COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2531-CR **Cir. Ct. No. 2008CF164**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DONOVAN L. LEWIS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Reversed and cause remanded for further proceedings consistent with this opinion.*

Before Vergeront, P.J., Lundsten and Higginbotham, JJ.

¶1 VERGERONT, P.J. The State appeals the circuit court's pretrial order to suppress statements and bar testimony of the victim of an alleged sexual assault. The circuit court entered this order because the alleged victim refused to

allow an in camera inspection of his counseling records after the court ordered production of the records following an evidentiary hearing. The State contends that the defendant, Donovan Lewis, failed to make the preliminary showing required by ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), as modified by ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, for an in camera inspection of the alleged victim's privileged counseling records.

¶2 We conclude that Lewis has failed to make the preliminary showing required by ***Shiffra***, as modified by ***Green***, for an in camera inspection. We therefore reverse the circuit court's order suppressing the alleged victim's statements and barring his testimony.[1]

BACKGROUND

¶3 The complaint charged Lewis with two counts of second-degree sexual assault of a child under the age of sixteen, in violation of WIS. STAT. § 948.02(2) (2007-08).[2] The complaint alleged that Lewis had sexual intercourse with D.M.O., then fourteen years old, on two separate occasions in July 2008. According to the complaint, in August 2008 D.M.O.'s parents went to the police

[1] The State also asks that we rule on two additional issues: (1) whether the circuit court employed the correct procedure in allowing an evidentiary hearing based on what the State contends was an inadequate offer of proof, thus permitting questioning of the alleged victim and his mother, who had apparently declined to speak to the defense; and (2) whether a circuit court may conduct an in camera inspection of privileged medical or counseling records without a victim's consent when the showing required by ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), as modified by ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, has been made. We do not address these issues because it is unnecessary to do so given our conclusion that the showing Lewis made at the evidentiary hearing did not make the requisite showing.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

to report their discovery of computer messages they believed showed that D.M.O. may have been having a sexual relationship with Lewis, a twenty-four-year-old co-worker at Hardee's. Also, according to the complaint, in a subsequent interview with a police officer, D.M.O. told the officer that he had engaged in oral sex with Lewis, once at Lewis's apartment and another time when Lewis was driving D.M.O. home after work.

¶4 Lewis filed a motion for production and in camera inspection of D.M.O.'s counseling records. The motion asserted that D.M.O. told co-workers that he was in counseling because his parents did not accept his homosexuality. The motion also asserted that D.M.O.'s mother told Hardee's general manager that her son was a "pathological liar" after learning that her son told the manager his parents had given him permission to work with Lewis.

¶5 Lewis argued in support of the motion that the information from D.M.O.'s co-workers:

> demonstrate[s] a high probability that counseling records exist that discuss the ongoing struggle that DMO has had with his parents over DMO's sexual orientation, which may be a motive for DMO to fabricate an intimate relationship with Mr. Lewis. DMO may feel that if he continues to tell his parents of new homosexual relationships, that they will eventually … accept him as being gay…. The counseling notes may shed some light upon whether DMO's allegations of intimate homosexual relationships have been fabricated or exaggerated for the benefit of DMO's parents.

Lewis also argued that the "pathological liar" incident "highlights the issue of DMO's truthfulness when it comes to his interactions with gay men … [and] [d]iscovery of further evidence of this issue in counseling notes would prove to be critical to Mr. Lewis's defense."

¶6 At the evidentiary hearing on the motion Lewis called D.M.O. and his mother to testify, as well as Hardee's general manager and two former employees who knew D.M.O. at work. There was no dispute that D.M.O. was in counseling after he quit work at Hardee's in August 2008, but there was conflicting testimony on whether he began counseling before that and, if so, when. D.M.O.'s mother testified that there were various reasons he went into counseling, and a "large part was because of this assault." She also testified that he was very confused, more so than most teenagers. There was testimony that D.M.O. told his co-workers he was in counseling because his parents didn't like him being gay, but D.M.O. denied that he talked to his co-workers about counseling and his mother denied this was the reason for the counseling. There was also conflicting testimony on whether his mother told the general manager that D.M.O. was a liar. Other evidence presented at the hearing that is relevant to this appeal will be discussed later in this opinion.

¶7 The circuit court concluded that the testimony established grounds to inspect D.M.O.'s counseling records in camera. The court stated that the test was whether there was "a showing of materiality that the records here would have some basis to provide information so that a defense can be appropriately tendered." The court also indicated that establishing credibility was part of the test. The court found that the test was met by the testimony of D.M.O.'s mother that she and her husband got their son into counseling after the alleged assaults and her testimony that her son was very confused, more than most teenagers. The court noted that D.M.O.'s mother did not testify in what way he was confused and that the possibilities included confusion over "identity, … the event, what may have happened previous[ly] and what [D.M.O.'s] previous experiences were that impacted upon these things." The court also noted the conflict in testimony on

whether D.M.O.'s mother said he was a liar and stated that "if, in fact, that issue would possibly be resolved, as an illustration, adversely in the in camera inspection that [the general manager's testimony] was true as opposed to [that of D.M.O.'s mother], that's something that needs to be determined."

¶8 After rendering this opinion, the circuit court entered an order requiring D.M.O. to produce his counseling records for the court's in camera review. D.M.O.'s parents decided not to release the records, after having been informed by the prosecutor that the probable consequence would be suppression of D.M.O.'s statements and testimony at the trial. The court subsequently granted Lewis's motion to suppress D.M.O.'s statements and bar his testimony.

DISCUSSION

¶9 On appeal, the State contends that Lewis failed to make the preliminary showing required by ***Shiffra***, as modified by ***Green*** (***Shiffra/Green***), for an in camera inspection of D.M.O.'s counseling records. Lewis responds that he has made the requisite showing. There is no dispute that D.M.O.'s counseling records are protected by the professional counselor-patient privilege under WIS. STAT. § 905.04(2).[3] Therefore, in order to obtain discovery of them, the first step for Lewis is to obtain an in camera inspection. *See* ***Shiffra***, 175 Wis. 2d at 605.

[3] WISCONSIN STAT. § 905.04(2) provides:

> General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, … the patient's psychologist, … or professional counselor.

Because the proper standard for obtaining an in camera inspection is central to our analysis, we first discuss ***Shiffra*** and ***Green*** and then turn to the parties' arguments.

¶10 In ***Shiffra***, this court adopted the procedure and the standard for a defendant to obtain an in camera inspection of a victim's counseling records, recognizing that an in camera review "achieves the proper balance between the defendant's [right to present a complete defense] and the state's interests in protection of its citizens." ***Shiffra***, 175 Wis. 2d at 605. The supreme court in ***Green*** approved much of ***Shiffra***, but substituted a "slightly higher" standard for the showing the defendant must make: "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***, 253 Wis. 2d 356, ¶¶32-34 (emphasis added). A "reasonable likelihood," the ***Green*** court concluded, was more appropriate than the ***Shiffra*** term "*may be* necessary," which the court viewed as expressing a "mere possibility." ***Id.***, ¶32 (emphasis added).[4]

¶11 Although it made this change, the ***Green*** court declared that other requirements this court had employed in ***Shiffra*** cases remained applicable, including: (1) the mere assertion that the victim has been in counseling related to prior sexual assaults or the current sexual assault is insufficient; (2) the defendant must make a sufficient evidentiary showing that is not based on mere speculation or conjecture as to what information is in the records; (3) a defendant must show

[4] In ***Shiffra*** we described the standard as a "preliminary showing of materiality [that] must establish that [the victim's] records are relevant and may be necessary to a fair determination of guilt or innocence." ***Shiffra***, 175 Wis. 2d at 610.

more than a mere possibility that the records will contain evidence that may be helpful to the defense; and (4) the evidence sought from the records must not be merely cumulative to evidence already available to the defendant. ***Id.***, ¶33.

¶12 The ***Green*** court explained that the test it was establishing "essentially requires the court to look at the existing evidence in light of the request and determine, as the ***Shiffra*** court did, whether the records will likely contain evidence that is independently probative to the defense." ***Green***, 253 Wis. 2d 356, ¶34.

¶13 It is the defendant's burden to make the required showing. ***Id.***, ¶20. Whether a defendant's evidentiary showing is sufficient for in camera review implicates a defendant's constitutional right to a fair trial and thus presents a question of law, which we review de novo. ***Id.***, ¶20. If the circuit court makes factual findings, we accept those unless they are clearly erroneous. ***Shiffra***, 175 Wis. 2d at 605. In this case, the court held an evidentiary hearing at Lewis's request at which he had an opportunity to present as witnesses the unnamed co-workers whose statements he referred to in the motion, as well as D.M.O. and his mother. We therefore confine our analysis to the evidence presented at the hearing.

¶14 We note that there is no indication that the circuit court employed the "reasonable likelihood" standard adopted in ***Green***. The court does not mention this standard and its analysis appears to consider possibilities of what the counseling records might contain rather than the higher "reasonable likelihood"

standard.[5] Because we independently determine whether Lewis's showing is sufficient under ***Shiffra***/***Green***, we apply this standard and do not focus on what standard the circuit court applied.

¶15 The State contends that Lewis's showing does not meet the ***Shiffra/Green*** standard because he did not establish that the records were not cumulative to other available evidence and were necessary to the defense. The State also contends that the nexus Lewis attempted to draw between D.M.O.'s counseling records and his defense was speculative and did not demonstrate the requisite reasonable likelihood.

¶16 Lewis responds that his motion showed a nexus between his factual allegations and his theory of defense—that D.M.O.'s parents' disapproval of his sexual orientation, combined with his lack of truthfulness, may have led him to rebel against his parents by fabricating a story that he had sexual contact with Lewis. Lewis further contends that the testimony of D.M.O.'s co-workers that D.M.O. told them he was in counseling because of his parents' concerns about his homosexuality shows that the counseling notes will likely contain information on "whether his allegations of assault were fabricated for his parents' benefit … [and] given the mother's statement that D.M.O. was a liar, it was likely that the counseling notes would shed light on his truthfulness." Such information, argues

[5] The circuit court used the term "showing of materiality." Lewis also uses the term "material" in his argument. *See* paragraph 16. This is likely based on our use of the term "preliminary showing of materiality" in ***Shiffra*** to generally describe the standard we adopted. *See* footnote 4. However, when using this term it is important to understand that the ***Shiffra*** "preliminary showing of materiality" has been modified by ***Green*** with the adoption of "reasonable likelihood" to describe the degree of certainty that "relevant [noncumulative] information necessary to a determination of guilt or innocence" is in the record. *See* ***Green***, 253 Wis. 2d 356, ¶34.

Lewis, would be relevant and material to his defense that D.M.O. fabricated the assault allegations.

¶17 We agree with the State that Lewis has not shown a "specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence [that] is not merely cumulative to other evidence available to the defendant." ***Green***, 253 Wis. 2d 356, ¶34.

¶18 Lewis's defense theory is that D.M.O. is lying when he says he had oral sex with Lewis.[6] The key components of this defense theory are that (1) D.M.O. is homosexual, (2) his parents disapprove of this, (3) in reaction to his parents' disapproval he was motivated to fabricate sexual encounters with Lewis, and (4) his general lack of truthfulness played a role in this fabrication. As for the first two components, even if there is a reasonable likelihood that there is information in D.M.O.'s counseling records that he is homosexual and that his parents disapprove of this, it is cumulative to evidence the defense already had and is therefore not necessary to the defense. Two persons who had worked with D.M.O. testified that he had told them his parents did not like the fact that he was gay. In addition, D.M.O. acknowledged that he was gay, that his parents didn't

