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Trials & TRIBULATIONS

Preclusion of expert upheld by Court of Appeals

As a matter of first impression, the New York State Court of Appeals recently, in *People v. Bedessie*, __ NY3d __, WL 1032738 (March 29), was asked to consider the admissibility of expert testimony on false confessions. Although ultimately the Court of Appeals affirmed the trial court's denial of the expert's testimony, the court did identify that in a proper case, expert testimony "on the phenomenon of false confessions should be admitted." However, in *Bedessie*, the proposed expert testimony was not relevant to the particular defendant or her interrogation.

Facts

In a prosecution for rape, sexual abuse and endangering the welfare of a child in Queens, the defendant was convicted of sexually abusing a four-year old boy and was ultimately sentenced to 20 years in prison. After the victim was questioned by his mother concerning a rash in his rectal area, it was learned that the defendant — his day care provider — had touched the victim in his "private areas" and performed other acts of sexual abuse.

Without any evidence to corroborate the victim's version of abuse, the detective requested that the defendant accompany him to an interview room at the Queens Child Advocacy Center. After being read her *Miranda* warnings, the defendant, according to the detective, admitted to abusing the victim on three separate occasions in manners similarly described by the victim. After making these oral admissions, the defendant was interviewed on video and gave statements similar to the prior admissions to the detective.

The day before the trial was scheduled to commence (perhaps one of the reasons the trial court denied the request), defense counsel made an application to introduce the testimony of Dr. Richard J. Ofshe, an expert in the field of false confessions, whose planned testimony would address the social science that "false confessions do exist and research regarding the correlation between the use of certain police interrogation techniques and proven false confessions."

The defense argued that, at a minimum, the trial court should hold a *Frye* hearing on the admissibility of Ofshe's proffered testimony, and that the defense needed the expert in order to mount a meaningful defense. The trial court, prior to jury selection, commented that it was not inclined to permit this type of expert testi-

mony because "jurors are completely and utterly competent to draw from their own life experiences, from their every day experiences, whether or not a statement is in fact voluntary and knowingly given."



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During the people's case, defense counsel once again brought up the subject of an expert on false confessions and the trial court reiterated that a *Frye* hearing was not necessary, because even if such evidence was scientifically valid, it might not be relevant in this particular case.

During the defense case, a psychologist testified regarding the proper technique for interviewing young children when investigating sexual abuse allegations. The psychologist testified that the mother's practice of randomly and frequently asking the victim whether anyone had touched him inappropriately had a "suggestive quality" to it and alerted the child to a particular area of parental concern and that young children, who are especially susceptible to suggestion, have difficulty keeping track of whether they know something because it actually happened, or because someone important in their lives

told them about it.

Additionally, the defendant testified that she was lied to and tricked by the detective, and that she "had two options: to tell the truth and go home, or go to Rikers Island jail, where she would be beaten." The defendant testified that she became — not surprisingly — scared because she never previously had a problem with the police.

It was at this point, the defendant testified, that she acquiesced and told the detective that she would "do anything" if he would let her go home to her sickly mother.

The defendant testified that the detective wrote something on a piece of paper and directed her to sign it, which she did without reading. In order to refute her statements on the videotape, the defendant testified that she "said all those things on the tape" only because the detective gave his word that he would let her go home to her mother if she did, and that she sincerely believed that if she admitted to the acts described on the videotape, the detective would let her leave as promised.

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Decision

The Appellate Division, Second Department unanimously affirmed the conviction, in a decision dated Nov. 16, 2011, *People v. Bedessie*, 78 AD3d 960 (2d Dept. 2010), and identified that the trial court properly exercised its discretion when it precluded the expert testimony on false confessions.

In an opinion authored by Justice Read, the court of Appeals affirmed the conviction, but importantly identified that “the phenomenon of false confessions is genuine [and] has moved from the realm of startling hypothesis into that of common knowledge, if not conventional wisdom.”

Seemingly adopting the reality of false confessions, the court found that Ofshe’s testimony was not relevant and likely to assist the jurors in any way because the victim’s testimony was corroborated by the defendant’s confession. This was not a situation, the court reasoned, where there was evidence supplied in the defendant’s confession that was not previously known by the police.

The court found that although Ofshe’s seven page report, at the outset, identified 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. Bedessie’s interrogation,” 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, Ofshe’s report discussed that the false accusations elicited from pre-school children, must be viewed with caution when “de-briefing” them. However, the court found that this theory had nothing to do with any factors or circumstances related to false confessions.

Ofshe also criticized the detective’s failure to initially videotape his first interview with the defendant, and any discussions that took place between defendant’s oral and videotaped confessions. Once again, the court found that Ofshe’s report regarding “contamination” or inadvertent or deliberate police disclosure of non-public crime facts to the suspect during the interrogation was not properly the subject expert testimony regarding false confessions.

Ofshe also suggested that the detective may have neglected to record the first interrogation so that he could “surreptitiously overbear defendant’s will and then school her as to what to say in her videotaped confession.” The court found that this argument was merely speculation and not a topic on which expert evidence may aid the jury in determining the reliability of the defendant’s confession. Importantly, the court detailed the types of defendants likely to be coerced into giving a false confession: “individuals who are highly compliant or intellectually impaired or suffer from a diagnos-

able psychiatric disorder, or who are for some other reasons psychologically or mentally fragile.”

The court determined that Ofshe did not proffer testimony that the defendant exhibited any of the aforementioned personality traits that research studies have linked to false confessions. In fact, the defendant appeared to be an adult of normal intelligence, and displayed no signs of any mental factors associated, by psychiatrists or psychologists, with individuals more likely to confess to crimes they did not commit.

Moreover, in terms of certain conditions or characteristics of an interrogation which might induce someone to falsely confess, the court found that Ofshe offered to “apply the published analysis of interrogation to the specifics” of the defendant’s “deeply troubling” account of what happened to her, but his descriptions of the allegations upon which he purported to base his opinion were “general or vague and not, in fact, linked to any published analysis.”

For example, Ofshe never explained how the defendant claimed to have been tricked, nor identified what generalizations about the detective’s alleged behavior had to do with the false confession. In fact, during her testimony, the defendant did not portray the detective as acting aggressively toward her during the interview.

While rejecting the appropriateness of Ofshe’s testimony under the circumstances of this case, the court did leave open the possibility of using experts in this area under the proper set of facts: “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 ... [but] the experts proffer must be relevant to the defendant and interrogation before the court.”

The court found that Ofshe’s proposed testimony did not meet this standard and the trial judge did not abuse his discretion when he excluded the testimony.

Practically speaking, if one is to seek to admit expert testimony concerning false confessions, a motion should be made to the trial court well in advance of trial.

Additionally, the proffered testimony needs to be relevant to the circumstances of a particular defendant’s confession. Most importantly, when a defendant possesses mental characteristics, such as being highly compliant, intellectually compromised, or mentally fragile, this defense may be extremely helpful and relevant. Based upon the Court of Appeals’ decision, if one is to advance this type of defense at trial, the defendant must certainly possess at least one personality trait that research studies have linked to false confessions. Otherwise, this defense will be difficult to advance.

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