

2016

**The State of Utah, Plaintiff/Appellee, vs. Russell Edward Yalowski,  
Defendant/Appellant.**

Utah Court of Appeals

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**Recommended Citation**

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,

Plaintiff/Appellee,

vs.

RUSSELL EDWARD YALOWSKI,

Defendant/Appellant.

Case No. 20150270-CA

Appellant is incarcerated.

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**BRIEF OF APPELLANT**

Appeal from a conviction for one count of burglary, a second degree felony, in violation of Utah Code §76-6-202; one count of threat of violence, a class B misdemeanor, in violation of Utah Code §76-5-107(1); and one count of criminal mischief, a class B misdemeanor, in violation of Utah Code §76-6-106(2)(c), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Paul B. Parker presiding.

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FILED  
UTAH APPELLATE COURTS

MAR 29 2016



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**INTRODUCTION**

As required by Utah Rule of Appellate Procedure 24(c), this reply brief is “limited to answering any new matter set forth in the opposing brief.” The brief does not restate arguments from the opening brief or address matters that do not merit reply.

**ARGUMENT**

**I. THIS COURT SHOULD REVERSE BECAUSE THE TRIAL COURT PRECLUDED YALOWSKI FROM CROSS-EXAMINING THE STATE’S COMPLAINING WITNESS REGARDING PRIOR ACTS OF DISHONESTY THAT WERE PROBATIVE OF THE WITNESS’S CHARACTER FOR UNTRUTHFULNESS AND MOTIVE TO TESTIFY FALSELY.**

The State concedes in its brief that the issue is preserved as to rules 608(b) and 403. This Court should reverse because (A) Yalowski established prejudice, and (B) the trial court abused its discretion by precluding cross-examination regarding prior misconduct that was admissible and highly probative of Richards’s credibility.

### **A. Yalowski Established Prejudice.**

Contrary to the State's claims, the trial court's exclusion of Richards's plea in abeyance (theft by deception) and 2014 arrest (giving a false name to an officer and theft by deception) was not harmless. *See* Aple. Br. 22-25. Richards's testimony was critical to the State's case, particularly with respect to the burglary and threat of violence allegations. Moreover, the extent of the cross-examination allowed was insufficient to expose Richards's motive to lie and reveal her incapacity for truthfulness.

First, the State contends that its "case neither rose nor fell on [Richards's] credibility." Aple. Br. 22. The State is mistaken as it is reasonably likely that Richards's testimony significantly influenced the jury's decision. For example, Richards's testimony was important with respect to the elements of burglary and threat of violence.

Burglary requires more than just "enter[ing] the [victim's] home without permission." Aple. Br. 23. Rather, "it is 'the intent to commit' [a] specific underlying offense which qualifies the crime as burglary" as opposed to criminal trespass. *State v. Alexander*, 2012 UT 27, ¶32 n.56, 279 P.3d 371; *see also* Utah Code § 76-6-202. Thus, to establish the elements of burglary in this case, the State had to prove that Yalowski intended to commit assault, which is defined, *inter alia*, as "a threat, accompanied by a show of immediate force or violence, to do bodily injury to another." Utah Code §76-5-102 (2003); *see also* R.90, 95.<sup>1</sup>

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<sup>1</sup> As explained in the opening brief, the jury's consideration of the crimes Yalowski "intended to commit" was limited to assault or lewdness. R.90. The jury acquitted on the lewdness count, so it is likely they convicted under an assault theory. R.101. But even if the jury did convict under a lewdness theory, the State acknowledges

As Richards provided the only evidence of Yalowski's alleged threats of bodily injury, her testimony was critical to satisfy burglary's requisite intent—that is, the intent to threaten Richards with bodily injury while entering or remaining in her home. *See* Utah Code § 76-6-202. Her testimony was also essential to convict Yalowski of threat of violence, which requires proof of a “threat[] to commit any offense involving bodily injury [or] death.” Utah Code § 76-5-107 (1).

Tabora's testimony added little value to the overall evidence, as she could not recall the conversation between Richards and Yalowski. She only described “arguing” and “bickering.” R.167:140-41, 150. But evidence of arguing does not establish that Yalowski threatened Richards with bodily injury. Nor does evidence of Tabora and Richards acting “frightened” establish what Yalowski said. *See* Aple. Br. 23. Accordingly, without Richards's testimony, the State could not prove that any threats were made; all they could show was an argument between Richards and Yalowski. Thus, Richards's testimony was critical to satisfy burglary's intent element as well as the elements of threat of violence. In other words, Richards's credibility mattered.

The State also maintains that the error was harmless because Yalowski “was allowed to ask [Richards] about using a false name.” Aple. Br. 24. But cross-examination regarding Richards's use of a false identification was insufficient to expose Richards's motive to lie and reveal her incapacity for truthfulness. As discussed, the defense's ability to fully develop that cross-examination was circumscribed by the fact that Richards used

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that this count was “supported solely by [Richards's] uncorroborated testimony.” Aple. Br. 24.



the fake ID to visit Yalowski at the jail. *See* Aplt. Br. 25-26; *see also* R.167:11-15, 131. Accordingly, defense counsel had to limit her cross-examination of Richards to questions that would not reveal Yalowski was incarcerated.

Moreover, Richards's use of a false ID—viewed in isolation—did not serve to undermine her veracity in the same way it would if the sum of her dishonest acts were revealed to the jury. *See United States v. Leake*, 642 F.2d 715, 717-19, (4th Cir. 1981) (finding limitation of the defendant's cross-examination of a prosecution witness "was clearly prejudicial error" where the sum of the witness' dishonest acts "establish[ed] a pattern of fraudulent activity that, if revealed, would have placed [the witness's] credibility in question"). Nor did it shed light on Richards's *pattern* of misconduct and deceit, which demonstrated her willingness to lie in order to satisfy her self-interests. Thus, by disallowing cross-examination on the plea in abeyance and 2014 arrest, the jury was denied full exposure to Richard's character for untruthfulness and motive to testify falsely.

**B. The Trial Court Erred By Limiting Yalowski's Cross-examination Of Richards Regarding Her Prior Plea In Abeyance And 2014 Arrest; This Misconduct Was Highly Probative Of Richards's Credibility And Admissible Under Rules 608 And 403.**

Richards's prior acts of misconduct were probative of her character for truthfulness under rule 608(b) and her motive to testify falsely under rule 608(c); that probative value was not outweighed by the danger of unfair prejudice under rule 403.

1. *Rules 608(b) & 608(c).*

The State acknowledges that allegations of theft by deception and giving a false

name to a police officer were relevant to Richards's "general character for truthfulness or untruthfulness" under rule 608(b). Aple. Br. 27. Contrary to the State's claims, Richards's prior acts of misconduct were also probative of her motive to testify falsely under rule 608(c). Moreover, defense counsel preserved an argument under rule 608(c), and Yalowski can demonstrate plain error. *See* Aple. Br. 30-33.

First, the State takes an unnecessarily narrow view of what constitutes "motive," which is defined broadly as "something (as a need or desire) that causes a person to act." *See* <http://www.merriam-webster.com/dictionary/motive>; *State v. Morris*, 40 Utah 431, 122 P. 380, 382 (1912) (defining motive as "the moving power which impels to action for a definite result"); *see also* Utah R. Evid. 608 (c) (broadly allowing evidence of "[b]ias, prejudice, or *any* motive to misrepresent" (emphasis added)). As the State itself recognizes, Richards's misconduct demonstrates a "willingness to lie for personal gain." Aple. Br. 32. Her acts do not only show that she lied in the past, but also shed light on *why* she lies—to satisfy her own self-interests. Accordingly, her acts are probative of why she would lie about Yalowski's conduct on the night of the incident—again, to satisfy her own self-interests, be it ill-will, pleasure, or revenge.<sup>2</sup>

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<sup>2</sup> The State also suggests that because Richards already testified favorably for the prosecution at preliminary hearing, her 2014 arrest did not give her any incentive to favor the prosecution in her testimony. Aple. Br. 32. Regardless of how she testified at the preliminary hearing, the lingering prospect of charges gave Richards a personal interest in the case, which, if put before the jury, supported a reasonable inference of bias. *See State v. Fung*, 907 P.2d 1192, 1195 (Utah Ct. App. 1995).

Next, the State contends that Yalowski did not preserve his argument under Rule 608(c). Aplt. Br. 30-32. However, as discussed, defense counsel gave the court an opportunity to rule on Yalowski's rule 608(c) argument when she moved to admit Richards's plea in abeyance and 2014 arrest under rule 608. Aplt. Br. 27-28. Defense counsel also argued that Richards's acts "involve[d] acts of deception *with the intent to gain something*" R.167:10-11 (emphasis added). Counsel's "intent to gain something" language was relevant to *why* Richards lies, i.e. her motive. Thus, counsel adequately raised the issue "even if indirectly," by bringing it "to a level of consciousness such that the trial judge [could] consider it." *In re Baby Girl T.*, 2012 UT 78, ¶39.

But even if Yalowski's rule 608(c) argument is unpreserved, Yalowski sufficiently demonstrated plain error. Aplt. Br. 27-28. The State nevertheless contends that Yalowski "nominally argue[d]" plain error and that his 608(c) argument should be disregarded because he "d[id] not even bother to separate his rule 608(b) and 608(c) arguments." Aplt. Br. 30-32; *State v. Roberts*, 2015 UT 24, ¶¶18-19, 345 P.3d 1226. On the contrary, Yalowski demonstrated error by citing to the section of his brief that analyzed—under separate headings—why the court erroneously excluded Richards's misconduct under rules 608(b), 608(c), and 403. *See* Aplt. Br. 12-21, 28. In his rule 608(c) section, Yalowski conducted a separate legal analysis under rule 608(c) and cited pertinent rules and cases. *See* Aplt. Br. 17-18. He also satisfied plain error's prejudice prong by pointing to the section in his brief that analyzed prejudice. *See* Aplt. Br. 21-28. Finally, Yalowski pointed to relevant cases and rules to demonstrate the obviousness of the court's error,



see Aplt. Br. 28, including cases defining the proper scope of a trial court's discretion.

See *State v. Sheehan*, 2012 UT App 62, ¶¶29-30, 36, 273 P.3d 417.<sup>3</sup>

## 2. Rule 403

Even though the trial court did not provide any reasons for limiting Richards's cross-examination, the State argues that "the trial court was well within its discretion" to disallow inquiry into Richards's misconduct under rule 403. Aple. Br. 25-23. Nothing in the record justifies the court's limitations because (1) this case is distinguishable from *State v. Gomez* and *State v. Valdez*, (2) Richards's misconduct was similar to and probative of the circumstances in this case, and (3) the probative value of the misconduct was not substantially outweighed by the danger of unfair prejudice. See Aple. Br. 25-23.

First, the State attempts to compare this case to *State v. Gomez*, which held that the trial court was within its discretion to preclude inquiry into the victim's use of a false identification card to gain entry into bars. 2002 UT 120, ¶7, 33-36, 63 P.3d 72; Aple. Br. 28-29. *Gomez* is inapposite because it addressed an isolated instance of untruthful conduct that was tangential to whether the victim would lie to the police about the rape charges. See *id.* In this case, however, the strong probative force of Richards's misconduct came from her consistent pattern of intentionally deceiving others, including law enforcement.

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<sup>3</sup> The State contends that the court's error under rule 608(c) was not obvious because "[n]othing in Defendant's proffer ... suggest[ed] any connection between Defendant and [Richards's] accusations in this case," Aple. Br. 32. Yalowski's trial counsel, however, argued that Richards's misconduct "involve[d] acts of deception *with the intent to gain something*" R.167:10-11 (emphasis). This language was relevant to *why* Richards lies, i.e. her "motive" to falsely incriminate Yalowski. See Utah R. Evid. 608(c).

This case is also distinguishable from *State v. Valdez*, 2006 UT App 290, 141 P.3d 614; Aple. Br. 29-30. In that case the trial court permitted cross-examination concerning the victim's forgery conviction, but precluded inquiry into a dismissed false information to police charge. *Valdez*, 2006 UT App 290, ¶4. This court affirmed, reasoning that the probative value of the dismissed charge was "negligible in light of other similar impeachment evidence and because a dismissed charge [wa]s merely an allegation of misconduct." *Id.* ¶16.

In this case, Richards's dishonest acts included recent acts that were strongly probative of a continuous pattern of lying. Unlike *Valdez*, where there was no indication that the victim's giving of false information occurred temporally close to trial, at least one of Richards's acts of misconduct took place in June, 2014—only 6 months before trial. R.71-75, 167:10-11. Also, Richards's acts of misconduct collectively reveal a stronger pattern of deceit as there were three separate instances in total. R.167:9-11. Accordingly, the sum of Richards's misconduct demonstrates a continuous course of lies that persisted up until the trial, which was highly probative of her willingness to lie on the stand.

Secondly, the State argues that the misconduct was only "marginally" probative of "whether she was telling the truth here." Aple. Br. 27. To support this argument, the State contends that "the defense proffer about the plea in abeyance and the arrest was too vague to say whether they involved specific instances of conduct similar to the circumstances here." Aple. Br. 27-28. On the contrary, the defense proffered that Richards's plea in abeyance and arrest involved "lying to the jail, [] lying to the police,

[and] acts of deception with the intent to gain something.” R.167:10-11. Counsel’s proffer adequately informed the court that Richards’s conduct was probative of: (1) whether Richards lied to the police in this case and (2) her willingness to lie for purposes of self-gain.

The record also refutes the State’s claim that “the trial court could have reasonably viewed [the 2014 arrest] as a mere allegation of misconduct.” Aple. Br. 28. In fact, it is evident that the trial court was not concerned that the arrest constituted a “mere allegation” because it allowed inquiry into Richards’s use of a false ID at the jail, which was also an allegation of misconduct.

Nor was it important that Yalowski “never proffered when the dismissed plea in abeyance was.” Aple. Br. 28. Nothing in the record suggests that the plea in abeyance was remote. However, the plea is relevant even if it was remote. Indeed, even remote misconduct carries strong probative value if the person “has not led a legally blameless life since the time of the remote prior” and it fits into a “‘pattern’” of misconduct. *People v. Mendoza*, 93 Cal. Rptr. 2d 216, 220 (Cal.App. 4th 2000). The record reveals that Richards did not lead a “blameless life” given her recent June 2014 arrest and her use of a fake ID at the jail while Yalowski’s charges were pending. Thus, regardless of the age of the plea in abeyance, the act carried strong probative value as it fit into an uninterrupted pattern of lying for self-gain.

Finally, the State is wrong to suggest that evidence of Richards’s plea in abeyance and 2014 arrest was “unlikely to have any effect other than to embarrass [Richards] and to distract the jury.” Aple. Br. 28. As explained, Richards’s prior acts of misconduct were



highly probative of her character for truthfulness and motive to testify falsely. Moreover, Defense counsel asked that she be allowed to “briefly cross-examine [Richards]” regarding the instances and proffered that her inquiry would involve “approximately three questions” for each incident. R.167:11; Aplt. Br. 21. Counsel’s proffer suggested that she did not plan to inquire into irrelevant detail at the risk of the jury’s confusion or Richard’s embarrassment. Thus, on balance, the risk of prejudice, if any, did not substantially outweigh the strong probative value of the evidence.

## **II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING LAY OPINION TESTIMONY REGARDING SHOE IMPRESSION EVIDENCE THAT REQUIRED SPECIALIZED KNOWLEDGE AND WAS NOT HELPFUL TO THE JURY.**

### **A. Kalinowski Offered Opinions About The Shoe Impressions That Fausett Never Gave.**

Kalinowski, a lay forensic technician, offered opinions regarding shoe impression evidence that were unfounded and misleading and required a degree of knowledge well outside the ken of the average bystander. Even though Kalinowski provided inappropriate lay opinions that Officer Fausett never gave, the State argues that Yalowski’s failure to challenge Fausett’s testimony was “fatal to his claim.” Aple. Br. 38-40. The State is incorrect.

To be clear, Yalowski challenged Kalinowski’s testimony because it went above and beyond Fausett’s testimony and exceeded what *State v. Ellis* held was appropriate. 748 P.2d 188, 190 (Utah 1987). Fausett’s testimony was more akin to the lay opinion testimony in *Ellis*; it involved general comparisons about observed similarities between the shoes and the impressions. *See id.* Kalinowski, however, improperly added to

Fausett's testimony in two ways: (1) by testifying that an impression in the snow was "identical" to tread pattern areas of Yalowski's sneakers, *see* R.167:208, and (2) by drawing the following conclusions:

[although] there's not much of a shoe impression on the top, . . . you can see . . . down the side [of the door] you have that same, similar, block cut pattern on the side of the shoe indicating more of an angled hit towards the door. Therefore, you wouldn't see much of the shoe itself, but more of the side of the shoe.

R.167:209-10; *see also* R.167:207; State's Exh. 45.

Kalinowski asserted his conclusion—using an expression of absolute certainty—that the tread patterns were "[i]dentical." R.167:208. He also told the jury that the mark on Richards's door was a shoe impression and that the impression was created by "hit[ting]" the door at an angle. R.167:209-10. Fausett offered no conclusions of this strength. *Cf.* R.167:180 (Fausett describing "white marks [on the door] that are similar to the ones in size and shape that we saw on the shoe print impressions"); *see generally* R.167:166-83, 189-90. And unlike Fausett's testimony, Kalinowski's opinions went to the ultimate issue of breaking and entering. That is, whether Yalowski unlawfully entered Richards's home by forcefully kicking her door with his shoe. Thus, Kalinowski's testimony was not cumulative of Fausett's.

**B. Kalinowski's Lay Opinion Testimony Required Specialized Knowledge And Failed To Assist The Jury.**

Kalinowski's testimony was not "the same as that given in *Ellis*." Aple. Br. 40-47. Additionally, his opinions were not helpful and could not be "readily drawn by any person who observed both' the shoes and the shoe impressions." Aple. Br. 42-48.

First, the State argues that Kalinowski's testimony was "no different from the muddy footprint comparison in *Ellis*." Aple. Br. 42. But as explained, the lay security guard in *Ellis* merely "compared the footprints outside the house to those inside." *Ellis*, 748 P.2d at 190. He also said that one exhibit, "a photograph of a footprint 'with the distinctive heel marking[,] appeared to be the one on the inside of the carpet.'" *Id.* However, unlike Kalinowski, the lay security guard in *Ellis* did not use terms of certainty like "identical;" he did not claim that impressions were "identical" to tread patterns on the defendant's shoe; he did not conclude that an otherwise ambiguous mark was a shoe impression; and he did not offer his opinion concerning the type of force needed to create such an impression. *See id.* at 190-91. Thus, in contrast to *Ellis*, Kalinowski did not merely "compare[]" the footprints and suggest that they "'appeared to be'" similar. *Id.*

Additionally, the State argues that Kalinowski's testimony was helpful, and his conclusion that the tread patterns were "identical" "did not tell the jury what result what to reach." Aple. Br. 43-44. It reasons, *inter alia*, that "it is not as all clear that the technician's isolated 'identical' meant 'matched.'" Aple. Br. 43-44.<sup>4</sup> It further contends that this conclusion required no specialized knowledge because Kalinowski only pointed out readily observable similarities using terms like "'similar' and 'consistent with,'" but never "certain match." Aple. 47-48. The State fails to appreciate that words matter—particular in the context of forensic evidence.

Powerful words like "'identical'" and "'match'" have a "profound effect on how

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<sup>4</sup> "Identical" is defined as "exactly the same," *see* <http://www.merriam-webster.com/dictionary/identical>, and "match" is similarly defined as "an exact counterpart." *See* <http://www.merriam-webster.com/dictionary/match>.

the trier of fact ... perceives and evaluates scientific evidence.” National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward*, 21 (2009) [NAS Report]. Studies show that jurors overestimate the meaning of these terms. See Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 Hastings L.J. 1159, 1188 (2008). Moreover, as is the case with shoe impression comparison evidence, terming a comparison a “match” or “identical” may imply a degree of confidence that is not scientifically supportable or meaningful. NAS Report, at 149; Jane Campbell Moriarty, *Will History Be Servitude?: The Nas Report on Forensic Science and the Role of the Judiciary*, 2010 Utah L. Rev. 299, 313 (2010). These considerations have generated concern among researchers<sup>5</sup> and have prompted courts to limit expert expressions of certitude with respect to forensic evidence.<sup>6</sup>

If courts are to allow lay witnesses to testify about similarities among shoes and shoe impressions, then they should require these witnesses to use terminology commensurate with their lay understanding of the evidence. Only then can the testimony be helpful to the jury. But as argued, that was not the case here. See Aplt. Br. 31-34. And

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<sup>5</sup> See, e.g., John M. Butler, *Advanced Topics in Forensic DNA Typing: Interpretation* 472-74 (2015); NAS Report, at 21; McQuiston-Surrett & Saks, *Communicating Opinion Evidence*, at 1188.

<sup>6</sup> See, e.g., *United States v. Monteiro*, 407 F. Supp.2d 351, 372-73 (D. Mass. 2006) (refusing to allow the expert to “assert any degree of statistical certainty, 100 percent or otherwise, as to a match” where “there [wa]s no reliable statistical or scientific methodology which w[ould] currently permit the expert to” give such testimony); *United States v. Glynn*, 578 F. Supp. 2d 567, 569-75 (S.D.N.Y. 2008); *United States v. Taylor*, 663 F. Supp. 2d 1170, 1179-80 (D. N.M. 2009).

furthermore, if researchers and courts agree that opinions of certitude exceed the scope of proper expert testimony, then surely Kalinowski's conclusion that the tread patterns were "identical" required specialized knowledge outside the ken of an average bystander.

The State likewise argues that Kalinowski's opinions regarding the mark on the door were helpful and did not require specialized knowledge. Aple. Br. 47-48. It claims that Kalinowski's "inference" "that the shoe struck the door at an angle was proper under rule 701" because it could "be readily drawn by any person who observed both" the shoes and the photos. Aple. Br. 45, 48. These arguments are unpersuasive.

Yalowski urges this Court to look at the photos of the marks on the door. *See* Addendum A; State's Exs. 12, 43-45. The photo portrays several small, indistinct marks. These marks could have come from many different sources. Could they be rub marks left from moving an oversized piece of furniture through the door? Or could they be paint marks? Based on these pictures and without better context, it is not readily inferable that a shoe was the source of the marks. Kalinowski, however, implied to the jury that these marks came from "the side of the shoe"; the reason the full impression was not visible was the person's "angled hit to the door." R.167:209-10.

But even if the source of the marks was a shoe, it was not readily inferable that they were produced by an "angled hit to the door." R.167:209-10. A juror just as easily could have concluded that the marks came from an individual, such as Yalowski, who used his foot to push open the door because his hands were full. Kalinowski's comments concerning the marks on the door were not appropriate inferences for a lay witness to make, particularly because they went to the ultimate issue of breaking and entering. Thus,



whether the marks came from a “hit to the door” was an inference for the jury to make. Or alternatively, this was an opinion that should have been drawn by a properly qualified expert. As given, Kalinowski’s opinions were unhelpful and required the specialized knowledge of an expert.

Finally, the State contends “the jury knew that no one expected them to unquestionably accept [Kalinowski’s] comparisons, no matter how strong his opinions.” Aple. Br. 46. “And because the testimony did not purport to draw a conclusion based on scientific methodology, the jury would not likely feel compelled to give [Kalinowski’s] lay comparisons any greater weight than its own lay comparison.” Aple. Br. 49. But even if Kalinowski did not claim to draw his conclusions from scientific principles, “we cannot underestimate the weight that juries give to forensic evidence.” *Gardner v. U.S.*, 999 A.2d 55, 63 (D.C. 2010). Even the testimony of a “forensic technician,” like Kalinowski, is likely to “overawe”—particularly where he testified to details that were not readily apparent from the photos and shoes. *See Alder v. Bayer Corp., AGFA Div.*, 2002 UT 115, ¶56, 61 P.3d 1068. Moreover, Kalinowski’s use of terms of certainty as well as the conclusory tone in which he delivered his opinions likely contributed to the weight the jury afforded Kalinowski’s testimony. R.167:209-10 (“*Therefore*, you wouldn’t see much of the shoe itself, but more of the side of the shoe.” (emphasis added)). Thus, it is reasonable to believe that the jury would defer to Kalinowski’s opinions.

**III. THIS COURT SHOULD REVERSE BECAUSE THE TRIAL COURT IMPROPERLY DENIED THE DEFENSE’S MOTION FOR MISTRIAL AFTER RICHARDS TESTIFIED ABOUT YALOWSKI’S PRIOR ACTS OF VIOLENCE IN VIOLATION OF RULE 404(b) OF THE UTAH RULES OF EVIDENCE.**

Even though Richards testified about Yalowski “getting violent” in violation of a pretrial agreement and rule 404(b), the State maintains that the trial court properly denied Yalowski’s mistrial motion. Aple. Br. 49-56. To support its argument, the State contends that the comment “likely escaped the jury.” Aple. Br. 55. This claim is unpersuasive.

Richards’s reference to Yalowski “getting violent” was not tangential to the issues in the case. Instead, her comment went to the heart of Richards’s and Yalowski’s relationship. It also implicated conduct that was directly related to the charges, which included threat of violence and burglary with the intent to assault. *See* Utah Code § 76-5-102 (2003); § 76-6-202 (2003); §76-5-107(1); R.1-5; *see also State v. Larrabee*, 2013 UT 70, ¶36, 321 P.3d 1136 (“prosecutor's comments were highly prejudicial since they went to the heart of what the jury was being asked to decide”).

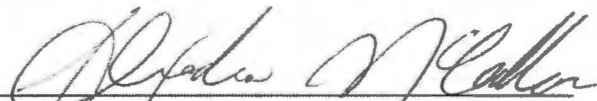
With knowledge that Yalowski had acted violently against Richards in the past, the jury could have believed that Yalowski’s behavior had not changed; thus, they could have concluded that Yalowski violently threatened Richards in this case. *See State v. Reed*, 2000 UT 68, ¶23, 8 P.3d 1025 (“It is of course fundamental in our law that a person can be convicted only for acts committed, and not because of general character or a proclivity to commit bad acts.”). And given the court’s limitations on Yalowski’s ability to attack Richards’s credibility, it is likely that the jury placed undue weight on Richards’s comment. Thus, as argued, there is a reasonable likelihood that Yalowski

would have enjoyed a more favorable result if the jury did not hear Richards's "getting violent" comment.

### CONCLUSION

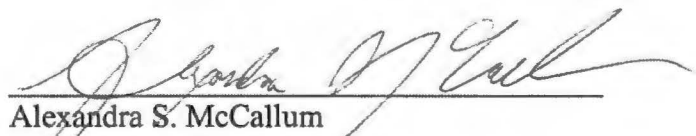
For the reasons above and in the opening brief, Yalowski asks this Court to reverse his convictions and remand for a new trial.

SUBMITTED this 29<sup>th</sup> day of March, 2016.

  
ALEXANDRA S. MCCALLUM  
Attorney for Defendant/Appellant

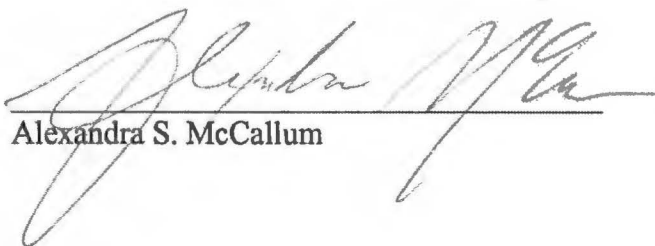
### CERTIFICATE OF DELIVERY

I, Alexandra S. McCallum, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 29<sup>th</sup> day of March, 2016.

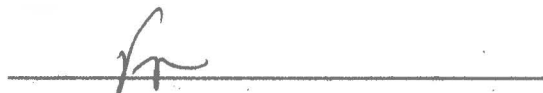
  
Alexandra S. McCallum

**CERTIFICATE OF COMPLIANCE**

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 4,436 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

  
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Alexandra S. McCallum

DELIVERED this 29 day of March, 2016.

  
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Tab A



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