[6] Consent is not an element of second-degree sexual assault of a child under the age of sixteen. *See* WIS. STAT. § 948.02(2). Therefore we understand Lewis to mean that D.M.O. is lying about whether he had the sexual encounters with Lewis, not that he is lying about whether they were consensual or not.

accept it, and that he told people at work he was homosexual and his parents had problems with it.[7]

¶19 As for the third component—that in reaction to his parents' disapproval D.M.O. was motivated to fabricate sexual encounters with Lewis—Lewis's showing falls far short of a specific factual basis demonstrating a reasonable likelihood that his counseling records contain information on this point. There is no evidence that D.M.O. told his co-workers anything about his relationship with Lewis. As for his parents, the only evidence at the hearing on how they first learned of any relationship between Lewis and D.M.O. was that they found explicit emails between Lewis and D.M.O. This is not consistent with D.M.O. fabricating a sexual relationship with Lewis for "his parents' benefit."

¶20 There is also no evidence D.M.O. fabricated the existence of a sexual relationship with another male. The evidence concerning a sexual relationship with another male—someone he knew in Michigan before his family moved to Wisconsin—is that *it occurred*. D.M.O. testified that he did have a relationship with that young man and did not think his parents knew about it. His mother testified that she found out about the relationship just before moving. One of the former employees testified that D.M.O. told her about the relationship. According to this witness, D.M.O.'s mother also mentioned it to her during a conversation in which she asked that D.M.O. not work with Lewis. There is no

[7] In recounting D.M.O.'s testimony at the evidentiary hearing, we are mindful that the State has raised the issue, which we are not addressing, that Lewis should not have been permitted to question D.M.O. and his mother at the hearing. *See* footnote 1. We note that, even without D.M.O.'s testimony on this point—and before the evidentiary hearing—there was evidence available to Lewis from D.M.O.'s co-workers that he told them he was homosexual and that his parents disapproved.

reasonable inference from the testimony at the hearing that D.M.O. fabricated the existence of the relationship with the young man in Michigan.[8]

¶21 In short, there is an absence of a specific factual basis for inferring that D.M.O. fabricated either his relationship with Lewis or a prior relationship in response to his parents' disapproval. It follows that there is not a specific factual basis demonstrating a reasonable likelihood that D.M.O.'s counseling records contain such information.

¶22 As for the fourth component—D.M.O.'s lack of truthfulness—the only evidence that he was not truthful is not connected to his sexual relationships with males. As already noted, there was a factual dispute, which the court did not resolve, over whether D.M.O.'s mother told the general manager that D.M.O. was a pathological liar. There was also testimony that his mother said her son was a compulsive liar to a former employee with whom his mother also spoke about not wanting her son to work with Lewis. This witness suggested that D.M.O. could be in counseling for being a compulsive liar as well as because his family did not like him being gay. It is not clear if this "lying" reason for counseling was based on what D.M.O. told her or was her own surmise; and the court did not mention this reason for counseling in its decision. It is also not clear whether the circuit court

[8] The motion asserted that D.M.O. told a co-worker that his parents tried to have the young man in Michigan prosecuted and that D.M.O. "may have discussed with his counselor whether the allegations [about the young man in Michigan] were not pursued by legal authorities because they were fabricated or exaggerated." At the evidentiary hearing, the only evidence on prosecution or attempted prosecution against this man was the testimony of D.M.O.'s mother. She answered "no" to the question whether she filed or pressed charges against this man. (She also testified that to her knowledge he was not an adult.) None of the three witnesses from Hardee's testified that D.M.O. or his mother told them anything about attempts to prosecute the young man in Michigan or reasons for not doing so. Thus, there is no factual basis for reasonably inferring that the lack of a prosecution was due to D.M.O. fabricating or exaggerating that relationship.

credited this testimony on why D.M.O. was in counseling; the court did not mention this witness's testimony.

¶23 Even if we accept that D.M.O.'s mother told both the general manager and the former employee that her son was a pathological or compulsive liar and further that D.M.O. told the former employee that he was in counseling because of this, there is no specific factual basis demonstrating that his lying had anything to do with fabricating sexual encounters with males. The context in which his mother called him a liar, if one believes the other two witnesses, is his effort to work with Lewis despite his parents' instructions that he not do so. In other words, there is evidence that D.M.O.'s lies were for the purpose of undermining his parents' efforts to prevent him from having sexual relationships with males. It is simply speculation to conclude that, because he is a liar for this purpose, he also lies in order to fabricate sexual relationships with males. *See* ***State v. Behnke***, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996) (rejecting the contention that a victim's history of engaging in one type of self-abuse creates an inference that the victim has engaged in a different type of self-abuse that is relevant to the defense). Indeed, lying in order to be able to work with Lewis appears to be inconsistent with lying in order to make his parents believe he has sexual relationships with males that have not occurred.

¶24 We agree with the State that the contrast between the showing Lewis has made and the showings in ***Shiffra*** and ***State v. Robertson***, 2003 WI App 84, 263 Wis. 2d 349, 661 N.W.2d 105, illustrates the deficiency of the showing here. In both those cases we concluded the requisite showing had been met. There was specific evidence that the victims suffered from psychiatric conditions that affected their perceptions and their ability to relate the truth. ***Shiffra***, 175 Wis. 2d at 603, 610-12; ***Robertson***, 263 Wis. 2d 349, ¶¶9-10, 27-28, 31. These conditions,

we determined, could bear on why the victims described the sexual experiences as nonconsensual when, according to the defense, they were consensual. ***Id.*** There is no evidence that D.M.O. has any similar problem. The description of "compulsive or pathological liar," attributed to his mother, arising as it did in another context, plus the suggestion from a co-worker that he may have been in counseling because of his compulsive lying, is insufficient to make it reasonably likely that there is information in his counseling records that he fabricated sexual relationships with males.

¶25 Similarly, D.M.O.'s mother's testimony that he was very confused, more so than most teenagers, does not constitute evidence that he had a condition that affected his ability to perceive what was really happening. The circuit court correctly noted that deciding what his mother meant by this testimony would be based on speculation because there are a number of possibilities. However, the court erred in concluding that the number of possibilities warranted an in camera inspection. ***Green*** requires more than a possibility that relevant non-cumulative information necessary to the defense will be found in the counseling records: it requires a reasonable likelihood. ***Green***, 253 Wis. 2d 356, ¶34.

¶26 The circuit court here was evidently of the view that an in camera inspection was also appropriate to resolve issues of credibility. However, as we have already noted, in ***Shiffra*** and ***Robertson*** there was evidence of specific psychiatric conditions that affected the victims' perceptions and their ability to relate the truth; and it was in this context that we determined the information in the victims' treatment records was relevant to the victims' credibility and, thus, to the defense of consent. ***Shiffra***, 175 Wis. 2d at 603, 610-12; ***Robertson***, 263 Wis. 2d 249, ¶¶9-10, 27-28, 31. The case law does not allow an in camera inspection of an alleged victim's counseling or psychiatric records to determine that person's

credibility without a comparable specific factual basis meeting the ***Shiffra/Green*** standard.

¶27 Finally, we note that D.M.O.'s mother's testimony that a big reason for the counseling was "this assault" does not meet the ***Shiffra/Green*** standard. Evidence that the victim was in "counseling related to prior sexual assaults or the current sexual assault is insufficient" to make the requisite preliminary showing for in camera review of the victim's privileged counseling records. ***Green***, 253 Wis. 2d 356, ¶33.

CONCLUSION

¶28 We conclude that Lewis's showing does not entitle him to an in camera inspection of D.M.O.'s privileged counseling records. We therefore reverse the circuit court's order suppressing D.M.O.'s statements and barring his testimony and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded for further proceedings consistent with this opinion.

Not recommended for publication in the official reports.