STATE OF MICHIGAN

IN THE 17TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF KENT

THE PEOPLE OF THE
STATE OF MICHIGAN,

vs.

File No.: 93-63014-FCA
93-63014-FCB

STEPHEN DANIEL TURNER
and DANIEL ARTHUR TURNER,

Defendant.
_____/



**MOTION PROCEEDINGS**

BEFORE THE HONORABLE DENNIS C. KOLENDA, CIRCUIT JUDGE

Grand Rapids, Michigan - Wednesday, December 1, 1993

APPEARANCES:

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| FOR THE PEOPLE: | KEVIN M. BRAMBLE (P38380)<br>Assistant Prosecuting Attorney<br>416 Hall of Justice<br>Grand Rapids, MI 49503 |
| FOR THE DEFENDANT<br>DANIEL TURNER: | ROBERT F. MIRQUE (P47391)<br>920 McKay Tower<br>Grand Rapids, MI 49503 |
| FOR THE DEFENDANT<br>STEPHEN TURNER: | TONYA L. KRAUSE (P42056)<br>920 McKay Tower<br>Grand Rapids, MI 49503 |

# T A B L E  OF  C O N T E N T S

Grand Rapids, Michigan

Wednesday, December 1, 1993

(Daniel Turner's case)

THE COURT: Ladies and gentlemen, what those two announcements mean is that the 14 of you in the jury box will hear this case; 12 of you, but at this point we do not know which 12 will decide the case. We'll deal with you in just a couple of moments. We're going to break for what I said will be a long lunch, but then we will start the trial this afternoon. It turns out that with regard to one of our other juries, and that's why there's been all this somewhat distracting commotion going on behind me, one of the other juror's husband has become ill, so we need to replace a juror on the other case. Fortunately, we still have the panel that preceded you available, so right after lunch we're going to select one more juror in that case to fill out that panel and then about three o'clock we'll be able to start this case.

It's important that we do it then, even though it won't give us a lot of time because there is a discernable part of the case we can finish; preliminary instructions and opening statements today so that tomorrow morning we can start fresh with the first witness and have nothing that will interfere with that.

As to the other ladies and gentlemen, I

thank you for being here for two days. I know there's a sense of you fell you've just wasted your time for being here for all that time and not being selected. I want you to know, however, from my perspective, it was not waste of time. Having you there to fill slots as they became available up here was very much a part of the decisions that were made. So, you had your part to play in this case and you very much did indeed have a role, although it was a very inactive one from your position, but it was a very real one. Would you please return to the assembly room to see if there is anything else going on today for which they need jurors? I don't believe there is, but I don't know.

As for the jurors in the jury box, ladies and gentlemen, we will, this afternoon before we start anything, administer to you the traditional jurors' oath. But, I'm not going to do that know because once that oath is administered, we are irrevocably committed to going forward. Had I administered an oath to the jury selected yesterday, we wouldn't have the luxury of being able to replace the one juror who has a legitimate reason not to be here. I certainly hope lightening doesn't strike twice. But, just to be safe, I want to have that option available.

Please do not pay attention to anything that you might see in the media, be it between now and resumption at three o'clock or at any time during this case

that relates either to this case or to anything that sounds like this case. I, frankly, do not believe you will see anything in the paper today about this matter, frankly, during the course of the trial you probably will because there was some publicity about it. Other people will. You shouldn't look at that, but we'll deal with that when the time arrives. The same is true about broadcast reports.

But it's equally important that if you see something that looks like this case or resembles this case, but is obviously not, you shouldn't pay attention to it either for the simple reason it is not this case. Whatever similarities there are are just fortuitous and may very well get in the way of evaluating this case because of a whole host of dissimilarities, most of which we won't know about. So it's an impossibility to educate people to ignore that which is dis-similar. So, just ignore any and everything that sounds like this particular case.

Ms. Hull will be here in a moment to show you which jury room we're going to use and where to report back this afternoon. Please be back by three o'clock. In addition to avoiding any news coverage of this case, please don't talk about the case with anybody. That includes, among yourselves. You can say, if someone asks, you've been selected to sit on a case where the charges are of kidnapping and criminal sexual conduct, but please don't go further than

that because, frankly, the moment you start talking with people, you start coming to some conclusions. That's how the mind works. You talk a little bit about it, you think about it, you come to some conclusions and, obviously it's much, much too soon to do that.

We'll see you at 3:00, and if the first thing which happens is not me instructing the clerk to administer to you your oath, please raise your hands and reminds us, because just like we're irrevocably committed to going forward once you take that oath, if I don't give it to you, everything we do doesn't count.

(Jurors exit courtroom, short break had, and court resumes)

THE COURT: The Court is convened, at the moment, in the case of The People versus Daniel Arthur Turner. The point of being in session without the jury is to deal with some legal issues that counsel wish addressed before they make opening statements.

One of the issues is, I understand, to be joined in by counsel for Mr. Stephen Turner. We are awaiting her arrival so that, hopefully, we can do this efficiently one time.

In the interim, we will deal with the one issue which is being brought on behalf of Mr. Daniel Turner. Mr. Mirque?

MR. MIRQUE: Thank you, your Honor.

Before we begin the opening statements, I have one question, and that question is what are exactly the elements of the crime of kidnapping a child under the age of 14, MCL 750.350?

Defendant Turner proposes that this brand of kidnapping also carries with it an element of asportation, which has historically shown under the more garden-variety kidnapping under 750.349.

The Court in Adams, and more recently the Court in Wesley, confirmed that the asportation element in 349 as to the forcible confinement part of the statute is a necessary ingredient the prosecution needs to prove.

The Court in Wesley and Adams, felt that the other aspects of 349 did not need the asportation element. That being the specific intent to hold hostage, the specific intent to extort money, the specific intent to commit murder, or the specific intent to secretly confine an individual.

The Court said in Adams that given these specific intent elements, there was not a necessary -- it was not necessary to have an asportation element because of the nature of these specific intents. Hostage taking, extortion, secret confinement, elevated what was once believed false imprisonment, a misdemeanor to a life -- to a capital offense.

Historically, kidnapping, false

imprisonment was a misdemeanor. Apparently a liberal reading of 349 elevated it to a life offense. And it was on the verge of being declared unconstitutional that the Court in Adams interpellated this asportation element to within the statute, where prosecution's theory is enforceable confinement. The defendant requests is that that similar element of asportation also be read into 350.

The Court in Adams identified three problems that the forcible confinement in 349 faced, constitutionally, in order to develop the asportation. Those three problems were:

One, elevation of a common-law misdemeanor into a capital crime.

The second problem that Adams identifies is that it converts lesser crimes, for example, an assault and battery, into a life offense, just based upon mere movement to complete the crime.

And the third problem was that the prosecution -- the fear of prosecuting overcharging for the same reasons that problem two would have given the basis for overcharge.

The Court in Adams, the Court in Wesley felt that if you take an adult from this room into that room in the Court's hallway, that -- and he slapped him, clearly an assault and battery in the other hallway, because he moved him

a mere distance of ten feet to complete this assault and battery, the prosecution now has the opportunity to charge him with a life offense.

Wesley and Adams says, no, that's not the case. There's got to be something more. There's got to be an independent act. The movement has to be more than just simply incidental to the assault and battery.

Under 350, those three problems still exist. I don't know whether or not false imprisonment of a child under 14 was a common-law misdemeanor. I don't know whether 350 elevates it to a life sentence. Problems two and three still exist under the statute. It does convert lesser offenses just on the basis of one's age into capital offenses.

Given the analogy that I've already described, if a person takes a child under the age of 14 into the hallway and commits an assault and battery outside of the presence of the parents, then what we've done is made an assault and battery a life offense.

Likewise, prosecution has the opportunity to overcharge on that given offense. Problems two and three still exist under 350 that the interpolation of that asportation will cure.

Now the Court may be hung up on the specific intent element of 350 doesn't necessitate asportation. But what the defendant suggests is that this

specific intent is one, illusory; and two, really cannot -- is a necessary consequence if there is an underlined crime.

For example, if you have the parents in this courtroom, they certainly would not allow an individual to slap their child and commit an assault and battery in their presence. If that individual wants to commit the assault and battery, he would necessarily remove the child outside of the parents' view. He would take the child into the hallway, do it outside the parents' view. He is entrained to get the child outside of the parents' guardianship to commit an assault and battery.

Now, that now becomes a life offense. Unless there is a settlement of asportation in this, that's what's going to happen. Wesley and Adams has thwarted the prosecution from simply tagging along life offenses where there are minor crimes, or where there are major life offenses in Wesley, by requiring asportation.

In this case, what the prosecution is doing is going around the asportation element by using -- by virtue of the child's age, and then saying, look, there is no asportation, we can overcharge, we can make what's obviously an offense another life offense to be considered.

Problems two and three still exist under 350. The Court in Adams said that these specific intents do not necessitate asportation. Did not state any specific

intent. It enumerates which specific intents. The specific intent in 350 is merely to detain or conceal the child. And I submit to the Court that that does not weigh equally as taking hostage, extorting money, committing murder, or secretly confining an individual.

If it does weigh equally, then the Court would surely say that detaining a child, just detaining a child, you don't need a specific intent, you don't need -- I mean, you do need specific intent and negates any need for asportation.

What the defense submits is that specific intent in 350 does not weigh equally as the ones that Adams supports, saying that no asportation is necessary. Problems two and three still exist under the existing statute and I feel that it is unconstitutional for those reasons.

THE COURT: Mr. Bramble?

MR. BRAMBLE: Your Honor, I had a chance to review both Wesley and 350 and I will be very brief. ??? and Wesley says that when --

THE REPORTER: Mr. Bramble, you have to speak up, please.

MR. BRAMBLE: Sure. The information in the -- the holding in Wesley says that when an information charged in the offense under the forceful confinement part of the kidnapping statute --

THE COURT: Slow down, too.

MR. BRAMBLE: -- part of the kidnapping statute, section A, the following elements must be proven. They go into asportation aspect. But, clearly, we haven't charged the defendant under that portion of the statute.

Number two, as I read 350, the forceful confinement never has to enter into the picture with this. It is the -- if a person takes, carries away, leads away, or entices away. And there's even a word, "lead". So, the leading away of a child with the intent. So, there doesn't have to be any effort to conceal, or imprison, or anything of that nature, or there doesn't have to be any concealment or imprisonment. The fact that they take that person away with the intent to do so, the act is completed and the crime was committed.

The fact that this is, again, a different statute involving a child, I think is significant in that regard. I submit that that element, as requested by defense counsel, is not needed.

And I actually went -- as I was searching for elements of the offense, I went to, and I'm not sure if these are this Court's elements or not, but I looked into a case that involved this and the jury instructing on this never required that particular -- the Court instructing on this never required that element as well.

THE COURT: Ms. Krause, anything you want to say on this issue on behalf of Stephen Turner?

MS. KRAUSE: No, your Honor.

THE COURT: The statute under which Mr. Daniel Turner is charged with kidnapping is not, everyone agrees, the statute which was at issue for The People vs Adams. It is, in fact, a much different statute. So different, in my judgment, that the decisions in those cases do not apply.

I used the plural word "decisions" because what the Supreme Court did in Adams was adopt, with one or two modifications, the Court of Appeals decision, by then, Judge Levin. So, in fact, to analyze Adams, you'd have to look at both decisions. The differences are two, and, as I say, I think they are very major differences.

First of all, the kidnapping or child-enticement statute, which we're using now, Section 350 of the Penal Code, does not have forcible confinement as an element. It's elements, in terms of the acts required of the defendant, are much distinct from that and require some much more active activity, if you will. It's simply not confining someone. There has to be taking, leading, carrying away, decoying, or enticing them away.

That is significant for this reason: forcible confinement, being an element that the Court of

Appeals and Supreme Court said in Adams created too much prospect off a crime otherwise not nearly as serious as kidnapping becoming kidnapping because forcible confinement is very often an inevitable element of some other offense and they didn't think it appropriate to aggravate much less serious offenses into life offenses as the result of a necessary element of the lesser offense, coincidentally, also being an element of kidnapping.

Whether the current Supreme Court would rule that way is an interesting question, but not something which need detain us, because they never overturned Adams and, therefore, this Court must follow it.

This statute, 350, simply does not, as I say, involve an element of forcible confinement. It, therefore, does not raise the specter of some act incident to a lesser offense being aggravated simply by commission of the lesser offense into the more serious one.

There is a second reason why Adams does not apply. And that is that, unlike Section 349, Section 350 has a very specific intent which is required. And that is an intent to detain or conceal the child from it's parents or guardians. I believe, frankly, that is an element which, in any given case, the prosecution is likely to have difficulty proving. It can be proven, but it is not an easy element by any means.

It, however, clearly eliminates the problem of some other offense becoming kidnapping under this statute simply by virtue of some incident. It's not enough to commit the other offense, it's not enough to commit the other offense by means of decoying a child or enticing the child to come with you. The kidnapping occurs only if, in addition to everything else, there is proven to have existed a specific intent to detain or conceal the child from its parents.

If that is proven, the fact that it was part of a scheme to commit another crime does not, I think, in any fashion, render it unfair, that when that particular element is proven, a separate crime has occurred. It is appropriate for the Legislature to conclude that someone who acts with a specific purpose of taking a child from its parents, which puts the child at significant risk by virtue of that intent, alone, and was a separate crime to be dealt with very severely.

Perhaps an argument can be made that a possible life sentence is too severe, but that's for the Legislature to determine, because they have not mandated a life sentence, they've simply said life for any term of years. So depending upon the circumstances, it could be a relatively minor sentence or a very serious one.

The simple fact is that all of the

concerns that the Court of Appeals and the Supreme Court had in Adams which prompted their addition to save the constitutionality of Section 349 of an asportation element, do not exist here. You do not need any additional element, asportation, or anything else, to have a constitutional statute which does not pose the problems that Section 349 have posed.

Accordingly, this Court will not be instructing that there is any required asportation. The Court will instruct the jury that there are three elements:

Number one, that the child had been led, taken, or carried away, or decoyed or enticed. Actually, four elements. That she was under the age of 14 when that happened, that it was done maliciously, forcibly, and fraudulently, which I take to means by some force with knowledge that it was wrong and without any belief that they had authority from the parents to do it. And that this was all done with the specific intent to detain or conceal the child from its parents or guardians.

Let's move on to the testimony of Ms. Mona Eckloff (phonetic). Mr. Mirque?

MR. MIRQUE: Okay, your Honor.

THE COURT: That's the psychologist from Milwaukee, Mr. Bramble.

And before we get too far into this, Mr.

Mirque, would you tell me what it is in this testimony she gave in Milwaukee you wish to present to the jury.

MR. MIRQUE: The only bit of information we hope to gather out of this entire transcript, your Honor, is just the diagnosis. On page -- actually it's not even a page of the transcript, but it was the report submitted into evidence. Under -- it's page five of the Capital Square Associates under assessment.

According to the revised diagnostic and statistical manual three, by which all of the standardized psychiatric diagnosis are made, the criteria -- Daniel meets all of the criteria for the diagnosis and that he has experienced persistent discomfort as a male.

That particular paragraph, the assessment, that is all we are asking for. We don't want any testimony or any mitigating factors. We're not interested in all of that because, quite frankly, we're going to have somebody up there to assist us in telling us all about the issue trans-genderism.

THE COURT: Then it wasn't true, all this talk we told the jury that it's not an issue in this case.

MR. MIRQUE: Well, it may not be. I mean, if we are not going to be able to get this in, then the relevancy of the expert is not going to be -- is going to be moot. Because we won't be able to testify as to whether or

not he is transgender or transvestite.

THE COURT: Is the expert you propose to call in a position to make the diagnosis? Or is that expert dependant upon Ms. Eckloff's diagnosis?

MR. MIRQUE: That expert can only comment, at this time, on the basis of another -- he's not going to -- he's clearly not going to say that he's had any interaction with Mr. Turner. All he's going to do is portray a very general, very explanatory explanation of what it means to be a transgender. That cross-dressing for a transgender individual is not a sexual deviation, but a sexual identification problem.

He's not going to say that he's not a child, pedophile. He's not going to say the he's a homosexual. He's not going to say anything other than the fact that this is why transgenders cross dress. Because they have it in their mind that they are women. Not because they do it for sexual gratification, which a transvestite does. There is a big difference between the two. And without the diagnosis, sexual gratification versus gratification of a gender identity problem is totally separate. I don't want the jury to get the impression that Mr. Turner cross dresses for sexual pleasure. That's not what he does it for. That's not why he does it. He does it because he believes he is a woman.

And all we need is the diagnosis. And we

can't get the diagnosis because, first of all, no doctor in this area has been willing to touch the issue. And those that have been able to do it say it's going to take a long time to get this thing done. I've got to do testing, I've got to do counseling, I've got to do X number of things, it's going to be incredibly economically burdensome, it's going to be time consuming, and given that Mr. Turner is on no bond, we've got this speedy docket thing to get done. It's just not possible to have an appropriate diagnosis of transgenderism given the fact situations of what we have here.

We have a diagnosis. It's legitimate in the State of Wisconsin. I don't think that it's going to prejudice the prosecution in any manner because the prosecution is going to have the opportunity to cross examine the one expert who is going to be able to say whether or not transgender or transvestitism is of any concern to this trial.

I don't -- I think it's a reasonable request because we are just using it for a limited purpose.

THE COURT: I read this testimony, Mr. Mirque, and I recall at one point Ms. Eckloff saying that her opinion was based upon some tests she had administered and maybe one session with Mr. Turner.

MR. MIRQUE: One session -- one, I think it was two, 1-1/2 to 2-hour sessions and then there was correspondence between --

THE REPORTER: Wait a minute. Two 1 \-1/2 hour -- what did you say?

MR. MIRQUE: No, I'm sorry. I think it was 1-1/2 to 2-hour session and then some correspondence between Mr. Turner and herself.

THE COURT: Well, if the experts you have consulted here say that they can't make a comparable diagnosis without treatment, counseling, and a variety of other things which obviously implicate a lot more than one 1-1/2 to 2-hour session, doesn't that really establish the value of some cross examination as well as call in to serious question without at least her here to explain this diagnosis she having done it under circumstances where all of the experts you have consulted won't do it?

MR. MIRQUE: No, your Honor. Because even though Ms. Eckloff did not personally do it, members of her counseling team administered tests, and MMPIs, Wechslers, what have you. That was all done, but it was not done in the presence of Ms. Eckloff. So even if --

THE COURT: But isn't there also the problem here that all of those tests were unavailable to her, except the one that she administered? Didn't she specifically say they did an MMPI and she didn't have it, couldn't find it, or something to that extent?

MR. MIRQUE: I'm not quite sure, your

Honor. All I know is that Ms. Eckloff was relying on certain test results and that the psychologist that I had spoken also was going to have to rely on certain test results, and it was going to take them more than two hours to administer those tests, more than the counseling of which Ms. Eckloff says she did.

THE COURT: Ms. Krause, what have you got to say about all of this?

MS. KRAUSE: Your Honor, I don't have anything to add because I don't believe that this issue, at this time, affects my client. I don't think this evidence is going to be brought into trial against my client and I don't have to add.

THE COURT: Mr. Bramble?

MR. BRAMBLE: Your Honor --

THE COURT: Before we do that, Mr. Mirque, was this report actually an exhibit in the proceedings in Milwaukee? It's attached to what I have here. There is some talk about a report she prepared, but I can't find in the transcript any actual place where she --

MR. MIRQUE: On page two, under the exhibits, we have the report of Mona Eckloff under the date of February 3, 1998 (sic) --

THE REPORTER: 1998?

MR. MIRQUE: I'm sorry, 1988, received.

I'm assuming that the Court accepted this as evidence. As a matter of fact, I think the prosecutor in this case stipulated to the issuance of that report after there was some voir dire of the expert.

THE COURT: Mr. Bramble?

MR. BRAMBLE: Your Honor, I would oppose the admission of the report or anything contained in the materials provided by defense counsel. Several factors cause me to object.

Number one, this was a sentencing hearing, or a hearing on sentence modification motion. I think it's far different than a trial and the purpose of the prosecutor cross examining an individual would be different than my purposes or my reason for doing so here at a trial on an entirely different matter than the defendant was sentenced on in Milwaukee.

There are other factors as well. I noticed in reading through this there is reference, at least on page 13 and a couple other areas, that the witness refers to reports of another doctor an either disagreeing -- or agreeing with the reports, that's Dr. Ladwig (phonetic), but I don't have those reports and we don't have -- obviously know who Dr. Ladwig is or what his findings or her findings were.

Another factor is the fact that any analysis or any judgment that took place referred to a report

that was apparently put together in February of 1988, some five years ago, or over five years ago.

For all of these reasons and, finally, I guess I'm not convinced this is even relevant to the purpose that we're here before this court; that is, a criminal sexual conduct and kidnapping.

So, for all of those reasons I move the motion be denied.

MR. MIRQUE: May I respond, your Honor?

The test is not whether these questions that the prosecutor in Milwaukee had asked would have been the same questions that Mr. Bramble would ask. It's whether or not the predecessor in interest had an opportunity to ask these type of questions, not whether or not he would have had the exact same questions because, clearly, then, this rule will never be permitted.

You know, any lawyer could come and say, well, I wouldn't cross examine her in that manner, I would have ask her different questions. If that's the standard, then it never would have happened.

Whether or not the predecessor in interest, prosecutor in Milwaukee versus the prosecutor in Kent County, the prosecutor in Milwaukee had the opportunity to do a more in-depth cross examination. The expert, whether the prosecutor in Milwaukee had a more in-depth opportunity to

commit a more in-depth cross examination of diagnostic materials. She didn't. She had the opportunity, and I believe that's a standard by which the predecessor in interest should be viewed under. I don't think we would argue that -- we would argue differently or I ask questions differently is the standard for the test.

THE COURT: This Court is satisfied that the proffered "testimony", and I use that word in quotations for reasons I'll explain in a moment, of Ms. Eckloff is inadmissible in this proceeding for a host of reasons.

The reason I use the word testimony in quotations is the fact that, in reality, what is being offered here is not the testimony in the traditional sense, but the statement made in a report which was introduced as an exhibit at a proceeding at which the author testified.

I am, however, for the sake of argument, going to assume that inasmuch as the report was admitted as an exhibit and there were some references, albeit oblique ones, in the testimony of Ms. Eckloff to that report, that the contents to the report were, for all practical purposes, adopted by a reference and constitute testimony within the meaning of Rule 804.

Rule -- the testimony is not admissible, however, to begin with because it is hearsay, not accepted from the prohibition on hearsay. The only possible available

exception to that prohibition is Michigan Rule of Evidence 804B1. That rule has several prongs to it, only two of which have been met here, at least two of which have not been met.

It clearly was testimony, if we include the report within testimony, at another hearing, not in this proceeding, but in a different proceeding.

The -- it also was testimony from an individual, who, although we haven't talked about it here, I'm satisfied from the statements that were made in chambers, can't be located and it is therefore deemed to be unavailable. So those two predicates are satisfied.

However, in order to admit testimony of a witness who is unavailable, testimony given in a different proceeding, a couple of other things have to be established. In a criminal case, the proponent must establish that the same party against whom the evidence is being offered here was a party in the other proceeding. And I cannot say that the prosecuting authority in the State of Wisconsin is the same party as the prosecuting authority in the State of Michigan.

I understand the argument is often made and accepted that the government is the government, but I don't ever recall that being crossed jurisdictional lines.

Secondly, and more significantly, even if we assume that a prosecutor is a prosecutor and, therefore, the same parties were involved in the Wisconsin proceeding and

in this proceeding, there has to have been, not only an opportunity to cross examine, but a similar motive to develop the testimony.

And I don't believe, given what I see here, that it can be said that that motive existed. What was going on in Wisconsin was a relatively short hearing at which a judge was being asked to modify a burglary sentence. That's much different than a proceeding at which we are going to have to determine whether criminal sexual conduct occurred.

A sentencing is post-conviction. This is, of course, is pre-conviction. Sentencing proceedings are not nearly as elaborate as are trials, don't involve nearly the same kinds of questions. There is simply such a big difference between what they were doing in Wisconsin and what they were doing here that I can't say that there was a similar motive.

Now, to put it bluntly, the approach that someone takes at a proceeding like what was being done here, given my experience on requests for resentencing, which this really was, are quite legitimately much different and more relaxed than are issues raised in a trial of this particular sort.

Therefore, while Ms. Eckloff is unavailable, as defined by 804A5, and while the testimony that is offered was taken in another proceeding under oath it,

nonetheless, remains hearsay because the prosecutor in this case was not involved in that case and because while maybe the prosecutor there had an opportunity to more fully cross examine, that prosecutor didn't have the same motive and I would doubt, frankly, he had the same opportunity. If, given the nature of that proceeding, anywhere near as elaborate a cross examination as is appropriate here was tried there, it would have been cut off in a minute by the judge as going much beyond what was appropriate in that particular case.

Therefore, the statement remains hearsay and, as such, because there is no exception applicable, is inadmissible for that problem. Lets for the sake of argument, however, assume away the hearsay problem; assume that this evidence does not violate the prohibition on hearsay. It is still inadmissible because it does not satisfy Michigan Rule of Evidence 702, which it must satisfy in order to be received, is that which it is offered as, the opinion of an expert. So even if it's not hearsay, that doesn't make it admissible, that simply gets rid of one inadmissibility problem. There are still other hurdles to overcome.

On this record, there is absolutely no basis for this Court to conclude that the discipline with regard to which Ms. Eckloff was testifying, and the diagnosis to which she was testifying, if we assume that submitting the

report constituted testimony to that diagnosis comes anywhere close to satisfying the Davis/Frye test in Michigan, or the more relaxed, People vs Beckley Badour test for a more biological or sociological sciences, et cetera, excuse me. Nor can it even be said that anything has been presented here from which I can conclude that the potentially new and much more relaxed test in Daubert vs Merrell Dow, 113 Supreme Court 2786 has been satisfied here.

I simply have no basis upon which to conclude that the Interpersonal Inventory Test, to which reference is made by Ms. Eckloff, is capable of diagnosing transsexualism. I have no basis on the record presented thus far to conclude that there is any expertise in this particular area, or that there is a legitimate discipline, however modestly you might want to define it, that distinguishes between transgenderalism, transsexualism, transvestitism, or whatever.

Therefore, even if Ms. Eckloff were here, I wouldn't allow her to testify, at least based upon what I have thus far.

There are other problems which provide independent bases for concluding that the evidence is not admissible. Neither Rule 703 nor 705, under the circumstances, can arguably be satisfied. Those rules authorize the Court, when it thinks it appropriate, to require

that the underlying data and bases for an opinion be presented as evidence. We can't do that in this particular case because we don't have any of that data offered here. We have the report, but we don't have the test results, the test documents, themselves, we don't have a lot of that to which the report makes reference.

In addition to that, assuming that we have all of these other problems out of the way, the evidence here is, I submit, simply too old to be relevant. We're talking about a diagnosis in 1988 without any predicate for concluding that such a diagnosis remains constant over time. Nor do we know how the discipline, if there is such a discipline, has, in fact, matured or regressed between 1988 and 1993.

Accordingly, it's simply too remote in time to be significantly relevant. If it is relevant, the passage of time clearly creates a 403 problem. And then, frankly, we have a glaring 403 problem. And that comes from the fact that the experts who would be called here to explain certain things, based upon the diagnosis of Ms. Eckloff, has been represented to this court, are not willing to make the same diagnosis themselves because they do not have an adequate predicate in terms of exclosure to Mr. Daniel Turner to do that. And yet, from having read the testimony here, Ms. Eckloff's testimony -- or exposure was considerably less than, I'm being told, these people would insist on because they

don't have it and won't give any evidence with regard to it.

So even if we can get over all of the other hurdles, we've got a situation where I think Rule 403 is clearly violated if I let the evidence in. It's too significant of a point to be presented in this fashion. To have a five-year-old diagnosis, without any of the bases for that diagnosis presented to this jury, and then allow people who would not be willing to make the same diagnosis themselves then explain various things, all of this being done without any opportunity on the part of the prosecution to cross examine them.

Accordingly, for all of those reasons, the Court will not receive either testimony or the report of Ms. Eckloff as an exhibit. I will, obviously, make same a matter of a separate record here so that if it becomes necessary, a higher, wiser court can review the matter.

MR. MIRQUE: Your Honor, will that record then be available for an offer of proof, or a record for a reviewing court to look at.

THE COURT: I don't understand what you mean. I'm going to make what you've given me as a --

MR. MIRQUE: I know. But what I want is either an offer of proof later on in the trial that that particular piece of evidence that I submitted to you be made available for a higher court to review or be made record.

Which do you prefer, do you want to make --

THE COURT: I still don't understand what you are asking. If what you are saying -- I deem this to be an offer of proof. I will put this in the record and the Court of Appeals, or the Supreme Court, or both will review everything I've reviewed. If there's something more you want to present --

MR. MIRQUE: Just that.

THE COURT: All right, then. Then the transcript of the proceedings on May 17, 1988, in the Jefferson County Circuit Court involving a Mr. Daniel A. Turner, whom I presume is the same individual, will be made a part of this record so that higher courts can review it. And, obviously, the statements made by counsel here as to what he wanted to present and if he was allowed to present it, what other evidence he would present, also constitute a component of that offer of proof and are there for any higher court to deal with.

I think, Mr. Mirque, that takes care of your issues. Does it?

MR. MIRQUE: I think so.

There are a couple of witnesses that came up off the list that were not endorsed. And I would like to know whether those are going to be endorsed at this time. Dr. Cox. Is he endorsed or not endorsed?

THE COURT: By "endorsed", do you mean is he going to be called or not?

MR. MIRQUE: Yes. Dr. Cox is not on our witness list. And if he's not going to be called, then I want to know in advance whether we have to subpoena him.

MR. BRAMBLE: You want him called and you want him here?

MR. MIRQUE: I want him here. Correct.

MR. BRAMBLE: I'll have him here.

THE COURT: Okay.

MR. MIRQUE: And the other witness that are on the list that's not already endorsed as to this one here. There's two or three that have been mentioned in here.

THE COURT: Why don't you give us some names, Mr. Mirque. Whom do you want to know if they are going to be called?

MR. MIRQUE: Well, there's a whole list of witnesses that Kevin read here during the voir dire and some of them, quite frankly, didn't appear our the witness list. That gives him some room so that he doesn't have to call them if they are not endorsed.

MR. BRAMBLE: Tell me who you want here and I'll --

MR. MIRQUE: Dr. Edward Cox and Ruth

Hamstra, the registered nurse.

THE COURT: I take it, Mr. Bramble, there will be either witnesses or be available to be called by the defense.

MR. BRAMBLE: Yes, your Honor.

THE COURT: Ms. Krause, anything we need to do other than have me put on the record my ruling with regard to your rejected challenges for cause yesterday afternoon?

MS. KRAUSE: Not to my client, individually. I still think there were pretrial matters that we all discussed in chambers on Monday that I think should be put on the record and solidified before we begin opening statements.

And I believe one final issue that needs to be addressed is what we are going to do, if anything, with the information that was put into -- or that we received in the counseling reports in reference to Lakeysha Cage.

THE COURT: Well, let's put on the record that agreements were made as to what was not going to be done in terms of evidence, so that's a matter of record, and then I'll ask you what you want to do with regard to Ms. Cage's counseling record.

Ms. Krause, why don't you go ahead and put on the record what was discussed between you and other

counsel.

MS. KRAUSE: Thank you, your Honor.

It is my understanding that in reference to Stephen Turner, my client, the issue that he may be a cross dresser is not going to be brought up by the prosecution in this case. I do not anticipate making that an issue and Mr. Bramble has assured me that he will make all efforts to keep that information out as it relates to my client, individually. Is that accurate?

MR. BRAMBLE: If the question being posed to me is, do I plan on producing evidence that your client is a cross dresser, no.

You know, I guess there is going to be evidence of that regarding the co-defendant and -- is my aim or purpose to bring any of that out? No.

MR. KRAUSE: I acknowledge, for the record, that it's going to come in against the co-defendant. My concern is my client, Stephen Turner. I don't want any prejudicial information coming in against my client. I ask the prosecution, as the Court ruled, that that is irrelevant and prejudicial to my client, and that it not come in.

THE COURT: Well, the Court has ruled tentatively that it appears to be irrelevant, and so long as it remains irrelevant, it's not to come in. But we haven't had the evidence presented yet and, therefore, there are

circumstances, I can imagine, under which might become an issue. I recall, however, that at least this thing sounds to me and the prosecution doesn't propose to present it and will present it only if the doors are opened.

What I would suggest we do is make no reference to it in opening statement, and before any attempt is made to introduce such evidence, the prosecution and then defense counsel meet with me either at the bench or otherwise out of the presence of the jury to see if it has, in fact, become admissible. It certainly does not appear to be, given what we understand to be the description of the transaction at issue here. We'll just have to wait and see if something else develops.

MS. KRAUSE: Very well.

Additionally, your Honor, there were numerous items taken out of Apartment 204, at Cory 130, Oak Park, S.E., which is the alleged scene of the offense. Several of those items, in my opinion, are irrelevant, but even if there is minimal relevance, 403 prejudice would preclude them of being introduced by the prosecution.

Particularly, I am referring to photographs of my client dressed as a woman. As we've already had a ruling that at least at this point that it is irrelevant to the case and is not coming in. Photographs, obviously, are going to be irrelevant as well.

There are, in addition to my client being dressed in woman's clothing, there are photographs of other unknown individuals who are men dressed as women, that I also believe are irrelevant, and I believe that those should stay out.

Do you want me to go item-by-item and make it one ruling, or do I rule one at a time?

THE COURT: Just keep going. They sound like they are all variations on the same theme.

MS. KRAUSE: There were also children's clothing and toys removed from the apartment. It is my understanding that these will not be used in any way, shape, or form by the prosecution to substantiate or attempt to prove this case.

I believe that if they are used, one of two things will happen: One, the prosecutor will be trying to imply that these were somehow related to the offense or show that my client somehow has proclivities with children. I think that's irrelevant and prejudicial.

The other thing is, is that if I am forced to, I could bring the wife of my client in to testify that those are, in fact, the clothes of children that belong to her and my client's children. I don't want to have to be put in that position, given this Court's prior ruling, that the wife cannot be forced to testify against my client.

There are two letters that were taken out of the apartment. One is entitled, To All You Straight Peers. The other is entitled, Mother Dear, My First Love. These items are of no relevance to the case. Again, they have nothing to do with the elements that Mr. Bramble has to try to prove here, nor do they have anything to do with what the alleged victim has testified to thus far. I believe they would be extremely prejudicial and of little probative value.

Additionally, there were numerous computer disks taken out of the apartment, some of which may be relevant to the prosecutor's case. The alleged victim in this case spoke of playing computer games during the commission of the alleged offense. She was very specific about which computer games were being played. I think the prosecutor would agree with me that there were hundreds disks taken out of the apartment, most of which we do not know what they are because the last I was informed by the State, many of them could not be accessed.

Again, I don't want there to be any implication or any chance for the jury to impermissibly infer that these are all some kind of either pornographic or improper computer games or anything else. Again, they are not relevant, and if there is minimal relevance, the prejudicial effect could be devastating to my client.

There were sexual aids removed from the

house as well. Specifically, a dildo as well as other sexual aids. There was no reference of these items made by the alleged victim in any other testimony, so they are not relevant. They are, again, your Honor, prejudicial effect could be devastating to my client.

Those are the items I have main concern about. If other items are attempted to be introduced at the time of trial, I will make appropriate objections, but these are the ones of main concern at this point in time.

THE COURT: Mr. Mirque?

MR. MIRQUE: Your Honor, I'm going to echo much of what Ms. Krause has said. A lot of this stuff, unless it comes in through the girl and is somehow related to this whole affair, things found underneath beds or tucked away in suitcases that the girl never saw is irrelevant. Things like sex aids and clothing that was stashed in a drawer. Now, clearly, it's been said the girl was trying on clothes, and I have no objection that that is evidence that should probably come in, but other clothing that the girl never saw, other clothing in the drawers or whatever. All of this female attire, the girl has no knowledge of and, really, there is no bearing on this case, other than my guy is this cross dresser, is irrelevant.

Likewise, the toys, which are not -- there has been no showing having any relationship with Daniel

Turner, rather they are owned by Stephen Turner. The children's clothes, again, no relevance to Daniel Turner and, again, belonged to Stephen Turner. I don't think that stuff should come in.

Sex aids or adult sex aids, the girl never saw them, there has been no information from her or from the police department that there's been any child pornography, anything of that nature. This stuff is truly inflammatory, truly prejudicial to Mr. Turner's behalf. That poetry, the girl never heard of. No. It just doesn't have any bearing on the issues of this case. I think that it's irrelevant and prejudicial, substantially prejudicial.

THE COURT: Mr. Bramble?

MR. BRAMBLE: Briefly, your Honor, these sexual devices, for lack of a better word, found in a closed container, as I indicated in chambers, unless they do become relevant by the child's testimony, they really aren't of any significance.

Regarding the children's clothes, I think there may come a point where the victim testifies, regarding certain items of clothing she was asked to try on by Mr. Mirque's client, Daniel Turner, some of them may actually be children's clothing. If that is, in fact, the case, and I have reason to believe that is the case, I think they become relevant and they are admissible.

Regarding the toys, the children's toys that were found there, again, unless they become relevant based on the testimony of Lakeysha Cage, I don't plan on producing them.

Regarding the computer disks. There were, as Ms. Krause indicated, countless computer disks. Many, or if not all of them, we have unable to access despite considerable effort. I believe that they become relevant in that there will be testimony that, on this computer screen, through this computer system, certain games were played off the disks. And at that time, I believe the testimony will be that Miss Cage was actually sitting on Mr. Turner's lap and was being felt or her chest was being touched by Mr. Turner, Daniel Turner.

So I suspect those will become relevant.

THE COURT: Have you, in fact, accessed any of the computer tapes to find the games she was talking about?

MR. BRAMBLE: No. That's been our efforts, is to try and find that game. We've found a few others, but have not been able to find the actual one. Our ability to get into these disks has been very limited.

THE COURT: So it's not a question of you looked, and that game isn't there, it's that you can't even determine what's on some of those disks.

MR. BRAMBLE: Correct.

Regarding the poetry, or whatever, the writings, either of these defendants', again, unless they are made relevant, either by cross examination of the defense or through direct examination of Miss Cage, I don't plan on producing them.

Regarding the clothing that would be found in the drawers and, what have you, I believe there will be testimony from, again, Miss Cage that she was asked or told to try on clothing by the defendant and I submit where -- if the search warrant reveals that the clothing on this night and type and nature were found in the apartment, regardless of where they were found is -- it's relevant evidence to demonstrate that this young girl says that it was tried on and if it's found, that it be admitted at trial.

MS. KRAUSE: Your Honor, for the record, I would ask that the prosecutor to clarify which defendant he is referring to as to the article of -- or as to the item of trying on articles of clothing, because that may have a difference on your ruling if it comes in against both, neither, or one or the other.

MR. MIRQUE: Your Honor, I agree with Mr. Bramble that in one way she is going to be saying which clothes she would wear, but I would suggest that the young lady and Mr. Bramble work out ahead of time as to which

clothes she did, in fact, wear to prevent coming up here and parading a fashion show of all of Mr. Turner's before she hits jackpot and seeing 50 different negligees before the one that, perhaps, she did wear.

I think it can be worked out to narrow down which ones were already tried on and not -- and avoid this incident of having this prejudicial flooding of woman's clothing. I think that is logistical, I think it's practical, and it certainly would preserve Mr. Turner's evidentiary rights.

MR. BRAMBLE: My response to that is, as Mr. Mirque indicated, there may be evidence that there were countless numbers of pieces of negligee, panties and bras, found in the apartment. And to ask a ten-year-old to go back and, among the numbers of these, to say that there are 20 different bras or 20 different pieces of negligee and say, it was this one, may be difficult to do. Only the fact that she said she tried these on, it was this type of a bra with padding in it or, whatever, and she could say this was the one, and what we found with a search warrant looks like it, again, I think that's asking a lot of an eleven-year-old.

MR. MIRQUE: Well, then if that's all it takes is, did you put this on, did you see it, I don't see any relevance to bring it out to begin with. Why bring it out? I mean, if she's going to testify that she wore a bra and this

bra had, you know, fake breasts in it --

THE COURT: It does tend to convince the jury that she's telling the truth if, in fact, they find them and if the jury never sees of hears of them, then the conclusion may very well be that well, the police didn't find them, otherwise we would have heard of them, and at that point they are discounting the girl's testimony for a very appropriate reason.

MR. MIRQUE: But what I don't want happening is this simply true-false examination upon this girl of 50 different articles of woman's clothing, because then the irrelevance objection that we made earlier is moot.

You know, obviously the girl is not going to be able to know every single item, but I don't want a parade of things coming through here so that the girl can say, yes, no, yes, no. The jury is going to hear -- see all of this stuff. What's the point of having an irrelevancy objection if they're going to see it anyway?

THE COURT: Well, with regard to the photographs and like things of various men, maybe these defendants, and others, dressed as women, at this point I don't see where that is relevant, or if it's relevant, where it's sufficiently probative to be admissible.

The letters, likewise, at this point, stay out. The adult's sex aids stay out, again, unless something

totally unexpected happens which makes them relevant.

As far as the items of children's clothes as well as other clothes, to the extent a child testifies that she was asked to put on various clothes, be they adult, woman's clothes, or certain kinds of children's clothes, if the search warrant disclosed items like that, and I use the word "like that" in a somewhat general term, if she talks about black negligees, and black negligees were found, then I think they are admissible to establish that there is a basis to believe her. If she talks only about black negligees, then pink ones, white ones, and other colored ones, are not, but we certainly can't get to the point of saying we will admit only those which she can specifically identify as the ones she was asked to put on, because she probably can't do that.

Frankly, I think, to the extent there are such items which are used to corroborate her description of events, those items are admissible against both defendants because, frankly, the aiding and abetting conviction requires proving the other one as well. So the jury trying Mr. Stephen Turner's case has got to be convinced that Mr. Daniel Turner engaged in the conduct which is alleged here and so, therefore, they have to hear the proofs with regard to that as well. There is no need for them to hear, at this point, that Mr. Stephen Turner apparently also at some point engaged in this practice of cross dressing, because the girl doesn't

describe him as in that situation and, frankly, it's not particularly pertinent to the case to whom the items in the house belonged. The pertinence is their corroboration of the girl's testimony if they, in fact, do that.

The fact that they were there and the police found them shortly thereafter, gives some added weight to her claim that certain things happened. Maybe not enough, but that's under the admissibility question.

As far as the computer games are concerned, it's my understanding from our previous conversations that the girl describes a computer game of strip poker or something to that effect; is that correct?

MR. BRAMBLE: Yes, your Honor.

THE COURT: Is that the only kind of computer games she describes?

MS. KRAUSE: No, your Honor.

THE COURT: Well, unless it is stipulated, -- if it is stipulated by both defense attorneys that there was, in fact, found in the house, a computer strip poker game, then we don't need to go into all of the computer tapes or, whatever, that were found.

If, however, that stipulation is not made by both attorneys, then in both cases, or in one case, if one attorney makes the stipulation, but not the other attorney, the prosecution will be entitled to have an officer establish

that they did find numerous computer tapes. That of those, they have been able to access, the strip poker game was not there, but they have not been able to access all of the others and, therefore, don't know whether it is or is not there. And if, in fact, what they have been able to access are sex games, they may testify, generically, to that effect because that will help explain that the strip poker might well be on the various tapes, but can't be found.

If, in fact, all the computer tapes found are accounting programs, or Lexis programs then, of course, it's absolutely proof that there wasn't, in all likelihood, a computerized sex game there in the first place, in particular, strip poker.

So with regard to clothes, it may be introduced to the extent the child testifies that she was asked to put on various clothes, clothes of a like kind that were found. Recognizing the parameters I have established, of like kind, may be introduced, and absent the stipulation that I have talked about about the strip poker game, testimony may be offered that tapes were found. Some were read, some cannot be. No strip poker was found on those that were read, but of those that were read, they do contain various sex games, and we'll leave it at that and let the jury conclude, if they wish, that maybe the strip poker is on one of the unaccessed tapes.

Has everybody got all of that figured out?

MR. MIRQUE: Not quite. If an officer comes up and says, I did find the strip poker game, are we going to be able to view that game? Are we going to be able to say, okay, which disk is it, let's plug it in and take a look at it?

THE COURT: Produce a computer, and we will, if you want to do that.

MR. MIRQUE: Or any of the sex games that Mr. Officer may testify to?

THE COURT: If you want to verify to the jury that, in fact, he saw what he said he saw and you want to play that to the jury, you may.

MS. KRAUSE: As a point of clarification, I'm not sure what the police have read on the tapes they did have access to. It is not my understanding, however, after talking with the detectives, that they were sex games that have been read. I want that point to be clear here. I don't think any of the sex games have been uncovered on the computer tapes thus far.

THE COURT: If they haven't been, then, obviously, there won't be any testimony to that effect. The testimony will be, we haven't accessed them all. Those that we have accessed, we haven't found any sex games. If that's the testimony, then that's what it is.

If, in fact, the testimony is, we have found some sex games, then they may testify to that to establish the possibility that, there being some sex games, there were others that they haven't been able to find, including the strip poker one. And if defense counsel then wants to put those games on a computer so that a jury can see what we're talking about, you're free to do that.

MR. MIRQUE: Now, just in putting in my computer isn't going to be as simple as it sounds. Apparently, these are rather exotic computers and that if -- I know the defense is not going to be able to produce a computer to read those. I would ask that the prosecution bring whatever mechanical means that they did read it with and bring it in. If it was an Atari game system, then the officer should be prepared to have the Atari game system. Because these are not general PC computers. It's an old computer system.

THE COURT: Well, if, in fact, the prosecution has readily available to it that kind of equipment and can produce it here without a lot of trouble, they probably should do it. If it's going to take more than that, we'll revisit the situation, because what I'm not going to get into is simply fortuitous burdens on the prosecution. I'm going to have to be convinced, at that point, that it's really worth --

MR. MIRQUE: Now I don't want to create an entire electronics lab. It's just a matter of getting a screen and a keyboard in, I don't think that's entirely burdensome.

THE COURT: Well, presumably these games were used by computers on the premises, which I would assume you have access to, likewise, and you might want to look at them.

MR. MIRQUE: I do not have access to them. They didn't confiscate to the computers.

THE COURT: Good, then you've got the computers. Bring them here.

MR. MIRQUE: No, we don't. They were stolen in a burglary at the apartment.

THE COURT: We'll simply have to work out and see whether or not anyone really wants to show those to the jury, and if so, what's likely to be demonstrated on them and we'll see how much of a burden we are going to endure to present them.

MS. KRAUSE: Your Honor, I'm sorry, but your ruling on the children's toys taken from the house was what?

THE COURT: I never heard any claim about toys. So, at this point, I would think toys are inadmissible. Children's clothes may be if, in fact, the child -- will be,

as a matter of fact, if the child testifies that she was asked, among other things, to put on children's clothes and clothes of like kind were found.

MR. MIRQUE: Are the toys inadmissible for both defendant's if testimony is such reveals that?

THE COURT: At this point. But, let's face it, frankly, I can't, before I've heard any evidence, rule on, with precision, on what's relevant and what isn't irrelevant. A lot of things become relevant as the result of statements and questions, as well as testimony, and we'll simply have to wait and see.

My initial impression is is that given what has been represented here, children's toys, as children's toys, don't have a particular role to play here, but we'll have to wait and see. Children's clothes, it's been represented, may have a role to play. Adult clothes may very well have a role to play. To the extent they do, they are admissible.

MS. KRAUSE: You still haven't said what we are going to do with any rape shield issues or --

THE COURT: Well, let's give Leslie a break. She's been here all morning. We'll deal with that --

MR. MIRQUE: Before opening?

THE COURT: Well, you come and tell me in a few minutes in my office what it is and why you think it's

admissible.

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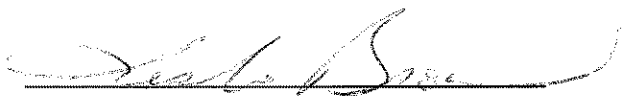
STATE OF MICHIGAN)

) SS

COUNTY OF KENT )

I, Leslie Brown, CSR, do hereby certify this to be a true, accurate, and complete transcript in the aforementioned case on the aforementioned date, comprised of Pages 1 through 51, inclusive.



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