A P P E N D I X

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COURT OF APPEALS
DECISION
DATED AND RELEASED

October 3, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0156-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MAURICE M. HARDY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Reversed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

FINE, J. Maurice M. Hardy appeals from a judgment convicting him of second-degree sexual assault, *see* § 940.225(2)(a), STATS., on a jury's verdict of guilty. He raises two issues on this appeal. First, he argues that the trial court

improperly rejected his request for the health-care records of the alleged victim. Second, he contends that he was denied his right to cross-examine the alleged victim on a matter affecting her credibility. We reverse.

Hardy and the alleged victim were acquaintances and had been drinking together in a tavern on the evening of the alleged assault. The alleged victim testified that she was "drunk" at the time. Later, they went to the alleged victim's apartment where, according to her, Hardy raped her. Hardy denied any sexual contact, consensual or not.

During his cross-examination of the alleged victim, Hardy's counsel attempted to impeach her credibility by asking her if she had tried to persuade Colorado correction officials to let her talk to an inmate who was allegedly the father of her daughter by falsely telling them that the girl was dying. The trial court indicated in a pre-trial ruling that it would not permit the inquiry, noting that in its opinion "[s]pecific instance--instances of conduct, unless they relate directly to this incident [i.e. the alleged rape], aren't generally permissible cross examination." Later, during the trial, the trial court sustained objections to Hardy's cross-examination of the alleged victim on this subject. Unfortunately, the trial court heard argument and explained its ruling at an unreported sidebar.[1]

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[1] We again disapprove of unreported sidebars on matters of significance. *See State v. Mainiero*, 189 Wis.2d 80, 95 n.3, 525 N.W.2d 304, 310 n.3 (Ct. App. 1994).

A trial court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has "a reasonable basis" and was made "'in accordance with accepted legal standards and in accordance with the facts of record.'" *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983) (citation omitted). Contrary to the trial court's analysis, RULE 906.08(2), STATS., permits inquiry into collateral matters on cross-examination if those matters are "probative of truthfulness or untruthfulness and not remote in time."[2] *See also State v. Sonnenberg*, 117 Wis.2d 159, 166-167, 344 N.W.2d 95, 98-99 (1984). The questions Hardy's counsel sought to ask satisfied these criteria and, given the fact that this case boiled down to an issue of credibility, we cannot say that the trial court's error was harmless beyond a reasonable doubt. *See State v. Dyess*, 124 Wis.2d 525, 540-547, 370 N.W.2d 222, 230-233 (1985).[3]

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[2] RULE 906.08(2), STATS., provides:

> SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crimes as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

[3] The State has crafted an ingenious, but unpersuasive, argument from the trial court's later reconstruction of the unreported sidebar conference that the sole purpose of Hardy's attempted inquiry into the Colorado incident was to elicit testimony about prior false accusations against the inmate by the alleged victim in this case, and that Hardy had not made the requisite preliminary showing required by the rape-shield law, §§ 972.11(2) & 971.31(11), STATS. Although Hardy's (continued...)

Although we have concluded that reversal of Hardy's conviction is required because the trial court erred in preventing the inquiry under RULE 906.08(2), STATS., we also discuss the question of whether Hardy is entitled to receive access to the health-care records of the alleged victim. *See State ex rel. Jackson v. Coffey*, 18 Wis.2d 529, 533, 118 N.W.2d 939, 942 (1963) (issues briefed may be considered if they are likely to recur on remand even though other issues are dispositive of appeal). Hardy sought production of the alleged victim's psychological-treatment records that "would tend to negate the guilt of the defendant." The trial court denied the motion.

Access to an alleged victim's mental-health records where those records have a bearing on an alleged victim's credibility implicates, at the very least, a defendant's right to due process. *State v. Shiffra*, 175 Wis.2d 600, 605 and 605 n.1, 499 N.W.2d 719, 721 and 721 n.1 (Ct. App. 1993) (declining to address the defendant's rights to confrontation and compulsory process).[4] Prior to granting a

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[3](...continued)
argument before the trial court during the reconstruction colloquy was, as phrased by the State's brief, "all over the board," it is clear that Hardy wanted to impeach the alleged victim's credibility by asking her whether she had previously lied. RULE 906.08(2), STATS., permits this inquiry on cross-examination. If the matters are collateral, however, the examiner is bound by the witness's answer. *See McClelland v. State*, 84 Wis.2d 145, 159-161, 267 N.W.2d 843, 849-850 (1978).

[4] *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-56 (1987), held that the confrontation clause of the United States Constitution was inapplicable but did not decide whether the defendant's access to the files there at issue was required by the compulsory-process clause of the United States Constitution.

defendant access to those records, two hurdles must be cleared. First, "the defendant must make a preliminary showing that the sought-after evidence is material to his or her defense," *id.*, 175 Wis.2d at 605, 499 N.W.2d at 721, or, phrased somewhat differently, "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," *id.*, 175 Wis.2d at 608, 499 N.W.2d at 723. Second, if that showing is made, the trial court must examine the records *in camera* to determine whether the records contain information that "probably would" affect the trial's outcome. *See* ***Pennsylvania v. Ritchie***, 480 U.S. 39, 58 (1987). The trial court rejected Hardy's request for an *in camera* examination of the records. Our review of the trial court's findings of fact in connection with that determination is "under the clearly erroneous standard." ***Shiffra***, 175 Wis.2d at 605, 499 N.W.2d at 721.

Hardy's pre-trial showing in support of his motion for an *in camera* review of the alleged victim's mental health records was deficient. Although counsel told the trial court that he believed that the alleged victim had been an in-patient at the Milwaukee County Mental Health Complex, he did not know when this was. Further, he presented no evidence to the trial court that anything in those records was material to his defense. Although the prerequisite showing under *Shiffra* is not high, *id.*, 175 Wis.2d at 609, 499 N.W.2d at 723, the trial court was presented with nothing from which it could make the findings to justify an *in camera* review.

During the trial, Hardy renewed his request that the trial court review the alleged victim's mental-health records *in camera*. He based his renewed request on two grounds. First, he learned that the alleged victim had attempted suicide some two months prior to the trial and some four months after the alleged assault, and, as a result, had been taken to the Milwaukee County Mental Health Complex for at least observation. Second, during her testimony, the alleged victim admitted that she only remembered "bits and pieces" of what had happened the night of the alleged assault. The trial court rejected the renewed request, determining that the requisite ***Shiffra*** showing had not been made because there was no expert testimony connecting suicidal ideation or attempted suicide with an impaired ability to "perceive the truth." Although such expert testimony might not be necessary under other circumstances, without it here Hardy's motion for an *in camera* review was, unlike the situation in ***Shiffra***, 175 Wis.2d at 610–611, 499 N.W.2d at 723–724, based on pure speculation and supposition. Significantly, the alleged victim *did* testify later that she had "blocked ... out" certain things that happened the night of the alleged assault, and, as a result, "received counseling to try to help me remember, to try and go through the facts about what happened." Hardy, however, never renewed his request so as to encompass an *in camera* review of those counseling records. Although the trial court did not err when it rejected Hardy's requests for an *in camera* review of the alleged victim's mental-health records when those requests were made, it might very well be that this additional testimony by the alleged victim will, together with other

focussed material presented to the trial court on remand, justify the requested *in camera* review. That determination must, however, be made in the first instance by the trial court.[5]

By the Court.—Judgment reversed.

Publication in the official reports is not recommended.

[5] We may not make findings of fact. *Wurtz v. Fleischman*, 97 Wis.2d 100, 107, 293 N.W.2d 155, 159 (1980).