STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP968-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GIANCARLO GIACOMANTONIO,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY WAGNER, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. It believes that the parties' briefs adequately set forth the facts and law required to resolve the issues presented.

Although there is no Wisconsin case law specifically addressing authentication requirements for text messages, this

court can resolve that issue by applying existing law and common sense. Accordingly, publication is likely not warranted based on that issue, and none of the remaining issues provide grounds for publication.

INTRODUCTION & SUMMARY OF PARTIES' POSITIONS

Giancarlo Giacomantonio appeals from a judgment of conviction in which a jury found him guilty of one count of sexual exploitation of a child (32; A-Ap. 1-2). The State based the charge on allegations by Giacomantonio's stepdaughter, K.R., who claimed that Giacomantonio induced her to provide him with photos of her bare buttocks and vagina (2:2-3). According to K.R., if she refused to take (or allow Giacomantonio to take) the photos, Giacomantonio would withhold affection and prevent her from seeing her friends; if she complied with his demands, Giacomantonio would be more supportive, more lenient, and would supply her and her friends with alcohol (2:2).[1]

On appeal, Giacomantonio raises two main challenges. First, he claims that the circuit court erroneously exercised its discretion in several ways by deeming admissible seven text messages between K.R. and Giacomantonio found on K.R.'s phone (Giacomantonio's br. at 16-28). Giacomantonio claims that the State failed to satisfy preliminary authentication requirements to establish that Giacomantonio wrote the texts (*id.* at 16-24). He also argues that the form of the text-message evidence—photographic screen shots of the texts—violated the best-evidence rule (*id.* at 24-26). He further asserts that the court improperly overruled Giacomantonio's hearsay objection

[1] The State had also charged Giacomantonio of one count of incest based on K.R.'s allegations that Giacomantonio had touched and licked her buttocks and anus on multiple occasions (2:3; 5). The jury acquitted Giacomantonio of that count (27).

and permitted a law enforcement witness at trial to read aloud the content of the text messages (*id.* at 26-27).

Second, Giacomantonio claims that the circuit court improperly denied his *Shiffra*/*Green*[2] motion in which he sought in-camera review of K.R.'s treatment records (*id.* at 28-41).

As set forth below, Giacomantonio is not entitled to relief. As to the first issue, the State adequately authenticated the text messages through K.R.'s testimony that the messages came from a number she recognized as Giacomantonio's and that the content was consistent with things that he had said to her in the past. Giacomantonio's best-evidence argument fails because the screen shots were admissible under the circumstances. And law enforcement's reciting the text messages at trial was not hearsay. Finally, as to the second issue, Giacomantonio failed to satisfy his burden under *Green* to obtain in-camera review of K.R.'s treatment records. This court should affirm.

The State will address additional facts in the argument section below.

ARGUMENT

I. The circuit court[3] properly allowed the State to admit the text messages and related testimony.

The circuit court has "broad discretion to admit or exclude evidence," and this court may overturn its decision only if the circuit court erroneously exercised its discretion. *State v. Kandutsch*, 2011 WI 78, ¶23, 336 Wis. 2d 478, 799 N.W.2d 865

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[2] *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W. 2d 298; *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993).

[3] The Honorable Stephanie Rothstein presided over the pretrial matters and denied Giacomantonio's motion in limine and *Shiffra*/*Green* motion. The Honorable Jeffrey Wagner presided over the trial and sentencing.

(quoted source omitted). This court upholds the circuit court's decision to admit evidence "if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698 (citations omitted).

A. The State properly authenticated the text messages.

Giacomantonio first complains that the circuit court erroneously exercised its discretion in admitting a series of text messages between Giacomantonio's phone number and K.R.'s phone number because the State never authenticated them by establishing that Giacomantonio was the author of the messages or participant in the conversations (Giacomantonio's br. at 16-24). Because the State adequately authenticated the messages through circumstantial evidence and K.R.'s and law enforcement's testimony, his claim cannot succeed.

1. The State authenticated the text messages with testimony of witnesses with knowledge.

Wisconsin Stat. § 909.01 provides that a proponent may satisfy authentication requirements by presenting evidence that would sufficiently support findings that the evidence is what its proponent says it is. One of the many ways that a proponent can adequately lay such a foundation is through the "[t]estimony of a witness with knowledge that a matter is what it is claimed to be." Wis. Stat. § 909.015(1). In addition, authentication may be accomplished through circumstantial evidence. *Campbell v. Wilson*, 18 Wis. 2d 22, 30 n.1, 117 N.W.2d 620 (1962); *see also* Wis. Stat. § 909.015(4).

The State presented the following text messages between the phone number 414-517-8341 (hereinafter 8341), which K.R.

identified as Giacomantonio's number, and K.R.'s number 414-722-1569 (hereinafter 1569):

> Aug 7 1:45 AM To 1569 From 8341 Come to my room
> Aug 7 1:46 AM To 8341 From 1569 No. Im about to go to sleep
> Aug 8 1:27 AM To 1569 From 8341 I want my boty
> Aug 8 12:53 PM To 1569 From 8341 I want my booty today
> Aug 8 12:54 PM To 8341 From 1569 Why
> Aug 8 12:58 PM To 1569 From 8341 Why not I got plans for u and page
> Aug 8 2:08 PM To 1569 From 8341 Can I have my booty

(56:Exh. 8-9; A-Ap. 46-47). The police found the messages on K.R.'s Sanyo phone and the State presented them at trial as screen shots.

At trial, the State used those messages in a two ways. First, it used the messages to explain how and why police began investigating Giacomantonio. It brought out that M.R., K.R.'s mother, who was suspicious that Giacomantonio was sexually abusing K.R., found the messages on K.R.'s phone and took K.R.'s phone to the police (48:56-58, 61). After viewing the messages, police sought K.R. for an interview, and eventually K.R. revealed that Giacomantonio had touched her and had induced her to send or give him photos of her naked buttocks and vagina (48:5; 49:13, 26-28, 39).

In accordance with that purpose, Detective McLeod testified that he saw the messages when M.R. brought the phone to him, that he took the screen shots of the messages that appeared in Exhibits 8 and 9, and that the screen shots accurately depicted the text messages he had viewed (48:24-29). That testimony sufficiently authenticated the screen shots as to their accuracy in representing what McLeod saw on K.R.'s phone.

Second, the State primarily used the text messages to support the incest count, which was based on K.R.'s claims that Giacomantonio touched her buttocks, and of which the jury found Giacomantonio not guilty. K.R. testified that when

Giacomantonio asked her to come to his room and said that he wanted his booty, she understood him to mean that he wanted to touch her buttocks (48:89-91; 49:26-29).

In accordance with that purpose, K.R. testified that the number ending in 8341 was Giacomantonio's phone number, that she understood that the messages had come from him, and that the text messages in Exhibits 8 and 9 were typical messages she would receive from Giacomantonio (48:86-88; A-Ap. 58-60). K.R. said specifically that Giacomantonio often texted her requests to come to his room late at night, and that he told her he wanted his "booty" "all the time," which she understood to mean that he wanted to touch her (48:89-90; A-Ap. 61-62). That testimony was sufficient to allow a reasonable jury to find that Giacomantonio was the author of those messages.

Further, circumstantial evidence supported the finding that Giacomantonio likely wrote the messages. For example, the first message read, "Come to my room" and was sent during the early morning hours of August 7 (56:Exh. 8; A-Ap. 46). That language and timing suggest that someone in K.R.'s house wrote it. That writer was likely Giacomantonio, given that those messages came from his phone number and he stayed in a room separate from M.R. and K.R. The "I want my boty" message the next morning at 1:27 AM likely came from the same writer as the "Come to my room" message the night before, given the early morning timing (*id.*).; it also follows that the other messages referencing "booty" likely came from the same writer. Further, in the August 8 message at 12:58, the writer references "u and page" (56:Exh. 9; A-Ap. 47), which suggested the writer knew about K.R. and her then-girlfriend, Paige. Giacomantonio knew about Paige.

Given that, the circuit court did not erroneously exercise its discretion in denying Giacomantonio's motion in limine and authentication arguments. Giacomantonio did not deny that the 8341 number was his or claim that those messages did not

appear on K.R.'s phone. Rather, he claimed that the State did not adequately establish that he wrote the messages (20:2-3; A-Ap. 34-35). Judge Rothstein ultimately determined that K.R., as a participant in the text conversations, could authenticate the messages and that any arguments that the messages had been fabricated went to the weight of the evidence, not its admissibility under authentication principles. The court told Giacomantonio, "If you . . . believe that the victim or another has falsely manufactured these text conversations, you are certainly entitled to cross examine them on that point" (44:12; A-Ap. 45). And during trial, when Giacomantonio renewed his objection, Judge Wagner declined to revisit Judge Rothstein's ruling and agreed that Giacomantonio's objections went to "the weight of the evidence" (48:54; A-Ap. 57).

Giacomantonio argues that because Wis. Stat. § 909.01 requires authentication as a prerequisite to admissibility, the courts wrongly conflated authentication with weight (Giacomantonio's br. at 22). But Giacomantonio demands too much of the authentication rule. "Authentication involves a low threshold of proof merely sufficient to permit a reasonable person to conclude the matter is what the proponent claims." *Nischke v. Farmers & Merchants Bank & Trust*, 187 Wis. 2d 96, 122, 522 N.W.2d 542 (Ct. App. 1994) (citing 2 McCormick on Evidence § 227 at 53 (John W. Strong ed. 1992)). Thus, the "proponent need not prove that the matter is what the proponent claims, but must only establish sufficient authentication to support admissibility so that the jury may ultimately resolve the disputed issue of fact regarding the nature of the proposed evidence." *Id.* (citing Wis. Stat. § 909.01; McCormick § 194 at 53-54); *see also United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006) ("The Court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so.").

In all, the evidence presented was sufficient to allow a reasonable jury to conclude that the text messages presented in Exhibits 8 and 9 were on K.R.'s phone as M.R. discovered them and that Giacomantonio probably wrote the messages. Once the texts were admitted, the jury was left to ultimately resolve whether Giacomantonio actually wrote the text messages, what he meant by them, and how that all weighed in its determination of whether he was guilty of the charges.

2. The authentication here was consistent with out-of-state authority assessing authentication of text and other electronic messaging.

Giacomantonio claims that out-of-state courts considering authentication requirements for text messages urge a different result (Giacomantonio's br. at 17-20). He suggests that those courts have identified specific authentication standards that require more than what was presented in this case (Giacomantonio's br. at 20-23).

Not so. In the out-of-state cases that Giacomantonio invokes, as Giacomantonio concedes, courts have determined that text messages do not "warrant different or more stringent authentication rules than those that are used to authenticate other sorts of correspondence" (Giacomantonio's br. at 16). And collectively, those courts have agreed that text-message authentication is a low standard that can be achieved with the sort of testimonial evidence of a witness with knowledge and circumstantial evidence, as was presented here.[4] Further, those

[4] *See, e.g.*, *Smith v. Smith*, No. 2140028, 2015 WL 1525213, at *6 (Ala. Ct. Civ. App. Apr. 3 2015) (holding that text messages were authenticated by direct evidence that sender's number associated with party opponent and circumstantial evidence from recipient of context and content of texts); *State v. Thompson*, 777 N.W.2d 617, 626 (N.D. 2010) (holding that victim's testimony as recipient of messages as to knowledge of defendant's phone number and circumstances of the day they were sent was sufficient to

(continued on next page)

courts have generally agreed that text and other electronic messaging did not require new rules on authentication. The North Dakota Supreme Court favorably quoted a Pennsylvania case to cement that point:

> Essentially, appellant would have us create a whole new body of law just to deal with e-mails or instant messages. The argument is that e-mails or text messages are inherently unreliable because of their relative anonymity and the fact that while an electronic message can be traced to a particular computer, it can rarely be connected to a specific author with any certainty. Unless the purported author is actually witnessed sending the e-mail, there is always the possibility it is not from whom it claims. As appellant correctly points out, anybody with the right password can gain access to another's e-mail account and send a message ostensibly from that person. However, the same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationary can be copied or stolen. We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of Pa. R.E. 901 and Pennsylvania case law. We see no justification for constructing unique rules for admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity.

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authenticate the messages and collecting similar out-of-state and federal cases); *State v. Bickerstaff*, No. 2014-A-0054, 2015 WL 5728518, at *4 (Ohio Ct. App. Sept. 30, 2015) (holding that recipient's testimony of content and context of text messages was sufficient to authenticate them); *Dickens v. State*, 927 A.2d 32, 37 (Md. Ct. Spec. App. 2007) (finding adequate foundation with direct evidence that messages came from number associated with defendant's phone and circumstantial evidence in the messages' content and context); *Butler v. State*, 459 S.W.3d 595, 603 (Tex. Crim. App. 2015) (finding authentication with recipient's understanding that context and content of messages identified the defendant as the sender, evidence that the defendant had called the recipient from that number in the past, and fact that no one else had motive to send those particular messages to the recipient).

State v. Thompson, 777 N.W.2d 617, 625-26 (N.D. 2010) (quoting *In re F.P.*, 878 A.2d 91, 95-96 (Pa. Super. Ct. 2005)).

Giacomantonio relies heavily on another Pennsylvania case, *Commonwealth v. Koch*, in which the Pennsylvania Superior Court determined that text messages were not adequately authenticated where the only evidence that the defendant authored the messages was her acknowledgement that the phone was hers. 39 A.3d 996, 1005 (Pa. Super. Ct. 2011), *aff'd by an equally divided court*, 106 A.3d 705 (Pa. 2014). Given that there was no testimony from either the sender or recipient of the messages, there were no clues in messages' content to indicate that the defendant likely wrote them, and, importantly, the content of some of the messages suggested that someone other than the defendant wrote some of the messages, the *Koch* court held that the State failed to satisfy the authentication requirements. *Id.* at 1003, 05.

Koch does not encourage a different result here.[5] In *Koch*, the State had little more than an admission that the defendant owned the phone that the messages came from and no testimony from either the purported sender or recipient of the messages. Had the *Koch* court before it the evidence in this case—K.R.'s and McLeod's testimony and the circumstantial evidence in the text themselves—it would have deemed the texts to have been adequately authenticated.

In sum, the circuit court did not erroneously exercise its discretion in finding that the State satisfied authentication requirements for the text messages.

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[5] Nor does *State v. Francis*, 455 S.W.3d 56, 71-72 (Mo. Ct. App. 2014), add persuasive support. In *Francis*, the State believed that it authenticated text messages simply with the defendant's admission that the phone was his. *Id.* Like in *Koch*, that bare assertion was not sufficient and is distinguishable from the evidence presented in this case.

B. Giacomantonio's best-evidence argument is meritless.

Giacomantonio also claims that the circuit court should have excluded the text messages because the State presented them as screen shots, rather than presenting the messages on the phone itself or a transcription of the messages, in violation of the best evidence rule (Giacomantonio's br. at 24-26). He is wrong.

In the motion in limine, Giacomantonio objected that the State had not provided him with a transcription of the full text conversation and appeared to be relying on law enforcement's transcription of the messages in a police report (20:1; A-Ap. 33). He claimed that the State was required under Wis. Stat. § 910.02 to provide "a complete transcription of the text messaging conversation" (20:4; A-Ap. 36), and that the messages in the police report were taken out of context and did not include the entire conversation (44:9-10; A-Ap. 42-43).

At the pretrial hearing on the motion, the parties agreed that there were no phone provider records available showing the content of the text message conversation (44:10-11; A-Ap. 43-44). The prosecutor told the court that it had (and provided the defense with) screen shots of the text messages, that he would talk to the detective who took the screen shots and determine whether he "took some screen shots and didn't take others" (44:10; A-Ap. 43).

The court first addressed Giacomantonio's concern as to the form of the evidence. It noted that the State could use the screen shots, given that there was no "original" available from the phone provider (*id.*). It then addressed Giacomantonio's concern about context, explaining that that "would be a matter for cross examination" (44:11; A-Ap. 44). It stated that Giacomantonio could cross examine K.R. as a participant in the conversation and the law enforcement officer who drafted the reports to argue that the State was presenting the text messages out of context (*id.*). Accordingly, it denied the motion in limine.

The State introduced the text messages at trial through the testimony of a detective and the photographic screen shots that the detective had taken of the text messages, which appeared in Exhibits 8 and 9 (48:26; A-Ap. 50). Giacomantonio objected, again complaining that the screen shots were taken out of context and that best evidence demanded a transcription of the full text conversation (48:52-54; A-Ap. 55-57). The circuit court stood by Judge Rothstein's earlier ruling and stated that Giacomantonio's objections went to weight, not admissibility (48:54; A-Ap. 57).

Now, on appeal, Giacomantonio asserts that the State had K.R.'s phone and should have shown the jury the text messages on the phone as "originals," or shown the content that the State's forensic expert downloaded from the phone (Giacomantonio's br. at 25).[6] His claim fails in a number of ways.

As an initial matter, Giacomantonio did not argue for either of those solutions to the circuit court and cannot fairly complain now that the court and State should have adopted a different solution than the transcription he originally argued for. *See State v. Ndina*, 2009 WI 21, ¶¶28-30, 315 Wis. 2d 653, 761 N.W.2d 612 ("[S]ome rights are forfeited when they are not claimed at trial; a mere failure to object constitutes a forfeiture of the right on appellate review."); *see also State v. Nelis*, 2007 WI 58, ¶31, 300 Wis. 2d 415, 733 N.W.2d 619 ("A general objection that does not indicate the specific grounds for inadmissibility of evidence will not suffice to preserve the objector's right to appeal.").

[6] There is nothing to indicate that the State's forensic expert had reviewed or downloaded the text messages from the Sanyo phone or that she could do so in a transcription form that would have satisfied Giacomantonio's suggestion. The forensic expert's focus at trial was the images found on Giacomantonio's phone and memory card.

Moreover, the screen shots can be said to be "originals." Under the definition of "original" in Wis. Stat. § 910.01(3), "[i]f data are stored in a computer or similar device, any printout or output readable by sight, shown to reflect the data accurately, is an 'original.'" A cell phone is a computer or other device; unlike a traditional computer, there is no obvious means of a "printout" or "output" other than a screen shot. Thus, the screen shots here, which Detective McLeod testified that he took two days after M.R. and K.R. provided her phone, are seemingly printouts or "output readable by sight," and reflect the data accurately. *See, e.g.*, *Steele v. Lyon*, 460 S.W.2d 827, 831 (Ark. Ct. App. 2015) (holding that screen shots of text messages satisfied "printout or output" rule defining originals for best-evidence purposes); *Conceal City v. Looper Law Enforcement*, No. 3:10-CV-2506-D, 2011 WL 5557421 at *7 n.10 (N.D. Tex. Nov. 15, 2011) (same). *But cf. Gene Forbes Enterprises v. Cooper*, No. 2320-14-2, 2015 WL 3549987 at *6 n. 7 (Va. Ct. App. June 9, 2015) (noting that screen shots satisfy "duplicate originals" rule without considering the "printout or output" rule for electronic data).

That said, even if the screen shots are duplicates, there is no "genuine question . . . as to the authenticity of the original" barring their use. *See* Wis. Stat. § 910.03 (stating that a duplicate is admissible to the same extent as an original unless there is a genuine question raised as to the original's authenticity). Here, Giacomantonio does not seriously dipute that the texts appeared on K.R.'s phone. He simply claims that he did not write or send them.

Giacomantonio's best-evidence objection elevates form over substance. "The purpose of the best evidence rule is to prevent fraud on the trier of fact, depriving it of the benefit of the original document." *Grunwaldt v. Wisconsin State Highway Comm'n*, 21 Wis. 2d 153, 163, 124 N.W.2d 13 (1963). Because Giacomantonio never asserted that the content of the text messages had been altered (or that the screen shots do not

accurately depict the messages' content), the best evidence rule does not demand that the State present the messages on the phone itself or some sort of forensic printout. Indeed, if the text messages had been altered, the phone or a printout would not necessarily display more trustworthy versions of the messages than what appeared on the screen shots. Again, Giacomantonio's solution fails to serve the best evidence rule's purpose.

In sum, the screen shots, accompanied by Detective McLeod's testimony of how and when he viewed the messages and took the photographs, comprised an accurate and fair presentation of the text message evidence. The circuit court did not erroneously exercise its discretion in permitting the State to present the text messages as screen shots.

C. The circuit court properly exercised its discretion in overruling Giacomantonio's hearsay objection to Detective McLeod's reading the content of the text messages.

Finally, Giacomantonio argues that Detective McLeod's testimony describing the text messages was inadmissible hearsay (Giacomantonio's br. at 26-27). The circuit court correctly found that it was not.

At trial, Detective McLeod testified that he met with M.R. when she came to the Whitefish Bay Police Department with K.R.'s Sanyo cell phone (48:23-24). McLeod explained that he looked through the text messages on the phone with M.R.'s permission,[7] and saw the seven text messages at issue (48:27-28; A-Ap. 51-52). After the court overruled Giacomantonio's hearsay objection, Detective McLeod read aloud the text messages and confirmed that he had taken the screen shots depicted in Exhibits 8 and 9 (*id.*). McLeod had taken the screen

[7] According to McLeod, M.R. paid the bill on the Sanyo phone (48:24).

shots of the messages two days after he first saw them "to preserve them for evidence and also present it to . . . the D.A.[] at the time of charging" (48:26, 28-29; A-Ap. 50, 52-53). McLeod explained that after viewing the text messages, he had another officer retrieve K.R. from school and opened the investigation of Giacomantonio (48:26, 29; A-Ap. 50, 53).

The circuit court properly overruled Giacomantonio's objection because McLeod's reading the texts was not hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *See* Wis. Stat. § 908.01(3). Here, the State admitted the content of the text messages through McLeod's testimony not for the truth of the matter asserted (i.e., that Giacomantonio wanted K.R. to come to his room and wanted "booty"), but, rather, for McLeod to describe what he saw on the phone and why that led him to open an investigation. *See, e.g.*, *State v. Medrano*, 84 Wis. 2d 11, 19–20, 267 N.W.2d 586 (1978) (testimony is proper when not offered for the truth but to explain subsequent actions).

Accordingly, the circuit court soundly exercised its discretion in overruling Giacomantonio's hearsay objections.

D. Any error in admitting the content of the text messages was harmless.

Because the court properly found that the text messages were admissible, this court need not consider whether the error was harmless. But if this court deems that any of Giacomantonio's arguments above should have resulted in the exclusion of the text messages entirely,[8] the State briefly addresses harmless error below.

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[8] It is not apparent that the circuit court would have excluded the messages if Giacomantonio's arguments were persuasive. Had the circuit court agreed with Giacomantonio's authentication argument, the State may have

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Even if the court erroneously exercised its discretion in deeming evidence of the text messages' content inadmissible, this court may not reverse "unless an examination of the entire proceeding reveals that the admission of the evidence has 'affected the substantial rights' of the party seeking the reversal. *State v. Armstrong*, 223 Wis. 2d 331, 368, 588 N.W.2d 606 (1999) (quoting Wis. Stat. § 805.18(2)) (footnote omitted). In order to support reversal, there must be a "'reasonable probability that, but for . . . [the] errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* at 369 (quoting *Strickland v. Washington*, 466 U.S. 668, 694-95 (1984)).

The State used the text messages primarily to support the incest charge, which again, resulted in an acquittal. K.R., in her testimony, read the text messages and identified the phone numbers as being hers and Giacomantonio's (48:86-88; A-Ap. 58-60). She stated that she remembered Giacomantonio "oftentimes texting me, telling me to like go to his room late at night. And I'd try to come up with any excuse not to do so I wouldn't have to" (48:89; A-Ap. 61). Giacomantonio said "I want your booty" to K.R. "all the time," which she understood to mean that he wanted to either "grab my butt, or lick it, or do something of that sort" (48:89-90; A-Ap. 61-62). But given that the jury acquitted Giacomantonio of the incest charge, the text messages certainly were harmless in that respect.

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nevertheless authenticated the messages through other evidence. Had Giacomantonio raised the best-evidence claims and the court agreed, the State may have successfully presented the messages through K.R.'s phone. Moreover, even if McLeod's testimony was hearsay, K.R. testified as the recipient of those messages to their content and their content was entered into evidence as exhibits; hence, his reading the text messages was simply cumulative to K.R.'s.

The State also used the texts to counter Giacomantonio's defense that M.R. and K.R. had fabricated the allegations to get him out of their lives. The texts were the basis for M.R.'s initial report to law enforcement about her suspicions and law enforcement's initiation of the investigation that eventually led to K.R.'s claims and the discovery of the images supporting the exploitation count.

But the texts cannot have figured significantly into the jury's conviction on the exploitation count. To prove that count, the State relied primarily on (1) the images themselves, which police found on K.R.'s phone and the SD card of Giacomantonio's phone (*see* 47:54-55, 66) and (2) K.R.'s testimony that Giacomantonio induced her to take and send him the photos through emotional abuse, i.e., granting her leniency and favors when she agreed to send him photos, and curtailing her freedom and withdrawing emotional support when she refused (*see* 49:6, 13, 20-21). K.R. testified that typically she would give in to Giacomantonio's requests by taking photos with her phone and texting them to him, or by taking his phone at his request, taking photos, and returning the phone to him (49:24).

Consistently with that, the State in closing repeatedly emphasized the photos, their humiliating nature, and K.R.'s testimony that Giacomantonio used emotional blackmail to get them from K.R. (50:19-20) To be sure, the State briefly mentioned that the text messages "led to . . . pictures," but it acknowledged that the messages themselves could be "interpreted [in] different ways. Maybe it's nothing" (50:22).

And that equivocal approach was about as far as the State could go in using the text messages to support the exploitation count. The messages' content—which involved Giacomantonio's telling K.R. to "come to his room" late at night, K.R's. refusing, and Giacomantonio's stating that he wanted "his booty"—supported an inference that

Giacomantonio engaged in concerning and inappropriate text messaging with K.R. It did not support the inference that Giacomantonio had induced K.R. into sending pictures to him. K.R. did not testify that Giacomantonio routinely (or ever) took pictures of her late at night or in his room, or that the message conversations had anything to do with Giacomantonio requesting images. Again, K.R. stated that the texts were about Giacomantonio's wanting her to come to his room so that he could touch her (48:86-91; A-Ap. 58-63).

In all, there is no reasonable likelihood that the text messages factored significantly into jury's finding of guilt on the exploitation count. Giacomantonio is not entitled to relief based on the court's admission of the text messages.

II. The circuit court properly denied Giacomantonio's motion for in camera review of K.R.'s treatment records.

Giacomantonio next argues that the circuit court erred in denying his request for in camera review of K.R.'s treatment records from therapy she received during the period that she had alleged that Giacomantonio had committed the crimes. For the reasons below, the circuit court correctly denied his motion.

A. To establish a right to in camera review of privileged records, a defendant must show a "reasonable likelihood" that the records will be necessary to the jury's determination.

In *State v. Shiffra*, 175 Wis. 2d 600, 608, 499 N.W.2d 719 (Ct. App. 1993), this court held that a defendant may establish a constitutional right to in camera review of a victim's privileged private therapy records by making a preliminary showing that the records are material to the defense.

The Wisconsin Supreme Court clarified in *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, what a defendant

must demonstrate to establish a constitutional right to in camera review of privileged therapy records. It rejected language in *Shiffra* allowing in camera review whenever evidence is "relevant and may be helpful to the defense." *Id.* ¶25 (citation omitted). It held that "a defendant must show a 'reasonable likelihood' that the records will be necessary to a determination of guilt or innocence." *Id.* ¶32.

To make that showing, "a defendant must set forth a fact-specific evidentiary showing, describing as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense." *Id.* ¶¶33, 35. A showing for in camera review must be based on more than "mere speculation or conjecture as to what information is in the records" or a "mere contention that the victim has been involved in counseling related to prior sexual assaults or the current sexual assault." *Id.* ¶33. Further, the evidence sought "must not be merely cumulative to evidence already available to the defendant." *Id.* "A defendant must show more than a mere possibility that the records will contain evidence that may be helpful or useful to the defense." *Id.* (citing *State v. Munoz*, 200 Wis. 2d 391, 397-98, 546 N.W.2d 570 (Ct. App. 1996)).

> We conclude that the information will be "necessary to a determination of guilt or innocence" if it "tends to create a reasonable doubt that might not otherwise exist." This test essentially requires the court to look at the existing evidence in light of the request and determine . . . whether the records will likely contain evidence that is independently probative to the defense.

Id. ¶34 (citation omitted).

Whether a defendant established a constitutional right to in camera review of privileged therapy records is a legal question. *Green*, 253 Wis. 2d 356, ¶19. This court accepts the circuit court's factual findings unless clearly erroneous but independently reviews whether a defendant made the constitutional showing. *Id.* Finally, any error by the court in

denying in camera review is subject to a harmless error analysis. *See id.* ¶20 (stating that defendant must show that error in denying in camera review is not harmless).

B. The circuit court correctly concluded that the information that Giacomantonio believed may be in the records was cumulative to information he knew or could discover independently of the records.

In his circuit court memorandum requesting *in camera* review, Giacomantonio stated the following:

1. K.R. "has seen a therapist on multiple occasions to discuss issues relating to her interpersonal relationships within her family, issues of depression as well as suicidal tendencies" (7:1; A-Ap. 4).

2. "[T]hese counseling sessions occurred during the time period from before these alleged incidents occurred until it was reported many months later" (*id.*).

Based on those points, Giacomantonio alleged that "[t]here is a reasonable likelihood that the records relating to [K.R.'s] therapy contain exculpatory information necessary for a proper defense" (*id.*). He wrote that the records would likely demonstrate (1) that K.R. discussed her relationships with Giacomantonio and her mother, her depression, her suicidal thoughts, and (2) that K.R. "either denied or did not disclose to her therapist any sexual contact with, or abuse by, Giacomantonio" (7:1-2; A-Ap. 4-5).

The State opposed the motion, arguing that Giacomantonio failed to satisfy his burden because he was simply arguing that the records could show that K.R. denied or did not disclose Giacomantonio's abuse to the therapist (8; A-Ap. 10). The circuit court agreed and denied the motion in a hearing (41; A-Ap. 14).

The court first explained that it reviewed the relevant case law and the pleading requirements for in camera review, and highlighted the requirement that the evidence not be cumulative to other evidence available to the defendant (41:11-12; A-Ap. 24-25). It observed that Giacomantonio was aware that K.R. had attempted suicide in the past; that she was dating Paige, another minor; and that K.R. had allegedly lied to M.R. about that relationship (41:13; A-Ap. 26). It stated that Giacomantonio was independently aware of the information he was alleging that the records might contain that could impugn K.R.'s credibility where he had "other avenues by which to pursue the facts, as he alleges them to be" (41:14; A-Ap. 27). It concluded that Giacomantonio failed to satisfy his burden for in camera review (41:15; A-Ap. 28).

The circuit court's conclusion was correct. Under *Green*, "the evidence sought from the records must not be merely cumulative to evidence already available to the defendant." 253 Wis. 2d 356, ¶33. Here, Giacomantonio conceded at the hearing that he had "personal knowledge of those things [K.R.'s suicide attempt, her relationship with Paige, and her lying to M.R.] independent of the counseling records" (41:7-8; A-Ap. 20-21). Given that alone, the circuit court did not err in concluding that Giacomantonio did not satisfy his burden.

Moreover, to the extent that Giacomantonio sought information confirming that K.R. never told her therapist about his abuse, he was able to get that information and assert that defense simply by asking K.R. whether she ever disclosed the abuse. He also could bring out that the therapist, as a mandatory reporter, would have reported K.R.'s claims to police had K.R. said anything, and that there did not appear to be any such reports from the therapist. Indeed, as discussed in part II.C, *infra*, K.R. stated that she never told her therapist about the abuse and the jury learned that K.R.'s therapist was a mandatory reporter.

Ultimately, both of Giacomantonio's reasons for seeking review of the records were to obtain evidence that K.R. was providing inconsistent statements. To do that, a defendant must show, through other evidence, that the records will "tend to prove that [the victim] has a psychological disorder that would make her a poor reporter of events relating to sexual conduct or draw her credibility into question in any way." *In re Jessica J.L.*, 223 Wis. 2d 622, 635, 589 N.W.2d 660 (Ct. App. 1998).

Here, Giacomantonio presented nothing to suggest that K.R. suffered from a psychological condition that compromised either her ability to accurately report sexual events or her credibility generally. *Compare id.* (no entitlement to in camera review where allegations lacked claim that victim had "a psychological disorder that would make her a poor reporter of events relating to sexual conduct or draw her credibility into question in any way"); *and Munoz*, 200 Wis. 2d at 399 (no entitlement to in camera review when Munoz offered nothing to suggest that the victim suffered from a psychological disorder causing her to experience "reality problems in sexual matters") (internal citation and quotation marks omitted); *with Shiffra*, 175 Wis. 2d at 603 (post-traumatic stress disorder in the victim could allow her to view past sexual encounters as nonconsensual when they were consensual); *and State v. Robertson*, 2003 WI App 84, ¶¶9-10, 263 Wis. 2d 349, 661 N.W.2d 105 (depression with psychotic features that had elevated before the alleged sexual assault could explain victim's belief that sexual encounter was an assault).

Appropriately, the circuit court denied in camera review. Giacomantonio is not entitled to relief.

C. Giacomantonio's arguments that he satisfied the "reasonable likelihood" standard and that he was prejudiced by the court's ruling are meritless.

1. *Speese I* and *II* do not compel a different result.

Giacomantonio argues that in *State v. Speese*, 191 Wis. 2d 205, 223, 528 N.W.2d 63 (Ct. App. 1995) (*Speese I*), *rev'd on harmless error grounds*, 199 Wis. 2d 597 (1996) (*Speese II*), this court concluded that Speese's pleading based on the victim's delayed reporting while she attended treatment by a mandatory reporter was sufficient to trigger in camera review of her treatment files, and that this court should follow suit.

But the *Speese* decisions are unhelpful to Giacomantonio in at least two respects. First, in *Speese I*, this court concluded that Speese's claim that access to the victim's treatment records "*may be necessary* to a fair determination of Speese's guilt or innocence" because the victim was in therapy when the alleged abuse occurred and seemingly did not tell her treatment providers about it, given that they were mandatory reporters and never reported abuse. 191 Wis. 2d at 224 (emphasis added).

But this court decided (and the supreme court reversed) *Speese I* years before the supreme court in *Green* bolstered *Shiffra*'s pleading standards from "may be necessary" to a "reasonable likelihood" that the records are necessary. *See Green*, 253 Wis. 2d 356, ¶32 (internal quotation marks omitted). Accordingly, Wisconsin courts have not resolved whether a defendant's allegation that records may show that the victim did not report contemporaneous abuse to a mandatory reporter is enough to compel in camera review under the "reasonable likelihood" standard in *Green*. *See, e.g.*, *State v. Lynch*, 2015 WI App 2, ¶33, 359 Wis. 2d 482, 859 N.W.2d 125 (declining to reach argument that delayed reporting by victims should not compel in camera review).

Second, Giacomantonio cannot demonstrate prejudice because the jury was well aware, even without the medical records, that K.R. did not disclose Giacomantonio's abuse or exploitative behavior to her therapist. *See Speese II*, 199 Wis. 2d at 604-05 (reversing on harmless error grounds and concluding that evidence that the victim did not tell her therapist of abuse would have been redundant to evidence from police that she did not initially report abuse and from the victim herself acknowledging that she delayed reporting the abuse).

At trial, the jury heard that K.R. was in counseling beginning with her December 2012 suicide attempt through the allegations in September 2013 (48:58). Detective McLeod explained that under mandatory reporting laws, if a therapist had learned that Giacomantonio was engaging in sexual misconduct with K.R., the therapist would have been required to report it (48:36). McLeod stated that he was not aware of any complaints against Giacomantonio beyond those raised by M.R. (48:36-37).

K.R. testified that she did not tell anyone about Giacomantonio's abuse until after the first interview with police in September 2013; until then, she avoided even thinking about the photos and touching, because if she avoided confronting the situation, it "wouldn't be true, and [she] wouldn't have to deal with it" (48:82).

Specifically, K.R. stated that she did not disclose Giacomantonio's abuse to her therapist (48:81-82). She also acknowledged that when police first talked to her, she denied that Giacomantonio had done anything inappropriate with her (49:38, 48). K.R. stated that she did not talk to police during their first interview with her because it would have forced her to confront and think about everything that had happened (49:65).

In all, the jury heard plenty of evidence that K.R. did not disclose Giacomantonio's abuse to her therapist. Anything in

the therapy records confirming that fact would have been redundant. Thus, any error was harmless.

2. *Johnson* is not binding on this court, nor is it persuasive.

The unpublished decision in *State v. Johnson*, No. 2011AP2864, slip op. (Wis. Ct. App. Apr. 18, 2012) (A-Ap. 65-72), to the extent this court wishes to address it,[9] does not lend persuasive support to Giacomantonio's position. Giacomantonio invokes *Johnson* because, in that case, this court concluded that based on the timing of the therapy and the undisputed fact that the purpose of the victim's therapy was to address family issues, Johnson (the victim's father), made a preliminary showing for in camera review of the records. Slip op., ¶14 (A-Ap. 70).

In *Johnson*, both the defendant and the victim agreed that the specific purpose of her counseling was to discuss "interpersonal" relationships between the victim and family members, which included the defendant. *Id.* Here, Giacomantonio simply adopts the "interpersonal relationships" language in an apparent effort to align his case with Johnson's.

But the purpose of K.R.'s counseling between December 2012 and September 2013—the period of counseling records that Giacomantonio sought access to (7:1-2; A-Ap. 4-5)—was not specifically family relationships, but to address her attempted suicide (48:78-79). K.R. stated at trial that she remained in counseling after September 2013 to deal with Giacomantonio's abuse (48:80), but she had not told her therapist about the abuse until after she admitted it to police in September 2013 (48:81-82). Thus, even if K.R. had discussed

[9] "A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it." Wis. Stat. § 809.23(3)(b).

Giacomantonio's abuse with her therapist, she would have done so only after September 2013.

And while K.R.'s therapy to deal with the suicide attempt potentially involved discussion of K.R.'s family relationships, that does not necessarily translate to a "reasonable likelihood" that the records contain relevant evidence. As the circuit court noted, every sexual assault case involving family members "involves interpersonal relationships" (41:12). If a defendant could compel in camera review of privileged records with a general allegation that the records were likely to contain information involving interpersonal relationships, that assertion would virtually eliminate any burden in the pleading requirements for in camera review in family-abuse cases.

Given that Giacomantonio lived with K.R., and had independent knowledge of K.R.'s suicide attempt, of K.R.'s lying to M.R., of K.R.'s relationship with Paige, and of K.R.'s general complaints about M.R., any information from the therapy records that he sought to those ends was cumulative. And any error in denying in camera review based on Giacomantonio's "interpersonal relationships" rationale was harmless because again, the jury learned of anything Giacomantonio was "reasonably likely" to discover in the records at trial.

The jury learned about K.R.'s suicide attempt and that she initially blamed M.R. M.R. testified that when K.R. started therapy, K.R. blamed M.R., not Giacomantonio, for the suicide attempt (48:68). M.R. said that her and K.R.'s relationship was now improved, and that K.R. no longer blamed her for the suicide attempt (48:69).

As noted above, the jury had also learned that K.R. delayed reporting Giacomantonio's conduct to anyone. In that time between December 2012 and September 2013, K.R. said that she trusted Giacomantonio as a father figure, in part because he discouraged K.R. from confiding in M.R. According to K.R.,

Giacomantonio told K.R. not to talk to M.R. She stated, "He made me feel as though he was the only person that would ever care about me or be there for me. And that [M.R.] wasn't somebody that I could trust or rely on" (48:85-86). K.R. acknowledged that Giacomantonio was supportive of her relationship with Paige, whereas M.R. disapproved of it (49:32-33).

K.R. said that she sent Giacomantonio the images of her buttocks and vagina because Giacomantonio made her feel "as though he did so much for me that he deserved stuff, those pictures in return for everything he would do for [her]," including providing alcohol, drugs, and freedom to hang out with her friends (49:6; *see also* 49:20, 26, 69-71). K.R. said that if she refused to take the photos or to allow him to touch her, Giacomantonio would stop talking to her, would take away her phone, would get K.R. in trouble with M.R., or would otherwise curtail her freedom (49:13; *see also* 49:20-21, 69-71). And as noted above, K.R. testified repeatedly that before she told law enforcement about Giacomantonio's abuse, she was in denial about Giacomantonio's conduct toward her to avoid confronting it and to pretend that it was not happening.

Accordingly, the records could not have been helpful to Giacomantonio's defense. If the records established that K.R. told her therapist that M.R., not Giacomantonio, was the problem in her life, that would have been consistent with M.R.'s testimony that K.R. initially blamed M.R. for the suicide attempt and K.R.'s testimony that Giacomantonio was emotionally isolating and manipulating her at the time. If the records established that K.R. told her therapist that Giacomantonio was manipulative and controlling, that would have likewise supported K.R.'s testimony to that effect.

In sum, Giacomantonio failed to establish a right to in camera review of K.R.'s records under the circumstances. The

circuit court's decision so holding was correct, and any error was harmless.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this court affirm the judgment of conviction.

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 7862 words.

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I hereby certify that:

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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 11th day of November, 2015.

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