

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE MICHAEL GRESHAM,

Defendant-Appellant.

---

UNPUBLISHED  
December 7, 2010

No. 293580  
Kent Circuit Court  
LC No. 09-001515-FC

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

M. J. KELLY, P.J. (*dissenting*).

I respectfully dissent. Because I conclude that the trial court erred when it permitted the physician who examined the complainant to improperly vouch for the complainant's credibility and that this error deprived defendant of a fair trial, I would reverse defendant's convictions and remand for a new trial.

**I. BASIC FACTS**

Phyllis Gresham testified that she was defendant's mother and that she had at one time had several foster children. She said that EBT and her half-sister, BLB, came to live with her at her home on Bemis in May 2007. She moved her family to a home on South Hampton in December 2007. Phyllis stated that the girls left her care in October 2008. In November of that same year, Bethany Christian Services contacted her about possibly taking the girls in again. Later that same week, EBT made the allegations at issue. Phyllis said she lost her foster care license, in part, because of these allegations.

EBT testified that she entered foster care when she was twelve. Her foster mother was Phyllis. She went into foster care with her sister BLB. They first came to live with Phyllis at her home on Bemis. However, they eventually moved to a home on South Hampton.

EBT stated that defendant started trying to "touch on me" at the home on South Hampton. He later came into her room, which she shared with BLB, took her clothes off, covered her mouth, and told her that "it wouldn't hurt." He then put his "private" in her "private." She said that he asked her if she liked it and she told him, "No" and "Get off me." She said this happened two or three times, that it hurt each time, and that each occurrence happened in winter.

EBT said that her sister was asleep in the room when defendant assaulted her. At one point she testified that she did not scream because defendant had his hand over her mouth and at another point she testified that she did scream and BLB heard her, at which point, "he ranned [sic] out the room." She admitted that she originally told an officer that she did not know if he put his penis in her vagina, but that was only because she was a "virgin before he did what he did" and she did not "know" what it felt like. She also said he never used a condom and never told anyone that he did. Other testimony established that she reported that he used a condom once, but took it off because it was too slippery. She also reported that he used a condom each time, dropped it by the side of the bed, and took it with him when he left. There was also testimony that she originally reported that it happened at least once in the summertime. When asked about the discrepancies in the timing, she stated that she did not have an exact date because it happened "so many times."

She said that she told Phyllis and POS, who was an older foster child that also lived in Phyllis' home. She did not tell her own mother because Phyllis told her that her mother would hurt someone and then she would never be able to go home. Phyllis testified that EBT never told her about any abuse. She also denied that she ever told EBT not to tell her mother.

EBT said that everything came out when POS told her cousin about the abuse at school and her cousin told her mother. JJ testified that she is EBT's cousin. She said she knew POS from school and that POS told her something about EBT. JJ said she then told EBT's mom.

POS testified that she lived with Phyllis at the home on Bemis and later at the home on South Hampton. Several people lived at the home on South Hampton; there were three other foster children in addition to her: EBT, BLB, and Nadia. Phyllis' two younger boys also lived in the house along with Phyllis' mother. She said that EBT shared a room with her sister, BLB, and Nadia.

POS stated that she began to have a sexual relationship with defendant at about the time that she turned seventeen. She said that she broke up with defendant because he had a "girlfriend on the side and he had a newborn son." POS said that EBT would come to her and tell her about boys and came to her about some guy, but made it seem as though there was nothing going on.

MT testified that she was EBT's mother and that she went to visit her children every week after they were placed in foster care. She said that EBT and BLB both complained that defendant's "baby momma" was beating them while they were staying at the Bemis residence. MT stated that she told someone with the department that handles foster care placements, but "they wouldn't do nothin'" so she went to the Bemis residence to take care of the problem herself. A judge eventually told her not to go to the foster parent's residence.

BLB testified that she and her sister left Phyllis' care and went back to their mother's house. They later learned that they might have to go back to Phyllis' home; she was mad about that. Although she was not lying now, she admitted that EBT once told her that they should say that defendant tried to touch EBT's private parts so that they would not have to go back to Phyllis' home. She said that she never saw defendant on top of her sister or anything like that and her sister never told her about any abuse.

Defendant testified on his own behalf and denied having had sexual contact with EBT.

Moncheri Virgins testified that she was defendant's fiancée and that they had dated since he was 17 or 18 and she was 16. She said that they broke up in February 2008, which was when he started having a relationship with POS. However, they got back together later that year and she had his baby. She said that EBT had previously falsely accused her of choking EBT. She said that EBT liked to tell stories.

Bernice Gresham testified that she was defendant's grandmother and that she lived with Phyllis. She said that she had a good relationship with EBT and was surprised to learn of the allegations. She stated that she caught EBT stealing from her and that when she confronted EBT, EBT lied to try and get out of it.

After hearing the evidence, the jury returned a verdict of guilty on two counts of criminal sexual conduct in the first degree and not guilty on one count.

This appeal followed.

## II. VOUCHING

### A. STANDARDS OF REVIEW

Defendant argues that the physician who examined the complainant improperly vouched for her credibility, and, in doing so, effectively testified that the sexual abuse actually occurred and that defendant was guilty. Defendant's trial counsel did not properly preserve this claim of error by an objection before the trial court. Therefore, the proper review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Roper*, 286 Mich App 77, 90; 777 NW2d 483 (2009). However, a trial court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id.* at 91.

### B. ANALYSIS

It is well-settled that a witness may not offer an opinion on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). And, as our Supreme Court has explained, this prohibition extends to expert witnesses who testify in criminal sexual conduct cases: "an expert may not testify that the sexual abuse occurred," may not "vouch for the veracity of a victim," and "may not testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995), citing *People v Beckley*, 434 Mich 691; 465 NW2d 391 (1990). An expert's testimony will amount to an impermissible lay opinion vouching for the veracity of the complainant where the expert's opinion was based solely on the complainant's history and emotional state, and was not based on "any findings within the realm of his medical capabilities or expertise[.]" *People v Smith*, 425 Mich 98, 112-113; 387 NW2d 814 (1986).

Here, Dr. Sarah Jane Brown testified that she examined EBT in February 2009 and found that she did not have any signs of physical injury. She stated that EBT had a rating of five on the scale for sexual maturity, which means that she had progressed through puberty and had adult physical features. For that reason, her genital structures had become “stretchy” and could produce “lubricant.” Dr. Brown stated that, with girls at her stage of development, only about half will show signs of penetration. Despite finding that EBT had a “normal” exam, Dr. Brown still diagnosed EBT with “probable pediatric sexual abuse.”

After giving her diagnosis, the prosecutor asked Dr. Brown to explain to the jury her reasons for the diagnosis; Dr. Brown stated that she reached her diagnosis on the basis of EBT’s “clear” and “detailed” statements to “our medical team”:

A. [EBT] made a clear and detailed statement to our medical team about contact by [defendant] that included him using his penis on her genital area. She gave detail that helped to support her statements. Her physical examination being normal did not discredit her statements that she had made, because again, many young girls do not show evidence of penetration on their physical exams.

Q. Go ahead.

A. [EBT’s] statements were also consistent with statements that she had made to the investigative team. There were no changes in her statements.

Thus, Dr. Brown effectively testified that she came to her diagnosis because she—and presumably her “team”—*believed* EBT. Indeed, Dr. Brown clarified that her diagnosis was in large measure the result of finding EBT’s statements to be consistent:

Q. And so do you look towards not only the statements that are made to Holly Bathrick and you, but you also do like a little—not investigation, but you compare what she told you to statements that were made to law enforcement investigators.

A. I do review statements that the child has made to other persons as part of my evaluation.

Q. And an underlying reason for your diagnosis was that these statements were overall consistent in nature.

A. Yes.

Dr. Brown’s testimony that EBT’s reports regarding the alleged assaults were consistent from one report to the next and that her examination results did not “discredit” her testimony was plainly improper. Although Dr. Brown could have testified that a normal result was not inconsistent with an actual assault, she did not limit her testimony in this way. Rather, she opined that there was “probable” sexual abuse because EBT’s statements were “consistent” from one telling to the next—that is, she improperly testified that sexual abuse occurred and improperly vouched for EBT’s credibility. This testimony was, as a matter of law, inadmissible. See *Peterson*, 450 Mich at 352.

However, as already noted, defendant's trial counsel did not preserve this claim of error by objecting before the trial court. Accordingly, this Court will not grant relief unless there was a plain or obvious error that affected defendant's substantial rights. *Carines*, 460 Mich at 763. An error affects a defendant's substantial rights if it prejudiced him—that is, affected the outcome of the lower court proceedings. *Id.* Finally, even if a defendant shows that there was a plain error that affected his substantial rights, this Court has the discretion to deny relief. Typically, this Court will only exercise its discretion to grant relief where the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

In this case, the error was plain; the trial court and trial attorneys should have immediately recognized that Dr. Brown could not properly offer an opinion regarding whether there was actual sexual abuse and could not offer an opinion regarding EBT's credibility. Further, under the totality of the evidence, and contrary to the majority, I conclude that the error likely affected the outcome of the proceedings.

This case involved a clear credibility contest between EBT and defendant. Defendant's trial counsel presented compelling evidence that EBT had a motive to fabricate the charges against defendant and actually suggested such a fabrication to her half-sister. Moreover, there were serious inconsistencies in EBT's statements as to the number, timing, and details of the alleged assaults. There were also inconsistencies regarding how the abuse came to light. Finally, there was evidence that EBT had fabricated stories in the past and a suggestion that EBT's mother had previously used allegations of wrongdoing to try and get her children removed from Phyllis' home. Unlike the majority, my review of the trial transcript does not reveal that the two investigating officers "provided testimony that *strongly corroborated* Dr. Brown's testimony that the victim had provided consistent statements." (emphasis supplied). Indeed, the officers admitted that the complainant's testimony was somewhat inconsistent, albeit that this was not uncommon in young victims.

To counteract the evidence tending to undermine EBT's credibility, the prosecutor tried to minimize the inconsistencies in EBT's statements and to highlight the consistent elements. Part of this effort included referring to the fact that Dr. Brown had found EBT credible. Indeed, in his closing, the prosecutor invited the jury to defer to Dr. Brown's superior ability to judge EBT's credibility:

But as to the core issues that you are to consider, [EBT] has been consistent, and I ask you, because we got in everything she said to the detective, everything she said to Holly Bathrick, and *just as Dr. Brown indicated, she looked at what [EBT] had said to the detective, what she had said to Holly Bathrick, to make her determination and her diagnosis as to what had happened to [EBT].* And I submit to you, ladies and gentlemen of the jury, when you look at the core facts here and the reasons why we're here, she has been consistent here. [Emphasis added.]

Given the close nature of the evidence and the fact that the jury actually acquitted defendant of one count, I must conclude that Dr. Brown's improper testimony and the prosecutor's improper use of the testimony, prejudiced defendant. As Justice BRICKLEY once noted, in cases of child sexual abuse, there is a clear danger that jurors, confronted with the daunting task of evaluating such heinous crimes, will defer to an expert:

The use of expert testimony in the prosecution of criminal sexual conduct cases is not an ordinary situation. Given the nature of the offense and the terrible consequences of a miscalculation—the consequences when an individual, on many occasions a family member, is falsely accused of one of society's most heinous offenses, or, conversely, when one who commits such a crime would go unpunished and a possible reoccurrence of the act would go unprevented—appropriate safeguards are necessary. To a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat. [Beckley, 434 Mich at 721-722 (opinion by BRICKLEY, J.).]

Further, because this type of error seriously implicates the fairness and integrity of judicial proceedings, I conclude that this is an appropriate case in which to grant relief. Therefore, I believe defendant is entitled to a new trial.

Although I have concluded that defendant is entitled to a new trial on the basis of this error alone, I further believe that the cumulative effect of the trial court improperly allowing testimony about the history of sexual activity and pedophilia among the male members of defendant's family also tipped the scales in favor of granting a new trial.

At trial, EBT's grandmother testified that she had known defendant's mother and her family for "many moons." She also stated that there had been a lot of "sexual conducts" in defendant's family. She testified that she had known generations of men in the family, and that "back in the days" some of the men in defendant's family had sexual intercourse with some of the boys, and that they touched each other. She stated that the behavior continued for years.

This testimony was irrelevant and inadmissible. See MRE 401; MRE 402. With this testimony, the witness implied that defendant—like the other men in his family—had a propensity to commit pedophilia and there was the possibility that the jury might have concluded that defendant acted in conformity with this propensity. Such character to conduct evidence is inadmissible as a matter of law. See MRE 404. And, although this testimony might not have warranted relief on its own, it exacerbated the prejudice caused by Dr. Brown's testimony. See *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003) (noting that the cumulative effect of several minor errors may warrant relief where none would warrant relief on its own).

I would reverse.

/s/ Michael J. Kelly