

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.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUE

Did the district court properly exercise its discretion in granting the State's motion in limine to exclude Appellant's proposed expert witness testimony that was designed to attack the young sexual abuse victim's credibility when the expert lacked necessary qualifications and/or Appellant could not establish the requisite foundation for the proposed testimony?

STATEMENT OF THE CASE

The State charged Appellant Joshua Reams with one count of Incest, involving his stepdaughter J.L. (D.C. Docs. 80, 83.) Reams gave notice of his intent to call Dr. Davis, an expert witness to "provide *opinion* testimony in the defense's case-in-chief as well as rebuttal to the testimony of Paula Samms." (D.C. Doc. 36; emphasis added.)

The State filed a motion in limine and supporting brief to exclude Dr. Davis' testimony because Dr. Davis did not have the necessary qualifications to offer opinion testimony in a child sexual abuse case. (D.C. Docs. 51-52.) Reams filed a brief in opposition to the State's motion in limine. (D.C. Doc. 57.) Reams explained that Dr. Davis "has written and testified extensively as an expert on memory and false reports of sexual abuse." (*Id.* at 2.) Reams stated that Dr. Davis

“will not talk about the facts of this case at trial, but will generally testify about false reports of sexual abuse and why and how they occur.” *Id.* Reams elaborated:

[Dr. Davis’] testimony is intended to help the jury comprehend some of the reasons that *J.L.* might make a false report of sex abuse by Reams. Dr. Davis will not discuss the facts of this case or [] apply her methodology to the facts of the case. She will be called to testify on the general causes of false reports of sexual abuse, including (1) intentional deception; (2) distortion of memory/belief; (3) guessing; and (4) compliance with suggestion.

(*Id.* at 3; emphasis added.) The State filed a reply. (D.C. Doc. 69.)

The district court granted the State’s motion in limine to exclude Dr. Davis’ testimony, and in so doing explained:

Here, Reams’ motion indicates Davis will testify about the general causes of false reports of sexual abuse to assist the jury in understanding some of the reasons why J.L., a child, might make a false accusation of abuse. Def.’s Resp. Br., at 3. Unlike 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. This type of testimony falls plainly within the ambit of *Scheffelman*, and a review of Davis’ expert disclosure indicates she fails to meet the requisite qualifications under the first prong of *Scheffelman*. Although Davis is a psychologist, professor, and faculty member of the National Judicial College who has knowledge of the subject of sexual abuse, there is no indication from Davis’ CV she has extensive firsthand experience treating children. Both proposed experts in *Scheffelman* and *Steffes* were determined unqualified to testify on the topic of child sexual abuse despite holding similar qualifications to that of Davis. *See Scheffelman*, 250 Mont. 342 (clinical social worker not permitted to testify as an expert because she lacked firsthand experience treating children who had not been sexually abused); *Steffes*, 269 Mont. at 227-28 (psychologist not permitted to testify as an expert because she had “very little” firsthand experience working with sexually abused children).

Without extensive firsthand experience working with children who have been sexually abused and non-sexually abused, Davis cannot give an opinion on why a child like J.L. may make false accusations of abuse. Accordingly, Davis is excluded from testifying as an expert witness in this case.

(D.C. Doc. 84 at 5, attached as App. A.)

The district court conducted a jury trial on January 16 through January 19, 2018. (1/16/18-1/19/18 Transcript of Jury Trial [Tr.]) The jury found Reams guilty of Incest. (D.C. Doc. 114.) After a sentencing hearing, the district court sentenced Reams to 100 years in prison with 60 years suspended. The court designated Reams ineligible for parole for 15 years and until Reams completed Phases I and II of sex offender treatment. (D.C. Doc. 139 at 2, attached to Appellant's Br. as App. A.)

STATEMENT OF THE FACTS

I. Facts related to the Incest and the disclosure of Incest

Shontea is J.L.'s mother. At the time of trial, Shontea resided in Boulder, Montana with 11-year-old J.L., Shontea's younger son, and Shontea's twin daughters. (Tr. at 658-59.) Reams is J.L.'s stepdad and is the father of the other three children. (Tr. at 661.) Shontea was still married to Reams but had filed for divorce about a month prior to trial. (Tr. at 659.) Shontea met Reams on May 14, 2007, in Denver, Colorado. (Tr. at 260.) J.L. was about five months old. (Tr. at

809.) Shontea, J.L., and Reams lived together for about a year until Reams was taken into federal custody. Reams remained in prison in Oregon for about five-and-a-half years. (Tr. at 260.) In 2011, while Reams was still in prison, the couple married. (Tr. at 261.)

In 2014, federal authorities released Reams from prison to a prerelease center in Butte, Montana. The prerelease center allowed Reams to spend weekends with his family in Boulder until Reams' discharge from the prerelease center. (Tr. at 262-63.) In 2015, Shontea became pregnant with the twins. At this time, Shontea, Reams, J.L., and J.L.'s younger brother resided in the family's home in Boulder. Shontea had difficulties with her pregnancy and had to spend about six weeks prior to the twins' birth at the Ronald McDonald House in Missoula. (Tr. at 663.) J.L. and her younger brother were with Reams during the week; on the weekends, Reams and the children would travel to Missoula to visit Shontea. (Tr. at 664.)

After the birth of the twins, while Shontea and the babies were still in Missoula, officers arrested Reams for DUI. (Tr. at 356-58.) As a result, federal authorities placed Reams back at the Butte Prerelease Center. (Tr. at 664-65.) Reams was still allowed to go home for family visits on the weekends. (Tr. at 665.) From October 2016 through January 2017, Shontea generally worked on the

weekends. Reams cared for the children while Shontea was at work. (Tr. at 665-66.)

Shontea described that Reams was very close to J.L. He wanted to spend a lot of time with J.L. and was always physically touching her either by hugging her, kissing her, or poking at her. (Tr. at 666.) Reams favored J.L. and was a little harder on J.L.'s younger brother. A couple of times, Reams went into the bathroom while J.L. was showering and threw cold water on her. Shontea told him not to do that anymore because it was "inappropriate." (Tr. at 667.) Shontea was afraid to continue to saying things about Reams' conduct that she found inappropriate because Reams had threatened to divorce her and take one or more of the children. (Tr. at 669.)

After Reams came to live in the family home, J.L.'s behavior changed. J.L. became withdrawn and seemed angry all the time. J.L. became defensive and it was "really difficult to reach her emotionally." (Tr. at 669.)

Barbara Rashleigh co-owns a daycare in Boulder. Barbara began caring for J.L. when J.L. was about two years old. (Tr. at 538.) Barbara knows Reams and recalls when Reams reentered J.L.'s life. J.L. often spent the night at Barbara's house, but when Reams began his weekend visits with the family, he would never allow J.L. to spend the night because he stated it was his time. As Reams

reintegrated into the family, it appeared to Barbara that this became a control issue for Reams. (Tr. at 540.)

After Reams was back in the family home either part time or full time, Barbara noticed a change in J.L.'s behavior. Barbara explained:

[J.L.] was a very happy girl, very normal little girl, full of joy. Just, she was pretty special. And that as Dad came home and they started their little family, she wasn't so happy all the time. We didn't know what was going on. We just figured it was the mom and dad and the different dynamics of the family.

(Tr. at 542.)

Barbara watched J.L. develop a rage that was not normal for a child. It was far beyond the normal stuff kids get angry about like chores or losing privileges.

(Tr. at 543.) Barbara was very concerned about J.L.'s rage. At one point, Barbara told J.L. that she loved her, and that if there was ever anything J.L. needed to tell her, Barbara was there to listen and to support her. J.L. hugged and thanked Barbara but did not confide in her about why she was so angry. (Tr. at 544.)

J.L. did express that she would like to move in with Barbara. (*Id.*)

RaeAnn Kallberg is Barbara's daughter, and she provides day care with her mother. Along with Barbara, RaeAnn has been caring for J.L. since she was two years old. (Tr. at 553.) Around the summer of 2016, RaeAnn noticed changes in J.L.'s behavior. (Tr. at 554.) J.L. became very angry. (Tr. at 555.) J.L.'s level of

anger seemed unusual. (Tr. at 556-57.) J.L.'s anger usually increased leading up to or right after a weekend. (Tr. at 258-59.)

RaeAnn also became concerned about J.L. because she gained about 50 pounds over the course of a year, which was highly unusual. (Tr. at 559.) On at least one occasion, J.L. expressed fear of Reams to RaeAnn. (Tr. at 567.)

J.L. confided in RaeAnn that Reams had threatened to break every bone in her body. (Tr. at 569.)

Heather Rykal, who lives in Boulder, is Shontea's sister. Heather has four children, including a daughter, Breanna, who was 18 years old. Heather's family and Shontea's family are very close. (Tr. at 697-99.) Heather and Breanna are very involved in J.L.'s life and spend a lot of time with her. J.L. is like one of Heather's own children. (Tr. at 700.) When Reams returned to live with Shontea and the children, Heather observed that Reams was very "touchy feely" with J.L. (Tr. at 701.) Reams was constantly poking at, grabbing at, touching, hugging, or pulling J.L. onto his lap. Reams' touching of J.L. seemed unwanted at times, and J.L. would pull away, screech, or ask him to stop. (Tr. at 701-02.) Reams did not engage in the same kind of touching with his son. (*Id.*)

Heather recalled that in January 2017 Reams was living at the prerelease center in Butte but was spending the weekends in Boulder. (Tr. at 707.) One evening, Heather and Breanna stopped by to visit Shontea and the children. During

the visit, J.L.'s younger brother mentioned something about a chip clip and a nipple. Shontea elaborated that Reams had clipped a chip clip on J.L.'s nipple. While Shontea explained this, Heather looked over at J.L., who seemed anxious. Heather told J.L. that nobody should ever touch her that way, and if it ever happened again, she should tell Heather, her mom, Breanna, or someone else who she trusted. (Tr. at 709.)

