

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS RAY JENSEN,

Defendant-Appellant.

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UNPUBLISHED  
September 9, 2003

No. 235372  
Mason Circuit Court  
LC No. 00-015696

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree home invasion, MCL 750.110a(2), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under thirteen-years-old). He was sentenced to concurrent prison terms of five to twenty years for the first-degree home invasion conviction and thirty-eight months to fifteen years for the CSC II conviction. We reverse and remand for a new trial.

I

The complainant, who was twelve-years-old at the time of trial, testified that she knew defendant as her landlord. When the complainant was home alone on July 29, 2000, defendant came to her residence and asked if he could use the bathroom. He entered the residence and walked to the bathroom, then said that he had to retrieve something from his car. Defendant returned to the apartment and asked the complainant if she wanted to dance. The complainant said no. Defendant pulled the complainant toward him, then put one of his hands on her shoulder and the other on her hips, and they swayed back and forth. She got away from him, but he eventually got her in a place where she could not get away. Defendant kissed her, then put his hand on and rubbed her “private part between [her] legs” and brought his hand up to her breast. Defendant told the complainant that she was cute and, “It’s our little secret,” before leaving the complainant’s home.

Notably, the complainant testified at trial that, prior to the alleged incident, she went downstairs to the living room and saw “someone” walking out the door and then she eventually heard a knock, opened the door, and found defendant there. In contrast, Detective Susan Randall testified that the complainant had said that, when she left the bathroom, defendant was standing in her living room.

Defendant testified, in short, that he went to the residence where the complainant and her family lived on July 29, 2000, but that he never entered the residence that day. He testified that he was never alone in the house with the complainant that morning. Defendant also expressly denied touching the complainant inappropriately. Defendant testified that he gave the complainant's family at least three warnings about not paying the full amount of rent that they owed. Defendant said that he "had the documents completed," to begin eviction proceedings against complainant's family for non-payment of rent and that he showed them to the complainant's stepfather on July 27, 2000. In contrast, the complainant's stepfather testified that defendant only verbally warned him once about being evicted if they did not get caught up in their rent.

Detective Randall testified that she prepared an envelope that appeared to be addressed to the Ludington Police Department and placed "tell-tell powder" inside it, took it to the complainant's residence, and left the envelope on the kitchen table. She also testified that defendant, who had "purple tell-tell powder" in his nail beds, admitted to her during an interview that he went into the apartment and opened the envelope. Detective Randall further testified that defendant denied having been alone with the complainant in her residence when she first asked him. However, he later acknowledged being alone with the complainant a few times and said that one time he gave her a hug because he thought she was upset. Defendant also acknowledged that he was not supposed to be there when the complainant was home alone. In his testimony, defendant acknowledged opening the envelope in question. He said that he was at the residence to collect the rent and that he was "really, really, curious" when he saw the envelope.

## II

Defendant alleges that the trial court violated his constitutional right to confrontation by admitting inadmissible hearsay testimony from a police officer regarding an incident that led to a prior conviction of fourth-degree criminal sexual conduct (CSC IV). We agree.

At trial, Lieutenant Ronald Wolter testified on direct examination that he had previously been a road trooper employed at the Newaygo post of the state police. In that capacity, he investigated a prior complaint of criminal sexual contact that was allegedly perpetrated by defendant. In particular, Lieutenant Wolter testified that he received a complaint from a female who was thirteen-years-old or younger, who described contact involving the fondling of the chest and buttocks area. He further testified that the victim in that case was a neighbor of defendant's and that she described the fondling as being nonconsensual. Lieutenant Wolter also testified that there was no report of an adult being present at the time and that the victim in the prior case said she was fondled above her clothing. The victim said that defendant told her, "You have a nice butt." Lieutenant Wolter believed that defendant was convicted by guilty plea of CSC IV based on that prior incident. However, the judgment of sentence for this prior conviction indicated that defendant pleaded no contest to the charge.

Hearsay may be admissible pursuant to the residual hearsay rule, MRE 803(24), if four elements are established: (1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions; (2) it must tend to establish a material fact; (3) it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts; and (4) its admission must serve the interests of justice. *People v Katt*, 468 Mich 272, 279, 290; 662 NW2d 12 (2003). The party seeking admission must also give advance notice of the intent

to introduce the evidence. *Id.* at 279. To determine whether the statement has circumstantial guarantees of trustworthiness, the inquiry demanded must comport with that of the Confrontation Clause. Specifically, the court must examine the totality of the circumstances surrounding the statement to determine whether equivalent guarantees of trustworthiness exist. *Id.* at 290-291. There is no exhaustive list of factors to determine whether a statement has equivalent guarantees of trustworthiness. *Id.* at 291. However, “the Confrontation Clause forbids the use of corroborative evidence to determine the trustworthiness of statements offered under the residual exception in criminal cases if the declarant does not testify at trial.” *Id.* at 291-292.

Secondly, the proffered statement must be directly relevant to a material fact; that is, a fact that is significant or essential to an issue or matter at hand. *Id.* at 292. Thirdly, the proffered statement must be the “best evidence” or the most probative evidence reasonably available to prove its point. This requirement was established to ensure that the residual exception will be limited to use in exceptional circumstances. *Id.* at 293. Nonhearsay evidence is derived from first hand knowledge, and therefore, nonhearsay evidence of a material fact has more probative value than hearsay statements. Consequently, the residual hearsay evidence will not be available if there is applicable nonhearsay evidence. Finally, the proffered statement’s admission must conform to the rules of evidence to serve the interests of justice. Therefore, a trial court may refuse to admit a statement into evidence although the first three criteria for admission had been established where the purpose of the rules and interests of justice will not be served by admission. *Id.* at 293. It is incumbent upon the trial court to make explicit supportive findings upon the record to facilitate the review of admission of evidence pursuant to MRE 803(24). *Id.* at 293.

On the record available, the trial court’s admission of this evidence pursuant to the residual hearsay exception was erroneous. The residual hearsay exception was designed to apply in exceptional circumstances where the proffered statement was the best evidence reasonably available. In the present case, there was no explanation or analysis regarding the availability of the declarant of the statements that served as the foundation for defendant’s prior conviction. Additionally, while defendant gave statements to the investigators in the prior and current case, there was no delineation of statements that were based on defendant’s admissions to Lieutenant Wolter as opposed to the statement of the prior victim. Thus, it is unknown if the best evidence was available to address the prior conviction. Furthermore, the Confrontation Clause forbids the use of corroborative evidence, in this case Lieutenant Wolter’s testimony, to determine the trustworthiness of the statements offered under the residual hearsay exception because the declarant did not testify. *Katt, supra*. Based on the record available, the trial court erred in admitting evidence pursuant to MRE 803(24).

We reject the prosecution’s argument on appeal to the effect that Lieutenant Wolter’s testimony about the prior incident was non-hearsay because it was not directly offered to prove the truth of his statements, but rather to “set up” the content of defendant’s admissions to Detectives Wolter and Randall regarding the prior incident. See MRE 801(d)(2). The prosecutor asked Lieutenant Wolter if defendant indicated whether he had touched or grabbed the complainant in the prior case and that defendant “indicated that they do play games, meaning the

victim and him; and that if there was any touching, it was unintentional.” Thus, there was no evidence that defendant made any admission at all to Lieutenant Wolter that he committed the alleged intentional acts of fondling during the prior incident.<sup>1</sup> Detective Randall testified that defendant told her, during her interview with him in connection with the present case, that, “I’ll admit it. I have been convicted of CSC Fourth in the past.” She also replied affirmatively when asked with regard to that conviction “did [defendant] acknowledge that the conduct that he was accused of and convicted of was conduct that he engaged in.” On redirect examination, Detective Randall testified that defendant did not give her “any real specifics” about the prior incident, but said that she knew it involved an “underage person.” At most, Detective Randall’s testimony reflects an admission by defendant that he committed CSC IV with an underage person in the past. It cannot reasonably be considered to constitute an admission to the surrounding circumstances of that prior conviction. Those details were the point of evidence about the prior incident, which was admitted as evidence of the alleged plan or scheme used by defendant. Thus, the relevant testimony from Lieutenant Wolter cannot be considered to have been effectively adopted by defendant in his admissions to Detective Randall.

