STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

Judge: Kathleen Jensen
Mark J. Cavanagh
Joel P. Hoekstra

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

Supreme Court No. 145604
Court of Appeals No. 304403
Lower Court No. 10-10787-FC
(Appeal from Bay County)

DAVID BARRY BURNS,

Defendant-Appellee.
_____/

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

(Oral Argument Requested)

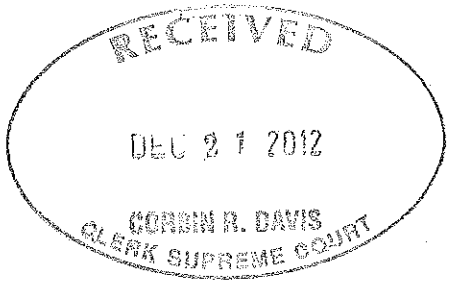

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii, iv, v, vi

STATEMENT OF JURISDICTION vii

STATEMENT OF QUESTIONS PRESENTED viii

STATEMENT OF FACTS 1

ARGUMENT 11

I. THE TRIAL COURT DID *NOT* ABUSE ITS DISCRETION WHEN IT ADMITTED THE 4-YEAR-OLD CHILD VICTIM'S OUT-OF-COURT STATEMENTS UNDER THE "FORFEITURE-BY-WRONGDOING" RULE OF MRE 804(b)(6) 11

A. STANDARD OF REVIEW 11

B. DISCUSSION 12

1. Forfeiture-by-wrongdoing generally 12

2. No abuse of discretion here regarding applicability of the forfeiture-by-wrongdoing rule of MRE 804(b)(6) 15

3. In reversing the trial court, the Court of Appeals erroneously promulgated a "bright line" rule which effectively immunizes child sex abusers from the forfeiture-by-wrongdoing rule of MRE 804(b)(6) 25

a. The bright line rule approach 25

b. The totality of the circumstances approach 32

II. THE COURT OF APPEALS SUBSTITUTED ITS JUDGMENT FOR THAT OF THE TRIAL COURT AND, IN SO DOING, IMPERMISSIBLY INVADED THE FACT-FINDING AUTHORITY OF THE TRIAL COURT 35

A. STANDARD OF REVIEW 35

B. DISCUSSION 35

III. THE COURT OF APPEALS ERRED IN FINDING THAT THE 4-YEAR-OLD CHILD-VICTIM'S STATEMENTS TO THE S.A.N.E. NURSE WERE NOT ADMISSIBLE UNDER THE "MEDICAL TREATMENT'" EXCEPTION OF MRE 803(4) 42

A. STANDARD OF REVIEW 42

B. DISCUSSION 42

RELIEF REQUESTED 46

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES CITED

Chambers v. Mississippi, 410 US 284; 93 S Ct 1038; 35 L Ed 2d 297 (1973) 25

Crawford v. Washington, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004) 13

Davis v. Washington, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006) . . 12, 31, 33

Giles v. California, 554 US 353; 128 S Ct 2678;
171 L Ed 2d 488 (2008) 12, 13, 14, 17, 22, 23, 25, 31, 40

Reynolds v. United States, 98 US 145; 25 L Ed 244 (1879) 13

UNITED STATES COURT OF APPEALS CASES CITED

Cunningham v. City of Wenatchee, 345 F3d 802 (9th Cir. 2003) 33

Foster v. Wofenbarger, 687 F3d 702 (6th Cir. 2012) 32

Holzemer v. City of Memphis, 621 F 3d 512 (6th Cir. 2010) 32

Lund v. Hennepin County, 427 F3d 1123 (8th Cir. 2005) 33

United States v. Cromer, 389 F3d 662 (6th Cir. 2004) 13

United States v. Cunningham, 103 F3d 553 (7th Cir. 1996) 29

United States v. Fullmer, 584 F3d 132 (3rd Cir. 2009) 32

United States v. Scott, 284 F3d 758 (7TH Cir. 2002) 14, 21

Steele v. Taylor, 684 F2d 1193 (6th Cir. 1982) 18

Winzer v. Hall, 494 F3d 1192 (9th Cir. 2007) 13

MICHIGAN CASES CITED

Beason v. Beason, 435 Mich 791; 460 NW2d 207 (1990) 35, 36, 38

Donaldson v. Donaldson, 134 Mich 289; 96 NW 448 (1903) 38

Halloway v. General Motors Corp., 399 Mich 617; 250 NW2d 736 (1977) 14

Merrow v. Bofferding, 458 Mich 617 NW2d 696 (1998) 14

People v. Ackerman, 257 Mich App 434 (2003) 30, 32

People v. Avant, 325 Mich App 499; 597 NW2d 864 (1999) 36

People v. Bauder, 269 Mich App 174; 712 NW2d 506 (2005) 13, 18

People v. Blackmon, 280 Mich App 253; 761 NW2d 172 (2008) 11

People v. Decosey, 2009 WL 1068878 (2009) 27

People v. Doud, 462 Mich 629; 614 NW2d 152 (2000) 32

People v. Elston, 462 Mich 751; 614 NW2d 595 (2000) 12

People v. Fetterley, 229 Mich App 511; 583 NW2d 199 (1998) 22

People v. Grant, 470 Mich 477; 684 NW2d 686 (2004) 14

People v. Hardiman, 466 Mich 417; 646 NW2d 158 (2002) 22

People v. Herndon, 246 Mich App 371; 633 NW2d 376 (2001) 11

People v. Kissner, 292 Mich App 526; 808 NW2d 522 (2011) 22, 36

People v. Jones, 270 Mich App 208; 714 NW2d 362 (2006) 12, 13, 14, 15, 21, 27

People v. Katt, 468 Mich 272; 662 NW2d 12 (2003) 11

People v. Luckity, 460 Mich 484; 596 NW2d 607 (1999) 11

People v. Meeboer (After Remand), 439 Mich 310; 484 NW2d 621 (1992) 43

People v. Starr, 457 Mich 490; 577 NW2d 673 (1998) 11, 35, 42

People v. Unger, 278 Mich App 210; 749 NW2d 272 (2008) 11, 35, 42

People v. Washington, 468 Mich 667; 664 NW2d 203 (2003) 11, 35, 42

People v. Watkins, 491 Mich 450; 818 NW2d 286 (2012) 29

People v. Williams, 472 Mich 308; 696 NW2d 636 (2005) 32

OUT-OF-STATE CASES CITED

Commonwealth v. Szerlong, 933 NE2d 633 (Mass. 2010) 21, 27, 28

Roberts v. State, 894 NE2d 1018 (Illinois 2008) 18

State v. Baldwin, 794 NW2d 769 (Wisc. 2012) 27

State v. Zaragoza, 287 P3d 510 (Utah 2012) 27

STATUTES CITED

MCL 750.520b(1)(a) 1

MCL 768.27a 29

RULES CITED

FRE 804 12

MCR 7.301(A)(2) iv

MCR 7.302(H)(1) iv

MRE 609 18

MRE 803(4) . . . . . ii, viii, 18, 42, 43, 45

MRE 804(b)(6) . . . . . i, viii, 9, 10, 11, 12, 15, 25, 26, 30, 32, 34, 35, 42

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STATEMENT OF JURISDICTION

On April 5, 2011, a jury convicted defendant as charged on one count of First-Degree Criminal Sexual Conduct (victim under 13 years of age)[1] involving his four-year-old daughter.[2] Defendant then filed an appeal of right,[3] the People filed a brief in opposition thereto, and, on June 14, 2012, the Court of Appeals issued an unpublished, per curiam Opinion reversing defendant's conviction and remanding the matter for new trial.[4]

On or about August 3, 2012, the People filed in this Honorable Court a timely *Application for Leave to Appeal* the Court of Appeals' decision. By Order dated October 31, 2012, this Honorable Court granted the People's *Application for Leave.*[5] Said Order provided, in relevant part, that "[t]he parties shall include among the issues to be briefed: (1) whether the trial court abused its discretion in admitting the complainant's out-of-court statements under the forfeiture-by-wrongdoing exception to the hearsay rule set out in MRE 804(b)(6); and (2) whether the Court of Appeals substituted its judgment for that of the trial court and, in so doing, invaded the fact-finding authority vested in the trial court."[6]

This Honorable Court has jurisdiction over the present matter pursuant to MCR 7.301(A)(2) and MCR 7.302(H)(1).

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[1] MCL 750.520b(1)(a).

[2] See *Register of Actions from Circuit Court* at 1a - 5a.

[3] See *Court of Appeals Docket Sheet at* 6a - 8a.

[4] See *Slip Op* at 135a - 139a.

[5] See *Supreme Court Order* at 140a.

[6] *Id*

STATEMENT OF QUESTIONS PRESENTED

I. **DID THE TRIAL COURT PROPERLY EXERCISE ITS DISCRETION WHEN IT ADMITTED THE 4-YEAR-OLD CHILD VICTIM'S OUT-OF-COURT STATEMENTS UNDER THE "FORFEITURE-BY-WRONGDOING" RULE OF MRE 804(b)(6)?**

Plaintiff-Appellant answers, "YES"

Defendant-Appellee answers, "NO"

II. **DID THE COURT OF APPEALS SUBSTITUTE ITS JUDGMENT FOR THAT OF THE TRIAL COURT AND, IN SO DOING, IMPERMISSIBLY INVADE THE FACT-FINDING AUTHORITY OF THE TRIAL COURT?**

Plaintiff-Appellant answers, "YES"

Defendant-Appellee answers, "NO"

III. **DID THE COURT OF APPEALS ERR IN FINDING THAT THE 4-YEAR-OLD CHILD-VICTIM'S STATEMENTS TO THE S.A.N.E. NURSE WERE INADMISSIBLE UNDER THE "MEDICAL TREATMENT'" EXCEPTION OF MRE 803(4)?**

Plaintiff-Appellant answers, "YES"

Defendant-Appellee answers, "NO"

STATEMENT OF FACTS

A jury convicted defendant as charged on one count of First-Degree Criminal Sexual Conduct (victim under 13 years of age)[7] involving his four-year-old daughter. The Court of Appeals succinctly summarized the facts of this case as follows:

> "In January of 2010, the victim a four-year-old girl, began talking about sex and an imaginary friend. Subsequently, the victim was accused of inappropriate sexual behavior at her daycare, began wetting the bed, and exhibited anger issues. In August of 2010, the victim made disclosures to an associate pastor at her church that suggested she was the victim of sexual abuse committed by defendant, her father. The police were contacted. Following a forensic interview at the Child Advocacy Center ["CAC"], an interview with a Sexual Assault Nurse Examiner (SANE) nurse, and a physical examination, defendant was charged with first-degree CSC. However, **the victim refused to testify at defendant's trial.** In her absence at trial, the associate pastor testified regarding statements made by the victim. **The trial court held that those hearsay statements were admissible as evidence against defendant pursuant to MRE 804(b)(6) because defendant 'engaged in or encouraged wrongdoing that was intended to and did procure the unavailability of' the victim** as evidenced by the victim's statements made during the forensic interview. For the same reason, the trial court admitted the testimony of the SANE nurse regarding statements allegedly made by the victim to her, as well as the recording of the victim's forensic interview at the Child Advocacy Center. Subsequently, defendant was convicted..."[8]

With reference to the victim's refusal to testify, the People initially requested two accommodations be made by the trial court in order to minimize the fear and/or anxiety the four-year-old child-victim would undoubtedly experience during the proceedings: (1) that a victim advocate be allowed to sit with the child-victim during her testimony; and, (2) that pursuant to statute, the parties switch counsel tables so that the prosecution was closer to

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[7] MCL 750.520b(1)(a).

[8] See *Slip Op* at 135a - 139a (emphasis added).

the child-victim during her testimony. Both of these requests were granted by the trial court over defendant's objections. Then, immediately prior to the child-victim being brought into the courtroom, the trial court exercised its discretion and ordered the courtroom be closed during the child-victim's testimony.

Thereafter, the court made four (4) separate attempts to qualify the child-victim to testify at trial.

During the first attempt to qualify the child-victim,[9] she stated she did not want to talk to the microphone and she wanted to stand up.[10] The child-victim further stated the jury was scaring her and she wanted them to leave.[11] The child-victim further stated she was *not* going to tell the truth,[12] and she was *not* going to talk about her family "'cause my dad not's gonna want me to talk about my family."[13]

During the second attempt to qualify the child-victim,[14] she got down off the witness chair, peeked over the stand, and pushed the microphone away.[15] The assistant prosecutor then told the child-victim "when we talk about [your family] and other things, we're going to talk about things that really happened. The truth, okay?"[16] In response, the child-victim

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[9] This first attempt is found at 36a - 51a.

[10] 37a.

[11] 42a - 43a.

[12] 48a - 49a.

[13] 50a.

[14] This second attempt is found at 53a - 70a.

[15] 54a - 55a.

[16] 59a.

shook her head "no".[17] Similarly, when the assistant prosecutor asked the child-victim if she was ready to talk about what happened, she whispered "no".[18] When asked, "why not," the child-victim simply stated, "'Cause."[19] The child-victim then continued to push the microphone away and wanted to play with the assistant prosecutor's lapel microphone.[20]

Thereafter, the assistant prosecutor apparently noticed the child-victim was looking at defense table so she asked, "[w]hat are you looking at?"[21] The child-victim responded, "Da-da."[22] At that point, the assistant prosecutor stated, "we're gonna talk about Da-da today, okay," and the child-victim responded,"Uh-uh. I don't want to talk about my Da-da."[23] However, when asked why she didn't want to talk about her Da-da, the child-victim was non-responsive.[24] The child-victim then spontaneously stated, "I can't come here anymore," and refused to explain any further.[25]

Following a brief sidebar, the child-victim: (1) answered some questions about Dora

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[17] *Id.*

[18] 61a.

[19] *Id.*

[20] 63a.

[21] 64a.

[22] *Id.*

[23] 65a.

[24] *Id.*

[25] 65a - 66a.

the Explorer;[26] (2) stated she was a girl and daddy was a boy;[27] and, (3) shook her head "no" when asked, "[I]f someone came in and said you were a boy, is that the truth?"[28] However, when asked "will you tell us the truth today," she shook her head in the negative.[29] Likewise, when asked whether she wanted to talk at all, she shook her head in the negative.[30] The trial court then determined the child-victim should be allowed to leave and be brought back the next day.[31]

Prior to the third attempt to get the child-victim qualified, the assistant prosecutor notified the court he had just learned the child-victim was petrified of CPS worker John Jones because defendant had told her Mr. Jones would take her away if she told the truth:

> "Angela Gomez [i.e., the child-victim's mother] told me for the first time yesterday that when she comes out of the CAC interview and she sees John Jones, the CPS worker, she spontaneously to her mother said, Daddy said if I tell the truth, John Jones will take me away from my mamma.
>
> "And she is petrified of John Jones and throughout the course of this trial coming into our office has talked about how John Jones, a CPS worker, takes children away from their family."[32]

The assistant prosecutor then argued this information "shows wrongdoing on the part of the defendant which is encouraging the unavailability of [the child-victim] as a witness which

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[26] 66a.

[27] 67a.

[28] *Id.*

[29] 68a.

[30] *Id.*

[31] 68a - 70a.

[32] 77a.

then shou- -then allow us to use a prior statement of [the child-victim]."[33]

In addition to raising this forfeiture by wrongdoing argument, the assistant prosecutor also requested the child-victim be allowed to testify from behind a screen or via closed circuit television. In addressing this request, the trial court noted "I do have [a child-victim] who's afraid to come into this courtroom and look at people who she's scared of and say anything." A separate record was then made to determine whether it was likely the child-victim would testify in front of the defendant.[34] Said separate record consisted of the testimony of the child-victim's mother, Angela Gomez.

According to Ms. Gomez, when the child-victim walked out of the courtroom the first time "she said she didn't want to say anything in front of her dad."[35] And even though the child-victim was "ready to testify in her mind," when she gets into the courtroom "she's scared."[36]

Ms. Gomez was then asked whether she believed the child-victim was refusing to

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[33] 78a.

[34] The relevant portionof this Separate Record is found at 80a - 85a..

NOTE: There were three (3) separate records in this case. The first separate record involved testimony from assistant pastor Viola Gonzales who was the first person to whom the child-victim disclosed the sexual abuse. See, 71a - 76a. for the relevant portions of this first separate record. The second separate record involved testimony from the child-victim's mother Angela Gomez regarding the likelihood of the child testifying in front of defendant. See, 80a - 85a for the relevant portions of this second separate record. The third separate record was actually the evidentiary hearing regarding the forfeiture-by-wrongdoing issue, and involved testimony from the child-victim's mother Angela Gomez, Detective Richard Roberts, and Victim Advocate Kristin Monoghan. See, 110a - 130a for the relevant portions of this third separate record.

[35] 81a.

[36] *Id.*

testify because she was nervous about having the jury in the courtroom. Ms. Gomez responded, "[y]ou know, I'm not really sure. When she came out yesterday afternoon, she said 'I want to protect my dad.' 'I want to protect my family.'"[37] Ms. Gomez further stated, "[s]he knows her daddy's in trouble. She knows that. And she knows if she says something, you know, she's not going to be able to see her daddy. But its been the same way since August, you know. Um, I'm not- -I'm not quite sure what's going on in her head, but that's what she said, 'I want to protect my daddy,' 'I want to protect my family.'"[38]

After this separate record was completed, the third attempt to qualify the child-victim was made.[39]

During said third attempt, the child-victim was extremely non-responsive and/or gave "no audible response" to almost every question posed to her by the assistant prosecutor and the trial court.[40] Eventually, the child-victim did answer a couple of questions regarding the color of different things.[41] However, as soon as the assistant prosecutor began asking her about her family, the child-victim once again became non-responsive.[42] The child-victim continued to remain non-responsive during the course of additional questioning, but

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[37] 84a - 85a.

[38] 85a.

[39] This third attempt is found at 86a - 109a.

[40] 86a - 99a.

[41] 99a - 101a.

[42] 102a - 103a.

eventually (and spontaneously) she stated, "I want to go out there."[43] The trial court determined the child-victim no longer wanted to be in the courtroom and allowed her to leave.[44]

During the fourth and final attempt to get the child-victim qualified, the trial court allowed the prosecution to conduct a video deposition in the prosecutor's office with the following individuals present: (1) the videographer; (2) the child-victim; (3) the victim advocate; (4) the defendant's attorney and his assistant; and, (5) the assistant prosecutor.[45] However, as subsequently noted by the assistant prosecutor, the child-victim "just would not talk, behaved much in the same manner as she has at our other attempts."[46]

Following this fourth failed attempt to get the child-victim qualified, the trial court noted the prosecution had previously suggested the victim was unavailable due to defendant's wrongdoing.[47] The trial court then made a separate record (i.e., conducted an evidentiary hearing) in order to explore this issue.[48] The child-victim's mother, Angela Gomez, Detective Richard Roberts, and Victim Advocate Kristin Monoghan, all testified as part of that separate record.

According to Ms. Gomez, when the child-victim was done with her C.A.C. interview,

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[43] 105a.

[44] 106a..

[45] This fourth and final attempt to get the child-victim qualified is found at 107a - 109a.

[46] 108a - 109a.

[47] 109a.

[48] See, 110a - 130a.

"[s]he was pretty upset. She started crying."[49] Ms. Gomez further stated she [Gomez] was told by the forensic interviewer Jill Krol that when the child-victim saw John Jones (a CPS worker), the child-victim told Jill, "Daddy said not to tell about what happened or I'll be taken away or I'll get in trouble" or something to that effect.[50]

According to Detective Roberts, the child-victim told the forensic interviewer "[m]y dad told me not to tell. She said that twice. There was a different time further along in the interview where she said: My dad told me not to tell anybody or I would get in trouble."[51] Furthermore, at the time the child-victim made the statements about "[d]addy says not to tell," she had already disclosed contact between herself and defendant.[52]

According to Victim Advocate Kristin Monaghan: (1) the child-victim "is afraid she's going to be taken away from her mother if she tells the truth;" (2) the child-victim '"talks about no one's here to protect her or her sister;" and, (3) the child-victim is "trying to do what's best for her father, what's best for her family."[53]

Following the arguments of counsel, the trial court ruled the child-victim's out-of-court statements to Viola Gonzales (the assistance pastor to whom the child first disclosed the abuse) and to the SANE nurse were admissible under the "forfeiture by wrongdoing

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[49] 111a.

[50] 112a.

[51] 114a.

[52] 116a.

[53] 119a - 120a.

rule" of MRE 804(b)(6).[54]

Specifically, the court first stated, "I don't make this ruling lightly. I've spent a considerable amount of time, both me and my law clerk, researching this issue during the course of this trial. Including, again, this morning at 4 a.m."[55] The court then went on to cite the relevant portions of the forensic interview where the child-victim told the interviewer, "My daddy says don't tell," "He told me not to tell," "I can't tell anybody 'cause I'll get in trouble," and "He didn't want me to tell anybody."[56] The court then stated, in relevant part, as follows:

> "Now, we are dealing with a ***four-year-old child***. Not dealing with a--even a child who is 8 or 9 or 10 or 11 can articulate themselves better than a four-year-old can.
>
> ". . . In my opinion, then, the Court will find that based upon our, frankly, four efforts to get the [child-victim] to testify that the witness Charity is ***unavailable because,*** among other things, of her infirmity, her youth, to be able to testify here in court and ***the fear,*** frankly, that ***she has of testifying here in court.***
>
> "And thus, if she's unavailable, her statements would come under--could arguably come under any of the hearsay exceptions, the--one of them being the following: 'A statement made by declarant made unavailable by opponent.'
>
> * * *
>
> "As I said, she's unavailable in my opinion. Also ***in my opinion, the provisions of 804(b)(6) do apply based upon the facts presented***, and I already read the rule and I already read the statements that she made in the--in the interview.
>
> * * *
>
> "The suggestion by Ms. Monaghan that the in--the child said these things, what she said in court and I'm not sure they made the record or not, but it helps to buttress the fear that this child may have been placed in.

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[54] 122a - 130a.

[55] 122a - 123a.

[56] 126a.

> "But the only person that would know what was said when the act was occurring, if indeed it occurred, or acts perhaps if indeed they occurred, was between the defendant and a four-year-old child. And ***the four-year-old child did say at the first time being forensically interviewed that her daddy said don't tell anybody. 'He told me not to tell.***'
>
> "One in the ordinary course of life can suspect that it was not a singular statement if indeed it was made, but. . .It was not a singular statement. Probably a series of statements if indeed they were made. The child related those as best perhaps a four-year-old could.
>
> "So, with that, I would rule that Miss Gonzales' statements- -repeating of the statements made to her by [the child-victim] are in fact admissible and can be considered not- -not as corroborative evidence but can be admitted and be considered by the jury."[57]

The trial court further stated it was not ruling on whether the recording of the forensic interview was also admissible under MRE 804(b)(6) because that issue is "not before me right now."[58] However, the trial court indicated the recording would be "admissible upon proper foundation." That foundation was then laid via the testimony of Detective Roberts, and the recording was therefore admitted into evidence.

Following his conviction, defendant appealed as of right. The Court of Appeals, in an unpublished opinion dated June 14, 2012,[59] found the trial court had abused its discretion in finding the "forfeiture by wrongdoing rule" of MRE 804(b)(6) was applicable in this case. The Court of Appeals therefore reversed and remanded the matter for a new trial.

Additional facts may be found in the body of this brief and the appendix thereto.

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[57] 126a - 128a (emphasis added).

[58] 129a.

[59] *Slip Op* at 135a - 139a.

ARGUMENT

I. THE TRIAL COURT DID *NOT* ABUSE ITS DISCRETION WHEN IT ADMITTED THE 4-YEAR-OLD CHILD VICTIM'S OUT-OF-COURT STATEMENTS UNDER THE "FORFEITURE-BY-WRONGDOING" RULE OF MRE 804(b)(6).

STANDARD OF REVIEW

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion.[60] "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes."[61] However, the decision to admit evidence frequently "involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of evidence."[62] Questions of law are reviewed de novo.[63] A court does not abuse its discretion when it admits evidence that is admissible as a matter of law.[64]

Further, errors in the admission of evidence are non-constitutional.[65] Non-constitutional errors that are preserved will not result in a reversal of a conviction unless it is more probable than not that the error was outcome determinative.[66] "An error is

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[60] *People v. Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003); *People v. Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

[61] *People v. Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

[62] *People v. Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

[63] *Id.*

[64] *Id* at 279.

[65] *People v. Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008), citing *People v. Herndon*, 246 Mich App 371, 402 n.71; 633 NW2d 376 (2001).

[66] *People v. Luckity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

deemed to have been 'outcome determinative' if it undermined the reliability of the verdict."[67]

DISCUSSION

A. Forfeiture by wrongdoing, generally.

> *"The common-law forfeiture [by wrongdoing] rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them – in other words, it is grounded in 'the ability of courts to protect the integrity of their proceedings.'*[68]

Our forfeiture by wrongdoing rule "provides an exception to the hearsay rule for a statement by a declarant made unavailable by the opponent."[69] Specifically, it provides:

> "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness. . . (6) 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."[70]

This rule, which was "adopted in 2001, is nearly identical to FRE 804(b)(6), except that the Michigan exception applies if a party 'has engaged in or *encouraged* wrongdoing' rather than 'engaged or *acquiesced* in wrongdoing.'"[71] Not surprisingly, "'[t]he rule has its foundation in the maxim that no one shall be permitted to take advantage of his own

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[67] *People v. Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).

[68] *Giles v. California*, 554 US 353, 374; 128 S Ct 2678; 171 L Ed 2d 488 (2008)(emphasis added), quoting *Davis v. Washington*, 547 US 813, 834; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

[69] *People v. Jones*, 270 Mich App 208, 212; 714 NW2d 362 (2006)

[70] MRE 804(b)(6)("Statement by declarant made unavailable by opponent").

[71] *Jones, supra* (emphasis in original text)(footnote omitted).

wrong..."[72]

Clearly, then, our forfeiture by wrongdoing rule "is an attempt to respond to the problem of witness intimidation whereby the criminal defendant,...*through one means or another*, often a simple telephone call, procures the unavailability of the witness at trial and thereby benefits from the wrongdoing by depriving the trier of fact of relevant testimony of a potential witness."[73] Consequently, "[u]nder the [forfeiture by wrongdoing] doctrine, a defendant *forfeits* his or her constitutional *right of confrontation* if a witness's [unavailability] results from wrongdoing procured by the defendant."[74] Hence, if a witness is unavailable to testify because the defendant has "'intimidated her, then the defendant has forfeited his right to confront that witness.'"[75]

"'To admit a statement against defendant under the [forfeiture by wrongdoing]

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[72] *Id* at 213, quoting *Reynolds v. United States*, 98 US 145, 158-159; 25 L Ed 244 (1879) and citing *People v. Bauder*, 269 Mich App 174, 183; 712 NW2d 506 (2005)

[73] *Jones, supra* at 220 (emphasis added).

[74] *Id.* at 213 (emphasis added). See also, *Giles, supra* at 371-372 for the proposition that prior confrontation of the unavailable witness is ***not*** a requirement for application of the forfeiture by wrongdoing doctrine.

[75] *Jones, supra* at 214-215, quoting *United States v. Cromer*, 389 F3d 662, 679 (6th Cir. 2004). *See also, Crawford v. Washington*, 541 US 36, 62; 124 S. Ct 1354; 158 L Ed 2d 177 (2004)("the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability"); *Reynolds, supra* at 158 ("The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege").

Notwithstanding the foregoing, it must be remembered that Confrontation Clause violations are subject to harmless error review. *See, e.g., Winzer v. Hall*, 494 F3d 1192, 1201 (9th Cir. 2007)("Violation of the Confrontation Clause is trial error subject to harmless-error analysis ... because its effect can be 'quantitatively assessed in the context of other evidence presented' to the jury").

rule,...the government must show (1) that the defendant engaged [in or encouraged] wrongdoing, (2) that the wrongdoing was intended to procure the declarant's unavailability, and (3) that the wrongdoing did procure the unavailability.'"[76] In determining whether this test has been satisfied, the trial court is to apply a preponderance of the evidence standard.[77] The preponderance of the evidence standard is well-understood to mean "more likely than not."[78]

Importantly, with reference to the intent requirement, not only are issues of intent inherently fact-driven, but our United State Supreme Court has made clear that the defendant's conduct must be intended ***or designed*** to prevent the witness from testifying:

> "Although there are definitions of 'procure' and 'procurement' that would merely require that a defendant have caused the witness's absence, other definitions would limit the causality to one that was *designed* to bring about the result 'procured.' ... We are aware of no case in which the [forfeiture by wrongdoing] exception was invoked although the defendant had not engaged in conduct *designed* to prevent a witness from testifying, such as offering a bribe."[79]
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> * * *
>
> "But as the evidence amply shows, the 'wrong' and the 'evil practices' to which these statements referred was conduct *designed* to prevent a witness from testifying."[80]

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[76] *Jones, supra* at 217, quoting *United States v. Scott*, 284 F3d 758, 762 (7th Cir. 2002).

[77] *Jones, supra* at 215-217.

[78] *See, e.g., People v. Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004)(equating a preponderance of the evidence with the "more likely than not" threshold). See also, *Merrow v. Bofferding*, 458 Mich 617; 581 NW2d 696 (1998)(discussing the preponderance or "more likely than not" standard that applies to preliminary questions on the admissibility of evidence), *Halloway v. General Motors Corp.*, 399 Mich 617, 636-637; 250 NW2d 736 (1977)(noting that the preponderance of probability is "more likely than not."),.

[79] *Giles, supra* at 360-361 (emphasis in original text).

[80] *Id* at 365 (emphasis in original text).

* * *

"In sum, our interpretation of the common-law forfeiture rule is supported by ... the absence of common-law cases *admitting* prior statements on a forfeiture theory when defendant had not engaged in conduct *designed* to prevent a witness from testifying..."[81]

Hence, in order to apply the forfeiture-by-wrongdoing rule, a trial court must first evaluate all relevant evidence presented by the prosecution,[82] and then determine whether it is more likely than not that: (1) defendant engaged in or encouraged wrongdoing relative to the child-victim; (2) defendant's wrongdoing was intended or designed to procure the child-victim's unavailability; and, (3) defendant's wrongdoing did procure the child-victim's unavailability.[83]

B. <u>No abuse of discretion here regarding applicability of the forfeiture-by-wrongdoing rule of MRE 804(b)(6)</u>.

Based on the foregoing, it is clear the trial court had an obligation to evaluate all relevant evidence presented by the prosecution, and then determine whether it was more likely than not that:

1. Defendant engaged in or encouraged wrongdoing relative to the child-victim (i.e., his four-year-old daughter);

2. Defendant's wrongdoing was intended or designed to procure the child-victim's unavailability; and,

3. Defendant's wrongdoing did procure the child-victim's unavailability.

Here, the record clearly demonstrates the trial court fulfilled this obligation – first, by

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[81] *Id* at 368 (emphasis in original text).

[82] Said evaluation necessarily requires weighing of the evidence and assessing witness credibility.

[83] *Jones, supra* at 215-217.

holding an evidentiary hearing on the matter;[84] and, second, by finding that each of the above three requirements had been met.[85]

With reference to the first requirement (i.e., that defendant engaged in or encouraged wrongdoing relative to the child-victim), a review of the record reveals the child-victim stated *several* times defendant had told her not to tell anyone about the sexual abuse. For instance, during the forensic interview (a transcript of which had been provided to the court), the following exchange took place with the child-victim:

> Interviewer: You know how you said he puts it in your mouth, does he say anything to you when does that?
>
> Child: ***My daddy says don't tell.***
>
> * * *
>
> Interviewer: What did you say your daddy said to you? Did he ever say anything to you about telling or not telling?
>
> Child: ***He told me not to tell.***[86]
>
> * * *
>
> Interviewer: What was he doing when the milk came out [of his string]?
>
> Child: I can tell you but ***my Dad told me not to tell anybody cause I'll get in trouble*** but I won't get in trouble.
>
> Interviewer: No, you can tell me anything in here. He didn't mean in here. You can tell in here. You can tell anything in here. What did he not want you to tell?

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[84] Said evidentiary hearing is contained in the third Separate Record that was made in this case. *See,* 110a - 130a. The witnesses who testified at said hearing were the child-victim's mother Angela Gomez, Detective Richard Roberts, and Victim Advocate Kristin Monoghan.

[85] The factual support for the court's finding that all three of these requirements had been met is found in the CAC interview transcript, the trial transcript, and the three separate records that were made during the course of this trial (the third separate record being the evidentiary hearing which specifically dealt with the forfeiture-by-wrongdoing issue).

[86] 20a (emphasis added).

Child: ***He didn't want me to tell nobody.***

Interviewer: And he said you'd get in trouble?

Child: Yeah.[87]

Similarly, at trial, the following exchange with the child-victim occurred:

Prosecutor: Charity? We are going to talk today about family. Okay?

Child: We can't.

Prosecutor: Why?

Child: 'Cause.

Prosecutor: Why though?

Child: 'Cause ***my dad not's gonna want me to talk about my family.***[88]

Other witnesses also testified at trial about statements made by the child-victim regarding defendant telling her not to disclose the sexual abuse. For instance, assistant pastor Viola Gonzales testified the child-victim told her defendant "hurts me."[89] When Viola asked how defendant hurt her, the child-victim stated, "He puts his finger in my butt."[90] When Viola asked the child-victim if her mother knows defendant does this to her, the child-victim "said no; ***he told me not to tell anyone.***"[91]

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[87] 25a (emphasis added).

[88] 50a (emphasis added)

[89] 34a.

[90] 35a.

[91] *Id.* (Emphasis added). Notably, in *Giles, supra*, our U.S. Supreme Court emphasized States are free to adopt their own rules regarding the admissibility of *non*-testimonial statements:

Angela Gomez (the child-victim's mother) testified on a separate record at trial as follows:

> Court: And you- -your opinion is that she's primarily just nervous about having the jury here, is that right?
>
> Mom: Yes.
>
> Court: It's not out of fear or anxiety for having the dad here?
>
> Mom: You know, I'm not really sure. When she came out yesterday afternoon, she said, ***"I want to protect my daddy***." "I want to protect my family." And- -
>
> Court: What do you think she meant by that?
>
> Mom: She knows her daddy's in trouble. She knows that. And she knows if she says something, you know, she's not going to be able to see her daddy. But it's been the same way since August, you know. Um, I'm not- -I'm not quite sure what's going on in her head, but ***that's what she said, "I want to protect my daddy,"*** "I want to protect my family."[92]

> "[O]nly *testimonial* statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent's version of forfeiture by wrongdoing."

Under our rules of evidence, if the child-victim not been rendered unavailable by defendant, and, instead, had testified at trial, then this testimony by Viola Gonzales would have been admissible under MRE 803A to corroborate the child-victim's testimony. Therefore, the trial court's ultimate decision to allow Viola Gonzales to testify about the child-victim's statements was absolutely proper under Michigan law – i.e., "'[a] prior statement given by a witness made unavailable by the wrongful conduct of a party is admissible against the party *if the statement would have been admissible had the witness testified.*'" *People v. Bauder*, 269 Mich App 174, 184; 712 NW2d 506 (2005)(emphasis added), quoting *Steele v. Taylor*, 684 F2d 1193, 1202 (6th Cir.1982). *See also, e.g., Roberts v. State*, 894 NE2d 1018, 1024-1026 (Illinois 2008). Similarly, the CAC interview would have been admissible for impeachment purposes under MRE 609 which, upon information and belief, was exactly what defense counsel intended to do had the child testified.

[92] 84a - 85a (emphasis added).

At the evidentiary hearing (i.e., the third separate record at trial), there were three witnesses who testified about the defendant's statements to the child-victim and their effect upon the child-victim: (1) the child-victim's mother Angela Gomez; (2) Detective Roberts; and, (3) Victim Advocate Kristin Monaghan. Ms. Gomez testified about the child-victim's fear of CPS worker John Jones:

> Prosecutor: Do you remember talking with me yesterday, ma'am?
>
> Mom: Yes.
>
> Prosecutor: And did you tell me yesterday that- -that ***Charity made the statement*** when she saw John that, ***Daddy said not to tell about what happened or I'll be taken away or I'll get in trouble***? Something to that effect?
>
> Mom: That is what Charity told Jill [at the CAC]. And Jill told me when she took me back and I talked to John.[93]

Detective Roberts testified about what the child-victim said at the CAC interview regarding defendant's statements to her:

> Prosecutor: Did Charity make any statements or give any indications of whether she had been told not to talk about what she was there to be interviewed on?
>
> Detective: She did make statements like that.
>
> Prosecutor: And what statements did she make, sir?
>
> Detective: She said to Jill, she said: ***My dad told me not to tell.*** She

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[93] 112a (emphasis added). It was this conversation the prosecutor was referring to when he informed the court earlier that "Angela Gomez told me for the first time yesterday that when she comes out of the C.A.C. interview and *she sees John Jones, the C.P.S. worker, she spontaneously* to her mother *said, Daddy said if I tell the truth, John Jones will take me away from my mama.* And she is petrified of John Jones and throughout the course of this trial coming into our office has talked about how John Jones, a C.P.S. worker, takes children away from their family." 111a (emphasis added).

said that twice. There was a different time farther along in the interview where she said: ***My dad told me not to tell anybody or I would get in trouble.***[94]

Victim Advocate Kristin Monaghan testified about what the child-victim said regarding her inability and/or refusal to testifiy:

Prosecutor: Now, has Charity made any statements to you with regard to why she isn't able to testify when she comes into the courtroom or when she's gone into video depositions?

Kristin: Um, she said some things, yes.

Prosecutor: And has she made- -So she's made statements to you- -some things. Statements to you about why she won't testify or won't tell the truth, is that correct?

Kristin: Yes.

Prosecutor: And what are those things that she's said to you, ma'am?

Kristin: Um, she's scared of the people in here. Um, ***she is afraid she's going to be taken away from her mother if she tells the truth.*** Um. . .I don't know; I- -I- -She's said a lot of things over the last three days. She talks about no one's here to protect her or her sister.

Prosecutor: Has she made any statements to you with regard to her father?

Kristin: Ah, I- -I can't think of anything right offhand. Um. . . ***She talked about how she doesn't know what to do because she's trying to do what's best for her father***, what's best for her family.[95]

Based on all the foregoing, it certainly is more likely than not that defendant told the child-victim (i.e., his four-year-old daughter) not to tell about the sexual abuse and/or told

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[94] 113a - 114a (emphasis added).

[95] 119a - 120a (emphasis added).

the child-victim she would be taken away from her mother if she told the truth about the sexual abuse. The trial court was therefore absolutely correct in finding the first requirement of forfeiture by wrongdoing had been met here – i.e., that defendant had engaged in or encouraged wrongdoing relative to the child-victim.[96]

With reference to the second requirement (i.e., that defendant engaged in the aforementioned wrongdoing with the intent of procuring the unavailability of the child-victim), it is true the court never *expressly* stated it was finding defendant engaged in the aforementioned wrongdoing with the intent of procuring the child-victim's unavailability. *However,* said finding was implicit within the court's ruling.[97]

Specifically, after hearing the prosecution's argument on the issue, the court stated, "I don't make this ruling lightly. I've spent a considerable amount of time, both me and my law clerk, researching this issue during the course of this trial. Including, again, this morning at 4 a.m."[98] The court then went on to cite the relevant portions of the forensic interview where the child-victim told the interviewer, "My daddy says don't tell," "He told me not to tell," "I can't tell anybody 'cause I'll get in trouble," and "He didn't want me to tell anybody."[99] The court then found defendant had told the four-year-old child-victim not to

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[96] "'*[A]pplying pressure on potential witnesses* not to testify, *including by threats of harm and suggestion of future retribution is wrongdoing.*" *Jones, supra* at 221, quoting *United States v. Scott*, *supra* at 764 (emphasis added).

[97] *See, Commonwealth v. Szerlong*, 933 NE2d 633 (Mass.2010)("Though he made no findings of fact, ***the judge implicitly found*** that defendant married the victim with the ***intent*** to enable her to claim her spousal privilege and thereby avoid testifying against the defendant")(emphasis added).

[98] 122a - 123a.

[99] 126a.

tell anyone about the abuse and, as a result thereof, had rendered her unavailable to testify at trial.[100]

In so finding, the court obviously determined there was a cause-and-effect correlation between the defendant telling the child-victim not to tell anyone about the abuse and the child-victim being fearful of testifying. It seems rather axiomatic that implicit in this cause-and-effect determination was a finding that the "cause" was *intended or designed* to bring about the desired "effect" of preventing the child from telling anyone, including authorities, about the sexual abuse.[101] The mere fact the court did not recite any "magical incantation" regarding intent does *not* mean the court somehow failed to find the necessary intent here. On the contrary, the court specifically found the forfeiture by wrongdoing rule applied "based upon the facts presented."[102] As this Court well-knows, "[a]n actor's intent may be inferred from all the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient."[103]

Additionally, our United States Supreme Court has noted as follows regarding forfeiture by wrongdoing in the context of domestic violence:

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[100] 126a - 128a.

[101] As previously noted, in dealing with the intent requirement, our United State Supreme Court has made clear that the defendant's conduct must be intended ***or designed*** to prevent the witness from testifying. *Giles, supra* at 360-361; 365; 368.

[102] 127a.

[103] *People v. Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). *See also, People v. Kissner*, 292 Mich App 526, 527; 808 NW2d 522 (2011)("A fact-finder may infer a defendant's intent from all the facts and circumstances. ... Furthermore, '[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded to those inferences.'"), quoting *People v. Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

". . . [O]nly *testimonial* statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent's version of forfeiture by wrongdoing. . . .

"The domestic-violence context is, however, relevant for a separate reason. ***Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions***. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution – rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify."[104]

It is beyond contestation that the same type of controlling dynamic is also found in child sex abuse cases – i.e., the abuser commonly uses manipulation, threats, and even violence to dissuade the child from disclosing the abuse to third parties.[105] Consequently, when there is evidence the abuser instructed the child not to tell anyone about the sexual abuse (as was the case here), said evidence can certainly support a finding that, by so instructing the child, the abuser engaged in behavior that was *intended or designed* to prevent the child from disclosing the sexual abuse to *any* third parties, *including* police officers and juries.

Based on the foregoing, it is certainly more likely than not that when defendant told the four-year-old child-victim not to tell about the sexual abuse and/or told the child-victim she would be taken away from her mother if she told the truth about the sexual abuse,

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[104] *Giles, supra* at 377 (emphasis added).

[105] Indeed, when child sex abuse involves a parent or step-parent or other relative, it is essentially domestic violence with a sexual component.

defendant *intended* that the child not disclose said abuse to *any* third parties, *including* police and *juries.*[106] Thus, the second requirement of forfeiture by wrongdoing (i.e., that defendant engaged in the aforementioned wrongdoing with the intent of procuring the unavailability of the child-victim) was satisfied in this case.

With reference to the third and final requirement of forfeiture by wrongdoing (i.e., that defendant's wrongdoing did, in fact, procure the unavailability of the child-victim), the record clearly indicates this requirement was satisfied. After all, the child-victim made clear at the forensic interview that she had been instructed by defendant not to tell anyone about the sexual abuse. Then, at trial, the child-victim basically refused to speak; however, the one thing she did say loud and clear was that she was not going to talk about her family because defendant did not want her to talk about her family.[107] This statement, along with her statements at the forensic interview and her statements to other third-parties certainly make it more likely than not that defendant's wrongdoing did, in fact, procure the unavailability of this child-victim at trial.

Based on all the foregoing, it is clear the trial court did not abuse its discretion when it found the child-victim's statements were admissible under our forfeiture by wrongdoing

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[106] The mere fact that defendant may not have specifically told this four-year-old child not to testify *at trial* is ***not*** determinative. Defendant told her not to tell *anyone* and "anyone" necessarily includes police, prosecutors, judges and juries. Furthermore, the very fact that the child refused to testify at trial "'cause my dad's not gonna want me to talk about my family," 50a, indicates the child herself was able to glean ***exactly*** what her father meant and/or intended by his words.

[107] *Id.*

rule.[108] Hence, neither defendant's due process rights[109] nor his confrontation rights[110] were violated here.

C. In reversing the trial court, the Court of Appeals erroneously promulgated a "bright line" rule which effectively immunizes child sex abusers from the forfeiture-by-wrongdoing rule of MRE 804(b)(6).

1. The bright line rule approach.

The Court of Appeals, in reviewing the trial court's decision to allow the aforementioned evidence to be admitted under the forfeiture-by-wrongdoing rule of MRE 804(b)(6), held as follows:

"We do not agree with the prosecution or the trial court that

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[108] MRE 804(b)(6).

[109] "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 US 284, 294; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Here, the Court of Appeals has given defendant *more* than a fair opportunity to defend against the State's accusations. Indeed, the Court of Appeals has given defendant a windfall of epic portion under the guise of "due process" by allowing his wrongful manipulation and intimidation of the key witness to go unpunished. As astutely noted by one legal scholar, "'it is difficult to summon much sympathy for the defendant who complains that [admitting evidence of an] unavailable witness is unfair and violative of [his constitutional rights],' when the defendant himself is the one who actually made that witness unavailable." Joshua R. Van Laan, *How to Make a Witness Disappear Legally: The Supreme Court's Improper Decision in Crawford v. Washington*, 13 T.M. Cooley J. Prac. & Clinical L 485, 509 (2011).

[110] As noted by our United States Supreme Court, "[t]he reasoning of the common-law authorities reinforces the conclusion that *the wrongful-procurement rule did not depend on prior confrontation*....While American courts understood the admissibility of statements made at prior proceedings...to turn on prior opportunity to cross-examination as a general matter,...no such limit was applied or expressed in early wrongful-procurement cases....The leading Ameri-can case on forfeiture of the confrontation right was our 1879 decision in *Reynolds*. That case does not set forth prior confrontation as a requirement for the doctrine's application, and begins its historical analysis with a full description of the rule set forth in *Lord Morley's Case*, which itself contained no indication that the admitted testimony must have been previously confronted." *Giles, supra* at 370-372 (emphasis added).

> defendant's alleged ***contemporaneously issued statements to the victim*** amount to the 'wrongdoing' contemplated by MRE 804(b)(6). ***Although it appears that the purpose of any such statements 'not to tell' may have been to prevent the victim from disclosing the criminal acts, it is doubtful that they can be construed as threats intended to prevent the victim from testifying at trial.*** That is, ***these statements cannot reasonably be characterized as 'coercion, undue influence, or pressure to silence testimony and impede the truth-finding function.'*** See, *Jones,* 270 Mich App 221. And there is evidence that, prior to trial, the victim did allegedly tell the associate pastor, forensic interviewer and SANE nurse about certain criminal sexual acts allegedly committed by defendant."[111]

In so holding, the Court of Appeals effectively created a "bright line rule" whereby threats, manipulation, coercion and/or other wrongdoing committed contemporaneously with acts of child molestation are *per se* insufficient to trigger the forfeiture-by-wrongdoing rule of MRE 804(b)(6) regardless of their intended effect upon the child-victim's availability at trial.

The practical effect of this bright line rule is disturbingly clear: Child molesters are effectively immune from the "forfeiture by wrongdoing rule" of MRE 804(b)(6) if, *during the course of their molestation*, they can successfully threaten, manipulate, and/or coerce the child-victim into being unavailable for trial thereby eliminating the need for any additional threats at or near the time of trial. In other words, child molesters can effectively avoid the "forfeiture by wrongdoing rule" simply by being proficient in the art of manipulation and/or coercion during the course of their molestation. Such proficiency necessarily eliminates the need for additional manipulation, threats, coercion and/or other wrongdoing after charges are brought in order to render the child-victim unavailable at trial.

Needless to say, "timing is everything" under the Court of Appeals' bright-line rule approach to the forfeiture by wrongdoing rule. If, contemporaneously with the sexual

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[111] 136a (emphasis added).

abuse, the molester tells the child "don't tell anyone" and/or threatens the child with dire consequences if the child "tells anyone" and/or promises the child a reward if the child does not tell anyone, then the molester is not subject to the forfeiture by wrongdoing rule. However, if upon being charged and/or near the time of trial the molester does the exact same thing, then the molester *may* be subject to the forfeiture by wrongdoing rule.

The incongruity and unfairness of such a result is plain upon its face – especially given: (1) the language of the forfeiture by wrongdoing rule; and, (2) the nature of child sex abuse.

