COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1392-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHNNY L. GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE K. SCHMIDT, Judge. *Affirmed.*

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

¶1 BROWN, P.J. Johnny L. Green appeals from an amended judgment of conviction of first-degree sexual assault of a child as a habitual offender. He also appeals from an order denying his motion for postconviction relief. Green claims the trial court erred: (1) by refusing to conduct an in camera inspection of

the victim's counseling records, (2) by denying Green's motion to dismiss on the basis that the prosecutor violated the witness sequestration order, and (3) by admitting the testimony of the State's sexual assault expert witness. We conclude that Green did not make a sufficient pretrial showing entitling him to trial court review of the victim's counseling records. We also conclude that the trial court did not err in finding that the witness sequestration order had not been violated and that it properly admitted the testimony of the State's expert witness.

FACTS

¶2 The facts will be described as necessary for each of Green's claims. The victim, whom we will refer to as Nadine W., initially reported the sexual assault, which occurred on or about November 22, 1996, to her mother's friends on March 28, 1997. Nadine then told her mother about the assault and gave a statement to police on April 10, 1997. Nadine's account of the assault became more detailed as time went on, culminating in an October 1998 statement where, for the first time, Nadine alleged that Green had sexual intercourse with her. During this period of time, she underwent counseling. Green made an oral motion to have the records of those counseling sessions subpoenaed on the basis that they might contain information relevant to his defense. Nadine's mother had apparently signed a release waiving Nadine's right to confidentiality with respect to those records. Nevertheless, the trial court denied the motion. The jury convicted Green of first-degree sexual assault of a child as a habitual offender. He received the maximum sentence of forty-two years in prison.

PRETRIAL REQUEST FOR INSPECTION OF COUNSELING RECORDS

¶3 As we have explained before, a defendant who seeks access to a witness's medical or psychiatric records must first make a preliminary showing

that the evidence is relevant and necessary to a fair determination of guilt or innocence. ***State v. Behnke***, 203 Wis. 2d 43, 49, 553 N.W.2d 265 (Ct. App. 1996); ***State v. Shiffra***, 175 Wis. 2d 600, 610, 499 N.W.2d 719 (Ct. App. 1993). If the defendant satisfies this burden, then the trial court must order that the records be produced and conduct an in camera review to determine if the evidence is material to the defense. ***Shiffra***, 175 Wis. 2d at 605. Evidence that is material must be disclosed to the defendant in order to protect his or her constitutional right to present a complete defense.[1] ***Id***. If the State's witness refuses to waive his or her privilege with respect to those records, the appropriate sanction is to suppress the testimony of that witness. ***Id***. at 612.

¶4 To prevail in making the preliminary showing, the defendant must establish more than the mere possibility that the requested records may be necessary to a fair determination of guilt or innocence. ***State v. Munoz***, 200 Wis. 2d 391, 397-98, 546 N.W.2d 570 (Ct. App. 1996). In fact, our review of the

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[1] The State asserts that it must disclose exculpatory evidence only if such evidence is in its exclusive possession or control. *See* ***Brady v. Maryland***, 373 U.S. 83, 87 (1961). Absent possession or control, the State argues, any basis for discovery must come from WIS. STAT. § 971.23 (1999-2000).

We take a dim view of the State's repeated efforts to circumvent the due process basis for disclosure of records as set forth in ***Pennsylvania v. Ritchie***, 480 U.S. 39, 56 (1987), and extended by this court in ***State v. Shiffra***, 175 Wis. 2d 600, 607-08, 499 N.W.2d 719 (Ct. App. 1993). In ***Ritchie***, the United States Supreme Court held that an in camera review of privileged evidence achieves the proper balance between the defendant's rights and the State's interest in protection of its citizens. ***Ritchie***, 480 U.S. at 60-61. In ***Shiffra***, we extended this holding to include a witness's medical records even when the State does not have possession of the records. ***Shiffra***, 175 Wis. 2d at 611-12. The basis of our holding was neither ***Brady*** nor the Wisconsin discovery statutes. Instead, we held that disclosure of a witness's medical records may be required under the Due Process Clause of the Fourteenth Amendment which protects the right of a defendant to present a complete defense. ***Shiffra***, 175 Wis. 2d at 605 & n.1. The reasoning of ***Shiffra*** was explicitly approved by the supreme court in ***State v. Solberg***, 211 Wis. 2d 372, 386-87, 564 N.W.2d 775 (1997). Thus, we reject completely the State's argument that this case presents a threshold question of whether the records were discoverable at all under ***Brady*** or WIS. STAT. § 971.23.

published cases in this state shows that the defendant's motion for a ***Shiffra*** hearing must make a fact-specific proffer of materiality.

¶5 We begin our brief review of the case law with ***Shiffra***. In that case, the defendant claimed the sexual contact was consensual. He made a showing that the victim had a psychological disorder which at times prevented her from determining when memories related to sexual matters were based on real events or fantasies. ***Shiffra***, 175 Wis. 2d at 610-12. Hence, health care records describing the nature of the victim's psychological disorder were material to her ability to report the events that led to the charge of sexual assault. *See* ***Munoz***, 200 Wis. 2d at 397-98 (discussing the reasoning in ***Shiffra***).

¶6 More recently in ***State v. Walther***, 2001 WI App 23, 240 Wis. 2d 619, __ N.W.2d __, the defendant denied battery and sexual contact with a child who lived at a residential treatment facility. To satisfy his preliminary showing, the defendant proffered facts which, if accepted as true, would show that the victim had given inconsistent statements regarding who had assaulted him. ***Id***. at ¶¶3, 4. In particular, the defendant offered affidavits of two acquaintances of the victim who would testify that the victim had accused staff members at the residential facility of assaulting him for the same injuries. ***Id.*** at ¶3. The court determined that medical and psychological records documenting this information would be relevant to the child's credibility generally and to the allegations against the defendant specifically. ***Id***. at ¶12. Thus, the defendant had clearly shown that the records were material to a fair determination of guilt or innocence. ***Id***.

¶7 We also find helpful the series of cases in which we have affirmed the denial of a defendant's request for an in camera review of a sexual assault victim's mental health records. For example, in ***Jessica J.L. v. State***, 223 Wis. 2d

622, 634-35, 589 N.W.2d 660 (Ct. App. 1998), we held that the allegation that a victim is attending counseling sessions, by itself, does not even raise a mere possibility that the victim's records are relevant to the defendant's denial of guilt, nor does it show the records may be necessary to a fair determination of guilt or innocence. In contrast to ***Shiffra***, the defense had not provided any "allegation which, if believed, would tend to prove that [the child had] a psychological disorder that would make her a poor reporter of events relating to sexual conduct or draw her credibility into question in any way." ***Jessica J.L.***, 223 Wis. 2d at 635.

¶8 ***Munoz*** involved a victim who had suffered prior sexual assaults and had received extensive counseling. These facts alone, however, did not suggest that the victim had any psychological disorder causing her to have reality problems in sexual matters. ***Munoz***, 200 Wis. 2d at 399. "Although allegedly receiving psychiatric counseling for assaults may lead one to speculate about any number of 'mere possibilities,' standing alone it has no relevance." ***Id.***; *see also* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 656, 581 N.W.2d 567 (Ct. App. 1998).

¶9 From the cases described above, we discern that in order to make a preliminary showing for purposes of a ***Shiffra*** hearing, the defendant must allege specific facts which would bear upon the witness's ability to accurately perceive events, remember or testify. Fishing expeditions into privileged counseling records to ascertain whether the victim had made prior inconsistent statements will not be tolerated absent specific allegations that such statements had in fact been made.

¶10 Having reviewed the case law, we now undertake the task of reviewing the trial court's materiality determination. As the State notes, there is

some conflict in the case law on the correct standard of review which is fully described in ***State v. Richard A.P.***, 223 Wis. 2d 777, 786-89, 589 N.W.2d 674 (Ct. App. 1998). For our purposes, we conclude that under either the "fact/law" standard or the "fact/discretion" standard, Green has failed to show that Nadine's counseling records are necessary to a fair determination of his guilt or innocence.

¶11 Green's counsel first raised a motion for request of a subpoena duces tecum of Nadine's mental health records at a pretrial hearing on February 10, 1999. The only basis for the motion articulated at that time was that her records might contain inconsistent statements. This issue was raised again in a hearing on April 12, 2000, when the trial court considered Green's postconviction motion for a new trial. At that point, it became clear that the parties disagreed about whether Nadine had begun counseling immediately after she disclosed the sexual assault to her mother or sometime before that. Defense counsel opined that this was significant because "if she was in counseling at the time of the alleged assault the question would be raised as to why she did not disclose the assault to her therapist." In addition, it would be relevant to why the victim waited four months to disclose the alleged assault and why details of the assault emerged over the course of a year.

¶12 Green relies primarily on ***State v. Speese***, 191 Wis. 2d 205, 528 N.W.2d (Ct. App. 1995), *rev'd*, 199 Wis. 2d 597, 545 N.W.2d 510 (1996), to support his view that the timing of the commencement of counseling is significant. In ***Speese***, the allegation of sexual abuse was not reported to police until seven months *after* the victim's psychiatric hospitalization, indicating that the victim did not tell anyone during the psychiatric treatment about the assault. ***Id***. at 223. The court of appeals believed that the victim's silence during counseling could cause a jury to doubt the truth of the victim's allegation. ***Id***. at 224. On this basis, the

court of appeals determined that the defendant had made a sufficient showing to merit an in camera inspection of the records.

¶13 The supreme court reversed this decision on appeal and we find its reasoning persuasive and applicable to this case. Even if the trial court erred in refusing to disclose the records to the defense, the supreme court concluded, any such error was harmless. ***State v. Speese***, 199 Wis. 2d 597, 600, 545 N.W.2d 510 (1996). At trial there had been substantial evidence, even without the hospital records, that the victim had been silent both while the sexual conduct was going on and for a prolonged period thereafter. ***Id***. at 604. Therefore, evidence of her silence regarding sexual abuse in the medical records would have been redundant. ***Id***. at 605-06. Consequently, the defendant's lack of access to the records did not affect the outcome of the trial. ***Id***. at 606.

¶14 As in ***Speese***, we find that this record contains ample evidence that the victim delayed disclosing the abuse to anyone for four months after it occurred and that details of the abuse continued to emerge for a full year after the initial disclosure. Green is most concerned with the victim's delay in reporting penetration to authorities until well after a year had passed from the time of the initial disclosure. Yet, we do not see how information contained in her counseling records on this issue would be at all helpful to Green in his defense. As the State noted, if Nadine reported penetration early in her counseling sessions, this inculpates Green and adds nothing to his defense. If she delayed reporting details during counseling sessions, this would be wholly consistent with other facts adduced at trial, including testimony of the State's expert witness that children who are victims of sexual abuse often repress details and delay reporting sexual assaults for long periods of time. Furthermore, the defense had numerous opportunities to cross-examine State investigators who took Nadine's statements

both in April 1997 and October 1998, as well as Nadine herself and the State's expert witness. Any further evidence relating to the piecemeal disclosure of abuse which could be gleaned from counseling records would be cumulative and redundant.

¶15 In making this determination, we are mindful of the obvious difficulties in discerning the details of nondisclosed confidential records. We also appreciate that a trial court's in camera inspection is a limited intrusion that may provide "the best tool for resolving conflicts between the sometimes competing goals of confidential privilege and the right to put on a defense." ***Munoz***, 200 Wis. 2d at 400. Nevertheless, unlike the situation in ***Shiffra*** or ***Walther***, Green has not offered a single factual allegation which suggests that the counseling records at issue here could contain information that would impinge Nadine's ability to perceive events, remember or testify. This is not even a close call.

ALLEGED VIOLATION OF WITNESS SEQUESTRATION ORDER

¶16 During the course of the trial, the State called Cheryl Haack to testify that she and Green had had a conversation at the Salvation Army in which he admitted to abusing Nadine. During direct examination, Haack testified that this conversation took place on November 13, 1996. Later, the prosecutor recalled Haack during which Haack changed her testimony, claiming the conversation at the Salvation Army actually occurred on November 19, 1996. On cross-examination, defense counsel elicited testimony that she had changed the date of the conversation from November 13 to November 19 after a discussion with the prosecutor in the hallway during the recess. The discussion in the hallway occurred because the prosecutor apparently realized that November 13 preceded

the date of the alleged assault. Green claims the hallway discussion violated the court's sequestration order.

¶17 When a witness violates a sequestration order, the decision as to whether the witness should be allowed to testify is in the sound discretion of the trial court. ***State v. Bembenek***, 111 Wis. 2d 617, 637, 331 N.W.2d 616 (Ct. App. 1983). A witness who violates a sequestration order is not allowed to testify if the defendant has been prejudiced by the violation and the party calling the witness was a guilty participant in the violation. ***Id***. If there is no prejudice, it is not a misuse of discretion to allow a witness to testify even if the party calling the witness participated in the violation. ***Id***.

¶18 We are not convinced that the prosecutor's hallway conversation with the State's witness violated the sequestration order. The record does not indicate the scope of the order, but as a general rule, the purpose of such an order is to prevent the shaping of testimony by one witness to match that given by other witnesses. ***Nyberg v. State***, 75 Wis. 2d 400, 409, 249 N.W.2d 524 (1977). Green has cited no authority to show that a sequestration order requires the witness to be sequestered from the prosecutor as well as from other witnesses. Moreover, if Green had concerns about the alleged violation of the order, the appropriate response would have been to move to strike the witness's testimony or move for a mistrial as soon as prejudice became apparent. ***State v. Simplot***, 180 Wis. 2d 383, 406-07, 509 N.W.2d 338 (Ct. App. 1993).

¶19 Assuming, arguendo, there was a violation of the sequestration order, we see no prejudice to Green. Haack was a terrible witness for the State, as defense counsel so lucidly made clear both on cross-examination and in his summation at the close of trial. Haack had previously told police that her

conversation with Green occurred in January or February 1997, a time when it would have been impossible for them to have met at the Salvation Army because Green was in jail. At trial, Haack settled on November 13, 1996, as the date of this incriminating conversation, but as it turns out, that date preceded the assault. Following the conversation in the hallway with the prosecutor, Haack finally chose November 19, 1996, as the date. However, even this date precedes the date of the assault. The credibility of her entire testimony can be summed up by this statement elicited by defense counsel:

> Q. You're telling me that those two previous settings of the dates were wrong?
>
> A. Correct.
>
> Q. So that now are we to believe the third one?
>
> A. I don't know. Believe what you want to believe.

¶20 Furthermore, had the testimony of this witness been struck, there was still more than sufficient evidence to convict Green of the crime charged, including testimony of Haack's daughter that Green had confessed to her as well, testimony of Green's girlfriend that he admitted fantasizing about little girls and Nadine's own testimony. Because no actual prejudice has been shown, we conclude the trial court did not misuse its discretion in refusing to order a new trial.

ADMISSION OF EXPERT WITNESS

¶21 The State presented an expert witness, Marie Nesemann, to testify about the tendency of child sexual assault victims to delay in reporting either the assault itself or the details of the assault. Nesemann rendered an opinion that it is common for child sexual assault victims to delay reporting the assault, to disassociate from the assault and to gradually recall the details of the assault over a

period of time. Green now challenges the qualifications of Nesemann to render those opinions.

¶22 We reverse a trial court's determination to allow expert testimony only if it is an erroneous exercise of discretion. ***State v. Hollingsworth***, 160 Wis. 2d 883, 895, 467 N.W.2d 555 (Ct. App. 1991). If the determination manifests a reasoned result based upon the relevant facts and applicable law, we will find no misuse of discretion. ***Id***.

¶23 Under WIS. STAT. § 907.02 (1999-2000), a person may give an opinion within his or her area of expertise as long as the witness is "qualified as an expert by knowledge, skill, experience, training, or education." An expert's competence may be shown by experience or technical and academic training, so long as the witness knows something beyond that which is generally known in the community. *See* ***Hollingsworth***, 160 Wis. 2d at 896. In addition, properly qualified experts may render comparison opinion testimony in sexual assault cases, comparing the behavior of the victim in the particular case to that of a typical sexual assault victim. ***State v. Jensen***, 147 Wis. 2d 240, 249-52, 432 N.W.2d 913 (1988).

¶24 Here, Nesemann had been executive director of Reach Counseling Services, an organization specializing in sexual assault counseling, since 1995. She had worked as a social worker for over twenty years, focusing on child welfare and abused and neglected children. The trial court admitted her testimony as an expert on delayed disclosure based upon her knowledge and experience from treating "hundreds of young sexual assault victims.… She's also read materials and has been at seminars where that issue has been discussed." The trial court also allowed her to testify on disassociation based upon her experience. We hold that

the trial court properly exercised its discretion in concluding that Nesemann's opinion testimony regarding the behavior of child sexual assault victims would assist the jury in resolving the factual issues of the case. *See* ***Jensen***, 147 Wis. 2d at 249-51.

¶25 In conclusion, we hold that Green has failed to make the preliminary fact-specific showing to entitle him to an in camera inspection of Nadine's counseling records. He has failed to show he was prejudiced by any violation of the witness sequestration order, and the trial court did not err in admitting the testimony of the State's sexual assault expert.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.