Rather, the pertinent testimony from Lieutenant Wolter was hearsay because it related statements made by the victim in the prior case in order to prove the truth of the matters asserted, in particular, certain details of the alleged prior incident in which defendant inappropriately touched a girl in a sexually oriented matter. See MRE 801(c). Hearsay is inadmissible except as provided by the Michigan Rules of Evidence. MRE 802. Contrary to the prosecution’s argument on appeal, this testimony was not properly admissible under the “catch all” or residual hearsay exception, MRE 803(24). *Katt, supra*. Plainly, direct testimony from the prior victim would have been more probative than the hearsay testimony from Lieutenant Wolter. However, the prosecution made no showing or representation that there was an impediment to calling the alleged prior victim as a witness. The statements seem to have been simply in the nature of typical hearsay statements made to a police officer during the course of an investigation. In sum, the testimony at issue was not admissible under MRE 803(24). It is also evident that no other exception to the hearsay rule is arguably applicable to justify admission of the challenged testimony.

The Sixth Amendment Confrontation Clause bars the use of hearsay evidence against a criminal defendant unless such evidence falls within a firmly rooted hearsay exception or has “particularized guarantees of trustworthiness.” *People v Lee*, 243 Mich App 163, 173-174; 622 NW2d 71 (2000). As discussed above, the testimony at issue did not fall within any hearsay exception and lacked particularized guarantees of trustworthiness.<sup>2</sup> Thus, the admission of this testimony violated defendant’s constitutional right to confrontation.

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<sup>1</sup> We note that defendant attributed the prior conviction to substance abuse problems, but denied having a current alcohol or substance abuse problem at the time of these charges.

<sup>2</sup> As with MRE 803(24), other corroborating evidence cannot be considered in determining whether there are particularized guarantees of trustworthiness for a statement under the federal Confrontation Clause. Rather, the pertinent circumstances for this determination are those that surround the making of the statement. *Lee, supra* at 174.

We cannot conclude that this constitutional error is harmless beyond a reasonable doubt. See *People v Smith (On Remand)*, 249 Mich App 728, 730; 643 NW2d 607 (2002). At its core, this case pitted the credibility of the complainant's testimony that she was molested by defendant against his testimony denying any such inappropriate contact with her. Testimony indicating that defendant had previously engaged in similar conduct with another girl with elements reflecting a common scheme or plan may well have had its intended effect of increasing the likelihood that the jury credited the complainant over defendant. This possibility is heightened by evidence of at least arguable inconsistency between the present complainant's description of circumstances surrounding the alleged incident in her trial testimony and in earlier statements to Detective Randall. We recognize that Detective Randall's testimony that defendant initially denied, but then later admitted, ever having been alone with the complainant in her residence presented a reason to question his credibility. However, it is conceivable that a person accused of molesting a child, even if innocent, might initially falsely deny having ever been alone with that child as a fearful reaction to the allegation. Similarly, while it is disturbing that defendant entered the residence occupied by the complainant's family and opened an envelope that was marked in a manner suggesting it might contain items related to the case, one can imagine that a person charged with a serious crime would be curious about documents related to that charge regardless of the person's guilt or innocence. Further, defendant's testimony indicating that the complainant's family was behind in their rental payments to him and that he had essentially warned the complainant's stepfather that this could lead to their eviction indicated at least an arguable motive for the complainant or her family to wrongly implicate defendant. In sum, we conclude that there is a reasonable possibility that the improperly admitted hearsay testimony contributed to defendant's convictions. Thus, we reverse defendant's convictions and remand for a new trial.<sup>3</sup>

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Hilda R. Gage  
/s/ Kurtis T. Wilder  
/s/ Karen M. Fort Hood

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<sup>3</sup> We note that, in light of our analysis, we do not reach the issue of whether the testimony in question was permissible other acts evidence under MRE 404(b). Obviously, we cannot know what testimony would be provided by the victim in the prior case if the prosecution seeks to offer testimony from her at a new trial. Accordingly, we do not venture an opinion about the permissibility of such other acts testimony at a new trial.