

Order

Michigan Supreme Court
Lansing, Michigan

October 13, 2023

Elizabeth T. Clement,
Chief Justice

165467

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 165467
COA: 362321
St Clair CC: 21-001883-FC

STEVEN MICHAEL ROGERS,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the February 21, 2023 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

CAVANAGH, J. (*concurring*).

I share many of the concerns raised in Justice WELCH's dissenting statement. Broadly, I agree with Justice WELCH that "[t]his case . . . raises concerns about potential inequities in how courts handle proposed expert testimony in criminal sexual conduct cases." If the prosecutor may, under certain circumstances, present expert testimony regarding common misconceptions as to how a victim of such a crime might behave, see, e.g., *People v Peterson*, 450 Mich 349 (1995), a criminal defendant should have the same (if not greater) ability to present expert testimony addressing common misconceptions relevant to the credibility of a complainant's allegations, such as the formation and reliability of memories.

As applied to this case, I share Justice WELCH's uncertainty as to whether *all* of defendant's proposed expert testimony from Dr. David Thompson was properly excluded from trial. Moreover, I question the apparent view of the trial court and the Court of Appeals that Dr. Thompson did not adequately connect his proposed expert testimony to the facts of this case. As Justice WELCH notes, "[a] proposed expert witness for the defense may not invade the province of the jury any more than an expert for the prosecution," so Dr. Thompson's failure to opine specifically as to the complainant's credibility does not render his proffered testimony inadmissible. On the current record, it appears that Dr. Thompson had a sufficient basis under MRE 702 to connect his proposed testimony to the complainant's allegations.

However, I do not believe that this is an appropriate case to further explore these issues. Defendant's appellate briefing focuses almost exclusively on the admissibility of only one part of Dr. Thompson's proposed expert testimony, i.e., his testimony regarding dream-reality confusion.¹ Accordingly, I cannot fault the Court of Appeals for addressing only that issue. And I see no abuse of discretion in the trial court's determination that defendant did not demonstrate at the *Daubert*² hearing that the concept of dream-reality confusion is sufficiently scientifically supported to satisfy MRE 702. In light of the appellate briefing in the record, it is difficult to assess whether the trial court erred in excluding other aspects of Dr. Thompson's proposed testimony.

Accordingly, I concur in the Court's denial order.

WELCH, J., (*dissenting*).

This criminal appeal presents difficult questions about the admissibility of defendant's proposed expert testimony. I am concerned that the trial court erred by excluding *the entirety* of proposed testimony from defendant's expert—Dr. David Thompson—when much of the proposed testimony satisfied MRE 702 because it was relevant to the veracity of the complainant's accusations, well accepted by the relevant medical community, and well supported by relevant medical literature. The Court of Appeals decision, in affirming the trial court, focused exclusively on Dr. Thompson's proposed testimony about the concept of dream-reality confusion as a source of misattribution error for human memories. But this subject was only a small part of Dr. Thompson's proposed testimony. Accordingly, I would have remanded the case to the Court of Appeals to consider whether Dr. Thompson's non-dream-reality confusion testimony was admissible, or I would have ordered additional briefing and oral argument to fully explore these questions.

I. SUMMARY OF RELEVANT FACTS

Defendant is charged with two counts of first-degree criminal sexual conduct (CSC-I) premised on allegations that he raped his daughter on multiple occasions in 2016 when she was 12 years old.³ MCL 750.520b(2)(b). The sexual abuse allegations were not

¹ In short, Dr. Thompson argued that there is scientific support for the proposition that a dream can morph into a false memory.

² *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993).

³ This statement will use “the complainant” to refer to defendant's daughter. However, defendant is also charged with one count of third-degree criminal sexual conduct arising

disclosed by the complainant until 2021, and the circumstances surrounding the disclosure were unique. The disclosure was first made to the complainant's mother and youth pastor, after which law enforcement was contacted. The complainant reported that her recollection of the alleged sexual abuse had been prompted by an incident at an overnight summer camp in which other girls were sharing images of their boyfriends' genitalia on their phones. The complainant reported that this event triggered traumatic memories of sexual abuse.

Days later, the complainant submitted to a forensic interview at the Child Advocacy Center in Port Huron. Contrary to national best practice standards, the interview was not recorded or transcribed. The complainant's mother later told police that the complainant had been having nightmares about being raped and that initially the figure in her daughter's dreams had no face but that the dream later turned into nightmares about being raped by defendant. At the time of the disclosure, the complainant was receiving treatment from a therapist related to issues of self-harm and severe physical tics. These therapy sessions began in 2018. In July 2021, weeks before disclosing the alleged sexual abuse, the complainant told her therapist that she had been having reoccurring, realistic, and vivid nightmares in which she was being raped. The therapist's notes apparently indicate that the complainant initially shared that the nightmares were so real that she *thought* they might be prior memories. It was not until after the disclosure to the complainant's youth pastor and mother that the complainant became certain that these dreams were flashbacks to memories rather than fictitious nightmares.

During defendant's preliminary examination hearing, the complainant testified that these dreams had been occurring since she was "young." It is unclear from the limited record that is presently available when these dreams began or how frequently they had been occurring. The record also indicates that the complainant had been prescribed an antipsychotic medication during this period, but the purpose of this prescription or its possible side effects are presently unknown.

II. THE CONTESTED EXPERT TESTIMONY

After being arrested, charged, and bound over for trial, defendant filed an offer of proof with respect to the proposed testimony of Dr. Thompson, who is an expert in the fields of clinical and child psychology. The offer of proof indicated that Dr. Thompson would testify "regarding ways in which the complainant[s] allegations may be based in fantasy not fact." A close reading of the offer of proof also establishes that Dr. Thompson was prepared to testify in general terms about the scientific basis of how memories are formed and external factors that can affect the reliability of human memory. The possibility of false memories originating in dreams and those dreams being misattributed

from allegations raised by his ex-wife, one count of assault with intent to commit sexual penetration, and one count of distributing sexually explicit visual or verbal material to a minor.

to memories of actual events was only one small part of Dr. Thompson's proposed testimony. The prosecution subsequently filed a motion in limine seeking to exclude the entirety of Dr. Thompson's proposed testimony and requested a *Daubert*⁴ hearing if needed. The trial court scheduled the requested hearing.

Throughout the *Daubert* hearing, Dr. Thompson testified that he would discuss the six factors that psychologists consider when evaluating the reliability of a memory or disclosure that has been made by a patient or individual. These six factors were discussed in the research publications cited by the doctor. Dr. Thompson was prepared to testify that studies have shown that when children (and adults) are repeatedly interviewed or asked questions about a non-event, subjects report believing that the non-event occurred at relatively high rates and may hold to false memories—even when confronted with evidence to the contrary. He was also prepared to testify about how external influences can affect a child's report of an event or memory, such as studies showing that overhearing people talk about another person in a negative manner can cause a person to make reports that are consistent with the discussed negative characteristics despite lacking first-hand knowledge on which to base such statements. Finally, Dr. Thompson was prepared to discuss studies concerning interviewer bias and its effect on interviewees, as well as various sources of misattribution error (i.e., an individual identifying the incorrect source of a memory, regardless of whether the memory is true or false).

Dr. Thompson was also prepared to offer testimony concerning the concept of dream-reality confusion—and the reliability of memories that might have originated from dreams—but only as it related to misattribution error. The purpose of the dream-reality confusion testimony was to inform the jury of one form of misattribution error that can affect a child's reports and memory. Dr. Thompson cited at least four peer-reviewed studies published in psychology and neuroscience journals between 2014 and 2018 that indicated that the concept of dream-reality confusion has been studied by various experts for decades, although often in a clinical or institutionalized setting.

