Missouri Court of Appeals
Southern District

In Division

STATE OF MISSOURI,

Plaintiff-Respondent,

v.

ERNESTO VALENTINO BELL,

Defendant-Appellant.

Case Number SD39090

Filed: July 24, 2026

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Jerry A. Harmison, Jr., Circuit Judge

AFFIRMED AND REMANDED WITH DIRECTIONS

Following a jury trial, Ernesto Bell (Defendant) was convicted of the lesser-included offense of domestic assault in the fourth degree (Count 1); domestic assault in the third degree (Count 2); unlawful use of a weapon (Count 3); kidnapping in the second degree (Count 5); two counts of armed criminal action (Counts 4 and 6); and one count of unlawful possession of a firearm (Count 7). *See* § 565.076; § 565.074;

§ 571.030; § 565.120; § 571.015; and § 571.070.[1] The trial court found Defendant to be a prior and persistent offender and sentenced him to a total of 15 years' imprisonment.[2]

In Defendant's three points on appeal, he contends: (1) the trial court plainly erred by entering judgment and sentence for armed criminal action (ACA) as charged in Count 4, based on the predicate offense of unlawful use of a weapon as charged in Count 3, because it violated his right to be free from double jeopardy; (2) the trial court abused its discretion when it overruled his objection to a police officer's opinion testimony regarding whether the sound on an audio recording of the incident was the sound of a firearm being "racked"; and (3) the trial court plainly erred by entering a written judgment memorializing a conviction for domestic assault in the second degree as charged for Count 1, when he was actually convicted of the lesser-included offense of domestic assault in the fourth degree.

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[1] References to Chapter 565 are to RSMo (2016). References to § 571.015 and § 571.070 are to RSMo Cum. Supp. (2020), unless otherwise specified; and references to § 571.030 are to RSMo Cum. Supp. (2023). All rule references are to Missouri Court Rules (2025).

[2] The parties stipulated at trial to Defendant's three prior felony convictions committed on different dates, which were the basis of the trial court's finding that Defendant is a prior and persistent offender. Defendant did not object to that finding, and no request for plain error review has been made on appeal based on ***Erlinger v. United States***, 602 U.S. 821, 834 (2024). Even if that had occurred, it is clear an ***Erlinger*** violation is not a structural error requiring automatic reversal. *See* ***State v. Otis***, --- S.W.3d ----, 2026 WL 1810031, at *3 (Mo. banc June 23, 2026). Instead, we would have conducted a harmless error review. ***Id***.

Factual Background

In early 2024, at the time of the incident that was the basis for Defendant's convictions, Defendant and the victim (Victim) were in a romantic relationship and lived together with Victim's 15-year-old grandson.

On March 16, 2024, Victim and a male friend (Friend) drank alcohol and smoked a joint containing marijuana and cocaine while Defendant slept in the bedroom. Defendant later left the residence with another friend who had come to pick him up.

When Defendant returned later that night, Friend had left, and Victim was alone in the home. Victim testified that Defendant appeared "snippy" and that she could tell he had been drinking alcohol. Later, while the two were in bed, Defendant started arguing about Friend being at the house. According to Victim, the argument escalated when Defendant pulled out a gun. Victim described the "small handgun" as "silver or grey on top [and] black on the bottom." Defendant "clicked" it and pointed it at her.

Victim testified that Defendant then "got in [her] face" and grabbed her by the throat. When she attempted to leave the bedroom, Defendant blocked her path, cursed at her, accused her of attempting to call the police, and threatened to shoot her if she left. Defendant then spat in Victim's face and struck her with the back of his hand, causing her to fall off the bed and hit her head on the wall. During one of Victim's attempts to leave the bedroom, Defendant grabbed Victim by the throat a second time and held her "against the wall" in the hallway. This caused her vision to blur and left bruises on her neck. Victim testified that she "could barely breathe."

According to Victim, once the altercation ended, both she and Defendant went to sleep. She awoke before Defendant and called her daughter to report what had happened. Victim's daughter then contacted two friends, who went to the residence to check on Victim before ultimately deciding to call the police.

A Springfield Police Officer (Officer C.B.) responded to the scene, following the report of an assault. After Defendant voluntarily left the residence and was taken into custody, Officer C.B. and other officers searched the home for the silver and black handgun Victim had described. Officers located the gun inside a box in the basement, and Victim identified it as the weapon Defendant had used to threaten her. At trial, the jury viewed a portion of Officer C.B.'s body-worn camera footage showing Officer C.B. pulling back the slide, or "racking" the firearm, producing an audible clicking sound.

Victim informed the officers that she had recorded the audio of the altercation on her cellphone. Portions of that recording were played for the jury. During Victim's testimony, she stated that the "click, click" heard at the beginning of the recording was the sound of Defendant manipulating the gun. She further testified that she could be heard saying, "Please just kill me[,]" because she was scared and tired and Defendant continued to point the gun at her face.

Defendant confirmed that the voice on the recording was his. He admitted to hitting Victim and threatening to shoot her, but he denied having a gun, holding her against her will, or strangling her.

Another Springfield Police Officer (Officer J.D.) also responded to the scene, where she spoke to Victim and was involved in the search for the gun. Officer J.D. testified that she had been a police officer in the city since February 2021 and had received specialized firearm training, including week-long courses on duty pistols and shotguns, as well as training with rifles. She also testified that she carried a firearm at all times while on duty.

During Officer J.D.'s testimony, the State attempted to play a portion of Victim's audio recording of the incident so the officer could identify the sound heard in the background. Defense counsel objected, and the following exchange occurred:

> [Prosecutor]: We're not attempting to play the full recording of audio clip 2, but we're simply playing parts of it, where the noise in the background is being heard which [Officer J.D.], based on her training and experience, will be able to say that she is familiar with the sound that is being heard in the background. It's State's Exhibit 2. She doesn't need to lay any foundation to what exactly it is, and she is familiar with the content of the recording in general. So she should be able to testify, again, based on her training and experience, what she believes that sound in the background is.
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> [Defense Counsel]: Well, that's invading the province of the jury. So we're going to have her slide the gun, and then she is going to listen to the one on the recording and go, oh, that's the same. No, that's the jury's job to decide whether or not they are the same. They can put the pieces together. It's not fair for her to say this is the same sound as what I just made. That's invading the province of the jury for sure.
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> [The Court]: What's your response?
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> [Prosecutor]: Your honor, it's not invading the province of the jury. We're not argue – she is not going to say 100 percent this is what it is. But, again, she is allowed to say based on her training and experience what she believes that sound is. That is a fact for – to be submitted for the jury and

> they should be able to hear what an officer, who is familiar and has training handling firearms, to say what she believes that sound to be.
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> [The Court]: So basically an expert opinion?
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> [Prosecutor]: Yes.
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> [The Court]: Well, I agree with [Defense Counsel] that it is for the jury to ultimately decide it, but experts are permitted to share their experiences if it's an aid to the jury. So if that's the purpose, she is permitted to do it. The objection is overruled.

Officer J.D. testified that, based on her training and experience, she believed the clicking sound heard in the background on the recording was that of a slide being pulled back on a firearm, a maneuver referred to as "racking" the firearm. Without objection, she also demonstrated the action for the jury using the handgun recovered from Victim's home.

The jury found Defendant guilty as charged on six of the seven counts: domestic assault in the third degree (Count 2); unlawful use of a weapon (Count 3); kidnapping in the second degree (Count 5); two counts of ACA (Counts 4 and 6); and one count of unlawful possession of a firearm (Count 7). As to Count 1, the jury was instructed to consider domestic assault in the second degree, as charged, in addition to two lesser-included offenses of domestic assault in the third and fourth degree. The jury ultimately convicted Defendant of domestic assault in the fourth degree. However, the written judgment incorrectly states that he was convicted of domestic assault in the second degree. The trial court found Defendant to be a prior and persistent offender and sentenced Defendant to a total of 15 years' imprisonment.

As relevant to this appeal, Defendant argued in his motion for new trial that the trial court "erred in allowing 'expert' testimony of [Officer J.D.] regarding the sound a gun makes when the slide is pulled." The trial court overruled the motion, and this appeal followed.

Standard of Review

"The circuit court has broad discretion to admit or exclude evidence during a criminal trial," and we will not reverse absent "a clear abuse of discretion." ***State v. Loper***, 609 S.W.3d 725, 731 (Mo. banc 2020) (internal quotation omitted). However, when a defendant has not preserved his claim of evidentiary error, we may only review for plain error. ***Id***. The plain error rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review. ***State v. Brandolese***, 601 S.W.3d 519, 526 (Mo. banc 2020).

Courts will decline to review for plain error unless "the appellant's request for plain error review establishes facially substantial grounds for believing that the trial court's error was evident, obvious, and clear and that manifest injustice or miscarriage of justice has resulted." ***State v. Jones***, 725 S.W.3d 577, 583 (Mo. banc 2025) (citation omitted). "Unless the appellant makes this facial showing, this Court will decline to review for plain error under Rule 30.20." ***State v. Jones***, 427 S.W.3d 191, 195-96 (Mo. banc 2014). "Generally, the existence of manifest injustice or miscarriage of justice depends on the strength of the evidence leading to conviction and whether the error was outcome determinative." ***Jones***, 725 S.W.3d at 583. (citation modified).

Discussion and Decision

Point 1

In Defendant's first point, he contends the trial court plainly erred in entering judgment and sentence for ACA in Count 4 because it was based on the predicate offense of unlawful use of a weapon in Count 3. According to Defendant, "the legislature has specifically prohibited cumulative punishments for both this specific offense of unlawful use of a weapon and an attached offense of [ACA.]"

Defendant concedes that he failed to raise the issue of double jeopardy before the trial court and thus asks this Court to review this constitutional claim for plain error. "Where an appellant fails to preserve a constitutional claim, this Court may still hear such a claim pursuant to Rule 30.20." ***State v. Alexander***, 505 S.W.3d 384, 396 (Mo. App. 2016). The Double Jeopardy Clause of the Fifth Amendment prevents a defendant from being subjected to multiple punishments for the same offense. ***State v. Prince***, 311 S.W.3d 327, 330-31 (Mo. App. 2010); *see* ***Peiffer v. State***, 88 S.W.3d 439, 442 (Mo. banc 2002). Analysis of a double jeopardy claim is "limited to determining whether cumulative punishments were intended by the legislature." ***Prince***, 311 S.W.3d at 331 (citations omitted).

Defendant was convicted of unlawful use of a weapon for knowingly exhibiting, in the presence of one or more persons, a firearm, a weapon readily capable of lethal use, in an angry or threatening manner. *See* § 571.030(4). He was also convicted of ACA predicated on the former conviction. *See* § 571.015.1.

The penalties imposed for violations of criminal laws are to be governed by the statutes in effect at the time the crime was committed. *See* ***State v. Williams***, 936 S.W.2d 828, 830-31 (Mo. App. 1996). Defendant cites § 571.015 as it was originally enacted in 1977. In relevant part, that version stated:

> Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of [ACA.]
>
> ….
>
> The provisions of this section shall not apply to the felonies defined in sections 564.590, **564.610**, 564.620, 564.630, and 564.640, RSMo.

§ 571.015.1 and .4 RSMo Supp. (1977), effective January 1, 1979 (emphasis added). At the time this section was enacted, § 564.610 made it a criminal offense to "exhibit" deadly weapons "in the presence of one or more persons … in a rude, angry or threatening manner[.]" *See* § 564.610 RSMo (1969). In 1978, however, § 564.610 was renumbered, and the section was repealed entirely in 1981. *See* ***Prince***, 311 S.W.3d at 332; §§ 564.610 and 571.115 RSMo (1978), and 571.115 RSMo Cum. Supp. (1982). Defendant argues that, because § 564.610 is "the exact offense for which [he] was charged[,]" the former exception in § 571.015.4 RSMo Supp. (1977), exempting § 564.610, should apply.

Defendant's argument fails because it relies on a statutory exception that no longer exists. Section 571.015 was amended effective August 28, 2020, and it was this version that was in effect at the time of the commission of Defendant's charged crimes

in March 2024. As amended, this section states that "[a]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the offense of [ACA.]" § 571.015.1 Cum. Supp. (2020). The 1977 exceptions previously contained in subsection 4 upon which Defendant relies have been eliminated. Because Defendant's claim is based on a superseded version of the statute, he has failed to demonstrate facially substantial grounds for believing that the trial court committed an evident, obvious, and clear error. *See* ***Jones***, 725 S.W.3d at 583. Thus, we decline to exercise our discretion to review Point 1 for plain error.

Point 2

In Defendant's second point, he contends the trial court abused its discretion in admitting the testimony of Officer J.D. that the "clicking" sound on the phone recording of the incident was the sound of a firearm being made ready to fire.

Once again, this claim of error was not properly preserved for appellate review. "[T]o properly preserve an evidentiary issue for appellate review, an objection must be made upon introduction of the evidence; that objection must be reasserted as error in a motion for new trial; and the issue must be briefed on appeal." ***State v. Robinson***, 194 S.W.3d 379, 380 (Mo. App. 2006).

The objection made at trial was that the testimony of Officer J.D. would "invad[e] the province of the jury." This objection means that a "lay witness," meaning a witness who does not testify to any "scientific, technical, or specialized knowledge[,]" generally "is

not permitted to give opinion testimony about a matter in dispute because the jury and lay witness are ordinarily in equal positions to reach an accurate opinion about the matter." ***State v. Jefferson***, 341 S.W.3d 690, 697 (Mo. App. 2011) (citation omitted). Next, in Defendant's motion for new trial, he asserted that the trial court "erred in allowing 'expert' testimony of [Officer J.D.] regarding the sound a gun makes when the slide is pulled." Now, on appeal, Defendant contends that Officer J.D.'s testimony was not admissible: (1) as "expert" testimony pursuant to § 490.065 because it was not the product of "reliable principles or methods"; and (2) as "lay opinion testimony" because it "usurped the jury's role as the sole fact-finder" on a matter "the jury was equally able to determine[.]"[3]

To preserve an objection to evidence for appellate review, the objection must be specific, and the point on appeal must be based on the same theory that was presented at trial. ***State v. Boydston***, 198 S.W.3d 671, 674 (Mo. App. 2006). That did not occur here. Defendant failed to preserve his objection that Officer J.D.'s testimony "invad[ed] the province of the jury" because Defendant did not reassert the same objection in his motion for new trial. *See* ***Khan v. Gutsgell***, 55 S.W.3d 440, 442 (Mo. App. 2001) ("Assuming a proper objection is made, the party must then set forth the same objection in their motion for new trial and in their appellate brief."). Furthermore, Defendant failed to preserve the claim in his motion for new trial that the trial court

[3] References to § 490.065 are to RSMo (2016).

erred in "allowing 'expert' testimony" of Officer J.D. because he never objected on this basis at trial. *See* ***Zakibe v. Ahrens & McCarron, Inc.***, 28 S.W.3d 373, 387 (Mo. App. 2000) (a "point on appeal must be based upon the theory voiced in the objection at trial" and an appellant "cannot expand or change on appeal the objection as made"); *see also* ***State v. Scherrer***, 673 S.W.3d 899, 915 (Mo. App. 2023) ("Only an objection made timely *at trial* will preserve an issue for appeal."); ***State v. Johnson***, 943 S.W.2d 285, 291 (Mo. App. 1997) (an "allegation of error in a motion for new trial may not be changed or broadened on appeal").

Defendant's unpreserved point on appeal is subject to plain error review only. Rule 30.20; ***Brandolese***, 601 S.W.3d at 530. As previously stated, we must first determine whether an evident, obvious, and clear error has, in fact, occurred. ***Jones***, 725 S.W.3d at 583.

Defendant first contends Officer J.D.'s testimony was not admissible as "expert" testimony under § 490.065 because it was not the product of "reliable principles or methods." We disagree.

"Because expert testimony is laden with questions of competency and relevancy, admission of expert testimony is generally within the trial court's sound discretion and will not be reversed absent a showing of abuse of discretion." ***State v. Cobb***, 336 S.W.3d 201, 209 (Mo. App. 2011). The admissibility of expert testimony pursuant to § 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. 2018). An expert is

qualified by his or her "knowledge, skill, experience, training, or education." ***Id***.; § 490.065.2(1). Such testimony is relevant if it contains "scientific, technical, or other specialized knowledge" that will assist the trier of fact. § 490.065.2(1)(a); *see* ***Gardner***, 562 S.W.3d at 319. The reliability of expert testimony is determined by considering whether the testimony is based on: (1) sufficient facts or data; (2) reliable principles and methods; and (3) reliable application thereof. § 490.065.2(1)(b)-(d); *see* ***Gardner***, 562 S.W.3d at 319.

"Whether the testimony will assist the trier of fact is simply a question of relevance, namely, whether the testimony is helpful to the jury because it has a valid connection to the case." ***Gardner***, 562 S.W.3d at 319 (citation modified). Given the charges in this case, whether Defendant possessed a firearm at the time of the altercation was very relevant.

Defendant argues that Officer J.D.'s testimony did not satisfy the reliability requirements under ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993). In ***Daubert***, the Supreme Court of the United States provided several factors to be considered in assessing the reliability of expert testimony, summarized as follows:

> (1) whether a theory or technique can be and has been tested;
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> (2) whether the theory or technique has been subjected to peer review and publication;
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> (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and

(4) whether the theory or technique enjoys a general acceptance within the relevant scientific, technical, or other specialized community.

See ***Id***. at 593-94.

However, the specific ***Daubert*** factors "do *not* constitute a definitive checklist or test" for determining the reliability of expert testimony because "the gatekeeping inquiry" depends on the particular facts and circumstances of the case at issue. ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137, 149-50 (1999); *see* ***Daubert***, 509 U.S. at 593. Rather, the standard is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." ***Kumho Tire Co.***, 526 U.S. at 152. The statute's plain language contemplates that an expert may be qualified based solely upon his or her training or experience. ***Gardner***, 562 S.W.3d at 321. "[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience." ***Kumho Tire Co.***, 526 U.S. at 156.

Furthermore, the Supreme Court held in ***Daubert*** that trial courts must act as gatekeepers to ensure that expert testimony sought to be admitted is both relevant and reliable. ***Daubert***, 509 U.S. at 589. However, the trial court's gatekeeper role is not intended to be a replacement for the adversary system: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." ***Id***.

at 596; *see* ***Gardner***, 562 S.W.3d at 317-18. Here, Defendant had the opportunity to cross-examine Officer J.D. on her training, experience, methods, and principles. Officer J.D. testified that she had been a police officer since February 2021 and had received specialized firearm training, including week-long courses on duty pistols and shotguns, as well as training with rifles. She also testified that she carried a firearm at all times while on duty. This extensive and specialized experience is sufficient to establish that Officer J.D.'s testimony was reliable. We therefore find no evident, obvious, and clear error by the trial court in allowing the challenged expert testimony.

Defendant also contends that Officer J.D.'s testimony was inadmissible as "lay opinion" testimony. "The trial court has wide discretion in admitting the testimony of a lay witness into evidence" and this Court will not reverse the ruling unless it constitutes an abuse of discretion. ***State v. Winston***, 959 S.W.2d 874, 877 (Mo. App. 1997). Defendant argues that Officer J.D.'s testimony invaded the province of the jury because the officer's training made her no more likely to be able to identify the sounds in the audio recording than the jurors. Again, we disagree.

"[G]enerally, opinion testimony is inadmissible when the trier of fact is as capable as the witness to draw conclusions from the facts provided." ***State v. Futo***, 932 S.W.2d 808, 819 (Mo. App. 1996). The rationale for this "opinion rule" is that a lay witness does not possess specialized knowledge on the matter, meaning the lay witness and jurors are similarly situated to form an accurate opinion. ***Winston***, 959 S.W.2d at 877; *see* ***Mohr v. Mobley***, 938 S.W.2d 319, 321 (Mo. App. 1997). "Courts have created an

exception to the opinion rule by allowing lay witnesses to testify as to their opinion" when the lay witness "is in possession of knowledge that the jury does not also possess" that would aid the jury in determining an issue in dispute. ***Winston***, 959 S.W.2d at 877. The question is: "Can the jury be fully equipped, by the mere recital of the data, to draw inferences?" ***State v. Davidson***, 242 S.W.3d 409, 413-14 (Mo. App. 2007).

Defendant argues that, because the jury heard the sound of the gun being "racked" in the body-worn camera footage and in the live demonstration by Officer J.D. at trial, the jurors were no less capable than Officer J.D. to determine the sound on the audio recording. We disagree because it would be unreasonable to assume that every member of the jury has experience with firearms, and even more unreasonable to assume that they have the same extensive experience and training as that of the officer. Based on Officer J.D.'s extensive training and handling of firearms, she was clearly in a better position to identify the source of the noise on the audio recording. It is permissible for a police officer to testify concerning his or her observation of a fact, based on the witness' experience as an officer. ***Loper***, 609 S.W.3d at 733-34.

For the aforementioned reasons, Defendant has failed to demonstrate facially substantial grounds for believing that the trial court committed an evident, obvious, and clear error in allowing the challenged testimony of Officer J.D. *See* ***Jones***, 725 S.W.3d at 583. Therefore, we decline to engage in plain error review of Point 2.

Point 3

In Defendant's third point, he contends the trial court plainly erred in entering written judgment for domestic assault in the second degree pursuant to § 565.073 for Count 1. Defendant correctly argues that he was acquitted by the jury of domestic assault in the second degree, and instead found guilty of the lesser-included offense of domestic assault in the fourth degree. The State concedes this point of error and also asserts that the written judgment fails to memorialize the trial court's finding that Defendant was a prior and persistent offender.

The written judgment of the trial court should reflect its oral pronouncement before the defendant. ***State v. Robinson***, 685 S.W.3d 32, 34 (Mo. App. 2024). When a material difference exists between the written judgment and oral pronouncement, it is the oral pronouncement that controls. ***Id***. "The failure to accurately memorialize the decision of the trial court as it was announced in open court is a clerical mistake." ***Id***.; *see* ***State v. Davie***, 638 S.W.3d 514, 524 (Mo. App. 2021). Clerical errors in a criminal judgment may be corrected by order *nunc pro tunc* when the written judgment does not reflect what was actually done. ***Robinson***, 685 S.W.3d at 34.

We agree that the written judgment contains a clerical error, as it incorrectly states that Defendant was convicted on Count 1 of domestic assault in the second degree, rather than domestic assault in the fourth degree. The judgment also fails to indicate the trial court's finding that Defendant was a prior and persistent offender. Accordingly, we remand with directions for the trial court to correct these errors in the

written judgment via order *nunc pro tunc*. In all other respects, the judgment is affirmed.

JEFFREY W. BATES, J. – OPINION AUTHOR

BECKY J. WEST, J. – CONCUR

MATTHEW P. HAMNER, J. – CONCUR