

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-3546-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRIAN C. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Brian C. Miller appeals from a judgment of conviction of four counts of delivery of a controlled substance within 1000 feet of a park as a repeat offender. He argues that the trial court improperly restricted his cross-examination of the informant by not allowing examination on information

contained in a psychological report prepared for child custody litigation in which the informant was involved. We conclude that the scope of the proposed cross-examination was not relevant and, if relevant, was outweighed by prejudice. We further conclude that even if there was error in not permitting unlimited cross-examination, it was harmless error. We affirm the judgment of conviction.

¶2 Miller was convicted of delivering cocaine on four occasions to Gregory Crego, an undercover narcotics informant. All four transactions were controlled buys. Crego and his vehicle were searched before each buy, he was supplied with the purchase money, and after contact with Miller, he immediately returned to a designated spot, turned over the cocaine, was searched again and his written statement taken. Three of the buys were recorded. The first buy occurred on March 8, 1996.

¶3 Crego is Miller's cousin and volunteered to work for the Fond du Lac police department. Crego testified that he came in contact with the police when he turned his son in for having drugs at home and that he became an informant "for my kids." He explained that he was not paid any money and that he had not asked for any consideration on any pending criminal matters. He acknowledged that the police detective offered to speak to the district attorney about a conviction Crego had a short time before. He indicated that he had used cocaine in the past and that he had twice been convicted of a crime.

¶4 On cross-examination, Crego stated that he had a sentence pending when he started working with the police but reaffirmed that he did not ask for consideration on his sentence. He further explained that when he turned his son in for having drugs, he wanted his son to work with the police so that drugs would no longer be available to his son. He realized he could help as well. Crego was

asked if he was involved in a custody problem with his former wife at the time he made the controlled buys. The objection to this question was sustained. In response to further questioning, Crego stated that there was no discussion about his assistance to the police helping him out with custody of his children.

¶5 When the State recalled Crego at the end of its case, the defense sought to examine Crego about information reported in a psychological evaluation of him completed for custody purposes. The report was dated December 22, 1995. The offer of proof was that Crego reported to the psychologist that there were pending allegations that he had committed sexual abuse of a child. The defense also argued that the report was relevant to Crego's mental status at the time he began working for police and his overall credibility. The trial court ruled that the defense could not make any inquiries with respect to the report.

¶6 Miller argues that his constitutional right of confrontation was violated by the trial court's restriction on his cross-examination of Crego. The right of confrontation is not unlimited. *See State v. Pulizzano*, 155 Wis.2d 633, 646, 456 N.W.2d 325, 330 (1990). Two of the acceptable limitations are precluding a defendant from presenting evidence that is irrelevant or that is relevant but substantially outweighed by its prejudicial effect. *See State v. McCall*, 202 Wis.2d 29, 44, 549 N.W.2d 418, 424 (1996); *State v. Jackson*, 216 Wis.2d 646, 657, 575 N.W.2d 475, 480 (1998).

¶7 The relevancy and prejudice determinations are within the trial court's discretion and we review whether there has been an erroneous exercise of discretion. *See McCall*, 202 Wis.2d at 35, 549 N.W.2d at 420-21. We may sustain the trial court's determination on different grounds. *See State v. Sharp*, 180 Wis.2d 640, 650, 511 N.W.2d 316, 321 (Ct. App. 1993). If the evidence

sought to be elicited is irrelevant or outweighed by prejudice, then Miller's constitutional right of confrontation was not infringed. *See Rogers v. State*, 93 Wis.2d 682, 692, 287 N.W.2d 774, 778 (1980).

¶8 The information in the report includes the description of Crego's two prior convictions, his psychological history and the psychologist's evaluation, the history of his drug use and related treatment, and references to allegations against him of sexual abuse of a child. We conclude that the trial court's determination that inquiry into any of these areas was not relevant to Crego's credibility in relating the drug purchases was a proper exercise of discretion.

¶9 Crego admitted his two prior convictions, and the nature of those convictions was not admissible. *See State v. Smith*, 203 Wis.2d 288, 297, 553 N.W.2d 824, 828 (Ct. App. 1996). Psychological disorders identified in the report do not alone affect credibility, particularly where there is no evidence that the disorders affect the witness's ability to recall events. *See Chapin v. State*, 78 Wis.2d 346, 353, 254 N.W.2d 286, 290 (1977); *State v. Richard A.P.*, 223 Wis.2d 777, 790, 589 N.W.2d 674, 680 (Ct. App. 1998), *review denied*, 225 Wis.2d 489, 594 N.W.2d 383 (1999). Similarly, Crego's past drug or alcohol abuse is immaterial to credibility absent any showing that he was under the influence of those substances at the time of the drug purchases. *See Barren v. State*, 55 Wis.2d 460, 464-66, 198 N.W.2d 345, 347-48 (1972). That the report makes a visitation recommendation only documents that Crego may have been involved in a custody dispute. The supposition that he helped the police to gain favor or consideration in a child custody dispute is speculation and not supported by any evidence that the police department or the district attorney's office could influence the outcome of the custody matter. Finally, that allegations of sexual abuse had been made did

not render Crego's answer about his prior convictions or pending charges untruthful. No formal charges were pending.

¶10 We further conclude that to the extent that areas of inquiry from the report may be relevant, the relevancy is substantially outweighed by the prejudicial effect. "Unfair prejudice ... means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (quoted source omitted). The mental health information is highly personal and perhaps confidential. Inquiry about allegations of child abuse is inflammatory and appeals to the jury's natural revulsion towards such conduct. Revealing the source and context of the allegations would have caused undue embarrassment for Crego. The limitation on cross-examination was a proper exercise of discretion and not a violation of Miller's right of confrontation.

¶11 Even if error, the limitation on cross-examination was harmless error. "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction." *State v. Sullivan*, 216 Wis.2d 768, 792, 576 N.W.2d 30, 41 (1998). We review the entire record to determine if our confidence in the outcome is undermined. *See State v. Randall*, 197 Wis.2d 29, 39, 539 N.W.2d 708, 712 (Ct. App. 1995).

¶12 Crego's credibility was already impeached by his admission of two criminal convictions and past cocaine use. The jury heard that Crego was awaiting sentence and that the police officer had offered to discuss that case with the district attorney. There was very compelling evidence of Miller's guilt aside from Crego's testimony about the drug purchases. The tape recordings of the buys were played for the jury. The police officers testified that Crego and his vehicle were

searched before and after the buys. Even unlimited attack on Crego's credibility or motive for testifying would not have undermined the evidence supporting the conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

