STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v Docket No.

JOHNNY ALLEN HARRIS,

Defendant-Appellant. / OK

Oakland Circuit Court No. 2009-225570-FC
Court of Appeals Docket No. 296631 OPN 7-19-12

APPLICATION FOR LEAVE TO APPEAL
BRIEF IN SUPPORT OF APPLICATION

NOTICE OF HEARING

CERTIFICATION OF SERVICE

145833
APL
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40605

FILED

SEP 13 2012

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

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STATE OF MICHIGAN
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PEOPLE OF THE STATE OF MICHIGAN,

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JOHNNY ALLEN HARRIS,

Defendant-Appellant.
_____/

Oakland Circuit Court No. 2009-225570-FC
Court of Appeals Docket No. 296631

APPLICATION FOR LEAVE TO APPEAL

Pursuant to MCR 7.302, Defendant-Appellant Johnny Allen Harris, by and through Jonathan B.D. Simon, his attorney, applies for leave to appeal, stating:

1. Appellant was charged with three counts of first degree criminal sexual conduct [MCL 750.520b(1)(a)], involving Jacqueline Luvenia-Carrie Rogers. The offenses were alleged to have occurred between May, 2006 and November, 2007 in the Township of West Bloomfield.

2. On February 26, 2009, following preliminary examination, the dates of the alleged offenses was amended to November, 2007 through November, 2008 and he was bound over as charged. On July 1, 2009, his motion to quash the information was denied. On November 19, 2009, following trial by jury, he was found guilty as charged. On January 11, 2010 he was sentenced to concurrent terms of 17 to 50 years.

3. On February 22, 2010 Appellant claimed an appeal to the Michigan Court of Appeals, maintaining that (1) it was reversible error in violation of MRE 803a and Appellant's due process right to a fair trial to allow complainant's sister Alyissa to testify about the complainant's alleged hearsay statement made to her where the alleged statement was not made immediately after the incident and the statement was not shown to be spontaneous and without indication of manufacture; (2) the trial judge deprived Appellant of his state and federal constitutional rights to a fair trial by overruling counsel's relevancy objection, allowing the prosecutor to introduce highly prejudicial and

irrelevant evidence from complainant's pediatrician who testified complainant reported sexual abuse and diagnosed sexual abuse despite finding no evidence of sexual abuse. In the alternative, counsel was ineffective for failing properly object; and (3) the prosecutor engaged in misconduct when she bolstered the testimony of the complainant by eliciting testimony from another witness that "delayed disclosure is more common than not" and the court abused it's discretion by permitting the lay witness to express an expert opinion. In an opinion dated August 2, 2011, his conviction and sentence were affirmed. (Court of Appeals Docket No. 296631).

4. On August 26, 2011, Appellant applied for leave to appeal the decision of the Michigan Court of Appeals to this Honorable Court (Supreme Court Docket No. 143630). In a order dated April 18, 2012, the judgment of the Court of Appeals was reversed in part for the reason that the trial court impermissibly allowed an expert witness to testify that the complainant was the victim of chid sexual abuse and trial counsel was ineffective for failing to object to this evidence. The matter was remanded to the Court of Appeals to determine whether Appellant was prejudiced by the admission of the doctor's diagnosis and whether Appellant is entitled to a new trial. On remand, the Court of Appeals the admission of the improper evidence did not effect the outcome of the trial; that Appellant was not denied a fair trial; and that he is not entitled to retrial.

5. Appellant now applies for leave to appeal to this Honorable Court, contending that the opinion of the Michigan Court of Appeals is clearly erroneous and will cause material injustice.

WHEREFORE, Defendant-Appellant Johnny Allen Harris prays this Honorable Court grant him leave to appeal. Further that reverse his conviction and remand his cause to the Oakland Circuit Court for a new trial, together with such other and further relief to which he may be entitled.

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Dated: September 13, 2012

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY ALLEN HARRIS,

Defendant-Appellant.

UNPUBLISHED
August 2, 2011

No. 296631
Oakland Circuit Court
LC No. 2009-225570-FC

Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant, Johnny Allen Harris, of three counts of Criminal Sexual Conduct, First Degree, in violation of MCL 750.520b(1)(a), involving his then five-year-old stepdaughter, JCR. The trial court sentenced him to serve 17 to 50 years. Harris appeals as of right. More specifically, he appeals the trial court's admission of certain testimony and also claims ineffective assistance of counsel. We affirm.

I. FACTS

At trial, JCR testified that she is six years old. She has five siblings, including a sister named AR. JCR stated that she knew Harris because he used to live in her house. She shared a bedroom with her sister, AR, but each of them had their own beds. JCR testified that on six occasions, when she was five and six years old, Harris woke her up and took her from her bedroom to various parts of the house and told her to suck his penis, and she used her mouth and hands. Yellow stuff went into her mouth, which she would spit into a sink. She would then get a drink of water and return to bed. Harris told JCR that she would get in trouble if she told anyone. JCR did not tell her mother until Harris moved out of the house.

After Harris moved out, JCR told her sister AR what happened by whispering in her ear that Harris told her to "suck his penis." Eventually, one of JCR's other siblings, who had heard what happened, told their mother about the incidents. Her mother questioned JCR alone and had her demonstrate on a banana what she had to do. Her mother had JCR leave the room and then called her back to have her explain it again to see if she explained it the same way, which she did. JRC's mother called the police, and they went to the police department. JRC's mother then took JCR to a pediatrician to be examined. She also took JCR to Care House, where Sarah Killips interviewed her.

JCR's sister, AR, testified that Harris would come into her and JCR's bedroom at night. Harris would ask the girls if they were awake, and he would ask JCR if she wanted some water. JCR would say yes, and they would go downstairs. AR stated that Harris never asked anyone else if they wanted any water. She thought it was odd that Harris would ask JCR if she wanted any water because normally Harris would not let them get up to get water. She remembered that JCR would be gone 10 to 20 minutes and that she would have a bottle of water when she returned. AR also stated that normally Harris would not let them drink bottled water. AR testified that JCR would be kind of scared or frightened when she would return. AR stated that she was glad when Harris moved out because he would push her and he "did not treat [them] well."

Sarah Killips conducted forensic interviews for Care House of Oakland County at the time of the incident. She interviewed JCR alone, using an approved forensic interview protocol, including a drawing of a naked child. The intention of the interview is to get a statement from the child. Killips testified, without objection, that "the literature, [Killips'] training and experience [have] demonstrate[d] that delayed disclosure is more common than not."

Dr. Carrie Ricci is a pediatrician who saw JCR after JCR told her mother about the incidents with Harris. Dr. Ricci testified that she asked JCR direct questions "for the purpose of providing her with the treatment and seeing what, if anything – the diagnosis [was]." JCR told her that Harris "had woken her up from sleep, taken her downstairs, and had her suck on his penis until yellow stuff came out." Dr. Ricci gave JCR a physical examination. She also tested JCR for sexually transmitted diseases, which tests all came back negative. Dr. Ricci diagnosed JCR with child sexual abuse and nocturnal enuresis (bedwetting). Dr. Ricci made her diagnosis because she believed that JCR had been abused.

Harris testified that he moved out of the home while JRC's mother was out of town because she was "very confrontational." He stated that, on one occasion, he and JRC's mother got into an argument in which she threatened to call the police on him, stating, "I'll call the police on your ass. You know they'll believe me if I call them." He also stated that, after he had moved out of the house, JRC's mother called him to ask why he had moved out. He responded by saying their marriage was over, to which she replied, "I'm gonna get your ass." Harris testified that he never molested JCR, and he never put his penis in her mouth. He stated that he believed JCR's mother had "put her up to this." Harris denied that he did not like to give the children bottled water. He also denied ever pushing AR while he was moving out.

The jury returned a verdict of guilty on all three counts of Criminal Sexual Conduct, First Degree. The trial court sentenced Harris to 17 to 50 years in prison. Harris appeals as of right.

II. HEARSAY CHALLENGE TO AR'S TESTIMONY

A. STANDARD OF REVIEW

Harris argues that the trial court committed reversible error when it allowed JCR's sister, AR, to testify about what JCR told her about the incident involving Harris. Harris contends that AR's testimony was hearsay.

The decision whether to admit or exclude evidence is within the trial court's discretion and will only be reversed when the trial court has abused that discretion.[1] "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes."[2]

B. LEGAL STANDARDS

The general rule is that hearsay is inadmissible.[3] But a trial court can allow hearsay testimony if an exception to hearsay applies.[4] There are certain circumstances when hearsay uttered by a person of tender years may be admitted as evidence.[5] A delay in a child's declaration may be excusable if the child fears reprisal if she makes the declaration.[6]

The "tender years" exception to hearsay states, in relevant part:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.[7]

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[1] *People v Crawford*, 458 Mich 376, 400; 582 NW2d 785 (1998).

[2] *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

[3] MRE 802; *Yost*, 278 Mich App at 363.

[4] *Yost*, 278 Mich App at 365.

[5] MRE 803A; *People v Hammons*, 210 Mich App 554, 558; 534 NW2d 183 (1995).

[6] MRE 803A; *Hammons*, 210 Mich App at 558.

[7] MRE 803A.

C. APPLYING THE LEGAL STANDARDS

Harris contends that JCR's statement cannot satisfy the second and third prongs of the "tender years" exception.

More specifically, Harris contends that the requirements for hearsay to be admitted under the "excited utterance" exception are analogous to the requirements under the "tender years" exception. Under the excited utterance exception, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event of the condition," is not excluded by the hearsay rule.[8] Harris focuses his assertion on the time frame that has generally been applied to the excited utterance exception. Specifically, he states that there can be no time for the declarant to contrive the statement in order for it to be admitted under the exception.

In essence, Harris claims that, because JCR delayed making her statement to AR, she had time to fabricate her story. Harris incorrectly intertwines the requirements of the "tender years" exception and the "exited utterance" exception. He attempts to bolster his argument by citing *People v Straight*.[9] Harris states that in that case, "the complainant made the statements approximately one month after the alleged event, *immediately following a medical exam and repeated questioning by her parents*." But any statements the declarant made in *Straight* would clearly not be spontaneous because they came after an exam and repeated questions from the parents. And that is why the Michigan Supreme Court reversed the conviction;[10] not because of the one month that elapsed between the incident and the declaration.

In this case, JCR was not asked about any alleged sexual abuse. She was not given a medical exam prior to her declaration. The record shows that AR asked her why she was going downstairs with Harris. JCR's response was to declare the incidents that had occurred between her and Harris. There is no indication she was predisposed to tell such a story. Further, JCR was six years old at the time. The chances of a six year old fabricating such an illicit story are minimal. Harris cannot show that JCR's statements were not spontaneous or that there was any indication that JCR fabricated them. He cannot show that the trial court abused its discretion regarding the second prong.

Harris also contends that the statement fails the "tender years" exception because JCR did not make it "immediately after the incident" as the third prong requires. Notwithstanding the fact that Harris mistakenly claims on appeal that a year passed between the incident and JCR's declaration, he has overlooked the plain language of the statute that allows for delay in certain

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[8] MRE 803(2).

[9] *People v Straight*, 430 Mich 418; 424 NW2d 257 (1988).

[10] *Id.* at 433.

circumstances. As previously stated, it is excusable if a child delays making her declaration if she fears the subject of her declaration may retaliate in some way.[11]

JCR expressly stated that Harris told her she would get in trouble if she told anyone of what had transpired. It is certainly feasible that a young girl, subjected to such treatment, could fear "getting in trouble" by the alleged perpetrator of the treatment. Her delayed declaration was due to a fear of reprisal from Harris. This reason for delay fits squarely within the excusable exception stated in MRE 803(A)(3). Harris cannot show JCR's delayed declaration was inexcusable. He cannot show that the trial court abused its discretion by finding the delay was excusable.

In summary, Harris cannot show that the trial court abused its discretion when it admitted AR's testimony pursuant to the "tender years" exception. A reasonable person could find that, given the circumstances, JCR's declaration was spontaneous and that she delayed making the declaration out of fear.

III. HEARSAY AND RELEVANCE CHALLENGES TO DR. RICCI'S TESTIMONY

A. STANDARD OF REVIEW

Harris argues that the trial court erred when it allowed Dr. Ricci to testify that she diagnosed JCR as having been sexually abused despite finding no evidence of sexual abuse. He contends that Dr. Ricci's testimony was irrelevant because there was no evidence that supported it. Harris also claims that Dr. Ricci's testimony was hearsay. The decision whether to admit or exclude evidence is within the trial court's discretion and will only be reversed when the trial court has abused that discretion.[12] "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes."[13] But if this Court finds an abuse of discretion, we should not set aside a defendant's conviction unless the defendant shows that the error more probably than not changed the outcome of the case.[14]

B. RELEVANCE

Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.[15] "Relevant evidence is generally admissible, except as provided by the

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[11] MRE 803A; *Hammons*, 210 Mich App at 558.

[12] *Crawford*, 458 Mich at 400; *People v Unger*, 278 Mich App 210, 238; 749 NW2d 272 (2008).

[13] *Yost*, 278 Mich App at 353.

[14] *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

[15] MRE 401.

United States and Michigan constitutions and other rules."[16] However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[17]

Harris claims that Dr. Ricci's testimony was not relevant because no evidence of sexual abuse supported it. Dr. Ricci's testimony that JCR told her that Harris woke her up from her sleep, took her downstairs, and had her suck on his penis is relevant. Her testimony has a tendency to make it more probable that JCR was sexually abused. Harris maintains that Dr. Ricci's testimony is not relevant because no evidence of abuse supports it. At trial, defense counsel asked, "Well Doctor, it seems to me that – is that appropriate medical protocol to make a diagnosis where there are no symptoms or any evidence of the alleged malady?" Dr. Ricci responded:

> Well, if, for example, you came in and told me you were vomiting and having diarrhea, but you had a normal physical examination, I would diagnose you with, um, a virus – a stomach virus, even though my examination may have been normal, based on the history that you told me, that you were having vomiting and diarrhea. So, sometimes in medicine, you do make a diagnosis based on the history, more so than your physical examination.

Dr. Ricci did not find physical evidence that sexual abuse had occurred. However, given her experience and by interviewing JCR, Dr. Ricci determined that JCR had been sexually abused. Dr. Ricci does not need physical evidence to make that determination, and Harris cites no case law supporting his assertion that she does. Harris cannot show the trial court abused its discretion by allowing Dr. Ricci to testify that JCR was abused, even though there was no physical evidence of the abuse.

C. HEARSAY

MRE 803(4) states:

> **(4) Statements Made for Purposes of Medical Treatment or Medical Diagnosis in Connection With Treatment.** Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.[18]

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[16] MRE 402; *Yost*, 278 Mich App at 355.

[17] *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995).

[18] MRE 803(4).

"The rationale supporting the admission of statements under this exception is the existence of (1) the reasonable necessity of the statement to the diagnosis and treatment of the patient, and (2) the declarant's self-interested motivation to speak the truth to treating physicians in order to receive proper medical care."[19]

Harris asserts that there are not sufficient indicia of reliability to justify the trial court admitting JCR's statement. He argues that JCR is simply too young to recognize the weight of her statements to Dr. Ricci. He also asserts that JCR's motive for going to Dr. Ricci was because her mother took her there and her motive for her statement was simply to respond to Dr. Ricci's questions. But Harris cannot show that these assertions are true.

Dr. Ricci's testimony as to what JCR told her clearly reflected Dr. Ricci's purpose to treat or diagnose JCR. Even if Dr. Ricci found no physical evidence of sexual abuse, there is still a diagnosis. Further, Dr. Ricci tested JCR for several sexually transmitted diseases. Even though the results of those tests were negative, they were still administered by Dr. Ricci so she could treat and diagnose JCR. Harris cannot show that the trial court abused its discretion by admitting Dr. Ricci's testimony based on a hearsay exception.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

This Court's review is limited to mistakes that are on the record.[20] Harris is not clear whether he alleges that his counsel was ineffective for not objecting on strict hearsay grounds or on grounds that Dr. Ricci gave impermissible opinion evidence that Harris was guilty of sexual abuse. Harris cannot show there was clear error on either theory.

B. FAILURE TO OBJECT ON GROUNDS OF HEARSAY

1. LEGAL STANDARDS

There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[21] To establish ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment."[22]

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[19] *People v Garland*, 286 Mich App 1, 8-9; 777 NW2d 732 (2009).

[20] *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

[21] *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

[22] *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

2. APPLYING THE LEGAL STANDARDS

Harris cannot show that JCR's statements to Dr. Ricci were not made in connection with Dr. Ricci diagnosing or treating JCR. And a defense attorney is not obligated to make a futile objection.[23] As discussed earlier, it is certainly within the range of reasonable outcomes for the trial court to find that Dr. Ricci's testimony fell within the hearsay exception under MRE 803(4). It is possible that defense counsel recognized the likelihood that the trial court would rule that the testimony was an exception. Defense counsel may have thought that it would be futile for him to object to the testimony. Further, it may have been trial strategy for defense counsel to not object so that the jury did not hear another of his objections overruled.

C. FAILURE TO OBJECT TO OPINION EVIDENCE

1. LEGAL STANDARDS

MRE 704 allows opinion testimony if it is not objectionable because it embraces an issue that should be decided by the trier of fact.[24]

2. APPLYING THE LEGAL STANDARDS

To the extent that Harris contends that his counsel was ineffective for not objecting because Dr. Ricci gave opinion evidence that Harris was the abuser, he also cannot meet his burden. Harris cites a distinguishable case where this Court remanded for a new trial where the prosecutor asked the defendant "so you're guilty of the crime?"

But in this case, Dr. Ricci did not give her opinion that Harris was the one who abused JCR. Dr. Ricci only testified that JCR had been abused and that JCR stated, under an exception to hearsay, that Harris was the one who abused her. But Dr. Ricci stated that it was her diagnosis that JCR had been sexually abused. Dr. Ricci never mentioned that she thought Harris was the abuser or concluded that he was. She simply diagnosed sexual abuse. Therefore, Harris cannot meet his burden of showing that his trial counsel was clearly deficient.

V. PROSECUTOR MISCONDUCT

A. STANDARD OF REVIEW

Harris argues that Sarah Killips, a Care House employee, bolstered JCR's testimony when she stated that "the literature, her training, and experience demonstrate that delayed disclosure is more common than not." He contends this is an example of the prosecutor vouching for the credibility of one of its witnesses. "Where issues of prosecutorial misconduct

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[23] *People v Odom*, 276 Mich App 407, 416; 740 NW2d 557 (2007).

[24] MRE 704.

are preserved, we review them de novo to determine if the defendant was denied a fair and impartial trial."[25]

B. ANALYSIS

Killips testified that through her experience and her understanding of literature in the field, she believed it was more likely for a child to delay disclosing being sexually abused than to immediately disclose the abuse.

Killips never mentioned JCR or stated that she believed JCR because of JCR's delayed disclosure. The prosecutor did not ask Killips if she thought JCR was more reliable or believable because of JCR's delayed disclosure. Killips stated that it was typical that a victim of sexual abuse would delay telling someone. She only testified that she had done a forensic interview and that she had followed established protocol when she conducted it. Thus, Harris cannot show that he was denied a fair trial because Killips vouched for the credibility of JCR.

VI. EXPERT OPINION TESTIMONY

A. STANDARD OF REVIEW

Harris contends that Killips gave expert opinion testimony without being qualified as an expert. This Court reviews unpreserved claims of nonconstitutional error for plain error that affected the defendant's substantial rights.[26]

B. LEGAL STANDARDS

"MRE 701 permits lay witnesses to testify about opinions and inferences that are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or determination of a fact in issue."[27] "An expert witness is one who has been qualified by knowledge, skill, experience, training, or education, and is used where scientific, technical, or other specialized knowledge will assist the trier of fact to understand evidence or determine a fact at issue."[28] Also, "MCR 6.201(A) does not explicitly require *designation* of expert and lay witnesses."[29]

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[25] *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

[26] *People v Aguwa*, 245 Mich App 1, 6; 626 NW2d 176 (2001).

[27] MRE 701; *People v McLaughlin*, 258 Mich App 635, 658; 672 NW2d 860 (2003) (internal quotations omitted).

[28] MRE 702; *Richardson v Ryder Truck Rental Inc*, 213 Mich App 447, 455; 540 NW2d 696 (1995).

[29] *McLaughlin*, 258 Mich App at 658.

C. APPLYING THE LEGAL STANDARDS

Killips testified that it is not unusual for the complainant in a rape case to delay disclosure of the incident. Harris contends that Killips clearly gave expert testimony. But even if this Court were to find that Killips did give expert testimony rather than opinion testimony, Harris cannot demonstrate plain error by the trial court. If Harris would have objected, the prosecution could have moved for the witness to be qualified as an expert. Killips stated that she had conducted over 500 forensic interviews on children and she was also familiar with the Care House protocol for interviewing children. Killips' merely expressed her opinion that, in her experience, it was not uncommon for children to delay telling someone that they had been abused. Thus, Harris has failed to demonstrate that the trial court abused its discretion when it allowed Killips to testify at trial.

We affirm.

/s/ Kurtis T. Wilder
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood

STATE OF MICHIGAN
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Oakland Circuit Court No. 2009-225570-FC
Court of Appeals Docket No. 296631

BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellant was convicted in the Oakland County Circuit Court by jury trial, and a Judgment of Sentence was entered on January 11, 2010. A Claim of Appeal was filed in the Michigan Court of Appeals on February 22, 2010. On August 2, 2011 his conviction was affirmed. (Docket No. 296631). This application is made within 56 days thereafter. The Court of Appeals had jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, § 20, pursuant to MCL 600.308(1); MSA 27A.308, MCL 770.3; MSA 28.1100, MCR 7.203(A), MCR 7.204(A)(2). This Court has jurisdiction to consider this application for leave to appeal pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I

WAS IT REVERSIBLE ERROR IN VIOLATION OF MRE 803A AND APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL TO ALLOW COMPLAINANT'S SISTER ALYISSA TO TESTIFY ABOUT THE COMPLAINANT'S ALLEGED HEARSAY STATEMENT MADE TO HER WHERE THE ALLEGED STATEMENT WAS NOT MADE IMMEDIATELY AFTER THE INCIDENT AND THE STATEMENT WAS NOT SHOWN TO BE SPONTANEOUS AND WITHOUT INDICATION OF MANUFACTURE

Defendant-Appellant answers this question "Yes".
Plaintiff-Appellee answered this question "No".
The court below answered this question "No".
The Court of Appeals answered this question "No".

II

DID THE TRIAL JUDGE DEPRIVE APPELLANT OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BY OVERRULING COUNSEL'S RELEVANCY OBJECTION, ALLOWING THE PROSECUTOR TO INTRODUCE HIGHLY PREJUDICIAL AND IRRELEVANT EVIDENCE FROM COMPLAINANT'S PEDIATRICIAN WHO TESTIFIED COMPLAINANT REPORTED SEXUAL ABUSE AND DIAGNOSED SEXUAL ABUSE DESPITE FINDING NO EVIDENCE OF SEXUAL ABUSE. IN THE ALTERNATIVE, WAS APPELLANT PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL, WHO FAILED TO PROPERLY OBJECT.

Defendant-Appellant answers this question "Yes".
Plaintiff-Appellee answered this question "No".
The court below answered this question "No".
The Court of Appeals answered this question "No".

III

WHETHER THE PROSECUTOR ENGAGED IN MISCONDUCT WHEN SHE BOLSTERED THE TESTIMONY OF THE COMPLAINANT BY ELICITING TESTIMONY FROM ANOTHER WITNESS THAT "DELAYED DISCLOSURE IS MORE COMMON THAN NOT" AND WHETHER THE COURT ABUSED IT'S DISCRETION BY PERMITTING THE LAY WITNESS TO EXPRESS AN EXPERT OPINION.

Defendant-Appellant answers this question "Yes".
Plaintiff-Appellee answered this question "No".
The court below answered this question "No".
The Court of Appeals answered this question "No".

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Johnny Allen Harris appealed as of right from his Oakland County jury based conviction of three counts of first degree criminal sexual conduct. The Court of Appeals affirmed his conviction in an unpublished per curiam opinion issued on August 2, 2011. Mr. Harris now files this application for leave to appeal asking this Court to either grant leave to hear and decide this case or that this Court, upon review of the application, reverse the conviction.

Mr. Harris raised issues significant to the jurisprudence of this state in his appeal of right and continues to raise the issues herein. He contends that the Court of Appeals erred in affirming his convictions and its opinion is clearly erroneous where (1) it was reversible error in violation of MRE 803a and Appellant's due process right to a fair trial to allow complainant's sister Alyissa to testify about the complainant's alleged hearsay statement made to her where the alleged statement was not made immediately after the incident and the statement was not shown to be spontaneous and without indication of manufacture; (2) the trial judge deprived Appellant of his state and federal constitutional rights to a fair trial by overruling counsel's relevancy objection, allowing the prosecutor to introduce highly prejudicial and irrelevant evidence from complainant's pediatrician who testified complainant reported sexual abuse and diagnosed sexual abuse despite finding no evidence of sexual abuse. In the alternative, counsel was ineffective for failing properly object; and (3) the prosecutor engaged in misconduct when she bolstered the testimony of the complainant by eliciting testimony from another witness that "delayed disclosure is more common than not" and the court abused it's discretion by permitting the lay witness to express an expert opinion. The decision of the Court of Appeals will cause material injustice to Mr. Harris.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

"P1" and "P2" are transcripts of the preliminary examination held February 26, 2009 and March 4, 2009 in the 48th District Court before the Hon. Marc Barron. "M", "T1", "T2", "T3" and "S" are transcripts of the July 1, 2009 motion, November 16, 17, 19, 2009 jury trial and January 11, 2010 sentencing in the Oakland Circuit Court before the Hon. John J. McDonald. Numbers following refer to pages therein.

Defendant-Appellant Johnny Allen Harris (hereinafter "Appellant") a person seventeen years of age or older, was charged with three counts of first degree criminal sexual conduct (fellatio) in violation of MCL 750.520b(1)(a), involving Jacqueline Luvenia-Carrie Rogers. The offenses were alleged to have occurred between May, 2006 and November, 2007 in the Township of West Bloomfield. On February 26, 2009 he appeared for preliminary examination.

Following voir dire, (P1 11-16), complainant stated that she is six years old and in the sixth grade. On six occasions when she was five and six years old, Appellant told her to suck his penis and she did so in various parts of the house. On at lest one occasion, yellow stuff went into her mouth. She did not tell her mother until after Appellant moved out of the house. (P1 16-38).

Complainant's mother, Jacqueline Marie Rogers, stated that her daughter was born June 8, 2002. She married Appellant September 28, 2006. They separated in November, 2008. (P1 40-74).

The dates of the alleged offenses was amended to November, 2007 through November, 2008, and Appellant was bound over as charged. (P2 14-20). On July 1, 2009, his motion to quash the information was denied. (M 3-9). On November 16, 2009 he appeared for trial. Following jury selection, (T1 3-98), preliminary jury instructions (T1 99-107) and opening statements, (T2 5-16), the following evidence was presented:

Jacqueline Rogers (the complainant) stated that she is seven years old. (T2 18). According to Jacqueline, on six occasions, (T2 37), when she was four or five years old, (T2 56), Appellant took her from her bedroom to various parts of the house, (T2 38), where he would have her suck his penis. Yellow stuff went into her mouth, which she would spit into a sink. She would then have a drink of water and return to bed. (T2 27-57, 67-70). He told her that she would get if trouble if she told anyone. She told her sisters Alyissa and Charlette after Appellant moved out of the house. Charlette

had her draw pictures of the acts. Alyissa told her to tell their mother. (T2 57-64). Her mother took her to the police. She later spoke with Sarah at CARE House. (T2 65-66). Before testifying, she discussed it with Charlette and her mother. (T2 72). They reminded her what she was supposed to say, told her to say that it happened in the basement and told her that she spit in the sink, (T2 73), and that it happened six times. (T2 81). Her mother told her to use the word penis and to say that the stuff was yellow. (T2 83). She could not recall the taste of the yellow stuff. (T2 80).

Alyissa Moore described the layout of the house. (T2 102-105). She recalled that Appellant lived there "probably about 2004 to 2008". (T2 105-106). On or about January 10, 2009, she was in the kitchen with Jacqueline and her brother Max when Jacqueline whispered in her ear "Johnny told me to suck his private". When her older sister Charlette came into the kitchen, she and Max told Charlette. (T2 108-109). The following day, Charlette had Jacqueline draw pictures. (T2 112-113). Charlette then told their brother Matthew, who told their mother. (T2 115). Her mother then reported it to the police. (T2 119-120). Alyissa recalled two or three occasions in 2007 or 2008 Appellant came into the bedroom she shared with Jacqueline and asked if Jacqueline wanted some water. He and Jacqueline would then go downstairs. Alyissa noted that he would not ask anyone else whether they wanted water and would not let anyone else get up and get water. (T2 121-123, 129-130). When they returned 10 or 20 minutes later, Jacqueline had a bottle of water and seemed kind of scared. (T2 124). According to Alyssia, Appellant got mad when Jacqueline would sleep in Charlette's bed, but did not seem to mind as much when she slept in Charlette's bed. (T2 125-127). Alyissa acknowledged discussing her testimony with her mother. (T2 150).

Carrie Ricci is a pediatrician. (T2 164). She examined Jacqueline on January 12, 2009 for assessment of possible sexual abuse. (T2 165-166). According to Ricci, Jacqueline told her that her dad had woken her up from sleep, taken her downstairs, and had her suck on his penis until yellow stuff came out. She would spit it out and return to bed. (T2 169, 175-176). A physical examination was normal. (T2 177). All tests for sexually transmitted diseases were negative. (T2 179-182, 186). She diagnosed child sexual abuse, (T2 192), but found no evidence of sexual abuse. (T2 193-195).

Charlette Moore recalled that Appellant came to live with them after he married her mother in late 2006. He moved out after Thanksgiving, 2008. (T2 199-200, 217). On January 10, 2009, after receiving information from Alyssia, she spoke with Jacqueline and had Jacqueline perform a demonstration and draw pictures of the described events. (T2 218-221, 231-232. The next day she told her brother Matthew and had him report the information to their mother. (T2 201- 208). She later told her mother what Jacqueline had said and showed her mother the pictures Jacqueline had drawn. Her mother then spoke with Jacqueline alone and called the police. After making a police report she scheduled an appointment with Jacqueline's doctor. (T2 210-211). Charlette also reported that Appellant would become upset when Jacqueline slept in her bed, but less upset when Alyssia did so. (T2 211-213). She denied disliking Appellant or being glad when he moved out. (T2 216-218, 228). She never saw him do anything inappropriate to Jacqueline. (T2 225).

Jacqueline Rogers (the complainant's mother) stated that the father of her three youngest children is currently incarcerated for criminal sexual conduct against herself. (T2 236). She married Appellant in September, 2006. The marriage began to break down months later. Appellant moved out in November, 2008 while she was out of town. (T2 237-240; T3 23-24, 35). On January 11, 2009, her son Matthew told her something Jacqueline told him. She questioned Jacqueline alone, had Jacqueline demonstrate using a banana and viewed the pictures Jacqueline drew for Charlette. (T2 241-247, 260; T3 19-21, 47-48). She also spoke with Alyssa, Matthew and Charlette, took Jacqueline to the police department and made a report. The police had Jacqueline interviewed at Care House. She had Jacqueline examined by Dr. Ricci. (T2 248-249, 252-253, 259-260). She maintained that all of her children disliked Appellant, (T23 35-38), and that Jacqueline experienced bed wetting from Summer, 2007 until Appellant moved out, and slept in Charlette's bedroom more frequently, which caused Appellant much consternation. (T2 254-256). She acknowledged claiming Appellant's veteran's benefits, (T3 42-43), and his financial assistance in home improvements, (T3 44), but denied threatening to "get him" if he left her, (T3 44), and denied infecting him with herpes. (T3 30).

Sarah Killips conducts forensic interviews for Care House of Oakland County. (T3 68-70).

On January 14, 2009 she interviewed the complainant alone, using an approved forensic interview protocol, (T3 70-72), including a drawing of a naked child. (T3 77-78). According to Killips, "the literature, her training and experience demonstrate that delayed disclosure is more common than not". (T3 76). She also explained how memory encodes relevant information. (T3 77).

West Bloomfield Police Sergeant Tara Kane recalled that following the forensic interview of the child, the mother reported that Appellant had denied being a pedophile. (T3 81-82). On January 15, 2009 she went to the house to solicit written statements from the other family members. (T3 82-85). The People then rested. (T3 88).

Appellant stated that he married Jacqueline Rogers in 2006, (T3 105), and that they are now divorced. (T3 90-91). When they met, he was on active military duty at Fort Campbell, Kentucky. (T3 92-93). He was honorably discharged before they married. (T3 94). About two months before their marriage, he moved in with her and her six children. (T3 94-95). Using his military pension and income from his civilian job as a logistics management specialist, he contributed $1,000 per month toward the household expenses and purchased for her a new BMW, (T3 102-103), helped pay to remodel the basement and paint the interior, added all of the children to his medical and dental insurance policies and paid them an allowance. (T3 96, 103). He also introduced a new regimen to achieve order in the household during the school year. (T3 104-105, 118-119). Appellant recounted that when he first moved in, complainant's urine soaked mattress needed replacement, (T3 97), and that she feared sleeping in her own bedroom because of noise from bats in the attic. (T3 100-101).

According to Appellant, the marriage began to deteriorate in June, 2008 when she gave him herpes and he discovered her involvement in illegal activities. (T3 105-106). He decided to vacate the house while his wife was out of town because she was confrontational and had previously threatened to make false police reports. (T3 106-108, 119-120). Upon her return, she called him. When he told her the marriage was over, she replied "I'm gonna get your ass". (T3 109). He learned of the allegation in January, 2009. (T3 115). On January 6, 2009 he retained divorce counsel. (T3 92, 116). On January 20, 2009 his attorney filed a complaint for divorce. (T3 115).

Appellant denied ever striking the children, (T3 105, 115-116), touching the complainant inappropriately, (T3 109), or entering their bedrooms while they slept. (T3 126). He maintained that he treated complainant no differently than the other children, (T3 111), but acknowledged that he would become upset when she would sleep in Charlette's bed on school nights. (T3 112).

The defense rested. (T3 127). After a review of the jury instructions, (T3 128-132, 133), closing arguments, (T3 134-177) and final jury instructions (T3 177-193), Appellant was found guilty as charged. (T3 197-199). From concurrent terms of 17 to 50 years, (S 4), he appealed of right to the Michigan Court of Appeals. In an opinion dated August 2, 2011, his conviction was affirmed by the Michigan Court of Appeals (Docket No. 296631). Appellant contends that the decision of the Court of Appeals is clearly erroneous and will cause material injustice. He now applies for leave to appeal to this Honorable Court.

ARGUMENT I

IT WAS REVERSIBLE ERROR IN VIOLATION OF MRE 803A AND APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL TO ALLOW COMPLAINANT'S SISTER ALYISSA TO TESTIFY ABOUT THE COMPLAINANT'S ALLEGED HEARSAY STATEMENT MADE TO HER WHERE THE ALLEGED STATEMENT WAS NOT MADE IMMEDIATELY AFTER THE INCIDENT AND THE STATEMENT WAS NOT SHOWN TO BE SPONTANEOUS AND WITHOUT INDICATION OF MANUFACTURE

Issue Preservation and Standard of Review

Counsel objected to the admission of the evidence. (T2 91-96). The decision to admit evidence is within the trial court's discretion and will only be reversed where there has been an abuse of discretion. See People v Crawford, 458 Mich 376, 400 (1998). However, in the absence of a timely objection, appellate relief is only appropriate if the result constitutes a manifest injustice. See People v Fenner, 136 Mich App 45, 47 (1984), see also People v Stull, 127 Mich App 14, 22 (1983).

Discussion

The instant criminal sexual conduct case was essentially a typical one-on-one credibility contest between the complainant and Appellant. The investigation began when complainant allegedly remarked to her sister Alyissa that on or about January 10, 2009, she was in the kitchen with complainant and her brother Max when complainant whispered in her ear "Johnny told me to suck his private". When her older sister Charlette came into the kitchen, she and Max told Charlette. (T2 108-109). The following day, Charlette had Jacqueline draw pictures. (T2 112-113). Charlette then told their brother Matthew, who told their mother. (T2 115). Her mother then reported it to the police. (T2 119-120). The Michigan Supreme Court has consistently held that hearsay "may only be admitted if provided for in an exception to the hearsay rule." People v LaLone, 432 Mich 103, 109 (1989). In the instant case, none of the exceptions to the hearsay rule are applicable to the various witnesses' hearsay statements about what the complainant told them.

Appellant contends that Alyissa Rogers' testimony should have been inadmissible because Jacqueline's alleged statement to her was not shown to be "spontaneous and without indication of manufacture." MRE 803A. No theory of admissibility can justify the introduction of the statement

that the complainant allegedly made to Alyissa. None of this testimony was admissible under MRE 803A, sometimes referred to as the tender years exception to the hearsay rule, which provides:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.
>
> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.
>
> A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.
>
> This rule applies in criminal and delinquency proceedings only.

Although the Michigan Supreme Court over a century ago created a special hearsay exception striking a balance between competing policy interests in child-sexual abuse cases (See People v Gage, 62 Mich 271 (1886)), it was not until March 1, 1991 that MRE 803A was adopted. Years after enactment of the statute, Michigan case law interpreting the rule is still fairly scarce. However, case law interpreting MRE 803(2), the excited utterance exception, does exist. Excited utterance case law is instructive for two reasons. First, the policy considerations underlying each rule is the same: attempting to ease the tension between two underlying policies of protecting the most vulnerable of our citizens from exploitation while at the same time protecting the accused against both erroneous conviction and the devastating consequences that can follow. See People v Straight, 430 Mich 418, 429 (1988). Second, the admission criteria for corroborative statements is similar under both rules.

Excited utterances are admitted "on the theory that the startling event suspends the

[declarant's] reflective thought process and renders the person incapable of fabricating a story at the time the statement was made." People v Carson, 87 Mich App 163, 167 (1978). The statement is viewed as trustworthy since the utterance is made "during the brief period when considerations of self-interest could not have been brought fully to bear." People v Cunningham, 398 Mich 514, 520 (1976) (quoting 6 Wigmore on Evidence, Sec. 1747, p 195 (Chadbourn Revision, 1976)), see also People v Schinzel, 86 Mich App 337 (1978).

To come within the excited utterance exception to the hearsay rule, a statement must meet three criteria: "(1) it must arise out of a startling occasion, (2) it must be made before there has been time to contrive and misrepresent, and (3) it must relate to the circumstances of the startling occasion." People v Gee, 406 Mich 279, 282 (1979).

It is the second requirement -- that there is no time for contrivance -- that is the key factor in the analysis of the 803(2) exception. And that same factor is shared by the requirement in 803A that the statement be "spontaneous and without indication of manufacture." MRE 803A. The declarant's statements must have been made "before there has been time to contrive and misrepresent," Cunningham, 398 Mich at 519, Gee, 406 Mich at 282, and "while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance." People v Ivory Thomas, 14 Mich App 642, 650 (1968) (Levin, J., concurring). Since the 803(2) hearsay exception is based on the theory that the circumstances under which such a statement is made infer reliability, those circumstances must be closely considered.

Because so much depends on the particular circumstances surrounding the declarant's statements, "[n]o hard and fast rule can be laid down which will apply to each case." White v City of Marquette, 140 Mich 310, 314 (1905), see also Ivory Thomas, 14 Mich App at 654. Whether a statement is properly admissible "depends entirely on the circumstances of each case." Browning v Spiech, 63 Mich App 271, 276 (1975) (quoting 6 Wigmore, supra, Sec. 1750, p 204).

There are several common factors that courts consider when analyzing this issue. Perhaps most important to the analysis is the requirement that the statement be made "without indication of

manufacture." MRE 803A. Logically, there is always time to manufacture, whether the statement is made while observing the event or ten minutes or ten hours later. See People v Straight, 430 Mich 418, 424 (1988). Although the length of time is a factor, the lack of capacity to manufacture is more important than the lack of time in which to contrive. See Id.

In People v Dunham, 220 Mich App 268 (1996), the defendant was convicted of first-degree criminal sexual conduct. The defendant argued that the trial court erred in admitting statements pursuant to MRE 803A that a child complainant made to a mediator. This Court held that the statements were spontaneous and without indication of manufacture because the complainant "made the statements in response to customary, open-ended questions asked of all children of divorcing parents." Dunham, 220 Mich App at 272.

However, in Straight, the Michigan Supreme Court reversed the criminal sexual conduct conviction where the lower court admitted the complainant's statements testified to by her parents. In that case, the complainant made the statements approximately one month after the alleged event, immediately following a medical exam and repeated questioning by her parents. The Court stated that it could not conclude that the statements were made as a result of the alleged assault or resulted from a combination of the medical examination and repeated questioning.

Here, the information alleged that the offenses occurred between May, 2006 and November, 2007. The "revelation allegedly occurred on January 10, 2009, more than a year later. Like in Straight, Jacqueline's alleged statement to Alyissa was revealed long after the alleged offenses occurred. Although witness Sarah Killips from Care House of Oakland County attempted to justify the delay, stating "the literature, her training and experience demonstrate that delayed disclosure is more common than not", (T3 76), Killips was not qualified as an expert, and her account of unidentified "literature" to support her position was clearly hearsay. She never attempted to explain why this complainant waited this long this particular case, and she did not justify the delay here.

Neither could the People satisfy the requirement that the evidence be "without indication of manufacture." In People v Petrella, 124 Mich App 745 (1983), this Court, in reference to how

questioning relates to the spontaneity analysis, stated the following:

> "Although the fact that a statement has been made in response to questioning does not in and of itself preclude the statement from being an excited utterance, it is a factor militating against admitting it." Petrella, 124 Mich App at 759-60.

Thus, because the events in the instant case have a strong indication of contrivance and manufacture, the testimony regarding the note inadmissible. MRE 803A 's requirement that the statement be "without indication of manufacture" precludes the introduction of a statement when there is time to contrive a story, or indication that the story was contrived.

As applied to the alleged statement made by Jacqueline to Alyissa on January 10, 2009, MRE 803A would preclude its admission because it was neither "spontaneous" nor was it made "immediately after the incident" or after a delay if that delay is "excusable." MRE 803A. In Petrella, this Court held that a complainant's statement to a witness forty minutes after an alleged rape was not spontaneous. In that case, the complainant called a friend thirty minutes after the alleged rape, and ten minutes later the friend arrived at her apartment where the complainant stated that she knew her assailant. At page 760, this Court stated:

> "The witness testified that the complainant was upset and crying where she arrived at the complainant's residence. However, we cannot really say that the statement was a spontaneous response to the event. The complainant composed herself enough in the half-hour period following the rape to make the phone call. The statement was not made until ten minutes after that phone call. We cannot conclude, based on this record, that the complainant was still within the grip of the event."

In the instant case over a year had passed, and the statement was made. In Petrella, the statement was held inadmissible under MRE 803(2). It cannot be said that the prejudice caused by the trial court was harmless. In People v Scobey, 153 Mich App 82, 86 (1986), an infant victim criminal sexual conduct case, this Court stated:

> "Concluding that admission of this hearsay evidence was error, we consider whether the error was harmless. Under People v Gee, the error cannot be considered harmless because, as in most criminal sexual assault cases, the testimony concerning the event was one-to-one, complainant versus defendant. While the testimony of the other witnesses corroborated and made more credible the testimony of defendant's daughter, . . . we cannot conclude beyond a reasonable doubt that, if the trial had been free of this error, not one juror would have voted to acquit defendant. Therefore, the error was not harmless." (footnotes omitted).

See also People v Lee, 177 Mich App 382 (1989), People v Gee, 406 Mich 279, 283 (1979) (stating that "corroborating testimony on either side could tip the scales.").

To deem the improper admission of such critical testimony harmless would defy logic. The prosecution's ability to win a conviction in the present case turned almost entirely upon its capacity to convince the jury that Jacqueline, who posed serious competency problems at the preliminary examination, (P1 11-38; M 3-9), was being truthful. The instant case was not unlike the typical one-on-one credibility contest. The hearsay evidence was a critical part of the prosecution's case and immeasurably bolstered the complainant's credibility.

When evaluating the testimony's prejudicial effect in light of other competent evidence, the error is only magnified. It is not unfair to characterize the totality of the prosecution's evidence against Appellant as marginal at best. The testimony of the complainant herself was contradictory. There was no medical evidence. Under all of the circumstances, it cannot be said that the error did not substantially effect the jury's decision, resulting in a manifest injustice. The hearsay statement was not harmless error. Appellant's conviction should be reversed and remanded for a new trial.

ARGUMENT II

THE TRIAL JUDGE DEPRIVED APPELLANT OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BY OVERRULING COUNSEL'S RELEVANCY OBJECTION, ALLOWING THE PROSECUTOR TO INTRODUCE HIGHLY PREJUDICIAL AND IRRELEVANT EVIDENCE FROM COMPLAINANT'S PEDIATRICIAN WHO TESTIFIED COMPLAINANT REPORTED SEXUAL ABUSE AND DIAGNOSED SEXUAL ABUSE DESPITE FINDING NO EVIDENCE OF SEXUAL ABUSE. IN THE ALTERNATIVE, APPELLANT WAS PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL, WHO FAILED TO PROPERLY OBJECT.

Issue Preservation and Standard of Review

The issue was preserved by counsel's objection that the testimony was irrelevant. (T2 171). This Court generally evaluates a trial court's decision regarding the relevance of evidence pursuant to an abuse of discretion standard of review. See e.g., People v Badour, 167 Mich App 186, 191 (1988). Because admission of the evidence deprived Appellant of his state and federal constitutional rights to a fair trial, this Court should use a de novo standard of review when assessing whether the evidence was improperly admitted. Sitz v Department of State Police, 443 Mich 744 (1993), Seals v Henry Ford Hospital, 123 Mich App 329 (1983). People v Vaughn, 447 Mich 217, 226 n.2 (1994) (error which might at first seem to be non-constitutional may have constitutional dimensions). Unpreserved constitutional error is reviewed for "plain error," People v Carines, 460 Mich 750, 764 (1999). Under this standard, the reviewing court should reverse if clear error affected substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings. Counsel's performance is reviewed de novo to determine whether it fell below an objective standard of reasonableness, and if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". Strickland v Washington, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); People v Mitchell, 454 Mich 145 (1997).

Discussion

The accused in a criminal trial possesses state and federal Constitutional rights to a fair trial. US Const Ams V, XIV; Mich Const 1963, art 1, §17. The fundamental purpose of a criminal trial is the fair assessment of the truth. People v Sorna, 88 Mich App 351, 358 (1979). In order to ensure

that the trial fulfills its purpose, the trial judge has a duty to control the proceedings and to limit the introduction of the evidence to relevant and material matters. MCL 768.29; People v Spencer, 130 Mich App 527, 539 (1983). Improper evidentiary rulings may deprive the accused of fundamental fairness and due process of law. Walker v Engle, 703 F2d 959, 962-963, 968-969 (CA 6, 1983). Trial courts must not permit this Constitutional protection to be overridden by zealous prosecutors. Id at 969. Therefore, courts must ensure that the state does not obtain convictions by methods which "offend a sense of justice". Rochin v California, 342 US 165, 173; 72 S Ct 205; 96 L Ed 183 (1952).

A. APPELLANT WAS DENIED A FAIR TRIAL BY TESTIMONY FROM COMPLAINANT'S PEDIATRICIAN THAT COMPLAINANT REPORTED SEXUAL ABUSE AND HER DIAGNOSIS OF SEXUAL ABUSE ABSENT ANY EVIDENCE OF SEXUAL ABUSE

Relevant evidence is defined as 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. MRE 401; People v Lewis, 97 Mich App 359, 367 (1980). In determining whether evidence is relevant, a court must answer two questions. First, the Court must determine whether the evidence was "material", or, in other words, was the evidence "of consequence to the determination of the action" or "in issue". People v Mills, 450 Mich 61, 66-68 (1995). Secondly, the Court must assess the "probative force" of the evidence, or whether the evidence makes a fact of consequence more or less probable than it would be without the evidence. Mills, supra at 67. Evidence which is not relevant is not admissible. MRE 402.

Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Mills, supra at 75. "Unfair prejudice" is defined as "an undue tendency to move the [trier of fact] to decide on an improper basis, commonly, though not always, an emotional one." People v Vasher, 449 Mich 494, 501 (1995). Evidence presents the danger of unfair prejudice when it threatens the fundamental goals of MRE 403: accuracy and fairness. People v Vasher, supra. "Unfair prejudice" denotes a situation in which there is a danger that "marginally probative evidence will be given undue or pre-emptive

weight by the jury." Mills, 450 Mich at 75. The idea of unfairness "embodies the further proposition that it would be inequitable to allow the proponent of the evidence to use it." Mills, supra at 76.

In the present case, the People presented Carrie Ricci, Jacqueline's pediatrician. (T2 164). She examined Jacqueline on January 12, 2009 for assessment of possible sexual abuse. (T2 165-166). As Dr. Ricci attempted to recount the complainant's report of he allegations against Appellant, (T2 168-169), counsel objected and the jury was excused. (T2 169). Counsel first noted that the witness was crying, and that the proceedings should recess until such time as an expert witness is able to compose herself. The court replied that it did not notice the outburst. The witness acknowledged "Yeah, I got choked up and had a couple of tears". The court instructed her to "Try not to do that, okay?" (T2 170). The People noted that Ricci was not presented as an expert. Counsel then questioned the relevance of such testimony and Ricci confirmed that she is a general pediatrician and a specialist in infectious diseaseses, not a child abuse specialist. (T2 171). When the jury returned, Ricci reported that Jacqueline told her that her dad had woken her up from sleep, taken her downstairs, and had her suck on his penis until yellow stuff came out. She would spit it out and return to bed. (T2 169, 175-176). A physical examination was normal. (T2 177). All tests for sexually transmitted diseases were negative. (T2 179-182, 186). She diagnosed child sexual abuse, (T2 192), but found no evidence of sexual abuse. (T2 193-195).

While the prosecutor was free to have Ricci introduce evidence to explain that Jacqueline's failure to contract the herpes virus does not equate with a lack of contact with a herpes virus carrier, it was not an excuse to repeat Jacqueline's allegation that she committed fellatio on Appellant. The statement had no tendency to make the determination of criminal sexual conduct more probable or less probable than it would be without the statement. It was not material to the issue of Jacqueline's lack of herpes and its probative value was substantially outweighed by the danger of unfair prejudice.

The statement was also hearsay. MRE 803(4) provides an exception to the hearsay rule for:

> "Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment."

The hearsay exception described in MRE 803(4) is based on the assumption that a patient will give a doctor reliable information about his condition so that the doctor will accurately diagnose and treat the condition, and that false claims can usually be negated by medical examination and testing. People v LaLone, 432 Mich 103, 109-110 (1989); McCormick on Evidence (3d ed), § 253, p 753.

Traditionally, to insure reliability, there is a two-pronged test for admissibility of hearsay evidence under this exception. First, the declarant's motive in making this statement must have been consistent with the purposes of the rule, i.e., the promotion of treatment. Second, the content of the statement must have been of the type reasonably relied upon by a physician in diagnosis or treatment. People v LaLone, supra, at 112; People v Hackney, 183 Mich App 516, 527 (1990). See also United States v Iron Shell, 633 F2d 77, 84 (CA 8, 1980). The first part of the test is not met in this case and there are not sufficient indicia of reliability generally to justify the admission of the child's statement. It cannot be said that Jacqueline's statement was made because she was seeking appropriate medical treatment. A child of seven simply would not recognize the importance of truthfully and accurately describing the events nor appreciate the relationship between the event, her account, and a possible need for the correct treatment. Jacqueline's "motive" for seeing the doctor was that her mother took her there (at the direction of the police) and her "motive" for the statement was simply to provide an answer to the question, the same motive she would have for answering anyone's questions. The child cannot reasonably be assumed to have had any greater compunction to tell the truth to Dr. Ricci than to any other stranger.

Because complainant's statement to Ricci was not made immediately after the incident and the statement was not shown to be spontaneous and without indication of manufacture, it was also inadmissible under MRE 803A. See Argument I, supra.

B. ALTHOUGH DEFENSE TRIAL COUNSEL OBJECTED TO COMPLAINANT'S STATEMENT ON RELEVANCY GROUNDS, HE WAS CONSTITUTIONALLY INEFFECTIVE IN FAILING TO OBJECT TO IT ON HEARSAY GROUNDS. HE WAS ALSO INEFFECTIVE TO THE EXTENT THAT HE FAILED TO OBJECT TO DR. RICCI'S OPINION TESTIMONY OF SEXUAL ABUSE.

Because trial counsel only objected on relevancy grounds, the hearsay issue now being argued

on appeal was not preserved below. See People v Kimble, 470 Mich 305, 312 (2004) (attorney failed to raise precise issue at sentencing). Defense counsel's failure to object to Ricci's recitation of complainant's statement on hearsay grounds constituted ineffective assistance of counsel.

A knowledge of the law applicable to the defendant's case is of course essential to a rendering of effective assistance. People v Carrick, 220 Mich 17, 22 (1996). Cf, People v Ullah, 216 Mich App 669, 685-686 (1996); People v Gridiron (On Reh), 190 Mich App 366, 370 (1991). Any attorney doing trial work has to be familiar with the operation of the hearsay rule, and the violations here were blatant. Failure to object to hearsay testimony has been the basis for findings of ineffectiveness. See People v White, 142 Mich App 581 (1985), overruled on other grounds People v Pickens, 446 Mich 298 (1994); People v Fenner, 136 Mich App 45 (1984).

Here, the statement was (presumably) brought in under MRE 704, which provides:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

However, in criminal cases, the Due Process Clause of US Const, Am XIV prohibits introduction of opinion testimony as to a defendant's guilt. For example, in Cooper v Sowders, 837 F2d 284 (CA 6, 1988), the Sixth Circuit granted Federal habeas relief in a murder case where a detective testified, over objection, that in the detective's opinion the evidence found linked only the defendant to the crime.

Similarly, in People v Bragdon, 142 Mich App 197 (1985), the Court of Appeals remanded for a new trial where the prosecutor had asked the defendant "so you're guilty of the crime?":

> Absent a valid plea, the issue of an accused's guilt or innocence is a question for the trier of fact. As with matters of credibility, it is clear that a witness cannot express an opinion on the defendant's guilt or innocence of the charged offense. See, People v Drossart, 99 Mich App 66; 297 NW2d 863 (1980); People v Parks, 57 Mich App 738; 226 NW2d 710 (1975) [People v Bragdon, supra, p 199].

See also, People v Peterson, 450 Mich 349, 352 (1995) (re-affirming holding in People v Beckley, 434 Mich 691 (1990), that an expert in a child sexual abuse case may not testify that the defendant is guilty); People v Horton, unpublished opinion per curiam of the Court of Appeals, decided August

5, 1997 (Docket No. 193854) (granting new trial in breaking and entering case where police chief testified that, in his opinion, defendant and an accomplice were the ones that committed the offense).

Applying the above principles to the present case, pediatrician Carrie Ricci stated that she examined Jacqueline on January 12, 2009 for assessment of possible sexual abuse. (T2 165-166). According to Ricci, Jacqueline told her that her dad had woken her up from sleep, taken her downstairs, and had her suck on his penis until yellow stuff came out. She would spit it out and return to bed. (T2 169, 175-176). A physical examination was normal. (T2 177). All tests for sexually transmitted diseases were negative. (T2 179-182, 186). She diagnosed child sexual abuse, (T2 192), but found no evidence of sexual abuse. (T2 193-195). According to Ricci, the diagnosis was "based on the history from Jacqueline and her mother". (T2 193). Later, she elaborated:

Q Let me ask you something. When you took the witness stand you began to cry.

A. Un-hum.

Q. Is it that you felt sympathy because of the story that made you write that diagnosis?

A. No, I did not write the diagnosis because I felt sympathy; I wrote the diagnosis because I believe that Jacqueline was abused.

Q. You believe -

A. Yes.

Q. What did you rely on, other than your belief?

A. I relied on the testimony from Jacqueline and her mother.

Q. And based upon what they told you, with no physical evidence, you wrote that she had been abused?

A. Correct. (T2 195).

Given the substantial credibility questions in this case, there is a real likelihood that defense trial counsel's failure to object to the improper opinion testimony affected the outcome of the trial. Due Process requires a new trial. Const 1963, are 1, §§ 17, 20; US Const, Am XIV.

C. THE INTRODUCTION OF THIS IRRELEVANT AND INADMISSIBLE PREJUDICIAL EVIDENCE DEPRIVED APPELLANT OF A FAIR TRIAL.

Even if the Court had cautioned the jurors to disregard Dr. Ricci's testimony, such instructions would have been insufficient to remove the taint, given the highly prejudicial quality of the remarks, especially given their source, a physician specializing in pediatrics. Moreover, as our United States Supreme Court stated over 60 years ago, "[t]he naïve assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction." Krulewitch v United States, 336 US 440, 453; 103 S Ct 916; 74 L Ed 2d 748 (1948). Indeed, you cannot "unring" a bell. The testimony complained of here was improper and unhelpful, and served only to unfairly bolster the prosecutions' case while at the same time "invading the province of the jury." People v Oliver, 170 Mich App 38, 49 (1987). The harmless error standard for preserved non-constitutional errors is whether it is more probable than not that the error was outcome determinative. People v Lukity, 460 Mich 484, 496 (1999). Appellant asserts that the error was not harmless. The proper remedy is reversal and retrial.

ARGUMENT III

THE PROSECUTOR ENGAGED IN MISCONDUCT WHEN SHE BOLSTERED THE TESTIMONY OF THE COMPLAINANT BY ELICITING TESTIMONY FROM ANOTHER WITNESS THAT "DELAYED DISCLOSURE IS MORE COMMON THAN NOT" AND THE COURT ABUSED IT'S DISCRETION BY PERMITTING THE LAY WITNESS TO EXPRESS AN EXPERT OPINION.

