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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v **No. 168009**

GWENDOLYN ALEXANDER,
Defendant-Appellant.

Court of Appeals No. 364063
Third Circuit Court No. 20-001501-02

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF OPPOSING DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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SUMMARY OF ARGUMENT

At first glance, this case appears to be a heavy-weight championship match where the Court of Appeal's decision in *McFarlane* is matched up against court rule MRE 704.[1] But as is so often true, the reality differs from the initial appearance. Although *McFarlane* is helpful in its analysis, the real issue in this case is regarding the interaction of this Court's case of *People v Bynum*, its relationship to MRE 704, and how those two guidelines form a brightline rule that is simple to both understand and apply. The brightline rule is that an expert may not use language that clearly suggests that they are trying to testify to the mindset or culpability of the accused.

People v McFarlane was not the fabrication of a new maxim out of whole cloth.[2] *McFarlane* does *not* hold that there is any problem with a doctor referencing statements, a doctor diagnosing inflicted harm, or that it was impermissible for a clinical diagnosis to sound similar to a charged offense. Rather, the *McFarlane* decision was exclusively the Court of Appeals attempting to faithfully apply this Court's *People v Bynum* case, to a new area.[3]

Thus, it is *Bynum*, not *McFarlane* that is at the crux of the issue. In this case, both *Bynum* and MRE 704 are in lockstep supporting the fact that the medical expert was allowed to testify that both the victim and the victim's sister were diagnosed as suffering "medical torture."

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[1] MRE 704 says, "An opinion is not objectionable just because it embraces an ultimate issue."
[2] *People v McFarlane*, 325 Mich App 507 (2018).
[3] *People v Bynum*, 496 Mich 610 (2014).

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The reason for this unity is contained in the nature of *Bynum*, which was crafted to address a real problem, not a hypothetical fear of possible confusion.

The *Bynum* problem, and indeed the *McFarlane* problem, occurred when experts exceeded the scope of their expertise, to opine on the mental culpability of the accused. Although an expert may testify to the ultimate issue and a doctor may provide a diagnosis based on a combination of physical findings and victim statements, no doctor or other expert may testify *as to the mindset or culpability of the accused*. Thus, the clear rule is broken if an expert testifies that a defendant is "acting in conformity with criminal behavior" or if a doctor claims a child "was abusively given head trauma." Both of these statements tend to assume an accused's mens rea, rather than provide a general diagnosis about a victim. In contrast, the rule is fully intact if the doctor testifies about some diagnosis that explains *what injuries and pain the victim suffered*.

Here, the People's expert did not delve into the mental state of the accused, so the *Bynum*/*McFarlane* rule is not implicated. MRE 704 controls and, accordingly, the testimony about the clinical diagnosis of medical torture was permissible. There is no, and never has been a, rule prohibiting an expert from using language that "sounds similar" to the charged crimes. To create such, would be for the legal system to attempt to control the practice of medicine and redefine the standards that healthcare providers use, a grotesque overreach of power. Instead, as clearly illustrated by this case, careful explanations and jury

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instructions are sufficient to explain the differences between medical definitions and charged crimes.

This case is the paradigm for that plan working *flawlessly*. Even if it were possible for a jury to misunderstand the concept of medical torture and to conflate it with a charged crime of torture or abuse, that clearly *did not occur in the instant case*. Here, the People's expert was called and testified as to the unique definition of medical torture and then explained that she had diagnosed that both victim one, M.A., and victim two, R.S., suffered medical torture. The jury heard that testimony and then rendered a verdict that defendant was guilty of the charges regarding M.A., but not guilty of the charge regarding R.S. Thus, it is clear that they understood that a diagnosis of medical torture was not a substitute for the elements of criminal charges. Even though the expert said they both suffered medical torture, the jury looked at the evidence. The evidence was strong with M.A.'s conviction and the jury convicted based on that evidence. The evidence was much weaker with R.A.'s charge and the jury acquitted on that count. If the expert had invaded the jury's realm and superseded its ability to make an independent decision, it necessarily would have convicted defendant of the charges arising from *both* victims.

Defendant has not shown error, has not shown plain error, and has not shown prejudice. This Court should deny defendant's application for leave to appeal.

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COUNTERSTATEMENT OF QUESTION PRESENTED

I

An expert may opine on the ultimate issue but may not opine on the mental culpability of a defendant. Here, the expert doctor testified that the victim was diagnosed as having suffered from "medical torture," but did not imply that defendant had any culpable mental state. Did the trial court plainly err by allowing the doctor to testify about making a medical diagnosis that did not create any inferences about defendant's state of mind?

The trial court did not answer this question.

The Court of Appeals answered, "No."

The People answer, "No."

Defendant answers, "Yes."

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COUNTERSTATEMENT OF FACTS

On September 23, 2022, defendant was convicted after jury trial of torture,[4] second-degree child abuse,[5] second-degree child abuse in the presence of another child,[6] and third-degree child abuse,[7] all of which dealt with her abuse and torment of the victim, her 6-year-old son, M.A. Defendant was acquitted of third-degree child abuse[8] concerning her 3-year-old daughter R.S. Defendant was tried at a joint trial with her boyfriend, codefendant Errown Scott.

The charges against defendant stemmed from her practice of having the victim zip-tied by his wrists and ankles to a chair, causing significant cuts, swelling, and scarring on his wrists and ankles, and hitting him with a belt.

On January 4, 2020, the defendant reached out to a friend, Ranisha Bowden, who was the godmother of the victim, M.A. Defendant asked Bowden if she would take custody of the victim because she wanted "to give him away."[9]

On January 22, 2020, Bowden went over to defendant's home to check on the victim. When she saw the victim, he looked malnourished, had two black eyes, had scars on his face and hands, and both scars and lacerations on his wrists and ankles from being restrained with zip

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[4] MCL 750.85.
[5] MCL 750.136b(3).
[6] MCL 750.136d(1)(b).
[7] MCL 750.136b(5).
[8] MCL 750.136b(5).
[9] 166-67A.

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ties.[10] Bowden called emergency services. The police and an ambulance showed up.

Officer Janelle Thomas responded to the scene and discovered that the victim had bruises and swelling on his face and neck and "thick, thick… raised scarring on his wrists."[11] An EMT, Anthony Curti, treated the victim at the scene. Curti noted that the victim suffered from swollen ligature marks around his wrists and ankles, had a bruise on the side of his face, bruising around the sides of each eye,[12] and abrasions on the neck and upper chest.[13] The victim was taken to the hospital. At the emergency room, Dr. Shazia Maqbool found that the victim wrists and ankles both suffered from swelling and tenderness and found linear scars around both his ankles and his wrists.[14] The jury was shown pictures of the victim's scars and swelling around his wrists and ankles from the hospital.[15] The police found zip ties on the ground in front of the house and inside the house.[16]

The ligature scars were caused by defendant's practice of zip tying, or having her boyfriend zip tie, the victim to furniture so that he could not escape when she decided not to supervise him. The victim

[10] 169A, 176A.
[11] 198A.
[12] 115A-117A.
[13] 132-34A
[14] 350-56A.
[15] 217A.
[16] 196A, 199A, 209-10A, 214A, 220A, 224A, 235-36A.

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remembered being zip tied more than five times, but not more than ten times.[17] His sister, R.S. also remembered him being tied up.[18]

On March 3, 2020, a month and ten days after the police rescued the victim, Dr. Dena Nazer of Kids-TALK Children's Advocacy Center examined both the victim and his sister, R.S.[19] The victim still had significant scarring on or around both wrists and ankles.[20] Nazer diagnosed that both the victim and R.S. had suffered "medical torture."[21] Nazer was very specific, however, and indicated her conclusion was only a "clinical diagnosis" or "medical diagnosis," which indicated the child was subject to "two different physical assaults" that were accompanied by "two psychological maltreatments."[22] Nazer classified the scarring as severe due to the nature of the injury.[23]

When interviewed by the police, defendant admitted to tying the victim up on multiple occasions and requesting codefendant do the same. She said that she "whooped" the victim and that "codefendant" did the same with her approval. She also acknowledged that the injuries to the victim's wrists were the result of struggling once he was bound. Despite her claims that she was justified in restraining him due to his troubled behavior, she never sought counseling or help for him, outside of trying to give him away.

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[17] 77A.
[18] 101A.
[19] 391A, 398A.
[20] 398A.
[21] 399-400A, 403A.
[22] 400A.
[23] 445-46A.

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After defendant's conviction, defendant appealed as of right to the Court of Appeals. The Court of Appeals affirmed the conviction. Of particular note was the Court of Appeals conclusion that here, "The contested terminology in this case did not have the potential to conflate Dr. Nazer's medical diagnosis with a legal conclusion concerning defendant's legal responsibility."[24] Additionally, the court held that according to the record, the testimony of Dr. Nazer was focused on the victim and "did not suggest that defendant acted knowingly or intentionally when she testified that the children were diagnosed with medical torture."[25]

This Court scheduled oral argument on the application, directing the parties to only address a single question: "whether the prosecution's medical expert invaded the province of the jury by using the phrase 'medical torture' to label her diagnosis of the child complainant."[26]

This supplemental brief addresses this Court's question.

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[24] *People v Alexander*, ___ Mich App ___, 2024 WL 4846088, at *5 (No. 364063, November 20, 2024).
[25] *Alexander supra,* *8.
[26] *People v Alexander*, 21 NW3d 211 (Mich, 2025).

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ARGUMENT

I.

An expert may opine on the ultimate issue but may not opine on the mental culpability of a defendant. Here, the expert doctor testified that the victim was diagnosed as having suffered from "medical torture," but did not imply that defendant had any culpable mental state. The trial court did not plainly err by allowing the doctor to testify about making a medical diagnosis that did not create any inferences about defendant's state of mind.

Standard of Review

Unpreserved claims are forfeited unless the defendant satisfies the burden of persuasion on all three requirements: (1) An "error must have occurred," (2) "the error was plain, i.e., clear or obvious," (3) "and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings."[27] Further, once the defendant has satisfied all the above requirements, reversal is only warranted when one of two policy concerns is present: (1) The "forfeited error resulted in the conviction of an actually innocent defendant" or (2) the "error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence."[28]

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable and that there is a reasonable probability that, but for counsel's error, the result

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[27] *People v Carines*, 460 Mich 750, 763-65 (1999) (cleaned up).
[28] *Id.*

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of the proceedings would have been different.[29] There is a strong presumption, however, that counsel provided effective representation.[30] The defendant bears the burden of proof and must exclude those reasonable hypotheses consistent with the view that trial counsel provided effective representation.[31]

Discussion

Defendant is not entitled to relief based on the claim that Dr. Nazer should not have been allowed to opine that the victim was subject to medical torture.

A. Diagnosing a victim as having suffered "medical torture" does not provide commentary on a defendant's state of mind.

Defendant is not entitled to a new trial merely because the victim was diagnosed as suffering something that, at first glance, sounded like the charge against defendant. Defendant asserts that it was impermissible for Dr. Nazer to testify truthfully because the diagnostic term used by the doctor is too similar to the legal crime that the defendant was charged with violating. Defendant asserts that this claim stems from *People v McFarlane*.[32] This assertion is based on a fundamental misunderstanding of *McFarlane* and the underlying case of *People v Bynum*.[33]

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[29] *People v Leonard*, 224 Mich App 569, 592 (1997); *Strickland v Washington*, 466 US 668 (1984).
[30] *Id.*
[31] *People v Ginther*, 390 Mich 436 (1973).
[32] *People v McFarlane*, 325 Mich App 507 (2018).
[33] *People v Bynum*, 496 Mich 610 (2014).

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Neither *McFarlane* nor *Bynum* share similar facts with the instant case. In *McFarlane*, the victim was diagnosed as suffering a type of head injury known in medicine as "abusive head trauma." The *McFarlane* defendant was charged with first-degree child abuse. The court ultimately held that reference to the particular diagnosis of "abusive head trauma" was both improper and, ultimately, harmless.[34] But what is most important is the reasoning of the court for finding the word "abusive" in "abusive head trauma" inappropriate. The *McFarlane* panel started with the understanding that an expert was allowed to opine on the ultimate issue but noted that the question did not end there. Accordingly, the panel reviewed several different types of expert testimony, ranging from experts testifying about sexual assault to experts discussing gang culture.

Ultimately, the panel did not hold—as has been widely misinterpreted—that the similarity between the legal term "first-degree child abuse" and the medical term "abusive head trauma" was the reason the testimony was not allowed. Similarly, the court did not disallow the testimony because it indicated that the injury was inflicted by another person. Quite the opposite, the court specifically indicated that an expert may testify "that, when the medical evidence is considered along with the child's history, the child's injuries were inflicted rather than caused by accident or disease because a jury is unlikely to be able to assess the medical evidence."[35]

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[34] *McFarlane*, 325 Mich App at 526–27.
[35] *Id* at 522.

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The real issue was that the court found that the term "abuse" implied that whoever caused the injuries did them with a "culpable state of mind" and that they were done "knowingly and intentionally."[36] Pain, torture, injury, or damage, can all be caused by non-actors or inadvertently. In contrast, the court felt that the word "abuse" intrinsically implied an intent to harm, when determining that fact was beyond the ability of the expert. Accordingly, the *McFarlane* panel held that the controlling case was not any of the cases regarding different types of medical testimony, but rather was the *Bynum* case that featured an expert in criminal gangs. For the most part, this Court in *Bynum* did not have a problem with the expert testimony that discussed gang culture and traits. Nevertheless, the *Bynum* Court found that it was impermissible for an expert to testify that the defendant "acted in conformity with the character traits commonly associated with gang members" which, in essence, was testimony that he acted with a culpable state of mind. Thus, both *McFarlane* and *Bynum* are premised on the same issue: the expert was perceived to testify not only about their areas of expertise, but also about the mental state of involved defendants.

In this case, however, Dr. Nazer did not provide any state-of-mind or conformity testimony. Rather, Dr. Nazer's testimony concerned the condition of the victims and what those children had experienced, rather than the attributes, thoughts, or state of mind of defendant. Defendant erroneously asserts that the People put on Nazer merely to label the defendant's conduct as "torture," when the record shows that the People

[36] *Id* at 524.

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and the doctor went to great lengths to differentiate the term medical torture from the crime of torture. The term, "medical torture" does not denote any intent whatsoever on behalf of any defendant. As Nazer explained exhaustively, "medical torture" is merely a measurement showing that a victim objectively suffered "two physical assaults" and "two psychological maltreatments."[37] Thus, the term speaks *only* to the physical and psychological injuries *suffered by the victim*. It does not invoke the defendant's culpability or mental state at all. Even in colloquial use, people understand that torture can be inflicted by others with intent to cause pain, inflicted by others through recklessness or negligence, or even inflicted by some source that is not human at all, such as ailment or injury.[38] This is in sharp contrast to *McFarlane*. In *McFarlane*, the panel noted that in all colloquial usage "abuse" indicates that a perpetrator has a "culpable state of mind."

"Medical torture," just like a medical examiner's diagnosis of "homicide" or the diagnosis discussed and recommended by *McFarlane* of "inflicted head trauma," says nothing about a perpetrator's state of

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[37] T. 9/22, 27-28.

[38] By itself, the term "medical torture" as used throughout the trial does not require or imply any intent by a defendant. It was an objective measurement of what the victim had experienced. Thus, everyone understood that when Nazer talked about "medical torture," the word "torture" was used in the objective sense defined as "anguish of body or mind." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/torture. Accessed 25 Jul. 2024.

Other definitions of torture, some of which might rely on the intent of the actor, were not at issue in Nazer's testimony. Nazer's testimony exclusively focused on the objective experiences that the victim and R.S. suffered. The jury clearly understood the nature of Nazer's testimony and even displayed its understanding for the testimony in its verdict, which will be discussed below.

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mind. There is no reason nor authority to radically expand the scope of *McFarlane* to other medical diagnoses such as "medical torture" or, for that matter, any other diagnosis that merely sounds similar to a charged crime. Diagnosing a victim's injuries should be left to the trained hands of a medical doctor, not to the courts. Similarly, doctors should not be required to lie about their diagnosis, while testifying to the jury under oath. Nazer had no options when testifying. The victim and R.S. were both diagnosed with suffering medical torture. The defense could, and did, challenge those diagnoses and clearly were partially successful. But it is unconscionable that the doctor be required to lie about what diagnosis she originally made.

Under *McFarlane* and *Bynum*, the only time a court may intervene in a truthful diagnosis is when providing diagnosis to the jury would clearly mislead it into believing that the doctor was testifying as to the state of mind of the defendant. Where that concern may be present with "abusive head trauma" it is not present with "medical torture."[39] Accordingly, defendant is not entitled to relief.

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[39] The diagnosis of medical torture is far removed from an ailment that seemingly implies the mental state of a defendant.

During Nazer's testimony, she mentioned the concept of "abuse" as it related to the diagnosis of the victims. This is utterly unsurprising, considering that she is a child abuse pediatrician. None of these mentions of the word "abuse" labeled defendant as an abuser, undermined Nazer's role as diagnosing the children involved, or made Nazer appear to be guessing the mind of the perpetrator. Nazer never provided an expert opinion diagnosing the victim as having suffered some medical type of "abuse" that would imply culpable intent on behalf of defendant. Rather, the term was merely mentioned during discussions of other concepts. To whatever extent this could be seen as objectionable, that issue is abandoned because the defense has not

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B. Even if the term "medical torture" was impermissible, there was no plain error because the jury did not rely on that diagnosis to render its opinion, as shown by its verdict on the charges concerning R.S.

Defendant asserts that it is reasonably probable that the outcome of her trial would have been different if not for Nazer's testimony using the term "medical torture." This claim is false on its face. Nazer diagnosed both the victim and R.S. with having suffered medical torture. Nazer's testimony that R.S. suffered medical torture was the primary reason for the charges regarding the abuse of R.S. But the jury acquitted defendant of the charge stemming from her acts against R.S. If the jury here had blindly equated an expert's opinion on "medical torture" as establishing both the actus reus and mens rea of the charges—a claim defendant must establish to meet her burden of showing outcome-determinative prejudice—then the jury would necessarily have convicted defendant of the charge that she harmed R.S., as well as the charges involving the victim.

The testimony from Nazer regarding the medical torture of both the victim and R.S. was pervasively similar. What was not similar, however, was the injuries the victim suffered and the testimony of the other witnesses who observed the victim's injuries. Dr. Nazer's testimony was meant to show that R.S. had undergone some similar

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briefed it. *People v Matuszak*, 263 Mich App 42, 59 (2004); *People v Van Tubbergen*, 249 Mich App 354, 364-65 (2002).

Furthermore, such an argument would be meritless because there was no prejudice. The discussion of "abuse" was more prevalent during the testimony about Nazer's diagnosis of R.S. The jury acquitted defendant of all crimes regarding her treatment of R.S. Accordingly, the jury clearly did not base its determinations merely based on the mention of the word "abuse."

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pain and suffering to that of the victim. With the victim, there was overwhelming evidence including photographs, lay witnesses, the responding police officer, and the EMT. In contrast, Nazer's testimony was the primary inculpatory evidence that defendant had abused R.S. The jury's act of acquitting defendant of the R.S. charges shows that Nazer's testimony about medical torture, even if erroneous, had no impact on the jury's decision.

C. A physician may base her expert testimony on both statements and physical or medical findings.

Under this same section, defendant also misstates the holdings of *People v Harbison and Thorpe*[40] and *People v Smith*[41] and, in doing so, ignores the relevant case law contained in *McFarlane*. Defendant's claim and extrapolations are false. Michigan does not have any moratorium against a doctor's diagnosis when that diagnosis incorporates a victim's statements or other relevant medical histories. Rather, the diagnosis only becomes objectionable when it is *solely* based on the victim's statements to the doctor, without any physical findings or scientific underpinnings.

In *Harbison*, a sexual assault case without any physical evidence of assault, the doctor made a diagnosis *exclusively* on the basis of the victim's claims.[42] The Court held that the doctor's diagnosis was objectionable because it was solely based on the doctor's evaluation of credibility. The *Harbison* case was based on *Smith*. In *Smith*, the doctor

[40] *People v Thorpe*, 504 Mich 230, 262 (2019).
[41] *People v Smith*, 425 Mich 98, 112 (1986).
[42] *Thorpe*, 504 Mich at 262

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made a diagnosis of sexual assault based exclusively on the statements of the complainant and her emotional state. The Court noted that the doctor did not base any of his "findings within the realm of his medical capabilities or expertise as an obstetrician/gynecologist."[43] Accordingly, the doctor was merely giving an impermissible opinion as a lay witness.[44]

The defense in *McFarlane* made the identical argument that the instant defendant makes: arguing that *Smith* precluded the doctor's diagnosis. The *McFarlane* court held the defense was wrong:

> [C]ontrary to defendant's contention on appeal, a physician may properly offer an opinion that, when the medical evidence is considered along with the child's history, the child's injuries were inflicted rather than caused by accident or disease because a jury is unlikely to be able to assess the medical evidence.[45]

Defendant claims in her supplemental briefing that this case is the same and that Dr. Nazer testified to complain about defendant rather than diagnose the victim. But according to the transcript, that simply is not accurate at all. Here, the doctor testified about her specialized training in child abuse pediatrics, the physical injuries of the victim both as she saw and were documented, the medical history of the victim, and the evaluation of the victim. It was a textbook diagnosis according to the *McFarlane* court's equation: objective medical evidence + medical history = opinion of the physician.

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[43] *Smith*, 425 Mich at 112.
[44] *Id* at 113.
[45] *McFarlane*, 325 Mich App at 522–23.

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This case is nothing like *Harbison* or *Smith*. Instead, just like as was approved in *McFarlane*, the diagnosis was based on Nazer's specialized role, the victim's injuries, and the history as well. Accordingly, *Smith* is inapplicable and the testimony was permissible. Defendant is not entitled to relief.

D. Defendant is not entitled to use an appellate parachute, by complaining that evidence she did not want admitted was not admitted.

Defendant goes beyond this Court's instruction to argue the permissibility of the terminology of "medical torture" under MRE 703.

Defendant is not entitled to relief on the basis of MRE 703, because defendant fundamentally views this rule backwards. It is not a rule of exclusion, it is a rule of admission. Defendant's claim is basically the assumption that because Nazer reviewed some hearsay statements as part of her diagnosis, her opinion and testimony should have been excluded under MRE 703. But that claim is errant.

MRE 703 states:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. The facts or data must be in evidence--or, in the court's discretion, be admitted in evidence later.[46]

By its plain language, MRE 703 allows an expert to form an opinion based on information that would not be otherwise admissible because it allows the expert to use facts or data "the expert has been

[46] This is the revised MRE 703 that took effect January 1, 2024. The revisions were not substantive in nature.

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made aware of," which is also known as hearsay. Indeed, the Courts have consistently held that this is the case. "An expert witness may… base his opinion on hearsay information or on the findings and opinions of other experts."[47] "It is well-settled that an expert witness may rely on hearsay evidence when the witness formulates an opinion."[48] "MRE 703 provides that an expert witness may base an opinion on hearsay evidence."[49] Ultimately, this conclusion is obvious. Experts need to rely on reports, records, and interviews that happen in medical offices, science laboratories, and in thousands of personal homes during randomized studies. All of these represent inadmissible hearsay. And all of these are permissible bases for an expert's opinion.

The proper route to levy a challenge under MRE 703 is not to wait until trial is over and then complain that something was omitted. Rather, the correct procedure is to follow the dictates of MRE 705. Using MRE 703 and 705, the cross-examining party may require the admission of facts and data that would otherwise be inadmissible.

MRE 705 says:

> Unless the court orders otherwise, an expert may state an opinion - and give the reasons for it - without first testifying to the underlying facts or data. But *the expert may be required to disclose those facts or data on cross-examination*. (Emphasis added.)

Thus, if the defense had wanted the Kids-TALK Forensic Interview admitted, that would have been available under MRE 703 and

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[47] *People v Dobben*, 440 Mich 679, 695–96 (1992) (cleaned up).
[48] *People v Lonsby*, 268 Mich App 375, 382–83 (2005).
[49] *People v Caulley*, 197 Mich App 177, 194 (1992).

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705 on cross-examination. Here, however, the defense did not challenge the facts or data on cross-examination by requesting that the Kids-TALK Forensic Interview be added to evidence. Thus, Nazer's testimony was entirely proper.

The only fact or datum not available in evidence was the Kids-TALK Forensic Interview. Nazer made her diagnosis of the victim based on her evaluation of the victim, a discussion with eyewitness Bowden, the victim's medical history, and the forensic interview. Each of these areas were fully explorable by the defense on cross-examination. And the facts and data were in evidence so far as the defense requested. Specifically, during the trial the following took place:

- Nazer testified about her evaluation,
- The victim testified allowing the defense to explore any of his statements to Nazer without hearsay problems, as he was the declarant,
- Bowden was called as a witness, allowing the defense to explore any of her statements to Nazer without hearsay problems, as she was the declarant,
- The victim's medical history was admitted as People's Exhibit 31.

The only thing that was not put on evidence was the Kids-TALK Forensic Interview. Clearly, the defense did not want the Kids-TALK interview in front of the jury. Accordingly, it did not request that interview's admission through MRE 705 and 703. As Nazer was not required to provide those underlying facts and data until requested—and the defense declined to make that request—there is no error, except for whatever error the defense invited through its own desire to avoid the jury seeing the forensic interview.

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Furthermore, there is no Confrontation Clause or *Crawford*[50] issue with an expert relying on hearsay, unless that expert is merely there to use the MRE 703 exception to get otherwise inadmissible data into a trial. MRE 703 and 705 are an exception allowing the underlying data to be admitted during a cross-examination. But when the party offering the expert seeks to do so merely for the reason of justifying the admission of otherwise inadmissible hearsay evidence, that party must comply with *Crawford*.[51] Here, we clearly do not have that issue. Nazer testified to her own examination conducted according to her own expert specialization. The underlying data was available, but Nazer was not used as a Trojan horse to admit it. Logically, the defense cannot both complain that there was a *Crawford* violation for admitting testimonial hearsay and complain that the testimony was never admitted. Here, there was no *Crawford* violation, because Nazer testified as a diagnosing expert, rather than for the purpose of admitting the forensic interview. If defendant had wanted the forensic interview admitted, then under

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[50] *Crawford v Washington*, 541 US 36 (2004).

[51] See *United States v Johnson*, 587 F3d 625, 635 (CA 4, 2009).

> An expert witness's reliance on evidence that *Crawford* would bar if offered directly only becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation.

See also *United States v Lombardozzi*, 491 F3d 61, 72 (CA 2, 2007) that noted, "it is permissible for an expert witness to form an opinion by applying her expertise to otherwise inadmissible evidence because, in that limited instance, the evidence is not being presented for the truth of the matter asserted." (Citation omitted.)

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MRE 703 and 705 she had that opportunity. Clearly, defendant did not want that interview on evidence. But nothing about the defense choice of whether to put the interview in front of the jury prevented Nazer from permissibly reviewing hearsay when forming her expert opinion. Defendant is not entitled to relief on the basis that she did not exercise her rights under MRE 705, because doing so would have been strategically detrimental to her case.

Conclusion

Defendant is not entitled to relief based on the claim that the trial court plainly erred by failing to stretch the holding in *McFarlane* to unrelated diagnoses that do not imply a defendant's mental state or culpability. The diagnosis of "medical torture" does not imply any state of mind on a defendant, nor even require the existence of a defendant. Furthermore, the use of the term "medical torture" had no prejudicial impact on the trial, because Nazer diagnosed both the victim and R.S. with having suffered medical torture, but the jury only chose to convict defendant of charges relating to her treatment of the victim.

Finally, the People's expert testified and explained her reasons and conclusions under MRE 705. The defense chose not to move for the admission of the Kids-TALK video on Nazer's cross-examination. They cannot now complain that it was error not to have the Kids-TALK video in evidence, when they declined to request it, pursuant to MRE 705, during cross-examination.

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RELIEF

THEREFORE, the People request that this Honorable Court deny defendant's application for leave to appeal.

Respectfully submitted,

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WORD COUNT

Relying on the word-processing system used to prepare this brief, this document contains 5,445 countable words.