COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0624-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN C. VANNORMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. John VanNorman appeals a judgment convicting him of sexually assaulting an unconscious person. He argues that the trial court erred by denying his motion for an in-camera inspection of the complainant's counseling records. Because VanNorman failed to make the necessary showing of

materiality to support his request for in-camera review of the victim's records, we affirm the judgment.

The victim testified that she went to sleep on the futon in the living room of a friend's apartment some time after 2:00 a.m. while others, including VanNorman were still awake in the apartment. She awoke some time between 4:00 and 5:00 a.m. to discover VanNorman removing his fingers from her vagina. She told VanNorman to give back her clothes and to get out. He complied and left the apartment.

The complainant's friend, William Dawson, testified that he fell asleep about 4:15 to 4:30 a.m. in the same room. He saw or heard nothing except that at some point he thought he dreamed he heard the complainant scream. Another occupant of the apartment, asleep in a different room, testified that at about 6:00 or 6:30 a.m., he heard the complainant yell "No one does that to me. I would not let my own boyfriend do that to me." He heard the complainant yell "get out" and shortly thereafter heard footsteps.

VanNorman denied any sexual contact with the complainant. He testified that he could not sleep comfortably on the floor and left about 4:30 a.m. without touching or speaking to the complainant or anyone else. The principal defense theory was that the complainant may have believed that VanNorman assaulted her, but her belief was not based on a real event. The defense suggested that the complainant's memory was based on a dream, hallucination or delusion induced by her admitted use of alcohol or marijuana. The defense requested the trial court to conduct an in-camera review of the complainant's counseling records on the ground that she may have made exculpatory statements to her counselor.

The trial court denied the motion, finding that VanNorman was unable to point with any particularity to relevant information that might be found in the records.

To be entitled to pretrial in-camera inspection of a witness's privileged material, a defendant must make a preliminary showing that the sought-after evidence is material to his defense. *See* ***State v. Shiffra***, 175 Wis.2d 600, 605, 499 N.W.2d 719, 721 (Ct. App. 1993). Because the trial court made its decision without making findings of fact based on disputed evidence, this court reviews its decision without deference. *See* ***State v. Munoz***, 200 Wis.2d 391, 395-96, 546 N.W.2d 570, 572 (Ct. App. 1996).

The trial court properly denied VanNorman's motion for in-camera inspection because he showed no more than a "mere possibility" that the records would be helpful to his defense and necessary to a fair determination of guilt or innocence. ***Munoz***, 200 Wis.2d at 397-98, 456 N.W.2d at 572-73. VanNorman's motion was a classic "fishing expedition" based solely on the assertion that the complainant likely discussed the assault with her counselor.

In his brief on appeal, VanNorman argues for the first time that his denial of any sexual touching, the absence of corroborating physical evidence or eye-witness testimony and the complainant's admission that she consumed large amounts of intoxicants and some marijuana justify inspection of her private records. These factors do not establish a basis for believing that the counseling records would be helpful to the defense or necessary to a fair determination of guilt or innocence. VanNorman's preliminary showing is not comparable to that in ***Shiffra*** (where the victim suffered from post-traumatic stress disorder stemming from repeated sexual assaults by her stepfather that resulted in possible flashbacks and might render her unable to perceive the difference between consensual and

nonconsensual sexual contact) or ***State v. Speese***, 191 Wis.2d 205, 528 N.W.2d 63, (Ct. App. 1995) rev'd, 199 Wis.2d 597, 545 N.W.2d 510 (1996), (where the teenage victim had undergone psychiatric hospitalization during the time in which the charged assaults were supposedly occurring, yet the hospital staff had not reported the abuse as required by law). Here, the trial court correctly determined that VanNorman's preliminary showing lacked the particularity required to establish that the counseling records were material to his defense.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.