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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0710

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSHUA WAYNE REAMS,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Fifth Judicial District Court,
Jefferson County, the Honorable Luke M. Berger, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 1

STANDARDS OF REVIEW 23

SUMMARY OF THE ARGUMENT 23

ARGUMENT 25

I. The district court misapplied the *Scheffelman* exception to prevent the defense from presenting Dr. Deborah Davis's educational testimony on the topic of false reporting in child abuse cases although it allowed the state to present testimonies on the same subject through multiple expert witnesses. 25

A. Applicable law 25

B. Error 33

C. Not harmless 39

CONCLUSION 41

CERTIFICATE OF COMPLIANCE 42

APPENDIX 42

TABLE OF AUTHORITIES

Cases

Com. v. Olivo,
633 Pa. 617, 127 A.3d 769 (2015) 24, 30

Durbin v. Ross,
276 Mont. 463, 916 P.2d 758 (1996) 36

Jim's Excavating Service v. HKM Assoc.,
265 Mont. 494, 878 P.2d 248 (1994) 36

McColl v. Lang,
2016 MT 255, 385 Mont. 150, 381 P.3d 574 .... 23, 25

Minnesota v. Myers,
359 N.W.2d 604 (1984) 32

State v. Berosik,
2009 MT 260, 352 Mont. 16, 214 P.3d 776 .... 30, 31, 34, 36

State v. Clifford,
2005 MT 219, 328 Mont. 300, 121 P.3d 489 .... 25, 26

State v. Colburn,
2016 MT 41, 382 Mont. 223, 366 P.3d 258 38

State v. Derbyshire,
2009 MT 27, 349 Mont. 114, 201 P.3d 811 23

State v. Geyman,
224 Mont. 194, 729 P.2d 475 (1986) 32

State v. Harris,
247 Mont. 405, 808 P.2d 453 (1991) 27, 28, 40

State v. Hensley,
250 Mont. 478, 821 P.2d 1029 (1991) 27

State v. J.C.E.,
235 Mont. 264, 767 P.2d 309 (1988) 28

State v. Lotter,
2013 MT 336, 372 Mont. 445, 313 P.3d 148 23

State v. McOmber,
2007 MT 340, 340 Mont. 262, 173 P.3d 690 41

State v. Mizenko,
2006 MT 11, 330 Mont. 299, 127 P.3d 458 34

State v. Morgan,
1998 MT 268, 291 Mont. 347, 968 P.2d 1120 .... passim

State v. Morris,
72 Haw. 527, 825 P.2d 1051 (1992) 37

State v. Reichmand,
2010 MT 228, 358 Mont. 68, 243 P.3d 423 .... 39, 40, 41

State v. Robins,
2013 MT 71, 369 Mont. 291, 297 P.3d 1213 .... passim

State v. Scheffelman,
250 Mont. 334, 820 P.2d 1293 (1991) 28, 30

State v. Scott,
257 Mont. 454, 850 P.2d 286 (1993) 27, 28, 32

State v. Van Kirk,
2001 MT 184, 306 Mont. 215, 32 P.3d 735 39

United States v. Hall,
974 F. Supp. 1198, 165 F.3d 1095 (7th Cir. 1999) 36

<u>*Montana Code Annotated*</u>

§ 45-5-507 1

<u>*Montana Rules of Evidence*</u>

Rule 401 2

Rule 402 2

Rule 403 2

Rule 702 .... passim

<u>*Other Authorities*</u>

1 Modern Science Evidence § 3:20 *Reactions to experts* (2019–2020 Edtition) 26

STATEMENT OF THE ISSUE

Should Joshua Reams have been allowed to present Dr. Deborah Davis's educational testimony on false reporting in child abuse cases to counter the testimony the State presented from multiple expert witnesses on the same subject?

STATEMENT OF THE CASE

Appellant Joshua Wayne Reams appeals following a jury verdict in the Montana Fifth Judicial District Court, Jefferson County, convicting him of incest against his ten-year-old stepdaughter J.L.

The State charged Reams by amended information with one count of incest in violation of Mont. Code Ann. § 45-5-507. (D.C. Doc. 80, 82.) Reams's ten-year-old stepdaughter, J.L., alleged, and later testified, that he had touched her private spot between her legs with his finger. (D.C. Docs 80–84; Trial Tr. at 422–425.) In the course of its investigation, Boulder County Police took J.L. to Paula Samms—Director of the Child Advocacy Center (CAC)[1]—for a forensic interview. (D.C. Docs 80 at 1–3; 84 at 1–2.) During the interview, J.L. made

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[1] Law enforcement and Child Protective Services routinely take children to CAC when someone alleges sexual abuse may have happened against a child.

various allegations against Reams: that he touched her private spot between her legs with his finger, attempted to put his penis in her butt, and made her rub his penis. (D.C. Docs 80 at 1–3; 84 at 1–2.) Reams was arrested to answer charges and he faced 100 years in prison.

Initially, Reams's theory of the case was that J.L. falsely reported sexual abuse because she wanted to have something in common with Breanne Rykal, her cousin who was also sexually abused. *(See* Trial Tr. at 411; D.C. Doc. 50 at 4.) The defense sought to present evidence of Breanne's sexual abuse and to establish that Breanne told J.L.: "Something happened to me, and so, you can tell me." (Trial Tr. at 411.) The State moved in limine to exclude any prior sexual conduct of any witness under the rape shield statute or as irrelevant and inadmissible under Mont. R. Evid. 401, 402, and 403. (D.C. Docs. 29, 31.) The district court agreed with the State and prohibited Reams from presenting any evidence of Breanne's sexual abuse as irrelevant and inadmissible under Mont. R. Evid. 401, 402, and 403. (D.C. Doc. 84 at 9.) As a result of this ruling Reams was unable to present his preferred defense. Reams's theory of the case changed into attempting to establish that J.L. made a false report of sexual assault because she

became angry and resentful after learning that Reams was not her biological father—throughout her childhood Reams made her do more chores than was normal for a child. (*See* Trial Tr. at 394–95, 450–51, 881–82, 994.)

The defense retained its own expert on child sexual abuse, Dr. Deborah Davis. Pre-trial, the defense gave notice of its intent to call Dr. Davis to present educational testimony concerning the general causes of false reports of sexual abuse in children to assist the jury in understanding some of the reasons why a child might make a false accusation of abuse. (D.C. Docs. 30, 36). The defense intended Dr. Davis to also provide rebuttal against the testimony of Samms—J.L.'s forensic interviewer. (D.C. Doc. 36 at 1.)

According to Dr. Davis's 24-page curriculum vitae (CV) attached to the defense's notice, she received a Bachelor of Arts in psychology from the University of Texas in 1970 and a Ph.D. in psychology from Ohio State University in 1973. (Davis Curriculum Vitae (attached as App. C) at 1–2.) She was a post-doctoral fellow at Ohio State University for two years, and has taught at Southern Illinois University, Georgia State University, and the University of Nevada, Reno, where she has been a

professor of psychology since 1978. (App. C at 2.) Additionally, she has been a member of the faculty of the National Judicial College since 2012. (App. C at 2.) She has published numerous articles[2] and chapters on false allegations of child sexual abuse and other related topics in forensic psychology, and has presented for scientific organizations and continuing legal education events for the National Judicial College. (*See* App. C.) In 2012, she was awarded a joint research grant from the Department of Justice and the Federal Bureau of Investigation. (*See* App. C at 2.) She has served as an expert witness on the topic of child sexual abuse countless times, testifying in 16 states from Alaska to New York. (*See* App. C at 2.).

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[2] Dr. Davis's publications include: McGovern, K., & Davis, D. (1989). *False allegations of child sexual abuse: Is there a problem*? Nevada Family Law Review, February; Davis, D., & Loftus, E. F. (2004); *What's good for the goose cooks the gander: Inconsistencies between the law and psychology of voluntary intoxication and sexual assault*. In W. T. O'Donohue & E. Levensky (Eds.) *Handbook of forensic psychology* (pp. 997-1032) New York, Elsevier Academic Press; Davis, D., Rippens, P., & Foushee, R. (1989) . *Public knowledge and beliefs concerning child sex abuse*. Western Psychological Association, Reno; and Davis, D., & Loftus, E. F., *Recovered memories can be false memories*. In N. Andreasen, J. Geddes, G. Goodwin (Eds.), New Oxford Textbook of Psychiatry (3rd Edition).

The defense provided the trial court with Davis's CV along with its notice of intent and asserted that she qualified under Mont. R. Evid. 702 as an expert who could give educational testimony on the topic of false reports of sexual abuse in children, which was outside of most jurors' common experience. (*See* D.C. Doc. 30 at 3.) Her educational testimony was intended to explain the general causes of false reports of sexual abuse among children such as: (1) intentional deception; (2) distortion of memory or belief; (3) guessing; and (4) compliance with suggestion. (D.C. Doc. 30 at 3.) The defense assured the trial court that it would not ask Dr. Davis to discuss the facts of this case nor to apply her methodology to the present facts. (D.C. Doc. 30 at 3.)

In its motion in limine, the State asked the trial court to preclude Dr. Davis's educational testimony arguing she was unqualified to comment directly on J.L.'s credibility as an expert on child sexual abuse. (*See* D.C. Doc. 52 at 3–4.)

The trial court ruled for the State and precluded Dr. Davis from testifying. It concluded that she did not meet the requisite qualifications to directly comment on J.L.'s credibility. (*See* D.C. Doc. 84 at 5.)

Following a four-day trial, the jury found Reams guilty of one count of incest. (Tr. at 1014.) On the single count, Reams was sentenced to 100 years at the Montana State Prison with 60 years suspended. (Sentencing Tr. (attached as App. B) at 34; D.C. Doc. 142 at 2.) The district court ordered a 15-year parole ineligibility and conditioned parole on completion of Phases I and II of sex offender treatment. (Sentencing Tr. at 34; D.C. Doc. 142 at 2.)

Reams filed a timely appeal. (D.C. Doc. 142.)

STATEMENT OF THE FACTS

The case against Reams was one in which there was no other witness to the alleged incidents, there was no physical evidence that the alleged sexual abuse occurred (*see* Trial Tr. 219–20 (the prosecution opening by conceding that a "full-body check" of J.L. revealed no physical evidence of sexual abuse)), and the jury was left to believe either J.L. or Reams.

J.L. was eleven years old at trial and was nine or ten years old at the time of the alleged incest. (Trial Tr. at 443.) It was in that context that Reams, pre-trial, gave notice of his intent to call Dr. Deborah Davis to provide educational testimony and to rebut the formidable list of the

prosecution's experts, especially Samms, the forensic interviewer. (*See* D.C. Doc. 30 at 3.) However, the State moved in limine urging the trial court to exclude Dr. Davis's educational testimony arguing she would only comment directly on J.L.'s credibility. (*See* D.C. Doc. 52 at 3–4.)

In addition, the State filed two notices of intent to call multiple expert witnesses—Dr. Michelle Danielson, Paula Samms, Dr. Wendy Dutton, and Jordan Hinshaw. (D.C. Doc. 25 at 1–2.) Dr. Danielson would testify as a pediatric doctor who routinely treats victims of sexual assault and who treated J.L after the alleged sexual abuse. (D.C. Doc. 25 at 1–2.) Samms would testify concerning the general process of victimology, a child's typical reaction to abuse, and the proper protocol for how forensic interviews are generally conducted. (D.C. Doc. 25 at 1–2.) Samms would testify about the forensic interview she conducted of J.L. (D.C. Doc. 25 at 1–2.) Dr. Dutton would testify concerning child sexual abuse victims and specifically about their: (1) general patterns of disclosing sexual abuse—including delayed reporting; (2) general coping strategies; (3) general ways that a victim recalls the abuse such as script and episodic memory; and (4) generally how the process of

victimization occurs—how a perpetrator selects a victim, engages, grooms, assault, and conceals the sexual assault. (D.C. Doc. 42 at 1–2.)

Voir Dire

During voir dire, Juror 25, unprompted by any party, acknowledged that she expected the trial to consist of a battle of experts, and suggested that if the State's expert witnesses were not met by equal and opposite expert testimony from the defense on the issues in question she would have reservations about Reams's claims of innocence:

> [PROSECUTION]: Yeah. Who here -- Does anybody expect that there would be witnesses to child sexual abuse? That people would see this happening?
> PROSPECTIVE JURY PANEL: (No response)
> [PROSECUTION]: Miss Rowe.
> JUROR NO. 25: I would expect there would be experts on both sides, and that there would be some medical reports. And the Defense would present experts on their, you know, their side and present their evidence. And you guys would have experts for either side to what you've seen and what's been recorded.

(Trial Tr. at 109.)

Trial

The defense in opening—instead of telling the jury its own expert Dr. Davis will explain the phenomenon of intentional false reporting in children—could only say to the jury that it intended to piece together its

case by *cross-examining* Dr. Dutton concerning why a child might intentionally make a false report of sexual abuse:

> I'll cross-examine [Dr. Dutton] on reasons why a child might be intentionally deceptive, why they might make false allegations of sexual abuse. And the [prosecution] witnesses will testify, as will Wendy Dutton, that they can be intentionally deceptive.

(Trial Tr. at 233.)

Dr. Dutton testified the forensic interview process is both neutral and objective, and it provides accurate information from any child:

> Q. And what is a forensic interview?
> A. A forensic interview is basically a fact finding or investigative interview that's approached from a neutral stance with -- And it takes what we know from the research on children's memory and eye witness ability and child development and provides a structure for children to hopefully provide as much accurate information as they can about something they experienced or witnessed.
> Q. And how do you conduct those forensic interviews?
> A. Well, we use a specific protocol that's been well researched. And the protocol starts out with asking open-ended questions about neutral topics to build rapport and to help the child practice giving what we call free recall narrative.
>
> . . . .
>
> And especially with young children, and I tell them, "I don't know the answers to the questions that I'm asking you. I don't know what happened." And then ask children to promise to tell the truth. From there, we start by asking very open-ended questions like, "Tell me about why you came to talk to me today." Or, "I heard something happened

to you. Tell me everything about it," and allow the child to give their own narrative account of what happened.

. . . .

Q. And you said at the end you want to avoid leading or suggestive questions. Is there a question that's called a tag leading question?
A. Yes.
Q. What kind of question is that?
A. Well, tag leading questions are actually very coercive forms of questions you can ask children which typically suggest information to the child and then supplies the answer the questioner is looking for.

. . . .

Q. Okay. Those tag-type questions, though, there's tag leading questions are questions you don't want to ask as a forensic interviewer.
A. Correct, especially with young children. They are coercive. And especially if a child is tired or maybe they didn't have that information or don't remember the information. Those types of questions can lead to more errors in a child's account of what happened.
Q. So, this protocol or these procedures you just outlined about how you do a forensic interview, what's your ultimate goal in conducting a forensic interview or your purpose of conducting your forensic interview with a child?
A. Well, the purpose of a forensic interview is to, number one, find out if the child is reporting that they witnessed or experienced something. And then, if the child indicates something happened, to help them provide hopefully as much accurate information as they can about what happened.
Q. So, the forensic interview approach you've discussed with the jury actually brings about the most accurate information if you take this approach; is that right?
A. Yes, especially asking those open-ended questions or the questions that start with WH.

(Trial Tr. at 317–320.)

The prosecution called Jordan Hinshaw, a licensed clinical social worker, to the stand to comment that J.L. disclosed credibly that she had been sexually abused. (*See* Trial Tr. at 255, 260–61.) Hinshaw received her bachelor's degree from the University of Montana and her master's program through Walla Walla University. (Trial Tr. at 255.) She received some certifications for attending various continuing education trainings and conferences around the state on child abuse and neglect. (Trial Tr. at 255–57.)

After Samms conducted the forensic interview, she referred J.L. to Hinshaw for a clinical assessment. (Trial Tr. at 258–60.) Over the hearsay objection of the defense, the prosecution elicited from Hinshaw that J.L disclosed she was sexually abused:

> Q. When you're discussing that you did an assessment with [J.L.], what did the assessment consist of?
> A. So, we -- It was disclosed in the assessment, the sexual abuse was disclosed.
> [DEFENSE COUNSEL]: Objection, hearsay.
> [PROSECUTION]: Your Honor, it's not offered for the truth of the matter asserted. It's offered for how she proceeded with her counseling of [J.L.].
> [DEFENSE COUNSEL]: Well, then the objection is relevance.
> [PROSECUTION]: I think it is relevant. She's in a therapy relationship. And understand the hearsay rules, Your

Honor, and we're not going to get into any individual statements of [J.L.]. But I think as far as what effect it had on her counseling relationship, I think is extremely relevant in this case, Your Honor.
THE COURT: I'm going to allow it for the offered -- the way that [THE PROSECUTOR] has asserted it, for how it affects the counseling relationship, not the truth of the matter asserted.

(Trial Tr. at 260–61.)

Hinshaw then testified that during her counselling sessions she treated specific symptoms J.L. suffered from such as nightmares, lots of fear, blame, and shame, which allegedly resulted from the sexual abuse. (Trial Tr. at 264.) Hinshaw explained that since J.L. was sexual abused she had significantly gained weight. (Trial Tr. at 264–65.) The prosecution elicited that at first J.L. would not talk about the alleged sexual abuse; but, over time, after several of Hinshaw's counselling sessions, J.L. began verbalizing specific details of her sexual abuse. (Trial Tr. at 266–67.) Hinshaw diagnosed J.L. with Post Traumatic Stress Disorder (PTSD) stemming from the sexual abuse:

Q. You indicated [J.L.] has exhibited PTSD-type symptoms.
A. Uh-huh.
Q. Have you made any specific diagnosis of her?
A. Yes, I currently have her diagnosed as Posttraumatic Stress Disorder.
Q. What event did that arise out of?

> A. When I conducted her clinical assessment, some of the symptoms that were being reported to me, such as nightmares. And [J.L.] reported to me -- She wrote on the board -- When I first met with her individually for the clinical assessment, she told me, "I feel like there's something you should know, but I'm not ready to talk about it." And I asked her, "Okay, you know, what is that?" So, she wrote on the board that her -- I believe she wrote Josh [meaning Reams]. I can't recall exactly, but she wrote something.
> [DEFENSE COUNSEL]: Objection hearsay.
> [PROSECUTION]: I'd like to -- If I could ask her a different question.
>
> . . . .
>
> Q. (BY [PROSECUTION], continuing) You indicated you diagnosed her with posttraumatic stress syndrome or disorder. What is that based on?
> A. The presenting symptoms that she had when I conducted her clinical assessment.
> Q. Was there a traumatic event that it's based on?
> A. Yes.
> Q. And what's that?
> A. Sexual abuse.
> Q. How's [J.L.] progressing today in therapy?
> A. She's made a lot of progress since we've started.
> For example, being able to process her sexual abuse and be able to verbalize it, and for us to be able to process that verbally together in therapy.

(Trial Tr. at 268–273.)

The district court barred Davis's expert testimony, although it permitted the prosecution to call Dr. Dutton to present the same category of educational testimony covering the same topic of false allegations in children. Dr. Dutton, who did not review any materials

or other evidence in the present case, testified generally concerning the process of conducting a forensic interview of a child. (Trial Tr. at 320, 329.) Dr. Dutton had testified in 550 cases as a "blind witness" in similar cases. (Trial Tr. at 327.) She explained the common responses and coping mechanism of children in traumatic or threatening situations. (*See* Trial Tr. at 329.) Dr. Dutton opined that children rarely disclose sexual abuse right away for various reasons—not comprehending what is happening to them, fear, and a sense of loyalty to the perpetrator. (Trial Tr. at 329.) Dr. Dutton testified generally concerning the general characteristics of the process of victimization, including selection, engagement, grooming, assault, and concealment. (Trial Tr. at 345–57.)

Just as defense counsel foreshadowed in its opening remarks, instead of relying on its own expert witness, the defense tried its best to make its case by cross-examining Dr. Dutton about false reporting and specifically why a child might make a malicious false report:

> Q. So, tell us about the phenomenon that the research shows of false reporting. Are you familiar with that?
> A. False reporting of sexual abuse?
> Q. Yes.
> A. Yes, there are two types of false reports of sexual abuse. One is called erroneous, and the other is malicious

> false reports. Of the two, erroneous reports are most common -- are more common than the malicious false reports. And erroneous reports are typically reports that are made in good faith. Meaning a concerned adult has made a report or a child has made a report to an adult. And then it's reported to the police or law -- child protective services. And then once it's investigated, it's determined not to be abuse or there's not enough information to support that abuse happened.
>
> . . . .
>
> As opposed to a malicious false report, these are consciously made false reports for some ulterior motive or secondary gain. And the research shows that when false reports or malicious false reports occur, they occur most commonly but not exclusively in two situations. The first being generally involving younger children whose parents are involved in a high conflict divorce or custody dispute. And most often the allegation arises from one of the adults and the child might be coached or encouraged to make the false report against the parent or the other parent's new partner in an effort to gain an advantage in the custody dispute.
>
> Now, there are some children that do initiate those false reports themselves.
>
> The second situation where false reports occur are with teenage girls. And usually the goal behind that or the ulterior motive is to either change their living situation, they're unhappy living in one household, so they make a report against somebody in that household in an effort to move elsewhere, or they're witnessing domestic violence going on in the home, and then they may make a report against a mother's abuser in order to get him out of the home and protect the mother. We also see teenage girls making false reports when they're trying to cover up the fact that they're having consensual sex with somebody.

(Trial Tr. at 366–68.)

> Q. Okay. But those aren't the sole situations in which these arise.
> A. No, there could be other possibilities. It's just those are the reasons that have been identified most commonly in the research.
> Q. Okay. So, erroneous, I just made a mistake, and secondly, malicious. And in those malicious situations, are they intentionally deceptive? They can be intentionally deceptive.
> A. They can be, yes.
> Q. And they can be motivated, I think as you stated before, the desire to change a living situation.
> A. Yes.
> Q. And those situations would incur -- or include situations where the child wants the parent to divorce possibly.
> A. Not so much that. It's usually where a parent -- like a child who is living with one of them, like at one parent and the stepparent. And they're unhappy in that household, so they make a report, so they can go live with the other parent in the other situation.
> Q. Sure. But it happens; would you agree?
> A. It's possible. I've never encountered that, but it's possible.

(Trial Tr. 368–369.)

On redirect the State sought to give the jury the impression from Dr. Dutton's testimony that malicious reporting was extremely rare and that a ten-year-old child would most likely not be engaged in malicious reporting:

> Q. How commonplace is false reporting?
> A. Of the two types, erroneous are the more common. The malicious false reports tend to be rare.
> Q. So, when you're talking about this subject, it's your testimony that malicious false report are rare; is that right?

A. Yes.
Q. You were talking to [DEFENSE COUNSEL] a moment ago about how -- that a child has been -- who – It's possible, I think you said, that an angry child can make a false report; right?
A. What I said --
Q. Let me finish that question. And maybe if I've mis-phrased it, please correct me. But you also indicated that a child who is being sexually abused can also be angry at the abuse; right?
A. Yes.
Q. And it sounds like I may have misinterpreted your testimony with [DEFENSE COUNSEL.]
A. Yes, well, when children, especially as they reach puberty and adolescence, when a child becomes angry for some other reason, that anger can give them the push, so to speak, the emotional push to then have the courage to then disclose the sexual abuse that's happened.
Q. And you also indicated that children who are being sexually abused can be angry about it.
A. Yes.
Q. In the research that you've looked at, do you see, as a basis for making a malicious false report of sexual abuse, that children who are asked to do chores and those types of things will go forward and make false sexual abuse allegations?
A. Again, it's not one that's identified. It's possible. It's just not one reason that's identified as common in research.

(Trial Tr. at 394–95.)

Again, the prosecution in its re-direct examination of Dr. Dutton sought to impress upon the jury that a child of J.L.'s age was highly unlikely to be fabricating a report of sexual abuse. (Trial Tr. at 397.)

Dr. Dutton opined that generally teenagers above the age of eleven were more susceptible to suggestibility than eight-year-old children. (*See* Trial Tr. at 397.) Dutton suggested that eight-year-old children have well established "source monitoring"—identifying how you know what you know—which was the "most crucial" thing to resisting suggestion. (Trial Tr. at 397.) Dr. Dutton testified that malicious false reporting tended only to happen with teenage girls and children younger than eight and only occurred in high conflict divorce or custody battles:

> Q. And [DEFENSE COUNSEL] did talk to you about false allegations, and it seems to me you listed three times that you see malicious false allegations; is that right?
> A. Two major situations, they're the divorce and custody disputes and then with teenage girls.
> Q. And divorce and custody dispute, what are the ages on that where they're most prevalent?
> A. The majority of children are typically under the age of eight.
> Q. And those are divorce or custody disputes when one parent is trying to gain an advantage for custody?
> A. Yes.
> Q. So, it's not just divorce or custody the parents that are being divorced, it's been one parent trying to get an advantage of custody; is that right?
> A. Yes, it's usually high conflict divorce cases or high conflict custody cases.
> Q. And then what's the next type?
> A. The others are with teenage girls.
> Q. And so, those are teenage girls, but what do you define teenage as?
> A. Thirteen and older.

> Q. So, even though you testified that malicious false disclosures are rare, these are the times when the research has identified are most common; is that right?
> A. When they happen, they tend to occur in those situations, not exclusively, but most often.
> Q. And when [Defense counsel] gave you a variety of examples, I remember you saying the words "it's possible". And that means that it's not impossible, but are you saying that those other times happen often?
> A. No, as I said, the ones that were identified in the research happened most often.
>
> . . . .
>
> Of all the studies that have been done, the four or five major studies that have been done, tended to fall in -- the false allegations tended to occur in those situations.

(Trial Tr. at 405–406.)

Dr. Danielson testified for the prosecution. (Trial Tr. at 473–519; 577–656.) She testified about the general process as to how a pediatrician examines a victim of sexual assault and then specifically testified how she examined J.L. in her role as a pediatric doctor. (Trial Tr. at 482–497.)

Before calling Paula Samms to testify, the State, outside the hearing of the jury, indicated to the trial court that it would play two videos of Samms's forensic interview with J.L. for the jury. (Trial Tr. at 521.) Over the objection of the defense, both videos of Samms's forensic interview were played for the jury. (Trial Tr. at 589–591.)

Samms was yet another expert witness for the prosecution and she explained to the jury that a forensic interviewer was someone "objective" unlike a police investigator. (*See* Trial Tr. at 578.) According to Samms, the purpose of a forensic interview was to have "a neutral, fact finding, objective interview done by somebody who's trained to ... to ask questions in a developmentally appropriate manner." (Trial Tr. at 579, 626.) The forensic interviewer was trained to set or create an environment where a child feels free to disclose accurately if something, such as sexual abuse, happened to her:

> Q. So, we've already had some testimony on this.
>
> . . . .
>
> But can you just generally tell the jury from your perspective, what's the purpose of a forensic interviewer?
> A. The purpose of a forensic interview is to have a developmentally appropriate, neutral factfinding interview. So, my job is not only to have the training to know how to ask questions, but to set -- create an environment where the child is able to let me know something accurately if something actually happened. That's what our desire is.

(Trial Tr. at 579.)

Samms testified that Heather Rykal, J.L.'s aunt and her professional colleague—whose daughter Breanne reported that her cousin J.L. confided in her that Reams had touched her private spot—reported a suspected sexual abuse directly to her. (Trial Tr. at 577–86.)

J.L. was taken to CAC and Samms conducted a forensic interview. (Trial Tr. at 577–586.) Over the objection of the defense, the six drawings that J.L. made as she was interviewed by Samms were all introduced into evidence. (Trial Tr. at 592.) The prosecution sought to establish through Samms's testimony that J.L. made prior statements that were consistent with her allegations of sexual abuse and showed the jury J.L.'s drawings as demonstrative evidence. (Trial Tr. at 595–597.) Partly through Samms's testimony, the second 30-minute forensic video was played for the jury. (Trial Tr. at 620.)

Closing Arguments

In its closing remarks, the prosecution highlighted Dr. Dutton's expert testimony that malicious false allegations were very rare with nine and ten-year-olds, and moreover *only* occurred with teenage girls and with younger children in high conflict divorces or custody disputes:

> Dr. Dutton also talked about false allegations. If you remember her testimony clearly, she said false allegations, malicious false allegations are *very rare*; and that's based on the research in this field. She said they're *very rare*. But researchers, scientists, social scientists who look at this type of thing, they have identified some areas where it occurs, some predominant areas where it occurs. Younger children in high conflict divorce or custody disputes over children. That wasn't present here. Teenage girls -- teenage girls, not nine and ten-year-olds -- teenage girls wanting a change in

> living circumstances. Teenage girls witnessing domestic violence. And teenage girls trying to cover up consensual sex. And then last, teenage girls who suffer from severe mental illness.

(Trial Tr. at 372–73 (emphasis added).)

In closing, the defense attempted to rebut Samms's testimony solely by argument:

> Which brings us to the issue of priming. Paula Samms stated that she con -- that there is the ability -- First, the problem is these young girls, these young children are susceptible to persuasion. They can be suggestive. They are susceptible to suggestibility. And so, we don't know what statements were made to her prior. But we do know, because we heard from Breanna, Breanna told her, "Look, I had the same or similar -- something similar happened to me. You can tell me.

(Trial Tr. at 988.)

Unlike the State, the defense was unable to reference its own expert testimony when it argued that a child can indeed make a false report of sexual abuse: "And then there is a true phenomenon of false reporting. And false reporting occurs, as a matter of fact. It really does. And it occurs often times in the context of deliberate or intentional deception." (Trial Tr. at 994–95.)

STANDARDS OF REVIEW

The Court generally reviews evidentiary rulings—including oral testimony—for abuse of discretion. *State v. Lotter*, 2013 MT 336, ¶ 13, 372 Mont. 445, 313 P.3d 148. To the extent the [trial] court's ruling is based on a rule of evidence, a statute, or a constitutional right, the Court's review is de novo. *Lotter*, ¶ 13. This Court reviews an order barring evidence or testimony, including admissibility of expert testimony, for abuse of discretion. *McColl v. Lang*, 2016 MT 255, ¶ 7, 385 Mont. 150, 381 P.3d 574 (citation omitted). A court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811. Reversible error occurs when a substantial right of the appellant is affected, or when the challenged evidence affected the outcome of the trial. *Lang*, ¶ 7 (internal citation omitted).

SUMMARY OF THE ARGUMENT

The district court committed prejudicial error when it misapplied the narrow *Scheffelman* exception—not implicated in the present case—to deny Reams his expert witness. The exception is implicated only

when an expert seeks to *directly* comment on a child victim's credibility. The district court's ruling excluding the expert educational testimony of Dr. Deborah Davis—was clearly erroneous under this Court's jurisprudence in *Robins*.

The error prejudiced Reams at trial as the State was permitted to call Dr. Wendy Dutton as a blind expert—along with several other experts to testify about the same category of child sexual abuse educational testimony. What's sauce for the goose is sauce for the gander.[3] Because Dr. Dutton's educational testimony was the only one of its kind permitted by the trial court, it became imbued with a stamp of scientific legitimacy that Reams could not rebut—making the trial unfair. The Court must remand for a new trial in which both parties can fairly and fully present their cases with all the relevant expert testimony.

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[3] What is sauce for the goose is sauce for the gander, and if expert opinions are admissible and helpful to the prosecution here, there will be experts with admissible opinions to the contrary, in rebuttal and in each ensuing case. *Com. v. Olivo*, 633 Pa. 617, 640, 127 A.3d 769, 782–83 (2015) (Eakin, J. dissenting).

ARGUMENT

I. The district court misapplied the *Scheffelman* exception to prevent the defense from presenting Dr. Deborah Davis's educational testimony on the topic of false reporting in child abuse cases although it allowed the State to present testimonies on the same subject through multiple expert witnesses.

A. Applicable law

Montana Rule of Evidence 702—governing the admissibility of expert testimony—provides that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise. *See also*, *Lang*, ¶ 17. In *State v. Clifford*, 2005 MT 219, ¶ 33, 328 Mont. 300, 121 P.3d 489, this Court restated this rule, as follows: "if a reliable field helps the trier of fact, and the court deems the witness qualified as an expert, then he [or she] may testify." Whether the witness has scientific, technical, or specialized knowledge bears on the question whether the witness qualifies as an expert.

The Court has long recognized such educational testimony—concerning the general causes of delayed reporting of sexual abuse or

general causes of false reporting of sexual abuse in children— as admissible under Mont. R. Evid. 702. *State v. Robins*, 2013 MT 71, ¶ 16, 369 Mont. 291, 297 P.3d 1213; *State v. Morgan*, 1998 MT 268, ¶ 29, 291 Mont. 347, 968 P.2d 1120. In cases involving child sexual abuse, the Montana Supreme Court has repeatedly upheld the use of expert testimony to explain "the complexities of child sexual abuse and to give guidance which would help jurors understand and judge the victim's testimony." *Morgan*, ¶ 29 (citations omitted). In instances where there is no battle of experts, as in most criminal cases, jurors might uncritically accept as true what is asserted by the one expert who is testifying, whether or not it is correct, merely because it has not been met by an equal and opposite expert. *See* § 3:20. *Reactions to experts*, 1 Mod. Sci. Evidence § 3:20 (2019–2020 Edition); *see also*, *Clifford*, ¶ 33. It is well-established and is significant to note that the rebuttal experts may not opine as to the child's truthfulness.

In *Morgan*, a defendant convicted of incest argued the district court erred when it admitted expert testimony regarding child sexual abuse. *Morgan*, ¶ 27. The expert offered no opinion concerning the credibility of the child witness or any other specific aspect of the case.

Morgan, ¶ 26. The defendant did not dispute the expert's qualifications as the State did here; rather, the defendant asserted the facts of the case could be understood by the jury without need for such expert testimony. *Morgan*, ¶26. The Court disagreed, concluding an expert's testimony regarding general information about child sexual abuse is helpful in educating jurors on a topic "in which most people have no common experience," as well as assisting the jurors in assessing the credibility of the victim. *Morgan*, ¶ 30 (*citing State v. Scott*, 257 Mont. 454, 456, 850 P.2d 286, 292 (1993)). The Court further observed such generalized testimony "does not impinge on the jury's ultimate obligation to decide the credibility of the victim." *Morgan*, ¶ 30.

It is solely the jury's duty to determine the credibility of witnesses. *State v. Harris*, 247 Mont. 405, 409, 808 P.2d 453, 455 (1991). Thus, an expert witness generally cannot comment on the credibility of the alleged victim. *Harris*, 247 Mont. at 409–10, 808 P.2d at 455. A narrow exception allows an expert to comment directly on a victim's credibility in child sexual abuse cases in limited situations. *Harris*, 247 Mont. at 410, 808 P.2d at 455. The exception applies only when the accuser is a young child, *see State v. Hensley*, 250 Mont. 478, 482, 821 P.2d 1029,

1032 (1991), she testifies at trial, *see State v. J.C.E.*, 235 Mont. 264, 269, 767 P.2d 309, 313 (1988) (overruled in part on other grounds), her credibility is brought into question, *see Harris*, 247 Mont. at 410, 808 P.2d at 455–56, and the expert is properly qualified as such in the field of child sexual abuse, *see State v. Scheffelman*, 250 Mont. 334, 342, 820 P.2d 1293, 1298 (1991). To be clear, this exception allows an expert to directly comment on the victim's credibility. *Robins*, ¶ 12; *Scott*, 257 Mont. at 465, 850 P.2d at 292.

In very few other situations, if any, does this Court permit experts to directly testify that they believe that a witness has told the truth. Expert testimony that only indirectly bears on a child sexual abuse victim's credibility does not have to satisfy the exception's requirements to be admissible. *Robins*, ¶ 12. The exception is implicated only when the expert directly comments on the victim's credibility. *Robins*, ¶ 12.

The Court's decision in *Morgan* is particularly instructive in that regard. In *Morgan*, a qualified expert testified about patterns of child sexual abuse and factors to consider in the evaluation of a child's sexual abuse report. *See Morgan*, ¶ 26. The expert did not investigate the facts of the case and did not offer an opinion concerning the victim's

credibility or any other specific aspect of the case. *Morgan*, ¶ 26. In holding that the expert's testimony was admissible, the Court did not apply the exception that permits direct expert testimony on credibility. Rather, the Court only considered whether the expert's testimony was proper under Mont. R. Evid. 702.

As in *Morgan*, here the Court must *not* consider whether Dr. Davis's testimony was proper pursuant to the exception that allows direct comment on credibility because the defense was not calling Dr. Davis to comment directly on J.L.'s credibility. Like the expert in *Morgan*, the defense intended to limit Dr. Davis's testimony to general causes of false reporting in child sexual abuse cases. Just as in *Morgan*, ¶ 26, Dr. Davis did not investigate the facts of this case and would not offer an opinion concerning J.L.'s credibility or any other specific aspect of this case. She was not being called to offer an opinion of whether J.L. was credible. She was not being called to offer an opinion about what happened in this case, and specifically she was not going to offer an opinion as to whether J.L. was sexually assaulted. The notice of intent clearly indicated Davis was not being called to directly or otherwise comment on J.L.'s credibility. Dr. Davis intended to give scientific

information about false reporting in child sexual abuse cases, a subject beyond the ken of an average jury, and without such testimony stereotypes concerning child sexual assault victims may cloud a jury's judgment. *See Olivo*, 633 Pa. at 640, 127 A.3d at 782–83.

In *Berosik*, the defendant cited *Scheffelman*, 250 Mont. at 342, 820 P.2d at 1298 and argued that the district court erred in allowing the State's child abuse expert to testify because she did not have extensive first-hand experience with sexually and non-sexually abused children, did not have a thorough and up-to-date knowledge of the professional literature on child sexual abuse, and was not objective and neutral about this case. *State v. Berosik*, 2009 MT 260, ¶ 35, 352 Mont. 16, 214 P.3d 776. This Court found Berosik's arguments unpersuasive and allowed the State's expert to present her opinions to the jury. *Berosik*, ¶ 36. This Court reasoned that the State's expert was a licensed marriage and family counselor with a master's degree who had commenced a dissertation on disclosure of child sexual abuse. *Berosik*, ¶ 36. She had extensive experience in working with those convicted of offenses involving sexual aggression, providing sex offender treatment to both adults and juveniles, and providing family and group counseling

to those dealing with sex offenses as well as persons dealing with non-sexual child abuse. *Berosik*, ¶ 36. She has conducted thousands of forensic interviews and testified as an expert in several states, including Montana. *Berosik*, ¶ 36.

In *Robins*, ¶ 15, the State called the same Dr. Dutton to provide educational testimony and this Court refused to use the *Scheffelman* exception criteria to evaluate whether general educational testimony was admissible. The State had indicated in its notice of intent that Dutton *would* testify to the credibility of child sex victims, among other things. *Robins*, ¶ 15 (emphasis added). Curiously, the State had relied, in part, on the *Scheffelman* exception to defeat Robins's motion in limine. This Court reasoned that the fact that the State gave notice that Dutton may testify to the credibility of child sex victims and cited legal authority saying that she could do so did not mean that it must apply law that is not otherwise implicated. *Robins*, ¶ 15. The Court reviewed Dutton's testimony at trial and considered whether her testimony was proper. *See Robins*, ¶ 15. Because Dutton did not *directly* comment on the victim's credibility, the Court only considered

whether her testimony was admissible under Mont.R. Evid. 702, and it did not apply the *Scheffelman* exception.

Generally, an expert may testify about scientific, technical, or other specialized knowledge if it will help the jury understand the evidence or determine a fact in issue. *Robbins*, ¶ 16 *citing* Mont. R. Evid. 702. The Court has consistently upheld the use of experts to explain the complexities of child sexual abuse. *Morgan*, ¶ 29. Child sexual abuse is a topic that many or most jurors have no common experience with. *Scott*, 257 Mont. at 456, 850 P.2d at 292. This is particularly so when the alleged victim and perpetrator are family members. *State v. Geyman*, 224 Mont. 194, 198, 729 P.2d 475, 478 (1986) (*citing Minnesota v. Myers*, 359 N.W.2d 604, 609–10 (1984)). Child sexual abuse victims often respond to the abuse with seemingly puzzling and contradictory behavior. *Scott*, 257 Mont. at 465, 850 P.2d at 292. The expert's testimony educates and enlightens the jury. *Scott*, 257 Mont. at 465, 850 P.2d at 292–93. The jury can then make a more informed decision when it assesses the victim's credibility. *Scott*, 257 Mont. at 465, 850 P.2d at 292–93.

Chief Justice McGrath concluded in *Robins*, ¶¶ 13-17, that Dutton's testimony qualified under Mont. R. Evid. 702 as educational testimony on a topic outside of most jurors' common experience. The Court reasoned that Dr. Dutton's testimony was intended to help the jury comprehend some of C.G.'s behavior that might have otherwise seemed inconsistent with abuse. *Robins*, ¶ 17. For example, Dr. Dutton explained that it was not unusual for sexual abuse victims to not report the abuse, especially when the victim has a close relationship with the perpetrator, or for the victim to act inappropriately when discussing the abuse. *Robins*, ¶ 17. Dr. Dutton also may have helped the jury see Robins's actions as a pattern of abuse. *Robins*, ¶ 17. The Court explained that Dr. Dutton's testimony did not impinge upon the jury's obligation to ultimately decide C.G.'s credibility; it merely allowed the jurors to make an informed decision. *Robins*, ¶ 17.

B. Error

Here, the defense sought to introduce Dr. Davis's testimony as educational testimony on the general causes of false reporting of sexual abuse among children and not to directly comment on J.L.'s credibility. The defense assured the trial court in its notice of intent that the

educational testimony would carefully avoid commenting regarding J.L.'s credibility and only opine as to the general causes of false reporting of sexual abuse among children. The district court erred in not permitting the defense to present this testimony. Just as in *Robins*, ¶ 15, although the prosecution erroneously asserted *Scheffelman* applied, the trial court was not obligated to apply law that was not otherwise implicated—Davis's educational testimony was not intended to directly comment on J.L.'s credibility.

This Court has said there is no "discretion" in properly interpreting a statute or rule of evidence. *Berosik*, ¶ 55 *citing State v. Mizenko*, 2006 MT 11, ¶ 8, 330 Mont. 299, 127 P.3d 458. The court's interpretation is either correct or incorrect. *Berosik*, ¶ 55. Here, the evidentiary rulings at issue were based on the trial court's interpretation of Mont. R. Evid. 702; i.e., they were based on conclusions of law. The Court's review of such a ruling, therefore, is plenary. *See Berosik*, ¶ 55 (internal citation omitted).

The trial court should have only considered whether her testimony was admissible under Mont. R. Evid. 702. The district court's conclusion of law was clearly erroneous—it misapplied *Scheffelman*. It

acknowledged that from Reams's motion in limine its notice of intent was clear that Davis would carefully avoid commenting on J.L.'s credibility and would only testify about the general causes of false reports of sexual abuse to assist the jury in understanding some of the reasons why a child might make a false accusation of sexual abuse. (D.C. Doc. 84 at 5.) However, the district court precluded this educational testimony by reasoning that "[u]nlike the generalized testimony offered in *Morgan*, there appears to be no other purpose for offering Davis' testimony except to attempt to undermine J.L.'s credibility in making her accusations of abuse." (D.C. Doc. 84 at 5.) According to the trial court's reasoning, Davis's testimony was the "type of testimony" that falls plainly within the "ambit of *Scheffelman*," and she did not meet the requisite qualifications to directly comment on a child's credibility under the first prong of *Scheffelman*. (D.C. Doc. 84 at 5.) The trial court noted that although Davis is a psychologist, professor, and faculty member of the National Judicial College who is knowledgeable in the subject of sexual abuse, there was no indication from her CV that she had extensive firsthand experience working with

children who have been sexually abused and non-sexually abused.

(D.C. Doc. 84 at 5.)

Again, the test for admissibility of Dr. Davis's expert testimony is "whether the matter is sufficiently beyond common experience that the opinion will assist the trier of fact." *Durbin v. Ross*, 276 Mont. 463, 469, 916 P.2d 758, 762 (1996) (*citing Jim's Excavating Service v. HKM Assoc.*, 265 Mont. 494, 509, 878 P.2d 248, 257 (1994)).

Just like *Robins*, ¶ 17, and *Berosik*, ¶ 36, Dr. Davis— based on her numerous accolades and years of experience—is a qualified expert under Mont. R. Evid. 702 to provide educational testimony on a topic outside of most jurors' common experience. Her testimony had a solid foundation in social psychology and utilizes accepted publications and studies regarding sexual abuse. *See United States v. Hall*, 974 F. Supp. 1198, 1205 (CD. 111. 1997), aff'd, 165 F.3d 1095 (7th Cir. 1999) ("concluding that the science of social psychology is sufficiently developed in its methods to constitute a reliable body of specialized knowledge under Rule 702"). Dr. Davis's testimony was intended to help the jury comprehend that sometimes children—even nine and

ten-year-olds—make false allegations of sexual abuse. Such testimony did not impinge upon the jury's obligation to ultimately decide J.L.'s credibility; it merely would have allowed the jurors to make an informed decision. *See Robins*, ¶ 17. Instead of erroneously precluding Dr. Davis from testifying, the trial court could have limited her testimony by prohibiting her from commenting directly as to whether J.L. actually made a false report to law enforcement.

The general rule appears to be that psychiatrists and psychologists may not vouch for another witness's truthfulness. Indeed, the law in this area was summed up by the Hawaii Supreme Court:

> Thus, while expert testimony explaining "seemingly bizarre" behavior of child sex abuse victims is helpful to the jury and should be admitted, conclusory opinions that abuse did occur and that the child victim's report of abuse is truthful and believable is of no assistance to the jury, and therefore, should not be admitted. Such testimony is precluded by Rule 702.

State v. Morris, 72 Haw. 527, 528, 825 P.2d 1051, 1052 (1992).

Reams's expert witness was not permitted to explain what studies show about children who have fabricated charges of sexual abuse. Reams could not rebut Samms's suggestion that the forensic interview of J.L. was "a neutral, fact finding, objective interview done by

somebody who's trained to ... to ask questions in a developmentally appropriate manner," (Trial Tr. at 626), with Dr. Davis's expected testimony about how forensic interviewers can influence children through leading questions to falsely report sexual abuse. When Dr. Dutton also testified in unison with Samms that the forensic interviewing process was a neutral fact-finding process, Reams could not controvert this opinion with his own expert to call into question that supposed objectivity.

Dr. Davis's educational testimony was essential to Reams's right to confront the witnesses against him and to mount a meaningful defense. This was especially true in light of the State being allowed the same category of educational testimony from four expert witnesses in comfortable unison suggesting that a forensic interview is a neutral, objective fact-finding process, which uncovered J.L.'s truthful reporting of sexual abuse in a neutral and objective process. The jury was permitted to hear extensive testimony suggesting the objectivity and neutrality of the forensic interview and indirect and direct expert opinion from four experts bolstering J.L.'s credibility. *See State v. Colburn*, 2016 MT 41, ¶ 28, 382 Mont. 223, 366 P.3d 258 (reversing

convictions for incest, rape, and sexual assault where district court precluded relevant evidence regarding a child victim).

C. Not harmless

The erroneous preclusion of Dr. Davis's educational testimony was not harmless. Within the harmless error analysis, the question is not whether this erroneously admitted testimony actually influenced the jury's decision. The question is whether the State can show there is no reasonable possibility that the erroneous exclusion of evidence might have contributed to the conviction. *See State v. Reichmand*, 2010 MT 228, ¶ 23, 358 Mont. 68, 243 P.3d 423; *see also, State v. Van Kirk*, 2001 MT 184, ¶¶ 42-44, 306 Mont. 215, 32 P.3d 735. The Court recently reemphasized that "this is a very high bar." *Reichmand*, ¶ 23.

The State bears the harmless error burden to demonstrate that there is no reasonable possibility that this erroneous preclusion of opinion testimony "might have contributed" to Reams's conviction. *Van Kirk*, ¶ 42. The State will be unable to meet this "very high bar." *Reichmand*, ¶ 23.

In a case entirely dependent upon the jury's evaluation of J.L.'s credibility, the erroneously excluded testimony prejudiced Reams's

defense by placing "a stamp of scientific legitimacy" upon J.L.'s allegation of sexual abuse made in the objective, neutral fact-finding forensic interview. The unfair exclusion also placed a similar stamp of legitimacy on Dutton's expert testimony and elevated the forensic interview process as objective and neutral. *See Harris*, 247 Mont. at 409, 808 P.2d at 455. Excluding Reams's expert while allowing the State to present extensive expert testimony made it impossible to establish the possibility that J.L.'s accusations against Reams could have been fabricated or could have originated with a family member. Again, like the recording in *Reichmand*, ¶ 24, the erroneously excluded opinion testimony here left all the State's expert witnesses with a stamp of scientific legitimacy. The error "provided the jurors with just what they needed in order to fully believe" the State's complaining witness. It is uncontested that the record is devoid of any physical evidence suggesting that Reams sexually assaulted J.L. Here the State exploited the quality of the bolstering statements from the several of its unchallenged expert testimonies and used that consistency and unison in its case-in-chief and in closing. The State will be unable to demonstrate that no reasonable possibility exists that the erroneous

preclusion of the defense's educational testimony might have contributed to Reams's conviction. *State v. McOmber*, 2007 MT 340, ¶ 25, 340 Mont. 262, 173 P.3d 690. Because the State cannot meet its harmless error burden, the error is prejudicial and warrants a remand for a new trial. *Reichmand*, ¶ 27.

A balanced trial would have let Reams put on his own expert testimony explaining the phenomenon of false reporting of sexual abuse in children and the role forensic interviewers can play in leading to such false reporting. Since the district court's ruling led to an unbalanced, unfair presentation of evidence, reversal is required.

CONCLUSION

Reams respectfully requests the Court to remand for a fair trial.

Respectfully submitted this 25th day of February 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,954, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Moses Okeyo
MOSES OKEYO

APPENDIX

Judgment .... App. A

Sentencing Tr. .... App. B

Dr. Deborah Davis Curriculum Vitae .... App. C

CERTIFICATE OF SERVICE

I, Moses Ouma Okeyo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-24-2020:

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