S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2013
v ALEX TRAVOLTO THAMES, Defendant-Appellant.	No. 306313 Ottawa Circuit Court LC No. 10-034632-FC

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant Alex Travolto Thames appeals as of right his conviction for second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under 13 years of age). The trial court sentenced defendant to 365 days in jail and five years' probation for his conviction. We affirm.

Defendant's conviction arose out of sexual abuse perpetrated on the minor victim. During an interview with Detective Michael Tamminga of the Ottawa County Sheriff's Department, defendant admitted to touching the victim's breasts underneath her clothes. At trial, defendant wanted to offer the testimony of Dr. Terence Campbell, a forensic psychologist who testified as an expert in the area of forensic psychology, to demonstrate defendant's psychological makeup at the time of his confession, and to testify about the phenomenon of false confessions. Dr. Campbell found that defendant's military background, particularly his near-death experiences as a Marine, was significant in determining whether defendant was susceptible to providing a false confession. Dr. Campbell indicated that defendant explained to him that when his anxiety level increased, he responded instinctively and acted in accordance with his training. In particular, Dr. Campbell planned to testify regarding defendant's psychological makeup during the interview with Tamminga:

> [defendant] responded as a good Marine would do. He followed orders and he complied with the person who was in charge. In that interrogation, Detective Tamminga was clearly in charge, and, without thinking about it, just instinctively resorting to his Marie [sic] Corps training, [defendant] gave Detective Tamminga what he thought Detective Tamminga wanted to hear. In other words, [defendant] again followed orders.

Dr. Campbell opined that defendant's psychological makeup caused him to comply with Tamminga's suggestions and to tell Tamminga that he touched the victim's breasts. The trial

court excluded the testimony, concluding that the testimony was inadmissible under MRE 702 because it would not assist the trier of fact in determining a fact in issue.

Defendant argues that the trial court erred by excluding this testimony. This Court reviews a trial court's decision to admit or exclude expert testimony for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). "An abuse of discretion occurs [] when the trial court chooses an outcome falling outside [a] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). And, an appellate court will not reverse a conviction because of a trial court's evidentiary error unless "it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

The admissibility of expert testimony is governed by MRE 702, which provides as follows:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial court acts as a "gatekeeper" under MRE 702 to ensure that the proffered expert testimony will benefit the jury, and that the testimony is based on reliable scientific principles and data. *Dobek*, 274 Mich App at 94. As explained by this Court in *Dobek*:

> While the exercise of the gatekeeper function is within a court's discretion, the court may neither abandon this obligation nor perform the function inadequately. Expert testimony may be excluded when it is based on assumptions that do not comport with the established facts or when it is derived from unreliable and untrustworthy scientific data. The *Gilbert* Court stated that "junk science" must be excluded, and it further indicated:
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> MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Id.*, quoting *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004) (internal citations omitted).]

The proponent of expert testimony bears the burden of establishing the admissibility of the testimony under MRE 702. *People v Yost*, 278 Mich App 341, 394; 749 NW2d 753 (2008), citing *Gilbert*, 470 Mich at 782.

Defendant argues that the trial court erred by excluding Dr. Campbell's testimony because he contends that such testimony is beyond the common understanding of the average juror. Assuming without deciding that such testimony can assist the trier of fact, see *People v Kowalski*, 492 Mich 106, 129; 821 NW2d 14 (2012) (MARY BETH KELLY, J.), and *People v Hamilton*, 163 Mich App 661; 415 NW2d 653 (1987), we find that the trial court did not abuse its discretion when it excluded this evidence under MRE 702 because there is no indication on the record regarding the reliability of Dr. Campbell's testimony as to defendant's psychological makeup. In addition to the requirement that expert testimony be helpful to the jury, the trial court must ensure that expert testimony is reliable. *Dobek*, 274 Mich App at 95. The record contains no evidence regarding the reliability of Dr. Campbell's testimony as required by MRE 702, as there is nothing in the record about whether Dr. Campbell's testimony was based on sufficient facts or data with regard to the effect of Marine Corps training on confessions, whether the testimony is the product of reliable principles and methods, or whether Dr. Campbell applied these principles and methods reliably to this case. Additionally, defendant does not offer an argument regarding the reliability of Dr. Campbell's testimony on appeal. As the proponent of the evidence, defendant bore the burden of establishing the admissibility of the testimony under MRE 702. *Yost*, 278 Mich App at 394. However, defendant did not satisfy this burden as he failed to elicit testimony regarding the reliability of Dr. Campbell's testimony as part of his offer of proof. Without evidence regarding the reliability of Dr. Campbell's testimony in this regard, we decline to find that the trial court's exclusion of this testimony was outside a principled range of outcomes. See *Babcock*, 469 Mich at 269. Additionally, although the trial court excluded the testimony for reasons other than those set forth above, we decline to find that defendant is entitled to reversal. *People v McLaughlin*, 258 Mich App 635, 652 n 7; 672 NW2d 860 (2003) ("[T]his Court will not reverse a trial court's order if it reached the right result for the wrong reason.")

Next, defendant argues that the trial court abused its discretion when it excluded Dr. Campbell's testimony concerning false confessions and police interrogation techniques. Unlike Dr. Campbell's testimony concerning defendant's psychological makeup, defendant made an offer of proof with regard to the facts and data upon which Dr. Campbell relied in forming his opinion on this subject. At a *Daubert*[1] hearing, Dr. Campbell testified about a number of different techniques police officers use during interrogations, as well as the effect that some of these techniques have on confessions. For instance, Dr. Campbell testified that police officers sometimes use a confrontation technique that involves confronting the suspect with allegations, and that this technique alone has been shown to provoke false confessions in laboratory settings. In support of his testimony, Dr. Campbell cited a study in which 69 percent of participants confessed to touching the "ALT" key on a computer keyboard when they had not done so, but were confronted with allegations that they had. Dr. Campbell also described research regarding false confessions that was conducted on suspects, in two criminal cases, who confessed to crimes for which they were later exonerated.

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

On cross-examination, however, Dr. Campbell testified that the interrogation tactics he studied increased both the number of false confessions and the number of true confessions. Specifically, he testified, "[w]e have data that demonstrates when you use isolation, confrontation, maximization, minimization, and offering a deal, the number of true confessions increases. Also, the number of false confessions increases." He also testified that defendant confessed approximately six minutes after his interrogation began, and at the time of his confession, Tamminga used some interrogation techniques on defendant, such as confrontation, but he had not used other techniques.

The trial court excluded the testimony after questioning the reliability of some of the data on which Dr. Campbell relied, particularly the study where 69 percent of individuals who were confronted with allegations that they touched the "ALT" key confessed. On this issue, the trial court found that allegations of accidently touching a computer key were different from allegations of committing a crime. The trial court also found that Dr. Campbell's testimony would not assist the trier of fact because Dr. Campbell concluded that police interrogation techniques could provoke false confessions or true confessions, but Dr. Campbell did not provide a correlation between certain techniques and false confessions.

We find that the trial court did not abuse its discretion when it excluded Dr. Campbell's testimony. Again, assuming without deciding that evidence of false confessions could assist the trier of fact, the trial court did not abuse its discretion when it excluded Dr. Campbell's proffered testimony because defendant failed to establish the reliability of the testimony under MRE 702. As explained by this Court in *People v Steele*, 283 Mich App 472, 481; 769 NW2d 256 (2009), quoting *Gilbert*, 470 Mich at 779:

> Under MRE 702, a trial court must ensure that all expert opinion testimony, regardless of whether it is based on novel science, is reliable. "MRE 702 requires the trial court to ensure that each aspect of an expert witness's proffered testimony—*including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data*—is reliable." [Emphasis in original.]

Here, the trial court did not abuse its discretion when it concluded that Dr. Campbell's testimony was not reliable because although Dr. Campbell cited studies on false confessions and interrogation techniques, he admitted that police interrogation techniques increase both the likelihood of false confessions and true confessions. Thus, we concur with the trial court's finding that his proffered testimony afforded the jury no reliable basis upon which to determine whether police interrogations render confessions either false or true, and therefore did not meet the requirements of MRE 702. See *Dobek*, 274 Mich App at 95-96 (excluding as unreliable proffered expert testimony concerning sex offender profile evidence when the testing conducted by the expert could not identify with any degree of certainty whether a person was or was not a sex offender); *People v Coy*, 243 Mich App 283, 294-295; 620 NW2d 888 (2000) (excluding testimony from a DNA expert when the expert could not provide the jury with evidence concerning the likelihood or significance of a DNA profile match); *United States v Deuman*, 892

F Supp 2d 881, 886-887 (WD Mich, 2012)[2] (upholding the trial court's exclusion of expert testimony concerning false confessions and police interrogation techniques where the expert witness admitted that his methodology could not indicate whether a confession was false or true).

Moreover, we concur with the trial court when it excluded Dr. Campbell's testimony because the tests upon which Dr. Campbell relied in forming his opinion were unreliable. Particularly, the study involving laboratory subjects who were confronted with touching the "ALT" key was too dissimilar from police interrogations involving crimes to be considered a reliable indicator of false confessions. In *Deuman*, 892 F Supp 2d at 886, quoting *United States v Jacques*, 784 F Supp 2d 59, 66 (D Mass, 2011), the Western District of Michigan questioned the same study, explaining that studies such as the "ALT" key study are not reliable with regard to confessions obtained by police officers because they "shed no light on real-world interrogation practices and results because they 'were not conducted by law enforcement, were not part of a criminal investigation, did not involve actual suspects, and did not present the students with a serious penalty.'" These same concerns existed in the case at bar with regard to the study cited by Dr. Campbell. The "ALT" key study did not involve police officers or significant consequences; it simply involved laboratory assistants asking test subjects, who had little to gain or lose by confessing or staying silent, whether they did something they were not supposed to do. Accordingly, we find that the trial court did not abuse its discretion when it excluded Dr. Campbell's testimony about police interrogation techniques and false confessions under MRE 702.

Next, regarding his confession, defendant argues that the trial court erred when it denied his motion to suppress the confession. Defendant alleges that he was in custody at the time of his interrogation with Tamminga, and that the *Miranda*[3] warnings given by Tamminga at the outset of the interrogation were inadequate. A criminal defendant has a right against self-incrimination. *People v White*, 493 Mich 187, 193-194; 828 NW2d 329 (2013). Therefore, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A suspect need not be given *Miranda* warnings unless the questioning done by police officers amounts to a custodial interrogation. *People v Steele*, 292 Mich App 308, 316; 806 NW2d 753 (2011); *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). "Generally, a custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his or her freedom of action in any significant way." *Steele*, 292 Mich App at 316. "To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could

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[2] This Court can look to law from federal courts for guidance when interpreting rules of evidence because MRE 702 contains language that is similar to FRE 702; however, such cases are persuasive, not binding. See FRE 702; MRE 702; *People v Fomby*, 300 Mich App 46, 50; 831 NW2d 887 (2013).

[3] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

have believed that [s]he was not free to leave." *Coomer*, 245 Mich App at 219 (quotation omitted; alteration in original). This inquiry focuses on whether an objective individual would feel free to leave, based on the circumstances of the interrogation, and not whether the suspect subjectively believed he could have left. *Id.* at 220 (citation omitted). "The ultimate question whether a person was 'in custody' for purposes of *Miranda* warnings is a mixed question of fact and law, which must be answered independently by the reviewing court after review de novo of the record." *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997).

Based on the totality of the circumstances, we concur with the trial court that defendant was not in custody at the time of his confession. At Tamminga's request, defendant voluntarily drove himself to the Hudsonville City Hall, where the interview occurred. Defendant was not under arrest, nor was he restrained at the time of the interview. Moreover, the interview was short, lasting approximately 28 minutes. Based on these factors, an objective person would have felt free to leave the interview, defendant was not in custody. See *id.* (holding that the defendant was not in custody where he voluntarily drove himself to the police station, was not placed under arrest or restrained in any manner, and the interview was short, lasting approximately 1-1/2 hours). Additionally, we find that defendant was not in custody at the time of his confession because the interview occurred at a city hall building, and we are less likely to find that a defendant was in custody when the interview occurs at a neutral location. See *People v Mayes (After Remand)*, 202 Mich App 181, 196; 508 NW2d 161 (1993). Defendant's argument on appeal that he did not feel free to leave during the interview because he was not expressly told that he could leave is meritless, as the pertinent inquiry when deciding such issues has always been objective, not the subjective views of the suspect or the police. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999) ("The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned."). Because defendant was not in custody at the time of his confession, he was not entitled to *Miranda* warnings, and the trial court did not err by denying his motion to suppress his statements. *Steele*, 292 Mich App at 316; *Coomer*, 245 Mich App at 219.

Next, defendant argues that the trial court abused its discretion when it excluded Dr. Campbell's testimony concerning psychological testing he performed on the victim. Dr. Campbell proposed to testify that the victim's personality scores on the Minnesota Multiphasic Personality Inventory for Adolescents ("MMPI-A") were consistent with adolescents who fabricate events. Dr. Campbell also proposed to testify that the victim struggled with identity issues; Dr. Campbell opined that the victim's struggles in this area could have given her motivation to fabricate her allegations. We review a trial court's decision to admit or exclude expert testimony for an abuse of discretion. *Dobek*, 274 Mich App at 93.

We concur with the trial court that such testimony would invade the province of the jury. Relying, in part, on *United States v Bailey*, 444 US 394, 414; 100 S Ct 624; 62 L Ed 2d 575 (1980), our Supreme Court has held that "It is the Anglo-Saxon tradition of criminal justice…[that] makes jurors the judges of the credibility of testimony offered by witnesses. Because it is the province of the jury to determine whether a particular witness spoke the truth or fabricated a cock-and-bull story, it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial." *People v Musser*, 494 Mich 337, 348-349; 835 NW2d 319 (2013) (quotation and citation omitted). Moreover, in a

criminal sexual conduct case involving a child victim, it is improper for an expert witness to comment on the credibility of the victim. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). Here, the trial court did not abuse its discretion because, contrary to defendant's assertions, this testimony would have served as an indirect commentary on the victim's credibility. Indeed the only possible inference from Dr. Campbell's testimony was that if the victim had personality traits that gave her a motivation to fabricate allegations, she must have fabricated the allegations. This type of indirect comment on the victim's credibility by an expert witness is not permissible. See *id.* at 376.

In addition to contending that the trial court abused its discretion in its evidentiary ruling, defendant raises a constitutional argument that the trial court's evidentiary ruling prevented him from presenting a defense. "A defendant has a constitutionally guaranteed right to present a defense . . . ." *Yost*, 278 Mich App at 379. "However, an accused's right to present evidence in his defense is not absolute." *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008). The constitutional right to present a defense only extends to evidence that is relevant and admissible. *Id.* Here, because Dr. Campbell's proffered testimony was not admissible, the trial court's exclusion of the testimony did not deny defendant his right to present a defense. *Id.*

Defendant next argues that the trial court abused its discretion when it excluded testimony from the victim's stepmother about the contents of a fiction book, *Identical*, by Ellen Hopkins. The victim denied reading the book at trial. She also denied telling her uncle's former girlfriend that she read the book. During defendant's case-in-chief, the uncle's ex-girlfriend testified that the victim pointed to a group of books on a bookshelf at the ex-girlfriend's home and stated that "she had pretty much read them all . . . ." The victim did not, however, mention the book *Identical* by name. The victim's stepmother also testified that she saw the book "on the floor." She did not specify where she saw the book, or whether the victim read the book. Outside the presence of the jury, the victim's stepmother testified that *Identical* contained descriptions of sexual abuse similar to the allegations made by the victim in the case at bar. Defendant sought to use the stepmother's testimony to show that the victim used *Identical* as a source for her allegations against defendant, and that the victim fabricated her allegations. The trial court excluded the evidence, finding that the contents of the book were irrelevant because defendant did not establish that the victim actually read the book. "The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

In order to be admissible, evidence must be relevant. MRE 402. "'Relevant evidence' means 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 evidence." MRE 401. "Relevance involves two elements, materiality and probative value." *People v McGhee*, 268 Mich App 600, 610; 709 NW2d 595 (2005). "Materiality refers to whether the fact was truly at issue." *Id.* The second prong of relevance, probative value, "asks whether the proffered evidence tends '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 evidence.' The threshold is minimal: 'any' tendency is sufficient probative force." *People v Crawford*, 458 Mich 376, 389-390; 582 NW2d 785 (1998), quoting MRE 401.

Here, because the contents *Identical* were similar to the victim's allegations against defendant, the contents were material to a fact in issue, i.e., whether the victim fabricated the allegations against defendant. See *McGhee*, 268 Mich App at 610. However, in order to be relevant, the contents of the book also had to be probative of the issue concerning whether the victim fabricated her allegations against defendant. Here, the contents of the book were only probative if the victim actually read the book; otherwise, the contents of the book would not have any tendency to make more or less probable that the victim fabricated the allegations. Thus, the relevancy of the stepmother's testimony about the contents of the book was conditioned on whether the victim read the book.

MRE 104(b) governs preliminary questions regarding the admissibility of evidence, and provides, in pertinent part: "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Under MRE 104(b), the trial court does not have to make a preliminary finding that the act in question occurred, but rather, simply has to determine whether the jury could reasonably find the conditional fact by a preponderance of the evidence. *People v VanderVliet*, 444 Mich 52, 68-69 n 20; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994), citing *Huddleston v United States*, 485 US 681, 688-691; 108 S Ct 1496; 99 L Ed 2d 771 (1988). In making this determination, the trial court is to consider all of the evidence presented. *Id.*, citing *Huddleston*, 485 US at 688-691. Consequently, the question of whether the trial court abused its discretion by excluding testimony about the contents of *Identical* depends on whether there was sufficient evidence to support a finding of the fulfillment of the condition that the victim read the book. See MRE 104(b).

On this record, the trial court did not abuse its discretion when it excluded the stepmother's testimony about the contents of the book, *Identical*. Although the stepmother and the uncle's ex-girlfriend provided circumstantial evidence that the victim read the book, the victim denied reading the book. She also denied telling the uncle's ex-girlfriend that she read the book. Accordingly, on the entire record, the question of whether a jury could reasonably find by a preponderance of the evidence that the victim read the book presents a close call. As such, the trial court's ruling excluding testimony of the contents of the book cannot constitute an abuse of discretion because "[a] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *McGhee*, 268 Mich App at 614. Consequently, defendant is not entitled to relief on this issue.

In addition to contending that the trial court abused its discretion in its evidentiary ruling, defendant argues that the trial court's exclusion of the stepmother's testimony about *Identical* prevented him from presenting a defense. "A defendant has a constitutionally guaranteed right to present a defense . . . ." *Yost*, 278 Mich App at 379. However, "[t]he right to present a defense extends only to *relevant* evidence." *People v Danto*, 294 Mich App 596, 604; 822 NW2d 600 (2011) (emphasis in original). Because defendant did not establish the fact on which the relevance of the contents of the book was conditioned, the trial court's evidentiary ruling did not deny defendant his right to present a defense. See *id.*

Lastly, defendant labels the prosecution's brief as a "vexatious pleading," and requests an award of attorney fees and costs, arguing that the brief contains misrepresentations of fact and law. MCR 7.216(C)(1) governs vexatious appeals or proceedings, and provides as follows:

> The Court of Appeals may, on its own initiative or on the motion of any party filed under MCR 7.211(C)(8), assess actual and punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because
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> (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or
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> (b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.

We reject defendant's request for sanctions because the request does not conform with the requirement found in MCR 7.216(C)(1) that the request be made in a separate pleading under MCR 7.211(C)(8). See *The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 60; 698 NW2d 900 (2005). Moreover, we have reviewed defendant's request for sanctions and found it to be meritless.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello