17CA0084 Peo v Gebreyohannes 04-18-2019

COLORADO COURT OF APPEALS

Court of Appeals No. 17CA0084
City and County of Denver District Court No. 15CR5874
Honorable Brian R. Whitney, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Temesghen M. Gebreyohannes,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE WELLING
Richman and Navarro, JJ., concur

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

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¶ 1 Defendant, Temesghen M. Gebreyohannes, appeals his judgment of conviction entered on a jury verdict finding him guilty of sexual assault by means of sufficient consequence and unlawful sexual contact against the victim, P.S.

¶ 2 Gebreyohannes contends that his convictions must be reversed because (1) the prosecution presented insufficient evidence of his complicity in the alleged sexual assault perpetrated by his codefendant, Maicle K. Abraha, against P.S.; (2) the prosecution presented insufficient evidence that Gebreyohannes knowingly subjected P.S. to any sexual contact; (3) the trial court deprived him of his constitutional right to present a complete defense by refusing to qualify the defense's sole DNA expert, thereby excluding his testimony; and (4) the prosecutor committed misconduct during closing argument by misstating the evidence, misstating the law, and expressing her personal opinion regarding Gebreyohannes' guilt. Because we conclude that the trial court committed reversible error by excluding the testimony of Gebreyohannes' sole DNA expert, we reverse and remand for a new trial.

I. Background

¶ 3 On November 30, 2013, Gebreyohannes' brother drove him to downtown Denver to meet Abraha and two other friends. They visited several bars, the last of which they left in the early morning hours on December 1. The same evening, P.S. and several friends went out to dinner in downtown Denver and then visited three different bars. P.S. smoked marijuana early in the evening and consumed several alcoholic drinks. P.S. began losing her memory while at the first bar. At the third bar they visited, P.S. and her friends met Abraha and Gebreyohannes, who bought them a round of drinks. P.S. was "definitely drunk" by the time she left the third bar.

¶ 4 At closing time, a dispute inside the bar caused everyone to exit all at once onto the sidewalk. Once outside, P.S. and her friends began crossing a street as the stoplight turned red. While her friends retreated to the sidewalk, P.S. remained with the crowd of people who continued to cross the street. By the time her friends crossed the street "one minute later," P.S. was nowhere to be found. P.S.'s friends searched for her, called her name, and drove around the area looking for her before eventually returning to their hotel

without her. One of P.S.'s friends had possession of her phone, which she had left behind at the bar. P.S. testified that her memory after this time was spotty.

¶ 5 Sometime after crossing the street, P.S. encountered Abraha. P.S. told him that she had become separated from her friends and that she did not have her phone. She requested a ride back to the Marriot hotel downtown where she was staying. Abraha stated that, once his friends dropped them off at the Marriot and began to drive away, P.S. told him that she was sharing a room with a friend and did not have a key to the room. Abraha stated that he then flagged down his friends to get a ride with P.S. to a different hotel.

¶ 6 Abraha, P.S., and three other men, including Gebreyohannes, drove to the All In Motel on East Colfax. The motel's surveillance camera recorded Abraha entering the motel lobby around 2:45 a.m. and approaching the counter to speak with the clerk. While Abraha was speaking with the clerk, P.S. and Gebreyohannes entered the lobby and walked past the counter toward the elevator before they were stopped by the clerk. Surveillance video showed that, when they entered the lobby, Abraha was wearing a white jacket and

white shoes. Gebreyohannes was wearing a red jacket and dark shoes.

¶ 7 While Abraha registered at the counter under his name, P.S. wandered around the lobby. P.S. testified that she could only remember being in the motel lobby for "a brief second."

¶ 8 Around this time, Gebreyohannes asked to use the bathroom, but the clerk told him that there were no public bathrooms. The clerk testified that P.S. appeared drunk, could not stand, and had "no stability," while Abraha and Gebreyohannes appeared sober and "normal."

¶ 9 Before the clerk allowed P.S. to go upstairs to the motel room, she instructed P.S., who did not have identification with her, to write down her name and birthdate. Abraha gestured to Gebreyohannes, who then joined P.S. at the counter while she spent approximately four minutes trying to write down her birthdate and sign her name on a piece of paper. The results were illegible, but the clerk allowed P.S. to go upstairs. Because the elevator was not operational, P.S. and Abraha went to the stairwell to access the motel room on the third floor. Before P.S. went upstairs, she hugged Gebreyohannes.

¶ 10 After Abraha and P.S. went to the motel room, Gebreyohannes walked outside and stood by the front door for several seconds. When another customer approached the counter and began speaking to the clerk, Gebreyohannes re-entered the lobby and walked toward the stairwell. The clerk stopped him and told him that he was not allowed to go upstairs unless he presented identification. Gebreyohannes then left the motel lobby and walked to the car.

¶ 11 Approximately twenty-five minutes later, Gebreyohannes returned to the lobby and asked the clerk if he could go up to the room. The clerk testified that she denied him permission "[be]cause the room was rented to the gentleman in the white jacket." Gebreyohannes then told her that he needed to give Abraha his keys. The clerk gave Gebreyohannes permission to go to the room, but instructed him to return within five minutes.

¶ 12 When Gebreyohannes failed to return after eleven minutes, the clerk went upstairs. When she reached the third floor, she found a man seated in the stairwell in a red jacket and white shoes. The clerk told the man that he had to leave, and he walked downstairs with the clerk and left the motel.

¶ 13 Approximately two minutes later, a man wearing a white jacket and dark shoes walked downstairs, left the motel lobby, and walked to the car. Through the surveillance camera monitor, the clerk watched the men switch jackets. The man now wearing the white jacket then returned to the lobby and told the clerk that he needed to go upstairs to give P.S. a ride. Becoming suspicious, the clerk denied the man re-entry. The clerk went up to the room herself and found it unlocked. Inside, she found P.S. unresponsive on a bed, lying naked on top of the covers. The clerk covered P.S. with a blanket, locked the door to the room, and went back downstairs.

¶ 14 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 find her phone, so she dressed and walked to a convenience store where she called her boyfriend. Her boyfriend urged her to call the police, which she did.

¶ 15 A sex assault nurse examiner (SANE) examination revealed 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' DNA matched swabs collected from P.S.'s right breast, and a partial swab taken and developed from P.S.'s left breast identified a male-specific profile and matched Gebreyohannes' DNA in at least fourteen of sixteen locations on the DNA. Gebreyohannes' DNA was found in a mixture of DNA taken from the washcloth, which he 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' and P.S.'s DNA. Finally, investigators could not exclude Abraha's or Gebreyohannes' DNA from the mixture taken from P.S.'s mouth.

¶ 16 On October 28, 2015, Gebreyohannes was charged with three counts of sexual assault and one count of unlawful sexual contact. Abraha was charged with three counts of sexual assault. Gebreyohannes and Abraha were tried together.

¶ 17 At trial, Abraha testified that he and P.S. had consensual sex. P.S. testified that she did not remember wanting to have sex with anyone that night. Gebreyohannes testified that he had used the bathroom in the motel room and dried his hands and face on a

towel, but that he had neither seen nor touched P.S. while he was in the motel room.

¶ 18 Gebreyohannes also testified that, before they arrived at the All In Motel, they stopped at a convenience store to buy cigarettes. He testified that when he got out of the car, he realized that Abraha was wearing his white jacket, so he put on Abraha's red jacket, which was in the car. Gebreyohannes testified that when he later went to the room at the All In Motel to use the bathroom, he noticed his white jacket in the room and put it on, leaving Abraha's red jacket behind. He then wore his white jacket downstairs as he left the motel and walked to the parking lot. He testified that he and Abraha switched jackets again in the parking lot so that Abraha could return wearing the white jacket and be allowed to go back to the motel room. In a videotaped interview with investigators, however, Gebreyohannes stated that the red jacket, which he was wearing when he arrived at the All In Motel, actually belonged to him, and the white jacket belonged to Abraha.

¶ 19 The prosecution argued at trial that P.S. was so intoxicated that she could not consent to sex. The prosecution argued that Gebreyohannes was guilty of sexual assault either as a principal,

arguing that Gebreyohannes had been alone in the room with P.S. for more than ten minutes and had worn Abraha's jacket to make P.S. believe that he was Abraha, or under a complicitor theory of liability. The prosecution argued that Gebreyohannes was guilty as a complicitor because he initially tried to sneak P.S. past the clerk, then stood beside her at the counter for several minutes as she struggled to legibly write her name and birthdate. The prosecution also argued that Gebreyohannes' attempts to follow P.S. and Abraha to the motel room were inconsistent with his stated belief that they were going to have consensual sex, and that Gebreyohannes would have known that P.S. was highly intoxicated from observing her behavior in the motel lobby, including her inability to legibly write her name and birthdate. The trial court instructed the jury that it could find that Gebreyohannes was guilty of sexual assault (means of sufficient consequence) either as a principal or under a complicitor theory of liability.

¶ 20 The prosecution also argued that Gebreyohannes was guilty of unlawful sexual contact as a principal based on evidence that he had been in the motel room for more than ten minutes and his DNA had been found on a washcloth and a towel in the bathroom, as

well as on P.S.'s breasts, where the prosecution argued it could not have been deposited unless Gebreyohannes had touched P.S. after her clothes were removed.

¶ 21 After a six-day trial, the jury found Gebreyohannes guilty on two counts: sexual assault (means of sufficient consequence), § 18-3-402(1)(a), C.R.S. 2018, and unlawful sexual contact, § 18-3-404, C.R.S. 2018. The jury found Gebreyohannes not guilty of the remaining two charges: sexual assault (victim physically helpless), § 18-3-402(1)(h), and sexual assault (victim incapable), § 18-3-402(1)(b).[1] The trial court sentenced Gebreyohannes to an indeterminate term of four years to life in the custody of the Department of Corrections.

II. Analysis

¶ 22 Gebreyohannes raises four claims on appeal.

¶ 23 First, he contends that insufficient evidence supported his conviction for sexual assault (means of sufficient consequence) as a complicitor because there was no evidence establishing that he was

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[1] Abraha, on the other hand, was found guilty of sexual assault (victim incapable) and sexual assault (means of sufficient consequence).

complicit in Abraha's alleged sexual intrusion or penetration on P.S. He also contends that there was insufficient evidence to support his conviction for the same offense under a principal theory of liability.

¶ 24 Second, Gebreyohannes contends that insufficient evidence supported his conviction for unlawful sexual contact because no evidence showed that he subjected P.S. to any sexual contact.

¶ 25 Third, Gebreyohannes contends that the trial court erroneously refused to qualify the defense's sole DNA expert witness as an expert in DNA testing and analysis, thereby depriving him of his constitutional right to present a complete defense.

¶ 26 Fourth, Gebreyohannes contends that he was denied his constitutional right to a fair trial before an impartial jury because of prosecutorial misconduct. He argues that the prosecutor misstated both the evidence and the law, and made improper comments that expressed her personal opinion and were calculated to inflame the passions of the jury.

¶ 27 We conclude that the evidence was sufficient to sustain Gebreyohannes' convictions, but that the trial court's erroneous refusal to qualify the defense's sole DNA expert witness as an expert in DNA testing and analysis requires reversal of Gebreyohannes'

convictions and remand for a new trial. Because Gebreyohannes' contentions of prosecutorial misconduct are not likely to arise on remand, we do not address them in this opinion.

A. Sufficient Evidence Supported Gebreyohannes' Conviction for Sexual Assault (Means of Sufficient Consequence)

1. Standard of Review

¶ 28 We review de novo whether the evidence is sufficient to support a conviction. *People v. Hard*, 2014 COA 132, ¶ 39. We must determine whether the evidence, viewed as a whole and in the light most favorable to the prosecution, is both substantial and sufficient to support a conclusion by a reasonable person that the defendant is guilty of the crimes charged beyond a reasonable doubt. *People v. Serra*, 2015 COA 130, ¶ 18. If the record contains evidence upon which the fact finder could reasonably infer an element is satisfied, or if reasonable minds could differ, the evidence is sufficient. *See People v. Grant*, 174 P.3d 798, 812 (Colo. App. 2007).

2. Legal Principles

¶ 29 A defendant commits sexual assault-means of sufficient consequence if he "knowingly inflicts sexual intrusion or sexual

penetration on a victim" and if "[t]he actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will[.]" § 18-3-402(1)(a), C.R.S. 2018. "Sexual penetration" denotes, among other things, intercourse or fellatio. § 18-3-401(6), C.R.S. 2018.

¶ 30 A person is guilty as a complicitor

> if he aids, abets, advises, or encourages the other person in planning or committing that offense, and he does so with: (1) the intent to aid, abet, advise, or encourage the other person in his criminal act or conduct, and (2) an awareness of circumstances attending the act or conduct he seeks to further, including a required mental state, if any, that are necessary for commission of the offense in question.

People v. Childress, 2015 CO 65M, ¶ 34; *see also* § 18-1-603, C.R.S. 2018.

¶ 31 Where causing a particular result is an element of the offense, the complicitor must act "with an awareness the principal is or would be acting with that required mental state." *Childress*, ¶ 29.

¶ 32 A person commits unlawful sexual contact by knowingly subjecting a victim to any sexual contact if the actor knows that the victim does not consent. § 18-3-404(1)(a). "Sexual contact"

denotes, as relevant here, the knowing touching of the victim's intimate parts by the actor for purposes of sexual arousal, gratification, or abuse. § 18-3-401(4).

3. Discussion

¶ 33 First, the evidence supported a reasonable inference that Gebreyohannes acted as a complicitor in that he intended to aid, abet, advise, or encourage Abraha in committing the crime. *See Childress*, ¶ 34. The evidence showed that Gebreyohannes accompanied P.S. into the motel lobby after Abraha had approached the counter to speak with the clerk. The surveillance video from the motel lobby showed that, immediately after entering the motel, Gebreyohannes and P.S. walked toward the elevator without acknowledging Abraha or the clerk — until they were stopped by the clerk. Several minutes later, the video shows Abraha gesture to Gebreyohannes, who then joins P.S. and remains there for four minutes as P.S. tries to write her name and birthdate. From this evidence, the jury may have reasonably inferred that Gebreyohannes attempted to sneak P.S. into the motel while the clerk was engaged with Abraha. The jury may also have reasonably inferred that Gebreyohannes, at Abraha's direction, stood beside

P.S. to ensure that she completed the task of writing her name and birthdate, without which the clerk would not have permitted P.S. to accompany Abraha upstairs.

¶ 34 Second, the evidence supported a reasonable inference that Gebreyohannes knew both that P.S. was highly intoxicated and that Abraha intended to have sex with her. In the surveillance video, P.S. can be seen stumbling as she enters the motel lobby, while Gebreyohannes walks directly behind her. Gebreyohannes also stood beside P.S. at the counter for four minutes while she tried to write down her name and birthdate on a piece of paper. The paper on which P.S. wrote was admitted into evidence and shows that P.S. could not write legibly. The night manager testified that, when P.S. stood at the counter, she appeared "drunk," "[s]he couldn't stand," and she was "writing sloppy, like if she was a 5- or 6-year-old." From the evidence showing that P.S. was unable to stand or write legibly in Gebreyohannes' presence while Abraha was registering for a motel room in which to have sex with her, the jury may have reasonably concluded that Gebreyohannes possessed the requisite state of mind to be guilty as a complicitor. *See People v. Foster*, 2013 COA 85, ¶ 45 ("A defendant's intent 'is usually discerned from

the circumstances surrounding the occurrence [of a crime].'" (quoting *Baker v. People*, 176 Colo. 99, 102, 489 P.2d 196, 197 (1971))).

¶ 35 Gebreyohannes contends that there was insufficient evidence to prove beyond a reasonable doubt that he had the requisite intent because his actions on December 1st were consistent with a belief that Abraha and P.S. intended to have consensual sex. We are not persuaded. The evidence showed that Gebreyohannes tried at least twice to go upstairs to the motel room; from this, the jury may have reasonably inferred that Gebreyohannes must not have believed that Abraha and P.S. intended to have, or were engaged in, consensual sex. The evidence also showed that Gebreyohannes tried to bypass the counter without acknowledging the clerk on two separate occasions. Additionally, the prosecution argued that Gebreyohannes could be seen turning his face away from the security camera in the lobby. From this evidence, the jury may have reasonably inferred that Gebreyohannes knew that he and Abraha were engaged in wrongdoing.

¶ 36 Additionally, the jury heard evidence that Gebreyohannes' testimony at trial was inconsistent with his initial statements to

investigators. In December 2013, Gebreyohannes told investigators that he went to the motel room because he needed to urinate. At trial, however, Gebreyohannes testified that he had a bowel movement in the motel room bathroom (trying to explain his prolonged visit to the motel room).

¶ 37 Accordingly, the evidence was sufficient to allow a reasonable jury to find Gebreyohannes guilty of sexual assault-means of sufficient consequence under a complicitor theory of liability. Because we reach this conclusion, we do not separately analyze whether there was sufficient evidence to find Gebreyohannes guilty of this charge as a principal. *See People v. Dunaway*, 88 P.3d 619, 622 (Colo. 2004) ("[W]hen a jury instruction includes two alternative factual theories of the same charged offense and the jury returns a general verdict of guilt, due process does not require reversal of that conviction merely because the evidence only supports one of the theories beyond a reasonable doubt." (citing *Griffin v. United States*, 502 U.S. 46 (1991))).

B. Sufficient Evidence Supported Gebreyohannes' Conviction for Unlawful Sexual Contact

1. Additional Background

¶ 38 The prosecution argued that Gebreyohannes was guilty of unlawful sexual contact as a principal based on evidence that he had touched P.S.'s breasts for a sexual purpose and not by accident. The prosecution relied on DNA evidence collected from P.S.'s breasts and from the towel and washcloth in the motel room bathroom to establish Gebreyohannes' culpability for unlawful sexual contact. Additionally, the prosecution relied on expert testimony to argue that Gebreyohannes' DNA had not been deposited in these locations through secondary DNA transfer.

¶ 39 The prosecution called Mary Schleicher, an expert in forensic biology and DNA analysis, to testify about the results of the tests conducted on DNA samples from P.S.'s breasts. Schleicher testified that the swab taken from P.S.'s right breast contained a mixture of DNA from two individuals, and that "[t]he major component of this

mixture matched Mr. Gebreyohannes."[2] She further testified that the likelihood of selecting an unrelated individual from the population with a DNA profile that matched Gebreyohannes and the sample from P.S. right breast was "1 in 380 quintillion." Schleicher also testified that the swab taken from P.S.'s left breast matched Gebreyohannes at fourteen of the sixteen locations tested. She testified that none of the DNA found on P.S.'s left breast could have been contributed by Abraha.

¶ 40 Additionally, the prosecution called Eric Duvall, an expert in forensic biology and DNA analysis, to testify about the results of DNA tests conducted on the towel and washcloth found in the motel room bathroom. Duvall testified that one area of the washcloth contained sperm from a single source with a DNA profile that matched Abraha. Duvall also testified that the DNA profile found on a separate area of the washcloth likely matched Abraha, P.S., and Gebreyohannes. He also testified that one area of the towel contained a mixture of DNA from at least three people, while

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[2] Schleicher explained that serological testing was not conducted to determine what type of biological material contributed the DNA sample found on P.S.'s right breast.

another area of the towel contained a DNA profile that likely matched P.S. and Gebreyohannes. Duvall testified that none of the DNA found on this second area of the towel could have been contributed by Abraha.

¶ 41 Duvall also testified about secondary DNA transfer. Duvall testified that secondary DNA transfer occurs "when DNA from an individual is transferred to another item through an intermediary where they don't have direct contact with that item." Addressing the likelihood of secondary DNA transfer, Duvall described a published study (the Cale Study) in which two people were instructed to vigorously shake hands with each other for two minutes. Afterward, each participant in the Cale Study then handled a different knife for one to two minutes. Duvall explained that the authors of the Cale Study then examined the frequency of secondary DNA transfer by seeing how often DNA appeared on each knife belonging to the person who never directly handled the knife. Duvall testified that "in 85 percent of the samples, so 17 out of 20 times, they observed a secondary transfer." Duvall further testified that twenty-five percent of the time "the person who was the secondary transfer person was the major or single source."

¶ 42 The prosecution then asked Duvall to compare the findings reported in the Cale Study to the evidence to describe the likelihood that Gebreyohannes' DNA could have been deposited on P.S.'s breasts, the towel, and the washcloth. Duvall testified that on sixty-seven percent of the items on which Gebreyohannes DNA had been found, Gebreyohannes was the major contributor or single source of the DNA.

2. Discussion

¶ 43 Gebreyohannes contends that the evidence was insufficient to support his conviction for unlawful sexual contact because the prosecution failed to establish that his DNA was transferred to P.S.'s breasts by sexual contact and not through secondary DNA transfer. Gebreyohannes also contends that the Duvall misrepresented the number of evidentiary items that had DNA from Gebreyohannes and P.S., but not Abraha. We conclude that sufficient evidence supported Gebreyohannes' conviction for unlawful sexual contact.

¶ 44 First, the evidence supported a reasonable inference that Gebreyohannes did not transfer his DNA to P.S.'s breasts through inadvertent, direct contact. The evidence established that when she

went up to the room, P.S. was wearing a shirt that covered her breasts. The nurse who performed P.S.'s SANE examination testified that she collected the breast swabs from P.S.'s "nipple and areola" areas, which would have been covered by her shirt up until P.S. became undressed. The evidence, therefore, supported an inference that Gebreyohannes' DNA was deposited on P.S.'s breasts either through direct contact in the motel room or through secondary DNA transfer.

¶ 45 Second, the jury may have reasonably rejected the defense's argument that Gebreyohannes' DNA was deposited on P.S.'s breasts through secondary DNA transfer. Gebreyohannes' DNA matched or could not be excluded from the DNA profiles found on six samples in evidence — including the samples from P.S.'s left breast, her right breast, her mouth, two areas on the towel, and the washcloth. While Duvall appeared to misstate how many samples showed Gebreyohannes to be the major or sole known male DNA contributor — Duvall testified that there were four such samples, while the record shows only three — the jury may have reasonably concluded that Gebreyohannes had sexual contact with P.S. without relying on Duvall's characterization of the DNA evidence.

¶ 46 The DNA evidence supported an inference that secondary DNA transfer resulting in Gebreyohannes being identified as the major contributor or the sole known male contributor would have needed to occur twice as frequently (in fifty percent of the evidentiary samples containing his DNA) as reported in the Cale Study (twenty-five percent) in order to explain the presence of Gebreyohannes' DNA on P.S.'s breasts and the towel. *See People v. Kessler*, 2018 COA 60, ¶ 12 ("[I]f there is evidence upon which one may reasonably infer an element of the crime, the evidence is sufficient to sustain that element . . . ." (quoting *People v. Chase*, 2013 COA 27, ¶ 50)).

¶ 47 Alternatively, the jury may have reasonably concluded that secondary DNA transfer was not responsible for the presence of Gebreyohannes' DNA on P.S.'s breasts for other reasons without relying on Duvall's testimony. *See id.* For instance, the evidence established that Abraha — through whom Gebreyohannes argued that his DNA was transferred to P.S. — was excluded as a contributor to the DNA sample from P.S.'s left breast. Additionally, the secondary DNA transfer rates reported in the Cale Study were based on a level of sustained physical contact — up to two minutes

of vigorous handshaking — that had not occurred between Gebreyohannes and Abraha before Abraha had sex with P.S.

¶ 48 Accordingly, the evidence was sufficient to allow a reasonable jury to find Gebreyohannes guilty of unlawful sexual contact. *See Serra*, ¶ 18 (when reviewing the sufficiency of the evidence, the evidence must be "viewed as a whole and in a light most favorable to the prosecution").

C. The Trial Court Abused Its Discretion By Refusing to Qualify the Defense's Witness as an Expert in DNA Testing and Analysis

1. Additional Background

¶ 49 Gebreyohannes timely endorsed forensic scientist Richard Eikelenboom as "an expert in DNA testing." Eikelenboom submitted an expert report in which he provided opinions on subjects including deficiencies in the DNA testing and analysis, and circumstances that may have led to Gebreyohannes' and Abraha's respective DNA being deposited on evidentiary items, including the possibility of secondary DNA transfer.

¶ 50 Before trial, the prosecution filed a motion in limine to limit Eikelenboom's testimony to the scope of his endorsement. The prosecution sought to exclude testimony regarding numerous

opinions in his report as outside the scope of his endorsement. For example, the prosecution sought to preclude Eikelenboom from testifying regarding certain opinions in his report that the prosecution argued lacked any foundation in the evidence.

¶ 51 The trial court heard argument on the motion before jury selection. Counsel for Abraha agreed with the prosecution that Eikelenboom's report contained some opinions outside the scope of his endorsement, but argued that Eikelenboom could properly opine on subjects within the scope of his endorsement. For example, counsel argued that "we have a right to bring out from the DNA expert [Eikelenboom] that there is a possibility of secondary transfer based on the experience that [Eikelenboom] has." The trial court denied the prosecution's motion in part, noting that the prosecution could cross-examine Eikelenboom at trial to dispute conclusions within his area of expertise with which they disagreed.

¶ 52 On the penultimate day of trial, Gebreyohannes called Eikelenboom to testify and asked the trial court to qualify him as "an expert in DNA report analysis, analyzing the reports of others and reviewing those reports." The prosecutor objected and requested voir dire as to Eikelenboom's qualifications.

¶ 53 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."

¶ 54 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."[3]

¶ 55 After asking Eikelenboom several leading 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 struck.

¶ 56 Defense counsel for Abraha then engaged in an additional round of voir dire with Eikelenboom, eliciting from Eikelenboom that he 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.

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[3] Eikelenboom also testified that IFS had not received accreditation from the American Society for Crime Lab Directors (ASCLD) but that accreditation was expected soon. Later that day, the defense made an offer of proof regarding Eikelenboom's qualifications, representing to the trial court that IFS had, in fact, received accreditation from ASCLD. The trial court, however, declined to revisit its earlier decision.

¶ 57 Regarding Eikelenboom's qualifications, the trial court stated at a bench conference that, "every time the foundation has been laid, [the prosecutor] has gotten up and voir dired and challenged that. So that's where we are. She has put forth a challenge." Defense counsel for Abraha responded, "I believe that the questions that we've asked and that he's answered negative the disqualification of him on that narrow issue." The prosecutor, in turn, argued that, "if an unqualified person gets accepted by the Court and then that replicates itself, that doesn't make it okay for the person to be recognized as an expert *ad infinitum*."

¶ 58 The trial court then informed the parties that Eikelenboom would not be qualified as an expert, stating:

> Well, I requested more – a foundation be given after the People's cross-examination, -- or voir dire cross-examination. And then the – it changed. And then we came back with more qualification and then a cross-examination. So at this point, the People's objection for expert testimony is sustained.

¶ 59 When the prosecutor requested clarification, the trial court confirmed that its ruling precluded Eikelenboom from testifying at trial. Defense counsel for Abraha then stated that he wanted to "put . . . on the record" that "Mr. Eikelenboom is an essential part

of this defense." The trial court made no further findings regarding its exclusion of Eikelenboom's testimony.

¶ 60 Eikelenboom then stepped down from the witness stand, and the defense called its next witness.[4]

2. Preservation and Standard of Review

¶ 61 We review the trial court's exclusion of expert testimony for an abuse of discretion. *People v. Douglas*, 2015 COA 155, ¶ 58.

¶ 62 The People dispute whether Gebreyohannes preserved his claim that the trial court erroneously excluded Eikelenboom's testimony. Gebreyohannes' counsel did not object to the ruling, and the People argue that counsel for Abraha could not preserve the claim on Gebreyohannes' behalf. The People further argue that counsel's statement that "Mr. Eikelenboom is an essential part of this defense" was insufficiently specific to draw the trial court's attention to the asserted error. We conclude that the issue was preserved.

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[4] The prosecution later filed a "submission to complete the record on court's ruling rejecting qualification of Richard Eikelenboom as an expert."

¶ 63 Notwithstanding that the statement came from counsel for Abraha, the objection that Eikelenboom was "an essential part of th[e] defense" gave the trial court "a meaningful chance to prevent or correct the error and create[] a record for appellate review." *People v. Tardif*, 2017 COA 136, ¶ 10 (quoting *Martinez v. People*, 2015 CO 16, ¶ 14); *see also People v. Heisler*, 2017 COA 58, ¶ 42 ("[W]e do not require that parties use 'talismanic language' to preserve particular arguments for appeal . . . ." (quoting *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004))). Thus, we conclude that the claim was preserved.

¶ 64 The parties also disagree whether this issue is reviewed for constitutional or non-constitutional harmless error. *See Hagos v. People*, 2012 CO 63, ¶¶ 11-12 (holding that "trial errors of constitutional dimension that were preserved by objection . . . require reversal unless the reviewing court is 'able to declare a belief that [the error] was harmless beyond a reasonable doubt,'" whereas "nonconstitutional trial errors that were preserved by objection" require reversal "only if the error affects the substantial rights of the parties" (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967))). On the one hand, the supreme court has held that "[b]ecause a

criminal defendant has the right to call witnesses in his defense, abridgement of that right is subject to a constitutional harmless error analysis." *Golob v. People*, 180 P.3d 1006, 1013 (Colo. 2008); *see also People v. Williams*, 790 P.2d 796, 798 (Colo. 1990) ("A decision 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.") (citation omitted). On the other hand, the supreme court has also held that exclusion of evidence is of constitutional dimension "only where the defendant was denied virtually his only means of effectively testing significant prosecution evidence," *Krutsinger v. People*, 219 P.3d 1054, 1062 (Colo. 2009), and here, the People point out, Gebreyohannes had the opportunity to test the State's DNA experts through cross-examination. But because we ultimately conclude that the exclusion of Eikelenboom's testimony does not survive the more forgiving nonconstitutional harmless error standard, we do not need to definitively resolve which standard of reversal applies.

3. Legal Principles

¶ 65 Pursuant to CRE 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The trial court determining whether to qualify a witness as an expert must consider whether (1) the scientific principles underlying his or her testimony are reliable; (2) the expert is qualified to provide an opinion on the subject; and (3) the expert's testimony will be helpful to the jury; and (4) the testimony comports with CRE 403. *See People v. Campbell*, 2018 COA 5, ¶ 40.

¶ 66 "[T]here is no requirement that a witness hold a specific degree, training certificate, accreditation, or membership in a professional organization, in order to testify on a particular issue." *Douglas*, ¶ 71 (quoting *Huntoon v. TCI Cablevision of Colo., Inc.*, 969 P.2d 681, 690 (Colo. 1998)). The witness, however, must provide "an understandable explanation of his [or her] qualifications." *Id.* (quoting *People v. Tidwell*, 706 P.2d 438, 439 (Colo. App. 1985)).

¶ 67 When the trial court excludes expert testimony under CRE 702, it "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).

4. Discussion

¶ 68 Gebreyohannes contends that Eikelenboom could have been qualified under any of the five factors set forth in CRE 702, and that the prosecution's challenges to his qualifications during voir dire went to the weight of his testimony, not its admissibility. The People contend the trial court acted within its discretion because Eikelenboom failed during voir dire to provide an understandable explanation for his qualifications. Specifically, the People argue that Eikelenboom was unable to explain how he became qualified to perform DNA testing and analysis at IFS from 2005 onward when he was not qualified to perform that same work at NFI from 1998 until 2005.

¶ 69 We conclude that the trial court's refusal to qualify Eikelenboom as an expert, thereby excluding his testimony, was an abuse of discretion because the trial court made no findings in support of its ruling. And we further conclude that the error

requires reversal because (1) the subject matter of Eikelenboom's testimony was central to Gebreyohannes' theory of defense; and (2) the timing of the ruling — coming after the defense had concluded its cross-examination of the prosecution's DNA experts — amplified the prejudice to Gebreyohannes by preventing him from presenting a meaningful challenge to the prosecution's theory that DNA evidence established Gebreyohannes' guilt. We address each conclusion in turn below.

¶ 70 First, the trial court erroneously excluded Eikelenboom's testimony without making findings or providing an explanation. *Shreck* holds that "a trial court's CRE 702 determination must be based upon specific findings on the record as to the helpfulness and reliability of the evidence proffered." 22 P.3d at 78. Here, the trial court generally referenced the prosecution's voir dire examination of Eikelenboom as grounds for its ruling, but the record shows that Eikelenboom disputed the premise of many of the prosecution's leading questions during voir dire. Defense counsel's voir dire examination of Eikelenboom was also responsive to the concerns raised by the prosecution with respect to Eikelenboom's qualifications. And it was undisputed that Eikelenboom had been

previously qualified as a DNA expert on multiple occasions in criminal trials in Colorado.

¶ 71 But our ability to review the trial court's implicit conclusion — that Eikelenboom was not qualified to offer expert testimony — is substantially impaired by the absence of any findings by the trial court concerning Eikelenboom's credibility or resolving the factual disputes in the record. These findings are all the more necessary when the proffered expert witness has been previously qualified by other trial courts as an expert in the same general subject matter. Make no mistake, we are *not* saying that once an expert has been qualified by a court in this state, that expert is presumptively qualified in all future proceedings; instead, we simply observe that explicit findings are even more critical when a court declines to qualify an expert who has an established track record of being accepted as an expert in a particular field. Simply put, absent findings by the trial court, we cannot discern a basis for the trial court to conclude that Eikelenboom was not qualified by education, training, or experience to offer opinion testimony under CRE 702. Thus, the trial court abused its discretion by excluding Eikelenboom's testimony without supporting its ruling with findings

in the record. *Cf. People v. Lanari*, 926 P.2d 116, 121 (Colo. App. 1996) (The trial court's exclusion of expert testimony was not an abuse of discretion where trial court "set forth in great detail its findings as to the scope and content of the expert's proposed testimony.").

