SUMMARY
July 22, 2021

2021COA98

No. 17CA2332, *Peo v Barajas* — Jurors — Colorado Uniform Jury Service and Selection Act; Criminal Law — Trials — Birfurcation

As a matter of first impression, a division of the court of appeals holds that the Colorado Uniform Jury Selection and Service Act does not bar jurors from serving in both stages of a bifurcated trial. The division also concludes that the trial court erred by beginning voir dire in the defendant's absence but holds that the error was harmless beyond a reasonable doubt.

COLORADO COURT OF APPEALS

2021COA98

Court of Appeals No. 17CA2332
City and County of Denver District Court No. 14CR4770
Honorable Morris B. Hoffman, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jose Barajas,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE GROVE
Fox and Harris, JJ., concur

Announced July 22, 2021

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¶ 1 Defendant, Jose Barajas, appeals the judgment entered on a jury verdict finding him guilty of possession of a weapon by a previous offender (POWPO). We affirm.

I. Background

¶ 2 Police executed a warrant to search for drugs at a house in Denver where Barajas was believed to be staying. The officers found Barajas inside the house, along with several methamphetamine pipes, a loaded handgun, and, in Barajas's front pocket, a small bag of suspected methamphetamine. Barajas was arrested and charged with one count of possession of a controlled substance and two counts of POWPO.

¶ 3 Before trial, Barajas moved for separate trials on the POWPO and drug possession counts. In a written order, the trial court decided to "sever the drug possession count (Count 1) from the weapons counts (Counts 2 and 3)" but denied the request for "separate trials, rather than bifurcation." Thus, the court ruled, it would "have a single jury first hear the drug charge and then hear the weapons charges."

¶ 4 Trial began on a Tuesday, and before voir dire began the court informed the prospective jurors that "for planning purposes, you

should all plan to be here through the rest of this week, through Friday, although the evidence we think will be finished Thursday, and you may even begin to begin your deliberations late Thursday." The court did not inform the jurors that the trial would consist of two phases.

¶ 5 The trial's first phase, relating to the drug possession charge, took a day and a half. The jury deliberated on Thursday morning and found Barajas not guilty. The trial then proceeded immediately to its second stage — the POWPO charges — and after another day of testimony and deliberations the jury found Barajas guilty.

¶ 6 Barajas now challenges the judgment entered on the POWPO verdict, arguing that the trial court erred by (1) bifurcating the trial into two parts tried to one jury, instead of severing the charges into two trials with separate juries; (2) beginning voir dire before Barajas had arrived at the courthouse; (3) admitting testimony from a DNA analyst who "neither supervised nor certified the results of the DNA tests conducted"; and (4) allowing witnesses to testify to statements made by an undisclosed confidential informant. We review each argument in turn below.

II. Bifurcated Trial

¶ 7 Barajas contends that "the bifurcated procedure employed by the trial court constituted a misapplication of the law." We disagree.

A. Bifurcation or Severance

¶ 8 Barajas moved to sever the charges against him and have each tried to a separate jury. He argued that "an entirely separate trial, with separate jury panels . . . and *not* mere bifurcation with the same jury" was required because "prior felony convictions . . . are an imperative topic for jury selection." The court ultimately decided to bifurcate the trial and have the same jury sit for both phases.

¶ 9 A motion for separate trials before different juries is "addressed to the sound discretion of the trial court," and we review the trial court's ruling on that motion for an abuse of discretion. *People v. Robinson*, 187 P.3d 1166, 1175 (Colo. App. 2008) (citation omitted). While "procedural safeguards" are necessary to ensure a fair trial where a defendant is charged with a substantive offense and POWPO, a trial court has latitude to determine whether severance or bifurcation is an appropriate remedy. *See People v.*

Peterson, 633 P.2d 1088, 1090 (Colo. App. 1981), *aff'd in part*, *rev'd in part*, 656 P.2d 1301 (Colo. 1983).

¶ 10 Citing *Robinson*, 187 P.3d at 1176, the trial court rejected Barajas's argument that bifurcation would chill his attorney "from asking in voir dire about whether prospective jurors could follow the court's instructions on the limited purposes for which evidence of prior convictions might be admitted." The scope of voir dire, the trial court wrote, "is a strategic decision that does not in and of itself render the bifurcation process unfair." We agree with this reasoning. As *Robinson* held, bifurcation may require "counsel to make difficult decisions regarding what information to disclose to potential jurors and what questions to ask," but, nonetheless, bifurcated proceedings "have been expressly endorsed by the supreme court as a mechanism for avoiding prejudice to defendants in circumstances such as those in this case." *Id.* We are therefore not persuaded that the trial court's decision to bifurcate Barajas's trial instead of trying the charges to separate juries was an abuse of discretion.

B. Juror Qualifications

¶ 11 In a related argument, and as a matter of first impression in Colorado, Barajas contends that the court's refusal to sever the counts violated the Colorado Uniform Jury Selection and Service Act (UJSSA), specifically section 13-71-120, C.R.S. 2020. Under that statute, "a trial juror whose deliberation ended with a verdict shall not be required to participate in a second trial" as part of the same jury call. *Id.* In a related provision, the UJSSA states that "[a] prospective trial . . . juror shall be disqualified" if he or she has served as an impaneled trial juror "within the preceding twelve months." § 13-71-105(2)(f), C.R.S. 2020. Because the jurors who heard the POWPO charge had just reached a verdict on the drug possession charge, Barajas argues that their continued service violated the UJSSA. And a violation of the UJSSA, he argues, is a structural error that requires reversal of his conviction.[1]

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[1] Although we conclude that the court's decision to bifurcate the trial did not implicate the UJSSA — and thus do not address the standard of reversal — we note that "structural error" is a constitutional standard, not a statutory one. A statutory error requires reversal in all circumstances only if there is an "express legislative mandate" to that effect. *See People v. Abu-Nantambu-El*, 2019 CO 106, ¶¶ 21-25.

1. Standard of Review

¶ 12 Whether the jurors' continued service during the second phase of the trial violated the UJSSA is a question of statutory interpretation. We review such questions de novo. *See People v. Perez*, 2016 CO 12, ¶ 8.

2. The UJSSA and Bifurcated Trials

¶ 13 Barajas contends that his POWPO conviction must be reversed because all of the jurors who sat for the second phase of the trial had previously deliberated to a verdict on the drug possession charge and were thus statutorily disqualified from serving as jurors for another year. We reject this argument because it confuses bifurcation, which results in a single trial divided into phases and entry of a single judgment, and severance, which results in multiple trials and entry of multiple judgments.

¶ 14 A bifurcated trial is "a trial that is divided into two stages." Black's Law Dictionary 1735 (10th ed. 2014); *see also People v. Fullerton*, 186 Colo. 97, 100, 525 P.2d 1166, 1168 (1974) (describing bifurcated proceedings as "two-part jury trials") (citation omitted); *State v. Ward*, 694 S.E.2d 729, 733 (N.C. 2010) ("[E]ven bifurcated, a hearing is still treated as the same single proceeding

or trial."). In the event of a conviction, a bifurcated trial results in one — and only one — appealable verdict. *See, e.g.*, *State. v. Craig*, 151 N.E.3d 574, 578 (Ohio 2020) ("This court has on numerous occasions indicated that all counts of an indictment must be resolved before a judgment entry of conviction may become a final, appealable order . . . 'disposing of all' charges.") (citation omitted); *cf. Stevenson v. Gen. Motors Corp.*, 521 A.2d 413, 416 (Pa. 1987) ("If a bifurcated trial were considered two distinct trials, rather than two halves of one trial, the finding of liability would be treated as a judgment, subject to post-trial review and appeal. This treatment does not withstand scrutiny under general principles relating to impermissible interlocutory appeals.").

¶ 15 Severance, on the other hand, involves "[t]he separation of criminal charges or criminal defendants for trial." Black's Law Dictionary 1583; *see also* Crim. P. 14 (providing that if a joinder of offenses will prejudice the defendant, the court "may order an election or separate trials of counts"). Once severed, criminal counts proceed on separate tracks and, in the event of a conviction, are subject to independent appeals. *See, e.g.*, *United States v. Leichter*, 160 F.3d 33, 36 (1st Cir. 1998) ("[W]hen a severance

occurs under [Fed. R. Crim. P.] 14, each conviction on the separate count should be separately appealable upon the imposition of sentence.").[2] That is, a defendant who is found guilty of counts that have been severed will have a separate judgment of conviction reflecting each such verdict.

¶ 16 Because the court bifurcated the trial, rather than granting Barajas's request for separate trials, the jurors who deliberated during the first phase of the trial did not participate in a "second trial" in violation of section 13-71-120. Indeed, holding otherwise would raise questions about the propriety of any prosecution with multiple counts. Taken to its extreme, Barajas's theory — that "the disqualifying event is deliberation to a verdict within the calendar year" — would mean that jurors who reach verdicts in a multiple-count case sequentially, rather than simultaneously, have served in violation of section 13-71-120. We decline to adopt an

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[2] Because Fed. R. Crim. P. 14 is substantially similar to Crim. P. 14, "we consider federal cases and authorities concerning the federal rule highly persuasive in interpreting and applying our own." *People v. Short*, 2018 COA 47, ¶ 41.

interpretation of the UJSSA that would lead to such an absurd result.

III. Right to Be Present at Trial

¶ 17 Barajas contends that the trial court violated his right to be present at trial by beginning the voir dire without him. The People respond that Barajas waived his right to be present by failing to appear on time. We agree with Barajas that the court erred but conclude that any error was harmless beyond a reasonable doubt.

¶ 18 On the first morning of trial, Barajas — who was not in custody pending trial — was late to the courthouse. When the court went on record at around 8:30 a.m., defense counsel said that Barajas was running late and would arrive at approximately 9:15 a.m. The court responded that it would "start the pretrial checklist . . . with the understanding that you waive his presence until we get to something that you think you need to have him here, and then just let me know." Defense counsel agreed and waived Barajas's presence for "any of these pretrial matters."

¶ 19 At 10 a.m., Barajas still had not appeared, and the court decided to proceed with introductory remarks to the venire in his absence. Defense counsel objected "for the record" but also said

that he "underst[ood] the Court's intention." The court began addressing the jury and, during those remarks, told the jurors that "Mr. Barajas is not here. He has my permission not to be here. He should be here around 10:30."

¶ 20 By 10:45 a.m. Barajas had still not arrived, and, after completing introductory remarks, the court swore in the venire and asked each prospective juror statutory qualification questions. The court also asked typical background questions about the venirepersons' employment, marital status, and education, whether they knew the parties and witnesses involved in the case, whether they could be fair and impartial, and whether there were any hardships that would arise from jury service. After consulting with counsel, the court excused several jurors for cause (without objection from either side) and then called twenty-five jurors to the box.

¶ 21 The court then began asking background questions of individual jurors. Barajas arrived during this questioning and was present for the remainder of the court's voir dire, the entirety of the lawyers' voir dire, and for the lawyers' remaining challenges for cause and peremptory challenges.

A. Preservation and Standard of Review

¶ 22 The parties agree that we should review de novo Barajas's argument that the trial court violated his right to be present by beginning voir dire in his absence. *Zoll v. People*, 2018 CO 70, ¶ 15. But they disagree as to preservation and the standard of reversal. With respect to preservation, Barajas asserts that his attorney's objection to beginning the voir dire process was sufficient to preserve the issue for appeal. The People respond that Barajas waived his right to be present by failing to appear on time. We conclude that Barajas's failure to appear was not a waiver of his right to be present and that his attorney preserved the issue for our review by raising a timely objection to the court's decision to proceed.

¶ 23 Crim. P. 43(a) states that "[t]he defendant shall be present . . . at every stage of the trial including the impaneling of the jury . . . except as otherwise provided by this rule."

¶ 24 Crim. P. 43(b) provides in pertinent part as follows:

> Continued Presence Not Required. The trial court in its discretion may *complete* the trial, and the defendant shall be considered to have waived his right to be present, whenever a defendant, *initially present*:

> (1) Voluntarily absents himself *after the trial has commenced*, whether or not he has been informed by the court of his obligation to remain during the trial . . . .

(Emphasis added.) Thus, under the rule, "a defendant may waive his or her right to be present by his or her actions, including voluntary absence." *People v. Price*, 240 P.3d 557, 560 (Colo. App. 2010). But by its plain terms, the rule only provides for waiver if the defendant is "initially present," Crim. P. 43(b)(1), or, in other words, "after the trial has been commenced in his or her presence," *Price*, 240 P.3d at 560. Here, because Barajas was not "initially present," Crim. P. 43(b)(1)'s waiver provision does not apply.

¶ 25 As for the standard of reversal, Barajas asserts that the trial court committed structural error by proceeding in his absence during a critical stage of the trial. But a violation of a defendant's right to be present is reviewed for constitutional harmless error, not structural error. *See Luu v. People*, 841 P.2d 271, 274 (Colo. 1992) ("[A]llegations of denial of the right to be present at trial are scrutinized under the harmless error doctrine."); *see also People v. Payne*, 2014 COA 81, ¶ 17. "Under this standard, the prosecution

has the burden of demonstrating, beyond a reasonable doubt, that the error in proceeding in defendant's absence did not contribute to his conviction." *Payne*, ¶ 7.

B. Analysis

¶ 26 A criminal defendant has a constitutional right "to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975). This includes jury selection. *See Gomez v. United States*, 490 U.S. 858, 873 (1989). The right to be present is not absolute, however. There is no constitutional right to be present where the defendant's presence "would be useless, or the benefit but a shadow." *Snyder v. Massachusetts*, 291 U.S. 97, 106-07 (1934); *see also People v. Isom*, 140 P.3d 100, 104 (Colo. App. 2005) "([D]ue process does not require the defendant's presence when it would be useless or only slightly beneficial.").

¶ 27 At the outset, the People argue that the individual voir dire the court conducted was an "administrative empanelment process" and thus was not a critical stage of the trial. *See Cohen v. Senkowski*, 290 F.3d 485, 489-90 (2d Cir. 2002). Even assuming that the jury selection process can be separated into legally distinct phases, here,

the trial court's initial voir dire went beyond pre-screening for issues such as personal hardship, and instead involved discussions specific to the impending trial. For example, the court introduced counsel and Barajas (in absentia) and informed the venire that the case involved a charge of possession of a controlled substance. When jurors expressed doubt as to whether they could be fair in a case involving drugs, the court pressed them on the issue and the importance of applying the law consistent with its instructions.

¶ 28 Accordingly, the court erred by beginning voir dire without Barajas, and we turn to whether that error was harmless beyond a reasonable doubt. For two primary reasons, we conclude that it was.

¶ 29 First is the "fiction" that the court created to explain Barajas's absence: "Mr. Barajas is not here. He has my permission not to be here. He should be here around 10:30." By expressly assuming responsibility for Barajas's absence, the court mitigated any possibility that the jurors would hold his tardiness against him.

¶ 30 Second is the nature and outcome of the voir dire conducted by the court. We agree that the court's questions amounted to more than mere "administrative empanelment." Still, the three

jurors who were excused before Barajas arrived were dismissed for personal hardship or statutory disqualification reasons without objection by either side. The court did hold one challenge for cause (to Juror T.D.) in abeyance pending further voir dire, but, as the court predicted, that juror never made it to the box. Another juror who expressed concern about having to care for a sick relative was excused for that reason after Barajas arrived.

¶ 31 Barajas's theory that, had he been present sooner, he might have been able to "assist counsel in identifying jurors' biases" is purely speculative. The only possible prejudice Barajas specifically identifies is a statement by one juror that she had a "friend that has a brother that's named Jose Vargas Barajas." But the juror did not re-raise her concern after Barajas arrived, and so there is no reason to conclude that he was the Jose Barajas the juror knew.

¶ 32 We conclude that the People have shown beyond a reasonable doubt that the court's decision to proceed with voir dire in Barajas's absence did not contribute to the verdict. Because there is nothing in the record suggesting that Barajas's presence during the early stages of voir dire would have created a reasonable possibility of a

different outcome, he was not prejudiced by the trial court's decision to proceed with voir dire in his absence.

IV. DNA Evidence

¶ 33 Barajas contends that the trial court violated his right to confront the witnesses against him by allowing the testimony of a laboratory analyst who did not perform, observe, or supervise each stage of the DNA testing process.[3] We disagree.

A. Preservation and Standard of Review

¶ 34 The parties agree that Barajas preserved his constitutional argument. We review his confrontation argument de novo. *Bernal v. People*, 44 P.3d 184, 198 (Colo. 2002).

B. Applicable Law

¶ 35 The Sixth Amendment of the United States Constitution affords to the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; *see also* Colo. Const. art. II,

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[3] Barajas also suggests that the expert's testimony contravened his request for in-person testimony under section 16-3-309(5), C.R.S. 2020, by the employee who "accomplished the requested analysis." But he does not develop any argument regarding this alleged statutory violation, so we do not consider it further. *See People v. Wallin*, 167 P.3d 183, 187 (Colo. App. 2007) (declining to address arguments presented in a perfunctory or conclusory manner).

§ 16 ("In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ."). The United States Supreme Court has interpreted this right to disallow "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

¶ 36 In *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the Court applied the rule from *Crawford* to a forensic laboratory report. Because it was testimonial, *id.* at 665, the report could not be admitted into evidence unless the defendant could cross-examine the analyst who prepared it, *id.* at 657-58. But the prosecution did not call that analyst to testify at trial; instead, it called a different analyst who had not been involved in either the testing process or preparation of the report. *Id.* at 652. The Court held that this "surrogate" testimony, provided by someone "who did not sign the certification or personally perform or observe the performance of the test reported in the certification," *id.* at 657, and who "could not convey what the [nontestifying analyst] knew or observed about the

events his certification concerned," *id.* at 661, violated the defendant's confrontation right.

¶ 37 Applying *Bullcoming* in *Marshall v. People*, 2013 CO 51, our supreme court considered the admissibility of testimony from a laboratory supervisor who did not personally test the disputed urine sample for drugs, but who did oversee the process and certify the test results. In concluding that the laboratory supervisor was not a "surrogate" for the purpose of a Confrontation Clause analysis, the court noted that she had

- "synthesized the tests performed by two different analysts to ensure that both had reached the same conclusion";
- "reviewed the data generated by the scientific instruments to ensure that the controls show the instruments were working properly while they performed the tests in question"; and
- "reviewed the analysts' notes to ensure that they followed lab protocol throughout the testing process."

Id. at ¶ 18.

¶ 38 Once she performed all of these steps, the laboratory supervisor "certif[ied] the test results and sign[ed] the form that was

sent back to the" police department. *Id.* The supreme court held that because she testified as to "her own involvement in the process, not as a 'surrogate' for someone else's," the supervisor's testimony was properly admitted. *Id.*

C. Analysis

¶ 39 During the POWPO phase of the bifurcated trial, the People called Kelsey McDonald, a forensic scientist from the Denver Crime Laboratory, to testify about the results of DNA analysis on the gun found at the house. McDonald explained the multistep testing process in detail but conceded that she did not perform or observe each part of the process personally. Nonetheless, based on data generated during the testing, McDonald testified as to her own conclusions about the statistical likelihood that Barajas was a contributor to the DNA recovered from the seized firearm.

¶ 40 Barajas contends that because McDonald did not supervise, personally conduct, or observe each step of the DNA extraction, quantification, amplification, and separation process, she was a mere surrogate for the analyst or analysts who completed those steps. But *Marshall* rejected the notion that a defendant must "have the opportunity to confront any lab analyst who participates

in the testing process." *Marshall*, ¶ 19 n.8; *accord Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009) ("[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case.").

¶ 41 To be sure, McDonald's role differed from that of *Marshall*'s laboratory supervisor in several respects. For one thing, McDonald was not a supervisor, although she was "qualified to review" the work of the technicians who extracted, quantified, amplified, and separated the DNA sample. Nor does it appear that McDonald "certified the lab report" in the same manner that *Marshall*'s expert witness did. *Marshall*, ¶ 18. However, she did "generate" and "sign" a report that was discussed but not offered into evidence.

¶ 42 Like the laboratory supervisor in *Marshall*, McDonald reviewed the analysts' notes to ensure that they had followed protocol during each phase of the analysis, that the machines were working properly, and that the correct chemicals were used. But she also performed tasks that *Marshall*'s expert witness did not. For instance, whereas the supervisor in *Marshall* "synthesized the tests"

performed by subordinates to ensure that the results matched, *id.*, McDonald conducted her "own independent assessment of the data," and, based on that analysis, reached her own conclusion as to the likelihood that Barajas had contributed to the DNA found on the handgun. Defense counsel's cross-examination explored that conclusion as well the processes that the other analysts followed to generate the data that McDonald relied on to support it. Notably, McDonald was able to answer each question asked and never suggested that she lacked adequate information to address any of the issues that defense counsel raised.

¶ 43 Though McDonald lacked supervisory authority, she otherwise had the same role as the expert witnesses in *United States v. Summers*, 666 F.3d 192 (4th Cir. 2011), and *State v. Lopez*, 45 A.3d 1 (R.I. 2012), cases cited favorably by the majority in *Marshall*. In *Summers*, the supervising analyst "painstakingly explained the process, whereby he, and he alone, evaluated the data [generated by subordinate analysts] to reach the conclusion that . . . Summers was the major contributor of the DNA recovered" from a key piece of evidence. 666 F.3d at 201-02. This was not surrogate testimony,

the Fourth Circuit held, because the supervisor provided "[t]he only evidence interpreting the raw data." *Id.* at 203.

¶ 44 Likewise, in *Lopez*, the preliminary analytical phases were a team effort, "with different analysts performing each step." 45 A.3d at 10. The testifying supervisor neither performed nor personally observed those steps; rather, he took the raw data that they generated and calculated the statistical likelihood that the DNA recovered from several pieces of evidence matched the defendant. The Rhode Island Supreme Court rejected the defendant's argument that this was "surrogate" testimony under *Bullcoming* because the witness "was integrally involved in the entire process of DNA testing, analysis, and certification," and his testimony relayed the conclusions that he personally drew from the data generated during that process. *Id.* at 13.

¶ 45 True, unlike the witnesses in *Marshall*, *Summers*, and *Lopez*, McDonald was not a supervisor. But in our view, her position on the lab's organizational chart is less important than the work that she performed. *See, e.g.*, David H. Kaye et al., The New Wigmore: Expert Evidence § 5.5.1 (3d ed. 2021) ("The mere fact of a supervisory relationship does not allow the witness to assess the

accuracy of the testimonial statements."). So long as the witness is describing conclusions that she has drawn based on her own analysis, as opposed to simply conveying the results of an analysis completed by others, then her supervisory status is not of paramount importance. *See, e.g.*, *Bullcoming*, 564 U.S. at 668, 672 (Sotomayor, J., concurring in part) (noting, in "emphasiz[ing] the limited reach of the Court's opinion," that "this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue"); *see also State v. Watson*, 185 A.3d 845, 858 (N.H. 2018) (approving the testimony of an nonsupervisor expert who had not personally conducted the testing but had reviewed the documentation, confirmed the accuracy of the data entry, and "actually reviewed all of the testing results"); *State v. Roach*, 95 A.3d 683, 695 (N.J. 2014) (noting that while a supervisor may "testify based on his or her independent review of raw data and conclusions that he or she reports based on that data, the reasoning applies with comparable force to the analogous circumstance of a co-worker or other independent reviewer").

