

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
March 27, 2014

v

CARLOS ROBERT GARCIA,  
  
Defendant-Appellant.

No. 309081  
Oakland Circuit Court  
LC No. 2008-221344-FC

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Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by leave granted the order denying his motion for relief from judgment. Defendant was convicted of five counts of first-degree criminal sexual conduct (victim under 13), MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct (victim under 13), MCL 750.520c(1)(a), for sexually abusing his stepdaughter. This Court affirmed his convictions.<sup>1</sup> Defendant subsequently filed a motion for relief from judgment, which the trial court denied. We affirm the trial court's order.

I. MOTION FOR RELIEF FROM JUDGMENT

This Court reviews a trial court's decision to deny a motion for relief from judgment for an abuse of discretion. *People v Fonville*, 291 Mich App 363, 375-376; 804 NW2d 878 (2011). Motions for relief from judgment are governed by MCR 6.500 *et seq.* A defendant has the burden to show entitlement to relief. *People v Swain*, 288 Mich App 609, 629; 794 NW2d 92 (2010). The trial court may not grant relief to the defendant if his motion for relief from judgment:

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;

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<sup>1</sup> *People v Garcia*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2010 (Docket No. 289432).

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in a prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, “actual prejudice” means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

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(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case[.] [MCR 6.508(D).]

Further, the law of the case doctrine provides that an appellate court’s decision binds a trial court on remand and binds an appellate court in later appeals. *Duncan v Michigan*, 300 Mich App 176, 188-189; 832 NW2d 761 (2013). This rule is discretionary, except where there has been no material change in fact or intervening change in the law. *Id.*

## II. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Defendant argues that he received ineffective assistance of appellate counsel in his original appeal, which he also contends was “good cause” under MCR 6.508(D)(3)(a) for failing to raise issues on direct appeal. Where the issue of ineffective assistance of counsel is unpreserved, this Court’s review is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Ineffective assistance of appellate counsel claims are reviewed under the same test as ineffective assistance of trial counsel claims. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). “In order to obtain a new trial, a defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different.” *People v Trakhtenberg*, 493 Mich 38, 51-52; 826 NW2d 136 (2012) (citations omitted).

On the record before this Court, defendant has not established ineffective assistance of appellate counsel. Although defendant provided an incomplete transcript of an attorney grievance commission hearing in which his appellate attorney was suspended from practicing law for three years as a result of his neglect of defendant’s appeal, the findings of the attorney grievance commission were based on appellate counsel’s default. Defendant requested a remand to the trial court for an evidentiary hearing to establish this record, but this Court denied that hearing.

Defendant argues that his appellate counsel failed to communicate effectively with him, failed to investigate his claims or interview witnesses, and failed to inform him of his right to file a standard 4 brief in a timely manner. We note that, although abandonment by an appellate attorney without notice may constitute good cause to grant relief from judgment under MCR 6.508, see *Maples v Thomas*, 565 US \_\_\_; 132 S Ct 912, 922-923; 181 L Ed 2d 807 (2012), defendant was not completely abandoned by his appellate attorney in the direct appeal. Appellate counsel filed a brief on defendant's behalf and defendant was able to file a lengthy standard 4 brief. His other complaints, at worst, allege negligence under *Maples*. Apparently after defendant complained about his appellate brief, his appellate attorney filed a motion to withdraw before the trial court, which was denied. Defendant did not miss any deadlines and was not abandoned without notice.

The failure to assert all arguable claims is not sufficient to overcome the presumption that appellate counsel performed as a reasonable appellate attorney in selecting the issues presented. *People v Reed*, 449 Mich 375, 504-505; 535 NW2d 496 (1995). The question is whether a reasonable appellate attorney would conclude that the issues raised here were not worthy of mention on appeal. *Id.* Because we conclude that none of defendant's issues are meritorious, we again decline to remand this matter for an evidentiary hearing.

