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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

ERNESTO EVARISTO URIBE,

Defendant-Appellant.
_____/

Supreme Court No. 159194

Court of Appeals No. 338586

Circuit Court No. 13-20404 FC

EATON COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

MICHAEL R. WALDO (P72342)
Attorney for Defendant-Appellant

Supplemental Authority (MCR 7.212(F))

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Supplemental Authority (MCR 7.212(F))

Ernesto Uribe asks this Court to apply *People v Thorpe*, __ Mich __ (2019) (Docket No. 156777) and *People v Harbison*, __ Mich __ (2019) (Docket No. 157404) to his case. Mr. Uribe maintains the trial court erred when it denied his request for a mistrial after Dr. Guertin, a prosecution expert in child sexual abuse, testified that he believed the complainant had been sexually abused. In *Harbison*, this Court held an examining physician may not opine whether a complainant has been sexually abused absent corroborating physical evidence. *Id.* at 2. The facts in Mr. Uribe's case are analogous to those in *Harbison* and warrant the same conclusion.

During cross-examination, defense counsel confirmed Dr. Guertin's report did not specify any diagnosis of sexual abuse for the complainant. (II, 236-237) On re-direct, the prosecution elicited that Dr. Guertin did, in fact, diagnose the complainant with sexual abuse. (II, 237) When counsel again explored this omission in the report, Dr. Guertin volunteered, "in my opinion there would be no question that she's been sexually abused." (II, 239)

Like Dr. Simms in *Harbison*, Dr. Guertin based his opinion only on what the complainant told him. Dr. Guertin testified his physical examination of the complainant was "fairly normal." (II, 227) Both Dr. Simms and Dr. Guertin observed non-specific findings during their exams, which did not sufficiently corroborate the complainants' accounts so as to allow their improper opinion testimony that the complainants had been sexually abused.

In *Thorpe*, this Court concluded defense counsel did not open the door to improper opinion testimony by a prosecution expert merely by asking the expert whether children sometimes lie. *Id.* at 21. Here, defense counsel's questions to Dr. Guertin pertaining to the lack of any specific diagnosis included in his report "were discrete, straightforward, and uncontroversial questions of fact" that did not open the door to Dr. Guerin's improper testimony. *Id*.

In a credibility contest with no physical evidence or eyewitnesses, Dr. Guertin's improper opinion testimony that the complainant had been sexually abused undoubtedly prejudiced Mr. Uribe and invaded the province of the jury. As in *Harbison* and *Thorpe*, reversal is warranted.

Respectfully submitted,

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/s/ Michael Waldo

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Dated: July 25, 2019

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