

ing judicial weight to individualized claims of mental handicaps creates a quandary for the courts, as emerging neuroimaging, neuropsychological, and social science research cited in support of treating adolescents differently from an average mature adult reveals differences not necessarily unique to adolescents. The same abnormal findings on a neuroimaging study or neuropsychological test presented to excuse a defendant for a particular act may well be found in normal, well-behaving citizens. Similarly, many individuals with adverse early-life experiences emerge as responsible and law abiding citizens.

The *J.D.B.* and *Miller* decisions require individual determinations of a juvenile defendant's culpability and cognitive/emotional capacity. Such determinations may someday be extended to the adult defendants, thus carrying the potential of greatly adding to the burden of an already overwhelmed court system. *J.D.B.* and *Roper* illustrate the difficulties that the neurosciences face when trying to distinguish between normal and abnormal brain characteristics and psychological profiles as they relate to judgment, decision-making, and capacity to resist impulses, among other factors.

One could imagine a scenario where one's biology and life history are configured to explain and perhaps excuse all conceivable actions. The worry is that, by relying on what is perhaps premature neurosocial science and by opening the door to individualized mental assessments of defendants, the Supreme Court has taken a step onto a slippery slope. Trial and appellate courts will long grapple with how to translate the emerging brain and neurocognitive sciences into questions of individual responsibility, choice and free will, and personal accountability.

Disclosures of financial or other potential conflicts of interest: None.

Evidence Admissibility Standards for Defense Expert Testimony Concerning False Confessions

Chrisantha E. Anandappa, MD
Fellow in Forensic Psychiatry
Center for Forensic Psychiatry
Saline, MI

Melvin Guyer, PhD, JD
Professor of Psychology
Department of Psychiatry
University of Michigan
Ann Arbor, MI

Defense Expert Testimony Concerning False Confessions May be Admissible to Assist the Jury, but Only When It Is Shown to be Both Scientifically Reliable and Relevant to the Facts of the Instant Case

The Michigan Supreme Court, in *People v. Kowalski*, 821 N.W.2d 14 (Mich. 2012), held, for the first time, that expert scientific testimony concerning false confessions is admissible. The court held that such testimony concerned matters that are outside the ordinary understanding of laypersons, and thus expert testimony could be of assistance to a jury. However, the testimony could be admitted only if it was first demonstrated to be scientifically reliable and relevant to the particular facts of the case at hand.

Facts of the Case

In May 2008, the brother and sister-in-law of the defendant, Jerome Kowalski, were found shot to death in their residence. Police questioned Mr. Kowalski about the murders four times over the next several days. During the third interview session, Mr. Kowalski allegedly acquiesced to an interviewer's statement that "there was a 50 percent chance" that he had killed his brother. At that time, Mr. Kowalski discussed having a "blackout" and "blurred" memory. During his fourth and final police interview, Mr. Kowalski allegedly confessed to the murders, stating that he killed the victims after a verbal exchange. At a pretrial hearing, the confession elicited during the final interview was identified as the primary evidence that implicated him in the murders.

Before trial in the circuit court, defense counsel filed notice of intent to call expert witnesses, including Dr. Richard Leo, an expert on false confessions and interrogation techniques, and Dr. Jeffrey Wendt, a forensic psychologist who would testify about his psychological testing of the defendant and provide his opinion about Mr. Kowalski's mental state during the police interrogation. At a pretrial *Daubert* hearing, the circuit court noted that Dr. Leo's analysis incorporated facts from case files but also facts from accounts in the popular media. The circuit court also acknowledged that Dr. Leo categorized coerced confessions by comparing them to "other confessions he had already determined to be

false” (*Kowalski*, p 21). At the same hearing, Dr. Wendt testified that his review of data sources, including psychological testing and a review of the interrogation transcripts, would help him present a psychological profile of Mr. Kowalski, including his ability to interact with other people.

The circuit court ruled that Dr. Leo’s testimony was “unreliable” because “the lack of precise information” prohibited him from “measuring the accuracy of his studies” (*Kowalski*, p 21). The circuit court also noted that his reliance on prejudiced media reports contributed to the unreliability of his methodology. Furthermore, the circuit court suggested that his methodology began with the assumption that a confession was false and then sought to categorize it based on one of his unproven typologies. Finally, the circuit court determined that his testimony would not assist the trier of fact “because the jury could evaluate the credibility and reliability of defendant’s confession in other ways” (*Kowalski*, p 22). Thus, based on its findings, the circuit court ruled that his testimony did not comply with Michigan Rule of Evidence 702 (MRE 702), which states that a qualified expert:

... 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 addition, the circuit court ruled that Dr. Leo’s testimony was properly excluded under Michigan Rule of Evidence 403 (MRE 403), concluding that, “The highly probative value of Dr. Leo’s testimony was outweighed by the danger of unfair prejudice because the jury would hear about confessions of defendants not present in this case. . .” (*Kowalski*, p 22). As to Dr. Wendt’s testimony, the circuit court found that the exclusion of Dr. Leo’s testimony regarding false confessions required the exclusion of Dr. Wendt’s testimony, stating, “I don’t see how this could be relevant, helpful or do anything other than be misleading [and] at least, that probative value would be substantially outweighed by the danger of unfair prejudice” (*Kowalski*, p 22). Mr. Kowalski appealed the circuit court’s exclusion of his experts’ testimony to the Michigan Court of Appeals, which affirmed the circuit court’s ruling. Mr. Kowalski then appealed to the Michigan Supreme Court.

Ruling and Reasoning

In this case of first impression, the Michigan Supreme Court held that expert scientific testimony concerning false confessions is admissible. The rationale for the decision is that knowledge concerning false confessions lies outside the understanding of ordinary jurors, and thus expert testimony is helpful to the jury in its decision-making. Nonetheless, the court held that such testimony, before being admitted, must also be shown, in each instance, to be scientifically reliable and to pass the hurdle of being more probative than prejudicial. The supreme court stated that the trial judge is the gatekeeper of admissibility in determining the reliability and helpfulness of the proffered testimony (i.e., beyond the fact finder’s “ken of common knowledge”) before considering the additional requirements of MRE 702. The Michigan Supreme Court noted in its reasoning on the admissibility of false-confession testimony that it has allowed experts to explain other human behavior that was “contrary to the average person’s commonsense assumptions” (*Kowalski*, p 26). In particular, it cited the admissibility of expert testimony on certain counterintuitive behaviors such as those of the sexually abused child or victims of battered-woman syndrome. It held that, in those instances, an expert’s specialized testimony “may enlighten the jury so that it can intelligently evaluate an experience that is otherwise foreign” (*Kowalski*, p 27). In addition, citing *People v. Hamilton*, 415 N.W.2d 653 (Mich. Ct. App.1987), the court noted that certain actions could be considered counterintuitive behaviors that were beyond the understanding of an ordinary person. Thus, a qualified expert witness using reliable methodology could help jurors understand how and why a defendant might falsely confess. The court further held that both lower courts were in error in presuming that the average juror possessed adequate knowledge to evaluate factors that might lead to a false confession, rather than considering how such testimony could reliably educate a jury.

The Michigan Supreme Court also held that the circuit court erred in not applying the remaining MRE 702 factors to the psychological testing component of Dr. Wendt’s testimony. It noted that Dr. Wendt’s methods, analysis, and psychological profiling were, “in fact, independent of the false confession literature” (*Kowalski*, p 27) and ruled that the circuit court’s decision to exclude all of Dr. Wendt’s testimony amounted to an abuse of discretion. In addi-

tion, it found that the circuit court's exclusion of Dr. Wendt's testimony disregarded the tenets of MRE 403, in that the circuit court simply speculated that the entirety of Dr. Wendt's testimony would be irrelevant. Hence, the circuit court abused its discretion because it failed to weigh adequately the psychological testing and other elements of Dr. Wendt's testimony on the probative side. Accordingly, the Michigan Supreme Court reversed portions of the lower courts' rulings and remanded the matter to the circuit court with the caveat that the relevant testimony of Dr. Wendt should also meet the requirements of MRE 702 and 403.

Finally, in regard to Mr. Kowalski's claim that any exclusion of proposed witness testimony was a violation of his rights under the Sixth Amendment, the Michigan Supreme Court compared MRE 702 to the "nearly identical" Federal Rule of Evidence 702, which requires that "any and all scientific testimony and evidence admitted [be] not only relevant, but reliable." Ultimately, the Michigan Supreme Court endorsed that "courts are vested with the gatekeeping authority to apply MRE 702 on a case-by-case basis. . . . Consequently, we hold that proper application of MRE 702 in this case does not deny defendant his constitutional right to present a defense" (*Kowalski*, p 35).

Dissenting Opinion

The single dissenting justice concluded that expert testimony regarding false confessions is not beyond the common knowledge of the average juror and is thus inadmissible under MRE 702. Also, he found that Dr. Wendt's testimony regarding Mr. Kowalski's psychological characteristics was irrelevant, since Dr. Wendt himself admitted that none of the psychological tests made it "more probable or less probable" that Mr. Kowalski's confession could be either true or false. The dissenting justice focused on how the experts' testimony would not offer jurors "any actual assistance in determining whether *defendant's* confession was, in fact, false" (*Kowalski*, p 39, italics in original). He strongly argued that introducing experts not only risked distracting the jury but also would cause them to "subordinate their own commonsense judgments" (*Kowalski*, p 39). Finally, in his wariness over expert testimony on false confession, the justice warned of the possibility of an increasing number of false-confession experts attempting to undermine defendants' confessions, de-

fendants choosing not to testify and relying on experts to show that their confessions were false, prosecutors having to bring in their own experts regarding the truthfulness of confessions, and criminal trials dissolving into debates between battling experts rather than a "search for the truth."

Discussion

The Michigan Supreme Court appeared to agree with the trial and appellate court in their critical application of MRE 702 to the proffered evidence of Dr. Leo, noting the poor reliability of the scientific principles and methodology. The court did not find the exclusion of most of the proffered expert testimony to be an abuse of discretion. In fact, it affirmed the gatekeeping authority of the trial courts in assessing the reliability of specific false-confession testimony. However, it rebuked the lower courts' presumption that the average juror possesses sufficient knowledge to evaluate false confessions without making a commonsense inquiry under MRE 702. Furthermore, the Michigan Supreme Court reminded the lower courts that each aspect of expert witness testimony must be assessed for its reliability rather than summarily rejecting all expert testimony when only certain elements were questionable. By dismissing the entirety of Dr. Wendt's testimony, the lower courts failed to consider separately the reliability of his other relevant testimony. Finally, the circuit court's holding that it should reject the entirety of the false-confession testimony because it had no evidence to the contrary failed to weigh the probative value of Dr. Wendt's psychological testing against any prejudicial concerns under MRE 403.

Disclosures of financial or other potential conflicts of interest: None.

When Does a Plaintiff's Deliberate Indifference Claim Survive Summary Judgment?

Michael Seyffert, MD
Psychiatry Resident
Department of Psychiatry
University of Michigan Medical School
Ann Arbor, MI

Craig Lemmen, MD
Director of Training and Research
Michigan Center for Forensic Psychiatry
Saline, MI