STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEVON HOWARD,

Defendant-Appellee.

UNPUBLISHED
March 18, 2010

Nos. 288723; 288724
Oakland Circuit Court
LC No. 2008-221695-FH

Before: Shapiro, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Defendant was charged with two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). The prosecution appeals as on leave granted[1] the circuit court's orders granting in camera reviews of the counseling and school records of the two alleged minor victims. We reverse and remand.

The prosecution argues that the circuit court erred by granting the in camera reviews of the privileged counseling and school records without first determining that defendant had met the necessary burden. We agree. We review for an abuse of discretion the circuit court's decision to order an in camera review of privileged materials pursuant to MCR 6.201. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

In general, privileged information is not intended to be available for use as evidence, either for impeachment or as exculpatory evidence in any trial. *People v Stanaway*, 446 Mich 643, 662; 521 NW2d 557 (1994). However, there is a limited exception to this general rule. In *Stanaway*, our Supreme Court balanced the opposing interests of protecting the confidentiality of privileged records with a criminal defendant's constitutional right to obtain evidence necessary to his defense. In striking this balance, the *Stanaway* Court held that "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

[1] Our Supreme Court has remanded this matter to this Court for consideration as on leave granted. *People v Howard*, 482 Mich 1073 (2008).

ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense." *Id.* at 649-650.

Following its opinion in *Stanaway,* our Supreme Court amended MCR 6.201(C) to comport with the decision. See *People v Fink*, 456 Mich 449, 455 n 7; 574 NW2d 28 (1998). MCR 6.201(C)(2) provides in pertinent part:

> If a defendant demonstrates 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, the trial court shall conduct an in camera inspection of the records.

In the present case, defendant argued that the privileged records should be turned over for an in camera inspection essentially because they *might* contain exculpatory evidence or impeachment material:

> What we're saying is that different stories can be given [by the alleged victims]. Often that's the case. We have discrepancies between the stories that have already been given. So what we need to see is are there other stories that have been given? Have there been any statements made that it didn't happen? Have there been any statements at all that are directly relevant to the statements in this case? And there's no way we can know that until we look at the records.
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> * * *
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> What we do have, though, is both of these kids are supposed to be talking to a counselor specifically about this incident. . . . If those versions of stories are different, the defendant needs to have those and defend himself properly. It's all based on somebody's word. If they say a completely different story, that is huge. That's the whole ball game for juries.
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> * * *
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> The fact of it is this is all about the credibility of accusations and if there is anything, when somebody specifically talking about the incident, that is markedly different than the prior claims, credibility is not a minor matter. It is the whole case. And the defendant is [facing serious charges] here and needs to look at this stuff or somebody does to see if that exists.

Defendant further argued that he had a "good-faith belie[f]" that

> the records will show there have been no changes in the children either before the alleged act or after, indicating that nothing happened to the children; that is, the "silence speaks volumes" and undercuts the allegations to a crucial level necessary for the defense to effectively and completely defend against the allegations.

The circuit court granted defendant's motion to review the school and counseling records, remarking from the bench:

> The Court acknowledges that the prosecutor has said that case law in this state is very restrictive in regards to the invasion of privacy of children as to their school records or other records that may [relate to] counseling. . . . A lawful standard requires an in camera reviewing of the records only upon the appropriate showing by the defendant.
>
> The defendant has not made, allegedly, by the prosecutor, any showing that satisfies that burden.
>
> Nevertheless, the Court is going to hold . . . an in camera inspection and we'll look at those files within ten days.

Admittedly, the circuit court never explicitly stated whether it believed that defendant *had* or *had not* met his burden under *Stanaway* and MCR 6.201(C). But a review of the hearing transcript leads us to conclude that the circuit court was (1) aware of the proper legal standard, and (2) knew that defendant had not met his burden in this case. This appears to be why the circuit court used the word "[n]evertheless," which means "in spite of that,"[2] when it decided to grant the in camera review. The natural and logical understanding of the circuit court's words is that the court was granting the in camera review "in spite of" defendant not having met his burden. This was an abuse of the court's discretion. An in camera review is only permitted upon a proper showing by the defendant. MCR 6.201(C)(2). Here, the circuit court implicitly acknowledged that defendant had not met his burden. Thus, the only reasonable and principled outcome would have been a denial of defendant's motions.

Moreover, even if the circuit court did not intend to imply that defendant had failed to make the necessary showing under MCR 6.201(C)(2), our review of the circuit court record establishes that defendant, indeed, failed to sufficiently demonstrate that the records would likely contain materials necessary to his defense. Defendant admitted as much when he stated, "Have there been any statements at all that are directly relevant to the statements in this case? And there's no way we can know that until we look at the records." Through his repeated references to *possibly* finding statements of the alleged victims that *might have been* inconsistent with their testimony at the preliminary examination, defendant revealed that his desire to examine the records was nothing more than a "fishing expedition." See *Stanaway*, 446 Mich at 680-681. Generalized assertions of this type are quite simply insufficient to establish the threshold showing of a reasonable probability that the records will contain information material to the defense.[3] *Id.* at 681-682.

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[2] *Random House Webster's College Dictionary* (1997).

[3] Defendant also argues that his request rises beyond a generalized inquiry because the children had previously made a false accusation of sexual abuse against their grandmother. If that were so, it could affect the *Stanaway* analysis. However, the Child Protective Services records cited in defendant's brief wholly contradict this contention. Instead, they reveal that when there was an

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Lastly, we are not persuaded by defendant's "silence speaks volumes" argument. Our Supreme Court has already rejected such an argument in this context. *Stanaway*, 446 Mich at 681 n 41 (observing that "negative" evidence, such as "[s]ilence," "would not prove that the offense did not occur").

We conclude that defendant failed to meet his burden under MCR 6.201(C)(2) and *Stanaway* because he did not provide any specific, articulable facts to establish a reasonable probability that the privileged records were likely to contain material information necessary to his defense.

Reversed and remanded. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane M. Beckering

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allegation of sexual abuse against the grandmother, it was made by a third party and that when the children were interviewed, they each stated that they had not been sexually abused.