STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFERY ALAN DOUGLAS,

Defendant-Appellant.

FOR PUBLICATION
April 12,2012

No. 301546
Lenawee Circuit Court
LC No. 09-014365-FC

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. *(concurring)*

I agree and concur with the majority in all respects other than the majority's conclusion that KD's statement to her mother was not admissible pursuant to MRE 803A. Under the circumstances of this case, I would not reverse the admission of KD's report of the abuse to her mother under MRE 803A(3). Because, for the other reasons discussed by the majority, this matter must be remanded for a new trial irrespective of the admissibility of that statement, I concur in the result. However, I write separately to address the concerns I have regarding what constitutes an excusable delay in reporting under MRE 803A(3).

The so-called "tender years exception" to the hearsay evidence rule originated in *People v Gage*, 62 Mich 271; 28 NW 835 (1886). At that time, the exception specifically discussed only "silence [as] the direct consequence of fears of chastisement induced by threats of the perpetrator of the wrong." The alternative of " . . . or other equally effective circumstance" was appended to that rule by our Supreme Court in *People v Baker*, 251 Mich 322, 326; 232 NW 381 (1930). Importantly, the Court in that case discussed a delay after the defendant, who was the father of the victim, simply told the victim not to tell anyone else. The Court held the delay excusable because "[a] child would ordinarily have no sense of outrage at such acts by her own father, and complaining of them would not occur to her. Her telling of the affair would more naturally arise as the relation of an unusual occurrence and might be delayed until something arose to suggest it." *Baker*, 251 Mich at 326 (1930). The Court opined that a mere admonition by the victim's father was "as effective to promote delay as threats by a stranger would have been." *Id*.

I understand MRE 803A to be nothing but a codification of the old common law "tender years" rule, which the Supreme Court had held in 1982 did not survive the adoption of the then-new Rules of Evidence. *People v Kreiner*, 415 Mich 372, 377-378; 329 NW2d 716 (1982). So although I cannot find any cases directly under MRE 803A that are helpful in explaining what an

"other equally effective circumstance" might be, I think that *Baker* is not only relevant, but binding. Therefore, fear or some analogue thereof is not the only basis for excusing a delay under MRE 803A(3). Rather, MRE 803A(3) requires any circumstance that would be similar *in its effect* on a victim as fear in inducing a delay in reporting, not a circumstance that is necessarily similar *in nature* to fear. Indeed, the plain language of the rule explains that it must be an "equally *effective* circumstance," not necessarily a *similar* one. Nothing in the rule even requires that any "other equally effective circumstance" even must have been affirmatively created by the defendant.

The abuse in question occurred in mid-May to June 2008. At that time, KD was living with defendant, apparently because of some kind of involvement by Child Protective Services. KD did not return to living with her mother until the next January, approximately eight months later. KD was, moreover, approximately three and a half years old at the time of the abuse. KD's mother and the care house interviewer both explained that four-year-olds do not understand "concepts of time." The record indicates to me that KD may not have had a realistic opportunity to report the abuse for most of the year it took her to do so, the fact of the delay would not likely have been subjectively apparent to her, and, as *Baker* suggests, at her age KD would not necessarily have even understood why the abuse was something she should have reported to anyone. Even if she had appreciated the nature of the acts, it is common and basic knowledge of how human beings operate that shame and confusion are powerful motivators of silence.

This is not to say that I do not find the record disappointing. It certainly would have been better had some kind of explicit record been made directly explaining why KD's disclosure did not occur until approximately a year after the abuse took place. Had defendant objected to the admission of this testimony at trial, a record like this one might not be sufficient to permit the admission of KD's disclosure to her mother to stand. However, had defendant objected, the prosecution would have had an opportunity to make that record. I do not decide that question, though: as the matter is before us, our review of this *unpreserved* evidentiary challenge is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Consequently, reversal is not warranted merely because an error occurred, but rather "only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 774.

Under the totality of the circumstances of this case, I would find that plain error affecting defendant's substantial rights did not occur, and consequently, I would not reverse the admission of KD's disclosure of the abuse to her mother. However, because this matter must be remanded for a new trial in any event, I concur with the majority.

/s/ Amy Ronayne Krause