17CA0003 Peo v Abraha 04-18-2019

COLORADO COURT OF APPEALS

Court of Appeals No. 17CA0003
City and County of Denver District Court No. 15CR5918
Honorable Brian R. Whitney, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Maicle K. Abraha,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE TAUBMAN
Berger and Tow, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced April 18, 2019

Philip J. Weiser, Attorney General, Elizabeth Ford Milani, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Haddon, Morgan and Foreman, P.C., Norman R. Mueller, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Maicle K. Abraha, appeals his judgment of conviction entered on a jury verdict finding him guilty of two counts of sexual assault (class 4 felonies) — sexual assault causing submission and sexual assault-victim incapable — against the victim, P.S. He contends that (1) the prosecution presented insufficient evidence of submission of P.S. against her will to sustain his conviction for sexual assault-causing submission; (2) the prohibition against double jeopardy prohibits the court from upholding two convictions and sentences for sexual assault-causing submission and sexual assault-victim incapable, because the statute prescribes alternative means for committing the same crime; (3) he was denied his due process right to present a complete defense by the exclusion of his only DNA expert; and (4) the prosecutor committed misconduct by lessening the prosecution's burden of proof and depriving Abraha of his right to a fair trial by an impartial jury. We disagree with his sufficiency of the evidence claim. However, we agree that he was deprived of his right to a complete defense and that three of his allegations of prosecutorial misconduct are meritorious. Thus, we reverse and remand to the trial court for a new trial.

I. Background

¶ 2 On November 30, 2013, Abraha and P.S. met at a bar in lower downtown Denver during an evening of P.S. drinking with coworkers. Prior to their meeting, P.S. had consumed several drinks, smoked marijuana, and suffered from memory loss. Abraha and his friends bought a round of drinks for P.S. and her coworkers, and Abraha stated that he and P.S. danced for two songs.

¶ 3 Once the bar closed, P.S. and her friends began crossing a street, and when the stoplight turned red, she crossed the street while her friends retreated to the sidewalk. Her friends reported that she had disappeared after she crossed the street, and she asserted that her memory thereafter became spotty.

¶ 4 Sometime after she crossed the street, Abraha and P.S. reconnected, and she explained that she had become separated from her friends and requested a ride back to the Marriott hotel downtown, where she was staying. Abraha stated that, once they arrived at the hotel, she announced that she was sharing a room with a coworker and did not have a room key. He said that, at that point, his friends were driving away, so they flagged down the

friends' vehicle to get a ride to another hotel. Abraha and his friends took P.S. to the All Inn Motel on East Colfax Avenue. P.S., Abraha, and one of his friends, Temesghen Gebreyohannes, entered the hotel lobby around 2:45 a.m. The motel clerk recalled, and the security video confirmed, that Abraha was wearing a white jacket and white shoes when he entered the lobby while his codefendant, Gebreyohannes,[1] wore a red jacket and dark shoes. Gebreyohannes attempted to use the restroom in the lobby, but the clerk did not allow him to do so. Abraha reserved and paid for a room under his name while P.S. wandered around the lobby. The motel clerk testified that P.S. looked drunk, could not stand, and demonstrated "no stability"; however, she stated that Abraha and Gebreyohannes seemed sober and "normal." Before the clerk allowed P.S. to accompany Abraha to the room, she required her to write down her name and birthdate because P.S. stated that she did not have her identification with her. While P.S. signed her name and birthdate — which took nearly four minutes with illegible

---

[1] Abraha and Gebreyohannes were tried together; the decision in Gebreyohannes's appeal is announced today.

results — Abraha gestured to Gebreyohannes to join P.S. at the counter. Once finished, P.S. hugged Gebreyohannes, then joined Abraha, and they headed toward the stairs while Gebreyohannes left the lobby. Immediately thereafter, Gebreyohannes returned and attempted to follow the two up the stairs; the clerk prevented him from going upstairs, so he left the lobby again.

¶ 5 According to Abraha's testimony, once inside the room, he and P.S. began undressing each other, and P.S. performed oral sex on Abraha. Subsequently, she assisted him in putting on a condom, and they engaged in intercourse. P.S. reportedly fell asleep while Abraha used the bathroom; Abraha also fell asleep when he returned.

¶ 6 Gebreyohannes returned to the lobby to tell the clerk that he needed to retrieve his jacket from Abraha because it contained his keys. The clerk allowed him five minutes to go to the room — Gebreyohannes recounted that Abraha let him in, and then he used the bathroom. When the clerk went upstairs to find Gebreyohannes, she found Abraha sitting in the stairwell, wearing the red jacket and white shoes. She forced him to leave, and approximately three minutes later, Gebreyohannes left the motel

wearing the white jacket and dark shoes. Gebreyohannes returned to the parking lot, the men switched jackets, and Abraha tried to go back to the room wearing the white jacket. The clerk thwarted his attempt to return to the room, so the men left.

¶ 7 After the men left, the clerk found P.S. naked and unresponsive on the bed, so she laid a blanket over her and left. P.S. reported that she awoke naked, in pain, and in a puddle of urine. She did not know where she was, and could not locate her phone, so she dressed and walked to a nearby convenience store to call her boyfriend. Her boyfriend urged her to call the police when she disclosed to him that she believed she might have been sexually assaulted.

¶ 8 An examination discovered abrasions on her vagina, and DNA collected from swabs taken from P.S.'s anus matched Abraha, whose sperm was also found on the condom and washcloth recovered from the motel room. Gebreyohannes's DNA matched a swab collected from P.S.'s right breast, and DNA analysts also noted possible indication of his DNA on her left breast. Gebreyohannes's DNA was found in a mixture of DNA taken from the washcloth, which Gebreyohannes reported using to wash his hands while

using the bathroom. Forensic testing noted three DNA sources recovered from a towel, two of which were consistent with Gebreyohannes's and P.S.'s DNA. Finally, DNA analysts could not exclude Abraha's nor Gebreyohannes's DNA from the mixture taken from P.S.'s mouth.

¶ 9 At trial, Abraha testified that P.S. consented to have sex with him. However, P.S. recalled that, despite her vague memory, she did not remember desiring sex when she stood in the motel lobby. Gebreyohannes claimed not to have sexually touched P.S., but said he dried his hands and face on the towel in the motel room bathroom.

¶ 10 Abraha and Gebreyohannes explained the multiple exchanges of jackets, stating that they had inadvertently worn each other's jackets into the motel, switched them upstairs, and then switched in the parking lot so that the motel clerk would recognize Abraha and allow him upstairs to spend the night with P.S. However, in a recorded video, Gebreyohannes revealed that the red jacket belonged to him and the white jacket (which Abraha initially wore into the hotel) belonged to Abraha.

¶ 11 The jury convicted Abraha of sexual assault-means of sufficient consequence and sexual assault-victim incapable, as either a principal or complicitor. The prosecution's theory focused on the following: (1) P.S.'s intoxication rendered her incapable of consent; (2) none of P.S.'s coworkers saw Abraha at any of the bars; (3) P.S. had a boyfriend and did not indicate her intent to engage in sexual relations with anyone that night; (4) it took P.S. a long time to sign her name and write her birthdate in the motel lobby; (5) the jacket exchange was a ruse to allow Gebreyohannes to sexually touch P.S.; and (6) investigators found Gebreyohannes's DNA on P.S.'s breasts, despite his claim that he did not touch her. The court sentenced Abraha to six years to life in the custody of the Department of Corrections. The jury also convicted Gebreyohannes of sexual assault-means of sufficient consequence, as either a principal or complicitor, and unlawful sexual contact.

II. Sufficiency of the Evidence

¶ 12 Abraha argues that we must vacate his conviction for sexual assault-causing submission because P.S. consented to have sex with him and the prosecution introduced insufficient evidence to prove that Abraha caused submission of P.S. against her will. We

disagree. As discussed below, we reverse and remand for a new trial based on the trial court's exclusion of Abraha's expert witness and three instances of prosecutorial misconduct. However, we address this issue because, if the evidence at trial was insufficient to support the convictions, a second trial on the same charge would violate Abraha's right to be free from double jeopardy. *See People v. Hard*, 2014 COA 132, ¶ 38, 342 P.3d 572, 579.

A. Standard of Review

¶ 13 We review de novo whether sufficient evidence exists to uphold a conviction. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005).

B. Applicable Law

¶ 14 To assess a challenge to the sufficiency of the evidence, we apply the substantial evidence test: Is the evidence, when viewed as a whole and "in the light most favorable to the prosecution, . . . "'substantial and sufficient" to support the defendant's guilt beyond a reasonable doubt[?]'" *Id.* (quoting *People v. Bennett*, 183 Colo. 125, 130, 515 P.2d 466, 469 (1973)); *People v. Serra*, 2015 COA 130, ¶ 18, 361 P.3d 1122, 1129. In so doing, we accord the prosecution "every reasonable inference that might fairly be drawn

from the evidence." *Serra*, ¶ 19, 361 P.3d at 1129 (quoting *People v. Duncan*, 109 P.3d 1044, 1045-46 (Colo. App. 2004)).

¶ 15 Section 18-3-402(1)(a), C.R.S. 2018, provides that "[a]ny actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if: [t]he actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will." A violation of section 18-3-402(1)(a) is a class 4 felony. § 18-3-402(2). Sexual penetration includes sexual intercourse and fellatio. § 18-3-401(6), C.R.S. 2018.

¶ 16 A jury may convict a defendant of having committed a crime as a principal or through complicity with another if "with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense." § 18-1-603, C.R.S. 2018; *see People v. Childress*, 2015 CO 65M, ¶ 7, 363 P.3d 155, 156. Conviction as a complicitor requires the jury to determine that the defendant had "an intent to aid or encourage the criminal act, combined with an awareness of sufficient attendant circumstances." *Id.* at ¶ 33, 363 P.3d at 165.

C. Analysis

¶ 17 Based on the evidence admitted at trial, the jury could have convicted Abraha as either the principal or a complicitor in causing P.S.'s submission against her will. Though Abraha cites evidence admitted through witness testimony that refutes evidence supporting the conviction,[2] "the credibility of witnesses or the weight to be accorded evidence" lies in the sole province of the jury. *People v. Noga*, 196 Colo. 478, 480, 586 P.2d 1002, 1003 (1978).

¶ 18 Further, section 18-3-402(1)(a) does not require the use of force — only that the defendant caused submission against the victim's will. Thus — along with P.S.'s testimony that she was sexually assaulted — evidence that Abraha took a visibly intoxicated P.S. from a bar to a motel, miles away from where she was staying, could cause a reasonable jury to find that he caused submission against her will.

---

[2] Abraha contends that he had a better recollection of the evening, P.S. asked for a ride to her hotel, she asked to go elsewhere when she said she was sharing a room with her coworker, the two were kissing in the car, P.S. voluntarily walked up to the motel room with him after hugging Gebreyohannes, and that she initiated sexual activity and helped him put on a condom before intercourse.

¶ 19 However, even if the jury did not believe Abraha caused submission, it was also instructed to find him guilty if "[Gebreyohannes] committed all or part of the crime," and "[Abraha] . . . aided, abetted, advised, or encouraged [Gebreyohannes] in planning or committing all or part of that crime," "with the intent to promote or facilitate the commission of that crime, and . . . with an awareness that . . ." Gebreyohannes's conduct that Abraha "sought to further would constitute all of the elements of sexual assault. . . ." Therefore, the jury could have concluded that Abraha was guilty as a complicitor because Gebreyohannes's DNA was found on P.S.'s breasts and could not be excluded from that collected from her mouth. The multiple jacket swaps between Gebreyohannes and Abraha arguably done as a ruse, coupled with Gebreyohannes's presence in the lobby and the motel room, could suggest that Abraha helped further Gebreyohannes's conduct.

¶ 20 Accordingly, the evidence was sufficient to allow a reasonable jury to find Abraha guilty of sexual assault-causing submission.

III. Exclusion of Expert Testimony

¶ 21 Abraha contends that the trial court improperly excluded testimony from his only expert witness proffered to testify about

DNA evidence and rebut the prosecution's five DNA experts' testimony. We agree.

A. Standard of Review

¶ 22 We review the trial court's exclusion of expert testimony for an abuse of discretion. *People v. Douglas*, 2015 COA 155, ¶ 58, 412 P.3d 785, 796.

¶ 23 We review preserved errors of constitutional magnitude for constitutional harmless error, reversing if "there is a reasonable *possibility* that the [error] might have contributed to the conviction." *Hagos v. People*, 2012 CO 63, ¶ 11, 288 P.3d 116, 119 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). The People bear the burden of proving that any error was harmless beyond a reasonable doubt. *Id.*

¶ 24 As relevant here, "[w]e will reverse for cumulative error where, although numerous individual allegations of error may be deemed harmless and not require reversal, in the aggregate those errors show prejudice to the defendant's substantial rights and, thus, the absence of a fair trial." *People v. Stewart*, 2017 COA 99, ¶ 39, 417 P.3d 882, 890 (quoting *People v. Gallegos*, 260 P.3d 15, 28-29 (Colo. App. 2010)).

