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ADVANCE SHEET HEADNOTE
November 4, 2024

2024 CO 69

No. 23SC197, *People v. Martinez*—Expert Witness Testimony.

The supreme court granted certiorari to determine whether (1) testimony that otherwise meets the requirements of CRE 702 and *People v. Shreck*, 22 P.3d 68 (Colo. 2001), is rendered inadmissible because the witness was not formally offered and accepted as an expert during their testimony; and (2) it is plain error to admit expert testimony without a formal offer and acceptance when the record demonstrates that the requirements of CRE 702 and *Shreck* have been met.

The supreme court now concludes that CRE 702 and applicable case law neither require nor prohibit a formal offer and acceptance of an expert. Accordingly, the lack of a formal tender and acceptance of the expert does not alone render expert testimony inadmissible, and such testimony is admissible if it otherwise complies with the requirements of CRE 702 and *Shreck*.

Applying these principles here, the court further concludes that the trial court did not err, much less plainly err, in admitting the expert's testimony in this

case. The court therefore reverses the judgment of the division below and remands this case to allow the division to address the other issues that the defendant raised and that the division, in light of its determination, did not reach.

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

2024 CO 69

Supreme Court Case No. 23SC197
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA175

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Pete Paul Martinez.

Judgment Reversed
en banc
November 4, 2024

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

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 We granted certiorari to determine whether (1) testimony that otherwise meets the requirements of CRE 702 and *People v. Shreck*, 22 P.3d 68 (Colo. 2001), is rendered inadmissible because the witness was not formally offered and accepted as an expert during their testimony; and (2) it is plain error to admit expert testimony without a formal offer and acceptance when the record demonstrates that the requirements of CRE 702 and *Shreck* have been met.

¶2 We now conclude that CRE 702 and our case law neither require nor prohibit a formal offer and acceptance of an expert. Accordingly, the lack of a formal tender and acceptance of the expert does not alone render expert testimony inadmissible, and such testimony is admissible if it otherwise complies with the requirements of CRE 702 and *Shreck*.

¶3 Applying these principles here, we further conclude that the trial court did not err, much less plainly err, in admitting Dr. Charles Harrison's testimony in this case. We therefore reverse the judgment of the division below and remand this case to allow the division to address the other issues that Pete Paul Martinez raised and that the division, in light of its determination, did not reach.

I. Facts and Procedural History

¶4 Martinez was charged with first degree murder, and he entered a plea of not guilty by reason of insanity ("NGRI"). As required by law, the trial court ordered

a sanity evaluation, which was conducted by Dr. Harrison, a staff psychologist at the Colorado Mental Health Institute in Pueblo. Dr. Harrison reviewed discovery, records from the jail, and Martinez's mental health records, and he interviewed Martinez for three hours. He then produced a report in which he opined that Martinez was legally sane at the time of the alleged offense. The Colorado Mental Health Institute's superintendent sent this report to the court in November 2017, over a year before trial, and the report was apparently provided to the parties at or about that time. Martinez later hired his own expert, Dr. Wells, to perform a second sanity evaluation.

¶5 In advance of trial, the People filed a supplemental witness list, noting which of its witnesses were experts and in what field. Notably, this list did not include Dr. Harrison. Thereafter, at the final pretrial conference, the People explained that they had not endorsed Dr. Harrison as a witness because they planned to call him only on rebuttal, and only if Martinez chose to testify and raised something that the People felt necessitated a response.

¶6 Approximately one week later, Martinez filed an Endorsement of Defenses and Witnesses. In this document, he indicated that he might rely on general denial and NGRI defenses at trial.

¶7 Trial subsequently commenced, and on the first day of trial, the People argued that Martinez had failed to disclose his insanity defense in a timely fashion

and that the People had thought that Martinez had abandoned that defense. Now that he had endorsed the defense for trial, however, the People requested that the court order Martinez to turn over anything that his sanity expert, Dr. Wells, had relied on or produced, including any notes or "summations" that she had prepared. Notably, in the ensuing discussion, the court referred to Dr. Harrison and Dr. Wells as the "two experts." The court ultimately ordered Martinez's counsel to obtain from Dr. Wells all documents in her file and to produce them to the court for in camera review. The court stated that after completing its review, it would determine which documents, if any, Martinez would need to produce to the People and also whether Dr. Wells would be permitted to testify.

¶8 The next day, the People filed a further supplemental witness list, which included only Dr. Harrison. As they had done in connection with the experts disclosed in their prior supplemental witness list, the People also filed Dr. Harrison's curriculum vitae. Unlike what they had done with their prior supplemental witness list, however, and for reasons that the record does not disclose, the People did not specifically note that Dr. Harrison was an expert witness, nor did they identify a field of expertise for him.

¶9 The case proceeded, and the People ultimately called several expert witnesses. For each of these witnesses, the People laid a foundation regarding the witness's qualifications and expertise and then expressly tendered the witness as

an expert in a given field pursuant to CRE 702. By way of example, the People tendered one of their expert witnesses, Dr. Caruso, and the trial court admitted him as an expert, as follows:

> [Prosecutor]: Your Honor, at this time, pursuant to Colorado Rule of Evidence 702, we would tender Dr. Caruso as an expert in forensic pathology.
>
> The Court: Any objection?
>
> [Defense Counsel]: No objection.
>
> The Court: He may offer opinions consistent with that rule. Ladies and gentlemen, the reference is to Rule 702, that is a rule of evidence that governs expert opinion testimony. He may offer opinions consistent with the rule.

¶10 In contrast to the foregoing procedure, when the People called Dr. Harrison, although they reviewed his qualifications and expertise in psychology at length, they did not expressly tender him as an expert. Nor did the court expressly accept him as an expert or rule that he was entitled to offer opinions consistent with CRE 702. The People nonetheless proceeded as if Dr. Harrison's qualifications had been accepted, ultimately asking for his opinion as to Martinez's mental state at the time of the offense at issue. Dr. Harrison reiterated his view that Martinez was sane at the time he committed the offense.

¶11 Notably, at various points throughout the trial proceedings, the People, the court, and defense counsel all referred to Dr. Harrison as an "expert." In one exchange, defense counsel even referred to Dr. Harrison as "the expert who's been

endorsed by the prosecution for purposes of giving expert opinion as to Mr. Martinez's mental state." In addition, on four occasions, the People asked Dr. Harrison for his "expert opinion," and Dr. Harrison twice expressly labeled his testimony as reflecting his "expert opinion" on a matter.

¶12 Although Martinez objected to certain questions as beyond the scope of Dr. Harrison's expert opinion, what he had been endorsed to testify to, what his report discussed, or allowable opinion, he did not object to Dr. Harrison's opining on Martinez's sanity, notwithstanding the lack of a formal offer and acceptance of Dr. Harrison as an expert. Similarly, although the People referred to Dr. Harrison as an "expert" multiple times in their closing argument, Martinez never objected to these characterizations. And Martinez chose not to call his own sanity expert, Dr. Wells, as a witness, thus undermining any suggestion that errors in disclosure regarding Dr. Harrison prevented Martinez from calling his own expert.

¶13 A jury ultimately convicted Martinez as charged, rejecting his NGRI defense. Martinez appealed, contending, as pertinent here, that the trial court had erred by admitting Dr. Harrison's testimony without requiring that he be formally offered and accepted as an expert witness. *People v. Martinez*, No. 19CA175, ¶ 8 (Feb. 16, 2023). A split division of the court of appeals agreed and reversed. *Id.*

¶14 The majority determined that "because Dr. Harrison was neither offered nor admitted as an expert witness, he was testifying only as a lay witness," and

because his testimony exceeded the scope of proper lay testimony under CRE 701, his testimony was erroneously admitted. *Id.* at ¶¶ 33, 40. The majority purported to find support for this ruling in several cases from this court discussing the requirements of expert witness testimony. *Id.* at ¶¶ 34–44. The majority further concluded that reversal was required "because Dr. Harrison's testimony was central to proving that Martinez was sane at the time of the charged crime." *Id.* at ¶ 8. In light of its ruling, the majority did not address the remaining issues that Martinez had raised on appeal. *Id.*

¶15 Judge Tow dissented. In his view, Martinez had waived any objection to Dr. Harrison's testimony by not challenging the propriety of Dr. Harrison's offering expert opinions despite knowing that he had not been formally tendered as an expert. *Id.* at ¶¶ 73–79 (Tow, J., dissenting). Alternatively, Judge Tow concluded that any error in admitting Dr. Harrison's testimony was not plain and therefore reversal was unwarranted. *Id.* at ¶ 80. Lastly, Judge Tow noted that all of the cases on which the majority relied to support its view that a formal tender and acceptance was a prerequisite to the witness's testifying as an expert were distinguishable because they involved scenarios in which a witness was called as a fact witness but then gave testimony that arguably strayed into expert testimony. *Id.* at ¶¶ 62–68. In contrast, this case involved an expert witness offering expert testimony who simply had not been expressly tendered as an expert. *Id.* at ¶ 69.

Moreover, Judge Tow observed that Dr. Harrison's involvement in this case began when *the court* appointed him as an expert, and his role never changed. *Id.*

¶16 The People petitioned this court for certiorari review, and we granted their petition.

II. Analysis

¶17 We begin by setting forth the applicable standard of review and the basic principles concerning expert witness testimony under the Colorado Rules of Evidence and our case law. We then address the question of whether CRE 702 and our case law require expert witnesses to be formally offered and accepted as experts as a condition of admissibility. We conclude that CRE 702 and our case law neither require nor prohibit such an offer and acceptance for expert testimony to be admissible and therefore, the trial court did not err, much less plainly err, in admitting Dr. Harrison's testimony.

A. Standard of Review and Principles of Expert Testimony

¶18 Whether CRE 702 requires a formal offer and acceptance of an expert witness is a question of law that we review de novo. *Gonzales v. People*, 2020 CO 71, ¶ 26, 471 P.3d 1059, 1063 ("The interpretation of a rule of evidence is a question of law, which we review de novo.").

¶19 CRE 702, which governs expert testimony, provides, "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."

¶20 In *Shreck*, 22 P.3d at 77–79, we announced what we later described as a four-part test to guide a trial court's exercise of discretion in considering the admissibility of expert testimony under CRE 702: "(1) the scientific principles underlying the testimony must be reasonably reliable; (2) the expert must be qualified to offer the testimony; (3) the testimony must be helpful to the jury; and (4) the evidence must satisfy CRE 403." *People v. Cooper*, 2021 CO 69, ¶ 1, 496 P.3d 430, 432 (citing *Shreck*, 22 P.3d at 77–79). In addition, expert testimony in criminal cases must comply with the discovery and disclosure requirements set forth in Crim. P. 16.

¶21 CRE 701, in turn, governs lay opinion testimony. That rule provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Id.

¶22 In *Venalonzo v. People*, 2017 CO 9, ¶ 16, 388 P.3d 868, 873, we provided guidance regarding how courts are to distinguish lay from expert testimony:

> [I]n determining whether testimony is lay testimony under CRE 701 or expert testimony under CRE 702, the trial court must look to the basis for the opinion. If the witness provides testimony that could be expected to be based on an ordinary person's experiences or knowledge, then the witness is offering lay testimony. If, on the other hand, the witness provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony.

B. Offer and Acceptance of an Expert

¶23 The People contend that the majority below erred in concluding that CRE 702 and our case law require, as a condition of the admissibility of expert testimony, that the witness be formally tendered by a party and admitted by the court as an expert. We agree.

¶24 As an initial matter, we note, contrary to the majority's opinion below, *Martinez*, ¶¶ 33, 40, that under *Venalonzo*, ¶ 16, 388 P.3d at 873, Dr. Harrison was testifying as an expert witness because, as the trial court and all parties below appear to have agreed, his testimony was indisputably based on "specialized experiences, knowledge, or training." The character of Dr. Harrison's testimony did not change merely because the People did not formally tender and the court did not admit him as an expert.

¶25 The question thus becomes whether Dr. Harrison's testimony was rendered inadmissible by the absence of a formal offer and acceptance of him as an expert. We conclude that it was not.

¶26 As noted above, CRE 702's plain text requires that a witness be qualified as an expert based on knowledge, skill, training, or education and that the witness's testimony be helpful to the trier of fact. Our case law has further determined that CRE 702 requires that the scientific principles underlying the expert's testimony be reasonably reliable and that the evidence satisfy the requirements of CRE 403. *See Cooper*, ¶ 1, 496 P.3d at 432; *Shreck*, 22 P.3d at 77–79. We perceive nothing in CRE 702's express language or in our case law that requires that an expert witness be formally offered and accepted as a condition of admissibility, and we decline to adopt such a requirement now.

¶27 We are not persuaded otherwise by Martinez's contention that the word "qualified" in CRE 702 implies an offer and acceptance requirement because, in his view, it is used as a verb requiring action to qualify the witness. To the contrary, CRE 702 uses the word "qualified" as an adjective modifying the word "witness." Specifically, under CRE 702's plain language, witnesses are "qualified" when they have certain qualifications, namely, knowledge, skill, experience, training, or education in the field in which they will offer opinion testimony. *See Shreck*, 22 P.3d at 78 (noting that CRE 702 requires a determination as to, among other things, "the qualifications of the witness"); s*ee also Melville v. Southward*, 791 P.2d 383, 387 (Colo. 1990) (stating that the court must determine, among other things, "whether the witness is properly qualified by knowledge, skill, experience,

training, or education, to offer an opinion on the issue in question"). Thus, the word "qualified" in CRE 702 does not refer to an action taken by a party or the court. Rather, it refers to a quality of the witness. In other words, a witness is not qualified *by* a court or a party, but rather a witness is qualified *because of* their "knowledge, skill, experience, training, or education." CRE 702.

¶28 We likewise are unpersuaded by Martinez's citation to cases from this court that he interprets as requiring that an expert witness be formally offered and accepted as a condition of admissibility. Contrary to Martinez's assertions, none of the cases on which he relies addressed the issue now before us, and, in any event, the cases are distinguishable on their facts.

¶29 For example, in *People v. Stewart*, 55 P.3d 107, 124 (Colo. 2002), we said that a witness "must be properly qualified as an expert before offering testimony that amounts to expert testimony." Similarly, in *Venalonzo*, ¶ 6, 388 P.3d at 871, we noted that the trial court had "declined to require the People to qualify [a forensic] interviewer as an expert." And in *People v. Ramos*, 2017 CO 6, ¶ 1, 388 P.3d 888, 890, we affirmed the court of appeals division's holding that "the trial court abused its discretion by not qualifying the police detective's blood testimony as expert testimony."

¶30 We, however, did not make these statements in the context of addressing whether the formal offer and acceptance of an expert was a condition of admissibility. Indeed, none of these cases presented that issue.

¶31 In any event, the cases on which Martinez relies are distinguishable from the present case. Specifically, *Stewart*, *Venalonzo*, and *Ramos* all involved scenarios in which what is essentially expert testimony was improperly admitted in the guise of lay opinion. *See Ramos*, ¶ 9, 388 P.3d 891; *Venalonzo*, ¶ 30, 388 P.3d at 877; *Stewart*, 55 P.3d at 123. In each of these cases, a witness was characterized as a fact or lay witness by the prosecution and the trial court, but then the witness offered what was ultimately determined to be expert testimony. *See Ramos*, ¶¶ 3, 9–11, 388 P.3d at 890–91; *Venalonzo*, ¶¶ 5–7, 26–31, 388 P.3d at 871–72, 875–77; *Stewart*, 55 P.3d at 122–24. Moreover, because the witnesses were proffered as fact witnesses, the People in these cases did not make any of the pretrial disclosures required of expert testimony, thereby depriving the defendants of, among other things, an opportunity to obtain their own expert witnesses. *See Venalonzo*, ¶ 50, 388 P.3d at 881 (noting that, if the defendant had the benefit of pretrial disclosure of the forensic interviewer's expert testimony and the bases for her opinions, then he would have had an opportunity to evaluate her testimony in advance of trial or to obtain his own expert witness); *Stewart*, 55 P.3d at 123 (observing that admitting expert testimony in the guise of lay testimony subverts the disclosure and

discovery requirements of the applicable rules, as well as the reliability requirements for expert testimony).

¶32 Our concern in these cases regarding the absence of the required expert disclosures and the denial of the other procedural protections afforded by the applicable rules of criminal procedure is not an issue in this case. Here, unlike in the above-described cases, the People did not attempt to evade expert witness disclosure requirements, nor did they call an expert witness in the guise of a lay witness. *Cf. Stewart*, 55 P.3d at 123 n.10. To the contrary, the trial court and the parties at all times treated Dr. Harrison as an expert, and the People substantially complied with Crim. P. 16's disclosure requirements. Indeed, Martinez appears to have received Dr. Harrison's expert report over a year before trial, and he was able to use that report in framing objections to the scope of Dr. Harrison's testimony. And Martinez had every opportunity to retain his own expert, which he did, although he ultimately declined to call her at trial.

¶33 For similar reasons, we are unpersuaded by Martinez's reliance on language in *Farley v. People*, 746 P.2d 956 (Colo. 1987), which he also characterizes as demonstrating that the formal offer and acceptance of an expert are required. In *Farley*, 746 P.2d at 958, the trial court stated that it had accepted a witness as an expert, but we observed that the record did not support the court's recollection. It is in this context that we pointed out that the witness "was neither offered nor

accepted as an expert." *Id.* In other words, we were simply responding, as a factual matter, to what the trial court had misremembered. We did not address or opine in that case on the necessity of a formal offer and acceptance of an expert witness.

¶34 Finally, we note that, in supporting its conclusion that a formal offer and acceptance are required as a condition of the admissibility of expert testimony, the majority below relied on our decision in *Cooper*, ¶ 1, 496 P.3d at 431–32. *Martinez*, ¶¶ 43, 47. That case, too, is inapposite. In *Cooper*, ¶ 1, 496 P.3d at 431–32, we began by noting the general principle that the trial court must act as a gatekeeper to ensure that expert testimony is not admitted unless it is both reliable and relevant. Nothing in *Cooper*, however, suggested that a party must formally offer and the court must formally accept a witness as an expert before the witness may testify. In discussing the trial courts' gatekeeper function, we were simply reiterating the settled principle that trial courts are responsible for ensuring that expert testimony satisfies the requirements of CRE 702 and *Shreck*. *See Cooper*, ¶ 1, 496 P.3d at 431–32.

¶35 For these reasons, we conclude that a party calling an expert witness need not formally offer, and the trial court need not formally accept, the witness as an expert as a condition of the admissibility of the expert's testimony. Accordingly, we conclude that the majority below erred in imposing such a requirement.

¶36 In so concluding, we hasten to add that a formal offer and acceptance of an expert are not prohibited, either. Indeed, it is often good practice for a party to tender an expert in a particular field and for the trial court to make findings, whether before or during trial, as to that expert's qualifications and the proper scope of the expert's testimony. Such findings can clarify for the parties and perhaps the jurors the proper limits of the expert's testimony. Nonetheless, when, as here, no party objects to the admissibility of the proffered expert's testimony, the lack of findings on the record will not necessarily render the expert testimony inadmissible. *See Ruibal v. People*, 2018 CO 93, ¶ 13, 432 P.3d 590, 593 (citing prior case law for the proposition that "*where a proper challenge has been raised*, a trial court 'is required to issue specific findings' as to relevance and reliability under CRE 702") (emphasis added) (quoting *People v. Rector*, 248 P.3d 1196, 1200 (Colo. 2011)).

¶37 In reaching our conclusion in this case, we recognize that for many trial judges and lawyers, the practice of having a party formally tender and the court formally accept an expert has become routine, and we do not intend to suggest that this procedure is categorically improper. We further recognize, however, that in a given case, opposing counsel, as a matter of sound trial strategy, might not want the trial court to endorse the witness's expertise before the jury. And we fully understand why many trial judges prefer not to do so (hence, rather than

informing the jury that the court will accept the witness as an expert in a given field, many trial judges prefer to announce that the court will allow the witness to offer opinion testimony under CRE 702, the rule governing expert testimony, as the trial court did here).

¶38 We perceive no reason to dictate a procedure that trial judges and lawyers must follow in all circumstances. It suffices for us to say that a party proffering expert testimony is obliged to comply with the procedural rules governing such testimony and to lay a proper foundation for that testimony. The trial court, in turn, is responsible for ensuring that admitted expert testimony complies with the requirements of CRE 702 and *Shreck* and that the proffering party adhered to the applicable procedural rules, so as not to prejudice the opposing party. Whether errors in any of these regards require reversal will depend on the specific circumstances of a given case.

III. Conclusion

¶39 For these reasons, we conclude that CRE 702 and our case law do not require that a party formally offer and that a court formally accept a witness as an expert as a condition of the admissibility of proffered expert testimony. To the contrary, when expert testimony meets the requirements of CRE 702 and *Shreck*, the lack of a formal offer and acceptance of the expert does not necessarily render the expert's testimony inadmissible.

¶40 Applying these principles here, we conclude that the trial court did not err, much less plainly err, in admitting Dr. Harrison's expert testimony despite the fact that the People did not formally offer and the trial court did not formally accept him as an expert witness. We therefore reverse the judgment of the division below and remand this case to allow the division to address the issues that Martinez raised below and that the division, in light of its determination, did not reach.