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Case Number 373,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN HERBERT,	)	
	)	
Defendant Below,	)	
Appellant,	)	**Case No. 373, 2022**
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE OF DELAWARE'S ANSWERING BRIEF

KATHRYN J. GARRISON (# 4622)
Department of Justice
Deputy Attorney General
102 West Water Street
Dover, DE 19904
(302) 739-4211

DATE: June 1, 2023

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NATURE AND STAGE OF THE PROCEEDINGS

On May 1, 2020, New Castle County police arrested John Herbert and the State charged him by indictment on August 24, 2020, with Unlawful Sexual Contact First Degree (USC 1st) and Sexual Abuse of a Child by a Person in a Position of Trust, Authority, or Supervision in the Second Degree (Sexual Abuse of a Child by a Person in a Position of Trust). DI 1, 2[1] at A1; A12–13. The State reindicted Herbert on May 24, 2021, and again on July 6, 2021. DI 13, 14. In the second superseding indictment, the charges against Herbert remained the same, except that the State clarified in the first charge, USC 1st, that the victim was less than seven years of age. A14–15.

On November 5, 2021, Herbert filed a motion to dismiss the indictment. DI 29 at A5; A17–35. The State filed a response, and on March 17, 2022, the Superior Court denied Herbert's motion.[2] DI 34, 40 at A5–6; A38–66. On April 29, 2022, the State filed a motion *in limine* to preclude the opinions of an expert retained by Herbert—Dr. Laura Cooney-Koss, a licensed clinical psychologist.[3] DI 49 at A7;

[1] "DI #" references items on the Superior Court criminal docket in *State v. John Herbert*, ID # 2005000034 (A1–11).

[2] *State v. Herbert*, 2022 WL 811175 (Del. Super. Ct. Mar. 17, 2022).

[3] The State initially filed the motion on March 4, 2022, but later filed a revised version after the court pointed out that the State needed to consider this Court's jurisprudence on the admissibility of expert testimony about the credibility of claims of child sexual abuse. *See* DI 39, 43 at A6.

A66–89. On May 6, 2022, Herbert filed a response to the State's motion and filed his own motion *in limine* to admit the testimony of a second expert retained by him—Dr. Joseph Zingaro, also a licensed clinical psychologist. DI 50, 51 at A8; A89–136. The State filed a response to Herbert's motion (A138–53), and, on August 8, 2022, the Superior Court issued an opinion in which it granted the State's motion and denied Herbert's motion (A154–79).[4] DI 52, 55 at A8.

At the close of a four-day trial, a jury found Herbert guilty of both counts. DI 60 at A9. While the jury was deliberating, Herbert moved to dismiss the State's case, arguing that it had not proved the contact between Herbert and his daughter was sexual in nature. B4. The court deferred decision on Herbert's motion and request that he brief his argument. A416; B4–5. The Superior Court sentenced Herbert immediately after the verdict for USC 1st, to eight years of Level V incarceration, suspended after the minimum sentence of five years, as required by 11 *Del. C.* § 4205A(d)(1); and, for Sexual Abuse of a Child by a Person in a Position of Trust, to eight years at Level V, suspended for one year of Level II probation. DI 60 at A9; Ex. A to Opening Br.; A411–15.

On September 22, 2022, Herbert filed a motion for judgment of acquittal (A389–95) and a motion to correct an illegal sentence (A374–79). DI 61, 62 at A9. The State filed responses to Herbert's motions. DI 63 at A9; A383–88, 396–402.

[4] *State v. Herbert*, 2022 WL 3211004 (Del. Super. Ct. Aug. 8, 2022).

On October 6, 2022, Herbert filed a notice of appeal in this Court. Thereafter, the Superior Court stayed its consideration of Herbert's motion to correct an illegal sentence because Herbert intended to raise the same issue on appeal. DI 66 at A9; A403–05. On November 21, 2022, the court denied Herbert's motion for judgment of acquittal. DI 67 at A10; A406–10. Herbert filed a timely Opening Brief. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. The superior court did not err in denying Herbert's pretrial motion to dismiss the indictment because the definition of "sexual contact" does not violate the federal or Delaware constitutions. The inclusion of a reasonable person standard in the definition did not absolve the State of having to prove intent. Nor did it shift the burden to Herbert. Moreover, to the extent the definition created an inference, it created a permissive inference, which is constitutionally allowed.

II. Appellant's second claim is DENIED. The Superior Court did not abuse its discretion in denying Herbert's motion to admit the expert testimony of Dr. Zingaro and in granting the State's motion to exclude the expert testimony of Dr. Cooney-Koss. The court properly excluded Dr. Zingaro's potential testimony because the opinions he provided in his report based on witness interviews comprised only lay opinions, and Herbert did not establish how his personality assessment test results were relevant or would aid the trier of fact. The court also correctly found Dr. Cooney-Koss's potential testimony inadmissible because her report directly and indirectly attacked the victim's credibility.

III. Appellant's third claim is DENIED. The Superior Court did not err in sentencing Herbert to a five year minimum mandatory sentence for USC 1st under 11 *Del. C.* § 4205A(d)(1). The statute required that Herbert receive a sentence of

"not less than 5 years" because the victim was less than seven years old at the time of the incident. And 11 *Del. C.* § 4204(d) mandates that "a suspended sentence shall not be substituted for imprisonment where the statute specifically indicates that a prison sentence is . . . a minimum sentence." The Superior Court had no discretion to suspend Herbert's five year minimum sentence.

STATEMENT OF FACTS

Herbert and his wife, Kathleen Herbert (Kate) had a daughter, A.H.,[5] in 2016. A187. Sometime in 2017, Herbert and Kate separated. A192. He moved out of their shared residence and eventually settled in an apartment in Newark, Delaware in 2020. A189, 194. They continued to coparent A.H., with A.H. often staying with Herbert on the weekends. A189, 196–97.

On April 21, 2020, A.H. had just come back from a weekend spent visiting Herbert. A218. The next day, Kate was in the kitchen cooking a pork tenderloin and A.H. told her that it looked like a penis. A201. Kate asked A.H. how she knew what a penis looked like and A.H. said that it was because her daddy makes her play with his penis. *Id.* Kate contacted her pediatrician, who reported the allegation to the police. A202, 223. A.H. was three at the time.

On April 28, 2020, a forensic interviewer interviewed A.H. at the Child Advocacy Center (CAC).[6] A283, 285. During the interview, A.H. said that she touches her daddy's penis because it is really cute and really big. Court Ex. 1;[7] A296; B1. She said that she touched Herbert's penis a lot of times because he wanted

[5] The State refers to the victim by her initials as she is a minor. *See* Supr. Ct. R. 7(d).

[6] A.H. was also interviewed two additional times at the CAC, but those interviews were not introduced into evidence. A287.

[7] It is not clear from the record how the CAC interview was introduced into evidence. The State believes it was likely a court exhibit and, thus, cites to it as Court Ex. 1.

her to touch it, and he told her it was okay to touch it. Court Ex. 1; B1. Herbert would pull his pants down so that she could touch his penis, which, she said, felt soggy but a little bit different; she would play with it and wiggle it. *Id*. A.H. also said that "the other penis squirts out from the other penis." *Id.* Herbert was not circumcised. A367–69.

At trial, Herbert testified that he had grown up in a family that was very comfortable with their bodies; his parents were often naked in front of him and children were often naked around each other. A331. He was born in Zimbabwe where his father, a wildlife biologist, had started a research unit at a National Park. A108, 264–65. Herbert spent time as a child in parts of Africa, Puerto Rico, and in Ohio. A264–66, 330. In turn, he and Kate were also comfortable being naked around A.H. A352–53. They did not walk around all the time naked, but if they were in the process of getting changed, they did not hide it from A.H. A353.

Herbert stated that on one occasion, when he and Kate were still living together, he had just finished taking a shower and went into where Kate was putting A.H. to bed to say goodnight with a towel wrapped around his waist. A341. As he stood talking to Kate, A.H. reached under the towel, picked up his penis and started to talk to it "like, oh, you are such a cute penis." A341. Kate started laughing. *Id.* Herbert tried to talk to Kate about the incident, but she did not seem concerned,

telling him that "in situations like that, we just need to support [A.H.] as she figures these things out in life."[8] A342.

After that incident, according to Herbert, A.H. did not touch his penis again, except on the weekend of April 21, 2020. A346. He was again getting dressed after having taken a bath. *Id.* A.H. was in the room watching Frozen on her iPad. *Id.* She did the same thing she had done 15 months earlier—came over and picked up his penis and looked at it. *Id*. The whole incident "lasted two seconds tops." *Id.* He pulled up his underwear; she said "it's kind of soggy," he said, "yeah," and "that was the end of it." A346–47. Herbert testified that A.H. was just being curious and that he never asked her to touch his penis. A347.

[8] Kate did not recall this incident. A220.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR IN DENYING HERBERT'S PRETRIAL MOTION TO DISMISS THE INDICTMENT BECAUSE THE DEFINITION OF "SEXUAL CONTACT" DOES NOT VIOLATE THE FEDERAL OR DELAWARE CONSTITUTIONS.

Question Presented

Whether the definition of "sexual contact" in section 761 of Title 11 violates the Due Process Clause of the Fourteenth Amendment or Article 1, section 7 of the Delaware Constitution.

Standard and Scope of Review

Claims of constitutional violations are reviewed *de novo.*[9]

Merits of the Argument

Prior to trial, Herbert filed a motion to dismiss the indictment. A17–35. In it he argued, as he does on appeal, that "sexual contact" as defined under Delaware law violates the Due Process Clause of the Fourteenth Amendment and the Delaware Constitution because it "fail[ed] to require the State to prove a defendant committed the act intending that it be sexual in nature or for the purpose of sexual gratification." A18–19; Opening Br. at 6. The Superior Court denied the motion, finding the

[9] *See Panuski v. State*, 41 A.3d 416, 419 (Del. 2012); *Martini v. State*, 2007 WL 4463586, at *2 (Del. Dec. 21, 2007).

definition did not violate due process and that Herbert's "interpretation misconstrues the statute and would lead to absurd results.[10] The court did not err in so deciding.

Both USC 1st and Sexual Abuse by a Person in a Position of Trust criminalize intentional sexual contact with a minor.[11] At the time Herbert committed the crime in this case, "sexual contact" was defined under 11 *Del. C.* § 761(g) to mean:

> (1) Any intentional touching by the defendant of the anus, breast, buttocks or genitalia of another person; or
>
> (2) Any intentional touching of another person with the defendant's anus, breast, buttocks, semen, or genitalia; or
>
> (3) Intentionally causing or allowing another person to touch the defendant's anus, breast, buttocks or genitalia
>
> which touching, under the circumstances as viewed by a reasonable person, is intended to be sexual in nature. "Sexual contact" shall also include touching when covered by clothing.[12]

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[10] *Herbert*, 2022 WL 811175, at *3.

[11] *See* 11 *Del. C.* § 769(a) (providing a person is guilty of unlawful sexual contact when "(3) [t] he person intentionally has sexual contact with another person who is less than 13 years of age or causes the victim to have sexual contact with the person or a third person); 11 *Del. C.* § 778A(a) (providing a person is guilty of sexual abuse by a person in a position of trust when they "(1) intentionally [have] sexual contact with a child" under 16 "or causes the child to have sexual contact with the person" and "the person stands in a position of trust . . . over the child").

[12] The statute was amended on June 3, 2021, before Herbert's trial, to alter the definition so that the "reasonable person" clause appeared at the beginning of subsection (g), not at the end. *See* 83 *Del. Laws*, c. 37, § 5. That change does not affect the analysis here.

At trial, the court gave a jury instruction that followed that definition and also told the jury that sexual gratification is not required. B2–3. The court instructed the jury that "[i]ntentionally means it was the defendant's conscious object or purpose to cause the sexual contact to occur." B2.

Herbert claims that because both of his convictions require the State to prove "only that a 'reasonable person' would find whatever contact that occurred was sexual in nature," and because the statutes do not require the State to prove that the touching was for sexual gratification or that *Herbert* intended the touching to be sexual in nature, the statutes violate the federal and Delaware constitutions. Opening Br. at 13, 16. He also asserts the statutes "effectively create a conclusive presumption as to intent, or have the effect of shifting the burden of proof upon the defendant to disprove intent." *Id.* at 17. He argues that the definitions of intent and sexual contact, when read together, are constitutionally problematic, because they are likely to lead the jury to conclude that Herbert acted intentionally if it finds the contact was sexual in nature to a reasonable person. *Id.* at 18–19. Such a conclusion, he contends, would relieve the State of the burden of proving that Herbert acted intentionally, thereby violating due process. *Id.* at 19. Herbert's arguments are unavailing.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime

with which he is charged."[13] This Court held in *Goddard v. State*[14] that the Delaware Constitution also requires at least as much.[15] Moreover, the Delaware Criminal Code explicitly mandates that each element of an offense must be proved beyond a reasonable doubt[16] and "[t]he State must present 'some credible evidence tending to prove the existence of each element of the offense.'"[17]

In *State v. Row*,[18] then-Judge Steele, noted that in 1973, the definition of sexual contact included a requirement that the purpose of the touching be for "arousing or gratifying sexual desire," but in 1986, the Delaware General Assembly amended the definition to remove that requirement.[19] In 1988, however, the General Assembly again amended the definition to add that a touching of the anus, breast,

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[13] *In re Winship*, 397 U.S. 358, 364 (1970), *quoted in State v. Baker*, 720 A.2d 1139, 1149 (Del. 1998).

[14] 382 A.2d 238, 240 (Del. 1977).

[15] *Id.* at 240 (citing Del. Const. Art. I, § 7); *see* Del. Const. Art. I, § 7 (providing in part that an accused in a criminal prosecution shall not be "deprived of life, liberty, or property, unless by the judgment of his peers or by the law of the land"); *Goddard*, 382 A.2d at 240 n.4 (noting that the phrase "law of the land" has substantially the same meaning as "due process of law").

[16] 11 *Del. C.* § 301(b).

[17] *Baker*, 720 A.2d at 1150 (quoting 11 *Del. C.* § 301(a)).

[18] 1994 WL 45358 (Del. Super. Ct. Feb. 1, 1994).

[19] *Id.* at *7 (citing 11 *Del. C.* § 773(d) (1973); 11 *Del. C.* § 761(f) (1986)).

buttocks, or genitalia constitutes sexual contact "when viewed by a reasonable person, under the circumstances" as sexual in nature.[20] Judge Steele concluded:

> Based on the evolution of the Unlawful Sexual Contact statute, it appears the Legislature has determined the Court should not require a finding of an intent to "gratify or arouse" to modify every touching of another's sexual organs in order to constitute a violation of 11 *Del.C.* § 768. However, the Legislature has also determined making *any* touching of the breast or genitalia the crime of Unlawful Sexual Contact is too vague and broadly based. The Court finds under the current definition of Unlawful Sexual Contact, the Legislature has finally concluded whether a touching constitutes sexual contact is fact specific for each case. Under the current statute, the contact must be something more than a mere touching of the genitalia, but something less than an attempt to arouse or gratify a sexual desire. Rather, the facts and circumstances surrounding the contact must lead a reasonable person, under the circumstances, to conclude the touching has sexual overtones.

