

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

JEROME KOWALSKI,

Defendant-Appellant.

Supreme Court No. 141932  
Court of Appeals Case No. 294054  
Livingston County Circuit Court  
Case No. 08-07643-FC

**BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF  
DEFENDANT-APPELLANT**

**INDEX OF EXHIBITS**

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TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES .....	ii
INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE .....	1
ARGUMENT .....	2
I. THE PROFFERED EXPERT TESTIMONY IS ADMISSIBLE UNDER MRE 702.....	2
A. The Testimony At Issue Is Relevant And Will Assist the Jury In Understanding the Evidence or Determine a Fact In Issue, And to Exclude It Denies the Defendant His Constitutional Right to Present A Defense. ....	4
1. Dr. Wendt’s Testimony Is Relevant and Will Assist The Jury.....	4
2. Dr. Leo’s Testimony Is Relevant and Will Assist the Jury.....	9
B. Dr. Leo’s Proffered Testimony Is Based on Sufficient Facts and Data and Is The Product of Reliable Principles and Methods.....	14
1. The Courts Applied Unsuitable Criteria to Stamp Dr. Leo’s Methods as Unreliable. ....	14
2. The Social Psychology of Police Interrogations and Confessions Is Reliable and Has Been Extensively Peer-Reviewed.....	17
II. THE PROBATIVE VALUE OF THE PROFFERED TESTIMONY IS NOT SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE. ....	24

TABLE OF AUTHORITIES

Page(s)

CASES

*Amunga v Jones*,  
51 F App'x 532 (CA6, 2002).....6

*Arizona v Fulminante*,  
499 US 279; 111 S Ct 1246; 113 L Ed 2d 302 (1991).....1

*Crane v Kentucky*,  
476 US 683; 106 S Ct 2142; 90 L Ed 2d 636 (1986).....1, 4, 5, 9

*Daubert v Merrell Dow Pharmaceuticals, Inc*,  
509 US 579, 113 S Ct 2786; 125 L Ed 2d 469 (1993)..... passim

*Gilbert v DaimlerChrysler Corp*,  
470 Mich 749; 685 NW2d 391 (2004).....3, 7

*Green v Texas*,  
55 SW3d 633 (Tex App 2001).....16

*Hannon v State*,  
84 P2d 320 (Wyo, 2004).....6

*Kumho Tire Co, Ltd v Carmichael*,  
526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999).....4, 14

*People v Bailey*,  
unpublished opinion of the Court of Appeals, entered Oct 15, 2009 (Docket No.  
285638) .....13, 24

*People v Beckley*,  
434 Mich 691; 456 NW2d 391 (1990).....13, 15, 16, 24

*People v Hamilton*,  
163 Mich App 661; 415 NW2d 653 (1987)..... passim

*People v Matuszak*,  
263 Mich App 42; 687 NW2d 342 (2004).....5

*People v Rowe*,  
unpublished opinion of the Court of Appeals, entered Mar 16, 2004 (Docket No.  
240820) .....6

*People v. Steele*,  
283 Mich App 472; 769 NW2d 256 (2009).....2

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*People v Stevens*, unpublished opinion of the Michigan Court of Appeals, entered January 24, 2003 (Docket No. 233153) .....6

*State v King*,  
387 NJ Super 522; 904 A2d 808 (NJ Super Ct App Div, 2006).....6

*Surman v Surman*,  
277 Mich App 287; 745 NW2d 802 (2003).....22

*United States v Hall*,  
974 F Supp 1198 (C D Ill, 1997) .....11, 15, 16

**RULES**

Michigan Rule of Evidence 403 .....24

Michigan Rule of Evidence 702 ..... passim

**OTHER AUTHORITIES**

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Danielle E. Chojnacki, Michael D. Cicchini, & Lawrence T. White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 Ariz St LJ 1 (2008).....9, 10

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George C. Thomas, *Telling Half-Truths*, Legal Times, Aug. 12, 1996.....23

*Gillespie Michigan Criminal Law & Procedure Practice Deskbook* § 3:70.....6

Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (1992) .....17

M. Blagrove, *Effects of Length of Sleep Deprivation on Interrogation Suggestibility*, 2 J Experimental Psychol Applied (1996).....19

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Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 Am J Crim L 191 (2005) .....10, 15

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 (1998).....20

Richard A. Leo & Richard J. Ofshe, *The Social Psychology of Police Interrogation, Studies in Law* 16 Pol & Soc’y (1997).....19

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Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely, Rational Choice and Irratoinal Action*, 74 Denver Univ L Rev (2000).....11

Saul Kassin & K. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psychol Sci 125-28 (1996).....19

Saul Kassin & Karlyn McNall, *Police Interrogations and Confessions Communicating Promises and Threats By Pragmatic Implication*, 15 Law & Human Behavior (1991).....11

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Saul M. Kassin, *The Psychology of Confessions*, Annu Rev Law and Soc Sci (2008) .....11

Staff Comment to 2004 Amendment to FRE 702.....3

Stanley Milgram, *Obedience to Authority: An Experimental View* (1974) .....19

Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA Age*, 82 NC L Rev 891 (2004) .....11, 20

Stephen J. Schulhofer, *Miranda’s Practical Effect: Substantive Benefits and Vanishingly Small Social Costs*, 90 NW Univ L Rev 500 .....23

Welsh S. White, *What Is An Involuntary Confession Now 50?* Rutg L Rev 2001 (1989) .....23

Welsh S. White, *False Confessions in Criminal Cases*, 17 Crim Just 4 (2003).....17, 19

[www.innocenceproject.org/false-confessions.php](http://www.innocenceproject.org/false-confessions.php).....10

## INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

“A confession is like no other evidence. Indeed, the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him.” *Arizona v Fulminante*, 499 US 279, 296; 111 S Ct 1246; 113 L Ed 2d 302 (1991). “[S]tripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?” *Crane v Kentucky*, 476 US 683, 689; 106 S Ct 2142; 90 L Ed 2d 636 (1986).

Defendant Jerome Kowalski had an expert prepared to testify at trial about why a person might, and sometimes does, confess to a crime he did not commit. Yet the trial court barred the door to this testimony and, in so doing, stripped Mr. Kowalski of a meaningful defense and violated his Constitutional rights. Specifically, the court excluded relevant testimony by a widely known, well-respected social scientist in the area of false confessions, Dr. Richard Leo, who has been qualified as an expert on false confessions in twenty-six states and whose methods are widely accepted both within his field and in the scientific community at large. The Circuit Court, and the Court of Appeals in affirming the exclusion of the evidence, erroneously held that Dr. Leo’s testimony regarding false confessions did not involve issues outside the common knowledge of a juror, and that his research was not based on reliable methods and principles. With his exclusion, an entire body of social scientific research was also excluded, depriving Mr. Kowalski of evidence critical to his defense. The courts then also excluded unrelated expert testimony by Dr. Jeffrey Wendt, a clinical psychologist whose pedigree and methods were unchallenged, and who sought only to share with the jury the results of his examination of Mr. Kowalski. In precluding his testimony, and in affirming this exclusion, the lower courts held that his testimony went towards the credibility of Defendant’s confession, which is within the sole

province of the jury. This Court should reverse the Court of Appeals and direct that the Circuit Court allow the testimony of Drs. Leo and Wendt.

The Innocence Network is an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove they are innocent of crimes for which they have been convicted. The Network also advocates for legislation, court rules, and judicial decisions to address the most common causes of wrongful convictions and to improve the accuracy of the criminal justice system. Innocence Network member organizations have exonerated scores of innocent defendants who confessed to crimes they did not commit. It seeks status as *amicus curiae* because it believes that the lower courts' refusal to allow Drs. Leo and Wendt to testify contradicts existing Michigan law, violates Defendant's constitutional rights and, if not reversed, sets a precedent which is likely to result in the convictions of innocent individuals.

## ARGUMENT

### STANDARD OF REVIEW

The Innocence Network agrees with the standard of review set forth by Defendant-Appellant and further notes that, as the Court of Appeals' Opinion stated, "whether defendant was denied his right to present a defense involves a question of law that this Court review *de novo*". (Court of Appeals' Opinion, p. 3, citing *People v. Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009)).

#### **I. THE PROFFERED EXPERT TESTIMONY IS ADMISSIBLE UNDER MRE 702.**

The lower courts erred in holding that the proffered testimony was not admissible under MRE 702. That rule states:

If the court determines that 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 if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702. The rule conforms to the United States Supreme Court's decision in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 113 S Ct 2786; 125 L Ed 2d 469 (1993), by emphasizing "the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies." MRE 702, Staff Comment to 2004 Amendment.

Under *Daubert*, a court may consider various factors in evaluating an expert's credentials and methods. In evaluating a particular scientific method, a court may, but need not, consider whether the method is testable, whether it is subject to peer-review, the extent of its error rate, and whether it enjoys "general acceptance." *Daubert*, 509 US at 593-94. The *Daubert* Court stressed that the inquiry into a potential expert's methods is "a flexible one[, whose] overarching subject is the scientific validity and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission." *Id.* at 594-95.

*Daubert* did not change the trial court's gatekeeping function; rather it expanded the range of factors a court may consider in evaluating potential expert testimony. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). Although the court must carefully examine the proffered testimony to exclude what appears to be "junk science," the court must not bar the door to well-accepted, well-established research methods. A *Daubert* inquiry's focus is on the "principles and methodology" behind an expert's conclusion, not whether the court agrees with that conclusion. *Daubert*, 509 US at 594-95; 113 S Ct 2786; 125 L Ed 2d 469 (1993); see also *Gilbert*, 470 Mich at 779-83.

