STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SPENCER ALAN FITZGERALD,

Defendant-Appellant.

UNPUBLISHED

No. 186969
Recorder's Court
LC No. 94-007646

Before: Markey, P.J., and Jansen and White, JJ.

White, J. (concurring in part and dissenting in part)

I concur in sections III, IV, V, VI and VII of the majority opinion. I dissent from the disposition of the similar acts issue.

Defendant's first two issues concern the court's admission of similar acts evidence regarding defendant's older daughter, complainant's sister. Defendant argues that the testimony should not have been admitted "where such evidence was not introduced for a proper purpose, its probative value was far outweighed by unfair prejudice, and was introduced solely to show defendant's criminal propensity to establish he acted in conformity with that propensity," and that the court erred in "admitting into evidence an alleged prior inconsistent statement of a witness, the authenticity of which was disputed …and which was highly prejudicial."

I

At the pre-trial hearing, the prosecution argued that the similar acts testimony of the older daughter was admissible for the non-character purpose of showing that defendant had earlier used a scheme or plan similar to that used in the instant case, whereby he would rape his daughters when his wife was out of town. The prosecution proffered the older daughter's 1987 statement to the Taylor police. Defense counsel objected on relevance grounds and on the basis that the statement was more prejudicial than probative, further arguing that the older daughter's credibility was in question because of her young age at the time, and the fact that the statement was made eight years earlier and in connection with an investigation that was dropped because she recanted the allegations. Defense counsel asserted

that the court had to find that the statement was credible, and argued that the court should not try a case within a case. The court reviewed the statement and went through the four-step analysis of *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), concluding that the evidence was admissible.

On the third day of trial, when the prosecution was about to call the older daughter, defense counsel again objected to the admission of her prior statement on the basis that "this particular testimony was never furthered in court, pursued in court; it was recanted and the matter was dropped." Defense counsel also argued that the statement had been written seven or eight years earlier and that "because it's a crime alleging that the father had sex with another child that the probative value is so prejudicial…" The court noted that defense counsel had argued the same points previously and that the issue of the daughter having recanted went to the weight, and not the admissibility, of the evidence. The court and counsel then discussed the subject of a cautionary instruction and agreed that the instruction would be given at the start of the older daughter's testimony.

The older daughter testified that she had three sisters, that she was the oldest, that in 1987 she was fifteen years old, and that in January of 1987 her grandfather died. She testified that her parents came up north to Michigan to her grandparents' home, where she and her sisters had been staying, and that her father took her sisters home, while she stayed with her mother for about a week. Her testimony continued:

> Q. Okay. When you did go back home, did your mom stay up north after you went home?
>
> A. No.
>
> Q. She didn't stay up north?
>
> A. No, she did not. My grandmother came home with us.
>
> Q. Now, in January of 1987, did your father ever rape you?
>
> A. No.
>
> Q. Never had sexual intercourse with you?
>
> A. No.
>
> Q. Now, on February 14th of 1987, or February 19th of 1987 did you go to the Taylor Police Department?
>
> A. That's correct.
>
> Q. And how was it that you got to the Taylor Police Department?

A. I was picked up from school by a Lieutenant Marshall.

Q. A female?

A. Yes.

Q. Could be Corporal Michelle Marshall?

A. Yes.

Q. And she brought you in?

A. Yes.

Q. And you talked to her about some things, right? You talked to her?

A. Yes.

Q. And you told her that your father sexually assaulted you while your mother was up north?

A. No, that's not what I said.

Q. You never told her, you never orally told her that your mother, that your father sexually assaulted you?

A. No.

Q. Now, the family has a business, correct?

A. Yes.

* * *

[testimony that the family computer business had been put in the older daughter's name, that her parents live in her house, that she learned about computers and running a business from her father, that she had only a high school diploma, and that her father takes care of her child when she is away]

Q. February of '87 you talked to Corporal M arshall, right?

A. Yes.

Q. And told her about some physical abuse you sustained at your father's hands?

A. No.

Q And you told her about some sexual abuse you sustained at your father's hands?

