

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

DAKOTA LEE SHORTER,
Defendant-Appellee.

Supreme Court No.

Court of Appeals No. 338629

Circuit Court No. 16-519-FH

_____ /

**PEOPLE OF THE STATE OF MICHIGAN'S
APPLICATION FOR LEAVE TO APPEAL**

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STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction pursuant to MCL 600.215(3) and MCR 7.303B(1). On June 7, 2018, the Michigan Court of Appeals issued an opinion reversing Defendant's convictions for third degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(c), and fourth degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(b), finding the trial court erred by granting the prosecution's motion to allow an adult complaining witness to testify while accompanied by a support animal and its handler. *People v Shorter*, ___ Mich App ___ (2018) (Docket No. 338629) (attached as Appendix A). The People seek leave to appeal the Court of Appeals' decision.

STATEMENT OF QUESTIONS PRESENTED

I. Whether the trial court has discretion to permit a witness the assistance of a support animal in order to effectuate its statutory duty to control its courtroom for the purpose of the effective ascertainment of the truth?

Appellant answer: Yes.

Appellee answers: No.

Trial court answer: Yes

Court of Appeals' answer: No

II. If the trial court abused its discretion in allowing a support dog, was the error harmless in light of the fact that the jurors affirmed they could ignore the dog's presence, the trial court instructed them that the presence of a dog has no factual or legal significance, and the facts strongly supported Shorter's guilt?

Appellant answer: Yes.

Appellee answer: No.

Court of Appeals' answer: No

Court of Appeals' dissent: Yes.

INTRODUCTION

Trial courts in this state necessarily have the broad authority and duty “to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.” MCL 768.28. This inherent authority and discretion extends to countless issues on a daily basis, how witnesses are questioned in their courtroom. The Michigan Rules of Evidence dictate the trial court “**should** exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to (1) make those procedures effective for determining the truth.” MRE 611(a)(1) (emphasis added). As both the statute and the rule of evidence plainly explain, the purpose of the broad authority to control the courtroom and monitor the questioning of witnesses is to aid the trial court’s duty—the effective ascertainment of the truth.

Courts across the country and in the Michigan Court of Appeals have agreed that this inherent authority includes allowing a witness to testify while accompanied by a support animal. The trial court in this case followed suit. But the Court of Appeals majority vacated defendant’s conviction and imposed a bright-line rule: that absent a specific statutory requirement, a trial court may not permit a support dog to assist a so-called “able-bodied adult.” The lower court simply foreclosed the trial court’s authority on this issue without any consideration for the countless circumstances that could arise before a trial court, including severely psychologically, emotionally, and physically traumatized adult “fully abled” adults. In fact, with the opinion as written, the lower court has foreclosed trial courts from even hearing litigation on the issue: if there isn’t a single scenario where a “fully abled” adult would be allowed a support dog while testifying, the trial court has been arbitrarily divested of its duty. Rather than adopting a

balancing test or standard like other states in foreign jurisdictions, the lower court imposed a complete and arbitrary bar.

This case of first impression presents this Court with the opportunity to allow trial courts to fulfill their duty as the Legislature intended. MCL 768.29. If a party requests a courtroom support dog for an adult witness, the trial court should be allowed to exercise its discretion in allowing its use if it will aid in “the expeditious and effective ascertainment of the truth.” This ruling should fairly apply across the spectrum of witnesses, both for the prosecution and defense. This Court should grant leave to appeal or, in the alternative, peremptorily reverse the Court of Appeals’ judgment and reinstate Shorter’s convictions.

STATEMENT OF FACTS AND PROCEEDINGS

Trial Testimony

Over the weekend of April 29 to May 1, 2016, Ariana Rickman traveled with three friends, including Defendant Dakota Shorter, from the Silver Dollar Ranch in Wayland, Michigan to a rodeo arena in Celina, Ohio. (Vol II, 30-31). The group all knew one another from riding bulls at the Silver Dollar Ranch; Defendant himself worked as a bullfighter at the ranch. (Vol II, 20-31). Ariana had met Defendant at the ranch in January of that year and the two were friends, but were never in a relationship or intimate. (Vol II, 31). When the group of friends traveled to Ohio for the rodeo, the initial plan was for the group to travel home Sunday morning. (Vol II, 32). However, the weather on Saturday was chilly and rainy and two of the tents they brought flooded. (Vol II, 32). Defendant offered to drive the group home Saturday night instead. (Vol II, 33). The new plan was for Defendant to drive the group home, Defendant would stay with Ariana, and she would take him to his birthday party in Wayland on Sunday. (Vol II, 33).

The group left Celina late on Saturday and Defendant dropped the two other friends off at their respective homes, as planned. (Vol II, 34). Defendant and Ariana reached her home, a trailer in Williamston, Michigan at approximately 4:30am. (Vol II, 34). Once Ariana and Defendant arrived at her home, she realized she left her air mattress in her car, which was across the street in an empty lot. (Vol II, 34). She initially told Defendant to go get it, but he objected because it was cold, raining, and 4:30 in the morning. (Vol II, 35, 50). She eventually conceded and told Defendant he could sleep with her in her queen-sized bed, which was large enough for them to sleep next to each other and not touch. (Vol II, 35). She told him that, “as both adults, [they] could sleep in [her] bed without being intimate.” (Vol II, 35) “[She] made that very clear

to him.” (Vol II, 35). Defendant agreed to these conditions and the two changed into pajamas in separate rooms. (Vol II, 35-36). Ariana wore leggings, a tank top and a bra. (Vol II, 36). Ariana fell asleep at approximately 5:30am laying on her right side with Defendant to the left of her; the two of them were not touching. (Vol II, 36).

Ariana awoke in the morning to the sounds of her roommate leaving for work at approximately 6:30am. (Vol II, 37). She was on her back with Defendant to the left of her. (Vol II, 37). Defendant had unfastened her bra and his right hand was underneath her shirt and bra, on her bare breast. (Vol II, 37). He had pulled down the front of her leggings and his left hand was in her pants and penetrating her vagina with his fingers. (Vol II, 37). She was “terrified” and immediately jumped up and lied to Defendant, saying she needed to go to the bathroom. (Vol II, 38). She did not go to the bathroom, but instead went to the end of the hallway to where her roommate’s boyfriend, Tyler Joseph, was staying. (Vol II, 38).

Tyler described Ariana as hysterical, crying, and shaking. (Vol II, 10, 38). She was so upset he had trouble understanding her, but heard “cold, dead hands” and “he’s in the room.” (Vol II, 11). Tyler’s phone was dead so he walked her across the street to the trailer of the park manager, Joshua Kaimon. (Vol II, 39). Joshua also found Ariana to be “absolutely hysterical, to the point [he] couldn’t understand her.” (Vol II, 20). Because of her hysteria, he initially thought she discovered a dead body in her bed. (Vol II, 20). Joshua called 911 and walked over to Ariana’s trailer. (Vol II, 21). He made contact with Defendant and tried to bring him to Ariana to show her Defendant was alive. (Vol II, 22). When she saw Defendant walking over, Ariana began to panic and desperately tried to get inside Joshua’s trailer. (Vol II, 22). Joshua realized what had happened, returned to his trailer and let Arianna in, locking the door for her. (Vol II, 23). She stayed there until police arrived. (Vol II, 41). Joshua stayed with Defendant outside

the trailer until the police arrived. (Vol II, 23). 'During that time, Joshua asked Defendant if he had done something he should not have and Defendant replied, "Yea, I did." (Vol II, 24).

Officers Pelong and Reynolds from the Williamston Police Department responded to the scene. (Vol II, 104-105). Officer Pelong interviewed Ariana and found her to be visibly upset – shaking and breathing in a manner where she appeared to be almost hyperventilating. (Vol II, 105). Ariana told Pelong that she woke up to Defendant's fingers inside of her vagina and another hand on her bare breast. (Vol II, 106). She also said she immediately got up, claimed she needed to use the bathroom, and instead went to Tyler Joseph to tell him about what happened. (Vol II, 106).

Officer Reynolds interviewed Defendant. (Vol II, 111). Defendant admitted to sleeping in Ariana's bed, but initially said nothing else happened. (Vol II, 112). He later said that Ariana had fallen asleep and he attempted to kiss her and he touched her butt. (Vol II, 112). He furthermore admitted to placing his hand under her shirt and touching her belly and back area. (Vol II, 112). Officer Reynolds then invited Defendant to sit in his police cruiser because it was cold outside. (Vol II, 113). Reynolds advised Defendant of his *Miranda* rights and Defendant agreed to waive them and continue speaking. (Vol II, 113). Defendant went on to say he placed his hand on Ariana's upper thigh while she was sleeping and that while the two of them were cuddling, he had an erection. (Vol II, 114). Reynolds said Defendant was clearly very tired and seemed frustrated with the situation. (Vol II, 114).

After giving a statement to the police, Ariana went to Sparrow Hospital for a sexual assault examination conducted by Matt Kasper, an expert in the area of sexual assault nurse examination and forensic nurse examination. (Vol II, 41, 65). During his examination, Kasper noted Ariana was quiet, would not make direct eye contact, and was initially hesitant to speak

about her situation. (Vol II, 70). She then described for Kasper the assault: “she awoke at approximately 6:40am to find an individual with his hand on her breast and in her genital area penetrating her with his fingers at that time.” (Vol II, 70). She was emotionally distraught and tearful throughout. (Vol II, 71). Kasper took swabs from her cheek, several swabs from her vaginal area and breasts. (Vol II, 42, 71). Kasper did not find any injury to Ariana’s vaginal area; however, Kasper opined that would not be inconsistent with her history of the event because, with digital penetration, “it’s very plausible for there not to be injury related to that type of insertion because one object is much smaller than the other.” (Vol II, 72).

Erika Everhart, an expert in forensic biology and forensic DNA, analyzed the swabs taken by Nurse Examiner Kasper. She testified that the vaginal and cervical swabs contained male DNA but the amount was insufficient for DNA analysis. (Vol II, 91). The swab from Ariana’s right breast indicated the presence of male DNA and was tested further.¹ (Vol II, 91-92). She found “the analysis [gave] very strong support that Dakota Shorter [was] not a contributor to the DNA profile developed from the right breast swabs.” (Vol II, 93). Specifically, it was 20 million more times likely that the male DNA was not Defendant. (Vol II, 99). Everhart explained that the results of the DNA testing could not actually confirm or deny whether Defendant inserted his fingers into Ariana’s vagina or whether he touched her right breast because it is possible to touch an object and leave no DNA behind at all. (Vol II, 85, 94-94). Furthermore, there is a possibility of transfer DNA – where an individual’s DNA could be left on an object the individual never actually touched. (Vol II, 85). For example, if one person in a household did all the laundry for that household, that person’s DNA could be found on other household members because it transferred from their clothing. (Vol II, 86).

¹ The swab from the left breast also came back with male DNA; however, because the right breast had more male DNA, Everhart only tested the swab from the right breast. (Vol II, 99-100).

Defendant also testified in his own defense at trial. He corroborated Ariana's testimony about how they knew one another and how the group got home from Ohio the night of the incident. (Vol II, 124-125). He also confirmed that when they got to Ariana's residence, he changed in the bathroom and she got dressed in her room. (Vol II, 130). He agreed that Ariana went to bed fully dressed in pants, a shirt, and a bra. (Vol II, 139). However, he denied she ever told him there would be no sexual contact between the two of them. (Vol II, 130). Defendant testified that the two of them went to bed at 5:30am and when he fell asleep he was on his right side facing the wall away from Ariana. (Vol II, 131-132). He said that when he awoke from her roommate's truck, Ariana had "wrapped herself" around him, with her arm across his chest, her leg across his waist area, and her head on his chest. (Vol II, 132). He said that he attempted to wake her and move her, but when he tried she "snuggled right back up to [him] and wouldn't move." (Vol II, 133). Defendant claimed he had an erection from where Ariana's leg was lying across his waist, but that he never put his hands on her in any sexual manner. (Vol II, 133). At one point, he kissed her on the forehead. (Vol II, 134). He said that when he awoke, she was out of the room so he went to use the bathroom. (Vol II, 134).

Support Animal

During voir dire, the prosecutor began to ask the potential jurors about the possibility of a support animal in the courtroom while the victim testified. (Vol I, 44). The prosecutor reiterated it was important for all the jurors not to draw any conclusions from the dog being in the courtroom. (Vol I, 45). In fact, she requested all the jurors confirm they could ignore the dog's presence entirely. (Vol I, 45). Every juror affirmed they would do so. (Vol I, 45).

After jury selection but before the trial began, the trial court raised the issue of the support dog and asked the prosecutor to make a record of the necessity for such an animal. (Vol

II, 6). The trial court cited to *People v Johnson*, 315 Mich App 163 (2016), stating that it was within the trial court's authority to control the proceedings in the courtroom and that it was best practice that there be some indication of the necessity for the support animal. (Vol II, 7). The prosecutor stated,

Judge, I think my response to that is it will limit her emotional outburst when she's testifying. This is a victim who has been teary eyed multiple times when I've spoke to her, without even getting into, you know, the facts of that occurred to her and the actual testimony that she will be giving. We did a preparation meeting at my office last week where Preston, the dog, was present. She was less emotional with him in the room. She indicated she felt more comfortable and that this is something she wants. I think that it - - it would be a benefit to both sides to have her control her emotions through the use of the support dog. (Vol II, 7).

The trial court allowed the support animal, finding,

That's sufficient for this Court in that it will limit her emotional display on the stand. I agree that could even be beneficial to the Defendant. And that there's already been, sort of, a trial run with the dog and it's been a successful one at that. So, I think that's a sufficient basis for her to use the support animal while testifying. (Vol II, 7-8).

The trial court also gave the jury two separate instructions regarding the support animal, one immediately before Ariana testified with the assistance of the support dog, and one during the final jury instructions given before deliberations. (Vol II, 28; Vol III, 53). Each instruction was the same:

The use of a support animal is authorized by law. You should disregard the animal's presence and decide the case based solely on the evidence presented. You should not consider the witness's testimony to be any more or less credible because of the animal's presence. You must not allow the use of a support animal to influence your decision in any way. (Vol II, 28; Vol III, 53).

Jury conviction

Following the jury trial, Defendant was found guilty of Criminal Sexual Conduct in the Third Degree (CSC III) and Criminal Sexual Conduct in the Fourth Degree (CSC IV). (Vol III,

64). He was sentenced to 30 to 180 months on the CSC III conviction and 12 to 24 months on the CSC IV conviction. (Sentencing, 04/19/2017, 12).

A split Michigan Court of Appeals panel determined the trial court erred by allowing the adult victim to testify with the assistance of a support animal.

The Michigan Court of Appeals majority concluded a fully abled adult witness may not be accompanied by a support animal or support person while testifying. *Shorter*, ___ Mich App ___, slip op at 7. The panel first found it was not controlled by the ruling in *People v Johnson*, 315 Mich App 163 (2016), where the Court of Appeals had found the trial court had the authority to allow the use of a support dog and the procedure was not “inherently prejudicial.” *Id.* at ___; slip op at 4, quoting *Johnson*, 315 Mich App at 175-176. The majority found *Johnson*’s holding was tied to the specific facts of that case; that is, the use of a support animal only during a child’s testimony. *Id.* at ___; slip op at 5.

The majority also focused on the fact that allowing support animals for “able-bodied” adults would be unprecedented in Michigan, and MCL 600.2163a, the statute allowing for support persons for children or developmentally disabled adults, limited the trial court’s inherent authority to only the circumstances listed in the statute (when the witness was “a person under 16 years of age, or “a person 16 years of age or older with a developmental disability,” or a “vulnerable adult.”). *Id.* Addressing the trial court’s inherent authority over its courtroom, the majority declined to extend the authority to allowing “able-bodied adult witness[es] to have support animals” because the proposition would be novel; no other court, including the Court of Appeals had previously allowed or considered the issue. *Shorter*. at ___; slip op at 6.

Finally, the majority concluded the error was not harmless because it undermined the reliability of the verdict. *Id.* The majority found the case came down to an evaluation of credibility between the victim and the defendant. *Id.* at ___; slip op at 7. While “[a] juror can

readily accept a child might need support simply to be in a courtroom to answer questions,” the same does not apply to a “fully abled adult.” Rather, “[a] juror is far more likely to conclude that the reason for the support animal or support person is because the complainant was traumatized by the actions for which the defendant is charged.” *Id.*

The Court of Appeals dissent would have concluded the trial court erred, but the error was harmless.

Judge O’Brien, in dissent, would have affirmed the defendant’s convictions. She would have concluded the trial court erred, but because the error did not affect the reliability of the jury verdict, the error was harmless. *Id.* at ____; (O’BRIEN, J., dissenting), slip op at 1. Disagreeing with the majority’s recitation of the facts, Judge O’Brien believed the effect of the support dog on the victim’s and defendant’s credibility was harmless in light of the untainted evidence that bolstered the victim’s ability and damaged defendant’s. *Id.* That untainted evidence included the manager of the victim’s trailer park, to whom the defendant made admissions he did “something [he] shouldn’t have,” and Officer Reynolds, to whom the defendant admitted he attempted to kiss the victim while she was sleeping, touched her butt, placed her hand on her upper thigh, and placed his hand underneath the victim’s shirt and touched her belly and back area. *Id.* at ____; (O’BRIEN, J., dissenting), slip op at 2. Furthermore, in contrast to the defendant’s changing story, the victim’s account of the assault was consistent when she testified, when she spoke to the responding police officer, and when she spoke to the sexual assault nurse examiner: she woke up to the defendant’s fingers inside her vagina and another hand on her bare breast. *Id.* All of that evidence was untainted by the trial court’s error of allowing a support dog to accompany the victim. *Id.*

Judge O’Brien also found the majority’s harmless-error analysis “unduly speculative.” *Id.* at ____; (O’BRIEN, J., dissenting), slip op at 3. The support dog was rarely mentioned during

the trial, except during the prosecutor's voir dire, when the jurors were asked not to draw any conclusions from the dog's presence and all jurors confirmed they could ignore the dog, and when the trial court gave two instructions to the jury advising the jurors to ignore the support animal and not draw any conclusions from its presence. *Id.* Thus, the majority's conclusion assumed that "(1) the juror[s] disregarded the trial court's instructions, despite the general rule that jurors are presumed to follow those instructions, and (2) the juror lied when he or she confirmed during voir dire that they could ignore the dog's presence." *Id.* at ___; (O'BRIEN, J., dissenting), slip op at 3 (citation omitted). Thus, the "unduly speculative" conclusion from the majority did not warrant a finding that the error in the case was not harmless. *Id.*

STANDARD OF REVIEW

Whether the trial court has the statutory authority to permit a witness the assistance of a support dog is a question of law that this Court reviews de novo. *People v Martin*, 271 Mich App 280, 286-87 (2006). Because the trial is vested with such discretion by the Legislature in MCL 768.29, the People advocate the trial court's discretionary decision to allow the witness the use of the support dog be reviewed for an abuse of discretion. *People v Banks*, 249 Mich App 247, 256 (2002). An abuse of discretion occurs when the circuit court's decision falls outside the range of principled outcomes. *People v Jones*, 497 Mich 155, 161 (2014).

ARGUMENT

I. The trial court has discretion to permit a witness the assistance of a support dog to effectuate its statutory duty to control its courtroom for the purpose of the effective ascertainment of the truth.

This case of first impression presents the question whether the trial court's inherent authority to control its courtroom "with a view to the expeditious and effective ascertainment of the truth" allows the trial court the discretion to permit an adult witness to testify with the assistance of a support dog. The trial court is in the best position to make the judgment call as to what procedure will lead to "the expeditious and effective ascertainment of the truth;" that is why the Legislature vested them with it. MCL 768.29. The use of a support dog to assist a testifying witness has been shown to assist with that goal and falls well within the trial court's control both of its own courtroom and to employ procedures that assist a witness when testifying, especially where the fact-finder is aided in its search for the truth.

The Court of Appeals below stripped trial courts of all authority on this issue by imposing a bright-line rule: that absent a specific statutory requirement, a trial court may not permit a support dog to assist a so-called "able-bodied adult." The lower court simply foreclosed the trial court's authority on this issue without any consideration for the countless circumstances that could arise before a trial court, including severely psychologically, emotionally, and physically traumatized adult "fully abled" adults. In fact, with the opinion as written, the lower court has foreclosed trial courts from even hearing litigation on the issue: if there isn't a single scenario where a "fully abled" adult would be allowed a support dog while testifying, the trial court has been arbitrarily divested of its duty. Rather than adopting a balancing test or standard like other states in foreign jurisdictions, the lower court imposed an arbitrary bar. In order to allow trial courts to fulfill their duty as the Legislature intended, this Court should grant leave to

appeal or, in the alternative, peremptorily reverse the Court of Appeals' judgment and reinstate Shorter's convictions.

A. Trial courts are granted the broad authority to run their courtrooms in a manner designed to assist with the truth.

Trial courts are vested with the authority and "the duty" "to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." MCL 768.29. By necessity, this inherent authority to control the proceedings is comprehensive. Trial courts are faced with myriad decisions on various issues—some novel, some run-of-the-mill—on a daily basis, so the law of this state has broadly construed this duty. For example, this duty includes the authority to shackle a defendant during trial, *People v Dunn*, 446 Mich 409, 425-427 (1994), shackle a witness while he testified, *Banks*, 249 Mich App at 257, impose time limitations on examination of witness, *People v Thompson*, 193 Mich App 58, 62 (1992), and even to bind and gag an "unruly, disruptive, rude, and obstreperous" defendant when repeated warnings to the defendant are ineffective, *People Conley*, 270 Mich App 301, 309 (2006).

This inherent authority and discretion extends specifically to the questioning of witnesses. The Michigan Rules of Evidence dictate the trial court "**should** exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to (1) make those procedures effective for determining the truth." MRE 611(a)(1) (emphasis added). Included in that inherent authority is the ability to prevent a witness from seeing the defendant through the use of a witness screen, *People v Rose*, 289 Mich App 499, 509 (2010), the use of "anatomically correct" dolls to help a witness demonstrate a sexual offense, *People v Garvie*,

148 Mich App 444, 450–451 (1986), or to use two-way interactive videoconferencing, *People v Burton*, 219 Mich App 278, 287 (1996).

As both the statute and the rule of evidence plainly explain, the purpose of the broad authority to control the courtroom and monitor the questioning of witnesses is to aid the trial court’s duty—the effective ascertainment of the truth. As discussed below, the use of courtroom support dogs can assist with that exact goal. But the Court of Appeals below has stripped trial courts of this tool by imposing a bright-line rule: that absent a specific statutory requirement, a trial court may not permit a support dog to assist a so-called “able-bodied adult.” The use of support dogs falls well within the trial court’s control both of its own courtroom and to employ procedures that assist a witness when testifying, especially where the fact-finder is aided in its search for the truth.

B. The Legislature may create specific limitations on the trial court’s inherent authority; however, those limitations restrict the trial court only as far as their language requires.

Although the Legislature can create specific limitations on the trial court’s inherent authority, those do not entirely strip the trial court of its authority. The trial court’s authority vested by statute still remains in all other ways. This is especially true where a statute creates a limitation in a specific circumstance and is silent as to others. MCL 600.2163a does not directly apply in this case. But discussion of it is important to determine the scope of a trial court’s authority in this area. MCL 600.2163a creates a “must” provision—it strips the trial court of its discretion to deny a witness the assistance of a support person when certain classes of victims seek the assistance. The statute is silent for situations when other individuals need the assistance of a support person. This silence is not a limitation, however. The language does not limit a trial court discretion to permit a support person (or dog, for that matter); MCL 768.29 fills the gap.

MCL 768.29 provides broad trial court authority and discretion it must apply in a myriad of ways in its courtroom daily. From the basic elements of trial like scheduling and time limits on witness questioning, to restricting and removing a defendant from a courtroom if necessary.

The issue is complicated by the recent enactment of 2018 PA 282, which is effective September 27, 2018 (Appendix B). While not law at the time the lower court decided this case, the amended statute adds “courtroom support dog” parallel to support persons in MCL 600.2163a, which, as discussed above, generally provides for the assistance of support persons for certain classes of witnesses. As amended, the statute provides the trial court “**must** permit a witness who is called upon to testify to have a support person with, accompany, or be in close proximity to the witness during his or her testimony. The court **must** also permit a witness who is called upon to testify to have a courtroom support dog and handler sit with, or be in close proximity to, the witness during his or her testimony.” 2018 PA 282, § 4. (emphasis added). “Witness” is defined as “an alleged victim” who is either under the age of 16, 16 years of age or older with a developmental disability, or a vulnerable adult, as defined in MCL 750.145m. 2018 PA 282, § (1)(f). Just like the un-amended version that refers only to support persons, the amended version contains no limitation a trial court’s authority to permit a support dog for non-specified individuals. MCL 768.29 provides for the trial court to, consistent with its inherent authority, permit a support animal where it supports the trial court’s goal to effectuate ascertainment of the truth.

The Legislative Analysis of this bill confirms the plain intent of the support dog statute, which was amended to *include* courtroom support dogs, not to prohibit courtroom support dogs in all circumstances with a few exceptions. In its discussion as to why the amended bill including a courtroom support dog was necessary, the House Fiscal Agency noted the bill was

“narrowly crafted,” “[h]owever, the bill should not restrict the use of support dogs by courts and prosecutor’s offices in other types of cases – for instance, adult witnesses who were traumatized by an assault.” House Legislative Analysis, HB 5645. (Appendix C). The intention was not to strip the trial court of its inherent authority but to limit the broad discretion in narrow circumstances and leave it intact in the rest.

C. The Michigan Court of Appeals has held the trial court has the inherent authority to control its courtroom and the proceedings before it to allow a witness to testify while accompanied by a support animal.

In 2016, the Michigan Court of Appeals decided *People v Johnson*, 315 Mich App 163, 173, 176-177 (2016), app den 500 Mich 951 (2017), holding that trial courts have the inherent authority to allow the use of a support dog by a child witness. The Court found that a support dog was not mentioned in MCL 600.2163a(4), which provides that, “A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony.” Because a dog, of course, is not a “person,” the panel found this provision was inapplicable.

Looking to the trial court’s inherent authority to control their courtroom, the *Johnson* Court determined that the discretion to allow a witness to use a support dog was well within that “broad” discretion. *Id.* at 177-178. And, as described more fully below, the *Johnson* Court also found that “[t]he use of a support animal in appropriate circumstances is therefore not inherently prejudicial.” *Id.* at 182.

The decision below dispensed with *Johnson*, explaining away much of *Johnson*’s reasoning, even though it was “cognizant of the fact that the language used in *Johnson* sweeps with a broad brush, and that the opinion contains language which, if one does not consider the facts of the case, could seem to be dispositive here.” *Shorter*, ___ Mich App ___; slip op at 3.

The factual difference between the cases is that *Johnson* involved a child witness, and this case involves an adult witness. *Id.*

The decision below dispensed with *Johnson* not because the facts of the case necessitate narrowing its holding, but because *Shorter* panel simply disagreed with *Johnson*. This comes through in various facets of the *Shorter* opinion. First, *Johnson*'s extensive reasoning contains no language limiting its holding to children, so *Shorter*'s use of "the facts of the case" as a limitation is unfounded. Second, the decision below is apparently concerned about allowing trial courts to exercise their discretion to permit support dogs for adults because it would be "unprecedented." But the use of support dogs in the courtroom is a relatively recent phenomenon, consistently evolving and expanding; someone has to be the first. Third, and perhaps most analytically egregious, *Shorter* discusses at length "the reliance placed on MCL 600.2163a in *Johnson*." *Shorter*, ___ Mich App ___; slip op at 4. As discussed above, *Johnson* disclaimed any reliance that statute, finding it inapplicable. *Shorter* set up a straw man and knocked it right over.

These faults in *Shorter*'s legal reasoning cast substantial doubt on the bright-line it draws—a court has the inherent authority to permit children witnesses to use support dogs, but lacks that authority once that same witness reaches the age of maturity.

D. Trial courts, not appellate courts, are in the best position to determine whether allowing a support animal will assist in the ascertainment of the truth, its legislative duty.

The trial court is in the best position to make the judgment call as to what procedure will lead to "the expeditious and effective ascertainment of the truth;" that is why the Legislature vested them with it. MCL 768.29. The trial courts are on the front lines of these cases. As the Washington Supreme Court determined when faced with the issue at hand, trial courts "have a

unique perspective on the actual witness that an appellate court reviewing a cold record lacks” and are “in the best position” to analyze the need for a “special dispensation” *State v Dye*, 178 Wash 2d 541, 553 (2013). Other state appellate courts have similarly shown restraint and deference to the trial courts. See, e.g., *People v Tohom*, 109 App Div 3d 253 (NY 2013) (New York Supreme Court observed that trial court judges are “empowered to control the proceedings in whatever manner may be consistent with the demands of decorum and due process”); *State v Devon D*, 321 Conn 656 (2016) (holding the trial judge has discretion and should weigh the need for the animal versus any potential prejudice).

The lower court simply foreclosed the trial court’s authority on this issue without any consideration for the countless circumstances that could arise before a trial court, including severely psychologically, emotionally, and physically traumatized adult “fully abled” adults. In fact, with the opinion as written, the lower court has foreclosed trial courts from even hearing litigation on the issue: if there isn’t a single scenario where a “fully abled” adult would be allowed a support dog while testifying, the trial court has been arbitrarily divested of its duty. Rather than adopting a balancing test or standard like other states in foreign jurisdictions, the lower court imposed an arbitrary bar. See, e.g. *People v Chenault*, 227 Cal App 4th 1503, 1517 (2014) (holding the trial court should consider the particular facts of the case and the circumstances of each individual witness and determine whether the presence of a . . . dog would assist or enable that witness to testify without undue harassment or embarrassment and provide complete and truthful testimony); *Devon D*, 321 Conn at 683 (agreeing the appropriate standard is whether the trial court has balanced the extent that the special accommodation will aid the reliability of the witness’ testimony against any possible prejudice to the defendant’s right to a fair trial); *Dye*, 178 Wash 2d at 553 (rejecting the requirement that a trial court was required to

show a “substantial need” or “compelling necessity;” rather, the appellate court “will not overrule the trial court’s exercise of discretion unless the record fails to reveal the party’s reasons for needing a support animal or if the record indicates that the trial court failed to consider those reasons”)

Rather than a ban completely foreclosing the trial court’s authority to exercise its discretion, the People advocate this Court allow the trial court to fulfill its duty as the Legislature intended. MCL 768.29. If a party requests a courtroom support dog for an adult witness, the trial court should be allowed to exercise its discretion in allowing its use if it will aid in “the expeditious and effective ascertainment of the truth.” This ruling should fairly apply across the spectrum of witnesses, both for the prosecution and defense. If the ultimate goal is “expeditious and effective ascertainment of the truth,” the trial court should employ the procedure fairly based on the facts and witnesses presented before it.

II. Support animals are not unduly prejudicial and do not automatically implicate a defendant’s due process rights.

Courts across this country have acknowledged and accepted the profound positive effect a courtroom support dog can have for a testifying witness. See *e.g. State v Jacobs*, 2015-Ohio-4353(Ohio App, 2015) (the record showed the dog’s presence would make the witness feel “more comfortable”); *Tohom*, 109 App Div 3d at 267 (the record showed the dog’s presence would alleviate the witness’ anxiety and help her to more easily discuss the conduct at issue); *Dye* 178 Wash 2d at 554 (the dog’s presence would serve to facilitate the testimony of a witness who was significantly anxious about testifying and who had developmental disabilities).

The People recognize a trial court’s ability to control its courtroom is not limitless; it is not entitled to do so at the expense of the defendant’s constitutional right to due process. *People v Arquette*, 202 Mich App 227, 232 (1993). The procedure of allowing a courtroom support dog

to accompany a witness while testifying is not inherently prejudicial against the defendant. “Whenever a courtroom arrangement is challenged as inherently prejudicial the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether ‘an unacceptable risk is presented of impermissible factors coming into play.’” *Holbrook v Flynn*, 475 US 560, 570 (1986). “[I]f the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.” *Id.* at 572. The analysis in *Johnson, supra* provides us with guidance on this issue. Looking at whether “the practice gives rise primarily to prejudicial inferences or whether it is possible for the jury to make a wider range of inferences from the use of the procedure,”² the *Johnson* court found “a reasonable jury could conclude that the support animal is being used to calm the witness’s general anxiety about testifying or simply being in an unfamiliar setting.” *Johnson*, 315 Mich App at 180. The use of a support dog may allow for a jury to make inferences related to the witness and are wholly unrelated to defendant. This procedure is vastly unlike “the inherently prejudicial practices of clothing a defendant in his prison outfit or the shackling of a defendant.” *Id.*, citing *Rose*, 289 Mich App at 520. In short, the support dog is there to assist the *witness*, and does not reflect upon the guilt or innocence of a defendant. *Id.*

Courts across the country agree. In addition to the presence of a support dog not inherently prejudicing a defendant, the People are unable to find a single case where a court has found to a support dog to have *actually* prejudiced a defendant, save the one before this Court. Support dogs are trained to be unseen: each of these courts also noted the support dogs were “very unobtrusive,” “almost unnoticeable,” and “very well-behaved.” *Dye*, 178 Wash 2d at 554, *People v Spence*, 212 Cal App 4th 478, 513, 517 (2012). “It is beyond dispute that a dog does not have the ability to discern truth from falsehood and, thus, cannot communicate such a

² *Rose*, 289 Mich App at 518 (2010).

distinction to a jury. Nor can it be concluded that any actual prejudice resulted from the concededly unobtrusive presence of the dog in the courtroom.” *Tohom*, 109 App Div 3d at 268.

In this case, the lower court not only divested the trial court of its authority, but went a step further in finding actual prejudice where none existed. After repeatedly expressing concern about being the first court to allow an adult witness to testify with a support dog, the lower court certainly had no problem being the first and only court to find actual prejudice by the presence of one. The court stacked presumption upon presumption until it landed on the following: “A juror can readily accept that a child might need support simply to be in a courtroom to answer questions. With a full abled adult, a juror is far more likely to conclude that the reason for the support animal or support person is because the complainant was traumatized by the actions for which the defendant is charged.” *Shorter*, ___ Mich App ___; slip op at 7. This baseless assertion not only falls against every other court in the country, it is completely devoid of *any* factual support in the record; it is speculative at best. There is not a shred of evidence that the support dog was anything other than silent, unobtrusive, and virtually unseen by the jury. This finding was clearly erroneous.

III. If the trial court abused its discretion in allowing a support dog, the error was harmless because the jurors affirmed they could ignore the dog’s presence, the trial court instructed them that the presence of a dog has no factual or legal significance, and the facts strongly supported Shorter’s guilt.

The lower court in this case presumed prejudice, contrary to the weight of authority and fact, presumed the jury did not follow instructions, and presumed the jurors were untruthful when they told the prosecutor they could and would ignore the presence of a support dog. Each presumption is unwarranted, but necessary to their holding.

If the trial court erred, reversal was not required unless the defendant established it more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495

(1999). “An error is deemed to have been ‘outcome determinative’ if it undermined the validity of the verdict.” *People v Elston*, 462 Mich 751, 766 (2000). As discussed above, the lower court came upon the conclusion that “a juror is far more likely to conclude that the reason for the support animal or support person is because the complainant was traumatized by the actions for which the defendant is charged.” *Shorter*, ___ Mich App ___; slip op at 7. The lower court expects this presumption to be true apparently just because they announced it to be. It has no support from foreign jurisdictions or the record. Rather, the above-cited references to the support dog directly contradict this presumption.

Not only does persuasive authority suggest that a support animal is not prejudicial, the very jurors that decided Mr. Shorter’s case specifically affirmed they would disregard the animal. During voir dire, the prosecutor began to ask the potential jurors about the possibility of a support animal in the courtroom while the victim testified. (Vol I, 44). The prosecutor reiterated it was important for all the jurors not to draw any conclusions from the dog being in the courtroom. (Vol I, 45). In fact, she requested all the jurors confirm they could ignore the dog’s presence entirely. (Vol I, 45). Every juror affirmed they would do so. (Vol I, 45). The lower court presumed the jurors were untruthful when they made such a promise.

The trial court also gave the jury two separate instructions regarding the support animal, one immediately before Ariana testified with the assistance of the support dog, and one during the final jury instructions given before deliberations. (Vol II, 28; Vol III, 53). Each instruction was the same:

The use of a support animal is authorized by law. You should disregard the animal’s presence and decide the case based solely on the evidence presented. You should not consider the witness’s testimony to be any more or less credible because of the animal’s presence. You must not allow the use of a support animal to influence your decision in any way. (Vol II, 28; Vol III, 53).

Although jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486 (1998), the lower court *again* took the opposite presumption, that the jurors in this case must have completely disregarded them. As the dissent in the lower court stated, “the majority’s conclusion is ‘unduly speculative’ and does not warrant finding that the error in this case was not harmless.” *Shorter*, ___ Mich App ___ at ___; (O’BRIEN, J., dissenting), slip op at 1, citing *Graves*, 458 Mich at 485-486 (recognizing that an error is harmless if a conclusion to the contrary is “unduly speculative”).

Furthermore, when determining whether an error was harmless, the focus is on the nature of the error “in light of the weight and strength of the untainted evidence.” *People v Mateo*, 453 Mich 203, 215 (1996). In addition to Ariana’s testimony at trial, two lay witnesses corroborated her demeanor, fright, and hysteria. Her roommate’s boyfriend, Tyler Joseph, had contact with her immediately after the assault. Tyler described Ariana as hysterical, crying, and shaking. (Vol II, 10, 38). She was so upset he had trouble understanding her, but heard “cold, dead hands” and “he’s in the room.” (Vol II, 11). Tyler’s phone was dead so he walked her across the street to the trailer of the park manager, Joshua Kaimon. (Vol II, 39). Joshua also found Ariana to be “absolutely hysterical to the point [he] couldn’t understand her.” (Vol II, 20). Because of her hysteria, he initially thought she discovered a dead body in her bed. (Vol II, 20). Joshua called 911 and walked over to Ariana’s trailer. (Vol II, 21). He made contact with Defendant and tried to bring him to Ariana to show her Defendant was alive. (Vol II, 22). When she saw him walking over, Ariana began to panic and desperately tried to get inside Joshua’s trailer. (Vol II, 22). Joshua realized what had happened, returned to his trailer and let Arianna in, locking the door for her. (Vol II, 23). She stayed there until police arrived. (Vol II, 41). Defendant then made an admission to Joshua: Joshua asked Defendant if he had done something he should not

have and Defendant replied, "Yea, I did." (Vol II, 24). This testimony was "untainted" by Ariana's use of a support dog.

Defendant also made admissions to Officer Reynolds the morning of the assault. Defendant admitted to sleeping in Ariana's bed, but initially said nothing else happened. (Vol II, 112). He later said that Ariana had fallen asleep and he attempted to kiss her and he touched her butt. (Vol II, 112). He furthermore admitted to placing his hand under her shirt and touching her belly and back area. (Vol II, 112). Officer Reynolds then invited Defendant to sit in his police cruiser because it was cold outside. (Vol II, 113). Reynolds advised Defendant of his *Miranda* rights and Defendant agreed to waive them and continue speaking. (Vol II, 113). Defendant went on to say he placed his hand on Ariana's upper thigh while she was sleeping and that while the two of them were cuddling, he had an erection. (Vol II, 114). These admissions alone provide evidence substantiating Defendant's conviction of CSC IV (MCL 750.520e(1)(b) for intentionally touching the victim's buttock while she was asleep and for a sexual purpose. This testimony was "untainted" by Ariana's use of a support dog.

As further noted by the dissent in the lower court, Ariana's story remain unchanged, unlike the defendant's. She testified she awoke in the morning to the sounds of her roommate leaving for work at approximately 6:30. (Vol II, 37). She was on her back with Defendant to the left of her. (Vol II, 37). Defendant had unfastened her bra and his right hand was underneath her shirt and bra, on her breast. (Vol II, 37). He had pulled down the front of her leggings and his left hand was in her pants and penetrating her vagina with his fingers. (Vol II, 37). She told the police officer she woke up to Defendant's fingers inside of her vagina and another hand on her bare breast. (Vol II, 106). She also told the sexual assault nurse examiner "she awoke at approximately 6:40am to find an individual with his hand on her breast and in her genital area

penetrating her with his fingers at that time.” (Vol II, 70). Her “unchanging story bolstered her credibility, while evidence of the defendant’s incriminating admissions and changing story damaged his credibility.” *Shorter*, ___ Mich App ___ at ___; (O’BRIEN, J., dissenting), slip op at 1. “In light of the weight and strength of the untainted evidence,”³ this alleged error was not “outcome determinative”- it did not undermine the validity of the verdict. *People v Elston*, 462 Mich 751, 766 (2000).

The only error the lower court found was the mere presence of a support dog to assist Ariana while testifying. In order to reach its holding, it disregarded the other witnesses, the admissions by the defendant, and the victim’s unchanged account of the assault on three different occasions. The lower court also then presumed prejudice, contrary to the weight of authority and fact, presumed the jury did not follow instructions, and presumed the jurors were untruthful when they told the prosecutor they could and would ignore the presence of a support dog. This finding was clearly erroneous.

³ *Mateo*, 453 Mich at 215.

CONCLUSION AND RELIEF REQUESTED

The trial court properly exercised its discretion to permit a witness the assistance of a support animal to effectuate its statutory duty to control its courtroom for the purpose of the effective ascertainment of the truth. Even if the trial court abused its discretion in allowing a support dog, the error was harmless because the jurors affirmed they could ignore the dog's presence, the trial court instructed them that the presence of a dog has no factual or legal significance, and the facts strongly supported Shorter's guilt.

The People respectfully request this Court peremptorily reverse the Court of Appeals' judgment or, in the alternative, grant leave to appeal.

Respectfully submitted,

/s/ Elizabeth L. Allen

Dated: 08/02/2018

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PROOF OF SERVICE

On August 2, 2018, I served a copy of People's Application for Leave to Appeal by first class mail addressed to:

Donald J. Baranski
Law Offices of Casey D. Conklin, PLC
4084 Okemos Road, Ste. B
Okemos, MI 48864

I declare that the statements above are true to the best of my knowledge, information, and belief.

/s/ Lisa Renee Davis

Lisa Renee Davis

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAKOTA LEE SHORTER,

Defendant-Appellant.

FOR PUBLICATION

June 7, 2018

9:05 a.m.

No. 338629

Ingham Circuit Court

LC No. 16-000519-FH

Before: SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ.

SHAPIRO, P.J.

Defendant appeals his jury conviction of third-degree criminal sexual conduct (CSC-III) (incapacitated complainant), MCL 750.520d(1)(c), and fourth-degree criminal sexual conduct (CSC-IV) (incapacitated complainant), MCL 750.520e(1)(b). The trial court sentenced defendant to 30 to 180 months' imprisonment for the CSC-III conviction and 12 to 24 months' imprisonment for the CSC-IV conviction. On appeal, defendant argues that the trial court erred by granting the prosecution's motion to allow the complaining witness to testify while accompanied by a support dog and its handler. We agree, and so reverse and remand for a new trial.

I. FACTS AND PROCEDURAL BACKGROUND

The incident giving rise to the charges occurred early in the morning of May 1, 2016, in complainant's home in a mobile home community. Complainant and defendant both testified at trial, and their testimony about the events of the day are generally consistent until the point in time when they prepared to go to sleep. Complainant and defendant, along with two other friends, traveled to a rodeo together in complainant's car. The group had planned to camp nearby that night after the rodeo, but it rained and they decided to drive home instead. Defendant drove the group home in complainant's car and dropped off the other two friends first. When they arrived at complainant's home, it was about 4:30 a.m., so she told defendant that he could sleep on an air mattress at her home that night and that she would drive him to his house when they woke up. Defendant and complainant had known each other for some time as friends. They had never spent the night together or had any sexual contact with each other, although they both agreed that they had been flirting during the day. After entering the complainant's home, they discovered that the air mattress had been left in the car and because it was raining, neither wanted to go back outside to get it. Complainant answered a phone call and sat on her bed when conversing. During that time, defendant lay down with his head on her upper leg, and

complainant did not object. From this point in the chronology, the complainant's and defendant's testimony differ significantly.

Complainant testified that she told defendant that he could sleep with her in her queen-sized bed but that she would not engage in any sexual contact. She testified that "[w]e agreed that we could—as both adults we could sleep in my bed without being intimate, and I made that very clear to him." She explained that they dressed in separate rooms, and that she was clothed in leggings and a t-shirt with a bra underneath. According to complainant, at about 6:30 a.m., she woke to the sound of her roommate leaving for work, and discovered that defendant was sexually assaulting her. She testified that "[w]hen I woke up to my roommate leaving for work, I was on my back and [defendant] was to the left of me and he had unfastened my bra and his left hand was in my pants." She explained that defendant had pulled down the front of her leggings, that he was penetrating her vagina with his fingers, and that his other hand was underneath her shirt and bra on her breast. Complainant stated she was "terrified," and immediately jumped up, told defendant she needed to go to the bathroom, and went to the end of the hallway to her roommate's room to seek help from Tyler Johnson, her roommate's boyfriend.

Defendant's testimony as to what occurred before they fell asleep differed from complainant's only in that he testified that she did not make any statements about not wanting to have any sexual contact. Defendant testified, however, that he did not expect that there would be any sexual activity and that they changed clothes in separate rooms. Defendant testified that he was awakened by the sounds of the roommate leaving, and that when he awoke; he found that complainant had wrapped herself around him, i.e. she had "cuddled up" to him. According to defendant, complainant's leg was across his waist and her head was on his chest. He stated that he attempted to roll her off him by pushing her hip and thigh, but that she "snuggled" back. He admitted that he kissed her on the forehead. Defendant testified that he then fell back asleep. He testified that there had been no sexual contact that the complainant's behavior after she awoke was a complete surprise, and that he did not understand it. On cross-examination, he agreed that he did not have the complainant's consent to do anything sexual, and repeated that he had not done so. He was also asked about statements he had made to the officer that the prosecution argued were inconsistent with his testimony. Defendant agreed that he told the officer that he touched complainant's butt and thigh, and explained that this occurred while he was attempting to move her off him. When asked whether he had admitted to the officer that he had touched complainant's belly and back under her shirt, defendant denied making such a statement. Defendant also testified that he could not offer a reason why the complainant would make up the charges against him.

Johnson, complainant's housemate's boyfriend, testified that when complainant entered his room that morning, she was so upset that he could barely understand her. Because Johnson's phone was dead, he and complainant walked to the park manager's home to call the police. The manager described complainant's emotional state as "absolutely hysterical to the point I couldn't understand her." He concluded that complainant was saying that there was a dead body in her bed and he informed the police of this in his 911 call. The manager testified that he then walked back to complainant's house just as defendant was coming out the door and he told defendant

that he should come with him because he had been reported as dead. Finally, he testified that when he and defendant reached his house, he asked defendant if he had done something wrong and defendant responded, "Yea, I did."¹ The police officers, who testified, agreed that the complainant was very upset when they arrived. One officer testified that "[s]he was shaking and her breathing was to the point where almost hyperventilating."

After giving her statement to the police, the complainant went to Sparrow Hospital for a sexual assault examination. The sexual assault nurse examiner found no injury to the complainant's vaginal area. A DNA test of the surface of her breast revealed male DNA, but upon testing, it was concluded that the DNA did not belong to defendant. Before the start of trial, the prosecutor and defense counsel informed the court of these results, and the parties agreed that it was not necessary to present a full chain of custody for the DNA.

It appears uncontested that the defense counsel was not informed prior to trial that the prosecution intended to have complainant testify while accompanied by a support dog and the animal's handler. It was first raised during voir dire when the prosecutor asked potential jurors about the possibility of a support animal in the courtroom while the complainant testified. On the following trial day, before opening statements, the prosecution raised the issue again. When the judge learned that in addition to the dog, a handler would have to be present next to the witness stand to hold the dog's leash, she expressed concern about whether there was evidence of a "necessity for that support animal." Defense counsel objected to the use of a support dog noting that there had to be "some basis for the need for that animal to be here. You know, I usually experience this in kid's cases or something of that nature, and we're dealing with an adult woman. I'm not sure if there's some special exception that gives rise to the need for this, but at this point I would ask that she testify solely on her own." The trial court citing *People v Johnson*, 315 Mich App 163; 889 NW2d 513 (2016), stated that "there should be some kind of a showing of a need that it would promote the expeditious and effective ascertainment of the truth." The prosecution responded:

Judge, I think my response to that is that it will limit her emotional outbursts when she's testifying. This is a victim who has been teary eyed multiple times when I've spoken to her, without even getting into, you know, the facts of what occurred to her and the actual testimony that she will be giving. We did a trial preparation meeting at my office last week where Preston, the dog, was present. She was less emotional with him in the room. She indicated she felt more comfortable and that is something that she wants. I think that it—it would

¹ Defendant testified on cross-examination that he was not certain whether the manager asked him this question. When asked if he responded, "Yeah, I did," to that question he stated, "I don't remember me saying that, but I can tell you I didn't do anything to even reason me saying that." He then agreed that he didn't remember whether he said it or not and the prosecutor pursued it further, asking "Okay, so it's possible you said that to him." Defendant responded, "Yes, it is possible, but no, it's not probable because I didn't do anything to cause me saying that."

be a benefit to both sides to have her control her emotions through the use of the support dog.

The trial court then granted the prosecution's request, concluding, "That's sufficient for this Court in that it will limit her emotional display on the stand. I agree that that could even be beneficial to the Defendant. And that there's already been, sort of, a trial run with the dog and it's been a successful one at that. So, I think that's a sufficient basis for her to use the support animal while testifying."

When instructing the jury at the outset of the complainant's testimony and, again, at the end of the trial, the court instructed the jury that you must "not allow the use of a support animal to influence your decision in any way," and that "you should not consider the witness's testimony to be any more or less credible because of the animal's presence." Closing arguments focused on the credibility of the complainant and defendant, and who the jury should believe. The jury returned, after several hours, and advised the court that they had reached a verdict as to the CSC IV charge, but not as to the CSC III charge. The court gave them the deadlocked jury instruction; they resumed deliberations, and sometime later, returned a verdict of guilty on both counts.

II. ANALYSIS

Defendant contends that the trial court erred in allowing the complainant to testify while accompanied by a support animal and its handler.²

In making its ruling, the trial court relied on *People v Johnson*, 315 Mich App 163; 889 NW2d 513 (2016). In that case, the defendant was accused of sexually assaulting his six-year-old niece, and the trial court permitted a support dog to be with the six year old and her ten-year-old brother during their testimony. *Id.* at 171-172. The defense appealed on the ground that allowing the support dog was improper. *Id.* at 173. The *Johnson* Court affirmed the conviction finding no error and concluding, as a matter of first impression that allowing the use of a support dog is within the authority of a trial court and is not "inherently prejudicial." *Id.* at 181. *Johnson* also held that pre-trial notice of an intent to use a support animal was not required because the statute requiring notice, MCL 600.2163a(4), was directed only at "support persons," and makes no reference to support animals. *Id.* at 175-176.

The first question before us, therefore, is whether *Johnson* controls our decision. We conclude that it does not. In reaching this conclusion, we are cognizant of the fact that the language used in *Johnson* sweeps with a broad brush, and that the opinion contains language which, if one does not consider the facts of the case, could seem to be dispositive here. However, we conclude that there is a fundamental difference between allowing a support animal

² Defendant argues that the prosecution committed misconduct by failing to give proper notice and that his attorney was ineffective for failing to object. Because of our decision, we need not address the question of notice or the performance of defense counsel. We note, however, that defense counsel did object to the use of the support dog as quoted above.

to accompany a child witness, as in *Johnson*, and allowing the animal to accompany a fully abled adult witness, as in the instant case. Accordingly, we conclude that *Johnson's* holding was tied to the facts presented, i.e., the use of a support animal during a *child's* testimony. We do so for several reasons.

First, allowing support animals for able-bodied adults would be unprecedented, not only in Michigan, but apparently nationwide. *Johnson* cites too many out-of-state cases in support of its conclusion, but each of the cited cases involved a witness who was either a child or an adult with a developmental disability. Indeed, despite our efforts, we have been unable to find a case in *any* jurisdiction allowing the use of a support animal or a support person when the witness is a non-disabled adult. Therefore, *Johnson's* observation that "other jurisdictions have upheld this procedure as part of a trial court's inherent authority to control the courtroom," *Id.* at 171, while broadly stated, rests solely on cases involving children or developmentally disabled adults.

Second, the reliance placed on MCL 600.2163a in *Johnson* is inapposite because that statute, by its terms, applies only if the witness is a child or a developmentally disabled adult. *Johnson* noted that this statute grants a trial court the authority to allow a support person, or take other action, to protect a witness such as using a screen. *Johnson*, 315 Mich App at 176-177. However, by its terms, MCL 600.2163a limits this authority to cases in which the witness is either "a person under 16 years of age," or "a person 16 years of age or older with a developmental disability," or a "vulnerable adult." The statute defines "developmental disability" as "a condition that is attributable to a mental impairment or to a combination of mental or physical impairments." MCL 600.6123a(1)(d). The term "vulnerable adult" is defined as: "an individual age 18 or over who, because of age, developmental disability, mental illness or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently;"³ "[a] person who is placed in an adult foster care small group home . . .;"⁴ or a person, "unable to protect himself or herself from abuse, neglect, or exploitation because of a mental or physical impairment or because of advanced age."⁵ There is nothing in the record to suggest that the complainant was developmentally disabled, mentally ill, physically disabled so as to require supervision, or that she was unable to live independently. MCL 600.6123a; MCL 750.145m(u)(i). Accordingly, although MCL 600.6123a provided authority for the trial court in *Johnson*, it does not do so in this case.

Third, *Johnson* refers to the trial court's inherent authority over the courtroom. We agree that this authority is broad and that the practice of allowing child witnesses to have a support animal or person is common enough that it is comparable to the examples offered in *Johnson* of that authority. However, allowing an able-bodied adult witness to have support animals or persons with them during testimony is a different circumstance. Given that we cannot find a single prior example of any court allowing such a procedure, we hesitate to conclude that it is

³ MCL 750.145m(u)(i).

⁴ MCL 400.703(1)(b).

⁵ See MCL 400.11(b), (f).

simply a matter of a trial judge's inherent authority. If that were so, one would presumably be able to find prior examples of that authority being exercised somewhere.

Fourth, we note that the *Johnson* decision repeatedly and properly notes the tender ages of the children testifying. Moreover, we find nothing in the opinion, despite its broad language, that indicates that the Court even considered whether its holding would apply in the setting of a fully abled adult. As already discussed, none of the cases relied on in *Johnson* considered the issue in that context.⁶

Lastly, we note that *Johnson* made no mention of allowing an animal handler to also accompany the witness during testimony. In the instant case, the complainant was accompanied not only by the dog, but also by the handler, who is a human being, which unlike the situation in *Johnson*, triggers the requirements of MCL 600.2163(4) even if the witness is a child.

Even assuming a trial court had the inherent authority to allow such a procedure, we would not approve its use where the basis for it was simply that doing so will allow the witness to be "more comfortable" or because "that this is something she wants." Nor are we convinced that allowing a support animal or person so that the witness will be better able to "control her emotions" necessarily aids the truth-finding process. This is particularly so in this case, where the prosecution presented evidence from four different witnesses that the complainant was hysterical, shaking, and barely able to speak following the alleged assault, and argued to the jury that her emotional reactions were evidence of defendant's guilt. In that context, it was particularly improper to allow a comfort dog to help the complainant "control her emotions" while testifying. If the adult complainant's emotional state constitutes evidence of guilt, the jury is entitled to evaluate her emotional state uninfluenced by outside support, not only as to her own credibility, but also to determine the weight to be given to testimony by others who described her emotional state.

For all these reasons, we conclude that allowing the complainant to be accompanied by a support dog during her testimony was error.

Although the prosecution does not ask that we consider whether any such error was harmless, we have done so, and we conclude that the error was not harmless because it undermined the reliability of the verdict. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67

⁶ By way of example, the very first line from a passage *Johnson* quoted from *People v Tohom*, 109 AD 3d 253, 272-273; 969 NYS 2d 123 (2013) begins, " 'In fact, permitting a comfort dog to accompany a child victim to the stand can be considered less prejudicial than allowing support persons.' " (emphasis added). Similarly, the court in *State v Dye*, 178 Wash 2d 541, 544; 309 P3d 1192 (2013), on which *Johnson* relied, described the witness in that case as "suffer[ing] from significant developmental disabilities, including cerebral palsy, Kallman Syndrome, and mild mental retardation. He has an IQ (intelligence quotient) 65, and although he is 56 years old, he functions at a mental age ranging from 6 to 12 years old."

(2010).⁷ There were no witnesses to the actual events other than defendant and complainant, and the only forensic evidence consisted of a different male's DNA. Thus, the case turned almost exclusively on the jury's evaluation of their respective credibility. Secondly, it turned, in part, on the weight given by the jury to the testimony concerning complainant's state of hysteria after leaving her bedroom that morning. These determinations are likely affected by the use of the support dog and handler. A juror can readily accept that a child might need support simply to be in a courtroom to be able to answer questions. With a fully abled adult, a juror is far more likely to conclude that the reason for the support animal or support person is because the complainant was traumatized by the actions for which the defendant is charged.⁸

In sum, we conclude that a fully abled adult witness may not be accompanied by a support animal or support person while testifying. Indeed, were we to rule that that a fully abled adult may be accompanied by a support dog or person simply because they will be "more comfortable," unlocks a door that we have great hesitation about opening. At a minimum, this

⁷ In considering whether an error was harmless, "the relevant inquiry is 'the effect the error had or reasonably may be taken to have had upon the jury's decision.'" *People v. Straight*, 430 Mich. 418, 427, 424 NW2d 257 (1988) (citation omitted). The error justifies reversal if it is more probable than not that it affected the outcome. *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005). An error is "outcome determinative if it undermined the reliability of the verdict." *Id.* at 142 (quotation marks and citation omitted). In making this determination, this Court should focus "on the nature of the error and assess[] its effects in light of the weight and strength of the untainted evidence." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (quotation marks and citations omitted). Also, an error should not be considered harmless where "the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings. . . ." *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004) (quotation marks and citation omitted). If the error is so "offensive to the maintenance of a sound judicial process," then "it can never be regarded as harmless[.]" *People v Robinson*, 386 Mich 551, 563; 194 NW2d 709 (1972).

⁸ Our dissenting colleague observes that the testimony of the police officer provided substantive evidence sufficient to uphold the conviction. One could argue to the contrary, but more importantly, the issue of harmless error is not determined by whether a jury could have convicted regardless of the error. Harmless error review turns on "whether the error more probably than not affected the outcome" or "undermined the validity of the verdict." *Young*, 472 Mich at 141-142.

unprecedented change, if adopted, should be made by legislation, court rule, or a decision of our Supreme Court.⁹

Reversed and remand for new trial. We do not retain jurisdiction.

/s/ Douglas B. Shapiro

/s/ Michael J. Kelly

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⁹ One example of the unexpected consequences from permitting this practice will arise the first time a criminal defendant requests a support animal while testifying. And allowing support animals for complainants but not defendants may implicate due process concerns.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

FOR PUBLICATION
June 7, 2018

v

DAKOTA LEE SHORTER,

Defendant-Appellant.

No. 338629
Ingham Circuit Court
LC No. 16-00519-FH

Before: SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ.

O'BRIEN, J. (*dissenting*).

I agree with the majority that the trial court erred in this case by allowing the victim to use a support dog while testifying. However, I believe that the error was harmless. Therefore, I respectfully dissent.

For preserved, nonconstitutional errors, reversal is not required unless the defendant establishes that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). This standard does not “require actual innocence, but, rather, it should be viewed as a legislative directive to presume the validity of verdicts and to reverse only with respect to those errors that affirmatively appear to undermine the reliability of the verdict.” *People v Mateo*, 453 Mich 203, 211; 551 NW2d 891 (1996). Thus, “[a]n error is deemed to have been ‘outcome determinative’ if it undermined the reliability of the verdict.” *People v Elston*, 462 Mich 751, 766; 614 NW2d 595, 602 (2000). When determining whether an error was harmless, the focus is on the nature of the error “in light of the weight and strength of the untainted evidence.” *Mateo*, 453 Mich at 215.

I agree with the majority that this case—like the vast majority of criminal sexual assault cases—had “no witnesses to the actual events other than defendant and” the victim and, therefore, largely came down to “their respective credibility.” However, unlike the majority, I believe that the effect—if any—of the support dog on the victim’s and defendant’s credibility was harmless in light of the untainted evidence that bolstered the victim’s credibility and damaged defendant’s.

The manager of the victim’s trailer park, Joshua Kaimon, testified that, shortly after the assault occurred, defendant admitted to him that he had done something wrong. Specifically, Kaimon testified that, on the morning of the incident, he was outside of his trailer with defendant waiting for the police to arrive and asked defendant if he did “something [he] shouldn’t have,” to

which defendant replied, "Yea, I did."¹ Officer Aaron Reynolds, who interviewed defendant on the morning of the assault, testified that defendant initially denied that anything occurred while he was sleeping with the victim in her bed. However, according to Officer Reynolds, defendant later changed his story and admitted that, while the victim was sleeping, he attempted to kiss her, touched her butt, placed his hand on her upper thigh, and placed his hand underneath the victim's shirt and touched her belly and back area. Officer Reynolds also testified that defendant told him that he had an erection "while they were cuddling."² The testimony of Officer Reynolds, besides damaging defendant's credibility, provided substantive evidence to convict defendant of fourth-degree criminal sexual assault (CSC IV), MCL 750.520e(1)(b), if the jury found that defendant's touching of the victim's buttock while she was asleep was intentional and for a sexual purpose, see MCL 750.520a(f) and (g).³ The majority does not contend that Officer Reynolds's testimony was tainted by the victim's use of a support dog. Therefore, even under the majority's analysis, defendant's CSC IV conviction should be upheld. See *Mateo*, 453 Mich at 215.

In contrast to defendant's changing story, the victim's story remained unchanged: she testified at trial that she woke up to defendant's fingers inside her vagina and another hand on her bare breast. The officer that interviewed the victim following the incident, as well as the sexual-assault nurse examiner that examined the victim, testified that, when they spoke with the victim on the morning of the incident, she told them that she woke up to defendant's fingers inside her vagina and another hand on her breast. Evidence of the victim's unchanging story bolstered her credibility, while evidence of defendant's incriminating admissions and changing story damaged his credibility. All of this evidence was untainted by the trial court's error of allowing a support dog to accompany the victim.

The majority's harmless-error analysis does not appear to assess the effect of the trial court's error "in light of the weight and strength of the untainted evidence." *Mateo*, 453 Mich at 215. Instead, it rests on the following analysis:

A juror can readily accept that a child might need support simply to be in a courtroom to be able to answer questions. With a fully-abled adult, a juror is far more likely to conclude that the reason for the support animal or support person is

¹ As recognized by the majority, defendant testified that he could not remember whether he made the incriminating statement to Kaimon, but admitted that it was possible he made the statement.

² Defendant denied some, but not all, of the statements that Officer Reynolds attributed to him, and he corroborated the officer's testimony that he initially told the officer that nothing happened with the victim that morning.

³ Defendant admitted that he told the officer that he grabbed the victim's buttock, but explained that it was accidental. He also admitted that he had an erection while he was in bed with the victim that morning, but explained that it was not due to sexual arousal.

because the complainant was traumatized by the actions for which the defendant is charged.⁴

When reviewing the information—more accurately, the lack of information—placed before the jurors regarding the support dog, the majority’s holding becomes unduly speculative. The support dog was barely mentioned during the course of the three-day trial. The first time it was mentioned was during voir dire when the prosecutor told jurors that the victim may be accompanied by a support dog. The prosecutor asked jurors not to draw any conclusions from the dog’s presence, and all jurors confirmed that they could ignore the dog. The prosecutor did not discuss the dog any further.

The next time that the dog was mentioned to jurors was before the victim testified. At that time, the trial court told jurors that the victim would be accompanied by a support animal and gave the following instruction:

You should disregard the [support] animal’s presence and decide the case based solely on the evidence presented. You should not consider the witness’s testimony to be any more or less credible because of the animal’s presence. You must not allow the use of a support animal to influence your decision in any way.

The support dog was not mentioned at any point during the victim’s testimony, no other witness was asked about or mentioned the support dog, and neither party referenced the support animal during closing arguments. The dog was only mentioned one other time; during final jury instructions, the trial court repeated its instruction that the jurors were to ignore the support animal and not draw any conclusions from its presence.

On this record, I see no reason to make the leaps necessary to find that a juror was “likely to conclude that the reason for the support animal . . . [was] because the complainant was traumatized by the actions for which the defendant [was] charged.” No one gave any reason to jurors for why the support dog was accompanying the victim. In fact, no one even explained to jurors what a support animal was. Thus, the majority’s conclusion assumes (1) that a juror had general knowledge about why someone may use a support animal and (2) what the juror was “likely to conclude” from the animal’s presence. With respect to this second point, this Court has recognized that the use of a support dog “does not give rise to *primarily* prejudicial preferences, as it is possible for the jury to make a wide range of inferences from the use of this procedure that are unrelated to defendant.” *People v Johnson*, 315 Mich App 163, 180; 889 NW2d 513 (2016). Yet, without explanation, the majority concludes that “a juror is far more

⁴ This analysis does not appear to be fact specific. Rather, the majority opinion appears to require automatic-reversal if a fully-abled adult is accompanied by a support animal. Such a conclusion is contrary to this state’s harmless-error jurisprudence. See *People v Graves*, 458 Mich 476, 483-484; 581 NW2d 229 (1998) (rejecting a rule for automatic reversal in harmless-error review).

likely to conclude that the reason for the support animal” is related to defendant.⁵ The majority’s conclusion also assumes that (1) the juror disregarded the trial court’s instructions, despite the general rule that jurors are presumed to follow those instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) and (2) the juror lied when he or she confirmed during voir dire that they could ignore the dog’s presence. In my opinion, the majority’s conclusion is “unduly speculative” and does not warrant finding that the error in this case was not harmless. See *id.* at 485-486 (recognizing that an error is harmless if a conclusion to the contrary is “unduly speculative”).

In sum, the only error was the trial court allowing a support dog to accompany the victim. This dog—which was barely mentioned throughout trial—did not, by its mere presence, add credibility to the victim’s claim of a traumatic experience because none of the jurors knew why the dog accompanied the victim. More importantly, any credibility that the support dog’s presence may have added to the victim—or taken away from defendant—was minimal in light of the significant untainted evidence which damaged defendant’s credibility and supported the victim’s. Based on the untainted evidence, it is not more probable that, had the victim testified without the aid of a support dog, a different outcome would have resulted. See *Lukity*, 460 Mich at 495.

Because I do not believe that the error affected the reliability of the jury verdict, I would leave the jury’s verdict untouched.

/s/ Colleen A. O'Brien

⁵ The majority’s conclusion appears based on the fact that the victim was a “fully-abled adult” without developmental disabilities. However, neither the victim’s age nor her lack of developmental disabilities was ever placed before the jury. As such, it is speculation to even conclude that the jury viewed the victim as a fully-abled adult.

APPENDIX B

Act No. 282
 Public Acts of 2018
 Approved by the Governor
 June 28, 2018
 Filed with the Secretary of State
 June 29, 2018
 EFFECTIVE DATE: September 27, 2018

**STATE OF MICHIGAN
 99TH LEGISLATURE
 REGULAR SESSION OF 2018**

Introduced by Rep. Barrett

ENROLLED HOUSE BILL No. 5645

AN ACT to amend 1961 PA 236, entitled "An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of the courts, and of the judges and other officers of the courts; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in the courts; pleading, evidence, practice, and procedure in civil and criminal actions and proceedings in the courts; to provide for the powers and duties of certain state governmental officers and entities; to provide remedies and penalties for the violation of certain provisions of this act; to repeal all acts and parts of acts inconsistent with or contravening any of the provisions of this act; and to repeal acts and parts of acts," by amending section 2163a (MCL 600.2163a), as amended by 2012 PA 170.

The People of the State of Michigan enact:

Sec. 2163a. (1) As used in this section:

(a) "Courtroom support dog" means a dog that has been trained and evaluated as a support dog pursuant to the Assistance Dogs International Standards for guide or service work and that is repurposed and appropriate for providing emotional support to children and adults within the court or legal system or that has performed the duties of a courtroom support dog prior to the effective date of the amendatory act that added this definition.

(b) "Custodian of the videorecorded statement" means the department of health and human services, investigating law enforcement agency, prosecuting attorney, or department of attorney general or another person designated under the county protocols established as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628.

(c) "Developmental disability" means that term as defined in section 100a of the mental health code, 1974 PA 258, MCL 330.1100a, except that, for the purposes of implementing this section, developmental disability includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment.

(d) "Videorecorded statement" means a witness's statement taken by a custodian of the videorecorded statement as provided in subsection (7). Videorecorded statement does not include a videorecorded deposition taken as provided in subsections (20) and (21).

(e) "Vulnerable adult" means that term as defined in section 145m of the Michigan penal code, 1981 PA 328, MCL 750.145m.

(f) "Witness" means an alleged victim of an offense listed under subsection (2) who is any of the following:

(i) A person under 16 years of age.

(ii) A person 16 years of age or older with a developmental disability.

(iii) A vulnerable adult.

(2) This section only applies to the following:

(a) For purposes of subsection (1)(f)(i) and (ii), prosecutions and proceedings under section 136b, 145c, 520b to 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136b, 750.145c, 750.520b to 750.520e, and 750.520g.

(b) For purposes of subsection (1)(f)(iii), 1 or more of the following matters:

(i) Prosecutions and proceedings under section 110a, 145n, 145o, 145p, 174, or 174a of the Michigan penal code, 1931 PA 328, MCL 750.110a, 750.145n, 750.145o, 750.145p, 750.174, and 750.174a.

(ii) Prosecutions and proceedings for an assaultive crime as that term is defined in section 9a of chapter X of the code of criminal procedure, 1927 PA 175, MCL 770.9a.

(3) If pertinent, the court must permit the witness to use dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination.

(4) The court must permit a witness who is called upon to testify to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. The court must also permit a witness who is called upon to testify to have a courtroom support dog and handler sit with, or be in close proximity to, the witness during his or her testimony.

(5) A notice of intent to use a support person or courtroom support dog is only required if the support person or courtroom support dog is to be utilized during trial and is not required for the use of a support person or courtroom support dog during any other courtroom proceeding. A notice of intent under this subsection must be filed with the court and must be served upon all parties to the proceeding. The notice must name the support person or courtroom support dog, identify the relationship the support person has with the witness, if applicable, and give notice to all parties that the witness may request that the named support person or courtroom support dog sit with the witness when the witness is called upon to testify during trial. A court must rule on a motion objecting to the use of a named support person or courtroom support dog before the date when the witness desires to use the support person or courtroom support dog.

(6) An agency that supplies a courtroom support dog under this section conveys all responsibility for the courtroom support dog to the participating prosecutor's office or government entity in charge of the local courtroom support dog program during the period of time the participating prosecutor's office or government entity in charge of the local program is utilizing the courtroom support dog.

(7) A custodian of the videorecorded statement may take a witness's videorecorded statement before the normally scheduled date for the defendant's preliminary examination. The videorecorded statement must state the date and time that the statement was taken; must identify the persons present in the room and state whether they were present for the entire videorecording or only a portion of the videorecording; and must show a time clock that is running during the taking of the videorecorded statement.

(8) A videorecorded statement may be considered in court proceedings only for 1 or more of the following purposes:

(a) It may be admitted as evidence at all pretrial proceedings, except that it cannot be introduced at the preliminary examination instead of the live testimony of the witness.

(b) It may be admitted for impeachment purposes.

(c) It may be considered by the court in determining the sentence.

(d) It may be used as a factual basis for a no contest plea or to supplement a guilty plea.

(9) A videorecorded deposition may be considered in court proceedings only as provided by law.

(10) In a videorecorded statement, the questioning of the witness should be full and complete; must be in accordance with the forensic interview protocol implemented as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628, or as otherwise provided by law; and, if appropriate for the witness's developmental level or mental acuity, must include, but is not limited to, all of the following areas:

(a) The time and date of the alleged offense or offenses.

(b) The location and area of the alleged offense or offenses.

(c) The relationship, if any, between the witness and the accused.

(d) The details of the offense or offenses.

(e) The names of any other persons known to the witness who may have personal knowledge of the alleged offense or offenses.

(11) A custodian of the videorecorded statement may release or consent to the release or use of a videorecorded statement or copies of a videorecorded statement to a law enforcement agency, an agency authorized to prosecute the criminal case to which the videorecorded statement relates, or an entity that is part of county protocols established under section 8 of the child protection law, 1975 PA 238, MCL 722.628, or as otherwise provided by law. The defendant and, if represented, his or her attorney has the right to view and hear a videorecorded statement before the defendant's preliminary examination. Upon request, the prosecuting attorney shall provide the defendant and, if represented, his

or her attorney with reasonable access and means to view and hear the videorecorded statement at a reasonable time before the defendant's pretrial or trial of the case. In preparation for a court proceeding and under protective conditions, including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement, the court may order that a copy of the videorecorded statement be given to the defense.

(12) If authorized by the prosecuting attorney in the county in which the videorecorded statement was taken, a videorecorded statement may be used for purposes of training the custodians of the videorecorded statement in that county on the forensic interview protocol implemented as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628, or as otherwise provided by law.

(13) Except as provided in this section, an individual, including, but not limited to, a custodian of the videorecorded statement, the witness, or the witness's parent, guardian, guardian ad litem, or attorney, shall not release or consent to release a videorecorded statement or a copy of a videorecorded statement.

(14) A videorecorded statement that becomes part of the court record is subject to a protective order of the court for the purpose of protecting the privacy of the witness.

(15) A videorecorded statement must not be copied or reproduced in any manner except as provided in this section. A videorecorded statement is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, is not subject to release under another statute, and is not subject to disclosure under the Michigan court rules governing discovery. This section does not prohibit the production or release of a transcript of a videorecorded statement.

(16) If, upon the motion of a party made before the preliminary examination, the court finds on the record that the special arrangements specified in subsection (17) are necessary to protect the welfare of the witness, the court must order those special arrangements. In determining whether it is necessary to protect the welfare of the witness, the court must consider all of the following factors:

- (a) The age of the witness.
- (b) The nature of the offense or offenses.
- (c) The desire of the witness or the witness's family or guardian to have the testimony taken in a room closed to the public.
- (d) The physical condition of the witness.

(17) If the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under subsection (16), the court must order both of the following:

(a) That all persons not necessary to the proceeding must be excluded during the witness's testimony from the courtroom where the preliminary examination is held. Upon request by any person and the payment of the appropriate fees, a transcript of the witness's testimony must be made available.

(b) That the courtroom be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand in order to protect the witness from directly viewing the defendant. The defendant's position must be located so as to allow the defendant to hear and see the witness and be able to communicate with his or her attorney.

(18) If upon the motion of a party made before trial the court finds on the record that the special arrangements specified in subsection (19) are necessary to protect the welfare of the witness, the court must order those special arrangements. In determining whether it is necessary to protect the welfare of the witness, the court must consider all of the following factors:

- (a) The age of the witness.
- (b) The nature of the offense or offenses.
- (c) The desire of the witness or the witness's family or guardian to have the testimony taken in a room closed to the public.
- (d) The physical condition of the witness.

(19) If the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under subsection (18), the court must order 1 or more of the following:

(a) That all persons not necessary to the proceeding be excluded during the witness's testimony from the courtroom where the trial is held. The witness's testimony must be broadcast by closed-circuit television to the public in another location out of sight of the witness.

(b) That the courtroom be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand in order to protect the witness from directly viewing the defendant. The defendant's position must be the same for all witnesses and must be located so as to allow the defendant to hear and see all witnesses and be able to communicate with his or her attorney.

(c) That a questioner's stand or podium be used for all questioning of all witnesses by all parties and must be located in front of the witness stand.

(20) If, upon the motion of a party or in the court's discretion, the court finds on the record that the witness is or will be psychologically or emotionally unable to testify at a court proceeding even with the benefit of the protections afforded the witness in subsections (3), (4), (17), and (19), the court must order that the witness may testify outside the physical presence of the defendant by closed circuit television or other electronic means that allows the witness to be observed by the trier of fact and the defendant when questioned by the parties.

(21) For purposes of the videorecorded deposition under subsection (20), the witness's examination and cross-examination must proceed in the same manner as if the witness testified at the court proceeding for which the videorecorded deposition is to be used. The court must permit the defendant to hear the testimony of the witness and to consult with his or her attorney.

(22) This section is in addition to other protections or procedures afforded to a witness by law or court rule.

(23) A person who intentionally releases a videorecorded statement in violation of this section is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both.

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.

This act is ordered to take immediate effect.



Clerk of the House of Representatives



Secretary of the Senate

Approved _____

Governor

APPENDIX C

Legislative Analysis

COURTROOM SUPPORT DOGS

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 5645 as reported from committee w/o amendment

Analysis available at
<http://www.legislature.mi.gov>

Sponsor: Rep. Tom Barrett

Committee: Judiciary

Complete to 5-9-18

(Enacted as Public Act 282 of 2018)

BRIEF SUMMARY: House Bill 5645 would allow eligible witnesses (children or vulnerable adults) who are victims of certain specified crimes, such as physical or sexual abuse or vulnerable adult-related crimes, to utilize a courtroom support dog when providing testimony at trial.

FISCAL IMPACT: House Bill 5645 is not expected to have any additional fiscal implications for the judiciary. Insurance policies currently carried by courts and county prosecutor's offices will be ample to cover any issues that may arise from a witness's utilizing a court therapy dog while providing testimony.

THE APPARENT PROBLEM:

Michigan law allows young children and individuals with developmental disabilities to be accompanied by a support person when testifying as a witness in cases involving child abuse and neglect or physical or sexual assault. Likewise, a person meeting the definition of a vulnerable adult may also have a support person nearby when testifying in cases involving a crime against a vulnerable adult.

Recently, a few prosecutor's offices in the state have begun using specially trained dogs, both in their offices when interviewing potential witnesses and in court when certain victims testify. Research studies support the idea that the dogs have a calming effect on, and so enable testimony to be elicited from, otherwise anxious witnesses. Though current law does not specifically allow the use of courtroom support dogs in any courtroom, the practice is also not specifically prohibited.

A few years ago, a support dog named Mr. Weebers accompanied two child witnesses when they provided testimony against their uncle, who had been accused of sexually abusing one of the children. The defendant appealed his conviction on several grounds, including that the court had no authority to allow the use of the dog and that his due process rights had been violated. In *People v Johnson*, the Michigan Court of Appeals upheld the conviction and, in addressing these two issues, held that case law and court rules establish that courts have an inherent authority to control their courtrooms, including how witnesses are questioned, and that a current statutory provision "does not preclude trial courts from using alternative procedures to protect and assist witnesses while testifying..."¹ The court

¹ *People v Johnson*, 315 Mich App 163, 176 (2016), citing *People v Rose*, 289 Mich App 499, 509 (2010). *Rose* cites MRE 611(a) regarding the court's authority to control the mode of interrogating witnesses.

also concluded that “use of a support animal is more neutral, and thus less prejudicial, than the use of a support person—a procedure deemed permissible by our Legislature.”²

Though some expect the court decision to expand the use of courtroom dogs, some feel that the decision should be codified, or put into statute, to protect the current practice utilizing support dogs to accompany witnesses in those circumstances in which a support person is authorized. Legislation has been offered to do so.

THE CONTENT OF THE BILL:

Currently, a provision in the Revised Judicature Act (RJA) allows a *witness* who is called upon to testify to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. If a support person will be used, a notice of intent naming the support person must be filed with the court and provided to all parties to the proceeding. A party can object to use of a named support person, and the court must rule on the objection.

Witness is defined as a person under 16 years of age (or older if he or she has a developmental disability), or a vulnerable adult, who is an alleged victim of certain listed crimes, such as child abuse, child sexually abusive materials, or a criminal sexual conduct offense, or, if a vulnerable adult, vulnerable adult abuse, assaultive crimes against a vulnerable adult, or using fraud or deceit to use or obtain a vulnerable adult’s money or property.

House Bill 5645 would amend the RJA to also allow a witness, as described above, to use a *courtroom support dog* during his or her testimony.

Courtroom support dog would mean a dog that has been trained and evaluated as a support dog under the Assistance Dogs International Standards for Guide or Service Work and that is repurposed and appropriate for providing emotional support to children and adults within the court or legal system or that has performed the duties of a courtroom support dog prior to the bill’s effective date. The courtroom support dog and handler could sit with, or be in close proximity to, the witness during his or her testimony.

Further, the bill would eliminate the current provisions regarding a notice of intent to use a support person and replace them with updated language that retains much of the current language but also includes the use of a courtroom support dog. Under the bill, a notice of intent to use a support person or a courtroom support dog would be required only if either were to be utilized during trial and would not be required for use during any other courtroom proceeding. The notice would have to be filed with the court, be served upon all parties to the proceeding, name the support person or courtroom support dog, identify the relationship the support person has with the witness (if applicable), and give notice to all parties that the witness may request the support person or dog to sit with him or her when called upon to testify during trial. A court would have to rule on a motion objecting to the

² *Johnson*, 315 Mich App at 181.

Reportedly, the ability to calm a fearful or anxious witness, as the support dogs are able to do, enables investigators and prosecutors to obtain better information from witnesses. Enactment of the bill would protect the use of the dogs in cases involving the most vulnerable of witnesses, and would likely provide an incentive to expand the use of the dogs in other types of cases and other courts, such as specialty courts, as well.

Response:

Reportedly, a few veterans courts are currently using courtroom support dogs. Though the bill would not specifically prohibit such a practice, expanding the bill to cover other situations involving traumatized or anxious victims could also be beneficial in encouraging more courts, law enforcement agencies, and prosecutor's offices to embrace the practice.

In addition, several states specifically include a requirement for the development and use of special jury instructions explaining how the jury should not infer that the presence of the dog gives more or less weight to the testimony of either party. Perhaps including a similar requirement would strengthen protections for all parties.

POSITIONS:

The Department of State Police indicated support for the bill. (5-1-17)

The Office of the Attorney General indicated support for the bill. (4-17-18)

A representative of the Prosecuting Attorneys Association of Michigan (PAAM) testified in support of the bill. (4-17-18)

The Wayne County Prosecutor's Office indicated support for the bill. (4-17-18)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

use of a named support person or courtroom support dog before the date when the witness desires to use the support person or dog.

An agency that supplies a courtroom dog would convey all responsibility for the dog to the participating prosecutor's office or government entity in charge of the local courtroom support dog program during the period of time the support dog is being utilized by the office or entity.

The bill would take effect 90 days after being enacted.

MCL 600.2163a

ARGUMENTS:

For:

Including courtroom support dogs in statutory provisions that currently allow a witness to have a support person will protect the practice from court challenges and may encourage more judges and prosecutor's offices to embrace the use of such dogs.

The bill is narrowly crafted. It does not allow every witness to have any therapy animal present. The bill only pertains to the use of courtroom support dogs in situations in which support persons are allowed to accompany young children, persons with developmental disabilities, and vulnerable adults, and then only in the types of criminal cases specified in statute. However, the bill should not restrict the use of support dogs by courts and prosecutor's offices in other types of cases—for instance, adult witnesses who were traumatized by an assault.

The dogs would be provided to witnesses by law enforcement agencies or prosecutor's offices, although they could be owned and trained by a private entity. Should there be an incident with a courtroom support dog, the prosecutor's office or other governmental entity, such as a law enforcement agency, would be liable. Moreover, the definition of *courtroom support dog* would include only those dogs meeting certain training standards, although dogs currently providing support in courtrooms could continue to do so even though they do not meet the Assistance Dog International (ADI) standards.

Though some concerns were raised about the prejudicial effects a dog by the side of a witness could have on a defendant's due process rights, courts across the country, including the Michigan Court of Appeals, have decided that the dogs are no more prejudicial, and may be less prejudicial, than having a support person sit beside or near a witness while he or she is testifying. Like seeing-eye dogs for the visually impaired, courtroom support dogs are highly trained to not be disruptive.

Further, any defendant objecting to the use of a courtroom support dog could file a petition with the court to disallow it. A court would have to rule on the motion on a case-by-case basis. Though the bill does not require special jury instructions to be given, it also would not preclude such a practice.

