

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD LAMONT LESTER,

Defendant-Appellant.

UNPUBLISHED

October 31, 2006

No. 264605

Lenawee Circuit Court

LC No. 05-011560-FH

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

WHITBECK, C.J. (*concurring in part and dissenting in part*).

I agree with the majority that defendant Donald Lester's claims are unpreserved and that he improperly relies on documentation that he failed to present to the trial court below. But I disagree that Lester has failed to establish plain error affecting his substantial rights. Therefore, I would remand.

Lester argues that the trial court improperly sentenced him as an habitual offender without confirming that his prior convictions in Ohio were for offenses that would have been felonies under Michigan law.¹ And the majority concludes that, in the absence of any evidence in the record concerning the facts of his Ohio offenses, Lester cannot establish a plain sentencing error. However, it is "the *facts* of the out-of-state crime, rather than the words of title of the out-of-state statute under which the conviction arose, are determinative."² Therefore, I believe that Lester has shown plain error for the very reason that the record is devoid of facts concerning his Ohio offenses. In other words, in my opinion, sentencing Lester as an habitual offender without confirming that his prior convictions in Ohio were for offenses that would have been felonies under Michigan law seriously affects the fairness, integrity, and public reputation of the judicial proceedings.³

¹ See *People v Quintanilla*, 225 Mich App 477, 479; 571 NW2d 228 (1997).

² *Id.* (emphasis added).

³ *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Accordingly, I would remand this case to allow the prosecutor to show that the facts of the Ohio convictions would support a felony conviction in Michigan.⁴

/s/ William C. Whitbeck

⁴ See *Quintanilla, supra* at 479; *People v Drayton*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2003 (Docket No. 241282).