

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
PLAINTIFF-APPELLEE

SUPREME COURT NO.

v

COURT OF APPEALS NO:
341147

JUAN MARTINEZ III
DEFENDANT- APPELLANT

BERRIEN CIRCUIT COURT NO:
17-15329-FH

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DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Pursuant to MCR 7.203(A)(1) Defendant-Appellant is appealing the Circuit Court conviction in the case of *People v Juan Martinez II* as defined in MCR 7.202(6)(b)(ii).

Defendant-Appellant was found guilty by a jury on August 25, 2017 and was sentenced on September 26, 2017. The Judgment of Sentence was not entered on the docket with the Clerk of Court's office until October 27, 2017; however, it was date stamped for September 26, 2017. At the time of filing the Claim of Appeal, an Affidavit was also filed, along with two Register of Actions showing the discrepancies.

Defendant-Appellant, through retained counsel, filed a Claim of Appeal on November 17, 2017 in the Michigan Court of Appeals File No. 341147.

The Court of Appeals heard oral arguments on March 5, 2019. The Court of Appeals issued an Unpublished Decision on June 18, 2019 and an Unpublished Dissenting Opinion on June 18, 2019.

This Court has jurisdiction to grant leave to appeal. MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

- I. Whether the Trial Court erred when it granted Prosecutor's Motion in *Limine*, excluding victim's statements, on the record, that she would lie and state that her own father inappropriately touched her

Court of Appeals Answers "NO"

Court of Appeals Dissenting Opinion Answers "YES"

Defendant-Appellant Answers, "YES"

- II. Whether the Trial Court erred when it denied a mistrial regarding Barbara Welke's testimony.

Court of Appeals Answers "NO"

Defendant-Appellant Answers, "YES"

STATEMENT OF FACTS

The three (3) day Jury Trial on *People of the State of Michigan Juan Martinez III Berrien County Circuit Court Case 17-015329-FH* commenced on August 23, 2017, before Honorable Angela M. Pasula, Berrien County Circuit Court Judge.

Defendant-Appellant was charged with one (1) Count of Third Degree Criminal Sexual Conduct, pursuant to MCL 750.520d(1)(b). Defendant-Appellant was convicted of Criminal Sexual Conduct 3rd Degree. Defendant-Appellant was sentenced on September 25, 2017 to 50 to 180 months.

It is alleged that sometime in late November 2016 to early December 2016, at 3121 South 13th Street, Niles, Township, Berrien County, Michigan, Defendant-Appellant did engage in sexual (digital) penetration of Jacqueline Gadde, age 17.

On June 14, 2017, prior to the Trial commencing, the Prosecution filed a Motion in *Limine* to exclude previous statements made by the victim that she would lie about a sexual assault. The Court granted the Prosecutions Motion in *Limine* (Motion Hearing Transcript pg. 60).

At trial Jacqueline Gadde, when asked about the incident specifically, Jacqueline testified that it was on a weekday around 3 p.m. to 3:30 p.m. and it was just she and Defendant-Appellant at home. (Trial Transcript Vol. I, pgs. 153-154) Jacqueline testified that the incident happened in “early December”. (Trial Transcript Vol. I, pg. 173) Jacqueline testified that she did not tell anyone about the incident until early January when she told her ex-boyfriend and close friend, William “Cam” Shirley via instant messages on Facebook of the incident. (Trial Transcript Vol.

I, pg. 174) Jacqueline testified that she did not tell her mom because she did not think that she would believe her, and she was scared. (Trial Transcript Vol. I, pg. 175) Jacqueline also admitted that she could not remember the specific date of the incident. (Trial Transcript Vol. I, pg. 195)

The Prosecution called Barbara Welke (Welke) as an expert witness. Welke testified that it is typical to have a delayed disclosure and that it is a typical disclosure pattern for a child to reveal more information about what happened to them over time. (Trial Transcript Vol. II, pg. 75) Welke testified in detail about disclosures. Welke testified that on February 28, 2017, she interviewed Jacqueline. (Trial Transcript Vol. II, pg. 83) On cross-examination, Welke agreed that some young people make up stories about abuse* and could be led by adults to make up claims of abuse or exaggerate things. (Trial Transcript Vol. II, pgs. 92-93) During redirect, the Prosecution asked the following question that was answered by Welke:

Q. You talked with Jacqueline for 40 minutes. You observed her behavior. And we've talked about this process in this interviewing discussions, discussion as being a truth-seeking process. So are there things that you did in the interview to try and make sure that she knew she could tell you the truth?

