

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EUGENE GRISSOM,

Defendant-Appellant.

UNPUBLISHED

October 29, 2009

No. 274148

St. Clair Circuit Court

LC No. 03-000881-FH

Before: Borrello, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's denial of his motion for relief from judgment on the basis of newly discovered evidence. We review for an abuse of discretion the trial court's denial of defendant's motion for relief from judgment, and we review for clear error the trial court's underlying factual findings. *People v Clark*, 274 Mich App 248, 251; 732 NW2d 605 (2007). We find no error and no abuse of discretion, therefore we affirm.

I. Overview

In 2003, defendant was convicted by a jury of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f), for a brutal rape that had been committed in a shopping center parking lot on a Saturday afternoon in May 2001. Defendant was sentenced to two concurrent sentences of 15 to 35 years in prison. This Court upheld defendant's conviction on appeal. *People v Grissom*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2004 (Docket No. 251427) (*Grissom I*).

In 2005, the prosecutor forwarded a packet of documents to defendant's trial and appellate counsel. The packet contained several police reports and three anonymous emails, all generally containing assertions to the effect that the victim in this case was a liar and had made false accusations of rape in California, some time after the rape in the instant case but before defendant's trial. Based on the discovery of evidence that the victim may have made false allegations of sexual assault, defendant filed a motion with the trial court for relief from judgment. The trial court denied that motion, and we denied leave to appeal.¹ Defendant then

¹ *People v Grissom*, unpublished order of the Court of Appeals, entered July 2, 2007 (Docket No. (continued...))

sought leave to appeal from the Michigan Supreme Court, which remanded this matter to this Court “to consider whether defendant has a reasonably likely chance of acquittal in light of the newly discovered evidence and in light of the evidence presented against defendant that did not involve the complainant’s credibility.” *People v Grissom*, 480 Mich 1140; 746 NW2d 99 (2008).

A new trial may be granted on the basis of newly discovered evidence. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). The defendant must show: (1) that the evidence itself, and not just its materiality, is newly discovered; (2) the newly discovered evidence is not merely cumulative; (3) the new evidence would probably cause a different result on retrial; and (4) the defendant could not, with reasonable diligence, have discovered and produced the new evidence at trial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). In other words, defendant must demonstrate both good cause *and* actual prejudice. See *People v Kimble*, 470 Mich 305, 313-314; 684 NW2d 669 (2004). Here, the prosecutor conceded all of the *Cress* elements pertaining to good cause, but disputed actual prejudice. At issue is whether the newly discovered evidence would probably result in an acquittal on retrial.

We note that some of the documents contained in the packet would clearly be inadmissible – the three anonymous emails, for example, were never traced, and the unknown author apparently did not respond to a request to come forward.² Of the remaining portion of the newly discovered evidence, none of it could be used for any purpose other than impeachment, which is not grounds for a new trial. See *People v Duncan*, 414 Mich 877, 877-878; 322 NW2d 714 (1982), reversing the Court of Appeals, which had granted a new trial on the basis of newly discovered evidence, “for the reasons stated in” Judge Burns’s dissent, which held that the newly discovered evidence in that case “[did] not relate to the defendants’ guilt or innocence but rather attack[ed] the character and credibility of the prosecution’s main witness;” see also *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977), and *Davis*, *supra* at 516. Additionally, it appears that *none* of the newly discovered evidence may be substantively admissible, because it only pertains to proving “[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility.” MRE 608(b).

We would conclude that none of the newly discovered evidence would justify a new trial, given that even if it would be ruled admissible, it would only be admissible for the limited purpose of impeachment of the complainant. However, pursuant to our Supreme Court’s remand order, we nevertheless consider the possible effect it might have in the event of a retrial.

II. Timeline Of Events

The victim testified that on May 12, 2001, she pulled into the parking lot of the Fort Gratiot Meijer store sometime between 12:00 p.m. and 12:30 p.m. She testified that she stepped out of her vehicle and turned to retrieve her purse from between the front seats. When she turned

(...continued)

274148).

² At a *minimum*, they constitute hearsay not within any exception. Given their obvious inadmissibility, we will not further consider them in this opinion.

around, a man with long dirty hair and a scraggly beard was standing in front of the open door. The man was wearing a hat. The man grabbed the victim's arm and ordered her to get into her vehicle. According to the victim, she resisted her attacker and he struck her, causing her to fall back into the vehicle. The victim continued to resist, but the man struck her again and she briefly lost consciousness. According to the victim, when she came to, her head was between the front seats, one of her legs was pinned by the man, and her other leg was pinned by the steering wheel. She testified that she tried to sit up as the man unbuttoned her pants and pulled them and her underwear down around her knees. He then unzipped his own pants and she saw his erect penis. She managed to raise herself partway up, and the man struck her several times in the chest, knocking her back down. According to the victim's testimony, the man stated: "This will shut you up," and slid a "gold nugget" ring with several stones on it down one of his fingers to his knuckle. She testified that he then forced the finger with the ring into her vagina.

The victim stated that she attempted to scream but was having difficulty breathing from the blows the man had inflicted. She was able to call her attacker a bastard and he responded by pulling his hand away from her body and backhanding her. She fell back again and could taste blood from a cut on her face. According to the victim, the man then inserted his penis in her vagina, while gripping and striking her thighs when she continued to resist. At some point, she lost consciousness again, and when she regained consciousness, the man was gone. She testified that she made her way home, but was she unable to recall the details of how she got there. Upon entering her home, she immediately proceeded to her bedroom because she did not want her children to see what had happened.

The victim's husband testified that when she returned home that afternoon, he knew immediately that something was wrong. He reported that she looked panicked and had a cut on her mouth. The victim's husband questioned her about what had happened, and the victim told him in a somewhat incoherent and rambling manner that she been physically attacked. However she did not tell her husband at that time that she had been sexually assaulted. She testified that she did not tell him about the sexual assault because "I wasn't ready to face myself" and she "didn't know how to break his heart." The victim's husband testified that he noticed large bruises developing on the victim's legs and arms over the next few days after the attack.

The victim testified that, two days later, on May 14, 2001, she reported to the police that she had been assaulted. She did not reveal the sexual assault, so the police treated the matter as an attempted carjacking. The officer who took the complaint did, however, note a large scratch on the victim's face and that the victim was complaining of extensive bruising.³ The victim testified that she did not reveal the full extent of the attack because she had not yet fully disclosed the details of the attack to her husband and she was not ready to face the fact that she had been sexually assaulted. The same day, she received medical treatment for some of her injuries from Paul Jerry, M.D., of Port Huron Hospital. Dr. Jerry testified that he observed that the victim's arm was swollen and bruised and that she reported tenderness in her neck. The victim was diagnosed with a sprain and/or hematoma, given a sling, and discharged. She did not report the sexual assault to Dr. Jerry because she was uncomfortable talking to him in an area

³ It was not clear from the testimony of the officer who took this complaint whether the victim mentioned the ring at this time.

with six other beds and because she did not think reporting it would be helpful because she had already taken a shower.

The next day, May 15, 2001, the victim confided to a friend that she had been sexually assaulted. The friend described the victim's demeanor as traumatized and stated that she walked and talked slowly. The friend advised the victim to disclose the full incident to her husband. Later that day, the victim told her husband that the man who had assaulted her had digitally penetrated her; however, she did not disclose further details because of his reaction.

The next day, on May 16, 2001, the victim contacted her OB-GYN, Dr. Deborah Russell, to whom she reported the full details of the attack, including the fact that her attacker penetrated her with his penis. She explained that because her attacker had not worn a condom, she was beginning to worry about possible health-related repercussions. Dr. Russell directed the victim to return to the emergency room because the doctors there would be better able to handle treatment for sexual assault. On the basis of Dr. Russell's advice, the victim returned to the Port Huron Hospital that same day, along with her husband. She was treated by Dr. Thabit Bahhur. Because her husband was present, and she had not yet told him the full extent of the assault, she only told Dr. Bahhur about the digital penetration. Dr. Bahhur conducted a physical examination and observed abrasions on the outside and inside the victim's vagina as well as on her cervix, which Dr. Bahhur described as being "deep inside the vagina." He testified that the victim's injuries were consistent with forceful digital or penile penetration, but he could not rule out other reasons for the injuries. He did not collect any "rape kit" evidence because of the time since the attack, the fact that the victim had changed clothes, and the fact that the victim only reported digital penetration.⁴

Thus, within only a few days of the assault, the victim had revealed most of what had occurred to two doctors, a friend, and her husband; she revealed at least the fact of the attack to the police and another doctor.⁵ Moreover, there was substantial objective evidence to support what she had disclosed. On May 23, 2001, the victim returned to Dr. Russell for a follow-up examination, which revealed "pretty obvious" bruises on the victim's arm and inner legs, and abrasions and scratches along her inner labia. Dr. Russell testified that the victim's vaginal area was normal at that time, but the "vaginal area heals very quickly," so any abrasions more than a few days old would be expected to have healed by then.⁶ The victim told her husband the remaining details of the assault a "few more months" later.

⁴ As discussed *infra*, also on May 16, 2001, defendant pawned a men's gold nugget-style ring with diamond chips on its face; defendant never redeemed it. Defendant would, during the 2003 investigation, later deny to the police owning such a ring or any jewelry.

⁵ Dr. Jerry, the first emergency room doctor to see the victim, testified that the emergency room is not an "ideal" environment for rape victims, but that for the most part no alternatives existed; he also explained that rape victims do not always come to the emergency room immediately.

⁶ Dr. Russell conceded that it would be impossible to determine whether any abrasions made eleven days previously had healed or had never existed in the first place. However, she lacked any knowledge of the examination conducted by Dr. Bahhur only four days after the assault.

The victim would not report the full details of the Fort Gratiot assault to the police until approximately a year after. In June of 2002, the victim was driving near the Fort Gratiot Meijer when she saw a black Jeep pull out of a driveway behind her. When she stopped at a traffic light, she recognized in her rear-view mirror the person she thought to have been her attacker. She stated that the person in the Jeep behind her had semi-long, scraggly hair, a beard, and a ring on his hand. She thought it was the same person who had raped her, although it is undisputed that the ring she had described her attacker using had been pawned by then. She testified that the face of the man behind her frightened her. She contacted the police again because she did not want to live in fear any longer and believed she might be able to “get the person off the street who hurt me.” It was at this time that she first related to the police that her assault had involved being raped.

In October of 2002, the victim reviewed approximately 6,800 photographs in “loose-leaf” books and another 1,000 digital photographs⁷ over a five-day period at the Port Huron Police Department. The assisting officer noticed that the victim became visibly upset after viewing “approximately one thousand” of the digital photographs and had to leave the room to regain her composure. When she returned, the victim informed the officer that she had viewed a picture of the man who had assaulted her. The person in the photograph was defendant. The officer passed information concerning defendant to the St. Clair Sheriff’s Department, which had jurisdiction in the matter, but did so outside of the victim’s presence. At some point thereafter,⁸ a sheriff’s deputy briefly interviewed defendant, at which time defendant denied owning a ring of the sort described by the victim. Defendant later admitted that he had owned such a ring after being asked about pawning it.

On November 7, 2002, a live lineup was arranged. The deputy advised defendant in person at his home that morning that defendant should be at the sheriff’s department at a certain time. Defendant specifically asked whether he needed an attorney and whether there would be a police lineup. That morning, defendant looked unkempt, with “long hair, [and] the long goatee-type, scraggly-looking beard.” But by the time of the lineup, defendant had shaved his head and face, “completely chang[ing]” his appearance to the extent that neither the deputy nor the other police officer assigned to the case recognized defendant. The victim hesitated and then picked a different person out of the lineup. A few months before trial, the victim recalled that her attacker had had a skull tattoo on his upper arm, although she did not recall any details thereof. Defendant did, in fact, have a skull tattoo on his upper arm. There was testimony that defendant worked at the Fort Gratiot Meijer on the day of the rape.

The jury convicted defendant of two counts of first-degree CSC. The court sentenced him to concurrent sentences of 15 to 35 years.

III. The Newly Discovered Evidence

⁷ The police officer who assisted the victim testified that the photographs did not reveal to the viewer any identifying information like name or date of birth.

⁸ The date was not stated in the lower court record.

The “newly discovered evidence” in this case concerns events that transpired in California between September 28, 2001, and October 1, 2001, which was after the Fort Gratiot sexual assault at issue in this case, but before the trial. More specifically, it consists of a packet that contains: (a) several police reports from Bakersfield and Fresno, California, dated from September 28, 2001 through October 1, 2001;⁹ (b) a police report from St. Clair, Michigan, from 2005; and (c) three anonymous emails that were apparently generated by newspaper coverage of the 2003 trial in this case.

The first report from California was generated in Bakersfield as a missing persons case when the victim walked out of a restaurant where she was eating with her mother and a friend, and did not return. The victim’s mother informed the police that it was “out of character” for the victim to “just take off,” and also noted that the victim had been raped four months previously in Michigan, and “has not been herself.” The victim’s mother believed the victim may have been talking on her cell phone to a friend from Fresno named “Catina” at the time. The second report indicated that the victim’s father had received a telephone call from the victim on her cell phone stating that she had been kidnapped, which the father did not believe because his “daughter likes to have a lot of attention.” The victim’s husband confirmed the call and added that

his wife had been sexually assaulted approximately four months ago in Michigan and she initially reported to him she was just robbed; however, she later told him she had been raped by a man in the parking lot when she had gone to the grocery store. [The victim’s husband] said the initial assault was reported to the police; however, the rape was never reported to the police.

The victim’s father and husband both noted that the victim had been molested between the ages of 10 and 12 by a member of their church, that the matter had been handled internally, and that the victim never received any counseling.

It turned out that the victim’s friend in Fresno was Katina Mamigonian, who was engaged to a Fresno police technician, who in turn reported on September 29 to the Bakersfield officer that the victim was with him and safe. He reported further that the victim had “been raped several times and ‘her husband was in on it.’” He further explained that the victim had been “hiding out in Colorado earlier this week, where she was assaulted by her brother.” He concluded that the victim alleged that her brother had raped her. The victim herself called the Bakersfield police to say that it was true that she had been abducted at knifepoint, taken to a windowless room, given pills, and robbed; however, she then “recanted this version of the incident, stating it never occurred, and that Mamigonian and [the police technician] had picked

⁹ We will presume, for the sake of argument, that the police reports themselves can be verified as genuine and are at least theoretically admissible as evidence. See *People v Jambor (On Remand)*, 273 Mich App 477, 481-486; 729 NW2d 569 (2007). The police reports consist in significant part of secondary and even tertiary hearsay, but statements from the reports could be admissible for purposes other than proving the truth of the contents thereof. MRE 801(c). However, as discussed *supra*, if their only purpose would be proving “[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility,” they may nevertheless be inadmissible pursuant to MRE 608(b).

her up” from the restaurant in Bakersfield. A Fresno Sheriff’s Deputy was dispatched to Mamigonian’s residence, where the Deputy found the victim safe, but also bearing “some injuries consistent with a sexual assault.”

