



The Superior Court of Pennsylvania  
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Com. vs. Alicia

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- 1) memorandum dated 3/14/11
- 2) Dissenting memorandum
- 3) Concurring Statement

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**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
JOSE ALICIA,	:	
	:	
Appellee	:	No. 2445 EDA 2008

Appeal from the Order Entered August 12, 2008,  
in the Court of Common Pleas of Philadelphia County,  
Criminal Division, at No. CP-51-CR-0107261-2006.

BEFORE: STEVENS and BOWES, JJ. and McEWEN, P.J.E.

MEMORANDUM:

**FILED MARCH 14, 2011**

The Commonwealth appeals from an order denying in part its motion *in limine* to preclude expert testimony regarding the phenomena of false confessions.<sup>1</sup> After careful review, we affirm.

The relevant factual and procedural backgrounds of this case are as follows. On October 30, 2005, twenty-one-year-old Esroy George Rowe was shot inside the Blue Mountain Café located at 5514 Rising Sun Avenue, Philadelphia, Pennsylvania. Rowe suffered a single gunshot wound to the head and was pronounced dead the following day. The shooting occurred after an altercation erupted inside the café between two groups over a

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<sup>1</sup> The Commonwealth appeals pursuant to Pa.R.A.P. 313, asserting that the order in question is a collateral order. We address that issue in the text, *infra*.

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purported robbery of Appellee's friend, Angel Ortiz. Rowe was not involved in the melee. Following the shooting, several eyewitnesses identified Ortiz as the shooter while Ortiz claimed that a person named Jeremy Duffy shot Rowe. Lydia Rivera<sup>2</sup> identified the gunman as Appellee, Jose Alicia. Ortiz, Duffy, Rivera, Appellee, and another individual started the physical exchange with the other group.

At 2:00 a.m. on November 1, 2005, police brought then nineteen-year-old Appellee to the police station for questioning. Upon Appellee's arrival, police gave him *Miranda*<sup>3</sup> warnings. Five hours later, Appellee began to make a statement implicating himself in the shooting. The entire interview process took over six hours. According to one officer involved in the interview, Appellee appeared very nervous, was shaking, and went through an extended period of denial. Appellee had no prior record or experience with police interrogation and his IQ was sixty-four.<sup>4</sup> In his confession, Appellee related the following. On the day in question, he, Ortiz, Duffy, Lydia Rivera, and an individual identified as Tito, whose actual name is Andres Rivera, went to the Blue Mountain Café looking for individuals who allegedly robbed Ortiz. Looking into the café window, Ortiz identified his

<sup>2</sup> Ms. Rivera was friends with Angel Ortiz and according to the Commonwealth is Appellee's aunt.

<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>4</sup> An IQ below seventy is considered mentally challenged. *See Atkins v. Virginia*, 536 U.S. 304, 309 n.3 (2002).

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assailants, so Appellee and his associates entered the café. Appellee remarked that he went in last and stood by the door. According to Appellee:

Everybody just started fighting, tables and chairs started flying. I started to back up and as I did that, I pulled a gun out of my waist. I pointed it at the guys and told them to stop throwing chairs. The guy threw another chair and the gun went off. Everybody started running[.] [O]ne guy was trying to run to the back door and I fired two shots at the door while he was running.

Investigation Interview Record, 11/1/05, at 3. Subsequently, the Commonwealth charged Appellee with murder, criminal conspiracy, possession of an instrument of crime ("PIC"), and two violations of the Uniform Firearms Act.

In light of the fact that other eyewitnesses identified two other individuals as the shooter, Appellee requested a physical line-up. The Commonwealth objected because Appellee had lost a substantial amount of weight since the shooting. Thereafter, police conducted a photographic identification with five eyewitnesses. None of the eyewitnesses was able to identify Appellee as the shooter. Accordingly, the evidence against Appellee consisted of his confession, an identification by Lydia Rivera, and the testimony of individuals who previously were implicated as the gunman.

Appellee contended that his confession was coerced and filed a motion *in limine* seeking the admission of expert testimony from Dr. Richard Leo, Ph.D., J.D., an expert in the field of false confessions. The Commonwealth

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filed a responsive motion *in limine* to preclude Dr. Leo's testimony, arguing, *inter alia*, that Dr. Leo's expertise was not outside the purview of a layperson and would invade the province of the jury. In the motion, the Commonwealth also averred that Dr. Leo's testimony was novel and did not satisfy the *Frye* standards of admissibility. *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Commonwealth v. Topa*, 369 A.2d 1277 (Pa. 1977) (adopting *Frye*).

On June 17, 2008, the trial court conducted a hearing to determine the admissibility of Dr. Leo's proposed testimony. Dr. Leo stated that he received a bachelor's degree in sociology from the University of California at Berkeley, a master's degree in sociology from the University of Chicago, a J.D. from Berkeley, and a Ph.D in jurisprudence and social policy from Berkeley. His Ph.D. dissertation was on the history, psychology, and law of police interrogation practices in the 20th century.

Currently, Dr. Leo is a professor of law at the University of San Francisco, has studied and conducted research in the field of police interrogation, and taught classes on police interrogation practices, confessions, and the criminal justice system. In addition, Dr. Leo has published numerous peer-reviewed articles on police coercion, persuasion, and interrogation and is familiar with various case studies in which individuals have confessed to a crime that was impossible for them to have

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committed.<sup>5</sup> He has testified approximately 160 times in twenty-three states, including once in Pennsylvania. N.T., 6/17/08, at 26. Dr. Leo also provided that he has refused to take cases in which he would be unable to render a helpful opinion. *Id.* at 99-101. He estimated that in 80 to 85 percent of the cases in which he is contacted, he does not testify because he cannot provide useful testimony. *Id.* at 101. At that hearing, Dr. Leo remarked that his study focused on the "psychological study of police interrogation methods and practices, how they work, how they elicit confessions, false confessions, true confessions, issues of reliability." N.T., 6/17/08, at 35. According to Dr. Leo, this particular area of scholarship dates back to 1908, but the modern era of this field of study began in the early 1980s. *Id.*

Dr. Leo continued that his discipline is an empirical science. *Id.* Accordingly, he and others in his field rely on experimental studies, field-observation and interview studies, and studies based on analysis of documents, contemporary and historical materials, and opinion surveys. *Id.* at 35-36. Further, Dr. Leo testified that his expertise is "an area of social science research widely published and studied in the normal scientific ways and scientific outlets." *Id.* at 37. Additionally, he related that his method of

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<sup>5</sup> Dr. Leo's work has also been cited with approval by the Supreme Court of the United States. *See Corley v. United States*, 129 S.Ct. 1558, 1570 (2009).

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study of police interrogation techniques and false confessions was generally accepted in the scientific community. *Id.* at 38.

After outlining his methodology, Dr. Leo set forth the substance of his findings and the general subject matter of his proposed testimony. Based on his extensive study in the area of police interrogations, Dr. Leo opined that many jurors find the notion of false confessions counterintuitive. *Id.* at 55-56. He further remarked that, if allowed to present testimony, he could discuss the interrogation techniques utilized by police, the psychological design of those methods, and what techniques pose a risk of eliciting a false confession because they are psychologically coercive. *Id.* at 59-60.

As indicated by Dr. Leo, there are two foundational steps in an interrogation. *Id.* at 47. The first step is to convince the person that he is caught and that it is futile to deny the charges. *Id.* The interrogator will ordinarily accuse the individual of committing the crime, state that the person is lying if he denies the charge, challenge, attack, reverse or interrupt a denial, and then confront the suspect with real or fabricated evidence. *Id.*

The second step involves inducing the accused to confess. *Id.* at 48. An officer may say, "get it off your chest, you'll feel better, just tell the truth, do the right thing." *Id.* The interviewer might also implicitly or explicitly promise or threaten the accused, "whether they'll get bail or be

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able to fight their case or be able to go home or be charged with something even lower than the worst possible charge." *Id.*

Dr. Leo also testified that there are three types of false confessions, two of which can result from police interrogations. *Id.* at 50. A confession can be a voluntary false confession, where the person is seeking notoriety, a compliant false confession, or a persuaded false confession. *Id.* at 50-51. The latter two forms of a false confession can result from police questioning. *Id.* When a suspect is "coerced psychologically to lie because they think this is their only way out, their will is broken," that is known as a compliant false confession. *Id.* at 51. The persuaded confession, which is less common and counterintuitive, occurs when the accused, "comes to believe, typically, because the police tell them there is evidence and they don't know the police are lying about non-existent evidence, but the person comes to believe that they committed the crime likely without a memory of it." *Id.*

Dr. Leo noted that he interviewed Appellee, as well as viewed other discovery materials, including two separate psychological reports of Appellee. *Id.* at 53-54. He also authored a report, based on his conversation with Appellee, discussing the risk factors present in Appellee's interrogation. *Id.* at 58-59. Dr. Leo testified that a low-level IQ is one factor that enhances the chances of a false confession and that other techniques that allegedly occurred during Appellee's interrogation also could

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increase the risk of a false confession. For example, Appellee apparently indicated to Dr. Leo that his denials were repeatedly interrupted and that police officers lied to him during the interview process. *Id.* at 63-64.

At the hearing, the Commonwealth did not dispute Dr. Leo's statements or contend that the methods employed by Dr. Leo were novel. Instead, the Commonwealth challenged whether Dr. Leo's testimony would be outside of a layperson's knowledge. *Id.* at 106. After hearing the testimony of Dr. Leo, the trial court concluded that his testimony would not invade the credibility functions of the jury. The trial court ruled that Dr. Leo would be allowed to testify about his own research, the research of others that he was familiar with, police interrogation techniques, and methods that may increase the risk of a false confession. Importantly, the court also limited Dr. Leo's testimony. Pursuant to the trial court's order, Dr. Leo was not permitted to testify about the precise allegations underlying the defendant's confession, specifically state that the police in the case *sub judice* utilized methods that increase the risk of a false confession, or to offer an opinion as to whether he believed Appellee's confession was false. Thus, Dr. Leo's proposed testimony was restricted to an explanation of the phenomena of false confessions.

The trial court reasoned that since it limited Dr. Leo's testimony in this fashion, the testimony would aid the jury in understanding police

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interrogation and the fact that false confessions can occur due to interrogation techniques. However, the jury would remain the sole arbiter of whether Appellee's confession was truthful. This timely appeal by the Commonwealth followed. The Commonwealth raises the following two issues for our consideration.

- I. Did the lower court err in admitting expert testimony on the phenomenon of false confessions where such testimony would invade the jury's exclusive role as the arbiter of credibility?
- II. In the alternative, did the lower court err in admitting expert testimony on the phenomenon of false confessions where such testimony would not be based on any generally accepted theory or methodology?

Commonwealth's brief at 7.

Preliminarily, we address the issue of whether this Court has jurisdiction over the instant case, as the appeal is not from a final order. The Commonwealth contends that we have jurisdiction over this interlocutory appeal pursuant to Pa.R.A.P. 313. Rule 313 provides that, "[a]n appeal may be taken as of right from a collateral order of an administrative agency or lower court." Pa.R.A.P. 313(a); **Commonwealth v. Minich**, 4 A.3d 1063 (Pa.Super. 2010). The rules of appellate procedure define a collateral order as "an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until

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final judgment in the case, the claim will be irreparably lost.” Pa.R.A.P. 313(b); *Minich, supra; Commonwealth v. Kennedy*, 876 A.2d 939, 943 (Pa. 2005).

The Commonwealth submits that each of the requirements permitting review of an interlocutory order under the collateral order doctrine is present. Specifically, the Commonwealth asserts that the order is separable from the main cause of action because it can be addressed without analyzing the central issue in the case, namely, whether Appellee committed murder. In addition, the prosecution posits that the right involved is too important to be denied review since it implicates the question of whether expert testimony respecting false confessions impermissibly interferes with a jury’s credibility determination and thus affects the right to trial by jury. The Commonwealth continues that: the issue “also involves an important and emerging issue pertaining to the right to exclude unreliable expert testimony on false confessions that will have broad application in future cases in Pennsylvania.” Commonwealth’s brief at 3.

Lastly, the prosecution avers that the issues will no longer be reviewable if the case proceeds to final judgment. This position flows from the fact that the Commonwealth cannot appeal the decision if they obtain a conviction, as it will not be an aggrieved party. *See Commonwealth v. Dellisanti*, 831 A.2d 1159, 1164 n.7 (Pa.Super. 2003), *reversed on other*

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*grounds*, 876 A.2d 366 (Pa. 2005). Furthermore, it would not be permitted to appeal from Appellee's acquittal due to double jeopardy implications. ***Minich, supra***. Hence, the Commonwealth asserts that this appeal is properly before this Court.

Appellee counters that the order in question is not separable from the main cause of action and does not involve an issue too important to be denied review. According to Appellee, his statement given to the police "is the only evidence presented to establish his guilt and, therefore, anything which concerns the statement must necessarily be pertinent to that central issue." Appellee's brief at 10. Therefore, Appellee contends, the admission of defense evidence related to his confession concerns the main cause of action.

Additionally, Appellee opines that the issue is not too important to be denied review. In particular, Appellee asserts that no established, wide-ranging, and deeply-held principle is implicated by the instant appeal. In support of this position, Appellee observes that the cases relied upon by the Commonwealth involve the work product doctrine and the right to privacy. ***See Kennedy, supra; Commonwealth v. Dennis***, 859 A.2d 1270 (Pa. 2004).

Ordinarily, a party may only appeal from a final order. ***Commonwealth v. Shearer***, 882 A.2d 462 (Pa. 2005); Pa.R.A.P. 341(b).

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Exceptions to this rule, nevertheless, exist. One such exception is Pa.R.A.P. 313, which codified the collateral order doctrine. In *Shearer*, our Supreme Court discussed the applicability of Pa.R.A.P. 313 to a Commonwealth appeal from an order that granted a defendant's request to compel a child victim to undergo a psychological examination to decide the victim's competency. The Court determined that the order was separable from the main cause of action because the appeal was limited to whether the trial court had erred in ordering the victim to be psychologically evaluated prior to making its own effort to determine the competency of the witness. According to the *Shearer* Court, this question was unrelated to the issue of whether the defendant had committed the crime in question.

Similarly, in the case *sub judice*, the Commonwealth's appeal asks us to decide solely whether the trial court erred in allowing expert testimony regarding false confessions. The main issue in the case is whether Appellee committed the charged offenses. We need not determine Appellee's guilt or innocence in settling the issues presently before this Court. Hence, the Commonwealth has met the first prong of the collateral order rule.

Additionally, we find that the third prong of the rule is met because the claims will be lost if appellate review is delayed until after final judgment. The Commonwealth is barred from appealing the trial court's decision if Appellee is convicted because it will not be an aggrieved party. *Dellisanti*,

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*supra*, at 1164 n.7. Further, the Commonwealth would not be permitted to appeal from Appellee's acquittal due to double jeopardy implications. ***Minich, supra.***

In discussing the second prong of the collateral order rule, the ***Shearer*** Court emphasized that a claim is too important to be denied review if it "implicates rights deeply rooted in public policy going beyond the particular litigation at hand and does not merely affect the individuals involved in the case at hand." ***Id.*** at 469 (internal quotations omitted). Review of this order will affect more than just the parties in the case herein. The issue of whether expert testimony explaining the existence of false confessions is admissible has yet to be determined in this Commonwealth, leaving a void in Pennsylvania law.

Moreover, it pertains to an emerging issue regarding the right of an accused to present a defense and implicates the question of whether expert testimony regarding false confessions impermissibly interferes with a jury's credibility determinations. These dual implications each bear on deeply-rooted principles respecting the right to trial by jury. Accordingly, we find that the Commonwealth has satisfied each prong of the collateral order rule, and we therefore exercise jurisdiction over the instant case.

Having concluded that we have jurisdiction to decide this appeal, we next examine the Commonwealth's substantive claims. The Commonwealth

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asserts that the trial court erred in denying its motion *in limine* to bar expert testimony with respect to false confessions. In evaluating the denial or grant of a motion *in limine*, our standard of review involves that utilized to analyze an evidentiary abuse of discretion. ***Minich, supra***. Pursuant to that standard, we have held that:

The admission of evidence is committed to the sound discretion of the trial court, and a trial court's ruling regarding the admission of evidence will not be disturbed on appeal unless that ruling reflects manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous.

