

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY ALLEN HARRIS,

Defendant-Appellant.

UNPUBLISHED

July 19, 2012

No. 296631

Oakland Circuit Court

LC No. 2009-225570-FC

ON REMAND

Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

This case returns to this Court on remand from the Michigan Supreme Court for a determination whether the improper admission of evidence at trial and ineffective assistance of counsel prejudiced defendant Johnny Allen Harris such that he is entitled to a new trial. We conclude that defense counsel's representation did not prejudice Harris such that he was deprived a fair trial. Accordingly, we affirm his jury trial convictions of three counts of first-degree criminal sexual conduct,¹ involving his five-year-old stepdaughter, JCR.

I. FACTS

This Court set forth the facts of the case in its prior opinion, in pertinent part, as follows:

At trial, JCR testified that she is six years old. She has five siblings, including a sister named AR. JCR stated that she knew Harris because he used to live in her house. She shared a bedroom with her sister, AR, but each of them had their own beds. JCR testified that on six occasions, when she was five and six years old, Harris woke her up and took her from her bedroom to various parts of the house and told her to suck his penis, and she used her mouth and hands. Yellow stuff went into her mouth, which she would spit into a sink. She would then get a drink of water and return to bed. Harris told JCR that she would get in

¹ MCL 750.520b(1)(a).

trouble if she told anyone. JCR did not tell her mother until Harris moved out of the house.

After Harris moved out, JCR told her sister AR what happened by whispering in her ear that Harris told her to “suck his penis.” Eventually, one of JCR’s other siblings, who had heard what happened, told their mother about the incident. Her mother questioned JCR alone and had her demonstrate on a banana what she had to do. Her mother had JCR leave the room and then called her back to have her explain it again to see if she explained it the same way, which she did. JCR’s [sic] mother called the police, and they went to the police department. JCR’s [sic] mother then took JCR to a pediatrician to be examined. She also took JCR to Care House, where Sarah Killips interviewed her.

JCR’s sister, AR, testified that Harris would come into her and JCR’s bedroom at night. Harris would ask the girls if they were awake, and he would ask JCR if she wanted some water. JCR would say yes, and they would go downstairs. AR stated that Harris never asked anyone else if they wanted any water. She thought it was odd that Harris would ask JCR if she wanted any water because normally Harris would not let them get up to get water. She remembered that JCR would be gone 10 to 20 minutes and that she would have a bottle of water when she returned. AR also stated that normally Harris would not let them drink bottled water. AR testified that JCR would be kind of scared or frightened when she would return. AR stated that she was glad when Harris moved out because he would push her and he “did not treat [them] well.”

* * *

Harris testified that he moved out of the home while JCR’s [sic] mother was out of town because she was “very confrontational.” He stated that, on one occasion, he and JCR’s [sic] mother got into an argument in which she threatened to call the police on him, stating, “I’ll call the police on your ass. You know they’ll believe me if I call them.” He also stated that, after he had moved out of the house, JCR’s [sic] mother called him to ask why he had moved out. He responded by saying their marriage was over, to which she replied, “I’m gonna get your ass.” Harris testified that he never molested JCR, and he never put his penis in her mouth. He stated that he believed JCR’s mother had “put her up to this.” Harris denied that he did not like to give the children bottled water. He also denied ever pushing AR while he was moving out.^[2]

Pediatrician Dr. Carrie Ricci testified regarding her examination and assessment of JCR after the incident was reported. We explained Dr. Ricci’s testimony as follows in our prior opinion:

² *People v Harris*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 2011 (Docket No. 296631), rev’d in part 491 Mich 906 (2012).

Dr. Ricci testified that she asked JCR direct questions “for the purpose of providing her with the treatment and seeing what, if anything—the diagnosis [was].” JCR told her that Harris “had woken her up from sleep, taken her downstairs, and had her suck on his penis until yellow stuff came out.” Dr. Ricci gave JCR a physical examination. She also tested JCR for sexually transmitted diseases, which tests all came back negative. Dr. Ricci diagnosed JCR with child sexual abuse and nocturnal enuresis (bedwetting). Dr. Ricci made her diagnosis because she believed that JCR had been abused.^[3]

On cross-examination, Dr. Ricci testified that she saw no evidence of sexual abuse in JCR. She also admitted that “the majority of the history was obtained from Mom.” However, on redirect examination, the prosecution elicited from Dr. Ricci the improper testimony regarding her diagnosis:

Q. . . . What was your—did you make a finding or a diagnosis?

A. My diagnoses were, number one, child sexual abuse; number two, enuresis.

Defense counsel recross-examined Dr. Ricci about the basis of her diagnosis, which the doctor admitted was formed entirely from the history that she was given:

Q. How did you diagnose child abuse, please?

A. Based on the history from [JCR] and her mother.

Q. There were no objective—no objective evidence; no objective findings, wouldn’t you agree?

A. That is common in cases of abuse if there’s normal physical examination.

Q. But if you—if I came into you and I said that I had the flu with no symptoms and nothing—no evidence of it, would you say, as a diagnosis, I had the flu?

A. No.

Q. Then how can you say, with a child who has no symptoms—I mean, nothing. No find no—no corroborating physical finding in this matter; is that true?

A. No physical findings.

Q. Only on the history you make a diagnosis, if I understand, of child abuse based upon what you said?

A. Correct.

³ *Id.*

Q. And primarily, the biggest part of your history came from that Mom?

A. Um, the large portion—I'm note—is from Mom, and—but [JCR] is the one who told me, as I stated earlier, what [JCR] had told me, and that was enough for me to diagnose her as sexual abuse.

Q. What were the—it was only her statement that allowed you to make the diagnoses; is that my understanding?

A. Yes.

Q. Without any other physical manifestations?

A. Correct.

Q. Well, Doctor, it seems to me that—is that appropriate medical protocol to make a diagnoses [sic] where there are no symptoms or any evidence of the alleged malady?

A. Well, if, for example, you came in and told me you were vomiting and having diarrhea, but you had a normal physical examination, I would diagnose you with, um, a virus—a stomach virus, even though my examination may have been normal, based on the history that you told me, that you were having vomiting and diarrhea. So, sometimes, in medicine, you do make a diagnosis based on the history, more so than your physical examination.

Q. Let me ask you something. When you took the witness stand, you began to cry.

A. Um-hum.

Q. Is it that you felt sympathy because of the story that made you write that diagnoses [sic]?

A. No, I did not write the diagnosis because I felt sympathy; I wrote the diagnosis because I believe that [JCR] was abused.

Q. You believe—

A. Yes.

Q. What did you rely on, other than your belief?

A. I relied on the testimony from [JCR] and her mother.

Q. And based upon what they told you, with no physical evidence, you write that she had been abused?

A. Correct.

In closing argument, the prosecution framed the issue as a credibility contest between JCR and Harris: “[W]hat it comes down to is do you believe [JCR] beyond a reasonable doubt or don’t you? . . . You have her saying it happened and you have the defendant saying it didn’t happen. Who do you believe?” The prosecution argued that JCR’s statement to Dr. Ricci about the sexual conduct with Harris was consistent with her other statements. The prosecution did not mention Dr. Ricci’s diagnosis of child abuse. Defense counsel’s closing argument addressed Dr. Ricci’s testimony by emphasizing that her testimony showed a “lack of proof.” Defense counsel also stressed the fact that Dr. Ricci’s opinion was based on a history that was given to her by JCR’s mother, not on any physical evidence.

After his conviction, Harris raised several issues on appeal to this Court. He argued (1) that AR’s testimony about what the complainant, JCR, told her was inadmissible hearsay, (2) that Dr. Ricci’s testimony about what JCR told her was inadmissible hearsay and irrelevant, (3) that defense counsel was ineffective for failing to object to hearsay evidence, (4) that defense counsel was ineffective for failing to object to Dr. Ricci’s opinion testimony that Harris sexually abused JCR, (5) that the prosecution engaged in misconduct by bolstering Killips’ testimony, and (6) that Killips’ testimony was erroneously admitted because she was not qualified as an expert.⁴ This Court found no error and affirmed Harris’s convictions and sentences.⁵

Harris then filed an application for leave to appeal in the Supreme Court. In lieu of granting the application, the Court reversed in part this Court’s decision with respect to Dr. Ricci’s testimony that JCR had been sexually abused. According to the Court, the trial court erred in allowing the testimony and defense counsel was ineffective for failing to object to it:

