APPENDIX A

COLORADO COURT OF APPEALS

No. 19CA1247
Arapahoe County District Court No. 17CR998
Honorable Darren L. Vahle, Judge

The People of the State of Colorado,
Plaintiff-Appellee,
v.
James Edwin Hoganson,
Defendant-Appellant.

JUDGMENT AND SENTENCES AFFIRMED, ORDER VACATED, AND CASE REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE NAVARRO
Welling and Johnson, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced November 3, 2022

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¶ 1 Defendant, James Edwin Hoganson, appeals the judgment of conviction and sentences entered on jury verdicts finding him guilty of manslaughter and tampering with evidence. He also appeals the ensuing restitution order. We affirm the judgment and sentences, but we vacate the restitution order because it was entered more than ninety-one days after

sentencing without a timely express finding of good cause to extend the deadline. We remand for the trial court to amend the mittimus accordingly.

I. Factual and Procedural History

¶ 2 In February 2017, Hoganson lived in a house with Brandon Wright, the victim. Sometime later, Hoganson moved out.

¶ 3 On March 29, Wright's father went to check on Wright because he had not responded to several calls and texts. When Wright's father entered the house, he observed that the lights were off, a movie was paused on the television, and Wright was lying on the couch unresponsive. Because Wright had struggled with alcoholism in the past, his father assumed that he had passed out after drinking; so his father left.

¶ 4 The next day, Wright's father returned. Because the conditions of the house were the same as the day before—i.e., the lights were still off, the same movie was still paused on the television, and Wright was still lying on the couch—Wright's father suspected that something was wrong. Wright's father touched Wright, noticed that he felt cold, and determined that he was dead. Emergency personnel arrived and noticed blood on Wright's chest. An autopsy revealed that Wright's cause of death was six stab wounds to his chest. A pathologist concluded that Wright had likely died between March 26 and March 29.

¶ 5 Law enforcement officers determined that Hoganson was a person of interest and attempted to contact him, but they were unsuccessful. So they reached out to Hoganson's brother. Hoganson's

brother learned that Hoganson had been admitted to a mental health facility and went to pick him up. While they were driving, Hoganson explained to his brother that he and Wright had gotten into a heated argument. Specifically, Hoganson said that, as he was heading for the door of Wright's house, Wright "attacked" him, and Hoganson "hit [Wright] with the knife" in the chest. According to Hoganson, he offered to call an ambulance for Wright, but Wright declined. After hearing this story, Hoganson's brother drove Hoganson to a police station and gave the police the information Hoganson had shared with him.

¶ 6 The prosecution charged Hoganson with first degree murder and tampering with evidence. A jury convicted him of the lesser offense of manslaughter, as well as tampering with evidence. The trial court sentenced Hoganson to twelve years in prison for manslaughter and three years for tampering with evidence, to run consecutively.

¶ 7 On appeal, Hoganson raises six claims: (1) the trial court erred by limiting "his ability to present alternate suspect evidence"; (2) the court erred by preventing him from presenting evidence that "he has had false memories before"; (3) the court violated his Sixth Amendment rights by imposing "aggravated sentences with no jury findings to support them"; (4) the sentencing statute on which the court relied is "unconstitutionally vague"; (5) the court violated Hoganson's due process rights by imposing aggravated sentences without prior notice that "he would be subject to aggravated sentencing"; and (6) the "restitution order must be vacated because it was ordered out of time with no finding of good cause."

¶ 8 Because we disagree with Hoganson's first five claims, we affirm the judgment and sentences. Because we agree with his sixth claim, however, we vacate the restitution order and remand the case for amendment of the mittimus accordingly.

II. Alternate Suspect Evidence

¶ 9 Hoganson contends that the trial court erred by limiting "the alternate suspect evidence he could introduce." We do not perceive an abuse of discretion by the court.

A. Standard of Review and Applicable Law

¶ 10 We review a trial court's decision to exclude alternate suspect evidence for an abuse of discretion. *People v. Elmarr*, 2015 CO 53, ¶ 20. A trial court abuses its discretion where its ruling is manifestly arbitrary, unreasonable, or unfair, or where it is based on an erroneous view of the law. *Id.*

¶ 11 A criminal defendant is constitutionally entitled "to all reasonable opportunities to present evidence that might tend to create doubt as to the defendant's guilt." *Id.* at ¶ 26. The right to present a defense, however, is constrained by well-established limits on the admissibility of evidence. *Id.* at ¶ 27.

¶ 12 The admissibility of alternate suspect evidence is governed by CRE 401 and CRE 403. *See id.* at ¶ 22. Accordingly, such evidence must be relevant and its probative value must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See id.* "The touchstone of relevance in this context is whether the alternate suspect evidence establishes a non-speculative connection or nexus between the al-

ternate suspect and the crime charged." *Id.* at ¶ 32. Such evidence "must create more than just an unsupported inference or possible ground for suspicion." *Id.* "Anything less may lead to speculative blaming that heightens the risk of jury confusion and invites the jury to render its findings based on emotion or prejudice." *Id.*

¶ 13 Evidence that merely shows another person's motive or opportunity to commit the charged crime is too "tenuous and speculative" to qualify for admission. *Id.* at ¶ 34. Rather, to establish a non-speculative connection, a "defendant must proffer something 'more,'" such as additional evidence circumstantially or inferentially linking the alternate suspect to the charged crime. *Id.*

¶ 14 "Sometimes, the 'more' offered to establish the non-speculative connection between the alternate suspect and the charged crime is evidence that the alternate suspect committed other similar acts or crimes." *Id.* at ¶ 35. But the inference that an alternate suspect committed both the other acts and the crime charged is permissible only when "the prior acts and the charged crime share sufficient similar characteristics or details," such that the same person was probably involved in both the other acts and the charged crimes. *Id.* at ¶¶ 38-39.

¶ 15 Additionally, if a defendant seeks to introduce hearsay statements made by an alternate suspect or other person, evidentiary rules regarding hearsay apply. *Id.* at ¶ 41. A court must determine whether the proffered statements meet the requirements of any applicable hearsay exception. *Id.* at ¶ 42. Even if they do, a court must still assess whether the statements and other evidence establish the req-

uisite non-speculative connection tying the alternate suspect to the charged crime. *Id.*

B. Analysis

¶ 16 Before trial, Hoganson sought to introduce evidence that two other people—Ashley Walters and Jonathan Benson—committed the charged offenses in 2017. After a hearing, the trial court issued a thorough written order in which it applied the above principles, admitted some of the proffered evidence, and excluded some of it.

1. Ashley Walters

¶ 17 Hoganson proffered evidence of six prior incidents that involved Wright and Walters, an ex-girlfriend of his:

- In November 2013, Walters kicked Wright in the face.
- On March 3, 2014, Walters punched and kicked Wright.
- On March 4, 2014, Walters punched Wright in the mouth.
- In July 2014, Walters threw items around the house, bit Wright, and tried to hit him with a frying pan.
- On March 25, 2015, Walters hit Wright with a glass item under his eye.
- On March 31, 2015, Walters went to Wright's house to retrieve some things and then tried to hit him with a car.

¶ 18 Hoganson also proffered evidence that (1) shortly after Wright's death, Walters had scratches on her arm that she said were caused by her dog; (2)

Walters had moved back to "the Denver area," and Wright's neighbor "may have seen a car similar to" one Walters drove near Wright's house "potentially during the period" that he was killed; (3) a strand of long, dark hair was found in Wright's home after his death; and (4) Wright told a friend in October 2016 that an ex-girlfriend "had threatened to hurt him."

¶ 19 The trial court found that the incidents between Walters and Wright appeared to be alcohol related, "'misdemeanor' type events (with the possible exception of the 'car' incident)," and "orders of magnitude" different from the charged homicide in this case. The court also noted that, according to Walters, she and Wright had separated two years before his death, she had a new significant other, and she now abstained from alcohol. The court ultimately found that these incidents "do not suggest sufficient similar characteristics or details to support a finding that" Walters was probably the person responsible for Wright's death.

¶ 20 With respect to the other evidence allegedly connecting Walters to the charged crimes, the court found that "although Walters had an opportunity to commit the murder because she had moved back to the Denver area a few weeks before Wright's death, there is no apparent motive." As for the scratches on Walters's arms, the court noted that her "statement to police that she was scratched by her dog is also unchallenged." Regarding the hair found in Wright's house, the court concluded that this "has only minimal significance" because the hair had "not been connected to Walters in any meaningful way, and even if it could [be connected to her], there is no dispute that Walters spent time and actually lived at

the [h]ouse for several years prior to her separation from Wright in 2015."

¶ 21 Finally, the court explained that, while the above evidence on its own was insufficient to satisfy the standards of *Elmarr*, evidence that Wright's friend had told a police officer that Wright had told the friend that an ex-girlfriend had threatened him might be enough to tip the scales. Nonetheless, the court noted that Hoganson had not established "a basis to admit" this evidence in the face of the prosecution's multi-layered hearsay objections. Accordingly, the court ruled that, as a whole, the alternate suspect evidence involving Walters was inadmissible.

¶ 22 The record and the law support the trial court's rulings. To start, the earlier incidents between Wright and Walters were not sufficiently similar to the charged offenses to be relevant under *Elmarr*. Although we acknowledge that Walters's alleged acts were abusive and violent, we see record support for the trial court's determination that they were not sufficiently similar in character, detail, or magnitude to the charged crimes to reliably suggest that Walters was probably the person who killed Wright by repeatedly stabbing him. None of the earlier incidents involved a knife or serious injury; they were alcohol related; and they happened years earlier while Walters and Wright were dating. As our supreme court has held, where the details of the other acts "were not distinctive or unusual enough to represent the 'signature' of a single individual," they do "not support a finding that the same person probably

was involved in all the cases." *Elmarr*, ¶ 39 (citation omitted).[1]

¶ 23 Nor did the other evidence allegedly linking Walters to the crimes supply the required nexus. Evidence that Walters had recently moved to the Denver area and that her car perhaps had been spotted near Wright's house merely suggested that she had an opportunity to harm Wright. That is not enough to establish a non- speculative connection between Walters and the crimes — especially in the absence of an apparent motive for her to harm Wright. *See People v. Shanks*, 2019 COA 160, ¶ 59. Likewise, the record does not indicate whose hair was found in Wright's house after he was killed; rather, Hoganson simply alleged that the hair was consistent with that of Walters. Even if the hair were hers, however, the court noted that there was an obvious, innocent explanation for its presence: Walters formerly lived in that house.

¶ 24 The record also supports the trial court's view that the scratches on Walters's arm were not terribly probative. As the court mentioned, Walters told officers that the scratches were caused by her dog, and, as the People point out on appeal, such

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[1] We are not persuaded otherwise by Hoganson's reliance on *People v. Ruibal*, 2015 COA 55, *aff'd on other grounds*, 2018 CO 93, ¶¶ 10, 17 (disagreeing with the rationale of the court of appeals); *People v. McBride*, 228 P.3d 216 (Colo. App. 2009); and *People v. Torres*, 141 P.3d 931 (Colo. App. 2006). Alluding to these cases, Hoganson contends that, because "prosecutors are routinely allowed to introduce evidence of prior, less serious domestic violence incidents," he should have been allowed to admit such evidence in this case. After carefully considering those other cases, we conclude that they are all factually and legally inapposite to the circumstances here.

scratches are "commonplace." Put simply, we cannot say the trial court acted unreasonably by finding that this evidence was too tenuous and speculative to be relevant. *See Elmarr*, ¶ 34.

¶ 25 Still, Hoganson contends that he "did not have to disprove [Walters's] statement that the scratches came from her dog" and that, while Walters spent time at the house before the stabbing, the house had been cleaned before Wright's death in 2017. He does not, however, cite to where in the record he proffered evidence of such a house cleaning to the trial court before its ruling. Moreover, when reviewing the court's ruling, we must defer to the court's balancing of the proffered evidence, so long as its ruling is not manifestly arbitrary, unreasonable, or unfair. *See id.* at ¶ 20. Because the record supplies support for the court's decision here, we discern no abuse of discretion even if the record would have also supported a contrary decision. *See People v. Brown*, 2014 COA 155M-2, ¶ 29.

¶ 26 Finally, the trial court reasonably determined that evidence of an ex-girlfriend's alleged threat to harm Wright in the months before the stabbing could theoretically have been the "more" necessary to "circumstantially or inferentially" link Walters to the charged crimes. *Elmarr*, ¶¶ 34-35. As the court explained, however, Hoganson failed to provide a basis for admitting this evidence over the prosecution's hearsay objections.

¶ 27 Relatedly, we disagree with Hoganson's assertion that the trial court "never ruled on the hearsay question." In its ruling, the court (1) acknowledged the prosecution's argument that this evidence

involved "three layers of hearsay"; (2) explained that the prosecution had "persuasively argued that the Defense could not satisfy the three layers of hearsay necessary" to admit the evidence; and (3) ruled expressly that Hoganson had not established a basis to admit the evidence.

¶ 28 In his opening brief, Hoganson does not challenge the court's hearsay ruling. And we will not address his belated challenge based on CRE 807 because he raises it for the first time in his reply brief. *See, e.g.*, *People v. Douglas*, 2015 COA 155, ¶ 31 n.4.

¶ 29 In sum, we note that the question for us is not whether we would have admitted the proffered evidence had we been sitting as the trial court. "[A]n appellate court may not substitute its own judgment for that of the trial court where a matter is committed to the trial court's discretion." *DeBella v. People*, 233 P.3d 664, 666 (Colo. 2010). Because the trial court's evidentiary ruling here enjoys support in the record, and "[b]ecause the trial court is in the best position to evaluate this evidence," we affirm its ruling. *Elmarr*, ¶ 45.

2. Jonathan Benson

¶ 30 Hoganson proffered evidence that Jonathan Benson, a former friend of Wright's, was also a viable alternate suspect. In its pretrial ruling, the trial court permitted the defense to present Benson as an alternate suspect to the jury and to introduce evidence in support of that theory. Specifically, the court allowed evidence that (1) a day or so after the stabbing, Benson stayed in a hotel near Wright's house; (2) according to two witnesses, Benson had a "crazy" state of mind; (3) about six weeks prior to the

stabbing, Benson and Wright "had a dispute or falling out of some sort," and Benson texted about the dispute; (4) Benson had bruises after Wright had been stabbed; and (5) Benson authored Facebook posts in which he might have suggested that he was culpable of the crimes charged. In addition, the court ultimately permitted Hoganson to present evidence that Benson had scratches on his arms after Wright was killed and that Benson had a knife when the police interviewed him.

¶ 31 As relevant here, however, the court excluded evidence of two occasions on which Benson had "pulled a knife" during altercations with two other people—Eric Salazar and Jason Leedy—between 2012 and 2014. The court ruled that these prior acts lacked sufficient similarities to the charged offenses and that CRE 403 considerations weighed against admitting them.

¶ 32 Once again, the record and the law support the court's rulings. As the court reasonably found, other than Benson's use of a knife, there was nothing distinctive or unusual linking these prior incidents to the crimes charged. For instance, Benson did not stab Salazar or Leedy. And, in the Leedy incident, Benson intervened to assist *Wright* in the altercation, which hardly made it more probable that Benson later killed Wright.

¶ 33 Furthermore, the record supports the court's decision, based on CRE 403, that (1) this evidence "would inject collateral issues into this criminal case which are likely to confuse and mislead the jury" and (2) admitting this evidence "would also result in undue delay as the parties litigated a 6 year old case of Mr. Benson." And, under CRE 403, "[t]he probative

worth of any particular bit of evidence is affected by the scarcity or abundance of other evidence on the same point." *Elmarr*, ¶ 44. The jury heard ample other evidence supporting Hoganson's claim that Benson was an alternate suspect. For example, the jury heard evidence that: (1) Benson had keys to Wright's house; (2) a month before the stabbing, Benson sent Wright texts saying "You're a fucking thief" and "It will catch up"; (3) Benson sent texts to another person saying that Wright was a "bitch ass thief lying fucking bitch"; (4) Benson planned to stay at a motel near Wright's house on March 29; (5) Benson stayed at a hotel near Wright's house on March 31; and (6) Benson had injuries on his hands and arms.

¶ 34 Given all this, we conclude that the court's decision to exclude the alternate suspect evidence at issue was not manifestly arbitrary, unreasonable, or unfair.

III. False Memories Evidence

¶ 35 Hoganson contends that the trial court erred by preventing "him from introducing evidence that he had previously reported false memories." We are not persuaded.

A. Relevant Background

¶ 36 During cross-examination at trial, defense counsel asked Hoganson's brother, "Was there an instance in [Hoganson's] childhood where he vividly remembers something that didn't happen?" The prosecutor objected on relevance grounds. Defense counsel responded that the defense wanted to elicit testimony from Hoganson's brother that Hoganson had "an extremely vivid memory" of his father

"screaming, ranting and raving like a madman, [and] throwing his mother's property out of the house onto the front lawn." Counsel explained that he planned to also elicit testimony from the brother that this incident did not happen. The purpose of this evidence was to suggest that Hoganson's confession to stabbing Wright was possibly a false memory by showing that Hoganson had experienced an earlier false memory.

¶ 37 During a bench conference, the court expressed concern that this question called for hearsay. The court asked how the brother would know that Hoganson actually believed that this childhood incident happened, and defense counsel acknowledged that the brother's knowledge resulted from Hoganson's out-of-court statement to the brother. Defense counsel conceded that Hoganson's statement "would be hearsay" but argued that "it would be exempted under the effect on the listener, as it relates to [Hoganson's brother's] understanding of his brother."[2]

¶ 38 The court ruled that defense counsel's question was improper because it attempted to elicit hearsay. The court explained that Hoganson's statements "that he believes that these things happened are, in fact, hearsay. They are offered to show that he, in fact, believes these things happened." Accordingly, the court excluded the evidence.

B. Pertinent Principles and Analysis

¶ 39 On appeal, Hoganson contends that the court erred because the "proposed testimony did not contain any out-of-court statements" and the statement

[2] Hoganson does not raise this argument on appeal.

at issue "was not offered for its truth." Instead, he argues, the statement was offered for the opposite purpose—to show that the incident Hoganson allegedly remembered did not, in fact, happen. He is mistaken.

¶ 40 We review a trial court's evidentiary rulings for an abuse of discretion. *Elmarr*, ¶ 20. Hoganson's appellate argument differs from his argument to the trial court, wherein he conceded that the question called for his out-of-court statement. In such circumstances, we would normally apply plain error analysis to any error we detect. *See People v. Zubiate*, 2013 COA 69, ¶¶ 23-24 (applying plain error review where defendant on appeal argued that evidence was admissible under a different hearsay exception from the one raised at trial), *aff'd*, 2017 CO 17, *disapproved on other grounds by People v. Rock*, 2017 CO 84, ¶ 16 n.4. But we need not decide whether plain error review applies because we do not detect any error.

¶ 41 Hearsay is a statement other than one made by the declarant while testifying at trial, offered to prove the truth of the matter asserted. CRE 801(c). It is inadmissible unless permitted by a hearsay exception. CRE 802.

¶ 42 We conclude that the trial court reasonably decided that defense counsel's question at issue sought to elicit hearsay. The phrasing of the question was important; counsel asked, "Was there an instance in [Hoganson's] childhood *where he vividly remembers something* that didn't happen?" (Emphasis added.) By asking the question in this way, counsel tried to elicit testimony from Hoganson's brother that Hoganson actually remembered that this inci-

dent occurred. As Hoganson points out on appeal, the purpose of this question was to show that he had a false memory because this event had not occurred. To establish this point, defense counsel attempted to show that Hoganson truly believed that the incident had happened. This relevance depended on the truth of Hoganson's out-of-court assertion that he, in fact, remembered this incident. So, as the court found, this statement was offered for its truth.

¶ 43 Because Hoganson did not assert that a hearsay exception applied, we conclude that the trial court reasonably excluded the proffered statement as hearsay.

IV. Aggravated Sentences

¶ 44 Hoganson contends that the "trial court violated the Sixth Amendment" by aggravating his sentences (1) "based on a historical fact the jury did not find," and (2) "without a jury finding of extraordinary aggravating circumstances." We disagree with both contentions.

A. Facts Supporting Aggravation

1. Additional Procedural History

¶ 45 After the jury returned guilty verdicts of manslaughter and tampering with evidence, the trial court set a sentencing hearing.

¶ 46 Before the hearing, Hoganson filed two motions to declare a sentencing provision, section 18-1.3-401(6), C.R.S. 2022, unconstitutional. The first motion argued that this statute violates a defendant's jury right by permitting a court to impose a sentence beyond the presumptive range based on the court's conclusion that the facts in the record

amount to extraordinary aggravating circumstances. The second motion argued that the statute is unconstitutionally vague. The prosecution filed a written response to the second motion.

¶ 47 At the outset of the hearing, the prosecutor registered her disagreement with the first motion. Additionally, the prosecutor asked the court to conclude that Hoganson's tampering with evidence—which the jury had found beyond a reasonable doubt—was an extraordinary aggravating circumstance relevant to his manslaughter sentence.

¶ 48 The court denied Hoganson's motions. Then, after hearing from witnesses, the court heard the parties' sentencing arguments. Defense counsel asserted that *Blakely v. Washington*, 542 U.S. 296 (2004), required the court to "impose a sentence in the presumptive range for both of these offenses." Defense counsel also argued that "extraordinary aggravating circumstances are not whether a person died or whether a person used a weapon or whether a person tampered with physical evidence." Counsel declared, "There is nothing about Mr. Hoganson or the circumstances here that are extraordinary as a matter of law."

¶ 49 The prosecutor argued that multiple extraordinary aggravating circumstances surrounded Hoganson's manslaughter offense, including "an affirmative effort to avoid detection." The prosecutor maintained that this effort (i.e., Hogan's tampering with evidence) was a "*Blakely*-compliant" fact[3] the court could consider:

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[3] "[F]acts admitted by the defendant, found by the jury, or found by a judge when the defendant has consented to judicial fact-finding for sentencing purposes" are called "*Blakely*-

> This jury found beyond a reasonable doubt that this Defendant, upon committing the act which caused Brandon Wright's death, took affirmative steps to cover his tracks. They had to. They found that the Defendant destroyed evidence with the specific intent to impair it's [sic] verity for purposes of this proceeding. And that, Your Honor, is the *Blakely*-compliant factor I'm asking the Court to consider in imposing a sentence in the aggravated range.
>
> I, too, am relying on the *Lopez* decision. And I agree the Court needs one, that *Blakely*-compliant aggravating factor. And that's what this is. This is facts found by a jury beyond a reasonable doubt. . . .
>
> Tampering is unique. And its correlation with the other crime is unique. It requires an intent to destroy evidence and impair—to subvert justice. In committing this reckless manslaughter, this Defendant took an added step to subvert justice, and that is a *Blakely*-compliant aggravating factor upon which this Court can find exceptional, extraordinary aggravating circumstances. And we are asking the Court to do that.

¶ 50 The court agreed with the prosecution and found that the aggravating circumstances of this case were "significant." The court concluded that the law permitted it to impose aggravated sentences on Hoganson's convictions. The court pointed to three

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compliant"; prior convictions facts are called "*Blakely*-exempt." *Lopez v. People*, 113 P.3d 713, 723 (Colo. 2005) (quoting *State v. Aleman*, 109 P.3d 571, 580 (Ariz. Ct. App. 2005)) (discussing *Blakely v. Washington*, 542 U.S. 296 (2004)).

cases—*People v. Lopez*, 113 P.3d 713 (Colo. 2005); *People v. Bass*, 155 P.3d 547 (Colo. App. 2006); and *People v. Mountjoy*, 2016 COA 86 (*Mountjoy I*), *aff'd on other grounds*, 2018 CO 92M (*Mountjoy II*).

¶ 51 The trial court noted that *Lopez* identified *Blakely*-exempt and *Blakely*-compliant factors that can support aggravated sentences. With respect to *Mountjoy I*, the court called it "a very interesting case" because it also involved manslaughter and tampering with evidence. The court explained that, in *Mountjoy I*, the defendant received an aggravated sentence for manslaughter based on the tampering offense and an aggravated sentence for tampering based on the manslaughter offense. "Those were upheld," the court observed, before remarking that "this case is just stunningly similar on the facts, although different in some other respects."[4]

¶ 52 Then, when turning to whether aggravated sentences for Hoganson were allowed and appropriate, the court recognized that his prior convictions were *Blakely*-exempt facts the court could consider. The court decided that his criminal history was not "sufficient on its own."

¶ 53 When addressing an aggravated sentence for Hoganson's manslaughter offense in particular, the court "consider[ed] the commission and conviction of the two separate offenses in this case." The court reasoned that "[s]urely a person who's been convict-

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[4] The trial court also read the decision in *People v. Mountjoy*, 2016 COA 86 (*Mountjoy I*), *aff'd on other grounds*, 2018 CO 92M, as permitting an aggravated sentence based solely on facts the jury did not find but which the jury would have found if the jury had been asked via an interrogatory. The court misread *Mountjoy I* on this point, which we will explain.

ed on manslaughter alone is different than someone who was convicted of manslaughter and tampering." The court also explained that an aggravated sentence was appropriate for the manslaughter offense because Hoganson "used a deadly weapon, a knife" during the crime. The court found that the jury "would have found [this fact] beyond a reasonable doubt" if it had been asked through an interrogatory.

¶ 54 As to the tampering with evidence conviction, the court found an aggravated sentence appropriate because Hoganson tampered with "a deadly weapon" and because he committed manslaughter.

¶ 55 Finally, the court determined that "[g]eneral considerations of aggravation, not necessarily statutory aggravations but just things the Court considers in this case, are replete." The court detailed those aggravating factors and found that "the ferocity and the nature of what happened in this case and the outcome of [what] happened in this case steamroll" the mitigating factors.

¶ 56 In conclusion, the court reiterated, "The Court does find discretionary aggravation and the Court does find *Blakely*- compliant and exempt factors, as stated." The court imposed an aggravated twelve-year sentence for manslaughter and an aggravated three-year sentence for tampering with evidence.

2. Analysis

¶ 57 Hoganson contends that the trial court violated his right to a jury trial by aggravating his sentences based on a fact that the jury did not find—that he used a deadly weapon, i.e., a knife. Because the court also relied on facts that were *Blakely*-

compliant, however, we do not discern constitutional error in the sentences.[5]

¶ 58 We review constitutional challenges to a sentence de novo. *Lopez*, 113 P.3d at 720. While Hoganson raised other challenges, he did not object, either before or during the sentencing hearing, to the trial court's consideration of the fact that he used a knife in the crimes. Again, however, we need not address whether any error would be plain because we do not perceive error.

