

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JARRON DONTI GEORGE,

Defendant-Appellant.

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UNPUBLISHED

November 20, 2007

No. 271892

Oakland Circuit Court

LC No. 2005-205374-FC

Before: Kelly, P.J., and Meter and Gleicher, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent from the portion of the majority opinion holding that the hearsay evidence provided by the victim’s mother and sister was properly admitted. Further, the error was not harmless.

In a sexual assault prosecution, MRE 803A permits the introduction of a single corroborative hearsay statement to bolster the credibility of a child witness. The trial court here permitted two witnesses to provide corroborative hearsay evidence. In my view, neither witness’s testimony fulfilled the foundational requirements of MRE 803A. I also conclude that this error was so prejudicial that reversal and remand for a new trial are required.

I. Factual and Procedural Background

The victim initially disclosed the alleged sexual assault almost one year after it occurred. At the preliminary examination, she testified that defendant, her uncle, put his “private” into her “private,” but denied that she was afraid of defendant, or that he hit her, put his hand over her mouth, told her to be quiet, or did anything to prevent her from revealing the assault. The victim stated that she tried to tell her mother about the assault the day after it occurred, but “[t]he door was closed.” She did not know who closed the door, and reiterated that no one stopped her from revealing the assault. At the preliminary examination, the prosecutor did not offer any additional evidence to explain the victim’s delay in reporting the incident.

Before the trial, the prosecutor notified defense counsel that she would introduce the testimony of the victim’s sister, Marquayla, pursuant to MRE 803A. The notice stated that the

content of Marquayla's testimony could be found in the transcript of the preliminary examination and a police report.<sup>1</sup> Defense counsel filed objections to the introduction of this evidence, including that the prosecutor's notice did not establish the "criteria under" MRE 803A. The prosecutor did not file a response.

On the first day of trial, defense counsel sought to argue regarding the admissibility of the MRE 803A evidence. The prosecutor stated, "In my opinion it's a foundational question. Either I lay the foundation to admit 803A or I don't . . . ." The trial court heard argument regarding the adequacy of the prosecutor's notice of her intent to present MRE 803A evidence, and ruled that the notice was adequate. Defense counsel attempted to bring up other issues related to MRE 803A, but the trial court prohibited him from doing so.<sup>2</sup>

At the trial, the victim, then eight years of age, testified as the first prosecution witness. She recounted that defendant vaginally penetrated her. Consistent with her preliminary examination testimony, the victim repeatedly denied that defendant put his hand on her mouth, told her to be quiet, hit her, or instructed her not to tell anyone about what happened, and also denied that she feared defendant. The victim recalled that she first reported the assault to her older sister, Marquayla.

Marquayla, aged 17 at the time of trial, testified next. On direct examination, Marquayla stated that she first learned of the sexual assault in 2005 from a friend of the victim, then aged 10. According to Marquayla, the victim and the friend were talking "upstairs," and the victim told the friend "what happened." Marquayla apparently overheard this conversation and called the victim downstairs. Marquayla testified that she asked the victim whether "that really happen[ed]," and told the victim that "if she was lying that she was going to be in trouble. . . . So then I asked her what happened and I said I'm going to give you one last time. If you're lying you ain't goin [sic] get in trouble."

Marquayla admitted that she could not recall the victim's exact words describing the sexual assault. At first, Marquayla testified that the victim told her that defendant had "raped" her. Marquayla then clarified that the victim did not use the word "rape." Marquayla testified that after she learned of the assault, she told a friend of the family about it, and later told her mother.

The victim's mother also testified for the prosecution. The prosecutor asked her, "[D]id [the victim] ever tell you that she began crying when this happened with --." Defense counsel objected on the basis that the mother was not the first person told of the assault. The trial court allowed the answer, explaining that the prosecutor had "a right to rehabilitate the witness by a

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<sup>1</sup> Marquayla did not testify at the preliminary examination and the police report is not part of the trial court record.

<sup>2</sup> Defense counsel stated, "Your Honor, I know you've ruled but what about the other -- ." The court interposed, "I don't want to hear another word from you." Defense counsel again asked to say something, and the court replied, "No, you may not. Sir, once the Court rules it's over. You do not have a right to challenge me."

prior consistent statement under Rule 801 of the Michigan Rules of Evidence.” In response to questions by the prosecutor, the mother then testified in detail regarding statements made by the victim related to the alleged assault.

On cross-examination, the mother confirmed Marquayla’s testimony that the first person informed of the assault was a young friend of the victim, not Marquayla. The mother explained that the victim and her friend were “in the closet and they was discussing – the little girl had been molested and so [the victim] told the little girl that her uncle had molested her.” The mother then reiterated that the victim talked to a friend before telling Marquayla of the assault.

Defense counsel moved to strike Marquayla’s testimony, arguing that Marquayla was not the first person told of the incident. The prosecutor admitted that it was “unclear” whom the victim first told of the assault. The trial court recognized that there was conflicting testimony as to whom the victim first told, and ruled that this conflict “only presents an issue of fact for the trier of fact.”

## II. The Admissibility of Marquayla’s Testimony

Our law generally prohibits the admission of hearsay evidence, as well as testimony intended solely to bolster the credibility of a witness. Motivated by “the unique evidentiary problems which arise in the prosecution of child criminal sexual conduct cases,” *People v Straight*, 430 Mich 418, 432; 424 NW2d 257 (1988), the Michigan Supreme Court crafted MRE 803A as a narrow exception to these venerable evidentiary doctrines. The rule allows the introduction of corroborative hearsay that has certain indicia of trustworthiness, including: (1) that the statement be “shown to have been spontaneous and without indication of manufacture,” MRE 803A(2); (2) that the declarant made the statement “immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance,” MRE 803A(3), and (3) that if the declarant made more than one corroborative statement, “only the first is admissible.”

Both Marquayla and her mother testified that the victim made the first statement regarding the alleged assault to a friend. The testimony of the adult witnesses concerning the victim’s initial report of the assault was consistent and detailed. The prosecuting attorney admitted that she herself was “unclear” whether the victim first told Marquayla or the friend of the sexual assault. Having refused to consider the admissibility of the evidence offered under MRE 803A before the trial, the trial court then improperly ruled that this critical foundational question represented a jury question.

Under MRE 104, the trial court was obligated to make a preliminary determination of the admissibility of the proffered hearsay evidence before submitting it to the jury. Preliminary questions concerning the admissibility of evidence are to be decided by the trial court, and not the jury. *People v Burton*, 433 Mich 268, 302; 445 NW2d 133 (1989). Had the trial court conducted an inquiry into whether the testimony of the victim’s sister met the requirements of MRE 803A, it would have recognized that *two* predicate factual issues required judicial determination: (1) whether Marquayla was the first person told of the event; and (2) whether the statement made by the victim to Marquayla was “spontaneous.” These questions demanded consideration and evidentiary analysis by the trial court before it permitted the introduction of corroborative hearsay evidence.

The majority correctly recognizes that the trial court need not hold a separate hearing on the admissibility of hearsay testimony in every case. In this case, however, an 11-month delay preceded the victim's report of the assault, and defense counsel made two pretrial attempts to advise the court of potential problems with the MRE 803A evidence. Contrary to the majority's conclusion that "[t]he trial court considered the evidence and ruled that it was admissible," the trial court *refused* to "consider the evidence" until after it had been admitted. The trial court did not exercise discretion in ruling on the admissibility of the evidence offered under MRE 803A; the trial court instead elected not to make a preliminary determination of the admissibility of this evidence.

Pursuant to MRE 104(c), hearings on preliminary matters relating to the admissibility of evidence "shall . . . be conducted" out of the presence of the jury "when the interests of justice require . . . ." This was such a case. The testimony of the victim's sister and mother cast enormous doubt on the victim's statement that the first person with whom she spoke was Marquayla, and on whether the statements to which both testified were spontaneous.

The majority points out that the eight-year-old victim testified that Marquayla was the first person with whom she spoke about the assault. The trial court did not make a specific finding that this testimony was more credible than that of Marquayla and her mother. Nor is it clear from the record that the trial court would have decided that the victim's testimony was more credible than that of her mother and older sister, particularly in light of the prosecutor's inability to make that argument when she herself conceded that she felt "unsure" as to what actually occurred.

Indeed, in admitting Marquayla's testimony the trial court disregarded the victim's testimony on another essential foundational question. The victim testified at both the trial and the preliminary examination that defendant did nothing to make her fearful of reporting the assault. Because the victim's first report of the assault was made eleven months after it allegedly occurred, Marquayla's testimony could be admitted under MRE 803A only if the victim's delay in making the statement was "excusable as having been caused by fear or other equally effective circumstance." MRE 803A(3). If the trial court believed the victim's testimony that she was not in fear of her uncle, it could not have admitted Marquayla's testimony under MRE 803A.

Additionally, the evidence did not support a finding that the victim spontaneously made her statement to Marquayla. Both Marquayla and the mother testified that the victim's report to Marquayla was not spontaneous, but was made in response to questioning. Marquayla's testimony reflects that the questioning included threats about "lying" and "getting into trouble." The victim did not supply any other information regarding the circumstances of the statement she claimed to have made to Marquayla. The absence of a showing of spontaneity reinforces the need, in this case, for a pretrial determination as to the admissibility of the hearsay evidence pursuant to MRE 104.

### III. The Hearsay Evidence Offered by the Victim's Mother

The majority recognizes that the trial court erred by admitting the victim's mother's testimony as a prior consistent statement under MRE 801(d)(1). According to the majority, however, the hearsay evidence provided by the mother was admissible "for impeachment purposes." This conclusion reflects a misapprehension of both the nature of impeachment and

the actual purpose for which the mother's testimony was used. Impeachment is an evidentiary effort to attack a witness's credibility. The prosecutor did not utilize the mother's testimony to impeach the credibility of the victim, but to provide substantive, extrinsic evidence of the sexual assault and a substantive, extrinsic explanation for the victim's delay in reporting the incident.

There was no proper basis – impeachment or otherwise – for the admission of bolstering hearsay testimony regarding the sexual assault itself.<sup>3</sup> This portion of the mother's testimony was inadmissible under MRE 803A, and it did not “impeach” the victim's testimony in any respect. The admission the mother's hearsay testimony regarding the incident itself was plain error.

The majority asserts that the mother's testimony “was properly used to demonstrate that the victim made the prior inconsistent statement regarding defendant's actions that could explain why the victim was afraid to disclose the incident sooner,” and as such constituted impeachment. However, “[t]he purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement – not to prove the contents of the statement.” *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). Although a prosecutor may impeach her own witness, the prosecutor in the instant case did not introduce extrinsic evidence of the victim's statements to “impeach” the victim. The mother's testimony was introduced to prove the truth of the matter asserted: that the victim feared defendant. The prosecutor in the instant case introduced extrinsic evidence of the victim's hearsay statements in the guise of impeachment, which served the improper purpose of providing substantive evidence of both the sexual assault and the victim's fear. During her closing argument, the prosecutor placed great reliance on the substantive aspect of the mother's testimony, and, not surprisingly, never once called into question the credibility of the victim.

This error is particularly egregious in light of the fact that both the prosecutor and the trial court knew that the mother could not provide hearsay evidence under MRE 803A. “As time goes on, a child's perceptions become more and more influenced by the reactions of the adults with whom the child speaks. It is for that reason that the tender-years rule prefers a child's first statement over later statements.” *People v Katt*, 468 Mich 272, 296; 662 NW2d 12 (2003). The mother was at best the second person to whom the victim spoke about the assault, and there was no foundation that the victim's statements to her mother were spontaneous.<sup>4</sup> Her testimony regarding the victim's statement bore none of the indicia of trustworthiness required under MRE 803A, and its admission as “impeachment” was disingenuous at best.

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<sup>3</sup> The mother testified that the victim told her that defendant pulled his pants down, “put his thang in her,” and began “humping” her.

<sup>4</sup> Nor was this testimony likely to be admissible under MRE 803(24), as the prosecutor did not disclose the nature and “the particulars” of the mother's testimony before the trial, and the record reveals absolutely no “circumstantial guarantees of trustworthiness” attending the statement to which she testified.

#### IV. Harmless Error Analysis

Preserved nonconstitutional error is harmless “unless the defendant demonstrates that the error was outcome determinative.” *People v Schaefer*, 473 Mich 418, 443; 703 NW2d 774 (2005), modified on other grounds in *People v Derror*, 475 Mich 316, 334, 341-342; 715 NW2d 822 (2006). The defendant must demonstrate that “it is more probable than not that the error was outcome determinative.” *Id.* (internal quotation omitted). An error is not outcome determinative unless it “undermined the reliability of the verdict.” *Id.* (internal quotation omitted).

The erroneous admission of the corroborative hearsay testimony of Marquayla and the victim’s mother was, in my judgment, outcome determinative. Without this evidence, the sole witness against defendant was the eight-year-old victim. The prosecutor realized the substantial weakness of her testimony, and it is for this reason, and this reason alone, that she elicited the corroborative hearsay testimony by Marquayla and the mother.

Further, the improper admission of the mother’s testimony, standing alone, was outcome determinative. During her closing argument, the prosecutor began by discussing “two moments” in the trial that “were very knowing and very powerful.” The first involved the “body language” of the victim. The second, the prosecutor argued, was the testimony of the mother, which was “just as powerful.” The prosecutor asked the jury,

I mean is there any doubt in your mind from listening to [the mother] that when [the victim] was telling her those things, that she wasn’t feeling them too, that she didn’t believe her daughter 100 percent? Is there any doubt in your mind, the emotion that she felt? I saw a couple of you moved by that, a couple that are mothers, you know.

As explicitly recognized by the prosecutor, the mother’s testimony was introduced to prove its substance, and was certain to have played a major role in the jury’s verdict. In analyzing a similar harmless error issue in *People v Stanaway*, 446 Mich 643, 695; 521 NW2d 557 (1994), the Michigan Supreme Court determined that “[a]ny nagging doubts the jury may have had about whether these sexual incidents took place between the complainant and the defendant were likely erased by the words he purportedly uttered to his nephew.” In the instant case, any doubts about the victim’s report of a sexual encounter that allegedly took place 11 months earlier were eliminated by the testimony of the mother, with or without Marquayla’s corroboration.

Because the improperly admitted corroborative hearsay permeated this trial and undermined the reliability of the jury’s verdict, I would reverse defendant’s conviction and remand for a new trial. Given my determination that a new trial is required, I would not reach the other issues presented by defendant.

/s/ Elizabeth L. Gleicher