

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

FRANK THOMAS SPAGNOLA,

Defendant-Appellee/Cross-  
Appellant.

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UNPUBLISHED

August 4, 2009

No. 250488

Berrien Circuit Court

LC No. 2002-403913-FC

Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree premeditated murder, MCL 750.316. This case arises from the murder of Lisa Fein, a 33-year-old female. Defendant is the father of Lisa’s son, Jacob, who was 11 years old at the time of the murder. Because defendant has not shown that he was denied the effective assistance of counsel at trial, error in the admission of evidence during trial, that he was denied the opportunity to present a viable defense at trial, that prosecutorial misconduct denied him a fair trial, or that he was denied the right to an impartial jury at trial, we affirm.

I

During summer 2000, Lisa lived with her husband, Ron Fein, her son Jacob, and Ron Fein’s son from a previous marriage, Shane Demeulenaere, who was just over a year younger than Jacob. The family lived on Olive Branch Road, in Galien, Michigan. June 28, 2000 was a Wednesday, defendant’s regular day to have visitation with Jacob. After spending time playing basketball with Jacob, defendant returned Jacob to the Fein residence sometime during the evening of June 28, 2000. Defendant and Lisa spoke outside and reviewed the visitation calendar. It was a warm night and there were mosquitoes out. Defendant stayed around after he dropped Jacob off watching the boys catch fireflies. He drove away at about 10:30 pm in his parents’ Buick Park Avenue.

The next day, June 29, 2000, Ron Fein left his home in late afternoon to go to work the midnight shift (6:00 pm to 6:00 am) at the Cook Nuclear Facility as he regularly did. Lisa was home with Jacob and Shane that evening, planning to go to a water park the next day. Eventually the three went to sleep. In the early morning hours of June 30, 2000, Jacob woke up because he heard noises. Jacob ran to the master bedroom and saw someone struggling with his

mother. Jacob testified that the attacker wore a motorcycle-type helmet with a full face shield, dark blue or black work clothes (long pants and a long sleeved shirt), gloves, and boots. Jacob could not see the identity of the attacker. At trial, Jacob testified that he was sure the attacker was not defendant, his father. Jacob initially stated that it was not Ron Fein, but his testimony wavered that he did not know the identity of the attacker.

Jacob ran from the doorway and woke up Shane. He told Shane that he thought, “my mom and your dad are fighting.” Jacob ran back to the bedroom door but it was closed. He banged on the door and yelled but there was no response. He heard the sound of tape being pulled off a roll. Jacob attempted to call 911 from two different phones during the incident, but the first time he hung up quickly and the second time the cordless phone would not connect. Jacob and Shane initially hid in the bathroom because it had a lock on the door. During this time they heard loud “thumps,” not like footsteps.

Scared, the boys left the bathroom and escaped the house through Jacob’s bedroom window by opening the window and tearing away the screen by first poking it with a pencil. Shane looked at the clock in Jacob’s bedroom before they left and it said “3-0” something so he thought it was around 3:00 am when they left the house. They ran to two different neighbors’ homes to try to get help but no one answered. They ultimately decided to go to the home of Jeanette Fein, Ron’s grandmother, which was also on the street. On their trek, they saw the helmeted figure running/jogging down the street. Shane testified that the person was “[k]ind of short” and ran with a limp of sorts, like he had been recently hit. The boys watched the person until they lost sight of him. Shortly thereafter, they saw a car, not a truck, go down Olive Branch Road the opposite way the person had been running.

The boys arrived at Jeanette Fein’s house and she let the boys into the house. Jacob noted it was about 3:30 am because he saw a clock in the living room. Jacob testified that he and Shane told her “my Mom and Shane’s dad were fighting.” Shane testified that Jeanette Fein did not do anything because she thought Ron Fein and Lisa were just having an argument. Jacob did not describe the attack to Shane until they were on Jeanette Fein’s couch. Shane had not actually seen the attacker because once he left his bedroom the master bedroom door was already closed. Jacob and Shane remained at Jeanette Fein’s house for the rest of the night.

Ron Fein arrived home around 6:15 am. He entered the house through the back door and noticed that there had been a call at 6:17 am shortly before he entered the house. He recognized the number as defendant’s phone number on the caller ID. As Ron Fein was heading toward the basement stairs he noticed that the light was on in the master bedroom because it normally was not on. He looked in and saw that the bed was “messed up” and Lisa was not there, which was unusual. He checked other rooms and the basement, but no one was in the house. He noticed that the window was open in Jacob’s room and the screen was busted out. There was money sitting on the top of the dresser in the master bedroom and Ron Fein’s gun cabinet containing seven guns was also undisturbed. Also, both Lisa’s glasses and contacts were in the house and Lisa would not have left the house without one of them. Ron Fein then went to the basement that was also in disarray with dog food strewn about and a rug dragged out of place. Ron Fein then exited the basement through a door that leads outside. He noticed a roll of duct tape sitting on a woodpile that was not his duct tape. Ron Fein testified that the tape he found was not the brand he used. He used Tuck brand duct tape purchased from Wal-Mart or Meijer later found in the

house, and the brand he found on the woodpile that was not his, was later identified as Ace duct tape.

Ron Fein went back in the house and called defendant because it was odd that defendant had called his house so early in the morning and since something was obviously wrong, he wanted to call to see if defendant knew what happened. He spoke with defendant and defendant offered to come over but Ron Fein declined and said that he was calling the police. Ron Fein called the police and his father. He then went to his grandmother's house to see if she knew anything and found Jacob and Shane there. Shortly thereafter, the police arrived. Ron Fein showed the police through his house and they interviewed him, Jacob, and Shane. Jacob told police about the helmet-wearing intruder. Ron Fein drove around looking for Lisa but did not find her. Police also searched for Lisa at some point but did not locate her.

Police sought out defendant as part of their investigation of Lisa's death on the morning after the incident, June 30, 2000, after speaking with Lisa's family members at the scene. Lieutenant Rolland Lombard testified that he arrived at defendant's parents' home at approximately 9:00 am. Lombard testified that defendant appeared "tired" and that his responses to their questions were "slow." Lombard and other officers observed a raised, red scratch on defendant's lower left jaw line about ½ inch long that appeared to have been recently inflicted. Defendant told Lombard that he had cut himself shaving a couple weeks earlier. Officers did not believe that defendant's shaving cut explanation for the origin of the scrape on his jaw was physically consistent with the mark they observed.

Two days later, a group of Lisa's friends and other volunteers met and selected areas to search for Lisa. Greg Wiser, a coworker, called Ron Fein stating that his search party thought it found something near a wooded area at the edge of a bean field about a quarter mile away from Olive Branch Road. Police later found Lisa's body buried face down in the ground in a shallow grave at that location. Sergeant Doug Westrate testified that a blue J.P. Stevens pillowcase had been placed over Lisa's head, then a white Martex terry cloth towel covered her face. The towel and pillowcase were held tightly in place with duct tape wrapped several times around her head over her mouth and nose. Dr. David Allen Start, the forensic pathologist who performed the autopsy of the victim, testified that the towel, pillowcase, and duct tape were wrapped around the head and face in a fashion that would occlude the airway or occlude the nose and mouth of the victim. The autopsy revealed that the cause of Lisa's death was suffocation.

On July 10, 2000, police executed a search warrant at defendant's parents' house where he lived. Detective Sergeant Robert Boyce was one of the officers present at the search. He testified that police located a white Martex towel on the floor along one of the walls in the garage at defendant's house. Glenn Moore, a forensic scientist with the Michigan State Police (MSP) testified that the white Martex towel found in defendant's garage was similar in almost every way to the white Martex towel duct taped to Lisa's face except that the two towels were manufactured one year apart (1995 and 1996). He also testified that this type of towel was not sold for regular consumer use but exclusively for institutional use, primarily to hospitals or hotels. Sergeant Dave Rosenau testified that he searched the Fein residence twice, on different days, and found no similar towels in the Fein house.

Boyce testified that police found three J.P. Stevens pillowcases at defendant's house, a white one in the linen closet, and two light green colored pillowcases, one found in an adult

male's bedroom and one in a child's bedroom. Moore testified that he compared these pillowcases to the blue one found on the victim. He eliminated the white pillowcase because although it was a J.P. Stevens pillowcase, it was standard size, and the blue pillowcase was J.P. Stevens queen size. The green pillowcases matched the blue one found over victim's head as to size (queen), brand (J.P. Stevens), and approximate date of manufacture (manufactured prior to the end of 1990). Rosenau testified that he searched the Fein residence twice and found no similar pillowcases in the Fein house.

Michele Marfori, a forensic scientist for the MSP, analyzed fingernail clippings taken from both the right and left hands during the autopsy. Marfori conducted a DNA analysis of brown flaky material recovered from the swabbing of the right hand and compared it to the known reference samples she received for DNA comparison. Marfori testified that defendant's DNA matched the nail clippings profile of the right hand at all thirteen locations for the major donor. She also testified that Ron Fein and Jeffrey Rohl, a friend of Lisa, were excluded from contributing to the DNA types obtained in the samples.

Defendant testified on his own behalf at trial. He stated that he did not kill Lisa and that the last time he saw Lisa was on the Wednesday before she went missing, June 28, 2000 when he dropped Jacob off after his regular visitation at about 9:00 pm. He testified that on the night Lisa disappeared he ran errands including picking up his mother's check from the hospital, and then going to the Hollywood Video store before it closed at midnight. Defendant stated that he then went straight home and did not leave the house at all that night. When police came to talk to him the next morning, he told police that the "red mark" on his jaw line happened "a couple of days" before June 30, 2000 when the police initially came to his house, not a couple of weeks so they must have gotten that wrong in their reports. Defendant testified that he loved Jacob, and he would not have done anything to Lisa with Jacob in the house, or otherwise.

The jury found defendant guilty of first-degree murder. After defendant's conviction and sentence he filed numerous post-conviction motions and ultimately in May 2004 moved for a new trial. The trial court denied that motion in all respects with the exception of the ineffective assistance of counsel issue which dealt mainly with issues surrounding the DNA evidence. The trial court conducted a two-week hearing in 2005 after which the trial court ordered the release of DNA electronic testing data to defendant for review by his experts. Defendant could not go forward with a *Ginther*<sup>1</sup> hearing until that review was completed. The *Ginther* evidentiary hearing was held in December 2007. At the *Ginther* hearing, defendant presented two forensic scientists, a statistics expert, an attorney expert, and also questioned defendant's trial counsel, Tat Parish. The trial court issued a 53-page opinion and order denying defendant's motion for new trial holding that defendant had not carried his burden of showing that the performance of his trial counsel fell below an objective standard of reasonableness and that defendant failed to show that, but for any failings of trial counsel, there was a reasonable probability that the trial outcome would be different. Defendant now appeals as of right.

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

## II

Defendant first argues that he was denied the effective assistance of counsel at trial because his trial counsel, without having a strategic purpose, did not investigate or unreasonably terminated his investigation, and as a result, did not discover information that would have permitted him to successfully challenge the DNA evidence and related statistics at trial. Defendant raised this issue in his motion for new trial. The trial court held a *Ginther* evidentiary hearing and then issued its order denying defendant's motion for new trial. Therefore, this issue is preserved for this Court's review.

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional rights. *Id.* This Court reviews for clear error the trial court's findings of fact, and reviews de novo questions of constitutional law. *Id.* The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

To prevail on a claim of ineffective assistance of counsel, defendant must prove two components: 1) deficient performance, and 2) prejudice. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see also *People v Butler*, 193 Mich App 63, 66-67; 483 NW2d 430 (1992). To satisfy the first component, defendant must show that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland, supra* at 687. In other words, defense counsel's conduct must fall below an objective standard of reasonableness. *Id.* at 687-688. The second component requires the defendant to show “the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.” *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Defendant must satisfy both components to prevail. *Id.* at 599-600. In deciding the issue, “this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight.” *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Moreover, “[a] defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). “A substantial defense is one that might have made a difference in the outcome of the trial.” *Id.* “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant makes nine separate claims underlying this issue. We will address each claim in turn.

### A. Failure to Investigate Statistics

Defendant asserts that defense counsel unreasonably terminated his investigation regarding the DNA statistics involved in the case. As a result, defendant argues, defense counsel conceded the statistics to the prosecutor. Defendant contends that had defense counsel

investigated, he would have been able to discredit Marfori's statistical testimony and would have given the jury reasons to doubt that the DNA profile found under the victim's fingernails actually belonged to defendant. The prosecutor responds that defense counsel's theory of the case was that defendant's DNA arrived on the victim's nails by means that had nothing to do with murder, i.e. innocent transfer, and thus, defense counsel wisely declined to challenge the proposition that the DNA under the victim's nails was in fact defendant's DNA and the related statistics. The trial court held that defense counsel's decision not to pursue the statistical calculations was not ineffective assistance but reasonable trial strategy.

Marfori testified that she completed a statistical profile of the DNA results. She stated that the probability of choosing, at random, an individual that matches the profile of the right hand major donor, at all thirteen locations was one in 212.7 quadrillion in the Caucasian population, noting that the current population of the world was about 6 billion. Rodney Wolfarth is the biology subunit supervisor at the MSP Grand Rapids laboratory and is Marfori's supervisor at the laboratory. Wolfarth testified that chances of a random match decrease when doing statistical analysis on DNA when considering related individuals. He stated that when considering a father and son, the probability could drop by half, to one in 106 quadrillion.

In his brief on appeal, defendant specifically asserts that the jury should never have heard the one in 212 quadrillion number testified to by Marfori. He asserts that had defense counsel investigated and found an expert like Dr. Sandy Zabel who testified at the *Ginther* hearing on defendant's behalf, he would have learned that Marfori used the wrong method to compute the statistics, single donor as opposed to multiple donors, and that expert could have testified about the effect that siblings have on the probability numbers. At the *Ginther* hearing, Dr. Zabel confirmed that the probability of an unrelated Caucasian having the same DNA as defendant was indeed one in 212.7 quadrillion, but opined that Wolfarth's trial testimony about reducing the random match probability for related individuals by half is an incorrect statement, having calculated that the chance of defendant's brother having his same DNA is actually much greater, one in 565,469.

After reviewing the record, we conclude that defense counsel's decision not to pursue the DNA statistics was a classic matter of trial strategy which, under the circumstances, was not objectively unreasonable. Defense counsel was faced with the uncontroverted DNA evidence that defendant's DNA was found under or on Lisa's fingernails of her right hand. Faced with this evidence, defense counsel chose a path that allowed him not to have to challenge the near insurmountable probabilities involved that somehow the DNA was not defendant's DNA. Instead, defense counsel chose the defense strategy that allowed him to admit the DNA was defendant's DNA, but argue that the DNA was transferred onto Lisa through totally innocent means, i.e. direct transfer as defendant and Lisa reviewed the calendar, through Jacob or his clothes, or even through a mosquito swat.

When considering the path defense counsel chose to take in regard to the DNA, that the probability of choosing, at random, an individual that matched the profile of the right hand major donor, at all thirteen locations being 1 in 212.7 quadrillion as Marfori testified, or a smaller 1 in 106 quadrillion as Wolfarth testified when considering related individuals, or a still smaller 1 in 565,469 as Zabel testified when considering the chances that defendant's brother has his same DNA, is irrelevant because defense counsel's theory of the case conceded that the DNA was defendant's DNA. Focusing on the probabilities that the DNA somehow was not defendant's

DNA after all, makes no sense in light of the innocent transfer theory of defense. Furthermore, from a tactical perspective, had defendant focused to a larger degree on the probability that the DNA was not defendant's DNA, it could have confused the jury and backfired, in essence compromising defendant's casual contact/innocent transfer theory in the jury's eyes. In any event, this Court does not review counsel's decision with the benefit of hindsight. *Matuszak, supra* at 58. In addition, the mere fact that a strategy does not work does not constitute ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Thus, defense counsel was not constitutionally ineffective for not discovering that the statistical probability number testified to by Marfori may have been incorrect depending on the circumstances.

#### B. Failure to Investigate Alternative Theories of Transfer

Defendant next asserts alternative theories existed to present a viable and plausible theory of transfer in this case. Defendant argues specifically that while investigation would have confirmed that secondary transfer through Jacob was less likely, defense counsel should have continued his investigation to learn what other theories might be used to confront the prosecutor's case such as those presented by DNA experts who testified at the *Ginther* hearing including that DNA could have been directly transferred via a pimple, saliva, matter from a cough, sneeze, dripping nose, or mosquito. The prosecution responds that defense counsel was effective in eliciting testimony regarding both primary and secondary transfer of DNA at trial, and also argues that the other transfer theories that defendant asserts should have been presented at trial are problematic based on the facts of the case.

The trial court's holding on this issue focuses solely on whether, based on the facts, Jacob could have been an intermediary for a transfer from defendant to Lisa. The trial court held that the argument was "based on skimpy evidence," and held that "[s]uch thin gruel cannot feed a claim for ineffective assistance." A careful reading of defendant's brief on appeal reveals that defendant does not challenge the trial court's conclusion on appeal, but instead focuses his argument only on other theories of direct transfer that he asserts defense counsel should have investigated, discovered, and presented to the jury.

A review of the record reveals that in attempts to buttress his argument regarding innocent or casual transfer, when questioning both Marfori and Wolfarth at trial, defense counsel got both of them to admit that both primary and secondary transfer of DNA were possible via numerous different vectors, including sweat, hair, saliva, skin cells, cloth, and mosquitoes. Defense counsel also elicited testimony from both defendant and Jacob that mosquitoes were out the night that defendant and Lisa reviewed the visitation calendar. But defendant was not able to testify that Lisa actually swatted at a mosquito that was on him so as to get his DNA on or under her fingernails. He stated that he did not remember if that occurred but testified that had a mosquito been on him, Lisa would have swatted it away. Defense counsel also elicited testimony that defendant and Jacob had been playing basketball that night and that they both had been sweating, that defendant regularly hugged Jacob, and that Lisa also was affectionate with Jacob and handled his clothes. Defendant also testified that Lisa was standing right up against him and that their arms may have brushed.

While defendant argues that other theories of transfer exist, defendant does not provide any citation to the record that there was evidence supporting transfer from a pimple, saliva,

matter from a cough, sneeze, or dripping nose. Defense counsel is limited by the facts of the case. Defense counsel clearly highlighted the facts that best supported his innocent transfer theory of defense during questioning of his witnesses, during argument, and was even able to get forensics experts, Marfori and Wolfarth to admit that both primary and secondary transfer of DNA were possible via numerous different vectors. Defense counsel's role is "to choose the best defense for the defendant under the circumstances." *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). Considering the limited facts available, defense counsel made his best effort to advance the best defense available based on the facts in the record. *Id.*

Moreover, defendant must show "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin, supra* at 600. Defendant has argued that defense counsel should have continued the investigation to learn what other theories might be used to confront the prosecutor's case. In doing so, he hypothesizes that these other transfer theories would have resulted in a more favorable outcome for defendant, but he provides absolutely no record support for that contention. Defendant's argument fails. *Id.*

### C. Failure to Investigate Quantity of DNA

Next, defendant argues that had defense counsel investigated, he would have discovered that Marfori's estimates about the amount of human DNA present were wrong, and at a minimum, this was another reason to doubt her testimony. The prosecution responds that defense counsel explained repeatedly that the precise amount of DNA was not as important as showing the jury that it was microscopically, almost incomprehensibly small, and therefore quite possible to transfer through lab contamination or nonaggressive contact. The prosecution also points out that neither the prosecution nor their witnesses made any claims based on the difference between 3 nanograms and 21 nanograms of defendant's DNA. The trial court held that "[q]uibbling about the precise amount of DNA was not helpful," at trial.

At trial, Marfori testified that it was her estimate that the matter collected from the right hand sample contained approximately 40 nanograms of human DNA. Because defendant was the major donor, he would have accounted for 21 nanograms based on Marfori's estimate. Marfori also testified that a nanogram is one-billionth of a gram. She also stated that she only tested one nanogram of DNA from the sample to determine that it was a match to defendant's DNA. Defendant asserts that had defense counsel investigated further, he would have learned that other's estimated the amount of DNA present in the right hand sample was only 5 to 8 nanograms. Defendant contends that because the amount was less than what Marfori testified to, this would have been beneficial testimony at trial because the less DNA recovered, the increased likelihood of innocent or casual transfer. While this argument, in theory, is true, in practice, when presenting evidence regarding nanograms equivalent to one-billionth of a gram, the difference in the eyes of the jury regarding the precise amount of a sample size so infinitesimally small is negligible and any practical difference would be barely even noticeable to the jury.

The record reveals that defense counsel clearly argued at trial that the amount of DNA present was an extremely small amount of DNA. Other than quantifying the difference numerically as 21 of 40 nanograms or 3 of 5 nanograms, defense counsel's argument would have been exactly the same, that the amount of DNA transferred was an extremely small amount such that casual transfer or secondary transfer was possible. Our review of the record reveals that defense counsel was effective in eliciting testimony and characterizing the facts of the case to

support his theory that the amount of DNA matter was so very small that it could have been present on Lisa's right hand by virtue of casual contact.

Further, defendant must show "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin, supra* at 600. Defendant has argued that defense counsel should have continued the investigation to uncover alternate estimates of the amount of DNA present but provides no support that uncovering the alternate, lesser estimates would have had any effect at all on the jury at trial when considering the infinitesimally small sample size at issue. Thus, defendant has not shown that the result of the proceeding would have been different, and, his argument fails. *Id.*

#### D. Failure to Investigate Lab Accreditation

Defendant contends that had defense counsel investigated he would have learned that the lab was not accredited when the DNA tests were performed thereby giving the jury another reason to doubt whether the DNA evidence was reliable. The prosecutor responds that defense counsel was not ineffective when he chose not to attack the accreditation of the Grand Rapids lab at trial because accreditation is not required and any attack would have been tangential to the issues in the case. At trial, Marfori was specifically asked if the Grand Rapids MSP laboratory "is" accredited. She answered his question in the affirmative. Defense counsel did not ask the follow-up question on cross-examination concerning whether the lab was accredited at the time she performed the DNA analysis in this case. The trial court held that choosing not to attack the credibility of the lab did not amount to ineffective assistance of counsel at trial because it was a matter of trial strategy that could easily have backfired.

The record reveals that Jeffrey Nye, Supervisor of the Biology Subunit of the Forensic Science Division of the Lansing MSP Laboratory testified at the 2005 DNA release hearings that the Grand Rapids laboratory was a satellite lab to the main Lansing laboratory. He stated that the main Lansing MSP lab was accredited during all times relevant to this case. And that the Grand Rapids satellite laboratory came online in 1999 or 2000, in between American Society of Crime Laboratory Directors (ASCLD) accreditation cycles for the main Lansing lab. Nye testified that the ASCLD does not automatically come out and test satellite labs when they open. He further stated that the Grand Rapids satellite lab need only provide proof of "validation," that the instruments in Grand Rapids were operating within the tolerances already approved for the parent lab in Lansing in order for it to be accredited. Nye testified that those validation studies were completed before the 2000 testing in this case. However, according to Nye, the ASCLD only visits every five years, so they waited until the regularly scheduled ASCLD audit for the Grand Rapids satellite office to be accredited.

This argument boils down to a matter of trial strategy. Defendant argues that had defense counsel delved into the accreditation issue, he could have used it to vigorously discredit Marfori, Wolfarth, and anyone or anything associated with the MSP lab in Grand Rapids. But defendant's theory of the case admitted that the DNA results from the Grand Rapids lab as prepared by Marfori were accurate and that defendant's DNA matched the sample taken from Lisa, but that his DNA landed there through innocent means. Attempting to discredit Marfori, Wolfarth, and the Grand Rapids crime lab would not have bolstered his chosen defense when defendant already conceded the DNA was his. As such, any argument attempting to discredit the Grand Rapids lab and its staff would have been counterproductive and would have been a

confusing distraction for the jury. Additionally, as Nye explained, the fact that the ASCLD had not actually accredited the location was a matter of timing. Testimony established that while not officially accredited yet, the Grand Rapids lab had gone through the internal validation process and was operating within Lansing guidelines. Thus, had defense counsel chosen this route, he would have risked much with little if anything to gain. Defense counsel's failure to attack the accreditation issue was sound in retrospect and did not amount to ineffective assistance of counsel. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Matuszak, supra* at 58.

#### E. Failure to Investigate Violations of Lab Protocols

Defendant argues that had defense counsel investigated he would have discovered that Marfori's actual laboratory practices did not conform to written protocols, discrepancies in the testing data, analytical disputes, issues with interpretation of the results, issues with the chain of custody, and that Marfori suspiciously discarded and disregarded data. Defendant contends that had the jury learned this information, it would have had reason to doubt the reliability and accuracy of the DNA testing, analysis, and interpretation, as well as the credibility of Marfori. The prosecution responds that defense counsel was not ineffective for choosing not to pursue technical challenges of laboratory protocols because pursuing them would have accomplished nothing and would likely have given the jury the impression that defense counsel was attempting to avoid the substantive issues. The trial court held that defendant did not meet his burden at the *Ginther* hearing regarding defense counsel's failure to challenge laboratory protocol issues amounting to ineffective assistance at trial because defendant did not show that such a challenge would have had some chance of success at trial.

Once again, this issue is a matter of trial strategy. Like the previous accreditation issue, defendant argues that defense counsel could have used these perceived discrepancies in the testing data to vigorously discredit Marfori, Wolfarth, as well as the MSP lab in Grand Rapids. But, once again, defendant's theory of the case admitted that the DNA results from the Grand Rapids lab as prepared by Marfori were accurate and that defendant's DNA matched the sample taken from Lisa, but that his DNA had been transferred there through innocent means. Attempting to discredit Marfori's methods, or the lab protocols at the Grand Rapids crime laboratory would have had no positive effect on his innocent transfer defense when considering that defendant already conceded the DNA at trial. As such, any argument attempting to discredit the Grand Rapids lab protocols and its staffs' application of those protocols, when at the same time conceding the result of the analysis was correct would be pointless and likely would have diverted the jury's attention from the defense's main focus, the innocent transfer theory. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Matuszak, supra* at 58.

Moreover, the burden is on defendant to show "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin, supra* at 600. Defendant has raised technical questions about alleged procedural deficiencies but has not provided this Court with answers explaining how the outcome of the proceeding would have been different had these been further investigated by defense counsel. *Id.* In fact, defendant has provided no evidence that the alleged testing irregularities would have had any effect on the result of the proceeding whatsoever. Indeed, all defendant's experts at the *Ginther* hearing conceded that Marfori's ultimate result, no matter how flawed her analysis or procedure,

was correct – that defendant’s DNA was a match to the major donor of the right hand sample taken from the victim. Thus, any attempt defense counsel would have made at trial to cast doubt on the procedure employed while at the same time accepting the result of that procedure as correct would have been a futile endeavor. Counsel does not render ineffective assistance by failing to make a futile argument. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). Defense counsel’s failure to probe the lab protocols did not amount to ineffective assistance of counsel.

#### F. Failure to Investigate the Left Hand Evidence

Defendant argues that had defense counsel investigated, he would have discovered that there were no male chromosomes in the victim’s left hand DNA sample, and thus defendant could be excluded as a contributor. The prosecutor responds that defense counsel was not ineffective in regard to his handling of the DNA results from the left hand nail clippings because he made the inconclusiveness of the results for the left hand plain for the jury through Marfori’s testimony. The trial court held that defense counsel was not ineffective because defense counsel “made sure that the jury understood that the MSP could not say that defendant was the minor donor to the left-hand sample” and characterized the argument as a “semantic quibble.”

Our review of the record reveals that on cross-examination, defense counsel was able to get Marfori to say more than once that defendant was excluded at one location from the DNA results from the victim’s left hand. This was skilled questioning on the part of defense counsel because this was not truly the case. Marfori then stated that she was not saying defendant was the minor donor of the left hand sample, only that defendant could not be excluded as a possible donor. Marfori also admitted that an allele of defendants, which she would expect to see in a complete mixture, was missing from the left hand results. Wolfarth testified that no conclusions could be drawn about the minor donor to the left hand. Clearly, defense counsel’s nuanced questioning not only made the inconclusiveness of the results for the left hand plain for the jury, but it also manipulated Marfori into providing positive, if not correct, testimony for the defense.

Also, defense counsel was not ineffective for failing to present the results for the left hand that showed only an X chromosome. Defense counsel pointed at Ron Fein and Jeff Rohl as possible suspects. Thus, information about an X chromosome was irrelevant because no one ever suggested even the possibility that the attacker was a woman and it had been established that the major donor to the left hand was the victim herself. In any event, the left hand results were inconclusive but the right hand results were definite, defendant was the major donor. The record reveals that defense counsel questioned the witnesses about the left hand results with finesse and it cannot be said, as defendant argues, that defense counsel did not investigate and properly present the evidence resulting from the left hand sample. “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *Rockey*, supra at 76-77. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Matuszak*, supra at 58.

#### G. Failure to Investigate the Presumptive Blood Test

Defendant argues that defense counsel needed to do an independent investigation of the brown flaky material in order to challenge the prosecutor’s theory of the case that the material was defendant’s blood. The prosecutor responds that defense counsel was not ineffective for

declining to request further testing because if a confirmatory test for blood in the substance on the fingernails had come back positive, or if blood tests on a soil sample had come back negative, the prosecution would have additional evidence in support of their theory that the victim scratched defendant in a struggle. The trial court held that defense counsel was not ineffective for not requiring testing to confirm the presumptive Hemastix test because of the level of risk involved.

We conclude that defense counsel's strategy was reasonable and did not amount to ineffective assistance of counsel because additional testing was indeed too risky and without an upside. There was no advantage to having the matter tested to see if it was blood. If it was blood, the innocent transfer theory would have been torpedoed because the only way the blood could have gotten there would have been through the scratch on defendant's face during a struggle. The only other possible way would have been through a mosquito swat which defendant could not testify to at trial. And, not testing it allowed defense counsel to argue that it was not blood just as he would have if the test result would have come back negative. Importantly, defendant produced no expert at the *Ginther* hearing to testify that the matter was not blood. Defense counsel's decision not to have the matter tested for blood measured the risks involved and did not amount to ineffective assistance of counsel. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Rockey, supra* at 76-77. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Matuszak, supra* at 58.

#### H. Failure to Investigate the Swabbing of the Nail Clippings

Defendant asserts that Marfori failed to separately swab Lisa's nail clippings and had defense counsel investigated this issue it would have provided an additional reason to doubt the reliability of the DNA testing and the credibility of the analyst. The trial court disagreed and held that the "defense provided inadequate evidence that such an opinion was scientifically supportable or that analyzing nail clippings by finger instead of by hand was accepted scientific practice."

The record reveals that Dr. David Allen Start, the forensic pathologist who performed the autopsy of the victim, testified that it was not MSP protocol to clip fingernails and package them individually for analysis. Thus, during the autopsy, he and an assistant packaged the fingernails in envelopes per right and left hand. Defense counsel used this to defendant's benefit at trial because he elicited testimony from Marfori that the clippings were touching each other in the envelopes and that although Marfori only swabbed the underside of each nail, she admitted that matter from the top part of a nail could have touched the underside of a different nail and then been included in the swab. This testimony was important because it opened the door to the possibility that defendant's DNA could have been on top of Lisa's nails rather than underneath her nails. DNA found on top of Lisa's nails would support defendant's theory of innocent transfer because she could have gotten the DNA on her nails when she and defendant studied Jacob's visitation calendar together, or even via Jacob or his clothing. Soliciting this evidence was a clear attempt to counter the prosecution's theory of the case that the victim got defendant's DNA under her fingernails by scratching at defendant's jaw in a struggle.

Defendant cannot show he was prejudiced by defense counsel's use of the evidence in an affirmatively exculpatory manner rather than in the losing battle of attempting to discredit

Marfori and the Grand Rapids MSP laboratory, or to identify a possible third minor DNA donor to the right hand sample when the experts agree that defendant was the major donor to the right hand sample. In short, defendant cannot show prejudice in defense counsel's approach to this evidence. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Rockey, supra* at 76-77.

#### I. Failure to Investigate, Consult With, and Call an Expert Witness at Trial

Defendant argues that had defense counsel investigated, he would have learned of many weapons that he could use to call into question the reliability of the lab procedures and accuracy of the results, the reliability and credibility of the analyst-witness and supervisor-witness, the reliability of the statistics, and the prosecutor's theory about when defendant's DNA was transferred to the victim's fingernails. Furthermore, defendant asserts that defense counsel should have known that experts can provide invaluable assistance during the pretrial preparation stage of the case and would have assisted in the development of a principled defense. The prosecution responds that defense counsel did well to avoid the risk that the prosecution would use defense counsel's own expert witness to establish the truth, that the simplest hypothesis in this case is true, that the victim got defendant's DNA under the fingernails of her right-hand when she scratched him while he was assaulting and murdering her. The trial court held that "[g]iven the concessions [defense counsel] secured from the prosecution experts at trial and given the concessions made by defense experts at the *Ginther* hearing, it was a reasonable defense strategy for [defense counsel] to opt not to call his own expert but to try to prove his points through the mouths of his adversary's witnesses."

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Rockey, supra* at 76-77. The failure to call a witness constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Contrary to defendant's argument on appeal, we conclude that defense counsel's decision not to call an expert witness at trial did not dispossess defendant of a substantial defense but in fact afforded defendant with a substantial defense in the face of uncontroverted DNA evidence. The concessions that a DNA expert for the defense would have had to make at trial on cross-examination would have been damning and likely would have totally derailed defendant's innocent transfer theory. These concessions include major evidentiary aspects of the case including: defendant was the major donor to the right-hand sample, no other identifiable DNA was found on the victim other than her own, the red/brown flaky substance was blood under the victim's fingernails, DNA evidence degrades over time and considering a 30 hour period passed since the victim had any contact with defendant innocent primary transfer through casual contact was not a viable defense, and that secondary transfer through Jacob was almost impossible considering that in that instance Jacob's DNA would have been on the victim in a larger amount than defendant's DNA.

When considering the defense tactics in this case, a fundamental law of physics comes to mind, that is, every action has an equal and opposite reaction. Had defense counsel brought in an expert witness, that action necessarily would have resulted in a mountain of concessions that likely would have resulted in an avalanche of damning evidence. While it would be favorable to have an expert affirmatively state that innocent transfer was possible notwithstanding the amount of defendant's DNA that existed on the victim, the cost to defendant of such a witness was

strategically too expensive in light of the concessions made by defendant's experts at the *Ginther* hearing. That defense counsel chose a strategy that allowed him to argue nuances in the evidence to make his case without making certain concessions about the facts of the case was a sound strategy. The strategy allowed defense counsel to get the concessions out of the MSP forensic experts, an approach that may have been even more effective before the jury rather than bringing in his own expert. For these reasons, we conclude that defense counsel's choice not to call an expert witness for the defense at trial was a reasoned and appropriate trial strategy in light of the evidence of the case and did not deny defendant a substantial defense at trial. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Rockey*, supra at 76-77.

Regarding defense counsel's preparation for the trial and performance at trial, it is clear from the focused and detailed questioning of witnesses together with the creative objections and arguments defense counsel made at trial, he was prepared. Defense counsel's strategy was well thought out in both a macro and micro sense. Defense counsel stayed on message throughout trial that the DNA was deposited on the victim through innocent means and did his best to support this strategy through pointed elicitation of evidence as well as inspired argument. That a strategy does not work does not render its use ineffective assistance of counsel. *Kevorkian*, supra at 414-415.

Edward Ungvasky, the attorney defense expert at the *Ginther* hearing believed that the innocent transfer theory was "idle speculation" and defendant would have been better served had defense counsel called his own expert witness and advanced a strategy that the MSP analysis was sloppy and biased and not to be believed. His assertions ignore the fact that defendant's expert witnesses at the *Ginther* hearing did not doubt the conclusion that defendant was the major donor to the right hand sample of the victim. The logical conclusion is that a crusade to discredit Marfori, Wolfarth, and the procedures at the Grand Rapids lab at trial would have failed the minute the defense expert conceded that the DNA was defendant's DNA and no other identifiable DNA was present. Defendant would have been left with no defense, and no explanation of the evidence. Defense counsel's strategic choices of not calling an expert witness and arguing the innocent transfer theory allowed defendant to steer clear of this result.

Moreover, Ungvasky, a well-credited defense attorney practices in Washington D.C., an urban metropolis. Defense counsel Tat Parish is also a well-credited defense attorney who practices in Berrien County, a rural area of western Michigan. Defense counsel testified that he did not believe it would be a smart or effective choice to forcefully or agonistically cross-examine Marfori, a female witness. Further he also stated that the MSP crime labs are well-respected and in his experience have a good reputation in the area. Thus he did not believe, in his experience, that these approaches would be effective before a Berrien County jury. Local expertise cannot be disregarded. Plainly, defendant asserts that lack of investigation resulted in defense counsel being unaware of other possible more favorable defenses including discrediting the crime lab. Based on the record, this assertion is bald and false. Defense counsel was limited for want of factual predicate and foundation to arguments now raised by defendant. Defense counsel made thoughtful, calculated decisions based on his research and experience. To be clear, defense counsel studied DNA forensic analysis before trial and consulted and retained a preeminent expert in DNA. He also consulted with a forensic pathologist and a serologist, as well as other attorneys, while making these decisions.

In sum, defense counsel's decision not to call an expert witness did not deprive defendant of a substantial defense and does not constitute ineffective assistance of counsel. *Dixon, supra* at 398.

#### J. Absence of Prejudice

Defendant presented multiple claims of ineffective assistance of counsel in his brief on appeal and again at oral argument that all in essence assert that defense counsel simply picked the wrong strategy at trial. But, when considering all the circumstance of this case, defendant has failed to show prejudice in light of the overwhelming evidence that defendant committed the charged crime even without the evidence that the DNA type of the major donor to the material found on the victim's fingernails was consistent with defendant's DNA type at all 13 loci.

There was abundant evidence of defendant's motive to kill the victim. Defendant and Lisa were gnashing their teeth in prolonged and heated custody battle over Jacob for nearly 11 years. Defendant had a large monetary debt to the victim for unpaid child support and was facing jail time for not paying the child support to the victim in violation of several court orders. Defendant was suffering from depression, could not work, and several coworkers, some who even characterized themselves as friends of defendant, testified that defendant could not think or talk about anything other than getting custody of Jacob even in work situations.

There was no evidence of any credible motive for anyone other than defendant to commit this crime. Ron Fein had an airtight alibi at the Cook Plant. There were no signs of burglary at the scene, the victim was not sexually assaulted, and neither Jacob nor Shane were harmed even though the attacker knew at least Jacob was present in the house because he saw Jacob and closed the door to the bedroom. No DNA was found on the victim from Ron Fein or Jeff Rohl, the alternative suspects the defense put forth.

Defendant and the victim had a contentious relationship. Defendant did not agree with the victim's lifestyle and believed he was the better parent to Jacob. He also thought that the victim was not spending the child support he paid to her on Jacob. At some point, there was evidence that defendant even believed that the victim did not love Jacob. There was copious evidence that the victim was afraid of defendant and did her utmost not to be near him. Defendant stared at the victim and threatened her. Several friends and neighbors supported the victim's profound fear of defendant and that she never wanted to be anywhere close to him when she was alone.

There was evidence that defendant attempted to hire a life-long criminal, Matthew Ross, to kill the victim a few years before her attack. Ross testified at trial that when he declined to kill Lisa, defendant paid him to plant drugs in the victim's car to discredit her so he could get custody of Jacob. Ross was already in prison in California and had nothing to gain by testifying at trial. In fact testifying at trial might have put him at risk when he returned to prison.

Defendant's alibi for the night of the murder was weak at best. His father admitted that he had not seen defendant between 12:30 a.m. and 6:30 a.m. Defendant even told the police he did not see his parents that night between 12:30 a.m. and 6:30 a.m. The only testimony that defendant was home during this time came from defendant's mother who claimed she had seen defendant at least twice during the night when she used the bathroom. But, after cross-

examination her testimony was suspect due to limited observation as well as a clear bias for defendant and against the victim.

The physical evidence is also overwhelming. The white towel wrapped around the victim's head was a towel sold only to institutions like hospitals and hotels. Police found a towel identical in every way, made by the same manufacturer only one year apart, in defendant's garage. The pillowcase found over the victim's head was a queen-size pillowcase made by JP Stevens, and police discovered two other queen-size pillowcases made by JP Stevens, albeit a different color at defendant's home. No similar towels or pillowcases were found at the victim's home, which police searched twice. Also, the duct tape wrapped around the pillowcase and towel on the victim's head asphyxiating her was the same type, brand, and physical composition as the duct tape police found on defendant's roof liner in his Chevette.

The intruder wore a long-sleeved shirt, gloves, long pants, boots, and a motorcycle helmet with a full face shield. On the morning after the attack, police observed a scratch on just about the only place where the victim, confronted with her attacker, could have scratched exposed skin with her right fingernails.

We credit the trial court because it may have summed up the lack of prejudice best in its opinion and order denying defendant's motion for new trial when it stated as follows:

Such a series of coincidences and bad luck is hard to believe at best and absurd at worst. There is no reasonable probability that, using their common sense, a jury would decide that defendant was that unlucky. Though defendant's trial counsel did his best to counter it, the prosecution's non-DNA evidence was -- if not overwhelming -- certainly very strong. Using *Strickland's* language, there is no reasonable probability that, absent the errors reliably testified to by defendant's *Ginther* experts, the jury would have had a reasonable doubt respecting guilt.

Defendant has not established that defense counsel was ineffective at trial.

### III

Defendant argues that testimony at trial regarding Lisa's allegations in the custody litigation between she and defendant violated his right of confrontation because the testimony was hearsay. Defendant also argues that statements at trial concerning Lisa's fear of defendant violated his constitutional right of confrontation. We review de novo a defendant's assertion that admission of certain testimony violated his constitutional right to confront the witnesses against him, to determine whether any constitutional error occurred and, if so, whether that error was harmless beyond a reasonable doubt. *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005); *People v Carines*, 460 Mich 750, 774; 597 NW 2d 130 (1999). We review the trial court's evidentiary decision to admit the challenged evidence for a clear abuse of discretion. *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006). The trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW 2d 347 (2007).

Here, the trial court granted the prosecutor's pretrial request to admit evidence regarding Lisa's allegations in the custody litigation holding that the proffered evidence from the custody

documents was relevant to show the discord between the parties and defendant's motive for murder, as well as to explain the context of defendant's 1997 solicitation of Matthew Ross to kill Lisa. In doing so, the trial court specifically listed the documents and events to which Paul Jancha, Lisa's custody attorney could testify. The trial court also disallowed the prosecutor's request to play videotapes of Lisa's testimony in June 1997 and June 1998 for the reason that they were duplicative of information already contained in the documents to be testified to by Jancha at trial.

Further, the trial court granted the prosecutor's pretrial request to admit statements Lisa had made to various friends and neighbors expressing her fear of defendant pursuant to MRE 803(3) holding that the evidence showed defendant's motive, the discord between defendant and Lisa, and to rebut the theory that defendant's DNA was transferred to Lisa via casual contact. Though, the trial court found inadmissible any statements Lisa made to friends about her fear of defendant prior to spring 1997 as too remote in time and because the probative value of the statements were substantially outweighed by their prejudicial effect.

#### A. Lisa's Allegations in the Custody Litigation

A defendant has the right to be confronted with the witnesses against him or her. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination. *Id.* at 68. But, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted. *People v McPherson*, 263 Mich App 124, 133; 687 N W 2d 370 (2004), citing *Crawford, supra* at 59 n. 9. Thus, a statement offered to show the effect of the out-of-court statement on the hearer is not hearsay and does not violate the Confrontation Clause. *People v Lee*, 391 Mich 618, 642-643; 218 NW2d 655 (1974). Specifically, a statement offered to show why a person who heard the statement acted as he or she did is not hearsay. See *People v Jackson*, 113 Mich App 620, 624; 318 NW 2d 495 (1982).

In the present case, the challenged testimony regarding Lisa's allegations in the custody litigation did not violate defendant's right of confrontation. When read in context, it is clear that the testimony was not hearsay because it was not offered to prove the truth of the matter asserted. MRE 801(c). The testimony was not offered to establish the truth of any of the allegations Lisa waged against defendant throughout the course of the custody litigation – that defendant repeatedly brought Jacob home late despite visitation guidelines, licked his wounds, cut his hair, slept in the same bed with Jacob, or even failed to pay his child support on time. Rather, the prosecutor offered the evidence to establish and explain the discord between defendant and Lisa caused by a long-term heated custody dispute, defendant's increasing frustration with Lisa as well as the effect it had on him over the years, and defendant's motive to kill Lisa to get custody of their son Jacob. Because the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted, this testimony did not violate defendant's right of confrontation. Thus, the trial court did not plainly err when it admitted testimony regarding Lisa's allegations in the custody litigation. *McPherson, supra* at 133, citing *Crawford, supra* at 59 n. 9.

#### B. Lisa's Statements About Her Fear of Defendant

The Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford, supra* at 53-54; also see *Shepherd, supra* at 347. Thus, the Confrontation Clause is not implicated unless the statements of a declarant are testimonial. *Davis v Washington*, 547 US 813, 821; 126 S Ct 2266, 165 L Ed 2d 224 (2006); *People v Taylor*, 482 Mich 368, 377-378; 759 NW 2d 361 (2008). This is because only testimonial statements cause the declarant to be a “witness” within the meaning of the Confrontation Clause. *Davis, supra* at 821. “It is the testimonial character of a statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.” *Id.*

A witness provides a testimonial statement when she gives “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford, supra* at 51 (quotations omitted). Statements are testimonial if the “primary purpose” of the statements or the questioning that elicits them “is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis, supra* at 814. “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Crawford, supra* at 51.

We conclude that Lisa’s statements regarding her fear of defendant did not constitute testimonial evidence under *Crawford*, and therefore were not barred by the Confrontation Clause. The record provides no support for the assertion that the statements of Lisa to her friends, neighbors, or acquaintances regarding her fear of defendant were made as solemn declarations or affirmations for the purpose of establishing any past fact. Rather, the statements were casual remarks made to friends, neighbors, or acquaintances regarding the way defendant made her feel, that she was scared to be around him, chose not to be near him, and how that fear affected her daily life. *Crawford, supra* at 51. Generally, Lisa’s statements were made during Jacob’s sports or school events to other parents, casual conversations with friends and neighbors, or other similar informal contexts. Not one of Lisa’s statements regarding her fear of defendant was made to a government officer. *Id.*

Furthermore, it cannot be said that the declarant should have reasonably expected any of the statements to be used in a prosecutorial manner, or that the circumstances under which the statements were made would cause an objective witness reasonably to believe that the statements would be available for use at a later trial. *Crawford, supra* at 51-52; *People v Lonsby*, 268 Mich App 375, 377; 707 NW 2d 610 (2005). In other words, an objective witness would not reasonably expect that Lisa’s casual statements made to friends, neighbors, or acquaintances in informal situations that she was afraid of defendant would later be used in a prosecutorial manner. *Id.* Thus, the challenged statements regarding Lisa’s fear of defendant do not qualify as testimonial and their admission at trial did not violate defendant’s constitutional right of confrontation.

Defendant argues specifically about a statement made by Dale Foster at trial. Foster testified that Lisa would talk to him about her problems with defendant concerning child support

and custody battles. When the prosecutor asked Foster if Lisa ever told him what her feelings were concerning defendant, he responded, “she had stated a couple of times of – if there was anything that ever happened to her that [defendant] was to blame.”<sup>2</sup> Defense counsel did not object to the testimony at trial. While it is more specific in nature than the other more generalized statements relating her feelings of fear to her friends, neighbors, and acquaintances, even this statement does not qualify as testimonial in nature. The statement was informal and made to a neighbor, not a government official. Lisa made no effort to have Foster relay information to police or any other government official for later use at trial. Lisa included no information on how defendant might harm her and no information on time frame. There is no indication that Lisa made this statement as a specific attempt to supply formal testimony for her own anticipated murder trial. *Crawford, supra* at 51-52; *Lonsby, supra* at 377. In any event, Foster’s statement was one sentence in a seventeen day trial to which defendant did not object. No error occurred.

### C. Harmless Error

If a defendant’s right to confrontation is violated, he is entitled to a new trial unless the error was harmless beyond a reasonable doubt. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). Though we concluded that defendant’s right to confrontation was not violated at trial, even if the trial court’s admission of one or more of Lisa’s statements was error, the evidence of defendant’s guilt was so overwhelming, any error would have been harmless and defendant would not be entitled to a new trial. *Id.*

## IV

Next, defendant argues that the trial court abused its discretion in excluding a substantial amount of critical defense evidence at trial and as a result denied him a meaningful opportunity to present a complete defense. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). The trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Young, supra* at 448.

### A. Evidence of Fein Relationship Issues

Defendant first asserts that the trial court’s exclusion of relevant evidence suggesting that Lisa was engaged in an acrimonious relationship with another suspect, Ron Fein, a relationship that was fraught with problems, was error. Defendant sought to provide testimony through three witnesses, Lori Maitland, Jeff Rohl, and Cindy Lannan, that Lisa and Ron Fein had problems in their marriage to counter the theory that only defendant had a motive to murder Lisa. The prosecutor responds that the trial court did not abuse its discretion in excluding evidence of

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<sup>2</sup> The trial court had ruled pretrial that Foster’s statement and three similar statements to other friends were inadmissible at trial and the prosecutor was not allowed to ask the witnesses about those specific statements.

alleged problems in the Feins' marriage because this evidence was either immaterial or inadmissible hearsay. We will address the proffered testimony of each witness in turn.

(i.) Lori Maitland

Defense counsel made an offer of proof at trial that if he was allowed to pursue Maitland she would testify that Ron Fein was very jealous, that Lisa and Ron Fein were not getting along, that in 1999 Lisa talked about leaving Ron Fein and moving in with Maitland, and that the two had even looked at houses together. Defense counsel argued at trial that he was offering Maitland's testimony to show Lisa's state of mind and to show that Ron Fein had a reason for killing Lisa. The trial court disallowed Maitland's testimony as hearsay.

Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is inadmissible unless otherwise provided by the rules of evidence. MRE 802. The trial court properly observed that Maitland's anticipated testimony stood on different footing from other statements the prosecutor introduced about defendant because defense counsel was offering Lisa's statement to Maitland that Ron Fein was jealous to show that Ron Fein was jealous. That is, defense counsel was indeed offering Lisa's statement for the truth of the matter asserted. Thus, the proffered testimony was hearsay offered for the truth of the matter asserted and the trial court properly disallowed the evidence.

There is a relevance issue with the proffered evidence as well. Evidence is relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. The trial court found that the prosecutor's evidence of Lisa's fear of defendant was relevant to the question of whether Lisa likely had voluntary physical contact with defendant. This was clearly material in light of the defense's cross-examination of the prosecution witnesses that had focused on the source of defendant's DNA found on Lisa. Lisa's state of mind as expressed to Maitland about Ron Fein, however, was not similarly relevant. MRE 401.

(ii.) Jeff Rohl

Rohl admitted to having an affair with Lisa from mid-1999 until roughly the end of that year. At trial, defense counsel made an offer of proof about testimony he hoped to elicit from Rohl that Lisa said that Ron Fein was always yelling at her, that they had arguments about money, and that she was interested in divorce. The trial court ruled that the evidence would be excluded for the same reasons it excluded Maitland's testimony. Again, defendant was offering Rohl's testimony for the truth of the matter asserted and thus, the proffered testimony was hearsay offered only for the truth of the matter asserted and the trial court properly disallowed the evidence.

(iii.) Cindy Lannan

At trial, during the examination of Lannan, a coworker and friend of Lisa, defense counsel created a record outside the presence of the jury. At this time, Lannan testified to problems between Ron and Lisa including that Ron was always accusing Lisa of flirting and wanted to know where she was, that Lisa had talked about getting a place of her own, and had

stated that a separation from Ron might be a good thing for a while. But Lannan also stated that in the last six months of her life, Lisa had not complained and was very happy in her marriage. Defense counsel once again argued that he should be able to present this evidence to the jury to counter the idea that only defendant had a motive to murder Lisa. The prosecutor argued that Lannan's testimony did not portray any fear of Ron Fein and that again defendant was offering the hearsay testimony for the truth of the matter asserted.

The trial court separated the testimony, allowing testimony regarding Lisa's intention to find a residence of her own, or the notion that "separation would be a good thing" from Lisa's perspective. The trial court also allowed redirect by the prosecutor regarding the last six months of the marriage. The trial court also ruled that no other statements were admissible because they contained another level of hearsay, "statement[s] of belief or intent or plan" of Ron Fein. We conclude that the trial court's action in splitting up the testimony was correct because when the prosecution introduced evidence of Lisa's state of mind regarding defendant, it was for the particular purpose of showing Lisa would not get close enough to defendant to get his DNA on her fingernails through casual contact. There was no such purpose for showing Lisa's state of mind regarding Ron Fein, thus the evidence was inadmissible as hearsay testimony offered for the truth of the matter asserted.

#### B. Rehabilitation of Jacob Spagnola

Next, defendant argues that the trial court erred when it limited the ability of the defense to rehabilitate Jacob Spagnola's certainty that the victim's attacker was Ron Fein. The prosecutor counters that the trial court allowed some of defendant's proposed "rehabilitation" of Jacob while properly excluding the rest which was repetitive or nonexistent. At trial, defendant sought to "rehabilitate" some of Jacob's testimony on direct examination regarding alleged prior identifications he had made of the intruder as being Ron Fein to Shane before they left the house, to Ron's grandmother when they arrived at her house, and later that morning to police. Defense counsel characterized these statements as prior consistent statements and sought their admission under MRE 801(d)(1)(B) and alternatively argued that the statements were excited utterances or present sense impressions under MRE 803(2) and (3). The trial court held that Jacob's statement to Shane was an excited utterance under MRE 803(2) and allowed defense counsel a single line of inquiry into the statement. The trial court did not allow defense counsel an opportunity to question Jacob about his statement to Ron's grandmother under MRE 403 finding that it had been covered once already. The trial court also found that any statement Jacob made to the police later that day did not qualify as an excited utterance under MRE 803(2).

The whole of defendant's argument on this particular issue consists of one sentence and does not provide any analysis. Defendant states that "[t]he trial court further erred, denying [defendant's] due process and confrontation rights, by limiting the defense ability to rehabilitate Jacob Spagnola's certainty that Lisa's attacker was Ron Fein . . . , ruling out prior consistent statements to others, including the police . . . ." This Court need not address an issue that is given only cursory treatment, *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), nor may a defendant leave it to this Court to search for a factual basis to sustain or reject a position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

Though we may choose not to address this issue, we will address it. The issue is straightforwardly resolved because the premise of defendant's argument fails based on the

record. The record reveals that there was no “certainty” on Jacob’s part regarding the identity of the intruder to “rehabilitate.” Although Jacob had made statements to the effect that he thought he saw his mother fighting with Ron Fein when he looked into her bedroom on the night of the incident, he also testified that he did not know the identity of the intruder. He specifically stated, he saw his mother and “some guy.” He also stated, “I don’t know who it was.” During testimony he referred to the attacker as “the guy.” The record reveals that Jacob was not “certain” about the identity of the attacker and therefore there was no “certainty” to rehabilitate. Defendant has not shown error.

Furthermore, defendant cannot establish error because the trial court did allow defense counsel to once again inquire into Jacob’s statement to Shane that “I just woke [Shane] up and I told him that my mom and your dad [Ron] are fighting.” Also, Jacob’s statement to Ron’s grandmother was also testified to before the jury and was in the record. Shane also provided similar testimony, thus Jacob’s statement to Ron’s grandmother came in again anyway through Shane’s testimony. Defendant has presented no citation to the record that Jacob made any statement to police that Ron was the intruder. In fact, this assertion is belied by the record because Jacob testified at trial when asked if he told the police that the intruder was not Ron, he answered, “I didn’t – I would tell them that I was sure that it wasn’t Ron . . . .” For all of these reasons, defendant’s argument that the trial court erred when it limited the ability of the defense to rehabilitate Jacob Spagnola’s certainty that the victim’s attacker was Ron Fein, fails.

### C. Impeachment of Matthew Ross

Defendant argues that the trial court erred when it limited the ability of the defense to challenge the testimony of Matthew Ross allegedly receiving from the prosecutor a “free pass” on a previous robbery in Michigan in exchange for his testimony against defendant at this trial, as well as Ross being a “snitch” in a previous case in Oregon 22 years ago.

#### (i.) Alleged “Free Pass”

Defendant argues that error occurred because he was not allowed to explore a “free pass” given to Ross on an alleged armed robbery that Ross testified he committed in Michigan in 1995 during the preliminary examination of this matter. Ross had stated that he and an accomplice had “stuck up a bookie” in the western part of Michigan in 1995. Defense counsel sought to use this testimony at trial by arguing that Ross was merely providing testimony at this trial in exchange for a “free pass” he received from the prosecutor on that earlier robbery. The prosecutor contends that defendant’s argument is blatantly wrong because defendant presented no facts to establish that Ross had received a “free pass” on the 1995 robbery. The parties argued the issue at trial and the trial court disallowed the evidence.

Our review of the record confirms the trial court’s observance that there is a total lack of evidence in the record that the prosecutor had given or had the power to give Ross any kind of “free pass” regarding the 1995 Michigan robbery in exchange for his testimony in defendant’s case. In fact, aside from defendant’s own short statement, there was no further evidence about the circumstances of the alleged robbery. Importantly, other than “western Michigan” as the location of the crime, there was no specific testimony regarding where, or in what county the crime occurred. Considering the dearth of evidence on the alleged robbery, there was no evidence to show that prosecution on the alleged robbery was even viable or proper in Berrien

County. Without any foundational testimony regarding the existence of a conviction, this Court finds no error with the trial court's conclusion that the testimony was inadmissible under MRE 609(a). Moreover, lacking any evidentiary support whatsoever for his proposition that the prosecutor provided Ross a "free pass" on an earlier robbery in exchange for his testimony against defendant in this case, defendant clearly failed to establish the relevance of the fact that Ross had not been prosecuted for robbery under MRE 104(b). Finally, evidence that is unfairly prejudicial goes beyond the merits of the case to inject issues broader than defendant's guilt or innocence. *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005). The evidence at issue would have injected broader issues into the trial and would have been inequitable. *Id.*

#### (ii.) Oregon Case

Ross also testified at the preliminary examination that he provided information to the police in a murder case in Oregon about 22 years earlier. Defendant sought to introduce this information to rebut Ross's claim that he was testifying against defendant for the reason that he had recently "found God" because he acted in the Oregon case before he found God. The trial court found that the evidence relating to the Oregon case was "ancient," too far removed in time as compared to the current case, and not analogous due to the fact that Ross only provided evidence to the police in the Oregon case and did not testify as he was in this case. For those reasons, the trial court held that the evidence was not relevant and therefore, inadmissible.

"Generally, all relevant evidence is admissible, and irrelevant evidence is not." *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003); MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Wayne Co v State Tax Comm*, 261 Mich App 174, 196; 682 NW2d 100 (2004). Under this broad definition, evidence that is useful in shedding light on any material point is admissible. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). To be material, evidence does not need to relate to an element of the charged crime or an applicable defense. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996). Rather, the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs the questions of relevance and materiality. *Yost, supra* at 403.

Indeed, the facts show that although Ross provided information to the police in the 22-year-old Oregon case, he did not testify in that case. Defendant provided no evidence that Ross's motivation for assisting the police in the Oregon case 22 years prior could somehow negate his assertion that his reason for actually testifying in this case was his recent discovery of God after his latest conviction in California and realizing that he may spend the rest of his life in prison. Thus, defendant has not shown that the proffered evidence was relevant or material to any aspect of the present case. MRE 401, MRE 402. We conclude that the trial court properly found that the evidence relating to the Oregon case was not relevant and therefore inadmissible because it was too far removed in time and was not analogous due to the differing circumstances.

#### D. Defendant's Right to Present a Defense at Trial

Defendant couches his argument in constitutional terms arguing that the trial court denied him his right to present a defense at trial. A criminal defendant has both a state and federal constitutional right to present a defense "which includes the right to call witnesses." *Yost, supra* at 379, citing US Const, Am VI; Const 1963, art 1, § 20. The "right to offer the testimony of

witnesses . . . is in plain terms the right to present a defense . . .” *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920, 18 L Ed 2d 1019 (1967). “Although the right to present a defense is a fundamental element of due process, it is not an absolute right. The accused must still comply with ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Because the trial court properly applied the rules of evidence, and only excluded and included evidence as required by established rules of evidence, the trial court did not deny defendant his constitutional right to present a defense. *Hayes, supra*.

## V

Defendant next argues that he was denied a fair trial by testimony elicited by the prosecutor that alluded to his exercise of his constitutional rights. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Yost, supra* at 341. The trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Young, supra* at 448.

### A. Blood Sample

Defendant first asserts that reference at trial to a search warrant obtained to get a sample of defendant’s blood was impermissible and a violation of his Fourth Amendment right to be free from unreasonable searches. At trial, defense counsel requested, outside the presence of the jury, that the trial court not allow comment on the fact that police obtained a search warrant to obtain a sample of defendant’s blood as opposed to defendant volunteering his blood. The trial court ruled that “the prosecutor can elicit that a search warrant was obtained and that a blood sample was taken pursuant to the search warrant, but I do not want any comment that the reason why the officer’s obtained a search warrant was because [defense counsel] requested one before the defendant would accede to the taking of his – of his blood.” Later that afternoon, the prosecutor called Detective Sergeant Dennis Buller to the witness stand. The following exchange took place:

*The Prosecutor:* You met with defendant yet on a later date, is that correct, for the purposes of taking blood?

*Buller:* Yes, we did.

*The Prosecutor:* And did you witness that?

*Buller:* Yes, I did.

*The Prosecutor:* How did that happen?

*Buller:* We had an officer stop the gentleman where we then served a search warrant. We went back to the Sheriff’s Department with his son. We asked the son – we left the son with a plain clothes detective, and then he submitted to the blood draw through our nurse at the Berrien County Sheriff’s Department.

Our review of the record reveals that the matter never arose again either in testimony or in argument. Despite defendant’s argument to the contrary, this lone reference to a search warrant, read in context, does not reveal the circumstances surrounding the procurement of the search warrant, and certainly does not expose defendant’s insistence on the police getting a valid

search warrant before submitting a sample of his blood. In his brief on appeal, defendant mischaracterizes Buller's testimony stating that at trial "police testified that they had to serve a warrant" in order to obtain defendant's blood sample. This characterization is disingenuous because it implies that the testimony insinuated that defendant's actions necessitated police to get a search warrant to get defendant's blood sample. The testimony reveals no such insinuation or implication. And defendant does not point to anywhere else in the record where a witness or the prosecutor again mentioned the search warrant.

Defendant seeks to support his argument that reference at trial to the search warrant obtained to get a sample of his blood was impermissible and a violation of his Fourth Amendment right to be free from unreasonable searches by reference to case law indicating that the Fifth Amendment forbids the prosecutor from commenting on an accused's post arrest silence. However, defendant cites no authority that there is any such analogous prohibition relating to the Fourth Amendment's search and seizure constraints. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Kevorkian, supra* at 388-389, quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). In any event, the prosecutor never commented on Buller's testimony and never argued to the jury that defendant forced police to obtain a search warrant for his blood. Defendant has not shown error.

#### B. Attorney Presence

Next, defendant claims that evidence of his attorney's presence at a police interview with defendant violated his Fifth Amendment right to silence, his Sixth Amendment right to counsel, and his Fourteenth Amendment right to due process. After lengthy argument on the issues by both parties, the trial court ruled that any comment that defendant did not want to speak to police without a lawyer present was precluded. But because it was relevant and because the police interview was non-custodial and police did not give defendant *Miranda*<sup>3</sup> warnings, officers were allowed to testify that defense counsel was present during police questioning.

Evidence that defense counsel was present while police questioned defendant came up twice during testimony. First, during Detective Sergeant Dennis Buller's testimony:

*The Prosecutor:* Okay. At some point did you end up talking to the defendant yet again?

*Buller:* Yes, I did.

*The Prosecutor:* And about what time would that have been?

*Buller:* We talked with the defendant back at our Sheriff's Department approximately 5:45 p.m. the same day, [June] 30<sup>th</sup>.

*The Prosecutor:* The same day? And who was present during that conversation?

*Buller:* It was Mr. Spagnola, Detective Sergeant Rosenau, myself, and Attorney Wolfram from Mr. Parish's office.

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<sup>3</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Then, it came up again during Sergeant Dave Rosenau's testimony.

*The Prosecutor:* Did you at some point on June 30<sup>th</sup>, you listed several interviews. Did you at some point also interview the defendant?

*Rosenau:* I did, with Sergeant Buller.

*The Prosecutor:* Sergeant Buller. And that interview was what time, approximately?

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*Rosenau:* It was late afternoon. I – right around – well, it had to have been right after five o'clock because when we were at Frank's house, Frank was trying to get a hold of his attorney by telephone and I think – I think finally contacted him at his house.

The interview occurred on June 30, 2000. Defendant was not under arrest at this interview.

Defendant argues in his brief on appeal that as a result of these two exchanges, the prosecutor improperly and deliberately injected the exercise of defendant's right to silence and right to counsel at trial as substantive evidence of defendant's guilt. This argument fails for two reasons. First, to be fair, reviewing these two exchanges in the context of a seventeen day jury trial, the jury heard virtually nothing about defendant's exercise of his Constitutional rights. The exchanges reveal only that defendant contacted his attorney and that his attorney was present at a police interview. The jury heard nothing about the fact that defendant refused to speak with police without having an attorney present through witness testimony, and the prosecutor did not argue that to the jury. Clearly the evidence that was brought out in the two exchanges was not substantive evidence of guilt. Instead, it was, as the trial court allowed, no more evidence than necessary to give the jury context regarding who was actually present at the police interview. Defendant has not pointed to, and we have not found any argument by the prosecutor revealing anything more about the interviews than who was present pursuant to the trial court decisions. The evidence was relevant to give the jury context, as was the trial court's point in allowing the evidence in at trial. MRE 401, MRE 402.

And secondly, even if the statements of Buller and Rosenau regarding the presence of defense counsel was somehow viewed as substantive evidence, admission as substantive evidence of testimony concerning a defendant's silence *before* custodial interrogation and *before* *Miranda* warnings have been given is not a violation of the defendant's constitutional rights. *People v Schollaert*, 194 Mich App 158, 164-166; 486 NW 2d 312 (1992). "The defendant's right to due process is implicated only where his silence is attributable to either an invocation of his Fifth Amendment right or his reliance on the *Miranda* warnings." *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW 2d 761 (2004). See, also, *People v Dunham*, 220 Mich App 268, 274; 559 NW 2d 360 (1996) (no error in introducing testimony that the defendant canceled a scheduled interview with the police). It is undisputed that defendant was not in custody and police had not given him *Miranda* warnings. Defendant's argument fails.

### C. Elicitation of Contrasting Testimony from Ron Fein and Jeff Rohl

Defendant also argues that the prosecutor improperly made inculpatory inferences about defendant by eliciting contrasting testimony from other suspects, namely Ron Fein and Jeff Rohl,

that they had fully cooperated with police. Again, a prosecutor may not argue that a defendant's silence substantively evidences his guilt. *People v Fields*, 450 Mich 94, 111; 538 NW2d 356 (1995). However, a prosecutor may fairly respond to defense counsel's arguments and strategy. *United States v Robinson*, 485 US 25, 33; 108 S Ct 864; 99 L.Ed.2d 23 (1988). Throughout trial defense counsel repeatedly attempted to implicate both Ron Fein and Jeff Rohl in Lisa's murder. In fact, this would be considered one of the defense's theory of the case, that defendant did not commit the murder, either Ron Fein or Jeff Rohl did. Defense counsel questioned both Ron Fein and Jeff Rohl at length about their relationships with Lisa and their opportunities to commit the murder. As such, the prosecutor was well within his rights to elicit testimony from Ron Fein and Jeff Rohl about their full cooperation with the police investigation as a fair response to defense counsel's arguments and strategy at trial. *Id.*

## VI

Defendant argues that the evidence shows that the police and prosecution conducted, at best, a cursory investigation instead of pursuing attainable, objective, and exculpatory evidence. Defendant contends that, in doing so, the police and prosecution prevented defendant from presenting a viable defense. Because defendant failed to raise this issue below, this Court's review is limited to plain error affecting his substantial rights. *Carines, supra* at 764-767.

Despite defendant's argument to the contrary, our Supreme Court has held that the prosecutor and the police do not have a duty to investigate on behalf of a defendant, or to seek and find exculpatory evidence. *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995); *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997). Defendant contends that the police should have done more to prove his theory that other viable suspects, Jeff Rohl and Ron Fein, against both of whom, in his opinion, a sound circumstantial case could easily have been made, committed the murder. Under established case law, however, the prosecutor and the police had no obligation to do so. "Absent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process." *Coy, supra* at 21. Defendant has not shown, and the record does not display that the police or the prosecution suppressed evidence, engaged in intentional misconduct, or exhibited bad faith. *Id.*

Further, defendant relies on inapplicable cases to support his argument. One such case on which defendant relies is *People v Jordan*, 23 Mich App 375; 178 NW2d 659 (1970). In *Jordan*, this Court dealt with the foundation for the admission of evidence. Specifically, this Court considered whether laboratory testing of a handkerchief with stains of uncertain origin was required in order to establish the necessary foundation for its admission into evidence in a sexual assault case, not whether the prosecutor or the police had a duty to test the handkerchief. *Id.* at 385-389. Here, defendant does not challenge the necessary foundation for the admission of any evidence. Instead, he challenges the police and prosecutor's duty to further investigate. As discussed in *Burwick, supra* at 289 n 10 and *Sawyer, supra* at 6, no such duty exists. Thus, defendant's reliance on *Jordan* is misplaced and his argument fails.

## VII

Defendant next argues that the prosecutor engaged in repeated and egregious instances of prosecutorial misconduct and that the cumulative effect of these errors denied him his due

process right to a fair trial. Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Some of the claims of misconduct were preserved and others were not. This Court reviews the unpreserved claims for plain error affecting substantial rights. *Carines, supra* at 763. To avoid forfeiture under the plain error rule, it must be established that: (1) an error occurred, (2) the error was plain, and (3) the plain error affected the defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *Id.* Moreover, even after these three requirements are satisfied, reversal is unwarranted unless the error resulted in the conviction of an actually innocent defendant or seriously compromised the fairness, integrity, or public reputation of the judicial proceedings independent of the question concerning the defendant's innocence. *Id.* With respect to preserved issues, it still must be shown that the error was not harmless and that the defendant incurred prejudice as a result of the error before reversal is warranted. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW 2d 607 (1999). This Court will not reverse if the alleged prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *Watson, supra* at 586.

In *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007), this Court set forth the general principles regarding a claim of prosecutorial misconduct:

Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence. Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context. 'The propriety of a prosecutor's remarks depends on all the facts of the case.' A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. [Citations omitted.]

Defendant alleges myriad instances of prosecutorial misconduct occurred at trial. We address each issue separately.

#### A. Constitutional Rights

Defendant argues that the prosecutor erred when he repeatedly elicited evidence of defendant's exercise of his federal constitutional rights and contrasting that exercise with the cooperation offered by other suspects to show that defendant was guilty. We have addressed the substance of this issue in Section V, *supra*. Because no error occurred, the prosecutor's actions did not deny defendant a fair and impartial trial. *Rodriguez, supra* at 29-30.

#### B. Testifying to Facts Not in Evidence

Next, defendant argues that the prosecutor erred when he testified to medical facts that were not part of the record in an attempt to discredit defendant's mother, Wanda Spagnola, a key alibi witness. In its brief on appeal, the prosecution admits that the prosecutor overstated the limits of defendant's mother, Wanda Spagnola's, testimony regarding defendant's alibi. But, the prosecutor asserts that defendant objected immediately, and the trial court provided a proper

curative instruction to the jury. The prosecutor submits that there is no reason to believe that the instruction did not serve to cure the prosecutor's misstatement of this minor point.

Wanda Spagnola had recently had bladder surgery. She testified that on the night of the murder, defendant was sleeping at her house, and she got up that night at about 1:00 am and again at about 3:30 am to empty her catheter bag and each time she saw defendant on the couch. On cross-examination, the prosecutor asked Wanda Spagnola, who had worked at a hospital for seven and a half years, whether she was aware of a product described as an all-night catheter bag. The prosecutor showed Wanda Spagnola an all-night catheter bag with a mechanism to prevent the back-flow of liquid. Wanda Spagnola testified that she had never seen one like it. Later, during closing argument, the prosecutor challenged the credibility of Wanda Spagnola's testimony stating, "[c]ertainly her doctor would want her to use a bag – a large overnight bag that had a valve that prevented backup." Defendant objected immediately arguing that a doctor never provided such testimony. The trial court provided a curative instruction that "if the argument is not supported by the evidence, you may disregard it – and should disregard it if it's not supported by the evidence as you find it."

Generally, prosecutors are afforded great latitude in their closing arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor is free to argue that the evidence and all reasonable inferences arising from it that demonstrates that the defendant is guilty. *Id.* But, defendant is also correct that a prosecutor may not introduce facts that are not in evidence. *People v McCain*, 84 Mich App 210, 215; 269 NW2d 528 (1978). The prosecutor admits on appeal that the prosecutor's comment during closing went beyond what could be considered a reasonable inference drawn from the testimony. But, at trial defendant objected and the trial court immediately instructed the jury to disregard unsupported evidence. And during its final instructions, the trial court also instructed the jury to base its verdict solely on properly admitted evidence, and it instructed the jury that "[t]he lawyers' statements and arguments are not evidence." Jurors are assumed to follow a court's instructions; therefore, any prejudicial effect of the prosecutor's closing argument would have been cured by the trial court's jury instructions. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

### C. Misstating the Evidence

#### (i.) Tire Track Evidence

Defendant argues that during his closing, the prosecutor misstated critical tire track evidence when he told the jury that one of the tire tracks found in the area of the makeshift grave in which the victim's body was found "kind of matched" defendant's Chevette. Defendant asserts this was a gross exaggeration of the actual testimony that had simply suggested that the inadequate track evidence could not exclude certain vehicles. The prosecutor argues in response that the context of the comment shows that the prosecutor went out of his way not to misstate the tire track evidence, and in fact readily admitted the weakness of the evidence and pointed out that the tire tracks could have been left by Ron Fein's car or even one of the investigator's, but nonetheless defendant's Chevette could not be excluded.

The portion of the prosecutor's statement is as follows:

*The Prosecutor:* Again, a lot of things the police tried and were unable to find any evidence, but there were a few things that they did find. They found a tire track out close to the grave. It wasn't in good condition. You'll remember it rained really hard the night before and they didn't cover that track up with a tarp. So they got a very bad impression with it. And it could have been somebody else's tire track out there, any of the search party that had driven back and forth out of that area. We don't know, and I don't think we'll ever know.

But we do know that that tire track kind of matched the one that was on defendant's Chevette. At least she testified that his car couldn't be excluded –

*Defense Counsel:* Objection to that your Honor. I –

*The Prosecutor:* -- from the pattern.

*Defense Counsel:* -- don't think he said that at all and I think the testimony was that they excluded the Park Avenue – the car he was driving that night.

*The Court:* Well again, ladies and gentlemen, any argument that is not supported by the evidence should be rejected.

Go ahead, Mr. Sanford.

*The Prosecutor:* Christine Stepleton clearly testified that the defendant's Chevette could not be excluded as having left that track. Now she also testified that Ron's car couldn't be excluded either, so we've got quite a wide patch of people that are included, but I think that's something to note.

The record reveals that Christine Stepleton, a forensic scientist with the MSP, testified that defendant's Chevette could not be excluded as the vehicle responsible for the tire impression. Again, a prosecutor is free to argue that the evidence and all reasonable inferences arising from it that demonstrates that the defendant is guilty. *Bahoda, supra* at 282. Furthermore, defendant objected and the trial court immediately instructed the jury to disregard unsupported evidence. Jurors are assumed to follow a court's instructions; therefore, any prejudicial effect of the prosecutor's closing argument would have been cured by the trial court's jury instructions. *Green, supra* at 693.

#### (ii.) Identification of Defendant Running Down the Road

Next, defendant argues that the prosecutor misstated crucial evidence when he told the jury that Jacob and Shane saw defendant running down the road after they escaped the Fein residence in the wake of the victim's abduction. Defendant asserts that this misleading argument was particularly offensive and prejudicial because it placed defendant at the scene without basis in evidence. The prosecutor responds that defendant mischaracterizes and takes out of context the prosecutor's comment that Jacob and Shane saw someone running down the road and the context shows that the prosecutor made the statement when discussing the timeline of the crime in connection with defendant's alibi, not eyewitness identification.

The portion of the prosecutor's statement is as follows:

*The Prosecutor:* The defendant has no credible alibi for where he was during the hours of the murder.

What's the timeline? Did he have time to do this or didn't he?

Well, we know that he got home approximately 12:30 from the video store, and we know from the testimony of Detective Rosenau that that drive from his house to Lisa's house is 45 minutes. He could have left by, say, 1:30, quarter to two, and still gotten there by 2:30 to commit the murder. And I say 2:30 because after Jake saw the struggle in the bedroom, and then after he went back and pounded on the door and said, "Leave my mom alone," and after he heard that duct tape ripping off the roll through the door, he went to get Jake [sic] and woke him up, and they tried to make the phone call, and then they ended up going out the screen. And Shane remembered that the time was three o'clock – maybe 3:04 or 3:02. Something right at three o'clock. So we know the murder must have happened about 2:30-ish. Defendant certainly had plenty of time to get there.

And then we know, after the boys got out the window and ran next door and pounded on the neighbor's doors, that they saw the defendant running down the road.

*Defense Counsel:* Objection, your Honor. Nobody testified they saw the defendant.

*The Court:* It's argument. Overruled.

*The Prosecutor:* That puts the defendant running down the road maybe 3:15 in the morning, and by then he would have already dragged the body down the basement, through the lawn, into the woods, and left her there on the side of the road.

The context of the challenged comment allows an interpretation that the prosecutor made the comment in reference to the timeline of the murder and how based on the known times involved, defendant could have committed the murder and therefore been the man they saw running down the road. A prosecutor is free to argue that the evidence and all reasonable inferences arising from it that demonstrates that the defendant is guilty. *Bahoda, supra* at 282. To the extent the comment can be interpreted as an identification of defendant himself running down the road, it would be, as defendant argues, a misstatement of the evidence. But defendant objected and the trial court immediately instructed the jury that it was argument. Later the court instructed the jury to base its decision only on the evidence and that the lawyers' comments were not evidence. Jurors are assumed to follow a court's instructions; therefore, any prejudicial effect of the prosecutor's closing argument would have been cured by the trial court's jury instructions. *Green, supra* at 693.

#### D. Presenting Misleading Conclusions about the Evidence

Defendant argues that the prosecutor misrepresented the duct tape evidence in closing and used highly suspect math to reach a misleading conclusion that there were less than 100 rolls of duct tape in Berrien County that could have provided the tape found on defendant's Chevette and the tape found on the victim's head. During trial, the prosecutor called Carter MacFarland, a quality assurance manager for ShurTape Technologies, a manufacturer of duct tape. MacFarland testified that after examining the duct tape at issue in the crime, both the tape found around the victim's head as well as the duct tape on the roof liner of defendant's Chevette was manufactured by ShurTape Technologies between early 1995 to November 1996, and branded as Ace for Ace Hardware Stores. MacFarland testified that probably 5%, or 1,000,000 rolls, of ShurTape's duct tape was of the grade at issue. And about 30 or 40% of those 1,000,000 rolls (300,000 to 400,000) were distributed to Ace Stores in the United States. MacFarland did not know how many of those rolls were shipped to Michigan.

During the prosecutor's closing argument, he stated as follows:

*The Prosecutor:* Carter MacFarland told you that that tape was only produced from early 1995 to November of '96, essentially a two year window.

Now defense counsel will argue all he wants about, well, we can't prove that that's from the same roll of duct tape, and we can't. But Carter MacFarland did testify that there were about 300,000 rolls of that tape manufactured for the Ace Hardware stores –

*Defense Counsel:* Objection.

*The Prosecutor:* -- during that two year period.

*Defense Counsel:* Objection, your Honor. He testified three to 400,000 per year for at least two – approximately two years. It would have been more like 700,000.

*The Court:* Mr. --

*Defense Counsel:* He's misrepresenting the evidence.

*The Court:* Mr. Parish? Ladies and gentlemen, for – again, the same instruction. If the argument is not supported by the evidence, you should – you are entitled to reject it.

*The Prosecutor:* That amount of tape was manufactured for the entire United States, all the Ace Hardware stores throughout the country, so if you divide it by the number of states and then you divide it by the number of counties in Michigan, you come down to a very small number of rolls that that tape could have come from. Probably very few, less than 100 or so. Even if you used Mr. Parish's figures, less than a couple hundred?

And we know that it's – was four or five years old at the time because it was manufactured during that two year gap. And I think that evidence shows is

that there is a very good chance that the duct tape on the roof liner of the defendant's car was from the same roll of duct tape that was used to kill Lisa.

After reviewing the record, we conclude that the prosecutor's representations were properly based on the extensive testimony of MacFarland and the statistics he provided about the distinctive characteristics, age, and relative rarity of the kind of duct tape found wrapped around the victim's head and on defendant's car liner. The prosecutor was extrapolating to make his point about the very specific nature of the duct tape used both on the victim and in defendant's car based directly on the statistics provided by MacFarland. The prosecutor was attempting to draw a reasonable inference based on the manufacturing and distribution statistics provided by MacFarland. Again, a prosecutor is free to argue that the evidence and all reasonable inferences arising from it demonstrates that the defendant is guilty. *Bahoda, supra* at 282.

#### E. Improper Vouching

Defendant argues that the prosecutor engaged in impermissible vouching three times during his closing argument. A prosecutor's comments do not constitute improper vouching if they constitute "arguments from the facts and testimony that the witnesses at issue were credible or worthy of belief" as opposed to implying that the prosecutor "had some special knowledge that the witnesses were testifying truthfully." *Dobek, supra* at 66. Further, a prosecutor's remarks are evaluated in context. *Id.* at 64. Furthermore, a prosecutor may "argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Also, "a prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness," but "he may comment on his own witnesses' credibility during closing argument . . . ." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

##### (i.) Copy of Key

Defendant asserts that the prosecutor improperly vouched and provided testimony when he claimed, in closing, that defendant got inside the Fein residence because, "I also think there was a very real chance that defendant made a copy of that key that was kept in that rock outside." The prosecutor's statement was not impermissible vouching. The prosecutor was simply arguing the evidence and reasonable inferences from the evidence when he made the statement. Jacob and Ron Fein both testified that there was a fake rock outside the house for a time with a key to the house in it in case someone got locked out or if one of the kids got home and no one was home for some reason. Though Jacob testified at trial that he never told defendant about the key, Detective Sergeant Michael Danneffel testified that when he interviewed Jacob, Jacob told him that he had told defendant about the key. Lauren House, the victim's sister also testified that she overheard a phone conversation between Jacob and defendant where Jacob told defendant, "I tell you everything, Dad." Furthermore, there was testimony that defendant would walk around the outside of the Fein residence. Defendant has not shown error where the prosecutor was arguing from the facts in evidence and not that he had some special knowledge regarding the truthfulness of a witness. *Dobek, supra* at 66.

