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State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

Gwendolyn J. Alexander

Defendant-Appellant.

MSC No. 168009

COA No. 364063

Wayne County Circuit Court
Case No. 20-001501-02 FC

Reply Brief of Gwendolyn Alexander

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Statement of the Questions Presented

First Question

Did the physician expert invade the province of the jury and violate MRE 702 and MRE 704 when she "diagnosed" MA with "medical torture" where: that term conflates a medical diagnosis with a legal determination; "torture" is commonly understood to mean the intentional infliction of physical or mental pain and suffering; the physician essentially confirmed that was the intended meaning of the term; and, the diagnosis was based on the doctor's assessment of witness reports describing Ms. Alexander's alleged treatment of MA?

Ms. Alexander answers: Yes.

The Court of Appeals answered: No.

Second Question

Was the erroneous admission of the physican's expert testimony outcome determinative?

Ms. Alexander answers: Yes.

The Court of Appeals answered: No.

Third Question

Did the admission of the physician's testimony and report violate MRE 703?

Ms. Alexander answers: Yes.

The Court of Appeals answered: No.

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Arguments

I. The physician expert invaded the province of the jury and violated MRE 702 and MRE 704 when she "diagnosed" MA with "medical torture" where: that term conflates a medical diagnosis with a legal determination; "torture" is commonly understood to mean the intentional infliction of physical or mental pain and suffering; the physician essentially confirmed that was the intended meaning of the term; and, the diagnosis was based on the doctor's assessment of witness reports describing Ms. Alexander's alleged treatment of MA.

In defending Dr. Nazer's opinion testimony, the appellee miscasts Ms. Alexander's arguments, contends that *People v Bynum,* 496 Mich 610 (2014) is essentially the controlling authority on the issue, and argues that *Bynum* actually favors admission in this case. Appellee's Supplemental Brief at 6-7, 16-17. This is wrong on several fronts.

While *Bynum* certainly is instructive, it represents but one of the many branches[1] of this Court's cases defining the line between MRE 704, which allows some expert testimony that touches on "ultimate" jury questions, and forbidden opinions that invade the jury's exclusive province. *People v McFarlane I* listed *Bynum* along with a number of cases representing where this Court has drawn that line and found that experts had come "too close" to invading the jury's province in various areas. *People v McFarlane ("McFarlane I")* 325 Mich App 507, 521-522 (2018) (collecting cases). Recognizing the accused's *mens rea* is one of those areas, *McFarlane I* correctly held that an expert invades that province by testifying to a diagnosis of "abusive head trauma" and "pediatric abuse" because, in lay parlance, those terms connote

[1]And *Bynum* represents a branch that is relatively adjacent to this Court's other decision on the "ultimate issue" question of MRE 704, since the Court focused primarily on whether a gang expert had violated MRE 404(a) by giving an opinion that the defendant's gang membership meant that his actions observed on security video meant he was intending to commit the crime. *Bynym*, 496 Mich at 630-631.

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intentional or willful misconduct, as well as overall culpability. *Id.* at 524-525. The Court also rightly recognized that the name of the diagnosis itself and the expert's explanation of the basis for it came "too close" to a legal conclusion. *Id.* ("It was also evident from [the expert's] testimony that 'abusive head trauma' meant child abuse."). As two concurring Justices of this Court later recognized, the terminology used in *McFarlane I* had the significant potential to "confuse medical diagnosis with a legal determination" in the jury's mind. *People v McFarlane ("McFarlane II"),* 505 Mich 1059 (2020) (Justices Cavanagh and McCormack concurring in the denial of leave to appeal but agreeing with *McFarlane I*'s conclusion that there was error).

Contrary to the appellee's straw man argument, Ms. Alexander does not content that Dr. Nazer's diagnosis was improper simply because its name is too similar to the crime of Torture. Appellee's Brief at 15-16. To be sure, that similarity likely blurred a "diagnosis with [a] legal determination" and thus, conveyed an opinion that Ms. Alexander was guilty. *McFarlane II,* 505 Mich at 1059 (Cavanaugh, J. concurring). But her opinion crossed many other lines as well, and the appellee is simply off base in contending that Dr. Nazer did not speak to Ms. Alexander's state of mind. As with the term "abusive head trauma," Dr. Nazer's repeated use of the term "torture" no doubt connoted in the jurors' minds "the infliction of intense pain. . . to punish, coerce, or afford sadistic pleasure. . . [the infliction] of great physical or mental pain…in order to be cruel to a person;" or the intentional act of causing "great physical or mental pain." *Webster's Online Dictionary*, found at https://www.merriam-webster.com/dictionary/torture; *Cambridge Dictionary*, found at https://dictionary.cambridge.org/us/dictionary/english/torture. Those connotations line up very closely with elements of the crime of Torture, which required proof that Ms. Alexander intentionally inflicted great bodily injury and that she specifically intended for MA to "suffer cruel or extreme physical pain or mental pain and suffering." MCL 750.85; 606A.

The appellee ignores those common definitions and simply insists the jury must not have interpreted the term in that manner. Appellee's Brief

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at 17-18. The appellee appears to rely primarily on the fact that a person can experience "torture" from unintentional conduct, or even non-human factors. *Id.* at 18. While that may be the case, that's not how Dr. Nazer explained things. She made it clear to the jury that she was referencing intentional mistreatment when she described "medical torture" as a "rare" designation reserved for extreme cases where witness reports reveal that the child was "severe[ly]. . . maltreated," and subject to abuse that caused him "pain and suffering." 420A, 422A. She further explained that to reach that conclusion, witness statements must persuade her that the child was physically assaulted and psychologically "abused." 400A-401A. "Abuse" is the very term *McFarlane I* rightfully found to connote the abuser's criminal intent, while "assault" and "mistreatment" similarly suggest the actor's culpability. *McFarlane I*, 325 Mich App at 524-525. The doctor dispelled any lingering doubt about whether she was alluding to culpability when she explained that the diagnosis required her to assess the "criminology [sic]" of the acts of psychological maltreatment" of MA that had been reported to her by "other sources." 420A.

The appellee's contention that Dr. Nazer's opinion focused primarily on a condition that afflicted MA and not on Ms. Alexander's culpability puts semantics over substance and is belied by the doctor's own testimony. Appellee's Brief at 18. While styled as a "diagnosis", Dr. Nazer's conclusion said little about what MA was "afflicted" with. Aside from a brief mention of visible scaring and a passing allusion to "trauma," Dr. Nazer said very little about MA's condition—physical or mental—in relation to her diagnosis. 398A-399A, 401A-403A. There was nothing "objectively medical" about considering witness accounts of Ms. Alexander's actions and concluding that her psychological "maltreatment" reached a degree of "criminology" justifying the "rare" and "serious" characterization of medical torture. Indeed, the doctor revealed that "objective medical evidence" was neither necessary nor sufficient for her conclusion; there was nothing medically notable about RS, but upon reviewing witness accounts describing similar "maltreatment" of RS, Dr. Nazer concluded that she too suffered from "medical torture." 403A, 409A-410A. Rather than "interpreting the medical evidence and offering [an] opinion" as to what caused any

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symptoms, Dr. Nazer interpreted witness accounts and gave an opinion that reflected directly on Ms. Alexander's culpability. *McFarlane I*, 325 Mich App at 523.

The appellee also wrongly contends that Dr. Nazer went no further than giving the type of opinion recognized by this Court as permissible. For instance, while *McFarlane I* concluded the "abusive head trauma" diagnosis had gone "too far," it nonetheless held that, under *People v Smith,* 425 Mich 98, 106 (1986), 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." *McFarlane I*, 325 Mich App at 522-523. Here, however, Dr. Nazer was not offering an opinion of the "cause" of MA's physical symptoms because physical and psychological symptoms were at most, incidental to her ultimate conclusion. There was no attempt to trace a path from the injuries Dr. Nazer did observe (slight scarring on MA's wrist) back to those symptoms being "caused" by "medical torture." It was all about witness accounts, the credibility of those accounts, and Dr. Nazer's judgment about the egregiousness of the conduct described.

Contrary to the appellee's argument, Dr. Nazer's opinion was also inconsistent with *People v Harbison,* 504 Mich 230 (2019), and *People v Smith, supra*. While those cases are not on "all fours," they identified limits that were exceeded here. Dr. Nazer's diagnosis was based on accounts of Ms. Alexander's conduct relayed to her by at least three people, and like those cases, the diagnosis was made irrespective of any physical symptoms or medical findings. 446A-449A, 706A-708A; *Harbison*, 504 Mich at 255; *Smith*, 425 Mich at 110-111. And while not as direct as in *Smith* and *Harbison,* Dr. Nazer implicitly endorsed the truthfulness of those accounts by accepting them as established facts, opining that MA had in fact been physically assaulted and psychologically mistreated, and concluding that the described conduct amounted to medical torture. *Harbison, supra; Smith,* 425 Mich at 109. Indeed, she went further into the jury's realm to judge credibility by opining that the witness accounts described criminally culpable actions. And as in those cases, the jury was "just as good a position [as Dr. Nazer

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was] to evaluate" witness accounts of Ms. Alexander's behavior and determine whether she committed the *actus reus* of the charges with the required *mens rea. Harbison, supra; Smith*, *supra.*; *see also* MRE 702.

For these reasons and those presented in Ms. Alexander's supplemental brief, admitting Dr. Nazer's opinion was plain error because it encroached on the jury's province to determine the ultimate questions of Ms. Alexander's overall guilt, her culpability, and her state of mind.

II. The erroneous admission of the physician's improper testimony was outcome determinative

For the reasons explained in her Supplemental Brief, Ms. Alexander contends the plain error in admitting Dr. Nazer's improper opinion was more likely than not outcome determinative, and that there is a reasonable probability of a different result but for counsel's failure to object. Supplemental Brief at 27-33; *see also People v Young*, 425 Mich 470, 505 (1986); *Strickland v Washington,* 466 US 668, 687 (1984)

The appellee makes no attempt to refute those arguments. Instead, it points to the jury's acquittal on Count 5, the third-degree child abuse count involving MA's half-sister RS. Appellee's Brief at 20-21; 629A. The appellee reasons that, since Dr. Nazer had also diagnosed RS with medical torture, the jury must not have been swayed by the improper opinion with regard to the charges involving MA, particularly Count 1. Appellee's Brief at 20-21; 629A. This contention is without merit.

For one thing, the third-degree child abuse charge of Count 5 required proof that RS suffered "physical harm" as a result of Ms. Alexander's actions. 609A-610A. The jury heard no evidence that RS suffered any physical harm at all. 358A, 403A. Thus, the acquittal on that count likely arose from the jury's (correct) conclusion that the prosecution simply failed to meet its burden of proof on each essential element of that charge.

Additionally, Count 5 is distinguishable from the Torture charge of Count 1 because the former charge required the jury to find that Ms. Alexander knowingly or intentionally committed an act that posed an

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unreasonable risk of harm or injury to RS. 605A. As shown above, the medical torture diagnosis connoted a specific intent to cause intense pain. . . to punish, coerce, or afford sadistic pleasure;" or the infliction of "great physical or mental pain…in order to be cruel to a person or an animal;" or the intentional act of causing "great physical or mental pain." While that relates very closely to the *mens rea* of Torture, it is far different from the *mens rea* required to convict on Count 5. Given this distinction and the dearth of other evidence regarding Ms. Alexander's actions or state of mind specific to RS, the jury's acquittal shows us nothing about the impact of Dr. Nazer's testimony on the other counts against Ms. Alexander.

III. Admission of the physician's testimony and her report violated MRE 703.

Although Ms. Alexander made only a passing mention of her prior challenge to Dr. Nazer's testimony under MRE 703, the appellee digresses into a multi-page defense against the challenge despite acknowledging this Court did not order briefing on that issue. Appellee's Brief at 23-29. In the event this Court decides there is a need to reach that issue, Ms. Alexander requests the opportunity to submit additional supplemental briefing to address the issue. For purposes of this pleading, undersigned Counsel makes three points.

First, the appellee mischaracterizes Ms. Alexander's claim. She did not, as appellee seems to believe, argue that the off-record evidence Dr. Nazer relied on should have been admitted at trial. Instead, it is just the opposite—because much of the evidence relied on by Dr. Nazer was not in evidence and was inadmissible, her ultimate opinion was inadmissible. As the 2003 amendment to MRE 703 made clear and this Court confirmed eight years later, an expert may testify to an opinion "only if that opinion is based **exclusively** on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony." 468 Mich xcv, xcvi (staff comment to the 2003 amendment of MRE 703), *accord People v Fackelman*, 489 Mich 515, 534 (2011); *see also* Michigan, *6 Jones on Evidence* § 46:49 (7th ed.) ("The Michigan rule does not permit an expert to base his or her opinion on facts or data, however reliable such information might be considered

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within that field of expertise, unless they have already been or will be introduced into evidence.")

Second, the appellee relies on decisions of this Court and from the Court of Appeals for the proposition that experts may rely on hearsay in forming their opinions. Brief of Appellee at 24-25. While that may be the case, none of those precedents speak to whether the hearsay relied upon must be "in evidence" as MRE 703 requires, or admissible under an exception to the hearsay rule. See MRE 803. And all of the cases appellee invokes interpreted MRE 703 before it was amended in 2003. While the former version provided that the trial court "may" require the facts or data underlying relied on by the expert be "in evidence," the version that applies to *this* case removed all discretion from the judge. Now, the admission or admissibility of the underlying facts or data is a mandatory prerequisite to the admissibility of the expert's opinion. 468 Mich xcv, xcvi (staff comment to the 2003 amendment of MRE 703). This "sea change" in the requirements for admitting expert testimony thus renders much of the authority relied on the appellee inapposite.

And third, in claiming the facts or data underlying Dr. Nazer's opinion were already "in evidence," the appellee simply repeats the same false claim found in the Court of Appeals' opinion. Appellee's Brief at 25. While a "Bowden" had testified at trial, this was not the same "Bowden" who provided information to Dr. Nazer. ***Ranisha*** Bowden, MA's godmother, testified at trial and described Ms. Alexander's statements that motivated her to contact authorities, and what she observed when the welfare check was conducted the day the children were removed. 163A-186A. Dr. Nazer's opinion was based on what ***Monisha*** Bowden, MA's aunt and Ranisha's mother, told her about MA's treatment at the hands of Ms. Alexander and Mr. Scott. 396A-402A, 706A-708A. Monisha Bowden made allegations of mistreatment of MA that went far beyond what the jury heard from MA on the stand, or from Ms. Alexander in her police statement. 429A-430A, 446A-449A, 707A. Monisha Bowden did not testify at trial, and as such, the appellee is wrong is claiming the facts or data relied on by Dr. Nazer were in evidence as MRE 703 requires.

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Conclusion and Relief Requested

For the reasons discussed above, in her supplemental brief, and in her application for leave to appeal, Ms. Alexander respectfully requests that this Honorable Court reverse her convictions and remand for a new trial.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this document contains 2574 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 18-point line spacing and 12 points of spacing between paragraphs.

Respectfully submitted,

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