

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 29, 2011

v

DENNIS LEE TOMASIK,
Defendant-Appellant.

No. 279161
Kent Circuit Court
LC No. 06-003485-FC

AFTER REMAND

Before: K. F. KELLY, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

This case is back before us following our Supreme Court's remand to the trial court for further proceedings pursuant to the decision in *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). *People v Tomasik*, 488 Mich 1053, 1053; 794 NW2d 620 (2011). Because we conclude that the failure to disclose counseling records during trial did not deny defendant his due process right to a fair trial, we affirm.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). Defendant was sentenced to concurrent terms of 12 to 50 years' imprisonment. Defendant filed a claim of appeal as of right on July 9, 2007, and in a brief filed on October 10, 2007, he raised three issues. Shortly after filing his first brief on appeal, defendant was granted leave to file a supplemental brief in which he raised four additional issues. At the same time, defendant also moved this Court for remand in order to conduct a *Ginther*¹ hearing. On November 6, 2008, we granted defendant's motion for remand and stated that defendant may move for an in camera review of the victim's counseling records pursuant to *Stanaway*. *People v Tomasik*, unpublished order of the Court of Appeals, entered November 6, 2008 (Docket No. 279161).

In the trial court, defendant moved for a new trial and evidentiary hearing pursuant to *Ginther*, and for review of counseling records pursuant to *Stanaway*. The trial court held an

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

evidentiary hearing, and denied the motion for a new trial in a ruling from the bench. The trial court agreed to conduct an in camera review of the victim, T.J.'s, counseling records. On July 6, 2009, the trial court affirmed its prior decision denying disclosure of T.J.'s records to defendant, and rejected a request by defense counsel, made by letter dated February 13, 2009, that the trial court also obtain and review additional documents. After the remand proceedings in the trial court, defendant filed a supplement brief with this Court and raised two additional issues.

In *People v Tomasik*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2010 (Docket No. 279161), we addressed the issues raised by defendant in his original brief on appeal, in his supplemental brief on appeal, and in his supplemental brief filed after the evidentiary hearing. We addressed each issue on the merits, rejected defendant's arguments regarding each issue, and affirmed defendant's convictions. The facts that resulted in defendant's convictions were set forth in our previous unpublished opinion:

The victim, T.J., testified that his family lived seven houses down from defendant's house, and that he was a friend of defendant's son, E.T. According to T.J., he played with E.T. inside defendant's house about four times a week. They often played Nintendo in the basement. One day, when T.J. was six years old, defendant called T.J. away from E.T. He led T.J. to E.T.'s bedroom. Defendant closed the bedroom door, and took off his pants and T.J.'s pants. Defendant told T.J. that his penis was like a Popsicle but that T.J. should not bite. Defendant's penis went into T.J.'s mouth, defendant ejaculated, and told T.J. to swallow. Defendant threatened T.J. that he would kill T.J. and his family if T.J. told anybody. T.J. returned to the basement to play with E.T.

T.J. continued to play with E.T. at defendant's house because E.T. was his best friend. According to T.J., defendant continued to sexually abuse him. He remembered one time "really well" where defendant penetrated his anus. After T.J. abandoned a bike ride with his dad to play with E.T., defendant asked T.J. to come inside with him. In E.T.'s bedroom, defendant took off T.J.'s pants and his pants. He then flipped T.J., so that T.J.'s face was on the bed, and defendant pushed his penis into T.J.'s anus.

In February 1997, when T.J. was six years old, T.J. saw blood in the toilet and on toilet paper after wiping himself after having a bowel movement. T.J.'s mother took him to the family doctor, Dr. Randall Clark. Clark discovered an anal fissure, and he did not suspect that it was caused by anything other than constipation. However, he testified that, had he known that T.J. was being anally penetrated, his diagnosis would have changed because the fissure was compatible with sexual abuse. Dr. Debra Simms, an expert in child sexual abuse, testified that an anal fissure can be the result of forcible penile entry.

T.J. did not know how often defendant abused him, but testified that it continued during "[t]he whole course of the whole time [he] was hangin' out" with E.T." When T.J. was "about eight," he realized that what defendant was doing to him was wrong, and he stopped playing with E.T.

During his freshman year in high school, T.J. was caught stealing money from purses belonging to his school's cheerleaders. T.J. admitted his involvement in the theft, and because the offense was his first offense, he was not prosecuted in juvenile court. He was suspended from school for ten days, ordered to repay the money he stole, and was required to meet with a probation officer. After he received his punishment, T.J. decided that he did not want to "live in a jail cell for the rest of [his] life," so he disclosed the sexual abuse by defendant to his counselor, Julie Schaefer-Space. Schaefer-Space reported the abuse using a "3200 form" to the local sheriff's department.

According to T.J., he was "messed up," "a demon child" before he disclosed the sexual abuse to Schaefer-Space. His mom described him as "very angry, almost hate-filled." T.J. kept weapons, such as knives and bats, in his room, because he was scared that defendant would kill his family. He fondled his younger cousin. He often talked of dying, and attempted suicide on several occasions. He used drugs. He often got into trouble at school. At different times, as his parents tried to figure out the cause of his problems, T.J. was asked if he had been sexually abused. T.J. never admitted the abuse to his parents, telling them that he had a secret that he could not tell anyone. According to his parents and Schaefer-Space, after T.J. disclosed the abuse, he became a different person. He was no longer angry. [*Tomasik*, unpub op at *1-2.]

After our decision in *Tomasik*, defendant sought leave to appeal to the Michigan Supreme Court. The Supreme Court vacated this Court's judgment and remanded the case to the trial court. *Tomasik*, 488 Mich at 1053. The Court's order provided:

On order of the Court, the motion for miscellaneous relief is GRANTED. The application for leave to appeal the January 26, 2010 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and REMAND this case to the Kent Circuit Court for further proceedings pursuant to this Court's decision in *People v Stanaway*, 446 Mich 643 (1994). On remand, the trial court shall disclose to the defendant the March 26, 2003 report authored by Timothy Zwart of Pine Rest Christian Mental Health Services and the March 1, 2003 form authored by Denise Joseph-Enders. After disclosing these documents to the defendant, the trial court shall permit the defendant to argue that a new trial should be granted.

We do not retain jurisdiction. [*Id.*]

The trial court disclosed the documents as required by our Supreme Court's order, and defendant moved for a new trial. A hearing was conducted on July 29, 2011, after which the trial court denied defendant's motion for a new trial. On September 13, 2011, defendant filed a motion in this Court to reopen this case in order to challenge the trial court's order denying his motion for a new trial, and to obtain an opinion on the issues raised pursuant to his claim of appeal. Defendant's motion was accompanied by a motion for leave to file a supplemental brief

after remand and a supplemental brief. In an administrative order entered on September 30, 2011, we granted defendant's motion to reopen the case and accepted his supplemental brief.

In his supplemental brief after remand, defendant argues that the trial court's failure to comply with the *Stanaway* procedures denied him evidence that was favorable and material to his case, and thus denied him due process and a fair trial. Specifically, defendant argues that the reports disclosed to the defense pursuant to our Supreme Court's order indicated that T.J. lied consistently and to get out of trouble, and indicated that T.J. believed his own lies and at times could not distinguish fantasy from reality. Defendant maintains that while some similar evidence was produced at trial, this previously undisclosed evidence would have put the case in such a different light that it is reasonably probable that the result would have been different. Accordingly, defendant argues that the trial court abused its discretion by denying his motion for a new trial. Defendant relies on his previous briefs in regard to all the other issues raised throughout the procedure of this case.

We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). A trial court abuses its discretion when its decision "falls outside the principled range of outcomes." *Id.* We review a preliminary issue of law regarding admission of evidence de novo. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

A defendant has a due process right to obtain exculpatory evidence from the prosecutor if the evidence is favorable to the defendant and material to the issue of the defendant's guilt. *Stanaway*, 446 Mich at 666. In this case, the records that were not disclosed to defendant during trial are a March 26, 2003 report authored by Zwart, and a March 1, 2003 form authored by Joseph-Enders. The report authored by Zwart indicated that T.J. lied consistently and relished doing so, was quick to blame adults when he got into trouble, and had difficulty with impulse control. It also indicated that T.J. appeared to believe some of his untruthful statements. The form completed by Joseph-Enders indicated that T.J. was deceitful and had had difficulties telling the truth for some time. It is not disputed that the documents not initially disclosed to defendant were favorable to his case. In this case, the trial court denied defendant's motion for a new trial because it determined that even if the documents were to have been disclosed to defendant during trial, the documents were not material because no reasonable probability existed that the result would have been different if the documents were disclosed to defendant during trial. We agree.

Our Supreme Court, citing federal precedent, set forth the procedure to be used to determine whether evidence is material in *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998):

In *Kyles v Whitley*, 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490 (1995), the Court explained that there are four aspects of "materiality." First, the touchstone of materiality is a "reasonable probability" of a different result. The question is not whether the defendant would have been more likely than not to have received a different verdict, but whether he received a fair trial in the absence of the evidence, i.e., a trial resulting in a verdict worthy of confidence. A reasonable

probability of a different result exists where suppression of the evidence undermines confidence in the outcome of the trial.

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

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

Fourth, the suppressed evidence must be considered collectively, not item by item.

The evidence presented at trial demonstrated that T.J. was a troubled child who engaged in theft and deceit and had difficulty distinguishing fantasy from reality. Defendant's assertion that the information in the documents was different in kind than the evidence presented at trial is without merit. At trial, defense counsel pointed to evidence that showed that T.J. could not distinguish fantasy from reality, including reminding the jury that T.J. admitted during his testimony that he thought Batman was real, that T.J. lied, and that T.J. previously denied that he was sexually abused and disclosed the abuse only after he was charged with theft.

We conclude that the evidence presented in the documents was cumulative to the evidence presented during the trial. Accordingly, the documents were not material because there is not a reasonable probability of a different result if the documents would have been disclosed to defendant during trial. *Id.* A new trial is generally not required "where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998). The documents contained evidence that T.J. lied; however, during trial, both T.J. and his parents testified that T.J. lied repeatedly. The documents presented evidence that T.J. had difficulty distinguishing fantasy from reality; but at trial T.J. himself acknowledged that he believed that Batman was real. The jury had before it ample evidence that T.J. was a troubled young man who lied, blamed others for his behavior, and could not distinguish fantasy from reality. While the documents reflected poorly on T.J.'s credibility, the evidence presented at trial also provided the jury with reasons to doubt T.J.'s veracity. The evidence would not have mandated that the jury reject T.J.'s testimony as untruthful, and the issue of credibility is for the jury to decide. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). The evidence in the documents would not have placed this case in such a different light that we must conclude that our confidence in the verdict is undermined because of the absence of the documents. *Fink*, 456 Mich at 454. We conclude defendant was not denied a fair trial in violation of his due process right to exculpatory evidence that is both favorable and material, and accordingly, the trial court did not abuse its discretion when it denied defendant's motion for a new trial. *Stanaway*, 446 Mich at 666.

In regard to the additional issues defendant raised in his original brief on appeal, his supplemental brief on appeal, and his supplemental brief after evidentiary hearing, we adopt the reasoning set forth in the unpublished opinion, *Tomasik*, unpub op at *2-14, where we first

addressed defendant's claims. Consequently, we conclude that defendant's remaining issues are without merit and affirm defendant's convictions and sentence.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck