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November 21, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP2113-CR State of Wisconsin v. Prince F. Rashada (L.C. # 2015CF5529)

Before Brennan, Brash and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Prince F. Rashada appeals a judgment of conviction entered after a jury found him guilty of two counts of first-degree sexual assault of a child younger than thirteen years old. He also appeals an order denying his postconviction motion for an *in camera* review of the victim's

confidential treatment records.[1] Based upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition.[2] *See* WIS. STAT. RULE 809.21. We summarily affirm.

R.K.M. alleged that in December 2015, when she was twelve years old, her mother's boyfriend—Rashada—touched her breast and vagina. The State charged Rashada with two counts of first-degree sexual assault of a child younger than thirteen years old. *See* WIS. STAT. § 948.02(1)(e). The matter proceeded to trial, and a jury found Rashada guilty as charged. Rashada then filed two motions for postconviction relief. In one, he sought an *in camera* review of R.K.M.'s "medical and/or mental health records" on the grounds that they "may be helpful to [] Rashada's defense ... and may be necessary to a fair determination of his right to postconviction relief, in particular, a postconviction motion for new trial that is being filed contemporaneously with this motion." In a separate submission, Rashada filed a motion for a new trial alleging, *inter alia*, that his trial counsel was ineffective for failing to seek an *in camera* inspection of R.K.M.'s confidential medical and/or mental health records. The circuit court denied both postconviction motions without a hearing. Rashada appeals, challenging only the decision to deny an *in camera* review of R.K.M.'s records.

[1] The Honorable Ellen R. Brostrom presided over the trial and entered the judgment of conviction. The Honorable Jeffrey A. Wagner presided over the postconviction proceedings and entered the order denying postconviction relief.

[2] After this matter was fully briefed by counsel for the parties, we received a packet of documents from Rashada with a cover letter advising that he was submitting "additional information and evidence." We have not considered Rashada's *pro se* submission because he is represented by counsel in this appeal. *See* ***State v. Redmond***, 203 Wis. 2d 13, 19, 552 N.W.2d 115 (Ct. App. 1996) (defendant pursuing an appeal may proceed with counsel or *pro se*). Moreover, arguments regarding the substance of the issues on appeal must be presented to this court in appellate briefs that comply with the requirements set forth in WIS. STAT. RULE 809.19 (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Whether to grant an *in camera* review of an alleged victim's confidential medical and psychiatric records is governed by ***State v. Shiffra***, 175 Wis. 2d 600, 605-08, 499 N.W.2d 719 (Ct. App. 1993), *modified by* ***State v. Green***, 2002 WI 68, ¶¶30-34, 253 Wis. 2d 356, 646 N.W.2d 298. To obtain review, the defendant must make a preliminary showing, setting 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***, 253 Wis. 2d 356, ¶34. This showing, referred to as "the ***Shiffra-Green*** preliminary materiality test," *see* ***State v. Robertson***, 2003 WI App 84, ¶17, 263 Wis. 2d 349, 661 N.W.2d 105, requires the defendant to articulate clearly in an offer of proof how the information he or she seeks corresponds to the theory of defense.[3] *See* ***Green***, 253 Wis. 2d 356, ¶35. The burden of proof is on the defendant, *see* ***id.***, ¶20, who "must show more than a mere possibility that the records will contain evidence that may be helpful or useful to the defense," ***id.***, ¶33. "[S]peculation or conjecture as to what information is in the records" is not a substitute for a fact-specific showing. *See* ***id.***

In the postconviction context, a defendant seeking an *in camera* review of a victim's confidential records must make a somewhat more extensive showing than is required by ***Shiffra-Green***. *See* ***Robertson***, 263 Wis. 2d 349, ¶¶22-23. As we explained in ***Robertson***, a convicted defendant seeking a victim's confidential records must satisfy the first four elements of the newly discovered evidence test. *See* ***id.***, ¶22. Those elements are: "(1) the evidence must have

[3] The ***Shiffra-Green*** test is "preliminary" because it precedes the analysis that is applied when the defendant is successful in compelling an *in camera* review of confidential records and the circuit court is required to determine whether to release the records to the defendant. *See* ***State v. Green***, 2002 WI 68, ¶31, 253 Wis. 2d 356, 646 N.W.2d 298. The instant appeal does not involve the question of whether, following an *in camera* inspection, the circuit court should release records.

come to the moving party's knowledge after trial, (2) the party must not have been negligent in seeking to discover [the evidence], (3) the evidence must be material, [and] (4) the evidence must not be cumulative." ***Id.***, ¶16. In assessing the defendant's postconviction showing, a court uses the preliminary materiality test developed in ***Shiffra*** and ***Green*** and applies that test to the third newly discovered evidence factor. *See* ***Robertson,*** 263 Wis. 2d 349, ¶¶1, 23.

Because Rashada moved for an *in camera* review after conviction, his motion was governed by ***Robertson***. Whether Rashada made the showing that ***Robertson*** requires is a question of law that we consider *de novo*. *See* ***id.***, ¶24.

Before commencing our analysis under ***Robertson***, we address Rashada's assertion that the newly discovered evidence component of that analysis is inapplicable here because Rashada did not move for a new trial on the basis of newly discovered evidence. Rather, Rashada maintains, he sought postconviction review of confidential records "to determine if [he] received the effective assistance of trial counsel" (capitalization omitted). He explains that if a review of the records reveals information that would have helped him at trial, "he would then proceed with [a] postconviction motion for a new trial, on the grounds of ineffective assistance of counsel" for failing to pursue the records in pretrial proceedings. Rashada's argument does not permit him to evade the newly discovered evidence test.

As we explained in ***Robertson***, the analysis we applied in that case was required by the need to reconcile the principles of ***Shiffra*** and ***Green*** with our approach in, *inter alia*, ***State v. Behnke***, 203 Wis. 2d 43, 53-54, 553 N.W.2d 265 (Ct. App. 1996). *See* ***Robertson***, 263 Wis. 2d 349, ¶11. In ***Behnke***, we applied the newly discovered evidence test to a post-trial request for an *in camera* review of confidential records. *See* ***Robertson***, 263 Wis. 2d 349, ¶16 (discussing

Behnke). Significantly, the litigant in ***Behnke*** "was not ... asking for a new trial." *See* ***Behnke***, 203 Wis. 2d at 53. Rather, the litigant in ***Behnke*** was "asking for a post[-]trial *in camera* review by the [circuit] court to see if there [was] relevant evidence justifying a new trial." *See* ***id.*** We nonetheless concluded in ***Behnke*** that the relevant considerations were those required when analyzing a claim that newly discovered evidence warrants a new trial, and we therefore relied on and used those factors to resolve the post-trial request for an *in camera* review. *See* ***id.***

Rashada, like the litigant in ***Behnke***, moved for an *in camera* review of evidence that was not offered at trial, and he made that motion in aid of a potential claim for postconviction relief. Under ***Robertson***, the applicable analysis requires Rashada to satisfy the first four factors of the newly discovered evidence test, and, as ***Behnke*** demonstrates, he cannot dodge that requirement by labeling the postconviction claim as something other than a request for a new trial based on newly discovered evidence. *See* ***Behnke***, 203 Wis. 2d at 53. Accordingly, we turn to the analysis that ***Robertson*** requires.

We first consider whether Rashada showed in the postconviction motion that he became aware of R.K.M.'s confidential records only after trial. *See* ***Robertson***, 263 Wis. 2d 349, ¶25. Rashada plainly did not make such a showing. To the contrary, Rashada revealed in the motion and supporting documentation that R.K.M.'s mother told him before trial that R.K.M. carried a diagnosis of posttraumatic stress disorder and "was prescribed ... psychotropic medications, which she was taking at the time of the alleged incident in this case [and] which affected her ability to perceive reality and events in her life as well as her memory." Rashada went on to state his belief that "a review of [R.K.M.'s] medical and/or mental health records" would reveal the allegedly adverse effects of R.K.M.'s medication, and he advised that he "repeatedly asked" his trial attorney, both in person and in writing on specified dates, "to seek these records before

trial." Further, he acknowledged that he filed a *pro se* pretrial motion for disclosure of R.K.M.'s records. Because Rashada clearly and unequivocally demonstrated in his postconviction motion that he knew before trial about R.K.M.'s alleged psychiatric problems and the existence of medical and mental health records regarding those problems, Rashada cannot, as required by ***Robertson***, satisfy the first factor of the newly discovered evidence test.

