No. SC98295

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

RASHIDI LOPER,

Appellant.

Appeal from the Circuit Court of the City of St. Louis
22nd Judicial Circuit
The Honorable Thomas C. Clark, Judge

RESPONDENT'S SUBSTITUTE BRIEF

ERIC S. SCHMITT
Attorney General

GARRICK APLIN
Assistant Attorney General
Missouri Bar No. 62723

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-9393
Fax: (573) 751-5391
Garrick.Aplin@ago.mo.gov

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

STATEMENT OF FACTS 8

ARGUMENT 18

I. ("Evidence" of "Power and Control") 18

A. The record regarding this claim. 18

B. Standard of review. 23

C. The trial court did not plainly err in admitting Detective Lindhorst's testimony because it did not invade the province of the jury by vouching for Victim's credibility or commenting directly on Defendant's guilt. 26

II. (Expert Testimony – Ms. Schiller-Baker) 33

A. The record regarding this claim. 33

B. Standard of review. 38

C. The trial court did not abuse its discretion in finding that Ms. Schiller-Baker was qualified as an expert and that her testimony was relevant and reliable, and she did not vouch for Victim's credibility. 38

III. (Hearsay - Subsequent Police Conduct) 45

A. The record regarding this claim. 45

B. Standard of review. 48

C. The doctor's out-of-court statement was admissible because it was reasonably necessary to explain the subsequent police investigation, and Defendant was not prejudiced by its admission because it was merely cumulative to Dr. Quattromani's testimony at trial. 49

IV. ("Surprise Medical Opinion") 54

A. The record regarding this claim. 54

B. Standard of review. 59

C. The trial court did not abuse its discretion in finding that the State did not violate Rule 25.03, and Defendant was not genuinely surprised or prevented from meaningfully preparing a defense to the medical opinion that Victim's wrist injury was not self-inflicted. 60

V. (Victim's Prior Bad Act) 65

A. The record regarding this claim. 65

B. Standard of review. 69

C. The trial court did not plainly err in excluding evidence of Victim's prior bad act as irrelevant because it was reasonably too remote from the charged incident, and Defendant failed to establish a manifest injustice. 69

CONCLUSION 74

CERTIFICATE OF COMPLIANCE 75

TABLE OF AUTHORITIES

Cases

Brown v. State, 450 S.W.3d 847 (Mo. App. S.D. 2014) 39, 40

Childs v. State, 314 S.W.3d 862 (Mo. App. W.D. 2010).....70

Johnson v. Mead Johnson & Co., 754 F.3d 557 (8th Cir. 2014).....41

Jones v. City of Kansas City, 569 S.W.3d 42 (Mo. App. W.D. 2019) 41

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) 39

Mitchell v. Kardesch, 313 S.W.3d 667 (Mo. banc 2010) 70

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

..... 31, 39, 41, 42

State v. Amick, 462, S.W.3d 413 (Mo. banc 2015).....25

State v. Baker, 422 S.W.3d 508 (Mo. App. E.D. 2014) 44

State v. Battle, 415 S.W.3d 783 (Mo. App. E.D. 2013) 31

State v. Beck, 557 S.W.3d 408 (Mo. App. W.D. 2018) 28, 29

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993) 71

State v. Blakey, 203 S.W.3d 806 (Mo. App. S.D. 2006).....40

State v. Bowens, 550 S.W.3d 84 (Mo. App. E.D. 2018) 49

State v. Boykins, 477 S.W.3d 109 (Mo. App. E.D. 2015) 49, 50

State v. Brooks, 618 S.W.2d 22 (Mo. banc 1981) 49, 51

State v. Bynum, 299 S.W.3d 52 (Mo. App. E.D. 2009) 53

State v. Churchill, 98 S.W.3d 536 (Mo. banc 2003).....27, 44

State v. Cochran, 365 S.W.3d 628 (Mo. App. W.D. 2012) 25

State v. Cole, 483 S.W.3d 470 (Mo. App. E.D. 2016) 24

State v. Cook, 386 S.W.3d 842 (Mo. App. S.D. 2012) 52

State v. Cravens, 968 S.W.2d 707 (Mo. App. S.D. 1998) 62, 63

State v. Davis, 226 S.W.3d 167 (Mo. App. W.D. 2007) 71

State v. Douglas, 131 S.W.3d 818 (Mo. App. W.D. 2004) 24, 50

State v. Drisdel, 417 S.W.3d 773 (Mo. App. E.D. 2013) 49

State v. Enke, 891 S.W.2d 134 (Mo. App. S.D. 1994) 60, 62, 63

State v. Faulkner, 103 S.W.3d 346 (Mo. App. S.D. 2003) 29, 32

State v. Ferguson, 568 S.W.3d 533 (Mo. App. E.D. 2019) 29

State v. Fewell, 198 S.W.3d 691 (Mo. App. S.D. 2006) 29

State v. Futo, 932 S.W.2d 808 (Mo. App. E.D. 1996) 39

State v. Gilyard, 979 S.W.2d 138 (Mo. banc 1998) 70

State v. Gray, 347 S.W.3d 490 (Mo. App. E.D. 2011) 29

State v. Hamilton, 892 S.W.2d 371 (Mo. App. E.D. 1995) 52

State v. Haslett, 283 S.W.3d 769 (Mo. App. S.D. 2009) 28, 32

State v. Howell, 226 S.W.3d 892 (Mo. App. S.D. 2007) 52

State v. Johnson, 150 S.W.3d 132 (Mo. App. E.D. 2004) 24

State v. Johnson, 513 S.W.3d 360 (Mo. App. E.D. 2016) 59

State v. Kinder, 942 S.W.2d 313 (Mo. Banc 1996) 59

State v. Link, 25 S.W.3d 136 (Mo. banc 2000) 30

State v. McGee, 284 S.W.3d 690 (Mo. App. E.D. 2009) 49

State v. Mickle, 164 S.W.3d 33 (Mo. App. W.D. 2005) 25

State v. Miller, 372 S.W.3d 455 (Mo. banc 2012) 70

State v. Mosley, 526 S.W.3d 361 (Mo. App. E.D. 2017) 31, 42

State v. Nabors, 267 S.W.3d 789 (Mo. App. E.D. 2008) 49

State v. Paglino, 319 S.W.2d 613 (Mo. 1958) 31

State v. Pickens, 332 S.W.3d 303 (Mo. App. E.D. 2011) 31

State v. Pointer, 887 S.W.2d 652 (Mo. App. W.D. 1994) 25

State v. Porter, 439 S.W.3d 208 (Mo. banc 2014) 27

State v. Price, 165 S.W.3d 568 (Mo. App. S.D. 2005) 24

State v. Primm, 347 S.W.3d 66 (Mo. banc 2011) 70

State v. Prince, 534 S.W.3d 813 (Mo. banc 2017) 71

State v. Renner, 675 S.W.2d 463 (Mo. App. E.D. 1984) 63

State v. Rogers, 529, S.W.3d 906 (Mo. App. E.D. 2017) 29

State v. Schneider, 483 S.W.3d 495 (Mo. App. E.D. 2016) 26, 43

State v. Silvey, 894 S.W.2d 662 (Mo. banc 1995) 27, 28

State v. Simmons, 233 S.W.3d 235 (Mo. App. E.D. 2007) 24, 51

State v. Simmons, 944 S.W.2d 165 (Mo. banc 1997) 69

State v. Suttles, 581 S.W.3d 137 (Mo. App. E.D. 2019) 40, 41

State v. Taylor, 663 S.W.2d 235 (Mo. banc 1984) 28

State v. Thomas, 290 S.W.3d 129 (Mo. App. S.D. 2009) 44

State v. Thompson, 985 S.W.2d 779 (Mo. banc 1999) 59

State v. Tolliver, 101 S.W.3d 313 (Mo. App. E.D. 2003) 70

State v. Wallace, 943 S.W.2d 721 (Mo. App. W.D. 1997) 70

State v. Williams, 858 S.W.2d 796 (Mo. App. E.D. 1993) 27, 42

State v. Wolfe, 13 S.W.3d 248 (Mo. banc 2000) 70

State v. Wolfe, 793 S.W.2d 580 (Mo. App. E.D. 1990) 62

State v. Zetina-Torres, 400 S.W.3d 343 (Mo. App. W.D. 2013) 60

Rules

Rule 25.03 ..... passim

Rule 25.12 .....60, 62

Statutes

§ 490.065.2(1), RSMo Cum. Supp. 2017 .....39, 41, 42

STATEMENT OF FACTS

Mr. Rashidi Loper ("Defendant") appeals from a City of St. Louis Circuit Court judgment convicting him of first-degree attempted rape, first-degree domestic assault, second-degree domestic assault, two counts of armed criminal action, and tampering with a victim, for which he was sentenced to a total of 22 years' imprisonment. (D43).

Defendant was charged with the unclassified felony of attempted rape in the first degree in Count I, for attempting to have sexual intercourse with E.S. ("Victim") by the use of forcible compulsion; the class B felony of domestic assault in the first degree in Count II, for attempting to kill or cause serious physical injury to Victim by strangling her with a phone cord; the unclassified felony of armed criminal action in Count III, for committing the felony of first-degree domestic assault in Count II with the knowing use of a dangerous instrument; the class A felony of domestic assault in the first degree in Count IV, for attempting to kill or cause serious physical injury to Victim by cutting her wrist, and in the course thereof inflicting serious physical injury to Victim; the unclassified felony of armed criminal action in Count V, for committing the felony of first-degree domestic assault in Count IV with the knowing use of a dangerous instrument; the class B felony of kidnapping in Count VI; and the class C felony of victim tampering in Count VII, for purposely preventing or dissuading Victim, a victim of the charged offense of domestic assault in the

first degree, from assisting in the prosecution. (D2). Counts I-VI were alleged to have occurred on or about April 3, 2015. (D2, pp. 2-3). Count VII was alleged to have occurred between September 19, 2016, and October 14, 2016. (D2, p. 3). The kidnapping charge in Count VI was dismissed by the State before trial. (D1, p. 14; D26; Tr. 10). A jury found Defendant guilty of the lesser offense of second-degree domestic assault in Count II, for knowingly causing physical injury to Victim by choking her, and as charged in all of the other counts. (D1, p. 18; D38, pp. 11, 22-27; Tr. 523-24). The jury recommended sentences of 7 years' imprisonment for Count I, 5 years' imprisonment for Count II, 3 years' imprisonment for Count III, 15 years' imprisonment for Count IV, 5 years' imprisonment for Count V, and 3 years' imprisonment for Count VII. (D1, pp. 18-19; D39, pp. 7-12; Tr. 539-40). The trial court followed the jury's recommendations and sentenced Defendant accordingly, with the sentence for Count I to be served consecutively to the other sentences, for a total of 22 years' imprisonment. (D43; Tr. 550).

Defendant does not challenge the sufficiency of the evidence to support the convictions. (Def's Br. 23-26). Viewed in the light most favorable to the verdict, the evidence presented at trial showed the following:

Victim was in an on-and-off relationship with Defendant for several years, beginning in 2009. (Tr. 178, 209-10). On the morning of April 3, 2015, Defendant came to Victim's apartment building and woke Victim with a knock

on her door. (Tr. 180, 231-32, 358). They were not dating at that time, and Victim had last seen Defendant approximately five months earlier in November 2014. (Tr. 179, 217, 245, 322). Victim asked Defendant what he wanted, and Defendant asked if he could come in and talk to her. (Tr. 180-81). Victim eventually let Defendant in, and they walked up the stairs to her apartment. (Tr. 181). Victim went back to her bed, lay down, and pulled the covers over her head. (Tr. 180-82).

Defendant "snatched" the covers off Victim and pulled her legs toward him. (Tr. 182). Victim told Defendant that she did not want to have sex with him, not having seen him for several months. (Tr. 182, 250). Defendant pulled his pants down, exposing himself, and started pulling down Victim's pants. (Tr. 182, 184). Victim tried to fight Defendant off by kicking at him and pulling at her pants. (Tr. 183, 250). Defendant responded by grabbing Victim around her throat with both of his hands and choking her to the point that Victim could not breathe. (Tr. 183, 248, 358, 393). Victim succeeded in temporarily dislodging herself from Defendant, but he then got on top of her and began choking her again, causing her to lose consciousness. (Tr. 183-84).

Victim testified that the first thing she remembered after waking up was lying on her back in the bathtub, with the shower running, submerged in water almost up to her nose. (Tr. 184-85, 248, 283, 358). Victim was not wearing any clothes, her wrist had been cut to the point that "[i]t was barely attached to

[her] arm," and a kitchen knife was lying between her legs in the bathtub. (Tr. 186-87, 195, 233, 258, 262, 280-81, 284, 297, 358; State's Ex. 65). Victim struggled and managed to pull herself over the side of the tub. (Tr. 185-86). Victim then wrapped her injured wrist in a sweatshirt to try to stop the bleeding, crawled to her telephone, and called 911. (Tr. 186-87, 258, 280). Victim then crawled to her bedroom to get her cell phone, before crawling downstairs to the building's front door, where she waited until first responders arrived. (Tr. 186-87, 258, 280). Defendant was no longer present in the building. (Tr. 234, 261).

Victim initially told 911 and first responders that she had cut her wrist, though she couldn't remember doing it, but after receiving some medical treatment, she remembered that Defendant had been present and realized that she hadn't done it. (Tr. 188, 232, 234, 249, 275, 282-83, 286, 348). Dr. Erin Quattromani, the ER physician who treated Victim, testified that Victim was hypotensive, or had lower than normal blood pressure, which was likely due to blood loss, and that "not thinking clearly" is a side effect. (Tr. 347). Victim testified that she did not try to commit suicide. (Tr. 234, 253-54).

Victim had "an obvious[,] large laceration" to her wrist that "went all the way through the skin," exposing fatty tissue and lacerations to tendons, and that "was wide across the wrist." (Tr. 349-50). Dr. Quattromani testified that she did not believe that the cut to Victim's wrist could have been self-inflicted

because of the extent of the injury. (Tr. 354-55). Victim underwent surgery to repair her wrist, followed by "extensive physical therapy." (Tr. 188-89, 300, 349-50, 389). Victim still had a scar on her wrist at the time of trial. (Tr. 208).

Victim also had significant swelling to her face, tiny bruises or petechiae, and hemorrhaging in the whites of her eyes, which suggested that she had been strangled. (Tr. 207-08, 272, 351-53, 381-83, 393; State's Ex. 70). Victim had apparent ligature marks around her neck, consisting of a pattern of vertical lines that could have been caused by a phone cord. (Tr. 284-85, 321, 378-79, 391, 393; State's Ex. 59). Additionally, there was some bruising around Victim's chin and to her tongue, and her voice was described as "a little bit hoarse." (Tr. 351, 380-81). Victim also lost one of her artificial fingernails during the incident. (Tr. 194-95, 208, 384). The sexual assault nurse examiner testified that she would have examined Victim's body for the presence of potential fluids, due to her having woken up in the nude, but that "[a]nything on her body would not be there" after having been "soaking in a tub." (Tr. 387-88).

Investigators observed a pool of blood on the bottom stairs where Victim had been waiting for first responders, along with apparent blood spatter on the wall. (Tr. 258-59, 269, 296). There were also "trails of blood leading to almost each room in the apartment," including one leading out of the bathroom into the living room to where the landline phone was located. (Tr. 261, 271, 296-

97). Investigators observed blood on the walls of the bathtub, as well as immediately outside the tub. (Tr. 262, 270, 297). Blood and hair were present on the spiral phone cord in the living room. (Tr. 297). There was also blood on the mattress in the bedroom. (Tr. 298). The pair of pants that Victim said she had been wearing at the time of the incident was found in a basket in the closet. (Tr. 192, 308; State's Ex. 41-43). Victim's missing fingernail was also found on the floor. (Tr. 309, 311; State's Ex. 52).

When Defendant was interviewed by the detective, Defendant had a small scratch on his cheek and on the right side of his lower back. (Tr. 314-15).

In June 2015, two months after the incident, Defendant sent letters to Victim. (Tr. 198, 219). Two of those letters were admitted into evidence and read aloud to the jury. (Tr. 199, 201-04). In the letters, Defendant repeatedly apologized to Victim "for that day"—"the day our lives changed forever"—and asked her "for forgiveness." (Tr. 201-04, 220). Defendant claimed that "the day before [he] did a drug [he] wish[ed] [he] never tried" and that "[i]t brought out evil in [him]" and "[m]ade [him] think about . . . harming others, causing hell and pain." (Tr. 201-02). Defendant said, "I cry every night wishing this was just a bad dream hoping I wake up outside of this justice center." (Tr. 202). Defendant told Victim that he loved her, asked her to come see him, and asked her to send him pictures of herself. (Tr. 202-04, 220). Defendant asked Victim, "If you would ever find it in your heart, please at least drop the rape charge."

(Tr. 204). Defendant concluded, "P.S. I hope with the grace of God, when this is all behind us, maybe I can . . . take care of you like a man should." (Tr. 204). In addition to the letters, Defendant also called Victim on the phone, and she went to see him every week. (Tr. 204-05). Recordings of phone calls from April 27, 2015, April 29, 2015, and May 13, 2015, were admitted into evidence and played for the jury. (Tr. 402-04). Defendant and Victim "talked about getting back together whenever he got out." (Tr. 206, 220). Defendant told Victim that he and his family would "help [her] out financially." (Tr. 220).

Victim testified that she assisted in obtaining Defendant's release from jail by testifying on his behalf at a bond hearing "[b]ecause he had asked [her] to." (Tr. 231). Victim also testified that Defendant pressured her not to cooperate with the prosecution. (Tr. 252-53). Victim testified that "[Defendant] moved back in as soon as he got out of jail" and that they eventually got married. (Tr. 206, 223).

Defendant called a DNA section supervisor from the crime laboratory to testify. (Tr. 419). She testified that no DNA was detected on Victim's fake fingernail. (Tr. 421-22). Victim's DNA was found on the spiral phone cord, along with trace amounts of DNA that were not enough to make a source identification. (Tr. 412, 423, 428-29).

Defendant testified on his own behalf. (Tr. 435). Defendant admitted that he repeatedly cheated on Victim throughout their "on[-]and[-]off" relationship,

but that they both decided to leave the relationship at various times and repeatedly got back together. (Tr. 436-41, 458). Defendant admitted that he stopped seeing Victim in November 2014 when Victim found out he was seeing another woman. (Tr. 441-43).

Defendant testified that on the morning of the incident an acquaintance named Teshambre Newell drove him to Victim's residence. (Tr. 449, 463). Defendant testified that he went to Victim's residence that day because "basically I hadn't had any intercourse in a while, me and her." (Tr. 449). Defendant admitted that Victim did not immediately let him in and that she said, "I'm not going to be going back and forth with you." (Tr. 450). Defendant testified that after Victim let him in, they went upstairs, she got in bed, and she pulled the covers over her head. (Tr. 450, 464). Defendant claimed that he "playfully pulled the covers off." (Tr. 450). Defendant admitted that Victim told him to stop and initially told him "no" when he "tr[ied] to kiss on her." (Tr. 450-51). But Defendant claimed that "[s]he didn't deny [him] of" "kissing on her some more" or stop him when he started to touch her in a sexual way. (Tr. 451). Defendant admitted pulling Victim's pants down and having sex with her. (Tr. 451, 465). Defendant claimed that "[i]n the middle of it, [he] stopped" because he thought he should not be cheating on his girlfriend. (Tr. 449, 451).

Defendant claimed that Victim "started cussing [him] out" and "attempted to fight [him]" as he was leaving. (Tr. 451-52). Defendant claimed that Victim

"started to physically fight [him]" and "[he] pushed her by her throat[—]like pushed her back to get off of [him]." (Tr. 452). Defendant claimed that "[s]he came at [him] again" and "[he] did it for the second time." (Tr. 452). Defendant claimed that he then left. (Tr. 452). Defendant denied causing the injury to Victim's wrist, using force to have sex with her, or choking her until she passed out. (Tr. 458).

Defendant admitted that he lied to the police when he told them that he had not been at Victim's apartment and had not seen Victim since November. (Tr. 454-55, 466).

Defendant admitted writing letters to Victim after he was incarcerated, including those admitted at trial, "[t]o let her know that [he's] not made for jail." (Tr. 453-54, 461). Defendant admitted that it was his intention to induce Victim to "drop the charges" so that he could get out of jail. (Tr. 454). Defendant further admitted that he told his girlfriend to burn those letters. (Tr. 461). Defendant also admitted that he called Victim in order to get her to come see him at jail because he knew that it would cause her to "have a change of heart." (Tr. 455-56, 462). Defendant admitted that he instructed his uncle to have Victim sign non-prosecution forms. (Tr. 462). Defendant admitted that he told Victim to drop the charges. (Tr. 463). Defendant admitted that he eventually married Victim in August 2016, while this case was pending, but he claimed that "[i]t was more so her idea to keep from trying to testify." (Tr. 457, 460).

Mr. Newell testified that he remembered giving Defendant a ride "toward the end" of 2015 to see his girlfriend and "pick something up." (Tr. 472-73). Mr. Newell testified that he and another friend shared a cigarette in the car for no more than 10 to 15 minutes before Defendant came back to the car. (Tr. 473, 476). Mr. Newell did not remember the address, and he had no idea if the date was April 3, 2015. (Tr. 473, 475-76).

ARGUMENT

I. ("Evidence" of "Power and Control")

The trial court did not abuse its discretion or plainly err in permitting Detective Lindhorst to testify that there was "evidence" in this case of the common, domestic-violence dynamic of "power and control" because the detective was qualified to provide her expert opinion on the evidence in this case, and her testimony did not invade the province of the jury by vouching for Victim's credibility or commenting directly on Defendant's guilt.

A. The record regarding this claim.

Detective Lindhorst of the St. Louis Police Department's domestic-violence unit testified that she had handled thousands of domestic-violence cases and had received specialized training regarding domestic violence. (Tr. 292-93, 311). The detective testified that she became involved in this case when an officer contacted her and told her that Victim had a cut to her wrist, that she had been strangled by her ex-boyfriend, that she had a ligature mark around her neck, and that she had multiple bruises on her chin and throat. (Tr. 294-95). The detective testified that after examining the scene, she went to the hospital and spoke to the paramedics, the doctor, Victim, and the forensic nursing coordinator, who had taken photographs of the injury to Victim's wrist. (Tr. 298-300).

The detective testified that through her training and experience in domestic-violence cases she had become familiar with the "concept of power and control." (Tr. 311). The prosecutor asked, "Can you tell me what your understanding of these principles are and how you apply it to your day-to-day handling of your caseload?" (Tr. 311-12). The detective answered:

> In general, domestic violence, unlike a lot of crime, it's all about power and control and authority over one person. We have—a lot of our offenders this is what they do. They want to make sure that the victim is controlled all the time, . . . no matter how long the relationship has been over. We try to get that from our victim . . . that power and control which includes harassment, stalking, threatening behavior, threats to the victim, threats to the victim's family. We try to get all that information, talk to the victims about it. We also train on that information.

(Tr. 312). The prosecutor then asked, "Did you have evidence of power and control in this case?" and the detective answered, "Absolutely." (Tr. 312). The prosecutor asked, "What were the signs you saw through your investigation?" (Tr. 312).

Defense counsel objected during the detective's answer, stating, "Personal opinion, Your Honor." (Tr. 312-13). The trial court asked the attorneys to approach the bench. (Tr. 312-13). The trial court then said, "I think she's laid

the foundation that she has sufficient training and experience to discuss this." (Tr. 313). The trial court asked defense counsel, "Do you want to add on your objection?" and defense 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 trial court responded, "Thank you. Overruled." (Tr. 313).

The prosecutor asked, "Through your training and experience and dealing with all the cases you have over the years, what evidence of concepts of power and control did you witness in this case?" (Tr. 313). The detective answered:

> [T]he time that had passed between when the relationship had ended and the assault that occurred is not uncommon. A lot of cases aren't exactly the same. It's telling since they hadn't 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. Additionally, the strangulation is a very intimate crime. Strangulation and also 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
>
> . . . .

(Tr. 313-14).

The State also called Michelle Schiller-Baker, the executive director of an emergency, domestic-violence shelter for abused women and children and an expert in domestic violence, who testified that the "root of domestic violence" is "one individual's desire to have power and control over another in an intimate relationship with the belief that [that] relationship is not equal, and one person should have more power and control over another in the relationship." (Tr. 151-53, 325, 330). Ms. Schiller-Baker further testified that she was familiar with "the cycle of violence" and that eventually the abuser begins to exercise "coercive control as well as assaultive physical control." (Tr. 330-31). Ms. Schiller-Baker testified that once a victim "actually break[s] full power and control that individual has over her . . . the abusive person will do whatever they need to do to get that individual back." (Tr. 334).

At the beginning of the State's initial closing argument, the prosecutor said, "Power and control. At the beginning of this trial, I told you that those were two important words. After sitting here through this trial for the last four days, you now see why power and control applies to this case." (Tr. 487-88). While specifically addressing the attempted rape charge, the prosecutor told the jury, "Just think . . . about those vivid details that [Victim] gave you. That day, as he was choking her with his hands around her neck and an erect penis and he was trying to rape her, he had all the control. He had all the control that morning." (Tr. 488-90). While addressing the charge of domestic assault for

cutting Victim's wrist, the prosecutor said, "The medical professionals in this case did not believe it was a suicide." (Tr. 496-97). While addressing the victim-tampering charge, the prosecutor argued, "She was never free of him, ladies and gentlemen, even while he was locked up. . . . he was manipulating [Victim]." (Tr. 497-98).

Defense counsel argued during closing, "In this case they're trying to pigeonhole this into what they would consider their typical domestic abuse or domestic violence relationship," which he claimed was "trying to take a square peg and put it into a round hole." (Tr. 504). Defense counsel argued that "[t]he relationship between [Defendant] and [Victim] [was] not one of power and control" but rather "a toxic relationship." (Tr. 505). Defense counsel asked the jury, "What woman marries the guy that supposedly rapes her? What woman marries the guy that supposedly puts . . . this gash in her hand. . . . You're going to tell me this case fits into the model they're trying to tell you he fits into, power and controlling of him." (Tr. 507).

The prosecutor responded during rebuttal, "[Defense counsel] got up here and screamed and yelled at you what woman would go back? Look what happened when she tried to tell him no. You heard about the cycle of violence, ladies and gentlemen. . . . You heard [Victim] talk about marrying him. I figured he would do the right thing this time if I married him, ladies and gentlemen. Detective Lindhorst testified the fact they had not seen each other

in a while was not uncommon." (Tr. 512). The prosecutor argued that "[D]efendant was losing his power. He didn't have control over [Victim] anymore." (Tr. 512).

While specifically addressing Victim's wrist injury in rebuttal, the prosecutor argued, "The medical evidence for the wrist is very strong, ladies and gentlemen. The paramedic, . . . she testified in her 15 years she has never seen a self-inflicted wound like this. Dr. Quattromani, . . . in her years of experience as an emergency room doctor, she has never seen a self-inflicted injury like this. The depth is just too deep, ladies and gentlemen." (Tr. 514). The prosecutor later again argued, "The defendant this entire time has just been giving you distractions, because the medical evidence is strong. [Victim] did not inflict these injuries on herself. You heard medical professionals say that." (Tr. 517-18).

Defendant included a related claim of error in his motion for a new trial. (D40, p. 2). Specifically, the motion alleged that "[s]aid opinion testimony was irrelevant [and] outside of [the detective's] training and experience." (D40, p. 2).

B. Standard of review.

"A trial court has broad discretion to admit or exclude evidence and [this Court] will reverse a trial court's ruling on the admission of evidence only when a trial court abuses its discretion." *State v. Simmons*, 233 S.W.3d 235, 237 (Mo.

App. E.D. 2007). "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Id*.

"Upon finding an abuse of discretion, a reviewing court will only reverse if the prejudice resulting from improper admission of evidence is outcome-determinative." *State v. Cole*, 483 S.W.3d 470, 474 (Mo. App. E.D. 2016). "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.'" *Id*. (quoting *State v. Douglas*, 131 S.W.3d 818, 826 (Mo. App. W.D. 2004)).

Additionally, "[t]he plain error rule is to be used sparingly, and it does not provide an avenue of relief for every trial court error that has not been properly preserved." *State v. Price*, 165 S.W.3d 568, 574 (Mo. App. S.D. 2005). "Plain errors are evident, obvious, and clear, and we determine such errors exist based on the facts and circumstances of each case." *Id*. (quoting *State v. Johnson*, 150 S.W.3d 132, 136 (Mo. App. E.D. 2004)). "A plain error claim must establish on its face substantial grounds for an appellate court to believe a manifest injustice or miscarriage of justice will result if error is left uncorrected." *Id*.

Defendant failed to preserve his claim on appeal that the trial court erred in admitting Detective Lindhorst's testimony on the basis that it invaded the province of the jury by vouching for Victim's credibility or by commenting on Defendant's guilt. (Def's Br. 30). Defense counsel's objection at trial merely claimed error in admitting the detective's "[p]ersonal opinion." (Tr. 312-13). The trial court responded by finding that "[the detective] has sufficient training and experience to discuss this." (Tr. 313). When the trial court specifically asked if defense counsel wanted to "add on [his] objection," defense counsel replied, "No. That's fine." (Tr. 313). Moreover, Defendant's claim of error in his motion for a new trial alleged only that the "opinion testimony was irrelevant [and] outside of her training and experience." (D40, p. 2). At no time did Defendant object before the trial court on the specific grounds that Detective Lindhorst's testimony was inadmissible because it invaded the province of the jury by vouching for Victim's credibility or directly commenting on Defendant's guilt. *See State v. Cochran*, 365 S.W.3d 628, 632-33 (Mo. App. W.D. 2012) (quoting *State v. Mickle*, 164 S.W.3d 33, 55 (Mo. App. W.D. 2005)) ("To properly preserve a challenge to the admission of evidence, the objecting party must make a specific objection to the evidence at the time of its attempted admission."); *State v. Amick*, 462, S.W.3d 413, 415 (Mo. banc 2015) (quoting *State v. Pointer*, 887 S.W.2d 652, 654 (Mo. App. W.D. 1994)) ("Our rules for preservation of error for review are applied . . . to enable the court—the trial

court first, then the appellate court—to define the precise claim made by the defendant."); *State v. Schneider*, 483 S.W.3d 495, 505 (Mo. App. E.D. 2016) ("[B]ecause [the defendant's] theory of trial-court error on appeal is different from the theory that underpinned his specific objection at trial, [he] has waived his argument on appeal."). Therefore, to the extent that Defendant claims that the trial court erred in permitting the detective's testimony because it invaded the province of the jury by vouching for Victim's credibility or commenting on Defendant's guilt, it is unpreserved for appellate review. *See Cochran*, 365 S.W.3d at 632-33.

C. The trial court did not plainly err in admitting Detective Lindhorst's testimony because it did not invade the province of the jury by vouching for Victim's credibility or commenting directly on Defendant's guilt.

Defendant claims on appeal that Detective Lindhorst's testimony that there was evidence of power and control in this case "directly impedes upon the province of the jury to judge [Victim's] credibility and [Defendant's] state of mind" and was "similar to the 'particularized testimony' found inadmissible in child sexual abuse [cases]." (Def's Br. 32).

> General testimony describes a 'generalization' of behaviors and other characteristics commonly found in those who have been the victims of sexual abuse. Particularized testimony is that testimony

> concerning a specific victim's credibility as to whether they have been abused. The trial court has broad discretion in admitting general testimony, but when particularized testimony is offered, it must be rejected because it usurps the decision-making function of the jury and, therefore, is inadmissible.

State v. Churchill, 98 S.W.3d 536, 539 (Mo. banc 2003). "However, it may be appropriate for an expert to testify that a child demonstrates age-inappropriate sexual knowledge or awareness, and that a child's behaviors are consistent with a stressful sexual experience." *State v. Williams*, 858 S.W.2d 796, 800 (Mo. App. E.D. 1993); *see also State v. Silvey*, 894 S.W.2d 662, 671 (Mo. banc 1995) (abrogated on other grounds by *State v. Porter*, 439 S.W.3d 208 (Mo. banc 2014)) (holding that an expert's testimony that the victim "exhibited several behavioral indicators consistent with a child that has been sexually abused" "did not offer an opinion as to whether [the victim] suffered abuse at the hand of [the defendant]," was "clearly within the province of allowable expert testimony[,] and did not invade the province of the jury").

Here, the trial court did not plainly err in permitting Detective Lindhorst's testimony because it did not invade the province of the jury by vouching for Victim's credibility or commenting directly on Defendant's guilt. In response to the prosecutor's question, "Through your training and experience . . ., what evidence of concepts of power and control did you witness in this case?" the

domestic-violence detective testified that "the time that had passed between when the relationship had ended and the assault that occurred [was] not uncommon" and that "[a]dditionally, the strangulation is a very intimate crime." (Tr. 313-14). Detective Lindhorst's testimony that there was "evidence of . . . power and control . . . in this case" thus merely established that the timing of the incident and Victim's injuries were consistent with the dynamic of power and control commonly present in domestic-violence cases. Expert testimony that certain behavior or injuries are consistent with a particular type of offense have been repeatedly upheld in Missouri as properly admissible expert testimony that does not invade the province of the jury. *See Silvey*, 894 S.W.2d at 671; *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. banc 1984) ("It is nearly bromidic that a physician may give his opinion that a rape victim's wounds were caused by forcible sexual intercourse."); *State v. Beck*, 557 S.W.3d 408, 422-23 (Mo. App. W.D. 2018) (holding that a physician's diagnosis of child sexual abuse, based on the victim's history and a physical exam, "did not state that [the defendant] was guilty of the abuse, nor did [it] comment on [the victim's] veracity"); *State v. Haslett*, 283 S.W.3d 769, 779-80 (Mo. App. S.D. 2009) (holding that a medical examiner's testimony that the victim's injuries were "indicative of abuse," "abusive in nature," "routinely see[n] in cases involving child abuse" and that the victim died as a result of child abuse "was allowable expert testimony in that it did not invade the province of the jury"

because it "never opined on [the defendant's] guilt"); *State v. Gray*, 347 S.W.3d 490, 504 (Mo. App. E.D. 2011) (holding that an emergency-room physician's testimony that he would "absolutely consider [the victim's injuries to be] consistent with abusive behavior or suspicion of abusive type of injuries" was not an opinion as to Defendant's guilt and "was admissible expert testimony that did not invade the province of the jury").

Defendant argues that "[b]y basing her opinion only on [Victim's] statements, she is directly commenting on the reliability of [Victim] and lending credibility to [Victim's] allegations." (Def's Br. 32). But Detective Lindhorst did not testify that she believed that Victim was telling the truth or that Victim's statements were reliable. (Tr. 311-14). *Cf. State v. Ferguson*, 568 S.W.3d 533, 544 (Mo. App. E.D. 2019); *State v. Rogers*, 529, S.W.3d 906, 916 (Mo. App. E.D. 2017). Nor did the detective vouch for Victim's credibility and invade the province of the jury simply because her testimony relied, in part, on Victim's statements. *See Beck*, 557 S.W.3d at 422-23; *State v. Fewell*, 198 S.W.3d 691, 697-98 (Mo. App. S.D. 2006). Indeed, Detective Lindhorst testified merely that there was "evidence of" domestic violence in this case, without making a final determination of the credibility or weight of that evidence. (Tr. 314). *See State v. Faulkner*, 103 S.W.3d 346, 361 (Mo. App. S.D. 2003) (holding that the expert's testimony "simply reflected his view that [the evidence] could provide evidentiary support to convict a defendant" and "did not invade the

province of the jury on the ultimate issue of whether [the defendant] kidnapped, raped and sodomized [the victim]"); *State v. Link*, 25 S.W.3d 136, 145 (Mo. banc 2000) (rejecting the defendant's argument that the "clear import" of the officer's testimony that five individuals, other than the defendant, had been eliminated as suspects invaded the province of the jury by commenting directly on the defendant's guilt). Moreover, it was not clear that the detective's testimony was strictly based on Victim's statements, given that Defendant also told the police that he and Victim had not seen each other for five months before the incident and that the detective had spoken to the paramedics, the doctor, and the forensic nursing coordinator at the hospital about Victim's injuries. (Tr. 298-300, 442-43, 455). Therefore, the trial court did not plainly err in admitting the detective's testimony because it did not invade the province of the jury by impermissibly vouching for Victim's credibility or commenting directly on Defendant's guilt.

To the extent that Defendant argues that there was insufficient foundation for the detective's testimony because she was not qualified as an expert and that the testimony was not "based on her experience," it is without merit. (Def's Br. 30-31). Detective Lindhorst testified that she had been a police officer for 16 years and a domestic-violence detective for 9 years, she had handled thousands of domestic-violence cases, she had received specialized training regarding domestic violence throughout the country, and had taught courses

on domestic violence. (Tr. 291-93, 311). Defendant has failed to show that the trial court abused its discretion in finding that the detective's training and extensive experience as a domestic-violence detective provided her with specialized knowledge superior to that of an average juror and qualified her as an expert. (Def's Br. 30; Tr. 313). *See State v. Battle*, 415 S.W.3d 783, 788 (Mo. App. E.D. 2013); *State ex rel. Gardner v. Wright*, 562 S.W.3d 311, 321 (Mo. App. E.D. 2018) ("Section 490.065.2(1) expressly contemplates that an expert may be qualified on the basis of experience alone."); *State v. Mosley*, 526 S.W.3d 361, 365 (Mo. App. E.D. 2017) ("Expert testimony is helpful to the jury if the witness has specialized knowledge . . . from . . . experience that gives the witness knowledge of the subject that is superior to that of an average juror.").

Further, the record belies Defendant's claim that the detective's opinion testimony was not based on her experience. (Def's Br. 30). The detective's testimony was in direct response to the prosecutor's question, "Through your training and experience and dealing with all the cases you have over the years, what evidence of concepts of power and control did you witness in this case?" (Tr. 313-14). The trial court did not therefore abuse its discretion in admitting Detective Lindhorst's expert testimony. *See State v. Pickens*, 332 S.W.3d 303, 321 (Mo. App. E.D. 2011) (quoting *State v. Paglino*, 319 S.W.2d 613, 623-24 (Mo. 1958)) ("An expert witness, in a manner, discharges the functions of a juror because, in matters in which intelligent conclusions cannot be drawn

from the facts by inexperienced persons, experts, who, by experience, observation, or knowledge, are peculiarly qualified to draw conclusions from such facts, are, for the purpose of aiding the jury, permitted to give their opinion."); *Haslett*, 283 S.W.3d at 779 (quoting *Faulkner*, 103 S.W.3d at 360-61) ("It is well-established law that 'expert testimony is admissible if it is clear that the subject of such testimony is one upon which the jurors, for want of experience or knowledge, would otherwise be incapable of drawing a proper conclusion from the facts in evidence.'").

Defendant's first point should be denied.

II. (Expert Testimony – Ms. Schiller-Baker)

The trial court did not abuse its discretion in permitting Ms. Schiller-Baker's expert testimony because her extensive experience and training as the director of a domestic-violence shelter for almost 35 years qualified her to testify about domestic-violence behavior, such testimony was relevant and reliable, and her general profile testimony did not impermissibly vouch for Victim's credibility.

A. The record regarding this claim.

The State filed a motion to endorse Michelle Schiller-Baker on November 30, 2017. (D1, p. 13; D23). Defendant objected to the endorsement of the proposed expert witness, and the trial court held a hearing on the matter. (Tr. 133-34).

Michelle Schiller-Baker testified at the hearing, and later at trial, that she was the executive director of St. Martha's Hall, an emergency domestic-violence shelter for abused women and children. (Tr. 134, 325). She testified that she had been "doing this work for almost 35 years." (Tr. 135, 326). Ms. Schiller-Baker testified that the shelter had served approximately 12,000 women over that time and that she had worked personally with at least 4,000 of them. (Tr. 145, 327). Her resume, which was admitted into evidence at the hearing, further stated that she was "[r]esponsible for . . . the physical and emotional development of the shelter residents." (Tr. 136-37; State's Ex. 81).

When asked "[w]hat kind of training . . . [she] had in the area of domestic violence," Ms. Schiller-Baker replied that she had "attended well over 120 workshops, conferences for training" and continuing education. (Tr. 135, 326). Her resume similarly stated that she had attended "over 110 workshops and conferences on domestic violence and related topics." (State's Ex. 81). She testified at trial that she has "formal meetings with the St. Louis area networks and coalitions where [they] discuss policies, protocols, safety planning, all of the other procedures that would occur working with victims of domestic violence." (Tr. 326-27). Her resume stated that "[s]ponsors of the workshops have included" the Missouri Coalition Against Domestic and Sexual Violence, the National Coalition Against Domestic Violence, the Missouri Organization of Victims Assistance, and the National Organization of Victims Assistance. (State's Ex. 81). Additionally, speakers at the workshops included a professor, a lawyer from the Department of Justice, multiple PhD holders, a senior research analyst, and the author of "Why Does He Do That? Inside the Minds of Angry and Controlling Men." (State's Ex. 81).

Ms. Schiller-Baker further testified that she had provided about 200 workshops or presentations on working with victims of domestic violence for a variety of entities, including law schools, medical schools, the clergy, and law enforcement departments. (Tr. 135, 327). Her resume further attested that she

had been a "[s]peaker and [t]rainer at over . . . 2000 presentations on domestic violence and related topics" from 1983 to the present. (State's Ex. 81).

Ms. Schiller-Baker testified that she had been previously qualified as an expert witness in the area of domestic violence and behavior six times in multiple counties in Missouri, including the City of St. Louis and St. Louis County. (Tr. 136, 328; State's Ex. 81).

Defense counsel asked Ms. Schiller-Baker what her opinions were based on, and she replied, "My experience. As well as research that I've read over the years." (Tr. 145-46). She again cited the fact that she had interacted with at least 4,000 women who had sought safety at her shelter, as well as "ongoing training, workshops, [and] research that [she'd] read." (Tr. 145, 147). Ms. Schiller-Baker stated that the research she relied on was produced by "different universities" and specifically concerned "domestic violence" and the "victim's response to trauma." (Tr. 147).

The trial court ruled that "[o]ver the defendant's objection, the Court will grant the state's motion to endorse" Ms. Schiller-Baker as an expert witness because "the Court believes that [her] testimony can illuminate the jury as to the common behaviors of domestic violence," which was "an area beyond the understanding of the ordinary person." (Tr. 151). The trial court further found that "the expert is qualified to offer an expert opinion based on . . . Exhibit 81[ ] and . . . the testimony of the witness," citing her "unique and extensive

knowledge of domestic violence as the executive director of a premier St. Louis women's shelter," "the training that she has received and offered through the state," and the fact that "[she] has been qualified as an expert in domestic violence on no less than six occasions." (Tr. 152). The trial court further found that her testimony was "based on sufficient facts and data," "the product of reliable principle[s] and methods," and that her "methodology" was "reliable." (Tr. 152-53).

During Ms. Schiller-Baker's direct examination at trial, defense counsel objected "to her testimony as a whole based upon pretrial motions." (Tr. 326). The trial court overruled the objection. (Tr. 326).

Ms. Schiller-Baker testified that she had not spoken to Defendant or Victim, had not examined any of the evidence, and did not know any details about the case. (Tr. 328-29). She confirmed during cross-examination that she was not there to offer an opinion as to whether domestic violence had been committed in this case. (Tr. 337). She testified that her testimony was confined to domestic violence and victims in general. (Tr. 336). She further testified that while there are "some commonalities among all the victims of domestic violence," "[e]very human being is distinct and unique in how they respond to trauma." (Tr. 329-30).

Ms. Schiller-Baker testified that she had commonly seen victims that had been isolated from family, friends, and social support. (Tr. 329). She explained

that the abuser uses jealousy as a "means to control the person" and isolate the victim from the "support that they need." (Tr. 331-32). She also testified that she had commonly witnessed fear in victims and that "[m]ost of the[ir] decisions will be based on fear." (Tr. 329, 335). Ms. Schiller-Baker further testified that "[the abusers] make [the victim] feel guilty" and that the victim "begins to blame herself for [the abuse]." (Tr. 332-33).

Ms. Schiller-Baker testified that the "root of domestic violence" is "one individual's desire to have power and control over another in an intimate relationship with the belief that [a] relationship is not equal, and one person should have more power and control over another in the relationship." (Tr. 330). She further testified that she was familiar with "the cycle of violence." (Tr. 330). She explained that "the relationship doesn't start out violen[t]," but rather begins with intimacy and love before the abuser begins to exercise "coercive control as well as assaultive physical control." (Tr. 331). Ms. Schiller-Baker testified that once a victim "actually break[s] full power and control that individual has over her . . . the abusive person will do whatever they need to do to get that individual back." (Tr. 334).

The prosecutor asked Ms. Schiller-Baker, "How have you seen the crime [of] strangulation play into power and control?" (Tr. 333). She answered that "[s]trangulation . . . is one of the four or five lethal signs in a relationship" and that it was "a very personal crime." (Tr. 333). She emphasized the intimacy of

the act and the fact that "[the abuser] ha[s] control over [the victim's] life source, their breath." (Tr. 333). She testified, "It's complete control over that person at that point." (Tr. 333). Ms. Schiller-Baker similarly testified that sexual assault was another "lethal sign" and was "a way of controlling that person." (Tr. 333-34).

Defendant claimed in his motion for a new trial that "[t]he trial court erred when [it] overruled [D]efendant's objection to Michelle Schiller-Baker giving her opinion testimony about domestic violence generally. Ms. Schiller-Baker's testimony was not scientific and did not meet the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals*." (D40, p. 2).

B. Standard of review.

The applicable standard of review for this claim is outlined in Point I. *See* Point I at 23-24.

C. The trial court did not abuse its discretion in finding that Ms. Schiller-Baker was qualified as an expert and that her testimony was relevant and reliable, and she did not vouch for Victim's credibility.

The trial court did not abuse its discretion in finding a sufficient foundation for Ms. Schiller-Baker's expert testimony. "[A]dmissibility of expert testimony under Section 490.065.2 requires simply that it be relevant and reliable and

proffered by a qualified expert." *State ex rel. Gardner v. Wright*, 562 S.W.3d 311, 319 (Mo. App. E.D. 2018).

"An expert is qualified by her 'knowledge, skill, experience, training, or education.'" *Id.* (quoting § 490.065.2(1), RSMo Cum. Supp. 2017). Thus, "[s]ection 490.065.2(1) expressly contemplates that an expert may be qualified on the basis of experience alone." *Id.* at 321. "No one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience." *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156 (1999)). Therefore, Defendant's claim that Ms. Schiller-Baker was not qualified due to her lack of "formal education" or "licensing" is without merit. (Def's Br. 42-43). *See Brown v. State*, 450 S.W.3d 847, 852 (Mo. App. S.D. 2014) (quoting *State v. Futo*, 932 S.W.2d 808, 820 (Mo. App. E.D. 1996)) ("This knowledge or skill need not come from formal sources; 'practical experience, rather than scientific study or formal training, may qualify a witness to testify as an expert.'").

The trial court did not abuse its discretion in finding that Ms. Schiller-Baker's extensive experience and training were sufficient to qualify her to testify about domestic-violence behavior. Ms. Schiller-Baker testified that she had been the executive director of a domestic-violence shelter for abused women for almost 35 years, that she had personally worked with at least 4,000 such women, and that she had supervised contact with a total of approximately

12,000 women. (Tr. 134-35, 325-27). That work included being "[r]esponsible for . . . the physical and emotional development of the shelter residents." (State's Ex. 81).

Additionally, during that time, Ms. Schiller-Baker attended training of "well over 120 workshops" and conferences "in the area of domestic violence." (Tr. 135, 326; State's Ex. 81). Ms. Schiller-Baker's resume indicated that speakers at such workshops included a professor, a lawyer from the Department of Justice, multiple PhD holders, a senior research analyst, and the author of "Why Does He Do That? Inside the Minds of Angry and Controlling Men." (State's Ex. 81). She further testified that she continued to read and rely on university research publications specifically concerning "domestic violence" and the "victim's response to trauma." (Tr. 147). Additionally, Ms. Schiller-Baker testified that a variety of organizations including law enforcement, clergy, and law schools had sought training from her on the subject of domestic violence. (Tr. 135, 327).

Based on the foregoing, the trial court did not abuse its discretion in finding that a sufficient foundation had been laid to establish that Ms. Schiller-Baker was qualified as an expert in the field of domestic-violence behavior. *See State v. Suttles*, 581 S.W.3d 137, 147 (Mo. App. E.D. 2019); *Brown*, 450 S.W.3d at 852 (quoting *State v. Blakey*, 203 S.W.3d 806, 816 (Mo. App. S.D. 2006)) ("[T]he

extent of an expert's experience or training in a particular field goes to the weight, not the admissibility, of the testimony.").

Defendant also argues that Ms. Schiller-Baker's testimony was "not reliable or relevant" because "[it] was not based on or even consistent with the facts of this case as testified to by [Victim]." (Def's Br. 43). That Ms. Schiller-Baker's generalized testimony was based on her own experience and training as the director of a domestic-violence shelter rather than Victim's account of the incident did not render it unreliable. "Reliability is determined by considering whether the testimony is based on sufficient facts or data, reliable principles and methods and reliable application thereof." *Wright*, 562 S.W.3d at 319; *see* § 490.065.2(1)(b-d), RSMo Cum. Supp. 2017. "There is nothing per se unreliable about testimony based on personal observations made in the course of an expert's professional experiences." *Wright*, 562 S.W.3d at 321. "As long as an expert's testimony 'rests upon good grounds, based on what is known[,] it should be tested by the adversary process with competing expert testimony and cross-examination, rather than excluded by the court at the outset.'" *Jones v. City of Kansas City*, 569 S.W.3d 42, 56 (Mo. App. W.D. 2019) (quoting *Johnson v. Mead Johnson & Co.*, 754 F.3d 557, 561 (8th Cir. 2014)). Defendant has failed to establish that the trial court abused its discretion in finding that Ms. Schiller-Baker's testimony was sufficiently reliable. (Tr. 152-53). *See Suttles*, 581 S.W.3d at 151-53.

Finally, the trial court did not abuse its discretion in finding that Ms. Schiller-Baker's testimony was relevant because it was helpful to the jury in understanding the potential behavioral dynamics in this case of alleged domestic violence. Expert "testimony is relevant if it contains specialized knowledge . . . that will assist the trier of fact." *Wright*, 562 S.W.3d at 319; *see* § 490.065.2(1)(a), RSMo Cum. Supp. 2017. "Expert testimony is helpful to the jury if the witness has specialized knowledge . . . from . . . experience that gives the witness knowledge of the subject that is superior to that of an average juror." *State v. Mosley*, 526 S.W.3d 361, 365 (Mo. App. E.D. 2017). It was reasonable for the trial court to find that Ms. Schiller-Baker's 35 years of working with victims of domestic violence and training in the area of domestic violence had resulted in her having specialized knowledge that was superior to that of an average juror.

Additionally, "general profile evidence of . . . abuse victims can be a proper topic of expert testimony . . . to 'assist the jury's understanding of the behavior of . . . abused [victims], a subject beyond the knowledge of an ordinary juror.'" *Williams*, 858 S.W.2d at 799 (internal citation omitted). "Knowledge of such characteristics may well aid the jury in weighing the testimony of the alleged . . . victim." *Id*. The State argued at trial that "[Defendant] was losing his power" and "control over [Victim]" and that he responded by using violence, while Defendant argued that "[t]he relationship between [Defendant] and

[Victim] [was] not one of power and control" but rather "a toxic relationship." (Tr. 505, 512). Thus, the trial court did not abuse its discretion in finding that Ms. Schiller-Baker's testimony was relevant to the jury's determination of the credibility of Victim and Defendant and to the issues in this case. (Tr. 151).

To the extent that Defendant also claims that Ms. Schiller-Baker's testimony invaded the province of the jury by vouching for Victim's credibility, it is not preserved for appellate review. Defendant did not object at trial on such grounds or rely on such grounds for the claim of error in his motion for a new trial. (Def's Br. 24; Tr. 133-34, 326; D40, p. 2). This part of Defendant's claim is therefore unpreserved. *See Schneider*, 483 S.W.3d at 505.

Even if it had been preserved, Defendant's claim would be without merit because Ms. Schiller-Baker's general profile testimony did not vouch for Victim's credibility.

> General testimony describes a 'generalization' of behaviors and other characteristics commonly found in those who have been the victims of . . . abuse. Particularized testimony is that testimony concerning a specific victim's credibility as to whether they have been abused. The trial court has broad discretion in admitting general testimony, but when particularized testimony is offered, it must be rejected because it usurps the decision-making function of the jury and, therefore, is inadmissible.

Churchill, 98 S.W.3d at 539.

Here, Ms. Schiller-Baker explicitly testified that her testimony was about domestic violence and domestic-violence victims in general, that she had not spoken to Victim or examined any of the evidence in the case, and that she was not there to offer an opinion as to whether domestic violence had been committed in this case. (Tr. 328-29, 336-37). Thus, Ms. Schiller-Baker's testimony did not invade the province of the jury by vouching for Victim's credibility, and the trial court did not plainly err in admitting her generalized testimony. *See State v. Thomas*, 290 S.W.3d 129, 135 (Mo. App. S.D. 2009); *State v. Baker*, 422 S.W.3d 508, 515 (Mo. App. E.D. 2014) (rejecting the defendant's claim that the State's use of the expert's generalized testimony transformed it into improper particularized testimony).

Defendant's second point should be denied.

III. (Hearsay - Subsequent Police Conduct)

The trial court did not abuse its discretion in admitting a doctor's out-of-court statement that she did not believe that Victim's wrist injury could have been self-inflicted because the statement was reasonably necessary to explain the subsequent criminal investigation, and Defendant was not prejudiced because it was cumulative to testimony by Dr. Quattromani, the ER physician who assessed Victim's wound, that she did not believe that the wrist injury was self-inflicted.

A. The record regarding this claim.

Officer Pierce testified that he first responded to Victim's apartment building after being assigned to a "call for police help." (Tr. 257). Upon making contact with Victim, she was "[v]ery disoriented" and "confused about what [had] happened." (Tr. 259-60). Officer Pierce testified that at that time they did not know that another person had been involved in causing Victim's injuries. (Tr. 259). Victim told the officer that "[s]he didn't know if she tried killing herself" and that "[s]he didn't know why she had a cut on her left wrist." (Tr. 260). Accordingly, Officer Pierce testified that he initially thought that Victim's injuries might have been the result of a suicide attempt. (Tr. 267). Officer Pierce testified that "[they] didn't unwrap [the cloth around her wrist], because [they] weren't sure exactly how severe the injury was." (Tr. 260). In response

to hearing water running, the officers swept the apartment building "to make sure there was no one else in there whether it was a suspect or witness," but they found no one. (Tr. 260-61).

Officer Pierce testified that he subsequently went to the hospital to check on Victim's condition and attempt to determine what had happened. (Tr. 262). Officer Pierce testified that he spoke to "[t]he doctor" at the hospital in order "to get [Victim's] condition," "[s]o [they] kind of know which way to take an investigation." (Tr. 263).

When the prosecutor asked, "What did the doctor tell you?" defense counsel objected and the attorneys approached the bench. (Tr. 264). Defense counsel stated, "In the police report it says that the doctor tells him that the injuries could not be caused—it's hearsay from the doctor that the injury was not self-inflicted. That's a hearsay statement made by the doctor." (Tr. 264). Defense counsel later said, "It's a hearsay statement that goes to one of the key facts of the case." (Tr. 265). Defense counsel also objected on the basis of "confrontation." (Tr. 265). Defense counsel further noted that "this doctor is going to testify [s]he reviewed the medical records. There's nothing in there that suggests [s]he says that." (Tr. 264). Defense counsel continued, "[I]t's not in the medical records. There's no direct statement that I've ever received from them, a report, or anything suggested by the state that that was, in fact, what she said." (Tr. 264).

The prosecutor argued that "this goes to subsequent police conduct." (Tr. 264). In support, the prosecutor stated that "when [the officer] first arrived on the scene, he believed it's a suicide attempt." (Tr. 264). The prosecutor argued that "[i]t's based on the conversation with the doctor. He calls back to his sergeant they believe there's a suspect involved, because there's no way this could be self-inflicted. It's the conversation that kicks off the investigation." (Tr. 264-65).

The trial court overruled the objection, stating, "I think it does go to the . . . subsequent conduct," and "the police officer responding to the emergency and investigating the case." (Tr. 265). Later, while addressing Defendant's objection to the ER physician's testimony, the trial court stated that "[the doctor's] response, [in] which Dr. Quattromani indicated that there's no way it could be self-inflicted, triggered the police investigation," and that that fact "contributed to the Court's logic in overruling [Defendant's] hearsay objection . . . because it went to subsequent conduct." (Tr. 340-41).

Officer Pierce then testified that he asked the doctor "about the cut to [Victim's] wrist" and "[s]he stated that she does not believe that this could have been a self-inflicted wound." (Tr. 266). The prosecutor asked, "Based on the information you received from the doctor that this could not have been a self-inflicted wound, what did you do next?" (Tr. 266). The officer replied, "I called my sergeant and told him what the victim said and what the doctor said." (Tr.

266). The officer testified that he also contacted the Domestic Abuse Response Team (DART) and turned the investigation over to them. (Tr. 266-67). Detective Lindhorst, the domestic-violence detective, subsequently testified that she became involved in the investigation when Officer Pierce contacted her and told her that Victim had been strangled and had a cut on her wrist that they didn't believe was self-inflicted. (Tr. 293).

Officer Pierce admitted during cross-examination that he did not contact DART "based on just [the doctor's opinion] alone," but due to "[t]he totality of the circumstances." (Tr. 274-75). Officer Pierce also confirmed that Victim told him at the hospital that Defendant had been at the residence and that he had injured her. (Tr. 275).

Defendant's motion for a new trial included a claim that "[t]he trial court committed error when [it] overruled [D]efendant's objection to the hearsay testimony provided by [Officer] Peirce [sic] . . . that it was the docotor's [sic] opinion that the wounds suffered by [Victim] were not self-inflicted." (D40, p. 1).

B. Standard of review.

The applicable standard of review for this claim is outlined in Point I. *See* Point I at 23-24.

Additionally, "whether a criminal defendant's 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. Nabors*, 267 S.W.3d 789, 793 (Mo. App. E.D. 2008). "Properly preserved Confrontation Clause violations are presumed prejudicial." *State v. McGee*, 284 S.W.3d 690, 701 (Mo. App. E.D. 2009).

C. The doctor's out-of-court statement was admissible because it was reasonably necessary to explain the subsequent police investigation, and Defendant was not prejudiced by its admission because it was merely cumulative to Dr. Quattromani's testimony at trial.

"Hearsay is an out-of-court statement offered to prove the truth of the matter asserted." *State v. Boykins*, 477 S.W.3d 109, 112 (Mo. App. E.D. 2015). "Statements that are not offered for the truth of the matter asserted—but rather to explain subsequent actions of the police—are not hearsay." *Id*. Similarly, "if a statement is not offered to prove the truth of the matter asserted, then the defendant's rights under the Confrontation Clause are not implicated." *State v. Bowens*, 550 S.W.3d 84, 103 (Mo. App. E.D. 2018).

"[A]n out-of-court statement is admissible to explain subsequent police conduct in order to provide background and continuity to an officer's explanation of events 'so the jury is not called upon to speculate on the reasons for the officer's later actions.'" *Bowens*, 550 S.W.3d at 103 (quoting *State v. Drisdel*, 417 S.W.3d 773, 787-88 (Mo. App. E.D. 2013)); *see also State v. Brooks*, 618 S.W.2d 22, 25 (Mo. banc 1981). "In many cases, a police investigation might

not make sense to the jury without some explanation of how the investigation progressed from one phase to the next." *Boykins*, 477 S.W.3d at 113. "However, when such out-of-court statements go beyond what is necessary to explain subsequent police conduct, they are hearsay . . . ." *State v. Douglas*, 131 S.W.3d 818, 824 (Mo. App. W.D. 2004).

The trial court did not abuse its discretion in permitting Officer Pierce to testify to the doctor's out-of-court statement because it was reasonably necessary to provide the background and continuity necessary to explain the resulting criminal investigation. (Tr. 266). Officer Pierce prefaced the out-of-court statement by testifying that he spoke to "[t]he doctor" at the hospital specifically in order "to get [Victim's] condition," "[s]o [they] kind of know which way to take an investigation." (Tr. 263). Moreover, Officer Pierce testified that he initially thought that Victim's injuries might have been the result of a suicide attempt. (Tr. 267). It was only after learning the doctor's opinion that the injury to Victim's wrist was not self-inflicted that Officer Pierce contacted other law enforcement officers and a criminal investigation ensued. (Tr. 266). Indeed, Detective Lindhorst testified that she only conducted an investigation in this case after Officer Pierce contacted her and told her that Victim had a cut on her wrist that they did not believe was self-inflicted. (Tr. 293). Detective Lindhorst further testified regarding the progression of the subsequent investigation, including her observations of the crime scene. (Tr. 295-98).

Defendant claims that Officer Pierce could have simply testified that he referred the case for investigation "based on the 'totality of the circumstances' at the crime scene as well as the hospital." (Def's Br. 51). But without the specific testimony regarding the doctor's reported belief that Victim's wrist injury was not self-inflicted, the jury would have been left "to speculate on the cause or reasons for the officers' subsequent activities," especially given that until then the officer had believed that Victim had attempted to commit suicide. *Brooks*, 618 S.W.2d at 25. Because Officer Pierce's testimony regarding the doctor's out-of-court statement provided relevant background and continuity that was reasonably necessary to explain the resulting criminal investigation, the trial court did not abuse its discretion in overruling Defendant's objection. *See State v. Simmons*, 233 S.W.3d 235, 238 (Mo. App. E.D. 2007).

Even if the trial court abused its discretion in admitting the doctor's out-of-court statement, Defendant did not suffer any prejudice as a result. Dr. Quattromani, the emergency room physician who assessed and treated Victim's injuries, testified at trial, in a manner consistent with the out-of-court statement, that she did not believe that Victim's wrist injury could have been self-inflicted because of the extent of the injury. (Tr. 344-46, 348, 354-55). Furthermore, Dr. Quattromani was extensively cross-examined regarding that opinion. (Tr. 360-65). "[P]rejudice will not be found from the admission of

hearsay testimony where the declarant was also a witness at trial, testified on the same matter, and was subject to cross-examination." *State v. Cook*, 386 S.W.3d 842, 847-48 (Mo. App. S.D. 2012) (quoting *State v. Hamilton*, 892 S.W.2d 371, 378 (Mo. App. E.D. 1995)); *see also State v. Howell*, 226 S.W.3d 892, 896 (Mo. App. S.D. 2007) (quoting *Crawford v. Washington*, 541 U.S. 36, 59 n.9) (2004)) ("[W]here as here, 'the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of [her] prior testimonial statements.'").

Defendant argues that "[he] could not cross-examine an anonymous declarant" and that neither Dr. Quattromani nor Officer Pierce testified that Dr. Quattromani was in fact the declarant of the out-of-court statement. (Def's Br. 52-53). But Defendant has failed to establish that the out-of-court declarant was not Dr. Quattromani or that it was unreasonable for the trial court to have so found, especially given that Officer Pierce's report, which contained the allegedly unattributed out-of-court statement, identified Dr. Quattromani as the treating physician; Dr. Quattromani testified that she assessed and treated Victim's wounds in the emergency room; and in testifying to the out-of-court statement, Officer Pierce referred to the declarant as female, which was consistent with Dr. Quattromani. (Tr. 262-64, 266, 340-42, 344-55).

Even if Dr. Quattromani was not the declarant of the out-of-court statement, there is no reasonable probability that the outcome of the trial

would have been different if the statement had not been admitted. While Defendant argues that "[t]he State argued in closing that the doctor said the injury was not self-inflicted," the prosecutor actually told the jury, "Dr. Quattromani, an experienced emergency room doctor, in her years of experience as an emergency room doctor, she has never seen a self-inflicted injury like this. The depth is just too deep, ladies and gentlemen." (Def's Br. 53; Tr. 514). Thus, the State did not use the out-of-court statement for the truth of the matter asserted, but rather argued that the jury should rely on Dr. Quattromani's testimony. Indeed, the deliberating jury specifically asked for "Dr. Q['s]" entries in the medical records. (D38, p. 35). It is not reasonably probable that the jury relied on the allegedly anonymous doctor's unsupported conclusion that Victim's wrist injury was not self-inflicted in finding Defendant guilty of first-degree assault, especially considering that it was merely cumulative to Dr. Quattromani's detailed testimony at trial. *See State v. Bynum*, 299 S.W.3d 52, 61 (Mo. App. E.D. 2009).

Defendant's third point should be denied.

IV. ("Surprise Medical Opinion")

The trial court did not abuse its discretion in finding that the State did not violate Rule 25.03(A)(5) and in denying Defendant's motion to exclude Dr. Quattromani's expert opinion testimony that Victim's wrist injury could not have been self-inflicted because the State disclosed a report containing a doctor's opinion that Victim's wrist injury could not have been self-inflicted and endorsed Dr. Quattromani, who was Victim's treating physician, and Defendant failed to show that he was prevented from meaningfully preparing a defense to such testimony.

A. The record regarding this claim.

Defendant was charged with the class A felony of domestic assault in the first degree in Count IV, for attempting to kill or cause serious physical injury to Victim by cutting her wrist. (D2). On March 21, 2017, Defendant filed a written request for discovery, pursuant to Rule 25.03, including a request for "[a]ny reports of the statements of experts made in connection with this case. (D1, p. 10; D5). Erin Quattromani, "Doctor at St. Louis University Hospital," was endorsed by the State on July 17, 2017. (D1, p. 11; D6, p. 1). Victim's medical records from St. Louis University Hospital were disclosed to defense counsel on November 28, 2017. (D1, p. 12; D20; D21). Police Report 15-015426 was disclosed to defense counsel on November 30, 2017. (D1, p. 13; D10).

Defendant was tried by a jury between December 11, 2017, and December 14, 2017. (D1, pp. 14-19).

During the direct examination of Officer Pierce, defense counsel objected and told the trial court, "In the police report it says that the doctor tells him that the injuries could not be . . . self-inflicted." (Tr. 264). Defense counsel further told the court that "this doctor is going to testify [s]he reviewed the medical records. There's nothing in there that suggests [s]he says that." (Tr. 264). Defense counsel continued, "[I]t's not in the medical records. There's no direct statement that I've ever received from them, a report, or anything suggested by the state that that was, in fact, what she said." (Tr. 264). Defense counsel argued, "I don't know the doctor is going to come forward and say that. There's been nothing provided to me in discovery that this doctor has that opinion." (Tr. 265). Officer Pierce subsequently testified that he did not remember the doctor's name and that he could not recall if the doctor was a "he or she," though he had previously referred to the doctor as a "she." (Tr. 266, 275).

Before Dr. Quattromani testified, the trial court addressed defense counsel's "motion in limine specifically requesting the state [be] prohibited from asking the emergency medical room physician Quattromani . . . from offering an expert opinion about whether or not the wrist injury suffered by [Victim] was self-inflicted." (Tr. 340). The trial court stated that "[i]n support of his motion

in limine, [defense counsel] has referred the Court to Rule 25.03, Subsection 5, on this matter." (Tr. 340).

The trial court stated that "[t]here is a police report documenting that the responding officer consulted Dr. Quattromani regarding the wrist injury, specifically whether or not it was self-inflicted," and that "Dr. Quattromani indicated that there's no way it could be self-inflicted." (Tr. 340). The trial court then permitted defense counsel and the prosecutor to "make a record." (Tr. 341).

Defense counsel stated, "[T]he police reports do indicate the first responding . . . police officer had a conversation with a doctor. It didn't mention Dr. Quattromani by name." (Tr. 341). Defense counsel conceded that "[l]ater in the report it does say Dr. Quattromani was the treating physician." (Tr. 341). Defense counsel stated that "[t]he statement was he consulted with a doctor, and the doctor said that the injury could not be self-inflicted." (Tr. 341). Defense counsel argued, "[T]hat was the only notice I received potentially that there was going to be a . . . medical expert offering an opinion that the wound was not self-inflicted." (Tr. 341). Defense counsel stated that while "[he] did receive from the prosecuting attorney's office 273 pages of medical records," "[t]here was no indication in those records whether or not the wound was self-inflicted." (Tr. 341). Defense counsel claimed that "[a]t this point offering Dr.

Quattromani to render that opinion that the injury was not self-inflicted . . . violates the Rule 25.03, Subsection 5." (Tr. 341).

The prosecutor responded that "the state has the same evidence as the defense in this case," in that "[t]he state had the police report and medical records." (Tr. 342). The prosecutor argued that "[a] statement as to her opinion . . . was in the police report which was turned over to [defense counsel]." (Tr. 342).

The trial court asked if it was "the State's position . . . that [Defendant] had notice of the fact that Dr. Quattromani would testify or had concluded that the wrist injury was not self-inflicted," and the prosecutor answered, "That's correct, Your Honor." (Tr. 342). The trial court then denied Defendant's motion (Tr. 342-43). The trial court asked, "Anything further for the record?" and defense counsel replied, "Nothing from the defense, Your Honor. We'll just see how cross-examination goes." (Tr. 343).

Dr. Quattromani testified that she had been a physician in the emergency room at SLU hospital and that she had treated Victim after the incident and assessed her injuries. (Tr. 344-49). The prosecutor asked, "In your opinion, could an injury like this [to Victim's wrist] be self-inflicted?" (Tr. 354). The doctor replied, "In my opinion, no." (Tr. 354). The prosecutor asked, "Why not?" and the doctor answered, "This is fairly extensive." (Tr. 354). Defense counsel objected to the doctor's opinion, "based on pretrial motions," but the trial court

told the witness that she was permitted to answer the question. (Tr. 354). The doctor testified that based on her experience with cuts in the emergency room, the depth and length of Victim's wound was inconsistent with a self-inflicted wound, which was more likely to be superficial. (Tr. 354-55). The doctor also testified that "if [they] thought it was self-inflicted, . . . then [they] would have [had] [their] psychiatric colleagues consult," which they did not. (Tr. 355).

During cross-examination, Dr. Quattromani admitted that her conclusion that Victim's wrist injury was not self-inflicted was based in part on Victim's statements about what had happened, including her statement that "she did not do it." (Tr. 362). The doctor also conceded that she was not saying that it was impossible for the injury to have been self-inflicted. (Tr. 363). Additionally, defense counsel asked the doctor if she was "familiar with a psychological disorder called body identity integrity disorder." (Tr. 364). Upon objection, defense counsel told the trial court, "Judge, I'm testing the depth of her medical opinion." (Tr. 364). The doctor answered that someone with the disorder "doesn't want a limb, or . . . doesn't identify that's their own leg or their own arm." (Tr. 364-65). The doctor conceded that there are known cases of such individuals cutting off their own limbs. (Tr. 365). The doctor further conceded that she was not personally familiar with Victim. (Tr. 365).

Defendant included this claim of error in his motion for a new trial on the basis that "[t]he records indicated Dr. Quattromani as [sic] a treating physician

and the extent of [Victim's] injuries, but never indicated an opinion by the doctor that the wound to her wrist was not self-inflicted," "[t]his opinion was not included in any finding or report authored by Dr. Quattromani, nor were there any representations made by the State that this was her opinion." (D40, p. 2).

B. Standard of review.

"The determination whether the State violated a rule of discovery is within the sound discretion of the trial court," and "determining whether a sanction should be imposed for a discovery violation is within the court's discretion." *State v. Johnson*, 513 S.W.3d 360, 364-65 (Mo. App. E.D. 2016).

"Failure to impose sanctions for a discovery violation will be considered an abuse of discretion if the violation resulted in fundamental unfairness or substantively altered the outcome of the case." *State v. Thompson*, 985 S.W.2d 779, 785 (Mo. banc 1999) (quoting *State v. Kinder*, 942 S.W.2d 313, 338 (Mo. banc 1996)). "Fundamental unfairness occurs when the state's failure to disclose results in defendant's 'genuine surprise' and the surprise prevents meaningful efforts to consider and prepare a strategy for addressing the evidence." *Id*.

C. The trial court did not abuse its discretion in finding that the State did not violate Rule 25.03, and Defendant was not genuinely surprised or prevented from meaningfully preparing a defense to the medical opinion that Victim's wrist injury was not self-inflicted.

"In review of discovery violations, [an appellate court] must answer two questions: first, whether the State's failure to disclose the evidence violated Rule 25.03, and second, if the State violated Rule 25.03, then what is the appropriate sanction the trial court should have imposed." *State v. Zetina-Torres*, 400 S.W.3d 343, 353 (Mo. App. W.D. 2013).

"[T]he state shall, upon written request of defendant's counsel, disclose to defendant's counsel . . . [a]ny reports or statements of experts, made in connection with the particular case." Rule 25.03(A)(5). "This rule and Rule 25.12, which allows the defense to depose potential witnesses, are designed to prevent surprises at trial." *State v. Enke*, 891 S.W.2d 134, 137 (Mo. App. S.D. 1994); *see* Rule 25.12(d) ("The defense may discover by deposition the facts and opinions to which an expert is expected to testify.").

Defendant claims that "no report or statement of a medical opinion on the nature of the wound was disclosed prior to trial," but Defendant has nevertheless conceded that the State disclosed a police report containing a doctor's statement that Victim's wound could not have been self-inflicted. (Def's Br. 25, 55; Tr. 264, 340-42). In doing so, the State satisfied Rule 25.03(A)(5)'s

mandate to disclose the statement of an expert made in connection with the case. *See* Rule 25.03(A)(5).

Defendant argues that "[t]he police report, however, does not attribute that statement to any particular doctor" and therefore "could not give notice sufficient under Rule 25.03(A)(5) that Dr. Quattromani would testify . . . that the wrist wound was not self-inflicted." (Def's Br. 58). But the plain language of Rule 25.03(A)(5) did not require the State to specifically identify the expert to whom the statement was attributable. *See* Rule 25.03(A)(5); *but see* Rule 25.03(A)(1) (requiring disclosure of "[t]he names and last known addresses of persons whom the state intends to call as witnesses at any hearing or at the trial, together with their written or recorded statements, and existing memoranda, reporting or summarizing part or all of their oral statements").

Even if Rule 25.03(A)(5) did require the State to identify the expert who provided the recorded statement, the trial court did not abuse its discretion in finding that the State had complied with such a requirement in this case. Defense counsel conceded that the same report containing the statement made by "a doctor" subsequently identified Dr. Quattromani by name as Victim's treating physician. (Tr. 341). Accordingly, the prosecutor told the trial court that "[a] statement as to her opinion . . . was in the police report which was turned over to [defense counsel]" and that it was "the State's position . . . that [Defendant] had notice of the fact that Dr. Quattromani would testify or had

concluded that the wrist injury was not self-inflicted." (Tr. 342). Moreover, defense counsel implicitly conceded having notice that the statement could be attributed to Dr. Quattromani when he told the trial court during an earlier discussion about the statement that "this doctor is going to testify." (Tr. 264). The trial court thus did not abuse its discretion in finding that the State had disclosed Dr. Quattromani's opinion and did not violate Rule 25.03(A)(5).

Furthermore, even if the disclosed statement was not reasonably attributable to Dr. Quattromani, Defendant has failed to allege, much less show, that the State possessed any other existing, undisclosed report or statement by Dr. Quattromani containing her opinion that Victim's wrist injury could not have been self-inflicted. (Def's Br. 25). Defendant has therefore failed to establish that the State violated Rule 25.03 by failing to disclose such an existing report or statement before trial. *See Enke*, 891 S.W.2d at 138; *State v. Cravens*, 968 S.W.2d 707, 710 (Mo. App. S.D. 1998).

"Rule 25.03 . . . does not require a summarization of a witness'[s] testimony." *Enke*, 891 S.W.2d at 138; *see also State v. Wolfe*, 793 S.W.2d 580, 587 (Mo. App. E.D. 1990). Defendant acknowledges that the State endorsed Dr. Quattromani as a potential witness and that the State disclosed Victim's medical records, which showed that Dr. Quattromani was Victim's treating physician. (Def's Br. 58; D1, pp. 11-12; D6, p. 1; D20; D21). Defendant was entitled under Rule 25.12 to depose Dr. Quattromani in order to determine the full extent of her potential

testimony. *See Enke*, 891 S.W.2d at 137; *Cravens*, 968 S.W.2d at 711 ("It is not inconceivable that an interview of [the expert witness] or his deposition would have produced the information that the prosecutor's noontime conversation with [him] revealed.").

Even if the trial court abused its discretion in finding no discovery violation, it did not abuse its discretion in failing to exclude Dr. Quattromani's opinion testimony because Defendant was not genuinely surprised by the testimony or prevented from meaningfully preparing a defense to address the opinion. Given that the defense was provided with a report containing a doctor's opinion that Victim's wrist injury was not self-inflicted, Defendant could not have been genuinely surprised that this type of testimony was elicited at trial from Victim's treating physician. *See State v. Renner*, 675 S.W.2d 463, 465 (Mo. App. E.D. 1984) ("Defendant could have been surprised only by the identity of the witness, not by the substance of the testimony. The identity of the substituted witness itself could not work any prejudice against defendant.").

Defendant now claims on appeal that he was prejudiced by the alleged nondisclosure because it prevented him from "endors[ing] a medical expert to counter such testimony," but he made no such claim to the trial court, either during trial or in his motion for a new trial. (Def's Br. 59; Tr. 340-42; D40, p. 2). *See Enke*, 891 S.W.2d at 138 ("It is . . . significant that Appellant never contended at trial that he was surprised by or was not prepared to meet the

testimony of [the expert] about which he complains."). Moreover, even aside from the notice provided by the police report, Defendant recognizes that the issue of whether Victim's wrist injury was self-inflicted was "a key issue of the defense." (Def's Br. 59). Therefore, Defendant's ability to prepare an adequate defense by obtaining an expert witness who could testify that Victim's wrist injury appeared to be self-inflicted was not reasonably dependent on whether the State presented testimony like Dr. Quattromani's.

Additionally, defense counsel cross-examined Dr. Quattromani about her opinion, eliciting concessions from her that it was possible that Victim's wound was self-inflicted, that there were known cases of individuals who had cut off their own limbs, and that her opinion was partially influenced by Victim's denial that it was self-inflicted. (Tr. 362-65). Defendant has thus failed to show that the State's alleged discovery violation resulted in his genuine surprise that prevented him from meaningfully preparing a defense.

Defendant's fourth point should be denied.

V. (Victim's Prior Bad Act)

The trial court did not plainly err in excluding evidence of Victim's prior bad act of attempting to assault Defendant approximately two years after the charged incident as irrelevant because it was reasonably too remote in time and nature to provide the jury with a complete and coherent picture of the charged offenses, and Defendant failed to establish that he suffered a manifest injustice as a result of the trial court's alleged error.

A. The record regarding this claim.

Defendant objected to the State's pretrial motion in limine regarding "specific bad acts of the [S]tate's witnesses." (Tr. 166). Defense counsel cited a specific act by Victim that he wanted to elicit on cross-examination. (Tr. 166). Defense counsel told the trial court, "There's an incident where she—this is after the fact. There's an incident where she chases after or she finds [Defendant] at the Hooters with his new girlfriend, and has a tire iron and is trying to assault [Defendant] and his new girlfriend." (Tr. 166).

The trial court asked, "When did the tire iron happen in relation to the charged act?" (Tr. 167). The prosecutor answered that it was "two years later"—"May 6th, 2017," with Defendant's charged offenses of attempted rape and assaults against Victim occurring on "April 3rd, 2015." (Tr. 167-68, 170).

Defense counsel added that Victim's bad act occurred "after the case was [initially] dismissed." (Tr. 166).

Defense counsel argued that evidence of Victim's attempted assault on Defendant should be admissible because "[the State's] got a witness coming in . . . Michelle Schiller-Baker who basically talks about a cycle of violence . . . . It's my belief here that [Victim] doesn't fit that mold. . . . Part of my cross-examination of her is going to be and I expect I'm going to be arguing she's not part of the cycle of violence based on these actions. It shows her feeling for the defendant. . . . [P]art of my theory is she's obsessed with him. She just refuses to let him go." (Tr. 167). Defense counsel further argued that it "goes toward state of mind," in that "[s]he's not fearful." (Tr. 172).

The prosecutor responded by arguing that it "occurred . . . after the charged incident," was "the definition of a bad act," and was "not relevant to the case at hand." (Tr. 168). The prosecutor also argued that defense counsel would have the opportunity to cross-examine Ms. Schiller-Baker "about her views on jealousy" and that he could cross-examine Victim about her "state of mind," including the fact that she visited Defendant in jail after the incident and married him. (Tr. 172-73). The prosecutor emphasized that "[i]t is well beyond the charged time frame." (Tr. 173).

The trial court stated, "I think it's too far removed." (Tr. 173). The trial court noted that defense counsel would be permitted to cross-examine Victim about the fact that Defendant left her and that she was jealous. (Tr. 173).

Victim first testified during direct examination that she and Defendant were "going through a divorce" at the time of trial because she had discovered that Defendant had impregnated another woman three months after he had married Victim. (Tr. 178, 206, 226-27).

During cross-examination, Victim admitted that her relationship with Defendant had been unstable because "[h]e would cheat frequently, and [they] would break up." (Tr. 210). Victim also testified that Defendant had physically assaulted her multiple times when she had confronted him about his infidelity. (Tr. 211-15). But she admitted that she had repeatedly reengaged in a relationship with him when he would "pop[ ] back up." (Tr. 213-16, 251). Victim also agreed that Defendant had left her twice. (Tr. 218-19). Victim admitted that, even after the charged incident, she visited Defendant in jail, sent him pictures of herself in bathing suits, lived with him when he got out of jail, and eventually married him in August 2016. (Tr. 223).

Victim also testified during cross-examination that nine days after she had married Defendant, she found out that he was cheating on her again. (Tr. 227). Victim said that "[she] put him out" but that "[h]e moved back in maybe two weeks later." (Tr. 227-28). Victim admitted that Defendant subsequently left

her and blocked her on social media without her knowing why. (Tr. 228). Victim testified that she later found out that Defendant was with another woman, whom he had impregnated. (Tr. 228-29). Victim denied that she was jealous, but she admitted that she was "hurt and angry." (Tr. 230).

At that point, defense counsel approached and asked to "go into the incident at Hooters." (Tr. 230). The trial court responded, "The motion in limine is . . . sustained as previously directed." (Tr. 230).

During an offer of proof, defense counsel asked Victim if she remembered something that had occurred at Hooters on May 6, 2017. (Tr. 238). Victim confirmed that she had learned from a friend that Defendant was there with his pregnant girlfriend. (Tr. 238). Victim admitted that she went there to confront Defendant because she had asked Defendant for a divorce two days earlier and Defendant had denied impregnating another woman and told her that he did not want a divorce. (Tr. 239). Victim admitted that she was angry with Defendant, that she went into the restaurant with a tire iron and confronted Defendant, and that she ultimately tried to hit Defendant over the head with the tire iron. (Tr. 239-40). Victim also admitted that she tried to hit Defendant's girlfriend with her hand because she was angry. (Tr. 240).

Defendant testified during direct examination that he had learned that Victim was in an automobile accident in 2013 and that "the reason for that accident was [Victim's] desire to kill herself, because [he] [wasn't] together

with her anymore." (Tr. 447-48). Defendant also testified that Victim had threatened Defendant after he left her at some point, saying, "If I can't have you, no one can." (Tr. 448).

During closing argument, defense counsel cited Victim and Defendant's on-and-off relationship, the fact that "[h]e left her on two occasions," and the evidence that Victim had "[t]rie[d] to kill herself when they're not together with that automobile accident" as evidence to support that "[Victim] was obsessed with [Defendant]." (Tr. 506-07).

B. Standard of review.

Defendant concedes that this claim of error was unpreserved for appellate review because he did not raise it in his motion for a new trial, and he requests plain-error review. (Def's Br. 62; D40). The standard of review for plain error is outlined in Point I. *See* Point I at 24.

C. The trial court did not plainly err in excluding evidence of Victim's prior bad act as irrelevant because it was reasonably too remote from the charged incident, and Defendant failed to establish a manifest injustice.

"[G]enerally, one may not impeach a witness's credibility by showing an arrest, investigation or criminal charge that has not resulted in a conviction." *State v. Simmons*, 944 S.W.2d 165, 179-80 (Mo. banc 1997). "A witness cannot

be impeached by proof of any specific act indicating moral degeneration." *Childs v. State*, 314 S.W.3d 862, 867 (Mo. App. W.D. 2010) (quoting *State v. Wolfe*, 13 S.W.3d 248, 258 (Mo. banc 2000)); *see also Mitchell v. Kardesch*, 313 S.W.3d 667, 677 (Mo. banc 2010) ("[A] witness may not be impeached by evidence that his or her 'general moral character is bad.'"). Additionally, "[e]vidence of prior uncharged misconduct is inadmissible for the sole purpose of showing the propensity of the [actor] to commit such acts." *State v. Miller*, 372 S.W.3d 455, 473 (Mo. banc 2012) (quoting *State v. Gilyard*, 979 S.W.2d 138, 140 (Mo. banc 1998)); *see also Childs*, 314 S.W.3d at 867 ("Evidence of a witness's prior [misconduct] is not admissible as evidence . . . of her propensity to [commit such misconduct]"). "[T]he prejudicial effect of admitting [such] evidence is substantial." *State v. Tolliver*, 101 S.W.3d 313, 315 (Mo. App. E.D. 2003) (quoting *State v. Wallace*, 943 S.W.2d 721, 725 (Mo. App. W.D. 1997)).

Defendant claims that evidence of Victim's prior misconduct was necessary to "show the jury a complete and coherent picture of the events that occurred" and "that [Victim] does not fit this 'mold' of the fearful victim who is being overpowered and controlled by [Defendant]." (Def's Br. 26, 63). "[E]vidence of uncharged crimes that are part of the circumstances or the sequence of events surrounding the offense charged may be admissible 'to present a complete and coherent picture of the events that transpired.'" *Miller*, 372 S.W.3d at 474 (quoting *State v. Primm*, 347 S.W.3d 66, 70 (Mo. banc 2011)). "Consideration

of such evidence requires a 'balancing of the effect and value' of the evidence and 'rests within the sound discretion of the trial court.'" *State v. Davis*, 226 S.W.3d 167, 170 (Mo. App. W.D. 2007) (quoting *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993)). "The court must take special care in striking this balance, especially when the evidence of the uncharged crimes is remote in time or nature from the crime at issue." *Id.*; *see also State v. Prince*, 534 S.W.3d 813, 820 (Mo. banc 2017) ("Remoteness in time may render evidence inadmissible when the prejudicial effect outweighs the probative value.").

Here, the trial court did not plainly err in excluding evidence of Victim's alleged misconduct after properly weighing its probative value against its prejudicial value and finding it "too far removed." (Tr. 173). Victim's attempted assault on Defendant occurred more than two years after the charged offenses of Defendant's attempted rape and assaults against Victim, and it was therefore not plainly relevant as part of the sequence of events surrounding the charged offenses. (Tr. 167-68, 170, 238-240).

Additionally, while Defendant argues that Victim's attempted assault on Defendant would have constituted "direct evidence of her state of mind" and "negate[d] the testimony that she was afraid of [Defendant]," the trial court did not plainly err in finding that the evidence was not relevant to show Victim's state of mind at the time of the charged offenses. Along with the remoteness of time, the circumstances of the charged offenses and Victim's

attempted assault on Defendant more than two years later were reasonably different. After Defendant had allegedly attempted to rape and assault Victim, Defendant worked to convince Victim that he was sorry for his prior mistreatment of her, that their relationship would change, and that he would "take care of [her] like a man should," to the point that Victim agreed to assist in getting him out of jail, worked to get the criminal charges against him dropped, and ultimately married him. (Tr. 198-206, 219-20, 224-26, 230-31, 252-53). At some point after Defendant married Victim, he unexpectedly left Victim, blocked her on social media, and impregnated another woman. (Tr. 228-29). It was only at this point in their relationship that Victim allegedly attempted to assault Defendant and his pregnant girlfriend, unexpectedly and supported by a weapon. (Tr. 238-40). In contrast, Victim and Defendant were not dating at the time of the charged incident, and they had last seen each other approximately five months earlier. (Tr. 179, 217, 245, 322, 441-43). The trial court thus did not plainly err in determining that the probative value of Victim's attempted assault on Defendant more than two years after the charged offenses in establishing Victim's state of mind at the time of the charged incident was minimal and did not outweigh its prejudicial value as improper character and propensity evidence.

Even if the trial court plainly erred in excluding evidence of Victim's attempted assault on Defendant, he did not suffer a manifest injustice as a

result. In its ruling, the trial court permitted the defense to cross-examine Victim about the fact that Defendant had left her after they got married and that she was jealous as a result, without the further prejudicial evidence of Victim's specific bad act. (Tr. 173). Indeed, the defense elicited from Victim during cross-examination that she was "hurt and angry" when she found out that Defendant had left their marriage to be with another woman whom he had impregnated. (Tr. 228-30). Thus, the court's exclusion of Victim's misconduct did not prevent "evidence of [Victim's] state of mind and motive to fabricate the allegations against [Defendant]" from being presented at trial. (Def's Br. 63).

Additionally, Defendant testified that he had learned that Victim had tried to kill herself in an automobile crash in 2013 "because [he] [wasn't] together with her anymore" and that she had threatened Defendant once after he had left her, saying, "If I can't have you, no one can." (Tr. 443, 447-48). The trial court's exclusion of Victim's attempted assault on Defendant thus did not preclude Defendant from presenting evidence of Victim's alleged "obsess[ion]" with Defendant, countering the State's theory that she had permitted Defendant to reenter her life out of fear. (Tr. 167, 506-07). Defendant has failed to establish that he suffered a manifest injustice as a result of the trial court's alleged error.

Defendant's final point should be denied.

CONCLUSION

This Court should affirm Defendant's convictions and sentences.

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

/s/ *Garrick Aplin*

GARRICK APLIN
Assistant Attorney General
Missouri Bar No. 62723

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-9393
Fax: (573) 751-5391
Garrick.Aplin@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 16,565 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word 2016 software; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

ERIC S. SCHMITT
Attorney General

/s/ *Garrick Aplin*

GARRICK APLIN
Assistant Attorney General
Missouri Bar No. 62723

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-9393
Fax: (573) 751-5391
Garrick.Aplin@ago.mo.gov

Attorneys for Respondent