

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
October 30, 2018

v

JAMES VICTOR HACKLER,  
Defendant-Appellant.

No. 338561  
Gogebic Circuit Court  
LC No. 2016-000251-FC

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Before: SAWYER, P.J., AND STEPHENS AND GADOLA, JJ.

PER CURIAM.

STEPHENS, J. (*Dissenting*).

I respectfully dissent from the majority and would reverse the conviction in this case and remand to the trial court for the appointment of an expert on false memory. I agree that the majority stated the legal standard for the appointment of an expert. They correctly note that while a prayer for expert assistance need not be so specific as to state both the relevance and the likely effect of such assistance, it must be specific enough to establish a connection to the issues presented in the specific case. Crucial to the analysis of the need for an expert in this case are the following:

- 1) The age of the complainant when she was assaulted (four years' old);
  - 2) The partial disclosure of wrongful conduct at age four;
  - 3) Intervening psychological treatment;
  - 4) Subsequent trauma involving the defendant and the complainant's mother;
- and,
- 5) A fulsome disclosure at trial.

In this instance, the trial court's reasons for rejecting the request illustrate why the expert was needed. The trial court equated false memory with repressed memory. The literature reveals that not all false memory is repressed. Additionally, not all false memory is the product of intentional planting whether by lay persons or treaters. However, life experience, including

psychological care, can affect memory. See generally Loftus, *Make Believe Memories*, 58(11) *American Psychologist* 867 (November, 2003).

Dr. Elizabeth Loftus noted in *Semantic Integration of Verbal Information into Visual Memory*, 4(1) *Journal of Experimental Psychology: Human Learning and Memory*, 19 (1978), that participants in a study viewed a film and reported its contents immediately afterwards, the equivalent of disclosure. Weeks later, they again recounted what they saw quite differently but with equal sincerity. A cursory review of the literature reveals information about how memory is affected by time and myriad experiences, including therapy and maturing. See Otgaar, *Eliminating Differences in Children's and Adults' Suggestibility and Memory Conformity Effects*, 53 *Developmental Psychology*, 5 (May, 2017). The fact that the complainant revealed exposure to pornography immediately at four years of age, but testified years later regarding myriad details of abuse, should have led a legal expert—who knew what he did not know—to seek the guidance of experts. It was error for a judge learned in law, but a layperson on psychology and memory to deny the expert consult.

/s/ Cynthia Diane Stephens