

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Docket No. 145833

JOHNNY ALLEN HARRIS,

Defendant-Appellant.

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

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

CERTIFICATION OF SERVICE

145833 /
DFAT's Suppl

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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 QUESTION PRESENTED

WAS APPELLANT PREJUDICED BY THE ADMISSION OF DR. CARRIE RICCI'S DIAGNOSIS THAT THE COMPLAINANT WAS THE VICTIM OF CHILD SEXUAL ABUSE AND ENTITLED TO A NEW TRIAL.

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".

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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 The Court of Appeals affirmed his conviction in an unpublished per curiam opinion issued on August 2, 2011.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 before this Honorable Court. 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 its 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. This supplemental brief is filed in response to this Court's December 14, 2012 Order .

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant-Appellant Johnny Allen Harris (hereinafter "Appellant") incorporates by reference the Statement of Material Proceedings and Facts set forth in his September 13, 2012 Application for Leave to Appeal as though fully set forth herein.

ARGUMENT

APPELLANT WAS PREJUDICED BY THE ADMISSION OF DR. CARRIE RICCI'S DIAGNOSIS THAT THE COMPLAINANT WAS THE VICTIM OF CHILD SEXUAL ABUSE AND ENTITLED TO A NEW TRIAL.

Standard of Review

The issue was preserved by objection. (T2 171). A trial court's decision regarding the relevance of evidence is generally reviewed for abuse of discretion. See e.g., People v Badour, 167 Mich App 186, 191; 421 NW2d 624 (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; 506 NW2d 209 (1993), Seals v Henry Ford Hospital, 123 Mich App 329; 333 NW2d 272 (1983). People v Vaughn, 447 Mich 217, 226 n.2; 524 NW2d 217 (1994) (error which might at first seem to be non-constitutional may have constitutional dimensions).

Discussion

Carrie Ricci is a pediatrician. (T2 164)¹. 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).

Dr. Ricci's diagnosis of child asexual abuse was highly improper. In general, witnesses may

¹ "T2" refers to transcripts of the November 17, 2009 jury trial. Numbers are pages therein.

not serve as “human lie detectors,” and so are not free to comment on the truthfulness of other witnesses, or worse, to invade the jury’s province by stating their opinions of the merits of the charges at issue. People v Izzo, 90 Mich App 727, 730 (1979); see People v Buckey, 424 Mich 1, 17 (1985); People v Dobek, 274 Mich App 58, 70-71 (2007). It is for the jury, not other witnesses, to determine witness credibility. Even an expert medical witness in a child sex-offense prosecution has a particular obligation to steer clear of stating an opinion that sexual abuse occurred or vouching for the complainant’s credibility. People v Peterson, 450 Mich. 349, 352 (1995), mod 450 Mich 1212 (1995); Dobek, supra. The proper testimony of such a witness is limited to two areas: (i) testimony regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a complainant’s specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (ii) testimony regarding the consistencies between the behavior of the particular victim and other victims of child sexual abuse, to rebut an attack on the complainant’s credibility. Peterson, supra, 450 Mich at 352. An expert may not state an opinion that the charged abuse occurred or that the defendant is guilty, and she may not vouch for the complainant’s veracity. Id. But Dr. Ricci, a recent pediatrician, was not even qualified as an expert.

With the prosecutor’s encouragement and the court’s endorsement, (T2 171), Dr. Ricci did exactly what Peterson forbids: she vouched for the complainant’s credibility, and in the process reported that the charged abuse occurred and that Appellant was guilty. Dr. Ricci found no evidence of sexual abuse and her diagnosis had no bearing on the issues at trial except to signal her acceptance of the complainant’s allegations. The message was clear: she thought the allegations truthful, and so should the jury. Appellant was prejudiced by the admission of Dr. Ricci’s lay opinion testimony when the jury assigned unwarranted weight to her unqualified testimony masking as expertise.

In Michigan, opinion testimony of an expert witness is admissible under MRE 702 if it will assist the jury in its understanding of the evidence or the factual issues present in the case, and the expert has sufficient qualifications to allow the expert's opinion to aid the trier of fact in its determination of the truth. People v Smith, 425 Mich 98, 106; 387 NW2d 814 (1986). Moreover, under MRE 701, a lay witness may also testify as to his opinion on matters that are related to his observations and findings and are not "overly dependant upon scientific, technical or other specialized knowledge." People v Oliver, 170 Mich App 38, 50; 427 NW2d 898 (1988), see also People v McLaughlin, 258 Mich App 635, 657-659; 672 NW2d 860 (2003).

People v Smith held that a physician's opinion that the complainant had been sexually assaulted was based, not on any findings within the realm of his medical capabilities or expertise as an obstetrician-gynecologist but rather on the emotional state of and the history given by the complainant, and therefore the physician's opinion testimony was inadmissible as it was an assessment of the victim's credibility. Id. at 112. In the present matter, the prosecution offered no foundation for Dr. Ricci's improper opinion testimony other than her status as a pediatrician. Here, as in Smith, the opinion testimony was in effect an assessment of the victim's credibility. Id. at 113. Smith further opined that, "to the extent the doctor's opinion was based on the complainant's emotional state, the record does not support a finding that the [doctor] possessed specialized knowledge which would enable him to draw inferences from that evidence." Id. Here, no proper foundation was provided for Dr. Ricci to provide opinion testimony. There is no showing that she possessed any specialized knowledge upon which to base her diagnosis of child sexual abuse.

Additionally, the Court in Co-Jo Inc. v Strand, 226 Mich App 108, 116; 572 NW 2d 251 (1997), stated that "lay opinion" testimony is permitted where it is rationally based on the witness'


perception of the incident, and where it is helpful to a clear understanding of his testimony, or relevant to the determination of a fact in issue. At bar, Dr. Ricci testified she found no evidence of sexual abuse. Thus, her opinion testimony is not rationally based on her perceptions.

In summary, the lay opinion testimony elicited from Dr. Ricci clearly denied Appellant a fair trial, since such testimony was an assessment of complainant's credibility, was not "rationally" based on her perceptions of the incident, but centered solely on the fact that complainant said it was so.

The trial was a pure credibility contest, and the case was close. Any mistake might have tipped the balance. Not only was the complainant's account uncorroborated, but despite Dr. Ricci's claim to the contrary, as well as the trial prosecutor's reliance on that claim in her summation, it is improbable that the jury would have returned a verdict of guilty. Therefore, Appellant's conviction should be reversed and his cause remanded to the Oakland Circuit Court for a new trial.

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: January 16, 2013

STATE OF MICHIGAN
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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Docket No. 145833

JOHNNY ALLEN HARRIS,

Defendant-Appellant.

_____/

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

CERTIFICATION OF SERVICE

Pursuant to MCR 2.104(A)(2)(d), Jonathan B.D. Simon certifies that he is the attorney for Johnny Allen Harris, Defendant-Appellant in the above captioned cause. Further, that on the 16th day of January, 2013 he served a copy of Defendant-Appellant's SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL upon the following:

Clerk of the Court
Oakland Circuit Court
1200 North Telegraph Rd.
Pontiac, Michigan 48341

Clerk of the Court
Michigan Court of Appeals
925 W. Ottawa
Lansing, Michigan 48909

Hon. Jessica R. Cooper
Oakland County Prosecutor
1200 North Telegraph Rd.
Pontiac, Michigan 48341

by placing the same in an envelope plainly addressed as above with appropriate postage affixed thereon and depositing the same in a United States postal receptacle.



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January 16, 2013


Clerk of the Court
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Re: People v Johnny Allen Harris
Oakland Circuit Court No. 09-225570-FC
Court of Appeals No. 296631
Supreme Court No. 145833

Dear Clerk:

Pursuant to the December 14, 2012 Order entered in the above referenced matter, please find enclosed Defendant-Appellant's Supplemental Brief in Support of Application for Leave to Appeal and Certification of Service. Kindly accept the same for filing in your usual manner.

Very truly yours,


Jonathan B.D. Simon

JBDS:bms
encl.

cc Michigan Court of Appeals
Oakland County Clerk
Hon. Jessica R. Cooper, P/A

