

EXAMINERS' ANALYSIS OF QUESTION NO. 6

1. Wendy Can Testify to Her Lay Opinion Under MRE 701.

Pursuant to MRE 701, Opinion Testimony by Lay Witnesses,

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

MRE 701 allows a lay witness to offer opinion testimony "as long as the opinion is rationally based on the perception of the witness and helpful to a clear understanding of [her] testimony or a fact in issue." *Sells v Monroe County*, 158 Mich App 637, 644-645 (1987). Wendy plans to testify to her rational perception of events she observed. Although she was in a bar, she was sober, she could see some of the events unfolding, and there is no evidence that she was anything other than competent. While the decision under MRE 701 is within the discretion of the court, the fact that her view of the events was not as clear as that of the other witnesses, who were closer, does not disqualify her as a witness or preclude her from explaining what she observed and how those events led to her conclusion. Rather, her impaired view, if anything, goes to the weight of her testimony, and is a matter for cross-examination. *Sells*, 158 Mich App at 646-647. Finally, whether Patty or Dennis was the aggressor whose actions were unwelcome is the critical issue and therefore should be helpful to determining a fact in issue. The requirements of MRE 701 are thus satisfied and the court should overrule Equity's objection.

2. Dr. Wilma's Testimony Is Not Admissible Under MRE 702 Because It Is Not The Product Of Reliable Principles And Methods.

MRE 702, Testimony by Experts, provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *People v Dobek*, 274 Mich App 58 (2007), the court reviewed a similar expert opinion offered by a psychologist using psychological testing to opine whether or not an accused fit the profile of a sex offender. There, as here, the witness had specialized knowledge that qualified her as an expert. The putative expert had conceded that there remained considerable controversy and disagreement among the psychological community concerning the reliability of identifying sex offenders through psychological testing. In light of the lack of general acceptance among the witness' peers, the court held that the expert opinion "was neither sufficiently scientifically reliable nor supported by sufficient scientific data" to be admissible at trial. *Dobek*, 274 Mich App at 94-95. The same lack of general acceptance is present here. Therefore, the objection should be sustained.

Any Probative Value of Dr. Wilma's Testimony Would Be Substantially Outweighed By Undue Prejudice Under MRE 403.

MRE 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The critical issue in this case is whether Dennis engaged in unwelcome sexual conduct on this occasion, not whether he may have engaged in such conduct on some other occasion or whether he had some predisposition for such conduct under some circumstances that

may or may not have been present in this case. In light of the questionable reliability of Dr. Wilma's novel theory, any arguable probative value would be substantially outweighed under MRE 403, by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *Dobek*, 274 Mich App at 94-95.

Accordingly, Equity's MRE 702 objections should be sustained.