

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of CHRISTOPHER ALLEN
EISENHARDT, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

UNPUBLISHED
September 4, 2001

V

CHRISTOPHER ALLEN EISENHARDT,

Respondent-Appellant.

No. 220134
Macomb Circuit Court
Family Division
LC No. 97-045037

Before: White, P.J., and Cavanagh and Talbot, JJ.

TALBOT, J., (*dissenting.*)

I respectfully dissent because I conclude that respondent has not established prejudice requiring reversal.

It is impossible to ascertain from the record precisely what assistance Terence Campbell would have provided to the defense. Although respondent argued generally to the trial court that Campbell would have assisted regarding interview techniques and “other matters,” both by assisting in cross-examination and by testifying, the record is void of any indication how Campbell’s expertise relates to the facts of this case. Additionally, respondent’s claims about Campbell’s expertise were inconsistent and wide-ranging. Based upon respondent’s arguments below and on appeal, the nature and subject of Campbell’s proposed assistance varied considerably throughout these proceedings.

Prior to trial, respondent moved the court to pay for an expert witness. At that time, respondent’s stated purpose for the expert was “to assist defense counsel in reviewing medical evidence of the alleged victim and preparing for cross examination of plaintiff’s two endorsed medical witnesses.” On the first day of trial respondent moved for a continuance because Campbell could not be present that day. At that time, respondent’s counsel expanded upon the need for Campbell’s presence at trial and did not limit him to use in cross-examining the prosecution’s two endorsed medical witnesses. Not only was Campbell needed to aid in the cross-examination of the prosecution’s medical witnesses, but he was also deemed necessary for the cross-examination of “all the witnesses who interviewed the young girl.” Counsel for respondent argued:

[Respondent's Counsel]: . . . I anticipate my expert is going to assist me in cross examination of witnesses, both Cynthia Davis who is going to be probably the subject of the 803A motion of the prosecution *and also of the cross examination of all the witnesses who interviewed the young girl*. So, for those reasons I would ask the court to give us a continuance in this matter. . . . I do need him now, he was going to assist me, my expert, by giving me some direction as far as what the witnesses are saying on the stand, as far as what Ms. Davis says and as far as what the girl says, she's going to be part of the 803A motion. [Emphasis added.]

In response, the prosecution moved to sequester all witnesses. Indeed, respondent's purpose in enlisting Campbell's assistance was also unclear to the prosecution:

[The Prosecution]: Your Honor, I'm not exactly sure what his purpose is with this witness but I would move to have the witnesses sequestered. If he intends to testify I would not want him sitting in and listening to the testimony. If he's just here to assist, just sit with counsel I don't think that is an appropriate basis for an adjournment.

Respondent then specified that Campbell's assistance was needed on the subject of interview techniques employed with children making sexual abuse allegations:

[Respondent's Counsel]: Your Honor, I'm not quite sure [of] which evidence counsel speaks, apparently I have not supplied a summary of what I expect Dr. Campbell to say as to relevancy, perhaps she knows better than I. But in this particular case I have an expert, he's going to testify, he's not going to testify that the girl is incredible, nonsense, he's not going to testify that way, no. He's not going to make a statement the girl has to be incredible, he's going to assist me in the matter of interview techniques, of interview techniques of children, young children making sexual allegations. And, how those interview techniques are properly done, how they are improperly done, and the effects of them being properly done or being improperly done. That is what I'm talking about and, so, we're going to find out whether or not the interview techniques used by a variety of individuals in this case were proper and whether or not they had any effect on what a child's memory of any allegations. . . .

After the trial court denied the prosecution's motion to exclude Campbell's testimony, the prosecution attempted to limit the scope of Campbell's testimony to the matter of interview techniques as represented by respondent's counsel. Respondent's counsel attempted to expand the scope of Campbell's expertise, ostensibly without limit:

[The Prosecution]: May I just ask that his testimony be limited to testimony on interview techniques.

THE COURT: Counsel?

[Respondent's Counsel]: No, basically, if he has some assistance he can assist me in other matters as far as this case develops. I don't know everything because not everything is contained in the police report. So, I don't know everything he

will be able to help me on because not all the interviewing is on the police report. There were no tapes made in this matter, at least none submitted to me. *I'm not going to limit his expertise.* . . . [Emphasis added.]

One can only speculate regarding the “other matters” to which respondent’s counsel refers. Respondent made no proffer of the evidence that his expert witness would provide. Respondent neither filed an affidavit nor moved for a new trial.

On appeal, respondent offers a different subject on which Campbell would have been of assistance. Respondent’s claim of prejudice is based upon proposed expert testimony regarding “the difference between normal traits of child development versus abnormal child developmental traits and/or characteristics of sexually abused children.” Respondent’s brief on appeal makes no mention of interview techniques. Because respondent’s only claim of prejudice on appeal relates to expert testimony on “the difference between normal traits of child development versus abnormal child developmental traits and/or characteristics of sexually abused children,” I can only assume that respondent has abandoned any claim of prejudice regarding Campbell’s expertise on interview techniques employed with children. *People v Carpentier*, 446 Mich 19, 41; 521 NW2d 195 (1994); *People v McClain*, 218 Mich App 613, 615; 554 NW2d 608 (1996).

I cannot conclude that respondent was prejudiced by Campbell’s absence at trial. Respondent contends that Campbell was “absolutely vital” to respondent’s defense, but provides no basis from the record to substantiate his claim. Respondent cites no trial testimony which would have been contradicted by Campbell, or testimony of prosecution witnesses on which respondent’s counsel would have more effectively cross-examined based upon Campbell’s assistance. Notably, at trial there was no issue raised regarding any interview techniques employed by any individual with the complainant.¹ The only expert witness called by the prosecution was a registered nurse who testified only regarding her physical examination of complainant. Respondent argues generally that Campbell would have assisted at trial, but respondent does not specify how he would have assisted or how his assistance was germane to the facts of this case.

Moreover, although Campbell was unavailable on the first day of trial, respondent did not call him to testify on the second day of trial. Nor did respondent ask for another continuance, although the trial court left open that possibility. There is no indication that Campbell was unavailable on the second day of trial. Unlike the majority, I would not excuse respondent’s failure to call Campbell to testify later in the trial. The majority finds this failure nonfatal because his usefulness was minimal as a result of his absence during the testimony of other witnesses. I see no basis in the record to support this conclusion.

Further, the record provides no information regarding the admissibility of the proposed testimony. In order for expert testimony to be admissible, “(1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in

¹ At trial the prosecution attempted to elicit testimony from Cynthia Davis, complainant’s aunt, regarding her experience in questioning children. Respondent’s counsel objected, arguing that Davis was not testifying as an expert, but rather as a corroborative witness to corroborate the testimony of complainant. The trial court sustained the objection.

determining a fact in issue; and (3) the evidence must be from a recognized discipline.” *People v Murray*, 234 Mich App 46, 53; 593 NW2d 690 (1999), quoting *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993); MRE 702. The record is void of any indication of Campbell’s qualifications or credentials. Nor does respondent argue how the testimony would serve to give the jury a better understanding of the evidence or assist in determining a fact in issue. Respondent does not cite to the testimony of the complainant or any other witness which Campbell could have contradicted or clarified for the jury. Respondent failed to make a proffer to the trial court regarding the substance of his proposed testimony or assistance as it relates to the facts of this case. See *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997); *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995).

Based upon my review of the record and respondent’s argument on appeal, I disagree with the majority’s conclusion that Campbell’s assistance was imperative to respondent’s defense. In light of respondent’s failure to make an adequate record for review, I would not speculate regarding the value of Campbell’s proposed assistance in this case. Accordingly, I would affirm.

/s/ Michael J. Talbot