### III. PROSECUTORIAL MISCONDUCT

Defendant argues that the trial court abused its discretion in denying his motion for relief from judgment on the ground that the prosecutor committed misconduct by failing to produce a letter used to corroborate the allegations of abuse. Three witnesses testified about the letter, which allegedly contained unknown sexual allegations regarding defendant and the victim. The victim's friend, a 15-year-old girl, testified that when she and the victim were in sixth grade she found the letter taped to the victim's locker. She removed it and read it. And, when defendant came to her house to pick up the letter, he laughed about it and said it was "high-school drama." The victim's mother testified that defendant showed her a letter, which had been taped to the victim's locker. She talked to defendant and the victim about it. She kept the letter, but did not know what happened to it. The victim testified that she read the letter and it contained some information about her and defendant doing things sexually. She was shocked by what she read and did not know who wrote the letter. The letter was at her house at some point.

The letter is plainly a written assertion made out of court. However, the letter was not presented for the truth of the matter asserted and is, therefore, not hearsay. See MRE 801(c). The prosecution, in its closing argument, stated that the letter was brought up because the prosecution wanted the jury to consider defendant's reaction to the letter — that he was joking and laughing about it. The prosecution never asked the jury to consider the letter as direct or indirect evidence of guilt. Further, the direct allegations of the letter were not presented, and the jury was only aware that there were allegations of something sexual occurring between defendant and the victim. Under these circumstances, there was no requirement that the declarant of the statement be known, that the complete statement be presented, or that the declarant be available to testify. The rules requiring a declarant to be available to testify, except under certain exceptions, apply to hearsay. MRE 803; MRE 803a; MRE 804. However, as this statement was not presented for the truth of the matter asserted, it was not hearsay and it was not necessary for the declarant to be available or for the statement to fit within an exception.

Defendant also argues that the prosecutor committed misconduct by introducing testimony about this letter without identifying the author because the author would have been a *res gestae* witness. However, MCL 767.40a(1) requires the prosecution to provide a witness list of all witnesses *known* to the prosecution and all *res gestae* witnesses *known* to the prosecuting attorney or to law enforcement. MCL 767.40a(1). Defendant admits that the author of this letter was unknown to the prosecution or law enforcement. Further, the purpose of MCL 767.40a(1) is to provide the defendant with notice. Defendant does not claim that he did not have notice of the letter or that he otherwise lacked notice. Because the letter was not hearsay, trial counsel was not ineffective for failing to object to testimony regarding it. See *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008).

Next, defendant argues that the prosecutor committed misconduct by failing to call *res gestae* witnesses Sudie Super and Officer McGee. A prosecutor is not required to produce *res gestae* witnesses at trial. Rather, that duty was replaced with the duty to provide notice of witnesses and to provide reasonable assistance to a defendant to locate witnesses at the defendant's request. *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995); *People v Cook*, 266 Mich App 290, 293 n 4; 702 NW2d 613 (2005). Defendant does not claim that the prosecution failed to provide assistance to locate the witnesses upon his request. As one was the officer-in-charge and likely sitting next to the prosecution during trial and the other was defendant's mother, it is unlikely defendant needed any assistance in finding these witnesses. The prosecution did not commit misconduct by failing to call these witnesses at trial.

#### IV. JURY REQUEST

Defendant next argues that the trial court abused its discretion in denying the jury's request to rehear testimony from the victim's Care House interview. This Court reviews a trial court's decision regarding a jury's request to review testimony or evidence for an abuse of discretion. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). Because this issue was not preserved, this Court must review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

MCR 2.513(P) provides:

If, after beginning deliberation, the jury requests a review of certain testimony or evidence . . . , the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. . . . The court may order the jury to deliberate further without the requested review, as long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Here, the jury's note stated, "Can we have the pieces of the Care House interview that were read aloud in open court?" The trial court's response was, "You have all the admitted evidence."

The jury's request to rehear testimony that was read aloud in court was reasonable. Although the entire transcript of the victim's Care House interview was not admitted into evidence, the jury was requesting only those parts that were read during trial and not the entire transcript. Because the trial court refused to allow a rehearing of the testimony and foreclosed

the possibility that the jury would ever rehear this testimony, the trial court abused its discretion. *People v Robbins*, 132 Mich App 616, 621; 347 NW2d 765 (1984).

However, defendant has failed to show that the error affected the outcome of the proceedings. Our review of the entirety of the testimony that would have been read back to the jury if the request was granted makes it clear that the testimony benefited the prosecution and not defendant. Defendant's theory that the victim previously lied about her mother knowing everything and denied the allegations that defendant performed oral sex on her was not supported by the parts of the Care House transcript that were read aloud to the jury as part of the questioning of the victim. This error did not affect the outcome of the proceedings and, therefore, was not plain error.

Further, defendant has not shown (as required for a motion for relief from judgment) that he was actually prejudiced by the error or that the irregularity was so offensive to the maintenance of a sound judicial process that his convictions should not be allowed to stand. MCR 6.508(D)(3). Finally, trial counsel was not ineffective for failing to object to the denial of the jury's request where defendant has not shown prejudice or that there was a reasonable probability that the outcome of the proceedings would have been different. See *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

#### V. ADMISSION OF HEARSAY — TESTIMONY OF VICTIM'S FRIEND

Defendant argues that the testimony of the victim's friend — that the victim told her (at some later point) that the allegations in the locker letter were true — is hearsay and does not fit within any exception to the hearsay rule. We agree. Defendant did not object to this testimony at trial. Had defendant objected, the trial court could have stricken the statement and given a curative instruction that the testimony was not to be considered by the jury. We review unpreserved errors for plain error affecting substantial rights. *Carines*, 460 Mich at 763, 774.

Because the victim later testified that the allegations were true and defendant had the opportunity to cross-examine the victim, defendant failed to establish that the statement affected the outcome of the lower court proceedings. Further, the friend never testified regarding when the victim told her that the allegations were true, and the non-specificity of the timing of the statement did not serve to bolster the victim's testimony. This error did not rise to actual prejudice or an irregularity so offensive to the maintenance of a sound judicial process that defendant's convictions should not be allowed to stand. See MCR 6.508(D)(3). Therefore, defendant has not met the burden of establishing that he was entitled to relief from judgment on this ground.

#### VI. DENIAL OF RIGHT TO CONFRONT WITNESSES

Next, defendant argues that the admission of testimony regarding the locker letter violated his constitutional right to confront witnesses against him. Whether the admission of evidence constitutes a violation of the defendant's rights under the Confrontation Clause is a constitutional question reviewed de novo on appeal. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). Because this issue is unpreserved, it is reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763, 774.

A defendant's constitutional rights under the Confrontation Clause of the Sixth Amendment are implicated only by the admission of "testimonial statements." *People v Taylor*, 482 Mich 368, 377; 759 NW2d 361 (2008). Testimonial statements are solemn declarations or affirmations made for the purpose of establishing or proving a fact and are not statements by a person making a casual remark to an acquaintance. *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Nontestimonial statements are subject to the traditional rules limiting the admissibility of hearsay and do not implicate the Confrontation Clause. *Taylor*, 482 Mich at 378.

The letter at issue here contained allegations of some sexual conduct between the victim and defendant. The unknown author of the letter posted this letter on the victim's locker apparently for the victim to find. As the author wished to remain anonymous and the letter was for the victim and not a school or police official, the letter was not a solemn declaration made for the purpose of establishing a fact. It was a casual statement made to a middle school student. Because the statement was nontestimonial, defendant's rights under the Confrontation Clause were not implicated. See *Taylor*, 482 Mich at 378.

## VII. RULE OF COMPLETENESS AND BEST EVIDENCE RULE

Defendant next argues that the admission of the letter violated the rule of completeness and the best evidence rule. With regard to the rule of completeness, MRE 106 states that:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

However, MRE 106 is only pertinent if the defendant sought to introduce the entire writing or recorded statement and was denied permission to have the complete writing or statement introduced. *People v McGuffey*, 251 Mich App 155, 161; 649 NW2d 801 (2002). Defendant did not seek to introduce the complete writing under MRE 106 and is instead arguing that testimony regarding the letter should not have been admitted because the letter could not be presented in its entirety. MRE 106 does not have any bearing on the admissibility of the portion of the writing or statement the prosecution introduced. *Id.*

The best evidence rule, MRE 1001, requires the use of an original document to prove the content of a writing. Notwithstanding that the contents of the letter were not introduced to prove the content of the writing, MRE 1001 has an exception, where all originals were lost or destroyed, unless the proponent lost or destroyed the document in bad faith. MRE 1004(1). Here, there is no allegation that the letter was lost or destroyed in bad faith (except by defendant) and no allegation that the original letter was available. Because the original was lost or destroyed, MRE 1001 does not preclude the admission of testimony regarding the contents of the letter.

## VIII. JURY AS WITNESSES

Next, defendant argues that the prosecution improperly made the jury witnesses in this matter through statements in rebuttal argument. MRE 606(a) prohibits a member of the jury from testifying as a witness before that jury. The prosecution argued:

[The victim] tells you and I remember it because, well, again, use your collective memories, counsel asked her questions, I believe on two occasions, did you or have you ever lied. Who in the world has never told a lie? You're under oath. Who in the world can say, no, I've never lied. I'd like to meet that person.

In examining this statement, it is not clear that the prosecutor was referring to the jury when she said, "You're under oath." But the gist of what the prosecutor was arguing is that a person under oath has to tell the truth and no person who is telling the truth can say that they have never lied. In any event, MRE 603 requires that every witness be placed under oath to testify truthfully. The jurors were not under this oath and were not witnesses in this matter. Defendant has not shown actual prejudice or irregularity so offensive to the maintenance of the sound judicial process that his convictions should not be allowed to stand. See MCR 6.508(D).

## IX. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Next, defendant argues that his trial counsel was ineffective. Where the issue of ineffective assistance of counsel is unpreserved, this Court's review is limited to errors apparent on the record. *Davis*, 250 Mich App at 368. "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 51-52 (citations omitted). In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was sound trial strategy. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Failure to call a witness only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant attached three affidavits to his application for leave to appeal, detailing what witnesses would have testified if called at trial. James J. Super and Sudie Lee Super stated in their affidavits that, in March 2007, they were at the home of the victim's mother, defendant stated that he intended to move out of the home, and the victim begged him not to leave her with her drunken mother. First, it should be noted that Ms. Super was called as a witness to make an offer of proof outside the jury's hearing and testified that the victim's mother telephoned Ms. Super, said that she was the only one who could save defendant, and asked to have defendant call her. No questions were asked of Ms. Super regarding the victim's statements to her, her husband, or defendant about not wanting defendant to leave the victim with her mother. Defendant has not established that defense counsel knew of the conversation detailed in the affidavits.

Defense counsel's theory at trial was that the victim was lying about the sexual abuse because she was angry with defendant after she overheard defendant talking to her biological father about custody, that the victim admitted to lying before and changed her testimony several times, and that the victim had lied to the court in the past so that she did not have to visit her biological father. Mr. and Ms. Super's testimony that the victim wanted to stay with defendant and not her mother conflicted with the defense theory that the victim lied to stay with her mother (over her biological father) and did not deprive defendant of a substantial defense. It would seem odd that a child would want to stay with someone who was sexually abusing them, but the victim testified that she sometimes liked the sexual activity with defendant, that she loved defendant and looked up to him, and that they had a father-daughter relationship. Ms. Allen, the expert on sexual abuse, testified that children who are sexually abused sometimes still love their abusers. Because testimony that the victim loved defendant was consistent with the statements of Mr. and Ms. Super regarding the victim wanting to stay with defendant, the defense did not prove that the victim was lying about anything or present an inconsistency. Therefore, defendant was not deprived of a substantial defense and was not prejudiced by trial counsel's decision not to call Mr. and Ms. Super as witnesses. See *Dixon*, 263 Mich App at 398.

Next, defendant raised the issue of trial counsel's failure to call his brother as an alibi witness. James A. Super stated in his affidavit that defendant lived at his home from August 18, 2005 to January 5, 2006, that he informed trial counsel of this fact, and that counsel indicated his testimony was not necessary because he could not provide exact dates. James A. Super also stated that he was present when defendant received a phone call from the victim's mother in March 2007, telling defendant she was going to accuse him of this abuse. However, under defense counsel's questioning, the victim and her mother testified that defendant did not stay at their house throughout the entire period in question, and therefore defendant was not deprived of a substantial defense because of counsel's failure to call his brother as an alibi witness.

Defendant also argues that trial counsel was ineffective for failing to investigate and present lay witnesses Wendy Garcia, Jennifer Knecht, and Thomas Jaworski. Wendy Garcia and Jennifer Knecht, defendant's sisters, state that they would have testified that the victim's mother had a poor reputation in the community for truthfulness and was known as a liar and a drunkard, and that they believed that the allegations were fabricated by the mother to help her in her custody dispute with defendant. Neither was interviewed by trial counsel. Thomas Jaworski, defendant's long time friend who met with trial counsel, would have testified that the victim's mother had a poor reputation for truthfulness, that she accused him of attempted sexual assault when they were both 17, and that he believed she made up the allegations to help her in the custody dispute with defendant.

Although the mother's reputation for truthfulness would have been admissible under MRE 608(a), specific instances of conduct would not have been admissible. MRE 608(b). Further, the lay witnesses' belief that she made up the allegations to assist her in a custody dispute would not have been admissible. Finally, trial counsel made a strategic decision to argue that the victim made up the allegations and not her mother. There was ample evidence to support trial counsel's decision and defendant was not deprived of a substantial defense.

Defendant also argues that the decision not to present these witnesses was not a strategic decision but was instead born out of trial counsel's failure to investigate the case properly.

Counsel's failure to reasonably investigate a case can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Failure to investigate witnesses does not, however, establish inadequate preparation unless the defendant can show that the failure to investigate resulted in a failure to find valuable evidence that would have substantially benefited the defendant. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Here, none of the affidavits presented valuable evidence that would have substantially benefited defendant. Therefore, trial counsel was not ineffective for failing to investigate or present lay witnesses.

Defendant argues that trial counsel was ineffective for failing to hire Dr. Okla, who would have testified as an expert witness that the victim's testimony was unreliable and questionable due to suggestibility and adolescent brain development. The failure to consult with Dr. Okla was not raised in defendant's application for leave to appeal, and defendant has not provided an affidavit or other offer of proof from Dr. Okla regarding her proposed testimony. Therefore, this argument is beyond the scope of this Court's grant of leave to appeal.

Defendant also argues that trial counsel was ineffective for arguing in opening that there were times that the victim said there was abuse when defendant was not in the home, in his mind effectively shifting the burden to the defense to establish that defendant was not in the home at times. In her opening statement, defense counsel stated that there were two reasons the victim was lying — because she was angry that she was no longer the center of attention after the birth of her sister and because of the custody issue with her biological father. Defense counsel also mentioned that there were times that defendant was not in the home when abuse was alleged to have happened. In questioning the witnesses, trial counsel elicited testimony from the victim and her mother that defendant was not in the home for months at a time during the period that the victim alleged the sexual incidents occurred. Because the victim provided no specific timeline, there was no way to pin the dates down and flush out this argument. In closing, defense counsel argued that the victim's lack of specificity regarding dates made her testimony incredible. Further, trial counsel mentioned several times in opening and closing that the burden was on the prosecution and that the defense did not have to provide evidence, and the trial court instructed the jury that defendant had no burden of proof. Trial counsel made no error that fell below an objective standard of reasonableness. Defendant has not established ineffective assistance of trial counsel. See *Strickland*, 466 US at 689.

## X. NEWLY DISCOVERED EVIDENCE

Next, defendant argues that the trial court abused its discretion in denying his motion for relief from judgment based on newly discovered evidence. “Motions for a new trial on the ground of newly-discovered evidence are looked upon with disfavor, and the cases where this court has held that there was an abuse of discretion in denying a motion based on such grounds are few and far between.” *People v Rao*, 491 Mich 271, 279-280; 815 NW2d 105 (2012), quoting *Webert v Maser*, 247 Mich 245, 246; 225 NW 635 (1929). The defendant must show that:

- (1) “[T]he evidence itself, not merely its materiality, was newly discovered”; (2) “the newly discovered evidence was not cumulative”; (3) “the party could not, using reasonable diligence, have discovered and produced the evidence at trial”;

and (4) the new evidence makes a different result probable on retrial. [*Rao*, 491 Mich at 279, quoting *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).]

Further, our Supreme Court has held that, although impeachment evidence is generally insufficient to warrant a new trial as newly discovered evidence, it can be grounds for a new trial if the *Cress* test is satisfied. *People v Grissom*, 492 Mich 296, 321; 821 NW2d 50 (2012). “Newly discovered impeachment evidence concerning immaterial or collateral matters cannot satisfy *Cress*. But if it has an exculpatory connection to testimony concerning a material matter and a different result is probable, a new trial is warranted.” *Id.*

The *Grissom* Court found that a remand for an evidentiary hearing was necessary where the newly discovered evidence was that the victim had claimed to have been raped several other times, there were some similarities between the other alleged rapes and the details given to police, and the police investigating the prior claims concluded the victim was possibly unstable. There was no physical evidence connecting the *Grissom* defendant to the rape. *Grissom*, 492 Mich at 306-311.

The evidence defendant proffers in seeking a new trial here is also impeachment evidence, but it is not as strong as that in *Grissom*. First, there is no question that the phone records, which defendant argues show that the victim’s mother was lying when she claimed not to have spoken to defendant until 2002, do not concern a material matter and do not make a different result probable. Although defendant asserts that the victim’s mother was part of the conspiracy to make up these allegations against him, her testimony did not harm defendant; she testified that she did not suspect that defendant was sexually abusing her daughter even after seeing the locker letter alleging sexual activity, that defendant and her daughter had a close relationship, and that she was shocked when her daughter told her that defendant sexually abused her. The victim’s mother’s testimony about when she first rekindled her relationship with defendant was merely background information and did not concern a material matter.

Next, defendant argues that evidence that no “Dr. Phil” show regarding childhood sexual abuse aired during the dates the victim alleged that she saw the show (prompting her to stop the sexual activity with defendant) is newly discovered evidence warranting a new trial. The victim testified that she saw the show at her father’s house in California over Christmas break in 2006 and, upon her return, stopped sexual activity with defendant because she did not want to grow up and be “weird” like the woman on the show. Although the evidence that there was no show concerns a material matter, it does not make a different result probable. At a new trial, the victim could testify that she was mistaken about the host of the show or the date she saw the show, and her testimony would not be impeached to the extent that her credibility is diminished.

Defendant also argues that a transcript of a “Dr. Phil” show about childhood secrets is newly discovered evidence warranting a new trial. Although the show dealt with sexual abuse allegations, the allegations were not specific and the sexual abuse was not so similar to the allegations of the present case that a different result would be probable. Further, defendant alleges that the show aired in November 2006, which was not in the time frame in which the victim testified she saw the show that made her stop sexual activity with defendant.

Lastly, defendant argues that a letter from the officer-in-charge of this case, stating that he had doubts about the allegations, is newly discovered evidence warranting a new trial. Even if defendant had known about the officer's doubts, the evidence would not have been admissible. Matters of credibility are to be determined by the jury and, therefore, it is generally improper for a witness to comment or provide an opinion on the credibility of another witness. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Because the evidence was not admissible, it would not have changed the outcome of proceedings and a new trial is not warranted. *Grissom*, 492 Mich at 321.

Defendant argues that the prosecution violated defendant's rights by withholding the information that the officer had doubts about the victim and her mother's credibility. This Court reviews a trial court's decision regarding a discovery violation for an abuse of discretion. MCR 6.201(J). Under *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), the government is required to turn over evidence in its possession that is both favorable to the defendant and material to guilt or punishment.

Defendant has failed to establish a *Brady* violation here. Although the state could be said to have possessed the evidence and the evidence was favorable to defendant, defendant could have obtained the evidence with reasonable diligence. The officer was listed as a witness and was present at trial. There is no evidence that the prosecution suppressed the favorable evidence, especially where there was no evidence of a written statement. Further, the officer's opinion about another witness' credibility was not admissible, and defendant has not argued that knowing the officer's opinion would have changed his trial strategy in any way.

#### XI. *PEOPLE V GARRETT*

Defendant finally argues that this Court should hold this matter in abeyance until the Michigan Supreme Court decides the case of *People v Garrett*, which defendant argues will redefine the parameters of "good cause" and "actual prejudice." However, this argument is moot because *Garrett* has been decided by order of the Supreme Court and does not change the law in this area. *People v Garrett*, \_\_\_ Mich \_\_\_; 840 NW2d 168 (2013).

Affirmed.

/s/ Michael J. Kelly  
/s/ Mark J. Cavanagh  
/s/ Karen M. Fort Hood