Issue Preservation and Standard of Review

The issue was preserved by objection at trial. (T3 76). This Court has said that prosecutorial misconduct is a mixed question of fact and law. People v Tracey, 221 Mich App 321, 323-234 (1997). It has also said that because prosecutorial misconduct is constitutional in nature, review is de novo. People v Abraham, 256 Mich App 265, 272 (2003). A trial court's decision to admit evidence is generally reviewed for an abuse of discretion. People v Starr, 457 Mich. 490, 494 (1998),

Discussion

At trial, the overriding defense theme was that the complainant's mother used her child to fabricate a criminal complaint against Appellant after Appellant moved out of the marital home. (See generally T2 12-14; T3 162-169). The People presented Sarah Killips, who performed a forensic interview of the complainant at Care House of Oakland County. (T3 68-70). Killips was not qualified as an expert witness in that or any other field. Outside the presence of the jury, the parameters of Killips' testimony was delineated. Specifically, Killips was to describe to the jury the forensic interview method, but to vouch for the complainant. Specifically, the court instructed that Killips was not to testify about her questions to the complainant or the statements made by the complainant or the complainant's mother. (T3 59-67). When the jury returned, Killips stated that on January 14, 2009 she interviewed the complainant alone, using an approved forensic interview protocol, (T3 70-72), including a drawing of a naked child. (T3 77-78). In response to questioning from the prosecutor, and over the objection of defense counsel, Killips was permitted to testify that "the literature, her training and experience demonstrate that delayed disclosure is more common than not". (T3 76). She also explained how memory encodes relevant information. (T3 77)..

A. KILLIPS' TESTIMONY BOLSTERED THE COMPLAINANT'S TESTIMONY.

It is the duty of the prosecutor to see that a defendant receives a fair trial. People v Bahoda, 448 Mich 261, 267 (1995). In determining whether the prosecution engaged in misconduct warranting reversal, appellate courts must consider whether the misconduct was of "a particularly . . .persuasive kind . . . that rose to the level of denying a defendant of a fair trial" under the due process guarantees of US Const, Ams V, XIV; Const 1963, art 1, § 17. Id. A prosecutor engages in misconduct when he or she vouches for the credibility of prosecution witnesses and suggests special knowledge regarding those witnesses' truthfulness. Id. at 276.

Michigan law is replete with cases where this Court reversed a defendant's conviction because the prosecution vouched for the credibility of one or more of its witnesses. In People v Smith, 158 Mich App 220 (1987), this Court reversed the defendant's conviction because the prosecutor argued that his office and the police did a very careful job of interviewing witnesses to make sure the wrong person does not get charged, had done a very careful job in the particular case, and got the right person. In People v Kulick, 209 Mich App 258, remanded 449 Mich 851 (1995), this Court found that the defendant was denied a fair trial when the prosecution repeatedly vouched for the credibility of its witnesses, and the errors were not cured by cautionary instruction. In People v Erb, 48 Mich App 622 (1973), this Court said that prosecutorial vouching is tantamount to presenting unsworn testimony, and a cautionary instruction may not be sufficient to cure the error, and it reversed where the prosecutor said that he would never call a witness if he believed the witness was lying. In People v Knapp, 244 Mich App 361 (2001), this Court said that the prosecutor's characterization of the complainant's testimony as honest and straightforward constituted improper vouching for the complainant's credibility.

These cases are very much like the one at bar, where the prosecutor used questioning of former Care House of Oakland County forensic interviewer Sarah Killips to vouch for the truth and credibility of complainant Jacqueline Rogers, the prosecution's most important witness. The testimony of Killips was essential to the prosecution. A cautionary instruction could not have cured the unfair impression planted in the minds of the jurors that complainant's behavior was normal.

B. KILLIPS' TESTIMONY EXPRESSED IMPROPER OPINION TESTIMONY.

Under MRE 702 expert testimony is permitted if "the court determines that recognized 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." In its exercise of discretion, the trial court must preliminarily determine that the witness qualifies as an expert in the subject matter upon which he intends to testify. Moreover, the expert's opinion testimony must be limited to his area of expertise. People v Zimmerman, 385 Mich 417 (1971), O'Dowd v Linehan, 385 Mich 491 (1971). Thus, a trial court abuses its discretion by allowing a witness to testify to matters beyond his or her area of expertise. See People v Jones, 95 Mich App 390, 391 395 (1980) (abuse of discretion to allow police officer to testify as an expert on powder burns). See also People v Hubbard, 209 Mich App 234 (1995) (error to allow police officer recognized as an expert on drug trafficking to also testify concerning a "profile" of drug couriers).

In the present case, while Killlips was not formally presented to the court as an expert, it is clear that her testimony regarding the usual delay to be expected from a complainant in a rape case clearly was expert testimony. She was called upon to explain only the forensic interview method. The question, therefore is whether a proper foundation was laid for the admission of this evidence, and Sarah Killips's qualifications to give this opinion. In an analogous situation, Michigan Courts have found error in the admission of medical testimony which was beyond the area of expertise and gave unwarranted reinforcement of the complaining witnesses' testimony. See People v McGillen #2, 392 Mich 278, 281-286 (1974); People v Izzo, 90 Mich App 727, 729-730 (1979).

Sarah Killips related no special expertise in the field of psychology of sexual assault complainants. In fact, the alleged statistic she cited was merely a hearsay recitation of unspecified literature with which she claimed to be familiar. She did not profess any specialized knowledge about the behavior of sexual assault victims, she did not testify as to any special training she may have received or anything which would indicate whether her experience regarding delays in reporting

sexual assault was normal or aberrant. Conducting forensic interviews of alleged sexual assault victims, alone, does not constitute expertise in the psychology of sexual assault victimization.

Assuming, arguendo, that Sarah Killips qualified as an expert, her opinion was still objectionable because it was based on data which was overly broad, and which could easily lead to a misleading result. She had not investigated sexual assault cases, she had investigated complaints of sexual assault. Many of the complaints may not have been valid. If this is so, any conclusion about whether a delay in reporting a sexual assault was normal or not could not be drawn. The conclusion which was sought -- that a delay in reporting rape is normal -- relies on the premise that all complaints are legitimate.

Second, even assuming all complaints of rape are legitimate, her "literature, training and experience" was too broad to be of logical use to the jury. How many of those complaints involved children? How many involved claims of incest? How many involved assaults upon strangers? How many involved date rape? What kind of delay, if any, is to be expected in each of these categories?

Where the data from which the opinion is drawn is too broad to support the opinion, the testimony far from helping the jury, may actually mislead it. The Supreme Court in People v Smith, 425 Mich 98, 105 (1986) held that the critical enquiry under MRE 702 is whether the testimony of an expert will aid the factfinder in making the ultimate decision in the case. The testimony at issue here, rather than aiding the factfinder in reaching a decision based on the evidence, prevented the factfinder from accurately gauging the evidence before it.

Further support for the contention that Killips was not properly qualified to testify as an expert in the behavior of sexual assault victims can be found from an examination of case law: in other cases where delay in reporting was at issue, the prosecution has sought to rebut the presumption that the delay bears on the credibility of the complainant through the testimony of a psychologist or psychiatrist qualified in the field of rape trauma syndrome, or in the profile of sexually abused children, or in battered spouse syndrome. People v Draper, 150 Mich App 481, 487-488 (1986); People v Skinner, 153 Mich App 815, 822-23 (1986); People v Beckley, 434 Mich

691, 711 (1990); People v Wilson, 194 Mich App 599 (1992). An examination of what has been considered appropriate expert testimony to explain a delay in reporting shows how far the "expert" testimony at issue here fell from that standard.

The testimony of Sarah Killips on the question of what is a usual delay in reporting a sexual assault was improperly admitted. By admitting expert testimony without a proper qualification of the expert or a proper foundation for the introduction of the testimony, the trial court abused its discretion. Further, the admission of this testimony was not harmless error. The testimony that delay was normal increased the credibility of the complainant by implying that she had been acting in conformity with behavior to be expected from sexual assault victims when she failed to immediately report the charged offense. Because the error complained of was not harmless beyond a reasonable doubt, reversal of Appellant's conviction is mandated.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant Johnny Allen Harris prays this Honorable Court grant him leave to appeal. Further that reverse his conviction and remand his cause to the Oakland Circuit Court for a new trial, together with such other and further relief to which he may be entitled.

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Dated: August 24, 2011