The victim then told the Bakersfield police that she *had* in fact been assaulted, but she had been assaulted by a man who accosted her at knifepoint outside the restaurant and raped her between two cars parked in the parking lot. She stated that she made up her prior story because she was confused and uncertain whether she would be believed. She stated that she did not tell her friend what had really happened “because she did not want to go through a traumatic incident again because she had just been through one with her prior rape and did not ‘want to deal with it.’” She declined to file a report because she did not want to deal with it. She also reported, and then recanted, another assault in a motel in Colorado by a friend of her brother who “had tracked her down” there. She explained that “she made up the story because she believed if she had said the assault had occurred a few days prior, nothing would be done about it,” and she also stated that she did not want to “go through the trauma of a sexual assault investigation.” The deputy who had been dispatched to Mamigonian’s residence reported that the victim had “some bruising and was spotting (bleeding) from her vaginal area.” The victim wanted to go to a hospital to have her injuries checked but did not want “a sexual assault kit to be accomplished.” The victim’s friend stated that the victim had not reported to her any assault or kidnapping.

The next report from Bakersfield consisted of an interview with the victim at the hospital. The victim there repeated that she had been accosted at knifepoint outside the restaurant after talking to Mamigonian on her cell phone. She provided a detailed description of being raped by a suspect wearing a mask. She stated that she then went back into the restaurant and acted like nothing had happened, partly because she was in shock, and partly because “this had happened once before,” relating that “approximately six months ago, while in Michigan, she had been raped in the parking lot of a grocery store while getting out of her vehicle.” She explained that she had made previous arrangements for Mamigonian to pick her up without telling her family, because her husband did not approve of the victim’s friendship with Mamigonian; she did not think about how her family would react because “she just wanted to get away.” She told her husband about the rape but she did not disclose all of the details. She confessed that she invented the story about being kidnapped because “she needed some time alone and away from her family to think,” and even though she “knew it was stupid,” she “did not know what else to do.” The victim stated that she belonged to several internet support groups and met Mamigonian through a rape support group that she had joined eight months previously because of sexual assaults she experienced as a child. The victim’s husband told the reporting officer that he “had a difficult time” believing the truth of the victim’s story.

The final California police report was from Fresno. It consisted solely of a narrative by Mamigonian’s fiancé. In relevant part, he related his opinion that the victim “is possibly mentally unstable and may try to file false allegations against him if [the victim] was willing to lie to his [fiancée] and the police.” He therefore “wanted this incident documented in case she does try to do something like that.” The Fresno report contains a “conclusion” that the victim lied and “is possibly mentally unstable,” that “conclusion” appears to be based solely on the narrative of the fiancé. Although the Fresno report includes the victim’s story about being kidnapped, and her recantation of that story, it does not indicate that the victim told the fiancé about being raped in Bakersfield.

The police report from St. Clair, Michigan, was generated because in 2004, the victim re-contacted one of the officers who had been involved in the investigation in the instant case. During that investigation, the victim had mentioned having been sexually assaulted as a child by her father and brother, and she now wished to pursue that with law enforcement. The St. Clair Sheriff's Department referred the matter to the Huron County Sheriff's Department on venue grounds. The Huron County Sheriff's Department notified the St. Clair Sheriff's Department that the victim had reported being the victim of a rape in California, and the Huron County Sheriff's Department had obtained the police reports described above. The St. Clair Sheriff's Department additionally took note of a number of emails generated by newspaper coverage of the trial in this matter: a newspaper employee set up an account to receive email for the victim, and the newspaper "received many, many responses however there were three that appeared to all be from the same email address that were indicating that basically [the victim] was a sick individual and was lying." The St. Clair Sheriff's Department asked the newspaper to request that the person who sent those three emails come forward and make a statement, but although the newspaper agreed to do so, no one did step forward.

The St. Clair Sheriff's Department took no action on the victim's complaint regarding her childhood sexual assault by her father and brother, citing venue, the officer's "belief that the statute of limitations would be expired on that matter," and the officer's "belief that any details of that particular incident would be protected under the Michigan Rape Shield Law." The St. Clair Sheriff's Department then forwarded the emails, the California police reports, and its own report to the prosecutor.

IV. Analysis

Defendant contends that the evidence presented at trial that did not rely on complainant's credibility was insufficient to support his conviction.¹⁰ In reviewing a sufficiency of the evidence claim, this Court applies a de novo standard. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Due process requirements prohibit a criminal conviction unless the prosecution establishes guilt of the essential elements of a criminal charge beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). We examine the evidence in a light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond reasonable doubt. *Hawkins*, *supra* at 457.

The prosecution was required to establish beyond a reasonable doubt that: (1) defendant engaged in an act of sexual penetration with complainant, (2) complainant suffered personal injury, and (3) the defendant used force or coercion to commit the sexual act. MCL 750.520b(f). Because defendant was charged with two counts of CSC I, the prosecution was required to show two distinct acts of sexual penetration.

¹⁰ We previously rejected defendant's assertion of insufficient evidence in his appeal of right. *Grissom I*, *supra* at p 2.

There was considerable objective evidence corroborating defendant's conviction, meaning that, contrary to the dissent's contention, this case was not merely a "battlefield of witness credibility." *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 129 (1998). First, defendant was present at the scene of the crime on the date and at the time it allegedly occurred. There was medical evidence from several doctors that the victim had physical injuries consistent with assault and rape within days of the event. The victim told a number of people within a short period of time that she had been raped, and the core of her story did not change – to the extent it did, trial counsel was well aware of it and had the opportunity to cross-examine the victim regarding those changes. We note further that the victim's rape in Michigan was repeated in the above police reports not only by the victim, but also by her family members in her absence. Defendant's skull tattoo as described by the victim,¹¹ his denial of owning the ring,¹² and his radical appearance change just before his lineup,¹³ are further independent indicia of his guilt.

To the extent the California police reports show that the victim made a false allegation of being kidnapped, she herself admitted that was a lie. There was evidence consistent with physical trauma and perhaps sexual assault observed by the deputy at Mamigonian's residence. That officer took the victim to a local hospital for examination, where she apparently agreed to undergo a sexual assault examination, but the results are unknown and there is no further information.

The California police reports contain numerous statements by different individuals. Some of these statements indicated that the victim had been kidnapped or sexually assaulted on other occasions and were arguably inadmissible based on relevance or hearsay grounds or based on Michigan's rape-shield law.¹⁴ MRE 402; MRE 802; MCL 750.520j. In addition, some of the

¹¹ The victim did not recall the fact that her assailant had a skull tattoo on his upper arm – as did defendant – until only a few months before trial. However, because there is no indication that this was a false memory induced by actually observing defendant's tattoo, her recollection of this detail nevertheless constitutes an objective verification of defendant's role in the crime.

¹² The dissent makes much of the fact that the victim could not have seen defendant wearing the ring after it had been pawned, but this is irrelevant given that there was no evidence that the person driving behind her actually was anyone in particular. The facts are that at some point, the victim remembered the ring, was able to describe it with sufficient detail to permit the police to track it down to the pawn shop, and – most significantly – defendant denied ever having owned it until confronted with evidence to the contrary. The timing of his pawning thereof is also significant.

¹³ The dissent states that "[t]he victim identified a different man at the lineup," but fails to include with that observation that defendant had radically altered his appearance mere hours before appearing in the lineup, so much so that the very police officer who had told defendant to appear *earlier that same day* no longer recognized defendant. Defendant had actually resembled the description given by the victim prior when the officer told defendant to appear. The dissent also fails to include the fact that the victim did identify a photograph of defendant out of a lineup of approximately a thousand.

¹⁴ We observe that the rape-shield statute does not preclude the introduction of evidence to show that a victim has made prior false accusations of rape. *People v Williams*, 191 Mich App 269, 272; 477 NW2d 877 (1991).

statements, including statements made by the victim's father, statements made by the victim's husband, statements made by Mamigonian's fiancé, and even statements made by the victim herself, bore on the victim's credibility. Significantly, the newly discovered police reports contain no substantive evidence bearing on the offense for which defendant was convicted. There is simply no substantive evidence in the police reports that is relevant to whether defendant committed the offense in the present case.

Therefore, the only purpose to introduce the newly discovered police reports would be to use statements in those reports tending to show that the victim may have lied about being kidnapped and sexually assaulted on other occasions, subsequent to the crimes charged here, to impeach the victim's credibility. False accusations of rape are relevant in a subsequent prosecution "because the fact that the victim has made prior false accusations of rape directly bears on the victim's credibility and the credibility of the victim's accusations in the subsequent case" *Williams, supra* at 272. Because the newly discovered evidence in this case would be used merely for impeachment purposes, it is not grounds for a new trial.¹⁵ *Duncan, supra* at 877-878; *Davis, supra* at 516.

Supposing the police reports were admitted for their only allowable purpose, impeachment of the victim's testimony, they contain no reliable evidence that the victim lied about having been sexually assaulted, although they do indicate that the victim lied about the surrounding circumstances and details to the extent of her subsequent admissions in that regard. As to the events in Michigan, however, defendant *was* able to impeach the victim's testimony at trial, by pointing out that she did not immediately report the nature of the attack and further, that her descriptions of the attack, while not wholly inconsistent, were incremental in the manner that she released the information to her husband and to the authorities. The police reports of events that took place *after* the victim told several people that she had been raped and *after* objective evidence thereof¹⁶ had been obtained does not cast much doubt on events that took place several months earlier in Michigan. Furthermore, unlike the fictitious story the victim told in California, the victim has never recanted her version of the events complained of in this case.

The dissent asserts that "a blanket prohibition of the use of the police reports for cross-examination would violate defendant's Sixth Amendment right to effectively confront the victim." We are unable to perceive anything in our opinion suggesting any such blanket

¹⁵ The dissent's contention that "application of this rule makes no sense in the instant case" ignores the fact that this Court is bound by precedent set by our Supreme Court, and even if no Supreme Court precedent existed on point, this Court is still bound by decisions made by prior panels after November 1, 1990. MCR 7.215(J)(1).

¹⁶ As discussed, the significant objective evidence – defendant's presence in the vicinity of the crime, the victim's description of defendant's tattoo and ring, defendant's denial that he owned the ring, defendant's pawning of the ring only four days after the attack, the victim's identification of defendant's picture, defendant's radical change in appearance during the short time between being told to attend a lineup and his appearance therein, and medical evidence of injuries consistent with a sexual assault – did not involve the victim's credibility and were legally sufficient to support defendant's convictions. Moreover, none of it is affected in any way by the California police reports.

prohibition on the use of police reports for cross-examination. The Confrontation Clause¹⁷ only guarantees effective cross-examination, not unlimited cross-examination. *People v Bushard*, 444 Mich 384, 391; 508 NW2d 745 (1993). And in any event, the question before this Court is only tangentially whether the police reports would be admissible *per se*, but rather whether they could be used for anything other than impeaching the victim’s credibility or whether they otherwise are so demonstrative of actual prejudice that we are compelled to find that the trial court abused its discretion.¹⁸ As discussed, (1) the evidence against defendant was significant even without any evidence that depended on the victim’s credibility; (2) the contents of the police reports have no bearing on defendant’s actual guilt or innocence; (3) to the extent the reports contain the opinions of laypersons that the victim had mental problems, those are not expert opinions and it would hardly be surprising that a rape victim might experience some psychological upset shortly thereafter; and (4) the police reports contain as much corroboration of the Michigan rape at issue in this case as they do evidence that the victim lied about a rape in California.

V. Conclusions and Holding

We conclude that, even if the newly discovered evidence at issue in this appeal was admissible on retrial, there is no reasonable chance of an acquittal in light of it. The only possible purpose for its admission would be to impeach the victim’s credibility. Defendant’s conviction was corroborated by substantial objective evidence that was, and is, independent of and unaffected by the victim’s credibility. That objective evidence was legally sufficient to support defendant’s convictions. The newly discovered evidence paints an unflattering picture of the victim’s mental state four months after suffering a violent sexual assault, but it does not tend to undermine confidence in defendant’s conviction. We do not find that it “makes a different result probable on retrial.” *Cress, supra* at 692.

Affirmed.

/s/ Stephen L. Borrello
/s/ Alton T. Davis

¹⁷ “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” US Const, Am VI.

¹⁸ The dissent relies on *White v Coplan*, 399 F3d 18 (CA 1, 2005) to support her contention that prohibiting cross-examination of a complaining witness’s prior sexual allegations violated the defendant’s Sixth Amendment right to confrontation. But as discussed, this case is not a pure credibility contest of the sort that *White* was, and the victim’s false accusation here was neither repeated nor so strikingly similar to the instant factual scenario as were the false accusations made by the witnesses in *White*. The facts in this case are too distinguishable for us to find *White* persuasive.

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GLEICHER, J. (*dissenting*).

I respectfully dissent. Because the newly discovered evidence satisfies the four-part test described in *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), the trial court erred by denying defendant's motion for a new trial.

I. Underlying Facts

A jury convicted defendant of brutally raping the victim in a busy shopping center parking lot on a Saturday afternoon in May 2001. The victim's courtroom description of the attack differed markedly from the versions of the event that she provided to police and others during the year before defendant's trial. Initially, the victim claimed that a man in the parking lot had beaten her about the head and neck. She then asserted that the man had attempted to steal her car. Eventually, the victim described that the man had sexually penetrated her with his finger. Still later, the victim added that the man had raped her with his penis. Finally, she added that her assailant had used a ring to penetrate her vagina. Despite that the victim's description of her attack underwent a gradual metamorphosis, defense counsel lacked any information that could call into question the victim's general credibility, or that substantiated any motive to lie.

The newly discovered evidence reveals that the victim fabricated other assault claims within the same time frame that her description of the May 2001 event continued to evolve. The fabricated assault claims bear striking similarities to the description of the sexual assault that she offered during defendant's trial. Additionally, the newly discovered evidence includes information that the victim harbored relevant biases and interests that were otherwise unknown. In my view, this evidence mandates a new trial because its proper use to impeach the victim's credibility would afford defendant a reasonably likely chance of acquittal.

A. Evolution of the Victim's Story

The victim first described the events of May 12, 2001 to her husband. The victim returned home from an afternoon shopping trip to Meijer's, and told him that a man "kept hitting me over and over but I got away." She did not tell her husband that the man had sexually assaulted her. According to the victim's husband, the attack left the victim, "incoherent" and "rambling," with a cut near her mouth. Yet neither the victim nor her husband called the police to report the attack. Instead, they drove that evening from Croswell to Sandusky to attend a wedding rehearsal dinner. The next day, they returned to Sandusky to attend the wedding. On the way home from the wedding, the victim and her husband stopped at a Michigan State Police post, where the husband attempted to report the attack on his wife that had occurred the previous day. The state police advised the husband to contact a local police authority.

On Monday, May 14, 2001, the victim met with St. Clair County Deputy Sheriff Timothy O'Boyle. She reported to O'Boyle "an attempted car-jacking" in the Meijer's parking lot, but failed to mention anything about a sexual assault. That same day, the victim presented to a hospital emergency room. She told the examining physician that a man "pulled and punched me about my left arm," and again failed to report any sexual assault. The emergency room physician noted that the victim's arm and neck were bruised and swollen.

On Wednesday, May 16, 2001, the victim called her gynecologist, Dr. Deborah Russell, and reported that she had been sexually assaulted. According to Russell's trial testimony, the victim was "not terribly specific" regarding the details of the assault. Russell advised the victim to seek an examination in a hospital emergency room. The victim returned to the hospital and reported to the examining physician that a man had penetrated her vagina with his finger, but did not report penile penetration. The doctor's testimony included no mention of a penetration with a ring. The doctor noted that the victim had abrasions on the right side of her vagina and her cervix consistent with forceful digital or penile penetration.

Thirteen months elapsed before the victim reported to the police that she had been sexually assaulted. During those 13 months, events unfolded in California involving the victim's false reports of other sexual attacks. However, neither defendant nor the prosecutor became aware of the California evidence until after a jury had convicted defendant of sexually assaulting the victim.

B. Newly Discovered Evidence from California

Two years after defendant's conviction, the prosecutor first learned of the facts described presently. The prosecutor does not challenge that these facts qualify as new information that defendant could not have discovered before his trial.

The new information consists of police reports from Bakersfield and Fresno, California. The first of these reports, dated September 28, 2001, recounts that the victim's mother, Mary Beth Hill, reported to the Bakersfield police that the victim was missing. According to the report, the victim was having lunch at a restaurant with Hill and a friend, when her cell phone rang. The victim left the restaurant with her phone and never returned. Hill could not find the victim outside the restaurant, and informed the police that it was "out of character" for the victim

to “just take off.” Hill added that the victim was raped several months earlier in Michigan, and since “has not been herself.”

A second Bakersfield police report, dated September 29, 2001, summarized information the police had received from the victim’s father, Dale Hill. Hill reported that the victim called recently and “told him she had been kidnapped and he needed to call the police.” The police went to Hill’s home and asked Hill if he believed his daughter. The police report documents that Hill replied, “No. I’m afraid it’s just a smoke screen. My daughter likes to have a lot of attention.” In the second report, Hill additionally explained that the victim “had been sexually assaulted between the ages of 10 and 12 years, by a female member of their Jehovah Witness congregation.” The report continued, “Dale Hill told me the police were never contacted, a report was never made, and [the victim] never received any type of counseling.”

The Bakersfield police determined that the victim had not been kidnapped, but was staying with friends in Fresno. When contacted by the Bakersfield police, one of the victim’s friends claimed, “[The victim] had been raped several times and ‘her husband was in on it.’” The friend further explained that the victim had been “hiding out in Colorado earlier this week, where she was assaulted by her brother.” According to the friend, the victim alleged that her brother had raped her.

The Bakersfield police reports reflect that the victim admitted calling her father to report that she had been kidnapped. The victim confirmed to Bakersfield police officer L. Lerman that she had been kidnapped by a “white male adult, late 20’s, 5’9”, 200 pounds, with black, curly, medium length hair, light complexion, mustache, wearing black pants and a white and blue striped shirt.” Lerman also reported the victim’s claim that the man had taken her to a “concrete block room where there were no lights or windows,” and forced her at knifepoint to swallow six large, white pills. Lerman’s report continued, “[The victim] later recanted this version of the incident, stating it never occurred,” and that her Fresno friends had picked her up at the restaurant.

Further investigation by another officer “revealed a possible assault had taken place against [the victim], as she had some injuries consistent with a sexual assault.” Lerman reinterviewed the victim, who next claimed that “a white male adult, with short, black hair, wearing a green and gray mask, which covered his mouth, chin and nose; dirty jeans; and a short-sleeve shirt with the sleeves rolled up” had accosted and raped her “between two cars parked in the parking lot” of the Bakersfield restaurant. The victim additionally told Lerman that she had been sexually assaulted at an unknown Colorado motel while en route to California, but then admitted that she had fabricated this story.

Lerman contacted one of the victim’s Fresno friends, who explained that she had picked up the victim at the Bakersfield restaurant on the day of the victim’s disappearance. The friend denied that the victim ever “made . . . mention of a sexual assault.” Lerman considered that the victim might need “psychiatric evaluation.”

Another police report reveals that on September 30, 2001, the victim went to a California hospital emergency room and announced that she had been raped. Bakersfield police officer A. Gavin met with the victim at the hospital, where she claimed that “a Hispanic male, late 20’s to early 30’s, 5’6”, 180 pounds, medium build, with black, curly hair, short in front and long in

back, last seen wearing a green plastic surgical type mask over his face, a light blue work shirt with no emblem on it, with the sleeves rolled up, dirty in appearance, dirty blue jeans and dirty tennis shoes,” had accosted her near the Bakersfield restaurant and pushed her into the parking lot with a knife in her back. Gavin’s report continued,

[The victim] said when they reached the south parking lot of the restaurant, she saw two vans parked next to each other. The suspect then pushed her in between these two vans. She said the suspect was wearing a small, hand-held, gray flashlight hooked on his belt with some type of leather strap. [The victim] said he removed the flashlight from his belt with his right hand, reached down the front of her pants, and moved her underwear aside. He then inserted the flashlight into her vagina. I asked [the victim] what she was wearing when this occurred and she told me it was the same clothing she was currently wearing. She told me she had not changed clothing since the incident occurred. I asked [the victim] if she had showered or douched and she said she had taken one shower since the incident. I asked [the victim] if the suspect said anything to her when he was putting the flashlight into her vagina and she said he never said anything. She said he did this for a few seconds and he then removed the flashlight and inserted one of his fingers inside her vagina.

[The victim] said she began screaming and the suspect yelled at her to stop screaming. She said he undid his pants and exposed his erect penis. He was able to move her pants and underwear aside and insert his penis into her vagina. [The victim] said she began hitting him and he put his hands on her thighs and tried to keep her from squirming around. She said she screamed again and the suspect ran south through the parking lot toward the businesses located south of the restaurant. She never saw a vehicle. [The victim] said the suspect did not ejaculate inside her vagina.

[The victim] said she does not believe she could identify the suspect again if she were to see him again because he was wearing some type of mask over his face. She described this mask as green and said it reminded her of a mask a gardener or doctor might wear.

I asked [the victim] what happened after the suspect fled and she said she retrieved her purse from the sidewalk in front of the restaurant where she had dropped it. She then went back inside the business and sat with her mother and two aunts and acted like nothing happened. [The victim] said she ordered a cup of tea and sat silently while the three others conversed. I asked her why she did not say anything to her family and she said she was in shock. I asked [the victim] if her family members would find it odd that they had made lunch arrangements, but she had not ordered any lunch and sat silently while the other three women socialized. She said that was typical behavior for her.

The victim told Gavin that “this had happened once before” in Michigan.

Gavin’s report mentions that the victim met her Fresno friend through an email “on-line rape support group.” The victim explained that she had joined the rape support group before

being raped in Michigan because “she was raped when she was six years old.” The victim told Gavin that “she has been in and out of support groups and therapy for years.” According to Gavin’s report, the victim’s husband expressed “a difficult time believing [the victim] was telling the truth.”

Meanwhile, one of the victim’s Fresno friends filed a police report regarding the victim’s allegations, expressing concern that “[the victim] is possibly mentally unstable and may try to file false allegations against him” The September 29, 2001 report reflects that the victim met one of her Fresno friends “about 18 months ago online and has been talking to her online and on the phone since then.” According to the Fresno police report,

[The victim], who is from an unknown city in Michigan, claims that approximately 18 months ago, her brother and his friends gang-raped her. She reported this crime and the suspects were arrested and convicted.

She states that her brother got out of jail a week ago and found her in Colorado, where she was staying with her husband to hide from her brother. [The victim] told [a friend] that her brother raped her again on Monday and she said she felt her husband was involved because her brother was not supposed to know where she and her husband were.

The Fresno officer who completed this report opined that the victim had lied to her Fresno friends, “her family and to law enforcement. She told her family and Bakersfield PD she was being held against her will in Fresno, which was not true. [The victim] is possibly mentally unstable.” The California police reports do not detail whether the Bakersfield police ever established or further investigated the victim’s claimed assault in the restaurant parking lot.

C. The Michigan Prosecution Evolves

Approximately 13 months after the victim claimed to have been assaulted in the Meijer’s parking lot, and nine months after the events in California, she first reported to police that the May 2001 attack in Michigan involved a sexual assault. Deputy O’Boyle described that around June 2002, the victim began calling him “quite a bit.” According to O’Boyle, the victim reported that she “saw somebody that she thought” was her attacker. The victim related to O’Boyle that she had noticed a “black Jeep” in her rearview mirror and recognized the driver as the man who had assaulted her in the Meijer’s parking lot. The victim further described that she had observed in the rearview mirror “a ring on his hand,” which upset her.¹ When O’Boyle met with the victim, she revealed to him for the first time that the May 2001 attack involved a sexual assault.²

¹ At defendant’s preliminary examination conducted on April 3, 2003, the victim testified as follows:

Q. Now, you indicated in the police report that you saw someone driving in a black Jeep; is that correct?

A. Yes.

(continued...)

In October 2002, the victim selected defendant's photograph from thousands of police photographs shown to her. But the victim failed to identify defendant during a November 2002 lineup, during which the participants were instructed to say, "Stupid bitch." Instead, the victim

(...continued)

Q. And that black Jeep had no top on it; is that correct?

A. Yes.

Q. And that black Jeep pulled out behind you driving on—was it 24th avenue?

A. Yes.

Q. And you indicated that you what, looked in your rearview mirror?

A. Yes.

Q. And in looking in your rearview mirror at the vehicle behind you, you saw someone that looked familiar; is that correct?

A. Correct.

Q. How far behind you was that Jeep vehicle?

A. A few feet.

Q. How many?

A. A few feet.

Q. Okay. And in that report you also indicate that you were not only able to identify that individual but you were able to identify a ring that he was wearing; is that correct?

A. Yes.

Q. While you were driving you were able to look in the rearview mirror and see that individual and see that ring; is that correct?

A. Yes.

As is discussed in greater detail, *infra*, in 2001, defendant pawned the ring that the victim claimed to have seen on defendant's finger in 2002.

² O'Boyle's police report documenting this interview is not contained in the record provided to this Court. At trial, O'Boyle supplied no details regarding the victim's description of the sexual assault.

selected another man. An investigating detective explained that in anticipation of the lineup, defendant had altered his appearance by shaving his beard and mustache and cutting his hair.

At trial, the victim explained that at approximately 12:30 p.m. on the day of the assault, she stopped at Meijer's to do some shopping, and noted that the parking lot "was very busy." The victim described that she parked her minivan between two vehicles and began to gather her purse and shopping list from between the minivan's front seats. The victim claimed that as she attempted to leave her minivan, a man grabbed her arm and pushed her back into the vehicle. When she resisted, the man hit her in the face with his fist. The victim continued to resist, and grabbed for the man's sunglasses. According to the victim, the man hit her again and she fell backward, striking her head on the edge of the passenger seat. The victim testified that she briefly lost consciousness, and awoke with her head "down between the [front] seats" of the minivan. As she attempted to sit up, the man unbuttoned her pants and pulled them down, along with her underwear. The victim described that she saw the man "unzipping his pants" to reveal his erect penis. The victim asserted that she tried to sit up, but the man hit her several times in the chest, knocking her back, while calling her a "stupid bitch." She recounted, "He told me this will shut you up, and I watched him slide that ring down on his knuckle and then I felt him force that ring and finger up inside of me." The victim described that she called him a "bastard," and he "back-handed" her, cutting her face. She then "became aware that his penis was inside of me," before again losing consciousness. When she sat up, he was gone. The victim recalled that she started her minivan and drove home to Crosswell.

Several months before defendant's trial, the victim remembered that her assailant had a skull tattoo on his arm. The victim admitted that she had not previously recalled this detail. The trial record indicates that defendant had a skull tattoo on his arm. The trial evidence further revealed that in May 2001, defendant worked at the Meijer's store where the victim claimed to have been attacked. Several days after the victim's attack, defendant pawned a ring described by the pawnshop owners as a ten-carat gold man's "cluster ring" with diamond chips on its face. The pawnshop later sold the ring, and it was not available at defendant's trial. A detective testified that defendant initially denied owning a ring, but then admitted to "hocking it."

Detective O'Boyle testified that the police never established any connection between defendant and a Jeep-type vehicle that the victim asserted she had seen him driving. Furthermore, defendant pawned the "cluster ring" in May 2001, more than a year before the victim reported seeing a man in a black Jeep wearing a ring that she claimed she could identify.

Defendant did not testify at trial. The jury convicted him of the charged offenses. This Court affirmed defendant's convictions, *People v Grissom*, unpublished opinion per curiam of the Court of Appeals issued November 18, 2004 (Docket No. 251427), and the Michigan Supreme Court denied leave to appeal. *People v Grissom*, 472 Mich 919; 696 NW2d 715 (2005).

D. Postjudgment Proceedings

In October 2004, the victim called one of the detectives who had investigated the case against defendant, and informed the detective that she had been "sexually assaulted by her brother and her father when she was a child." Another officer spoke with the victim, who then

reported having been raped in California. The prosecutor subsequently obtained the California police reports, and provided them to defendant.³

In March 2006, defendant filed a pro se motion for relief from judgment under MCR 6.502 *et seq.* Defendant's motion primarily relied on the newly discovered California police reports. The trial court appointed counsel for defendant. In its bench ruling denying defendant's motion, the trial court summarized as follows:

The decision to grant or deny a motion for new trial on the basis of newly discovered evidence lies within the sound discretion of the trial court. It is well established case law in Michigan that newly discovered evidence that can only be used for impeachment purposes is not the basis for a new trial according to the holding in *People v[] Snell*, 118 Mich[] App[] 750[; 325 NW2d 563 (1982)], . . . and *People v[] Davis*, 199 Mich[] App[] 502[; 503 NW2d 457 (1993)], . . . and *People v[] Sharbnaw*, 174 Mich[] App[] 94[; 435 NW2d 772 (1989)]

The Court acknowledges that had the parties had knowledge at the time of defendant Grissom's trial of [the victim's] subsequent complaints of being sexually assaulted, that evidence would have been admissible for purposes of testing her credibility. However, the subsequent allegations of rape are not in any fashion admissible as substantive evidence in this case. Even considering the police reports in the light most favorable to the defense's claim that they are newly discovered evidence, these allegations could only be used for the purposes of challenging the victim's credibility in accordance with the holding of *People v[] Williams*, 191 Mich[] App[] 269[; 477 NW2d 877 (1991)]

Based on the existing case law in the State of Michigan, the newly discovered evidence which would be used only to impeach the victim's credibility cannot form the basis for this Court to grant the Defendant a new trial.

This Court denied defendant's application for leave to appeal. *People v Grissom*, unpublished order of the Court of Appeals, issued July 2, 2007 (Docket No. 274148). In lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration as on leave granted. The Supreme Court's order further specifies, "On remand, the Court of Appeals is to consider whether defendant has a reasonably likely chance of acquittal in light of the newly discovered evidence and in light of the evidence presented against defendant that did not involve the complainant's credibility."

II. Analysis

The majority concludes that the trial court correctly denied defendant's motion for relief from judgment because newly discovered evidence used merely for impeachment purposes

³ The officers did not investigate the victim's allegations involving her father and brother because they believed that the statute of limitations for any prosecution based on those claims had expired.

cannot supply the grounds for a new trial, and “[t]here was considerable objective evidence corroborating defendant’s conviction.” *Ante* at 3, 14. I respectfully disagree with these conclusions.

A. Standard for Granting a New Trial Based on Newly Discovered Evidence

In *Cress*, 468 Mich at 692, our Supreme Court explained that to obtain a new trial based on newly discovered evidence a defendant must show that

- (1) “the evidence itself, not merely its materiality, was newly discovered”; (2) “the newly discovered evidence was not cumulative”; (3) “the party could not, using reasonable diligence, have discovered and produced the evidence at trial”; and (4) the new evidence makes a different result probable on retrial. [Citations omitted.]

Here, the prosecutor does not dispute that the evidence qualifies as newly discovered and noncumulative, and that defendant could not have discovered it before his trial using reasonable diligence. The sole contested issue is whether the new evidence would make a different result probable on retrial.

B. The Admissibility of the Newly Discovered Evidence

The majority asserts that the statements contained in the California police reports “were arguably inadmissible based on relevance or hearsay grounds or based on Michigan’s rape-shield law.” *Ante* at 15. A police report “is plausibly admissible under the business record exception, MRE 803(6).” *Maiden v Rozwood*, 461 Mich 109, 124; 597 NW2d 817 (1999). “MRE 803(8) allows admission of routine police reports, even though they are hearsay, if those reports are made in a setting that is not adversarial to the defendant.” *People v McDaniel*, 469 Mich 409, 413; 670 NW2d 659 (2003); see also *People v Jambor (On Remand)*, 273 Mich App 477, 483-487; 729 NW2d 569 (2007). Although the police reports unquestionably contain second- and third-level hearsay, the hearsay within the reports may nevertheless be potentially admissible if offered for a purpose other than proof of its truth. MRE 801(c).⁴

But regardless whether the reports themselves could be admitted as substantive evidence, they supply powerful ammunition for impeaching the victim’s credibility. Specific instances of conduct may “be inquired into on cross-examination of the witness” if the court considers them probative of truthfulness or untruthfulness. MRE 608(b). Moreover, the rape-shield statute, MCL 750.520j, does not bar a cross-examiner’s use of the information contained in the California police reports. *People v Jackson*, 477 Mich 1019; 726 NW2d 727 (2007) (“[T]estimony concerning prior false allegations [of sexual abuse] does not implicate the rape-shield statute.”). Furthermore, the Confrontation Clause affords defendant a constitutional right to question the victim about her prior allegations. Our Supreme Court explained in *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984):

⁴ If the victim denied ever having falsely reported a sexual assault, a portion of the police report could be admissible under MRE 613(b).

The fact that the Legislature has determined that evidence of sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes is not however a declaration that evidence of sexual conduct is never admissible. We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover, in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. [Citations omitted.]

Cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." *People v Banks*, 438 Mich 408, 414; 475 NW2d 769 (1991) (internal quotation omitted). In my view, the Bakersfield and Fresno police reports supply potent fuel for that engine. Even a moderately skillful cross-examiner, armed with the Bakersfield and Fresno information, could cast considerable doubt on the victim's credibility by revealing sources for bias and a motive to fabricate. The victim's description of the assault in the Bakersfield restaurant parking lot bears remarkable similarities to her later description of her assault at Meijer's. The facts common to both reports are striking: the attacks allegedly occurred in a parking lot during the middle of the day, involved a sexual assault perpetrated between vehicles, the use of a foreign object to penetrate the victim's vagina, followed by penile rape, described identically. Given that the details of the Michigan assault did not emerge until *after* the California events had occurred, defendant could reasonably and justifiably theorize that the victim fabricated all of her sexual assault claims.

C. The Power of the Newly Discovered Evidence

The majority asserts, "Significantly, the newly discovered police reports contain no substantive evidence bearing on the offense for which defendant was convicted. There is simply no substantive evidence in the police reports that is relevant to whether defendant committed the offense in the present case." *Ante* at 15-16. According to the majority, the police reports "contain no reliable evidence that the victim lied about having been sexually assaulted" in California, and this evidence "does not cast much doubt on events that took place several months earlier in Michigan." *Ante* at 16-17.

In my view, the majority misapprehends the nature of relevant evidence, ignores the conclusions reached by California law enforcement personnel, and inappropriately dismisses or minimizes the gravity of the newly discovered evidence. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence bearing on a witness's credibility inherently qualifies as relevant:

Assume that a witness on the stand gives some testimony or that a counsel introduces an out-of-court declarant's hearsay statement as substantive evidence. As soon as the testimony or hearsay statement is admitted, the credibility of the

witness or declarant becomes a fact of consequence within the range of dispute at trial under Federal Rule 401. [McCormick, Evidence (6th ed), § 33, p 146.]⁵

The newly discovered police reports contain evidence directly bearing on whether the victim's testimony that defendant sexually assaulted her is worthy of belief. Because this evidence tends to make the victim's testimony regarding the Michigan assault less believable, it makes less probable a fact of consequence to the action: that defendant sexually assaulted the victim. Consequently, this evidence is relevant. By focusing on whether the police reports contain "substantive evidence bearing on the offense for which defendant was convicted," *ante* at 14, the majority erroneously dismisses the relevance of evidence impeaching a witness's credibility.

I respectfully disagree with the majority's conclusion that the California evidence fails to "cast much doubt" on the victim's version of events that occurred four months earlier in Michigan. *Ante* at 16. Defendant's conviction rests on the victim's testimony that he sexually assaulted her. Although a doctor identified the presence of "some abrasions on the right side of the vagina as well as on the cervical area," he admitted that other possible explanations existed for those abrasions. Thus, absent the victim's testimony that she suffered a sexual assault, the doctor's testimony does not prove beyond a reasonable doubt that a sexual assault occurred. Contrary to the majority's assertion that "considerable objective evidence corroborat[ed]" defendant's conviction, *ante* at 14, no eyewitnesses to the crime exist, despite that it occurred in a public place during daytime hours, and no physical evidence established that the victim had endured a sexual assault. The victim's description of the event does not qualify as an "objective" fact. Rather, the jury's acceptance of the victim's testimony that she was sexually assaulted depended on whether it decided that she had testified credibly. The victim's veracity, and not "objective evidence," was central to proof of the prosecutor's case.

The California police reports disclose the victim's admittedly false kidnapping claim, and abundant evidence calling into question her allegations of sexual assault in Bakersfield and Colorado. Furthermore, the California police reports document the victim's father's belief that the victim would lie about being kidnapped to receive attention, and the Fresno police officer's conclusion that the victim lied repeatedly to law enforcement personnel and to her family about being the victim of sexual assaults. That the victim lied about being assaulted and kidnapped to her parents, friends and the police supplies a powerful reason for disbelieving her testimony in this case that defendant had sexually assaulted her in the front seat of her minivan while the driver's door remained open, in the parking lot of a busy shopping center on a Saturday afternoon. The evidence contained in the police reports seriously undermines the victim's credibility with respect to whether a sexual assault occurred at all. Moreover, the newly discovered evidence strongly tends to support that the victim suffers from emotional problems that predate the Michigan events, and that provide either a motive or an explanation for her fabrications about multiple sexual assaults. In my judgment, the information in the police reports renders reasonably probable on retrial a jury's rejection that defendant committed a sexual assault that afternoon at Meijer's.

⁵ FRE 401 is identical to MRE 401.

If this Court ordered a new trial, the Bakersfield and Fresno evidence could also yield a different result regarding defendant's motion for discovery. The trial court denied defendant access to the victim's medical, counseling and psychological records. This Court affirmed that decision, observing, "We are satisfied that the trial court did not abuse its discretion where defendant failed to show—as he likewise fails here—that the privileged materials contained material necessary to his defense." *Grissom, supra* at 4. At a minimum, the information contained in the police reports warrants in camera review of the victim's psychological records, as well as those of the online rape support group.

