STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NEAL HAVILAND ERICKSON,

Defendant-Appellant.

FOR PUBLICATION
November 18, 2021
9:00 a.m.

No. 355943
Ogemaw Circuit Court
LC No. 13-004013-FC

Before: MURRAY, C.J., and MARKEY and RIORDAN, JJ.

MURRAY, C.J.

In this interlocutory appeal, defendant, Neal Haviland Erickson, appeals by leave granted[1] an order granting in part and denying in part his motion to exclude certain evidence from trial. We affirm, and remand for further proceedings.

I. FACTS

In 2013, the prosecutor charged defendant with three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b), and one count each of distributing sexually explicit material to a minor, MCL 722.675, possession of sexually abusive material, MCL 750.145c(4), and using a computer to commit a crime, MCL 752.796. Defendant, then a middle-school teacher, allegedly exchanged photographs and had sex with a male student while the student was in the eighth grade and during the summer before the student entered the ninth grade. On May 8, 2013, defendant pleaded guilty to one count of CSC-I in exchange for the prosecution dropping the remaining counts. On July 10, 2013, the circuit court sentenced him to 15 to 30 years in prison.

After various appellate proceedings not relevant to this appeal, in January 2019, defendant filed a motion for relief from judgment, arguing, amongst other things, that he must be allowed to withdraw his guilty plea because the trial judge that took his plea had not informed defendant that

[1] *People v Erickson*, unpublished order of the Court of Appeals, entered June 29, 2021 (Docket No. 355943).

he would be subject to lifetime electronic monitoring. The circuit court agreed with this argument, granted the motion, and set the case for trial.

By way of a motion in limine dated June 10, 2020, defendant argued that statements he made at sentencing and statements he made in connection with the presentence-investigation report (PSIR) should be excluded from trial because of their link to the vacated guilty plea, which was itself inadmissible under MRE 410, as conceded by the prosecutor. Defense counsel argued at the motion hearing that sentencing "is part and parcel of the plea." Counsel argued that defendant's plea was withdrawn, meaning that he had not been convicted of anything, and contended that statements made in connection with sentencing should not be admitted because they would never have been made without a conviction.[2] Defendant also argued that pursuant to MCL 791.229, statements set forth in a PSIR are privileged.

The prosecutor argued that *People v Cowhy* (*After Remand*), 330 Mich App 452; 948 NW2d 632 (2019), belied defendant's assertion that the evidence must be excluded from trial. The prosecutor stated, "[I]f you look at the plain, unambiguous language of [MRE] 410 there is no language that extends [the prohibition of introducing plea evidence] beyond the plea itself, and that's what the [*Cowhy* Court] held." The prosecutor also argued, with regard to the PSIR evidence, that the need for impeachment outweighed any confidentiality conferred by way of MCL 791.229.

The circuit court concluded that MRE 410 did not bar admission of the challenged statements, stating that *Cowhy* and a case cited in *Cowhy—People v Dunn*, 446 Mich 409; 521 NW2d 255 (1994)—were on point. It also held that statements made in connection with the PSIR were confidential but ultimately admitted all the evidence in question—but only for impeachment purposes.

We now turn to defendant's challenges to the trial court's decision.

II. STANDARDS OF REVIEW

We review for an abuse of discretion a trial court's ruling regarding a motion to exclude evidence. *Cowhy*, 330 Mich App at 461. "The trial court abuses its discretion when its decision falls outside the range of principled outcomes or when it erroneously interprets or applies the law."

[2] At sentencing, defendant had stated, in part, "And more often than not, the dozens and dozens of times that [the student] was at my house, nothing inappropriate happened. But in the incident that I pled guilty to, I am guilty of mutual oral sex." Defendant added, "I'm guilty of this terrible, terrible decision." The PSIR includes a letter defendant wrote to the court. In this letter, defendant stated that he and the student had watched pornographic videos together, became aroused, and fondled each other's genitals. He added, "In these few inappropriate encounters we never ended up engaging in more than mutual oral sex." Defendant said that there had been four or five sexual encounters. He claimed that the student had sent him two photographs that the student had taken of the student's penis, but that he immediately deleted them. Defendant stated that, eventually, the two stopped engaging in sexual activity and the relationship became one of a mentor and mentee.

People v Lane, 308 Mich App 38, 51; 862 NW2d 446 (2014). "Whether a confidential communication is privileged is reviewed de novo." *Cowhy*, 330 Mich App at 461.

III. MRE 410 AS INTERPRETED IN *COWHY*

MRE 410 states:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) A plea of guilty which was later withdrawn;
>
> (2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
>
> (3) Any statement made in the course of any proceedings under MCR 6.302[3] or comparable state or federal procedure regarding either of the foregoing pleas; or
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Pursuant to the unambiguous language of MRE 410 as reinforced by *Cowhy*, the trial court's conclusions were correct. First, MRE 410 is limited to precluding admission of statements made to a prosecuting attorney in the course of plea proceedings. Here, the trial court did not admit for impeachment purposes any such statements, as the statements were all made after the plea agreement was finalized. Defendant's argument is foreclosed by the plain language of the rule of evidence.

Second, *Cowhy* reinforces this conclusion. The defendant in *Cowhy* pleaded guilty to multiple counts of second and third-degree criminal sexual conduct and first-degree child abuse, as well as to one count of accosting a child for immoral purposes. *Cowhy*, 330 Mich App at 457. After his plea was entered, but before the sentence was imposed, the parties stipulated that the

[3] This rule is inapplicable because the parties are not arguing about any statements made during the plea hearing itself.

defendant "would submit to 'a risk assessment/evaluation . . . for the purposes of sentencing.' " *Id*. at 458 (ellipses in original). The defendant met with a social worker in accordance with this stipulation and admitted to abusing the children named in the information. *Id*. After sentencing, the defendant filed a motion to withdraw his guilty plea. *Id*. The defendant attached to that motion an affidavit in which he stated, in part, that all of the sexual incidents to which he pleaded guilty " 'occurred when he was between the ages of 13 and 15, or possibly right after he turned 16.' " *Id*. at 458-459. The trial court initially denied the motion to withdraw the plea, but the defendant was allowed to withdraw it after various appellate proceedings. *Id*. at 459-460.

Before trial, the prosecutor filed a motion to admit the statements defendant made in the affidavit attached to the motion to withdraw the plea. *Id*. at 460. In addition, the defendant filed motions to exclude testimony by his initial attorney and by the social worker who performed his risk assessment/evaluation. *Id*. The trial court concluded that all of this evidence was precluded by MRE 410. *Id*.

This Court held that none of the evidence was precluded by MRE 410(1), (2), or (3), because "the prosecution is not attempting to introduce evidence of a guilty plea that was later withdrawn, a plea of nolo contendere, or a statement made in the course of a proceeding under MCR 6.302 or a comparable state of [sic] federal procedure." *Id*. at 463. As for whether the challenged statements were "made in the course of plea discussions for purposes of MRE 410(4)," the *Cowhy* Court explained that courts should apply the "two-pronged test adopted in" *Dunn*, 446 at 415. *Cowhy*, 330 Mich App at 463. "In *Dunn*, our Supreme Court held that MRE 410 applies when (1) the defendant has an actual subjective expectation to negotiate a plea at the time of the discussion and (2) that expectation is reasonable given the totality of the objective circumstances." *People v Smart*, 304 Mich App 244, 249; 850 NW2d 579 (2014) (quotation marks and citations omitted).

Applying the test set forth by the *Dunn* Court, the *Cowhy* Court concluded that the circuit court erred by excluding statements made to the social worker under MRE 410. *Cowhy*, 330 Mich App at 465-466. The Court concluded that the defendant did not have an actual subjective expectation to negotiate a plea when he spoke to the social worker and that even if he did, "his expectation was not reasonable under the totality of the circumstances," *id*. at 465, as the plea had already been entered when the defendant spoke with the social worker. *Id*. The Court mentioned the stipulation for the risk assessment/evaluation and stated:

> [The social worker's] report was subsequently submitted to the court prior to sentencing, and it focused on sentencing issues, i.e., Cowhy's rehabilitative potential. Cowhy used the report at sentencing as part of his argument in favor of a more lenient sentence. Therefore, . . . Cowhy's expectation at the time he made the statements was to receive a more lenient sentence, not to receive a better plea agreement with the prosecution. The trial court abused its discretion by excluding the statements to [the social worker] under MRE 410. [*Id*. at 466.]

With regard to the statements made in the affidavit, the Court stated that the defendant's "expectation when he made the inculpatory statements in the affidavit was to have his plea withdrawn." *Id*. at 466. The Court stated:

> Furthermore, even if Cowhy had a subjective expectation to negotiate a better plea after withdrawing his original plea, there is nothing on the record indicating that such a belief was reasonable given the totality of the objective circumstances. Moreover, . . . Cowhy was not leveraging his inculpatory statements against a more favorable plea agreement with the prosecution. He was not, in fact, engaged in any discussions with a lawyer for the prosecuting authority, or anyone acting at the direction of the prosecuting authority, when he made the statements. See MRE 410(4) (barring statements "made in the course of plea discussions with an attorney for the prosecuting authority")[.] [*Id*. at 466 (emphasis omitted).]

The Court concluded that "the trial court abused its discretion by excluding the statements in the affidavit under MRE 410." *Id*.

Concerning the statements made to defense counsel, the *Cowhy* Court stated:

> Finally, the trial court abused its discretion by excluding statements Cowhy made to [the lawyer] under MRE 410. Based on the information before this Court, it is apparent that the statements were made by Cowhy to [the lawyer] before Cowhy entered into a plea agreement with the prosecution because they were used to inform [the lawyer's] advice to Cowhy regarding the plea. Therefore, the statements were not made in the course of plea negotiations with a lawyer for the prosecuting authority or at the direction of a lawyer for the prosecuting authority. And, although the information may have been used by [the lawyer] to advise Cowhy regarding his legal options, there is nothing in the record to suggest that when Cowhy made the statements he had a subjective expectation to negotiate a plea with the prosecuting authority or that such an expectation would be reasonable under the totality of the circumstances. Accordingly, on this record, we conclude that the statements between Cowhy and [the lawyer] were not protected by MRE 410. [*Id*. at 466-467 (citation omitted).]

Here, at defendant's May 8, 2013, plea hearing, the court asked defendant if he understood that there was "no agreement as to the sentence," that the court had not yet scored the sentencing guidelines, and that the court had not "talked to probation/parole nor seen a report so [the court does not] know what the sentencing [will] be." Defendant remained steadfast in wanting the court to accept the plea, which the court did.

The statements in the PSIR are contained in a letter dated June 13, 2013. The inculpatory statements in the letter, including a description of the sexual activity at issue and an acknowledgment of defendant's responsibility, were made in the context of an extended explanation regarding why defendant should be incarcerated "for the least amount of time" the circuit court was "legally able" to impose. Defendant's statements at sentencing were also made after entry of the plea and were similarly made in the context of an extended explanation regarding why the court should be as lenient as possible when imposing a sentence. Defendant stated at the sentencing hearing, "I'm begging the [c]ourt to consider my reasoning for sentencing me below the guidelines or consider some sort of alternative to longer incarceration—county time or time

served, sent home with a tether, super-restrictive and long probations or restrictions and conditions anybody can think of, anything that gets me home to my family as soon as possible."

Pursuant to *Dunn*, as discussed and applied in *Cowhy*, the circuit court did not err by concluding that the inculpatory statements are not barred by MRE 410. There is nothing in the record to indicate that defendant believed he was actively negotiating a plea agreement at the time the statements were made. The plea agreement had, in fact, already been consummated. At this later point, defendant was attempting to moderate whatever sentence was to be imposed, but the plea agreement did not include any deal concerning sentencing. And even if defendant did believe he was still negotiating the plea, that belief was not objectively reasonable given the totality of the circumstances. Indeed, the terms of the plea agreement were set forth at the plea hearing, and the court made very clear to defendant that the plea did not, in fact, encompass sentencing.

Defendant's attempts to distinguish *Cowhy* are not convincing. With respect to his argument that the PSIR that was formulated and the sentencing that occurred were integral parts of the plea process, whereas the affidavit and the statements to the attorney in *Cowhy* were not related at all to the plea process, it is enough to simply reiterate that defendant's plea agreement did not, in fact, encompass sentencing. Also, and significantly, the *Cowhy* Court cited favorably to *United States v Marks*, 209 F3d 577, 582 (CA 6, 2000), where the court stated that "statements made after a plea agreement is finalized are not made in the course of plea discussions." *Marks*, 209 F 3d at 582 (quotation marks and citations omitted). As we have repeatedly noted, the statements at issue occurred after finalization of the plea.

Defendant next attempts to distinguish the statements made to the social worker in *Cowhy* by arguing that they were contained in a "voluntary mitigation document" that a defendant can submit to try to lessen a sentence. But the letter in the PSIR and the statements made at sentencing were of the same nature—i.e., they were voluntary statements made in an attempt to lessen a sentence. And again, they were made after finalization of the plea. *Id*.[4]

Cowhy addressed the issue of MRE 410 head-on and in detail, and we are bound by *Cowhy*. In addition, the analysis set forth in *Cowhy* accords with the language of MRE 410 itself and with *Dunn*.

IV. DISTINGUISHABLE CASELAW

Defendant cites *Carr v Midland Co Concealed Weapons Licensing Bd*, 259 Mich App 428; 674 NW2d 709 (2003), for the proposition that when a guilty plea is vacated, everything that transpired pursuant to it is a nullity. *Carr* dealt with whether "a person who successfully completes probation under MCL 333.7411 and had the felony charge dismissed under that statutory provision is deemed to have been convicted of a felony under the concealed pistol licensing act . . . by virtue

[4] Defendant contends that the prosecutor's failure to seek admission of certain statements in *Cowhy* means that the *Cowhy* Court's holding must be viewed as not applying to statements made at sentencing. Defendant's argument is neither logical nor persuasive. The reasons for the prosecutor's alleged failure to seek admission of these statements are unknown, and had no bearing on the issues brought before the *Cowhy* Court.

of the charge dismissed under MCL 333.7411." *Id*. at 429-430. The *Carr* Court cited language from *People v George*, 69 Mich App 403, 407; 245 NW2d 65 (1976), where the Court stated that "when a guilty plea is vacated it is a nullity. That means that everything that transpired pursuant to the guilty plea is a nullity." Crucially, however, *George* dealt with the prosecutor's attempt to introduce statements made *at the plea hearing itself*. *Id*. at 404-405. The Court concluded that facts elicited during a subsequently vacated "plea taking" were inadmissible at a subsequent trial because the "plea taking [was] . . . a nullity." *Id*. at 404-408. The Court, citing "Uniform Rules of Evidence, rule 410," stated that its holding was "consistent with modern thought on the topic." *Id*. at 408. Although *George* foreshadowed the adoption of MRE 410, here, the prosecutor is not seeking to introduce any statements from the plea hearing and the plain language of MRE 410 controls.

The non-binding decisions cited by defendant are not persuasive, or point to our conclusion. For example, in *State v Jackson*, 325 NW2d 819 (Minn, 1982), the trial court "accepted the plea *subject to a presentence investigation*." *Id*. at 820 (emphasis added). The court stated:

> Both the in-court and the out-of-court statements are integral parts of the plea proceedings and cannot realistically be separated. Here the out-of-court statements were made pursuant to a presentence investigation ordered by the trial court, in which the defendant was expected to cooperate, and which statements were to be used in determining whether or not the court would accept the plea and plea agreement. [*Id*. at 822.]

Also distinguishable is *State v Amidon*, 185 Vt 1; 2008 VT 122; 967 A3d 1126, because in that case the plea agreement encompassed sentencing. *Id*. at 2. The court noted that the presentence investigation was a part of the plea procedure. *Id*. at 11. Likewise, in *Gillum v State*, 681 P2d 87 (Okla Crim App, 1984), the statements given to investigators were, once again, a part of the actual plea procedure and were given "in the reasonable subjective belief that they were part of the plea bargain." *Id*. at 88-89. None of the foreign decisions cited by defendant provide an analysis of facts similar to those present here.

V. MCL 791.229

With regard to the statements in the PSIR, defendant argues that MCL 791.229 bars their admission. MCL 791.229 states:

> Except as otherwise provided by law, all records and reports of investigations made by a probation officer, and all case histories of probationers shall be privileged or confidential communications not open to public inspection. Judges and probation officers shall have access to the records, reports, and case histories. The probation officer, the assistant director of probation, or the assistant director's representative shall permit the attorney general, the auditor general, and law enforcement agencies to have access to the records, reports, and case histories and shall permit designated representatives of a private contractor that operates a facility or institution that houses prisoners under the jurisdiction of the department to have access to the records, reports, and case histories pertaining to prisoners

> assigned to that facility. The relation of confidence between the probation officer and probationer or defendant under investigation shall remain inviolate.

The prosecutor contends that this statute does not apply to defendant's statements in the PSIR and that the rest of the report could be redacted. But the letter containing defendant's statements is set forth in a section of the PSIR labeled, in bold typeface, "Defendant's Description of the Offense."[5] Clearly, even though the statements are conveyed in the form of a letter to the court by defendant, they are an integral part of the report. There is no rational basis for viewing the statements set forth in this section of the report differently from the information set forth in other sections of the report. In addition, *Cowhy* clarifies that admissibility in connection with MRE 410 does not "trump" privileges. The *Cowhy* Court concluded that the statements to the social worker were inadmissible because of the psychologist-patient privilege and the statements to the attorney were inadmissible because of the attorney-client privilege. *Cowhy*, 330 Mich App at 472, 474.

Citing *People v Hooper (After Remand)*, 157 Mich App 669; 403 NW2d 605 (1987), the prosecutor contends that the PSIR evidence was available not just for impeachment but also for the prosecutor's case-in-chief. However, regarding the PSIR information *and* the statements made at the sentencing hearing,[6] the prosecutor has not filed a cross-appeal. As stated in *Bank of America, NA v Fidelity Nat Title Ins Co*, 316 Mich App 480, 518; 892 NW2d 467 (2016), "[a]lthough an appellee need not file a cross-appeal in order to assert an alternative ground for affirmance, an appellee that has not sought to cross appeal cannot obtain a decision more favorable than was rendered by the lower tribunal." (Quotation marks and citation omitted.) Hence, the arguments that the contested evidence be admitted as part of the prosecutor's case-in-chief are not properly before us.

VI. CONCLUSION

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Michael J. Riordan

[5] Other sections include "Agent's Description of the Offense" and "Victim's Impact Statement."

[6] The prosecutor argues that these statements, too, should be admissible in the prosecutor's case-in-chief.