The prosecutor did not present any additional studies, testimony, or other evidence to contradict Dr. Thompson's proposed testimony. Rather, the prosecutor argued that much of the testimony was irrelevant, that Dr. Thompson was unable to say with certainty which of the six factors he discussed were applicable to this case and to what degree, and that the dream-reality confusion testimony was not sufficiently accepted in the relevant medical community or sufficiently analogous to the circumstances of this case to be admissible under MRE 702. The prosecutor also noted that although Dr. Thompson has been permitted to testify as an expert witness numerous times in Michigan and in other states, similar proposed testimony had been rejected in at least a few criminal cases from other

⁴ *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993).

jurisdictions because it was deemed insufficiently relevant to the criminal accusations at issue.

Following the *Daubert* hearing, the trial court excluded the entirety of Dr. Thompson's proposed testimony. The Court of Appeals initially denied defendant's application for leave to appeal over the dissent of Chief Judge GLEICHER. *People v Rogers*, unpublished order of the Court of Appeals, entered August 10, 2022 (Docket No. 362321). Then, following a remand from this Court for consideration as on leave granted, *People v Rogers*, 510 Mich ____ (2022), a different panel of the Court of Appeals affirmed the trial court's ruling. *People v Rogers*, unpublished per curiam opinion of the Court of Appeals, issued February 21, 2023 (Docket No. 362321).

III. ANALYSIS

The ultimate question on appeal is whether the circuit court abused its discretion by excluding the *entirety* of Dr. Thompson's proposed expert testimony. See *People v Denson*, 500 Mich 385, 396 (2017). Because the admissibility of evidence involves a preliminary question of law, our review of the admissibility question is largely de novo. See *People v Lukity*, 460 Mich 484, 488 (1999). MRE 702 provides that:

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.

In *People v Kowalski*, 492 Mich 106, 120 (2012) (opinion by MARY BETH KELLY, J.), quoting *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 152 (1999), Justice MARY BETH KELLY stated:

A court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and has a fundamental duty to ensure that the proffered expert testimony is both relevant and reliable. The overarching goal is “to make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Because there are many different kinds of experts and expertise, this inquiry is, by necessity, 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.* [Emphasis added.]

Moreover, a “common theme” in this Court’s prior cases is that some “people are known to exhibit types of behavior that are contrary to common sense that are not within the average person’s understanding of human behavior. In these instances, an expert’s specialized testimony may enlighten the jury so that it can intellectually evaluate an experience that is otherwise foreign.” *Kowalski*, 492 Mich at 124 (opinion by MARY BETH KELLY, J.). It appears undisputed that the average juror is unlikely to have more than a general, colloquial understanding of how human memories are formed, the reliability of such memories, and the types of things that can influence or alter memories. Therefore, our focus should be on whether MRE 702’s *flexible* inquiry into the admissibility of Dr. Thompson’s proposed testimony required admission of some or all of the evidence.

I have several concerns with the trial court’s review of Dr. Thompson’s proposed testimony. My first concern is that the trial court appeared to accept, with minimal analysis, the prosecutor’s argument that the entirety of Dr. Thompson’s proposed testimony was irrelevant because Dr. Thompson had never met or interviewed the complainant and because the complainant had been interviewed by a trained forensic interviewer. The trial court also referred to four Wisconsin Court of Appeals decisions that excluded similar proposed testimony from Dr. Thompson on the basis that the “relationship of the testimony to the facts of the case didn’t fit and because of that the trial court in those cases concluded that the testimony was not relevant.” The trial court reached the same conclusion because Dr. Thompson

cannot point to any particular facts that he can then offer an opinion on that would say it’s more likely than not that this individual was influenced because of this fact and this research that supports this particular conclusion or opinion that I have reached. I did not hear any testimony to that effect. He would like to have more detail, but he doesn’t.

