

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME WALTER KOWALSKI,

Defendant-Appellant.

UNPUBLISHED

August 26, 2010

No. 294054

Livingston Circuit Court

LC No. 08-017643-FC

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

DAVIS, J. (*concurring in part and dissenting in part*)

I agree with the majority's determination that it was proper to exclude Dr. Richard Leo's expert testimony as to the significance of particular police interrogation techniques and their supposed association with false confessions. However, I respectfully disagree with the majority's determination that it was proper to exclude Dr. Leo's testimony as to the general fact of false confessions or to exclude Dr. Jeffery Wendt's expert testimony as to defendant's state of mind during his confession. Furthermore, I believe that this matter calls for a much more straightforward and simple analysis than engaged in by the majority.

At oral argument, the prosecution conceded that if Dr. Wendt's testimony was offered independent of a "package deal" with Dr. Leo's testimony, that "there may be an appropriate basis for the trial court to consider admitting it" and "psychological contours of the interrogation are relevant." I agree. There is no real challenge to Dr. Wendt's credentials as an experienced clinical and forensic psychologist; nor to his methodologies, which included a standard battery of objective tests recognized as reliable detectors of enduring personality traits. Furthermore, while Dr. Wendt's testimony may have initially been offered as a "package," it was presented as capable of standing alone. Dr. Wendt's conclusion that defendant's personality makes him more susceptible to influence than normal is based on reliable methodologies and is highly relevant to explain his mental state as a circumstance attendant to his confession. See *Crane v Kentucky*, 476 US 683, 688-691; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Particularly under the circumstances of this case, where defendant's sole defense is that he falsely confessed, I find Dr. Wendt's testimony relevant and its probative value not significantly outweighed by the danger of prejudice or confusion. I believe it is an abuse of discretion to exclude it.

As noted, I agree that part of Dr. Leo's testimony was properly excluded. I find it unnecessary to evaluate *how* Dr. Leo came to the conclusion that certain police interrogation techniques are associated with false confessions in this circumstance because the conclusion itself is useless. The police interrogation techniques Dr. Leo associated with false confessions are also associated with true ones and partially true ones, and there is no known difference in rates. Dr. Leo did not apparently study any sort of baseline rate for true confessions or make any comparisons. While I appreciate that studying the phenomenon is difficult, and as the trial court noted, "one false confession is unjust and too many," all Dr. Leo can tell us is that police interrogation techniques are associated with *confessions*. This association will not assist the jury, irrespective of how reliable its underlying methodology might be.

But Dr. Leo also proposed to testify that, contrary to general knowledge and belief, people do confess falsely even in the absence of torture or mental illness. The majority states that this is within the common knowledge of a layperson, but cites no evidence for this. In contrast, Dr. Leo explained that actual experiments had been performed on mock jurors to see how they evaluated coerced confession evidence and to see whether they inferred promises of lenity or threats of harm under various conditions. Surveys of jurors were also performed. The results showed that people were commonly skeptical of false confessions, that they placed the same weight on involuntary confessions as voluntary ones, even when explicitly instructed not to, and that they tended to believe that people would not falsely confess in the absence of torture or illness. Furthermore, irrespective of whether some of the instances studied by Dr. Leo were dubious, the existence of false confessions was established through such objective tests as DNA evidence.

Taken together, this shows, using reliable methodologies, that false confessions do occur—albeit in a "minority" of cases—and that it is not within the general knowledge that they occur in the absence of torture or mental illness. Particularly in a capital case, I would not make the same assumptions as the majority as to what a layperson may or may not commonly know. I find this aspect of Dr. Leo's testimony admissible under MRE 702. The circumstances of this case, wherein the only defense is that defendant falsely confessed, leads me to conclude that it was an abuse of discretion to exclude it. See *Crane, supra*.

I would affirm the trial court's exclusion of all of Dr. Leo's testimony except for his testimony as to the fact that false confessions do occur in the absence of mental illness or torture; I would reverse the exclusion of that one point. I would reverse the trial court's exclusion of Dr. Wendt's testimony to the extent that testimony can stand independent of Dr. Leo's.

/s/ Alton T. Davis