Before Heather and Breanna left, Heather and Shontea left the room, while Breanna and J.L. remained. (Tr. at 710.) The two talked for about 10 or 15 minutes. J.L. seemed terrified. J.L. thought that Reams would hurt her. J.L. cried and then as she struggled to talk, she cried harder. (Tr. at 743.) J.L. finally confided in Breanna about what Reams had done to her. Breanna explained to J.L. that she was going to have to tell her mom, Heather, what J.L. had shared with her. (Tr. at 744.) When Breanna went outside to join Heather, her skin was blotchy, and she had been crying. When Breanna and Heather got in the car, Breanna told Heather they needed to get J.L. "out of there right now." (Tr. at 711-12.)

Paula Samms, a trained forensic interviewer and the director of the Lewis and Clark County Child Advocacy Center, completed a forensic interview with J.L. on January 26, 2017. (Tr. at 578, 583, 585; State's Exs. 22 and 33, disc of recorded interview and transcript of recorded interview.) The purpose of a forensic

interview is to have a developmentally appropriate, neutral factfinding interview. Samms has completed about 1,500 forensic interviews. (Tr. at 579.)

Before beginning the interview, Samms generally knew that J.L. had disclosed to her cousin that her stepdad had sexually abused her. (Tr. at 584.) Throughout the interview, J.L. struggled to verbalize answers to Samms' questions. At one point, Samms told her that if she did not remember something it was okay. J.L. responded, "It's not that I don't remember. It's that it's hard for me to say out loud." (Tr. at 623.) J.L. was more comfortable drawing specifically what happened to her than verbalizing it. (Tr. at 592-93, 595-97; State's Demonstrative Exs. 28-32, J.L.'s Drawings during Forensic Interview.) For example, J.L. used a drawing to show where Reams had touched her with his finger and how Reams had placed his penis on her bottom. J.L. referred to Reams' penis as his "dick" and referred to her genital and buttocks areas as "private spot[s]." (Tr. at 596.)

J.L. used a drawing to explain to Samms that Reams wanted to "go to the next level" with J.L. (Tr. at 598.) J.L. struggled to put this into words but ultimately explained to Samms, "He wants to sort of put his dick in my private spot." (*Id.*) J.L. also disclosed that Reams had made her rub his dick and, if J.L. did not listen, he put his finger in her private spot. (Tr. at 600; State's Demonstrative Ex. 32.) J.L. pleaded with Samms not to forget that her dad made her do these things. (Tr. at 600-01.)

J.L.'s demeanor throughout the forensic interview did not raise any concerns for Samms. (Tr. at 643.) J.L. corrected Samms if she believed Samms misstated something, and if J.L. did not know the answer to a question she stated so. (Tr. at 656.)

Samms interviewed J.L. a second time on December 27, 2017. (Tr. at 601; State's Ex. 34, Disc of Second Forensic Interview, State's Ex. 25, Transcript of Second Interview.) This interview was primarily about a letter that J.L. had written to Reams. (State's Ex. 23, Letter from J.L. to Reams.)

At trial, 11-year-old J.L. explained that Reams "molested" her, meaning he touched her inappropriately. (Tr. at 421.) By using the drawing of a stick figure, J.L. put an X on her "private spot" and stated that Reams used his finger to touch her "private spot." (Tr. at 422-23.) J.L. remembered telling Samms that when Reams touched her "private spot" with his finger it hurt. (Tr. at 423.) J.L. also recalled that she may have told Samms that Reams put his privates on her privates, but when the prosecutor asked if that was something that happened, J.L. replied that she did not remember. J.L. had not told anyone about Reams touching her because he told her not to tell. (Tr. at 424.) J.L. testified that Reams' touches happened more than once. (Tr. at 425.) Reams touched J.L. both outside of and inside of her clothing. (Tr. at 469.)

After J.L.'s disclosure of sexual abuse, Dr. Danielson, a pediatrician, conducted a physical examination of J.L. (Tr. at 473.) J.L. had previously weighed 73 pounds, but at the time of Dr. Danielson's physical examination, J.L. had gained 122 pounds and was considered obese. (Tr. at 494-95.) Dr. Danielson was concerned that J.L.'s weight gain could be related to emotional distress from her disclosure of sexual abuse. (Tr. at 494)

The physical examination of J.L.'s anal and genital areas resulted in normal findings. Dr. Danielson explained that normal findings were not inconsistent with sexual abuse because in 95% of cases where children have been sexually abused there are no physical findings of abuse. (Tr. at 489-90.)

Jordan Hinshaw is an outpatient psychotherapist who treats both children who have and children who have not been sexually abused. (Tr. at 255, 257.) Hinshaw completed a clinical assessment of J.L. in February 2017. (Tr. at 258.) J.L. disclosed sexual abuse during Hinshaw's initial assessment. (Tr. at 260.) Since the initial assessment, Hinshaw has continued to see J.L. once a week. (Tr. at 262.) J.L. has reported nightmares and expressed fear, blame, and shame related to the sexual abuse. Hinshaw continues to work with J.L. on healthy coping skills. (Tr. at 264.)

Since Hinshaw began working with J.L., J.L. has gained weight. J.L. reports that she seeks comfort from food. (Tr. at 265.) J.L. is cooperative and motivated to

work on the issues that are affecting her. (Tr. at 266.) Initially it was difficult for J.L. to communicate about the sexual abuse. It was easier for J.L. to draw pictures about what happened to her. J.L. has become comfortable verbalizing details during her counseling session and can articulate the emotions that she feels while discussing it. (Tr. at 270.)

Hinshaw diagnosed J.L. with posttraumatic stress disorder. The traumatic event upon which Hinshaw based her diagnosis was sexual abuse. (Tr. at 272-73.)

Reams denied sexually abusing J.L. (Tr. at 805.) Reams theorized that there were other explanations for J.L.'s anger, anxiety, and weight gain, including her anger with her mother and jealousy over her mother favoring J.L.'s younger brother, which was magnified when the twins were born. (Tr. at 838-39, 879.)

Reams explained his constant touching of J.L. as teasing or just providing parental affection and attention. (Tr. at 876.) Reams also believed that J.L. resented the chores he required her to complete. (Tr. at 879-880.) Reams described his actions of throwing cold water on J.L. when she showered or clipping a chip clip near her breast area as jokes. (Tr. at 875, 885.)

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II. Facts related to expert witness testimony

A. Forensic interviewer Paula Samms

During defense counsel's cross-examination of Samms, he asked her to "tell the members of the jury exactly what a forensic interview is." (Tr. at 626.) Samms replied that it is a "neutral, fact finding, objective interview done by somebody who's trained to . . . ask questions in a developmentally appropriate manner." (*Id.*) Samms acknowledged that some interview models that forensic interviewers previously used with children were suggestive. (Tr. at 627-28.) Samms does not use such a model. (Tr. at 628-29.)

During defense counsel's cross-examination of Samms, the following exchange occurred:

Q. Okay. Do you know what priming is?

A. Are you talking about priming a pump kind of a thing[?]

Q. I'm talking about priming for an interview, placing into somebody's mind a particular concept.

A. I don't. I'm sorry, I'm not sure what you're trying to ask.

(Tr. at 630.) Samms admitted that even if a forensic interviewer employs a nonsuggestive interview technique, that cannot undo any suggestive questioning that occurred by family members or professionals untrained in proper forensic interview techniques. (Tr. at 631-633.)

When defense counsel asked Samms about false reporting of sexual abuse, she responded:

Well, we do talk about false reporting. But in regards to forensic interviewing, it's the idea of—I always have to have an alternative hypothesis in my mind. So, you know, when a child comes in, as I share, I can't assume that all the information I've gotten is accurate.

(Tr. at 638.) Samms tries to get the context of everything that has happened or has not happened. (*Id.*)

B. Examining pediatrician Dr. Danielson

During cross-examination, Dr. Danielson conceded that there were many plausible explanations for J.L.'s weight gain, such as genetics, simple overeating, and poor diet. (Tr. at 497-98.) Dr. Danielson also acknowledged that J.L.'s mother is overweight, so a genetic disposition towards obesity could partly explain J.L.'s dramatic weight gain. (Tr. at 499.)

C. Treating therapist Jordan Hinshaw

During cross-examination, Hinshaw agreed that false allegations of abuse occur. One reason for a child making a false sexual abuse allegation is the child's desire to change her circumstances. (Tr. at 283.) Hinshaw agreed that during counseling sessions J.L. has stated that she wants her mother to divorce Reams. (Tr. at 283.)

During cross-examination, defense counsel implied that J.L. was jealous of her brother and the twins because they got more of her mom's attention than she did. (Tr. at 278.) Hinshaw agreed that jealousy, lack of attention, and/or neglect could cause nightmares, anxiety, and weight gain. (Tr. at 279-80.)

D. State's blind expert Wendy Dutton

Wendy Dutton is licensed professional counselor and a forensic interviewer with the Child Protection Team at Phoenix Children's Hospital in Phoenix, Arizona. She has conducted approximately 9,600 forensic interviews. (Tr. at 317.) Dutton has a Master of Arts degree in marriage and family counseling and a doctorate in justice studies. (Tr. at 321.) Dutton has taken over 1,400 hours of continuing education, most of which have been on assessment and treatment of sex offenders, assessment and treatment of victims of abuse, and issues related to forensic interviewing. (Tr. at 321.) Dutton has testified as an expert about 700 times. (Tr. at 326.)

Dutton described a forensic interview as:

[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.

(Tr. at 317-18.)

Dutton explained the importance of avoiding leading or suggestive questions. Dutton described a tag leading question as a very coercive form of question you can ask children, which typically suggests information to the child and then supplies the answer the questioner is looking for. (Tr. at 319.)

During her direct examination, Dutton explained that it is common for children who have been sexually abused to wait weeks, months, or years before disclosing the abuse. (Tr. at 329.) Children delay disclosing because they do not understand what is happening to them, they are fearful, or they have a sense of loyalty to their perpetrators. (Tr. at 330.) Research shows that the timing of the disclosure has no bearing on the credibility of the disclosure. (Tr. at 331.) Children often disclose details of sexual abuse in a piecemeal fashion. (Tr. at 335-36.)

Dutton testified about the process of victimization—selection, grooming, assault, and concealment. (Tr. at 345-357.) Dutton explained that not all children who have been sexually abused exhibit symptoms, but school-aged children may have trouble paying attention at school, may have problems getting along with their peer group, or may exhibit anxiety. (Tr. at 357.) Dramatic weight gain can be a symptom of sexual abuse. A child sexual abuse victim may believe that by putting on weight, she will become less attractive to her perpetrator. Alternatively, sugar is a mood-altering substance. Becoming addicted to sugar is a way of coping with life problems and contributes to weight gain. (Tr. at 358.)

Dutton discussed the concept of script memory, explaining that when children have been repeatedly abused, they tend to meld or blend all the events into one event and talk about how the abuse usually happened. (Tr. at 345.)

Finally, Dutton testified about some of the difficulties child sexual abuse victims may experience while testifying at a trial. (Tr. at 361.) For example, because testifying is a stressful situation for children, they can become more easily confused by complex, leading, or suggestive questions. As a result, children may acquiesce, often inaccurately, to leading and suggestive questions. (*Id.*)

During cross-examination, Dutton testified extensively about false reporting of sexual abuse and provided circumstances in which false reporting occurs. (Tr. at 366-68.) There are two types of false reports of sexual abuse—erroneous false reports and malicious false reports. (Tr. at 366.) Erroneous false reports are more common than malicious false reports. An erroneous false report generally happens when a concerned adult makes a report of sexual abuse to law enforcement or child protective services. After an investigation, the investigator determines there is not information to support a conclusion that the abuse happened. (*Id.*)

Malicious false reports are consciously-made false reports for some ulterior motive or secondary gain. Research shows that malicious false reports occur most commonly, but not exclusively, in two situations. The first situation generally involves younger children whose parents are involved in a high conflict divorce or

custody dispute. Most often, the allegation arises from one of the adults involved in the dispute. The adult coaches or encourages the child to make the false report against the other parent to gain an advantage in the divorce or custody dispute. Occasionally, children initiate the malicious false report on their own. (Tr. at 367.)

The second situation of false reports involves teenage girls. Generally, the goal behind these false reports is either to change their living situations or to cover up their own consensual sexual activity. Also, some teenage girls who make false reports have serious mental illnesses that impair their ability to tell the difference between reality and fantasy. (Tr. at 367-68.)

Dutton further acknowledged that a malicious or intentional false report could arise when a child is angry or upset at the accused. (Tr. at 370.) Dutton agreed that, in addition to the circumstances she described, there could be other possibilities for false reporting. She provided testimony on the reasons for false reporting documented in research concerning child sexual abuse. (Tr. at 369.)

Dutton explained:

The—What the research says is what I've already talked about. There are certainly other possibilities. And the reason I say that is the best and most comprehensive studies that have been done on false allegations will typically look at the official outcome in cases. Let's say one study looked at all the cases that child protective services investigated in Denver over the course of a year, and then identified the cases that were determined to be malicious false reports and talked about the characteristics those cases had.

Now, when you select one year in Denver Social Services reports, that certainly is not going to encompass every possibility. But

all the research studies that have been done on larger populations seem to agree that those are the situations that most commonly occur.

(Tr. at 371.)

During cross-examination, the following dialogue occurred on the topic of what defense counsel referred to as priming:

Q. Well, priming, for example, if an interviewer says, “I heard something happened to you.”

A. I wouldn’t—I’m not sure what your definition of priming is. But “I heard something happened to you. Tell me about it,” is a common question we ask in forensic interviews. It’s not suggestive. It’s, you know, focusing a child’s attention. “I heard something happened,” and then they can describe whatever it is then.

Q. Sure. “Did your father touch you?”

A. That would be a suggestive question.

Q. And that would—Would that focus the attention into this issue of priming?

A. Again, priming, I’m not sure what you mean by priming. But the question, especially if I started out an interview, “Did your father touch you,” would be a suggestive question. It suggests who did it and what happened, and then asking the child to agree or disagree because it’s a yes/no question; and that’s suggestive.

Q. Priming occurs when a question puts a concept in somebody’s mind. Do you understand that?

A. My understanding, and I’m not sure if this is the same as yours, but priming has to do with somebody setting themselves up to believe something happened by exposing themselves to a lot of information about it.

Q. How about somebody setting somebody else up? In other words, can somebody, like a law enforcement officer or a relative or somebody, or like maybe a CPS worker, prime somebody into the concept that sexual abuse might have occurred?

...

Q. "When did your father touch you?"

A. Well, assuming that the child had not already disclosed that, that would be what we call a presumptive suggestive question. The classic example is, "When did you stop beating your wife?" That type of question. So, you're presuming something happened when it didn't, and then asking a child to provide an answer.

Q. "Something inappropriate happened to me. You can tell me what happened to you."

A. That I would consider—Well, if you're using literally "inappropriately", you're not suggesting what happened. But that type of question would be considered coercive.

Q. "Somebody inappropriately touched me. You can tell me what happened to you."

A. Again, that would be social pressure and use of coercion.

Q. Okay. So, you have all these different . . . different names, these different identifiers for what happened that, really, it boils down to the notion of suggestibility; doesn't it?

A. Yes.

Q. Okay. And that can happen prior to a forensic interviewer ever having met up with the child. Would you agree with that?

A. Certainly information children are exposed to or conversations that they're exposed to can happen prior to a forensic interview.

(Tr. at 374-77.)

Dutton agreed that it is possible to have memories—even clear memories—of things that never happened. (Tr. at 288.)

SUMMARY OF THE ARGUMENT

Reams’ purported purpose for calling Dr. Davis as an expert witness was to give “opinion testimony” and rebut the testimony of Samms. But when the State objected that Dr. Davis did not have the qualifications to offer opinion testimony to attack J.L.’s credibility, Reams attempted to recast her purported testimony as educational testimony for the jury about false allegations of sexual abuse. But, even with the recast, Reams stated that his intention was for Dr. Davis to testify about the reasons J.L. might fabricate an allegation of sexual abuse against Reams. Under these circumstances, the district court did not abuse its discretion when it prohibited such testimony because the testimony was designed to attack J.L.’s credibility. Dr. Davis did not have the qualifications to offer such testimony because she had neither worked with sexually abused nor non-sexually abused children.

And Dr. Davis could not offer testimony to rebut the State’s witnesses because Reams claimed he would call Dr. Davis as a blind witness—meaning she had no familiarity with the facts and circumstances of Reams’ case. If Reams believed the district court had incorrectly interpreted his reason for calling

Dr. Davis, it was incumbent upon Reams to make an offer of proof to clear up any misunderstanding.

If this Court concludes that the district court abused its discretion in not allowing Dr. Davis to testify in some limited capacity, then any error was harmless because Reams elicited the same testimony through cross-examination of the State's witnesses, who acknowledged that false allegations of sexual abuse do occur and can occur when a child wants to change her circumstances, such as wanting her mother to divorce her stepfather. Also, none of the State's witnesses offered opinion testimony about J.L.'s credibility. There was no reasonable possibility that excluding Dr. Davis' testimony contributed to Reams' conviction.

ARGUMENT

I. The standard of review

The authority to grant or deny a motion in limine “rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties.” *State v. Dubray*, 2003 MT 255, ¶ 47, 317 Mont. 377, 77 P.3d 247, quoting *Hulse v. State Dep't. of Justice*, 1998 MT 108, ¶ 15, 289 Mont. 1, 961 P.2d 75. A district court is vested with broad discretion in ruling on the admissibility of expert testimony. *State v. Riggs*, 2005 MT 124, ¶ 18, 327 Mont. 196, 113 P.3d 281. A court abuses its discretion when it

acts arbitrarily, without conscientious judgment, or exceeds the bounds of reason.

State v. Given, 2015 MT 273, ¶ 23, 281 Mont. 115, 359 P.3d 70.

II. The district court properly exercised its discretion in granting the State’s motion in limine.

A. Relevant case law

Montana allows expert testimony directly about the credibility of a young victim who testifies in a child sexual abuse trial. *See State v. Geyman*, 224 Mont. 194, 729 P.2d 475 (1986). Such testimony is admissible when the child victim testifies and her credibility is attacked. *State v. Harris*, 247 Mont. 405, 410, 808 P.2d 453, 455 (1991) In order to render such an opinion, “and like opinions,” the expert must be properly qualified. *State v. Scheffelman*, 250 Mont. 334, 342, 820 P.2d 1293, 1298 (1991).

In *Scheffelman*, this Court identified the proper qualifications for such expert testimony to include:

(1) extensive first hand experience with sexually abused and non-sexually abused children; (2) thorough and up to date knowledge of the professional literature on child sexual abuse; and (3) objectivity and neutrality about individual cases as are required of other experts.

Id., citing Myers, et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1, 12 (1989). “If these factors cannot be shown, the individual witness should not be allowed to testify as an expert on child sexual abuse.” *Id.*

Additionally, in *State v. Scott*, 257 Mont. 454, 465, 850 P.2d 286, 292 (1993), this Court held that, “Expert testimony relating to the contradictory behavior . . . of a child victim of sexual abuse, will be allowed to enlighten the jury on a subject with which most people have no common experience and to assist the jurors in assessing the credibility of the victim.”

In *State v. Morgan*, 1998 MT 268, 291 Mont. 347, 968 P.2d 1120, the State called an expert witness to testify about general matters concerning child sexual abuse. *Id.* ¶ 25. The State’s expert did not investigate the case or offer an opinion about the victim’s credibility. *Id.* ¶ 26. Morgan objected to the expert’s testimony, arguing that the subject of child sexual abuse does not require any expert testimony to assist the jury’s understanding of the issues before it. *Id.* ¶ 29. On appeal, this Court concluded that the district court properly admitted the expert testimony. *Id.* ¶ 30.

Finally, in *State v. Robbins*, 2013 MT 71, 369 Mont. 291, 297 P.3d 1213, this Court clarified the difference between an expert whose testimony directly comments on the victim’s credibility, and an expert whose testimony is related to general matters concerning child sexual abuse. In the first instance, the Court applies the *Scheffelman* exception that permits direct testimony on credibility. *Id.* ¶ 13. In the second instance, the Court considers whether the expert’s testimony was proper under Mont. R. Evid. 702. *Id.*

On appeal, Reams argues that the district court erred because it incorrectly applied the *Scheffelman* exception to his proposed expert witness testimony rather than evaluating the testimony under Mont. R. Evid. 702.

B. Reams’ stated purpose in calling Dr. Davis was to give opinion testimony designed to attack J.L.’s credibility.

In Reams’ notice of intent to call Dr. Davis as an expert, he stated that Dr. Davis would provide “opinion” testimony and “rebuttal” to Paula Samms’ testimony. (D.C. Doc. 36.) When the State filed a motion in limine to prohibit such testimony, Reams responded by stating that Dr. Davis has written exclusively as an expert on memory and false reports of sexual abuse, and her intended testimony was to help the jury comprehend some of the reasons that *J.L.* might make a false report of sexual abuse by Reams. (D.C. Doc. 69 at 3.) In other words, either explicitly or implicitly, Dr. Davis’ testimony was intended to attack J.L.’s credibility. Reams informed the court that he needed Dr. Davis’ testimony to explain why J.L. would make a false report—not generalized testimony that false reports occur and the common circumstances, backed by research, in which false reports occur. As such, the district court correctly concluded, “Unlike 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.” (App. A at 5.)

In Reams' expert witness notice, he indicated, "Dr. Davis is currently preparing a report which will be produced to the prosecution after transcripts of the various witness interviews, including Paula Samms, are prepared by the court reporter and reviewed by Dr. Davis." (D.C. Doc. 36 at 2.) Again, contrary to Reams' claim on appeal, this demonstrates that the intent behind Dr. Davis' testimony was to attack J.L.'s credibility by offering an opinion that J.L.'s allegation of sexual abuse was the result of "(1) intentional deception; (2) distortion of memory/belief; (3) guessing; and (4) compliance with suggestion." (D.C. Doc. 57 at 3.)

Reams also claimed in his brief in opposition to the State's motion in limine that Dr. Davis would not discuss the facts of Reams' case or apply her methodology to Reams' case. (*Id.*) But, if Reams' intent was for Dr. Davis to testify as a blind expert, there was no reason for her to review witness interviews and reports, as Reams claimed Dr. Davis was in the process of completing in his initial expert witness disclosure. (D.C. Doc. 36.) Further, as a blind expert, Dr. Davis could not testify about reasons that J.L. specifically might falsely accuse Reams of sexually abusing her.

Also, Reams' argument that the State stacked the deck against him with its own cadre of experts, including Samms, Hinshaw, Dr. Danielson, and Dr. Dutton, is incorrect. Samms, Hinshaw, and Dr. Danielson were all fact witnesses who

testified about their own personal observations of J.L. Samms completed J.L.'s forensic interview, Hinshaw is J.L.'s therapist who diagnosed her with posttraumatic stress disorder, and Dr. Danielson completed a physical examination of J.L.

Dr. Dutton testified as blind expert. Dr. Dutton did not provide any opinion about this case and made no comments on J.L.'s credibility. She also had extensive experience working with child sexual abuse victims and with offenders. Reams did not assert to the district court that the purported purpose for Dr. Davis' testimony was to rebut all or parts of Dr. Dutton's testimony.

On the other hand, Reams specifically informed the court in his notice of expert witness disclosure that Dr. Davis would provide opinion testimony. The only thing Dr. Davis could give an opinion about was false reporting in child sexual abuse cases because that is Dr. Davis' area of study. The purpose of her testimony was two-fold—to cast doubt on J.L.'s credibility and to bolster Reams' testimony that he never touched his daughter. Dr. Davis could not rebut the State's witnesses' testimony because, according to Reams, she would not offer testimony about the facts or circumstances of his case. Thus, it was impossible for Reams to offer testimony of such things as critiquing Samms' forensic interview of J.L. because Dr. Davis did not watch the forensic interview and could not offer a critique. (*See* Appellant's Br. at 37-38.) Similarly, Dr. Davis had no basis to rebut

Hinshaw's diagnosis that J.L. suffered from posttraumatic stress disorder. Finally, Dr. Danielson's physical examination of J.L. was normal, and Dr. Davis is not a medical doctor, so she could not rebut Dr. Danielson's testimony.

If, upon receiving the district court's order granting the State's motion in limine, Reams believed that the district court had misconstrued his intended purpose in presenting Dr. Davis' testimony, then Reams should have clarified his purpose through an offer of proof. *See* Mont. R. Evid. 103(a)(2); *In re O.A.W.*, 2007 MT 13, ¶ 51, 335 Mont. 304, 153 P.3d 6 ("The reason for Mont. R. Evid. 103(a)(2) is to require that if evidence is excluded there must be an offer of proof so that neither the trial court nor this Court has to speculate concerning what the evidence would have been."). An offer of proof should be specific as to the facts to be proven. *State v. King*, 2013 MT 139, ¶ 38, 370 Mont. 277, 304 P.3d 1.

Reams has failed to demonstrate that under the circumstances of this case the district court abused its broad discretion when it precluded Dr. Davis from offering expert testimony the purpose of which was to implicate J.L.'s lack of credibility and bolster Reams' denial of sexual abuse. Reams has not carried his burden on appeal of showing that the district court acted arbitrarily, without conscientious judgment, or exceeded the bounds of reason. *Given*, ¶ 23.

Even if this Court were to conclude that the district court should have allowed Dr. Davis' testimony in some limited fashion, any error in not doing so was harmless.

B. The alleged error is harmless.

The first step in a harmless error analysis is to determine whether the error is structural error or trial error. *State v. Garding*, 2013 MT 355, ¶ 28, 373 Mont. 16, 315 P.3d 912, citing *State v. Stewart*, 2012 MT 317, ¶ 45, 367 Mont. 503, 291 P.3d 1187. Structural error affects the framework within which a trial proceeds. *State v. Van Kirk*, 2001 MT 184, ¶ 38, 306 Mont. 215, 32 P.3d 735. Structural error is not subject to harmless error analysis. *Id.* ¶ 39. Trial error typically occurs during trial and is not automatically reversible. *Stewart*, ¶ 45.

Precluding expert testimony is trial error subject to Montana's harmless error statute. *Garding*, ¶ 28. That statute provides, "[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 error was prejudicial," and "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Mont. Code Ann. §§ 46-20-701(1), (2).

In response to a claim that trial error may have contributed to a conviction, it "becomes incumbent on the State to demonstrate that the error at issue was not prejudicial." *State v. Slavin*, 2004 MT 76, ¶ 22, 320 Mont. 425, 87 P.3d 495. In a

case where the trial court's ruling excluded testimony, the State must demonstrate that there was no reasonable possibility that the exclusion of the testimony contributed to the conviction. *Garding*, ¶ 31, *citing Slavin*, ¶ 22.

Assuming Dr. Davis would have testified in the manner that Reams claims on appeal, Reams exacted the same testimony on cross-examination of the State's witnesses. For example, Samms acknowledged that some forensic interview models that forensic interviewers have used with children are suggestive. (Tr. at 627-28.) Samms also acknowledged that, even assuming a forensic interviewer employs a nonsuggestive interview technique, that cannot undo any suggestive questioning by family members or other professionals that occurred prior to the forensic interview. (Tr. at 630.) Finally, Samms acknowledged that false allegations of sexual abuse do occur and she cannot assume that all of the information she has gotten during a forensic interview is accurate. (Tr. at 638.)

Similarly, Hinshaw agreed that false allegations of child sexual abuse occur. Hinshaw acknowledged that one reason for a child to make a false allegation of sexual abuse is the child's desire to change her circumstances. During counseling sessions, J.L. told Hinshaw she wanted her mother to divorce Reams. (Tr. at 283.) Hinshaw also agreed that jealousy or lack of attention were alternative explanations for J.L.'s nightmares, anxiety, and weight gain. (Tr. at 279-80.)

Dutton testified extensively about false reporting of sexual abuse and provided the commonly recognized circumstances in which false reporting occurs. (Tr. at 366-68.) Dutton acknowledged that a false report could arise when a child is angry or upset at the accused. (Tr. at 370.) Finally, Dutton testified about coercive and suggestive questioning that could impact the accuracy of a child's report of sexual abuse. (Tr. at 374-77.) Reams could have applied this testimony to Samms' interview, if he believed Samms' forensic interview was suggestive and/or coercive.

Reams was free to use all of the testimony he elicited to challenge J.L.'s credibility and the propriety of the forensic interview questions to promote his defense theory that J.L. made up an allegation of sexual abuse against him out of anger and jealousy.

///

CONCLUSION

The district court did not abuse its discretion in excluding Reams' expert witness testimony because the purported purpose of Dr. Davis' testimony was to give an opinion on J.L.'s credibility. Dr. Davis did not have the qualifications to comment on J.L.'s credibility. If this Court determines that the district court erred in not allowing Dr. Davis to testify in some limited fashion, the error was harmless.

Respectfully submitted this 7th day of August, 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 7,381 words, excluding cover page, table of contents, table of authorities, signatures, certificate of service, certificate of compliance, and appendices.

/s/ Tammy K Plubell
TAMMY K PLUBELL

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.

APPENDIX

Order on Motions in Limine, December 22, 2017 (D.C. Doc. 84)..... Appendix A

CERTIFICATE OF SERVICE

I, Tammy Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-07-2020:

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