COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP2614-CR
2014AP2615-CR
2014AP2616-CR

Cir. Ct. Nos. 2010CF707
2010CF3272
2010CF4684

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY TYSON BELOW,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve Judge.

¶1 LaROCQUE, J. Gregory T. Below appeals a judgment of conviction and an order denying his postconviction motion following a three-week jury trial. The jury reached verdicts on forty-one felony charges involving nine women. It found Below guilty of twenty-nine charges, including kidnapping, strangulation and suffocation, sexual assault, substantial battery, reckless injury, and one count of solicitation of prostitutes. It acquitted him of twelve other similar felony counts.

¶2 Below seeks a new trial on four claims of trial court error: 1) denial of his motion for severance (separate trials); 2) denial of his claim of ineffective trial counsel; 3) denial of his motion to suppress evidence seized with a search warrant; and 4) denial of his motion for an *in camera* inspection of a victim's mental health treatment records. We affirm the judgment and order of the circuit court for the reasons stated herein.

BACKGROUND

¶3 Milwaukee police detectives arrested Below at the home of his girlfriend, C.R., where he was living on February 10, 2010. The arrest followed the consensual search of a van registered to C.R. but essentially driven only by Below. The search revealed evidence suspected to be related to a sexual assault of a child. In addition, following a search of the home, again with consensual consent, C.R. told police that Below had sexually assaulted her.

¶4 The State initially charged Below with sixty-one felonies in three separate cases. After various motions to consolidate and to sever were filed, the State dismissed sixteen counts. The court ordered the remaining forty-five felony counts joined for trial, and the case went to trial. At the conclusion of the State's

case, the court granted the prosecutor's motion to dismiss four more charges, counts numbered eight, nine, thirteen, and twenty.[1]

¶5 The jury rendered forty-one verdicts on the remaining charges: guilty on twenty-nine counts and not guilty on twelve. The following summary correlates the names of the nine alleged victims with the corresponding forty-one counts, as set forth in the second amended information, with the jury verdict on each:

- J.O.: guilty on counts one, two, and ten (sexual assault; substantial battery; reckless injury;); not guilty on counts three, four, five, six, and seven (sexual assault; substantial battery; kidnapping; sexual assault; substantial battery).

- M.M.: guilty on counts eleven, twelve, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, forty-four, and forty-five (sexual assault; kidnapping; kidnapping; substantial battery; sexual assault; sexual assault; soliciting a prostitute; sexual assault; sexual assault; kidnapping).

- S.M.: not guilty on counts twenty-one, twenty-two, twenty-three, and twenty-four (attempted kidnapping; kidnapping; sexual assault; kidnapping).

[1] Counts eight and nine related to victim J.O.; counts thirteen and twenty related to victim M.M.

- L.W.: guilty on counts twenty-five, twenty-six, and twenty-seven; (kidnapping; sexual assault; strangulation and suffocation).

- A.V.: guilty on counts twenty-eight, twenty-nine, and thirty (kidnapping; sexual assault; strangulation and suffocation).

- C.A.: guilty on counts thirty-two and thirty-four (sexual assault; strangulation and suffocation); not guilty on counts thirty-one and thirty-three (kidnapping; reckless injury).

- C.R.: guilty on counts thirty-five, thirty-six, and thirty-seven (reckless injury; strangulation and suffocation; sexual assault).

- G.L.: guilty on counts thirty-eight, thirty-nine, and forty; (kidnapping; sexual assault; strangulation and suffocation); and

- L.R.: guilty on counts forty-two and forty-three (sexual assault; strangulation and suffocation); not guilty on count forty-one (kidnapping).

¶6 After he was convicted, Below filed a postconviction motion, which was denied without an evidentiary hearing. This appeal follows. Additional facts will be developed as necessary below.

DISCUSSION

¶7 As noted, Below raises four issues on appeal. We discuss each in turn.

1) Joinder and Severance.

¶8 Following a hearing on dueling motions for joinder and severance, the trial court explained its decision to join all of the charges for trial. The court observed that Below was charged with sexual assault of each of the nine alleged victims, often repeated assaults of the same victim. Each allegation involved extreme violence and some form of confinement or restraint, even if the exact method of restraint varied slightly. Seven of the nine women alleged choking and strangulation. The other two, J.O. and S.M., related other acts of similar violence.

Standard of Review

¶9 Below observes that even if charges would satisfy joinder requirements, a court may order separate trials if it appears that a defendant or the State is prejudiced by a joinder of crimes. *See* WIS. STAT. § 971.12 (2013-14).[2] If a severance motion is made, the court must determine whether prejudice would result from joinder and weigh the potential prejudice against the public interest of having one trial. ***State v. Locke***, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). An appellate court reviews *de novo* whether initial joinder was proper, construing the joinder statute broadly. ***Id.*** at 596. Whether severance is appropriate is a question left to the trial court's discretion. ***Id.*** at 597. We will not find an erroneous exercise of discretion unless the defendant can establish that failure to sever the charges caused substantial prejudice. *See* ***id.*** If the evidence of the severed counts would be admissible in separate trials, "the risk of prejudice arising because of joinder is generally not significant." ***Id.*** "The test for failure to

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

sever thus turns to an analysis of other crimes evidence under ***Whitty v. State***, 34 Wis. 2d 278, 149 N.W.2d 557 (1967)." *See* ***Locke***, 177 Wis. 2d at 597. We must ask: (1) Does the evidence fit within an exception set forth in WIS. STAT. § 904.04(2)?; (2) Is the evidence relevant under WIS. STAT. § 904.01?; and (3) Is the evidence's probative value substantially outweighed by the danger of unfair prejudice under WIS. STAT. § 904.03? *See* ***State v . Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Though most lenient in child sex assault cases, courts generally allow a "'greater latitude of proof as to other like occurrences'" in sexual assault cases. ***State v. Davidson***, 2000 WI 91, ¶26, 236 Wis. 2d 537, 613 N.W.2d 606 (citation omitted). This latitude has been expanded, effective in 2014. *See* 2013 Wis. Act 362.

Discussion

¶10 We focus our discussion on the issue of severance. We need not dwell on the question of consolidation, nor does Below. The trial court stated that the core issue is the issue of prejudice. Below agrees, "and focuses his challenge on the substantial prejudice of trying these charges together." He therefore narrows his statement of the issue to this: "[t]he [trial] court erred in denying the severance motion."

¶11 The complaints against Below established a five-year continuum, between November 2004 and December 2009. The trial court ruled that it could deal with any cumulative impact of the numerous victims and charges with an appropriate jury instruction.

¶12 While Below recites the appropriate standards, the State contends that he does not relate those standards to specific evidence from each of the

charges sufficient to rebut the circuit court's holding that the other acts evidence would be admissible under these standards. We agree.

¶13 Instead, Below emphasizes the exceptional number of charges, the number of alleged victims, the five-year time frame of events, and the disparities in the quality and credibility of the State's evidence.

¶14 Without setting forth an exhaustive description of the allegations in the complaints, a summary is informative on the issue of admissibility of other acts evidence:

- J.O.: She met Below in 2004 and had sex with him in exchange for drugs. Later, between September 2004 and November 2009, on a number of occasions, he broke into her apartment, beat or strangled her until she lost consciousness, and then had sex with her without her consent. Afterward, he often held her in her room for hours against her will.

- M.M.: She met Below in August 2004. He soon became extremely violent, intimidating, and controlling. Between about June 2006 and December 2009, he repeatedly assaulted, beat, and strangled her; on one occasion he sodomized her with a beer bottle. Below would carry M.M. from one place to another against her will, threaten to set her hair on fire, and cut her hair off. He also forced her to prostitute herself by use of violence and threat of violence.

- S.M.: Below approached her in his van, took her to an alley, and threatened to hurt her if she did not undress; she ran away and he followed her and punched and kicked her repeatedly. He beat her

again the next day, locked her in a room for days, and sexually assaulted her repeatedly.

- L.W.: In June 2009, after Below offered her money to perform a sex act and she agreed, he grabbed her by the throat and took her to an abandoned building. He choked her and she lost consciousness repeatedly. She stated that he had oral and vaginal sex with her. When she confronted him months later, he denied assaulting her.

- A.V.: She met Below at a bar called Club 24 sometime in 2008, and had seen him in the bar several times before she talked with him in October of that year. She consented to leave the bar with Below to find some drugs, but then things took a turn for the worse. He locked her in an apartment, beat and choked her, and sexually assaulted her several times. He threatened to kill her and dump her body in the river if she continued to resist him.

- C.A.: She too met Below at Club 24, and in November 2009 he invited himself over to her house. He started punching her and choking her, and she lost consciousness. C.A. believed Below raped her. Male DNA extracted from her vagina matched Below's.

- C.R.: Below strangled, beat, and sexually assaulted her between August 2009 and December 2009. During some of the assaults, he would use objects to rape her, causing her to bleed profusely. On one occasion he beat her head against a cement garage floor. C.R. explained that she was living with Below out of fear.

- G.L.: Below approached her while she was walking to a friend's house in September 2009. He was driving a white conversion van, and she refused to go with him. Later, he returned and she again refused. She tried to get away, but someone grabbed her from behind and began choking her. She lost consciousness, and when revived, she saw Below, who again started to choke her and ultimately raped her.

- L.R.: As she was walking down the street, an unknown man, whom she later identified as Below, grabbed her, and forced her into the back of a silver van. He choked and raped her and held her in the van for several hours before letting her go. A DNA sample from her vagina matched Below's.

¶15 As the trial court determined, the modus operandi was similar—the crimes always involved extreme violence, the crimes took place in the same geographic area, and the crimes demonstrated evidence of a common scheme or plan. *See* WIS. STAT. § 971.12(1).

¶16 Finally, Below has not established substantial prejudice. Because the record supports the decision to join the charges, the defendant must not only overcome a presumption of no prejudice, but must also show *substantial* prejudice; "some" prejudice will not suffice. *See* ***State v. Hoffman***, 106 Wis. 2d 185, 209, 316 N.W. 2d 143 (Ct. App. 1982); *see also* ***State v. Leach***, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985) ("If the offenses meet the criteria for joinder, it is presumed that the defendant will suffer no prejudice from a joint trial."). The mere fact that there were a large number of victims and allegations over a five-year span does not by itself establish that Below was substantially prejudiced—

particularly in a case where he does not dispute the trial court's analysis that the evidence of the allegations involving each victim would have been relevant regarding the other victims under WIS. STAT. § 904.04. Moreover, we do not find his additional arguments regarding the strength and "quality" of the witness testimony or "damning photos" of M.M. that supposedly infected the jury's verdict regarding one of the counts involving J.O. persuasive. As the State correctly notes, the trial court could not have decided a pretrial motion to consolidate "by speculating or attempting to foresee the quantity or quality of evidence the parties will introduce at trial." Rather, the court must decide the motion based on the allegations in the complaint. *See* WIS. STAT. § 971.12. We therefore conclude that the trial court's decision to deny the request for severance was a proper exercise of its discretion.

2) Ineffective Assistance of Counsel.

¶17 Below divides his claim of ineffective assistance of counsel into three subjects: (a) hearsay evidence; (b) evidence of Below's HIV status; and (c) references to his accusers as "victims." He additionally argues that the cumulative impact of these errors prejudiced him.

Standard of Review

¶18 In ***State v. Allen***, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, the Wisconsin Supreme Court reviewed the standard applied when defendants assert that they are entitled to a postconviction evidentiary hearing on the issue of ineffective assistance of counsel:

> First, [courts] determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that

> [appellate courts] review *de novo*. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing.

Id., ¶9 (italics added; citations omitted).

¶19 A claim of ineffective assistance requires the defendant to show that his attorney's performance was deficient as well as prejudicial to his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984.). To prove deficient representation, a defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To satisfy the prejudice prong, a defendant must demonstrate that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. In other words, there must be a showing "that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. We need not address both aspects of the test if the defendant fails to make a sufficient showing on either one. *See* ***id.*** at 697.

¶20 The ultimate question as to whether there was ineffective counsel is a question of law which this court reviews *de novo*. *See* ***State v. Balliette***, 2011 WI 79, ¶19, 336 Wis. 2d 358, 805 N.W.2d 334.

a. Hearsay.

¶21 The trial court denied the postconviction motion for relief without an evidentiary hearing. Before doing so, the court gave counsel a comprehensive

opportunity to argue admissibility of the evidence in question as well as the impact on the outcome of the trial. It did not make formal or specific findings but stated it was in general agreement with the State's analysis and conceded that to some extent, counsel probably should have objected on hearsay grounds. The court then found that Below did not suffer any prejudice.

¶22 On appeal, Below refers to eighteen individual statements to support his motion for a new trial. Some of the statements may qualify as hearsay exceptions as excited utterances, or statements for purposes of medical diagnosis or treatment, or statements having comparable guarantees of trustworthiness; however, because we conclude that Below has failed to satisfy the prejudice prong of the ***Strickland*** test, we will assume, without deciding, that the statements are inadmissible.

¶23 We include a summary of the eighteen statements below. All but two of the out-of-court statements are attributed to one or another of the victims who testified in person at trial:

1. S.M. testified that her sister, M.M., told her she was scared of Below; and

2. S.M. also testified that Below threatened to set M.M.'s hair on fire.

3. G.S., the father of M.M.'s child, testified that M.M. said Below was beating her and made her cut her hair off; and

4. G.S. testified that M.M. told him that Below told her to go out on the streets and sell her body, and if she did not listen and bring money back, he would whoop her.

5. Detective Justin Carloni stated that G.S. had indicated that Below threatened to cut off M.M.'s hair.

6. S.M. testified that everybody around the neighborhood said Below was bad business and an all-around bad person who beats up women and stalks them.

7. L.W. testified that she told A.V. about her assault because A.V. said that the same thing happened to her (A.V.).

8. Similarly, L.W. testified that A.V. told her Below beat her and raped her and that she told A.V. that Below raped her.

9. Mike Ceplina, who worked at Club 24, testified that when Below walked into his bar, A.V. appeared upset and said Below had attacked her and sexually assaulted her. A.V. also told Ceplina to keep Below away from her.

10. Ceplina also said that a lot of girls at the bar were afraid of Below over the last year and that he heard of girls saying they were assaulted or that they had not had a good time with him.

11. C.A. testified that A.V. visited her after she (C.A.) was attacked and reminded C.A. that she (A.V.) had told her that she was attacked but C.A. did not believe her.

12. C.A. was asked to clarify what she just said, and explained that A.V. had told her about being assaulted before but C.A. had not believed her.

13. One of the investigating detectives testified that C.R. did not want him to write anything down and did not want any part of being a victim. She told him numerous times that she was very afraid of Below.

14. T.L. testified that her sister, G.L., reported that she was attacked.

15. A friend of G.L. testified that around September 4, 2009, G.L. said that she had been sexually assaulted.

16. Sexual Assault Nurse Examiner ("SANE") Eva Meyer testified that C.A. said that Below kept telling her to shut up and threatened to kill her. Medical records containing these statements were entered into evidence.

17. Meyer also testified that C.A. told her that Below had strangled her friends in prior assaults. This statement is also included in the medical records.

18. Another nurse testified the L.R. said her attacker told her to shut up and kept referring to her as "Brittany" even though that was not her name. These statements are in the medical reports.

¶24 As noted, all but two of the statements were attributed to the complaining witnesses, each of whom testified at trial. Each was subject to cross-examination. We conclude, as did the trial court, that this minimizes the significance of the out-of-court statements.

¶25 Of the two remaining statements, one came from a complaining witness, S.M., a remark about people around the neighborhood saying that Below

beats and stalks women. S.M. was also subject to cross-examination. Moreover, the jury acquitted Below of all three charges relating to S.M., which suggests that the jury did not find her credible.

¶26 Finally, we note that Below's defense was that his conduct with the women in question was consensual. Below testified at great length and in graphic detail—explaining that he often offered drugs or money in exchange for consensual sex. Even for the one victim he denied having sex with—A.V.—he testified that he drove her to a residence and gave her drugs. According to Below, the evening ended abruptly after the two argued and the police arrived to arrest him based on an outstanding warrant. The irreconcilable conflict between the in-court version of events of Below and his accusers was the central focus of this three week trial. Given the totality of the evidence in this case, the hearsay statements Below cites above did not deprive him of a fair trial.

b. Below's HIV Status.

¶27 Below argues that trial counsel was ineffective for failing to object to testimony that he had told police he thought he was HIV positive, and for eliciting testimony from the SANE nurse that Below told everyone he was HIV positive. In the first instance, the prosecutor asked A.V. about a conversation she had with a police officer. She testified the officer told her he had to know if she had intercourse with Below because he had just told the police he might be HIV positive. Counsel did not object to her response. In the second instance, counsel cross-examined the SANE nurse about her examination of C.A., asking if the patient reported that the assailant had "told everyone that he is HIV positive?" The nurse answered yes.

¶28 We need not address the State's arguments that these questions and answers were appropriate matters of strategy and not ineffective assistance of counsel because they simply were not prejudicial. *See* ***Strickland***, 466 U.S. at 697. First, they were brief and there is no indication they were discussed again in the course of the lengthy proceedings. Moreover, Below's own trial testimony introduced the subject through no fault of his attorney. The prosecutor asked Below on cross-examination why he did not use protection during the numerous sexual encounters he had freely described. Below responded: "Well, I mean it is no excuse. Like they say, get high, get stupid, get AIDS."

¶29 This was a self-inflicted wound. Below was not asked about AIDS. He need not have volunteered the remark. Below tacitly acknowledges this in his argument on appeal, but seeks to minimize the significance of it. He contends his "flippant comment about the *risk* of contracting HIV did not negate the severity of multiple witnesses testifying that he believed he *was* HIV positive while having unprotected sex."

¶30 We respectfully disagree. His gratuitous "get AIDS" remark, compared with the statement regarding his belief he was HIV positive, presents a distinction without a difference.

¶31 In light of Below's statement to the jury, we find no prejudice attributable to counsel's performance on the subject of HIV.

c. Reference to accusers as " victims".

¶32 The trial court granted a motion to preclude references to the women as "victims." Below contends that the trial transcript reveals over forty occasions where a violation occurred. The State responds with numerous examples of use of

the word in the generic or abstract sense, such as references to victims in the medical forms; where a policeman referred to procedures in general, *e.g.*, "sometimes you bring the victim down to the car…"; questions as to whether a person may have been a victim; or where a witness self-corrected or was told to use another term.

¶33 We conclude that the use of the word does not amount to error "of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.'" *See* ***State v. Erickson***, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999) (citation omitted).

d. Cumulative effect of inadmissible evidence.

¶34 Finally, Below seeks a new trial, citing ***State v. Thiel***, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305. ***Thiel*** holds that even if individual deficiencies of counsel standing alone are not sufficiently prejudicial, if the cumulative effect of numerous unreasonable errors creates a reasonable probability that but for these errors the result would have been different, a new trial is required. *See* ***id.***, ¶60.

¶35 ***Thiel***, however, involved egregious errors far removed from those presented here. Thiel's counsel failed to read discovery documents that provided critical exculpatory information that would have benefited the defense. *See* ***id.***, ¶38. In addition, counsel failed to make any independent investigation relevant to critical matters of credibility of the complaining witness. *See* ***id.***, ¶¶46-50. The court found this failure deficient, even though "***Strickland*** informs us that 'counsel is strongly presumed to have rendered adequate assistance.'" ***Thiel***, 264 Wis. 2d 571, ¶44 (citing ***Strickland***, 466 U.S. at 690-91). Also, counsel failed to seek evidence highly probative of the complaining witness's truthfulness—evidence

that was admissible as an exception to the therapist/client personal or medical history exclusion of WIS. STAT. § 972.11(3). ***Thiel***, 264 Wis. 2d 571, ¶¶30, 51.

¶36 In contrast, the errors in failing to exclude hearsay or other irrelevant matters here are relatively minor and inconsequential. As ***Thiel*** declares: "Lest there be any misunderstanding, a convicted defendant may not simply present a laundry list of mistakes by counsel and expect to be awarded a new trial. A criminal defense attorney's performance is not expected to be flawless." *See* ***id.***, ¶61.

¶37 We conclude that the errors here, considered cumulatively, do not undermine this court's confidence in the outcome. Thus, there is no reasonable probability that, but for the errors, the result would have been different.

3) Motion to Suppress Evidence Obtained by Search Warrant.

¶38 Below claims the trial court erred when it denied his motion to suppress evidence, including Below's DNA sample. He maintains the affidavit in support of the warrant fell short of establishing probable cause in two respects: first, it established no sufficient link between his DNA and the child sexual assault of J.D.; second, it failed to show any relevance between his DNA and the offenses involving C.R., one of the women for which he was tried and convicted. The circuit court denied the motion to suppress.

Standard of Review

¶39 "The duty of the court issuing [a] warrant is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before it, there is a fair probability that contraband or evidence of a crime

will be found in a particular place." ***State v. Multaler***, 2002 WI 35, ¶8, 252 Wis. 2d 54, 643 N.W.2d 437. Therefore, "[w]e accord great deference to the warrant-issuing judge's determination of probable cause, and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause." *See* ***id.***, ¶7. "The burden of proof in a challenge to the existence of probable cause for the issuance of a search warrant is clearly with the defendant." ***State v. Edwards***, 98 Wis. 2d 367, 376, 297 N.W.2d 12 (1980).

¶40 In addition, "[t]he admission of evidence lies within the sound discretion of the trial court." ***State v. Keith***, 216 Wis. 2d 61, 68, 573 N.W.2d 888 (Ct. App. 1997). When reviewing a discretionary decision, "we examine the record to determine if the [trial] court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach." ***Id.*** at 69. In considering whether the proper legal standard was applied, on the other hand, no deference is due. ***Id.*** "Therefore, we review *de novo* whether the evidence before the [trial] court was legally sufficient to support its rulings." ***Id.*** Moreover, "if evidence has been erroneously admitted or excluded, we will independently determine whether that error was harmless or prejudicial." *See* ***id.***

¶41 "In reviewing a motion to suppress, we apply a two-step standard of review." ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. We first review the trial court's findings of historical fact, upholding them unless they are clearly erroneous. *See* ***id.*** "Second, we review the application of constitutional principles to those facts *de novo*." ***Id.***

Contents of the Affidavit for a Search Warrant

- A woman named J.D. reported to a Milwaukee police officer on January 21, 2010, that on that night, while asleep in her bed, an unknown black male awoke her and forcibly removed her from her home. She said the suspect, who had a white rag similar to a kitchen rag covering his face from the nose down, placed her in the back seat of a grey van. He continuously struck her in the face with closed fists and forced penis to vaginal sexual intercourse against her will. He then dumped her in an alley, leaving her bleeding heavily from her vagina. As a result of the assault, J.D. suffered severe internal injuries requiring surgery to repair, including a laceration from her vagina to her anus.

- J.D. was examined at Children's Hospital, and the sexual assault kit used during the examination was sent to the Wisconsin Regional Crime Lab for testing. A DNA profile, foreign to J.D., was developed. The profile matched that from a sexual assault in Milwaukee upon C.S. on August 20, 2008.

- The aforementioned 2008 assault on C.S., according to the police report, began about 1:00 a.m., as she approached her residential entrance door. The suspect took her purse and struck her numerous times to the face with a closed fist. He forced her to the ground and engaged in penis to vaginal sexual intercourse against her will. As a result of this assault, the victim sustained a fractured orbital socket and laceration that required sutures to close.

- The aforementioned DNA linkage between those two assaults, coupled with the level of violence, led Carloni to search internal Sensitive Crimes Databases, looking for prior reported sexual assaults involving vans. He established "a possible link" with at least three previously reported sexual assaults. Each was particularly violent in nature and involved a conversion van.

- "In further researching these cases," Carloni determined that the alleged victim of one such assault had given a license plate number of the van of the person who assaulted her. This registration plate was listed to C.R., with her address. Another possible linked assault listed a known suspect as "Gregory Below."

- Carloni and another officer went to C.R.'s address and "observed a grey conversion [van] parked out front." They spoke with both C.R. and Below, who was at the residence, and established that C.R. is the registered owner of the van, but Below was essentially the only individual who drives the vehicle per his own admission.

- Both C.R. and Below gave oral permission to search the van. In a cursory search, police found a white rag with what appeared to be bloodstains on it, similar to that described by the victim. The rag was located in a pocket behind the rear passenger seat. Possible bloodstains were also observed on the rear seat of the van.

- In addition, C.R. stated that "Below has raped her with a bottle in the past causing bleeding, and has been very violent toward her… Below does reside with her, and they do share a bedroom."

Probable Cause

¶42 Below argues that "the core question was whether the [affidavit] provided a sufficient link between Below's DNA and the child assault." He points to Carloni's statements described above, the first in paragraph fifteen of the affidavit, which he claims only established "a possible link" between J.D.'s case and "at least three previously reported sexual assaults." The second statement Below relies upon, in paragraph sixteen, says "in researching these cases"—*i.e.*, the ones in paragraph fifteen involving particularly violent assaults involving vans—"Carloni was able to determine that one of the alleged victims had given the license number of [C.R.]'s van", and "[a]nother possible linked assault listed a known suspect… Gregory Below, B/M, 10/12/73." Below argues that these facts create a possible link to Below, but objectively viewed, failed to amount to probable cause.

¶43 We disagree. The factual information, read as a whole, reveals facts and reasonable inferences from those facts that Below disregards. While it is true that read in isolation, the paragraphs he relies upon deal with undeveloped possibilities, the affidavit in its entirety establishes that the detectives followed up on those possibilities. The result was information revealing Below to be closely tied to the grey van that contained an apparent bloodstained white rag and an apparent bloodstained rear seat, consistent with J.D.'s report. In addition, these pieces of circumstantial evidence joined forces with Cynthia's reported personal experience: Below's egregious bloody sexual assault and prior violence toward her.

¶44 Under the deference we accord the magistrate who issues a search warrant, and the practical, common sense decision that entails, *see* ***Multaler***, 252

Wis. 2d 54, ¶¶7-8, we conclude that Below fails to meet the burden necessary to overturn the warrant, *see* ***Edwards***, 98 Wis. 2d at 376. The trial court then reviewed the warrant and denied the motion to suppress. Our review of the evidence before the court shows that the evidence before the trial court was sufficient to support its ruling. That ruling is therefore affirmed.

4) *In Camera* review of C.R.'s mental health records.

¶45 Below's final argument on appeal is that the circuit court erred by failing to conduct an *in camera* review of C.R.'s mental health records.

¶46 Below filed a pretrial motion, which he later renewed postconviction, seeking an *in camera* review of C.R.'s mental health records from February 10, 2010—*i.e.*, the date Below was arrested and C.R. was placed in the Milwaukee Mental Health Complex for treatment. As noted, Below's arrest followed the investigation of several particularly violent assaults in Milwaukee. When C.R. told police during an interview that Below had raped her and had been very violent with her, a detective observed her to be nervous, distraught, and shaking. In addition, C.R. asked the detective not to pursue her report of Below's crimes and threatened to hurt herself.

¶47 In seeking the *in camera* review of C.R.'s treatment records, Below argued that "Any mental health issues/disorders that affect memory impairment or ability to control one's behavior would be exculpatory … or … would at the very least be proper information for cross-examination regarding [C.R.]'s perception/recollection of events, which goes directly to credibility." Below further alleged that "the counseling records may contain information relevant to

whether or not [C.R.] disclosed the alleged sexual assaults to a treatment provider, or whether there are any inconsistencies in the disclosure."

¶48 The trial court denied Below's motion, both before and after trial, on grounds that the facts did not meet the ***Shiffra/Green*** standard. *See* ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298; ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (1993), abrogated by ***Green***, *supra*.

Standard of Review

¶49 In ***Green***, the supreme court held:

> The defendant bears the burden of making a preliminary evidentiary showing before an *in camera* review is conducted by the court. Factual findings made by the court in its determination are reviewed under the clearly erroneous standard. 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*. If we determine the requisite showing was made, the defendant is not automatically entitled to a remand for an *in camera* review. The defendant still must show the error was not harmless.

Id., 253 Wis. 2d 356, ¶20 (italics added; citations and footnote omitted).

¶50 "[T]he preliminary showing for an *in camera* review requires a defendant to set 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." ***Id.***, ¶34. "[I]nformation will be 'necessary to a determination of guilt or innocence' if it 'tends to create a reasonable doubt that might not otherwise exist.'" ***Id.*** (citation omitted). "This test essentially requires the court to look at the existing evidence in light of the request and determine …

whether the records will likely contain evidence that is independently probative to the defense." ***Id.***

¶51 Again, we note that the burden is on "the defendant to reasonably investigate information related to the victim before setting forth an offer of proof and to clearly articulate how the information sought corresponds to his or her theory of defense." ***Green***, 253 Wis. 2d 356, ¶35. Such a request "will often require support through motion and affidavit from the defendant." ***Id.*** The "standard is not intended, however, to be unduly high for the defendant before an *in camera* review is ordered by the [trial] court." ***Id.*** "Therefore, in cases where it is a close call, the [trial] court should generally provide an *in camera* review." ***Id.***

Discussion

¶52 Below fails to meet his burden to obtain an *in camera* review of C.R.'s records. The mere fact that someone has received treatment at a mental health center does not trigger a right to review those records. If it did, the privilege established under the law would be rendered meaningless.

¶53 Below points to the fact that C.R. was nervous and distraught, that she delayed reporting the assaults, and that she threatened to harm herself if police charged him with a crime. These factors do not, in our opinion, meet the ***Green*** standard. There is nothing that shows that the mental health records at issue would have suggested that C.R. suffered from any psychological disorder that hindered her ability to relay truthful information. *See* ***id.***, ¶37 (defendant in similar circumstances "failed to show any evidence to even remotely suggest that [the victim] suffered from any psychological disorder that hindered her ability to relay truthful information"). Indeed, contrary to what Below argues, his case is

even less a "close call" than ***Green*** was, as in the ***Green*** case the victim not only delayed reporting the assault at issue, but also gave significantly conflicting descriptions of the assault. *See* ***id.***, ¶¶4-8, 37.

¶54 Therefore, for the foregoing reasons, we affirm the denial of Below's motion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.