

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 23, 2014

v

ROBERT KENDALL NICHOLLS,
Defendant-Appellant.

No. 318090
Wayne Circuit Court
LC No. 13-003691-FH

Before: JANSEN, P.J., and TALBOT and SERVITTO, JJ.

JANSEN, P.J. (*dissenting*).

I respectfully dissent from the majority's determination that defendant was not prejudiced by the admission of hearsay testimony in this case. Because the circuit court's admission of the hearsay testimony rose to the level of plain error affecting defendant's substantial rights, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), I would reverse defendant's convictions and remand for a new trial.

I agree with the majority that the challenged statements of Shannon Long (the shift manager at the restaurant where the victim worked), John Raymond Taylor (the victim's boyfriend), and Hilda Nicholls (the victim's mother) constituted inadmissible hearsay. Unlike the majority, I conclude that certain of the challenged statements of William Parsons (the general manager at the restaurant where the victim worked) constituted hearsay as well.¹ Apart from the

¹ The prosecutor opened her line of questioning by asking Parsons, "[D]id [the victim] tell you something about her father?" The prosecutor then asked, "What was the nature of [the conversation]?" Parsons answered, "Like more of a touching, like type thing" and "[m]ore of a relationship between [the victim and her father]." When specifically asked whether he was talking about a "physical touching," Parsons replied, "Yes." Contrary to the majority's determination, Parsons was not exclusively characterizing the nature of the conversation and his reaction thereto. He was also testifying, at least in part, about the substance of the victim's out-of-court statements. I agree that the testimony was partially elicited for the nonhearsay purposes of proving that a conversation occurred and showing the effect on the listener. See *People v Eggleston*, 148 Mich App 494, 502; 384 NW2d 811 (1986). However, it is axiomatic that testimony may have both hearsay and nonhearsay uses. See *People v Derring*, 470 Mich 851,

testimony of the victim herself, the case against defendant rested almost exclusively on hearsay testimony that was not subject to any exception.

I acknowledge that defense counsel did not object to this hearsay testimony and that defendant's claim of error is therefore unpreserved. But even in the absence of a proper objection, it is the duty of the circuit judge to control all proceedings during trial and restrict the introduction of inadmissible evidence. MCL 768.29; see also *People v Serra*, 301 Mich 124, 135; 3 NW2d 35 (1942) (noting that "[i]t is the province of the court to determine what testimony is admissible"). The prosecution's introduction of the various hearsay statements was so improper as a matter of law that the circuit judge was obligated to step in and prevent the repeated errors from infecting defendant's trial. See *People v Spencer*, 130 Mich App 527, 539-540, 542-543; 343 NW2d 607 (1983). Having reviewed the transcripts in this case, I am left with the impression that the circuit judge lost control of the proceedings as a result of her own lack of understanding of the rules of evidence.

Nor can I agree with the majority's determination that these evidentiary errors were rendered harmless because the hearsay was cumulative to the victim's own testimony or because defendant was subject to cross-examination at trial. I fully acknowledge our Supreme Court's decision in *People v Gursky*, 486 Mich 596, 620-621; 786 NW2d 579 (2010), wherein the Court observed:

Michigan law provides that where a hearsay statement is not offered and argued as substantive proof of guilt, but rather offered merely to corroborate the child's testimony, it is more likely that the error will be harmless. Moreover, the admission of a hearsay statement that is cumulative to in-court testimony by the declarant can be harmless error, particularly when corroborated by other evidence. . . . [I]f the declarant himself testified at trial, "any likelihood of prejudice was greatly diminished" because "the primary rationale for the exclusion of hearsay is the inability to test the reliability of out-of-court statements[.]" Where the declarant himself testifies and is subject to cross-examination, the hearsay testimony is of less importance and less prejudicial. [Citation omitted.]

It is true that the hearsay statements offered by Shannon Long, John Raymond Taylor, Hilda Nicholls, and William Parsons were cumulative to the victim's testimony. However, "the fact that [a] statement was cumulative, standing alone, does not automatically result in a finding of harmless error." *People v Smith*, 456 Mich 543, 555; 581 NW2d 654 (1998). The admission of hearsay testimony may be prejudicial even if it is cumulative. *Id.* When the trial is primarily a credibility contest between the defendant and the victim, as it was in this case, reinforcement of

852 n 1 (2004) (YOUNG, J., concurring). Viewed logically, Parsons's testimony was also elicited to prove that the victim had been in a physical relationship with her father. This is the quintessence of hearsay. MRE 801(c). Defense counsel should have requested, and the circuit judge should have given, a limiting instruction advising the jurors that Parsons's testimony could be considered only for its nonhearsay purposes. MRE 105.

the victim's testimony with inadmissible hearsay unfairly "tip[s] the scales toward a guilty verdict." *People v Straight*, 430 Mich 418, 428; 424 NW2d 257 (1988).

Taken to its logical conclusion, the majority's reasoning would sanction the introduction of unlimited hearsay evidence, no matter how egregious, any time it is used to bolster the victim's own testimony and the defendant testifies at trial. This certainly cannot be the law, as it would altogether swallow the rule barring the admission of hearsay evidence. See MRE 802. Our rules of evidence are not merely advisory. They are part of Michigan law, see Const 1963, art 6, § 5, and must be followed in all cases unless a specific exception applies, MRE 101. A circuit judge who ignores the rules of evidence and repeatedly permits the prosecutor to elicit inadmissible testimony, without uttering so much as a warning, is the functional equivalent of no judge at all. While I am certainly disturbed by the offenses that defendant is alleged to have committed, this Court must be careful not to compound the circuit court's mistake through a rote recitation of the harmless-error rule.

Because "[t]he testimony of a victim need not be corroborated" in cases of criminal sexual conduct, MCL 750.520h, the prosecution had no need to present the cumulative hearsay evidence in the first place. Yet it did so anyway, eliciting inadmissible hearsay from not one, but four separate witnesses. In my opinion, the overall effect of these errors, taken together with the abdication of responsibility by the circuit judge, denied defendant his right to a fair trial and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of . . . defendant's innocence." *Carines*, 460 Mich at 763-764 (quotations and citations omitted). Because the plain error affected defendant's substantial rights in this case, *id.*, I would reverse defendant's convictions and remand for a new trial.

/s/ Kathleen Jansen