

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 151899  
Court of Appeals No. 321012  
Lower Court No. 13-020404-FC

V

ERNESTO EVARISTO URIBE,

Defendant-Appellant.

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DEFENDANT-APPELLANT'S  
SUPPLEMENTAL BRIEF

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**SUPPLEMENTAL STATEMENT OF JURISDICTION**

Defendant-Appellant Uribe files this supplemental brief in accordance with this Court's October 9, 2015 order requesting supplemental brief be supplemented within 42 days of the October 9, 2015 order. See 10/09/15 Order.

**SUPPLEMENTAL QUESTIONS PRESENTED**

- I. DID THE EATON CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING THE ADMISSION OF TESTIMONY OFFERED UNDER MCL 768.27a?

The Court of Appeals answered Yes.

Plaintiff-Appellee answers, "Yes."

Defendant-Appellant answers, "No."

- II. DID THE COURT OF APPEALS PROPERLY APPLY *PEOPLE V WATKINS*, 491 MICH 450 (2012), IN REVERSING THE CIRCUIT COURT?

The Court of Appeals answered Yes.

Plaintiff-Appellee answers, "Yes."

Defendant-Appellant answers, "No."

**SUPPLEMENTAL STATEMENT OF FACTS**

Defendant-Appellant Uribe incorporates the statement of facts from his application for leave.

**SUPPLEMENTAL ARGUMENTS**

- I. THE EATON CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE ADMISSION OF TESTIMONY OFFERED UNDER MCL 768.27A.

**Standard of Review:**

A trial court's findings of fact during a suppression hearing is reviewed for clear error, "giving deference to the trial court's resolution of factual issues." *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001)

5. "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Swirles* (After Remand), 218 Mich App 133, 136; 553 NW2d 357 (1996). However, the standard of review is de novo on the trial court's ultimate decision on a motion to suppress." A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *People v Blackston*, 481 Mich 451, 480; 751 NW2d 408 (2008). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008).

**Discussion:**

This Court in *People v Watkins*, 491 Mich 450 (2012) determined that a trial court has discretion in determining whether or not to admit evidence under MCL 768.27a This Court in *Watkins*, held:

Under MCL 768.27a "evidence that the defendant *committed* another listed offense against a minor is admissible," but the statute goes on to provide that such evidence "*may* be considered for its bearing on any matter to which it is relevant." When the statute is read as a whole, the phrase "is admissible" is qualified by the phrase "may be considered," thereby indicating that admissibility remains subject to some level of discretion on the part of the trial court. As this Court has explained, "courts should give the ordinary and accepted meaning to . . . the permissive word 'may' unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole." (*Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982)) Because there is no indication in MCL 768.27a that "may" should be interpreted contrary to its generally accepted meaning, the term is permissive, not mandatory.

By providing that evidence admissible under MCL 768.27a “may be considered,” the Legislature necessarily contemplated that evidence admissible under the statute need not be considered in all cases and that whether and which evidence would be considered would be a matter of judicial discretion, as guided by the rules of evidence. *Watkins* at 483-484. [emphasis added.]

According to this analysis of the use of "may" in MCL 768.27a in *Watkins*, Judge Cunningham had discretion in this case to admit or keep out the other acts evidence proffered. There is no language in the statute that says such evidence "shall be" admitted, the statute simply says it "is" admissible.

The first step that must be taken, although it is not specifically mentioned, in MCL 768.27a is that the trial court would have to determine one of the listed offense was *committed* by the defendant because the statute states, "**evidence** that the defendant **committed** another listed offense against a minor is admissible". The statute does not say *any* evidence or *all* evidence. Logic would say, it is imperative for a trial court to consider all the facts regarding the other alleged crime to determine whether or not the defendant committed a crime and not solely consider the facts favorable to the prosecution. In the instant case, this is not a decision for a jury to make, as this appeal is based on a motion in limine to determine if this other act evidence will be heard by the jury at all during the trial. It defeats the purpose of of having a hearing on admissibility if the same jury making the final decision on a defendant's guilt is going to be the same one to determine whether or not the defendant committed the other act. It also takes away the trial judge's discretion in admitting or denying the entry of such other acts.

Essentially, in determining whether or not an other act offense was committed, the trial court has to sit as a finder of fact just as a trial court would do in a bench trial. While sitting as a finder of fact, the judge, just like a jury, must take into account the veracity of the complainant witness. In the case at hand, Judge Cunningham chose not to believe the complainant and did

not find a listed offense in the conduct complained of. This Court has to give deference to the trial court's resolution of factual issues." *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001).

Even assuming arguendo that a listed offense was committed, a trial court still has discretion to admit or exclude the other act evidence due to the statute's use of the term "may." And again, There is no language in the statute that says such evidence "shall be" admitted, the statute simply says it "is" admissible. See discussion above. No abuse of discretion occurred because the Trial Court chose an outcome that fell inside the range of reasonable and principled outcomes because the Trial Court followed the *Watkins* analysis in determining whether or not the MCL 768.27a evidence was admissible.

### **Conclusion.**

For the above reasons, Judge Cunningham did not abuse her discretion in excluding this other acts evidence by finding no offense occurred.

## II. THE COURT OF APPEALS DID NOT PROPERLY APPLY *PEOPLE V WATKINS*, 491 MICH 450 (2012), IN REVERSING THE CIRCUIT COURT.

### **Standard of Review:**

Constitutional questions and issues of statutory interpretation are questions of law, which is reviewed de novo. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007); *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *People v Blackston*, 481 Mich 451, 480; 751 NW2d 408 (2008). A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

**Discussion:**

The Court of Appeals did not properly apply *People v Watkins*, 491 Mich 450 (2012) when reversing the Eaton County Circuit Court, despite multiple references to the *Watkins* case. The Court of Appeals in its analysis stated "the trial court committed another error of law when it assessed the admissibility of J.U.'s testimony under MRE 403." This was not an error according to *Watkins* that specifically stated MRE 403 applied to cases involving MCL 768.27a. *Watkins*, at 481-482.

This Court held in *Watkins*, 491 Mich 450 (2012) that "evidence admissible pursuant to MCL 768.27a **may** nonetheless be excluded under MRE 403 if 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *Watkins*, supra at 481. This is contrary to the Court of Appeals understanding in the instant case being under the mistaken belief that all MCL 768.27a evidence is admissible for whatever reason, with no exceptions, "The statute provides that the prosecution may present any evidence that the defendant committed other sex crimes against children, for the express purpose of demonstrating that the defendant has a propensity to molest children", and "[...] *People v Watkins* [...] upheld the statute's categorical mandate that required the admission of propensity evidence in child molestation cases." That is not what the statute says nor how it is analyzed in *Watkins*. There is no language in the statute that says such evidence "shall be" admitted, the statute simply says it "is" admissible. See also the discussion in Argument I regarding the statutes use of the term "may".

In fact, the Court of Appeals stated that if anything, *Watkins* "carved out a very limited role for the judiciary in making admissibility determinations under MCL 768.27a, by using the

safety valve of MRE 403" and held that the Trial Court erred when "The court held the testimony to be inadmissible because it believed the molestation described by J.U. to be too "dissimilar" to the molestation described by V.G. Similarity, or lack thereof, between another criminal act and the charged crime, is a comparison courts frequently make to assess whether evidence of the other criminal act is admissible to show something other than a defendant's criminal propensity under MRE 404(b). Whether an act is similar or dissimilar to a charged offense does not matter for the purposes of MRE 403, which, as noted, looks to whether otherwise relevant evidence is overly sensational or needlessly cumulative."

It is not a far stretch to see that there was a misreading of some very important language in *Watkins* regarding what a trial court should consider in determining whether or not to exclude MCL 768.27a evidence due to its analysis of MRE 403. Similarity or dissimilarity was *exactly* what *Watkins* addressed as part of one of several considerations a court could take into account. *Watkins* specifically states, "***This does not mean, however, that other-acts evidence admissible under MCL 768.27a may never be excluded under MRE 403 as overly prejudicial.*** There are *several* considerations that may lead a court to exclude such evidence. These considerations include (1) ***the dissimilarity between the other acts and the charged crime***, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) ***the lack of reliability of the evidence supporting the occurrence of the other acts***, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. This list of considerations is meant to be ***illustrative rather than exhaustive.***" *Watkins*, at 487-488 [emphasis added.] Therefore, the Court of Appeals misapplied *Watkins* in its reasoning that the other act's similarity/dissimilarity could not be considered by the Trial Court.

Likewise the Court of Appeals also incorrectly held that the Trial Court could not take into consideration the lack of reliability of the evidence of the other act. Lack of reliability is addressed in item 5 of the non-exclusive list of considerations above. According to *Watkins*, it was not error for the Trial Court to consider lack of reliability. Therefore, the Court of Appeals misapplied *Watkins* again when it stated the Trial Court could not consider the witness's veracity.

Simply put, *Watkins* did *not* carve out "a limited role for the judiciary", rather, *Watkins* gave a non-exclusive list of examples the judiciary could consider when determining to keep out MCL 768.27a evidence due to being overly prejudicial under MRE 403.

**Conclusion.**

The Court of Appeals, in essence - if not in form - overrules *Watkins* in its entirety by their holding in *Uribe*. The Trial court was doing nothing more than making a decision according to what was specifically instructed by *Watkins*. Propensity was addressed. MT 19. The remaining *Watkins* factors were addressed as well. The Michigan Court of Appeals decision must be reversed.

**PRAYER FOR RELIEF**

**WHEREFORE**, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court to **AFFIRM** the lower court's ruling to exclude the MCL 768.27a evidence proffered by Plaintiff-Appellee and **REVERSE** the Michigan Court of Appeals.

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Respectfully submitted,

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