

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**APPEAL FROM THE COURT OF APPEALS
Judges Kathleen Jansen, Mark J. Cavanagh, Joel P. Hoekstra**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAVID BARRY BURNS,

Defendant-Appellee.

SUPREME COURT NO. 145604

COURT OF APPEALS NO. 304403

LOWER COURT NO. 10-10787-FC

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AMICUS BRIEF

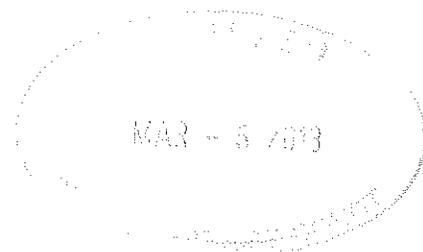


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STATEMENT OF THE QUESTION PRESENTED

Where the trial court specifically centered the decision on the victim's statements that defendant had told her not to tell what was happening to her, did it clearly err in factually finding (1) that defendant had intended that she not testify and (2) the victim, at least in part, did not testify because of what defendant said?

Defendant-Appellee and the Court of Appeals answer: Yes
Plaintiff-Appellant and Amicus Curiae answer: No

STATEMENT OF FACTS

Amicus Curiae relies on plaintiff's Statement of Facts from its December 14, 2012, brief.

ARGUMENT

Especially where the evidentiary rules do not apply, because evidence supports the conclusion, an appellate court should not second-guess a trial court's factual decision that defendant's statements not to tell anyone made his four-year-old daughter not testify.

In the end, the Court of Appeals second-guessed the trial court's resolution of the "battle of inferences." It ignored that the evidentiary rules do not apply here. MRE 1101(b)(1). It also established a test that is more difficult than courts use for evidence sufficiency. The trial court did not clearly err in finding a forfeiture by wrongdoing. MRE 804(b)(6). This Court should reverse, reinstate the conviction, and remand to the Court of Appeals to consider the rest of the issues.¹

Although the parties correctly state that a trial court's decision whether or not to admit evidence is reviewed for an abuse of discretion and this Court reviews how to legally interpret a court rule *de novo* the real review standard in this case is "clearly erroneous." The trial court made certain factual findings the only issue is whether or not those factual findings.

Plain error is not a particularly easy standard for an appellant to meet. As stated in *United States v Hinojosa*, 606 F3d 875, 882 (CA 6, 2010) a judge's findings will be given especial deference where credibility is involved. It said: "'Where there are two permissible views of the evidence,' the district court does not clearly err in

¹Even though the parties addressed both the Confrontation Clause and whether or not MRE 803(4) applies, this brief will not address either simply because this Court's order granting leave to appeal does not mention either issue. ___ Mich ___; 821 NW2d 787 (2012). (140a). In addition, the Court of Appeals specifically declined to address defendant's constitutional issue. (139a).

accepting one interpretation over the other.” Here, plaintiff presented evidence that the victim had stated a number of times that defendant had told her not to tell anyone. (77a, 112a, 114a, 116a, 126a-128a). That defendant had told the victim not to tell anyone (including not to testify against him) and that the four-year-old victim, at least in part, chose not to testify because of these statements may be inferred.

Forfeiture-by-wrongdoing is different than most evidentiary rules. As pointed out in *People v Jones*, 270 Mich App 208, 212; 714 NW2d 362 (2006), lv den 477 Mich 866; 721 NW2d 215 (2006), MRE 804(b)(6)² codifies the common-law equitable doctrine that a person is not to profit from his own wrongdoing. Although this concept looks simple on its face, proving the wrongdoing is not. A problem develops if the person’s wrongdoing is very successful. For example, where the witness completely fails to appear, no one will have direct evidence that the defendant procured the witness’ absence. Accordingly, MRE 1101(b)(1) says that the evidentiary rules do not apply when the judge is determining factual questions in deciding whether or not to admit evidence. Hence, as occurred in the present case, the prosecutor presented evidence about what the victim said out of court. Because of MRE 1101(b)(1), this otherwise inadmissible hearsay is properly admitted.

Although direct evidence (a statement by the victim or the defendant saying that the witness is not testifying specifically because of a threat) is preferable, as in any situation, it is not always there. Therefore, the trial court is very often required to

²MRE 804(b)(6) says: “A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”

decide whether or not to draw an inference based on what is there. In *Jones* itself (written by now Western District Judge Janet Neff and signed by now Justice Brian Zahra), the Court of Appeals specifically said that direct evidence is not required. 270 Mich App 220 n 3. It found that the trial court had not clearly erred (or abused its discretion) in allowing in evidence under MRE 804(b)(6) even though no direct evidence was presented that the defendant himself had threatened the missing witness. In *Jones*, the defendant was charged with assault with intent to commit murder and felony firearm. The witness refused to testify because a number of members from the defendant's gang had threatened him. Given the personal relationships and the history of witness intimidation from this gang, the Court of Appeals concluded that the trial court could infer that the defendant was involved. 270 Mich App 221. In the end, this "close call" in this "battle of inferences" did not require a reversal. *Id.*

Around the same time, *People v Bauder*, 269 Mich App 174; 712 NW2d 506 (2006), *lv den* 476 Mich 863; 720 NW2d 287 (2006), used a similar analysis in allowing in evidence under MRE 804(b)(6). Here, the defendant was charged with murdering a domestic violence victim. The trial court concluded that part of why the defendant killed the victim was to prevent her from testifying on the domestic violence charge. The Court of Appeals affirmed, finding the inference proper under the facts.

The same analysis applies in the present case. Applying both *Jones* and *Bauder* (something that the Court of Appeals in the present case failed to do) shows that the forfeiture-by-wrongdoing can be legitimately inferred from these facts. After all, as pointed out above, defendant told his four-year-old daughter not to tell anyone. The Court of Appeals conclusion that "it is doubtful that they can be construed as threats

intended to prevent the victim from testifying at trial," misses a very obvious point. Defendant made the statement to prevent the victim from *ever* telling—including testifying. He would not want her to say anything to other children, to her mother, to the police, to the jury. It encompasses *everything*. In *Bauder*, quite likely, the defendant killed the victim because he did not like her. Even so, *Bauder* concluded that the defendant killing the victim (even in part) to keep her from testifying was sufficient. Thus, the Court of Appeals conclusion that there were "several possible reasons for the victim's refusal to testify in court" ignores its own binding precedent in *Bauder*. All that matters is that it was a reason, not that it was the only reason.³

Likewise, the Court of Appeals pointing out that the victim spoke to a lot of people about what had happened, although relevant, does not necessarily mean that she did not testify (at least in part) because of what defendant said. Telling somebody something is one thing. Actually testifying in court is another. Given all of what was happening, the formality of the courtroom may have just been the tipping point. Something other than defendant's wrongdoing, however, being the tipping point does not mean that defendant's wrongdoing had nothing to do with it. All that matters is that in *part* defendant's wrongdoing had something to do with the victim's unavailability. The trial court specifically weighed the battling inferences and chose one that is plausible. In such a situation, an appellate court may not conclude that the decision is clearly erroneous.

³Although *Bauder's* decision may not survive *Giles v California*, 554 US 353; 128 S Ct 2678; 171 L Ed 2d 488 (2008), amicus cites it only for its analysis, its finding the inference despite no direct evidence.

In fact, the Court of Appeals' opinion here creates an anomaly in the law. Specifically "because of the difficulty of proving an act or state of mind, [in deciding a sufficiency question,] minimal circumstantial evidence is sufficient." *People v Fetterly*, 229 Mich App 511, 518; 583 NW2d 199 (1998), lv den 459 Mich 866; 584 NW2d 735 (1998). The Sixth Circuit itself has noted, even in evidence sufficiency questions, that intent determinations are special: An intent question "is generally considered to be one of fact to be resolved by the trier of facts . . . and the determination thereof should not be lightly overturned." *United States v White*, 492 F.3d 380, 394 (CA 6, 2007).

The Court of Appeals has created an anomaly in that it has set a higher standard for overturning facts where the judge notes a decision by the preponderance of the evidence where the evidence rules do not apply as opposed to the jury finding guilt beyond a reasonable doubt using the evidentiary rules. Just what defendant intended when he told the victim not to tell anyone and just why the victim did not testify are by law among the most difficult to second-guess. In second-guessing the trial court's conclusions, the Court of Appeals set a standard too high, one that does not consider the special problems behind missing witnesses. The trial court did not clearly err in factually finding as it did.

RELIEF

ACCORDINGLY, amicus joins with plaintiff in asking this Court to reverse, reinstate the conviction, and remand to the Court of Appeals to consider defendant's remaining issues.

Respectfully submitted,

March 5, 2013


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