

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Michigan Court of Appeals
HON. PAT M. DONOFRIO, P.J., and CYNTHIA DIANE STEPHENS and RONAYNE KRAUSE, JJ.

**THE PEOPLE OF THE
STATE OF MICHIGAN,**

Plaintiff-Appellant,

Docket No. 145646

VS.

JEFFERY ALAN DOUGLAS,

Defendant-Appellee.

Brief on Appeal - Appellant

ORAL ARGUMENT REQUESTED



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STATEMENT OF QUESTIONS PRESENTED

I.

DID THE COURT OF APPEALS ERR IN CONCLUDING THE DEFENDANT WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO INFORM HIM OF A MANDATORY MINIMUM SENTENCE IF CONVICTED OF THE CHARGED OFFENSE WHERE THE TRIAL COURT DETERMINED DEFENDANT REFUSED ALL PLEA OFFERS BECAUSE HE CLAIMED TO BE INNOCENT?

The trial court answers, "Yes."

Plaintiff-Appellant answers, "Yes."

Defendant-Appellee answers, "No."

II.

SHOULD THE REMEDY FOR INEFFECTIVE ASSISTANCE OF COUNSEL INCLUDE RE-OFFERING A PLEA BARGAIN TO A LESSER CHARGE AFTER DEFENDANT HAS TESTIFIED AT TRIAL THAT HE DID NOT COMMIT AN OFFENSE?

The trial court answers, "No."

Plaintiff-Appellant answers, "No."

Defendant-Appellee answers, "Yes."

III.

UNDER MRE 803A(3), ARE THERE CIRCUMSTANCES OTHER THAN "FEAR" WHICH MAY EXCUSE THE FAILURE TO REPORT SEXUAL ABUSE IMMEDIATELY?

The trial court answers, "Yes."

Plaintiff-Appellant answers, "Yes."

Defendant-Appellee answers, "No."

IV.

IS A SECOND CORROBORATIVE STATEMENT CONCERNING SEXUAL ABUSE ADMISSIBLE UNDER 803A WHERE THE STATEMENT INCLUDES A DIFFERENT ALLEGATION OF SEXUAL ABUSE THAN WAS PROVIDED IN THE CHILD'S FIRST STATEMENT?

The trial court answers, "Yes."

Plaintiff-Appellant answers, "Yes."

Defendant-Appellee answers, "No."

V.

DOES A WITNESS'S TESTIMONY THAT A CHILD'S STATEMENT WAS "SUBSTANTIATED" CONSTITUTE IMPROPER VOUCHING?

The trial court answers, "No."

Plaintiff-Appellant answers, "No."

Defendant-Appellee answers, "Yes."

VI.

IN LIGHT OF DEFENDANT'S ATTACKS ON THE VICTIM'S CREDIBILITY FROM THE OUTSET OF THE TRIAL, SHOULD ALL CORROBORATIVE STATEMENTS OF KENDAL'S ALLEGATIONS OF SEXUAL ABUSE AND OTHER TESTIMONY DEEMED IMPROPERLY ADMITTED BY THE COURT OF APPEALS BE CONSIDERED HARMLESS?

The trial court answers, "Yes."

Plaintiff-Appellant answers, "Yes."

Defendant-Appellee answers, "No."

VII.

DID THE MICHIGAN COURT OF APPEALS ERR IN FINDING COUNSEL INEFFECTIVE REGARDING HIS TRIAL TACTICS?

The trial court answers, "Yes."

Plaintiff-Appellant answers, "Yes."

Defendant-Appellee answers, "No."

STATEMENT IDENTIFYING JUDGMENT BEING APPEALED

This is an appeal requesting the reversal of the published opinion of the Michigan Court of Appeals, *People v Douglas*, 296 Mich App 186; 817 NW2d 640 (2012); (Court of Appeals Docket No. 301546). (Appellant's Appendix¹, 117a). Plaintiff-Appellant's Motion for Reconsideration was denied by the Court of Appeals on June 14, 2012.

In the Order granting Plaintiff-Appellant's application for leave to appeal, the Michigan Supreme Court directed the parties to include among the issues to be briefed: (1) whether the Court of Appeals erred in concluding that the defendant was prejudiced by his attorney's failure to inform him of a mandatory minimum sentence if convicted of the charged offense where the trial court determined that the defendant refused plea offers because he claimed to be innocent; (2) whether the remedy for ineffective assistance of counsel may include re-offering a plea bargain to a lesser charge after the defendant has testified at a trial that he did not commit an offense; (3) under MRE 803A(3), what circumstances other than "fear" may excuse the failure of a child to report sexual abuse immediately; (4) whether a second corroborative statement concerning sexual abuse is admissible under MRE 803A where the statement includes a different allegation of sexual abuse than was provided in the declarant's first statement; and (5) whether a witness's testimony that a child's statement was "substantiated" constitutes improper vouching. (AA 135a)

¹Hereinafter referred to as "(AA ____)."

STATEMENT OF FACTS AND PROCEEDINGS

Defendant-Appellee was convicted by jury of the crimes of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13), and second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13) perpetrated against his 3 ½ year old daughter. The Michigan Court of Appeals determined defendant was denied effective assistance of counsel during both the pre-trial and trial proceedings and vacated the convictions and sentences and remanded to the trial court “for the prosecution to reinstate its plea offer. If defendant refuses to accept the offer, he is entitled to a new trial.” *People v Douglas*, 296 Mich App 186; 817 NW2d 640 (2012); slip op at 13. (AA 131a).

Before the preliminary examination, defendant was advised by counsel that if he accepted a plea offer to attempted CSC (five year maximum penalty) he would likely be looking at only jail, but if convicted of CSC 1st, he could possibly be sentenced to 20 years. (AA 17a-18a) Defendant was further advised if convicted of 1st degree CSC the high end of the minimum sentence range counsel calculated under the guidelines was 8 years; that the trial court could depart upwards from the guidelines; that defendant was likely to be denied parole initially; and that his relationship with his children could be severely jeopardized with a CSC conviction, particularly if placed on probation or parole. (AA 17a-18a, 89a-90a, 100a, 102a) Before trial commenced, defendant was offered the opportunity to plead guilty to fourth-degree CSC, MCL 750.520e (two year maximum penalty.) Defendant was advised if he pled guilty to that offense he was facing ten months jail and sex offenders’ registration. (AA 91a-92a) Trial counsel did not advise defendant of the 25 year mandatory minimum sentence if convicted of CSC, 1st degree. MCL 750.520b(2)(b). Defendant rejected all plea offers and proceeded to trial. He was convicted as charged.

Defendant testified at the *Ginther* hearing that if he had known of the 25 year minimum he would have taken the plea. (AA 104a) He also testified that he would not have taken any plea offer that required him to be placed on the sex offenders’ registry; that he would not have pled guilty regardless of the maximum or minimum if it required any jail time; that he probably would not have pled guilty because he believed he was innocent. (AA 105a-106a)

At trial, five year old victim Kendal Douglas (age 3 ½ at time of offense) testified she had touched her daddy’s “peepee” and that she had sucked his “peepee.” (AA 23a, 25a) Defendant

had asked her to do it. (AA 27a) Milk came out of her daddy's peepee and it tasted like peepee and regular milk. (AA 30a) That these events took place at her Grandma Rhonda's house. (AA 28a)

Kendal's mother, Jessica Brodie, testified that there had been a domestic violence case between her and defendant in May 2008 and Child Protective Services (CPS) suggested Kendal go live with defendant. (AA 33a) This was about the time the sexual abuse occurred. Ms. Brodie then testified about Kendal's disclosure of the sexual abuse made about one year later, after Kendal had come back to live with her.

Q All right, I want to move forward to June of 2009. Did anything unusual occur between yourself and Kendal?

A Yes.

Q What was that?

A We were in the car, and it was spontaneous. She told me that I sucked my daddy's peepee until the milk came out, and my daddy said, oh, yeah, that's how you do it.

(AA 34a)

Ms. Brodie testified Kendal told her this occurred at Grandma Rhonda's in the office. (AA 35a) She further testified about what steps she took after the disclosure and the people and/or agencies with which she became involved. She also testified as to the relationship between her and defendant.

Detective/Sergeant Muir testified about what was said during a recorded conversation between Kendal's mother and defendant regarding defendant's responses to Kendal's allegations, including defendant not specifically admitting to any inappropriate sexual activity. When asked about Kendal's allegations, defendant responded that he didn't know why she was saying he abused her. (AA 41a-44a)

Jennifer Wheeler, the Care House forensic interviewer, testified over defendant's objection. The objection was that Kendal's statement to her was not the first corroborative statement. (AA 45a, 49a) She testified as to her forensic interview of Kendal, which was video-taped, which included Kendal's statements regarding the abuse; one time she sucked daddy's peepee and one time, a different time, she touched his peepee. (AA 50a-59a) Kendal told her where it happened, that milk came out and that it tasted, "Yuk." (AA 60a-61a)

The CPS worker, Diana Fallone, also testified for the prosecution as did Trooper Rothman of the Michigan State Police. Ms. Fallone testified she filed a petition in a child protection proceeding in Oakland County and that the allegations of sexual abuse had been substantiated. (AA 65a-66a) Trooper Rothman testified he advised defendant as to the specific allegations and asked him if he remembered and also asked him if it occurred. Defendant's response to both questions was that, "I don't remember." (AA 69a-70a)

Defendant called his mother, Rhonda Douglas and his wife Jessica Douglas to testify in his defense. Rhonda Douglas stated the office was where defendant slept during the time he stayed there. (AA 77a)

Defendant also testified in his own behalf. He testified that he did nothing sexually inappropriate with his daughter. (AA 80a) He testified that when he was sleeping nude in bed, Kendal, at about age two, touched him inappropriately. (AA 79a) He kept sleeping in the nude. (AA 81a) On further cross-examination, defendant testified as follows:

Q I'm talking about the second interview, sir. When he asked you, when he said to you, you're daughter's accusing you of having her suck your peepee until the milk came out, your response to him was I don't remember that happening; is that true?

A Yes.

Q Okay. It wasn't absolutely not, there's no way, that's crazy, I would never do that? It was none of that. It was, I don't remember that happening. Is that your testimony, sir?

A Yeah, I - - yeah.

* * *

Q Do you remember the detective saying to you in the second interview that what Kendal was describing was that she was performing oral sex to you until you ejaculated in her mouth? Do you remember what your response to that was?

A No, I don't.

Q The detective said you just shook your head. Do you believe that was your response?

A Probably.
(AA 82a-83a)

On re-direct, defendant testified:

Q I don't remember? Did you say, no, I don't re - -

A Yes. I said, no, I don't remember that happening.
(AA 84a)

At his initial sentencing, defendant, through his counsel, maintained his innocence. All plea offers had been rejected because of his professed innocence. (AA 87a)

Following defendant's conviction by jury and initial sentencing, it came to light that defendant was subject to the mandatory minimum sentence of twenty-five years. The prosecution moved to modify defendant's sentence. Defendant moved to reinstate the pre-trial plea offer and for a *Ginther* hearing.

Following the September 9, 2010, hearing, the trial court denied defendant's motion to reinstate the plea offer, issuing its findings on November 1, 2010. It stated its findings, in pertinent part, as follows:

The defendant proclaimed his innocence in the face of plea bargains that were offered.

* * *

Defendant knew and he believed, although that there was a 20-year max, and in fact, there is a 25 mandatory. In the face of a plea of innocence, it makes no difference. He knew he would be on the sex offenders' list. He knew he would have no contact with children. If any, it would be supervised for 20 years or more, and he knew he would be on the sex offenders' registry list.

* * *

In the face of "I didn't do it", I don't know how that would have changed anything. I would have said I did do it if I'd known it was 25 years. Well, it just doesn't make sense, and it's not logical.

(AA 112a-114a)

Defendant-Appellee's direct appeal followed which resulted in the reversal of his convictions by the Michigan Court of Appeals and the order to re-offer the plea bargain on remand. (AA 119a) The Michigan Supreme Court granted Plaintiff-Appellant application for leave to appeal the decision of the Michigan Court of Appeals on October 24, 2012. *People v Douglas*, ____ Mich ____; 821 NW2d 574 (2012). (AA 135a)

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN CONCLUDING THE DEFENDANT WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO INFORM HIM OF A MANDATORY MINIMUM SENTENCE IF CONVICTED OF THE CHARGED OFFENSE WHERE THE TRIAL COURT DETERMINED DEFENDANT REFUSED ALL PLEA OFFERS BECAUSE HE CLAIMED TO BE INNOCENT.

A. STANDARD OF REVIEW.

Whether a defendant received effective assistance of trial counsel presents a mixed question of fact and constitutional law. "A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's factual findings are reviewed for clear error. Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake. Questions of constitutional law are reviewed de novo. *People v Armstrong*, 490 Mich 281, 289; 802 NW2d 552 (2011).

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 US at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. 466 US at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." 466 US at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. 466 US at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). [*People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001)] (Footnote omitted.)

These same standards apply where a defendant's ineffective assistance of counsel claim is based on counsel's failure to properly inform a defendant of the consequences of accepting or

rejecting a prosecutor's plea offer. *Hill v Lockhart*, 474 US 52, 58; 106 SCt 366; 88 LEd 2d 203 (1985). "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler v Cooper*, 566 US ____; 132 S Ct 1376; 182 LEd 2d 398 (2012), slip op at 8.

B. ARGUMENT.

The trial court did not clearly err when finding the outcome of the plea process would not have been different even if defendant had been informed by counsel of the 25 year mandatory minimum sentence. The Court of Appeals erred by failing to consider these findings.

The Michigan Court of Appeals determined that defendant's trial counsel was constitutionally ineffective for failing to advise defendant of the mandatory 25 year minimum sentence if convicted of First Degree Criminal Sexual Conduct. *People v Douglas*, Slip Opinion at 10. (AA 128a) It is respectfully submitted the Michigan Court of Appeals erred by failing to even consider the trial court's exercise of discretion, erred by failing to apply the proper standard when reviewing the trial court's findings following the *Ginther*² hearing, and failed to give proper deference to the trial court's ability to view and evaluate the credibility of trial counsel and defendant and their testimony at that hearing. The Court of Appeals simply and erroneously substituted its own opinion.

The trial court found incredible defendant's post-conviction testimony that if he had been informed of the 25 year mandatory minimum, he would have accepted the plea to 4th degree CSC the morning of trial. (AA 114a) Deference is to be given to a trial court's determination of credibility. *People v Grant*, 470 Mich 477, fn 5 at 485; 684 NW2d 686 (2004); *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999); *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). The facts established were that, before trial, counsel advised defendant that he was charged with a life offense; that he faced a possible minimum of twenty years of incarceration; the high end of the minimum sentence range counsel calculated under the

²*People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

guidelines was 8 years; that the trial court could depart upwards from the guidelines; and, that defendant was likely to be denied parole initially. (AA 17a-18a, 89a-90a, 100a, 102a) Defendant would also be required to register as a Tier III sex offender even if he had pled guilty to a lesser CSC offense. MCL 28.723; MCL 28.722(k) and (w)(vi); MCL 28.725(12). (AA 92a)

Before defendant's preliminary examination, he was specifically advised that if he accepted the plea offer made at that time he would likely be looking at only jail, but if convicted of CSC 1st, he could possibly be sentenced to twenty years.

MR DALY: That's correct, your Honor, the record should reflect that I discussed with Mr. Douglas the possible consequences of proceeding. I indicated to him that the likelihood of being offered a plea bargain after the victim had testified was greatly diminished and almost never happened after there had been a prelin on a case like this. I had indicated to him the range of the plea bargain would probably result in him receiving a jail sentence rather than going to prison. I also indicated to him that if he lost this case and was convicted of first degree CSC the possibly [sic] of being incarcerated for 20 years was possible.

THE COURT: All right. Mr. Douglas, you're aware of all those consequences and you still don't want to discuss any—

MR. DOUGLAS: No
(AA 17a-18a)

At his *Ginther* hearing, defendant testified he had been advised by his counsel:

A I understood that I could – I believe I was told it would be like a maximum of 20 years with my conviction. I was told that I would be placed on the sex offender list, and I wouldn't be able to have contact with my children unless it was severely supervised.
(AA 103a)

When presented with a similar option the morning of trial and the offer of pleading to an offense resulting only in jail and no prison, defendant's answer was the same, "No."

Q Okay, so there is no plea bargain you could have been offered that would've required you to be on the sex offender registry that you could have accepted; is that true?

A [Defendant] Correct.
(AA 105a)

Q Okay, there's no plea bargain that could've been offered to you, except one that included no jail time, that you would have accepted; is that true?

A [Defendant] Probably.
(AA 106a)

Q Isn't it true the reason was is because you didn't think you committed this crime and you weren't gonna lose this case at trial?

A [Defendant] Correct.

Q Okay, so it didn't matter. All this talk about the minimum, it didn't matter because you were innocent, you didn't commit this crime, correct?

A [Defendant] Correct.

Q And any plea bargain that included a registrationable offense you would not accept because it would have impacted your relationship with your children, correct?

A [Defendant] Correct.
(AA 105a-106a)

Defendant's only complaint, made only after he had been convicted and with the benefit of 20/20 hindsight, is that he regretted having not taken the plea bargain offered before trial.

A If I was facing a 25-year minimum, I would've took the plea bargain.
(AA 104a)

However, at the post-trial proceedings, upon cross-examination, defendant revealed his true motive for requesting reinstatement of the plea offer.

Q And now – now that you've been sentenced to prison, now that a jury of your peers found you guilty, you want this Court to overrun that and offer you a plea bargain that you wish you had taken before, correct?

A [Defendant] Correct.
(AA 108a)

Based upon all of the testimony at the *Ginther* hearing, the trial court reasonably concluded that defendant's post-conviction claim he would have accepted the plea offer if he had known of the mandatory minimum was not credible.

[Trial Court:] The defendant proclaimed his innocence in the face of plea bargains offered.

* * *

In the face of "I didn't do it", I don't know how that would have changed anything. I would have said I did do it if I'd known it was 25 years. Well, it just doesn't make sense, and it's not logical.
(AA 112a, 114a)

The trial court's finding that the failure to advise defendant of the 25 year minimum would not have changed the outcome of defendant's decision, was based upon the testimony and

the evaluation of the credibility of the parties.³ This finding was not clearly erroneous, ie. it should not have lead to a “definite and firm conviction that the trial court made a mistake.”

Farrow, supra.

Moreover, defense counsel gave accurate legal advice to defendant that any conviction involving sexual abuse of his daughter could have profound negative consequences upon his relationship with his other children.⁴ His parental rights could have been terminated.

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

[MCL 712A.19b(3)] (Emphasis added.)

Additionally, the Juvenile Code does not require reunification attempts if a parent is on the Sex Offender Registry. MCL 712A.13a; MCL 712A.18f; MCL 712A.19a, as amended.

(3) The case service plan shall provide for placing the child in the most family-like setting available and in as close proximity to the child's parents' home as is consistent with the child's best interests and special needs. The case service plan

³After conviction, but before learning of the mandatory minimum sentence, defendant had always professed his innocence and stated that was the reason he had rejected all plea offers:

“This is what Mr. Douglas has said. He said it at his arraignment time, and he has consistently said that since then, that he did not commit this crime..... **Mr. Douglas has made it very clear that he turned down numerous plea bargains because he was basing his decision based upon his innocence.**” (AA 87a) (Emphasis added.)

Defendant did not correct or object to this statement of his counsel. It was only after defendant learned of the statutory minimum did he change his tune.

⁴Defendant had been advised of the consequences he might face if he pled guilty to the lesser offense because he would have to admit he had sexually abused his daughter. (AA 93a) Accordingly, defendant's relationship with his children would have been at risk upon conviction of any CSC offense involving his young daughter. The Michigan Court of Appeals clearly erred in determining trial counsel's advice was deficient in this respect.

shall include, but is not limited to, the following:

* * *

(f) Conditions that would **limit or preclude placement or parenting time with a parent who is required by court order to register under the sex offenders registration act.**

[MCL712A.18f(3)] (Emphasis added.)

If defendant had accepted the plea, no doubt defendant would have claimed ineffective assistance of counsel pursuant to *Padilla v Kentucky*, 559 US ___; 130 SCt 1473; 176 LEd2d 284 (2010), for failing to warn him of these consequences.

Before rejecting the plea offer of CSC 4th degree, defendant had been provided sufficiently accurate information upon which to base his decision. If convicted of the life offense of CSC, 1st degree, he had been advised he was facing several years in prison, up to twenty years. (AA 103a) If he took the plea, defendant was further advised he was facing months in jail but would still be required to register under the sex offender registration act with potential negative consequences on his relationship with all of his children. Under the circumstances of this case, it should be determined that even though counsel's advice was deficient, it was not objectively unreasonable and not constitutionally defective. "In the context of pleas[,] a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler, supra*, at 5. Even acknowledging counsel's failure to advise of the mandatory minimum, with proper deference given to the trial court's findings, defendant has failed to carry his burden of establishing prejudice. The result of the proceedings would not have been different. There is no reasonable likelihood defendant would have accepted any CSC plea. Defendant had also been told he was facing 20 years if convicted of CSC, 1st degree. The difference between the two offenses, whether serving 25 years or 20 years for CSC 1st, is objectively insignificant when compared with the minor 2 year statutory maximum penalty for CSC, 4th degree and serving only a few months in jail. Counsel's advice was sufficient to allow defendant to intelligently weigh his options. Regardless of specific knowledge of the 25 year minimum, defendant would have rejected any plea offer resulting in incarceration or sex offender registration or potential restrictions affecting his relationship with his children. The outcome of the plea process would

not have been different. Therefore, counsel's advice was not constitutionally deficient. The Michigan Court of Appeals clearly erred by substituting its opinion in place of the trial court's without giving any consideration to the trial court's findings and its superior position to evaluate credibility and determine the pertinent facts.

II.

THE REMEDY FOR INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD NOT INCLUDE RE-OFFERING A PLEA BARGAIN TO A LESSER CHARGE AFTER DEFENDANT HAS TESTIFIED AT TRIAL THAT HE DID NOT COMMIT AN OFFENSE.

A. STANDARD OF REVIEW.

Questions of constitutional law are reviewed de novo. *People v Armstrong, supra*. "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler v Cooper, supra*. A trial court's decision finding the plea process would not have been different is reviewed for an abuse of discretion. *Id.* at 11-13.

B. ARGUMENT.

1. *Lafler v Cooper* directs that a trial court has discretion to reject a pre-conviction plea offer.

The United States Supreme Court has stated that in the event ineffective assistance of counsel causes the rejection of a favorable plea, the trial court must exercise its discretion in fashioning an appropriate remedy. *Lafler*, 566 US at ____, slip op at 11-13.

Sixth Amendment remedies should be "tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U. S. 361, 364 (1981). Thus, a remedy must "neutralize the taint" of a constitutional violation, *id.*, at 365, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution. See *Mechanik*, 475 U. S., at 72 ("The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences"). [*Lafler*, 566 US at ____, slip op at 11-12]

It is respectfully submitted the Michigan Court of Appeals erroneously disregarded this standard

and granted defendant a windfall.

In the instant case, the Michigan Court of Appeals has remanded the case “to the trial court for the prosecution to reinstate its plea offer made immediately before trial. If defendant refuses to accept the plea offer, he is entitled to a new trial.” *People v Douglas, supra*, slip op at 13. (AA 131a) Under the precise terms of the Court of Appeals’ opinion, the trial court has no discretion to reject the plea offer should defendant elect to accept it. This order of remand is contrary to the directives and prerogatives set forth by the United States Supreme Court. In *Lafler v Cooper*, 566 US at ____, slip op at 16, the United States Supreme Court stated:

As a remedy, the District Court ordered specific performance of the original plea agreement. The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, **the state trial court can then exercise its discretion** in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed. See Mich. Ct. Rule 6.302(C)(3) (2011) (“If there is a plea agreement and its terms provide for the defendant’s plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, **the court may . . . reject the agreement**”). **Today’s decision leaves open to the trial court how best to exercise that discretion in all the circumstances of the case.** (Emphasis added.)

The United States Supreme Court provided direction to trial courts as to how discretion should be exercised.

In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge’s sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. See, e.g., *Williams*, 571 F. 3d, at 1088; *Riggs v. Fairman*, 399 F. 3d 1179, 1181 (CA9 2005). In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, **the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.**

In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge’s discretion. At this point, however, it suffices to note two considerations that are of relevance.

First, a court may take account of a defendant’s earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions.

Second, it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial. [*Id.*, at 12 - 13] (Emphasis added.)

Consequently, any remand should, pursuant to *Lafler*, leave the trial court free to exercise its discretion which may include rejecting the plea that was offered before trial, even if defendant now elects to accept it. In the instant case, before conviction, defendant never expressed any willingness to accept any responsibility for his actions.⁵ To the contrary, he always disclaimed responsibility. The trial court should be permitted to exercise its discretion and determine a new trial is the only proper remedy (assuming reversible trial error) rather than give defendant a windfall and permit him to plead to CSC, 4th degree. *Lafler, supra*.

2. **To require the prosecution to reoffer a plea to CSC, 4th degree is contrary to the administration of justice because the ordered remedy, in effect, either rewards defendant's trial perjury or suborns defendant's plea perjury.**

There is a unique fact which clearly distinguishes the reasoning for the remedy ordered in *Lafler v Cooper, supra*, from the situation in the instant case. In *Lafler*, defendant Cooper did not testify at trial. Moreover, there, contrary to the instant case, defendant admitted his guilt. *Lafler*, 566 US at ____, slip op at 2. Accordingly, there was no disparity between Cooper's pre-trial position and his post-trial position. But here, defendant never admitted guilt nor expressed any willingness to admit to any sexual misconduct whatsoever. He always professed innocence. At trial, defendant testified under oath that he did nothing sexually inappropriate with his daughter. (AA 80a) However, if defendant were to plead guilty at this time, he must admit, under oath, that he sexually molested his daughter when she was 3 ½ years old. MCR 6.302(A)

⁵Moreover, it should be remembered defendant rejected all plea offers and compelled his five year old daughter to testify at trial who was very credible. In evaluating Kendal's credibility, the trial court stated "...it is very apparent that – to the prosecutor and to defendant and to defense counsel her testimony was compelling. Her accuracy, her recollection, her detail to the facts surrounding this criminal sexual conduct were apparent." (AA 112a)

and (D)(1).⁶ Therefore, either his trial testimony was perjured or his plea of guilty would be perjured. There is no middle ground.⁷ Hence, the practical effect of the Court of Appeals order permitting defendant to enter a plea to the lesser offense at this time would either reward his trial perjury, or would, in effect, suborn plea perjury. To require the trial court participate in such a charade is absolutely repugnant to the administration of justice. To the contrary, a court can stop perjury and immediately commit a witness or party.⁸ See *People v Toma, infra*.

In this constitutional process of securing a witness' testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative. [*United States v Mandujano*, 425 US 564, 576; 96 S Ct 1768; 48 L Ed 2d 212 (1976)]

In *People v Blanchura*, 81 Mich App 399, 401, 406; 265 NW2d 348 (1978), prosecutorial error did not excuse perjury. For similar reasons, claims of ineffective assistance of counsel should not justify perjury. A defendant has "no right, constitutional or otherwise, to testify falsely" *People v Adams*, 430 Mich 679, 694; 425 NW2d 437 (1988). The remedy ordered by the Michigan Court of Appeals to re-offer the plea should not apply under the facts and circumstances of the instant case and be reversed.

⁶"Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out subrules (B)-(E)." [6.302(A)] "If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading." [MCR 6.302(D)(1)]

⁷Defendant has previously argued that an "*Alford* plea" would be permitted under such circumstances. *North Carolina v Alford*, 400 US 25; 91 SCt 160; 27 LEd2d 162 (1970). However, an *Alford* plea is a plea of nolo contendere which requires the consent of the court and prosecutor. "A defendant may enter the following pleas only with the consent of the court and the prosecutor: ...nolo contendere...." [MCR 6.301(C)]. At no time was such a plea negotiated or contemplated by the parties. The only pre-trial plea offer was for an admission of guilt to actual criminal sexual conduct perpetrated against his young daughter. *Lafler* does not require the manufacture of new or revised plea offers or conditions. *Lafler* does not require the parties to renegotiate.

⁸MCL 750.426.

3. **Because of Counsel's belief in defendant's assertions of innocence, there can be no ineffective assistance of counsel in failing to proffer a perjured plea.**

Defendant consistently, pre- and post-conviction, professed his innocence. (AA 87a, 94a-

96a) Trial counsel believed his client.

A Yes, but Mr. Douglas didn't fit into that category. I have lots of clients tell me they're innocent. Most of them I don't believe. Mr. Douglas I did.
(AA 101a)

Under these circumstances, the United States Supreme Court and the Michigan Supreme Court have indicated counsel cannot be ineffective for failing to proffer a perjured plea.

While a defendant may have the constitutional right to the effective assistance of counsel, this does not encompass the right to assistance of counsel in committing perjury. In fact, **an attorney's refusal to knowingly assist in the presentation of perjured testimony is not only consistent with his ethical obligations, but cannot be the basis of a claim of ineffective assistance of counsel.** *Nix v Whiteside*, 475 US 157, 174-175; 106 S Ct 988; 89 L Ed 2d 123 (1986). See also *United States v Grayson*, 438 US 41, 54; 98 S Ct 2610; 57 L Ed 2d 582 (1978) ("Counsel ethically cannot assist his client in presenting what the attorney has reason to believe is false testimony"); *Adams*, n. 7 430 Mich. at 694 ("there is no right, constitutional or otherwise, to testify falsely"); MRPC 3.3(a)(4) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false"). [*People v Toma*, 462 Mich 281, fn 16 at 303; 613 NW2d 694 (2000) (Emphasis added.)]

[A] defendant cannot show prejudice based on counsel's refusal to present perjured testimony, even if such testimony might have affected the outcome of the case. [*Lafler v Cooper*, 566 US at ____, slip op at 8]

Applying these principles, regardless of counsel's advice or lack thereof regarding the minimum sentence, no ineffective assistance of counsel occurred. Under the facts and circumstances of the instant case, defendant could not have accepted the plea offer and entered a guilty plea. Therefore, counsel was not ineffective for failing to pursue a perjured plea.

III.

UNDER MRE 803A(3), THERE EXIST CIRCUMSTANCES OTHER THAN “FEAR” WHICH EXCUSE THE FAILURE TO REPORT SEXUAL ABUSE IMMEDIATELY.

A. STANDARD OF REVIEW.

Defendant did not object to the mother’s testimony pertaining to the victim’s first disclosure made to her approximately one year after the sexual abuse occurred.

A trial court’s decision whether to admit or exclude evidence will be affirmed in the absence of a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). The trial court abuses its discretion when its decision is outside the range of principled outcomes. *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012); *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). A trial court’s ruling on preliminary questions of law regarding the admissibility of evidence, such as the application of a statute or rule of evidence is reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Unpreserved constitutional and non-constitutional issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The latter part of this standard generally requires a showing of prejudice i.e., that the error affected the outcome of the case. *Id.* Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

The Michigan Court of Appeals majority cited this standard but failed to apply it upon direct review.

B. ARGUMENT.⁹

The tender years exception to the hearsay rule is a recognition of the common law rule that, under appropriate circumstances, a corroborative statement of a child sexual abuse victim should be deemed admissible. Judge Krause stated in her concurring opinion in the instant case,

The [Michigan Supreme Court in *People v Baker*, 251 Mich 322, 326; 232 NW 381 (1930)] held the delay excusable because “[a] child would ordinarily have no sense of outrage at such acts by her own father, and complaining of them would not occur to her. Her telling of the affair would more naturally arise as the relation of an unusual occurrence and might be delayed until something arose to suggest it.” *Baker*, 251 Mich at 326 (1930). The Court opined that a mere admonition by the victim’s father was “as effective to promote delay as threats by a stranger would have been.” *Id.*

I understand MRE 803A to be nothing but a codification of the old common law “tender years” rule, which the Supreme Court had held in 1982 did not survive the adoption of the then new Rules of Evidence. *People v Kreiner*, 415 Mich 372, 377-378; 329 NW2d 716 (1982). So although I cannot find any cases directly under MRE 803A that are helpful in explaining what an “other equally effective circumstance” might be, I think that *Baker* is not only relevant, but binding. Therefore, fear or some analogue thereof is not the only basis for excusing a delay under MRE 803A(3). Rather, MRE 803A(3) requires any circumstance that would be similar *in its effect* on a victim as fear in inducing a delay in reporting, not a circumstance that is necessarily similar *in nature* to fear. Indeed, the plain language of the rule explains that it must be an “equally *effective* circumstance,” not necessarily a *similar* one. Nothing in the rule even requires that any “other equally effective circumstance” even must have been affirmatively created by the defendant. [*People v Douglas*, Judge Krause Concurring Opinion at 1-2.] (AA 132a-133a)

This interpretation of equivalent circumstances excusing delayed reporting is consistent with the principle that “government may have a substantial or compelling interest in protecting young witnesses who are called to testify in cases involving allegations of sexual abuse.” *People v Kline*, 197 Mich App 165, 171; 494 NW2d 756 (1992), citing *Globe Newspaper Co v Superior Court for Norfolk Co*, 457 US 596, 607; 102 S Ct 2613; 73 L Ed2d 248 (1982).

⁹The one year delay in reporting the sexual abuse was not an issue at trial.

MRE 803A(3)¹⁰ specifically states that other circumstances “equally effective” as “fear” render a child’s out-of-court delayed disclosure admissible. The question then becomes, what circumstances other than fear would effectively cause a child to delay disclosing they had been sexually abused? First, the question presupposes that the child is of sufficient age at the time of the occurrence to even recognize there had been any wrongdoing by her father. See *Baker, supra*, and *Peterson, infra*, fn 5 at 360. Consequently, age is a fundamentally important factor to be considered when analyzing the period of delay. See *Baker, supra*. Second, determining other factors or circumstances “effectively” causing a child victim of sexual abuse to delay reporting necessarily involves a child’s perspective, capacity, and relationships, including the weighing of the risks against potential rewards or benefits inherent with disclosure. The United States Supreme Court has referenced various factors causing delayed reporting.

The California Legislature noted that "young victims often delay reporting sexual abuse because they are easily manipulated by offenders in positions of authority and trust, and because children have difficulty remembering the crime or facing the trauma it can cause." *People v Frazer*, 21 Cal. 4th 737, 744, 982 P.2d 180, 183-184,

¹⁰“A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

“(1) the declarant was under the age of ten when the statement was made;

“(2) the statement is shown to have been spontaneous and without indication of manufacture;

“(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

“(4) the statement is introduced through the testimony of someone other than the declarant.

“If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

“A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

“This rule applies in criminal and delinquency proceedings only.” [MRE803A]

88 Cal. Rptr. 2d 312 (1999). The concern is amply supported by empirical studies. See, e.g., Summit, Abuse of the Child Sexual Abuse Accommodation Syndrome, in 1 J. of Child Sexual Abuse 153, 156-163 (1992); Lyon, Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation, in Critical Issues in Child Sexual Abuse 107, 114-120 (J. Conte ed. 2002). [*Stogner v California*, 539 US 607, 649; 123 S Ct 2446; 156 L Ed 2d 544 (2003) (Dissenting opinion by Justice Kennedy)]¹¹

Similarly, the Michigan Legislature recognized similar rationales excusing delayed reporting such as “shame, humiliation, fear, or filiation with the perpetrator” when it extended Michigan’s statute of limitations for CSC crimes involving child victims. Enrolled Analysis, SB 1, May 7, 2001.

The Michigan Supreme Court has likewise approved expert witness testimony outlining many reasons which excused a several-year delay in reporting. “[T]here are a variety of explanations regarding why a particular victim might delay reporting, which include the victim's relationship with the perpetrator, the living arrangements, the age of the victim, coercive threats, and childhood fears.” *People v Peterson*, 450 Mich 349, 360; 537 NW2d 857 (1995).^{12,13}

¹¹*Stogner* addressed the retroactive application of amended statutes of limitations involving victims of sexual abuse and ex post facto.

¹²The relevant testimony of the expert follows:

Q. And why would a child delay reporting of sexual abuse?

A. Well, there's a **multitude of reasons** and it depends on several variables, depending on the **relationship** between the child and the perpetrator, the relationship between them, **the living arrangements between them**. There's a lot of contingencies.

* * *

A. It is from my own experience, as well as the literature, that clearly indicates **the closer the relationship between the child and the perpetrator, the less likely that abuse is going to be disclosed at the time of offense. If an offender is living in the same dwelling where the victim resides, the chance of that sexual abuse being disclosed at the time that it is occurring are unlikely.**

Q. Now, what, if you have any experience or any opinion, as to what effect the removal of the person causing the abuse or doing the abuse from the home would trigger or cause a person to report, a child to report?

A. It increases the likelihood of that child revealing the sexual abuse once the offender has left the

The Court of Appeals in the instant case over simplified and ignored pertinent facts when stating, “KD’s youth, without more, is not an “equally effective circumstance.” (AA 121a)

Here, the child’s very young age was an important factor that should have been considered when

home.

Q. Now, does the age of a child victim have anything to do with the timing of reporting?

A. Yes; it does.

Q. And what effects do age have?

A. In my experience, **the younger the victim, the less likely they are going to tell at the time the abuse is occurring.** The older a victim becomes, the more empowered and liberated from home that victim becomes, the more likely they are to tell.

Q. What effect, if any, do threats made to a child affect their ability to report or not report?

A. Threats are very effective in keeping a child quiet.

* * *

Q. Other than threats and the offender being in the home, are there any other reasons which a child would delay in reporting?

A. Many.

Q. What type of reasons?

A. Well, aside from fear of the person abusing them, **very often children feel responsible for holding the family together,** and most children, however small they are, are smart enough to know what's going on, **if it is disclosed could very well split the family apart,** and so keeping the family together very often is one reason why they do not disclose. In addition to feelings that **they are responsible for the other family members' emotional welfare,** very often children feel that is their responsibility. **Very often they feel they won't be believed. Very often they are frightened that if the abuse has occurred more than once, that someone is going to blame them for letting it happen more than once. They feel guilty.** Somehow they are made to feel responsible, quite often, for that abuse occurring, that there's something they did to cause it.

Q. How do children exhibit -- I'll withdraw that question. **In your experience, is there any magical number on how long a child would delay in reporting?**

A. **Not necessarily.** One particularly common thread that I see is very often -- well, two things come to mind, one, that **once a child feels empowered or safe enough to tell, they may,** and the second thing is very often I find children tell when they are provoked, when either something new is introduced to them sexually or they have been provoked by something that they will tell. There's a third thing that I would like to mention, too.

Q. Sure.

A. Very often children will disclose if they are directly asked.

[*People v Peterson, supra*, fn 5 at 359] (Emphasis added.)

¹³The Michigan Supreme Court recently cited *Peterson* approvingly. *People v Kowalski*, 492 Mich 106, 123-124; 821 NW2d 14 (2012).

determining whether the child's statement was admissible.¹⁴ *People v Peterson, supra*. Age is at the very core of the "tender years" exception. *People v Baker, supra; People v Kline, supra*. Consequently, other equally effective circumstances explaining delay include, *inter alia*, the extreme youth of a victim, the closeness of the relationship between the victim and abuser, the proximity of the abuser to the living arrangements of the victim, fear of the abuser, fear of being disbelieved, fear of causing emotional upset to other members of the household, fear of breaking up the family, guilt or false sense of responsibility for the abuse, or absence of a sense of safety and security. *Peterson, supra*.

It is respectfully requested that this Honorable Court determine no clear error affecting defendant's substantial rights occurred by the unobjected-to admission of the victim mother's corroborative statement of Kendal's first disclosure. *People v Carines, supra*. Here, Kendal's mother was the one who placed Kendal in defendant's custody and care after having been told to do so by a Protective Services worker. (AA 33a, 37a) For a 3½ year old, that alone should be sufficient as an "other equally effective circumstance." The child's thought process certainly ran along the lines of – Mommy and Daddy were fighting, police came, someone told Mommy I had to live with Daddy, so Mommy made me live with Daddy. Kendal was removed from her mother's protection and placed in her abuser's home. She may have had no immediate sense of outrage at her father's acts. *Baker, supra*. The "abuse" seemingly must have been okay. What else was a 3½ year old supposed to think. Just as if her father admonished her or if she had been afraid of him, she did not immediately disclose the abuse because she not only was with him, she was required to be with him. Her mother had put her there with him. See *People v Gurski*, 486

¹⁴How children acquire or process information is a function of age. See *Peterson, supra* at 360 and (AA 61a-62a, 64a)

Mich 596; 786 NW2d 579 (2010); *People v Baker, supra*. As Judge Krause stated in the instant case:

The abuse in question occurred in mid-May to June 2008. At that time, KD was living with defendant, apparently because of some kind of involvement by Child Protective Services. KD did not return to living with her mother until the next January, approximately eight months later. KD was, moreover, approximately three and a half years old at the time of the abuse. KD's mother and the care house interviewer both explained that four-year-olds do not understand "concepts of time." The record indicates to me that KD may not have had a realistic opportunity to report the abuse for most of the year it took her to do so, the fact of the delay would not likely have been subjectively apparent to her, and, as *Baker* suggests, at her age KD would not necessarily have even understood why the abuse was something she should have reported to anyone. Even if she had appreciated the nature of the acts, it is common and basic knowledge of how human beings operate that shame and confusion are powerful motivators of silence. [*Douglas*, Judge Krause Concurring Opinion, at 2] (AA 133a)

Kendal's spontaneous statement to her mother, made only after she had been returned to her care and custody and safety, and after her father's remarriage, excused the delay. The corroborative statement should be deemed admissible.¹⁵ *Peterson, supra*. Moreover, the admission of the mother's unobjected-to testimony regarding Kendal's spontaneous disclosure certainly did not result in the conviction of an actually innocent person or seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Carines, supra*.

While the Michigan Court of Appeals acknowledged the *Carines* standard of review, it ignored it altogether when finding this unobjected-to testimony inadmissible. It simply and erroneously determined the unexplained delay caused the statement to be inadmissible (AA, fn 2 at 110a) and ignored the *Carines* requirement that the "error" must also have affected substantial

¹⁵Even if an objection had been made, a decision to admit the evidence under these circumstances would certainly not be outside the range of principled outcomes. It certainly should not be determined to be per se an abuse of discretion as the Michigan Court of Appeals did.

rights. It also completely and totally ignored the fact that the delay in reporting was not an issue at trial. The reasons for the delay between the abuse and its disclosure were readily apparent to the parties and the timing of the disclosure supported defendant's trial theory.¹⁶

IV.

A SECOND CORROBORATIVE STATEMENT CONCERNING SEXUAL ABUSE SHOULD BE ADMISSIBLE UNDER 803A WHERE THE STATEMENT INCLUDES A DIFFERENT ALLEGATION OF SEXUAL ABUSE THAN WAS PROVIDED IN THE CHILD'S FIRST STATEMENT.

A. STANDARD OF REVIEW.

Defendant objected to the victim's Care House statement, arguing the statement was suspect and not the first corroborative statement, citing as authority MRE 803A. (AA 45a-46a)

Evidentiary rulings are reviewed for an abuse of discretion. *People v Lukity, supra*. A trial court abuses its discretion when its decision is outside the range of principled outcomes. *People v Watkins, supra; People v Feezel, supra*. Evidentiary decisions involving preliminary questions of law, such as whether a rule of evidence or statute precludes admissibility, are reviewed de novo. *Lukity, supra*. "A preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Id.* at 495-496. "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich

¹⁶It was to defendant's advantage, as part of his overall trial strategy to be able to correlate the timing of the disclosure with his claims of acrimony between he and Kendal's mother, Jessica Brodie, and the fact he had just gotten remarried and the revelation of abuse soon followed the marriage and honeymoon. (AA 21a-22a, 85a)

App 101, 113; 631 NW2d 67 (2001).

B. ARGUMENT.

- 1. The statement Kendal made to the forensic interviewer, Jennifer Wheeler, which disclosed for the first time a separate incident of sexual abuse, should be determined to be admissible under MRE 803A.**

Defendant complained on direct appeal that the trial court abused its discretion when admitting the victim's statements made to Jennifer Wheeler (Care House expert forensic interviewer). These statements were made to Ms. Wheeler approximately one week after the victim, Kendal Douglas (then four years of age), had first disclosed to her mother, from "out-of-the-blue" that, "I sucked my daddy's peepee until the milk came out." (AA 34a-35a) Defendant objected to allowing Jennifer Wheeler to testify, citing as authority MRE 803A, and arguing that this statement was suspect and not the first corroborative statement.¹⁷ (AA 45a-46a) Defendant did not object on the basis that the delay was unexplained. The trial court overruled defendant's 803A objection ruling that the victim's forensic statement was not manufactured and was the first corroborative statement of the victim's testimony that defendant also had the victim touch his penis. (AA 48a-49a) Consequently, the preserved evidentiary objection to this testimony should have been reviewed for an abuse of discretion that was also outcome determinative. *Lukity, supra*. The claim the delayed disclosure caused the testimony to be inadmissible was not preserved, *People v Aldrich, supra*, and should have been reviewed under the *Carines* standard of plain error affecting substantial rights. The Michigan Court of Appeals erred by lumping the preserved and unpreserved objections together and deciding solely on the basis of an abuse of

¹⁷On this same basis, defendant also objected to the admission of the DVD of the victim's Care House forensic interview.

discretion.

(a) The Court of Appeals opined that the statements Kendal made to Ms. Wheeler were “arguably not spontaneous” and that the issue of spontaneity under MRE 803A was “a close question.”¹⁸ (AA 120a-121a) If the statement was “arguably not spontaneous” then the converse is also true, the statement was “arguably spontaneous.” Therefore, the Court of Appeals effectively conceded that the trial court’s determination the statement was spontaneous was also a reasonable and principled outcome. Therefore, regardless of whether there was a proper objection, the decision to admit the statement, by definition, could not be an abuse of discretion on the basis of spontaneity.

Moreover, the questions asked by Ms. Wheeler of four year old Kendal were not suggestive of sexual misconduct. As this Honorable Court has stated, when questioning a child, the child must broach the subject of sexual abuse and the questions must be non-leading or open-ended.

We hold that the mere fact that questioning occurred is not incompatible with a ruling that the child produced a spontaneous statement. However, for such statements to be admissible, the child must broach the subject of sexual abuse, and any questioning or prompts from adults must be nonleading or open-ended in order for the statement to be considered the creation of the child.

To be clear, we do not hold that any questioning by an adult automatically renders a statement "nonspontaneous" and thus inadmissible under MRE 803A. Open-ended, nonleading questions that do not specifically suggest sexual abuse do not pose a problem with eliciting potentially false claims of sexual abuse. But where the initial questioning focuses on possible sexual abuse, the resultant answers are not spontaneous because they do not arise without external cause. When questioning is involved, trial courts must look specifically at the questions posed in order to determine whether the questioning shaped, prompted, suggested, or otherwise implied the answers. [*People v Gursky, supra* at 614-615]

¹⁸Spontaneity was not the basis of defendant’s objection. Consequently, *Carines* was the appropriate standard for review.

The questioning by the Care House worker was consistent with and did not violate these principles. After some introductory conversation, the pertinent colloquy between Ms. Wheeler and Kendal was as follows:

MS. WHEELER: You didn't name it [the teddy bear.] That's okay. You don't have to name it. Well, you know what, Kendal, I'm gonna tell you a little bit about me and this place here, okay? All right. My name's Jennifer just in case you forgot that. This place here is called Care House, and we call it Care House not because anyone lives here--

KENDAL DOUGLAS: Um-hum.

MS. WHEELER: --just because everyone who works here really cares about kids. You know what my job is here at Care House?

KENDAL DOUGLAS: M-mm.

MS. WHEELER: It's to listen and talk with kids. That's what I do every single day all day long. I talk to little kids. I talk to older kids like you. Sometimes even teenagers.

KENDAL DOUGLAS: Teenagers?

MS. WHEELER: Yeah, teenagers. And when I talk to kids, they tell me everything. They tell me about their friends and their families. They tell me about their moms and their dads. They tell me about things that happen to them. Things that they saw. Things that they heard. They tell me about worries and problems. They tell me about secrets. They even tell me about things that people tell them not to tell, and that's okay because as long as you talk to me today, you get to tell me anything and everything that you want. Okay?

KENDAL DOUGLAS: Know what, my daddy makes me suck his peepee.
(AA 73a-74a)

Ms. Wheeler did not even hint at sexual misconduct, let alone specifically suggest it.

Kendal's response was "impulsive" and "non-sequitur" to Ms. Wheeler's statements and are precisely the type of child-initiated statements approved by this Honorable Court in *Gursky*,

supra at 614.¹⁹ Kendal “broached” the subject of sexual abuse, not the interviewer.

(b) The Court of Appeals further erroneously determined it was an abuse of discretion to admit Kendal’s statements to Ms. Wheeler because the disclosure occurred about one year after the sexual abuse. (AA 121a) This, however, was not the basis for the objection made at trial and was not, therefore, preserved. *Aldrich, supra*. But the Michigan Court of Appeals erroneously failed to apply the *Carines* standard of review. To the extent defendant failed to object on the basis of delay in making this disclosure to Ms. Wheeler, it is an unpreserved claim of error which is reviewed for plain error that affected defendant’s substantial rights, ie. the unpreserved error resulted in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra*.

Nevertheless, the delay in reporting the sexual touching made to Ms. Wheeler only one week after the sexual penetration was first disclosed to Kendal’s mother should have been deemed admissible under MRE 803A for the same reasons advanced in Argument III above as an “equally effective circumstance” justifying the one year delay.

(c) The statement made to Ms. Wheeler was the first disclosure of the sexual touching of defendant’s “peepee” by his daughter-victim. This should be deemed to be permitted under MRE 803A and such an interpretation is consistent with the general principle of protecting sexually abused children. See *People v Kline, supra*.

MRE 803a states, in pertinent part, “If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.” The operative word, therefore, for determining when a first corroborative statement is admissible is “incident.” Since

¹⁹Kendal’s mother testified she did not tell Kendal what was going to occur at Care House. She merely told her daughter that was where they were going.(AA 40a)

the rule does not define that term, it's generally accepted meaning should be applied.

As when construing statutes, in the absence of a specific definition of a common term used in an evidentiary rule, it is appropriate to look to the dictionary definition to discern the term's ordinary and generally accepted meaning. [*People v Gursky, supra* at 608]

The Merriam-Webster dictionary defines the noun "incident" as "an occurrence of an action or situation that is a separate unit of experience."²⁰ In the instant case, Kendal described two separate events of sexual abuse. The first incident she described was sucking defendant's "peepee" until milk came out. (AA 34a) This disclosure was first made to Kendal's mother. The second incident was first disclosed to Ms. Wheeler when Kendal revealed she had touched defendant's "peepee." (AA 75a) Kendal clearly indicated that the touching incident occurred on a different date from the sucking occurrence. (AA 76a) This disclosure was different in both character and time. Clearly, then, two separate events, two separate incidents. Accordingly, applying the plain unambiguous meaning of 803A, the first disclosure of each occurrence was a separate unit of experience and, therefore, both first statements were independently admissible as first corroborative statements.

2. The testimony of Care House worker/forensic interviewer Jennifer Wheeler was also admissible pursuant to MRE 803(24).

Under the Michigan Rules of Evidence, evidence that is properly admissible for one purpose need not be excluded because it is not admissible for another purpose. See *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000) (discussing the theory of multiple admissibility). Even if all of Kendal's statements to Ms. Wheeler are determined to approximate but not quite satisfy all of the requirements of MRE 803A, i.e., similar to 803A but

²⁰<http://www.merriam-webster.com/dictionary/incident>

not admissible under that rule, her testimony and the DVD of her forensic interview with Kendal should still be admissible pursuant to MRE 803(24)²¹, the catchall exception to the hearsay rule.²²

In *People v Katt*, 468 Mich 272, 279; 662 NW2d 12 (2003), it was determined that a hearsay statement is admissible under this residual rule if it (1) demonstrates circumstantial guarantees of trustworthiness equivalent to the categorical exceptions, (2) is relevant to a material fact, (3) is the most probative evidence of that fact reasonably available, and (4) serve the interests of justice by its admission. In *Katt*, the issue was whether the trial court properly admitted under MRE 803(24) a victim's second corroborative hearsay statement which was made to a CPS specialist revealing that the defendant had sexually abused him. The statement did not qualify for admission under MRE 803A because it was the second statement. However, the Michigan Supreme Court upheld its admission due to the spontaneity of the interview, lack of motive to lie, and the specialist's interviewing methods which combined to give the statement circumstantial guarantees of trustworthiness equivalent to the categorical exceptions.

In the instant case, Kendal's statements also had substantial "circumstantial guarantees of trustworthiness equivalent" to 803A. They were not prompted but were spontaneous, they were

²¹(24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. [MRE 803(24)]

²²Defendant was on notice before trial that this testimony was going to be introduced as Ms. Wheeler was endorsed by stipulation on the prosecution's witness list.

made by a child of tender years, and the delay was justified by the interim custodial placement of Kendal with her defendant father. See Argument III above. Kendal's statements to Ms. Wheeler also bear indicia of reliability necessary for their admission into evidence. The statement was made by a child of tender years and was not prompted or solicited. The child was merely told she could discuss anything she wanted to with Ms. Wheeler and "that it was okay because kids tell [Ms. Wheeler] secrets all the time." (AA 56a-57a, 74a) In *Katt*, the CPS specialist while interviewing the victim asked him to identify members of his household. The victim then identified defendant as a relative and spontaneously said defendant did "nasty stuff" to him. The specialist then asked the victim what he meant by "nasty stuff" and he, after being guarded initially, described the sexual abuse. *Katt, supra* at 274-275. The conversation between the forensic interviewer and the victim in the instant case was even less suggestive and more open-ended. She did not ask any leading questions or even suggest to Kendal that anyone, let alone her father, had done anything at all to her. No inquiry about "nasty stuff." The forensic protocol for interviewing children was scrupulously followed. *People v Geno*, 261 Mich App 624, 631-635; 688 NW2d 829 (2004). The statements were certainly relevant as to the allegation defendant had molested his daughter and the forensic interview protocol. The statements were most probative of the victim's assertions of abuse as they were Kendal's recorded and preserved corroborative statements, made closer in time to the abuse, not someone's interpretation of them.²³ *Katt, supra* at 295-296. Moreover, the testimony and video were the most probative of

²³Moreover, the statement made to Ms. Bowman [the CPS specialist] is more probative than DD's testimony at trial for the same reasons that underscore the tender-years rule. As time goes on, a child's perceptions become more and more influenced by the reactions of the adults with whom the child speaks. It is for that reason that the tender-years rule prefers a child's first statement over later statements. By analogy, the child's second statement is preferable to still later statements. Similarly, if DD's mother had a motive to induce her son to lie, she would have had

the forensic interview. The admission of the recorded statement was the best evidence demonstrating the non-leading forensic interview of the child victim. Finally, by the admission of these statements, the jury was given a more complete and accurate picture and not a redacted, condensed, or synthesized version. Justice was better served by admitting them rather than excluding them as it provided relevant and material information to the jury, not withholding probative information from them. Certainly the trial court's decision to admit the testimony was an outcome that was the result of principled reasoning and not an abuse of discretion.

V.

A WITNESS'S TESTIMONY THAT A CHILD'S STATEMENT WAS "SUBSTANTIATED" DOES NOT CONSTITUTE IMPROPER VOUCHING.

A. STANDARD OF REVIEW.

Evidentiary rulings are reviewed for an abuse of discretion. *People v Lukity, supra*. A trial court abuses its discretion when its decision is outside the range of principled outcomes. *People v Watkins, supra; People v Feezel, supra*. Evidentiary decisions involving preliminary questions of law, such as whether a rule of evidence or statute precludes admissibility, are reviewed de novo. *Lukity, supra*. "A preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Id.* at 495-496. "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich, supra*.

much more opportunity to influence him before trial than before the Bowman interview." [*Katt, supra* at 295-296]

Unpreserved constitutional and non-constitutional issues are reviewed for plain error affecting substantial rights. *People v Carines, supra*.

B. ARGUMENT.

- 1. A CPS worker's testimony that the child's statement was substantiated is a statement of the obvious and equivalent to an expert's statement that the child's behavior is consistent with children who are victims of sexual abuse and admissible.**

The Michigan Court of Appeals erred when it determined that Child Protective Services worker Diana Fallone improperly vouched for Kendal's credibility by testifying the allegations of sexual abuse were substantiated. CPS worker Fallone testified:

Q. If you thought the child was lying, and I don't mean this particular case, but any case—

A. Right.

Q. —you thought the child was lying, would you still seek a petition?

A. No.

* * *

Q. In this case before us now regarding [KD]—

A. Um-hum.

Q. Is that a yes?

A. Yes.

Q. Okay.

A. Sorry.

Q. did—did you—was this investigation that you've described to us, was it completed?

A. Yes.

Q. Okay, and you're indicating that you sought the court's assistance, you filed a

A. petition in a child protection proceeding in Oakland County, correct?
Correct.

Q. All right. Does that—can that lead us to the conclusion that you found that the allegations had been substantiated?

A. Yes.
(AA 65a-66a)

First, there was no objection to this testimony or to the prosecutor's questions.

Consequently, defendant was required to establish that the testimony was not only erroneous, but plainly so. Moreover, assuming plain error, defendant was also required to establish prejudice; actual innocence, or damage to the integrity of the judicial proceedings. *Carines, supra* at 763. Defendant has failed to establish plain error or actual prejudice.

Second, this testimony is no more than a statement of the obvious. Defendant was on trial because others clearly believed the victim was telling the truth when alleging defendant had sexually molested her. This observation is indistinguishable from *Dobek, infra*. "Given that [Detective] Leach was called as a witness by the prosecutor and that a criminal prosecution against defendant was pursued, the jurors surely understood that Leach believed that the victim was telling the truth even without the disputed testimony." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Such testimony is not reversible error.

Third, in cases of child sexual abuse, the Michigan Supreme Court has determined that an expert may testify with regard to the consistencies between the behavior of a particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. *People v Peterson, supra* at 353. Testimony that the victim's behavior is consistent with sexual abuse is equivalent to stating allegations of sexual abuse have been substantiated. Both statements should be considered admissible after the child victim's credibility has been attacked. Here, defendant

attacked Kendal's veracity and credibility in his opening statement to the jury.

We believe the proofs are going to show that, yes, she said this happened. We believe the proofs are also going to show that she said it didn't happen. We believe the proofs are going to show that there are other things that she said happened that we can absolutely document couldn't have happened and didn't happen. At least one time she said, oh, yes, I did this, and his milk tasted like cherry. She has gave many different versions about what happened and how it happened and when it happened.

* * *

We believe at the end of the proofs you're going to see the testimony of a young five-year-old girl that is confused, that doesn't know what happened or when it happened. (AA 21a-22a)

In response to this attack, it was not improper to inquire of the Child Protective Services worker as to the actions she took to investigate the allegations of sexual abuse and whether they were consistent or substantiated.

2. The testimony of Detective Muir was not hearsay.

The Michigan Court of Appeals also erred when it determined that Detective/Sergeant Muir's unobjected-to testimony impermissibly repeated Kendal's hearsay statements. However, his testimony pertaining to the phone call between defendant and the victim's mother, which included Kendal's allegations, was not offered for the truth of the matter asserted in the questions. (AA 41a-43a) The allegations were merely the context in which questions were being posed to defendant. Just as lawyers' trial questions are not evidence, the questions asked by Kendal's mother were not evidence during this conversation. CJI, 2nd 3.5(5).²⁴ What was offered for the truth of the matters asserted within the conversation were defendant's responses and admissions only.

²⁴(5) The lawyers' statements and arguments [and any commentary] are not evidence..... The lawyers' questions to the witnesses[, your questions to the witnesses,] and my questions to the witnesses are also not evidence. You should consider these questions only as they give meaning to the witnesses' answers. [CJI, 2nd 3.5(5)] The jury was so instructed. (AA 86a)

(c) *Hearsay*. "Hearsay" is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay*. A statement is not hearsay if—

* * *

The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity....

[MRE 801(c) and (d)(2)]

Defendant admitted in the conversation Det. Muir heard that defendant slept in the nude and that there was an incident where he "made a comment about Kendal touching him" and that he claimed he had previously told Kendal's mother about that incident. (AA 42a-43a) In response to the specific allegations of sexual abuse made by Kendal and disclosed to defendant by Jessica Brodie, defendant only said he didn't know why Kendal was saying that. (AA 42a)

Det. Muir further testified he observed the forensic interview with Kendal at Care house. However, he did not repeat anything that Kendal said at that interview. The balance of his testimony pertained primarily with chain of custody of various items of evidence. There was no inadmissible hearsay. There certainly was no plain error affecting substantial rights. The testimony of sexual penetration and sexual touching was independently produced at trial by Kendal (AA 23a, 25a) and defendant admitted she had touched his penis while he slept in the nude. (AA 79a) There was no evidentiary error in Det. Muir's testimony.

VI.

IN LIGHT OF DEFENDANT'S ATTACKS ON THE VICTIM'S CREDIBILITY FROM THE OUTSET OF THE TRIAL, ALL CORROBORATIVE STATEMENTS OF KENDAL'S ALLEGATIONS OF SEXUAL ABUSE AND OTHER TESTIMONY DEEMED IMPROPERLY ADMITTED BY THE COURT OF APPEALS SHOULD BE CONSIDERED HARMLESS.

A. STANDARD OF REVIEW.

A trial court's decision whether to admit or exclude evidence will be affirmed in the absence of a clear abuse of discretion. *People v Starr, supra*. The trial court abuses its discretion when its decision is outside the range of principled outcomes. *People v Watkins, supra; People v Feezel, supra*. A trial court's ruling on preliminary questions of law regarding the admissibility of evidence, such as the application of a statute or rule of evidence is reviewed de novo. *People v Lukity, supra*.

Unpreserved constitutional and non-constitutional issues are reviewed for plain error affecting substantial rights. *People v Carines, supra*. The latter part of this standard generally requires a showing of prejudice i.e., that the error affected the outcome of the case. *Id*. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id*.

B. ARGUMENT.

In a criminal case, assuming the alleged evidentiary error has been preserved, reversal is not warranted unless, upon examination of the entire case, it appears more probable than not that

the evidentiary error was outcome determinative. MRE 103(a);²⁵ *People v Lukity, supra*, at 495-496. If the alleged error has not been preserved, then the perceived error must also be plain and result in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra*. As noted in the earlier arguments, the Michigan Court of Appeals failed to apply these requirements. Additionally, the Michigan Court of Appeals erred by failing to consider the doctrine of harmless error.

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. [MCL 769.26]

Moreover, the Michigan Supreme Court has stated:

Michigan law provides that where a hearsay statement is not offered and argued as substantive proof of guilt, but rather offered merely to corroborate the child's testimony, it is more likely that the error will be harmless. Moreover, the admission of a hearsay statement that is cumulative to in-court testimony by the declarant can be harmless error, particularly when corroborated by other evidence. This Court has cautioned, though, that "the fact that the statement [is] cumulative, standing alone, does not automatically result in a finding of harmless error. . . . [Instead, the] inquiry into prejudice focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." In a trial where the evidence essentially presents a one-on-one credibility contest between the victim and the defendant, hearsay evidence may tip the scales against the defendant, which means that the error is more harmful. This may be even more likely when the hearsay statement was made by a young child, as opposed to an older child or adult. n48 However, if the declarant himself testified at trial, "any likelihood of prejudice was greatly diminished" because "the primary rationale for the exclusion of hearsay is the inability to test the reliability of out-of-court statements[.]" Where the declarant himself testifies and is subject to cross-examination, the hearsay testimony is of less importance and less prejudicial. [*People v Gursky, supra* at 620-621 (Footnote omitted.)]

²⁵ Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, [MRE 103(a)]

Here, the victim testified at trial and was subjected to cross-examination. She gave specific and detailed testimony about defendant sexually assaulting her. Even though very young, she described not only the sexual acts perpetrated against her, but also gave specifics as to where the abuse took place, and also as to taste. She was consistent in her trial testimony. (AA 112a) In evaluating Kendal's credibility, the trial court stated "...it is very apparent that – to the prosecutor and to defendant and to defense counsel her testimony was compelling. Her accuracy, her recollection, her detail to the facts surrounding this criminal sexual conduct were apparent." (AA 112a) Because the victim's testimony in a criminal sexual conduct case need not be corroborated, MCL 750.520h,²⁶ there was more than sufficient evidence to support the jury verdict even ignoring the testimony of the other witnesses.

In addition to the victim's credible testimony, defendant made tacit admissions. When first confronted with the claim he had sexually abused his daughter, defendant did not deny the sexual abuse had occurred. He just said that he didn't know why Kendal was saying he sexually abused her. (AA 42a) Additionally, defendant admitted to Trooper Rothman that it was his custom to sleep in the nude (AA 72a), and that at one time, Kendal had touched his penis when in bed with him. (AA 71a) When confronted with Kendal's specific accusations, defendant merely told the Michigan State Police Trooper that he could not "remember" if Kendal had sucked his penis. (AA 69a-70a)

A Again, I went over the allegations with Mr. Douglas, and at that point he stated he couldn't remember.

Q He couldn't remember what?

²⁶ The testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g. [MCL 750.520h]

A He couldn't remember that--if Kendal had sucked his peepee or not.

Q Okay. Did that strike you as an odd response?

A Yes.

Q Okay, why?

A Based on my experience as a police officer, usually when you talk to someone about some allegations, if they're false, especially in natures like this, they would immediately, if they were untrue, state that.

Q Let me ask you this: Is it possible that you asked him if he remembers performing that or that having occurred, or did you ask him did it occur? Do you recall?

A Well, I recall that I asked him if he remembers, and then I would have asked him also if it did occur.

Q Okay, so you asked him both.

A Correct.

Q Okay, what was his response when you asked him if he remembered?

A He doesn't remember. He said, I don't remember.

Q Okay, what was his response when you asked him if it did occur?

A I don't remember.

Q Okay, so either way, he didn't remember.

A Correct.
(AA 69a-70a)

At trial, defendant also admitted being in bed nude when Kendal touched his penis. (AA 78a-79a)

Moreover, Kendal's statements to Ms. Wheeler were proper rebuttal to defendant's assertions Kendal's claims of sexual abuse were manufactured or coached. During defendant's opening statement he stated there was a "hostile relationship" between defendant and the victim's

mother; that the allegations were made at the same time defendant was “getting remarried” and “developing a new life;” that Kendal said it “happened and that she also said it didn’t happen;” and, “We believe at the end of the proofs you’re going to see the testimony of a young five-year-old girl that is confused, that doesn’t know what happened or when it happened....” (AA 21a-22a) During cross-examination of five year old Kendal, defendant attempted to develop this “confusion” and inconsistencies when he elicited from her that she never told anyone other than her mother and inquired if her mother was mad when she told her mother about the abuse? (AA 29a-30a) He also elicited from Kendal that her mother had asked her to say these things. (AA 31a)

Defendant elicited from the victim’s mother, Jessica Brodie, that she had been charged with assaulting defendant and that Child Protective Services, at that time, told her it would be best for Kendal to be with defendant (AA 36a); that the sexual misconduct revelations were made right after defendant had gotten married to someone else. (AA 38a) Defendant also developed that Ms. Brodie took Kendal to Care House for the interview and had told her that’s where they were going. (AA 39a-40a) Defendant also elicited from Ms. Brodie that Kendal, at the preliminary examination, and contrary to Kendal’s trial testimony, described the milk from daddy’s peepee as tasting like cherry.²⁷ (AA 39a)

The testimony of the forensic interview expert and the DVD were material, probative, and necessary to counter this defense strategy. Moreover, the testimony of Ms. Wheeler was vital to develop important information for the jury when evaluating a young child’s ability/inability to relate events to time, the presence or absence of detail, and the significance of details provided

²⁷At trial Kendal testified the “milk” from her daddy’s peepee tasted like peepee and regular milk and denied she ever said it tasted like cherry. (AA 30a)

pertaining to a disclosure such as descriptions of taste, color, and/or a specific location where an event occurred. (AA 55a-56a, 64a)

Coached kids, they don't have details. They don't have the surrounding details whereas, y'know, research will tell you if a child can tell you what it tastes like. When people coach kids, they don't remember to tell them taste. They don't remember to give them certain words and things like Kendal said when she said it tastes like milk. That's her thought process because she's – she was four at the time. (AA 63a)

Certainly, in light of the substantial evidence establishing defendant's guilt, none of the perceived errors were outcome determinative. Defendant cannot, therefore, meet his burden of establishing a miscarriage of justice. The alleged errors should be determined to be harmless.

People v Gursky, supra at 519.

VII.

THE MICHIGAN COURT OF APPEALS ERRED IN FINDING COUNSEL INEFFECTIVE REGARDING HIS TRIAL TACTICS.

A. STANDARD OF REVIEW.

Whether a defendant received effective assistance of trial counsel presents a mixed question of fact and constitutional law. "A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *People v LeBlanc, supra*. A trial court's factual findings are reviewed for clear error. Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake. Questions of constitutional law are reviewed de novo. *People v Armstrong, supra*.

B. ARGUMENT.

There is a presumption that defense counsel was effective, and a defendant must

overcome the strong presumption that counsel's performance was sound trial strategy. *People v Carbin, supra*. To establish ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

The Michigan Court of Appeals determined trial counsel was ineffective for failing to object to the "hearsay" evidence and failing to impeach the victim with her preliminary examination testimony. However, as demonstrated in Arguments III, IV, and V above, the evidence now complained of was properly admitted. Counsel is not required to make meritless objections. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Moreover, trial counsel testified at the *Ginther* hearing that his lack of objection was part of his overall trial strategy:

A [Defense Counsel Mr. Daly] Yes. My defense was – what I was trying to convince the jury of was that she [Kendal] wasn't believable, not that she was lying, but that her testimony had been tainted by that of her mother who was now disgusted with Mr. Douglas.

Q In fact, you believed that this young girl told stories that it had happened and that it had not happened.

A That's correct.

Q Okay, so your theory was she would tell a different story depending on who she was standing in front of.

A Absolutely.

Q In fact, you told the jury that in your opening statement; didn't you?

A I did.

Q And you told the jury that she was gonna tell different stories, and you were going to be able to show that her stories were not consistent

throughout the –

A That's correct.

Q – the investigative process; is that true?

A Yes.

Q Okay. As it pertains to your objec – your lack of objection to testimony from witnesses other than Ms. Wheeler, the Care House expert, isn't true that you didn't object because that was part of your trial strategy? When they testified as to stories that she had told, that was part of your trial strategy to show the jury that she was telling different stories.

A There was – there was different stories being told by different people. The reality is there was nobody there as a witness to this other than Nevaeh, and they [Defendant and his wife] didn't want Nevaeh put on the stand. And with the exception of Nevaeh, there was nobody else there to testify as to what happened or what didn't happen, but only merely what they had been told, and several people had been told different things at different times.

Q So, by several people telling several different stories to the jury, that supported your trial strategy of the fact that the young lady was telling different stories throughout the process; is that true?

A Yes. I was convinced that when the trial was over with that the jury would believe that the young lady was testifying as to what she thought happened, but I had hoped that we would be able to convince the jury that she really had no idea what had happened.

Q So, the different stories actually supported your theory.

A I thought so.
(AA 94a-96a)

Counsel purposely did not object to the delay in the disclosures of the abuse because it fit within defendant's strategic theory that the allegations were the result of his having remarried and were made in retribution therefor. No objection was made to CPS worker Fallon's statement that her investigation was "substantiated" because such a conclusion was obvious to all since defendant was charged and on trial. Moreover, to object would have highlighted that

testimony for the jury. Such strategic decisions should not be second guessed. No objection was made to Det. Muir's testimony because any objection on hearsay grounds would have been futile as his testimony was not offered to show the truth of the matters asserted therein and, therefore, not hearsay. See Argument V above. Counsel could have objected to CPS worker Fallone's testimony that she believed that the victim had not been "coached" and was "credible."

Q The only thing you used in that petition, the only evidence you considered in deciding whether to substantiate it or not was the interview at the Care House; is that true?

A Not the only thing. However, based on the disclosures made at Care House, there was no indication that she was coached or being untruthful, and that does play a role in the petition filing. However, I did have the results of the police investigation and the CPS investigation in the other county which helped me write the petition.

Q Okay, so you looked at all of that in its totality to decide to file a petition.

A Right.

MR. BAKER: Okay. Thank you. No further questions, Your Honor.
(AA 67a-68a)

But, it is readily apparent that this testimony was not responsive to the prosecutor's question. The Court of Appeals did not address this factor. Nor, apparently, did that Honorable Court consider that for counsel to have objected to the nonresponsive answer would have focused undue attention to the brief statement and highlighted it for the jury. Moreover, the prosecutor did not ask for any elaboration of those brief comments but ended the examination. How to handle a nonresponsive answer, whether to object or not, should be determined to be matters of trial strategy. See *People v Pickens, infra*.

There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy. *People v*

Carbin, supra. To establish ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment."

Strickland v Washington, supra. Here, trial counsel testified that his lack of objection was specifically part of his trial strategy. The fact that a trial strategy is ultimately unsuccessful does not necessitate the conclusion that counsel was ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

The Michigan Court of Appeals also stated trial counsel was also ineffective for failing to impeach five year old Kendal with various statements she made at the Preliminary Examination. However, trial counsel's representation was neither deficient nor prejudicial to defendant. Trial counsel has "great discretion in the trying of a case - - especially with regard to trial strategy and tactics." *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). Trial counsel's decisions regarding "what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy," which an appellate court is not to assess on the basis of hindsight.

People v Rockey, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Clearly the manner, method, and extent of cross-examining five year old Kendal was part of counsel's trial strategy.

Decisions regarding how to question witnesses are presumed to be matters of trial strategy that a reviewing court should not second-guess with the benefit of hindsight. *Id.* Defendant was not denied effective assistance of counsel because he did not aggressively challenge a five year old.

Moreover, the testimony the Court of Appeals says counsel should have used to impeach Kendal was utilized at trial, so defendant was not prejudiced. Counsel elicited from Kendal that at one time she had said she had only touched defendant's penis with her hand. (AA 29a)

Counsel then demonstrated she had testified differently by having her say she had also touched it

with her mouth. (AA 29a) Kendal did the same thing at the Preliminary Examination. (AA 19a-20a) Counsel also got Kendal to say she had told no one other than her mother. (AA 29a) Counsel also elicited from Kendal that her mother asked her to tell things. (AA 31a) Also, counsel did impeach Kendal's trial testimony, through her mother, that Kendal had previously testified that the "milk" tasted like cherry at the Preliminary Examination. (AA 39a) The decision whether to attempt to impeach a five year old with a preliminary examination transcript as opposed to impeaching the same testimony through a different witness should be deemed the exercise of sound trial strategy. It was proper trial strategy not to attempt to aggressively impeach before the jury a five year old sympathetic child by using a transcript from the examination as to statements she made at that earlier time where counsel otherwise demonstrated inconsistencies. Moreover, the rule of completeness would have allowed the balance of her examination testimony to have also been admitted. MRE 105.²⁸ To have done as the Court of Appeals now suggests would have made trial counsel appear like a bully and undermined defendant's overall trial strategy that Kendal was a confused child. Defendant has simply failed to carry his burden of overcoming the presumption of effective assistance of counsel and establish that the perceived errors were actually outcome determinative. The Michigan Court of Appeals erred in ruling to the contrary.

²⁸“When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” [MRE 105]

SUMMARY

The Michigan Court of Appeals erroneously applied the recent United States Supreme Court case of *Lafler v Cooper* by denying the trial court any discretion whether a pre-trial plea offer should be reinstated and by totally ignoring the trial court's *Ginther* findings that defendant was not denied effective assistance of counsel because defendant would not have accepted the pre-trial plea offer even if he had been informed of the mandatory twenty-five year penalty for first-degree criminal sexual conduct. Moreover, implementation of the Court of Appeals' remedy will result in a windfall for defendant and a miscarriage of justice as it will reward defendant's trial perjury or it will reward his plea perjury.

The decision of the appellate court was also clearly erroneous by failing to review the various claims of evidentiary error under the correct standards of review. It further erred by determining a 3 ½ year old's one year delay in reporting the sexual abuse by her father was inadmissible where the child had been placed in defendant's care and custody by her mother at the direction of CPS, an equivalent effective circumstance under MRE 803A. Moreover, the victim's statement made to Care House during a forensic interview should also be deemed properly admissible as the first corroborative statement of different criminal sexual conduct that occurred at a different time, or alternatively, was admissible under MRE 803(24). *People v Katt, supra*.

Under the facts and circumstances of this case, giving due consideration to the credibility of the five year old victim and defendant's incriminating admissions, the alleged evidentiary errors were not outcome determinative nor did they affect defendant's substantial rights and were, otherwise, harmless; nor was defendant denied the effective assistance of counsel. *Lukity, supra*; MCL 769.26; *Gursky, supra*; *Carbin, supra*.

RELIEF REQUESTED

WHEREFORE, the People request that this Honorable Court reverse the Michigan Court of Appeals and affirm defendant's convictions and sentences.

January 10, 2013

Respectfully submitted,

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**STATE OF MICHIGAN
IN THE SUPREME COURT**

**THE PEOPLE OF THE
STATE OF MICHIGAN,**
Plaintiff-Appellant,

Supreme Court No. 145646

Court of Appeals No. 301546

VS.

Trial Court No. 09-14365 FC

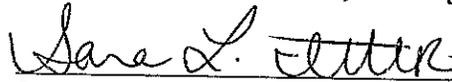
JEFFERY ALAN DOUGLAS,
Defendant-Appellee.

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PROOF OF SERVICE

Sara L. Itter, being first duly sworn, deposes and says that on January 10, 2013, she mailed two copies of PLAINTIFF-APPELLANT'S BRIEF ON APPEAL and PLAINTIFF-APPELLANT'S APPENDIX to Joan Ellerbusch Morgan, Attorney for Defendant-Appellee, via first class mail to the following address: 2057 Orchard Lake Road, Sylvan Lake, MI 48320; she further deposes and says on said date she mailed a copy of said brief and appendix to Bill Schuette, Attorney General, G. Mennen Williams Bldg., 4th Floor, 525 W. Ottawa Street, P.O. Box 30217, Lansing, MI 48909


Sara L. Itter

Sworn and subscribed to before me on January 10, 2013.


Jonathan L. Poer, *Notary Public*
Lenawee County, Michigan
Commission Expiration Date: 12/14/2013
Acting in Lenawee County