# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

WILLIAM HARRY HACKEL,

Defendant-Appellant.

UNPUBLISHED
December 20, 2002

No. 227737
Isabella Circuit Court
LC No. 99-009148-FY

Before: Whitbeck, C.J., and Hood and Kelly, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b). He was sentenced to two concurrent terms of three to fifteen years' imprisonment and appeals as of right. We affirm.

Defendant was convicted of sexually assaulting the victim while they attended a conference of the Michigan Sheriff's Association held at a casino resort. Defendant, who had been the Macomb County Sheriff for twenty-four years, admitted engaging in sexual relations with the victim, but claimed that it was consensual. Defendant's theory of the case was that the rape accusation was fabricated because the victim had a monetary motive.

Defendant first alleges that the trial court erred by not permitting the victim's mother to be examined in camera about her knowledge of any alleged past accusations of sexual assault by the victim. We disagree.[1] The rape-shield statute, MCL 750.520j, was aimed at thwarting the impeachment of a complainant's testimony with evidence of the complainant's past consensual

[1] At trial, defense counsel sought to impeach the victim's mother based on her statement that "[w]e'd never been involved in anything like this in our family." However, the victim's mother also stated that an attorney was sought out so that "we could be sure that she wasn't going to be railroaded again." We conclude that impeachment based on the second statement was not preserved because defendant did not identify this testimony in his offer of proof at trial. *People v Hackett*, 421 Mich 338, 352; 365 NW2d 120 (1984). Without an offer of proof or an actual undertaking by defense counsel to cross-examine the victim's mother about the meaning of her "railroaded again" testimony, defendant cannot establish a plain violation of his constitutional right to confront witnesses. Therefore, this forfeited statement affords no basis for relief. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

activities. *People v Adair*, 452 Mich 473, 480; 550 NW2d 505 (1996). At the same time, however, the rape-shield statute could presumably apply when evidence of a complainant's nonconsensual sexual activities is offered for the same type of impermissible character purpose prohibited under the statute as a complainant's consensual sexual activities. *People v Williams*, 191 Mich App 269, 272; 477 NW2d 877 (1991). The rape-shield statute has been said to bar "testimony regarding sexual subjects involving the complainant, unless such testimony falls outside the scope of the statute." *People v Ivers*, 459 Mich 320, 328; 587 NW2d 10 (1998). The rape-shield statute represents a legislative determination that, in most cases, the prohibited evidence is irrelevant. *Adair, supra* at 480. "A complainant's sexual history with others is generally irrelevant with respect to the alleged sexual assault by the defendant. MRE 401." *Adair, supra* at 481.

Nevertheless, whether the rape-shield statute should, as a matter of law, be construed as applying only to consensual sexual activities need not be addressed in the case at bar because the trial court did not rely solely on the rape-shield statute as the basis for limiting defendant's cross-examination of the victim's mother. Rather, the trial court engaged in a case-specific analysis of defendant's offer of proof concerning his constitutional right of confrontation. We note that defendant did not proffer substantive evidence that the victim was subjected to past nonconsensual sexual activities where an investigation occurred or raised false allegations of rape. Rather, the defense alleged that the testimony by the victim's mother that "we'd never been involved in anything like this in our family," opened the door to statements allegedly made by the victim to her ex-boyfriend and a former coworker about past sexual violations and sexual contact to determine the mother's knowledge of alleged past sexual abuse perpetrated on the victim.

"[W]hile the extent of cross-examination is within the discretion of the trial court there is a dimension of the Confrontation Clause that guarantees to defendant a reasonable opportunity to test the truth of a witness' testimony." *Hackett, supra* at 347. We hold here that the trial court did not abuse its discretion by precluding defendant from cross-examining the victim's mother regarding other allegations of sexual abuse. The trial court is permitted to determine preliminary questions concerning the admissibility of evidence pursuant to MRE 104(a). Preliminary facts under MRE 104(a) are determined under a preponderance of the evidence standard. *People v Hendrickson*, 459 Mich 229, 242-243; 586 NW2d 906 (1998) (Boyle, J., concurring). A trial court's factual findings are reviewed for clear error. See *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996).

Here, the trial court did not abuse its discretion in determining that it properly could decide whether the statement by the victim's mother opened the door to the proffered cross-examination based on a contextual review of that testimony. This is particularly true given the fact that trial counsel declined the opportunity to question the victim's mother about the meaning of her statement.[2] Further, we find no basis for disturbing the trial court's preliminary factual

[2] The trial judge stated: "When I suggested that we have the witness testify concerning what she meant by the word 'this' neither counsel advocated that we should do that. And in taking a closer look at the transcript I'm not convinced that we need to because this is defined by what is stated before and after. Therefore, I feel there's a sufficient record. So the court is ruling that the witness is basically talking about a process, and that there is no entitlement to defendant's (continued…)

determination, inasmuch as a contextual review of the testimony supports the trial court's determination that the mother was referring to how the legal process functions and, in particular, how it might function when a law enforcement officer is the defendant. Specifically, the victim's mother testified that she contacted an attorney because:

> I was concerned about the good ole boy network; and I was concerned that she was going to be violated, and her rights would be trashed. We'd never been involved in anything like this in our family. I had no basis of comparison with a trial or whatever. And you watch T V, or I watch T V and, you know, you watch "Sixty Minutes" and "Newsweek" and all about how the police and . . .

In light of the parties' decision not to seek clarification from the witness and the trial court's factual determination based on its contextual analysis, it was not necessary for the trial court to hold an in camera hearing to question the victim's mother concerning her knowledge of the victim's alleged past sexual activities. Further, defendant's constitutional right to confront witnesses was not violated by the trial court's ruling, inasmuch as defendant failed to establish the relevancy of the proffered cross-examination to the credibility of the victim's mother's testimony or her reason for contacting an attorney. The right of cross-examination does not include a right to cross-examine a witness on irrelevant issues. *Adair, supra* at 488. The Confrontation Clause only guarantees an opportunity for effective cross-examination. It does not guarantee cross-examination to whatever extent the defense might wish. *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999). Accordingly, the trial court did not abuse its discretion by limiting cross-examination of the victim's mother.[3]

Defendant next alleges that the trial court committed structural or plain error by failing to sua sponte order a mistrial or question other jurors after it was revealed that the investigating police agency in the case offered employment to a juror. We conclude that defense counsel's approval of the relief granted by the trial court, namely, removal of the juror who was offered employment by the investigating police prior to jury deliberations, effectuated a waiver of this issue. *People v Carter*, 462 Mich 206, 218-219; 612 NW2d 144 (2000). Even if we were to treat defendant's claim as an unpreserved issue subject to forfeiture, we would not reverse

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(…continued)

right to confrontation." Counsel may not harbor error as an appellate parachute. *People v Riley*, 465 Mich 442, 448; 636 NW2d 514 (2001). Both parties had the opportunity to definitively determine what the victim's mother was referring to by her use of the word "this," but declined. Thus, it is speculative whether impeachment was feasible under the circumstances.

[3] Even if we had concluded that the trial court abused its discretion by limiting cross-examination of the victim's mother involving a preserved error of constitutional magnitude, the error was harmless beyond a reasonable doubt. *People v Kelly*, 231 Mich App 627, 644-645; 588 NW2d 480 (1998). Although evidence that a witness filed or contemplated filing a civil lawsuit is relevant to the witness' credibility because it relates to the witness' bias or interest in the case, *People v Morton*, 213 Mich App 331, 334-335; 539 NW2d 771 (1995), the trial court's ruling did not prevent defendant from presenting his theory that the victim had a monetary motive for making a false accusation against him. Nor did it preclude defendant from challenging the credibility of mother's testimony regarding her motivation for contacting an attorney.

because defendant has not demonstrated a plain error. *Carines, supra* at 763. The record reflects that the trial court conducted a sufficient investigation of the matter to ensure that defendant's constitutional right to an impartial jury was not violated when it questioned the juror about the circumstances of the offer of employment, about any discussions he had with other jurors about the offer of employment, and how the offer of employment might effect his ability to decide the case. *Smith v Phillips*, 455 US 209, 220; 102 S Ct 940; 71 L Ed 2d 78 (1982); *United States v Corrado*, 227 F3d 528, 535 (CA 6, 2000).

Defendant's reliance on *People v France*, 436 Mich 138; 461 NW2d 621 (1990), to establish a presumption of prejudice, is misplaced because the instant case did not involve a substantive communication with a deliberating jury. Here, the excused juror was not part of the deliberating jury. Further, an offer of employment is not a prohibited substantive communication. The type of communication deemed substantive in *France, supra*, was a supplemental jury instruction on the law. Defendant's reliance on *Remmer v United States*, 347 US 227; 74 S Ct 450; 98 L Ed 654 (1954), is similarly misplaced because an offer of employment, even with knowledge that the person is sitting on a jury, does not constitute a communication, directly or indirectly, about the case.

We are not persuaded that it was necessary, under the facts of this case, for the trial court to sua sponte question other jurors concerning their communication with the excused juror about the case. The trial court did not find jury tampering; it only determined that the investigating police agency's conduct in making the offer of employment during trial was, at best, ill advised and, at worst, created an appearance of jury tampering. Further, the trial court instructed the jurors at the onset of the case not to discuss the case with anyone, including other jurors, until it was time to decide the case. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). We find no basis grounded in the excused juror's contact with the investigating police agency that would preclude application of this presumption.

Finally, defendant alleges that he was denied the effective assistance of counsel as a result of defense counsel's deficit performance. Because defendant did not raise this issue by motion in the trial court, our review is limited to errors apparent on the record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). When a claim depends on facts not of record, it is incumbent upon the defendant to make a testimonial record at the trial court level in connection with a motion for new trial. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant failed to establish his claims of ineffective assistance of counsel. The existing record is sufficient to determine that counsel's performance relative to the matter involving the excused juror did not fall below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). The record is insufficient to establish deficient performance or prejudice in connection with counsel's failure to pursue a defense based on the theory that the victim made past false accusations of sexual abuse. Defense counsel's testimony is essential to a

proper assessment of his performance in investigating this theory. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). Further, absence evidence of a false accusation to support defendant's claim, it cannot be determined that, but for counsel's alleged deficient performance, the outcome of the trial would have been different. *Avant, supra*.

Affirmed.

/s/ William C. Whitbeck
/s/ Harold Hood
/s/ Kirsten Frank Kelly