

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
January 3, 2013

v

BILLY HOOVER,

No. 308115  
Saginaw Circuit Court  
LC No. 10-035183-FC

Defendant-Appellant.

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Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2); torture, MCL 750.85; and aggravated stalking, MCL 750.411i.<sup>1</sup> The trial court sentenced him as a fourth habitual offender, MCL 769.12, to concurrent terms of 15 to 60 months in prison for the aggravated-stalking conviction, 20 to 30 years in prison for the torture conviction, and 5 to 20 years in prison for the home-invasion conviction. Defendant appeals as of right. We affirm.

**I. FACTUAL BACKGROUND**

Defendant assaulted the victim, with whom he had had an unstable dating relationship, on September 30, 2010. She testified that defendant called her and stated that her house was damaged and needed repair. She drove to her house and discovered that the front door was “jammed” and that the lock was no longer functional. She called defendant’s mother to complain that he had damaged her house. During this conversation, defendant entered the victim’s house uninvited. Defendant spoke with his mother on the telephone and decided to leave the house. About 60 to 90 minutes later, defendant returned to the victim’s house uninvited with two friends. The victim testified that she and defendant got into an argument and that defendant grabbed her shirt and exposed her breast to his friends. Defendant then removed a knife from her kitchen and stated his intent to slash her tires. Defendant and his two friends went outside, and the victim remained inside her house to call the police. After the victim called the

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<sup>1</sup> The jury acquitted defendant of second-degree criminal sexual conduct, MCL 750.520c(1)(f), and assault with intent to commit murder, MCL 750.83.

police, defendant reentered her house. The two continued arguing, and at some point defendant squeezed the victim's neck in a "choke hold" from behind. The victim became light headed and collapsed to the floor. Defendant then held a pillow against her face while telling someone on the telephone that he was going to kill the victim. The police arrived at the victim's house during the assault, thereby bringing the assault to a sudden end. The responding officer testified that the victim was lying on the floor struggling to breathe when he arrived. The victim eventually regained her breath and identified defendant as her assailant. The officer immediately arrested defendant.

At trial, defendant called his two friends as witnesses. Each friend denied the victim's version of the events, testifying that she was often "jealous" of defendant. Defendant's theory of the case was that the victim fabricated the assault because of a heated disagreement between the two at a gas station on the afternoon of September 30.

## II. VICTIM'S LETTER

Defendant first argues that the trial court erred by excluding as irrelevant a letter written by the victim to defense counsel indicating that she did not want to continue with the prosecution. Defendant asserts that the exclusion of the letter violated his constitutional right to present a defense. We review for an abuse of discretion defendant's preserved relevancy argument. *People v Howard*, 226 Mich App 528, 542; 575 NW2d 16 (1997). We review for plain error defendant's unpreserved constitutional argument. *People v Barber*, 255 Mich App 288, 291; 659 NW2d 674 (2003).

"Evidence is relevant if it has 'any 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.'" *People v Brown*, 294 Mich App 377, 383; 811 NW2d 531 (2011), quoting MRE 401. To determine whether evidence is relevant, a court must assess its "materiality" and "probative force." *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Evidence is "material" when it relates to "'any fact *that is of consequence*' to the action." *Id.* at 67, quoting MRE 401 (emphasis in *Mills*). Evidence is "probative" when it has *any* "'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.'" *Id.* at 68, quoting MRE 401.

Here, the letter indicated that the victim did not want to continue the prosecution against defendant. Defendant argues that the letter was relevant because it supported the defense theory that the victim had fabricated the charges out of jealousy or spite and also contradicted the victim's trial testimony because someone who had endured what she claims to have occurred would not likely ask the prosecutor to dismiss the case. A witness's credibility is a material fact of consequence to the determination of an action. *Id.* at 69, 72. However, the trial court did not abuse its discretion by excluding the victim's letter in this instance because the letter was not "probative." It did not make the victim's credibility more or less probable. The letter did not indicate that the alleged assault never occurred. Rather, the letter indicates that the victim believed that the personal costs of prosecuting defendant outweighed any personal benefit that she may receive from his prosecution. The victim's individual view of the nature of criminal proceedings bears no relationship to her credibility as a witness. See *People v Adams*, 233 Mich

App 652, 658; 592 NW2d 794 (1999) (“We are cognizant that all too often, the victims of domestic assault and abuse are fearful and reluctant to assist in the prosecution of their assailants . . .”). Moreover, the victim’s mention of a personal protection order suggests that the victim still had reason to fear defendant, which is consistent with the actual occurrence of the assault. For these reasons, the letter was not “probative” with respect to the victim’s credibility. We conclude that the trial court did not abuse its discretion by excluding the letter as irrelevant.

Regarding defendant’s claim that exclusion of the letter impaired his right to present a defense, the Sixth Amendment to the United States Constitution guarantees such right. *People v Orlewicz*, 293 Mich App 96, 101; 809 NW2d 194 (2011), lv held in abeyance 812 NW2d 734 (2012).<sup>2</sup> Generally, the right to present a defense is subject to rules of evidence regarding relevancy and unfair prejudice. See *id.* at 101-102. However, “a rule of evidence contravenes the due process right to present a defense if it infringes on a defendant’s substantial interest or significantly undermines a fundamental element of his or her defense.” *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005). Exclusion of impeachment evidence may significantly undermine “a fundamental element of [the defendant’s] defense[,]” depending on the theory of defense. See *id.* at 637-638.

The exclusion of the letter did not deny defendant his right to present a defense. Defendant was able to challenge the victim’s credibility in other respects, such as by comparing her trial testimony to either her previous testimony at the preliminary examination or her statement to the investigating detective. The exclusion of the letter, therefore, did not deny defendant his ability to challenge the victim’s credibility. Moreover, even if the letter was relevant, it was only minimally relevant for the reasons explained above. Thus, exclusion of the letter did not “significantly undermine” defendant’s ability to question the victim’s credibility. *Id.* at 637. Accordingly, we conclude that the trial court did not plainly err by excluding the letter.

### III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to authenticate a telephone record from the victim’s cellular service provider, which resulted in exclusion of the record. Defendant argues that he would have been able to impeach the victim had defense counsel authenticated the telephone record because the record did not show a call during the time when the assault allegedly occurred. Because defendant failed to establish grounds for a *Ginther*<sup>3</sup> hearing, our review is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

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<sup>2</sup> The right to present a defense is also guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *People v Aspy*, 292 Mich App 36, 48-49; 808 NW2d 569 (2011).

<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. The right to counsel is the right to the effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). “To establish ineffective assistance of counsel, a defendant must show (1) that the attorney’s performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney’s error or errors, a different outcome reasonably would have resulted.” *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002), citing *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). A defendant bears the burden of overcoming the presumption that counsel rendered effective assistance. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). This Court does not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if the strategy was unsuccessful. *Id.* at 715.

Generally, trial counsel’s decision whether to call a certain witness or present certain evidence is presumed to be trial strategy that we do not second-guess on appeal. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). However, when the case is a “close credibility contest,” trial counsel’s “failure to have admitted evidence critical to the issue of the credibility of the complainant” may be ineffective assistance of counsel. See *id.* at 397-398.

In this case, defendant cannot show that a different outcome reasonably would have resulted but for trial counsel’s failure to authenticate the telephone record. See *Werner*, 254 Mich App at 534. Defendant’s argument is flawed because it presumes that the victim testified that defendant used *her cellular telephone* while holding the pillow against her face. However, the victim did not testify at trial that defendant used her cellular telephone. Rather, the victim repeatedly testified that defendant used “the phone.” It is possible that she was referring to her cellular telephone, defendant’s telephone, or even a landline telephone. Further, the victim’s use of the term “the phone” is in contrast to her other testimony about “my phone.” Thus, the absence in the telephone record of a call made during the time when the assault allegedly occurred would have had minimal impeachment value. We cannot conclude that its authentication and introduction at trial would have resulted in a different outcome by significantly undermining the victim’s credibility. The telephone record was not “critical to the issue” of the victim’s credibility, so defense counsel was not constitutionally deficient for failing to authenticate it. See *Dixon*, 263 Mich App at 397-398.

#### IV. CVRA ASSESSMENT

Defendant argues that the trial court violated the Ex Post Facto Clauses of the United States and Michigan Constitutions<sup>4</sup> by imposing a \$130 assessment under MCL 780.905(1) of the Crime Victim’s Rights Act (CVRA), MCL 780.751 *et seq.* Defendant argues that because the assault was committed before December 16, 2010, the trial court should have imposed a \$60 assessment. See 2005 PA 315. We review this unpreserved claim for plain error. *Barber*, 255 Mich App at 291.

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<sup>4</sup> Const 1963, art 1, § 10; US Const, art I, § 10.

In *People v Earl*, 297 Mich App 104, 111-114; 822 NW2d 271 (2012), this Court held that the Legislature’s amendment of the CVRA to provide for an increased assessment of \$130 does not violate the Ex Post Facto Clauses of the United States and Michigan Constitutions when the increased assessment is imposed for a crime committed before the amendment’s effective date. An assessment under the CVRA is not restitution or punishment, so the Ex Post Facto Clauses are inapplicable. *Id.* at 113. Accordingly, the trial court did not plainly error by imposing a \$130 assessment.

## V. STANDARD 4 BRIEF

Defendant raises five additional claims of error in his Standard 4 brief.

### A. SUFFICIENCY OF THE EVIDENCE

Defendant challenges the sufficiency of the evidence with respect to his torture conviction. We review de novo a claim of insufficient evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). “This Court should not interfere with the jury’s role of determining the weight of the evidence or the credibility of the witnesses.” *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003). This Court’s review of the sufficiency of the evidence is “deferential,” and all reasonable inferences are drawn in support of the jury’s verdict. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

MCL 750.85, the torture statute, requires the prosecution to establish, among other elements, that defendant inflicted either “great bodily injury” or “severe mental pain or suffering” upon the victim. Defendant argues that there is no evidence of either injury in this case. We disagree.

Review of the record reveals that there is no evidence that the victim suffered “great bodily injury” within the meaning of the torture statute. Specifically, she did not suffer a serious impairment of body function as defined by MCL 257.58c., see MCL 750.85(2)(c)(i), and there is no evidence to suggest that she suffered “internal injury, poisoning, serious burns or scalding, severe cuts, or multiple puncture wounds,” see MCL 750.85(2)(c)(ii). In fact, two police officers testified that they did not notice any such physical injuries on the victim after the assault. Thus, because there is insufficient evidence to show that the victim suffered “great bodily injury,” we must determine whether the victim suffered “severe mental pain or suffering.”

MCL 750.85(2)(d) defines “severe mental pain or suffering” as follows:

(d) “Severe mental pain or suffering” means a mental injury that results in a substantial alteration of mental functioning that is manifested in a visibly demonstrable manner caused by or resulting from any of the following:

(i) The intentional infliction or threatened infliction of great bodily injury.

(ii) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt the senses or the personality.

(iii) The threat of imminent death.

(iv) The threat that another person will imminently be subjected to death, great bodily injury, or the administration or application of mind-altering substances or other procedures calculated to disrupt the senses or personality.

In this case, the victim testified that defendant grabbed her shirt and exposed her breast to his friends, which embarrassed her. Defendant later pushed her and threw her cellular telephone at her. Defendant then grabbed her from behind around the neck and put her in a chokehold. Unable to break free, the victim became lightheaded, her knees buckled, and she fell to the floor. Although the victim tried to stand up, defendant would not let her. At some point, defendant got a cold towel and threw it on the victim's face, for which one could reasonably infer was for the purpose of reviving the victim. Defendant then grabbed a pillow and held it down over the victim's face with his foot so that she could not breathe. As the victim was being suffocated, she could hear defendant on a telephone stating, "I'm going to kill this . . . bitch," "I ain't going to save her," and she "should be out of here" in 15 minutes. The victim testified that she thought she was going to die. Once police officers arrived and the pillow was released from the victim's face, the victim was in a state of hyperventilation. She was having a "very difficult time breathing" and was gasping for air. Officer Joseph Grigg testified that the victim was emotional when he observed her at the scene of the assault, and another witness testified that the victim was "in tears." Evidence at trial illustrated that the victim had been hit in the mouth, suffered a black right eye, injured her neck, and had marks on her arm as a result of the assault. According to the victim, she suffered emotionally because of the assault. She became scared and "didn't want [her] son to be out of [her] sight." She also sought spiritual assistance from her pastor to cope with the aftermath of the assault.<sup>5</sup>

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<sup>5</sup> We note that the prosecutor pointed out during direct examination of the victim that the victim was "visibly upset" while testifying; neither the victim nor the court confirmed the prosecutor's assessment. Furthermore, the prosecutor made the victim's demeanor while testifying a point of emphasis during closing argument to illustrate that the victim suffered severe mental pain or suffering. It is well established that a prosecutor's statements are not evidence, and we, therefore, do not consider them as evidence of severe mental pain or suffering. See *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). However, it is equally well established that the jury, not this Court, is in the best position to observe the demeanor of witnesses. See *People v Lemmon*, 456 Mich 625, 676; 576 NW2d 129 (1998); *People v Stewart*, 36 Mich App 93, 98; 193 NW2d 184 (1971). Witness demeanor is not a factor considered by the jury that is accounted for in a transcript of trial proceedings that is merely "a record of the words spoken at

Viewing this evidence in a light most favorable to the prosecution and drawing all reasonable inferences in support of the jury's verdict, we conclude that the evidence presented at trial was sufficient for a rational trier of fact to find beyond a reasonable doubt that the victim suffered severe mental pain or suffering. Defendant's choking and smothering of the victim with the pillow while stating that he would kill her was sufficient evidence to show a "threat of imminent death." MCL 750.85(2)(d)(iii). Moreover, when considering the brutal nature of defendant's conduct in conjunction with the various evidence at trial regarding the impact of defendant's conduct on the victim, a rational trier of fact could reasonably infer that the victim suffered a mental injury that resulted in a "substantial alteration of mental functioning that is manifested in a visibly demonstrable manner." MCL 750.85(2)(d).

Accordingly, we conclude that the evidence at trial was sufficient to support defendant's torture conviction.

## B. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed error warranting reversal when she asserted during her opening statement that the victim received oxygen treatment from medical personnel immediately after the assault, but failed to provide evidentiary support for this assertion at trial. We review defendant's unpreserved claim of prosecutorial misconduct for plain error. *People v Meissner*, 294 Mich App 438, 455; 812 NW2d 37 (2011).

"Opening statement is the appropriate time to state the facts that will be proved at trial." *People v Ericksen*, 288 Mich App 192, 200; 793 NW2d 120 (2010). It is error for a prosecutor to fail to support a factual allegation made during opening statement. See *People v Wolverton*, 227 Mich App 72, 76; 574 NW2d 703 (1997). However, when a prosecutor acts in good faith and the reference to the proposed evidence is "isolated," the defendant has not been denied a fair trial and reversal is not warranted. See *People v King*, 215 Mich App 301, 307; 544 NW2d 765 (1996).

Here, the prosecutor did not provide any evidence at trial to support her statement that the victim was treated with oxygen after the assault. However, there is nothing in the record to suggest that the prosecutor's statement was made in bad faith. In fact, the prosecutor attempted to elicit information from both the responding officer and the victim about the treatment that she received from emergency personnel after the assault. This indicates that the prosecutor attempted, albeit unsuccessfully, to obtain testimony to support her opening statement.

More importantly, there is nothing in the record to suggest that defendant was denied a fair trial because of the prosecutor's opening statement. The victim and the responding officer repeatedly testified that the victim struggled to breathe immediately after the assault, which

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trial." *Stewart*, 36 Mich App at 98. "For this reason, an appellate court is reluctant to overturn the judgment of the trier of fact and substitute its judgment, which must necessarily be based on an inadequate description of the factors which lead the trier of fact to reach its decision." *Id.*

clearly indicates the lack of oxygen. Thus, the prosecutor's statement about oxygen treatment did not introduce an entirely unsupported issue to the jury; rather, the statement discussed a collateral fact to an issue that was repeatedly mentioned at trial. In addition, the prosecutor's reference to oxygen treatment was isolated and not repeated during trial. Further, the trial court instructed the jury that the attorneys' statements are not evidence, and jurors are presumed to follow this instruction. *Meissner*, 294 Mich App at 457. Therefore, we conclude that defendant was not denied a fair trial because of the prosecutor's erroneous comment during opening statement.

### C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to investigate the medical treatment received by the victim after the assault, failing to represent him during the second day of the preliminary examination, and failing to impeach the victim with the telephone record. Again, because defendant failed to establish grounds for a *Ginther* hearing, our review is limited to errors apparent on the record. *Davis*, 250 Mich App at 368.

Defendant argues that an investigation by defense counsel of "medical witnesses and records" would have shown that the victim did not receive any medical attention after the assault, that "the entire incident was staged[,] and that [the victim] was faking." "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

Here, the only testimony about medical treatment was that the victim received some type of treatment from medical personnel at her house and that the victim declined to go to the hospital. Thus, the jury heard no evidence about the nature of the medical treatment received by the victim. Had defense counsel investigated the medical treatment received by the victim and presented the investigation results to the jury, the jury would have heard *more* about the medical treatment than it would have otherwise. It was, therefore, reasonable trial strategy to not present the jury with any information about the medical treatment received by the victim. We do not second-guess such trial strategy on appeal. *Rodgers*, 248 Mich App at 715. Furthermore, there is no record evidence demonstrating that "medical witnesses and records" would establish that the victim did not receive any medical treatment after the assault, that an incident in this case was "staged," or that the victim was "faking" something. Defendant's failure to establish the factual predicate of his allegation of ineffective assistance of counsel is fatal to his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant next argues that he was completely deprived of counsel during the second day of the preliminary examination on November 30, 2010. "[T]he complete deprivation of the assistance of counsel at a critical stage of the adversary proceedings amounts to structural error, and, therefore, prejudice is presumed." *People v Frazier*, 270 Mich App 172, 179; 715 NW2d 341 (2006), rev'd in part on other grounds 478 Mich 231 (2007); see also *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005) ("It is well established that a total or complete deprivation of the right to counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal."). A preliminary examination is one "critical stage" of the adversary proceedings. *People v Carter*, 412 Mich 214, 217-218; 313 NW2d 896 (1981). Here, the transcript indicates that defense counsel was present during the entire hearing on November

30. Defense counsel is quoted throughout the hearing, beginning on the first page of the transcript and ending on the second-to-last page of the transcript. Defendant's argument that he was completely deprived of counsel is unsupported by the record.

Defendant further argues that he received the ineffective assistance of counsel at the November 30 preliminary examination because defense counsel did not test the prosecution's case on this date. "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic*, 466 US at 659. In this case, all the preliminary examination testimony was presented on October 18, 2010, the first day of the preliminary examination. The October 18 transcript indicates that defense counsel cross-examined the prosecution's witnesses. The prosecution's case was, therefore, subjected to adversarial testing. See *Ford v Wainwright*, 477 US 399, 426; 106 S Ct 2595; 91 L Ed 2d 335 (1986) (Powell, J., concurring) (explaining that cross-examination is an "ordinary adversarial" procedure). To the extent that defendant argues that trial counsel did not sufficiently cross-examine the prosecution's witnesses, defendant has not overcome the strong presumption that counsel rendered effective assistance on a matter of trial strategy. See *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Moreover, at the conclusion of the final day of preliminary examination, trial counsel argued against the bind over with respect to counts three, four, and five. We conclude that defendant's second claim of ineffective assistance is without merit.

Defendant next argues that defense counsel was ineffective for failing to impeach the victim with the telephone record. Defendant argues that, even if the record could not be authenticated, defense counsel could impeach the victim with the record because authentication is not an evidentiary requirement for impeachment. In support of this argument, defendant cites MRE 803(5), which provides that a "recorded recollection" may be used by a witness even if it is not independently admitted as an exhibit. Defendant also cites MRE 612(c), which provides that a writing used to refresh a witness's memory need not be admissible. MRE 803(5) and MRE 612(c) do not address impeachment. Moreover, the governing legal rule here is that a party may introduce extrinsic evidence contradicting a witness's testimony on matters closely related to a defendant's guilt or innocence but not on a collateral matter. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). The telephone record would have had minimal impeachment value because it was largely consistent with the victim's testimony. The victim apparently erred in estimating her arrival at home at about 8:00 p.m. to 8:30 p.m., because this was about 60 minutes too early, but the telephone record is otherwise consistent with the victim's testimony.

Defendant contends that the telephone record does not reflect an incoming call that would be consistent with the victim's testimony that she received a call from defendant while driving on September 30. However, the record reflects inbound telephone calls at 9:13 p.m. and 9:35 p.m. While the telephone calls were only 13 seconds and 14 seconds, respectively, this is enough time for the brief conversation with defendant to which the victim testified.

Defendant contends that the telephone record does not reflect an outbound telephone call to defendant's mother. Actually, however, the telephone record reflects an outbound telephone call to defendant's mother at 9:43 p.m. that lasted 365 seconds. This is consistent with the victim's testimony that she called defendant's mother shortly after she arrived home.

Defendant observes that the telephone record reflects the 911 call at 11:52 p.m. Defendant argues that the time of the 911 call suggests that the victim made the call about three and a half to four hours after she arrived home, which is inconsistent with the victim's other testimony that she made the 911 call about one and a half to two hours after she arrived home. However, as noted above, the victim's estimate of 8:00 or 8:30 was too early. The telephone record suggests that the victim arrived home at about 9:30 p.m., which means that the 911 call was placed about two and a half hours after she arrived home. This is more consistent with the victim's testimony that the 911 call was placed about one and a half to two hours after she arrived home.

For these reasons, defendant has not established a claim of ineffective assistance of counsel on the basis of defense counsel's failure to authenticate or otherwise use the telephone record at trial. See *Werner*, 254 Mich App at 534. We conclude that defendant's third claim of ineffective assistance is without merit.

#### D. TRANSCRIPT ACCURACY

Defendant argues that the transcript of the October 18 preliminary examination hearing is inaccurate because it omits certain testimony and includes other testimony that was never actually given. Defendant argues that the transcript inaccuracies denied him a fair trial because he was unable to impeach the victim with prior inconsistent preliminary examination testimony. We review de novo defendant's claim of constitutional error. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004).

We conclude that this issue is not properly before this Court. Defense counsel stated to the trial court in a motion and also at a hearing that he listened to the recording of the preliminary examination and determined that the transcript was not erroneous. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Czymbor's Timber, Inc v City of Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006) (quotation marks and citation omitted). An attorney is the agent of a defendant, and a defendant is generally bound by the actions of his or her attorney. *People v Buie*, 491 Mich 294, 306; 817 NW2d 33 (2012).

Furthermore, we would conclude that defendant is not entitled to relief even if this issue were properly before us. In *People v Abdella*, 200 Mich App 473, 476; 505 NW2d 18 (1993), we held that certified transcripts have a rebuttable presumption of accuracy. To overcome the presumption of accuracy and obtain relief, a party must satisfy four requirements:

- (1) seasonably seek relief;
- (2) assert with specificity the alleged inaccuracy;
- (3) provide some independent corroboration of the asserted inaccuracy;
- (4) describe how the claimed inaccuracy in transcription has adversely affected the ability to secure postconviction relief pursuant to subchapters 7.200 and 7.300 of our court rules. [*Id.*]

Although defendant seasonably sought relief in this case and has specifically identified 26 separate alleged errors in the October 18 certified transcript, he has failed to meet the independent-corroboration requirement. Defendant admits that he does not have "independent

evidence” of the alleged transcript errors. He attempts to corroborate the alleged transcript errors by comparing the responding officer’s testimony at the October 18 hearing to his police report. For example, defendant notes that the responding officer’s report states that defendant told him that “we had a disagreement.” This is consistent with the responding officer’s testimony at the preliminary examination. Defendant’s comparison of the responding officer’s testimony to the responding officer’s police report does not support the existence of the alleged transcript errors. Moreover, defense counsel’s assertion to the trial court regarding the accuracy of the transcript is strong evidence that the October 18 transcript is not erroneous. Accordingly, defendant is not entitled to relief on this claim of error.

#### E. CUMULATIVE ERROR

Finally, defendant argues that the cumulative effect of the alleged errors deprived him of a fair trial. Similar to defendant’s previous claim of error, this issue is also not properly before this Court. Defendant failed to raise this issue in his statement of questions presented. See *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008) (declining to review a claim of error where the issue is not properly presented in the defendant’s statement of questions presented); see also MCR 7.212(C)(5). Additionally, defendant’s argument lacks merit.

In *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007), this Court explained:

The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted. Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. [Citations omitted.]

In this case, the prosecutor erroneously referenced an oxygen treatment in the opening statement. For the reasons previously explained, the prosecutor’s comment during her opening statement was not error warranting reversal. All other allegations of error lack factual or legal merit. Thus, defendant’s claim of cumulative error must fail. See *id.* (stating that a claim of cumulative error requires the establishment of more than one error).

Affirmed.

/s/ William C. Whitbeck  
/s/ E. Thomas Fitzgerald  
/s/ Jane M. Beckering