

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Bandstra, P.J., and Fort Hood and Davis, JJ.

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 141932
Plaintiff-Appellant, Court of Appeals No. 294054
v Livingston Circuit Co No. 08-017643-
FC
JEROME WALTER KOWALKSI,
Defendant-Appellee.

BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS *AMICUS CURIAE*

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INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE

The Attorney General is the chief law enforcement officer for the State of Michigan. In recognition of this duty, the Court Rules provide that the Attorney General may file a brief as *amicus curiae* without seeking permission from this Court. MCR 7.306(D)(2).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In an order dated March 25, 2011, this Court granted defendant's application for leave to appeal and ordered the parties to include the following among the issues to be briefed:

(1) Whether the defendant's proffered expert testimony regarding the existence of false confessions, and the interrogation techniques and psychological factors that tend to generate false confessions is admissible under MRE 702;

(2) whether the probative value of the proffered expert testimony is substantially outweighed by the danger of unfair prejudice; and

(3) whether the Livingston Circuit Court's order excluding the defendant's proffered expert testimony denies the defendant his constitutional right to present a defense.

INTRODUCTION

At issue in this case is whether an “expert” witness should be allowed to testify to a matter that ordinarily falls within the province of the jury. One of the foundations of our criminal justice system is that the jury – made up of 12 of the defendant’s peers in the community – comes together and uses its common experiences in order to determine whether the State has proved his guilt beyond a reasonable doubt. One of the quintessential ways a jury fills that role is by determining what witnesses are worthy of belief and what witnesses’s statements must be discounted as not credible.

The defendant and his amici ask this Court to adopt a rule that would create a “super juror” – an individual with significant credentials who will tell the jury how it should make these kinds of credibility determinations. Specifically, in the realm of “false confessions,” the defendant and his amici argue that the jury should be made aware that (1) false confessions exist; (2) some interrogation techniques may (or may not) cause a false confession; and (3) false confessions can be detected by comparing the confession to the known facts. But the fact that a suspect will sometimes confess to a crime he did not commit is a phenomenon that is known to the public at large. Moreover, the method by which a “false confession” can be detected is simply a matter of common sense. That is, a juror knows without the help of a Ph.D. that if the defendant’s statement is not consistent with the known facts, that his statement is not credible. Moreover, as noted in detail in the People’s brief on appeal, the experts offered by the defendant and his amici admit they

cannot discern whether a particular interrogation technique has caused a false confession in a given case.

An ordinary juror is fully capable of comparing a statement to known facts and evaluating the interrogation techniques used by police in order to make a finding of credibility without the imprimatur of a “super juror.” Indeed, the Kansas, Missouri, and Alaska Courts of Appeals have all rejected Dr. Leo’s attempts to present the same testimony offered in the instant trial. Because Dr. Leo’s testimony does not assist the jury in making a determination that they could not make on their own, it is inadmissible as invading the province of the jury.

COUNTER-STATEMENT OF FACTS

Attorney General Schuette adopts the People's recitation of facts as accurate and complete.

ARGUMENT

I. Expert testimony regarding “false confessions” is not admissible because it invades the province of the jury to determine questions of fact and to assess the credibility of witnesses.

This Court has long recognized that “[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses.” See *People v Weddell*, 485 Mich 942; 774 NW2d 509 (2009), quoting *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Jurors are expected to apply their “common experience” in reviewing the evidence adduced at trial and assessing which facts are believable and which witnesses are credible. See *Grimes v Department of Transportation*, 475 Mich 72, 85 n 41; 715 NW2d 275 (2006). However, under some circumstances, expert testimony is required in order to explain a subject matter beyond the common understanding of a lay member of the jury. As explained by our Court of Appeals, the question is “whether an untrained person would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from experts.” *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 197; 555 NW2d 733 (1996).

At issue in this case is whether a common juror would be “qualified” to determine the truth or falsity of a confession given by the defendant. Dr. Richard Leo, one of the leading proponents of “false confession” expert testimony, argues expert testimony is required because most jurors simply do not believe false confessions exist. See, e.g., L. Davies, *The Reality of False Confessions--Lessons of the Central Park Jogger Case*, 30 N.Y.U Rev. L. & Soc. Change 209, 250 (2006).

According to Dr. Leo's methodology, one of the primary ways to determine whether a confession is "false" is to "scrutinize and evaluate a suspect's post-admission narrative against the known facts of the crime." See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 *J. Crim. L. & Criminology* 429, 495 (1998).

But that sort of comparison is exactly what a jury is supposed to perform. That is, a jury, unaided, is able to determine if a confessing defendant's version of events is not consistent with the facts adduced at trial and, therefore, is not credible. Likewise, a jury can determine, based on its common experiences, whether the interrogation techniques used by an officer were sufficiently coercive as to render a defendant's confession to be of questionable evidentiary value. Here, the defendant wants to allow an expert, acting with the imprimatur of a law professor with a Ph.D. in Jurisprudence and Social Policy, to perform a role filled by juries for centuries.

This Court should decline the defendant's invitation to create a "super juror" to find facts related to confessions and should, instead, affirm the well-reasoned decision of the Michigan Court of Appeals, which properly recognizes that this sort of "expert" testimony is within the sole province of the jury.

It is axiomatic that jurors are the ultimate arbiters of both a witness's credibility and of the facts as they relate to the case in front of them. Jurors are drawn from the defendant's community and are expected to use their common

experiences to determine, based on the evidence and testimony adduced at trial, what the facts are and whether those facts establish a defendant's guilt. *Grimes*, 475 Mich at 85 n 41. But there are certain facts that are simply beyond that "common experience" and, therefore, expert testimony is necessary to explain the significance of those facts to the jury or to assist it in its fact finding. Under MRE 702, expert testimony is limited to circumstances where "scientific, technical, or other specialize knowledge" is required to allow the trier of fact to understand the evidence or to determine a fact at issue. That is, expert testimony is admissible when the jury is confronted with facts or circumstances that it will not generally be able to comprehend based on its common experience. For instance, a lay person is unqualified to determine the cause of a victim's death. Therefore, the testimony of a pathologist is generally admissible – so long as it meets the other requirements of MRE 702 – in order to assist the jury in understanding the evidence before it in order to arrive at an intelligent conclusion.

However, it is not proper for "a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). In the context of a criminal sexual assault trial involving a child, it is proper to admit expert testimony "regarding typical symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim or to rebut an attack on the victim's credibility." *People v Peterson*, 450 Mich 349, 373; 537 NW2d

857 (1995). However, that expert may not testify that the victim behaved in a fashion consistent with that of a sexually abused child. *Peterson*, 450 Mich at 373-374. That is because the ultimate question of whether the victim was actually sexually abused is to be left to the jury.

But allowing experts to make those kinds of credibility determinations is exactly what the rule of law proposed by the defendant and his amici would accomplish. In order for “false confession” expert testimony to be relevant, there must be some nexus between that testimony and the facts of the case. According to Dr. Leo, that nexus is established, in part, by comparing the confession to the actual facts of the crime. That sort of comparison, however, is exactly what a jury is supposed to perform. For instance, a jury is able to determine whether a particular witness was lying at trial, or to decide which of two witnesses telling giving two different versions of events is the more credible. False confessions are no different. A jury, unaided, is able to determine if a confessing defendant’s version of events is not consistent with the facts adduced at trial and, therefore, is not credible. Likewise, a jury can determine, based on its common experiences, whether the interrogation techniques used by an officer was sufficiently coercive as to render a defendant’s confession to be of questionable evidentiary value.

Several other courts have similarly held that expert testimony on “false confessions” is not admissible because it invades the province of the jury. In *United States v Adams*, the United States Court of Appeals for the Tenth Circuit held that testimony regarding the credibility of incriminating statements made by a

defendant to police officers was not admissible because it invaded the province of the jury. 271 F3d 1236 (CA 10, 2001). In *Adams*, the defendant sought to introduce expert testimony that his “neurocognitive impairment and dependent personality structure . . . support[s] the possibility the statements he gave to the police were false.” *Adams*, 271 F3d at 1244. The Tenth Circuit undertook its analysis by noting that testimony which seeks to challenge the credibility of a defendant’s statement to the police “is generally not an appropriate subject for expert testimony.” *Adams*, 271 F3d at 1244. In particular, the Court noted three significant concerns with this type of expert testimony:

First, expert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore does not assist the trier of fact as required by Rule 702. Also, a proposed expert's opinion that a witness is lying or telling the truth might be inadmissible pursuant to Rule 702 because the opinion exceeds the scope of the expert's specialized knowledge and therefore merely informs the jury that it should reach a particular outcome. Yet another rationale for exclusion is that the testimony of impressively qualified experts on the credibility of other witnesses is prejudicial, unduly influences the jury, and should be excluded under Rule 403. [*Adams*, 271 F3d at 1245 (citations omitted).]

The expert would have testified that defendant’s claim at trial that he falsely confessed in order to protect his girlfriend was “plausible” given his low neurocognitive functioning. But the Tenth Circuit noted that defendant’s subsequent recantation “is precisely the type of explanation that a jury is capable of resolving without expert testimony.” *Adams*, 271 F3d at 1246. The “expert” testimony essentially would have vouched for the credibility of the defendant’s explanation for his recantation. Such testimony necessarily “encroaches upon the

jury's vital and exclusive function to make credibility determinations" and, therefore, was properly excluded. *Adams*, 271 F3d at 1246.

Similarly, in *Missouri v Davis*, the defendant sought to introduce testimony from Dr. Leo to support his theory of defense that the interviewing detective pressured him into confessing. 32 SW3d 603 (Mo App ED 2000). Specifically, Dr. Leo would have testified that "certain techniques" can lead people to confess to crimes they did not commit. The Missouri court undertook its analysis by noting that expert testimony regarding a witness's credibility is not admissible because it invades the jury's province to make credibility determinations. *Davis*, 32 SW3d at 608. The court reads this conclusion even though Dr. Leo's testimony would have been tailored to the circumstances present in that case. Thus, the testimony was not generic in nature, but rather consisted of "specific credibility testimony that encroaches upon the jury's duty to determine the reliability of defendant's statement." *Davis*, 32 SW3d at 608. But a jury does not need expert testimony in order to evaluate the credibility of a defendant's confession. Rather, "[t]he jury is capable of understanding the reasons why a statement may be unreliable; therefore, the introduction of expert testimony would be 'a superfluous attempt to put the gloss of expertise, like a bit of frosting, upon inferences which lay persons were equally capable of drawing from the evidence.'" *Davis*, 32 SW3d at 609 (citation omitted). In other words, the Missouri court held that Dr. Leo may not testify as a "super juror" in order to make factual determinations that have traditionally been left to the jury.

The Alaska Court of Appeals reached a similar conclusion in regard to Dr. Leo's expert testimony. *Vent v Alaska*, 67 P3d 661, 670 (Alas Ct App 2003). In *Vent*, Dr. Leo offered to testify that false confessions exist, that they can be caused by certain interrogation techniques, and that researchers evaluate the truth or falsity of confessions by comparing them to known facts. The majority held that Dr. Leo's conclusions could not be quantified or tested and, therefore, the trial court did not err in excluding his testimony as unreliable. *Vent*, 67 P3d at 670.¹ The concurring judge, on the other hand, argued that Dr. Leo's testimony was not admissible because his method of comparing the confession to known facts was not really "expert" testimony. *Vent*, 67 P3d at 670-671 (Mannheimer, J., concurring). The concurring judge argued that a person does not need specialized training or experience in order to compare a confession to the known facts adduced at trial. The trial court did not abuse its discretion in refusing to admit Dr. Leo's proposed testimony because it "amounted to nothing more than the common-sense notion that a confession must be tested against the known facts." *Vent*, 67 P3d at 673 (Mannheimer, J., concurring). Simply put, one does not need to have a Ph.D. or to be a law professor in order to compare the facts and evidence presented at trial with the defendant's statements to the police.

The Kansas Court of Appeals has also rejected Dr. Leo's offer to testify at trial as a "super juror." *Kansas v Cobb*, 30 Kan App 544; 43 P3d 855 (2002). In *Cobb*, Dr. Leo testified at trial about the techniques used by police to interrogate the

¹ The Attorney General agrees with this analysis, for the reasons set forth in the People's brief on appeal.

defendant, adding that some had contributed to false confessions. But the Kansas Court of Appeals noted that the same information could have been conveyed to the jury during the cross-examination of the investigating officers and then during closing arguments. *Cobb*, 43 P3d at 869. Dr. Leo could not opine then (or now) that a confession was false simply by looking to the particular technique used. Rather, the Court concluded that Dr. Leo was testifying regarding the credibility of the defendant's confession. But the question of whether the defendant's statement to the police was credible in light of the interrogation tactics used was a question of fact reserved for the jury. *Cobb*, 43 P3d at 869. Therefore, the Court concluded that Dr. Leo's proposed testimony improperly invaded the province of the jury.

Defendant and his amici cite the United States Court of Appeals for the Seventh Circuit's decision in *United States v Hall* for the proposition that expert testimony on false confessions is admissible. 93 F3d 1337 (CA 7, 1996). In a case similar to *Hall*, the United States Court of Appeals for the First Circuit also allowed testimony regarding false confessions. *United States v Shay*, 57 F3d 126 (CA 1, 1995). But these cases are distinguishable.

In *Hall*, the defendant's theory of defense was that he had a personality disorder that makes him susceptible to suggestion and pathologically eager to please and that, because of his mental disorder, he "confessed" to gain approval from the investigating officers. *Hall*, 93 F3d at 1341. The Seventh Circuit undertook its analysis by noting that in the field of psychology, a layperson will not always be aware of the existence of a mental disorder, let alone the symptoms or

consequences of that disorder. *Hall*, 93 F3d at 1343. For instance, the court noted that ordinarily, the jury could assess the question of whether a person's use of profanity was intended to harm another person because the use of profanity is part of everyday life. But, if that person suffered from Tourette's syndrome – which is manifested in part by the use of foul language – expert testimony would be permissible to explain the disorder so that the jury could take it into account in making its factual findings. *Hall*, 93 F3d at 1343. Applying that reasoning, the Seventh Circuit concluded that “juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions.” *Hall*, 93 F3d at 1345. In other words, expert testimony regarding the mental disorder is admissible in order to allow the jury to take into account that specific disorder when it makes its factual finding regarding the credibility of the suspect's confession.

Likewise, in *United States v Shay*, the First Circuit held that testimony regarding the voluntariness of a confession is admissible when the expert will testify to the existence of an identifiable mental disorder the jury may consider in making its credibility determination. In *Shay*, the defendant's theory of defense was that he falsely confessed because he suffered from a mental disorder that caused him to tell grandiose stories in order to place himself at the center of attention. *Shay*, 57 F3d at 129. In order to support his theory, the defendant sought to introduce expert testimony that he suffered from a mental disorder known

as “pseudologia fantastica,”² which causes a person to “spin out webs of lies which are ordinarily self-aggrandizing and serve to place him in the center of attention.” *Shay*, 57 F3d at 129-130. The First Circuit noted that the proposed testimony did touch upon the credibility of the defendant and that such testimony regarding credibility is ordinarily not admissible. *Shay*, 57 F3d at 131. Indeed, the Court agreed that ordinarily expert testimony would not be required because the jury has the capacity “to generally assess the reliability of [the defendant’s confession] in light of the other evidence in the case” *Shay*, 57 F3d at 133. But the First Circuit noted that this was not an ordinary circumstance. An ordinary person is not equipped to consider whether a person may make false statements against his own interests because of a mental disorder without expert testimony. *Shay*, 57 F3d at 133. Therefore, the First Circuit concluded the expert testimony was admissible in order to provide the jury with the specialized knowledge it needed in order to determine whether the defendant’s confession was credible. *Shay*, 57 F3d at 133-134.

Both *Hall* and *Shay* should be read to stand for the proposition that expert testimony regarding “false” confession may be admissible if there is a medical reason for the suspect’s confession that could not be understood by a lay juror.³ General testimony that false confessions exist is not sufficient to meet that threshold. See *United States v Dixon*, 2008 WL 162874; 261 Fed Appx 800, 805 (CA

² Also known as Munchausen’s Disease.

³ However, at least one state has cited *Hall* for the proposition that this type of expert testimony is more generally admissible. See *Boyer v Florida*, 825 So2d 418 (Fla App, 2002).

5, 2008) (affirming the trial court's exclusion of expert testimony where the expert "offered only the general proposition that false confessions occur"). Rather, such an expert must establish either defendant was interrogated under special or unique circumstances that could produce a false confession; or that he suffered from a specific mental disorder beyond what the jury could understand and that would be relevant to the credibility of his confession. *United States v Mamah*, 332 F3d 475, 478 (CA 7, 2003). In other words, expert testimony can only be said to be helpful to the jury if it explains something that jurors would not understand based on their common experience.

The defendant and his amici want Dr. Leo to do what jurors already are capable of doing – to compare conflicting versions of the events at issue and determine what the facts are based on their observations and experiences. But our jury system has existed for centuries without the type of "super juror" that the defendant and his amici would create. That is because an expert is not required when the subject matter "is one which common knowledge would enable one to decide." *Vent*, 67 P3d 668. For instance, it is well settled that the results of a polygraph test are not admissible into evidence. *People v Becker*, 300 Mich 562; 2 NW2d 503 (1942). And one of the reasons why polygraph tests are not admissible is because the results supplant the jury's decision on the ultimate issue within its province and ability – whether the defendant is actually guilty beyond a reasonable doubt of the crime charged. See, e.g., *Colorado v Wallace*, 97 P3d 262, 268 (Colo App 2004). Indeed, the assumption that the jury can use its common knowledge to

decide whether a defendant has been proven guilty beyond a reasonable doubt is the very foundation of our criminal justice system. It is within the common understanding of jurors that some suspects – for whatever reason – will confess to a crime they did not commit. The way to determine whether a confession is false is also well known – by comparing the confession to the known facts. In fact, the jury is specifically instructed to consider both the circumstances surrounding the confession and the other evidence in the case in determining whether the defendant’s statement is credible. Because determining the credibility of a witness – even a confessing defendant – is within the province of the jury, “expert” testimony on false confessions generically is not admissible.

CONCLUSION AND RELIEF REQUESTED

Expert testimony is only admissible under MRE 702 when it will assist the jury in understanding the evidence or determining a fact at issue. An expert witness is not necessary when the evidence or facts comes within the scope of the common understanding of the jury. The “expert” testimony offered by Dr. Leo in this case is just that type of evidence. It is within the scope of common understanding that a suspect may for some reason confess to a crime that he did not commit. More critically, the method by which Dr. Leo suggests that such a “false confession” is detected is also well known. According to Dr. Leo, a false confession is detected by “scrutiniz[ing] and evaluat[ing] a suspect’s post-admission narrative against the known facts of the crime.” But juries are fully capable of making these types of comparisons without the imprimatur of a “super juror.” Because Dr. Leo’s testimony does not assist the jury in making a determination that it could not make on its own, it is inadmissible as invading the province of the jury.

Accordingly, *Amicus Curiae* Attorney General Bill Schuette respectfully urges this Honorable Court affirm the well-reasoned decision of the Court of Appeals.

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