

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

ANTHONY RAY MCFARLANE, JR.,

Defendant-Appellant,

SUPREME COURT NO: 158259

COURT OF APPEALS NO: 336187

LOWER COURT NO: 14-18862-FC

MEREDITH R. BEIDLER (P78256)
Assistant Prosecutor
113 Chestnut Street
Allegan, Michigan 49010
(269) 673-0280

C. MICHAEL VILLAR (P46324)
Attorney for Defendant-Appellant
139 Riverfront Plaza
Allegan, Michigan 49010
(269) 673-3292

PLAINTIFF-APPELLEE'S BRIEF
ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

QUESTIONS PRESENTEDiv

COUNTER STATEMENT OF FACTSv

ARGUMENT I1

 The prosecution’s medical expert did not invade the province of the jury
 by using phrases such as “abusive head trauma” and “definite pediatric
 abuse.”

ARGUMENT II.....4

 The Defendant has not satisfied the plain error standard.

CONCLUSION AND RELIEF REQUESTED.....9

INDEX OF AUTHORITIES

CASE LAW CITED

People v Carines, 460 Mich 750, 763 (1999) 4,8,9

People v Johnson, 397 Mich 686 (1976) 5

People v Lemmon, 456 Mich 625, 646–647 (1998) 5

People v Mehall, 454 Mich 1, 6 (1997) 5

People v Thorpe, 504 Mich 230, 261 (2019) 6

Sissoko v State, 236 Md App 676, 717–725 (2018) 2

United States v Olano, 507 US 725 (1993) 4

PEOPLE vs ANTHONY RAY MCFARLANE, JR. - 336187

COA Opinion, p 2 5

COA Opinion, p 4 1

COA Opinion, p 4 4

COA Opinion, p 5 2

COA Opinion, p 7 2

MICHIGAN RULES OF EVIDENCE CITED

MRE 702 1

MRE 704 1

QUESTIONS PRESENTED

ARGUMENT I

The prosecution's medical expert testified that this case was definite pediatric abuse. The Defense offered three experts who rebutted this position. Did the expert's use of the phrases such as "abusive head trauma" and "definite pediatric physical abuse" invade the province of the jury?

Defendant-Appellant's answer: Yes
Plaintiff-Appellee's answer: No

ARGUMENT II

The jury heard testimony from several lay witnesses, an eyewitness, and five experts in total. Dr. Brown's opinion was based on a physical examination of the child. All three of the Defendant's experts questioned Dr. Brown's diagnosis. The jury, as the trier of fact, is tasked with determining the credibility of each witness. After hearing all of the testimony, the jury found the Defendant guilty. Has the Defendant satisfied the plain error standard?

Defendant-Appellant's answer: Yes
Plaintiff-Appellee's answer: No

COUNTER-STATEMENT OF FACTS

Defendant-Appellant Anthony McFarlane appeals his conviction for First-Degree Child Abuse. The prosecution had several witnesses including the child's mother, sister, and neighbors. The prosecution also presented testimony of two expert witnesses who treated the child, one of whom was Dr. Sarah Brown. The child's sister testified that the Defendant was taking care of her and her sister and she saw the Defendant shake the child. (TR Vol II, p 111). She also testified that the Defendant disciplined her by forcing her to hold a penny against the wall with her nose, and if she dropped the penny she would get a "whooping." *Id.* at 107.

Prosecution expert Dr. Brown, a child abuse pediatrician at Helen DeVos Children's Hospital, testified about her care and treatment of the child. (TR Vol III, pp 14–43). She discussed all the various tests and images that she reviewed to care for the child and determine what may have happened. *Id.* Ultimately, Dr. Brown stated that the child suffered from abusive head trauma which was formerly referred to as shaken baby syndrome. *Id.* at 33. She also testified that this was a case of definite pediatric abuse. *Id.*

Defendant then presented three expert witnesses to rebut the prosecution's case. The first expert was Dr. Julie Mack, an expert in radiology. Dr. Mack rebutted the prosecution's theory that the child's injuries were caused by the Defendant or by any trauma. (TR Vol III, p 152). She also stated that she didn't think a physician could diagnosis abuse. *Id.* at 180. She indicated that a physician could state there was suspected abuse, but not definite. *Id.* The Defendant's second expert, Dr. Douglas Smith testified that the injury occurred before the date that

was indicated by the child's sister. (TR Vol IV, p 85). The Defendant's final expert was Dr. Joseph Scheller, a pediatric neurologist. He testified that the child in this case was not a victim of child abuse. *Id.* at 170, 172, 194.

After hearing the testimony and reviewing the evidence, the jury came back with a verdict of guilty on Count 1: Child Abuse in the First Degree and not guilty on Count 2: Child Abuse in the Second Degree.

ARGUMENT I

The prosecution’s medical expert did not invade the province of the jury by using phrases such as “abusive head trauma” and “definite pediatric abuse.”

The Rules of Evidence permit expert testimony “[i]f the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue...” MRE 702. The rule permits a qualified witness to “testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” *Id.* Furthermore, “if an expert’s opinion is otherwise admissible, it does not become objectionable merely because ‘it embraces an ultimate issue to be decided by the trier of fact.’” COA Opinion, p 4; MRE 704.

