

Miranda: Admissibility of Expert Testimony on False Confessions; Failure of Expert To Offer Case and Fact-Specific Basis for His Expert Testimony; Exclusion of Pro-Offered Expert Testimony; Dr. Ofshe People v. Bedessie, No. 46 (N.Y. Court of Appeals, March 30, 2012).

Attorney James Manak writes a monthly legal column for our Reid Institute Members - the heading above is the focus of his April 2012 column - because it deals with how the N. Y. Court of Appeals viewed the testimony of Dr. Richard Ofshe in the *Bedessie* case, a false confession expert, we thought the general readership would be interested in a few of the observations by the court that Attorney Manak included in his column.

"In this appeal, the New York Court of Appeals was asked for the first time to consider the admissibility of expert testimony proffered on the issue of the reliability of a confession. While in a proper case expert testimony on the phenomenon of false confessions is admissible, the expert here, Dr. Richard J. Ofshe—an expert well known to Reid alumni—did not propose testimony relevant to this defendant or her interrogation. As a result, the court ruled the trial judge did not abuse its discretion when it declined to hold a Frye hearing (admissibility of scientific evidence) to assess whether any principles about which the expert proposed to testify were generally accepted in the scientific community, or to permit the expert to testify."

Excerpts from the column:

Dr. Ofshe's report was slightly over seven pages long. He represented at the outset that his proposed testimony would "involve three elements: presentation of information on the topic of police interrogation and tactics that can result in unreliable statements, information on the phenomenon of false confession and analysis of Ms. Bedassie's interrogation." **But the body of his report was filled with discussion of extraneous matters, speculation and conclusions based on facts unsupported even by defendant's version of her interrogation.** For example, Dr. Ofshe discussed at some length the "rash of day-care sexual abuse cases based on false accusations elicited from pre-school children," the suggestibility of very young children and the caution that must be exercised when "de-briefing" them. As noted earlier, defendant's theory of the case was that the mother unwittingly created an illusion of sexual abuse in her son's memory, which medical and law enforcement personnel bolstered by sloppy questioning. In other words, nothing improper happened to the boy, although he and his cadre of supporters may have sincerely thought otherwise. **But this has nothing to do with any factors or circumstances correlated by psychologists with false confessions.** In the event, defendant could—and did—fully explore her theory through cross-examination and the direct testimony of another expert, Dr. Mantell.

Dr. Ofshe also criticized at length Detective Bourbon's failure to videotape his interview with defendant and any discussions that took place between her oral and videotaped confessions, a period of slightly more than one hour in Detective Bourbon's telling; slightly more than two hours in defendant's. While electronic recording of interrogations should facilitate the discovery of false confessions and is becoming standard police practice, the neglect to record is not a factor or

circumstance that might induce a false confession. Dr. Ofshe talked in his report about videotaping as a means to identify what is called “contamination”—inadvertent or deliberate police disclosure of non-public crime facts to the suspect during interrogation, which then seep into the suspect’s confession and so make it seem more credible (see *Warney v. State* (16 NY3d 428 [2011])). To this point, he asks “Were [the particular facts that came into the videotaped statement] volunteered by the suspect or deliberately or inadvertently revealed by the interrogator?” **But contamination was never relevant in this case.** All that Detective Bourbon knew at the time of the interview was that the boy had made an allegation that defendant sexually abused him by genital sexual contact.

Dr. Ofshe suggested that Detective Bourbon may have neglected to record the interrogation so that he could surreptitiously overbear defendant’s will and then school her as to what to say in her videotaped confession; specifically, the detective’s “failure to record . . . deprives anyone seeking to evaluate the truthfulness of [defendant’s] confession of the evidence that would allow for this determination based on fact rather than prejudice. It would have been possible to evaluate whether she introduced the wealth of apparently corroborative information contained in the recorded statement, whether those parts of the recorded statement she introduced (if she is the source of any of it) were likely to be nothing more than inventions, and how much, if any, of the factual description of the sexual assaults contained in the confession was first provided by [Detective Bourbon] and then merely parroted by [defendant].”

This is argument and speculation, not a topic on which expert evidence might aid the jury in determining the reliability of defendant’s confession.

Research in the area of false confessions purports to show that certain types of defendants are more likely to be coerced into giving a false confession—e.g., individuals who are highly compliant or intellectually impaired or suffer from a diagnosable psychiatric disorder, or who are for some other reason psychologically or mentally fragile (see Chojnacki, Cicchini and White, “An Empirical Basis for the Admission of Expert Testimony on False Confessions,” 40 *Ariz St L J* 1, 15-17 [2008] [discussing “dispositional factors” associated with false confessions]). **Dr. Ofshe did not proffer testimony that defendant exhibited any of the personality traits that research studies have linked to false confessions.** And in fact, defendant, although not well educated, appeared at trial to be an adult of normal intelligence. She displayed no sign of any of the mental factors associated by psychiatrists or psychologists with individuals more likely to confess to crimes they did not commit.

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proffer testimony that defendant exhibited any of the personality traits that research studies have linked to false confessions. And in fact, defendant, although not well educated, appeared at trial to be an adult of normal intelligence. She displayed no sign of any of the mental factors associated by psychiatrists or psychologists with individuals more likely to confess to crimes they did not commit.

Research also purports to identify certain conditions or characteristics of an interrogation which might induce [sic] someone to confess falsely to a crime (id. at 17-18) [discussing “situational factors” associated with false confessions]]. Dr. Ofshe offered to “apply the published analysis of interrogation to the specifics” of defendant’s “deeply troubling” account of what happened to her. **But his descriptions of the allegations on which he purported to base his expert opinion were general or vague and not, in fact, linked to any published analysis.** First, he stated that defendant “report[ed] being tricked into accompanying Detective [Bourbon] into his car and then being transported to a police facility.” But he never explained how she claimed to have been “tricked.” Defendant did not claim deception when she later testified at trial. As noted earlier, there she said that she left the day care center with Detective Bourbon at her employer’s direction.

As a final example, Dr. Ofshe commented that “[i]n an interrogation such as [defendant’s] in which the investigator relies on evidence ploys (claims that overwhelming evidence links the suspect to the crime) to base his assertion that the suspect’s position is helpless and therefore the suspect will be arrested, tried and convicted, introducing the treatment alternative strategy is likely to be very influential.” He defines the “treatment alternative strategy” as offering a suspect a choice “between two alternatives . . . clearly linked to very different results.” In this case, he stated that Detective Bourbon “promised” defendant that “confession would result in nothing more than . . . being required to undergo counseling which . . . would happen in the building where she was being interrogated,” but that if she “continued to deny guilt she would be sent to Rikers Island where she would be brutalized by the other inmates because she was a child abuser.”

In the first place, Dr. Ofshe does not say that defendant ever informed him that Detective Bourbon made claims that there was “overwhelming evidence [linking her] to the crime”; he did not identify any published studies to support the proposition that the “treatment alternative strategy” is generally accepted within the relevant scientific community as a situational factor associated with false confessions. And again, at trial defendant did not testify that she was offered treatment if she confessed. She claimed that Detective Bourbon assured her there would be no repercussions if she confessed.

CONCLUSION AND DISPOSITION

False confessions that precipitate a wrongful conviction manifestly harm the defendant, the crime victim, society and the criminal justice system. **And there is no doubt that experts in such disciplines as psychiatry and psychology or the social sciences may**

offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions. While the expert may not testify as to whether a particular defendant's confession was or was not reliable, the expert's proffer must be relevant to the defendant and interrogation before the court. **Dr. Ofshe's proffer does not meet this standard, and therefore the trial judge did not abuse his discretion when he excluded the proposed testimony, even assuming that the confession was not corroborated.**

We have considered defendant's other arguments and find them to be without merit. Accordingly, the order of the Appellate Division should be affirmed.