# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 17, 2008 |
| v | No. 276566<br>Calhoun Circuit Court |
| JOSEPH WIXSON LAIRD,<br><br>Defendant-Appellant. | LC No. 2005-004169-FC |

Before: Bandstra, PJ, and Talbot and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for six counts of first-degree criminal sexual conduct ("CSC") with a person under the age of 13, MCL 750.520b(1)(a). Defendant was sentenced in accordance with MCL 769.10, as a habitual offender, second offense, to 356 to 600 months' imprisonment. We affirm.

Defendant first asserts that the trial court erred when it refused to conduct an in camera review of the victims' counseling records, which he alleged contained exculpatory evidence. We review a trial court's decision denying a discovery request for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998).

In general, "confidential communications made to a sexual . . . assault counselor 'shall not be admissible evidence in any civil or criminal proceeding without the prior written consent of the victim.'" *People v Stanaway*, 446 Mich 643, 658-659; 521 NW2d 557 (1994), quoting MCL 600.2157a(2). Statements made by a client to a psychologist are also privileged pursuant to MCL 330.1750. *Stanaway, supra* at 659-660. The purpose of these privileges is to shield these communications from use as impeachment or exculpatory evidence in a criminal or civil trial. *Id.* at 662. However, it is recognized that "[c]ommon-law and statutory privileges may have to be narrowed or yielded if these privileges interfere with certain constitutional rights of defendants." *Id.* at 668-669. A fair balance of these competing concerns permits privileged information to be made available when necessity so demands, or when the benefit gained by providing access to the privileged information is more valuable than the disadvantage incurred. *Id.* at 663. Therefore,

> where a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted to ascertain whether they

> contain evidence that is reasonably necessary, and therefore essential, to the defense. Only when the trial court finds such evidence, should it be provided to the defendant. [*Id.* at 649-650.]

This is consistent with MCR 6.201(C)(2), which requires a trial court to conduct an in camera inspection following a defendant's demonstration of "a good faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense."

Based on our review of the record, we find that the trial court did not abuse its discretion when it determined that defendant failed to meet his burden to articulate sufficient facts to demonstrate a reasonable probability that the victims' counseling records contained exculpatory information. Contrary to the requirements delineated, *supra,* defendant failed to articulate *any* facts in support of his request for the records. Rather, defendant merely theorized that the counseling records contained exculpatory evidence based on the victims' delay in reporting the abuse and an alleged false report of abuse against another individual. However, defendant provided no factual support to verify the existence of a prior false report of abuse by the victims. In addition, an expert testified that children often hide abuse, which addressed defendant's assertion that the victims' delay in reporting the alleged abuse raised issues regarding their veracity necessitating release of the records. Based on the inadequate assertions by defendant, the trial court properly exercised its discretion in denying defendant's motion.

Defendant next contends that he was improperly sentenced as a habitual offender because his criminal conduct in this case occurred *before* the conviction that formed the basis for the habitual offender enhancement. We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even when plain error affecting defendant's substantial rights exist, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763-764, quoting *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

MCL 769.10(1) permits enhanced sentencing for habitual offenders in circumstances where "a person has been convicted of a felony or an attempt to commit a felony . . . and that person commits a subsequent felony within this state." The intent of this statute is to punish defendants more severely when they "decline to change their ways after an opportunity to reform." *People v Poole*, 218 Mich App 702, 713; 555 NW2d 485 (1996). Thus, it is not sufficient that a defendant be convicted of two felonies; rather, the defendant must offend, be convicted, and after the initial conviction, commit another offense. *Id.* at 711.

The trial court erred when it allowed defendant to be sentenced as a second habitual offender based on his previous conviction for fourth-degree CSC. The presentence investigation report reveals that defendant's fourth-degree CSC conviction was entered on August 31, 2004. However, the information charged that the instant conduct occurred between August 1, 2001 and August 1, 2004, which was *before* the conviction used for the sentencing enhancement. Therefore, pursuant to *Poole, supra*, defendant's habitual offender status could not be based on his 2004 fourth-degree CSC conviction.

However, we find that this error did not prejudice defendant or seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Rather than using the fourth-degree CSC conviction, the prosecutor could have based defendant's habitual offender enhancement on defendant's April 7, 2003, conviction for attempted second-degree child abuse, which comprises a felony punishable by a maximum of four years' imprisonment. MCL 750.136b(4). Although the prosecutor is subject to a strict 21-day time limit for the original notice that it will seek an habitual offender enhancement, MCL 769.13(1), a prosecutor may amend "a timely sentence enhancement information to correct a technical defect where the amendment does not otherwise increase the potential sentence consequences." *People v Hornsby*, 251 Mich App 462, 472; 650 NW2d 700 (2002). The substitution of the attempted child-abuse conviction for the fourth degree CSC conviction would not have increased defendant's sentence beyond that contemplated in the original information. Thus, any error in the sentencing enhancement notice did not affect defendant's substantial rights.

Defendant asserts that the April 7, 2003, conviction cannot provide the basis for his habitual offender enhancement because there were "no facts" to support that his sexual abuse of the victims occurred after April 7, 2003. Contrary to defendant's assertion, one of the victims testified that acts of abuse took place in the family's "green and white" house. The victims' mother testified that they moved into this residence in April 2003, and that defendant was not living with them in "early April" of that year. However, defendant moved back in with the family shortly thereafter, and lived with the family until November 2003. The logical conclusion to be drawn from this testimony is that defendant's abuse of the victims, while residing at this location, occurred between April 2003, when defendant moved back in with the family, and November 2003, when defendant ceased residing with them. As a result, defendant's conviction for attempted second-degree child abuse could be used for purposes of enhancement as having occurred before the currently charged incidents of criminal sexual conduct.

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Bill Schuette