

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS RAY JENSEN,

Defendant-Appellant.

UNPUBLISHED
November 9, 2004

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

ON RECONSIDERATION

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

FORT HOOD, J. (dissenting).

I would remain with the original per curiam opinion issued in this case to reverse and remand for a new trial.

As stated in the original opinion, defendant's constitutional right to confront witnesses¹ was violated when the police officer testified regarding the circumstances that led to a prior conviction of fourth-degree criminal sexual conduct (CSC IV). However, violations of the Confrontation Clause are reviewed in light of plain, outcome determinative error or the harmless beyond a reasonable doubt standard.² See *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004); *People v Geno*, 261 Mich App 624, 630; 683 NW2d 687 (2004); *People v Spinks*, 206 Mich App 488, 493; 522 NW2d 875 (1994). The defendant's own statement or confession may be examined on appeal when determining whether a Confrontation Clause violation was harmless. See *People v Etheridge*, 196 Mich App 43, 47; 492 NW2d 490 (1992). On this record, I cannot conclude that the violation was harmless beyond a reasonable doubt.

This case did not involve any eyewitnesses; rather, the conviction was premised on the credibility assessment of the victim and defendant. Although defendant may have given inconsistent statements to police regarding his entry into the home, he denied touching the victim. Thus, to bolster the credibility of the victim, the prosecution sought to admit prior bad

¹ US Const Am VI; Const 1963, Art I, § 20.

² The United States Supreme Court in *Crawford v Washington*, 541 US ____; 124 S Ct 1354; 158 L Ed 2d 177 (2004), did not reach the issue of whether any error was harmless because the state did not raise the issue. *Id.* at 1359 n 1.

acts evidence, including a statement regarding defendant's feelings for young females, and testimony that defendant had a sexual relationship with his son's girlfriend. The prior bad acts testimony was improper propensity evidence and should have been excluded. See *People v Sabin*, 463 Mich 43, 56; 614 NW2d 888 (2000). Moreover, while any relationship with his son's girlfriend may bear on defendant's morals, it does not reflect defendant's reputation for truth or veracity. See *People v Parker*, 76 Mich App 432, 450; 257 NW2d 109 (1977). Therefore, I would hold that this evidence should have been excluded at trial. Without inclusion of this evidence, I cannot conclude that the violation of the confrontation clause was harmless beyond a reasonable doubt. I would reverse and remand for a new trial.

/s/ Karen M. Fort Hood