STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals,
David H. Sawyer, P.J., and William Murphy and Peter O'Connell, J.J.
Affirming the Circuit Court for the County of Kent, James R. Redford, J.

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

-v-

JOHN M. MUSSER,

Defendant-Appellant.

_____/

Supreme Court
No. 145237

Court of Appeals
No. 301765

Kent County Circuit Court
No. 10-05943-FC

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

The People accept that this matter is properly before the Court pursuant to this Court's September 26, 2012 grant of leave to appeal (148a).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

-I-

DO STATEMENTS MADE BY POLICE DETECTIVES DURING THE COURSE OF INTERROGATION, DESIGNED TO PROVIDE A COMPLETE PICTURE TO THE JURY OF THE INTERROGATION AND NOT OFFERED FOR THEIR TRUTH, CONSTITUTE NEITHER SUBSTANTIVE EVIDENCE NOR "VOUCHING" FOR A VICTIM, AND ARE SUCH STATEMENTS ORDINARILY ADMISSIBLE, SUBJECT TO THE TRIAL COURT'S AUTHORITY UNDER MRE 403 TO EXCLUDE CERTAIN STATEMENTS WHERE THE PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE?

The Trial Court answered Yes.
Defendant-Appellant answers No.
Plaintiff-Appellee answers Yes.

-II-

WAS ANY POSSIBLE ERROR IN THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION TO REDACT CERTAIN STATEMENTS OF THE INVESTIGATING OFFICERS FROM THE TAPED INTERVIEW OF THE DEFENDANT HARMLESS, SINCE THE DEFENDANT'S STATEMENTS PRIOR TO THE INVESTIGATOR'S COMMENTS ESSENTIALLY CONFIRMED THE VICTIM'S STORY THAT THE DEFENDANT SEXUALLY ABUSED HER?

The Trial Court answered Yes.
Defendant-Appellant answers No.
Plaintiff-Appellee answers Yes.

COUNTER-STATEMENT OF FACTS

The defendant was convicted of two counts of criminal sexual conduct, second degree, MCL 750.520c. The victim, [redacted] was born on [redacted] (1b), and was [redacted] years old in 2009 when the incidents in question occurred.

[redacted] testified that she and her parents were at the defendant's home, watching a hockey game. At one point she was upstairs in a room, while the defendant's wife and [redacted] parents were downstairs (2b). She testified that the defendant sat next to her on a couch and put his hands on her thighs, between her legs (2b). The defendant got a blanket and put it over her (3b). He then put his hand under her shirt and over her breasts (3b). [redacted] testified that the defendant also put his hand down her pants, with his thumb on her underwear line (4b). He then got up and left. [redacted] got up, went to the bathroom, and then went downstairs and asked her parents if they could leave (4b). She said that a few weeks later she told her friend [redacted] what had happened, but didn't tell her mother for some time (4b).

In cross-examination of [redacted] defense counsel brought out that [redacted] told Deputy Edward Kolakowski, the detective who investigated the case, that she tried to believe what happened was an accident, and did not tell [redacted] all the details of what happened (5b). [redacted] said, "I guess I was trying to make myself believe that it didn't happen, so that I could like sleep at nighttime" (5b).

[redacted] Fritts testified that [redacted] had told her that something had happened, that someone had touched [redacted] and that [redacted] went downstairs to her mom and dad, but that [redacted] did not give any details of what occurred (11b).

[redacted] mother, said she and her husband were friends with the defendant and the defendant's wife. After May 2009, they did not see the defendant and his wife

very often. [redacted] "was never very interested in going" to the Musser house, "was very resistant in going over to their home" (14b). Ms. [redacted] said she had a conversation with [redacted] in May 2009, when [redacted] was very upset. [redacted] was "crying hysterically" and clawing at her arms (14b).

Prior to trial, defense counsel had moved to exclude several comments from the interview of the defendant conducted by the police. A hearing on the defendant's motion was set for October 15, 2010, the Friday before trial was to begin. The trial court commented that defense counsel's motion was not presented timely, and that it would be necessary to go over the interview line-by-line to consider defense counsel's objections (87a). The trial court asked for a clean copy of the transcript of the interview, and took a short recess to review the transcript (89a). After this recess, the trial court asked defense counsel what in the interview counsel felt should be excluded (89a). After reviewing the transcript and defense counsel's objections, the trial court ordered that references to the victim suffering from post traumatic stress syndrome would be excluded (94a-95a). The trial court in an "overabundance of caution" excluded a portion of the interview where Detective Kolakowski said he had no reason to disbelieve [redacted] (95a). The trial court ruled that any references to a polygraph would be excluded (95a). The other objections were overruled.

Detective Edward Kolakowski testified to his interview of the defendant. The DVD of the interview was played for the jury (103a-104a).[1] During the interview the defendant said that

[1] The DVD, Exhibit #2, has been forwarded to the Court. The transcript of the interview is in the joint appendix. In preparing our brief, counsel for Plaintiff noticed that this transcript, which we provided to defense counsel, was of the unredacted interview. We have included in our appendix the redacted interview, where the portions that the trial court ordered to be redacted are blacked out. For the sake of continuity, we shall refer to the interview as contained in the defendant's

he hugged [redacted] but did not touch her sexually, that "I kissed her on the cheek or on the forehead, or something like that" (29a). "I caught myself and I realized that 'you're being ridiculous' and I just – I got away . . . I don't know what I was thinking nor where I thought it was going or whatever possessed me to do that" (30a). He said that "I don't think I touched her inappropriately" (31a), and that "I think I put my arms around the back of her" (32a-33a). He denied touching [redacted] breasts, or touching her sexually in any way. He said that "I don't know – I – I don't know what motivated me. I think I explained it, I was just trying to give her a peck. I don't know where this touching of the breast is coming from" (72a). He said that if any inappropriate touching occurred, it was accidental (73a). When confronted with [redacted] story, and Detective Kolakowski's belief that something more had happened, the defendant said that "you got her side of the story and you're trying to beat me down until mine agrees with what she's already said" (42a-43a). On further questioning, when Detective Kolakowski told the defendant "but your arms go underneath her shirt," the defendant said that was "because her shirt was up on the back," and that he knew this because "I touched skin and that's how – what made me realize that the situation is awkward and I needed to remove myself from it" (60a).

Following the playing of the interview, the trial court gave the following instruction to the jury:

> Ladies and Gentlemen of the Jury, at the close of proofs, I will be giving you a detailed set of written jury instructions about the law that will govern the case in addition to the instructions I've already given and the one I'm giving right now. Among the instructions that I will give you at closing is one – it is an instruction about what is and is not evidence. One of the things I will instruct you on at that time is that the questions of the lawyers are not evidence, only the answers of a witness are evidence. The

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appendix. During the playing of the DVD at trial, those portions ordered to be redacted were not played.

> questions only serve to give meaning and context to the answers of the witness.
>
> Similarly, as it related to Prosecution Exhibit 2, which before the lunch recess was played for you, there are many statements and questions by one or more law enforcement Detectives. These questions or statements, no matter how short or how long, are not evidence, and you must not consider them as such. Only the answers of Mr. Musser are evidence. The questions or statements of the law enforcement Detectives are only provided to you to put into context the answers of Mr. Musser. It is only the answers of Mr. Musser that are evidence in the case.
>
> Everyone understand? Yes?
>
> THE JURORS: Yes.

Defense counsel said they had no objection to that clarification (123a).

Thomas Cottrell testified for the prosecution as an expert on why children would delay reporting sexual abuse. Terence Campbell testified as an expert for the defense, on the protocol for conducting forensic interviews of children and his position that not following the protocol could lead to unreliable information. The trial court permitted the prosecution to recall Detective Kolakowski and [redacted] [redacted] to relate what [redacted] had told them. The court said that the implication of Dr. Campbell's testimony was that [redacted] testimony could be the result of either her imagination or improper influence by law enforcement and or her parents, and that the court had warned defense counsel before going down that avenue that it might open the door for testimony of prior consistent statements. The court ruled that such statements would be permitted to rebut an inference of undue influence or recent fabrication.

Detective Kolakowski, recalled to the stand, said he started out the interview with [redacted] by asking her to relate what had happened (19b). She indicated that she was touched inappropriately by the defendant, and related that the defendant had rubbed her thigh area, that

she was pretending to be asleep but was nervous, that he covered her with a blanket, and then touched her breasts and put his hand down the front of her pants (20b).

[redacted] [redacted] also recalled in rebuttal, said that when she asked [redacted] what was wrong, [redacted] said that she was tired, and Ms. [redacted] told her that she wasn't going to leave her room until she found out what was wrong (22b). Ms. [redacted] said she asked [redacted] if she was fighting with a friend at school, and [redacted] said no. Ms. [redacted] asked [redacted] if one of her friends hurt her. [redacted] did not respond. Mr. [redacted] asked if a girl hurt her, and when [redacted] shook her head no, asked if a boy hurt her; [redacted] said "not really," and when asked if was a grownup, [redacted] "shook her head yes" (23b). Ms. [redacted] gave two names of adults in the neighborhood, and [redacted] shook her head no. When Ms. [redacted] asked "was it John," [redacted] "shook her head yes" and started to cry even more (23b). [redacted] refused to tell her what the defendant had done. Ms. [redacted] then arranged for [redacted] to see a counselor (23b).

ARGUMENT I

STATEMENTS MADE BY POLICE DETECTIVES DURING THE COURSE OF INTERROGATION, DESIGNED TO PROVIDE A COMPLETE PICTURE TO THE JURY OF THE INTERROGATION AND NOT OFFERED FOR THEIR TRUTH, CONSTITUTE NEITHER SUBSTANTIVE EVIDENCE NOR "VOUCHING" FOR A VICTIM. SUCH STATEMENTS ARE ORDINARILY ADMISSIBLE, SUBJECT TO THE TRIAL COURT'S AUTHORITY UNDER MRE 403 TO EXCLUDE CERTAIN STATEMENTS WHERE THE PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

Standard of Review. The defendant argues that this Court should, as a matter of law, hold that all statements made by police officers in the course of interrogating a suspect that supposedly "vouch" for the credibility of a victim should be excluded. The defendant's request is for a per se, absolute rule.

The People do not accept the defendant's claim that the questions of the Detectives posed to the defendant in this case constituted "vouching." But we in any event submit that that is the wrong question. It is not the question that was presented to the trial court. Defense counsel's motion was "to exclude certain evidence I have made in my motion, irrelevant evidence, but some of the evidence may be relevant but too prejudicial" (86a). Defense counsel did object to Detective Kolakowski's comment to the defendant that he had no reason to disbelieve [redacted] arguing that he was "playing the human life detector, possibly. He's vouching for the veracity of the witnesses, in effect" (91a). But objection to that comment was sustained, and that statement was redacted (93a). The defendant's other objections were that the comments of Detective Heffron were irrelevant opinions (91a-92a). The defendant did not argue at trial that those comments constituted "vouching" for [redacted] credibility, nor present an argument that all such statements should be categorically excluded. The question presented to the trial court was

whether those statements should, in this particular case, have been excluded. The proper question should be whether the trial court erred when it excluded some, but not all, of the Detectives' comments under MRE 403. "The trial court is in the best position to make MRE 403 determinations on the basis of 'a contemporaneous assessment of the presentation, credibility, and effect of testimony. . . . Accordingly, [this Court] review[s] its decisions admitting or excluding evidence under a deferential standard and will reverse only if we identify 'a clear abuse of discretion.'" *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010) (citations omitted). An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

Discussion. The statements which the defendant asserts should have been excluded all occurred during the interrogation of the defendant. They were not sworn statements under oath. They were not offered for the truth of the matter asserted. They were not presented as substantive evidence at all. They were presented to show the jury the entire picture of the interrogation.

Numerous cases from other jurisdictions have rejected the defendant's argument. For example, in *Dubria v Smith*, 224 F3d 995, 2001 (CA 9, 2000), the defendant argued that comments of an interrogating officer expressing disbelief in the defendant's story and elaborating on the officer's theory of the defendant's involvement in the crime should have been redacted from a taped interview and transcript. The Court held that the questions and comments by the defendant were proper to place the defendant's answer in context. In *State v Boggs*, 218 Ariz 325, 334-335; 185 P2d 111, 120-121 (2008), refusal to redact statements of an investigating detective which accused the defendant of lying, and falsely stated that another person had implicated the defendant in a shooting, was upheld, since the statements were part of an

investigative technique and not offered as substantive evidence. In *People v Castaneda*, 715 SE2d 290 (NC App, 2011), detectives in an interview of the defendant referred to "other witnesses" statements about a homicide and referred to the defendant's version of evidence as a "lie." The trial court's denial of a motion to redact those comments was upheld, since the comments were not offered as substantive evidence and the trial court gave a limiting instruction to the jury. Such comments are not made as substantive evidence at all, instead "are part of an interrogation technique aimed at showing the defendant that the Detective recognizes the holes and contradictions in the defendant's story, thus urging him or her to tell the truth." *Lanham v Commonwealth*, 171 SW3d 14, 27 (Ky 2005).

The defendant specifically argues that the comments of Detectives Kolakowski and Heffron in this case vouched for [redacted] credibility. Actually, they did no such thing; the comments were generic to victims, that victims didn't ordinarily make up such stories, and were an effort to get the defendant to explain some reason why he might be falsely accused. The defendant theorizes that there is no difference between allowing police detectives to testify live in front of a jury that they believe complainants tell the truth and playing for a jury a recording of an interview with a defendant where the detectives make the same assertion. Aside from the fact that Detectives Kolakowski and Heffron did not express to the defendant any expertise in determining whether a crime victim is telling the truth, there is a substantial difference in those circumstances. In the former, a detective's declaration of personal belief in the veracity of the victim would be a formal, solemn statement under oath, a direct invasion of the jury's province. In the latter, it is an interrogation technique used as effort to get a defendant to face the contradictions in his own story, and to provide a needed context to the entire interrogation.

The defendant cites numerous cases in support of his proposed "categorical" ban. Most of them involve more than simply presenting a detective's statements during interrogation. For example, in *State v Jones*, 117 Wash App 89, 92; 68 P3d 1153 (2003), a police detective actually testified at trial about his statement, saying that he didn't believe the defendant. In *Sweet v State*, 234 P3d 1193 (Wyo 2010), the prosecutor stated in opening statement that the jury would hear a deputy's impression of the defendant and that the deputy believed the victim was truthful, which in essence transformed the statement into substantive evidence. *State v Elnicki*, 279 Kan 47, 57; 105 P3d 1222 (2005), found cumulative error in multiple references, including the prosecutor's comments in final argument that the defendant's story was a "yarn" and that the victim was "telling the truth."[2] In *Sparkman v State*, 902 So2d 253 (Fla App 2005), a manslaughter prosecution, the statements during interrogation constituted the detective giving his entire theory of the case, of how the killing occurred. The Court held this to be error, not as impermissible vouching, but instead as improper hearsay that had the effect of becoming substantive evidence. In *Holland v State*, 221 Ga App 821; 472 SE2d 711 (1996), the Detectives misrepresented what the defendant actually said, and the defendant apparently never admitted anything anyway.

These cases held – rightly or wrongly – that certain statements of a detective during interrogation should not have been presented to the jury. But they made a fundamental error in analysis. Rather than adopt a traditional analysis under their jurisdiction's version of MRE 403, they instead took the position that such statements are the equivalent of stating a personal

[2] The logic of *Elnicki* is strained on this point. While a prosecutor may not suggest that he or she has special knowledge concerning a witness's credibility, a prosecutor may argue from the evidence that a witness is or is not credible or worthy of belief. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

opinion on the witness stand under oath, and ignored that the statements are investigatory techniques designed to expose the fallacies and lacunae in a defendant's version of evidence.

The People submit that the rules of evidence already provide the framework for addressing this issue. The substantive evidence during the interrogation was the defendant's specific response to specific questions. The questions provide the context for the answer and, while part of Exhibit #2, the video of the interrogation, and thus evidence for purposes of showing that context, they were not substantive evidence. To the extent that some such questions could be viewed as irrelevant, or subject to misuse by the finder of fact, they could be excluded under MRE 403, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

A trial judge already has the authority to exclude portions of an interrogation. A judge could, for example, and probably would, order redaction of a statement of an interrogating officer concerning a defendant's prior record, or for that matter a defendant's own comment on his prior record.[3] The trial court in this case in fact did exercise its discretion in excluding any reference to a possible polygraph, any comment on [redacted] suffering from post traumatic stress syndrome, and Detective Kolakowski's comment that he didn't have any reason to disbelieve [redacted]

[3] Even in that situation, however, there are circumstances where a defendant's reference to his prior record is relevant and admissible. For example, in *People v Schaw*, 288 Mich App 231; 791 NW2d 743 (2010), a defendant's statement to his victim that he did not want to "go back to prison," was held admissible, to show the defendant's efforts to get the victim to not testify at trial. *Schaw* is not directly on point to the instant case – it involved a defendant's statement to the victim, not comments during a police interrogation – but it does illustrate the folly in creating an absolute rule that bars all statements of a particular type in all circumstances.

The defendant argues that any rule other than the one he is advancing "would wreak evidentiary havoc," that it would invite the police "to seed interrogations with vouching for complainants and other witnesses, so that the restriction on its presentation by a testifying witness can be evaded" (Defendant's brief, p 15). Aside from being extraordinarily hyperbolic, that observation does not comport with reality. Since the rule the defendant advances does not now exist in Michigan, one would have to assume, if the defendant's assertion were correct, that "evidentiary havoc" already exists in Michigan. Defense counsel are already able to object to portions of an interview whose probative value is believed to be substantially outweighed by the danger of unfair prejudice, and trial courts are of course empowered under MRE 403 to exclude statements where the police "seed . . . vouching for complainants and other witnesses" (Defendant's brief, p 15). The suggestion that the failure to adopt the defendant's proposed rule would allow the police to "recount for a suspect everything that they have been told by others" and could reveal "polygraph test results, voiceprint analyses, etc.," and would permit "defendant, not just prosecutors, from engaging in comparable conduct to add now-inadmissible evidence to trials" (Defendant's brief, p 16) is similarly chimerical. The possibility that a permissible investigative technique could be misused to sneak into evidence otherwise inadmissible evidence is no reason to adopt an absolute per se rule, designed to correct a problem that does not exist, particularly where there is already a mechanism in place to prevent those sorts of potential shenanigans.

A good analogy can be made to cases where police Detectives testify to receiving information which identifies the defendant as the perpetrator of the crime. Sometimes that evidence is important, to explain why the police engaged in conduct that otherwise might seem inexplicable, and to provide a needed context to show how a defendant came to be arrested.

People v Chambers, 277 Mich App 11; 742 NW2d 610 (2007). Sometimes that evidence has no evidentiary value, or even if it has some, should be excluded because it presents to the jury "the content of an unsworn statement of an informant who was not produced at trial." *People v Wilkins*, 408 Mich 69, 74; 288 NW2d 583 (1980). Even here, however, we should keep in mind Justice Williams's cogent observation that "[t]o require a trial judge to pare a witness's testimony of everything but its barest factual essentials might well serve to confuse or mislead the jury, as well as being a dangerous curtailment of the discretion of the trial judge in the conduct of the case." *Id*, p 76 (dissent of Williams, J).

The defendant's proposed rule is much more likely to create "evidentiary havoc." One can envision any number of situations where an interrogating officer's comment is the trigger than causes a suspect to confess, or short of that to make a significant admission. Suppose, for example, that a police Detective states, in an interrogation of a suspect, that he thinks it unlikely that a victim would make up a story about sexual abuse. Suppose, in response, the defendant who at first completely denied any sexual touching at all later admits that he engaged in what could be considered sexual touching, but that it was accidental. Or that he touched the victim in an inappropriate way, but never touched the intimate parts of the victim. That, of course, is similar to what happened in the case at bar. A defendant's comment that he accidentally touched a victim might, standing alone, seen innocuous. When the comment is made in response to an inquiry, including one that questions why a victim would lie, it takes on far more import. The defendant's proposed rule would require that the defendant's own words be admitted only in the most pristine way imaginable, with no context for a jury to determine the import of those words.

Application to the case at bar. The defendant has presented nine bullet points where he claims police Detectives vouched for "child victims and for [redacted] (Defendant's brief, p 9). The

first can be ignored, since, as the defendant concedes (defendant's brief, p 10), that comment – from Detective Kolakowski that he had no reason to disbelieve what [redacted] said – was redacted and not heard by the jury.

The second bulleted point – the comment that "kids have a hard time lying about this stuff" – came just before Detective Kolakowski asked the defendant if he wanted to know why [redacted] waited to tell. The defendant said "sure" (66a). That was a rather odd comment; instead of saying something like, "waited to tell what," or "nothing happened," the defendant indicated he wanted to be advised of [redacted] delay in reporting. In isolation that statement admits nothing, but the implication from this comment is that the defendant knew the sexual contact had occurred, even though it had taken awhile for it to be reported.

The defendant's third bulleted point concerns Detective Heffron's comment on the difference between 4 to 6 year olds and 10 to 13 year olds, and that if [redacted] wanted to get the defendant in trouble she could have said something more. The defendant's response was "[t]hat she would say that I fucked her?" (68a). That statement admits nothing specific, but it is a statement of the defendant, one that would be exceedingly odd to make from a completely innocent man, and understandable only in context of the comments of Detective Heffron made just before the comment.

The defendant's remaining bullet points all concern an extended statement from Detective Heffron (69a-71a). These comments come the closest to constituting alleged "vouching"; they contain the observation that what [redacted] said was "pretty credible" – not because [redacted] was particularly credible personally, but because her statement was detailed – and that "kids don't lie about this stuff" (69a). The most interesting thing about this, though, was the defendant's response: "You asked me a lot of different questions right there. I don't know – I – I

don't know what motivated me. I think I explained it, I was just trying to give her a peck. I don't know where this touching of the breast is coming from" (71a-72a). The defendant then said, "I don't think that it happened" (73a). He then said that "if I accidentally when I was bringing my arms back around from the back of her," that "this is how it could've happened" that he touched [redacted] breasts, "but I don't think that it did" (73a-74a). A statement that a suspect could have accidentally touched a young girl's breasts doesn't admit a crime; but the statement takes on a new light when the touching was first denied, and then later admitted as a possibility. The comment that caused the defendant to change his story was relevant to show how that story changed and to give full significance to the change in the story.

What was exhibited throughout this interview was the defendant's slow admission to inappropriate contact with [redacted] He never admitted that he engaged in contact that would constitute criminal sexual conduct. But the defendant admitted that he had kissed [redacted] put his arms around her, had touched her skin on the back, and then realized he was being "ridiculous" and that the situation was "awkward." Those comments in isolation are odd, but only in the context of the interview, the accusation of the defendant having done something inappropriate, and his evolving story to admitting to conduct that he agreed was inappropriate but not criminal, could the jury fairly evaluate them.

This is of course something of a two edged sword. The defendant's supposition is that Detectives Kolakowski and Heffron were impermissibly presenting to the jury their personal opinion on the veracity of young sexual assault victims in general and [redacted] in particular. But the defendant never completely confessed. A jury hearing an interview in which a defendant was accused of sexual impropriety with a minor, where the defendant was extensively questioned by an investigating detective with comments that the victim wouldn't be lying about the accusation,

and where the defendant does not confess, could in the right case possibly conclude that the defendant's failure to confess in the face of the investigating Detective's interrogation was evidence that the defendant did not commit the crime. But here, where the defendant did make several admissions that strongly support his guilt, though falling short of being an actual confession, the entire colloquy between the defendant and the Detectives Kolakowski and Heffron was a relevant fact for the jury to hear.

The trial court, confronted with a last minute motion to redact a statement that did not specify the precise nature of the defendant's objections, nonetheless undertook an analysis of the specific objections the defendant made. The trial court excluded some of the comments; other objections were overruled. The trial judge's decision was a proper exercise of judicial discretion that should not be overturned based on a request to adopt a per se absolute rule.

Curative Instruction. This Court's grant of leave to appeal (148a) asked whether, if a jury is presented a recording of statements that include comments from an investigator that could be viewed as vouching statements, "what circumstances must be present and what, if any, protective measures must be in place" (148a).

The defendant's brief contains a section titled "no cautionary instruction was given" (Defendant's brief, p 23). That of course is wrong. The trial court gave an instruction, one that would obviate any concern that the jury would misuse statements that are part of an interrogation technique. That instruction was:

> Ladies and Gentlemen of the Jury, at the close of proofs, I will be giving you a detailed set of written jury instructions about the law that will govern the case in addition to the instructions I've already given and the one I'm giving right now. Among the instructions that I will give you at closing is one – it is an instruction about what is and is not evidence. One of the things I will instruct you on at that time is that the questions of the lawyers

> are not evidence, only the answers of a witness are evidence. The questions only serve to give meaning and context to the answers of the witness.
>
> Similarly, as it related to Prosecution Exhibit 2, which before the lunch recess was played for you, there are many statements and questions by one or more law enforcement Detectives. These questions or statements, no matter how short or how long, are not evidence, and you must not consider them as such. Only the answers of Mr. Musser are evidence. The questions or statements of the law enforcement Detectives are only provided to you to put into context the answers of Mr. Musser. It is only the answers of Mr. Musser that are evidence in the case.
>
> Everyone understand? Yes?
>
> THE JURORS: Yes. [123a]

This is precisely the sort of instruction a trial court should give when confronted with a claim that an officer's statements during an interrogation could be misused by the jury. The instruction told the jury that the questions of Detectives Kolakowski and Heffron were in Exhibit #2 for a limited purpose, and could only be considered for that purpose.

The defendant on appeal argues that this instruction was ineffective because (a) it was given only after Exhibit #2 was played for the jury, and (b) it was not repeated during final instructions to the jury. Defense counsel at trial did not share those concerns, having accepted the instruction as given, having failed to object to the timing of the instruction, and having failed to request the instruction to be restated.

The defendant argues that the instruction was untimely. But there are numerous circumstances in which a trial judge advises a jury after the fact that certain comments are not evidence and are to be disregarded. We presume that juries follow the instructions of the trial court. *People v Armstrong*, 490 Mich 281, 294; 806 NW2d 767 (2011); *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). There is no reason for this Court to conclude that the

jury, having been told that the comments of the detectives were not themselves evidence and that only the statements of the defendant were evidence, could not follow that instruction.

The defendant argues that the trial court, by not repeating the instruction in its final instructions, "withdrew the curative instruction" (Defendant's brief, p 25). One can only surmise that if the trial court had given the instruction only in its final instructions to the jury, the defendant would be arguing that the failure to give the curative instruction to the jury at a time reasonably contemporaneous to the presentation of the evidence was improper. The fact remains that the jury, immediately after seeing Exhibit #2, was told that only the defendant's statements during the interrogation would be substantive evidence, and that the detective's comments were only to provide context to the defendant's answers. That instruction was considered adequate by defense counsel at trial. Any claim that the instruction was inadequate because it was not repeated or not stated earlier is simply not preserved for appellate review. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

Conclusion. The trial court, presented on the last working day before the start of trial with a claim that certain comments from detectives in an interrogation interview should be excluded, reviewed the comments, listened to the arguments of counsel, and determined that some, but not all, of the complained of comments should be redacted. Those comments were redacted. The trial court properly applied MRE 403 in determining what statements should be redacted. The trial court then gave an instruction, approved by the defendant's counsel at trial, that only the defendant's answers to the questions were to be considered as evidence. The trial court's ultimate determination was well within the discretion that this Court has always recognized lies with the trial court in making an MRE 403 determination. This Court should reject the defendant's invitation to create a one-size-fits-all rule that would preclude such

statements categorically, and permit statements from interrogating officers to be allowed as part of the colloquy between the officer and suspect, to enable the jury to see the complete context of the defendant's statements, subject to the already existent power of a trial court to exclude such comments where their probative effect is substantially outweighed by the danger of unfair prejudice.

ARGUMENT II

ANY POSSIBLE ERROR IN THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION TO REDACT CERTAIN STATEMENTS OF THE INVESTIGATING OFFICERS FROM THE TAPED INTERVIEW OF THE DEFENDANT WAS HARMLESS, SINCE THE DEFENDANT'S STATEMENTS PRIOR TO THE INVESTIGATOR'S COMMENTS ESSENTIALLY CONFIRMED THE VICTIM'S STORY THAT THE DEFENDANT SEXUALLY ABUSED HER.

Standard of Review. The proper standard depends on how any error in this case is viewed. The People maintain, obviously, that no error occurred, that the trial court's decision that some of the comments the defendant requested be redacted should be redacted, and others should not, was within the realm of the trial court's discretion. If the Court agrees with our position, this second argument need not be addressed.

If, however, the Court feels that some error occurred, it is necessary to determine whether any error was (1) preserved, and (2) if so, constitutional or nonconstitutional in nature.

To the extent that an alleged error is unpreserved, it is forfeited and may be considered only under the standards applied to forfeited error. In order to obtain relief on appeal, the defendant must demonstrate (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) that the plain error affected substantial rights. *People v Carines, supra.* This standard applies whether the error in question is characterized as constitutional or nonconstitutional error. *Id.*; *People v Pipes*, 475 Mich 267, 270-271; 715 NW2d 290 (2006).

If an error is constitutional in nature, and is preserved for appellate review, and is not a structural error mandating reversal, the prosecutor must show beyond a reasonable doubt that the error was harmless. *People v Anderson (after remand)*, 446 Mich 392; 521 NW2d 538 (1994). If the error is preserved nonconstitutional error, the defendant has the burden of affirmatively

establishing that the error asserted has resulted in a miscarriage of justice. "The effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Discussion. There is no question that the defendant preserved for appeal his claim that the statements of Detectives Kolakowski and Heffron to which he objects on appeal should have been redacted. But as noted in Argument I, *supra*, the defendant did not argue for a per se exclusion of all such statements. His argument was that the statements in this case were irrelevant and overly prejudicial. No claim was made that the admission of these statements constituted a violation of his right to confront witnesses. No claim was made that any constitutional right was violated by admission of the statements.

Not every trial error is of constitutional dimension. In fact, most are not constitutional in nature. See *People v Toma*, 462 Mich 281; 613 NW2d 694 (2000) (error in admitting statement of defendant to a forensic psychologist in contemplation of interposing an insanity defense, where the defense was not pursued at trial, was a nonconstitutional error). Specifically, this Court has held that errors regarding the admission of evidence are nonconstitutional. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2007).

The defendant claims that any error cannot be harmless because the case was a classic "credibility contest." Had this been a simple case where [redacted] said the sexual touching occurred, and the defendant adamantly denied any touching occurred, the defendant's argument would be more compelling. But of course that is not what happened.

[redacted] testified clearly that the defendant put a blanket over her, put his hand under her shirt and over her breasts, and then put his hand down her pants. When [redacted] [redacted]

[redacted] mother, had the conversation with [redacted] about the incident, [redacted] was crying hysterically. The testimony showed that something traumatic happened to [redacted] but of course there was no physical evidence to support her story; there rarely is in a case of criminal sexual conduct second degree, particularly one where the incident is not reported immediately.

The defendant never exactly confessed. But he might as well have. He became extremely nervous when confronted by Detective Kolakowski with the allegations (26a). He admitted that [redacted] was "sitting there sleeping and I don't even remember why, but yeah, I – I hugged her" (27a). When Detective Kolakowski said, "well, you didn't hug her" and "tell me what happened," the defendant said, "I can't remember the situation" (28a). Though he denied any sexual touching, the defendant, exhibiting a speedy recovery of memory, said that "I kissed her on the cheek or on the forehead [sic], or something like that" (29a). He then said that "I caught myself and I realized that 'You're being ridiculous' and I just – I got away. I walked away from it. I – that – I don't know what I was thinking or where I thought it was going or what even possessed me to do that" (30a). He then said that "I don't think I touched her inappropriately" (31a). He said that "I think I put my arms around the back of her. She was slouched down in the couch and I put my arms around the back of her" (33a). When asked if he thought he should walk away from the situation because he "didn't know where it was goin' [sic] . . . because it was in a sexual way" (33a), the defendant said, "Right. Yeah, I need to remove myself from that situation, not because I thought it was gonna go any farther or – and I didn't think she woke up" (34a).

This was hardly a denial of [redacted] story. In fact, it is a statement that practically reeks of guilt. The defendant did not admit to a sexual touching of [redacted] but he did admit to hugging and kissing her, while she was asleep, essentially verifying [redacted] statements. This was not a

"she said he said" situation. It was a "she said and he confirmed while stopping just short of confessing" situation.

It is also noteworthy that when Detective Kolakowski asked if the defendant got something from the couch and put something on [redacted] the defendant said, "Put something on her? A blanket?" (34a). Detective Kolakowski had not to this point mentioned anything about a blanket. The defendant said he did not remember doing so (34a), though later affirmatively denied getting the blanket (38a). The defendant's denial in context supported [redacted] testimony that the defendant, in the course of his sexual abuse of [redacted] got a blanket and put it over her.

The defendant said that his contact with [redacted] was not sexual. But when asked if he had rubbed her thigh, he did not deny doing so. He only said "I don't remember doing that" and "I don't believe that it happened" (37a). The defendant's selective memory of events, his admission to physical contact with a sleeping girl, and his statement that he "needed to remove myself from the situation," all support [redacted] testimony. And all of the statements cited in this argument occurred before any of the comments of either Detective Kolakowski or Detective Heffron that are alleged to be error (see Defendant's brief, pp 9-10).

The People submit that the defendant cannot meet the *Lukity* standard, cannot show that the errors alleged on appeal affirmatively call into question the reliability of the verdict. The defendant was convicted because of [redacted] testimony, to be sure; but he also was convicted because of his own statements that showed he knew he was guilty of sexually molesting [redacted] even if he could not bring himself to make the ultimate admission of guilt.

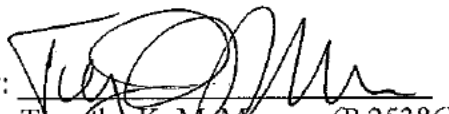
RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, the People respectfully pray that the decision of the Court of Appeals, affirming the conviction and sentence entered in this cause by the Circuit Court for the County of Kent, be affirmed.

Respectfully submitted,

William A. Forsyth (P 23770)
Kent County Prosecuting Attorney

Dated: January 30, 2013

By: 
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