¶ 46 Nor are we persuaded that either *Williams v. Illinois*, 567 U.S. 50 (2012), or our supreme court's more recent holding in *Campbell v. People*, 2020 CO 49, compels a different conclusion. Although *Williams* predated *Marshall*, it did not affect our supreme court's holding that the laboratory supervisor's testimony in that case was constitutionally permissible. As for *Campbell*, in that case a lab analyst testified as to DNA results from a test that was completed in a private facility in Virginia. But because the defendant did not object on confrontation grounds to the analyst's testimony, the court applied plain error review and appeared to have only *assumed* that the challenged testimony was erroneously admitted, rather than actually deciding the issue. *See id.* at ¶ 42 ("[B]ecause *any error* was not plain, reversal is not required.") (emphasis added). In fact, and perhaps because it was applying plain error review, *Campbell* concentrated primarily on whether the Virginia lab results were testimonial hearsay and did not undertake any substantive analysis of whether the analyst's involvement in the testing process was sufficient to satisfy the Confrontation Clause.

¶ 47 Notably, *Campbell* also cited *Marshall* with approval, and, aside from distinctions that we have already concluded are not

critical to our analysis, the situation here is virtually indistinguishable from that in *Marshall.* That differs from the situation in *Campbell*, where the testifying analyst did not appear to have had any knowledge of (much less involvement in) the Virginia laboratory's testing. Here, by contrast, the analyst testified as to, and could be cross-examined on, the conclusions that she independently reached after evaluating data developed by technicians in her own lab, using techniques that she was familiar with and could verify had been followed.

V. Confidential Informant's Statement

¶ 48 Last, Barajas contends that the trial court violated his right to confrontation by permitting two prosecution witnesses to testify, based on information provided by a confidential informant, that Barajas was known to carry a gun at all times. We are not persuaded.

A. Preservation and Standard of Review

¶ 49 The parties agree that Barajas preserved this issue. We review alleged Confrontation Clause violations de novo. *Bernal*, 44 P.3d at 198.

B. Analysis

¶ 50 The search warrant obtained by the police was based on information provided by a confidential informant who, the affidavit alleged, had made controlled drug purchases from Barajas at the house in question. At trial, in the course of explaining why police had used flashbang grenades and an armored vehicle when executing the warrant, one officer testified that "the detective let us know that . . . the suspect was known to carry a handgun in his waistband at all times." Another officer testified that "we had information, or it had been received in our unit that the subject of the search warrant, Mr. Barajas, was known to previously carry a weapon." On cross-examination, one of the officers confirmed that the confidential informant was the source of that information.

¶ 51 Barajas asserts that the confidential informant's claim that he carried a gun was testimonial hearsay, and that the trial court violated his right to confrontation by admitting it. *See, e.g.*, *People v. Ray*, 252 P.3d 1042, 1048 (Colo. 2011) (admitting testimonial hearsay at trial of an unavailable declarant, without a prior opportunity for cross-examination by the defendant, violates the defendant's confrontation rights). "However, the admission of nonhearsay does not implicate a defendant's confrontation rights."

People v. Robinson, 226 P.3d 1145, 1151 (Colo. App. 2009); *Crawford*, 541 U.S. at 59 n.9; *accord Isom*, 140 P.3d at 103 (there is no right of confrontation or hearsay preclusion when statements are not offered for their truth).

¶ 52 Hearsay is defined as a "statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801(c). An out-of-court statement is not hearsay if it is offered for some other purpose, such as to provide context for other actions, to show its effect on the listener, or to explain why a government investigation was undertaken. *See People v. Tenorio*, 197 Colo. 137, 145, 590 P.2d 952, 958 (1979); *Robinson*, 226 P.3d at 1152.

¶ 53 We need not consider whether the confidential informant's statements were testimonial because they were not hearsay to begin with. That is, the prosecution did not offer them to prove the truth of the matter asserted — that Barajas carried a gun with him — but instead to justify the aggressive tactics that the police used in executing the search warrant. *See Robinson*, 226 P.3d at 1151 ("An out-of-court statement offered, not for the truth of the matter it asserts, but solely to show its effect on the listener, is not

hearsay."). Although no limiting instruction was requested or provided, our review of closing arguments confirms that the prosecutor never even mentioned the confidential informant's statements, much less asserted that the jury should consider them when deliberating about whether the firearm located during the search belonged to Barajas. Accordingly, references to the confidential informant's statement were nonhearsay and did not implicate Barajas's confrontation rights.

VI. Conclusion

¶ 54 The judgment is affirmed.

JUDGE FOX and JUDGE HARRIS concur.