No. SC87837

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

JUSTIN J. WALKUP,

Appellant.

APPEAL FROM JACKSON COUNTY CIRCUIT COURT
SIXTEENTH JUDICIAL CIRCUIT
THE HONORABLE VERNON E. SCOVILLE, III, JUDGE

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant appeals from a Jackson County Circuit Court judgment convicting him of one count of first-degree murder and one count of armed criminal action, for which he was sentenced to concurrent terms of life imprisonment without the possibility of probation or parole and life imprisonment, respectively. Following an opinion of the Missouri Court of Appeals, Western District, reversing Appellant's conviction, this Court ordered this appeal transferred to it. Therefore, jurisdiction lies in this Court. MO. CONST. art. V, § 10; Rule 83.04.

STATEMENT OF FACTS

Appellant was charged as a prior offender with one count of first-degree murder and one count of armed criminal action relating to the January 21, 2003 murder of his girlfriend, Deborah Lilly. (L.F. 5-6). Appellant was tried before a jury on January 13-15, 2004, in Jackson County Circuit Court before Judge Vernon E. Scoville, III. (L.F. 78-80). Appellant does not contest the sufficiency of the evidence to support his conviction. The evidence at trial, viewed in the light most favorable to the verdict, showed that:

Appellant and Ms. Lilly, met in Summer 2002. (Tr. 351-52). Appellant moved in with Ms. Lilly at her Grandview, Missouri, residence within a few weeks after they met. (Tr. 352, 562).

On January 21, 2003, between 9:30 p.m. and 10 p.m., Appellant called his friend and former employer, Matthew Magness, and told him that he had killed Ms. Lilly. (Tr. 353). Appellant made multiple phone calls to Mr. Magness, including some from Ms. Lilly's car, saying that there was "blood everywhere" and insisting that Ms. Lilly was dead. (Tr. 355-58). Appellant told Mr. Magness that he had beat and strangled Ms. Lilly, and that he had stabbed her in the chest. (Tr. 360-61). Appellant also said that he was going to take Ms. Lilly's money, credit cards, and car and leave town. (Tr. 371-72).

Sometime between 10 and 11 p.m., Appellant, who was intoxicated, crashed Ms. Lilly's car into a residential fence along the interstate. (Tr. 307-08, 416-17). The

homeowners, Ms. Slover and Mr. Smith, came out to investigate and found Appellant in the car. (Tr. 308-09). Appellant begged them not to call police. (Tr. 308-09, 417). He also said something to them about having killed his girlfriend. (Tr. 313-14, 479).

Ms. Slover saw Appellant throw something into the snow behind a shed. (Tr. 310). After the snow had melted a few days later, she found two knives lying in the area where Appellant had thrown the items. (Tr. 325, 462-63). Tests showed that the knives had the victim's blood on them. (Tr. 545).

Mr. Smith agreed to drive Appellant to his home, but when he arrived at the address Appellant had given him (Ms. Lilly's residence), he saw police "everywhere." (Tr. 422). They returned to Mr. Smith's residence, and Appellant used the phone to call Ms. Lilly's residence. (Tr. 424). After he apparently reached the answering machine, Appellant began a taunt directed toward the victim during which he said that "you're laying in a pool of blood and nobody is going to help you." (Tr. 424).

After police arrived to investigate the car accident, Ms. Slover and Mr. Smith forced Appellant to leave their residence. (Tr. 315, 426). Appellant walked right up to police officers who were standing outside and said that he was wanted for murder and that he had killed his girlfriend. (Tr. 316, 427-28). While he was at the hospital being treated for injuries suffered during the car accident, Appellant admitted to a police officer that he murdered Ms. Lilly. (Tr. 470-72).

Police found Ms. Lilly dead on the floor of her residence. (Tr. 389-90). She died from multiple "sharp force" and "blunt force" injuries. (Tr. 580). She was

stabbed or cut 13 times, including one stab wound that went through her aorta, one that went through her heart, and another that went through her chest and produced an exit wound on the other side. (Tr. 581-88, 599). On four of the stab wounds, the knife blade was thrust into Ms. Lilly's body up to the handle. (Tr. 601). She suffered post-mortem stab and cut wounds to her scalp and defensive wounds on her hands. (Tr. 589-93). She was also strangled before she was stabbed, and she suffered a severe blunt force trauma to the back of her skull and a blunt-force injury to her eye. (Tr. 595-97, 605).

