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SUMMARY
October 29, 2026

2026 COA 75

No. 23CA0606, *People v. Ortiz* — Criminal Law — Required Notice of Alibi Defense — Defendant's Alibi Testimony; Criminal Procedure — Discovery and Procedure Before Trial — Notice of Alibi; Appeals — Standard of Reversal — Harmless Error

A division of the court of appeals considers, for the first time in a published opinion, what standard of reversal applies when a defendant is erroneously precluded from testifying as an alibi witness. The division concludes that the constitutional harmless error standard applies but that the error here wasn't reversible.

The division further concludes that the trial court erred by misapplying the crime-fraud exception to strip the attorney-client privilege from certain communications, admitting portions of the privileged communications, and permitting the prosecution to call defendant's former attorneys as witnesses.

The division rejects defendant's remaining contentions and therefore affirms in part, reverses in part, and remands for a new trial on the two counts impacted by the crime-fraud exception error.

COLORADO COURT OF APPEALS **2026 COA 75**

Court of Appeals No. 23CA0606
Arapahoe County District Court No. 18CR1951
Honorable Ryan J. Stuart, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Josias Deonicio Ortiz,

Defendant-Appellant.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE MEIRINK
Sullivan and Taubman*, JJ., concur

Announced October 29, 2026

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Andrew Sidley-MacKie, Alternate Defense Counsel, Fort Collins, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2026.

¶ 1 Defendant, Josias Deonicio Ortiz, appeals the trial court's judgment of conviction entered after a jury found him guilty of seven offenses relating to sexual assault on a child.

¶ 2 Ortiz's appeal requires us to consider what standard of reversal applies when a defendant is erroneously precluded from testifying as an alibi witness, an issue of first impression in Colorado.

¶ 3 We affirm in part, reverse in part, and remand for a new trial on two of the counts.

I. Background

¶ 4 In 2017, Ortiz met then-thirteen-year-old B.B. online.[1] Ortiz asked B.B. to send him naked photos and videos, which they did, and Ortiz sent them a picture of his penis.

¶ 5 When B.B. was home alone one day, Ortiz went to their house. He asked B.B. to touch his penis with their hands and mouth, which they did. Ortiz touched B.B.'s breasts and vagina and tried to insert his penis into B.B.'s vagina.

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[1] At the time of the incident B.B. used she/her pronouns but now uses they/them pronouns. Accordingly, we use they/them pronouns for B.B. in this opinion.

¶ 6 Ortiz met B.B. a second time at a park. Both of them got into the back seat of Ortiz's car, and he kissed their neck and touched their breasts and vagina. B.B. had told their father that they were going to a friend's house and that B.B. would send him a message when they arrived. When B.B. failed to text their father, B.B.'s father drove around to look for B.B. He saw a car near the park and saw B.B. getting out of it. B.B.'s father approached the car, confronted Ortiz, and tried to stop him from leaving. The dashboard camera of a nearby parking enforcement officer's vehicle captured the altercation and Ortiz's license plate number. Later that day, Ortiz sent B.B. a message saying, "[D]on't say anything[;] we just met at park first time."

¶ 7 The prosecution charged Ortiz with enticement of a child, two counts of sexual assault on a child as a pattern of abuse, two counts of internet sexual exploitation of a child, and two counts of sexual exploitation of a child (possession with intent to distribute). After a two-day trial, the jury found Ortiz guilty on all counts, and he was sentenced to an indeterminate sentence of twenty years to life in the custody of the Department of Corrections and consecutive determinate sentences of ten years and six years.

II. Analysis

¶ 8 Ortiz contends that (1) the trial court violated his right to testify and present a defense by precluding his alibi testimony; (2) the prosecution presented insufficient evidence to support the conviction of sexual exploitation of a child (possession with intent to distribute); (3) the trial court erred by allowing the prosecution to call Ortiz's former attorneys as witnesses and introduce a sexually exploitative video he sent to one of the attorneys; (4) the trial court allowed improper expert testimony; (5) the prosecutor committed misconduct during closing and rebuttal arguments; (6) the trial court erred by not sua sponte making findings on Ortiz's competency at trial; and (7) the cumulative effect of these errors warrants reversal.

¶ 9 We agree with Ortiz that the trial court erred by precluding his alibi testimony but conclude that the error was harmless. We also agree that the court erred by allowing Ortiz's former attorneys to testify against him and by admitting the sexually exploitative video as evidence, but we disagree with Ortiz's remaining contentions and address each in turn.

A. Ortiz's Right to Testify Regarding His Own Alibi

¶ 10 Ortiz contends that, by finding that his alibi disclosure notice was untimely, the trial court violated his right to testify and to present a defense. We conclude that the trial court misapplied the disclosure requirement rule and precluded Ortiz from presenting his own alibi testimony but that the error wasn't reversible.

1. Applicable Law and Standard of Review

¶ 11 If a defendant intends to introduce evidence that he or she was somewhere other than at the location of the offense, no later than thirty-five days before trial, the defense must provide the prosecution with a notice specifying where the defendant claims to have been and the names and addresses of the witnesses the defendant will call to support his or her alibi defense. § 16-7-102, C.R.S. 2026; Crim. P. 16(II)(d). If the defendant doesn't provide the requisite information, the court "shall exclude evidence offered in support of the defense of alibi unless the court finds upon good cause shown that such evidence should be admitted in the interest of justice." § 16-7-102; Crim. P. 16(II)(d). Thus, the rule doesn't "mandate the automatic exclusion of an accused's alibi witnesses upon noncompliance with the disclosure requirement, but rather

vests the trial court with discretion to permit the witnesses to testify, notwithstanding the defendant's noncompliance, upon a showing by the defendant of good cause to admit the alibi evidence." *People v. Hampton*, 696 P.2d 765, 775 (Colo. 1985) (*Hampton I*).[2]

¶ 12 The possibility of a sanction against a defendant comes into play only after the defendant violates the disclosure requirement. *Id.* Before imposing a sanction, the court must consider, in relevant part, the following factors:

> whether and to what extent the nondisclosure prejudiced the prosecution's opportunity to effectively prepare for trial; whether events occurring subsequent to the defendant's noncompliance mitigate the prejudice to the prosecution; whether there is a reasonable and less drastic alternative to the preclusion of alibi evidence; and any other relevant factors arising out of the circumstances of the case.

Id. at 778 (footnotes omitted). The purpose of the requirement is "to condition the presentation of alibi evidence on a timely pretrial disclosure, so that the surprise and prejudice incident to the

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[2] *Hampton I* addressed Crim. P. 12.1, which was repealed in 1985. But its contents, with amendments, have been relocated to Crim. P. 16(II)(d).

eleventh-hour introduction of the alibi defense into the trial may be avoided and the reliability of the factfinding process correspondingly enhanced." *Id.* at 774.

¶ 13 But the prospect that a defendant will testify in his or her own defense is always present in a criminal case, so a defendant's election to testify shouldn't come as a surprise to the prosecution. *Id.* at 775. Thus, the supreme court has held that (1) the rule doesn't facially abridge an accused's right to present evidence in defense of the charges; (2) the disclosure requirement doesn't apply to the defendant as an alibi witness; and (3) the exclusion sanction isn't applicable to the defendant's alibi testimony. *Id.* at 776; *see also People v. Hampton*, 758 P.2d 1344, 1352 (Colo. 1988) (*Hampton II*) (clarifying that the alibi disclosure requirement doesn't "prevent an accused from exercising the right to present a defense, nor does it restrict the nature and content of alibi evidence").

¶ 14 A trial court's exercise of its discretionary authority to impose a sanction for noncompliance will not be overturned on review unless such decision amounts to an abuse of discretion. *Hampton II*, 758 P.2d at 1348. A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it is

based on an erroneous view of the law. *People v. Elmarr*, 2015 CO 53, ¶ 20.

2. Additional Applicable Facts

¶ 15 Twenty-one days before trial, Ortiz filed a notice of alibi indicating that he "was in custody with the US Customs and Border Protection with the Department of Homeland Security in Texas from June 2nd, 2017, to July 14th, 2017." The notice didn't provide the address where Ortiz claimed to have been at the time, nor did it contain the names and addresses of any alibi witnesses whom Ortiz intended to call.

¶ 16 At a hearing, the prosecutor objected to Ortiz's notice of alibi, arguing that the notice was untimely and, even if it had been timely, it didn't comply with the rule's disclosure requirements. The prosecutor noted that "there [we]re 31 U.S. Customs & Border Protections" in Texas and "there [wa]s no endorsement of who is going to testify with addresses to this alibi," and, if the court allowed it despite the age of the case, the prosecution would need a continuation to find new witnesses.

¶ 17 Defense counsel asked the court to find good cause to allow the notice of alibi, stating that he had endorsed his private

investigator and that "Mr. Ortiz could speak to that as well, to take the stand to testify." When the court asked defense counsel to identify good cause why the notice hadn't been timely provided, counsel responded that Ortiz had been "back and forth between homes and it took him a little while to find the documentation."

¶ 18 The trial court found that under section 16-7-102, Ortiz "did not comply with the notice requirements and . . . [it] cannot find good cause that the evidence should be admitted in the interests of justice." In making this finding, the court didn't differentiate between the proposed alibi testimony offered by the defense investigator, which was subject to the exclusion sanction of section 16-7-102 and Crim. P. 16(II)(d), and Ortiz's own alibi testimony, which wasn't subject to the sanction. *See Hampton I*, 696 P.2d at 776; *Hampton II*, 758 P.2d at 1352. And neither party asked the court to clarify whether its ruling barred only the investigator from providing alibi testimony or if it also precluded Ortiz's alibi testimony.

¶ 19 At trial, the court advised Ortiz — as required by *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984) — that he had the right to testify, no one could prevent him from testifying even if doing so

went against his attorney's advice, and only he could decide whether to testify. Ortiz indicated that he understood his rights. After the prosecution rested the next day, Ortiz informed the court that he'd had enough time to speak to his attorney, he would "remain silent," and he'd made the decision "on [his] own."

3. Discussion

¶ 20 Ortiz contends — and we agree — that he could provide alibi testimony without following the disclosure requirements of section 16-7-102 and Crim. P. 16(II)(d). Recall that neither the statute nor the rule abridges an accused's right to present evidence in defense of criminal charges and that the disclosure requirement and exclusion sanction don't apply to the defendant as an alibi witness. *Hampton I*, 696 P.2d at 776; *Hampton II*, 758 P.2d at 1352. Because Ortiz's own testimony would fall outside the statute and rule, applying the rule to preclude Ortiz's alibi testimony would be an erroneous application of the law.

¶ 21 Thus, we conclude that the trial court erred by including Ortiz's alibi testimony in its exclusionary sanction order but that the error was harmless.

a. Whether Ortiz Waived His Right to Challenge the Court's Order

¶ 22 As a preliminary matter, the People assert that Ortiz waived his right to challenge the court's order precluding alibi testimony because the court found that Ortiz waived his right to testify.

¶ 23 Waiver is the "intentional relinquishment of a known right or privilege," *People v. Rediger*, 2018 CO 32, ¶ 39 (emphasis omitted), and may be implied or — as is asserted in this case — explicit, *Forgette v. People*, 2023 CO 4, ¶ 28. "[E]ven fundamental rights can be waived, regardless of whether the deprivation thereof would otherwise constitute structural error." *Stackhouse v. People*, 2015 CO 48, ¶ 8.

¶ 24 Although Ortiz was given a proper *Curtis* advisement, and the court found that he had waived the right to testify, we can't say, based on the record before us, that Ortiz knowingly relinquished his right to challenge the trial court's order when he elected not to testify. He may well have believed that the court's previous ruling forbade him from providing *any* alibi testimony, including his own, and the court didn't clarify the extent of its ruling. Because the court's ruling was ambiguous, we can't presume waiver. *See Curtis*, 681 P.2d at 514 (recognizing that a defendant has the

constitutional right to testify in his or her own defense and that "[t]he courts do not presume acquiescence in the loss of fundamental constitutional rights, and therefore indulge every reasonable presumption against waiver").

b. What Standard of Reversal Applies

¶ 25 Having concluded that Ortiz didn't waive his right to challenge the trial court's order precluding alibi testimony, we now consider, as a matter of first impression, what standard of reversal applies when a defendant is prevented from testifying as an alibi witness.

¶ 26 Ortiz contends that structural error applies, but that if we disagree, then constitutional harmless error applies. In contrast, the People argue that because the issue was unpreserved, we review for plain error.

¶ 27 Ortiz filed a notice to present his alibi as a defense, and defense counsel indicated that Ortiz could "speak to [alibi]" and take the stand to testify, but the court determined that it couldn't find good cause to permit the evidence, so it excluded any alibi testimony. Accordingly, Ortiz preserved the issue. *See Dill v. Rembrandt Grp., Inc.*, 2020 COA 69, ¶ 24 (To preserve an issue for appeal, all that is necessary is that the issue "be brought to the

attention of the trial court and that the court be given an opportunity to rule on it." (citation omitted)). For the reasons explained below, we conclude that constitutional harmless error applies. And in this case, the error wasn't reversible.

¶ 28 Structural errors "require automatic reversal without individualized analysis of how the error impairs the reliability of the judgment of conviction." *Hagos v. People*, 2012 CO 63, ¶ 10. Structural errors aren't "amenable to either a harmless error or a plain error analysis because such errors affect the framework within which the trial proceeds." *People v. Hassen*, 2015 CO 49, ¶ 7 (citation omitted).

¶ 29 Under the constitutional harmless error standard, we must reverse if there's "a reasonable *possibility* that the [error] might have contributed to the conviction." *Hagos*, ¶ 11 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

¶ 30 Although the issue isn't before us — and Colorado has yet to resolve it — the standard of reversal that applies when a defendant is denied his constitutional right to testify is informative to our

analysis. On this question, courts are split.[3] Some courts have held that prohibiting a defendant from testifying amounts to structural error. *See, e.g.*, *State v. Loher*, 398 P.3d 794, 809-10 (Haw. 2017) (concluding that the trial court violated the defendant's state constitutional rights when it required him to testify before his other witnesses testified or forfeit the right to testify, and that the violation amounted to structural error); *State v. Cantu*, 547 P.3d 477, 487 (Kan. 2024) (holding that removing the defendant from the stand and striking his testimony, which deprived him of the right to testify, was structural error). Other courts have rejected structural error in these circumstances and have instead applied the constitutional harmlessness standard. *See, e.g.*, *Palmer v. Hendricks*, 592 F.3d 386, 398 (3d Cir. 2010) (concluding that violation of the right to testify is subject to constitutional harmless

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[3] The supreme court held in *People v. Curtis* that a defendant in a criminal case has the constitutional right to testify in his or her own defense under the Due Process Clauses of the Colorado and Federal Constitutions, but it didn't resolve which standard of reversal applies when a defendant is denied that right. 681 P.2d 504, 515 n.15 (Colo. 1984) (declining to decide whether the denial of the right to testify can be harmless beyond a reasonable doubt because the People didn't assert that denial of the defendant's right to testify was harmless beyond a reasonable doubt).

error and that attorney's failure to advise client of the right to testify in his own defense "is not the sort of structural defect for which the automatic reversal rule is reserved"); *Ortega v. O'Leary*, 843 F.2d 258, 262 (7th Cir. 1988) (constitutional harmless error applies to denial of the defendant's right to testify); *Wright v. Estelle*, 549 F.2d 971, 974 (5th Cir. 1977) (holding that even if the defendant was deprived of the right to testify on his own behalf, any error was harmless beyond a reasonable doubt because the defendant's testimony wouldn't have altered the verdict and the evidence connecting the defendant to his crime was overwhelming).

¶ 31 But Ortiz wasn't entirely denied the right to testify — he was precluded only from testifying as an alibi witness. Thus, while the cases from other jurisdictions involved an issue broader than the one before us, the rationale in *Palmer*, 592 F.3d at 398, in which the court held that violating the defendant's right to testify was subject to constitutional harmless error review, is persuasive. The court in *Palmer* distinguished those errors where the "effect of the violation cannot be ascertained" from those where the violation can be evaluated in the context of the other evidence presented to quantitatively assess the impact of the constitutional violation,

rendering the error subject to a constitutional harmlessness analysis. *Id.* at 398-99 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006)).

¶ 32 Preventing Ortiz from giving his own alibi testimony is an error that can be quantitatively assessed in the context of the other evidence presented. Put differently, it's the type of constitutional error that's amenable to conventional review in the context of the trial and the evidence as a whole and is therefore subject to constitutional harmless error review. *See id.* at 399.

c. The Trial Court's Error Wasn't Reversible

¶ 33 Under the constitutional harmless error standard, any error requires reversal unless we are "able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Hagos*, ¶ 11 (quoting *Chapman*, 386 U.S. at 24). In other words, we reverse if "there is a reasonable *possibility* that the [error] might have contributed to the conviction." *Id.* (citations omitted). "For this kind of error, the State bears the burden of proving the error was harmless beyond a reasonable doubt." *Id.*

¶ 34 Under this standard, there isn't a reasonable possibility that the court's error in precluding Ortiz from providing alibi testimony

may have contributed to his conviction. Based on our review of the record, and despite Ortiz's contentions suggesting the contrary, the evidence against Ortiz was overwhelming. There was DNA evidence against Ortiz; the defense conceded several times during closing argument that Ortiz's DNA was found on B.B.; a dashcam at the park captured images of Ortiz and his car; B.B.'s father confronted Ortiz at the park; there was evidence that Ortiz sent B.B. a text message telling them to say that the park incident was the first time that they had met; and Ortiz's daughter identified him in a photograph taken from the dashcam video. Given the evidence presented against Ortiz, there wasn't a reasonable possibility that any error the trial court may have committed by precluding Ortiz from testifying as an alibi witness contributed to his conviction.

d. The Trial Court Didn't Err by Excluding the Defense Investigator's Testimony

¶ 35 To the extent that Ortiz asserts on appeal that the trial court abused its discretion by excluding the defense investigator from being an alibi witness, we aren't persuaded.

¶ 36 After considering the *Hampton I* factors, the trial court had discretion to exclude the investigator's alibi witness testimony as a

sanction. The court considered that Ortiz had four and a half years to file the notice of alibi; the case had been continued approximately ten times; the prosecution would need another continuance to find possible rebuttal witnesses; the delay was unreasonable; and the prosecution would have been prejudiced by the late and nonspecific disclosure.

¶ 37 Based on the record, we discern no basis to overturn the trial court's decision to exclude the investigator's alibi testimony as a sanction for noncompliance with the disclosure requirements.

B. Sufficiency of the Evidence and Attorney-Client Privilege

¶ 38 Ortiz contends that the prosecution presented insufficient evidence in support of count 6: sexual exploitation of a child (possession with intent to distribute). He also contends the trial court violated his right to counsel by permitting the prosecution to call his former defense attorneys as witnesses and by introducing privileged communications at trial. We disagree with his first contention but agree with his second contention. Because both of Ortiz's arguments arise from the same facts, we address them together.

1. Additional Applicable Facts

¶ 39 In July 2022, the Public Defender's Office (PDO) filed an emergency motion to withdraw as Ortiz's counsel, citing Colo. RPC 1.6 and 1.7(a)(2). The court granted the motion, and new counsel entered an appearance.

¶ 40 On the same day that the PDO moved to withdraw as counsel, lawyers at the PDO turned over to the prosecution a thumb drive containing a previously unknown video of B.B. appearing nude. Based on the sexually exploitative material, the prosecution moved for a determination that Ortiz had waived the attorney-client privilege in a limited way so that the prosecution could establish how and when Ortiz's former attorney, Patrick Thompson, received the video; who sent it; and whether Thompson or his supervisor, David Kaplan, had created or tampered with the video.

¶ 41 The court held a hearing and both parties made arguments. Ortiz's new defense counsel argued that Ortiz "didn't know the contents [of the video], did not knowingly possess or distribute this alleged child pornography. And he [emailed] it to aid in his defense at the advice of his Public Defender." Ortiz didn't testify. The trial court found that "the act of a client distributing child pornography

to his attorney [wa]s not privileged communications recognized under Colorado Law" and that the crime-fraud "exception applie[d] to this act and any communication that effectuated the distribution." The court allowed the district attorney to subpoena Ortiz's former counsel for the limited purpose of asking how they came to possess the sexually exploitative material but clarified that "[a]ny other communications between Mr. Ortiz and his former counsel . . . remain[ed] privileged."

¶ 42 Based on the video, the prosecution amended the complaint to add two counts — one for sexual exploitation of a child in violation of section 18-6-403(3)(c), C.R.S. 2026, for unlawfully, feloniously, and knowingly possessing with intent to deal in, sell, or distribute the video (count 6); and another count for sexual exploitation of a child for possessing the video in violation of section 18-6-403(3)(b.5), (5)(b) (count 7).

¶ 43 The PDO filed a motion to clarify the court's purported finding of a limited waiver of privilege and to quash the subpoenas because it was unclear which "communications" were subject to the waiver. The trial court didn't enter an order, but at the preliminary hearing a few days later, it reiterated that the "district attorney had

established the threshold finding sufficient to invoke the exception that there was a good-faith belief by a reasonable person that wrongful conduct existed to invoke the exception" and that the communications between Ortiz and his former counsel regarding the email "will be stripped of privilege under the crime fraud exception."

¶ 44 At trial, Thompson testified that Ortiz had sent him an email, written in Spanish, with an attached video. Because he didn't speak Spanish, Thompson testified that he didn't understand the message but, nonetheless, opened the video. When Thompson started watching the video, he thought he "was potentially in possession of some material that [he] was concerned might be illegal for [him] to be in possession of" and immediately contacted Kaplan. Kaplan testified that, after he consulted outside ethics counsel and reviewed the rules of professional conduct, he determined that the video needed to be turned over to the prosecution. Kaplan contacted the PDO's technology department to transfer the video to a thumb drive and delete it from the PDO's computer system.

2. The Prosecution Presented Sufficient Evidence in Support of Count 6

¶ 45 Ortiz argues that the prosecution presented insufficient evidence on count 6 because former counsel's possession of sexually exploitative material in the performance of his official duties was lawful. Specifically, Ortiz claims that it wasn't a crime for him to send Thompson the video because, while it's otherwise illegal to possess sexually exploitative material, section 18-6-403(3)(b.5) exempts defense counsel from exposure to criminal charges when possession of the material is related to counsel's obligation to advise clients, prepare for trial, and evaluate whether the material is exculpatory evidence.

¶ 46 The prosecution must prove every element of a charged offense beyond a reasonable doubt. *Thomas v. People*, 2021 CO 84, ¶ 10. "When a defendant challenges the sufficiency of the evidence supporting a conviction, an appellate court reviews the record de novo to determine whether the evidence presented is sufficient both in quantity and quality to satisfy this burden." *Id.*; *McCoy v. People*, 2019 CO 44, ¶ 27. But in doing so, we "'may not serve as a thirteenth juror' by considering whether we 'might have reached a

different conclusion than the jury.'" *Thomas*, ¶ 10 (quoting *People v. Harrison*, 2020 CO 57, ¶ 33). Rather, we must ask "whether the evidence, 'viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt.'" *Id.* (citations omitted).

¶ 47 As charged in count 6, "[a] person commits sexual exploitation of a child if, for any purpose, he or she knowingly . . . [p]ossesses with the intent to deal in, sell, or distribute, including but not limited to distributing through digital or electronic means, any sexually exploitative material." § 18-6-403(3)(c).

¶ 48 The prosecution presented sufficient evidence to support Ortiz's conviction for the counts involving the video. The evidence showed that Ortiz knowingly possessed a nude video of B.B. and emailed it to Thompson. Based on this evidence, the jury could have reasonably concluded that Ortiz knowingly possessed sexually exploitative material with the intent to distribute it.

3. The Trial Court Erred by Finding a Limited Waiver of the Attorney-Client Privilege Under the Crime-Fraud Exception

¶ 49 Ortiz argues — and we agree — that the trial court erred by permitting the prosecution to call his former defense attorneys as witnesses and by introducing privileged communications at trial with respect to counts 6 and 7.

a. Applicable Law and Standard of Review

¶ 50 The attorney-client privilege applies to "confidential matters communicated by or to the client in the course of obtaining counsel, advice, or direction with respect to the client's rights or obligations." *People v. Madera*, 112 P.3d 688, 690 (Colo. 2005) (quoting *People v. Lesslie*, 24 P.3d 22, 26 (Colo. App. 2000)). "Though designed to be sturdy and reliable, this shield of privilege may sometimes be pierced." *In re 2015-2016 Jefferson Cnty. Grand Jury*, 2018 CO 9, ¶ 24. "The crime-fraud exception to the attorney-client privilege 'provides that communications between a client and his attorney will not be privileged if they are made for the purpose of aiding the commission of a future crime or of a present continuing crime.'" *Id.* (quoting *A v. Dist. Ct.*, 550 P.2d 315, 324 (Colo. 1976)).

¶ 51 A two-step process applies when a party seeks disclosure of attorney-client privileged materials under the crime-fraud exception. *Id.* at ¶ 4. First, before a court may review any privileged materials in camera, it must "require a showing of a factual basis adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the . . . exception . . . has occurred." *Id.* (quoting *Caldwell v. Dist. Ct.*, 644 P.2d 26, 33 (Colo. 1982)). "Second, the court may strip a communication of privilege only upon a showing of probable cause to believe that (1) the client was committing, or attempting to commit, a crime . . . and (2) the communication was made in furtherance of the putative crime." *Id.*

¶ 52 "The rationale for excluding such communications from the attorney-client privilege is that the policies supporting the existence of that privilege are inapplicable where the advice and aid sought refers to future wrongdoing rather than prior misconduct." *Caldwell*, 644 P.2d at 32. Accordingly, the crime-fraud exception generally "applies only when the client knows or reasonably should know that the advice is sought for a wrongful purpose." *Id.* at 33. Thus, "[g]ood-faith consultations with attorneys by clients who are

uncertain about the legal implications of a proposed course of action are entitled to the protection of the privilege, even if that action should later be held improper." *Id.* (quoting *State ex rel. N. Pac. Lumber Co. v. Unis*, 579 P.2d 1291, 1295 (Or. 1978)) (recognizing that the policy reasons supporting the attorney-client privilege "predicate the need of confidence on the part not only of injured persons, but also of those who, being already wrongdoers in part or all of their cause, are seeking legal advice suitable for their plight" (citation omitted)).

¶ 53 We review a trial court's ruling regarding application of the crime-fraud exception to the attorney-client privilege for an abuse of discretion. *Jefferson Cnty. Grand Jury*, ¶ 21. "Under this standard, we will reverse the district court only if its decision was manifestly arbitrary, unreasonable, or unfair," or based on an erroneous understanding of the law. *Id.*

b. Discussion

¶ 54 We conclude that the trial court erred because it incorrectly applied the crime-fraud exception to strip the subject email of attorney-client privilege. The record supports the court's step-one finding that the prosecution made a "threshold showing of facts

adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the exception has occurred" — that Ortiz sent Thompson an email purportedly containing a video attachment of B.B. nude. But the same can't be said for step two — that the prosecution demonstrated probable cause that Ortiz committed a crime or was attempting to commit a crime and that he sent the email in furtherance of the crime. *See Jefferson Cnty. Grand Jury*, ¶ 25 (party seeking to invoke the crime-fraud exception bears the burden of establishing that the exception applies). The prosecution didn't present evidence, and the trial court never made any findings, regarding Ortiz's purpose in sending Thompson the video. *See Caldwell*, 644 P.2d at 33 ("It is . . . generally accepted that the crime or fraud exception applies only when the client knows or reasonably should know that the [attorney's] advice is sought for a wrongful purpose.").

¶ 55 Moreover, at the hearing addressing the privilege, Ortiz's counsel indicated that Ortiz "gave [the video] to aid in his defense at the advice of his Public Defender." But Ortiz never testified why he sent the email to Thompson; the email itself wasn't preserved; and no witnesses who recalled seeing the email could testify to its

substance because those witnesses didn't speak Spanish. The only evidence in the record concerning Ortiz's reason for sending the email was new counsel's fleeting statement that Ortiz believed he was aiding his defense. The court focused only on Ortiz's conduct — sending sexually exploitative materials to Thompson — to find that the crime-fraud exception applied. But it made no findings that Ortiz's email to Thompson was in furtherance of an end that he knew or reasonably should've known was improper, which was required before the court could strip Ortiz's email of its attorney-client privilege. *See Caldwell*, 644 P.2d at 33; *Jefferson Cnty. Grand Jury*, ¶ 24.

¶ 56 The subsequent preliminary hearing presented the trial court with another opportunity to determine if Ortiz knew or reasonably should have known that he was committing a crime by emailing Thompson. But again, the court didn't make the requisite findings. Instead, it concluded that "the district attorney had established the threshold finding sufficient to invoke the exception that there was a good-faith belief by a reasonable person that wrongful conduct existed to invoke the exception." That finding didn't consider why Ortiz reached out to Thompson or whether Ortiz knew or reasonably

should have known that he was seeking advice for a wrongful purpose. In short, the court erred by not following the two-step process before applying the crime-fraud exception to strip away Ortiz's attorney-client privilege with his former attorneys.

¶ 57 We also conclude that the error wasn't harmless as it pertains to count 6 and count 7. Thompson and Kaplan were the only witnesses to testify against Ortiz on counts 6 and 7; thus, the court's erroneous ruling allowed their testimony to substantially influence the jury's verdict on those counts. *See Venalonzo v. People*, 2017 CO 9, ¶ 48.

¶ 58 Because the trial court erred by ordering a limited waiver of the attorney-client privilege, we reverse Ortiz's convictions on counts 6 and 7 but note that he can be retried on those counts.

C. The Expert Testimony

¶ 59 Ortiz argues that the trial court erred by allowing improper and unreliable DNA expert testimony. We disagree.

1. Standard of Review and Applicable Law

¶ 60 We review a trial court's evidentiary rulings, including the admission of expert testimony, for an abuse of discretion. *Id.* at ¶¶ 15, 24.

¶ 61 When defense counsel doesn't object — as is the case here — we review for plain error and reverse only if any error "so undermined the fundamental fairness of the trial itself . . . as to cast serious doubt on the reliability of the judgment of conviction." *Hagos*, ¶ 14 (quoting *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005)).

¶ 62 "If 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." CRE 702. The focus of a CRE 702 inquiry is on whether the proffered evidence is reliable and relevant. *People v. Shreck*, 22 P.3d 68, 77 (Colo. 2001). When determining whether the expert testimony at issue is reliable, the court must consider (1) the reliability of the scientific principles; (2) the witness' qualifications; and (3) the usefulness of the testimony to the jury. *Id.*; *Lawrence v. People*, 2021 CO 28, ¶ 43 (recognizing that trial courts "serve as gatekeepers regarding the propriety of expert testimony").

2. Additional Applicable Facts

¶ 63 An expert with the Colorado Bureau of Investigation tested DNA samples taken from B.B.'s neck, face, and clothing. The expert testified that she ran two types of tests on the DNA samples: (1) the "total human" DNA test, which focuses on results specific to individual potential contributors; and (2) the YSTR DNA test, which excludes female DNA and provides male-specific results.

¶ 64 With respect to the total human DNA test, the expert testified that the DNA mixture taken from B.B.'s neck and face was consistent with DNA from B.B., Ortiz, and an unknown individual. The expert explained that the sample taken from B.B.'s neck contained three contributors amounting to 85%, 14%, and 1% of the sample. The portion amounting to 85% was consistent with B.B.'s DNA, the portion amounting to 14% was consistent with Ortiz's DNA, and the portion amounting to 1% was from an unknown contributor. The expert discussed the statistical conclusions that she drew using a "likelihood ratio," explaining that the mixture was "approximately 1.8 septillion . . . times more likely to be observed if it originated from [B.B.], Mr. Ortiz, and an unknown, unrelated individual, than if it had originated from [B.B.],

and two unknown, unrelated individuals," which strongly supported "the proposition that Mr. Ortiz is included as a potential contributor to that mixture profile."

¶ 65 The jury asked whether there was "strong DNA evidence of [Ortiz]" from the total human test. The expert responded that "there used to be an easy answer for that, but since we have changed from random match probability — which indicates one human, we have gone to this likelihood ratio, I can tell you it's approximately 1.8 septillion times more likely that he is there than he is not there."

3. Discussion

¶ 66 Ortiz contends that the expert presented unreliable evidence and committed the "prosecutor's fallacy," which is the "assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample." As Ortiz's argument goes,

> if a juror is told the probability that a member of the general population would share the same DNA is 1 in 10,000, (random match probability) and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor's fallacy.

¶ 67 But the record doesn't support that characterization. The expert testified that the laboratory no longer reports random match probabilities and instead now uses a likelihood ratio. She explained that a likelihood ratio evaluates how much more strongly the DNA evidence supports one proposition than another; it doesn't assign a statistical probability that Ortiz committed the crime. Consistent with that methodology, the expert testified that when Ortiz's DNA profile was introduced and compared to the mixture to determine if he could be a potential contributor, his DNA profile was consistent with the 14% contributor and that the test results "indicat[ed] that it's 1.8 septillion times more likely that Mr. Ortiz is in that [DNA] mixture." That testimony didn't encompass the prosecutor's fallacy; it just described the result of the DNA evidence.

¶ 68 Because the expert's testimony accurately described the methodology used and the testimony helped the jury evaluate the DNA evidence, we discern no error in the court's decision to admit it.

D. Prosecutorial Misconduct

¶ 69 Ortiz contends the court committed reversible error by allowing the prosecutor to invoke the prosecutor's fallacy during

closing and rebuttal arguments and to misstate the evidence by claiming that the DNA results excluded Ortiz's relatives as contributors to the DNA mixture. While we agree that some of the prosecutor's statements were improper, none rose to the level requiring reversal.

1. Applicable Law and Standard of Review

¶ 70 "Closing argument must be confined to the evidence admitted at trial, the inferences that can reasonably and fairly be drawn from the evidence, and the instructions of law submitted to the jury." *People v. Conyac*, 2014 COA 8M, ¶ 132. When reviewing claims of improper argument, we "evaluate the conduct in the context of the argument as a whole and in light of the evidence before the jury." *Id.* A prosecutor "may comment on the evidence and may employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance." *Id.* But a prosecutor shouldn't "intentionally misstate the evidence or mislead the jury as to the inferences it may draw." *People v. Maloy*, 2020 COA 71, ¶ 61 (citation omitted).

¶ 71 We engage in a two-step analysis when reviewing claims of prosecutorial misconduct. *Wend v. People*, 235 P.3d 1089, 1096

(Colo. 2010). First, we determine whether the prosecutor's conduct was improper based on the totality of the circumstances; second, if so, we decide whether it warrants reversal under the applicable standard of review. *Id.* Because this issue is unpreserved, we review for plain error. *See People v. Ujaama*, 2012 COA 36, ¶ 38.

2. Discussion

¶ 72 Ortiz claims that the prosecutor invoked the prosecutor's fallacy and committed misconduct by saying the following:

> I understand this is confusing, but it is 1.8 septillion times more likely that . . . 14 percent is the defendant, 85 percent is [B.B.], and one percent some random person, than it for it to be two random males.
>
> There was a Powerball recently. You had one in 2.92 million chances of winning it, okay? You had a better chance of winning that Powerball a hundred time[s] over than it not being him on [B.B.]. That is what that number looks like. That is what 1.8 septillion looks like. It is a huge number.

The prosecutor's closing arguments drew on the DNA expert's testimony and the likelihood ratio. Although the prosecutor used a rhetorical device to comment on the evidence, we perceive no misconduct. It was proper for her to reference the likelihood that Ortiz contributed to the mixture of the DNA sample taken from B.B.

And the prosecutor's comments didn't intentionally misstate the evidence or the inferences the jury could draw from it.

¶ 73 During rebuttal, the prosecutor said that Ortiz's "DNA is on [B.B.]. We are not asking you to speculate that it was [Ortiz]. Guess what? It was. And by lots of zeros of numbers." Again, this statement didn't amount to misconduct. A prosecutor is entitled to argue reasonable inferences from the evidence presented at trial, *People v. McMinn*, 2013 COA 94, ¶ 62, and the challenged remarks did that. Moreover, defense counsel conceded several times during closing argument that Ortiz's DNA was present on B.B.

¶ 74 Ortiz also argues that the prosecutor misstated the evidence concerning relatives when she said the following:

> So on the neck and face swabs, that is Mr. Ortiz's DNA. It's not a male relative. The second test was for total human DNA, so that knocked out that first test that said it could be Mr. Ortiz or anyone in his male line, okay? If that's the only test you had, then maybe you could be thinking, Well, it could have been him, or somebody else in his male line, but once you get that human total test, no. That was Mr. Ortiz's DNA.
>
> And as [the expert] pointed out, it only makes sense to worry about the male line if another male actually had access on that day. There was one male in that car, and [B.B.'s father]

> said it was that man, and his wife and [B.B.] said it's him. So even if he didn't have total DNA, it would not really have mattered, but you do have that total DNA.

The prosecutor argued during closing arguments that this test confirmed that Ortiz's relatives were not the ones who contributed to the DNA mixture, but there was no evidence supporting that claim.

¶ 75 The People concede in their answer brief — and we agree — that the prosecutor's statements were imprecise. But because any error the court may have committed by allowing the statements wasn't obvious or substantial, the error wasn't reversible. *See People v. Sauser*, 2020 COA 174, ¶ 81 (recognizing that "an appellate court could find a prosecutor's conduct improper, but it could uphold the trial court's verdict because the errors" weren't reversible under the applicable standard of reversal (quoting *Wend*, 235 P.3d at 1096)).

¶ 76 During rebuttal, the prosecutor also said that the jury was "not to consider an alternate suspect, because, quite frankly, there is none, and you are not instructed on it, and there is no evidence," which Ortiz asserts amounted to misconduct because she misstated

the law, reduced the prosecution's burden, and misled the jury. Ortiz contends that the prosecutor's statement prevented the jury from considering an alternate suspect when the defense presented evidence that Ortiz's family members used the car and one or more of his relatives could've contributed to the DNA mixture.

¶ 77 While the prosecutor correctly told the jury that there was no instruction for an alternate suspect, we agree that the statement was improper because the defense presented nonspeculative evidence of an alternate suspect. Nevertheless, the prosecutor's fleeting statement didn't so undermine the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the conviction.

¶ 78 Reviewing the context of the arguments as a whole and considering the evidence before the jury, the prosecutor's arguments — though imprecise or improper at times — didn't deprive Ortiz of a fair trial. Thus, even if there was misconduct, it didn't rise to the level of plain error.

E. Ortiz's Competency

¶ 79 Ortiz argues that the trial court should have, sua sponte, made factual findings about his competency to proceed at the time of trial or ordered a competency evaluation. We disagree.

1. Standard of Review and Applicable Law

¶ 80 Ortiz didn't raise this issue in the trial court, so we review for plain error. *See Hagos*, ¶ 14.

¶ 81 The question of whether a defendant is competent to proceed may be raised by counsel, or if "the judge has reason to believe that the defendant is incompetent to proceed," the judge must "suspend the proceeding and determine the competency or incompetency of the defendant." § 16-8.5-102(2)(a), C.R.S. 2026. A defendant is "incompetent to stand trial if he or she is not capable of understanding the nature and course of the proceedings, cannot assist in the defense, or is incapable of cooperating with defense counsel." *People v. Stephenson*, 165 P.3d 860, 864 (Colo. App. 2007). While "reason to believe" isn't defined by statute, and "there is no definitive constitutional standard with respect to the nature and quantum of evidence necessary to require resort to an adequate procedure for determining competency," the standard "presents a

low threshold." *People v. Nagi*, 2014 COA 12, ¶ 15 (citation omitted), *aff'd*, 2017 CO 12; *Cappelli v. Demlow*, 935 P.2d 57, 62 (Colo. App. 1996) (recognizing that a defendant's irrational behavior or his demeanor at trial may be sufficient to require an evaluation, but there are no fixed or immutable signs requiring further inquiry to determine fitness to proceed).

¶ 82 "A defendant is presumed to be competent to stand trial." *Stephenson*, 165 P.3d at 866. And because the trial court is in the best position to observe the defendant's general demeanor, "it has substantial discretion in determining whether a legitimate issue respecting that defendant's competency has been raised." *People v. Kilgore*, 992 P.2d 661, 663-64 (Colo. App. 1999).

2. Discussion

¶ 83 Ortiz contends that, based on two pro se pleadings he filed two years before trial reflecting his delusional and paranoid beliefs about the case, the trial court had reason to believe that he was incompetent to proceed. We aren't persuaded.

¶ 84 The case remained pending for approximately four years because of numerous stays, during which Ortiz remained on bond and complied with its conditions. He was permitted to relocate to

Washington and travel to Texas, and he appeared for every court setting except for one. Over the course of these appearances, the judge had many opportunities to observe Ortiz firsthand; the record doesn't indicate that Ortiz exhibited behavior at hearings or at trial suggesting incompetence. Likewise, neither defense counsel nor the prosecution expressed concerns regarding Ortiz's competency or requested a competency evaluation.

¶ 85 Following Ortiz's conviction, a psychosexual evaluator concluded that Ortiz didn't meet the criteria for any diagnosable mental health disorder. While the evaluator observed obsessive-compulsive personality features that affected Ortiz's functioning, those traits didn't meet the criteria to diagnose a formal personality disorder. Also, before that time, Ortiz had never been treated for his mental health, had never been evaluated for a mental illness, and had never been prescribed antipsychotic medication.

¶ 86 To the extent that Ortiz contends that his mental health deteriorated after trial and sentencing and the psychosexual evaluation results validate his claim that he was incompetent, as evidenced in his pro se filings, that assertion doesn't establish that he was incompetent when tried. The trial court was required to

assess competency based on the circumstances presented during the proceedings before it, and nothing in the record reasonably suggested that Ortiz couldn't understand the nature and course of the proceedings or that he couldn't assist with his defense or cooperate with defense counsel. Accordingly, the trial court didn't err, let alone plainly err, by failing to, sua sponte, conduct a competency inquiry or order a competency evaluation.

F. Cumulative Error

¶ 87 Ortiz argues that the cumulative effect of the trial court's errors deprived him of a fair trial.

¶ 88 The cumulative error doctrine applies when "the cumulative effect of [multiple] errors and defects substantially affected the fairness of the trial proceedings and the integrity of the fact-finding process." *Howard-Walker v. People*, 2019 CO 69, ¶ 24 (quoting *People v. Lucero*, 615 P.2d 660, 666 (Colo. 1980)).

¶ 89 Although the trial court erred by finding a limited waiver of the attorney-client privilege and there were errors during the prosecutor's closing arguments, these errors weren't sufficient to constitute cumulative error that requires reversal.

III. Disposition

¶ 90 We reverse Ortiz's convictions for counts 6 and 7 and remand for a new trial on those counts. In all other respects, we affirm the judgment.

JUDGE SULLIVAN and JUDGE TAUBMAN concur.