

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
October 18, 2011

v

ROBERT EDWARD MOTT,  
  
Defendant-Appellant.

No. 299771  
Ingham Circuit Court  
LC No. 09-001053-FH

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Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

A jury convicted defendant of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and the trial court sentenced him to a prison term of 4-1/2 to 15 years. Defendant appeals as of right. We affirm.

**FACTS**

According to the victim, she sought employment with defendant's cleaning service. Defendant told her to report to the Marriott Hotel at 6:00 p.m. in East Lansing on April 24, 2009, where she assumed she would be meeting defendant to interview for a job. Instead, defendant's employee put the victim to work cleaning the front entrance to the hotel. On May 4, 2009, the victim, who did not know whether she actually had the job, phoned defendant to inquire about a paycheck. Defendant instructed the victim to pick up her check at his home. That same day, defendant instructed the victim to report to work at the hotel. Defendant told her that he would stop by the hotel that night to evaluate her work and determine whether he "wanted to keep her." The victim was cleaning a fourth-floor men's restroom when defendant arrived. He asked the victim if she had ever "fooled around" with her boss. When the victim responded that she did not "mix business with pleasure," defendant stated that "nobody would have to know."

Defendant then left the restroom and the victim continued to clean. Defendant later returned to the restroom and instructed the victim to follow him. He unlocked the door to a suite of offices and took the victim into an inner office. Defendant walked her through the office and showed her what to clean. Defendant again began talking about "messing around with the boss" and got "real close." When the victim told defendant that she "doesn't do stuff like that," he responded, "I'm the boss, you know how many people want this job?" Defendant reached over to kiss her. As the victim tried to leave, defendant grabbed her arm. The victim pushed defendant's hand down as he tried to put his hand up her shirt and touch her breast. As she

attempted to leave, defendant said, “no, no.” Defendant then grabbed the front of her stretch pants. He put his hand inside her pants and panties and into her vaginal area. The victim reacted quickly and pushed defendant away while saying, “Stop.” Defendant said, “Nobody will know. I’m the boss. Don’t worry . . . don’t be scared.”

The victim told defendant that she was going to go downstairs to smoke a cigarette. She pushed past defendant and then went to the men’s restroom to retrieve her belongings before heading to the hotel’s lounge. Defendant followed her and insisted on buying her a drink. The victim then went on the balcony and defendant again followed her. She left after a third person came out onto the balcony and began to talk to defendant. The victim called 911 from outside the hotel lobby. While on the phone, she observed defendant enter a bar across the street from the hotel.

After the victim identified defendant, an East Lansing police officer had contact with him outside the hotel. Defendant was belligerent, slurred his speech, and smelled of alcohol. When asked if he had seen the victim that night, defendant stated that she had broken a key to the toilet paper holder and that his employee had “chewed her out.” Defendant denied inappropriately touching the victim, but stated that he could have touched her shoulder while trying to console her.

Defendant was not arrested that night, but was charged with CSC a few days later. The victim began receiving telephone calls from defendant on June 1, 2009. The caller ID on her cellular phone indicated that the number calling had been blocked, but the victim recognized the voice as defendant. Defendant stated that he wanted to settle out-of-court and to pay her \$2,500 for “not speaking in court.” The victim told defendant that she would have to call him back and then she hung up. Defendant then called back. The victim tried to figure out how to record the conversations. Evans called Detective Phelps, the detective assigned to the case, but was unable to reach him and left a message on his voicemail. Later that same day, a friend showed the victim how to record a telephone conversation on her cell phone. The victim recorded three telephone calls that day. During one call, defendant identified himself as “Matt” and stated that he was a friend of defendant.

The victim recorded additional telephone conversations with defendant on June 2. On June 3, she took her phone to Detective Phelps. Detective Phelps listened to the recordings and recorded them onto another device. Detective Phelps told the victim to try to get defendant to apologize and to meet up so that they could determine who was involved. Money was discussed during the recorded conversations. The victim did not know what to say to defendant but wanted to keep him talking so she proposed that defendant pay \$3,500. Defendant gave her a 2-day time limit to make a decision and wanted her to sign a document. Defendant gave her the name of his attorney.

Detective James Phelps testified that was in training on June 1 and returned to work on June 3. He had a voicemail message dated June 1 from the victim indicating that defendant had called her and offered her money to drop the charges against him. Detective Phelps met with the victim on June 3. The victim played the telephone recordings with him in which she and defendant were discussing money to drop the charges. Detective Phelps preserved the recordings by recording them on a digital voice recorder that recorded the messages while the victim’s cell

phone was playing the messages. Detective Phelps recorded three messages that day. He then transferred the messages to a CD. None of the recordings were altered.

Plaintiff's proposed exhibit 19 contained the three re-recorded cellular calls between the victim and defendant. The first two calls occurred at 8:22 p.m. and 8:40 p.m. on June 1. The third call occurred at 10:07 p.m. on June 2. Detective Phelps transcribed each of the calls so that the conversations could be made part of the police report and to make it easier for a listener to follow along with the conversations. The transcripts were marked as plaintiff's proposed exhibit 20.

Plaintiff's proposed exhibit 21 was an accurate re-recording of a cellular call between the victim and defendant on June 3. During this conversation, defendant told the victim to contact his attorney. Detective Phelps transcribed the recording and the transcription was marked as plaintiff's proposed exhibit 22. Plaintiff's proposed exhibit 23 was an accurate re-recording of a cellular call between the victim and defendant at 6:10 p.m. on June 3. The call was transcribed by Detective Phelps and marked as plaintiff's proposed exhibit 24. Detective Phelps acknowledged that the transcripts were not verbatim because it was difficult at times to hear the recordings, but he prepared the transcripts to the best of his ability. Additionally, when a comment was made two or three times in a row, he only included the comment once.

Defendant objected to admission of the transcripts because the transcripts were not "word-for-word." The trial court noted that the foundation for admission of the transcripts was sufficient, and that defendant's argument went to the weight of the evidence rather than the admissibility of the evidence. The court noted that the recording of each of the calls was available for the jury to hear. The trial court received all of the exhibits into evidence.

Detective Phelps submitted a search warrant to Comcast and Sprint/Nextel for the telephone records of the two telephone numbers given to the victim by defendant. He also obtained a waiver from the victim for the telephone records for her Sprint telephone number. The records requested in each case were those for the time period of May 4, 2009, through June 15, 2009. The certified telephone records for the victim's Sprint telephone were marked as plaintiff's proposed exhibit 26. The certified telephone records for defendant's Comcast cellular phone number were in his name and were marked as plaintiff's proposed exhibit 27. The certified telephone records for defendant's Sprint phone number were in the name of the cleaning service and were marked as plaintiff's proposed exhibit 28.

In analyzing the telephone records, Detective Phelps found that the victim did not initiate the calls to defendant. The records revealed that the victim first called defendant 12 hours after receiving the first call from defendant. On June 1, 15 calls were made from defendant's phone number to the victim's phone number.

Detective Phelps matched the phone records to the phone calls between defendant and the victim. All of the recorded telephone calls between the victim and defendant were played for the jury.

Defendant testified that he went to the Marriott Hotel because the victim had broken the key to the toilet paper holder and he was bringing an extra key. The victim was very upset so

defendant invited her to have a cigarette break. Defendant and the victim rode down on the elevator together, and his employee joined them shortly after. The three of them went together to the hotel's garage to smoke. Defendant denied ever being alone with the victim. Following the cigarette break, the employee went back to work. Defendant consoled the victim. He patted her on the shoulder and offered her a Coke. The victim then left, and defendant assumed she was going back to work.

According to defendant, approximately four days later he received a telephone call from a man, on behalf of the victim, demanding money. The man threatened to sue him and to ruin his life. He received approximately four calls from the man. After the second call, the man told defendant to contact the victim. During one of the calls, defendant was in his attorney's office. Defendant gave the phone to his attorney and the attorney pretended to be defendant. A few days later, defendant found out he was being charged with CSC. Defendant admitted that he was the person who talked to Evans during each phone call and that he called himself "Matt."

## I

Defendant first argues that his due process right to present a defense and to a fair trial were violated by Detective Phelps' failure to preserve and present all of the telephone conversations between the victim and defendant. This Court reviews de novo defendant's claim of a constitutional due process violation. *People v Schumacher*, 176 Mich App 165, 176; 740 NW2d 534 (2007).

Under *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988), a government's failure to preserve potentially exculpatory evidence violates a defendant's due process rights if the defendant can show bad faith. See *People v Anstey*, 476 Mich 436, 460-461; 719 NW2d 579 (2006). The presence of bad faith turns on the police knowledge of the exculpatory evidence at the time that it is lost or destroyed. *United States v Jobson*, 102 F3d 214, 218 (CA 6, 1996). There must be a conscious effort to suppress exculpatory evidence. *Id.*

Here, defendant alleges that Detective Phelps made the decision with regard to which telephone calls between Evans and defendant to preserve and which to destroy. Defendant further alleges that he knows that some of the non-recorded conversations contained helpful and exculpatory evidence to his case. However, the record does not support this allegation. Although the record reflects that Detective Phelps determined from the certified telephone records that 15 telephone calls were placed from defendant's phone number to Evans' phone number on June 1, nothing in the record supports a finding that each of the 15 telephone calls was answered. Additionally, nothing in the record supports a finding that Evans recorded each of the 15 telephone calls. Evans testified that she did not initially know how to record conversations on her phone, and that she did record two conversations on June 1 after learning how to record the conversations. The record is clear that Detective Phelps was out of the office and in training and that he did not receive Evans' voicemail message regarding the fact that defendant was calling her until he returned to the office on June 3. Thus, defendant's assertion that Detective Phelps had anything to do with the recording (or failure to record) conversations between June 1 and June 3 is misplaced. Further, the record reflects that Detective Phelps re-recorded each of the recorded telephone conversations provided to him by Evans and that the CDs of the recordings were placed into the police file. Nothing in the record supports a finding

that Detective Phelps destroyed any of the recorded conversations or that he failed to re-record any of the recordings provided by Evans. Defendant's factual allegations are simply not supported by the record. Defendant has not established a due process violation because he has not shown that potentially helpful evidence was destroyed in bad faith.<sup>1</sup>

## II

Defendant next argues that his constitutional right to present a defense and to a fair trial were denied by the trial court's failure to admit a recorded telephone conversation between the victim and defendant's attorney and by the trial court's admission of inaccurate transcripts. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588–589; 739 NW2d 385 (2007). However, this Court reviews de novo whether a defendant has been deprived of his constitutional rights. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

First, defendant contends that the recording between the victim and defendant's attorney was "relevant" under MRE 401 to give the jury a "full picture of the entire progression of the process between Mr. Mott and [the victim . . .]." Outside the presence of the jury, defense counsel requested that the court admit an additional recording and transcript of a conversation between the victim and defendant's attorney. The prosecutor objected to this evidence on the grounds that defendant was not a party to the conversation and that the attorney had not testified. Defense counsel suggested that the conversation was not hearsay but was a "res gestae" of the case, explaining what was going on during the course of the phone calls. When asked about the relevance of the conversation, defense counsel suggested the phone conversation was relevant to prove that defendant was not bribing the victim but, rather, was trying to settle a possible civil suit. The Court then stated:

THE COURT: So, he [defendant] makes all of these statements and then later on, she calls the lawyer and the lawyer, the lawyer, not the defendant, says something different about it?

The court ultimately concluded that the phone call was not res gestae, was hearsay, and was not relevant because the attorney could not speak to defendant's state of mind, which was the only relevant use of the phone conversations. The court opined that the phone call did not increase or decrease the likelihood of a guilty state of mind on the part of defendant because the phone call was between the victim and a third party.

Defendant's argument is limited solely to a recitation of the evidentiary rules regarding relevant evidence, MRE 401, 402, 403. Generally, all relevant evidence is admissible, and

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<sup>1</sup> Defendant maintains that he "could not get this information from any other source." Defendant fails to explain why he could not have recorded the telephone conversations just as the victim did.

irrelevant evidence is not. MRE 402; *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Wayne Co v. State Tax Comm*, 261 Mich App 174, 196; 682 NW2d 100 (2004).

Here, the recorded phone conversation between the victim and *defendant* were relevant to whether defendant had a guilty state of mind; that is, whether he was attempting to bribe the victim not to testify. However, the trial court properly decided that the phone conversation between the victim and *defendant's attorney* was not admissible. The conversation is hearsay and has no bearing on the issue of defendant's state of mind at the time he contacted Evans and offered her money. The trial court did not abuse its discretion by denying admission of the evidence.

Defendant also asserts that the trial court abused its discretion by admitting transcripts of the recorded phone conversations that were admitted into evidence and played for the jury. Defendant does not offer a specific argument with regard to this assertion. Nonetheless, his objection at trial was that the transcripts were "slanted" and that a "lot of stuff was deleted" from the transcript. Detective Phelps acknowledged at trial that the transcripts were not verbatim due to difficulties in understanding the calls at times, but that he did his best to listen and make accurate transcripts. The trial court admitted the transcripts of the recordings prepared by Detective Phelps to assist the jurors while they listened to the recordings. The trial court noted that the recordings were available for the jury to listen to and, therefore, any inaccuracies or omissions in the transcript went to the weight of the evidence, not its admissibility. The trial court's admission of the transcripts was not outside the range of reasonable and principled outcomes. *Orr*, 275 Mich App at 588–589.

Affirmed.

/s/ Michael J. Kelly  
/s/ E. Thomas Fitzgerald  
/s/ William C. Whitbeck