

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs

Michigan Supreme Court No. 158259

ANTHONY RAY MCFARLANE JR,
Defendant-Appellant.

Court of Appeals No. 336187
Circuit Court No. 14-018862-FC

**BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS
AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

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SUMMARY OF ARGUMENT

The Court of Appeals rightly held that defendant was not entitled to relief. Nevertheless, the Court of Appeals panel also used the opportunity to create a new rule against allowing a doctor to present the diagnosis of “abusive head trauma,” even though abusive head trauma was the correct diagnosis.

The Court of Appeals had no reason to create a new rule against “abusive head trauma” in this case. Typically, when an appellate court finds that an unpreserved claim would not have changed the outcome of trial, it will decline to make new underlying rules to find error. This principle exists for multiple reasons. First, it is unfair to provide what is essentially a ruling against the People, which is negated only for the present case. Crafting the opinion in this way makes it impossible for the People to appeal—because they are not the aggrieved party—even though they will be the ones penalized by the ruling in the future. Second, the courts dislike this type of procedure because it confuses the issues. The expert’s use of abusive head trauma was primarily a peripheral issue in the case. The claim was not even preserved at trial. The accuracy and validity of different expert opinions were the primary issues at play in the present case. The Court of Appeals panel’s new rule had no bearing on the case at hand and little direct relevance to either litigant. But the rule will cause significant prejudice to future prosecutions throughout Michigan dealing with abusive head trauma.

The rule against the diagnosis of abusive head trauma was inappropriately made. As will be discussed below, the rule will cause significant and widespread problems for doctors who are just trying to testify honestly in many child injury cases. The amicus asks that this Honorable Court: (1) order that the Court of Appeals opinion be considered non-precedential, (2) vacate the opinion in the areas that created this rule, or (3) expressly disapprove of this rule.

STATEMENT OF QUESTION PRESENTED

I

It is improper to announce a new rule and to simultaneously hold that the violation of that rule is non-prejudicial error, as such renders the rule obiter dictum. Here, the Court of Appeals affirmed defendant's convictions, but still created a new rule that prevents medical experts from using the accurate and internationally approved diagnostic terminology of "abusive head trauma," even though it found that the usage was non-prejudicial. This action rendered the People unable to appeal a sweeping new rule that will impact the ability of experts to testify truthfully in many child homicide and child injury cases. Was the Court of Appeals panel's new rule properly made?

The trial court did not answer this question.

The Court of Appeals did not answer this question.

The People answer, "No."

Defendant would answer, "Yes."

The amicus answers, "No."

COUNTERSTATEMENT OF FACTS

Amicus supports the statement of facts by Appellee, the People.

ARGUMENT

I.

It is improper to announce a new rule and to simultaneously hold that the violation of that rule is non-prejudicial error, as such renders the rule obiter dictum. Here, the Court of Appeals affirmed defendant's convictions, but still created a new rule that prevents medical experts from using the accurate and internationally approved diagnostic terminology of "abusive head trauma," even though it found that the usage was non-prejudicial. This action rendered the People unable to appeal a sweeping new rule that will impact the ability of experts to testify truthfully in many child homicide and child injury cases. The Court of Appeals panel's new rule was not properly made.

Standard of Review

Here, the Court of Appeals created a novel and problematic new rule by combining two concepts that do not fit together. An expert may not engage in speculative testimony that would invade the province of the jury. A medical expert, however, may provide the jury with the accurate diagnosis made according to his professional standards. Here, the Court of Appeals applied case law regarding speculative testimony about behavior to create a new rule that completely excludes the diagnoses of "abusive head trauma" even when that diagnosis is admittedly accurate.

This Court reviews questions of law, including the application of a legal doctrine to a particular set of facts, de novo.¹

Discussion

Although the Court of Appeals came to the right ultimate decision, denying defendant relief, it erred by creating an expansive new rule that will inflict significant harm on the

¹ *People v Randolph*, 502 Mich 1 (2018).

prosecution of child injury and child homicide cases in the State of Michigan, without allowing the People a chance to respond or appeal. Originally, this case was decided in an unpublished decision. Although the amicus disagrees with the panel’s reasoning, the unpublished opinion was not problematic. When the panel ordered the opinion to be published after the conclusion of the case, significant problems arose. The amicus respectfully requests this Honorable Court take action by: ordering that the Court of Appeals opinion be considered non-precedential, vacating the unnecessary portion of the Court of Appeals opinion adding in the rule against “abusive head trauma,” or specifically disproving and, possibly, replacing the new rule.

