STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JAMES SCHNEIDER,

Defendant-Appellee.

UNPUBLISHED
April 24, 2007

No. 273421
Wayne Circuit Court
LC No. 05-009901

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant is charged with four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) and MCL 750.520b(1)(b), and two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(d). After a March 20, 2006, pretrial hearing, the trial court granted defendant's motion to admit Dr. Michael Abramsky's expert testimony regarding patterns and behavior of child molesters. The prosecution appeals by leave granted.[1] We reverse and remand.

I

The prosecution argues that the trial court abused its discretion by not performing its gatekeeping function under MRE 702 and, further, that the proposed expert testimony regarding a profile of a child molester is inadmissible junk science. After the trial court's ruling in this case, and after the briefs in this appeal were filed, this Court issued a decision directly addressing the admissibility of expert testimony on characteristics of a sex offender, *People v Dobek*, ___ Mich App ___; ___ NW2d ___ (Docket No. 264366, issued January 30, 2007). The expert testimony proffered in this case is analogous to the testimony found to be inadmissible in *Dobek*. Because the reasoning and decision in *Dobek* is dispositive, we conclude that the trial court abused its discretion in ruling that the expert testimony was admissible.

[1] The prosecution's application for leave to this Court was initially denied. The prosecution then filed an application for leave to the Supreme Court and, in lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration as on leave granted.

A

This Court reviews a trial court's determination regarding the admissibility of expert testimony for an abuse of discretion. *Dobek, supra*, slip op at 18; *People v Ackerman*, 257 Mich App 434, 442-443; 669 NW2d 818 (2003). However, if the question of admissibility involves an examination of the meaning of the Michigan Rules of Evidence, an issue of law is presented, which we review de novo. *Id*. at 442. "A trial court necessarily abuses its discretion when the court permits the introduction of evidence that is inadmissible as a matter of law." *Dobek, supra*, slip op at 18.

Expert testimony is admissible under MRE 702 if the trial court determines that it is from a recognized discipline, it will aid the trier of fact in understanding evidence or determine a fact in issue, and the witness is deemed qualified. *People v Peterson*, 450 Mich 349, 362; 537 NW2d 857, mod 450 Mich 1212 (1995); *Ackerman, supra* at 444. The admission of expert testimony is governed by MRE 702, which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The party offering the expert testimony has the burden of establishing its admissibility. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). However, "[t]he trial court has an obligation under MRE 702 "to ensure that any expert testimony admitted at trial is reliable.'" *Dobek, supra*, slip op at 19, quoting *Gilbert, supra* at 780. "While the exercise of the gatekeeper function is within a court's discretion, the court may neither abandon this obligation nor perform the function inadequately." *Dobek, supra*, slip op at 19. Junk science must be excluded. *Id*.

> "MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology." [*Dobek, supra*, slip op at 19, quoting *Gilbert, supra* at 782.]

B

In *Dobek*, the defendant sought reversal of his CSC convictions following a jury trial, in which the court excluded testimony from the defendant's expert, Dr. Andrew Barclay, a retired professor of psychology and a licensed psychologist. Barclay would have testified that the defendant did not exhibit characteristics or fit the profile of a typical sex offender according to psychological testing and interviews. *Dobek, supra*, slip op at 18. His testimony and

conclusions were based in part on psychological tests given to defendant: the Millon Clinical Multiaxial Inventory – Third Edition, the Minnesota Multiphasic Personality Inventory – Second Edition, and the Rorschach test, better known as the inkblot test. "As a result of the interviews and psychological testing, Barclay opined that defendant did not fit the profile of a sex offender." *Id*.

The trial court excluded Barclay's testimony, finding that it lacked scientific reliability in the process of identifying sex offenders through psychological testing and because the testimony would not assist the trier of fact in its function of deliberating the issue of guilt or innocence. This Court agreed. *Dobek*, *supra*, slip op at 18-21. In a lengthy analysis, this Court concluded that "Dr. Barclay's proffered testimony regarding defendant's sex offender profile as developed from psychological testing was not sufficiently scientifically reliable, nor supported by sufficient scientific data . . . ." *Id*. at 19. Further, the proffered expert testimony "would not assist the trier of fact to understand the evidence or determine a fact in issue," and "any arguable probative value attached to the evidence would be substantially outweighed by the danger of unfair prejudice to the prosecution, confusion of the issues, or misleading the jury." *Id*.

This Court found no objection to the general validity and acceptance of the psychological tests used by Barclay, or their administration and interpretation. *Id*. at 19-20. But the Court found that the "use of the psychological tests to actually identify sex offenders was not sufficiently supported by the data, nor can the science be deemed sufficiently reliable, such that Barclay's testimony should have been admitted in a court of law and presented to the jury." *Id*. at 20.

The *Dobek* Court found many aspects of the proffered expert testimony problematic:

> Barclay stated that the sex offender profiles developed from the testing are useful and can give you a predisposition, but they cannot tell you with any degree of certainty that a person is or is not a sex offender. Barclay acknowledged that none of the literature presented endorsed using the test results in a court of law for purposes of assisting in the determination of whether someone is a sex offender based on a psychological profile. Barclay also conceded that there are numerous articles that indicate that the tests should not be used to create a sex offender profile. Indeed, there is controversy in the psychological community in using the psychological testing to identify sex offenders. Barclay's testimony further reflected that the research is ongoing in this area, as opposed to being firmly established. [*Id*.]

The Court noted additionally that other aspects of the process used by Barclay made it questionable: the subjectivity; the lack of a definitive determination whether an individual is a sex offender; a defendant's profile may be skewed by life events at the time of testing, and could change over time; and an intelligent or cagey person could manipulate the tests. For all these reasons, the Court held "that sex offender profiling is not sufficiently reliable, nor is the supporting data sufficient, to allow for admission." *Id*.

The Court observed that the testimony would not assist the jury in understanding the evidence or determining a fact in issue, and would more likely confuse the jury and distract it from focusing on the pertinent evidence regarding the events that transpired in the Dobek

household 10 years ago. *Id*. at 20. Further, evidence that the defendant did not fit the profile of a sex offender based on interviews and psychological testing was comparable to inadmissible evidence of a favorable polygraph test. *Id*. As with polygraph test results, the danger of sex offender profile evidence is that the offender profile and testing could be given disproportionate weight by the jury, and therefore interfere with the jury's charge to determine the truthfulness of witnesses and determine whether the defendant committed the crimes. *Id*.

In comparing the sex offender testimony with testimony regarding battered woman syndrome that our courts have held is admissible, the *Dobek* Court found that unlike the syndrome testimony, the sex offender profile testimony was not comparable because the testimony:

> would not be utilized to explain or give credence to defendant's past behavior, actions, and the events in his life. Instead, Barclay's testimony would relate to psychological tests taken by defendant as part of preparation for his defense in the criminal action and would paint a profile of defendant as someone who would not be a sex offender. [*Id*. at 21.]

Likewise, the proffered testimony in *Dobek* was not in keeping with permissible testimony in child sexual abuse cases as discussed in *Peterson*, *supra* at 352 or *Ackerman*, *supra* at 445. *Dobek*, *supra* at 22. Barclay's testimony would not explain the defendant's behavior, or address consistencies or inconsistencies in *behavior* between known sex offenders and the defendant, as in *Peterson*; rather the focus was on test results, the reliability of which was subject to question. *Dobek*, *supra* at 22. Nor would Barclay be testifying to the behavior and patterns of others in similar circumstances as substantiated by scientifically collected data to help explain to the jury actions in the case before it, as in *Ackerman*, in which the court admitted expert testimony from a social worker and psychotherapist regarding patterns and common practices of sex offenders in desensitizing child victims. *Id*. Barclay would instead be offering a profile based on psychological testing of known sex offenders and the defendant, which amounted to a comparison of test results rather than a comparison of behaviors. *Id*. at 22-23.

Finally, the Court noted its agreement with courts in other jurisdictions that have rejected the admission of sex offender profile testimony. *Id*. at 23-24. Moreover, the acceptance of the defendant's proffered sex offender profile evidence would be a double-edged sword in that prosecutors undoubtedly would seek to admit unfavorable profile results to obtain a conviction, a tactic that would not be countenanced in our system of justice. *Id*. at 24.

II

In this case, defendant sought the admission of expert testimony that differed in certain respects to that in *Dobek*, but essentially is grounded in the same objectionable process. That is, the expert evidence uses a sex offender/offense profile to state whether defendant, and this case, fit the profile indicators or "data points." Here, the expert testimony is in some respects even more objectionable than that in *Dobek*, because the profile indicators are based on overly simplistic probabilities that have little or no connective logic to determining whether a sex offense was committed in this specific case or whether defendant committed the charged offenses. Accordingly, the testimony is not scientifically reliable or supportable and would not assist the trier of fact to understand the evidence or determine a fact in issue.

Abramsky's proposed testimony consisted of him addressing various "data points" of child sexual molestation described in his paper, *Criminal Profiling in Child Sexual Assault Cases*,[2] which sets forth 16 data points to indicate whether a defendant in a criminal child sexual assault crime is more or less likely to have committed the charged offense. The data points are divided into three categories: the alleged perpetrator, the act of sexual molestation, and alleged child victim profile characteristics. Abramsky would testify whether defendant, and this case, fit the data points, although he would render no opinion on the ultimate issues of whether defendant is a child molester or whether he committed the charged crimes.

The data points are phrased in terms of probabilities, i.e., whether the allegations of abuse in this case are more likely true or false. For example, one data point reads, "If the allegations are of a single episode of molestation rather than a sequence of molesting acts then the allegations are more likely to be false." Psychological testing of defendant using the Millon test referenced in *Dobek*, is relied on for the conclusion in one of the 16 data points: "If the alleged child molester produces valid [Millon] psychological test results with no signs of significant pathology, than [sic] the allegations are more likely to be false."

While Abramsky phrases his data points in terms of whether allegations are more likely true or false, the data points are, in effect, being used to predict whether an individual is or is not a child molester and not to explain the evidence or behaviors. For instance, the data points can be read to say that a typical child molester has a substance abuse problem, a criminal history, was sexually abused as a child, orchestrates significant alone time with a child, is male, and scores over 75 on the Millon test.

An examination of Abramsky's testimony and paper implicates the same concerns of reliability discussed in *Dobek*. Abramsky testified that the database he uses for the three areas described in his paper—the perpetrator, the victim, and the act, came from "about two hundred references and they're all cases where the child abuse was confirmed." However, only certain references are cited for each particular data point, and thus, the actual scientific foundation for each data point/probability is far more limited, with some data points relying on only two references.

Other data points are subject to the same criticism identified in *Dobek* with regard to manipulation. For instance, one data point states, "If the alleged perpetrator claims a personal history of being sexually molested or the victim of physical abuse as a child, than [sic] the allegations are more likely to be true." Abramsky relies on studies of perpetrators to show that there is a "correlation between being victimized as a child and victimizing a child as an adult." However, Abramsky states that "[a]ctual historical data is difficult to come by" because

---

[2] The gist of Abramsky's paper is that courts should allow profiling techniques in child sexual assault cases. Abramsky writes that "[c]riminal profiling is an investigative technique developed by the FBI to narrow and focus a search for an unknown suspect. This technique may also be utilized to identify whether a defendant in a criminal child sexual assault crime is more or less likely to have committed this offense." Abramsky testified that his paper "follows traditionally [sic] *profiling . . . .*"

"[d]ysfunctional family interactions, unless reported to police, are not open to empirical investigation," and "[s]elf-report may be self-serving or open to other forms of distortion." It may be unlikely that defendant would admit to Abramsky, in preparation for litigation, that he was sexually molested as a child when he is currently being charged with sexual molestation of a child, especially if defendant is aware of the data points.

Further, the oversimplification of probability conclusions in the data points are particularly troublesome from the standpoint of determining guilt in a particular case. As in *Dobek*, the proffered expert testimony would more likely interfere with the jury's charge to determine the truthfulness of witnesses and whether the defendant committed the charged crimes. *Dobek, supra*, slip op at 21. For instance, one data point states: "If the alleged perpetrator is a female then the allegations are less likely to be true." Clearly, however, in any given case, the fact that the defendant is female could be irrelevant to the determination of guilt and, thus, this data point probability is misleading.

Similarly problematic, another data point concludes: "If the claim involved is made in the context of a conflictual divorce or family dispute it is more likely to be false." This statement may give the trier of fact the impression that over 50 percent of allegations made during a conflictual divorce or family dispute are false. However, Abramsky states in his paper that false allegations are reported at an overall rate of three to seventy-eight percent, but when allegations are made in the context of custodial disputes "at least one-third . . . appear[] to be false." Regardless, these underlying conclusions have no acceptable logical connection to whether defendant committed the charged crimes in this specific case. As in *Dobek*, this type of testimony would not assist the trier of fact in understanding the evidence or determining a fact in issue, and would more likely confuse the jury and distract it from focusing on the pertinent evidence regarding the events that transpired. *Id.* at 20.

While the trial court determined that Abramsky would not testify regarding the ultimate issues of whether defendant is a child molester or committed the charged crimes, Abramsky's testimony that defendant and this case do not match the data points, "comes dangerously close to constituting testimony that defendant is not a sex offender, testimony vouching for defendant's veracity, and testimony that defendant is not guilty." *Id.* at 22. With regard to drug profile evidence, this Court has noted that "'point by point examination of profile characteristics with specific reference to [the defendant] constitutes use of the profile not as background . . . but as substantive evidence that [the defendant] fits the profile,'" and is therefore improper. *People v Murray*, 234 Mich App 46, 58; 593 NW2d 690 (1999), quoting *United States v Quigley*, 890 F2d 1019, 1023-1024 (CA 8, 1989). Similarly, Abramsy's proffered expert testimony is improper.

It appears that while Abramsky's testimony differs in content from that in *Dobek*, its underlying nature and purpose are the same. Applying the reasoning in *Dobek*, we conclude that the profile evidence proffered by Abramsky is inadmissible and the trial court abused its discretion in ruling otherwise.

From the record, it appears that there was confusion on the part of all parties, particularly the prosecutor, concerning the substance of the proffered expert testimony and the bases for its admissibility. If defendant seeks to reframe the inquiries to and testimony elicited from Abramsky on remand so as not to run afoul of *Dobek*, the trial court should take care to fully perform its gatekeeping role under MRE 702.

III

Defendant claims that even if this Court determines that Abramsky's testimony is inadmissible as expert testimony, Abramsky can testify under MRE 405(a) (opinion offered to prove character).[3] This same argument was addressed in *Dobek, supra*, slip op at 23, and was rejected. It is likewise untenable in this case because admissibility under MRE 702 is not satisfied. *Id.*

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ Helene N. White

[3] MRE 405(a) provides:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.