . . ?” *Id.* at ¶ 72, 522 P.3d at 225. Defense counsel replied that defendant “does know about the hearing . . . [and] he chose not to be present.” *Id.*

¶ 69 The *Rodriguez-Morelos* division distinguished *Hernandez*, noting that “defense counsel in this case spoke to defendant, who unambiguously said that he did not wish to participate.” *Id.* at ¶ 76, 522 P.3d at 226. In light of counsel’s statement, the division held that *Rodriguez-Morelos* had waived his right to attend the second restitution hearing in his case. *Id.*

4. The Court Erred by Conducting
the Second Restitution Hearing in Martinez Rubier’s Absence,
Without Determining Whether He Had Waived
His Right to Be Present

¶ 70 The record does not show whether Martinez Rubier waived his right to be present at the second restitution hearing. As at the first restitution hearing, defense counsel did not provide any explanation for Martinez Rubier’s absence at the second restitution hearing and did not advise the court that Martinez Rubier had waived his right to attend.

¶ 71 The prosecutor argued that the court could infer that Martinez Rubier’s absence was willful. On appeal, the People continue to insist that, “when defense counsel appeared at the rescheduled restitution hearing without the defendant and did not request another continuance[,] it was because the defendant had indicated he did not want to attend.” But the case law does not authorize us to draw such an inference. Because the record does not reveal whether Martinez Rubier made — or did not make — a conscious decision not to attend the second restitution hearing, we hold that the court erred by proceeding without him.

¶ 72 For purposes of our plain error review, the court’s error was obvious. See *Hernandez*, ¶¶ 32-33, 487 P.3d at 1102. An obvious error is one that is “so clear-cut” that “a trial judge should be able to avoid it without benefit of objection.” *Crabtree*, ¶ 42, ___ P.3d at ___ (quoting *Romero v. People*, 2017 CO 37, ¶ 6, 393 P.3d 973, 976). As the division explained in *Hernandez*, a court’s violation of the clear command of a court rule is an obvious error. *Id.* at ¶¶ 25-26, 32-33, 487 P.3d at 1101-02. And as the *Hernandez* division noted, Crim. P. 43 requires the defendant’s presence at the “imposition of sentence.” *Hernandez*, ¶ 25, 487 P.3d at 1101 (quoting Crim. P. 43).

¶ 73 Moreover, the court’s error in conducting the second restitution hearing without Martinez Rubier was substantial. See *id.* at ¶ 34, 487 P.3d at 1102. The *Hernandez* division explained that this threshold is low and that “where a defendant was absent — . . . through no fault of his own — determining what the defendant’s presence could have added will often be difficult.” *Id.* at ¶ 35, 487 P.3d at 1102.

¶ 74 The *Hernandez* division observed that a restitution hearing is “like imposing a new sentence based on new evidence,” and that a

defendant must be present when the court imposes a new sentence. *Id.* at ¶ 40, 487 P.3d at 1102. Because a key issue in restitution proceedings is whether the defendant was the proximate cause of the victim's loss, *see id.* at ¶ 14, 487 P.3d at 1099, and proximate cause is typically a question of fact, *id.* at ¶ 40, 487 P.3d at 1103, a defendant is prejudiced if denied the opportunity to assist defense counsel in challenging the prosecution's evidence at a restitution hearing. *See id.* at ¶¶ 38-40, 487 P.3d at 1102-03. For example, a defendant can provide testimony that calls into doubt the prosecutor's restitution argument. *See id.* at ¶ 38, 487 P.3d at 1102. Without Martinez Rubier's testimony, defense counsel's only challenge to the restitution amount rested on the sufficiency of the prosecutor's evidence. *See infra* Part II.C.

¶ 75 For these reasons, we reverse the restitution order and remand for a new restitution hearing. If Martinez Rubier does not attend that hearing, the court should ask defense counsel the types of questions the trial court asked defense counsel in *Rodriguez-Morelos*: Did the defendant know of the hearing and, if so, did he knowingly, intelligently, and voluntarily choose not to be present, thereby waiving his right? If counsel for Martinez Rubier answers

both questions in the affirmative, the court would not err by conducting the hearing in his absence. (We need not reach the separate questions, not presented or briefed here, regarding how the court should proceed if defense counsel says that Martinez Rubier does not waive his right to attend the hearing or if counsel represents that, despite the court's admonition at the first restitution hearing, counsel had not attempted or been able to discuss the waiver issue with Martinez Rubier.)

C. The Court's Proximate Cause Finding

¶ 76 In light of our disposition of the case, we need not address Martinez Rubier's argument regarding the sufficiency of the prosecutor's evidence linking his actions to the \$1,179 requested amount of restitution.

¶ 77 On remand, we expect that the prosecutor will abide by the case law addressing the quality and quantity of evidence the prosecution must present to obtain a restitution award. *See People v. Stone*, 2020 COA 24, ¶ 6, 471 P.3d 1159, 1162 (stating that the prosecution "must establish 'the amount of restitution owed and, generally, that the defendant's conduct was the proximate cause of

the victim's loss” by a preponderance of the evidence (quoting *People v. Henry*, 2018 COA 48M, ¶ 15, 439 P.3d 33, 36)).

III. Disposition

¶ 78 The restitution order is reversed, and the case is remanded with instructions.

JUDGE FREYRE and JUDGE SCHUTZ concur.