I find this aspect of the trial court’s ruling to be concerning. One could read the trial court’s ruling as a conclusion that the proposed testimony is not relevant because Dr. Thompson did not offer an opinion as to whether the complainant’s report of alleged sexual abuse was true or false. Such reasoning would, of course, be at odds with this Court’s holding in *People v Thorpe*, 504 Mich 230, 258-265 (2019). An expert witness cannot vouch for the credibility of an alleged sexual assault victim under the guise of a medical or professional opinion based merely on the disclosures made by the alleged victim. A proposed expert witness for the defense may not invade the province of the jury any more than an expert for the prosecution. As a result, Dr. Thompson properly refrained from offering an opinion as to the complainant’s credibility.

To the extent the trial court concluded that Dr. Thompson could not adequately connect his proposed testimony to the facts of this case, that assessment is not entirely accurate. Dr. Thompson explicitly testified that scientifically supported concerns about the reliability of memories arise with repeated interviews. Specifically, he noted that any

conversation about alleged sexual abuse would be considered an interview and that the complainant had been talking with her therapist for years before making a disclosure. The complainant discussed the alleged abuse with her mother, a youth pastor, and police, and the complainant went through a forensic interview that was not recorded. Each of these interactions would be considered an “interview” under the technical standards used in the studies Dr. Thompson referenced.

Dr. Thompson also testified that based on the information he had, there was “considerable negative discussion over a period of time . . . in the household about” defendant, at least some of the children were aware of the negative conversations, and there were interviewer bias and subjectivity concerns because the complainant’s therapist also treated the complainant’s mother and sister. Dr. Thompson further testified that the complainant’s preexisting mental health issues and prescription for antidepressants and antipsychotic medications might have affected her memory and perceptions. This specific testimony connected directly to the facts of the case based on the minimal pretrial record then known to defendant and his expert. Dr. Thompson’s proposed testimony about memory formation and reliability is certainly relevant to a jury’s future evaluation of the credibility of the complainant’s allegations of long-time repressed memories of sexual abuse. The prosecutor did not present any evidence questioning the scientific basis of these aspects of Dr. Thompson’s proposed testimony. Further, the degree to which the factors discussed by Dr. Thompson might be applicable to this case or the reliability of the complainant’s allegations goes to the weight of the evidence—not admissibility—and is best left for a jury to decide. See *People v Wager*, 460 Mich 118, 126 (1999).

It is correct that Dr. Thompson was unable to comment further as to other external influences that might have affected the reliability of the complainant’s memory based on the current record. Dr. Thompson gave two reasonable justifications for this. First, Dr. Thompson did not have the complete therapy records or a transcript from any sessions. Second, the forensic interview at the Port Huron Child Advocacy Center was not video- or audiorecorded, and there was no transcript, a fact that Dr. Thompson noted was contrary to best practices and national accreditation standards. As a result, he was unable to offer an opinion regarding whether the complainant was influenced during that process.

The fact that the forensic interview was conducted in a manner that did not follow best practices is a flaw in the government’s pre-prosecution investigation of this case. It strikes me as unusual and unjust that a qualified expert would not be permitted to testify about relevant, well-accepted, unchallenged scientific concepts—information of a type that is often admitted in criminal sexual conduct cases⁵—on the basis of inadequate

⁵ This case also raises concerns about potential inequities in how courts handle proposed expert testimony in criminal sexual conduct cases. For example, prosecutors have long been permitted to offer expert testimony about whether a complainant’s behaviors, such as

recordkeeping and departures from best practices during the government's investigation. Moreover, the expert could obtain the missing details and provide more nuanced testimony in the future based on additional discovery that might occur and from other exhibits and witness testimony⁶ that will be presented at trial. The trial in this case will effectively be a one-on-one credibility contest with no physical evidence of sexual abuse that allegedly occurred years before the disclosure. Whether the presence or absence of external influences affects the reliability of the complainant's memories is a question for the jury to resolve, not the court. See *Wager*, 460 Mich at 126.

I am also concerned with the narrow focus of the Court of Appeals' analysis on remand. While defendant's counsel focused the appeal on one aspect of the proposed testimony (dream-reality confusion), Dr. Thompson also offered other relevant testimony

delayed disclosure, are consistent or inconsistent with sexual abuse. See *People v Peterson*, 450 Mich 349, 370-371 (1995). Just as there are common misunderstandings and misconceptions about how victims of sexual abuse will or should behave following the abuse, there are also common misunderstandings and misconceptions about the formation and reliability of memories. Science-based expert testimony can be helpful for jurors in both arenas. But in the realm of criminal sexual conduct prosecutions, courts appear to be more critical of experts put forward by the criminally accused than those offered by the prosecutor, even though it is the government that has the burden of proving its case against the accused.

⁶ While MRE 615 grants trial courts discretion to sequester a witness upon the request of a party, the rule does not authorize exclusion of "a person whose presence is shown by a party to be essential to the presentation of the party's cause." Expert witnesses often fall within this exception. Assuming no further pretrial discovery or interviews occur, defendant would have a potentially meritorious argument that his expert should, at a minimum, be permitted to observe the testimony of those witnesses to whom the complainant disclosed the alleged sexual abuse, including the individual who performed the forensic interview. See MRE 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence."); 2 Robinson & Longhofer, *Michigan Court Rules Practice, Evidence* (4th ed, September 2023 update), § 615.4 ("Experts are frequently permitted to attend the trial because they may be necessary to assist counsel in cross-examining opposing experts, and, indeed, may base their own opinions on the evidence presented at trial."). Alternatively, Dr. Thompson would be able to review transcripts or recordings of the testimony of other witnesses and use this information as a proper basis of his expert opinion.

that would have educated jurors about memory formation. Rather than find only the dream-reality confusion testimony inadmissible, the trial court ruled that Dr. Thompson could not testify as an expert at all. While one can question the trial court's and Court of Appeals' exclusion of the dream-reality confusion testimony,⁷ it seems beyond reasonable debate that the remainder of Dr. Thompson's testimony was admissible and of a nature that is standard in trials where memory is at issue. Given the role of courts as a gatekeeper in the realm of expert evidence, I believe a more nuanced review of the totality of the proposed expert testimony is needed to protect the accused's right to present a potentially meritorious defense and educate jurors about relevant scientific information.

Given my belief that much of the proposed expert testimony satisfied the requirements of MRE 702 and yet that testimony has been excluded from admission at defendant's trial, I respectfully dissent.

⁷ Much of the trial court's analysis focused on concerns with the concept of dream-reality confusion and was based largely on its own research. The court concluded that the lack of error rates, the lack of established testing standards, the varied results, and the alleged lack of general acceptance within the scientific community rendered the scientific basis for the dream-reality confusion testimony unreliable for purposes of MRE 702 and *Daubert*. The Court of Appeals affirmed this aspect of the circuit court's ruling concerning dream-reality confusion, but it was the *sole* focus of the analysis. I have some reservations about the Court of Appeals' analysis and conclusion that dream-reality confusion was not an adequately supported and reliable scientific theory. This is because many psychological and social science theories are not susceptible to ideal experimental conditions and controls, and there was support in the relevant literature for Dr. Thompson's testimony. See *United States v Simmons*, 470 F3d 1115, 1123 (CA 5, 2006); *Isely v Capuchin Province*, 877 F Supp 1055, 1065-1066 (ED Mich, 1995) (permitting a psychological expert to testify regarding repressed memory, despite the expert's acknowledgment that her theory of repressed memory could not be empirically tested). However, because the studies cited by Dr. Thompson primarily focused on the study of dream-reality confusion in an inpatient, clinical setting and often involved individuals with very serious mental health disorders, I am not certain that defendant has carried his burden of establishing the admissibility of that aspect of Dr. Thompson's testimony under MRE 702.



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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 13, 2023

Clerk