

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 188494

Genesee Circuit Court

BOYD GORDON PECK,

LC No. 95-052071-FC

Defendant-Appellant.

Before: Corrigan, C.J., Michael J. Kelly and Hoekstra, JJ.

MICHAEL J. KELLY (dissenting).

I believe that defendant was denied a fair trial because Officer Mack Rust improperly vouched for the complainant's credibility, and improperly referred to alleged similar criminal acts when he volunteered that the victim's sisters also complained of sexual abuse by defendant. Moreover, I find that defense counsel's failure to object to these highly prejudicial statements amounted to ineffective assistance of counsel. Therefore, I respectfully dissent.

Defendant argues that Officer Rust improperly vouched for the complainant's credibility by stating that he believed the complainant was telling the truth when she accused defendant of sexually assaulting her. Although defendant did not object to Officer Rust's testimony, which normally would preclude appellate review, I find that reversal is necessary because the error that resulted from Officer Rust's improper testimony was such that it could easily have affected the outcome of this case. See MRE 103(d); *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

It is improper for a witness to comment or provide an opinion on the credibility of another witness, because matters of credibility are to be determined by the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Nonetheless, this Court should carefully scrutinize even unresponsive answers made by police witnesses to determine whether they have ventured into forbidden areas which may prejudice the defense, because police witnesses are obligated to avoid this kind of behavior which is sometimes thought to be deliberate and tactical. *People v Stewart*, 199 Mich App 199, 201; 500 NW2d 756 (1993) (Connor, J., dissenting); *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983).

Despite the prosecutor's cautioning of Officer Rust not to state whether he thought the complainant was truthful when she accused defendant of criminal sexual conduct, Officer Rust testified that he thought she was telling the truth, stating, "I think she was telling the truth. . . . Her conduct and her behavior, I believe she was – she wasn't exaggerating a bit with what she was telling me." Thus, Officer Rust asserted a highly improper opinion regarding the complainant's credibility and the truthfulness of her accusations in general. This was plain error. Moreover, the error was compounded by the fact that Officer Rust was a trained police officer. Based on its knowledge of his qualifications, there was a grave possibility that the jury might have believed Officer Rust possessed superior faculties for assessing the veracity of the complainant's accusations, and thus deferred to his credibility determination. This is akin to the situation in which an expert witness opines that, based on his or her interpretation of an alleged child sexual assault victim's behavior, a sexual assault really occurred or that the alleged victim is credible. The Supreme Court and this Court have found testimony of this ilk to be improper. See *People v Peterson*, 450 Mich 349, 375-376; 537 NW2d 857, modified, reh den 450 Mich 1212; 548 NW2d 625 (1995); *People v Beckley*, 434 Mich 691, 725, 727; 456 NW2d 391 (1990) (Brickley, J.); *People v Reinhardt (On Remand)*, 188 Mich App 80, 81; 469 NW2d 22 (1991); *People v Draper (On Remand)*, 188 Mich App 77, 78; 468 NW2d 902 (1991). In this case, I find likewise, and further find that the error of admitting Officer Rust's testimony regarding the victim's credibility could have been decisive of the outcome of the case. The evidence against defendant was not overwhelming. The outcome hinged on the credibility of the complainant, a thirteen-year-old girl with a mild mental impairment. The prosecutor submitted no physical evidence of sexual assault. In a credibility contest between the complainant and defendant, there is a pronounced risk that the jury will "hang its hat" on a witness it views as impartial, or otherwise specially qualified to discern the truth. See *Peterson*, *supra* at 374, 376. The majority finds that the evidence against defendant was overwhelming because some of the testimony regarding whether he babysat for the victim during November 1994 conflicted. The question is whether defendant molested the victim, not whether he babysat her. On the relevant issue, there is little evidence other than the victim's account of events. I would not call this "overwhelming," especially in the case of a first time offender such as defendant.

Defendant also argues that his conviction should be reversed because Officer Rust improperly referred to alleged similar criminal acts when he volunteered that the victim's sisters also complained of sexual abuse by defendant. I agree.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. MRE 404(b)(1); *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993). After advancing that the alleged victim's behavior indicated that her allegations of sexual abuse were truthful, Officer Rust stated that the complainant's two sisters, both minors, had told him "the same thing . . . happened to them." Although other acts evidence might be admissible for certain purposes unrelated to showing the propensity of a defendant to commit a criminal act, see *id.* at 74, Officer Rust's testimony was offered for no other reason than to portray defendant as a habitual child molester, and was thus inadmissible pursuant to MRE 404. In light of the highly prejudicial quality of this testimony, I can not consider this error to be harmless. On the contrary, it was a bombshell from which there could be no recovery.

Defendant also advances that his attorney's failure to object to Officer Rust's testimony amounted to ineffective assistance of counsel. Because defendant failed to move for a new trial or an evidentiary hearing on this issue, this Court's review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Normally, this Court will find ineffective assistance of counsel where defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and where there exists a reasonable possibility that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Because Officer Rust's testimony concerning the complainant's credibility and defendant's other bad acts so clearly prejudiced defendant's right to be fairly and impartially tried, I do not hesitate to find that defense counsel's failure to object to such blatantly objectionable testimony fell below the prevailing standard of reasonableness. For the reasons stated above, I find that there was a reasonable possibility that, but for defense counsel's errors, the result of defendant's trial would have been different. Thus, I believe that defendant received ineffective assistance of counsel at trial.

I would reverse.

/s/ Michael J. Kelly