With reference to the language of the forfeiture by wrongdoing rule, neither the rule itself nor the three-part test applicable thereto specifically state that the wrongdoing must occur at or near a particular time or event, such as after the molester is charged and/or immediately prior to or during trial.[112] Of course, this is not to say that the timing of the

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[112] Similarly, neither the rule nor the admissibility test require that the wrongdoing take any particular shape or form. *See. e.g.,* Van Laan, *supra* at 501 ("The wrongdoing *does not need to be a criminal act*, and the [forfeiture-by-wrongdoing] Rule applies to all parties, including the government")(emphasis added). *See also, e.g., Commonwealth v. Szerlong, supra* ("'A defendant's involvement in procuring a witness's unavailability need not consist of a criminal act'; the 'wrongdoing' in forfeiture by wrongdoing is simply the intentional act of making the witness unavailable to testify or helping the witness become unavailable"). On the contrary, as noted previously, the wrongdoing could be something as innocuous as a simple telephone call. *Jones, supra. See also, State v. Zaragoza*, 287 P3d 510 (Utah 2012) (forfeiture by wrongdoing applied where defendant-husband made numerous *phone calls to victim-wife in violation of a no contact order while he was in jail for domestic violence*, and victim-wife subsequently invoked her state constitutional spousal testimonial privilege); *State v. Baldwin*, 794 NW2d 769 (Wisc. 2012) (forfeiture-by-wrongdoing applied where defendant-boyfriend sent written correspondences and made numerous phone calls to victim-girlfriend while he was in jail for domestic violence).

Hence, some "extreme" form of wrongdoing such as murder or kidnaping is ***not*** necessary to trigger the rule; rather, mere threats and manipulation are sufficient. *See, e.g., People v. Decosey*, 2009 WL 1068878 (2009)("Because *defendant manipulated and influenced Nachica [with declarations of love and promises of marriage] so that she* refused to cooperate with police and *failed to appear at court to testify*, defendant waived any right to confront Nachica at trial

wrongdoing is irrelevant under the rule. It certainly is not. However, rather than being *the* determining factor (as it seems to be under the Court of Appeals' bright-line rule approach), the timing of the wrongdoing is simply *one* of several factor to be considered in applying the three-part admissibility test. This is especially true as it relates to molester's intent and the actual reason for the child-victim's unavailability.

With reference to the nature of the offense, it certainly comes as no surprise to anyone that child sex abuse is very different from almost every other type of crime:

> "*Child abuse is maddeningly difficult to prove*. Maltreatment occurs in secret, with the child usually the only witness. ... In sex abuse cases, *the evidentiary vacuum created by lack of eyewitnesses is often compounded by a paucity of physical evidence because sexual abuse seldom results in physical injury.*"[113]
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> * * *
>
> "Obviously, it is true that many, if not most crimes are at least attempted to be committed in secrecy. *But few are so shrouded in secrecy or able to be committed in the defendant's choice of location. Moreover, many of the investigative tools used by the police to obtain evidence in other cases simply are of no use in sex offenses.* Undercover agents, wiretaps, search warrants to recover stolen property or contraband, getting a co-defendant to roll – none of these can be used to gain evidence in the typical child molestation case."[114]

Further, as noted by our federal courts, child molesters (unlike other type of criminals) have a separate and very distinct *motive* for engaging in their crime of choice:

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pursuant to the doctrine of forfeiture by wrong-doing")(emphasis added); *Commonwealth v. Szerlong, supra* (evidence supported trial court's implicit finding that *defendant married the victim with intent to enable her to claim spousal privilege and thereby avoid testifying against him in an assault and battery prosecution*).

[113] John E. B. Meyers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 Utah L. Rev. 479, 479-480 (emphasis added).

[114] Ellen H. Meilaender, *Revising Indiana's Rule of Evidence 404(b) and the Lannan Decision in Light of Federal Rules of Evidence 413-415*, 75 Ind. L. Rev. 1103, 1117 (2000)(footnotes omitted)(emphasis added).

> "...*[T]he crime [of child sex abuse] is motivated by a taste for engaging in that crime or a compulsion to engage in it (an 'addiction'), rather than by a desire for pecuniary gain or some other advantage* to which the crime is instrumental in the sense that it would not be committed if the advantage could be obtained as easily by a lawful route. Sex crimes provide a particularly clear example. Most people do not have a taste for sexually molesting children. As between two suspected molesters, then, only one of whom has a history of such molestation, the history establishes a motive that enables the two suspects to be distinguished."[115]

This highly distinctive motive has undoubtedly contributed to the "growing realization that recidivism rates for these [child sex abuse] offenses were for many years vastly underestimated and are actually much higher than thought."[116] This highly distinctive motive has also undoubtedly contributed to this Court's determination that when MRE 403 is applied to prior acts of sexual abuse in child molestation cases,[117] the propensity inference must be weighed on the probative side of the balancing test, rather than on the prejudicial side.[118] To say this is a departure from how the 403 balancing test is applied to prior acts evidence in other type of cases is an understatement.

Finally, but perhaps most importantly, it has been recognized there are typical patterns of behavior exhibited by adults who sexually abuse children:

> "... [T]here is a difference between an offender who is a stranger and one who has a relationship with a victim. ... [A] 'molestation scenario' generally unfolds over time and builds in intensity. ... [P]art of the reason for this [is] that the sex offender needs to 'desensitize' the child and have some ***assurance that the child will not disclose the abuse***. ... [I]t [is] not

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[115] *United States v. Cunningham*, 103 F3d 553, 556-57 (7th Cir. 1996)(emphasis added) (internal citations omitted).

[116] Meilaender, *supra* at 1113.

[117] Said prior acts being admissible under MCLA 768.27a.

[118] *People v. Watkins*, 491 Mich 450; 818 NW2d 286 (2012).

> unusual for molestation to begin with apparently innocuous touching or hugging. ... [O]ther examples of desensitizing a child [include] involving other children to give the sense 'that this is an okay kind of behavior,' photographing the child and having the photographs become increasingly explicit, exposing the child to sexual items such as condoms or pornography, using sexually oriented language, and the offender exposing himself."[119]

All of the foregoing makes clear that child molestation is a crime that is perpetrated for a very different reason and in a very different manner than almost any other type of crime. These critical differences – especially the ongoing and escalating nature of child molestation, and the manipulation inherent therein (including statements of "don't tell") – make it quite obvious that the "forfeiture by wrongdoing rule" of MRE 804(b)(6) should ***not*** be subject to the Court of Appeals bright-line rule. Said bright-line rule ignores the very unique nature of child molestation and, in so doing, *extends greater protection to child molesters* than to other type of criminals.[120]

Additionally, in the analogous context of domestic violence, our United States Supreme Court has acknowledged that the ongoing and escalating nature of domestic violence, as well as the dynamics involved in an abusive relationship, allow for application of the forfeiture by wrongdoing rule:

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[119] *People v. Ackerman*, 257 Mich App 434, 443 (2003)(emphasis added).

[120] In opposing the People's application for leave in this Honorable Court, defendant argued the People were somehow asserting "the notion that the Confrontation Clause's applicability depends on the alleged crime." On the contrary, the People are simply asserting that the forfeiture-by-wrongdoing rule should *not be limited by the nature of the alleged crime*. Indeed, that is precisely why the People are advocating a totality of the circumstances approach to the forfeiture-by-wrongdoing rule – i.e., so that *all* offenders, *including* those who engage in wrongdoing during and as part of their ongoing manipulation, coercion and/or abuse of a vulnerable victim, may be subject to the rule. Such crimes include, but are not limited to: child molestation, child abuse, elder abuse, domestic violence, stalking, extortion, pandering, kidnaping, witness intimidation, etc.

"... Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and *include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions.* Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and *stop her from reporting abuse to the authorities or cooperating with the criminal prosecution – rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry*, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify."[121]

As noted *supra*, child sex abuse is typically an ongoing and escalating offense which also

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[121] *Giles, supra* at 377 (emphasis added). *See also,* Justice Souter's concurrence therein:

"The second [thing that counts in favor of the Court's understanding of forfeiture when the evidence shows domestic abuse] is the *absence* from the early material *of any reason to doubt that the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship*, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say, in a fit of anger." *Id* at 380 (emphasis added).

See also, Justice Breyer's dissent therein:

"In *Davis*, we recognized that 'domestic violence' cases are 'notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.' We noted the concern that '[w]hen this occurs, the Confrontation Clause gives the criminal a windfall.' And we replied that 'one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.'" *Id* at 2709 (internal citations omitted).

See also, Davis v. Washington, supra at 832-833 wherein our U.S. Supreme Court held that although the nature of domestic violence offenses does not justify "greater flexibility in the use of testimonial evidence, ... when [domestic violence] defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce."

involves a very controlling dynamic.[122] Consequently, when there is evidence the molester instructed the child not to tell anyone about the sexual abuse, said evidence can certainly support a finding that the instruction "not to tell" was *intended or designed* to prevent the child from disclosing the sexual abuse to third parties, including police officers and juries.

2. The totality of the circumstances approach.

The best approach for applying the forfeiture by wrongdoing rule of MRE 804(b)(6) in *all* cases – *including* child molestation cases – is a totality of the circumstances approach. Such an approach would better allow trial courts to analyze a defendant's behavior, defendant's intent in engaging in the behavior, and the impact of defendant's behavior upon a victim – i.e., it would better allow trial courts to apply the three-part admissibility test. This is particularly true as it relates to the intent of the defendant and the impact of defendant's behavior upon the victim.

Furthermore, not only is the totality of the circumstances the preferred approach for dealing with numerous issues, including those of constitutional magnitude,[123] but our U.S.

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[122] *Ackerman, supra.*

[123] *See, e.g., United States v. Fullmer*, 584 F3d 132 (3rd Cir.2009)(in deciding whether speech constitutes a "true threat," and is thus unprotected by the First Amendment, a court should consider the totality of the circumstances and not just the words in isolation); *Holzemer v. City of Memphis*, 621 F 3d 512 (6th Cir.2010)(temporal proximity in cases under a First Amendment retaliation case requires the court to always look at the totality of the circumstances to determine whether an inference of retaliatory motive exists); *People v. Williams*, 472 Mich 308, 314; 696 NW2d 636 (2005)(the touchstone of the Fourth Amendment is reasonableness, and reasonableness requires a fact-specific inquiry, which is ultimately measured by examining the totality of the circumstances); *People v. Doud*, 462 Mich 629, 636; 614 NW2d 152 (2000)(whether a suspect has knowingly and intelligently waived his Fifth Amendment privilege depends on the totality of the circumstances); *Foster v. Wofenbarger*, 687 F3d 702 (6th Cir.2012)(when evaluating prejudice to the defendant in the context of an ineffective assistance of counsel claim under the Sixth Amendment, a reviewing court must take into account the totality of the circumstances);

Supreme Court has indicated that such an approach is proper regarding the forfeiture-by-wrongdoing doctrine:

> ". . . The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to [the forfeiture-by-wrongdoing] doctrine less necessary, because prosecutors could show the 'reliability' of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence. *Crawford*, in overruling *Roberts* did not destroy the ability of courts to protect the integrity of their proceedings."[124]

Of course, applying a totality of the circumstances approach to the forfeiture-by-wrongdoing rule would involve a review of several factors, including, but not limited to:

1. The nature of the charged offense – e.g., was it a single incident, or did it involve ongoing conduct over the course of time.

2. The nature of wrongdoing.

   a. Was it a single request "not to tell," or was it a request that was repeated several times over the course of the alleged conduct?

   b. Was the request "not to tell" accompanied by any threats and/or promises?

3. The timing of the wrongdoing.

4. The age and maturity level of the victim.

5. The relationship between the victim and the defendant.

Cunningham v. City of Wenatchee, 345 F3d 802 (9th Cir.2003)(a coercive interrogation exists, in violation of the Fifth and Fourteenth Amendments when the totality of the circumstances shows that the interrogating officer's tactics undermined the suspect's ability to exercise his free will); and, *Lund v. Hennepin County*, 427 F3d 1123, 1126 (8th Cir.2005)("It is well-settled under our precedents that establishing a violation of due process [under the Fourteenth Amendment] as a basis for municipal liability under §1983 requires plaintiff to show more than mere negligence or unreasonableness; a plaintiff must point to conduct by the municipality, or by employees acting with its knowledge, that shocks the conscience given the totality of the circumstances.").

[124] *Davis, supra* at 833-834.

6. Whether the victim specifically indicated they are "not telling" because they were told not to and/or because something bad will happen.

7. Whether the victim disclosed the wrongdoing (i.e., the request not to tell and/or threats of dire circumstances) to third-parties and, if so, the consistency of said disclosure(s).

8. Lack of motive by the victim to fabricate the wrongdoing.

9. Lack of bias by the victim.

10. Corroboration of the wrongdoing by other evidence.

Hence, unlike the Court of Appeals' "bright line rule" approach, a totality of the circumstances approach allows a trial court to look at numerous relevant factors, not just the temporal proximity and/or the semantics of the wrongful act(s). It would therefore result in a much more accurate and correct application of the three-part admissibility test under the forfeiture by wrongdoing rule of MRE 804(b)(6).

II. THE COURT OF APPEALS SUBSTITUTED ITS JUDGMENT FOR THAT OF THE TRIAL COURT AND, IN SO DOING, IMPERMISSIBLY INVADED THE FACT-FINDING AUTHORITY OF THE TRIAL COURT.

STANDARD OF REVIEW

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion.[125] "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes."[126] Questions of law are reviewed de novo.[127]

DISCUSSION

> *"...[W]here the circuit judge saw the witnesses and heard the testimony we give great weight to the findings of fact."*[128]

Admission of the subject evidence under the forfeiture by wrongdoing rule[129] necessarily required the trial court to assess the credibility and demeanor of the four-year old child-victim as she repeatedly refused to testify at trial. As this Honorable Court so wisely noted nearly a quarter of a century ago, trial courts (*not* appellate courts) are in the best position to make such assessments:

> "...[I]n examining Michigan case law, to determine the meaning of 'de novo' review, we find such a variety of terminology and application that a single clear standard of appellate review does not emerge. *Mindful of our distance from the trial bench function, we do see one clear and consistent*

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[125] *Washington, supra; Starr, supra.*

[126] *Unger, supra.*

[127] *Id.*

[128] *Beason v. Beason*, 435 Mich 791, 801; 460 NW2d 207 (1990)(emphasis added).

[129] MRE 804(b)(6).

historical theme: ***appellate courts have recognized the superior position of the trial court in evaluating the evidence and have hesitated to interfere with factual findings.*** *Very early, this Court* recognized the superior position of the trial court in making factual determinations and, consequently, *limited review of such determinations:*

> 'Scattered through the large record there are many traces of truth and of untruth, and numerous instances of coloring and exaggeration. There is much to believe and much to disbelieve, and the case is one of those where the decision of the judge exercising primary jurisdiction on matters of fact ought not to be over-ruled by a court of appeal except upon clear and satisfactory grounds. The appellate tribunal ought to be fully persuaded that is *must* have reached a different conclusion had it occupied the position of the court appealed from and been favored with all the advantages of that court for judging rightly. *Nicholas v. Nicholas*, 50 Mich 162; 15 NW 64 (1883). (Emphasis in original.) '

"Despite some shifting degree of certainty which the appellate courts have felt necessary before reversing a factual determination, *this Court and the Court of Appeals have recognized the advantage of the trial judge in making factual determinations.* While we acknowledge that it is impossible and perhaps unwise to articulate a bright-line standard of review, we take this occasion to observe that it is as true today as when first stated that ***'[t]here are many aids possessed by the judge who hears the oral testimony in deciding who of the witnesses are truthful that do not get upon the printed page.'*** *Donaldson v. Donaldson*, 134 Mich App 289, 291; 96 NW 448 (1903). *This Court has stated that where the circuit judge saw the witnesses and heard the testimony we give great weight to the findings of fact.* (Citations omitted)."[130]

Here, the Court of Appeals improperly usurped the trial court's fact-finding province when it found the 4-year-old child victim refused to testify for reasons *other than* defendant's wrongdoing as found by the trial court:

"... Further, review of *the record reveals several possible reasons for*

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[130] *Beason, supra* (emphasis added except where noted otherwise). *See also, Kissner, supra* at 527 ("'Questions of credibility are left to the trier of fact and will not be resolved anew by this Court'"), quoting *People v. Avant*, 325 Mich App 499, 506; 597 NW2d 864 (1999).

> *the victim's refusal to testify in court* including, for example, that she was intimidated by the formality of the proceedings and presence of people in the courtroom, as well as by the use of a microphone. However, we could not discern from the record any evidence that would lead to the conclusion that the victim refused to testify in court because of any threats issued by defendant against the victim."[131]

By finding the record "reveals several possible reasons for the victim's refusal to testify in court," and then concluding those *other* "possible reasons" negated the trial court's finding that the victim refused to testify in court due to defendant's wrongdoing, the Court of Appeals clearly substituted its judgment for that of the trial court and, in so doing, impermissibly invaded the fact-finding authority of the trial court. After all, the trial court was certainly well-aware there *could have been* other reasons why the 4-year-old child victim refused to testify. Indeed, there can always be "other reasons" for a witness's behavior on the stand – especially when one is dealing with a child of tender years. However, *unlike the Court of Appeals, the trial court had the benefit of actually being able to observe this four-year-old child victim on the stand, to watch her demeanor and to draw all reasonable conclusions therefrom.*

Moreover, a trial court's observations of a witness's demeanor often includes behaviors and/or mannerisms which simply are not obvious from reading a cold, impersonal record – e.g., whether the child looked fearful; whether the child was looking at defendant and, if so, whether it was with fear and/or for approval; whether the child was being "stared down" by defendant; whether the child began to "play" with the microphone because she was curious or because she wanted to avoid answering questions about her "daddy;" whether the child was actually intimidated by the formality of the proceedings and

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[131] 136a - 137a.

the presence of people in the courtroom, or whether she was simply trying to avoid answering questions about her "daddy;" etc. That is precisely why factual determinations which hinge upon the demeanor of a witness are the exclusive province of the trial court.[132] And neither this Court nor the Court of Appeals should be allowed to invade that province absent a clear abuse of discretion by the trial court.

As demonstrated *supra*, the trial court did *not* abuse its discretion in finding this four-year-old child-victim was refusing to testify as a result of defendant having instructed her "not to tell" and having threatened her with being "taken away" if she did tell. Simply stated, there was more than sufficient evidence in the record from which the trial court could reasonably conclude it was more likely than not that the child-victim was refusing to testify as a result of defendant's wrongdoing:

1. The CAC interview transcript wherein the child-victim stated several times that defendant told her "not to tell" and that she'd get in trouble if she did tell;[133]

2. The testimony of Viola Gonzales that the child-victim told her defendant "told me not to tell anyone."[134]

3. The in-court behavior and statements of the child-victim;[135]

4. The testimony of the child-victim's mother Angela Gomez during the second separate record regarding the child's statements of wanting

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[132] *Beason, supra. See also, Donaldson v. Donaldson*, 134 Mich 289, 291; 96 NW 448 (1903)("There are many aids possessed by the judge who hears the oral testimony in deciding who of the witnesses are truthful that do not get upon the printed page").

[133] *See, e.g.*, 20a and 25a.

[134] 35a.

[135] 36a - 51a.; 53a - 70a.; 86a - 106a; and,107a - 109a.

to protect her daddy and protect her family;[136]

5. The information provided by the assistant prosecuting attorney regarding the child-victim's fear of CPS worker John Jones and the basis for that fear;[137] and,

6. The evidence adduced at the evidentiary hearing during the third separate record.[138]

Therefore, the Court of Appeals clearly erred when it found there was not "*any* evidence that would lead to the conclusion that the victim refused to testify in court because of any threats issued by defendant against the victim."[139]

Further, and as also noted *supra*, *unlike the trial court, the Court of Appeals did not have the benefit of actually being able to observe this four-year-old child victim on the stand, to watch her demeanor and to draw all reasonable conclusions therefrom. Nor did the Court of Appeals have the benefit of being able to observe the defendant's demeanor while the child-victim was on the stand.*

Based on all the foregoing, it is clear there ***was*** sufficient "evidence that would lead to the conclusion that the victim refused to testify in court because of any threats issued by defendant against the victim."[140] When it found to the contrary, the Court of Appeals clearly substituted its judgment for that of the trial court and, in so doing, impermissibly invaded the fact-finding authority of the trial court.

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[136] 80a - 85a.

[137] 77a.

[138] *See, e.g.*, 112a - 117a; 119a - 120a.

[139] 136a - 137a (emphasis added).

[140] *Id.*

The Court of Appeals also substituted its judgment for that of the trial court and, in so doing, impermissibly invaded the fact-finding authority of the trial court when it found defendant's statements "not to tell" could *not* satisfy the forfeiture-by-wrongdoing rule:

> "We do not agree with the prosecution or the trial court that defendant's alleged contemporaneously issued statements to the victim amount to the 'wrongdoing' contemplated by MRE 804(b)(6). *Although it appears that the purpose of any such statements 'not to tell' may have been to prevent the victim from disclosing the criminal acts, it is doubtful that they can be construed as threats intended to prevent the victim from testifying at trial.* That is, *these statements cannot reasonably be characterized as 'coercion, undue influence, or pressure to silence testimony and impede the truth-finding function.'* See, *Jones,* 270 Mich App 221. And there is evidence that, prior to trial, the victim did allegedly tell the associate pastor, forensic interviewer and SANE nurse about certain criminal sexual acts allegedly committed by defendant."[141]

Obviously, the Court of Appeals looked at defendant's statement "not to tell" in an appellate vacuum and concluded such statements were *per se* insufficient to trigger the forfeiture-by-wrongdoing rule. However, it seems rather axiomatic that defendant's

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[141] 136a (emphasis added).

The mere fact the child-victim disclosed the abuse to others prior to trial is not determinative; rather, it is simply one more factor to be considered under the totality of the circumstances approach. Moreover, when the child-victim made these pre-trial disclosures, defendant was not present and the child-victim was in surroundings that were obviously interpreted by her as being "safe places" to tell the truth (i.e., at church, in the hospital and at the CAC). Finally, but perhaps most importantly, to say there can be no wrongdoing unless the wrongdoing is 100% effective is nothing more than circular logic – i.e., telling the child-victim not to tell anyone about the abuse could not have been wrongdoing because the child-victim told someone about the abuse.

The forfeiture-by-wrongdoing rule is *not* concerned with whether the witness discloses the wrong-doing to others – for how else would we know if the rule might even apply? Rather, the forfeiture by wrongdoing rule is concerned with"removing the otherwise powerful incentive for *defendants* to intimidate, bribe, and kill the witnesses against them." *Giles, supra* at 374. Hence, whether the threat of "don't tell anyone" was 100% effective is ***not*** the issue. The issue is whether a father's statement to his 4-year-old child "not to tell anyone" was intended or designed to prevent that child from bearing witness against him, and whether that statement did in fact prevent that child from bearing witness against him.

intended effect in making such statements to his 4-year-old daughter must be gleaned from all the facts and circumstances involved, *including* the in-court behavior of that 4-year-old daughter. Said in-court behavior necessarily included more than just the words contained in the cold, black and white record – it also included the demeanor, mannerisms and physical responses of the 4-year-old daughter, as well as those of defendant himself. Since only the trial court had the ability to observe these witnesses' demeanor, mannerisms and physical responses, then only the trial court should have determined whether defendant's statements and/or threats were intended to prevent this particular witness from testifying at trial.

Finally, just as statements "not to tell" are not *per se in*sufficient to trigger the forfeiture by wrongdoing rule, neither are they *per se sufficient* to trigger the rule. Rather, it is the facts and circumstances of each individual case that determine whether such a statement is sufficient to trigger the rule. Those particular facts and circumstances are often available only to the trial court in form of the witnesses' *and the defendants'* demeanor, mannerisms and physical responses in the courtroom. Hence, absent a ***clear*** abuse of discretion, the appellate courts should refrain from attempting to second-guess a trial court's finding regarding this particular issue.

III. THE COURT OF APPEALS ERRED IN FINDING THAT THE 4-YEAR-OLD CHILD-VICTIM'S STATEMENTS TO THE S.A.N.E. NURSE WERE NOT ADMISSIBLE UNDER THE "MEDICAL TREATMENT'" EXCEPTION OF MRE 803(4).

STANDARD OF REVIEW.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion.[142] "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes."[143] Questions of law are reviewed de novo.[144]

DISCUSSION.

The People argued in the Court of Appeals that even if the disputed evidence was erroneously admitted under MRE 804(b)(6), reversal was not required because the evidence was otherwise admissible.[145] As it related to the testimony of the SANE Nurse (Bonnie Skornia), the People argued that same was admissible under MRE 803(4) – i.e., the medical treatment exception to the hearsay rule.[146] However, the Court of Appeals erroneously concluded said testimony was *not* admissible under MRE 803(4) because the People had "failed to establish that the victim's out-of-court statements to the SANE nurse were reliable, and thus admissible under MRE 803(4)."[147] In reaching this conclusion, the

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[142] *Washington, supra; Starr, supra.*

[143] *Unger, supra.*

[144] *Id.*

[145] See 137a.

[146] Said argument was contained in the People's Brief on Appeal in the Court of Appeals. See, 131a - 134a.

[147] 138a.

Court of Appeals relied exclusively upon the fact that the People had failed to cite and apply the ten (10) "reliability factors" from *Meeboer*[148] in their argument on appeal.[149]

The mere fact that the People failed to cite and/or apply the *Meeboer* factors to this particular argument on appeal is not determinative, and is wholly insufficient for finding that the SANE nurse's testimony was inadmissible under MRE 803(4). A review of both the record on appeal and the People's brief in the Court of Appeals indicate that said factors were mentioned (albeit without specific reference to *Meeboer*) and were satisfied here:

1. The age & maturity of the child: The facts contained in the People's brief and the record on appeal clearly indicated the child was 4-years-old and exhibited the "maturity" of a normal 4-year-old.

2. The manner in which the statements were elicited: The People's brief on appeal made clear the manner in which the statements were elicited. The SANE nurse testified that while she was performing her nursing assessment of the child-victim, she asked the child-victim "if there was any reason we needed to check her whole body because we wanted to make sure everything was healthy and at that point she elicited a response....She just came out with, 'My dad put his string in my butt.'...Well, I don't want to assume anything so I want to make sure I know what string is to her. So I asked here, 'What does daddy use his string for?' And she said to go potty..."[150]

3. The manner in which the statements are phrased; The People brief on appeal made clear the child-victim stated "My dad put his string in my butt." The child further stated he used his "string" to "go potty" and that "butt milk" comes out of it.[151]

4. Use of terminology unexpected of a child of similar age. As noted by the Court of Appeals, "[i]n January of 2010, the victim, a four-year-old

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[148] *People v. Meeboer (After Remand)*, 439 Mich 310; 484 NW2d 621 (1992).

[149] 137a - 138a.

[150] See 132a - 133a.

[151] 133a.

girl, began talking about sex and an imaginary friend. Subsequently, the victim was accused of inappropriate sexual behavior at her daycare..."[152]

5. Who initiated the examination. As noted by the Court of Appeals, after the child-victim made disclosures to her pastor and after the police were contacted and after the child-victim under went a forensic interview, she was taken for a physical examination which included "an interview with a Sexual Assault Nurse Examiner (SANE) nurse, and a physical examination..."[153]

6. The timing of the examination in relation to the assault. The record on appeal clearly indicated the abuse was alleged to have occurred on or about August 19, 2010,[154] the police were contacted shortly thereafter,[155] the forensic interview was conducted on September 1, 2010,[156] and the child-victim was seen by the SANE nurse on September 7, 2010.[157]

7. The timing of the examination in relation to the trial. As stated above, the abuse occurred on or about August 19, 2010 and the police were contacted shortly thereafter (i.e., on or before September 1, 2010). Trial then began on March 29, 2011.

8. The type of examination. As explained in the People's brief on appeal, the SANE nurse testified about the intake procedure she uses for child patients who come to the C.A.C. to be diagnosed, treated and helped with recent or past sexual assaults.[158] "Nurse Skornia also testified that, with reference to the examination of child patients, '[t]ypically what I do in our setting at the Children's Advocacy Center is I assist Dr. Frederick. There's times I've done it on my own, and

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[152] 135a.

[153] *Id.*

[154] 33a.

[155] 135a.

[156] 9a - 32a.

[157] 52a.

[158] 132a.

then obviously the SANE ones are on my own.' Importantly, Nurse Skornia further testified that she performs a nursing assessment prior to the child patient being examined by the doctor, and that said nursing assessment is used in diagnosing and treating the child patient."[159]

9. The relation of the child-victim to the defendant. Defendant was the child-victim's father.

10. The existence of or lack of motive to fabricate. Admittedly, the People's brief on appeal did not address this factor. However, there were never any claims by defendant that the child had somehow been made to fabricate these allegations.

Based on the foregoing, it is clear that all the *Meeboer* factors were contained in the record on appeal and/or in the People's brief on appeal. It is further clear that application of those factors necessarily leads to the conclusion that the child-victim's statements to the SANE nurse bore the necessary indicia of reliability to allow their admission at trial under MRE 803(4). The mere fact that the People's argument regarding the admissibility of the child-victim's statements to the SANE nurse under MRE 803(4) may have been inartfully presented on appeal does not justify the harsh remedy imposed by the Court of Appeals.

Given that the testimony of the SANE nurse was otherwise properly admitted under MRE 803(4), and given that the other challenged evidence (i.e., the testimony of the child-victim's pastor and the C.A.C. interview) was essentially the same as this evidence, any error in the admission of said other evidence was, at most, harmless error.

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[159] *Id.*

RELIEF REQUESTED

WHEREFORE, for all of the reasons herein stated, the People respectfully request that this Honorable Court ***REVERSE*** the Court of Appeals' decision and ***REINSTATE*** Defendant's conviction and sentence, accordingly.

Respectfully submitted,

BAY COUNTY PROSECUTOR'S OFFICE

Dated: December 14, 2012

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