STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2011AP2680-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

PATRICK J. LYNCH,

Defendant-Respondent.

ON APPEAL FROM A PRETRIAL ORDER BARRING TESTIMONY, ENTERED IN DODGE COUNTY CIRCUIT COURT, THE HONORABLE ANDREW P. BISSONNETTE PRESIDING

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page

STATUTES

STATE OF WISCONSIN

C O U R T O F A P P E A L S

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ARGUMENT

I. Lynch Failed to Make the Preliminary Showing of Materiality Required by *Shiffra/Green* Entitling Him to an In Camera Review of A.M.'s Privileged Records.

A. Additional information showing that A.M. did not report being sexually assaulted by Lynch until years after the fact despite reporting the sexual assaults her father committed against her would be cumulative to information already in Lynch's possession.

In *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, the supreme court in defining the preliminary showing a defendant must make to obtain an in camera review of privileged records included the requirement that the sought-after evidence "is not merely cumulative to other evidence available to the defendant." *Id.* ¶ 34.

With respect to Lynch's claim that he is entitled to in camera review of A.M.'s counseling records between 1993 and 2011 – a period spanning nearly two decades – to show that A.M. failed to report the charged assaults to her treatment providers, Lynch is exaggerating the importance of any such information. As the State argued in its brief-in-chief, Lynch already has a wealth of information regarding A.M.'s reporting history. This information includes A.M.'s formerly privileged therapy and medical records that were released during the prosecution of her father for sexually assaulting her; police reports and other

materials from that prosecution; and reports of A.M. providing inconsistent allegations against Lynch. State's brief-in-chief at 15.

Perhaps most pertinent to Lynch's claim that the information in the 1993-2011 privileged records may be necessary to determine his guilt or innocence if they show A.M.'s failure to report his assaults to treatment providers is a February 17, 1993 letter from Dr. Sionag Black to Judge Daniel Klossner. Lynch attached a copy of Dr. Black's letter to his amended offer of proof in support of his request for in camera review (*see* 92:10-12). In her letter, which was submitted to Judge Klossner in connection with the sentencing of A.M.'s father, Dr. Black indicated that she had been working with A.M. and her family for approximately one year (92:10). In discounting claims made by relatives of A.M.'s father suggesting he had been "framed," Dr. Black wrote:

> [A.M.] has repeatedly identified her father and demonstrated behavior consistent with he [sic] being the perpetrator. *I do want you to know that as her therapist, I did carefully assess the possibility of any other person who might [have] been involved. She identified no one.*

(92:11-12; emphasis added.)

Presumably, Dr. Black would testify consistent with the representations in her letter were she called as a defense witness at Lynch's trial. That information is no longer privileged and would establish that A.M., despite being in treatment with Dr. Black for a year and despite revealing that her father had sexually assaulted her, did not accuse Lynch of similar conduct.

In addition to Dr. Black's potential testimony regarding A.M.'s non-reporting, Lynch also has available the evidence that A.M. waited until 2009 to report to police that he had sexually assaulted her. In this regard, A.M. testified at the preliminary hearing that she reported the assaults by Lynch to law enforcement during the time she revealed that her father was sexually assaulting her (31:7). Specifically, A.M. claimed she had informed the former district attorney, Pat Ramirez, and a detective about Lynch's assaults but was told "they were going to go after my father first and they would take a look at him [Lynch] later" (*id.*). Ramirez, however, denied making such a statement or knowing that Lynch had sexually assaulted A.M. (92:8:¶¶ 32-33). Ramirez's testimony would be available to Lynch to impeach A.M.'s claim that she told law enforcement about Lynch during the same time frame she accused her father of assault.

In addition to Dr. Black and former district attorney Ramirez, Lynch could also call various witnesses to testify that although A.M. reported to them that he had fondled her, she never claimed he had had sexual intercourse with her, as counts one, two and three of the information allege (27:1-2). One such witness is A.M.'s ex-husband, who told agents from the Division of Criminal Investigation that A.M. said that when she was a child, Lynch had groped and fondled her while in the bathroom of her home but never claimed he had had intercourse with her (92:6-7:¶¶ 16, 19).

In light of all the evidence of non-reporting and inconsistent reporting already available to Lynch, information from A.M.'s counseling records from 1993-2011 indicating she had not revealed Lynch's

assaults to her treatment providers would be cumulative to information already in his possession. Assuming it exists, such information would not be "independently probative to the defense," as *Green*, 253 Wis. 2d 356, ¶ 34, requires.

Insofar as Lynch wants A.M.'s privileged records reviewed with an eye to determining whether she reported the assaults to her therapists, he has failed to satisfy the showing of materiality as heightened by *Green*.

B. Lynch has not shown a reasonable probability that A.M.'s privileged records from 1993-2011 will contain information showing she has post-traumatic stress disorder (PTSD) which prevents her from accurately perceiving events and relating the truth.

The trial court found, and Lynch argues, that A.M.'s records are reasonably likely to contain information that she suffers from PTSD and that this condition "might affect both her ability to accurately perceive events and . . . to relate the truth." Lynch's brief at 27-28. He relies on *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), and *State v. Robertson*, 2003 WI App 84, 263 Wis. 2d 349, 661 N.W.2d 105, as support for his entitlement to in camera review. Those cases, however, are factually distinguishable from the situation here.

Admittedly, back in 1993, Dr. Black diagnosed A.M. as suffering from the symptoms of PTSD; Dr. Black felt the symptoms were triggered by A.M.'s act of reporting her father's abuse (92:10). That

A.M. as an eleven-year-old child was suffering symptoms of PTSD after disclosing her father's sexual assaults does not create a reasonable probability that she still suffers from this condition as a thirty-two-year-old[1] woman. More importantly, however, there is no reason to believe that even if A.M. continues to suffer from PTSD, she is unable to accurately relate the truth as a result. Certainly nothing in Dr. Black's 1993 letter suggested that A.M. was suffering from delusions as a result of PTSD.

Unlike the complainant in *Shiffra*, whose own sister refused to testify on her behalf in a prior sexual assault case because she felt Pamela was unable to distinguish between reality and "'what would be characterized as some dream effect,'" (175 Wis. 2d at 610), A.M. has not been shown to suffer from any such disability as an adult. As the State pointed out in its brief-in-chief, just because PTSD sufferers sometimes experience psychosis does not mean that every time a defendant has information indicating a complainant may have this disorder, he is automatically entitled to in camera review of her privileged records.

A person suffering from a particular mental illness does not necessarily experience each and every symptom associated with that illness. For example, a person suffering from depression may have a decrease or increase in appetite; the symptomatology varies from person to person. Absent some evidence that A.M. has an inability to accurately perceive events or relate the truth as a result of a psychiatric disorder, in camera review of her privileged records is unwarranted.

[1] A.M.'s birth date is January 11, 1982 (31:2).

This case is also unlike *Robertson*, because there the complainant had been diagnosed with depression accompanied by psychotic features a year before the charged assault and had an exacerbation of symptoms before the charged assault occurred. *See* 263 Wis. 2d 365, ¶ 27. Given that the State had argued that the complainant's conduct in fleeing Robertson's van without putting on her underwear or pants showed that the sexual intercourse was not consensual (*id.* ¶ 7), information that she suffered from psychosis would have offered an alternative basis for her strange behavior that was inconsistent with Robertson's guilt. That is why the evidence in *Robertson* satisfied *Green's* test for materiality.

The trial court erred in finding Lynch had made a preliminary showing that A.M.'s therapy records would contain information showing an inability to accurately perceive events and narrate the truth.

C. Lynch has not shown a reasonable probability that A.M.'s records will show she has Sociopathic Personality Disorder or that such information would satisfy the showing mandated by *Green*.

The State has already shown in its brief-in-chief why Dr. Wolfgram's January 30, 2011 letter (76:1-3) does not provide sufficient information to establish that A.M.'s records will show she has Sociopathic Personality Disorder, one symptom of which is pathological lying.

Even if the records did contain such information, however, it would not be material

under *Green* because it would be cumulative to information already in Lynch's possession, i.e., the information on which Dr. Wolfgram based her opinion (*see* 76:1-3). The Wolfgram letter does not support Lynch's entitlement to in camera review.

