

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY ALLEN HARRIS,

Defendant-Appellant.

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UNPUBLISHED

August 2, 2011

No. 296631

Oakland Circuit Court

LC No. 2009-225570-FC

Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant, Johnny Allen Harris, of three counts of Criminal Sexual Conduct, First Degree, in violation of MCL 750.520b(1)(a), involving his then five-year-old stepdaughter, JCR. The trial court sentenced him to serve 17 to 50 years. Harris appeals as of right. More specifically, he appeals the trial court's admission of certain testimony and also claims ineffective assistance of counsel. We affirm.

**I. FACTS**

At trial, JCR testified that she is six years old. She has five siblings, including a sister named AR. JCR stated that she knew Harris because he used to live in her house. She shared a bedroom with her sister, AR, but each of them had their own beds. JCR testified that on six occasions, when she was five and six years old, Harris woke her up and took her from her bedroom to various parts of the house and told her to suck his penis, and she used her mouth and hands. Yellow stuff went into her mouth, which she would spit into a sink. She would then get a drink of water and return to bed. Harris told JCR that she would get in trouble if she told anyone. JCR did not tell her mother until Harris moved out of the house.

After Harris moved out, JCR told her sister AR what happened by whispering in her ear that Harris told her to "suck his penis." Eventually, one of JCR's other siblings, who had heard what happened, told their mother about the incidents. Her mother questioned JCR alone and had her demonstrate on a banana what she had to do. Her mother had JCR leave the room and then called her back to have her explain it again to see if she explained it the same way, which she did. JCR's mother called the police, and they went to the police department. JCR's mother then took JCR to a pediatrician to be examined. She also took JCR to Care House, where Sarah Killips interviewed her.

JCR's sister, AR, testified that Harris would come into her and JCR's bedroom at night. Harris would ask the girls if they were awake, and he would ask JCR if she wanted some water. JCR would say yes, and they would go downstairs. AR stated that Harris never asked anyone else if they wanted any water. She thought it was odd that Harris would ask JCR if she wanted any water because normally Harris would not let them get up to get water. She remembered that JCR would be gone 10 to 20 minutes and that she would have a bottle of water when she returned. AR also stated that normally Harris would not let them drink bottled water. AR testified that JCR would be kind of scared or frightened when she would return. AR stated that she was glad when Harris moved out because he would push her and he "did not treat [them] well."

Sarah Killips conducted forensic interviews for Care House of Oakland County at the time of the incident. She interviewed JCR alone, using an approved forensic interview protocol, including a drawing of a naked child. The intention of the interview is to get a statement from the child. Killips testified, without objection, that "the literature, [Killips'] training and experience [have] demonstrate[d] that delayed disclosure is more common than not."

Dr. Carrie Ricci is a pediatrician who saw JCR after JCR told her mother about the incidents with Harris. Dr. Ricci testified that she asked JCR direct questions "for the purpose of providing her with the treatment and seeing what, if anything – the diagnosis [was]." JCR told her that Harris "had woken her up from sleep, taken her downstairs, and had her suck on his penis until yellow stuff came out." Dr. Ricci gave JCR a physical examination. She also tested JCR for sexually transmitted diseases, which tests all came back negative. Dr. Ricci diagnosed JCR with child sexual abuse and nocturnal enuresis (bedwetting). Dr. Ricci made her diagnosis because she believed that JCR had been abused.

Harris testified that he moved out of the home while JCR's mother was out of town because she was "very confrontational." He stated that, on one occasion, he and JCR's mother got into an argument in which she threatened to call the police on him, stating, "I'll call the police on your ass. You know they'll believe me if I call them." He also stated that, after he had moved out of the house, JCR's mother called him to ask why he had moved out. He responded by saying their marriage was over, to which she replied, "I'm gonna get your ass." Harris testified that he never molested JCR, and he never put his penis in her mouth. He stated that he believed JCR's mother had "put her up to this." Harris denied that he did not like to give the children bottled water. He also denied ever pushing AR while he was moving out.

The jury returned a verdict of guilty on all three counts of Criminal Sexual Conduct, First Degree. The trial court sentenced Harris to 17 to 50 years in prison. Harris appeals as of right.

## II. HEARSAY CHALLENGE TO AR'S TESTIMONY

### A. STANDARD OF REVIEW

Harris argues that the trial court committed reversible error when it allowed JCR's sister, AR, to testify about what JCR told her about the incident involving Harris. Harris contends that AR's testimony was hearsay.

The decision whether to admit or exclude evidence is within the trial court's discretion and will only be reversed when the trial court has abused that discretion.<sup>1</sup> "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes."<sup>2</sup>

## B. LEGAL STANDARDS

The general rule is that hearsay is inadmissible.<sup>3</sup> But a trial court can allow hearsay testimony if an exception to hearsay applies.<sup>4</sup> There are certain circumstances when hearsay uttered by a person of tender years may be admitted as evidence.<sup>5</sup> A delay in a child's declaration may be excusable if the child fears reprisal if she makes the declaration.<sup>6</sup>

The "tender years" exception to hearsay states, in relevant part:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (1) the declarant was under the age of ten when the statement was made;
- (2) the statement is shown to have been spontaneous and without indication of manufacture;
- (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
- (4) the statement is introduced through the testimony of someone other than the declarant.<sup>7</sup>

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<sup>1</sup> *People v Crawford*, 458 Mich 376, 400; 582 NW2d 785 (1998).

<sup>2</sup> *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

<sup>3</sup> MRE 802; *Yost*, 278 Mich App at 363.

<sup>4</sup> *Yost*, 278 Mich App at 365.

<sup>5</sup> MRE 803A; *People v Hammons*, 210 Mich App 554, 558; 534 NW2d 183 (1995).

<sup>6</sup> MRE 803A; *Hammons*, 210 Mich App at 558.

<sup>7</sup> MRE 803A.

### C. APPLYING THE LEGAL STANDARDS

Harris contends that JCR's statement cannot satisfy the second and third prongs of the "tender years" exception.

More specifically, Harris contends that the requirements for hearsay to be admitted under the "excited utterance" exception are analogous to the requirements under the "tender years" exception. Under the excited utterance exception, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event of the condition," is not excluded by the hearsay rule.<sup>8</sup> Harris focuses his assertion on the time frame that has generally been applied to the excited utterance exception. Specifically, he states that there can be no time for the declarant to contrive the statement in order for it to be admitted under the exception.

In essence, Harris claims that, because JCR delayed making her statement to AR, she had time to fabricate her story. Harris incorrectly intertwines the requirements of the "tender years" exception and the "excited utterance" exception. He attempts to bolster his argument by citing *People v Straight*.<sup>9</sup> Harris states that in that case, "the complainant made the statements approximately one month after the alleged event, *immediately following a medical exam and repeated questioning by her parents.*" But any statements the declarant made in *Straight* would clearly not be spontaneous because they came after an exam and repeated questions from the parents. And that is why the Michigan Supreme Court reversed the conviction;<sup>10</sup> not because of the one month that elapsed between the incident and the declaration.

In this case, JCR was not asked about any alleged sexual abuse. She was not given a medical exam prior to her declaration. The record shows that AR asked her why she was going downstairs with Harris. JCR's response was to declare the incidents that had occurred between her and Harris. There is no indication she was predisposed to tell such a story. Further, JCR was six years old at the time. The chances of a six year old fabricating such an illicit story are minimal. Harris cannot show that JCR's statements were not spontaneous or that there was any indication that JCR fabricated them. He cannot show that the trial court abused its discretion regarding the second prong.

Harris also contends that the statement fails the "tender years" exception because JCR did not make it "immediately after the incident" as the third prong requires. Notwithstanding the fact that Harris mistakenly claims on appeal that a year passed between the incident and JCR's declaration, he has overlooked the plain language of the statute that allows for delay in certain

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<sup>8</sup> MRE 803(2).

<sup>9</sup> *People v Straight*, 430 Mich 418; 424 NW2d 257 (1988).

<sup>10</sup> *Id.* at 433.

circumstances. As previously stated, it is excusable if a child delays making her declaration if she fears the subject of her declaration may retaliate in some way.<sup>11</sup>

JCR expressly stated that Harris told her she would get in trouble if she told anyone of what had transpired. It is certainly feasible that a young girl, subjected to such treatment, could fear “getting in trouble” by the alleged perpetrator of the treatment. Her delayed declaration was due to a fear of reprisal from Harris. This reason for delay fits squarely within the excusable exception stated in MRE 803(A)(3). Harris cannot show JCR’s delayed declaration was inexcusable. He cannot show that the trial court abused its discretion by finding the delay was excusable.

In summary, Harris cannot show that the trial court abused its discretion when it admitted AR’s testimony pursuant to the “tender years” exception. A reasonable person could find that, given the circumstances, JCR’s declaration was spontaneous and that she delayed making the declaration out of fear.

### III. HEARSAY AND RELEVANCE CHALLENGES TO DR. RICCI’S TESTIMONY

#### A. STANDARD OF REVIEW

Harris argues that the trial court erred when it allowed Dr. Ricci to testify that she diagnosed JCR as having been sexually abused despite finding no evidence of sexual abuse. He contends that Dr. Ricci’s testimony was irrelevant because there was no evidence that supported it. Harris also claims that Dr. Ricci’s testimony was hearsay. The decision whether to admit or exclude evidence is within the trial court’s discretion and will only be reversed when the trial court has abused that discretion.<sup>12</sup> “A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes.”<sup>13</sup> But if this Court finds an abuse of discretion, we should not set aside a defendant’s conviction unless the defendant shows that the error more probably than not changed the outcome of the case.<sup>14</sup>

#### B. RELEVANCE

Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.<sup>15</sup> “Relevant evidence is generally admissible, except as provided by the

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<sup>11</sup> MRE 803A; *Hammons*, 210 Mich App at 558.

<sup>12</sup> *Crawford*, 458 Mich at 400; *People v Unger*, 278 Mich App 210, 238; 749 NW2d 272 (2008).

<sup>13</sup> *Yost*, 278 Mich App at 353.

<sup>14</sup> *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

<sup>15</sup> MRE 401.

United States and Michigan constitutions and other rules.”<sup>16</sup> However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.<sup>17</sup>

Harris claims that Dr. Ricci’s testimony was not relevant because no evidence of sexual abuse supported it. Dr. Ricci’s testimony that JCR told her that Harris woke her up from her sleep, took her downstairs, and had her suck on his penis is relevant. Her testimony has a tendency to make it more probable that JCR was sexually abused. Harris maintains that Dr. Ricci’s testimony is not relevant because no evidence of abuse supports it. At trial, defense counsel asked, “Well Doctor, it seems to me that – is that appropriate medical protocol to make a diagnosis where there are no symptoms or any evidence of the alleged malady?” Dr. Ricci responded:

Well, if, for example, you came in and told me you were vomiting and having diarrhea, but you had a normal physical examination, I would diagnose you with, um, a virus – a stomach virus, even though my examination may have been normal, based on the history that you told me, that you were having vomiting and diarrhea. So, sometimes in medicine, you do make a diagnosis based on the history, more so than your physical examination.

Dr. Ricci did not find physical evidence that sexual abuse had occurred. However, given her experience and by interviewing JCR, Dr. Ricci determined that JCR had been sexually abused. Dr. Ricci does not need physical evidence to make that determination, and Harris cites no case law supporting his assertion that she does. Harris cannot show the trial court abused its discretion by allowing Dr. Ricci to testify that JCR was abused, even though there was no physical evidence of the abuse.

### C. HEARSAY

MRE 803(4) states:

**(4) Statements Made for Purposes of Medical Treatment or Medical Diagnosis in Connection With Treatment.** Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.<sup>18</sup>

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<sup>16</sup> MRE 402; *Yost*, 278 Mich App at 355.

<sup>17</sup> *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995).

<sup>18</sup> MRE 803(4).

“The rationale supporting the admission of statements under this exception is the existence of (1) the reasonable necessity of the statement to the diagnosis and treatment of the patient, and (2) the declarant’s self-interested motivation to speak the truth to treating physicians in order to receive proper medical care.”<sup>19</sup>

Harris asserts that there are not sufficient indicia of reliability to justify the trial court admitting JCR’s statement. He argues that JCR is simply too young to recognize the weight of her statements to Dr. Ricci. He also asserts that JCR’s motive for going to Dr. Ricci was because her mother took her there and her motive for her statement was simply to respond to Dr. Ricci’s questions. But Harris cannot show that these assertions are true.

Dr. Ricci’s testimony as to what JCR told her clearly reflected Dr. Ricci’s purpose to treat or diagnose JCR. Even if Dr. Ricci found no physical evidence of sexual abuse, there is still a diagnosis. Further, Dr. Ricci tested JCR for several sexually transmitted diseases. Even though the results of those tests were negative, they were still administered by Dr. Ricci so she could treat and diagnose JCR. Harris cannot show that the trial court abused its discretion by admitting Dr. Ricci’s testimony based on a hearsay exception.

#### IV. INEFFECTIVE ASSISTANCE OF COUNSEL

##### A. STANDARD OF REVIEW

This Court’s review is limited to mistakes that are on the record.<sup>20</sup> Harris is not clear whether he alleges that his counsel was ineffective for not objecting on strict hearsay grounds or on grounds that Dr. Ricci gave impermissible opinion evidence that Harris was guilty of sexual abuse. Harris cannot show there was clear error on either theory.

##### B. FAILURE TO OBJECT ON GROUNDS OF HEARSAY

###### 1. LEGAL STANDARDS

There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel’s performance was sound trial strategy.<sup>21</sup> To establish ineffective assistance of counsel, “the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.”<sup>22</sup>

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<sup>19</sup> *People v Garland*, 286 Mich App 1, 8-9; 777 NW2d 732 (2009).

<sup>20</sup> *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

<sup>21</sup> *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

<sup>22</sup> *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

## 2. APPLYING THE LEGAL STANDARDS

Harris cannot show that JCR's statements to Dr. Ricci were not made in connection with Dr. Ricci diagnosing or treating JCR. And a defense attorney is not obligated to make a futile objection.<sup>23</sup> As discussed earlier, it is certainly within the range of reasonable outcomes for the trial court to find that Dr. Ricci's testimony fell within the hearsay exception under MRE 803(4). It is possible that defense counsel recognized the likelihood that the trial court would rule that the testimony was an exception. Defense counsel may have thought that it would be futile for him to object to the testimony. Further, it may have been trial strategy for defense counsel to not object so that the jury did not hear another of his objections overruled.

### C. FAILURE TO OBJECT TO OPINION EVIDENCE

#### 1. LEGAL STANDARDS

MRE 704 allows opinion testimony if it is not objectionable because it embraces an issue that should be decided by the trier of fact.<sup>24</sup>

#### 2. APPLYING THE LEGAL STANDARDS

To the extent that Harris contends that his counsel was ineffective for not objecting because Dr. Ricci gave opinion evidence that Harris was the abuser, he also cannot meet his burden. Harris cites a distinguishable case where this Court remanded for a new trial where the prosecutor asked the defendant "so you're guilty of the crime?"

