No. SC98295

In the

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent/Cross-Appellant,

v.

RASHIDI LOPER,

Appellant/Cross-Respondent.

Appeal from the City of St. Louis Circuit Court

Twenty-Second Judicial Circuit

The Honorable Thomas C. Clark, Judge of Division Seven

APPELLANT'S SUBSTITUTE BRIEF, STATEMENT, AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant Rashidi Loper was found guilty after a trial by jury on one count of attempted rape in the first degree, §566.030 RSMo., (Count I), one count of domestic assault in the second degree, §565.072 RSMo., (Count II), two counts of armed criminal action, §571.015 RSMo., (Counts III & V), one count of domestic assault in the first degree, §565.072 RSMo., (Count IV), and one count of tampering with a victim, §575.270 RSMo., (Count VI), in the Circuit Court of the City of St. Louis, Missouri, the Honorable Thomas C. Clark, II presiding. Mr. Loper was sentenced on March 16, 2018 to seven years imprisonment on Count I to run consecutively with all other Counts, fifteen years on Count IV, and a total of sixteen years on Counts II, III, V, and VI to run concurrently with the fifteen-year sentence on Count V. A timely notice of appeal was filed with the Missouri Court of Appeals, Eastern District.

On November 12, 2019, the Eastern District Court of Appeals issued its opinion in *State v. Loper*, 2019 WL 5882880 (Mo. App. E.D. 2019). After denying Mr. Loper's motion for rehearing, the Eastern District Court of Appeals issued a corrected opinion on December 10, 2019. *Id.* On February 4, 2020, this Court sustained Mr. Loper and Respondent/Cross-Appellant[1]'s application for transfer, and transferred Mr. Loper's case to this Court. Therefore, this Court has jurisdiction over Mr. Loper's appeal. Article V, § 10, Rule 83.04.

[1] Mr. Loper will refer to Respondent/Cross-Appellant as Respondent or the State to avoid confusion.

STATEMENT OF FACTS

Rashidi Loper's charges and convictions arose from an incident that occurred in April 2015 between himself and his long-time girlfriend, and wife at the time of trial, E.S.

Rashidi Loper and E.S. were in an on again, off again relationship from 2009 through 2016. (TR 178-79; 209-10; TR 437-41). E.S. said they broke up several times because Mr. Loper was continuously unfaithful. (TR 210-11). E.S. stated that in April 2015, her and Mr. Loper were not together but Mr. Loper later moved in with her in September 2015. (TR 224). E.S. and Mr. Loper married in August 2016. (TR 224-25). Eventually, Mr. Loper and E.S. broke up for good in December 2016. (TR 225). E.S. kicked Mr. Loper out of his house a final time when she discovered Mr. Loper had, yet again, cheated on her. (TR 227). E.S. discovered Mr. Loper got another woman pregnant. (TR 227-28).

E.S. testified she was very angry with Mr. Loper when they finally broke up. (TR 228-29). Mr. Loper moved out of her house and blocked her on social media without explanation. (TR 229). After Mr. Loper left, E.S. learned Mr. Loper had impregnated another woman. (TR 229). E.S. testified she was hurt and angry. (TR 229-30). In May 2017, E.S. learned Mr. Loper and his girlfriend, who appeared to be pregnant, were at Hooters in downtown St. Louis. (TR 238). E.S. approached Mr. Loper at the Hooters and attempted to hit him with a tire iron. (TR 239). E.S. then tried to hit Mr. Loper's girlfriend with her hand. (TR. 239). The jury did not hear E.S. testify about attempting to assault Mr. Loper and his girlfriend at Hooters. (TR. 238-39).

In February 2017, the State charged Mr. Loper with seven counts: One count of attempted rape in the first degree, two counts of domestic assault in the first degree, serious injury, two counts of armed criminal action, one count of kidnapping, and one count of tampering with a victim or attempting to tamper with a victim in a felony prosecution. (D2, pp. 1-3).[2] Prior to trial, the count of kidnapping was dismissed by the State. (D 26). The State has alleged that the victim in all counts was E.S. (D2, p. 2).

Pre-Trial Hearings and Motions

Prior to trial, the State sought to endorse Michelle Schiller-Baker pursuant to §490.065 RSMo as an expert witness regarding domestic violence against victims, specifically women. (TR 134). Mr. Loper objected to the endorsement of the expert. (TR 133). The Court held a hearing "under Missouri Statute §490.065." (TR 134-152). During the hearing, Ms. Schiller-Baker testified she was the executive director of St. Martha's Hall, a women's domestic violence shelter. (TR 134). She had a bachelor's degree in political science. (TR 136). She testified her expertise was based on attending "well over 120 workshops, conferences for training." (TR 135). Ms. Schiller-Baker testified she led trainings for a variety of disciplines. (TR 135). She also testified she has testified in court six times where she was qualified as an expert witness. (TR 136). Ms. Schiller-Baker stated her expertise extends to "victim behavior, victimization, specifically domestic violence." (TR 136). The Court overruled Mr. Loper's objection to the witness being qualified as an

[2] Mr. Loper will refer to the trial transcript as "TR", the electronic legal file as "D" followed by the document number and corresponding page numbers.

expert witness and allowed Ms. Schiller-Baker to be endorsed as an expert witness. (TR 153). Citing *Arcoren v. United States*, 929 F.2d 1235 (8th Cir. 1991), the Court found general profile evidence of behaviors involving domestic violence was proper. (TR 150).

On the second day of trial, the State filed a motion in limine to exclude specific bad acts of the State's witnesses. (TR 166). Defendant objected to the exclusion of evidence that E.S. attacked Mr. Loper with a tire iron at Hooters in downtown St. Louis in May of 2017. (TR 166- 167). Mr. Loper argued E.S. did not fit the general profile of behaviors by an abuse victim as proffered by the State's proposed expert witness due to the victim's violent behavior and jealousy toward Mr. Loper. (TR 167). Mr. Loper also argued it was evidence of E.S.'s motive to falsify allegations against Mr. Loper. (TR 166-167). The State argued the incident, "is the definition of a bad act and not relevant." (TR 168). The Court ruled that the incident was too remote from the original incident, which occurred in April 2015, and therefore, "under Rule 404", should not be allowed to be brought in to show "a pertinent trait" of the alleged victim. (TR 173).

Trial Evidence

E.S. was the first witness called by the State to testify. E.S. testified that, prior to April of 2015, Mr. Loper and E.S. had been in an on again and off-again romantic relationship. (TR 178). Mr. Loper and E.S. would be in a relationship for months at a time, including residing together at various locations, before they would separate. (TR 178). In April of 2015, Mr. Loper and E.S. were no longer in a relationship. (TR 179). E.S. was residing by herself. (TR 179).

E.S. testified she returned home from work and went to bed in the early morning hours of April 3, 2015. (TR 180). She testified that she was awakened by Mr. Loper knocking on the front door of the apartment. (TR 180). E.S. opened the door to Mr. Loper, allowing him into the apartment. (TR 181).

After E.S. and Mr. Loper went back into the apartment, E.S. went to the restroom. (TR 181). When E.S. left the restroom, Mr. Loper was standing outside the door and asked her a question about the floors of the residence, which E.S. responded to before returning to bed. (TR 181). E.S. said she pulled the blankets over her head to block the light and allow her to go back to sleep. (TR 182). E.S. said Mr. Loper pulled back the blankets from the bed, unveiling E.S. (TR 182). Mr. Loper attempted to remove her pants before removing his own pants, revealing that Mr. Loper had an erection. (TR 182). E.S. said when she refused Mr. Loper's advances, Mr. Loper began to choke her with his hands, causing her to lose consciousness. (TR 184).

The next thing E.S. remembered is awakening in a bathtub with cold water running on her. (TR 184). She attempted to turn off the water but realized she had a severe cut on her wrist. (TR 186). E.S. then managed to crawl out of the bathtub and find her landline telephone, where she was able to call 911. (TR 186). E.S. went down the steps to the front door, where she waited for emergency services to arrive. (TR 187).

E.S. recalled telling 911 she may have cut her own wrist. (TR 241). She considered that she may have attempted to kill herself. (TR 242-243). She told the EMT in the ambulance she had not cut herself. (TR 188). E.S. was treated at the hospital for injuries to her neck and wrist and eventually had surgery on her wrist. (TR 189). They gave her a

sexual assault kit. (TR 188). She was missing an artificial fingernail from one of her fingers. (TR 194-95). She spoke to the detective at the hospital. (TR 188.).

E.S. testified that after she was released from the hospital, Mr. Loper had been charged and jailed. (TR 198). She described several letters she received from Mr. Loper, including letters acknowledging he had injured her, although the letters were vague on when the injuries may have occurred or what those injuries were. (TR 198-205). E.S. also testified that she had responded to these letters with letters of her own and erotic pictures. (TR 219). She further admitted to visiting Mr. Loper in jail and sending more suggestive photographs. (TR 219-222). She eventually allowed his bond to be reduced. (TR 219-223). She further testified she reunited with Mr. Loper and he moved in with her upon his release from jail in September 2015. (TR 206). She testified Mr. Loper moved in with her as soon as he got out of jail. (TR 206). They eventually married, and were still married on the trial date. (TR 206). She stopped cooperating with the prosecution on the original charges after the marriage. (TR 226-227). The case was dismissed for non-prosecution. (TR 168).

E.S. admitted the relationship between her and Mr. Loper was unstable. (TR 212-219). She admitted the relationship ended multiple times and Mr. Loper had packed his stuff and left her twice before. (TR 210-219). She further testified that after Mr. Loper was released from jail, he resided with her until December of 2016. (TR 223). She admitted that she was "hurt and angry" when Mr. Loper left her again. (TR 228). She admitted she threatened to kill Mr. Loper. (TR 229).

Defense counsel attempted to cross-examine E.S. about her attack on Mr. Loper that occurred at the downtown St. Louis Hooters restaurant in May of 2017. (TR 230). The Court again sustained the State's motion to exclude evidence of the incident. (TR 230). Mr. Loper tried to begin a line of questioning about E.S.'s state of mind at the time of incident in April of 2015, including possible attempted suicide by E.S. (TR 234). The Court allowed Mr. Loper to ask if she had ever attempted suicide before, which she denied. (TR 241).

Defense counsel then made an offer of proof. E.S. testified about the incident at Hooters. (TR 238). She admitted she confronted Mr. Loper and his pregnant girlfriend with a tire iron. (TR 239). She admitted she tried to hit Mr. Loper over the head with the tire iron because she was angry. (TR 240). She tried to hit the girlfriend with her hand. (TR 240). The Court did not allow this evidence after the offer of proof. (TR 242).

Police Officer Wesley Pierce testified he was the first policeman to arrive on the scene to find E.S. sitting on the steps by the front door of the apartment completely naked but for a sweatshirt around her wrist. (TR 258). Officer Pierce observed what appeared to be fresh blood pooling around E.S.'s feet and on the stairs behind her. (TR 259). Officer Pierce testified he asked E.S. what happened. (TR 259-260). E.S. responded "that she did not know exactly what happened to her...she did not know if she tried killing herself." (TR 260). She told Officer Pierce she did not know why she had a cut on her wrist. (TR 260). This was the information that Officer Pierce conveyed to EMS when they arrived. (TR 260).

Officer Pierce then transferred care of E.S. to the paramedics on scene. Officer Pierce and another officer went into the apartment and found the water in the shower still running. (TR 261). They also observed a knife in the bathtub and blood on the walls and the floor around the tub. (TR 262). Officer Pierce and his partner secured the crime scene and transferred control of the crime scene to another officer before going to the hospital. (TR 262).

Officer Pierce testified he first thought this case was an attempted suicide. (TR 267). He testified he went to the hospital to speak to the victim and check on her condition. (TR 262). He testified he spoke to "the doctor" but did not identify the doctor by name. (TR 263). The State then asked Officer Pierce what the doctor told him. (TR 264).

Mr. Loper objected. (TR 264). Defense counsel advised the Court that the police report indicated an unidentified doctor had told the witness that the victim's injuries were not self-inflicted and defense counsel objected to the hearsay statement. (TR 264). Defense counsel argued the statement was not noted anywhere in the medical records or attributed to any particular doctor. (TR 264-265). Defendant also objected that the statement violated the Confrontation Clause. (TR 265). The State argued the conversation with the unidentified doctor went to subsequent police conduct. (TR 264).

The Court overruled the objection as explaining subsequent police conduct. (TR 265). Officer Pierce testified an unidentified doctor at the hospital told him she did not believe the wound was self-inflicted. (TR 266). He testified that he referred the investigation to the Domestic Abuse Response Team (DART) because of the "totality of the circumstances" and not just based on the doctor's opinion. (TR 274-275). Officer

Pierce could not recall the doctor's name and could not recall whether the doctor was a woman or a man. (TR 275). He could not attribute the doctor's statement to Dr. Quattromani. (TR 275).

Over Mr. Loper's objection, the EMT who responded to the scene, Christine Dooley, testified at trial that, "at first she told me she didn't know what happened. She woke up in the bathtub confused. Thought maybe she had harmed herself." (TR 282). The EMT later testified that E.S., after some treatment, stated she remembered her ex-boyfriend coming into the house, pushing his way through the door, taking her onto the bed and choking her before she woke up in the shower. (TR 282-3).

E.S. was transported to the hospital, where she was treated by Dr. Erin Quattromani, an emergency medicine physician, for injuries to her neck and wrist. (TR 349). E.S. received emergency surgery to repair the injuries to her wrist. (TR 350).

The State called Detective Kara Lindhorst who was identified on the indictment as a witness. (D. 2).[3] Detective Lindhorst of the St. Louis Metropolitan Police Department DART Team testified she responded to the scene to investigate the incident. (TR 293). Detective Lindhorst investigated the scene, where she observed blood leading from the bathtub to a computer station in one of the rooms of the apartment. (TR 295-296). The detective also observed a telephone cord connected to the landline telephone that appeared to have blood and hair on it. (TR 297). Detective Lindhorst also observed one

[3] The State did not endorse Detective Lindhorst as an expert in domestic violence pursuant to §490.065.

artificial fingernail that had appeared to have fallen off the victim's hand. (TR 309). Detective Lindhorst and evidence technicians seized all the evidence from the scene and took photographs. (TR 297). Detective Lindhorst traveled to the hospital and interviewed E.S. about the incident. (TR 298).

After the witness testified to the victim's injuries and the evidence seized, the State asked Detective Lindhorst, based on her experience on the Domestic Assault Response Team, whether she was familiar with the concept of "power and control." (TR 311). She testified domestic violence is all about power and control and authority over one person. (TR 312). The State asked if there was evidence of power and control in this case and Defendant objected that it was personal opinion testimony of the witness. (TR 312). The Court overruled the objection stating the witness "had sufficient training and experience to discuss this." (TR 313). The witness testified she saw evidence of power and control in the fact that the couple had broken up for some time and then the assault occurred. (TR 313). She testified:

> "The offender had thought maybe his power and authority over her had started to slip which indicates he needs to come back and dominate. In addition, the strangulation is a very intimate crime. Strangulation and the cut on her wrist is very – the strangulation is very intimate. You have to be close to that person. When you strangle them, they go unconscious. That takes a lot of fight. You will be able to feel them stop breathing. You will be able to feel them kick or struggle with you, and to have a broken fingernail –." (TR 314).

The State then called Michelle Schiller-Baker, the expert endorsed by the State. Defense counsel again objected to her testimony as a whole being admitted. (TR 326). The Court, again, overruled the objection and allowed Ms. Schiller-Baker to testify. (TR 326). Ms. Schiller-Baker testified that she did not know the facts of this case. (TR 329). She testified about how the victim in an abusive relationship has "power and control" exerted over them by the abuser in a relationship. (TR 330). She explained how the abused in a relationship may continue to return to their abuser out of guilt or fear. (TR 334-335). She further testified that an abused person in a relationship may feel that they can never leave a relationship for fear of their own personal safety or the safety or family members. (TR 335).

On the third day of trial, the State's first witness was treating doctor, Dr. Erin Quattromani. Prior to her testifying, the State advised Mr. Loper for the first time that the doctor was going to give the medical opinion that the wound to the wrist was not self-inflicted. (TR 340). The defense made a motion in limine based on the failure to disclose an expert statement or report pursuant to Defendant's written request and Rule 25.03. (TR 340, D. 5). The prosecutor said he had just spoken to Dr. Quattromani for the first time because she now lived out of state. (TR 342). The State intended to call Dr. Quattromani to testify E.S.'s wrist wound was not self-inflicted. (TR 340). Defense counsel stated the defense had no notice that the unattributed statement of "the doctor" on the nature of the wrist wound in the police report was the opinion of Dr. Quattromani. (TR 341).

Mr. Loper objected. Dr. Quattromani was not named in the police report as "the doctor" giving the opinion and it was fundamentally unfair to allow the statement in the

police report to now be used as notice under 25.03. (TR 341). The trial court, relying on the police report's unattributed doctor's statement to Officer Pierce, denied Mr. Loper's motion to exclude Dr. Quattromani's opinion testimony. (TR 343). The Court stated that "there was a police report documenting that the responding officer consulted Dr. Quattromani." (TR 340). Officer Pierce testified at trial he could not identify the doctor he spoke to or state whether it was a man or a woman. (TR 275). Dr. Quattromani did not testify she spoke to Officer Pierce.

Dr. Quattromani testified that the injury to E.S.'s wrist had cut through several tendons and nerves in the wrist, requiring a consult with a hand expert and surgery. (TR 349-350). Over Defendant's renewed objection, Dr. Quattromani testified that based upon the depth and breadth of the cut to her wrist, the wound "does not seem that it would be self-inflicted." (TR 354-355). On cross-examination, Dr. Quattromani conceded it was not impossible for E.S. to have inflicted this wound to herself. (TR 363).

The State then called nurse Kathy Howard to the stand. (TR 375). First, Ms. Howard performed a strangulation assessment that showed a pattern injury across E.S.'s neck. (TR 379). Ms. Howard was unable to say definitively what E.S. was strangled with or even if someone had strangled her with their hands as E.S. alleged Mr. Loper did. (TR 380). Ms. Howard testified that they performed a full sexual assault kit in this matter; however, no evidence of rape was obtained through swabs of her genitalia. (TR 386-389).

After the State rested, Mr. Loper moved for judgment of acquittal, which was denied. (TR 405). Mr. Loper opened his case by calling two St. Louis Metropolitan Police Department Laboratory witnesses to the stand. (TR 406, 419). First, Eric Hall, Biology

Technical Leader in the St. Louis Metropolitan Police Department testified he performed examinations of several items of evidence, including E.S.'s pants and the phone cord (TR 407). He testified that the phone cord was returned with only blood evidence. (TR 410). He testified that there were trace amounts of what appeared to be seminal fluid on the pants, however, he was unable to confirm that. (TR 409). Mr. Hall also performed tests on the sexual assault kit swabs that Ms. Howard had taken. (TR 412-415). He testified, "for all intents and purposes, I did not find any semen on the vaginal swabs." (TR 415).

Next, Defense counsel called Anne Kwiatkowski to the stand. (TR 419). Ms. Kwiatkowski is the Biology DNA Section Supervisor for the St. Louis Metropolitan Police Department Crime Laboratory. (TR 419). She testified there was no DNA located on the artificial fingernail. (TR 421). Ms. Kwiatkowski testified the DNA found on the phone cord matched only E.S. (TR 422-423). Ms. Kwiatkowski stated the DNA on the swabs of the sexual assault kit were consistent with E.S. (TR 423). She testified none of the DNA that was testable in this matter was able to be consistently linked to Mr. Loper. (TR 425). The only DNA that was identified in this matter was attributed to E.S. (TR 425).

Mr. Loper testified in his own defense. (TR 431). Mr. Loper testified about the tumultuous relationship between himself and E.S. (TR 436-441). He testified about how they began dating in 2009 but broke off their relationship at least eight times between 2009 and the present. (TR 437-441). He testified that, while there were times of domestic violence committed by him against E.S. during previous breakups, there were also times of domestic violence committed by E.S. against him during previous breakups. (TR 437-441).

Mr. Loper testified the relationship was often ended when he was caught cheating on E.S. (TR 441).

He testified on April 3, 2015, he went to see E.S. (TR 449). Mr. Loper stated his friend, Teshambre Newell, drove him to the apartment that morning. (TR 449). Mr. Loper stated he knocked on the door around 8:30 or 9:00 a.m. and waited for E.S. to let him in. (TR 450). Mr. Loper confirmed he followed her into her apartment, waited as she went to the bathroom and then followed her into the bedroom. (TR 450). Mr. Loper testified when E.S. covered herself with her blanket he pulled the blanket off, at which point he began to kiss on her and started to have sex with her. (TR 451). Mr. Loper testified he began thinking of his girlfriend, Liz, and he stopped the intercourse, got out of bed, dressed, and began to leave the apartment. (TR 451-452). Mr. Loper then testified that, while trying to leave the apartment, E.S. began to attack and berate him. (TR 452). She grabbed him and pulled his jacket. (TR 452). When Mr. Loper could not pull free from her, Mr. Loper testified that he pushed E.S. away with his hands around her throat. (TR 452). When he pushed her away, he was able to leave. (TR 452). Mr. Loper testified he was first made aware of the allegations in this incident when he was contacted by Detective Lindhorst. (TR 455). Mr. Loper's testified that, while initially he was contacting E.S. after the April 2015 charges, eventually E.S. corresponded with him and sent him erotic pictures. (TR 462-463). Mr. Loper testified that after his release from jail he married E.S. in August 2016. (TR 457). He asked her in letters from jail not to proceed with testifying in his trial. (TR 454). He stated the purpose of this was because he was not guilty of the allegations. (TR 454).

