

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals,
Kirsten Frank Kelly, P.J., and Joel P. Hoekstra, and William C. Whitbeck, J.J.
Affirming the Circuit Court for the County of Kent, Donald A. Johnston, J.

PEOPLE OF THE STATE
OF MICHIGAN,

Appellee
Plaintiff-~~Appellant~~,

Supreme Court
No. 149372

Court of Appeals
No. 279161

v

DENNIS LEE TOMASIK,

Appellant
Defendant-~~Appellee~~.

Kent County Circuit
Court No. 06-003485-FC

Appellee
BRIEF ON APPEAL – ~~APPELLANT~~

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

On March 25, 2015, this Court granted Defendant-Appellant leave to appeal the April 22, 2014 opinion of the Court of Appeals affirming defendant's convictions. Having granted leave to appeal, this Court has jurisdiction over this case pursuant to MCR 7.301(A)(2) and MCR 7.302(H)(3). This case has a long procedural history, resulting in three opinions from the Court of Appeals and multiple remands to the Circuit Court to address the issues now to be addressed by this Court. Plaintiff-Appellee generally accepts the Statement of Material Proceedings submitted by Defendant-Appellant (Defendant's Brief, vi-viii) that outline this procedural history.

STATEMENT OF QUESTIONS PRESENTED

-I-

WHERE THE BUILD-UP OF STATEMENTS AND QUESTIONS PROVIDED PROPER CONTEXT FOR BOTH DEFENDANT'S ULTIMATE SUGGESTION THAT HE WAS BEING ACCUSED OF CHILD MOLESTATION AND DEFENSE COUNSEL'S ARGUMENT THAT DEFENDANT WAS LED TO THAT CONCLUSION BY DETECTIVE MARTIN'S STATEMENTS, DID THE TRIAL COURT PLAINLY ERR BY ADMITTING DEFENDANT'S ENTIRE INTERVIEW?

The Trial Court was not asked this question.
The Court of Appeals answered, "No."
Defendant-Appellee answers, "Yes."
Plaintiff-Appellant answers, "No."

-II-

DID THE TRIAL COURT PLAINLY ERR BY ADMITTING THOMAS COTTRELL'S EXPERT TESTIMONY THAT THE VICTIM'S BEHAVIOR WAS NOT INCONSISTENT WITH OTHER CHILDREN SUFFERING SEXUAL ABUSE WHERE THE DEFENSE ATTACKED THE VICTIM'S CREDIBILITY AND, SPECIFICALLY, HIS ACTIONS AFTER THE ABUSE AND THE TIMING OF HIS DISCLOSURE?

The Trial Court was not asked this question.
The Court of Appeals answered, "No."
Defendant-Appellee answers, "Yes."
Plaintiff-Appellant answers, "No."

-III-

DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING DEFENDANT’S MOTION FOR A NEW TRIAL BASED UPON NEWLY DISCLOSED IMPEACHMENT EVIDENCE WHERE THE REPORTS THEMSELVES ARE INADMISSIBLE HEARSAY AND WHERE, GIVEN THE EVIDENCE ADMITTED AT TRIAL HIGHLIGHTING THE VICTIM’S BAD BEHAVIOR AND LIES, THE PROPOSED CHARACTER TESTIMONY OF THE AUTHORS CONCERNING THE VICTIM’S TRUTHFULNESS THREE YEARS BEFORE HIS DISCLOSURE OF SEXUAL ABUSE ARE CUMULATIVE AT BEST AND, THEREFORE, DOES NOT MAKE A DIFFERENT RESULT PROBABLE ON RETRIAL?

The Trial Court would answer, “No.”
The Court of Appeals answered, “No.”
Defendant-Appellee answers, “Yes.”
Plaintiff-Appellant answers, “No.”

-IV-

WAS DEFENDANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE NONE OF TRIAL COUNSEL’S STRATEGIC DECISIONS DENIED HIM ANY SUBSTANTIAL DEFENSE?

The Trial Court answered, “No.”
The Court of Appeals answered, “No.”
Defendant-Appellee answers, “Yes.”
Plaintiff-Appellant answers, “No.”

COUNTER-STATEMENT OF MATERIAL FACTS

Defendant Dennis Lee Tomasik was charged with two counts of Criminal Sexual Conduct (CSC), First Degree, MCL 750.520b(1)(a) (child under 13), stemming from the sexual abuse of victim Theo Jenson some ten years prior, beginning when Theo was six years old. Following a jury trial in April 2007, defendant was found guilty of both counts (T VI, 3; 80b).

Theo Jensen testified¹ that he has lived seven houses away from defendant since moving into his grandfather's house when he was roughly 4 years old; Theo and defendant's son, Ethan, became friends (Tr III, 32-34; 156a-158a). He and Ethan would ride bikes together and play video games in defendant's basement (Tr III, 34-35; 158a-159a). Theo would sometimes see other kids at the Tomasik house outside playing and other times he was there when Jason Barringer, who was also friends with Ethan, was there playing (Tr III, 45; 169a). Theo testified that sometime after his sixth birthday – after his grandfather had passed away – defendant called Theo away from playing with Ethan, took him up to Ethan's room, and put his penis in Theo's mouth (Tr III, 35-38; 159a-162a). Defendant told Theo that it would be okay, that no one should know, and that it was just something between the two of them (Tr III, 37; 161a). Defendant told Theo that his penis was “like a popsicle but not to bite on it” and he ultimately ejaculated in Theo's mouth (Tr III, 38; 162a). Theo was confused and he didn't tell anyone about what had happened; Theo testified that defendant threatened to kill him and his family if he told anyone (Tr III, 38; 162a). Afterward, Theo went back downstairs and continued to play with Ethan; Theo testified that he continued to go over to the house after this happened because Ethan was his best friend at the time (Tr III, 39;

¹ Defendant-Appellant's Statement of Facts begins by centering on what it labels “Theo's inconsistencies” (Defendant's Brief, 2). Beyond being argumentative in violation of MCR 7.212(C)(6), the statement of facts fails to provide a complete picture of the victim's testimony including defense counsel's cross-examination, which is a basis for Appellant's ineffective assistance of counsel claim.

163a). When asked if the same thing happened again and how often, Theo responded, “A lot after that” (*Id.*).

Theo testified about another time he remembered clearly that began when he and his father were riding bikes and he saw Ethan playing outside; he asked if he could stop over and his father talked with defendant for a bit outside before continuing on the bike ride without Theo (Tr III, 39; 163a). Defendant was working on his truck at the time and, after Theo’s father left, defendant started talking to him and Ethan, then asked Theo to come inside (Tr III, 39-40; 163a-164a). They again went to Ethan’s room and defendant again told Theo that everything would be fine (Tr III, 40; 164a). Defendant took their pants off then flipped Theo over on the bed and “started pushing his penis in my butt and at the time I didn’t know what was going on, all I knew was that it hurt and I don’t - - after that I really don’t remember much” (Tr III, 40; 164a). Theo didn’t know how many times that type of thing happened over the whole time he hung out with Ethan (*Id.*). Theo explained that it all stopped when he finally learned that what was happening was wrong and he estimated that he was about 8 years old at the time; he stopped going over to defendant’s house (Tr III, 41; 165a).

When asked if anything happened as a result of the pain he felt, Theo responded that he was bleeding; he noticed it one day when he was going to the bathroom (Tr III, 40; 164a). His mother took him to the doctor because of the bleeding but Theo did not say anything about what defendant had been doing to him; he let his mother do the talking (Tr III, 41; 165a). Theo testified that he knows now what constipation means but he does not remember suffering from it; he was just a skinny but healthy kid (Tr III, 43; 167a).

Theo started acting out after the offenses and testified that he was “so angry inside and so angry about myself because I should have known, I should have told, but I didn’t” because he was

scared (Tr III, 42; 166a). His parents kept asking him why he was acting up, why he was keeping knives and bats and things in his bedroom under his pillow or under his bed and they took him to counselors but Theo did not trust any of them; he did not even trust himself (Tr III, 43-44; 167a-168a). Theo explained that his parents seemed to blame his behavior on the loss of his grandfather because both things happened around the same time; his grandfather died in March just two days before Theo's sixth birthday and then that summer was when the abuse began (Tr III, 44; 168a). Over the years, Theo attempted suicide multiple times – both by cutting his wrist and by trying to hang himself – and his parents took him to Pine Rest for a psychiatric evaluation; again, he did not tell anyone about what had happened to him (Tr III, 45-46; 169a-170a). Theo admitted that he also got into trouble repeatedly at school for fighting, bringing drugs to school, talking back to teachers, and, in February 2006, was caught along with a friend his freshman year stealing money out of purses (Tr III, 47; 171a). After initially lying and denying the theft, Theo admitted to stealing and was ordered to pay the money back and to go to a probation officer meeting (Tr III, 47-48; 171a-172a).² He was also suspended from school for ten days (Tr III, 94-95; 218a-219a). Theo explained that he decided, "I've had enough of living my life the way I am and I don't want to live in a jail cell for the rest of my life so the next time I had a meeting with Julie [Schaefer-Space – his then counselor], I just told her" that he had been molested; Schaefer-Space then filed the initial report with police (Tr III, 48-49; 172a-173a).