D. Impeachment Evidence

Drawing on a long line of Michigan cases, the majority opines that the police reports could be used only for impeachment, which is not a recognized ground for granting a new trial. *Ante* at 3. Although this Court has repeatedly invoked the "no new trial for impeachment" doctrine, blanket application of this rule makes no sense in the instant case. The court rules do not specifically prohibit new trials premised on the discovery of impeachment evidence. Moreover, the prosecution's case against defendant rested entirely on the victim's testimony that she was sexually assaulted, and that defendant perpetrated the attack. Circumstantial evidence linked defendant to the crime, but ultimately those circumstantial links derived entirely from the victim's description of the attack and her attacker. While impeachment often involves peripheral issues or collateral misbehavior, exposure of the victim's prior fabrications could completely undercut her claim that a sexual assault actually occurred in this case. Defendant lacked any method of defending himself other than impeaching the victim's credibility.

That the victim's credibility was crucial to the prosecution cannot be overstated. In the prosecutor's closing argument, she admitted that the victim's story did not necessarily ring true:

I'll be quite honest with you, when I prepared for this case my concern was that you as a jury were going to not want to believe this. Because I don't want to believe it. I don't want to believe that you can go to the Meijer store in Fort Gratiot at 12:30 on a Saturday afternoon and get raped in public. That's harsh.

And sitting there where you are, your first inclination is to not want to believe it. Because it's easier to live in a society where that doesn't happen. We're supposed to have safe places, we're supposed to have this idea that rapes only happen in alleys in the dark. But that's not what happened here.

The prosecutor emphasized shortly thereafter, "There's really, really no question as to whether or not this assault happened. There's really no question." But the Bakersfield and Fresno police records create a serious question regarding whether a sexual assault really occurred in Michigan, and defendant's use of the California police reports in cross-examining the victim may well have altered the focus of the entire trial. At a minimum, the victim's statements documented by the Bakersfield and Fresno police reflect potential psychological problems, calling into question her veracity concerning the nature of the Meijer's attack and its details.

No physical evidence linked defendant to a sexual assault.⁶ The victim identified a different man at the lineup, and claimed not to have remembered the presence of a tattoo on her attacker's arm until several months before trial. Because the prosecution lacked physical evidence of defendant's guilt as the victim's assailant, the case rose or fell on whether the jury believed the victim's testimony, including her description of the man who had attacked her. In my view, cross-examination directed at exposing the victim as a habitual liar would have changed the entire complexion of defendant's trial. In *White v Coplan*, 399 F3d 18 (CA 1, 2005), the First Circuit rejected the notion that "mere impeachment" lacked the inherent power to alter a verdict:

In this case, White's evidence was not merely "general" credibility evidence. That label applies to the traditional proofs—offered through character or reputation witnesses and sometimes through proof of specific instances of misbehavior, especially prior convictions—to support an inference that the witness has a tendency to lie. Once a staple of trials, modern evidence rules ... have significantly restricted such evidence without totally precluding it in all cases. ...

The evidence in this case was considerably more powerful. The past accusations were about sexual assaults, not lies on other subjects; and while sexual assaults may have some generic similarity, here the past accusations by the girls bore a close resemblance to the girls' present testimony—in one case markedly so. In this regard the evidence of prior allegations is unusual.

If the prior allegations were false, it suggests a pattern and a pattern suggests an underlying motive (although without pinpointing its precise character). The strength of impeachment evidence falls along a continuum. That a defendant told lies to his teacher in grade school is at one end; that the witness was bribed for his court testimony is at another. Many jurors would regard a set of similar past charges by the girls, if shown to be false, as very potent proof in White's favor. [*Id.* at 24 (citations omitted).]⁷

⁶ The victim's first gynecologic exam occurred four days after the assault. "Rape kit" evidence was not obtained during this examination, in part because the victim denied that her attacker had penetrated her with his penis. Furthermore, the victim admitted that within a short time after the assault, she destroyed all of the clothing she had worn that day. Although the victim testified regarding a ring that defendant had pawned, the ring was never introduced at the trial, and the victim claimed to have seen it on defendant's finger a year *after* defendant pawned it.

⁷ In *United States v Taglia*, 922 F2d 413, 415 (CA 7, 1991), Judge Richard Posner critiqued the argument that newly discovered evidence "that is merely impeaching" cannot serve as a ground for a new trial. In *Taglia*, Judge Posner wrote for a unanimous court that although "[t]here is language to this effect in countless cases, ... we do not think it can be taken at face value," and characterized the "judicial language" as illustrating "the tendency to overgeneralize" by confusing "a practice with a rule." *Id.* The Seventh Circuit described in *Taglia*,

(continued...)

The Bakersfield and Fresno reports supplied evidence far more powerful than typical impeachment because the victim's credibility served as the cornerstone of the case. If the jury disbelieved the victim, the prosecution lacked any evidence to support defendant's guilt. Moreover, the impeachment evidence at issue here goes beyond calling into question the victim's *character* for truthfulness. The California reports reveal that the victim has made other false accusations of sexual assault, and suggest that the victim may suffer from psychological problems related to childhood events. The victim's previous involvement with rape support groups, and her father's statement that she "likes to have a lot of attention," suggest a motive to lie. Cf. *Redmond v Kingston*, 240 F3d 590, 591 (CA 7, 2001) (in which the defendant sought to cross-examine the complainant to show that she "would lie about a sexual assault in order to get attention, and thus had a motive to accuse him falsely"). Defendant lacked an opportunity to explore this very real possibility during his trial. In my view, the *Cress* standards for granting a new trial require that he be afforded that opportunity now.

E. Reasonably Likely Result of Retrial

Fifty years ago, in *Napue v Illinois*, 360 US 264, 270; 79 S Ct 1173; 3 L Ed 2d 1217 (1959), the United States Supreme Court observed, "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." This prosecution depended entirely on the victim's truthfulness. And the prosecution capitalized on the victim's apparent truthfulness by portraying her as a courageous wife and mother, who struggled to overcome profound shock and embarrassment resulting from the sexual assault at Meijer's.

This is a vastly different victim than the woman with a traumatic childhood who had actively participated in an online rape support group before she was raped. See *Delaware v Van Arsdall*, 475 US 673, 680; 106 S Ct 1431; 89 L Ed 2d 674 (1986): "A reasonable jury might have received a significantly different impression of [the complainant's] credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination." The physical evidence directly linking defendant to the crime consisted of (1) a ring that the prosecutor never produced at trial, and that had been pawned when the victim reported having seen defendant wearing it a year after the attack, and (2) defendant's tattoo, which the victim purportedly remembered for the first time shortly before trial commenced. This circumstantial evidence tended to corroborate the victim's story. But in my view, the ring and the tattoo qualify as evidence too slim to independently support defendant's convictions.

(...continued)

If the government's case rested entirely on the uncorroborated testimony of a single witness who was discovered after trial to be utterly unworthy of being believed because he had lied consistently in a string of previous cases, the district judge would have the power to grant a new trial in order to prevent an innocent person from being convicted. The "interest of justice," the operative term in Rule 33, would require no less [*Id.*]

In summary, the prosecutor presented the victim as an ordinary wife and mother, engaged in a routine shopping trip, whom defendant senselessly and brutally attacked. The jury remained ignorant of other highly relevant facts, including the victim's prior participation in an online rape support group, which likely would have engendered reasonable doubt regarding her delayed and inconsistent description of the attack in the Meijer's parking lot. The impeachment evidence supplied by the California police reports, and the further information likely to flow directly from additional investigation triggered by those reports, more probably than not renders the victim's testimony incredible. Because I find defendant's acquittal reasonably likely on retrial, I conclude that the trial court abused its discretion in denying defendant's motion for relief from judgment seeking a new trial. *Cress*, 468 Mich at 691-692.

/s/ Elizabeth L. Gleicher