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COURT OF APPEALS

DECISION

NOTICE

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**Appeal No. 2008AP1697-CR
STATE OF WISCONSIN**

**Cir. Ct. No. 2006CF3871
IN COURT OF APPEALS
DISTRICT I**

**STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,
V.
ROBERT J. DIETRICH,
DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge. *Affirmed.*

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

¶1 FINE, J. Robert J. Dietrich appeals a judgment entered after he pled guilty to first-degree sexual assault of a child. *See* WIS. STAT. § 948.02(1)(b) (200506). He also appeals an order denying his postconviction motion. Dietrich claims that the circuit court: (1) erred when it denied his motion to suppress his confession;⁽¹⁾ (2) violated his due-process rights when it allowed the victim's treating therapist to address the circuit court at sentencing; and (3) erroneously exercised its sentencing discretion. We affirm.

I.

¶2 Dietrich was charged with one count of repeatedly sexually assaulting a child and two counts of intimidating a child victim after B.T. told the police in July of 2006 that Dietrich, a family friend, had sexually assaulted her several times between June 1, 2004, and August 22, 2004, when she was twelve years old. Dietrich confessed to the police that he had engaged in one sexual act with B.T. According to the complaint, after Dietrich confessed, he wrote an apology letter to B.T., and a letter to the district attorney's office saying that he was sorry and willing to get counseling.

¶3 In a pretrial motion, Dietrich sought an *in camera* review of B.T.'s mental health records regarding an April of 2006 suicide attempt. His theory of defense was that B.T. fabricated the assaults to "deflect" police attention away from an unrelated incident with her boyfriend and onto Dietrich. He claimed that B.T.'s mental health records were material to his defense because they would show that B.T. had not mentioned during therapy the sexual assaults by Dietrich. In support, Dietrich attached to the motion a St. Francis Police Department report that recounted that B.T. told the police that she had attempted suicide because her friends at school were being mean to her and had accused her of making a bomb threat. He claimed that the police report supported his defense because "the failure to mention an event under circumstances where it would be natural to mention it is very relevant to whether the claim was recently fabricated."

¶4 The circuit court denied the motion, concluding that Dietrich had not met his burden under *State v. Green*, 2002 WI 68, ¶34, 253 Wis. 2d 356, 381, 646 N.W.2d 298, 310, to demonstrate a reasonable likelihood that B.T.'s mental health records contained relevant information necessary to a determination of his guilt or innocence. *See also State v. Shiffra*, 175 Wis. 2d 600, 608610, 499 N.W.2d 719, 723 (Ct. App. 1993).

¶5 Dietrich also sought to suppress his confession, claiming that the police violated his Fifth Amendment right to counsel. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The circuit court held an evidentiary hearing on Dietrich's motion. Milwaukee Police Detective Victor Wong testified that in July of 2006, he and Detective Justin Carloni interviewed Dietrich about the assaults. According to Wong, after he went through a personal-information form with Dietrich, he read to Dietrich his *Miranda* rights, including the right to consult with a lawyer. Wong testified that Dietrich told him that he understood and would waive his rights. According to Wong, Dietrich did not ask to talk to a lawyer at any point in the interview.

¶6 Wong testified that he did not audio or video record the interview because at the time of the interview it was not required by department policy. According to Wong, Dietrich did not ask to make any telephone calls before the interview, and it was not department policy to allow defendants to make telephone calls "to family members" before questioning.

¶7 On cross-examination, Wong told the circuit court that while he would sometimes write in a defendant's statement that the defendant had agreed to talk to the detectives without a lawyer, he did not do so in this case:

Q So that's your handwriting on the so-called statement. Right?

A Yes.

Q Was it you who decided what got written down?

A Yes.

Q So you decided if it's important, write it down. If you didn't think it was important, you didn't write it down. