

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERE WENDELL CLARK,

Defendant-Appellant.

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UNPUBLISHED  
January 15, 2013

No. 307694  
Antrim Circuit Court  
LC No. 2011-004424-FC

Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Defendant Jere Clark appeals as of right his convictions, following a jury trial, of four counts of criminal sexual conduct in the first degree (CSC I) for sexual contact with a person related by blood or affinity,<sup>1</sup> one count of CSC I for sexual contact with a person under the age of 13,<sup>2</sup> and five counts criminal sexual conduct in the third degree (CSC III) for sexual contact with a person at least 13 but less than 16 years old.<sup>3</sup> We affirm.

**I. FACTS**

The prosecution charged Clark with sexually assaulting his adopted granddaughter when she was between the ages of 13 and 21, and sexually assaulting the adopted daughter of one of Clark's former foster children when she was between the ages of 12 and 18.

Both complainants were placed in foster care after relatives sexually abused them. In his pretrial materials, Clark indicated that he wanted to introduce evidence of the complainants' childhood medical diagnoses and treatments, and moved the trial court for an in camera review of their medical and counseling records. Clark attached the affidavits of the complainants' mothers to his materials, in which the mothers indicated that they were aware that the complainants were diagnosed with post-traumatic stress disorder (PTSD) as children, and that

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<sup>1</sup> MCL 750.520b(1)(b)(ii).

<sup>2</sup> MCL 750.520b(1)(a).

<sup>3</sup> MCL 750.520d(1)(a).

their symptoms improved during the time period in which the complainants alleged that Clark was sexually abusing them. Clark argued that the information was (1) relevant to show that the abuse did not happen because an improvement in their diagnoses inconsistent with their accusations of ongoing sexual assaults, (2) necessary for his expert witnesses' testimonies, and (3) necessary to show that the complainants did not mention during their treatments that he was sexually abusing them.

The prosecution argued that the complainants' medical records were privileged and not necessary to Clark's defense because he could prove these points through direct and cross examinations. The trial court ultimately denied Clark's motion. The trial court reasoned that Clark could call the complainants' mothers to establish the necessary foundation for his expert's testimony, and that the affidavits did not sufficiently include articulable facts. Clark argued that he could not call the complainants' mothers because they were the subject of ongoing neglect proceedings. After Clark and the prosecution did not reach an agreement to limit the scope of the mothers' testimonies, Clark did not call the complainants' mothers or his expert witness at trial.

Clark cross-examined the complainants about their medical diagnoses, histories, and medications. Both complainants testified that they were diagnosed as children with PTSD, that they took several medications, and that their PTSD eventually improved and they stopped taking medications. Both complainants admitted that they did not disclose the ongoing sexual abuse to their counselors or otherwise report the abuse when it was ongoing. A third witness, whose complaints were being prosecuted in a separate case, testified that she could not remember whether she saw a doctor during the time period. Clark also cross-examined the complainants about their motives for testifying, cross-examined the prosecution's expert witness, and called impeachment and exculpatory witnesses.

As stated above, the jury found Clark guilty of ten counts of CSC.

## II. CONFIDENTIALITY OF MEDICAL RECORDS

### A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision to conduct or deny an in camera review of records in a criminal case.<sup>4</sup> The trial court abuses its discretion when its outcome is outside of the reasonable and principled range of outcomes.<sup>5</sup>

### B. LEGAL STANDARDS

Subject to exceptions which do not apply in this case, a patient's communication with her psychiatrist or psychologist about a diagnosis or treatment are privileged and "shall not be

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<sup>4</sup> *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998); see *People v Stanaway*, 446 Mich 643, 682; 521 NW2d 557 (1994).

<sup>5</sup> *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

disclosed in . . . criminal . . . proceedings, unless the patient has waived the privilege . . . .”<sup>6</sup> However, a patient’s privilege may conflict with a defendant’s due process rights to a fair trial in a criminal case.<sup>7</sup> If the defendant shows “a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense,” then the trial court must conduct an in camera inspection of the patient’s medical records.<sup>8</sup>

The defendant must have a specific justification to overcome the patient’s privilege.<sup>9</sup> The defendant must assert “particularized facts [to] support that an in camera review of the victim’s counseling records is required,” rather than a general need for impeachment material.<sup>10</sup> Further, the records must be “material” to the defense, which means that the defendant would not receive a fair trial without access to the evidence.<sup>11</sup>

### C. APPLYING THE STANDARDS

The trial court refused to conduct an in camera review of the complainants’ medical records because it ruled Clark did not make the necessary showing to warrant a review of the complainants’ medical records. Clark argues that he sufficiently asserted demonstrable facts in the mothers’ affidavits, and that the medical records contained material necessary for the defense to show that the complainants’ improved PTSD was inconsistent with their accusations. We agree that Clark asserted sufficient demonstrable facts. But we conclude that the trial court did not abuse its discretion when it denied his motion for an in camera review, because he did not show that information in the complainants’ medical records was material information necessary to the defense.

Clark argued that he needed the records to prove that the victims’ symptoms generally improved, and that they did not report to their counselors that he was abusing them, in order to support his theory that the inconsistency between the allegations and the reports made it less likely that Clark abused them during the same period. The factual support he was looking for were medication records, records that the complainants’ symptoms and diagnoses improved, and evidence that the complainants affirmatively stated that they had no problems at home. The prosecution argues that Clark did not identify specific exculpatory statements that the victims would have made, but we do not agree that the Michigan Supreme Court’s decision in *Stanaway* requires that level of particularity. Though this may also have been impeachment material, it

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<sup>6</sup> MCL 330.1750(1).

<sup>7</sup> *Stanaway*, 446 Mich at 679-680.

<sup>8</sup> *Id.* at 678-679; MCR 6.201(C).

<sup>9</sup> *Stanaway*, 446 Mich at 681-682.

<sup>10</sup> *Id.* at 696.

<sup>11</sup> *Fink*, 456 Mich at 458-459.

was likely also relevant to the truth or falsity of the claims themselves.<sup>12</sup> Thus, we agree that Clark adequately specified the information that he sought in the complainants' medical records, and that he was not making a blanket request for impeachment material.

However, we conclude that Clark has not shown that the trial court abused its discretion because he did not demonstrate that the records were material information necessary to the defense. We do not think that Clark's lack of access to the medical records undermined the jury's verdict. Evidence is material to the defense only if the defendant's lack of access to the records undermined the verdict, meaning that with access to the records it is reasonably probable that the result would have been different.<sup>13</sup> Evidence is less likely to be material if it is not significant new information, or if another witness testified about the information at trial.<sup>14</sup>

Here, the complainants themselves testified that they were diagnosed with PTSD, their symptoms eventually improved, and they did not tell their counselors that Clark was sexually abusing them. And the prosecution's expert admitted during cross-examination that it is less likely that a child who previously suffered from PTSD will recover if there is ongoing sexual abuse occurring. Even if the complainants' medical records also contained this information, the trial court's ruling did not prevent Clark from presenting evidence that the complainants' improvements were inconsistent with their accusations. Further, Clark's supporting affidavits indicated that the complainants' mothers had personal knowledge that the complainants' were diagnosed with PTSD and that their symptoms improved. The mothers also could have testified about this information.

Because the medical records did not contain significant new information, and Clark was able to elicit the information he sought on cross-examinations, we are not convinced that access to the complainants' medical records would have been reasonably probable to achieve a different result for Clark. We conclude that the trial court did not abuse its discretion because its ruling that Clark did not make the necessary showing to warrant an in camera review was not an outcome outside of the range of reasonable and principled outcomes.

We affirm.

/s/ William C. Whitbeck  
/s/ Henry William Saad  
/s/ Douglas B. Shapiro

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<sup>12</sup> See *Stanaway*, 446 Mich at 682.

<sup>13</sup> *Fink*, 456 Mich at 459.

<sup>14</sup> *Id.* at 460.