A. Well, for one thing we talked about the importance of telling the truth and I asked her if she would commit to making sure that what we talked about in here today was only the truth and she agreed to do so. And there was nothing that she said or did that made me believe that wasn't happening.
(Trial Transcript Vol. II, pg. 111)

Defendant-Appellant's attorney objected, and counsel approached the bench. The Court, in front of the jury, struck Welke's answer. (Trial Transcript Vol. II, pg. 112) Shortly thereafter, the jury was excused for lunch. Outside of the presence of the Jury, Defendant-Appellant's attorney requested a mistrial based on the well-established prohibition that Welke, as an expert

* Yet the trial court did not admit Jacqueline Gadde's prior testimony at the preliminary examination that she considered making up a story regarding abuse at the hands of her father in 2014 to prevent him from coming back home.

witness, cannot vouch for the credibility of the complainant in a criminal sexual contact case. (Trial Transcript Vol. II, pg. 117) The Court replayed back the answer given by Welke and denied Defendant-Appellant's Motion for a mistrial.

Defendant-Appellant took the stand in his own defense. The only evidence against Defendant-Appellant was the testimony of victim Jacqueline Gadde. There was no physical evidence against Defendant-Appellant, there was no DNA found, and Jacqueline could not narrow the date that the alleged incident took place to what month it happened.

LAW AND ARUGMENT

I. WHETHER THE TRIAL COURT ERRED WHEN IT GRANTED PROSECUTOR'S MOTION IN *LIMINE* EXCLUDING VICTIMS STATEMENTS THAT SHE WOULD LIE THAT HER OWN FATHER INAPPROPRIATELY TOUCHED HER

Standard of Review. A lower court's findings of fact are reviewed for clear error. MCR 2.613(C). See also *Walters v Snyder*, 239 Mich App 453, 456 (2000). "In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses before it." MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Lanzo Constr Co*, 272 Mich App 470, 473 (2006). See also *Walters*, 239 Mich App at 456.

The Prosecutor filed a Motion *in Limine* to exclude the following statements made by Jacqueline Gadde. Ms. Gadde's biological mother and father were separated for a period of time in 2014. During this time, Jacqueline and her younger sister, Lana told their mother that if she allowed their father to return to the family home, both Jacqueline and Lana would say that their biological father sexual abused them. Ms. Gadde admitted, during the preliminary hearing, that she would make up an allegation against her own father, if her mother allowed her father to move back into their home.

- Q. Isn't it true, that during your interview regarding this incident with the police officer, you confirmed that you would tell a story about your dad,

saying he touched her(sic), if you thought your mom and him were going to get back together.

A. Yes sir. I was also fourteen and my dad was abusive. Also, I didn't know the seriousness of that crime.

Court: Okay. You're not talking about this defendant, then? You're referring to – okay.

A. No, I'm referring to my father.

Q. But the point is, at some point, you were willing to make up a story – (Prelim Transcript pgs. 28-29)

The Prosecution objected and the Court sustained the same not allowing Defendant-Appellant to continue with the line of questioning. On redirect, the Prosecution asked:

Q. Jackie that was your father correct?

A. Yes, ma'am.

Q. That Mr. Engram is referring to, correct?

A. Yes, ma'am.

Q. And your concern was him moving back in the house?

A. Yes, ma'am.

Q. And did he in fact move back in the house?

A. He did.

Q. Okay. And that was after you made those statements, correct?

A. Yes, ma'am.

Q. And did you ever actually make a statement that your father sexually assaulted you to anyone?[†]

A. No, ma'am. I did not.

(Prelim Transcript pgs. 31-32)

The Motion in *Limine* was heard on June 14, 2017. Rachel Hart (victim's mother) was on the stand and during direct examination and Hart was asked about the prior statement made by Jacqueline Gadde:

Q. ...That had to do with your ex-husband; is that right?

A. Yes, ma'am.

Q. And had she made – what kinds of comments had she made to you about your ex-husband?

A. At one point, when I was discussing with my children getting back with their father, her and my other daughter stated that – they said that their dad had touched them.