B. Relevant Facts

¶ 25 Before trial, the defense timely proffered Richard Eikelenboom as an expert in DNA testing, placing his name on the revised and consolidated witness list, and including his PowerPoint slides in a joint exhibit list. Rather than requesting a *Shreck*[3] hearing to challenge Eikelenboom's qualifications as an expert, the prosecution filed an omnibus motion in limine to limit Eikelenboom's testimony to his endorsed expertise and preclude testimony about potential DNA contamination, comments on P.S.'s credibility, and characterizations of the State's use of three different laboratories as "strange." During the motions hearing, the defense agreed to limit the scope of his testimony, but they did not discuss any challenge to his testimony regarding DNA transfer or DNA collection. The trial court denied the prosecution's motion in part, however, stating that the prosecution could address unresolved

---

[3] *People v. Shreck*, 22 P.3d 68 (Colo. 2001), requires the trial court to assess the admissibility of scientific evidence as it relates to expert testimony. A party may — but is not required to — request, through a motion in limine, that proffered expert testimony be subject to a *Shreck* analysis in an evidentiary hearing. *See People v. Campbell*, 2018 COA 5, ¶ 40, 425 P.3d 1163, 1171.

matters at trial via contemporaneous objections and cross-examination.

¶ 26 When the defense attempted to qualify Eikelenboom as an expert in DNA analysis during trial, the prosecutor objected and engaged in extensive voir dire.

¶ 27 During voir dire, Eikelenboom testified that he was from the Netherlands, but now lived and worked in Colorado. He received an undergraduate degree in biochemistry, but did not have a Ph.D., nor did he belong to any professional organizations. Eikelenboom's work experience included employment at the Netherlands Forensic Institute (NFI) in the Netherlands between 1998 and 2005. At NFI, Eikelenboom was a "coordinating officer," responsible for reviewing other scientists' DNA analysis, writing reports, and determining whether lab results matched known DNA samples. Eikelenboom did not perform DNA extraction or DNA analysis at NFI. He explained that responsibilities in Dutch laboratories were distributed differently than in the United States, and that he did not need to perform DNA analysis himself in order to help a jury understand how to interpret DNA profiles. Eikelenboom confirmed that, while at NFI, he was not qualified as a DNA analyst.

¶ 28 Eikelenboom testified that, in 2005, he joined Independent Forensic Services (IFS), a forensic analysis lab located in Conifer, Colorado, founded by his wife in 2003. He testified that he was responsible for all DNA analysis at IFS, but that IFS owned a laboratory in the Netherlands, and that "the [DNA] lab work was done always in the Netherlands" because the altitude in Conifer interferes with the DNA equipment and IFS "already [had] an accredited laboratory in the Netherlands."

¶ 29 After asking Eikelenboom several questions regarding the unreliability of testimony he gave in past criminal trials, which Eikelenboom disputed, the prosecution moved for Eikelenboom "not to be qualified as an expert" and for his testimony to be stricken.

¶ 30 Defense counsel for Abraha then engaged in an additional round of voir dire with Eikelenboom, eliciting that Eikelenboom had fifteen years' experience at IFS performing DNA analysis bench work, and that he had testified as an expert and evaluated the DNA analysis work of others approximately thirty times in Dutch courts, despite the fact that at the time he was not qualified to perform DNA analysis at NFI.

¶ 31 After defense and co-defense counsels' attempts to rehabilitate him, the trial court sustained the State's objection and, without making any findings, precluded all testimony by Eikelenboom. Defense counsel made a final statement before the witness's dismissal that "Mr. Eikelenboom is an essential part of this defense."

¶ 32 Later that day, defense counsel asked the court to reconsider its ruling, supplementing Eikelenboom's qualifications with additional information regarding the accreditation of his lab. The court declined to reconsider its earlier ruling.

C. Applicable Law

¶ 33 A criminal defendant has the right to call witnesses in his or her defense; thus, the exclusion of a defendant's only expert witness on a matter implicates constitutional harmless error. *Golob v. People*, 180 P.3d 1006, 1013 (Colo. 2008), and a court's ruling "excluding expert testimony offered by a criminal defendant is perhaps somewhat more susceptible of reversal because of the courts' sensitivity to the defendant's need and lack of access to the personnel available to the state." *People v. Williams*, 790 P.2d 796, 798 (Colo. 1990) (quoting 3 Jack B. Weinstein & Margaret A.

Berger, *Weinstein's Evidence* ¶ 702[04], at 702-47 to -48 (1988)). A trial court's exclusion of a defense expert is particularly problematic because it may implicate the defendant's constitutional right to present a complete defense and, potentially, the right to a fair trial. *See People v. Hampton*, 696 P.2d 765, 778 (Colo. 1985).

¶ 34 If the trial court excludes expert testimony, under CRE 702, the court "must issue specific findings as it applies the CRE 702 and 403 analyses." *People v. Shreck*, 22 P.3d 68, 79 (Colo. 2001), *as modified* (May 14, 2001). In reviewing the trial court's ruling excluding Eikelenboom's expert testimony, we must accord the proffered testimony the maximum probative value and minimum unfair prejudice. *People v. Conyac*, 2014 COA 8M, ¶ 23, 361 P.3d 1005, 1016.

D. Analysis

¶ 35 The court instructed the jury on complicity for both counts of sexual assault for which Abraha was convicted. Therefore, it is possible that the jury convicted Abraha as a complicitor in both counts, making Eikelenboom's testimony paramount to the defense. Though Abraha admitted to having sex with P.S. and a DNA expert could not provide testimony to show it was consensual,

Eikelenboom's testimony could have refuted the theory that Abraha was complicit in Gebreyohannes's sexual assault of P.S. Abraha proffered Eikelenboom as the only DNA expert witness in his defense; thus, the exclusion of his testimony prevented the presentation of important evidence rebutting his guilt as a complicitor including, but not limited to,

- a more complete discussion of the possibility of secondary transfer than that offered by the prosecution experts;
- a full and comprehensible description of the different types of cell material that contain DNA and the difference in potential significance of different cell material;
- an explanation of the limitations of the evidentiary value of matching DNA markers and the potential for overestimation of the strength of DNA evidence;
- the complexity of interpreting DNA evidence when two or more persons contribute cell material, as occurred in this case;

- the failure of investigators to document the location of the tested stain on the right breast of P.S. and the significance of that failure;
- how more could have and should have been done to identify the source of the cell material discovered on the towel;
- the towel from the hotel room contained DNA of an unknown third person; and
- saliva and blood tests should have been performed to determine which type of cell material could have been transferred by the different donors.

¶ 36 The court's ruling to preclude Eikelenboom from testifying significantly impaired the defense's theory that Gebreyohannes's DNA was transferred to P.S. without him sexually touching her and likely lent undue weight to the prosecution's case because Abraha was unable to counter testimony by the People's five DNA experts.

¶ 37 The People contend that the defense should have relied on cross-examination of the prosecution's five DNA expert witnesses[4] to challenge the prosecution's case. However, that the trial court admitted testimony from five DNA expert witnesses for the prosecution while excluding the defendant's *only* DNA expert witness actually runs counter to the People's argument. Given the lack of pretrial challenge to Eikelenboom's qualifications, defense counsel may have reasonably relied on its own expert's testimony to controvert that of the prosecution's experts. Since the prosecution presented its case first, by the time defense counsel realized they would be unable to introduce their own expert testimony, it was too late to cross-examine the prosecution's DNA experts.

¶ 38 Moreover, the exclusion of Eikelenboom's testimony could have contributed to the jury's decision to convict by making it

---

[4] The People qualified five witnesses without objection from the defense: Robert Boyle, expert in forensic biology and DNA analysis for Cellmark; Kelly Byrd, expert in forensic biology and DNA analysis for Cellmark; Mary Schleicher, expert in forensic biology and DNA analysis for the Colorado Bureau of Investigation; Kristin Denning, expert in forensic biology at the Denver Police Department Crime Laboratory; and Eric Duvall, expert in forensic biology at the Denver Police Department Crime Laboratory.

appear that Abraha had no experts to support his defense. Therefore, the trial court essentially deprived Abraha of his only means of a defense against the prosecution's DNA evidence — the linchpin of the prosecution's theory of Abraha's guilt as a complicitor to each count of sexual assault.

