STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Kathleen Jansen, Presiding Judge
Cynthia Diane Stephens and Michael J. Riordan, Judges

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v. **Case No.: 146295**

STANLEY GREIG DUNCAN,

Defendant-Appellee.

BRIEF ON APPEAL OF APPELLEE STANLEY GREIG DUNCAN

ORAL ARGUMENT REQUESTED

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COUNTER STATEMENT OF ISSUE PRESENTED

I. Whether the trial court properly exercised judicial discretion in finding that the complainant RS was not unavailable within the meaning of MRE 804(a)?

Defendant-Appellee answers "Yes."
Michigan Court of Appeals answered "Yes."
Plaintiff-Appellant answers "No."

COUNTER-STATEMENT OF FACTS

Defendant-Appellee Stanley Greig Duncan is charged with four counts of first-degree criminal sexual conduct with RS, (Counts 1 & 2) a person under 13, defendant being over 17 years of age, and two additional counts with KN (Counts 3 & 4) a person under 13, defendant being over 17 years of age MCL § 750.52(b)(1)(a) and MCL § 750.520b(2)(b), punishable by a mandatory minimum sentence of 25 years.

Mr. Duncan is also charged with four counts of CSC 2, Counts 5 & 6 with RS and Counts 7 & 8 with KN, contrary to MCL 750.520c(1)(a) and MCL 750.520c(2)(b), and punishable by 15 years in prison.

Mr. Duncan was bound over to circuit court after a preliminary examination in the 39th District Court for the City of Fraser that took place on October 17, 19, and 26, 2011. He is represented at trial by defense counsel Mr. Timothy S. Barkovic. His case is joined for trial with his wife Vita Duncan, who was charged on an aiding and abetting theory and is represented at trial by attorney Mr. Ryan H. Machasic. Trial counsel for the prosecution is Nicole Blank.

Vita Duncan's preliminary examination was held in the 39th District Court on December 2, 2011, after Mr. Duncan's cases had been bound over to circuit court for trial. The witness that is the subject of this appeal, complainant RS, testified at both preliminary examinations, however counsel for the parties did not

have the opportunity to confront or cross-examine RS at the other codefendant's preliminary hearing.

A consolidated jury trial commenced in the Macomb County Circuit Court on September 26, 2012, before the Honorable Matthew S. Switalski, Circuit Judge.

During the trial complainant RS, four years old, was called to the witness stand by the prosecution. The court asked her a series of questions to determine if she was competent to testify by the trial as required by MRE 601 (Tr. 9/28/12, pp. 4-7; Appx. pp. 52a-55a).[1] RS was unable to answer several questions and a recess

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[1] Transcripts and other documents are referred to in this brief as indicated below, followed by page numbers designated in Appellant's Appendix, (Appx., p. ____):

PET, 10/17/11	Preliminary examination transcript, Stanley Duncan, October17, 2011,
PET, 12/2/11	Preliminary examination transcript, Vita Duncan, December 2, 2011,
Tr., 9/28/12	Excerpt of Jury Trial Proceedings, September 28, 2012
Tr., 10/2/12	Excerpt of Jury Trial Proceedings, October 2, 2012
TC Order, 10/2/12	Trial Court Order re: Complainant's testimony and stay of proceedings
CA Order, 10/4/12	Michigan Court of Appeals Order holding Application in Abeyance and For Opinion of the Trail Court,
TC Opinion, 10/5/12	Trial Court Opinion pursuant to Court of Appeals Order,
CA Order, 10/8/12	Michigan Court of Appeals Order denying Appellant's Application for Leave,
MSC Order, 10/10/12	Michigan Supreme Court Order remanding to Court of Appeals,
CA Order, 10/17/12	Michigan Court of Appeals Order for consolidated expedited appeal,
CA Opinion, 11/29/12	Michigan Court of Appeals Opinion affirming the trial court order,
MSC Order, 1/24/13	Michigan Supreme Court Order granting leave to appeal.

was taken after which a second attempt to question her was similarly unsuccessful. *Id.*, 9-10; Appx. pp. 57a-58a. The prosecution request that attorney's for the parties be permitted to ask RS questions was denied by the court. *Id.*, 10-11; Appx. pp. 58a-59a. The prosecution moved for introduction of RS's testimony -- from both preliminary examination's -- on the basis that RS was unavailable under the provisions of MRE 804(a)(3). *Id.* 11; Appx. p. 59a. Counsel for the defendant's opposed to the prosecution's motion, arguing that RS was present and available to testify at the trial and did not have a lack of memory as required by MRE 804(a)(3). The codefendant's argued that they did not have an adequate opportunity or motive to confront RS and fully develop her testimony at the respective preliminary examinations that they would have undertaken at the jury trial and that the court should deny the prosecutions motion (Tr. 9/28/12, pp. 12-13; Appx. pp. 60a-61a).

The trial court assessed each of the subsections of MRE 804(a) (1-5) and determined that none of them applied to the circumstances extant and denied the prosecutors motion. *Id.*, 13-14; Appx. pp. 61a-62a.

When trial recommenced on October 2, 2012, the prosecution renewed it motion and asked the court to reconsider its ruling, now arguing that MRE 804(a)(4) was the appropriate authority for its position. The prosecution argued that the case of *People v. Edgar,* 113 Mich.App. 528; 317 N.W.2d 675 (1982), was

on point with the facts of the instant matter and that the subsequent case of *People v. Bradley,* 1999 WL 33437808 (Mich.App. 1999), supported is position that RS should be declared unavailable and that her preliminary exam testimony introduced at trial (Tr. 10/2/12, pp. 4-7; Appx. pp. 69a-72a). The defendant's responded stating that counsel did not have an adequate opportunity or motive to confront RS and fully develop her testimony at the respective preliminary examinations that they would have undertaken at the jury trial. They did not have the discovery available that would have allowed more appropriate preparation and intensive examination. That the introduction of RS's testimony from both preliminary examinations at the joint trial would violate the codefendant's constitutional right to confrontation, since neither was present nor did they have the opportunity to cross-examine RS at the other's separate preliminary hearing. *Id.*, 7-9; Appx. pp. 72a-74a. Mr. Barkovic argued that RS was not incapacitated as required by the court rule and statute but rather was incompetent. He further noted that the magistrate specifically delimited his ability to cross-examine RS at the preliminary hearing by controlling his demeanor, voice and positioning in the courtroom. *Id.*, 10-11; Appx. pp. 75a-76a. Both defense counsel reminded the court that confrontation was a significant trial right and that to grant the prosecutions motion would deprive the jury of the opportunity evaluate the witness in person and properly assess her credibility. *Id.*, 12-13; Appx. pp. 77a-78a.

The prosecution maintained that if a witness is incompetent under MRE 601, MRE 804(a) requires the court to find her unavailable. That because the defendant's had the opportunity to cross-examine RS at the examination, and that RS's testimony would be the similar for both defendant's the court should permit the transcripts to be read to the jury. *Id.*, 13-14; Appx. pp. 78a-79a.

The trial court again reviewed MRE 804(a) and denied the prosecution's request finding that RS was not unavailable within the meaning of the rule. *Id.*, 14-17; Appx. pp. 79a-82a. The prosecution moved for a stay of proceedings under MCR 7.205(e)(3). After some discussion of whether the newly amended rule contemplated a stay during a trial, the prosecution's request for a stay of the jury trial was granted with the trial scheduled to recommence the following week, on October 10, 2012. *Id.*, 18-28; Appx. pp. 83a-93a; TC Order, 10/2/12; Appx. p. 98a.

Plaintiff-Appellant filed an Application for Interlocutory Appeal to the Court of Appeals on October 2, 2012. On October 4, 2012, the Court entered an order (CA Order, 10/4/12; Appx. p. 100a) staying the application and requiring that the trial court issue an opinion detailing the reasons for its ruling by 10:00 a.m. on October 5, 2012. Appellant was given until 5:00 p.m. that day to file a supplement to the APLV based on the trial court's opinion. The trial court filed an opinion (TC Opinion, 10/5/12; Appx. p. 102a) and Appellant filed a supplement to its application for leave on that date.

Mr. Duncan filed an answer in opposition and brief in support in the Court of Appeals on October 8, 2012. On that same date the Court of Appeals entered an order denying the application (CA Order, 10/8/12; Appx. p. 106a). On October 9, 2012 Appellant filed an emergency application for leave to this Court. Mr. Duncan filed an answer and brief in opposition, and this Court issued an order remanding to the Court of Appeals for consideration of the merits of the appeal as on leave granted (MSC Order, 10/10/12; Appx. p. 108a).

By order entered on October 17, 2012, the Court of Appeals established a briefing and oral argument schedule as an expedited appeal and consolidating Mr. Duncan's case with that of codefendant Vita Duncan (Docket No. 312638) (CA Order, 10/17/12; Appx. p. 110a).

On November 9, 2012, oral argument of the parties was heard by the Court of Appeals. On November 29, 2012, the Court of Appeals issued an unpublished, per curiam opinion, affirming the trial court ruling that excluded the introduction of RS's testimony at both preliminary examinations at Mr. Duncan's trial (CA Opinion, 11/29/12; Appx. p. 111a). On December 4, 2012, Appellant filed an Interlocutory Application for Leave to Appeal with this Court, to which Mr. Duncan filed an answer in opposition on December 10, 2012. On January 24, 2013 this Court entered an order granting leave "... limited to the issue whether the witness was "unavailable" for the purposes of MRE 804(a)" (Appx. p. 119a). Mr.

Duncan submits this brief in support of his request that this Court affirm the rulings of the trial court and Court of Appeals, denying the prosecution's motion to admit the testimony of RS from both preliminary examinations at his trial.

