

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MICHAEL PEARSON,

Defendant-Appellant.

UNPUBLISHED

July 17, 2012

No. 305957

Mecosta Circuit Court

LC No. 11-007092-FC

Before: METER, P.J., AND SERVITTO AND STEPHENS, JJ.

PER CURIAM.

Defendant appeals by leave granted from Mecosta Circuit Court Judge Ronald C. Nichols's August 15, 2011 order granting the prosecution's motion to admit certain testimony of Pastor Ron Rickard. Specifically, the trial court found that defendant has waived the clergy-penitent privilege to the extent that he discussed with his ex-wife the content of his communications with Rickard. Defendant then applied for leave to appeal to this Court, and the application was granted. *People v Pearson*, unpublished order of the Court of Appeals, entered December 20, 2011 (Docket No. 305957). We affirm.

Defendant is charged in Mecosta Circuit Court with two counts first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age), and two counts second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years of age). The charges stem from allegations of sexual abuse against defendant made by his ex-wife's daughters. Defendant's ex-wife reported that when she confronted defendant with the allegations of sexual abuse, he told her that he had confessed to Pastor Ron Rickard that he had been tempted by, and had inappropriately touched, her two daughters. Rickard testified that he confirmed to police that defendant had admitted to inappropriate touching and temptation. The prosecution sought to admit the evidence, arguing that the communication was either not privileged because Rickard initiated the conversation or, in the alternative, that the clergy-penitent privilege was waived when defendant spoke to his wife about the conversation he had with Rickard. Defendant responded that while the prosecution may be able to call defendant's ex-wife, it could not call Rickard because the communication is privileged. Defendant also argued that the prosecution misread *People v Lipszinski*, 212 Mich 484; 180 NW2d 617 (1920), citing dicta from the case in support of its position. Further, defendant argued that the issue of whether the privilege existed under the facts of the case was an evidentiary matter to be addressed at trial.

At the close of the hearing on the prosecution's motion to admit Rickard's testimony, the trial court stated the following:

As I started to rule earlier, I believe the privilege lies with [defendant]. I believe that at least to the extent as to the tempting and the inappropriate touching, [defendant] waived his privilege by speaking to a third party, which is his former wife. So, therefore, I'm going to rule that as far as at least to those two issues, the pastor can testify at least those two issues, if indeed that's what he said to her. . . .

Subsequently, the trial court issued an order granting the prosecution's motion to admit, stating that "defendant has waived the priest-penitent privilege to the extent of and for the reasons fully stated on the record."

Defendant argues on appeal that the trial court erred in admitting Rickard's testimony. We disagree. The issue of whether a privilege applies is a mixed question of fact and law. *Centennial Healthcare Mgmt Corp v Dep't of Consumer and Ind Svs*, 254 Mich App 275, 284 657 NW2d 746 (2002). We review the court's evidentiary rulings for an abuse of discretion. *People v Layher*, 464 Mich 756, 761 631 NW2d 281 (2001). Questions of statutory interpretation are also reviewed de novo, *People v Schutter*, 265 Mich App 423, 429; 695 NW2d 360 (2005), as are preliminary questions of law regarding the admissibility of evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The prosecution argues on appeal, as they did at the trial court, that the privilege under MCL 767.5a(2) does not apply in this case because Rickard initiated the conversation in which the statements were made. We disagree. In the recently published case of *People v Bragg*, ___ Mich App ___; ___ NW2d ___ (2012), this Court found that any analysis of the clergy-congregant privilege should focus not on the process, but the purpose, of the communication. In doing so, the *Bragg* Court relied in part on the logic of the New York court in *State v Johnson*, 497 NYSD 539, 115; 115 AD2d 973 (1985), which focused its clergy privilege analysis on whether the communication at issue was for "the purpose of seeking religious counsel, advice, solace, absolution or ministrations." Additionally, the *Bragg* Court agreed with the reasoning of *State v Diercks*, 88 Ill App 3d 1073, 1074; 411 NE2d 97 (1980), when the Illinois court ruled that it is irrelevant who initiated a communication. It is noteworthy that MCL 767.5a cloaks communications of any kind between attorneys, physicians and clergy with their patients, clients and congregants with privilege when the communication is necessary to perform their respective duties. The prosecution fails to offer any case where the courts of this or any other state have determined that communications initiated by physicians or attorneys to their clients or patients are removed from protection based upon who initiated the communication. We reject this argument.

Both parties agree that if the MCL 767.5a(2) privilege applies, it is defendant's privilege to invoke or waive. The trial court had the sworn testimony of defendant's ex-wife that defendant disclosed the contents of his conversation with Rickard to her. Rickard testified at the motion hearing that he had confirmed to the police that defendant had made admissions of temptation and touching. Defendant does not appeal the use of Rickard's testimony at the motion hearing. The trial judge found that the disclosure did in fact occur. The trial court had competent evidence upon which to base that finding and we cannot find that that finding was

outside the range of principled outcomes. Both parties, curiously, rely on *People v Lipszinska*, 212 Mich 484; 180 NW 617 (1920) to support their positions on whether disclosure of privileged communication to a third-party acts a waiver of the privilege. Defendant's argument that the cleric-congregant privilege should be accorded greater protection than the other privileges protected under the statute is unavailing. Defendant offers no case support for elevation of the clergy privilege under MCL 767.5a(2) to a higher status than the others privileges therein. He argues that the common law roots of the clergy privilege support his position. However, as noted in *Bragg*, the privilege arose not from common law, but from canon law regarding the confessional.

Defendant also argues that there is significant probability of abuse if the privilege can be deemed waived based upon the testimony of third parties, particularly those with a motive to lie. Perjury is a possibility in every case and controversy does not justify expanding the narrow constraints of privilege. We find no significance in the fact that there are statutes governing the waiver of the physician privilege while there are none for the waiver of the clergy privilege. We note that there is no statute for the waiver of the attorney client privilege either. Nonetheless, as this Court has previously noted, disclosure of confidences to a third-party results in a waiver of the attorney-client privilege. *Leibel v General Motors Corp*, 250 Mich App 229, 242; 646 NW2d 179 (2002). More importantly, it has been held that disclosure of contents of the confessional to third parties constitutes a waiver of the privilege of the confessional since *Lipszinska*. As the *Bragg* Court stated, "Similarly a congregant may waive the cleric-congregant privilege by 'giving evidence of what took place in the confessions,' *Lipszinska*, 212 Mich at 493, or sharing the content of the otherwise privileged communication with a third party." *Bragg*, slip op at 18. The trial court did not err in finding a waiver through disclosure to a third-party in this case.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens