ADVANCE SHEET HEADNOTE
June 23, 2025

2025 CO 43

No. 23SC776, *People v. Schnorenberg*—Securities Fraud—Evidence—Jury Instructions.

This securities fraud proceeding requires the supreme court to determine whether the court of appeals division below misconstrued the law in concluding that the trial court had reversibly erred in excluding the defendant's testimony and rejecting a defense-tendered jury instruction about the advice of counsel. This question, in turn, requires the court to decide whether the mens rea of "willfully" applies to each element of securities fraud under subsections 11-51-501(1)(b) and (c), C.R.S (2024), of the Colorado Securities Act.

The court now concludes that the mens rea of "willfully," which, for purposes here, is synonymous with "knowingly," applies to every element under subsections 11-51-501(1)(b) and (c). As a result, the court further concludes that the defendant's proffered testimony about the advice of his counsel was relevant to whether he had the requisite mens rea and that, therefore, the trial court reversibly erred in excluding this testimony.

The court therefore affirms the judgment of the division below and remands this case for a new trial on the counts at issue.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2025 CO 43

Supreme Court Case No. 23SC776
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA223

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Kelly James Schnorenberg.

Judgment Affirmed
en banc
June 23, 2025

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JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE BOATRIGHT**, **JUSTICE HOOD**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 In this securities fraud case, we granted certiorari to determine whether the court of appeals division below misconstrued the law in concluding that the trial court had reversibly erred by limiting defendant Kelly James Schnorenberg's testimony, and not giving a defense-tendered jury instruction, about the advice of counsel. This question, in turn, requires us to decide whether the mens rea of "willfully" applies to each element of securities fraud under subsections 11-51-501(1)(b) and (c), C.R.S. (2024), of the Colorado Securities Act ("CSA").

¶2 We now conclude that the mens rea of "willfully," which, for purposes here, is synonymous with "knowingly," applies to every element under subsections 11-51-501(1)(b) and (c). Accordingly, to convict a defendant under subsection 11-51-501(1)(b), the People must prove, among other things, that the defendant knew that the false statement or omitted fact at issue was material. Likewise, under subsection 11-51-501(1)(c), the People must prove that the defendant knew that their act, practice, or course of business operated or would operate as a fraud or deceit on another person. As a result, we further conclude that Schnorenberg's proffered testimony about the advice of his counsel was relevant to whether he had the requisite mens rea and that, therefore, the trial court reversibly erred in excluding this testimony.

¶3 Accordingly, we affirm the judgment of the division below and remand this case for a new trial on the counts at issue.

I. Facts and Procedural History

¶4 In 2008, Schnorenberg formed KJS Marketing, Inc. to secure funding and recruit agents for insurance companies. Between 2009 and 2015, KJS solicited over $15 million from approximately 250 investors. Pursuant to investment agreements and promissory notes between KJS and these investors, the investors provided Schnorenberg with funding with the understanding that they would be repaid at 12% interest per year.

¶5 In soliciting these investments, Schnorenberg did not inform his investors that the Colorado Division of Securities had sued him, that he had been permanently enjoined from selling investments and securities in Colorado, or that he had filed for bankruptcy five years before forming KJS. He also did not inform his investors that he had failed to repay prior investors; his companies had carried large debt loads; civil judgments had been entered against him and his companies for unpaid debts, and he had not satisfied those judgments; some of his companies had failed; and he had failed to provide his prior investors with quarterly and annual financial statements for his companies.

¶6 Schnorenberg was subsequently charged with, among other things, twenty-five counts of securities fraud under section 11-51-501. Twenty-four of

these counts were premised on materially false statements or material omissions under subsection 11-51-501(1)(b), and one was premised on a fraudulent course of business under subsection 11-51-501(1)(c).

¶7 As pertinent here, Schnorenberg planned to defend against these charges by arguing that he had acted in good faith reliance on the advice of his securities lawyer, Hank Schlueter. To this end, Schnorenberg intended to call Schlueter as a witness, but Schlueter was due to be out of the country for the duration of Schnorenberg's trial. Accordingly, Schnorenberg moved for a continuance so that Schlueter could appear. The trial court, however, denied this motion, and the case proceeded to trial.

¶8 On the first day of trial, Schnorenberg again moved for a continuance, asserting that he needed Schlueter's testimony for his defense. The People opposed this motion, and the trial court denied it.

¶9 Trial thus commenced, and Schnorenberg, who testified in his own defense, sought to testify regarding the advice that Schlueter had given him. Specifically, on direct examination, Schnorenberg's defense attorney asked him if he had consulted with his securities lawyer as to "whether the bankruptcy or the injunctions were material in that they needed to be disclosed to anybody." The People objected on relevance grounds, but the court overruled that objection. Defense counsel then asked Schnorenberg whether, based on his conversations

with his securities attorney, he believed he was required to make the foregoing disclosures. The People again objected, this time on hearsay grounds. Defense counsel responded that the proffered testimony was being offered solely for its effect on Schnorenberg as the listener (i.e., not for the truth of the matter asserted). The court, however, sustained the People's hearsay objection.

¶10 Subsequently, defense counsel proposed a limiting instruction that would have confirmed that the foregoing proffered testimony was being offered for "the limited purpose of showing the effect of the attorney's advice on Mr. Schnorenberg." The court, however, denied the request for this limiting instruction, adhering to its original ruling excluding this testimony on hearsay grounds. As a result, Schnorenberg could not testify as to the specific advice that Schleuter had given him. Instead, he was limited to testifying, in general terms, that he had acted after obtaining advice from counsel.

¶11 Notwithstanding the foregoing restrictions on his evidence, Schnorenberg requested that the court instruct the jury, as part of its final charge, that "[i]n determining whether Mr. Schnorenberg acted willfully, you may consider the evidence as it relates to good faith reliance on the advice of counsel." The court, however, refused to give this proposed instruction, and Schnorenberg was eventually convicted on the twenty-five counts on which he was tried.

¶12 Schnorenberg then appealed, and a unanimous division of the court of appeals vacated seven of his convictions as time-barred, reversed the remaining convictions, and remanded the case for further proceedings. *People v. Schnorenberg*, 2023 COA 82, ¶¶ 1, 6, 541 P.3d 1, 3–4. As to the non-time-barred convictions, which are the charges now before us, the division concluded that the trial court had erred in preventing Schnorenberg from testifying as to the advice that he had received from his securities lawyer regarding the disclosures that he needed to make to prospective investors. *Id.* at ¶ 6, 541 P.3d at 4. In reaching this conclusion, the division observed that a defendant's good faith reliance on the advice of counsel could negate the mens rea element of the securities fraud counts at issue. *Id.* at ¶¶ 20–22, 541 P.3d at 6–7. The division further determined that Schnorenberg's proffered testimony regarding the advice that he had received from counsel was not hearsay, and, regarding CRE 403, which the People raised for the first time on appeal, the division opined that even had a CRE 403 objection been preserved, that rule did not support the exclusion of such testimony. *Id.* at ¶¶ 27–35, 541 P.3d at 7–9. Accordingly, the division concluded that the trial court had erred in excluding Schnorenberg's proffered testimony regarding the advice of his counsel. *Id.* at ¶ 35, 541 P.3d at 8–9.

¶13 Having so decided, the division proceeded to consider whether the trial court had also erred in declining to instruct the jury that good faith reliance on the

advice of counsel was relevant to whether Schnorenberg had acted willfully. *Id.* at ¶ 36, 541 P.3d at 9. The division concluded that it had and that the foregoing errors were not harmless and required reversal. *Id.* at ¶¶ 36–39, 541 P.3d at 9.

¶14 The People then petitioned this court for a writ of certiorari, and we granted their petition.

II. Analysis

¶15 We begin by setting forth the applicable standard of review. We then address whether the trial court erred in excluding Schnorenberg's testimony about the advice of his counsel and conclude that it did and that this error was not harmless. Finally, because the issue is likely to arise again on remand, we address whether Schnorenberg is entitled to a jury instruction advising the jurors that, in determining whether Schnorenberg acted willfully, they may consider good faith reliance on the advice of counsel.

A. Standard of Review

¶16 We review a trial court's ruling on the admissibility of evidence for an abuse of discretion, *Bly v. Story*, 241 P.3d 529, 535 (Colo. 2010), but we review legal questions de novo, *Clark v. People*, 2024 CO 55, ¶ 65, 553 P.3d 215, 230. A trial court abuses its discretion when its ruling is "manifestly arbitrary, unreasonable, or unfair, or based on a misapprehension of the law." *Cath. Health Initiatives Colo. v. Earl Swensson Assocs., Inc.*, 2017 CO 94, ¶ 8, 403 P.3d 185, 187.

¶17 The issue of the admissibility of Schnorenberg's testimony requires us to determine the elements of securities fraud under subsections 11-51-501(1)(b) and (c) to which the mens rea of "willfully" applies. This is a matter of statutory construction that we review de novo. *See People v. Cross*, 127 P.3d 71, 73–74 (Colo. 2006), *abrogated on other grounds by Counterman v. Colorado*, 600 U.S. 66, 77–78 (2023).

¶18 Lastly, we review de novo whether a jury instruction correctly states the law, and we review a trial court's decision as to whether to give a particular instruction for an abuse of discretion. *Day v. Johnson*, 255 P.3d 1064, 1067 (Colo. 2011).

B. Advice-of-Counsel Testimony

¶19 The People concede that Schnorenberg's testimony regarding the advice of his counsel was not hearsay, as the trial court had ruled. The People nonetheless contend that the trial court did not err in excluding this evidence because it was not relevant under CRE 401. Specifically, the People assert that the testimony was not relevant because, in their view, the good faith reliance on the advice of counsel is not a defense to the crime of securities fraud. We are not persuaded.

¶20 Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401. CRE 401 thus

encompasses two requirements: materiality and probative value. *Fletcher v. People*, 179 P.3d 969, 974 (Colo. 2007). To be material, evidence must relate to a fact of consequence to the determination of the case. *Id.* This, in turn, requires a court to consider the elements of the offense charged. *Id.* Evidence is probative if it has "a tendency to prove the proposition for which it is offered." *Id.*

¶21 Subsection 11-51-501(1)(b) provides:

> It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading . . . .

¶22 Subsection 11-51-501(1)(c), in turn, provides, "It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly . . . [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

¶23 As charged here, the requisite mental state for violations of subsections 11-51-501(1)(b) and (c) is "willfully." § 11-51-603(1), C.R.S. (2024); *accord People v. Riley*, 708 P.2d 1359, 1365 (Colo. 1985); *People v. Blair*, 579 P.2d 1133, 1137 (Colo. 1978). "Willfully" is synonymous with "knowingly," and a person acts willfully or knowingly with respect to conduct or a circumstance at issue "when he is aware that his conduct is of such nature or that such circumstance exists." § 18-1-501(6),

C.R.S. (2024); *see also Riley*, 708 P.2d at 1365 (noting that the Colorado Criminal Code equates the culpable states of "willfully" and "knowingly").

¶24 The dispute before us concerns the elements of securities fraud to which the mens rea of "willfully" applies. The People contend that it applies only to the acts of making an untrue statement or omitting facts within the meaning of subsection 11-51-501(1)(b), or to a defendant's conducting an act, practice, or course of business under subsection 11-51-501(1)(c). Schnorenberg responds that "willfully" also applies to the element of materiality under subsection 11-51-501(1)(b) and to the element of fraud or deceit under subsection 11-51-501(1)(c). Thus, in his view, the People were required to prove that he knew that his allegedly false statements and omitted information were material and that he knew that his act, practice, or course of business was fraudulent or deceitful. We agree with Schnorenberg.

¶25 Section 18-1-503(4), C.R.S. (2024), provides, "When a statute defining an offense prescribes as an element thereof a specified culpable mental state, that mental state is deemed to apply to every element of the offense unless an intent to limit its application clearly appears." We perceive no such intent in subsections 11-51-501(1)(b) or (c). Nor do the People point to language in those provisions indicating such an intent. Accordingly, we conclude that the mens rea of "willfully" applies to each element of the offenses defined by section 11-51-501(1).

Thus, to be convicted under subsection 11-51-501(1)(b), the defendant (1) must have knowingly made an untrue statement of a material fact or omitted a material fact necessary to make a statement made, in light of the circumstances under which it was made, not misleading; *and* (2) must have known that the untrue statement or omitted fact was material. Similarly, to be convicted under subsection 11-51-501(1)(c), the defendant must have knowingly engaged in an act, practice, or course of business *and* must have known that this conduct would operate as a fraud or deceit on another person.

¶26 The question thus becomes whether, in light of our conclusion that the mens rea of "willfully" applies to each element of the offense of securities fraud, a defendant's reliance on advice of counsel is relevant in a securities fraud prosecution. We conclude that it is.

¶27 As many courts have concluded, the good faith reliance on the advice of counsel tends to negate a finding that a defendant had the requisite mens rea for securities fraud. *See, e.g.*, *SEC v. Snyder*, 292 F. App'x 391, 406 (5th Cir. 2008) (unpublished opinion); *Howard v. SEC*, 376 F.3d 1136, 1147–48, 1147 n.19 (D.C. Cir. 2004); *Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1961); *People v. Hoover*, 165 P.3d 784, 792 (Colo. App. 2006). Specifically, in the context of subsection 11-51-501(1)(b), good faith reliance on the advice of counsel could negate a finding that a defendant knowingly misstated or omitted a *material* fact. *See People v.*

Terranova, 563 P.2d 363, 365–67 (Colo. App. 1976); *cf. United States v. Peterson*, 101 F.3d 375, 381–82, 381 n.5 (5th Cir. 1996) (affirming the district court's issuance of a jury instruction that stated, in pertinent part, "To decide whether such reliance [on the advice of counsel] was in good faith, you may consider whether the Defendant sought the advice of a competent attorney *concerning the material fact allegedly omitted or misrepresented*"). A fact is material "if there is a substantial likelihood that a reasonable investor would consider the matter important in making an investment decision." *Goss v. Clutch Exch., Inc.*, 701 P.2d 33, 36 (Colo. 1985).

¶28 Accordingly, we conclude that good faith reliance on the advice of counsel is a relevant consideration for the jury in evaluating whether a defendant acted willfully with respect to the materiality requirement of subsection 11-51-501(1)(b). *See Howard*, 376 F.3d at 1147. Likewise, a defendant who relied on counsel's advice that a course of business was not fraudulent may not have had the requisite mens rea for conviction under subsection 11-51-501(1)(c) (because they might not have known that they were defrauding or deceiving someone). *See Hoover*, 165 P.3d at 792 ("Advice of counsel is relevant to the fraudulent practices aspect of a securities charge if a defendant can show that he or she relied in good faith on advice that his or her actions were legal, to show lack of scienter."); *see also Snyder*, 292 F. App'x. at 406 ("[R]eliance on counsel's advice is not an affirmative

defense. . . . Rather, '[i]t is simply a means of demonstrating good faith and represents possible evidence of an absence of any intent to defraud.'") (second alteration in original) (quoting *Peterson*, 101 F.3d at 381). (*Hoover*'s reference to a mens rea of scienter, as opposed to willfulness, does not change the outcome here because our decision rests on the fact that "willfully" applies to every element of the offense, not on any distinction between willfulness and scienter.)

¶29 This conclusion comports with our decision in *Riley*, 708 P.2d at 1364–65. There, we determined that the trial court had erred in instructing the jury that good faith is not a defense to securities fraud. *Id.* We explained that such an instruction was improper because it created a substantial risk that a jury would convict a defendant under the precursor to subsection 11-51-501(1)(b) "even if the defendant made false or misleading statements in the good faith belief that they were true." *Id.* at 1365. The instruction created a similar risk of conviction under the precursor to subsection 11-51-501(1)(c), "even if the defendant in good faith believed the practice or course of business was not fraudulent or deceitful." *Id.* Thus, we explained that to convict a defendant under the precursor to subsection 11-51-501(1)(b), the prosecution was required to prove, beyond a reasonable doubt, that the defendant "was *aware* that he was making an untrue statement of material fact or was *aware* that he omitted to state a material fact necessary to make the statement not misleading in light of the circumstances under which it was

made." *Id.* And we explained that to convict a defendant under the precursor to subsection 11-51-501(1)(c), the prosecution was required to prove, beyond a reasonable doubt, that the defendant "was *aware* that he was engaging in an act or practice that would operate as a fraud or deceit upon any person." *Id.*

¶30 Longstanding precedent from divisions of our court of appeals is in accord. *See Hoover*, 165 P.3d at 792; *see also Terranova*, 563 P.2d at 366 ("[A]dvice of counsel is relevant to the fraudulent practices charge (Count 3), and Terranova should be entitled to show, if he can, that he sold the securities based upon his good faith reliance on such advice that he could do so legally.").

¶31 And our conclusion comports with federal courts' interpretation of the federal securities law analogues to our state securities laws. *See, e.g.*, 17 C.F.R. § 240.10b-5 (2025). This is pertinent here because the CSA states that its provisions "shall be coordinated" with the federal acts, statutes, and regulations to which Colorado securities laws refer, to the extent coordination is consistent with the purposes and provisions of those Colorado laws. § 11-51-101(3), C.R.S. (2024); *see also Cagle v. Mathers Fam. Tr.*, 2013 CO 7, ¶ 19, 295 P.3d 460, 467 (noting that federal authorities are "highly persuasive" when the language of the federal enactments parallels that of Colorado state securities laws) (quoting *Lowery v. Ford Hill Inv. Co.*, 556 P.2d 1201, 1204 (Colo. 1976)).

¶32 Here, 17 C.F.R. § 240.10b-5 and section 11-51-501(1) are nearly identical. Accordingly, we may look to federal precedent, and federal courts have consistently held that the advice of counsel is relevant to the issue of mens rea in securities fraud prosecutions. *See, e.g.*, *United States v. Bush*, 626 F.3d 527, 540 (9th Cir. 2010); *Howard*, 376 F.3d at 1147; *Peterson*, 101 F.3d at 381. For these reasons as well, we conclude that Schnorenberg's testimony concerning the advice of his counsel was relevant and, therefore, the district court erred in excluding it.

¶33 We are not persuaded otherwise by the People's assertion that this conclusion is contrary to our decision in *Blair*, 579 P.2d at 1138–40. In *Blair*, 579 P.2d at 1138–39, we concluded that "specific intent" is not required to prove securities fraud under Colorado law, to the extent that "specific intent" would require a defendant to have purposely intended to violate the law. We hastened to add, however, that in this context, the use of the term "specific intent" confuses matters. *Id.* at 1139. We therefore disapproved of the use of that term, making clear that, as pertinent here, the mens rea should be phrased in terms of "willfully" or "knowingly." *Id.*

¶34 Nowhere in *Blair* did we say that "willfully" applies only to the act of making a false statement or omission and not to the materiality requirement. And although we said that good faith was not a proper defense in that case, we made that statement in the context of rejecting a defense-tendered jury instruction that

would have provided that good faith was an *absolute* defense to securities fraud. *Id.* As noted above, although good faith reliance on the advice of counsel is not an absolute defense, it may be relevant to the issue of the defendant's mens rea.

¶35 For several reasons, we likewise are unpersuaded by the People's contention that we should not follow federal case law because the mens rea requirement under federal law is "scienter," which, according to the People, means "intent to deceive, manipulate or defraud," rather than "willfully."

¶36 First, notwithstanding the People's suggestion to the contrary, federal courts have not uniformly interpreted the term "scienter." *Compare Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976) (defining scienter as "a mental state embracing intent to deceive, manipulate, or defraud"), *with Rehaif v. United States*, 588 U.S. 225, 229 (2019) (defining scienter as requiring "the degree of knowledge sufficient to 'mak[e] a person legally responsible for the consequences of his or her act or omission'") (alteration in original) (quoting *Scienter*, Black's Law Dictionary (10th ed. 2014)).

¶37 Second, whether or not federal law and Colorado law require a different mens rea for securities fraud is immaterial because, as we have explained, the principal reason that evidence regarding the advice of counsel is relevant here is the fact that, under Colorado law, "willfully" applies to every element of subsections 11-51-501(1)(b) and (c), including the element of materiality.

¶38 Finally, we are unpersuaded by the People's contention that our conclusion would recognize a mistake of law defense to securities fraud, notwithstanding the fact that a mistake of law defense is recognized only in limited circumstances. *See* § 18-1-504(2), C.R.S. (2024). Essentially, the People argue that our conclusion would shield a defendant whose attorney told him that his actions were legal. This is incorrect. A mistake of law generally refers to "[a] sincere but mistaken belief as to whether particular conduct constitutes an offense." *People v. Bossert*, 722 P.2d 998, 1008 (Colo. 1986). Here, it is immaterial whether Schnorenberg believed that his conduct was lawful; the question is whether he knew that any false statements or omitted information was material. Accordingly, notwithstanding the People's assertion to the contrary, our conclusion in this case does not recognize a mistake of law defense.

C. CRE 403

¶39 The People next contend that the trial court excluded Schnorenberg's testimony "due to several concerns that fall under the umbrella of CRE 403" and that we should reverse the division's decision on CRE 403 grounds. We again disagree.

¶40 As an initial matter, we question whether the trial court, in fact, relied on CRE 403 in excluding Schnorenberg's testimony. As noted above, the trial court explicitly ruled on hearsay grounds, which the People now concede was error.

¶41 Even had the trial court ruled on CRE 403 grounds, however, we are not persuaded that the division erred in refusing to affirm the trial court on that basis.

¶42 CRE 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." CRE 403 "strongly favors the admission of relevant evidence." *People v. Greenlee*, 200 P.3d 363, 367 (Colo. 2009). Accordingly, a reviewing court must afford the evidence its maximum probative value and minimum prejudicial effect. *Id.*

¶43 Applying this standard here, the evidence concerning what Schnorenberg's securities attorney had informed him regarding the materiality of the allegedly omitted information or his course of business could have been highly probative as to whether Schnorenberg had the requisite mental state under subsections 11-51-501(1)(b) or (c). This testimony went to the heart of his defense at trial.

¶44 In contrast, we cannot say that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice.

¶45 The People contend that the risk of unfair prejudice was substantial because (1) Schnorenberg's counsel was not available to be cross-examined; (2) had the evidence been admitted, the jurors might erroneously have accepted Schnorenberg's testimony as to what his counsel had advised him for the truth of

the matter asserted; and (3) admitting this testimony would have allowed Schnorenberg to use the attorney-client privilege as both a sword and a shield.

¶46 We are unwilling to lay sole blame on Schnorenberg for his securities counsel's unavailability when the People objected to a continuance that would have allowed securities counsel to appear and the trial court denied Schnorenberg's request for a continuance.

¶47 Regardless, any possible prejudice from Schnorenberg's testimony or his counsel's unavailability could have been mitigated through the use of a limiting instruction informing the jurors that they may not consider the testimony for the truth of the matter asserted. *See, e.g.*, *Williams v. People*, 724 P.2d 1279, 1284 (Colo. 1986) (approving a limiting instruction advising the jury that some of the evidence that it had heard could be considered only for a limited purpose); *People v. Smalley*, 2015 COA 140, ¶ 30, 369 P.3d 737, 744 (concluding that a limiting instruction provided by the trial court had adequately communicated to the jury the limited nonhearsay purpose for which the jury could consider the statements at issue). And cross-examination of Schnorenberg likewise could have mitigated possible prejudice. *See Kelly v. Haralampopoulos by Haralampopoulos*, 2014 CO 46, ¶ 48, 327 P.3d 255, 268 (concluding that the trial court could reasonably have determined that cross-examination and argument would have addressed any issues of prejudice); *see also United States v. Scully*, 877 F.3d 464, 475 (2d Cir. 2017)

(concluding that the defendant's testimony regarding the advice of counsel was improperly excluded under Fed. R. Evid. 403, based on the prosecution's assertion that it would have been prejudiced by the fact that counsel was not present, in part because the prosecution could have cross-examined the defendant).

¶48 Finally, regarding the People's concern that admitting this testimony would have allowed Schnorenberg to use the attorney-client privilege as both a sword and a shield, we disagree. By testifying as to what his counsel had advised him, Schnorenberg would necessarily have waived his attorney-client privilege. *People v. Trujillo*, 144 P.3d 539, 543 (Colo. 2006). Accordingly, the People would have been able to cross-examine Schnorenberg regarding what his counsel had told him, and Schnorenberg would not have been able to hide behind the privilege.

¶49 For these reasons, we conclude that even were the CRE 403 issue properly preserved, that rule does not require reversal here.

D. Harmlessness

¶50 Having thus determined that the trial court erred in excluding Schnorenberg's proffered testimony regarding the advice of his counsel, the question becomes whether the error was harmless. The People contend that it was because the division applied the incorrect standard of review and the evidence of Schnorenberg's guilt was overwhelming. We are not persuaded.

¶51 As an initial matter, we note that the parties disagree as to whether our review implicates the constitutional or nonconstitutional harmless error standards. Schnorenberg contends that the issue presented concerns his right to present a defense and, therefore, we must apply the constitutional harmless error standard. The People, in contrast, assert that the nonconstitutional harmless error standard should apply because, notwithstanding the trial court's exclusion of Schnorenberg's testimony as to the specific advice of his counsel, he was able to put on a defense and meaningfully test the People's evidence. We need not resolve this dispute because we conclude that the above-described errors require reversal even under the nonconstitutional harmless error standard advanced by the People.

¶52 Preserved nonconstitutional errors require reversal if there is a reasonable probability that the error contributed to the defendant's conviction. *People v. Monroe*, 2020 CO 67, ¶ 17, 468 P.3d 1273, 1276. When the alleged error is of a constitutional dimension, however, reversal is required unless the reviewing court can say that the error was harmless beyond a reasonable doubt. *Hagos v. People*, 2012 CO 63, ¶ 11, 288 P.3d 116, 119 ("In other words, we reverse if 'there is a reasonable *possibility* that the [error] might have contributed to the conviction.'") (alteration in original) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

¶53 Here, assuming without deciding that the nonconstitutional harmless error standard applies as the People contend, we conclude that there is a reasonable probability that the error contributed to Schnorenberg's convictions.

¶54 As noted above, Schnorenberg's primary defense at trial was that he did not disclose certain information to investors because his securities attorney had advised him that he did not need to do so, and thus he lacked the requisite mens rea. Due to the trial court's evidentiary rulings, however, Schnorenberg was unable to testify as to what his lawyer had actually advised him, which limited his ability to argue that he lacked the required mental state. Because this evidence was central to Schnorenberg's defense, we conclude that there is a reasonable probability that the exclusion of this testimony contributed to Schnorenberg's convictions and that, therefore, the trial court's error in excluding such evidence was not harmless.

¶55 We are not persuaded by the People's arguments to the contrary. The People quote extensively from Schnorenberg's testimony and contend that he was able to tell his side of the story. The testimony that the People cite, however, reveals that Schnorenberg was able to testify only in general terms about seeking advice from counsel. He was not permitted to testify regarding what his lawyer had actually told him.

¶56 Likewise, although the People cite federal standards as to when a defendant is entitled to an instruction on an advice-of-counsel defense, these standards have no bearing on the question of whether the advice that Schnorenberg had received was relevant and potentially exculpatory.

¶57 And notwithstanding the People's extensive recitation of the allegations of Schnorenberg's wrongdoing in order to show that the evidence of guilt was overwhelming, the fact remains that in excluding relevant, potentially exculpatory testimony that went to a central element of the offense (and the premise of Schnorenberg's defense), there is a reasonable probability that the trial court's error contributed to Schnorenberg's convictions.

¶58 Accordingly, we conclude that the trial court's error in excluding the evidence of the advice of counsel was not harmless and that the division below therefore correctly reversed Schnorenberg's convictions.

E. Jury Instruction

¶59 Finally, the People contend that the division below erred in concluding that the trial court had erroneously refused to give Schnorenberg's proposed jury instruction that good faith reliance on the advice of counsel is relevant to whether he had acted willfully. *Schnorenberg*, ¶ 36, 541 P.3d at 9. Although we need not address this issue in order to decide whether Schnorenberg is entitled to a new

trial, because this issue is likely to recur on remand, we briefly address it to provide guidance for the trial court and the parties.

¶60 Jury instructions must correctly inform the jury of the law. *Day*, 255 P.3d at 1067. "A jury instruction should substantially track the language of the statute describing the crime . . . ." *People v. Weinreich*, 119 P.3d 1073, 1076 (Colo. 2005). As long as the instruction correctly informs the jury of the law, the trial court has "broad discretion to determine the form and style of jury instructions." *Day*, 255 P.3d at 1067.

¶61 Here, the trial court's jury instructions explained:

> A person acts "knowingly" or "willfully" with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such a circumstance exists. A person acts "knowingly" or "willfully", with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.

This language tracked the statutory definition of "willfully" in section 18-1-501(6).

¶62 The trial court's instructions further enumerated the elements of securities fraud under section 11-51-501(1)(b):

> 1. That the defendant,
>
> 2. in the State of Colorado, at or about the date and place charged,
>
> 3. in connection with the offer or sale of any security,
>
> 4. directly or indirectly,
>
> 5. willfully

6. (a) made an untrue statement of material fact,

or

(b) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

¶63 And the instructions set forth the elements of securities fraud under section 11-51-501(1)(c):

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. in connection with the offer or sale of any security,

4. directly or indirectly,

5. willfully

6. engaged in any act, practice or course of business which operated or would operate as a fraud or deceit upon any person.

¶64 The foregoing elemental instructions also properly tracked the language of the statute. And when, as here, the mens rea is offset from other elements of the offense in a jury instruction, the mens rea modifies all succeeding conduct elements. *People v. Rodriguez*, 914 P.2d 230, 272 (Colo. 1996).

¶65 Accordingly, we conclude that the foregoing instructions properly advised the jury of the applicable law.

¶66 The question remains whether Schnorenberg is entitled to an additional instruction that, in determining whether he had acted willfully, the jury may

consider the evidence as it relates to his good faith reliance on the advice of counsel.

¶67 In *Blair*, 579 P.2d at 1139, we rejected a jury instruction that advised the jurors that good faith was an *absolute* defense to a securities fraud violation.

¶68 In *Riley*, 708 P.2d at 1364–65, in contrast, we concluded that a jury instruction providing that good faith was *not* a defense was also impermissible. This was because such an instruction created a substantial risk that a jury would convict a defendant who had made false or misleading statements in the good faith belief that they were true or who in good faith believed that the defendant's practice or course of business was not fraudulent or deceitful. *Id.* at 1365.

¶69 Taken together, these cases bar a trial court from instructing the jury that good faith is either an absolute defense or not a defense at all. Thus, Colorado case law neither requires nor prohibits Schnorenberg's particular requested instruction, and the decision as to whether to provide such an instruction rests within the trial court's sound discretion.

III. Conclusion

¶70 For these reasons, we conclude that the trial court reversibly erred in excluding Schnorenberg's testimony about the advice of his securities counsel. Accordingly, we affirm the judgment of the division below and remand this case for a new trial on the counts at issue.