STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

JEROME WALTER KOWALSKI,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
September 30, 2021

No. 355456
Livingston Circuit Court
LC No. 08-017643-FC

Before: BECKERING, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] an order granting in part a motion to strike filed by the prosecutor. The motion sought to exclude the expert testimony of Dr. Richard Ofshe at defendant's upcoming trial. Defendant argues that the trial court abused its discretion by limiting Dr. Ofshe's testimony. The prosecutor has filed a cross-appeal, contending that the trial court abused its discretion by allowing Dr. Ofshe to testify at all. Because we conclude that the trial court's evidentiary decision did not constitute an abuse of discretion, we affirm.

I. BACKGROUND

The Supreme Court previously summarized the background of this case:

> In May 2008, the brother and sister-in-law of defendant, Jerome Walter Kowalski, were found dead in their home. Defendant was charged with both murders. Testimony elicited at defendant's preliminary examination and *Walker* hearing indicates that police questioned defendant about the killings four times over the course of several days: first at defendant's home, next at the Brighton Police

[1] *People v Kowalski*, unpublished order of the Court of Appeals, entered March 18, 2021 (Docket No. 355456).

> Station, then at the Ann Arbor Police Department, and finally at a Michigan State Police post.
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> During the third interview session, defendant acquiesced to the interviewer's statement that there was a "fifty percent chance [he killed his brother], but a fifty percent chance [he] didn't." Defendant discussed having a "blackout" and "blurred" memory and stated, "I thought I had a dream Thursday, but it was the actual shooting."
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> Defendant confessed to the murders during the last interview session, which followed a night in jail. Defendant stated that he went to his brother's home, walked into the kitchen, and murdered his brother and sister-in-law after a brief verbal exchange. The record suggests that defendant initially described shooting his brother in the chest from a distance of several feet, although he eventually changed his account after a detective illustrated through role-playing that defendant's first version of events did not corroborate the evidence recovered from the victims' house. At this point in the pretrial proceedings, defendant's confession is the primary evidence implicating him in the murders. [*People v Kowalski*, 492 Mich 106, 110-111; 821 NW2d 14 (2012).]

The question before the Supreme Court was whether the trial court erred by precluding defendant from presenting two expert witnesses in support of his defense that his statements to the police constituted a false confession. Defendant had intended to call Dr. Richard Leo and Dr. Jeffrey Wendt. Leo was to testify regarding false confessions. He classified confessions as "proven false"; "highly probable" or "probable false" confession—and he did this by "comparing the narrative of a defendant's confession with other evidence, checking whether the confession led to independent evidence, and looking for other indicia of reliability, with a researcher determining whether the confession fell into one of the three categories of false confessions." *Id.* at 112-113 (quotation marks omitted). Wendt, a forensic psychologist, had done a psychological evaluation of defendant and would have testified about how his findings relate to defendant's susceptibility to being manipulated into giving a false confession.

The Supreme Court first held that, contrary to the trial court's ruling, "the claim of a false confession is beyond the common knowledge of the ordinary person," and therefore "expert testimony about this phenomenon is admissible under MRE 702 when it meets the other requirements of MRE 702." *Id.* at 129. But the Court explained that "[a]n expert explaining the situational or psychological factors that might lead to a false confession may not 'comment on the . . . truthfulness' of a defendant's confession, 'vouch for the veracity' of a defendant recanting a confession, or 'give an opinion as to whether defendant was telling the truth when he made the statements to the police.' " *Id.* (footnotes omitted). The Court then moved on to the remaining parts of the MRE 702 analysis and held that the trial court did not abuse its discretion by excluding Dr. Leo's testimony on the ground that his methodology was unreliable. See *id.* at 132-133. But the Court held that the trial court's basis for excluding Dr. Wendt from testifying regarding

defendant's psychological profile was erroneous and remanded for further proceedings.[2] *Id*. at 136-138.

Defendant was tried before a jury in 2013 and was found guilty of two counts of first-degree murder and two counts of felony-firearm. On stipulation of the prosecutor, however, the trial court granted a motion for relief from judgment because of a structural error.[3] Defendant is now set to be retried. At the upcoming trial, he seeks to call Dr. Richard Ofshe. Dr. Ofshe holds a Ph.D in sociology and is a professor emeritus of sociology at the University of California at Berkeley. Dr. Ofshe has been admitted as an expert on the subject of police interrogation techniques on more than 380 occasions in federal, state and military courts, and has conducted extensive research on extreme forms of influence in this and other settings. The notice of Dr. Ofshe's proposed testimony provided that he would give expert testimony regarding the persuasive effect of police interrogation techniques and how those techniques are used to elicit a confession from a suspect. Dr. Ofshe said he would also explain that in cases later found to have involved false confessions certain known interrogation techniques were used. Ofshe also intended to apply his knowledge of police interrogation to Kowalski's interrogation, showing that the tactics used by the officers influenced Kowalski to comply with the officer's demand for a confession.

The prosecutor moved to strike Dr. Ofshe's proposed testimony. The prosecutor argued that Dr. Ofshe's opinion would rely on the same methodology and research as Dr. Leo, and thus Dr. Ofshe's testimony was also unreliable and thus inadmissible under MRE 702.

The trial court held a *Daubert*[4] hearing where Dr. Ofshe testified at length regarding his qualifications, research, and methodology. Dr. Ofshe explained that his expertise is in police interrogation techniques. He examines how certain tactics—in particular, those used in the Reid method of interrogation—are used by interrogators. Dr. Ofshe divides interrogations into "themes or strings" that run throughout the interrogation. One tactic explained by Dr. Ofshe is an "evidence ploy," which is a statement made to the suspect indicating that there is evidence of some sort linking him or her to the crime. The statement may be true, may be exaggerated, or may be entirely fabricated. Another interrogation tactic is "laying out possible narratives or elements of narratives for the confession statement." As an example, the officer may characterize the crime as "an event that may not appear to be a crime to the suspect to make it easier to adopt . . . this explanation." This is frequently accompanied by the interrogator indicating that if the suspect states "the kind of story that [the interrogator has] been suggesting, that will result in [the suspect] receiving little to

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[2] Dr. Wendt was allowed to testify at defendant's first trial.

[3] The trial had been held before a former Livingston District Court judge who, following defendant's first trial, was removed from the bench because, among other reasons, she failed to disclose the extent of her communications and relationship with Detective Sean Furlong to the parties in this case. Furlong was the co-officer in charge in this criminal matter, testified at defendant's trial, and took defendant's confession. The judge also discussed the case with Furlong before trial began. See *In re Brennan*, 504 Mich 80; 929 NW2d 290 (2019).

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

no punishment." Dr. Ofshe also testified that he would explain to the jury the importance of distinguishing between "contaminated information" about the crime introduced by the interrogator and statements volunteered by the suspect. Specifically, Dr. Ofshe "would be sensitizing the jury to the importance of distinguishing between contaminated and uncontaminated and looking at volunteered statements and comparing volunteered statements to the evidence of the case." Overall, Dr. Ofshe will "explain to the jury how interrogation works in general and then be able to show the jury how the interrogation in the case at issue works specifically." Dr. Ofshe would not, however, testify that a defendant's confession is or is not false. Dr. Ofshe views his role as "educat[ing] the jurors so they can do their job better and more intelligently." Rather than offering an opinion as to the truth or falsity of a confession, he explained that his testimony would be "about the tactics that are used to move someone from denial to admission—whether they committed the crime or did not commit the crime." Dr. Ofshe studies "what the interrogators do and the react[ion]s of the suspect." He denied that he would explain to a jury how to infer from the interrogation methods used whether a confession was false.

As applied to this case, Dr. Ofshe denied that he would identify portions of Kowalski's confession that did not comport with the facts or were the product of contaminated information. He also would not be explaining to the jury how it should interpret the interrogation tactics used in this case**.** But Dr. Ofshe did testify that after explaining to the jury how the interrogation process worked, he intended to then take the jury through defendant's interrogation and explain how the process "worked in this particular case." He would "show the entire string that was used to accomplish the change that occurred" from the beginning of the interrogation to the point where "the person begins to adopt the crime or adopt the event at issue."

In a post-hearing brief, defendant argued that Dr. Ofshe's proposed testimony should be admitted under MRE 702 and that all elements of the rule were satisfied. The prosecutor's brief, filed the following day, took issue with every portion of the MRE 702 analysis. The prosecutor also argued that the testimony would not assist the trier of fact, as Dr. Ofshe would only testify to what any juror would already know: that the police exert pressure on suspects in various ways, which can cause a defendant to then admit responsibility; and that when a suspect is given information about a crime, a later confession incorporating those same facts may be "contaminated" by that same information. The prosecutor also pointed out that at no point had Dr. Ofshe explained what problematic techniques were used in defendant's own interrogation. Thus, it did not appear that Dr. Ofshe's testimony could satisfy the requirement that he applied his methods reliably to the facts of this case. The prosecutor maintained that admission of the testimony would be more prejudicial than probative, and thus, Dr. Ofshe's testimony should be excluded under MRE 403. About six months later, defendant filed a "supplemental closing argument," which informed the trial court that Dr. Ofshe had been qualified to testify as an expert in police interrogation in a different criminal matter by a different Michigan circuit court.

A few months later, the trial court issued its opinion. The trial court first explained that, pursuant to *Kowalski*, 492 Mich 106, Dr. Ofshe's proposed testimony would be helpful to the jury, as persuasive interrogation techniques were outside the ordinary knowledge of a juror. The court also concluded that Dr. Ofshe was qualified to provide testimony regarding police interrogation techniques and that they have resulted in confessions, both true and false. Further, the "study of false confessions – as a discipline – has sufficient scientific rigor to warrant its presentation to the jury." However, the trial court explained that what was missing in this case was a showing that

Dr. Ofshe had applied the scientific principles and methods reliably to the facts of this case. The record did not show that Dr. Ofshe had reviewed defendant's own interrogation. While he discussed problematic police techniques at the evidentiary hearing, he did not identify whether any of those techniques were actually used in this case. The trial court stated that it was left "with an 'analytical gap' between Dr. Ofshe's expertise on false confessions and the facts of this case." Accordingly, the court ordered that Dr. Ofshe could testify "concerning the existence of false confessions and that certain techniques correlate to an increased likelihood of false confessions," but precluded him from providing any case-specific testimony.

Defendant moved for reconsideration, arguing that Dr. Ofshe should be allowed to explain whether there were signs of a false confession in this particular case. Defendant noted that the prosecutor's initial motion to strike had not challenged whether Dr. Ofshe had reliably applied the relevant principles and methods in this case. Defendant asserted that he "stands ready" to have Dr. Ofshe "testify as to exactly what concerning issues he found to be present in the interrogation of [d]efendant, and how the science of his work would suggest fallibility might be present in the results thereof." (Emphasis omitted).

The trial court denied the motion for reconsideration, explaining that it was defendant's burden to establish that each part of the MRE 702 analysis was satisfied. Defendant had multiple opportunities to address whether Dr. Ofshe had applied his methods reliably to this case. And even at that point, with the trial court's decision in hand, defendant could only assert that Dr. Ofshe *could* provide the missing information at another hearing. Defendant had provided no testimony regarding the confession in this case. The trial court declined to allow defendant another opportunity to present the missing information, and denied the motion.

Defendant then sought leave to appeal in this Court, and this Court granted the application. The prosecutor has filed a cross-appeal.

II. ANALYSIS

A. PROSECUTOR'S CROSS-APPEAL

We will first address the prosecutor's argument that the trial court erred by allowing Dr. Ofshe to provide expert testimony on police interrogation techniques and false confessions.[5]

> MRE 702 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

[5] Evidentiary decisions are reviewed for an abuse of discretion. *Kowalski*, 492 Mich at 119. "An abuse of discretion results when a circuit court selects an outcome falling outside the range of principled outcomes." *Id*.

> reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

A trial court considering whether to admit evidence under MRE 702 "acts as a gatekeeper and has a fundamental duty to ensure that the proffered expert testimony is both relevant and reliable." *Kowalski*, 492 Mich at 120.

When determining whether to admit expert testimony under MRE 702, "the threshold inquiry—whether the proposed expert testimony will 'assist the trier of fact to understand the evidence or to determine a fact in issue'—is . . . not satisfied if the proffered testimony is not relevant or does not involve a matter that is beyond the common understanding of the average juror." *Kowalski*, 492 Mich. at 121. In *Kowalski*, the Supreme Court held that the subject of false confessions is beyond the ken of common knowledge of the layperson, as "a purported false confession . . . constitutes counterintuitive behavior that is not within the ordinary person's common understanding, and thus expert assistance can help jurors understand how and why a defendant might confess falsely." *Id*. at 126-127 (footnote omitted).

The prosecutor acknowledges this holding, but asserts that Dr. Ofshe's expertise is primarily in police interrogation techniques rather than the field of false confessions. The prosecutor argues that expert testimony on police interrogation techniques is not appropriate because that topic is not beyond the realm of the ordinary layperson. However, this overlooks that *Kowalski* also stated that "expert testimony bearing *on the manner in which a confession is obtained* . . . is beyond the understanding of the average juror and may be relevant to the reliability and credibility of a confession." *Id*. at 126. Further, the Supreme Court ruled that "[a]n expert explaining *the situational* or psychological *factors that might lead to a false confession*" may not comment on the truth or falsity of the confession in the case at issue. *Id*. at 129 (emphasis added). The emphasized statements were clearly in reference to Dr. Leo, who intended to testify, in part, about interrogation techniques that generate false confessions. See *id*. at 110. We therefore see no basis for concluding that the trial court erred by determining that the jury would benefit from expert testimony on this subject.

The prosecution also argues that Dr. Ofshe cannot assist the jury in this case because defendant is claiming that his confession is false, and Dr. Ofshe does not have a method for determining whether a confession is false. As explained by *Kowalski*, however, an expert witness may not comment on the truthfulness of a defendant's confession. See *id*. at 129. Thus, it would be impermissible for Dr. Ofshe to testify whether defendant's confession was false. Rather, Dr. Ofshe will assist the jury by explaining the interrogation techniques that may lead to a false confession, and the jury will then be tasked with determining the reliability of defendant's confession.

Next, the prosecutor contends that Dr. Ofshe's testimony should be excluded as unreliable because his principles and methods stand on the same faulty ground as did Dr. Leo's principles and methods. "When evaluating the reliability of a scientific theory or technique, courts consider certain factors, including but not limited to whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, and its rate of error if known." *Id*. at 131. The inquiry is "a flexible one, and a court determining the admissibility of

expert testimony may consider reliability factors pertinent to the particular type of expert testimony offered and its connection to the particular facts of the case." *Id.* at 120.

To begin, it bears repeating that *Kowalski* held only that the trial court did not abuse its discretion by excluding Dr. Leo's testimony. *Id*. at 133. The trial court found that Dr. Leo's methodology was unreliable because it concluded that Dr. Leo's underlying data on false confessions, which was partly based on "secondary sources, including popular media accounts," *id*. at 113, was prone to inaccuracy and bias. See *id*. at 132-133. The trial court also had concerns with Dr. Leo's analysis of that data, i.e., he "starts with the conclusion that the confession is false and then he works backwards to find commonalities." *Id*. at 133 (quotation marks and citation omitted). "The unreliable methodology, as the circuit court described, resulted in conclusions consistent with Leo's own preconceived beliefs rather than testable results consistent with an objective, scientific process."[6] *Id*. at 133. The Supreme Court held that the trial court's decision fell within the range of principled outcomes. *Id*.

Although there is some overlap between Dr. Leo and Dr. Ofshe's proposed testimony, Dr. Ofshe repeatedly indicated that his expertise is not in the field of false confessions, but in police interrogation tactics. As the trial court found, Dr. Ofshe's methodology "includes breaking interrogations down into constituent themes, which he calls 'strings.' " Dr. Ofshe would explain how certain tactics and techniques are employed by interrogators in order to move a suspect from denying involvement in a crime to admitting responsibility and he would testify regarding the difference between contaminated and uncontaminated statements. Dr. Leo, on the other hand, was concerned with classifying confessions he believed to be false by his confidence in their falsity, and then further classifying these confessions by the manner in which they were obtained, i.e., "voluntary false confessions, stress-compliant false confessions, coerced-compliant false confessions, coerced-persuaded false confessions, or non-coerced-persuaded false confessions." *Kowalski*, 492 Mich at 113. In contrast, Dr. Ofshe's primary focus is persuasive police interrogation techniques. Accordingly, the prior judge's concerns about Dr. Leo's methods for determining whether a confession was false are not at issue in this case. And the successor judge, considering the proffered testimony of a different expert, was free to make a determination regarding reliability, so long as it was in the range of reasonable outcomes.

Here, the trial court found that "[t]he materials provided to the Court demonstrate that social psychology researchers have studied confessions at length and that certain techniques provide areas of special concern for producing false confessions. The research on these topics

[6] We note that some courts do not require the rigors of the scientific process to "soft" sciences, such as sociology. As the Fifth Circuit Court of Appeals has observed, there is a "necessarily diminished methodological precision of 'soft' social sciences," because "naturally occurring circumstances" may "preclude experimental conditions." *United States v Simmons*, 470 F3d 1115, 1123 (CA 5, 2006), quoting *Jenson v Eveleth Taconite Co*, 130 F3d 1287, 1297 (CA 8, 1997). "In such instances, other indicia of reliability are considered under *Daubert*, including professional experience, education, training, and observations," and trial courts are given broad discretion to determine reliability. *Simmons*, 470 F3d at 1123.

appears to have widespread acceptance in the field of social psychology." Significantly, the prosecutor does not dispute this finding. Further, it appears that in the years since Dr. Leo's testimony was excluded, the phenomenon of false confessions and the police interrogation techniques associated with false confessions have become increasingly well accepted. See e.g., *Lapointe v Comm'r of Correction*, 316 Conn 225, 325; 112 A3d 1 (2015) ("[A]n abundance of social science research about the phenomenon has been conducted, and, due largely to advances in DNA testing, scores of false confessions have been identified."). *State v Perea*, 322 P3d 624, 642-644 (Utah, 2013) (holding that the trial court erred by excluding Dr. Ofshe from testifying given the studies indicating that certain police interrogation techniques increase the rate of false confessions.).[7]

The prosecutor also argues that Dr. Ofshe's method of dissecting the Reid interrogation technique might not be applicable in this case because it has not yet been established that the Reid style of interrogation was used on defendant. Dr. Ofshe testified that "the Reid technique is the model that the interrogators follow," and that it is "pervasive in the United States." While different interrogators "tend to bring . . . their own style and personality," Dr. Ofshe has observed the "same phrasing in the same kinds of cases." And a review of the interrogation clearly shows that some of those persuasive techniques were used in this case. Ultimately, it will be the jury's role, after review of all the evidence, to determine whether in this particular case defendant's confession was reliable. Thus, the prosecutor's argument, which is essentially a challenge to the relevance of Dr. Ofshe's testimony, is unavailing.

Lastly, the prosecutor argues that Dr. Ofshe will rely on materials, such as the polygraph results and police reports in this case, that are not admissible in evidence as required by MRE 703. The prosecutor also contends that "if Ofshe is allowed to identify certain tactics employed in [defendant's] interviews and connect them to factors or commonalities of false confessions" then his testimony should be excluded under MRE 403 because there would be a significant risk of confusing the jury. However, for the reasons that we will discuss next, we are affirming the trial court's decision to preclude Dr. Ofshe from providing case-specific testimony and so the prosecutor's concerns are unwarranted.

B. DEFENDANT'S APPEAL

The trial court precluded Dr. Ofshe from providing case specific testimony in this case on the basis that Dr. Ofshe did not testify at the *Daubert* hearing regarding the application of his methods to this case. Defendant argues that this was error because the prosecutor had not challenged the reliable-application prong of MRE 702 and therefore the trial court should not have addressed it or based its ruling on that component of the rule.

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[7] It also notable that the United States Supreme Court has observed that "[b]y its very nature, custodial police interrogation entails inherently compelling pressures. . . . Indeed, the pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v United States*, 556 US 303, 321; 129 S Ct 1558; 173 L Ed 2d 443 (2009) (quotation marks and citation omitted).

As the proponent of Dr. Ofshe's testimony, defendant bears the burden of demonstrating that the testimony is admissible. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). The prosecutor did not argue in the motion to strike that Dr. Ofshe had not applied his methods to defendant's interrogation.[8] But in the supplemental briefing filed on February 27, 2020, the prosecutor pointed out that deficiency, which became apparent at the *Daubert* hearing. Defendant's post-hearing brief, filed the day before the prosecutor's brief asserted that the application prong of MRE 702 was satisfied. Thus, defendant was aware that the requirement existed.

Defendant filed a supplemental brief on October 24, 2020—six months after the prosecutor specifically and clearly raised the issue. Yet at that point, defendant did not come forward with even an affidavit from Dr. Ofshe stating whether he had reviewed defendant's interrogation and found any problematic interrogation techniques. After the trial court issued its decision, defendant's motion for reconsideration asserted that Dr. Ofshe "st[ood] ready" to provide evidence addressing the trial court's concern. But defendant provided no affidavits or evidence to support that statement. In this Court, defendant has had multiple opportunities to file briefs. Yet, he *still* only asserts that he "stands ready" to provide the missing link. Notably, defendant continues to assert that it is the prosecutor who does not want this testimony to come forward, because according to defendant, what took place at the interrogation was so egregious that the prosecutor would never want the trial court to see the techniques employed. Yet it is defendant who, having had multiple opportunities to present the missing information, has failed to do so. Accordingly, we find no abuse of discretion in the trial court's decision not to continue the *Daubert* hearing to allow defendant another opportunity to supplement the record where defendant has not even put forth an offer of proof on the relevant issue.

III. CONCLUSION

The trial court did not abuse its discretion by finding that Dr. Ofshe was qualified to give expert testimony on police interrogation techniques and that his methodology was sufficiently reliable to admit his testimony. Nor did the court abuse its discretion by precluding Dr. Ofshe from offering case-specific testimony given defendant's failure to make an offer or proof on that matter.

Affirmed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Douglas B. Shapiro
/s/ Brock A. Swartzle

[8] Perhaps the prosecutor did not make such a challenge because the notice filed by defendant indicated, at multiple points, that Dr. Ofshe would do exactly that. The prosecutor likely presumed that, having made those statements, Dr. Ofshe was prepared to explain how his method of analysis applied in this case.