STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

JOSHUA LEE THORPE

Defendant-Appellant
_____/

Supreme Court No. _____

Court of Appeals No. 332694

Lower Court No. 13-18428 FH

ALLEGAN COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

KATHERINE L. MARCUZ (P76625)
Attorney for Defendant-Appellant
_____

APPLICATION FOR LEAVE TO APPEAL

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Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. IN WHAT AMOUNTED TO A ONE-ON-ONE CREDIBILITY CONTEST BETWEEN THE COMPLAINANT AND THE DEFENDANT, DID THE TRIAL COURT ERR IN EXCLUDING CRITICAL IMPEACHMENT EVIDENCE AND IN DOING SO VIOLATE MR. THORPE'S RIGHT TO PRESENT A DEFENSE?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

III. DID THE PROSECUTION'S CLOSING AND REBUTTAL ARGUMENTS, WHICH VOUCHED FOR THE CREDIBILITY OF THE COMPLAINANT AND DISPARAGED DEFENSE COUNSEL, DEPRIVE MR. THORPE OF HIS STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL. ALTERNATIVELY, WAS DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO OBJECT?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Joshua Lee Thorpe appeals from the Court of Appeals' August 10, 2017 unpublished opinion affirming his convictions for three counts of second degree criminal sexual conduct after a two-day jury trial in Allegan County Circuit Court. (Court of Appeals per curiam opinion attached as Appendix A; September 21, 2017 order denying reconsideration attached as Appendix B).

Mr. Thorpe's trial was a pure credibility contest. There was no forensic evidence, witnesses to the alleged assaults, confessions, or evidence admissible under MCL 768.27a[1] or MRE 404b. The prosecution's case consisted of the complainant's allegations, testimony by the complainant's mother regarding her daughter's disclosure of the alleged abuse and behavior throughout the summer and fall of 2012, and the expert testimony of Thomas Cottrell. Cottrell, who opined on the common behaviors of children who have been sexually abused, was allowed to testify that children lie about sexual abuse at a rate of about two percent. Mr. Thorpe testified in his own defense and denied the allegations. Additionally, Mr. Thorpe's mother testified about other reasons why the complainant may have been acting out during the summer and fall of 2012. Namely, that the complainant's mother had started a new relationship and was pregnant, and that Mr. Thorpe had decided to no longer have parenting time. From these proofs, the jurors were tasked with determining the defendant's guilt.

The primary issue in this appeal concerns testimony by the prosecution's expert witness regarding the percentage of children who falsely report sexual abuse. The Court of Appeals properly observed that such references to truthfulness violate MRE 702 under *People v Peterson*,

[1] MCL 768.27a states in pertinent part "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant."

450 Mich 349, 371 (1995), yet erred in concluding that, assuming error, reversal was unnecessary because the error was harmless. Court of Appeals Opinion at 1-2, Appendix A.

The Court of Appeals' conclusion that there was no prejudice from the admission of Cottrell's improper testimony ignores the nature of the error and is predicated on a number of clearly erroneous findings of fact discussed in detail *infra*. This was not a case where there was overwhelming evidence of guilt. To the contrary this was a sexual assault case in which the complainant's credibility was paramount. The jury was required to weigh the complainant's credibility. The inadmissible testimony, which bolstered the complainant's credibility and carried with it the aura of impartial scientific evidence, unfairly placed a weight on the scales in favor of the prosecution and made it impossible for Mr. Thorpe to receive the fair trial he was entitled to.

The Court of Appeals clearly erred in its analysis of the effect this error had on the fairness of Mr. Thorpe's trial. MCR 7.302 (B)(5). In addition, if left uncorrected, the Court of Appeals' decision will cause material injustice to Mr. Thorpe. MCR 7.302(B)(5). For the reasons expressed in detail in the attached brief in support, this Court should either grant leave to appeal, or peremptorily reverse the decision of the Court of Appeals, and order a new trial for Mr. Thorpe.

Mr. Thorpe has raised two other issues in this appeal concerning the trial court's exclusion of critical impeachment evidence and misconduct by the prosecutor during closing argument. Those issues are fully discussed in the brief in support of this application, and provide sufficient and independent grounds for this Court to either grant leave to appeal or remand the matter to the trial court for further development of the record.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

The pertinent trial evidence –

Chelsie Krotz and Joshua Thorpe started dating in 2006 when Ms. Krotz's daughter from a previous relationship, Brianne Goodenough, was three years old. I, 182-183. The following year, in August 2007, Josh and Chelsie had a daughter together, Emma. I, 184; II, 82. Over time, Brianne thought of Mr. Thorpe as a father figure and called him "Dad." I, 183; II, 86. By all accounts Mr. Thorpe was a caring and involved parent to both girls. I, 186, 194; II,43. He and Ms. Krotz both worked outside the home and shared the responsibility of watching the children. II, 82. Mr. Thorpe's mother, Kimberley Smalla, also helped take care of the girls. I, 197. She ran a daycare and began caring for the children there after Ms. Krotz went back to school in 2008. II, 85. Additionally, Ms. Smalla's daughter Abigail (Mr. Thorpe's half-sister) and Brianne were close in age and good friends. I, 187; II, 57. The two girls often spent time together after school. II, 56.

When Mr. Thorpe and Ms. Krotz broke up in 2010, Mr. Thorpe continued to parent Brianne and Emma and the girls continued to attend daycare at Ms. Smalla's house. I, 184; II, 87. In an effort to stay close with his family, Mr. Thorpe moved to a house down the street from his mother and within walking distance from the children's elementary school. II, 88. Though no formal custody agreement was established, Mr. Thorpe took care of Brianne and Emma the three days out of the week he was not working—Saturday afternoon to Tuesday morning. II, 82, 89. Mr. Thorpe's mother Kimberly Smalla explained that her son was a dedicated and loving parent to both Brianne and his biological daughter Emma: "He would cook for them, do their laundry. He would teach them how to ride their bike, tie their shoes, take them for walks, get them up in the morning, put them to bed at night." II, 43.

In 2012, Ms. Smalla noticed a change in Ms. Krotz's lifestyle. She noted that Ms. Krotz had completed her schooling and had a new boyfriend, and was talking about moving to Kalamazoo with her boyfriend. II, 69. Along with these observations, Ms. Smalla felt that Ms. Krotz was distancing herself from the family. II, 69.

Ms. Smalla also recalled a specific conflict between her son and Ms. Krotz around July 4, 2012, when Ms. Krotz took the girls to South Haven to watch fireworks with her new boyfriend and his daughter instead of spending the holiday with Mr. Thorpe and his family in Allegan. II, 46, 67-68. Mr. Thorpe also testified that this event was upsetting to him and explained that he had a tough time accepting that his family was with "another man" during the holidays. II, 92. According to Mr. Thorpe, the Fourth of July situation led to an argument with Ms. Krotz and as a result he did not have parenting time with the children for the rest of the summer. II, 92.

This time alone and Ms. Krotz's new life and relationship forced Mr. Thorpe to reevaluate his family dynamics. II, 92. At some point that July, Mr. Thorpe had a discussion with him mom about the time and effort he put into parenting Brianne. II, 48. In particular, he was concerned about Brianne's neediness and not being able to spend any one-on-one time with Emma. II, 48, 94. He worried that Emma was suffering as a result. II, 94. Given Ms. Krotz's recent behavior, Ms. Smalla stated that she advised her son to focus on his biological daughter because she "did not believe that Chelsie [Krotz] was going to keep the girls in Joshua's life." II, 72.

On August 27, 2012, Mr. Thorpe took Emma out for her birthday. He testified that it was the first time he had seen either of the girls since the fight about the Fourth of July, and it was on this day that he advised Ms. Krotz of his decision to no longer have parenting time with Brianne. II, 92, 95.

Around that same time, Ms. Smalla learned that Ms. Krotz was pregnant and immediately started to notice that Brianne was experiencing temperament issues. II, 51-52. She witnessed Brianne have tantrums and outbursts and noted that she would have tantrums about going home with her mom. II, 51-52. Ms. Krotz also testified that Brianne began "acting out" in the fall of 2012. I, 188. Specifically, she became very clingy and was also more argumentative, often getting into trouble. I, 188. As a result, Ms. Krotz sought out professional help and Brianne attended counseling sessions for approximately six weeks. I, 188. When asked whether Brianne was upset about her mother's pregnancy, Ms. Krotz answered, "I guess maybe she was." I, 200.[2]

Ms. Krotz testified that the girls saw Mr. Thorpe regularly over the summer of 2012. I, 191. She recalled that Mr. Thorpe stopped seeing Brianne in late September or early October of 2012, but stated that it was Brianne's choice not to go there. I, 190. At no point did Brianne tell her mother that any inappropriate touching had taken place. I, 193. Ms. Smalla continued to care for both girls even after Mr. Thorpe stopped having parenting time with Brianne, and she occasionally witnessed Brianne around Mr. Thorpe when he came by to get Emma. II, 52. During this time she never got the sense that Brianne was repulsed or afraid of Mr. Thorpe. II, 52.

The following April, Ms. Smalla informed Ms. Krotz that Brianne had told Abigail that Mr. Thorpe had touched her inappropriately. I, 191. Ms. Smalla testified that she does not believe any abuse happened, but knew she had a duty to communicate the allegation to Ms.

[2] There was also some testimony about Mr. Thorpe's behavior in 2012 and 2013. Ms. Krotz testified that Mr. Thorpe began behaving erratically toward the end of 2012 and in April of 2013 he made suicidal remarks that worried her. I, 191-192. Mr. Thorpe acknowledged that in the spring of 2013 he was struggling and seeking help. He testified that he lost his doctor around Christmastime of 2012 and consequently stopped receiving his medication. II, 53, 97. This, in Mr. Thorpe's words, caused a downward spiral. II, 98. Ms. Smalla also noted that in March of 2013 she noticed that her son seemed very depressed and that he was also struggling with other health issues and financial stress. II, 53.

Krotz even if she didn't believe it. II, 73-74. Upon receiving this information, Ms. Krotz notified the authorities. I, 191.

Brianne was questioned by Officer Dame of the Allegan City Police Criminal Sexual Conduct Unit. He was the officer in charge of the investigation and he conducted a forensic interview of Brianne at Safe Harbor Children's Advocacy Center on April 17, 2013, approximately one week after the allegations were first reported. I, 251.

Officer Dame testified that during the interview Brianne disclosed that Mr. Thorpe had touched her. I, 253. In response to questions by defense counsel and the prosecutor, Officer Dame further stated that because he got a direct response from Brianne, he did not feel the need to follow up with any hypothesis testing questions or do anything to see if she was lying. I, 259-260.

At trial, Brianne testified that Mr. Thorpe sexually assaulted her three separate times on two dates in August of 2012 when she and her sister were staying the night at Mr. Thorpe's home. I, 215. According to Brianne, the first time it happened she and Emma were in bed when Mr. Thorpe came into the room and touched her vagina with his hand.[3] At trial, Brianne testified that the touching was under her pajamas abut over her underwear and that he rubbed her with his hand. I, 216-217. At the preliminary exam, she testified that the touching was under her pajamas and her underwear. PE, 12. Brianne acknowledged that she never mentioned a rubbing action to Officer Dame during the forensic interview or at the preliminary exam and testified that was because she had just remembered it. I, 239. Additionally, at trial, Brianne testified that Emma was sleeping when this incident occurred. I, 216. At the preliminary exam, Brianne testified that she and Emma were awake watching the movie when it happened. PE, 11, 22-23.

[3] Brianne testified that when she and her sister stayed at Mr. Thorpe's house they typically slept in his bed. I, 211-212. There was a kids' room there with toys and a twin bed for her and Emma to share, but they mostly just used the room for playing. I, 211.

Brianne further testified that Mr. Thorpe repeated the same behavior minutes later, this time under her pajamas but over her underwear. I, 224-225. Neither incident involved penetration. I, 217, 225. She further indicated that she asked Mr. Thorpe to stop each time, and he did. I, 218, 225. At trial, Brianne alleged that the next morning Mr. Thorpe told her not to tell anyone. I, 218. However, at the preliminary exam, when she was asked if "he sa[id] anything to [her] the next morning about what he had done," she stated he did not. PE, 14. Nor did Brianne ever tell Officer Dame that Mr. Thorpe had told her not to tell. I, 239; 257.

At both the preliminary exam and at trial, Brianne testified that along with Emma, her dog Jake was present in the room at the time of the alleged assaults. PE, 22; II, 220, 237. At trial, defense counsel attempted to elicit testimony from Ms. Smalla that the dog had died approximately 9 months before the assaults were alleged to have taken place, but was prevented from doing so after the prosecutor objected to the testimony on the basis of relevancy. II, 54-56.

Brianne also testified about a third incident. She described the third incident as taking place approximately one week after the first two when she was again staying at Mr. Thorpe's house in bed with Emma. I, 218-219. According to Brianne, on this occasion Mr. Thorpe came in the bed and pulled her wrist behind her body, placing her hand on his unclothed penis. I, 219-222. She testified that when this happened she tried to pull her arm away then kicked his leg, and that he let go of her wrist at that point. I, 221-223.

Brianne was also questioned about her disclosure to her friend Abby (Abigail Smalla). I, 230. Brianne testified that after telling Abby, Abby told her mom Kim Smalla, and that Kim came to talk to Brianne that same night and asked her what happened. I, 230, 242. When asked on cross-examination whether she told Kim at that time that "one thing happened on one night", Brianne testified that she did not remember and then after further questioning agreed that it was

possible. I, 242. Additionally, at trial, Brianne testified for the first time that in September of 2012 she decided that she did not want to see Josh anymore and stopped going over to his house. I, 228. She did not tell this fact to Officer Dame at the forensic interview nor did she say as much at the preliminary exam. I, 243; 257 (Dame). Indeed, at the preliminary exam, Brianne agreed that "there came a point when he stopped seeing [her]". PE, 25.

Joshua Thorpe testified in his own defense and maintained that he did not sexually assault Brianne in any way. II, 81.

The prosecution presented the expert testimony of Thomas Cottrell. Cottrell, who has a Masters in Social Work and is the vice-president of counseling services at the YWCA Counseling Center, was qualified as an expert in the area of child sexual abuse and disclosure. II, 7. According to the prosecution, Mr. Cottrell had not been provided any specific information about the case at hand and had not examined or treated Brianne in the past. II, 28. Rather, his expert opinion was offered based on his education, experience, and long-term involvement with children and child sexual abuse. II, 28.

Mr. Cottrell testified that "there is [sic] a broad range of reactions when children are abused." II, 10. He stated, "for those of us who work with it day in and day out, it's relatively easy for us to recognize because we ask the questions." II, 11. According to Cottrell, children make a cost/benefit analysis in deciding whether to disclose abuse, which ultimately comes down to which decision will hurt more. II, 14.

When asked what may be some reasons for children to not come forward right away, Cottrell stated, "children often do come forward. We just don't recognize it when they do." II, 13. As an example, he averred that children may be "coming forward" when they say things like "I don't want to go on visits with Dad." II, 13. Cottrell defined the term "delayed disclosure" as

"… simply a time lapse between--when we are talking about child sexual abuse--between when the abuse occurs and when a child discloses in a way that someone understands that they are disclosing." II, 23. Cottrell explained the delay in disclosure could be "because they just didn't believe that it was wrong until something in their maturity changes or they hear information that they incurred was indeed wrong and then someone discloses." II, 23. Cottrell explained a child may also choose to disclose abuse that happened in the past because "it is now easier to tell than to keep the secret. It is now less painful to tell than to keep the secret." II, 27.

On cross-examination, Cottrell was asked if kids could lie, to which he responded, "Anyone who has ever worked with a child or has had a child knows that they can lie, yes." II, 30. On re-direct, the following exchange took place:

> Q: In your training and experience of all of the times that you've handled child sexual abuse cases, what, in your experience, if you can say, is the percentage of children who actually do lie?
>
> A: About the sexual assault itself?
>
> Q: About the sexual assault itself.

II, 31. Defense counsel objected and asked if there were statistics to support Cottrell's proposed answer. II, 31. The court initially ordered the prosecution to lay a foundation, but then held that Cottrell could answer without addressing the issue further. II, 32. It concluded that defense counsel had brought up the issue of children lying on cross-examination and thus "opened the door" to the prosecutor's line of questioning on redirect. II, 32. Subsequently, Mr. Cottrell answered the question as follows:

> I can only speak to our experience at the organization. There is literature out there that is extremely variable in its—in it's [sic] identification of fabrication disclosures. I can tell you within our population, we run into it probably two to four percent of the cases that we get having children alleging abuse when—sexual abuse when abuse did not actually occur. But I will say that in those cases, there is clear motivation for them to do

> that. When children lie, they lie with a purpose. They are usually trying to get something positive to happen to them or escape some kind of pain . . .

II, 32-33.

Shortly thereafter, the prosecutor again questioned Mr. Cottrell about the frequency of false reports based on his experience ("in your experience, you said it's rare; is that correct?") and Mr. Cottrell again testified, "it's extremely rare." II, 34.

The jury convicted Mr. Thorpe as charged of three counts of second degree criminal sexual conduct, and on March 21, 2016, he was sentenced to 71 months to 15 years in prison.

Post-conviction proceedings –

On August 10, 2017, after briefing by the parties and oral argument, the Court of Appeals issued a per curiam opinion affirming Mr. Thorpe's convictions. Appendix A.

On August 31, 2017, Mr. Thorpe filed a timely Motion for Reconsideration in the Court of Appeals, asserting, *inter alia*, that the court committed palpable error in basing its finding that the improper expert testimony did not prejudice Mr. Thorpe on a mistaken belief that "the victim testified unequivocally" about the allegations and a misunderstanding of the strength of the untainted evidence. The Court of Appeals denied motion for reconsideration on November 21, 2017. Appendix B.

ARGUMENT

I. JOSHUA THORPE WAS DENIED A FAIR TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND MICHIGAN CONSTITUTIONS WHERE THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING UNHELPFUL, UNRELIABLE, AND PREJUDICIAL EXPERT TESTIMONY ABOUT THE RATE OF FALSE REPORTS OF SEXUAL ABUSE BY CHILDREN.

Issue Preservation and Standard of Review

This issue is preserved as defense counsel objected to the admission of Thomas Cottrell's testimony regarding the rate of false reports in child sexual abuse cases. Questions of whether to permit particular kinds of expert testimony are reviewed for abuse of discretion. *People v Beckley*, 434 Mich 691 (1990); *People v Haywood*, 209 Mich App 217 (1995). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269 (2003).

Criminal defendants possess a due process right to a fair trial, which may be denied by improper evidentiary rulings. See US Const, Am V, XIV. State court evidentiary violations may rise to the level of federal constitutional deprivation by rendering a trial fundamentally unfair. *Crane v Kentucky*, 476 US 683 (1986). As the preserved evidentiary error implicated due process rights under US Const, Am V, XIV; Const, 1963, art 1, § 17, and was preserved by defense counsel's objection, the prosecutor must prove the error was harmless beyond a reasonable doubt. *People v Anderson*, 446 Mich 392, 405-406 (1994).

Discussion

The case against Joshua Thorpe was a one-on-one credibility contest between the complainant and the defendant. On the second day of trial, the prosecution presented an expert witness, Thomas Cottrell, who had never met Brianne Goodenough, but who nonetheless

testified in great detail how the complainant's behavior and actions comported with those of a victim of sexual abuse. On cross-examination, defense counsel asked Cottrell if kids could lie, to which he responded, "anyone who has ever worked with a child or has had a child knows that they can lie, yes." II, 30. This concept—that children sometimes lie—was brought up numerous times during voir dire by both the prosecutor and defense counsel. I, 30, 61, 89, 104.

On-redirect, the prosecutor asked Mr. Cottrell, "In your training and experience of all of times that you've handled child sexual abuse cases, what, in your experience, if you can say, is the percentage of children who actually do lie?" II, 31. Over defense counsel's objection, Cottrell stated in pertinent part, "I can only speak to our experience at the organization. There is literature out there that is extremely variable in its—in it's identification of fabricated disclosures. I can tell you within our population, we run into it probably two to four percent of the cases that we get have children alleging abuse when—sexual abuse when abuse did not actually occur." II, 33. Cottrell further testified that in those two to four percent of cases there was a "clear motivation" for the lie and "very purposeful gains" the child lying about the abuse was trying to achieve because "when children lie, they lie with a purpose." II, 33-34.

The admission of improper "expert" testimony about the rate or percentages of false reports of sexual abuse by children violated the standards set forth in *People v Kowalski*, 492 Mich 106 (2012) and MRE 702. The trial court failed in its fundamental role as a gatekeeper, and failed to follow the proper guidelines for assessing expert testimony. Moreover, the error was not harmless—the expert's testimony improperly vouched for the credibility of the complainant and invaded the province of the jury.

A. Thomas Cottrell's testimony on the rates at which children lie about sexual abuse did not satisfy *Daubert* or MRE 702's reliability requirements.

In Michigan the admissibility of scientific and other technical evidence is governed by *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579 (1993), in which the U.S. Supreme Court found that testimony based on scientific evidence is admissible if it is both relevant and reliable. Relevance is determined by whether the evidence "will assist the trier of fact to understand the evidence or to determine a fact in issue." MRE 702. Reliability requires a showing that the evidence is based on "the methods and procedures of science." *Id.* at 599. "A court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and has a fundamental duty to ensure that the proffered expert testimony is both relevant and reliable." *Id.*

The admissibility of expert testimony is further governed by MRE 702, which states, "*If* the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if:

> (1) the testimony is based on sufficient facts or data,
> (2) the testimony is the product of reliable principles and methods, and
> (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE702 (emphasis added).

These considerations are separate and distinct and each must be satisfied independently in order to "assist the trier of fact to understand the evidence or to determine a fact in issue." *Kowalski*, 492 Mich at 120-121. "A court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and has a fundamental duty to ensure that the proffered expert testimony is both relevant and reliable." *Id*. This analysis requires courts to ensure that **each aspect** of an expert witness's proffered testimony—including the data underlying the expert's

theories and the methodology by which the expert draws conclusions from that data—is reliable." *Id*. at 131 (emphasis added).

The trial court in this case failed in its fundamental role as gatekeeper when it allowed Cottrell to testify that false reports of sexual abuse happen at a rate of 2 to 4 percent, are "extremely rare," and only occur where there is a compelling and clear motivation to lie. Cottrell's expert testimony on this matter crossed the line from educating the jury about matters outside their ken, into a confirmation of the complainant's allegation. Nor did the testimony meet the standard for admissibility as set forth in MRE 702 and *Kowalski*.

1. The trial court failed to make the threshold inquiry required by MRE 702 and wrongly concluded that defense counsel "opened the door" to Mr. Cottrell's expert testimony on this matter.

The threshold inquiry into whether expert testimony is proper under MRE 702 is whether the proposed testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue. Here, when counsel objected to the prosecutor's line of questioning and challenged the scientific validity of the proposed testimony (II, 31-32), the court did not make this inquiry, nor did analyze whether the proposed testimony satisfied MRE 702's three-prong test. Rather the court summarily concluded the testimony was proper because defense counsel had "opened the door" to Cottrell's "expert" testimony regarding the rate at which children make false reports of sexual abuse when he asked Cottrell whether "kids can lie" and Mr. Cottrell responded, "Anyone who has ever worked with a child or has had a child knows that they can lie, yes" II, 30, 32.

Not only did the defense not "open the door" to the quasi-scientific testimony elicited by the prosecution by asking one simple and unscientific question, one cannot "open the door" to improper expert opinions. Indeed, it is the judge's duty as gatekeeper to prevent the jury from

hearing unreliable expert testimony. Under *Daubert*, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 US at 589.

What's more, the proposed testimony here is precisely the kind of information that does not assist the trier of fact in understanding the evidence, but "risks the prospect of jurors increasingly subordinating their own commonsense judgments . . . . to the false appearance of expertise suggested by the presence of expert psychological testimony." *Kowalski*, 492 Mich at 147-148 (Markman, J., concurring in part and dissenting in part). To expose the jury to "expert" witnesses who will testify that children lie about sexual abuse in 2 to 4 percent of cases and only with a clear and meaningful purpose "creates[s] the illusion that there is some 'scientific, technical, or other specialized knowledge' that will assist the jury in carrying out its core responsibility of determining credibility." *Id.*

2. Mr. Cottrell's testimony regarding the percentage of children who falsely report being sexually abused was not based on sufficient facts and was not the product of reliable principles and methods.

Even if a court identifies that testimony does involve a matter beyond the common understanding of the average juror, the trial court has an obligation under MRE 702 "to ensure that any expert testimony admitted at trial is reliable." *Gilbert v Daimler Chrysler Corp.*, 470 Mich 749, 780 (2004).While the exercise of the gatekeeper function is within a court's discretion, the court may neither abandon this obligation nor perform the function inadequately. *Id.*

"Expert testimony without a credible foundation of scientific data, principles, and methodologies is unreliable and, thus unhelpful to the trier of fact." *Kowalski*, 492 Mich at 121. "When evaluating the reliability of a scientific theory or technique, courts consider certain factors, including but not limited to whether the theory has been or can be tested, whether it has

been published and peer-reviewed, its level of general acceptance, and its rate of error if known." *Id* at 131.

The jury in this case heard an "expert" testify that children allege abuse that did not actually occur in a very small percentage of cases (2 to 4%). II, 33. He further testified that when children do make false reports of sexual abuse they have a clear and recognizable motivation for doing so. II, 33. This was improper. The evidence was inadmissible under MRE 702 and *Kowalski* because it does not hold up under the scientific microscope.

Neither a psychologist nor a psychiatrist, Cottrell based his testimony completely on his experience working with people who were self-reported victims of sexual assault. II, 33.[4] Cottrell worked at the YWCA for nearly 33 years in various positions and testified that "the bulk" of his experience treating those who claimed to be sexually abused was in the first 20 years of his career where he served as a therapist for at least three hundred children and another one hundred children in group therapy. II, 9. Mental health professionals are trained to assist patients, not judge their credibility. "While it may be entirely proper for a clinician to accept a patient report of sex abuse at face value and proceed to render treatment on that basis, for forensic purposes, such an assumption is utterly inappropriate." *Newkirk v Commonwealth*, 937 SW2d 690, 694 (Ky, 1996).

Another issue with the expert testimony that was presented in this case is that the underlying support for the "evidence" is derived not from experimentation, but simply from observation. Mr. Cottrell's anecdotal testimony about children he has observed cannot be considered to be based in science. The testimony could not be tested or peer-reviewed. There

[4] Notably, before Cottrell provided the jury with his own statistics, he acknowledged that there was literature on the topic of fabricated disclosures, derived presumably from formal studies and methods other than a treating therapist's personal observation, and that the literature was "extremely variable." II, 32-33. Yet Cottrell did not base his opinion on the literature or any other source, but rather on his observations alone.

would be no way to determine the error rate of Cottrell's observations, or how many of the sexual assault victims Cottrell helped treat were actually abused.[5] No data was presented to supplement Mr. Cottrell's theory. Instead, his testimony was rooted solely in his opinions based on what he claimed he witnessed working with victims of sexual assault. While courts have emphasized the need to be flexible regarding the application of the reliability factors to testimony based on experience and observation, there still must be some showing of validation beyond the witness's own assurance.

In *Kowalski*, Dr. Richard Leo, a social psychologist, proposed to testify that false confessions existed, that certain psychological interrogation techniques commonly employed by the police sometimes resulted in false confessions, and that some of those techniques were used in that case. *Kowalski*, 492 Mich at 132. "With regard to Leo, the circuit court followed the mandate of MRE 702 and carefully reviewed all the stages of Leo's research, starting with his data. The circuit court noted that Leo decided whether a confession was false on the basis of information he gathered from sources." *Id*. The circuit court also "questioned the accuracy and potential bias of these sources." *Id*. This type of analysis was not done by the trial court in this case.

The *Kowalski* Court identified multiple problems with the analysis Leo applied to his data. *Id*. at 133. "The circuit court concluded that, rather than yielding factors common to all confessions, Leo's method seemed to yield only factors common to confessions Leo believed to be false. This also made it impossible to test Leo's research or compute its rate of error. The circuit court also noted that because Leo did not have a 'reliable means to have a study group'

[5] The state of Louisiana performed its own evaluation of the known or potential rate of error of a criminal sexual abuse accommodation syndrome (CSAAS) diagnosis, and it found that the error rate was too high for the testimony to be admissible. *State v Foret*, 628 So 2d 1116, 1125-27 (La, 1993).

that excluded extraneous factors, he had 'no ability to estimate the frequency of false confessions.'" *Id*. at 132-133.

This is precisely the issue with Cottrell's testimony. It was all observational in nature, and not testable data. Indeed, he was never asked to present any data. It was merely stated by Mr. Cottrell as truth, and presented to the jury as "expert testimony." Experience is not enough to declare expert testimony generally reliable. *Kowalski, supra*.

Finally, this Court has determined almost identical testimony to be beyond the scope allowed by expert witnesses in CSC cases involving children. In *People v Peterson*, 450 Mich 349 (1995), this Court found that:

> the experts in that case improperly vouched for the veracity of the child victim. For example, Gillan was allowed to testify that children lie about sexual abuse at a rate of about two percent. O'Melia was allowed to testify, over defense objection, that of the cases and studies he was familiar with, there is about an eighty-five percent rate of veracity among child abuse victims. Although we have no basis to dispute these numbers, their inherent inconsistency shows the difficulties that arise when attempting to vouch for the credibility of a witness. **Certainly neither witness stated that the child victim was telling the truth. However, the risk here goes beyond such a direct reference**. Indeed, as we have cautioned before, the jury in these credibility contests is looking "to hang its hat" on the testimony of witnesses it views as impartial. Such references to truthfulness as go beyond that which is allowed under MRE 702.

Id. at 375-76 (emphasis added).

In permitting Mr. Cottrell to testify as an expert about the frequency with which children fabricate allegations of sexual assault, the trial court failed in its fundamental duty as a gatekeeper and allowed Cottrell to vouch for the complainant's credibility, invading the province of the jury to determine the credibility of witnesses.

B. Even assuming Mr. Cottrell's testimony satisfied MRE 702, it should have been excluded under MRE 403 because it was far more prejudicial than probative.

Even if expert testimony meets the strict requirements for reliability and relevance, a trial judge must further consider how the testimony will fare under MRE 403. *Kowalski*, 492 Mich at 120-122. MRE 403 establishes a balancing test for the admissibility of all evidence; it excludes relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." MRE 403. Evidence is unfairly prejudicial when "there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 367, 398 (1998).

The United States Supreme Court has warned that "expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing the possible prejudice against probative force under Rule 403 . . . exercises more control over experts than other lay witnesses." *Daubert*, *supra* at 595. The concern of unfair prejudice to defendants is particularly critical in child sexual abuse cases. In *People v Peterson*, 450 Mich 349, 371 (1995) this Court recognized that child-sexual-abuse cases present "special considerations" given "the reliability problems created by children's suggestibility." Further, the *Peterson* Court condemned opinions related to the truthfulness of alleged child-sexual-abuse complainants even when the opinions are not directed at a specific complainant. "This is because in cases hinging on credibility assessments, the risk goes beyond any direct reference to a specific complainant given that the jury is often "looking to 'hang its hat' on the testimony of witnesses it views as impartial."" *People v Musser*, 494 Mich 337, 357-358 (2013), citing *Peterson*, *supra* at 376.

There is no doubt that Cottrell's testimony dealing with the rate at which children falsely report sexual abuse was considerably more prejudicial than probative. When a jury is confronted

with evidence of an alleged child victim's behaviors, paired with testimony that these behaviors are consistent with being sexually abused, and then told that it is exceedingly rare for children to make false allegations of abuse and that in those rare instances when they do falsely report there are clear and compelling reasons to do so, the invited inference is obviously that the child was sexually abused. This evidence is profoundly misleading, and it is just as prejudicial as if the expert had stated outright that it was his conclusion that the complainant was abused by the defendant.

C. Mr. Cottrell's testimony prejudiced Mr. Thorpe and deprived him of a fair trial.

This case hinged on the complainant's credibility. Indeed, there was no evidence of sexual abuse outside of the testimony of Brianne. The introduction and use of Cottrell's expert testimony unfairly bolstered the credibility of the complainant and served to unduly prejudice Mr. Thorpe. Errors that lend corroboration to one side's story in a credibility contest are intrinsically prejudicial. *People v Anderson*, 446 Mich 392, 407, n 37 (1994). Again, this is particularly so where the bolstering is of child sex-offense complainants and is done by an expert who often represents the only "seemingly objective source." *Musser*, 494 Mich at 357-58; *People v Beckley*, 434 Mich 691,722 (1990). Moreover, the fact that Cottrell went beyond stating that he found false allegations of abuse to be "rare" or even "exceedingly rare" and placed a statistical probability on the event makes the testimony even more problematic and prejudicial. As the Sixth Circuit observed in *Ege v Yukins*, 485 F3d 364, 376-377 (CA 6, 2007) "testimony expressing opinions or conclusions in terms of statistical probabilities can make the uncertain seem all but proven, and suggest, by quantification, satisfaction of the requirement that guilt be established 'beyond a reasonable doubt.'" *Id.* (internal citations omitted).

The importance of Thomas Cottrell's testimony in bolstering Brianne's story is evident from the prosecutor's summation arguments. First, in closing argument the prosecutor asked the jury to think about Brianne's testimony in conjunction with Cottrell's. II, 117. She then walked them through all the ways Brianne's behavior comported with the profile that Cottrell provided, concluding "Doesn't all of that information describe Bree and her behavior, when this was happening to her and after it happened to her?" II, 117-119. Then later in her rebuttal summation, and in response to defense counsel's argument that children do sometimes lie about sexual abuse, the prosecutor referred directly to Cottrell's statistics: "The defense attorney asked you, why would Bree lie? It's a very good question. You need to think about that, because she did not. Mr. Cottrell did say that it's very rare for children to lie. His percentage was less than two to four percent of all those cases that his agency sees." II, 134.

What's more, defense counsel's attempts to counteract the improper testimony on cross-examination and closing argument could not cure the problem. On cross, defense counsel questioned Cottrell on the validity of his information, asking "these percentages are when it's discovered, when it's figured out, fair?" II, 34. And in closing, defense counsel reminded the jury that Cottrell had testified that children do sometimes lie and then addressed Cottrell's testimony regarding error rates, stating that he did not think Cottrell's statistics were "necessarily accurate" because they did not account for the cases where allegations were fabricated and no one figured it out. II, 129-130. The court's gatekeeping function under *Daubert* is critical precisely because the jury does not have the education or experience to properly assess whether expert testimony is unreliable or overly prejudicial and to properly weigh unreliable and unscientific opinions against rebuttal evidence. See, e.g., *Ege*, 485 F.3d at 375 (explaining that

the admission of an unreliable expert opinion may violate a defendant's right to a fundamentally fair trial, even where rebuttal experts are presented by the defense at trial).

Mr. Cottrell's testimony on the rates at which children lie about sexual abuse was wholly improper and denied Mr. Thorpe a fair trial. The trial court in this case failed in its fundamental role as a gatekeeper when it neglected to follow the proper guidelines for admitting scientific expert testimony. Cottrell's testimony was not needed to assist the jury and it was ultimately more prejudicial than probative. Accordingly, under either the non-constitutional or constitutional standard, the error was reversible. Mr. Thorpe's conviction on all three counts should be vacated, and the matter remanded for a new trial.

D. Errors in the Court of Appeals Analysis

The Court of Appeals reversibly erred by concluding that—assuming the prosecution's expert witness violated MRE 702 under *People v Peterson*, 450 Mich 349, 371 (1995) by testifying that children only allege abuse that did not actually occur in 2 to 4% of cases—reversal is unnecessary because the error was harmless. Court of Appeals Opinion at 2, Appendix A. The court based its finding that the improper expert testimony did not prejudice Mr. Thorpe on a misunderstanding of the strength of the untainted evidence and failed to consider the lack of other evidence to corroborate the complainant's allegations.

Foremost, in finding that Mr. Thorpe did not establish the requisite prejudice to warrant reversal, the Court of Appeals inaccurately characterized the complainant's testimony about the alleged abuse as "unequivocal[]." Opinion at 2. The record does not support this conclusion.

As defense counsel elicited during cross-examination, there were a number of inconsistencies between the accounts that the complainant provided prior to trial (including the forensic interview and preliminary exam) and on direct examination at trial.

- At trial, Brianne testified about three incidents, yet acknowledged that in April, 2013 she may have informed Kimberly Smalla that the abuse occurred one time.[6] I, 242.[7]

- At the preliminary exam, Brianne testified that her sister Emma was awake and watching a movie in bed with her when the first incident happened. PE, 11, 22-23.
    - At trial, Brianne testified that Emma was asleep when the assault occurred. I, 216.

- At the preliminary exam, Brianne testified that the first incident involved touching *under* her underwear. PE, 12.
    - At trial, Brianne testified that the first incident involved touching *over* her underwear. I, 216-217.

- At the preliminary exam, Brianne that a second touching occurred on the same night, two or three minutes after the first incident. PE, 14.
    - At trial, Brianne first testified that Mr. Thorpe did not touch her again that night, then later testified that he did touch her a second time the same night. I, 218, 224.

- At the preliminary exam, despite being specifically asked whether Mr. Thorpe had "sa[id] anything to [her] the next morning about what he had done," Brianne testified that Mr. Thorpe did not say anything about what happened the next morning and that he never said anything after that about what he had done. PE, 14.
    - At trial, Brianne testified that the next morning Mr. Thorpe asked her not to tell anybody about what happened. I, 218.

- At the preliminary exam, Brianne testified that she told her friend Abby after not seeing Mr. Thorpe for a long time. She further agreed that there came a point where *he* stopped seeing *her*. When asked whether that made her mad, she replied, "I don't think so." PE, 25.
    - At trial, Brianne testified that she stopped going to Mr. Thorpe's house by choice. I, 230. See also I, 243 (acknowledging that she did not give this testimony at the forensic interview or preliminary exam).

[6] Defense counsel attempted to elicit testimony from Ms. Smalla regarding how many times Brianne claimed to have been assaulted. II, 57. The prosecutor objected to the question and the parties approached for a bench conference. II, 57. Any argument or ruling on the objection took place off the record. II, 57. Thereafter, defense counsel continued his examination of Ms. Smalla and made no further attempts to elicit testimony about Brianne's initial allegation.

[7] References to the trial transcript are denoted by volume and page number. References to the preliminary exam transcript are abbreviated "PE".

Next, in support of its conclusion that the error was harmless, the court noted that the complainant's mother corroborated the complainant's testimony that she was the one who decided to stop visiting the defendant. Opinon at 2. It failed to acknowledge however, that Mr. Thorpe's mother corroborated his testimony that it was he who decided to no longer have parenting time with the complainant and that his mother had advised him to focus on his biological daughter because she "did not believe that Chelsie [Krotz] was going to keep the girls in Joshua's life." II, 72.

Similarly, the court pointed to the expert's testimony identifying certain factual situations in which children were found to be lying regarding sexual abuse as a fact that mitigated the prejudicial impact of his improper vouching testimony—that in his experience only two to four percent of children allege sexual abuse when abuse did not actually occur. Opinion at 2. But this anecdotal data was not beneficial to Mr. Thorpe. Rather, it served to further vouch for the veracity of the complainant by distinguishing her from the "extremely rare" occasions in which children lie about sexual abuse.

Specifically, Cottrell opined:

> . . . in those cases [the two to four percent], there is clear motivation for them to do that. When children lie, they lie with a purpose. They are usually trying to get something positive to happen to them or escape some kind of pain . . . The whole process of investigating and being questioned and being brought into therapy are not pleasant experiences for children by any stretch of the imagination. **So lying to bring that on to them is a relatively rare occurrence because there is no gain for children in having the spotlight put on them.** [II, 32-33 (emphasis added)].

Cottrell went on to describe the two different scenarios where he has experienced children lie about sexual abuse and outlined for the jury why there was a "clear motivation" to lie in those cases. Namely, (1) situations where a sibling has been abused and the child wants to be part of whatever their brother or sister is doing including the therapy process and (2) situations where

teenagers disclose sexual abuse that did not occur in order to bring attention to domestic violence and protect a parent. II, 32-34. After explaining these scenarios, Cottrell concluded, "so there were very purposeful gains that the children who were lying about abuse were trying to achieve" and then, in response to a question by the prosecutor, reiterated that in his experience false reporting is "extremely rare." II, 34.

Contrary to the court's characterization of this testimony as a fact that weighed against a finding that the improper expert testimony was prejudicial, Cottrell's identification of these specific factual situations exacerbated the problem. It qualified his previous testimony about the rate of veracity among child abuse victims and functioned as additional vouching for the credibility of the who complainant who undisputedly did not fit into either anecdotal scenario and arguably achieved no "purposeful gains" from lying about abuse.

In criminal sexual conduct cases involving children, when no physical evidence corroborates the prosecution's case, expert witnesses that testify about the behavior of child abuse victims play a central role. This Court has specifically recognized the compelling influence of an expert in a child sexual abuse prosecution: "To a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat." *People v Beckley*, 434 Mich 691, 722 (1990).

The expert in this case improperly vouched for the veracity of the child complainant. See *Peterson*, 450 Mich at 375. Cottrell's testimony on the whole gave the jury seemingly ironclad proof that the complainant was telling the truth in a case where the truth was anything but clear.

Defense counsel attempted to combat the improper expert testimony during re-cross examination and in closing argument, but he did not present any rebuttal evidence and could only

argue that he did not think Cottrell's statistics were "necessarily accurate." II, 129-130. Despite Cottrell's passing reference that "[t]here is literature out there that is extremely variable in its . . . identification of fabricated disclosures," (II, 32) the jury heard statistical testimony only from Cottrell, with no additional evidence to conflict with it.

The Court of Appeals findings with respect to prejudice misrepresent the evidence presented at trial and ignore the intrinsic prejudice in the wrongful admission of corroborating expert testimony. Given the centrality of the complainant's credibility to the prosecution's case, the lack of evidence beyond her allegations, and the nature of testimony offered by Cottrell, Mr. Thorpe established the requisite prejudice to warrant reversal.

To allow the Court of Appeals' decision to stand in this case would be manifestly unjust. MCR 7.302(B)(5).

II. IN WHAT AMOUNTED TO A ONE-ON-ONE CREDIBILITY CONTEST BETWEEN THE COMPLAINANT AND THE DEFENDANT, THE TRIAL COURT ERRED IN EXCLUDING CRITICAL IMPEACHMENT EVIDENCE AND IN DOING SO VIOLATED MR. THORPE'S RIGHT TO PRESENT A DEFENSE.

Issue Preservation and Standard of review

The issue of the admissibility of the testimony was preserved when the trial court sustained the prosecution's objections to the defense's proposed testimony.

All criminal defendants are entitled to the due process right to present a defense at trial. Improper evidentiary rulings made by the court deprive criminal defendants of this right if those rulings render the trial fundamentally unfair. A trial court's determination of evidentiary issues is reviewed for abuse of discretion. *People v Adair,* 452 Mich 473 (1996). For preserved Constitutional errors, this Court must reverse unless the prosecution proves that the error was "harmless beyond a reasonable doubt." *People v Anderson*, 446 Mich 392, 405-406 (1994).

Factual summary

At trial, defense counsel was twice prevented from presenting to the jury proper impeachment evidence that would have served to cast doubt on Brianne's credibility and reliability.

At the preliminary hearing and at trial, Brianne testified that her dog, named Jake, was present during the time of the alleged assaults. PE, 23; I, 220, 237.

MS. KOCH: Was anybody else in the trailer when this happened?
BRIANNE: Nobody except for my dog. [I, 220]

MR. HILLS: Okay. So your testimony that when this happened, I believe you indicated that Josh was there, Emma was there --
BRIANNE: Correct.
MR. HILLS: And I think you mentioned a dog.
BRIANNE: Correct.

MR. HILLS: Would that be Jake the dog?
BRIANNE: Correct. [I, 237]

At trial, defense counsel sought to elicit testimony from Mr. Thorpe's mother, Kim Smalla, regarding the dog. II, 53-54. Before Ms. Smalla could respond, the prosecution objected, arguing that testimony regarding the dog was not relevant. II, 54. After excusing the witness and the jury, the court asked both parties to put their arguments on the issue on the record. II, 55. In defending the line of questioning, defense counsel stated:

> And I would say it is relevant. My recollection of Brianne's testimony is that present was herself, Josh, Emma, and this dog, Jake during this timeframe of the assaults. I think it is relevant to this case that the dog was deceased at this time. And she said that the assault happened in August of 2012 and the dog – I believe the witness will indicate that the dog died around Christmas 2011.

II, 55. The court then recessed to review Brianne's testimony. II, 56. The ruling on the prosecution's objection was made off the record; no mention of whether the objection was sustained or overruled can be found in the transcript. II, 56. It appears, however, that the court sustained the objection, as defense counsel continued its examination of Ms. Smalla, making no further mention of the dog. II, 56-57.

To the extent that the court's failure to make evidentiary rulings on the record precludes effective appellate review, this error should be construed in favor of the defendant. It is axiomatic that the court has a duty to maintain the record, and the court's failure to respond to an objection is error. *Kirby v Larson*, 400 Mich 585 (1977). Where a trial court fails to make, on the record, sufficient findings of fact for the Court to engage in meaningful review, remand is necessary to develop the record. *See People v Tennille*, 315 Mich App 51 (2016).

Defense counsel then attempted once more to impeach Brianne through Ms. Smalla. Brianne testified at the preliminary exam and again at trial that Mr. Thorpe had touched her

inappropriately three separate times on two different occasions. Defense counsel sought testimony from Ms. Smalla that in April, 2013, Brianne had reported to her that she had been assaulted only once. II, 57. This prompted a hearsay objection from the prosecution; defense counsel argued that Ms. Smalla's answer would have been admissible as impeachment. II, 57. A bench conference followed. II, 57. This time, neither attorney's argument nor the court's ruling were made on the record; nevertheless, it appears that the court sustained the state's objection, as defense counsel made no further attempts to elicit testimony on what Brianne had told Ms. Smalla when she first alleged that she had been sexually abused by Mr. Thorpe.

Discussion

By sustaining the state objections and preventing defense counsel from pursuing these two lines of impeachment, the trial court erred, and in doing so, deprived Mr. Thorpe of his right to present a defense.

First, the court's off-the-record ruling sustaining the state's relevance objection to questions regarding the family dog, Jake, was erroneous.

MRE 401 defines "relevant evidence" as evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 402 states "all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible." The decision whether to admit evidence is within the sound discretion of the trial court. *People v McDaniel*, 469 Mich 409 (2003). However, a trial judge must be guided by the principle that MRE 401 sets forth a low threshold of relevancy. *See People v Crawford*, 458 Mich 376, 390 (1998). In order to be relevant,

evidence need only have "any tendency" to make the existence of any fact in issue more, or less, probable. *Id*.; MRE 401.

Here, the testimony defense counsel sought to elicit with this line of questioning was not only relevant, but crucial to Mr. Thorpe's case. Defense counsel sought to establish that the family dog, Jake, had died in December of 2011. This was directly relevant to the case because Brianne had testified, that the dog was present when the alleged assaults took place in 2012. I, 220, 237. The testimony sought from Ms. Smalla regarding the dog, therefore, would have cast doubt as to veracity of specific details in Brianne's recollection of the incidents. Evidence of the impossibility of one aspect of Brianne's account of the assaults would have been relevant because it would have had the consequence of showing the jury that Brianne's memory was both unreliable and inaccurate.

Additionally, the court also ruled erroneously and abused its discretion when it sustained the state's hearsay objection to defense counsel's attempt to elicit testimony from Ms. Smalla regarding how many times Brianne claimed to have been assaulted. Extrinsic evidence of a witness's prior inconsistent statement is admissible for impeachment purposes if "the witness is afforded an opportunity to explain or deny the [prior inconsistent statement] and the opposite party is afforded an opportunity to interrogate the witness thereon." MRE 613. Here, Brianne testified at trial that Mr. Thorpe had sexually assaulted her three separate times in August of 2012. I, 215. When confronted with her prior statement to Ms. Smalla that she had been assaulted once, not three times, Brianne testified that she did not remember making the statement. I, 242. She later conceded that it was possible. I, 242. Brianne's refusal to acknowledge the inconsistency entitled the defense to introduce extrinsic evidence of the prior inconsistent statement: in this instance, the testimony of Ms. Smalla regarding the conversation

she had with Brianne. Thus, the trial court abused its discretion in sustaining the prosecution's objection to the testimony as inadmissible hearsay.

Further, the testimony defense counsel sought to elicit by asking about both the family dog and Brianne's prior statement was not collateral, but highly relevant and material to Mr. Thorpe's central theory of defense. By denying defense counsel from presenting this evidence to the jury, the court denied Mr. Thorpe of his due process right to present a defense.

The Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Holmes v South Carolina*, 547 US 319 (2006), *quoting Crane v Kentucky*, 476 US 683, 690 (1986). The Due Process Clause of the Fourteenth Amendment asserts that the accused has the right at trial to present testimony that is "relevant," "material," and "vital to the defense." *Washington v Texas,* 388 US 14, 16 (1967); *Crane v Kentucky*, 476 US 683, 690-691 (1986). Furthermore, restrictions on the defendant's right to present relevant evidence may not be arbitrary or disproportionate to the purposes they are designed to serve. *Rock v Arkansas*, 483 US 44, 56 (1987).

Here, the testimony defense counsel sought to elicit from Ms. Smalla regarding the family dog and Brianne's prior inconsistent statement was relevant, material, and vital to Mr. Thorpe's defense. Mr. Thorpe's case boiled down to a one-on-one credibility contest between himself and Brianne. No forensic or scientific evidence was offered by the state against Mr. Thorpe. No witnesses other than Brianne were called to testify that the assaults actually occurred. Therefore, whether Mr. Thorpe was guilty depended on what the jury found most credible: the testimony of Mr. Thorpe, or that of Brianne. In his testimony and through his counsel's opening and closing statements, Mr. Thorpe argued that no sexual assault ever occurred, and that Brianne's testimony ought to be disbelieved. This argument would have been substantially

bolstered by evidence that major components of the story Brianne told on the stand—who was present during the assaults, and how many times she was assaulted—were either impossible or had changed over time. Here, Mr. Thorpe was denied the opportunity to present such evidence through the court's erroneous evidentiary rulings, and thus was denied his constitutional right to present a defense. Reversal is required.

Errors in the Court of Appeals Analysis

The Court of Appeals determined that the record was insufficient to assess and rule on this issue because there was no ruling by the trial court to examine or on which to assume that the trial court ruled against the defendant on the prosecutor's objections. Opinion at 3. Still, the court held that "giving the defendant the benefit of numerous assumptions" the trial court's exclusion of impeachment evidence concerning who was present when the abuse allegedly occurred and how the complainant's account of what occurred changed over time was harmless as the impeachment evidence would not have "tainted the victim's credibility to such a degree that it would have undermined her credibility . . . in the eyes of the jury." Opinion at 3. Again, given the lack of evidence beyond the complainant's allegations, it is more probable than not that evidence that undermined her credibility would have tipped the scales in favor of the defense. Additionally, if the trial court's exclusion of conflicting testimony does not mandate reversal standing alone, it must be considered along with the other errors which occurred. See *People v LeBlanc*, 465 Mich 575, 591 (2002) (The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal). The cumulative effect of the errors undermines confidence in the reliability of the verdict.

It not through any fault of Defendant-Appellant that the trial court did not make evidentiary rulings on the record such that the record does not facilitate appellate review. See *Kirby v Larson*,

400 Mich 585 (1977) (the court has a duty to maintain the record). As Mr. Thorpe asserted in his brief on appeal and motion for reconsideration, where a trial court fails to make, on the record, sufficient findings of fact for this Court to engage in meaningful review, remand is necessary to develop the record. See *People v Tennille*, 315 Mich App 51 (2016). See *People v Jackson*, 487 Mich 783 (2010) (a defendant's request for remand is not required to be made in a separate motion and can be made within his appellate brief). Accordingly, undersigned counsel requests that this Court grant leave to appeal and allow Mr. Thorpe to file a motion to remand to supplement the record or remand the case to the trial court in order to develop the record.

III. THE PROSECUTION'S CLOSING AND REBUTTAL ARGUMENTS, WHICH VOUCHED FOR THE CREDIBILITY OF THE COMPLAINANT AND DISPARAGED DEFENSE COUNSEL, DEPRIVED MR. THORPE OF HIS STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL. ALTERNATIVELY, DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.

Issue Preservation and Standard of Review

Claims of prosecutorial misconduct are constitutional issues reviewed de novo. *People v Wilson*, 265 Mich App 386, 393 (2005). Appellate courts decide whether such misconduct denied the defendant a fair trial by evaluating each question in the context of a case's particular facts. *People v Duncan*, 402 Mich 1, 16 (1977). Because trial counsel failed to object, the error is unpreserved and thus Mr. Thorpe must show plain error that affected substantial rights, seriously affecting the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763, 774 (1999). Relevant to the plain-error analysis is whether a cautionary instruction would have cured the prejudice created by the misconduct. *People v Dalessandro*, 165 Mich App 569, 578-79 (1988).

Claims of ineffective assistance of counsel are reviewed de novo under the two-part *Strickland* test described in the argument that follows. *Strickland v Washington*, 466 US 668 (1984). Ineffectiveness claims present mixed questions of law and fact. *Strickland*, 466 US at 698; *People v LeBlanc*, 465 Mich 575, 579 (2002). Questions of law are reviewed de novo. *LeBlanc*, *supra*. Questions of fact are reviewed for clear error. MCR 2.613(C); *LeBlanc*, *supra*.

Discussion

A defendant's due-process right to a fair trial is implicated when the prosecutor employs unfair tactics to gain an advantage. US Const, Am XIV; Const 1963, art 1, §17; *Donnelly v De Christoforo*, 416 US 637, 642 (1974). As quasi-judicial officers, prosecutors have the solemn

duty to ensure defendants are afforded a fair trial and to protect the interests of the people as well as the criminal-justice system. *People v Burrell*, 127 Mich App 721, 726 (1983). The Supreme Court has recognized that a prosecutor owes allegiance, not only to the government, but to the accused and to society at large. *Berger v United States*, 295 US 78, 88 (1935). This duty prohibits the prosecutor from using improper tactics to win convictions. *Id.*

Claims of prosecutorial misconduct are reviewed case-by-case. *People v McElheney*, 215 Mich App 269, 283 (1996). The test is whether the defendant was denied a fair trial as a result of the misconduct. *People v Foster*, 175 Mich App 311, 317 (1989), *disapproved on other grounds by*, *People v Fields*, 450 Mich 94 (1995). "Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.' They are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *People v Bahoda*, 448 Mich 261, 282 (1995) (citations omitted). They may not, however, comment on the credibility of a witness or express a personal belief a particular witness is lying. *United States v Young*, 470 US 1, 17-19 (1985); *Berger*, 295 US at 86-88; *see also Bates v Bell*, 402 F3d 635, 646 (CA 6, 2005).

Mr. Thorpe's trial was rendered fundamentally unfair when, during closing and rebuttal argument, the prosecutor vouched for the credibility of the complainant and suggested that Mr. Thorpe's defense counsel was intentionally trying to mislead the jury.

First, in her principal summation, the prosecutor summarized one part of Brianne's testimony—that she had kicked Mr. Thorpe during the assault and he let go of her—and then commented: "She thought about it and told you the truth." II, 115. Subsequently, on rebuttal summation, the prosecutor sought to respond to defense counsel's argument that Brianne had fabricated the allegations. In doing so, she directly told the jury that Brianne was telling the

truth, stating: "The defense attorney asked you, why would Bree lie? It's a very good question. You need to think about that, because she did not. Mr. Cottrell did say that it's very rare for children to lie." II, 134. And then, again, a short time later after asserting that Brianne made a decision not to see Mr. Thorpe anymore, she stated, "Bree didn't lie. She didn't manipulate anything." II, 135.

Here, the prosecutor expressed her personal belief that the complainant was testifying truthfully. As the Supreme Court explained in *Young,* there are two separate harms that arise from such misconduct. First, "such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury." *Young, supra* at 18. Second, "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.* at 18–19. Both concerns are implicated in this case.

Prosecutorial vouching is especially improper when the trial is a credibility contest. *People v Smith,* 158 Mich App 220, 232 (1987); *see also Hodge v Hurley*, 426 F3d 368 (CA 6, 2005). The jury cannot be encouraged to rely on the prestige of the prosecutor's office, rather than on their individual assessments, to decide each witness's credibility. *People v Yearrell,* 101 Mich App 164, 167 (1980). Such vouching for the credibility of a witness by a prosecutor may be regarded as unsworn testimony and is impermissible.

> Statements made by the prosecutor which attest to or vouch for the credibility of certain witnesses are very cautiously reviewed. To hold otherwise would be to ignore the impact of such statements upon a jury, which is heavily influenced by prosecutorial comments; when such comments relate to the credibility of a witness, which is

> the exclusive province of the jury, prejudice to the defendant readily follows." *People v Erb*, 48 Mich App 622, 632 (1973).

In addition to commenting on the credibility of the complainant, the prosecutor engaged in misconduct when she disparaged defense counsel during her rebuttal summation and suggested that he was attempting to distract the jury from the truth. It is improper for a prosecutor to question defense counsel's veracity. *People v Wise*, 134 Mich App 82, 101-102 (1984). By arguing that defense counsel is intentionally trying to mislead the jury, the prosecutor is undermining the defendant's presumption of innocence and shifting the focus away from the evidence itself. *Id*. A prosecutor closing argument that diverts the jury away from its duty to decide a case based on the evidence presented at trial is one such improper method. *People v Farrar*, 36 Mich App 294, 299 (1971). Here, the prosecutor stated: "Now the defense attorney wants you to look away from [Brianne's] testimony here in Court. He wants you to believe that somehow she said something different." She then inaccurately summarized defense counsel's efforts to impeach Brianne with her prior testimony at the preliminary exam and remarked, "The defense attorney was trying to divert your attention and make you think she was inconsistent when she wasn't." II, 135.

The prosecutor improperly weighted the scale against Mr. Thorpe by vouching for the complainant and by disparaging defense counsel. These comments amounted to plain error. This misconduct requires reversal even without an objection from the defense, because it was highly prejudicial and could not be cured by an instruction from the trial court, and therefore violated Mr. Thorpe right to a fair trial. *See People v Carines, supra*, 763-764.

As discussed in more detail in Issues I and II, Mr. Thorpe's trial was a credibility contest between himself and the complainant. No forensic or scientific evidence was offered by the state against Mr. Thorpe. No witnesses other than Brianne were called to testify that the assaults

actually occurred. Therefore, the jury's determination depended on who they found most credible: Mr. Thorpe or Brianne. By informing the jury that the complainant was telling the truth and that defense counsel was trying to distract them from the truth, the prosecutor seriously affected the fairness and integrity of this trial. *Carines*, *supra* at 763. Reversal is required.

In the alternative, counsel was ineffective for not objecting. The state and federal constitutions guarantee a criminal defendant the right to the effective assistance of counsel. US Const Am VI, XIV; Const 1963, art 1, §20. The test for determining ineffective assistance is twofold: whether "'counsel's performance was deficient,'" and if so, whether his "'deficient performance prejudiced the defense.'" *People v LaVearn*, 448 Mich 207, 213 (1995) (quoting *Strickland v Washington*, 466 US 668, 687 (1984)). Counsel's performance is deficient if it falls "below an objective standard of reasonableness under prevailing professional norms." *People v Stanaway*, 446 Mich 643, 687 (1994). The defendant is prejudiced where "there is a reasonable probability[8] that, but for counsel's error, the result of the proceeding would have been different." *Stanaway*, *supra* at 687-88; *see also People v Pickens*, 446 Mich 298, 314 (1994) (adopting *Strickland* prejudice standard as matter of state constitutional law).

One way in which counsel may perform deficiently is by failing to object to prosecutorial misconduct without a legitimate strategic reason. *Washington v Hofbauer*, 228 F3d 689, 704-05 (CA 6, 2000). No legitimate strategy could explain counsel's failure to object here. *See Washington*, 228 F 3d at 703-705 (holding counsel's failure to object to improper summation arguments deficient despite proffered trial-strategy explanation).

[8] A "reasonable probability" is less than a preponderance of evidence. *Strickland*, 466 US at 693 ("we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case"); *see also Nix v Whiteside*, 475 US 157, 175 (1986) ("a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*"). It is "a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

The second prong is also met. As discussed above, it is reasonably probable that the prosecutor's improper conduct prompted the jury to convict Mr. Thorpe, thus depriving him of due process and a fair trial. US Const, Ams V, XIV; Const 1963, art 1, § 17.

SUMMARY AND RELIEF

Defendant-Appellant asks this Honorable Court to either grant this application for leave to appeal, remand to the trial court for further development of the record with respect to Issue II, or grant any appropriate peremptory relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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Date: November 16, 2017