

OAKLAND FUMBLES SEX CASE CHARGES

Overeager prosecutions can ruin lives, some say

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Oakland County prosecutors have won convictions in just 35 of the sex cases they have argued in front of juries since 2005, according to a Free Press review of court records. About 35 of cases brought outright acquittals while the rest have ended in mistrials, hung juries or dismissals. By comparison, Wayne County juries convicted, on average, in about 80 of cases during that same time period. A comparable statistic was not available for Macomb County.

Defense attorneys contend the numbers indicate overzealous charging policies that can ruin lives over things like child custody disputes. One man spent almost \$100,000 on legal fees and another spent 80 days in jail before their cases were dropped. Several legal experts say a 35 acquittal rate is a sign prosecutors are bringing cases that don't hold up under the scrutiny of a jury.

"That's high and that should give them concern," said Abbe Smith, the former deputy director of the Criminal Justice Institute at Harvard Law School who now teaches legal ethics at Georgetown University. "The charging decision is a critical decision. You should not prosecute every case."

Neither Oakland County Prosecutor David Gorcyca, nor anyone in his office, would speak to the Free Press about his office's charging policies. The claims of negligent prosecutions come at a time when Gorcyca faces increased scrutiny for his handling of sex cases.

A Grievance Commission filed professional misconduct charges against Gorcyca for his handling of the case against James Ferry, a former Oak Park kindergarten teacher charged with raping two boys. Perry was granted a new trial last year; the second trial ended in a hung jury this month with 11 jurors voting to acquit and one holdout.

Last month, Gorcyca dropped charges in a high-profile case against a West Bloomfield father accused of raping his autistic daughter after the man spent 80 days in jail. The case collapsed because the court could never establish the girl, who cannot speak, was the author of the rape claim allegedly made with the help of a teaching aide through a widely dismissed method known as facilitated communication. And last fall, an Oakland County jury took less than 30 minutes to acquit an Oxford Middle School teacher accused of groping his daughter, who later recanted her testimony.

Michigan law does not require corroborating evidence, such as DNA samples, before sex charges can be filed. Still, "some cases you just don't prosecute," said Therese Tobin, chief trial attorney in the Macomb County Prosecutor's Office. "Sometimes you have a 3-year-old victim, and you don't think you can prove it beyond a reasonable doubt. You don't put the child through that."

Similarly, Tobin said, custody disputes raise questions about allegations children make against a parent. "Divorce is always a big red flag," Tobin said.

In the case of the West Bloomfield man accused of raping his autistic daughter who cannot speak, the girl allegedly made the accusation through a controversial method known as facilitated communication, where a teacher's aide helps a nonverbal student type answers to questions on a keyboard. On March 11, they asked District Judge Marc Barron to dismiss the case, claiming the girl was too afraid to testify. The judge dismissed the case.

"It is important to protect children, and we understand that," said defense attorney Robyn Frankel, who helped represent the girl's mother. "But it is equally important to be sure you're not putting innocent people in jail."

James Perry, a former Oak Park kindergarten teacher charged with raping two boys in October 2005, was granted a new trial last year; the second trial ended in a hung jury this month

The second boy's accounting conflicted with the first boy's and their accounts continued to change even through the second trial. In September 2006, a jury convicted Perry, but Judge Denise Langford Morris threw out that conviction, saying police never interviewed three key witnesses who could have aided the defense. A retrial concluded April 1 in a hung jury.

Gorcyca now must decide whether to try Perry a third time, though Morris said that based on her conversations with jurors in the second trial, there was a "low probability of conviction." During the 'case, Gorcyca called Perry "a freak" and a "pedophile" and publicized evidence excluded by the court,

Legal experts say a decision to not charge is almost as important as deciding to charge.

"As a threshold matter, prosecutors have tremendous discretion over what charges to bring," said David Uhlmann, a former federal prosecutor and current law professor at the University of Michigan. "The notion that prosecutors are automatons, who must pursue cases simply because allegations have been made, ignores the role of prosecutorial discretion and the obligation all prosecutors have to do justice in their cases."

Sexual assault cases, by their nature, are difficult to prove, since they typically hinge on one person's word against another's. Michigan law instructs jurors that they may convict on a victim's claim alone if they find it credible enough to remove any reasonable doubt. But experts say relying solely on victim's claims creates risks for prosecutors.

Gerard Wilson had been searching frantically for more than a day last May for his 14-year-old daughter when Sheriff's deputies found her in a motel room with a convicted pedophile from Texas whom she met on the Internet. The girl told police she had sex with Richard Carrasco, 27, who was arrested with a loaded gun, sex toys and thousands of images of child pornography. But the girl also told police her father had touched her inappropriately, too.

Wilson, an Oxford Middle School teacher, had not slept in more than 24 hours when investigators began an hours-long interrogation. He was in tears when they asked him to write his daughter a letter apologizing for the things she said he'd done: brushing his hand over the top of her breast, and once hugging her while partially aroused. Wilson wrote the letter, was immediately arrested and jailed on a \$4 million bond.

The girl later testified that she made up the claims to shift police attention to her father instead of Carrasco, whom she said she wanted to marry. Jurors deliberated for less than half an hour before acquitting.

"I was glad the police interview was taped because it showed the progression, his state of mind, how they befriended him," said Wilson's attorney, Lawrence Kaluzny. "The jurors saw that and found it outrageous." Since the ordeal, Wilson has returned to teaching and his daughter is back in school.

Patrick McCarthy tells a similar story. He was battling for custody of his two daughters in 2005 when they accused him of fondling them. Police arrested McCarthy, 50, at his engineering job and jailed

him. The Auburn Hills man spent nearly \$100,000 on lawyers during the next five months, preparing for a trial that would never happen.

The girls, who were 10 and 11 at the time, began recanting. Investigators pressed ahead anyway. On the eve of trial, the girls met privately with the judge and confessed to fabricating the claims because they preferred living with their mother. Only then did Oakland County prosecutors drop the charges that McCarthy insists should never have been filed.

"They had no witnesses, no evidence and still they went forward," McCarthy said. "They do this, and they're not held , accountable. They have to be held accountable when they destroy lives like this."

Defense experts testified that scientific studies of facilitated communication show the facilitator, consciously or subconsciously, authors the messages. During two days of demonstration in 48th District Court in January, the girl was unable to correctly answer a single question on the keyboard if the question was asked out of earshot of the facilitator. That raised doubts about whether the girl wrote a lengthy statement about sexual abuse.

Other evidence also seemed to contradict the girl's statement, including a physical exam that showed her hymen is intact, despite claims of repeated rapes since age 6.

The girl also claimed she feared her father, who kept guns in the house, but a police search of the home found no weapons. Even after the courtroom demonstrations, Assistant Prosecutor Andrea Dean argued the man should remain in jail. But on Feb. 21 prosecutors reversed course and agreed to release him on personal bond.

Gorcycya faces a hearing next month before the state's Attorney Discipline Board on the charges. He said in a statement that he looks forward to defending himself.