A. No, I did not.

Q. After making your report to Corporal Marshall they took you away from your mother and father; correct, being the police department and the Department of Social Services?

A. I believe that that's who they were.

Q. Okay. You were taken away from your parents, right?

A. Yes.

Q. And you were placed – where were you initially placed, do you remember the name of that?

A. No, the stuck me in this place that they said was a hospital. I never got placed anywhere else.

* * *

Q. And you ran away and your mother met you and you left that place?

A. No. I did not.

Q. How did you get away?

A. It was my birthday so I told them I wanted to go out for a walk. We walked up to the Renaissance Center and on the way back I ran up to the door of an older couple's car, I banged on the window and told them that there were three males chasing me along with an older male and I was afraid. I asked them to, please, take me somewhere.

Q. And they did?

A. Yes, they did.

* * *

Q. – so you made up this story to get these older people to take you away?

A. Yes.

Q. And when they took you away, did you call your mom or dad to get you to come home?

A. No.

Q. How did you get home?

A. I didn't go home.

Q. Where did you go?

A. I went to a friend's house.

Q. How long did you stay with a friend?

A. Until, at least, a month.

Q. Then, when did you go home?

A. Then, we went in front of a magistrate and I stayed at my Aunt Tracy's house in Dearborn.

Q. And eventually you told people that what you told to the police never happened; correct?

A. I never said anything to the police.

Q. You never said anything to the police?

A. No, I did not.

Q. Now, one of the things Corporal Marshall does after she talks to you orally, she gives you a sheet of paper and says please write out in your own words what happened; didn't she do that?

A. She handed me a piece of paper, yes.

Q. And asked you to write out what happened?

A. She dictated to me to write.

Q. So she dictated to you what to say?

A. Yes.

Q. Why would she do that?

A. I don't know.

Q. Didn't you have bruises on your body when you showed up?

A. Yes, I did.

Q. How did those bruises get there?

A. From falling down the stairs at school two days prior.

Q. Falling down the stairs at school; that's what you're telling the jury now?

A. Yes.

Q. And so Corporal Marshall gave you a sheet of paper and asked you, dictated something and told you to write it down?

A. Yes.

Q. Never told Corporal Marshall the [sic] he, being your father, started – or you never wrote down – he, being your father, spanked with you a board?

A. I really don't recall what was written down.

Q. I'm going to show you what's been marked as Peoples [sic] Proposed Exhibit Number 1. Ask you to look at that.

A. Okay.

Q. Does that look like your signature as it would have been back in 1987?

A. Yes, this does look like my signature right here on this page.

Q. And the reason I had asked about look like 1987 is because your writing has kind of changes [sic] as you've gotten older?

A. Not really.

Q. Okay. Your signature hasn't changed?

A. Not really, very little.

Q. Didn't you, when you testified at a prior hearing, and were shown that same statement, and the attorney general asked to [sic] the question does that look like your signature, you said well I really can't tell because my signature's changed; didn't you tell that to the attorney general?

A. I said that the second page is not my signature. I said the first page looks as if it could have been my signature.

Q. That's a two page document, right?

A. Yes.

Q. And I'd like you to look at the second page.

A. Yes, that is not my signature at all.

Q. At the bottom of that page, that is not your signature?

A. No, that is not my signature at all.

Q. That's what you're trying to tell this jury?

A. They're two totally different signatures.

Q. Now, the main body of these two pages, just look it over for a second. I want to know does that main body of these two pages look like your handwriting as it was back in 1987?

A. There are – it looks like something I might have, like, written; but there's several letters in here that I have never made this way. And this is not the way that I've ever spoken.

Q. And you're telling us that Corporal Marshall dictated this to you and you wrote it?

A. Yes.

Q. You're also telling us that your father doesn't work for you he merely advises you. And for that advice and taking care of this kid –

A. My child.

Q. –your child, you let him, your mother and your three sisters live in your house; or you did let him and your mother and your three sisters live in your house?

