

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME WALTER KOWALSKI,

Defendant-Appellant.

UNPUBLISHED

August 26, 2010

No. 294054

Livingston Circuit Court

LC No. 08-017643-FC

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's pretrial order granting plaintiff's motion to strike the testimonies of defendant's proffered experts, Dr. Richard Leo and Dr. Jeffery Wendt. We affirm.

On May 1, 2008, the bodies of defendant's brother and sister-in-law were found in their home; each had suffered multiple gunshot wounds. Defendant and his brother had a strained relationship and rarely spoke with each other. However, shortly before the murders, the two brothers encountered each other at their mother's funeral.

During the course of interviews with police officers, defendant made numerous incriminating statements, ultimately confessing to the murders. Defendant was charged with the crimes; thereafter, he moved to suppress the incriminating statements he made to police. Defendant claimed that his statements, which constitute the primary evidence against him, were involuntary and obtained in violation of his *Miranda*¹ rights. Following a *Walker*² hearing, the trial court denied this motion.

Some time after the *Walker* hearing, defendant submitted a notice of intent to introduce the expert testimonies of Drs. Leo and Wendt. Defendant stated that Dr. Leo would be called to "give expert testimony concerning false confessions, that is that they occur and some of the reasons that they are known to occur." Defendant explained that Dr. Leo would testify "that

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

² *People v Walker (On Rehearing)*, 374 Mich 331, 337-338; 132 NW2d 87 (1965).

false confessions are associated with certain police interrogation techniques and that some of those interrogation techniques were used in this case” and would “offer an opinion that the risk factors associated with false and unreliable confessions, especially persuaded false confessions, were present in this case.” Dr. Wendt, a forensic psychologist, would testify that he administered several psychological evaluations to defendant and concluded that “the totality of the circumstances surrounding [defendant’s] communication with law enforcement resulted in conditions that increased his likelihood of false confession.” However, Dr. Wendt would not offer testimony on the ultimate issue of whether defendant made a false confession; instead, his testimony would “address the psychological and situational factors bearing on the credibility and reliability of [defendant’s] statements to the police.”

Plaintiff moved to suppress defendant’s proffered expert testimony, arguing that it was inadmissible under MRE 702 and *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). Following a *Daubert* hearing, during which both experts testified, and after considering numerous published articles on the subject, the trial court ruled that the proposed expert testimony of Dr. Leo regarding the correlation between certain police interrogation techniques and false confessions and the proposed testimony of Dr. Wendt concerning defendant’s personality traits was not admissible under MRE 702. The trial court reasoned that Dr. Leo’s proposed expert testimony was not reliable because it was not the product of proper principles and methodologies. The trial court held that Dr. Leo’s methodology was unreliable and highly questionable because it did not include objective and verifiable criteria. The trial court further concluded that Dr. Leo’s testimony would be unhelpful to the jury and was not relevant inasmuch as Dr. Leo agreed that the same interrogation techniques that produce false confessions also produce true confessions. The trial court noted that a jury could analyze whether defendant’s confession contained certain details about the crime and conclude on its own whether the confession lacked credibility. The court also noted that the police witnesses could be cross-examined on the interrogation techniques and methods they use, and that the jury could consider this information in weighing the reliability of defendant’s confession. The trial court then concluded that Dr. Wendt’s proposed testimony was not relevant and could not be linked in any way to proof of a false confession.

Defendant argues that the trial court’s evidentiary ruling constituted an abuse of discretion, which deprived him of his constitutional right to present a defense. We disagree.

This Court reviews a trial court’s decision to admit or exclude expert witness testimony, including the trial court’s determination with respect to an expert’s qualifications, for an abuse of discretion. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). A trial court abuses its discretion when it reaches an outcome “falling outside [] [the] principled range of outcomes.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, this Court reviews de novo preliminary questions of law such as whether a rule of evidence or a statute precludes admission of evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

A criminal defendant has both a state and federal constitutional right to present a defense “which includes the right to call witnesses.” *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008), citing US Const, Am VI; Const 1963, art 1, § 20; *People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984). Part of a defendant’s right to present a defense may include the right to introduce evidence concerning the “manner in which a confession was secured” including evidence concerning the “physical and psychological environment that yielded the

confession . . .” *Crane v Kentucky*, 476 US 683, 688-691; 106 S Ct 2142; 90 L Ed 2d 636 (1986). However, “this right is not absolute: the ‘accused must still comply with ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *Yost*, 278 Mich App at 379, quoting *Hayes*, 421 Mich at 279, and *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Whether defendant was denied his right to present a defense involves a question of law that this Court reviews de novo. *Steele*, 283 Mich App at 480.

MRE 702³ governs the admissibility of expert testimony and 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.

“The admission of expert testimony requires that . . . the [expert’s] knowledge is in a particular area that belongs more to an expert than to the common man.” *Surman v Surman*, 277 Mich App 287, 308; 745 NW2d 802 (2007). “[E]xpert testimony is not admissible unless it will be helpful to the fact finder. Such testimony is unhelpful when it is unreliable or irrelevant . . . and also when it merely deals with a proposition that is not beyond the ken of common knowledge.” *Gilbert v Daimler-Chrysler Corp*, 470 Mich 749, 790; 685 NW2d 391 (2004), quoting *Zuzula v ABB Power T & D Co, Inc*, 267 F Supp 2d 703, 711 (ED Mich, 2003). Pursuant to MRE 702, a trial court must ensure that “all expert opinion testimony, regardless of whether it is based on novel science, is reliable.” *Steele*, 283 Mich App at 481, citing *Gilbert*, 470 Mich at 781. “MRE 702 requires the trial court to ensure that each aspect of an expert witness’s proffered testimony—including the data underlying the expert’s theories and the methodology by which the expert draws conclusions from that data—is reliable.” *Gilbert*, 470 Mich at 779. “[R]eference in MRE 702 to ‘scientific’ evidence implies a grounding in the methods and procedures of science, and the rule’s reference to ‘knowledge’ connotes more than subjective belief or unsupported speculation.” *Id.* at 781 (quotations omitted).

We conclude that the trial court did not abuse its discretion by excluding Dr. Leo’s testimony. The trial court concluded that Dr. Leo was qualified in terms of knowledge, but it excluded Dr. Leo’s testimony on several grounds including its finding that the testimony would not assist the trier of fact in understanding the evidence or in determining a fact at issue. MRE 702. This was not an abuse of discretion. Defendant essentially offered Dr. Leo’s testimony to help the jury determine the reliability of defendant’s confession. However, Dr. Leo’s testimony would not have involved a proposition that was outside the common knowledge of a layperson. *Gilbert*, 470 Mich at 790. Dr. Leo acknowledged that the same interrogation techniques that he

³ This rule incorporates the standards set forth in *Daubert*. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

determined led to false confessions could also lead to true confessions. He could not identify any unique correlation between certain police interrogation tactics and false confessions. Dr. Leo explained that the reliability of a confession is determined by considering whether aspects of the confession fit with the evidence in the case. Nothing in the record here indicates that a juror cannot perform this same analysis without the assistance of expert testimony. Further, the police interrogation of defendant was recorded and the jury will be able to review the recordings at trial. Additionally, the police officers will be subject to cross-examination with respect to their specialized training in the art of interrogation and techniques they may use to pressure a defendant into confessing to a crime. The jury will be able to consider the manner in which defendant's confession was elicited, and the way in which his statements progressed during the course of the interrogation, and it will be able to weigh the interrogation and confession with the remainder of the evidence introduced at trial and make a determination as to the credibility of the confession. No expert testimony is needed to assist the jury in this process. See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (issues involving credibility are within the sole province of the jury).

The trial court also excluded Dr. Leo's testimony on the grounds that the proposed testimony was not reliable because it was not based on sufficient facts or data, and it was not the product of reliable principles and methodologies. MRE 702. These conclusions were not outside the "principled range of outcomes." *Babcock*, 469 Mich at 269. The principles and methodologies used by Dr. Leo to arrive at his opinion that certain interrogation techniques correlate with false confessions were not shown to be reliable. The evidence showed that Dr. Leo's conclusions were based on the study of confessions that he subjectively determined, without definitive evidence, were false. Dr. Leo admitted during his testimony that the same interrogation tactics that produce false confessions also produce true confessions. Dr. Leo did not explain how age or mental illness affected a person's decision to confess to police. Furthermore, there is no way to test or quantify Dr. Leo's methodologies or to decipher a known error rate. In sum, the trial court did not abuse its discretion by determining that Dr. Leo's proposed testimony was not based on reliable methods and principles.⁴

⁴ Courts in several other jurisdictions have also affirmed a trial court's exclusion of expert testimony concerning false confessions: see *State v Wooden*, unpublished opinion of the Ohio Court of Appeals, issued July 23, 2008 (Docket No. 23992) (affirming the trial court's exclusion of Dr. Leo's testimony as unreliable, noting that Dr. Leo "could offer no expert insight into the actual likelihood that coercive interrogation tactics will lead to a false confession," and because it is "based on nothing more than common sense insofar as it would assist the jury in assessing the reliability of the confession"); *Vent v State*, 67 P3d 661, 667 (Alaska App 2003) (affirming trial court's exclusion of Dr. Leo's proffered testimony on the basis that there was no way to quantify or test his conclusions and because the proffered testimony would invade province of the jury and is based on "common sense rather than scientific knowledge"); *State v Cobb*, 43 P3d 855, 869 (Kan App 2002) (affirming trial court's exclusion of Dr. Leo's proffered testimony on basis that the expert testimony would invade province of the jury); *State v Free*, 351 NJ Super 203; 798 A2d 83 (2002) (holding that the trial court erred by admitting expert testimony on false confessions because the proposed testimony was not scientifically reliable and would not assist the trier of fact); *State v Davis*, 32 SW3d 603, 608-609 (Mo App 2000) (affirming the trial court's exclusion of Dr. Leo's proffered expert testimony because it would have interfered with

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Similarly, the trial court's determination that Dr. Wendt's testimony would not assist the jury was not outside the "principled range of outcomes" and did not amount to an abuse of discretion. *Babcock*, 469 Mich at 269. Here, according to defendant's notice of intent to introduce expert testimony, Dr. Wendt advised that he would discuss situational factors bearing on the "credibility and reliability of [defendant's] statements to police." Dr. Wendt testified that defendant was easily influenced and vulnerable to persons in authority. Dr. Wendt's proposed testimony related to the credibility of defendant's confession to police, the determination of which is within the sole province of the jury. Moreover, Dr. Wendt admitted that the same personality traits that correlate with false confessions can also lead to true confessions. Dr. Wendt could not identify a specific psychological factor that distinguishes a person who makes a false confession from one who makes a true confession. Thus, his testimony would have been of no help to the jury because the jury would have still been required to weigh defendant's confession against the other evidence in the case to determine whether it was credible. While *Crane*, 476 US at 683, holds that a defendant has the right to introduce evidence concerning the circumstances surrounding his confession, exclusion of Dr. Wendt's testimony here does not deprive defendant of that right. The jury will be able to review the recorded portions of the interrogation, and the police witnesses will be subject to cross-examination regarding the techniques they use during interrogation. Further, defense counsel can argue that the lack of evidence in the case shows that defendant's confession is not reliable.

We also agree with the trial court's conclusion that, with respect to the proposed expert testimony generally, the danger of unfair prejudice outweighed any probative value and thus it was inadmissible pursuant to MRE 403. "Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor (After Remand)*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002), citing *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Although both experts testified that they would not offer opinion regarding whether defendant made a false confession, that conclusion was implicit in both of their proposed testimonies. This would interfere with the jury's role in determining the credibility and weight of the confession. Thus, there was a significant danger of unfair prejudice with respect to the proposed testimony; and, as discussed above, neither of the expert's proposed testimony had high probative value. The trial court did not abuse its discretion by concluding that MRE 403 was an additional basis on which to exclude the proffered expert testimony. *Babcock*, 469 Mich at 269; *Steele*, 283 Mich App at 480.

Defendant's argument that the proffered expert testimonies are admissible pursuant to *People v Hamilton*, 163 Mich App 661, 663-664, 669; 415 NW2d 653 (1987), is unpersuasive. In *Hamilton*, the defendant proposed to admit the expert testimony of Dr. Michael Abramsky, a clinical psychologist who interviewed the defendant about a month after he confessed to police. *Id.* at 663. Specifically, Dr. Abramsky proposed to testify and explain the "psychological reasons and factors which would motivate" defendant to make incriminating statements to police. *Id.* Dr. Abramsky opined that the defendant was "operating psychologically at the level of a 15 year old" and had "extremely bad judgment" and other characteristics of immaturity. *Id.*

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the province of the jury).

at 664. This Court held that the trial court erred by excluding the proposed expert testimony, concluding that the testimony was admissible because it was relevant to the “weight and credibility of defendant’s statements” to police. *Id.* at 665. This Court cited *Crane*, 476 US at 683, and held that a criminal defendant has the right to introduce evidence concerning the circumstances surrounding his confession. *Id.* at 666-668. In applying the former version of MRE 702, this Court stated that the critical inquiry in regard to the admissibility of expert testimony involved determining whether the testimony “will aid the factfinder in making the ultimate decision in the case.” *Id.* at 667.

Contrary to defendant’s assertion, the trial court’s order here did not conflict with the holding in *Hamilton*; *Hamilton* is distinguishable. Dr. Leo proposed to testify regarding certain techniques that affected other suspects and criminal defendants whereas, in *Hamilton*, the expert proposed only to offer testimony concerning the defendant’s psychological makeup. Moreover, when *Hamilton* was decided, MRE 702 did not incorporate the standards set forth in *Daubert*, and the trial court was not required to make a “searching inquiry” into the reliability of the proffered expert’s testimony by analyzing the expert’s methodologies and principles. See *Gilbert*, 470 Mich at 782 (noting that, under the current version of the rule, “MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data”). Here, as discussed above, Dr. Leo’s testimony was not based on reliable principles and methodologies. Furthermore, Dr. Leo’s testimony would not have been of any help to the jury where Dr. Leo admitted that the same interrogation techniques that produce false confessions also produce true confessions and that the reliability of a confession is determining by comparing it to the other evidence in the case.⁵

Likewise, Dr. Wendt proposed to testify concerning defendant’s personality traits and how those personality traits were consistent with those of other persons who offered false confessions as described in the literature. Defendant argues that, at minimum, Dr. Wendt should be permitted to provide testimony concerning defendant’s personality traits, similar to the expert testimony in *Hamilton*, 163 Mich App at 661. However, in *Hamilton*, the expert merely proposed to testify that the defendant had the psychological maturity level of a 15-year-old. Here, Dr. Wendt proposed to testify that defendant had personality traits that would allow him to be easily influenced by police interrogators, thus directly implying, at least, that the police influenced him into making a false confession. Additionally, Dr. Wendt asserted that he would testify that defendant’s personality traits were similar to the traits possessed by others who made false confessions. The expert in *Hamilton* did not propose to testify concerning the personality traits of any other individual or how the defendant’s traits compared to others. Furthermore, Dr. Wendt’s proposed testimony would not have helped, and may have confused, the jury in this case because Dr. Wendt agreed that the same personality traits that cause false confessions can also lead to true confessions.

⁵ We also note that defendant’s argument that *Hamilton* is binding precedent on this Court is incorrect. While published opinions have precedential effect under the rule of stare decisis, MCR 7.215, a panel of this Court is only bound by published opinions issued after November 1, 1990. MCR 7.215(J)(1).

Similarly, defendant's argument that the proposed expert testimony in this case is akin to expert testimony concerning battered women's syndrome is unpersuasive. In *People v Christel*, 449 Mich 578, 591-592; 537 NW2d 194 (1995), our Supreme Court held that, where helpful and relevant, expert testimony regarding the "generalities or characteristics" of battered women's syndrome may be admissible to describe the "uniqueness of a specific behavior brought out at trial." Unlike expert testimony on battered women's syndrome, where an expert can link specific behavioral traits of a female witness to the specific, widely known and accepted syndrome, neither of defendant's proposed experts could link police interrogation techniques or personality traits to false confessions. Both experts acknowledged that the same techniques and traits correlated with both false confessions and true confessions. Additionally, while a jury may become confused by a battered women's actions or responses to abuse, a trial court does not abuse its discretion in reasoning that a jury is more likely to realize the coercive nature of a police interrogation and understand that some suspects make false confessions in that kind of setting.

Finally, defendant's argument that the proposed expert testimony is similar to expert testimony concerning victims of child sexual abuse is also unpersuasive. In *People v Peterson*, 450 Mich 349, 373; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995), our Supreme Court held that "[a]n expert may testify regarding typical symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim or to rebut an attack on the victim's credibility." Again, unlike the expert testimony discussed in *Peterson*, neither of the experts here could testify regarding common factors that typically explain or lead to a false confession. Both experts acknowledged that the same police interrogation techniques and personality traits correlated with both true and false confessions. Thus, the expert testimony would not have been helpful to the jury's determination of the reliability of defendant's confession in this case.

We affirm.

/s/ Richard A. Bandstra

/s/ Karen M. Fort Hood