

MSC Opinion: People v. Gursky

26. July 2010 By Aaron Lindstrom

A jury convicted Jason Gursky of four counts of first-degree criminal sexual conduct, based on testimony from his girlfriend's daughter that he touched sexually abused her (the daughter) on two occasions, once when she was six and once when she was seven. The girl testified at trial and was cross-examined by defense counsel, and a friend of the girl's mother also testified to corroborate that the girl's testimony at trial was consistent with what the girl had described shortly after the second incident. In *People v. Gursky*, No. 137251 (published July 22, 2010), the Michigan Supreme Court considered whether the testimony of the mother's friend was admissible under Michigan Rule of Evidence 803A, which provides that spontaneous statements by a child under the age of ten about sexual abuse are an exception to the rule against hearsay. All seven justices agreed the statements the girl made to the mother's friend were not "spontaneous" because the friend brought up the subject of sexual abuse and specifically asked, after running through the names of several men, whether the defendant had abused her. The Court clarified the rules for determining whether a statement is spontaneous under MRE 403A (see further discussion after the jump). The majority, with Justice Young writing for the Court, also held that while it was error to admit the friend's testimony, that error was harmless because (1) the prosecutor offered the testimony merely to corroborate the girl's testimony, (2) the friend's testimony was cumulative of the girl's own testimony, and (3) the friend's testimony of the girl's emotional reaction to the questions (the girl responded by looking horrified, sucking her thumb, crying, and gasping for breath) was not hearsay because it was non-verbal conduct that was not intended to be an assertion. Justice Cavanagh, joined by Chief Justice Kelly, dissented on the harmless-error issue, arguing that because the girl's credibility was the primary issue at trial, admitting the friend's testimony made it "more probable than not" that excluding the evidence would have resulted in a different outcome at trial.

The Court clarified that statements prompted by an adult's questions specifically about sexual abuse are not spontaneous, but if a child brings up sexual abuse, the resulting statement may be considered spontaneous, even if later questioning occurs by the adult. For such statements to be admissible, the child must broach the subject of sexual abuse, any questioning or prompts from adults must be nonleading and open-ended, and the statement must be the creation of the child.