STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs

BRANDON JAMES HARBISON,

Defendant,

SUPREME COURT NO: 157404
COURT OF APPEALS NO: 326105
LOWER COURT NO: 13-18686-FC

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

COURT RULES

STATUTES

APPENDICES TO THIS SUPPLEMENTAL BRIEF

The Plaintiff-Appellee stipulates to the use of the Defendant's well-crafted appendix as allowed under this Court's order of May 16, 2018.

All unpublished cases are included in attachment A.

STATEMENT OF JURISDICTION

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

COUNTER-STATEMENT OF QUESTIONS PRESENTED

ARGUMENT I

DID DR. N. DEBRA SIMMS' EXPERT TESTIMONY THAT THE VICTIM SUFFERED "PROBABLE PEDIATRIC ABUSE" VIOLATE THIS COURT'S DECISION IN *PEOPLE V PERSON*, 450 MICH 349 (1995)?

Plaintiff-Appellee Answers:	"No"
Defendant-Appellant Answers:	"Yes"
Court of Appeals Answers:	"No"

ARGUMENT II

WAS THE ADMISSION OF DR. N. DEBRA SIMMS' TESTIMONY AT TRIAL PLAIN ERROR REQUIRING REVERSAL OF THE DEFENDANT'S CONVICTIONS?

Plaintiff-Appellee Answers:	"No"
Defendant-Appellant Answers:	"Yes"
Court of Appeals Answers:	"No"

COUNTER-STATEMENT OF FACTS

Plaintiff-Appellee supplements Defendant's statement of facts herein and as in the argument below.

On November 21, 2014, the Defendant was convicted of two counts of Criminal Sexual Conduct 1st, one count of attempted Criminal Sexual Conduct 1st, two counts of Criminal Sexual Conduct 2nd, and one count of Accosting a Child for Immoral Purposes. (48a) The victim was the Defendant's niece. On January 26, 2015, the Defendant was sentenced.

The Defendant filed a claim of appeal with the Court of Appeals on February 19, 2015. Transcripts were filed on June 25, 2015. Defendant filed a "Motion for New Trial" with the trial court on August 21, 2015, which was heard September 10, 2015. The court denied all issues in this motion except for resentencing regarding a deviation from the guidelines. (52a) The Court resentenced the Defendant on January 21, 2016, to the same sentence previously imposed. (57a)

Defendant filed a Motion to Remand with the Court of Appeals on March 18, 2016. After the Court of Appeals granted the People an extension to file an answer, the Court of Appeals granted the motion on April 25, 2016, before the due date for the People's answer had elapsed. The Court of Appeals ordered that "[t]he trial court shall conduct an evidentiary hearing and again rule on defendant-appellant's motion for a new trial after supplement the record with its finding of fact. Proceedings on remand are limited to issues raised in the motion to remand." Order of the Court of Appeals, 326105. (60a)

On June 2, 2016, the trial court held a *Ginther* hearing with testimony presented on the Defendant's motion for a new trial. The Defendant's motion for new trial/remand raises the same issues heard by the trial court on September 10, 2015: (1) that trial counsel was ineffective

for failure to timely communicate a plea offer, and (2) that trial counsel was ineffective for failing to investigate various claims by the Defendant. (172a)

On or about July 28, 2016, the trial court ruled that the Defendant was entitled to a new trial because "trial counsel's failure to reasonably investigate and present to the jury contradictions between statement of Seth Harbison and the victim, resulting in prejudice to the Appellant-Defendant." (217a)

The People cross-appealed along with Defendant's still pending appeal as a right. On or about January 26, 2017, the Court of Appeals issued an opinion finding that "The trial court's order granting defendant a new trial is reversed and defendant's convictions are affirmed." *People v Harbison*, Unpublished opinion per curiam of the Court of Appeals Issued January 26, 2017 (Docket No. 326105). (234a)

This Court then considered the case under docket number 155501. (242a) This Court vacated the Court of Appeals judgment "concerning the testimony of Dr. N. Debra Sims" and remanded the case for the Court of Appeals to consider under *People v Peterson*, 450 Mich 349 (1995). *People v Harbison*, 501 Mich 897 (2017 (Harbison II) (Defendant's 243a). The Court of Appeals, on January 23, 2018, issued another opinion, again affirming the conviction. *People v Harbison* (*On Remand*), unpublished opinion of the Court of Appeals issued January 23, 2018 (Doc No. 326105) (*Harbison III*) (Defendant's 248a)

The Defendant then sought leave of this Court again and it was set for oral arguments on the application. (Defendant's 252a)

ARGUMENT I

DR. N. DEBRA SIMMS' EXPERT TESTIMONY DID NOT VIOLATE THIS COURT DECISION IN *PEOPLE V PERSON*, 450 MICH 349 (1995)?