Moreover, context is key in every *Daubert* inquiry. What the judge must do, in every case, is to “determine whether the testimony has a reliable basis in the knowledge and experience *of the relevant discipline.*” *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 149; 119 S Ct 1167; 143 L Ed 2d 238 (1999) (emphasis added). That means looking to the facts of each case and the standards of the particular discipline in question to determine reliability. *Id.*, 526 US at 150. *Daubert*’s “list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged.” *Id.* at 151.

Here, the trial court conceded that Dr. Leo is “knowledgeable in the field of police interrogation techniques” and “in the field of confessions.” (Appx. 641a-642a). It also noted Dr. Wendt’s experience as a clinical psychologist. (Appx. 676a.) The Court of Appeals did not disagree with either of these rulings. Thus, only the courts’ decisions regarding the relevance of their testimony, and the reliability of Dr. Leo’s methods, are in question.

**A. The Testimony At Issue Is Relevant And Will Assist the Jury In Understanding the Evidence or Determine a Fact In Issue, And to Exclude It Denies the Defendant His Constitutional Right to Present A Defense.**

Pursuant to Federal Rule of Evidence 702, expert testimony is relevant if it will “assist the trier of fact to understand the evidence or to determine a fact in issue.” Mr. Kowalski’s sole defense is that he confessed falsely. Whether or not he did, testimony concerning factors that may contribute to a false confession is unquestionably relevant.

1. Dr. Wendt’s Testimony Is Relevant and Will Assist The Jury.

The United States Supreme Court has held that where the prosecution relies on a confession, expert testimony about the circumstances of that confession, and the psychological makeup of the confessor, are relevant. In *Crane v Kentucky*, the Court unanimously held that a defendant whose prosecution hinges upon a confession has a constitutional right to describe the

circumstances of his detention and interrogation. 476 US 683, 685; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Such testimony, held the Court, is relevant not only to the confession's voluntariness—a question of law—but also to its credibility, a question for the jury. 476 US at 688 (“evidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess”). The Court noted, “a defendant’s case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.” *Id.* at 689. Thus, the Court held, the opportunity to present a complete defense “would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant’s claim of innocence.” *Id.* at 690. We could not have said it better ourselves.

Shortly after *Crane*, and relying heavily upon it, the Michigan Court of Appeals held that expert testimony concerning a defendant’s psychological condition at the time he confessed is admissible to rebut evidence of the confession. *People v Hamilton*, 163 Mich App 661, 665; 415 NW2d 653 (1987). In *Hamilton*, the court reasoned that although *Crane* “did not concern evidence of the defendant’s psychological makeup, but focused instead on the physical and psychological aspects of an interrogation . . . we [nonetheless] believe the United States Supreme Court’s reasoning is equally applicable to otherwise admissible expert testimony.” 163 Mich App at 666. This is true, the court held, irrespective of a court’s decision on the voluntariness of the confession. *Id.* at 665. “[P]sychiatric testimony [in such a case] is admissible as it relates to the weight and credibility of defendant’s statements.” *Id.*

The Court of Appeals has repeatedly reinforced *Hamilton*, and other jurisdictions have also looked to it as persuasive. *See, e.g., People v Matuszak*, 263 Mich App 42, 51; 687 NW2d

342 (2004) (citing *Hamilton* to support the holding that a “psychologist’s testimony about the victim’s diminished comprehension capabilities and IQ could assist the jury both in evaluating the importance of apparent inconsistencies in the victim’s testimony and in properly evaluating [its] weight and credibility”); *People v Rowe*, unpublished opinion of the Michigan Court of Appeals, entered March 16, 2004 (Docket No. 240820) (attached as Exhibit A) (citing *Hamilton* for the proposition that “even where a court has previously determined that a defendant’s statements were voluntary a defendant is still entitled to present evidence at trial of the circumstances attendant to the taking of a confession to impeach its reliability or credibility”); *People v Stevens*, unpublished opinion of the Court of Appeals, entered January 24, 2003 (Docket No. 233153) (attached as Exhibit B) (citing *Hamilton* and holding that “[e]xpert testimony is admissible to explain a defendant’s psychological makeup at the time of a confession and the reasons why a defendant confessed to a crime that he later claimed he did not commit”); *see also Amunga v Jones*, 51 F App’x 532, 543 (CA6, 2002); *State v King*, 387 NJ Super 522, 538; 904 A2d 808 (NJ Super Ct App Div, 2006); *Hannon v State*, 84 P2d 320 (Wyo, 2004), all citing *Hamilton* with approval.

*Hamilton*’s holding also appears in the *Gillespie Michigan Criminal Law & Procedure Practice Deskbook*. According to the Deskbook, “[t]he defense may call an expert to explain the defendant’s psychological make-up to assist the jury in deciding whether the confession was true, though the expert may not give an opinion as to the truthfulness of the confession.” *Gillespie Michigan Criminal Law & Procedure Practice Deskbook* § 3:70 (citing *Hamilton*, 163 Mich App at 665) (emphasis in original).

The trial court found *Hamilton* inapplicable because it predated the Supreme Court’s decision in *Daubert*. (Appx. 672a, 676a.) The Court of Appeals made the same finding. (Court

of Appeals' Opinion, p. 6.) But that conclusion ignores the point of *Hamilton* -- not to mention the wealth of post-*Daubert* authority buttressing *Hamilton* -- and further assumes that something about *Daubert* supersedes the *Hamilton* analysis. This simply is not the case. *Daubert*'s test for expert testimony (and the subsequent reworking of MRE 702) *expanded* the factors a court could consider in evaluating expert testimony. *Gilbert*, 470 Mich at 782 (“[T]he court’s gatekeeper role is the same under *Davis-Frye* and *Daubert* . . . [B]oth tests require courts to exclude junk science; *Daubert* simply allows courts to consider more than just ‘general acceptance’ in determining whether expert testimony must be excluded”). *Daubert* did not purport to disturb the relevance of expert testimony that courts had previously admitted under a narrower test. More importantly, until now, no known case since *Hamilton* has disavowed its holding in any way.

The Court of Appeals also attempted to distinguish *Hamilton* by saying that in *Hamilton*, the expert proposed only to offer testimony regarding the defendant’s psychological makeup, whereas here, Dr. Wendt “proposed to testify that defendant had personality traits that would allow him to be easily influenced by police interrogators, thus directly implying, at least, that the police influenced him into making a false confession.” Court of Appeals’ Opinion, p. 6. “Additionally,” the court found, “Dr. Wendt asserted that he would testify that the defendant’s personality traits were similar to the traits possessed by others who made false confessions.” *Id.* Such testimony, the Court of Appeals held, removed this case from *Hamilton*’s reach. But the court was mistaken - such testimony is exactly the type to which *Hamilton* was meant to apply. The point in *Hamilton* was that a defendant must be allowed to combat evidence of his confession with evidence of his psychological state at the time he confessed, to help the jury understand why he might have confessed falsely. Dr. Wendt proposed to do exactly that. Mr.

Kowalski cannot be denied the right to put on evidence of his psychological makeup simply because it might lead jurors to agree with his defense. If he indeed confessed falsely, how else might the jury hear of, and credit, that possibility? *Hamilton* remains good law, is not distinguishable, and should be reinforced by a reversal from this Court.

Expert testimony about the various factors underlying a false confession is not admissible so that an expert may opine, or even imply, that a particular confession in a particular case was false, as that would indeed invade the province of the jury. Rather, it is admissible to educate the jury about the phenomenon and potential bases of false confessions, so that the jury may reach its own educated conclusion regarding the truth or falsity of the confession in the case before it. The trial court gave this inquiry short shrift, determining that even if it found Dr. Leo's methods to be reliable (which they clearly are, as discussed below), his testimony would be irrelevant as it invaded the province of the jury. (Appx. 672a.) Such a conclusion violates the appropriate standards set forth in *Daubert*, as discussed below.

The trial court then made a similar mistake concerning Dr. Wendt. Discussing only cursorily his credentials, which it determined were adequate, (Appx. 676a), it disallowed Dr. Wendt's testimony because it felt such testimony would be misleading "[w]ith no other evidence about false confessions." (Appx. 677a.) This, of course, was only the case because the court disallowed Dr. Leo's testimony. In other words, the court created the very problem of which it then complained. More importantly, however, Dr. Wendt's testimony is admissible in its own right; it does not depend on Dr. Leo's testimony, as it has only to do with his examination of Mr. Kowalski.

*Hamilton* specifically allows Dr. Wendt's testimony. Defendant offered Dr. Wendt for exactly the same reason similar testimony was allowed in *Hamilton*: to assist the jury in

understanding the defendant’s psychological makeup and specifically, “to explain to the jury the psychological reasons and factors which would motivate [the defendant’s] statements [to the police], i.e., to explain the evidence presented by the prosecution, as permitted by MRE 702.” *Hamilton*, 163 Mich App at 663 (internal quotation marks omitted).

As Judge Davis said in his dissent to the Court of Appeals’ Opinion, “Dr. Wendt’s conclusion that defendant’s personality makes him more susceptible to influence than normal is based on reliable methodologies and is highly relevant to explain his mental state as a circumstance attendant to his confession.” (Court of Appeals’ Opinion of Davis, J., concurring in part and dissenting in part, p. 1, (citing *Crane*, 476 US at 688-691.)) Judge Davis continued, “[p]articularly under the circumstances of this case, where defendant’s sole defense is that he falsely confessed, I find Dr. Wendt’s testimony relevant and its probative value not significantly outweighed by the danger of prejudice or confusion. I believe it is an abuse of discretion to exclude it.” *Id.*

We agree. There is no substantive difference between Dr. Wendt’s proffered testimony and the testimony allowed in *Hamilton*. There simply is no basis in the law for the exclusion of Dr. Wendt’s testimony and the lower courts should be reversed.

2. Dr. Leo’s Testimony Is Relevant and Will Assist the Jury.

The Court of Appeals erred in holding that Dr. Leo’s proffered testimony did not involve a proposition “that was outside the common knowledge of a layperson.” (Court of Appeals’ Opinion, p. 3.) Quite to the contrary, the area of false confessions is one in which a jury needs help. Numerous studies demonstrate that juries, as a rule, believe that a defendant would never falsely confess unless he was subjected to extreme coercion and that juries do not understand the psychological and circumstantial factors that could cause a person to confess in the absence of such extreme coercion. *See, e.g.* Danielle E. Chojnacki, Michael D. Cicchini, & Lawrence T.

White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 Ariz St LJ 1, 40 (2008) (finding that in a study of potential jury candidates, 73 percent believed that “an innocent person . . . would either ‘never confess’ or would only confess after ‘strenuous interrogation pressure,’” directly contradicting the many documented cases of false confessions following minimal pressure). The lack of such understanding can have grave results. According to data collected and analyzed by the Innocence Project some years back, “33 of the first 123 postconviction DNA exonerations involve false confessions or admissions. Thirty-seven of those 123 exonerations involve homicides, and of those, two-thirds involve the use of false confessions or admissions to secure convictions.” Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 Am J Crim L 191, 195 (2005). Since that time, there have been even more DNA exonerations, for a total of 273 as of August 1, 2011. In approximately 25% of these cases in which there were post-conviction exonerations based on DNA evidence, the innocent defendant confessed or pled guilty. [www.innocenceproject.org/false-confessions.php](http://www.innocenceproject.org/false-confessions.php). Evidence of the circumstances underlying a confession is not only relevant; it is critical.

The average juror is not familiar with the process of a police interrogation. Most people are not aware that interrogators may permissibly use rude or insulting remarks, cut off the suspects’ denials of guilt, or blatantly lie about fingerprint or DNA evidence. *See Chojnacki et. al., supra*, at 39. Nor do jurors understand the effect that a skillful combination of these tactics can have on an innocent person in the emotionally charged atmosphere of an interrogation room. The high percentage of wrongful convictions based primarily on a confession that was later proven to be false demonstrates that jurors often do not understand how psychologically coercive circumstances surrounding an interrogation can produce a false confession. Steven A. Drizin

and Richard A. Leo, *The Problem of False Confessions in the Post-DNA Age*, 82 NC L Rev 891, 921-23, 960-61 (2004) (finding that 81 percent of false confessors who went to trial were wrongfully convicted despite the fact that little or no other credible evidence supported their confessions).

A common misperception among the public is that if a person confesses, he must be guilty. An expert's testimony challenges this perception based on specialized knowledge and systematic observation of data to which the common juror is not privy. *United States v Hall*, 974 F Supp 1198, 1205 (CD Ill, 1997). The focus of an expert such as Dr. Leo is on assisting the trier of fact in understanding general findings and social psychology research regarding the interrogation process, and how such a process may lead to a false confession.<sup>1</sup>

The fact is, jurors treat evidence of a confession as more probative than nearly any other type of evidence, even if the confession is uncorroborated, which serves to underscore the need for expert testimony in the field of false confessions. Research conducted by false confession experts has documented reliable methods for identifying factors common to false confessions.<sup>2</sup>

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<sup>1</sup> Even where, as here, the defendant's statement is videotaped, the opportunity to view a videotaped statement does not automatically confer knowledge and understanding of the police interrogation process on the jury. And where, as here, the recorded statement does not document the entire process, the jury is left without any framework by which to understand what led the defendant to the point he was at when the video camera was turned on. Thus, the mere fact that the jury may see or hear portions of the interrogation does not protect Defendants' right to present a defense of false confession, as the Court of Appeals implied.

<sup>2</sup> For example, certain interrogation techniques may result in false confessions. The use of what is known as the "false evidence ploy", falsely telling a suspect that the interrogator already has incriminating evidence (such as a failed polygraph, or DNA evidence, or an eyewitness identification) has repeatedly been shown to increase the risk of confessions by the innocent. See Saul M. Kassin, *The Psychology of Confessions*, Annu Rev Law Soc Sci (2008) at 9-10. False confessions also result from a tactic known as "minimization", in which the interrogator urges the suspect to confess under a theory that would make his actions seem justified or less culpable (such as he was intoxicated or under the influence of drugs, or succumbed to group pressure, or was provoked). See Kassin, *supra*. pp. 10-11; Saul M. Kassin and Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats By Pragmatic Implication*, 15 Law & Human Behavior, 233-251 (1991). A suspect's decision to give a false confession under the latter circumstances reflects his judgment (albeit

Well-established, traditional devices of litigation, like vigorous cross-examination and the presentation of contrary evidence, provide better safeguards for both parties in a case than the complete exclusion of expert testimony in this area. In the end, the decision to accept or reject a defendant’s confession remains with the jury. By acting contrary to the courts in the twenty-six other states that have qualified Dr. Leo as an expert in false confessions and depriving the jury of Dr. Leo’s specialized knowledge, the trial court skewed the jury’s view of Defendant’s confession and violated Defendant’s right to present a defense.

Judge Davis agreed. “[T]he proffered evidence from Dr. Leo that people falsely confess] shows, using reliable methodologies, that false confessions do occur—albeit in a ‘minority’ of cases and that it is not within the general knowledge that they occur in the absence of torture or mental illness.” (Court of Appeals’ Opinion of Davis, J., concurring in part and dissenting in part, p. 2.) “Particularly in a capital case, I would not make the same assumptions as the majority as to what a layperson may or may not commonly know. I find this aspect of Dr. Leo’s testimony admissible under MRE 702.” *Id.*

Recognition by this Court of the educational value of such testimony would be nothing new. The Court of Appeals has repeatedly upheld the admissibility of testimony about social psychological phenomena. In addition to *Hamilton*, discussed above, the court has allowed expert testimony offered to explain why a child victim of sexual abuse might delay in disclosing

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usually a poor judgment) that confessing will end the pressure of the interrogation yet still permit him to later establish his innocence or obtain lenient treatment. Richard J. Ofshe & Richard E. Leo, *The Decision to Confess Falsely, Rational Choice and Irrational Action*, 74 *Denver Univ L Rev* (2007) at 990-98, 1051-60.

False confession can also be caused solely due to the psychological make-up of the accused – a desire for attention or self-punishment, feelings of guilt over unrelated transgressions, mental illness, or a desire to protect another. *Kassin* at 13. False confessions have also been made by persons who are vulnerable, due to anxiety, fatigue, or confusion, following a long interrogation, who come to believe that they must have committed the crime. *Id.*

that abuse. *People v Bailey*, unpublished opinion of the Court of Appeals, entered Oct 15, 2009, Docket No. 285638 (attached as Exhibit C). There, as here, the party opposing admission challenged the need for an expert on a social science-based behavior. *Id.* But the court disagreed, recognizing that “in cases involving sexually abused children, it might be natural for a jury to question why a victim did not immediately disclose sexual abuse.” *Id.*, citing *People v Beckley*, 434 Mich 691, 715-18; 456 NW2d 391 (1990).

This Court has acknowledged similar phenomena, and a similar need for expert testimony. In *Beckley*, it recognized that there is:

considerable authority suggesting that society has a prevailing distrust of the female who complains of rape. This historical distrust of the female complainant is nullified a bit when dealing with child sexual abuse; however, such distrust is not eliminated. It is not surprising that jurors would be skeptical about a child’s complaint of sexual abuse because of a child’s susceptibility to external influences.

434 Mich at 717.

Although the subject matter here is different, the governing concepts are the same. Plain and simply, it confounds common sense to think that an innocent person accused of a crime would nonetheless confess to its commission. But the fact that this does happen is a phenomenon well-established by both the scientific literature and by scores of DNA exonerations. Consequently, this is an area where expert testimony is highly valuable to a jury.

Notably, a recent study of mock jurors selected according to census data to reflect, as closely as possible, real juror composition, shows that an overwhelming majority of jurors would welcome this type of evidence, and find it helpful.

Roughly three quarters of the participants (74.3 percent) indicated that it would be useful for jurors to hear an expert witness testify about interrogation techniques used by police, and only 11.8 percent indicated that they would *not* find such testimony helpful. Similarly, when asked if it would be helpful to hear testimony from

an expert about why a defendant might falsely confess to a crime he or she did not commit, 71.2 percent said that such testimony would be helpful, while only 13.5 percent believed that it would not.

Mark Costanzo, Netta Shaked-Schroer, and Katherine Vinson, *Juror Beliefs About Police Interrogations, False Confessions, and Expert Testimony*, 7 J of Empiral Legal Studies 231, 240 (2010).

**B. Dr. Leo's Proffered Testimony Is Based on Sufficient Facts and Data And Is The Product of Reliable Principles and Methods.**

1. The Courts Applied Unsuitable Criteria to Stamp Dr. Leo's Methods as Unreliable.

Although neither court below questioned Dr. Leo's qualifications as an expert in the field for which he was offered, they took issue with his methods, finding that they did not bear the requisite indicia of reliability required by *Daubert* and MRE 702. (Appx. 673-74a; Court of Appeals' Opinion, p. 4.) The courts' errors were in the process they used to arrive at this conclusion: they clung to an impermissibly narrow view of the *Daubert* holding, one which the United States Supreme Court itself has disavowed.

In *Kumho Tire*, the Supreme Court extended *Daubert's* principles to all types of expert testimony, not just to testimony involving scientific methods. 526 US at 149. At the base of that holding was another – that a court may not limit its gatekeeping role to only the factors listed in *Daubert*. Instead, the Court held, a trial court must “determine whether the testimony has a reliable basis in the knowledge and experience *of the relevant discipline*.” 526 US at 149 (emphasis added). In other words, a court may not graft a predetermined set of criteria onto a field of study where their application would not make sense. One cannot judge a game of football by the rules of baseball. Yet that is essentially what happened here.

