

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS JURK,

Defendant-Appellant.

UNPUBLISHED

August 2, 1996

ON REMAND

No. 193719

LC No. 87-038182-FC

Before: Wahls, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

This Court affirmed defendant's conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(b); MSA 28.788(3)(1)(b). Defendant then sought leave to appeal in the Michigan Supreme Court, which remanded the matter to us for reconsideration in light of *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995). We now reverse.

In *Peterson, supra*, our Supreme Court revisited *People v Beckley*, 434 Mich 691; 465 NW2d 391 (1990), and held as follows:

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. [*Peterson, supra* at 352-353.]

Thus, the Court concluded that such expert testimony could be introduced “for the sole purpose” of explaining a victim’s specific behavior that might be incorrectly construed by the jury as inconsistent with an abuse victim *or* to rebut an attack on the victim’s credibility. *Id.* at 372-373. The Court explained that the credibility of a victim is attacked “when the defendant highlights behaviors exhibited by the victim” and claims that the victim is not believable because of those behaviors, even though the behaviors are consistent with a child victim of sexual abuse.

When the credibility of the particular victim is attacked by a defendant, we think it is proper to allow an explanation by a qualified expert regarding the consistencies between the behavior of that victim and other victims of child sexual abuse. [*Id.* at 375.]

Thus, expert testimony may be used only where the victim’s behaviors are at issue, not for an attack on the victim’s general credibility.

On remand, defendant Jurk argues that the trial court abused its discretion in allowing the prosecution’s expert witnesses to testify regarding specific behaviors of the victims that were consistent with those of child sexual abuse victims. Defendant argues that this testimony was not relevant to his general-denial defense because he never highlighted any behaviors exhibited by the victims as inconsistent with those of a child victim of sexual abuse. We agree with defendant that the admission of this testimony violated the holdings of *Peterson*.

Defendant’s defense, as exemplified by his own testimony, was that he did not commit the charged offenses and had never molested either victim. In his opening statement, defense counsel stressed the need for the jury to pay close attention to the inconsistencies in the testimony and statements of the victims. On cross-examination, defense counsel impeached both victims with prior inconsistent statements that they had made to various persons, e.g., investigating officers, their therapists, and the examining physician. The defense also attempted to show a motive for the two victims to lie, suggesting that defendant and his wife (the victims’ stepmother) had a strained relationship that would probably end in divorce and the victims wanted to make sure that the stepmother was awarded custody. In his closing argument, defense counsel again stressed the need for the jury to scrutinize the inconsistencies in the victims’ allegations.

The *Peterson* Court stated, at p 375, that the “pertinent inquiry” for the admission of expert witness testimony in child sexual abuse cases “is not the timing of the admission, but rather the reason for the use of the evidence.” Here, the prosecutor filed a pretrial motion to endorse expert witnesses Johnson and Schram, listing the sole reason for endorsement as “All three witnesses have provided psychological counseling for the victims in this matter.”¹ Witnesses Schram and Johnson both testified as experts based upon their experience in treating sexually abused children. They testified that the victims they treated in this case exhibited a group of behaviors consistent with having been sexually abused. Schram testified that the older victim had three particular behaviors: provocative behavior, promiscuity, and a need for reassurance. Johnson testified that the younger victim exhibited behaviors

consistent with a child who had been sexually abused: difficulty in school, difficulty in concentrating, a tendency to isolate herself, nightmares, and mood swings. The younger victim did not display promiscuity or delinquency. Neither expert testified as to the veracity of the victims nor whether the victims had been sexually abused. Both agreed that other trauma could be responsible for the behaviors exhibited by the victims, and that the existence of these behaviors in the two victims did not indicate who might have sexually abused them.

In closing argument, the prosecutor reviewed the testimony and evidence that corroborated the victims' allegations. In particular, the prosecutor argued:

We had corroboration inferentially from the therapists, and it went in this fashion. There are a bunch of behaviors that show up when children are sexually molested, and you heard from the therapist of each girl, and you heard them testify, Mr. Schram at some length, as to what symptoms the girls showed.

And, in rebuttal argument, the prosecutor stated that "[t]here was corroboration from the expert witnesses, and I am including Dr. Bentley [the treating physician], Mr. Schram and Ms. Johnson, who was the therapist for [the younger victim]."

Having reviewed the record, we are compelled to conclude that the victims' behaviors were not an issue in this case. Defendant attempted only to impeach the victims' general credibility, focusing his defense on the inconsistencies and improbabilities of the victims' allegations. Yet, the expert witnesses testified that the specific behaviors of the victims were consistent with those of sexually abused children. This testimony is expressly disallowed under *Peterson*. See *Peterson, supra* at 376. Indeed, it is an established principle that a jury does not need an expert witness to assist it in assessing the general credibility of a witness.

The error in the admission of the expert testimony cannot be deemed harmless.² Their testimony was offered for no other purpose than to add an aura of expertise to support the testimony of the victims. Moreover, given the jury's extensive deliberations and eventual acquittal of defendant on the charge involving the older victim, it is apparent that the prosecution's case was not an overwhelming one in the eyes of the jury. In a credibility contest such as this case, we cannot say that the admission of the expert testimony did not have a likely impact on the outcome of this trial. Cf. *Peterson, supra* at 377-379. Accordingly, the error in the admission of the expert testimony was not harmless, and we reverse defendant's conviction.

Reversed.

/s/ Myron H. Wahls

/s/ Donald E. Holbrook, Jr.

/s/ Gary R. McDonald

¹ At the motion hearing, the prosecutor indicated that she intended to rely on *People v Badour*, 167 Mich App 186; 421 NW2d 624 (1988), in her examination of the expert witnesses. That decision was eventually overturned by the Michigan Supreme Court in *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990).

² Although it may be argued that the admission of Schram's testimony was harmless because defendant was acquitted of the charge involving the victim whom Schram treated, we believe that his testimony may have also had an impact on the jury's assessment of the second victim.