¶ 39 In excluding Eikelenboom's testimony, the trial court did not make factual findings; instead, it issued a conclusory ruling and excused Eikelenboom from the stand. This was an abuse of discretion. *See Shreck*, 22 P.3d at 79.

¶ 40 In *People v. Lanari*, a division of our court affirmed the trial court's decision to exclude expert testimony, reasoning that the trial court did not abuse its discretion because it "set forth in great detail its findings as to the scope and content of the expert's proposed testimony." 926 P.2d 116, 121 (Colo. App. 1996), *as modified on denial of reh'g* (May 2, 1996).

¶ 41 Here, given that Eikelenboom had been qualified as an expert in several high-profile cases, including two in Colorado — in at least one of which he testified as an expert for the Colorado Attorney General's Office — we perceive little reason for the trial court to

disqualify him as an expert, especially without any specific findings and analysis under CRE 702 and 403.[5]

¶ 42 We conclude that the trial court abused its discretion, because without Eikelenboom's testimony, Abraha had no way of refuting the prosecution's complicity theory based on Gebreyohannes's DNA found on P.S. Thus, the trial court effectively deprived him of a complete defense. Accordingly, this error and the three instances of prosecutorial misconduct discussed below resulted in cumulative error.

¶ 43 We cannot determine whether the jury based its verdict on the theory that Abraha acted alone or on the complicity theory. Given that the jury convicted Abraha of sexual assault–victim incapable, but acquitted Gebreyohannes of the same charge, it would appear more likely that the jury considered Abraha the principal in that act. However, because the jury was instructed that it could find Abraha guilty as a complicitor if it found that Gebreyohannes

---

[5] If the prosecution was concerned about Eikelenboom's qualifications, it could have sought to exclude his testimony in its motion in limine. Although this was not required of the prosecution, the lack of notice impaired Abraha's defense.

committed only part of that crime, the acquittal does not rule out the possibility that the jury relied upon the complicity theory to convict Abraha. When we are "uncertain which of the two grounds was relied upon by the jury in reaching the verdict," "the jury's verdict must be set aside if it could be supported on one ground but not on another . . . ." *People v. Davis*, 794 P.2d 159, 216 (Colo. 1990) (citing *Mills v. Maryland*, 486 U.S. 367, 376 (1988)), *abrogated on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005). We note that, while special interrogatories were not legally required, such special interrogatories would have provided clarity to the jury's action. Absent such clarity, we must set aside the verdict. *See United States v. McKye*, 734 F.3d 1104, 1110 n.6 (10th Cir. 2013) ("[W]hen there is legal error as to one basis for finding an element, the submission of an alternative theory for making that finding cannot sustain the verdict 'unless it is possible to determine the verdict rested on the valid ground.'" (quoting *United States v. Holly*, 488 F.3d 1298, 1305 (10th Cir. 2007))); *see also People v. Mendenhall*, 2015 COA 107M, ¶¶ 46-47, 363 P.3d 758, 770 (concluding that, unless a prosecutor can show that any error was harmless, reversal is required when it cannot be determined

whether the jury convicted the defendant based on a theory of liability affected by an instructional error or based on an alternative theory of liability).

IV. Prosecutorial Misconduct

¶ 44 In addition to the exclusion of Abraha's only expert DNA witness, Abraha also alleges numerous instances of prosecutorial misconduct — not preserved by a contemporaneous objection — that constitute cumulative error and warrant reversal. We agree that three of the instances alleged, coupled with the exclusion of Eikelenboom's testimony, warrant reversal.

A. Standard of Review and Applicable Law

¶ 45 We review allegations of unpreserved errors for plain error, reversing only if the error was "so clear cut and so obvious that a trial judge should have been able to avoid it without benefit of objection." *Conyac*, ¶ 54, 361 P.3d at 1020. Moreover, it must "so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the conviction." *People v. Davis*, 2012 COA 56, ¶ 39, 296 P.3d 219, 229.