Like expert opinions regarding the delayed reporting of sexual abuse, the social psychology of police interrogations and false confessions does not deal with hard numbers and “Newtonian science.” Instead, it is an area of specialized knowledge which draws from a body of empirical research, case study data, and controlled experiments in areas of social persuasion, obedience to authority, and the effects of suggestive techniques on certain individuals. “Because of the ethical restraints on actual laboratory experimentation, social scientists must rely on analysis of” existing data surrounding real-world confessions. Soree, 32 Am J Crim L at 235. “[S]tudies based upon [such] observational data are subjected to a process of peer review within the social psychologist community[.]” *Id.*, quoting *United States v Hall*, 974 F Supp at 1204-05. Importantly, “*there is no dispute in the scientific community that false confessions do exist and that studying things like coercion and the post-admission narrative statement is the proper method of analyzing whether they occur.*” Sorce, 32 Am J Crim L at 235. (emphasis added).

That social science is not a “hard” science does not discount its inherent value as a legitimate academic pursuit. As this Court recognized for a related field, “[i]t is undeniable that there is an emerging cadre of social and behavioral scientists and clinicians who specialize in the treatment and the study of the victims of child sexual abuse. It would further deny reality not to recognize this field of practice and study.” *Beckley*, 434 Mich at 718. Social psychology is the study of human behavior. It is the study of influence and how external social pressures can shape decision making. Social psychologists also study how people influence one another, and how certain kinds of people are more vulnerable to pressures and more likely than others to comply under a given set of conditions. Thus, in conducting a flexible *Daubert* analysis for a social psychologist, the critical question for the court is whether a proffered expert has used

accepted *principles of social psychology* to identify various factors—situational or psychological—that may influence a person to confess falsely.

The trial court’s holding ignored this question, and instead critiqued the field of social science as a whole by using a set of inquiries inapplicable to its study. Specifically, the court cited the lack of a knowable “error rate” in Dr. Leo’s research as an indication that it is unreliable. (Appx. 666a.) The Court of Appeals also cited this as a problem, as well as the inability to test or quantify Dr. Leo’s methodologies. (Court of Appeals’ Opinion, p. 4.) But the fact that there is no known or potential error rate in the study of social science does not render the whole field unfit to produce expert testimony. Although it is true that *Daubert* encourages courts to consider known or potential rates of error, *Daubert* does not require error rates for all fields of study—and for good reason. In some fields there is simply no way of assigning an error rate because of the nature of what is being studied. See *Green v Texas*, 55 SW3d 633, 640 (Tex App, 2001) (“hard science methods of validation such as assessing the potential rate of error . . . may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences”). The social psychology of false confessions is one such field. *Hall*, 974 F Supp at 1200-02.

This Court has recognized this very point. In *Beckley*, the Court considered experts who were offered to explain the possible array of behaviors a child might exhibit following sexual abuse. In evaluating the methods used by experts to explain such behaviors, this Court held, “syndrome evidence is not a technique or principle which can predict abuse and its use is merely to explain behavior[.]” 434 Mich at 734. In such a case, the Court held, “[t]he evidence is only an expert’s opinion which explains and describes probable responses to a traumatic event.” *Id.*

Similarly, a social psychologist's testimony describes and explains how phenomena occur in a particular setting. As in *Beckley*, the ultimate goal of the social scientist's testimony is not to determine the truth or falsity of a defendant's confession, but to inform the jury of principles *the jury* should use to assess the confession's reliability. Welsh S. White, *False Confessions in Criminal Cases*, 17 Crim Just 4 (2003). Experimentation with live subjects, and consequent error rates, are simply inapplicable to this type of research. Indeed, the former is ethically impermissible. Thus, judging the field of social science by such hard scientific criteria makes no sense and is not required under MRE 702.

2. The Social Psychology of Police Interrogations and Confessions Is Reliable and Has Been Extensively Peer-Reviewed.

While focusing on a lack of definitive error rate, the trial court ignored the *true* factors that would indicate whether Dr. Leo's research is reliable, namely, whether his methodology is accepted in the field and in the scientific community at large. Dr. Leo's extensive body of work unquestionably passes this test, as evidenced by the numerous times and numerous states in which he has been qualified as an expert in the area of false confessions.

The principles of false confession research have been extensively published and peer-reviewed. Numerous academic articles and books draw upon empirical data to identify both the coercive techniques that are common to false confessions and the characteristics of individuals most vulnerable to those techniques. *See e.g.*, Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (1992), pp 631-62 (citing nearly 800 articles in areas relating to false confessions and police interrogations); Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psychol Sci Pub Int 2 (2004) (reviewing and updating the significant research in the area of false confessions and interrogations); Saul Kassin et al, including Richard A. Leo, *Police-Induced*

*Confessions: Risk Factors and Recommendations*, 34 *Law Human Behav* (2010) (official White Paper of The American Psychology-Law Society, (“AP-LS”), a division of the American Psychological Association.)<sup>3</sup> (reviewing and summarizing what is known about police-induced confessions, including identification of suspect characteristics, interrogation tactics, and “the phenomenology of innocence”). The principles detailed in these publications are generally recognized and accepted in the field of social psychology. Deborah Davis & William T. O’Donohue, *On the Road to Perdition: Extreme Influence Tactics in the Interrogation Room*, HANDBOOK OF FORENSIC PSYCHOLOGY, at 897-996 (2004), available at <http://www.sierratrialandopinion.com/papers>. There are at least 60 professionals from over 10 countries who have been qualified as experts by virtue of their courtroom experience or publications on the subject of interviewing, interrogations, and confessions.<sup>4</sup> Dr. Leo is foremost

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<sup>3</sup> It is very rare for the AP-LS to deem a document a “White Paper”. Other than the Kassin article, the AP-LS has only approved one other White Paper. Naming an article as an AP-LS White Paper is one of the strongest indicators that the research contained therein is reliable and generally accepted in the field.

<sup>4</sup> These experts include, in alphabetical order: Lucy Akehurst (U Portsmouth, UK), Elliott Aronson (U. California at Santa Cruz, USA), John Baldwin (U of Birmingham, UK), Peter Ball (U of Tasmania, Australia), Ray Bull (U Leicester, UK), Sven Christianson (Stockholm U, Sweden), Isabel Clare (UK), Alan Costall (U of Portsmouth, UK), Mark Costanzo (Claremont McKenna College), Graham Davies (U of Leicester, UK), Deborah Davis (U Nevada at Reno, USA), Emil Einarsson (U of Iceland, Iceland), Eitan Elaad (Israel National Police Headquarters, Israel), Krista Forrest (U Nebraska – Kearney, USA), Solomon Fulero (Sinclair College, USA), Eugenio Garrido (U Salamanca, Spain), Stephen Golding (U Utah, USA), Naomi Goldstein (Drexel U, USA), Par-Anders Granhag (U Gothenburg, Sweden), Thomas Grisso (U Mass Medical, USA), Gisli Gudjonsson (King’s College, London UK), Maria Hartwig (U Gothenburg, Sweden), Linda Henkel (Fairfield U, USA), Martin Hill (Ponce School of Medicine, Puerto Rico), Ulf Holmberg (Stokholm University, Sweden), Ronald Huff (U California at Irvine, USA), Barrie Irving (The Police Foundation, UK), Matthew Johnson (John Jay Criminal Justice, USA), Saul Kassin (Williams College, USA), Gunter Koehnken (Universitaet Kiel, Germany), Martha Komter (U of Amsterdam, Netherlands), Daniel Lassiter (Ohio University, USA), Richard Leo (U California at Irvine, USA), James MacKeith (UK), Jaime Masip (U Salamanca, Spain), Christian Meissner (Florida International U, USA), Amina Memon (U Aberdeen, Scotland), Harald Merckelbach (Maastricht U, Netherlands), Rebecca Milne (U Portsmouth, UK), Stephen Moston (U of Kent, UK), Lois Oberlander (U Mass Medical, USA), Richard Ofshe (U California at Berkeley, USA), James Ost (U Porstmouth, UK), John Pearce (UK), Stephen Porter (Dalhousie U, Canada), Michael Radelet (U of Colorado, USA), Allison Redlich (Policy Research Associates, USA), Dick Reppuci (U Virginia, USA), Melissa Russano (Roger

among them, and at the time he was proffered as an expert in this case, he had testified as an expert in approximately 182 cases, in 26 states. ( Appx. 331-332a.) Thus, should this Court not reverse the Court of Appeals, Michigan would be an outlier in the field of false confession testimony.

Social psychologists study influence and suggestibility with a particular application to police interrogation and false confessions. They agree about which specialized interrogation techniques can lead to a false confession, and the methods developed to assess the reliability of a confession. See e.g., Richard A. Leo & Richard J. Ofshe, *The Social Psychology of Police Interrogation, Studies in Law*, 16 Pol & Soc'y, 191-207 (1997); Welsh S. White, *supra*.

Controlled, easily replicated laboratory experiments that test individual suggestibility and vulnerability to authority have allowed scientists to develop methods they use to spot psychologically coercive tactics, and to assess a confession's reliability. Saul Kassin & K. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psychol Sci 125-28 (1996) (testing hypothesis regarding effect of presentation of false evidence in experiment accusing test subjects of hitting a forbidden key and crashing computer); M. Blagrove, *Effects of Length of Sleep Deprivation on Interrogation Suggestibility*, 2 J Experimental Psychol Applied 48-59 (1996); Stanley Milgram, *Obedience to Authority: An Experimental View* (1974) (explaining that shock studies revealed a profound form of social influence where test subjects exhibited almost total obedience to authority figures).

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Brown U, USA), Susan Rutter (UK), Eric Shepherd (City of London Polytechnic, UK), John Fridrik Sigurdsson (U Hospital, Reykjavik, Iceland), Jerome Skolnick (New York U School of Law, USA), Geoffrey Stephenson (U of Kent, UK), Aldert Vrij (U Portsmouth, UK), Tom Williamson (U Portsmouth, UK), James Wood (U Texas, USA), Lawrence Wrightsman (U Kansas, USA), and Philip Zimbardo (Stanford U, USA).

Researchers also collect empirical data to develop valid, reliable theories about police interrogation tactics and contextual factors by observing police interrogations. The observational method allows the researcher to observe a naturally occurring phenomenon in its context. The researcher subsequently attempts to explain what was observed. He then codes the data for quantitative or statistical purposes, subjecting the data to systematic scientific peer review analysis and publication. See Richard A. Leo, *Inside the Interrogation Room*, 86 J Crim L & Criminology 266 (Winter 1996) (describing observational study of 182 suspects interrogated by detectives in Northern California police departments). In any documented interrogation, the methods used to assess the reliability of a resulting confession can be retested by other experts to compare observations.

Another method of studying false confessions involves analyzing actual cases of known or suspected false confessions. Drizin and Leo, *The Problem of False Confessions in the Post-DNA Age*, *supra.*, (analyzing 125 cases of proven false confessions in the United States); 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, 435-36 (1998). Here, the researcher obtains documented cases where DNA or other evidence has exonerated the accused. Drawing on principles of rational decision making, perception, and interpersonal influence, the expert identifies psychologically coercive factors common in each false confession that influence an innocent suspect to falsely confess. By isolating commonly identified factors in known false confessions, experts can assess the reliability of disputed confessions. That the identifiable factors at play in false confessions are varied does not render them irrelevant or unreliable. The expert's testimony is critical to explaining what those factors are, and why they are significant.

Where DNA or other clearly exonerating evidence is unavailable, another generally accepted analytical method for determining the reliability of a confession is the post-admission narrative statement. Researchers look for a “fit” between the suspect’s post-admission narrative and the facts of the crime to evaluate the suspect’s actual knowledge or lack of knowledge about what happened. The researcher further analyzes the statement to determine if it is “internally consistent” (i.e., unwavering from one telling to the next), has generative value (i.e., if it leads investigators to discover new evidence) and contains details of the crime only known to the perpetrator and unknowable from any other source (i.e., the press). Saul M. Kassin, *How to Evaluate a Defendant’s Statement: A Four-Step Inquiry* (2003) <<http://www.williams.edu/Psychology/Faculty/Kassin/files/confessions.checklist.howto.pdf>> (accessed July 16, 2011).

As the citations above suggest, Dr. Leo is a prolific and renowned leader in this field of inquiry and is familiar with each of its methods. Dr. Leo’s experience and methods are not only well-recognized, but they are central to this field of social science. At the time he was proffered as an expert, Dr. Leo had studied between 2000 and 3000 police investigations. (Appx. 273a) He had published over 70 articles and several books about police interrogation techniques and false confessions. He has received multiple awards and presentations for his work. (Appx. 271a-272a). During the *Daubert* hearing, Dr. Leo testified that he was familiar with more than 40 other peer-reviewed articles in the area of false confessions (none of which the court reviewed, citing time constraints). He himself has coauthored four studies, utilizing three different data sets of false confessions. (Appx. 276a.) Each of these studies was peer-reviewed by social-psychology scientists. His testimony in this case would draw upon a wealth of widely accepted

scientific knowledge. And Dr. Leo is familiar with each of the five accepted methodologies used in the study of false confessions and can describe each in detail.

The trial court, however, relying in part on a single article by Paul Cassell, believed that some of the false confessions Dr. Leo studied were not *definitively* false, and thus his methods were unreliable. (Appx 668a.) But the fact that one person, in one *non* peer-reviewed article, questions the methods and findings of experts in the field of false confessions, is neither surprising nor significant. Dueling experts in the courtroom are more often the rule than the exception. That experts' views can differ goes to the *weight* of an expert's testimony, not its admissibility. *Surman v Surman*, 277 Mich App 287, 309-10; 745 NW2d 802 (2003) ("Gaps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility").

Moreover, the trial court's emphasis on Mr. Cassell's single article is troubling. Cassell is not a social scientist, has no training in social science research methods, and has never published any social science research in a peer-reviewed journal. Moreover, as both Dr. Leo and Dr. Richard Ofshe have pointed out, "numerous scholars have strongly criticized Cassell for his bias, reliance on flawed methods, studies and data, inaccurate and incomplete summaries, sources and quotes out of context, arbitrary, speculative, and exaggerated statistical estimates, and indefensibly selective reporting of data." Richard A. Leo & Richard J. Ofshe, *The Truth About False Confessions and Advocacy Scholarship*, 37 Crim L Bull 293, 295-97, n 11-17 (July-Aug. 2001).

These are not empty words. A number of other scholars have critiqued Cassell's work and methods specifically:

at critical points in [Cassell's] analysis, data are cited selectively, sources are quoted out of context, weak studies showing negative

impacts are uncritically accepted, and small methodological problems are invoked to discredit a no-harm conclusion when the same difficulties are present—to an even greater extent—in the negative-impact studies that Cassell chooses to feature.

Stephen J Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW Univ L Rev 500, 502 (1996). One scholar gave an example of Cassell's poor methods:

The Huff study [estimating, via surveys taken from judges, prosecutors, and others in the criminal justice system, that there are approximately 6000 wrongful convictions per year] quoted one Ohio judge's statement that he had the "strong suspicion that each year in Ohio, at least one or two dozen persons are convicted of crimes of which they are innocent." Remarkably, Cassell seeks to estimate the maximum number of wrongful convictions nationwide by adopting this judge's wild guess as to the minimum number of such convictions in Ohio (one dozen) and then extrapolating that number on the assumption that "Ohio's experience is similar to that in other states." Through this extraordinary substitution, Cassell reduces the Huff estimate of 6000 wrongful convictions per year to 350 such convictions per year. Even aside from Cassell's use of bizarre assumptions to reduce the study's estimate by a factor of nearly 20 to 1, his conclusion is speculative because it relies heavily on the Huff study, which was predicated on the dubious premise that those contacted to provide estimates of the number of wrongful convictions per year had a sound basis for providing such estimates.

Welsh S. White, *What Is An Involuntary Confession Now?*, 50 Rutg L Rev 2001, 2030-31, n 189 (1989) (internal citations omitted). Professor White is not alone in his criticism. See, Charles Weisselberg, *Saving Miranda*, 84 Corn L Rev 109, 176-77 (recognizing "Cassell's flawed methodologies" and noting that "Cassell's work, with its dubious methods, sets a poor benchmark from which to base a revision of *Miranda's* settled rules") and George C. Thomas, *Telling Half-Truths*, Legal Times, Aug. 12, 1996 at 21 ("Cassell relies on flawed studies, while rejecting other studies that show little or no effect from *Miranda*. His empirical theories and underlying methodologies have been strongly criticized").

The point, of course, is not whether Paul Cassell is correct or incorrect in his criticism of the findings of Dr. Leo and others in the field; the point is that the trial court abused its discretion to rely on Professor Cassell, who is himself not a social scientist, to dismiss Dr. Leo's entire body of work.

In *Bailey*, the Court of Appeals upheld the admission of a behavioral scientist who testified about delayed disclosure in sexually abused children. That expert, Mr. Robert Schumann, was a clinical psychologist who "had a master's degree in counseling and 70 hours toward his PhD." *Id.* He had attended counseling seminars and was an experienced counselor himself, but had done no research, nor published any articles, on the phenomenon he wished to discuss. *Id.* The court held, nevertheless, that "the extent of Schumann's experience with child sexual abuse victims affected only the weight of his testimony, not its admissibility[.]" and that his "lack of published material did not disqualify him as an expert, nor did the fact that he was not a degreed professional." *Id.*, citing *Beckley*, 434 Mich App at 712-13. If the State can admit behavioral experts who do not possess anything close to Dr. Leo's extensive qualifications, surely a defendant should be entitled to have competent testimony from one of the field's preeminent experts.

For all of these reasons, the proffered testimony of Dr. Leo and Dr. Wendt is admissible under MRE 702 and the Court of Appeals should be reversed.

**II. THE PROBATIVE VALUE OF THE PROFFERED TESTIMONY IS NOT SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.**

The lower courts also erred in excluding the testimony of Drs. Leo and Wendt on the grounds that its probative value was outweighed by unfair prejudice, citing MRE 403. The trial court apparently found such prejudice would exist because any discussion of the factors contributing to false confessions necessarily would involve the dissection of confessions by the

mentally ill and/or young. (Appx. 675-676a.) This, the court found, would mislead the jury. (*Id.*) But such concerns are easily addressed during cross-examination. The Court of Appeals found undue prejudice because the conclusion that Defendant made a false confession is implicit in the experts' testimony. (Court of Appeals' Opinion, p. 5.) But this could be true of any expert testimony and is not a basis for exclusion. And nowhere did the lower courts address how its ruling in this regard squares with *Crane* or *Hamilton*. Again, Mr. Kowalski's defense rests principally on his argument that he confessed falsely. It is hard to imagine a topic more probative in such a case than the circumstances and psychological traits that correlate with false confessions.

### CONCLUSION

Because the trial court impermissibly excluded the testimony of Drs. Leo and Wendt and the Court of Appeals incorrectly affirmed that exclusion, the Innocence Network supports Mr. Kowalski's request that this Court reverse the Court of Appeals.

Respectfully submitted,

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Dated: August 10, 2011

## INDEX OF EXHIBITS

- Exhibit A     *People v Rowe*, unpublished opinion of the Michigan Court of Appeals, entered March 16, 2004 (Docket No. 240820).
- Exhibit B     *People v Stevens*, unpublished opinion of the Michigan Court of Appeals, entered January 24, 2003 (Docket No. 233153).
- Exhibit C     *People v Bailey*, unpublished opinion of the Michigan Court of Appeals, entered October 15, 2009 (Docket No. 285638)

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STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDRIC K. ROWE,

Defendant-Appellant.

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UNPUBLISHED  
March 16, 2004

No. 240820  
Wayne Circuit Court  
LC No. 00-011920-01

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of six counts of first-degree criminal sexual conduct ("CSC-I"), MCL 750.520b(1)(c) and (e), and one count each of armed robbery, MCL 750.529, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of twenty-eight to forty-five years' imprisonment for each of the CSC-I convictions and the armed robbery conviction, and consecutive terms of twenty to forty years' imprisonment for the carjacking conviction and two years for the felony-firearm conviction. He appeals as of right. We vacate three of defendant's CSC-I convictions, but affirm in all other respects.

I

Defendant first argues that he was denied the effective assistance of counsel because trial counsel failed to call Christopher Glispie as a witness. We disagree.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. The court must first determine the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 578; *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed

2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

The failure to call a witness may constitute ineffective assistance of counsel if the failure deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). However, decisions regarding whether to call or question witnesses are generally presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To overcome the presumption of sound trial strategy, the defendant must show that counsel's failure to present evidence would have substantially benefited the defendant. *Kelly, supra* at 526.

The defense theory of the case as presented in defense counsel's opening statement and closing argument was that defendant was misidentified, that he was coerced into giving false confessions to the police, and that he was falsely arrested and charged because he was an African-American male who happened to be in the vicinity of the bank where the victim was abducted. According to Glispie's affidavit, Glispie would have testified that he saw defendant with "a woman," who defendant now maintains was the victim, at Juanita's Bar sometime "during the mid-summer." To the extent defense counsel made a strategic decision not to call Glispie as a witness, the decision was not unreasonable because Glispie's testimony would not have supported a misidentification theory, and would have placed defendant with the victim. Defendant does not explain how Glispie's testimony would have benefited him. This Court will not second-guess counsel in matters of trial strategy, and the fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The record shows that counsel presented a reasonable, albeit unsuccessful, defense of mistaken identity. Further, defendant cannot demonstrate that defense counsel's failure to call Glispie deprived defendant of a substantial defense. *Daniel, supra* at 58. Glispie's affidavit does not identify a specific date, nor does it indicate that the woman who was with defendant was the victim, as defendant now alleges. The vague allegations in the affidavit fail to demonstrate that Glispie's proposed testimony would have made a difference in the outcome of the trial. *Kelly, supra* at 526.

## II

Next, defendant argues that the trial court abused its discretion by precluding him from questioning Officer Kevin Robinson about the physical condition of the cell in which defendant was held at police headquarters.

Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998); *People v Gonzalez*, 256 Mich App 212, 218; 663 NW2d 499 (2003). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000).

In this case, the trial court determined that the proffered testimony was not relevant because it had previously determined, following a *Walker*<sup>1</sup> hearing, that defendant's statements to the police were voluntary. However, even where a court has previously determined that a defendant's statements were voluntary a defendant is still entitled to present evidence at trial of the circumstances attendant to the taking of a confession to impeach its reliability or credibility. See *Crane v Kentucky*, 476 US 683; 106 S Ct 2142; 90 L Ed 2d 636 (1986); *People v Hamilton*, 163 Mich App 661, 665-666; 415 NW2d 653 (1987); *People v Gilbert*, 55 Mich App 168, 172-173; 222 NW2d 305 (1974). We therefore conclude that the trial court abused its discretion in disallowing the proposed cross-examination.

Nonetheless, we conclude that reversal is not required. Error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993). Reversal is required only if the error was prejudicial. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

The victim in this case testified that defendant took her car at gunpoint and then sexually assaulted and robbed her. She identified defendant at a police lineup. Defendant gave two separate statements to the police admitting that he took the victim's car at gunpoint, and that he then sexually assaulted and robbed her. He also argued to the jury that his statements were involuntary. In view of the evidence presented at trial, it is not more probable than not that testimony concerning the conditions of the detention units at police headquarters would have convinced the jury to ignore his inculpatory statements and affected the outcome. Accordingly, this error does not require reversal.

### III

Defendant next argues, and plaintiff agrees, that three of his six convictions for CSC-I should be vacated because he was only convicted of three acts of penetration, under alternate theories for each act.

Defendant was convicted of three counts of CSC-I based on three acts of sexual penetration during the commission of another felony, MCL 750.520b(1)(c). He was also convicted of three counts of CSC-I based on the same three acts of sexual penetration under the alternate theory that he was armed with a weapon, MCL 750.520b(1)(e). Because defendant was convicted of engaging in only three acts of sexual penetration, under alternate theories for each act, he may only be convicted and sentenced for three counts of CSC-I. *People v Johnson*, 406 Mich 320, 331; 279 NW2d 534 (1979) (where a sexual penetration is accompanied by more than one of the aggravating circumstances enumerated in the statute, it may give rise to only one criminal charge for purposes of trial, conviction, and sentencing); *People v Malkowski*, 198 Mich App 610, 612-613; 499 NW2d 450 (1993), overruled in part on other grounds *People v Edgett*,

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<sup>1</sup> *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

220 Mich App 686; 560 NW2d 360 (1996). Accordingly, we vacate three of defendant's convictions of CSC-I.

#### IV

Defendant raises five additional issues in a brief filed in propria persona. None of the issues have merit.

First, defendant argues that trial counsel's failure to object to the delay in his arraignment deprived him of the effective assistance of counsel. We disagree. The record discloses that defendant was arrested on October 2, 2000, because he matched the description of the suspect. At the time of his arrest, he had a gun in his possession. On the next day, October 3, 2000, defendant was transported to Detroit Police headquarters, and the police obtained a search warrant for a sample of his blood. Later that day, defendant was placed in a lineup and was identified by the victim. Subsequently, after 10:30 p.m. on October 3, 2000, defendant gave a statement to the police. He later gave a second statement during the early hours of October 4, 2000. Defendant now complains that he was detained several more days to allow the police to investigate him for other crimes before he was finally arraigned on October 7, 2000.

On appeal, defendant argues that his continued detention was unlawful under the Fourth Amendment, and that defense counsel was ineffective for failing to file a motion to suppress the evidence against him. Assuming, however, that defendant was not timely arraigned, he cannot show that he was prejudiced by the objectionable delay. Because his statements were given before any impermissible delay, defendant cannot establish a causal connection between any delay and the giving of his statements. *People v Cipriano*, 431 Mich 315; 429 NW2d 781 (1988); *People v Manning*, 243 Mich App 615; 624 NW2d 746 (2000).

#### V

Defendant next argues that defense counsel was ineffective for failing to object to testimony that he had a gun in his possession when he was arrested, and that the prosecutor engaged in misconduct by eliciting testimony from police that defendant was arrested for having a gun in his possession. We conclude, however, that the evidence regarding the gun did not affect the outcome of the trial.

#### VI

Next, defendant argues that the trial court erred when it allowed Erica Farrell, a friend of the victim, to testify about her phone conversation on July 10, 2000. Defendant maintains that the testimony was hearsay.

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). In this case, defense counsel objected to Farrell's testimony only on the ground that the prosecutor provided untimely notice of her appearance as a witness, not on the basis that her testimony was hearsay. Thus, defendant failed to preserve the issue for appellate review and our review is for plain error.

As this Court observed in *Tobin v Providence Hospital*, 244 Mich App 626, 640; 624 NW2d 548 (2001):

“Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. MRE 801(c). Hearsay is not admissible except as provided by the rules of evidence MRE 802.

Contrary to what defendant argues, it is not clear or obvious that Farrell’s testimony about the statements of the unidentified man (the declarant) were being offered “to prove the truth of the matter asserted” under MRE 801(c). The fact that the statements were made, regardless of whether they were true, tended to support the victim’s credibility. Thus, defendant has not demonstrated plain error. Furthermore, Farrell’s testimony was cumulative of the victim’s testimony and, therefore, did not affect defendant’s substantial rights.

## VII

Finally, defendant has failed to show plain error with regard to his claim that his Fourth Amendment rights were violated on the basis that he was unlawfully detained so that the police could investigate his possible involvement in other crimes and obtain a confession. As previously indicated, defendant has failed to show that he was unlawfully arrested or that any delay in his arraignment resulted in an involuntary confession that was subject to suppression. *Cipriano, supra* at 315; *Manning, supra* at 615.

We vacate three of defendant’s convictions of CSC-I, but affirm in all other respects.

/s/ Richard Allen Griffin

/s/ Helene N. White

/s/ Pat M. Donofrio

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STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
January 24, 2003

v

JAMES MICHAEL STEVENS,  
Defendant-Appellant.

No. 233153  
Saginaw Circuit Court  
LC No. 97-013871-FC

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Before: Neff, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree felony murder, MCL 750.316(1)(b), and conspiracy to commit armed robbery, MCL 750.157(a). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to two concurrent terms of life imprisonment. We affirm.

I

Defendant's first issue on appeal is that he was improperly denied his right of self-representation. We disagree. The determination whether self-representation is appropriate is largely a matter within the discretion of the trial judge. *People v Adkins (After Remand)*, 452 Mich 702, 721 n 16; 551 NW2d 108 (1996). A defendant must exhibit an intentional relinquishment or abandonment of the right to counsel, and the court should indulge every reasonable presumption against a waiver of that right. *Id.* at 721.

The right of self-representation is guaranteed by both Constitution and statute, US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1, but this right is not absolute. *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976). Before granting a defendant's request to proceed in propria persona, the trial court must determine that (1) the defendant's request is unequivocal, (2) that the defendant is knowingly, intelligently, and voluntarily asserting his right, and (3) "that the defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *Id.* at 367-368.

The record supports the trial court's denial of defendant's request for self-representation because it would unduly disrupt the court. In addressing the court regarding defendant's motion, defense counsel stated that defendant was not dissatisfied with counsel, but indicated that he (defendant) wanted to make certain that his story got out, and felt he could do that better through himself; however, defendant also expressed concerns that he is "a very excitable person and very aggressive person" and "may have to be bound and gagged." The record indicates that during the nearly four years that this case was before the trial judge, defendant filed numerous exhaustive letters with the court complaining of judicial procedures, criticizing the handling of his case, and alleging a legal conspiracy, bribery, and coercion with respect to the charges against him. As the court noted, defendant was already serving a substantial sentence for a prior conviction and would have little motivation for adhering to the court's protocol and procedures during trial. The record supports the court's reasons for denying defendant's motion. *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 1 (1998); *People v Ahumada*, 222 Mich App 612, 617; 564 NW2d 188 (1997).

Further, even absent a finding that defendant's self-representation would be disruptive, the record supports additional reasons for the denial of defendant's motion. The record does not establish that defendant made an unequivocal request to represent himself. *People v Rice*, 459 Mich 899; 589 NW2d 280 (1998), mod on other grounds 459 Mich 929 (1998); *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999). This Court will not reverse where the trial court reaches the right result for the wrong reason. *Ramsdell, supra* at 406.

In addressing the court on the morning of trial, defendant complained that defense counsel had no witnesses, no defense, and no strategy planned and was not adequately representing defendant. Along with his motion to proceed without counsel, defendant also filed a "motion for provision of essential legal materials with in (sic) which to effectively represent himself."<sup>1</sup> Defendant's motion included a lengthy list of legal materials necessary for self-representation and requested a memory capable typewriter, accessories, and supplies, and stamps. In light of defendant's prerequisites for self-representation, the record does not support a conclusion that his request for self-representation was unequivocal. *Anderson, supra* at 367; *People v Yeoman*, 218 Mich App 406, 415; 554 NW2d 577 (1996). Further, under these circumstances, the record supports a finding that defendant's self representation would be unduly burdensome for the court. *Anderson, supra* at 367.

## II

Defendant's second issue on appeal is that his incriminating statements were admitted against him in violation of his Fifth Amendment right to counsel under *Miranda*.<sup>2</sup> We disagree. Because defendant failed to preserve this issue for appellate review, our consideration is limited to whether there is plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

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<sup>1</sup> Defendant filed this motion, as well as several other documents, in propria persona even though he was represented by counsel.

<sup>2</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Once a defendant invokes his Fifth Amendment right to counsel, police may not continue questioning the defendant without counsel present unless the defendant initiates the contact. *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880, 68 L Ed 2d 378 (1981); *People v Paintman*, 412 Mich 518, 529; 315 NW2d 418 (1982). However, a defendant who requests counsel can waive this right. *Id.* at 528.

Defendant invoked his right to counsel, but months later received an investigative subpoena. Investigative subpoenas are initiated by a prosecutor. MCL 767A.2(1). Investigative subpoenas include a statement that a person may have legal counsel present at all times during questioning, MCL 767A.4(g), and a person must be advised of his constitutional rights against compulsory self-incrimination. MCL 767A.5(5). Before attending the proceeding, defendant consulted with an attorney and invoked his right to remain silent on the advice of counsel. Defendant's earlier invocation of his right to counsel was not violated by the issuing of the investigative subpoena because defendant had the right to, and did, contact counsel.

Weeks after the proceeding, defendant initiated contact with the prosecutor's investigator. "*Edwards* does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities." *Minnick v Mississippi*, 498 US 146, 156; 111 S Ct 486; 112 L Ed 2d 489 (1990). In this case, defendant's right to counsel was not violated because he reinitiated contact.

### III

Defendant's third issue on appeal is that the trial court abused its discretion in failing to appoint an expert witness to testify concerning defendant's confession. We disagree. The decision to appoint an expert is within the trial court's discretion and reviewed for abuse of that discretion. *People v Herndon*, 246 Mich App 371, 398; 633 NW2d 376 (2001). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

Defendant sought a court-appointed expert witness in psychology to explain why he confessed to a crime that he later claimed he did not commit. Defendant claimed that he gave the incriminating statements under the stress of incarceration and to gain certain benefits from the police, including cigarettes (to which he was allegedly addicted), a fast food meal, favorable treatment within the Department of Corrections, and immunity for his brother who was connected with the charged offense.

Expert witness testimony is admissible to explain a defendant's psychological makeup at the time of a confession and the reasons why a defendant confessed to a crime that he later claimed he did not commit. *People v Hamilton*, 163 Mich App 661, 663-665; 415 NW2d 653 (1987). An indigent defendant must show a nexus between the facts of the case and the need for an expert and that he cannot otherwise proceed safely to trial without the expert. *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995); *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997).

Defendant had adequate opportunity to present his claim that his confessions were false and to present his motivations and explanation for falsely confessing. He was permitted to examine witnesses and introduce extensive evidence concerning his claim that his statements were induced because of specific psychological stresses. See *People v Manser*, 250 Mich App 21, 32-33; 645 NW2d 65 (2002). When an expert witness has been denied and a defendant is challenging the denial on due process grounds, a defendant must have made a timely request for an expert witness, the court must have improperly denied the request, and the denial must have rendered the defendant's trial fundamentally unfair. *Leonard*, supra at 584. We cannot conclude that the court's denial was improper or that defendant's trial was rendered fundamentally unfair.

#### IV

Defendant's fourth issue on appeal is that the trial court abused its discretion by admitting a club without a sufficient foundation that connected the club with defendant. We disagree. The decision to admit evidence is within the trial court's discretion and is reviewed for an abuse of that discretion. *Sawyer*, supra at 5.

The admission of physical evidence requires that a proper foundation be laid and that the articles be identified as that which they purport to be and that they are shown to be connected with the crime or with the accused. *People v Furman*, 158 Mich App 302, 331; 404 NW2d 246 (1987). Identification of an object does not have to be positive, absolute, certain, or wholly unqualified. *People v Rojem*, 99 Mich App 452, 458; 297 NW2d 698 (1980).

The club was connected to defendant through the testimony of a friend. Moments before her murder—the result of being beaten with an object such as a club—the victim described a black man in the motel lobby with a large stick in his back pocket. Because the prosecutor was not arguing that the club was definitely the murder weapon, only that the club was similar to that described by the victim and used in her murder, the trial court did not abuse its discretion in admitting the club into evidence.

#### V

Defendant's final issue on appeal is that he involuntarily confessed to the murder. We disagree. The trial court's determination that a statement was voluntary will not be reversed unless the determination was clearly erroneous. *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990).

The right against compelled self-incrimination is protected by the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17; *Herndon*, supra at 395. The test to determine if a confession was voluntary is whether, considering the totality of the surrounding circumstances, "the confession is 'the product of an essentially free and unconstrained choice by its maker,' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired ....'" *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988) (citation omitted).

In determining whether a statement is voluntary, the following factors should be considered, although none of these factors is determinative:

the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.* at 334.]

In this case, defendant was repeatedly advised of his *Miranda* rights and his rights with regard to the investigative subpoena. Defendant was allowed to, and did, contact his attorney repeatedly. See *People v Sexton (After Remand)*, 461 Mich 746, 753-754; 609 NW2d 822 (2000). Defendant made a calculated decision to attempt to benefit from the situation when he waived his *Miranda* rights and confessed to the murder. While defendant may now regret his decision, his regret is not evidence of police compulsion. *People v Daoud*, 462 Mich 621, 642-643; 614 NW2d 152 (2000).

Affirmed.

/s/ Janet T. Neff  
/s/ Joel P. Hoekstra  
/s/ Peter D. O'Connell

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STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
October 15, 2009

v

JONATHON CHARLES BAILEY,  
Defendant-Appellee.

No. 285638  
Macomb Circuit Court  
LC No. 2007-001901-FC

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Before: Saad, C.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Defendant was charged with one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b)(ii) (sexual penetration of a relative at least 13 years of age but less than 16 years of age), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b)(ii) (sexual contact with a relative at least 13 years of age but less than 16 years of age). Following a jury trial, defendant was convicted of one count of CSC II and was sentenced to 30 months to 15 years' imprisonment. He appeals as of right. We affirm defendant's conviction and sentence, but remand for correction of the judgment of sentence.

I. Expert Testimony

First, defendant argues that the trial court abused its discretion when it qualified Robert Schumann as an expert witness on the subject of delayed disclosure of sexual abuse and permitted Schumann to testify that delayed disclosure is a typical behavior by sexually abused children. We disagree.

We review for an abuse of discretion a trial court's decisions regarding the qualification of a witness as an expert and the admissibility of his testimony. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). An abuse of discretion exists if the court's decision results in an outcome outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). Any preliminary issues of law regarding admissibility based on the construction of a rule of evidence or statute is subject to review de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court's findings of fact are reviewed for clear error. MCR 2.613(C).

In *Dobek*, *supra* at 93-94 (footnote omitted), this Court set forth the law applicable to an analysis of expert testimony:

The analysis regarding whether to admit or exclude expert testimony begins with MRE 702. We again quote MRE 702:

If the court determines that 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 if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial court has an obligation under MRE 702 “to ensure that any expert testimony admitted at trial is reliable.” *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). While the exercise of the gatekeeper function is within a court’s discretion, the court may neither abandon this obligation nor perform the function inadequately. *Id.* Expert testimony may be excluded when it is based on assumptions that do not comport with the established facts or when it is derived from unreliable and untrustworthy scientific data. *Tobin v Providence Hosp*, 244 Mich App 626, 650-651; 624 NW2d 548 (2001); *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999). The *Gilbert* Court stated that “junk science” must be excluded, and it further indicated:

MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Gilbert, supra* at 782.]

Defendant challenges the admission of Schumann’s testimony on three bases. First, he argues that the testimony was not relevant because delayed disclosure is a subject within the jury’s common knowledge and, thus, expert testimony is not required. The trial court determined that the victim’s delay in disclosure might be viewed by the jury as inconsistent with the behavior of a sexually abused victim. Our courts have recognized that in cases involving sexually abused children, it might be natural for a jury to question why a victim did not immediately disclose sexual abuse. See *People v Peterson*, 450 Mich 349, 373-374, 379-380; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995); *People v Beckley*, 434 Mich 691, 715-718; 456 NW2d 391 (1990). Schumann’s testimony was offered to explain why a child victim of sexual abuse might delay disclosing the abuse. Therefore, the trial court did not clearly err in finding that Schumann’s testimony would be helpful to assist the jury in understanding the evidence.

Second, defendant argues that Schumann was not qualified under MRE 702 because he was not an expert on delayed disclosure. Defendant’s focus on delayed disclosure as a distinct,

independent field of expertise is misplaced. Schumann's testimony was offered to explain that delayed disclosure is a behavior typical of sexually abused children. To be an expert and give such testimony, one should have an appropriate educational background in fields such as psychology and counseling, which cover human behavior and firsthand experience working with victims of sexual abuse. *Beckley, supra* at 712-713. Schumann had significant knowledge, experience, and education regarding the behaviors of sexually abused children. He had a master's degree in counseling and 70 hours toward his PhD, he continuously attended seminars that pertained to counseling and child sexual abuse, he was a licensed professional counselor, and he had over 30 years' experience in dealing with sexually abused children. He had also been qualified as an expert in court numerous times in the field of counseling.

Defendant asserts that Schumann's experience could not substitute for scientific training in the field of psychology and mentions that Schumann had not done any research or published any articles on delayed disclosure. However, MRE 702 expressly allows an expert to be qualified based on knowledge and experience. The extent of Schumann's experience with child sexual abuse victims affected only the weight of his testimony, not its admissibility. See *In re Noecker*, 472 Mich 1, 12; 691 NW2d 440 (2005). Similarly, Schumann's lack of published material did not disqualify him as an expert, nor did the fact that he was not a degreed professional. See *id.* at 11-12; *Beckley, supra* at 712-713. Thus, the trial court did not abuse its discretion in qualifying Schumann as an expert in matters involving sexually abused children, specifically concerning whether delayed disclosure is a behavior consistent with such a victim.

Third, defendant argues that Schumann's conclusions were not based on reliable data. In *Beckley, supra* at 718-721, the Court held that the *Davis/Frye*<sup>1</sup> test regarding reliability is not applicable where syndrome evidence is offered to explain behavior, i.e., the test is not applicable to the behavioral sciences. In *Gilbert, supra* at 781, our Supreme Court acknowledged that MRE 702 governed the trial court's role as gatekeeper and that the amended version of MRE 702 explicitly incorporated the *Daubert*<sup>2</sup> standards of reliability. The *Gilbert* Court further noted, however, that the trial court's gatekeeper role is the same under *Davis/Frye* and *Daubert*. *Id.* at 782. Thus, it is appropriate to consider the reasoning behind the *Beckley* Court's holding when considering whether an expert's testimony regarding behavioral traits of child sexual abuse victims satisfies the third prong of MRE 702. The *Beckley* Court stated:

The ultimate testimony received on syndrome evidence is really only an opinion of the expert based on collective clinical observations of a class of victims. . . . The experts in each case are merely outlining probable responses to a traumatic event. It is clearly within the realm of all human experience to expect that a person would react to a traumatic event and that such reactions would not be consistent or predictable in all persons. Finally, there is a fundamental

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<sup>1</sup> *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 293 F 1013 (DC Cir 1923), superseded by statute as stated in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 587; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

<sup>2</sup> *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences. [*Beckley, supra* at 721.]

Defendant argues that the trial court abandoned its gatekeeping role when it allowed Schumann to testify because the area of delayed disclosure is junk science, i.e., the source of Schumann's data was unreliable. Again, defendant's focus on delayed disclosure as a distinct field is misplaced and, thus, the premise of his argument is faulty. Schumann derived his opinions from the field of behavioral science and, more particularly, the subspecialty of child sexual abuse, both of which are recognized fields of practice. *Peterson, supra* at 362-363; *Beckley, supra* at 718. Defendant's evidence showing that there is disagreement regarding the ratio of sexually abused children who delay disclosure affects only the weight of Schumann's testimony, not its admissibility. It does not render the subspecialty unreliable. Moreover, the lack of definitive empirical data drawn from scientific studies is irrelevant. As the *Beckley* Court recognized, human behavior is not a subject matter that lends itself to the type of scientific testing performed in the hard sciences. *Beckley, supra* at 721. "The expert testimony offered is based at best on an inexact scientific foundation, and therefore the evidence is only admissible when a victim's behavior becomes an issue in the case." *Id.* at 722.

Defendant also argues that Schumann's testimony was not reliable because the prosecution failed to show that Schumann used a scientific methodology in reaching his conclusions. Schumann's opinions were based on his experience and knowledge of pertinent literature. Defendant asserts that personal observation is not scientific methodology. However, as the *Beckley* Court observed, the ultimate testimony regarding behavioral traits "is really only an opinion of the expert based on collective clinical observations of a class of victims." *Id.* at 721. More recently, the Supreme Court held that a psychiatrist's testimony complied with the current version of MRE 702 where, based on his experience treating alcoholics, he testified about the behaviors typical of an alcoholic. *Noecker, supra* at 11-12. Accordingly, the trial court did not abuse its discretion in deciding that Schumann's testimony met the standards in MRE 702.

Defendant also argues that Schumann impermissibly testified at trial that the victim in this case was, in fact, a victim of sexual abuse. Because defendant did not challenge this testimony at trial, our review is limited to plain error affecting defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). An expert may not testify that sexual abuse occurred or vouch for the veracity of an alleged victim. *Peterson, supra* at 352. However, "an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Id.* at 352-353. We do not view Schumann's testimony as stating that the victim was indeed a victim of sexual abuse. Rather, Schumann interpreted the victim's behavior as consistent with that of a sexual abuse victim after defendant attacked her credibility. Therefore, defendant has not established plain error warranting reversal.

## II. Prosecutor's Conduct

Defendant argues that the prosecutor committed misconduct by comparing him to Ted Bundy, a well-known serial killer, in her closing argument. Because defendant failed to challenge the prosecutor's argument at trial, we review this issue for plain error affecting defendant's substantial rights. *Knox, supra* at 508. Claims of prosecutorial misconduct are

decided on a case-by-case basis, and we must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Viewed in context, the prosecutor did not compare defendant directly to Ted Bundy. She only made the point that people who commit heinous crimes do not look a particular way, i.e., guilt cannot be judged by physical appearance. A prosecutor need not limit her arguments to the blandest possible terms. *Dobek, supra* at 66. Accordingly, there was no plain error. In addition, defense counsel was not ineffective for failing to challenge the prosecutor's argument. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) (counsel is not required to make a futile objection).

### III. Jury Instructions

Defendant argues that the trial court erred by failing sua sponte to give a special unanimity instruction because his CSC II conviction could have been based on numerous different acts. Because defendant failed to request a special unanimity instruction, or challenge the trial court's failure to give such an instruction, this issue is unpreserved. Thus, our review is limited to plain error affecting defendant's substantial rights. *Knox, supra* at 508. "A defendant has the right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement." *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006). In this case, the trial court gave a general unanimity instruction, which is usually sufficient. *Id.* But as further explained in *Martin*,

the trial court must give a specific unanimity instruction where the state offers evidence of alternative acts allegedly committed by the defendant and "1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." [*Id.*, quoting *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994).]

CSC II involves sexual contact. MCL 750.520c. "Sexual contact' includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts . . ." MCL 750.520a(q). According to the victim's testimony, the acts corresponding to the CSC II counts occurred when defendant got into her bed during the early morning hours and rubbed her vagina under or over her underwear, or rubbed her buttocks. She testified regarding the details of the first incident and stated that similar incidents occurred more than ten times. However, these different acts were not materially distinct and defendant offered the same defense to all acts, i.e., that the victim was lying.

Defendant asserts that his conviction of only one count of CSC II indicates that there was juror confusion or disagreement. However, the question is whether there was reason to believe that jurors would be confused or disagree on the factual basis for the charges at the time the trial court instructed the jury. Here, there was no evidence of any variation from the specific facts pertaining to the acts other than when they occurred, and all the alleged acts were within the timeframe of the charged offenses. Therefore, the trial court had no reason to believe that there might be juror confusion or disagreement. Accordingly, the trial court did not plainly err in failing to give a special unanimity instruction. Further, because a request for such an instruction

would have been futile, defendant's corresponding ineffective assistance claim also fails. *Mack, supra* at 130.

#### IV. Student Safety Zone Restrictions

Defendant challenges the constitutionality of the student safety zone restrictions laid out in the Sex Offenders Registration Act, MCL 28.721 *et seq.* These restrictions provide that sex offenders shall not live or work within 1,000 feet of a school, with certain exceptions. MCL 28.733-MCL 28.735. Questions regarding justiciability are questions of law subject to de novo review. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006). "The doctrine of ripeness is closely related to the doctrine of standing, as both justiciability doctrines assess pending claims for the presence of an actual or imminent injury in fact." *Id.* at 378. Here, defendant has not alleged any injury in fact as a result of the student safety zone restrictions. Indeed, defendant is currently incarcerated. Therefore, defendant has no justiciable claim and this issue is not properly before us.

#### V. Correction of the Judgment of Sentence

Defendant argues, and plaintiff concedes, that the judgment of sentence inaccurately indicates that defendant was convicted of violating MCL 750.520c(1)(a) when he was actually convicted of violating MCL 750.520c(1)(b). Therefore, we remand for correction of this clerical error.

Affirmed and remanded for correction of defendant's judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad  
/s/ Peter D. O'Connell  
/s/ Brian K. Zahra