

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 2004

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. 04-0783-CR

Cir. Ct. No. 03CM000950

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

RICARDO MARTINEZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County:
STEPHEN A. SIMANEK, Judge. *Reversed and cause remanded.*

¶1 NETTESHEIM, J.¹ Ricardo Martinez was charged with battery and disorderly conduct following a dispute with his wife, C.M. Prior to trial, Martinez filed a motion and supporting affidavit pursuant to *State v. Shiffra*, 175 Wis. 2d

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

600, 499 N.W.2d 719 (Ct. App. 1993), seeking C.M.'s psychiatric records. The trial court found that there was sufficient information to order an in camera inspection of C.M.'s records. Based on C.M.'s refusal to authorize the disclosure of her records, the trial court ordered that C.M. be barred from testifying. The State of Wisconsin appeals from the trial court's order.

¶2 For the reasons set forth below, we conclude that Martinez's *Shiffra* motion was insufficient to warrant an in camera review of C.M.'s records. We reverse the order and remand for further proceedings.

Background

¶3 On April 22, 2003, the State filed a criminal complaint against Martinez alleging one count of battery and one count of disorderly conduct following a dispute with his wife, C.M. According to the complaint, a friend of C.M. received a phone call from C.M., who was crying and requesting that she be picked up because she feared for her safety. The friend could hear Martinez yelling in the background. According to the friend, C.M. had been home alone when Martinez came home intoxicated and stated that he had been out with another woman. When C.M. attempted to go through Martinez's pants pocket, he pulled C.M. by the hair and pushed her on the bed. C.M., who was eight months pregnant with Martinez's child at the time, felt the baby drop to a lower position.

¶4 On August 28, 2003, Martinez filed a *Shiffra* motion requesting C.M.'s psychological records. In support of his motion he filed an affidavit alleging in its entirety:

1. I am the defendant in the above matter;
2. That the alleged victim is my wife, [C.M.];

3. That I deny that I ever touched my wife on March 23, 2003 as she alleges in the Criminal Complaint.
4. That my wife has undergone psychiatric care in the past.
5. That in my best judgment and belief, her psychiatric condition has caused her, in the past, to attempt suicide, to accuse me of various behaviors that I did not commit, and to act irrationally enough to cause police to intervene on at least 3 occasions;
6. That I am making this affidavit of my own free will with no coercion, promises, rewards, or inducements;
7. That this affidavit is true and correct to the best of my knowledge and belief.

¶5 At a September 3, 2003 hearing on the motion, Martinez argued that he was entitled to an in camera review of C.M.'s records based on his allegation in the affidavit that she had, in the past, accused him of "doing things he never did." Martinez's attorney, in the form of argument to the court, presented some additional information regarding C.M., including that she previously had two miscarriages resulting in psychiatric treatment and that she had made two suicide attempts. Defense counsel additionally represented that C.M. had previously accused Martinez of various behavior, including having an affair that had "no basis in reality." Defense counsel also stated that C.M. had exhibited "erratic" behavior "to the point where she's packed up all her clothes, and the police have just found her walking the streets with all her clothes." The State objected to the discovery of C.M.'s records on grounds that Martinez's information and affidavit failed to set forth a specific factual basis for the request. Following the hearing, the trial court found that Martinez had met the threshold requirements of *Shiffra* and *State v. Green*, 2002 WI 68, ¶20, 253 Wis. 2d 356, 646 N.W.2d 298, and ordered the State to make C.M.'s psychiatric records available to the court. The State appeals.

Discussion

¶6 Pursuant to *Shiffra*, 175 Wis. 2d at 605, 608, 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. The defendant bears the burden of making a preliminary evidentiary showing before an in camera review is conducted by the court. *Green*, 253 Wis. 2d 356, ¶20. Factual findings made by the court in its determination are reviewed under the clearly erroneous standard. *Id.* Whether the defendant submitted a preliminary evidentiary showing sufficient for an in camera review implicates a defendant's constitutional right to a fair trial and raises a question of law that we review de novo. *Id.*

¶7 The threshold the defendant must satisfy to be entitled to an in camera review was clarified by the supreme court in *Green*. 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. *Id.*, ¶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.*

¶8 Applying the *Shiffra-Green* standards to Martinez’s motion, we conclude that Martinez failed to make a sufficient showing to compel an in camera review of C.M.’s psychiatric records. As grounds for discovery, Martinez stated in his affidavit that C.M.’s “psychiatric condition has caused her, in the past, to attempt suicide, to accuse me of various behaviors that I did not commit, and to act irrationally enough to cause police to intervene on at least 3 occasions.” For openers, we fail to see how the statement that C.M.’s suicide attempts and the counseling for her miscarriages demonstrates a reasonable likelihood that the records contain relevant information necessary to a determination of Martinez’s defense that C.M. has fabricated her allegations. We therefore focus on Martinez’s allegation that C.M. had previously and falsely accused him of engaging in certain behaviors.

¶9 As to Martinez’s allegations of false accusations, Martinez did not provide specific factual information regarding the various behaviors C.M. accused him of engaging in, nor does he indicate what, if any, information might be in C.M.’s psychiatric records regarding these events which is not merely cumulative to evidence already available to him.

¶10 We acknowledge that in some cases it might be difficult to provide a more specific factual basis of the incidents underlying a *Shiffra-Green* motion. However, as a party directly involved in the prior incidents of false accusations and police contact described in his affidavit, Martinez presumably has knowledge of the timing and circumstances of these events. Yet in his affidavit Martinez fails

to provide anything but a terse and general statement regarding these prior incidents. Moreover, Martinez fails to indicate what, if any, linkage there might be between these prior incidents, C.M.'s psychiatric records and his defense to the current charges. In other words, he does not offer any factual showing that C.M.'s counseling records would indicate an inability to perceive events or report them truthfully. *See, e.g., Shiffra*, 175 Wis. 2d at 603-04. If Martinez suspects that C.M.'s psychiatric records might contain additional information regarding these incidents which might be relevant to his defense, the onus is on him to indicate that possibility. *See Green*, 253 Wis. 2d 356, ¶20. His motion fails to do so.

¶11 The *Shiffra-Green* test essentially requires both the trial court and a reviewing court to look at the existing evidence in light of the request for an in camera review and to determine “whether the records will likely contain evidence that is independently probative to the defense.” *Green*, 253 Wis. 2d 356, ¶34. While the *Green* court did not intend this standard to be unduly high, it did expect the defendant to reasonably investigate information related to the victim and clearly articulate how the information sought corresponds to his or her theory of defense. *Id.*, ¶35. While Martinez argues that he is seeking information regarding C.M. accusing him of doing things he never did, his motion and accompanying affidavit fail to clearly articulate how information in C.M.'s records will be independently probative on this issue.

¶12 In reaching our decision, we observe that in prior cases concluding that the defendant was entitled to an in camera review of the victim's confidential records, the defendant provided more independent factual information in making his or her motion. *See Shiffra*, 175 Wis. 2d at 603 (the defendant's motion was based upon information received from the State that the complaining witness had a history of psychiatric problems “which may affect her ability to perceive and

relate truthful information”); *State v. Robertson*, 2003 WI App 84, ¶27, 263 Wis. 2d 349, 661 N.W.2d 105 (defendant proffered a letter from the victim’s doctor stating that the victim had been diagnosed with depression accompanied by psychotic features and that her depression had been exacerbated before the alleged sexual assault); *State v. Walther*, 2001 WI App 23, ¶¶3, 6, 240 Wis. 2d 619, 623 N.W.2d 205 (defense counsel’s affidavit proffered statements from independent witnesses, information from police reports involving the victim, information from a newspaper article and defendant’s motion was later supplemented with Child Protective Services records causing concern as to the victim’s ability to accurately perceive events).

¶13 Here, the information proffered by Martinez is more akin to that proffered by the defendant in *Green*, where the supreme court concluded that a defendant’s statement that counseling records may contain statements from a victim that are inconsistent with what he or she told the police is insufficient to compel an in camera review of confidential records. *See Green*, 253 Wis. 2d 356, ¶36. There, the defendant had failed to show that the victim suffered from a psychological disorder hindering his or her ability to relay truthful information and the defendant had access to other reports from the police and social services which he could have used to attack the victim’s credibility. *Id.*, ¶37. As in *Green*, the information proffered by Martinez failed to show that C.M.’s ability to relay truthful information was hindered. *See also Walther*, 240 Wis. 2d 619, ¶13. Also, as in *Green*, Martinez failed to demonstrate any effort to access or proffer police reports from the prior incidents. Again, as a party directly involved in these prior incidents, Martinez should have been able to access any police reports and should have been able to provide a more specific factual basis to compel the in camera review of C.M.’s privileged records.

Conclusion

¶14 We conclude that under the *Shiffra-Green* standard, Martinez has failed to make a sufficient showing to compel the court to conduct an in camera review of C.M.'s records. We therefore reverse the order of the trial court and remand for further proceedings.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

