COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0492-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY PAUL HETTO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County: ROBERT A. KENNEDY, Judge. *Affirmed.*

¶1 CANE, C.J. Gary Paul Hetto appeals from a judgment, entered upon a jury's verdict, convicting him of three counts of sexual intercourse with Amanda L., a child age sixteen or older, contrary to WIS. STAT. § 948.09.[1] Hetto

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

argues that the trial court (1) erred by denying his motion for an *in camera* inspection of Amanda's counseling records; and (2) misused its discretion by denying his request to submit Amanda's journals to the jury during its deliberations. This court rejects Hetto's arguments and affirms the judgment.

A. *IN CAMERA* INSPECTION

¶2 Hetto, a former Antigo police officer, was convicted of three counts of sexual intercourse with Amanda, then age seventeen. Relevant to this appeal, Hetto filed a pretrial motion requesting an *in camera* inspection of "all psychiatric/psychological and/or counseling/treatment records of Amanda." Hetto had no proof of the existence of these records, and the State denied knowledge that such records existed. The court consequently denied the motion, but indicated that Hetto could renew the motion if evidence of the records' existence subsequently surfaced.

¶3 During Amanda's cross-examination at trial, the following exchange occurred:

> [Defense counsel]: Throughout the time that you knew [Hetto], you told him that you were seeing a therapist, didn't you?
>
> [Amanda]: Yes, I was talking to someone.
>
> [Defense counsel]: So you were indeed undergoing some form of therapy during the time period you've been asked to testify about, is that true?
>
> [Amanda]: No, it was not therapy. It was a lady that I could speak to at any given point about a friend's suicide which is set up in every county. We have one like Avail.
>
> ….
>
> [Defense counsel]: And then you would have continued in that therapy into 1998?
>
> [Amanda]: It's not really therapy.

> [Defense counsel]: I am sorry, counseling?
>
> [Amanda]: It's just talking to someone when I needed someone to listen.

As a result of Amanda's testimony, Hetto renewed his motion for an *in camera* inspection of Amanda's mental records. The trial court again denied Hetto's motion, concluding:

> Use of the word counseling by this witness was not defined. She just mentioned it in passing as far as the court's concerned.
>
> … I don't think what she said was definitive at all. She might have had counseling from a friend or a brother, who knows. It wasn't defined at all. So, as far as I'm concerned, what she testified to does not indicate that there are medical records in existence.

¶4 To seek access to a witness's medical records, a defendant "must first make a preliminary showing that the evidence is relevant and is necessary to a fair determination of guilt or innocence." ***State v. Behnke***, 203 Wis. 2d 43, 49, 553 N.W.2d 265 (Ct. App. 1996). If this burden is satisfied, the trial court must then "order that the records be produced and conduct an *in camera* inspection to determine if the evidence is indeed material to the defense." ***Id.*** To make the necessary preliminary showing, however, a defendant must establish more than the mere possibility that psychiatric records may be helpful. *See* ***State v. Munoz***, 200 Wis. 2d 391, 397-98, 546 N.W.2d 570 (Ct. App 1996).

¶5 Here, however, Hetto has failed to prove the existence of the records sought. Therefore, this court need not reach the determination of whether Hetto satisfied the burden of showing that the records were relevant and necessary to a fair determination of guilt or innocence. Although Amanda testified she talked to a counselor, she intimated that this counseling was akin to contacting a telephone

hotline. In any event, defense counsel never sought to clarify the exact nature of the counseling in order to determine if any records did, in fact, exist. This court has recognized that, "[w]hile in civil cases parties may seek to impose upon opponents the duty of determining whether certain records exist, the criminal discovery provisions do not impose upon the State an obligation to conduct this type of discovery for the defense." ***Behnke***, 203 Wis. 2d at 51. Because Hetto failed to prove that the records existed, the trial court did not err by denying his motion for an *in camera* inspection.

B. THE JOURNALS

¶6 At trial, Hetto conceded engaging in a sexual relationship with Amanda, but denied doing so before her eighteenth birthday. During Amanda's trial testimony, various references were made to a two-volume journal she kept during the months prior to and following her eighteenth birthday. As part of Hetto's defense, Amanda was asked to read and explain certain entries. Hetto emphasized that although the journal entries made before Amanda's eighteenth birthday were ambiguous as to any details of her claimed sexual relationship with Hetto, those entries made after her eighteenth birthday were rife with graphic detail of their sexual encounters. Hetto also argued that Amanda's accusations arose from anger after he broke off the relationship with her. To that end, the jury heard a journal entry in which Amanda wrote: "Gary never came back over. I am sick of his [expletive]. Big time lying [expletive]. Let's see how you like it from now on. I will make [you] miserable with untruths. … [R]evenge sucks when you're Gary. I love me."

¶7 Hetto requested that the journals be submitted to the jury during its deliberations. Although the court denied Hetto's request for submission of the

entire journals, it concluded: "[W]hat the court's gonna do is not send it in and wait and see if the jury asks for the [pages referenced during the course of Amanda's testimony]. If they do and if counsel will find them and put paper clips on them, I'll decide at that time on those very few pages." The pages were never sent in, as the jury never affirmatively requested them.

¶8 Whether exhibits should be sent to the jury room is within the trial court's discretion. *See* ***State v. Larsen***, 165 Wis. 2d 316, 321-22, 477 N.W.2d 87 (Ct. App. 1991). "A court properly exercises its discretion when, in making a decision, it employs a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record, and yields a conclusion based on logic and founded on proper legal standards." ***Id.*** at 322. This court will not reverse a discretionary decision if the record shows that discretion was in fact exercised and there is a reasonable basis for the court's decision. *See* ***State v. Hines***, 173 Wis. 2d 850, 858, 496 N.W.2d 720 (Ct. App. 1993).

¶9 In determining whether to send exhibits to the jury during deliberations, a trial court is guided by three considerations: "(1) whether the exhibit will aid the jury in proper consideration of the case; (2) whether a party will be unduly prejudiced by submission of the exhibit; and (3) whether the exhibit could be subjected to improper use by the jury." ***Id.*** at 860.

¶10 In addressing these three considerations, the court stated:

> So factor one … would the statement, meaning all of it, aid the jury in a proper consideration of the case, in the court's opinion? No. Number two, would a party be unduly prejudiced by submission of the statement? Well, who knows. That's not clear because, as I said, it could be read in numerous ways. Three, whether the statement

> could be subjected to improper use by the jury. Well, yes, it could, if they based their findings on it.

¶11 Although the court did not address each consideration in detail, its comments nevertheless support its exercise of discretion. *See* ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983) (this court may independently review the record for reasons to support the court's exercise of discretion). Here, the court noted: "The two diaries in the opinion of the court basically contain—over 90 percent of it anyway is just rumblings by a young woman that's emotionally upset. Different things could be read into it. Really—most of it really doesn't make any sense. … It would take the jury a long time to read these. It wouldn't gain them anything." Here, the relevant entries in the journals were read to the jury. The trial court refused to submit the journals in their entirety because they contained a great deal of irrelevant information. *See* WIS. STAT. § 904.03. Thus, the trial court reasonably exercised its discretion by refusing to submit the journals to the jury during its deliberations.

By the Court.—Judgment affirmed.

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