STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 29, 2009
v	No. 274148 St. Clair Circuit Court
JAMES EUGENE GRISSOM, Defendant-Appellant.	LC No. 03-000881-FH

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

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.
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> [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]

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[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

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(…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 Croswell.

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*[] *Sharbnow*, 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)] . . . .
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> 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]

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[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