Trial counsel Damien Nunzio began his cross-examination of Theo by asking him about his Batman doll; Theo had brought a doll to the preliminary examination as a type of support and

² Defendant's uncited assertion that the charges were "dropped" against Theo after, and impliedly because of, his disclosure is misleading; it appears that Theo's juvenile case was placed on the Consent Calendar pursuant to MCR 3.932 (Tr IV, 110-111; 21b-22b). This also corresponds with Theo's testimony during cross-examination that he was told he would not have to go to juvenile court, he would have to pay, have a "parole" [sic] officer meeting and that if he did not get in trouble during six months *then* all the charges would be dropped (Tr III, 96-97; 220a-221a).

while he did not have the doll with him during trial, he had a belt-buckle on representing the same idea (Tr III, 51, 57-60; 175a, 181a-184a). Theo identified with Batman because “he too has deep dark secrets” and when asked if he was real, Theo responded, “To me in my heart, yes, he is real” (Tr III, 57; 181a). However, Theo acknowledged that Batman is a fictional character (Tr III, 58; 182a). Thereafter, Nunzio used Theo’s preliminary examination testimony as he cross-examined him on the number of times he had stated in the past that defendant had sexually assaulted him (Tr III, 60-61, 67; 184a-185a, 191a). Nunzio highlighted the victim’s statements about the frequency and nature of the abuse – happened every time he went over, he was raped 50-60 times, each time took anywhere from 15 minutes to an hour, etc. (Tr III, 60, 66, 79-80; 184a, 190a, 203a-204a), and used those to impeach Theo’s credibility. Nunzio later elicited the fact that Theo originally told Detective Martin that the penetration occurred twice and then later changed his story stating 10 to 20 times (Tr V, 63-64; 45b-46b). When pressed on how he told the detective that he was molested almost every time he went over to the Tomasik house, Theo responded that he does not think he used the word “almost” but instead said “sometimes” and later, again, reiterated that he was not testifying that defendant sexually assaulted him every time he was there “because it wasn’t every time because he has a job” (Tr III, 66, 72; 190a, 196a). Nunzio questioned Theo about being sexually assaulted yet going back to the household over and over again (Tr III, 72; 196a), about denying being abused even when asked (Tr III, 62-63; 89-90; 186a-187a; 213a-214a), about him continuing to play and ride bikes by the house after the offenses (Tr III, 82-83; 206a-207a), about being jealous of Ethan and his family (Tr III, 101-103; 225a-227a), and about being dishonest and using marijuana (Tr III, 105-107; 229a-231a). Nunzio ultimately suggested that Theo was simply making up a story in order to get out of trouble (Tr III, 93-97; 217a-221a). The cross-examination covered over 50 pages of transcript.

The jury heard testimony from Dr. Randall Clark, the physician who treated Theo for the anal bleeding when he was a child, and who found an anal fissure or tear during the examination, most commonly associated with constipation; his diagnosis was an anal fissure (Tr IV, 152-56; 29b-30b, 275a, 31b-32b). Clark testified that, had he been aware of an allegation of sexual abuse back in 1997 at the time of the exam, the diagnosis – anal fissure – would have been the same but the cause would have been compatible with sexual abuse (Tr IV, 157; 276a). Clark did not suspect sexual abuse at the time (Tr IV, 163; 277a). Dr. N. Debra Simms, testified that finding an anal fissure does not rule out that a child was sexually abused but it also does not mean that a child was sexually abused; anal fissures can occur from many causes (Tr IV, 125; 243a). However, she added that the presence of an anal fissure along with a history given of penile penetration “is concerning” (*Id.*).

Thomas Cottrell³ testified that he is vice president of counseling services at the YWCA counseling center and has been with the YWCA since 1983 in positions ranging from a therapist in the child sexual abuse treatment program to the clinical director to program manager and now as vice-president of all the counseling services provided there (Tr IV, 4; 282a). Cottrell has a Bachelor’s degree in child development from the University of Michigan and a Master’s degree in social work, also from the University of Michigan, specializing in interpersonal practice (Tr IV, 4-5; 282a-283a). Cottrell has provided direct services to approximately 300 families in which he provided services to children (Tr IV, 5; 283a). He has particular expertise in offender dynamics and child victim dynamics and has provided group therapy work at the YWCA since 1983, just ending in 2006; he explained that part of providing good therapy services to offenders is understanding the dynamics that impact a child victim (Tr IV, 5; 283a). Cottrell has been qualified

³ Defendant-Appellant’s short inclusion of facts related to Thomas Cottrell’s testimony is again argumentative (Defendant’s Brief, 7-8).

as an expert in the field of child sexual abuse multiple times in the past (Tr IV, 5; 283a). Given this history, the trial court accepted him as an expert in the field without objection (Tr IV, 6; 284a).

Cottrell testified that delay in disclosure of sexual abuse is not inconsistent with child sexual abuse but instead is very common (Tr IV, 8; 286a). Cottrell explained possible reasons for the delay that range from instances where an event is particularly traumatizing to instances where children have been groomed to not even know the abuse is wrong, and also include those children in between those extremes who go through a weighing of the decision whether to tell this secret; they weigh the costs/benefits differently than adults and even differently depending on gender (Tr IV, 8-10; 286a-288a). When the cost of holding onto the secret is greater than the cost of telling the secret and when the child has a safe person to whom he or she can disclose, that is when disclosure is more likely to occur (Tr IV, 10-11; 288a-289a). Cottrell explained that six to eight year olds do not necessarily connect the perception of their friend's house – the house they go to in order to play with their friend – with an unsafe place to be avoided; Cottrell compared the situation with a child that returns to the playground because his friends are there despite the fact that a bully is there as well (Tr IV, 12-13; 290a-291a). “And to give up their friends to be safe simply isn't even on the radar for them” (Tr IV, 13; 291a). When asked if going out and riding a bike right after sexual abuse involving penile/anal penetration is inconsistent with sexual abuse, Cottrell responded, no, and explained that as children attempt to avoid the emotional pain, part of surviving is to not repeatedly focus on a painful event and to act as if everything is normal (Tr IV, 13-14; 291a-292a).

In talking about offender dynamics, Cottrell was asked whether to expect an offender to be perpetrating on his own children and all other children that come into the home, to which he responded that such a scenario would not be typical (Tr IV, 15; 293a). Cottrell explained that most

sex offenders carefully select their victims based upon a number of factors including whether or not the child has a personality the person believes will be susceptible to influence or to a grooming process (*Id.*). During cross-examination, Cottrell agreed that there are cases in which sexually abused children go through life without any problems, as “A” students, with regular-appearing relationships with their parents, that they do not all steal, use drugs, commit suicide, etc. (Tr IV, 17-18; 295a-296a). Nunzio clarified that Cottrell had never counseled or spoke with Theo, had not reviewed any of his counseling records, spoke with his therapists or medical doctors, etc. (Tr IV, 19-20; 297a-298a). Nunzio emphasized through his cross-examination that not all kids who use drugs, steal from other people, attempt suicide, or fear repercussions of being kicked out of school or going to jail are sex abuse victims (Tr IV, 21-22; 299a-300a).

Additional facts and/or corrections to Defendant’s Statement of Facts will be discussed as necessary within the Argument sections.

ARGUMENT I

The trial court did not plainly err by admitting defendant’s entire interview where both the prosecution and defense required the entirety of the interview in order to make their respective arguments. It is the build-up of the statements and questions that provided proper context for both defendant’s ultimate suggestion that he was being accused of child molestation and defense counsel’s argument that defendant was led to that conclusion by Detective Martin’s statements.

Standard of Review: This Court has directed the parties to address “whether the Kent Circuit Court erred by admitting the entire recording of the defendant’s interrogation in light of *People v Musser*, 494 Mich 337 (2013), and, if so, whether admission of the evidence amounted to plain error” (132a).

Defendant-Appellant asserts that this issue is constitutional and should be reviewed de novo (Defendant's Brief, 20). This issue concerns the admission of evidence; generally, 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 Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, because no objection was made to the admission of the challenged testimony below, this issue is unpreserved and, as noted by this Court in its order granting leave, appellate review is for plain error affecting substantial rights as discussed in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130, reh den 461 Mich 1205 (1999). As stated in *Carines*:

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted *only* when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Carines, supra* at 763-764; internal citations omitted.]

Discussion: Defendant argues that the trial court erred in admitting the entirety of defendant's interview with Detective Heather Martin. The Court of Appeals had previously concluded that the trial court did not plainly err in admitting the interview and that Detective Martin's comments were necessary to provide the full context of defendant's statements (96a-97a). On final remand, the Court of Appeals reconsidered that determination in light of this Court's decision in *Musser, supra*. Ultimately, the Court of Appeals agreed with the People's argument that the present case is distinguishable from *Musser* and that defendant failed to demonstrate that the trial court plainly erred in admitting the entire interview where there was no objection and where the arguments of both sides required the complete interview. *People v Tomasik, On Second*

Remand, unpublished opinion per curiam of the Court of Appeals, pp 7-8, decided April 22, 2014 (Docket No. 279161) (120a-124a).

During defendant's trial, his recorded interview with Detective Martin was introduced into evidence and played for the jury without objection from his trial counsel (Tr V, 34-36; 38b; 313-314a). Obviously, defendant's statements are admissible as admissions by a party-opponent. MRE 801(d)(2)(A). At issue is whether or not the trial court plainly erred in admitting the entire interview, including all of Detective Martin's statements, in light of this Court's recent decision in *Musser, supra*.

Martin testified that defendant was very cooperative when she called him to come in for an interview, that he never asked why he was being asked in, and that she purposefully does not tell an individual the reason if not asked (Tr V, 31-32; 36b-37b). Martin explained that she does not share information because she wants the person to be surprised with it when they come in for the interview (Tr V, 32; 37b). During cross-examination, Martin confirmed that she spent a great deal of time chatting with defendant and building a rapport (Tr V, 45; 39b). She agreed that her statements about investigating the heck out of the case already was a figure of speech used when talking to an alleged suspect (Tr V, 60; 44b). In response to questioning by defendant's trial counsel, Martin admitted that she had already told defendant that he was there to discuss something that happened between Theo and himself when Theo was young before defendant, in response to repeated declarations by Martin that he already knew why he was there finally answered, "Child molestation or something?" (Tr V, 46-48; 40b-42b). As noted above, defendant's own statements are admissible against him including the fact that he brought up the allegation of molestation before Detective Martin told him the nature of the accusations against him. Without Detective Martin's statements, that fact is lost. In contrast, the inclusion of Martin's statements and her multiple

attempts to get defendant to admit his guilt by claiming to already know what happened, offered defense counsel the opportunity to point out how defendant continued to vehemently proclaim his innocence despite her efforts (Tr V, 46-48; 40b-42b). Defendant has not demonstrated that the trial court plainly erred in the admission of his complete interview.

This Court's decision in *Musser* is factually distinguishable from the present case in several ways. First, defense counsel in *Musser* objected to the evidence while, in the present case, defense counsel did not object to the interview being played in its entirety; as a result, on appeal, this issue is reviewed for plain error affecting substantial rights and not as a preserved evidentiary issue. As noted above, it was important for defense counsel's argument to be able to point to that interview, including the techniques used by Martin and the pressure she put on defendant, to emphasize that no matter how much pressure she placed on defendant, he never admitted any wrong-doing.

Second, in *Musser, supra*, 494 Mich at 345-346, one of the interviewing detectives testified before the playing of the interview that he had received special training in forensic interview techniques used when interviewing children to ensure they understand the difference between a lie and the truth and that children such as the victim in that case, given her age, did understand the difference. During the interview itself, the detective talked about the forensic interview protocol, and noted repeatedly that 'kids don't lie about this stuff.' *Musser, supra*, at 343-345. In the present case, while Detective Martin told the defendant that she had "investigated the heck out of" the case and repeatedly stated that she knew what happened (506a, 508-509a), there was no testimony before the playing of the interview regarding any special interview skills concerning children and, further, Martin did not claim 'kids don't lie about this stuff' as in *Musser*.

Third, there was discussion before and after the interview being played about the techniques used by Detective Martin, including that she purposefully did not inform the defendant about the

nature of her questions, either on the phone when setting up the interview or during the initial portion of the interview when building a rapport with defendant (Tr V, 31-32, 45-46; 36b-37b, 39b-40b). During cross-examination, when asked about ‘investigating the heck out’ of her cases when there was information she admitted she did not have, Detective Martin testified, “And when I indicate that I investigate the heck out of cases, that’s pretty much a figure of speech, obviously I investigate my cases thoroughly, however a figure of speech when you talk to an alleged suspect in an interview” (Tr V, 60; 44b). In contrast, the defendant in *Musser* was apparently informed of the allegations against him when he arrived for his interview and any interview techniques discussed concerned the forensic protocol used when interviewing children. *Musser, supra*, at 342-346. The jury in the present case was well aware through her testimony that Detective Martin was using interview techniques when speaking with defendant. Furthermore, the jury was instructed that in determining what weight to give a defendant’s purported statements, they should consider how and when the statements were made (Tr V, 181; 76b); therefore, they knew to consider the methods and statements used by Martin during the interview in assessing defendant’s responses. “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

In applying the Rules of Evidence to the present case as this Court did in *Musser*, it is important to remember the distinctions between the two. The entirety of defendant’s interview in the present case was relevant, MRE 401-402, to provide the proper context to his statements. Defendant did not inquire as to why he was being asked down to speak with a detective, which is a question Detective Martin testified was very common in such circumstances (Tr V, 31-32; 36b-37b). Throughout the beginning of defendant’s interview, during which they discussed his background, work, pursuits, and family, and even after Detective Martin specifically brought up

Theo's family as neighbors, defendant did not ask why he was being interviewed (487a-506a). Instead, when Theo's family was discussed as being a basis for the interview in some way, defendant laughed and noted that he doesn't actually know the family all that well (506a-507a). After Detective Martin stated that she knows what happened and only wants to know why, defendant responded that he does not know what she is talking about (509a). As Martin began to give more facts, began to talk about Theo coming over to play, and stated that she knows things happened between the two of them, defendant repeated that he did not know what she was talking about (509a-511a). Defendant started to get irritated, angry, stating, "Ya know, I know no clue what your [sic] talking about. No clue ..." (513a). Martin later told him, "It's not ridiculous, it's not far fetched, it's not ridiculous, you know exactly what this is about ..." to which defendant responded adamantly, "NO I DON'T!" (514a).

All of the now challenged statements are included in this initial build-up between pages 17 and 25 of the interview (503a-511a). Yet, without the challenged statements, the jury would not have the full understanding of how long it took and under what circumstances defendant finally suggested he was being accused of child molestation because they would not have the full context of the discussion. Conversely, without the entirety of the interview, including the now challenged statements, defense counsel could not point to that same interview and 1) highlight the language 'investigate the heck out of this' while then poking holes in that same investigation; 2) argue the high level of defendant's cooperation in coming in to speak with Detective Martin at such length; and 3) point specifically to the now challenged statements about knowing that things happened between the two of them ten years ago in order to explain why defendant brought up child molestation as the possible accusation (Tr V, 158, 160-162; 53b, 55b-57b).

Furthermore, under MRE 403, the probative value of Detective Martin's statements when taken as a whole exceed any danger of unfair prejudice. The entire interview, including the challenged statements, show the complete circumstances under which defendant failed to ask, "Of what am I being accused?" and, ultimately, made the "child molestation" suggestion himself. Yet, as explained above, the entirety of that interview was highly relevant to defendant's argument as well because, without it, if the jury heard a shortened interview with gaps and without the extensive interplay between Detective Martin's cryptic, or not so cryptic, suggestions and defendant's increasing frustration, the fact that defendant never admitted any wrongdoing loses a great deal of power. Defendant certainly isn't the first accused to deny wrongdoing during an interview; however, given a chance to listen to the entire interview including the veiled accusations made by Detective Martin, repeated affirmative statements that she knew what happened, then defendant's continued denial in the face of that interview means more. And defense counsel used it.

Any danger of unfair prejudice was further minimized by Detective Martin's testimony in which she talks of the techniques she used in purposefully not telling defendant the nature of the accusations – or even if he was being accused of something – and that she tells suspects that she investigates the heck out of her cases as a figure of speech. The jury was thus informed that what the detective said was an interview technique and, further, they were instructed to consider the circumstances under which defendant made any statement in order to properly evaluate it. This is not the case in *Musser* in which the detective testified as to his special training in interviewing children before repeatedly speaking of the credibility of the victim when interviewing the defendant. Further, the build-up of the interview was less necessary in *Musser* where the defendant was told early on of the accusations, while in the present interview, that build-up is what makes the interview so probative and valuable to both sides. Under the unique circumstances of this case,

the trial court did not plainly err in admitting the complete interview. Even if this Court, in hindsight, finds fault with the admission of some part of the interview, given 1) defense counsel's strategy of using the interview to undermine the People's conclusions that could be drawn from it and 2) the other evidence at trial – including the victim's testimony and the physical evidence that, in part, corroborated that testimony – defendant is unable to demonstrate the necessary prejudice to obtain relief under the plain error standard.

Finally, defendant makes much of the fact that there was not a specific limiting instruction given in this case; however, no limiting instruction was requested and even the *Musser* court did not suggest that a trial court must *sua sponte* provide such an instruction. *Musser, supra*, at 358. Although no such instruction was requested or given, as noted above, it was evident in Detective Martin's testimony that she spoke a certain way to suspects before and during interviews and the jury *was* instructed that when evaluating the defendant's statements, they should consider the circumstances under which the statements were made. In contrast, even had a limiting instruction been requested, defendant's argumentative version of a limiting instruction (Defendant's Brief, 30) is not required nor suggested under *Musser*.

ARGUMENT II

The trial court did not plainly err by admitting Thomas Cottrell's expert testimony that the victim's behavior was not inconsistent with other children suffering sexual abuse where the defense attacked the victim's credibility and, specifically, the victim's actions after the abuse and the timing of his disclosure.

Standard of Review: In order to preserve the issue of the improper admission of evidence for appeal, a party generally must object at the time of admission. Defendant did not object to the admission of the expert testimony of Thomas Cottrell; therefore, he must demonstrate plain error

affecting his substantial rights, and then that he was actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence. *Carines, supra*, 460 Mich at 763-764.

Discussion: This Court has directed the parties to address “whether the trial court erred in admitting Thomas Cottrell’s expert testimony regarding child sexual abuse accommodation syndrome under current MRE 702, and *People v Kowalski*, 492 Mich 106 (2012), and, if so, whether admission of the testimony amounted to plain error” (132a). The Court of Appeals had previously found that the admission of Thomas Cottrell’s testimony regarding delayed reporting and other behaviors amongst child sexual abuse victims was properly admitted pursuant to this Court’s decision in *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995) (91a-93a). Upon reconsideration of that determination in light of this Court’s recent decision in *Kowalski, supra*, the Court of Appeals correctly found that just as the challenged testimony was admissible under *Peterson*, it is also admissible under *Kowalski* and MRE 702 (124a-128a).

In *Peterson, supra*, this Court reaffirmed its decision in *People v Beckley*, 434 Mich 691, 727, 734; 456 NW2d 391 (1990), that an expert may not testify that the sexual abuse occurred, may not vouch for the victim’s veracity, and may not testify that a defendant is guilty. This Court found, however, that an expert may testify regarding typical and relevant symptoms of child sexual abuse to explain a victim’s behavior that may be construed by a jury as being inconsistent with that of a sexual abuse victim, and may also testify regarding consistencies between the victim and other victims to rebut an attack on the victim’s credibility. *Peterson, supra* at 352-353. The purpose of such testimony is “to provide the jury with background information that it could not otherwise bring to its evaluation of the child’s credibility.” *Id.* at 365.

Beginning in his opening statement, defense counsel told the jury that the evidence would show that Theo Jensen, the victim in this case, continued to ride his bike and play in front of defendant's house even after the "alleged allegations" (Tr III, 27; b), noted Theo's admitted theft of money from students to help a friend with a drug debt, as well as a rumor about another teen who had spent time as a child at defendant's home, and then explained to the jury that, ultimately, the case is "a false allegation about a desperate young man attempting to get out of trouble" (Tr III, 29-31; b). Thereafter, during his cross examination of Theo, defense counsel asked him to explain why he continued to go back over and over again to defendant's house if he was being sexually assaulted, asked about his numerous counselors, asked about him going out and playing after the abuse occurred as if nothing had happened and how he could ride a bike directly after being anally assaulted, and then asked about whether the school had lifted his suspension for stealing after he "came out with this incident," this "revelation" about defendant (Tr III, 72-75, 81-83, 95-96, 98; 196a-199a, 205a-207a, 219a-220a, 222a). Defendant argued that Theo was a troubled youth making up stories about defendant in order to get out of trouble. The strategy was one of attacking Theo's credibility by noting his current troubles as well as his behavior of returning to defendant's house repeatedly and/or continuing to play and ride his bike in front of defendant's house after the sexual abuse and even after the allegations were made. Because of this strategy, the People introduced expert testimony to explain how Theo's behavior was not inconsistent with children who had suffered sexual abuse; this testimony directly responded to defense counsel's attacks and was permissible under *Peterson, supra*, 450 Mich at 352-353, 373.

Specifically, Cottrell testified that delay in disclosure is very common in child victims of sexual abuse and explained several reasons why such delay occurs (Tr IV, 8-10; 286a-288a). Cottrell further explained why a victim might continue to return to the home of the offender or

return to play soon after an offense (Tr IV, 12-13; 290a-291a). Cottrell also explained that Theo's self-destructive behavior was not inconsistent with victims of child sexual abuse (Tr IV, 12, 14; 290a, 292a-293a). At no point did Cottrell vouch for Theo's veracity, or opine that Theo had been sexually abused, or that defendant was guilty of the offenses charged. He provided information to the jury about whether certain behaviors – including delayed reporting and continuing to go around the assailant's home after the abuse – were inconsistent with a child being sexually abused, after an attack on the victim's credibility based upon the timing of his disclosure and his post-offense behavior. Such testimony is proper pursuant to *Peterson, supra*, 434 Mich at 352-353, in light of the defense's attack on Theo's credibility and post-abuse actions. Furthermore, Cottrell's testimony regarding common characteristics of sexual offenders was offered in response to the defendant's proffered character witness testimony that he is a trusted neighbor who was not inappropriate with children, and was properly admitted pursuant to *People v Ackerman*, 257 Mich App 434; 669 NW2d 818 (2003).

In *Kowalski, supra*, at 120-121, this Court noted that, pursuant to MRE 702, a trial court evaluating expert testimony must ensure that the testimony “(1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case.” The analysis begins with a determination of whether the type of expert testimony is “beyond the ken of common knowledge” so that the testimony will assist the trier of fact to understand a fact in issue. *Kowalski, supra*, at 121-123. This initial question is easily answered by this Court's analysis in *Kowalski* in which it cites to *Peterson, supra*, as an example of the type of expert testimony that deals with behavior beyond the understanding of many jurors, *Id.* at 123-124; therefore, the expert testimony at issue in the present case meets that initial hurdle.

Defendant-Appellant concedes that are situations in which CSAAS testimony is appropriate; however, he disagrees that it was necessary in the present case. In arguing so, Appellant asserts that because he never questioned that kids will sometimes delay disclosure, Cottrell should not have been able to testify concerning such delays (Defendant's Brief, 37-38). This factual assertion is not supported by the record. Defense counsel opened his case by arguing that the timing of Theo's disclosure was suspect – that he did not disclose through years of being asked about abuse yet did so immediately after getting into trouble – and was a reason to question his credibility. Defendant further questioned Theo's return to the Tomasik home multiple times over the course of two years during the abuse and his actions of continuing to play with Ethan or going for a bike ride after an assault, using this behavior as a reason to question Theo's credibility. Without Cottrell's testimony explaining the reasons behind such behavior and that such behavior is not inconsistent with sexual abuse, the jury would likely assume that any child being harmed in such a way would obviously not keep going back to the same house, that the child would tell a parent or friend and not wait ten or more years to disclose the abuse. This case is precisely the type of case in which such expert testimony is needed so that the jury has all the tools necessary to determine the credibility of the witnesses before it.

The next inquiry is whether Thomas Cottrell is qualified as an expert by knowledge, skill, experience, training, or education. *Kowalski, supra*, at 131, citing MRE 702. Defendant-Appellant does not appear to attack this factor; regardless, given Cottrell's education, experience, and background, he has been accepted as an expert in this area multiple times. As noted in the Counter Statement of Facts, Cottrell testified that he is vice president of counseling services at the YWCA counseling center and has been with the YWCA since 1983 in positions ranging from a therapist in the child sexual abuse treatment program to the clinical director to program manager and now

as vice-president of all the counseling services provided there (Tr IV, 4; 282a). Cottrell has a Bachelor's degree in child development from the University of Michigan and a Master's degree in social work, also from the University of Michigan, specializing in interpersonal practice (Tr IV, 4-5; 282a-283a). Cottrell has provided direct services to approximately 300 families in which he provided services to children (Tr IV, 5; 283a). Cottrell has particular expertise in offender dynamics and child victim dynamics and has provided group therapy work at the YWCA since 1983, just ending in 2006; he explained that part of providing good therapy services to offenders is understanding the dynamics that impact a child victim (Tr IV, 5; 283a). Cottrell has been qualified as an expert in the field of child sexual abuse multiple times in the past (Tr IV, 5; 283a). Given this history, the trial court accepted him as an expert in the field without objection (Tr IV, 6; 284a). In light of Cottrell's education, experience, and practice, the trial court did not err in finding him to be an expert in child sexual abuse. Cottrell has counseled hundreds of children as well as offenders and thereby can provide insight to a child victim's behavior that might be otherwise confusing to a jury.

The next inquiry is whether Cottrell's testimony in this case was based upon sufficient facts or data. *Kowalski, supra*. Cottrell's testimony came after Theo had testified as to the sexual abuse and his behavior in the years following, including the fact that he did not immediately disclose the abuse, continued to play at defendant's house for a period of time following the abuse, that he was consistently in trouble over the years, that he lied, and was caught stealing (Tr III, 38-47; 162a-171a). These are examples of the facts provided by the prosecutor as ones for Cottrell to assume for the sake of her hypothetical questions (Tr IV, 7-8; 285a-286a), so the facts were ones already in evidence.

Finally, the question is whether the testimony is the product of reliable principles and methods. *Kowalski, supra*. Again, there was no evidentiary hearing held in the present case concerning the “principles and methods” of child sexually abusive accommodation syndrome (CSAAS) or whether the theory has been or can be tested, has been published and peer-reviewed, etc., likely because this type of evidence was found to be admissible in *Peterson, supra*. In supplemental briefing to the Court of Appeals, defendant made no analysis or argument that Cottrell’s testimony was inadmissible pursuant to *Kowalski* other than to say that it was inadmissible pursuant to *Peterson* so it must also be inadmissible under *Kowalski*. However, in *Beckley, supra*, 434 Mich at 718-719, this Court considered a similar argument concerning this type of testimony and whether it must first pass the *Davis/Frye*⁴ test and demonstrate that “the scientific principle or technique has gained such general acceptance within the scientific community as to render the technique or principle reliable. Further, general scientific acceptability must be established by disinterested scientists.” In finding that such a test is difficult to apply to the area of behavioral sciences, this Court stated:

The ultimate testimony received on syndrome evidence is really only an opinion of the expert based on collective clinical observations of a class of victims. Further, the issues and the testimony solicited from experts is not so complicated that jurors will not be able to understand the “technical” details. The experts in each case are merely outlining probable responses to a traumatic event. It is clearly within the realm of all human experience to expect that a person would react to a traumatic event and that such reactions would not be consistent or predictable in all persons. Finally, there is a fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences.

⁴ *People v Davis*, 343 Mich 348, 72 NW2d 269 (1955); *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

We would hold that so long as the purpose of the evidence is merely to offer an explanation for certain behavior, the *Davis/Frye* test is inapplicable. [*Beckley, supra*, at 721.]⁵

That same reasoning would seem to hold true concerning the scientific testing in *Daubert v Merrell Dow Pharm., Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and other states and federal courts have agreed. See *United States v Bighead*, 128 F 3d 1329 (9th Cir 1997) (per curiam) (*Daubert* standard is inapplicable to expert testimony regarding CSAAS because such testimony requires “specialized knowledge,” but not “scientific knowledge” based on the “scientific method.”); *Lyons v State*, 976 NE 2d 137, 141-143 (Ind App) (2012) (*Daubert* did not apply to “specialized knowledge” in the area of child sexual abuse); *People v Spicola*, 16 NY 3d 441, 465; 947 NE2d 620 (2011) (majority of states “permit expert testimony to explain delayed reporting, recantation, and inconsistency,” as well as “to explain why some abused children are angry, why some children want to live with the person who abused them, why a victim might appear ‘emotionally flat’ following sexual assault, why a child might run away from home, and for other purposes”).

Defendant’s claim that “many” jurisdictions have scaled back or held CSAAS evidence inadmissible appears to include only several states – Kentucky, Tennessee, Pennsylvania, and Massachusetts – yet the *Commonwealth v Dunkle*, 602 A2d 830 (PA, 1992) case cited so extensively by Appellant has been superseded by statute. *Commonwealth v Carter*, 111 A.3d 1221, 1222-1224 (2015) (*Dunkle* predates 42 Pa.C.S.A. § 5920 providing for the admissibility of expert testimony regarding sexual victim responses and behaviors without allowing an opinion on

⁵ Defendant includes a portion of this quote in his brief at p 39 to support his argument that jurors today no longer need the type of expert testimony involved in this case. Instead, the quoted language explains why this Court found that the *Davis/Frye* test was inapplicable to behavioral science expert testimony, not to suggest that such testimony was unnecessary or would not benefit the jury in making its determinations.

the credibility of any witness). And while Massachusetts limits the introduction of CSAAS evidence, it does not foreclose it and instead recognizes, like Michigan, that “testimony on the general behavior characteristics of sexually abused children may properly be the subject of expert testimony because behavioral and emotional characteristics common to these victims are ‘beyond the jury’s common knowledge and may aid them in reaching a decision.’” *Commonwealth v Quinn*, 469 Mass 641, 646-647 (2014) (internal citations omitted). The limitation is that an expert witness may not “directly opine on whether the victim was in fact subject to sexual abuse or directly refer or compare the behavior of the complainant to general behavioral characteristics of sexually abused children.” *Id.* (internal quotations and citations omitted).

Further examples of states allowing CSAAS type testimony in manners very similar to the *Peterson* decision include: **Connecticut** allows expert testimony about the behavioral characteristics of child sexual assault victims limited to that “stated in general or hypothetical terms, but precludes opinion testimony about whether the specific complainant has exhibited such behaviors.” *State v. Favoccia*, 306 Conn 770, 803 (2012). Likewise, **Florida** does not allow scientific expert testimony that a victim exhibits symptoms of CSAAS but allows expert testimony based upon training and experience about typical behaviors of sexually abused children. *Petruschke v State*, 125 So 3d 274, 282 fn 3 (2013). **Georgia** allows an expert qualified by training and experience to discuss the characteristics of CSAAS while not giving an opinion as to whether a victim suffers from the syndrome or directly addressing the victim’s credibility. *Pearce v State*, 300 Ga App 777, 786 (2009). **Arizona** allows expert testimony about general behavior patterns of child sexual abuse victims that may help the jury understand the evidence providing the expert does not “‘go beyond the description of general principles of social or behavior science’ to offer opinions about ‘the accuracy, reliability or credibility of a particular witness in the case being tried

... [or] of the type under consideration.” *State v Salazar-Mercado*, 234 Ariz 590, 594 (2014), quoting *State v Lindsey*, 149 Ariz 472, 474-475 (1986).⁶ **Texas** allows a qualified child sexual abuse expert to testify about patterns found in exploited children and to offer opinions “of whether the complainant’s statements demonstrate a pattern consistent with other exploited children, but cannot offer expert opinions of the child’s truthfulness.” *Dennis v State*, 178 SW3d 172, 182 (2005). Such testimony is allowed to help the jury understand “the seemingly illogical behavior of the child who changes her story, seems confused, and does not immediately disclose a sexual assault.” *Id.* **New Jersey** allows CSAAS expert testimony to explain why many child sexual abuse victims delay reporting, later recant, etc. to explain “why a victim’s reactions, as demonstrated by the evidence, are not inconsistent with having been molested.” *State v W.B.* 205 NJ 588, 610-611 (2011). **Wyoming** allows qualified experts on child sexual abuse to explain behavior that might be incorrectly construed as inconsistent with an abuse victim or to rebut an attack on the victim’s credibility; however, expert testimony on CSAAS cannot be used to prove whether the victim’s claim is true. *Frenzel v State*, 849 P 2d 741, 749 (1993). Even **Louisiana**, noted by Appellant as being the only state he found to have performed a known or potential rate of error test of CSAAS diagnosis and which precludes expert opinion as to whether a victim suffers from the syndrome or whether a witness is being truthful, allows testimony concerning CSAAS “for the limited purpose of explaining, in general terms, certain reactions of a child to abuse that would be used to attack the victim/witness credibility” such as delayed reporting, etc. *State v Hampton*, 136 So 3d 240, 247 (2014), quoting *State v Foret*, 628 So 2d 1116, 1130-1131 (1993).

⁶ While the defendant in *Salazar-Mercado* asked the Court to “take a fresh look at CSAAS” evidence, the Court declined to do so because the defendant had “failed to establish a sufficient record to merit renewed scrutiny of CSAAS evidence or a departure from our prior cases....” *Id.* Likewise, while the People do not believe that *Daubert* applies to this type of evidence just as *Davis/Frye* did not apply, even if this Court were to decide that such a review is necessary, defendant in the present case has never requested a *Daubert* hearing.

Finally, *Kowalski* noted the importance of analysis under MRE 403 when admitting expert testimony. *Kowalski, supra*, 492 Mich at 136-137. As noted by this Court, “MRE 403 excludes relevant evidence only if ‘its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury’ Evidence is unfairly prejudicial when ‘there exists a danger that *marginally* probative evidence will be given undue or preemptive weight by the jury.’” *Id.* (emphasis in original). In the present case, defense counsel pointed out Theo’s post-offense actions of continuing to go over to the defendant’s house for a period of roughly two years during the abuse, playing and riding his bike like normal immediately after abuse, and the timing of his disclosure – ten years later after he was caught stealing – as reasons for the jury not to believe his testimony. Because of this attack on the victim’s credibility, Cottrell’s testimony educating the jury that such behavior – delay in reporting, continuing to play and go over to the perpetrator’s house, along with acting out, etc. – is not inconsistent⁷ with child sexual abuse was more than marginally probative and, in fact, helped to ensure that the jury could fairly evaluate Theo’s credibility. Without this testimony, the jury would have been left with a view of a troubled teen who randomly picked a neighbor to blame for his problems in order to get out of trouble because they would commonly wonder why a child would not, if he had actually been abused, immediately tell his parents or a friend and/or why that child would continue to go over to the place of the abuse after the first time. Given the attack on Theo’s credibility based

⁷ Defendant-Appellant repeatedly argues that Cottrell testified that Theo’s behaviors were all consistent with being sexually abused and that defendant’s actions were consistent with being a sexual predator. In doing so, he misrepresents Cottrell’s testimony. The majority of Cottrell’s testimony described behavior of child sexual abuse victims and the reasons behind it and, when asked, noted when hypothetical behavior was not inconsistent with child sexual abuse. Appellant’s own proposed expert explained that there is difference between “consistent” and “not inconsistent” (GH I, 78; 423a). Appellant’s change in phrasing is particularly misleading when he includes quotations around “consistent with” with citations to the record, which insinuates that this was the language used in the testimony cited even when it was not (Defendant’s Brief, 38, 45).

upon his post-offense behavior and the fact that Cottrell never opined that Theo was abused or that he was being truthful, the probative value of the challenged testimony was not substantially outweighed by the danger of unfair prejudice to defendant.

In short, it appears that a greater number of jurisdictions currently allow in CSAAS type testimony in a manner similar to Michigan than those that bar it or place greater restrictions on it. It is the type of behavioral science testimony that is beneficial to a jury not because it provides them with a scientific method for determining a diagnosis but, rather, it provides specialized knowledge as noted in MRE 702 that will assist them in understanding post-offense behavior such as delayed reporting or accommodating the sexual abuse so that they can fairly evaluate a complainant's credibility. In the present case, because defense counsel did not object to Cottrell's testimony and because such testimony has been routinely admitted pursuant to *Peterson, supra*, where a victim's credibility is attacked based upon a delay in disclosure or other behaviors, no *Daubert* hearing was held. Furthermore, for the same reasons that *Davis/Frye* did not apply to CSAAS testimony, *Daubert* should not apply. *Beckley, supra*. Other states and federal courts have found that the *Daubert* standard does not apply to "specialized knowledge" as opposed to "scientific knowledge." In the present case, Cottrell's testimony merely explained that delayed reporting and some of Theo's other behaviors were not inconsistent with victims of sexual abuse and the testimony was in response to defense counsel's argument that Theo was lying based on that delayed reporting, his actions of continuing to play at defendant's house after the abuse, and his overall destructive behavior. Such testimony was proper pursuant to *Peterson, supra*, and, for the reasons stated above, the decision in *Kowalski* does not require reversal in the present case.

Finally, even if this Court disagrees and finds that the trial court plainly erred, despite *Peterson*, in allowing Cottrell's testimony, defendant is not entitled to a new trial where he is

unable to demonstrate that it affected his substantial rights. Defense counsel was well prepared to cross-examine Cottrell and prompted him to agree that there are cases in which sexually abused children go through life without any problems, as “A” students, with regular appearing relationships with their parents, that they do not all steal, use drugs, commit suicide, etc. (Tr IV, 17-18; 295a-296a). Defense counsel clarified that Cottrell had never counseled or spoke with Theo, had not reviewed any of his counseling records, spoke with his therapists or medical doctors, etc. (Tr IV, 19-20; 297a-298a). Defense counsel emphasized that not all kids who use drugs, steal from other people, attempt suicide, or fear repercussions of being kicked out of school or going to jail are sex abuse victims (Tr IV, 21-22; 299a-300a). Essentially, defense counsel pointed out that just because a behavior is consistent with the behavior of victims of child sexual abuse, it doesn’t mean that behavior isn’t also consistent with the behavior of children who have not suffered sexual abuse, thereby minimizing any possible improper impact of Cottrell’s testimony. Furthermore, the jury was instructed as to how to consider expert testimony – specifically that they need not believe an expert’s testimony and they decide its level of importance (Tr V, 185; 345a). The jury was instructed to “think carefully about the reasons and facts the expert gave for the opinion and whether those reasons and facts are true” and to further consider the expert’s qualifications and whether the testimony makes sense in light of the evidence (*Id.*). Given the plain error review, the evidence admitted in the case including Theo’s testimony and the physical evidence that in part corroborated his testimony, defendant is unable to prove that the admission of Cottrell’s testimony affected his substantial rights and resulted in the conviction of an innocent man.

ARGUMENT III

The trial court did not abuse its discretion by denying defendant's motion for a new trial based upon newly disclosed impeachment evidence where the reports themselves are inadmissible hearsay and where, given the evidence admitted at trial highlighting the victim's bad behavior and lies, any proposed character testimony from the authors concerning the victim's truthfulness three years before his disclosure of sexual abuse would be at best cumulative and, therefore, does not make a different result probable on retrial.

Standard of Review: A trial court's decision following a motion for a new trial is reviewed for an abuse of discretion. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008), citing *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). “A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes.” *Id.*

Discussion: This Court has asked the parties to address “whether the trial court erred in denying the defendant's motion for a new trial based on the newly disclosed impeachment evidence of the March 26, 2003 report authored by Timothy Zwart and the March 1, 2003 form completed by Denise Joseph-Enders in light of *People v Grissom*, 492 Mich 296 (2012)” (132a). Defendant argues that he is entitled to a new trial based upon the late disclosure of two documents written three years before the victim Theo disclosed his sexual abuse. This argument lacks merit. Although the documents include statements concerning Theo's bad behavior, including the belief of a teacher and guidance counselor that he would tell lies, Theo's bad behavior and lies to others came out during the trial through Theo's testimony as well as the testimony of other witnesses and the defense was able to argue based on that admitted evidence that Theo was a troubled teen who was telling a lie. The Court of Appeals held that this evidence was cumulative to that which was already introduced during defendant's trial and there is not a reasonable probability that the result of the trial would have been different had the documents been disclosed earlier; the Court of

Appeals later determined that application of this Court's recent decision in *Grissom, supra*, does not affect their original holding whatsoever (128a-130a).

Pursuant to MCR 6.431(B), a trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." When this issue was first presented to the Court of Appeals as a violation of due process based upon the trial court's failure to disclose these privileged documents, the analysis was based upon this Court's similar case in *People v Fink*, 456 Mich 449; 574 NW2d 28 (1998). In *Fink, supra*, at 450-451, the defendant was convicted of first and second degree criminal sexual conduct involving a 13 year old resident of a home for children with severe behavior problems; the sexual assaults occurred when he was a staff worker at the facility. Before trial, the defendant in *Fink* requested access to the records from the facility and another agency concerning two boys – the victim and another witness. *Id.* at 451. The trial court found that the files were privileged under Michigan law and refused to order their disclosure. *Id.* The Court of Appeals affirmed the defendant's convictions and, following his application to the Supreme Court, this Court remanded the case to the trial court for an in camera review of the documents and further instructed the trial court to grant the defendant a new trial if any of the documents were favorable to the defendant and material to the case. *Id.* at 451-452. On remand, the trial court found nothing fitting that description yet, curiously, decided to turn over several documents to the defense that "might be helpful," although the trial court indicated that they would not have changed the outcome. *Id.* at 452. Based on the disclosure, the defendant obtained the testimony of the authors of the documents; however, the trial court denied his amended motion for a new trial, finding that

the evidence was not material, as defined *Pennsylvania v Ritchie*,⁸ 480 US 39, 56; 107 S Ct 989; 94 L Ed 2d 40 (1987). *Id.* at 453.

In *Fink*, this Court held that the proper analysis for this issue is under the Due Process Clause of the Fourteenth Amendment. *Fink, supra*, 456 Mich at 453-454, citing *Ritchie*, 480 US at 56. Due process requires that the prosecution turn over evidence that is “both favorable to the defendant and *material* to the determination of guilt or punishment.”⁹ *Fink, supra*; emphasis added. The *Fink* court, citing *Kyles v Whitley*, 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490 (1995), noted the four aspects of “materiality” as follows:

First, the touchstone of materiality is a “reasonable probability” of a different result. The question is not whether the defendant would have been more likely than not to have received a different verdict, but whether he received a fair trial in the absence of the evidence, i.e., a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result exists where suppression of the evidence undermines confidence in the outcome of the trial.

Second, the *Kyles* Court said that the inquiry into materiality does not test the sufficiency of evidence. Rather, one claiming a violation must show that the favorable evidence could reasonably be taken to put the whole case in such a different light so as to undermine confidence in the verdict.

Third, if there is a finding of constitutional error, it cannot be considered harmless.

Fourth, the suppressed evidence must be considered collectively, not item by item. [*Fink, supra*, 456 Mich at 454; emphasis added.]

⁸ In *Ritchie, supra*, at 43, the defendant was convicted of the rape of his 13 year old daughter and, before trial, he requested access to the investigative records concerning his daughter kept by the Children and Youth Services (CYS), an agency charged with the investigation of such abuse. Under Pennsylvania law, the files were privileged and the trial court refused to order their disclosure. *Ritchie, supra*, at 43-44. Ultimately, the Supreme Court remanded the case with instructions for the lower court to conduct an in camera review of the requested files to determine whether they contained evidence *material* to the case. *Id.* at 57-61.

⁹ Likewise, in *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), this Court held that evidence protected by privilege should be provided to defense counsel only if the court finds that the evidence is *essential* to the defense. *Fink, supra*, at 455.

Therefore, in the present case, to prove that the trial court's decision not to disclose any documents following its in camera review of Theo's counseling records violated his due process rights, it was defendant's burden to demonstrate that the disclosed documents contain evidence material to his case, i.e., evidence that could reasonably be taken to put the whole case in such a different light so as to undermine confidence in the verdict. He failed to make such a showing.

This Court ordered the Court of Appeals to reconsider this case in light of *Grissom, supra*. In *Grissom*, this Court considered newly discovered impeachment evidence and whether such evidence could ever be the basis for a new trial. This Court affirmed that, in order to grant a new trial based upon newly discovered evidence, a defendant must demonstrate 1) the evidence itself, not merely its materiality, is newly discovered, 2) the newly discovered evidence is not cumulative, 3) using reasonable diligence, the party could not have discovered and produced the evidence at trial, and 4) the new evidence makes a different result probable on retrial. *Grissom, supra*, 492 Mich at 320. While the point in *Grissom* was undeniably that the fact that newly discovered evidence is impeachment evidence does not foreclose the possibility that a defendant can meet this burden, this Court further remarked:

It bears emphasizing that, as this Court recognized more than a century ago, newly discovered impeachment evidence ordinarily will not justify the grant of a new trial. Our decision today, therefore, does not disturb this unremarkable statement. It will be the rare case in which (1) the necessary exculpatory connection exists between the heart of the witness's testimony at trial and the new impeachment evidence and (2) a different result is probable on retrial. [*Grissom, supra*, at 317-318.]

With this background, the People agree with defendant that the tests in *Fink* and *Grissom*, still hinge in large part on what the parties have previously argued – whether this evidence makes a different result probable on retrial (Defendant's brief, 60). The Court of Appeals correctly found the disclosed documents to contain cumulative evidence and there is no reasonable probability that their earlier disclosure would have affected the result of the trial.

The report from Pine Rest, authored by Timothy Zwart, (720a-727a) is based in part on the forms (728a-735a) filled out by Nancy Jansen, Theo's 6th grade guidance counselor, and Denise Joseph-Enders, one of his teachers at that time.¹⁰ Both Jansen and Joseph-Enders state that Theo has lied in the past and generally describe a troubled teenager with low self-esteem and an accompanying learning disability. In contrast, Jansen also noted that Theo is respectful and generally honest with his school principal (734a). Nothing in the report or forms suggests that Theo had made sexual allegations in the past or had anything against the defendant in this case that would support a finding that he would make a false allegation against him. Furthermore, nothing in Zwart's summary and recommendations suggests anything but that Theo was a troubled young man with low self-esteem, a learning disability, and depression.

At trial, Theo explained that before he began being sexually abused by the defendant, he was a carefree kid, good kid, but after the abuse occurred, he was "messed up" and "so angry inside" (Tr III, 42; 166a). He spoke of keeping weapons around and described himself as kind of a demon child (Tr III, 43; 167a). Theo talked about wanting to kill himself, about the evaluation at Pine Rest, and that he did not disclose the abuse at that time because he did not know the people there (Tr III, 45-46; 169a-170a). Theo talked about getting into trouble at school, fighting with kids, bringing drugs, knives, back talking to teachers, etc. (Tr III, 46; 170a). Theo talked about getting in trouble for stealing at school and that he initially did not admit to what he did – that he only admitted to it once he knew that they had him on tape (Tr III, 47-48; 171a-172a). Theo also explained that although it was at this time that he disclosed the abuse to his counselor, he had already pled guilty to the theft and knew what his sentence would be before he disclosed (Tr III, 49-50; 173a-174a). During cross-examination, Theo admitted that he had been asked in the past

¹⁰ The report and form are both dated March 2003, indicating that they were completed roughly three years before Theo disclosed his sexual abuse to his counselor.

whether he had ever been sexually abused but had answered, “No” (Tr III, 62-63; 186a-187a). Theo admitted to using drugs, particularly marijuana (Tr III, 106; 230a). Theo admitted that he knew that stealing was wrong and was dishonest (Tr III, 94; 218a).

Theo’s mother, Susan Jensen, also testified that as a young child, Theo was happy but by June – after school was finished – when he was six years old, Theo changed (Tr IV, 29-30; 7b-8b). She noticed his anger, finding knives in his room, finding him sleeping under his bed or in his closet, and testified that she and her husband thought it was related to Theo’s grandfather dying the previous March (Tr IV, 30-32; 8b-10b). Ted Jensen, Theo’s father, also described the change in Theo’s behavior before the age of six and then after the age of six as being between black and white (Tr IV, 73; 17b). Susan added that Theo had told her in the past that he had a secret – that he had done horrible things and no one could love him (Tr IV, 32-33; 10b-11b). Susan testified that since the disclosure, Theo’s behavior had changed again – he is not angry, he is loving (Tr IV, 42; 12b). During cross-examination, Susan testified that Theo had lied about sexually touching a younger cousin one time when he was ten years old (Tr IV, 47-48; 13b-14b).¹¹ Susan further testified that Theo had lied in the past about smoking marijuana (Tr IV, 64-65; 15b-16b). Ted also testified as to Theo’s drug use and trouble in the past, including the police coming to the house two times concerning Theo – one time for a prank call and another time to speak about the stealing incident at school (Tr IV, 99, 103; 19b-20b). Julie Anna Schaefer-Space, Theo’s counselor, testified as well about Theo’s history of getting in trouble and the change that occurred after his

¹¹ In fact, defendant’s trial counsel first requested access to Theo’s counseling records based upon his preliminary testimony that he had never before disclosed the sexual abuse to his prior counselors and his mother’s information that he had sexually acted out around the age of 10-11 (Defendant’s December 1, 2006, Motion to Disclose Complainant’s Counseling Records; 65b-66b ¶¶ 2, 5-7, 9, 12). It was counsel’s belief that a prior therapist would have asked about any sexual abuse and it was for this review that the original *Stanaway* Motion was granted and in camera review conducted.

disclosure of the sexual abuse (Tr IV, 120-122; 260a-262a). Ethan Tomasik testified that he stopped hanging out with Theo at about age 8 because Theo “got into a lot of trouble and I just don’t like gettin’ in trouble” (Tr IV, 143; 24b). Ethan added that Theo was always getting into trouble; he would hear about it at school from other people (Tr IV, 144; 25b). Ethan further testified that Theo’s reputation in the area was not good because people talk about him getting in trouble and Ethan has seen the police at Theo’s house before (Tr IV, 144-145; 25b-26b). Amantha Engleman, another classmate, also testified that Theo got into trouble a lot when they were younger (Tr V, 10-11; 34b-35b).

Defense counsel’s argument at trial was that Theo Jensen was a troubled teenager who had gotten in trouble for stealing and had made a false allegation of sexual abuse in order to get out of that trouble. Counsel’s cross-examination of Theo was extensive and highlighted his stealing along with the argument that his disclosure was of convenient timing given the theft. Defense counsel noted Theo’s statements about the frequency and nature of the abuse – happened every time he went over, he was raped 50-60 times, each time took anywhere from 15 minutes to an hour, etc. (Tr III, 60, 66, 79-80; 184a, 190a, 203a-204a) – and used those to impeach Theo’s credibility. Counsel also elicited the fact that Theo originally told Detective Martin that the penetration occurred twice and then later changed his story stating 10 to 20 times (Tr V, 63-64; 45b-46b). Defense counsel also questioned Theo about the fact that he brought in a Batman doll to court during a prior proceeding; Theo agreed that he identified with Batman because Batman has “deep dark secrets” (Tr III, 56-57; 180a-181a). In response to defense counsel’s question about whether Batman is real or not, Theo answered, “To me in my heart, yes, he is real” (Tr III, 57; 181a). Over several pages, defense counsel questioned Theo about his affinity for Batman and how “real” Batman is to him (Tr III, 56-60; 180a-184a).

Thus, through Theo's testimony and that of other witnesses, defense counsel noted not only many differences between Theo's initial disclosure and his testimony at trial, but also his lying, trouble-making at school, drug use, and his stated belief that Batman is real. The jury was able to hear these witnesses and judge their credibility. Based on the evidence admitted at trial, one of the first and last things that defense counsel argued to the jury was, "Batman is real to him. What does that tell you? He still cannot decipher between fiction and reality" (Tr V, 155-156, 169; 50b-51b, 64b). Defense counsel noted the inconsistencies in Theo's testimony during his closing argument, highlighting Theo's initial statement to the Detective that the penetration occurred two times then the story grew to 10 to 20 times and, during cross-examination at trial, to 50-60 times (Tr V, 163; 58b). Counsel pointed out the inconsistencies in Theo's testimony, focused on why people lie, and argued that Theo reported the abuse as a means of getting out of trouble when he got caught stealing at school (Tr V, 162-168; 57b-63b). Nothing in the disclosed documents can be said then to reasonably put this whole case in such a different light so as to undermine confidence in the jury verdict.

Furthermore, defendant's argument continues to appear to be based on a mistaken belief that these disclosed documents would themselves be admissible at trial. He failed to explain the basis for the admission to the trial court, did not do so in either of his supplemental briefs to the Court of Appeals, and does not appear to do so in his brief to this Court. The reports are inadmissible hearsay documents. MRE 801; MRE 802. At most, had these documents been disclosed to defense counsel before trial, they could have identified Theo's past teacher and guidance counselor as potential character witnesses. The trial court agreed, stating:

I agree with the prosecutor that the reports themselves would not have been admissible, and presumably their authors would not have been able to testify, except in a certain very limited area. The value of the reports, I suppose, is that they might have brought forth witnesses who could have been offered by way of

impeachment of the credibility of the witness, admittedly on a collateral point. [July 29, 2011, Motion for a New Trial, 26-27; 73b-74b]

No testimony was taken at the motion hearing as was done in the *Fink* case following the disclosure of documents, *Fink, supra*, 456 Mich at 453, and so we do not know what testimony would have been admitted. Furthermore, whatever testimony that the teacher and guidance counselor could have given as to Theo's character for truthfulness would have been tempered by the fact that the basis for their opinions stemmed from their contact with Theo at school roughly three years before he made the disclosure of sexual abuse. Given the testimony that came out at trial regarding instances of Theo telling lies, such additional witnesses giving cumulative character testimony would not make a different result probable on retrial. Defendant received a fair trial in which he continually highlighted Theo's wrong-doing and demonstrated ability to lie when in trouble; quite simply, the information in these documents adds little, if anything, to what was already known by the jury. The Court of Appeals correctly found that this analysis is unchanged by this Court's opinion in *Grissom*.

ARGUMENT IV

None of defendant's asserted errors by his trial counsel support a finding of ineffective assistance. Defendant was not denied any substantial defense through the strategic decisions by his trial counsel. Contrary to defendant's assertion, trial counsel requested and received an in camera review of some of the victim's counseling records, called character witnesses on behalf of defendant, and effectively cross-examined the prosecution's witnesses. Furthermore, defendant's trial counsel had a strategic reason for not objecting to the introduction of his complete interview, and was well prepared to counter Thomas Cottrell's expert testimony. Finally, proposed expert Jeffrey Kieliszewski admitted he would agree with much of Cottrell's trial testimony and failed to explain what admissible testimony he would be able to provide that would make a different result reasonably probable on retrial.

Standard of Review: A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, and its constitutional determinations are reviewed de novo. *Id.* Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 578.

The Court of Appeals granted, in part, defendant's request for remand to the trial court in order to conduct an evidentiary hearing regarding his claim that his trial counsel was ineffective for not calling a psychological expert to rebut the prosecution's experts and for not calling defendant to testify on his own behalf; therefore, the record on appeal is expanded to include the testimony and evidence received during the subsequent hearings on December 18, 2008, and February 12, 2009. When a *Ginther*¹² evidentiary hearing is held concerning a claim of ineffective assistance of counsel, the trial court is permitted to assess the credibility of witnesses and the

¹² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

reviewing Court defers to that determination. *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008), modified 481 Mich 1201; 750 NW2d 165 (2008); MCR 2.613(C).

Discussion: Defendant argues that his trial counsel was ineffective in a myriad of ways, most particularly in not calling a psychological expert, such as Jeffrey Kieliszewski, to rebut the testimony of the prosecution's expert, Thomas Cottrell; not interviewing or presenting more potential witnesses, not obtaining defendant's work records, not effectively cross-examining the victim, not taking necessary steps to obtain Theo's psychiatric and counseling records, and not objecting to the introduction of defendant's full interview. These arguments ultimately fail. Defense counsel had a strategic reason to want the entire interview entered into evidence, and, given Kieliszewski's testimony at the *Ginther* hearing, which conceded and agreed with many of the main points made by Cottrell during trial, counsel's decision not to bring someone like Kieliszewski in to challenge Cottrell's testimony was reasonable professional judgment. The decisions of what witnesses to present at trial concern trial strategy. Defendant's trial counsel presented character witnesses on defendant's behalf, consulted with a medical expert, testified that he was well acquainted with the prosecution's psychological expert and his manner of testifying in CSC cases, and ensured that the victim's therapist would testify in order to point out the nature of the actual disclosure, which did not include penetration. Nothing presented by defendant during his two evidentiary hearings demonstrates that his trial counsel's performance fell below an objective standard of reasonableness.

Effective assistance is presumed and defendant has the burden to prove both an error outside of reasonable professional judgment as well as prejudice, i.e., a reasonable probability that but for that error, the result of defendant's trial would have been different. In *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme

Court set forth the following test for determining whether a defendant was deprived of the effective assistance of counsel under the Sixth Amendment:

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

The Court further held that an error by counsel, "even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Thus, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 692. The Court said that "every effort [must] be made to eliminate the distorting effects of hindsight," and that "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689. Ultimately, the defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

IV-A: Thomas Cottrell's Testimony and Trial Counsel's Response to It

Defendant argues that defense counsel was ineffective for not securing his own psychological expert to challenge Cottrell's testimony. The decisions regarding what evidence or witnesses to present are presumed to be matters of trial strategy, which reviewing courts have declined to "second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393,

398; 688 NW2d 308 (2004). Furthermore, the failure to call a witness only constitutes ineffective assistance of counsel if the failure deprived the defendant of a substantial defense. *Id.*

In this case, trial counsel testified at the *Ginther* hearing that he was very familiar with Thomas Cottrell's testimony with respect to victim dynamics, delayed reporting, and offender dynamics, and has cross-examined him a number of times (GH Tr I, 107; 452a). In his opinion, securing a psychological expert for the defense would have ultimately benefited the prosecution (*Id.*); this opinion proved true at the *Ginther* hearing. Defendant's proposed expert witness, Dr. Jeffrey Kieliszewski, agreed that children who are victims of sexual abuse can often delay reporting and agreed that this is consistent with Cottrell's trial testimony (GH Tr I, 77-78; 422a-423a). When asked if a child acting out on another child is consistent with a child who has been sexually abused, Kieliszewski answered, "That is not inconsistent" (GH Tr I, 78; 423a). Kieliszewski further agreed that children who have been sexually abused can engage in destructive behavior and can have suicidal ideation (GH Tr I, 78-79; 423a-424a). Such testimony is consistent with that of Cottrell at trial (Tr IV, 8-12; 286a-290a).

When asked about the issues of clinician illusions and confirmatory bias on the part of the therapist, trial counsel noted the problem with the physical evidence in the case – the rectal bleeding – which is why he consulted with Dr. Guertin, cross-examined Dr. Clark accordingly, and brought out the victim's later episode of rectal bleeding (GH Tr I, 108-109; 453a-454a). Trial counsel also noted he saw no evidence of coaching, bias, or disclosure between 1996 and 2006 when the victim made his disclosure to his therapist (GH Tr I, 109; 454a). The therapist, Julie Schaefer-Space, was important to the defense because she filed the 3200 form – the first notification of the victim being sexually abused – and the notification makes no mention of the penetration alleged at the trial (GH Tr I, 110; 455a). Trial counsel testified that he was the party

who wanted the therapist to testify¹³ – she was not qualified as an expert¹⁴ and her notification on the 3200 form impeached the victim’s statement about multiple penetrations and oral sex (GH Tr I, 110, 129; 455a, 474a). In reiterating why he did not call a psychological expert, trial counsel again noted that a defense expert would have been subject to cross-examination by the prosecutor with respect to offender dynamics, victim dynamics, and delayed reporting allowing then the prosecutor in closing to argue, “Ladies and gentlemen of the jury, even the defense expert agrees with Mr. Cottrell ...,” and this was also the reason he did not call his medical expert, Dr. Guertin to the stand, i.e., he would agree with the prosecution’s medical expert (GH Tr I, 111; 456a).

During the *Ginther* hearing, the prosecutor, who was the trial prosecutor in this case, elicited the proposed expert’s admission that he is unaware of the forensic protocol used by law enforcement in Kent County or the fact that officers must be trained in that protocol before they are allowed to interview children of sexual abuse (GH Tr I, 69; 414a). Kieliszewski also agreed that the protocols are in place to keep young children from being improperly influenced by the questioning but that the victim in the present case was 15 or 16 years old when first interviewed and was old enough to understand what is real or not real (GH Tr I, 70-71; 415a-416a). When Kieliszewski testified that some of Cottrell’s statements were not necessarily supported in empirical literature, the prosecutor asked for examples – Kieliszewski answered that he “might” be able to find some citations if he left and went to the library (GH Tr I, 76; 421a). As noted

¹³ Trial counsel testified that he had informed the prosecutor before trial that he was going to call the therapist and agreed that it is common for prosecutors in Kent County to then call the witness themselves instead (GH Tr I, 134-135).

¹⁴ In his Statement of Facts, Defendant-Appellant includes Schaefer-Space as one of four expert witnesses presented by the People; this is incorrect. Schaefer-Space was never qualified as an expert witness; she was a fact witness brought in because defense counsel planned to call her as a witness to discuss her mandatory report that did not include an allegation of anal penetration (see FN 13).

above, Kieliszewski agreed with several of the key statements made by Cottrell at trial regarding delayed reporting and behaviors that are seen in children who have been sexually abused (GH Tr I, 77-79; 422a-424a). Kieliszewski was disturbed by what he said was a lack of an “examination” as to whether the victim was making a false allegation; however, when the prosecutor explained that examinations for the sake of determining truthfulness are not admissible and asked the expert to explain exactly what he could offer on defendant’s behalf that was not already brought out at trial, Kieliszewski again testified that he could educate the jury about the idea that there are occasions where false allegations of sexual abuse occur, and that the way to assess whether or not it is false is through a variety of factors and approaches, one being a forensic evaluation (GH Tr I, 79-82; 424a-427a). The People note that absent the continued mention of an “evaluation,” this sounds remarkably like informing the jury of the factors to be used in determining the credibility of a witness, the instructions on which are given to every jury before deliberations begin.

The trial court noted that “it would be a peculiar proposition to assert that, in any situation of this sort, an attorney must bring forward a rebuttal expert or be automatically deemed deficient” (GH Tr II, 62; 82a). The trial court found that such a decision depends on the case, and stated, “in this case, I don’t see that there is clear evidence that the failure of Mr. Nunzio to do so falls below objective standards of performance by counsel of this community or others with which I’m familiar” (GH Tr II, 62; 82a). The trial court then found that even had counsel’s performance been deemed deficient, it would then be difficult to find that “but for” that deficiency a different outcome would have been probable for the reasons suggested by the prosecutor (GH Tr II, 62; 82a). In short, the trial court appropriately considered the testimony and evidence, made credibility determinations, and found trial counsel’s explanations of his decisions reasonable rather than ineffective.

IV-B: Introduction of Character Witnesses

Defendant next argues that his trial counsel was ineffective for failing to call over 20 additional witnesses who would have testified as to his good character, his work habits, and the victim's bad character (Defendant's Brief, 73-74). Again, as noted above, decisions regarding what evidence or witnesses to present are presumed to be matters of trial strategy, which reviewing courts decline to "second-guess with the benefit of hindsight," and which only constitutes ineffective assistance of counsel if the failure to call a witness deprived the defendant of a substantial defense. *Dixon, supra*, 263 Mich App at 398.

Defendant maintains that the jury did not hear "from defense witnesses who could have, layer by layer, attacked the veracity of Theo's story" (Defendant's Brief, 73); however, trial counsel presented such a case to the jury, explaining that the case was "a false allegation about a desperate young man attempting to get out of trouble" (Tr III, 30-31; 4b-5b). Defense counsel cross-examined the victim about his behavior after the assaults, about his numerous counselors, and about whether the school had lifted his suspension for stealing after he "came out with this incident," this "revelation" about defendant (Tr III, 72-75, 81-83, 95-96, 98; 196a-199a, 205a-207a, 219a-220a, 222a).

The jury also heard of defendant's reputation for being appropriate with children from four neighbors who testified that they had never seen defendant be inappropriate and, indeed, would continue to allow their own children to go to defendant's home (Tr V, 78, 89, 94-95, 100-101; 48b, 321a, 326a-327a, 332a-333a). Defendant's son, Ethan, and another teenager familiar with the family, Jason Barringer, testified in kind as well (Tr IV, 129, 149; 23b, 27b). Jason also testified

that he did not recall Theo Jensen, the victim, being present when he and Ethan played in the house and did not remember defendant ever calling Theo away if they were outside playing (Tr IV, 128; 266a). Ethan testified that Theo was not at the house a lot when they were little (certainly not five times a week) (Tr IV, 136, 142; 268a, 274a). Ethan added that he and Theo stopped playing together when he was about 8 years old because Theo always got into trouble and Ethan did not like getting into trouble (Tr IV, 143; 24b). Ethan further testified that Theo does not have a very good reputation on the street because he's gotten into a lot of trouble (Tr IV 144-145; 25b-26b).

Kimberly Tomasik, defendant's wife, testified that Theo has only been inside their home maybe five or six times and outside playing perhaps six times (Tr V, 108-109; 340a-341a). Kimberly added that during that period of time, defendant would go to work at 9 or 10 a.m. and come home sometime between 8 and 11 p.m., working 10-12 hour days every day in 1996 through 1998 (Tr V, 109, 124; 341a, 49b). Kimberly further testified that defendant was not even present when Theo was there (Tr V, 110, 112; 342a, 344a). Ethan also testified that defendant worked a lot, stating, "I mean, he's gone a lot. He puts in a lot of hours at work" (Tr IV, 150; 28b). In fact, Theo himself noted the abuse did not occur every time he was at the Tomasik house "because [defendant] has a job" (Tr III, 72; 196a). Therefore, the jury heard the arguments claimed here by defendant's appellate counsel; they simply were not swayed by those arguments.

IV-C: Impeachment of Theo Jensen

Defendant further argues that his trial counsel failed to effectively cross-examine the victim, Theo Jensen, concerning prior inconsistent statements (Defendant's Brief, 79-80). This claim is not supported by the record. Trial counsel's cross-examination of the victim begins on page 56 of Tr III (180a) and continues for over 50 pages. During that cross-examination, defense

counsel repeatedly used the preliminary examination transcript to impeach the victim's testimony (Tr III, 60, 79-80, 90; 184a, 203a-204a, 214a). Defendant appears to argue that his trial counsel was not effective because he allowed the victim to read the transcript to refresh his memory when his answer was that he did not remember (Defendant's Brief, 5 fn 4); yet this is the correct method of questioning a witness who does not remember prior testimony. MRE 613. During the cross-examination, trial counsel appeared to highlight the victim's statements about the frequency and nature of the abuse – happened every time he went over, he was raped 50-60 times, each time took anywhere from 15 minutes to an hour, etc. (Tr III, 60, 66, 79-80; 184a, 190a, 203a-204a), and used those to impeach Theo's credibility. Trial counsel also elicited the fact that Theo originally told Detective Martin that the penetration occurred twice and then later changed his story stating 10 to 20 times (Tr V, 63-64; 45b-46b). Counsel noted the inconsistencies in the victim's testimony during his closing argument, highlighting the victim's initial statement to the Detective that the penetration occurred two times then the story grew to 10 to 20 times and, during cross-examination at trial, to 50-60 times (Tr V, 163; 58b). By doing so, defendant's trial counsel ensured that that jury was well aware that the victim's story had changed during the investigation of the case and course of the trial. Defendant's argument to the contrary, that more questions highlighting the same issue would have made a difference, is without merit.

IV-D: Requested Psychological and Counseling Records

Defendant also argues that his trial counsel was ineffective for failing to adequately investigate and demand an in camera review by the trial court of all of the victim's treatment, counseling, and educational records (Defendant's Brief, 78). The People respond to this claim simply by noting that it is not supported by the record. It was the trial counsel's motion prior to

trial which resulted in the original *Stanaway* review and, within that motion, trial counsel did in fact state that Theo had been in counseling since the age of five, and that he had testified at the preliminary examination that he had never before revealed that defendant had sexually molested him but could not remember if any of his approximately eight counselors before Julie Schaefer-Space had asked him if he had been sexually abused (65b-66b). Within his motion, trial counsel specifically requested “that any and all [of Theo’s] counseling records be made available for inspection” citing to *Stanaway, supra*.

IV-E: Introduction of Defendant’s Complete Interview

Defendant also argues that his trial counsel was ineffective for failing to object to the introduction of his recorded interview into evidence (Defendant’s Brief, 80-81). For the reasons stated *infra* during the discussion of issue I, the trial court properly admitted the recording of defendant’s interview and, beyond that, defense counsel’s decision not to object to the admission of the entire recording was strategic.

Finally, defendant argues that the cumulative effect of his claimed errors by trial counsel denied him a fair trial (Defendant’s Brief, 81-82). As noted above, none of defendant’s claims of ineffective assistance of counsel have merit; therefore, there was no adverse cumulative effect.

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, the People respectfully pray that this Court AFFIRM the April 22, 2014 decision of the Court of Appeals, which affirmed the convictions entered in this cause by the Circuit Court for the County of Kent.

Respectfully submitted,

William A. Forsyth (P 23770)
Kent County Prosecuting Attorney

James K. Benison (P 54429)
Chief Appellate Attorney

Dated: September 15, 2015

By: /s/ Kimberly M. Manns

Kimberly M. Manns (P 67127)
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