

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN RICHARD,

Defendant-Appellant.

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UNPUBLISHED

June 24, 2014

No. 315267

Grand Traverse Circuit Court

LC No. 13-011510-FH

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by leave granted a trial court order denying his pretrial motion to suppress the proffered testimony of Matthew Herron, a Baptist minister. Defendant was charged with first-degree criminal sexual conduct, second offense. MCL 750.520b(1)(a); MCL 750.520b(2)(b); MCL 750.520b(2)(c) (victim under 13 years of age). Defendant, claiming a clergy-penitent<sup>1</sup> privilege, moved to suppress Herron's testimony concerning statements defendant made to Herron wherein defendant admitted to sexually assaulting the victim. Following the trial court's denial of his motion, this Court granted defendant's interlocutory application for leave to appeal. *People v Richard*, unpublished order of the Court of Appeals, entered May 24, 2013 (Docket No. 315267). For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Herron is a pastor at the Immanuel Baptist Church. According to Herron, on January 6, 2013, defendant approached him at the church following the morning service and asked to speak about an urgent matter. Defendant and Herron stepped into a small room and shut the door. Defendant then told Herron that he "fell." When Herron asked for clarification, defendant stated that he had abused a minor at the church that morning by performing fellatio on the minor in the church bathroom. Herron testified that defendant told him he knew the minor's name and that the minor attended church that morning with his grandfather. Defendant indicated that he

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<sup>1</sup> In *People v Bragg*, 296 Mich App 433, 436 n 1; 824 NW2d 170 (2012), this Court stated that the privilege is "known by many names, including the 'priest-penitent privilege' or the 'cleric-communicant privilege.'"

wanted Herron to contact the grandfather so that “we [can] talk to the family[,] I would like a second chance.” Herron described “[t]he nature of [defendant’s] conversation” as designed “to get the family to come in the room so he could talk to them . . . . For a second chance.”

Because Herron had to attend to pressing church business, his conversation with defendant lasted only two minutes. Herron then instructed defendant to wait in a nearby balcony. When Herron completed his business, he spoke with two church leaders, one of whom contacted police, while the other contacted the victim’s family. An investigation ensued and defendant was subsequently arrested and charged as stated above.

Defendant filed a pretrial motion to suppress Herron’s proffered testimony regarding the incriminating statements he made to Herron. Defendant argued that his communication with Herron was privileged under the clergy-penitent privilege. In an affidavit attached to the motion, defendant averred that he specifically asked to speak to Herron in private, that his purpose in seeking out Herron was to “speak to him as a pastor,” and that he wished to seek forgiveness from the minor’s family through Herron’s counseling.

At a suppression hearing, Herron testified that the Baptist Church believes that every Christian has a personal relationship with God, with Jesus Christ as the only mediator. Herron explained that he did not consider the communication with defendant confidential and that, although Baptist doctrine considers certain communications to be confidential, his communication with defendant did not trigger that confidentiality. Herron testified that the nature of defendant’s statements were focused on locating the victim’s family so defendant could talk to them, and that defendant neither asked to speak to him in confidence nor used the words, “forgiveness,” “sin,” or “confession” during the conversation. Herron also testified that defendant told him he did not want the police called and did not want to go back to jail. Herron admitted, however, that counseling fell within his role as a Baptist minister. Communications during such counseling sessions were kept confidential, unless a crime such as child or spousal abuse was reported, Herron testified.

Following Herron’s testimony, the trial court denied defendant’s motion, finding in pertinent part:

What is important, I think, in the connection of recognizing the privilege is what is the reasonable expectation of privacy, and that can’t be divorced from an understanding of church doctrine. The only testimony here with regard to the relationship of church doctrine to this case is the primacy that the Baptist faith puts on protecting children and apparently abused spouses, in other words criminal behavior. And, within the context of the Baptist faith there is no reasonable expectation that a disclosure relating to beating ones [sic] spouse or abusing children physically or sexually would not be reported. The Baptist faith doesn’t offer attendees or members any reasonable expectation that this kind of behavior is not going to be reported. In fact, it is apparently fundamental to the Baptist faith, as apparently it is to other non-Catholic but Christian faiths, that the relationship is directly with God . . . . In the context of communication made through a priest in a confessional, this wouldn’t be hard, it would be in the sense that if the priest thought he was doing the right thing and behaved as had occurred

here we would know this had happened but we couldn't use the evidence. That's not the case. We have a communication not seeking a forgiveness, there is no reason to seek forgiveness from a pastor, that's not how it's done in the Baptist faith. And, inherently, the purpose of the communication is to locate the child's grandfather, the defendant doesn't know the name, so it's to locate the child's grandfather, perhaps the pastor would have acted as an intermediary. This is essentially a race to get to grandpa before the child discloses and grandpa goes to the police in an effort to cut grandpa off at the police and offer a second chance . . . . [T]his wasn't a communication that was made to enable the pastor to serve as a member of the clergy, but rather he was a readily available source of information regarding the identity of the child so that the defendant could get to the family first. This wasn't a request for forgiveness, it wasn't a request for guidance, there wasn't even a request for confidentiality or privacy.

## II. STANDARD OF REVIEW

We review a trial court's findings of fact in a suppression hearing for clear error, while the ultimate issue on a motion to suppress is reviewed de novo. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008) (quotation and citation omitted). The clear error standard is highly deferential "because the trial court is usually in a superior position to assess the evidence." *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999).

## III. THE CLERGY-PENITENT PRIVILEGE

This Court recently addressed the scope of the clergy-penitent privilege as it applies to pastoral testimony of congregants' statements. In *People v Bragg*, 296 Mich App 433, 437-438; 824 NW2d 170 (2012), the defendant's pastor was contacted by a family claiming that the defendant molested their young children two years prior. The pastor telephoned the defendant's mother and asked her to bring the defendant to church for a meeting. *Id.* at 438. During the meeting, the pastor elicited a confession. *Id.* This Court affirmed the circuit court's finding that the clergy-penitent privilege precluded the introduction of the pastor's testimony about the defendant's confession at trial. *Id.* at 469.

Prior to beginning its analysis the *Bragg* Court first noted that privileges must be strictly construed because they subvert fact-finding by shielding potentially reliable evidence in an effort to foster certain relationships. *Id.* at 445-446. Further, this Court made clear that, to avoid improper inquiry into religious doctrine, penitents of all denominations are eligible to claim the clergy-penitent privilege with respect to their communications with members of the clergy. *Id.* at 448-449.

With respect to the substance of the privilege, this Court relied on MCL 767.5a(2) and MCL 600.2156, which provides in pertinent part as follows:

Any communications between . . . members of the clergy and the members of their respective churches . . . are hereby declared to be privileged and confidential when those communications were necessary to enable the . . . members of the clergy . . . to serve as such . . . member of the clergy[.] [MCL 767.5a(2).]

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No minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination. [MCL 600.2156.]

Reading the statutes together, this Court determined that MCL 767.5a(2) creates an evidentiary privilege that precludes the incriminatory use of “any communication made by a congregant to his clergy when that communication was ‘necessary to enable’ the cleric ‘to serve as such’ cleric.” *Bragg*, 296 Mich App at 453. A communication is “necessary to enable a cleric to serve as a cleric” when the communication: (1) “serves a religious function, such as providing guidance, counseling, forgiveness, or discipline,” (2) is conveyed to the cleric in his or her capacity as a spiritual leader within the denomination, and (3) considered privileged under the discipline or practices of the denomination. *Id.* at 454-462. We proceed by discussing each of these factors in more detail.

#### 1. SERVES A RELIGIOUS FUNCTION

In defining the scope of religious functions covered by the privilege, the *Bragg* Court relied on *Cox v Miller*, 296 F3d 89 (CA 2, 2002).<sup>2</sup> In *Cox*, the defendant claimed that statements made to his Alcoholics Anonymous group were privileged because they were made to admit “to God, to [himself], and to another human being the exact nature of [his] wrongs.” *Id.* at 91. The court assumed that AA qualified as a “religion,” but rejected the defendant’s argument, finding that the defendant’s statements were made for secular purposes. *Id.* at 110. The court held that a communication must be made in confidence and for the purpose of obtaining spiritual guidance in order to be privileged, or stated differently, the conversation is not privileged if made “with wholly secular purposes solely because one of the parties to the conversation happens to be a religious minister.” *Id.* at 106.

The *Bragg* Court also relied upon *Scott v Hammock*, 870 P2d 947, 956 (Utah, 1994), in which the “court acknowledged that a cleric, serving in the role of a cleric, must engage in many communications that would not necessarily be deemed a ‘confession’ but should nevertheless fall within the privilege.” *Bragg*, 296 Mich App at 456. Rather, a member of the clergy may be

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<sup>2</sup> Although cases from federal jurisdictions are not binding on this Court, they may be considered persuasive authority. *People v Holtzmann*, 234 Mich App 166, 178; 593 NW2d 617 (1999).

required to hold privileged many communications undertaken in “confidential counsel and advise.” *Id.*

Applying the same reasoning, this Court in *Bragg* found that the communication between the defendant and his pastor served a religious function because “it enabled [the minister] to provide guidance, counseling, forgiveness, and discipline to [the] defendant.” *Id.* at 462. The defendant’s pastor, motivated by a desire to help the defendant, testified that he encouraged the defendant to own up to his wrongdoing because the first step to “get[ting] some help” was to admit his actions. *Id.* The pastor admitted to consoling and counseling the defendant as “a loving broken hearted minister.” *Id.* When the meeting concluded, the defendant and his pastor prayed together, and the pastor “asked God to—to help us through this and help [defendant].” *Id.* at 441.

## 2. CONVEYED TO A CLERIC IN HIS OR HER CAPACITY AS A SPIRITUAL LEADER

The *Bragg* Court explained that a congregant speaks to a cleric in his or her “professional character” as a spiritual leader when he or she does so “as part of the cleric’s job as a cleric.” *Id.* at 458. However, because members of the clergy may act in many different capacities besides spiritual advisers, “[t]he congregant cannot speak to the cleric in his or her role as a relative, friend, or employer and receive the benefit of the evidentiary privilege.” *Id.* at 458-459.

In *Bragg*, the Court concluded that the defendant spoke to the minister in his role as a cleric. First, the minister specifically testified that he was acting in his religious role during the conversation. *Id.* at 462. Second, had the minister not been the defendant’s pastor, the communication would not have occurred. His “authority as the church pastor” gave him the power “to summon” the defendant to his office for the communication. *Id.* Moreover, no secular topics were interjected into the conversation; the communication was only about the accusation and the defendant’s “sin.” *Id.* at 462-463.

## 3. CONSIDERED PRIVILEGED BY THE DENOMINATION

With respect to the third factor—i.e. whether the communication is considered privileged by the rules or practice of the cleric’s denomination—the *Bragg* Court cautioned that courts should not invoke their own “consideration and determination of a religion’s parameters,” noting that “our secular judiciary must avoid resolving controversies about a religion’s or church’s internal governance or operating procedures.” *Id.* at 459. Rather, courts “are bound to accept the guidance provided by the clerical witness without embarking on a fact-finding mission.” *Id.* In defining this factor, the Court quoted with approval *In re Contempt of Swenson*, 183 Minn 602, 604-605; 237 NW 589 (1931), which held that “[i]t is important that the communication be made in such spirit and within the course of ‘discipline’” of the particular religion, and that the “‘discipline’ enjoins the clergyman to receive the communication or whether it enjoins the other party, if a member of the church, to deliver the communication.” *Bragg*, 296 Mich App at 460-461.

In *Bragg*, this Court found that the defendant’s communication with his pastor was “made in the course of discipline enjoined by the Baptist Church.” *Id.* at 463. The defendant’s pastor acknowledged that under Baptist doctrine, the communication that he revealed to the

victim's family and police was a confidential communication. *Id.* Moreover, the defendant's pastor testified that he was acting pursuant to his duties as a Baptist minister when he provided the defendant with counseling and guidance during the meeting. *Id.*

#### IV. ANALYSIS

Guided by the factors set forth in *Bragg*, we begin our analysis by examining whether Herron's communication with defendant served a religious function such as enabling Herron to provide spiritual guidance, counseling, or forgiveness. *Id.* In this regard, the trial court placed too much emphasis on the lack of confession in the Baptist Church,<sup>3</sup> and seemingly failed to understand that confidential counseling can serve a religious function according to Herron's own testimony.

Here, we cannot be certain of defendant's intent in approaching Herron. As found by the trial court, defendant could simply have been seeking assistance in locating his victim's family. Defendant's request that Herron summon the victim's family so they could reach some sort of resolution also could be interpreted as a request for counseling, a communication that arguably would have served a religious function. In any event, we discern no clear error in the trial court's ultimate resolution of this factual question. In general, questions of intent are factual determinations that are to be inferred from the circumstances by the trier of fact, which in this case, was the trial court. *People v Burns*, 494 Mich 104, 117 n 39; 832 NW2d 738 (2013). Moreover, when credibility is at issue and facts are in dispute, we will generally defer to the trial court since the trial judge is in a superior position to judge the credibility of witnesses that appear before it. *People v Roberts*, 292 Mich App 492, 503-504; 808 NW2d 290 (2011). The trial court found that defendant, viewing Herron as a ready source of information, sought his assistance in locating the victim's grandfather. The court viewed the parties and was in a better position than this Court to assess their credibility and resolve this issue. Moreover, defendant's conversation with Herron was short and, even if defendant intended to seek out spiritual counseling or guidance, the meeting did not reach that point. Unlike in *Bragg*, where the defendant's pastor counseled the defendant as a "loving, broken hearted minister" and immediately prayed with the defendant after the meeting, in this case, Herron and defendant did not engage in religious discussion and they did not pray until later in the day, after the police were contacted.

The second *Bragg* factor concerns whether defendant directed his communication to Herron in Herron's professional capacity as a Baptist minister. Again, defendant's intent in seeking out Herron could be interpreted in this manner. The trial court, however, after hearing the testimony and considering the evidence, rejected that proposition. Herron testified that

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<sup>3</sup> The trial court's finding that "there is no reason to seek forgiveness in the Baptist faith," contrasts with the holding in *Bragg* that penitents of all denominations are eligible to claim the clergy-penitent privilege with respect to their communications with members of the clergy if those communications meet the conditions of the statute. *Bragg*, 296 Mich App at 448-449. Because the trial court did not base its decision on this finding, we find harmless the court's error in this regard. See generally, MCL 769.26; *People v Lukity* 460 Mich 484, 496; 596 NW2d 607 (1999); *People v Smith*, 249 Mich App 728, 730; 643 NW2d 607 (2002).

defendant sought to locate the victim's grandfather and stated that he did not want to return to prison. The trial court interpreted this evidence as showing that defendant merely saw Herron as the most likely person to have knowledge about the whereabouts of the grandfather, whom he feared may contact police if he learned of defendant's actions before defendant could ask for a second chance. Herron did not state that he acted as a pastor during his communication with defendant. Neither Herron nor defendant used religious language and defendant did not explicitly ask for forgiveness or guidance. Therefore, we can find no clear error in the trial court's finding that Herron was not acting in his professional capacity during his brief communication with defendant.

Finally, the third *Bragg* factor concerns whether defendant's communication with Herron is "considered confidential under the discipline or practices" of the Baptist faith. In *Bragg*, the defendant's pastor testified that the defendant's statements were made to him during the course of his duties as a Baptist minister and were confidential communications. *Id.* at 441-442. In contrast, in this case, Herron testified that, although some communications are considered confidential under Baptist doctrine, the circumstances of his meeting with defendant did not trigger that confidentiality. Because the trial court was required to accept Herron's position with respect to Baptist doctrine, and because Herron testified that the communication was not protected under that doctrine, we cannot conclude that the trial court clearly erred in finding that the communication was not considered confidential under the Baptist faith.

## V. CONCLUSION

Given the level of deference afforded to the trial court and the evidence supporting its factual findings in the form of Herron's testimony, we discern no clear error in the trial court's conclusion that the communication between defendant and Herron did not serve a religious function, was not made to Herron in his professional character, and was not considered confidential by the Baptist faith. Given its analysis, the trial court did not err in finding Herron's testimony admissible against defendant. Our disposition of the issue eliminates any need to address whether defendant waived the privilege or whether evidence flowing from the communication should be suppressed under the fruit of the poisonous tree doctrine.

Affirmed.

/s/ Donald S. Owens  
/s/ Stephen L. Borrello  
/s/ Elizabeth L. Gleicher