

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ROBERT MICHAEL PUGH,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 343 EDA 2012

Appeal from the Judgment of Sentence entered December 19, 2011
In the Court of Common Pleas of Monroe County
Criminal Division at No(s): CP-45-CR-0000303-2010.

BEFORE: PANELLA, OLSON and FITZGERALD,* JJ.

DISSENTING MEMORANDUM BY OLSON, J.:

FILED JULY 11, 2013

I agree with the learned Majority's affirmation of 1) the trial court's rejection of Appellant's proposed jury instructions regarding videotaped custodial interrogations; 2) the trial court's order limiting the cross-examination of the Victim's brother-in-law; and, 3) the trial court's order denying Appellant's motion for a mistrial. However, I part company with my learned colleagues on the issue of whether the trial court erred when it granted the Commonwealth's motion *in limine* to exclude expert testimony regarding the phenomena of false confessions. I believe that the trial court did err in granting said motion and, therefore, I would vacate Appellant's judgment of sentence and remand for a new trial. Accordingly, I respectfully dissent.

*Former Justice specially assigned to the Superior Court.

In order to understand the basis for my dissent, I believe that it is necessary to set forth the facts and circumstances surrounding the Commonwealth's motion *in limine*.

On July 7, 2011, Appellant provided the Commonwealth with the name and curriculum vitae of Frank Dattilio, Ph.D., an expert Appellant intended to call to testify regarding the phenomena of false confessions. On July 8, 2011, the Commonwealth filed a motion *in limine*, seeking to exclude, *inter alia*, Appellant's proposed expert testimony regarding false confessions. On August 9, 2011, the Commonwealth supplemented its motion *in limine* seeking to exclude expert testimony regarding false confessions, and requested a **Frye**¹ hearing to determine the admissibility of such evidence.

On August 24, 2011, the trial court conducted a **Frye** hearing regarding the admission of Dr. Dattilio's expert testimony. At that hearing, Dr. Dattilio testified that he has been a clinical and forensic psychologist for over 25 years, and that he is currently on the faculty of Harvard Medical School and the University of Pennsylvania Medical School. N.T., 8/24/2011, at 4-6. After additional discussion regarding Dr. Dattilio's experience and expertise, Appellant offered Dr. Dattilio as an expert in clinical and forensic psychology. **Id.** at 10. With no objection from the Commonwealth, the trial court qualified Dr. Dattilio as an expert. **Id.** at 10.

¹ Referring to **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923).

Dr. Dattilio then explained that over the last 10 years, there has been a great deal of growth in the empirical data which supports the phenomena known as false confessions – “people who wrongly confess to crimes that they didn’t commit. Some of the most common ones, of course, involve acts of rape and murder.” **Id.** at 11. Dr. Dattilio explained that advances in science have given rise to the recognition of the false confessions. **Id.** Particularly, Dr. Dattilio explained that advances in social and clinical psychology have focused on the issue of the vulnerability of human beings to reward and punishment, as well as to responses to stress, fatigue, fear, and intimidation. **Id.** at 11-12. Additionally, Dr. Dattilio explained that scientific advances in DNA technologies have reached a degree of medical certainty, resulting in the exoneration of, for example, many homicide convictions. **Id.** at 12. Dr. Dattilio testified that false confessions as a result of certain human vulnerabilities are now conclusively documented as an accepted phenomena. **Id.**

Dr. Dattilio testified that he based his knowledge of the phenomena of false confessions upon peer reviewed medical journals, curriculum within his training of psychiatric residents at the University of Pennsylvania and Harvard, lectures on the topic, and, in particular, upon two publications by individuals with whom Dr. Dattilio works at the University of Pennsylvania. **Id.** at 12-13. Dr. Dattilio explained that he had testified twice before in Pennsylvania courts regarding false confessions. **Id.** at 13-14.

Dr. Dattilio then testified that experts have identified four different types of false confessions. **Id.** at 14. Within the stress compliant type, individuals become overwhelmed by anxiety and their physical exhaustion elevates their desire to bring the uncomfortable interrogation to an end. **Id.** at 14-15. Dr. Dattilio explained that those individuals confess, just so they can go home. **Id.** Dr. Dattilio classified the second group as the coerced compliant type. **Id.** at 15. Those individuals respond to either overt promises of leniency, or the notion that punishment will be reduced if you just comply and confess. **Id.** Dr. Dattilio testified that the third group is called the persuaded false non-coerced type, which is an individual persuaded by the interrogator or the investigator of the probability of guilt. **Id.** Those individuals have no memory or recollection of the accused event, so they assume that they are guilty if there is evidence to suggest their guilt. **Id.** Finally, Dr. Dattilio labeled the fourth group as the persuaded false coerced, wherein there is more coercion overtly used with regard to the individual's confession. **Id.** Coercion, Dr. Dattilio explained, included things such as pressure, intimidation, or presentation of false evidence. **Id.**

