

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 17, 2007**

David R. Schanker  
Clerk of Court of Appeals

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**Appeal No. 2006AP1788-CR**

**Cir. Ct. No. 2003CF158**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SALVATORE J. RIZZO,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and orders of the circuit court for Kenosha County: MICHAEL S. FISHER and BRUCE E. SCHROEDER, Judges. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, C.J., Anderson, P.J., and Nettesheim, J.

¶1 PER CURIAM. Salvatore J. Rizzo has appealed from a judgment convicting him of the repeated sexual assault of the same child in violation of WIS. STAT. § 948.025(1) (1999-2000).<sup>1</sup> He has also appealed from an order entered in the trial court on January 12, 2006, denying his postconviction motion for an in camera review of Kenosha County Department of Human Services records (the social services records) related to the victim, Caitlyn S., and Rizzo's son, Joey R. In addition, he has appealed from an order entered in the trial court on July 11, 2006, denying his motion for postconviction relief.<sup>2</sup>

¶2 We affirm the judgment of conviction and the July 11, 2006 order denying postconviction relief. However, we reverse the January 12, 2006 order denying in camera review. We remand the matter to the trial court to conduct an in camera examination of the social services records and, if warranted, to disclose or release those records to Rizzo. If records are ultimately released to Rizzo and he concludes that they warrant the filing of a motion for a new trial, he may file a new motion for postconviction relief under WIS. STAT. RULE 809.30(2)(h).

¶3 Rizzo raises four issues on appeal: (1) whether the trial court erred in denying his motion for an in camera review of the social services records; (2) whether WIS. STAT. § 948.025 was unconstitutional as applied to him, denying him his constitutional right to a unanimous verdict; (3) whether he was denied effective assistance of counsel based upon his trial counsel's failure to properly

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<sup>1</sup> All references to the Wisconsin Statutes underlying Rizzo's conviction are to the 1999-2000 version. All other references to the Wisconsin Statutes are to the 2005-06 version.

<sup>2</sup> The Honorable Michael S. Fisher entered the judgment of conviction and the July 11, 2006 order denying postconviction relief. The Honorable Bruce E. Schroeder entered the January 12, 2006 order denying in camera review.

impeach Caitlyn with prior inconsistent statements; and (4) whether he is entitled to a new trial based on newly discovered evidence. We conclude that issues two through four provide no basis for relief and affirm the July 11, 2006 order. However, we conclude that the trial court erroneously exercised its discretion when it denied Rizzo's motion for an in camera review of the social services records and remand the matter for further proceedings.

¶4 Rizzo's conviction is based upon Caitlyn's testimony that Rizzo sexually assaulted her on multiple occasions between 1999 or 2000 and 2002. Rizzo was married to Caitlyn's mother, Robin, during this time period, and they had a son, Joey R., together.

¶5 Testimony indicated that Caitlyn went to live with her aunt in Texas in the summer of 2002. Caitlyn's aunt testified that in September 2002, Caitlyn told her that Rizzo had sexually assaulted her. The aunt testified that she and Caitlyn reported the matter to Robin and authorities in Texas, and that she brought Caitlyn back to Kenosha in November 2002. In December 2002, Caitlyn was interviewed by a Kenosha police detective, John Gregory, regarding the matter.

¶6 Gregory testified that Caitlyn told him that the last assault occurred around her birthday, which was May 3, 2002. The parties stipulated that Rizzo was in custody on an unrelated matter from April 30, 2002, to January 22, 2003.

¶7 After conviction and sentencing, Rizzo became aware of a pending social services investigation into information indicating that Aaron D. had sexually assaulted Caitlyn and that Caitlyn and Aaron had sexually assaulted Joey. Pursuant to WIS. STAT. § 48.78(2), Rizzo moved for an in camera review by the

juvenile court of the social services records related to the investigation of these allegations.<sup>3</sup> With certain specified exceptions, an agency may not disclose the contents of any record kept or information received about a child in its care or legal custody, absent an order of the court. Sec. 48.78(2)(a).