¶ 46 However, where we deem several errors in isolation insufficient to constitute plain error, we may nevertheless reverse if we

conclude that all alleged errors aggregately affected the fundamental fairness of the trial. *People v. Nardine*, 2016 COA 85, ¶ 65, 409 P.3d 441, 454. Thus, "[w]e focus on the cumulative effect of the prosecutor's statements using factors including the exact language used, the nature of the misconduct, the degree of prejudice associated with the misconduct, the surrounding context, and the strength of the other evidence of guilt." *Id.*

¶ 47 "[A] prosecutor has wide latitude and may refer to the strength and significance of the evidence, conflicting evidence, and reasonable inferences that may be drawn from the evidence" during closing arguments, but the prosecutor must "stay within the limits of appropriate prosecutorial advocacy . . . ." *People v. Rhea*, 2014 COA 60, ¶¶ 46-47, 349 P.3d 280, 291-92 (quoting *People v. Walters*, 148 P.3d 331, 334 (Colo. App. 2006)). Therefore, the prosecutor must avoid making arguments intended to appeal to the prejudices, or inflame the passions, of the jury. *Domingo-Gomez v. People*, 125 P.3d 1043, 1049-50 (Colo. 2005).

B. Analysis

¶ 48 During closing arguments, the prosecutor misrepresented evidence on secondary transfer of DNA by stating that it occurs in

only twenty-five percent of cases when one of the State's experts testified that it occurred in eighty-five percent of cases. The exclusion of Eikelenboom's testimony heightened the significance and prejudicial impact of this statement because Abraha had no way to rebut the statistic with his own expert testimony.

¶ 49 The prosecutor also improperly appealed to the female jurors — who constituted one half of the jury — by first stating, "To the women among you, think about where you have to be, in what state you'd have to be to get into a car with four men that you don't know at the time of bar close." She later commented on testimony offered by a defense expert witness: "Picture of her genitalia in front of you, of which, if I can remind you, the defense expert just told you [ninety] percent of consensual sexual encounters result in injuries worse than those. Ladies, no. Just no. There's really nothing I need to say about that expert." These comments were calculated to appeal to the passions and the prejudices of women jurors, thus diverting the jury's attention away from the evidence. *See People v. Garcia*, 2012 COA 79, ¶ 15, 296 P.3d 285, 289. Moreover, "the Equal Protection Clause prohibits discrimination . . . on the assumption that an individual will be biased in a particular case for

no reason other than the fact that the person happens to be a woman or happens to be a man." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (holding that intentional discrimination on the basis of gender by state actors in use of peremptory strikes in jury selection violates the Equal Protection Clause).

¶ 50 Finally, the prosecutor denigrated defense counsel by telling the jury that "[the defense is] going to try to persuade you to be more confused . . . . [D]on't be fooled" by the defense's response to the DNA evidence. The prosecutor further denigrated counsel by classifying his argument as "laughable" and stating that "I am not entirely sure that we were all watching the same trial." A division of our court considered remarks of this nature highly improper, concluding that they "serve[] no legitimate purpose but ha[ve] the function only of erroneously diverting the attention of the jurors from the factual issues concerning defendant's guilt." *People v. Jones*, 832 P.2d 1036, 1039 (Colo. App. 1991); *see also People v. Coria*, 937 P.2d 386, 388-91 (Colo. 1997) (concluding that a prosecutor's closing arguments referring to the defense's argument as "Theatrics 101," "smoke and mirrors," and "diversionary tactics" were improper because they were not directed to the law and facts

of the case, but at opposing counsel). *But cf. People v. Iversen*, 2013 COA 40, ¶ 38, 321 P.3d 573, 580 (stating that the prosecutor did not denigrate defense counsel by using the word "laughable" to respond to counsel's argument and theory because it was not made for the purpose of mocking or personally attacking defense counsel, but was a comment on the evidence and defendant's theory of the case).

¶ 51 Though unpreserved allegations of prosecutorial misconduct usually require a showing of plain error to be successful, we need not address that analysis. We conclude that these errors and the exclusion of Eikelenboom constitute cumulative error that subverted the fairness and integrity of the trial and casts serious doubt on the reliability of the verdict. *See Nardine*, ¶ 66, 409 P.3d at 454. In light of our conclusion, we perceive sufficient error warranting reversal.

V. Other Issues

¶ 52 Since we reverse and remand for a new trial, we need not address Abraha's contentions that the prohibition against double jeopardy prevents two convictions and sentences for sexual assault-causing submission and sexual assault-victim incapable.

VI. Conclusion

¶ 53 Accordingly, the judgment is reversed, and the case is remanded to the trial court for a new trial.

JUDGE BERGER and JUDGE TOW concur.