COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1666-CR **Cir. Ct. No. 2008CF2587**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALAN EDWARD SPARKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN FRANKE and JEFFREY A. CONEN, Judges. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Alan Edward Sparks appeals from a judgment of conviction, entered upon a jury's verdict, on one count of first-degree sexual assault of a child under thirteen years of age. Sparks also appeals from an order

partially denying his postconviction motion.[1] The fundamental question in this appeal is whether Sparks has made a sufficient showing to justify the circuit court's *in camera* inspection of the victim's counseling records. We conclude he has not and, therefore, affirm the judgment and order.

BACKGROUND

¶2 On May 18, 2008, Sparks and his daughter, Morgan, picked up her friend, then-twelve-year-old Bryanna C., who was planning to spend the night. After watching movies, baking cookies, and cleaning up, the girls put on their pajamas and got ready to go to bed. They were going to sleep in Sparks's bed because, although there was another bedroom in the house, the bed there was too small for both girls. The girls got into bed with Sparks sitting on the edge, watching television. According to Bryanna, Sparks began rubbing her lower leg, then her thigh, then her vaginal area and buttocks. Bryanna tried various things to stop Sparks—including changing her position, attempting to wake Morgan, and kicking Sparks—but ultimately, she jumped out of bed, grabbed her cell phone, and sent a text message to her sister; Bryanna's sister called their mother, who called 911.

¶3 Shortly before trial, Sparks moved to adjourn so that he could retain an expert. The motion was heard on the first day of trial, at which point counsel also advised, "some information … came up that I think I need to explore a little bit in terms of possibly filing a Shiffra motion."[2] The circuit court denied the

[1] The Honorable John Franke presided over trial and imposed sentence. The Honorable Jeffrey A. Conen denied the postconviction motion.

[2] *See* ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993).

motion to adjourn. At trial, Bryanna's testimony was not wholly consistent with statements she gave to police. For instance, Bryanna did not tell the interviewing officer that she had tried to wake up Morgan. The jury ultimately convicted Sparks. He was sentenced to four years' initial confinement and three years' extended supervision, imposed and stayed in favor of five years' probation.

¶4 Sparks moved for postconviction relief. As relevant to the appeal, Sparks alleged that the victim was in counseling and, thus, there was a question as to whether he was entitled to her treatment records. If so, Sparks argued, the adjournment should have been granted.[3] The court directed the State to respond regarding the counseling records. After the State filed its response and Sparks replied, the court denied the motion, explaining that Sparks had failed to make the necessary evidentiary showing.[4] Sparks appeals.

DISCUSSION

¶5 Due process requires that defendants "be given a meaningful opportunity to present a complete defense." ***State v. Shiffra***, 175 Wis. 2d 600, 605, 499 N.W.2d 719, 721 (Ct. App. 1993). This may mean a defendant is entitled to review a victim's mental health treatment records. *See* ***ibid.*** However, the State has a competing interest in protecting citizens' privileged information. ***State v. Green***, 2002 WI 68, ¶23, 253 Wis. 2d 356, 371, 646 N.W.2d 298, 305. To balance

[3] The postconviction motion also alleged that the adjournment should have been granted so that Sparks could retain an expert. In the order directing the State to respond about the treatment records, the circuit court denied the portion of the motion relating to the expert. Sparks does not challenge that denial on appeal.

[4] Sparks's postconviction motion also alleged, to preserve the issue, ineffective assistance of trial counsel. The circuit court concluded that Sparks had not established that counsel was ineffective.

these interests, ***Shiffra*** concluded that a defendant's access to treatment records could be had by *in camera* review. *See* ***Shiffra***, 175 Wis. 2d at 605, 499 N.W.2d at 721; *see also* ***Green***, 2002 WI 68, ¶23, 253 Wis. 2d at 371–372, 646 N.W.2d at 305.

¶6 The preliminary showing necessary for a defendant to be entitled to *in camera* review of a victim's mental health treatment records "requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." ***Green***, 2002 WI 68, ¶34, 253 Wis. 2d at 381, 646 N.W.2d at 310. Information is necessary to the determination of guilt or innocence "if it 'tends to create a reasonable doubt that might not otherwise exist.'" ***Ibid.*** (citation omitted). In essence, the court must look at existing evidence in light of the request and determine whether the treatment records "will likely contain evidence that is independently probative to the defense." ***Ibid.*** This standard also applies in a postconviction setting. *See* ***State v. Robertson***, 2003 WI App 84, ¶22, 263 Wis. 2d 349, 362–363, 661 N.W.2d 105, 111.

¶7 In his postconviction motion, Sparks alleged that it was "clear from the testimony of the victim that she was in counseling. Therefore, the question is whether or not the Defendant was entitled to these records and if so, the Defendant asserts that the jury trial in this case should have been adjourned[.]" Attached to the motion was an affidavit from counsel "in support of the information that was learned on this issue and how the information is obviously relevant to the relationship to the crime, the focus of the treatment and the fact that this information supports the basis for an *in camera* inspection of the counseling record." Counsel's affidavit, in turn, alleged:

> 4. That this affiant has spoken to Jeanie Sparks, the mother of Morgan[.] Morgan [] is the daughter of Alan Sparks who was friends with the victim and was present in the bed on the date in question. This affiant learned that Morgan [] was made aware of the fact that the victim was going to see the school counselor in regards to the alleged actions of the Defendant. Morgan [] indicated that she is aware of this fact because the victim requested that she go with her to see the counselor.
>
> 5. That the undersigned believes that this information would allow for a request for an *in camera* inspection of her counseling records because it was counseling that was received based upon the allegations against Mr. Sparks.

¶8 The State countered that Sparks was claiming only "that because the victim was in counseling and the counseling may have related to the sexual assault, he is entitled to an in camera inspection of those records[,]" but such a claim is "legally wrong," and Sparks failed to meet the necessary burden under ***Green***. Sparks responded, in part:

> [T]he information is relevant to his theory of defense. The Defendant believes that the victim could have made this claim for the purpose of attention. If that is the case, [counsel] has learned that the victim asked the defendant's daughter to attend these counseling sessions with her in because it was fun or enjoyable to get out of class to attend these sessions which would confirm that the victim was claiming this for attention.

¶9 The circuit court rejected Sparks's motion as insufficient. We agree. "The mere contention that the victim has been involved in counseling related to … the current sexual assault is insufficient." ***Green***, 2002 WI 68, ¶33, 253 Wis. 2d at 380, 646 N.W.2d at 310. Further, evidence sought from treatment records must not merely be cumulative. ***Id.***, 2002 WI 68, ¶33, 253 Wis. 2d at 381, 640 N.W.2d at 310. To the extent Sparks believes that Bryanna's treatment records will show she enjoys getting out of class for therapy, it appears this information may be

available elsewhere. It is also not evident, if it exists, that Bryanna's derivation of some small psychic value from leaving class to attend counseling is probative of, or even relevant to, a theory that she fabricated her allegations against Sparks.

¶10 A defendant must "make a sufficient evidentiary showing that is not based on mere speculation or conjecture as to what information is in the records." ***Id.***, 2002 WI 68, ¶33, 253 Wis. 2d at 380–381, 646 N.W.2d at 310. Sparks's motion is not even based on speculation. The circuit court properly rejected the postconviction motion; adjournment for pursuit of a ***Shiffra*** motion could not have been had on the facts as alleged.[5]

By the Court.—Judgment and order affirmed.

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

[5] There is no reason to believe that trial counsel had, or should have had, more information than postconviction counsel. Thus, any ***Shiffra*** motion from trial counsel would have been unsuccessful, so the circuit court properly determined that trial counsel was not ineffective for failing to raise such a motion. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). The trial court also properly denied the motion to adjourn in light of any ***Shiffra*** motion's insufficiency.