Q. Is that all they said, just touched them?

[†] This statement of Jacqueline appears inconsistent with her mother Rachel Hart's testimony that follows

- A. Yes.
 Q. Did they give any further explanation?
 A. No.
 Q. Okay. And did you take that to mean sexual touching?
 A. I didn't know if they meant sexual or just physical because he had, in the past, put his hands on them kind of hard...
 (Motion transcript pgs. 27-28)

On cross-examination, Hart testified as follows:

- Q. You're telling me that you had no idea what they meant by he touched them?
 A. I had an idea.
 Q. And your idea was he was – they were talking about being sexually molested; is that correct?
 A. Sexual or physical.
 Q. And whether they followed through or not, your understanding that they were telling you flat-out, that they would lie; is that correct?
 A. Yes, sir.
 Q. So, either they followed through or not, they indicated to you they were willing to do that?
 A. Yes, sir.
 (Motion transcript pg. 31)

At the Motion in *Limine*, the Prosecution's argument was that Jacqueline Gadde's admission that she would lie about a sexual assault was that was "...merely a statement of a child made in 2014 about a different person-not the defendant, a different person all together". (Motion transcript pg. 43). Further, the State's argument was that the statements were hearsay as defined by MRE 801 because Defendant-Appellant was offering the statements to show that "...she would lie about a sexual assault. That's why he[‡] wants to offer it. He wants to offer it for the truth, so it's clearly hearsay. It is not hearsay, under 801, if it is an inconsistent – if it is inconsistent with the declarant's testimony given under oath at trial.". (Motion transcript pg. 43) The Prosecution went on to argue that the statement was not inconsistent, that she didn't make a different statement under oath or to a police officer and that she did not make the statement

[‡] Defendant- Appellant

against Defendant-Appellant. (Motion Transcript Pgs. 43-44) Defendant-Appellant's attorney argued the following:

You've got a witness – an alleged victim – who has said under oath in this courtroom what amounts to the fact that she would be willing to lie about someone in a criminal sexual conduct case. Whether it was her father or someone else, the point is we're not asserting it for the truth of the matter asserted. I could care less whether she followed through. She indicated under oath that she would, at one point, be willing to lie about criminal sexual conduct...The statement is not hearsay because we're not offering it for the proof (sic) of the matter asserted.; rather, the fact that she made the statement; and it does indicate that this witness is willing to fabricate a story.
(Motion transcript pg. 47)

The Court concluded that the statement was hearsay. "It definitely is an assertion, or a statement made by a witness, while not under oath in court[§], and it is not an inconsistent statement". (Motion transcript pg. 59) The court went on to state "I'm not sure how that would be used specifically for impeachment purposes because there isn't an inconsistency there, and she acknowledges that she specifically made the statement". (Motion transcript pg. 59)

Defendant-Appellant should have been allowed to impeach Jacqueline's credibility pursuant to MRE 608, which states:

- (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or

[§] Jacqueline was in fact under oath at the preliminary examination when she made these statements.

(2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Furthermore, 404(b)(1) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v Denson*, 500 Mich 385, 396-397; 902 NW2d 306 (2017) (footnote omitted),

the Supreme Court reiterated the proper analysis in light of such an error:

When we find error in the admission of evidence, a preserved nonconstitutional error ‘is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative – i.e. that it undermined the reliability of the verdict.’ *People v Douglas*, 496 Mich 557, 565-566; 852 NW2d 587 (2014) (quotation marks and citations omitted) *Lukity*, 460 Mich. at 495-496. This inquiry " focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." *Lukity*, 460 Mich. at 495 (quotation marks and citation omitted). " In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id.*

This case is a battle of credibility. It is Defendant-Appellant’s position that the evidence that was excluded was highly relevant. In *People v Salimone*, 265 Mich 486, 499-500; 251 NW 486 (1933), this Court held:

An elementary principle[] of cross-examination is that the party having the right to cross-examine has a right to draw out from the witness and lay before the jury anything...which tends or may tend to elucidate the testimony or affect the credibility of the witness.”.

Further, in *People v King*, 297 Mich App 465, 476-477; 824 NW2d 258 (2012) the Court stated “Clearly, evidence is relevant when it affects of the credibility of the victim” and the “jury

is generally entitled to weigh all evidence that might bear on the truth or accuracy of a witness's testimony.

In the Court of Appeal's Dissenting Opinion in this matter, Justice Riordan stated:

I also have taken into account that our Supreme Court has stressed that an error is more likely to be outcome determinative in cases such as these, 'where the evidence essentially presents a one-on-one credibility contest between the victim and the defendant...'. Citing *People v Gursky*, 486 Mich 596, 620-621; 786 NW 2d 579 (2010)

Further, in the Dissenting Opinion, Justice Riordan stated:

Considering the probative value of JG's prior threat to make a false accusation of inappropriate touching under almost the same circumstances here, I would hold that "***it is more probable than not that a different outcome would have resulted without the error.***" *Denson*, 500 Mich at 397 (quotations omitted); see also *Armstrong*, 490 Mich at 291-292. IN this matter, it should be the province of the jury to determine whether to believe JG in the light of *all* the evidence regarding her credibility. See *Salimone*, 265 Mich at 499-500.

Emphasis added

II. WHETHER THE TRIAL COURT ERRED WHEN IT DENIED A MISTRIAL REGARDING BARBARA WELKE'S TESTIMONY.

Standard of Review. A preserved nonconstitutional error is subject to the harmless-error review under MCL 769.26. Further MCR 2.613(A) states:

Harmless Error: an error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is no ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

It was not harmless error when Barbara Welke testified for the Prosecution and was admitted as an expert witness as a forensic interviewer when on redirect examination, the following took place:

Q. You talked with Jacqueline for 40 minutes. You observed her behavior. And we've talked about this process in this interviewing discussions, discussion as being a truth seeking process. So, are there things that you

did in that interview to try and make sure that she knew she could tell you the truth?

A. Well, for one thing we talked about the importance of telling the truth and I asked her if she would commit to making sure that what we talked about in here today was only the truth and she agreed to do. And there was nothing that she said or did that made me believe that wasn't happening.

Q. And do you –

Engram: Objection. May we approach?

(Trial Transcript Vol. II pgs. 111-112)

After a sidebar, the Court instructed "...the jury that the very last statement made by the witness is not to be considered by them...". (Trial Transcript Vol. II pg. 112) After the jury was released for lunch and outside the presence of the jury, Defendant-Appellant's attorney requested a mistrial. The Defense attorney argued "...And I indicated at the bench that obviously well established (sic) and an expert witness cannot vouch for the credibility of the complainant in this particular case and it I think went over the line at that point.". (Trial transcript Vol. II pg. 117) The Court played back the statement of Welke and the Court "...struck that particular statement from the record". The Court also stated that the Court had to view the evidence in the light most favorable to the non-moving party, which was the State, and ruled that the statement made by Welke did not rise to the level of a mistrial. Because Defendant-Appellant's attorney objected to the testimony, this issue was preserved; therefore Defendant -Appellant has the burden of establishing a miscarriage of justice under a "more probable than not" standard to establish error requiring reversal.

People v Peterson, 450 Mich. 349, 537 NW 2d 857 (1995) the Supreme Court stated:

In these consolidated cases, we are asked to revisit our decision in *People v Beckley*, 434 Mich. 691, 456 N.W.2d 391 (1990), and determine the proper scope of expert testimony in childhood sexual abuse cases. The question that arises in such cases is how a trial court must limit the testimony of experts while crafting a fair and equitable solution to the credibility contests that inevitably arise. As a threshold matter, we reaffirm our holding in *Beckley* that (1) an expert may not

testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty. However, we clarify our decision in Beckley and now hold that (1) **an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim**, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. (Id at 352-353) (emphasis added)

In this case, the Welke testimony was not for the “sole purpose of explaining a victim’s specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim”. The testimony was to notify the jury that Welke believed that the victim was telling the truth about the assault. There is no other logical reason that that testimony would have been necessary or even solicited.

More recently, *State v Thorpe*, Supreme Court Docket No. 15677, _____ Mich _____, in an **unanimous** opinion, the Supreme Court held:

Thorpe’s trial was a true credibility contest because there was no physical evidence, there were no witnesses to the alleged assaults, and there were no inculpatory statements. Because the trial turned on the jury’s assessment of the child’s credibility, the improperly admitted testimony wherein Cottrell** vouched for the child’s credibility likely affected the jury’s ultimate decision. Under these circumstances, Thorpe showed that it was more probable than not that a different outcome could have resulted without the expert’s improper testimony.

In this case, the alleged victim Jacqueline’s credibility is one, if not the main focus of the defense. There was no physical evidence, no witnesses and no inculpatory statements.

Because Welke testified that she stressed to the victim, Jacqueline Gadde, the “importance of telling the truth” and then testified “And there was nothing that she said or did that made me believe that wasn’t happening”, it is Defendant-Appellant’s position that this

** Cottrell is the medical expert in the *Thorpe* case that testified for the Prosecution

testimony falls within *People v Smith*, 425 Mich 98(1986) holding that "...an examining physician cannot give an opinion on whether a complainant had been sexually assaulted if the conclusion is nothing more than the doctor's opinion that the victim had told the truth". Citing *Thorpe*, supra.

Even though the Court instructed the jury not to consider Welke's statement, the damage was done.

Welke and the same Prosecutor as in the matter at bar, have employed the same tactic in the past. In *People v Hreha*, COA No. 324389, Unpublished April 21, 2016, Welke testified as an expert.

Welke's testimony that the behaviors and actions of KH, WE and MJ during their CAC interviews were consistent with those of sexually abused children constitutes plain error. See *Benton*, 294 Mich. App at 202. There is no indication that the jurors would potentially perceive the victims' behaviors during the interviews as being inconsistent with a child abuse victim. Also, defendant did not attack the victims' credibility by alluding that there were incredible because of their behaviors and actions during the interviews. Accordingly, the testimony did not fall within the permissible scope of expert testimony in a child sexual abuse case, and Welke was prohibited from testifying that the victims' behaviors and actions were consistent with those of child sexual abuse victims. See *Peterson*, 450 Mich at 373-374.

However, this error did not affect defendant's substantial rights. See *Benton*, 294 Mich.App at 202. Welke's improper opinion was never repeated during trial, and neither the prosecution nor defendant ever argued that the victims' behaviors at their CAC interviews rendered them credible or incredible. Further, the trial court instructed the jury that it could not consider Welke's expert testimony as an opinion regarding whether KH, WE or MJ were telling the truth... (Emphasis added)

The Prosecution knew or should have known, that it is out of the scope of this expert witness to testify about the truthfulness of the victim; however, she specifically asked Welke a question that could/would solicit Welke's improper answer. Welke knows from past experience that she can make a statement in front of the jury, which she knows is outside of the scope of her

expert testimony and as long as the court gives a jury instruction, it may not constitute a mistrial. **Further, *Hreha*, supra was also a Berrien County case with the same Prosecutor, O'Malley.**

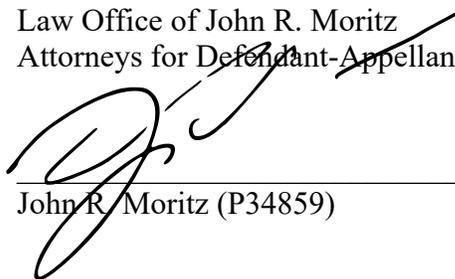
In this case, the victim's credibility is the issue. The only evidence that any crime was committed was the victim, Jacqueline's testimony and Welke testified improperly.

RELIEF REQUESTED

Defendant-Appellant requests that the Supreme Court reverse his conviction, grant his Application for leave to Appeal or any appropriate peremptory relief

Dated: August 9, 2019

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