

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

Appeal from the Court of Appeals
Bandstra, P.J., Fort Hood and Davis, JJ.

PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff/Appellee,
vs.

JEROME KOWALSKI,

Defendant/Appellant.

Michigan Supreme Court Docket No. 141932
COA No. 294054
Livingston CC: 08-017643-FC

DEFENDANT JEROME KOWALSKI'S

REPLY BRIEF

ORAL ARGUMENT REQUESTED

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I. The Trial Court Abused its Discretion in Finding Dr. Leo's Testimony Unreliable Because the Research on False Confessions was Purportedly Based on his Subjective Determinations.

The prosecution argues that Dr. Leo's testimony is unreliable because the study of false confessions utilizes subjective analysis. It contends the problem with the research is that, in addition to the four ways the field of study determines whether a confession is false: (1) showing the crime didn't occur; (2) showing it was physically impossible for the confessor to have committed it; (3) showing scientific findings exonerate the confessor, such as through DNA; and (4) identifying the true offender; there is an additional method that compares the confessions to other known evidence to see if it "fits". (Appellee Br., p. 10) The prosecution directs criticism of this additional method at Dr. Leo claiming it is "based on confessions *he* deems to be false by virtue of *his* determination that the confession is not supported by what *he* concludes is 'significant credible' evidence". (Appellee Br., p. 14)¹ The criticism is based on a distorted view of the methodology employed by social scientists when gathering and categorizing confessions in the field. As Dr. Leo explained, the research conducted by social scientists divides confessions into three different categories: "proven," "highly probable," or "probable." (395-398a) Classifying a confession as "proven" false requires the application of the four criteria cited above. But, if a case does not fit within the criteria, researchers then look secondarily to determine

¹ The claim is made frequently enough to become its own mantra:

"Leo examines only confessions that *he* determines are false" (Appellee Br., p. 10)

"he applies *his* criteria to determine if a confession is false . . ." (Appellee Br., p. 11)

"...he takes what he has determined to be a false confession ..." (Appellee Br., p. 11)

"...Leo is the one who determines if the confession is false . . ." (Appellee Br., p. 16)

"But for Leo, the only one who can tell if a confession is false is Leo, based on his own subjective view . . ." (Appellee Br., p. 16)

"The bottom line is that Leo's testimony inherently relies on his subjective judgments about what constitutes a false confession . . ." (Appellee Br., p. 19)

"And that Leo has subjectively deemed some confessions to be false that involve a certain interrogation technique . . ." (Appellee Br., p. 29)

whether the suspect's narrative account is consistent with the unique and non-public details of the offense. (291a) Cases that are selected in this alternative manner may be characterized as either "highly probable" or "probable" false confessions for further study. The prosecution's attack on the methodology entirely ignores the distinction between the different categories of confessions and how they are classed. The entire body of research examining false confessions is condemned as "subjective" when, in truth, it is based in large measure on "a body of proven false confessions in the real world through DNA and other means that have been extensively studied. There's no question they are false confessions." (283a)

Appellee's brief attempts – repeatedly – to portray Dr. Leo as a solitary proponent of some idiosyncratic theories and methodologies when he is but one of many contributors to the body of research in the field of false confessions that has already "reached a state of scientific acceptability in the social sciences." (279a) To the extent that "other researchers may agree with Leo" – which they uniformly do – the prosecution contends "they have either fallen into the same trap of applying their own subjective determinations . . . or relied on Leo's flawed methodology." (Appellee Br., pp. 13-14) In other words, it is not that Dr. Leo's methodology departs from accepted standards and principles for conducting social scientific research in this area, it is that the standards established by the community of professionals that conduct this type of research is, in the prosecution's eyes (and without expert social scientific support) unacceptable and flawed across the board.

The prosecution argues that the trial court recognized the flaw in methodology citing an article that Dr. Leo wrote in which he stated that "it is possible that his classification of a confession as false could be mistaken." (Appellee Brief, p. 14) In the article, *The Consequences of False Confessions*, Dr. Leo wrote:

“For any case that could not be classified as a proven false confession, there is a possibility that our classification of the case might be an error. Despite strong evidence supporting the conclusion that the confession is false, it remains theoretically possible that one or more of the defendants we classify as false confessors may have committed the crime.”

Both the trial court and the prosecution take the comment out of context, ignoring the fact that it was limited to those confessions categorized as “highly probable” or “probable” false confessions. Dr. Leo was not speaking of “proven” false confessions. He was being intellectually honest, acknowledging that the latter two categories of false confessions have a component of subjectivity to them; that is why they are categorized as “highly probable” or “possible”. On the other hand, those that are categorized as “proven” false confessions have been categorically proven to be false. The contention that the research derived from them is unreliable because the confessions are of questionable character is simply unfounded.

The prosecution then accuses Dr. Leo of professing to have a monopoly on the truth: “But for Leo, the only one who can tell if a confession is false is Leo . . .” (Appellee Brief p. 16). The sarcasm stems from Dr. Leo’s comment that he views false confessions “like plane crashes and train wrecks.” (440a) The prosecution decries Dr. Leo for thinking he is the only one who can spot a false confession, and retorts that, “a false confession is not like plane crash or train wreck” because “those events are objectively and unequivocally discernible . . .” “Everyone can see it.” (Appellee Br., p. 16) This analogy too, was taken out of context. Dr. Leo was explaining, as he had many times throughout his testimony, that his research was not a quantitative analysis to determine how often false confessions occur – despite the prosecution’s insistence that this was the only thing that would legitimize the research – rather, he stated, “they may be low probability events, but they are high consequence.” The analogy to plane crashes

and train wrecks conveys that false confessions occur infrequently, but that when left unchallenged, the ramifications for an innocent man, are dramatic.

The prosecution argues, repeatedly, that matching the defendant's statement with the known objective facts does not require Dr. Leo's testimony, "Rather, that is precisely what we ask the jury to do." (Appellee Br. p. 18-19,23,24,27) The argument misconstrues the purpose of Dr. Leo's testimony who will not be asked to compare Mr. Kowalski's statements to the evidence, or lack of evidence. Rather, defense counsel will ask jurors to make that comparison on their own. Dr. Leo's testimony is offered to assist jurors in deciding the more complex issue, "Why would a person make statements implicating himself in a crime he did not commit?"

The prosecution submits that *State of Ohio v. Wooden*, unpublished opinion of the Ohio Court of Appeals, issued July 23, 2008 (Docket No. 23992) (2008 WL2814346) offers guidance on this issue. There, the court acknowledged Dr. Leo's credentials, but found the principal flaw with his testimony was that he could not predict when a confession was false. There is a serious flaw with the court's logic. If Dr. Leo was able to predict when a confession is false and to testify about his conclusion, he would be accused of serving as a human lie detector and of invading the province of the jury, something case law uniformly condemns. But, he does not claim that power. He is the first to concede that human behavior is not predictable to a mathematical certainty. He and other scholars agree that repeated social scientific studies show that correlations exist between certain interrogation techniques and false confessions. His testimony is meant solely to assist jurors understand, rather than predict behavior.

The prosecution also argues that *Wooden* supports its position because "defendant's confession was videotaped." (Appellee Br. p. 18). The claim is questionable since as was

pointed out (Appellant's Br., p. 15), a large, and the most important portion of Mr. Kowalski's interrogation was neither audio nor video recorded.

The prosecution posits that a jury "can easily assess the tactics used by police to determine if they believe defendant's confession." (Appellee Br., p. 18) It is astonishing that both the trial court and the prosecution acknowledge that police receive specialized training in interrogation techniques, yet both feel that a jury will somehow intuitively recognize when such techniques are being applied. Either police officers are receiving specialized training for something that is mere common sense, or the trial court and prosecution simply choose to understate the sophistication and importance of police interrogation techniques.

The prosecution dismisses the comparison of false confession testimony to expert testimony about battered spouse syndrome and the behavior of child sexual assault victims. First, it argues that, "Unlike *Christel*² and *Peterson*³, the concept that people sometimes lie to the police and may even falsely confess to a crime is neither unremarkable nor even counter-intuitive." (Appellee Br., p. 25) The claim, unsupported by any authority, is itself remarkable in light of the fact that the assumption that people do not make false statements damaging to themselves is the bedrock for the hearsay exception admitting statements against interest. MRE 804(b)(3). "The advisory committee said concerning FRE 804(b)(3), on which MRE 804(b)(3) is modeled said: 'The circumstantial guarantee of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.'" *People v. Poole*, 444 Mich 151, 160-161; 506 NW2d 505 (1993). If the assumption that people do not generally lie to get themselves into trouble is so well-grounded that it has been engrafted into a rule of evidence, then the notion that

² *People v. Christel*, 449 Mich 578; 537 NW2d 194 (1995)

³ *People v. Peterson*, 450 Mich 349; 537 NW2d 857 (1995)

someone would confess to a murder which they did not commit is surely the hallmark of counter-intuitiveness.

Second, the prosecution argues that neither *Christel* nor *Peterson* lend any support because both were decided before the revision of MRE 702 and *Daubert v Merrell Dow Pharmaceuticals Inc*, 509 U.S. 679; 113 S.Ct. 2786; 125 L.Ed.2d. 469 (1993). Both, however, follow this Court's earlier decision in *People v. Beckley*, 434 Mich 691, 456 NW2d 391 (1990) where the Court held that, as a general rule, the Davis/Frye test does not apply to behavioral sciences. *Beckley* found that the Davis-Frye test applied to various scientific devices and techniques and noted the difference between traditional sciences and behavioral sciences:

Psychologists, when called as experts, do not talk about things or objects, they talk about people. They do not dehumanize people with whom they deal by treating them as objects composed of interacting biological systems. Rather, they speak of the whole person. *Beckley, supra*, at 820.

The Court held, "There is a fundamental difference between techniques and procedures based on chemical, biological, or physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences". *Beckley* at 721. In essence this Court was making the very point defendant makes in his brief; behavioral sciences are not subject to the same mathematical precision as the hard sciences under a *Daubert* analysis. This is not to say it is a lesser standard, only that it is a different standard; one that takes into account the view of the social sciences held by this Court in *Beckley*.

II. The Trial Court Abused its Discretion in its Blanket Exclusion of Dr. Wendt's Expert Testimony

The prosecution claims that Dr. Wendt's testimony is inextricably linked to Dr. Leo's based on a selected excerpt from the initial notice provided to the prosecution i.e., Defendant's Notice of Proposed Expert Witness Testimony, that identified some overlap between the two

experts. However, in addition to the one paragraph cited by the prosecution, Dr. Wendt's correspondence, attached to Defendant's notice also stated:

My opinion is based upon extensive information collected during the course of my evaluation of Mr. Kowalski, including the administration of a battery of psychological testing, extensive clinical interview, review of police reports, documents, and review of transcripts of interactions between Mr. Kowalski and law enforcement officials. I conducted a retrospective evaluation of Mr. Kowalski's mental state during the time in question, similar to an evaluation of criminal responsibility.

The substance of my testimony will address the psychological and situational factors bearing on the credibility and reliability of Mr. Kowalski's statements to the police. I will not, however, offer testimony of an ultimate issue of whether Mr. Kowalski made a false confession. (4a)

The trial court was well aware of the defense's intent to have Dr. Wendt merely testify as to the defendant's psychological state at the time he gave his statements, independent of the research on false confessions. Defense counsel requested whether or not Dr. Wendt can testify as to his clinical psychological findings with respect to Mr. Kowalski; the court stated flatly "I've determined them not to be relevant." (Vol. III p. 110) By doing so the trial court blatantly ignored Kowalski's right to present his defense and the longstanding holding of *People v. Hamilton*, 163 Mich App 661; 415 NW2d 653 (1987), where the court concluded that the exact same type of testimony was not only relevant, but essential evidence:

Dr. Abramsky's testimony meets this test as it would help the jury understand the circumstances surrounding defendant's statements to the police and how those circumstances affected the reliability and credibility of defendant's statements. Such an understanding is central to the juries' determination of defendant's guilt or innocence. *Hamilton*, at 667.

Defendant offers, through Dr. Wendt, the same type of testimony for the very same purpose. The trial court's ruling (that it is irrelevant) flies in the face of both *Hamilton* and *Crane v. Kentucky*, 476 US 683; 106 S.Ct. 2142; 90 LE.2d. 636 (1986).

The prosecution argues that the proffered testimony, even if probative, creates a high risk of unfair prejudice. Despite defense assurances by both defense experts that neither intended to offer an opinion as to whether or not Kowalski's confession is false, the prosecution persists that "an expert should not be permitted to give an opinion as to whether defendant was telling the truth when he made statements to police. Yet that is precisely how Defendant seeks to use Dr. Leo's testimony in this case." (Appellee Br., p 31) That is not the purpose or the design of the testimony any more than experts in criminal sexual conduct cases are stating whether or not a "victim has actually been abused." Once more, it bears repeating: defendant's experts are not going to be asked to give an opinion as to whether Mr. Kowalski is telling the truth and they will do so.

Next, the prosecution argues that Dr. Leo's testimony does nothing more than "add the imprimatur of an expert in an attempt to lend added reliability to defendant's argument" citing the Court's comment in *Peterson, supra*, that "an expert will often represent the only seemingly objective source on which the jury may have to hang its hat." *Peterson* at 374. (Appellee Br. P 34) What this Court stated immediately thereafter is even more pertinent:

"This expert testimony however, may be introduced only if the facts as they develop would raise a question in the minds of the jury regarding the specific behavior. The behavior must be of such a nature that it may be potentially be perceived as that which would be inconsistent with a victim of child abuse i.e. delay in reporting recantation . . . the court must determine whether the particular characteristic is one that calls for an expert explanation." *Peterson* at 374.

The same type of consideration is at issue here. If the defendant did not commit the crime, why would he make the statements that he did? This is a question that needs explanation and the evidence proffered helps to dispel the notion that false confessions do not occur in the same manner that an expert helps to dispel the notion that if abuse were real, a child would not wait to report it.

The prosecution professes fear that the issue of the reliability of Mr. Kowalski's statements to the police may become a side show. The fact is, it cannot become a sideshow; it is the main event. It is the central issue in the case. The only issue is whether the defendant will be allowed to present his own witnesses or whether he will be relegated to a second rate defense and be required to make his case through the cross examination of hostile prosecution witnesses.

While professing a general fear that in future cases every interrogation will be the subject of a battle of experts, the prosecution's fear is groundless. It is the rare case in which the defense of a false confession is raised. As Dr. Leo stated, they are like plane crashes, "they are low probability events..." The reason they are rare, and the reason why expert testimony in the area is not akin to the admission of polygraph evidence, is because the testimony is not used to bolster a defendant's credibility but to do just the opposite, to explain a counter intuitive phenomenon; why a defendant would say something that is untrue when it could place him in jeopardy.

III. The Exclusion of Defense Expert Witnesses Deprives Defendant His Constitutional Right to Present A Defense

The prosecution argues that a violation of the constitutional right to present a defense occurs only when there is an arbitrary or disproportionate exclusion of evidence that "in fact, *infringes* a weighty interest of the accused." This clearly implies that even if the trial court's exclusion of the defense experts was an arbitrary and/or discriminate application of MRE 702, it did not amount to a constitutional violation because there is no 'weighty interest' of the defendant involved. The quote cited comes from *United States v. Scheffer*, 523 U.S., 303; 140 L.Ed.2d. 413 (1998). In *Crane v. Kentucky*, the Court found a violation of the right to present a defense since defendant was precluded from introducing evidence bearing on the credibility of his confession. It was a "weighty interest" of the accused at consideration in that case, and it is the same "weighty interest" of the defendant at issue in this case.

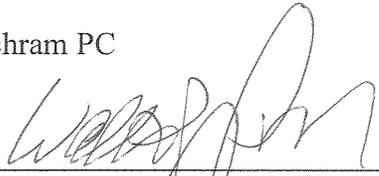
Finally, the prosecution argues that exclusion of the defense experts does not deprive defendant of his constitutional right to present a defense; “Through his own testimony the testimony of other witnesses, and the physical evidence, defendant can still assert that the evidence does not corroborate his confession and it should not be believed.” (Appellee Br., p. 49) Defendant already intends to argue that the confession is not reliable by comparing it to the other evidence in the case. But, he still must cope with the 600 pound gorilla in the courtroom; why did he make incriminatory statements to the police if he is innocent? Without the testimony of Dr. Leo to explain the phenomenon of false confessions and the circumstances under which they have been known to occur, along with Dr. Wendt’s testimony that among other things his psychological state made him extremely compliant, defendant is forced to tip toe around the issue without addressing it head on.

The right to present a defense is one that the constitution grants the “accused.” Here Kowalski is prepared to offer relevant reliable testimony regarding a material issue that goes to the very heart of his defense. The prosecution’s suggestion that he will not be deprived of his right to present a defense because his defense is not being eliminated completely, but merely diminished, is an affront to individual rights.

Respectfully submitted,

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