STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
(Sawyer, P.J., Murphy, C.J., and O'Connell, J.)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

JOHN M. MUSSER,

Defendant-Appellant.

Supreme Court Docket No. 145237
COA Docket No. 301765
LC Docket No. 10-05943-FH

REPLY BRIEF – APPELLANT

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Leave to appeal having been granted to him on September 26, 2012, John M. Musser filed his brief on appeal on November 21, 2012, the due date. The prosecution filed its response on January 31, 2013. This is the reply permitted Mr. Musser by MCR 7.306(C), assuming this Court accepts the prosecution's response and this reply. The Court must agree to accept them because both were filed late; the prosecution's response was a month late; Mr. Musser's reply is a few days late. (Appropriate motions have been filed. Mr. Musser does not object to the prosecution's being granted, and asks that his be, as well.)

I. STATEMENT OF FACTS AND PROCEEDINGS

Although its Counter-Statement of Facts does not, as required by MCR 7.306(A) and 7.212(D), "point[] out" any inaccuracies and deficiencies in Mr. Musser's Statement of Facts, the prosecution's response states some contrary facts, and insinuates others, suggesting inaccuracies. Those suggestions need to be addressed, because, uncorrected, they could bear on the prosecution's efforts to circumvent the error in this case.

1. The prosecution incorrectly states that [redacted] told a friend what had happened just "a few weeks later" (PA 1)[1] and that her "conversation" with her mother occurred "in May 2009" (PA p 2), which, if true, would have been very soon after she says she was assaulted (158a). But, [redacted] testified that "I told my mom like a year later" (161a-39, line 24),[2] and confided to a girlfriend just "a couple of weeks" before then (161a-40, line 5), which necessarily was also a year later. The girlfriend placed the conversation when she and [redacted] were in the [redacted] grade; they were in the [redacted] grade a few weeks after the alleged incident (164a-67, line 9). [redacted] parents

[1] All parenthetical references herein to "PA p___" are to the prosecution's response filed on January 31, 2013. Such references to "D p___" are to Mr. Musser's initial brief.

[2] The parties' stipulated joint appendix ends with p 157a. Mr. Musser's supplemental appendix, authorized by MCR 7.307(B)(2), begins, therefore, with p 158a.

took her to the police on May 11, 2010 (101a-116, lines 17-21), which, they both testified, was just a couple of days after her conversation with her mother (168a-82, lines 1-16), placing it in May 2010, not in May 2009. Finally, in closing argument, the trial prosecutor acknowledged that [redacted] had "remained silent for a year (176a-32, line 5)."

Mr. Musser is not asserting that the delay by [redacted] in reporting the supposed sexual abuse proves that her report was mistaken or untrue. He appreciates that such delay is not necessarily inconsistent with a truthful report, but neither is delay necessarily irrelevant. It can undermine a complainant's credibility and his or her memory. More significantly, quick reports tend to intuitively enhance credibility. Since the prosecution's fall-back position is that any improper vouching in this case was harmless error, it is important to correct its Statement of Facts so as not to overstate its case by substantially accelerating [redacted] disclosure.

2. The prosecution also incorrectly reports that [redacted] and her family "did not see the defendant and his wife very often" after May, 2009 because, the prosecution intimates, "[redacted] 'was never very interested' and was very resistant" to doing so (PA 1-2). While [redacted] mother did testify that "we did not" continue to see the Mussers on a regular basis after May 2009 (166a-76, lines 12-15), her family, including [redacted] did, thereafter, attend the Mussers' daughter's First Communion (169a-85, line 1); spend time with them at a cottage the following August (167a-76, lines 6-7); celebrated a birthday at the Musser home in December, 2009 (169a-86, lines 9-14); and, later, went skiing with the Mussers (161a-40, lines 13-18).

3. The prosecution also incorrectly insinuates that appellate review of it was not preserved because Mr. Musser's objection to the evidence at issue "was not presented timely" (PA p 2). The prosecution quotes such a complaint by the trial court (*Id.*); describes Mr. Musser's objection as "last minute" (PA p 15); and reports that it was "presented on the last

working day before the start of trial" (PA p 17). While the trial court did so complain (87a, lines 9-10), its grumbling was unfounded. The objection was argued on a Friday (84a); the DVD was not presented as evidence until the following Tuesday (100a, 103a-124). Objecting days beforehand was early, not untimely, or even last minute. An objection need not be made any sooner than evidence is offered. *Greathouse v Rhodes*, 465 Mich 885; 636 NW2d 138 (2001), *rev'g* 242 Mich App 221, 231-236; 618 NW2d 106 (2000).

4. Finally, the prosecution states that "[f]ollowing the playing of the interview [of Mr. Musser], the trial court gave a cautionary instruction" (PA p 3). That is true, but potentially misleading. The instruction was not given until an hour after the interview had been played and after a recess for lunch (123a-141-143). The prosecution's brief can be read as stating that a cautionary instruction was given immediately after the interview was shown to the jury. That is why the traditional oath requires "the whole truth," not just "the truth." In *People v Jenkins*, 450 Mich 249, 263; 537 NW2d 828 (1995), discussed below, this Court observed that such a "belated instruction" is "concern[ing]."

II. STANDARD OF REVIEW

The prosecution also incorrectly dilutes from *de novo* to abuse of discretion the standard of review to which the issue raised by this appeal is subject. The prosecution assumes in effect that this Court has already answered the legal questions which it has posed to the parties. Abuse of discretion is the standard to be used when a trial court has chosen from among outcomes previously determined to be permitted by law. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An initial determination, which is what is being undertaken in this case, of whether there can be multiple outcomes, and under what circumstances, is a preliminary question of law which is reviewed *de novo*. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607

(2010); *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003); and *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

III. PRESERVATION OF ISSUE

The prosecution also intimates, inappropriately and incorrectly, that the issue of vouching was not preserved for review because Mr. Musser's trial counsel objected to the evidence at issue as "irrelevant" or "too prejudicial," not because it was vouching. Asserting a failure of preservation is inappropriate, first of all, because the issue is barred by MCR 7.302(H)(4)(a). The Court of Appeals had required a showing of plain error, bespeaking a conclusion that the issue had not been preserved. Mr. Musser's application to this Court asked for review of that decision, but this Court did not include it in the issues to be addressed. In addition, the prosecution never lodged in the Court of Appeal or in response to Mr. Musser's application here the complaint it now makes, precluding it for want of preservation. *Kuznar v Raksha Corp*, 481 Mich 169, 180, fn 31; 750 NW2d 121 (2008).

More significantly, the prosecution's assertion is plainly incorrect because the issue of vouching was plainly preserved for review. Vouching is legally irrelevant, *People v Peterson*, 450 Mich 349, 363; 537 NW2d 857 (1995), and/or violates MRE 403, *id.*, at 374-375, which means that trial counsel's initial "irrelevant" and "too prejudicial" objections were sufficient. But, Mr. Musser's trial counsel said more; their objection was "spot on." They complained that one of the interrogating police officers was "playing the human lie detector" on the DVD and that presenting that DVD unredacted would be "vouching for the veracity of the witness, in effect" (91a-18, lines 14-17).[3] (Mr. Musser's counsel demanded a mistrial immediately after the DVD had been played for the jury.)

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[3] Although the quoted comments were in response to a question by the trial court about one of the vouching

IV. ARGUMENT

The prosecution's substantive response to Mr. Musser's arguments focuses on cases from other jurisdictions. Specifically, the prosecution touts cases which it reads, incorrectly, to support its counter-arguments, and it disparages, also incorrectly, cases from elsewhere which support Mr. Musser. More about those errors momentarily. First, however, the Michigan case law which supports his position. Obviously, such Michigan cases, unless this Court decides to overrule them, have priority over cases from other jurisdictions.

A. Michigan Law Forbids Vouching As Occurred In This Case.

Granted, there is no decision by this Court, or by the Court of Appeals, which addresses what to do at trial with vouching during recorded police interrogations. In other words, this case presents a question of first impression. But, that does not mean that this case is not resolved by Michigan cases. Like all questions, ones of first impression cannot be decided in conflict with principles of Michigan law, but must be decided "in consonance with" principles of Michigan law. *Lumbermen's Mutual Casualty Co v Bissell*, 220 Mich 352; 190 NW 283 (1922). Otherwise, the rule of law is too crabbed.

1. Near-Categorical Ban.

The prosecution does not dispute that it is, and has long been, our law that "an expert may not give an opinion whether the complainant is being truthful or whether the defendant is guilty." *Peterson*, *supra* at 369, discussing *People v Beckley*, 434 Mich 691; 465 NW2d 391 (1990). See also *People v Christel*, 449 Mich 578; 537 NW2d 194 (1995); and *People v Kowalski*, 492 Mich 106, 129, 137, fn 74; 821 NW2d 14 (2012). No witness, lay or expert, may vouch for the credibility of another in any kind of case, criminal or civil, (D p 9, fn 5), but such

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statements, it is apparent from context that defense counsel was addressing collectively all the vouching statements as commonly objectionable (82a-6, lines 16-25; -7, lines 1-21).

testimony is particularly problematic when coming from experts in cases, like this one, alleging child sexual abuse. *Peterson, supra* at 371. That ban on vouching is absolute, not discretionary, and was repeatedly violated in this case.

The prosecution contends, instead, that the ban on vouching was not violated in this case for a variety of reasons. The prosecution contends, first, that the police did not vouch for this case's complainant (PA p 8). That is plain wrong. True, Detective Kolakowski spoke of "[k]ids hav[ing] a hard time lying about this stuff" (65a, lines 8-9), and Detective Heffron stated that "kids don't lie about this stuff" (69a, lines 17-18, 22-25), but those statements were explanations why they believed [redacted] Even if generic, such testimony is inadmissible, *Peterson, supra* at 375-376, but the testimony was specific to [redacted] Furthermore, Detective Heffron spoke of "she" being "pretty credible" (69a, line 6); "she's not going to make that crap up" (70a, lines 20-21); and "there's no question" that "what she is saying" happened (71a, lines 14-18). [redacted] was, unquestionably, the "she" to whom he was referring.

The prosecution also contends that neither of the interrogating officers were put forward as experts (PA p 8). Again, the prosecution is plain wrong. At trial, the prosecutor quizzed Detective Kolakowski about his special training in and extensive experience interviewing children (102a-117-119). Why do that, except to establish the officer to have expertise in getting the truth from child victims? And, both Detectives Kolakowski and Heffron were heard on the DVD talking about the former's many years investigating such cases (65a, lines 14-20; 71a, lines 15-16). Those, too, were assertions of expertise. See, e.g., *Mulholland v DEC Int'l Corp*, 432 Mich 395, 401-411; 443 NW2d 340 (1989). Finally, Detective Heffron's testimony about how children react to sex abuse (69a-73a) bespoke conclusions learned from handling such cases. That was another claim of expertise. *Id.*

Therefore, had the officers said at trial while testifying live what they were heard at trial saying on the DVD, error would have unquestionably occurred. Vouching "on tape" was no different. "[A] common sense inquiry," like that which informed this Court's decision in *Kowalski*, *supra* at 129, and placing "judgment over technicality," which this Court lauded in *People v Mateo*, 453 Mich 203, 216; 551 NW2d 891 (1996), combine to lead to that conclusion. There simply is no meaningful difference between a police officer saying during trial, and explaining why, that he believes the complainant and the jury hearing a recorded interview by a police officer saying the same things, especially when that officer also testifies at trial.

Not unexpectedly, the prosecution contends otherwise. It asserts that vouching during testimony, because it is "a formal, solemn statement under oath," is "a direct invasion of the jury's province," while vouching during an interrogation "is an interrogation technique ..." (p 8). But, again, the prosecution is wrong. The conclusion it draws from that distinction is a non-sequitur. That a pronouncement is an interview technique does not mean that it is not also an assertion by the questioner, likely to be so understood by any listener. Interrogations are often assertions offering opportunities for concurrence or rebuttal.

At a minimum, jurors need to be told that what sounds like an unequivocal opinion about veracity really is something else. Nobody did that in this case. If anything, Mr. Musser's jury was told the contrary. Detective Kolakowski explained not telling Mr. Musser why he was asked to come to the Sheriff's Department as a technique designed to use surprise "to see what kind of reactions I can get" (104a-194, lines 6-18). "[D]rop[ping] a few 'F' bombs" was another technique to get a reaction (104a-194, lines 23-25; -195, lines 1-13); and "minimiz[ing]" [redacted] allegations was a technique intended to induce Mr. Musser to "open up" (106a-202, lines 4-7).

But, the officer never explained that his vouching for [redacted] was just another interview tactic, nor did the prosecutor during argument or the trial court in its instructions.

Perhaps, an occasional juror might understand without being told that statements of vouching are techniques to get a reaction, not actual assessments of veracity. Most jurors, however, lack "the 'life's experience [needed] to comprehend' the circumstances of police interrogation," *Kowalski, supra* at 127, fn 48, so that, unless told otherwise, most jurors "will misunderstand and accord to ... comments [of vouching] impermissible weight ..." *Lanham v Commonwealth*, 171 SW2d 14, 35 (Ky 2005). Hence, an explanation is required, especially, when other interview techniques were discussed. It is a longstanding tenet of interpretation that what is not included in a list of examples is omitted by comparison.

But, there is no workable way to explain to jurors that what sounds like vouching during an interrogation was not vouching, but just an interview technique. If an officer says that his or her statements of belief were only an interview technique, proper follow-up cross-examination would seek to clarify that he or she really had no opinion about the complainant's veracity. But, no officer is likely to say so; he or she will assert that he or she believed the witness. No rule allowing evidence favorable to the prosecution can be based on limiting responsive cross-examination. Nor, as discussed below, is a cautionary instruction workable. Hence, because less than a ban is not workable, a ban is required, unless *Peterson*, et al., are overturned.

2. Restricted Admission.

If *Beckley, Christel, Peterson* and *Kowalski* do not require banning vouching like that in this case, they surely require "strik[ing] the appropriate balance" between allowing testimony in the courtroom about investigative techniques which sound like vouching and protecting the jury process. Cf., *Peterson, supra* at 375. That means, Mr. Musser respectfully submits, limiting the revealing of vouching during interrogations "only (1) when it (a) genuinely explains (b) a truly

relevant inculpatory responses (c) actually provoked or elicited by it; (2) when the vouching does not have any special aura of reliability; (3) when the jury is told in so many words that the apparent vouching was not an opinion of veracity, but merely an investigative technique; and (4) when the jury is instructed immediately beforehand that what sounds like vouching may be considered only for the purpose of putting in context what the defendant said, never as indicative of veracity (D p 18).

The prosecution essentially accepts those requirements by contending that no error occurred in this case because they were satisfied. Not so. Mr. Musser's statements merely came after declamations of vouching; none of them were made any more intelligible by the vouching. For example, his response, "You asked me a lot of questions right there. I don't know – I – don't know what motivated me" (71a, lines 24-25; 72a, lines 1-3), is fully explained by recounting the questions which immediately prompted it, namely: "[W]e just need to know why. Was it alcohol? Was it – I don't know what your sex life has been at home, but all we want to know is why. Were you ever molested as a child?" (71a, lines 18-21). Nothing in the preceding 72-line soliloquy of vouching (68a, line 25; 69a, 70a, 71a, lines 1-18) is the least bit helpful, let alone necessary, to understanding Mr. Musser's response.

The prosecution is correct that a cautionary instruction was given, but that instruction was inadequate. Mr. Musser's counsel apologizes for omitting that word (D p 23) from subargument I(D)(4). That was a proofreading error. The cautionary instruction was inadequate because it did not explain that the apparent vouching was not real, but only an interview technique, and because it was not given before the jury heard what, sans an instruction, sure sounded like vouching, when, maybe, it could have done some good, nor even immediately afterwards, but only an hour later after a break, when, to work, it had to induce all the jurors to erase what they

had heard, and what had settled in mind, as vouching, and reconstruct history. That, frankly, is so likely to be asking too much to preclude relying on the instruction to remove from this case the impact of a constitutional or near-constitutional jury error.

The prosecution's contrary argument is based exclusively on a mere incantation of the general rule that "[w]e presume the jury has followed the instructions of the trial court" (PA p 16), which the prosecution incorrectly treats as an absolute rule. This Court has said that it is not absolute. In *People v Jenkins*, *supra*, at 263, this Court expressed "heightened" concern when a cautionary instruction was given "belated[ly]." More significantly, in *People v Armstrong*, 490 Mich 281, 294; 806 NW2d 767 (2011), the Court held unanimously that an inappropriate accusation of dishonesty had not been cured by an instruction indistinguishable from the instruction given in this case.[4] The prosecution ignored both holdings, even though it cited *Armstrong* for the general proposition.

B. Much Law Elsewhere Bans Vouching As Occurred In This Case.

Of course, this Court can, if it chooses, look beyond *Peterson*, etc., to authority elsewhere. But, that authority does not warrant sustaining Mr. Musser's convictions. The prosecution is incorrect that "[n]umerous cases from other jurisdictions have rejected the defendant's argument" (p 7). Only cases from one state are at odds with Mr. Musser's argument here. See *State v O'Brien*, 857 SW2d 212 (Mo 1993); and *State v Palmes*, 964 SW2d 241 (Mo App 1998). The other cases from other jurisdictions, even those which seemingly rule the other way, reveal, when read carefully, a broad consensus that error occurred in this case. Either they

[4] *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), another case cited by the prosecution, is an example of the kind of situation where a cautionary instruction can comfortably be presumed to have been followed. In that case, the instruction at issue was a directive to not compromise. That instruction asked no mental gymnastics of the jury. This case does not involve that kind of situation, but involves the kind of situation presented in *Armstrong, supra*.

found error in situations indistinguishable from this case, or they found no error for reasons not presented by this case.

The four cases cited by the prosecution (PA p 7) as rejecting Mr. Musser's argument all involved accusations that the defendants were lying. Hence, those cases did not involve vouching, let alone vouching for the star witness. There is a significant difference between bare, unadorned accusations during questioning that a defendant is not telling the truth and "more aggressive" questioning during which the police both vouch for a key prosecution witness and explain why. See *Clark v Commonwealth*, unpublished opinion by the Kentucky Supreme Court issued on October 23, 2008, in its Case No. N02006-FC-00379-MR (149a). The former say only what jurors likely assume. But, explaining in detail why the police believe a complainant is an intrusion into the sole prerogative of juries. An explained assertion is much more than a bare assertion.[5]

And, the cases from elsewhere favorable to Mr. Musser are not distinguishable as asserted by the prosecution (PA pp 9-10). While it is true that, in *State v Jones*, 117 Wash App 89; 68 P3d 1153 (2003), a conviction was reversed because a police officer was allowed to testify at trial that he did not believe the defendant, not because vouching during an interrogation was played at trial, the former was held to be error because it was no different than the latter, which was not inadmissible. In sum, the outcome of *Jones* was based on the very ban Mr. Musser urges upon this Court in this case.

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[5] There are other reasons why the cases cited by the prosecution are not applicable here. *Dubria v Smith*, 224 F3d 995 (9th Cir 2000), was a habeas case in which the standard of review is much higher. In *State v Boggs*, 218 Ariz 325; 185 P3d 111 (2008), the error was unpreserved, also requiring a higher showing of error and prejudice. In *People v Castaneda*, 715 SE2d 290 (NC App 2011), any error was harmless because the prosecution's proofs were "overwhelming," rendering dictum what was said about vouching. Finally, *Lanham v Commonwealth*, 171 SW3d 14 (Ky 2005), allowed juries hearing statements of disparagement only if a cautionary instruction was given "*before* the playing of the recording," *id.* at 28 [emphasis added], which did not happen in this case.