Id. He concluded that to convict a defendant of a charge involving sexual contact, "the Court must determine not only that the touchings actually occurred, but also that a reasonable person under the circumstances would find the Defendant intended these touchings to be 'sexual in nature.'"[21]

Thus, the fact that whether the touchings at issue were sexual in nature is judged by a reasonable person standard instead of by the defendant's subjective belief does not mean that the State is relieved from having to prove each element of the crime beyond a reasonable doubt. The State must still prove that the defendant

[20] *Id.* (citing 11 *Del. C.* § 761(f) (eff. June 15, 1988)).

[21] *Id.* at *8.

intended to cause or allow A.H. to touch his genitalia *and* that the "touching, under the circumstances as viewed by a reasonable person, is intended to be sexual in nature." Reasonable person standards are often used in the alternative to knowledge in criminal statutes; they are generally accepted and are not, as a rule, unconstitutional.[22] Their use simply means that whether the act is criminal is necessarily judged by a community standard and not by the defendant's subjective belief.

The Superior Court, in its well-reasoned decision denying Herbert's pretrial motion to dismiss pointed out that "the reasonable person standard operates as a template by which to judge a Defendant's credibility, not as a bar to considering his subjective intent"—"it informs the jury that it may consider the Defendant's stated subjective intent by comparing his stated intent against the intent of a reasonable person in similar circumstances."[23] The court noted the absurdity of following Herbert's argument to its logical conclusion:

> [T]he General Assembly purposefully removed a gratification element from the statute. It did so to ensure children, like [A.H.], would be protected from all contact-based sexual abuse—even abuse an accused says he found ungratifying. Here, an objective analysis of the circumstances surrounding Defendant's stated intent would allow

[22] *Cf. United States v. Ragen*, 314 U.S. 513, 523 (1942) ("The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct.").

[23] *Herbert*, 2022 WL 811175, at *3.

> incredible evidence to be impeached and rejected and so would discharge the legislature's intent to widen the scope of child sexual abuse protection.
>
> ***
>
> [Herbert's] reading would achieve the patently absurd outcome of judicially legalizing sexually "ungratifying" child abuse that the General Assembly actively tried to eliminate. Whether based on the Constitution or not, Defendant's interpretation is easily avoidable.[24]

Many other Delaware statutes use some variation of a reasonable person standard.[25] Indeed, the Delaware Criminal Code specifically authorizes jurors to infer a defendant's intention, recklessness, knowledge or belief at the time of the offense from the circumstances surrounding the act.[26] In so doing, they may consider "whether *a reasonable person in the defendant's circumstances at the time* of the offense would have had or lacked the requisite intention, recklessness, knowledge or belief."[27]

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[24] *Id.* at *8.

[25] *See, e.g.*, 11 *Del. C.* § 632(2) (providing a person is guilty of manslaughter when "[w]ith intent to cause serious physical injury to another person the person causes the death . . . , employing means which would *to a reasonable person* in the defendant's situation, knowing the facts known to the defendant, seem likely to cause death" (emphasis added)); 11 *Del. C.* § 1332 (providing "[a] person is guilty of abusing a corpse when, except as authorized by law, the person treats a corpse *in a way that a reasonable person knows* would outrage ordinary family sensibilities" (emphasis added)); *see also* 11 *Del. C.* § 1112C(c) (enticement for purposes of sexual contact); 11 *Del. C.* § 1311 (harassment); 11 *Del. C.* § 1312(a) (stalking); 11 *Del. C.* § 1456(a)(1)c (unsafe storage of a firearm).

[26] 11 *Del. C.* § 307(a).

[27] *Id.* (emphasis added).

In *Deputy v. State*,[28] this Court considered whether the language in section 307 of the Delaware Criminal Code, by permitting the jury "to infer the existence of an element (i.e., his state of mind) from proof of the surrounding circumstances," violated the Due Process Clause because it relieved the State of its burden to prove every element of the offense beyond a reasonable doubt.[29] The Court found that the instruction did not violate due process, noting that the inference contained in an instruction based on section 307 was a constitutionally sound permissive inference and that it did not shift the burden of persuasion to the defendant.[30] The Court further noted:

> [T]he problems involved in proving the existence of a person's state of mind necessitate some reliance on circumstantial evidence. In *Plass v. State*,[31] we said:
>
> > As a matter of common sense, in judging the sufficiency of the evidence as to the state of mind, the jury must be able to weigh the conduct of the defendant. Otherwise, in most situations, the only evidence would be the defendant's own self-interested testimony.

In sum, the definition of sexual contact does not violate due process or Article 1, section 7 of the Delaware Constitution. It neither relieves the State of its burden

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[28] 500 A.2d 581 (Del. 1985).

[29] *Id.* at 596–97.

[30] *Id.* at 597 (citing *Francis v. Franklin*, 471 U.S. 307 (1985)).

[31] 457 A.2d 362, 365 (Del. 1983).

to prove all elements of the offenses of USC 1st and Sexual Abuse by a Person in a Position of Trust, nor does it shift the burden of proof to the defendant. To the extent the definition contains an inference, it is a permissive inference akin to the one this Court found acceptable in *Deputy v. State*.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE TESTIMONY OF HERBERT'S TWO EXPERT WITNESSES.

Question Presented

Whether the Superior Court abused its discretion in excluding Dr. Zingaro's testimony.

Whether the Superior Court abused its discretion in excluding Dr. Cooney-Koss's testimony.

Standard and Scope of Review

This Court reviews a trial judge's decision to admit expert testimony for abuse of discretion "because trial judges, as gatekeepers, must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[32] A trial judge abuses his discretion when he exceeds the bounds of reason under the circumstances or when he ignores recognized rules of law or practice in a way that produces injustice.[33]

Merits of the Argument

Herbert sought to present the expert testimony of two clinical psychologists at trial. The Superior Court found the testimony of both of those experts

[32] *Rodriguez v. State*, 30 A.3d 764, 769 (Del. 2011) (internal quotation marks omitted).

[33] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).

inadmissible. Herbert claims the court erred in excluding his experts from testifying. Opening Br. at 22–38. His claim is unavailing.

A. The Superior Court Properly Excluded Dr. Zingaro's Testimony.

Dr. Zingaro interviewed Herbert, his parents, his therapist, and a former supervisor, and conducted a Personality Assessment Inventory. A107. He also reviewed some classroom evaluations from supervisors when Herbert was a teacher in Costa Rica and an article that contained observations about family standards for nudity and modesty and a website that listed examples of healthy sexual behavior in young children. A111. Dr. Zingaro summarized his findings:

> [] Herbert grew up with unique opportunities, including living in different countries with various cultural traditions and mores. He was raised by parents who identify themselves as "scientists" who brought their children up in environments that made it difficult for them to be narrowminded, judgmental, and intolerant. One of Mr. Herbert's former supervisors, Dylan Deal, described him as someone who promoted "experiential learning" (i.e., learning by doing). His therapist (Dr. Novak) did not believe that his client had any problems with identity issues, sexual predatory behaviors, or sexual identity disturbance and said they were working in therapy on helping Mr. Herbert merge the affective and cognitive components of his problem-solving skillset rather than tending to his overuse of an intellectual problem-solving strategy. The results of psychological testing revealed no evidence of clinical psychopathology.

A111.

The Superior Court found Dr. Zingaro's potential testimony inadmissible, concluding that his expert opinion that Herbert was not a "clinical psychopath" was

not relevant because the State had not challenged Herbert's mental health.[34] The court further concluded there was a danger that Dr. Zingaro's opinion would mislead or confuse the jury because, with the opinion, Herbert sought to cast doubt on the element of intent "by suggesting that only diagnosed psychopaths can form the intent to commit child sexual abuse."[35] In addition, the doctor's observations about Herbert's background did not rest on scientific or specialized knowledge as he was "merely recount[ing] Herbert's biography as it was fed to him" by other lay witnesses.[36] The court concluded that Dr. Zingaro's psychiatric conclusions[37] were irrelevant and his remaining findings were not the proper subjects for expert opinion. The court did not abuse its discretion in so finding.

1. Delaware Rule of Evidence 702 and the *Daubert* Standard

Delaware Rule of Evidence 702 governs the admissibility of expert testimony. The rule provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

[34] *Herbert*, 2022 WL 3211004, at *9.

[35] *Id.*

[36] *Id.* at 9–10.

[37] The Superior Court discussed Dr. Zingaro's psychiatric conclusions, but it appears that he is a psychologist, not a psychiatrist. *See* A113.

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

D.R.E. 702 is identical to its federal counterpart.[38] Accordingly, this Court has adopted the holdings of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[39] and its progeny—which interpret Federal Rule of Evidence 702—as the correct interpretation of D.R.E. 702.[40]

Under D.R.E. 702 and the *Daubert* standard, trial judges act as "gatekeepers" to the admission of expert testimony.[41] A trial judge's responsibility is to ensure that an expert's testimony "is not only relevant, but reliable."[42] The focus, therefore, is on the principles and methodology used in formulating an expert's testimony—not on the conclusions they generate.[43] The trial judge considers whether the proffered

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[38] *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 521 (Del. 1999).

[39] 509 U.S. 579 (1993).

[40] *Le Beau*, 737 A.2d at 522.

[41] *Rivera v. State*, 7 A.3d 961, 971 (Del. 2010).

[42] *Id.*

[43] *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 794 (Del 2006).

testimony is based on reliable methods and procedures, as opposed to subjective belief or speculation.[44]

Delaware trial courts employ a five-step test, consistent with *Daubert*, to determine the admissibility of expert testimony.[45] The trial judge considers whether: (i) the witness is qualified as an expert by knowledge, skill, experience, training, or education; (ii) the evidence is relevant; (iii) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (iv) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and (v) the expert testimony will not create unfair prejudice or confuse or mislead the jury.[46] The proponent of the expert evidence must establish its admissibility by a preponderance of the evidence.[47]

Trial judges have "considerable leeway" to decide whether expert testimony is reliable in a particular case.[48] Generally speaking:

> If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable. Further, an expert's testimony is unreliable even when the underlying data are

[44] *Rivera*, 7 A.3d at 971–72.

[45] *Bowen*, 906 A.2d at 795.

[46] *Id.*

[47] *Id.*

[48] *Rivera*, 7 A.3d at 972 (internal quotation marks omitted).

sound if the expert draws conclusions from that data based on flawed methodology.[49]

The trial judge's inquiry is flexible and should be tied to the facts of the particular case.[50] To be relevant, the expert opinion testimony must "relate to an issue in the case and assist the trier of fact to understand the evidence or to determine a fact issue."[51]

2. Dr. Zingaro's Opinions Based on Witness Interviews Comprised Only Lay Opinions and Herbert Failed to Show how his Personal Assessment Inventory Test Results Were Relevant.

Other than the psychological test Dr. Zingaro administered to Herbert, the doctor's conclusions were not based on any specialized knowledge or information outside of the lay person's domain. Rather, he merely recapped what other potential witnesses felt about Herbert and knew about his background, including Herbert's parents, his therapist, and a former supervisor. The doctor extrapolated nothing from those interviews, other than that Herbert grew up with unique opportunities. Each of his conclusions was appropriated entirely from what one of the interviewees had told him about Herbert. As the Superior Court noted, "Dr. Zingaro does not offer a

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[49] *Tumlinson v. Advanced Micro Devices, Inc.*, 81 A.3d 1264, 1270 (Del. 2013) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997)).

[50] *Kumho Tire Co. v. Carmichael*,, 526 U.S. 137, 150 (1999); *Le Beau*, 737 A.2d at 521–22.

[51] *Tumlinson*, 81 A.3d at 1270 (internal quotation marks and footnotes omitted) (quoting *Daubert*, 509 U.S. at 591).

scientific or specialized explanation as to why Herbert's unique childhood may have caused him to view any sexual touching that occurred between him and A.H. as educational or innocuous."[52]

The court pointed out that the underlying details would still be admissible through the appropriate witnesses. Indeed, several of the witnesses, including Herbert and his mother, did testify at trial about many of the details included in Dr. Zingaro's report. But the court correctly concluded that Dr. Zingaro's opinions based on the witnesses' interviews were not admissible, as his thoughts on Herbert's personality based on those interviews comprised only lay opinions.[53]

The court also did not abuse its discretion in excluding Dr. Zingaro's conclusion that Herbert's psychological testing results "revealed no evidence of clinical psychopathology." A111. It is not clear how those testing results were relevant to Herbert's case. Dr. Zingaro did not explain the purpose of the test or how it related to the sexual abuse allegations. Thus, it seemed the only purpose of citing those results was so that Herbert could argue that because he exhibited no psychopathologies, he must not have intended A.H.'s touching of his penis to be sexual in nature.

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[52] *Herbert*, 2022 WL 3211004, at *9.

[53] *Id.* at *10.

The Superior Court found that because Dr. Zingaro's intent in "clearing Herbert's mental health" was to cast doubt on the statutory element of his intent, his opinion would mislead or confuse the jury "by suggesting only diagnosed psychopaths can form the intent to commit child sexual abuse."[54] The court seemed to have a mistaken idea of the purpose of the testing administered to Herbert. The purpose of the Personality Assessment Inventory (PAI), the test administered by Dr. Zingaro is not to determine whether an individual is a psychopath. Instead, the PAI is a clinical diagnostic tool used to "yield information that assists in determining diagnosis, symptom severity, level of risk, and treatment planning."[55] The test is popular in forensic settings "due to its utility to assess factors salient to psycholegal decision making," and it is often used "to assess for potential risk of aggression towards self and others, to classify offenders, and even to predict the likelihood of disciplinary action being taken against an inmate during incarceration or recidivism once an inmate is released from custody."[56]

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[54] *Id.* at *9.

[55] Tatiana M. Matlasz et al., *Cognitive status and profile validity on the Personality Assessment Inventory (PAI) in offenders with serious mental illness*, 50 Int'l J.L. & Psychiatry 38, 38–41 (2017) (citations omitted), *quoted in Savage v. State*, 166 A.3d 183, 199–200 (Md. 2017).

[56] *Id. See also id.* ("The PAI consists of 22 non-overlapping validity, clinical, and supplemental scales. The clinical scales include Somatic Complaints (SOM), Anxiety (ANX), Anxiety–Related Disorders (ARD), Depression (DEP), Mania (MAN), Paranoia (PAR), Schizophrenia (SCZ), Borderline Features (BOR), Antisocial Features (ANT), Alcohol Problems (ALC), and Drug Problems (DRG).

Although the court's conclusion was based on a mistaken assumption about the test given to Herbert, the court still did not abuse its discretion in excluding Dr. Zingaro's conclusion of no psychopathology based on those results.[57] Herbert did not establish how the testing evidence related to an issue in the case or would assist the trier of fact to understand the evidence or determine a fact issue.

A. The Superior Court Did Not Abuse its Discretion in Excluding Dr. Cooney-Koss's Testimony.

Dr. Cooney-Koss reviewed all three of A.H.'s CAC interviews. A79. She recorded her clinical observations from those interviews and concluded that A.H.'s statements in the first interview about touching her father's penis appeared credible. A87. But she continued:

> It must be underscored that the complete context in which this occurred was not included in the CAC interview. The discernment of whether this was an abusive act on the part of Mr. Herbert is one that can be better understood through a psychosexual evaluation. However, ultimately, judgment about whether a violation of the law has occurred would be left to the trier of fact.

Ten of the full scales contain subscales to assist in further interpretation of complex clinical constructs, such as Antisocial Features (broken down into antisocial behavior, egocentricity, and stimulus-seeking) and Anxiety and Depression (each containing physiological, cognitive, and affective subscales)." (citation omitted)).

[57] *See Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995) ("We recognize that this Court may affirm on the basis of a different rationale than that which was articulated by the trial court."); *Colon v. State*, 900 A.2d 635, 638 n.12 (Del. 2006) ("While the judge articulated a different rationale for his ruling in this case, we may affirm on grounds other than those relied upon by the judge." (citations omitted)).

Id.

Dr. Cooney-Koss also concluded that A.H.s second interview yielded no salient memories and that A.H.'s allegation of vaginal penetration made during her third interview was implausible.[58] *Id.* The doctor noted, among other things, that while children who have been sexually abused often have negative emotional experiences, "A.H. did not display any distress, aversion, embarrassment, fear, or sadness." *Id.* She also noted that "if A.H.'s statements about her father's actions are hypothetically accepted, they are not consistent with how sexually abusive crimes (especially in incest cases) are typically perpetrated." *Id.* Dr. Cooney-Koss concluded:

> A.H.'s presentation and statements during the CAC videos offer data that is worthy of consideration when the finder of fact is attempting to ascertain the credibility of the allegations against Mr. Herbert. Based on the clinical findings in this report, I have identified several irregularities in most of the allegations that A.H. made against Mr. Herbert.

Id.

Herbert argued that Dr. Cooney-Koss's opinions provided "academic helpful background and context for the factfinder" because "[a] layperson does not have understanding of the appropriate vocabulary, social skills and social dynamics at

[58] Herbert was not charged with any crimes based on this allegation. *See* A325.

play when a complaining witness of that age [three and four] is asked about sex, anatomy, and family dynamics," and, more specifically, her testimony would help explain contradictions in A.H.'s statements and her behavior. A130–33. The Superior Court found Dr. Cooney-Koss's report and potential testimony inadmissible because her opinions directly and indirectly attacked A.H.'s credibility, which would usurp the jury's function.[59]

In most cases, this Court has prohibited the use of expert testimony to assist the trier of fact in evaluating the testimony of a child sexual abuse victim. "The general rule is that the common experience of the jury provides a sufficient basis to assess the credibility of the child-witness and the testimony of an expert witness is not necessary to assist the jury."[60] The Court has, however, recognized an exception in intrafamily child sexual abuse cases "when the child 'has displayed behavior (... delay in reporting) or made statements (... recantation) which, to [an] average [lay person], are superficially inconsistent with the occurrence of sexual abuse and which are established as especially attributable to intrafamily child sexual abuse rather than simply stress or trauma in general.'"[61] Thus, the use of such testimony is limited to "evaluating the psychological dynamics and resulting behavior patterns of alleged

[59] *Herbert*, 2022 WL 3211004, at *4, 7–8.

[60] *Floray v. State*, 720 A.2d 1132, 1135 (Del. 1998) (citing *Wheat v. State*, 527 A.2d 269, 273 (Del. 1987)).

[61] *Id.* (citing *Wheat*, 527 A.2d at 274.

victims of child abuse, where the child's behavior is not within the common experience of the average juror."[62] Such testimony must be "given in general terms and directed to behavior factors in evidence."[63] "The expert may not directly or indirectly express opinions concerning a particular witness' veracity or attempt to quantify the probability of truth or falsity of either the initial allegations of abuse or subsequent statements."[64]

Here, the Superior Court correctly held that Dr. Cooney-Koss's testimony was inadmissible because her report directly and indirectly attacked A.H.'s credibility. As noted by the court:

> Her report does not speak in general terms or discuss principles of intrafamilial child sexual abuse. Nor does it seek to place A.H.'s allegations and conduct in a behavioral context. And it does not identify any nexus—let alone a "special nexus—connecting A.H.'s supposedly unbelievable demeanor and statements to the unique problems caused when a father sexually abuses his daughter. To the extent Dr. Cooney-Koss's report ever mentions these factors and concepts, the report binds them inextricably to credibility determinations reserved solely for the jury.

Indeed, the whole professed purpose of Dr. Cooney-Koss's report was to challenge the veracity of A.H.'s allegations. The majority of the report consisted of a "line-

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[62] *Wheat*, 527 A.2d at 275.

[63] *Id.*

[64] *Id. See Wittrock v. State*, 1993 WL 307616, at *2 (Del. Jul. 27, 1993) ("Thus, in cases of alleged child sexual abuse experts may testify to general principles of social or behavioral science, but may not make credibility determinations." (citing *Wheat*, 527 A.2d at 275; *Powell v. State*, 527 A.2d 276, 279–80 (Del. 1987))).

by-line rebuttal of A.H.'s allegations"[65] and the doctor's conclusions focused, not on general terms, but specifically on whether A.H.'s behaviors were consistent with the crimes having occurred. Such expert testimony is patently prohibited under this Court's jurisprudence.[66]

[65] *Herbert*, 2022 WL 3211004, at *8 (noting that the format was "reminiscent of the 'lie detector' technique *Wheat* and *Powell* abolished").

[66] *See Floray*, 720 A.2d at 1136 (finding expert testimony concerning the susceptibility of young children to influence to falsify abuse allegations in hostile custody situations inadmissible, noting the credibility of alleged child victims was properly left to the jury); *Wittrock*, 1993 WL 307616, at *2 (finding expert testimony admissible when the testimony "explained the significance of both the victim's and her mother's actions and statements without passing judgment on the credibility of either witness' testimony"); *see also Waterman v. State*, 956 A.2d 1261, 1264 (Del. 2008) ("It is settled in Delaware that experts may not usurp the jury's function by opining on a witness's credibility." (citing *Powell*, 527 A.2d 276; *Holtzman v. State*, 1998 WL 666722, at *4–5 (Del. Jul. 27, 1998); *Hassan-El v. State*, 911 A.2d 385, 396 (Del.2006))).

III. THE SUPERIOR COURT DID NOT ERR IN SENTENCING HERBERT TO A MANDATORY MINIMUM SENTENCE OF FIVE YEARS.

Question Presented

Whether the superior court erred in sentencing Herbert to a mandatory minimum sentence of five years under 11 *Del. C.* § 4205A(d)(1).

Standard and Scope of Review

This court reviews statutory construction issues *de novo*.[67]

Merits of the Argument

At sentencing, Herbert agreed that he was subject to a minimum-mandatory five year sentence for his USC 1st conviction under 11 *Del. C.* § 4205A. Subsection (d)(1) of section 4205A provides that, upon the State's application, the Superior Court "shall sentence a defendant convicted of any crime set forth in § 769 or § 783(4) of this title to not less than 5 years to be served at Level V if the victim of the crime is a child less than 7 years of age." Accordingly, the Superior Court sentenced Herbert for USC 1st to eight years at Level V, suspended after five years. Thereafter, Herbert filed a motion to correct an illegal sentence. However, the Superior Court deferred decision on Herbert's motion because he intended to raise the same issue on appeal.

[67] *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998).

Herbert argues that the Superior Court erred in sentencing him to a minimum-mandatory sentence of five years because section 4205A does not actually require that he serve the minimum five year sentence in jail. Opening Br. at 39–42. In other words, he asserts the court could have suspended the minimum five year sentence and that section 4205A merely requires that the court sentence him to a minimum of five years total Level V time, not unsuspended Level V time.

Herbert's argument is contradicted by the plain language of the statute. Subsection (d)(1) of section 4205 provides that where the victim is less than seven, a defendant shall be sentenced to "not less than 5 years to be served at Level V." Although, as noted by Herbert, the language is not consistent with other provisions containing mandatory-minimums, such as the habitual offender statute[68] or the statute codifying possession of a firearm by a person prohibited,[69] the language is similar to that contained in 11 *Del. C.* § 4205(b)(1) and (2). Subsection (b)(1) of section 4205 provides that a person convicted of a Class A felony shall be sentenced to "not less than 15 years up to life imprisonment to be served at Level V" and

[68] *See* 11 *Del. C.* § 4214(e) ("[A]ny minimum sentence required to be imposed pursuant to subsection (b), (c), or (d) of this section shall not be subject to suspension by the court").

[69] *See* 11 *Del. C.* § 1448(e)(4) ("Any sentence imposed for a violation of this subsection shall not be subject to suspension and no person convicted for a violation of this subsection shall be eligible for good time, parole or probation during the period of the sentence imposed.").

subsection (b)(2) provides that a person convicted of a Class B felony shall be sentenced to "not less than 2 years up to 25 years to be served at Level V." In each case, the lower level is a mandatory-minimum.[70] That is because subsection 4205(d) provides that "[w]here a minimum, mandatory, mandatory minimum or minimum mandatory sentence is required by subsection (b) of this section, such sentence shall not be subject to suspension by the court." Although section 4205A(d)(1) does not contain a similar provision to 4205(d), section 4204(d) applies and mandates that "a suspended sentence shall not be substituted for imprisonment where the statute specifically indicates that a prison sentence is . . . a minimum sentence." Such is the case with subsection 4205A(d)(1). The Superior Court had to sentence Herbert to a minimum of five years in prison and had no discretion to suspend the sentence.

[70] *See State v. Sturgis*, 947 A.2d 1087, 1091 (Del. 2008) (noting that the minimum mandatory Level V sentence for a Class A felony is 15 years, which must be imposed by the Superior Court and cannot be suspended).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

/s/ Kathryn J. Garrison
Bar I.D. No. 4622
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, DE 19947
(302) 739-4211

DATED: June 1, 2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN HERBERT,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	**No. 373, 2022**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 7,421 words, which were counted by Microsoft Word 2016.

/s/ Kathryn J. Garrison
Kathryn J. Garrison (No. 4622)
Deputy Attorney General
Department of Justice

DATE: June 1, 2023