COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2864-CRAC **Cir. Ct. No. 2011CF376**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

SAMUEL CURTIS JOHNSON, III,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Racine County: EUGENE A. GASIORKIEWICZ, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 REILLY, J. This matter is before us on an interlocutory appeal from pretrial discovery orders issued by the circuit court.[1] Trial by jury is scheduled for April 23, 2012. The circuit court granted the defendant's motion for in camera inspection of the victim's therapy records. The victim thereafter refused to consent to the release of her privileged records. The court responded with a six-part order:

1. the court would honor the assertion of the privilege by the victim;
2. allow the victim to testify;
3. inform the jury that the victim had been ordered to release her therapy records for in camera inspection;
4. inform the jury that the victim had a privilege to refuse the production of her records;
5. inform the jury that the victim had, in fact, refused the court's order;
6. inform the jury that, as a result of the victim's refusal, a presumption exists that the contents of the records would have been helpful to the defense.

[1] This court granted the motions for leave to appeal. *See* WIS. STAT. RULE 809.50(3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶2 We affirm the circuit court's initial decision granting the motion for in camera review. We reverse the circuit court's order allowing the victim to testify at trial.

DISCUSSION

¶3 Samuel Curtis Johnson, III, is charged with one count of repeated sexual assault of his stepdaughter, T.S. The assaults allegedly took place when T.S. was between twelve and fifteen years of age. T.S. will be seventeen years of age at the time of trial. The prosecution of Johnson is premised upon statements made by T.S. There appears to be no physical evidence of sexual assault.

¶4 Johnson moved the court for in camera inspection of T.S.'s therapy records. The factual basis for Johnson's request was:

1. T.S. was in counseling during the time period in which T.S. alleges that Johnson was engaging in repeated acts of sexual abuse.
2. The purpose of the therapy sessions was to discuss issues relating to interpersonal relationships within T.S.'s family, including her relationship with her stepfather, Johnson.
3. There is a reasonable likelihood that the therapy records contain exculpatory information, specifically that:
    a. T.S. discussed her relationship with Johnson,
    b. T.S. either denied or did not disclose any sexual assault by Johnson.

¶5 The State argued that Johnson had not made the requisite preliminary showing for in camera inspection as he failed to show that any relevant records existed and that Johnson had failed to show that T.S. was suffering from a mental illness at the time of the alleged assaults, affecting her ability to perceive the event or relate the truth. T.S., through her counsel, informed the court that she had reviewed the facts set forth in Johnson's motion seeking in camera inspection of her records and that those facts were accurate. The State offered no facts pertinent to Johnson's motion.

¶6 The circuit court granted Johnson's motion pursuant to ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), and ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298. The court found that the reasons and basis proffered by Johnson met the requisite requirement for relevancy and materiality.

¶7 T.S. notified the court, through her counsel, that after thorough consideration, including consultation with her independent counsel and her parents, she was refusing to consent to in camera inspection of her therapy records. T.S.'s counsel notified the court that T.S. was invoking her "absolute statutory privilege" to refuse to disclose her records. Counsel indicated that T.S. understood the possible impact her decision would have on the prosecution of Johnson.

¶8 The State sought an order from the court compelling the production of T.S.'s therapy records regardless of T.S.'s invocation of privilege. T.S. objected to the State's request. Johnson and T.S. argued the only remedy available was that T.S. must be barred from testifying until such time as she consents to the release of her privileged records. The State responded that the privilege was not

absolute and the appropriate remedy was for the circuit court to issue a subpoena compelling the release of the records directly to the court for in camera review despite the invocation of the privilege.

¶9 The circuit court considered both options and found neither appropriate. The court chose the six-part order set forth above.

¶10 The State and Johnson both petitioned for leave to appeal. The State sought review as to whether Johnson made a sufficient showing under ***Shiffra*** and ***Green*** to get in camera inspection and also sought review of the circuit court's refusal to compel the production of T.S.'s therapy records despite T.S.'s invocation of her privilege. Johnson sought review of the circuit court's order allowing T.S. to testify despite her refusal to release her therapy records for in camera review.

Johnson Made the Requisite Preliminary Showing Required for In Camera Review

¶11 Counseling records are protected by the professional counselor-patient privilege under WIS. STAT. § 905.04(2). In order to obtain discovery of therapy records, one must first obtain an in camera inspection. *See* ***Shiffra***, 175 Wis. 2d at 605. In ***Shiffra***, this court adopted the procedure and the standard for a defendant to obtain an in camera inspection of a victim's counseling records, recognizing that in camera review achieves the proper balance between the defendant's right to present a complete defense and the State's interest in protecting its citizens. ***Id.*** at 605. The preliminary showing needed for in camera review "requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely

cumulative to other evidence available to the defendant." ***Green***, 253 Wis. 2d 356, ¶34.

¶12 Information will be necessary to a determination of guilt or innocence if it tends to create a reasonable doubt that might not otherwise exist. ***Id.*** This test 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.***

¶13 The defendant bears the burden of making a preliminary evidentiary showing before an in camera review is conducted by the court. ***Id.***, ¶20. Factual findings made by the court in its determination are reviewed under the clearly erroneous standard. ***Id.*** Whether the defendant submitted a preliminary evidentiary showing sufficient for in camera review implicates a defendant's constitutional right to a fair trial and raises a question of law that we review de novo. *See* ***id.***

¶14 We agree with the circuit court's order granting in camera inspection. Johnson set forth that T.S. was in counseling at the time that the alleged acts of abuse occurred and that the purpose of counseling was centered on interpersonal relationships within T.S.'s family, including her relationship with Johnson. T.S. agreed that Johnson correctly set forth the time and purpose of her counseling sessions. It is reasonably likely, therefore, that the records contain relevant evidence of T.S.'s recitation as to her relationship with and the actions of Johnson.

¶15 We conclude that there is a "reasonable likelihood" that the records contain relevant information necessary to a determination of guilt or innocence such that in camera inspection is required. *See* ***Green***, 253 Wis. 2d 356, ¶32. The

fact that the purpose of the therapy was to address interpersonal relationships between T.S. and Johnson and that the therapy occurred during the time period at issue makes it reasonably likely the records contain relevant information necessary to a determination of guilt or innocence. Just as the statements made by T.S. to a member of the child advocacy center and agents of the prosecution are relevant, the statements T.S. made to her therapists at the time of the alleged assaults may be relevant to the determination of guilt or innocence of Johnson.

Shiffra *Requires Suppression of T.S.'s Testimony*

¶16 In ***Shiffra***, we affirmed the circuit court's order for in camera inspection of the victim's psychiatric records. ***Shiffra***, 175 Wis. 2d at 604, 612. We also held that the victim was "not obligated to disclose her psychiatric records." ***Id.*** at 612. The issue presented in ***Shiffra*** was whether the circuit court erroneously exercised its discretion when it suppressed the victim's testimony as a sanction for her refusal to release the records. ***Id.*** We held that the court did not err, and that "[i]n this situation, no other sanction would be appropriate." ***Id.***

¶17 We find ourselves in the same factual and legal situation as in ***Shiffra***: An order for in camera inspection by the circuit court and an invocation of a WIS. STAT. § 905.04 privilege by the victim. As an intermediate appellate court, we are without authority to modify, withdraw, or otherwise change the holding in ***Shiffra*** even if we wanted to. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) ("[O]nly the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals."). ***Shiffra*** mandates the suppression of T.S's testimony.

¶18 Given our adherence to ***Shiffra***, we need not reach the circuit court's remedy of allowing T.S.'s testimony, coupled with jury instructions, addressing the invocation of the privilege and the presumption flowing from it. We note, however, that this option was presented to us in ***Shiffra*** and we held it to be "no solution at all." ***Shiffra***, 175 Wis. 2d at 612 n.4.

CONCLUSION

¶19 We affirm the circuit court's order for in camera inspection. We reverse the circuit court's order allowing T.S. to testify during such time that she is exerting her privilege. We remand for further proceedings consistent with this opinion.

¶20 No costs to either party.

By the Court.—Affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.

¶21 BROWN, C.J. (*dissenting*). When this court wrote ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), we knew its importance. Before us was a clash between a patient's privacy concerns regarding mental health or counseling records versus the Sixth Amendment right to present a defense. We recognized the State's policy of protecting privileged information pursuant to WIS. STAT. § 905.04, but also understood how, in certain limited fact situations, this privileged information might well include evidence raising a reasonable doubt about the alleged victim's allegations. *See* ***Shiffra***, 175 Wis. 2d at 609-10. The State argued, in part, that the alleged victim had an absolute privilege which under no circumstances could be abridged by a defendant. *See* ***id.*** at 604. Shiffra asserted that the alleged victim had to disclose the records for inspection so long as they might be possibly relevant to the defense.

¶22 We rejected both contentions and instead reasoned that neither the alleged victim's right to nondisclosure nor the defendant's right to a fair trial should be given absolute preference over the other. *See* ***id.*** at 611-12. Taking our cue from the plurality opinion of the United States Supreme Court in ***Pennsylvania v. Ritchie***, 480 U.S. 39 (1987), we held that the trial court was in the best position to balance the two conflicting interests. *See* ***Shiffra***, 175 Wis. 2d at 611-12. We determined that, by use of an in camera inspection by the trial court, the privacy intrusion to the alleged victim would be comparatively minimal and would allow for an impartial set of eyes to inspect the records to determine if the records were so material that the defense should have access to them. *See* ***id.*** We held that, if the alleged victim still persisted in keeping the records private, even

from in camera inspection, the alleged victim would not be allowed to testify. ***Id.*** at 612.

¶23 Nineteen years later, ***Shiffra*** is still the law in this state, although slightly modified by the supreme court in ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298. Indeed, it is the majority's belief that ***Shiffra*** and ***Green*** compel the result it has reached. I agree with the majority that Johnson made the requisite preliminary showing required for in camera review, but that is because, contrary to what the State thinks, we are bound by ***State v. Speese***, 191 Wis. 2d 205, 528 N.W.2d 63 (Ct. App. 1995). There is no essential difference between what Speese presented to the trial court and what Johnson presented. ***Speese*** was reversed by the supreme court on harmless error grounds; it was not "overruled." ***State v. Speese***, 199 Wis. 2d 597, 545 N.W.2d 510 (1996).

¶24 I do not, however, agree that ***Shiffra*** necessarily requires suppression of T.S.'s testimony. 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.

¶25 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.[1] I also agree with the State that HIPPA allows health providers to release records pursuant to court order. *See* 45 C.F.R. § 164.512 (e)(l)(i) (West 2012).

¶26 I reject Johnson's argument that WIS. STAT. § 146.82(2)(a)4. is a "general statute" which, in turn, is governed by the "more specific" WIS. STAT. § 905.04. I further reject his argument that the privilege is "absolute" according to both state and federal law. First, the privilege and the right to present a defense are, as I stated before, two equally conflicting interests and neither should be given absolute preference over the other. I do not see anything in either statute which gives one more weight than the other or which is "more specific" than the other. Second, even though it is correct that another panel of this court said in ***Speese***, 191 Wis. 2d at 219, that we "treated" the privilege as being absolute in ***Shiffra***, nowhere did we say that in our opinion.

¶27 I adhere to the same theme that was the central focus of our rationale in ***Shiffra***. When there are two competing and compelling societal interests, it is for the court to balance these interests on a case-by-case basis. The courts are especially equipped for this task. Indeed, it is what judges do. In ***Shiffra***, we

[1] The State did not make this specific argument in ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993). In fact, because the sought-after information in ***Shiffra*** implicated WIS. STAT. ch. 51 records, the State argued that the court had no lawful authority to order release pursuant to WIS. STAT. § 146.82(2)(a)4. *See* WIS. STAT. § 146.81(4). That was the only mention of the statute.

quoted U.S. Supreme Court Chief Justice John Marshall for this exact proposition. ***Shiffra***, 175 Wis. 2d at 611.

¶28 By ordering that the records be turned over for in camera review, we protect the public's interest by denying the alleged victim the authority to veto the prosecution (which may well be what is going on here) and adequately protect the defendant's interest in due process. It allows a neutral tribunal to review the materials to see if they may significantly undermine the witness's credibility thus negating the risk that an innocent defendant may be convicted.

¶29 Johnson argues that the United States Supreme Court in ***Jaffee v. Redmond***, 518 U.S. 1, 17 (1996), rejected the view that the courts should be permitted to make this balancing determination. He quotes that part of ***Jaffee*** which states: "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." ***Id.*** But the ***Jaffee*** court made no attempt to "delineate [the] full contours" of the privilege and recognized that circumstances may exist where the privilege "must give way." ***Jaffee***, 518 U.S. at 18 and n.19. And ***Jaffee***, a civil case, did not speak to whether any federal constitutional considerations might limit the privilege. I am convinced that ***Jaffee*** offers no clear guidance.

¶30 One final point. In ***Speese***, 199 Wis. 2d 597, where our supreme court reversed our decision on harmless error grounds, the court seemed to suggest that whether the physician-patient privilege was absolute was an open question. It also left open the issue of whether, assuming the court were to decide that the privilege is absolute, the appropriate sanction is witness preclusion. ***Id.*** at 613.

Based on these comments, I am convinced that the supreme court was also of the view that neither ***Shiffra*** nor ***Green*** had answered these questions.

¶31 I would reverse and remand with directions that the court order the records, review the records, decide whether or not they should be disclosed and, after having made that decision, try the case.