II. If This Court Finds That Lynch Has Made the Showing Entitling Him to Pretrial In Camera Review of A.M.'s Privileged Records, This Court Should Certify This Case to the Wisconsin Supreme Court to Decide 1) Whether the Circuit Court Can Order Production of Those Records Under Wis. Stat. § 146.82(2)(a)4. Without A.M.'s Consent; and 2) If Not, Whether Suppression of A.M.'s Testimony is Required If A.M. Will Not Waive Her Privilege.

On May 24, 2012, this court placed this case on hold until the Wisconsin Supreme Court either denied the petition for review in *State v. Johnson*, case no. 2011AP2864-CRAC, or, having granted review, issued a decision in *Johnson*.

After granting review, the supreme court on July 3, 2013, issued its decision in *State v. Johnson*, 2013 WI 59, 348 Wis. 2d 450, 832 N.W.2d 609 (per curiam). That opinion did not remain precedent for long, however. On March 26, 2014, the supreme court in a 3-2 decision granted Johnson's motion for reconsideration and explained that its per curiam opinion represented a deadlock, meaning that the court of appeals' decision in *Johnson* was affirmed. *See State v. Johnson*, 2014 WI 16, 353 Wis. 2d 119, 846 N.W.2d 1.

This means that the supreme court has not decided one of the issues briefed in *Johnson*, i.e., whether Wis. Stat. § 146.82(2)(a)4. provides a mechanism for ordering the production of privileged records when the privilege-holder does not consent to their release. While the court of appeals' majority in *Johnson* held that under *Shiffra*, 175 Wis. 2d 600, suppression of the victim's testimony was the only available response to the victim's refusal to consent to release of her privileged records, Chief Judge Brown disagreed.

Chief Judge Brown – who authored the opinion in *Shiffra* – agreed with the State that § 146.82(2)(a)4. provides a mechanism for obtaining a witness's records without her consent, assuming the defendant has established a constitutional entitlement to them:

> I am convinced that, if an alleged victim refuses to release medical or counseling records to the court for in camera inspection, the court may compel release anyway, pursuant to Wis. Stat. § 146.82(2)(a)4. No case binds me to an opposite conclusion–not ***Shiffra***, nor ***Green*** nor ***Speese*** nor any other case cited by Johnson.
>
> Wisconsin Stat. § 146.82(1) establishes the state of Wisconsin's policy that medical records are confidential and that records may not be released without informed consent. However, § 146.82(2) lists specific instances where records may be released without consent. One of those instances is § 146.82(2)(a)4., which explicitly allows release without consent "[u]nder a lawful order of a court of record." I acknowledge that, generally, this statute cannot trump Wis. Stat. § 905.04, known in Wisconsin as the "physician-patient privilege" (even though it covers other kinds of medical providers).

> But I agree with the State that, when the defendant has established a *constitutional right* to an in camera review, the constitution trumps the privilege and the court may lawfully order release of the records for that limited purpose.

State v. Johnson, No. 2011AP2864-CRAC, 2012 WL 1319781, ¶¶ 24-25 (Wis. Ct. App. Apr. 18, 2012) (Brown, C.J., dissenting (footnote omitted)); Supp. App. 110-11.[2]

Chief Judge Brown is correct. While it is true that § 146.82(2)(a)4. does not itself trump § 905.04, if this court determines that Lynch has a constitutional right to in camera review of records covered by the privilege statute, then a circuit court order compelling the custodian to produce the records becomes "a lawful order of a court of record" under that statute. In other words, a constitutional exception becomes engrafted onto § 905.04.

Certainly there is some authority for the proposition that § 905.04 must on rare occasions yield to other important public interests. For example, in *Schuster v. Altenberg*, 144 Wis. 2d 223, 249-50, 424 N.W.2d 159 (1988), the supreme court held that § 905.04 "must yield" if a patient poses an imminent threat to himself or others. As this court later observed in *State v. Agacki*, 226 Wis. 2d 349, 359, 595 N.W.2d 31 (Ct. App. 1999),

[2] In the original per curiam opinion in *State v. Johnson*, the Chief Justice and Justice Bradley agreed with Chief Judge Brown's dissent; Justices Crooks and Roggensack disagreed; and Justice Ziegler did not address the issue because she found that Johnson was not entitled to in camera review. *See State v. Johnson*, 2013 WI 59, 348 Wis. 2d 450, 832 N.W.2d 609 (per curiam).

the "dangerous patient exception" adopted in *Schuster* is not among the enumerated exceptions to the privilege the supreme court promulgated[3] in § 905.04, yet it trumps the patient's privilege to keep her records confidential.

More recently, three members of the court in *Johnson v. Rogers Memorial Hospital, Inc.*, 2005 WI 114, 283 Wis. 2d 384, 700 N.W.2d 27, declared that "public policy requires creating an exception to therapist-patient confidentiality and privilege where negligent therapy is alleged to have caused accusations against parents for sexually or physically abusing their child." *Id.* ¶ 71. That segment of the court decided that even if the privilege-holder did not consent to an in camera review of her records, the civil plaintiff could compel their production without her consent. *Id.* ¶ 75.

That § 905.04 may yield to public policy exceptions adopted by the supreme court supports the State's argument that it may also yield to a defendant's constitutional rights and the public's interest in the effective prosecution of crime. In those limited situations, § 146.82(2)(a)4. authorizes a court to obtain privileged records without the patient's consent.

Finally, it is worth noting that in one important respect a witness who is compelled to produce her records receives more protection than a witness who is forced to choose between voluntary disclosure and suppression of her testimony. As

[3] As *Agacki* noted, the rules of evidence – including § 905.04 – were promulgated by the supreme court, not the legislature. *State v. Agacki*, 226 Wis. 2d 349, 359 n.8, 595 N.W.2d 31 (Ct. App. 1999).

the Kentucky Supreme Court in *Commonwealth v. Barosso*, 122 S.W.3d 554, 565 (Ky. 2003), explained, "a witness whose privileged information is compelled by court order has not disclosed it voluntarily. Thus, the privilege remains intact for purposes other than the criminal proceeding in which it was compelled."

Under Wis. Stat. § 905.11, A.M. would waive her therapist-patient privilege if she decided to surrender her records for in camera review because that decision would be regarded as voluntary. In contrast, a circuit court order requiring the production of her records without her consent would not constitute a waiver, and A.M.'s privilege would remain intact for purposes unrelated to this criminal prosecution.

If this court agrees with Chief Judge Brown that *Shiffra* does not prevent it from holding that § 146.82(2)(a)4. allows the circuit court to order the production of privileged records when the privilege-holder does not consent to their release, then the State asks this court to so hold in the event it finds Lynch is entitled to in camera review.

More likely, however, this court will be reluctant to adopt this view, given that the court of appeals' majority in *State v. Johnson* believed that *Shiffra* mandates witness preclusion as the only available remedy in this situation, and this court in *State v. Speese*, 191 Wis. 2d 205, 225, 528 N.W.2d 63 (Ct. App. 1995), *rev'd on other grounds*, 199 Wis. 2d 597, 545 N.W.2d 510 (1996), seemingly agreed.

If this court believes it cannot accept the State's argument without modifying *State v. Shiffra* – something this court is not authorized to do[4] – then the State asks the court to certify this case to the supreme court to decide whether the circuit court can order production of A.M.'s records under § 146.82(2)(a)4. without her consent. In addition, this court should also ask the supreme court to decide whether suppression of the victim's testimony is the only response where a circuit court finds a defendant is constitutionally entitled to in camera review of the victim's records but the victim refuses to waive her privilege. In the original opinion in *Johnson*, both the Chief Justice and Justice Bradley agreed with Chief Judge Brown that *Shiffra* does not necessarily require the suppression of the privilege-holder's records if she refuses to release them for in camera review. *See Johnson*, 348 Wis. 2d 450, ¶ 4. That issue is still an open question as far as the supreme court is concerned.

CONCLUSION

This court should reverse the circuit court's order barring A.M. from testifying and remand for further proceedings.

Alternatively, if this court finds that Lynch has made the showing required by *Green*, it should certify this case to the Wisconsin Supreme Court to decide 1) whether the circuit court can order the production of A.M.'s privileged records for in camera review without her consent pursuant to § 146.82(2)(a)4.; and 2) whether *Shiffra* requires

[4] *See Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997).

suppression of the privilege-holder's testimony as the only response to her refusal to consent to in camera review.

Dated this 13th day of June, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3000 words.

_____
Marguerite M. Moeller
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of June, 2014.

_____
Marguerite M. Moeller
Assistant Attorney General