***Minich, supra*** at 1068 (citations omitted). Where the evidentiary question involves a discretionary ruling, our scope of review is plenary. ***Commonwealth v. Delbridge***, 859 A.2d 1254 (Pa. 2004).

The Commonwealth argues that admitting expert testimony on false confessions impermissibly invades the jury's exclusive role as the arbiter of credibility and that the expert testimony does not meet the requirements of ***Topa/Frye***. In support of its position, the Commonwealth relies on a plethora of cases finding expert testimony inadmissible because it improperly bolsters or attacks credibility. ***See Commonwealth v. Seese***, 517 A.2d 920 (Pa. 1986); ***Commonwealth v. Spence***, 627 A.2d 1176 (Pa. 1993); ***Commonwealth v. Simmons***, 662 A.2d 621 (Pa. 1995); ***Commonwealth v. Gallagher***, 547 A.2d 355 (Pa. 1988).

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The Commonwealth posits that the expert testimony regarding false confessions in the present case would be used to enhance Appellee's credibility and to attack the credibility of the detectives who took the confession. Additionally, the Commonwealth refers this Court to a host of cases decided in other jurisdictions that have ruled expert testimony on false confessions inadmissible. *See United States v. Benally*, 541 F.3d 990 (10<sup>th</sup> Cir. 2008); *United States v. Griffin*, 50 M.J. 278 (U.S.A.F. 1999); *Commonwealth v. Robinson*, 864 N.E.2d 1186 (Mass. 2007); *Riley v. State*, 604 S.E.2d 488 (Ga. 2004); *Vent v. State*, 67 P.3d 661 (Alaska App. 2003); *State v. Free*, 798 A.2d 83 (N.J.Super. 2002); *State v. Cobb*, 43 P.3d 855 (Kan.App. 2002); *State v. Davis*, 32 S.W.3d 603 (Mo.App. 2000); *State v. Ritt*, 599 N.W.2d 802 (Minn. 1999); *Kolb v. State*, 930 P.2d 1238 (Wyo. 1996); *People v. Gilliam*, 670 N.E.2d 606 (Ill. 1996); *State v. Stewart*, 633 So.2d 925 (La.App. 1994); *State v. Tellier*, 526 A.2d 941 (Me. 1987).

Appellee responds that testimony regarding the physical and psychological environment that induced a confession is relevant to whether a defendant voluntarily confessed. *See Crane v. Kentucky*, 476 U.S. 683 (1986). Accordingly, Appellee posits that expert testimony on the issue of an involuntary confession is appropriate. Further, Appellee maintains that expert testimony on false confessions is admissible since the state of mind

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of a defendant at the time of his or her confession can be brought into question at trial. **Commonwealth v. Jones**, 327 A.2d 10 (Pa. 1974). Appellee also noted that a trial court previously permitted Dr. Leo to testify in this Commonwealth as an expert witness on the issue of false confessions. **Commonwealth v. Cornelius**, 856 A.2d 62 (Pa.Super. 2004). In addition, Appellee references several court cases in outside jurisdictions that have permitted expert testimony on the subject at issue. **See United States v. Hall**, 93 F.3d 1337 (7<sup>th</sup> Cir. 1996); **Boyer v. State**, 825 So.2d 418 (Fla.App.Dist. 1 2002); **Miller v. State**, 770 N.E.2d 763 (Ind. 2002); **People v. Page**, 2 Cal.App.4<sup>th</sup> 161 (Cal.Ct.App. 1991); **Franks v. State**, 90 S.W.3d 771 (Tex.App. Ft. Worth 2002); **United States v. Smith**, 638 F.2d 131 (9<sup>th</sup> Cir. 1981).

We begin our analysis with an examination of Pennsylvania law. First, we note that Pa.R.E. 702 delineates when expert testimony is permissible. The rule provides:

If scientific, technical or other specialized knowledge beyond that possessed by a layperson 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.

Pa.R.E. 702.

Under Rule 702, both opinion and non-opinion expert testimony is admissible. Non-opinion expert testimony is testimony that consists of

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background or technical information without offering an opinion about the facts of the trial, and is allowable if it meets the other requirements of the rules of evidence. **See** Comment to Pa.R.E. 702 (“The language ‘or otherwise’ reflects the fact that experts frequently are called upon to educate the trier of fact about the scientific or technical principles relevant to the case.”).

Where a party challenges scientific knowledge as being based on a novel methodology, the proponent must establish that the methodology utilized by the expert witness is generally accepted by other practitioners in his or her field. **Topa, supra; Betz v. Pneumo Abex LLC**, 998 A.2d 962 (Pa.Super. 2010), *appeal granted* \_\_\_ A.3d \_\_\_ (Dec. 1, 2010 No. 278 WAL 2010). The proponent need only demonstrate that the witness’s methodology has achieved general acceptance in the relevant scientific community; his or her conclusions are not required to be generally accepted. **See Tucker v. Community Med. Center**, 833 A.2d 217 (Pa.Super. 2003); **Betz, supra**. This rule is commonly referred to in Pennsylvania as the **Topa/Frye** rule.

In **Grady v. Frito-Lay**, 839 A.2d 1038 (Pa. 2003), our Supreme Court reaffirmed the use of the **Topa/Frye** test, reasoning that, “requiring judges to pay deference to the conclusions of those who are in the best position to evaluate the merits of scientific theory and technique when ruling on the

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admissibility of scientific proof, as the **Frye** rule requires, is the better way of ensuring that only reliable expert scientific evidence is admitted at trial.” **Grady, supra** at 1045. The rule does not bar the expert testimony if the evidence is not developed through a novel methodology. **Betz, supra**. Where the proponent of the evidence proves that the methodology is not novel, *i.e.*, it is generally accepted, or that the science is not novel, the evidence meets the **Frye** test. **See generally Grady, supra; Betz, supra; Trach v. Fellin**, 817 A.2d 1102 (Pa.Super. 2003) (*en banc*).

Since proposed expert testimony must meet the **Frye** test before being admitted, we address the Commonwealth’s second claim, whether the trial court erred in concluding that Dr. Leo’s testimony was based on generally-accepted theories or methodology, first. This issue pertains to the gatekeeping function of the trial court in admitting expert testimony. Pursuant to the **Topa/Frye** test, before expert testimony can be introduced at trial, the proponent of the testimony must demonstrate that other practitioners in the field generally accept the methodology utilized in the area. Methodology is commonly defined as a procedure of analysis and process of research.

Initially, we note that the Commonwealth in its original motion *in limine* and now on appeal argues that the testimony of Dr. Leo is novel. After a careful review of the transcript from the **Frye** hearing, it is evident

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that the Commonwealth did not challenge the methodology used by Dr. Leo and others in his field as novel. However, since the issue was properly framed in the Commonwealth's motion and has been argued and briefed on appeal, we find the issue to be preserved. Therefore, we address its merits.<sup>6</sup>

The Commonwealth now maintains that the proposed testimony of Dr. Leo is "not supported by any generally accepted empirical data, established methodologies, or testable theories." Commonwealth's brief at 26. According to the Commonwealth, "Dr. Leo did not offer any scientific principle or theory at the pre-trial hearing." *Id.* at 27. Thus, the Commonwealth concludes that Dr. Leo's proffered testimony is not based on

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<sup>6</sup> Pa.R.E. 103 specifically provides in pertinent part:

**(a) Effect of Erroneous Ruling.** Error may not be predicated upon a ruling that admits or excludes evidence unless

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection, motion to strike or motion in limine appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or by motion in limine or was apparent from the context within which the evidence was offered.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

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generally accepted empirical data, established methodologies, or testable theories.

In contrast, Appellee argues that Dr. Leo testified that the methodologies used in his field are generally accepted and follow established protocols for conducting research. Dr. Leo specifically testified that:

General acceptance could go to a number of things, primarily, general acceptance on methodology, general acceptance on principles and theories, and general acceptance on findings. And in my opinion there's no question, there is general acceptance on all of those.

