

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2006AP1322-CR

Cir. Ct. No. 2005CF1819

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK W. BAILEY,

DEFENDANT-APPELLANT.

APPEAL from a non-final order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Remanded with directions.*

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

¶1 PER CURIAM. Mark W. Bailey appeals from a non-final order denying his discovery request pertaining to a prior sexual assault of the victim.¹

¹ By order dated August 17, 2006, we granted Bailey's petition to appeal from the non-final order.

Bailey contends the trial court violated his constitutional rights to confront and cross-examine his accusers by excluding all evidence of the prior sexual assault, and he argues that his request is not barred by the rape shield law, WIS. STAT. § 972.11(2) (2005-06).² Because Bailey has demonstrated the burden for an *in camera* review of the State's discovery file from the prior criminal sexual assault case, we remand this matter to the trial court with directions to conduct an *in camera* review of the State's discovery file in the *State v. Hermann*, No. 03CF004436 case.

BACKGROUND

¶2 In April 2005, Bailey was charged with one count of first-degree sexual assault of a child. The complaint alleged that between July 1, 2001 and November 1, 2004, Bailey had sexual contact with his minor stepdaughter, Ashley R. (d.o.b. March 2, 1991). The complaint also charged Bailey with one count of sexual assault of a child (repeated acts). This charge was based on Bailey's alleged sexual contact with Bailey's other minor stepdaughter, Taylor R., (d.o.b. June 23, 1993) between July 8, 2004 and February 28, 2005.

¶3 Bailey pled not guilty and sought discovery of the criminal discovery file in the Hermann case. In that case, William Hermann, a stranger sexually assaulted then 12-year-old Ashley in the presence of then ten-year-old Taylor. This assault occurred on July 16, 2003. As a result of the assault, Hermann was charged with (among other things) first-degree sexual assault. In June 2004, he pled guilty to the charges and was sent to prison.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 Directly following the Hermann assault, Ashley was examined by Rita M. Giese, R.N. of the Aurora Sexual Assault Treatment Center. During the examination, Giese asked Ashley questions about whether she had experienced any prior sexual abuse. Ashley responded negatively to three questions pertaining to prior sexual abuse. On the medical form arising from the examination, Giese had marked “No” to the questions asking whether Ashley was currently in an “abuse relationship,” and whether Ashley ever had sex against her will. Giese marked “Yes” to the question of whether the assault was Ashley’s first sexual experience.

¶5 Bailey contends that after the Hermann sexual assault, Ashley suffered from post-traumatic stress disorder and missed a substantial amount of school. Her grades dropped, she stopped bathing regularly, started dressing provocatively, started dating older boys, came home late, and went to internet chat rooms using provocative names. Bailey indicated that he was very upset and was disciplining Ashley for her inappropriate behavior. Bailey contends that as a result, Ashley was very upset with him and wanted him out of her life. Bailey said that after Hermann was sent to prison, Ashley became uncontrollable, and in November 2004 was sent to live with a family friend.

¶6 Five months later, Ashley alleged that Bailey had sexually abused her, which led to the charges in this case. Taylor also alleged that Bailey had inappropriately touched her (Taylor). Bailey pled not guilty to both charges that resulted from these allegations.

¶7 In preparing his defense, Bailey requested discovery of both Ashley’s and Taylor’s school records, as well as the criminal discovery file in the Hermann case. Bailey believed these files would contain additional statements

indicating that Ashley had never been sexually abused prior to the Hermann incident. Bailey argued that because Ashley's allegations against him pre-dated the Hermann incident, such statements would be relevant to his defense. The trial court granted his motion for an *in camera* review of the school records. The trial court conducted the *in camera* review and concluded that there was no evidence in the school records which would be relevant to Bailey's case. The trial court denied Bailey's request for discovery for review of the Hermann discovery file on the grounds that the rape shield law barred the admission of this material, and that it was not relevant and would likely confuse the jury. An order was entered memorializing the trial court's decision.

¶8 Bailey now appeals from that order.

DISCUSSION

¶9 Bailey contends that Ashley's denials of prior sexual abuse in the Hermann case in 2003, directly contradict her allegations that Bailey sexually abused her in 2001. Citing *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), Bailey argues that this contradiction supports his innocence, requiring admission of these records on constitutional grounds. He asserts that he has a constitutional right to cross-examine Ashley about these denials in order to impeach her accusations against him. See *Davis v. Alaska*, 415 U.S. 308, 316-18 (1974). He also contends that the rape shield law should not bar his access to the Hermann discovery file because his constitutional right to due process outweighs the rape shield law protections.

¶10 The trial court denied Bailey's motion for access to the Hermann discovery file without conducting an *in camera* review to determine if the file contained any information that would be pertinent to his defense. "The defendant

bears the burden of making a preliminary evidentiary showing before an *in camera* review is conducted by the court.” *State v. Green*, 2002 WI 68, ¶20, 253 Wis. 2d 356, 646 N.W.2d 298. Any factual findings that the court makes in its determination are viewed under the clearly erroneous standard. *Id.* However, whether the defendant’s showing was sufficient implicates the constitutional right to a fair trial, raising a question of law for us to review *de novo*. *Id.* The preliminary showing for an *in camera* review requires a defendant to set forth a good faith, specific factual basis that demonstrates a reasonable likelihood the records contain noncumulative, relevant information necessary to a determination of guilt or innocence. *Id.*, ¶34. Information is “necessary to a determination of guilt or innocence” if it “tends to create a reasonable doubt that might not otherwise exist.” *Id.* (citation omitted). The defendant must “clearly articulate how the information sought corresponds to his or her theory of defense.” *Id.*, ¶35.

¶11 We conclude that Bailey has made a sufficient showing to require an *in camera* review of the Hermann discovery file. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). He has satisfied his burden of demonstrating that the Hermann discovery file contains evidence that may be relevant to a determination of his guilt or innocence. He has made a fact-specific connection between his theory of defense and the discovery file. Bailey points to the medical record from July 2003, wherein, Ashley denied any prior sexual abuse. He also notes Ashley’s statement made to the police during the Hermann case, that she had never had something like this happen before. If the records contain evidence supporting Ashley’s statements that she had never been sexually abused prior to July 2003, such evidence would tend to create a reasonable doubt that might not otherwise exist.

¶12 Thus, the trial court should conduct an *in camera* review of the State's discovery file in the Hermann matter to determine whether it contains any information pertinent to Bailey's defense. We retain jurisdiction of this appeal until such *in camera* review can be conducted. After the trial court has conducted the review, we direct it to provide the results to this court within thirty days so that this appeal may proceed to disposition.

By the Court.—Cause remanded with directions.

This opinion will not be published. *See* WIS. STAT RULE 809.23(1)(b)5.

