STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
Michigan Supreme Court
Hall of Justice
PO Box 30052
Lansing, MI 48909

PEOPLE OF THE STATE OF MICHIGAN

v

ANTHONY RAY McFARLANE, JR.
Defendant/Appellant

Supreme Court No. 158259

Court of Appeals No. 336187

Lower Court No. 14-018862-FC

Myrene Koch (P62570)
Allegan County Prosecuting Attorney's Office
113 Chestnut Street
Allegan, Michigan 49010
269-673-0280

DEFENDANT/APPELLANT'S
SUPPLEMENTAL BRIEF

Michael Villar (P46324)
Villar Law Offices
Attorney for Defendant/Appellant
139 Riverfront Plaza
Allegan, Michigan 49010
269-673-3292

TABLE OF CONTENTS

Appendices Attached Electronically:

Trial Transcripts:

Vol 1
Vol 2
Vol 3
Vol 4
Vol 5
Vol 6

INDEX OF AUTHORITIES

Cases:

Michigan Rules of Evidence

Statutes

STATEMENT OF QUESTIONS PRESENTED IN SUPPLEMENTAL BRIEF

I. WHETHER THE PROSECUTION'S MEDICAL EXPERT INVADED THE PROVINCE OF THE JURY BY USING PHRASES LIKE "ABUSIVE HEAD TRAUMA" AND "DEFINITE PEDIATRIC PHYSICAL ABUSE" TO LABEL HER DIAGNOSIS?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court and appellate court say "no."

II. WHETHER THE DEFENDANT HAS SATISFIED THE PLAIN ERROR STANDARD SET FORTH IN PEOPLE V CARINES, 460 MICH 750, 763 (1999)?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court and appellate court say "no."

STATEMENT OF FACTS

Defendant Anthony McFarlane was charged and ultimately convicted of first-degree child abuse. Mr. McFarlane was acquitted on a charge of second-degree child abuse (COA Opinion, p 1) The prosecution alleged that Defendant shook a nine-week old infant, KM, with the infant suffering physical damage based on a theory of Shaken Baby Syndrome. At trial, KM's sister, KD, testified that she saw Defendant shake KM, even though she had not disclosed any shaking in her Safe Harbor Interview that occurred approximately 10 days after the events in question. (Vol 2, pp 161, 162) Moreover, KD testified that she might have seen the shaking occur on a Friday night and she might have seen the shaking on a Saturday morning. (COA Opinion, p 2) The time that the shaking occurred is highly relevant because KM was exhibiting signs of pain and discomfort prior to Saturday morning. (COA Opinion, p 2) It is important to note that KM was born with a severely deformed left hemisphere in her brain that was only approximately 1/3 of its normal size as a result of suffering a prenatal stroke. (COA Opinion, p 2)

KD, who had just turned five when the incident happened, and was 7 and ½ years old at the time of trial, testified as follows:

Q: [BY MS. KOCH] Okay. Do you live in the State of Michigan or a different state?

A: A different state.

Q: Do you know which one it is?

A: (No verbal response)

Q: I'm not sure if you heard me or you answered, I'm sorry, but do you know what state you live in?

A: No. (Vol 2, p 101)

* * * * *

Q: And is that Anthony is your sister Kayde's dad. Is that right?

A: Yes.

Q: When you lived here in Michigan with him and your mom and your sister did you call him Anthony or something else?

A: I can't really remember what I called him. (Vol 2, pp 104-105)

* * * * *

Q: ….do you remember going with your little sister to Anthony's mom's house?

A: Yes.

Q: What did you call Anthony's mom?

A: I don't remember that. I don't remember what I called her.

Q: But do you know who she was?

A: Yes.

Q: Okay.

A: I'm not really sure who her name was but I did know her.

Q: Okay. Now right before your sister got hurt and had to go to the hospital were you home that day?

A: I don't think so. I think I was with Anthony's parents but can't really remember if I was or not.

Q: Before you went over to Anthony's parents do you remember where you were?

A: I was in my apartment. (Vol 2, pp 105-106)

* * * * *

Q: What happened then?

A: I don't know if he meant to choke but he did.

Q: Can you explain what you mean?

A: Oh, I'm not too sure if he really meant to do it but I was just 5 so I kind of like didn't know

what choking really meant then so I'm not too sure.

Q: Okay. Well, let me ask you what choking means. What does that mean to you? What happened?

A: (No verbal response)

Q: Do you understand my question?

A: No. (Vol 2, p 108)

* * * * *

Q: While you were in your bedroom did you hear something from your sister coming from the living room?

A: Yes.

Q: What did you hear?

A: Her crying.

Q: Had you heard her cry before?

A: Yes.

Q: Was she crying kind of softly, loudly or something else?

A: Pretty Loud.

Q: Did you stay in your bedroom or did you go somewhere else yourself?

A: Well I did peek over a corner to see what was happening?

Q: Okay. You peeked over a corner. Tell me about that. What corner did you peek over?

A: There was a wall from the hall into my room.

Q: and when you peeked what room were you looking into?

A: The living room where she was at.

Q: Did you see whether or not Anthony was still in the living room with her?

A: Yes, he was.

Q: When you peeked into the living room what was Anthony doing?

A: He was shaking her.

Q: Did you hear him say anything to her? To Kayde?

A: No. I said no.

Q: You said no you didn't hear him say anything, okay. Could you describe how he was holding her when he shook her?

A: Like you hold a little baby.

Q: Well can you tell me how that was? What did you see?

A: I can't remember now. It [sic] just remember like a baby and that's all I know.

Q: Okay. Well when you hold a baby you could hold somebody by -- I'm showing you your legs, your waist, your belly, your shoulders, your arm pits, something else. Was there any part that you can remember how he was holding her?

A: Like he was holding her -- I can't remember now. (Vol 2, pp. 110-112)

* * * * *

Q: Did Anthony sometimes since Kaydence was born yell at you and her?

A: I can't -- I think so but I'm not too sure. (Vol 2, p. 112)

* * * * *

Q: Kynleigh do you remember when you lived in Michigan did you talk to anybody else about what happened with your sister that day?

A: I didn't really want to but I think I had, I'm not too sure. Not that day because we just got home from school and (inaudible) so I guess not. (Vol 2, p 113)

* * * * *

Q: [BY MR. CHAMPION] Now, this happened after you were at dance and got home from school. Is that correct?

A: Yes.

Q: Is that a yes?

A: Yes.

Q: After all this happened where did you go or what did you do?

A: I went to my room and as soon as I got done peeking over I was turning on the TV.

Q: You did. Do you know if this was at night or in the morning or when was this?

A: I think it was in the afternoon about to be night. I always watch the (inaudible) before I went to bed.

Q: And you say your mom was at work?

A: Yeah, she comes home at 5:00. (Vol 2, p 114)

* * * * *

Q: [BY MS. KOCH] Kynleigh in this case you never actually talked to the police officer who is sitting here, did you?

A: (No verbal response)

Q: Can you see him sitting over here behind me?

A: (No verbal response)

Q: I think there's a video glitch. Can you repeat your answer?

A: Yes.

Q: You remember talking to Detective Doan?

A: No. (Vol 2, p 116)

* * * * *

Detective Doan, who led the investigation, testified as follows:

Q: [BY MS. KOCH] Detective [Doan] did you yourself ever interview Kynleigh Dixon?

A: No, I did not.

Q: Can you explain why you yourself didn't interview Kynleigh Dixon?

A: Kynleigh was sent to what we call our Safe Harbor, it's a Children's Safe Harbor home there where we send all children that are possibly abused or are victims, we send them to this special place, it's called Safe Harbor, it's in Allegan, and it's an environment where the kids - there's no pressure on the kids, there's one interviewer who does the interviews, they're specially trained, they don't lead the children in any of the questions that they ask. It's very laid back type of environment, and that's where we sent Kynleigh for her interview. (Vol 2, p 158)

* * * * *

Q: [BY MR. CHAMPION] Were any disclosures made of strangulation or shaken baby?

MS. KOCH: Objection, it calls for hearsay.

MR. CHAMPION: Your Honor it's to impeach a witness who has already testified.

MS. KOCH: May we approach?

THE COURT: Yes.

(At about 3:18 p.m. bench conference conducted)

(At about 3:22 p.m. bench conference concluded)

THE COURT: You can inquire further on that topic Mr. Champion.

Q: [BY MR. CHAMPION] You were present during the entire interview. Is that correct?

A: That's correct.

Q: And you were watching it on videotape?

A: Yes, sir.

Q: Did this child ever disclose that she had been choked or seen the baby shaken.

A: No. (Vol 2, pp 161-162)

The Prosecution brought forth testimony from Dr. Sarah J. Brown, who was admitted as an expert in child abuse pediatrics. (COA Opinion, p 2) Dr. Brown testified that the case involved a

"definite case of abusive head trauma" and that the injuries to KM were "caused by definite pediatric physical abuse." (COA Opinion, p 7) Her statements, according to the Court of Appeals, "strongly suggested that it was her opinion that whoever inflicted the injuries on KM did so with a culpable state of mind, which requires a defendant to "knowingly or intentionally" cause serious physical harm to a child." MCL 750.136b(2); (COA Opinion, p 7) The Court of Appeals admitted that the terms used by Dr. Brown implied a "level of willfulness and moral culpability that implicates the defendant's intent or knowledge when performing the act that caused the head trauma." (COA Opinion, p 7)

The Court of Appeals found that the testimony of Dr. Brown, as to her belief that the Defendant's actions were abusive or amounted to child abuse, were irrelevant and inadmissible as a matter of law because Dr. Brown was in no better position than the jury to assess the intent that defendant had when he acted. (COA Opinion, p 7) The Court of Appeals opined that the trial court plainly erred to the extent that it allowed Dr. Brown to use the phrase "abusive head trauma" to label her diagnosis and that the trial court plainly erred by allowing her to testify that KM's injuries amounted to "child abuse." (COA Opinion, p 7) However, the Court of Appeals then surmised that the errors by the trial court were "unlikely" to have affected the outcome of the trial. (COA Opinion, p 8)

At trial, Dr. Brown also was allowed to testify, without defense counsel objection, to her opinion that KM has suffered a prior broken tibia. (COA Opinion, p 9) The Court of Appeals found that in the absence of any evidence connecting the Defendant to the fracture, the opinion of the Doctor did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; (COA Opinion, p 9)

The Court of Appeals found that the testimony regarding the alleged fracture was not relevant to prove conduct in conformity with character and was thus inadmissible under MRE 404(b). (COA Opinion, pp 9-10) The Court of Appeals opined that the evidence was "likely inadmissible under MRE

403 because it invited speculation by the jury, and the danger of unfair prejudice outweighed whatever marginal relevance the evidence might have had for purposes of the diagnosis." MRE 403; (COA Opinion, pp 9-10) Nevertheless, the Court of Appeals determined that defense counsel had a legitimate strategic reason for not objecting to testimony about the fracture. (COA Opinion, p 10) The prosecuting attorney highlighted the evidence of the broken tibia and the importance of the testimony of Dr. Brown in her closing argument by stating:

> "The defense attorney in his closing argument wanted you to believe Dr. Brown is the only one who sees these things. She's the only one who saw this as abuse, she's the only one this and the only one that. Think about that for a minute. It's as if he's saying Dr. Brown is somehow only focused on child abuse, she's not looking anywhere else. But you know from the testimony that's not true. She did everything else first. The medical testing, the extra scans, going above and beyond, actually sitting there herself with the pediatric radiologist conferring as they're looking at those things. She didn't look at Kaydence, come out and say yep, that's child abuse, we're done. She conducted a lot of tests and exams and things to do.
>
> Now the defendant attorney told you well there's nothing linking his client to this. Nothing at all. Yet we know he's the primary caregiver and more than that, what do we know? When those pained cries started in the middle of the night between 12-6 and 12-7, who was in charge of Kaydence? He was. Dakota was asleep. When those pained cries happened the next day when Kynleigh and Kaydence and the defendant were home who was in charge of Kaydence? The defendant was. So yes, we do know that he did those things.
>
> **The bottom like ladies and gentlemen is you need to look at everything,** not just the scans, not just the X-rays, but consider everything in its totality. **The bruise, the leg, and the leg is important. Why is that important? Because that leg fracture one or two, depending on what there are, had absolutely no connection to her head injuries.** Not the stroke she suffered in utero, not anything else that may have happened later, that ladies and gentlemen **is evidence of abuse**, and if you have that, and if you look at the other factors this is where I ask you to put all these pieces in this puzzle together, look at them all, take it as a whole. It's going to give you a clear picture, and once you do that the clear picture will show that you should find the defendant guilty with regard to child abuse in the first degree and also guilty of child abuse in the second degree. (Vol V, pp 49-51) (emphasis added)

There was absolutely no evidence adduced at trial regarding who, if anyone, caused the broken

tibia. Nevertheless, the prosecutor used Dr. Brown's testimony to impermissibly tie the defendant to the broken leg and use it as just another part of the "clear picture" of abuse with which the jury should convict defendant.

STANDARDS OF REVIEW

Plain Error Standard

People v Carines, 460 Mich 750, 763 (1999) sets forth the plain error standard for nonpreserved errors at trial. The standard requires the following: 1) error must have occurred; 2) the error was plain, i.e. clear or obvious; and 3) the error affected the outcome of the lower court proceedings. The defendant rather than the prosecution bears the burden of persuasion with respect to prejudice. Id. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." Id.

Invading the Province of the Jury

Generally, an appellate court reviews a trial court's decision to allow the admission of testimony for an abuse of discretion. However, it is an abuse of discretion to allow testimony that is inadmissible as a matter of law. People v Bynum, 496 Mich 610, 623 (2014). The appellate court reviews de novo whether the trial court properly interpreted and applied the rules of evidence. People v Duncan, 494 Mich 713 (2013). If the error alleged was not properly preserved at trial, the defendant must show a plain error that affected his or her substantial rights. Carines, supra at 763.

I. WHETHER THE PROSECUTION'S MEDICAL EXPERT INVADED THE PROVINCE OF THE JURY BY USING PHRASES LIKE "ABUSIVE HEAD TRAUMA" AND "DEFINITE PEDIATRIC PHYSICAL ABUSE" TO LABEL HER DIAGNOSIS?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court and appellate court say "no."

The Court of Appeals properly recognized that the admission of Dr. Smith's expert testimony that KM suffered "abusive head trauma" and "definite pediatric physical abuse" was an abuse of discretion by the trial court because her testimony was inadmissible as a matter of law. (COA Opinion, P 7) The Court of Appeals correctly stated that an expert may not offer an opinion on the intent of criminal responsibility of the accused. (COA Opinion, p 6) The Court of Appeals observed, "Brown's testimony that KM's injuries were caused by 'abusive head trauma' or otherwise amounted to 'child abuse' strongly suggested that it was her opinion that whoever inflicted the injuries on KM did so with a culpable state of mind; that is, her testimony plainly implicated whether defendant 'knowingly or intentionally' caused serious physical harm to KM within the meaning of MCL 750.136b(2)." (COA Opinion , p 7)

In the present case, there was no external evidence of injury. (COA Opinion, p 5) The theory of the prosecution rested on a diagnosis of shaken baby syndrome or abusive head trauma (COA Opinion p 5) The Court of Appeals described how the American Academy of Pediatrics adopted the term "abusive head trauma" and that such a diagnosis involves "trauma caused by human agency", which the Academy of Pediatrics labels "abusive." (COA Opinion, p 5) The Court of Appeals acknowledged that the Michigan Supreme Court has recognized that there is a debate within the medical community as to the reliability of a diagnosis of shaken baby syndrome or abusive head trauma, citing People v Ackley, 497 Mich 381, 391-392 (2015). The Court of Appeals noted that this Court has not considered whether there are "any limits on an expert's ability to diagnose abusive head trauma." (COA Opinion, p 5-6)

The Court of Appeals opined, "[t]his case required expert medical testimony because it was beyond the ken of ordinary persons to evaluate the medical evidence and assess the nature and extent of

KM's injuries, the timing of those injuries, and the possible mechanisms of injury implicated by the medical evidence." (COA Opinion, P 4 citing People v Kowalski, 492 Mich106, 121-122 (2019)) At the same time, the Court of Appeals recognized that an expert's opinion does not become objectionable merely because "it embraces an ultimate issue to be decided by the trier of fact." (COA Opinion, p 4 citing MRE 704)

The Court of Appeals stated that a diagnosis that a child's head injuries were not accidental may be made on the basis of physical examination and scientific evidence rather than solely on the history provided by the complainant. (COA Opinion, p 6) The Court of Appeals opined that a physician may properly offer an opinion that, when the medical evidence is considered along with the child's history, the child's injuries were inflicted rather than caused by accident or disease because a "jury is unlikely to be able to assess the medical evidence." (COA Opinion, p 6) The Court of Appeals made the distinction between concluding that trauma was inflicted or not accidental does not invade the province of the jury because the expert is not expressing an opinion on the Defendant's guilt or state of mind. (COA Opinion, p 6)

The Court of Appeals then determined that 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 because such a label implies a level of willfulness and moral culpability that implicates the defendant's intent or knowledge when performing that act that caused the head trauma." (COA Opinion, p 6) An expert may not offer an opinion on the intent or criminal responsibility of the accused. (COA Opinion, p 6 citing Bynum, supra at 630-633)

The Court of Appeals was correct in determining that the testimony of Dr. Smith in labeling KM's injuries as definite pediatric abuse, abusive head trauma and child abuse were irrelevant and inadmissible as a matter of law because she was in no better position than the jury to assess the defendant's intent than was the jury.

There appears to be no reasonable argument that Dr. Smith's testimony as to "definite physical pediatric abuse," "abusive head trauma," and "child abuse" should have been allowed. The Court of Appeals acknowledges and concluded that Dr. Smith's testimony went too far and invaded the province of the jury. (COA Opinion, p 6) Thus, the real issue to be decided by this Court is whether the plain error made by the trial court affected the outcome of the lower court proceedings OR if the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." People v Carines, 460 Mich 750, 763 (1999) The Court of Appeals only considered whether the error affected the outcome of the lower court proceedings. (COA Opinion, p 7) Defendant/Appellant contends that the Court of Appeals was in error when it found that the prejudice in the lower court as a result of Dr. Smith's testimony was "minimal" and it was in error when it did not consider whether the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence.

II. WHETHER THE DEFENDANT HAS SATISFIED THE PLAIN ERROR STANDARD SET FORTH IN PEOPLE V CARINES, 460 MICH 750, 763 (1999)?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court and appellate court say "no."

People v Carines, 460 Mich 750, 763 (1999) sets forth the plain error standard for nonpreserved errors at trial. The standard requires the following: 1) error must have occurred; 2) the error was plain, i.e. clear or obvious; and 3) the error affected the outcome of the lower court proceedings. The defendant rather than the prosecution bears the burden of persuasion with respect to prejudice. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of

judicial proceedings independent of the defendant's innocence. Id at 763.

The facts and procedure in this case amply satisfy the first two prongs of the plain error standard. The remaining issue is whether the error affected the outcome of the lower proceedings. The Defendant/Appellant bears the burden of persuasion with respect to prejudice, and must show that the plain, forfeited error resulted in the conviction of an actually innocent defendant or that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." Id at 763.

The Court of Appeals did not do a thorough job in explaining its reasoning as to the final prong of the plain error standard. The Court of Appeals came to the conclusion that "[t]he totality of the evidence strongly supported that defendant became angry with KM, violently shook her out of frustration, and caused the injuries at issue. Given the strength of the evidence, to the extent that the trial court plainly erred by allowing Brown to use the labels abusive head trauma or child abuse, we find it unlikely that the error affected the outcome of the trial….Therefore, the error does not warrant relief." (COA Opinion, p 8) Later, the Court of Appeals found, without record support, that the jury was "well aware of the limits on Brown's opinion, and because of that, the prejudice occasioned by her irrelevant and inadmissible testimony was "minimal." (COA Opinion, p 7)

A review of each of the conclusions of the Court of Appeals will show that the Court of Appeals committed error warranting reversal because the record demonstrates that the errors made by the trial court seriously affected the fairness, integrity or public reputation of the judicial proceedings. The prejudice occasioned by the admission of irrelevant and inadmissible evidence by Dr. Brown was far more than minimal.

The Court of Appeals asserted that "[t]he totality of the evidence strongly supported that Defendant became angry with KM, violently shook her out of frustration, and caused injuries the injuries at issue. The evidence relied upon by the Court of Appeals was that there was evidence that

KM became symptomatic while in defendant's care and that KD, the only alleged eyewitness of the events, saw defendant shake KM at around that same time. (COA Opinion, p 8) However KD was five at the time of the alleged incident and her testimony and past statements were inconsistent. KD made no mention of seeing defendant shake KM when she was interviewed at Safe Harbor on or about December 16, 2013, which was approximately 10 days after the alleged event. (Vol 2, p 161) Moreover, the Court of Appeals acknowledged that KD's testimony about the timing of what she saw was "not entirely clear." (COA Opinion, p 2) The Court of Appeals noted that she did "at first imply that the shaking incident occurred sometime immediately before defendant took her to his mother's house, which would have been early on Saturday, December 7, 2013." (COA Opinion, p 2) The children's mother, Dakota Chitwood, testified that KM was already showing signs of fussiness and pain by that time, and Chitwood was home and would likely have been in a position to witness the alleged shaking had it occurred Saturday morning. (COA Opinion, p 2) However, KD later testified that the discipline occurred after she got home from school and before her mother got home from work. From KD's testimony, a reasonable finder of fact could infer that the shaking incident occurred on Friday." (COA Opinion, p 2)

The Court of Appeals analysis of KD's testimony was made in regards to an analysis of the "sufficiency of the evidence" that was presented in the lower court. The Court of Appeals said their analysis required them to review the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt and noted that the Court of Appeals must resolve all conflicts in the evidence in favor of the prosecution. (COA Opinion, p 1)

The only testimony that defendant was "angry" with KM was based upon KD's testimony that she went to her room after being spanked and peeked into the living room when she heard KM crying. She stated that she saw defendant shaking KM. KD testified that she did not hear defendant say

anything at that time, nor did she testify that defendant acted or appeared angry. (Vol 2, p 112) In fact, when she was asked, KD could not testify that Anthony had ever yelled at her and her sister. (Vol 2, p 112) KD could not describe what she meant by shaking other than saying that it looked like Defendant was "holding a baby." (Vol 2, p 112)

Dr. Brown's testimony that KM's injuries could have been caused by someone violently shaking KM or by throwing her onto a couch or other soft surface was enough evidence for the Court of Appeals. (COA Opinion, p 2) The Court of Appeals also pointed out that Dr. Brown testified that KM's subdural hematomas and retinal hemorrhages were not attributable to her stroke. (COA Opinion, pp 2-3) The Court of Appeals used both Dr. Brown's testimony and KD's testimony to prove that defendant was angry with KM and shook KM violently, even though there really was nothing in KD's testimony to indicate that the defendant was angry. The Court of Appeals went on to state that it "does not matter that the finder of fact must make multiple inferences to establish these elements and that it doesn't matter that the evidence gives rise to multiple inferences or that an inference gives rise to further inferences." (COA Opinion, p 3) As for the cause of KM's injuries, the Court of Appeals used Dr. Brown's conclusion that KM's injuries were caused by violent shaking and were not attributable to her prenatal stroke. (COA Opinion, pp 2-3)

The Court of Appeals went on to acknowledge that only minimal circumstantial evidence to prove that the defendant had the required mental state was needed to affirm a conviction based upon sufficiency of the evidence. The Court of Appeals relied upon evidence that the defendant shook KM and that his shaking caused her injuries was sufficient to find that he acted intentionally and caused her serious physical harm. The Court of Appeals relied on Dr. Brown's opinion that the acts that caused KM's injuries had to be violent to establish intent, even though there was expert opinion to the contrary, because the Court of Appeals had to resolve all disputes in the prosecution's favor. (COA Opinion, p 3)

The Court of Appeals opinion on the sufficiency of the evidence then bleeds over to their

analysis of the plain error standard. Their conclusion that the "totality of the evidence strongly supported that defendant became angry with KM, violently shook her out of frustration, and caused the injuries at issue" is from their analysis of sufficiency of the evidence, which required them to resolve all evidence issues in favor of the prosecutor. This case is similar to People v Harbison, Supreme Court no. 157404 (2019), in that the issues raised and decided by the Court of Appeals were far more pernicious than merely evidentiary errors, but strike at the heart of several important principles. Id at 31.

Even though Dr. Brown did not vouch for the credibility of the victim in this case due to the victim's young age, her testimony did serve to vouch for the credibility of the only "eyewitness" of the "crime." KD did not mention being choked by the defendant or that she had seen defendant shaking KM during her interview at Safe Harbor about 10 days after the incident occurred. (Vol 2, pp 161-162) Her timing was "not entirely clear" at trial and she testified for the first time at trial that she saw KM being shaken. (Vol 2, p 162) However, her testimony about what constitutes "shaking" was suspect and could in no way be construed as "violent." (Vol 2, pp 110-112) KD could only state that defendant was holding KM "like a baby" and really couldn't remember how he was holding her (Vol, 2 pp 110-112)

Dr. Brown's testimony that the injuries to KM were the result of violent shaking that constituted abusive head trauma, definite pediatric physical abuse and child abuse, served to bolster the credibility of KD and apparently served to convince the Court of Appeals and the jury that there was "strong evidence" that defendant became angry with KM, violently shook her out of frustration, and caused the injuries at issue. It apparently also influenced the jury to disregard all expert opinion to the contrary regarding the potential of KM's injuries being caused by disease, namely, her prenatal stroke and the severely deformed left hemisphere of her brain.

The Court of Appeals indicated that the prejudice attributable to Dr. Brown's plain error of

being allowed to testify as to "abusive head trauma", "definite pediatric abuse" and "child abuse" was "minimal" and did not affect the outcome of the case. (COA Opinion , p7) The basis for the Court of Appeals opinion was that defense counsel called three witnesses who did not agree with Brown's diagnosis. The Court of Appeals noted that the experts informed the jury that they did not believe that a medical professional could diagnose abuse, that shaken baby syndrome or abusive head trauma diagnoses were founded on flawed studies, that a suspicion of abuse does not mean abuse actually occurred, and that the symptoms at issue were not an absolute sign of abuse. (COA Opinion, p 7) The Court of Appeals concluded that the jury was "well aware of the limits on Brown's opinion, and because of that, the prejudice occasioned by her irrelevant and inadmissible testimony was "minimal." (COA Opinion, p 7)

Interestingly, the Court of Appeals mentioned that the prosecutor did mention in her closing that Brown characterized the symptoms as having been caused by abuse. (COA Opinion, p 7) One thing that the jury was not aware of was the fact that important parts of Dr. Brown's testimony were irrelevant and inadmissible. Instead, the jury was simply given testimony by three of defendant's experts that unsuccessfully attempted to minimize or thwart the inadmissible testimony of Dr. Brown.

It is an abuse of discretion to allow testimony that is inadmissible as a matter of law. People v Bynum, 496 Mich 610, 623 (2014). Testimony that is inadmissible as a matter of law is not capable of being cured by countering with admissible testimony that tends to negate the inadmissible evidence. In this case, Dr. Brown's testimony was correctly deemed irrelevant and inadmissible as a matter of law by the Court of Appeals. The reason that the testimony is irrelevant and inadmissible as a matter of law is that the expert is either vouching for the credibility of a victim or witness or is giving her "expert" opinion that the defendant engaged in actions that were willful, wanton and abusive and had the requisite intent required for a conviction, namely, that it was her opinion that "whoever inflicted the injuries on KM did so with a culpable state of mind, which requires a defendant to "knowingly or

intentionally" cause serious physical harm to a child." MCL 750.136b(2); (COA Opinion, p 7)

The prejudice occasioned by Dr. Brown's characterization of the acts was not minimal. The Defendant was convicted despite the testimony of defendant's own three experts who attempted to overcome Dr. Brown's recitation to the jury of irrelevant and inadmissible testimony. Dr. Brown's testimony, if believed, led to the conclusion that Defendant knowingly and/or intentionally caused serious physical harm to KM. In addition, Dr. Brown's testimony served to vouch for the credibility of KD's testimony that she saw the victim being shaken and which would have led the jury to believe that the events had happened on Friday evening rather than Saturday morning. Dr. Brown's testimony also caused the jury to overlook the unreliable nature of KD's testimony regarding her lack of memory and inability to detail what she meant by "shaking."

Another theme running throughout the trial and appeal was the issue of trial counsel failing to object to testimony of Dr. Brown that KM suffered a previous tibia fracture. (COA Opinion, p 9) The Court of Appeals refused to consider prosecutorial misconduct by mentioning the tibia fracture in closing because previous appellate counsel apparently did not offer any substantive analysis of the issue and abandoned those claims on appeal. However, the Court of Appeals did point out that the evidence of the tibia fracture was inadmissible under MRE 402. (COA Opinion, p 9)

The Court of Appeals concluded that such testimony regarding the possible tibia fractured could not be relevant to prove conduct in conformity with character as per MRE 404(b), and that the danger of unfair prejudice of the testimony outweighed whatever marginal relevance the evidence might have had under MRE 403. (COA Opinion, pp 9-10) The Court of Appeals noted that even if that evidence was used by Dr. Brown as part of her differential diagnosis of abusive head trauma, the evidence was still not admissible under MRE 403. (COA Opinion, p 10) There was no evidence given in the entire trial that linked defendant to the alleged broken bones of KM. The Court of Appeals somehow concluded that defense counsel had a legitimate strategic reason for not objecting to testimony about

the fracture. (COA Opinion, p 10) They pointed out that defense counsel had strong evidence to contradict the evidence and that it allowed counsel the opportunity to challenge the credibility of the prosecution's experts. (COA Opinion, p 10) The reasoning of the Court of Appeals is apparently that trial counsel's strategy was to allow the admission of irrelevant, inadmissible and highly prejudicial testimony in hopes of challenging the credibility of the witness who testified as to the irrelevant, inadmissible and highly prejudicial testimony. (COA Opinion, p 10)

The Court of Appeals wrote an opinion that should have led to the overturning of Mr. McFarlane's conviction. Instead, despite making findings of plain error and abuses of discretion by the trial court, the Court of Appeals overlooked or failed to properly consider how directly those plain errors related to the questions to be decided by the jury and affirmed Mr. McFarlane's conviction. The Court of Appeals found the following plain errors committed by the trial court:

1. Dr. Brown testified that there was "definite pediatric physical abuse,"
2. Dr. Brown testified that there was "a definite case of abusive head trauma",
3. Dr. Brown testified that the injuries to KM were the result of "child abuse", and
4. Dr. Brown testified that KM had suffered previous child abuse in regards to her broken tibia. (COA Opinion, p 7; pp 9-10)

The appellate court concluded that "totality of the evidence strongly supported that defendant became angry with KM, violently shook her out of frustration, and caused the injuries at issue. Given the strength of the evidence, to the extent that the trial court plainly erred by allowing Brown to use the labels abusive head trauma or child abuse, we find it unlikely that the error affected the outcome of the trial…..Therefore, the error does not warrant relief." (COA Opinion, p 8) The Court of Appeals sited the following to support their conclusion:

> "There was evidence that KM became symptomatic while in defendant's care, and KD testified that she saw defendant shake KM at around that same time. The timing and eyewitness account permitted an inference that KM

> manifested her symptoms at that time because they were inflicted at that moment. A detective also reported that KD had reported that she heard defendant yell 'shut up' to KM. KD stated that defendant punished her when she cried at a time when he wanted to play video games. The evidence tended to suggest that defendant could become angry and frustrated by crying children. Brown also testified that KM's injuries were consistent with having been violently shaken. There was also testimony that defendant warned KD not to tell anyone and threatened to come after a neighbor if she or her husband said anything wrong about his statements to investigators. Defendant's statements suggested that he was conscious of his guilt." (COA Opinion, p 8)

The Court of Appeals opinion of what constitutes "strong evidence" is filled with problematic issues. First, KD testified that the occurrence might have happened on Saturday morning as well, which would have undermined the People's case against defendant. Instead, the Court of Appeals carefully parses its words by pointing out that there "was evidence" that KM became symptomatic while in defendant's care. Of course, there also "was evidence" that KM became symptomatic prior to being in defendant's care. The Court of Appeals then says that the timing and eyewitness account "permitted an inference" that KM manifested her symptoms at that time. Again, the Court of Appeals is using one version of the evidence that then "permits" an inference. It is important to remember that KD was five years old at the time of the alleged events and 7 ½ years old when she testified.

The Court of Appeals noted that a detective apparently reported that KD has reported that she heard defendant yell 'shut up' to KM. KD did not remember speaking to any detective. (Vol 2, p 116) In addition, KD stated that defendant punished her when she cried when he wanted to play video games. KD never stated that the defendant was angry when he punished her and could not testify that defendant had yelled at her and her sister in the past. (Vol 2, p 112) KD testified that defendant did not say anything when she saw him "shaking" KM. (Vol 2, pp 110-112) The Court of Appeals used this information to state that "the evidence **tended to suggest** that defendant **could become angry and frustrated** by crying children." (Emphasis added). It is far from strong evidence when the evidence

"tends to suggest" that the defendant "could become angry." It is more speculation than actual evidence.

The Court of Appeals then used Dr. Brown's testimony that KM's injuries were consistent with having been violently shaken. (COA Opinion, p 8) Of course, Dr. Brown also testified that the victim suffered abusive head trauma and definite pediatric physical abuse. The Court of Appeals must have believed that the jury could have listened to defendant's three medical experts to "know the limitations" of Dr. Brown's testimony and then were able to use Dr. Brown's testimony that KD was violently shaken without being influenced by Dr. Brown's other inadmissible testimony as to KD suffering abusive head trauma and definite pediatric physical abuse. The major point is that in calculating what the "strong evidence" was at trial, the Court of Appeals had to use Dr. Brown's testimony. If the "admissible" part of Dr. Brown's testimony was crucial to the development of strong evidence, then Dr. Brown's "inadmissible" testimony that KD suffered abusive head trauma and definite pediatric physical abuse would have also had to influence the jury.

The Court of Appeals states that the defendant warned KD not to tell anyone of what happened. (COA Opinion, p 8) Then the Court of Appeals stated that defendant threatened to come after a neighbor if she or her husband said anything wrong about his statements to investigators. The actual testimony came from Desiree Solomon, who had babysat for Kadence several weeks prior to the events in question. (Vol 3, p 125) The "threatening" testimony went as follows:

Q: [BY MS. KOCH] What did he say to you?

A: He pretty much just said that she was okay at the time and that everybody was going to get questioned and we needed to lawyer up.

Q: Did he indicate he would tell you what was going on in the investigation?

A: He did, and I'm not -- if it was during the investigation, I was told that I was going to be informed on what was going on.

Q: Okay. Did he say anything else other than I'll just let you know what's going on?

A: He did.

Q: What did he say?

A: He said that he would let us know what was going on and that if anything that he told us went outside the wrong way he would come after us.

* * * * *

Q: Were you afraid of the statement that he made he would come after you?

A: I wasn't really afraid of it. I was more struck with it was odd.

* * * * *

Q: [BY MR. CHAMPION] In this conversation that you had with Anthony, you felt he was accusing you. Is that correct?

A: I felt like he was accusing us, yes. (Vol 3, pp 126-127)

The "threat" in this case was not taken as a threat by the witness, who thought it was more odd and that the defendant was accusing her of being the one who potentially injured KM. (Vol 3, p 127) It is a stretch to conclude that defendant's statement to Ms. Solomon was an "awareness of guilt" as indicated by the Court of Appeals. (COA Opinion, p 8)

This Court in People v Harbison, Supreme Court No. 157404 (2019), considered the plain error standard as it related to expert testimony regarding the term "probable pediatric sexual abuse" used by the People's expert in that case. In that case, this Court held specifically that "examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without any physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainants veracity and improperly interferes with the role of the jury. Harbison, supra, p 2. In Harbison, the error was not preserved and the court entered into an analysis under the plain error standard and concluded that the error was plain, affected Harbison's

substantial rights, and seriously affected the integrity of his trial and reversed Harbison's conviction.

The Harbison case differs from the instant case in several ways. The instant case is not a criminal sexual conduct case and the victim in the instant case was too young to testify. Consequently, the expert in the instant case could not vouch for the credibility of the testimony of the alleged victim. In Harbison, the alleged victim was a nine-year-old who was the niece of the 18-year-old defendant Brandon Harbison. The testimony showed that Mr. Harbison would occasionally babysit his niece. While in foster-care, the victim began to sob and to describe the "really bad" things done to her by Harbison. Mr. Harbison was charged with two counts of CSC 1, attempted CSC 1, two counts of CSC II and one count of accosting a child less than 16 years old for immoral purposes. Harbison, supra at 9-10.

In the Harbison trial, the alleged victim testified that she had been sexually abused at her grandmother's house and at her mother's house. She testified that Harbison performed oral sex on her "too many times to remember" and, among other things, attempted vaginal and anal penetration. Her testimony indicated that Harbison had sexually abused her on more than 30 occasions. Id at 10. In that case, the biological mother testified that she had been using methamphetamines and so had Mr. Harbison. Id.

Dr. N. Debra Simms testified that she had examined the victim and diagnosed her with "probable pediatric sexual abuse." Id. Dr. Simms admitted that there were no physical findings to corroborate sexual abuse, but based upon her interview with the child and was based on clear, consistent detailed and descriptive history. Id at 11. Dr. Simms testified that to get a diagnosis of definite pediatric sexual abuse there must be a sexually transmitted disease from sexual contact, a pregnancy, a video, a picture, or an eyewitness of the abuse. Id at 11. If such things were available, the diagnosis of definite pediatric sexual abuse could be made. Id at 12-13.

After six hours of deliberation, Harbison was found guilty as charged on all counts and filed his

appeal. The case was remanded to the trial court and the trial court granted a new trial on the grounds that trial counsel was ineffective in failing to investigate and present testimony from the victim's brother, who at testified earlier that he never witnessed Harbison attempt to have sexual contact with the victim. The Court of Appeals reversed the grant of a new trial and affirmed Harbison's convictions.

The Court of Appeals had held that the admission of Dr. Simm's diagnosis of "probable pediatric sexual abuse" was not plain error because "it appears that Dr. Simms was simply leaning toward taking [TH] at her word." The Court of Appeals found no prejudice because the testimony made clear that the physician was "simply relying" on the victim's word and that the victim herself testified at trial.

However, this Court concluded that Dr. Simm's testimony that the victim suffered "probable pediatric sexual abuse" affected defendant's substantial rights. This Court noted that the "jury was in just as good a position to evaluate the victim's testimony" as was the expert. The most prejudicial aspect of Dr. Simm's testimony, according to this Court, was that she clearly vouched for the victim's credibility. This Court went on to say that "[g]iven the lack of compelling testimony that forms the basis for the verdict and the plainly erroneous testimony that TH suffered "probable pediatric sexual abuse," we conclude that the plain error affected Harbison's substantial rights. This court found a lack of compelling testimony despite the testimony of a 9-year-old girl that indicated she was abused over 30 times. This Court noted that this error was far more pernicious than a mere evidentiary error. This Court stated that Dr. Simm's testimony vouched for the victim's credibility and invaded the province of the jury to determine the only issue in the case. Harbison, supra, pp 30-31. This Court concluded that the error of Simm's testimony affected the verdict and seriously affected the integrity of Harbison's trial.

Harbison Applied to the Instant Case

While the factual circumstance are different in the instant case than in Harbison, the reasoning

used in Harbison should also compel this Court to vacate Mr. McFarlane's conviction. In the instant case, the victim was too young to testify and suffered from a defective left hemisphere of her brain that caused her left hemisphere to be one-third of its normal size. The one eye-witness that testified was a five-year-old girl whose testimony was not consistent or particularly inculpatory. Dr. Brown's testimony served to bolster KD's testimony and led the jury to take the position that favored the prosecution's theory of events that the shaking "incident" occurred on Friday evening rather than Saturday morning. As such, the trial did present a credibility contest between the five-year-old eyewitness and the Defendant. KD also testified that she peeked in and saw the defendant shaking the victim. However, her testimony about the issue of "shaking" was amplified and vouched for by Dr. Brown testifying that the only cause of such injuries would be violent shaking. The jury was again led to the conclusion that some version of KD's testimony must be true because the injuries had to be caused by violent shaking and because Dr. Brown testified that the injuries were "definite pediatric physical abuse", "abusive head trauma" and "child abuse."

At trial KD, who had just turned five when the incident happened and was 7 and ½ years old at trial, testified as follows:

Q: [BY MS. KOCH] Okay. Do you live in the State of Michigan or a different state?

A: A different state.

Q: Do you know which one it is?

A: (No verbal response)

Q: I'm not sure if you heard me or you answered, I'm sorry, but do you know what state you live in?

A: No. (Vol 2, p 101)

* * * * *

Q: And is that Anthony is your sister Kayde's dad. Is that right?

A: Yes.

Q: When you lived here in Michigan with him and your mom and your sister did you call him Anthony or something else?

A: I can't really remember what I called him. (Vol 2, pp 104-105)

* * * * *

Q: ….do you remember going with your little sister to Anthony's mom's house?

A: Yes.

Q: What did you call Anthony's mom?

A: I don't remember that. I don't remember what I called her.

Q: But do you know who she was?

A: Yes.

Q: Okay.

A: I'm not really sure who her name was but I did know her. (Vol 2, p 105)

Q: Okay. Now right before your sister got hurt and had to go to the hospital were you home that day?

A: I don't think so. I think I was with Anthony's parents but can't really remember if I was or not.

Q: Before you went over to Anthony's parents do you remember where you were?

A: I was in my apartment. (Vol 2, pp 105-106)

* * * * *

Q: What happened then?

A: I don't know if he meant to choke but he did.

Q: Can you explain what you mean?

A: Oh, I'm not too sure if he really meant to do it but I was just 5 so I kind of like didn't know what choking really meant then so I'm not too sure.

Q: Okay. Well, let me ask you what choking means. What does that mean to you? What happened?

A: (No verbal response)

Q: Do you understand my question?

A: No. (Vol 2, p 108)

* * * * *

Q: While you were in your bedroom did you hear something from your sister coming from the living room?

A: Yes.

Q: What did you hear?

A: Her crying.

Q: Had you heard her cry before?

A: Yes.

Q: Was she crying kind of softly, loudly or something else?

A: Pretty Loud.

Q: Did you stay in your bedroom or did you go somewhere else yourself?

A: Well I did peek over a corner to see what was happening?

Q: Okay. You peeked over a corner. Tell me about that. What corner did you peek over?

A: There was a wall from the hall into my room.

Q: and when you peeked what room were you looking into?

A: The living room where she was at.

Q: Did you see whether or not Anthony was still in the living room with her?

A: Yes, he was.

Q: When you peeked into the living room what was Anthony doing?

A: He was shaking her.

Q: Did you hear him say anything to her? To Kayde?

A: No. I said no.

Q: You said no you didn't hear him say anything, okay. Could you describe how he was holding her when he shook her?

A: Like you hold a little baby.

Q: Well can you tell me how that was? What did you see?

A: I can't remember now. It [sic] just remember like a baby and that's all I know.

Q: Okay. Well when you hold a baby you could hold somebody by -- I'm showing you your legs, your waist, your belly, your shoulders, your arm pits, something else. Was there any part that you can remember how he was holding her?

A: Like he was holding her -- I can't remember now. (Vol 2, pp. 110-112)

* * * * *

Q: Did Anthony sometimes since Kaydence was born yell at you and her?

A: I can't -- I think so but I'm not too sure. (Vol 2, p. 112)

* * * * *

Q: Kynleigh do you remember when you lived in Michigan did you talk to anybody else about what happened with your sister that day?

A: I didn't really want to but I think I had, I'm not too sure. Not that day because we just got home from school and (inaudible) so I guess not. (Vol 2, p 113)

* * * * *

Q: [BY MR. CHAMPION] Now, this happened after you were at dance and got home from school. Is that correct?

A: Yes.

Q: Is that a yes?

A: Yes.

Q: After all this happened where did you go or what did you do?

A: I went to my room and as soon as I got done peeking over I was turning on the TV.

Q: You did. Do you know if this was at night or in the morning or when was this?

A: I think it was in the afternoon about to be night. I always watch the (inaudible) before I went to bed.

Q: And you say your mom was at work?

A: Yeah, she comes home at 5:00. (Vol 2, p 114)

* * * * *

Q: [BY MS. KOCH] Kynleigh in this case you never actually talked to the police officer who is sitting here, did you?

A: (No verbal response)

Q: Can you see him sitting over here behind me?

A: (No verbal response)

Q: I think there's a video glitch. Can you repeat your answer?

A: Yes.

Q: You remember talking to Detective Doan?

A: No. (Vol 2, p 116)

The only eyewitness to anything in this case was KD. As can been seen from the above testimony, her memory of events was extremely suspect. She did not disclose any choking of herself or any shaking of KM at her Safe Harbor interview 10 or so days after the event. (Vol 2, p 162) The testimony as to the "shaking" was very inconclusive as well. Not only was there a discrepancy as to the timing of the events, but KD merely stated that the defendant was holding KM like you hold a baby

and could not provide any further information as to how the shaking occurred or as to how animated the shaking was. (Vol 2, pp 110-112) KD admitted in her testimony that she couldn't remember how Anthony was holding or shaking the baby. (Vol 2, p 112) Dr. Brown's testimony that there had to be a violent shaking of KD, that there was definite pediatric physical abuse of KD, that there was abusive head trauma of KD, and that her injuries were a result of child abuse had to have had a significant, if not conclusive, impact on the outcome of the trial given the problematic nature of the eyewitness testimony.

The testimony of the tibia fracture that the Court of Appeals concluded was inadmissible, irrelevant, and prejudicial had an impact on the outcome of the trial. The jury took the testimony of Dr. Brown and the testimony that there was a prior fracture of KD's leg and imputed both the physical acts of violence and the requisite intent from Dr. Brown's testimony to conclude that defendant willfully and wantonly caused KM injury. Without Dr. Brown's testimony that KM's injuries were a result of "definite pediatric physical abuse", "abusive head trauma" and "child abuse" it is unlikely that Defendant would have been convicted. Alternatively, the use of Dr. Brown's testimony to bolster the credibility of a young eyewitness whose testimony was suspect, "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence."

CONCLUSION

Dr. Brown's testimony regarding KM's injuries being "definite pediatric physical abuse, abusive head trauma and child abuse "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence."

REQUEST FOR RELIEF

WHEREFORE, defendant requests that this Honorable Court vacate his conviction and remand the case to the Allegan County Circuit Court for further proceedings.

Dated: November 25, 2019

_____

Attorney for Defendant/Appellant