Rashada also did not satisfy the third newly discovered evidence factor, which requires a showing that the records at issue are material to the defense. *See* ***Robertson***, 263 Wis. 2d 349, ¶¶16, 25. To make that showing in the context of a postconviction request for an *in camera* record review, "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.... Mere speculation or conjecture as to what information is in the records is not sufficient." *See* ***id.***, ¶26. Here, Rashada alleged in his postconviction motion that R.K.M.'s mother told him that R.K.M. took psychotropic medication, but he did not identify any facts to support his supposition that the medication affected her memory or the reliability of her perceptions. Indeed, he conceded in his supporting memorandum that he sought review of the medical and mental health records "to find out if the alleged victim was taking psychotropic medication that affected her ability to perceive reality (as well as her memory)." He went on to assert that R.K.M.'s confidential records might contain "any number of facts ... which would bear on [R.K.M.'s] perception of reality," and he listed hallucinations, mental impairment, mental defect, and a history of noncompliance with her medication regimen as information that the records might reveal.

In similar circumstances, we concluded that a defendant who sought an *in camera* review of a victim's confidential records failed to demonstrate their materiality. *See* ***State v. Munoz***,

200 Wis. 2d 391, 396-400, 546 N.W.2d 570 (Ct. App. 1996). In ***Munoz***, a defendant facing charges of second-degree sexual assault sought a victim's mental health records based on the defendant's understanding that the victim had received psychiatric counseling for prior unrelated assaults. *See* ***id.*** at 394. The defendant asserted that, in light of the similarity between the charges he faced and the assaults the victim previously suffered, the "records may lay the basis for introduction of prior untruthful allegations of sexual assault" and "may demonstrate an inability of [the victim] to accurately perceive events of this nature." *See* ***id.*** at 397. We determined that the defendant offered "nothing more than 'the mere possibility' that the records '*might* produce some evidence helpful to the defense.'" *See* ***id.*** We added that, "[a]lthough allegedly receiving psychiatric counseling for assaults may lead one to speculate about any number of 'mere possibilities,' standing alone it has no relevance." *See* ***id.*** at 399.

Like the defendant in ***Munoz***, Rashada failed to show that the records he seeks will contain anything that might undercut R.K.M.'s credibility or her ability to perceive reality with accuracy. At most, he showed a basis to believe that R.K.M. took prescription medication, but his suggestion that the medication adversely affected her perception or her memory is nothing more than speculation, the "mere possibility" of helpful evidence that ***Munoz*** teaches is insufficient. *See* ***id.*** at 397.

Rashada responds by stating that he "simply does not have a large amount of detail to support his request" for R.K.M.'s confidential records, and he advises that he requires those records "to determine if they contain relevant evidence." We acknowledged a similar circumstance in ***Munoz***, stating that we appreciated the defendant's inability to provide more detail about the sought-after records. *See* ***id.*** at 399. Nonetheless, we observed in ***Munoz*** that the defendant had offered nothing concrete to show that the victim's records contained any

evidence of a psychological disorder that compromised her credibility or impeded her ability to separate fact from fiction. *See* ***id.*** at 399-400. Such is also the case with Rashada's postconviction motion. As the circuit court emphasized, Rashada did not identify "a single instance in which [R.K.M.] has demonstrated behavior that would give rise to a belief that ... any medications she was taking affected her memory or her ability to perceive reality."

In sum, Rashada failed to satisfy both the first and the third factors of the newly discovered evidence test. To obtain an *in camera* review of a victim's confidential records after conviction, however, a defendant must satisfy all four of the newly discovered evidence factors required by ***Robertson***. *See* ***id.***, 263 Wis. 2d 349, ¶¶1, 22. Rashada failed to carry his burden. Accordingly, his claim for an *in camera* review must fail.

For all the foregoing reasons,

IT IS ORDERED that the judgment and order are affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals