

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 14, 2014

Diane M. Fremgen
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. 2014AP445-CR

Cir. Ct. No. 2011CM3164

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW M. OBRIECHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed.*

¶1 SHERMAN, J.¹ Andrew Obrieht appeals a judgment of conviction and an order denying his postconviction motion for an in camera inspection of the victim's mental health records. I affirm.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

BACKGROUND

¶2 The State of Wisconsin charged Obrieht with two Class A misdemeanor counts of having sexual intercourse with a child sixteen years or older, contrary to WIS. STAT. § 948.09, as a repeat offender. *See* WIS. STAT. § 939.62(1)(c). Pursuant to a plea bargain, Obrieht pled no contest to one misdemeanor count and the State agreed to dismiss the repeat offender charge, the second misdemeanor count, and recommended no more than six months' incarceration. Obrieht completed and signed a Plea Questionnaire and Wavier of Rights document.

¶3 Prior to the plea and sentencing, Obrieht's attorney filed two *Shiffra-Green*² motions to compel an in camera inspection of confidential records, including those related to the victim's mental health. The first motion sought to obtain records from the Middleton School District. The second motion sought records from the Adolescent Psychological Clinic and from Dane County Human Services. The circuit court denied both motions. Obrieht's counsel filed a Motion to Reconsider the first motion, citing WIS. STAT. § 118.125(2)(f),³ which the court granted, giving access to the victim's requested school records.

¶4 Obrieht asserts that he learned for the first time during the sentencing hearing that the victim was seeking mental health treatment to cope

² *See State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

³ WISCONSIN STAT. § 118.125(2)(f) provides that a pupil's records "shall be provided to a court in response to subpoena by parties to an action for in camera inspection, to be used only for purposes of impeachment of any witness who has testified in the action. The court may turn said records or parts thereof over to parties in the action or their attorneys if said records would be relevant and material to a witness's credibility or competency."

with the emotional impact of the sexual assault. Obrieht filed a motion for an in camera inspection of the victim's privileged and confidential mental health records. The circuit court denied Obrieht's motion. He now appeals.⁴

DISCUSSION

¶5 On appeal, Obrieht argues that the circuit court erred in denying his postconviction motion for relief, asserting that he made the necessary evidentiary showing to entitle him to an in camera review. I disagree.

Standard of Review

¶6 Newly discovered evidence introduced postconviction to compel an in camera review of mental health records must satisfy, by clear and convincing evidence, four factors to establish a preliminary evidentiary showing: (1) the evidence is discovered after the conviction; (2) the defendant is not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. *State v. Robertson*, 2003 WI App 84, ¶¶1, 16, 263 Wis. 2d 349, 661 N.W.2d 105 (applying the first four factors of the newly discovered evidence test and the *Shiffra-Green* analysis to a postconviction request for an in camera review of mental health records). The *Shiffra-Green* materiality test, which I discuss in a separate section that follows, applies to the third and fourth factors. *Robertson*, 263 Wis. 2d 349, ¶26; see *State v. Shiffra*, 175 Wis. 2d 600, 608, 499 N.W.2d 719 (Ct. App. 1993) (holding that to satisfy a

⁴ The State argues that Obrieht waived his right to bring this postconviction motion. I will not address this issue, as the appeal is resolved upon another dispositive issue. See *Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

preliminary showing of materiality of victim’s mental health records for an in camera inspection, the defendant must demonstrate “that the sought-after evidence is relevant and *may be helpful* to the defense” (emphasis added)); ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298 (modifying and raising the threshold for satisfying a preliminary showing under ***Shiffra*** by requiring that the defendant demonstrate a *reasonable likelihood* that the victim’s records will contain information necessary to a determination of guilt or innocence). Our analysis follows that of the ***Robertson*** court in determining whether Obrieht is entitled to an in camera review of the victim’s counseling records.

¶7 We defer to the circuit court’s findings of fact and will not upset them unless they are clearly erroneous. ***Shiffra***, 175 Wis. 2d at 605. Whether the requested records satisfy the first four factors of the new evidence test and the ***Shiffra-Green*** materiality test presents a question of law that we review de novo. ***Robertson***, 2003 WI App 84, ¶24.

New Evidence

¶8 Obrieht argues that his postconviction motion satisfies the requisite four prongs of the new evidence test necessary to demonstrate a preliminary evidentiary showing, thereby entitling him to an in camera review of the victim’s counseling records. Obrieht contends that because he learned the victim was seeking psychological counseling related to the assault after he waived his right to a trial, the evidence satisfies the first element. Obrieht next argues that his counsel was not negligent in seeking this evidence because the information’s confidential nature inhibits discovery, and counsel’s efforts to obtain personal information through a hired private investigator proved fruitless. The circuit court assumed, without deciding, that the first two factors of the new evidence test had

been satisfied, and rejected the request for an in camera review based on Obrieht's failure to satisfy, by clear and convincing evidence, the requirements of the last two factors. I will also assume, without deciding, that the first two factors have been met.

¶9 The circuit court determined that in order to establish the third and fourth factors, the evidence needed to satisfy the *Shiffra-Green* materiality test, and held that Obrieht did not meet this evidentiary burden. Accordingly, on appeal, the briefs focus on the materiality of the records sought by Obrieht and whether the information therein is cumulative.

Shiffra-Green Analysis

¶10 Granting access to privileged and confidential records for an in camera review requires that a court balance the competing interests of the victim's right to privacy and the defendant's right to a fair trial. *Robertson*, 263 Wis. 2d 349, ¶12. This balancing turns primarily on the materiality of the evidence under the *Shiffra-Green* analysis. *Id.*, ¶¶1,13.

¶11 The test requires that the defendant establish "a specific factual basis demonstrating a reasonable likelihood that the [victim's] 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.*, ¶26 (citing *Green*, 2002 WI 68, ¶34). The court must look at the existing evidence and determine if the records will provide information that is "independently probative to the defense." *Id.* Such a fact-specific evidentiary showing may also not be based on mere speculation or conjecture, or the mere possibility that the records will contain useful evidence. *Id.*

¶12 The specific factual basis upon which Obrieht relies is the proposition that these records will likely contain information capable of impeaching the victim’s credibility. Obrieht further contends that the records will likely contain the victim’s recitation of the events, including potential feelings of “regret or remorse for falsely implicating the defendant” along with professional insight into the victim’s ability to recite the events as they occurred. Therefore, Obrieht argues, there is a reasonable likelihood that these records are relevant to a determination of guilt or innocence. Finally, Obrieht argues that the information is distinct from the victim’s previously known mental health history, as the counseling sessions specifically relate to his alleged crime, and is therefore not cumulative.

¶13 Obrieht cites to *State v. Johnson*, No. 2011AP2864-CR, unpublished slip op. ¶15 (WI App Apr. 18, 2012),⁵ for support wherein the appeals court determined there was a “‘reasonable likelihood’ that the [victim’s mental health] records contain[ed] relevant information necessary to a determination of guilt or innocence.” Obrieht’s reliance on *Johnson* is misplaced. First, the victim in *Johnson* sought counseling *at the time* the ongoing sexual assaults were occurring. *Id.*, ¶14. Second, the purpose of the therapy was, in part, to discuss the relationship with the perpetrator, the victim’s stepfather. *Id.* The *Johnson* court found that the counseling sessions were therefore sufficiently material to satisfy the requisite preliminary showing under *Shiffra-Green* and compelled an in

⁵ The supreme court also issued a ruling in this case, but because the majority of the court could not reach consensus, the court affirmed the decision of the court of appeals (“since a majority of the court has not reached consensus under precedent so as to decide the issue presented and the court is deadlocked, the decision of the court of appeals must be affirmed”) *State v. Johnson*, 2014 WI 16, ¶13, 353 Wis. 2d 119, 846 N.W.2d 1.

camera review. *Id.*, ¶1. Unlike the victim in *Johnson*, the records Obrieht seeks to obtain relate to counseling sessions that occurred *after* the sexual assault, with the stated purpose of helping the victim deal with emotional damage—specifically “self esteem” and “confidence” issues stemming from the assault. There is no evidence to indicate that the counselling involved the victim’s relationship with Obrieht. The *Shiffra-Green* test does not open the door to confidential record disclosures merely because a victim receives mental health counseling in the aftermath of sexual assault. *State v. Munoz*, 200 Wis. 2d 391, 397-99, 546 N.W.2d 570 (Ct. App. 1996) (holding that the mere possibility that mental health records may produce evidence helpful to the defense does not entitle the defendant to an in camera review of the records).

¶14 Obrieht fails to demonstrate a reasonable likelihood that the records will contain exculpatory information or information capable of undermining the victim’s credibility or bearing on the victim’s ability to relate events truthfully or accurately. Rather than evidence, his motion consists primarily of unsupported conclusory assertions. First, in the absence of evidence to the contrary, there is nothing inherent in the victim’s decision to seek counseling that suggests she is incapable of relating events truthfully or accurately or that she has in fact not done so. Second, Obrieht has not offered any evidence, such as expert testimony, that the disabilities from which she evidently suffers, including ADHD and “cognitive limitations,” potentially impact her ability to relate reliable evidence.

¶15 Obrieht also fails to demonstrate that the evidence is not merely cumulative. Evidence is considered “not merely cumulative” if it “differs from the substance and quality” of the evidence to which defense counsel already had access. *State v. Edmunds*, 2008 WI App 33, ¶15, 308 Wis. 2d 374, 746 N.W.2d 590. Obrieht knew before his conviction that the victim had sought mental health

counseling, and it is reasonable to infer that any professional insight into her ability to perceive events and relate them accurately and truthfully would have been discussed in earlier counseling sessions. The circuit court denied access to the victim's earlier records.

¶16 Whether or not the court had granted these earlier requests, Obrieht has not provided any evidence that the records he presently seeks to obtain would not constitute evidence cumulative to the information already available to Obrieht's defense. Obrieht already had information at his disposal to evaluate and impeach the victim's credibility, such as testimony from school officials, police reports, and the opinions of professionals familiar with the victim. Indeed, the court granted Obrieht access to the victim's school records, pursuant to WIS. STAT. § 118.125(2)(f), for the explicit purpose "of impeachment of any witness who has testified in [this] action." Yet the circuit court did not find any factual support in the record for the proposition that the victim was unable to perceive events or report them truthfully, or that she had not done so, nor did it believe that such information might be gleaned from the mental health records requested prior to his plea. While that prior denial of access is not before us, Obrieht has similarly provided no evidence that the requested records would not be merely cumulative to the records to which his counsel already had access.

¶17 Therefore, Obrieht did not satisfy the preliminary showing necessary to compel a court to conduct an in camera review. Obrieht has not satisfied his burden of showing, by clear and convincing evidence, that the victim's counseling records contain relevant information necessary to a determination of guilt or innocence. Obrieht's conclusory assertions provide no basis to do more than speculate that information material to his theory of defense

may exist in the victim's mental health records. Therefore, I affirm the circuit court's decision not to compel an in camera review.

CONCLUSION

¶18 For the reasons discussed above, I affirm.

By the Court.—Judgment and order affirmed.

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

