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DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

Circuit Court Case No.
2015CF000186

-VS-

WAYNE A. JOHNSON,

Appeal Case No.
17-AP-729-CR

Defendant-Appellant.

**APPEAL FROM JUDGMENT OF CONVICTION AND AN ORDER
DENYING POST-CONVICTION RELIEF, BOTH
ENTERED IN THE CIRCUIT COURT FOR BARRON COUNTY,
THE HONORABLE JAMES C BABLER, PRESIDING**

BRIEF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

	Page
ISSUES PRESENTED.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	2
STATEMENT OF THE CASE AND FACTS.....	2
ARGUMENT.....	5
I. The defendant was not denied his constitutional right to effective representation, even though his trial counsel did not properly assert the legal and factual grounds under Shiffra/Green in order to obtain an in camera review.....	5
A. Legal Standards governing plea withdrawal based on ineffective assistance of counsel claims.....	5
B. Attorney Willett’s deficient performance regarding Shiffra/Green did not prejudice the defendant.....	6
II. The Circuit Court properly denied the defense motion for in camera review of the victim’s mental health records.....	7
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.....	8
B. The Circuit Court correctly concluded that the information that the defendant believed may be in the records was cumulative to information he knew or could discover independently of the records.....	9
CONCLUSION	12
CERTIFICATION	13

TABLE OF AUTHORITIES

Cases

Strickland v. Washington 466 U.S. 668 (1984).....	5
State v. Bentley 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).....	5
State v. Johnson 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).....	5
State v. Green 253 Wis. 2d 356, 646 N.W.2d 298 (2002).....	8
State v. Munoz 200 Wis. 2d 391, 546 N.W.2d 570 (Wis. Ct. App. 1996).....	9
State v. Shiffra 175 Wis. 2d 600, 499 N.W.2d 719 (Wis. Ct. App. 1993).....	8

Statutes

Wis. Stat. §753.31 (2)(f) and (3)	2
Wis. Stat. §809.23 (1)(b)4.....	2

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ISSUES PRESENTED

The issue in this case is whether trial counsel was ineffective for failing to properly present the established legal and sufficient factual grounds under ***Shifra/Green*** to obtain an in camera review of the victim's mental health records.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested because the briefs will adequately address all relevant issues. Publication is not appropriate because this is a one- judge panel. See Wis. Stat. 753.31 (2)(f) and (3) and Rule 809.23.(1)(b)4.

STATEMENT OF THE CASE AND FACTS

The defendant in this case was originally charged with one count of 1st degree sexual assault in violation of Wis. Stat. 948.02(1)(e). (1:1-3). During the course of representing the defendant, his trial counsel filed a motion seeking an in camera review of the victim's mental health records. (38:1-3, 63:1-22) . Several different hearings were held addressing the defense motion. (132; 133; 135; 137). The Trial Court ultimately denied the defense motion for an in camera review. (137:14-15).

The defense also filed a motion seeking to admit evidence that the victim made similar sexual assault allegations against the defendant in the past that were established to have been fabricated. (40:1-3). The defense also filed an additional Motion in Limine seeking to admit other acts evidence in the form of false allegations in a different Barron County case involving the prosecution of the defendant. (71:1-4). At a hearing held on May 20, 2016, the Court ruled that the victim could be cross-examined concerning the false allegations that were the subject of the Motion in Limine and the Other Acts Motion. (138:1-23).

Following the entry of a plea and being sentenced, the defendant filed a post-conviction motion seeking to withdraw his plea. The basis for the motion

was that his trial counsel was ineffective for failing to properly pursue an in camera inspection of the victim's mental health records under ***Shifra/Green***. (105:1-16).

The Trial Court conducted an evidentiary hearing on April 4, 2017, and took additional argument from the parties on April 5, 2017. (144:143). Stephen Willett, the defendant's trial counsel, testified that the main approach he took as a trial strategy was that the defendant did not commit the crime he was charged with. (144:9). The secondary trial strategy was to discredit the victim. (144:25). He also testified the defendant was aware the victim was involved in therapy through the child's mother. (144:9-10). He also testified that he met with the child's mother to gain information from her concerning her daughter, including the fact that the victim did not like the defendant. (144:25). She also provided information to him concerning the counseling that she and her daughter were involved with. (144:26). Mr. Willett also testified that part of his strategy was to present evidence at trial that the victim had made a prior false accusation against the defendant, specifically, in the State of Texas. (144:26-27). Mr. Willett also testified that he intended to call the victim's mother to essentially impeach her own daughter. (144:28). Mr. Willett also intended to call an expert, Hollida Wakefield, to offer testimony concerning issues regarding memory and the scrutiny that should be applied when an event is reported as a "flashback". (144:28).

The defendant also testified at the post-conviction hearing that he had contact with the victim's mother while the case was pending. (139:40). He also

testified that he was aware that the victim's mother had provided information to Attorney Willett. (144:41). He was also aware, through the victim's mother, of what was transpiring in the counseling sessions that the victim was involved in. (144:42). He was also in a relationship with the mother during the entire time the case was pending and knew that the mother believed the defendant over her daughter. (144:42-43). He also was aware that she was willing to testify on his behalf at trial. (144:44).

The defense did not call the victim's mother to testify at the post-conviction hearing, nor did they include any information from her in the post-conviction motion regarding the counseling that her daughter took part in. There was nothing alleged in any of the supporting documents filed in connection with the post-conviction motion indicating that the victim had made any statements in the counseling sessions recanting any of the allegations that were the basis of the charge in this case or that the allegations were not true.

The Trial Court denied the defendant's post-conviction motion. (143:18-19). The Court found that Attorney Willett was ineffective for failing to apply the applicable legal standard regarding his motion for an in camera inspection. (144:50-51). However, the Court further determined that Attorney Willett's ineffectiveness did not prejudice the defendant given the fact that the Court found that the defendant failed to meet his burden for an in camera review as alleged in the post-conviction motion. (143:18)

ARGUMENT

- I. **The defendant was not denied his constitutional right to effective representation, even though his trial counsel did not properly assert the legal and factual grounds under *Shiffra/Green* in order to obtain an in camera review**
 - A. **Legal standards governing plea withdrawal based on ineffective assistance of counsel claims.**

A defendant is entitled to withdraw a guilty plea after sentencing only if he establishes, by clear and convincing evidence, a “manifest injustice.” ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test is satisfied by a showing that the defendant received ineffective assistance of counsel. *See id.*

A defendant claiming ineffective assistance of counsel must prove both that his lawyer’s representation was deficient and that he suffered prejudice as a result of that deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were “outside the wide range of professionally competent assistance.” *Id.* at 690. To demonstrate prejudice, the defendant must affirmatively prove that the alleged defect in counsel’s performance actually had an adverse effect on the defense. *Id.* at 693. If the Court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The Circuit Court’s findings of fact will be upheld unless they are clearly

erroneous. *Id.* Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that an Appellate Court reviews without deference to the Circuit Court's conclusions. *Id.* at 128.

B. Attorney Willett's deficient performance regarding Shiffra/Green did not prejudice the defendant.

The State does not disagree with the Trial Court's finding that Attorney Willett's performance with respect to the **Shiffra/Green** issue was deficient. He clearly did not articulate and apply the **Green** case at the motion hearing that was held on May 11, 2016, or in his motion itself.

The crux of the matter is whether his performance with respect to that matter alone prejudiced the defendant and actually had an adverse effect on the defense. It is clear from Mr. Willett's testimony that it did not.

The defense literally had the victim's mother working on behalf of the defendant. The victim's mother was willing to testify on behalf of the defendant and also was well aware of what was transpiring in the counseling and therapy sessions that were the basis of the motion for an in camera inspection. At no point did Mr. Willett utilize the information that he was obtaining from the victim's mother as a basis for his motion for an in camera inspection. In addition, the post-conviction motion contains no information from the victim's mother concerning the mother's knowledge of what was transpiring in the counseling sessions. One would surmise that if the victim was making statements that were inconsistent with what was disclosed to the police or if she was acknowledging that these allegations were false, the mother would have been sharing that information with Mr. Willett and it would have been a basis for his motion for an in

camera inspection. Mr. Willett's testimony that the records were of marginal value suggests he knew directly from the victim's mother that there was nothing in the records that would assist the defense.

It is clear from Mr. Willett's testimony that his trial strategy had multiple facets to it. The trial strategy was clearly to discredit the victim. He had evidence of a prior false allegation that he was going to be able to cross-examine the victim on. He had the mother lined up to impeach her daughter and he had an expert lined up to address the issue of a disclosure made in the context of a "flashback" and to discredit the accuracy of such a disclosure.

In light of the evidence Mr. Willett had at his disposal, his failure to articulate and apply **Green** did not have an adverse effect on his overall defense of Mr. Johnson. It is unlikely the records would have been of any value to the defense.

II. The Circuit Court properly denied the defense motion for in camera review of the victim's mental health records.

The defense next argues that the Circuit Court erred in denying his request for in camera review of the victim's treatment records from therapy she received after the period that she had alleged that the defendant had committed the offense at issue. 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 the defendant believed may be in the records was cumulative to information he knew or could discover independently of the records.

In his ruling on April 5, 2017, the Circuit Court concluded that it would not have granted an in camera inspection due to the fact that there was no showing that the evidence sought from the records would have been independently probative and not cumulative to evidence the defense already had. (143:16-19). The Court further concluded that the fact that the victim was in counseling or therapy was insufficient for a showing under **Green**.

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. A showing for an in camera inspection must be based on more than a contention that the victim has been involved in counseling related to prior sexual assaults or the current sexual assault.” *Id.* ¶33.

As argued under Part I, the defense literally had inside access to the counseling and therapy the victim was participating in by virtue of the relationship between the defendant and the victim's mother. In addition, according to the testimony of both the defendant and Mr. Willett, she was clearly sharing information concerning the counseling and therapy not only with the defendant, but also with Mr. Willett.

If the victim had made statements in counseling that she either fabricated the allegations or recanted them, it is logical to infer that her mother would have passed that information on to the defendant or attorney Willett given her allegiance to the defendant. If the victim had some type of diagnosis impacting her ability to perceive events and recollect them, it is also logical to infer that her mother would have also passed that information on to the defendant or attorney Willett. The lack of such evidence being alleged in any of the defense motions concerning the in camera inspection clearly suggests there really wasn't anything transpiring in the counseling sessions that would have been beneficial to the defense. It is most likely why Mr. Willett viewed the records as having only a marginal benefit. The fair inference from his testimony is that he knew from his

meetings with the mother that there was nothing of value in the records to support the defendant's main defense, which was that the incident never happened and the victim fabricated it.

The defense, through the victim's own mother, also had evidence that the victim disliked the defendant. This clearly would have provided a motive to falsely accuse him. The victim's mother was also willing to testify on behalf of the defendant to impeach her own daughter. The defense also was going to be able to cross-examine the victim and potentially present evidence to the jury of a prior false accusation by the victim against the defendant.

Furthermore, the contention that the records would be critical to the defense due to a disclosure described as a "flashback" is of little consequence. Mr. Willett had retained an expert, Hollida Wakefield, to specifically address the reliability of an incident described as a "flashback" and to essentially discredit the victim's disclosure of the incidents.

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. It is difficult to discern a clearer situation under **Green** where a defendant had evidence directly available to them that they would have been seeking from the counseling records of the victim. In this case, the defense literally had someone on the inside of the counseling sessions providing information directly to the defendant and trial counsel.

The Trial court's factual findings were not clearly erroneous in any sense. Even if trial counsel had done a better job of articulating the legal standards

under **Green**, the defense motion for an in camera inspection would have still failed since any information he was seeking from the records would have already been available and known to him.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirmed the Trial Court's decision regarding the post-conviction motion.

Dated at Barron, Wisconsin, this 4th day of October, 2017.

RESPECTFULLY SUBMITTED,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,372 words.

Dated this 4th day of October, 2017.

John M. O'Boyle
Assistant District Attorney

CERTIFICATE OF COMPLIANCE **WITH RULE 809.19**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 4th day of October, 2017.

Signed:

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