STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2000
v	No. 186969 Recorder's Court LC No. 94-007646
SPENCER ALAN FITZGERALD, Defendant-Appellant.	ON REMAND

Before: Markey, P.J., and Jansen and White, JJ.

MEMORANDUM.

This case is before us on remand[1] from the Supreme Court for "reconsideration of the similar acts issue, in view of the prosecutor's confession of error." This Court was also instructed to "determine whether the error is harmless. See *People v Gearns*, 457 Mich 170 [; 577 NW2d 422] (1998)." We affirm.

In light of the prosecutor's confession of error, we conclude that defendant's older daughter's prior statements were erroneously admitted as prior acts evidence through the older daughter's testimony and the youth bureau officer's testimony at trial. We turn, then, to the question of harmless error.

Since our initial decision of this case and remand by the Supreme Court, the Supreme Court has decided *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). *Lukity* overruled the test for harmless nonconstitutional error announced in *Gearns, supra*, cited in the Supreme Court's order of remand. Therefore, although the remand order cites *Gearns*, we apply the test set forth in *Lukity* as the correct statement of the current law governing whether preserved nonconstitutional error is harmless.

Lukity states:

> Therefore, the bottom line is that § 26 [MCL 769.26; MSA 28.1096] presumes that a preserved, nonconstitutional error is not a ground for reversal unless "after an

examination of the entire cause, it shall affirmatively appear" that it is more probable than not that the error was outcome determinative. [460 Mich at 495-496.][2]

Although the erroneously admitted evidence was highly prejudicial in that it informed the jury that the older daughter had accused defendant of raping her when she was about fifteen years old, (although the older daughter steadfastly denied the truth of the allegations at trial), we are unable to say that it is more probable than not that this testimony was outcome determinative. The complainant's testimony was clear and consistent. She reported the alleged incident promptly and sought assistance. Defendant offered evidence that the complainant may have been ill or dreaming. We are unable to conclude that it is more probable than not that the jury would have been unconvinced by the complainant's testimony had it not been bolstered by the older daughter's earlier, recanted allegations. Thus, although we would reverse under *Gearns* because the evidence was so *potentially* prejudicial that one cannot say that it is highly probable that the evidence did not contribute to the verdict, we affirm under *Lukity* because the complainant's testimony was such that the jury may have found it credible, convincing and sufficient to establish defendant's guilt beyond a reasonable doubt, and therefore defendant has not established that it is more probable than not that the error was outcome determinative.

Affirmed.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Helene N. White

[1] In this Court's initial opinion, *People v Fitzgerald*, unpublished opinion per curiam, (Docket No. 186969, issued 12/23/97), the majority concluded that the similar acts evidence was properly admitted, noting that defendant did not raise an argument under *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). The dissent concluded that the similar acts evidence was erroneously admitted and that the error was not harmless.

[2] The prior test, set forth in *Gearns*, *supra* at 203-205, required that the prosecutor prove that it was highly probable that the error did not contribute to the verdict.