

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
April 23, 2013

v

SCOTT SYZAK,

Defendant-Appellant.

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No. 305310  
St. Clair Circuit Court  
LC No. 10-002410-FC

Before: MARKEY, P.J., and TALBOT and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), for which he was sentenced to life imprisonment. Defendant appeals by right. We affirm.

**I. BACKGROUND**

Defendant's conviction arises from the death of his four-month-old daughter on October 12, 1995, under circumstances involving first-degree child abuse. The victim sustained a skull fracture and cerebral contusion several weeks before her death, which the medical examiner, Dr. Richard Anderson, determined after an autopsy was the cause of the victim's death. The victim also had several rib fractures that were healing at the time of her death. Although Dr. Anderson could not determine the anatomical mechanism that caused the victim's death, he surmised that the victim might have had a post-traumatic seizure. During the initial police investigation of the victim's death in 1995, the victim's mother claimed responsibility for the victim's head injury, stating that she accidentally dropped the child while bathing her. The mother later stated that she claimed responsibility at defendant's request; he had previously been imprisoned for abusing another young child.

In August 2010, while defendant and the victim's mother were then living in Indiana, the police decided to re-interview defendant and the victim's mother, with the assistance of Indiana law enforcement officers. In an interview on August 25, 2010, the victim's mother denied holding the victim when the victim sustained the head injury. Defendant was then interviewed and became very emotional during the interview. Defendant eventually admitted that he had custody of the victim when she received her head injury. Defendant was lodged overnight in the medical wing of the jail under a suicide watch. Later, on August 26 and continuing into the early

morning hours of August 27, 2010, defendant was interviewed by law enforcement officers from Michigan. During that interview, defendant described how he had been frustrated adjusting to life outside of prison and how he might have used too much force against the victim when she received her head injury.

## II. THE MEDICAL EXAMINER'S TESTIMONY

Defendant argues that the trial court erred in denying his pretrial motion to suppress Dr. Anderson's testimony because the medical examiner's office failed to preserve slides of tissue or other samples taken from the victim's body during the 1995 autopsy. We disagree.

Questions of law relevant to a motion to suppress evidence are reviewed de novo. *People v Keller*, 479 Mich 467, 473; 739 NW2d 505 (2007). A defendant's constitutional due process claim is also reviewed de novo. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). Any findings of fact made by the trial court are reviewed for clear error. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

Due process requires the prosecution to disclose evidence that is exculpatory and material to a defendant's guilt or punishment, regardless of the prosecution's good or bad faith. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). This duty extends to impeachment evidence, as well as evidence known to government investigators. *Youngblood v West Virginia*, 547 US 867, 869-870; 126 S Ct 2188, 165 L Ed 2d 269 (2006). Evidence is material if a reasonable probability exists that the outcome of the proceeding would have been different if the evidence had been disclosed. *Schumacher*, 276 Mich App at 177; *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998). Materially favorable evidence is that which could be reasonably taken to put the whole case in such a different light that it undermines confidence in the verdict. *Youngblood*, 547 US at 870.

Although the good or bad faith of the state is irrelevant when the state fails to disclose material exculpatory evidence, the Due Process Clause requires a different result where the most that can be said is that the state failed to preserve evidence that could have been subjected to tests, the results of which might have exonerated the defendant. *Arizona v Youngblood*, 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988). To establish a due process violation when a state fails to preserve evidence that is potentially useful to a criminal defendant, the defendant must show bad faith. *Id.* at 58; *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993).

Although medical examiners have a duty to investigate the cause and manner of violent and unexpected deaths, MCL 522.202, and keep a record of autopsy reports, MCL 52.211, they are not of the same class as the police or other similar investigators. Still, our Supreme Court has opined medical examiner's duties are owed to the state. *Maiden v Rozwood*, 461 Mich 109, 132; 597 NW2d 817 (1999). Defendant has not provided any support beyond mere speculation for his argument that the missing slides would constitute material, exculpatory impeachment evidence. Such speculation is insufficient to establish a *Brady* violation. *Lester*, 232 Mich App at 282; *Morales v Ault*, 476 F3d 545, 555 (CA 8, 2007).

In any event, because defense counsel's position at the suppression hearing was that the slides were lost or destroyed, it appears that the matter before us does not involve the actual

suppression of evidence. Absent a showing of bad faith, only material exculpatory evidence that is destroyed or lost, and not evidence that is merely potentially useful, can establish a due process violation. *Youngblood*, 488 US at 57-58.

Although this case involves the medical examiner's office, and not the police, defendant has failed to establish anything about the missing slides that makes their exculpatory value apparent. Considering that the thrust of defendant's motion to suppress was that he should have an opportunity to have his own potential expert or experts examine the missing slides to evaluate the cause and mechanism of the victim's death, the trial court properly treated defendant's due process claim as involving only potentially useful evidence, and not material exculpatory evidence. As such, defendant had the burden of establishing bad faith. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Because defendant failed to offer evidence that the missing slides were lost or destroyed in bad faith, the trial court did not err in denying defendant's motion to suppress Dr. Anderson's testimony.

### III. DEFENDANT'S STATEMENTS

Defendant also argues that the trial court erred in denying his pretrial motion to suppress the statements he made during the custodial interview by Michigan law enforcement officers which began on August 26, 2010. We disagree.

A defendant's statements made during custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his *Miranda*<sup>1</sup> rights. *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000); *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). To be admissible, a defendant's statement must also be voluntary. *Daoud*, 462 Mich at 631. In determining the voluntariness of a defendant's statements, this Court must review the issue of voluntariness independent of the trial court. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Whether a defendant knowingly and intelligently waived his *Miranda* rights is also reviewed de novo on the entire record. *Daoud*, 462 Mich at 629. But the trial court's factual findings will not be disturbed unless they are clearly erroneous. *Id.* "A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake was made." *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003). Where the resolution of a factual issue turns on the credibility of witnesses or the weight of the evidence, this Court will defer to the trial court. *Sexton*, 461 Mich at 752.

Although a redacted transcript and recording of defendant's custodial statement were presented at trial, the trial court had the opportunity to review the unedited video recordings of defendant's August 25 and 26, 2010, interviews, as well as the testimony of defendant and the two law enforcement officers who participated in the interviews. After reviewing this evidence, we find no support for defendant's suggestion on appeal that his remark at the beginning of the August 26, 2010, interview, i.e., "I don't understand what's going on," was made in reference to his understanding of his *Miranda* rights. Rather, the video recording shows that defendant was

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

expressing that he did not understand why the victim's 1995 death was still being investigated in 2010. As the trial court also determined, the video recording also shows that defendant calmed down after he was given coffee and cigarettes at the beginning of the August 26, 2010, interview.

Considering the totality of the circumstances and giving deference to the trial court's superior ability to evaluate the testimony at the *Walker*<sup>2</sup> hearing, we conclude that the trial court did not clearly err in finding that defendant's statements during the interview were voluntarily made and that defendant knowingly and intelligently waived his *Miranda* rights. Although defendant had spent significant time in a cell under suicide watch before the August 26, 2010, interview, the record does not indicate that defendant's statements were coerced or that his emotional state was so extreme that he could not knowingly and intelligently waive his *Miranda* rights. *Gipson*, 287 Mich App at 264-265.

#### IV. NON-TESTIFYING EXPERTS

Defendant lastly argues that his Sixth Amendment right to confront the witnesses against him was violated by the prosecutor's questioning of three government witnesses regarding their investigation of the victim's death. Because defendant failed to object to any of the testimony on this ground below, he has not preserved this issue. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Accordingly, defendant bears the burden of showing a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Under the federal and state constitutions, a defendant has the right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *People v Fackelman*, 489 Mich 515, 524-525; 802 NW2d 552 (2011). As a rule, the Confrontation Clause bars the introduction of out-of-court statements that are testimonial in nature unless the witness is unavailable and the defendant had a prior opportunity to confront the witness. *Bullcoming v New Mexico*, 564 US \_\_\_; 131 S Ct 2705, 2713; 180 L Ed 2d 610 (2011). "To rank as 'testimonial,' a statement must have a 'primary purpose' of establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." *Id.* at 2714 n 6, quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). The Confrontation Clause only applies to statements used by the prosecution as substantive evidence. *Fackelman*, 489 Mich at 528.

Where a statement is used for a purpose other than to establish the truth of the matter asserted, such as to explain why police officers took certain actions, the Confrontation Clause is not violated. *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007). Federal courts have carefully scrutinized the relevancy of asserted non-hearsay use of out-of-court statements to avoid evisceration of the constitutional right of confrontation from the overly broad use of testimony by law enforcement officers to explain their actions. See *United States v Cabrera-Rivera*, 583 F3d 26, 33-34 (CA 1, 2009), and *United States v Cromer*, 389 F3d 662, 676

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<sup>2</sup> *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

(CA 6, 2004).<sup>3</sup> Courts have also cautioned that even where the actual statement of a non-testifying witness is not introduced, the Confrontation Clause may apply if the content of the statement is communicated by implication. See *United States v Meises*, 645 F3d 5, 21-22 (CA 1, 2011), and *Ryan v Miller*, 303 F3d 231, 250 (CA 2, 2002).

In this case, the record does not support defendant's argument that the prosecutor elicited testimony regarding statements or opinions from non-testifying experts. While an expert diagnosis or opinion offered into evidence for the truth of the matter asserted violates the Confrontation Clause where the expert is not subject to cross-examination, *Fackelman*, 489 Mich at 528-535, we conclude here that the challenged testimony in this case did not, expressly or implicitly, disclose the content of any non-testifying expert's opinion.

We reject defendant's argument that the prosecutor's reference to Dr. Clyde Owings during redirect examination of Mary Palmateer implied that Dr. Owings had determined from medical evidence that the victim's death was a homicide and warranted keeping the case open. The prosecutor had only asked Palmateer, "Were you aware as to whether or not an individual by the name of Doctor Clyde Owings—," at which point defense counsel's objection prevented the prosecutor from finishing her question. Because the trial court sustained the objection and the jury did not hear the completed question, let alone Palmateer's answer to the question, there were no testimonial statements admitted contrary to defendant's right of confrontation. Moreover, the trial court instructed the jury before deliberations that "[t]he lawyer's statements and arguments are not evidence." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

We also reject defendant's claim that Palmateer's testimony that "[t]his was a murder of a baby" during further redirect examination by the prosecutor, and in response to a question asking why this case bothered her, unmistakably recounted an accusation made by Dr. Owings. Because Palmateer provided no testimony regarding any out-of-court statement by Dr. Owings, expressly or implicitly, Palmateer's testimony did not violate defendant's confrontation rights.

We are also not persuaded that the testimony of former Port Huron Police Detective Clifford Reifert regarding his investigation of this case before his retirement in 1996 violated defendant's confrontation rights. Although the prosecutor elicited from Detective Reifert that he had reviewed Dr Anderson's findings with Doctor Werner Spitz, the jury was already apprised by Dr. Anderson's testimony that Dr. Anderson had consulted with Dr. Werner Spitz to determine whether there were any additional autopsy tests that he should conduct. Detective Reifert did so because he considered Dr. Werner Spitz to be a "noted forensic pathologist." Whether Detective Reifert received some other type of information or perhaps an opinion from Dr. Spitz when he had the opportunity to "review" Dr. Anderson's findings with Dr. Spitz is mere speculation. There is no substantive evidence that Dr. Spitz offered an opinion regarding the cause or mechanism of the victim's death, let alone that Dr. Spitz said something to

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<sup>3</sup> This Court is not bound by the decisions of lower federal courts, but such decisions may provide persuasive reasoning on questions of federal law. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

corroborate Dr. Anderson's opinion. Accordingly, defendant has not shown that his constitutional right of confrontation was violated.

Lastly, having considered the direct examination testimony of Port Huron Police Sergeant Marcy Kuehn, we find no support for defendant's claim on appeal that the prosecutor impliedly communicated the content of a non-testifying expert's opinion through that testimony.

We affirm.

/s/ Jane E. Markey  
/s/ Michael J. Talbot  
/s/ Pat M. Donofrio