Dr. Dattilio explained that there is a well-recognized group called the "Innocence Project," which investigates the potential for improper convictions based upon false confessions. **Id.** at 16. Dr. Dattilio said that, as a result of advancements in DNA technologies, the Innocence Project's statistics have shown that, in about 20 to 25 percent of confessions in

homicide cases, the confessions were actually false, and wrongly convicted individuals were proven innocent. ***Id.***

Dr. Dattilio then testified about his familiarity with police interrogation techniques, opining that certain techniques risk affecting the reliability of a confession. ***Id.*** at 16-17. Particularly, Dr. Dattilio testified that techniques such as deprivation of water and food, the denial of the ability to go home or somewhere of comfort, deprivation of an attorney or family member, and being shackled to an existing spot for hours, may affect the reliability of a confession. ***Id.*** at 17. Additionally, Dr. Dattilio said that confessions may be affected by falsely informing an accused of evidence such as videotapes, DNA, or other bodily fluids that place the accused at the scene of the crime. ***Id.*** Dr. Dattilio testified that a confession may emerge simply from fatigue or fear where, for example, an accused has been informed that he or she is going to get a life sentence, so he or she had better confess, or where the accused responds to suggestions that he or she tell authorities what he or she did so the accused can finally go home. ***Id.***

Dr. Dattilio explained that, in the last 20 years, the American Psychological Association has published 78 scientifically-based peer-reviewed articles on the subject matter of false confessions. ***Id.*** at 18-21. A list of the 78 articles was admitted into evidence without objection from the Commonwealth. ***Id.*** at 21. Also admitted into evidence, without objection, were two of the articles identified in the list, and a copy of a chapter of a

book regarding police interrogation techniques and false confessions. **Id.** at 23-24.

Dr. Dattilio explained, however, that in the absence of DNA evidence, he is unable to opine as to whether a particular confession, such as Appellant's, is false. **Id.** at 21. Rather, Dr. Dattilio explained that his testimony would be limited to explaining the phenomena of false confessions, and identifying factors proven to potentially affect the reliability of a confession. **Id.**

Dr. Dattilio opined that the average layperson without training in the field of psychology would be unaware of the factors that have been disclosed by research to increase the likelihood of a false confession. **Id.** at 25. Dr. Dattilio testified that the literature on false confessions explained that most people believe that if a person admits to something that he or she allegedly has done, then the individual in fact must have done it. **Id.** at 26.

The Commonwealth cross-examined Dr. Dattilio, highlighting that the factors that he identified as contributing to the propensity for a false confession, such as deprivation of food and water, are each, individually, not beyond an average layperson's understanding. **Id.** at 29. Dr. Dattilio also re-confirmed that, without DNA evidence, there is no scientific means to prove whether a confession is false. **Id.** at 32. Consequently, Dr. Dattilio explained that there are no studies to represent how widespread false confessions are in cases without DNA evidence. **Id.** at 33-34.

At the conclusion of the hearing, the trial court took Dr. Dattilio's proposed testimony under advisement and indicated that it would be willing to accept supplemental briefing regarding the admissibility of the testimony. Thereafter, the parties submitted those briefs, and on September 8, 2011, the trial court entered an order, *inter alia*, granting the Commonwealth's motion *in limine* to exclude Appellant's proposed expert testimony regarding false confessions. Specifically, in its September 8, 2011 order, the trial court precluded Dr. Dattilio "from testifying as to the phenomenon of false confessions, as such expert opinion invades on the province of the jury and may not be allowed to intrude upon the jury's basic function of deciding credibility." Order, 9/8/2011, at ¶ 2. Furthermore, in its Rule 1925(a) opinion, the trial court explained that it excluded Dr. Dattilio's testimony, because the proposed testimony was not beyond the understanding of a layperson, and because it was not proposed to assist the jury in understanding the evidence or determining an issue of fact. Trial Court Opinion, 3/13/2012, at 14. Ultimately, the trial court concluded that the proposed expert testimony "would not have provided assistance to the jury regarding the alleged false confession of [Appellant]." *Id.* at 15.

In its order sustaining the Commonwealth's motion *in limine* and in its Rule 1925(a) opinion, the trial court did not comment on whether Dr. Dattilio's testimony meets the **Frye** standard, but instead excluded the testimony based upon application of Rule 702. In affirming the trial court, the Majority notes that, although the trial court conducted a **Frye** analysis,

the court “relied directly upon Rule 702 [of the Pennsylvania Rules of Evidence]² in excluding the testimony of [Appellant’s] expert.” Majority at 5.

Throughout this case, however, the Commonwealth has challenged the admission of the proposed testimony, as failing to satisfy the **Frye** test. Because proposed expert testimony must meet the **Frye** test before being admitted under Rule 702, I believe that we must address that issue first - whether Dr. Dattilio’s testimony is based upon generally accepted theories or methodologies.

Where a party challenges the admissibility of scientific knowledge on the grounds that it constitutes a novel methodology, the proponent must establish that the methodology utilized by the expert witness is generally accepted by other practitioners in his or her field. **Commonwealth v. Topa**, 369 A.2d 1277, 1282 (Pa. 1977) (adopting **Frye**). The proponent need only demonstrate that the witness’s methodology has achieved general acceptance in the relevant scientific community; his or her conclusions are

² Pa.R.E. 702 delineates when expert testimony is permissible. The rule provides:

If scientific, technical or other specialized knowledge beyond that possessed by a layperson 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.

not required to be generally accepted. **See Tucker v. Community Med. Center**, 833 A.2d 217 (Pa. Super. 2003). This rule is commonly referred to in Pennsylvania as the **Topa/Frye** rule.

In **Grady v. Frito-Lay**, 839 A.2d 1038 (Pa. 2003), our Supreme Court reaffirmed the use of the **Topa/Frye** test, reasoning that, “requiring judges to pay deference to the conclusions of those who are in the best position to evaluate the merits of scientific theory and technique when ruling on the admissibility of scientific proof, as the **Frye** rule requires, is the better way of ensuring that only reliable expert scientific evidence is admitted at trial.” **Grady**, 839 A.2d at 1045. Where the proponent of the evidence proves that the methodology is not novel, *i.e.*, it is generally accepted, or that the science is not novel, the evidence meets the **Frye** test. **See generally id.**; **Trach v. Fellin**, 817 A.2d 1102 (Pa. Super. 2003) (*en banc*).

The Commonwealth argues that the data upon which Dr. Dattilio bases his theories is unreliable, because, absent DNA evidence (which does not exist in this matter), there is no quantitative way to establish the rate of false confessions. Commonwealth’s Brief at 21. Furthermore, the Commonwealth explains that, absent DNA evidence, there is no scientific method to distinguish between true and false confessions. **Id.** Therefore, the Commonwealth suggests that the data for non-DNA matters is inherently unreliable and not generally accepted. **Id.** at 21-22.

Appellant, however, disagrees with the Commonwealth's application of the **Frye** standard. Instead, Appellant argues that the proposed testimony of Dr. Dattilio is generally accepted within the scientific community and outside the ken of a lay juror. Appellant's Brief at 14-18. Appellant relies largely upon an *amicus* brief submitted by the American Psychological Association in an extra-judicial matter, as well as numerous instances in which DNA evidence has exonerated individuals wrongfully convicted because of false confessions. **Id.** at 18-38. Considering advancements in science that have proven the existence of the phenomena of false confessions, Appellant argues that the exclusion of Dr. Dattilio's testimony violated his constitutional right to present a defense. Appellant seeks a new trial on that basis. **Id.** at 38.

After careful review of the record, I believe that, based on the testimony presented at the **Frye** hearing, Dr. Dattilio's methodology is generally accepted in his field. Although the Commonwealth argues that there is no statistical data to indicate how often false confessions transpire, the **Frye** test in Pennsylvania does not focus on scientific conclusions, *i.e.*, the specific number of false confessions that occur. Instead, as mentioned *supra*, it concentrates on the acceptance of the methods employed in the field of study. Dr. Dattilio's un-rebutted testimony was that his expertise is in an area of social science research widely studied through traditional scientific methods and disseminated through customary scientific outlets.

Since the Commonwealth presented no testimony to refute Dr. Dattilio's statements, Appellant established that Dr. Dattilio's methodology was generally accepted in his field.³

Once expert testimony clears the hurdle of the **Frye** test, in order to be admissible, it still must satisfy Rule 702; the testimony must involve "explanations and inferences not within the range of ordinary training, knowledge, intelligence and experience," of laypersons. **See** Pa.R.E. 702; **Seese**, 517 A.2d at 921.