Defense counsel also called Teshambre Newell to the stand. Mr. Newell testified he had been contacted by Mr. Loper for a ride to the location of the alleged incident. (TR 472). He testified that Mr. Loper was only inside the residence for no more than the time it took Mr. Newell and another witness to smoke a cigarette outside, approximately ten or fifteen minutes. (TR 473). He testified he did not notice anything unusual about the Mr. Loper. (TR 473).

Mr. Loper moved for acquittal at the end of the evidence which was overruled by the Court. (TR 479). After closing arguments, the case was submitted to the jury.

During deliberations, the jury asked several questions. The jury wanted to know if they had to determine whether a phone cord was used in "Count II." (D38, p. 29). The trial court instructed the jury that they were to be guided by the evidence. (D38, p. 29). In addition, the jury asked for the pictures for "closer examination." (D38, p. 31). The jury asked to examine the actual phone cord. (D38, pp. 32, 36). The photographs and evidence were provided to the jury. (D38, pp. 32, 36). The jury wanted to review some of the pages of medical records, which the trial court responded were not admitted into evidence. (D38, p. 35). The jury also asked questions concerning the 911 call, letters from Mr. Loper to E.S., and the legal definition of rape. (D38, pp. 28, 29, 33, 34).

The jury returned a verdict of guilty on all counts. (TR 523). After penalty phase, the jury returned recommended sentences for Count I for imprisonment for a term of seven years; for Count II, imprisonment for five years; for Count III, imprisonment for three years; for Count IV, imprisonment for fifteen years; for Count V, imprisonment of five years; and for Count IV, imprisonment of three years. (TR 539-540).

The Court reconvened to sentence Mr. Loper in this matter. (TR 542). Before announcing its sentence in the matter, the Court commented on the Defendant's demeanor and previous uncharged bad acts, including uncharged domestic violence incidents. (TR 549). The Court sentenced Mr. Loper to a total of twenty-two years, well over the recommended sentencing guideline of 14.7 years in this matter. (TR 550, D. 3, Apdx. A3-A7).

On January 8, 2018, the Defendant filed a Motion for Judgment of Acquittal or in the Alternative for a New Trial. (D. 40). The Motion for New Trial included all allegations of error except the alleged error in excluding evidence of E.S.'s attack of Mr. Loper at Hooters. (D. 40). The Court denied the Motion for New Trial on March 16, 2018. (TR 543). This appeal follows.

POINTS RELIED ON

POINT I.

The trial court abused its discretion in overruling Mr. Loper's objection and allowing the State to present evidence from Detective Kara Lindhorst that the present case was about "power and control" by Mr. Loper over the victim because this ruling deprived Mr. Loper of his due process right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that Detective Lindhorst's testimony was not her personal observations but rather "expert" testimony on particular evidence relying on statements of the victim that invaded the province of the jury by vouching for E.S.'s credibility. This prejudiced Mr. Loper because the jury relied on Lindhorst's testimony when concluding Mr. Loper was guilty. *State v. Rogers,* 529 S.W.3d 906 (Mo. App. E.D. 2017);

State v. Churchill, 98 S.W.3d 536 (Mo. banc 2003);

State v. McWilliams, 564 S.W.3d 618 (Mo. App. W.D. 2018);

State v. Foster, 244 S.W.3d 800 (Mo. App. S.D. 2008);

Mo. Const. Art. I, §§ 10 and 18(a);

U.S. Const., Amend. VI, XIV.

POINT II.

The trial court abused its discretion in overruling Mr. Loper's objection to the qualification and expert testimony of Michelle Schiller-Baker because her testimony deprived Mr. Loper of his due process right to a fair trial under the Sixth and Fourteenth Amendments

to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution in that Michelle Schiller-Baker's testimony invaded the province of the jury by vouching for E.S.'s credibility and had improper foundation for an expert witness This prejudiced Mr. Loper because the jury relied on Lindhorst's testimony when concluding Mr. Loper was guilty.

State v. Evans, 490 S.W.3d 377 (Mo. App. W.D. 2016);

State ex rel. Gardner v. Wright, 562 S.W.3d 311 (Mo. App. E.D. 2018);

State v. Foster, 244 S.W.3d 800 (Mo. App. S.D. 2008);

§490.065 RSMo (2017);

Mo. Const. Art. I, §§ 10 and 18(a);

U.S. Const., Amend. VI, XIV.

POINT III.

The trial court abused its discretion by overruling Defendant's objection and admitting the testimony of P.O. Pierce that an unidentified doctor told him at the hospital that the victim's wounds were not self-inflicted in the doctor's opinion in violation of Mr. Loper's right to due process of law and to confront witnesses, guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution because the unknown doctor's out of court statement was inadmissible hearsay in that it was presented to the jury as proof of the matter asserted and it went beyond what was necessary to explain the officer's subsequent conduct and further prejudice Defendant because the inadmissible statement was later

relied upon by the Court to erroneously admit Dr. Quattromani's opinion testimony in violation of Rule 25.03.

State v. Douglas,131 S.W.3d 818 (Mo. App. W.D. 2004);

State v. Shigemura, 680 S.W.2d 256 (Mo. App. E.D. 1984);

State v. Cole, 483 S.W.3d 470 (Mo. App. E.D. 2016);

State v. Nabors, 267 S.W.3d 789 (Mo. App. E.D. 2008);

Mo. Cont. Art. I, §§ 10 and 18(a);

U.S. Const. Amend. V, VI, XIV.

POINT IV.

The trial court abused its discretion by overruling Defendant's objection and admitting the surprise medical opinion testimony of Dr. Quattromani that the wound was not self-inflicted because the testimony violated Rule 25.03 and Mr. Loper's right to due process of law and right to present a complete defense, guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution and should have been barred in that: a) 273 pages of medical records disclosed by the State did not contain Dr. Quattromani's opinion that the wound was not self-inflicted, b) Dr. Quattromani was endorsed as a treating doctor witness but no report or statement of a medical opinion on the nature of the wound was disclosed prior to trial, and c) the State first disclosed the doctor's surprise opinion on the third day of trial, just before her testimony which prevented meaningful efforts by the Defendant to consider and prepare a strategy to address the State's evidence or to endorse an expert to counter the testimony.

*State v. Johnson,*513 S.W.3d 360 (Mo. App. E.D. 2016);

Merriweather v. State, 294 S.W.3d 52 (Mo. banc 2009);

Mo. Sup. Ct. Rule 25.03 (2017);

Mo. Sup. Ct. Rule 25.08 (2017);

Mo. Cont. Art. I, §§ 10 and 18(a);

U.S. Const. Amend. V, VI, XIV.

POINT V.

The trial court plainly erred in sustaining the State's objection and failing to admit evidence of prior misconduct by E.S. because it deprived Mr. Loper of his due process right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution in that this was proper evidence of prior misconduct that was logically and legally relevant to show the jury a complete and coherent picture of the events that occurred. The trial court's error prejudiced Mr. Loper because he was not able to present a complete defense, which resulted in a manifest injustice.

State v. Blakey, 203 S.W.3d 806 (Mo. App. S.D. 2006);

*State v. Pitchford,*514 S.W.3d 693 (Mo. App. E.D. 2017);

Mo. Sup. Ct. Rule 29.12(b);

Mo. Cont. Art. I, §§ 10 and 18(a);

U.S. Const. Amend. VI, XIV.

ARGUMENT

POINT I.

The trial court abused its discretion in overruling Mr. Loper's objection and allowing the State to present evidence from Detective Kara Lindhorst that the present case was about "power and control" by Mr. Loper over the victim because this ruling deprived Mr. Loper of his due process right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that Detective Lindhorst's testimony was not her personal observations but rather "expert" testimony on particular evidence relying on statements of the victim that invaded the province of the jury by vouching for E.S.'s credibility. This prejudiced Mr. Loper because the jury relied on Lindhorst's testimony when concluding Mr. Loper was guilty.

Preservation of Error and Factual Background

During the trial, the State called Detective Kara Lindhorst of the St. Louis Metropolitan Police Department Domestic Assault Response Team, to testify about her investigation. (TR 291). Detective Lindhorst's testimony first related to investigating the scene of the alleged incident. (TR 295). Next, Detective Lindhorst testified about interviewing the alleged victim, E.S., in this matter. (TR 298). Then, after further testimony involving evidence that had been seized and photographed from the scene, the Detective was asked about the number of cases of this nature that she had handled. (TR 298-310, 311). Specifically, the State asked, "in your training and experience with these cases and all the training you've attended, have you become familiar with the concept of power and

control?" to which the Detective responded, "I have." (TR 311). After explaining the Detective's understanding of domestic violence and the theory of "power and control", the State asked Detective Lindhorst "did you have evidence of power and control in this case?" (TR 312). Detective Lindhorst responded that she absolutely had signs of power and control in this case. (TR 312). She was asked to elaborate on by the State. (TR 312).

Mr. Loper objected that the Detective's answer was a personal opinion. (TR 312-313). The Court took a side bar to discuss this matter further. (TR 313). At the side bar, the Court overruled Mr. Loper's objection, stating, "I think she's laid the foundation that she has sufficient training and experience to discuss this. Do you want to add to your objection?" (TR 313). Counsel replied, "No. That's fine. Just note the objection. I'll put it in the motion for new trial if we go that far." (TR 313).

The State then continued its questioning asking Detective Lindhorst, "what evidence of the concept of power and control did she witness in this case." (TR 313). Detective Lindhorst cited the amount of time that had passed between when the relationship had ended and the assault had occurred was, "not uncommon... the offender had thought maybe his power and authority over her had started to slip which means he needs to come back and dominate." (TR 314).

Mr. Loper's motion for a new trial alleged the trial court erred in failing to sustain his objection which allowed the Detective's opinion testimony to come before the jury in violation of Defendant's due process rights under the Fifth, Sixth, and Fourteenth Amendments. (D. 40 p. 2). This error is preserved for review. Mo. Sup. Ct. Rule 29.11(d); *State v. McWilliams,* 564 S.W.3d 618, 625 (Mo. App. W.D. 2018).