But in this case, Dr. Ricci did not give her opinion that Harris was the one who abused JCR. Dr. Ricci only testified that JCR had been abused and that JCR stated, under an exception to hearsay, that Harris was the one who abused her. But Dr. Ricci stated that it was her diagnosis that JCR had been sexually abused. Dr. Ricci never mentioned that she thought Harris was the abuser or concluded that he was. She simply diagnosed sexual abuse. Therefore, Harris cannot meet his burden of showing that his trial counsel was clearly deficient.

### V. PROSECUTOR MISCONDUCT

#### A. STANDARD OF REVIEW

Harris argues that Sarah Killips, a Care House employee, bolstered JCR's testimony when she stated that "the literature, her training, and experience demonstrate that delayed disclosure is more common than not." He contends this is an example of the prosecutor vouching for the credibility of one of its witnesses. "Where issues of prosecutorial misconduct

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<sup>23</sup> *People v Odom*, 276 Mich App 407, 416; 740 NW2d 557 (2007).

<sup>24</sup> MRE 704.

are preserved, we review them de novo to determine if the defendant was denied a fair and impartial trial.”<sup>25</sup>

## B. ANALYSIS

Killips testified that through her experience and her understanding of literature in the field, she believed it was more likely for a child to delay disclosing being sexually abused than to immediately disclose the abuse.

Killips never mentioned JCR or stated that she believed JCR because of JCR’s delayed disclosure. The prosecutor did not ask Killips if she thought JCR was more reliable or believable because of JCR’s delayed disclosure. Killips stated that it was typical that a victim of sexual abuse would delay telling someone. She only testified that she had done a forensic interview and that she had followed established protocol when she conducted it. Thus, Harris cannot show that he was denied a fair trial because Killips vouched for the credibility of JCR.

## VI. EXPERT OPINION TESTIMONY

### A. STANDARD OF REVIEW

Harris contends that Killips gave expert opinion testimony without being qualified as an expert. This Court reviews unpreserved claims of nonconstitutional error for plain error that affected the defendant’s substantial rights.<sup>26</sup>

### B. LEGAL STANDARDS

“MRE 701 permits lay witnesses to testify about opinions and inferences that are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or determination of a fact in issue.”<sup>27</sup> “An expert witness is one who has been qualified by knowledge, skill, experience, training, or education, and is used where scientific, technical, or other specialized knowledge will assist the trier of fact to understand evidence or determine a fact at issue.”<sup>28</sup> Also, “MCR 6.201(A) does not explicitly require *designation* of expert and lay witnesses.”<sup>29</sup>

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<sup>25</sup> *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

<sup>26</sup> *People v Aguwa*, 245 Mich App 1, 6; 626 NW2d 176 (2001).

<sup>27</sup> MRE 701; *People v McLaughlin*, 258 Mich App 635, 658; 672 NW2d 860 (2003) (internal quotations omitted).

<sup>28</sup> MRE 702; *Richardson v Ryder Truck Rental Inc*, 213 Mich App 447, 455; 540 NW2d 696 (1995).

<sup>29</sup> *McLaughlin*, 258 Mich App at 658.

### C. APPLYING THE LEGAL STANDARDS

Killips testified that it is not unusual for the complainant in a rape case to delay disclosure of the incident. Harris contends that Killips clearly gave expert testimony. But even if this Court were to find that Killips did give expert testimony rather than opinion testimony, Harris cannot demonstrate plain error by the trial court. If Harris would have objected, the prosecution could have moved for the witness to be qualified as an expert. Killips stated that she had conducted over 500 forensic interviews on children and she was also familiar with the Care House protocol for interviewing children. Killips' merely expressed her opinion that, in her experience, it was not uncommon for children to delay telling someone that they had been abused. Thus, Harris has failed to demonstrate that the trial court abused its discretion when it allowed Killips to testify at trial.

We affirm.

/s/ Kurtis T. Wilder  
/s/ William C. Whitbeck  
/s/ Karen M. Fort Hood