

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 01-1720-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY D. LEWIS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Timothy D. Lewis appeals from judgments entered after he pled no contest to battery while armed, and guilty to disorderly conduct while armed, contrary to WIS. STAT. §§ 940.19(1), 939.63, and 947.01

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

(1999-2000).² He also appeals from an order denying his postconviction order seeking discovery of the victim's medical records. Lewis claims the trial court erred when it denied his motion and contends that he should be entitled to an *in camera* review of the victim's medical records to confirm information about the injury presented during the sentencing hearing. Because medical records are privileged, and Lewis failed to make a contemporaneous objection during the sentencing, this court affirms.

I. BACKGROUND

¶2 On August 2, 2000, Lewis pulled a knife out of his sock and stabbed the victim, Marlene Brown, in the head and neck. According to the complaint, Brown received a one-inch laceration to the left side of her head which required five stitches to close, and a stab wound to her neck.

¶3 Lewis was charged with substantial battery, a felony. However, he entered into a plea agreement wherein he would plead no contest/guilty to the lesser charges of misdemeanor battery while armed, and disorderly conduct while armed. The trial court accepted the pleas.

¶4 During the sentencing hearing, Lewis made a statement, along with his counsel's statement. Brown and her cousin, Mitchell Baker, each made a statement. Baker advised the court that the doctor said the type of injury inflicted was such that if Brown had not been at the hospital, she may have died. Baker also indicated that Brown was in the hospital for almost a week. In her statement,

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Brown referred to the injuries as serious and the fact that exploratory surgery was required to determine the extent of the damage. The trial court sentenced Lewis to fifteen months on the battery charge, and stayed the maximum sentence on disorderly conduct in favor of probation, to run consecutively.

¶5 Lewis filed a postconviction motion seeking to review Brown's medical records, suggesting that Brown and Mitchell exaggerated the severity of the wounds. The trial court denied the motion. Lewis now appeals.

II. DISCUSSION

¶6 Lewis claims the medical records should be reviewed because they are material to his sentencing and he is entitled to be sentenced on accurate information. This court rejects his claim.

¶7 Medical records are privileged under WIS. STAT. § 905.04(2). There is no exception to this privilege in criminal sentencing proceedings, or in this type of criminal case. *See* WIS. STAT. § 905.04(4) (a-i). Lewis requests that this court create an exception under the circumstances here and follow the principles set forth in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). This court declines his invitation to do so for several reasons.

¶8 First, this criminal case is not the type of case which may require invasion of the privacy rights protected by the medical records privilege.

¶9 Second, Lewis seeks this information postconviction. Although Wisconsin provides no statutory mechanism for the postconviction discovery of scientific evidence, such discovery may be obtained upon a showing of materiality. *State v. O'Brien*, 223 Wis. 2d 303, 319-20, 588 N.W.2d 8 (1999). Sought-after evidence is material; that is, relevant to an issue of consequence,

when there is a reasonable probability that its disclosure would produce a different outcome of the case. *Id.* at 320-21. This court will not set aside the trial court's determination as to the materiality of evidence sought to be discovered in postconviction proceedings unless it is clearly erroneous. *Id.* at 322.

¶10 Here, there is no dispute that Lewis cut Brown in the neck and head with a bladed object. There is no dispute that Brown received injuries to her neck and head that required substantial treatment. The trial court personally observed Brown's scar. A review of the medical records will not change these facts.

¶11 Third, Lewis did not raise his objection contemporaneously to Baker's statement about the doctor's remarks or the length of the hospital stay. He did not seek an adjournment to request the medical records. He was given ample opportunity during sentencing to respond to, clarify, and rebut Brown's and Baker's statements. Lewis chose to proceed to sentencing, and did not raise this issue until his postconviction motion. Accordingly, this court applies waiver.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