An expert witness may not testify that sexual abuse occurred. *People v Beckley*, 434 Mich 691 (1990); *People v Peterson*, 450 Mich 349 (1995). The trial court impermissibly allowed Dr. Carrie Ricci to testify that the complainant was the victim of child sexual abuse and trial counsel was ineffective for failing to object to this evidence. *People v Toma*, 462 Mich 281 (2000).^[6]

The Michigan Supreme Court then remanded the case for this Court to “determine whether [Harris] was prejudiced by the admission of the doctor’s diagnosis and whether [Harris] is entitled to a new trial.”⁷

⁴ *Harris*, unpub op at 2, 4-9.

⁵ *Id.*, p 10.

⁶ *Harris*, 491 Mich at 906.

⁷ *Id.*

II. PREJUDICE

A. STANDARD OF REVIEW

Harris argues that the erroneous admission of Dr. Ricci's testimony was unfairly prejudicial and denied him a fair trial. He maintains that in light of the substantial credibility questions in this case, a real likelihood existed that Dr. Ricci's sexual abuse diagnosis affected the outcome of the trial. Harris argues that due process requires a new trial.

To establish ineffective assistance of counsel, a "defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived a fair trial."⁸ To prove prejudice, a defendant must show that the result of the proceeding would have been different but for defense counsel's error.⁹

The Michigan Supreme Court has determined that defense counsel's failure to object to Dr. Ricci's diagnosis testimony fell below an objective standard of reasonableness. This Court's review is confined to assessing whether Harris suffered prejudice.

B. ANALYSIS

A medical expert's opinion that a victim was sexually assaulted based on the "emotional state of, and history given by, the complainant" rather than on the expert's "medical capabilities or expertise" is inadmissible.¹⁰ The rationale for precluding such evidence is that an opinion based on the self-reported history of a victim is nothing more than an opinion that the victim is telling the truth.¹¹

Despite the improper nature of Dr. Ricci's testimony that JCR was the victim of child sexual abuse, we conclude that its admission does not require reversal. Counsel's arguments did not focus on Dr. Ricci's diagnosis. Harris's theory of the case was that JCR's mother fabricated the allegations and coached JCR to lie in order to punish Harris for leaving the marriage. Defense counsel's cross-examination of Dr. Ricci bolstered this theory and minimized the effect of the doctor's diagnosis by eliciting from Dr. Ricci that her diagnosis of sexual abuse was based entirely on the history she was given, the majority of which came from JCR's mother. In their closing arguments, both parties' counsel framed the issue as a credibility contest between JCR and Harris, and neither focused the jury's attention on Dr. Ricci's diagnosis. The prosecution did not even mention Dr. Ricci's diagnosis in closing argument. The prosecution's references to Dr. Ricci's testimony pertained to the story that JCR relayed to her and its consistency with JCR's

⁸ *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003).

⁹ *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

¹⁰ *People v Smith*, 425 Mich 98, 112-113; 387 NW2d 814 (1986).

¹¹ See *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007) ("It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury.").

previous statements and her testimony in court. Defense counsel emphasized the undisputed lack of any physical evidence of sexual abuse.

Moreover, the properly admitted evidence at trial would allow a rational jury to find Harris guilty beyond a reasonable doubt. JCR testified in graphic detail about the sexual acts that Harris forced her to perform. JCR's testimony alone was sufficient to sustain Harris's conviction.¹² Also, her sister's testimony about Harris taking JCR, and only JCR, from their bedroom for water in the middle of the night, and JCR's demeanor upon returning to her bed, supported JCR's version of events. JCR gave consistent stories to her sister, her mother, and Dr. Ricci. In light of the evidence of Harris's guilt, the admission of the improper evidence did not affect the outcome of the trial. Harris was not denied a fair trial and is not entitled to retrial.

We affirm.

/s/ Kurtis T. Wilder
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood

¹² See MCL 750.520h; *People v Szalma*, 487 Mich 708, 724; 790 NW2d 662 (2010) (stating that "the complainant's testimony can, by itself, be sufficient to support a conviction of CSC").