

1 preparation for trial the Commonwealth proffered Dr. Michael Dreary OB/GYN on July 19, 2018, as
2 an expert in both sexual assault examinations and the misconceptions associated with the diagnoses
3 of alleged sexual assault victims.¹ The Defendant filed a Motion in Limine to exclude Dr. Dreary as
4 an expert on October 2, 2018.²

5 After a false start attributable to the Commonwealth on December 19, 2018, the Court was
6 finally able to hear Dr. Dreary testify on Christmas Eve. The Christmas Eve hearing was exhaustive
7 and lasted most of the morning. After hearing the arguments and the testimony of Dr. Dreary, the
8 Court ruled from bench that Dr. Dreary could not be qualified as an expert regarding the common
9 misconceptions regarding the medical diagnosis of sexual assault patients. The Court took under
10 advisement the issue of whether Dr. Dreary could be qualified as an expert in sexual assault medical
11 examinations. The Court will address that issue below as well as elaborate on its previous ruling from
12 the bench regarding the misconceptions on sexual assault.

13 III. DISCUSSION

14 On July 13, 2018 the Commonwealth Supreme Court issued *Commonwealth v. Crisostomo*,
15 2018 MP 5 ¶ 19, which explicitly held *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579
16 (1993) and its progeny applicable to the Commonwealth. The United States Supreme Court
17 determined that a court has a “basic gatekeeping obligation” regarding all expert testimony. *Kumho*
18 *Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999). When determining the admissibility of expert
19 testimony, a court may consider the following factors set forth in *Daubert*: (1) whether a theory or
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21 ¹ The Commonwealth previously attempted to offer another expert on a different subject matter. Despite repeated attempts
22 by the Court to schedule a Daubert hearing for that proposed expert, the Commonwealth could never produce the expert
to the Court.

23 ² The Defendant’s Motion in Limine was late due to attorney’s being off island, and the Commonwealth failing to provide
a CV in a timely manner. To this date, the Court has still not received a CV.

1 technique... can be and has been tested”; (2) whether it “has been subjected to peer review and
2 publication”; (3) whether, with respect to a certain technique, there is a high “known or potential rate
3 or error”; and (4) whether the theory or technique enjoys “general acceptance” within a relevant
4 scientific community.” 509 U.S. at 592-595. These factors “may or may not be pertinent in assessing
5 reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of
6 his or [or her] testimony.” *Kumho Tire Co.*, 526 U.S. at 150. “[T]he trial judge has *considerable*
7 *leeway* in deciding in a particular case how to go about determining whether particular expert
8 testimony is reliable.” *Id.* at 152. (emphasis added).

9 To adequately follow the gatekeeping roles assigned to the court by NMI EVID. R 702³, and
10 *Kumho Tire Co.*, the court must allow sufficient questioning and examination of the expert regarding
11 his/her specialized knowledge and qualifications (702(a)), his/her use of sufficient base of facts
12 (702(b)), his/her testimony is the product of reliable principles (702(c)), and whether he/she applied
13 these principles to the facts (702(d)). *Crisostomo*, at ¶ 25. The Court will now turn to the
14 Commonwealth’s intention that Dr. Dreary be qualified as an expert sexual assault examiner.

15 **A. Dr. Dreary as an Expert Sexual Assault Examiner**

16 The Commonwealth argues that Dr. Dreary’s extensive experience and Sexual Assault Nurse
17 Examiner (“SANE”) training make him a qualified expert in sexual assault examinations. The
18 Defendant counters that Dr. Dreary has only conducted twenty (20) sexual assault examinations since
19 1994 and that small number in that length of time is not enough to qualify one as an expert. The
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21 ³ A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form
22 of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of
23 fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c)
24 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. NMI EVID. R 702.

1 Defendant argues that Dr. Dreary's qualifications are that of a basic OB/GYN, and not one of a
2 specialized sexual assault examiner. The Defendant points out that the Commonwealth's own source
3 on SANE states "[a]n ER or private doctor who lacks specialized training and has conducted only a
4 few of these examinations is not, nor is an inexperienced SANE." Lynn Hetcht Schafran, *Medical*
5 *Forensic Sexual Assault Examinations: What are They, and What Can They Tell the Court?*, The
6 Judges' Journal Special Issue on Forensics, 2015 at 9. The Defendant also argued that Dr. Dreary's
7 testimony would be prejudicial and would confuse the jury under NMI EVID. R 403 & 702.

8 In the opinion of the Court, Dr. Dreary's twenty-five (25) years of experience as an OB/GYN
9 gives him plenty of experience and expertise in the general field of female genital health. The
10 Defendant is challenging Dr. Dreary in the very narrow sense regarding sexual assault examinations.
11 However, courts generally have allowed experts to testify to matters within their general expertise
12 even when they lack the specific qualifications within that field if their general expertise allows them
13 to give relevant and reliable opinions. *Crisostomo*, 2018 MP 5 ¶ 30 (citing FED. R. EVID. 702
14 interpretive notes and decisions; *Gayton v. McCoy*, 593 F.3d 610, 617- 18 (7th Cir. 2010));
15 *Kannankeril v. Terminix Int'l*, 128 F.3d 802, 809 (3rd Cir. 1997). Aside from teaching a SANE
16 course, the Court is not sure how the Defendant can ask Dr. Dreary to be more qualified. Dr. Dreary
17 has conducted multiple sexual assault examinations over his career, recently took the SANE court in
18 2017 to stay up to date on the subject matter, and is the head of the OB/GYN Department at CHCC.⁴

19 In *Gayton*, the court found that a general practitioner could testify about potential effects of
20 specific medications on decedent's heart condition because the issue did not concern "specialized
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22 ⁴ Since Dr. Dreary is the head of the OB/GYN Department at CHCC, he is also in charge of implementing SANE practices
23 at CHCC.

1 knowledge held only by cardiologists.” 593 F.3d at 617– 18 (7th Cir. 2010). Relating to this case, the
2 Commonwealth is not putting forth a General Practitioner as an expert witness on sexual assault
3 examinations, instead the Commonwealth has found an expert in female genital health. Dr. Dreary is
4 certainly qualified to speak on that issue, even if he is not a full-fledged SANE specialist.⁵ The
5 Defendant still wishes the Court to exclude Dr. Dreary as an expert. However, courts have found that
6 excluding a witness merely because they lack expertise that is more specialized and directly related
7 to the pertinent issue is an abuse of discretion. *See Smith v. BMW N. Am., Inc.*, 308 F.3d 913, 919–20
8 (8th Cir. 2002); *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3rd Cir. 2008).⁶ The subject matter of
9 Dr. Dreary’s proposed expert testimony is well within Dr. Dreary’s knowledge, skill, experience, and
10 education. Additionally, “the focus of the court’s inquiry should be specific: whether the expert’s
11 qualifications fit the particular issues in the case.” *Crisostomo*, at ¶ 31 (citing *Kumho Tire*, 526 U.S.
12 at 156).

13 After hearing Dr. Dreary’s qualifications, it is more difficult for the Court to find a reason to
14 disqualify him.⁷ Therefore, the Court will qualify Dr. Dreary as an expert in sexual assault
15 examinations.

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19 ⁵ A lack of specialization goes to the weight of the expert’s testimony, not its admissibility. *United States v. Wen Chyu*
20 *Liu*, 716 F.3d 159, 168 (5th Cir. 2013). The Defendant will certainly be allowed ample time and leeway to address this
issue on cross examination if he wishes.

21 ⁶ “Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has
superior knowledge, skill, experience, or education with the subject matter of the witness’s testimony.” *Gayton*, at 616.

22 ⁷ “[T]he 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.” NMI EVID. R 702(a). The Court feels that Dr. Dreary’s testimony may give the jury a
23 better understanding of sexual assault examinations.

1 **B. The Court's Previous Ruling**

2 Before concluding, the Court would like to remind both parties, but the Commonwealth in
3 particular, of the Court's previous decision to exclude Dr. Dreary's proposed expert testimony on the
4 common misconceptions regarding the medical diagnosis of sexual assault patients. That decision
5 delivered from the bench on December 24, 2018, still stands. The Court will briefly revisit that
6 hearing and decision below.

7 The Commonwealth intended to have Dr. Dreary testify, as an expert, that it is a common
8 misconception that there are always injuries to the genitals following a sexual assault. However, the
9 Commonwealth was completely unable to show that Dr. Dreary is an expert regarding the
10 misconceptions surrounding sexual assault trauma. He has not authored an article nor studied that
11 matter extensively. Additionally, he was unable to recall the name of the article or the author of the
12 one article he read on the subject. Finally, Dr. Dreary could not recall of the twenty (20) or so sexual
13 assault examinations he has done, exactly how many suffered injuries, how many did not suffer
14 injuries, or how many were legally proven victims or sexual assault. Dr. Dreary learned of the alleged
15 misconception through the forty (40) hour SANE course. While the Court is sure that the course was
16 expansive and helpful, learning one fact from a course does not make an expert. The Court has no
17 doubt that Dr. Dreary is an excellent OB/GYN, but he is not a social scientist as the Commonwealth
18 attempted to argue. It is clear to the Court, that it is a bridge too far for Dr. Dreary to be qualified as
19 an expert on sexual assault misconceptions under NMI EVID. R 702.

20 Therefore, the Court would like to make it clear that Dr. Dreary is *not* allowed to testify at in
21 any way regarding any misconceptions associated with sexual assault.⁸ Dr. Dreary can testify to his

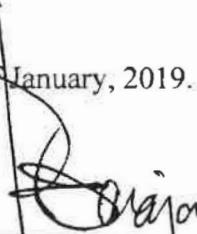
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23 ⁸ The Court would like to make it clear that any violation of this order will be cause for a mistrial.

1 medical findings and medical opinions of his sexual assault examination of the alleged victim, Joy
2 Trinos.⁹

3 **IV. CONCLUSION**

4 For the forgoing reasons, the Defendant's Motion in Limine is **GRANTED IN PART** and
5 **DENIED IN PART.**

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7 **IT IS SO ORDERED** this 10th day of January, 2019.

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11 **ROBERTO C. NARAJA**
12 Presiding Judge

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23 ⁹ The Court also believes it is acceptable for the Commonwealth to present Dr. Dreary as an expert OB/GYN for what it
24 is worth to the case.