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# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD MICHAEL FAUST,

Defendant-Appellant.

UNPUBLISHED
September 02, 2026
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No. 368356
Arenac Circuit Court
LC No. 2023-004549-FC

Before: GADOLA, C.J., and RIORDAN and SWARTZLE, JJ.

SWARTZLE, J. (*concurring in part and dissenting in part*).

I concur with much of the majority's opinion, specifically all but subsection II.A, and even with that subsection, I concur in part. The majority correctly observes in subsection II.A that defense counsel performed deficiently when preparing for trial, and this deficiency compounded itself during trial. I would go further, however, and conclude that defense counsel's performance actually prejudiced defendant.

This was almost exclusively a classic he said/she said credibility contest. I say "almost" because the complainant's father (the defendant's "foster stepbrother") did testify that defendant confessed to him that he had sexual intercourse with the complainant. The evidentiary weight of this testimony is open to debate, however, as the father appears to have acknowledged on cross-examination that he did not mention this confession to authorities before trial because "to [him], that's hearsay," and he did not think it would be "admissible in court." This is a rather odd reason to remain silent during a criminal investigation, especially considering that such a confession would not be hearsay under MRE 801(d)(1).

For her part, the complainant described the assault in brief and sparse terms. She identified the location (the bed in defendant's bedroom) and the type of assault (penal-vaginal intercourse), but she could not recall the time of day (except that it was light out); what defendant said (except to remove her clothes); the length of time of assault; or any other material description of the assault itself. With that said, it is not uncommon for a young complainant to provide minimal description of a traumatic event.

In what appears to have been an effort to bolster her credibility, the prosecutor did elicit other testimony from the complainant to give the jury some additional information about the day—what happened before the act, who was there, what they were doing, and the like. This testimony included the particular day (the Friday immediately after Thanksgiving 2021); who else was in the house that day (her grandfather); who was not in the house that day (her grandmother); and who else was in the bedroom right before the assault (an aunt who was close in age (15) to the complainant (12); the aunt's young boyfriend; and a younger sister). The younger sister testified similarly about the people who were in the house and bedroom.

During the *Ginther* hearing, however, it became clear that these details surrounding the complainant's testimony were highly contested. With due respect to the trial judge, who concluded that the witnesses who testified during the hearing provided conflicting accounts, I do not read much, if any, conflicting testimony from the three witnesses—the grandfather, the young aunt, and the aunt's ex-boyfriend.

The grandfather testified, for example, that he hunts deer "every" Friday after Thanksgiving and that this has been a life-long tradition. In fact, like many Michiganders, he did not need to be reminded of the dates of the regular firearm hunting season (Nov. 15-30), and the young aunt likewise testified that the grandfather would always be deer hunting the day after Thanksgiving. The grandfather further testified that he would not get home from deer hunting until 30 minutes or so after dark. Thus, a reasonable reading of the testimony at the *Ginther* hearing confirms that the grandfather was very likely not at the house on the day or time of the assault. Similarly, the grandfather testified that the grandmother was at the house that day, as she was not driving a school bus that day. These details are directly contrary to complainant's testimony.

More critically, the aunt's ex-boyfriend testified categorically that he was not in the bedroom on the day in question. He testified that he knew that the aunt could not date before she was 16, let alone have a boyfriend in a bedroom on the second floor with a closed door. The ex-boyfriend testified that he was not there, and the aunt's testimony was consistent with his testimony. Again, this testimony is directly contrary to the complainant's version of events surrounding the matter.

These and other inconsistencies were fleshed out by appellate counsel during the *Ginther* hearing. Had this testimony been brought out by defense counsel at trial, the complainant's credibility would likely have been undermined, at least to some extent.

I do not find any particular inconsistency fatal to complainant's testimony. Taken together, however, the cumulative effect of the inconsistencies raises a serious question of credibility. It is entirely possible that, even with the testimony from the missing witnesses, a reasonable juror could still credit complainant's otherwise uncontradicted testimony that a sexual assault took place, especially given her father's testimony of a confession and her younger sibling's testimony about surrounding details. But it is also entirely possible that a reasonable juror could have concluded that: (1) the missing-witness testimony significantly undermined complainant's credibility; (2) the father's surprise testimony of a confession had minimal evidentiary weight; and (3) the younger sibling's testimony could not do enough evidentiary work to offset (1) or (2).

As I read the record, there is a reasonable probability that the outcome of the trial would have been different had the missing witnesses testified. "A reasonable probability need not rise to the level of making it more likely than not that the outcome would have been different." *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). Rather, a reasonable probability is one that is sufficient to undermine confidence in the outcome. *People v Yeager*, 511 Mich 478, 488; 999 NW2d 490 (2023); see also *People v Trakhtenberg*, 493 Mich 38, 58; 826 NW2d 136 (2012). As explained here, I conclude that confidence in the jury's conviction has been undermined by the evidence presented at the *Ginther* hearing.

Accordingly, I would vacate defendant's conviction and remand for a new trial, and on this ground alone, I respectfully dissent. In all other respects, I concur with the majority's opinion.

/s/ Brock A. Swartzle