SUMMARY
September 21, 2023

2023COA82

No. 19CA0223, *People v. Schnorenberg* — Securities — Colorado Securities Act — Fraud and Other Prohibited Conduct — Material Misstatements or Omissions — Fraudulent Course of Business — Advice of Counsel Defense; Evidence — Hearsay — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time; Criminal Law — Jury Instructions — Good Faith Reliance on the Advice of Counsel

A division of the court of appeals considers the admissibility of testimony about the contents of a lawyer's advice to a defendant in a securities fraud prosecution. The division concludes that where a defendant has been charged with securities fraud under section 11-51-501(1)(b), C.R.S. 2023, or section § 11-51-501(1)(c), C.R.S. 2023, evidence that a lawyer advised the defendant that a misstatement or omission was not material or that a course of business was not fraudulent is relevant to whether the defendant had the required mental state to support a securities fraud conviction. The division

further concludes that an instruction explaining the relevance of advice of counsel evidence in securities fraud prosecutions is necessary when such evidence is admitted at trial. In reaching these conclusions, the division builds on the limited Colorado case law discussing advice of counsel evidence in securities fraud cases.

The division further concludes that in this case, the trial court erred in excluding the defendant's testimony about the content of his lawyer's advice regarding the securities offerings at issue. Because this testimony was offered for its effect on the defendant's state of mind, it was not hearsay. Additionally, the testimony should not have been excluded under CRE 403. The exclusion of this evidence and the failure to give an instruction explaining its relevance warrant reversal of the defendant's convictions for securities fraud.

The division also concludes that seven of the appellant's convictions for securities fraud were barred by the statute of limitations and must be vacated. Additionally, the division directs the trial court on remand to two recent supreme court decisions addressing the parameters of admissible expert testimony from securities law experts in securities fraud cases.

COLORADO COURT OF APPEALS **2023COA82**

Court of Appeals No. 19CA0223
Douglas County District Court No. 16CR187
Honorable Theresa Slade, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Kelly James Schnorenberg,

Defendant-Appellant.

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

Division VI
Opinion by JUDGE TAUBMAN*
Lipinsky and Schutz, JJ., concur

Announced September 21, 2023

Philip J. Weiser, Attorney General, Brittany Limes Zehner, Assistant Solicitor General, Denver, Colorado, for Plaintiff-Appellee

Lynn Hartfield, Alternate Defense Counsel, Denver, 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. 2023.

¶ 1 Defendant, Kelly James Schnorenberg, appeals his judgment of conviction for twenty-eight counts of securities fraud. We vacate seven of those convictions, reverse the judgment as to the remaining convictions, and remand the case for further proceedings.

I. Background

¶ 2 In 2008, Schnorenberg formed KJS Marketing Inc. with the stated purpose of securing funding and recruiting insurance agents for a related insurance marketing company. Over the next seven years, he established a succession of business entities to operate the insurance marketing business. To finance these enterprises, he solicited investments, securing over $15 million from more than 200 investors. These investments were governed by letters of agreement between Schnorenberg and each investor and, later, promissory notes. Pursuant to these agreements and promissory notes, investors generally provided Schnorenberg funding with the understanding the investors would receive twelve percent interest to be paid annually. The notes were collateralized by equity in KJS Marketing or one of the related companies. Thus, in the event Schnorenberg failed to pay the investors within the specified

timeframe, the agreements allowed the investors to acquire ownership interests in Schnorenberg's companies. The agreements also generally required Schnorenberg to provide investors with financial statements for the companies.

¶ 3 In soliciting these investments, Schnorenberg did not disclose certain information to investors. He did not tell them that the Colorado Division of Securities had sued him and that he had been permanently enjoined from selling securities in Colorado. Nor did he tell investors that he had obtained a discharge from bankruptcy in 2003. Schnorenberg also withheld information from the investors who entered into agreements after he failed to pay the initial investors the interest they were owed under their respective agreements. He did not disclose to the later investors that he had failed to pay the initial investors; his companies had carried large debt loads; civil judgments had been entered against him for unpaid debts, and he had not satisfied such judgments; some of his companies had failed; and he had failed to provide his prior investors with financial statements for his companies.

¶ 4 Based on this conduct, Schnorenberg was charged, as relevant here, with twenty-seven counts of securities fraud premised on

material misstatements or omissions, *see* § 11-51-501(1)(b), C.R.S. 2023, and one count of securities fraud premised on a fraudulent course of business, *see* § 11-51-501(1)(c).

¶ 5 He pursued two theories of defense at trial. First, he claimed that the agreements governing the investments were not securities under the Colorado Securities Act (the Act). §§ 11-51-101 to -803, C.R.S. 2023. Second, he argued that, because he acted in good faith and in reliance on the advice of his securities lawyer, he lacked the requisite mens rea to be convicted of securities fraud. The jury nonetheless convicted Schnorenberg of all twenty-eight counts.

¶ 6 On appeal, Schnorenberg argues that the trial court erred in six ways. We agree with the following three contentions of error: (1) the trial court erred by preventing Schnorenberg from testifying about the advice he received from his lawyer regarding what disclosures he needed to make to prospective investors; (2) the trial court further erred by declining to instruct the jury that good faith reliance on his lawyer's advice was relevant to show that he lacked the requisite intent to commit the charged offenses; and (3) his convictions for seven material misstatement or omission counts

were brought outside the statute of limitations and, as a result, must be vacated. Accordingly, as discussed below, we vacate his convictions on the seven time-barred counts, we reverse his convictions on the remaining twenty-one counts, and we remand the case for further proceedings.

¶ 7 In light of our disposition, we need not address Schnorenberg's contentions that the trial court abused its discretion by denying his requests for a continuance and that reversal is required under the doctrine of cumulative error. However, we address his contention that the trial court erred by admitting expert testimony from the Colorado Securities Commissioner only to direct the trial court to consider two recent supreme court decisions on remand.

II. The Advice of Counsel Defense

¶ 8 Schnorenberg argues that the trial court erred by excluding his testimony about the legal advice his securities lawyer gave him in connection with his insurance business, and relatedly, that the trial court erred by refusing to instruct the jury that good faith reliance on advice of counsel is relevant to whether he had the

requisite mental state to support a securities fraud conviction. We agree.

¶ 9 Both of these assertions of error relate to the advice of counsel defense to securities fraud charges. Because there is limited Colorado case law on this subject, we explain below how an advice of counsel defense is relevant to charges of securities fraud.

A. Standard of Review

¶ 10 We review a trial court's evidentiary decisions for an abuse of discretion, but whether a given statement constitutes hearsay is a legal question we review de novo. *People v. Hamilton*, 2019 COA 101, ¶ 12, 452 P.3d 184, 191. When the improper exclusion of nonhearsay evidence affects a defendant's fundamental right to present exculpatory evidence, it is an error of constitutional dimension, and reversal is required unless we are persuaded beyond a reasonable doubt that it did not contribute to the defendant's conviction. *People v. Hoover*, 165 P.3d 784, 790 (Colo. App. 2006) (citing *People v. Scearce*, 87 P.3d 228, 234 (Colo. App. 2003)).

¶ 11 "We review the jury instructions de novo to determine whether they correctly informed the jury of the law." *People v. Sanders*,

2022 COA 47, ¶ 34, 515 P.3d 167, 176 (*cert. granted* Apr. 24, 2023). "As long as we are satisfied that the jury was adequately instructed on the law, we review the trial court's decision to give or decline to give a particular instruction for an abuse of discretion." *Id.* (citing *People v. Roberts-Bicking*, 2021 COA 12, ¶ 17, 490 P.3d 1128, 1133). If we conclude the trial court erred by refusing to give an instruction, we must reverse unless the error was harmless. *See McDonald v. People*, 2021 CO 64, ¶ 55, 494 P.3d 1123, 1133.

B. Additional Facts

¶ 12 At trial, Schnorenberg testified that he had worked with the same securities attorney since 1990 and that he had consulted this lawyer for legal advice on how to raise funds for his insurance business. The securities lawyer could not testify at Schnorenberg's trial because he was out of the country at the time. The trial court denied Schnorenberg's motion to continue the trial so that the securities lawyer could testify.

¶ 13 Although the securities lawyer could not attend the trial, Schnorenberg sought to testify about the advice the lawyer had given him regarding his insurance business. On the first day of Schnorenberg's trial testimony, he said that he had consulted with

his securities lawyer about whether he could legally raise money and whether he needed to disclose to investors that he had been enjoined from selling securities in Colorado and had previously received a discharge from bankruptcy. His defense attorney then asked, "Based on those conversations with your lawyer [and] without telling me about the conversations, did you believe you were required to make those disclosures?" The prosecutor objected to this question, arguing that it called for a hearsay response. Schnorenberg, through his defense attorney, argued that his response did not call for hearsay because any out-of-court statement the question elicited would be offered for its effect on the listener. The trial court sustained the objection on the basis that the question called for hearsay.

¶ 14 During a subsequent recess, Schnorenberg's counsel revisited the issue with the court, again arguing that, to the extent the question called for an out-of-court statement, the statement would be offered for its effect on Schnorenberg's state of mind, not for the truth of the matter asserted, and that the statement was therefore not hearsay. He further contended that this testimony would be

relevant because it could negate the mental state element of all twenty-eight counts of securities fraud.

¶ 15 The trial court, however, maintained its ruling that the question impermissibly called for a hearsay response. The trial court subsequently clarified that it recognized that an out-of-court statement offered solely for its effect on the listener is not hearsay, and that in this case, "the argument can be made" that the contemplated testimony fit under that "exception." It nonetheless found that Schnorenberg's testimony was offered for its truth, and, accordingly, that the testimony should be excluded as hearsay. The trial court also declined to give Schnorenberg's tendered limiting instruction that would have informed the jury to consider the testimony only for this purpose, expressing concern that Schnorenberg's proffered testimony would not be reliable in the absence of his lawyer's testimony.

¶ 16 In response to questions from his defense attorneys, Schnorenberg attempted twice more to testify about the advice his securities lawyer had given him regarding his need to disclose the bankruptcy and injunction to potential investors, and both times the trial court prevented him from doing so based on its ruling that

these questions called for a hearsay response. The trial court also refused to ask a jury question to Schnorenberg that inquired about the advice the securities lawyer had provided him. Additionally, when Schnorenberg attempted to testify about the advice his lawyer had given him regarding the need to disclose the bankruptcy and injunction in response to a different jury question, the court sustained an objection to the proposed testimony.

¶ 17 Though the trial court did not allow Schnorenberg to testify to the specifics of his securities lawyer's advice, it permitted Schnorenberg to testify that he had consulted with his securities lawyer and had received advice regarding how to raise capital for his insurance business. Additionally, the trial court permitted Schnorenberg to testify, in response to a question from the prosecutor, that he had received advice that he did not need to disclose the debt loads of his insurance companies when soliciting investments. It also permitted Schnorenberg to testify with reference to one specific investment agreement that, based on his consultation with the securities lawyer, he did not need to disclose his bankruptcy case and that he had been enjoined from selling securities to that particular investor.

¶ 18 During the jury instruction conference, Schnorenberg's counsel tendered the following instruction: "In determining whether Mr. Schnorenberg acted willfully, you may consider the evidence as it relates to good faith reliance on the advice of counsel." The trial court declined to give the instruction, reasoning that because it had not permitted Schnorenberg to testify about the specific advice his securities lawyer had provided, there was insufficient evidence to warrant giving the instruction.

C. The Advice of Counsel Defense

¶ 19 Convictions for securities fraud under section 11-51-501 require proof that the defendant acted "willfully." *See People v. Pahl*, 169 P.3d 169, 185 (Colo. App. 2006) (explaining that the supreme court requires a mental state of willfulness to convict someone of securities fraud); *see also People v. Destro*, 215 P.3d 1147, 1150 (Colo. App. 2008) (explaining that, when read together, sections 11-51-501 and 11-51-603(1), C.R.S. 2023, make clear that the mens rea for securities fraud is "willfully"). The supreme court has defined the term "willfully" in Colorado's securities fraud statutes as synonymous with "knowingly." *People v. Lawrence*, 2019 COA 84, ¶ 27, 487 P.3d 1066, 1073 (citing *People v. Blair*, 195

Colo. 462, 467, 579 P.2d 1133, 1138 (1978)), *aff'd*, 2021 CO 28, 486 P.3d 269.

¶ 20 Thus, to prove that a defendant committed securities fraud by making a material misstatement or omission, the prosecution must "prove beyond a reasonable doubt that the accused 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." *People v. Riley*, 708 P.2d 1359, 1365 (Colo. 1985). Similarly, to prove that a defendant committed securities fraud by engaging in a fraudulent course of business, the prosecution must "prove beyond a reasonable doubt that the accused was *aware* that he was engaging in an act or practice that would operate as a fraud or deceit upon any person." *Id.* Evidence of a defendant's good faith lack of awareness of these facts or reliance on the advice of counsel may therefore negate the mental state element of a securities fraud charge. *See Terranova*, 38 Colo. App. at 481, 563 P.2d at 367 (explaining that "good faith is a defense" to a fraudulent course of business securities fraud charge); *see also Riley*, 708 P.2d at 1365 (holding that the trial court erred by instructing a jury that

good faith is not a defense to material misstatement or omission securities fraud or fraudulent course of business securities fraud).

¶ 21 A defendant's reliance on the advice of counsel in connection with a securities offering may be relevant to demonstrate what the defendant believed in good faith to be true. Two divisions of this court have concluded that a lawyer's advice that a given course of business would not be fraudulent tends to show that the defendant lacked the requisite mental state to commit securities fraud. *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." (citing *Terranova*, 38 Colo. App. at 481, 563 P.2d at 367)).

¶ 22 Though no Colorado case has addressed whether advice of counsel regarding the materiality of a misstatement or omission is relevant to determining if a defendant had the requisite mental state to commit securities fraud, we conclude that it is. If a defendant can demonstrate that the defendant's lawyer told the defendant that certain information would not be material, this

would tend to show the defendant lacked awareness that the information was material to investors.

¶ 23 Federal cases broadly agree with this conclusion. *See Riley*, 708 P.2d at 1363 (explaining that in interpreting Colorado's securities fraud statute, we may look to federal authority interpreting analogous federal statutes); *see also Terranova*, 38 Colo. App. at 480, 563 P.2d at 366 (same). Indeed, many federal courts have held that "advice of counsel is a proper consideration in analyzing a defendant's state of mind in connection with securities fraud claims." *U.S. Sec. & Exch. Comm'n v. ITT Educ. Servs., Inc.*, 303 F. Supp. 3d 746, 763 (S.D. Ind. 2018) (collecting cases); *see also United States v. Bush*, 626 F.3d 527, 540 (9th Cir. 2010) (noting that advice of counsel is "a circumstance indicating good faith which the trier of fact is entitled to consider on the issue of fraudulent intent" (quoting *Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1961))); *Howard v. Sec. & Exch. Comm'n*, 376 F.3d 1136, 1147 (D.C. Cir. 2004) (explaining that reliance on the advice of counsel in a securities fraud civil enforcement action may serve as "evidence of good faith, a relevant consideration in evaluating a defendant's scienter"). *But see Zacharias v. Sec. & Exch. Comm'n*,

569 F.3d 458, 467 (D.C. Cir. 2009) ("It appears to be an open question in this circuit whether reliance on the advice of counsel is a good defense to a securities violation . . . .").

¶ 24 There are limits, however, to the advice of counsel defense to securities fraud charges. Evidence of reliance on the advice of counsel is relevant only to the defendant's mental state. Such evidence is therefore relevant only to elements of the offense to which a mental state applies. For example, because whether a defendant believed in good faith that the defendant was not selling a security is "irrelevant to [a] securities fraud prosecution," evidence that a lawyer told the defendant that the instrument the defendant was selling was not a security is irrelevant. *Hoover*, 165 P.3d at 790-91. Even for those offenses with a mens rea element, evidence that the defendant relied on the advice of counsel is not "an absolute defense" to securities fraud charges, but is merely "a factor for the jury to consider" in deciding whether the defendant had the requisite state of mind. *Terranova*, 38 Colo. App. at 481, 563 P.2d at 366-67.

¶ 25 With these principles in mind, we turn to Schnorenberg's contentions of error.

D. Testimony About Counsel's Advice

¶ 26 Schnorenberg contends that the trial court erred by excluding his testimony about the contents of his securities lawyer's advice as hearsay. He argues he offered this testimony to establish an advice of counsel defense, meaning he offered the advice for its effect on the listener, not for its truth. As a result, he says, the testimony was not hearsay. We agree.

¶ 27 As previously discussed, the advice of counsel can be relevant to determining whether a defendant had the required mental state to support a securities fraud conviction. Schnorenberg sought to introduce testimony about the contents of his lawyer's advice to support his theory that he lacked the requisite mental state to commit securities fraud. Thus, he did not offer the testimony for its truth, but rather for its effect on his state of mind. Therefore, the testimony was not hearsay. *See, e.g.*, *People v. Barajas*, 2021 COA 98, ¶ 52, 497 P.3d 1078, 1088 (an out-of-court statement offered for its effect on the listener, not for its truth, is not hearsay); *see also United States v. Scully*, 877 F.3d 464, 474-76 (2d Cir. 2017) (the defendant's testimony regarding his lawyer's advice offered in support of an advice of counsel defense did not constitute hearsay

and should not have been excluded under Federal Rule of Evidence 403).

¶ 28 The prosecution concedes that testimony regarding the substance of the securities lawyer's advice is not hearsay but contends the testimony should nonetheless have been excluded as unfairly prejudicial under Rule 403. Initially, we note that the trial court did not cite Rule 403 in disallowing Schnorenberg's proposed testimony. However, even if such a rationale could be attributed to the trial court, we conclude that it does not support exclusion of the testimony.

¶ 29 Under Rule 403, 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." This rule "strongly favors the admission of evidence." *People v. Dominguez*, 2019 COA 78, ¶ 29, 454 P.3d 364, 370. Therefore, a reviewing court must "afford the evidence the maximum probative value attributable by a reasonable fact finder and the minimum unfair prejudice to be reasonably expected." *People v. Elmarr*, 2015 CO 53, ¶ 44, 351 P.3d 431, 442 (citation omitted).

¶ 30 The challenged testimony had potentially substantial probative value. We cannot discern on this record what exactly Schnorenberg would have said his lawyer told him, but evidence that his lawyer had advised him that the alleged misstatements and omissions were not material or that the course of business in which he engaged was not fraudulent would tend to show he lacked the requisite mental state for some or all of the securities fraud charges. In other words, this testimony could provide direct evidence from which a jury could conclude that Schnorenberg did not commit securities fraud.

¶ 31 The prosecution nonetheless asserts that the challenged testimony carried a great risk of unfair prejudice because the jury could have considered the testimony for its truth. We disagree. This same danger inheres any time an out-of-court statement is introduced into evidence for a nonhearsay purpose, yet divisions of this court regularly find such evidence admissible. *See, e.g.*, *Barajas*, ¶ 52, 497 P.3d at 1088; *see also People v. Knapp*, 2020 COA 107, ¶¶ 35-39, 487 P.3d 1243, 1252-53; *People v. Smalley*, 2015 COA 140, ¶ 30, 369 P.3d 737, 744. This is in large part because of the options available to mitigate this type of prejudice.

¶ 32 Here, the risk that the jury would consider the lawyer's testimony for its truth would have been substantially mitigated had the trial court given the limiting instruction Schnorenberg offered. *See Smalley*, ¶ 30, 369 P.3d at 744 (finding limiting instruction informing jury to consider out-of-court statement only for the context it provided, not for its truth, to be effective); *see also People v. Lancaster*, 2022 COA 82, ¶ 50, 519 P.3d 1053, 1064 (explaining that potential effectiveness of a limiting instruction is relevant to CRE 403 analysis). Though a jury may initially be inclined to consider the substance of the lawyer's advice, we presume that the jury would have followed a limiting instruction informing it not to consider the testimony for these purposes. *See People v. McKeel*, 246 P.3d 638, 641 (Colo. 2010) ("We presume that jurors follow the instructions that they receive.").

¶ 33 Additionally, the prosecution would have had the opportunity to cross-examine Schnorenberg about the advice he had received from his securities lawyer. Such cross-examination could have highlighted the self-serving nature of the contemplated testimony and alerted the jury to the danger in uncritically relying on it. *See Scully*, 877 F.3d at 475 (concluding the trial court erred by

excluding defendant's testimony about his lawyer's advice under Federal Rule of Evidence 403 in part because the prosecution had "ample means to challenge the credibility" of the defendant's testimony).

¶ 34 Considering these options for limiting the potential unfair prejudice in admitting testimony about the securities lawyer's advice, as well as the potentially significant probative value of that testimony as it related to Schnorenberg's mental state, we conclude that the danger of unfair prejudice did not substantially outweigh the probative value of the testimony. Accordingly, we reject the People's argument, and we conclude that the trial court abused its discretion by excluding the testimony.

¶ 35 As explained below, we find this error warrants reversal of Schnorenberg's judgment of conviction. Because the harm of this error is so closely related to the trial court's refusal to give an advice of counsel instruction, we address the harm of both errors together.

E. Jury Instruction Regarding Advice of Counsel

¶ 36 We agree with Schnorenberg that, under the circumstances, the trial court should have given his proposed instruction that good faith reliance on the advice of counsel is relevant to whether he had

acted willfully. As discussed above, the trial court erred by preventing Schnorenberg from testifying about the advice his securities lawyer had provided him because this testimony might have been highly probative of whether Schnorenberg had the requisite mental state to commit securities fraud. By rejecting the instruction on the ground that Schnorenberg had failed to present evidence about his securities lawyer's advice, the trial court compounded its earlier error. Thus, in our view, the trial court further erred by refusing to give the requested instruction. *See Terranova*, 38 Colo. App. at 481, 563 P.2d at 367 (holding that the trial court erred by instructing the jury that securities fraud is a strict liability crime and requiring the trial court to instruct the jury on remand that good faith reliance on the advice of counsel is relevant to the scienter element of a securities fraud charge).

F. Prejudice

¶ 37 We are not persuaded beyond a reasonable doubt that these errors did not contribute to Schnorenberg's conviction. *See Hoover*, 165 P.3d at 790. As previously discussed, the proffered testimony may have been highly relevant to whether Schnorenberg had the requisite mental state to commit securities fraud. Thus, if he had

been able to present this testimony, and if the jury had credited it, the jury may have reached different verdicts on some or all of the charged counts.

¶ 38 Nor are we persuaded by the People's argument that the error was harmless because of the limited testimony about the securities lawyer's advice that the trial court admitted. Testimony that Schnorenberg spoke to his lawyer before taking certain actions carries much less weight than testimony about his lawyer's specific advice with respect to operating and raising funds for his business. Though Schnorenberg testified as to specific advice with respect to one of the investment agreements and one of the alleged omissions, he was not able to testify about the specific advice he had received concerning the majority of the investment agreements or the remaining alleged misstatements and omissions.

¶ 39 The trial court's failure to provide an advice of counsel instruction compounded the harm. Had the jury been instructed that it could consider the securities lawyer's advice in determining whether Schnorenberg had acted willfully, it may well have reached a different conclusion regarding Schnorenberg's guilt. In sum, we find the trial court abused its discretion by excluding

Schnorenberg's testimony about his securities lawyer's advice and declining to give an instruction that good faith reliance on the advice of counsel is relevant to whether Schnorenberg acted willfully. Because these errors were not harmless beyond a reasonable doubt, we must reverse Schnorenberg's convictions.

III. Statute of Limitations

¶ 40 Schnorenberg argues, the People concede,[1] and we agree that seven of the charged counts of securities fraud premised on material misstatements or omissions were barred by the statute of limitations and, accordingly, the convictions for these counts must be vacated.

A. Standard of Review

¶ 41 "We review de novo issues concerning application of a statute of limitations." *People v. Johnson*, 2013 COA 122, ¶ 7, 327 P.3d 305, 307 (citing *People v. McKinney*, 99 P.3d 1038, 1041 (Colo. 2004)).

---

[1] Though we are not bound by the parties' concessions, in this case, our interpretation of the applicable law indicates that the parties are correct. *See People v. Snelling*, 2022 COA 116M, ¶ 49 n.3, 523 P.3d 477, 489 n.3 ("We rely on our own interpretation of the law and are not bound by the concessions of the parties.").

B. Additional Facts

¶ 42 On March 11, 2016, a grand jury returned an indictment charging Schnorenberg with securities fraud. Counts one through seven were premised on conduct alleged to have occurred before March 11, 2011. Following the trial, the jury returned a guilty verdict on each of these seven counts.

C. Analysis

¶ 43 Section 11-51-603, C.R.S. 2023, is the statute of limitations for securities fraud charges in Colorado. This statute provides that prosecutions for securities fraud must be brought "within five years after the commission of the offense." § 11-51-603(5). Thus, unless some tolling provision applied, the charged offenses must have been committed after March 11, 2011, to fall within the applicable statute of limitations.

¶ 44 Section 16-5-401(4.5), C.R.S. 2023, establishes that the statute of limitations for the offenses enumerated in that provision does not begin to run until the criminal act constituting the offense is discovered. In 2013, that provision was amended to include securities fraud as one of the enumerated offenses. Ch. 272, sec. 3, § 16-5-401, 2013 Colo. Sess. Laws 1427. That amendment,

however, specified that it applied only to offenses committed after July 1, 2013. Sec. 19, 2013 Colo. Sess. Laws at 1433. As a result, the alleged criminal acts charged in counts one through seven of the indictment do not fall within the discovery tolling provision of section 16-5-401(4.5). *See People v. Stellabotte*, 2018 CO 66, ¶ 3, 421 P.3d 174, 175 (amendatory legislation applies only prospectively if the amendment contains clear language indicating it applies only prospectively). Consequently, the convictions on these charges are barred by the statute of limitations and must be vacated. *See Bustamante v. Dist. Ct.*, 138 Colo. 97, 107, 329 P.2d 1013, 1018 (1958), *overruled in part on other grounds by Cnty. Ct. v. Ruth*, 194 Colo. 352, 575 P.2d 1 (1977).

IV. Expert Testimony

¶ 45 At trial, the prosecution called the Colorado Securities Commissioner as an expert witness. On appeal, Schnorenberg argues that the trial court erred by admitting some of the Securities Commissioner's testimony because it usurped the jury's role as fact finder. In our view, this issue is unlikely to arise on remand in the same manner it arose in Schnorenberg's trial because whether expert testimony usurps the jury's role is a highly case-specific

inquiry. *See People v. Rector*, 248 P.3d 1196, 1203 (Colo. 2011) (explaining that whether expert testimony usurped the jury's role as fact finder depends on case-specific factors such as whether the challenged testimony was clarified on cross-examination, expressed an opinion of the applicable law, and expressed an opinion that the defendant committed the charged offenses).

¶ 46 Because another expert in securities law will likely testify on retrial — possibly an employee of the Division of Securities or another former Securities Commissioner — we briefly address this issue for the limited purpose of directing the trial court's attention to recent case law. Since Schnorenberg's last trial, the supreme court has issued two decisions examining whether witnesses qualified as experts in securities law usurped the jury's role as fact finder. *See People v. Baker*, 2021 CO 29, 485 P.3d 1100; *Lawrence v. People*, 2021 CO 28, 486 P.3d 269. The supreme court issued these cases, in part, because it found that "many prosecutors have reflexively designated a current or former securities commissioner" as an expert in securities law and elicited testimony on whether the transaction at issue involved a security and whether any misstatements or omissions were material, "notwithstanding

admonitions from divisions of the court of appeals that such testimony could 'cross the line from acceptable opinion to unacceptable interference with the court's or jury's role.'" *Lawrence*, ¶ 44, 486 P.3d at 278 (citation omitted). The supreme court thus "encourage[d] trial judges to assess, on a case-by-case basis, whether such testimony would truly be helpful to the jury before allowing the jury to hear it." *Id.* at ¶ 48, 486 P.3d at 279. If an expert in securities law is endorsed prior to any retrial, the trial court should consider these admonitions in addressing the admissibility of such testimony.

V. Disposition

¶ 47 The convictions for counts one through seven are vacated, the judgment of conviction for the remaining counts is reversed, and the case is remanded for further proceedings.

JUDGE LIPINSKY and JUDGE SCHUTZ concur.