

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 15, 2005

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.

Appeal No. 2004AP2622-CR

Cir. Ct. No. 2003CF631

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

GERALD L. LARSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County:
WILLIAM H. CARVER, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. The State appeals from an order granting Gerald L. Larson's motion for an in camera inspection of the treatment and counseling records of a thirteen-year-old sexual assault victim. The victim's mother would not consent to release of the records for an in camera inspection and,

consequently, the victim is barred from testifying at trial. The sole issue on appeal is whether Larson made a sufficient preliminary showing to support an in camera review. We conclude that he did and affirm the circuit court's order.

¶2 Larson is charged with three counts of first-degree sexual assault of a child and one count of second-degree sexual assault of a child. The charges stem from four incidents of sexual intercourse reported in November and December 2003 by thirteen-year-old Krystal C. The incidents allegedly occurred between September 2002 and August 2003.

¶3 Citing *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), Larson moved to compel disclosure of Krystal's medical, psychiatric, psychological and counseling records related to her mental and emotional history. As grounds Larson asserted that in requesting that Krystal's mother and counselor be present during Krystal's testimony at the preliminary hearing, the State acknowledged that Krystal suffers from some mental health disorders. He also cited Krystal's false report that she was pregnant and that a pregnancy test was taken during an emergency room visit, that Krystal's mother told police that Krystal has had trouble with being truthful in the past, that the police report stated that Krystal was the victim of sexual assaults by two other perpetrators, that Krystal had long been in some type of counseling, and that Krystal was admitted to the adolescent ward at the hospital as the allegations against Larson were being investigated.

¶4 A defendant may obtain an in camera review of a victim's confidential mental health records upon showing that the records are relevant and may be necessary to a fair determination of guilt or innocence. *Id.* at 605, 608. The defendant bears the burden of making a preliminary evidentiary showing

before an in camera review is conducted by the court. *State v. Green*, 2002 WI 68, ¶20, 253 Wis. 2d 356, 646 N.W.2d 298. Whether the defendant has met his or her burden is a question of law that we review de novo. *Id.*

¶5 *Shiffra*, 175 Wis. 2d at 605, holds that to be entitled to an in camera review the defendant's preliminary showing must establish that the sought-after evidence is material to his or her defense. *Green* clarified the threshold the defendant must satisfy to be entitled to an in camera review. To be entitled to an in camera review of confidential records, a defendant must set forth a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information that is necessary to a determination of guilt or innocence and not merely cumulative to evidence already available to the defendant. *Green*, 253 Wis. 2d 356, ¶34. In setting forth a fact-specific evidentiary showing, a defendant must describe as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense. *Id.*, ¶33. Further, a defendant must undertake a reasonable investigation into the victim's background and counseling through other means first before the records will be made available. From this investigation, the defendant, when seeking an in camera review, must then make a sufficient evidentiary showing that is not based on mere speculation or conjecture as to what information is in the records. *Id.* The evidence sought from the records must not be merely cumulative to evidence already available to the defendant. *Id.* A defendant must show more than a mere possibility that the records will contain evidence that may be helpful or useful to the defense. *Id.* In recognizing that the defendant will most often be unable to determine the specific information in the records, the supreme court indicated that the standard is not intended to be unduly high and in cases where it is a "close call," an in camera review generally should be provided. *Id.*, ¶35.

¶6 We first observe that Larson's motion was based on information gleaned from the police reports and limited medical records. This minimally satisfies the requirement that the defendant undertake a reasonable investigation into the victim's background because it appears to be all the information that is available to Larson regarding this child victim.

¶7 In *Green*, 253 Wis. 2d 356, ¶37, the court concluded that Green had failed to show any evidence to even remotely suggest that the victim suffered from any psychological disorder that hindered her ability to relay truthful information. In contrast here, the State itself asserted at the preliminary hearing the existence of mental health disorders. Larson also asserted that Krystal's testimony at the preliminary hearing exhibited an inability to independently recall the incidents, thereby demonstrating that her mental health disorders may affect her veracity. As grounds for its motion for permission to use only Krystal's videotaped statement at trial, the State asserted the mental condition of Krystal at this time and that she is experiencing a number of symptoms of mental disorders, including but not limited to withdrawal, anxiety, stress, nightmares, mood changes, and changes in interpersonal relationships. Without the in camera inspection, Larson is unable to discover what those disorders are, the severity of the inflictions, and how they may impact Krystal's veracity or perception of what occurred.

¶8 The State argues that Larson's reliance on Krystal's false pregnancy report in support of an in camera inspection is of no value because Larson has other means to expose the falsity of that report. It explains that if the treatment and counseling records contain information about the false pregnancy report, that information is cumulative to other evidence available to Larson. It applies the same rationale to Larson's reliance on the mother's report that Krystal is not always truthful. The State contends it is sufficient to bring that point out on

examination of the mother regarding Krystal's reputation for being truthful. Finally, the State asserts that the fact that two other people sexually assaulted Krystal has no bearing on the *Green* analysis because there is no suggestion that those assaults did not occur. The State further posits that even if there is evidence of false sexual assault allegations, the State would be required to give that information to the defense.

¶9 We agree that information in the treatment and counseling records regarding the false pregnancy report is merely cumulative to other sources of this information. However, the mother's acknowledgement that Krystal is not always truthful is not limited to the allegations against Larson. Other instances of untruths, if significant enough to be documented in treatment and counseling records as a manifestation of mental health disorders, may be helpful or useful to the defense. Learning the full scope of Krystal's mental health disorders may provide an explanation for Krystal's mental health symptoms that the State advances. This appears to be a "close call" case, and the circuit court did not err in requiring the production of the treatment and counseling records for an in camera inspection to insure that Larson receives a fair determination of guilt or innocence.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

