

{¶ 1} Defendant-appellant Thomas Zimpfer appeals from a decision of the Montgomery County Court of Common Pleas denying his motions for discovery and the production of grand jury testimony. For the reasons that follow, we affirm the judgment of the trial court.

I. Facts and Procedural History

{¶ 2} In 2014, Zimpfer was convicted of three counts of unlawful sexual conduct with a minor and four counts of rape (by force or threat of force). He was sentenced to a prison term of 33 years and designated a Tier III sex offender/child victim offender. Following an appeal, we affirmed the conviction and sentence. *State v. Zimpfer*, 2d Dist. Montgomery No. 26062, 2014-Ohio-4401. While his direct appeal was pending, Zimpfer filed a petition for post-conviction relief which the trial court denied. We affirmed the trial court's denial in *State v. Zimpfer*, 2d Dist. Montgomery No. 26857, 2016-Ohio-7330. Zimpfer filed two separate applications seeking to reopen both appeals. This court denied both applications. Zimpfer also filed in the trial court a motion for production of documents seeking to have the Montgomery County Clerk of Courts provide him with a copy of all documents related to his case. The motion was denied by the trial court and Zimpfer appealed. We dismissed his appeal as untimely. The Ohio Supreme Court did not allow an appeal of our dismissal. *State v. Zimpfer*, 152 Ohio St.3d 1411, 2018-Ohio-723, 92 N.E.3d 881 (Table).

{¶ 3} Beginning in March 2017, Zimpfer filed, pro se, a series of motions in the trial court. On March 3, 2017, he filed a motion to unseal grand jury testimony. In his

motion, Zimpfer appeared to request all transcripts of the grand jury testimony related to his case. He claimed that he needed the transcripts to demonstrate that the victim was inconsistent in her testimony, that she committed perjury, and that the dates in the indictment did not align with the testimony of the victim and her boyfriend. On March 24, he filed a motion for discovery seeking to have the Montgomery County Prosecutor's Office produce "all material in their possession relating" to his case. On April 6, 2017, Zimpfer filed a motion seeking to compel his trial attorney to provide him with a complete copy of his case file. On the same date, he filed an identical motion directed at the attorney who represented him with regard to his petition for post-conviction relief. On July 5, 2017, he filed a motion for contempt and default judgment against the Prosecutor's Office for failing to comply with his discovery request. On July 19, Zimpfer filed a motion for contempt and default judgment against his trial attorney for failing to comply with his request for his file. On July 31, he filed an identical motion regarding the attorney representing him on his petition for post-conviction relief. The trial court denied all of the motions in a single entry filed August 14, 2017.

{¶ 4} Zimpfer appeals.

II. Grand Jury Testimony

{¶ 5} Zimpfer's first assignment of error states as follows:

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO UNSEAL GRAND JURY TESTIMONY.

{¶ 6} Zimpfer contends that the trial court should have granted his motion for

production of the grand jury testimony as he showed a particularized need for the transcripts.

{¶ 7} Crim.R. 6(E) expressly provides that grand jury matters may not be disclosed except “when so directed by the court preliminary to or in conjunction with a judicial proceeding.” A criminal defendant is not entitled to inspect grand jury transcripts “unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy.” *State v. Greer*, 66 Ohio St.2d 139, 420 N.E.2d 982 (1981), paragraph two of the syllabus. Whether a particularized need for disclosure of the grand jury testimony has been established is a question of fact. *Id.* at paragraph three of the syllabus. A particularized need for disclosure of grand jury testimony can be shown “where from a consideration of all the surrounding circumstances, it is probable that the failure to disclose the grand jury testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witness' trial testimony.” *Id.* If the defendant establishes a particularized need for certain grand jury testimony, then the trial court must “examine the grand jury transcript in camera and give the defense those portions of the transcript relevant to the witness' testimony at trial.” *Id.* at paragraph four of the syllabus.

{¶ 8} In *Greer*, the Supreme Court of Ohio held that the release of grand jury testimony is within the sound discretion of the trial court. *Id.* at paragraph one of the syllabus. While *Greer* involved the release of grand jury transcripts in the pretrial and trial contexts, its holding is also applicable in a post-conviction relief setting. *State v. Buelow*, 2d Dist. Clark No. 06-CA-29, 2007-Ohio-131, ¶ 45. Thus, we can reverse the decision to deny the release of grand jury testimony only if the trial court has abused its

discretion. *In re January 27, 2017 Order Releasing Grand Jury Materials*, 2018-Ohio-988, ___ N.E.3d ___, ¶ 6 (2d Dist.), citing *State v. Brown*, 38 Ohio St.3d 305, 308, 528 N.E.2d 523 (1988); *State v. Perkins*, 191 Ohio App.3d 263, 2010-Ohio-5161, 945 N.E.2d 1083, ¶ 45 (2d Dist.). An abuse of discretion occurs when the trial court acts in an arbitrary, unreasonable or unconscionable manner. *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.*, 63 Ohio St.3d 498, 506, 589 N.E.2d 24 (1992).

{¶ 9} At the outset, we note that there was no action or court proceeding pending at the time this motion was filed.¹ Thus, before addressing the merits of the case, we must determine whether the order in question is a final appealable order. The question of whether we have jurisdiction over an appeal is a matter that we can raise on our motion. *Care Risk Retention Group v. Martin*, 191 Ohio App.3d 797, 2010–Ohio–6091, 947 N.E.2d 1214, ¶ 97 (2d Dist.), citing *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544, 684 N.E.2d 72 (1997).

{¶ 10} R.C. 2505.02(B) provides that orders are final and may be reviewed if they fit within one of several categories, including “[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment”, “[a]n order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment,” or “[a]n order that grants or denies a provisional remedy * * *.” R.C. 2505.02(B)(1), (2) and (4).

{¶ 11} A substantial right for purposes of R.C. 2505.02 is defined as “a right that

¹ In his appellate brief, Zimpfer claims that the grand jury transcript is necessary for his “pending Federal Habitus [sic] Corpus petition * * *,” and that “there are any number of civil collateral attacks still available to the Appellant at the trial court level.” Regardless of this claim, there is nothing in the record before us to demonstrate that any action, state or federal, was pending at any time that the motion was before the trial court.

the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” R.C. 2505.02(A)(1). A court order depriving a person of a remedy which he would otherwise possess deprives that person of a substantial right. *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88, 541 N.E.2d 64 (1989). An order affecting a substantial right is one that, if not immediately appealable, would foreclose appropriate relief in the future. *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993). A “ ‘provisional remedy’ means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, [or] suppression of evidence * * *.” R.C. 2505.02(A)(5).

{¶ 12} This court has held that when “[t]here is no pending action wherein the grand jury testimony is needed to preserve a right guaranteed to [a defendant] by law,” there is no substantial right requiring protection. *State v. Pierce*, 2d Dist. Montgomery No. 25199, 2013-Ohio-1372, ¶ 16-17. Likewise, since Zimpfer’s motion was not ancillary to any action or court proceeding that was currently in existence, it does not constitute a provisional remedy. *Id.* at ¶ 16.

{¶ 13} Since the motion for the transcripts was not a provisional remedy, and no substantial right has been affected, the denial of the motion is not a final appealable order that we may consider.

{¶ 14} Even if the trial court’s order in this case were final and appealable, we note, as set forth hereafter, that Zimpfer’s arguments regarding his claim of a particularized need for the grand jury testimony lack merit. Zimpfer first claims that he needs the grand jury testimony in order to demonstrate that the dates contained in the indictment are overly

broad as they cover a period of several years, rather than citing specific dates. In support, he notes that the victim testified that the first three offenses occurred when she was 13, while the fourth offense occurred when she was 15, and the final offense occurred when she was 16. Zimpfer argues that the victim's age would be set forth in the grand jury testimony, and that it would prove that the State should have narrowed the indictment dates to correspond with the appropriate years to which the victim testified.

{¶ 15} We find this argument without merit. The victim testified to her age and date of birth during trial. She also testified as to her memory regarding her age at the time of each offense. Thus, the evidence Zimpfer claims he needs is in the trial record, and such testimony, if present in the grand jury transcript, would be merely cumulative. Further, the issue of the time ranges in the indictment was a matter fully capable of being raised at the trial court level and on direct appeal. Thus, it is now barred by res judicata.

{¶ 16} Zimpfer next claims that he needs the testimony to prove that the victim lied about her age with regard to the last offense. At trial, the victim testified that she was 16 when her father told her to go weed a flower bed at Zimpfer's residence. She testified that, while she was weeding, Zimpfer came up to her, forced her into his house and raped her. She testified that she then texted her boyfriend and told him to come over to the home. She testified that her boyfriend came to the Zimpfer home in his Chevy truck. The boyfriend also testified at trial regarding the flower bed incident. He testified that when he arrived at the home, he found the victim and he attempted to confront Zimpfer. He testified that he drove his Chevy truck to the Zimpfer residence, and that he did not purchase the truck until sometime after April of 2009. Zimpfer notes that the date of the truck purchase indicates that the victim was 17, rather than 16, at the time of the last

offense.

{¶ 17} Again, we cannot conclude that the grand jury transcript will help resolve this discrepancy. As noted above, the jury, counsel and the trial court were aware of the victim's birthdate, her claim that she was 16 when the subject offense occurred, and of the date cited by the boyfriend. The jury clearly credited the victim's testimony regarding her age at the time the offense occurred. Further, this is also a matter that could have been raised on direct appeal or in the petition for post-conviction relief. Thus, it is barred by res judicata.

{¶ 18} Next, Zimpfer claims that the victim's testimony at trial was not reliable because she contradicted herself. Specifically, he refers to the testimony of the victim indicating that she began self-harming by cutting herself after Zimpfer began having sexual relations with her. The victim claimed that Zimpfer knew about the cutting and that he threatened to tell her parents about it if she told anyone about his actions. However, Zimpfer claims that when asked on cross-examination whether she had actually informed him about the cutting, the victim repeatedly changed her answer. Zimpfer thus claims that if she did not inform him of the cutting, he could not have threatened to use the information to keep her from informing anyone of his offenses. He argues that the grand jury testimony is necessary for a resolution of these inconsistencies.

{¶ 19} We note that a review of the transcript reveals the victim testified that she did not recall telling Zimpfer about her self-cutting, but she did testify that he was aware of it. When asked on cross-examination whether she informed the police that she had told Zimpfer about the cutting, the victim testified that she did not recall, but did not deny, doing so. At no time did the victim testify that she did not inform Zimpfer of the cutting.

She merely testified that she did not recall doing so. Thus, we find no inconsistencies that would necessitate the use of the grand jury testimony.

{¶ 20} Finally, Zimpfer claims that the victim lied about her alcohol consumption. Of relevance to this claim, the victim testified that Zimpfer gave her a drink during the commission of the first offense. She testified that the drink tasted odd and that she had never consumed alcohol before then. Zimpfer claims that her statements to the police indicate that she told Zimpfer that she had consumed a beer sometime prior to the first incident. He also claims that at trial she testified that she did not know what type of alcohol he had provided her, but that she had been able to previously identify it in her statement to the police as Smirnoff Vodka. Thus, he claims that her grand jury testimony must be examined to determine her credibility at trial.

{¶ 21} We first note that at no time did the victim testify that she did not know what type of alcohol Zimpfer gave her. Also, the victim did not deny telling the police that she had told Zimpfer that she tried drinking beer prior to the date of the first offense. Again, we find no inconsistency that would require the release of the grand jury testimony. The victim simply testified that she had not tried alcohol before the offense, but she admitted that she told Zimpfer she had. In other words, any inconsistency in her testimony was apparent to the jury regardless of the grand jury testimony.

{¶ 22} Based upon this record, we conclude that the trial court did not abuse its discretion in finding that defendant's motion for production of grand jury testimony failed to set forth a particularized need.

{¶ 23} We, in conclusion, determine that Zimpfer's request for grand jury testimony does not arise from a final appealable order. However, even if the request arose from a

final appealable order, we would find Zimpfer's request without merit. Zimpfer's first assignment of error is overruled.

III. Prosecutor's Case File

{¶ 24} The second assignment of error asserted by Zimpfer states:

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT ACCESS TO THE STATE'S CASE FILE UPON FILING A MOTION FOR DISCOVERY.

{¶ 25} Zimpfer contends that the trial court abused its discretion when it denied his motions seeking to obtain all records and evidence pertaining to his case that are in the possession of the Montgomery County Clerk of Courts and the Montgomery County Prosecutor's office.

{¶ 26} We begin by noting that Zimpfer's motion seeking records from the Montgomery County Clerk's Office was filed in December 2016. The motion was denied in February 2017. Zimpfer filed an appeal of that decision. However, as the appeal was not filed until July 2017, we dismissed it as untimely. No further motion was filed seeking the records from the Clerk's Office. Therefore, this issue is not properly before us.

{¶ 27} We next address the claim that the trial court should have required the Montgomery County Prosecutor's Office to provide Zimpfer with a complete, unabridged copy of its file. Zimpfer's motion was styled as a Crim.R. 16 request for discovery. However, in it he also argues that he is entitled to his case file under the public records law.

{¶ 28} R.C. 149.43(B)(4) provides:

A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

{¶ 29} “R.C. 149.43(B)(4) sets forth heightened requirements for inmates seeking public records, and requires an incarcerated criminal defendant to demonstrate that the information he is seeking pursuant to R.C. 149.43 is necessary to support a justiciable claim or defense.” *State v. Gibson*, 2d Dist. Champaign No. 06CA37, 2007-Ohio-7161, ¶ 13, citing *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966; *State v. Lofton*, 2d Dist. Montgomery No. 20923, 2006-Ohio-4651. Zimpfer’s motion failed to identify any claim, justiciable or otherwise, that would require the records he seeks as he has failed to demonstrate that there is any pending proceeding with respect to which the requested documents would be material. While he has stated in his appellate brief that he has potential future claims, he has not shown that any of them remain justiciable in his case, which already includes a direct appeal, a

petition for post-conviction relief, and two applications for reopening. And as noted above, his claim that he has an ongoing federal habeas corpus action is not supported by this record. As a result, the trial court did not abuse its discretion in denying the public records request.

{¶ 30} To the extent that Zimpfer’s motion simply constituted a Crim.R. 16 motion seeking discovery, rather than a public records request, we note that his motion fails to establish that the State had not already complied with its discovery duties. Further, as noted by the State, Crim.R. 16, upon which Zimpfer’s motion was premised, “contemplates motions for discovery before or during trial, not during post-conviction proceedings.” *State v. Humphrey*, 2d Dist. Montgomery No. 19243, 2002-Ohio-6525, ¶ 3. And, since no proceedings were pending, there was no showing of the necessity for such discovery.

{¶ 31} We conclude that the trial court did not abuse its discretion in denying the requested discovery or records. Accordingly, the second assignment of error is overruled.

IV. Conclusion

{¶ 32} Both of Zimpfer’s assignments of error being overruled, the judgment of the trial court is affirmed.

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WELBAUM, P.J. and HALL, J., concur.

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