

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0342

STATE OF MONTANA,

Plaintiff and Appellee,

v.

PHILIP BRYSON GRIMSHAW,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable Deborah K. Christopher, Presiding

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STATEMENT OF ISSUES

1. Did the district court abuse its discretion when it allowed the State's blind expert to testify about common behaviors of sexual assault victims and common rape myths, including statistics on false reports?

2. If this testimony was admitted in error, was it harmless trial error because the qualitative impact of the admissible evidence showing the victim did not consent far outweighed the challenged testimony?

STATEMENT OF THE CASE

On December 22, 2016, the Appellant Philip Grimshaw (Grimshaw) was charged with felony sexual intercourse without consent in violation of Mont. Code Ann. § 45-5-503. (D.C. Docs. (Docs.) 1-2.) After a three-day trial, a jury convicted Grimshaw. (Docs. 56.1-56.3, 56.8.) The district court sentenced Grimshaw to 40 years in the Montana State Prison with 20 years suspended. (Doc. 77.) During trial, the State called a blind expert, Dr. Sheri Vanino, who testified about common behaviors of sexual assault victims and rape myths. (Trial Transcript (Tr.) at 341-89.) Grimshaw objected to Dr. Vanino's testimony on statistics. (Tr. at 343-47.) The district court overruled Grimshaw's objection, and on redirect Dr. Vanino testified about the statistical percentage of false reports of sexual

assault. (Tr. at 346-47, 384-87.) Grimshaw argues this statistical testimony prejudiced his right to a fair trial. (Appellant's Br. (Br.) at 1-33.)

STATEMENT OF FACTS

I. The offense

Just before midnight on November 10, 2016, the victim, Tylarann Grimshaw (Tylarann), got off work. (Tr. at 258, 282.) Tylarann had been texting with Grimshaw, the Appellant, who was her cousin and her best friend. (Tr. at 256-57, 286.) Grimshaw texted Tylarann and asked if she wanted to “come party.” (Tr. at 208-09.) Tylarann went to Grimshaw's house. (Tr. at 258-59, 282-86.) About seven or eight people were there playing drinking games, and Tylarann joined in. (*Id.*) After Tylarann had been there for a few hours, she heard yelling and glass break. (Tr. at 259, 286.) Tylarann found Grimshaw in the bathroom with his hand bleeding, because he had punched a picture on the wall. (Tr. at 215, 259, 286; Ex. 12 at 11:15-12:00, 12:55-13:10, 19:10-19:20.)¹

Grimshaw kicked everyone out, and Tylarann suggested they go for a drive to calm him down. (Tr. at 259-60; Ex. 12 at 13:30-13:40.) They brought a 12-pack of Twisted Tea and drove to the gravesite of Grimshaw's father. (Tr. at 260-61,

¹ Ex. 12 is the audio recording of Grimshaw's statement, which was admitted and played for the jury. (Tr. at 215.)

288-89; Ex. 12 at 13:40-13:50.) They had done this many times since Grimshaw's father passed away a few years before. (Tr. at 257, 261, 287-89; Ex. 12 at 10:30-10:50.) They sat at the gravesite for about an hour and talked, drank, and smoked a few cigarettes. (Tr. at 261, 290.) Tylarann felt safe, because she had known Grimshaw since they were kids. (Tr. at 256, 262, 290.) They left the gravesite around 4 a.m., on November 11, 2016, and continued to drive around, drink, and smoke marijuana. (Tr. at 262-63, 290-92.) They briefly stopped at a friend's house and then went to Tylarann's house around 6 a.m. (Tr. at 209, 263, 292-94; Ex. 12 at 14:00-14:10.)

Tylarann and Grimshaw sat on the couch for a short period of time to watch television. (Tr. at 264, 294; Ex. 12 at 14:00-14:10.) Tylarann got up, gave Grimshaw a pillow and a blanket, and went upstairs to bed. (Tr. at 264.) At 6:27 a.m., Grimshaw texted Tylarann "Goodnight beautiful." (Tr. at 209.) Tylarann responded "goodnight love." (*Id.*) Grimshaw then texted "Goodnight darlin can I come cuddle with you? I mean if it's not to [sic] much." (*Id.*) Tylarann testified she did not respond, because she had fallen asleep. (Tr. at 209, 264, 302.) The next thing Tylarann remembered was Grimshaw pulling her pants down and penetrating her anus with his penis. (Tr. at 264-65.) Tylarann tilted forward and told Grimshaw "no." (Tr. at 265.) Grimshaw then flipped Tylarann over and penetrated her vagina

with his penis. (*Id.*) Tylarann did not say anything at that point, and Grimshaw began to choke her with one hand. (Tr. at 265-66.) Tylarann was pinned to the bed. (*Id.*)

Tylarann blacked out for a moment, and when she regained consciousness Grimshaw had stopped vaginally raping her. (Tr. at 266-67.) Grimshaw then grabbed the back of Tylarann's head and put his penis in her mouth. (Tr. at 267.) Tylarann immediately took it out. (*Id.*) Neither of them said anything. (*Id.*) Tylarann waited until Grimshaw passed out. (Tr. at 267-68.) Tylarann grabbed her pants off the floor and went downstairs. (Tr. at 268.) She was scared and confused. (*Id.*) She eventually fell asleep on the couch. (*Id.*) Tylarann awoke when Grimshaw came downstairs. (Tr. at 268-69, 295.) Grimshaw was dressed, and he told Tylarann he was going outside to smoke a cigarette. (*Id.*)

Grimshaw texted Tylarann at 2:31 p.m., which led to the following exchange. (Tr. at 205-06 (Exs. 1-11), 209-12, 269-71.)

G: I'm sorry about last night. I love you darling. I know you probably never want to talk to me after what happen.

T: It's ok. I love you to. Where did you go?

G: I feel like i had to leave

T: Um ok.

G: So I started walking home

T: [Thumbs up emoji]

G: Do you hate me?
T: Did I say that?
G: Just making sure.
T: Fucked up though.
G: I feel ya
T: Yep.
G: I'm still hella drunk
T: Jeez
G: Yeah I love you.
T: I love ya to.

(Tr. at 209-10, 269-71 (typographical errors in original text messages).) Tylarann testified it was “[f]ucked up” because they were cousins and Grimshaw raped her. (Tr. at 271.)

Tylarann did not immediately report the rape. (Tr. at 272.) She was scared and was unsure what to do. (*Id.*) Tylarann was worried about impacting the family dynamic and losing her best friend. (Tr. at 272-73.) Ten days after the rape, Tylarann went to the hospital for a migraine headache that was causing her to vomit. (Tr. at 273-74, 296-305.) Tylarann had hit her head during a car accident that occurred after the rape. (Tr. at 297-99.) Tylarann’s mother went with her to the hospital. (Tr. at 274, 308-09.) Tylarann did not tell the doctor who treated her for

the migraines about the rape. (Tr. at 274-75, 297-306.) Throughout the week prior, Tylarann's mother had been asking her what was wrong, but Tylarann had avoided her phone calls and avoided addressing the "whole situation." (Tr. at 274.) While in the hospital, Tylarann told her mother about the rape. (Tr. at 274, 304, 307.)

Tylarann was examined by a sexual assault nurse. (Tr. at 242-54, 275-77, 304-05.) Tylarann gave the nurse a narrative description of the rape. (Tr. at 246.) The nurse ordered an MRI due to the strangulation and performed a physical exam. (Tr. at 275-76, 304-05.) Tylarann reported vaginal and rectal pain, but the nurse did not find any visible injuries on Tylarann's body. (Tr. at 246-50, 253-54.) The physical exam was limited because ten days had passed since the assault. (Tr. at 245-47, 250-51.) Tylarann was interviewed by law enforcement at the hospital and again later by a detective at the police station. (Tr. at 276-78.) After Tylarann was released from the hospital, she received counseling and medication for depression. (Tr. at 278-80, 300-03, 309-10.) She could not maintain her employment, because she was "missing too much work between counseling and the stress of all of it." (Tr. at 279-80.)

Grimshaw agreed to give a statement. (Tr. at 202-04, 212-15, 324.) Two detectives were present for the interview. (Ex. 12 at 5:20-30:00.) Grimshaw initially downplayed his relationship with Tylarann and denied having sex with her. (Ex. 12 at 14:10-14:25.) After the detective told Grimshaw that Tylarann said

some things happened she was not happy about, Grimshaw said he blacked out that night. (Ex. 12 at 14:25-14:40.) Grimshaw said he could have had sex with Tylarann. (Ex. 12 at 15:55-16:00.) The detective showed Grimshaw the text messages. (Ex. 12 at 16:00-17:00.) In response, Grimshaw admitted Tylarann had told him after they woke up that they had sex and it was something she did not want to have happen. (*Id.*) Grimshaw said he told Tylarann that morning that he was sorry and did not have any recollection of them having sex. (*Id.*)

Grimshaw said Tylarann told him “shit happened last night, yeah it might’ve been a little, kind of, rape, deal, yeah.” (Ex. 12 at 18:10-18:30.) Grimshaw then said, he did remember going upstairs and cuddling with her, and Tylarann was awake but intoxicated. (Ex. 12 at 18:25-18:50.) He said the next thing he remembered was waking up in her bed, and he realized they had sex because his clothes were all scattered. (Ex. at 18:45-19:00.) Grimshaw said he went downstairs, woke up Tylarann, and apologized for having sex with her. (Ex. 12 at 19:00-19:15.) Tylarann told Grimshaw about the sex, and Grimshaw said she told him that “she didn’t want to, that’s for sure, I know for a fact she didn’t want to.” (Ex. 12 at 19:20-19:55.) Grimshaw said Tylarann did not tell him that she woke up to him having anal sex with her or that he choked her. (Ex. 12 at 19:50-20:20.)

The detective asked Grimshaw if he looked back at what happened what did he feel it was. (Ex. 12 at 22:10-22:20.) Grimshaw responded “Rape. I mean, yeah,

I, I did something that she didn't want, and I did it forcibly, yeah.” (Ex. 12 at 22:15-22:45.) Grimshaw said he regretted it then said “Actually, I, I'm gonna be really truthful, I do remember a lot of that night.” (Ex. 12 at 22:45-22:55.)

Grimshaw said he remembered going to Tylarann's house, laying on her couch, her going upstairs, texting her, going up and laying in her bed, and “cuddling” with her. (Ex. 12 at 22:55-23:05.) Grimshaw said he started feeling Tylarann up, she started feeling him up, and he remembered having sex. (Ex. 12 at 23:05-23:10.) He remembered falling asleep, waking up, going downstairs to apologize, and then walking home. (Ex. 12 at 23:10-23:25.)

Grimshaw said he did not forcibly pick Tylarann up and rip her clothes off, she was awake when they had sex, and he was pretty sure she wanted to have sex at the time. (Ex. 12 at 23:25-24:55.) Grimshaw did not remember Tylarann saying no. (Ex. 12 at 24:55-25:30.) Grimshaw said he knew after the fact that Tylarann did not want to have sex, but he did not know what Tylarann was thinking at the time. (Ex. 12 at 24:30-24:55.) However, Grimshaw also said they had previously discussed their feelings for each other, and Tylarann said they “could never be anything, [they] could never do anything.” (Ex. 12 at 25:45-26:10.) Grimshaw acknowledged he should not have gone in to Tylarann's bedroom. (Ex. 12 at 23:40-23:55.)

Grimshaw said he did not remember choking Tylarann, but it was possible he did in a sexual way, and he did not remember having anal sex with her. (Ex. 12 at 27:30-29:00.) Grimshaw said he just remembered having sex. (Ex. 12 at 28:35-29:00.) Grimshaw said he believed Tylarann was telling the truth, and that she would probably have the more accurate version of the night. (Ex. 12 at 27:25-29:05.) Grimshaw told the detective to tell Tylarann he was sorry, and he did not mean to hurt her. (Ex. 12 at 29:00-29:50.) The detectives arrested Grimshaw after he provided his statement. (Tr. at 216; Ex. 12 at 1:00:00-1:00:53.) Law enforcement seized bedding and clothing from Tylarann's house but did not submit it to the crime lab for testing, because both parties agreed sexual intercourse occurred. (Tr. at 219-220.)

II. The trial

Grimshaw's defense at trial was that Tylarann consented to the sex and made a false allegation of rape, because she was ashamed that she had sex with her cousin. (Tr. at 154, 156-57, 172-74, 196-99, 441-56.) Grimshaw referenced false accusations of crimes during voir dire, and he explained a theory of Tylarann's consent to the sex and subsequent regret during his opening statement. (Tr. at 154, 156-57, 172-74, 196-99.) The State called Dr. Vanino as a blind expert. (Tr. at 340.) During its opening statement, the State said Dr. Vanino would "testify about

Tylarann’s delay in disclosure.” (Tr. at 194.) “She will tell you it’s common for rape victims to wait for several days before telling anyone about a rape.” (*Id.*)

During her testimony, Dr. Vanino said she was not opining on the merits of the case or identifying a victim or perpetrator, because she had limited knowledge of the facts of the case. (Tr. at 340-42.) She described the purpose of her testimony was to “educate the jury about sexual assault and victim behavior.” (Tr. at 340.)

Dr. Vanino described general myths in sexual assault cases, including the testimony that caused Grimshaw’s trial counsel to object. (Tr. at 341-89.)

[Dr. Vanino]: another one is that victims—or, I’m sorry, that women tend to run around and falsely accuse people of rape, or cry rape all the time, which is really not supported.

And so, most women don’t report.

MR. van der HAGEN: Your Honor, I’m going to object to that. That’s—*State v. Brodniak*, if you start talking about statistics or what’s common or what’s not common on false reports.

MR. BALL: Well, Your Honor, I think he might be misinterpreting that case a little bit. I don’t think that’s about statistics necessarily. It’s about giving an opinion on a specific case or a specific victim, which she is not going to.

THE COURT: As long as her comments are with regard to the myths, I’ll allow the witness to testify.

So the objection is overruled.

Q (By Mr. Ball): Okay. So I think you were talking about false reporting when you were interrupted, and how that's a myth. What are the—so how—what does entail a false report, or how common is that?

Sorry. Is that confusing?

A: Am I allowed to answer that?

Q: Go ahead.

A: Okay. So, the myth, again, is that it's common for women to run around and cry rape, when in reality, the bigger issue is that most people aren't reporting at all. It's not that people are falsely running around crying rape for attention. That's actually not common at all for people to run around doing it for attention.

Most people do not want to be associated with sexual assault. Certainly it can happen. But most women feel so shamed, and it's so humiliating that it's not something most people want to raise their hand and get attention for.

(Tr. at 343-44.)

The State then asked a question about the research on delayed disclosures.

(Tr. at 344-45.) Dr. Vanino asked if she could talk about statistics, and Grimshaw

renewed his objection under *State v. Brodniak*, 221 Mont. 212, 718 P.2d 322

(1986) and Mont. R. Evid. 702. (Tr. at 345-47.) The district court overruled

Grimshaw's objection, because Dr. Vanino's testimony was limited to general

behavior and common myths, to which Grimshaw's expert could also testify. (Tr.at

346-47.) The district court said both experts could testify without specifically

referencing this case, and the jury could weigh the testimony. (Tr. at 347.)

Dr. Vanino then testified that “between 16 and 20 percent of sexual assault survivors don’t ever tell anyone.” (Tr. at 347-48.) During the State’s direct examination of Dr. Vanino, this was the only statistic discussed and no further testimony was elicited regarding false reports. (Tr. at 341-68.)

During cross-examination, Grimshaw asked Dr. Vanino about various sexual assault myths, and Dr. Vanino relied on research statistics to support her testimony. (Tr. at 371-84.) In response to Grimshaw’s questioning, Dr. Vanino testified about 19 percent of sexual assault victims fight back. (Tr. at 373.) Dr. Vanino acknowledged this statistic alone does not show whether a person is a sexual assault victim, and she testified reverse logic cannot be applied to any statistical data to prove someone is a sexual assault victim. (Tr. at 374.) Dr. Vanino reiterated her role as a blind expert was to educate the jury and not to give an opinion on whether the victim was or was not sexually assaulted. (Tr. at 375-77.) Grimshaw repeatedly asked Dr. Vanino about false reporting. (Tr. at 372-84.) Near the end of the cross-examination, Grimshaw had the following exchange with Dr. Vanino.

Q: Okay. Simply because they reported it doesn’t mean that there’s a sexual assault that occurred; is that correct?

A: Well, I’m happy to talk to you about the false reporting statistics if I’m allowed to get into that because that’s [sic] sounds like what you’re asking about.

Q: What I'm asking you about is Have there been studies that determine—well, there's still not an adjudication; correct?

A: —so.

Q: Sixteen to 20 percent report. Approximately 80, 84 percent don't report.

A: Correct.

Q: Of the 80, 84 percent that don't report, we don't have an adjudication on whether or not it happened; is that correct? We don't have a trial here before a jury; is that correct?

A: Sure.

(Tr. at 383.)

On redirect, the State asked Dr. Vanino about the false reporting statistics.

(Tr. at 384.) Dr. Vanino testified between “two and eight percent of sexual assault cases end up to be false reporting.” (*Id.*) She explained that people who false report typically include details consistent with other rape myths. (Tr. at 385-87.) “I tried to fight back tooth and nail. There was a gun. It was a stranger, all that kind of stuff.” (Tr. at 386.) Dr. Vanino said details that are common in most rape cases are not included in false reports, because they are embarrassing. (Tr. at 386-87.) “[I]t was my father, or, you know, I didn't really fight back, or maybe it was my fault, or, you know, what I was really drunk, so maybe it was my fault.” (*Id.*)

The only witness called by Grimshaw was a rebuttal expert, Dr. Bowman Smelko. (Tr. at 390-418.) During Grimshaw's direct examination of Dr. Smelko, Dr. Smelko addressed the myths and statistics cited by Dr. Vanino and reiterated that reverse logic should not be used to support the veracity of a particular victim. (*Id.*) Dr. Smelko acknowledged the validity of the statistics for delayed disclosure (16 to 20 percent) and false reporting (2 to 8 percent), but he noted the delayed disclosure statistics are based on limited samples and the false reporting statistics are difficult to independently verify. (Tr. at 399-406.) During cross-examination, Dr. Smelko testified the false report statistics are accurate "[i]f you are considering lying alone." (Tr. at 410.)

The State did not reference any statistical data during its primary closing argument. (Tr. at 434-41.) The State referenced Dr. Vanino's testimony only to explain Tylarann's apprehension to tell the emergency room doctor about the rape. (Tr. at 436.) Grimshaw's closing described consensual sex that Tylarann regretted, and he argued Tylarann made up the rape to avoid explaining to her mother and her family that she had sex with her cousin. (Tr. at 441-56.) Grimshaw's counsel said, "it's a false allegation" and Tylarann made a "false report." (Tr. at 451-52.) In its rebuttal closing, the State reiterated that Tylarann did not consent to the sex, explained Tylarann had nothing to gain from making a false rape report, and

referenced Dr. Vanino's testimony on false reports, including the statistic that two to eight percent of sexual assault reports are false. (Tr. at 456-460.)

SUMMARY OF ARGUMENT

The district court did not abuse its discretion by admitting Dr. Vanino's testimony regarding general behaviors of sexual assault victims and common rape myths according to scientifically collected and unequivocally reliable data, including the false report statistics. Dr. Vanino's testimony assisted the jury to understand Tylarann's actions and it went to facts in issue to address Grimshaw's consent defense. Dr. Vanino's testimony, as a blind expert, did not invade the province of the jury, because she did not comment or offer an opinion on the credibility of Tylarann or Grimshaw. Dr. Vanino did not interview Tylarann or Grimshaw, and she repeatedly testified the statistics alone did not support a conclusion that Tylarann was raped or that she was telling the truth.

Dr. Vanino did not testify to the false report statistics until the State's redirect, after Grimshaw had repeatedly referenced false allegations throughout trial and questioned Dr. Vanino about false reports and statistics during cross-examination. The district court properly exercised its broad discretion to admit all relevant expert testimony, and the jury had testimony from both Dr. Vanino and Dr. Smelko, which they could weigh to assess the credibility of each witness.

If this Court holds the district court erred in admitting the statistical testimony, it was harmless trial error, because it did not prejudice Grimshaw's right to a fair trial. The jury was presented with significant admissible evidence to support its finding that Tylarann did not consent. Tylarann maintained she did not consent from the day of the rape to her testimony at trial. Grimshaw referred to the sexual encounter as "[r]ape," noting "I mean, yeah, I, I did something that she didn't want, and I did it forcibly, yeah." (Ex. 12 at 22:10-22:45.) The text messages support Tylarann's testimony that she was asleep when Grimshaw started having sex with her and show Grimshaw went to Tylarann's bedroom without regard to her consent, later apologized, and agreed it was "[f]ucked up." (Tr. at 209-10.) Grimshaw's limited denials are further undermined by his endorsement that Tylarann was telling the truth and her account would be more accurate.

The qualitative impact of the admissible evidence that Tylarann did not consent far outweighed the impact of Dr. Vanino's testimony on false report statistics, which she repeatedly testified could not be used to assess the credibility of Tylarann or Grimshaw. Grimshaw's conviction should be affirmed, because the challenged evidence, if admitted in error, did not prejudice his right to a fair trial.

ARGUMENT

I. Standard of review

“A district court is vested with broad discretion in ruling on the admissibility of expert testimony, and without a showing of abuse of discretion, the district court’s ruling will not be disturbed on appeal.” *State v. St. Germain*, 2007 MT 28, ¶ 14, 336 Mont. 17, 153 P.3d 591 (citing *State v. Riggs*, 2005 MT 124, ¶ 18, 327 Mont. 196, 113 P.3d 281; *State v. Crawford*, 2003 MT 118, ¶ 30, 315 Mont. 480, 68 P.3d 848; *State v. Hocevar*, 2000 MT 157, ¶ 54, 300 Mont. 167, 7 P.3d 329).

II. The district court did not abuse its discretion in allowing Dr. Vanino’s testimony on sexual assault myths and research statistics, because it assisted the jury and did not invade the province of the jury.

“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 thereto in the form of an opinion or otherwise.” Mont. R. Evid. 702. However, “the determination of the credibility of witnesses and the weight to be given their testimony is solely within the province of the jury.” *State v. Hayden*, 2008 MT 274, ¶ 26, 345 Mont. 252, 190 P.3d 1091 (quoting *State v. Brodniak*, 221 Mont. 212, 222, 718 P.2d 322, 329 (1986)).

In *State v. Walker*, 2018 MT 312, ¶¶ 26-48, 394 Mont. 1, 433 P.3d 202, this Court held the district court did not abuse its discretion in excluding expert testimony that the defendant’s psychosexual profile did “not fit into a class of offenders who are sexually interested in children.” The testimony invaded the province of the jury, because it “would lead the jury to inevitably conclude that because [the defendant] is not sexually interested in children, he is credible and believable; and that, because [the defendant] is not sexually interested in children, he is not guilty.” *Id.* This Court clarified its decision did “not foreclose an expert from testifying about the behavior and patterns of others in similar circumstances, as substantiated by scientifically collected data, to help explain the defendant’s actions to the jury in the case before the trial court.” *Id.* ¶ 46.

Here, Dr. Vanino testified to general behaviors of sexual assault victims and common rape myths according to scientifically collected data, including the false report statistics, which both Dr. Vanino and Grimshaw’s expert, Dr. Smelko, agreed were reliable. *See Walker*, ¶ 46. Dr. Vanino’s testimony had a similar purpose to expert testimony on battered woman syndrome, which this Court in *Walker*, ¶ 42, deemed appropriate under Mont. R. Evid. 702, and other evidentiary rules, to explain the “consistencies between other abuse victims who have battered woman syndrome and the behavior of the particular woman.” *Walker*, ¶ 42. The testimony “assists the jury in understanding the woman’s actions.” *Id.*

Dr. Vanino's testimony assisted the jury in understanding Tylarann's actions, it went to facts in issue to address Grimshaw's defense that Tylarann made up the rape, and her testimony was even more limited than the battered woman syndrome testimony described in *Walker*, ¶ 42. Dr. Vanino was a blind expert, and she did not offer an opinion on the credibility of Tylarann or Grimshaw. Unlike the expert in *Walker*, ¶¶ 42-48, Dr. Vanino had limited knowledge of the facts, she did not interview Tylarann or Grimshaw, and she repeatedly testified the statistics alone did not support a conclusion that Tylarann was raped or that she was telling the truth. For these same reasons, these facts are distinguishable from the exclusion of polygraph evidence in *Walker*, ¶¶ 13-24, which has long been held to be unreliable, and this Court's holding in *Brodniak*, 221 Mont. 212, 718 P.2d 322.

In *Brodniak*, 221 Mont. at 217-19, 718 P.2d at 326-27, this Court affirmed its holding in *State v. Liddell*, 211 Mont. 180, 188, 685 P.2d 918, 923 (1984), that expert testimony on rape trauma syndrome was appropriate in sexual intercourse without consent cases when, as here, consent is the only element in dispute. However, the expert in *Brodniak*, 221 Mont. at 219-22, 718 P.2d at 327-29, who had personally interviewed the victim, expanded his testimony beyond rape trauma syndrome to opine the victim was not malingering (lying), and he relied on the statistic that roughly two percent of rape reports are unfounded to support his conclusion. The State elicited this testimony during its direct examination of the

expert. *Id.* This Court held the “testimony with regard to malingering and the statistical percentage of false accusations was improper,” but the error was harmless. *Brodniak*, 221 Mont. at 222-23, 718 P.2d at 329 (the overwhelming evidence test for harmless error, as applied, was overruled by *State v. Van Kirk*, 2001 MT 184, ¶ 43, 306 Mont. 215, 32 P.3d 735).

Grimshaw asks this Court to expand its holding in *Brodniak*, 221 Mont. at 222-23, 718 P.2d at 329, to generally prohibit unequivocally reliable statistical evidence of sexual assault reports under Mont. R. Evid. 702. This ignores the significance of the expert’s opinion in *Brodniak*, 221 Mont. at 219-22, 718 P.2d at 327-29, that the victim was not lying. Grimshaw relies on a variety of non-binding authority to support his request, (Br. at 17-18), but three of these cases, like *Brodniak*, 221 Mont. at 219-22, 718 P.2d at 327-29, are based on an expert’s direct comment on the facts of the case or the credibility of a victim. *Snowden v. Singletary*, 135 F.3d 732, 737-38 (11th Cir. 1998) (the prosecutor’s questions “were linked to the expert’s interviews with a specific child who testified at the trial”); *Louisiana v. Vidrine*, 9 So. 3d 1095, 1109-11 (La. Ct. App. 2009) (the expert’s opinion relied on an evaluation of the victim’s testimony and spoke directly to the facts of the case); *State v. Chancy*, 391 N.W.2d 231, 234 (Iowa 1986) (distinguishing *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986)) (“[Myers] involved a direct comment by an expert on the credibility of a witness”).

Dr. Vanino did not comment on the facts of the case, and she repeatedly explained she could not, as a blind expert, comment on the credibility of Tylarann or Grimshaw. The district court allowed Dr. Vanino to testify on general behaviors and common myths, which both experts could address without specifically referencing the case. (Tr. at 347.) As the district court noted, “whether that information applies in this case or not will be left to the jury for their determination.” (*Id.*) Similarly, this Court noted in *Walker*, ¶ 23, “the trial process—counsel’s presentation of evidence and examination and cross-examination of witnesses—allows the jury to assess the credibility of each witness and arrive at a collective judgment of guilt or innocence.”

A district court should not be held in error when it exercises discretion pursuant to this Court’s directives, which encourage “district courts to ‘construe liberally the rules of evidence so as to admit all relevant expert testimony,’ subject to ‘stringent cross-examination.’” *State v. Colburn*, 2016 MT 41, ¶ 8, 382 Mont. 223, 366 P.3d 258 (quoting *State v. Damon*, 2005 MT 218, ¶ 19, 328 Mont. 276, 119 P.3d 1194; *Beehler v. E. Radiological Assoc.*, 2012 MT 260, ¶ 23, 367 Mont. 21, 289 P.3d 131). During Grimshaw’s cross-examination, Dr. Vanino reiterated the statistical data did not prove any given person was a sexual assault victim and the purpose of her testimony was not to say if “this person was or was not sexually assaulted.” (Tr. at 374-75.) Further, Grimshaw’s expert, Dr. Smelko, testified the

statistics were accurate, but alone they do not prove any particular victim is telling the truth. The district court properly exercised its discretion by allowing Dr. Vanino's testimony, subject to Grimshaw's stringent cross-examination, and allowing Grimshaw to call his own expert to address Dr. Vanino's testimony. *See Walker*, ¶ 23; *Colburn*, ¶ 8.

Grimshaw's reliance on *Brodniak*, 221 Mont. at 219-22, 718 P.2d at 327-29, also ignores the context of the admission of Dr. Vanino's testimony on the false report statistics. In *Brodniak*, 221 Mont. at 219-22, 718 P.2d at 327-29, the State elicited the expert's testimony during its direct examination. Here, Dr. Vanino did not testify to the statistics of false reports until the State's redirect of Dr. Vanino. This was after Grimshaw's repeated references to false allegations during voir dire, his story to the jury during his opening statement that Tylarann regretted her decision to have consensual sex with her cousin, and his repeated questioning of Dr. Vanino about false reports and statistics during cross-examination, including the following exchange.

Q: Okay. Simply because they reported it doesn't mean that there's a sexual assault that occurred; is that correct?

A: Well, I'm happy to talk to you about the false reporting statistics if I'm allowed to get into that because that's [sic] sounds like what you're asking about.

(Tr. at 383.)

“When one party opens the door, or broaches a certain topic that would otherwise be off limits, ‘the opposing party has the right to offer evidence in rebuttal, including evidence of other acts.’” *State v. Guill*, 2010 MT 69, ¶ 39, 355 Mont. 490, 228 P.3d 1152 (quoting *State v. Veis*, 1998 MT 162, ¶ 18, 289 Mont. 450, 962 P.2d 1153). “A party may open the door to a given subject during its opening statement.” *Guill*, ¶ 39. “A party may rebut an allegation of bias by offering testimony to explain the initial suggestion or correct a false impression given by the other party.” *Id.* “District courts have broad discretion to determine the extent to which a party may respond once the other party opens the door.” *Id.*

From the beginning, Grimshaw’s defense was that Tylarann made up the rape. The State had a right to rebut Grimshaw’s defense, and the State did not elicit the statistical data challenged on appeal until its redirect of Dr. Vanino. *See id.* After Grimshaw repeatedly accused Tylarann of making up the rape and repeatedly questioned Dr. Vanino about the statistical data’s correlation to false reports, it was appropriate for the State to ask Dr. Vanino to testify to the false report statistics on redirect. *Id.* Grimshaw then called his expert, who verified the reliability of the statistics referenced by Dr. Vanino and reiterated Dr. Vanino’s testimony that the statistics alone do not prove Tylarann was telling the truth.

The district court properly exercised its discretion by allowing Dr. Vanino’s testimony, because it assisted the trier of fact and it did not invade the jury’s

obligation to assess the credibility of the victim and Grimshaw. The State did not introduce the statistical testimony until after Grimshaw opened the door, and the jury had testimony from both Dr. Vanino and Dr. Smelko, which they could weigh to assess the credibility of each witness and arrive at a verdict.

III. If this Court holds the district court erred, it is harmless trial error, because it did not prejudice Grimshaw’s right to a fair trial.

“A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial.” Mont. Code Ann. § 46-20-701(1). This Court has adopted “a two-step analysis to determine whether the alleged error prejudiced the criminal defendant’s right to a fair trial and is therefore reversible.” *Van Kirk*, ¶ 37. Structural errors are presumptively prejudicial, while trial errors, which occur during the presentation of a case to the jury, are subject to harmless error review. *Id.* ¶¶ 37-39. The evidentiary error alleged by Grimshaw is a trial error. *Id.* ¶¶ 41-42.

This Court determines if an error is harmless with the cumulative evidence test. *State v. Stewart*, 2012 MT 317, ¶ 46, 367 Mont. 503, 291 P.3d 1187 (citing *Van Kirk*, ¶¶ 41, 43; *State v. Derbyshire*, 2009 MT 27, ¶ 47, 349 Mont. 114, 201 P.3d 811). “If the tainted evidence was admitted to prove an element of the offense, then the State must direct us to admissible evidence that proves the same

facts as the tainted evidence and demonstrate that the quality of the tainted evidence was such that there was no reasonable possibility it might have contributed to the conviction.” *Stewart*, ¶ 46 (citing *Derbyshire*, ¶¶ 47, 54). Grimshaw agrees this harmless error test applies in this case. (Br. at 23-24 (citing *Van Kirk*, ¶ 44).)

The only element in dispute during Grimshaw’s trial was consent, and Grimshaw argues Dr. Vanino’s testimony on the false report statistics prejudiced his right to a fair trial by improperly bolstering Tylarann’s testimony that she did not consent. This evidence did not prejudice Grimshaw’s right to a fair trial, because the qualitative impact of Dr. Vanino’s testimony is low compared to the cumulative admissible evidence that proved Tylarann did not consent. *See Stewart*, ¶ 46.

1. The jury was presented with substantial admissible evidence that proved Tylarann did not consent.

Tylarann testified Grimshaw was her cousin, her best friend and like a brother. Tylarann explained she had spent the early morning hours prior to the rape with Grimshaw, trying to comfort him about the death of his father. After visiting the grave of Grimshaw’s father, which is something they did frequently, she drove around with Grimshaw talking and drinking. After they returned to her house, she left Grimshaw with a pillow and a blanket on her couch and went upstairs to bed. Tylarann awoke to Grimshaw pulling her pants down and anally raping her.

Tylarann said she told Grimshaw no. Grimshaw flipped her over, choked her, vaginally raped her, then tried to put his penis in her mouth, which she removed. Grimshaw passed out, and Tylarann went downstairs. After Grimshaw woke up in Tylarann's bed, he came downstairs and apologized to Tylarann.

Grimshaw's statement to detectives supports Tylarann's testimony that she did not consent to having sex with Grimshaw. Grimshaw began his statement by lying to the detectives about his relationship with Tylarann and lying about having sex with her. However, after a detective showed Grimshaw a text message exchange that occurred before and after the rape, Grimshaw admitted he was close with Tylarann and that he had sex with her. Grimshaw said Tylarann told him the morning after that "shit happened last night, yeah it might've been a little, kind of, rape, deal, yeah." (Ex. 12 at 18:10-18:30.) Later, Grimshaw told the detectives he felt like what he did was "Rape. I mean, yeah, I, I did something that she didn't want, and I did it forcibly, yeah." (Ex. 12 at 22:10-22:45.) Grimshaw then told the detectives he was going to be "really truthful" and said he did remember "a lot of that night," including having sex with Tylarann. (Ex. 12 at 22:45-22:55.)

Grimshaw told the detectives Tylarann was awake, and he was pretty sure she wanted to have sex at the time. The text messages, however, support Tylarann's testimony that she was asleep when Grimshaw began having sex with her and show Tylarann did not invite Grimshaw into her bed despite his request to

“come cuddle.” (Tr. at 209.) After Tylarann went upstairs Grimshaw texted her “Goodnight beautiful.” (Tr. at 209.) Tylarann responded “goodnight love.” (*Id.*) Grimshaw then texted “Goodnight darlin can I come cuddle with you? I mean if it’s not to [sic] much.” (*Id.*) Tylarann did not respond. (*Id.*) Tylarann testified this was because she had fallen asleep. (Tr. at 264, 302.) The lack of response not only supports Tylarann’s testimony that she was asleep but shows Grimshaw decided to have sex with Tylarann without regard to her consent. Grimshaw acknowledged in his statement that he should not have got in Tylarann’s bed.

In his statement, Grimshaw endorsed Tylarann’s testimony by saying her version of the night was more accurate. Grimshaw informed the jury he knew Tylarann did not want to have sex with him before the rape, pursuant to previous conversations, and Tylarann told him after he woke up that she did not consent to the sex. Grimshaw said “she didn’t want to, that’s for sure, I know for a fact she didn’t want to.” (Ex. 12 at 19:20-19:55.) Tylarann consistently maintained that she did not consent from the day of the rape to trial, including her statements to Grimshaw, the emergency room nurse, the patrol officer, the detective, and the jury during her testimony.

Grimshaw’s repeated apologies to Tylarann show Grimshaw understood Tylarann did not consent. Grimshaw said in his statement that he apologized to Tylarann the next morning and left. Grimshaw apologized again in a text message:

“I’m sorry about last night. I love you darling. I know you probably never want to talk to me after what happen [sic].” (Tr. at 209-10.) During the exchange Grimshaw asked “Do you hate me?” and Tylarann texted Grimshaw “Fucked up though.” (Tr. at 210.) Grimshaw responded “I feel ya.” (*Id.*) Tylarann testified she said it was “Fucked up” because Grimshaw, her cousin, raped her. (Tr. at 210, 271.) Grimshaw again apologized during his statement when he asked the detectives to tell Tylarann he was sorry, and he did not mean to hurt her.

The jury was presented with significant admissible evidence to support its finding that Tylarann did not consent.

2. Given the quality of the trial testimony and other admissible evidence, no reasonable possibility exists that the qualified statistical testimony contributed to Grimshaw’s conviction.

The qualitative impact of the admissible evidence proving Tylarann did not consent far outweighed the impact of Dr. Vanino’s testimony on false report statistics. *See Stewart*, ¶¶ 45-51. The jury heard, from both Tylarann and Grimshaw, that Tylarann did not consent. Grimshaw asks this Court to minimize the quality of his statements that “yeah it might’ve been a little, kind of, rape, deal, yeah,” (Ex. 12 at 18:10-18:30), and his description of the sex as “Rape. I mean, yeah, I, I did something that she didn’t want, and I did it forcibly, yeah.” (Ex. 12 at 22:10-22:45.) Grimshaw describes his statement as “confused,” and argues he contradicted Tylarann’s testimony that she was asleep and that she said no. (Br. at

27.) But Grimshaw ignores his statement to the detectives that he thought Tylarann was telling the truth and she would have the more accurate version of the encounter. Grimshaw cannot ignore these facts or remove them from the record.

The qualitative impact of Grimshaw's admissions is exceptionally high, because he endorsed Tylarann's testimony that she did not consent. *See Stewart*, ¶¶ 45-51. Grimshaw said "she didn't want to, that's for sure, I know for a fact she didn't want to." (Ex. 12 at 19:20-19:55.) Aside from Grimshaw's endorsement, the qualitative reliability of Tylarann's testimony is high, because she maintained that she did not consent from the moment she discussed it with Grimshaw to her testimony at trial. *See Stewart*, ¶¶ 45-51. The text messages, which Grimshaw wholly ignores on appeal, further endorse the qualitative reliability of Tylarann's testimony that she was asleep when Grimshaw started having sex with her. *See id.* Despite responding to Grimshaw's first text message moments before the rape, Tylarann did not respond to Grimshaw's request to "come cuddle." (Tr. at 209.) This cumulative evidence undermines Grimshaw's denial that Tylarann was asleep and shows Grimshaw went to Tylarann's bedroom to have sex with her with no regard for her consent. *See Stewart*, ¶¶ 45-51.

The text messages further support the qualitative reliability of Tylarann's testimony, because Grimshaw said "I know you probably never want to talk to me after what happen [sic]," and Grimshaw asked Tylarann "Do you hate me?" (Tr. at

209-10.) Tylarann said it was “Fucked up though” and Grimshaw responded “I feel ya.” (Tr. at 210.) Grimshaw argues the lack of physical injuries to Tylarann support Grimshaw’s consent defense, and he distinguishes the harmless error holding in *Brodniak*, 221 Mont. at 214-16, 223, 718 P.2d at 324-25, 329, on these grounds. However, the absence of physical injuries is of little qualitative impact, because the nurse who examined Tylarann testified the exam was limited due to the ten-day delay. *See Stewart*, ¶¶ 45-51.

Considering the high qualitative impact of the admissible evidence showing Tylarann did not consent, the qualitative impact of Dr. Vanino’s testimony on false report statistics is low. *Id.* This impact was further diminished by Dr. Vanino’s consistent and repeated testimony the common behaviors and rape myths, including the false report statistics, could not be used to assess the credibility of Tylarann or Grimshaw, because she did not know either of them and did not know the facts of the case. *Id.* Dr. Vanino reiterated during cross-examination the false report statistics do not show Tylarann was telling the truth, and Grimshaw’s expert, Dr. Smelko, reiterated the limitations of the statistical testimony, including the inability of false report statistics to show a particular victim was telling the truth.

Despite this Court’s application of the overwhelming evidence test in *Brodniak*, 221 Mont. at 223, 718 P.2d at 329, it still supports a conclusion the error in this case is harmless. Although there were physical injuries to the victim in

Brodniak, 221 Mont. at 214-16, 718 P.2d at 324-25, which were discovered during an exam immediately after the rape, there was no statement from the defendant. A qualitative analysis must consider all the cumulative evidence going to the element of consent, and Grimshaw's admissions cannot be ignored. *See Stewart*, ¶¶ 45-51. Further, in *Brodniak*, 221 Mont. at 219-22, 718 P.2d at 327-29, the expert's testimony had more qualitative impact, because he interviewed the victim and directly opined she was not lying. *See Stewart*, ¶¶ 45-51. Dr. Vanino did not interview Tylarann or Grimshaw, she offered no direct comment on the credibility of either of them, and she consistently testified the statistics could not support a finding that Tylarann was telling the truth.

Considering the high qualitative impact of the admissible evidence showing Tylarann did not consent, the State's singular reference to the false report statistics during its rebuttal closing did not prejudice Grimshaw's right to a fair trial. *See Stewart*, ¶¶ 19, 48-51. The statistics were at most a side note in the State's closing. The State's primary focus was on the testimony and other admissible evidence, because its qualitative reliability was so high. In *Stewart*, ¶¶ 19, 48-51, this Court affirmed on harmless error grounds despite the State's reference to inadmissible evidence during closing, and distinguished *State v. Reichmand*, 2010 MT 228, ¶ 26, 358 Mont. 68, 243 P.3d 423. This case is similarly

distinguishable from *Reichmand*, ¶ 27, because the statistics were not the “sole piece of evidence” presented during the State’s closing.

If this Court relies on the non-binding authority cited by Grimshaw to hold the district court erred, it should not extend that reliance to the harmless error analysis. Three of those cases affirmed the conviction on various grounds. *United States v. Magnan*, 756 F. App’x 807, 816 (10th Cir. 2018) (affirmed, because the testimony concerning the false report statistics did not affect the defendant’s substantial rights); *New Jersey v. W.B.*, 17 A.3d 187, 201-02 (N.J. Sup. Ct. 2011) (affirmed, because the testimony did not deprive the defendant of a fair trial); *Vermont v. Kinney*, 762 A.2d 833, 843-45 (Vt. 2000) (affirmed, because the error did not meet the plain error standard, which required a “miscarriage of justice” or an error “so grave and serious that it strikes at the heart of defendant’s constitutional rights”).

The others included expert testimony directly addressing the victim’s credibility. *Snowden*, 135 F.3d at 737-38 (the expert linked the statistical testimony to his direct comments on his interviews with the victim and her credibility); *Vidrine*, 9 So. 3d at 1109-11 (the expert’s opinion relied on an evaluation of the victim’s testimony and spoke directly to the facts of the case); *Chancy*, 391 N.W.2d at 234 (distinguishing *Myers*, 382 N.W.2d at 97, because it “involved a direct comment by an expert on the credibility of a witness”). Conversely,

Dr. Vanino did not directly address Tylarann’s credibility, but rather consistently testified the statistics could not be used to support Tylarann’s testimony.

This Court’s harmless error analysis assesses the qualitative impact of the admissible evidence proving Tylarann did not consent and weighs it against the quality of the evidence admitted in error. *See Stewart*, ¶¶ 45-50. Here, the qualitative impact of the cumulative admissible evidence proving Tylarann did not consent far outweighs that of the statistical testimony, and there is “no reasonable possibility it might have contributed to the conviction.” *Id.* Grimshaw’s right to a fair trial was not prejudiced by the challenged evidence. *Id.*

CONCLUSION

The State respectfully requests this Court affirm Grimshaw’s conviction.

Respectfully submitted this 23rd day of March, 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 Times New Roman 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 7,768 words, excluding certificate of service and certificate of compliance.

/s/ Brad Fjeldheim

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CERTIFICATE OF SERVICE

I, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-23-2020:

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