¶ 59 Colorado statute provides presumptive range penalties for six classes of felonies. *See* § 18-1.3-401(1)(a)(V)(A). Manslaughter, a class four felony, carries a presumptive range prison sentence of two to six years. *Id.*; § 18-3-104(2), C.R.S. 2022. Tampering with evidence, a class six felony here, carries a presumptive range prison sentence of one year to eighteen months. § 18-1.3-401(1)(a)(V)(A); § 18-8-610(3)(a), C.R.S. 2022.

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[5] The record is ambiguous as to whether the trial court also relied on *Blakely*-exempt facts—Hoganson's prior convictions—to aggravate the sentences. Initially, the court said his criminal history was not "sufficient on its own." Presumably, the court meant "sufficient" to justify aggravated sentences. But regardless of whether a *Blakely*-exempt fact is sufficient "on its own" to convince a court to impose an aggravated sentence, it can render an aggravated sentence constitutional. That is, if a *Blakely*-exempt fact is one of the facts bearing on an aggravated sentence, the sentence would be constitutional even if the other facts are not *Blakely*-compliant or *Blakely*-exempt. *See Mountjoy v. People*, 2018 CO 92M, ¶ 29. And the court here said later it was relying, in part, on *Blakely*-exempt factors to impose the aggravated sentences. We need not decide, however, if Hoganson's prior convictions themselves rendered his aggravated sentences constitutional because the court also relied on *Blakely*-compliant facts.

¶ 60 Section 18-1.3-401(6) authorizes a court to sentence outside of the presumptive range if the court concludes that extraordinary mitigating or aggravating circumstances are present. If a court discerns extraordinary aggravating circumstances, it may impose a sentence of up to twice the maximum term of the presumptive range. § 18-1.3-401(6).

¶ 61 The United States Supreme Court has held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely*, 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). A sentencing court may consider facts that are either *Blakely*-exempt or *Blakely*-compliant when imposing a sentence beyond the prescribed statutory maximum, which is the maximum in the presumptive range in this context. *Mountjoy II*, ¶ 15. To reiterate, facts admitted by the defendant, found by the jury, or found by a judge when the defendant has consented to judicial fact-finding for sentencing purposes are *Blakely*-compliant; prior convictions are *Blakely*-exempt. *Id.*

¶ 62 Hoganson says the trial court aggravated his sentences based solely on a fact that was neither *Blakely*-exempt nor *Blakely*- compliant. Specifically, he argues that the "sole aggravator the trial court relied on to aggravate [his] manslaughter conviction was its finding that [he] used a deadly weapon." We disagree.

¶ 63 When sentencing Hoganson in the aggravated range, the court explicitly explained that it also "consider[ed] the commission and conviction of the

two separate offenses" and "[s]urely a person who's been convicted on manslaughter alone is different than someone who was convicted of manslaughter and tampering." The court's decision followed (1) the prosecutor's specific request that the court impose an aggravated sentence on the manslaughter conviction because of the tampering and (2) the court's recognition that the law permitted it to do just that. Hence, the court relied on Hoganson's tampering with evidence, among other facts, when imposing the aggravated sentence for manslaughter. Our supreme court has approved of this practice because the jury's finding that Hoganson committed tampering is a *Blakely*-compliant fact. *See id.* at ¶ 25.

¶ 64 Likewise, as Hoganson acknowledges in his reply brief, the court "made an explicit finding that the death element of the manslaughter conviction was an extraordinary aggravating circumstance of the tampering conviction." That is, the court used the jury's finding that he committed manslaughter—a *Blakely*-compliant fact—to enhance his sentence for tampering. This analysis rendered the sentence constitutionally sound. *See id.*

¶ 65 Given all this, it is constitutionally immaterial that the court also relied on its finding that Hoganson used a knife in the crimes. "[T]he presence of one *Blakely*-compliant or *Blakely*-exempt fact renders an aggravated sentence constitutionally sound even if the sentencing judge also considered facts that were not *Blakely*- compliant or *Blakely*-exempt." *Id.* at ¶ 29.

¶ 66 On this last point, we note that Hoganson's use of the knife was not a *Blakely*-compliant fact. Contrary to the trial court's view, the division in

Mountjoy I did not hold that it was consistent with *Blakely* to aggravate a sentence based on a fact the jury did not find but which the jury would have found if it had been asked to consider the issue. Instead, the division assumed that "*Blakely* error" had occurred in that case, but the division concluded that it was harmless because a reasonable jury would have found the fact on which the trial court had relied. *See Mountjoy I*, ¶¶ 1, 19, 23 (holding that, "if a trial court sentences in the aggravated range based on facts not found by a jury," the sentence can be affirmed "based on harmless error, if the record shows beyond a reasonable doubt that a reasonable jury would have found those facts, had the jury been requested to do so by special interrogatory"). But the trial court's misunderstanding here does not render Hoganson's sentences unconstitutional because, as we already concluded, the court also relied on *Blakely*-compliant facts. *See Mountjoy II*, ¶ 29.

¶ 67 To sum up, the trial court's decision to impose aggravated sentences based in part on Hoganson's use of a deadly weapon in the crimes did not violate his right to a jury trial.

B. Presence of Extraordinary Aggravating Circumstances

¶ 68 Hoganson next contends that the "court could not aggravate [his] sentences without a jury finding of extraordinary aggravating circumstances." He preserved this issue below, but he is mistaken on the merits.

¶ 69 Our supreme court has repeatedly rejected this claim. The court has explained that it does not violate *Blakely* for a trial judge to reach the legal

conclusion that the facts in the sentencing record constitute extraordinary aggravating circumstances, so long as the court's conclusion is supported by at least one *Blakely*-compliant or *Blakely*-exempt fact. *See id.* at ¶¶ 17-24 (reaffirming *Lopez*); *Lopez*, 113 P.3d at 726 n.11, 728, 730-31 ("One *Blakely*-compliant or *Blakely*-exempt factor is sufficient to support an aggravated sentence.").

¶ 70 Hoganson concedes that our supreme court rejected his claim in *Mountjoy II*, but he says that case was "wrongly decided at the time it issued, and subsequent [United States] Supreme Court decisions have eroded it further." But we must follow our supreme court's decisions. *See People v. Tarr*, 2022 COA 23, ¶ 33. And the three subsequent federal cases Hoganson cites do not give us license to do otherwise.

¶ 71 First, our supreme court in *Mountjoy II* already dismissed the argument that *United States v. Gaudin*, 515 U.S. 506 (1995), erodes the reasoning of *Lopez* or requires a different conclusion. The *Mountjoy II* court explained that "*Gaudin* is fundamentally different" from the sentencing scheme at issue here. *Mountjoy II*, ¶ 19. We are bound by our supreme court's pronouncements of the law.

¶ 72 Second, the plurality opinion in *United States v. Haymond*, ___ U.S. ___, 139 S. Ct. 2369 (2019), on which Hoganson relies, addressed a very different type of statute. That case dealt with a statute mandating an enhanced penalty if a judge found that the defendant committed one of several enumerated offenses while on supervised release. *Id.* at ___, 139 S. Ct. at 2374. The factual finding that a person committed a particular crime is not analo-

gous to a court's legal determination that the facts found by the jury (or facts otherwise satisfying *Blakely*) reflect extraordinary aggravating circumstances. *See Mountjoy II*, ¶¶ 23-24 (distinguishing a sentencing scheme that required a judge to find facts critical to an increased sentence).

¶ 73 Third, the decision in *Ramos v. Louisiana*, ___ U.S. ___, 140 S. Ct. 1390 (2020), is even further afield. That case addressed the constitutional requirement of a unanimous jury verdict to convict a defendant of a serious crime. *Id.* at ___, 140 S. Ct. at 1394.

V. Vagueness

¶ 74 Hoganson contends that section 18-1.3-401(6) is unconstitutionally vague. This argument is preserved. Because this is a constitutional challenge to a statute, our review is de novo. *Lopez*, 113 P.3d at 720. Even so, we must reject Hoganson's challenge because, once again, our supreme court has rejected this precise claim. In *People v. Phillips*, our supreme court held that an earlier version of section 18-1.3-401(6) was not unconstitutionally vague. 652 P.2d 575, 580 (Colo. 1982) (addressing section 18-1-105(6), C.R.S. 1981). In all material respects, the prior version of the statute is the same as the current version.

¶ 75 Hoganson argues, however, that we are not bound by *Phillips* because (1) its holding was limited to the sentencing context; and (2) the Court in *Johnson v. United States*, 576 U.S. 591 (2015), has since "clarified the vagueness doctrine."

¶ 76 On the first point, our supreme court in *Mountjoy II*, ¶ 19, reiterated that a sentencing

court's decision that the facts of the case constitute extraordinary aggravating circumstances under section 18-1.3-401(6) is "about sentencing," not "about proof of guilt." This is true because "aggravation" is not an element of any of the crimes charged. *Id.*; *see also Lopez*, 113 P.3d at 728 ("The subsequent determination that those facts are extraordinary aggravators is a legal determination that remains in the discretion of the trial court as long as it is based on permissible facts."). So the fact that the holding of *Phillips* came in the sentencing context does not distinguish it from this case or permit us to disregard it. *See Rocky Mountain Gun Owners v. Hickenlooper*, 2016 COA 45M, ¶ 21 (recognizing that it is the supreme court's prerogative to overrule its precedents).

¶ 77 On the second point, the only doctrinal clarification in *Johnson* identified by Hoganson was, in his words, the repudiation of "the proposition that a statute must be vague in all its applications to violate due process." *See* 576 U.S. at 602-03. But the *Phillips* court did not rely on such a proposition. So this purported clarification in the vagueness doctrine does not give us warrant to refuse to follow *Phillips*.[6]

VI. Notice of Extraordinary Aggravating Circumstances

¶ 78 Hoganson contends that the trial court violated his "due process rights when it imposed aggravated sentences with no prior notice." Specifically, he argues that, because "extraordinary aggravating circumstances were an element of both [his] offenses,"

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[6] To the extent Hoganson encourages us to follow *State v. Schmidt*, 208 P.3d 214 (Ariz. 2009), we decline to do so. We must follow controlling precedent from our supreme court.

the prosecution was required to allege this element in the charging document. We are not persuaded.

¶ 79 We review due process claims de novo. *People v. Deutsch*, 2020 COA 114, ¶14. Because this challenge is unpreserved, we review for plain error.

¶ 80 As discussed, the question of whether the facts in the sentencing record constituted extraordinary aggravating circumstances was not an element of the offenses. *See Mountjoy II*, ¶ 19. Instead, "the trial court determines as a matter of law whether *Blakely*-compliant facts and *Blakely*-exempt facts constitute aggravating circumstances pursuant to section 18-1.3- 401(6)." *Id.* at ¶ 15. Hence, to the extent Hoganson's due process claim rests on the notion that extraordinary aggravating circumstances were an element of his offenses, his claim fails.

¶ 81 A defendant must have reasonable notice and an opportunity to be heard with respect to a sentencing provision. *See People v. Lacey*, 723 P.2d 111, 113 (Colo. 1986). Hoganson had both with respect to section 18-1.3-401(6). We know this because, before the sentencing hearing, he filed two motions to declare section 18-1.3-401(6) unconstitutional. He would not have filed such motions if he did not know this provision could apply to his sentences. And, in its prehearing response, the prosecution argued that the jury's tampering verdict enabled the prosecution to assert that Hoganson's tampering was an "extraordinary aggravating factor" applicable to the manslaughter sentence. Hence, the record refutes Hoganson's claim that he had "no notice at all prior to the sentencing hearing" that the court could apply section 18-1.3-401(6).

¶ 82 Moreover, during the sentencing hearing, the court gave defense counsel further opportunity to be heard as to the constitutionality of the statute, but counsel rested on the motions. Counsel also received, and used, the opportunity to argue that section 18-1.3-401(6) did not apply to the facts here.

¶ 83 Therefore, we see no due process problem regarding notice.

VII. Restitution

¶ 84 Finally, Hoganson contends that "[t]he trial court's restitution order must be vacated because restitution was ordered outside the statutory time bar, with no finding of good cause." He is right.

A. Additional Facts

¶ 85 Before the sentencing hearing, the prosecution filed a motion seeking restitution in the amount of $35,510.61. On May 16, 2019, the day of the sentencing hearing, defense counsel said she had not yet reviewed the prosecution's motion "very closely," and she asked the court to set a restitution hearing. The court declined to do so but gave counsel twenty-one days to file an objection to the motion.

¶ 86 On May 28, defense counsel filed a timely objection and requested a hearing. The court set a restitution hearing for September 24 but then moved it to December 2. At the December hearing, the court ordered Hoganson to pay $35,510.61 in restitution.

B. Applicable Law and Analysis

¶ 87 A judgment of conviction must include one of four orders regarding restitution. *See* § 18-1.3-603(1), C.R.S. 2022. One such possible order is 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." § 18-1.3-603(1)(b). This deadline refers to the trial court's determination of the restitution amount the defendant must pay, and the ninety-one-day deadline "may be extended only if, before the deadline expires, the court expressly finds good cause for doing so." *People v. Weeks*, 2021 CO 75, ¶ 5.

¶ 88 There is no dispute that the trial court here ordered restitution more than ninety-one days after the judgment of conviction. There is also no dispute that the court did not expressly find good cause for extending the deadline. Consequently, the court lacked authority to impose restitution, and we must vacate the restitution order. *Id.* at ¶¶ 45, 47.

¶ 89 We reject the People's argument that Hoganson "invited or waived any error." The record shows that, at the sentencing hearing, defense counsel indicated that she was not yet prepared to address the prosecution's restitution request, and defense counsel requested a restitution hearing. Counsel did not ask the court to set the hearing for more than ninety-one days later.

¶ 90 The court gave defense counsel twenty-one days to file an objection. Counsel filed an objection only twelve days later, on May 28, 2019. For reasons not revealed by the record, the court did not set the restitution hearing until September 24—over a month past the ninety-one-day deadline of August 15. Nothing in the record permits us to attribute this delay to the defense. And even assuming (without

deciding) that a defendant can waive the statutory deadline, we see nothing approaching a waiver here.

¶ 91 Furthermore, the fact that defense counsel later asked for a continuance at the December 2019 restitution hearing is of no consequence. The court *denied* that request. More importantly, the court had already lost authority to impose restitution by then.

¶ 92 Nonetheless, the People argue that, because "the sentence initially imposed did not include consideration of restitution," the sentence was "illegal and could be corrected." *See People v. Bowerman*, 258 P.3d 314, 316 (Colo. App. 2010) (recognizing that the absence of a restitution finding results in an illegal sentence). Even if so, however, the proper correction was to amend the judgment of conviction (the mittimus) to reflect that no restitution is required—just as in the *Weeks* case. *See Weeks*, ¶ 10; *see also* § 18-1.3-603(1)(d).

¶ 93 Lastly, the People point out that Hoganson did not raise this issue below and that *Weeks* was announced after the restitution order was entered. Citing *Scott v. People*, 2017 CO 16, ¶ 16, the People argue that the trial court did not commit obvious error—and thus did not commit plain error—by failing to make an express finding of good cause to extend the ninety-one-day deadline. We disagree that plain error review applies. Because this claim would be cognizable under Crim. P. 35(a), Hoganson was not required to preserve it. *See Fransua v. People*, 2019 CO 96, ¶ 13 ("It makes no sense to require preservation of a claim on direct appeal when an identical claim could be raised without preservation [in a Crim. P. 35(a) motion] after the conclusion of the direct appeal."). So plain error review is inapplicable.

¶ 94 For all these reasons, we vacate the restitution order.

VIII. Conclusion

¶ 95 The judgment and sentences are affirmed. The restitution order is vacated, and the case is remanded for the trial court to amend the mittimus to reflect that Hoganson does not owe restitution.

JUDGE WELLING and JUDGE JOHNSON concur.