Appellant admitted to police that he and Ms. Lilly had a heated argument, but he initially claimed that he left the house before it became physical. (Tr. 505). But Appellant later confessed that the argument became physical and that he grabbed Ms. Lilly's throat and began strangling her until her tongue fell out of her mouth. (Tr. 565-65). He said that he then grabbed a kitchen knife and stabbed her. (Tr. 565). Appellant said that after he killed her, he grabbed some jewelry and left. (Tr. 566). He told police that he knew that Ms. Lilly was dead when he left the house. (Tr. 567). Appellant gave police a written confession admitting to the crime. (Tr. 569).

Appellant did not testify and offered no evidence on his behalf. Appellant did attempt to offer the expert testimony of Dr. Gregory Sisk, a psychologist Appellant identified as a witness the day before trial began. (Tr. 616, 624; Supp. L.F. 7-8). The trial court disallowed Dr. Sisk's testimony. (Tr. 626-27).

The jury found Appellant guilty of first-degree murder and armed criminal

action. (Tr. 716). The trial court sentenced Appellant to life imprisonment without the possibility of probation or parole on the murder conviction and to a concurrent sentence of life imprisonment on the armed criminal action conviction. (Tr. 735-36; L.F. 92-93).

ARGUMENT

The trial court did not abuse its discretion in refusing to allow Appellant's expert witness to testify at trial because Appellant failed to comply with discovery in that he did not disclose to the State that he intended to call this expert witness until the day before trial began.

Alternatively, the trial court's action can be upheld on the ground that: (1) Appellant failed to comply with the statutory notice requirements applicable to mental-disease or -defect evidence contained in § 552.030; and (2) the expert's proposed testimony that Appellant was suffering from a mental disease was inadmissible and irrelevant to the issues involved at trial since Appellant did not give notice that he intended to present either a mental-disease or -defect defense or a diminished-capacity defense and he expressly disavowed any intent to rely on either of these defenses when offering this testimony.

The issue in this case is whether the trial court abused the considerable discretion it is afforded in conducting a criminal jury trial when it refused to allow Appellant's expert witness to testify that Appellant suffered from mental disorders when Appellant failed to disclose this witness to the State until the day before trial began.

A. The untimely disclosure of Appellant's expert witness.

Four months before trial began, the State served its discovery request on

Appellant seeking: (1) any reports of expert witnesses, including the results of any mental examinations; (2) the identity of all witnesses Appellant intended to call at trial; (3) and, whether Appellant intended to rely on a defense of mental disease or defect. (Supp. L.F. 1).

In November 2003, the State filed a motion seeking a court-ordered mental examination of Appellant under § 552.020, RSMo, which pertains to a defendant's competency to stand trial. (Supp. L.F. 2-4). The motion alleged that the request was being made because the State had learned that Appellant was being evaluated by a private psychiatrist hired by defense counsel. (Supp. L.F. 4). On November 19, 2003, the trial court entered an order directing that a mental examination be conducted on Appellant under § 552.020. (Supp. L.F. 5-6).

On the day before trial began, Appellant, in response to the State's discovery request, identified Dr. Gregory Sisk, a psychologist who had evaluated Appellant, as an expert that he intended to call as a witness at trial. (Supp. L.F. 7-8). But the response also stated that Appellant did not intend to rely on the defense of mental disease or defect. (Supp. L.F. 8).

After the State had rested, Appellant called Dr. Sisk as a witness, but the State objected to his testimony. (Tr. 616-17). Appellant's counsel told the court that Dr. Sisk would testify that he had examined Appellant and Appellant's medical records, and that, in his opinion, Appellant suffered from three mental disorders, one of which was bipolar disorder. (Tr. 617-18). Appellant's counsel said that Dr. Sisk's

testimony would show that Appellant acted with "heightened sense of emotions," which he believed was relevant to show Appellant's "state of mind." (Tr. 618-19). But counsel adamantly stated that Dr. Sisk would offer no testimony regarding whether Appellant was incapable of deliberating on the night he killed Ms. Lilly:

> What the doctor is not here to testify about is actually anything about the events of that night in question whatsoever. We are drawing the line that the doctor should not say for any—in any context that Mr. Walkup was in any way incapable of deliberating on this night. He's simply here to talk about Mr. Walkup's history, to talk about his diagnosis that is clear to the doctor.

(Tr. 619). Counsel said that his plan was to present Dr. Sisk's testimony and then argue to the jury that they should consider the fact that Appellant suffers from bipolar disorder in determining whether Appellant acted in a cool frame of mind when he killed Ms. Lilly. (Tr. 619).

The State objected on the ground that any testimony showing that Appellant suffered from a mental disease or defect was irrelevant and inadmissible since Appellant had expressly disavowed any intent to rely on a mental-disease or -defect defense or a diminished-capacity defense. (Tr. 621-22). Thus, any evidence that he suffered from a mental disease was inadmissible under Chapter 552, RSMo. (Tr. 621-22).

The prosecutor acknowledged that she had been aware that Appellant had

been evaluated and that she had received Dr. Sisk's report on the Friday before trial began, but she said that she did not know until the day before trial that Appellant intended to offer Dr. Sisk's testimony. (Tr. 624, 629). Appellant's counsel confirmed that he had told the prosecutor that Appellant was not going to raise either a diminished-capacity or "NGRI" defense. (Tr. 625).

Because Appellant had not disclosed Dr. Sisk as a defense witness until the day before trial and because Appellant did not turn over Dr. Sisk's report to the State until the Friday before trial began, the trial court refused to allow Appellant's expert to testify before the jury. (Tr. 625-27). The trial court based its ruling on "fairness" grounds, including the inability of the State to depose Appellant's expert and to produce an expert of its own. (Tr. 626, 628-29).

Appellant's counsel was then permitted to make an offer of proof regarding Dr. Sisk's proposed testimony. (Tr. 627, 633). During this offer, Dr. Sisk testified about Appellant's psychological history and confirmed a diagnosis that Appellant suffered from bipolar disorder. (Tr. 645-46). Dr. Sisk also described in general terms how bipolar disorder might affect a person's mood. (Tr. 649). He said that persons suffering from bipolar disorder, apparently also including Appellant, can have an "exaggerated expression of emotions to relatively minor events." (Tr. 647). Other than this statement and another comment regarding Appellant's "moodiness," Appellant's counsel asked no questions regarding Appellant's specific symptoms or his ability to deliberate while having bipolar disorder. (Tr. 634-49).

When Dr. Sisk was directly asked by the prosecutor whether Appellant's mental disorders prevented him from being able to control his thinking and behavior or made him unable to deliberate, Dr. Sisk said only that Appellant's "conditions certainly disrupted his past behavior, his decision making, and how he conducted himself." (Tr. 652-53).

B. Standard of review.

The trial court has broad discretion in imposing sanctions on defendants who fail to comply with discovery requests. *State v. Miller*, 935 S.W.2d 618, 623 (Mo. App. W.D. 1996). "The exclusion of testimony as a sanction for a violation of the discovery rules is to be tested by whether such action resulted in fundamental unfairness to the defendant." *State v. Bowman*, 783 S.W.2d 506, 507 (Mo. App. E.D. 1990). "To determine whether the exclusion of the witness's testimony resulted in prejudice, the facts and circumstances of the particular case must be examined including the nature of the charge, the evidence presented, and the role the excluded evidence would have played in the defense's theory." *Id.*

In addition, the "admission of expert testimony is a matter within the sound discretion of the trial court." *State v. Erwin*, 848 S.W.2d 476, 480 (Mo. banc 1993). "Where expert testimony is not offered as a diagnosis of mental disease or defect showing a defendant was incapable of having a specific mental state, the opinion is merely a conclusion that can be drawn by a juror." *Id.*

C. The trial court did not abuse its discretion in excluding the expert's

testimony as a remedy for Appellant's failure to comply with the discovery rules.

"It is the responsibility of the defense to identify the witnesses and to disclose them." *State v. Miller*, 935 S.W.2d 618, 623 (Mo. App. W.D. 1996). When a party fails to comply with a discovery rule, the trial court may exclude evidence or enter such orders it deems just given the situation. *Id.* Under Rule 25.16, the trial court may exclude the testimony of a witness when the identity of that witness was not properly disclosed pursuant to a discovery request. *Id.* The exclusion of a witness is a proper remedy when no reasonable justification is given for the failure to disclose. *Id.*

The criminal discovery rules are not "mere etiquette," and compliance with their provisions is not discretionary. *State v. Bradley*, 882 S.W.2d 302, 306 (Mo. App. S.D. 1994) (quoting *State v. Luton*, 795 S.W.2d 468, 477 (Mo. App. E.D. 1990)). The goal of these rules "is a quest for truth which promotes informed pleas, expedited trials, a minimum of surprise and opportunity for effective cross-examination." *Id.* "Rules 25.03 and 25.05 clearly intend to allow both sides to know the witnesses and evidence to be introduced at trial." *State v. Whitfield*, 837 S.W.2d 503, 508 (Mo. banc 1992). The purpose of these rules is to eliminate surprise at trial. *Id.*

In *State v. Chandler*, 860 S.W.2d 823 (Mo. App. E.D. 1993), the court held that the trial court did not abuse its discretion in excluding the testimony of an

assault defendant's expert witness as a remedy for a discovery violation. *Id.* at 825. Even though the defense had timely endorsed this witness, this sanction was nevertheless upheld because the defendant failed to supply the expert's report to the State before trial. *Id.* The court of appeals also noted that even without the discovery violation, the trial court's action did not result in fundamental unfairness because the expert's proposed testimony was irrelevant. *Id.* Trial courts may exclude the testimony of an untimely endorsed defense witness, especially when that testimony is irrelevant or would result in surprise to the State. *See State v. Williams*, 853 S.W.2d 371, 373-74 (Mo. App. E.D. 1993).

Appellant failed to disclose his expert witness until the day before trial—much too late for the State to take a deposition and obtain an expert of its own without significantly disrupting, and most likely postponing, the trial in this case. (A result perhaps contemplated by the defense when it offered the testimony.) The content of Dr. Sisk's proposed testimony—Appellant's mental health and psychiatric diagnosis—made it impossible for the State to effectively cross-examine Dr. Sisk, to obtain its own mental examination of Appellant, and to retain an expert of its own before trial. Appellant offered no explanation at trial to justify the untimely disclosure.

Appellant complains that exclusion of Dr. Sisk's testimony was too harsh a sanction for his failure to comply with discovery because the State knew months in advance about Dr. Sisk's evaluation of Appellant. Although the prosecutor stated

during the hearing on Appellant's motion for new trial that the State was not arguing that Dr. Sisk's testimony should have been excluded because of lack of notice, (Tr. 729), this comment was obviously made well after the court had already imposed its sanction. In any event, the fact that Dr. Sisk's testimony was irrelevant and inadmissible under Chapter 552, RSMo, was a sufficient, independent ground for excluding his testimony.

The record suggests that the only thing the State knew before trial was that Appellant was being evaluated by a mental health expert chosen by Appellant's counsel for the purpose of determining whether Appellant was competent to proceed to trial under § 552.020, RSMo 2000. That section provides a mechanism for evaluating a criminal defendant to determine whether he "lacks mental fitness to proceed" with a criminal prosecution. Section 552.020.2, RSMo 2000. The State's request for a mental examination of Appellant in response to Appellant's activities was filed under the same statutory provision. (Supp. L.F. 2-3). Nothing in the record shows that the State conducted any evaluation under § 552.030, RSMo 2000, which is a separate section outlining the procedures applicable to an examination regarding the existence of a mental disease or defect that excludes responsibility for the crime.[1]

[1]While arguing to the trial court that it should allow Dr. Sisk's testimony, Appellant's counsel mentioned that he had just received from the State a report

performed by a Dr. Jackson. (Tr. 629). Nothing in the record reveals the nature of this report.

This conclusion is reinforced by the fact that Appellant made no effort to comply with the pleading or notice requirements of § 552.030.2 for making a mental-disease or -defect defense. In fact, Appellant disavowed any attempt to offer evidence of a mental disease or defect either to exclude criminal responsibility altogether or as part of a diminished-capacity defense. (Tr. 617-20; L.F. 8). Section 552.015 expressly provides, however, that "[e]vidence that the defendant did or did not suffer mental disease or defect shall not be admissible in a criminal prosecution except as provided in this section." Section 552.015.1, RSMo 2000.

For purposes of this case, mental-disease or -defect evidence is admissible at a criminal trial only when it is offered to prove that the defendant is not criminally responsible for any crime or when it is offered as part of a diminished-capacity defense, described in the statute as proof "that the defendant did or did not have a state of mind which is an element of the offense." Section 552.015.2(2) and (8). Consequently, the position Appellant took at trial—that he was not relying on a mental-disease or -defect defense—renders his argument on appeal regarding the provisions of section 552.030 and its statutorily-mandated notice requirements irrelevant to this Court's resolution of this case.

In fact, this also supports a finding that even if Appellant did not violate a discovery rule, the exclusion of Dr. Sisk's testimony still did not result in fundamental unfairness because the testimony was otherwise inadmissible and irrelevant evidence of a mental disease not offered in accordance with the provisions of

§ 552.030.

To support his claim that the trial court abused its discretion in refusing to allow Dr. Sisk's testimony, Appellant relies on *State v. Simonton*, 49 S.W.3d 766 (Mo. App. W.D. 2001). But *Simonton* is distinguishable on at least three grounds. First, the court in *Simonton* found that the defendant in that case had, in fact, violated the discovery rules. *Id.* at 780. Second, the defendant in *Simonton* had notified the State well in advance of trial that he intended to rely on a mental-disease or -defect defense. *Id.* at 781-82. And, third, the defendant had disclosed the witness's identity to the State ten weeks before trial, but had simply failed to update that disclosure with new information he had learned before trial regarding that witness's expert opinion. *Id.*

Appellant's case is more similar to *State v. Haslar*, 887 S.W.2d 610 (Mo. App. W.D. 1994). In *Haslar*, the defendant claimed that the trial court abused its discretion in sustaining the State's motion in limine precluding any evidence of the defendant's mental condition. *Id.* at 616. The defendant had argued that evidence of his past history of mental illness was relevant to the issue of his mental condition at the time of the offense and his ability to form the intent required to commit the offenses charged (burglary and stealing). *Id.* Although the trial court did not state its reasons for sustaining the motion in limine, the court of appeals upheld the trial court's ruling on the ground that the defendant did not raise a mental-disease or -defect defense and that he failed to comply with the notice requirements of

§ 552.030. *Id.* at 616-17. The court reached this holding despite the defendant's claim that the State "had been put on notice" that the defendant intended to rely on this defense. *Id.* at 617. The court held that even if this were true, a defendant seeking to raise a mental-disease or -defect defense is nevertheless obligated to comply with the notice requirements contained in § 552.030. *Id.*

D. The expert testimony was also properly excluded because it was inadmissible and irrelevant mental-disease evidence.

Apparently overlooking the fact that at trial he expressly disavowed any intent to rely on a defense of mental disease or defect excluding responsibility or a diminished-capacity defense, Appellant argues for the first time on appeal that the notice requirements contained in § 552.030 do not apply to diminished-capacity defenses. But this Court has expressly held that the notice requirements in § 552.030.2 also apply to defenses based on mental disease or defect relating to diminished capacity.

1. The diminished-capacity defense.

The diminished-capacity defense is available to criminal defendants by virtue of section 552.030, RSMo, which governs the use of mental-disease or -defect evidence in criminal prosecutions. *State v. Anderson*, 515 S.W.2d 534, 538-39 (Mo. banc 1974); *see also State ex rel. Westfall v. Crandall*, 610 S.W.2d 45, 47 (Mo. App. E.D. 1980); § 552.030, RSMo 2000. This defense is authorized by § 552.015, which permits the use of mental-disease or -defect evidence to "prove that the defendant

did or did not have a state of mind which is an element of the offense." *State v. Kruetzer*, 928 S.W.2d 854, 870 (Mo. banc 1996); § 552.015.2(8), RSMo 2000.

In making a diminished-capacity defense, "the defendant accepts criminal responsibility for his conduct but seeks conviction of a lesser degree of the crime because the mental disease or defect prevented the defendant from forming the mental element of the higher degree of the crime." *State v. Gary*, 913 S.W.2d 822, 827-28 (Mo. App. E.D. 1995); *Honeycutt v. State*, 54 S.W.3d 633, 640 n.2 (Mo. App. W.D. 2001). In other words, the diminished-capacity defense allows a defendant "to introduce evidence of a mental disease or defect to prove the absence of a particular mental element of the crime." *Gary*, 913 S.W.2d at 827. Because a diminished-capacity defense is premised on the defendant's inability to form the mental element necessary to commit the crime, it "is necessarily based on evidence of a mental disease or defect as defined in § 552.010." *Erwin*, 848 S.W.2d at 480.

In first-degree murder cases, the diminished-capacity defense is most commonly employed to prove that the defendant lacked the capacity to deliberate, a specific-intent element of first-degree murder. See § 565.020, RSMo 2000 (defining first-degree murder as "knowingly caus[ing] the death of another person after deliberation upon the matter"). To defend a first-degree murder charge by producing mental-disease or -defect evidence showing that the defendant was unable to deliberate is, by definition, a diminished-capacity defense. *Kreutzer*, 928 S.W.2d at 860-61, 870; *Henderson v. State*, 111 S.W.3d 537, 539-40 (Mo. App. W.D. 2003);

see also State v. Hart, 805 S.W.2d 234, 241 (Mo. App. E.D. 1991) ("Under the doctrine of diminished capacity, proof of a mental derangement short of insanity may be allowed as evidence of a lack of deliberate design or premeditation.").

2. The notice requirements of § 552.030 apply to diminished-capacity defenses.

Under § 552.030, evidence of mental disease or defect excluding responsibility "shall not be admissible" unless the defendant "files a written notice" signifying his intent to rely on such a defense. Section 552.030.2. Only after this written notice has been given does the trial court have authority to order the accused to undergo a mental evaluation. *See State v. Strubberg*, 616 S.W.2d 809, 813-14 (Mo. banc 1981); § 552.030.2 and .3.

This Court has expressly and unequivocally held that the notice requirement in § 552.030.2 also applies to diminished-capacity defenses. A defendant cannot raise a diminished-capacity defense unless the defense is pleaded and notice is given to the State under § 552.030. *See State v. Erwin*, 848 S.W.2d 476, 480 (Mo. banc 1993); *See also State v. Copeland*, 928 S.W.2d 828, 837 (Mo. banc 1996) ("If the evidence was being offered as expert testimony of a diagnosis of a mental disease or defect that excluded defendant's criminal responsibility, the defendant must comply with the notice requirements of § 552.030."). "Except as provided by chapter 552, expert testimony of a defendant's state of mind affecting criminal responsibility is not authorized and may be excluded." *Copeland*, 928 S.W.2d at 837. In both *Erwin* and *Copeland*, this Court specifically held that evidence of a defendant's mental disease or defect that is not being offered to prove that the defendant was incapable of forming the specific mental state to commit the crime is irrelevant and

inadmissible. *Erwin*, 848 S.W.2d at 480; *Copeland*, 928 S.W.2d at 837.

Appellant's position at trial is legally indistinguishable from the positions taken by the defendants in *Erwin* and *Copeland*. The defendants in both *Erwin* and *Copeland* also disavowed any intent to rely on a diminished-capacity defense, and claimed that they simply wanted to adduce evidence of their mental condition in an effort to refute the deliberation element of the first-degree murder charges they were facing. *See Erwin*, 848 S.W.2d at 479-80 ("defense counsel disavowed his intent to advance the defense of diminished responsibility or mental disease or defect"); *Copeland*, 928 S.W.2d at 837 (defense "counsel reiterated that defendant did not intend to rely on the defense of mental disease or defect or on the defense of diminishment of responsibility").

Yet in both cases this Court held that expert testimony regarding the defendants' alleged inability to deliberate was irrelevant and inadmissible. *Erwin*, 848 S.W.2d at 480 ("Where expert testimony is not offered as a diagnosis of mental disease or defect showing a defendant was incapable of having a specific mental state, the opinion is merely a conclusion that can be drawn by a juror."); *Copeland*, 928 S.W.2d at 837 ("If the evidence was not being offered as expert testimony diagnosing defendant to have a mental disease or defect excluding responsibility for committing one or more elements of the crime, including absence of the appropriate culpable mental state, it is inadmissible under chapter 552."). The *Copeland* court plainly and unambiguously held that "[e]xcept as provided by chapter 552, expert

testimony of a defendant's state of mind affecting criminal responsibility is not authorized and may be excluded." *Copeland*, 928 S.W.2d at 837.

In *Copeland*, the defendant sought to admit evidence of battered-spouse syndrome not as evidence that she was incapable of forming the mental state to commit the crime, but to prove the defendant's lack of intent to commit a criminal act. *Id.* Like Appellant, the defendant in *Copeland* expressly disavowed any intent to use the battered-spouse evidence as part of an insanity or diminished-capacity defense. *Id.* Relying on this assertion, this Court held that the trial court did not abuse its discretion in disallowing the testimony of an expert witness regarding the battered-spouse syndrome:

> [D]efense counsel made clear that defendant was not intending to rely on the defense of mental disease or defect or on the defense of diminished responsibility due to mental disease or defect. For that reason, the trial court did not abuse discretion in excluding the testimony.

Id. at 837-38.

Under this authority, the trial court below cannot possibly be convicted of error for refusing to allow Appellant's expert to testify. The evidence the expert was to give was unauthorized under Chapter 552 and irrelevant to any issue in the case since Appellant disavowed any reliance on a diminished-capacity defense.

During Appellant's offer of proof, his counsel did not ask Dr. Sisk any questions touching on whether Appellant was capable of deliberating on the night he

killed Ms. Lilly. (Tr. 645-49). Even when the prosecutor directly asked Dr. Sisk this question, Dr. Sisk avoided answering it and stated only that Appellant's condition "disrupted his past behavior, his decision making, and how he conducted himself." (Tr. 652-53).

This testimony was irrelevant to the issue of whether Appellant suffered from diminished capacity on the night of the murder. Dr. Sisk's testimony that Appellant allegedly had a history of bipolar disorder, without more, is no more relevant to the issues in this case as would be testimony that Appellant was a kleptomaniac or that he had a fear of heights. Allowing the jurors to hear testimony that Appellant suffered from a mental disorder would only confuse them, especially since Appellant's tactic was to argue that the existence of a mental disorder alone prevented Appellant from deliberating, notwithstanding the fact that Appellant's own expert refused to render such an opinion.

This Court also cannot discount the possibility that the manner in which Appellant sought to admit Dr. Sisk's testimony was trial strategy. Any objective reading of Dr. Sisk's testimony reveals that it is uniformly weak and unpersuasive on the issue of diminished capacity. In fact, nothing in the offer of proof shows that Dr. Sisk had any opinion about Appellant's ability to deliberate. Appellant was obviously aware of the shortcomings in this testimony when he made the late disclosure of Dr. Sisk as a witness.

Moreover, the weakness of Dr. Sisk's testimony would have been more fully

exposed to the jury if the State had been given an opportunity to depose Dr. Sisk. That would have allowed the State to prepare for an informed cross-examination and to produce an expert of its own. Thus, for Dr. Sisk's testimony to be remotely effective, the State needed to be denied the opportunity to prepare for it.

Appellant also knew that if the trial court gave the State this opportunity, a mistrial would have likely resulted since the State had already presented its case-in-chief. Even the trial court's order disallowing Dr. Sisk's testimony as a remedy to cure Appellant's failure to comply with discovery had its advantages. First, the loss of this testimony would have been negligible because of its overall weakness, and, second, the trial court's action provided a built-in issue for appeal that Appellant could (and did) exploit if he was found guilty of first-degree murder.

Appellant contends that the notice requirements contained in § 552.030 do not apply to diminished-capacity defenses. But § 552.030 contains only notice and other procedural provisions for presenting mental-disease and -defect evidence in criminal prosecutions. Section 552.015, on the other hand, provides the sole authority for admitting this type of evidence at trial. Section 552.015.1, RSMo 2000 ("Evidence that the defendant did or did not suffer mental disease or defect shall not be admissible in a criminal prosecution except as provided in this section."). Appellant's argument overlooks the fact that while the authority to pursue a diminished-capacity (or any other mental-disease or -defect) defense is authorized by § 552.015, it is the provisions of § 552.030 that govern the procedures defendants must follow in

asserting such a defense.

Acceptance of Appellant's argument would effectively divorce the diminished-capacity defense from the procedural requirements contained in § 552.030. This holding is certainly not contemplated by any other case that has considered the diminished-capacity issue, and it is directly contrary to *Erwin* and *Copeland*, both of which held that the notice requirement contained in § 552.030 applies to diminished-capacity defenses. *See also State v. Lewis*, 188 S.W.3d 483, 488 (Mo. App. W.D. 2006) (holding that a mental-disease or -defect defense cannot be considered "by the trial court, unless and until it is properly injected in the case, in accordance with § 552.030.2."); *Haslar*, 887 S.W.2d at 617.

Extended to its logical conclusion, Appellant's argument would apply to nearly all mental-disease or -defect evidence offered at criminal trials, since the admission of such evidence is authorized only under the substantive provisions of § 552.015, not under the procedural provisions contained in § 552.030. It is easy to imagine the rampant confusion and unwieldy results that would follow if Appellant's argument were adopted. Some cases involving mental-disease or -defect evidence would require pretrial notification, while others would not. This is surely not what the legislature intended.

The purpose of the notice requirements in § 552.030 is to prevent surprise to the State. *See State v. Isa*, 850 S.W.2d 876, 886 (Mo. banc 1993). That goal is not served by construing the law so that defendants claiming existence of a mental

disease or defect excluding all responsibility are required to give notice, but those defendants pursuing a diminished-capacity defense are exempt from the notice requirement. The two defenses are indistinguishable in the sense that they involve proof of the existence of a mental disease or defect. The State requires notice in either case to properly defend the case.

Appellant also relies on the statutory language of section 552.030 to support his argument. While the statutory language is not a model of clarity, this Court's decisions in *Copeland* and *Erwin* unequivocally hold that the notice requirements of § 552.030 apply to diminished-capacity defenses. "The construction of a statute by a court of last resort becomes a part of the statute as if it had been so amended by the legislature." *Dow Chemical Co., Inc. v. Director of Revenue*, 834 S.W.2d 742, 745 (Mo. banc 1992).

Moreover, the legislature amended § 552.015 after *Erwin* was decided, and it has amended § 552.030 since the decisions in both *Erwin* and *Copeland*. Yet the General Assembly, which is presumed to be aware of this Court's holdings that construe statutes, made no changes to undo the holdings in *Erwin* and *Copeland*, which expressly applied the notice requirements to diminished-capacity defenses. Thus, a presumption arises that this Court's construction of the law in *Erwin* and *Copeland* has been tacitly adopted by the legislature, and if the statute as construed by this Court is to be changed, it is incumbent on the legislature to amend the statute. *See Medicine Shoppe Intern., Inc. v. Director of Revenue*, 156 S.W.3d 333,

334 n.2 (Mo. banc 2005).

Since this Court's holdings in *Erwin* and *Copeland* have been in effect for over a decade, Appellant's suggestion that criminal defense attorneys would be confused or surprised that the law required them to give notice of diminished-capacity defenses is highly doubtful. Cases decided since *Erwin* and *Copeland*, as discussed above, have reinforced those holdings. Existence of this notice requirement is even included in the Missouri Practice Series treatise on criminal law. 32 Mo. Prac., Missouri Criminal Laws § 4.7. Appellant's argument that this Court should reverse course simply because the statutory language is less than precise should be rejected.

E. Cases that do not involve mental-disease or -defect evidence do not apply in this case.

Appellant's reliance on *State v. Taylor*, 929 S.W.2d 925 (Mo. App. S.D. 1996), in which the court of appeals held that the trial court erred in not admitting evidence of the defendant's intoxication on the night in question, is misplaced. In *Taylor*, the defendant sought to admit evidence of his intoxication to explain why he took certain actions or delayed in taking others, including explaining his statements to police. *Id.* at 926-27. The trial court, however, refused to admit any evidence whatsoever that the defendant was intoxicated. The court of appeals held that while "[e]vidence of intoxication is inadmissible to show that a defendant did not have the necessary mental state" to commit the crime, it may be relevant on other issues, such as

explaining evidence of behavior from which the jury could infer consciousness of guilt. *Id.* at 927.

In this case, however, Appellant's intent was to use Dr. Sisk's testimony as proof that he was incapable of forming the mental state necessary to commit first-degree murder. In other words, Appellant was going to rely on this testimony as proof that he did not deliberate before killing Ms. Lilly. Consequently, Appellant was not offering the testimony for a purpose approved by the court in *Taylor*.

First, Appellant's proposed evidence did not involve his voluntary intoxication. In fact, extensive evidence was adduced by both sides, including during Appellant's cross-examination of several witnesses, that Appellant was intoxicated on the night in question. (Tr. 314, 317, 418, 425). Second, to the extent that Appellant offered Dr. Sisk's testimony to prove that he suffered from a mental disease or defect, he not only failed to comply with the rules of criminal discovery, but also with the statutory requirements (§ 552.030) regarding proof of that issue. Third, unlike the defendant in *Taylor*, Appellant has never denied that he strangled and stabbed Ms. Lilly causing her death. His sole claim is that he did not deliberate before killing her.

These reasons also apply to make this case distinguishable from *State v. Boyd*, 143 S.W.3d 36 (Mo. App. W.D. 2004), in which the defendant sought to offer evidence that he suffered from Asperger's Syndrome. First, the defendant in *Boyd* suffered from "a developmental disability and a handicapping condition," "not a mental illness." *Id.* at 38. Appellant, on the other hand, sought to adduce evidence

that he suffered from a mental illness, bipolar disorder. Second, nothing in this Court's opinion suggests that the defendant in *Boyd*, unlike Appellant here, failed to comply with the rules of discovery regarding disclosure of expert witnesses. Finally, the defendant in *Boyd* sought to introduce evidence of his disease to explain the circumstances surrounding his confession to police, while Appellant sought to introduce evidence of his mental illness to prove that he did not deliberate, the required mental state to convict a defendant of first-degree murder. In other words, Appellant was not offering this evidence to explain the circumstances surrounding the murder, but to prove that he was not responsible because he did not possess the requisite mental state.

The trial court did not abuse its discretion in excluding Dr. Sisk's testimony as a remedy to cure Appellant's discovery violation. Even if Appellant's failure to disclose was not a discovery violation, the trial court's decision can be upheld on the alternative ground that Appellant failed to comply with the notice provisions of § 552.030 in asserting a diminished-capacity defense. *See Haslar*, 887 S.W.2d at 616 (holding that the trial court's ruling will be upheld by an appellate court if sustainable under any theory).

The trial court's exclusion of this testimony, especially when Appellant disavowed at trial that he did not intend to rely on a mental-disease or -defect defense or a diminished-capacity defense, did not result in fundamental unfairness to Appellant. This conclusion is bolstered by the weakness of Appellant's proposed

witness's testimony, during which he avoided offering any opinion on whether Appellant was capable of deliberation on the night he killed the victim.

CONCLUSION

The trial court did not commit reversible error in this case. Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 7,092 words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed on November 7, 2006, to:

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