¶ 72 Furthermore, we conclude that reversal is required because the trial court's erroneous exclusion of Eikelenboom's testimony likely affected the fairness of Gebreyohannes' trial. *See Hagos*, ¶ 12. At trial, five prosecution witnesses were qualified by the trial court as experts in DNA analysis and forensic biology and allowed to provide opinions about the DNA evidence. And the jury could have relied on the DNA evidence and testimony from the prosecution's DNA experts regarding that evidence to find Gebreyohannes guilty of both crimes as a principal.

¶ 73 Indeed, the DNA evidence was central to the prosecution's argument that Gebreyohannes had unlawful sexual contact with P.S. The prosecution argued that the presence of Gebreyohannes' DNA on P.S.'s breasts and around her mouth established that he had touched P.S. in the motel room. And the prosecution's assertion that Gebreyohannes had touched P.S. was not directly

supported by any other evidence; P.S. did not recall seeing Gebreyohannes in the motel room, while Gebreyohannes insisted that he had only used the bathroom and had not seen or touched P.S. while in the motel room.

¶ 74 The DNA evidence could have also supported Gebreyohannes' conviction for sexual assault as a principal. The jury was instructed that it could find Gebreyohannes guilty of sexual assault (means of sufficient consequence) as either a complicitor or a principal. And from the DNA evidence showing that Gebreyohannes was the major or sole known male contributor to the DNA samples taken from P.S.'s breasts and that he could not be excluded from the sample taken from around her mouth, the jury could have reasonably concluded that Gebreyohannes had penetrative sex[5] with P.S. Eikelenboom's testimony was, therefore, relevant to rebut DNA evidence that the jury may have relied upon to support both of Gebreyohannes' convictions.

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[5] "Sexual penetration" includes, among other things, intercourse or fellatio. § 18-3-401(6), C.R.S. 2018.

¶ 75 Finally, the prejudice to Gebreyohannes was amplified by the timing of the trial court's ruling. The prosecution's motion in limine sought only to limit Eikelenboom's testimony to his endorsed area of expertise — DNA testing. When the trial court heard argument on the opening day of trial regarding the prosecution's motion, defense counsel reiterated that Eikelenboom would testify as a DNA expert about the possibility that Gebreyohannes' DNA was deposited on items in evidence through secondary DNA transfer. Until the penultimate day of trial, the prosecution gave no indication that it would seek to prevent Eikelenboom from testifying within his endorsed area of expertise. Gebreyohannes, therefore, may have reasonably expected that Eikelenboom would be qualified without objection as a DNA expert. Given this expectation that he would have testimony from his own DNA expert to rebut the prosecution's experts, Gebreyohannes possibly — and understandably so — approached the cross-examination of the prosecution's expert witnesses quite differently than he would have had he known he would not be permitted to offer rebuttal testimony. In other words, Gebreyohannes' cross-examination of the prosecution's experts on issues such as secondary DNA transfer

may well have been truncated in anticipation of being able to make these points during Eikelenboom's forthcoming testimony.

¶ 76 In short, we conclude that the trial court's error requires reversal of Gebreyohannes' convictions for both unlawful sexual contact and sexual assault-means of sufficient consequence. Gebreyohannes' conviction for unlawful sexual contact must be reversed because the jury may have reasonably relied on the DNA evidence about which Eikelenboom was precluded from testifying as grounds to conclude that Gebreyohannes touched P.S. for a sexual purpose.

¶ 77 Gebreyohannes' conviction for sexual assault-means of sufficient consequence must also be reversed even though the prosecution's primary theory at trial was that Gebreyohannes was guilty of sexual assault as a complicitor based upon his actions to help Abraha transport P.S. to the motel and upstairs to the room. Even though the prosecution principally argued that Gebreyohannes was guilty as a complicitor, the jury was instructed that it could find him guilty for the sexual assault as either a complicitor or as a principal. And because the jury returned a general verdict, we cannot determine whether the jury reached its

guilty verdict on the theory that Gebreyohannes acted as a principal or instead based on a complicitor theory of culpability. Without knowing whether the jury convicted Gebreyohannes as a principal or a complicitor, we cannot conclude that the trial court's erroneous exclusion of Eikelenboom's testimony was harmless. *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))); *cf. People v. Mendenhall*, 2015 COA 107M, ¶ 51 (deciding instructional error not harmless beyond a reasonable doubt because it could not be determined whether the jury convicted the defendant based upon a theory of liability that was affected by the instructional error or based upon an alternative theory of liability). We must, therefore, set aside the verdict.

D. Prosecutorial Misconduct

¶ 78 We do not reach Gebreyohannes' unpreserved contentions of prosecutorial misconduct because we reverse and remand for a new trial for the reasons set forth in Part II.C.4, and Gebreyohannes'

contentions of misconduct are unlikely to arise again in the same posture on remand.

III. Conclusion

¶ 79 For these reasons, we reverse the trial court's judgment of conviction and remand the case to the trial court for a new trial.

JUDGE RICHMAN and JUDGE NAVARRO concur.