

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEMPER J. WHEELER,

Defendant-Appellant.

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UNPUBLISHED

January 5, 1999

No. 203441

Recorder's Court

LC No. 96-007624

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), and second-degree criminal sexual conduct, MCL 750.520c(1)(b); MSA 28.788(3)(1)(b). The trial court sentenced defendant to concurrent terms of nine to fifteen years' imprisonment. Defendant now appeals as of right. We affirm.

**I. Basic Facts And Procedural History**

In August 1996, defendant was arrested for allegedly sexually molesting the complainant, his thirteen-year-old niece, who had come to live regularly with him and his family. Complainant, testified that in May 1996, she lived at 11314 Evergreen with her two cousins, her aunt (defendant's wife), and defendant because of her mother's drug problem. Complainant claimed that sometime during that same month, defendant called her to his bedroom where he "touched [her] in the wrong places." Specifically, complainant alleged, defendant touched her breasts and penetrated her vagina with his penis and finger. Complainant also alleged that in July 1996, defendant engaged in similar conduct, again involving sexual penetration.

In early August of 1996, complainant alleged that she accompanied defendant on his way to pick up her aunt, defendant's wife, from work. While en route, she and defendant got into an argument because she had lied about visiting a neighborhood boy. According to complainant, defendant then "stopped the car and started hitting [complainant] and bumping [complainant's] head into the window." Defendant ordered complainant not to say anything about the incident and dropped her off at his home. Complainant testified that she then described the events to her cousins, stating "... and then I told 'em

the other accident [sic], when he touched me.” After defendant returned home with complainant’s aunt, his wife, complainant told her aunt about the incidents of molestation. Complainant was then taken to the police station and to Children’s Hospital. In an attempt to assign a date to the last time that she was molested, complainant claimed that the last episode of sexual penetration occurred approximately two days prior to her disclosure of the incidents to her aunt.

On cross-examination, complainant specified that defendant had molested her on two occasions, once in May 1996 and again in July 1996. Both incidents occurred while her aunt was at work and one or both of her cousins remained in the downstairs part of the home. The incident in May took place one week before complainant’s thirteenth birthday. Complainant admitted that she told her cousin that defendant had sex with her every night when her aunt went to work, yet told police that he had sex with her only twice. On redirect examination, complainant distinguished between the two occasions that defendant specifically had intercourse with her and the times that defendant would just touch and feel her.

Complainant’s cousin testified that during an evening in early August 1996, complainant returned home alone, “she was acting scared, like something had happened.” Complainant told her: “Well if uncle really love me, why is he doin’ all this stuff to me?” She also recalled complainant telling her, “when she go up in that room at night that he be feelin’ on her and havin’ sex with her.” She further testified that her parents’ bedroom was the only room upstairs and she recalled complainant being alone in that room with defendant.

Complainant’s other cousin testified that after complainant told the sisters of their parents’ argument and the incidents of molestation, the three began preparing to move to their grandmother’s house. Complainant’s aunt, defendant’s wife, was present at trial, but was precluded from testifying based on spousal privilege.

Defendant’s version of the events differed significantly. He testified that complainant occasionally visited his home in May of 1996 and may have spent the night on occasions during that month. Defendant agreed that he and complainant argued on August 1, 1996, because she had visited an older boy who she had been prohibited from seeing. Defendant added that the conversation regarding complainant’s visits with the young man was of a sexual nature. He claimed that during that discussion, he warned complainant that he intended to tell her aunt about her disobedience. Defendant denied that the argument occurred because he was uncomfortable with complainant associating with other young men and sought to keep complainant for himself. Defendant also denied ever touching complainant.

The trial court found that three relevant incidents of alleged first-degree criminal sexual conduct had occurred between May and July 31, 1996. The first incident, the trial court determined, occurred while complainant was twelve-years-old. Because of the prosecution’s failure to amend its charge of first-degree criminal sexual conduct with a person between thirteen and sixteen years of age, the trial court found defendant not guilty of the first count. However, the trial court did find that defendant had inappropriately touched complainant while she was thirteen-years-old and while a member of defendant’s household and therefore found defendant guilty of second-degree criminal sexual conduct.

Also, the trial court found that defendant's conduct during his argument with complainant evidenced his guilty mind. Specifically, the court claimed that his conduct was an "overreaction to her behavior with these boys [and] is indicative of something beyond a parental role." The court believed complainant's testimony regarding the instances of penetration and thus, also found defendant guilty of first-degree criminal sexual conduct. That finding was again based on complainant's age and status as a member of defendant's household.

Just prior to sentencing, defense counsel brought alleged newly discovered evidence to the court's attention. Defense counsel claimed that defendant's son contacted him, claiming that complainant had admitted that her trial testimony was untrue. The son then called the prosecutors to disclose the information and took complainant to personally speak with prosecutors. Based on that information, defense counsel moved for an evidentiary hearing and requested that the trial court allow defense counsel an opportunity to file a motion for new trial prior to sentencing.

The prosecutor agreed that defendant's son had brought complainant to speak with him two days before sentencing. He contended, however, that the alleged new evidence was the result of coercion or pressure put on complainant by defendant and his family. Thereafter, the trial court sentenced defendant without hearing further testimony in connection with the new evidence. The trial court reasoned that, because complainant still lived with defendant's family, she had been pressured into changing her account of the events.

## II. Standard Of Review

Whether to grant a new trial is in the trial court's discretion, and this Court will not reverse a trial court's decision absent a clear abuse of that discretion. See, e.g., *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id.*

## III. The Newly Discovered Evidence

Defendant argues that the trial court improperly denied his motion for an evidentiary hearing and the opportunity to request a new trial in light of newly discovered evidence. Before a court will grant a new trial because of newly discovered evidence, the moving party must show that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not, with reasonable diligence, have discovered and produced the evidence at trial. *People v Barbara*, 400 Mich 352, 362; 255 NW2d 171 (1977); *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995).

Here, the alleged new evidence consisting of complainant's recanted testimony properly qualifies as newly discovered evidence. However, newly discovered evidence in the form of recanted testimony is traditionally viewed as suspect and untrustworthy. *Barbara, supra* at 362-363; *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992).

Because the trial court acted as the trier of fact, it necessarily developed an insight into the conduct of the parties. The trial court specifically found complainant's trial testimony to be credible. A grant of new trial based upon the credibility of the witnesses must be made with great caution giving deference to the findings of the trier of fact. *People v Bart (On Remand)*, 220 Mich App 1, 11-13; 558 NW2d 449 (1996). Based on its prior findings and its superior knowledge of the circumstances, the trial court's decision to sentence defendant, notwithstanding his claim that complainant had recanted her testimony, was not violative of fact and logic. The court noted its suspicion that the recantation was due to pressure from defendant's family, with whom the complainant was still living at the time of sentencing. We find that the trial court did not abuse its discretion by refusing to hold further hearings on the newly discovered evidence.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Peter D. O'Connell

/s/ William C. Whitbeck