State of Michigan
In the Court of Appeals

The People of the State of Michigan

Plaintiff-Appellee,

v.

Defendant-Appellant.

Case No.

_____ County Circuit Court Case Nos. _____

Brief on Appeal

– Oral Argument Requested –

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Arguments

I. The circuit court erred in denying *Daubert* motion and admitting Tom Cottrell's testimony.

Issue Preservation

preserved this issue by moving to exclude Cottrell as an expert under MRE 702 and *Daubert*. DT, 3; Appendix G, J; TT2, 175-76.

Standard of Review

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Kowalski*, 492 Mich 106, 119 (2012). Legal errors are always an abuse of discretion because errors fall "outside the range of principled outcomes." *Id*. This Court "reviews de novo whether the trial court correctly selected, interpreted, and applied the law." *Gay v Select Specialty Hosp*, 295 Mich App 284, 291 (2012).

Discussion

MRE 702 provides:

> 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 the proponent demonstrates to the court that it is more likely than not that:
>
> (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's opinion reflects a reliable application of the principles and methods to the facts of the case.

Tom Cottrell's anecdotal testimony about children he has observed and counselors he has supervised was not "based on sufficient facts or data" or the "product of reliable principles and methods." MRE 702. As a result, no "reliable application" of principles to data occurred. *Id.* No aspect of Cottrell's testimony was tested or peer reviewed. There exists no way to determine the error rate of Cottrell's observations or how many of the sexual assault victims Cottrell helped treat were actually abused. No data supports Cottrell's theories. He has no set principles or methodologies. Instead his testimony is rooted solely in his opinions, which largely mirror the discredited Child Sexual Abuse Accommodation Syndrome ("CSAAS").

MRE 702 forbids such testimony.

A. Michigan law does not support a finding that Cottrell's testimony was admissible under MRE 702.

The Michigan Supreme Court has two decisions that address testimony like Cottrell's: *People v Beckley*, 434 Mich 691, 712 (1990), and *People v Peterson*, 450 Mich 349, 352 (1995). From the jump, our Supreme Court expressed concern about the use of "syndrome" testimony instead of diagnostic evidence because "syndrome evidence could be misconstrued as a predictor of child abuse," and therefore experts should be limited to dispelling common "myths" which "would have an effect on the jury's consideration as to the credibility of the witness." *Beckley*, 434 Mich at 709; see *Peterson*, 450 Mich at 373.

Beckley interpreted the old version of MRE 702,[3] noting that "Michigan endorses a broad application of the requirements for qualifying an expert." *Id*. at 712. The opinion found relevant expert testimony which explained the "many seemingly inconsistent responses to the trauma of the incident" and permitted an expert to explain those responses. The "*Frye* test has been engrafted by case law to determine whether a novel scientific principle or technique is 'recognized' within the relevant scientific community." *Id*. at 718. However, it was difficult to "fit the behavioral professions" under *Frye*'s standard. *Id*. at 720. The Court found "a fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences." *Id*. at 721. Accordingly, *Beckley* held *Frye* "inapplicable." *Id*.; *Peterson*, 450 Mich at 369.

MRE 702 was amended in 2004 "to particularize the kind of gatekeeper inquiry the trial court is required to make." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779 n.44 (2004). The amendment adopted *Daubert*'s placement of the trial court as "gatekeeper" vested with the "fundamental duty to ensure that the proffered expert testimony is both relevant and reliable." *Kowalski*, 492 Mich at 120.

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[3] In *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 587 (1993), the US Supreme Court departed from the standard announced in *Frye v United States*, 293 F 1013, 1014 (CA DC 1923). *Frye* tried to grasp from the "twilight zone" a principle with "evidential force" which limited the admission of expert testimony to only deductions which "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." 293 F at 1014. Michigan then adopted *Frye*. *People v Davis*, 343 Mich 348, 372 (1955).

"The evolution of the federal expert witness doctrine is important for understanding Michigan's approach." *Danhoff v Fahim*, 513 Mich 427, 443 (2024). Our Supreme Court recently clarified two major changes since the days of *Frye*: (1) "a trial court is not required to admit evidence that has a scientific basis but is only connected to data by the ipse dixit of the expert" and; (2) "the gatekeeping function performed by trial courts applies to all expert testimony, rather than to only a limited subset of scientific expert testimony." *Id*. at 444-445.

Beckley and *Peterson* did not fall within *Frye*, but now the same gatekeeping function applies to all proposed experts. *Id*.; see also *People v Lemons*, 514 Mich 485, 511-12 (2024).

Both individually and for the Court, Justices of our Supreme Court have since pondered the admissibility of testimony like Cottrell's under *Daubert* and the new MRE 702. *People v Tomasik*, 495 Mich 887, 888 (2013); *People v Thorpe*, 504 Mich 230, 253 n 32 (2019); *People v Mejia*, 505 Mich 963, 963 (2020) (MCCORMACK, CJ, dissenting); *People v Muniz*, 513 Mich 893, 893 (2023) (CAVANAGH, J, concurring); *People v Jackson*, 11 NW3d 515, 517-18 (2024) (WELCH, J, dissenting); *People v Del Cid*, 19 NW3d 373, 374 (2025) (THOMAS, J, concurring).

made such a challenge.

In *Muniz*, this Court held otherwise, concluding Cottrell's experience "treating more than 300 victims of abuse," as well as "his training, continuing education through conferences and training sessions, and research," passed muster under MRE 702. *People v Muniz*, 343 Mich App 437, 444 (2022). The opinion noted that, even if some of Cottrell's statements were disputed by other experts, he "defined the parameters of his knowledge base, which were adequate to qualify him." *Id*. at 445.

This Court cited *Beckley* and *Peterson* to conclude that "an objection to Cottrell's qualifications as an expert would have been futile." *Id*. at 449.

In so holding, the panel remarked that a trial court need not "engage in an analysis of scientific reliability." *Muniz*, 343 Mich App at 445 quoting *People v Spaulding*, 332 Mich App 638, 659 (2020). Respectfully, the quotation from *Spaulding* conflates *Frye* (which did not apply to *Peterson* and *Beckley*) with *Daubert* (which now does apply). See *Spaulding*, 332 Mich App at 659.

Cottrell's testimony is subject to a more stringent analysis under MRE 702 than in the days of *Beckley* and *Peterson*. This Court should hold Cottrell's testimony inadmissible under MRE 702. *Mejia*, 937 NW2d at 122 (MCCORMACK, CJ, dissenting); *Muniz*, 513 Mich at 893 (CAVANAGH, J, concurring); *Jackson*, 11 NW3d at 517 (Welch, J, dissenting); *Del Cid*, 19 NW3d at 374 (THOMAS, J, concurring).

B. Cottrell's testimony was founded on discredited CSAAS theories.

Cottrell's testimony closely aligns with now-discredited concepts made famous as CSAAS. CSAAS is the most well-known of a handful of theories put forth by clinical psychologists in the 1980s to explain "behaviors they reportedly witnessed in their adult psychiatric patients who self-reported having experienced sexual abuse as children." DGX2, 2; see also *Peterson*, 450 Mich at 384-85 (CAVANAGH, J, dissenting). Other theories went by other names, and some experts avoid using the term CSAAS since its conclusions have been criticized. GT2, 89; DGX2, 1 n.1. One of the main components of CSAAS is the same reason Cottrell is often called to testify: to explain the phenomenon of delayed reporting. GT2, 93-94. See *King v Commonwealth*, 472 SW3d 523, 528 (Ky, 2015) (describing connection between delayed disclosure testimony and

CSAAS); *Miller v Com*, 77 SW3d 566, 571 (Ky, 2002) (making same connection using statistics like in *Thorpe*).

CSAAS is not a true "syndrome" and is not a diagnostic tool. *State v JLG*, 234 NJ 265, 290 (2018); GT2, 90-91. That distinction is crucial under *Daubert*, in contrast to the old version of MRE 702. CSAAS cannot help a therapist or clinician determine *whether* a person has been sexually abused. "Rather, it assumes the presence of abuse, and explains the child's reactions to it. … With child sexual abuse accommodation syndrome, … one reasons from the presence of sexual abuse to reactions to sexual abuse. Thus, the accommodation syndrome is not probative of abuse." *State v Foret*, 628 So 2d 1116, 1124 (La 1993) quoting Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb L Rev 1, 67 (1989); see also *State v Chauvin*, 846 So 2d 697, 708 (La 2003).

Cottrell claimed he was not testifying about CSAAS, but his testimony bears all of CSAAS's hallmarks. DT, 62-63. His testimony covers "the same idea and the same points as what is presented in CSAAS." GT, 91. As Dr. London put it, "an arm is an arm, whether you want to call it an arm or a hand, wrist, elbow, and shoulder, it's still the same thing, you know?" *Id*. Or, as the Kentucky Supreme Court explains, "omission of the term 'syndrome' does not transform the objectionable nature of the testimony into reliable scientific evidence." *King*, 472 SW3d at 528.

The original CSAAS paper identified five categories of behavior it claimed were "a common denominator" of child sexual abuse: "secrecy; helplessness; entrapment and accommodation; delayed, conflicted, and unconvincing disclosure; and retraction." *JLG*, 234 NJ at 451-452, citing Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect 177, 180-181 (1983).

These factors map almost perfectly onto Cottrell's proposed areas of expertise: "delayed disclosure, grooming, a child's risk analysis, a victim's response to trauma, and offender dynamics." DT, 54. And Cottrell's testimony at the *Daubert* hearing, then the trial, bore out that his opinions were founded in CSAAS-type theories. Cottrell "mentioned behavioral signs, … behavioral issues that the kids could show, and grooming, and yeah, the piecemeal disclosures, and the recantations. All of that is from CSAAS." GT2, 95.

CSAAS testimony like Cottrell's has no probative value in terms of detecting whether sexual abuse occurred based on the existence of certain behavioral characteristics. *Beckley*, 434 Mich at 722-723. It is a therapeutic tool which *assumes abuse*. *Id*. at 722-723. "While it may be entirely proper for a clinician to accept a patient report of sex abuse at face value and proceed to render treatment on that basis, **for forensic purposes, such an assumption is utterly inappropriate**." *Newkirk v Commonwealth*, 937 SW2d 690, 694 (Ky, 1996) (emphasis added).

C. Cottrell's testimony does not satisfy MRE 702.

To be qualified, an expert must (1) "assist the trier of fact to understand a fact in issue," (2) be "qualified in the relevant field of knowledge," and (3) must offer opinions "based on reliable data, principles, and methodologies that are applied reliably to the facts of the case." *Kowalski*, 492 Mich at 120. These factors, though "separate and distinct," sometimes become "overlapping in nature." *Id*. at 120-21.

Trial courts' application of *Daubert* should look like the analysis of the false confessions expert in *Kowalski*. There, the trial court scrutinized a proposed expert's work and found "multiple problems with the analysis" he "applied to his data." *Id*. The trial court expressed concern about the lack of scientific method, omitting aspects like "a

random sample of confessions, true and false" or having a "reliable means" to exclude "extraneous factors," and overall lacking the "ability to estimate the frequency of false confessions." *Id*. at 133. The expert's "method" appeared to "yield only factors common to confessions" the expert "*believed* to be false." *Id*. Our Supreme Court affirmed the exclusion of this subjective testimony, which the trial court referred to as "unreliable at every stage." *Id*.

The proper analysis requires courts 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." *Id*. at 131 (emphasis added) quoting *Gilbert*, 470 Mich at 779. An expert cannot merely state that "the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine)." *Gilbert*, 470 Mich at 782. Rather, the expert's "proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology." *Id*.

Cottrell's testimony suffers the same flaws as the expert in *Kowalski*. *Id*. at 132-33. The court abused its discretion in concluding otherwise. DT, 70-71. Cottrell works backwards with no "set principles" or "methodologies" to check his work. TT4, 159-160. He begins with the assumption that a child has been sexually abused, valuing his patient's memory over the truth. The accuracy of his opinions depends not on data, methodology, or science, but what he picks and chooses from the things he reads. DT, 72. *Daubert* requires more, specifically a methodology and data. MRE 702.

Likewise, Cottrell does not have any data supporting his theories about delay, denial, and recantation. See *Kowalski*, 492 Mich at 132

(describing how trial court "followed the mandate of MRE 702 and carefully reviewed all the stages of [an expert's] research, starting with his data"). Cottrell explained that "we collect data in terms of demographics, but not clinical data." TT4, 156. Hearing this, the court should have excluded Cottrell. MRE 702.

Cottrell, who subscribes to no professional literature and relies on interns to find articles when he thinks he needs one, excuses his reliance on anecdotes because "there is little literature applying … scientific analysis in these particular types of cases." DT, 47, 71.

The absence of supporting literature "is an important factor in determining the admissibility of expert witness testimony." *Elher v Misra*, 499 Mich 11, 23 (2016). Cottrell is correct that CSAAS-like theories are not grounded in scientific research. Even Mr. Summit, who coined the term, later explained that he intended his paper to be a "summary of diverse clinical consulting experience," not a "laboratory hypothesis" or "study of a defined population." Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, 1 J Child Sexual Abuse 153, 156 (1992). Mr. Summit "did not cite any evidence" nor did he see "child patients." GT2, 91. In lieu of data, Mr. Summit cited publications like "Ann Landers and Newsweek Magazine and Penthouse Magazine" and as a result was rejected for publication until a colleague invited him to publish his theory in a special edition. *Id*. at 92.

But there is scientific literature and research on the topics of child sexual abuse disclosures, memory, and suggestibility—the research just doesn't support Cottrell's opinions or CSAAS. Dr. London provides an overview. DGX2, 3-4. Since 2000, Dr. London and colleagues "have reviewed the scientific literature and have conducted our own studies to evaluate the empirical support for CSAAS-type testimony (e.g., London

et al., 2005; London et al., 2008; London et al., 2022; McGuire & London, 2020, Miller & London, 2020)." *Id.* They "have explored the scientific foundation for claims regarding the extent to which sexually abused children delay reporting, deny abuse during formal questioning, and then later retract any disclosures." *Id.* at 4. Then, they conducted their own studies and large-scale literature reviews. *Id.*

Dr. London has studied "delay, denial, and recantation" as well as memory; compare this to the underlying components of CSAAS, many of which "are not even scientifically testable." GT2, 92-93. For example, "many kids do delay coming forward … in making allegations. But a good chunk also do disclose right away. So delay is not very helpful really because anyone could delay, one could say is consistent with abuse." *Id.* at 93. So "to say simply that many abused kids do delay, it doesn't really take into consideration that false allegations can also involve delay. A component of delay." *Id.* In fact, the "the longer the delay, the easier it is to implant suggestion." *Id.*

By failing to examine Cottrell's methodology or data, the court left him to opine ipse dixit on "subjective belief or unsupported speculation," which MRE 702 aims to exclude. *Lemons*, 514 Mich at 511 quoting *Daubert*, 509 US at 590. His testimony relied on "themes," and "dynamics" and drew on what he believes children think or feel. TT4, 138-40. His delayed disclosure testimony guessed that abused children go through "an analysis of which will hurt more, to disclose this abuse and endure the consequences or hold onto the secret of the abuse and not worry about the consequences to the rest of the family." *Id.* at 141. His testimony centered around guesswork about "developmentally what's most important to that child," claiming without empirical support that children under the age of 8 value their families more than their bodies. *Id.* at 143.

In the absence of data or methodology, all that is left is Cottrell's "opinion proffered." *Gen Elec Co v Joiner*, 522 US 136, 146 (1997). There is no reliable way to measure what children actually think or feel.

Apart from unscientific and therefore unreliable opinions, Cottrell's testimony was also unhelpful to jurors. Experts assist the trier of fact when they deconstruct or explain counterintuitive behaviors, actions, or responses. See *People v Christel*, 449 Mich 578, 592 (1995). Cottrell's testimony covered general misconceptions about memory and sexual assault which reflect "beliefs that the average person has." GT2, 96. His testimony reinforced, rather than dispelled, common myths about sexual assault. See Issue III.C.2.

For example, in light of the "increased attention towards sexual abuse" many adults now "actually over-estimate the extent to which kids would deny and recant." GT2, 95. Some children delay their disclosures, others do not. *Id*. at 93. But most "laypeople expect kids to delay." *Id*. at 94. In fact, most lay people "actually over-estimate … that kids will delay." *Id*. "Denial – what the literature review show is that among kids who come forward and are interviewed, most are already telling, that's what gets them there in the first place." *Id*. Dr. London's 2005 paper "found that overall among all adults who said they experienced sexual abuse as a child, only about a third indicated that they ever told anybody about it during childhood." *Id*. at 95. Today, though, most children do not deny. *Id*. (citing rates of "75, 85 percent of kids – of adults who experienced abuse as a kid, or who say they experienced abuse, are reporting that they told somebody about it during childhood"). *Id*.

Cottrell's testimony is no longer "helpful." *Beckley*, 434 Mich at 735 (BOYLE, J, concurring). Instead, he further reinforces over-estimations and confirms common misconceptions jurors already have.

D. Cottrell's testimony prejudiced .

Admitting Cottrell's testimony was outcome-determinative error. *People v Nelson*, ___ Mich ___, ___ (2025) (Docket No. 166297), slip op at 8. As discussed in greater detail in Issues II, III.C, and III.D, the actual evidence supporting convictions was nebulous and often unsupported by trial testimony.

Cottrell's CSAAS testimony gave the jury the "sought-after hook on which to hang its hat." *Beckley*, 434 Mich at 722. In a case that turned on inadmissible out-of-court statements and a witness who repeatedly testified that they could not remember what happened, Cottrell's testimony was the only "seemingly objective source." *Id.* Unsurprisingly, the prosecution used Cottrell's testimony in closing to paper over the holes in its case. E.g., TT5, 66-67.

It is "more probable than not that a different outcome would have resulted without Cottrell's testimony." *Thorpe*, 504 Mich at 259. As in *Thorpe*, "[t]here was no physical evidence, there were no witnesses to the alleged assaults, and there were no inculpatory statements." *Id*. at 260. is entitled to a new trial without Cottrell's testimony.