STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 21, 2011
v	No. 294631 Eaton Circuit Court
PATRICIA ANN ROBERTS, Defendant-Appellant.	LC No. 09-000213-AR

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

Defendant Patricia Ann Roberts was charged with fourth-degree child abuse, MCL 750.136b(7)(a), and convicted by a jury in the district court. After finding that the verdict was against the great weight of the evidence, the district court granted defendant's motion for a new trial. The prosecution filed an application for leave to appeal in the circuit court, and the circuit court granted the application and reversed the district court's grant of a new trial, reinstating defendant's conviction. Defendant appeals by leave granted the circuit court's decision. We reverse the circuit court's decision and reinstate the district court's grant of a new trial.

I

This case stems from injuries sustained by defendant's 23-month-old daughter K. On May 16, 2008, defendant and her husband Michael Roberts (K.'s father) went out for the evening and left K. with a babysitter. The babysitter was a 10-year-old neighbor who had babysat for K. once before. The babysitter's father testified at trial that he was returning from work at 6:30 p.m. when he saw his daughter pulling K. in a wagon on the sidewalk. He stopped his car and briefly talked to his daughter. He noticed that K.'s face looked a "little bit flushed or blushed."

The babysitter testified that she and K. watched a movie, went for a walk, played in the sandbox, and read books. At one point during the evening, K. grabbed a book and hit herself in the head with it, tossing her head back and forth. The babysitter grabbed and held K.'s face to stop her from doing that. The babysitter turned K.'s face toward her to examine it and make sure that K. was all right. K. was "kinda fighting" with the babysitter. The babysitter did not notice any injury to the child. The babysitter later told a police officer that she saw a red mark on K.'s face after they were playing in the sandbox.

At around 8:15 p.m., Maria Roberts, Michael's sister, came home. Maria was living with the Roberts while she attended Michigan State University. Maria testified that she found the babysitter in the living room watching a movie and K. was "hysterically crying" in the kitchen, calling out for her mother.[1] The babysitter told Maria that K. had been "crying for [defendant] all night." Maria noticed that K.'s face was red, "dotted," and "rashy almost." Maria asked the babysitter whether K. had been outside that day and whether the babysitter had put sunscreen on her. The babysitter "just kind of dismissed it." When the babysitter left, K. refused to give her a hug or say goodbye. On cross-examination, Maria admitted that in her statement to Grand Ledge Police Officer Anthony Gatewood and her written statement, she described K.'s face as appearing sunburned, and she did not mention it being "dotted or spotchy [sic]." Defendant and Michael returned home around 11:30 p.m. Maria did not mention anything to them about the redness on K.'s face at that time.

The next morning, defendant woke Michael to look at K.'s face, which had red marks. The marks appeared to be a rash, or "dottings," on both sides of her face with a little yellowing and bruising on the left side, according to Michael. Michael is a firefighter and paramedic. He and defendant were concerned about the redness in K.'s face. They decided to get other opinions before taking K. to the hospital.

Later that morning, defendant and Michael took K. to the fire station where Michael works. They asked paramedic Bob Lane to take a look at K.'s face. Michael asked Lane if he was "missing something here." Lane could not tell what was causing the redness. Defendant and Michael then went to the home of their friend, Kent Norlund. Norlund was also a firefighter and paramedic who worked with Michael. Norlund examined the red marks on K.'s face, which he described as "blotchy" and an "irregular shape." Defendant and Michael then took K. to the emergency room.

Gina Harrington-Gough, an investigator for Child Protective Services in Eaton County, was called to the hospital regarding K.'s injuries and suspected child abuse. She observed linear, deep purple and blue bruises, and red marks on K.'s face. Harrington-Gough testified that the bruises appeared to take the form of a hand print.

Officer Gatewood saw bruising on the left side of K.'s face, and redness and scratches on the right side of her face. He opined that the bruise on the left side of K.'s face looked like a hand print.

Officer Gatewood and Harrington-Gough interviewed defendant, Michael, and Maria on May 17, 2008. Defendant told them that on the previous night, she and Michael had left K. with a babysitter while they went out to dinner, shopping, and to a friend's house. Defendant said that when they returned home, she checked on K. and went to bed. It was dark in K.'s room, and

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[1] The babysitter admitted during cross-examination that when Maria came home, she was in the living room and K. was in the kitchen crying.

defendant did not notice any redness or marks. Defendant stated that K. awoke at 7:30 the next morning, and she noticed some redness on her cheeks, "little red dots."

After interviewing Maria, Officer Gatewood interviewed the babysitter, who at the time of an initial interview with Harrington-Gough had not mentioned that she held the child's face or that the child was crying in a different room. Officer Gatewood asked the babysitter to demonstrate what she did with K. regarding the book and holding the child's face. The babysitter put her hand to her own face to demonstrate. Officer Gatewood's report stated that the babysitter's hand was "almost an exact match" to the shape of the bruises on K.'s face. Officer Gatewood asked defendant to conduct the same demonstrative exercise and noted that defendant's hands were almost exact to the shape of the bruise as well. Officer Gatewood testified that defendant had "a little smaller" hands, and that the babysitter had "pretty long hands and fingers." Officer Gatewood did not write in any report that defendant's hand demonstration was an exact match.

K. was discharged from the hospital in good condition. The bruises went away in about four or five days. K. was never removed from defendant's home.

The emergency room report indicated that K. was not in any distress. She made eye contact and interacted well with her parents. The report stated that K. was active, playful, and friendly. Michael, Lane, and Norlund all testified that on May 17, 2008, K. appeared to be her normal, content self. She did not cry. She was not in pain or afraid. They all testified that defendant at all times behaved like and had the demeanor of a concerned parent who just wanted to find out what had happened to her daughter. Maria testified that she never saw K. shy away from defendant: "If anything, she ran to [defendant]." Both Officer Gatewood and Harrington-Gough testified that defendant was always cooperative and willing to talk to them.

Dr. Steven Guertin specializes in critical care pediatrics and is part of the child abuse evaluation team at Sparrow Hospital. He never examined K., but he reviewed hospital records and photographs. Dr. Guertin saw a "broad area of injury" just below the bridge of her nose and bruising along the cheek. The broad area of bruising and the linear components of the bruising were consistent with fingers or the spaces between fingers. Dr. Guertin stated that there was a semi-lunar pattern to the injury, which suggests a strike to the face. He also noted that the photographs showed petechiae, which is little red hemorrhages in the skin, caused when capillary beds rupture and pop under pressure. Dr. Guertin believed that injuries were caused by the child being slapped more than once, although some of the marks could have been made by somebody squeezing the face together. Dr. Guertin testified that a five- to ten-year-old could hit a child hard enough to leave bruises. He testified that the petechial hemorrhages would have appeared instantaneously, the redness from a slap can appear instantaneously or evolve over time, and while it is more difficult to estimate the onset of an injury based on bruising, because he saw no yellow coloration in the bruises as depicted in the photographs (adding the caveat that "you don't always see it"), the injury was probably under 18 hours of age.

Conflicting trial testimony came from Harrington-Gough and defendant. Harrington-Gough testified that she spoke with defendant at least five times during the course of her investigation. In the first interview, defendant had stated that she did not notice anything different about K.'s face on the morning of May 17 until about an hour after K. awoke.

Defendant had also stated that no one got out of bed that night. When Harrington-Gough spoke to defendant for the second time on May 17, defendant said that she had gotten out of bed during the night to tend to the dog. Defendant had forgotten to mention that fact earlier. Also during that second interview, defendant denied causing K.'s injuries. She said that she never grabbed K.'s face. Harrington-Gough offered defendant possible scenarios, such as an allergic reaction to a food or a chemical, or an accident.

Harrington-Gough testified that she spoke to defendant for the third time on May 17 by telephone that night. Defendant told her that K.'s face was red when she first awoke that morning, and that defendant had noticed it right away. Defendant also told Harrington-Gough that it was not unusual for K.'s cheeks to be red first thing in the morning. The redness would disappear after a short time.

Harrington-Gough testified that during the investigation, defendant asked whether child abuse charges would impact her potential employment as a teacher. At that time, defendant was seeking a job with the school district.

Harrington-Gough testified that throughout her investigation, defendant always denied causing K.'s injuries until June 18, 2008. On that day, Harrington-Gough asked defendant to come to her office. According to Harrington-Gough, defendant then admitted to grabbing K.'s face on the morning of May 17 in order to hold her still and put ointment and a band-aid on K.'s nose. (K. had a scratch on her nose from a fall on some steps a couple of weeks earlier.) K. was struggling and resisting defendant's efforts to apply the ointment and band-aid. Defendant became frustrated and admitted that she probably grabbed K.'s face too hard in an attempt to put the ointment on her nose. Harrington-Gough testified that defendant was tearful and upset, and appeared to be remorseful.

On cross-examination, Harrington-Gough acknowledged that on June 18, 2008, a decision needed to be reached in the case: "Well, a decision had to be made on the case whether or not to substantiate child abuse or not[.]" She testified:

> *Q.* So, she's invited by you to come, she's not with anyone else and, and you told her that—then you tell her that you gotta make a decision that, you know, she's either looking at no problems working with the system or she may be going to jail; did you tell her that?
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> *A.* I didn't tell her anything about going to jail, because I don't have any power or authority over anybody going to jail.
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> * * *
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> *Q.* [A]s you said you were testing out hypotheses. During this, did you test out the theory that, you know, did you, did you suggest to her maybe this was an accident?
>
> *A.* That what was an accident?
>
> *Q.* That—[K.'s] injuries, [K.'s] injuries.

A. We talked about the fact that she had stated she believed that it was an accident, that nobody meant to hurt [K.]. She'd actually stated that.

* * *

Q. Did you suggest to her that perhaps this occurred when she put the band-aid on?

A. No, she actually told me that the [sic] thinks that's when it happened.

* * *

Q. Okay. Did you ever give her suggestions that maybe I can live with these alternative hypothesis [sic] that you're talking about?

A. Well, I mean, we talked about the fact that because she was clear that she thought it was an accident and she said that it would never happen again, that she really did think that it was an accident. So, yeah, we talked about the fact that it could have been an accident and maybe she could have, you know, grabbed her face too hard.

Q. She denied slapping her, correct?

A. She did deny slapping her, yes.

At the close of the prosecution's proofs, defense counsel moved for a directed verdict. The district court denied the motion, stating:

> [T]his is a question of is there, are the proofs so weak that they would constitute a base to provide a directed verdict.
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> Basically, I'd have to find that there'd be no way that a rational jury could find the defendant guilty of this charge.
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> Mr. Clapp [defense counsel] makes an excellent argument in the sense he talks about that we have a ten year old child with apparently unusually long fingers who admits that on the day in question or the evening in question that she put her hands upon the child's face in the way that, in a way that would apparently, could potentially cause the type of injuries that are being complained of here. That's, that's a pretty compelling argument to not find proof beyond a reasonable doubt. But, that's not what you're asking me to rule on here. You're asking me to rule whether or not there is no way that a jury could find the defendant guilty.
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> The proofs do, particularly looking at Dr. Guertin's testimony, Dr. Guertin's testimony I thought was quite compelling. I thought that he obviously is, his expertise is well known and he is a very credible medical expert in this area. And, he indicated that the way that these injur—even though he didn't do

an examination of the, of the victim in the case, his, his testimony was I thought very compelling, that these injuries would have been caused by either slapping, and interesting, he said slapping on both sides of the face. Or, he said possibly it might have been caused by someone grabbing the face.

Well, . . . we did have the testimony from the young girl, the babysitter about grabbing the face. There was no testimony from the babysitter about slapping the face.

We do have the mother in close proximity to the victim. We have her one state—she gave apparently a series of statements to either the protective services worker or the officers who were doing the investigation. And after several situations of denial there was a statement that she made to, I believe one of the officers, she made a statement to the effect of, 'Okay, well to get this case over with, I'm gonna admit certain things'. That isn't something that certainly that I find to be the best, the best foundation upon which to start an admission of culpability. But she did make some statements as to her involvement in the case.

Based upon the fact that we have the testimony of the physician indicating that we are talking here about clearly child abuse, physical proofs being, I think prove beyond a reasonable doubt that there was physical, or that there was physical abuse. Second, that there is some question as to whether or not the babysitter's actions would have caused these specific injuries shown in the photographs. And then also the statement that was made at one point in time, I guess in the last interview to the officer, I do find that it would not be impossible for the trier of fact to find on behalf of the prosecution.

So, the motion for directed verdict is denied.

Defendant then testified. She has a bachelor's degree in education and a master's degree in educational technology. Defendant had been the director of a large daycare center in Lansing for four years. At the time of trial, defendant was teaching first grade. The previous year, she had been an elementary school substitute teacher. Defendant testified that before this case, she had never been charged with a crime. She had no history of involvement by Child Protective Services, and in her child care experience, she had no complaints or grievances filed against her.

Defendant testified about the events of May 16 and May 17, 2008. She testified that when the redness in K.'s cheeks did not go away shortly after K. awoke on May 17, she became concerned and asked her husband to look at it. Defendant called her doctor, but the doctor was unavailable because it was Saturday. K. was not in any pain. All morning she was happy and playful while they took her to be examined by Lane, Norlund, and the emergency room personnel.

Defendant testified that at the emergency room, a nurse apologetically told defendant that Child Protective Services had been called. Defendant knew that they are mandatory reporters, as was she, and it was a necessary process. Defendant testified that she told the nurse that she understood and "[t]hat's not a problem."

Defendant offered a different version of her last conversation with Harrington-Gough on June 18, 2008. Defendant testified that Harrington-Gough called her that morning and asked defendant to come to her office. She explained that she had to get the case closed because she had a 30-day deadline, and that they needed to meet.

Defendant testified that Harrington-Gough threatened her at that meeting. Harrington-Gough told defendant that she had to get the case closed. She said that she had been thinking about it, and asked defendant if "this could have been an accident." Defendant asked, "If what could have been an accident?" Harrington-Gough asked defendant if she could have accidentally grabbed K.'s face when she was on the counter. Defendant replied, "No." Defendant denied telling Harrington-Gough that she (defendant) was frustrated with K. and grabbed her face and squeezed her too hard.

Defendant testified that Harrington-Gough told her that they "need to figure out, we need to come to a conclusion together." Harrington-Gough gave defendant two options. The first was to "have somebody say that they did it," which "would be a category three case" that would "not put anybody on any central registry," and defendant "might have to have a parent counseling class one time, but then . . . would be done." The second option was to have Harrington-Gough get an extension from her supervisor and "walk over and show a judge these pictures, [with defendant going] to jail now." Defendant testified that Harrington-Gough was "very aggressive" with her, and she was scared. Harrington-Gough told defendant "this will not ruin your life. This is not a criminal case. You have to trust me on this."

Defendant denied telling Harrington-Gough that she became frustrated with K. or that she grabbed K.'s face. Defendant testified that she never grabbed K.'s face and did not cause her injuries. Defendant testified that the June 18, 2008, meeting at Harrington-Gough's office lasted from 10:10 a.m. until 12:30 p.m., and Harrington-Gough "convinced" defendant of an accidental injury. Defendant believed that if she agreed with Harrington-Gough, the case would be closed and there would be no consequences. Defendant testified that she "agreed [ ] with the story that [Harrington-Gough] had created." Harrington-Gough was doing the talking. Harrington-Gough posited that perhaps when defendant lifted K. onto the counter, she was going to replace her band-aid and put ointment on her nose and that K. was about to fall off and defendant squeezed her face to protect her from getting hurt even more. She asked defendant if that happened, and defendant had replied, "No, that didn't happen."

Defendant admitted that she expressed concern to Harrington-Gough about losing her job, and about being wrongly accused of child abuse. Defendant had told Harrington-Gough that she did not want to be accused of something that she did not do because she did not want to lose her job. When asked if she put ointment on K.'s face that morning, defendant did not remember.

The district court questioned defendant:

> *The Court:* . . . I want to make sure I understand your testimony as to part of your conversation with the caseworker, the last one on apparently the 18th.
>
> *[Defendant]:* Yes.

The Court: Okay. I want to make sure I have this right. So, you were saying that, or you were implying that there was a desire to get the case closed; is that correct?

[Defendant]: That is correct.

The Court: And, as I understand your testimony, you were presented with a scenario that would, in your, that you were led to believe would cause there to be no criminal prosecution but that if you simply agreed with the statement to the effect that you grabbed your daughter's face when she was attempting to fall off that somehow that if you agreed to that statement that the case would go away?

[Defendant]: She had mentioned that it would be considered an accidental injury.

The Court: Oh, an accidental injury. But that, and that even though you didn't say those specific words that you said words the case officer, to the caseworker to the effect that if that's what we need to close this, okay; words to that effect?

[Defendant]: We had clearly gone over the consequences of agreeing with her or making this case continue longer. In choosing the lesser of the two evils, I said to her, 'If that's what you need to say to close the case, I'm fine with that'. Because at that point there were not going to be any consequences . . . .

The jury found defendant guilty as charged of fourth-degree child abuse. Defendant moved for JNOV or a new trial, arguing that the verdict was against the great weight of the evidence. After articulating the applicable law, the district court granted the motion for a new trial. The court concluded that Harrington-Gough's testimony was significantly impeached:

I think everyone—from reviewing the briefs, I think everyone involved with the case agrees that the critical testimony in this case comes from Ms. Harrington who is the care worker, caseworker. There is little doubt that there was an improper touching of the child in this case. I think everyone basically agrees that there were red marks on the child's face; that, as the doctor indicated, would only have occurred if there had been improper touching, slapping I think was discussed as far as the probable way that these things were caused. So, I don't think that that's in dispute.

So, the heart of Ms. Harrington's testimony comes down to a conversation that she had with the defendant. And that's really where the heart of the case comes down to. Because quite frankly, there is no other evidence showing that the defendant did this, other than the statement given to Harrington.

So I have to determine whether or not one of these tests apply [sic]. And the test here goes to this question of was Harrington's testimony significantly impeached.

At the close of the People's proofs, of course, I had heard Harrington's testimony, and based upon her testimony I found that a jury could reasonably find the defendant guilty. At that point we had not heard the impeachment testimony that came from Ms. Roberts, the defendant.

I find Ms. Harrington's testimony, after listening to the testimony of Roberts, to be pretty incredible. Because here we got a person, we've got Roberts has talked, apparently talked to her on several occasions, cooperated with the police and had never admitted to anything. And there was no evidence of any sort indicating that she was the person who had inflicted the injuries on the child. At that point there was no, there was basically nothing against her. And the position of Ms., Ms. Harrington was that the defendant basically suddenly turned around a hundred and eighty degrees and admitted to this story that the child was somehow thrashing around while she was trying to put a band-aid on her nose and that she got frustrated when the child was trying to put a band-aid on her nose and that she then grabbed her face to, with too much strength or too hard.

That was the testimony that Ms. Harrington presented. That she had miraculously turned a hundred and eighty degrees in her testimony, even though there was no, any other evidence indicating that she was, that she was the person that did this.

And I was willing to let the matter stand as far as the directed verdict. Then we hear the testimony from Roberts. Roberts, to her credit, and I think it, it goes to her credibility, she didn't attempt to deny that she made this statement to the worker. But she testified that she'd made that because the caseworker said they had to close the case, that if she didn't admit to this scenario, which she said that she, that Harrington gave to her, that she was gonna put her in jail and she was gonna take her child away from her. That was Roberts' testimony.

So, looking at . . . these two bits of testimony between Harrington and Roberts—I've been on the bench a long time now—I find that the position taken by Roberts much more in line with human behavior than testimony that was given by Harrington.

People who, people don't just instantly change their positions unless, on something as important as this, unless they are, there is something that makes them do it. Nothing had changed as far as the case against Roberts. There was no additional reason for her logically to change her position. And, I find it much more credible that this statement was made under improper duress by the caseworker.

So, I do find that Harrington's testimony was seriously impeached by the testimony of Roberts and I find Ms. Harrington's testimony to be less than credible.

The district court then considered whether there were "other uncertainties and discrepancies" under the analysis in *People v Lemmon*, 456 Mich 625; 576 NW2d 129(1998), and focused in part on the evidence that the babysitter had caused K.'s injuries:

> Three or four different things come into play. First of all, and probably the most important, we have, I guess what you would call the classic situation of there's another suspect in this case. And that is the babysitter. The babysitter was watching the child the night, or the evening supposedly that the incident happened. The child, the babysitter is of relatively tender years, ten years old or something like that.
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> During the first time that the police officer interviewed the babysitter, she indicated that nothing wrong had gone on. On the second situation, the babysitter said that the child was hitting herself with a book, was shaking her head back and forth and then the babysitter admitted to the police officer that she had grabbed the baby's face in exactly the same place and exactly the same pattern as the injuries appear.
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> And it's true that the officer is not a doctor. Certainly, that's not true. But, let's face it, police officers see a lot of stuff.
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> So, also, so there is significant testimony that it was the babysitter who was watching the child the evening before the red marks occurred that she admits that she did the improper touching.
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> We also have the testimony of the aunt. Now, let's understand, it is an aunt. So, the aunt is a little bit suspect. I mean, come on, it's a family member. But, the aunt presented testimony saying that she came home, that the child was sitting on the floor of the kitchen sobbing, that the babysitter was in the living room watching television, that the child would not give the babysitter a hug goodbye when she left and so on. In and of itself, not a massive amount, but certainly a make wait [sic] argument as far as the situation.
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> So, there certainly is an uncertainty and a discrepancy created in the fact that probably there's a stronger case against the babysitter than there is against Ms. Roberts.
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> There also is a situation where a number of people testified that Mrs. Roberts acted as a loving, caring parent throughout the day in question. Took the child to see some paramedics, took the child to the hospital. Apparently all indications were that everyone was interacting appropriately. In and of itself, is that a massive thing? Probably not a massive thing, but certainly something that weighs in, weighs in her behalf.
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> There also comes down to this situation of the dispute between the doctors. The doctors seem to say that this would have been caused by a slap. That was the doctor's position. The doctor said that this was something that could be done by a child of the age of the babysitter. But he said specifically this was

caused by a slap. We don't have any evidence from anybody that anybody slapped this child. That has to raise a certain, certain question.

And again, we're talking about what the law requires. And possibly this was an issue with the jury. A reckless, this reckless act has to be something, or to have child abuse in the fourth degree you have to have a reckless act that caused physical injury. The only evidence that Ms. Roberts caused this injury was the statement made to Harrington that said, you know, I grabbed her face, held it too hard while I was trying to put a band-aid on and clean her nose.

I have a hard time buying that that's a reckless act.

The district court determined that the verdict was against the great weight of the evidence, set aside the verdict, and ordered a new trial:

So, it is my job to determine whether one of the tests . . . as applied in Lemmon applies to this case. So as to undermine a witness's testimony and that there's a real concern that an innocent party may be convicted and/or that a, there would be a manifest in justice [sic] to allow the verdict to stand.

And it can't be a situation where the evidence is just evenly balanced. It has to be some—because we've all been through trials here. I mean, there are times, there are many times when it's a close call. So a judge can't disturb a jury verdict if it's a close call. It has to be a substantial issue and there has to be a real concern that an innocent person has . . . been convicted, and that the proofs weigh heavily in the defendant's favor.

I've been on the bench a long time. I've never considered doing this. And I have a lot of respect for the juries.

But I do find that Harrington's testimony was heavily impeached. I do find that to a very extraordinary extent that there were substantial uncertainties and discrepancies included in this case.

I have three choices. I can let the verdict stand; I can vacate the verdict and enter a plea [sic] of not guilty; or I can vacate the verdict and call for a new trial.

I have a lot of respect for the juries.

I'm gonna take the middle course. I'm gonna set aside the verdict and I'm gonna order a new trial.

That's all.

The prosecution filed an application for leave to appeal in the circuit court. The circuit court granted the application and reversed. The circuit court credited the district court for not lightly deciding to set aside the jury verdict, but concluded that it misapplied the proper standard:

> In this case, although the trial judge engaged in the appropriate inquiry of whether the testimony had been seriously impeached so as to allow a setting aside of the verdict, in doing so he misapplied the appropriate standard. Much to his credit, the district judge was conversant in the standard of *Lemmon* and referenced more than one case detailing that standard. Contrary to the prosecutor's assertion, he did approach his decision "with great trepidation and reserve . . ." as Justice Taylor admonished judges to do, calling setting aside a jury verdict "something that's rare as hen's teeth, so to speak" and announcing that in twelve years he has never made such a determination despite often disagreeing with jury verdicts since, under Michigan law, "this is something that is not to be done lightly." He acknowledged that he could not "sit as a thirteenth juror" while reciting the standard that the evidence must "preponderate heavily against the verdict and that a serious miscarriage of justice would otherwise result." He noted that such is only the case in one of a certain set of circumstances, one being "where a witness's testimony has been seriously impeached and . . . the case marked by uncertainties and discrepancies." However, when he ultimately applied *Lemmon* to the facts of the case, he misapplied the "seriously impeached" standard and improperly engaged in a weighing of the credibility of the witnesses after having already admitted, as the trial judge did in *Lemmon*, that a reasonable jury could find the defendant guilty in ruling on the motion for a directed verdict.

The circuit court concluded that the district court erred in setting aside the jury's verdict, because the district court had denied defendant's motion for a directed verdict at the close of the prosecution's case:

> The reasoning of his opinion evidences that he erred by misapplying the "serious impeachment" standard since he found competent evidence to convict the defendant at the close of the prosecutor's proofs but later overturned the jury's decision on that evidence without deciding that the evidence had been totally deprived of all of its probative value. The *Lemmon* Court instructed trial judges that the credibility of the testimony is a decision for the jury and that a judge may not set aside a verdict on the basis that contradictory testimony impeached the testimony probative of the defendant's guilt "unless it can be said that [the] directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it. . . .' " In the instant case, the testimony set Ms. Harrington-Gough's account of her conversation with the defendant against the defendant's contrary account. The trial judge had already concluded on the motion for a directed verdict that Ms. Harrington-Gough's testimony, in combination with Dr. Guertin's testimony and the circumstantial evidence, was substantial enough to establish a jury decision in favor of the prosecution. However, after hearing Ms. Robert's testimony, he found that [Ms. Harrington-Gough's testimony] had been seriously impeached and set aside the jury's verdict on that basis. His assessment of Ms. Harrington-Gough's testimony was not that it had been deprived of all probative value and could not be believed by the jury but that it was "less than credible." Such a conclusion cannot justify setting aside a jury verdict in a case like this where the court had already determined that the evidence was sufficient to support a verdict for the

> prosecution and amounts to the court improperly weighing the credibility of witnesses. As noted in Gillespie's *Michigan Criminal Law and Procedure*, "[w]here there is sufficient evidence to convict, under the reasonable doubt standard . . . new trials on the basis of the weight of the evidence should be exceedingly rare." Consequently, since the district judge already found that the evidence was sufficient to support a jury verdict in the prosecution's favor and he did not later believe that the supporting evidence had been deprived of all probative value but only that it drew into question the credibility of the contradicting witness's testimony, he was therefore obligated "to leave the test of credibility where statute, case law, common law, and the constitution repose it 'in the trier of fact.'"

II

This Court reviews for an abuse of discretion a trial court's grant or denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "A mere difference in judicial opinion does not establish an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

> A trial court's determination that a verdict is not against the great weight of the evidence will be given substantial deference by the appellate court. A trial court's determination that a verdict is against the great weight of the evidence will be given somewhat less deference to insure that the trial court has not invaded the province of the jury. In either situation, however, "'it is incumbent upon a reviewing court to engage in an in-depth analysis of the record on appeal.'" *Bosak* [*v Hutchinson*, 422 Mich 712, 737; 375 NW2d 333 (1985)], quoting [*People v Talley*, 410 Mich 378, 399; 301 NW2d 809 (1981)] (Levin, J., concurring). [*Arrington v Detroit Osteopathic Hosp Corp*, 196 Mich App 544, 560; 493 NW2d 492 (1992).]
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> [T]he function of the trial court and the appellate court are not identical. The trial court's function on a motion for a new trial is to determine whether the overwhelming weight of the evidence favors the losing party. Our function as an appellate court is to determine whether the trial court abused its discretion in making such a finding. We do not determine whether we would have reached the same conclusion as the trial court after a review de novo of the trial court's findings. [*Id*. at 564.]

A new trial may be granted on some or all of the issues if the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). Such a motion should be granted only when "the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon*, 456 Mich at 627. Determining whether a verdict is against

the great weight of the evidence requires review of the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds in *Lemmon*. If the evidence conflicts, and in the absence of exceptional circumstances, the question of credibility should be left for the trier of fact. *Lemmon*, 456 Mich at 642-643. But a new trial may be justified if a witness's testimony was seriously impeached and the case was marked by uncertainties and discrepancies. *Id*. at 644.

A person is guilty of fourth-degree child abuse if his or her omission or reckless act causes physical harm to a child. MCL 750.136b(7)(a); *People v Gregg*, 206 Mich App 208, 210; 520 NW2d 690 (1994). Physical harm is "any injury to a child's physical condition." MCL 750.136b(1)(e); see also *Gregg*, 206 Mich App at 211. The statute does not define "reckless," but this Court has defined the term by reference to dictionary definitions for its plain, ordinary meaning, including careless, inattentive, without caution, and indifferent to or utterly unconcerned about consequences of some action. *Gregg*, 206 Mich App at 211-212.

Our analysis of the record in this case leads us to conclude that the district court did not abuse its discretion in granting defendant's motion for a new trial. The undisputed evidence established that the child suffered a physical injury in the form of redness/bruising on her face. Dr. Guertin opined that the appearance of the child's face indicated that someone had slapped her face or possibly grabbed and squeezed her face. He stated that the redness on the child's face would have appeared immediately after she was slapped, while the bruising would have appeared sometime after the slapping occurred.

The prosecution's case against defendant rested on the testimony of Harrington-Gough. Harrington-Gough testified that she interviewed defendant several times and that while initially defendant denied slapping the child or causing her injuries in any other way, eventually (on the day on which a decision had to be made as to whether child abuse charges could be substantiated), defendant suggested that she could have grabbed the child's face and held it too hard while trying to put a band-aid on the child's nose.

In granting defendant's motion for a new trial on the ground that the verdict was against the great weight of the evidence, the district court noted that while it had denied defendant's motion for a directed verdict, it had not yet heard testimony from defendant when it did so.[2] The

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[2] The prosecutor's assertion that the district court abused its discretion by granting defendant's motion for a new trial because earlier it had denied defendant's motion for a directed verdict is without merit. Defendant moved for a directed verdict at the close of the prosecutor's proofs. Therefore, the court was required to consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecutor and determine whether a rational trier of fact could conclude that the essential elements of the charged offense had been proven beyond a reasonable doubt. *People v Szalma*, 487 Mich 708, 721; 790 NW2d 662 (2010); *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). A trial court may not determine the weight of the evidence or the credibility of the witnesses in deciding a motion for a directed verdict. *Mehall*, 454 Mich at 6. However, in deciding a motion for a new trial on the ground

court noted that according to defendant's testimony, Harrington-Gough suggested that perhaps the child's injuries occurred when defendant attempted to place a band-aid on the child's nose, and that defendant agreed to the scenario because Harrington-Gough suggested that the consequences for doing so would be minimal and also implied that she could have defendant sent to jail and take her child if she did not agree. The court found that Harrington-Gough's testimony that defendant suddenly admitted causing the child's injuries after having repeatedly denied doing so to be "pretty incredible" and "less than credible," and that defendant's testimony "seriously impeached" the testimony given by Harrington-Gough.

However, the district court also relied on other evidence to find that the case was marked by uncertainties and discrepancies. The court observed that the babysitter, who had initially indicated nothing wrong had gone on, later admitted to the investigating officer that the child was hitting herself with a book and shaking her head back and forth, and that the babysitter grabbed the child's face to stop the behavior. The court noted that according to the investigating officer, the babysitter admitted that she had grabbed the child's face in exactly the same place and exactly the same pattern as the injuries appear, as well as the doctor's testimony that the injury could have been caused by a child of the age of the babysitter. The court also noted that Maria, the child's aunt, testified that when she arrived home during the time the babysitter was present the child was sitting on the floor of the kitchen sobbing, the babysitter was in the living room watching television, and the child would not hug the babysitter goodbye. The court observed that "there certainly is an uncertainty and a discrepancy created in the fact that probably there's a stronger case against the babysitter than there is against [defendant]." The court noted that two paramedics who looked at the child before she was taken to the hospital testified that defendant and the child were acting normally, and that defendant acted as a loving, caring parent throughout the day in question. And finally, while the injury indicated that the child had been slapped, there was no evidence "from anybody that anybody slapped this child. That has to raise a certain, certain question."

The circuit court erroneously concluded that the district court's denial of defendant's motion for a directed verdict compelled the denial of defendant's motion for a new trial on the ground that the verdict was against the great weight of the evidence. Moreover, contrary to the circuit court's conclusion, the district court did not conclude merely that Harrington-Gough's testimony was "less than credible." Rather, the court found that Harrington-Gough's testimony had been seriously impeached by the testimony given by defendant, and that, based on the entire body of evidence, the case was marked by discrepancies and uncertainties as demonstrated by the other evidence, in accordance with *Lemmon*, 456 Mich at 644.

The district court applied the correct standard when deciding defendant's motion for a new trial on the ground that the verdict was against the great weight of the evidence, and

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that the verdict was against the great weight of the evidence, the trial court must review the entire body of proofs. *Herbert*, 444 Mich at 475. Questions of credibility ordinarily are left for the trier of fact, but issues of credibility can come into play under certain circumstances. *Lemmon*, 456 Mich at 642-643. Thus, in this case, the court's denial of defendant's motion for a directed verdict did not compel a denial of defendant's motion for a new trial.

properly granted the motion. The circuit court improperly concluded that the district court abused its discretion by granting the motion.

Reversed and remanded to the district court for reinstatement of its order granting defendant a new trial. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens