

STATE OF MICHIGAN
IN THE SUPREME COURT

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v.

Supreme Court No. 141932
Court of Appeals No. 294054
Livingston County
Circuit Court Case No. 08-017643-FC

JEROME WALTER KOWALSKI,

Defendant/Appellant.

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PLAINTIFF/APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTIONAL BASIS

The People concur in Defendant's statement of jurisdictional basis.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. In order to admit expert testimony under MRE 702, the trial court must find that it is reliable and that it would assist the jury. Did the trial court abuse its discretion in excluding Defendant's proposed expert testimony about false confessions finding the evidence unreliable where the testimony was based on the expert's own subjective determination when a confession is "false" and also concluding that such testimony would not assist the jury?

The People answer: No

Defendant answers: Yes

The trial court answered: No

The Court of Appeals answered: No

- II. Where experts would essentially testify as false confession detectors, did the trial court abuse its discretion in excluding that testimony because whatever probative value that the unreliable testimony would have was substantially outweighed by the danger of unfair prejudice?

The People answer: No

Defendant answers: Yes

The trial court answered: No

The Court of Appeals answered: No

- III. A defendant does not possess an unfettered right to admit evidence simply because he deems it helpful to his defense. Did the trial court's exclusion of inadmissible expert testimony

about false confessions under well-established court rules that require evidence to be reliable
deprive Defendant of his constitutional right to present a defense?

The People answer: No

Defendant answers: Yes

The trial court answered: No

The Court of Appeals answered: No

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant is charged with two counts of open murder and two counts of possession of a firearm during the commission of a felony arising out of the shooting deaths of Richard and Brenda Kowalski on or about May 1, 2008.

At the preliminary examination, Defendant was identified as Richard's brother. (132a-133a). The medical examiner testified that she conducted autopsies on both Richard and Brenda Kowalski. (155a, 158a). Richard suffered two gunshot wounds to the head, both located behind the left ear. One was a contact wound and the other was inflicted within inches. The cause of death were both gunshot wounds and the manner of death was homicide. (159a-164a). Brenda suffered at least four gunshot wounds. One was through the right ear fired from close range and another was to the left side of the chest, also fired from an intermediate range. This gunshot struck her heart. A third shot, also fired from an intermediate range was beneath her belly button. A fourth shot was described as a graze wound on her left forearm, with possibly another graze wound in that same area. (165a-172a). The cause of death was multiple gunshot wounds and the manner of death was homicide. (175a).

The primary evidence against Defendant is his confession to police. Michigan State Police Detective Sean Furlong interviewed Defendant on May 7, 2008. Furlong testified that although Defendant had already been arrested the previous day based on statements he made during a police interview, he wanted to interview Defendant again to clarify those statements. (200a-202a, 207a). After acknowledging his *Miranda* waiver from the previous day (205a), Defendant told Furlong that he got off work around 5:40 a.m. on May 1, went home, grabbed a gun and described the route he drove to Brenda and Richard's home. (225a). He couldn't remember whether he knocked on the

door or just walked in, but Defendant said he entered the residence, walked down a hallway until he saw Richard and Brenda in the kitchen. Defendant said that Richard saw the gun and asked what the gun was for. Defendant said he responded that he'd show him what it was for and then he pulled out the gun and shot both Richard and Brenda. Defendant said he remembered hearing only two shots, but thought that he'd fired the gun four times. Furlong said that Defendant's description of the scene was accurate. And although Defendant's description of where the shots struck the victims was not, Defendant accurately stated that he shot Richard behind the left ear. (226a-228a).

Furlong asked Defendant why he did it. Defendant said that he and his brother had not been on good terms for eight to ten years and that they just didn't get along. Defendant kept saying that "it was a slow burn." (228a-229a).

Furlong's interview with Defendant lasted over three hours. (230a). Although Defendant said he used a nine millimeter handgun that police seized from his house to kill the Kowalskis, that gun was not the gun used to kill the Kowalskis. (236a-237a). Furlong testified that Defendant's story was inconsistent and changed a number of times. (240a-242a). He described that even though Defendant admitted to the killings, he wanted to confirm that Defendant's knowledge of the scene was accurate, that it was important to determine if Defendant was telling the truth, and that the best way to do that was to compare Defendant's description of events to the facts about the scene to determine if they were consistent. (243a-244a). Furlong admitted that he "was having issues with what [Defendant] was saying." (257a).

Defendant's Motion to Suppress

Defendant filed a motion to suppress his confession. During the evidentiary hearing, Detective Furlong explained that the interrogation of Defendant was an unusual one in that he tried

to get Defendant to recant his confession:

- Q During the course of the interview, did you ever do anything to challenge the, Mr. Kowalski?
- A Yes.
- Q About the information that he had given?
- A Multiple times.
- Q Did you ever try to talk him out of the confession during the course of the interview?
- A Multiple times.
- Q And a lot of times police officers try to talk people into confessing. Would you say that this was different than some interviews that you do?
- A I would categorize my interrogation and interview of Mr. Kowalski as reverse of what I normally do in those situations.
- Q Reverse how?
- A Meaning I normally try to elicit a confession from a suspect. In this particular interview and interrogation, I spent the majority of the time telling him I didn't believe his confession.
- Q Did he stick with it?
- A He did.
- Q And maintained it?
- A Yes. [106a-107a].

Even on cross-examination, Furlong acknowledged that a number of facts in Defendant's confession did not match the facts:

- Q He had confessed, but there were a number of facts, would it be fair to say, that did not match up to the case?
- A That's why I wanted to speak to him. [115a].

Defendant further pointed out that Furlong told Defendant that he did not believe his confession:

- Q [The prosecutor] asked you whether during part of this conversation you were trying to talk him quote out of a confession, correct?
- A Correct.
- Q Okay and were you trying to talk him out of the confession?
- A I didn't believe what he was telling me.
- Q Okay and, in fact, during the course of that conversation, you said to him there's no blank way you did this, Jerry and I don't know why you would lie about it, correct?
- A Without, I'm sure I said that if you're reading from the transcript.
- Q I am. This is the transcript that was provided to me and the Prosecutor's

office. [117a-118a].

The trial court denied the motion to suppress.¹

The People's Motion to Exclude Defendant's Experts

Defendant subsequently filed a *Notice of Proposed Expert Witness Testimony* indicating he intended to introduce testimony from two experts, Dr. Richard Leo and Dr. Jeffrey Wendt. (1a-5a). According to Defendant's notice, Leo would "testify that false confessions are associated with certain police interrogation techniques and that some of those interrogation techniques were used in this case." (1a-3a). Wendt was offered to testify that:

Mr. Kowalski's interactions with law enforcement officers was consistent with a coerced internalized confession. A coerced internalized confession occurs when a suspect comes to believe that he committed a crime that he did not commit. A coerced-internalized confession can occur when an anxious and confused suspect can feel overwhelmed by suggestive interrogation tactics. [5a]

The People responded by filing a motion to strike the witnesses because the proposed expert testimony was unreliable, and thus inadmissible, under MRE 702.

During two days of evidentiary hearings, the court heard from both Leo and Wendt. The foundation for Leo's expertise was his study of false confessions. But Leo's study was based on confessions that *he* determined were false by comparing the confession to other facts and evidence and then determining if there was a sufficient fit. (287a-292a, 365a, 447a-448a). Moreover, Leo testified that he could not tell from the interrogation techniques used whether a confession is true or false. (447a). After hearing the testimony, the argument of the parties, and engaging in a lengthy review of the literature, the trial court gave a lengthy opinion on the record granting the People's

¹During the hearing, the tape of the interrogation of Defendant was introduced as People's Exhibit 4 and a portion of it was played by the court. (109a-112a).

motion and precluding Defendant from calling both witnesses at trial. (677a-679a).

The trial court stated that it recognized that it was required to determine whether the proposed testimony rested on a reliable foundation and was relevant to the case. (587a). As the proponent of the evidence, Defendant bore the burden of satisfying MRE 702. (589a). The court further recognized the interplay between MRE's 401, 402, 403, 702, and 703 and the need to find that the methodology supporting the proposed expert testimony was both reliable and relevant because of the potential impact of expert testimony on the jury. (660a-663a). The court focused on the soundness of those principles and not the conclusions that were generated. (664a).

Reviewing Leo's testimony and writings, the trial court found that Leo's methods were subjective. It found that Leo took a confession that *he* concluded was false by comparing the confession to other evidence and then worked backwards, and that he relied on secondary sources that lacked reliability. (668a-670a). The court pointed out that Leo testified that the same interrogation techniques can lead to both true and false confessions and that he could not differentiate between the techniques and their results. The court questioned, "how is that helpful" to the jury. (669a). Focusing on the crux of Leo's analysis, the court found that the determination of whether a confession was false was a subjective judgment by Leo. (669a). The court further observed that Leo fails to consider other factors in assessing why a confession may not satisfy Leo's subjective comparison to the facts of a case. (670a). Emphasizing Leo's flaw that he starts with what he determines to be a false confession and then works backwards, the court pointed out that even Leo admitted that it was no longer apparent how or why interrogation techniques lead to false confessions. (671-672a). Absent a link between an interrogation technique and a true or false confession, the court found that such testimony had no relevance whatsoever and could not assist

the jury. The court reiterated that it was not looking for certainty, but only reliability. (672a).

The court stated that it could not let unreliable evidence be presented to the jury. The jury, the court acknowledged, is fully able to judge the credibility of Defendant's confession by comparing it to the other evidence in the case. (674a-675a). Moreover, the court further observed that Leo never testified about what interrogation techniques used in this case may have led Defendant to falsely confess. (675a).

Further, the court held that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The court found that presenting testimony to a jury about false confessions from the young and mentally ill, as well as evidence about confessions being "proven" false when, in fact, they were not proven false, would mislead the jury. (676a).

Regarding Wendt's testimony, the court rejected it as well, finding that he could not link Defendant to having given a false confession. (676a). Absent Leo's testimony about false confessions, the court concluded that Wendt's testimony would be irrelevant, misleading, and otherwise inadmissible under MRE 403.

Emphasizing that its ruling would preclude both Leo and Wendt from testifying (677a-679a), the court entered a written order consistent with its ruling. From that order, Defendant obtained interlocutory review by the Court of Appeals. The Court of Appeals affirmed in an unpublished opinion released on August 26, 2010.

Defendant filed an application for leave to appeal, which this Court granted on March 25, 2011. The Court ordered the parties to include among the issues to be briefed:

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

probative value of the proffered expert testimony is substantially outweighed by the danger of unfair prejudice; and (3) whether the Livingston Circuit Court's order excluding the defendant's proffered expert testimony denies the defendant his constitutional right to present a defense.

Additional facts are included in the argument where relevant.

SUMMARY OF ARGUMENT

Defendant seeks to call expert witnesses to testify about false confessions. Because the data on which the experts based their conclusions was unreliable, the trial court properly concluded that the testimony was not admissible under MRE 702. The experts based their conclusions about false confessions on a subjective judgment about whether a confession is false by comparing the statements related in the confession to the "facts" and determining if there was a sufficient fit between the two. Nor could the expert describe any link between interrogation techniques and whether a confession was true or false. The trial court properly found that such testimony would not assist the jury. Because the trial court properly applied well-established rules of evidence that are neither arbitrary nor disproportionate, the exclusion of this testimony did not deprive Defendant of his constitutional right to present a defense.

ARGUMENT

- I. **In order to admit expert testimony under MRE 702, the trial court must find that it is reliable and that it would assist the jury. The trial court did not abuse its discretion in excluding Defendant's proposed expert testimony about false confessions finding the evidence unreliable where the testimony was based on the expert's own subjective determination when a confession is "false" and also concluding that such testimony would not assist the jury.**

Standard of Review and Issue Preservation

A decision regarding the admissibility of expert testimony under MRE 702 is reviewed for an abuse of discretion.² An abuse of discretion is shown only when a decision falls *outside* the range of reasonable and principled outcomes.³ Findings of fact made in the course of exercising its discretion over the admission of evidence, however, are reviewed for clear error.⁴ Defendant preserved the issue by challenging the People's motion to strike his proposed experts. The trial court did not impose any exclusion sanction. It simply found Defendant's proffered evidence inadmissible.

Discussion

Defendant claims that his confession is a lie. To support that claim, he sought to introduce

²*Edry v Adelman*, 486 Mich 634, 636, 639; 786 NW2d 567 (2010); *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008); *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). *See also General Electric Co v Joiner*, 522 US 136, 139; 118 S Ct 512; 139 L Ed 2d 508 (1997)(admissibility of evidence under *Daubert* reviewed for an abuse of discretion).

³*See Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006)(adopting articulation in *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), as the default abuse of discretion standard).

⁴*People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996); *See also* MCR 2.613(C). "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must ... strike us as wrong with the force of a five-week old, unrefrigerated dead fish." *Cheatham, supra* at 30 n 23.

testimony from two experts and filed a *Notice of Proposed Expert Witness Testimony* identifying Dr. Richard Leo and Dr. Jeffrey Wendt. Dr. Leo would “testify that false confessions are associated with certain police interrogation techniques and that some of those interrogation techniques were used in this case.” (1a). Dr. Wendt was offered to testify that Defendant’s “interactions with law enforcement officers was consistent with a coerced internalized confession.” (5a).

In response, the People filed a motion challenging the proposed testimony as inadmissible under MRE 702, which provides:

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.

After conducting an evidentiary hearing regarding the proposed testimony, the trial court rejected it as unreliable.

A. Leo’s methodology is unreliable and would not assist the jury.

No one questions Leo’s education and qualifications. It’s whether his testimony satisfies the rigor of MRE 702 that’s in question. The crux of Leo’s testimony is his study of false confessions and his attempt to explain how and why they occur. Leo described that there are three types of false confessions. (285a). First is a “voluntary” false confession that is not in response to any police action, but exists when a person simply appears at a police department and confesses to a crime. The remaining two types of false confessions occur in response to police interrogation. A compliant false confession occurs “when somebody knowingly falsely confesses typically to escape the stress or coercion of an interrogation.” (285a). The remaining type is an “internalized” or “persuaded”

confession. (286a). Leo described this type of false confession as arising when a person, in response to interrogation, comes to perceive that they have committed a crime even though they have no memory of it. (286a-287a). Leo asserted that Defendant's confession in this case falls within the latter category - an internalized or persuaded confession. (287a). According to Leo, Defendant "desperately searches for memories of the crime, but doesn't appear to have them. He doesn't get the details right." (287a).

The significance of Leo's research and conclusions rests on the nature of the information that he starts with. Leo examines only confessions that *he* determines are false. According to Leo, there are generally four ways to determine if a confession is false. First, a confession is false if you can show that the crime did not occur. For example, the victim shows up alive. Second, a confession is false if you can prove that it was physically impossible for the confessor to have committed the crime, such as where the confessor has an airtight alibi. Third, a confession is false where there is scientific evidence that exonerates the confessor, such as a DNA exclusion. And finally, a confession is false where the true offender is found. (290a-291a).

But Leo stated that an additional method of proving a confession false exists by comparing the confession to other evidence to see if it "fits." Leo's description of how he and other "experts" can determine a confession false is telling:

So, if you can't prove the confession false, what researchers do to evaluate the reliability is they look at two things: the fit between the suspect's narrative account of how and why they committed the crime; and the crime facts, whether the suspect knows unique non-public details that are not likely guessed by chance; whether the suspect can lead police to new, missing, or derivative case evidence; whether the suspect can give police an account that fits. And then secondly, whether or not the suspect's account, the narrative of the confession fits the physical, medical, or other credible evidence. What you see in true confession cases is the person knows details that are not public, that are not likely guessed by chance. They can be

mundane details, not dramatic details, but details that unless you had pre-existing knowledge or you were contaminated by some source that did, you wouldn't likely know. Usually, the suspect gets most or all of the details correct and can lead the police, if there is new or missing evidence. The physical evidence fits. If there's evidence left at the crime scene by the perpetrator, it matches to the confessor. In false confession cases, you see the exact opposite. The person either repeats back what they're told, infers what, uh, infers from the police questions what the correct answers are or guesses and gets, uh, gets facts wrong unless they've been educated by other sources: community gossip, the media, etcetera. The physical evidence usually doesn't match, left behind by the perpetrator. So, that would be the second way of analyzing the likely reliability and we sometimes refer to those as highly probable false confessions as against proven false confessions when researchers conclude, based on their analysis of those factors, that a confession is likely unreliable or false. [291a-292a].

According to Leo, he applies *his* criteria to determine if a confession is false and then conducts his study. (365a). As Leo admitted, he cannot tell from the interrogation “techniques used whether you'll get a true or false confession.” (447a). Rather, he takes what *he* has determined to be a false confession and then works backward. (447a). As Leo summarized, the question of whether a confession is false is separate from the question of what made the person confess. The only way to determine if a confession is false, according to Leo, is to take the details of the confession and compare it with the objectively known facts:

The question of whether a confession is false or true is separate from the question of why did a person confess, what interrogation techniques led to it. If you want to analyze whether a confession is true or false, you have to look at, uh, the post admission narrative fit with the crime facts and what that reveals about a person's knowledge about unique non-public facts in the absence of contamination and you have to look at the physical and credible medical and other credible evidence. So, analyzing whether a confession is reliable is a different enterprise than analyzing whether the techniques caused the person to confess truthfully or falsely. If you have a false confession and you go back, you can analyze, you can analyze what techniques led to that false confession and there are patterns that have been studied and reported in the literature that I think would help someone understand whether or not a confession was false and why. [448a].

In order to determine if confession was false, Leo stated that he had police reports “for most or all

of the cases,” and that where there were no interrogation records he “interviewed the defendants about what they recalled.” (415a-416a).

Leo testified that you could never tell whether a confession was true or not from the interrogation techniques used. (315a-316a). Rather, one must resort to the method he described, i.e., analyze the confession to see if it conforms to the known facts:

The way to analyze whether a confession is reliable is what I mentioned earlier. First, if it falls into one of the categories of a proven false confession, then you would know, but most would not. Then to do an analysis of the post admission narrative and whether the person knows details, you know, they’re not likely guessed by chance and whether it fits the physical evidence or not. [316a].

In other words, Leo does what a jury does. Although this Court has recognized that “[p]sychologists and psychiatrists are not, and do not claim to be, experts at discerning truth,”⁵ Leo appears to believe he is an exception to that rule.

Neither the United States Supreme Court’s decision in *Daubert v Merrell Dow Pharmaceuticals, Inc.*,⁶ nor MRE 702, set forth any magical or required factors to weigh in satisfying MRE 702. The *Daubert* opinion is explicit: “[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test.”⁷ The inquiry under this rule is a flexible one.⁸ “[T]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending

⁵*People v Beckley*, 434 Mich 691, 728; 456 NW2d 391 (1990).

⁶*Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

⁷*Id.* at 593.

⁸*Id.* at 594; *Kuhmo Tire Company, Ltd v Carmichael*, 526 US 137, 141; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

on the nature of the issue, the expert's particular expertise, and the subject of his testimony."⁹ *Daubert* simply provides courts with the "discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky."¹⁰ As the Supreme Court later emphasized in *Kumho Tire*, the trial court retains broad discretion in determining whether *Daubert* is satisfied.¹¹

Because the inquiry is a flexible one, *Daubert* is not a mere laundry list that permits the admission of evidence so long as a check mark can be placed next to each factor. As the Court of Appeals recognized in *Unger*,¹² the inquiry into admissibility under MRE 702 is based on "whether the opinion is rationally derived from a sound foundation." In this case, it is not. The problem with Leo's testimony is illustrated by the well-known phrase "garbage-in garbage-out." Or as the Court of Appeals noted in more formal language: "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."¹³ As this Court observed in *Gilbert v DaimlerChrysler Corp*, MRE 702 mandates a "searching inquiry" of the data underlying expert testimony, as well as the manner in which the expert interprets that data.¹⁴ While other researchers may agree with Leo,¹⁵ they have

⁹*Kumho Tire, supra* at 150.

¹⁰*Id.* at 159 (concurring opinion of Scalia, J)(emphasis in original).

¹¹*Id.* at 152.

¹²*Unger, supra* at 217.

¹³*Dobek, supra* at 94.

¹⁴*Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004).

¹⁵Just as most polygraph examiners would probably assert that their tests yield valid and reliable results does not make it so, the fact that there is an active and vocal group in support of Leo

either fallen into the same trap of applying their own subjective determinations that the confessions they are studying are false or relied on Leo's flawed methodology. (460a-461a).

Leo's conclusions are based on a set of data that, however Leo tries to dress it up as objective or research-based, is really the product of his own subjective review and interpretation of the evidence. Leo's methodology 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 and credible" evidence.¹⁶ The trial court recognized this fundamental defect in Leo's methods. (650a-651a). As the trial court further pointed out, even Leo wrote that it was possible that his classification of a confession as false could be mistaken.¹⁷ Moreover, the trial court was troubled by the fact that Leo used questionable sources whose accuracy was subject to question, such as newspaper and magazine accounts, which raised concerns about his methodology in determining when a confession was "false".¹⁸

In this article, he has some footnotes that are, give me pause to be concerned about his methodology. He says at footnote fifteen due to the difficulty of directly obtaining case materials, especially in lesser known cases, all social science and legal research on miscarriages of justices relies on both primary and secondary source materials. The research here is no different, reported here is no different. By necessity, we rely on a variety of sources to document our assertions of a fact. Where possible, we have tried to draw directly on interviews, police transcripts, and trial

does not make his testimony any more reliable.

¹⁶See Leo & 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, 436 (Winter 1988). For example, Leo simply dismisses as inherently incredible any corroboration provided by a "jailhouse snitch" merely because they stood to gain something from their testimony. *Id.* at 436 n 17.

¹⁷652a, citing *The Consequences of False Confessions*, *supra* at 437.

¹⁸654a, citing *The Consequences of False Confessions*, *supra*.

records, but in many instances, we were only able to obtain newspaper and magazine accounts, appellate court opinions, academic journal articles, and/or books. Footnote nineteen, he says the amount of information on these cases varies. The analysis of some cases was based on access to virtually the entire case file, while the analysis of other cases was limited to journalists' accounts or published appellate court opinions.

Finally, the trial court quoted another Leo article bringing his methodology into question:

He says in this article as psychological methods of interrogation have evolved over the years, they have become increasingly sophisticated, relying on more subtle forms of manipulation, deception and coercion. As a result, it is no longer as apparent how and why police interrogation techniques might lead the innocent to confess falsely. [656a].

Leo attempted to justify his decision to study only "false" confessions by drawing an analogy to lung cancer. According to Leo, if you wanted to study lung cancer, you would study only those who *have* lung cancer. (437a). Thus, according to Leo, there is no reason to study those persons who do *not* have lung cancer. But to accurately apply Leo's analogy to his study of false confessions demonstrates the flaw in his reasoning. If one wishes to determine if certain factors have a correlation to causing lung cancer, one would study, for example, a group of smokers versus a group of non-smokers to see if smoking has a correlation to the incidence of lung cancer. And establishing such a correlation between interrogation techniques and false confessions is precisely how Defendant sought to use Leo. (581a-582a). But in order to determine whether a certain interrogation technique increases the incidence of "false" confessions, one must compare the effect that particular technique has in leading to true confessions and false confessions. Leo's research makes the fundamental mistake of saying "I looked at false confessions. False confessions existed where X technique (insert the one of your choice) was used. Therefore, X is related to false confessions." Without knowing whether that technique does *not* also result in true confessions renders the research meaningless in determining if an interrogation technique leads to a false confession. Moreover, even Leo's lung

cancer analogy misses the point. Lung cancer is objectively and scientifically determined. You know that's what you're studying. But because *Leo* is the one who determines if the confession is false, it would be analogous to Leo saying he has concluded that a person who coughs must have lung cancer and he then draws his conclusions about lung cancer from that sample. Because the data he studies is flawed, his conclusions are necessarily unreliable as well.

Leo further illustrates this defect with the claim that his research of false confessions was "like plane crashes and train wrecks." (440a). But a false confession is not like a plane crash or train wreck. Those events are objectively and unequivocally discernible. There's flaming wreckage and bodies strewn about. Everyone can see it. But for Leo, the only one who can tell if a confession is false is Leo, based on his own subjective view and interpretation of the statement and his comparison to the evidence. Only *he* sees the false confession and we must simply trust his judgment. But Leo is not a human lie detector. Credibility is a lay question for the jury decide, not for Leo based on all his "expertise" in determining what is true or false.

Matching a defendant's statement with the known and objective facts does not require Leo's testimony. Rather, that is *precisely* what we ask the jury to do. In fact, a standard jury instruction invites the jury to compare a Defendant's confession with "all the other evidence in the case" to determine if it should be believed.¹⁹ The jury can assess all of the evidence in the case and weigh it against Defendant's statement to determine whether his confession is, in fact, reliable. And this is exactly what the trial court held; by assessing the "fit" between the facts and the confession, the *jury* can decide if the confession is reliable. (649a-650a).

In rejecting Defendant's proposed expert testimony, the trial court found guidance from a

¹⁹CJI2d 4.1.

2008 opinion of the Ohio Court of Appeals in *State v Wooden* that affirmed the exclusion of expert testimony from Leo regarding false confessions.²⁰ In *Wooden*, the defendant sought to introduce testimony from Leo to challenge his confession to murder. As in this case, the defendant “planned to offer evidence at trial that his confession was not reliable due to the interrogation tactics that the police used.”²¹ Just as in this case, the Defendant sought to introduce testimony from Leo that “would focus on describing certain police interrogation techniques that tend to induce confessions and would also reveal the results of his studies in the area of false confessions.”²² The court rejected Leo’s testimony as lacking in scientific reliability under Ohio’s version of MRE 702, which adopts the *Daubert* standard. The *Wooden* court’s summary of Leo’s testimony is strikingly similar to this case:²³

Dr. Leo further explained that coercive interrogation techniques do tend to be effective in producing their desired result: a confession. He conceded on cross-examination, however, that coercive techniques are also effective in inducing true confessions and he could not offer any opinion as to how many of the resulting confessions are truthful and how many are false. Thus, he could offer no expert insight into the actual likelihood that coercive interrogation tactics will lead to a false confession.

Consistent with the trial court’s concerns in this case, the *Wooden* court rejected Leo’s testimony as “unrefined” that “has too many unanswered questions” and “fails to support any reliable

²⁰*State v Wooden*, unpublished opinion of the Ohio Court of Appeals, issued July 23, 2008 (Docket No 23992)(2008 WL 2814346)(attached as Exhibit A).

²¹*Id.* at ¶ 14.

²²*Id.*

²³*Id.* at ¶ 22.

conclusions”.²⁴

{¶ 23} Of particular significance to the *Daubert* analysis here, Dr. Leo has not formulated a specific theory or methodology about false confessions that could be tested, subjected to peer review, or permit an error rate to be determined. Dr. Leo’s research on false confessions has consisted of analyzing false confessions, after they have been determined to be false. Dr. Leo explained that confessions are sometimes proven to be false after the fact through DNA exoneration, physical impossibility, or when the true perpetrator is caught. Dr. Leo has looked back at many such confessions and focused on reviewing the interrogation techniques that had preceded the false confessions, in an attempt to find common variables. Dr. Leo’s research has focused in particular on similarities in the interrogation techniques that led to the false confessions. His research, however, has not led to any concrete theories or predictors about when and why false confessions occur.

{¶ 24} The general information given by Dr. Leo, although undoubtedly the result of extensive, published research, did not present any theory or methodology that could be tested or otherwise scrutinized for reliability in his field of criminology. As another court concluded, Dr. Leo’s false confession theory is new and unrefined and needs further study. ... Dr. Leo’s theory has too many unanswered questions and, therefore, fails to support any reliable conclusions.

Alternatively, the *Wooden* court held that Leo’s testimony would not assist the jury, because the jury has the same ability as Leo to compare the confession to the other evidence.²⁵

As another court observed on this issue, Dr. Leo’s testimony is based on nothing more than common sense insofar as it would assist the jury in assessing the reliability of the confession. ... His techniques “amounted to nothing more than testing the details of the confession against the known facts.” Lay jurors have the ability to make such an assessment of the evidence based on their own knowledge and experience.

And just like in *Wooden*, because Defendant’s confession was videotaped, a jury can easily assess the tactics used by police to determine if they believe Defendant’s confession.²⁶

²⁴*Id.* at ¶¶ 23-24 (internal citations omitted).

²⁵*Id.* at ¶ 28.

²⁶*Id.* at ¶ 29.

Defendant claims, however, that watching a videotape is not the same as hearing from Leo, echoing Leo's testimony that you cannot tell if a confession is false by seeing it.²⁷ But that is because Leo must compare the statement to the known facts. But that is precisely what a jury does and what Defendant will argue: the confession is false because it does not conform to the known facts. The inquiry regarding Leo remains whether his testimony is based on reliable data and principles, not whether the jury can tell if the confession is false by watching it. And the trial court properly concluded that Leo's testimony lacks reliability.

B. "General" testimony from Leo suffers from the same defects.

As an alternative to the total exclusion of Leo's testimony, Defendant wants to present just "general" testimony from Leo. Leo explained the distinction between the two as being his general research into false confessions and interrogation techniques versus applying it to a specific case:

Well, usually the testimony is general and sometimes also specific. The general testimony is educational where it's relevant. So, there's, usually, I testify about police interrogation training, police interrogation techniques, the study of the psychology of interrogations, and how and why interrogation can lead to false confessions, what the risk factors are for false confessions, both with respect to the interrogation and sometimes personality factors as well. Again, this is general testimony. And then what we know about false confessions: persuaded, compliant false confessions, uh, what the psychological studies show about the psychology of false confessions, uh, patterns and characteristics of false confessors in these, false confessions in these studies. And then where relevant, sometimes I analyze specific aspects of an interrogation or interrogation techniques or some aspect of the confessor's statements or narrative. [339a-340a].

But that's a distinction without a difference. The bottom line is that Leo's testimony inherently relies on his subjective judgments about what constitutes a false confession and draws conclusions based

²⁷342a. That a person cannot tell if a confession is true or false by simply watching it is an unremarkable proposition. That's why a jury is instructed to weigh a confession against other evidence to determine if it is true. The benefit to the interrogation being videotaped, however, is that the jury has the opportunity to actually view what happened rather than listen to a mere summary.

on that flawed methodology. Whether characterized as general or specific, the trial court properly concluded that his testimony fails to be reliable. The “general” testimony Defendant seeks to introduce is an attempt to do indirectly what he cannot do directly.

Defendant also claims that Leo’s “general” testimony is necessary to rebut the notion that people don’t falsely confess.²⁸ But absent Leo’s subjective manner of determining a confession is false, Leo’s testimony on that point would be purely anecdotal. He could simply tell the jury that in other cases people have falsely confessed because either the crime did not occur (i.e., the victim showed up alive), it was physically impossible for a defendant to have committed the crime (i.e., because he had an airtight alibi), or that scientific evidence conclusively exonerated the confessor. (290a-292a). Aside from the fact that Defendant is not claiming that his confession falls into any of those categories, Leo’s “expertise” is irrelevant to offering that kind of evidence.

In *State v Rosales*, the New Jersey Supreme Court rejected proposed testimony by an expert that people have given false confessions in the past. The Court agreed that “[n]othing else that he could say would be in any way scientifically established or accepted by the scientific community.”²⁹ Just like the expert in *Rosales*, there’s nothing scientific about Leo’s testimony that people have given false confessions in other cases. But whether there are false confessions in *other* cases is not relevant. The only question is whether *this* confession is true.

²⁸The partial concurring/dissenting opinion in the Court of Appeals agreed with the majority “that it was proper to exclude Dr. Richard Leo’s expert testimony as to the significance of particular police interrogation techniques and their supposed association with false confessions.” Partial concurrence/dissent, *slip op* at 1. (61a). The dissent disagreed with the majority, however, on whether Leo should be able to testify that people sometimes falsely confess, rejecting the finding that such a proposition is within the common knowledge of a layperson.

²⁹*State v Rosales*, 202 NJ 549, 565; 998 A2d 459 (2010).

C. Other states have rejected expert testimony about false confessions.

Other courts have reached conclusions similar to those drawn by the trial court and the Ohio Court of Appeals rejecting expert testimony about false confessions.

In *State v Free*,³⁰ the New Jersey Superior Court found that the trial court abused its discretion in permitting the introduction of false confessions testimony. Although New Jersey follows the *Frye* standard rather than *Daubert*, the court addressed whether such testimony would assist the jury under its version of MRE 702, which contains identical language that expert testimony is admissible if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” The *Free* court rejected the idea that jurors automatically believe that confessions are true: “Although rules of evidence recognize that people do not usually make statements against their penal interest unless they are true, ... it does not follow that ordinary jurors believe that all confessions made by defendants subjected to police interrogation are true.”³¹ Even though the proposed expert in *Free* identified a number of specific factors that might induce a false confession, the *Free* court nonetheless rejected that expert testimony would assist the jury in examining truthfulness of a confession.³²

Moreover, the coercive factors mentioned by Dr. Kassin, such as isolation, persistent questioning, confrontation with real or fabricated evidence of guilt, and minimization of the consequences of confession, are all matters that a jury would recognize as having a potential for causing a false confession.

But Leo failed to specify what factors existed in this case, and explain what effect those factors

³⁰*State v Free*, 351 NJ Super 203; 798 A2d 83 (2002).

³¹*Id.* at 220.

³²*Id.* at 220-221.

might have had. And the *Free* court made an observation equally applicable to Leo's proposed testimony in this case.³³

Furthermore, since Dr. Kassin cannot identify the degree to which the presence of one or more of these factors might cause a false confession, his opinions ... would be of no assistance to the jury. What the jury would be left with under those cases was accurately categorized by the Supreme Judicial Court of Maine as "nothing more than an assertion that false confessions do occur." [*State v*] *Tellier*, [526 A2d 941, 944 (Maine 1987)]. Also, as that Court further observed, the testimony would be "so abstract, vague and speculative that its relevance and probative value [would be] virtually nil."

In *State v Cobb*, the Kansas Court of Appeals held that testimony from Leo improperly invaded the province of the jury and should not have been admitted by the trial court, noting that "[c]ross-examination and argument are sufficient to make the same points and protect the defendant."³⁴ Moreover, on a separate issue, the defendant claimed error from the trial court's exclusion of testimony from an expert witness who wished to testify about inconsistencies between the defendant's confession when compared with the known facts. The *Cobb* court rejected that attempt concluding that nothing about such testimony would aid the jury.³⁵

Similarly, in *State v Davis*, the Missouri Court of Appeals affirmed a trial court's exclusion of testimony from Leo "on interrogation techniques, false confessions, and coercive persuasion."³⁶

³³*Id.* at 221.

³⁴*State v Cobb*, 30 Kan App 2d 544, 567; 43 P3d 855 (2002). In *State v Oliver*, 280 Kan 681, 702; 124 P3d 493 (2005), the Kansas Supreme Court subsequently clarified that *Cobb* did not require the automatic exclusion of expert psychological testimony about an individual defendant's ability to respond reliably to interrogation. The trial courts continue to retain the discretion to include or exclude the evidence.

³⁵*Id.* at 562.

³⁶*State v Davis*, 32 SW3d 603, 607-608 (Mo App 2000).

The Court held that such testimony improperly “encroaches upon the jury’s duty to determine the reliability of defendant’s statement.”³⁷

Leo also sought to testify in an Alaska murder case, but the trial court excluded his testimony. Finding that the exclusion was not an abuse of the broad discretion given trial judges under *Daubert*,³⁸ the Alaska Court of Appeals in *Vent v State* quoted one commentator who made the same point that the trial court did in this case:³⁹

Many of the tactics used by police that create false confessions typically result in true confessions as well.... A lack of corroborating evidence may also be a sign of a weak case or a lack of evidence, but it does not necessarily mean the confession was false. To encourage further study in this area, courts should exercise their discretion as the “gatekeepers” of expert testimony and find the psychology of false confessions unreliable at this time.

Leo’s testimony in *Vent* was remarkably similar to that presented in this case. As a concurring judge pointed out, Leo could not identify whether a specific interrogation technique caused an innocent person to confess. Instead, the only way Leo could determine if a confession was false was to compare the confession to the facts:⁴⁰

Rather, Leo told the court, his area of expertise was identification of the techniques that interrogators generally employ to convince suspects to confess. Leo had no opinion to offer as to whether these techniques led to truthful or false confessions. In fact, he told the court:

³⁷*Id.* at 608. *State v Wright*, 247 SW3d 161, 168 (Mo App 2008)(reaffirmed *Davis*, holding that expert testimony about factors that could lead to a false confession and that the defendant possessed those characteristics is inadmissible as improper testimony relating to credibility).

³⁸*Vent v State*, 67 P3d 661, 670 (Alaska App 2003).

³⁹*Id.*, quoting Agar, *The Admissibility of False Confession Expert Testimony*, 1999 Army Law 26, 42-43 (1999).

⁴⁰*Id.* at 671.

Dr. Leo: Even if an interrogation is [overtly] coercive, it still could produce a true confession. And so one can't infer from the [interrogative] techniques that are used, ... proper or improper, whether or not the confession is false. The only way to do [that] is to objectively analyze whether the suspect demonstrates actual knowledge [of the crime] and how [the suspect's narrative] fits with the record or doesn't fit with the record.

Based on this, the trial judge in *Vent* properly concluded that Leo's method of comparing a confession to known facts was nothing different from what we ask a jury to do:⁴¹

After hearing this, Judge Esch wondered aloud whether Leo's proposed testimony would be of appreciable help to the jury, since his analysis appeared to be based on common sense rather than academic study or research. A few minutes later, after he had heard the arguments of the parties, Judge Esch formally ruled that Leo would not be allowed to testify concerning his technique for evaluating the truthfulness or reliability of a confession, since this technique amounted to nothing more than testing the details of the confession against the known facts. Judge Esch concluded that this was not a proper subject for expert testimony because the jurors would understand this without explanation from an expert.

Leo's testimony in *Vent*, as in this case, is "nothing more than the common-sense notion that a confession must be tested against the known facts."⁴² Just as exclusion was proper in those cases, the trial court did not abuse its discretion in excluding the testimony in this case.

D. False confessions testimony is not the same as battered spouse syndrome or child sexual assault cases.

Defendant argues that false confession testimony is no different from testimony about battered spouse syndrome approved by this Court in *People v Christel*,⁴³ or explaining a victim's

⁴¹*Id.* at 672.

⁴²*Id.* at 673.

⁴³*People v Christel*, 449 Mich 578; 537 NW2d 194 (1995).

specific behavior in child sexual assault cases addressed in *People v Peterson*.⁴⁴ *Christel* discussed testimony about a victim's specific behavior: "for example, when a complainant endures prolonged toleration of physical abuse and then attempts to hide or minimize the effect of the abuse, delays reporting the abuse to authorities or friends, or denies or recants the claim of abuse."⁴⁵ *Peterson* similarly focused on behavior of a child sexual assault victim that "may potentially be perceived as that which would be inconsistent with a victim of child sexual abuse, i.e., delay in reporting, recantation, accommodating the abuser or secrecy."⁴⁶

But Defendant's analogy fails on two fronts. First, in *Peterson*, this Court recognized that it was undisputed that the expert testimony would assist the jury under MRE 702 in order to explain a victim's behavior that is seemingly inconsistent with being a victim of child sexual abuse.⁴⁷ Similarly, in *Christel*, expert testimony was introduced to describe "unique" and "specific" behavior that might otherwise be "incomprehensible to average people."⁴⁸ In this case, by contrast, whether Leo's testimony might be helpful to a jury is a critical and hotly contested point and one that the trial court rejected. Unlike *Christel* and *Peterson*, however, the concept that people sometimes lie to police is neither unremarkable nor even counterintuitive. That *other* people have falsely confessed offers no assistance to a jury determining if *this* Defendant confessed.

Second, and more relevant to the inquiry here, the testimony in *Christel* and *Peterson* was

⁴⁴*People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995).

⁴⁵*Christel*, *supra* at 592.

⁴⁶*Peterson*, *supra* at 374 n 12.

⁴⁷*Peterson*, *supra* at 363.

⁴⁸*Christel*, *supra* at 591-592.

not subjected to a searching examination under the post-*Daubert* revision to MRE 702.⁴⁹ By contrast, the amended version of MRE 702 now *requires* the trial court to make the findings encompassed by *Daubert*. Neither *Christel* nor *Peterson* lend any support to Defendant's argument.

Unlike battered women's syndrome, where an expert can link specific behavioral traits of a witness to the specific, widely known and accepted syndrome, neither Leo nor Wendt can link specific police interrogation techniques or specific personality traits to false confessions. Defendant asserts that the trial court erroneously required Leo to be able to *predict* when a confession would be untrue. But that is simply not the case. What both the trial court and the Court of Appeals found missing is the lack of any apparent relationship between interrogation techniques and a false confession. While both experts acknowledged that the same techniques and traits could lead to both false confessions and true confessions, they could not explain any link between them. The failure to do so rendered their testimony nothing more than speculation that could not help the jury. Defendant's argument rests on the unproven premise that because an expert says a confession is false and interrogation techniques are used, there must somehow be some connection between the two. But that speculation does meet the burden of establishing admissibility.

E. Wendt's testimony was properly excluded as not being helpful to the jury and being misleading.

Defendant's second proposed witness, Wendt, was offered to testify as to Defendant's psychological traits and that his confession was "consistent with a coerced internalized confession."

(5a). Defendant's *Notice of Proposed Expert Testimony* offered Wendt in conjunction with Leo's testimony about false confessions. Applying the same subjective methodology as Leo, Wendt's

⁴⁹MRE 702 was amended effective 2004 after *Christel* and *Peterson* were decided.

proposed testimony pointed to “a lack of detail in his confession” and compared that to “the actual facts of the crime scene.” (4a). After testing and interviewing Defendant, Wendt compared that information with the police reports to determine the reliability of Defendant’s statement by looking at the “consistency of information.” (507-508a). Based on his findings and the results of his tests, Wendt testified that Defendant’s psychological profile, i.e., his personality traits, (536a, 540a), was consistent with the literature he reviewed on false confessions. (527a-529a). Although Defendant relies on the Court of Appeal’s opinion in *People v Hamilton*,⁵⁰ *Hamilton* is a pre-*Daubert* case that does not make admissible the false confession testimony that Leo and Wendt sought to offer. Accordingly, the trial court did not abuse its discretion in excluding Wendt on the basis proffered by Defendant.

Regardless of whether Leo is permitted to testify, however, Defendant asserts that limited testimony from Wendt about Defendant’s psychological traits is nevertheless admissible under *Hamilton*. In *Hamilton*, the trial court excluded expert testimony from a psychologist about the psychological maturity of the juvenile defendant, concluding that “the issue of voluntariness was not for the jury to decide.”⁵¹ The trial court also apparently concluded that the testimony was improperly related to a “diminished capacity type of defense.”⁵² Applying a pre-*Daubert* version of MRE 702, the Court of Appeals concluded that such testimony would assist the trier of fact to understand the circumstances surrounding the defendant’s statements to police.⁵³

⁵⁰*People v Hamilton*, 163 Mich App 661; 415 NW2d 653 (1987)

⁵¹*Id.* at 664-665.

⁵²*Id.* at 665.

⁵³*Id.* at 667.

But expert testimony about a juvenile defendant is a world away from Defendant here. Defendant is a grown adult with no apparent prior psychological treatment or diagnoses. Wendt identified his primary findings as anxiety, depression, and interpersonal substance abuse (523a), and described these as personality traits, rather than specific disorders. (511a). Being anxious and depressed is certainly not surprising when one is accused of a double homicide. But Wendt's testimony that Defendant's psychological traits might have rendered him especially vulnerable to suggestion and that Defendant could have been trying to please police by confessing is deprived of any probative value that might assist a jury when considered against the unique nature of *this* police interrogation of Defendant. As Detective Furlong testified, the interrogation was an unusual one in that it was an attempt to get Defendant to *recant* his confession. (106a-107a, 117a-118a).

The trial court found that Wendt's proposed testimony was irrelevant, would not be helpful to the jury, and was misleading. (677a). As the Court of Appeals panel appropriately recognized, consistent with the trial court's findings, Wendt's testimony would be unhelpful and confusing to a jury as he "agreed that the same personality traits that cause false confessions can also lead to true confessions."⁵⁴ Defendant fails to establish clear error in the court's factual findings or an abuse of discretion.

F. The trial court did not abuse its discretion in excluding the proposed testimony.

Defendant continuously asserts that expert testimony is necessary to show that certain interrogation methods used in this case led to Defendant's supposedly false confession. In fact, Defendant argues that "at a minimum" Leo should be able to testify regarding police interrogation techniques in this case. Although Leo watched a tape of Defendant's confession (401a), he never

⁵⁴Majority opinion, *slip op* at 6. 59a.

offered any critique of it or the interrogation methods used whatsoever. Aside from the suspect basis for Leo's conclusions about false confessions, Defendant fails to ever identify what factors and interrogation techniques were used in this case and show what effect they had in leading to a "false" confession.⁵⁵ Moreover, as the trial court found, while Leo may be well-versed about police interrogation, his method of analysis lacks reliability because he is unable to discern whether a certain technique is more likely to lead to a true confession or a false confession. Thus, rather than being utilized to argue that Defendant's confession was false because some unknown and unspecified interrogation technique was used, in reality, the testimony is simply a stalking horse to put a "scientific" stamp of approval on Defendant's argument that the confession is false. But whether the confession conforms to known facts or is corroborated by other evidence can be answered by the jury without Leo's help. And that Leo has subjectively deemed some confessions to be false that involved a certain interrogation technique does not mean, even to Leo, that there is a connection between the two. Science requires an objective standard against which to measure. Leo's standard is a subjective one based on flawed data and questionable methods.⁵⁶

The trial court did exactly what we entrust trial courts to do under MRE 702 - conduct a searching inquiry into the basis of proposed expert testimony and act as a gatekeeper. No one can question the trial court's extraordinary effort in this case. Aware of the significance of the decision

⁵⁵This case differs from *Christel*, where the expert explained unique and specific behavior by the victim, and *Peterson*, where the Supreme Court held the expert could only testify about specific behavior. In this case, Leo did not proffer anything specific about the interrogation.

⁵⁶Leo's methodology has also been criticized in the legal literature. For a particularly detailed critique, see Professor Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 Harv JL & Pub Pol'y 523, 575-603 (Spring 1999). See also Comment, *The (In)admissibility of False Confession Expert Testimony*, 26 Tuoro L Rev 23 (2010).

to the defense (661a), the trial court engaged in a lengthy, thoughtful, and careful review of the evidence and the writings regarding the issue of false confessions. (641a-677a). It was cognizant of the legal standard it was being called on to apply and the burden of proving the evidence was admissible. The trial court's conclusion that Defendant failed to establish that the proposed expert testimony was reliable and would assist the jury was within the range of acceptable outcomes. Accordingly, the trial court did not abuse its discretion and should be affirmed.

II. Where experts would essentially testify as false confession detectors, the trial court did not abuse its discretion in excluding that testimony because whatever probative value that the unreliable testimony would have was substantially outweighed by the danger of unfair prejudice.

Standard of Review

The trial court's finding that the danger of unfair prejudice or confusion outweighed any probative value of Defendant's proposed expert testimony is reviewed for an abuse of discretion.⁵⁷ As this Court has consistently held, determinations under MRE 403⁵⁸ are best left to the trial judge.⁵⁹

Discussion

Whether the probative value of Defendant's proposed expert testimony is substantially outweighed by the danger of unfair prejudice is really the *Daubert* inquiry of whether the evidence would be helpful to a jury cast in other language. If the proposed testimony *really* would not help

⁵⁷*People v Blackston*, 481 Mich 451, 461; 751 NW2d 408 (2008).

⁵⁸“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

⁵⁹*Blackston, supra* at 462.

the jury under MRE 702, then its probative value under MRE 403 is virtually nil. Similarly, the trial court's conclusion that the proposed testimony is unreliable supports the conclusion that it presents a danger of unfair prejudice. What prejudice is more unfair than to invite a verdict based on unreliable evidence?

But even assuming that Leo's testimony has some probative value, the risk of unfair prejudice is high. Testimony about credibility has long been condemned.⁶⁰ Even the Court of Appeal's opinion in *Hamilton* emphasized that an expert "should not be permitted to give an opinion as to whether defendant was telling the truth when he made statements to the police."⁶¹ Yet that is *precisely* how Defendant seeks to use Leo's testimony in this case. He can already argue that the confession is false by comparing it to the other evidence in the case. Leo's testimony does nothing more than improperly add the imprimatur of an "expert" in an attempt to lend Defendant's argument an added, and unwarranted, aura of reliability. As this Court emphasized in *Peterson*:⁶² "To a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat." That is the precise risk presented here. That prospect is the epitome of unfair prejudice - injecting considerations extraneous to the merits of the case.⁶³

Moreover, such testimony will shift the entire focus of the trial from whether Defendant

⁶⁰*See, e.g., People v Graham*, 173 Mich App 473, 478; 434 NW2d 165 (1989) ("An expert cannot be used as a human lie detector to give a stamp of scientific legitimacy to the truth or falsity of a witness' testimony.")

⁶¹*Hamilton, supra* at 669.

⁶²*Peterson, supra* at 374, quoting with emphasis, *Beckley, supra* at 721-722.

⁶³*People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995).

committed murder to a contest over the “science” of false confessions and whether *Leo*’s testimony is reliable. The entire debate engaged in by the parties thus far will, at a minimum, be played out before the jury. A critique of the collateral litigation that would be involved in admitting polygraph evidence illustrates what would happen in this area as well.⁶⁴

Such collateral litigation prolongs criminal trials and threatens to distract the jury from its central function of determining guilt or innocence. Allowing proffers of polygraph evidence would inevitably entail assessments of such issues as whether the test and control questions were appropriate, whether a particular polygraph examiner was qualified and had properly interpreted the physiological responses, and whether other factors such as countermeasures employed by the examinee had distorted the exam results. Such assessments would be required in each and every case.

In this case, the criminal charges will become lost in the fog created by the dispute over the reliability of *Leo*’s testimony. The sideshow will become the main attraction.

In assessing whether such testimony will create the danger of confusing the issues and misleading the jury, it must be remembered that every action provokes a reaction. If a defendant can present testimony about how confessions are unreliable, the People would be entitled to refute it with testimony of their own. For example, when a defendant sought to introduce evidence that he did not fit the profile of a sex offender, the Court of Appeals affirmed a trial court’s finding that it was inadmissible under *Daubert*. But the Court went on to observe that one danger in admitting such testimony is that allowing it would be a double-edged sword for defendants.⁶⁵

Moreover, we cannot help but mention our belief that were we to rule otherwise and allow the evidence, prosecutors would seek, on the strength of our opinion, to admit unfavorable profile results obtained from defendants, showing that

⁶⁴*United States v Scheffer*, 523 US 303, 314-315; 118 S Ct 1261; 140 L Ed 2d 413 (1998)(plurality opinion).

⁶⁵*Dobek, supra* at 103-104.

the defendants fit the profile of a sex offender, and there most certainly would be an outcry, and rightfully so, from the defense bar if this were permitted.

False confessions testimony presents that same risk. If a defense expert can testify that a confession is false, then there is no reason the People could not offer its own witness to validate an interrogation and explain why a defendant's confession is truthful.⁶⁶

Finally, as a plurality of the United States Supreme Court discussed in *Scheffer*, “[a] fundamental premise of our criminal trial system is that the *jury* is the lie detector.”⁶⁷ Its observations about polygraph evidence are equally applicable to testimony about false confessions:⁶⁸

By its very nature, polygraph evidence may diminish the jury's role in making credibility determinations. The common form of polygraph test measures a variety of physiological responses to a set of questions asked by the examiner, who then interprets these physiological correlates of anxiety and offers an opinion to the jury about whether the witness—often, as in this case, the accused—was deceptive in answering questions about the very matters at issue in the trial. ... Unlike other expert witnesses who testify about factual matters outside the jurors' knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth. Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering, as in respondent's case, a conclusion about the ultimate issue in the trial.

Such testimony would open the door to a battle of experts regarding every interrogation. The nominal probative value, if any, arising from an expert “false confession detector” is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The

⁶⁶To the extent a defendant would seek to rely on expert testimony about his psychological traits would open the door to requiring the defendant to undergo a *state* psychological examination.

⁶⁷*Scheffer*, at 313 (emphasis in original)(Thomas, Souter, Scalia, JJ and Rehnquist, CJ).

⁶⁸*Id.* at 313-314.

trial court did not abuse its discretion in excluding that testimony.

III. A defendant does not possess an unfettered right to admit evidence simply because he deems it helpful to his defense. The trial court’s exclusion of inadmissible expert testimony about false confessions under well-established court rules that require evidence to be reliable does not deprive Defendant of his constitutional right to present a defense.

Standard of Review and Issue Preservation

Whether a defendant is deprived of his constitutional right to present a defense is reviewed *de novo*.⁶⁹ Defendant preserved the issue.

Discussion

Defendant claims that, even if the trial court properly excluded Defendant’s proposed expert witnesses under the rules of evidence, the application of those rules in this context violates his constitutional right to present a defense. He argues that the applicable constitutional standard is that a defendant can introduce any evidence “unless the state can demonstrate that it is ... inherently unreliable.”⁷⁰ But the United States Supreme Court has never endorsed such a standard. To the contrary, it has repeatedly stated that well-established rules of evidence designed to ensure that only reliable evidence is introduced are constitutional.

A. *The Constitutional Standard.*

The most recent detailed analysis by the United States Supreme Court on the constitutional right to present a defense is its unanimous 2006 opinion in *Holmes v South Carolina*.⁷¹

⁶⁹*People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

⁷⁰Defendant’s Brief at 41.

⁷¹*Holmes v South Carolina*, 547 US 319; 126 S Ct 1727; 164 L Ed 2d 503 (2006).

Acknowledging that the Constitution guarantees a “meaningful opportunity to present a complete defense,” the Supreme Court in *Holmes* noted that such a right is not unlimited. Only where evidentiary rules infringe “upon a weighty interest of the accused *and* are arbitrary or disproportionate to the purposes they are designed to serve” is that right abridged.⁷² The Court defined “arbitrary” rules as those that “exclude[] important defense evidence but that [do] not serve any legitimate interests.”⁷³ It explained that concept by examining five of its prior opinions.

The *Holmes* court first examined a 1967 challenge to a Texas statute in *Washington v Texas*.⁷⁴ Texas law barred a person who had been charged as a participant in a crime from testifying in defense of another participant unless the witness had been acquitted.⁷⁵ Charged with murder, the defendant in *Washington* was precluded from calling as a witness a person who had been charged and convicted of committing the same murder.⁷⁶ That witness would have testified that the defendant tried to convince the witness to leave the scene and that the defendant did not fire the fatal shot.⁷⁷ The question presented was whether the compulsory process clause, the ability of a defendant to call witnesses in his favor, applied to the States and whether it was violated by the Texas statutes. Examining the common law history of statutes disqualifying certain witnesses from testifying, the Supreme Court held that the right to compulsory process was violated by an arbitrary rule that

⁷²*Id.* at 324 (internal quotes omitted and emphasis added).

⁷³*Id.* at 325.

⁷⁴*Id.* at 325, citing *Washington v Texas*, 388 US 14; 87 S Ct 1920; 18 L Ed 2d 1019 (1967).

⁷⁵*Holmes, supra* at 325; *Washington, supra* at 16-17.

⁷⁶*Holmes, supra* at 325.

⁷⁷*Washington, supra* at 16.

prevented “whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief.”⁷⁸ The *Holmes* court observed that the statutes in *Washington* could not even be defended on the rational basis of setting apart persons likely to commit perjury because an alleged participant could testify if he had been acquitted or called by the prosecutor.⁷⁹

Contrary to Defendant’s claim, *Washington* did not invalidate the Texas statutes because they excluded testimony that would be “relevant and material to the defense.”⁸⁰ Instead, the constitutional infirmity arose because of the arbitrary nature of the rule rather than the fact that relevant testimony was excluded.⁸¹ Emphasizing that distinction, the Court cautioned:⁸²

Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges, which are based on entirely different considerations from those underlying the common-law disqualifications for interest. Nor do we deal in this case with nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them.

As the Supreme Court later explained in *United States v Scheffer*, the Texas statutes presented an arbitrary rule where “no legitimate interests in support of the evidentiary rules” could be advanced and the rule “burdened only the defense and not the prosecution.”⁸³ *Washington* does *not* stand for the proposition that nonarbitrary rules that exclude evidence sought to be introduced by a defendant

⁷⁸*Id.* at 22.

⁷⁹*Holmes, supra* at 325.

⁸⁰Defendant’s Brief at 41.

⁸¹*Washington, supra* at 23.

⁸²*Id.* at 23 n 21.

⁸³*Scheffer, supra* at 316 and n 12.

are unconstitutional.

Another example of an arbitrary rule discussed in *Holmes* was the subject of the 1973 decision in *Chambers v Mississippi*.⁸⁴ *Chambers* involved the combined application of Mississippi's common-law "voucher rule," which prevented a party from impeaching his own witness, and its hearsay rule that excluded the testimony of three persons to whom that witness had confessed.⁸⁵ Citing the observation that the voucher rule "has been condemned as archaic, irrational, and potentially destructive of the truth-gathering process,"⁸⁶ the *Chambers* court noted that Mississippi did not "defend the rule or explain its underlying rationale."⁸⁷ The *Holmes* court highlighted this as especially significant.⁸⁸ Accordingly, the Supreme Court concluded that the combination of the voucher rule with the hearsay rule denied the defendant in *Chambers* "a trial in accord with traditional and fundamental standards of due process."⁸⁹

But Defendant reads *Chambers* as requiring that evidence must be admitted so long as it bears "persuasive assurances of trustworthiness" and is "critical" to the defense, even if the rules of evidence would exclude it.⁹⁰ Notwithstanding the trial court's rejection of Defendant's proposed expert testimony as unreliable in this case, *Chambers* did not establish such a rule. To the contrary,

⁸⁴*Chambers v Mississippi*, 410 US 284; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

⁸⁵*Scheffer*, *supra* at 316.

⁸⁶*Chambers*, *supra* at 296 n 8.

⁸⁷*Id.* at 297.

⁸⁸*Holmes*, *supra* at 325.

⁸⁹*Chambers*, *supra* at 302.

⁹⁰Defendant's Brief at 42.

the Supreme Court emphasized the extremely limited nature of its holding.⁹¹

In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

In *Scheffer*, the Supreme Court specifically disclaimed the broad reading being urged by Defendant, stating that “*Chambers* ... does not stand for the proposition that the accused is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence.”⁹²

The *Holmes* court also discussed *Rock v Arkansas*, a 1987 opinion addressing an Arkansas rule that precluded *all* hypnotically refreshed testimony.⁹³ That rule prevented a criminal defendant from exercising his constitutional right to fully testify as to certain matters in his own defense. But the problem in *Rock* was not that the defendant was precluded from offering his own testimony, it was that Arkansas was unable to justify a blanket rule excluding post-hypnotic testimony in *all* cases. The Court concluded that a *per se* rule was arbitrary because it precluded any consideration of whether post-hypnotic testimony in a particular case might not be as untrustworthy as the rule presumed.⁹⁴ Moreover, the Court described the accused’s interest in testifying personally in his own defense as “particularly significant.”⁹⁵ The *Holmes* court explained that the *per se* rule was an arbitrary restriction that was unsupported by evidence repudiating the validity of all post-hypnotic

⁹¹*Chambers, supra* at 302-303.

⁹²*Scheffer, supra* at 316.

⁹³*Id.* at 326, citing *Rock v Arkansas*, 483 US 44; 107 S Ct 2704; 97 L Ed 2d 37 (1987).

⁹⁴*Rock, supra* at 61.

⁹⁵*Scheffer, supra* at 315-316.

recollections.⁹⁶

The *Holmes* court also discussed *Scheffer*, which also involved a challenge to a *per se* rule, this one a rule of evidence making polygraph evidence inadmissible. The Court's 1998 opinion upheld the rule, acknowledging that: "State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules."⁹⁷ Given the lack of any consensus that polygraph evidence is reliable,⁹⁸ the Court held that uniformly excluding such evidence "is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence."⁹⁹ The *Scheffer* Court rejected any analogy to *Rock*, *Washington*, or *Chambers*, describing those cases as ones involving the exclusion of evidence that "significantly undermined fundamental elements of the accused's defense."¹⁰⁰ In an observation just as applicable to this case, *Scheffer* recognized that the polygraph rule did not preclude the defendant from introducing any "factual evidence," but merely "barred [him] from introducing expert opinion testimony to bolster his own credibility."¹⁰¹ Instead, the Court concluded that, unlike the rules at issue in *Rock*, *Washington*, or *Chambers*, the polygraph rule did "not implicate any significant

⁹⁶*Holmes*, *supra* at 326.

⁹⁷*Scheffer*, *supra* at 309.

⁹⁸*Id.* at 309.

⁹⁹*Id.* at 312.

¹⁰⁰*Id.* at 315-316.

¹⁰¹*Id.* at 317.

interest of the accused.”¹⁰² The *Holmes* court repeated those observations.¹⁰³

The Supreme Court in *Holmes* summarized the standard: “[T]he Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote.”¹⁰⁴ The Supreme Court explained that this principle allows states to regulate the admission of evidence proffered by criminal defendants to show that someone else committed the crime.¹⁰⁵ Examining a South Carolina rule that was apparently intended to be of this type, the *Holmes* court observed that South Carolina had instead “radically changed and extended the rule,” by construing it to prevent a defendant from introducing evidence of the guilt of a third party where “there is strong forensic evidence.”¹⁰⁶ Thus, the critical inquiry in the admissibility decision focused on the strength of the prosecution’s case. As the Court noted:¹⁰⁷

If the prosecution’s case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.

But because the rule did not permit any qualitative assessment of the prosecutor’s evidence by considering defense challenges to that evidence,¹⁰⁸ the Supreme Court found that the South Carolina

¹⁰²*Id.*

¹⁰³*Holmes, supra* at 326.

¹⁰⁴*Id.* at 326-327.

¹⁰⁵*Id.* at 327.

¹⁰⁶*Id.* at 328.

¹⁰⁷*Id.* at 329.

¹⁰⁸*Id.* at 329.

rule did “not rationally serve the end that the ... rule and its analogues in other jurisdictions were designed to promote, i.e., to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues.”¹⁰⁹ The Court found that the rule was illogical and that because it did not “rationally serve the end” that the rule was designed to further, it was arbitrary.¹¹⁰ And since the State was unable to identify “any other legitimate end that the rule serves, [i]t follows that the rule ... violates a criminal defendant’s right to have a meaningful opportunity to present a complete defense.”¹¹¹

But had it been supported by a rational basis and served the ends it was designed to achieve, it is apparent that the Court would have approved an evidentiary rule that regulated or limited the admission of evidence proffered by a criminal defendant to show that someone else committed the crime with which they were charged.¹¹² Only when South Carolina interpreted the rule in such a way as to “not rationally serve the end” that the rule was designed to promote, did it run afoul of the Constitution.¹¹³

Defendant asserts that *Crane v Kentucky*¹¹⁴ is particularly instructive because it involved evidence a defendant sought to admit challenging the reliability of the defendant’s confession. He claims that *Crane* requires the admission of evidence regarding a defendant’s psychological makeup

¹⁰⁹*Id.* at 330.

¹¹⁰*Id.* at 331.

¹¹¹*Id.* at 331 (internal quotation and citations omitted).

¹¹²*Id.* at 327.

¹¹³*Id.* at 329-331.

¹¹⁴*Crane v Kentucky*, 476 US 683; 106 S Ct 2142; 90 L Ed 2d 636 (1986).

as a part of assessing the reliability of his statement to police. But the issue presented in *Crane* was actually quite narrow.

Having been unsuccessful in trying to suppress his confession as involuntary, the defendant in *Crane* sought to challenge the veracity of his confession by showing that “he had been detained in a windowless room for a protracted period of time, that he had been surrounded by as many as six police officers during the interrogation, that he had repeatedly requested and been denied permission to telephone his mother, and that he had been badgered into making a false confession.”¹¹⁵ At trial, the defendant argued that what he told police should not be believed.¹¹⁶

The confession was rife with inconsistencies, counsel argued. For example, petitioner had told the police that the crime was committed during daylight hours and that he had stolen a sum of money from the cash register. In fact, counsel told the jury, the evidence would show that the crime occurred at 10:40 p.m. and that no money at all was missing from the store. Beyond these inconsistencies, counsel suggested, “[t]he very circumstances surrounding the giving of the [confession] are enough to cast doubt on its credibility.” ... In particular, she continued, evidence bearing on the length of the interrogation and the manner in which it was conducted would show that the statement was unworthy of belief.

But the trial court in *Crane* concluded that because determination of the voluntariness of his confession was a legal issue that the court had already resolved, the defendant was not entitled to present any evidence to the jury challenging the credibility of the confession. That ruling precluded evidence consisting of “testimony from two police officers about the size and other physical characteristics of the interrogation room, the length of the interview, and various other details about the taking of the confession.”¹¹⁷

¹¹⁵*Id.* at 685.

¹¹⁶*Id.* at 685.

¹¹⁷*Id.* at 686.

The Supreme Court held that the trial court's ruling was based on the mistaken legal assumption once a confession was found to be voluntary, no further inquiry before the jury was permissible. The court held that a blanket rule excluding otherwise "competent [and] reliable evidence" could not be enforced "in the absence of any valid state justification."¹¹⁸ Discussing *Crane*, the *Holmes* court explained that the rule preventing a defendant from introducing the circumstances surrounding his confession was unconstitutional where no one had "advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence."¹¹⁹

As the *Crane* court observed: "[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability - even if the defendant would prefer to see that evidence admitted."¹²⁰ Rather, as *Crane* emphasized, a criminal defendant is entitled only to present "competent, *reliable* evidence bearing on the credibility of a confession."¹²¹ Because the blanket rule prohibiting the introduction of reliable evidence without any justification was arbitrary, the *Crane* court concluded it violated the right to present a defense. It did not, however, hold that evidence of a defendant's psychological makeup must be admitted.

Defendant argues that *Crane* should be extended to require the introduction of evidence of a defendant's psychological makeup, relying on the Court of Appeals opinion in *Hamilton*. But

¹¹⁸*Id.* at 690.

¹¹⁹*Holmes, supra* at 326, quoting *Crane, supra* at 691.

¹²⁰*Crane, supra* at 690.

¹²¹*Id.* (emphasis added).

Hamilton properly observed that *Crane* did not involve such evidence.¹²² More significantly, *Hamilton* was not decided based on the constitutional right to present a defense, but on the trial court’s evidentiary error for failing to exercise its discretion under the then-existing version of MRE 702.¹²³ Instead, the *Hamilton* court held only that the Supreme Court’s reasoning in *Crane* was “equally applicable to *otherwise admissible* expert testimony.”¹²⁴ The Court of Appeals in *Hamilton* found *evidentiary* error under the then-existing version of MRE 702, not *constitutional* error. Nothing in *Hamilton* lends any support for an extension of the principles enunciated by the United States Supreme Court to invalidate the application of the rules of evidence in this case.

B. MRE 702 and MRE 403 are not arbitrary nor disproportionate.

The Supreme Court has emphasized that an “accused is not denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence.”¹²⁵ Both MRE 702 and MRE 403 are rules that apply equally to prosecutors and criminal defendants. Nor are they *per se* rules that automatically exclude evidence. To the contrary, both rules require the sound exercise of the trial court’s discretion to apply those rules to the particular facts and circumstances of an individual case. They are unlike the rules invalidated in *Washington*, which applied only to criminal defendants, or *Rock*, which directly impinged on the constitutional right of a defendant to testify.

In *Scheffer*, the Supreme Court acknowledged that there is “unquestionably ... a legitimate

¹²²*Hamilton, supra* at 667.

¹²³*Id.* at 668.

¹²⁴*Hamilton, supra* at 666 (emphasis added).

¹²⁵*Scheffer, supra* at 316.

interest in ensuring that reliable evidence is presented” to the jury.¹²⁶ The Court recognized that “the exclusion of unreliable evidence is a principal objective of many evidentiary rules.”¹²⁷ As an example of that kind of rule, the Supreme Court specifically cited FRE 702, the counterpart to MRE 702, and *Daubert*.¹²⁸ Under MRE 702, the trial court must ensure that any expert testimony is not only relevant, but reliable. Because a defendant has no right to present unreliable testimony to the jury, there can be no constitutional violation.

Similarly, MRE 403 is a well-established rule of evidence that does not deprive a defendant of his right to present a defense. Pointing to the federal counterpart to that rule, the Supreme Court in *Holmes* described it as one that serves a legitimate purpose:¹²⁹

While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. *See, e.g.*, Fed. Rule Evid. 403; Uniform Rule of Evid. 45 (1953); ALI, Model Code of Evidence Rule 303 (1942); 3 J. Wigmore, Evidence §§ 1863, 1904 (1904). Plainly referring to rules of this type, we have stated that the Constitution permits judges “to exclude evidence that is ‘repetitive ..., only marginally relevant’ or poses an undue risk of ‘harassment, prejudice, [or] confusion of the issues.’ ” *Crane*, 476 US, at 689-690; 106 S Ct 2142 (quoting *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986); ellipsis and brackets in original). *See also Montana v. Egelhoff*, 518 US 37, 42; 116 S Ct 2013; 135 L Ed 2d 361 (1996)(plurality opinion)(terming such rules “familiar and unquestionably constitutional”).

¹²⁶*Id.* at 309.

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹*Holmes, supra* at 326-327. *See also People v Hill*, 282 Mich App 538, 542; 766 NW2d 17 (2009)(following *Holmes* to approve exclusion of defense evidence), *affirmed in part and vacated on other grounds*, 485 Mich 912; 773 NW2d 257 (2009).

Citing *Scheffer*, the Court of Appeals in *Unger* acknowledged that “an accused’s right to present evidence in his defense is not absolute” and that a defendant’s interest in presenting evidence may “bow to accommodate other legitimate interests in the criminal trial process.”¹³⁰ The *Unger* court properly rejected the constitutional claim finding that the rules of evidence served to ensure that expert testimony was “relevant and reliable.”¹³¹ Thus, there is no constitutional violation arising from the exclusion of defense evidence under the evidentiary rules because “[t]hese rules of evidence help to ensure the integrity of criminal trials and are neither ‘arbitrary’ nor ‘disproportionate to the purposes they are designed to serve.’”¹³²

MRE 702 and MRE 403 are neither arbitrary nor lacking a rational basis. They are a part of a comprehensive scheme of rules to ensure that only relevant and reliable evidence is presented to the fact-finder. There is no constitutional error arising from application of the rules of evidence precluding expert testimony in this case.

Faced with even-handed rules designed to ensure the reliability of evidence, Defendant argues that the right to present a defense involves “more than the trial court’s discretionary application of a non-arbitrary rule,” citing only a web site from “one of the premier criminal defense firms in Buffalo, New York.”¹³³ In any event, if a valid rule of evidence is applied in an arbitrary way, then the violation is an evidentiary one involving an abuse of discretion by the trial court, not an error of constitutional dimension.

¹³⁰*Unger, supra* at 250; 749 NW2d 272 (2008), *citing Scheffer, supra* at 308.

¹³¹*Id.* at 250.

¹³²*Id.* at 250-251.

¹³³Defendant’s Brief at 48.

Defendant additionally claims that a defendant's need for the evidence is an "important consideration in balancing evidentiary rules against the Constitutional right to present a defense."¹³⁴ That proposition is equally unavailing. Defendant relies on two cases from the Sixth Circuit, first claiming that *Miskel v Karnes* supports his claim that a "weighty interest of the accused" is infringed where the exclusion of evidence undermines elements of a defendant's defense.¹³⁵ But Defendant has gotten it backward. The Sixth Circuit stated that "the exclusion of evidence [is] unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused."¹³⁶ The "weighty interest of the accused" does not determine if there is a constitutional violation; the violation only occurs when there is an arbitrary or disproportionate exclusion of evidence that, in fact, *infringes* a weighty interest of the accused. The importance of the evidence to a defendant does not define whether there is a violation. Similarly, the discussion by the Sixth Circuit in *United States v Blackwell* cited by Defendant does not stand for the proposition that the exclusion of evidence that might create a reasonable doubt establishes a constitutional violation.¹³⁷ To the contrary, the statement by the Sixth Circuit was that, *even if evidence is erroneously excluded in violation of the constitutional right to present a defense*, the defendant must still have suffered some prejudice before relief can be granted.¹³⁸ This is nothing

¹³⁴Defendant's Brief at 48.

¹³⁵Defendant's Brief at 48-49, *citing Miskel v Karnes*, 397 F3d 446, 455 (CA 6 2005).

¹³⁶*Miskel, supra* at 455.

¹³⁷Defendant's Brief at 49, *citing United States v Blackwell*, 459 F3d 737, 753(CA 6 2006).

¹³⁸*Blackwell, supra* ("Moreover, even where a district court erroneously excludes defense evidence, '[w]hether the exclusion of [witnesses'] testimony violated [defendant's] right to present a defense depends upon whether the omitted evidence [evaluated in the context of the entire record]

more than a restatement of the established principle that some degree of prejudice is required to obtain relief from a constitutional claim of error.¹³⁹ A defendant's assessment of the evidence as important, especially on an interlocutory basis, is simply irrelevant to the calculus of whether a rule is arbitrary or disproportionate.

C. *Defendant is not being deprived of a defense, but simply some testimony he wishes to introduce in support of that defense.*

There is a fundamental distinction between a constitutional right to present a defense and the ability to introduce evidence in support of that defense. Simply because a defendant has a constitutional right to present a defense does not mean that any rule that prevents a defendant from introducing evidence in support of that defense abridges that right. Relevance or helpfulness to the defense does not trump evidentiary rules. Only rules that are arbitrary and disproportionate are unconstitutional. In this case, the trial court applied a rule that cannot be characterized as either and found that the proposed evidence was not reliable. It does not necessarily follow that the exclusion of this evidence prevents Defendant from arguing his defense that his confession should not be believed.

Excluding *some* evidence in support of a defense theory does not *deprive* a defendant of his constitutional right to present a defense where he is still able to argue the defense and present other evidence in support of it. For example, in *People v Steele*, the defendant sought to introduce evidence in support of his defense that a third party had put the victim up to accusing the defendant

creates a reasonable doubt that did not otherwise exist.”)(brackets in original). *See also Washington v Shriver*, 255 F3d 45, 59 (CA 2 2001)(other evidence might be sufficient to create a reasonable doubt “and raise the exclusion of the evidence to an error of constitutional proportions.”)

¹³⁹*See, e.g., People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005).

of criminal sexual conduct. The Court of Appeals concluded that while the trial court committed evidentiary error in excluding that evidence, the error did not deprive Defendant of his constitutional right to present a defense because he was still able to present that defense.¹⁴⁰

Excluding Defendant's proposed expert testimony does not prevent Defendant from presenting the defense that his confession should not be believed. 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 that it should not be believed. He simply cannot use unreliable and inadmissible evidence to do it. That he cannot use an expert witness does not mean he is left without a defense. Many defendants argue that reasonable doubt prevents their convictions without calling an expert to say they've examined the evidence and concluded that it does not prove guilt beyond a reasonable doubt. Nor is Defendant simply left with an *argument* that his confession is not corroborated by the evidence. With every witness the prosecutor calls, Defendant will be able to introduce testimony through cross-examination and use it to argue that the evidence does not corroborate Defendant's confession.

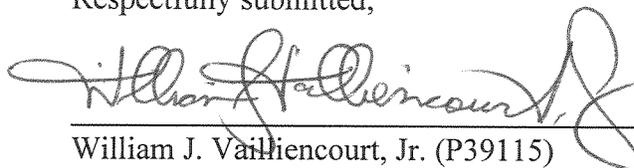
Because the trial court properly applied the rules of evidence to conclude that Defendant's proposed expert testimony was inadmissible, and those rules are neither arbitrary nor disproportionate, application of those rules do not violate Defendant's constitutional right to present a defense.

¹⁴⁰*Steele, supra* at 488-489. See also *Rockwell v Yukins*, 341 F 3d 507 (CA 6 2003)(*en banc*), *cert den*, 541 US 905; 124 S Ct 1601; 158 L Ed 2d 247 (2004)(exclusion of evidence in support of defense does not deprive defendant of the defense).

RELIEF REQUESTED

FOR THE FOREGOING REASONS, the People request that the Court affirm the judgment of the trial court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William J. Vaillencourt, Jr.", written over a horizontal line.

William J. Vaillencourt, Jr. (P39115)
Assistant Prosecuting Attorney

Dated: August 12, 2011

EXHIBIT A

Slip Copy, 2008 WL 2814346 (Ohio App. 9 Dist.), 2008 -Ohio- 3629
 (Cite as: 2008 WL 2814346 (Ohio App. 9 Dist.))

H

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Ninth District, Summit County.
 STATE of Ohio, Appellee
 v.
 Archie L. WOODEN, Appellant.
No. 23992.

Decided July 23, 2008.

West KeySummary

Criminal Law 110 ↪519(1)

110 Criminal Law
 110XVII Evidence
 110XVII(T) Confessions
 110k519 Voluntary Character in General
 110k519(1) k. What Confessions Are
 Voluntary. Most Cited Cases

A defendant's incriminating statements about how he murdered an eighteen-month old child were made voluntarily and were not coerced through improper interrogation techniques. The defendant was interviewed by several police detectives at different times, was read his *Miranda* rights several times during the interviews, and admitted that he struck the child in the stomach, slid the child across the floor, picked the child up and bounced his head on the floor six to seven times, and threw the child into the bathtub. The interviews with the detectives lasted no more than six hours altogether, the defendant was given several breaks, was given a meal when he stated he had not eaten, and was provided with drinks, a snack, and a cigarette when he asked for one.

Appeal from Judgment Entered in the Court of Common Pleas County of Summit, Ohio, Case No. CR 2006 11 4044.

Jeffrey N. James, Attorney at Law, for Appellant.

Sherri Bevan Walsh, Prosecuting Attorney, and Richard S. Kasay, Assistant Prosecuting Attorney, for Appellee.

MOORE, Presiding Judge.

*1 {¶ 1} Appellant, Archie Wooden, appeals from his conviction in the Summit County Court of Common Pleas of one count of murder, one count of felonious assault, and two counts of endangering children. We affirm.

I.

{¶ 2} On November 6, 2006, paramedics were called to the home of eighteen-month-old Cameron Allen, who was unresponsive when they arrived. Cameron was transported to Akron Children's Hospital, where he was pronounced dead. At the hospital, Wooden told police that he had briefly left Cameron alone in the bathtub and, when he returned, the child had fallen under the water and was having trouble breathing. This account of the events preceding Cameron's death was inconsistent with the results of the autopsy, however, which revealed that Cameron had died from blunt force trauma and his death was ruled a homicide. As Cameron had been left in the care of Wooden, the boyfriend of Cameron's mother, the police investigation focused on him as a suspect.

{¶ 3} Two days later, Akron Police arrested Wooden. During a series of interviews by four different detectives, Wooden eventually admitted that he had killed Cameron. Wooden explained how he had inflicted Cameron's injuries by punching him in the stomach, holding him upside down and repeatedly hitting his head on the floor, and finally by throwing the toddler into a bathtub with the water running. Wooden was charged with aggravated murder with a death specification, murder, three

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counts of felonious assault, and two counts of endangering children.

{¶ 4} Prior to trial, Wooden moved to suppress his statements to police, contending that he had involuntarily made incriminating statements due to the improper interrogation tactics of the police. After holding a hearing on the motion, the trial court found that Wooden's statements had been voluntary and denied the suppression motion. Following a pretrial hearing on the issue, the trial court also refused to allow Wooden to present the testimony of a criminologist who would testify about his research in the area of false confessions.

{¶ 5} Following a jury trial, Wooden was convicted of one count of murder, one count of felonious assault, and two counts of endangering children. Wooden appeals and raises two assignments of error.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN DENYING [WOODEN'S] MOTION TO SUPPRESS HIS CONFESSION AS IT WAS NOT VOLUNTARILY MADE."

