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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v **No. 168009**

GWENDOLYN JOSEPHINE ALEXANDER,
Defendant-Appellant.

Court of Appeals No. **364063**
Circuit Court No. **20-001501-02-FC**

PLAINTIFF-APPELLEE'S ANSWER OPPOSING DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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The People of the State of Michigan—through Kym L. Worthy, Prosecuting Attorney, County of Wayne; John P. Wojtala, Chief of Research, Training, and Appeals; Daniel E. Hebel, Lead Attorney—ask this Court to deny defendant's application for leave to appeal.

1. Defendant's application relies on the same arguments made in the Court of Appeals.
2. The People's brief on appeal in the Court of Appeals adequately addresses these issues and is incorporated in this answer. See Appendix 1.
3. The Court of Appeals did not clearly err in rejecting defendant's arguments and affirming her convictions. MCR 7.305(B)(5).
4. Defendant's application does not demonstrate any of the other grounds for granting leave to appeal. MCR 7.305(B)(1)-(3).
5. In sum, defendant's application raises no issues worthy of this Court's review, and it should be denied.

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RELIEF

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

Respectfully submitted,

KYM WORTHY
Prosecuting Attorney
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JON P. WOJTALA
Chief of Research, Training,
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/s/ *Daniel E. Hebel*

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Dated: February 11, 2025

WORD COUNT

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Appendix 1
People's Brief on Appeal to the Court of Appeals

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v **No. 364063**

GWENDOLYN ALEXANDER,
Defendant-Appellant.

Third Circuit Court No. 20-001501-02

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL
ORAL ARGUMENT NOT REQUESTED

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COUNTERSTATEMENT OF JURISDICTION

The People concur with defendant's statement of appellate jurisdiction.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

When a case is reviewed for the sufficiency of the evidence, the facts are viewed in a light most favorable to the prosecution. Here, the facts showed that defendant repeatedly and intentionally tortured the child-victim by inflicting excessive and severe lacerations on his wrists by having him zip tied. In a light most favorable to the People, was the evidence sufficient to find defendant guilty of torture beyond a reasonable doubt?

The trial court did not answer this question.

The People answer, "Yes."

Defendant answers, "No."

II

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 People answer, "No."

Defendant answers, "Yes."

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III

A defendant is scored fifty points for OV-7 when she tortures the victim and OV-7 is proven as an inherent part of the offense when a defendant is convicted of torture. Here, defendant was convicted of torture and was scored 50 points for OV-7. Did the trial court plainly err when it scored OV-7 due to defendant's torture conviction?

The trial court did not answer this question.

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,[1] second-degree child abuse,[2] second-degree child abuse in the presence of another child,[3] and third-degree child abuse,[4] 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[5] 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."[6]

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 ties.[7]

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[1] MCL 750.85.
[2] MCL 750.136b(3).
[3] MCL 750.136d(1)(b).
[4] MCL 750.136b(5).
[5] MCL 750.136b(5).
[6] T. 9/20, 126-27.
[7] T. 9/20, 129, 136.

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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."[8] 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, and bruising around the sides of each eye[9] and abrasions on the neck and upper chest.[10] 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.[11] The jury was shown pictures of the victim's scars and swelling around his wrists and ankles from the hospital.[12] The police found zip ties on the ground in front of the house and inside the house.[13]

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 remembered being zip tied more than five times, but not more than ten times.[14] His sister, R.S. also remembered him being tied up.[15]

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[8] T. 9/20, 158.
[9] T. 9/20, 75-77.
[10] T. 9/20, 93.
[11] T. 9/21, 107-113.
[12] T. 9/20, 177.
[13] T. 9/20, 156, 159, 169-70, 174, 180, 184, 195-96.
[14] T. 9/20, 37.
[15] T. 9/20, 61.

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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.[16] The victim still had significant scarring on around both wrists and ankles.[17] Nazer diagnosed that both the victim and R.S. had suffered "medical torture."[18] 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."[19] Nazer classified the scarring as severe due to the nature of the injury.[20]

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 victim's injuries to his 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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[16] T. 9/22, 19, 26.
[17] T. 9/22, 26.
[18] T. 9/22, 27-28, 31.
[19] T. 9/22, 28.
[20] T. 9/22, 73-74.

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ARGUMENT

I.

When a case is reviewed for the sufficiency of the evidence, the facts are viewed in a light most favorable to the prosecution. Here, the facts showed that defendant repeatedly and intentionally tortured the child-victim by inflicting excessive and severe lacerations on his wrists by having him zip tied. In a light most favorable to the People, evidence was sufficient to find defendant guilty of torture beyond a reasonable doubt.

Standard of Review

This Court reviews de novo to determine if there was sufficient evidence to support a conviction.[21] When reviewing a claim that there was insufficient evidence to support a conviction, the reviewing court must consider the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.[22] The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the verdict.[23] The scope of review is the same whether the evidence is direct or circumstantial.[24]

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[21] *People v Harverson*, 291 Mich App 171, 177 (2010).
[22] *People v Nowack*, 462 Mich 392, 399 (2000); *People v Petrella*, 424 Mich 221 (1985).
[23] *Nowack*, 462 Mich at 400.
[24] *Id* at 399.

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Discussion

Defendant is not entitled to relief on her claim that the People provided insufficient evidence for the jury to find beyond a reasonable doubt that she tortured the victim.

Torture is a broad statute that encompasses both the infliction of physical and mental pain, as well as the infliction of physical and mental injuries. In this case, the testimony revolved around defendant's cruel acts resulting in the six-year-old victim's physical injuries. Accordingly, the legal elements of torture for this case were as follows:

1) "[I]ntent to cause cruel or extreme physical or mental pain and suffering" on a person,
2) Within defendant's "custody or physical control,"
3) Infliction of a "great bodily injury,"[25] which is a "serious visible disfigurement."[26]

Defendant's pleading contests the first element, intent, and the third element, injury. In a light most favorable to the verdict, both these elements were established beyond a reasonable doubt.

A. Defendant had the requisite intent to inflict cruel or extreme physical or mental pain and suffering.

Defendant's entire argument on the element of intent is that the jury was somehow obligated to believe her self-serving assertion to the police that she merely had the six-year-old victim tied with zip ties to immobilize him and prevent bad conduct, without any intent of causing

[25] MCL 750.85.
[26] MCL 257.58c.

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cruel or extreme physical pain. Clearly, the jury did not believe defendant's hollow denials of intent.

Fortunately, the jury was not bound to accept defendant's self-serving excuses. Under the law, "minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented."[27] Here, that evidence included the thickly layered lacerations and scars on the victim's wrists, the explanation of the severity of those scars by the EMT and Dr. Nazer, and pictures of the scars. Most importantly, defendant's interrogation video showed that she knew that her cruel treatment of binding the victim's wrists and leaving him on the floor was the cause of the scars and lacerations he suffered.[28] But rather than stop her inhumane treatment of the victim, she chose instead to blame the victim for struggling against the bindings.

Defendant knew that she was torturing the victim, putting deep, layered lacerations on his wrists and ankles and making him suffer. If she never had the intent to cause him cruel or extreme pain and suffering, she could simply have stopped restraining him the first time the zip ties cut his wrists. But she did not. In the video where she was clearly trying to minimize her wrongdoing, she admitted to having him tied at least five times. The jury knew from the thick and layered nature of the wounds that these injuries were repeated and compounded rather than a single instance of surprise injury.

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[27] *People v Kanaan*, 278 Mich App 594, 622 (2008).
[28] People's Exhibit 38, 6:45-46.

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Defendant could have dealt with the victim's alleged misbehavior by seeking help for him, counseling, assistance watching him, or any of a dozen other methods to *help* him. Instead, she chose to torture him, by knowingly and intentionally inflicting cruel pain and suffering. Importantly, the statute provides a definition that indicates "Cruel, means brutal, inhuman, sadistic, or that which torments."[29] Under this definition, defendant's intention clearly qualifies, because using zip ties to bind a six-year-old is inhuman. Nobody would even consider that type of brutal treatment for a pet that misbehaves. But here, defendant inflicted that inhuman treatment on a young child.

