

STATE OF MICHIGAN  
COURT OF APPEALS

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In re KENDRICK GUY, Minor.

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PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

V

KENDRICK GUY,

Respondent-Appellant.

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UNPUBLISHED

May 24, 2005

No. 252762

Oakland Circuit Court

LC No. 02-672806-DL

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Respondent appeals as of right from his jury trial convictions of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under thirteen years of age), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under thirteen years of age)<sup>1</sup>. We affirm.

On appeal, defendant first asserts that the trial court improperly qualified Amy Allen, a forensic interviewer at the Child Abuse and Neglect Council, as an expert witness on the common characteristics of children who allege sexual abuse. We disagree.

“MRE 702 requires the trial court to ensure that each aspect of an expert witness’s proffered testimony – including the data underlying the expert’s theories and the methodology by which the expert draws conclusions from that data – is reliable.” *Gilbert v DaimlerChrysler Corp.*, 470 Mich 749, 779; 685 NW2d 391 (2004).<sup>2</sup> Prior to its decision in *Gilbert*, the Michigan

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<sup>1</sup> The victims were respondent’s female cousins, one of whom was mentally impaired. The girls are sisters who were seven and nine years old when the sexual abuse began; respondent was almost thirteen years old at that time.

<sup>2</sup> Although this case was tried before the current version of MRE 702 took effect on January 1, 2004, the trial court’s obligation to ensure reliability applies to both the current and former versions of the rule. *Gilbert, supra* at 780.

Supreme Court held that an “expert may testify regarding typical symptoms of child sexual abuse for the sole purpose of explaining a victim’s specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim *or* to rebut an attack on the victim’s credibility.” *People v Peterson*, 450 Mich 349, 373; 537 NW2d 857, amended 450 Mich 1212 (1995) (emphasis in original).

Under MRE 702, the trial court’s role is to serve as a gatekeeper to ensure the relevance and reliability of expert testimony. *Gilbert, supra* at 780-781. The trial court must look to several factors in determining both relevance and reliability. First, the trial court must ensure that the expert is qualified. *People v Beckley*, 434 Mich 691, 711; 456 NW2d 391 (1990). An expert may be qualified by knowledge, skill, experience, training, or education. MRE 702.

Here, Allen testified about her substantial experience dealing with child victims of sexual abuse. At the time of trial, she was a forensic interviewer at the Child Abuse and Neglect Council, where in the previous two years she had interviewed approximately 90% of the five to six hundred children that were interviewed there each year. She previously worked as a director there, and she also worked as a treatment specialist in the child protection unit at Oakland Family Services. Allen testified that she had a Bachelor of Arts degree in psychology and a Bachelor of Science degree in behavioral sciences. She also testified that she belonged to several professional organizations including the National Children’s Alliance. She received numerous hours of training on how to work with children who allege sexual abuse, including how to interview them, treat them, and conduct investigations. Allen also testified that she had lectured on topics relating to alleged child sexual abuse and stated that she had previously testified in circuit court forty or fifty times, in juvenile court fifty times, and in family court approximately twenty times. On these previous occasions, she had been qualified variously as an expert in forensic interviewing, child sexual abuse, and the characteristics of children who have been sexually abused. Accordingly, Allen had an appropriate educational background and extensive firsthand experience with sexually abused children, and the trial court did not abuse its discretion in qualifying her as an expert. *Id.* at 713.

An expert’s testimony must also be relevant in that it must be able to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue. *Id.* at 713-714. Our Supreme Court in *Beckley* found that expert testimony in sexual assault cases met this requirement because a victim’s unique reactions to sexual assault put the evidence beyond the jury’s ability to properly evaluate the facts, many responses to the trauma of the incident are inconsistent and require explanation, there is a misconception that a child who suffers an injury will report it immediately, and the testimony can be helpful to the jury in determining credibility as there are few witnesses to these types of crimes and children of tender years will have difficulty testifying. *Id.* at 715-718. These factors are all at play in this case; thus, the trial court did not abuse its discretion in finding Allen’s testimony relevant.

The next factor the trial court must evaluate is whether the evidence is from a recognized discipline. *Id.* at 711. In *Beckley*, the Court found that the mental health profession was a recognized field of specialized knowledge with a growing field of behavioral scientists and clinicians that specialize in the treatment and study of victims of child sexual abuse. *Id.* at 718. Since *Beckley*, the Michigan courts have continued to hold that an expert may testify regarding typical symptoms of child sexual abuse for the purpose of explaining a victim’s specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim or to

rebut an attack on the victim's credibility. *Peterson, supra* at 373. In this case, the victims delayed reporting the abuse, had some difficulty identifying exactly when the abuse took place, and had difficulty explaining some of the details of the alleged abuse. Allen's testimony was used to explain that these are common characteristics of child sexual abuse victims. This testimony was permissible under *Peterson. Id.*

The United States Supreme Court's interpretation of FRE 702 in *Kumho Tire Co v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999), is not in conflict with the Michigan Supreme Court's interpretation of MRE 702 in *Gilbert, supra* at 749. Under both, the trial court's role is that of a gatekeeper who must exclude any expert testimony, scientific or otherwise, that is irrelevant or unreliable. *Kumho Tire Co, Ltd, supra* at 147; *Gilbert, supra* at 780-781. There is nothing new in the *Gilbert* decision that casts doubt on the Michigan Supreme Court's earlier decisions in *Beckley* and *Peterson*, which found expert testimony regarding typical symptoms of child sexual abuse for the purpose of explaining a victim's specific behavior admissible.

The trial court in this case adequately performed its gate-keeping function under MRE 702, and its determination that Allen's testimony was sufficiently reliable and relevant was not an abuse of discretion.

Respondent also suggests that the trial court erred in qualifying Allen as an expert under MRE 703 because Allen mentioned on voir dire by respondent that certain journals had published data supporting her opinion, but those journals were never placed in evidence. We disagree. In ruling on defense counsel's objection to qualification of Allen as an expert, the trial court indicated to the prosecutor that she should, if so requested by defense counsel, provide this underlying data supporting Allen's view.

There is no indication in the record that defense counsel ever subsequently made this request. The trial court cannot be said to have abused its discretion in qualifying Allen as an expert, without requiring that the journals Allen referred to on voir dire by respondent be in evidence, where defense counsel herself has abandoned her attempts to have the data submitted. Reversible error must be that of the trial court and not error to which the aggrieved party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Defense counsel failed to take advantage of the trial court's instruction to obtain the data from the prosecutor at the next break; any error here was not that of the trial court.

Respondent next asserts that the trial court deprived him of a fair trial by improperly questioning witnesses and by making comments that showed bias and encouraged the victims to testify in a certain manner. We reject respondent's argument. A trial court may question witnesses to clarify testimony or elicit additional information, but should be cautious in using this power and avoid questions that are intimidating, argumentative, prejudicial, unfair, or partial. MRE 614(b); *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992). Reviewing courts must read the record as a whole to determine if the trial court's conduct pierced the veil of judicial impartiality. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). The veil of judicial impartiality is pierced when the court's comments or conduct "unduly influence the jury and thereby deprive the defendant of a fair and impartial trial". *Id.* Because this issue is unpreserved, we review it for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Over the course of the trial in this matter, the court used the phrases “good girl,” “good job,” and “well done” several times, in addition to asking some questions of the victims. When read in context, the court’s comments that the girls were doing “good”, were not displays of partiality or encouragement, or at least were not plainly such. Most often, the comments came not in response to testimony that was damaging to respondent’s case, but instead to testimony that was only foundational in nature, and the comments referred not to the content of the girls’ testimony but to its presentation, i.e., whether they were speaking loudly enough and directly answering the questions asked of them. Nor did the court’s questioning of the girls display bias; the court’s questions only elicited information to clarify their testimony. None of the court’s questions were intimidating, argumentative, prejudicial, unfair, or partial. *Conyers, supra* at 404-405. Taken together, the court’s comments and questions did not pierce the veil of judicial impartiality. *Paquette, supra* at 340, and respondent has failed to establish plain error affecting his substantial rights. *Carines, supra* at 764.

Respondent’s last assertion of error is that the trial court deprived him of his right to have a jury determine that he was guilty beyond a reasonable doubt of all the elements of the charged crimes when it instructed the jury that it was indicated that both victims were under thirteen years of age. However, in affirmatively expressing satisfaction with the trial court’s instructions as given, respondent waived this issue on appeal. *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000); *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987).

Indeed, even were we to review this issue we would not agree with respondent that the alleged error requires reversal because an instructional error regarding one element of a crime is subject to a harmless error analysis. *People v Duncan*, 462 Mich 47, 54-55; 610 NW2d 551 (2000); see also *Neder v United States*, 527 US 1, 8-9; 119 S Ct 1827; 144 L Ed 2d 35 (1999); *Carines, supra* at 766. In this case, the age of the girls was not contested at trial, and even if the court took the age element away from the jury, the jury was still able to fulfill its intended function. *Duncan, supra* at 54. There is no reason to believe that had the trial court not made this error, the outcome would have been different given that it was blatantly obvious that the girls were under thirteen years old at the time of the alleged offenses (and indeed even at the time of trial). *Carines, supra* at 764.

Affirmed.

/s/ Janet T. Neff  
/s/ Donald S. Owens  
/s/ Karen M. Fort Hood