Standard of Review

Trial courts have broad discretion in determining the admissibility of evidence, and this Court reviews their rulings for an abuse of that discretion. *State v. Rogers,* 529 S.W.3d 906, 910-11 (Mo. App. E.D. 2017). An abuse of discretion occurs when a ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration. *Id.* Where reasonable persons can differ about the propriety of the action taken by the trial court, no abuse of discretion will be found. *Id.* Further, this Court reviews for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *Id*; *State v. Churchill,* 98 S.W.3d 536, 539 (Mo. banc 2003). Trial court error in the admission of evidence is prejudicial if the error so influenced the jury when considered with all other evidence properly admitted that there is a reasonable probability the jury would reach a different conclusion without the error. *State v. McWilliams,* 564 S.W.3d 618, 630 (Mo. App. W.D. 2018).

Analysis

"The credibility of witnesses and the weight of the testimony are the province of the fact-finder." *State v. Davis,* 505 S.W.3d 401, 405 (Mo. App. E.D. 2016). (quoting *State v. Crawford*, 68 S.W.3d 406, 406 (Mo. banc 2002)). As the trier of fact, the jury is the arbiter of witness credibility. *State v. Armstrong,* 560 S.W.3d 563, 574 (Mo. App. E.D. 2018). Ordinarily, a lay person may not give an opinion on an ultimate issue the jury is to determine or give his or her opinion on matters in dispute. *State v. Starkey,* 380 S.W.3d 636, 647 (Mo. App. E.D. 2012).

The State did not endorse or qualify Detective Lindhorst as an expert in domestic violence under 490.065 RSMo. (D. 2). It was only when the State sought to introduce evidence of "power and control" that the State attempted to lay a foundation for expert testimony from Detective Lindhorst. This testimony, however, went far outside the Detective's personal observations as the investigating detective and asked her to apply the social science theory of power and control to the evidence in this case. A police witness with special knowledge can testify based on their experiences as an officer under some circumstances. *Id.* at 647-48. For instance, a police detective with experience on DART can testify that the victim's lack of bruising on her neck was not uncommon as bruising usually shows up a day or two later. *State v. Battle,* 415 S.W.3d 783, 787 (Mo. App. E.D. 2013). Here, however, Detective Lindhorst was not testifying to her personal observations in this case based on her experience, but to a social science theory explaining behavior of domestic violence abusers.

It is well-settled that "Missouri strictly prohibits expert evidence on witness credibility because it invades the province of the jury." *State v. Evans*, 490 S.W.3d 377, 386 (Mo. App. W.D. 2016). "Expert testimony that comments directly on a particular witness' credibility, as well as expert testimony that expresses an opinion with respect to the credibility or truthfulness of witnesses of the same type under consideration invests 'scientific cachet' on the central issue of credibility and should not be admitted." *Id.* (quoting *State v. Williams*, 858 S.W.2d 796, 800 (Mo. App. E.D. 1993)). The general purpose of expert testimony is to assist the jury in areas that are outside of everyday experience or lay experience. *State v. Pickens*, 332 S.W.3d 303, 321 (Mo. App. E.D.

2011). Expert opinion may never be admitted unless it is clear the jurors themselves are not capable for lack of experience or knowledge to draw the correct conclusions from the evidence. *State v. McWilliams,* 564 S.W.3d 618, 626 (Mo. App. W.D. 2018). Thus, "expert witnesses may not express an opinion as to the guilt or innocence of the defendant. To do so would usurp the decision-making function of the jury." *State v. Pickens,* 332 S.W.3d at 322. When determining the admissibility of opinion testimony, expert witnesses should not be allowed to give their opinion as to the veracity of another witness's statement because, in so doing, they invade the province of the jury. *Id. Rogers*, 529 S.W.3d at 911.

Detective Lindhorst was not an expert, but a lay witness asked for her personal opinion. Opinion testimony by a lay witness on a disputed fact is improper. *State v. Presberry*, 128 S.W.3d 80, 86 (Mo. App. E.D. 2003). In *Presberry*, the Court of Appeals held a police officer cannot identify a defendant based on video surveillance when the officer had no particularized or specialized knowledge that would make his identification more reliable than the jury's identification. *Id.* at 86.

Here, the only evidence other than Mr. Loper's testimony about what occurred on April 3, 2015 is circumstantial. E.S. did not and cannot testify about what happened to her after she passed out because she testified that she was unconscious. (TR 184). The State must rely on reasonable inferences from the circumstantial evidence, i.e., that the last thing E.S. recalls was Mr. Loper choking her (TR 184), that she awakened alone in the bathroom with a cut on her wrist and a knife between her legs (TR 184-185), and that the victim's blood was on a phone cord that seemed to match the pattern injury on E.S.'s neck. (TR 310).

After Detective Lindhorst testified as to what she observed at the scene and her interview of the victim, the State, without endorsing her as an expert, asked Detective Lindhorst her opinion on the evidence, specifically if there is evidence of "power and control." (TR 312). At this point, the statements made by the Detective rely entirely upon circumstantial evidence and statements made by the victim. By basing her opinion only on E.S.'s statements, she is directly commenting on the reliability of the victim and lending credibility to E.S. allegations. She testified that because E.S. and Mr. Loper had not been together in that long, "the offender had thought, maybe his power and authority over her had started to slip which indicates he needs to come back and dominate." (TR 314). She testified the strangulation was an "intimate crime." (TR 314).

This testimony directly impedes upon the province of the jury to judge E.S.'s credibility and Mr. Loper's state of mind. This expert testimony is similar to the "particularized testimony" found inadmissible in child sexual abuse where the expert testimony concerns the trustworthiness or believability of a particular victim as to whether they had been abused. *State v. Churchill,* 98 S.W.3d 536, 539 (Mo. banc 2003); *State v. Ferguson*, 568 S.W.3d 533, 541 (Mo. App. E.D. 2019). When read as a whole, the State was asking Detective Lindhorst to comment on the victim's story, her statements, her testimony, and her description of the relationship with Mr. Loper, which was asking her to comment on the victim's credibility. *State v. McWilliams,* 564 S.W.3d at 629. The testimony was designed to buttress and lend credibility to E.S.'s testimony after she testified that she did not remember what happened or why she woke up in the bathtub with her

wrist cut. *Id.* It was designed to counter E.S.'s initial statements that she had cut her own wrist in an attempt at suicide. (TR 188, 234, 260). Such testimony was inadmissible.

The State's theme in closing argument was that the theory of "power and control" and cycle of violence as testified to by "these experts" and "based in research" explain why E.S. returned repeatedly and why Mr. Loper turned violent when she "tried to tell him no." (TR 511). The State emphasized and relied on the improper testimony of Detective Lindhorst and Michelle Schiller-Baker to overcome the lack of physical evidence and direct testimony that Mr. Loper caused the injuries.

Mr. Loper was prejudiced by the improper admission of Lindhorst's testimony. The standard for prejudice is not whether there was overwhelming evidence of guilt, but whether if the erroneous admission of evidence was outcome determinative. *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000). When the prejudice resulting from the improper admission of evidence, reversal is required. This Court stated as follows:

> A finding of outcome determinative prejudice expressed a judicial conclusion that the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all of the evidence properly admitted, there is a reasonable probability the jury would have reached a different conclusion but for the erroneously admitted evidence.

Id. Therefore, even if there was overwhelming evidence of guilt, Mr. Loper was still prejudiced if the erroneously admitted evidence was outcome determinative.

In *State v. Douglas*, this Court held Douglas was prejudiced by erroneously admitted hearsay evidence in the form of a dispatch report because the report was outcome

determinative in his case. 131 S.W.3d 818 (Mo. banc 2004). Douglas was charged with driving while intoxicated and driving while revoked. *Id.* at 820-21. The officers testified at trial they approached a vehicle that was on the side of the road with its passenger side tires up on the curb and the front tire was flat. *Id.* at 821. As one of the officers approached the car, it started to go in reverse. *Id.* The other officer sounded his sirens and the car stopped. *Id.* Douglas exited from the driver's side of the vehicle. *Id.* When he exited the vehicle, he stumbled, had the odor of alcohol on his breath, slurred speech and watery, bloodshot eyes. *Id.* Douglas' driver's license was revoked. *Id.* Douglas refused to perform field sobriety tests or a breathalyzer test. *Id.* Over defense objection, the State admitted the dispatch report containing a statement that the officers were responding to a call of a person slumped over the steering wheel. *Id.* at 823. Douglas testified he was not driving the vehicle; his nephew was when the front tire blew out. *Id.* While his nephew went to find a jack, Douglas stayed in the front passenger seat. *Id.* When the officers ordered him to exit, he did so from the driver's side door because the passenger door was broken. *Id.* Douglas testified he knocked the gear into neutral as he was climbing over the seats to exit from the driver's side, causing the vehicle to move. *Id.* During deliberations, the jury asked to see "the dispatch report." *Id.* Douglas was convicted of both charges. *Id.*

This Court held the statement made in the dispatch report was inadmissible hearsay and should not have been admitted at trial. *Id.* at 824. When determining whether Douglas was prejudiced, the Court held the hearsay statement to be outcome determinative to Douglas' conviction. *Id.* The Court held the dispatch report was outcome determinative in Douglas' case because it was the only evidence on the disputed issue of whether Douglas

had been driving. *Id.* at 824. The Court held that because the jury asked for the dispatch report during its deliberation, it relied at least in part on the erroneously admitted evidence. *Id.* Therefore, there was a reasonable probability that but for the erroneously admitted evidence, the jury would have acquitted Douglas. *Id.* This Court reversed and remanded for a new trial. *Id.*

Like *Douglas*, the admission of Lindhorst's testimony prejudiced Mr. Loper in that it was outcome determinative. Mr. Loper denied committing any of the offenses against E.S.: he testified he had consensual sexual intercourse with her but then stopped abruptly. (TR 451-52). Mr. Loper said he only pushed her on her throat with his hands because E.S. was fighting him. (TR 452). In addition, Mr. Loper did not admit to cutting E.S.'s wrist. (TR 458). There was no direct evidence Mr. Loper was responsible for cutting E.S. with a knife or strangling her with a cord. Lindhorst's testimony that this was a situation involving domestic violence and that there was "absolutely" power and control exerted by Mr. Loper on E.S. (TR 312) and that the strangulation was "intimate crime" committed by Mr. Loper against E.S. (TR 314). The jury's questions showed the jury had questions about E.S.'s version of what happened, i.e., requesting the definition of rape, requesting the transcripts of the 911 tapes, what time the call was made, and wanting to view the pictures, letters and phone cord. (D38, 29, 31, 32, 33, 34, 36). The jury disbelieved the evidence of strangulation with a phone cord yet found Mr. Loper guilty of armed criminal action, even though there was no evidence presented of another weapon other than the cord involving strangulation or choking. This shows the jury was confused about E.S.'s credibility, and likely considered Lindhorst's testimony about "power and control" and the nature of the

offense being one of domestic violence when determining whether Mr. Loper was guilty. Therefore, Mr. Loper was prejudiced by the erroneous admission of Lindhorst's testimony.

Moreover, the inadmissible testimony was prejudicial as the evidence was far from overwhelming and resembled the "he said, she said" facts reversed in *State v. Foster,* 244 S.W.3d 800, 803 (Mo. App. S.D. 2008). The prejudicial nature of the evidence was further exacerbated by the admission of the testimony of Ms. Schiller-Baker, as well as the hearsay testimony of Officer Pierce, and the trial court prohibiting Mr. Loper to present evidence E.S. attacked him and his girlfriend. (See Points II, III and V).

There was not overwhelming evidence of guilt on any of the charges. The jury rejected the State's evidence on Count II that Mr. Loper strangled E.S. with a phone cord. (D38 p. 10, 11, 23). Instead, the jury found Mr. Loper guilty of the lesser included offense of second-degree domestic assault by causing physical injury to E.S. by choking her. (D38, p. 11; D38, p. 23). The jury determined there was not convincing evidence that E.S. was strangled with a telephone cord.

Given the jury's rejection of the first-degree domestic assault instruction on Count II, strangulation with a phone cord, the evidence of guilt as the Count III, armed criminal action, cannot be characterized as overwhelming. Because the jury did not find Mr. Loper strangled E.S. with a phone cord, and there was no other evidence presented showing a dangerous instrument or deadly weapon used in connection with the allegations in Count II, the evidence of armed criminal action as to Count III was particularly weak. Nurse Howard testified she did not characterize the marks on E.S.'s neck as a "ligature" mark.

(TR 391). She testified the description of a "pattern injury" was only based on what police told her about finding the telephone cord. (TR 391-92).

There was not overwhelming non-testimonial evidence that Mr. Loper "choked" the Victim. There was no DNA and no fingerprint evidence connecting Mr. Loper to E.S.'s neck injury. The medical and photograph evidence did not causally connect her injuries to Mr. Loper.

As to Count I, the evidence of "forcible compulsion" was not overwhelming. The verdict director required the jury to find Mr. Loper guilty by finding he "tried to have sexual intercourse with E.S. by strangling her." (D38, p. 8). Because the jury did not find Mr. Loper guilty of strangling E.S. with a telephone cord, there was not overwhelming evidence of guilt as to whether Mr. Loper tried having sexual intercourse with E.S. by strangling her, as was required to find him guilty of Count I, attempted forcible rape.

As this Court stated in *State v. Rogers*, when the State "insists on walking the precipice of reversible error, it must be prepared to suffer the consequences of stepping over the edge – reversal and remand for a new trial." *State v. Rogers,* 529 S.W.3d 906, 910-12 (Mo. App. E.D. 2017). This Court should reverse and remand for a new trial.

POINT II.

The trial court abused its discretion in overruling Mr. Loper's objection to the qualification and expert testimony of Michelle Schiller-Baker because her testimony deprived Mr. Loper of his due process right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution in that Michelle Schiller-Baker's testimony invaded the province of

the jury by vouching for E.S.'s credibility and had improper foundation for an expert witness This prejudiced Mr. Loper because the jury relied on Lindhorst's testimony when concluding Mr. Loper was guilty.

Preservation of Error and Factual Background

Shortly before trial, the State filed a witness endorsement for Michelle Schiller-Baker, accompanied by a motion to endorse an expert witness and a memorandum in support of the expert witness. (D. 23, D. 25). On the first day of trial, the Court held a hearing pursuant to 490.065 RSMo. regarding endorsement of expert witnesses. (TR 133). The State conducted a *voir dire* of the witness. (TR 133). The State requested the curriculum vitae of this witness; specifically, her educational background, her current job and any training and experience she had in that field. (TR134-135). The witness testified that she is the executive director at St. Martha's Hall, a twenty-four-hour emergency confidential shelter and domestic violence shelter. (TR 134). She further testified that she has been doing this work for almost thirty-five years, during which time she attended, "120 workshops, conferences for training." (TR 135). She testified that she attends monthly state meetings where they work on policies, protocols, crisis intervention and victim safety. (TR 135). She further testified that she also leads trainings, though she did not elaborate on what these trainings entail. (TR 135). She testified she has a Bachelor's in political science and ended her qualifications by stating that she had been qualified to testify as an expert witness six previous times in various circuits in the State of Missouri. (TR 136). She states that her area of expertise is "victim behavior, victimization, specifically domestic violence." (TR 136).

Ms. Schiller-Baker testified she had no knowledge of this case, nor has she talked to any witnesses or Mr. Loper in this case. (TR 137). She stated that she is not here to testify about the case, rather her expertise in victim behavior. (TR 137).

Ms. Schiller-Baker was then asked about some common theories of victim behaviors in reaction to domestic assault. (TR 137-138). Though she admits there is no standard way that a victim of domestic violence should behave, she states that many are similar and are based on fear. (TR 138). She elaborates that the root of domestic violence is an individual's desire is to have "power and control over another in an intimate relationship." Ms. Schiller-Baker testified isolation is often used against an abused person. (TR 139). Next, she stated in her experience of working with women of domestic assault, she has seen strangulation by a perpetrator play out in the dynamics of power and control. (TR 141). Finally, Ms. Schiller-Baker testified that a victim of domestic assault might stay in an abusive relationship because, "it is the safest place to be because once a victim leaves an abusive partner, they have broken that person's power and control...And that is when they are at their highest risk of being harmed or actually being murdered." (TR 142). She testified women will go back to abusive relationships as part of the cycle. (TR 143-144). She stated that they believe the person has changed, which is usually sort of an emotional or guilt feeling. (TR 144).

Mr. Loper was able to also cross-examine this witness outside the hearing of the jury. (TR 144). Mr. Loper was able to establish that Ms. Schiller-Baker had no educational training in these matters, but instead relied on "working with her shelter, who has served approximately twelve thousand women over thirty-four years that (she has) been

there...(She) worked personally with minimally four thousand of those women." (TR 145). At the end of this voir dire, the Court asked if Defendant wished to supplement the record at this time and defense counsel renewed his previous objection. (TR 151). The Court then granted the State's motion to endorse an expert witness in this matter. (TR 151). The Court relied upon *Arcoren v. United States*, 929 F.2d 1235 (8th Cir. 1991), finding that the testimony of Ms. Schiller-Baker can illuminate the jury as the common behaviors of domestic violence. (TR 151).

At trial, Ms. Schiller-Baker testified to the domestic abuse "Cycle of Violence" which is a social science theory where an abuser asserts "power and control." (TR 138-140). The theory as explained by the witness is that it is a pattern of coercive behavior first, and then assaultive behavior can follow very quickly after that. (TR 138). She testified that "once a victim leaves an abusive partner, they've broken that person's power and control...That's when they're at the highest risk of being harmed again or actually being murdered." (TR 142). She testified that sometimes the safest thing for a victim to do is to return to the abuser. (TR 142-143). The abuser will use jealousy as a tool to control and isolate the victim. (TR 332). This testimony was contrary to the evidence that E.S. was violent toward Mr. Loper and Mr. Loper had left her on several occasions. (TR 219, 239). The break-ups occurred because Mr. Loper cheated on E.S. and she was angry. (TR 210, 215).

Mr. Loper filed a Motion for New Trial alleging the trial court erred in allowing Ms. Schiller-Baker to testify as an expert witness and giving her opinions on domestic violence

in front of the jury. (D40, p.2) The error is preserved for review. Mo. Sup. Ct. Rule 29.11(d).

Standard of Review

Trial courts have broad discretion in determining the admissibility of evidence, and this Court reviews their rulings for an abuse of that discretion. *State v. Rogers,* 529 S.W.3d 906, 910-11 (Mo. App. E.D. 2017). An abuse of discretion occurs when a ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration. *Id.* Where reasonable persons can differ about the propriety of the action taken by the trial court, no abuse of discretion will be found. *Id.* Further, this Court reviews for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *Id*; *State v. Churchill,* 98 S.W.3d 536, 539 (Mo. banc 2003).

Analysis

As argued in Point I, it is well-settled that "Missouri strictly prohibits expert evidence on witness credibility because it invades the province of the jury." *State v. Evans*, 490 S.W.3d 377, 386 (Mo. App. W.D. 2016). (citation omitted). "Expert testimony that comments directly on a particular witness' credibility, as well as expert testimony that expresses an opinion with respect to the credibility or truthfulness of witnesses of the same type under consideration invests 'scientific cachet' on the central issue of credibility and should not be admitted." *Id.*, quoting *State v. Williams*, 858 S.W.2d 796, 800 (Mo. App. E.D. 1993). Expert testimony is inadmissible where the expert testimony concerns the trustworthiness or believability of a particular victim as to whether they had been abused.

State v. Churchill, 98 S.W.3d 536, 539 (Mo. banc 2003); *State v. Ferguson,* 568 S.W.3d 533, 541 (Mo. App. E.D. 2019).

Missouri statute allows for an expert to testify to assist the jury in areas that are outside of everyday experience of lay experience. "The general purpose of expert testimony is to assist the jury in areas that are outside of everyday experience or lay experience." *State v. Rogers,* 529 S.W.3d 906, 911 (Mo. App. E.D. 2017).

The court in *State ex rel. Gardner v. Wright* held that expert testimony has become generally admissible in child sexual abuse cases to explain an abused child's conduct "because it assists the jury in understanding the behavior of sexually abused children, a subject beyond the range of knowledge of the ordinary juror." *State ex rel. Gardner v. Wright,* 562 S.W.3d 311, 320 (Mo. App. E.D. 2018). The Court also held that §490.065 adopts the federal rules and standards in *Daubert. Id.* at 317. Section 490.065.2, borrowing the condensed three-part test of the federal rules, requires that the expert testimony be relevant and reliable and proffered by a qualified expert. *Id.* at 319. An expert is qualified by "knowledge, skill, experience, training or education." *Id.* Her testimony is "relevant if it contains specialized knowledge, either scientific, technical or otherwise, that will assist the trier or fact. *Id.* Reliability is determined by considering whether the testimony is based on sufficient facts or data. *Id.* No single factor is dispositive. *Id.*

The testimony that Ms. Schiller-Baker offers is not regarding children, but adults. (TR 134). She offers what she has experienced with abused women that she has worked with in the past. She is endorsed to offer an expert opinion of a psychological nature even though she has no formal education in medicine or psychology. (TR 146). In cases where

an expert is allowed to testify about child sex abuse cases, they are formally educated and licensed in the field. *State v. Contreras-Cornejo*, 526 S.W.3d 146, 149 (Mo. App. W.D. 2017). In fact, the State's own case it relies upon to move to use Ms. Schiller-Baker as an expert uses an expert with formal education in psychology. *Arcoren v. United States*, 929 F.2d 1235, 1239 (8th Cir. 1991).