N.T., 6/17/08, at 37. The Commonwealth was provided an opportunity to contest Dr. Leo's testimony regarding his methodologies and the general acceptance of those methods at the *Frye* hearing, but neglected to do so.

Preliminarily, we observe that Dr. Leo will not be offering opinion testimony as to whether a false confession occurred in this case. Parts of Dr. Leo's testimony will consist of non-opinion expert testimony, such as the general methods utilized by police officers to interrogate witnesses. Other portions of his testimony, however, will delve into expert opinion testimony, for example, interrogation methods used by the police that are more likely to induce a false confession.

After careful review of the record, we find that based on the testimony presented at the *Frye* hearing, the trial court did not abuse its discretion in deciding that Dr. Leo's methodology was generally accepted in his field.

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Although the Commonwealth appears to argue that there is no statistical data to indicate how often false confessions transpire, the *Frye* test in Pennsylvania does not focus on scientific conclusions, *i.e.*, the specific number of false confessions that occur. Instead, as mentioned *supra*, it concentrates on the acceptance of the methods employed in the field of study.<sup>7</sup> Dr. Leo's un rebutted testimony was that his expertise is "an area of social science research widely published and studied in the normal scientific ways and scientific outlets." N.T., 6/17/08, at 37. He indicated that in reaching his conclusions, he utilized experimental studies, field observation studies, interview studies, studies based on analysis of documents, contemporary and historical materials, and opinion surveys, *i.e.*, types of studies that are routine methods utilized in performing research. Since the Commonwealth presented no testimony to refute Dr. Leo's statements, the trial court properly determined, based on the record before it, that Appellee established that Dr. Leo's methodology was generally accepted in his field.

Once expert testimony that is challenged as novel clears the hurdle of the *Frye* test, in order to be admissible, it still must involve "explanations

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<sup>7</sup> We note that some jurisdictions that have discussed the applicability of *Frye* to similar types of testimony have seemingly confused whether the scientific conclusions are generally accepted with whether the methods used to reach those findings were accepted. *See State v. Free*, 798 A.2d 83 (N.J.Super. 2002). In Pennsylvania, we are not concerned with the conclusions reached by the expert, but with the methods employed in making a finding.

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and inferences not within the range of ordinary training, knowledge, intelligence and experience," of lay persons. **Seese, supra** at 921. Thus, our courts have consistently held that it is improper to allow expert testimony on the issue of a witness's credibility. **Seese, supra; Gallagher, supra; Spence, supra; Commonwealth v. O'Searo**, 352 A.2d 30 (Pa. 1976).

In **Seese**, the sole issue was whether the trial court erred in admitting testimony of the Commonwealth's expert witness, a board-certified pediatrician, as to the veracity of eight-year-old children who allegedly were sexually abused. The prosecution questioned the witness as follows:

"Based upon your experience and your pediatric specialization, does the medical literature say anything about children of the age of eight in giving complaints of sexual abuse or rape as far as their veracity?"

**Seese, supra** at 921. Defense counsel objected and the court sustained the objection insofar as it referred to medical literature, but permitted the witness to answer the question based upon the witness's own knowledge and experience. In answering the question, the witness testified that, "It would be very unusual for them to lie." **Id.** In granting the defendant a new trial, our Supreme Court ruled that because the testimony consisted of expert opinion as to the veracity of the class of potential witnesses of which the victim was a member, it improperly interfered with the credibility functions of the jury. **Id.** at 922.

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According to the **Seese** Court, "The question of whether a particular witness is testifying in a truthful manner is one that must be answered in reliance upon inferences drawn from the ordinary experiences of life and common knowledge as to the natural tendencies of human nature, as well as upon observations of the demeanor and character of the witness." **Id.** Therefore, the **Spence** Court concluded that it was error to admit expert testimony as to the credibility of children who are of an age similar to that of the prosecution's chief witness, the crime victim.

Similarly, in **Gallagher, supra**, our Supreme Court held that the introduction of expert testimony with respect to a victim suffering from rape trauma syndrome in order to explain why the victim had repeatedly failed to identify her attacker on prior occasions was error. The Commonwealth in **Gallagher** presented expert testimony which discussed the expert witness's opinion of how rape trauma syndrome affected the identification process. In reversing both the trial court and this Court, the Supreme Court reasoned that the expert testimony was "introduced for the sole purpose of shoring up the credibility of the victim on the crucial issue of identification." **Gallagher, supra** at 357.

Our Supreme Court also analyzed the issue of expert testimony infringing on the jury's function as the arbiter of credibility in **Commonwealth v. Spence, supra**. The defendant in **Spence** attempted

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to impeach a Commonwealth witness, whom the defendant had brutally attacked, with expert testimony from a psychologist. The proposed testimony consisted of the opinion that a person under extreme stress might be unable to identify his or her attacker. In upholding the trial court's decision not to permit the testimony, the Court stated that the proposed testimony would have created an "unwarranted appearance of authority in the subject of credibility which is within the facility of the ordinary juror to assess." *Id.* at 1182.

In the instant case, based on the order of the trial court, Dr. Leo will offer no opinion or comment as to the truthfulness of Appellee's confession. Nor will Dr. Leo discuss the particular circumstances of the police interrogation of Appellee. He is not permitted to state an opinion as to whether Appellee's confession was false. Dr. Leo's testimony will instead describe police interrogation techniques and how they can, in limited instances, result in false confessions.

In *Seese, supra*, the expert's profile testimony was inadmissible because the expert opined with scientific certainty that the witness was telling the truth as to the facts of that case. *Seese*, therefore, prohibits an expert from testifying about the credibility of the witness. Thus, we find *Seese* distinguishable from the present case.

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In addition, both **Gallagher** and **Spence** prevent expert testimony that has the sole purpose of either attacking or bolstering the credibility of a witness's eyewitness identification because the evidence impedes upon the credibility functions of the jury. **See also Commonwealth v. Simmons**, 662 A.2d 621 (Pa. 1995); **Commonwealth v. Bormack**, 827 A.2d 503 (Pa.Super. 2003). As mentioned *supra*, the proposed testimony of Dr. Leo does not purport to attack the credibility of the officers involved in Appellee's confession. Neither does his testimony improperly bolster Appellee's credibility, as the testimony is limited to general police interrogation methods and those that could lead to a false confession. It will ultimately be left to the jury to determine, based on the evidence elicited from the officers involved and Appellee, whether those techniques occurred in the present case and if they resulted in a false confession.

There exists a critical difference between expert testimony with respect to eyewitness identification and expert testimony regarding false confessions. The average juror has experience witnessing and observing events and trying to recall them, and therefore is in a position to assess whether someone is being truthful. However, an ordinary layperson has no experience with police interrogation methods and how they can lead to a false confession, or understanding why an innocent individual could be compelled to make an incriminating statement. Therefore, while eyewitness

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observation and credibility determinations are within the ordinary knowledge and experience of the average juror, police interrogation techniques and those techniques that may, in limited instances, lead to false confessions, are not.

We find that expert testimony on the battered person syndrome more analogous to expert testimony regarding false confessions than expert testimony about the reliability of eyewitnesses. Both the battered person syndrome and false confessions involve a phenomenon that appears to be counterintuitive: a person staying with, or even defending an abuser for an extended period of time, and an individual admitting to something that he or she has not done. Our courts have consistently permitted expert testimony with respect to the battered person syndrome. **See Commonwealth v. Miller**, 634 A.2d 614, 622 (Pa.Super. 1993) (*en banc*). Accordingly, both **Gallagher** and **Spence** are inapposite to this case.

The principal Pennsylvania case that Appellee relies upon is **Commonwealth v. Cornelius, supra**. In **Cornelius**, the defendant asked a panel of this Court to determine whether the trial court erred in not allowing Dr. Leo to testify about the specific interrogation techniques used against the defendant and if the defendant's confession was false. The trial court therein, consistent with the trial court herein, permitted Dr. Leo to testify generally with respect to false confessions. Defense counsel claimed

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that the Commonwealth opened the door during cross-examination regarding the particulars of the interrogation at issue. The trial court, however, did not permit Dr. Leo to testify as to the precise facts of that case.

