

STATE OF MICHIGAN
COURT OF APPEALS

In re CHRISTOPHER ALLEN EISENHARDT,
Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

UNPUBLISHED
September 4, 2001

V

CHRISTOPHER ALLEN EISENHARDT,

Respondent-Appellant.

No. 220134
Macomb Circuit Court
Family Court - Juvenile Division
LC No. 97-045037

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Respondent was charged with three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), adjudicated guilty by a jury of one count of CSC I and confined at the Macomb County Youth Home pursuant to an order of disposition. Respondent appeals on leave granted. We reverse and remand for a new trial.

Respondent contends that the trial court abused its discretion in denying respondent's motion for a continuance or adjournment made on the first morning of trial. We agree.

Continuances and adjournments are within the discretion of the trial court and reviewed for an abuse of discretion. *People v Taylor*, 159 Mich App 468, 489; 406 NW2d 859 (1987). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). In making a determination on whether a continuance should be granted, a trial court must consider whether (1) the defendant was asserting a constitutional right, (2) he had a legitimate reason for asserting that right, (3) he was not negligent in asserting it, (4) prior adjournments of trial were not at his request, and (5) on appeal, he has demonstrated prejudice resulting from the trial court's abuse of discretion. *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995).

MCL 768.2 provides, in part:

No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown in the manner provided by law for adjournments, continuances and delays in the trial of civil causes in courts of record: Provided, That no court shall adjourn, continue or delay the trial of any criminal cause by the consent of the prosecution and accused unless in his discretion it shall clearly appear by a sufficient showing to said court to be entered upon the record, that the reasons for such consent are founded upon strict necessity and that the trial of said cause cannot be then had without manifest injustice being done.

Respondent sought an adjournment of the trial because his expert witness, Terence W. Campbell, a forensic psychologist, was not available for trial for the reason that Campbell recently learned that he was required to testify at another trial at the same time.¹ Counsel explained that the expert would be assisting him in cross-examining Cynthia Davis, the complainant's aunt who would be testifying at an MRE 803A hearing, and in examining all witnesses who interviewed the complainant. The expert was to assist counsel in the matters of interview techniques of young children making sexual allegations, how interviews are properly and improperly conducted, and the effects of employing proper and improper techniques.

The trial court denied respondent's motion on the basis that the court would grant the prosecutor's request to have Campbell sequestered as a witness; therefore, it was not necessary to adjourn the commencement of the trial to secure his presence.² The trial court left it open to

¹ On January 5, 1998, Larry R. Kipke was appointed to represent respondent. In an ex parte motion dated April 16, 1998, respondent requested an order to pay a private investigator and medical/psychological expert. The ex parte motion stated that respondent was indigent, had court appointed counsel, and needed a medical expert "to assist defense counsel in reviewing medical evidence of the alleged victim and preparing for cross examination of plaintiff's two endorsed medical witnesses." That motion was denied by an order dated May 11, 1998.

Before entry of that order, Kipke sent a letter to the trial court indicating that \$1,000 would be sufficient to cover the costs of an expert witness. In an order dated May 27, 1998, the trial court reconsidered its earlier decision denying respondent's ex parte motion for order to pay a private investigator and medical/psychological expert, and the trial court ordered that respondent "may hire an expert witness(es) on the subject of psychology of rape victims and physical evidence of rape to assist counsel to prepare this case." Respondent retained Terence Campbell, Ph.D., a clinical and forensic psychologist, soon after, on either June 3 or June 4, 1998, the Memorial Day holiday weekend having passed in the interim.

On June 11, 1998, several motions were heard by the trial court before the trial commenced. Respondent's counsel sought an adjournment of the trial for several reasons, including that Campbell had just told him (respondent's counsel) several days before trial was to commence that he would not be available for trial on June 11, because he was required to testify at the same time at another trial, in Harrison, Michigan.

(continued...)

respondent to raise the issue of a continuance again at the time respondent presented proofs. Respondent did not raise the issue again. We observe, however, that the initial denial of the continuance request largely undermined Campbell's potential assistance to respondent's defense. Respondent planned on using Campbell to assist in cross-examination with respect to the admissibility of Davis' testimony under MRE 803A, and in cross-examining Davis should her testimony be admitted. Campbell was also expected to express an opinion regarding the interview techniques employed by Davis and perhaps others, and the effect of such techniques on complainant's testimony. The complainant and Davis testified at the MRE 803A hearing and at trial on the day the continuance request was made. When the trial court determined that Campbell would have been excluded under a sequestration order, and therefore there was no reason to adjourn the case, Campbell's potential usefulness to the defense was severely diminished and the benefit of having Campbell appear at a later date was limited because Campbell would not have had the opportunity to listen to the prosecutor's witnesses, as planned by respondent. Further, the opportunity to have Campbell's assistance in cross-examining the witnesses, especially Davis, was lost. Thus, we do not regard the failure to seek an adjournment later in the trial as fatal to respondent's claim.³

The question whether respondent was entitled to a continuance or adjournment under the tests and factors cited above necessarily entails a determination whether the trial court properly decided that Campbell would have been sequestered had he been present.

MRE 615 provides:

(...continued)

² The trial court ruled:

As to the issue of counsel's witness, expert witness being available, the Court can certainly appreciate the fact that it would be difficult on fairly short notice to obtain an expert, the Court would grant prosecution's request to sequester witnesses and in that case Mr. Campbell's presence in the court would not be allowed due to the fact that he would be a witness who would be called by the respondent's counsel. Therefore, the Court finds that there is no justification for not proceeding to trial.

I would say, counsel, that the Court had been informed of your obligations in circuit court tomorrow. And, I believe the Court was in a position this morning of proceeding on the issue of the admissibility of the evidence relating to the 803A issue, the jury selection process taking place today, and the commencing of the jury trial at a later date in order to allow you to proceed with your obligation in circuit court, yet continue with this trial as well.

³ Respondent also asserts that counsel was ineffective in not pursuing the request for an adjournment after the court left the possibility open.

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

The only exception contained in MRE 615 which might be applicable in the present case regards a person whose presence is essential.

MRE 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those **perceived by or made known to the expert at or before the hearing**. The court may require that underlying facts or data essential to an opinion or inference be in evidence. [Emphasis added.]

MCL 600.1420 provides:

The sittings of every court within this state shall be public except that a court may, for good cause shown, exclude from the courtroom other witnesses in the case when they are not testifying

Legal commentators have stated:

The third category [exception contained in MRE 615] – persons whose presence are shown to be essential to the presentation of the cause – ordinarily applies to **expert witnesses** or in criminal cases to a law enforcement official assisting the prosecutor. However, whether an expert is excluded from the courtroom is also left to the sound discretion of the court. **Experts are frequently permitted to attend the trial because they may be necessary to assist counsel in cross-examining opposing experts, and, indeed, may base their own opinions on the evidence presented at trial.** [Robinson, Longhofer & Ankers, Michigan Court Rules Practice, Evidence, Rules 501 to 707, pp 465-466 (emphasis added).]

Pursuant to MRE 703, which allows an expert to testify based on perceptions made known to the expert at the trial, and MRE 615, which prohibits the exclusion of a person who is essential to the presentation of a case, and given the nature of the testimony (see n 4), we conclude that the trial court abused its discretion in determining that even had Campbell been available, he would have been sequestered. Campbell was not a fact witness, and his presence at trial was necessary to assist counsel.

Turning to the factors for determining when a continuance should be granted, we first observe that requesting a continuance based on an expert's unexpected unavailability, especially where the expert is retained to assist in cross-examination and express opinions based on testimony presented, constitutes good cause for requesting a continuance.

Next, we conclude that respondent was diligent, in that, on very short notice, respondent secured an expert witness, and through no fault of respondent, the expert was unable to appear at trial, which was only made known to respondent shortly before trial, leaving respondent with no reasonable time to secure a new expert.

The rights to due process, to cross-examine witnesses and to present a defense are constitutional rights. In the present case, respondent was asserting a constitutional right, in that the continuance request was based on the need to have a witness present to assist respondent with his defense in furtherance of his right to a fair trial.

Regarding the issue whether respondent had a legitimate reason for asserting the right, respondent had a legitimate reason for asserting his right to have Campbell present because Campbell was procured to assist respondent in attacking the credibility of the victim and the actions of Davis.

Further, the record does not indicate any negligence on respondent's part in asserting his rights. There is nothing in the record to indicate that respondent was responsible for Campbell not being available or indicating that the continuance request was a tactic for delay. Additionally, the record indicates that the only other adjournment came at the request of the prosecutor.

We conclude that the trial court abused its discretion in denying respondent's motion for a continuance or adjournment, in that there was no legal justification to deny the request for a continuance.

The remaining inquiry is whether respondent has adequately demonstrated prejudice resulting from the trial court's abuse of discretion, and whether a manifest injustice would occur if the court's ruling were not reversed and the verdict vacated. We conclude that respondent has made an adequate showing. See *People v Wilson*, 397 Mich 76, 83; 243 NW2d 257 (1976). The testimony that led to respondent's conviction consisted almost exclusively of the testimony of the complainant and Davis, to whom the complainant first reported the abuse after two years. The victim's testimony consisted of her description of what transpired.⁴ Davis' testimony consisted

⁴ The complainant, who was 8 1/2 years old when she testified, and 7 1/2 when she first disclosed the alleged abuse, testified that while her mother and step-father were living together, but before they were married, respondent put his hands on her "pee-pee." The complainant would have been five years old at the time. She further testified that five weeks later he did the same thing, while her parents were out of the house playing Bingo. Her step-sister, Candy, was home on this occasion and saw what respondent did, but did not say anything. A couple of days later, respondent did the same thing. A week later the same thing happened a fourth time. All four incidents happened in the living room. A fifth incident occurred in the complainant's bed room, when respondent, who was vacuuming the hallway, entered complainant's room, removed her underpants, and put his "french fry" "up [complainant's] butt." Complainant variously testified that respondent stopped because her mother came home, and that he stopped one-half hour before she came home. Complainant also testified that the fourth incident involved respondent putting his mouth on her pee-pee and threatening to kill her. She later testified that the incident involving respondent placing his french fry in her butt occurred in the living room. There were
(continued...)

of what the victim told her. There was no other corroboration. The physical examination was negative, which neither proved nor disproved the allegations; and the step-sister who complainant said witnessed one incident of abuse refuted that testimony.⁵ The case, therefore, was a straight credibility contest, but involving circumstances not within the common experience of most persons - - allegations by an eight-year old that was abused by a different young boy when she was three, that her step-brother abused her in the same way when she was five, but which she did not report until she was seven. In fact, the trial court denied the prosecutor's request to exclude the testimony of Campbell should he appear, thereby indicating the trial court's belief that Campbell's testimony would be relevant. Based on respondent's argument to the trial court, Campbell's assistance was imperative to respondent's defense that the victim's allegations were untrue and manufactured.

We conclude that respondent is entitled to a new trial.⁶

In light of our ruling above, we need only briefly address other issues raised by respondent on appeal.

Respondent contends that the trial court erred in failing to instruct the jury sua sponte on second- and third-degree criminal sexual conduct [CSC II and CSC III]. An instruction on CSC III would have been improper, but an instruction on CSC II was supported by the evidence. However, defendant did not request an instruction on CSC II, and the court was not obliged to give one sua sponte where respondent contended that there was no sexual contact at all. The appropriateness of such an instruction on retrial will depend on how the remaining charge is presented to the jury, and whether a request is made.

Lastly, we conclude that on the record before us, while a close call, we cannot say that the trial court abused its discretion in allowing the testimony of Davis regarding statements made by

(...continued)

other inconsistencies in complainant's testimony. On the other hand, she was consistent in many respects. Both complainant and Davis testified that complainant was sexually abused by a boy named Jeffrey when she was three years old. Complainant conceded that she did not like respondent, even before the alleged abuse.

⁵ We recognize that the step-sister, who is respondent's sister, may have been reluctant to testify against her brother.

⁶ While the dissent states that the record is void of any indication of Campbell's qualifications or credentials, we note that the petitioner at no time objected to Campbell's qualifications below, nor does it raise the issue on appeal. We also note that petitioner does not argue on appeal that respondent failed to make an offer of proof regarding Campbell's anticipated testimony, or that respondent attempted to expand the scope of Campbell's expertise below or on appeal. Nor does petitioner argue that Campbell would not have been of assistance to respondent. Rather, petitioner argues that respondent was negligent in seeking the adjournment, and that the court did not abuse its discretion because the denial was without prejudice to respondent seeking a further adjournment later in the trial. We reject these arguments for the reasons stated in this opinion.

complainant to Davis under MRE 803A. However, because the issue is so closely drawn, we direct the trial court to reconsider the matter anew in light of any additional information or considerations that may come to light on remand when respondent has the benefit of an expert.

Reversed and remanded for a new trial consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Mark J. Cavanagh

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TALBOT, J., (*dissenting.*)

I respectfully dissent because I conclude that respondent has not established prejudice requiring reversal.

It is impossible to ascertain from the record precisely what assistance Terence Campbell would have provided to the defense. Although respondent argued generally to the trial court that Campbell would have assisted regarding interview techniques and “other matters,” both by assisting in cross-examination and by testifying, the record is void of any indication how Campbell’s expertise relates to the facts of this case. Additionally, respondent’s claims about Campbell’s expertise were inconsistent and wide-ranging. Based upon respondent’s arguments below and on appeal, the nature and subject of Campbell’s proposed assistance varied considerably throughout these proceedings.

Prior to trial, respondent moved the court to pay for an expert witness. At that time, respondent’s stated purpose for the expert was “to assist defense counsel in reviewing medical evidence of the alleged victim and preparing for cross examination of plaintiff’s two endorsed medical witnesses.” On the first day of trial respondent moved for a continuance because Campbell could not be present that day. At that time, respondent’s counsel expanded upon the need for Campbell’s presence at trial and did not limit him to use in cross-examining the prosecution’s two endorsed medical witnesses. Not only was Campbell needed to aid in the cross-examination of the prosecution’s medical witnesses, but he was also deemed necessary for the cross-examination of “all the witnesses who interviewed the young girl.” Counsel for respondent argued:

[Respondent's Counsel]: . . . I anticipate my expert is going to assist me in cross examination of witnesses, both Cynthia Davis who is going to be probably the subject of the 803A motion of the prosecution *and also of the cross examination of all the witnesses who interviewed the young girl*. So, for those reasons I would ask the court to give us a continuance in this matter. . . . I do need him now, he was going to assist me, my expert, by giving me some direction as far as what the witnesses are saying on the stand, as far as what Ms. Davis says and as far as what the girl says, she's going to be part of the 803A motion. [Emphasis added.]

In response, the prosecution moved to sequester all witnesses. Indeed, respondent's purpose in enlisting Campbell's assistance was also unclear to the prosecution:

[The Prosecution]: Your Honor, I'm not exactly sure what his purpose is with this witness but I would move to have the witnesses sequestered. If he intends to testify I would not want him sitting in and listening to the testimony. If he's just here to assist, just sit with counsel I don't think that is an appropriate basis for an adjournment.

Respondent then specified that Campbell's assistance was needed on the subject of interview techniques employed with children making sexual abuse allegations:

[Respondent's Counsel]: Your Honor, I'm not quite sure [of] which evidence counsel speaks, apparently I have not supplied a summary of what I expect Dr. Campbell to say as to relevancy, perhaps she knows better than I. But in this particular case I have an expert, he's going to testify, he's not going to testify that the girl is incredible, nonsense, he's not going to testify that way, no. He's not going to make a statement the girl has to be incredible, he's going to assist me in the matter of interview techniques, of interview techniques of children, young children making sexual allegations. And, how those interview techniques are properly done, how they are improperly done, and the effects of them being properly done or being improperly done. That is what I'm talking about and, so, we're going to find out whether or not the interview techniques used by a variety of individuals in this case were proper and whether or not they had any effect on what a child's memory of any allegations. . . .

After the trial court denied the prosecution's motion to exclude Campbell's testimony, the prosecution attempted to limit the scope of Campbell's testimony to the matter of interview techniques as represented by respondent's counsel. Respondent's counsel attempted to expand the scope of Campbell's expertise, ostensibly without limit:

[The Prosecution]: May I just ask that his testimony be limited to testimony on interview techniques.

THE COURT: Counsel?

[Respondent's Counsel]: No, basically, if he has some assistance he can assist me in other matters as far as this case develops. I don't know everything because not everything is contained in the police report. So, I don't know everything he

will be able to help me on because not all the interviewing is on the police report. There were no tapes made in this matter, at least none submitted to me. *I'm not going to limit his expertise.* . . . [Emphasis added.]

One can only speculate regarding the “other matters” to which respondent’s counsel refers. Respondent made no proffer of the evidence that his expert witness would provide. Respondent neither filed an affidavit nor moved for a new trial.

On appeal, respondent offers a different subject on which Campbell would have been of assistance. Respondent’s claim of prejudice is based upon proposed expert testimony regarding “the difference between normal traits of child development versus abnormal child developmental traits and/or characteristics of sexually abused children.” Respondent’s brief on appeal makes no mention of interview techniques. Because respondent’s only claim of prejudice on appeal relates to expert testimony on “the difference between normal traits of child development versus abnormal child developmental traits and/or characteristics of sexually abused children,” I can only assume that respondent has abandoned any claim of prejudice regarding Campbell’s expertise on interview techniques employed with children. *People v Carpentier*, 446 Mich 19, 41; 521 NW2d 195 (1994); *People v McClain*, 218 Mich App 613, 615; 554 NW2d 608 (1996).

I cannot conclude that respondent was prejudiced by Campbell’s absence at trial. Respondent contends that Campbell was “absolutely vital” to respondent’s defense, but provides no basis from the record to substantiate his claim. Respondent cites no trial testimony which would have been contradicted by Campbell, or testimony of prosecution witnesses on which respondent’s counsel would have more effectively cross-examined based upon Campbell’s assistance. Notably, at trial there was no issue raised regarding any interview techniques employed by any individual with the complainant.¹ The only expert witness called by the prosecution was a registered nurse who testified only regarding her physical examination of complainant. Respondent argues generally that Campbell would have assisted at trial, but respondent does not specify how he would have assisted or how his assistance was germane to the facts of this case.

Moreover, although Campbell was unavailable on the first day of trial, respondent did not call him to testify on the second day of trial. Nor did respondent ask for another continuance, although the trial court left open that possibility. There is no indication that Campbell was unavailable on the second day of trial. Unlike the majority, I would not excuse respondent’s failure to call Campbell to testify later in the trial. The majority finds this failure nonfatal because his usefulness was minimal as a result of his absence during the testimony of other witnesses. I see no basis in the record to support this conclusion.

Further, the record provides no information regarding the admissibility of the proposed testimony. In order for expert testimony to be admissible, “(1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in

¹ At trial the prosecution attempted to elicit testimony from Cynthia Davis, complainant’s aunt, regarding her experience in questioning children. Respondent’s counsel objected, arguing that Davis was not testifying as an expert, but rather as a corroborative witness to corroborate the testimony of complainant. The trial court sustained the objection.

determining a fact in issue; and (3) the evidence must be from a recognized discipline.” *People v Murray*, 234 Mich App 46, 53; 593 NW2d 690 (1999), quoting *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993); MRE 702. The record is void of any indication of Campbell’s qualifications or credentials. Nor does respondent argue how the testimony would serve to give the jury a better understanding of the evidence or assist in determining a fact in issue. Respondent does not cite to the testimony of the complainant or any other witness which Campbell could have contradicted or clarified for the jury. Respondent failed to make a proffer to the trial court regarding the substance of his proposed testimony or assistance as it relates to the facts of this case. See *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997); *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995).

Based upon my review of the record and respondent’s argument on appeal, I disagree with the majority’s conclusion that Campbell’s assistance was imperative to respondent’s defense. In light of respondent’s failure to make an adequate record for review, I would not speculate regarding the value of Campbell’s proposed assistance in this case. Accordingly, I would affirm.

/s/ Michael J. Talbot