The problematic language in the Court of Appeals opinion is its misapplication of *People v Bynum*² and *People v Peterson*³ to exclude an admittedly accurate medical diagnosis. Of particular note was the language in which the panel ruled that merely giving an accurate medical diagnosis was erroneous:

Notwithstanding the propriety of a diagnosis of inflicted trauma, we conclude that in cases involving allegations of abuse, an expert goes too far when he or she diagnoses the injury as “abusive head trauma” or opines that the inflicted trauma amounted to child abuse. The ordinary understanding of the term “abuse”—as opposed to neglect or carelessness—implies a level of willfulness and moral culpability that implicates the defendant’s intent or knowledge when performing the act that caused the head trauma.⁴

The amicus writes exclusively to address this new rule, which forbids accurate medical testimony due to the possibility of the jury misunderstanding the expert. The People could not raise this issue on any direct appeal due to the Court of Appeals panel’s decision to place the new rule behind the designation of non-prejudicial error that does not satisfy the plain-error standard.

² *People v Bynum*, 496 Mich 610, 631 (2014).

³ *People v Peterson*, 450 Mich 349, 374, *opinion amended on denial of reh* 450 Mich 1212 (1995).

⁴ *People v McFarlane*, ___Mich App___, at *6 (August 7, 2018).

A. *It is improper to declare a new rule that will not change the outcome of a case.*

The Court of Appeals erred when it created a rule against the diagnosis of abusive head trauma in an opinion where it held the new rule to be non-prejudicial.

In *Peterson*, a child sexual abuse expert witness testified that a child-victim's behavior was consistent with that of a sexually abused child.⁵ The *Peterson* Court held that this was improper because it was too close to directly testifying that the child had been sexually abused.⁶ In *Bynum*, the Court held that it was impermissible for an expert to claim that the defendant was acting in conformity with gang membership, based on the crimes in question. In each of these cases, an expert specifically speculated in their testimony as to whether someone's behavior suggested the perpetration of a crime and the Court found that type of testimony impermissible.

In contrast, here, the Court of Appeals used those cases to create a new rule against medical doctors testifying to "abusive head trauma" as the cause of injury in any child abuse case. Although the Court of Appeals claimed it was merely applying this Court's past decisions, it was actually creating a new rule. Neither *Peterson* nor *Bynum* created a blanket prohibition on anything as concrete as an internationally approved medical diagnosis. But the Court of Appeals applied the *Peterson* and *Bynum* decisions to a type of evidence—a medical diagnosis—that was not contemplated by those cases. Similarly, the reasoning the Court of Appeals provided was completely dissimilar from the reasoning in *Peterson* or *Bynum*. In both of this Court's cases, an expert provided speculative testimony that was tantamount to directly endorsing the People's theory. The *Bynum* case involved expert testimony that defendant's criminal activities corresponded to being part of a gang. The *Peterson* case involved expert testimony that a child behaved in accordance with having been sexually assaulted. In contrast, in this case, the Court

⁵ *Peterson*, 450 Mich at 373-74.

⁶ *Id.*

of Appeals took issue with potential confusion stemming from the colloquial use of the word “abuse,” which it claims is often construed to contain implications that the medical definition does not. The Court of Appeals’ reasoning and rule is nothing like the *Bynum/Peterson* rule. Excluding objectively accurate diagnostic terminology is not the same as excluding speculative conclusions based on behavior. Thus, the Court of Appeals created a new rule, when it stretched the *Bynum* and *Peterson* doctrines to encompass new types of evidence.

This Court has held that appellate courts are constrained from forming new rules, when the creation of that new rule would not change the result of the case at hand.

Since we conclude that plaintiff failed even to meet the threshold requirements of proof to make out a prima facie claim of intentional infliction of emotional distress, we are constrained from reaching the issue as to whether this modern tort should be formally adopted into our jurisprudence by the well-settled rule that statements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication.⁷

The Court of Appeals ruling violated this principle. The Court could, and should, have resolved the issue with a simple plain-error analysis. Here, defendant failed to show the threshold requirement that any potential error resulting from the language of “abusive head trauma” affected the outcome of the trial. Accordingly, defendant was not entitled to relief and the Court of Appeals had no need to reach the question of whether to massively extend the invasion of the realm of the jury doctrine into misunderstandings of accurate medical diagnoses.

Instead, the panel chose to create a new rule. Although the new rule is arguably obiter dictum,⁸ the procedural predicament arising from the creation the new rule places the People at

⁷ *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597–98 (1985) (footnotes omitted).

⁸ It is difficult to tell whether the creation of a rule constitutes obiter dictum, when that rule is considered non-prejudicial in the opinion that creates it. A ruling that an error occurred is typically considered the holding and is binding. Nevertheless, when a ruling that error occurred is not essential to the opinion, because it is not prejudicial—there is no effective difference

an unfair disadvantage. This new rule essentially makes every ongoing abusive head trauma case in Michigan errant, due merely to the use of accurate medical terminology. Meanwhile, the People are ineligible to appeal that sweeping new rule because they are not an aggrieved party.

Had the Court of Appeals merely followed this Court's rule from *Roberts*, there would be no issue. The result of this case would not have changed. Further, the issue could be considered fully at a later time with a proper case. A new and sweeping rule like this should only be created when it is directly applicable to the case that creates it. A case where the use of the term "abusive head trauma" caused a difference in the outcome of trial would be the proper case to determine whether that terminology was proper. If the diagnostic terminology of the abusive head trauma is persistently non-prejudicial, the creation of a rule against that diagnosis is unnecessary.

B. The Court of Appeals erred in forming a new rule to mandate, in some cases, that a doctor must mislead the jury.

It appears that the Court of Appeals opinion is based, at least partially, on the assumption that experts who are medical doctors can phrase a diagnosis according to whatever language they desire. This assumption is inaccurate.

Medical doctors are expected to conform their diagnostic language to the standards set out by their professional organizations. The American Academy of Pediatrics (AAP) sanctions only the use of the term "abusive head trauma" as a diagnosis for this category of injury. Similarly, the International Classification of Diseases (ICD), which is a coding system that both hospital physicians and medical examiners are legally required to use, uses the diagnostic

between saying an error was non-prejudicial under the plain error standard or that an error did not occur—*Roberts* indicates that the statement is dictum.

terminology “abusive head trauma.” The ICD is promulgated by the World Health Organization, and its usage is overseen in the United States by the Centers for Disease Control and Prevention.

The end result of the Court of Appeals panel’s decision to disallow medical experts to use the term “abusive head trauma” is that, in many cases, the doctor will not be able to honestly and fully answer the question of a victim’s diagnosis. “Inflicted head trauma” and “nonaccidental head trauma”—the phrases that the lower panel recommends—are not ICD or AAP approved diagnoses. They might be descriptions of related injuries, but they are not a substitute for the accurate, approved diagnosis.⁹

Many medical examiners, hospital physicians, and other licensed medical doctors will still be required to use the AAP/ICD terminology of “abusive head trauma” for all related diagnoses, regardless of the Court of Appeals decision. This is the diagnosis that will be found on innumerable medical reports, autopsy reports, case studies, scientific studies, and death certificates. The Court of Appeals opinion undermines the truth-seeking function of the trial courts when it excludes an accurate diagnosis, merely because a misunderstanding between a diagnostic term and the colloquial use of a word could potentially occur.

The rule’s abrogation of the trial court’s truth-seeking role applies not only to the diagnosis itself, but necessarily extends to the science behind that diagnosis. In several cases, juries have been required to view a battle of the experts to determine whether they believe that the victim died or was injured in the manner provided by the diagnosing physicians’ reports. The panel’s new rule against “abusive head trauma” would have an extreme chilling effect on

⁹ This ruling could create a bizarre situation where a medical examiner, called to testify as to the cause of death of an infant, would be committing perjury if she gave an answer other than abusive head trauma (assuming that was the cause of death on the autopsy report) but then could be held in contempt of court for violating the rules if she testified honestly.

such proceedings. Scientific and medical reports, articles, studies, and treatises regarding the constellation of injuries included in a diagnosis of abusive head trauma necessarily refer to the term “abusive head trauma.” Losing the ability to discuss “abusive head trauma” will likewise eviscerate the ability of medical experts on both sides to discuss the applicability and scientific underpinnings of abusive head trauma.¹⁰

C. The Court of Appeals erred when it applied an inapplicable analysis for speculative expert testimony to a factual medical diagnosis.

As discussed above, the authority used by the Court of Appeals in crafting this rule had nothing to do with this situation. The *Bynum/Peterson* rule applies to speculation conducted by an expert, which is then provided to the jury as part of the People’s proofs. Here, however, we have a grossly dissimilar situation. Abusive head trauma is a medical diagnosis that is the result of a differential diagnostic system where a factual conclusion is drawn on the basis of the injuries sustained by the victim and the situation in which they were derived.

Unlike an expert’s speculation as to what a party’s behavior may mean, when a victim is diagnosed as having suffered “abusive head trauma,” the analysis should be no different from a victim suffering “multiple gunshot wounds.” In both cases, a doctor reviews all applicable medical reports, a summary or description of the scene, conducts a patient examination, orders any applicable testing, and then determines the diagnosis. In fatal cases, the same situation occurs. A medical examiner reviews all medical reports and investigations and then conducts an autopsy, which yields a cause and manner of death. It is not an expert’s subjective speculation that a victim suffered “abusive head trauma” any more than it is speculation that a victim suffered “multiple gunshot wounds.” In either case, these are factual medical diagnoses. In the

¹⁰ The amicus submits that it would be nearly impossible for either side to argue the validity and applicability of the diagnosis of abusive head trauma if no expert is allowed to say the words “abusive head trauma.”

case of abusive head trauma, the finding is that maltreatment of the victim's head caused traumatic injury. In the case of multiple gunshot wounds, the finding is that the victim sustained injuries caused by being repeatedly shot. Neither finding implies intent. Neither finding indicates a responsible party. Neither finding draws any legal conclusions outside the acknowledgement of injury to the victim.

Nothing improper occurs when a doctor testifies regarding a victim sustaining "multiple gunshot wounds," even when a defendant is charged with a gun crime or assault with a dangerous weapon. If the defense feels that the medical conclusions of the People's expert are factually erroneous, they can hire an expert to disagree. Likewise, the defense is free to argue that defendant was not the source of the gunshots. The analysis is the same with abusive head trauma. Nothing improper occurs when a medical expert testifies that a victim suffered "abusive head trauma," even when a defendant is charged with a child-abuse crime. If the defense feels that the medical examiner's medical conclusions are factually errant, they can hire an expert to disagree. Likewise the defense is free to argue that defendant was not the source of the maltreatment and head injury.

Medical diagnoses are not merely expert speculation and applying the *Bynum/Peterson* standard to exclude an accurate diagnosis is error. When an expert provides a factual medical diagnosis of the cause of an injury or death, the defendant faces no unfair prejudice. Accordingly, the test the Court of Appeals used was inapplicable and the new rule it constructed against "abusive head trauma" was errant.

D. The correct method of dealing with a potential juror misunderstanding is to provide a clarifying jury instruction.

The Court of Appeals panel's reasoning for the creation of the new rule is drawn from its concern that a juror who heard the term "abuse" in "abusive head trauma" would confuse the

proper medical definition being discussed by the doctor, with a colloquial understanding of that term. The panel said that “[t]he ordinary understanding of the term ‘abuse’—as opposed to neglect or carelessness—implies a level of willfulness and moral culpability that implicates the defendant’s intent or knowledge when performing the act that caused the head trauma.”¹¹

This is the same type of potential tension that accompanies the use of the method-of-death term “homicide,” which has never been held to be problematic. Any confusion that would result from either the term “homicide” or the term “abuse” can easily be clarified during the direct and cross-examinations of the expert.

To whatever extent a trial court feels that additional clarification is needed, the appropriate remedy still has nothing to do with excluding accurate and necessary testimony. Instead, the proper remedy to be applied when a trial court believes that the jury could be confused by the term “abuse,” or any other medical term, is to provide a clarifying jury instruction. Juries are presumed to follow their instructions.¹²

If, at the close of a trial, the defense requests a jury instruction regarding the term “abusive head trauma” and the trial court decides that it is likely that the jury may be confused by the difference between the medical term “abuse” and either a colloquial or a legal definition for “abuse,” the trial court may provide an instruction to ensure that there is no confusion. The amicus would suggest the following language if this Court were to consider recommending such an instruction:

You have heard one or more experts refer to the diagnosis of “abusive head trauma.” “Abusive head trauma” is a medical diagnostic term that is used to indicate a specific set of injuries that an expert testified was suffered by the

¹¹ *McFarlane*, ___ Mich App at *6.

¹² *People v Bruner*, 501 Mich 220, 228 (2018).

deceased child. You may accept or reject the explanation of any expert, just as you can any witness.

Also, merely because the expert used the technical word “abuse,” does not mean you should assume that the defendant is responsible for the crimes charged. If you believe that the victim died as a result of abusive head trauma, you must also decide whether it was defendant, or some other source, that was responsible for causing the abusive head trauma.

The above instruction would remove any potential confusion between the medical term “abusive head trauma” and either colloquial or legal definitions of abuse. It would make sure that the jury would not presume a defendant had any intent, because it defines abusive head trauma by the specific injuries suffered, without any accompanying state of mind. It also makes sure that the jury does not use the expert’s testimony to assume that the defendant was responsible for causing the abusive head trauma based.

Accordingly, if this case were properly situated before the Court of Appeals to create a new rule on this issue, the panel’s best option would have been to provide an instruction similar to the one above. Such an instruction would meet the panel’s goals to protect the jury from misunderstandings regarding the medical terminology of abusive head trauma, without requiring the exclusion of accurate and truthful testimony.

Conclusion

The amicus asks this Court to deny defendant’s appeal and take steps to remove the new rule that the Court of Appeals impermissibly added in order to ban the diagnosis of “abusive head trauma” in all future child injury and child homicide prosecutions. The creation of the rule against a medical expert providing the accurate diagnosis of “abusive head trauma” is problematic for several reasons. First, the rule was improperly made because the question of whether to create that rule should not have been reached in the panel’s analysis. This Court has specifically held that appellate courts are constrained from creating new rules when the creation of that rule would not be essential to the disposition of the case. Here, the Court of Appeals

ignored that principle in order to create a new rule, even though the rule did not change the outcome of the case. By ignoring this principle, the Court of Appeals made it impossible for the People to appeal the creation of the rule. Second, the rule excludes a diagnosis that is promulgated by the American Academy of Pediatrics and the World Health Organization. The panel's moratorium against the term "abusive head trauma" will place any doctor that is compliant with the approved diagnostic terminology, in the uncomfortable position of needing to either violate the court's rule or misrepresent their diagnosis. Third, the Court of Appeals erred when it stretched the *Bynum/Peterson* rule regarding speculative expert testimony to encompass factual medical diagnoses, which were never contemplated in *Bynum* or *Peterson*. The decision to treat abusive head trauma differently than any other diagnoses or cause of death is unsupported. Fourth, the correct method to remedy any potential misunderstanding of the term "abusive head trauma" would be a comprehensive jury instruction, rather than excluding accurate testimony and evidence.

Accordingly, the amicus requests that this Court both deny defendant's appeal and also take action to remove the inappropriately created new rule against the diagnosis of "abusive head trauma."

RELIEF

THEREFORE, the amicus requests that this Honorable Court deny defendant's application for leave to appeal and, further, do one of the following:

- (1) order that the Court of Appeals opinion in this matter be returned to "unpublished" status or be considered "non-precedential,"
- (2) vacate the portions of the Court of Appeals opinion that impermissibly and unnecessarily created the rule that the diagnosis of "abusive head trauma" is inadmissible, OR
- (3) expressly disapprove of the Court of Appeals rule against the medical diagnosis "abusive head trauma" and, if this Court feels it is necessary, replace that rule with a recommendation for a trial court to use an instruction to prevent any jury confusion on the issue of abusive head trauma.

Respectfully submitted,

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