DIVISION ONE
FILED: 04/26/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Petitioner, v. THE HONORABLE MICHAEL D. BURKE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of La Paz, Respondent Judge, RICHARD AARON, Real Party in Interest.	)	No. 1 CA-SA 12-0028 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in La Paz County

Cause No. S1500CR 200900252

The Honorable Michael J. Burke, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

Samuel Vederman, La Paz County Attorney Parker
By Daniel J. Terrell, Deputy County Attorney
Attorneys for Petitioner

Fred H. Welch Parker
Attorney for Real Party in Interest

S W A N N, Judge

¶1 In January 2010, Defendant was convicted of three counts of sexual conduct with a minor under the age of twelve and one count of aggravated assault; those convictions were subsequently overturned by this court in 1 CA-CR 10-0504, 2011 WL 3805914 (Aug. 25, 2011), because the trial court improperly allowed the entirety of the interviews with the victim to be played for the jury. At Defendant's first trial in January 2010, Defendant introduced expert testimony from Dr. Phillip Esplin. Dr. Esplin is a licensed psychologist who specializes in forensic psychology and more specifically in interview techniques for and investigation of child sex crimes.

¶2 On December 5, 2011, and again on January 6, 2012, the state requested disclosure of information and documentation to establish the reliability of Dr. Esplin's opinions and expected testimony at a second trial under Ariz. R. Crim. Proc. 15.2. Defendant never provided the documentation. On January 5, 2012, Defendant responded to the state's motion[1] to exclude Dr. Esplin's testimony and the state's request for an evidentiary hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In the response, Defendant outlined the criteria set forth in *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973), and *State v. Chapple*, 135 Ariz. 281, 660 P.2d

[1] This motion was not included in the record on appeal.

1208 (1983), and explained without documentation or external citation that Dr. Esplin's testimony satisfied the admissibility criteria. Defendant argued that credibility of witnesses was a matter for the jury and that "challenges to Dr. Esplin's factual basis or the sufficiency of his methodology are issues for cross-examination and not a basis for exclusion." Defendant made no attempt to explain the admissibility of Dr. Esplin's testimony under the substantially revised Arizona Rule of Evidence 702 now in effect. The state replied, highlighting this omission and Defendant's failure to provide the basis for Dr. Esplin's opinions, and arguing that Dr. Esplin's testimony is inadmissible under Rule 702.

¶3 The court held a combined *Donald* hearing and hearing on the state's motion to preclude. The court examined the transcript of Dr. Esplin's testimony from the first trial and pointed out a series of questions and answers that would not be allowed for the second trial because they impinged on the jury's role in determining credibility. The court ultimately ruled that Dr. Esplin would be able to testify as an expert and that his testimony could include testimony about "false memory."

¶4 The state brought this petition for special action, arguing that the trial court erred by ruling *in limine* to allow Dr. Esplin to testify about "False Memory Syndrome" without properly considering or finding any of the Rule 702 factors

prior to the ruling. Accordingly, the state requests that this court exclude Dr. Esplin's testimony about "False Memory Syndrome" or, in the alternative, remand and require Defendant to disclose the basis for Dr. Esplin's testimony so the trial court can make an "adequate admissibility determination."

DISCUSSION

¶5 Because we agree that this is an issue of first impression and statewide importance, and that no other remedy is available to the state, we exercise our discretion to accept jurisdiction. Ariz. R.P. Spec. Act. 1(a); *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, 585, ¶ 8, 30 P.3d 649, 652 (App. 2001).

¶6 The current Arizona Rule of Evidence 702, effective January 1, 2012, adopts Federal Rule of Evidence 702 and states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

¶7 The new language of Rule 702 marks a notable departure from Arizona's former test for the admissibility of expert testimony that was detailed in *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000).[2] The comment to the new Arizona Rule 702 notes that the change from *Logerquist* and the former Rule 702 "recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue."

¶8 Because no Arizona case law exists to provide guidance to trial courts considering admissibility of expert testimony under the new Rule 702, we look to the decisions of federal courts applying *Daubert* and Federal Rule 702. In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) -- the third case in the *Daubert* trilogy that resulted in the current Federal Rule 702 -- the Supreme Court noted that when considering the admissibility of expert testimony, the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause

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[2] *Logerquist* prescribed a very low threshold for the admissibility of scientific evidence, rooted in the test outlined in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) -- the same test rejected by the federal courts in *Daubert* and the subsequent amendment to Federal Rule 702.

for questioning the expert's reliability arises." *Id.* at 152. Accordingly, because it is within the trial court's discretion to hold a hearing to determine the reliability of expert testimony, the lack of a hearing constitutes an abuse of that discretion when the evidentiary record is insufficient to allow the court to make a proper reliability determination under Rule 702. *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999).

¶9 Here, the court did not conduct a hearing in accordance with Rule 702 or *Daubert* before the first trial. Indeed, given the lax standards of *Logerquist* and the version of Rule 702 then in effect, there would have been no reason to do so. But under the new rule, it is difficult to discern how the trial court could have conducted the requisite analysis without the benefit of a hearing or, at a minimum, review of the requested disclosures regarding the basis of Dr. Esplin's testimony. Though the trial court did review the testimony from the first trial, and may have some personal recollection of the general methodologies used by Dr. Esplin, the court has been provided no offer of proof regarding False Memory Syndrome.[3]

[3] The trial court noted that this court did not "say anything about either party's expert testimony at the last trial" in the appeal from the resulting convictions. We note that not only was the propriety of the expert testimony not an issue in the former appeal, the current version of Rule 702 was not in effect

¶10 The trial court pointed to *Steward v. State*, 652 N.E.2d 490 (Ind. 1995), to justify admitting Dr. Esplin's proposed testimony under a *Daubert*-style test. In *Steward*, the Indiana court explained in dicta that "once a child's credibility is called into question, proper expert testimony *may* be appropriate" to explain "unexpected behavior patterns seemingly inconsistent with the claim of abuse." *Id.* at 499 (emphasis added). The Indiana court continued that "a trial court may consider permitting [such] expert testimony, *if [it is] based upon reliable scientific principles*." *Id.* (emphasis added). Even under the authority upon which the trial court relied, therefore, a reliability determination is necessarily a precursor to admissibility. The record here shows that no such determination was made.

¶11 As for the court's reliance on *State v. Speers*, 209 Ariz. 125, 98 P.3d 560 (App. 2005), that too is ultimately misplaced. The most obvious distinguishing characteristic between *Speers* and the present case is that *Speers* relied on *Logerquist* -- a case without continuing force as a matter of Arizona law. *Id.* at 129, ¶ 14, 98 P.3d at 564. Though it is true that we recognized *Frye*'s inapplicability to expert testimony that was not about "scientific principles advanced by

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-- our silence on the issue therefore lends nothing to the trial court's ruling or Defendant's position.

others," there still was no discussion of how the proposed testimony in *Speers* satisfied the elements of *Daubert* (or any rule substantially equivalent to the new Rule 702) in a manner that justifies admission under current law. *Id.* at 130, ¶¶ 18-19, 98 P.3d at 565. An additional and equally important factual difference is that in *Speers* we made explicit reference to "material provided to the trial court in support of the expert testimony." *Id.* at 130, ¶ 15, 98 P.3d at 565. Not only is no such material in the record of this case, such material is exactly what the state requested and Defendant failed to provide.

¶12 Accordingly, we hold that the evidentiary record available to the court here was insufficient to permit it to make a legally adequate determination that Dr. Esplin's testimony was admissible. The trial court therefore abused its discretion by failing to perform its gatekeeping role as required by Rule 702.

CONCLUSION

¶13 We accept jurisdiction of this special action and grant relief. We remand this case to the trial court for an evidentiary hearing or for the consideration of written evidence (after disclosure) and argument regarding the manner in which Dr. Esplin's testimony squares with the requirements of Rule 702.

/s/
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PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
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MICHAEL J. BROWN, Judge

/s/
_____
JON W. THOMPSON, Judge