##### (ii.) "It Wasn't Ron" Statement

Defendant next argues that the prosecutor impermissibly vouched in closing when he told the jury, while discussing the fact that while both defendant and Ron Fein knew Ron Fein's work schedule, knew access points to the Fein house, and knew the area behind the residence where the victim was found, that it was not Ron Fein, it was defendant who committed the murder, stating, "that's all true except that it wasn't Ron." Our review of the record reveals that the prosecutor supported his statement with evidence when he pointed out that, in contrast to defendant, Ron Fein had no scratch on his jaw, had an alibi, and his DNA was not under the victim's fingernails. Defendant has not shown error where the prosecutor was arguing from the facts in evidence and not that he had some special knowledge regarding the truthfulness of a witness. *Dobek, supra* at 66. Moreover, a prosecutor "may comment on his own witnesses' credibility during closing argument." *Thomas, supra* at 455.

### (iii.) Moral Fitness

Defendant argues that, over objection, the prosecutor impermissibly told the jury that his personal belief regarding the main reason defendant wanted custody of Jacob was because defendant did not believe the victim was morally fit. The specific comment defendant challenges is the following:

But I think the biggest thing – the biggest reason why defendant wanted custody, and the evidence is clear on this, the defendant did not believe that Lisa was morally fit enough to have custody of Jacob.

This argument, that the main reason defendant wanted custody of Jacob was because defendant did not believe the victim was morally fit, was also based on the evidence. Our review of the prosecutor's closing statement reveals that the prosecutor backed up this statement with evidence including specific references to exhibits that had been admitted from the child custody proceedings, defendant's own testimony, and other witness testimony. The evidence showed that defendant, at a minimum, believed Lisa was having affairs with other men, that she was critical and manipulative, she liked to "party," and that she did not love Jacob. There was also evidence that defendant believed that he was a morally fit, ideal parent, totally in contrast to Lisa. Defendant has not shown error where the prosecutor was arguing from the facts in evidence and not that he had some special knowledge regarding the truthfulness of a witness. *Dobek, supra* at 66. Moreover, a prosecutor "may comment on his own witnesses' credibility during closing argument." *Thomas, supra* at 455.

### F. Cumulative Effect of the Evidence

Although the cumulative effect of minor instances of prosecutorial misconduct may result in reversal, there were no errors in this case to accumulate. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

## VIII

Next, defendant argues that defense counsel failed to investigate and confront the prosecution's theory that the victim's scratch of defendant while he was wearing a full face helmet left a red mark that was the origin of the DNA amounted to ineffective assistance of counsel. Defendant raised this issue in a motion for new trial that the trial court denied and again

denied defendant's motion on reconsideration. We review the trial court's denial of defendant's motion for new trial for an abuse of discretion and the trial court's factual findings for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Defendant specifically asserts that defense counsel had a duty to respond to the prosecutor's theory about the origin of the DNA, and had he investigated, he would have discovered rebuttal expert opinions. Defendant has provided the proposed testimony of the three biomechanical experts upon which he relies: the affidavit of Waldemar A. Palutke, M.D; the affidavit of Daniel J. Schneck, Ph.D.; and the Declaration of Lawrence W. Schenider, Ph.D. Defendant contends that these expert's provide the following conclusions based on the evidence adduced at trial: 1) the fit of a full face shield helmet is so snug even a single finger could not access the area covered by it to scratch the wearer, 2) any possible access would be on the tip of the chin not jaw line, 3) any scratch on the chin would most likely be vertical rather than horizontal on the jaw line, 4) if a scratch had been inflicted that drew blood, blood or scabbing would have been visible to the officers, not a red mark. We have reviewed the affidavits and declaration as presented and they do appear to support the conclusions defendant has presented. However, defendant has ignored the myriad assumptions upon which the affiants had to rely in order to present their conclusions. Pursuant to MRE 703, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence."

There was a dearth of evidence regarding the type, size, and shape of the helmet and face shield the attacker wore presented at trial. Jacob and Shane identified it as a motorcycle type helmet with a full face shield. But the actual helmet was never found and one like it was never specifically identified. There are several types of motorcycle helmets available on the market providing various degrees of facial and neck coverage and there is not enough evidence in the record to pinpoint exactly what type of helmet the attacker wore. Furthermore, there was no evidence at all offered regarding the fit of the helmet, or if the helmet was properly sized to the attacker's head. Also, there is no evidence regarding whether the helmet was jarred sometime during the struggle and came off just enough for the victim to scratch her attacker. Also there was no witness to the great majority of the struggle because after Jacob discovered it, the bedroom door was closed. Therefore, it can never be known whether the helmet was momentarily knocked to its side, back, or up, providing an instant of time for the victim to scratch at her attacker with her right hand. In fact, without more evidence, it can never be known whether the helmet was even knocked totally off during the struggle, or even if the assailant actually took the helmet off himself during the struggle for some reason.

Without the physical helmet in evidence, or at least more solid facts in evidence on which to base their conclusions, the expert testimony defendant provides, or any expert testimony like it would be based not on facts in evidence, but almost wholly on speculative facts and assumptions. As such, it would not be admissible pursuant to MRE 703. Because the expert opinions defendant asserts his trial counsel should have investigated and attempted to introduce at trial would have been inadmissible pursuant to MRE 703, defense counsel was not ineffective for failing to introduce them because counsel is not required to argue a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Finally, defendant argues that that he was denied the right to an impartial jury at trial. Defendant filed a motion for new trial raising this issue. The trial court addressed the issue and denied defendant's motion, and again denied defendant's motion on reconsideration. We review the trial court's denial of defendant's motion for new trial for an abuse of discretion and the trial court's factual findings for clear error. *Cress, supra* at 691.

At trial, during voir dire, Byron Hatch a/k/a Juror 33 stated that he had known Barrett Fanning, one of the potential prosecution witnesses whose names had been read to the prospective jurors, for about two and a half years as neighbors. He stated that he had provided shelter for Barrett Fanning's ex-wife and children during their marital problems. Hatch stated that he had discussed the case with Fanning's ex-wife, but never with Fanning. Hatch, on his own volition, volunteered that he had formed an opinion on Fanning stating that he would not find Fanning's testimony credible. Hatch also clearly testified that he had not formulated an opinion on the case, that he could be fair and impartial to both sides, and that he could decide the case based solely on the evidence. Both the prosecution and the defense declined to exercise challenges for cause or otherwise. Defendant himself even expressed his satisfaction with the jury when asked by the trial court.

The jury trial progressed. On the thirteenth day of trial, Hatch reported to the bailiff that he had seen someone in the courthouse hallway whom he recognized as Debbie Fanning, Barrett Fanning's ex-wife. Defense counsel explained that the former Debbie Fanning was now Debbie Nosseck who was on the defense witness list under the last name "Nosseck." Hatch again informed the trial court that Nosseck had lived in Hatch's house during her estrangement from her ex-husband. After talking with Nosseck, the prosecutor declined to object to Hatch remaining on the jury. Defense counsel conferred with defendant and he also agreed to leave Hatch on the jury. Defendant even confirmed this on the record. While Barrett Fanning did not testify, Nosseck did testify briefly for defendant. Nosseck testified that she was close friends with Lisa because her son and Jacob had gone to the same daycare center. Nosseck testified that although Lisa found defendant to be annoying, she was not afraid of him. Nosseck testified that Lisa believed defendant was like a "nagging mother" who did not approve of her lifestyle. Nosseck also stated that she would characterize the relationship between Lisa and defendant as "cordial and friendly" and that she had seen them within touching range.

In support of his motion for new trial, defendant submitted to the trial court the affidavit of Nosseck detailing her knowledge of defendant, Lisa, Jacob, Ron Fein, as well as discussions she had with Hatch, and his wife, Kim, about the murder. Defendant based his argument that Hatch was a "stealth juror" wholly on Nosseck's affidavit. The trial court denied the motion, characterizing defendant's argument as beyond the pale noting that Hatch came forward on his own when he saw Nosseck and had been very candid.

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008). In *Miller*, our Supreme Court recently held that:

A juror's failure to disclose information that the juror should have disclosed is only prejudicial if it denied the defendant an impartial jury. "[Defendants] are not entitled to a new trial unless the juror's failure to disclose denied [the defendants] their right to an impartial jury." *McDonough Power Equip, Inc v Greenwood*, 464

US 548, 549; 104 S Ct 845; 78 L Ed 2d 663 (1984). ““The misconduct must be such as to reasonably indicate that a fair and impartial trial was not had . . . .” *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960), quoting 39 Am Jur, New Trial, § 70, p 85. [*Miller, supra* at 548-549 (internal footnotes omitted.)]

In *Miller*, a juror did not reveal his status as a convicted felon during voir dire. *Miller, supra* at 542-543. Pursuant to MCL 600.1307a(1)(e), in order to qualify to serve as a juror, a person must “[n]ot have been convicted of a felony.” However, the information that one of the jurors was in fact a convicted felon was discovered post-trial. *Id.* The defendant filed a motion for new trial arguing that he was entitled to a new trial, his only complaint about the juror at issue was that he was a convicted felon. Finding that the defendant had offered no evidence that the juror was not impartial, our Supreme Court held that the defendant had failed to establish actual prejudice, and denied the defendant a new trial. *Id.* at 561. The *Miller* Court reasoned as follows, in pertinent part:

Defendant has not offered any evidence to demonstrate that he was prejudiced by the convicted felon's presence on his jury. That is, defendant has offered no evidence to establish that the juror was partial. The juror testified that his status as a felon did not affect his deliberations and that he did not share this information with the other jurors or try to improperly persuade the rest of the jurors in any way. There is simply no evidence that this juror improperly affected any other jurors. Furthermore, as the trial court explained, this juror would likely have been more harmful to the prosecutor than to defendant. Having been previously convicted of similar offenses, the juror, if anything, likely would have been sympathetic towards defendant. For these reasons, we do not believe that the trial court clearly erred in ruling that defendant had not demonstrated that he was actually prejudiced by the convicted felon's presence on his jury. [*Miller, supra* at 554-555 (internal footnotes omitted.)]

“[J]urors are “presumed to be . . . impartial, until the contrary is shown.” *Miller, supra* at 550 quoting *Holt v People*, 13 Mich 224, 228 (1865). “The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt.” *Id.*, citing *Holt, supra*. We have carefully reviewed Nosseck’s affidavit and have found nothing indicating bias on the part of Hatch against either party. *Id.* Further, like *Miller*, considering that Juror Hatch was friendly with Nosseck, a defense witness, it would seem that Hatch would have been more sympathetic toward defendant. *Id., supra* at 554-555. Moreover, Hatch voluntarily and candidly revealed his knowledge and opinions regarding prospective witnesses as soon as he realized who they were during the course of trial. Hatch also clearly stated during voir dire that he had not formed an opinion about the case, and Nosseck’s affidavit does not rebut this point or even call it into reasonable doubt. *Id.* at 550, citing *Holt, supra*. Defendant has failed to show that he was denied the right to an impartial jury. *Id.* at 548-549

## X

On cross-appeal, the prosecutor argues that the trial court erred as a matter of law when it ruled that waiver of the psychiatrist-patient privilege applied only to the specific material defendant disclosed in the court of prior litigation. We decline to address the prosecutor’s issue

on cross-appeal because it is made moot by our decision to affirm defendant's conviction.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Richard A. Bandstra  
/s/ Pat M. Donofrio