

SUPREME COURT, STATE OF COLORADO	
Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Certiorari from the Colorado Court of Appeals Case No. 2015CA576	
Petitioner THE PEOPLE OF THE STATE OF COLORADO v. Respondent KERRY LEE COOPER	
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MR. COOPER'S ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).
It contains 7,172 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(b).

In response to each issue raised, the Respondent must provide under a separate heading before the discussion of the issue, a statement indicating whether respondent agrees with petitioner's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.


TRACY C. RENNER, #27242
Deputy State Public Defender

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ISSUES ANNOUNCED BY THE COURT¹

I. [REFRAMED] Whether the court of appeals erred in concluding that blind expert testimony on domestic violence must be limited to those facets of a subject that are specifically tied to the particular facts of the case.

II. [REFRAMED] Whether the court of appeals erred in concluding that blind expert testimony on domestic violence was inadmissible because the charged act was the first act of domestic violence in the relationship.

III. Whether the court of appeals erred in finding that the admission of the expert testimony was not harmless.

SUMMARY OF THE ARGUMENT

Expert testimony is admissible only in accordance with the rules of evidence and longstanding precedent, which require it to be relevant and reliable. To fulfill its gatekeeping role, a trial court must apply that legal framework and exclude expert testimony that does not help the jury understand the evidence or determine a fact in issue, or that is unfairly prejudicial or misleading. Thus, the simple answers to the questions before this Court are:

¹ Issues one and two are reversed from the order in the Court's announcement, both because the opening brief addresses them in that order, and counsel agrees that it is logical to address the broader question about the admissibility of expert domestic violence testimony before turning to the admissibility of such testimony in Mr. Cooper's case.

1) Yes. Blind expert domestic violence testimony must be limited to topics that assist the jury understand the evidence or determine a fact in issue and are thus relevant under CRE 401 and admissible under CRE 702. Even if some aspect of the expert's testimony relates to a fact of consequence, such testimony must be excluded under CRE 403 if it is unduly prejudicial or misleading. Moreover, evidence that causes a jury to render a verdict based on an improper basis deprives a defendant of their constitutional rights.

2) No. The court of appeals correctly concluded that blind expert domestic violence testimony was inadmissible in Mr. Cooper's case, because such testimony was not necessary to help the jury understand the evidence or determine a fact in issue where there was no evidence of prior violence, victim behaviors, or the dynamics associated with an abusive relationship.

3) No. The court of appeals correctly found evidence of guilt was not overwhelming and the erroneously admitted domestic violence testimony: a) suggested facts not in evidence about the dynamics of the relationship; b) invited the jury to infer Mr. Cooper had committed prior violence in violation of CRE 404(b); and c) unfairly undermined Mr. Cooper's credibility. Particularly where the prosecution extensively relied on the testimony in closing argument, its admission rendered the judgment of conviction unreliable.

STATEMENT OF THE CASE

The State charged Mr. Cooper with menacing, a class 5 felony under §18-3-206(1)(a)(b), C.R.S.; third degree assault, a class 1 misdemeanor under §18-3-204(1)(a), C.R.S.; and harassment, a class 3 misdemeanor under §18-9-111(1)(a), C.R.S. (CF, pp.8-9) On the morning of trial the court allowed the prosecution to add cruelty to animals, a class 1 misdemeanor under §18-9-202(1)(a), C.R.S. (TR 4-28-14, p.8:17-18; CF, pp.18-19). “Domestic violence,” appeared on the face of both charging documents, but the jury was not asked to make any finding in that regard. (CF, pp.8-11, 18-10; Supr, pp.1-4)

The jury returned verdicts finding Mr. Cooper guilty of third degree assault and harassment and acquitted him of menacing and cruelty to animals. (TR 5-1-14pm, p.1:6-15) The trial court sentenced Mr. Cooper to 253 days in county jail for harassment with credit for time served and two years probation for third degree assault. The court found the convictions were acts of domestic violence and ordered Mr. Cooper to undergo a domestic violence evaluation and comply with any recommended treatment. (TR 5-2-14, p.19-20).

Mr. Cooper appealed. The court of appeals reversed Mr. Cooper’s convictions for a new trial. *People v. Cooper*, 2019 COA 21.

STATEMENT OF THE FACTS

I. Trial Testimony about the Acts Alleged

Mr. Cooper, who was in his mid-fifties, met L.K., who was in her mid-twenties, through a mutual friend. (TR 4-30-14, p.158:11-20). L.K. was living on the streets and, while Mr. Coopers' home was very modest, he offered shelter to people experiencing homelessness on couches inside his home and in the garage. (TR 4-28-14, p.195:12-14; TR 4-30-14, pp158-59) Mr. Cooper and L.K. became romantically involved about a month after she began staying there. (TR 4-30-14, p.159:21-24)

About a year later, on a hot night in June, L.K. woke up having a panic attack because of the heat. (TR 4-28-14, p.197:9-16) The house had no air conditioning, and many of the windows were boarded up. There was just one window in the bedroom that brought in air. (TR 4-28-14, p.197:10-13; TR 4-30-14, p.23:12-13) The jury heard differing versions about what happened after L.K. woke Mr. Cooper, saying she could not breathe. (TR 4-28-14, p.197:16)

According to L.K., Mr. Cooper helped her turn on a fan, but he got angry when she asked him to reposition it. (TR 4-28-14, pp.197-98) It was a small plastic fan without a cover. (TR 4-28-14, p.198:5-6; EX [Peo. Ex.], p.10) L.K. claimed Mr. Cooper shoved the fan in her face while it was running, so she hit him in the head

with a flashlight. (TR 4-28-14, p.198:6-11) She said Mr. Cooper dropped the fan and began hitting her in the face and ribs. (TR 4-28-14, p.198:13-16) Mr. Cooper grabbed her jaw when she began screaming out the window, so she bit down on his fingers, at which point he grabbed a tire iron and came at her. (TR 4-28-14, pp.198-99) Her dog “Buddy” came into the room, and she claimed Mr. Cooper hit the dog twice in the face and hit her in the head twice with the tire iron because she was screaming. (TR 4-28-14, p.199:5-7,14-17).

Mr. Cooper testified that when L.K. woke up complaining about the heat, he helped her by plugging in the fan, but she started “yelling and bitching” because she did not like where he had plugged it in. (TR 4-30-14, pp.160-61) Mr. Cooper admitted he unplugged the fan, threw it on the end of the bed and said, “Well, you plug it in then.” (TR 4-30-14, p.161:1-2) When he tried to go back to sleep, L.K. “cracked” him over the head with a metal “MAG” flashlight, and when he tried to take the flashlight away, she bit through his finger “down to the bone,” drawing blood. (TR 4-30-14, p.161:4-15; EX [Peo. Ex.], pp.10, 12; EX [Def. Ex.], pp.1-2) Mr. Cooper said he only pushed L.K.’s forehead to get her off his finger, then he went and sat down in the front room of the house. (TR 4-30-14, pp.161-62) He denied holding the fan in her face, punching her, grabbing her jaw, hitting the dog, or even picking up the tire iron. (TR 4-30-14, pp.162-63; 165-67)

Mr. Cooper's daughter, who lived close by, called the police. (TR 4-30-14, pp.162-63) When the police arrived, Mr. Cooper was sitting in the living room with his daughter. He told the officers L.K. had hit him with a flashlight and had bitten his finger. (TR 4-30-14, pp.68:13-25; 116-17) The lead officer photographed Mr. Cooper's face and his bloody finger. (TR 4-30-14, pp.68-69; EX [Peo. Ex], pp.11-12; [Def. Ex.], pp.1-2)

She also photographed L.K.'s torso, which showed some redness, a red mark on her scalp, some red marks on her face, and blood on the inside of her lips. (EX [Peo. Ex], pp.2-3) When medical personnel arrived, they checked out L.K. and treated Mr. Cooper's finger. (TR 4-30-14, pp.49:8-19; 88:2-13; 89:15-23) L.K. agreed with the prosecutor that Mr. Cooper would have seen if she had gotten into an ambulance, but she did not understand what the prosecutor meant when she asked her if that was in her mind at all. (TR 4-30-14, pp.55-56)

At trial, L.K. testified her nose had been broken. (TR 4-28-14, p.204:3-9) On defense cross-examination, she testified she had sustained four broken ribs and had told the prosecutor about it months before trial. (TR 4-20-14, pp.50:9-15; 51-52)

The prosecution presented no evidence about Mr. Cooper's and L.K.'s relationship prior to this particular evening. L.K. moved out of the house immediately afterwards and never moved back. (TR 4-28-14, p.224:2-5) She saw

Mr. Cooper once, a couple of months later, for “a total of a half hour,” and still had “feelings of love” for him, but they never dated again and she was seeing someone else at the time of trial. (TR 4-28-14, pp.194-95; 4-30-14, pp.60-61, p.131:16-18)

II. Testimony by Domestic Violence Expert Janet Kerr

Defense counsel argued L.K. should testify before Janet Kerr, the prosecution’s domestic violence expert, in order to establish some relevance for Kerr’s testimony. (TR 4-28-14, 119:11-22) The court agreed there would have to be some evidence of recantation presented to make domestic violence testimony relevant. When the prosecutor said Kerr would not testify about recantation, the court ordered L.K. to testify first and “if there’s not a clear recantation, then we’re going to have a discussion about what is relevant in Ms. Kerr’s testimony.” (TR 4-28-14, pp. 120-21)

In opening statements, the prosecutor told the jury it would hear from Kerr, a “domestic violence expert” who had been licensed for twenty-seven years. (TR 4-28-14, p.185:9-15) The defense argued the jury should pay attention to the differences between L.K.’s statements to police the night of the incident and another statement she made before trial, as it would show the incident did not happen the way L.K. said it did. (TR 4-28-14, p.191:3-22)

After L.K.'s testimony, the court told the parties it had "serious concerns about whether [Kerr] will be able to testify." (TR 4-30-14, p.94:5-7) The prosecution asserted Kerr's testimony was necessary to explain certain counterintuitive facts. (TR 4-30-14, pp.96-100) The defense asked the court to exclude Kerr's testimony in its entirety because there was no evidence of recantation, no evidence of prior violence, and thus Kerr's testimony would not be helpful to the jury and would improperly bolster the prosecution's case. (TR 4-30-14, pp. 100-01)

The court ruled Kerr could not testify about recantation because there was no evidence of recantation. However, the court found refusing medical treatment and continuing to communicate with an abuser would be counterintuitive to a jury. The court ruled Kerr could, "testify generally about power and control, refusing medical treatment, and continuing to talk to someone that has been accused of abusing her." (TR 4-30-14, pp.101-03) After further argument, the court also ruled Kerr could "talk about the age differential," but expressly found testimony about "economic entrapment" would be more unfairly prejudicial than probative under CRE 403. The court also added abuse of a pet. (TR 4-30-14, pp.104-07)

The court qualified Kerr to testify as an expert in the area of "domestic violence, specifically of power and control and issues that fall under that." (TR 4-30-14, p.127:7-17) The prosecutor showed her People's Exhibit 2:



The court admitted the exhibit. Because of technical difficulties, the prosecutor was unable to publish the exhibit, but walked it in front of the jurors then asked Kerr to sketch the wheel on the board and explain it for the jury. (TR 4-30-14, pp.128-29)

According to Kerr the wheel:

[I]s a visual that really describes what we talk about when we talk about how somebody can abuse a person in a relationship without ever physically touching them because there are lots -- we all think about physical

violence, right, pushing and shoving and slapping and kicking and biting as domestic violence, but there are many other ways that a person can abuse their partner. So these are the nonphysical ways that a person can do that.

(TR 4-30-114, pp.128-29)

She gave examples of behaviors common to each form of abuse:

- “**emotional abuse**, and that’s name calling, put-downs, you’re stupid, you’re fat, you’re ugly, you can’t do anything right type of abuse.” (TR 4-30-14, p.130)
- “**financial or economic**. . . . it’s very common for victims of domestic violence to be – not just be financially dependent on their partner, but for the partner to use that as a way to control them, as a way to make sure that they don’t have any power of their own.” (TR 4-30-14, p.130)
- “**isolation**. . . . it’s quite common for offenders to try and isolate their victims from their sources of support . . . try and put a wedge in between their relationships with family, friends, maybe their church support, whoever it is that supports them the most.” (TR 4-30-14, p.130)
- “**using children**. . . . domestic violence offenders know that it’s really effective to threaten children or try and manipulate children in order to control their victim. (TR 4-30-14, p.131)
- “**minimizing, denying and blaming**. When we say that, very often domestic violence offenders will say things like, I didn’t do that. Well, if I did it, I didn’t do – it wasn’t really a big deal, and it was probably her fault anyway. So taking responsibility for their own behavior is quite common.” (TR 4-30-14, p.131)

- **“attitude of male privilege.** . . . in these relationships very often the offenders have this attitude that I’m the king of the castle. I’m the one who makes the decisions. I’m the one in charge.” (TR 4-30-14, p.131)
- **“coercion and threats.** It’s not at all uncommon for offender to make really specific and direct threats, very clear. If you call the police, if you tell anybody, if you don’t do this or don’t do that, there will be this consequence.” (TR 4-30-14, pp.131-32)
- **“intimidation.** Intimidation really falls on a spectrum. It can be something very small like giving a person a look. . . . But what domestic violence victims will say is the look in this case means uh-oh. There’s – something really horrible is going to happen. . . . Intimidation, though, can also be really extreme, like taking out a gun and waving it around without ever actually making a specific threat to do anything with it.” (TR 4-30-14, p.132)

(TR 4-30-14, pp.129-32) (emphasis added)

The prosecution also elicited testimony from Kerr that victims have difficulty sharing “exactly” what happened because:

- it is common for victims of domestic violence to “keep this secret and keep it quiet.”
- they are afraid
- they have a desire to keep themselves or other people safe
- they are extremely embarrassed, ashamed, humiliated

- “often people who go into abusive relationships have grown up in relationships where they’ve seen this kind of behavior modeled, and they – it’s sort of normalized for them.”

(TR 4-30-14, pp.134-35) Kerr explained an age difference may play a role in the power and control dynamic of an abusive relationship, because it is common for people who have grown up in abusive situations to choose a similarly abusive partner and work out those “issues” in their current relationship. (TR 4-30-14, p.138:10-16)

Kerr also testified that in an abusive relationship: 1) an abuser can be kind and loving because “remember, these guys are also – they have their good side;” 2) a domestic violence victim might consider going back because “they’ve experienced all of these different forms of power and control” and they may feel safer being in contact with their abuser to gauge their mood; 3) hurting a victim’s pet can send a message of power and control; and 4) a domestic violence victim might refuse treatment out of fear, since they have been told there will be “consequences” if they talk about the abuse. (TR 4-30-14, pp.134-39, 148-49)

In closing argument, the prosecutor urged the jury to render a verdict based on facts not in evidence:

And you heard from Janet Kerr how difficult it is for victims of these kinds of experiences to share this because they carry that shame. They carry it on themselves as if it's their fault. Look, they chose this relationship. She chose to be with this man, right? Among different reasons, she

chose that. And then look what happened, he attacked her. That's embarrassing for her.

* * *

Ms. Kerr talked to you about how those kind of family dynamics when you're growing up, those things that you go through really do impact who you are now and how you approach relationships. Maybe you're trying to resolve some of these old issues, you know, from growing up, from not having that trust of your father. Maybe you're trying to resolve them now; that comes into play.²

* * *

Ms. Kerr explained how these relationships can be like Jekyll and Hyde: One minute they're nice; one minute it's the opposite. If it was always mean, how would that work, right? You've got to sort of be like that a wolf in sheep's clothing. If you were just growly and mean all the time, hopefully you wouldn't have a relationship. But the way these things normally work is that they're nice. They form an attachment, especially for someone that really had a specific thing she was looking for, and then this kind of stuff. That attachment makes it harder to let go as well.

* * *

And, of course, he told her not to go to court. Classic, right? That's what Ms. Kerr said. That is a classic sign of power and control. You're still trying to control her. Look, you beat them up and if you can get them not to go to court, maybe it won't be so final. Plus, now I know I can tell her not to go to court, right? I can do what I want to her.

TR 5-1-14, pp.32-35, 41:8-13.

² No evidence was presented that L.K. grew up in an abusive household. L.K. testified she and her father were not speaking at the time of the incident, but at the time of trial they had a good relationship. (TR 4-28-14, p.195:15-22)

III. The Court of Appeals' Opinion

The court reversed Mr. Cooper's convictions for a new trial, after applying CRE 702 and CRE 403 and concluding Kerr's testimony was irrelevant to the issues before the jury and was highly prejudicial. *People v. Cooper*, 2019 COA 21, ¶¶17-32. The Court made clear this was not true for *all* blind expert testimony or all domestic violence testimony. *Id.* at ¶¶3, 28, 30. Rather, the court applied the rules of evidence in accordance with standard in *People v. Shreck*, 22 P.3d 68, 77-78 (Colo. 2001), to conclude testimony about domestic violence and the power and control wheel was not helpful and highly prejudicial in this case, involving no evidence of prior violence or behaviors associated with an abusive relationship. *Id.* at ¶¶17-26.

The court concluded the error was not harmless because: 1) the critical issues before the jury were who initiated the altercation and whether Mr. Cooper caused bodily injury to L.K.; 2) the testimony, as well as the prosecution's heavy reliance on it, may have caused the jury to speculate there was a history of abuse or violence; 3) the testimony invited the jury to find prior bad acts, which were never subject to CRE 404(b) and *People v. Spoto*, 795 P.2d 1314 (Colo. 1990); and 4) the testimony improperly impeached Mr. Cooper's credibility. Judge Roman dissented, agreeing Kerr's testimony was irrelevant, but concluding properly admitted evidence of guilt was overwhelming. *Id.* at ¶¶ 52-65.

STANDARD OF REVIEW AND REVERSAL

Whether the court of appeals applied the correct legal standard in evaluating the propriety of the trial court's admission of expert testimony is a question of law reviewed de novo. *Estate of Ford v. Eicher*, 250 P.3d 262, 266 (Colo. 2011). A trial court's discretion to admit expert testimony is confined to the standard in *People v. Shreck*, 22 P.3d 68 (Colo. 2001), which focuses on the application of CRE 702 and CRE 403. *People v. Martinez*, 74 P.3d 316, 322 (Colo. 2003). A trial court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. *Masters v. People*, 58 P.3d 979, 988 (Colo. 2002).

Defendants have a right to have guilt or innocence decided on the basis of properly introduced evidence. See U.S. Const. amend. V, VI, IX; Colo. Const. art. II, §§16, 25; *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). When the erroneous admission of evidence violates a defendant's constitutional rights, the State must prove the error was harmless beyond a reasonable doubt. *People v. Cobb*, 962 P.2d 944, 950 (Colo. 1998); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

If this Court concludes the error is not of constitutional dimension, reversal is required if the error substantially influenced the verdict or affected the fairness of proceedings. *Hagos v. People*, 288 P.3d 116, 119 (Colo. 2012); *People v. Summitt*, 132 P.3d 320, 327 (Colo. 2006); *Salcedo v. People*, 999 P.2d 833, 841 (Colo. 2000).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT A TRIAL COURT’S GATEKEEPER ROLE REQUIRES IT TO APPLY THE TEST IN *PEOPLE V. SHRECK*, 22 P.3D 68 (COLO. 2001) TO THE ADMISSION OF BLIND EXPERT DOMESTIC VIOLENCE TESTIMONY AND LIMIT THE TESTIMONY TO TOPICS THAT HELP THE JURY UNDERSTAND THE EVIDENCE, DETERMINE A FACT IN ISSUE, AND RETURN A VERDICT BASED ON PROPERLY ADMITTED EVIDENCE.

A. The legal framework for expert testimony

The United States and Colorado Constitutions guarantee a defendant the right to proof beyond a reasonable doubt of every element of an offense, by a fair and impartial jury. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II §§16, 23, 25. *In re Winship*, 397 U.S.358, 363-64 (1970); *McCoy v. People*, 442 P.3d 379, 385 (Colo. 2019). “This includes the right to have an impartial jury decide the accused’s guilt or innocence solely on the basis of the evidence properly introduced at trial.” *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005).

It also contemplates that the trial court will ensure the defendant’s right to a “fair verdict, free from the influence or poison of evidence which should never have been admitted, and the admission of which arouses passions and prejudices which tend to destroy the fairness of and impartiality of the jury.” *Harris v. People*, 888 P.2d 259, 264 (Colo. 1995) (citing *Oaks v. People*, 150 Colo. 64, 68, 371 P.2d 443, 447 (1962)).

The rules of evidence govern the admission of expert testimony. *People v. Shreck*, 22 P.3d 68, 76-77 (Colo. 2001); *Brooks v. People*, 975 P.2d 1105, 1113-114 (Colo. 1999). Under CRE 702, 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.” CRE 702 (emphasis added).

Evidence is only relevant if it has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” CRE 401. “Helpfulness to the jury hinges on whether the proffered testimony is relevant to the particular case: whether it ‘fits.’ Fit demands more than simple relevance; it requires that there be a logical relation between the proffered testimony and the factual issues involved in the litigation.” *People v. Martinez*, 74 P.3d 316, 323 (Colo. 2003).

Even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” CRE 403. A finding that “proposed testimony is speculative or prejudicial, or that the link between the expertise and the hard evidence in the case is tenuous, necessarily weakens the likelihood that an opinion on the subject will be

helpful to the trier of fact.” *Brooks*, 975 P.2d at 114. “Essentially, evidence should be excluded when it has an undue tendency to suggest a decision on an improper basis.” *People v. Ramirez*, 155 P.3d 371, 379 (Colo. 2007) (citing *Martinez*, 74 P.3d at 325).

The trial court performs an essential gatekeeping function. Before admitting expert testimony, a court must make specific findings on the record about: 1) the reliability of the principles underlying the testimony; 2) the qualifications of the witness; 3) the usefulness of the testimony to the jury; and 4) that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice or the other considerations in CRE 403. *Ruibal v. People*, 432 P.3d 590, 593 (Colo. 2018); *Shreck*, 228 P.3d at 77-78. *See also People v. Yachik*, 469 P.3d 582, 592 (Colo. App. 2020) (trial court must make specific findings on the record as to the reliability and relevance of blind expert testimony on grooming).

B. It is a trial court’s role as gatekeeper to determine when blind domestic expert violence testimony is admissible under the rules of evidence, and what facets of the expert’s testimony will be helpful to the jury and not outweighed by the considerations in CRE 403.

The State argues that blind expert domestic violence testimony should never be limited because blind testimony by nature is general, and it is the jury’s role to sift through an expert’s testimony and determine what is relevant to the case. (OB, p.20) The State confuses the jury’s role as factfinder and the trial court’s role as

gatekeeper. A jury makes credibility determinations and decides if the prosecution has proven the acts alleged, based on evidence properly admitted under the rules of evidence and court precedent. The trial court always has the initial role of ensuring evidence the jury receives comports with the rules of evidence.

In the context of FRE 702, the federal counterpart to CRE 702, the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) characterized the trial court's "task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand," as "a screening role." *Daubert*, 509 U.S. at 596-97. A trial court has a "special obligation" to act as gatekeeper with respect to expert testimony based on specialized knowledge. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). This Court also has taken the approach that the trial court makes decisions concerning relevancy of expert testimony before it reaches the jury. *Shreck*, 22 P.3d at 77.

Once a trial court determines an area of social science is "relevant" to help the jury understand the evidence or determine a fact in issue in the case, it does not open the floodgates for the expert witness to lecture the jury on all aspects of their area of expertise. A trial court's inquiry under CRE 702 must be tied to the facts of a particular case. *Kumho*, 526 U.S. at 150; *Shreck*, 22 P.3d at 77; *Brooks v. People*, 975 P.2d 1105, 1114 (Colo. 1999).

The Court in *Daubert* contemplated the trial court would apply CRE 702, not only to the subject of the testimony, but to the scope of the testimony. Indeed the Court acknowledged that trial courts, applying legal constructs in determining what aspects of expert testimony should properly go to the jury, may not satisfy the expert's desire to provide all of the details they would like:

We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.

Daubert, 509 U.S. at 597. The same is true in the social science realm where experts may want to educate the jury on all aspects of a particular theory of social science that are simply irrelevant or misleading in a particular criminal case. It is particularly true in the domestic violence context where experts are not only social workers or licensed counselors but also staunch advocates in the field.³

The State also takes the position that it would be problematic to limit an expert's testimony about the power and control "wheel" because it is a "well-recognized tool" that has been widely accepted in the social science community as

³ At the time of her testimony, Kerr was the executive director of TESSA, an agency dedicated to the issues of domestic violence and sexual assault, including victim advocacy. See <https://www.tessacs.org/> (last visited Oct. 27, 2020)

an “accurate explanation of the information.” (AB, pp.21-24) First, the State’s position is at odds with guidance within the field, that a blind expert testifying about the “wheel” should “highlight[] relevant sections of quadrants as prearranged with counsel.” Victoria L. Lutz, *A Guide to Domestic Violence Expert Testimony in Colorado*, 45 Colo. Law. 63, 65 (Nov. 2016).

Second, it assumes that the power and control wheel itself and testimony about the entire “wheel” is relevant and helpful to a jury in any case where one or more behaviors on the wheel might be present. The State argues that a blind domestic violence expert could limit their testimony to topics within their field through leading questions, but a “tool” such as the power and control wheel could not be so limited. (AB, pp.22-23) However, the State does not explain the relevance of the wheel or it is helpful to a jury’s understanding of the evidence or determination of a fact in issue. It seems unnecessary for an expert to refer to the wheel at all, when they are capable of testifying about the behaviors on the wheel involved in a particular case, and explain their significance in the domestic violence context.

Kerr herself described the wheel as something she and others “use in the domestic violence field to talk about the issue.” (TR 4-30-127-28) She did not describe it as a “tool” necessary for the jury to understand her testimony. Indeed, it was designed as, and remains a list of behaviors described by women in abusive

relationships.⁴ While it may be useful to persons working in the field of domestic violence as an educational, advocacy, or treatment tool, it is irrelevant to a jury's determination in a criminal case and has the potential for misuse as a diagnostic tool. Thus, it would be proper for a trial court, applying CRE 702 and CRE 403, to exclude the power and control wheel, exclude mention by the expert of the "wheel," and permit the expert to testify only about behaviors that might be counterintuitive.

The State also contends that limiting a domestic violence expert's testimony to topics relevant to the facts at issue in a case, may turn it into impermissible profile evidence like that in *Salcedo*, 999 P.2d at 838-39. However, *Salcedo* was a narrow decision that drug courier profile testimony was inadmissible because it was based on an officer's subjective judgment, was not reliable, and applied equally to law-abiding citizens. *Masters v. People*, 58 P.3d 979, 993 (Colo. 2002). Here, however, requiring an expert's testimony to be limited to topics logically related to issues

⁴ The Power and Control Wheel was developed in 1984 by staff at the Domestic Abuse Intervention Programs (DAIP), an organization formed in 1980 by "activists in the battered women's movement." <https://www.theduluthmodel.org/about-us/> (last visited Oct. 27, 2020); see also <https://www.theduluthmodel.org/wheels/faqs-about-the-wheels/> (last visited Oct. 27, 2020). According to its developers, the wheel was the product of "several months" of "focus groups of women who had been battered." *Id.* It is meant to be used as a means to "describe battering." *Id.* ("How is the Power and Control Wheel used?").

before the jury in the case, does not amount to profiling, it ensures the evidence is helpful to the jury as required by CRE 702.

Finally, the State argues that Kerr’s testimony here was sufficiently limited to topics at issue in the case because Kerr “addressed the spokes of the wheel that had factual support in this specific case.” (AB, p.26) Yet, the State acknowledges that before her testimony about specific spokes, Kerr explained “the generally-accepted power and control wheel in its entirety.” (AB, 26) Again, the contents of the entire wheel was not necessary to an understanding of the evidence or helpful to the jury in determining a fact at issue in the case. The jury was not asked to make a determination that the acts alleged fit into the social science definition of “domestic violence” or that Mr. Cooper and K.L. were in an abusive relationship involving power and control dynamics. The jury’s task was to determine whether the prosecution’s evidence established the elements of the crimes charged beyond a reasonable doubt.

The fact Mr. Cooper and K.L. were in an intimate relationship did not make Kerr’s testimony relevant. As the court of appeals explained, “the existence of the relationship alone does not justify the admission of the “power and control wheel” and other expert testimony regarding the characteristics of an abusive intimate relationship.” *Cooper*, 2019 COA at ¶29.

II. IN THE ABSENCE OF EVIDENCE OF PRIOR VIOLENCE, BLIND DOMESTIC VIOLENCE TESTIMONY MIGHT BE ADMISSIBLE IN A GIVEN CASE IF THE COURT FINDS SUCH TESTIMONY ADMISSIBLE AFTER EXERCISING ITS ROLE AS GATEKEEPER UNDER CRE 702 AND CRE 403. BUT HERE, THE COURT OF APPEALS CORRECTLY DETERMINED KERR’S TESTIMONY WAS INADMISSIBLE.

The court of appeals’ decision did not rest on a conclusion that Kerr’s testimony was inadmissible because the charged act was the first act of domestic violence. Rather, the court’s decision was based on the fact that there was no evidence of prior violence, *and* no evidence of controlling behaviors by Mr. Cooper, or counterintuitive behaviors by L.K., that would make such testimony relevant and helpful to the jury in deciding the issues before it. *Cooper*, ¶¶26-28.

The opinion made clear the court was not questioning the admissibility of blind domestic violence expert testimony “in the proper case.” *Id.*, ¶3. The court acknowledged expert domestic violence testimony might be relevant in a case involving counterintuitive victim behaviors like staying in an abusive relationship. *Id.*, ¶3, ¶28. But here, L.K. moved out immediately and did not remain in the relationship.

The State relies on *People v. Lafferty*, 9 P.3d 1132 (Colo. App. 1999) in arguing the court of appeals erred in finding that without a prior act of violence, Kerr’s testimony was inadmissible. First, the State mischaracterizes the court’s opinion in *Cooper*. The court did not find Kerr’s testimony admissible solely

because there was no prior act of violence. Second, the court acknowledged domestic violence testimony might be relevant when a case involves counterintuitive victim behaviors. *Lafferty* is such a case. The expert's testimony was limited to the "cycle of violence" and how it related to recantation. The court in *Cooper* concluded *Lafferty* did not apply because Mr. Cooper's case also did not involve recantation. *Cooper*, ¶ 30.

The other cases relied upon by the State, likewise involve alleged facts about counterintuitive victim behaviors to which the trial court found expert testimony on domestic violence relevant. *People v. Brown*, 94 P.3d 574, 581 (Cal. 2004) (recantation); *People v. Williams*, 78b Cal. App. 4th 1118, 1129 (2000) (telling a family member "it was an accident" and returning to the relationship). These behaviors were not present in this case.

The State also argues the fact the prosecutor did not admit "cycle of violence" testimony shows the prosecutor did not use Kerr's testimony to infer prior abuse. However, the prosecutor fully intended for Kerr to testify about the "cycle of violence," and argued vigorously for the court to admit it. The prosecutor also briefly asked Kerr about it before the court sustained a defense objection, reminding the prosecution that testimony was not allowed. (TR 4-28-14, pp.5-8, 226-27; TR 4-30-14, pp.9-10, 94-107; 133-34)

The State next argues there was a need for Kerr's testimony in this case because the defense cross-examined L.K. about differences between what she told police the night of the incident, her testimony to the prosecution before trial, and her testimony at trial. It was a routine method of cross-examination, used in all types of cases, to raise questions about a witness's credibility. Nothing about it pertained to counterintuitive victim behaviors or any other subject on which Kerr's testimony would provide appreciable help.

The State argues L.K. did not tell officers at the scene "the true extent of what defendant had done." (AB, p.36 n.12) However, there simply is no evidence in the record that L.K.'s later statements were a product of being a domestic violence victim, including Kerr's testimony. Kerr testified sometimes a domestic violence victim wants to keep the abuse a secret out of fear, or their embarrassed, or abusive behavior has been "normalized" by their childhood experiences. (TR 4-30-14, pp.134-35) This testimony by Kerr is more like "delayed reporting," which is a victim behavior that might be counterintuitive to a jury. L.K. did not call the police because a phone was not available, but when the officers arrived, she was not reluctant to talk to the them or allow them to take pictures.

The State also argues Kerr's testimony was relevant to explain why she did not seek medical attention. While that might be a counterintuitive victim behavior

in another case for which domestic violence testimony on that topic might be helpful, here there was no such evidence. L.K. said she was checked out by the medical personnel who arrived the night of the incident. (TR 4-30-14, pp. 49:14-19; 97:5-13) There was no testimony that they encouraged her to go to the hospital and she refused, or they offered to call an ambulance and she refused.

In exercising its gatekeeping function with respect to expert testimony, a trial court “must apply its discretionary authority under CRE 403 to ensure the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence.” *Shreck*, 22 P.3d at 78.

Here, there simply was no evidence presented by the prosecution of counterintuitive behaviors that made Kerr’s testimony relevant. Even if this Court concludes some of Kerr’s testimony had some minimal probative value, it was substantially outweighed by the unfair prejudice of testimony, particularly the behaviors on the “Power and Control Wheel,” which not logically connected to any facts in the case. The wheel reflected physical as well as “sexual” violence as being part of a domestic violence relationship and included numerous behaviors of domestic violence perpetrators which, in the absence of any relevance to facts of this

case, likely caused the jury to at best speculate or worse *believe* that Mr. Cooper had committed those types of acts and prior crimes against L.K.

Limited blind expert domestic violence testimony may be admissible in a case involving counterintuitive victim behaviors like recantation or delayed reporting. However, here, there was no logical relation between Kerr's testimony and the factual issues in the case. In the absence of any evidence of counterintuitive behaviors by L.K. or controlling behaviors by Mr. Cooper, the court of appeals correctly determined Kerr's testimony was inadmissible.

III. THE COURT OF APPEALS WAS CORRECT TO REVERSE MR. COOPER'S CASE FOR A NEW TRIAL BECAUSE KERR'S INADMISSIBLE TESTIMONY AND THE PROSECUTION'S RELIANCE ON IT IN CLOSING ARGUMENT, INVITED THE JURY TO INFER FACTS NOT IN EVIDENCE AND RENDER A VERDICT ON AN IMPROPER BASIS.

Kerr's irrelevant and highly prejudicial testimony, which cast L.K. as a "domestic violence victim" and Mr. Cooper as an "abuser," deprived Mr. Cooper of his federal and state constitutional right to proof beyond a reasonable doubt of every element of the offenses charged by a fair and impartial jury. See U.S. Const. amend. V, VI, IX; Colo. Const. art. II, §§16, 23, 25; *Sullivan*, 508 U.S. at 279; *Domingo-Gomez*, 125 P.3d at 1048; *Harris*, 888 P.2d at 264.; *Oaks*, 371 P.2d at 447. When the erroneous admission of evidence violates a defendant's constitutional rights, the State must prove the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Hagos v. People*, 288

P.3d 116, 119 (Colo. 2012) (reversal is required if there is a reasonable possibility the error might have contributed to the conviction).

Even if this Court concludes the error is not of constitutional dimension, reversal is required if the error substantially influenced the verdict or affected the fairness of proceedings. *Hagos*, 288 P.3d at 119; *Summitt*, 132 P.3d at 327; *Salcedo*, 999 P.2d at 841. The court of appeals, applying the more stringent harmless error analysis, correctly concluded the error was not harmless because: 1) the critical issues before the jury were who initiated the altercation and whether Mr. Cooper caused bodily injury to L.K.; 2) the testimony, as well as the prosecution's heavy reliance on it, may have caused the jury to speculate there was a history of abuse or violence; 3) the testimony invited the jury to find prior bad acts, which were never subject to CRE 404(b) and *People v. Spoto*, 795 P.2d 1314 (Colo. 1990); and 4) the testimony improperly impeached Mr. Cooper's credibility.

The State takes issue with the court of appeals' reliance on *Castillo v. People*, 421 P.3d 1141 (Colo. 2018) and *Kaufman v. People*, 202 P.3d 542 (Colo. 2009) for its finding that the admission of extensive expert testimony (and the prosecution's use of it in closing), in the absence of any evidence making it relevant, created a great danger that the jury would find a way to make use of it. While *Castillo* and *Kaufman* both involved erroneous jury instructions, the court of appeals did not err

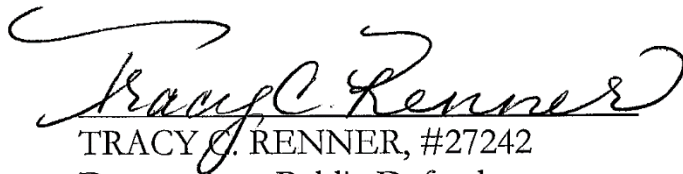
in applying the thinking behind those decisions to the situation here. The general principle behind both is the same—when the prosecution and/or court submit misleading material to a jury that is significant with respect to the jury’s determination of a fact in issue, it is reasonable to believe the jury will, given the authority of the party submitting it to them, believe they must make use of that material in some way.

Here, the prosecution presented extensive inadmissible expert testimony about domestic violence relationships and urged the jury to return a guilty verdict based on that erroneously admitted evidence. It is reasonable to believe the jury considered the evidence in a way that negatively affected their view of Mr. Cooper and his denial of the acts alleged and his self-defense claim. The fact that Kerr testified she had no knowledge about the particulars of the case made no difference. It did not make clear there were no prior acts of violence. The jury received her highly prejudicial testimony that legally bore no relevance to the facts of the case, but easily could have been misused by the jury to find Mr. Cooper had been violent and controlling in the past. Thus, the court of appeals correctly found reversal of Mr. Cooper’s convictions was required because the erroneous admission of Kerr’s testimony substantially influenced the verdict or affected the fairness of the trial.

CONCLUSION

Mr. Cooper respectfully requests this Court to affirm the decision of the Colorado Court of Appeals reversing his convictions for a new trial.

MEGAN A. RING
Colorado State Public Defender

A handwritten signature in black ink, reading "Tracy C. Renner". The signature is fluid and cursive, with a large initial "T" and "R".

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CERTIFICATE OF SERVICE

I certify that, on October 28, 2020, a copy of this Answer Brief was electronically served through Colorado Court E-Filing on Katharine J. Gillespie of the Attorney General's Office.

A handwritten signature in black ink, reading "Tracy C. Renner". The signature is fluid and cursive, with a large initial "T" and "R".