In a light most favorable to the verdict, there was sufficient evidence to find, beyond a reasonable doubt, that the defendant intended to cause cruel or extreme physical pain or suffering on the victim.

B. The victim's injuries constituted a "serious visible disfigurement."

Defendant likewise attempts to use a cherry-picked definition in the attempt to redefine what "serious" means in order to claim that the jury erred when finding that the victim's injuries were a serious disfigurement.

Almost any unbiased person who saw deeply layered scars around the wrists of a child-victim that last for months and months would consider the disfigurement "serious." The word "serious" is not some nebulous or mystical term of art, as the defense would have us believe. Nevertheless, defendant chose to fight over this word, because serious

[29] MCL 750.85.

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can mean different things in different contexts. The Black's Law Dictionary cherry picked by the defense for its narrow definition, is drawn from the context of catastrophic occurrence, wherein serious denotes a threat to life. (E.g. admitted to the hospital in serious condition, in a serious accident, etc.) It does not however, encompass any of the other types of occurrences that could be considered serious under broader, more common understandings of the word. According to the Black's definition, a woman whose face was brutally disfigured with a knife would not have suffered a "serious" injury.

But it is important to point out that the Black's definition is not on point at all. This definition only applies to the concept of *serious injuries*, which is not what the People were trying to prove. Rather, the people were merely trying to prove that this was a "*serious visible disfigurement.*" Quantifying the seriousness of a visible disfigurement is not commiserate with whether the injury was life-threatening, but rather whether it was disfiguring. Mirriam-Webster provides two applicable standard definitions for "serious" as "having important or dangerous possible consequences" or being "excessive or impressive in quality, quantity, extent, or degree."[30] Under this common definition, "serious" simply means an "important, dangerous, or excessive" visible disfigurement.

Fortunately for all the non-attorneys on juries everywhere, it is the standard, inclusive definition that controls. When engaging in statutory interpretation, the courts will "consult a lay dictionary when

[30] *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/serious. Accessed 27 Aug. 2024.

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defining common words or phrases."[31] The reason they consult regular dictionaries is because "the common and approved usage of a nonlegal term is most likely to be found in a standard dictionary, not in a legal dictionary."[32] And "undefined statutory terms are to be given their plain and ordinary meaning…."[33] The victim suffered a serious—"excessive"—visible disfigurement that left layers of lacerations and scars on his wrists. It was not necessarily life-threatening, and it did not have to be life-threatening to qualify as "serious" under the common definition.

Notably, this principle was already applied tangentially by this Court in the unpublished case of *People v Anderson*.[34] In *Anderson*, the Court noted that the People had provided sufficient evidence to show that the victim who had been spanked between 30-40 times had suffered "serious visible disfigurement." Specifically, the Court held:

> Although testimony was presented that the victim no longer had any physical injuries, except for scars, the condition of the victim's buttocks at the time of his medical treatment was sufficient to enable a reasonable jury to find serious visible disfigurement. As with the loss of use of the arm, it was not necessary that the disfigurement be permanent.[35]

Here, the only difference is that the injuries were on the victim's wrists, rather than his buttocks. They were serious according to the

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[31] *People v Thompson*, 477 Mich 146, 151 (2007).
[32] *Id* at 152.
[33] *Id.*
[34] *People v Anderson*, unpublished opinion of the Court of Appeals, issued November 18, 2008 (Docket No. 277370), 2008 WL 4923030, p *4.
[35] *Id.*

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doctors involved. They were serious according to the pictures viewed by the jury. They did not have to be permanent. Rather, the lacerations only needed to be a serious visible disfigurement in the jury's well-reasoned judgment.

Conclusion

In a light most favorable to the People, the facts of the case proved that defendant was guilty of torturing the victim. Defendant cloaks her case in terms of a legal argument but the real argument is simply her assertion that the jury was wrong. She would prefer that the jury had relied on her statements as to whether what she intended was torture, instead of her repeated conduct of knowingly and intentionally inflicting the suffering on the victim. She would prefer that the jury had confined its concept of serious only to potentially life-threatening issues, not to excessive disfigurements. But her preferences have no bearing on the legitimacy of the jury's decision. The jury rightly found that her repeated conduct exhibited a strong inference of intent. The jury rightly found that the layered wounds on the victim's wrists constituted a serious visible disfigurement. Accordingly, when all credibility decisions and inferences are drawn in favor of the verdict, there was sufficient reason to convict defendant beyond a reasonable doubt. Defendant is not entitled to relief.

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II.

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."[36] 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."[37]

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

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

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of the proceedings would have been different.[38] There is a strong presumption, however, that counsel provided effective representation.[39] The defendant bears the burden of proof and must exclude those reasonable hypotheses consistent with the view that trial counsel provided effective representation.[40]

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 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 "mirrors" the legal crime that the defendant was charged with violating. Defendant asserts that this claim stems from *People v McFarlane*.[41] This assertion is based on a fundamental misunderstanding of *McFarlane* and the underlying case of *People v Bynum*.[42]

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[38] *People v Leonard*, 224 Mich App 569, 592 (1997); *Strickland v Washington*, 466 US 668 (1984).
[39] *Id.*
[40] *People v Ginther*, 390 Mich 436 (1973).
[41] *People v McFarlane*, 325 Mich App 507 (2018).
[42] *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.[43] 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."[44]

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[43] *McFarlane*, 325 Mich App at 526–27.
[44] *Id* at 522.

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Instead, the Court held that the problem with the term "abuse" was that it implied that whoever caused the injuries did them with a "culpable state of mind" and that they were done "knowingly and intentionally."[45] In that respect, 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, the Michigan Supreme 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. 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."[46] Thus, the term speaks only to the physical and psychological injuries suffered by the victim. In colloquial use, people understand that torture can be inflicted by others with

[45] *Id* at 524.
[46] T. 9/22, 27-28.

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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.[47] 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 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

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[47] 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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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."[48] Accordingly, defendant is not entitled to relief.

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

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[48] 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 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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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 charges stemming from her acts against R.S. If the jury here had, as defendant must contend in order to receive relief, blindly equated an expert's opinion on "medical torture" as establishing both the actus reus and mens rea of the charges, then the jury would necessarily have convicted defendant of the charges 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. 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*[49] and *People v Smith*[50] 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

[49] *People v Thorpe*, 504 Mich 230, 262 (2019).
[50] *People v Smith*, 425 Mich 98, 112 (1986).

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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.[51] 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 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."[52] Accordingly, the doctor was merely giving an impermissible opinion as a lay witness.[53]

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.[54]

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[51] *Thorpe*, 504 Mich at 262
[52] *Smith*, 425 Mich at 112.
[53] *Id* at 113.
[54] *McFarlane*, 325 Mich App at 522–23.

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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.

This case is nothing like *Harbison* or *Smith*. Instead, just like 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 *McFarlane* controls. 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 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.[55]

By its plain language, MRE 703 allows an expert to form an opinion based on information that would not be otherwise admissible

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

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because it allows the expert to use facts or date "the expert has been 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."[56] "It is well-settled that an expert witness may rely on hearsay evidence when the witness formulates an opinion."[57] "MRE 703 provides that an expert witness may base an opinion on hearsay evidence."[58] 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.)

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

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

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for whatever error the defense invited through its own desire to avoid the jury seeing the forensic interview.

Furthermore, there is no Confrontation Clause or *Crawford*[59] 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*.[60] 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,

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

[60] See *People v Fields*, unpublished opinion of the Court of Appeals, issued December 27, 2012 (Docket No. 306624), 2012 WL 6720573, p *2. *Fields* is cited as it is the most on-point case for this particular issue.

> 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. Further, 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.* (Cleaned up.)

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

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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 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. 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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III.

A defendant is scored fifty points for OV-7 when she tortures the victim and OV-7 is proven as an inherent part of the offense when a defendant is convicted of torture. Here, defendant was convicted of torture and was scored 50 points for OV-7. The trial court did not plainly err when it scored OV-7 due to defendant's torture conviction.

Standard of Review

The application of the sentencing guidelines is reviewed de novo, but the trial court's scoring of a sentencing variable is reviewed for an abuse of discretion.[61] A trial court's factual determinations relating to the scoring of offense variables are reviewed for clear error and must be supported by a preponderance of the evidence.[62]

An unpreserved claim is forfeited unless the defendant satisfies the burden of persuasion on all three requirements: an "error must have occurred;" "the error was plain, i.e., clear or obvious;" "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."[63] Further, once the defendant has satisfied all the above requirements, reversal is only warranted when one of two policy concerns is present: the "forfeited error resulted in the conviction of an actually innocent defendant" or the "error seriously

[61] *People v Harverson*, 291 Mich App 171, 179 (2010).
[62] *People v Hardy*, 494 Mich 430, 438 (2013).
[63] *Carines*, 460 Mich at 763-65.

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affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence."[64]

Discussion

Defendant is not entitled to resentencing, because her torture conviction warrants a score of 50 points for OV-7 and, absent a change in that score, her sentencing guidelines do not change.

To start with, defendant does make a valid point. OV-5 was errantly scored in this case. MCL 777.22 commands that the courts only "[s]core offense variables 5 and 6 for homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder." The trial court should have scored OV-4 at 10 points for psychological damage to the victim, which does not require a homicide related crime and reflects the significant mental suffering experienced by the victim. Nevertheless, defendant is right that OV-5 was errantly scored at 15 points. Fortunately, this slight error does not require resentencing as it does not change defendant's guidelines.

Defendant also argues, erroneously, that she should not have been scored at 50 points for OV-7 for aggravated physical abuse to the victim. Defendant is not entitled to relief, because the jury's determination of her crime meets the requirements of OV-7 verbatim. OV-7 is scored at 50 points when "[a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to

[64] *Id* (internal citations omitted).

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substantially increase the fear and anxiety a victim suffered during the offense."[65]

Defendant argues that the scoring of the offense variable must involve conduct that was aggravated beyond that which was necessary to commit the crime. Apparently, defendant feels that when someone is convicted of torture, the court must find that the perpetrator engaged in super torture, or some bizarre escalation beyond the statutory required finding of "cruel or extreme physical or mental pain and suffering." This assertion is contrary to both logic and the unpublished case law of this Court.

In the unpublished case of *People v Jenkins*, which is cited because it is directly on point, the Court held "the trial court properly assessed 50 points under MCL 777.37(1)(a) because defendant tortured BP as an inherent part of his torture offense."[66] The *Jenkins* Court went on to quote the Michigan Supreme Court in *People v Hardy*, which explained that there are four distinct and specific categories of conduct that warrant scoring OV-7, including sadism, excessive brutality, conduct substantially increasing the victim's fear and anxiety, and torture.[67] As torture was one of the express categories of conduct addressed by OV-7 and the defendant was convicted of physically torturing the victim, the *Jenkins* Court held that the score was "inherent" to the offense itself.

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[65] MCL 777.37(1)(a).
[66] *People v Jenkins*, unpublished opinion of the Court of Appeals, issued June 15, 2023 (Docket No. 359341), 2023 WL 4043798, p *5.
[67] *People v Hardy*, 494 Mich 430, 440 (2013).

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This case is no different. Defendant physically tortured the victim. Defendant was convicted of torture. Accordingly, the OV-7 conduct of "torture" was inherently met through the conviction. The trial court did not err when holding that scoring OV-7 was warranted.

Furthermore, even if there was some hidden error in *Jenkins* that would change the standard and mandate that not all physical torture warranting conviction was torture in the eyes of OV-7, that would still not rise to the level of plain and unprofessional error required to meet the plain error standard. The trial court followed the law as it is clearly and unambiguously stated: OV-7 was scored at 50 points for torture, which *Jenkins* persuasively indicates is "inherent." It cannot be said that a trial court's actions are plainly erroneous when it is following the clear language of the law and, in the absence of published cases on point, it acts in direct compliance with this Court's unpublished cases.

Defendant is not entitled to relief.

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RELIEF

THEREFORE, the People request that this Honorable Court affirm defendant's convictions and sentences.

Respectfully submitted,

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WORD COUNT

Relying on the word-processing system used to prepare this brief, this document contains 6,679 countable words.