On appeal, we did not discuss the propriety of Dr. Leo's testimony. Nor did we determine whether the Commonwealth opened the door on cross-examination for case specific conclusions. Instead, we found that the issue was not properly preserved and therefore was waived. Hence, ***Cornelius*** does not address the concept of whether false confession expert testimony is admissible.

The Commonwealth and Appellee, nevertheless, have provided ample authority from other jurisdictions on the precise matter discussed herein. Although case law from outside jurisdictions is non-binding upon this Court, it can be instructive and provide persuasive authority. Thus, we examine the relevant authority from our sister states and the federal courts that have addressed this issue.

In ***United States v. Benally, supra***, the Tenth Circuit Court of Appeals dealt with the propriety of expert testimony regarding false confessions. In that case, the defendant was accused of sexually abusing two minor females on an Indian reservation. Tribal authorities referred the case to the Federal Bureau of Investigation ("FBI"). Two FBI agents

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interviewed Benally at his workplace for approximately one and one-half hours and, at the conclusion of the interrogation, he provided a written confession.

Prior to trial, Benally disavowed his confession, asserting that it was the result of coercive tactics used by the FBI agents. In support of his claim, he proffered the testimony of Dr. Deborah Davis, a professor of psychology at the University of Nevada at Reno, an expert witness on false confessions. Dr. Davis's proposed testimony would have focused on whether false confessions occur and why a person would falsely confess. She did not opine as to whether the defendant had falsely confessed.

The district court held that Dr. Davis' testimony was inadmissible, finding that it failed to meet the *Daubert* requirements of relevance and reliability. Pursuant to federal law, expert testimony that is considered novel must meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and not the previously mentioned *Frye* test.

In so concluding, the court remarked that the expert testimony at issue "encroaches upon the jury's vital and exclusive function to make credibility determinations." *Benally, supra* at 995. According to the court, the expert testimony, although not specifically addressing the credibility of the defendant, would have served the same purpose, *i.e.*, "to disregard the

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confession and credit the defendant's testimony that his confession was a lie." *Id.* Additionally, the *Benally* Court opined that the probative value of the evidence was substantially outweighed by its prejudicial impact. In making this determination, the court stated that, "the prejudice to the prosecution that would result from permitting an expert to opine that prior confessions should essentially be disregarded because they are just as likely to be true as untrue, substantially outweighs the testimony's minimal probative value." *Id.*

In the present case, however, the proffered expert testimony was not that a confession was just as likely to be true as untrue. Indeed, Dr. Leo provided that false confessions are a rare phenomenon and that the methods which can lead to false confessions also lead to true confessions. We also note that Dr. Leo's testimony is specifically relevant to the case herein because he set forth at the *Frye* hearing the various factors that could increase the likelihood of a false confession and that some factors apparently were present during Appellee's interrogation.

Moreover, unlike the *Benally* Court, we are not persuaded that Dr. Leo's testimony in the instant matter would result in the jury disregarding Appellee's confession and crediting Appellee's testimony that he lied to the police about committing the criminal act. Rather, Dr. Leo's testimony will serve to educate the jury on police interrogation techniques

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and provide an appropriate tool for the jury to utilize when assessing the testimony of both Appellee and the officers involved in his interrogation. Simply put, the jury can apply the factors testified to by Dr. Leo to the facts elicited from the officers and Appellee and determine whether Appellee's testimony that his confession was false is credible. Therefore, we find the rationale of *Benally* inapplicable to the case *sub judice*.

The Commonwealth next refers this Court to *United States v. Griffin, supra*, which was decided by the United States Court of Appeals for the Armed Forces in 1999 and involved a general court martial. The defendant in that case admitted to having improper sexual contact with his two-year-old daughter while bathing with her. On appeal, he asserted that the military judge had erred in excluding expert testimony by Dr. Rex Frank.

Dr. Frank, a licensed psychologist with a doctorate in counseling psychology, was proffered as an expert in false and coerced confessions. However, Dr. Frank admitted that he had "no scientific means of determining whether a confession is true or false[,]” and that "he had reservations about the normative-standards base on which he based his conclusions.” *Id.* at 282. Furthermore, the prosecution introduced its own witness who stated that at that time the subject area had not reached scientific acceptability. *Id.*

Dr. Frank's own hesitancy in a case decided ten years prior to Dr. Leo's

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testimony in the present case distinguishes **Griffin** from the matter herein. Dr. Leo's testimony was unequivocal and the Commonwealth presented no testimony to refute his assertion that the subject area was scientifically acceptable in 2009. Accordingly, we find **Griffin** inapplicable.

Similarly, we conclude that the case of **Commonwealth v. Robinson**, 864 N.E.2d 1186 (Mass. 2007), does not support the Commonwealth's position. According to the **Robinson** Court, the expert witness conceded that his opinions were not generally accepted, required further testing, and were not yet a subject of "scientific knowledge." **Id.** at 1190. The expert witness also admitted that his proposed testimony with respect to certain interrogation techniques having produced false confessions did not meet either general acceptance or reliability criteria governing admissibility of scientific testimony. Importantly, however, the court noted that the trial judge's conclusion that the expert testimony would have interfered with the credibility determinations of the jury was erroneous since the expert witness "was not opining on the truth of the defendant's confession, but on whether the police tactic was likely to induce a false confession." **Id.** at n.8. The court then added,

the subject of psychological manipulation of a defendant and its relation to false confessions presents a serious issue. Competent scientific evidence that satisfies the **Lanigan**<sup>[8]</sup>

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<sup>8</sup> **Commonwealth v. Lanigan**, 641 N.E.2d 1342 (Mass. 1994), is the Massachusetts equivalent to **Topa/Frye**.

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standard may well be useful to a fact finder in this area, but the evidence here fell far short of the standards governing the admissibility of scientific testimony.

***Id.***

The Georgia Supreme Court likewise based its decision as to the admissibility of expert false confession testimony in ***Riley v. State, supra***, on a determination that the methodology was, at that time, 2004, unreliable. The court in ***Riley*** noted that the expert "had never testified before a jury about false confession theory and knew of no expert who had done so in a Georgia court." ***Id.*** at 494. The expert witness himself acknowledged that his expertise derived from reading five articles about false confession theory. ***Id.*** When the trial court inquired as to whether the study of false confessions "had reached a verifiable stage of scientific certainty," the witness responded:

I don't think it's going to reach a verifiable study stage of scientific certainty until a number of years go by and we know more, do more research. We need much more research and more experience with it. I think all the writers that I have read so far agree that the phenomenon happens, we just don't know how often.

***Id.*** Thus, the rationale for the decision in ***Riley*** was that the testimony did not meet the necessary reliability requirements. That case, therefore, does not pertain to an analysis of whether expert testimony would invade the jury's exclusive role as the arbiter of credibility.

We next examine ***Vent v. State, supra***. In ***Vent***, the defendant

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attempted to call Dr. Leo as an expert witness to testify "about the psychology of confessions and how police interrogation techniques can cause innocent people to confess to crimes they did not commit[.]" *Id.* at 667.

Dr. Leo proposed to testify in the following manner:

there is the common belief that people do not make unreliable or false statements unless they're tortured or mentally ill. And I would explain that that-that's not the case, sometimes people do make false statements, even if they're not physically tortured or mentally ill, that there-there is psychological research that explains how certain techniques can lead people to make the decision to confess whether they're guilty or innocent. And that there are certain principles of analysis that researchers use to evaluate whether or not a statement is likely reliable or likely unreliable....

*Id.*

The *Vent* Court noted that there existed a split in authority on the issue of the admissibility of expert testimony on false confessions in other jurisdictions. It further elucidated that its standard of review was for abuse of discretion and determined that "whether to admit Dr. Leo's testimony and the determination whether his testimony would appreciably aid the jury in this case is a question that fell within the broad discretion reserved to the trial court." *Id.* at 670.

In reaching its conclusion, the court quoted at length from a law review article. The article, which was published more than eleven years ago in 1999, reads in pertinent part:

false confession theory needs further study and refinement.

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Consequently, the admission of expert testimony based on this new theory is premature and therefore unreliable. Currently, the empirical base that supports the theory has too many unanswered questions, no known error rate, and just one laboratory experiment to back it up. This foundation cannot support reliable conclusions just yet.

....

Still, the admissibility of expert testimony based on the psychology of false confessions cannot be ruled out. Two federal appellate courts have found this testimony admissible and the state courts are split on the issue of the reliability of this theory. In light of the *Kumho Tire Co.*<sup>9</sup> case, no trial court judge should fear the appellate courts on the reliability issue. Almost every trial judge who found this evidence reliable or unreliable has been upheld on appeal. Few have been found to abuse their discretion.

*Id.* citing Major James R. Agar, II, *The Admissibility of False Confession Expert Testimony*, 1999 Army Law 26, 42-43 (1999) (footnote added). The *Vent* Court did not conclusively find that expert testimony on false confessions was inadmissible as a matter of law because it always interfered with the function of the jury. Instead, the court left it within the broad discretion of the trial court to determine the admissibility of the expert testimony.

A significant period has passed since the conclusions reached in that article were published and the trial court decision was rendered in that

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<sup>9</sup> *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

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case.<sup>10</sup> Considerable study has transpired in the intervening years.<sup>11</sup> Thus, we find that the legal reasoning employed in *Vent* weighs neither in favor of nor in opposition to the Commonwealth's position herein.

Dr. Leo's testimony was also the subject of appeal in the Kansas case of *State v. Cobb, supra*. The prosecution in *Cobb* sought, via a pretrial motion *in limine*, to preclude the defendant from calling Dr. Leo to testify. At the pretrial *Frye* hearing, Dr. Leo proffered substantially the same testimony he tendered in the present case. The trial court permitted Dr. Leo to present testimony regarding false confessions and the correlation between false confessions and interrogation methods. *Id.* at 861. However, it did not allow him to testify about the voluntariness of the confession. *Id.* During trial, Dr. Leo opined that the officers involved told the defendant that

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<sup>10</sup> Dr. Leo testified at trial in the *Vent* case in 1998.

<sup>11</sup> Since 1999, myriad publications on the subject have been published. *See e.g.* Danielle E. Chojnacki, Michael D. Cicchini & Lawrence T. White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST.L.J. 1 (2008); Peter Kageliery, Jr., *Psychological Police Interrogation Methods: Pseudoscience in the Interrogation Room Obscures Justice in the Courtroom*, 193 Mil. L. Rev. 1 (2007); Jacqueline McMurtie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 Am. Crim. L. Rev. 1271 (2005); Saul M. Kassin, *Does Innocence Put Innocents at Risk?*, 60 AM PSYCHOLOGIST 215 (2005); Saul M. Kassin & Gili H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT 33 (2004); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. REV. 891 (2004); Gisli H. Gudjonsson, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK* (2003); Saul M. Kassin, Christine C. Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187 (2003).

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they knew he committed the crime, confronted him with irrefutable evidence of his guilt, and suggested that they wanted to help him. *Id.* Dr. Leo further provided that some of these techniques have contributed to false confessions.

On cross-appeal, the prosecution, which had obtained a conviction, argued that the trial court erred in allowing Dr. Leo's testimony. The Kansas Court of Appeals agreed. In rendering its decision, the *Cobb* Court, like other courts before it, acknowledged the diverse authority on the issue. Nevertheless, relying on a Missouri appellate decision, *State v. Davis, supra*, the court held that Dr. Leo's testimony "invaded the jury's province to make a credibility determination about the defendant's statement." *Cobb, supra* at 861.

Instantly, the trial court has not permitted Dr. Leo to testify about what the officers told Appellee when interrogating him. Indeed, the trial court specifically barred Dr. Leo from discussing the circumstances related to Appellee's interrogation and applying those facts to determine if Appellee's confession was false. Testimony about the facts of the interrogation must be elicited from the officers themselves as well as Appellee.<sup>12</sup> Dr. Leo

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<sup>12</sup> It would be this testimony by police and Appellee that would make evident the relevancy of Dr. Leo's expert opinion. Relevancy is broadly defined by our rules of evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

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cannot state that the officers involved told Appellee that they knew he committed the crime, confronted him with irrefutable evidence of his guilt, and suggested that they wanted to help him. Instead, Dr. Leo's testimony would be limited to educating the jury on the process employed by police officers during interrogations and which methods may lead to a false confession. It will be up to the prosecution and defense counsel to examine both the officers involved and Appellee to establish that those techniques were used and his inculpatory statement was not truthful. Thus, unlike **Cobb** and **Davis**, the jury's credibility-determining function will not be disturbed.

In a 2002 decision, **State v. Free, supra**, the New Jersey Superior Court also held expert testimony on false confessions inadmissible. The defendant therein tendered Dr. Saul Kassin, Ph.D., as an expert witness. Dr. Kassin proposed to testify about various police interrogation techniques including sleep deprivation, withholding of food, selective and partial recording of interviews, isolation, confrontation with fabricated evidence and

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evidence." Pa.R.E. 401. Evidence that false confessions do occur when the individual being interrogated is a person of extremely low intelligence, who is inexperienced with law enforcement, sleep deprived, and continuously denies committing a crime for a series of hours before confessing, could make a fact of consequence more or less probable, *i.e.*, whether a false confession occurred, if the testimony of the officers and Appellee and any other witnesses indicate that such factors existed. Of course, a defendant would not be entitled to expert testimony on false confessions in the situation where the factors that are considered to increase the likelihood of a false confession are not present.

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other related police methods. In addition, *Free* involved five days of expert testimony from a Commonwealth witness whose opinion was that the study of false confessions at that time, pre-2002, lacked a reliable scientific foundation. The *Free* Court indicated that the record did not support "the proposition that the general public believes that a person who confesses must be guilty." *Id.* at 93. It held that the premises of the testimony had not gained general acceptance and the testimony did not meet the *Frye* test, which we addressed earlier in this opinion.

Additionally, the court, citing to cases that discussed eyewitness expert testimony, concluded that the testimony did not concern a matter beyond the knowledge of the average juror. For reasons already delineated, we believe that expert testimony regarding eyewitness identification is sufficiently different from testimony with respect to false confessions and does not support a finding that the average juror understands the psychology behind false confessions or police interrogation techniques. Insofar as *Free* required the proponent of false confession testimony to demonstrate that the public believes a person who confesses must be guilty before allowing an expert witness on the subject, we find that no such requirement is mandated in Pennsylvania.

Our rules of evidence and case law interpreting those rules establish that a proponent of expert testimony need only demonstrate that the

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evidence will aid the trier of fact on an issue that is outside of his or her common knowledge. Police interrogation techniques of suspects and how they might provoke a false confession are not within the common experience of a juror. The average juror is unlikely to have undergone a police interrogation<sup>13</sup> or understand that an innocent individual can be compelled to make incriminating statements. Our own rules of evidence presume that a person is unlikely to make a statement against his penal interest, thereby indicating that a false confession is outside the normal purview of the average person's experience. Pa.R.E. 804(b)(3).

In analyzing the additional relevant cases provided by the Commonwealth, *Kolb v. State*, *supra*, *State v. Tellier*, *supra*, and *State v. Ritt*, *supra*, we conclude that these cases are each readily distinguishable.<sup>14</sup> In *Kolb*, the proposed defense expert had not conducted

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<sup>13</sup> Felons are not permitted to serve on juries within this Commonwealth. 42 Pa.C.S. § 4502.

<sup>14</sup> The Commonwealth also has cited *State v. Stewart*, 633 So.2d 925 (La.App. 1994); *People v. Gilliam*, 670 N.E.2d 606 (Ill. 1996); and *People v. Green*, 683 N.Y.S.2d 597 (N.Y.App.Div. 3d 1998). After reviewing these cases, we find that they do not provide any substantive discussion that is helpful to the claim herein. *Gilliam* made only a conclusory statement that whether a defendant falsely confessed to protect his family was not difficult to understand and not beyond the understanding of an ordinary citizen. In *Stewart*, defense counsel asked an expert witness to give an opinion on whether or not the defendant intelligently waived his rights and gave a confession. *Green* found that the proposed expert testimony would have unnecessarily confused the jury and had little probative value. We note that subsequently a trial court in New York permitted expert testimony on false

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any studies or received formal training in the field of false confessions and, according to the court, had viewed one television program that referred to false confession syndrome. Additionally, the expert testimony offered in *Tellier*, "amounted to nothing more than an assertion that false confessions do occur." *Tellier, supra* at 944. Dr. Leo's testimony, as outlined previously, far exceeds an unvarnished claim that false confessions happen.

In *Ritt*, the defendant tendered an expert witness to play a videotape of the defendant's confession for the jury and indicate the specific techniques designed to coerce an inculpatory statement. The trial court, in the present case, prevented Dr. Leo from directly applying his expertise to the interrogation of Appellee.

We find the discussion in *United States v. Hall, supra*, and the cases that have adopted its rationale more applicable to the instant case.<sup>15</sup> In *Hall*, the defendant proffered Dr. Richard Ofshe as an expert in police interrogation techniques and coerced confessions. Dr. Ofshe was widely

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confessions. *See People v. Kogut*, 806 N.Y.S.2d 366 (Sup.Ct. N.Y. 2005). However, in *People v. Bean*, 885 N.Y.S.2d 804 (N.Y.A.D. 4 Dept. 2009), such testimony was precluded.

<sup>15</sup> We remain cognizant that *Hall* applied the federal *Daubert* test. *Daubert* is considered a more liberal standard than our *Frye* test. The test announced in *Daubert* requires the trial judge to "make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and can be applied properly to the facts at issue." *Commonwealth v. Smith*, 995 A.2d 1143, 1174 n.1 (Pa. 2010) (Baer, J. concurring). Thus, under *Daubert*, there is no requirement that the expert testimony be generally accepted.

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published and had worked extensively with law enforcement officials and defense counsel. He provided that he would testify regarding "the fact that experts in his field agree that false confessions exist, that individuals can be coerced into giving false confessions, and that certain indicia can be identified to show when they are likely to occur." *Id.* at 1341. Additionally, Dr. Ofshe explained his methodology and what factors distinguish reliable and unreliable confessions. *Id.* The trial court denied admission of Dr. Ofshe's testimony in its entirety, finding that Dr. Ofshe would need to judge the credibility of the officers who conducted Hall's interrogation and that his opinions would add nothing to what the jury knew from common experience.

In overruling the trial court, the *Hall* Court remarked that, "If the expert testimony would be helpful and relevant with respect to an issue in the case, the trial court is not compelled to exclude the expert just because the testimony may, to a greater or lesser degree, cover matters that are within the average juror's comprehension." *Id.* at 1342. It further opined that properly conducted social science research often shows that commonly-held beliefs are in error. *Id.* at 1345.

Similarly, in *Boyer v. State, supra*, the Florida District Court of Appeals held that the trial court erred in not allowing expert testimony from Dr. Ofshe. The trial court therein determined that Dr. Ofshe's testimony met

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the *Frye* requirements; nevertheless, it excluded the testimony on the basis that it would not assist the jury in understanding the facts at issue. *Id.* at 419. In reversing the decision, the *Boyer* Court quoted from *Hall, supra*, stating that the evidence “would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried.” *Id.* at 420 (quoting *Hall, supra* at 1345).

Likewise, the Supreme Court of Indiana, in *Miller v. State, supra*, reversed a trial court’s decision to preclude expert testimony from Dr. Ofshe. Dr. Ofshe testified prior to trial as follows:

The nature of the testimony is going to be: one, about the general way in which police interrogation works which fits the description that [the officer who conducted the interview] gave about the tactics that he used; second, it will be about those things that can lead to someone giving a false confession; and third, it will be about how to take the undisputed record of the interrogation, the recorded part of it and analyze it, in terms of trying to figure out what is-what the indicia of a true or false confession might be-and thereby for the jurors to reach their decision about how much weight to give it. My role is only to point out what things ought to be considered.

*Id.* at 770-771. In remanding for a new trial, the Indiana Supreme Court held that “the general substance of Dr. Ofshe’s testimony would have assisted the jury regarding the psychology of relevant aspects of police interrogation and the interrogation of mentally retarded persons, topics outside the common knowledge and experience [of a jury].” *Id.* at 774.

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In addition, in both *People v. Page, supra* and *Callis v. State*, 684 N.E.2d 233 (Ind.App. 1997),<sup>16</sup> the courts permitted limited expert testimony on coerced confessions. The expert witness in each case was allowed to testify about the general factors that can influence a person to make a false confession and to give general examples of those factors. They were not authorized to testify about the specific facts of their respective cases.<sup>17</sup> Even though there was no challenge on appeal to the admission of the limited testimony, each court approved of the trial court's delineation between permissible and impermissible false confession expert testimony.

Since it is not within the average juror's common knowledge to know what causes a person to give a false confession, Dr. Leo's testimony will aid the jury in deciding the case. It has long been settled that a defendant may introduce relevant evidence to demonstrate that his confession was involuntary. *See Commonwealth v. McClean*, 247 A.2d 640 (Pa.Super.

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<sup>16</sup> *Callis v. State* was decided prior to *Miller v. State*, 770 N.E.2d 763 (Ind. 2002) discussed *supra*. Accordingly, it is clear that Indiana permits almost identical testimony that has been allowed herein.

<sup>17</sup> We note that in *Franks v. State*, 90 S.W.3d 771 (Tex.App. Ft. Worth 2002), Dr. Leo was permitted to testify on false confessions. We do not discuss the case herein because there was no challenge to the admission of his testimony or legal discussion regarding his statements made at trial. Nevertheless, it is evident that Texas has permitted false confession expert testimony. Similarly, in *State v. Gilman*, 702 S.E.2d 276 (W.Va. 2010) and *Commonwealth v. McCowen*, 458 Mass. 461 (Mass. 2010), expert testimony on false confessions was permitted.

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1968); **see also** Pa.R.Crim.P. 581(J).<sup>18</sup> In the case *sub judice*, Dr. Leo's testimony could give the jury a reason to reject the common sense evaluation that an individual does not ordinarily confess to perpetrating a crime he or she has not committed. It will, however, be up to the jury to weigh this testimony against any other evidence introduced at trial.

As a whole, the cases cited by the Commonwealth provide sparse reasoning for concluding that the type of expert testimony offered by Appellee is within the common knowledge of the jury and would infringe on the jury's credibility determining function. Even those jurors who are aware of police interrogation techniques, or believe that they are aware by watching media and television, are unlikely to understand how these methods can lead to an innocent individual confessing. As we do not find that the proposed expert testimony in this case impermissibly interferes with the jury's ability to determine the credibility of Appellee or improperly attacks the credibility of the police officers involved in his interrogation, we hold that the trial court did not commit an abuse of discretion in deciding that Dr. Leo's testimony would not infringe on the jury's role as arbiter of credibility.

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<sup>18</sup> Pa.R.Crim.P. 581 governs suppression motions. The comment to the rule states in pertinent part, "Paragraph (J) does not change the Massachusetts or 'humane rule' (whereby a defendant may raise the issue of voluntariness of a confession to the jury following denial of a motion to suppress) which is followed in the Commonwealth."

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In sum, we hold that the proposed testimony of Dr. Leo, who is qualified in the area, is based on generally accepted methods of study, is information that is beyond the ordinary experience of the average juror, and will assist them in assessing the testimony of both the police officers and Appellee. Instantly, Appellee's extraordinarily low IQ, the prolonged length of his interview that began at 2:00 a.m., the lack of detail in his confession,<sup>19</sup> the alleged continual interruptions of his denials and purported use of fabricated evidence are all factors present in this case that, according to Dr. Leo, increase the likelihood of a false confession, rendering Dr. Leo's proposed testimony relevant.<sup>20</sup> Dr. Leo's expert testimony will not improperly bolster the credibility of Appellee or attack the credibility of the law enforcement officials, but rather, will educate the jury and provide an appropriate tool with which to examine the testimony of Appellee and the officers involved in his interrogation. Therefore, the trial court did not commit an abuse of discretion, and we affirm.

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<sup>19</sup> Appellee was unable to state what type of gun he used, providing only that it was a silver automatic.

<sup>20</sup> It is precisely because Appellee's case involves so many of the factors that may lead to a false confession that Dr. Leo's testimony is both permissible and relevant. This is simply not a matter where a putative expert is being offered to testify regarding matters that occur in other instances but did not transpire in the instant case. For these reasons, we respectfully disagree with our esteemed colleague, President Judge Emeritus McEwen, that the Commonwealth's failure to set forth a relevancy argument is perplexing.

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Order affirmed. Case remanded. Jurisdiction relinquished.

Judge Stevens files a Dissenting Memorandum.

P.J.E. McEwen files a Concurring Statement.

Judgment Entered.

  
Prothonotary

MAR 14 2011

Date: \_\_\_\_\_

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COMMONWEALTH OF PENNSYLVANIA,

IN THE SUPERIOR COURT OF PENNSYLVANIA

Appellee

v.

JOSE ALICIA,

Appellant

No. 2445 EDA 2008

Appeal from the Order Entered August 12, 2008  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0107261-2006

BEFORE: STEVENS, BOWES, JJ., and McEWEN, P.J.E.

**FILED MARCH 14, 2011**

DISSENTING MEMORANDUM BY STEVENS, J.:

While I agree with the Majority that the Order in question is not interlocutory, I respectfully dissent.

The Majority stresses that the trial court limited Dr. Leo's testimony in that he will not be permitted to testify about the precise allegations underlying Appellee's confession or to specifically state police officers in this case utilized interrogation methodologies which increased the risk of false confession. Nevertheless, I agree with the Commonwealth's position that admitting expert testimony on false confessions impermissibly invades the jury's exclusive role as the arbiter of credibility.

The Commonwealth cites to several cases wherein our Supreme Court found expert testimony to be inadmissible because it improperly bolstered or attacked credibility as well as to numerous caselaw from other jurisdictions

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that have ruled expert testimony on false confessions was inadmissible. Among those cases is **Commonwealth v. Simmons**, 541 Pa. 211, 662 A.2d 621 (1995) where in finding the trial court properly excluded an appellant's proposed expert testimony the Court reasoned as follows:

It has long been established that expert testimony is only admissible where formation of an opinion on a subject requires knowledge, information, or skill beyond that possessed by the ordinary juror. **Commonwealth v. Seese**, 512 Pa. 439, 442, 517 A.2d 920, 921 (1986). Expert opinion cannot be offered to intrude upon the jury's basic function of deciding credibility. **Commonwealth v. Spence**, 534 Pa. 233, 245, 627 A.2d 1176, 1182 (1993) (testimony of psychologist as to the effects of stress upon people who are called to make identifications was properly excluded); **Commonwealth v. Gallagher**, 519 Pa. 291, 547 A.2d 355 (1988) (error to allow expert witness in the area of rape trauma to explain that such trauma could prevent a victim from making a timely identification of assailant); **Commonwealth v. Davis**, 518 Pa. 77, 541 A.2d 315 (1988) (error to allow expert to testify that child sex abuse victims generally lack the ability to fabricate stories of sexual experiences).

Here, appellant's expert would have testified generally about the reliability of eyewitness identification. Such testimony would have given an unwarranted appearance of authority as to the subject of credibility, a subject which an ordinary juror can assess. . . .

**Simmons**, 541 Pa. at 230-231, 662 A.2d at 630-631, *cert. denied*, 516 U.S. 1128, 116 S. Ct. 945 (1996).

While Dr. Leo will not proffer opinion testimony as to whether a false confession occurred in the case *sub judice*, his testimony will explore interrogation methods used by police that allegedly are more likely to induce a false confession. It is reasonable to conclude such expert testimony on

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false confessions will invite jurors to determine those techniques, in fact, occurred in the present case. Even a general discussion of interrogation methods police may use that are more likely to induce a false confession will enhance Appellee's credibility and attack that of the detectives who took his confession. An average juror who has been instructed to weigh only the evidence before him or her throughout trial logically could reason that Appellee would not have presented Dr. Leo's testimony had officers properly conducted their interrogation. Therefore, I would adopt the reasoning set forth by the Tenth Circuit Court of Appeals in ***United States v. Benally***, 541 F.3d 990, 995 (10<sup>th</sup> Cir. 2008) and find that an expert's proposed testimony which would have focused generally on when and why individuals falsely confess "encroaches upon the jury's vital and exclusive function to make credibility determinations," even where the expert did not intend to opine as to whether the defendant therein had falsely confessed.

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COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

JOSE ALICIA,

Appellee

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2445 EDA 2008

Appeal from the Order Entered August 12, 2008, in the Court of Common Pleas of Philadelphia County, Criminal Division, at No. CP-51-CR-0107261-2006.

BEFORE: STEVENS, BOWES, JJ., and McEWEN, P.J.E.

**FILED MARCH 14, 2011**

**CONCURRING STATEMENT BY McEWEN, P.J.E.:**

While the author of the lead Memorandum provides a comprehensive expression of rationale in support of the decision to affirm the ruling of the eminent Judge Benjamin Lerner, I, most respectfully, write separately since I view the issue before us as considerably narrower than the question discussed by the Memorandum.

We are here called upon to review the ruling of the trial court upon a Commonwealth motion *in limine*. Such decisions are, by their nature, malleable, and, depending on additional information produced at trial, subject to amendment by the judge who conducts the trial. The decision of the trial court that we here consider permitted defense counsel to offer the testimony of Dr. Leo, but restricted his testimony to the general subject of

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coerced confessions.<sup>1</sup> As the Memorandum aptly notes, Dr. Leo was not permitted to offer "opinion testimony as to whether a false confession occurred in this case," or to express an "opinion or comment as to the truthfulness of Appellee's confession."<sup>2</sup> Thus, the question arises as to the relevance of Dr. Leo's testimony to the present case, since academic opinions (1) that coerced confessions are possible, and (2) that there are conditions under which coerced confessions are more likely to happen, necessarily exist in a vacuum unless tied to the facts of a particular case. Had the Commonwealth in this appeal presented an argument based on the relevance of the limited testimony of Dr. Leo, I would have been inclined to reverse the order of the motion court, since it is clear to me that the testimony which the motion court would allow is not relevant to the critical issues which the jury is to consider. While aware of the differing view of the

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<sup>1</sup> At the close of the hearings on the motion *in limine* the trial judge stated that he would allow the Dr. Leo testify to the following:

[T]o testify generally about false confessions, to testify generally in terms of his knowledge and his research and other people's research that he's familiar with, about police methods and police training methods, police interrogation methods, and to testify generally about why certain interrogation techniques, if used in a particular case, may increase the risk of a false confession.

N.T. August 6, 2008, pp. 6-7.

<sup>2</sup> Memorandum, pp. 20, 24.

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author of the lead Memorandum,<sup>3</sup> I am of the mind that the failure of the Commonwealth to raise the issue of relevance in its arguments is indeed perplexing. I am thereby compelled to refrain from expression of a dissenting position and proceed instead to this Concurring Statement.<sup>4</sup>

Consequently, on this record, I find no abuse of discretion in the decision of the trial court to deny the full relief sought by the Commonwealth upon the motion *in limine*.<sup>5</sup>

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<sup>3</sup> Memorandum, p. 45 n. 20.

<sup>4</sup> It bears emphasis that, in my view, the Commonwealth might yet well raise a relevancy argument during the course of the trial of this case, and I would not preclude the trial judge from sustaining an objection of the Commonwealth based upon what would be a fuller record.

<sup>5</sup> The presentation of expert testimony, which began more than a century ago as a tremor, has become an avalanche in the present time. Expert testimony is customarily presented by self-described, forensic specialists, usually academics, who proffer opinions on critical issues in both civil and criminal forums. In the words of one observer, more cynic than authority: *Nothing sells in a jury trial like a forensically skilled Ph.D.'s opinion.*

It is to be emphasized, however, that there is a couloir of reliability between the opinion of scholars upon the mechanics of material objects, and that of scholars upon the mechanics of the mind.

The search for the truth would be greatly aided, of course, were the police required to conduct the interrogation of suspects, and even witnesses, before cameras for preservation on videotape, and thereby minimize, if not eliminate, the presentation of dueling academics addressing the physiological and psychological issues which attend confessions.