Here, Ms. Schiller-Baker admitted that she has no formal education involving any kinds of psychology, medicine or counseling. (TR 146). Instead, she testified that she has attended "well over 120 workshops, conferences for training." (TR 135). She was not asked what kind of workshops or conferences she attended, nor does she elaborate. (TR 135). She further testified that she had lead trainings in "a variety of disciplines." (TR 135). She then goes on to testify about where she performed these trainings, but never touches upon what the trainings pertain to. (TR 135). While the list of places she has lead trainings is impressive, the subject matter is left unanswered. (TR 135). Her experience in the matter is insufficient absent any education and licensing to cement and explicit information about experience in the matter outside that of a normal juror. Her testimony was not based on or even consistent with the facts of this case as testified to by E.S. It was not reliable or relevant. *State v. Gardner*, 562 S.W.3d at 317.

Finally, the court allowed Ms. Schiller-Baker's testimony as an expert witness to help explain the role of the abused in the cycle of violence. (TR 325- 338). However, as argued further in Point V, the full breadth of that argument was blocked by the court. (TR 173). Evidence of prior misconduct that does not fit any of the articulated exceptions may still be

admissible if it is logically and legally relevant. *State v. Blakey*, 203 S.W.3d 806, 812 (Mo. Ct. App. 2006).

Here, the issue is not just that the trial court allowed this testimony from an expert; rather, it is that the information provided by the expert, especially the cycle of violence and the terms "power and control" were not allowed to be countered by contrary evidence of E.S.'s conduct. (TR 325-338, 166-173). Ms. Schiller-Baker was expressly brought in to testify about the cycle of violence and the term "power and control." (TR 330). Detective Lindhorst explained—improperly, as state above in Point I—that there was evidence of "power and control" in this case, citing the history of the relationship between E.S. and Mr. Loper. (TR 312). Yet, when Mr. Loper attempted to cross examine E.S. about specific bad acts that would disprove or disrupt Ms. Schiller-Baker's testimony, the Court excluded the evidence. (TR 173). This is antithetical with the purpose of allowing Ms. Schiller-Baker's testimony in the first place, which would be to give the jury a better understanding of the cycle of violence and "power and control" in this relationship. Ms. Schiller-Baker's testimony was one-sided and as such could only lend credence to the victim's testimony and did not allow the jury to understand the entire relationship between Mr. Loper and E.S.

In addition, Ms. Schiller-Baker's testimony was not general in nature. Although she testified she did not know E.S. or Mr. Loper and had not reviewed the facts of the case (TR 329, 337) she was allowed to give her opinion about E.S. and Mr. Loper's relationship. Ms. Schiller-Baker testified a "victim" will go back to an "abuser" because of fear. (TR 335). Ms. Schiller-Baker told the jury a "victim" will return to her "abuser"

fearing retaliation if she does not. (TR 335). Ms. Schiller-Baker specifically referred to a situation, such as a trial where an abuser will attack the victim even worse if he is found not guilty. (TR 335). This testimony bolstered the jury and encouraged the jury to find Mr. Loper guilty to protect E.S. The testimony was used to explain why E.S. returned to Mr. Loper after the incident, to comment on the credibility of the victim. (TR 335). This was allowed even though Mr. Loper was not allowed to present evidence showing E.S. did not "fear" Mr. Loper and even attempted to assault him long after Mr. Loper broke up with her. (TR. 238-39). The State used Ms. Schiller-Baker's testimony to not only bolster her credibility but also to claim the jury needed to find Mr. Loper guilty to protect E.S. This was improper and should have been excluded.

This Court must also review the erroneous admission of Ms. Schiller-Baker's testimony for prejudice, not mere error. *State v. Foster,* 244 S.W.3d 800, 803 (Mo. App. S.D. 2008). As argued in Point I, Mr. Loper was prejudiced by the improper admission of Schiller-Baker's testimony because the erroneous admission of evidence was outcome determinative. *Barriner*, 34 S.W.3d at 150. Similar to the evidence of prejudice in Point I, the jury's questions demonstrated that there were questions that pertained to disputed facts, such as evidence Mr. Loper strangled E.S. with a phone cord, and whether E.S.'s wrist wound was self-inflicted. (D38, pp. 29, 31, 32, 33, 35, 36). The jury's questions and verdict demonstrated that there was a reasonable likelihood they considered Schiller-Baker's testimony in finding Mr. Loper guilty.

There was not overwhelming evidence of guilt in Mr. Loper's case. Error may be harmless if there is overwhelming guilt and no reasonable jury would doubt that the

defendant committed the crime. *Id.* In a "he said, she said" credibility case with no physical evidence connecting defendant to the crime, it cannot be said that there was no reasonable probability of a different verdict without Ms. Schiller-Baker's testimony. *Id.* at 804. Particularly as her testimony highlighted the erroneously admitted testimony of Detective Lindhorst and improperly bolstered the testimony of E.S.

As discussed above in Point I, there was not overwhelming evidence of guilt as to any of the counts in Mr. Loper's case. There was not overwhelming evidence of guilt on any of the charges. The jury rejected the State's evidence on Count II that Mr. Loper "strangled E.S. with a phone cord." (D38 p. 10, 11, 23). Instead, the jury found Mr. Loper guilty of the lesser included offense of second-degree domestic assault by causing "physical injury to E.S. by choking her." (D38, p. 11; D38, p. 23). The jury determined there was not convincing evidence that E.S. was "strangled with a telephone cord."

Given the jury's rejection of the first-degree domestic assault instruction on Count II, "strangulation with a phone cord", the evidence of guilt as the Count III, armed criminal action, cannot be characterized as overwhelming. Because the jury did not find Mr. Loper "strangled E.S. with a phone cord," and there was no other evidence presented as a dangerous instrument or deadly weapon, the evidence of armed criminal action as to Count III was particularly weak. Nurse Howard testified she did not characterize the marks on E.S.'s neck as a "ligature" mark. (TR 391). She testified the description of a "pattern injury" was only based on what police told her about finding the telephone cord. (TR 391-92).

There was not overwhelming non-testimonial evidence that Mr. Loper "choked" the Victim. There was no DNA and no fingerprint evidence connecting Mr. Loper to E.S.'s neck injury. The medical and photograph evidence did not causally connect her injuries to Mr. Loper.

As to Count I, the evidence of "forcible compulsion" was not overwhelming. The verdict director required the jury to find Mr. Loper guilty by finding he "tried to have sexual intercourse with E.S. by strangling her." (D38, p. 8). Because the jury did not find Mr. Loper guilty of strangling E.S. with a telephone cord, there was not overwhelming evidence of guilt as to whether Mr. Loper tried having sexual intercourse with E.S. by strangling her, as was required to find him guilty of Count I, attempted forcible rape.

An appellate court may grant a new trial based on the cumulative effects of errors, even without a specific finding that any single error would constitute grounds for a new trial. *State v. West*, 551 S.W.3d at 525.

POINT III.

The trial court abused its discretion by overruling Mr. Loper's objection and admitting the testimony of P.O. Pierce that an unidentified doctor told him at the hospital that the victim's wounds were not self-inflicted in the doctor's opinion in violation of Mr. Loper's right to due process of law and to confront witnesses, guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution because the unidentified doctor's out of court statement was inadmissible hearsay in that it was presented to the jury as proof of the

matter asserted and it went beyond what was necessary to explain the officer's subsequent conduct and further prejudice Defendant because the inadmissible statement was relied upon by the Court in a subsequent evidentiary ruling admitting Dr. Quattromani's testimony in violation of Rule 25.03.

Preservation of Error and Factual Background

On the first day of trial, immediately after the testimony of E.S., the State called P.O. Wesley Pierce to testify. On direct examination, Officer Pierce testified that he first thought this incident was an attempt at suicide. (TR 267). Officer Pierce testified that after he searched the apartment and secured the scene, he went to the hospital to check on the victim. He testified that he spoke to "the doctor" to get the victim's condition. (TR 263). The State then asked Officer Pierce to testify as to what the doctor told him. (TR 264). Mr. Loper, anticipating that Officer Pierce would testify that an unidentified doctor told him the wound was not self-inflicted as indicated in the police report, objected that the statement was hearsay. (TR 264).

Defense Counsel argued the unattributed statement of the doctor went to one of the key facts of the case, whether the victim's wounds were self-inflicted. (TR 266). The Defendant also objected that the unidentified doctor's statement violated Defendant's Confrontation Clause right. (TR 266). Defense counsel argued the medical records did not contain such a statement by any doctor and the State had not disclosed an opinion by any doctor that the wound was not self-inflicted. (TR 266). The State maintained the statement went to show "subsequent police conduct" as to why the case was referred to DART. (TR 266). The Court held:

> THE COURT: You know, based on my understanding of *Crawford* and whether this is testimonial or non-testimonial, I still think it goes to the police officer responding to the emergency and investigating the case. (TR 266).

The Court overruled the hearsay objection. (TR 266). Officer Pierce then testified that he spoke to an unidentified doctor who told him, "She does not believe that this could have been a self-inflicted wound." (TR 266). Police Officer Pierce testified that he contacted the Domestic Abuse Response Team (DART) and turned the investigation over to DART. (TR 266-267). On cross examination, Officer Pierce testified that he referred the case to DART because of the "totality of the circumstances and not just based on the doctor's opinion." (TR 274-275). Officer Pierce could not recall the doctor's name and he could not recall whether the doctor he spoke to was a woman or a man. (TR 275). Officer Pierce could not attribute the doctor's statement to Dr. Quattromani or any other trial witness. (TR 275).

Mr. Loper's Motion for New Trial contending the Court committed error in the admission of the unidentified doctor's statement to P.O. Pierce was denied. (D 40 p.1, TR 543). The issue is preserved for review. Mo. Sup. Ct. Rule 29.11(d) RSMo.

Standard of Review

The trial court has broad discretion in determining whether to admit or exclude evidence at trial. *State v. Forrest,* 183 S.W.3d 218, 233 (Mo. banc 2006). An abuse of discretion is found when the decision to admit or exclude evidence is clearly against the logic of the circumstances and is so unreasonable and arbitrary as to indicate a lack of

careful consideration. *State v. Douglas,* 131 S.W.3d 818, 826 (Mo. App. W.D. 2004), *State v. Cole,* 483 S.W.3d 470, 474 (Mo. App. E.D. 2016).

Upon finding an abuse of discretion a reviewing court will only reverse if the prejudice resulting from improper admission of evidence is outcome determinative. *Id.* Prejudice is outcome determinative when, considered with and balanced against all of the evidence properly admitted, "there is a reasonable probability that the jury would have reached a different conclusion but for the erroneously admitted evidence." *State v. Douglas,* 131 S.W.3d 818, 826 (Mo. App. W.D. 2004). However, where a criminal defendants rights were violated under the Confrontation Clause by the admission of evidence is a question of law that an appellate court reviews *de novo*. *State v. March*, 216 S.W.3d 663, 664-65 (Mo. banc 2007). Confrontation Clause violations are presumed prejudicial. *State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006).

Analysis

Hearsay statements are out-of-court statements used to prove the truth of the matter asserted, which, as a rule, are inadmissible. *State v. Barnett,* 980 S.W.2d 297, 306 (Mo. banc 1998). An out-of-court statement that is not offered for the truth of the matter asserted is not hearsay. *State v. Bell,* 62 S.W.3d 84, 89 (Mo. App. W.D. 2001). An out-of-court statement to explain subsequent police conduct can be an exception to hearsay. *State v. Douglas,* 131 S.W.3d 818, 824 (Mo. App. W.D. 2004). However, a growing number of cases hold that out-of-court statements are not admissible to explain subsequent police

conduct where the statement exceeds the minimum necessary to explain an officer's conduct, particularly if the statement goes to a key issue in the case and implicates the defendant directly in criminal conduct. *Id.* at 824.; *State v. Shigemura*, 680 S.W.2d 256, 257 (Mo. App. E.D. 1984), *State v. Cole*, 483 S.W.3d 470, 475 (Mo. App. E.D. 2016).

As noted by this Court in *Cole*, "this exception to the hearsay rule is susceptible to abuse." *Id.* at 474:

> "If an officer is permitted to narrate the details of an investigation in a way that unnecessarily puts incriminating evidence information about the defendant before the jury, the testimony violates the defendant's right to confrontation." *Id.*

If the out-of-court statement goes beyond the minimum necessary to explain subsequent police conduct it violates defendant's rights under the Confrontation Clause, U.S. Const., Amend. VI. *State v. Nabors*, 267 S.W.3d 789, 794 (Mo. App. E.D. 2008) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed. 177 (2004)). Where a police officer's testimony exceeds the scope of what is necessary to provide background information there is a violation of the Confrontation Clause. *State v. Cole*, 483 S.W.3d at 475.

In *Cole*, the court found a detective's testimony divulging a confidential informant's statement was not necessary to give context to his reason for applying for a search warrant. *Id.* Testimony that a detective applied for a search warrant based upon information received from an informant would have been sufficient. *Id.* Here, by Officer Pierce's own admission, he could have simply testified that based on the "totality of the circumstances" at the crime scene as well as the hospital that he referred the case to DART. (TR 274-75).

There was no justification for admitting the hearsay medical opinion of an unidentified doctor on one of the ultimate issues in the case, i.e. whether the victim harmed herself. Officer Pierce's own testimony contradicts the State's argument to admit this prejudicial evidence.

This case is similar to the cases of *State v. Douglas*, *State v. Shigemura,* and *State v. Garrett* in which the appellate court found the State misused the hearsay exception in claiming evidence of subsequent police conduct. *State v. Douglas,* 131 S.W.3d at 824; *State v. Shigemura,* 680 S.W.2d 256 at 258; *State v. Garrett,* 139 S.W.3d 577 (Mo. App. S.D. 2004) at 582. In each of the cases the appellate court found the details in the out-of-court statements from the dispatcher and confidential informants were not necessary to explain the officer's conduct in responding to a certain location. *Id.* Officer Pierce could have testified that he turned the case over to DART based on the total information he received at the hospital and the victim without further details to explain his subsequent conduct. The hearsay statement of an unidentified doctor that the wound was not self-inflicted clearly went to the truth of an ultimate issue in this case. Defendant could not cross-examine an anonymous declarant.

A finding that the trial court erred in admitting the hearsay statement of an unidentified doctor does not end this Court's inquiry. The Court must find prejudicial error which is presumed if there is a Confrontation Clause violation. *State v. Cole,* 483 S.W.3d 475. To overcome the presumption the appellate court must find "the error was harmless beyond a reasonable doubt." *Id.* If the prejudice from the hearsay was "outcome determinative" the appellate court must reverse. *Id.* "The mere fact that there is

overwhelming guilt is not the test; the test is whether there is a reasonable probability the jury relied upon the improperly admitted evidence in convicting the defendant." *State v. Douglas*, at 825.

Here, a central issue of the case was whether E.S.'s wrist wound was self-inflicted. Officer Pierce testified the call was initially dispatched as a possible suicide. (TR 267). The victim does not remember how her wrist was cut. (TR 240). The medical opinion hearsay testimony was critical. The State argued in closing that the doctor said the injury was not self-inflicted. (TR 514). Dr. Quattromani did not testify she spoke to Officer Pierce and Officer Pierce could not identify Dr. Quattromani as the doctor who made the statement. (TR 275). During deliberation, the jury asked to get certain pages of medical records from Dr. Quattromani. (D. 38 p. 35). The Court advised the medical records were not admitted into evidence and the jury should be guided by the evidence. (D 38 p. 35).

The only medical evidence that the wound was not self-inflicted was the hearsay statement testified to by Officer Pierce and the undisclosed opinion testimony of Dr. Quattromani, which Mr. Loper claims should have been excluded for non-disclosure in violation of Rule 25.03. (Appellant's Point IV). Clearly the evidence was central to the State's case and the Court cannot say the error was harmless beyond a reasonable doubt. *State v. Nabors*, 267 S.W.3d at 795. An appellate court may grant a new trial based on the cumulative effect of errors without a finding that any single error constituted grounds for reversal. *State v. West*, 551 S.W.3d 506, 525 (Mo. App. E.D. 2018).

POINT IV.

The trial court abused its discretion by overruling Defendant's objection and admitting the surprise medical opinion testimony of Dr. Quattromani that the wound was not self-inflicted because the testimony violated Rule 25.03 and Mr. Loper's right to due process of law and right to present a complete defense, guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution and should have been barred in that: a) 273 pages of medical records disclosed by the State did not contain Dr. Quattromani's opinion that the wound was not self-inflicted, b) Dr. Quattromani was endorsed as a treating doctor witness but no report or statement of a medical opinion on the nature of the wound was disclosed prior to trial, and c) the State first disclosed the doctor's surprise opinion on the third day of trial, just before her testimony which prevented meaningful efforts by the Defendant to consider and prepare a strategy to address the State's evidence or to endorse an expert to counter the testimony.

Preservation of Error and Factual Background

On the third day of trial, Mr. Loper learned for the first time Dr. Quattromani would testify to her opinion the victim's wound was not self-inflicted. (TR 340). Mr. Loper moved to exclude the opinion testimony based on a violation of Rule 25.03 (TR 340). Mr. Loper had asked the State for discovery of expert reports or statements pursuant to Rule 25.03. (D5).

The State provided 273 pages of medical records from St. Louis University of emergency medical treatment for E.S. and records from the EMS. (D18, D21). The

medical records did not contain a medical opinion on the nature of the wound. (TR 341). The police report was disclosed by the State which indicated Officer Pierce spoke to "the doctor" who made the statement the wrist was not a self-inflicted wound. (TR 341). The doctor is not identified by name. (TR 341). Later in the police report it states Detective Lindhorst was advised by Dr. Quattromani that the laceration to the victim's left wrist was significant and affected by her flexor tendon, exposed median nerve and damaged her artery but does not mention Dr. Quattromani's opinion on the cause of the wound. (TR 341).

The mention of the unnamed doctor's opinion in the police report was the only notice Mr. Loper had prior to trial that a doctor had a medical opinion on the nature of the wound. (TR 341). The State argued that Dr. Quattromani "now lives in Wisconsin and had been difficult to get in touch with... The State's first pretrial with her, which we discussed her testimony at length was this morning." (TR 342). The State argued the police report gave Defendant sufficient notice of Dr. Quattromani's opinion (TR 342). The trial court denied the motion to exclude Dr. Quattromani's opinion. (TR 343). The Court concluded:

> THE COURT: There is a police report documenting that the responding officer consulted Dr. Quattromani regarding the wrist injury, specifically whether or not it was self-inflicted. Based on that response, which Dr. Quattromani indicated that here's no way it could be self-inflicted, triggered the police investigation. The Court also recites the fact, because that contributed to the Court's logic in overruling Mr. Taaffe's hearsay. (TR 340).

Over Mr. Loper's renewed objection during her testimony, Dr. Quattromani testified in her opinion the wrist wound could not be self-inflicted due to the severity of the wound. (TR 354-355). She admitted on cross-examination that it was not impossible that the wound could be self-inflicted. (TR 363). The Motion for New Trial alleged the trial court erred in allowing Dr. Quattromani's medical opinion testimony on the nature of the wrist wound in violation of Rule 25.03 and violated Defendant's right to due process under the Fifth, Sixth and Fourteenth Amendments. (D. 40, p. 2-3). The trial court denied the Motion for New Trial. The issue is preserved for review. Mo. Sup. Ct. Rule 29.11(d).

Standard of Review

Appellate review of an alleged discovery violation consists of two questions. *State v. Pitchford*, 514 S.W.3d 693, 698 (Mo. App. E.D. 2017). First, the appellate court reviews whether the State violated Rule 25.03, and if so, the appellate court considers the appropriate sanction for such a violation. *Id.*

Each of these decisions is within the sound discretion of the trial court and the appellate court will not reverse absent an abuse of discretion. *State v. Johnson*, 513 S.W.3d 360, 364-65 (Mo. App. E.D. 2016). The trial court abuses its discretion if fundamental unfairness results to the Defendant. *Id.* at 365. Fundamental unfairness is found where the State's failure to disclose resulted in the Defendant's genuine surprise at learning of the unexpected evidence and there was at least a reasonable likelihood that the surprise prevented meaningful efforts by the Defendant to consider and prepare a strategy for addressing the State's evidence. *Id.*

Analysis

Rule 25.03 provides, in relevant part, that the State "shall upon written request of defendant's counsel, disclose to defendant's counsel, such part of all of the following material and information within its possession or control designated in said request... (5) Any reports or statements of experts, made in connection with the particular case including results of physical or mental examinations and of scientific tests, experiments, or comparisons." Mo. Sup. Ct. Rule 25.03 (2016). The State is also required under Rule 25.03(A)(1) to disclose the written or recorded statements of any witness it intends to call at trial. Mo. Sup. Ct. Rule 25.03(A)(1). The State has a continuing duty to supplement its responses in the event it learns of additional responsive material and "shall furnish such additional information to opposing counsel." Mo. Sup. Ct. Rule 25.08. Rule 25.03 imposes an affirmative duty of diligence and good faith on the State to locate material and information in its possession and control and in the control of other governmental personnel. *Merriweather v. State*, 294 S.W.3d 52, 55 (Mo. banc 2009). The duty to disclose includes not only information actually known by the State, but also information it may obtain through reasonable inquiry. *State v. Smith*, 491 S.W.3d 286, 298 (Mo. App. E.D. 2016).

The rules of criminal discovery exist to eliminate surprise by allowing both sides to know the witnesses and evidence to be produced at trial. *State v. Zuroweste*, 570 S.W.3d 51, 56 (Mo. banc 2019). The purpose of Rule 25.03 is to grant the defendant a decent opportunity to prepare his case in advance of trial and avoid surprise. *State v. Johnson*, 513 S.W.3d 360, 364 (Mo. App. E.D. 2016). The broad rights of discovery afforded criminal defendants by Rule 25 have constitutional underpinnings rooted in due process. *Id.* Simple

justice requires that defendant be permitted to prepare to meet what looms as the critical elements of the case against him. *Id.* The rules of criminal discovery are not mere etiquette nor is compliance discretionary. *Id.*

Here, the State identified in its endorsement, "Erin Quattromani, Doctor at St. Louis University Hospital" which is where the victim's emergency treatment occurred. (D. 6). The State also provided 273 pages of the victim's medical records from St. Louis University Hospital showing Dr. Quattromani as the treating doctor. (D. 21) The medical records did not disclose Dr. Quattromani's opinion or any other doctor's opinion that the wound was not self-inflicted. (TR 341).

The State did not dispute that the medical record did not contain Dr. Quattromani's opinion. Instead, the State argued that the police report contained Dr. Quattromani's opinion that the wound was not self-inflicted and the Defendant should have been on notice that Dr. Quattromani would testify to that opinion based on the police report. (TR 342). The police report, however, **does not** attribute that statement to any particular doctor and Officer Pierce testified he did not know the name of the doctor he spoke to or even if it was a man or a woman. (TR 263-264). The police report which did not identify a particular doctor could not give notice sufficient under Rule 25.03(A)(5) that Dr. Quattromani would testify in her medical opinion as an emergency room doctor that the wrist wound was not self-inflicted. In fact, the State argued to the trial court:

> "Dr. Quattromani is a doctor who now lives in Wisconsin and had been difficult to get in touch with... The State's first pretrial with her, which we discussed her testimony at length, was this morning at 9:15." (TR 342).

The State argued that it did not know Dr. Quattromani's opinion until that morning. A treating doctor of a victim, however, is in the unique control of the State because short of a deposition subpoena, Mr. Loper cannot contact a victim's treating doctor to inquire further of the doctor's medical opinions. If the State intended to elicit testimony from Dr. Quattromani that in her medical opinion the wound was not self-inflicted it had an affirmative duty of diligence to locate Dr. Quattromani and timely disclose such information or statement under Rule 25.03(A)(5). The witness was in the unique control of the State and the State should have known and disclosed the expert medical opinion prior to the third day of trial.

In the context of a violation of Rule 25.03(A) the question whether fundamental fairness resulted turns on whether there was a reasonable likelihood that timely disclosure of the untimely-disclosed evidence would have affected the result of the trial. *State v. Johnson,*513 S.W.3d at 365. Fundamental unfairness results if defendant is surprised by the undisclosed evidence and there was "at least a reasonable likelihood the surprise prevented meaningful efforts by defendant to prepare a strategy for addressing the State's evidence." *Id.*

If the State had timely disclosed it intended to elicit the expert medical opinion of Dr. Quattromani on a key issue of the defense, then Defendant would have had time to endorse a medical expert to counter such testimony. The State erroneously relied on the unattributed doctor's statement in the police report to justify its failure to disclose Dr. Quattromani's expert opinion. Mr. Loper could not be expected to conclude that an unattributed doctor's statement in a police report was the medical opinion of Dr.

Quattromani or that this hearsay statement would ever be admitted into evidence. (See Point I). The State's failure to disclose it intended to call Dr. Quattromani and elicit her opinion that the wrist wound was not self-inflicted clearly prejudiced Mr. Loper's trial preparation and defense in violation of Rule 25.03 and his due process rights.

Rule 25.18 allows the trial court to exclude evidence. Mo. Sup. Ct. Rule 25.18. When the trial court declines to impose sanctions, the reviewing court must determine whether the State's violation resulted in fundamental unfairness or bore a real potential for substantively altering the outcome of trial. *State v. Johnson*, 513 S.W.3d 360, 369 (Mo. App. E.D. 2016). On the third day of trial the only reasonable sanction the trial court could impose for the discovery violation was the exclusion of the proposed expert opinion. The trial court erred in allowing the evidence and the error caused Defendant fundamental unfairness at trial. *Id.*

POINT V.

The trial court plainly erred in sustaining the State's objection and failing to admit evidence of prior misconduct by E.S. because it deprived Mr. Loper of his due process right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution in that this was proper evidence of prior misconduct that was logically and legally relevant to show the jury a complete and coherent picture of the events that occurred. The trial court's error prejudiced Mr. Loper because he was not able to present a complete defense, which resulted in a manifest injustice.

Preservation of Error and Factual Background

Prior to the start of the trial, the State filed a motion in limine to prevent Mr. Loper from talking about specific bad acts of the State's witnesses. (TR 166). Mr. Loper objected to the exclusion of evidence that the victim attacked Mr. Loper with a tire iron at Hooters in downtown St. Louis. (TR 166). After charges have been issued against Mr. Loper, E.S. attacked Mr. Loper and another woman with a tire iron at Hooters downtown. (TR 166-167). Mr. Loper argued the incident is relevant because it counters the proposed expert testimony; "it doesn't fit the cycle of violence. It would show how obsessed she is with him." (TR 168). The State responded that it is the definition of a bad act and is irrelevant to the present case. (TR 168). Mr. Loper argued the incident directly goes against the testimony that is anticipated will be offered about power and control. (TR 168).

The incident occurred in May, 2017 after the Loper's marriage and after the original charges are dropped. (TR 168). E.S. reconciled with Mr. Loper when he was released on bond in September 2015. (TR 223). They were married in August 2016 and lived together until December 2016. TR 223-25). They were still married in May 2017. (TR 239). Mr. Loper argued this demonstrated E.S. was not afraid of Mr. Loper and how she is jealous of Mr. Loper. (TR 172). The Court, citing Rule 404, ruled this act was too far removed. (TR 173). Mr. Loper made an offer of proof.

E.S. testified she was not jealous but admitted to being angry. (TR 238). She admitted to the incident that occurred at Hooters in downtown St. Louis on May 6, 2017. (TR 238-239). She admitted to arriving at the restaurant and retrieving a tire iron from her car. (TR 239). She admitted to taking the tire iron into the Hooters, starting a fight with Mr.

Loper, and attempting to hit Mr. Loper in the head with the tire iron. (TR 239-240). She admitted to trying to slap the woman with Mr. Loper with her hand. (TR 240). The Court did not allow evidence of the Hooters incident after the offer of proof. (TR 242). Mr. Loper did not raise the exclusion of evidence of E.S.'s attack of Mr. Loper in the Motion for New Trial. (D. 40). Mr. Loper requests plain error review under Rule 29.12(b). Mo. Ct. App. Rule 29.12(b).

Standard of Review

Non-preserved issues are reviewed for plain error if the error results in manifest injustice or a miscarriage of justice. *State v. McClendon,* 477 S.W.3d 206, 216 (Mo. App. W.D. 2015). Plain error review involves a two-step process. *State v. Speed,* 551 S.W.3d 94, 98 (Mo. App. W.D. 2018). First the appellate court determines if the trial court committed evident, obvious and clear error effecting defendant's substantial rights and second, whether the error resulted in manifest injustice or a miscarriage of justice. *State v. Speed Id.*

Analysis

The trial court clearly erred when it failed to allow evidence of E.S.'s alleged bad acts against Mr. Loper in May of 2017. Evidence of prior misconduct that does not fit any of the articulated exceptions may still be admissible if it is logically and legally relevant. *State v. Blakey*, 203 S.W.3d 806, 812 (Mo. Ct. App. 2006); *State v. Pitchford* 514 S.W.3d 693, 701 (Mo. App. E.D. 2017). Evidence of uncharged misconduct is admissible where the evidence tends to present a "complete and coherent picture of the crime." *Id.* The evidence of E.S.'s violent conduct at Hooters not only negates the testimony that she was

afraid of the victim but also is direct evidence of her state of mind and motive to fabricate the allegations against Mr. Loper. Also, and most prejudicially, the State was allowed to endorse Michelle Schiller-Baker and use her testimony regarding an abuser exercising power and control over a victim. (TR 151, 331). The State relies upon this expert testimony and specifically the social scientific theory of power and control throughout the trial and through its closing argument. (TR 511). However, when Mr. Loper asks to show that E.S. does not fit this "mold" of the fearful victim who is being overpowered and controlled by Mr. Loper through evidence, the Court sustains the State's motion to keep this out. (TR 173).

This evidence is directly in opposition with what the State presented. This testimony was also repeated in the improperly admitted opinion testimony of Detective Lindhorst. (Point I). There must, however, be more than an abuse of discretion to reverse for plain error. Here, the erroneously excluded evidence prevented Mr. Loper from effective rebutting or countering the erroneously admitted expert testimony that he had to return to and assert his "power and control" over E.S. after a breakup (TR 314). And the abused returns to the abuser because it is the "safest place." (TR 335). This rebuttal evidence was shown in the offer of proof (Tr 238-240). Although not raised in the Motion for New Trial. The exclusion of E.S.'s admitted violent actions and anger at Mr. Loper deprived the jury of the full picture of their relationship and affected the outcome of the trial. The trial court plainly erred in not allowing defense counsel to cross-examine E.S. on this evidence. *State v. White,* 92 S.W.3d 183, 193 (Mo. App. W.D. 2002).

CONCLUSION

WHEREFORE, based on his arguments in Points I, II, III, IV, and V, Mr. Loper respectfully requests this Court to reverse his convictions and sentences and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that on this 26th day of March, 2020, a true and correct copy of the foregoing brief was served via the e-filing system to Assistant Attorney General Garrick Aplin at garrick.aplin@ago.mo.gov. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Baskerville Old Face 13-point font, and does not exceed 31,000 words. The word-processing software identified that this brief contains 17, 623 words, including the cover page, signature block, and certificates of service and of compliance.

/s/ Susan DeGeorge
Susan DeGeorge