STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 15, 2013
v	No. 311267 Grand Traverse Circuit Court
DENNIS ELIOT MILLER, Defendant-Appellant.	LC No. 11-011261-FC

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

GLEICHER, J. (*dissenting*).

The prosecution charged that defendant committed five acts of criminal sexual conduct involving his stepdaughter, DC. DC's credibility figured prominently throughout the trial. The jury's decision to acquit defendant of three charges suggests that DC's testimony was not entirely convincing.

The trial court permitted the prosecution to bolster DC's credibility by introducing as rebuttal evidence two videotaped forensic interviews conducted by a police detective. According to the majority, defense counsel opened the door to the introduction of these otherwise inadmissible videotapes by cross-examining the detective concerning her use of the word "okay" during the interviews. The trial court reasoned that defense counsel "suggested that the detective's manner of interviewing the victim violated proper protocol and may have improperly influenced the victim's answers."

The forensic interviews constituted profoundly prejudicial inadmissible hearsay that did not qualify as competent rebuttal evidence. Rather, the interviews served a wholly improper purpose: to unfairly bolster DC's courtroom testimony. Because this case rose or fell on DC's credibility, the erroneous admission of the interviews cannot be deemed harmless. I respectfully dissent.

I. FACTS AND PROCEEDINGS

At trial, the prosecutor presented five witnesses: DC, her mother, her grandmother, her aunt, and detective Dawn Wagoner, who performed the forensic interviews. DC's mother

disbelieved portions of DC's testimony. DC's grandmother offered inadmissible hearsay evidence which the majority finds harmless.[1] DC's aunt described the circumstances in which DC's allegations first surfaced. Wagoner testified that she interviewed DC twice pursuant to a forensic interview protocol and proceeded to describe in detail the protocol's "eight steps." The prosecutor asked Wagoner no questions concerning the substance of the interviews. The relevance of Wagoner's testimony is entirely unclear. Regarding Wagoner, the trial court later expressed: "I don't know why she was called."

Defense counsel cross-examined Wagoner regarding whether she utilized a different forensic technique with adolescents than she did with "an 8 year old or a 7 year old." This line of questioning led to Wagoner's admission that she had "not been qualified as an expert" by the court. Defense counsel then inquired as follows:

> *Q.* As such, when you do your forensic interviews I notice you lead off every question with okay, qualifying your question to the answer to the last question?
>
> *A.* It's simply linguistic, sort of like if you are talking, um, it's more to fill the void, nothing that's a conscious effort.
>
> *Q.* Is that something that's a forensic interview technique?
>
> *A.* No, it's not. It's a pattern I happen to have. I tried to correct that, it's just a pattern that I have.
>
> *Q.* I see. Is that something you should do or not in a forensic interview?
>
> *A.* It's a pattern that is consistent. It's not in any way leading, so.
>
> *Q.* But it essentially when you say, okay, to begin your next question, it authorizes the response to the last question, doesn't it?
>
> *A.* I would argue that, no, it's an affirmation.
>
> *Q.* I don't want to argue, I want to –
>
> *A.* It's an affirmation that I'm hearing what you're saying.
>
> *Q.* All right. So, okay, I hear what you're saying . . . .

Defense counsel turned to a discussion of the dates of the interviews and attempted to discredit information revealed during the second interview. At the conclusion of the cross-examination he returned to Wagoner's use of the term "okay:"

[1] The majority correctly observes that the jury acquitted defendant of the charges related to the grandmother's challenged testimony.

Q. Is it possible children are sometimes manipulated?

A. As far as what they say?

Q. Correct

A. It certainly is possible.

Q. And, you responding "okay" to every one of their responses, are you somewhat manipulating the child?

A. I am not.

Q. At least that's your belief?

A. I am not manipulative, yes.

Q. You are not manipulating in your belief?

A. That's correct.[2]

The prosecutor raised no objections to defense counsel's inquiries regarding Wagoner's use of "okay." Nor did the prosecutor establish through Wagoner that her use of the term conformed to proper interview techniques. When the cross-examination concluded, the prosecutor initiated the following colloquy:

> *[Prosecutor]*: Your Honor, at this particular time, based on the attacks on the forensic interview of Detective Wagoner, the fact she uses okay in her questioning, I would ask that either the defense not be allowed to argue this was not a forensically sound interview, both of them, or the jury be allowed to view that, I be allowed to admit both the DVD's of [DC's] interview and the jury be allowed to view those on their own.
>
> *The Court*: You would like me to do either A or B and you're willing to give the defendant his choice?
>
> *[Prosecutor]*: Just being fair.
>
> *The Court*: [Defense counsel].

[2] This line of questioning was ill-considered and lacked foundation. Had defense counsel done any homework regarding forensic interviewing techniques, he would have learned that the term "okay" is considered neutral rather than approving or reinforcing. See Sparling et al, *Effects of interviewing behavior on accuracy of children's responses*, 44 Journal of Applied Behavior Analysis 587 (Fall 2011).

[Defense Counsel]: I haven't argued it wasn't forensically appropriate.

The Court: Well, actually you questioned her about why she kept saying okay after each of [DC]'s answer. And, you implied – indeed actually stated, that reinforced and validated what [DC] said. Therefore, what [DC] is saying here is a product to some degree of the positive reinforcement and encouragement that this officer gave [DC] during that interview, that's the way I understood it.

[Defense Counsel]: I didn't mean to do that, she's not been qualified as an expert. She indicated she's not an expert, and I clearly agree she's not an expert.

[Prosecutor]: I can certainly qualify her as an expert.

[Defense Counsel]: That being said, I don't intend to argue it wasn't forensically appropriate.

[Prosecutor]: Your Honor, I think it's already done.

[Defense Counsel]: So, I choose A.

The Court: What if we take note maybe it was later in the afternoon and they probably didn't hear what he was saying. What do you want to do tell them? What do you want to do?

[Prosecutor]: I move for the admission based on the argument that he's made.

The Court: You want to admit the disks, which are video, and of course audio.

[Prosecutor]: Video and audio.

The Court: Of Detective Wagoner's two interviews with —

[Prosecutor]: [DC].

The Court: [DC].

[Defense counsel].

[Defense Counsel]: I think it's inappropriate, I didn't have an opportunity to cross-examine the interviews. It's like admitting a police report, it's hearsay testimony.

[Prosecutor]: Your Honor –

The Court: Well, it is hearsay, at least unless there is some other exception that I'm not immediately grasping. But, it is hearsay and of course I'm

assuming you want some kind of instruction to the jury that it's not to be considered.

But, the problem is, you have – I mean the argument has been made to the jury that this detective in her questioning has encouraged and some of [DC's] testimony here, and maybe it's testimony here all together, is due to the affirmation of this detective in the questioning. And, if you make the argument then how does the jury evaluate whether this detective's questioning inappropriately encouraged or supported [DC's] testimony, unless they can see it?

[Defense Counsel]: Judge, what other reason would you call this woman to testify, other than to vouch for her testimony as to the expertise of how many times she's been involved. There is no – Ms. Wagoner's a very nice individual but has nothing substantive to add to this case.

The Court: Well, okay. Remember, I just work here.

[Defense Counsel]: I understand.

The Court: Nobody said I object to Detective Wagoner testifying because I read her police report so she has nothing to add to this.

[Defense Counsel]: And, that is correct, I did not object. But she has nothing to add to it, the questions.

The Court: And, she has not testified about the specifics of what [DC] said to her.

[Prosecutor]: She has not, your Honor. She testified to the interview protocol she used.

[Defense Counsel]: And, that was the door opened up by the prosecuting attorney is the protocol that was used, I simply asked questions about it. What other reason to call –

[Prosecutor]: He attacked the protocol she used.

The Court: Attack[ing] the protocol is not quite like attacking the Constitution, but.

[Prosecutor]: He didn't attack protocol, he attacked Detective Wagoner.

[Defense Counsel]: Then why call her?

The Court: You questioned her in order to imply that [DC]'s testimony here was to some degree a product of the way she was questioned and validated with "okay" after every answer you are saying. I haven't seen the interview, of course.

[Defense Counsel]: I understand. But why would this witness be called but for the prosecutor to try to show what validity all of this has by the amount of expertise she has, I've got a right to cross-examine that.

The Court: I agree. I don't know why she was called. You had police reports. If you objected you could have objected.

In addition, the defense in any criminal case has not one defendant but two, the other is the investigating officer. I think we should normally put on the verdict form an additional thing, investigating officer guilty or not guilty but that's not what happed here.

[Defense Counsel]: No.

The Court: But that's the way it usually is.

The Court: Anything further anybody wants to say?

[Defense Counsel]: No, your Honor.

[Prosecutor]: No, your Honor.

The trial court admitted the DVD recordings of the interviews, reasoning in relevant part:

> Detective Wagoner has not at this particular time testified about the substance of what [DC] told her and no objection was made to her testifying at all. . . . [Defense counsel] questioned her about the way the questioning of [DC] was conducted. He made reference to, and I have not seen these interviews I don't know if this was true or not, it was implied after every answer [DC] gave about things her stepfather had done or she said he had done she would say "okay" kind of mannerism, but that – and, [defense counsel] questioned about could that not be, and in the presence of the jury so it's argument, could that not be interpreted by [DC] as a reaffirmation or encouragement of what she's saying and encouraging her to say more and therefore the story that [DC] is telling would be in some way a result of the encouragement that this detective gave her during those interrogations. And, there was testimony here that would be a result to some degree of that encouragement, that argument has been made. And, now the question is, how does the jury evaluate whether or not the way this interview was conducted may have contributed to the allegations testified here by the complaining witness, [DC], or not. And, the only way I think that could be done is to see the disks, so I'm going to admit them. It seems to me anything said in there by [DC] about what happened or claims made in the disk is still hearsay, so I'm going to give the jury an instruction. And, this is, *I'm saying this with a straight face because we all know this isn't going to have much effect, but it's the best I can,* an instruction that whatever [DC] says about the substance of what happened is hearsay, is inadmissible. And, I'll even explain that [defense counsel], no one was there on the other side to even question her it's therefore admitted *only for the purpose of them to evaluate whether the way the interview*

was conducted contributed or may have contributed to the allegations that [DC] has made here in Court. [Emphasis added].

Defense counsel again objected to admission of the DVDs. The trial court nevertheless formally admitted them and instructed the jury that the recordings "are actually hearsay" that "normally" would not be admitted as evidence, "but because there has been a question raised as to the way the interview was conducted, specifically what Detective Wagoner had said[,]" the jury could "evaluate whether or not the way the interview was conducted contributed to the allegations that have been testified here today[.]"

The jury watched the first DVD for approximately one hour before being dismissed for the day. Defense counsel suggested that "the jury's heard enough to see if the investigative interview was appropriately done or not," and the prosecutor agreed. The next day, the judge informed the jury that it had viewed enough of the DVD to determine "whether the way the interview was conducted may have contributed or caused some of the testimony that [DC] gave here." The court then reminded the jury that because the recordings had been admitted into evidence, the jury could watch them in the jury room. Not surprisingly, the jury requested a television "to see the DVD" almost immediately after deliberations commenced.

II. THE PARAMETERS OF REBUTTAL EVIDENCE

"Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996) (citations omitted). "Rebuttal is limited to the refutation of relevant and material evidence — hence evidence bearing on an issue properly raised in a case." *People v Bennett*, 393 Mich 445, 449; 224 NW2d 840 (1975). Permitting rebuttal on a collateral issue, "i.e. rebuttal on an issue not material to the resolution of the case[,]" constitutes error. *People v Hernandez*, 423 Mich 340, 352; 377 NW2d 729 (1985).

The DVDs constituted improper rebuttal evidence for three reasons. First, the conduct of the interviews lacked any relevance to the issues presented in the case. This collateral and immaterial topic should not have been subject to any rebuttal. Second, even assuming that defense counsel's artless cross-examination somehow "opened the door" to rehabilitation, the *substance* of the interviews was not probative of Wagoner's forensic technique. Third, the "cure" for defense counsel's wholly ineffective foray into irrelevancy was far more prejudicial than probative, and the trial court's failure to conduct any analysis under MRE 403 compounded the error.

III. WAGONER'S USE OF "OKAY" CONSTITUTED AN IRRELEVANT, COLLATERAL ISSUE

The majority holds the DVDs admissible as rebuttal of defense counsel's "sugge[stion] that the detective's manner of interviewing the victim violated proper protocol and may have improperly influenced the victim's answers." *Ante* at 2. According to the majority, the DVDs were "properly admitted" as "responsive to a theory developed by the defense." The majority's analysis elides the irrelevancy of Wagoner's direct testimony and the collateral nature of Wagoner's interview methods. Rebuttal affords an opportunity to expose false or misleading

evidence presented by an adversary. It does not authorize the introduction of irrelevant, unfairly prejudicial evidence concerning secondary facts.

Evidence is relevant if it has "any tendency to make the existence of [a] fact that is of consequence" to the action "more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence possesses two components: materiality and probative value. *People v Feezel*, 486 Mich 184, 197; 783 NW2d 67 (2010).

Material evidence relates to a fact of consequence to the action. *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). "A material fact need not be an element of a crime or . . . defense," but at least must fall "within the range of litigated matters in controversy." *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 667; 819 NW2d 28 (2011) (quotation marks and citations omitted). "Probity refers to the tendency of proffered evidence to make the existence of a fact at issue more or less probable. *People v Mills*, 450 Mich 61, 68; 537 NW2d 909 (1995). Alternatively stated, probative value refers to "the tendency of evidence to establish the proposition that it is offered to prove." 1 McCormick, Evidence (7th ed), § 185, p 995.

"Whether a matter is collateral or not depends upon whether direct evidence to establish it could be introduced." *Hall v Iosco Co Bd of Rd Com'rs*, 2 Mich App 511, 514; 140 NW2d 761 (1966). "A matter is deemed 'collateral' if the matter itself is irrelevant to establish any fact of consequence in the litigation, i.e., irrelevant for a purpose other than mere contradiction of the prior witness's in-court testimony." 1 McCormick, Evidence (7th ed), § 45, p 299.

Wagoner's forensic interview protocol bore no relevance to this case.[3] The details of the forensic interview protocol did not make it more likely that DC had been sexually abused. The trial court acknowledged the irrelevance of Wagoner's testimony when it asserted: "I don't know why she was called." Notably, the prosecutor never attempted to explain the relevance of Wagoner's testimony. Further, neither defense counsel's opening statement nor his cross-examination of the preceding witnesses had placed at issue the propriety of Wagoner's interview technique. Thus, Wagoner's forensic interview technique was wholly immaterial to any fact of consequence in the case. This subject also lacked any probative value, as the conduct of the interviews bore no logical connection to the honesty of DC's courtroom testimony.

Defense counsel's cross-examination concerning a derivative and equally irrelevant fact — Wagoner's use of "okay" — similarly failed to place in controversy any fact of consequence. Whether the word "okay" encouraged DC's responses during the *interview* lacked relevance to DC's veracity at the *trial*, except by creating an improper inference that because she said it before, it must be true.[4] Contrary to the trial court's interpretation of the cross-examination,

[3] In my view, the prosecutor presented Wagoner's testimony solely to signal that DC had "passed" the detective's test for veracity. This backdoor vouching, particularly by a witness who spontaneously conceded that she had "not been qualified as an expert," was offered for an improper and singular purpose: to bolster DC's credibility.

[4] Prior consistent statements attain relevance when they *predate* a charge of recent fabrication or improper influence or motive. *People v Rodriquez (On Remand)*, 216 Mich App 329, 331-332;

defense counsel never suggested or implied that DC's *courtroom* testimony was "a product to some degree of positive reinforcement and encouragement" during the interviews. Rather, counsel confined his questions to the conduct of the interviews. By doing so, he did not mislead the jury concerning an issue of consequence to the case.

Moreover, defense counsel's questioning could hardly be characterized as effective or advantageous to the defense. Wagoner ably refuted counsel's implied criticism of her use of the term "okay," and the prosecutor refrained from any redirect examination on this subject. Because the cross-examination failed to directly or indirectly weaken Wagoner's irrelevant testimony, the trial court abused its discretion by admitting collateral rebuttal as rehabilitation.

IV. THE DVDS DID NOT CONSTITUTE PROPER REBUTTAL

Generally, rebuttal evidence either specifically contradicts evidence presented by an adversary or serves to cure an opponent's introduction of inadmissible evidence.[5] For either purpose, the evidence introduced in rebuttal must be responsive to the damage done. "Opening the door is one thing. But what comes through the door is another." *United States v Winston*, 447 F2d 1236, 1240 (CA DC, 1971) (quoting the trial court with approval). "[T]he test of whether rebuttal evidence was properly admitted is . . . whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *Figgures*, 451 Mich at 399. "[E]vidence admitted under the 'open door' theory does not give an unbridled license to introduce otherwise inadmissible evidence beyond the extent necessary to remove and unfair prejudice which might have ensued from the original evidence." *Savoy v State*, 64 Md App 241, 254; 494 A2d 957 (1985).

Defense counsel's questioning sought to discredit the manner in which Wagoner conducted the forensic interviews. According to the prosecutor, the questioning created a misleading impression that the interviews were not forensically sound. Logically, rehabilitation of the witness required evidence countering counsel's implication that Wagoner's technique – her use of the term "okay" – did not subtly encourage exaggeration or dishonesty. Specific contradiction of the allegedly misleading inference that use of the term "okay" tainted the validity of the interviews called for evidence addressing proper interview methodology. The DVDs did not speak to that issue. The content of the recordings did not supply the jury with information relevant to whether Wagoner's use of the term "okay" constituted proper forensic technique.[6]

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549 NW2d 359 (1996). Defendant alleged that DC had a motive to fabricate — she wanted to avoid being sent to live with her father in Texas. DC's statements, including the forensic interviews, were made *after* that motive arose.

[5] For an extensive and illuminating discussion of rebuttal evidence see Gilligan & Imwinkelried, *Bringing the "opening the door" theory to a close: The tendency to overlook the specific contradiction doctrine in evidence law*, 41 Santa Clara L Rev 807 (2001).

[6] Nor were the DVDs admissible to rehabilitate DC's courtroom testimony, assuming that the cross-examination called her credibility into question. "Prior consistent statements may not be

Assuming that Wagoner's interview language bore any relevance to this case — which it did not — viewing the DVDs shed no light on whether Wagoner should have refrained from using the term "okay." This question could have been answered by an expert witness. Indeed, on redirect examination the prosecutor could have qualified Wagoner as an expert and elicited her testimony that use of the term "okay" raised no forensic concerns. Inadmissible hearsay evidence merely displaying the results of Wagoner's use of the term "okay" was unresponsive to defense counsel's challenge. It did not assist the jury in determining whether use of the term "okay" violated forensic interviewing rules. Without expert guidance regarding whether certain prompts or responses could call into question the reliability of a child's answers, the DVDs themselves merely reinforced DC's courtroom testimony.

V. INTRODUCTION OF THE DVDS DENIED DEFENDANT A FAIR TRIAL

Allowance of rebuttal by specific contradiction rests on a notion of fairness. Because of one party's conduct, previously inadmissible evidence becomes relevant.

> The "opening the door" doctrine is really a rule of expanded relevancy and authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue, or (2) inadmissible evidence admitted by the court over objection. Generally, "opening the door" is simply a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue. [*Clark v State*, 332 Md 77, 84-85; 629 A2d 1239 (1993).]

However, the doctrine "is not a panacea; it does not permit a party to introduce inadmissible evidence merely because the opponent brought out some evidence on the same subject." *People v Manning*, 182 Ill2d 193, 216; 695 NE2d 423 (1998). "The doctrine is to prevent prejudice and is not to be subverted into a rule for injection of prejudice." *Winston*, 447 F2d at 1240.[7]

The majority asserts that the trial court "carefully considered whether [the interviews] were more prejudicial than probative." I respectfully disagree. The trial court conducted no balancing whatsoever under MRE 403. Had the court attempted to articulate how the prosecution was damaged by the cross-examination, it would have recognized that any harm done to the prosecutor's case was insignificant. And even assuming the interviews possessed relevance, any misimpression left by the cross-examination would have been easily remedied by

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admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited . . . . The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told." *Tome v United States*, 513 US 150, 157-158; 115 S Ct 696; 130 L Ed 2d 574 (1995).

[7] It bears emphasis that the prosecution inserted the irrelevant subject of the interviews into this case. Having done so, the prosecutor should not have been permitted to complain that defendant brought out a possible weakness in Wagoner's testimony. After introducing irrelevant evidence and withholding objection to equally irrelevant cross-examination, as a matter of fundamental fairness the prosecutor should not gain the ability to introduce otherwise inadmissible hearsay.

brief redirect examination or, as the prosecutor herself suggested, an instruction that interview mechanics were not relevant to the case. The trial court's failure to balance the relevance of the DVDs against their substantial and unfair prejudice constitutes an abuse of discretion.

"Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The DVDs were not probative of whether Wagoner's use of "okay" tainted DC's interview statements or any other fact of consequence. On the other hand, the DVDs unfairly and powerfully bolstered DC's credibility. The trial court specifically acknowledged that the attempted limiting instruction "isn't going to have much effect." Given that this was a credibility contest from start to finish and that defendant prevailed as to three of the five charges, admission of the DVDs was far from harmless. I would reverse defendant's convictions and remand for a new trial.

/s/ Elizabeth L. Gleicher