COURT OF APPEALS
DECISION
DATED AND FILED

SEPTEMBER 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. **99-0944-CR**

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. ALGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge.

PER CURIAM. Michael Alger appeals his conviction for second-degree sexual assault of a child as a repeat offender, after a jury trial. The information charged that Alger had sexual contact with a girl under age sixteen "during about *June 1995*." Alger makes two arguments: (1) trial counsel

ineffectively failed to object to a confusing and misleading "time of offense" instruction, and (2) the trial court wrongly failed to hold an *in camera* inspection of the victim's counseling records. We reject Alger's arguments and affirm his conviction.

The State's inability to prove the precise date of the assault required the trial court to give a jury instruction on the time of the offense. The trial court explained at the instruction conference how it intended to modify the standard instruction to fit the facts of the case. The trial court then made a further extemporaneous modification from the bench, and Alger's trial counsel raised no objection to this extemporaneous modification. The trial court also refused Alger's request that it review *in camera* the victim's counseling records from a residential treatment center for exculpatory evidence, citing the request's lack of particularity.

The standard instruction, however, on the time of the offense, Wisconsin Criminal Jury Instruction No. 255, provides the following:

> If you find that the offense charged was committed by the defendant, it is not necessary that the State shall have proved that the offense was committed on the precise date alleged in the information. If the evidence shows beyond a reasonable doubt that the offense was committed on a date near the date alleged, that is sufficient.

The trial court gave the jury the following modified No. 255 instruction from the bench:

> If you find that the offense charged was committed by the defendant, it is not necessary that the State shall prove that the offense was committed on the precise time alleged in the information. If the evidence shows beyond a reasonable doubt that the offense was committed on a date here (sic) the time alleged that is sufficient. Maybe should

> say time frame as opposed to time. I'm not talking about time of day (sic).

According to Alger, the last three sentences of the modified instruction contradict the first sentence. The first sentence tells the jury that the prosecution need not prove the precise date of the crime; the last three, Alger claims, tell the jury that the prosecution must prove the time or time frame of the crime. The second sentence also improperly substitutes the word "here" for "near." We assume *arguendo* that the word "here" is not a transcriptional or typographical error. Alger believes that the modified instruction, viewed as a whole, is confusing and misleading. *See* ***State v. Dodson***, 219 Wis.2d 65, 580 N.W.2d 181 (1998).

Alger has not shown that trial counsel was ineffective for failing to object to the modified instruction. For such a claim, Alger needed to show both deficient performance by counsel and resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We see no material defect in the modified instruction. The first part informed the jury that the prosecution need not prove the precise date of the crime. This was the central point of the instruction. The remainder of the instruction had the same essential meaning. Further, the last three sentences were, to a large extent, supplementary and duplicative, and thus significantly less important in informative content. In context, the remainder did not cloud or confuse the instruction's central point. Moreover, even if the trial court inadvertently misspoke the word "here" for "near," this would not have confused the jury. Any reasonable juror would have understood the import of the instruction; none would have taken the misspoken word literally. Last, the trial court gave the jury a written modified instruction for its deliberations. The written

instruction contained only the first two sentences and the word "near."[1] This cured any unlikely confusion that might have taken place. There was no deficient performance by counsel or resulting prejudice.[2]

Alger has also not shown that the trial court wrongly refused to conduct an *in camera* review of the victim's treatment records. Alger points out that the victim admittedly made statements about the sexual assault to personnel where she received treatment. This is his sole basis for requesting *in camera* review. These records were privileged. *See* § 905.04, STATS. The trial court was required to review the records only if Alger made a preliminary showing that they were relevant and helpful to the defense or necessary for fairness. *See* ***State v. Shiffra***, 175 Wis.2d 600, 608, 499 N.W.2d 719, 722-23 (Ct. App. 1993). Alger has made no such showing, either in the trial court or on appeal. All Alger has offered is speculation that the records were relevant and helpful to his defense or necessary for a fair proceeding. He has offered no evidence that anything the

[1] The written modified instruction provides the following:

> If you find that the offense charged was committed by the defendant, it is not necessary that the State shall have proved that the offense was committed on the precise time frame alleged in the information. If the evidence shows beyond a reasonable doubt that the offense was committed on a date near the time frame alleged, that is sufficient.

[2] Alger also asks for a new trial in the interest of justice, claiming that the confusion in the modified instruction kept the real controversy from being tried. Our power is discretionary, *see* ***State v. Hicks***, 202 Wis.2d 150, 160, 549 N.W.2d 435, 439-440 (1996), and we are satisfied, for the reasons previously stated, that the modified instruction did not prevent the real controversy from being fairly tried.

victim told personnel actually found its way into her treatment records.[3] The trial court properly denied the request.

By the Court.—Judgment and order affirmed.

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

[3] Alger also seeks the records to contradict the victim's statement that she told treatment personnel about the sexual assault. If the records contain no reference to the assault, he would attempt to use this lack of reference to show the victim never told personnel and thereby impeach the victim's credibility Alger is asking for *in camera* review to look for what is a form of negative evidence—the absence of an entry. Alger has no evidence that the records in fact lack the above-cited entries. Under ***Shiffra***'s principles, Alger is not entitled to have *in camera* review absent some threshold indication that the records actually contain impeachment material of the kind sought. *Cf.* ***United States v. Mitchell***, 178 F.3d 904, 908-09 (7th Cir. 1999).