LEGAL ARGUMENT

I. The trial court properly exercised judicial discretion in finding that the complainant RS, was incompetent to testify at trial under MRE 601 and that she was not unavailable under the provisions of MRE 804(a)(4). The trial court's ruling, barring the introduction of her testimony, taken at two separate preliminary examinations, in Mr. Duncan's trial, and the Michigan Court of Appeals decision of November 29, 2012, affirming that ruling should be upheld by this Court.

a. The trial court's ruling that RS was not unavailable under the provisions of MRE 804(a)(4), was made on a strict interpretation of that court rule. Based on the facts and circumstances presented in the trial court its ruling was not an abuse of discretion;

b. The *Edgar*, *Karlese,* and *Brady* cases are distinguishable from Mr. Duncan's case. Both the trial court and Court of Appeals correctly determined that these cases do not control the facts of Mr. Duncan's case and their rulings should be affirmed;

c. This Court should affirm the Court of Appeals finding, that neither the case of *People v. Meredith* nor *People v. Adams* support the relief requested by Appellant.

d. The cases from other jurisdictions are not binding on this Court and should not determine the interpretation of Michigan Rule of Evidence 804(a).

Standard of Review:

This Court reviews a trial court's decision to admit evidence for an abuse of discretion, *People v. Gursky,* 486 Mich. 596, 606; 786 N.W.2d 579 (2010). If the trial court's decision involves a preliminary issue of law where a constitutional

provision, statute, or rule of evidence determines admissibility, then it is subject to *de novo* review. *Id.* Preserved constitutional issues are reviewed *de novo*, *People v. Idziak,* 484 Mich. 549, 554; 773 N.W.2d 616 (2009).

Discussion:

a. The trial court properly exercised judicial discretion in finding that the complainant RS, was incompetent to testify at trial under MRE 601. The court's ruling that she was not unavailable under the provisions of MRE 804(a)(4), was made on a strict interpretation of that court rule. Based on the facts, circumstances and case law presented in the trial court its ruling was not an abuse of discretion.

The test for competency is whether the witness has the capacity and sense of obligation to testify truthfully and understandably. *People v. Watson,* 245 Mich.App. 572, 583; 629 N.W.2d 411 (2001). Mr. Duncan does not dispute that RS was incompetent to testify and that the trial court made a proper determination under MRE 601 (TC Opinion 10/5/12, p. 2; Appx. p. 103a).

In the process of ruling on the prosecution's motion for admission of RS's prior testimony under MRE 804(b)(1), the trial court undertook a complete analysis of the MRE 804(a) both initially and on motion for reconsideration (Tr. 9/28/12, pp. 13-14; Tr. 10/2/12, pp. 14-17; Appx. pp. 61a-62a, 79a-82a). The court further articulated its analysis in a detailed opinion filed in the Court of Appeals (TC Opinion, 10/5/12; Appx. p. 102a).

MRE 804(a) provides:

Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant --

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) has a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance ... by process or other reasonable means, and in a criminal case, due diligence is shown.

The trial court reviewed each sub-section of the rule and determined that RS did not refuse to testify pursuant to an order of the court, did not demonstrate a lack of memory and was in fact present at trial and did not suffer from a "then existing physical or mental illness or infirmity" (TC Opinion, 10/5/12, p. 2; Appx. p. 103a).

There was no suggestion by the prosecution that RS was afraid of Mr. Duncan or his counsel. Mr. Duncan was present in the courtroom when RS testified against him at the preliminary examination. As the trial judge noted in his opinion, there are many accommodations that can be made for a child-witness such as alternate arrangements made in the courtroom for her testimony, closed circuit testimony, as well as statutory provisions and rules of evidence, all of which favor

the prosecutions ability to succeed in its case in chief (TC Opinion, 10/5/12, p. 3; Appx. p. 104a). There is no indication that the prosecution took advantage of any of these special provisions to protect the child and avoid the potential for what occurred here.

"An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v. Khouri,* 481 Mich. 519, 526; 751 N.W.2d 472 (2008). " '[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.' *Maldonado v. Ford Motor Co.,* 476 Mich. 372, 388, 719 N.W.2d 809, 817 (2006), quoting *People v. Babcock,* 469 Mich. 247, 269, 666 N.W.2d 231 (2003). " 'When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.*

To find that the trial court abused its discretion, this Court must conclude that the trial court's decision resulted in an outcome falling outside the principled range of outcomes. *Edry v. Adelman,* 486 Mich. 634, 639; 786 N.W.2d 567 (2010). Here, the trial court made the justifiable determination that based on an objective view of all of these factors, RS's lack of a capacity and sense of obligation to testify truthfully and understandably, did not translate into a "then existing

physical or mental illness or infirmity." Mr. Duncan believes that that the trial court's decision cannot be considered "an outcome falling outside the principled range of outcomes" and should be upheld on appeal.

When interpreting the rules of evidence an appellate court applies the principles of statutory interpretation. *People v. Caban,* 275 Mich.App 419, 422; 738 N.W.2d 297 (2007). As such, this Court begins by examining the plain language of the rule. *People v. Phillips,* 468 Mich. 583, 589; 663 N.W.2d 463 (2003). "If the language of the court rule is clear and unambiguous, then no further interpretation is required or allowed." *People v. Buie,* 285 Mich.App 401, 416; 775 N.W.2d 817 (2009)." It is clear that a trial court is bound by these same rules in considering the meaning of a rule of evidence. *Waknin v. Chamberlain,* 467 Mich. 329, 332, 653 N.W.2d 176 (2002).

In this regard the Court of Appeals in its opinion of November 29, 2012, noted:

> The prosecution in this case has presented no evidence that the complainant suffers from an ascertainable mental illness or infirmity. Rather, it appears that this young child was simply unable to provide the trial court with assurances that she understood the concept of truth and was capable and willing to testify truthfully. Absent those assurances, the trial court was unable to conclude that the proposed witness met the legal requirements of MRE 601. Without some demonstration that her inability to meet the requirements of MRE 601 is attributable to a mental illness or infirmity, we are unable to conclude that the trial court abused its discretion in refraining from declaring the complainant unavailable to testify. Furthermore, in reviewing the trial court's interpretation of MRE 804(a) de novo, we cannot conclude that the trial court committed any error in

> ascertaining the meaning of that rule of evidence. Rather, the court applied the unambiguous language of the rule of evidence to the facts of this case and made a ruling that was proper in light of its direct observations and the parties' arguments.
>
> Court of Appeals Opinion, 11/29/12, p. 7; Appx. p. 117a

The meaning of a rule of evidence is a question of law to be reviewed *de novo*. *People v. Caban,* 275 Mich.App. at 421.

The trial court evidentiary ruling and the Court of Appeals analysis affirming its interpretation and application of the rules of evidence are consistent with this Court's recitation of the principles governing statutory interpretation in *McCormick v. Carrier,* 487 Mich. 180, 191–192; 795 N.W.2d 517 (2010):

> The primary goal of statutory construction is to give effect to the Legislature's intent. This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. When reviewing a statute, all nontechnical words and phrases shall be construed and understood according to the common and approved usage of the language, MCL 8.3a, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. A court should consider the plain meaning of a statute's words and their placement and purpose in the statutory scheme. Where the language used has been subject to judicial interpretation, the legislature is presumed to have used particular words in the sense in which they have been interpreted. [Citations and quotation marks omitted.]

The trial court interpreted MRE 804(a) based on the clear and unambiguous language of the rule. Its finding of fact and interpretation of the rules of evidence were reasonable, within the range of principled outcomes, and did not constitute an

abuse of discretion. Both the trial court ruling and Court of Appeals decision affirming the trial court should be upheld.

b. The *Edgar*, *Karlese*, and *Brady* cases are distinguishable from Mr. Duncan's case. Both the trial court and Court of Appeals correctly determined that these cases do not control the facts of Mr. Duncan's case and their rulings should be affirmed.

In support of its position that RS is unavailable under MRE 804(a)(4) and that her prior testimony should be admitted pursuant to MRE 804(b)(1), Appellant relies on the decisions in, *People v. Edgar,* 113 Mich App. 528; 317 N.W.2d 675 (1982), *People v. Karelse,* 143 Mich.App. 712, 373 N.W.2d 200 (1985), (reversed on other grounds in *People v. Karelse,* 428 Mich. 872 (1987), and *People v. Bradley,* 1999 WL 33437808 (Mich.App. 1999), a case citing both *Edgar* and *Karelse* (Aplt. Brief, pp. 6-10).

Mr. Duncan maintains, and the Court of Appeals in its November 29, 2012 opinion agreed, that these cases are distinguishable from his case and do not control his facts. In *Edgar* when the child-witness could not testify at a pre-trial evidentiary hearing trial the trial judge found that she was also incompetent at the preliminary examination despite the fact that the magistrate found her competent then and she testified against the defendant. The court reversed the trial court's ruling stating that "...Although the change in the child's competency may seem incongruous on its face, her subsequent inability to testify does not alter the magistrate's initial finding. We find that the trial court erred in reversing the

magistrate's determination that Caprice was competent to testify." 113 Mich App at 535.

The *Edgar* court ruled that "...Whether her sudden failure of memory was due to fear of the defendant or an honest lack of recall does not affect the fact that she was unavailable as a witness during trial." In a footnote the Court cited both MRE 804(a) (3) and (4) in so holding. *Id.*, at 536, fn 1. The Court of Appeals in its November 29, 2012 decision concluded that the court in *Edgar*:

> "...noted that the complainant was unable or reluctant to answer the questions at trial and attributed her inability to a failure of memory. Notably, MRE 804(a)(3) permits a court to declare a witness unavailable as a result of deficiencies in memory. The Court did not, as plaintiff implies, specifically hold that where a witness is declared not competent under MRE 601, that the witness is unavailable per se under MRE 804(a)."
>
> Court of Appeals Opinion, 11/29/12, pp. 5-6; Appx., pp. 115a-116a

In *Karelse,* a case that involved the sexual abuse of the defendant's 20-year-old mentally retarded daughter, the defendant was successful in excluding his daughter's testimony on the because she was incompetent to testify pursuant to MRE 601. At trial the court admitted the complainant-daughter's preliminary examination testimony. The defendant appealed this ruling and the Court of Appeals affirmed, noting that "...the transcript of the preliminary examination shows that defendant utilized his opportunity to develop the victim's testimony on the issue of his guilt by cross-examination." 143 Mich.App. at 715. The Court of Appeals in the instant matter distinguished *Karelse* from Mr. Duncan's facts:

> The Court in *Karelse* did determine that the complainant was incompetent to testify under MRE 601 and further concluded that the complainant was unavailable pursuant to MRE 804(a)(4). However, it appears that the prosecution, in relying on *Karelse*, mistakes correlation for causation. It was not the complainant's incompetence under MRE 601 that rendered her unavailable, it was her mental incapacity, in the form of mental retardation, which was akin to mental illness or infirmity under MRE 804(a)(4).
>
> Court of Appeals Opinion, 11/29/12, p. 6; Appx. p. 116a

The only other case citing *Karelse* in the 27 years since it was decided is the unpublished *Bradley* decision also relied on by the Appellant. The Court of Appeals in its November 29, 2012 opinion, did not address the unpublished *Bradley* case.

Bradley, was a case in which the deposition of a child-witness was recorded at a juvenile proceeding that contained exculpatory statements about the charges against defendant. At the defendant's criminal trial the court refused admission of the recording. On appeal the Court of Appeals held:

> "Under the facts of this case, we conclude that the trial court's exclusion of the daughter's testimony was not harmless error because it deprived defendant of the ability to advocate his position and present significant exculpatory evidence from one of the victims. The trial court's error in excluding this important exculpatory evidence is not harmless. The error also prejudiced defendant because other witnesses were permitted to testify that the minor daughter made out-of-court statements accusing her father of sexual abuse. Specifically, the counselor testified that during an interview, the minor daughter described sexual contact between her and defendant. Therefore, because prejudicial out-of-court statements were admitted, but potentially exculpatory out-of-court statements were erroneously excluded, we cannot find that the error was harmless.

> Accordingly, we hold that the trial court abused its discretion when it refused to admit the minor daughter's videotaped testimony."
>
> 1999 WL 33437808 at *4; Appx., p. 122a

Thus, the primary thrust of the *Bradley* decision was that to otherwise hold would deny the defendant critical exculpatory evidence that would offend his right to present a defense to the charges. The child-witness in *Bradley* was found to be have a "then existing physical or mental illness or infirmity," under MRE 804(a)(4). *Bradley* is an unpublished opinion, which "has no precedential force." *Nuculovic v. Hill,* 287 Mich.App 58, 68; 783 N.W.2d 124 (2010); MCR 7.215(C)(1). Not only are *Bradly's* convoluted facts dissimilar to the instant case, but this Court is not bound by this unpublished decision.

The Court of Appeals summarized its analysis of the published cases Appellant relies on and of the applicable court rules MRE 601 and MRE 804(a)(4) as follows:

> "...In both *Karlese* and *Edgar*, the complainants were declared unavailable to testify because they met the criteria of one of the delineated situations in MRE 804(a). That those complainants were also declared incompetent was of no consequence to the unavailability analysis. Stated differently, that some potential witnesses are both incompetent and unavailable does not mean that *all* incompetent witnesses are also unavailable. Contrary to the prosecution's argument, incompetence and unavailability are two distinct concepts under the Michigan Rules of Evidence. Had the drafters of our rules of evidence intended to classify every witness who was incompetent pursuant to MRE 601 as unavailable, MRE 804(a) would have explicitly stated so. Rather, MRE 601 permits a trial court to declare a witness incompetent to testify when "the person does not have sufficient physical or mental capacity or sense of obligation to

testify truthfully and understandably." MRE 804(a)(4) does not address mental *capacity* or sense of obligation, it addresses mental *illness* or *infirmity*. We must assume that the use of distinctly different terms by the rules of evidence was conscious and intentional. Further, even if we were to conclude that deficient mental capacity under MRE 601 was akin to mental illness or infirmity under MRE 804(a)(4), our result would be no different, as the prosecution has not demonstrated that this witness was unable to testify as a result of a problem with capacity, as opposed to a lack of a sense of obligation.

(Court of Appeals Opinion, 11/29/12, p. 6; Appx. p. 116a
(Emphasis in original)

Mr. Duncan submits that this interpretation of the applicable rules regarding competency and capacity is well reasoned. This ruling embodies the argument he preserved by Mr. Duncan in the trial court:

"...Judge, the statute under which they are proceeding is 768.26, indicates that the victim has to be or the alleged person has to be mentally incapacitated. That's the standard that's announced in the statute. And Judge, there's all kinds of rule (sic) about statutory interpretation. But the Court of Appeals has said when examining a statute we presume that every word has some meaning. In this case, Judge, Rose isn't incapacitated.

There's no indication that she cannot carry on the normal activities of life. In fact, there's no finding of incapacity here. What there is is a finding of incompetence. And if the legislature said that incapacity equals incompetence then they would have used incompetence or incapacity. In this case, Judge, they chose to use the word incapacity, which means the ability to attend to your basic physical needs. And she does not have that mental status at this point in time."

Tr. 10/2/12, p. 10; Appx. p. 75a

Appellant's makes assertions that the trial court ruling is "contrary to published Michigan case law and constitutes reversible error," and that "The case at bar is factually identical to these cases from the Court of Appeals," in urging this

Court to reverse both the trial court and Duncan Court of Appeals decisions (Aplt. Brief, pp. 6, 9). These claims are incorrect in that they ignore the significant factual and legal differences from the *Edgar*, *Karlese,* and *Brady* cases and Mr. Duncan's case.

c. Neither the cases of *People v. Meredith* nor *People v. Adams* support the relief requested by Appellant.

Appellant has cited in its brief (p. 11) a quote from case of *People v. Meredith,* 459 Mich. 62, 65-66; 586 N.W.2d 538 (1998), in support of its claim that this Court "has endorsed a broad view of the term "unavailable" as it is used in MRE 804(a). That quote indicates that "unavailability" is a term of art under MRE 804(a) that "bears a close nexus to the ordinary meaning of the word." *Id.* In *Meredith,* this Court found that a witness who invoked the Fifth Amendment as a justification for not testifying was unavailable, even though the language of MRE 804(a) does not specifically reference such an exception. Appellant's construction of *Meredith,* and invitation to this Court to extend the application of MRE 804(a) beyond its language is flawed for several reasons.

First, as discussed above, the rules of statutory construction apply to the clear language of the rule of evidence. There is no ambiguity in the clear terms of the rule at issue here, and thus no interpretation of it is necessary. Secondly, MRE 804(a)(1) includes a witness who is "exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's

statement." This includes individuals who are entitled to assert their privilege against self-incrimination. The *Meredith*, Court stated "...we often have recognized that a witness, in fact, is unavailable who cites the Fifth Amendment as a justification for not testifying," referring to the prior the decisions of *People v. Fields,* 450 Mich. 94, 107, 538 N.W.2d 356 (1995); *People v. Underwood,* 447 Mich. 695, 702, 708, 526 N.W.2d 903 (1994), and *People v. Watkins,* 438 Mich. 627, 632, 475 N.W.2d 727 (1991) (opinion of Cavanagh, C.J.).

Likewise, the Court of Appeals in its November 29, 2012, opinion stated, "...in *People v Watkins,* 438 Mich. 627, 632 n 2; 475 N.W.2d 727 (1991), the Court previously indicated that the assertion of the Fifth Amendment falls within MRE 804(a)(1). Consequently, the prosecution has failed to demonstrate that MRE 804(a) does not provide an exhaustive list of when a witness can be declared unavailable. More importantly, even if the list included in MRE 804(a) is not intended to be exhaustive, the prosecution cannot show that the trial court erred." (CA Opinion, 11/29/12, p. 7; Appx. p. 117a).

If anything, the *Meredith* Court's discussion illustrates that the "close nexus" is subject to narrow construction rather than the broad application that Appellant seeks in this appeal. Moreover, the prosecution did not argue *Meredith,* at the trial court level, nor is there any case law from this Court on point with facts similar to the instant matter involving a child-witness.

Appellant also cites *People v. Adams,* 233 Mich.App. 652, 592 N.W.2d 794 (1999), where the Court of Appeals addressed circumstances where a prosecution witness, subpoenaed for trial, left the courthouse before providing any testimony. The *Adams* court noted that MRE 804(a) did not specifically address this kind of abrupt departure. However, the witness was deemed "unavailable" and her "refusal to testify "despite an order of the court to do so" (her subpoena) was found to be within the clear language of MRE 804(a)(2). *Adams,* 233 Mich.App. at 658-59. Thus, similar to *Meredith*, the *Adams* Court in dicta, generally discussed the concept of "unavailability", but ultimately found that the unavailable witness fit into a specific category delineated in the clear language of MRE 804(a). Mr. Duncan maintains that neither *Meredith* nor *Adams* provide controlling precedent for the resolution of his case.

d. The cases from other jurisdictions are not binding on this Court and should not determine the interpretation of Michigan Rule of Evidence 804(a).

Appellant has cited several cases from federal and state courts in support of its argument that "Other jurisdictions have overwhelmingly held that a child witness deemed incompetent to testify at trial is unavailable for purposes of that jurisdiction's hearsay rules and other rules of evidence" (Aplt. Brief, p. 12). The Court of Appeals in its opinion dismissed these cases from other jurisdictions, stating, "While the prosecution does provide a variety of holdings from foreign jurisdictions in support of its position, we cannot find that the trial court abused its

discretion in refraining from following case law that is nonbinding." (CA Opinion, 11/29/12, p.7 fn 2; Appx. p. 117a).

Mr. Duncan concurs with the Court of Appeals conclusion that these cases are not only non-binding but also are factually and legally inapposite. While this Court has noted in *People v. VanderVliet,* 444 Mich. 52, 60 n. 7, 508 N.W.2d 114 (1993), that the Michigan Rules of Evidence in general parallel the text of the federal rules and may find "helpful and, in some instances, persuasive," case law that regarding the Federal Rules of Evidence, this Court is not bound by these decisions. *People v. Malone,* 445 Mich. 369, 386 518 N.W.2d 418 (1994).

