

STATE OF MICHIGAN  
IN THE SUPREME COURT

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PEOPLE OF THE STATE OF MICHIGAN  
PLAINTIFF-APPELLEE

SUPREME COURT NO. 160060

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 SUPPLEMENTAL BRIEF  
ON LEAVE TO APPEAL

ORAL ARGUMENTS REQUESTED

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## STATEMENT OF JURISDICTION

Defendant-Appellant's Brief on Appeal is filed in compliance with MCR 7.309.

The Judgment of Sentence dated September 26, 2017 is the order appealed from. The Judgment of Sentence was not entered on the docket with the Berrien 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 20, 2017 in the Michigan Court of Appeals File No. 341147.

Transcripts from the Jury trial were filed on February 15, 2018 following a Motion to Show Cause on the reporter as to why the transcripts had not been filed.

On April 5, 2018, the Court of Appeals issued an Order extending the time to file Appellant's Brief on Appeal to May 7, 2018.

Defendant Appellant's Brief on Appeal was timely filed on May 7, 2018.

Plaintiff Appellee's Brief on Appeal was not timely filed on November 5, 2018.

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The Court of Appeals issued an Unpublished Decision on June 18, 2019 and an Unpublished Dissenting Opinion on June 18, 2019.

Defendant Appellant filed an Application for Leave to the Michigan Supreme Court on August 9, 2019.

On February 4, 2020, the Supreme Court issued an Order directing the Plaintiff Appellee to file an Answer to Defendant Appellant's Application within 28 days.

Plaintiff Appellee filed their Answer on February 27, 2020.

The Supreme Court issued an Order July 2, 2020 direct the their Clerk to schedule oral arguments on the application, requiring the filing of Defendant Appellant's Supplemental Brief and Appendix within 42 days of the order, directing Plaintiff Appellee to file a supplemental brief within 21 days from being served with Defendant Appellant's brief and Defendant Appellant has 14 days to file a reply, if any after being served with Plaintiff Appellee's brief. The Order also invited the Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan to file Briefs amicus curiae. Any other group may move the Court for permission to file briefs amicus curiae.

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**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?

Trial Court answered “No”  
Defendant-Appellant Answers, “Yes”

- II. Whether the Trial Court error was prejudicial?

Trial Court answered “No”  
Defendant-Appellant Answers, “Yes”

## STATEMENT OF FACTS

The three (3) day Jury Trial of *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).

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

On June 14, 2017, prior to the Trial commencing, there was a Motion Hearing. (Appendix E). The Prosecutor filed a Notice of intent to admit evidence pursuant to MCL 768.27a and a Motion in *Limine*. The prosecutor's motion in *limine*, to exclude\* previous statements made by the victim was granted. (Appendix E 0031a).

The following witnesses were called by the Prosecution and testified at the trial: the victim – Jacqueline Gadde (Jacqueline), Lana Gadde, Jacqueline's sister (Lana), Erica Furkis Rachel Bailey, Jacqueline's mom (Rachel), Deputy Matthew Walls, Berrien County Sheriff's Department (Walls), Teresa Yoakum (Yoakum), Detective Cathey Easton (Easton), Bark Welke (Welke), William Shirley (Shirley) The following witnesses were called by the Defense and testified at trial: Juan Martinez, Jr. (Martinez), Gloria Martinez (Gloria), Scott Grady (Grady), Gloria N. Martinez (GN Martinez) Jessica Blankenship (Blankenship), Levi Dillon (Dillon) and Angel Duarte (Duarte).

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\* That said "victim" stated in 2014 that she would say her own father touched her if her mom allowed her father to move back into the house.

At trial Jacqueline provided the following testimony: Jacqueline Skye Diamond Gadde (Jacqueline) is 17 years old (Date of birth September 26, 1999) and was in her Junior Year at Brandywine High School at the time of the alleged incident. (Appendix F 0034a). At the time of the alleged incident, the following individuals lived in the home located at 3121 South 13<sup>th</sup> Street, Niles Michigan: Jacqueline age 17, Lana age 15 (sister), Jonathan age 10 (brother), Olivia age 9 (sister), Rachel (mom) and Defendant-Appellant. (Appendix F 0034a-0035a). Rachel and Defendant-Appellant had been dating for about two years. Jacqueline described Defendant-Appellant as “pretty much just my mom’s boyfriend”. (Appendix F 0037a) When asked for more detail, Jacqueline did testify that Defendant-Appellant did watch her and her siblings and did discipline the children. (Appendix F 0037a) Jacqueline testified that during the time frame of November 2016 to January 2017, she would be in school from 7:15 a.m. to 2:40 p.m. and would get home around 3:00 p.m. (Appendix F 0038a) That Lana had basketball after school and that her mom would pick Lana up at 4:00 p.m. (Appendix F 0038a -0039a) Jonathan and Olivia would ride the bus and get home around 4:20 p.m. (Appendix F 0039a-0040a) Jacqueline testified that it would just be her and Defendant-Appellant in the home from 3 p.m. to 3:30 p.m. (Appendix F 0040a)

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. (Appendix F 0040a -0041a) Jacqueline testified that she came home from school, changed into pajamas, got a snack and that her and Defendant-Appellant were going to watch a movie. (Appendix F 0041a) At trial Jacqueline testified that she changed into a hoodie and pajama pants along with her underwear. (Appendix F 0042a) Jacqueline testified that she and Defendant-Appellant watched the movie in her mother and Defendant-Appellant’s bedroom. (Appendix F 0043a) That it was a

mutual idea to watch the movie in the bedroom (Appendix F 0061a) and that this was the first time that just the two of them watched a movie together. (Appendix F 0062a) Defendant-Appellant was lying on his side in the bed facing the television. (Appendix F 0043a-0044a) Jacqueline testified that she came in and sat down in the chair in front of the television. (Appendix F 0044a) At some point, Defendant-Appellant asked Jacqueline to come and lay on the bed with him. (Appendix F0045a) Jacqueline testified that she “thought it was odd” as prior to this day, she described that they did not have a real relationship. (Appendix F 0046a) Jacqueline testified that Defendant-Appellant would discipline her by taking her phone away or ground her. (Appendix F 0047a) Jacqueline described her relationship wither her mom as “it was okay”. (Appendix F 0047a) Jacqueline testified that she had been alone with Defendant-Appellant before and that she had been with Defendant-Appellant in that same room before. (Appendix F 0047a-0048a) Jacqueline testified that even though she thought it was “weird” she moved to the bed and sat on the edge of the bed. (Appendix F 0048a) Defendant-Appellant then asked Jacqueline to lay down and she “just thought it was strange”. (Appendix F 0049a) In any event, Jacqueline did lay down on her side facing the television. (Appendix F 0049a) Jacqueline stated that both she and Defendant-Appellant were facing the same way, both heads and feet going the same direction and were lying about a foot apart”. (Appendix F 0050a F 0063a) At some point, Jacqueline testified that Defendant-Appellant “reached his arm around me and put in on my stomach” and held it there for a second. (Appendix F 0050a -0051a) At this point, Defendant-Appellant’s hand was on the outside of Jacqueline’s sweatshirt. (Appendix F 0051a & F 0064a) During the entire incident, Jacqueline testified that Defendant-Appellant was dressed. (Appendix F 0052a) Defendant-Appellant then moved his hand from her stomach up to her chest still on the outside of her clothes. (Appendix F 0052a -0053a) Jacqueline testified that

she wanted to get up, that she tried to get up and that Defendant-Appellant held her by her chest and neither Jacqueline nor Defendant-Appellant said anything. (Appendix F 0053a -0054a) Defendant-Appellant then put his hand up Jacqueline's shirt and began grabbing her chest. (Appendix F 0054a & F0064a) Jacqueline testified that she was able to move his hand away but then he moved it down into her pants, under her underpants and inserted a finger into her vagina. (Appendix F 0055a & F 0065a) Jacqueline testified that this went on for about a minute and then just stopped. (Appendix F0056a) Jacqueline then left and went to her room until suppertime. Jacqueline testified that she did see Defendant-Appellant in the hallway, and he told her not to tell her mom. (Appendix F 0057a) Jacqueline did testify that the incident happened in "early December". (Appendix F 0058a) Jacqueline testified that she did not tell anyone about the incident until early January of the following year when she told her ex-boyfriend and close friend, William "Cam" Shirley via instant messages on Facebook of the incident. (Appendix F 0059a) During the instant messages, Jacqueline did not tell Shirley everything and she left out things because she could not bring herself to say it. (Appendix F 0060a) Jacqueline testified that she did not tell her mom because she did not think that she would believe her, and she was scared. (Appendix F 0060a) Jacqueline testified that on February 17, 2017, she told Lana and Lana's boyfriend while walking to a store when they were discussing that their mom was going to let Defendant-Appellant move back into the home<sup>†</sup>. It was at that time that Jacqueline told Lana what had happened. (Appendix F 0071a -0073a) Lana then told their mother and their mother (Rachel Hart) confronted Jacqueline. (Appendix F 0073a) The police were called, and Jacqueline was interviewed by police officer(s) as well as the Child Assessment Center. (Appendix F 0074a & 0066a)

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<sup>†</sup> Defendant-Appellant was not living at the home during this time as a result of a domestic violence incident.

During cross-examination, Jacqueline admitted that she did not disclose the incident to anybody until her mom told her that Defendant-Appellant might be moving back into the home.

Q. And you indicated under direct examination while (sic) ago you indicated that your mom was asking you about having Juan come back to the house. Is that correct?

A. Yes, sir.

Q. And that's when you told her about what you've described her today. Right?

A. No. That's when I told my sibling that I was not comfortable with him coming back to the house after she told me he might be coming back to the house.

Q. All right. So your mom told you he might be coming back. Then you talked to your sibling, then you talked to your mom about what happened. Right?

A. My mom called me to talk to me. Yes.

Q. Okay. So this story that you've told didn't come out until after your mom and asked you about him (Defendant Appellant)<sup>‡</sup> moving back to the house. Right?

A. Yes, sir.

Q. And you indicate that you had this conversation with Mr. Shirley. Right?

A. Yes, sir.

Q. Mr. Shirley – this was entirely by text. Right?

A. Yes, sir.

(Appendix F 0066a -0067a)

Jacqueline also admitted that she could not remember the specific date of the incident.

(Appendix F 0068a) On February 17, 2018, at the time of the interview with the police officer, Jacqueline was asked if the incident was before or after New Year's and Jacqueline told the officer that she could not remember the date but she did think it was on a school day. (Appendix F 0068a -0070a) Then on February 28, 2017, two weeks after the interview with the police officer and during her interview at the Children Assessment Center with Prosecutor's witness, Welke, Jacqueline stated that it was on a school day. (Appendix F 0069a) Defendant-Appellant's attorney attempted to impeach Jacqueline regarding her inconsistent statements. The

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<sup>‡</sup> Practical information added

inconsistent statements consisted of (1) whether or not she was wearing a t-shirt as stated in the CAC report (2) where her family members were as she testified to during the preliminary hearing on April 25, 2017 (3) inconsistent statements as to which pants she was wearing and (4) inconsistent statements as it related to Defendant-Appellant touching her breasts. (Appendix F 0075a -0081a) Jacqueline testified that even after the incident took place and even though she testified that she felt uncomfortable around Defendant-Appellant, she still would go to the store alone with Defendant-Appellant. (Appendix F 0082a) Jacqueline denied that she asked Defendant-Appellant to go shopping with him around Christmas, that they sat on the couch together in front of the fireplace and that she put her arm around Defendant-Appellant and told him that she loved him or that she rode alone with Defendant-Appellant from Scott Grady's house, who is a relative of Defendant-Appellant. (Appendix F 0083a-0086a) Jacqueline testified that Defendant-Appellant moved out of the home after he was arrested for Domestic Violence in late January 2017 or early February 2017. (Appendix F a0087a- 0089a) After the incident took place, Jacqueline testified that she voluntarily went to Defendant-Appellant's sons house with Defendant-Appellant. (Appendix F 0089a)

Lana Gadde, Jacqueline's younger sister testified at trial. Lana was 15 years old and was in her freshman year of high school. Lana testified that Defendant-Appellant had lived with her family for a year and a half to two years. (Appendix F 0090a) Lana testified that on the evening of February 17, 2017, Jacqueline, Lana and Lana's boyfriend were walking to the store, and Jacqueline told Lana about the incident, although Jacqueline did not give her details. (Appendix F 0091a-0092a) Lana then told their mom and their mom confronted Jacqueline. (Appendix F 0091a-0092a) On cross examination, Lana testified that on the walk to the store, Jacqueline and Lana were talking about Defendant-Appellant possibly moving back into the

home and getting back together with their mom. (Appendix F 0094a) Lana also confirmed that Jacqueline did not get along with Defendant-Appellant very well and that Defendant-Appellant would scream a lot and take Jacqueline's phone away. (Appendix F 0094a-0095a) Lana testified "We all wanted him out of the house". (Appendix F 0098a) Lana indicated that after the alleged incident she had seen Jacqueline leave with Defendant-Appellant alone and with other people and Jacqueline did not seem to be uncomfortable around Defendant-Appellant. (Appendix F 0099a)

The State called Erica Furkis to testify. Furkis testified that she has been employed as a children's service specialist at the Michigan Department of Health and Human Services as a CPS investigator for four years. (Appendix F 0100a) Furkis received the initial call and went to the home to interview mom and the children. (Appendix F 00102-0103a) At that time, Defendant-Appellant was incarcerated on the domestic violence charge. (Appendix F 0102a) On March 2, 2017 Furkis interviewed Defendant-Appellant and he indicated that the allegations were not true. (Appendix F 0104a)

The next witness that was called was Rachel Bailey, Jacqueline's mother. Rachel testified that she was in a relationship with Defendant-Appellant for a little over two years. (Appendix F 0105a) Rachel testified that she was employed as a nurse at a nursing home and her shifts during November 2016, December 2016 and December 2017 were from 7:00 am to "3:30ish". (Appendix F 0106a-0107a) By the time that Rachel got home, Jacqueline was usually home and her brother John and sister Olivia would arrive shortly thereafter. (Appendix F 0107a) Defendant-Appellant would normally pick up Lana from after school activities usually sometime after five. (Appendix F 0108a). Rachel testified that the relationship between Defendant-Appellant and her children was normal, very typical adult/child relationships. Rachel testified

that on February 17, 2017, after Lana disclosed to her what Jacqueline had said, she sat down with Jacqueline and talked with her. During the conversation, Jacqueline told her about the incident with Defendant-Appellant. Rachel then called the police and the police came and interviewed Jacqueline. Rachel stated that it was typical for Defendant-Appellant and the children, even Jacqueline to watch movies in the bedroom. (Appendix F 296) On cross-examination Rachel testified that during November 2016-January 2017, Jacqueline would go places with Defendant-Appellant.

Matthew Walls, Berrien County Sheriff Deputy was the next witness called to testify by the State. Walls testified that he was called to the home of Defendant-Appellant on February 17, 2017 for a suspicious type call, which turned into a sexual assault. (Appendix G 0111a) Walls testified that because the reporting was delayed and the suspect was known to the victim, there was no need to have a sexual assault examination done, collect DNA, or collect the victim's clothing. (Appendix G 0112a -0013a) Following a referral to the Children's Assessment Center, Walls had no further involvement with the case. (Appendix G 0114a) During Walls cross-examination, Walls testified that Jacqueline did not mention that her breasts were touched outside of her shirt. (Appendix G 0015a) Jacqueline did tell Walls during his interview of her that when his hand got up to her breasts that she grabbed his hand and stopped it, that she tried to move his hand away but he held it there, then he moved his hands down her pants, that she tried to get away from the Defendant and was unable to, and that his hand were inside her pants that he fingered her. (Appendix G1 0116a)

The next witness that was called by the Prosecution was Teresa Yoakum (a/k/a Teresa Spitler) "Yoakum". Yoakum is a SANE nurse employed at Lakeland Health. Yoakum was qualified as an expert in the area of Sexual Assault Nurse Examiner. Yoakum testified as to her

qualifications and specifically what takes place in a SANE examination. Yoakum testified that there was no exam on Jacqueline and that Jacqueline never was seen by Yoakum's or her facility. (Appendix G 0117a -0118a) Yoakum testified that where the disclosure is several months later, she would not recommend a sexual assault exam. (Appendix G 0118a)

The next Prosecution witness was Cathy Easton "Easton". Easton is employed by the Berrien County Sheriff's Department as a Detective/Sergeant and has been employed there for 22 years. (Appendix G 0119a) Easton received a request to follow up on an investigation as it related to Jacqueline and Defendant-Appellant. (Appendix G 0120a) On February 23, Easton interviewed Defendant-Appellant and then briefly spoke with Jacqueline and her mother. (Appendix G 0121a) Then on February 28, she attended the forensic interviews at CAC. (Appendix G 0121a) Easton interviewed Cam Shirley, Roxanne Tancil and Scott Grady. (Appendix G 0121a -0122a) During Easton's interview with Defendant-Appellant, Easton asked Defendant-Appellant about his relationship with Jacqueline and her mother. Defendant-Appellant told Easton that he was a father figure to Rachel's kids and that he shared in the disciplining of the children. (Appendix G 0123a) When Easton asked Defendant-Appellant if he watched a movie with Jacqueline, he indicated that he did and said it was two to three months ago. (Appendix G 0124a) Defendant-Appellant further told Easton that Jacqueline had come into the bedroom, she sat on the chair, and that at some point she came onto the bed with him. (Appendix G 0125a) The DVD of the interview was admitted into evidence. On cross-examination, Easton testified that Defendant-Appellant had told her during the interview that he and Jacqueline watched the movie on a weekend. (Appendix G 0126a- 0127a) Defendant-Appellant further stated that he knew that because John (Jacqueline's little brother) had come into the bedroom and that the movie that he and Jacqueline were watching was Suicide Squad.

(Appendix G 0127a) Easton testified that she only spoke with Jacqueline a couple of minutes.

(Appendix G 0128a)

The Prosecution then called Barbara Welke (Welke). Welke testified that she is semi-retired and works as a consultant in forensic interviews. (Appendix G 0129a) Welke testified as to her credentials and was accepted as an expert. (Appendix G 0130a-0131a) Welke went through the details of a forensic interview at CAC. 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. (Appendix G 0132a) Welke testified in detail about disclosures. Welke testified that on February 28, 2017, she interviewed Jacqueline. (Appendix G 0133a) During the interview, Welke testified that Jacqueline's behavior changed when asked about the incident, she became teary eyed and her voice kind of quivered. (Appendix G 0134a) On cross-examination, Welke agreed that some young people make up stories about abuse<sup>§</sup> and could be led by adults to make up claims of abuse or exaggerate things. (Appendix G 0135a-0136a) Welke testified that Jacqueline told her the incident happened sometime between Thanksgiving and Christmas and that the movie that she and Defendant-Appellant watched was called Civil War. (Appendix G 0137a) Jacqueline told Welke that she was wearing a t-shirt and there was no mention of a sweatshirt. (Appendix G 0138a) 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

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<sup>§</sup> Yet the trial court did not admit Jacqueline 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.

truth and she agreed to do so. And there was nothing that she said or did that made me believe that wasn't happening. (Appendix G 0139a)

Defendant-Appellant's attorney objected, and counsel approached the bench. The Court, in front of the jury, struck Welke's answer. (Appendix G 0140a) 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 witness, cannot vouch for the credibility of the complainant in a criminal sexual contact case. (Appendix G 0141a7) The Court replayed back the answer given by Welke and denied Defendant-Appellant's Motion for a mistrial.

Defendant-Appellant's attorney also requested to be able to allow testimony of two witnesses that would testify that Defendant-Appellant did not ever initiate sex with them by touching their stomachs and how Defendant-Appellant would discipline his own children. The Judge did not see the relevance and would not allow the witnesses to testify as to their past experiences with Defendant-Appellant.

The next witness that was called by the Prosecution was William "Cam" Shirley (Shirley). Shirley said that he knew Jacqueline when they both resided in Alabama. Shirley testified that in early January 2017, he and Jacqueline had communicated through Facebook and she told him that Defendant-Appellant had touched her inappropriately and tried to move forward. At the conclusion of Shirley's testimony, the Prosecution rested.

Defendant-Appellant's father, Juan Martinez Jr. (Martinez) was the first witness to take the stand for the defense. Martinez testified that he had been residing with Defendant-Appellant for the past two years at the home where the alleged incident took place. (Appendix G 0143a) Martinez testified that there was a difference in the way that Jacqueline responded to Defendant-

Appellant's discipline of her during the 6 months prior to Defendant-Appellant being charged. (Appendix G 0144a) Martinez further testified that Jacqueline would leave the house with Defendant-Appellant during December 2016 and January 2017 to go to different places such as Wal-Mart the grocery store, and other places. (Appendix G 0145a)

The next witness called by the Defense was Defendant-Appellant's mother, Gloria Martinez (Gloria). Gloria testified as to Jacqueline's recent demeanor toward Defendant-Appellant and his discipline. Gloria also testified that even after the alleged incident, she would see Jacqueline want to go places with Defendant-Appellant. (Appendix G 0146a-0147a)

Scott Grady (Grady) was the next witness called to testify for the defense. Grady testified that Defendant-Appellant is his brother-in-law and has known him for 30 years. (Appendix G 0148a) Grady testified that right before Christmas 2016, he was at Defendant-Appellant's house and Defendant-Appellant was going to give him a ride home and Jacqueline ran out to the car to go with Defendant-Appellant. (Appendix G 0149a-0150a)

The next witness was Defendant-Appellant's daughter Gloria Nicole Martinez (GN Martinez) GN Martinez testified that she would see and hear Jacqueline request to go with Defendant-Appellant when he would go to the store and other places. (Appendix G 0151a) There was a specific day in January 2017, when everyone went to church together and Jacqueline asked to ride with Defendant-Appellant in a separate car. (Appendix G 0152a) GN Martinez also testified that the day after Christmas 2016, there was a party and Jacqueline was sitting on the couch between Defendant-Appellant and GN Martinez's fiancé. (Appendix G 0152a-0153a) GN Martinez testified that Jacqueline told her that she could not wait until she turned 18 to move out and that Defendant-Appellant was an ass. (Appendix G 0154a) GN Martinez remembered a specific event where Jacqueline came up to Defendant-Appellant, in front of GN Martinez at a

holiday party (2016) and told Defendant-Appellant that she loved him. GN Martinez remembers the event because it made her mad and jealous. (Appendix G 0155a-0156a)

Defendant-Appellant's other daughter, Jessica Blankenship (Blankenship) was next to testify for the defense. Blankenship testified that she resided in the home with Defendant-Appellant for roughly a month in October 2016. (Appendix G 0157a) Blankenship testified that she would see how Jacqueline would react when Defendant-Appellant would discipline her, and she would stomp off and call him names behind his back. (Appendix G 0158a)

Defendant-Appellant's son, Levi Dillon (Dillon) was the next witness. Dillon testified that he would be at the home and see Jacqueline want to leave with Defendant-Appellant on multiple occasions. (Appendix G 0159a) Dillon testified that around November to December 2016, Defendant-Appellant was building a studio for him at his house. On one occasion Defendant-Appellant came over to Dillon's house and Jacqueline was with him. (Appendix G 0160a)

Angel Duarte (Duarte) was the next witness that was called by the Defense. Duarte is engaged to Defendant-Appellant's daughter, Gloria. Duarte testified that two days before Christmas 2016, Defendant-Appellant babysat their children and Jacqueline went shopping with Duarte. Defendant-Appellant was not going to let Jacqueline go shopping with them because she had not done her laundry. Jacqueline was mad; quick did her laundry and then was allowed to go. (Appendix G 0161a)

Defendant-Appellant took the stand in his own defense. Defendant-Appellant testified that on the day in question he was in his bedroom and a movie was on the television. Defendant-Appellant did not call Jacqueline into the room to watch a movie. (Appendix G 0162a) Defendant-Appellant testified that he was watching the movie on a Saturday after he had gotten

up early to take Lana to basketball practice and then came back home and went back to bed. (Appendix G 0163a) Also present in the home at the time were Defendant-Appellant's father, who was in the living room watching TV and John and Olivia were up in their room watching TV. (Appendix G 0163a) Defendant-Appellant testified that he has a bad shoulder and would not have been able to lay on the bed the way that Jacqueline testified that he had. (Appendix G 0164a) Defendant-Appellant testified that his father resided in the home and slept on the sofa. (Appendix G 0165a) Defendant-Appellant testified that since moving into the new house, Jacqueline's behavior in response to his disciplining her had gotten worse; she would cry, walk away mad and upset. (Appendix G 0166a) Defendant-Appellant testified that Jacqueline asked her mother and Defendant-Appellant if she could move out of the home and they told her that she was too young. (Appendix G 0167a) Defendant-Appellant testified that Jacqueline told him she loved him at a party over the 2016 Holidays and that Jacqueline wanted to go with him when he took Scott Grady home in December 2016. (Appendix G 0167a)

The only evidence against Defendant-Appellant was the testimony of victim Jacqueline. 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.

#### VERDICT AND SENTENCING

Defendant-Appellant was convicted of Criminal Sexual Conduct 3<sup>rd</sup> Degree. Defendant-Appellant was sentenced on September 25, 2017 to 50 to 180 months. (Appendix C)

#### SUPREME COURT ORDER

The Michigan Supreme Court issued an Order, Appendix J herein, instructing Defendant Appellant to file a supplemental brief addressing (1) whether the trial court erred by granting the

prosecution's motion in *limine* to bar the defendant from presenting evidence of an alleged prior threat by the complainant to report an assault and (2) if so, whether the error was prejudicial.

**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 trial court’s decision to grant or deny a motion in *limine* is reviewed for an abuse of discretion. *People v Vansickle*, 303 Mich App 111, 117; 842 NW2d 289 (2013). “An abuse of discretion occurs when the trial court renders a decision that falls outside the range of principled decisions.” *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012).

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 – (Appendix D 0017a-0018a)

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.  
 (Appendix D 0019a-0020a-)

The Motion in *Limine* was heard on June 14, 2017. Rachel Hart (victim's mother) during direct examination 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?  
 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...  
 (Appendix E 0023a-0024a)

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?

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\*\* This statement of Jacqueline appears inconsistent with her mother Rachel Hart's testimony that follows

A. Yes, sir.

Q. So, either they followed through or not, they indicated to you they were willing to do that?

A. Yes, sir.

(Appendix E 0026a)

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".

(Appendix E 0028a). 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<sup>††</sup> 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." (Appendix E 0028a) 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 against Defendant-Appellant. (Appendix E 0028a-0029a) 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.

(Appendix E 0030a)

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<sup>††</sup> Defendant- Appellant

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<sup>‡‡</sup>, and it is not an inconsistent statement”. (Appendix E 0031a) 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”. (Appendix E 0031a)

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

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.

*People v Sabin* 463 Mich 43, 55-56; 614 NW2d 888(Mich 2000) provides:

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<sup>‡‡</sup> Jacqueline was in fact under oath at the preliminary examination when she made these statements.

In order for other-acts evidence to be admissible, the following test must be satisfied: (1) it must be offered for a proper purpose, i.e., a reason other than to show character or propensity; (2) the evidence must be relevant; (3) the evidence's probative value must not be substantially outweighed by the danger of unfair prejudice.

The Prosecution in *People v Rieman*, *Unpublished Court of Appeals Case 341041*, 348477 argued

...that the purpose of the evidence was to establish (1) defendant's intent to defraud or cheat, (2) the lack of mistake or innocent justification, and (3) a common scheme or system. Because these are nonpropensity reasons, they are proper purposes under MRE 404(b)(1).

In the case before this Court, Jacqueline Gadde's statements should have been allowed in for the same reasons. It is clear that Jacqueline Gadde has the intent to "defraud or cheat" when she stated that she would report to the police that her father inappropriately touched her, even though he had not. Jacqueline Gadde could not allege "mistake or innocent justification". By her own statements, she knew that if she made the false allegations, her father would not be allowed back into the home. Jacqueline Gadde's purpose of making the statement was so that her parents would not reconcile. Jacqueline Gadde's stated that she would make the **exact same allegations** against her own father that she made against Defendant, shows a "common scheme" showing the lengths that JG would utilize in order to keep her mother from being in a relationship with a man that JG does not like or want in the home.

*Sabin, supra and citing People v Ewoldt*, 27 Cal.Rptr.2d 646, 867 P.2d 757 discusses common scheme.

To establish the existence of a common design or plan, the common features must indicate the **existence of a plan rather than a series of similar spontaneous acts**, but the plan thus revealed need not be distinctive or unusual. For example, evidence that a search of the residence of a person suspected of rape produced a written plan to invite the victim to his residence and, once alone, to force her to engage in

sexual intercourse would be highly relevant even if the plan lacked originality. In the same manner, evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense.  
(*emphasis added*)

This Court in *Sabin, supra* concluded that the Lower Court did not abuse its discretion when allowing evidence under 404(b) identifying:

The charged and uncharged acts contained common features beyond mere commission of acts of sexual abuse. Defendant and the alleged victims had a father-daughter relationship. The victims were of similar age at the time of the abuse. Defendant allegedly played on his daughters' fear of breaking up the family to silence them. One could infer from these common features that defendant had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetrate abuse.  
(*Id at 66*)

Using the same logic in the case before this Court, the common features of the victim's statement go "beyond mere" allegations. The allegations in both cases are a father-daughter relationship much like *Sabin, supra*. Both of the alleged perpetrators were out of the home and Jacqueline Gadde's mother was going to reconcile with the alleged perpetrators. Jacqueline Gadde played on the fact knowing that by making an allegation that she was sexually abused, would prevent the alleged "perpetrator" from returning to the home.

In the Court of Appeals Dissent, Justice Riordan agreed and stated:

Here, the unsworn, out-of-court statements regarding JG's self-admitted plan to falsely accuse her biological father of sexual abuse were not offered for the truth of the matter asserted. In seeking admission of these statements, defendant did not set out to prove that JG's biological father sexually abused her, that JG actually alleged any such abuse, or that JG

disclosed to her mother, or any other party, her plan to falsely accuse her father of sexual abuse. Rather, defendant sought to directly attack JG's credibility. Preclusion of such testimony on hearsay grounds is improper. Solloway, 316 Mich App at 199. Moreover, JG made statements under oath that she had been willing to fabricate a story of criminal sexual conduct to keep her mother from getting back together with a man. Accordingly, I would hold that this evidence was improperly excluded as inadmissible hearsay and the trial court's finding otherwise was in error. (Appendix I 0182a)

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 and outcome determinative. 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:

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** (Appendix I 0184a)

## II. WHETHER THE TRIAL COURT ERROR WAS PREJUDICIAL

Indeterminating that the trial court erred by granting the Prosecution's Motion in *Limine* and not allowing the alleged victim's prior statements to be heard by the jury, then the Court would have to next determine whether the error was sufficiently prejudicial to warrant a reversal of the conviction.

MCL 769.26 provides:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the *improper admission* or rejection of *evidence*, or for error as to any matter of pleading or procedure, *unless* in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that *the error complained of has resulted in a miscarriage of justice*

As outlined in *People v Gursky* 786 Mich 596, 786 NW2d 579 (Mich 2010):

In making this determination for preserved, non-constitutional error, this Court asks whether, absent the error, it is "more probable than not" that a different outcome would have resulted. The burden is on the defendant to show that the error resulted in a miscarriage of justice. Where the error did not result in a miscarriage of justice and a defendant cannot meet this burden, we have deemed the error "harmless" and thus not meriting reversal of the conviction. (*footnote omitted*)

Further, in *Gursky, supra*,

This Court has cautioned, though, that "the fact that the statement [is] cumulative, standing alone, does not automatically result in a finding of harmless error.... [Instead, the] inquiry into prejudice focuses on the nature

of the error and assesses its effect in light of the weight and strength of the untainted evidence." In a trial where the evidence essentially presents a one-on-one credibility contest between the victim and the defendant, hearsay evidence may tip the scales against the defendant, which means that the error is more harmful. (*footnote omitted*)

In *Gursky, supra*, 623-624 this Court noted "Defendant contends that this case largely rested on GA's credibility and believability, which Morgan (a friend of the victims' mother)<sup>§§</sup> undoubtedly bolstered. However, there was *additional corroborating evidence* introduced which tends to belie this claim".

In contrast, the case before this Court, there was no other evidence presented that corroborated JG's allegations. In *Gursky, supra*, the Prosecution relied on Morgan's testimony, GA's testimony and the sexual assault nurse to corroborate the allegations. Therefore, this Court found that it was not "...purely a one-on one credibility contest between the defendant and the victim". *Gursky, supra at 624*. In the case before this Court, it is "purely a one-on-one credibility contest". There was no physical evidence of a sexual assault. The defense was not allowed to impeach JG regarding her prior statements. The jury was not aware of the prior statements made by the victim. It is Defendant's position that this case was one-on-one credibility contest between he and Jacqueline Gadde, and the scales were tipped against Defendant. Had the Defense been able to impeach Jacqueline Gadde and the jury was aware of the same allegations that Jacqueline Gadde made against her own father, for the same reasons the scales would have possibly, if not probably tipped in Defendant's favor.

Justice Riordan in his dissent states:

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 . . . ." *People v Gursky*, 486 Mich

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<sup>§§</sup> Practical information added

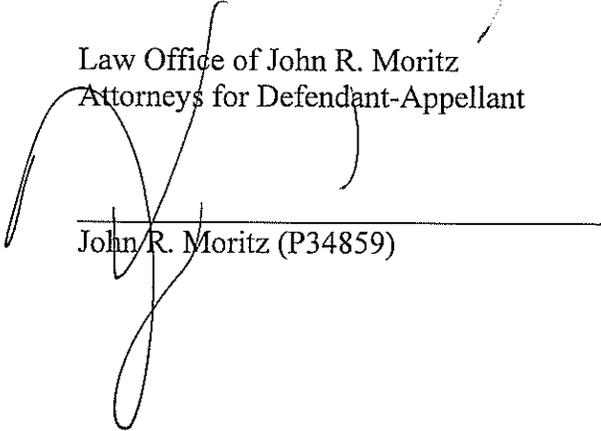
596, 620-621; 786 NW2d 579 (2010). Although the Supreme Court in Gursky was considering improperly admitted hearsay testimony corroborating the victim's version of the story, the same reasoning applies here. See *id.* To wit, a jury being permitted to hear additional inadmissible testimony bolstering the credibility of the victim, like in Gursky, would have a similar effect as a jury being denied the opportunity to hear additional admissible evidence suggesting that the victim lacks credibility. Indeed, the Supreme Court also has held that an admissible and highly probative attack on a complainant's credibility in a case "providing mere 'he said, she said' testimony contradicting the complainant's version of events . . . would have tipped the scales in favor of finding a reasonable doubt about defendant's guilt." *People v Armstrong*, 490 Mich 281, 291-292; 806 NW2d 676 (2011). (Appendix I 0183a-0184a)

**RELIEF REQUESTED**

Defendant-Appellant requests that the conviction be set aside and Defendant Appellant be granted a new trial, including the prior statements made by Jacqueline Gadde that she would threaten to make the same allegations against her own father.

Dated: August \_\_\_\_, 2020

Law Office of John R. Moritz  
Attorneys for Defendant-Appellant

  
\_\_\_\_\_  
John R. Moritz (P34859)