**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

-vs-

**JOSHUA LEE THORPE**

Defendant-Appellant
_____/

**ALLEGAN COUNTY PROSECUTOR**
Attorney for Plaintiff-Appellee
_____

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

**Supreme Court No.** 156777

**Court of Appeals No.** 332694

**Lower Court No.** 13-18428 FH

# DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

**STATE APPELLATE DEFENDER OFFICE**

**BY: KATHERINE L. MARCUZ (P76625)**
**Assistant Defender**
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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## STATEMENT OF FACTS

Chelsie Krotz and Joshua Thorpe started dating in 2006 when Ms. Krotz's daughter from a previous relationship, Brianne Goodenough, was three years old. 182a-183a. The following year, in August 2007, Josh and Chelsie had a daughter together, Emma. 184a; 345a. Over time, Brianne thought of Mr. Thorpe as a father figure and called him "Dad." 183a; 349a. By all accounts Mr. Thorpe was a caring and involved parent to both girls. 186a, 194a; 306a. He and Ms. Krotz both worked outside the home and shared the responsibility of watching the children. 345a. Mr. Thorpe's mother, Kimberley Smalla, also helped take care of the girls. 197a. Ms. Smalla ran a daycare and began caring for the children there after Ms. Krotz went back to school in 2008. 348a. Additionally, Ms. Smalla's daughter Abigail (Mr. Thorpe's half-sister) and Brianne were close in age and good friends. 187a; 320a. The two girls often spent time together after school. 319a.

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. 184a; 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. 351a. 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. 345a, 352a. 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." 306a.

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. 332a. Along with these observations, Ms. Smalla felt that Ms. Krotz was distancing herself from the family. 332a.

Ms. Smalla also recalled a specific conflict between Mr. Thorpe 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 in Allegan. 309a, 330a-331a. 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. 355a. 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. 355a.

This time alone and Ms. Krotz's new life and relationship forced Mr. Thorpe to reevaluate his family dynamics. 355a. At some point that July, Mr. Thorpe had a discussion with him mom about the time and effort he put into parenting Brianne. 311a. In particular, he was concerned about Brianne's neediness and not being able to spend any one-on-one time with Emma. 311a, 357a. He worried that Emma was suffering as a result. 357a. Given Ms. Krotz's recent behavior, Ms. Smalla 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." 335a.

On August 27, 2012, Mr. Thorpe took Emma out for her birthday. 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. 355a, 358a. Emma and Brianne continued to go to Ms. Smalla's daycare. 311a, 313a.

Around that same time, Ms. Smalla learned that Ms. Krotz was pregnant and immediately started to notice that Brianne was experiencing temperament issues. 314a-315a. She witnessed Brianne have tantrums and outbursts and noted that she would have tantrums about going home

with her mom. 314a-315a. Ms. Krotz agreed that Brianne began "acting out" in the fall of 2012. 188a. Specifically, Brianne became very clingy and was also more argumentative, often getting into trouble. 188a. As a result, Ms. Krotz sought out professional help and Brianne attended counseling sessions for approximately six weeks. 188a. When asked whether Brianne was upset about her mother's pregnancy, Ms. Krotz answered, "I guess maybe she was." 200a.[1]

Ms. Krotz testified that the girls saw Mr. Thorpe regularly over the summer of 2012. 191a. 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. 190a. At no point did Brianne tell her mother that any inappropriate touching had taken place. 193a. 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. 315a. During this time she never got the sense that Brianne was repulsed or afraid of Mr. Thorpe. 315a.

The following April, Ms. Smalla informed Ms. Krotz that Brianne had told Abigail that Mr. Thorpe had touched her inappropriately. 191a. Ms. Smalla testified that she does not believe any abuse happened, but knew she had a duty to communicate the allegation to Ms. Krotz even if she did not believe it. 336a-337a. Upon receiving this information, Ms. Krotz notified the authorities. 191a.

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

[1] There was also some testimony about Mr. Thorpe's behavior. 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. 191a-192a. 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. 316a, 360a. This, in Mr. Thorpe's words, caused a downward spiral. 361a. Ms. Smalla also noted that in March of 2013 Mr. Thorpe seemed very depressed and was struggling with health issues and financial stress. 316a.

interview of Brianne at Safe Harbor Children's Advocacy Center on April 17, 2013, approximately one week after the allegations were first reported. 251a.

Officer Dame testified that during the interview Brianne disclosed that Mr. Thorpe had touched her. 253a. 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. 259a-260a.

At trial, Brianne testified that Mr. Thorpe touched her inappropriately three separate times on two dates in August of 2012 when she was eight years old.[2] The incidents were alleged to have occurred when Brianne and her sister were staying the night at Mr. Thorpe's home. 215a. 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 under her pajamas but over her underwear. 216a-217a. At trial she indicated that Mr. Thorpe rubbed her with his hand (217a) but acknowledged that she never mentioned a rubbing action to Officer Dame during the forensic interview or at the preliminary exam, claiming she had only recently remembered it. 239a.

Brianne further testified that Mr. Thorpe repeated the same behavior minutes later. 224a-225a. Neither incident involved penetration. 217a, 225a. She indicated that she asked Mr. Thorpe to stop each time, and he did. 218a, 225a. At trial, Brianne alleged that the next morning Mr. Thorpe told her not to tell anyone. 227a. 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. 432a; 239a-241a. Nor did Brianne ever tell Officer Dame that Mr. Thorpe had told her not to tell. 239a, 257a.

[2] Brianne was twelve years old at the time of trial. 204a.

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, and in bed with Emma. 218a-219a. According to Brianne, on this occasion Mr. Thorpe got in the bed and pulled her wrist behind her body, placing her hand on his unclothed penis. 219a-222a. She testified that when this happened she tried to pull her arm away then kicked his leg, causing him to let go of her wrist. 221a-223a.

At 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. 440a; 220a, 237a. 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. 317a-319a.

Brianne was also questioned about her disclosure to her friend Abby (Abigail Smalla). 230a. Brianne testified that after telling Abby, Abby told her mom Kim Smalla, and that Kim spoke with Brianne that same night and asked her what happened. 230a, 242a. 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. 242a. Also, 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. 228a. She did not tell this fact to Officer Dame at the forensic interview nor did she say as much at the preliminary exam. 243a; 257a (Dame). Indeed, at the preliminary exam, Brianne agreed that "there came a point when he stopped seeing [her]." 443a.

Joshua Thorpe testified in his own defense and maintained that he did not sexually assault Brianne in any way. 344a.

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. 270a. 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. 291a. Rather, his expert opinion was offered based on his education, experience, and long-term involvement with children and child sexual abuse. 291a.

Mr. Cottrell testified that "there is a broad range of reactions when children are abused." 273a. 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." 274a. 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. 277a.

When asked why children may not come forward right away to report abuse, Cottrell stated, "children often do come forward. We just don't recognize it when they do." 276a. As an example, he explained that children may be "coming forward" when they say things like "I don't want to go on visits with Dad." 276a. 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." 286a. 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." 286a. 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." 290a.

Defense counsel's cross-examination was brief and aimed at illustrating that children may "act out" for many reasons including in response to other sorts of traumatic events. It including the following exchange:

Q: There are many reasons kids can act out.
A: That is correct.
Q: Not just sexual assault.
A: That is correct.
Q: And that goes along with – well, let me ask you this, kids can lie, true?
A: Anyone who has ever worked with a child or has had a child knows that they can lie, yes.
Q: And they can manipulate.
A: They can do that, yes.

293a-294a. On re-direct, the prosecutor began,

Q: Mr. Hills asked you questions regarding the fact whether or not children can lie –
A: Yes.
Q: -- and you answered that as possible.
A: Yes.
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.

294a. Defense counsel objected and asked if there were statistics to support Cottrell's proposed answer. 294a. The court initially suggested that the prosecutor lay a foundation to address the objection, but then, after hearing argument from the prosecutor and defense counsel[3], ruled that defense counsel had brought up the issue of children lying on cross-examination and thus opened

[3] The prosecutor argued that defense counsel "asked the initial questions regarding that children lie. He didn't provide any statistics for those questions either." 295a. Defense counsel responded, "I think that was just a basic, common sense question. It didn't – didn't even relate, I don't think, to him as an expert. Kids can lie. It was all through voir dire. I didn't ask him for specific statistics in regards to how many kids he has seen lie, how many kids he has seen not lie, what studies he has provided, what studies he's done. I didn't go into that." 295a.

the door to the prosecutor's line of questioning on redirect. 295a. 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 . . . 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.

295a-296a.

Cottrell went on to describe the two different scenarios where he had 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. 295a-297a. After explaining these scenarios, Cottrell concluded, "[s]o there were very purposeful gains that the children who were lying about abuse were trying to achieve." 297a. Thereafter the prosecutor again questioned Cottrell about the frequency of false reports based on his experience ("in your experience, you said it's rare; is that correct?") and Cottrell again testified, "it's extremely rare." 297a.

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.

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. 460a-463a.

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 reconsideration on November 21, 2017. 464a.

This Court has ordered oral argument on Mr. Thorpe's application for leave to appeal the affirmance of his convictions. *People v Thorpe*, __ Mich __; 917 NW2d 406 (September 27, 2018) (Docket No. 156777). At issue is "(1) whether the trial court abused its discretion by allowing expert testimony on redirect about the rate of false reports of sexual abuse by children, in order to rebut testimony elicited on cross examination that children can lie and manipulate; and, if so, (2) whether the error was harmless." *Id* (internal citations omitted).

## 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 Thomas Cottrell's testimony regarding the rate of false reports in child sexual abuse cases. Immediately following the prosecutor's improper question on redirect, defense counsel stated, "I am going to object, unless there are statistics. If we have a summary or some sort of report statistics in it." 294a.

A prerequisite to the admissibility of expert testimony under MRE 702 is that "the testimony is based on sufficient facts or data." MRE 702. Statistics are "a collection of quantitative data,"[4] especially useful in drawing general conclusions about a set of data from a sample of data. In challenging whether there were "statistics" to support the proposed testimony, trial counsel clearly expressed a concern that expert's proposed testimony was not based on sufficient data and thus properly flagged for the court a reliability issue under MRE 702. A court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and has a fundamental duty to ensure that the entirety of the proffered expert testimony is both relevant and reliable. See *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579 (1993).[5]

The purpose of the contemporaneous objection rule is to give the trial court an opportunity to correct the error and to prevent a litigant from "sandbagging" by remaining silent

[4] See *Merriam-Webster's Collegiate Dictionary* available online at https://www.merriam-webster.com/dictionary/statistics (accessed December 17, 2018).

[5] MRE 702 incorporated the "requirements of the United States Supreme Court's decision in [*Daubert*, 509 US 579]." *People v Unger*, 278 Mich App 210, 217 (2008).

about his objection. *People v Cain*, 498 Mich 108, 115 (2015). Here, the trial court understood the nature of the objection and initially directed the prosecutor to lay a foundation to address the objection before it concluded that defense counsel had opened the door and allowed the testimony without further discussion. In short, defense counsel did not remain silent about his objection and the trial court had every opportunity to correct the error.

Mr. Thorpe did not forfeit review of this issue when he stated he had no objection to the trial court recognizing Cottrell as an "expert in the area of child sexual abuse and disclosure." 272a. Expert testimony on the behavioral patterns of sexually abused children is admissible in Michigan, and presumably Mr. Cottrell is qualified to give expert testimony on that subject.[6] See *People v Beckley*, 434 Mich 691, 710, 712-713 (1990); see also *People v Peterson*, 450 Mich 349 (1995). Still this Court's decisions in *Beckley* and *Peterson* make clear that the proper use of expert syndrome evidence testimony in child sexual abuse cases is "limited to providing the jury with background information, relevant to the specific aspect of the child's conduct at issue, which it could not otherwise bring to its evaluation of the child's credibility." *Beckley*, 434 Mich at 407.

Syndrome evidence is *not* admissible to demonstrate that abuse occurred, and an expert may not give an opinion on whether the complainant is being truthful. *Beckley*, 434 Mich at 405-407. When Cottrell began testifying beyond the limitations established in *Beckley* and *Peterson*, and outside of the scope of his own expertise, the testimony was inadmissible and trial counsel appropriately objected.

[6] As the *Beckley* Court noted, "the ultimate testimony received on syndrome evidence is really only an opinion of the expert based on collective clinical observations of a class of victims." *Beckley*, 434 Mich at 403. With that in mind, the Court held that so long as the purpose of the evidence is merely to offer an explanation for certain behavior, the *Davis/Frye* test is inapplicable.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *People v Wilder*, 502 Mich 57, 62 (2018). However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo. *People v Sierb*, 456 Mich 519, 522 (1998). A trial court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *People v Lukity*, 460 Mich 484, 488 (1999); *People v Duncan*, 494 Mich 713, 723 (2013).

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). Because the preserved evidentiary error implicated due process rights under US Const, Am V, XIV, and Const, 1963, art 1, § 17, the prosecutor must prove the error was harmless beyond a reasonable doubt. *People v Anderson*, 446 Mich 392, 405-406 (1994).

*Discussion*

The trial court erred by allowing the prosecutor to elicit expert testimony regarding the percentage of children who lie about sexual assault. Mr. Thorpe did not "open the door" to this inadmissible evidence on redirect, nor was the court free to abdicate its gatekeeping role on that basis. The trial court's justification for admitting this evidence—that Mr. Thorpe opened the door—does not resolve the fundamental doubt as to the probative value of such testimony.

In this one-on-one credibility contest where assessing the complainant's credibilty was the central issue for the jury, Cottrell's unreliable expert testimony concerning the veracity of

child sexual abuse victims invaded the role of the jury, unfairly bolstered the credibility of the complainant, and served to unduly prejudice Mr. Thorpe.

**A. The trial court erroneously concluded that defense counsel "opened the door" to Cottrell's testimony regarding the rate of false reports in child sexual abuse cases.**

Defense counsel did not "open the door" to the prosecutor's line of questioning. On the contrary, the prosecutor intentionally introduced foundationless expert testimony this Court has explicitly found to be inadmissible vouching[7] under the pretext of curative admissibility.

A party opens the door to otherwise inadmissible evidence by itself presenting inadmissible evidence that tends to create a misimpression or to mislead the fact-finder. *Grist v Upjohn Co*, 16 Mich App 452, 483 (1969). The rule of "curative admissibility" permits the opposing party, subject to the judge's discretion, to point to the otherwise inadmissible evidence as a way of placing the first party's potentially-misleading evidence in its proper context and thereby rebutting any false impression. 1 Wigmore, Evidence §15, pp 731-51 (Tillers Revision 1983); see *Grist*, 16 Mich App at 481, 483; *United States v Whitworth*, 856 F2d 1268, 1285 (CA 9, 1988). The trial court may not allow inadmissible evidence "merely because the adverse party has brought out some evidence on the same subject, where the circumstances are such that no prejudice can result from a refusal to go into the matter further." *Grist*, 16 Mich App 482-483. This is because the doctrine is "intended to prevent prejudice and is not to be subverted into a rule for injection of prejudice." *United States v Winston*, 447 F2d 1236, 1240 (CA DC, 1971) (quoting *California Ins. Co. v Allen*, 235 F2d 178, 180 (CA 5, 1956)).

Foremost, Mr. Thorpe did not present inadmissible or misleading evidence. Defense counsel's questions to Cottrell--"let me ask you this, kids can lie, true?" and "and they can manipulate?"—were discrete, straight-forward, and uncontroversial questions of fact. Counsel

[7] See *Peterson*, 450 Mich at 375-376.

did not ask Cottrell about the frequency with which children lie, whether children make false allegations of sexual abuse, or whether he has had any experience with false accusations in his own practice. Indeed, he did not ask Cottrell to opine in his capacity as an expert whatsoever. And at no point did the prosecutor object. In obtaining an acknowledgement from Cottrell that children can lie—a fact discussed by both parties during voir dire—defense counsel did not elicit inadmissible evidence and he did not create a "false impression" that opened the door for the admission of unreliable, unscientific, and inadmissible expert testimony. Thus, the rule of curative admissibility was inapplicable, and the trial court abused its discretion in admitting Cottrell's testimony about the rate of false reports.

Even if the defense on cross-examination presented inadmissible evidence and created a "false impression" that the prosecution was entitled to "cure," the testimony elicited on redirect was not responsive to the damage done. "Opening the door is one thing. But what comes through the door is another." *Winston*, 447 F2d at 1240. "[T]he test of whether rebuttal evidence was properly admitted is . . . whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *People v Figgures*, 451 Mich 390, 399 (1996). The introduction of otherwise inadmissible evidence under the "open door" theory is permitted "only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence." *Winston*, 447 F2d at 1240; see *Grist*, 16 Mich App at 483; see also *Savoy v State*, 64 Md App 241, 254 (1985).

This Court confirmed in *People v Yager*, 432 Mich 887 (1989), that a reference to inadmissible evidence does not "open the door" to introduce extensive evidence on that topic. In *Yager*, the trial court found that the defendant's reference to having been threatened with prosecution as a habitual offender opened the door for admission of the evidence of his prior

convictions and it allowed the prosecutor to question the defendant about those convictions. The Court of Appeals, affirmed the trial court's ruling. On appeal, this Court reversed and granted a new trial because "[t]he defendant's reference to having been threatened with prosecution as a habitual offender did not 'open the door' to extensive questioning about the defendant's prior record." *Yager*, 432 Mich at 887.

The testimony elicited by the prosecution concerning the statistical frequency of false allegations of sexual abuse by children was not responsive to any "damage" done by Cottrell's acknowledgment that children can lie and manipulate, as human beings can. It exceeded the scope of any invitation by defense counsel. There was no prejudicial, false, or misleading impression created by Cottrell's answer that required the admission of unreliable and untested expert testimony that vouched for the credibility of the complainant. Nor did the prosecutor's redirect examination stop at the statistical likelihood of false reports. Cottrell was allowed to explain why false reports are, in his estimation, "extremely rare" with specific anecdotal examples. 295a-297a. And he was allowed to opine that when children do make false allegations of sexual abuse, they only do so for highly specific and purposeful reasons. 296a-297a. This testimony was extensive, prejudicial, and equally unresponsive to the evidence introduced by the defense.

Not only did the defense not "open the door" to the extensive unreliable and inadmissible testimony by asking one simple and unscientific question, one cannot "open the door" to unreliable forensic science. It is the judge's duty as gatekeeper to prevent the jury from hearing unreliable expert testimony. *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 782 (2004). Under *Daubert*, "the trial judge must ensure that any and all scientific testimony or evidence admitted is

not only relevant, but reliable." *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 589 (2003). The "open door" doctrine does not create an exception to that rule.

Finally, *Peterson* deals with the proper scope of expert testimony in childhood sexual abuse cases *both* in the prosecutor's case in chief *and* to rebut an attack on the complainant's credibility.[8] Nowhere does this Court suggest in *Peterson* that testimony about the rate of false reports of sexual abuse by children would be proper on rebuttal. *Peterson*, 450 Mich at 375-376. And for good reason; as discussed *infra*, Cottrell's testimony on the rates at which children lie about sexual abuse did not satisfy *Daubert* or MRE 702's reliability requirements.

In response to expert testimony that sought to demonstrate that the complainant's behaviors and disclosure were consistent with a victim of abuse, Mr. Thorpe was entitled to remind the jury that there could be other explanations for the behavior in question. Counsel did this without asking the prosecution's expert to opine on the complainant's veracity, the veracity of child complainants in general, or the frequency with which children lie. Nor did counsel inject a new issue into the trial. The trial court erred in concluding that defense counsel "opened the door" and in permitting rebuttal without first determining whether the evidence had probative value or was responsive to the damage done.

### B. Thomas Cottrell's testimony on the rates at which children lie about sexual abuse did not satisfy MRE 702's relevancy and reliability requirements.

The trial court abdicated 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 cogent motivation to lie. This Court has determined nearly identical testimony to fall beyond the scope allowed by expert witnesses in

[8] "Unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child." *Peterson*, 450 Mich at 373–74.

criminal sexual conduct cases involving children. *Peterson*, 450 Mich at 375-376. Here, like in *Peterson*, Cottrell's expert testimony constituted an inadmissible opinion on veracity, thereby invading the province of the jury. The testimony also failed to satisfy the reliability considerations as set forth in MRE 702.

In Michigan *all* scientific and other technical evidence must pass muster under the test of *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579 (1993), where the United States Supreme Court held that such evidence is admissible only 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." *People v Kowalski*, 492 Mich 106, 120-121 (2012). "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).

In *Peterson*, this Court held that expert testimony about the rate of false reports of sexual abuse by children does not pass muster under MRE 702. *Peterson*, 450 Mich at 376. The Court's analysis highlighted both relevancy and reliability concerns. *Id*. It recognized expert testimony of this sort "improperly vouched for the veracity of the child." *Id*. at 375-376. And it noted discrepancies in the "rate of veracity" endorsed by individual experts, stating "[a]lthough 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." *Id*.

1. Cottrell's testimony was not relevant as it did not assist the trier of fact in understanding the evidence or determining a fact in issue.

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. In *Daubert*, the United States Supreme Court explained that helping the trier of fact to "understand the evidence or to determine a fact in issue" presents a question of relevance because "'[e]xpert testimony which does not relate to any issue in the case is not relevant, and, ergo, non-helpful.'" *Daubert*, 590 US at 589. "Similarly, if the average juror does not need the aid of expert interpretation to understand a fact at issue, then the proffered testimony is not admissible because 'it merely deals with a proposition that is not beyond the ken of common knowledge.'" *Kowalski*, 492 Mich at 122.

Expert testimony is generally needed "when a witness' actions or responses are incomprehensible to average people." *People v Christel*, 449 Mich 578, 592 (1995). When expert testimony does nothing but vouch for the credibility of another witness, it encroaches on the jury's exclusive function to make credibility determinations, and therefore does not "assist the trier of fact" as required by MRE 702. See *People v Dobek*, 274 Mich App 58, 71 (2007) (An expert should not vouch for the veracity of a victim because matters of credibility are for the jury); *People v Musser*, 494 Mich 337, 349 (2013) (Because the jury is charged with determining the facts of a case, a witness's opinion on the credibility of another is generally not helpful and lacks probative value); see *People v Smith*, 425 Mich 98, 109 (1986).[9]

[9] This Court's analysis is consistent with that of other jurisdictions. See, e.g., *United States v Hill*, 749 F3d 1250 (CA 10, 2014) ("expert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore does not 'assist the trier of fact' as required by Rule 702."); *Engesser v Dooley*, 457 F3d 731, 736 (CA 8, 2006) ("An expert may not opine on another witness's credibility."); *Nimely v City of New York*, 414 F3d 381, 398 (CA 2, 2005) ("[T]his court, echoed by our sister circuits, has consistently held that expert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise, are inadmissible under Rule 702."); *United States v Vest*, 116 F3d 1179, 1185 (CA 7, 1997) ("Credibility is not a proper subject for expert testimony; the jury does not need an expert to tell it whom to believe, and the expert's stamp of approval on a particular witnesses' testimony may unduly influence the jury." (quotations omitted)); *United States v Gonzalez–Maldonado*, 115 F3d 9, 16 (CA 1, 1997) ("An expert's opinion that another witness is lying or telling the truth is ordinarily inadmissible pursuant to Rule 702 because the opinion exceeds the scope of the expert's specialized knowledge and therefore merely informs the jury that it should reach a particular conclusion." (quotation omitted)); *United States v Beasley*, 72 F3d 1518, 1528 (CA 11, 1996) ("Absent unusual circumstances, expert medical testimony concerning the truthfulness or credibility of a witness is inadmissible ... because it invades the jury's province to make credibility determinations."); *United States v Rivera*, 43 F3d 1291, 1295 (CA 9, 1995) ("[A]n expert witness is not permitted to testify specifically to a witness' credibility or to testify in such a manner as to improperly buttress a witness' credibility." (quotation and alteration omitted)); *United States v Dorsey*, 45 F3d 809, 815 (CA 4, 1995) ("[E]xpert testimony can be properly excluded if it is introduced merely to cast doubt on the credibility of other eyewitnesses, since the evaluation of a witness's credibility is a determination usually within the jury's exclusive purview.").

This Court has applied these principles to limit expert testimony that comes too close to offering an opinion on a witness's veracity. Thus, in *Beckley*, this Court held that in prosecutions for child sexual assault, "any testimony about the truthfulness of th[e] victim's allegations against the defendant would be improper because its underlying purpose would be to enhance the credibility of the witness." *Beckley*, 434 Mich at 727. Similarly, in *Kowalski*, this Court noted that like other expert testimony explaining counterintuitive behavior, the permissibility of expert testimony pertaining to false confessions is not without limitation. *Kowalski*, 492 Mich at 129. Specifically, "an expert explaining the situational or psychological factors that might lead to a false confession may not 'comment on the truthfulness of the defendant's confession,' [or] 'vouch for the veracity' of a defendant recanting a confession." *Id*. "These conventional limitations are necessary to guard against the potential for jurors to view the expert . . . as 'possess[ing] some specialized knowledge for discerning the truth.'" *Id*. quoting *Beckley*, 434 Mich at 727.

The proposed testimony here is precisely the kind of information that does not assist the trier of fact in understanding the evidence, but rather, as the *Peterson* Court recognized, risks the prospect of jurors subordinating their own commonsense judgments to seemingly impartial experts. *Peterson*, 450 Mich at 376.

2. Cottrell's testimony was not reliable as it was not based on sufficient facts and was not the product of reliable principles and methods.

Even if a court properly concludes that the proposed expert testimony will assist the trier of fact to understand the evidence or determine a fact in issue, the trial court has an obligation under MRE 702 "to ensure that any expert testimony admitted at trial is reliable." *Gilbert*, 470 Mich at 780. 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%). 296a. Mr. Cottrell further testified that when children do make false reports of sexual abuse, they have a clear and recognizable motivation for doing so. 296a. This was improper. The evidence was inadmissible under MRE 702 and *Kowalski* because it does not hold up under the scientific microscope.

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 such literature was "extremely variable." 295a-296a. Yet Cottrell did not base his opinion on the literature or any other scientific source. Cottrell based his testimony entirely on his experience working with people who were *self-reported* victims of sexual assault. 296a, 272a.

Cottrell worked at the YWCA for nearly 33 years in various positions. 270a. "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. 272a. Mental health professionals "are not . . . experts at discerning truth. [They are] are trained to accept facts provided by their patients, not to act as judges of patients' credibility." *Beckley*, 434 Mich at 728 (internal citations omitted). Moreover, the child

sexual abuse accommodation syndrome has no probative value in terms of being able to detect whether sexual abuse occured based on the existence of certain behavioral characteristics. *Id*. at 722-723. Rather, it is a therapeutic tool which *assumes abuse*. *Id*. at 722-723. "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).

This is precisely the issue with Cottrell's testimony; it is purely observational in nature and not grounded in the methods and procedures of science. Certainly, expert testimony can be based on experience or observation alone; but only where the conclusion to which the expert opines can reliably be drawn from observational data. See *Johnson v Vanderkooi*, 319 Mich App 589 (2017) (*Daubert's* general gatekeeping function applies to all expert testimony, whether the expert relies on scientific principles or skill or experience-based observation). For example, an experienced locomotive engineer may be competent to give his opinion as to the distance a locomotive in good order would throw sparks, though he has not made a scientific test to determine the duration of the life of sparks and is not a physicist. *Potter v Grand Trunk Western Ry. Co*., 157 Mich 216 (1909). Likewise, a mechanic with 15 years' experience inspecting and repairing brakes can testify regarding the cause of a broken brake line based on well-established principles rather than on experimental science. *People v Carll*, 322 Mich App 690 (2018). But veracity is different. Unlike sparks or a brake lines, it cannot be assessed reliably by observation alone. Thomas Cottrell could not reliably opine about the percentage of children who had truthfully reported sexual abuse because he had no reliable methodology for determining who was being truthful with him and who was not.

This Court recently considered the difficulty assessing the reliability of expert testimony that draws conclusions about veracity in *Kowalski*. There, 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*. Identifying multiple problems with the analysis Leo applied to his data, "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" which also made it impossible to test Leo's research or compute its rate of error. *Id*. at 133. And that "because Leo did not have a 'reliable means to have a study group' that excluded extraneous factors, he had 'no ability to estimate the frequency of false confessions.'" *Id*. at 132-133. In sum, this Court affirmed the trial court's conclusion that Leo's proposed expert testimony was not based on reliable scientific data and methods. *Id*. at 134.

In contrast, here the trial court did no analysis. It did not require the prosecutor establish a foundation for the basis of Cottrell's assertions about the frequency with which children lie about sexual abuse, make any findings, or even acknowledge that *Daubert* or MRE 702 have application here. Instead, it wholly abandoned its gatekeeping role based on the prosecution's assertion that defense counsel opened the door.

Mr. Cottrell's anecdotal testimony about children he has observed was not "based on sufficient facts or data" or the "product of reliable principles and methods." MRE 702. The testimony could not be tested or peer-reviewed. There 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.[10] No data was presented to support 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. See *Daubert*, 509 US at 590.

### C. Even assuming 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, "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*, 509 US at 595.

[10] 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).

The concern of unfair prejudice to defendants is particularly critical in child sexual abuse cases. For one, these cases present "special considerations" given "the reliability problems created by children's suggestibility." *Peterson,* 450 Mich at 371. Moreover, in cases hinging on credibility assessments, 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*, 450 Mich 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 presented 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 defendant abused the complainant. Particularly where the discrete reasons for a false report identified by the expert were not present in this case.

**D. The introduction and use of Cottrell's expert testimony concerning the rate at which children lie about sexual abuse was not harmless and requires reversal.**

Mr. Thorpe's trial was a true credibility contest. There was no physical evidence, witnesses to the alleged assaults, inculpatory statements, or evidence admissible under MCL 768.27a[11] or MRE 404(b). 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

[11] 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."

behavior throughout the summer and fall of 2012, and the expert testimony of Thomas Cottrell. Mr. Thorpe testified in his own defense and denied the allegations. Additionally, Mr. Thorpe's mother testified about other reasons for the complainant's behavior during the summer and fall of 2012; namely, that her mother had started a new relationship and become pregnant, and that Mr. Thorpe had decided to no longer have parenting time with her. She also testified that Mr. Thorpe was a loving and caring father.

The introduction and use of Cottrell's expert testimony about the frequency at which children falsely report sexual abuse 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). This is particularly so where the bolstering is of child sex-offense complainants and is done by an expert. As this Court has repeatedly recognized, "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." *Beckley*, 434 Mich at 722; *Musser*, 494 Mich at 357-58.

Moreover, that Cottrell went beyond offering an opinion that false allegations of abuse are "rare" or even "exceedingly rare" and placed a statistical probability on the event makes the testimony even more 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). Here, the jurors, faced with the difficult task of determining not only who to believe but whether the prosecution had proved its case beyond a reasonable doubt, were

told by an expert in child sexual abuse that there was 96 to 98 percent likelihood that the complainant was telling the truth. The danger that the jury either considered this evidence as conclusive proof of guilt or gave it disproportionate weight is manifest.

Cottrell's identification of limited factual situations in which children lied about abuse 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 complainant, who undisputedly did not fit into either scenario presented to the jury, and arguably achieved no "purposeful gains" from lying about abuse. Any possibility that the jury would find that this case presented one of the "extremely rare" instances of a false allegation was extinguished by the qualifications Cottrell placed on his findings.

The importance of Cottrell's testimony in bolstering Brianne's story is reflected in the prosecutor's closing arguments. First, the prosecutor asked the jury to think about Brianne's testimony in conjunction with Cottrell's. 380a. 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?" 380a-382a. Later, in 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." 397a.

Defense counsel's attempts to counteract the improper testimony on cross-examination and closing argument by challenging the accuracy of Cottrell's "percentages" could not cure the

problem. 297a (cross), 382a-393a (closing). 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. *Daubert*, 509 US at 595; see also *Ege*, 485 F3d 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).

Likewise, the final instructions to the jury did not reduce the prejudice to Mr. Thorpe. Indeed, the court's instruction concerning Cottrell highlights just how far out of bounds Cottrell's testimony went.[12] The instruction did not tell the jury to disregard the veracity evidence. And nothing in this instruction informed the jury that the expert's opinion had exceeded the scope of his expertise or was not founded on sufficient data or reliable methods. Because Cottrell's expert testimony went beyond a direct reference to truthfulness, but rather took the form of statistical evidence, the jury here could have faithfully followed the court's instruction and still relied on the improper testimony about the probability and nature of false reports in assessing whom to believe.

The error in this case amounted to a due process violation. Even if permissible under state law, when evidence is so unduly prejudicial that it renders the trial fundamentally unfair, "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v Tennessee*, 501 US 808, 825 (1991). Courts have found that where the improperly admitted

[12] "You have heard Thomas Cottrell's opinion about the behavior of sexually abused children. You should consider that evidence only for the limited purpose of deciding whether Brianne Goodenough's acts and words after the alleged crime were consistent with those of sexually abused children. The evidence cannot be used to show that the crime charged here was committed or that Defendant committed it. Nor can it be considered an opinion by Thomas Cottrell that Brianne Goodenough was telling the truth." 408a-410a.

evidence "is material in the sense of a crucial, critical, highly significant factor," the error constitutes a denial of fundamental fairness. *Snowden v Singletary*, 135 F3d 732, 737 (CA 11, 1998). Admission of expert testimony that invades the province of the jury can satisfy this standard. *Id.* at 738 (finding that expert testimony that 99.5% of child sexual abuse victims tell the truth made the trial fundamentally unfair); *see also Ege*, 485 F3d at 377 (due process violated by admission of substantively and probabilistically unsound bite mark expert testimony). Like in *Snowden*, where the jury's opinion on the child witness's truthfulness was paramount, "permitting an expert to vouch forcefully for the [complainant's] credibility in this case was a 'crucial, critical, highly significant factor.'" *Snowden*, 135 F3d at 739.

Even under the standard for preserved non-constitutional errors, the error of admitting Thomas Cottrell's improper testimony requires reversal. *People v Lukity*, 460 Mich 484 (1999). As established in *Lukity*, "the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id.* at 495. As discussed above, there was very little evidence against Joshua Thorpe and assessing witness credibility was the only issue for the jury. Here, as illustrated by the prosecution's argument in rebuttal summation—i.e., when you ask yourself "why would Bree lie?" remember that less than two to four percent of children lie about sexual abuse—the effect of the error was not only to bolster the complainant's credibility, but to "make the uncertain seem all but proven." *Ege*, 485 F3d at 376-377.

A closer look at this Court's harmless error analysis in *Lukity*, also a child sexual assault case where the trial court erred in admitting evidence that bolstered the complainant's character for truthfulness, is instructive. In *Lukity*, this Court recognized that the case did not present a "simple credibility contest between the complainant and the defendant." *Lukity*, 460 Mich at 496.

Rather, where the complainant's brother testified that the defendant made an apology in which he virtually confessed to the sexual assault, there was significant evidence untainted by the improper bolstering of the complainant's character for truthfulness. *Id.* In contrast, this case does present "a simple credibility contest between complainant and defendant" and there is virtually no evidence "untainted by the error" from which the jury could determine guilt. *Id.*

The Court of Appeals failed to properly consider the prejudicial effect of Cottrell's improper testimony on Mr. Thorpe's case. Evidence that the complainant's testimony was "unequivocal" about the incidents and "detailed" with respect to where she and Mr. Thorpe were situated in the room when the alleged abuse occurred is not "untainted" evidence of guilt where the error at issue served to vouch for the veracity of the complainant's allegation. 461a. The Court did not acknowledge that this case presented a pure credibility contest and it made no mention of the defense's case or the conflicting evidence that the jury had to weigh. 461a. Indeed, its prejudice inquiry reads as if the Court was considering a challenge to the sufficiency of the evidence rather than a harmless-error analysis. While heavy, the prejudice showing for a preserved non-constitutional error is not tantamount to proving that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The introduction of Cottrell's unreliable and inadmissible opinion about the rate of false allegations of sexual assault was not just an error in a close case—it was an error that had a profound effect in light of the weight and strength of the untainted evidence. Accordingly, Mr. Thorpe has demonstrated that it is more probable than not that the error undermined the reliability of the verdict and reversal is required. *Lukity*, 460 Mich at 495.

The trial court failed in its fundamental role as a gatekeeper when it neglected to follow the proper guidelines for admitting scientific expert testimony. Cottrell's testimony on the rates

at which children lie about sexual abuse was unhelpful, unreliable, and ultimately denied Mr. Thorpe a fair trial. Under either the non-constitutional or the 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.

## REQUEST FOR RELIEF

**WHEREFORE**, for the foregoing reasons, Defendant-Appellant Joshua Thorpe asks that this Honorable Court grant leave to appeal and/or reverse the decisions below and grant a new trial.

Respectfully submitted,
**STATE APPELLATE DEFENDER OFFICE**

/s/ Katherine L. Marcuz
BY:_____

**KATHERINE L. MARCUZ (P76625)**
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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