The Sixth Circuit Court of Appeals case of *Haggins v. Warden,* 715 F.2d 1050, 1055 (6th Cir. 1983), cited by several of the decisions relied upon by Appellant, was a federal habeas corpus case from the state of Tennessee in which the court cited FRE 804(a), rather than the applicable Tennessee rule of evidence to support its conclusion. Without any further analysis or citation of authority, state or federal simply stated: "Since the declarant in this case was ruled incompetent to testify, she was clearly unavailable. See Fed.R.Evid. 104(a), 804(a). Thus, the focus of our inquiry is whether the hearsay statements contain sufficient indicia of reliability to warrant their admission." The court ultimately concluded that the "child's declarations in this case are more properly analyzed as excited

utterances," and were admissible as such under FRE 803(2). *Haggins* 715 F.2d at 1057-59.

It was on this tenuous analytical foundation that another case cited by Appellant, *Government of Virgin Islands v. Riley,* 754 F.Supp. 61 (D.V.I. 1991), relied exclusively upon *Haggins,* as its only authority in support of the proposition, that a child who is incompetent to testify because of his age is "unavailable." *Riley,* was a U.S. district court case where a Fed. R. Crim. P. Rule 15, pre-trial deposition was taken specifically for the purpose of preserving a 4 year old child's testimony. The court ruled that admission of the deposition at trial and did not violate the Confrontation Clause. The court did find the otherwise competent child unavailable because of "mental infirmity", while in dicta reasoning that it did not matter why the child-witness was unable to testify so long as it was similar to the other types of unavailability set forth in FRE 804(a). *Riley,* 754 F.Supp. at 64. *Riley* has not been cited or followed for this proposition by any federal appellate court, and appears in a string-cite in another case cited by Appellant, *State v. Townsend,* 635 So.2d 949 (Fla.1994). In *Townsend* the Florida Supreme Court addressed a certified question as to whether an incompetent child-witness was unavailable for the purpose of admitting a prior hearsay statement, under section 90.803(23)(a)(2), Florida Statutes (1987). The court answered in the affirmative. *Id.*, at 952.

Townsend cited other cases to support its holding including the aforementioned *Haggins* and *Riley* cases, as well as federal cases from the Fourth and Eight federal circuits, Colorado, Minnesota, and North Carolina. Appellant references additional cases from Oregon, Washington, and Iowa in which the courts have ruled that a declarant found incompetent to testify is unavailable within the meaning of the formulation of the subject court rule or statute at issue. (Aplt. Brief pp. 13-15).

It would serve no useful purpose to individually dissect each of these cases because several of those jurisdictions states have enacted special statutes and procedural rules beyond an MRE 804(a) equivalent, that specifically address the admissibility of prior testimony of a child-witness who is unable to testify at a criminal trial or other proceeding. E.g., Colorado statute, CRS 1973, 13-90-106, Minnesota, Stat. § 595.02, subd. 3. Moreover, these decisions are predicated on the historical statutory, evidentiary rule, and case law development, unique to each jurisdiction that may or may not comport with this Court's clear and consistent rules of interpretation.

Assuming arguendo that the majority consensus is that incompetence is unavailable, there remain other jurisdictions that have taken a more narrow or strict analysis in addressing this issue. These include *State v. Fearing,* 315 N.C. 167; 337 S.E.2d 551 (1985) (requiring strict compliance with procedure for judicial

determination of competency); *State v. Ryan,* 103 Wash.2d 165, 178-79, 691; P.2d 197 (1984) (Same); *State v. Savage,* 30 Ohio St.3d 1, 506; N.E.2d 196 (1987), (holding in the context of spousal privilege that incompetency and unavailability are separate and distinct considerations).

Wisconsin has adopted a rule of evidence, consistent with its statute on incompetency (Wis. Stat. § 906.01), that provides, while excepting deceased persons their agents or insane persons that, "every person is competent to be a witness...". This has been interpreted to mean that § 906.01, removes from judicial determination the question of competency and requires submission of testimony to the jury so that it may assess its weight and credibility. *State v Dwyer,* 143 Wis.2d 448, 462-463; 442 NW2d 121 (1988). This includes child-witnesses of tender years. *State v. Daniels,* 117 Wis.2d 9, 343 N.W.2d 411, 414–15 (App.1983).

In *People v. Johnson,* 118 Ill.2d 501, 509-10, 517 N.E.2d 1070 (1987), the Illinois Supreme Court reversed a sexual abuse conviction where the child-witnesses were unresponsive to the prosecutor's questioning on the witness stand resulting in videotaped depositions of their testimony being introduced at trial. In holding that the intermediate appellate court erred in equating the reluctance to testify with unavailability of testimony, the Court found that this interpretation conflicted with the construction given the term "unavailable" in other contexts. After reciting FRE 804(a) in its entirety, the Court stated:

"While we do not necessarily adopt Rule 804 as an exhaustive definition of "unavailable" under Illinois law, we do embrace the general principles reflected therein. The general thrust of the rule makes clear that "unavailability" is a narrow concept, subject to a rigorous standard. The reasons for unavailability which are acceptable under Federal Rule 804- privilege, persistent contemptuous refusal to testify, failure of memory, death or illness, etc.- are substantial and therefore legally cognizable.

As we see it, the mere *unwillingness* of an otherwise available witness to testify simply does not rise to the high level of the Federal Rule 804 standards. Hence, it cannot constitute excusable unavailability for purposes of our Rule 414. The reasons for this view should be obvious. There is no question that testifying in open court can be a difficult experience, especially for victims of serious crimes. However, our legal system makes public testimony in front of the fact finder an important element of the truth-seeking process. Any departure from this preference must be based upon a showing of special need. It follows that a witness' mere reluctance to testify cannot be accepted as a good enough reason to permit the use of out-of-court testimony.

Having said that, we feel compelled to acknowledge the special difficulties presented by cases such as these, where the witness in question is a young child whose fear and reticence is probably nonvolitional and hence understandable.

However, it is our view that any attempts to resolve these difficulties must be initiated by the legislature..."

(Emphasis in original)

The *Johnson* Court went on to discuss legislative developments that ultimately resulted in the amendment of Ill.Rev.Stat.1987, ch. 38, par. 115-10(b)(2)(B). This amended statute as interpreted, provides that child witnesses are considered unavailable if it is demonstrated to the trial court that the children were unwilling or unable to testify because of fear, unable to communicate in the courtroom setting, or declared incompetent because they were incapable of

expressing themselves concerning the matter so as to be understood. *People v. Rocha,* 191 Ill.App.3d 529, 539, 138 Ill.Dec. 714, 547 N.E.2d 1335 (1989); *In re T.T.,* 384 Ill.App.3d 147, 156, 892 N.E.2d 1163 (Ill.App. 1 Dist. 2008).

Mr. Duncan recognizes that none of these cases from other jurisdictions, state of federal, are binding on this Court. He submits that the rationale of the *Johnson* court is sound, persuasive, and is consistent with this Court's rules of statutory construction set forth above, more so than the cases cited by Appellant that interpret the rule beyond its clear language. Mr. Duncan urges this Court to strictly construe MRE 804(a) and uphold the decisions of the Court of Appeals and the trial Court.

CONCLUSION

If incompetent witnesses were always "unavailable" under MRE 804(a), this Court in its rulemaking authority could have included "incompetent witnesses" in addition to those suffering from a "then existing physical or mental illness or infirmity" in MRE 804(a)(4). If this Court sustains the argument advocated by Appellant it would adopt an interpretation that would permit the exceptions to swallow the rule, and essentially dispense with the identified categories of "unavailable" in MRE 804(a)(1-5), potentially expanding the meaning of "unavailable" to any circumstance where a witness is unable to testify for any reason -- physical, mental or otherwise.

The trial court and the Court of Appeals in its November 29, 2012, decision, as well as other courts, have recognized incompetence and unavailability as distinct and separate considerations under Rules 601 and 804(a). It is clearly within the province of the Michigan Legislature to enact a statute similar to that of Wisconsin's if it is compelled to address the issue related to the testimony of reluctant child-witnesses. This would insure that if this kind of legislation is necessary it will be accomplished through the deliberative process incident to legislative enactments. Additionally, this Court has the constitutional authority to modify, alter and amend the Michigan Rules of Evidence, under Const. 1963, art. 6, § 5. *People v. Watkins,* 491 Mich. 450, 467; 818 N.W.2d 296 (2012), citing *McDougall v. Schanz,* 461 Mich. 15, 24, 597 N.W.2d 148 (1999). If this Court determines that an amendment to the rules of evidence is necessary this should be accomplished by the orderly process involving publication, notice and commentary. This would not only comport with the consistent rules of statutory and rule construction promulgated in the decisions of this Court, but would serve to foster the right of the state to establish and maintain its own unique rules of procedure and evidence.

As the U.S. Supreme Court has stated, "Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only eyewitness. But '(t)his Court cannot alter

evidentiary rules merely because litigants might prefer different rules in a particular class of cases." *Tome v. United States,* 513 U.S. 150, 166; 115 S Ct 696; 130 L.Ed.2d 574 (1995), quoting *United States v. Salerno,* 505 U.S. 317, 322; 112 S Ct 2503; 120 L.Ed.2d 255 (1992).

RELIEF REQUESTED

Defendant-Appellee, Stanley G. Duncan, requests that for the reasons stated and the law cited in this brief, that the ruling of the trial court, denying the motion of the prosecution to find RS unavailable under MRE 804(a)(4) and to introduce the testimony of RS taken under MRE 804(b(1) at both his and at Vita Duncan's preliminary examination hearings, at his trial, be upheld; and that the Michigan Court of Appeals decision of November 29, 2012, be affirmed.

Respectfully submitted,

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