COURT OF APPEALS
DECISION
DATED AND FILED

JUNE 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2405-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMIE R. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Jamie R. Miller appeals from a judgment convicting him of second-degree sexual assault of a child under sixteen years old, as a repeater, contrary to § 948.02(2), STATS., and from a postconviction order denying his motion for a new trial. On appeal, he challenges the trial court's refusal to conduct an in camera review of the victim's counseling and mental

heath records and the assistance furnished by trial counsel when attempting to gain access to those records. We reject both challenges and affirm.

The sexual assault allegedly occurred on November 30, 1995. The victim reported the assault in January 1996. On the first day scheduled for trial, May 28, 1996, Miller's counsel moved the court to require the State to provide the victim's mental health treatment and social worker counseling records (the records) since September 1995 because the records "likely contain exculpatory and mitigating information." In the alternative, Miller moved the court to review the records in camera and provide Miller with any exculpatory or mitigating information found therein. As grounds, Miller argued that the victim was hospitalized prior to the assault after she alleged that her father was physically abusing her. Miller argued that access to the records was necessary to his defense. The State objected on timeliness grounds and argued that Miller had not made the showing required by the case law governing access to confidential records.

The trial court denied the motion because Miller did not make a particularized showing regarding the contents of the records and their relevance to the trial. The court also noted that the motion was filed on the day of trial. Citing the age of the charges, the age of the victim and that trial was scheduled to start that day, the court declined to adjourn the trial to permit further exploration of matters relating to Miller's motion. On appeal, Miller challenges the trial court's pretrial ruling.

A defendant seeking access to a witness's medical records must first make a preliminary showing that the evidence is relevant and necessary to a fair determination of guilt or innocence. *See* ***State v. Behnke,*** 203 Wis.2d 43, 49, 553 N.W.2d 265, 268-69 (Ct. App. 1996). If this burden is met, the trial court

conducts an in camera inspection of the records to determine if they contain evidence material to the defense. *See* ***id.*** at 49, 553 N.W.2d at 269. To make the required preliminary showing, "the defendant must establish more than the mere possibility that psychiatric records may be helpful." ***Id.*** Whether the defendant made the required showing presents a question of law which we determine independently of the trial court. *See* ***State v. Munoz,*** 200 Wis.2d 391, 395, 546 N.W.2d 570, 572 (Ct. App. 1996).

We agree with the trial court that Miller did not make a sufficient pretrial showing that the records were necessary to a fair determination of guilt or innocence. Unlike ***State v. Shiffra,*** 175 Wis.2d 600, 610, 499 N.W.2d 719, 723-24 (Ct. App. 1993), where the defendant presented proof that the victim suffered from posttraumatic stress disorder stemming from prior assaults, linked that disorder to how the victim might have perceived what the defendant alleged was consensual sexual conduct, and offered additional evidence that the victim had difficulty distinguishing between reality and a "dream effect," Miller did not offer any evidence of what the records might contain and why such would be relevant and necessary to his defense. Rather, Miller merely argued that the fact that the victim had received counseling or mental health care at or around the time of the charged assault was enough to warrant an in camera inspection. On appeal, Miller continues to speculate about the contents of the victim's records without offering any evidence, like that which was offered in ***Shiffra,*** that the records would be relevant. Receiving counseling or treatment in and of itself does not constitute a sufficient showing of necessity or relevance. *See* ***Munoz,*** 200 Wis.2d at 399, 546 N.W.2d at 573.

Postconviction, Miller argued that the trial court should disclose the records based upon the victim's trial testimony that she spent a week or so in the

"psych ward" of a Milwaukee hospital approximately two weeks before Miller assaulted her, that her father had physically (not sexually) abused her, and that she received counseling from a social worker for a year after Miller's assault. Miller argued that the records were relevant to the victim's ability to perceive reality due to her mental condition prior to Miller's assault. Miller speculated that the records might contain inconsistent statements, the victim's medication history or evidence of other possible sources of the victim's sexual knowledge. The trial court again denied the motion because Miller had presented only speculation in support of his motion for an in camera inspection of the records.

We affirm the trial court's denial of the postconviction motion. Miller essentially made the same argument as he did pretrial, and the trial court, having presided over the trial, was able to evaluate that argument postconviction. The court noted that the victim was cross-examined at trial and that nothing was elicited which suggested that the victim had trouble perceiving reality or was unable to relate past events. Miller did not offer any ***Shiffra***-type evidence tending to substantiate that the information he sought could be located in the records.

Finally, Miller argues that his trial counsel was ineffective for waiting until the morning of trial to move the court for access to the victim's records. To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). However, we need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the grounds of lack of prejudice. *See* ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

Here, the trial court ruled posttrial that counsel's allegedly untimely request for access to the victim's records did not affect the court's disposition of the motion on the merits. The trial court repeatedly stated that Miller did not meet his burden to obtain an in camera review of the records regardless of the timing of the original motion because the motion was an impermissible "fishing expedition." The trial court stated that it would have denied the motion no matter when it had been brought. The trial court also rejected Miller's request for a new trial because Miller received a fair trial. We conclude that Miller has not demonstrated prejudice arising from trial counsel's filing of the records motion on the morning of trial.

Having rejected Miller's claims of error, we also reject his demand for a new trial in the interests of justice because the real controversy was not tried. Miller argues that the real controversy was not tried because the credibility of the victim could have been challenged by the records he sought. We have already held that Miller did not make a sufficient showing to gain an in camera review of those records. A final catch-all plea for discretionary reversal based on the cumulative effect of nonerrors cannot succeed. *See* ***State v. Marhal***, 172 Wis.2d 491, 507, 493 N.W.2d 758, 766 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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