STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRETT ANTHONY CROYLE,

Defendant-Appellant.

UNPUBLISHED
October 17, 2019

No. 344450
Macomb Circuit Court
LC No. 2016-001212-FC

Before: FORT HOOD, P.J., and SAWYER and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

Because I conclude that the testimony of the forensic interviewer was improperly admitted, I respectfully dissent. The testimony of the interviewer constituted both hearsay and improper vouching. And in a case without physical evidence or contemporaneous witnesses it should not be deemed harmless. This conclusion is required by the Supreme Court's recent decisions in the consolidated cases, *People v Thorpe*, 504 Mich ___; ___ NW2d ___ (2019) (Docket No. 156777) and *People v Harbison*, 504 Mich ___; ___ NW2d ___ (2019) (Docket No. 157404).

It has become common in police investigations of alleged criminal sexual conduct involving child victims for the child to undergo a forensic interview in which a trained interviewer attempts to determine the truth about the allegations. Typically, the interviewer reaches a conclusion whether the child's allegations are true and advises the police of her findings. The forensic interview seeks to determine whether the allegations are likely true by use of an informal setting, open-ended questions, the testing of alternative hypotheses and other techniques. I am not aware of a definitive study determining the accuracy of the conclusions reached by the interviewer. Nevertheless, it is an important investigatory tool for the police and aids the prosecution in charging decisions.

However, recognizing that a forensic interview is a useful investigatory tool is not grounds to admit evidence at trial about the interview, the child's statements or any opinion from the interviewer regarding the truth of the allegations. There are two obvious reasons. First, the child's statements made during the interview are classic hearsay—out-of-court statements which

a party, here the prosecution, seeks to admit for the truth of the matter asserted. There is no hearsay exception that provides for the admission of statements made by a child during a forensic interview. Second, a forensic interviewer may not vouch for the credibility or truthfulness of the witness. Vouching may be explicit (e.g., "the child was telling the truth") or implicit (e.g., "the child was open and forthcoming," "the child's statements were consistent with the allegations," or "other potential explanations were explored and rejected"). Whatever the precise form, vouching is improper because the jury may view the forensic examiner as a learned and reliable reporter who uses special interview methods to discern truth from falsehood. Indeed, in this case, the examiner testified that the purpose of the interview was to "obtain the truth of what may or may not have happened." Given that the interviewer is presented as an expert[1] with special tools to obtain the truth, it is difficult to see how a jury would not be swayed by testimony suggesting her opinion of the child's credibility.

The Supreme Court recently addressed this question in the consolidated cases of *Thorpe* and *Harbison*. In *Thorpe*, an expert testified that children only lie about alleged abuse in 2 to 4% of cases and that there are only two scenarios in which a child might lie, neither of which were present in that case. *Id*. at ___; slip op at 7, 26. Despite an instruction that the expert's testimony should not be considered as proof that the child was truthful or that the crime was committed, *id*. at ___, slip op at 8, the Supreme Court reversed, stating, "[A]lthough [the expert] did not actually say it, one might reasonably conclude on the basis of [the expert's] testimony that there was a 0% chance [the complainant] had lied about sexual abuse." Thus, the Court rejected the notion that such testimony is barred only when the interviewer explicitly tells the jury that the child was truthful. The Court stated that the expert's testimony, even if not explicit, "for all intents and purposes vouched for [the complainant's] credibility." *Id*. at ___; slip op at 26.

In *Harbison*, *Thorpe's* companion case, an examining physician diagnosed the child with "probable pediatric sexual abuse" based solely on the child's statements during an exam that did not reveal any physical findings. *Id*. at ___; slip op at 2, 11-12. In a decision that reads much like the majority opinion in this case, this Court held that the doctor's opinion did not constitute vouching because the doctor did not explicitly state that she found the child credible, but instead only testified that the victim had provided a history that was "clear, consistent, *or* descriptive." *Id*. at ___; slip op at 17 (quotation marks and citation omitted). The Supreme Court reversed, concluding that admission of the testimony was plain error. It held that the testimony was "clearly . . . within *Smith's* holding that an examining physician cannot give an opinion on whether a complainant had been sexually assaulted if the 'conclusion [is] nothing more than the doctor's opinion that the victim had told the truth.' " *Id*. at ___; slip op at 29, quoting *People v Smith*, 425 Mich 98, 109; 387 NW2d 814 (1986). The Court held "that examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury." *Id*. at ___; slip op at 2.

[1] In effect, if not literally so.

Finally, the Supreme Court made clear that such an error is unlikely to be harmless, concluding "that this error is far more pernicious than a mere evidentiary error. Rather, this error strikes at the heart of several important principles underlying our rules of evidence. . . . [I]t invaded the province of the jury to determine the only issue in the case." *Id*. at ___; slip op at 31-32. Also relevant to this case was the Court's acknowledgment that the vouching testimony is even less likely to be harmless when the expert testifies that her methods allow for a special ability to determine truthfulness. *Id*. at ___; slip op at 30. *Thorpe* is only the latest Supreme Court opinion that addresses the admissibility of forensic interviews and their results. The Court has repeatedly overruled decisions of this Court that permitted testimony from expert witnesses that had the effect of bolstering a child complainant's testimony. See e.g., *People v Beckley*, 434 Mich 691, 727; 456 NW2d 391(1990) ("[A]ny testimony about the truthfulness of this victim's allegations against the defendant would be improper because its underlying purpose would be to enhance the credibility of the witness."); *Smith*, 425 Mich at 109 (discussing *People v McGillen*, 392 Mich 278; 220 NW2d 689 (1974), in which the Court determined that the trial court wrongly admitted the doctor's testimony that his "findings" were "consistent [with] the history given by the victim" because such testimony "was nothing more than the doctor's opinion that the victim had told the truth.").

Returning to the facts of this case, the forensic interviewer,[2] Heather Solomon, testified for 10 pages of transcript as to the reliability of her interviewing technique. She said that the purpose of the forensic interview is "*to obtain the truth* of what may or may not have happened." (Emphasis added). She explained that she tells the child "that in this room we can only talk about the truth, not anything that's a lie" and that she "go[es] over different examples of . . . truth and lie just to make sure that [the child] understand[s] . . . ." She told the jury that the interview technique is designed to double check the child's statement, stating that she "ask[s] questions to make sure we know what the child is referring to, and I don't want to make any guesses or assumptions." She testified that the forensic interview "team" included a police officer and sometimes a prosecutor.

Although the interviewer never explicitly stated that the child accused defendant of criminal sexual conduct, she described being aware of the allegations against defendant before the interview, stated that the child confirmed and expanded on those allegations and that she "tested" alternative hypotheses (e.g., that someone else was the person who abused the child), all of which she found to be unfounded after speaking with the child. In her testimony, Solomon also stated that forensic interviews, like the one she conducted, are considered to be the most reliable method of testing claims of abuse when there is no physical evidence or third party witnesses. Anyone listening to (or reading) her testimony would conclude that as part of the investigation the police referred the child for interviewing and that the interview objectively confirmed the allegations.

[2] The witness described herself as the "lead forensic interviewer" of Care House. Defense counsel sought to question her about the reasons she was no longer with Care House but the trial court sustained the prosecution's objection to that questioning.

While consulting with a forensic examiner may be a good investigative technique, the mere fact that such an interview took place and the prosecution proceeded with the charges makes clear that the interviewer concluded that the allegations were true, including one that had not been previously described by the child,[3] or at minimum did not advise the police against seeking charges. In other words, the fact that Solomon stated that she is not a "human lie detector" does not cure the fact that she testified that she conducted the interview in a manner scientifically designed to elicit the truth and, either explicitly or implicitly, that at the conclusion of the interview she concluded that the child's accusations were true.

And, given that defendant was on trial, the obvious implication was that Solomon must have reported to the police that the child was truthful or as she put it in her testimony, that the child was "forthcoming with information and [was] engaged throughout the interview" and that the child's response to the "testing" was "telling." She further testified that the complainant did not identify any other potential assailant despite the interviewer "test[ing] for such other allegations." Further, the investigating officer testified that he relied on the Care House interview as evidence of guilt.[4] The inescapable conclusion is that Solomon found the child's allegations credible. In sum, like the expert witnesses in *Thorpe* and *Harbison*, Solomon's testimony had the effect of vouching for the child's credibility.

The prosecution also argues that it was nonetheless proper to have Solomon explain the integrity of the interview technique because the defense opened the door by claiming that Solomon somehow misled the child into making these allegations. However, the defense's opening statement did not claim that the child had been improperly influenced by the forensic interview.[5] And had defendant made such a claim in his case-in-chief, the prosecution properly could have had Solomon testify *in rebuttal* about the nature of forensic interviews and how she took measures not to influence the child. But without the defense opening the door Solomon's testimony had no relevance other than to assure the jury that the accusations were vetted and confirmed by a forensic interviewer and so highly likely to be true. In closing argument the prosecution returned to the interview and its importance to the case stating: "[T]hese are things that . . . the State of Michigan has designed for the child to feel comfortable, child-friendly

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[3] Detective Jason Dawidowicz testified that he first learned about the child's allegations of penetration at the Care House interview.

[4] Detective Dawidowicz testified that police do not interview children and therefore relied on the observation of the Care House interview. Like Solomon, Dawidowicz confirmed that not all interviews result in a disclosure of abuse, but the detective did not testify that there have been cases in which the allegations were "confirmed" by Care House but charges still not brought. The clear implication is that Solomon told the police that the interview confirmed the allegations.

[5] Defense counsel briefly mentioned the Care House interview but did not suggest that the child had been improperly influenced during that process. In any event, it was not the defense that initially told the jury about Care House counsel. In the prosecution's opening statement, Care House was described as a place where "a child, whether it is physical abuse [or] sexual abuse, goes there to talk about in a natural setting open ended questions to try to get to the truth."

manner, open-ended questions, clarifying questions . . . . [T]heir purpose is to get the child to feel safe to talk about if and [sic] anything that happened. [Solomon] even tested . . . these alternative hypotheses . . . ."

The prosecution's response has been to try to define a theory of relevancy that does not violate the rules of evidence, but its explanations that "we were informing the jury of the steps in the investigation" and that Solomon was a "res gestae" witness are arguments of last resort and are so vague as to allow the introduction of almost any inculpatory evidence despite the fact that the evidence is not admissible under the rules of evidence. The mere fact that the police employed an investigative technique does not transform hearsay or vouching testimony into admissible evidence; for that the prosecution must identify an applicable hearsay exception and a proper basis to allow the jury to hear an expert opine that the accusations against defendant were confirmed by the child—particularly where that expert claims that the interview was conducted using the most up-to-date interview techniques and that nothing was learned to contradict the allegations the police are investigating. Police often use polygraphs as part of their investigation but that fact, let alone the result of that exam, is not admissible. Similarly, the prosecution may not introduce evidence of what was discovered during an illegal search even though that search was part of the investigation. The prosecution's claim that any investigative activity trumps the rules of evidence is wholly without merit.

Thus, Solomon should not have been permitted to testify as to the child's statements, the manner of testing used or her conclusions about the child's veracity, whether explicit or implicit. That leaves only the bare fact that the police sent the child to a forensic interviewer, but that fact alone has no probative value. What the child said during that interview is hearsay and there is no applicable exception; the statements were not given in the context of medical care, MRE 803(4), and they did not describe either a present sense impression, MRE 803(1), or an existing mental or physical condition, MRE 803(3). The *only* relevance of the Solomon's testimony was to explain to the jury that, after using a prescribed, state-endorsed technique for getting children to tell the truth, no facts came to light that were inconsistent with the charges against defendant and that the child was "forthcoming and engaged" during the interview.

Following *Thorpe* and *Harbison*, I do not see how this error can be deemed harmless. This case was a credibility contest. That is, there was no physical evidence and no third party eyewitness to any misconduct. Solomon's impermissible vouching may have been even more damaging than the expert testimony in *Thorpe* and *Harbison* considering that she was a professional specially trained to determine if the child's allegation is true. Accordingly, I

conclude that Solomon's testimony more likely than not affected the outcome at trial and therefore would set aside defendant's conviction and remand for a new trial.[6]

/s/ Douglas B. Shapiro

[6] Defendant also objected to testimony from a physician and a lay witness describing the complainant's statements at the emergency room. These statements, unlike those of the forensic interviewer, were properly admitted. The child's statements to the doctor were admissible under the tender-years exception as it was her initial disclosure. MRE 803A. The prosecution also introduced testimony from the child's fictive grandmother who overheard the conversation between the child and the doctor; she recounted essentially the same statements as the doctor. As already noted, these statements were admissible as they were the child's first disclosure.