STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WAYNE GREER,

Defendant-Appellant.

UNPUBLISHED

No. 187475
Allegan Circuit Court
LC No. 94-009599

Before: Bandstra, P.J., and Hoekstra and J.M. Batzer*, JJ.

BATZER, J. (concurring).

I concur in the reversal of defendant's convictions. For the reasons stated by the lead opinion, I believe such a result is compelled.

I write separately to point out an issue that I believe is lurking in this case upon any re-trial for first-degree child abuse. The lead opinion cites evidence that the victim "urinated in inappropriate places and engaged in inappropriate sexual behavior as well as . . . teeth grinding, restlessness, aggressiveness, and unusually high tolerance for pain" as sufficient for the jury to conclude that she suffered the "serious mental harm" requisite for first-degree child abuse. I agree that these things can be indicative of "serious mental harm," but do not always necessarily amount to a demonstration of "serious mental harm" as that term is used in the statute. MCL 750.136b(f) provides:

> 'Serious mental harm' means injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.

Thus, as a predicate for finding "serious mental harm" there must first be a "visibly demonstrable manifestation of a substantial disorder of thought or mood . . . ," an element on which the jury received no instruction. The statutory language of " . . . a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the

* Circuit judge, sitting on the Court of Appeals by assignment.

ordinary demands of life" found in MCL 750.136b(f) is, of course, exactly the definition of "mental illness" as defined in the Mental Health Code at MCL 330.1400(g). In comparing the definition of "mental illness" found at CJI2d 7.11[1] as a requisite part of an insanity defense with paragraph two of CJI2d 17.18[2] in the first-degree child abuse instructions given here, it is evident to me that CJI2d 17.18 omits a vital part of what the legislature meant by "serious mental harm," i.e. there first must be a "substantial disorder of thought or mood." I think these words omitted from CJI2d 17.18 given in this case are vital because I believe that a child can exhibit the cited behavior for any of a number of reasons and be emotionally upset or suffer a disorder without necessarily suffering "a substantial disorder of thought or mood."[3]

Finally, I do not mean to imply that a jury must in all cases have expert testimony as from a clinical psychologist or a psychiatrist before it can conclude that a person suffers from a substantial disorder or thought or mood, i.e. "is mentally ill," but such expert testimony limited to the "serious mental harm" issue inclusive of all its elements as defined in the statute may well be necessary in most cases and will certainly assist the trier of fact to understand this evidence or to determine a fact in issue. MRE 702.

/s/ James M. Batzer

[1] CJI2d 7.11 provides in pertinent part:

> (4) 'Mental illness' is defined by law as a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or the ability to cope with the ordinary demands of life.

[2] CJI2d 17.18 provides in pertinent part:

> (b) by 'serious mental harm' I mean an injury to a child's mental condition that results in visible signs of an impairment in the child's judgment, behavior, ability to recognize reality, or ability to cope with the ordinary demands of life.

[3] In other words, before a victim can be found to have suffered "serious mental harm" under MCL 750.136b, it must be proved beyond a reasonable doubt that the child suffered "mental illness" as a result of defendant's intentionally or knowingly caused mental harm, and I believe the jury must be so instructed. See, e.g. MCL 768.21a(1).