{¶ 6} Through his first assignment of error, Wooden argues that the trial court erred in failing to suppress his oral statements to police. Wooden does not dispute that he was repeatedly given his *Miranda* rights, that he understood those rights, and that he waived his right to remain silent. Instead, he maintains that the police coerced an involuntary confession from him by using improper interrogation tactics.

{¶ 7} "[T]he state carries the burden of proving the voluntariness of a confession by a preponderance of the evidence." *State v. Hill* (1992), 64 Ohio St.3d 313, 317, 595 N.E.2d 884. The voluntariness of a

confession is reviewed under a totality-of-the-circumstances standard. *State v. Clark* (1988), 38 Ohio St.3d 252, 261, 527 N.E.2d 844. The totality of the circumstances includes "the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051, paragraph two of the syllabus, overruled on other grounds in *Edwards v. Ohio* (1978), 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155. Absent evidence that a defendant's will was overborne and that his capacity for self-determination was critically impaired because of coercive police conduct, the decision of a suspect to waive his right to Fifth Amendment privilege against self-incrimination is considered voluntary. *State v. Dailey* (1990), 53 Ohio St.3d 88, 91-92, 559 N.E.2d 459.

*2 {¶ 8} The record before the trial court at the suppression hearing revealed no coercive police conduct that overbore Wooden's free will. On November 8, 2006, four police detectives conducted a series of interviews with Wooden. Most of Wooden's interrogation was recorded either on audiotape or videotape. Prior to the suppression hearing, the trial court reviewed the audiotape and videotape recordings of Wooden's interrogation by police. The detectives read Wooden his *Miranda* rights three different times, and Wooden appeared to understand his rights and chose to speak with the police.

{¶ 9} At the suppression hearing, the State presented the testimony of two of the detectives who interviewed Wooden. Wooden's first interview by Akron police detectives began in the early afternoon at 12:18 p.m. and concluded one hour and nineteen minutes later. Another detective then interviewed Wooden for approximately 40-45 minutes.

{¶ 10} After a break, Detective Sergeant Butler interviewed Wooden for approximately two and one-

half hours. During that interview, Wooden admitted that he struck Cameron in the stomach and threw him in the bathtub. After a ten-minute break, the original two detectives returned to further question Wooden because they wanted to determine how Cameron had sustained severe bruising to his head. Wooden described how, after striking Cameron in the stomach and sliding him across the floor, he had picked the child up and bounced his head on the floor six to seven times. The final interview ended after approximately one hour.

{¶ 11} The series of interviews lasted less than six hours altogether and Wooden was given several breaks between the interviews by the different detectives. When Wooden told one detective that he had not eaten, he was given a meal. Wooden was also provided with drinks, a snack, and a cigarette when he asked for one. Although Wooden told them that he had not had much sleep, one detective testified that Wooden remained coherent during the questioning and did not appear to be extremely tired. Moreover, the interviews were conducted during the middle of the afternoon.

{¶ 12} The record also reveals that the detectives did not physically mistreat Wooden, nor did they make any threats or promises to him to elicit his statements. Although one of the detectives suggested to Wooden that he should get counseling, he never told Wooden that he would receive counseling in lieu of incarceration if he confessed.

{¶ 13} Given the evidence before the trial court on the totality of the circumstances surrounding Wooden's confession, the State established by a preponderance of evidence that Wooden's confession was not coerced in any manner but was given voluntarily. The trial court did not err in denying Wooden's motion to suppress and his first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED AND DENIED

[WOODEN] HIS DUE PROCESS RIGHT TO A FAIR TRIAL WHEN IT DENIED [WOODEN] THE OPPORTUNITY TO PRESENT THE TESTIMONY OF DR. LEO AT TRIAL.”

*3 {¶ 14} Because the trial court denied Wooden's suppression motion that challenged the voluntariness of his confession, Wooden planned to offer evidence at trial that his confession was not reliable due to the interrogation tactics that the police used. Wooden sought to admit the expert testimony of Dr. Richard Leo, an expert in the field of criminology, to challenge the reliability of the statements Wooden made to police. Wooden planned to have Dr. Leo testify about his research in the area of false confessions. Specifically, Dr. Leo's testimony would focus on describing certain police interrogation techniques that tend to induce confessions and would also reveal the results of his studies in the area of false confessions. Dr. Leo would not offer an opinion regarding the truth or falsity of Wooden's confession but, according to Wooden, Dr. Leo would provide the jury with background information to assist in its assessment of the reliability of Wooden's confession.

{¶ 15} Prior to trial, the State moved to exclude Dr. Leo's testimony. Following a hearing to determine the admissibility of Dr. Leo's testimony, the trial court held that the testimony of Dr. Leo would not be admitted as expert testimony under Evid.R. 702 because it was not scientifically reliable and it also did not relate to matters beyond the knowledge of lay people. Wooden preserved this issue for review by again raising the admissibility of Dr. Leo's testimony during trial.

{¶ 16} The trial court's decision to admit or exclude evidence lies within its sound discretion and the decision will not be reversed by a reviewing court absent an abuse of that discretion. See *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. An “abuse of discretion” means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450

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N.E.2d 1140. An abuse of discretion is more than an error of judgment, but instead demonstrates “perversity of will, passion, prejudice, partiality, or moral delinquency.” *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748.

{¶ 17} Expert testimony must meet the criteria of Evid.R. 702, which provides, in pertinent part, that a witness may testify as an expert if all of the following apply:

“(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons[;]

“(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

“(C) The witness' testimony is based on reliable scientific, technical, or other specialized information.” Evid.R. 702.

{¶ 18} The State did not dispute that Dr. Leo had specialized knowledge and education, but it did dispute whether Dr. Leo's testimony related to matters beyond the knowledge of the jury and whether his testimony was based on reliable scientific information. This Court will address these two Evid.R. 702 factors in turn. Because the parties and the trial court focused first on whether Dr. Leo's testimony was scientifically reliable under Evid.R. 702(C), this Court will begin with that factor.

Scientific Reliability

*4 {¶ 19} To determine whether a proposed expert's testimony about a scientific technique or a scientific methodology is scientifically reliable, the trial court focuses on the factors identified by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, as adopted by the Ohio Supreme Court in *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 611-612, 687 N.E.2d

735. See, also, *Terry v. Caputo*, 115 Ohio St.3d 351, 356, 875 N.E.2d 72, 2007-Ohio-5023, at ¶ 24-25. These factors include: (1) “whether a theory or technique * * * can be (and has been) tested”; (2) “whether the theory or technique has been subjected to peer review and publication”; (3) “the known or potential rate of error”; and (4) general acceptance in the scientific community. *Daubert*, 509 U.S. at 593-594.

{¶ 20} The trial court found that Dr. Leo's testimony failed to satisfy the *Daubert* factors and, therefore, was not scientifically reliable. This conclusion was supported by the evidence in the record.

{¶ 21} The evidence before the court demonstrated that Dr. Leo is well educated and that he has done extensive research in the area of police interrogation techniques and confessions. Dr. Leo testified about his research on false confessions, indicating that he has published several articles on the subject and that he has studied thousands of confessions. His proposed trial testimony consisted of general information about different police interrogation techniques and their potential to induce a confession. Dr. Leo would explain that certain interrogation techniques were more coercive than others and he was prepared to testify about the potentially coercive effect of the specific interrogation tactics that were used during the interrogation of Wooden.

{¶ 22} Dr. Leo further explained that coercive interrogation techniques do tend to be effective in producing their desired result: a confession. He conceded on cross-examination, however, that coercive techniques are also effective in inducing true confessions and he could not offer any opinion as to how many of the resulting confessions are truthful and how many are false. Thus, he could offer no expert insight into the actual likelihood that coercive interrogation tactics will lead to a false confession.

{¶ 23} Of particular significance to the *Daubert* analysis here, Dr. Leo has not formulated a specific

theory or methodology about false confessions that could be tested, subjected to peer review, or permit an error rate to be determined. Dr. Leo's research on false confessions has consisted of analyzing false confessions, after they have been determined to be false. Dr. Leo explained that confessions are sometimes proven to be false after the fact through DNA exoneration, physical impossibility, or when the true perpetrator is caught. Dr. Leo has looked back at many such confessions and focused on reviewing the interrogation techniques that had preceded the false confessions, in an attempt to find common variables. Dr. Leo's research has focused in particular on similarities in the interrogation techniques that led to the false confessions. His research, however, has not led to any concrete theories or predictors about when and why false confessions occur.

*5 {¶ 24} The general information given by Dr. Leo, although undoubtedly the result of extensive, published research, did not present any theory or methodology that could be tested or otherwise scrutinized for reliability in his field of criminology. As another court concluded, Dr. Leo's false confession theory is new and unrefined and needs further study. See *Vent v. State* (Alaska App.2003), 67 P.3d 661, 670. Dr. Leo's theory has too many unanswered questions and, therefore, fails to support any reliable conclusions. *Id.* The trial court reasonably concluded that Dr. Leo's testimony was not scientifically reliable under the *Daubert* factors and, therefore, failed to satisfy Evid.R. 702(C).

Assistance to Jury

{¶ 25} The trial court further found that Dr. Leo's testimony should not be admitted as expert testimony under Evid.R. 702 because it would not assist the jury in understanding matters beyond their knowledge as lay people. See Evid.R. 702(A).

{¶ 26} As explained above, Dr. Leo conceded that he could not predict when a confession was false, nor could he opine that coercive interrogation tac-

tics are more likely to yield false confessions instead of truthful ones. Dr. Leo could not offer an opinion on which interrogation techniques lead to false confessions, he had no information about the percentage of confessions that are truthful or false, nor could he analyze a given confession and offer an opinion as to whether it was true or false.

{¶ 27} Dr. Leo could offer no expert insight into any of the circumstances surrounding Wooden's confession and the likelihood that any of those circumstances led to a false confession. Dr. Leo's proposed testimony was not directly relevant to the reliability of the defendant's confession, such as a psychological expert who could offer insight into a defendant's mental state to explain the likelihood that a mentally ill or mentally retarded defendant falsely confessed to a crime. See, e.g., *State v. Southerland*, 10th Dist. No. 06AP-11, 2007-Ohio-379.

{¶ 28} It was not beyond the knowledge of lay jurors that coercive police interrogation tactics might be more likely to induce a confession from a criminal suspect, nor was the fact that suspects do sometimes falsely confess to a crime. As another court observed on this issue, Dr. Leo's testimony is based on nothing more than common sense insofar as it would assist the jury in assessing the reliability of the confession. See *Vent*, 67 P.3d at 672 (Mannheimer, J., concurring). His techniques "amounted to nothing more than testing the details of the confession against the known facts." *Id.* Lay jurors have the ability to make such an assessment of the evidence based on their own knowledge and experience.

{¶ 29} Since most of the interrogation of Wooden was recorded either by audiotape or videotape, the jury could assess the interrogation tactics used by the police during their interrogation of Wooden. The jury could observe the circumstances surrounding Wooden's confession and assess reliability on its own. Dr. Leo's testimony would not offer the jurors any insight outside their own knowledge and experience and, therefore, failed to satisfy Evid.R.

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702(A).

*6 {¶ 30} Given the evidence before the trial court that Dr. Leo's expert testimony did not include a reliable scientific theory or anything outside the understanding of the jury that would assist it in assessing the reliability of Wooden's confession, the trial court did not abuse its discretion in refusing to admit Dr. Leo's testimony. Wooden's second assignment of error is overruled.

III.

{¶ 31} The assignments of error are overruled and the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

SLABY, J., and WHITMORE, J., concur.

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