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DISTRICT IV

May 7, 2013

To:

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

2012AP1058-CR

State of Wisconsin v. Jay L. Morrison (L.C. #2010CF1584)

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

Jay Morrison appeals a judgment of conviction for three counts of second-degree sexual assault and one count of fourth-degree sexual assault. *See* WIS. STAT. §§ 940.225(2)(a) and 940.225(3m). Morrison contends that the circuit court erred in denying his motion to compel the release of his victim's psychological records for an in camera review. After reviewing the briefs

and record at conference, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

At trial, Morrison’s defense was that his victim consumed a great deal of alcohol at the time of the alleged assaults and did not properly recall the events surrounding her assault. Morrison argues that the court should have ordered his victim’s psychological records released for in camera review so that he could obtain evidence concerning whether the victim suffered from alcohol addiction issues, which may have affected her ability to recall events surrounding her assaults.

The information sought by Morrison is privileged. *See State v. Kletzien*, 2008 WI App 182, ¶9, 314 Wis. 2d 750, 762 N.W.2d 788. To obtain an in camera review of privileged records, the “defendant must show a ‘reasonable likelihood’ that the [privileged] records will be necessary to a determination of guilt or innocence.” *State v. Green*, 2002 WI 68, ¶32, 253 Wis. 2d 356, 646 N.W.2d 298. The showing by the 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.” *State v. Robertson*, 2003 WI App 84, ¶26, 263 Wis. 2d 349, 661 N.W.2d 105. *See also Green*, 253 Wis. 2d 356, ¶33. “Factual findings made by the court in its determination are reviewed under the clearly erroneous standard,” however, “[w]hether the defendant submitted a preliminary evidentiary showing sufficient for an in camera review” is a question of law this court reviews de novo. *Green*, 253 Wis. 2d 356, ¶20.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Morrison claims that he made a sufficient showing to warrant an in camera review of the victim's psychological records because he presented evidence that the victim and her family had a history of alcohol-related treatment, including blackouts, and had presented evidence that a "family friend had specific knowledge that there were alcoholism issues in the family and that [the victim] had those same issues."

We disagree. In both his motion and the pretrial hearing, Morrison failed to present any evidence that would suggest that the victim suffered from an addiction to alcohol, which may have hindered her ability to recollect the events of her assault. In his motion, Morrison asserted that "[b]ased upon conversations with a collateral source within the past two weeks, there is a history of family violence and alcoholism in the [victim's] family," and that "[u]pon information and belief, [the victim] has been involved in counseling for one or both of these issues [and] [i]n this case ... admitted to consuming alcohol." Morrison's motion did not specify who the "collateral source" was, nor did it specify whether the alleged counseling actually concerned alcoholism. In a subsequently filed addendum to his motion, Morrison alleged that he received information from Brian Tuman, who "ha[d] personal knowledge of the [victim's] family, specifically a 'history of family violence and alcoholism in the [victim's] family.'" However, Morrison failed to provide any evidence that Tuman was aware of whether the victim suffered from an alcohol related disorder and whether she had obtained counseling for that problem. In fact, Morrison acknowledged in his motion that he did not know whether the victim had been diagnosed with an alcohol-related disorder. At the pretrial hearing, Morrison's attorney acknowledged that he could not state that Tuman had knowledge that the victim had sought treatment for alcohol problems and he failed to present any other evidence that she had.

Morrison failed to show any evidence suggesting that the victim suffered from alcohol problems that may have hindered her ability to recall the events of her assault or that she had received any counseling for that problem. Accordingly, we conclude that Morrison did not meet his burden of showing a reasonable likelihood that the privileged records were necessary to a determination of guilt or innocence, the applicable standard for in camera review by the court, and therefore affirm the circuit court's denial of Morrison's motion. See *Green*, 253 Wis. 2d 356, ¶32.

IT IS ORDERED that the order appealed is summarily affirmed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals