**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>COLLIN KEVIN PACHECO,<br><br>Appellant. | 1 CA-CR 05-0820<br><br>DEPARTMENT D<br><br>**MEMORANDUM DECISION**<br>(Not for Publication - Rule 111, Rules of the Arizona Supreme Court) |

Appeal from the Superior Court in Yavapai County

Cause No. CR 82003-0474

The Honorable Janis Ann Sterling, Judge

**REVERSED AND REMANDED**

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**W E I S B E R G**, Judge

¶1 Collin K. Pacheco ("defendant") appeals his convictions and sentences on five counts of child molestation and four counts of sexual conduct with a minor. Defendant argues, among other things, that the trial court committed reversible error when it excluded the testimony of his expert witness. For the reasons discussed below, we reverse and remand for a new trial.

## FACTS AND PROCEDURAL HISTORY

¶2 In May 1998, defendant married A.,[1] and the two began living together with A.'s daughter from a previous marriage, who was born in November 1991. Additionally, A. gave birth to the couple's child in November 2000.

¶3 In June 2002, defendant separated from A. and moved out of their Sedona apartment. Defendant lived in three different apartments over the following year, but continued to visit the children. Defendant saw the children several times over the year at numerous locations, including A.'s Sedona apartment, his Jerome apartment, and his Drycreek apartment.

¶4 In August 2003, defendant's stepdaughter told three friends at a slumber party that defendant had performed various sexual acts on her during several visits with him over the prior year. She told her mother the next day what defendant had done, and her mother immediately reported the allegations to police.

¶5 In September 2003, defendant was indicted on five counts of sexual conduct with a minor and five counts of child molestation, all counts arising from defendant's conduct with his stepdaughter. The indictment alleged that one offense of sexual conduct with a minor and one of child molestation occurred on or about August 2002 to November 2002 (Counts One and Two); two more offenses of sexual conduct with a minor and two of child

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[1]We use the initial of defendant's wife in order to protect the identity of the victim.

molestation occurred on or about December 2002 to May 2003 (Counts[1]We use the initial of defendant's wife in order to protect the identity of the victim.

¶6 Three through Six); another offense of sexual conduct with a minor and one of child molestation occurred on or about December 2002 to May 2003 (Counts Seven and Eight); and another offense of sexual conduct with a minor and one of child molestation occurred on or about June to July 2003 (Counts Nine and Ten).

¶7 At trial, the court granted a judgment of acquittal on Count Two. The jury convicted defendant of the remaining nine counts, and found that the victim was "twelve years of age or younger" when each of the offenses occurred. The court sentenced defendant to four terms of life imprisonment pursuant to Arizona Revised Statutes ("A.R.S.") section 13-604.01 (2001) on the four counts of sexual conduct with a minor twelve years of age or under (Counts Four, Six, Eight, and Ten), and presumptive terms of seventeen years in prison on the child molestation counts (Counts One, Three, Five, Seven, Nine). Defendant timely appealed and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A).

**ISSUES ON APPEAL**

¶8 Although defendant raises several issues on appeal, the following issue is dispositive for the purposes of this appeal: Did the trial court commit reversible error in precluding defendant's psychosexual expert from testifying at trial?

## STANDARD OF REVIEW

¶9 We review a trial court's ruling on the admissibility of expert testimony for abuse of discretion. *State v. Speers,* 209 Ariz. 125, 129, ¶¶ 13-14, 98 P.3d 560, 564 (App. 2004). "However, when the admissibility of expert opinion evidence is a question of 'law or logic,' it is this court's responsibility to determine admissibility." *Id.* at ¶ 13 (quoting *State v. Moran,* 151 Ariz. 378, 381, 728 P.2d 248, 251 (1986)).

## DISCUSSION

¶10 Defendant argues that the trial court committed reversible error by precluding a clinical psychologist, Dr. Joseph Plaud, from offering his expert opinion on defendant's current psychological and psychosexual functioning, which demonstrated that he had no sexual interest in, and was not aroused by, female children.

¶11 Dr. Plaud offered his opinion in a nineteen-page report, based on a battery of tests conducted in December 2004, including the Multiphasic Sex Inventory-II ("MSI-II"), which in part compares defendant's written test scores to those of known child molesters and rapists, the Abel Assessment for Sexual Interest ("AASI"), which compares physiological responses to sexual stimuli to those from known child molesters, and a penile plethsymographic physiological assessment ("PPG"), which measures male sexual arousal by recording changes in penile volume. Dr. Plaud cautioned that the purpose of his evaluation was not to determine defendant's

guilt or innocence of the allegations in this case, but simply to evaluate defendant's psychological, psychosexual and behavioral patterns at the time of the testing. He summarized his final conclusion as follows: "[I]t is my professional opinion that Mr. Collin Pacheco does not meet the criteria for valid consideration as one in a risk category to perpetrate physical assault or sexual abuse against either children or adults."

¶12 Fifteen days before trial, after the deadline for filing motions, the State filed a Motion to Preclude Dr. Plaud's testimony, arguing that Dr. Plaud's opinion was based on a comparison of defendant's current reactions and patterns to those of known child molesters, and as such, was not relevant. The State further asserted that Dr. Plaud's opinion was misleading and constituted improper character evidence, and improper profile evidence. Defendant filed a motion to strike the State's motion on the ground that it was untimely, which the trial court denied. Defendant then filed a written response to the motion, arguing that Dr. Plaud's testing demonstrated that defendant did not possess the involuntary responses required to perform the acts of which he was accused, that the State's objections to the expert's opinion went to its weight, not to its admissibility, and that exclusion of the expert opinion would violate defendant's due process right to present his defense, particularly in light of the trial court's ruling allowing the State's expert to testify on the characteristics of molestation victims.

¶13 The trial court heard additional argument the day before trial. The State argued that Dr. Plaud's opinion was a comment on the credibility of the defendant, and was "reverse" propensity evidence specifically prohibited under Arizona Evidence Rule 404(b), both of which arguments defendant disputed. Defendant argued that an "evidentiary hearing is absolutely mandatory because neither the court nor [the prosecutor] know exactly what this man will testify."[2] Without an evidentiary hearing, the trial court granted the State's motion to preclude, reasoning as follows:

> The court is not going to allow Dr. Plaud to testify. Counsel, if you want to make an offer of proof outside the hearing of the jury, you're certainly welcome to do that.[3]
>
> My recollection, and I can't put my hands on it right now, for purposes of the record, the court did try to make an attempt to determine if the plethsymograph type of testimony, which I understand is a substantial part of his battery of tests and evaluation, this court could not find where it had been admitted in this State or anywhere frankly in a guilt phase. It is used and it's used repeatedly and has been approved for treatment, but not for a determination of guilt or--and I don't' know what the reverse of a 404B is. I don't

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[2]Contrary to defendant's argument on appeal, defendant did not request that the trial court hold a hearing to establish the reliability of the expert evidence under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Rather, defendant argued that *Frye* had no applicability to Dr. Plaud's testimony, citing *Logerquist v. McVey*, 196 Ariz. 470, 485-91, ¶¶ 46-65, 1 P.3d 113, 128-34 (2000), and the State specifically noted it had no *Frye* objection. Defendant instead sought the evidentiary hearing to determine the precise nature of Dr. Plaud's testimony.

[3]Dr. Plaud's entire report had been submitted to the court as an exhibit to the State's Supplement to Motion in Limine to Preclude Witness. The record fails to show, however, that defendant accepted the court's offer to make a separate offer of proof.

think it is either.

> I just don't find it is relevant to the events that occurred back in 2002 and 2003, where the defendant may or may not be emotionally or psychologically or physically in 2005 evaluation conduct [sic] as compared to where he was in 2002 and 2003 I don't think is relevant.
>
> As a result, Dr. Plaud is not going to be permitted to testify as he has outlined in his report.

**¶14** The trial court in this instance precluded expert testimony on the absence of sexually deviant responses on a variety of tests sixteen months after the offenses were alleged to have occurred, reasoning that the test results "may or may not be" indicative of defendant's sexual proclivities in 2005, but could not be relevant to defendant's sexual proclivities in 2002 and 2003. Relevant evidence, however, is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. Rule Evid. 401. Dr. Plaud's opinion that defendant did not exhibit the physiological or psychological responses that demonstrated a sexual interest in, or arousal by, female children, in December 2004, *might have* had some tendency to make it less likely that defendant had a sexual interest in, or arousal by, female children in general in 2002 and 2003. However, without an evidentiary hearing, such possible relevance must remain speculative.

**¶15** This expert opinion that defendant in 2005 did not possess either the physiological or psychological responses

demonstrating the character trait or motive of sexual deviancy, which might reflect defendant's propensities in 2002 and 2003, went to the heart of the defense in this case: that defendant did not commit the offenses that the victim described on the witness stand. Defendant denied the allegations when he was first interviewed by police, and denied the allegations on the witness stand at trial. Although the State may not have explicitly labeled defendant as a sexual deviant, or explicitly labeled defendant's motive for the conduct as sexual deviancy, its entire case against defendant relied on a jury being convinced that defendant had committed the sexually deviant acts of child molestation and sexual conduct with a child. The victim in fact testified to numerous instances of uncharged sexual acts by defendant at trial that suggested that defendant continuously engaged in sexually deviant behavior with the victim. Under these circumstances, defendant should not have been denied the opportunity to present expert opinion supporting his claim that he did not have a character trait or motive of sexual deviancy solely on the ground that the timing of the tests that formed the basis of the expert opinion made the opinion less relevant. *See State v. Christensen*, 129 Ariz. 32, 34-36, 628 P.2d 580, 582-84 (1981) (holding that the trial court erred in first-degree murder trial in excluding psychiatric testimony that defendant possessed a character trait of impulsivity). In short, the trial judge's exclusion of defendant's expert testimony in its entirety, without an evidentiary hearing, solely on the ground that

the testing was performed sixteen months after the offenses, constituted an abuse of discretion. *See State v. Chapple,* 135 Ariz. 281, 296-97, 660 P.2d 1208, 1223-25 (1983) (holding that trial court abused its discretion in precluding expert testimony on eyewitness identification based on its own conclusion that such scientific theory could be developed on cross-examination of eyewitnesses without expert testimony).

¶16 This is not to say that Dr. Plaud's testimony is necessarily admissible in its entirety, or that it could not be excluded in its entirety under the circumstances for different reasons than those articulated by the trial court. Under established Arizona case law, Dr. Plaud could not testify that defendant's denial of the allegations was credible, or that defendant's responses to testing were inconsistent with his having committed the offenses. *See State v. Moran,* 151 Ariz. 378, 386, 728 P.2d 248, 256 (1986) (holding that trial court abused its discretion in admitting expert testimony that "the victim's behavior was consistent with the abuse having occurred"); *State v. Lindsey,* 149 Ariz. 472, 474-75, 720 P.2d 73, 75-76 (1986) (holding that trial court abused its discretion in allowing expert to testify regarding percentage of incest victims who lied); *State v. Tucker,* 165 Ariz. 340, 350, 798 P.2d 1349, 1359 (App. 1990) (holding that trial court abused its discretion in admitting expert testimony as to believability of the victim). The trial court may also believe it appropriate to conduct a hearing pursuant to *Frye,*

293 F. 1014, with regard to the scientific acceptance of the results and interpretation of the PPG test, as defendant urges on appeal, and other tests performed by Dr. Plaud. *Cf. Doe ex rel. Rudy-Glanzer v. Glanzer,* 232 F.3d 1258, 1266 (9th Cir. 2000) (noting that "courts are uniform in their assertion that the results of penile plethsymographs are inadmissible as evidence because there are no accepted standards for this test in the scientific community.").

**¶17** In its ruling, the trial court did not address the aspects of Dr. Plaud's testimony in which he would rely on the comparison of defendant's physiological or psychological responses to those of known child molesters. On the basis of the record presented, however, we cannot say as a matter of law that such evidence, which is more akin to "propensity" evidence than "profile" evidence, must be excluded. The State's reliance on *State v. Cifuentes,* 171 Ariz. 257, 257-58, 830 P.2d 469, 469-70 (App. 1991), which precludes the State from convicting defendant on evidence that he fits a *profile*, is misplaced because sexual *propensity* evidence is admissible for limited purposes in sexual misconduct cases. Arizona Rule of Evidence 404(c) specifically allows defendant to offer evidence to rebut proof that defendant "had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Ariz. Rule Evid. 404(c). Moreover, Arizona's Evidence Rule 404(a) allows the defendant to offer evidence of a "pertinent character trait," and Rule 405(a)

allows such evidence in the form of an opinion, which is precisely what Dr. Plaud proposed to offer. *See* Ariz. R. Evid. 404(a), 405(a).

**¶18** We are not persuaded that the trial court's ruling should be affirmed on the basis of the reasoning in the cases from other jurisdictions cited by the State rejecting defendants' offers of expert opinion that they did not fit the profile of a child molester. The rulings in the cases cited by the State relied on grounds not addressed by the trial court in this case, and on grounds on which we do not believe the record permits us to rule. *See R.D. v. State,* 706 So. 2d 770, 774-76 (Ala. Crim. App. 1997) (precluding expert testimony that tests demonstrated that defendant did not manifest the symptoms of a child molester on ground state's evidentiary rules [unlike Arizona's] prohibit opinion testimony to prove character; and defendant had failed to show that such evidence was relevant to whether he committed offenses); *State v. Person,* 564 A.2d 626, 631-32 (Conn. App. Ct. 1989) (precluding expert testimony that defendant did not meet profile of child molester because defendant failed to show evidence was accepted by scientific community or that these experts had experience dealing with incestuous relationships); *State v. Floray,* 715 A.2d 855, 857-63 (Del. Super. Ct. 1997) (holding that expert testimony that defendant did not fit profile of child sexual abuser had little probative value on whether defendant committed the charged crimes and would lead to the extremely prejudicial and impermissible

inference that defendant was innocent; state's evidentiary rules [unlike Arizona's] prohibit opinion testimony to prove character; and defendant had failed to show that such evidence was reasonably accepted with the scientific community); *Tungate v. Commonwealth*, 901 S.W.2d 41, 41-43 (Ky. 1995) (precluding expert testimony that defendant was "unlikely to have engaged in the alleged acts of child sexual abuse based upon the doctor's 'indicators for pedophilia,'" on the ground that it was an impermissible opinion on defendant's innocence with no proof it met scientific acceptability); *State v. Meredith*, 2005 WL 1272512, *4 (Ohio App. 2005) (precluding Dr. Plaud's testimony that defendant had no attraction to children to show that touching was not for purposes of sexual arousal, on ground that facts were well within the capacity of the jury to ascertain and expert testimony was not necessary).

**¶19** We also note that at least two state courts have rejected any blanket prohibition on such evidence. *See People v. Stoll*, 783 P.2d 698, 707-15 (Cal. 1989) (en banc) (holding that opinion that defendant displayed no signs of deviance or abnormality was relevant character evidence, appropriate subject of expert opinion, and did not need to meet California's test for scientific reliability); *State v. Davis*, 645 N.W.2d 913, 917-22, ¶¶ 9-26 (Wis. 2002) (concluding that a blanket restriction on such evidence is unwarranted).

¶20 We leave to the trial court on remand to determine whether Dr. Plaud's testimony, consistent with this decision, should be excluded altogether on a basis other than the basis previously relied upon, whether some parts of it should be excluded, or whether it should be admitted in its entirety.

**CONCLUSION**

¶21 For the foregoing reasons, we reverse and remand defendant's convictions and sentences.[4]

SHELDON H. WEISBERG, Judge

CONCURRING:

LAWRENCE F. WINTHROP, Presiding Judge

SUSAN A. EHRLICH, Judge

[4]In light of our resolution of this case, we need not address the other issues raised in this appeal.