STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

-vs-

JOHNNY ALLEN HARRIS,

Defendant/Appellant.

Supreme Court
No. 145833

Court of Appeals
No. 296631

Circuit Court
No. 2009-225570-FC

145833

APPELLEE'S ANSWER TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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MICHIGAN SUPREME COURT

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RESPONSE TO APPELLANT'S JURISDICTIONAL STATEMENT

The People concede that Defendant's jurisdictional statement is accurate. Following a jury trial, Defendant was convicted of three counts of Criminal Sexual Assault – Third Degree in the Oakland County Circuit Court. On January 11, 2010, he was sentenced to 17-50 years in prison. On February 22, 2010, Defendant filed a Claim of Appeal in the Michigan Court of Appeals (Docket No. 296631). His conviction was affirmed on August 2, 2011. (See People's Appendix A). On April 18, 2012, this Court REVERSED in part the judgment of the Court of Appeals, and REMANDED the matter to the Court of Appeals for determination on "whether the defendant was prejudiced by the admission of the doctor's diagnosis and whether the defendant is entitled to a new trial." On July 19, 2012, the Court of Appeals again affirmed Defendant's conviction, finding that Defendant was not prejudiced by admission of the testimony because defense counsel "emphasized the undisputed lack of any physical evidence of sexual abuse" and that "the properly admitted evidence at trial would allow a rational jury to find Harris guilty beyond a reasonable doubt." (See People's Appendix B, 7). On December 14, 2012, this Court directed the Clerk to schedule oral argument on whether to grant Defendant's application or take other action. MCR 7.302(H)(1). This Court ordered the parties to address "whether the defendant was prejudiced by the admission of Dr. Carrie Ricci's diagnosis that the complainant was the victim of child sexual abuse, and whether the defendant is entitled to a new trial." The parties were given 42 days to file supplemental briefs.

COUNTER-STATEMENT OF QUESTION PRESENTED

I. WHETHER DEFENDANT WAS PREJUDICED BY THE ADMISSION OF DR. CARRIE RICCI'S DIAGNOSIS THAT THE COMPLAINANT WAS THE VICTIM OF CHILD SEXUAL ABUSE WHERE DEFENSE COUNSEL STRATEGICALLY ARGUED THE LACK OF PHYSICAL EVIDENCE TO HIS ADVANTAGE?

Defendant contends the answer is, "Yes."

The People contend the answer is, "No."

The Court of Appeals answered, "No."

COUNTER-STATEMENT OF FACTS

Defendant, Johnny Allen Harris (hereinafter Defendant), was charged with three counts of Criminal Sexual Conduct, Third Degree, contrary to MCL 750.520b. The victim was his five-year-old step-daughter, Jacqueline Rogers. Following a three day jury trial in the Oakland County Circuit Court, the Honorable John J. McDonald, presiding, Defendant was convicted as charged. On January 11, 2010, Judge McDonald sentenced Defendant to serve 17 to 50 years in the Michigan Department of Corrections. Defendant has appealed his conviction.

At trial, Jacqueline Rogers testified that she is seven years old and her birthday is June 8th. She testified that she knows the difference between a truth and a lie. (TII, 18)[1]. Jacqueline is in the second grade and she likes her teacher, Mrs. Mazur. (TII, 19). She has three brothers and two sisters, named Matthew, Max, Ralph, Charlette and Alyissa. (TII, 20). When asked what city she lives in, Jacqueline responded, "Michigan." (TII, 20).

Jacqueline knows Defendant Johnny Harris because he used to live in her house, which is the same house that she stills lives in. (TII, 21, 23). She testified that Defendant lived in her house for "a long time." (TII, 21). Jacqueline identified Defendant in court and testified that she called him "dad" or "Johnny". (TII, 22).

Jacqueline shares a bedroom with her older sister, Alyissa, but they have their own beds. (TII, 23). She identified pictures of her bedroom. (TII, 25). Jacqueline would sometimes sleep in her sister Charlette's room when Defendant lived in the home. (TII, 26). She slept there because she was scared, but she could not remember why she was scared. (TII, 26).

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[1] Trial Transcript dated November 16, 2009 [TI]
Trial Transcript dated November 17, 2009 [TII]
Trial Transcript dated November 19, 2009 [TIII]

Jacqueline testified that when Defendant was living in the home, he did something to her that she did not like. (TII, 27). Defendant told Jacqueline to "suck his penis." (TII, 27). When it happened, Defendant would walk her into the basement. It usually happened when she was in her bedroom sleeping, and he would shake her side to side to wake her up. (TII, 28). Jacqueline testified that Alyissa would usually be in her bed sleeping when Defendant would come to get her. (TII, 29). They would go into the basement and that is when he told Jacqueline to "suck his penis." (TII, 29). To do what he told her to do, she would use her hand and mouth. (TII, 29-30).

During the incident, Defendant was on the couch and the victim was on her knees in front of him. (TII, 30). She was facing Defendant when it happened. (TII, 30). The victim described and demonstrated her hand action, which the assistant prosecutor clarified for the record to reflect that "the victim has moved her hands – she, in fact, put it together, ah, her fingers touching her thumb and moved her hand up and down." (TII, 31). Her hands were on his penis when "it" was happening. (TII, 31-32).

Defendant did not have his pants on when this happened. Jacqueline indicated that his pants were "a little bit off." (TII, 32). She indicated and demonstrated that Defendant's pants were in the mid-thigh area. (TII, 33). Defendant pulled his pants off and he was not wearing underwear. (TII, 34).

Jacqueline identified pictures of the basement and the couch where the sexual assaults occurred. (TII, 34-35). There are three couches in the basement and the incidents happened on two of them. (TII, 36). Jacqueline testified that Defendant told her to suck his penis six times in the basement. (TII, 37). The incidents also happened in the office, the dining room, the living room and in Charlette's room. (TII, 38).

After sucking Defendant's penis, Defendant would tell Jacqueline to go get water. (TII, 40). Before she would get water, Jacqueline would "spit yellow stuff out". (TII, 40). The "yellow stuff" came from Defendant's penis and she spit it out because Defendant told her to. (TII, 40). She spit it into a sink in the basement. (TII, 41). After she got some water from upstairs, she would go back to bed. (TII, 42).

When Defendant told Jacqueline to suck his penis and yellow stuff would come out, Jacqueline's mom was usually sleeping or at work. (TII, 42). Alyissa was sometimes in Charlette's room with Charlette. (TII, 42). Her brothers were in the living room. (TII, 42-43). Matthew's bedroom was in the basement; they also had an office. (TII, 43). Jacqueline testified that there was a couch in the office. (TII, 46).

Jacqueline testified that she was in the same position in the office as she was in the basement when the assault occurred. (TII, 47). It happened one time in the office when the boys were watching television in the living room, and Alyissa and Charlette were watching television in Charlette's room. Defendant told Jacqueline to suck his penis. (TII, 47). Yellow stuff came out of Defendant's penis just like it did on the couch in the basement. (TII, 48). It went in her mouth and she spit it out in the sink in the basement. (TII, 49).

Defendant also told Jacqueline to suck his penis one time in the dining room and once in Charlette's room when she was at work. (TII, 50, 53). It happened the same way as the other times where Defendant told Jacqueline to suck his penis; she used her mouth and her hands. (TII, 53). When it happened in Charlette's room, Jacqueline was on her knees on the bed and Defendant was standing. (TII, 55). During the assault in the dining room, Defendant was sitting and Jacqueline was on her knees on the floor. (TII, 56).

Jacqueline testified that she was four and five when the assaults happened. (TII, 56). After the assaults, Defendant would tell Jacqueline to go back to bed when she was done with the water. (TII, 57). Defendant also told Jacqueline that if she told she would get in trouble. (TII, 57). This made Jacqueline feel nervous. (TII, 57-58).

After Defendant stopped living with her, she told her sister Alyissa about what happened by whispering it in Alyissa's ear. (TII, 58). Max was also in the kitchen when she told Alyissa. (TII, 59). Prior to disclosing the abuse to Alyissa, she was in the kitchen with Alyissa and Max and they were asking her why she kept going downstairs with Defendant. (TII, 71). Later, Jacqueline also told Charlette, and Jacqueline drew a picture showing Defendant on the couch and her on the floor. (TII, 60). When Jacqueline was drawing the pictures, it was only her and Charlette talking. (TII, 64). Her mother was in her room watching television. (TII, 64).

Jacqueline testified that she told her mom after she was finished speaking with Alyissa and Charlette because Alyissa told her to tell her mom. (TII, 64). After she told her mom, they went to the police department. (TII, 65). She also talked to Sarah at Care House and showed her what parts of Defendant's body she was talking about that touched her mouth and hands. (TII, 65). Defendant told Jacqueline to move her hand up and down on his "nuts", so she did. (TII, 68). According to Jacqueline, Alyissa never woke up when she came back to the bedroom. (TII, 69). The incidents in the basement took place after the basement was re-done. (TII, 70).

Jacqueline testified that she told the doctor that Johnny told her to suck his penis. (TII, 72). She talked to her mom and Charlette but denied that they told her to say that Defendant put his penis in her mouth. (TI, 72-73). Jacqueline testified that her mother told her to say that it happened six times and that she learned the word "penis" from her mom. (TII, 81, 83). Jacqueline testified that the stuff with "Johnny" really did happen. (TII, 87).

Alyissa Moore testified that she is twelve years old and in the 7th grade. (TII, 100). Her nickname for her sister Jacqueline is Lulu. (TII, 101). Alyissa identified Defendant and testified that he used to live with them and was married to her mother. (TII, 105). Alyissa called Defendant "Johnny". (TII, 107).

Alyissa recalled being in the kitchen with Max and Jacqueline on approximately January 10, 2009. (TII, 107). Her mother was in her room and Charlette was in her room watching television. (TII, 107-108). Alyissa was cleaning the kitchen with Jacqueline and Max when Jacqueline whispered in Alyissa's ear that Johnny told her to "suck his private". (TII, 108). When Charlettte came downstairs, Alyissa and Max told her what Jacqueline had said because Alyissa thought it was a serious issue. (TII, 109). Jacqueline had "a sad face" when she told Alyissa what had happened. (TII, 110).

After Charlette found out, she took Jacqueline upstairs. (TII, 112). After she and Max were done cleaning the kitchen, they also went upstairs. (TII, 112). Charlette had Jacqueline draw her some pictures of what happened. (TII, 112-113). Alyissa did not tell her mother because she was nervous and Charlette had indicated that she was going to tell. (TII, 114). Alyissa testified that "Charlette was trying to – she was trying to tell her to get the full story instead of just a little piece of it." (TII, 114).

Eventually, because Charlette had to go to work, Matthew told their mother about what had happened the next day. (TII, 116). After her mother found out, she called Jacqueline and Alyissa into the house. (TII, 116-117). Her mom wanted to know why nobody told her right away and, according to Alyissa, their mom was sad. (TII, 117, 119). Alyissa's mom reported what happened to the police and then she took Jacqueline to the hospital but not on that day. (TII, 120).

Alyissa testified that she remembered Johnny coming into the room when she was sleeping. (TII, 121). He would ask if they were awake and would ask Jacqueline if she wanted some water. (TII, 121). Jacqueline would say "yes" and they would go downstairs. (TII, 121). Alyissa thought it was strange because he would not ask anyone else if they wanted water and he would not let them get up to get water. (TII, 122). Defendant did not like the children drinking the bottled water; he wanted them to drink water from the faucet. (TII, 122).

Alyissa remembered Defendant coming in two or three times asking Jacqueline if she wanted water. (TII, 123). Jacqueline seemed "kind of scared" or "frightened" when she would return to her bed. (TII, 124). She would be gone for ten to twenty minutes. (TII, 124).

Defendant did not like it when Jacqueline slept with Charlette. (TII, 124). He was not as mad when Alyissa slept with Charlette as he was when Jacqueline slept with her. (TII, 125). Alyissa never saw Defendant do anything to her sister but she believes her sister. (TII, 133). She testified that she was happy that Defendant was gone because he would always "push" them. (TII, 134). Defendant hit her brother's head on the bathtub, so she was happy when he left. (TII, 138).

Alyissa's mother asked her to write down what Jacqueline told her had happened. (TII, 144). Alyissa thought it was important to write in her statement that Jacqueline came back with bottled water because they were not allowed to have it. (TII, 149). Alyissa agreed that Jacqueline was scared when the bats were in the attic but she testified that Defendant never got her out of bed at that time. (TII, 151). Alyissa's mom did not tell her what to put in the statement and she started it by writing "on Saturday, around 9:00 p.m." because she had learned how to start a sentence in English. (TII, 143, 160).

Dr. Carrie Ricci testified that she is a pediatrician who has been in private practice in Bingham Farms and West Bloomfield for a little over three years. (TII, 164-165). She saw Jacqueline Rogers at one of her clinics on January 12, 2009. (TII, 165). Jacqueline was seen for an assessment for possible sexual abuse. (TII, 166).

Dr. Ricci testified that she asked direct questions from Jacqueline "for the purpose of providing her with treatment and seeing what, if anything – the diagnosis what (sic, was?). (TII, 168). When directly questioning Jacqueline about what happened, Jacqueline told her that her dad "had woken her up from sleep, taken her downstairs and had her suck his penis until yellow stuff came out." (TII, 169). Jacqueline told her that she would spit out the yellow stuff and then go back to bed. (TII, 172, 176).

Jacqueline's demeanor during the conversation was quiet. (TII, 176). Jacqueline's mom did not interrupt Jacqueline. (TII, 176). Dr. Ricci asked Jacqueline how often it happened and Jacqueline first answered that it happened six times, then indicated that it happened every night. (TII, 177). When asked if there had been any fondling of other body parts, Jacqueline responded that there had not. (TII, 177).

Jacqueline's physical examination was "normal." (TII, 177). She was tested for sexually transmitted diseases. (TII, 179). Dr. Ricci testified that just because Jacqueline's test results regarding the herpes simplex virus came back negative, does not mean that she has not been exposed to someone who is infected. (TII, 183). Jacqueline was not diagnosed with any sexually-transmitted infections (TII, 186). The doctor's diagnosis was child sexual abuse and nocturnal enuresis (bedwetting). (TII, 192-193). Dr. Ricci made her diagnosis because she believed that Jacqueline was abused. (TII, 195).

Charlette Moore testified that she is twenty years old and she attends school at Oakland Community College. (TII, 198). She lives with her mother and her five siblings, Matthew, Alyissa, Max, Jacqueline and Raphael. (TII, 198). Jacqueline is the baby and she calls her Lulu. (TII, 198-199).

Charlette testified that Defendant, Johnny Harris, was her step-father and she has known him for about two or three years. (TII, 199). Charlette was shocked when Jacqueline told her about what Defendant had done to her. (TII, 204). Jacqueline was a little hesitant to tell Charlette what happened but she eventually told her. (TII, 203). Jacqueline drew a picture of herself and Defendant in the basement with Defendant on the couch and Jacqueline was on the floor. (TII, 205). Charlette did not tell Jacqueline what to draw. (TII, 206).

Jacqueline showed Charlette how she sucked Defendant's penis. (TII, 206). Nobody was present when Jacqueline showed Charlette how it happened, and she showed Charlette with her hand and her thumb by putting her thumb in her mouth and moving her head back and forth. (TII, 206-207).

The day after Jacqueline told her what happened, Charlette told her brother Matthew, who in turn, told their mother. (TII, 208). Charlette did not tell her mother right away because she needed time to process what she had been told. (TII, 207-208). After thinking about what she had been told and shown, Charlette was pretty convinced. (TII, 207). Charlette found out when she returned home from work that Matthew had told their mother. (TII, 208). Charlette's mother called her into the room and asked her what had happened. (TII, 209). She told her mother what Jacqueline had said and she showed her the pictures. (TII, 209-210). Her mom then called Jacqueline into the room and they all talked. Her mother appeared to be very upset and shocked because she did not know that this had been happening. (TII, 210).

Charlette's mother talked to Jacqueline alone, and when they came out of her room, her mother called the police. (TII, 211). They filed a police report and then her mom called to make a doctor's appointment for Jacqueline. (TII, 211).

Charlette acknowledged that Defendant would become upset when Jacqueline would sleep in Charlette's bed. (TII, 211-212). Defendant would also become upset if Alyissa slept with Charlette but not as upset as when Jacqueline was in there. (TII, 212). Nobody helped her write her statement and she gave it to Sergeant Kane when she was done with it. (TII, 213). Nobody told her to make any changes, add anything or take anything out of her statement. (TII, 214).

Charlette never observed Defendant do anything inappropriate to her sister. Charlette agreed that when there were bats in the attic Jacqueline was afraid. (TII, 225). Charlette testified that Jacqueline had a problem with bedwetting. (TII, 225). She would crawl into Charlette's bed late at night because she was afraid. (TII, 226). She would do this even after the bats had been removed. (TII, 226).

Charlette was not happy about Defendant moving out because she knew that her mother wanted things to work out between them. (TII, 228). She also did not want him to be taking things out of the house that were not his when he moved out just after Thanksgiving. (TII, 216-217). Defendant moved out when her mother was on a business trip and she did not know that he was moving out. (TII, 230).

Jacqueline Rogers (the mother) testified that she lives in West Bloomfield with her six children. (TII, 236). She and her seven year old daughter have the same name. (TII, 236). Young Jacqueline's father is Keith Rogers and he is in prison for criminal sexual conduct perpetrated against the elder Jacqueline, not the victim in this case. (TII, 236). Jacqueline married Defendant in September of 2006; they met in 2005. (TII, 237).

The witness testified that she lived in her home prior to meeting Defendant. (TII, 237). She has some businesses and when Defendant lived with her, she was still primarily responsible for paying the bills. (TII, 238). Defendant would pay for some bills and, after a while, he paid a portion of the mortgage. (TII, 238).

Ms. Rogers called the police the day that Defendant moved out because when she spoke with Alyissa, she had indicated that Defendant pushed her and she was crying. (TII, 239). Ms. Rogers was concerned about the children. (TII, 239). Prior to Defendant moving out, they had had discussions about separating or divorcing. (TII, 240). The children were not aware of these conversations. (TII, 241).

When Matthew told his mother about what happened with Jacqueline, he was very upset. (TII, 243). Ms. Rogers had Matthew repeat what he said again because she could not believe what she was hearing. (TII, 243). When Ms. Rogers was speaking to Jacqueline, Jacqueline was very nervous. (TII, 245). Ms. Rogers could not believe what she was hearing and Jacqueline was very graphic and detailed. (TII, 244-245). At one point, Ms. Rogers sent Jacqueline away and had her come back and tell her again what had happened. (TII, 245-246).

Jacqueline demonstrated on a banana what had happened with Defendant. (TII, 246). This was very concerning to Ms. Rogers because that was not something that a child her age should have known about. (TII, 246-247). Jacqueline told her mother that she was "very sure" that these things happened to her, even after Ms. Rogers told her that they could get in trouble if she was making it up. (TII, 246-247). Ms. Rogers testified that she told Jacqueline that if she was lying, someone might take her away because what she was saying was very serious and Ms. Rogers wanted her to know that she should not say it if it was not the truth. (TII, 247). Jacqueline told her that she was not lying. (TII, 247).

Ms. Rogers took Jacqueline to the police department after she talked with her. (TII, 248). At the time of the conversation with Jacqueline, neither party had filed for divorce. (TII, 249). Defendant filed for divorce the day after the police contacted him. (TII, 249). Ms. Rogers provided the police with a written report. (TII, 251). She was concerned with some breakage in Jacqueline's skin and, since Defendant has herpes, Ms. Rogers took Jacqueline to the pediatrician. (TII, 252).

Ms. Rogers testified that Jacqueline had not been wetting the bed anymore until the summer of 2007 when she started doing it again. (TII, 254). It stopped after Defendant moved out of the house. (TII, 254). Ms. Rogers testified that Defendant would become agitated when the girls slept together and, at one point, he told Ms. Rogers to make them stop. (TII, 256). In the fall of 2007, Jacqueline started sleeping with Charlette more often. (TII, 256).

Ms. Rogers testified that Defendant often made statements indicating that he was not a "child molester" or a "liar." (TII, 258). Ms. Rogers thought that these statements were not normal things that somebody would say. (TII, 258).

Ms. Rogers further testified that she was not standing over her children when they were writing their statements and she did not tell them what to write, or tell them to add or delete anything from their statements. (TII, 261). Defendant talked about getting back together in December of 2008 but Ms. Rogers did not want this and she did not have any feelings for him. (TII, 262-263). Defendant did not let the children have water bottles. (TII, 263). Jacqueline repeatedly asks her mother why Defendant would do that to her. She was extremely nervous and very scared about going to court and she would keep to herself. (TII, 266). Mother was instructed to not talk to Jacqueline about the incident. (TII, 267).

Ms. Rogers testified that she received mail from Keith Rogers but had not received anything in quite a while. The children do receive birthday cards and letters from him. The children are not in the habit of opening their mother's mail. (TIII, 8). Mother had never seen the letter that defense counsel sought to admit into evidence. The letter contained graphic and explicit material (TIII, 11). It was typed and Keith usually handwrote his letters and cards. (TIII, 12). Defendant retrieved the letter from the mail. (TIII, 13). Judge McDonald did not allow the letter into evidence. (TIII, 18).

Ms. Rogers testified that she did not know Defendant's income. (TIII, 28). She adamantly denied that she told Defendant that they had a great future as a family. (TIII, 31). Ms. Rogers denied telling Defendant that he would regret leaving her. (TIII, 44). Ms. Rogers testified that she contracted herpes from Defendant. (TIII, 50).

Sarah Killips testified that she used to work at Care House and conducted forensic interviews of children. (TIII, 68). She has conducted over 500 forensic interviews. (TIII, 69). The goal of a forensic interview is to get a statement from a child. (TIII, 69). Jacqueline's interview was conducted on January 14, 2009 in one of their interview rooms at Care House. (TIII, 70). Only Sarah and Jacqueline were present during the interview. (TIII, 71). It is very common with a child of Jacqueline's age to not provide specific dates because, developmentally, it is not in their capacity. (TIII, 74). Ms. Killips testified without objection that delayed disclosure is more common than not and that children typically wait a period of time to tell about sexual assault, if they decide to disclose at all. (TIII, 76).

Sergeant Tara Kane testified that she is a sergeant with the West Bloomfield Police Department. (TIII, 80). She testified that she recalled speaking with Ms. Rogers and that Ms. Rogers indicated that Defendant hits his head on the wall. (TIII, 81). Ms. Rogers told Sgt. Kane

about Defendant hitting his head at the post-interview session at Care House. (TIII, 82). Ms. Rogers also relayed information regarding Defendant's statements that he was not a pedophile or a molester. (TIII, 81).

Defendant took the stand and testified in his own defense that he is 47 years old and was formerly married to Jacqueline Rogers. (TIII, 90). According to Defendant, Ms. Rogers visited him when he was in the military. (TIII, 93). Defendant was discharged from the military before he married Ms. Rogers. (TIII, 94).

According to Defendant, Jacqueline was afraid to sleep in her room because of the scratching noises in the attic. (TIII, 100). Defendant was contributing to the household bills and also paying the car bills. Defendant was receiving a pension and he was also employed by the Army following his discharge and was earning approximately $72,000 a year. (TIII, 103). Defendant added the children to his medical benefits. (TIII, 102, 103). Defendant testified extensively about them buying new mattresses because all the children wet their beds. (TIII, 96-98).

Defendant testified that Ms. Rogers was the disciplinarian with the children. (TIII, 105). The marriage started to go bad in June of 2008. (TIII, 105). According to Defendant, the marriage deteriorated because Ms. Rogers gave him herpes and he suspected that she was involved in some kind of illegal activity. (TIII, 105-106). Defendant left the home when Ms. Rogers was out of town on business because she was "too confrontational". (TIII, 106). According to Defendant, there have been times when Ms. Rogers threatened him. (TIII, 106-107). She threatened to "get his ass." (TIII, 109).

Defendant denied that he ever put his penis into Jacqueline's mouth or that he touched her inappropriately. (TIII, 109). He believes that her mother put the child up to it. (TIII, 109-

110). Defendant denied that he did not like to give the children bottled water. (TIII, 112). He further denied that there was an incident with Alyissa when he was moving out. (TIII, 113). Defendant admitted that he never told the police that his wife had threatened to "get his ass" or that he had concerns about how confrontational she was. (TIII, 120). He admitted that a week before Jacqueline told her sister and the authorities about what happened, he and Ms. Rogers had "a cordial" meeting when she gave him his mail. (TIII, 122).

Following closing arguments and jury instructions, the jury returned a verdict of guilty as charged to three counts of Criminal Sexual Conduct, First Degree. (TIII, 197-198). On January 11, 2010, Judge McDonald sentenced Defendant to 17 to 50 years in the Michigan Department of Corrections.

Following his conviction, Defendant filed an appeal by right in the Michigan Court of Appeals. On appeal, Defendant alleged, inter alia, that he was denied a fair trial when the trial court permitted Dr. Ricci to testify that she diagnosed Jacqueline with having been sexually abused despite finding no evidence of sexual abuse. Defendant's argument centered on the fact that there was no physical evidence to support the diagnosis, therefore, it was improperly admitted. In addition, Defendant argued that the evidence was inadmissible hearsay.

In rejecting Defendant's claim, the Court of Appeals found significant the response from Dr. Ricci to defense counsel's question that sometimes a diagnosis is based on the given history rather than upon physical findings. (Appendix A, 6). In addition, the Court of Appeals rejected Defendant's contention that the doctor needed physical evidence to make a diagnosis, and found that the trial court had not abused its discretion in admitting the evidence.

In addition, the Court of Appeals found that Jacqueline's statements to Dr. Ricci were statements made for purpose of medical treatment or diagnosis, admissible under MRE 803(4).

The Court of Appeals found that there were sufficient indicia of reliability to justify the admission of the evidence, despite Jacqueline's young age. (Appendix A, 6-7). The Court of Appeals additionally rejected Defendant's ineffective assistance of counsel claim regarding counsel's failure to object to the alleged hearsay because the testimony was not objectionable, and because:

> ... 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. (Appendix A, 8).

After Defendant's conviction was affirmed by the Court of Appeals on August 2, 2011, Defendant filed an Application for Leave to Appeal to this Court. On April 18, 2012, this Court issued an Order indicating:

> On order of the Court, the application for leave to appeal the August 2, 2011 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals. An expert witness may not testify that sexual abuse occurred. *People v Beckley*, 434 Mich 691 (1990); *People v Peterson*, 450 Mich 349 (1995). The trial court impermissibly allowed Dr. Carrie Ricci to testify that the complainant was the victim of child sexual abuse and trial counsel was ineffective for failing to object to this evidence. *People v Toma*, 462 Mich 281 (2000). We REMAND this case to the Court of Appeals. On remand, the Court of Appeals shall determine whether the defendant was prejudiced by the admission of the doctor's diagnosis and whether the defendant is entitled to a new trial. *Id.* at 303-304.

Thereafter, the Court of Appeals, accepting this Court's determination that "defense counsel's failure to object to Dr. Ricci's diagnosis testimony fell below an objective standard of reasonableness", found that Defendant was not prejudiced where defense counsel "emphasized the undisputed lack of any physical evidence of sexual abuse" and that "the properly admitted

evidence at trial would allow a rational jury to find Harris guilty beyond a reasonable doubt." (Appendix B, 7). Due to the overwhelming evidence of guilt against Defendant, the Court of Appeals found that Defendant was not denied a fair trial. (Appendix B, 7).

Defendant thereafter filed another Application for Leave to Appeal the Court of Appeal's July 19, 2012 opinion on remand. On December 14, 2012, this Court entered the following Order:

> On order of the Court, the application for leave to appeal the July 19, 2012 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). At oral argument, the parties shall address whether the defendant was prejudiced by the admission of Dr. Carrie Ricci's diagnosis that the complainant was the victim of child sexual abuse, and whether the defendant is entitled to a new trial. The parties shall file supplement briefs within 42 days of the date of this order.

Due to the nature of the claims on appeal, additional pertinent facts will be discussed in the body of the argument section of this brief, *infra*, to the extent necessary to fully advise this Honorable Court as to the issues raised by Defendant on appeal.

ARGUMENT

I. DEFENDANT WAS NOT PREJUDICED BY THE ADMISSION OF DR. CARRIE RICCI'S DIAGNOSIS THAT THE COMPLAINANT WAS THE VICTIM OF CHILD SEXUAL ABUSE WHERE DEFENSE COUNSEL STRATEGICALLY ARGUED THE LACK OF PHYSICAL EVIDENCE TO HIS ADVANTAGE.

Standard of Review:

The People agree with the standard of review as alleged by Defendant. This Court reviews the admission of evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). See also *People v Sabin (Aft Rem)*, 463 Mich 43, 60; 614 NW2d 888 (2000). But even if an abuse of discretion is found, a defendant's conviction should not be set aside unless the defendant shows that the error more probably than not changed the outcome of the case. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Discussion:

Hearsay evidence regarding statements that a declarant makes for purposes of medical treatment or diagnosis is admissible when they are admitted for that purpose.[2] 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.

[2] "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." *People v Garland*, 286 Mich App 1; 777 NW2d 732 (2009). The Supreme Court in *People v Meeboer*, 439 Mich 310; 484 NW2d 621 (1992) noted that "[e]xceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy . . . further supporting rationale for MRE 803(4) are the existence of 1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and 2) the reasonable necessity of the statement to the diagnosis and treatment of the patient. The trustworthiness of a child's statement can be sufficiently established to support the application of the medical treatment exception." *Id.* at 322.

Defendant argues that he was prejudiced by the admission of Dr. Ricci's diagnosis of sexual abuse because this case was essentially a credibility contest between Defendant and the victim, and Dr. Ricci's diagnosis may have been the deciding factor for the jury to find Defendant guilty. At trial, defense counsel argued that the testimony of Dr. Ricci was irrelevant because it was not supported by physical evidence of sexual abuse. On direct appeal, Defendant argued again that the testimony of Dr. Ricci was irrelevant because of the lack of physical evidence, but also that trial counsel was ineffective in failing to challenge Dr. Ricci's testimony on hearsay grounds. By way of citation to *People v Bragdon*, 142 Mich App 197; 369 NW2d 208 (1985), *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995) and *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), Defendant also cursorily argued that counsel was ineffective for failing to object to Dr. Ricci's testimony that sexual abuse occurred. It is upon this last point that this Court seeks further discussion.

In affirming Defendant's conviction, the Court of Appeals rejected Defendant's argument that there had to be physical evidence of abuse in order for Dr. Ricci to have rendered a diagnosis. (Appendix A, 6). In addition, the Court of Appeals also rejected Defendant's appellate contention that trial counsel was ineffective in failing to object to the hearsay evidence, finding that the statements of Jacqueline were statements made for purposes of medical treatment or medical diagnosis in connection with treatment, as permitted under MRE 803(4). (Appendix A, 6-7). Finally, in rejecting the claim which Defendant only cursorily argued in his direct appeal, the Court of Appeals wrote:

> 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. (Appendix A, 8. Emphasis added).

In his Application for Leave to Appeal to this Court, Defendant again argues that the trial court and the Court of Appeals incorrectly concluded that a finding of physical evidence was necessary before Dr. Ricci could render a diagnosis, and that trial counsel was ineffective in failing to object to Dr. Ricci's opinion that Jacqueline was the victim of sexual abuse. Defendant does not, in his application, address the Court of Appeals' finding that *Bragdon, supra*, was distinguishable from the case at bar where Dr. Ricci was not asked to comment on Defendant's guilt, but rather was only asked, following cross-examination when she was questioned about finding "nothing" if, in fact, she had actually made a diagnosis. (TII, 186, 192).

While the People agree that it is improper for a witness to express an opinion on the defendant's guilt or innocence, *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985); *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), that is not what occurred in this case. In this case, the defense at trial was that the sexual abuse never happened and that the mother put her six-year old daughter up to falsely accuse Defendant of sexual abuse in order to get back at him for leaving the mother. During the cross-examination of Dr. Ricci, defense counsel's strategy was to emphasize the fact that no physical evidence of abuse was found on Jacqueline. Defense counsel introduced and used the lack of physical evidence to support his argument.

At trial, while Dr. Ricci was testifying, defense counsel asked why, if the People were not qualifying her as an expert witness, her testimony was relevant. (TII, 171). Judge McDonald found that her testimony was relevant. (TII, 171). After it was clarified outside the presence of the jury that Dr. Ricci was only testifying to what Jacqueline, the child, said (rather than her mother) (TII, 174-175), Dr. Ricci explained what it was she did in this case with regard to the questions she asked Jacqueline and the physical examination she conducted upon her. (TII, 177). She also testified that she performed a few swabs and cultures to check for sexually transmitted diseases. (TII, 179). The results of the examinations came back negative. (TII, 183, 186).

After asking the witness a few questions, defense counsel indicated, "Your Honor, I'm going to ask that the entire testimony of the doctor be striken (sic), and it's for the reason that pursuant to the Court Rule, she can testify as to history if it was for diagnosis or treatment. She didn't diagnose anything and she didn't treat anything." (TII, 186-187). Without requiring a response from the People, Judge McDonald indicated, "[w]ell, she did diagnose." (TII, 187). After defense counsel indicated that she diagnosed "nothing", Judge McDonald concluded, "[t]hat's a diagnosis." (TII, 187).

Later, when defense counsel indicated that Dr. Ricci should not have been permitted to render a diagnosis of sexual abuse where there was no physical evidence of it, Dr. Ricci indicated that he was incorrect. Defense counsel inquired:

> 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? (TII, 194).

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 diagnosis 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. (TII, 195).

Dr. Ricci's statement was accurate and admissible. She is a medical doctor who examined Jacqueline on January 12, 2009. She was told by the child that her dad made her suck his penis on several occasions and that yellow stuff came out of his penis into her mouth. Although Dr. Ricci did not find physical evidence to support Jacqueline's statements, Dr. Ricci nonetheless accepted her statements and rendered a reasoned and legitimate diagnosis based on the history she received. Just as with any other evidence presented at trial, the jury was free to accept the diagnosis or to reject it.

As noted, it was defense counsel, not the assistant prosecutor, who first brought up Dr. Ricci's diagnosis. (TII, 186-187). In seeking to strike Dr. Ricci's testimony for lack of physical evidence, defense counsel indicated, "[s]he didn't diagnose anything and she didn't treat anything." (TII, 187). Judge McDonald disagreed, and counsel moved on, inquiring how the doctor could make a diagnosis without physical evidence. As noted, Dr. Ricci thereafter explained how a diagnosis is made with just a medical history. (TII, 195).

By bringing up the doctor's diagnosis, or lack thereof as alleged by Defendant, defense counsel opened the door to the assistant prosecutor's clarification that Dr. Ricci had made a diagnosis. As the Court of Appeals noted in *People v McPherson*, 263 Mich App 124; 687 NW2d 370 (2004):

> Under the doctrine of invited error, a party waives the right to seek appellate review when the party's own conduct directly causes the error. *People v Jones*, 468 Mich 345, 352; 662 NW2d 376 (2003). Here, where defendant clearly waives the issue by inviting the alleged error and fails to object, he has lost his right to assert this issue on appeal. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). [*McPherson*, *supra* at 139].

Cf: *Ohler v United States,* 529 US 753, 755-756, 760; 120 S Ct 1851; 146 L Ed 2d 826 (2000) (indicating that a defendant who preemptively introduces information at trial cannot later contest the admission of such evidence at trial).

In bringing up the subject of a diagnosis in order to attack the lack of physical evidence, defense counsel made a strategic decision to open the door to the later clarification testimony of the witness. (TII, 192-193). Furthermore, defense counsel capitalized on the lack of physical evidence supporting Dr. Ricci's diagnosis, and emphasized the fact that the diagnosis was based entirely on what Dr. Ricci heard from Jacqueline and her mother – a fact completely in line with the defense theory that Jacqueline's mother manufactured the abuse. (TII, 193-195).

Defendant was not denied a fair trial, nor was he denied the effective assistance of counsel. Dr. Ricci did not testify as to Defendant's guilt but merely testified about her diagnosis of the child, based on the information that she had received from Jacqueline and her mother. Dr. Ricci did not indicate that she believed Defendant to be guilty, nor did she comment on Defendant's culpability. It was left to the jury to determine whether they accepted the medical testimony in light of the lack of physical evidence.

As recognized by the Court of Appeals before remand, this situation is distinguishable from the cases Defendant cites because in those cases the witness was specifically asked to comment on a defendant's guilt, or upon the reliability of the testimony offered by those who testified against the defendant. (Appendix A, 8). See *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995) amended 450 Mich 1212 (1995) (court upheld a ban on expert witness testimony regarding the truthfulness of victims' accusations that a particular defendant had sexually abused them because it went directly to the issue of the defendant's guilt); *Cooper v Sowders*, 837 F2d 284, 287 (CA 6, 1988) (prosecution erred when it asked a police witness to

opine whether the evidence supported a finding of guilt on behalf of any other suspects, and the witness testified the only person linked to the crime by the evidence was the defendant); See also *People v Smith*, 158 Mich App 220, 230-231; 405 NW2d 156 (1987) (the prosecution improperly elicited testimony from police witnesses bolstering the innocence and credibility of a conspirator, who was the only other person that could have committed the crime besides the defendant).[3]

It was Defendant who opened the door to Dr. Ricci testifying about the diagnosis. In order to not leave the jury with the impression that a diagnosis did not exist, the assistant prosecutor clarified that Dr. Ricci did diagnose Jacqueline. (TII, 192). As was also made clear, however, it was the strategy of defense counsel to argue that no physical evidence supported that diagnosis. (TII, 193-194). While a medical doctor accepts as true the medical history as given by the patient, the jury was not asked to make that leap of faith. Had the jury believed defense counsel's theory that Jacqueline and her mother fabricated the story about sexual abuse, then Dr. Ricci's diagnosis would have also failed in their eyes. As a result, Defendant has failed to demonstrate that he was prejudiced by the admission of the evidence.

In remanding this matter to the Court of Appeals in its April 18, 2012 Order, this Court specifically asked the Court of Appeals to "determine whether the defendant was prejudiced by the admission of the doctor's diagnosis and whether the defendant is entitled to a new trial." These are the same issues this Court has asked the parties to address at oral argument. In finding that Defendant was not prejudiced by admission of the diagnosis, the Court of Appeals wrote:

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[3] The People posit that there is a significant difference between a social worker, like those in *Beckley*, *supra*, and *Peterson*, *supra*, testifying that a defendant sexually abused the victim, and a medical doctor, who testifies under a firmly rooted exception to the hearsay rule. Whereas there are certainly reasons to question the "client's" motivations and the recognized characteristics of sexual abuse victims in the "soft sciences", our courts have long recognized the inherent reliability of statements made to doctors for purposes of **medical** treatment and diagnosis. See *People v Mahone*, 294 Mich App 208, 214-215; 816 NW2d 436 (2011).

> Despite the improper nature of Dr. Ricci's testimony that JCR was the victim of child sexual abuse, we conclude that its admission does not require reversal. Counsels' arguments did not focus on Dr. Ricci's diagnosis. Harris's theory of the case was that JCR's mother fabricated the allegations and coached JCR to lie in order to punish Harris for leaving the marriage. *Defense counsel's cross-examination of Dr. Ricci bolstered this theory and minimized the effect of the doctor's diagnosis by eliciting from Dr. Ricci that her diagnosis of sexual abuse was based entirely on the history as was given, the majority of which came from JCR's mother.* In their closing arguments, both parties' counsel framed the issue as to a credibility contest between JCR and Harris, and neither focused the jury's attention on Dr. Ricci's diagnosis. The prosecution did not even mention Dr. Ricci's diagnosis in closing argument. The prosecution's references to Dr. Ricci's testimony pertained to the story that JCR relayed to her and its consistency with JCR's previous statements and her testimony in court. Defense counsel emphasized the undisputed lack of any physical evidence of sexual abuse. (Appendix B, 6-7. Emphasis added).

As pointed out by the Court of Appeals, defense counsel vigorously cross-examined Dr. Ricci about the lack of physical evidence, and got her to admit that most of the patient's history came from the mother. In his closing argument, defense counsel argued:

> And the real concern that I had, particularly with the pediatrician – who I think is a fine lady and I hope I didn't offend her because I may take my children to her at some point. I don't know anything about her profession, she is probably an excellent physician.
>
> But the facts were her examination found nothing. So what do they do? They try to get you to believe something by trying to reconstruct nothing. That's not, that's not proof. That's a lack of proof.
>
> And, and then, well, because we – because Herpes is not detectable, we couldn't find it. That's a lack of proof and you're trying to get the jury to believe it. You're trying to get them to believe something where there is no evidence that it was ever involved with the child (sic). That's not proof, that's lack. That's reasonable doubt. That's reasonable doubt. (TIII, 161-162).

In addition, again discussing Dr. Ricci in his closing argument, defense counsel argued to the jury:

> *When it was all over and done, her diagnosis was what she was told by the mom. There was no physical evidence.* That's just – and it wasn't her fault. But there wasn't any. There wasn't any evidence that the child had been penetrated vaginally or anything done to her physically that would have caused her to do any bed wetting. (TIII, 167, Emphasis added).

As is readily apparent from defense counsel's argument, if the jury disbelieved Jacqueline and her mother, they would likewise disbelieve Dr. Ricci's diagnosis. Defense counsel made it very clear that Dr. Ricci's diagnosis hinged almost entirely on what a possibly scorned woman told her. Because there is little chance that the jury would believe Dr. Ricci if they disbelieved Jacqueline and her mother, Defendant cannot demonstrate that he was prejudiced by the admission of Dr. Ricci's diagnosis of Jacqueline. *Strickland v Washington*, 466 US 668, 687, 690, 694; 104 S Ct 2039; 80 L Ed 2d 657 (1984) (to show prejudice in a claim of ineffective assistance of counsel, there must exist a reasonable probability that the results of the proceedings would have been different but for the errors of counsel.)

Because Defendant was not prejudiced by the admission of the evidence, he is not entitled to a new trial. As the Court of Appeals indicated when addressing the same issue following remand from this Honorable Court:

> Moreover, the properly admitted evidence at trial would allow a rational jury to find Harris guilty beyond a reasonable doubt. JCR testified in graphic detail about the sexual acts that Harris forced her to perform. JCR's testimony alone was sufficient to sustain Harris's conviction.[12] Also, her sister's testimony about Harris taking JCR, and only JCR, from their bedroom for water in the middle of the night, and JCR's demeanor upon returning to her bed, supported JCR's version of events. JCR gave consistent stories to her sister, her mother, and Dr. Ricci. In light of the evidence of Harris's guilt, the admission of the improper evidence did not affect the outcome of the trial. Harris was not denied a fair trial and is not entitled to relief.

[12] See MCL 750.520h; *People v Szalma*, 487 Mich 708, 724; 790 NW2 662 (2010) (stating that "the complainant's testimony can, by itself, be sufficient to support a conviction of CSC").

Because Defendant cannot demonstrate that he was prejudiced by the admission of Dr. Ricci's diagnosis, and because there was sufficient, properly admitted, evidence at trial from which a reasonable jury could find Defendant's guilt beyond a reasonable doubt, Defendant has

failed to demonstrate that he is entitled to any relief. Even if this Court finds that Defendant's objection to the testimony on another ground preserved this issue for appellate review, Defendant still cannot show a miscarriage of justice under a more probable than not standard. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). Defendant's application for leave to appeal should be denied.

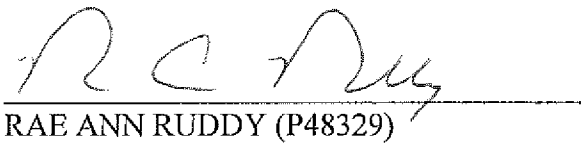
RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Rae Ann Ruddy, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court deny Defendant's Application for Leave to Appeal.

Respectfully Submitted,

JESSICA R. COOPER
PROSECUTING ATTORNEY
OAKLAND COUNTY

THOMAS R. GRDEN
CHIEF, APPELLATE DIVISION

By: 

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DATED: January 25, 2013

APPENDIX A

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

APPENDIX B

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY ALLEN HARRIS,

Defendant-Appellant.

UNPUBLISHED
July 19, 2012

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

ON REMAND

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

PER CURIAM.

This case returns to this Court on remand from the Michigan Supreme Court for a determination whether the improper admission of evidence at trial and ineffective assistance of counsel prejudiced defendant Johnny Allen Harris such that he is entitled to a new trial. We conclude that defense counsel's representation did not prejudice Harris such that he was deprived a fair trial. Accordingly, we affirm his jury trial convictions of three counts of first-degree criminal sexual conduct,[1] involving his five-year-old stepdaughter, JCR.

I. FACTS

This Court set forth the facts of the case in its prior opinion, in pertinent part, as follows:

> 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

[1] MCL 750.520b(1)(a).

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 incident. 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 [sic] mother called the police, and they went to the police department. JRC's [sic] 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."

* * *

Harris testified that he moved out of the home while JRC's [sic] mother was out of town because she was "very confrontational." He stated that, on one occasion, he and JRC's [sic] 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 [sic] 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.[2]

Pediatrician Dr. Carrie Ricci testified regarding her examination and assessment of JCR after the incident was reported. We explained Dr. Ricci's testimony as follows in our prior opinion:

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[2] *People v Harris*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 2011 (Docket No. 296631), rev'd in part 491 Mich 906 (2012).

> 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.[3]

On cross-examination, Dr. Ricci testified that she saw no evidence of sexual abuse in JCR. She also admitted that "the majority of the history was obtained from Mom." However, on redirect examination, the prosecution elicited from Dr. Ricci the improper testimony regarding her diagnosis:

> *Q.* . . . What was your—did you make a finding or a diagnosis?
>
> *A.* My diagnoses were, number one, child sexual abuse; number two, enuresis.

Defense counsel recross-examined Dr. Ricci about the basis of her diagnosis, which the doctor admitted was formed entirely from the history that she was given:

> *Q.* How did you diagnose child abuse, please?
>
> *A.* Based on the history from [JCR] and her mother.
>
> *Q.* There were no objective—no objective evidence; no objective findings, wouldn't you agree?
>
> *A.* That is common in cases of abuse if there's normal physical examination.
>
> *Q.* But if you—if I came into you and I said that I had the flu with no symptoms and nothing—no evidence of it, would you say, as a diagnosis, I had the flu?
>
> *A.* No.
>
> *Q.* Then how can you say, with a child who has no symptoms—I mean, nothing. No find no—no corroborating physical finding in this matter; is that true?
>
> *A.* No physical findings.
>
> *Q.* Only on the history you make a diagnosis, if I understand, of child abuse based upon what you said?
>
> *A.* Correct.

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[3] *Id.*

Q. And primarily, the biggest part of your history came from that Mom?

A. Um, the large portion—I'm note—is from Mom, and—but [JCR] is the one who told me, as I stated earlier, what [JCR] had told me, and that was enough for me to diagnose her as sexual abuse.

Q. What were the—it was only her statement that allowed you to make the diagnoses; is that my understanding?

A. Yes.

Q. Without any other physical manifestations?

A. Correct.

Q. Well, Doctor, it seems to me that—is that appropriate medical protocol to make a diagnoses [sic] where there are no symptoms or any evidence of the alleged malady?

A. 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.

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

A. Um-hum.

Q. Is it that you felt sympathy because of the story that made you write that diagnoses [sic]?

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

Q. You believe—

A. Yes.

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

A. I relied on the testimony from [JCR] and her mother.

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

A. Correct.

In closing argument, the prosecution framed the issue as a credibility contest between JCR and Harris: "[W]hat it comes down to is do you believe [JCR] beyond a reasonable doubt or don't you? . . . You have her saying it happened and you have the defendant saying it didn't happen. Who do you believe?" The prosecution argued that JCR's statement to Dr. Ricci about the sexual conduct with Harris was consistent with her other statements. The prosecution did not mention Dr. Ricci's diagnosis of child abuse. Defense counsel's closing argument addressed Dr. Ricci's testimony by emphasizing that her testimony showed a "lack of proof." Defense counsel also stressed the fact that Dr. Ricci's opinion was based on a history that was given to her by JCR's mother, not on any physical evidence.

After his conviction, Harris raised several issues on appeal to this Court. He argued (1) that AR's testimony about what the complainant, JCR, told her was inadmissible hearsay, (2) that Dr. Ricci's testimony about what JCR told her was inadmissible hearsay and irrelevant, (3) that defense counsel was ineffective for failing to object to hearsay evidence, (4) that defense counsel was ineffective for failing to object to Dr. Ricci's opinion testimony that Harris sexually abused JCR, (5) that the prosecution engaged in misconduct by bolstering Killips' testimony, and (6) that Killips' testimony was erroneously admitted because she was not qualified as an expert.[4] This Court found no error and affirmed Harris's convictions and sentences.[5]

Harris then filed an application for leave to appeal in the Supreme Court. In lieu of granting the application, the Court reversed in part this Court's decision with respect to Dr. Ricci's testimony that JCR had been sexually abused. According to the Court, the trial court erred in allowing the testimony and defense counsel was ineffective for failing to object to it:

> An expert witness may not testify that sexual abuse occurred. *People v Beckley*, 434 Mich 691 (1990); *People v Peterson*, 450 Mich 349 (1995). The trial court impermissibly allowed Dr. Carrie Ricci to testify that the complainant was the victim of child sexual abuse and trial counsel was ineffective for failing to object to this evidence. *People v Toma*, 462 Mich 281 (2000).[6]

The Michigan Supreme Court then remanded the case for this Court to "determine whether [Harris] was prejudiced by the admission of the doctor's diagnosis and whether [Harris] is entitled to a new trial."[7]

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[4] *Harris*, unpub op at 2, 4-9.

[5] *Id.*, p 10.

[6] *Harris*, 491 Mich at 906.

[7] *Id.*

II. PREJUDICE

A. STANDARD OF REVIEW

Harris argues that the erroneous admission of Dr. Ricci's testimony was unfairly prejudicial and denied him a fair trial. He maintains that in light of the substantial credibility questions in this case, a real likelihood existed that Dr. Ricci's sexual abuse diagnosis affected the outcome of the trial. Harris argues that due process requires a new trial.

To establish ineffective assistance of counsel, a "defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived a fair trial."[8] To prove prejudice, a defendant must show that the result of the proceeding would have been different but for defense counsel's error.[9]

The Michigan Supreme Court has determined that defense counsel's failure to object to Dr. Ricci's diagnosis testimony fell below an objective standard of reasonableness. This Court's review is confined to assessing whether Harris suffered prejudice.

B. ANALYSIS

A medical expert's opinion that a victim was sexually assaulted based on the "emotional state of, and history given by, the complainant" rather than on the expert's "medical capabilities or expertise" is inadmissible.[10] The rationale for precluding such evidence is that an opinion based on the self-reported history of a victim is nothing more than an opinion that the victim is telling the truth.[11]

Despite the improper nature of Dr. Ricci's testimony that JCR was the victim of child sexual abuse, we conclude that its admission does not require reversal. Counsels' arguments did not focus on Dr. Ricci's diagnosis. Harris's theory of the case was that JCR's mother fabricated the allegations and coached JCR to lie in order to punish Harris for leaving the marriage. Defense counsel's cross-examination of Dr. Ricci bolstered this theory and minimized the effect of the doctor's diagnosis by eliciting from Dr. Ricci that her diagnosis of sexual abuse was based entirely on the history she was given, the majority of which came from JCR's mother. In their closing arguments, both parties' counsel framed the issue as a credibility contest between JCR and Harris, and neither focused the jury's attention on Dr. Ricci's diagnosis. The prosecution did not even mention Dr. Ricci's diagnosis in closing argument. The prosecution's references to Dr. Ricci's testimony pertained to the story that JCR relayed to her and its consistency with JCR's

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[8] *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003).

[9] *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

[10] *People v Smith*, 425 Mich 98, 112-113; 387 NW2d 814 (1986).

[11] See *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007) ("It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury.").

previous statements and her testimony in court. Defense counsel emphasized the undisputed lack of any physical evidence of sexual abuse.

Moreover, the properly admitted evidence at trial would allow a rational jury to find Harris guilty beyond a reasonable doubt. JCR testified in graphic detail about the sexual acts that Harris forced her to perform. JCR's testimony alone was sufficient to sustain Harris's conviction.[12] Also, her sister's testimony about Harris taking JCR, and only JCR, from their bedroom for water in the middle of the night, and JCR's demeanor upon returning to her bed, supported JCR's version of events. JCR gave consistent stories to her sister, her mother, and Dr. Ricci. In light of the evidence of Harris's guilt, the admission of the improper evidence did not affect the outcome of the trial. Harris was not denied a fair trial and is not entitled to retrial.

We affirm.

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

[12] See MCL 750.520h; *People v Szalma*, 487 Mich 708, 724; 790 NW2d 662 (2010) (stating that "the complainant's testimony can, by itself, be sufficient to support a conviction of CSC").

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

Supreme Court
No. 145833

-vs-

Court of Appeals
No. 296631

JOHNNY ALLEN HARRIS,

Defendant/Appellant.
_____/

Circuit Court
No. 2009-225570-FC

PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

Laurie Wakerley, being duly sworn, deposes and says that on the 25th day of January, 2013, she served a copy of Appellee's Answer to Defendant's Application for Leave to Appeal, upon Jonathan B.D. Simon, attorney for Defendant, P.O. Box 2373, Birmingham, Michigan 48012, by depositing same in an envelope with the Oakland County mailing pick-up service.

Further deponent saith not.

Laurie Wakerley

Laurie Wakerley, Deponent

Subscribed and sworn to before me,
this 25th day of January, 2013.

Michelle Renee Leismer

MICHELLE RENEE LEISMER
Notary Public, State of Michigan
County of Oakland
My Commission Expires: 03/29/17
Acting in the County of Oakland