STANDARD OF REVIEW

Defendant raises an unpreserved claim of constitutional error. Constitutional questions are reviewed de novo. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508 (2008). The Court reviews the effect of unpreserved constitutional error under the plain-error standard. *People v McNally*, 470 Mich 1, 5 (2004). The plain-error standard is articulated in *People v Carines*, 460 Mich 750, 765-766 (1999).

In this case, the Court's review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414 (1997).

There are four steps to determining whether an unpreserved claim of error warrants reversal under plain-error review. First there must have been error. Second, the error must be plain, meaning clear or obvious. Third, the error must have affected substantial rights. This "generally requires a showing of prejudice, i.e. that the error affected the outcome of the lower court proceedings." The defendant bears the burden of establishing prejudice. Fourth, if the first three requirements are met, reversal is only warranted if the "error resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity or public reputation of judicial proceedings…" *People v Carines*, *supra at 763* (quotation marks and brackets omitted).

PRESERVATION OF ISSUE

This issue was not preserved at trial. However, Defendant did file a motion for new trial which dealt with this issue, and which the trial court denied after hearing. "We review unpreserved claims of evidentiary error for plain error affecting the defendant's substantial rights." *People v Benton*, 294 Mich App 191, 202 (2011). Plain error, which is error that is clear or obvious, affects a defendant's substantial rights when it affects the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763 (1999).

FACTS AND ARGUMENT

Under MRE 702, expert testimony is admissible if it is relevant and " 'assist[s] the trier of fact to understand the evidence or to determine a fact in issue....' " *People v Beckley,* 434 Mich 691, 713–714 (1990), quoting MRE 702. "The determination of when such testimony is admissible lies within the discretion of the trial court and will vary according to the area at issue and the particular facts of the case. *People v Smith,* 425 Mich 98, 106 (1986). "It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek,* 274 Mich App 58, 71; (2007).

More specifically, "[a]n expert may not vouch for the veracity of a victim." *Id.* In sexual abuse cases:

> (1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty. However, ... (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility.

People v Peterson, 450 Mich 349, 352 (1995). A physician is not permitted to "lend his expert opinion testimony as to the crucial issue of whether or not the prosecutrix was actually *raped* at a specific time and place." *People v McGillen # 2,* 392 Mich 278, 285 (1974) (emphasis in original). A medical expert's opinion that a victim was sexually assaulted based on the "emotional state of, and history given by, the complainant" rather than on his "medical capabilities or expertise" is inadmissible. *Smith,* 425 Mich at 112. "[A]n expert may [also] testify with regard to consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Peterson,* 450 Mich at 352–353.

The People presented Dr. N. Debra Simms as an expert witness for the prosecution in "child sexual abuse diagnostics and treatment." (27a). As a basis for her status as an expert she testified as to her background: she had previously been qualified as an expert in "child maltreatment," "child physical abuse," and "child sexual abuse" (26a) in 32 of Michigan's 83 counties (27a); she had been at Helen DeVos Children's Hospital since 2006 and was currently the Section Chief for the Center for Child Protection at Helen DeVos Children's Hospital (24a); she was the medical director at the Safe Harbor Children's Advocacy Center in both Allegan County and at the Ottawa County (26a); and board certified in pediatrics and as well in the specialty of "child abuse pediatrics" (25a). Dr. Simms also testified she had participated in research studies concerning child sexual abuse and examination, and that she had examined thousands of children who had been sexually abused. (25a-26a).

Dr. Simms testified:

Q. So all that information that you described all came from [the victim].

A. Well it came from [the victim] and sometimes from the foster mom.

Q. The information that you said that [the victim] told you that she was touched by [defendant], that he—all of that information that you just recently described, that was all from [the victim]?
A. Yes ma'am, that was in my taking a history from [the victim] prior to the physical examination. (32a)

* * *

Q. What did your physical examination consist of after you got the original history from [the victim]?

A. My physical exam included a head to toe generalized physical examination. It included looking at all of the parts of her body, doing the vital signs, and then it included using the culpascope and looking at the genital and anal area.

Q. Okay. And based upon what [the victim] had told you, would you have expected to find any injury or anything—any physical findings as a result of your exam?

A. No. When she described the genital to genital contact and I asked about any symptoms or sensation during that, she described that it felt uncomfortable but she did not allege any bleeding.

Q. Okay.

A. Without a history of bleeding it is unlikely that we will see any kind of scarring, although scarring is unusual to this area, but I did not expect to see any findings of healed trauma without that history.

Q. And did you find any physical findings?

A. Well she has normal female genital anatomy. The structures looked normal. In looking at her hymenal tissues she was what we call sexual maturity rating 3, so you're born at 1 and she was progressing puberty wise along a stage of development. She had not yet started her periods and she had enough sexual maturity that that could have happen [sic] at any time. In looking at the hymenal tissues they showed what we call an estrogenized effect, so you could see that she had gone—started going through puberty and had pubertal changes. At the 5:00 position on the hymen there was a very small notch, that's a non-specific finding. So in total her physical exam did not show any acute or remote indications of trauma, just the notch which is a non-specific exam.

Q. And what's a non-specific finding? What does that mean?

A. A non-specific finding is a finding that we can see for many different reasons and is not specific to any type of trauma to the genital tissues. You can have small notches that occur from events like time events such as the bicycle accident or something of that nature. You can get small notches from children that use

tampons. You can get small notches that are actually developmental in nature. So when you have a very shallow very small notch that is less than 50% of the width of the hymenal rim, those are considered non-specific findings. (32a-33a)

* * *

Q. Did you have a diagnosis based on your exam and history?

A. Yes, ma'am.

Q. What was that?

A. Probable pediatric sexual abuse.

Q. And you said that even if there was no other than what you described [sic], her physical exam was normal?

A. Yes, ma'am.

Q. Was her normal physical exam inconsistent with her description of the sexual penetrations that she suffered?

A. No, ma'am. Her disclosure was that there had been contact by—contact by her uncle's mouth to her genital area. You would not expect residual of trauma from that. There was contact by her mouth to his penis, once again you wouldn't expect any kind of physical examination finding from that. She described that there was touching. Children, we diaper them, we change them, we bathe them, we touch them all the time. To examine these children I have to touch them. I have to spread apart these layers and I don't cause any trauma. And then she described genital to genital contact which did not have any bleeding associated with it. So the fact that her physical examination shows non-specific findings with this notch and generally normal genital structures does not negate her history of what occurred to her body.

Q. How many attempted penile/anal or genital contact does not leave any marks on the body? Do you have a percentage?

A. I personally have had lots of experience in which there has been genital to genital contact and in which there is a normal or a non-specific exam. In our published literature there is a paper, the title of it it's normal to be normal [sic], they took 236 children in which there was a substantiation or conviction in which there was a higher standard than just we think that these children may be abused and so they looked at these 236 children and of those 236 children more than two-thirds of girls with substantiated abuse had normal or nonspecific findings. So it's normal to be normal. When you talk about what the nature of child sexual abuse is

the majority of time it's licking, kissing, touching, rubbing, and we would not expect to see scarring or residual trauma from those events. (35a-37a)

The trial court also questioned Dr. Simms:

Q. Alright. You described your conclusion as probable pediatric sexual abuse.

A. Yes, sir.

Q. Would you explain to the jury why you consider probable as opposed to maybe possible?

A. In an attempt to allow pediatricians that do child abuse evaluations to communicate with one another effectively, what I may look at and say this is concerning, and someone else may say it's suspicious, and someone else may say it's this or it's that, what happened is there became a national cocensus [sic] that we need to look at all of the evaluations and we need to be on the same page. We need to look at how is it that we are evaluating these patients and how are we coming to a conclusion. And, what occurred is that instead of using various and sundry words to describe the outcomes of these evaluations, an attempt was made to standardize this by saying if there is no disclosure of abuse and it is a normal exam with no concerning situations, this means that there are no medical indications of abuse at this time, and that is a negative evaluation. If—other criteria exists [sic] but it's what we would consider a lower form of history. As a pediatrician I cannot always diagnose based solely upon the medical testing such as you referenced or from seeing something on the physical examination. If you come in to see me and you have a headache, I cannot see your headache, but based upon your history of where you tell me it hurts, when it hurts, how it hurts, how it feels, when it comes, when it goes, how often it comes, taking a comprehensive history, I can diagnose stress headache, cluster headache, migraine headache, etcetera, based upon the history. So in child sexual abuse we take the history that the child gives us and based upon how clear, consistent, detailed or descriptive it may be, if that is present with or without physical examination findings, that is probable pediatric sexual abuse. If the child makes a statement but the statement is limited because the child may have a developmental disability, they may be young, they may not be able to really tell me what has happened to their body, then that can be possible pediatric sexual abuse. They're making a statement but for some reason they're not able to be clear, consistent, detailed and descriptive like with the headache analogy. To get a diagnosis of definite pediatric sexual abuse we have very high tough standards. You have to be pregnant, you have to have a sexually transmitted disease that does not come from anything other than direct sexual contact. There has to be a video, a picture or an eyewitness to you being abused. Or, you have to have physical examination findings that have no other explanation than penetrating trauma to the intervaginal area. That's a really tough standard. So that's our definite. Then clear, consistent,

> detailed and descriptive history is probable, and then we have the other 2 categories for less than that.
>
> Q. You refer to a WE have this standard. Who is the WE?
>
> A. The WE are the individuals that do pediatric sexual abuse evaluation nationwide, nationwide. We have this standard. So when I'm communicating with Dr. Chris Greely down at Children's Hospital in Texas, when I say I have this then he knows that the criteria that I'm using. So for individuals that do this on a regular basis, there's no rule to it because as a physician you can choose to do what you want to do, but it's basically a practice standard for those of us that are professionals in this field. (40a-44a)

On this appeal the Defendant argues that Dr. Simms violated *Peterson* when "she drew conclusions on the likelihood of abuse based solely on the complainant's assertions." Defendant's brief at 14. The Trial Court examined this issue at length at Defendant's first Motion for New Trial, and stated as follows:

> The statements of the doctor who testified, the expert who testified in this case for the prosecution do not in my opinion constitute an improper vouching for the credibility of the complaining witness. I think her testimony clearly revealed she had no objective findings, physical findings on examination at Safe Harbor, a medical examination. But I think she stopped short of making a direct and impermissible statement in front of the jury finding that sexual abuse by the defendant had occurred, and I think her testimony in light of her candid acknowledgement of no physical findings was not an important piece of evidence in this case, although evidence from an expert can be important and very impactful on a jury. I don't find anything about the scope of her testimony that was impermissible and I think it really in light of the absence of physical findings to corroborate sexual abuse, I think it landed with negligible weight. What was far more important in this trial, and even decisive, was the credibility battle between contradictory statements of admission and denial from the complaining witnesses and the defendant. I think the jurors found the complaining witnesses testimony very very credible and powerful and convincing. And, that is the principal reason that the jury convicted the defendant. (52a)

The Court of Appeals agreed, finding that:

> In other words, Dr. Simms never directly opined on the ultimate question in this case—i.e., whether the victim was abused by defendant—she merely stated a

> medical diagnosis based on established diagnostic criteria, all of which were explained to the jury. Moreover, she never stated that she personally, or as an expert, found the victim's account of the abuse to be credible. Rather, she indicated that the victim had provided a history that was "clear, consistent, detailed or descriptive[.]" (Emphasis added.) Viewed in context, the testimony did not clearly run afoul of *Peterson's* admonishment that an expert may not vouch for the veracity of the victim or testify that the sexual abuse occurred or that the defendant is guilty. (243a)

The People agree with this assessment. Dr. Simms did not give a definitive opinion that victim was telling the truth. Rather, the Doctor was describing her classification after review of the evidence. She was able to explain to the jury how this was determined. For "probable pediatric sexual abuse" "So in child sexual abuse we take the history that the child gives us and based upon how clear, consistent, detailed or descriptive it may be, if that is present with or without physical examination findings, that is probable pediatric sexual abuse." (42a-43a) She defined "possible pediatric sexual abuse" as "[i]f the child makes a statement but the statement is limited because the child may have a developmental disability, they may be young, they may not be able to really tell me what has happened to their body, then that can be possible pediatric sexual abuse. They're making a statement but for some reason they're not able to be clear, consistent, detailed and descriptive like with the headache analogy." (43a) Then she in turn explained "definite pediatric sexual abuse" as

> To get a diagnosis of definite pediatric sexual abuse we have very high tough standards. You have to be pregnant, you have to have a sexually transmitted disease that does not come from anything other than direct sexual contact. There has to be a video, a picture or an eyewitness to you being abused. Or, you have to have physical examination findings that have no other explanation than penetrating trauma to the intervaginal area. That's a really tough standard. So that's our definite. (43a)

She summarized: "Then clear, consistent, detailed and descriptive history is probable, and then we have the other 2 categories for less than that." (43a)

More importantly she never stated that the victim was credible, instead she stated that the history provided was that was "clear, consistent, detailed *or* descriptive[.]" This lead to a conclusion with a diagnostic criteria that there was probable pediatric sexual abuse. Not abuse beyond a reasonable standard, not that the Defendant committed a crime, just that there is a diagnostic criteria that Dr. Simms believed this victim met.

The Defendant maintains that Dr. Simms' testimony, even with the safeguards of explanation above, runs afoul of the law because it was based solely on the victim's statements. Dr. Simms based her statement on the victim's history and exam, but then compared it with her medical training, her years of experience, and the criteria created by herself and her co-workers. Moreover, Dr. Simms never attempted to hide the criteria that she used. She admitted that there were no physical findings. Based on this complete picture, the jury would not have believed that this testimony was simple vouching.

This Court stated in *Peterson* that "An expert may testify regarding typical symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim *or* to rebut an attack on the victim's credibility." *Peterson* at 373. This was the basis of Dr. Simms's testimony – to explain to the jury a theory why there could be no physical findings. She then did not take it as far as the Defendant presents, she did not state that the victim was credible or that there is a "typical veracity rate of children when disclosing sexual abuse." (243a) This case came down to the jury believing the victim. Dr. Simms explained that her claims could be diagnostically probable abuse without physical evidence. Not that the claims were valid or true, or that the defendant committed any such action.

ARGUMENT II

II. THE ADMISSION OF DR. N. DEBRA SIMMS' TESTIMONY THAT THE VICTIM WAS DIAGNOSED WITH "PROBABLE PEDIATRIC ABUSE" AT TRIAL WAS NOT PLAIN ERROR REQUIRING REVERSAL OF THE DEFENDANT'S CONVICTIONS.

Standard of Review

There are four steps to determining whether an unpreserved claim of error warrants reversal under plain-error review. First, there must have been error. Second, the error must be plain, meaning clear or obvious. Third, the error must have affected substantial rights. This "generally requires a showing of prejudice, i.e. that the error affected the outcome of the lower court proceedings." The defendant bears the burden of establishing prejudice. Fourth, if the first three requirements are met, reversal is only warranted if the "error resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity or public reputation of judicial proceedings…" *Carines*, *460 Mcih at 763* (quotation marks and brackets omitted). "Even if determined to be plain error, the error does not require reversal [if] the record does not support a finding that this error affected the outcome of the lower court proceedings." *Id.*

Argument

As noted in argument I, the People argue there was no error by the lower court. Moving to the second prong, that the error must be clear or obvious, the context of Dr. Simms' testimony leads reasonable minds to believe it was admissible thus not a plain error. It simply was not plain to the trial court that this testimony was or could be in error.

Moving to the prejudice prongs, this matter did not "seriously affect the fairness, integrity or public reputation of judicial proceedings; independent of the Defendant's innocence." *Carines supra* at 763. Specifically, part of Dr. Simms' testimony actually served to question the

victim's credibility; defendant was able to cross-examine Dr. Simms and attempt to cast doubt on her conclusions by pointing out how little time she had spent with the victim; and other, proper testimony corroborated the victim's testimony.

The testimony at the *Ginther* hearing does not show the Defendant's innocence. The Defendant presented two credibility witnesses: the victim's mother who wanted to claim that the victim was a "liar" but wished the court to overlook that the victim was removed from her care due to drug use; and Seth Harbison, who had only recently completed the terms of probation following a juvenile rape conviction. Seth was also accused of sexually assaulting the victim in this case. The Court of Appeals decision that the exclusion of this evidence did not amount to ineffective counsel is not in question here.

The Defendant points to a number of cases which support his claim that Dr. Simms' statement was in error. However, a number of these cases found that error was harmless.

In *People v Gresham*, unpublished per curiam opinion of the Court of Appeals Issued December 7, 2010 (Docket No, 293580) the doctor's statement was found to be in error, however the Court ruled that:

> In spite of the improper veracity vouching, however, we conclude that reversal is not required. Two of the investigating officers provided testimony that strongly corroborated Dr. Brown's testimony that the victim had provided consistent statements. Therefore, although Dr. Brown's testimony was improper, we conclude that the effect of the testimony was minimized, and the error did not affect the outcome of trial. Moreover, as previously indicated, the victim's testimony alone was sufficient to convict defendant. MCL 750.520h. Thus, plain error affecting defendant's substantial rights did not occur. *Carines*, 460 Mich at 763.

Gresham, supra at 2. In *People v Jackson*, Unpublished per curiam opinion of the Court of Appeals issued April 29, 2010 (Docket No. 283092) the Court found that Dr. Simms' statement was in error, however ruled that "The erroneous admission of Dr. Simms's diagnosis did not

affect the outcome of the lower court proceedings. As we previously noted, the complainant gave specific and detailed testimony about defendant's actions in sexually assaulting her. Because the victim's testimony in a criminal sexual conduct case need not be corroborated, MCL 750.520h, there was more than sufficient evidence to support the jury verdict absent Dr. Simms's diagnosis." *Jackson, supra* at 3.

Then in *People v Chevis*, unpublished opinion of the Court of Appeal issued October 8, 2013 (Docket No. 304358), the court held:

> Applying *Smith* and *Swartz* to the case at bar, and considering that Dr. Simms actually conducted physical examinations of the twins, there was nothing improper regarding the prosecutor's question whether Dr. Simms had "an opinion based on reasonable medical certainty as to whether or not [the] physical examination and medical history [were] consistent with [the] allegation of sexual abuse." We note that Dr. Simms never testified that it was her belief that defendant was the particular person who committed the sexual assault. Because the prosecutor's question was proper, defense counsel was not ineffective for failing to object. *See People v Ericksen*, 288 Mich App 192, 201; 793 (2010) (counsel is not ineffective for failing to raise a futile objection). That said, the nature of Dr. Simms's response appeared to indicate that her conclusion of probable pediatric sexual abuse was not based on objective physical evidence, but rather simply on the child's statements and claims, which, if true, would be improper under *Smith*. On cross-examination by defense counsel, Dr. Simms acknowledged repeatedly that the examinations of both children were normal and that her conclusion of sexual abuse as to the one twin was based solely on what she was told by the child. Defense counsel elicited from Dr. Simms, repeatedly, that she had no way of knowing whether the child's statements were true or false. We are not prepared to find defense counsel's performance deficient for failure to object to Dr. Simms's response of probable pediatric sexual abuse. First, until there was some elaboration by Dr. Simms on cross-examination, it was not immediately clear that her response was indeed improper. Even if it was, an objection and request to strike the testimony proffered at that point in time would not have been of much benefit to defendant; the response had already been heard by the jury and, although a jury is presumed to follow a court's instructions, an instruction to disregard the testimony would likely have held little sway. As opposed to objecting for the second time in a row, which in itself could have found disfavor with the jurors, it was sound trial strategy to simply await cross-examination, at which time defense counsel had the opportunity, which was taken, to elicit the weaknesses in Dr. Simms's conclusion. Defense counsel's performance in regard to this issue did not fall below an objective standard of reasonableness

Chevis, supra at 6.

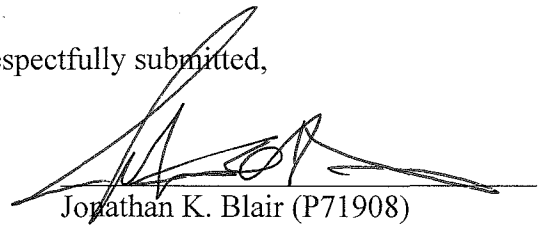
As a victim's testimony alone is sufficient to convict under MCL 750.520, there was no harm in the Doctor's testimony in trial. For the Doctor's statement to be relevant, the jury had to believe the victim, who testified, and then was cross-examined in front of them. She could provide details of the events. (20a) She also described more than one event in detail. (21a) Dr. Simms' effected credibility in that she testified that it is common for there to be no physical evidence, but beyond that any error in her testimony was harmless given the further clarifying questioning by the trial court and the testimony of the victim.

RELIEF REQUESTED

Wherefore, the People respectfully request that the Defendant's convictions be affirmed.

Dated: July 19, 2018

Respectfully submitted,



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JKB/plc