The Majority concludes that the trial court did not err when it held that the subject of Dr. Dattilio's proposed testimony was not admissible under Rule 702 because it fell within the understanding of a layperson. Majority at 6. I respectfully disagree. To the contrary, my review of the transcript from the **Frye** hearing reveals that Dr. Dattilio very clearly stated that studies indicate that typical individuals do not understand the phenomena of false confessions. **See** N.T., 8/24/2011, at 26-27. As Dr. Dattilio explained, literature summarizing those studies reveals that an ordinary person is

³ Indeed, in **Commonwealth v. Szakal**, 50 A.3d 210, 228 (Pa Super. 2012), a panel of this Court affirmed the exclusion of expert testimony regarding false confessions, but on grounds that the testimony would not assist the fact finder as required by Rule 702, not because the testimony failed to satisfy **Frye**. Therefore, in considering Rule 702's application, the panel in **Szakal** assumed that the proposed testimony satisfied the **Frye** requirements. **See id.**; Commonwealth's Brief at 20 (acknowledging that in **Szakal** the trial court determined that the scientific methodology used in the field of false confessions met the **Frye** test).

inclined to assume that, “if a person admits to something that they’ve done[,] then they must have done it.” **Id.** at 26. Dr. Dattilio further explained that, “there’s some literature that depicts the fact that there’s not a very sophisticated concept by the layperson as to all that goes into the factor that some people may actually falsely confess.” **Id.**

On cross-examination, Dr. Dattilio acknowledged that the factors that he identified as contributing to the propensity for a false confession, such as deprivation of food and water, are each, individually, not beyond an average layperson’s understanding. **Id.** at 29. However, contrary to the trial court’s holding, Dr. Dattilio never testified that a layperson understands how the combination of those factors can lead to the phenomena of false confessions. Consequently, I do not believe that the record supports the trial court’s determination that Dr. Dattilio’s own **Frye** hearing testimony conceded that his proposed testimony fell within the scope of knowledge of an ordinary layperson.

I acknowledge that in **Szakal, supra**, a panel of our Court affirmed the trial court’s exclusion of expert testimony regarding false confessions, reasoning that the testimony would not be of any assistance to the triers of fact in that case. **Szakal**, 50 A.3d at 228. Significant to the panel’s determination in **Szakal**, however, was the fact that during *voir dire* each of the jurors admitted that he or she already knew false confessions occur. **Id.** Furthermore, without providing any analysis or summary of the proffered

testimony or testimony from the **Frye** hearing, the panel agreed with the trial court's determination that the expert testimony, in that matter, was within the ordinary knowledge of a layperson. **Id.**

In this matter, however, we do not have evidence of *voir dire* questioning regarding the jury's knowledge of false confessions and we have a detailed **Frye** hearing establishing that the subject of Dr. Dattilio's testimony is, indeed, beyond the ordinary knowledge of a layperson. Consequently, while I respect my colleagues' determination in **Szagal**, I believe that it is distinguishable from this matter.

I further note that recently another panel of this Court relied upon **Szagal** in holding that the trial court did not abuse its discretion in precluding an expert from testifying to the phenomena of false confessions. In **Commonwealth v. Harrell**, 2013 WL 1501947 (Pa. Super. 2013), the majority, in reliance on **Szagal**, found that the trial court properly excluded such expert testimony on the basis that "the issue of false confessions was not beyond the ken of the average layperson." **Id.** at *8. However, as noted in Judge Christine Donohue's thoughtful and thorough dissenting opinion in **Harrell**, reliance on **Szagal** was misplaced as the facts in **Harrell** were clearly distinguishable from the facts of **Szagal**. **Id.** at *17-18. Specifically, in **Harrell**, as in the case *sub judice*, the order denying the defense's request to present expert testimony was issued prior to trial in response to the Commonwealth's motion *in limine*. Thus, jurors in **Harrell**,

like the jurors in this case, were not questioned about their beliefs of the existence of false confessions, as they were in **Szakal**. Therefore, as Judge Donohue noted in her dissent, “neither the trial court nor the [**Harrell**] Majority [] offers *any evidentiary support* for the contention that as-yet-unselected jurors would have any basis to believe that false confession do or do not occur.” **Id.** at *18 (emphasis in original).

Moreover, I respectfully disagree with the Majority’s conclusion that “the trial court’s decision is correct pursuant to the Supreme Court of Pennsylvania’s long-standing policy of protecting the jury’s duty to determine credibility from the undue influence that accompanies expert testimony on the credibility of witnesses.” Majority at 6. The majority cites to **Commonwealth v. Seese**, 517 A.2d 920 (Pa. 1986) and **Commonwealth v. Spence**, 627 A.2d 1176 (Pa. 1993), among other cases, in reaching this conclusion. I believe that **Seese** and **Spence**, and the other cases cited by the Majority (**see** Majority at 6-7), are distinguishable from this matter; therefore, I do not find that they support the Majority’s conclusion.

In **Seese**, the sole issue was whether the trial court erred in admitting the testimony of the Commonwealth's expert witness, a board-certified pediatrician, who proposed to testify as to the veracity of eight-year-old children who allegedly were sexually abused. The prosecution questioned the witness as follows:

“Based upon your experience and your pediatric specialization, does the medical literature say anything about children of the

age of eight in giving complaints of sexual abuse or rape as far as their veracity?"

Seese, 517 A.2d at 921. Defense counsel objected and the court sustained the objection insofar as it referred to medical literature, but permitted the witness to answer the question based upon the witness's own knowledge and experience. In answering the question, the witness testified that, "It would be very unusual for them to lie." **Id.** In granting the defendant a new trial, our Supreme Court ruled that because the testimony consisted of expert opinion as to the veracity of the class of potential witnesses of which the victim was a member, it improperly interfered with the credibility functions of the jury. **Id.** at 922.

According to the **Seese** Court,

[t]he question of whether a particular witness is testifying in a truthful manner is one that must be answered in reliance upon inferences drawn from the ordinary experiences of life and common knowledge as to the natural tendencies of human nature, as well as upon observations of the demeanor and character of the witness.

Id. Therefore, the **Seese** Court concluded that it was error to admit expert testimony as to the credibility of children who are of an age similar to that of the prosecution's chief witness, the crime victim. **Id. Seese** instructs that expert testimony is inadmissible when offered as a means of showing, with scientific certainty, that the witness was telling the truth as to the facts of that case. **See Seese**, 517 A.2d at 922.

Our Supreme Court also analyzed the issue of expert testimony infringing on the jury's function as the arbiter of credibility in **Spence**. The

facts in **Spence** involved a brutal attack against the victim, whom the Commonwealth called as a witness at defendant's trial. On cross-examination, defendant sought to impeach the victim using expert testimony which suggested that a person under extreme stress might be unable to identify his or her attacker. **Spence**, 627 A.2d at 1182. In upholding the trial court's decision not to permit the testimony, the Court stated that the proposed testimony would have created an "unwarranted appearance of authority in the subject of credibility which is within the facility of the ordinary juror to assess." **Id.** Thus, like **Seese**, the holding in **Spence** barred expert testimony that purported to offer scientific grounds for attacking a victim's identification of a suspect because such evidence invaded the function of the jury as the sole arbiter of credibility. **See also Commonwealth v. Davis**, 541 A.2d 315, 316 (Pa. 1988) (holding inadmissible testimony of clinical child psychologist's opinion that children who had not been involved in sexual experiences typically do not fantasize about sexual experiences); **Commonwealth v. Gallagher**, 547 A.2d 355 (Pa. 1988) (excluding testimony that victim suffered from Rape Trauma Syndrome);; **Commonwealth v. Dunkle**, 602 A.2d 830 (Pa. 1992) (excluding testimony on patterns of behavior of sexually abused children, and on why a child may not remember abuse or give incomplete details or delay reporting); **Commonwealth v. Boromack**, 827 A.2d 503 (Pa. Super. 2003) (excluding testimony regarding false identifications);

Commonwealth v. D.J.A., 800 A.2d 965 (Pa. Super. 2002) (expert testimony on trustworthiness of child's statement in light of suggestive interview technique inadmissible).

In the instant case, however, testimony at the **Frye** hearing made it clear that Appellant would not offer Dr. Dattilio's testimony to comment as to the truthfulness of Appellant's confession. Dr. Dattilio expressly stated that he is unable to offer such an opinion. N.T., 8/24/2011, at 21. Nor has it been suggested that Dr. Dattilio would offer testimony regarding the particular circumstances of the police interrogation of Appellant. Indeed, I agree that, based upon the above precedent, Dr. Dattilio should **not** be permitted to opine as to whether Appellant's confession was false. As my learned colleagues note, such an opinion would improperly usurp the credibility determining function of the jury. The testimony proffered by Appellant, however, does not comment on credibility but instead describes police interrogation techniques and how they can, in certain instances, result in false confessions. Consequently, I believe it is error to conclude that the proposed testimony of Dr. Dattilio would improperly bolster a witness's credibility.⁴

⁴ Furthermore, I note that since the issuance of **Seese, Dunkle** and other matters prohibiting expert testimony regarding victim responses in sexual assault matters, the General Assembly passed 42 Pa.C.S.A. § 5920, entitled "expert testimony in certain criminal proceedings." **See** 42 Pa.C.S.A. § 5920 (passed June 29, 2012, effective August 28, 2012). Pursuant to that (*Footnote Continued Next Page*)

As of yet, there is no on-point, published authority from our Supreme Court addressing the issue of the admission of expert testimony regarding the phenomena of false confessions.⁵ In the absence of binding precedent, the Commonwealth opposes the challenge raised in this appeal by citing to authority from other jurisdictions. Although case law from outside jurisdictions is non-binding upon this Court, it can be instructive and provide persuasive authority. Thus, I have examined relevant authority from our

(Footnote Continued) _____

statute, in an appropriate proceeding, a qualified expert may testify regarding specific types of responses and behaviors that victims of sexual abuse often exhibit. 42 Pa.C.S.A. § 5920(b)(2). The statute, however, prohibits such experts from offering an opinion regarding the credibility of any witnesses, including the victim. 42 Pa.C.S.A. § 5920(b)(3). Therefore, the framework utilized by the General Assembly in Section 5920 is the same framework that I believe trial courts should utilize with respect to the phenomena of false confessions – admitting testimony educating the jury about the phenomena of false confessions but excluding any testimony opining as to the credibility of a particular confessing defendant or the interrogating officers.

⁵ On May 15, 2012, the Supreme Court of Pennsylvania granted the petition for allowance of appeal in **Commonwealth v. Alicia**, 26 A.3d 1190 (Pa. Super. 2011), an unpublished memoranda decision from another panel of this Court. The Supreme Court accepted the appeal of the issue presented by the Commonwealth as follows:

Under [the Supreme Court’s] precedent, which the Superior Court mischaracterized and misapplied, does expert testimony on ‘the phenomena of false confessions’ impermissibly invade the jury’s exclusive role as the arbiter of credibility?”

Commonwealth v. Alicia, 44 A.3d 1147 (Pa. 2012). As of the date of this dissenting memorandum, no decision has been rendered by our Supreme Court in **Alicia**.

sister states and the federal courts that have addressed this issue.

In ***United States v. Benally***, 541 F.3d 990 (10th Cir. 2008), the Tenth Circuit Court of Appeals dealt with the propriety of expert testimony regarding false confessions. In that case, the defendant was accused of sexually abusing two minor females on an Indian reservation. ***Id.*** at 992. Tribal authorities referred the case to the Federal Bureau of Investigation (“FBI”). ***Id.*** Two FBI agents interviewed Benally at his workplace for approximately one and one-half hours and, at the conclusion of the interrogation, he provided a written confession. ***Id.***

Prior to trial, Benally disavowed his confession, asserting that it was the result of coercive tactics used by the FBI agents. ***Id.*** at 993. In support of his claim, he proffered the testimony of Dr. Deborah Davis, a professor of psychology at the University of Nevada at Reno, an expert witness on false confessions. ***Id.*** Dr. Davis’s proposed testimony would have focused on whether false confessions occur and why a person would falsely confess. ***Id.*** She did not opine as to whether the defendant had falsely confessed. ***Id.***

The district court held and the appellate court affirmed that Dr. Davis’ testimony was inadmissible, finding that it failed to meet the ***Daubert*** requirements of relevance and reliability. ***Id.*** Pursuant to federal law, expert testimony that is considered novel must meet the requirements of ***Daubert v. Merrell Dow Pharmaceuticals***, 509 U.S. 579 (1993), and not the previously mentioned ***Frye*** test.

In so concluding, the court remarked that the expert testimony at issue “encroaches upon the jury's vital and exclusive function to make credibility determinations.” **Benally**, 541 F.3d at 995. According to the court, the expert testimony, although not specifically addressing the credibility of the defendant, would have served the same purpose, *i.e.*, “to disregard the confession and credit the defendant’s testimony that his confession was a lie.” **Id.** Additionally, the **Benally** court opined that the probative value of the evidence was substantially outweighed by its prejudicial impact. **Id.** In making this determination, the court stated that, “the prejudice to the prosecution that would result from permitting an expert to opine that prior confessions should essentially be disregarded because they are just as likely to be true as untrue, substantially outweighs the testimony's minimal probative value.” **Id.**

In the present case, however, the proffered expert testimony was not that a confession was just as likely to be true as untrue. Indeed, Dr. Dattilio provided that there is no margin of error to quantify the number of false confessions as compared to the number of true confessions, only that false confessions, while counterintuitive, do occur. N.T., 8/24/2011, at 36-37. Dr. Dattilio’s testimony is specifically relevant to the case herein because he set forth at the **Frye** hearing the various factors that could increase the likelihood of a false confession and that some factors were present during Appellant’s interrogation.

Moreover, unlike the **Benally** court, I am not persuaded that Dr. Dattilio's testimony in the instant matter would result in the jury disregarding Appellant's confession and crediting Appellant's testimony that he lied to the police about committing several of the charged criminal acts. Rather, Dr. Dattilio's testimony would serve to educate the jury on police interrogation techniques and provide an appropriate tool for the jury to utilize when assessing the testimony of both Appellant and the officers involved in his interrogation. Simply put, I believe that the jury should be able to use the factors testified to by Dr. Dattilio to guide its independent assessment of the facts elicited from the officers and Appellant as it determines whether Appellant's testimony that his confession was false is credible. Therefore, I find the rationale of **Benally** inapplicable to the case *sub judice*.

In analyzing the additional relevant cases provided by the Commonwealth, I conclude that these cases are each readily distinguishable. Specifically, in **Kolb v. State**, 930 P.2d 1238 (Wy. 1996), a case decided nearly 15 years prior to Appellant's trial, the proposed defense expert testified that, at that time, there were no psychological studies upon which he could base his testimony. Furthermore, according to the court in **Kolb**, the proffered expert had received no formal training in his theory, had attended no seminars related to false confessions, and, "at best," had viewed one television program that referred to false confession syndrome.

Id. at 1242. Additionally, in **People v. Rosario**, 20 Misc.3d 401 (Ny. Sup. 2008), there was no evidence presented that the defendant had been subjected to coercive interrogation techniques. Therefore, the court excluded the testimony, *inter alia*, as irrelevant. **Id.** at 406. Finally, in **Edmonds v. State**, 955 So.2d 787 (Miss. 2007), the court excluded the proposed expert testimony regarding the possibility of false confessions because the expert admitted that her theories could not be empirically tested. For the reasons set forth *supra*, however, in Pennsylvania we are not concerned with test results or statistics reached by the expert, but with the methods employed in making the finding.

I find the discussion in **United States v. Hall**, 93 F.3d 1337 (7th Cir. 1996), and the cases that have adopted its rationale more applicable to the instant case.⁶ In **Hall**, the defendant proffered Dr. Richard Ofshe as an expert in police interrogation techniques and coerced confessions.⁷ **Id.** at 1341. Dr. Ofshe was widely published and had worked extensively with law enforcement officials and defense counsel. **Id.** He stated that he would

⁶ I remain cognizant that **Hall** applied the federal **Daubert** test. **Daubert** is considered a more liberal standard than Pennsylvania's **Frye** test. The test announced in **Daubert** requires the trial judge to "make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and can be applied properly to the facts at issue." **Commonwealth v. Smith**, 995 A.2d 1143, 1174 n.1 (Pa. 2010) (Baer, J. concurring). Thus, under **Daubert**, there is no requirement that the expert testimony be generally accepted.

⁷ Dr. Ofshe is the same expert that was excluded in **Harrell, supra**.

testify regarding “the fact that experts in his field agree that false confessions exist, that individuals can be coerced into giving false confessions, and that certain indicia can be identified to show when they are likely to occur.” **Id.** Additionally, Dr. Ofshe explained his methodology and what factors distinguish reliable from unreliable confessions. **Id.** The trial court denied admission of Dr. Ofshe's testimony in its entirety, finding that Dr. Ofshe would need to judge the credibility of the officers who conducted Hall's interrogation and that his opinions would add nothing to what the jury knew from common experience. **Id.** at 1341-1342.

In overruling the trial court, the **Hall** Court remarked that, “[i]f the expert testimony would be helpful and relevant with respect to an issue in the case, the trial court is not compelled to exclude the expert just because the testimony may, to a greater or lesser degree, cover matters that are within the average juror's comprehension.” **Id.** It further opined that properly conducted social science research often shows that commonly-held beliefs are in error. **Id.** at 1345.

Similarly, in **Boyer v. State**, 825 So.2d 418 (Fla.App.Dist. 1 2002), the Florida District Court of Appeals held that the trial court erred in not allowing expert testimony from Dr. Ofshe. **Id.** at 419. The trial court therein determined that Dr. Ofshe's testimony met the **Frye** requirements; nevertheless, it excluded the testimony on the basis that it would not assist the jury in understanding the facts at issue. **Id.** In reversing the trial

court's decision, the **Boyer** court quoted from **Hall**, stating that the evidence "would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried." **Id.** at 420, *quoting Hall*, 93 F.3d at 1345.

Likewise, the Supreme Court of Indiana, in **Miller v. State**, 770 N.E.2d 763 (Ind. 2002), reversed a trial court's decision to preclude expert testimony from Dr. Ofshe. **Id.** at 766. Dr. Ofshe testified prior to trial as follows:

The nature of the testimony is going to be: one, about the general way in which police interrogation works which fits the description that [the officer who conducted the interview] gave about the tactics that he used; second, it will be about those things that can lead to someone giving a false confession; and third, it will be about how to take the undisputed record of the interrogation, the recorded part of it and analyze it, in terms of trying to figure out what is-what the indicia of a true or false confession might be-and thereby for the jurors to reach their decision about how much weight to give it. My role is only to point out what things ought to be considered.

Id. at 770-771. In remanding for a new trial, the Indiana Supreme Court held that "the general substance of Dr. Ofshe's testimony would have assisted the jury regarding the psychology of relevant aspects of police interrogation and the interrogation of mentally retarded persons, topics outside the common knowledge and experience [of a jury]." **Id.** at 774.

In addition, in both **People v. Page**, 2 Cal.App. 4th 161 (Cal. Ct. App. 1991) and **Callis v. State**, 684 N.E.2d 233 (Ind. App. 1997), the courts

permitted limited expert testimony on coerced confessions. The expert witness in each case was allowed to testify about the general factors that can influence a person to make a false confession and to give general examples of those factors. **Page**, 2 Cal.App. 4th at 185-186; **Callis**, 684 N.E.2d at 239. They were not authorized to testify about the specific facts of their respective cases. **Page**, 2 Cal.App. 4th at 185-186; **Callis**, 684 N.E.2d at 239. Even though there was no challenge on appeal to the admission of the limited testimony, each court approved of the trial court's delineation between permissible and impermissible false confession expert testimony. **Page**, 2 Cal.App. 4th at 186-187; **Callis**, 684 N.E.2d at 239-240.⁸

In this matter, because it is not within the average juror's common knowledge to know what causes a person to give a false confession, Dr. Dattilio's testimony would aid the jury in deciding this case, while preserving the jury's traditional role as the ultimate arbiter of a witness's credibility. It

⁸ **Callis v. State** was decided prior to **Miller** discussed *supra*. Accordingly, it is clear that Indiana permits almost identical testimony that was proposed in this matter.

I note that other sister jurisdictions permit the admission of expert testimony regarding the phenomena of false confessions: **Franks v. State**, 90 S.W.3d 771 (Tex. App. Ft. Worth 2002); **State v. Gilman**, 702 S.E.2d 276 (W.Va. 2010); and **Commonwealth v. McCowen**, 458 Mass. 461 (Mass. 2010). I in no way represent this list to be exhaustive.

has long been settled that a defendant may introduce relevant evidence to demonstrate that his confession was involuntary. **See Commonwealth v. McClean**, 247 A.2d 640 (Pa. Super. 1968); **see also** Pa.R.Crim.P. 581(J).⁹ In the case *sub judice*, Dr. Dattilio's testimony could give the jury a generally accepted framework within which it may reconsider the prevailing consensus that an individual does not ordinarily confess to perpetrating a crime he or she has not committed. It would, however, be up to the jury to weigh Dr. Dattilio's testimony against any other evidence introduced at trial.

As a whole, I believe that the cases excluding expert testimony regarding false confessions provide sparse reasoning for concluding that the testimony offered by Appellant is within the common knowledge of the jury and would infringe on the jury's credibility determining function. Even those jurors who are aware of police interrogation techniques, or believe that they are aware of such methods by watching media and television, are unlikely to understand how these methods can produce a confession from an innocent individual. As I do not believe that the proposed expert testimony in this case impermissibly interferes with the jury's ability to determine the credibility of Appellant or improperly attacks the credibility of the police

⁹ Pennsylvania Rule of Criminal Procedure 581 governs suppression motions. The comment to the rule states in pertinent part, "Paragraph (J) does not change the Massachusetts or 'humane rule' (whereby a defendant may raise the issue of voluntariness of a confession to the jury following denial of a motion to suppress) which is followed in the Commonwealth."

officers involved in his interrogation, I would hold that the trial court committed an abuse of discretion in excluding the testimony of Dr. Dattilio and I would vacate Appellant's judgment of sentence and remand for a new trial. Consequently, I must dissent.