STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2010
v	No. 288258 Oakland Circuit Court
JARRON DONTI GEORGE, Defendant-Appellant.	LC No. 2005-205374-FC

Before: GLEICHER, P.J., and O'CONNELL and WILDER, JJ.

GLEICHER, P.J. (*dissenting*).

I respectfully dissent from the majority's holding that the trial court properly admitted the victim's hearsay statements. In my view, this evidence failed to satisfy MRE 803(24), and its admission cannot be considered harmless.

The victim was 10-years-old when she testified at trial. She asserted that defendant, her uncle, had sexually assaulted her about four or five years earlier. The victim described in detail the circumstances surrounding the assault, answering the prosecutor's questions without apparent difficulty. Virtually every aspect of the victim's testimony coincided with hearsay statements subsequently related by the victim's sister, Marquayla George.[1]

Marquayla recalled that while the six-year-old victim and another young child played in a closet, she overheard the victim say, "[M]y uncle raped me." Marquayla immediately interrogated the victim, and reiterated for the jury the victim's responses regarding the assault; these statements echoed the victim's testimony. The following colloquy then ensued:

> *The Prosecutor*: And did you ever ask her if she was telling the truth?
>
> *Marquayla George*: Yes.

[1] Marquayla testified that the victim showed her the dress she had worn on the night of the assault. On cross-examination, the victim claimed that she did not recall showing Marquayla a dress. Aside from this collateral fact, Marquayla's testimony added no information beyond the facts previously recounted by the victim.

> *The Prosecutor:* What did you ask her?
>
> *Marquayla George:* I said if you're telling a story, you know you're going to get in trouble. And she said I'm not—she say I'm not lying. I'll even take the lie detector test.

Marquayla explained that the victim's offer to take a "lie detector test" meant that the victim was willing to be poked with a needle in the finger by a blood sugar monitor.

The trial court admitted Marquayla's testimony concerning the victim's out-of-court statements pursuant to MRE 803(24), which sets forth the catchall or residual exception to the general rule against hearsay:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

This Court reviews for an abuse of discretion a trial court's decision whether to admit evidence. *People v Jambor (On Remand)*, 273 Mich App 477, 481; 729 NW2d 569 (2007). "A preliminary issue of law regarding admissibility based on construction of a constitutional provision, rule of evidence, court rule, or statute is subject to de novo review." *Id*. "The same legal principles that govern the construction and application of statutes apply to court rules. When construing a court rule [or rule of evidence], we begin with its plain language; *when that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation*." *People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009) (emphasis added).

In my view, the hearsay evidence supplied by Marquayla failed to satisfy the admissibility criterion in MRE 803(24)(B), and the trial court thus abused its discretion by admitting it. The plain language of MRE 803(24)(B) demands the proponent of hearsay evidence to show that "the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts." In *People v Katt*, 468 Mich 272, 293; 662 NW2d 12 (2003), the Supreme Court characterized MRE 803(24)(B) as "essentially creat[ing] a 'best evidence' requirement" that sets "a high bar and will effectively limit use of the residual exception to exceptional circumstances." The Supreme Court emphasized in *Katt* that "nonhearsay evidence on a material fact will nearly always have more probative value than hearsay statements, because nonhearsay derives from first-hand knowledge. Thus, the residual exception normally will not be available if there is nonhearsay evidence on point." *Id*.

The victim offered at trial first-hand, nonhearsay testimony concerning all material facts necessary to prove the elements of the charged offense. The victim's testimony qualified as more probative than the hearsay evidence later recounted at trial by Marquayla. The victim's recollection of the assault was comprehensive, detailed, and straightforward. Marquayla added no facts of consequence to the victim's account of the crime. Because the victim's testimony was more probative than Marquayla's, the plain language of MRE 803(24)(B) required that the trial court exclude the hearsay Marquayla related at trial.

Without explanation, the majority holds that Marquayla's testimony "was the most probative evidence that the prosecution could offer, particularly considering the passage of time between the victim's disclosure and trial." *Ante* at 4. In support of this conclusion, the majority interprets *Katt*, 468 Mich at 295-296, as holding that "a child's earlier statement is more probative than one repeated at trial." *Ante* at 4. However, the facts of this case support neither proposition. In contrast to the victim's clear and forthright testimony here, the victims' testimony in *Katt* was "at times vague and inconsistent." *Id*. at 301 (dissent by Young, J.). In *Katt*, the passage of time presumably *did* result in some memory loss and diminution of the evidence's probity. But in this case, the victim communicated without difficulty and no evidence suggests that the passage of time impaired her ability to recall events. Although *Katt* posits that a child's perceptions may "become more and more influenced by the reactions of the adults with whom the child speaks," *id*. at 296, I can discern no such effect in the instant case.[2] Moreover, no case law supports a blanket exception to MRE 803(24)(B) in cases involving available child witnesses. "Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only eyewitness. But '(t)his Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases.'" *Tome v United States*, 513 US 150, 166; 115 S Ct 696; 130 L Ed 2d 574 (1995), quoting *United States v Salerno*, 505 US 317, 322; 112 S Ct 2503; 120 L Ed 2d 255 (1992).

Instead of presenting probative information supplementing the victim's testimony, Marquayla's trial descriptions of the victim's hearsay account served solely to bolster the victim's credibility. "As a general rule, neither party in a criminal trial is permitted to bolster a witness' testimony by seeking the admission of a prior consistent statement made by that witness." *People v Lewis*, 160 Mich App 20, 29; 408 NW2d 94 (1987). Marquayla's improper bolstering of the victim's credibility assumed two different forms. First, the prosecutor introduced Marquayla's recitation of the victim's statements as substantive proof that defendant committed the charged crime, in violation of the unambiguous mandate of MRE 803(24)(B). Second, Marquayla's recollection regarding the "lie detector test" lacked any relevance to the case, and served only to inappropriately vouch for the victim's credibility.

A defendant in a criminal trial may not introduce evidence that he offered to take a lie detector test. *People v McLaughlin*, 3 Mich App 391, 395; 142 NW2d 484 (1966). One basis for

[2] In the prosecutor's closing argument, she stated about the victim, "[W]hile she doesn't have the perfect memory, she's got an adequate recollection. . . . And there has not been one scintilla of evidence in this case that has refuted that [the victim] has been 100 percent consistent that that act happened to her, and that act happened at the hands of her Uncle . . . ."

this rule is that lie detector tests lack proven scientific validity as truth-finding devices. *People v Barbara*, 400 Mich 352, 357-359; 255 NW2d 171 (1977). Even evidence that a witness offered to take a lie detector test is inadmissible. "[I]n every case where the credibility of a witness was being tested and where either by design or inadvertence either the witness or the police have sought to bolster the testimony being given by the disclosure of the fact of a polygraph test and its results, this Court has reversed." *People v Bush*, 54 Mich App 77, 80; 220 NW2d 333 (1974). Of course, no reasonable juror would consider the "lie detector test" referenced here scientifically reliable. Nonetheless, the danger inherent in the admission of this evidence inheres in its power to improperly bolster a witness's veracity, artificially enhancing the victim's credibility with the jury. The victim's credibility was central and crucial to the outcome of this case. The victim's expressed willingness to endure a poke with a needle tended to "bolster and verify that witness's credibility," in contravention of longstanding evidentiary rules. *People v Whitfield*, 58 Mich App 585, 590; 288 NW2d 475 (1975).

"[P]reserved 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), mod on other grounds in *People v Derror*, 475 Mich 316, 334, 341-342; 715 NW2d 822 (2006). The defendant must establish that "it is more probable than not that the error was outcome determinative. An error is not outcome determinative unless it undermined the reliability of the verdict." *Id*. (internal quotation omitted). The erroneous admission of corroborative and inadmissible hearsay likely determined the outcome in this case. Defendant testified and unequivocally denied having sexual contact with his niece. No physical evidence linked defendant to the crime, which allegedly occurred almost a year before the victim reported it. This case turned entirely on the credibility of the victim and defendant. Under these circumstances, the admission of the victim's hearsay statements concerning the assault improperly augmented her credibility.[3]

Furthermore, the victim's hearsay statements about her willingness to participate in a "lie detector" were even more likely to have determined the outcome of this case. The prosecutor highlighted Marquayla's "lie detector" testimony in her closing argument:

> Doesn't that speak volumes about [the victim] in she was willing to get poked. … Doesn't that tell you volumes? Doesn't that speak that this is not contrived or made up and that she's willing to get poked and have blood drawn to

[3] I disagree with the majority's conclusion that Marquayla's testimony was "cumulative," and thus "by definition" harmless. In the absence of any properly admitted evidence of defendant's guilt apart from the victim's trial testimony, the improper bolstering evidence offered by Marquayla possessed the unique power to persuade the factfinder that the victim spoke truthfully. Consequently, Marquayla's recitations of the victim's hearsay statements were not merely cumulative to the victim's testimony; they enhanced the victim's believability. "Improper corroboration testimony that is *merely cumulative to the victim's testimony* ... cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." *Jolly v State*, 314 SC 17, 21; 443 SE 2d 566 (SC, 1994) (emphasis in original).

> prove that what happened to her happened to her? It's an important piece of evidence.

I agree with the prosecutor that the "lie detector" evidence served an important function in this case. The "lie detector" mention shed no light on whether or not defendant committed the charged crime, but indisputably bolstered the victim's believability. In a case that turned wholly on credibility, the "lie detector" evidence unfairly tipped the scales. Accordingly, I cannot consider it harmless, and would reverse defendant's conviction.

/s/ Elizabeth L. Gleicher