Prosecution expert Dr. Brown testified that she was employed by Helen DeVos Children’s Hospital as a child abuse pediatrician “with the sole purpose of evaluating children who may have been abused or neglected.” (TR Vol. III, p 6). She also testified that there are seven practicing child abuse pediatricians in Michigan and about 300-400 nationally. *Id.* at 7. She explained that the American Board of Pediatrics is the agency that provides board certification. *Id.*

Dr. Brown explained that the terminology changed from “shaken baby syndrome” to “abusive head trauma” around 2009. (TR at 12). She explained that there wasn’t any new science surrounding the diagnosis, but it allows for a broader

diagnosis not limited to trauma caused solely by shaking a child. *Id.* As the Court of Appeals explained, the history of “shaken baby syndrome” and “abusive head trauma” is outlined in *Sissoko v State*, 236 Md App 676, 717–725 (2018). And, “The American Academy of Pediatrics adopted the term ‘abusive head trauma’ in 2009 and defined it to mean the ‘constellations of injuries that are caused by the directed application of force to an infant or young child, resulting in physical injury to the head and/or its contents.’” COA Opinion, p 5; *Sisko*, 236 Md App at 720.

The Court of Appeals determined that Dr. Brown went too far when she used the phrases “abusive head trauma” and “definite pediatric abuse.” COA Opinion, p 7. Importantly though, the Court noted that the defense offered the testimony of three different experts who did not agree with the prosecution’s expert and they did not believe a medical professional could diagnose abuse. *Id.* Defense expert Mack testified that the child’s medical records might give rise to a suspicion of abuse, but a medical professional could not diagnose abuse. *Id.* at 7–8. Defense also presented an expert who stated that the diagnosis of abusive head trauma was founded on flawed studies and there was controversy surrounding whether a medical professional could make such a diagnosis. *Id.* at 8.

Defense presented three witness, all of whom rebutted the prosecution’s expert testimony. However, the jury still chose to believe the testimony of the prosecution’s one expert over the testimony of the Defendant’s three experts. As the Court of Appeals noted, “Given this testimony, the jury was well aware of the limits

on Brown's opinion." *Id.* Furthermore, "Any prejudice occasioned by her characterization of the acts was minimal." *Id.*

Importantly, while Dr. Brown did testify that the child had suffered abusive head trauma and this was a case of definite pediatric abuse, she did not opine on *who* may have caused the injuries. The jury was free to interpret Dr. Brown's testimony combined with the testimony of an eyewitness, along with that of the conflicting experts, to come to its conclusion.

The Court of Appeals ultimately determined that "[g]iven the strength of the evidence, to the extent that the trial court plainly erred by allowing Brown to use the labels 'abuse head trauma' and 'child abuse,' we find it unlikely that the error affected the outcome of the trial." *Id.* Contrary to Defendant's arguments, the Court of Appeals did not acknowledge and conclude that Dr. Brown's testimony invaded the province of the jury. The Court of Appeals was correct when it determined that Dr. Brown's testimony did not invade the province of the jury. The totality of the circumstances—the testimony of the child's sister regarding the incident and the three conflicting expert witnesses—allowed for the jury to come to its own conclusion regarding the Defendant's guilt.

ARGUMENT II

The Defendant has not satisfied the plain error standard.

As noted by the Court of Appeals, the Defendant did not object to the prosecution's expert testimony so the Court's review is limited to whether there was plain error that affected the Defendant's substantial rights. COA Opinion, p 4. Even if the Court determines that the prosecution's medical expert invaded the province of the jury by using terms such as "abusive head trauma" and "definite pediatric abuse," the Defendant has not satisfied the plain error standard set forth in *People v Carines*, 460 Mich 750, 763 (1999). The *Carines* court stated, "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear and obvious, 3) and the plain error affected substantial rights." *Id.*, citing *United States v Olano*, 507 U.S. 725 (1993). The third requirement requires that the Defendant show prejudice, i.e., the error affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763, *Olano*, 507 U.S. at 734. The Court noted that the Defendant, not the government, bears the burden of persuasion regarding prejudice. *Olano*, 507 U.S. at 734. If the Defendant is able to satisfy these three requirements, the appellate court must use its discretion to determine whether to reverse. *Carines*, 460 Mich at 763. "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 763–764, *Olano*, 507 U.S. at 736–737.

In this case, Dr. Brown's testimony did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. The jury heard testimony from several witnesses during the trial including the child's sister and three defense expert witnesses. The child's sister testified that she saw the Defendant shaking the child. (TR Vol II, p 111). There was also testimony from the child's sister that the Defendant disciplined her by making her hold a penny against the wall with her nose, and if it dropped, she would get a "whooping" (TR Vol II, p 107). She also testified that the Defendant had choked her by putting his hands around her neck. *Id.* at 108–109.

Defense focusses on how the testimony of the child's sister may have been inconsistent. Nonetheless, the jury chose to believe her testimony. "As the trier of fact, the jury is the final judge of credibility." *People v Johnson*, 397 Mich 686 (1976). While the defense argues the witness's testimony was improbable, the Court should not "interfere with the fact-finder's role in deciding the weight and credibility to give to a witness's testimony—'no matter how inconsistent or vague that testimony might be.'" COA Opinion, p 2; *People v Mehall*, 454 Mich 1, 6 (1997); see also *People v Lemmon*, 456 Mich 625, 646–647 (1998). The same principle applies to Dr. Brown's testimony. The jury heard testimony from defense expert that trauma did not cause the child's injuries and that significant trauma would result in greater evidence of injury to the brain. (TR Vol III, p 152, 155). Another expert stated that it was his opinion that the child was *not* a victim of child abuse. (TR Vol IV, p 170, 172).

Thus, the jury was presented with two conflicting opinions: Dr. Brown stating there was pediatric abuse, and Dr. Scheller who stated that there was not child abuse. The jury was tasked, as the trier of fact, to determine the credibility of these conflicting opinions. Furthermore, the jury heard testimony from defense expert Julie Mack who stated that she did not think a physician could diagnose definite abuse, but merely the suspicion of abuse. (TR Vol III, p 180). Taking these conflicting opinions into consideration, the jury had the ability to determine the credibility of each witness and came up with a verdict based on everything it had heard.

While the Supreme Court held that the plain error standard was met when an expert testified that there was “probable pediatric abuse,” this case can be distinguished. *People v Thorpe*, 504 Mich 230, 261 (2019). In that case, the Court explained that the physician’s opinion was that the child had probably been sexually abused although she found no physical evidence of an assault. *Id.* The expert witness in that case acknowledged that there was no physical evidence of an assault and the Court determined that her conclusion was based solely on her own opinion that the child’s account of the assaults was truthful. *Id.* at 261–262. In the end, the Court noted that this case was largely a credibility contest and the only evidence against the Defendant was the child’s uncorroborated testimony. *Id.* at 264.

In the instant case, while Dr. Brown testified that there was abuse, her findings were based on a physical assessment. (TR Vol III, pp 24–32). This included

a head-to-toe examination of the child, bone surveys, x-rays, and reviewing scans, EEG, and bloodwork results. *Id.* This case involves much more than simply a credibility contest with only a child's uncorroborated testimony for a jury to rely on. The jurors in this case were presented with much medical documentation and testimony about the child's injuries and even an eyewitness account. Dr. Brown's testimony did not vouch for the credibility of any witnesses; in fact, her testimony is void of any reference to the child's sister—it appears from her testimony that she did not have any information from the child's sister about the shaking incident when she made her diagnosis.

The prosecution's closing argument focused on the totality of the circumstances surrounding the child's injuries—not simply on Dr. Brown's opinion that the injuries amounted to child abuse. The prosecutor, in her closing arguments, painted a picture for the jury of the prosecutor's theory of the case from beginning to end. While the prosecutor's closing arguments drew much attention to Dr. Brown's testimony, she focused on all of the things Dr. Brown noted from the child's history to her complete physical evaluation of the child. (TR Vol V, pp 20–24). The prosecutor asked the jury to look at the whole picture and put the pieces of the puzzle together—the testimony of the child's sister who was an eyewitness and the conflicting opinions of the medical experts. *Id.* at pp 27-28.

If the Court does find that Dr. Brown's testimony invaded the province of the jury, it surely did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. The expert's conflicting opinions were blatant to the jury.

And, the jury, as the trier of fact, must determine which witnesses to believe.

Looking at the totality of the circumstances, including the eyewitness testimony of the child's sister, the error, if any, did not affect the fairness of the trial. The jury was still able to make its decision based on the information provided to it.

Moreover, unlike *Thorpe*, the expert's testimony was based on a physical assessment rather than vouching for the credibility of a witness. Overall, the Defendant has not shown that the error affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763.

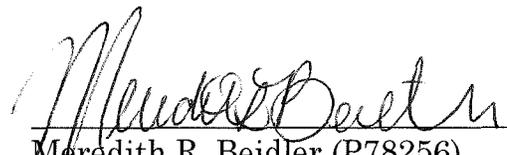
CONCLUSION AND RELIEF REQUESTED

The Court of Appeals correctly held that Dr. Brown's testimony did not invade the province of the jury. Moreover, the Defendant has not satisfied the plain error standard set forth in *Carines*. The jury heard testimony from several witnesses and heard conflicting expert witness opinions. It was the jury, as the trier of fact, who was tasked with determining which witnesses to believe and find credible. Looking at the totality of the circumstances and the sum of the evidence presented to the jury, Dr. Brown's opinion did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. The Defendant has not shown how Dr. Brown's testimony affected the outcome of the trial court proceedings.

WHEREFORE, the Plaintiff-Appellee respectfully requests that this Court uphold the Defendant's conviction.

Dated: December 13, 2019

Respectfully submitted,



Meredith R. Beidler (P78256)
Assistant Prosecutor

MRB/plc