A. Yes.

Q. Now, back in 1994, the spring of '94, April –

A. Yes.

Q. March, February and January, who worked at your store, or at your computer company?

A. My sisters worked there.

Q. All three of them?

A. Well, not Schaneon, really. She just, basically, came there and hung out.

* * *

Q. Now going back to the statement that you wrote out for Corporal Marshall, want to go to Page 2 of that? Actually, I want to go, I'm going to back up just a little bit. I'm going to go back to the first page of that statement at the very bottom.

Just look it over for a second, then, I have a couple questions before we go to the statement.

A. Okay.

Q. Now, back when you were in second and third grade, I think that's like eight or nine years old, did your father ever touch you improperly, touch you in a sexual manner?

A. No.

Q. Never touched you like that?

A. No.

Q. Now, when you were given this sheet of paper and told to write and you have written down here and I'm talking about eleven lines from the bottom. The line that starts, me with a board.

A. Okay.

Q. I'm sorry. Go down from where you're at to where it starts, mostly, I went to the wrong line.

A. Okay.

Q. You have written down in this statement that's in your own writing, when I was in second or third grade –

[Defense Counsel] I'm going to object to that your Honor, the witness I believe said that she didn't know whether it was her writing or not. There was certain things about it that she wasn't sure about.

THE COURT: Alright. Rephrase the question, Mr. Dawson.

BY MR. DAWSON:

Q. (Cont'g.) Written down on that page, where we were looking at it, when I was in second or third grade my father started to touch me, I didn't know that it was wrong until later. That's written down there?

A. Yes.

Q. Is that all in your handwriting?

A. It doesn't look like my writing.

* * *

Q. And you have told the jury that Corporal Marshall gave you the sheet of paper, right?

A. Yes.

Q. Gave you the sheet of paper, gave you a pen or pencil to write with, right?

A. M'hm.

Q. You have to say yes or no.

A. Yes.

Q. Then you started writing what she was telling you to write?

A. Yes.

Q. Did she ever take that paper back? While she's dictating, did she take the paper from you at points and write something out, and then, hand it back to you?

A. No, I would ask her, what do you want me to write next?

Q. So you're asking her what do you want me to write next, and she's telling you?

A. Yes.

Q. And you're writing everything down that she says?

A. Yes. I asked her what to write. I said, what do you want me to write?

Q. Now, then, you're telling us now that some of these things on this paper doesn't look like what you wrote?

A. I don't remember what was written.

Q. Would you write something down that wasn't true?

A. Yes.

Q. Why?

A. Because she told me that if I wrote down a statement that my sisters could go home and that they would let me go home.

* * *

Q. And you decided that it was in your best interest to write down whatever she said even if it was a lie, right?

A. yes.

Q. You decided that it was in your best interest to write down that your father raped you when you were in third or fourth grade, and second or third grade, excuse me?

A. I wrote down whatever she asked me to write.

Q. And what's written on the page is, that when I was in second or third grade my father started to touch me, right?

A. Yes, that's what [sic] written.

Q. And you're telling us now that isn't true, right?

A. I said that it wasn't true then, also.

* * *

Q. Okay. So you have no problems lying when you think it will benefit you, right?

A. Well, if it's going to save my life, yes.

* * *

Q. Was Corporal Marshall threatening your life?

A. She told me that if I didn't write it, that they were going to tell my parents that . . . I was going to be expelled from school because they said that I was a drug addict and that's what was wrong with me.

* * *

Q. . . . . Prior to telling Corporal Marshall and writing it down did you ever tell anybody that your father had touched you improperly when you were in second or third grade?

A. No.

Q. Going back to that, where we left off on your statement, it continues on to say, what's written down there, but I was afraid to tell anyone. I told my mother in eighth grade but I don't know if she believed me or not. Is that written down there?

A. Yes, that's written down.

Q. It goes on further to say, she told my father that one of her friends kids got raped by her stepfather and if anyone did that to one of her children, she would kill them. Is that written down?

A. Yes.

Q. Had you ever heard your mother say that before?

A. I heard them discuss something that happened while my mother was at work one day.

* * *

Q. And did your mother, in fact, say to your father, that if it happened to one of her children, she would kill them?

A. Yes, she said if anything like that ever happened, she would kill the person that did it.

Q. Okay. Now, did you tell Corporal Marshall that that incident had happened?

A. Yes.

* * *

Q. And you told Corporal Marshall those last few lines?

A. Yes.

Q. But you're telling us today that stuff immediately above that you never told her?

A. No, I did not.

Q. But it's written down here, right?

A. Yes.

Q. And it's handwriting that looks like yours but it isn't yours? Does it look similar to your handwriting?

A. I never said that it was not my writing. I said it does not look [sic] something that I ever wrote.

Q. But it's your writing.

A. I can't tell you that. I don't know. I told you this signature here looks like it could be mine. The signature on the second page is definitely not mine. I have never written that way at all.

Q. So what you're telling us now is that this could be your writing but your [sic] just not sure?

A. Yes, that's what I've said several times. It does not look like my writing.

* * *

Q. Now, did you ever tell your friend – Did you have a friend, Gina, back in '87?

A. Yes, I did.

Q. Did you ever tell her about being sexually assaulted by your father?

A. No.

Q. So you if [sic] never told her, and she never told you to call the police?

A. No.

Q. Let's turn to Page 2 of the statement. Now on Page 2 it starts out, I told my best friend Gina about my father raping me and she told me to call the police; is that what it says there?

A. Yes.

Q. You further go on to say . . . I didn't want to tell anyone else what had happened, I told her not to tell anyone, she said that she wouldn't; is that what it says there?

A. Yes.

Q. Then it says, a little while after I told her I moved to my grandparents up north because my grandfather was terminally ill with cancer; is that what it says there?

A. Yes.

* * *

Q. And so all that's in the middle of Page 2 is the truth . . . the last few lines that we went over, about you moving up north?

A. Yes.

* * *

In your statement it says, we came home and, then, in parenthesis me and my sisters close parenthesis and my father on that Sunday after; that's what it says there, right?

A. Yes.

Q. It goes on to say, my mom stayed up to help my grandma take care of her business; correct?

A. M'hm.

Q Is that a yes.

A. Oh, yes.

Q. I'm sorry. It goes on to say, during that week my father raped me daily; is that what it goes on to say?

A. Yes.

* * *

Q. Then, it finishes off by saying, since we've been back my father has been raping me at least once a week; that's how your statement finishes up; correct?

A. That's what it says on this paper.

Q. And you're telling us that that's a lie?

A. Yes.

Q. But immediately before that was the truth?

A. Yes.

* * *

Q. And you're telling us that the statement that you have in your lap, it's marked as People's Proposed Exhibit Number 1, you never said a word that's in that statement?

A. No, I never said that I didn't say a word that was in this statement. I said that the part about being beaten up and raped, that was incorrect. There are several things in here that are true. Yes, my grandfather died; yes, my grandfather died from cancer; yes, I lived up north.

Q. So, parts of it are true?

A. Yes.

Q. And parts you're saying Officer Marshall or Corporal Marshall made up and made you write, right?

A. She dictated to me what to write, yes.

Q. She have a gun to your head forcing you to write it?

A. No.

Q. She just dictated it and you wrote it?

A. Yes.

On cross-examination, the older daughter testified that Corporal Marshall picked her up from school in a police car and took her to the police station, that Marshall lied to her when she said that she and her sisters could go home and her sisters would not be removed from the home. Defense counsel showed the older daughter her statement, and she testified that there was no doubt in her mind that the signature on the second page of the statement was not hers. She testified that the matter was never pursued in court, that the prosecutor decided not to pursue it and that the police were unable to pursue it, but that, nonetheless, she was kept in the hospital for a month or more. She testified that she would have done anything to get out of the hospital. On further cross-examination, she explained that in 1987 she had a friend that was having problems with her father, who was very strict and beat her. She testified that she told the friend that she was going to tell the school's vice-principal about her friend being abused, but that before she did so, her friend "went there and, basically, twisted it around," and

that was how Marshall got involved. She testified that no physical or sexual abuse was ever inflicted by her father.

II

I agree with the prosecution and the majority that the trial court did not abuse its discretion in concluding that evidence of acts such as those set forth in the older daughter's written statement was admissible under *People v VanderVliet,* 444 Mich 52, 74-75; 508 NW2d 114 (1993). The court erred, however, in admitting the older daughter's testimony as similar acts testimony because she steadfastly denied that any similar acts had taken place. The older daughter's testimony provided no competent evidence of any similar act. She never acknowledged that her prior statement was truthful, and Marshall's testimony regarding that statement[1] was admitted for impeachment only, as a prior inconsistent statement.[2]

While the court correctly observed that it was not required to make a determination regarding the older daughter's credibility with regard to the similar acts testimony, and *VanderVliet, supra* at 68, n 20, observes that there is no requirement that the trial court make a preliminary finding that the other act occurred and that the trial court need only assess the evidence under the usual rules for determining admissibility – whether the danger of undue prejudice outweighs the probative value of the evidence – application of the relevancy test of MRE 402 and the balancing test of MRE 403 presumes the existence of some otherwise admissible evidence of the other act. Here, there was no such evidence and the court erred in concluding, in effect, that the older daughter's denials were relevant and that the probative value of those denials outweighed the prejudicial impact.[3]

The prosecution does not argue that any error in the admission of the evidence was harmless,[4] and a thorough review of the testimony at trial reveals that the admission of the prior acts testimony cannot be regarded as harmless. I would remand for a new trial, or at a minimum, a *Ginther* hearing.

/s/ Helene N. White

[1] Marshall testified that she had been an investigator in the Taylor Police Department's youth bureau handling child neglect, abuse and sexual assault cases for 14-15 years. She spoke to the complainant in April 1994. Marshall testified that she had had contact with one of the complainant's sisters around 1988.

Q. And do you remember when that complaint came in?

A. I believe it was in 1988.

Q. Do you have – Would any records maybe refresh your memory as to exactly when the complaint came in?

A. If I could see a police report or a statement.

The prosecutor then showed her the older daughter's statement, dated February 19, 1987. Marshall testified that older daughter's school contacted her because the older daughter had come to school with marks and bruises. When the prosecutor asked Marshall what the older daughter had said to her, defense counsel objected on hearsay grounds. The objection was sustained. Marshall testified that the older daughter then wrote out the statement, that Marshall had left the room, and then the older daughter told her she was done and Marshall signed the bottom of each page, along with the older daughter. Marshall denied telling the older daughter what to write.

At that point, the prosecution moved to admit the older daughter's "prior inconsistent statement under oath, Rule 613(b). And it's not hearsay under 801, I think it's (d)(1)." Defense counsel objected on relevance and hearsay grounds, the court overruled the relevance objection and the following colloquy occurred:

[Defense counsel]: Okay. My next basis is hearsay….

In this particular case, I don't want to -- and I expressed this to the Court before –I don't want to try a second case here before the Court. We had some questions about this particular incident. . . .

Now, basically speaking, the witness disavowed that statement and contradicted it, recanted it, and the fact of the matter is that that case was never pursued, okay?

THE COURT: … that doesn't have anything to do with whether it's admissible extrinsically. That's what I want you to address, extrinsically . . .

[Defense counsel]: Okay. Well, it's not relevant to the proceeding here. We had some testimony about it, and I think in the final analysis, it's a Rule 403 situation where it's prejudicial effect outweighs any probative value it may have.

We already had questions where she signed it or she didn't sign it. This witness here can testify that she signed it in her presence or wherever it was and the matter should rest at that point. But to allow the statement in itself, it contains allegations of her prior situation which we vehemently –

THE COURT: … You have reminded me of that. I made my ruling when the prosecution made their request for it to be used under People vs. Vandercleet [sic]. We're not going to revisit that. What I'm asking you now, what are the legal bases for your objections to the admission of this document?

> [Defense Counsel]: It's irrelevant. Its prejudice outweighs any probative value. And it's hearsay. And it's got nothing to do with the particular incident here at issue.

The court admitted the statement.

[2] Although it appears the prosecutor violated the principles discussed in *People v. Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), the majority correctly observes that an argument based on the *Stanaway* case has not been presented. In *People v Stanaway*, a criminal sexual conduct case, the prosecution as part of its case in chief called the defendant's nephew and asked him if he had made a statement to a police officer, Peters, regarding an incriminating statement the defendant had made about having sex with a young girl. The defendant's nephew denied ever having made the statement to Officer Peters and denied that the defendant told him that he had had sex with a young girl. The prosecutor then called Officer Peters to the stand who, over hearsay objections, was permitted to testify that the defendant's nephew told him that the defendant never mentioned having had sex with the complainant, but on several occasions told his nephew that he had sex with a young girl and that if he were caught he would be in alot of trouble. The trial court gave a cautionary instruction to the jury that it could consider the prior inconsistent statement for determining the credibility of the defendant's nephew only, and not as substantive proof of what the defendant's nephew said on a former occasion. The Supreme Court reversed and remanded for a new trial, concluding that the hearsay error was prejudicial, not harmless, and could not be cured by a cautionary instruction. The Court said:

> The only relevance Donald Stanaway's [the defendant's nephew] testimony had to this case was whether he made the statement regarding his uncle's alleged admission. The witness had no direct knowledge of any of the alleged incidents and was out of town at the time they would have occurred. While prior inconsistent statements may be used in some circumstances to impeach credibility, MRE 613, this was improper impeachment. The substance of the statement, purportedly used to impeach the credibility of the witness, went to the central issue of the case. Whether the witness could be believed in general was only relevant with respect to whether that specific statement was made. This evidence served the improper purpose of proving the truth of the matter asserted. MRE 801.
>
> While the prosecutor could have presented defendant's alleged admission by way of the nephew's statement, he could not have delivered it by way of the officer's testimony because the statement would be impermissible hearsay. [Citation omitted.] Likewise, a prosecutor may not use an elicited denial as a springboard for introducing substantive evidence under the guise of rebutting the denial. *People v Bennett*, 393 Mich 445; 224 NW2d 846 (1975). Here the prosecutor used the elicited denial as a means of introducing a highly prejudicial "admission" that otherwise would have been inadmissible hearsay. The testimony of Officer Peters was that Donald Stanaway said that Brian Stanaway said that he had sex with a young girl. This would have been clearly inadmissible without Donald Stanaway's denial. It is less reliable in the face of the

> denial. Absent any remaining testimony from the witness for which his credibility was relevant to this case, the impeachment should have been disallowed. [446 Mich at 692-693]

[3] While trial counsel never used the word "hearsay" in objecting to use of the older daughter's statement, his arguments asserting that the statement lacked credibility and reliability because it was denied and recanted were sufficient to raise the issue that a recanted statement that is not acknowledged as truthful during trial has no probative value to establish the contents of the statement, and therefore the similar acts testimony should not have been admitted.

If the objection at trial is regarded as insufficient to preserve the issue, the apparent gravity of the error should compel this court to remand for a *Ginther* hearing. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Similarly, while trial counsel raised a hearsay objection to the police officer's testimony regarding the contents of the statement, he did not assert a violation of the principles discussed in *Stanaway*, *supra*. See note 2, *supra*. On their face, these are grave errors which very likely prejudiced defendant and which cannot be regarded as trial strategy.

[4] The prosecutor argued that the testimony was admissible under *Vandervliet* and that defendant abandoned the issue by failing to refer to the trial court's ruling and by failing to provide a transcript. Defendant later filed the transcript and an amended brief.