¶8 Rizzo argues that the test applicable to his request for an in camera inspection is the test set forth in *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, both of which dealt with a defendant’s request for an alleged victim’s mental health treatment records (the *Shiffra-Green* test). To warrant an in camera inspection of confidential records, a defendant must make a preliminary good faith showing of a specific factual basis demonstrating a reasonable likelihood that the records are not cumulative to other available evidence and that they contain relevant information necessary to a determination of guilt or innocence. *Green*, 253 Wis. 2d 356, ¶34. “Necessary to a determination of guilt or innocence” means information that “tends to create a reasonable doubt that might not otherwise exist.” *Id.* (citation omitted). “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.*

¶9 The evidentiary showing for an in camera review under this test must describe as precisely as possible the information sought and how it is relevant to and supportive of the particular defense. *Id.*, ¶33. In conducting an appellate review of the matter, we review the trial court’s findings of fact under

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<sup>3</sup> In his motion, Rizzo sought social services records related to Caitlyn, Joey, and Devon S., another son of Robin’s. He has not pursued the request for records related to Devon on appeal.

the clearly erroneous standard, but whether a defendant has made the required preliminary showing presents a question of law because it implicates the defendant's constitutional right to a fair trial. *Id.*, ¶20. In cases where it is a close call, the circuit court generally should provide an in camera review. *Id.*, ¶35.

¶10 The State questions whether the proper test to apply to Rizzo's motion is the test set forth in *Courtney F. v. Ramiro M.C.*, 2004 WI App 36, 269 Wis. 2d 709, 676 N.W.2d 545, rather than the *Shiffra-Green* test. In *Courtney F.*, 269 Wis. 2d 709, ¶39, this court held that a request for the inspection of an agency record pursuant to WIS. STAT. § 48.78(2)(a) requires the juvenile court to conduct an in camera review of the records to determine whether they are relevant to the stated purpose of the discovery or inspection. The person seeking disclosure of the records must describe the information sought, the basis for the belief that the information is in the records, its relevance to the action, the probable admissibility of the information as evidence at trial, and efforts made to obtain the information elsewhere. *Courtney F.*, 269 Wis. 2d 709, ¶31. The child must be notified that the records are being sought and given an opportunity to respond.<sup>4</sup> *Id.* The court must then make an in camera inspection of the file. *Id.*

¶11 Although we believe *Courtney F.* sets forth the appropriate test to apply to Rizzo's request for an in camera inspection of the social services records, we conclude that an in camera review is required regardless of which test is applied. In his motion, Rizzo presented evidence that the Kenosha County Department of Human Services (the Department) was investigating a report that

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<sup>4</sup> In this case, Robin, Caitlyn, Joey, and Devon were given notice that in camera review of the records was being sought. They were all represented by counsel at the hearing on the motion and opposed it.

Joey had been sexually assaulted by Caitlyn and Aaron, and had observed Caitlyn and Aaron engaging in sexual activity together. Aaron was the teenage son of a man with whom Robin was living. An affidavit from Joey's foster father was attached to Rizzo's motion papers and indicated that he had reported Joey's statements regarding the alleged assaults to the Department sometime in 2004. The affidavit from Joey's foster father also detailed the nature of the alleged abuse described by Joey.

¶12 In his motion for an in camera inspection, Rizzo contended that the social services records regarding the investigation of these allegations were reasonably likely to contain relevant information necessary to a determination of his guilt or innocence. In his motion and on appeal, Rizzo correctly contends that the jury's credibility determinations were dispositive in this case. Caitlyn was the sole witness to directly testify that the assaults by Rizzo occurred. At trial, expert testimony was presented indicating that Caitlyn's conduct was consistent with that of a child sexual assault victim. The State also argued to the jury that a child who had not been sexually assaulted was unlikely to possess the sexual knowledge displayed by Caitlyn. Since there was no evidence that anyone else had sexually assaulted Caitlyn, this testimony and argument bolstered Caitlyn's credibility and diminished Rizzo's.

¶13 Based on the information presented by Rizzo regarding Joey's allegations that Aaron sexually assaulted Caitlyn and Caitlyn sexually assaulted Joey, the social services records are reasonably likely to contain evidence which could provide an alternative source for Caitlyn's sexual knowledge and diminish the impact of the expert testimony regarding the characteristics and behavior of child sexual assault victims. The records therefore could cast doubt on the evidence relied on by the State at trial in arguing that Caitlyn was credible.

¶14 In addition, as contended by Rizzo, evidence that a child sexual assault victim has been sexually assaulted by someone else may be relevant to whether she is projecting a sexual assault committed by someone else onto the defendant. *See State v. Harris*, 2004 WI 64, ¶30, 272 Wis. 2d 80, 680 N.W.2d 737. Based on Joey’s allegations, the social services records are reasonably likely to contain evidence indicating that Caitlyn was sexually assaulted by Aaron and to support an inference that she projected that assault onto Rizzo.<sup>5</sup> As such, Rizzo made the requisite showing that the social services records are reasonably likely to contain relevant information necessary to a determination of his guilt or innocence, and he was entitled to an in camera inspection under the *Shiffra-Green* test.<sup>6</sup>

¶15 For these same reasons, Rizzo was entitled to an in camera inspection under the standards applied in *Courtney F.* Rizzo set forth a reasonable basis for concluding that the social services records contain information relevant to the action and probably admissible as evidence at trial. As acknowledged by

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<sup>5</sup> The State contends that Caitlyn denies that the assaults alleged by Joey occurred. However, Caitlyn’s alleged denial is not dispositive on the issue of whether an in camera review is warranted.

<sup>6</sup> Rizzo also contends that an in camera inspection of the social services records is reasonably likely to lead to evidence revealing that Caitlyn has a reputation for lying and being uncontrollable, that Robin did not believe Caitlyn’s allegations against Rizzo, and that Robin lied at trial and to social services workers. Since we have already concluded that an in camera inspection of the social services records is necessary, we need not address whether these additional arguments support reversal of the January 12, 2006 order denying in camera review. We merely note that when the trial court conducts its in camera review of the social services records, it must apply the “consequential evidence” test to determine whether the material it reviews should be disclosed to the defendant, including material related to the credibility of Caitlyn or Robin. *See State v. Robertson*, 2003 WI App 84, ¶22, 263 Wis. 2d 349, 661 N.W.2d 105.

the State in its brief, this is a somewhat less stringent standard than the standard set forth in *Green* and *Shiffra*. It is clearly satisfied here.

¶16 The State also disputes Rizzo's entitlement to an in camera inspection of the social services records on the ground that Caitlyn's disclosure of the assaults by Rizzo predated the alleged assault of Caitlyn by Aaron. In support of this argument, the State relies on statements made by the prosecutor during the hearing on Rizzo's motion for in camera inspection. However, the prosecutor's statements are not evidence and nothing else in the record before us clearly establishes whether Aaron's alleged assault of Caitlyn and Joey, and Caitlyn's alleged sexual conduct with Joey, occurred before or after Caitlyn reported the assaults by Rizzo. In reaching this conclusion, we note that the time period during which Caitlyn and Joey lived with or associated with Aaron cannot be determined from this record. Both Rizzo and Robin testified at trial that Rizzo moved out of the home he shared with Robin in July 2001.<sup>7</sup> Rizzo testified that Robin began a relationship with another man the day after he left the house. While Rizzo also testified that he moved back into the house in September 2001, his testimony was unclear, since he later indicated that prior to April 2002, the last time he, Robin and Caitlyn all lived together in the same house would have been July 2001. In addition, Robin testified that she was living with another man when her sister and Caitlyn called from Texas and told her of the assaults by Rizzo.

¶17 Because it is unclear when the alleged sexual encounters involving Caitlyn and Aaron occurred, and whether they predated Caitlyn's reporting of the

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<sup>7</sup> Caitlyn testified that Rizzo moved out of the parties' home when she was in fifth grade, which she attended from August or September 2001 to June 2002.

assaults by Rizzo in the fall and winter of 2002, Rizzo's request for an in camera inspection cannot be denied based on the timing of the alleged assaults.

¶18 The State also contends that Rizzo could have obtained the same or similar information without the necessity of an in camera review of the social services records and that Rizzo did not demonstrate that he made an effort to obtain the information elsewhere. However, counsel for Rizzo alleged in an affidavit in support of the motion that he had requested the social services records and been told by Danielle Geary from the Department that the records could not be provided because they were confidential.

¶19 The State also relies on representations made by the prosecutor and the guardian ad litem for Joey, indicating that Rizzo could have had access to Joey's CHIPS file by virtue of his status as a parent. However, as acknowledged by the State, the prosecutor also indicated that information relating to Caitlyn would have to be omitted from that record. Consequently, whatever rights Rizzo had to Joey's records did not render unnecessary an in camera inspection of the social services records by the trial court.

¶20 The State also contends that information concerning the alleged sexual assault of Caitlyn by Aaron was available in the Kenosha police department files. However, since Caitlyn, Joey, and Aaron were all juveniles when Rizzo's motion was filed and heard, this court cannot conclude that Rizzo would have had access to all pertinent law enforcement records, rendering inspection of the social services records unnecessary. *See* WIS. STAT. § 48.396(1).

¶21 For these reasons, regardless of whether we apply the *Courtney F.* standard or the *Shiffra-Green* test, we conclude that Rizzo made a sufficient specific preliminary showing that the social services records are reasonably likely

to contain noncumulative relevant evidence necessary to his defense. The January 12, 2006 order denying Rizzo's motion for an in camera review of the social services records therefore must be reversed.

¶22 Although we reverse the January 12, 2006 order denying Rizzo's motion for an in camera inspection of the social services records, we affirm the July 11, 2006 order denying Rizzo's postconviction motion alleging ineffective assistance of trial counsel, newly discovered evidence, and the unconstitutionality of WIS. STAT. § 948.025 as applied. Rizzo contends that he was denied his constitutional right to a unanimous jury verdict because the State produced evidence of seven assaults over a three-year time period, and the jury was permitted to find him guilty by agreeing that he committed three assaults during that three-year time period, regardless of whether they unanimously agreed on which acts constituted the three assaults. He contends that this three-year time period is outside the traditional and historical notions of what constitutes a "continuous offense," and that, as applied to him under these circumstances, § 948.025 posed a serious risk of unfairness and violated his constitutional right to a jury trial and unanimous verdict. He contends that *State v. Johnson*, 2001 WI 52, 243 Wis. 2d 365, 627 N.W.2d 455, is distinguishable because the time period alleged in this case far exceeded the time span underlying the charge of repeated sexual assault of the same child in *Johnson*.

¶23 Rizzo has waived his right to challenge the constitutionality of WIS. STAT. § 948.025 as applied to him. An "as applied" challenge to the constitutionality of a statute may be waived. *State v. Bush*, 2005 WI 103, ¶17, 283 Wis. 2d 90, 699 N.W.2d 80, *cert. denied*, 546 U.S. 1004 (2005). Rizzo did not object to the verdict or jury instructions, nor did he request any special instruction on the issue of jury unanimity as applied to this case or make any other

timely objection to the statute as applied. Because he failed to timely object to the verdict and instructions, he waived his claim that § 948.025 as applied violated his right to a unanimous verdict. *See State v. Green*, 208 Wis. 2d 290, 303-04, 560 N.W.2d 295 (Ct. App. 1997). We therefore decline to address this issue any further.<sup>8</sup>

¶24 Rizzo's next argument is that his trial counsel rendered ineffective assistance by failing to properly impeach Caitlyn with prior inconsistent statements. To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's conduct is deficient if it falls below an objective standard of reasonableness. *State v. Thiel*, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.*, ¶20 (quoting *Strickland*, 466 U.S. at 694). The critical focus is not on the outcome of the trial, but on "the reliability of the proceedings." *Thiel*, 264 Wis. 2d 571, ¶20 (citation omitted).

¶25 Appellate review of an ineffective assistance of counsel claim presents a mixed question of law and fact. *State v. McDowell*, 2004 WI 70, ¶31,

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<sup>8</sup> Rizzo contends that the merits of the constitutionality issue should be addressed despite waiver, noting that this court has discretion to review a waived issue and that he raised ineffective assistance of trial counsel in his postconviction motion. However, Rizzo's claim that his trial counsel rendered ineffective assistance was premised on other arguments, not on a claim that counsel was ineffective for waiving the constitutionality issue. Since nothing in Rizzo's remaining argument persuades this court that the constitutionality issue should be reviewed despite waiver, we will address the matter no further.

272 Wis. 2d 488, 681 N.W.2d 500. We will not disturb the trial court's findings of fact unless they are clearly erroneous. *Id.* However, the ultimate determination of whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel presents a question of law. *Thiel*, 264 Wis. 2d 571, ¶21. This court reviews de novo the legal questions of whether deficient performance has been established and whether the deficient performance led to prejudice rising to a level undermining the reliability of the proceedings. *Id.*, ¶24.

¶26 While acknowledging that his trial counsel impeached Caitlyn's credibility by raising questions at trial concerning some of her prior inconsistent statements, Rizzo contends that his trial counsel performed deficiently by failing to impeach her with additional prior inconsistent statements made to the police and medical personnel. He contends that his trial counsel's testimony at the *Machner*<sup>9</sup> hearing concedes that he had no strategic reason for failing to do so. He contends that his trial counsel's failure to impeach was prejudicial because undermining Caitlyn's credibility was essential to his defense.

¶27 Initially, we point out that trial counsel's testimony that he did not have a reason for failing to impeach Caitlyn's credibility with some of the statements relied on by Rizzo on appeal does not compel a determination that he rendered ineffective assistance. A trial court need not accept as true an attorney's statement that he had no strategic reason for taking or omitting a particular action. *State v. Kimbrough*, 2001 WI App 138, ¶¶29-30, 246 Wis. 2d 648, 630 N.W.2d 752. Moreover, on appeal this court's responsibility is to determine whether trial counsel's performance was objectively reasonable under prevailing professional

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<sup>9</sup> *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

norms. *Id.*, ¶31. Because trial counsel's failure to impeach Caitlyn based on the statements identified by Rizzo on appeal was objectively reasonable, we conclude that the trial court properly rejected Rizzo's claim of ineffective assistance of counsel.

¶28 Rizzo identifies ten prior statements by Caitlyn that he contends should have been used for impeachment purposes. The first was a statement given by Caitlyn to Detective Gregory, describing penis-to-anus contact in the bathroom. Rizzo contends that his trial counsel should have relied on this statement to impeach Caitlyn because her description at trial of how anal intercourse occurred in the bathroom was different.

¶29 This argument is without merit because Caitlyn's trial testimony indicates that there were at least two instances of anal intercourse in the bathroom. No basis exists to conclude that she was describing the same incident in her description to Gregory and her testimony at trial, or that Rizzo assaulted her the same way each time. Moreover, under these circumstances, questioning Caitlyn regarding the details of another act of anal intercourse would likely have harmed Rizzo's defense rather than helped it. Failing to do so cannot be deemed objectively unreasonable.

¶30 Rizzo next contends that his trial counsel was ineffective for failing to impeach Caitlyn with her prior statement about being anally assaulted in her mother's bedroom. Again, failing to question Caitlyn about her prior statement was objectively reasonable because questioning her might have jogged her memory, and even if she could not remember, her prior graphic statement regarding the assault in the bedroom was not something a reasonable attorney would want a jury to hear.

¶31 Rizzo next contends that Caitlyn’s statement to Gregory indicating that she would tell Rizzo to stop when he anally assaulted her was inconsistent with her trial testimony indicating that it was Rizzo who chose to stop or told her to stop. However, the trial testimony cited by Rizzo for this argument dealt with acts of fellatio and cunnilingus, not anal intercourse. Because the statement and testimony are therefore not inconsistent, trial counsel did not render deficient performance by failing to impeach Caitlyn with her prior statement.

¶32 Similarly, there was no inconsistency between Caitlyn’s statement to Gregory indicating that Rizzo told her he would give her a bike, and her testimony that Rizzo told her that if she reported the assaults, he would get in trouble and Joey would be mad at her. A promise intended to induce cooperation and a threat intended to deter reporting are not inconsistent, and counsel was not deficient for failing to raise this matter. Likewise, Caitlyn’s testimony that “milky stuff would be on her butt” is not inconsistent with her testimony that Rizzo wiped his penis clean with his shirt, since ejaculate could have been in both places.

¶33 Rizzo’s remaining arguments also fail. He contends that Caitlyn’s statement to Gregory that Rizzo rubbed his penis on her crotch and said, “I won’t put it in,” was inconsistent with her testimony, since she never testified concerning such an act. However, the fact that Caitlyn did not mention this act in her trial testimony does not render her statement to Gregory inconsistent with her trial testimony. Moreover, an attorney could reasonably conclude that presenting evidence of an additional assault would damage rather than help Rizzo’s case, reinforcing a notion that Rizzo had assaulted Caitlyn so many times that she could not recall the details of each incident.

¶34 Rizzo next contends that his trial counsel was ineffective because he failed to impeach Caitlyn with her prior statement to Gregory indicating that Rizzo told her to “taste the white milky stuff” from his penis. Again, Caitlyn’s failure to testify concerning this subject does not render her prior statement inconsistent with her trial testimony. Moreover, defense counsel asked Gregory whether Caitlyn made this statement, and he replied, “That’s correct.” The jury was thus aware that Caitlyn had made the statement. Failing to directly confront her about it was unnecessary and would have risked alienating the jury. Counsel therefore cannot be deemed ineffective for failing to question Caitlyn directly about this matter.

¶35 Rizzo next contends that his trial counsel was deficient for failing to impeach Caitlyn’s testimony that Rizzo “never fingered me” with a statement in a December 10, 2002 medical report indicating that Rizzo had engaged in “vaginal digital penetration.” However, the trial transcript reveals that defense counsel impeached Caitlyn’s testimony that no vaginal digital penetration occurred, albeit by use of her statement to Gregory rather than the medical report. Because counsel placed this inconsistency before the jury, he cannot be deemed ineffective for failing to also raise it through use of the medical report.

¶36 Rizzo also contends that trial counsel was deficient for failing to use the December 10, 2002 medical report to impeach Caitlyn’s testimony that she “never said sex three times a week. I never gave a date, not even approximately.” However, in his cross-examination of the nurse practitioner who prepared the report, trial counsel relied on the medical report to elicit testimony that Caitlyn had reported having sexual contact with Rizzo approximately three times a week from when she was eight or nine until she turned eleven. Rizzo’s argument therefore lacks merit.

¶37 The final basis for Rizzo's claim of ineffective assistance of counsel is that counsel failed to impeach Caitlyn with her statement to the nurse practitioner indicating that the last sexual contact occurred approximately six months before the December 10, 2002 evaluation, which would have been June 10, 2002. Rizzo contends that his trial counsel should have used this statement to impeach Caitlyn based on the trial testimony indicating that he moved out of the house in July 2001.

¶38 This argument fails because, as previously discussed, Rizzo testified that he moved back in with Robin in September 2001. Moreover, even if Rizzo did not live with Robin from July 2001 to April 30, 2002, when he was taken into custody on another matter, information in the record supported the conclusion that he continued to have some contact with Caitlyn during this time period. Because sexual contact could have occurred during that time, counsel was not deficient for failing to rely on Caitlyn's estimate of when the last assault occurred to impeach her.

¶39 Because none of the instances cited by Rizzo establish that his trial counsel's performance was objectively unreasonable, Rizzo failed to establish deficient performance. Moreover, additional impeachment as advocated by Rizzo on appeal would have risked leading the jury to conclude that Rizzo committed even more acts of sexual assault than were testified to at trial and would have been prejudicial to him. Counsel's failure to pursue impeaching Caitlyn with the additional statements therefore does not undermine our confidence in the reliability of the proceedings. Consequently, Rizzo has failed to establish that his trial counsel's performance was prejudicial.

¶40 Rizzo's final argument is that he was entitled to a new trial based on newly discovered evidence. To be entitled to a new trial based on newly discovered evidence, a defendant must show: (1) that the evidence came to his knowledge after trial, (2) that he was not negligent in seeking to discover it, (3) that the evidence is material to an issue in the case, (4) that the testimony is not merely cumulative to the testimony which was introduced at trial, and (5) that it is reasonably probable that a different result would be reached on retrial. *State v. Brunton*, 203 Wis. 2d 195, 200, 552 N.W.2d 452 (Ct. App. 1996). The defendant must make this showing by clear and convincing evidence. *Id.* at 204. The evidence must meet all five of the requirements to warrant a new trial. *State v. Eckert*, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996).

¶41 In support of his motion, Rizzo relied upon a post-trial telephone conversation between him and Department social worker Danielle Geary, who told him that she believed "something happened to Joey." Based upon this statement, Rizzo contends that Robin knew that Caitlyn had assaulted Joey and sent her to Texas to cover it up. He contends that Caitlyn then made up the allegations against him so that she could return from Texas.

¶42 As noted by the trial court, even if the social worker's comment supported a determination that Joey was assaulted, it would be nothing more than speculation to conclude from it that Caitlyn was involved, that Robin knew of the assault and Caitlyn's involvement, that Robin sent Caitlyn to Texas to cover up the assault, and that Caitlyn fabricated allegations against Rizzo to facilitate her return to Wisconsin. Because Rizzo's arguments are purely speculative, the evidence was insufficient to establish a reasonable probability that a different result would be reached on retrial.

¶43 In summary, because the trial court properly denied Rizzo's postconviction motion alleging ineffective assistance of trial counsel, newly discovered evidence, and the unconstitutionality of WIS. STAT. § 948.025 as applied, we affirm the judgment of conviction and the July 11, 2006 order denying postconviction relief. However, we reverse the January 12, 2006 order denying in camera review. We remand the matter to the trial court to conduct an in camera examination of the social services records and, if warranted, to disclose or release those records to Rizzo. If records are released to Rizzo and he concludes that they warrant the filing of a motion for a new trial, he may file a new motion for postconviction relief under WIS. STAT. RULE 809.30(2)(h).

*By the Court.*—Judgment and orders affirmed in part; reversed in part and cause remanded with directions.

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

