IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO: 08-AP-55
Lower Court Case No: 2008-MM-7612

FREDERICK DARWIN WHEELER,
Appellant,
vs.

STATE OF FLORIDA,
Appellee.
_____/

Appeal from the County Court,
for Orange County, Florida,
Faye L. Allen, County Court Judge

Robert Wesley, Public Defender and Chelsea Simmons,
Assistant Public Defender, for Appellant

No Appearance for Appellee

Before POWELL, MIHOK, and M. SMITH, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Fredrick Wheeler appeals from a conviction in County Court after a jury trial for Battery and Resisting Officer Without Violence. He contends that the trial court erred (1) when it found no discovery violation by the State where no state witness statements were disclosed until the morning of trial; and (2) by excluding the opinion of a defense expert regarding the physical effect of Appellant's self-inflicted wounds and testimony about his post-traumatic syndrome and depression. We have carefully reviewed Appellant's Initial Brief (the State did not appear and file an answer brief), the record on appeal containing filings below, and have read the transcripts

of the pre-trial motion hearing and the trial. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. We affirm.

The State Discovery Violation Issue

Appellant's counsel first brought to the court's attention on the morning of the trial the "issue" of the State's failure to timely disclose the statements of its witnesses. The judge then made an inquiry (see Transcript of Pre-Trial Motions, Pg. 9-13), and heard arguments of Appellant's counsel and the prosecutor. It appears that Appellant's counsel had read the statements earlier that morning. She already had the police report and the State's witness list. The prosecutor responded that copies of the witness statements had been sent to Appellant's counsel again by e-mail the second time she had asked for them several days before the trial. Appellant's counsel stated she never received them. The inquiry concluded with the following:

> **THE COURT: All right. Well, you - - now, you did announce ready for trial, so you - - are you assuming I can - - I - -I - - you can see those witness statements, you're still ready for trial?**
>
> **MS. SIMMONS (Defense Counsel): Yes, your honor...**

After inquiring into other issues, the trial judge said:

> **THE COURT: All right. Now, on the issue of the witness statements, the Court will just order that the State allow the Defense to take a look at the witness statements again, if she needs to do so, because the computer glitches between the offices in sending the discovery, I - - I don't - - I don't know that there is anything I can do about that. But anything that wasn't received when the e-mail was sent, the - - what the Defense needs to do is show the State what it did receive, and the State needs to show the Defense what it sent.**
>
> **MS. SIMMONS: (No Verbal Response)**
>
> **MS. HUNG (the prosecutor) (No Verbal Response)**

Florida Rule of Criminal Procedure 3.220(b)(1)(B) requires the prosecutor to disclose to the defense the statements of any of its listed witnesses. We have found no reported cases where there has been a failure by the State to timely disclose witness statements.

The State called three witnesses: the victim (Appellant's mother) and two officers. We cannot tell from the record or Appellant's brief whether those witnesses made statements. The trial court made a short but adequate *Richardson* inquiry. Implicit in the judge's comments were findings that there may have been a violation, but it was inadvertent, and any prejudice was remedied by defense counsel getting to see the statements again before the witnesses testified. Defense counsel appeared to accede to this remedy and made no further mention of the issue during the rest of the trial. Appellant's counsel did not demonstrate prejudice during the pre-trial hearing or in her brief. She did not tell the trial judge or say in her brief what she would have done differently to prepare for trial or in her trial strategy had she received the witness statements timely. We conclude that if there was any error committed by the trial judge, the error was harmless.

Exclusion of the Defense Expert Witness

At a lengthy recess during the defense case, Appellant's counsel proffered Dr. Jeffrey Danziger, a forensic psychiatrist, as an expert witness to give his opinion as to the impact of several self- inflicted knife wounds on appellant's ***physical*** ability to obey police commands, and to give other testimony about appellant's post-traumatic stress syndrome (PTSS) and depression.

The State objected on several grounds, and the State and defense examined Dr. Danziger on his qualifications. He testified that he was a practicing psychiatrist for 22 years, that he had graduated from medical school, had done an internship and residency, and has been qualified as an expert many times, mostly to examine defendants and opine as to their competency to stand

trial and sanity at the time of the crime, which he had done in this case. The defense had listed him as a witness[1] and both sides had a copy of the copy of the competency report.

It was revealed during the proffer that the basis for his opinion and other testimony was that at some later time after the events in question had occurred, he had talked with Appellant about what had happened and had reviewed Appellant's hospital records.[2]

After hearing argument, the judge ruled that Dr. Danziger was not qualified to express the opinion because it was outside his expertise, and that any testimony about PTSS and depression would be irrelevant. Thus Dr. Danziger did not take the stand.

The law is well settled that a trial court has broad discretion with respect to qualifications of expert witnesses and the range of subjects about which they will testify. *Francis v. State*, 970 So. 2d 806 (Fla. 2007); *Caban v. State*, 892 So. 2d 1208 (Fla. 5th DCA 2005). It is not enough that the witness is qualified to propound opinions on a general subject; rather, he must be qualified as an expert on the discrete subject on which he is asked to opine. A witness cannot testify to matters outside his expertise. *Holland v. State*, 773 So. 2d 1065, 1075 (Fla. 2000), cert. denied 534 U.S. 834 (2001) (psychiatrist's opinion that gun was placed or dropped beyond his expertise). Absent a showing of clear error, a trial court's ruling will not be disturbed on appeal. *Francis*, 970 So. 2d 806*; Holland*, 773 So. 2d 1065*;Caban*, 892 So. 2d 1208.

After careful consideration, we conclude that the trial court did not abuse her discretion in excluding Dr. Danziger. The proffered opinion was how Appellant's wounds affected his ability to comply with the officers' demands - - his *physical capacity* - - not his mental state.

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[1] *Fla.R.Crim.P. 3.220(d)(1)(A)&(B)(ii)* say only that a defendant must list any witness they intend to call and disclose any listed expert's statement or report. Dr. Danziger did not make a statement or report in this case other than the competency report.

[2] Appellant's medical records were admitted in evidence as a defense exhibit, but Appellant did not include this exhibit with the record on appeal.

The doctor was asked if he had ever treated any trauma patients and replied "Not since residency." In fact, by his own admission, he was not qualified in the field of trauma.

Q Okay. And are you an expert in the field of anything related to trauma?
A No.

Q Okay. You're not an ER doc?
A Correct.

Q Okay. And so you agree that any testimony you may have regarding trauma or injuries involving stab wounds would be outside of your field of expertise?
A Trauma and the treatment of stab wounds or - - yes. That would be outside my field.

Q Okay. Because your field is psychology; correct?
A Psychiatry.

*** * * * ***

Q Okay. But you stated earlier that you - - I guess the issues with trauma, that's outside of your expertise; correct? Just focusing on the trauma aspect; correct?
A Yes, I'm certainly not a trauma surgeon or trauma specialist. Yes.

Q Yes. Okay.
A I'll agree with that.

Further, as the trial judge noted, there was no showing anywhere during the case as to how the doctor's testimony regarding Appellant's PTSS or depression had any relevancy to any issue in the case.

Accordingly, Appellant's convictions for Battery and Resisting Without Violence are **AFFIRMED.**

DONE AND ORDERED at Orlando, Florida this __2nd___ day of __March_____, 2011.

_/S/_____
ROM W. POWELL
Senior Judge

_/S/_____
A. THOMAS MIHOK
Circuit Judge

_/S/_____
MAURA T. SMITH
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **Chelsea Simmons, Assistant Public Defender,** 435 N. Orange Avenue, Ste. 400, Orlando, Florida 32801; **Lawson Lamar**, **State Attorney**, 415 N. Orange Avenue, Orlando, Florida 32801; and **Honorable Faye L. Allen**, 425 N. Orange Avenue, Orlando, Florida 32801, by mail, this _2nd___ day of __March_____, 2011.

_/S/_____
Judicial Assistant