COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP729-CR **Cir. Ct. No. 2015CF186**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WAYNE A. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Barron County: JAMES C. BABLER, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Wayne Johnson appeals a judgment, entered upon his guilty pleas, convicting him of two counts of fourth-degree sexual assault of a child and an order denying his postconviction motion. Johnson seeks to withdraw

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

his pleas on the basis that his trial counsel provided ineffective assistance. Specifically, Johnson claims that his counsel failed to cite and argue the correct legal standard for obtaining in camera review of the victim's counseling records and that, under the applicable facts and law, he was entitled to such review. We reject Johnson's argument on the second point, concluding he would not have met his initial burden for entitlement to in camera review. Accordingly, Johnson suffered no prejudice from any deficient performance, and we affirm.

BACKGROUND

¶2 The State charged Johnson with one count of first-degree sexual assault of a child under the age of thirteen in two separate cases. According to the complaint in the first case, filed in April 2015, Amy[2] told a social worker at the Mikan Day Treatment School ("Mikan") in February 2015 that Johnson had licked and fondled her breasts in November 2014, when she was twelve years old. According to the complaint in the second case, filed about a month later, a therapist at Mikan reported that Amy had "flashbacks" to an August 2014 incident where Johnson fondled her breasts after drawing a "tattoo" on her breast with a marker. During the relevant times, Johnson—who was not Amy's father—was in an intermittent relationship with Amy's mother.

¶3 Amy had also accused Johnson of sexual misconduct prior to the foregoing alleged incidents. While staying with her father's family in 2009, Amy told her grandmother that Johnson touched her vagina over her underwear. After an agency referral, law enforcement interviewed Amy, at which time she recanted.

[2] We refer to the victim using a pseudonym. *See* WIS. STAT. RULE 809.86(4).

Amy's mother first enrolled Amy in counseling after this allegation. In 2013, Amy's father reported that Amy told him Johnson had inappropriately touched her. Amy did not confirm that accusation in a later police interview, but she alleged that Johnson showed her a video depicting sexual activity. Johnson was charged as a result of the latter allegation, but that case was eventually dismissed. Amy began counseling on her mother's initiative at Mikan shortly following the latter report.

¶4 In this case, Johnson filed a motion for release of Amy's counseling records.[3] The motion cited the dismissed charges from 2013, but it did not cite any legal authority addressing in camera review of privileged records.

¶5 The release of Amy's counseling records was addressed over the course of several hearings. At a November 2, 2015 hearing, Johnson argued that in camera review was appropriate because Amy made the allegations that formed the basis of the second complaint in this case while she was in counseling and because the charges from 2013 had been dismissed. The circuit court rejected Johnson's argument because Johnson provided "no evidentiary grounds" to support his asserted basis to order an inspection. Johnson himself represented that he had meant to call Amy's mother to testify on the motion about "specific information from counselors and from counseling sessions with her daughter," but his counsel noted that she had not appeared for the hearing. The court adjourned the November 2 hearing to allow Johnson to present further evidence on the motion.

[3] Johnson primarily argued for an independent psychological evaluation of Amy in this motion. The circuit court denied this motion and an amended motion on that issue. Johnson did not pursue that issue in his postconviction motion, nor has he on appeal.

¶6 At a November 4, 2015 hearing, Johnson again argued that the second complaint in this case was based upon a "flashback" that occurred during counseling at Mikan and that Amy previously made unfounded allegations toward Johnson. Johnson also asserted that the defense had retained Dr. Hollida Wakefield—a licensed psychologist—as an expert witness and that Wakefield needed the counseling records to prepare an expert report. Johnson neither presented any witnesses nor submitted any affidavits at this hearing.

¶7 The circuit court explained to Johnson's trial counsel that his motion had not cited ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, the controlling case on motions for in camera review of confidential or privileged records. In particular, the court observed that Johnson's "argu[ment] is not an evidentiary fact … something that's under oath, whether in an affidavit or in a courtroom." After Johnson affirmed that an evidentiary basis for his motion existed, the court allowed Johnson to file an amended motion for in camera inspection, but the court asked trial counsel to "please take a look at ***State v*[.] ***Green***" before doing so.

¶8 Johnson filed an amended motion for in camera inspection, in which he argued the counseling records "could well be critical in [his] defense." In support, the motion cited ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993). Although ***Shiffra*** had been modified by ***Green***, Johnson's motion did not cite ***Green***. Johnson also attached an affidavit from Dr. Wakefield. In the affidavit, Wakefield averred that Amy had been involved in prior investigations and counseling in 2009 and 2013, and that the records from Mikan were "essential to Mr. Johnson's defense" in the present case. In particular, Wakefield claimed she needed to evaluate the records to determine whether any discussion of alleged abuse during treatment improperly influenced Amy's "current statements and

eventual testimony," to identify Amy's "functioning" and potential motives to falsely accuse Johnson, and to determine whether the records contained statements by Amy's mother or others that contradicted Amy's allegations against Johnson.

¶9 At a May 11, 2016 hearing, the circuit court denied Johnson's amended motion.[4] Johnson had argued at the hearing that Dr. Wakefield's affidavit established that the defense needed the counseling records to address whether Amy's memories were accurate, thus meeting the "very minimal" burden for in camera review in ***Shiffra***. Rejecting that argument, the court determined that Johnson had presented "nothing specific here other than [Wakefield] saying that it may be helpful to see [Amy's] records" and that Johnson had otherwise only established that Amy was in counseling when she made the allegations. The court concluded that Johnson failed to meet his initial burden under ***Green***.

¶10 Two weeks after the amended motion was denied, Johnson entered into a plea agreement with the State. The State amended one count of first-degree sexual assault to two counts of fourth-degree sexual assault, to which Johnson would plead guilty, while the other first-degree sexual assault count would be dismissed but read in for sentencing. The circuit court withheld sentence and ordered two years' probation on each count, to run concurrently.

¶11 Johnson filed a postconviction motion to withdraw his pleas, alleging he received ineffective assistance of counsel with respect to his motion for in camera review of Amy's confidential counseling records. Johnson and his

[4] The circuit court also addressed the amended motion for in camera review at a December 21, 2015 hearing. There, the court observed Johnson provided "no cited authority" to obtain Amy's counseling records, and it declined to permit in camera review "at th[at] time."

trial counsel were the only witnesses at the evidentiary hearing on the postconviction motion; Amy's mother did not testify. The circuit court rejected Johnson's claim of ineffective assistance on the basis that he had not met his burden of showing that he would have been entitled to in camera review of the records, even if trial counsel had performed as desired. It entered an order denying the motion, and Johnson appeals. We set forth additional facts established during the postconviction proceedings below, as necessary.

DISCUSSION

¶12 A defendant can withdraw a guilty plea after sentencing only if he or she shows that doing so is necessary to correct a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test is met if a defendant has received ineffective assistance of counsel. ***Id.*** To prevail on an ineffective assistance of counsel claim, a defendant must show his or her counsel's performance was deficient and this deficient performance resulted in prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Regarding deficiency, the defendant must prove that counsel's performance fell below an objective standard of reasonableness. ***Id.*** at 688. In the plea withdrawal context, prejudice ensues when, but for counsel's errors, there is a reasonable probability that the defendant would not have pleaded guilty and would have insisted on going to trial. ***Bentley***, 201 Wis. 2d at 312.

¶13 When reviewing a claim of ineffective assistance of counsel, we uphold the circuit court's findings of fact, including those pertaining to the circumstances of the case and counsel's conduct and strategy, unless they are clearly erroneous. ***State v. Jenkins***, 2014 WI 59, ¶38, 355 Wis. 2d 180, 848 N.W.2d 786. Whether counsel provided ineffective assistance is a question of law

that is subject to our independent review. ***Id.*** With respect to a circuit court's decision to grant or deny in camera inspection of confidential or privileged records, the question of whether a defendant made a sufficient preliminary evidentiary showing is one of law that we also review independently. *See* ***State v. Nellessen***, 2014 WI 84, ¶14, 360 Wis. 2d 493, 849 N.W.2d 654.

¶14 Before addressing Johnson's argument, we first briefly describe the legal standards governing in camera review of confidential or privileged records. In ***Shiffra***, this court held that for in camera inspection of a complaining witness's privileged records to occur, a defendant must "make a preliminary showing that the sought-after evidence is relevant and may be helpful to the defense or is necessary to a fair determination of guilt or innocence." ***Shiffra***, 175 Wis. 2d at 608. We reasoned that this approach properly balanced a defendant's right to a fair trial with the State's interest in protecting its citizens' privileged information. ***Id.*** at 605, 609.

¶15 In ***Green***, our supreme court approved of ***Shiffra***'s reasoning, but it modified the standard for a preliminary showing. *See* ***Green***, 253 Wis. 2d 356, ¶¶30-34. As revised, a defendant must "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 [are] not merely cumulative to other evidence available to the defendant." ***Id.***, ¶34. Our supreme court explained this "reasonable likelihood" standard was higher than the "may be necessary" standard in ***Shiffra***—which the court viewed as expressing a "mere possibility"—and was more appropriate due to the "strong public policy favoring protection of … counseling records." ***Green***, 253 Wis. 2d 356, ¶¶30, 32.

¶16 To summarize, the ***Shiffra*/*Green*** standard requires a court to view "the existing evidence in light of the request and determine … whether the records will likely contain evidence that is independently probative to the defense." ***Green***, 253 Wis. 2d 356, ¶34. Said differently, the sought-after evidence must "tend[] to create a reasonable doubt that might not otherwise exist." ***Id.*** Importantly, the burden of proof is on the defendant, ***id.***, ¶20, who "must show more than a mere possibility that the records will contain evidence that may be helpful or useful to the defense," ***id.***, ¶33. "[S]peculation or conjecture as to what information is in the records" is not a substitute for a fact-specific showing. ***Id.***

¶17 Johnson argues, and the State concedes, that his trial counsel was deficient by failing to cite and argue ***Green*** in relation to the known facts when he moved for in camera review of Amy's records. But prejudice does not result when counsel fails to file a motion that would have been properly denied. *See* ***State v. Golden***, 185 Wis. 2d 763, 771, 519 N.W.2d 659 (Ct. App. 1994). For his ineffective assistance claim to succeed, therefore, Johnson must still show that his motion would have been granted under the applicable facts and law. Johnson acknowledges that he cannot show prejudice if his request for in camera review would not result in the disclosure of Amy's counseling records, as he would be in the same position he occupied prior to entering his plea.

¶18 Johnson contends Amy's counseling records would likely contain: (1) a full description of the "flashback" memories Amy experienced during therapy that served as the basis of the second complaint; (2) a psychological explanation or diagnosis relating to those flashbacks; and (3) a psychological

explanation of Amy's ability to tell the truth or accurately remember events.[5] According to Johnson, any information related to these factors is "critical" to his defense because: (1) the conditions surrounding these reconstructed memories are unknown, which conditions—as Dr. Wakefield opined—may show that the memories were false or unreliable; and (2) Amy's credibility was central to the case, and her credibility was already in doubt due to the 2009 and 2013 allegations and her exhibited "extreme dislike" of Johnson. Johnson also asserts the records would not be cumulative to information at his disposal because he had no alternative information on Amy's mental health disclosed to him prior to trial.

¶19 The State does not directly address Johnson's argument that he established a specific factual basis for in camera review. Instead, it argues the records were cumulative to existing information available to Johnson. More precisely, it notes the circuit court's finding that Amy's mother was a witness aligned with the defense; in fact, in the court's words, she was the "linchpin" of the defense. Johnson's trial counsel testified that Amy's mother had obtained "child protection records" and information on counseling involving Amy on behalf of the defense. Trial counsel's strategy, as the circuit court also found, was to show that Johnson did not commit the alleged crimes and that Amy had "made up the allegations on her own or her perceptions were skewed by therapy or influenced by her father." At the postconviction hearing, trial counsel explained that Amy's mother was prepared to testify regarding Amy's strong dislike of Johnson and to impeach her daughter, specifically regarding Amy's past,

[5] In terms of a specific factual basis, Johnson cites both Dr. Wakefield's affidavit (as he did in the circuit court) and a large packet of law enforcement documents regarding the 2009 and 2013 allegations that Amy made against Johnson as well as the reasons Amy was in counseling (which he submitted with his postconviction motion).

unsubstantiated allegations against Johnson. Johnson confirmed that Amy's mother believed him over her daughter.

¶20 From these facts, the State argues "the defense literally had someone on the inside of the counseling sessions providing information directly to the defendant and trial counsel." Without testimony from Amy's mother at the postconviction hearing, the State contends that "it is logical to infer that [Amy's] mother would have passed that information" on to Johnson had she obtained any relevant information to his defense. According to the State, the fact that Amy's mother did not so testify leads to the conclusion that the records were—as trial counsel stated at the postconviction hearing—only "marginally" important to Johnson's defense and unnecessary to a determination of guilt or innocence in this case.

¶21 Johnson's various replies to the State's reasoning fail largely because they ignore his burden of proof. Johnson attempts to downplay the circuit court's finding that Amy's mother was aligned with the defense by suggesting that Amy's mother may have either had limited knowledge of her daughter's counseling or was a reluctant defense witness. Johnson states, in various manners, that the record does not "indicate" anything to contrary.[6] The evidentiary burden, however, was on Johnson to prove those facts, not on the State to disprove them. *See* ***Green***, 253 Wis. 2d 356, ¶20. Johnson cannot shift his responsibility to "undertake a reasonable investigation into the victim's background and counseling

[6] Johnson argues the Child Protective Services (CPS) report detailing the February 2015 allegation "indicates that staff members at [Mikan] were not freely sharing information with [Amy]'s mother." The portions of the record cited for this proposition do not support it. Rather, they merely reflect that the reporter at Mikan wanted to remain anonymous and asked that Mikan staff be contacted first if CPS was going to communicate with the family for further investigation.

through other means first before the records will be made available." ***Id.***, ¶33. As noted, the record is unambiguous that Amy's mother was actively assisting the defense by gathering and sharing information on her daughter, including Amy's counseling information, and directly providing it to trial counsel.

¶22 The following example from Johnson's reply brief demonstrates why his failure of proof dooms his argument. There, Johnson contends that nothing in the record supports an inference that Amy's mother could have independently accessed the counseling records from Mikan. Johnson's framing of this evidentiary void misses the point. ***Green*** instructs us to evaluate whether Johnson presented an adequate evidentiary showing on both the materiality of the records and their not being cumulative to information already known to the defense. *See* ***id.***, ¶¶34-35. Under the specific facts of this case, such a showing necessarily entailed an inquiry with Amy's mother. *See* ***id.***, ¶¶20, 34. Johnson never set forth any information from Amy's mother on her knowledge (or lack thereof) of Amy's counseling or diagnoses contrary to the circuit court's findings, or her knowledge of the information Dr. Wakefield claimed was critical to the defense. Johnson also did not subpoena Amy's mother to testify at the postconviction hearing on the nature of her involvement in the defense.[7]

¶23 Johnson's argument also falters on the issue of whether the records were necessary to a determination of guilt or innocence and would "tend[] to create a reasonable doubt that might not otherwise exist." *See* ***id.***, ¶34. In addition

[7] Regarding Amy's mother's actual access to the records, we observe that Johnson neither raises an argument nor cites anything in the record showing that, for example, Mikan either limited Amy's mother's involvement in Amy's counseling or blocked Amy's mother from receiving information about counseling after she enrolled Amy in 2013. A showing of such a limitation of the mother's access could well have affected our analysis in this case.

to planned testimony from Amy's mother to impeach her daughter, the circuit court ruled pretrial that Johnson could cross-examine Amy about the 2013 allegations. On the flashback issue, Johnson retained Dr. Wakefield to present expert testimony about problems associated with reconstructed memories.[8] Johnson has not made a specific factual showing that he needed the records for him to effectively cross-examine Amy about the prior allegations or to question her credibility. *See* ***id.***, ¶37.

¶24 For similar reasons, Johnson has not set forth a basis for why the records would have been independently probative to his defense and not cumulative to other evidence he already possessed. In arguing that the records from Mikan contained clinical diagnoses, Johnson asserts that the records would have likely shown that Amy had a mental illness, specifically post-traumatic stress disorder, that would call into doubt both the accuracy of her memories and her overall credibility.

¶25 At most, Johnson has shown that Amy's past allegations and her enrollment in counseling are related. This purported link to post-traumatic stress disorder is highly strained, and it is far from an evidentiary showing that Amy "suffered from any psychological disorder that hindered her ability to relay truthful information." *See* ***Green***, 253 Wis. 2d 356, ¶37; *see also* ***State v. Robertson***, 2003 WI App 84, ¶¶27-28, 263 Wis. 2d 349, 661 N.W.2d 105 (in camera review permitted when the defendant proffered a letter from the victim's

[8] Replying to the State, Johnson contends the records were also necessary because it was "unclear" whether Dr. Wakefield could provide an expert opinion without first reviewing them. We do not address this argument, as it is undeveloped and lacks citation to authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

doctor stating that the victim had been diagnosed with disorders that affected her ability to accurately perceive events). As the circuit court aptly stated in its postconviction ruling, "[j]ust because someone is in counseling does not mean that they have a psychological disorder that relates to truthfulness." Johnson failed to present any evidence in his submissions of the likelihood of such a diagnosis being found in the counseling records. This omission is all the more notable in light of the court's findings regarding Amy's mother's assistance to the defense, as well as Johnson's failure to demonstrate that her mother lacked access to Amy's diagnoses. *See* ***Green***, 253 Wis. 2d 356, ¶37.

¶26 We also reject Johnson's argument that the involvement of Amy's mother did not render the records cumulative. Johnson contends that "in cases where defendants have had access to certain mental health records or mental health history, the court of appeals has allowed in camera review of additional records." The two cases Johnson cites do not support his argument that he met his evidentiary burden under the facts of this case.

¶27 Johnson first focuses on this court's reasoning in ***Shiffra*** that in camera review is appropriate when the "*quality* and probative *value* of the information in the [records] may be better than anything that can be gleaned from other sources." ***Shiffra***, 175 Wis. 2d at 611. But the "may be better" or "mere possibility" language from ***Shiffra*** does not reflect the current standard. *See* ***Green***, 253 Wis. 2d 356, ¶¶32-33. To establish a reasonable likelihood that the records contain information that is not merely cumulative to other evidence available to the defendant, Johnson cannot merely hazard guesses—ones unsupported by any evidence—that the records might contain clinical opinions and that those opinions would better serve the defense than the evidence already at his disposal. *See* ***id.***, ¶34.

¶28 Johnson also relies on ***State v. Lynch***, 2015 WI App 2, 359 Wis. 2d 482, 859 N.W.2d 125 (2014), *aff'd by an equally divided court*, 2016 WI 66, 317 Wis. 2d 1, 885 N.W.2d 89, to argue that any information Amy's mother could have provided is not cumulative to information that may be contained in Amy's counseling records. In ***Lynch***, this court concluded that a victim's treatment records were not cumulative despite the defendant having access to evidence showing the victim delayed in reporting the alleged abuse. ***Id.***, ¶37. However, the defendant in ***Lynch*** made highly specific evidentiary showings that: (1) the victim was diagnosed with a psychological disorder that negatively affected her memory; and (2) the victim did not disclose the defendant's alleged abuse to her treatment provider during therapy, even though the victim reported abuse perpetrated by another person during this therapy. ***Id.***, ¶¶11-12, 18, 35-36. In this case, Johnson argues a "flashback" memory may be unreliable, but he merely speculates that the counseling records contain information that would have been more helpful than having Amy's mother impeach Amy based on information Amy's mother already knew. He has not set forth an adequate factual basis for review as exemplified in ***Lynch***.

¶29 We conclude Johnson was not entitled to in camera review of Amy's counseling records. Because we reject Johnson's argument on the merits, we conclude his trial counsel did not provide ineffective assistance insomuch as Johnson was not prejudiced. *See* ***Golden***, 185 Wis. 2d at 771. There exists no manifest injustice that would allow Johnson to withdraw his pleas. *See* ***Bentley***, 201 Wis. 2d at 311.

By the Court.—Judgment and order affirmed.

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