STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

JOSHUA LEE THORPE,

Defendant-Appellant,

SC NO. 156777

COURT OF APPEALS NO: 332694

CIRCUIT COURT NO: 13-18428-FH

ALLEGAN COUNTY PROSECUTOR JONATHAN K. BLAIR (P71908) Assistant Prosecutor 113 Chestnut Street Allegan, Michigan 49010 (269) 673-0280	KATHERINE MARCUZ (P76625) Attorney for Defendant-Appellant 3300 Penobscot Building 645 Griswold Detroit, Michigan 48226 (313) 256-9833

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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APPENDIX

The Plaintiff-Appellee stipulates to the appendix filed with the Defendant's supplemental brief of December 20, 2018. All citation therein are noted as "a".

STATEMENT OF JURISDICTION

The Plaintiff-Appellee accepts that this Court has jurisdiction to consider Defendant-Appellant's Appeal of Right.

STATEMENT OF QUESTIONS PRESENTED

ARGUMENT I

TRIAL COURT PROPERLY ADMITTED EXPERT TESTIMONY ON REDIRECT EXAMINATION TO FOLLOW UP DEFENSE COUNSEL ELICITATION ON CROSS-EXAMINATION THAT KIDS CAN LIE UNDER *PEOPLE V PETERSON*, 450 MICH 349 (1995).

Plaintiff-Appellee Answers:	"No"
Defendant-Appellant Answers:	"Yes"
Trial Court Answers:	Not asked
Court of Appeals:	"No"

ARGUMENT II

IF THE TRIAL COURT COMMITTED ERROR AN ALLOWING REBUTTAL TESTIMONY THAT CHILDREN CAN LIE AND MANIPULATE WAS SUCH AN ERROR WAS HARMLESS.

Plaintiff-Appellee Answers:	"Yes"
Defendant-Appellant Answers:	"No"
Trial Court Answers:	Not asked
Court of Appeals:	"Yes"

COUNTER-STATEMENT OF FACTS

On February 18, 2016, Defendant was convicted of three counts of Criminal Sexual Conduct Second Degree for sexual contact with a minor under age 13, defendant over 17, during August of 2012, in violation of MCL 750.520c(1)(a). On March 21, 2016, Defendant was sentenced to 71 months to 15 years for each of the 3 counts of CSC Second Degree. The Defendant is subject to mandatory lifetime electronic monitoring.

Trial occurred over two days, February 18 and 19, 2016. 1a - 264a. The first witness was Chelsie Krotz, mother of the victim "BG." 180a. She testified that BG was 12 on that date, and was born on 9-19-03. 180a. Ms. Krotz started a relationship with the Defendant in 2009 or 2010. 182a. They were never married but bought a home together. 183a. BG became close with the Defendant and called him "dad." 183a. Ms. Krotz and the Defendant spilt when the victim was about 7. 184a. Although not legally entitled to visitation, Ms. Krotz, BG, and the Defendant agreed that BG would visit the Defendant with her sister. 185a. Ms. Krotz stated that during the fall of 2012:

> She [BG] started acting out toward me, becoming very argumentative, and getting in trouble a lot. She was also extremely clingy to me. She would follow me around the house. If I went in to take a shower, she would come and sit on the bathroom floor while I was in the bathroom. She wanted to sleep in my room on the floor. She didn't ever want to leave my side. She was getting in trouble a lot.

188a. BG was placed into counseling for six months. 188a.

By April of 2013, the victim had stopped visiting with the Defendant, likely stopping in September/October 2012. 190a. This was at the victim's request. 190-191a.

Ms. Krotz then described the Defendant's behavior from fall 2012-2013:

> His behavior was very erratic. He would call me and be very angry with me and yelling at me for things that didn't really make sense. He would -- said -- you know, tell me that he still loved me and wanted to be with me. And then the very same day tell me that he hated me and he wished that I – he had never met me. He

had also made suicidal comments about never seeing me again. And how he wouldn't be here to see the girls anymore.

191-192a. Right before Ms. Krotz learned of the abuse, the Defendant indicated that he wished to kill himself. 192a.

BG testified that she is currently in the sixth grade, and is 12 years old. 205a. She believed her mom had started dating the Defendant when she was 3 or 4. 205a. She would call him dad and loved him. 206a. She indicated that after the break-up she would still visit with the Defendant in Allegan. 207a. When visiting the Defendant the victim would not sleep in the twin sized bed in her sister's room, instead she and her sister would sleep with the Defendant in his bed. 211a. BG, her sister, and the Defendant would lay in the bed and watch movies. 213.

In the fall of 2012, an event occurred: "Q: And what happened that time during that visit that made you uncomfortable. A: The first time he went under my shorts, on top of my underwear, and touched me, touched my vagina." 215a. She later clarified that he rubbed it. 217a. It occurred at night, in the Defendant's bed room. 215a. The Defendant was against the wall, BG was in the middle, and her sister was on the outside, non-wall side, of the bed. 215a-216a. They were watching "Dora the Explorer." 215a. BG stated she was wearing shorts and a t-shirt with underwear. 216a. When the abuse occurred BG's sister was sleeping. 216a. The Defendant touched her under her shorts, but over her underwear while BG was on her back. 217a. The Defendant was on his side. 217a. BG told the Defendant to stop and he did. 218a. BG stated that "It made me feel scared and uncomfortable. […]I didn't know what was going on and I didn't know what he was going to do." 218a.

On the same night, the Defendant again touched the victim's vagina using his hand. 224a. BG's sister was still sleeping, and BG could recall she was laying on her back. 225a. It

was again under her shorts but over her underwear. 225a. BG told him to stop and he did. 226a. The Defendant then left and slept on the couch. 226a.

The next morning the Defendant told BG not to tell anyone what had happened. 227a. BG's sister was playing Barbie's while this occurred. 227a.

BG testified that on another occasion the Defendant made her "touch him." 218a. This occurred in the same bed room. 219a. This time BG was against the wall, and her sister on the outside. 219a. When the Defendant entered the room he laid down between the girls. 220a. BG was on her side facing the wall, the Defendant on his side facing her. 220a. The Defendant then "pulled my arm behind me and made him -- made me touch his penis." 220a. She noted that she could not escape his grip. 221a. The victim was asked how she knew what she had grabbed, she stated "[i]t was (inaudible) long and it was not like a bone, like hard, and I could feel. He did not make me grab it, but he did make me touch it." 221a. BG kicked the Defendant and he let go of her hand. 222-223a. BG ultimately disclosed out of fear of continued contact with the Defendant. 229a

Officer Dame then testified to conclude the first day of trial. 248-260a

On the second day of trial, Mr. Thomas Cottrell, testified as an expert in the area of child sexual abuse and disclosure, being qualified without objection. 272a. Mr. Conttrell testified that he had no personal knowledge of the case, had not read any police or medical reports and had not met the child. 291a. Instead his "testimony is based on my education, the experiences that I have had, and my long term involvement with children and child sexual abuse in my practice. 291a.

Defendant's cross-examination consisted of the following:

Q: You've testified and your background is in victimization specialty in sexual assault, fair statement; is that correct?

A: Child sexual abuse, victimization, yeah, both domestic violence, sexual assault, child sexual abuse.

Q: Okay.

A: I also have much of my work in child sexual abuse is working with sex offenders.

Q: All right. And you've talked a lot about trauma and how -- how the kids react to trauma at different ages; is that correct?

A: Correct.

Q: And there are other traumas, not just sexual assault; is that fair?

A: Absolutely. Any event in an individual's life that overwhelms their capacity to cope, meaning they don't have the skills to manage that event in the moment has the potential to lead to traumatic reactions on the part of the person.

Q: So it could be something else, not just sexual assault and -- is that correct?

A: Many things can be traumatic. Anything from a car accident to the death of a loved one, to the death of a pet, to waking up in surgery, lots of things are traumatic.

Q: Strong feelings of abandonment by one parent or the other parent?

A: That's not a singular event, but if that was connected to an event, yes, that could possibly

Q: And it could build; is that true?

A: Yes.

Q: And another thing you mentioned is that sometimes -- I don't know if I am phrasing this quite right, but children's logic may be a little bit different than adult logic; is that fair?

A: Well logic is logic. Children's reasoning is different

Q: -Okay. I'm sorry. There you go --

A: -- Yes.

Q: All right. And for instance, I guess you talked about one of the things, many things, you talked about was acting out. Sometimes kids act out as a result of a trauma that they a sexual assault that they experienced.

A: Correct.

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.

Q: Okay. And again, you haven't reviewed any of the case facts in this case.

A: I have not.

Q: You are not forming any opinion on this particular case.

A: I could not.

Q: Okay. All right. Thank you.

292a-294.

The People then re-directed the witness.

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 sexual assault itself.

MR. HILLS: I -- I am going to object, unless there are statistics. If we have a summary or some sort of report statistics in it.

MS. KOCH: May may I respond

THE COURT: Well, in regards to your objection, I -- I guess the ground -- you could lay a foundation in regards to your question to address the objection~ But go ahead, you can respond

MS. KOCH: Just to respond briefly, Mr. Hills was the one who request -- excuse me-- asked the initial questions regarding that children lie. He didn't provide any statistics for those questions either. What I am trying to do is follow up on cross-examination on the -- on the questions that he asked.
MR. HILLS: 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 any of that.

THE COURT: But you did open the door for redirect, I think, on that issue, since you brought it up. I believe the prosecution has the right to redirect on that particular issue. Go ahead.

MS. KOCH: Thank you.

Q: Do you recall the question?

A: Yes. 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. 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. Disclosing sexual assault brings on a whole level of discomfort for children. The whole process of investigating and being questioned and being brought into therapy ate 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. When we have experienced children lying, it's because what we've identified in those cases is it's children wanting to be a part of the -- come to play therapy because their sibling is coming to play therapy because their sibling was abused and they don't want to miss out on whatever their brother or sister is doing. We've had that occur on several occasions. We have also had a few teenagers disclose about sexual assault when they weren't sexually abused, but their mothers were victims of domestic violence and they

needed to bring attention to family problems and it was the only way that -- essentially the children were functioning in a way to protect their parent. And they were willing to endure the consequences to them in order to bring law enforcement and child protective services into their case essentially to protect the mother, not because they were sexually abused. So there were very purposeful gains that the children who were lying about abuse were trying to achieve.

Q: In your experience, you said it's rare; is that correct?

A: And it's extremely rare.

a294-297. Defense counsel then concluded:

Q: These percentages are when it's discovered, when it's figured out, fair?

A: Correct. Yes.

Q: It's very possible that there are out there that were fabricated and false that were never discovered.

A: Well, we don't know what we don't know, obviously.

a297.

The Defendant appealed his convictions. The Court of Appeals denied the appeal and affirmed the convictions. The Defendant then sought reconsideration of the Court of Appeals. 460a-459a. The claims were denied by the Court of Appeals. 459a. The Defendant then sought reconsideration, which was again denied. 464a. The Defendant then sought leave of this honorable Court. This Court then directed the parties to file these supplemental briefs for consideration of the Defendant's application for leave.

Further relevant facts are located in the arguments below.

ARGUMENT I

TRIAL COURT PROPERLY ADMITTED EXPERT TESTIMONY ON REDIRECT EXAMINATION TO FOLLOW UP DEFENSE COUNSEL ELICITATION ON CROSS-EXAMINATION THAT KIDS CAN LIE UNDER *PEOPLE V PETERSON*, 450 MICH 349 (1995).

STANDARD OF REVIEW

At trial Defense counsel's objection was limited regarding Mr. Conttrells testimony. "I am going to object, unless there are statistics. If we have a summary or some sort of report statistics in it." 295a. Therefore the issue is preserved only as to this reason, and not for most of the reasons that Appellate counsel argues.

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. *MRE 103(a)(1); People v Aldrich,* 246 Mich App 101; 631 NW2d 67 (2001) On the basis of the objection made by defendants at trial, it appears that many of the evidentiary issues raised by defendant on appeal were not preserved for appellate review except for the stated reason, "unless there are statistics". 294a.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr,* 457 Mich 490, 494; 577 NW2d 673 (1998), reh den 459 Mich 1203; 618 NW2d 589 (1998) An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made. *People v Snider,* 239 Mich App 393, 419; 608 NW2d 502 (2000) A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand),* 463 Mich 43, 67; 614 NW2d 888 (2000).

The remaining issues raised by Appellate counsel, not having been raised at trial, are judged by a different standard. Because Defendant did not raise an objection to Cottrell's alleged improper testimony for the reasons argued on appeal at a time when the trial court had the opportunity to correct any error, the other issues with respect to Cottrell's testimony are unpreserved. *See People v Buie*, 491 Mich 294, 312; 817 NW2d 33 (2012); and see *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011) Unpreserved claims of evidentiary error are reviewed for plain error affecting the defendant's substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Plain error, which is error that is obvious or clear, affects a defendant's substantial rights when it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A. The Defendant opened the door to the rate of false reports.

In general, an appellant may not benefit from an alleged error that the appellant contributed to by plan or negligence. *People v Witherspoon*, 257 Mich App 329, 333; 670 NW2d 434, 436 (2003). Trial defense counsel in this case, asked questions on cross examination regarding victimization of children, children's reasoning being different, and acting out. 293a. Then he asked "…kids can lie, true?" Response; "Anyone who has ever worked with a child or has a child knows that they can lie, yes." Next question: "And they can manipulate." Response: "They can do that, yes." 293-294a.

On redirect, the Prosecutor then asked the witness, "in your training and experience of all the times you've handled child abuse cases, what, in your experience, if you can say, is the percentage of children who actually lie?" 264a. Upon Defendant's objection, the prosecutor argued that she was following up the defense question. 295a. Defense responded, "I think this 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 regard 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 any of that." 295a. The trial court ruled that Defense counsel opened the door on direct and allowed the prosecution to question as to statistics. 295a.

Cottrell's testimony was not objected to on the basis of MRE 702. Rather, the argument was over whether Defendant opened the door to the testimonial response of the witness. The lower court can admit otherwise inadmissible hearsay statements if the objecting party has opened the door to the evidence by using it to his or her advantage. *People v Verburg,* 170 Mich App 490, 498–99; 430 NW2d 775 (1988).

Generally, rebuttal evidence either specifically contradicts evidence presented by an adversary or serves to cure an opponent's introduction of inadmissible evidence. For either purpose, the evidence introduced in rebuttal must be responsive to the damage done. "Opening the door is one thing. But what comes through the door is another." *United States v Winston,* 447 F2d 1236, 1240 (CA DC, 1971) (quoting the trial court with approval). "[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; 547 NW2d 673 (1996)

"[E]vidence admitted under the 'open door' theory does not give an unbridled license to introduce otherwise inadmissible evidence beyond the extent necessary to remove an unfair prejudice which might have ensued from the original evidence." *Savoy v State,* 64 Md App 241, 254; 494 A2d 957 (1985)

Defendant elicited admissions from the witness that children can lie, and that children can manipulate. 293a. The prosecutor's questions on redirect were responsive to the issue Defendant raised in cross-examination. The follow up question to "do children lie?" is clearly limited to Cottrell's anecdotal information about his own experience. The response being that (paraphrased) 'yes, they lie, but, in my experience, rarely', is limited to the extent necessary to remove unfair prejudice which might have ensued from the original evidence, that Defendant intended the jury to hear that even the prosecutor's expert admits that children do lie. Defendant's gamble in getting the expert's admission backfired. The jury is entitled to hear the qualifications the witness would place on his statement.

Moreover, the Court's jury instructions appropriately limited the use the jury could make of Cottrell's testimony.

B. **Cottrell's testimony on redirect as a result of Defendant opening the door to evidence is distinguishable from *Kowalski* and *Peterson*.**

Defendant's reliance on *People v Kowalski, supra* and *People v Peterson,* supra, are without merit as those cases are distinguished on their facts.

Kowalski dealt with the question of whether Defendant's experts should be allowed under MRE 403 and 702 to testify regarding the theory of false confessions. Although the trial court and the Court of Appeals denied that admissibility, this Court held the testimony allowable and expressed utmost confidence in the jury's ability to weigh expert opinion against all the evidence presented in a case. The citations of the Defendant provide guidance to whether the "experts" could be qualified to testify in the first instance (on direct examination) and not in the circumstance where Defendant has opened the door to questioning on redirect and the jury is appropriately cautioned.

Peterson dealt with the testimony of the child sexual abuse experts in the prosecutor's case in chief. In *People v Peterson*, 450 Mich 349, 375–376; 537 N.W.2d 857 (1995), this Court observed and ruled:

> [T]he trial judge erred in the following areas. First, the experts ... 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 375-6.

Cottrell's testimony was solely to rebut the questions and the inference left by Defendant's questions on cross-examination. 294-297a. Defendant then on re-cross-examination elicited the point from the expert that the percentage could well be higher (of those that lie) but for the fact that those "fabrications" were never discovered. Defendant tried to close the door and gained the expert's admission that the percent of fabrications could indeed be higher.

Given the limiting instructions to the jury and supreme confidence in the jury's ability to weigh the evidence (a la *Kowalski*) in light of the court's instructions, any alleged error, was not prejudicial to the Defendant. *Peterson,* 450 Mich at 379.

C. **The evidence was not objected to under *MRE 702*, the Court essentially found that it was relevant to the issue the Defendant had raised on cross-examination (*MRE 403*), and the evidence was not more prejudicial than probative.**

Although not objected to on the basis of *MRE 702* or *MRE 403,* (issues not preserved for appeal) the trial court found that the evidence was relevant to countering the Defendant's

preferred inference in the expert's admission (on cross-examination) that children can lie. The Defendant opened the door to responsive testimony on redirect that was limited in scope, short in time frame, and cautioned in the Court's instructions to the jury.

MRE 403 provides that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Evidence must be relevant to be admissible. MRE 402; *People v Benton*, 294 Mich App 191, 199; 817 NW2d 599 (2011). Relevant evidence is evidence that is helpful in shedding light on any material point. MRE 401; *People v Murphy* (On Remand), 282 Mich App 571, 580; 766 NW2d 303 (2009). However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Feezel*, 486 Mich 184, 198; 783 NW2d 67 (2010). MRE 403 "does not prohibit prejudicial evidence; only evidence that is unfairly so." *People v Crawford*, 458 Mich 376, 398, 582 NW2d 785 (1998). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id.*

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr, supra* An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made. *People v Snider, supra* A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand), supra*

Defendant stated he had no objection to the court's recognizing Cottrell as an "expert in the area of child sexual abuse and disclosure". 272a. Defendant offered no objections at trial on the basis of *Daubert* or *MRE 702* reliability requirements. Cf *Daubert v Merrell Dow Pharmaceuticals,* 509 US 579 (1993). These issues raised on appeal were not preserved and are judged for plain error.

This is not a case such as *Gilbert v Daimler Chrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004), where it was held that the trial court failed its core gatekeeper duties in admitting "the faux 'medical' opinion of an individual who lacked any medical education, experience, training, skill, or knowledge (which) became the linchpin of plaintiff's case and unmistakably affected the verdict." *Gilbert, Id* at 783, 410. Nor does it easily compare to *People v Kowalski,* 492 Mich 102 (2012), where the Michigan Supreme Court held that the trial court *should have* allowed testimony of false confessions:

> We caution, however, that like other expert testimony explaining counterintuitive behavior, the admissibility of expert testimony pertaining to false confessions is not without limitations. An expert explaining the situational or psychological factors that might lead to a false confession may not "comment on the ... truthfulness" of a defendant's confession, "vouch for the veracity" of a defendant recanting a confession, or "give an opinion as to whether defendant was telling the truth when he made the statements to the police." These conventional limitations are necessary to guard against the potential for jurors to view the expert "not only as possessing specialized knowledge in terms of behavioral characteristics generally associated with the class of" defendants subject to police interrogation, but also as "possess[ing] some specialized knowledge for discerning the truth." **Given the availability of these conventional limitations, we—unlike the Court of Appeals, which viewed the expert testimony as tantamount to testimony that defendant's confession was false—are less pessimistic about the circuit court's management of the proposed testimony and the jury's capability to properly evaluate and assess the testimony in light of all the evidence submitted at trial.**

Kowalski Id at 129. Emphasis added

An expert in child sexual abuse may testify about typical and relevant symptoms of child sexual abuse to explain a victim's specific behavior that might be construed by the jury as

inconsistent with that of an actual victim of child sexual abuse. *People v Peterson,* 450 Mich 349, 352, 373; 537 NW2d 857 (1995) In addition, if the defendant attacks the victim's credibility, an expert may testify about the consistencies between the behavior of the victim and other victims of child sexual abuse. *Id.* at 352–353, 373 However, an expert may not testify that sexual abuse occurred, may not vouch for the credibility of the victim, and may not testify that the defendant is guilty. *Id.* at 352, 369

Thomas Cottrell did not testify that sexual abuse occurred, nor did he vouch for the credibility of the victim, nor did he testify that the Defendant was guilty. The testimony was relevant because it explained and clarified the questions asked by the Defense. It was better left calcified then open.

Furthermore, as already indicated, defense counsel had elicited testimony from the expert that children can lie and be manipulative. And, on recross-examination, the expert conceded that the low percentage upon which he testified only represented the false allegations that were actually discovered to be false. Indeed, during his closing argument, defense counsel highlighted the expert's testimony that children can lie and that the low percentage only reflected known false allegations. Additionally, even during redirect-examination by the prosecution, the expert admitted that "[t]here is literature out there that is extremely variable in its ... identification of fabricated disclosures." The expert also identified certain factual situations in which children were found to be lying regarding sexual abuse. Defendant has simply not established the requisite prejudice to warrant reversal of the convictions.

Thus the Trial Court did not commit any error in allowing the testimony.

II. IF THE TRIAL COURT COMMITTED ERROR AN ALLOWING REBUTTAL TESTIMONY THAT CHILDREN CAN LIE AND MANIPULATE SUCH AN ERROR WAS HARMLESS.

The introduction of Cottrell as an expert witness was stipulated to by defense after the foundation was laid. 272a. The matters testified to on direct examination are classic and deal with the expert's testimony of the various ways that children in general often cope with sexual abuse in different ways. There is nothing in the direct examination that has been objected to by defense at trial or on appeal.

The prosecutor on redirect of the expert witness allowed the expert to qualify the admissions he made in his cross-examination testimony by testifying about the percentage of children who actually lie, in his experience. The court's ruling was that the Defendant opened the door to the issue of whether children lie in his cross-examination of the expert. 294-297a Redirect was limited to short testimony about the number of children who lie, in the witness's experience. The court in addition cautioned the jury that none of Cottrell's testimony could be used for the reasons that Defendant argues in his brief are unfair and too prejudicial. 408-409a

The parties' closing are relevant to this argument. Excerpt from Defense closing:

> "…And these percentages, there is a percentage of kids that lie. We know that. And in the context of Mr. Cottrell, children who accused of sexual assault lie and he gave a percentage on that, a small percentage. Well, what about the people that you never figure it out. Okay. I think he said two to four percent. Okay. A small percent, two to four people out of a hundred are wrongly convicted. And that's the – when we find out about it. What about all of the ones that you don't find out about it. So I don't think his statistics are necessarily accurate.
>
> But what is important, is that it happens. Kids lie and manipulate. And we've got some reasons that that's a possibility in this case. Keeping in mind now that I don't have to prove anything. Josh Thorpe doesn't have to prove anything. He is doing his best in this case to prove that he is innocent of this crime, but

he doesn't have to prove anything. And at the beginning we had the he said, she said, and I will come back to that now…"

"…Okay. So I got sidetracked from kids lie. All right. We have this forensic protocol. And Brianne goes into the forensic protocol and gives a statement. And I asked a few questions about the forensic protocol and inside the forensic protocol it talks about alternative hypothesis testing. And this is basically to ferret out or to help ferret out if there is something else going on here. Is there a reason to lie? What – and that just wasn't done.

Some of the things are different. She said she told at the beginning of this, Bree told Kim Smalla it happened one time, then it turned into three times on different days. It started out without rubbing, now it's – there is rubbing. It helps, you know, for a sexual purpose. That's altered now. Never said to – that anyone until here that the Defendant, Josh, told her not to say anything.

I just came across another note that I wanted to talk to you about the acting out. And I do back to Thomas Cottrell and his focus. And he is – has served a long time in helping victims and focusing on sexual assaults of children and that's his focus.

And so he is testifying kids act out when they've been assaulted. They act out this way or they act out that way. They can act out a number of ways. Okay. That's fine. But he also had – had to testify that kids act out for any number of reasons. And I won't go through those again, but the person you call Dad has abandoned you and your mom is with somebody else now. But for a number of reasons, kids can act out. Her mom is pregnant again, any number of reasons. And we don't deny that she was acting – acting out.

And I hope the testimony was clear, I am going to argue it now, that because my client and I think Kim Smalla's perception of Brianne was that she was needing attention or she would try and get attention. It wasn't that it was abnormal. It wasn't that she is a bad girl because of that. It was just, you know, the way she was and it was taking focus away from Emma, which is where Defendant, Mr. Thorpe's attention needed to be. And that's the reason. So I just wanted to make that clear. Hopefully it was clear through their testimony.

393-395a.

Excerpt for Prosecutor rebuttal:

"…It's convenient for Mr. Thorpe to come up with this story of not seeing Bree until after June – or before – no, excuse me, after June 2012. And why? Because it's contrary to what Chelsie told you, it's contrary to what Bree said. And I want you to think about that for a second. 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 of those cases that his agency sees.

But he said one of the reasons they don't do that is because there is no gain for the victim. What gain did Bree get out of this? She didn't get attorney. She had to go to a forensic interview. She had to testify at a prelim, she had to testify here at trial. There is no gain for any of that. She had to talk about this a lot, about what happened to her.

And it was her that finally decided she didn't want to see the Defendant anymore. That was her decision, which is consistent with what Chelsie said, isn't it? Bree didn't lie. She didn't manipulate anything.

Now the defense attorney wants you to look away from her testimony here in Court. He wants you to believe that somehow she said something different. And I point out to you when he was cross-examining Bree and asking her about those three pages in the prelim transcript, do you remember that part, I think it was page 12, 14, and 16. And he had her read those things and said, aha, you said this then, didn't you? She didn't know what to say. But then when I actually read the exact question and her answer, those things were exactly consistent with what Bree said here in the courtroom. The defense attorney was trying to divert your attention and make you think she was inconsistent when she wasn't.

He also wants you to think about this forensic interview and somehow he is going to point the finger at Officer Dame now. It's Officer Dame's fault. He did it wrong. He didn't do something he should have. But when Officer Dame talked to you about that forensic interview protocol, he said there were the rules we established right from the get-go. To tell the truth when we are in that room, to correct me if I am wrong, to say I don't know or I don't remember, if you truly don't know, don't guess. He followed all of those rules. That's what he said he did.

He also asked in the end, did anyone tell you what to say and she said no. He gave Bree this open narrative in that interview to allow her to tell what happened to her without interruption and without leading questions and that's important.

397-399a.

Neither party unduly elaborated on this testimony in arguing all of the evidence to the jury. And the weight of Cottrell's testimony was limited by the court's cautionary instruction.

Even if held improperly admitted, the testimony about the percentage of children who lie (at his agency) did not affect the outcome of the trial, *Carines,* 460 Mich at 463. First, Cottrell's testimony was cumulative of his testimony that children lie and can be manipulative, which he qualified on redirect that though in his experience a false accusation of sexual abuse was an "extremely rare" circumstance. See *Witherspoon, supra* 257 Mich App at 333. Second, Cottrell also testified that "there is literature out there that is extremely variable in its identification of fabricated disclosures." 295-296a. He could speak only to his own experience in his organization. 296a. Third, the trial court instructed the jury that they could NOT use Cottrell's testimony as an opinion that Brianne Goodenough was telling the truth. 403-405a.

The remainder of the case supported conviction. The victim testified about two incidents where defendant touched her vagina and an incident when defendant made the victim touch his penis. She was able to provide the jury details such as the locations of her sister and the Defendant in the room at the time. She attempted to end contact with the Defendant after the incidents in 2012. This was confirmed by the victim's mother's testimony.

The victim's mother as testified that the victim's behavior had changed around the time of the incidents. The victim's mother ask provided behavioral information that was consistent with Mr. Contreels's testimony.

Moreover, the Trial Court corrected any when if instructed the jury about their duty to determine which witness to believe or not to believe, 403-405a, and also, more specifically:

> "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.
>
> That evidence cannot be used to show that the crime charged here was committed or that the Defendant committed it. Nor can it be considered an opinion by Thomas Cottrell that Brianne Goodenough was telling the truth."

408-409a.

A jury is presumed to follow its instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003)

Under these circumstances the alleged improper testimony of Cottrell did not prejudice the Defendant and as such reversal is not warranted.

RELIEF REQUESTED

The Plaintiff-Appellee prays this Court deny the Defendant-Appellant's Application for leave to appeal.

Dated: January 10, 2019

Respectfully submitted,

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Assistant Prosecutor