In *State v Elnicki*, 279 Kan 47, 57, 67; 105 P3d 1222 (2005), admitting at trial an opinion on veracity stated during a police interrogation was not merely one of several errors which only cumulatively were reversible. That error was found to not be harmless in light of what else had happened at trial. It "was error" and was "improper," said the Kansas Supreme Court, not because combined with other errors, but because the trial court "ha[d] no discretion" to admit the subject evidence. In other words, what was done in this case was itself error in that case.

The prosecution also misunderstands *Sparkman v State*, 902 So2d 253 (Fla App 2005); and *Holland v State*, 221 Ga App 821; 472 SE2d 711 (1996). While, as the prosecution notes, the Florida court seemingly suggested, but did not actually so hold, that an officer's comments remarkably similar to what Detectives Kolakowski and Heffron said, *id.*, at 257-258, were inadmissible as hearsay, a subsequent case explained that the officer's comments had been an inadmissible opinion, not inadmissible hearsay. *Eugene v State*, 53 So3d 1104, 1121, fn 3 (Fla App 2011). The only possible opinion was one about veracity, i.e., vouching.

Finally, in *Holland*, the Georgia Court of Appeals found improper vouching, as well as a misrepresentation, *id.*, at 822, 825-826, not just the latter, as claimed by the prosecution here. The prosecution here pared the opinion of the former holding. And, the prosecution did not even attempt to distinguish the other opinions Mr. Musser cited in his initial brief.

C. What Occurred In This Case Was Prejudicial Error, Not Harmless Error.

The prosecution's argument that "any possible error" by the trial court "was harmless" (PA p 19) is premised on a distortion of the trial record. The prosecution is just plain wrong that, although "[t]he defendant never actually confess[ed] ... he might as well have" (p 21). True, Mr. Musser "became extremely nervous when confronted by Detective Kolakowski with [Alisia's] allegations" (p 21), but such a reaction is hardly an admission of guilt, let alone an unequivocal

admission. It is much more likely indicative of innocence. Had Mr. Musser not reacted, the prosecution would be arguing that his cool demeanor indicated that [redacted] allegations were no surprise because he knew that they were true.

Furthermore, Mr. Musser's statement to the interrogating officers did not "practically reek[] of guilt" (PA p 21). The prosecution concedes in the very next sentence that Mr. Musser "did not admit to a sexual touching of [redacted] (*Id.*). Earlier, it had acknowledged that "He never admitted that he engaged in contact that would constitute criminal sexual conduct" (PA p 14), and that he "denied any sexual touching" (PA p 21). Admitting to a hug and kiss on top of a head hardly "stop[ped] just short of confessing." Furthermore, the lead interrogator, answered "No," when asked if Mr. Musser had "opened up … and confessed everything[?]" (p 106a-202, lines 10-12).

In sum, because the prosecution "relied heavily" on [redacted] testimony, because the vouching which the jury saw and heard was, necessarily by its very nature, "closely linked to the complainant's believability," and because there were no third-party eyewitnesses, no medical findings, and no confession, the error by the trial court in letting the jury see and hear that vouching "cannot be deemed harmless," *Clark, supra*, but "had a high probability of influencing the verdict." *People v Krueger*, 466 Mich 50, 55; 643 NW2d 223 (2002). See also *People v Gursky*, 486 Mich 596, 620-621; 786 NW2d 579 (2010).

V. CONCLUSION

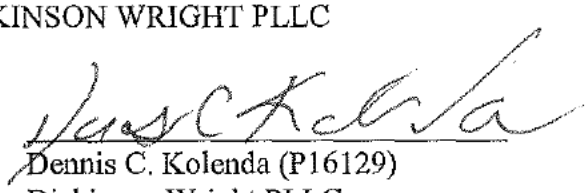
It is a bedrock principle deeply ingrained in our law that witnesses may not vouch for complainants, or others. Drawing the distinction urged by the prosecution between live vouching at trial and displaying recorded pre-trial vouching would subvert that principle.

Therefore, the distinction is meaningless. As a result, serious error infected Mr. Musser's trial, and, given the nature of this case and its proofs, that error was reversible.

Respectfully Submitted,

DICKINSON WRIGHT PLLC

Dated: February 22, 2013

By: 

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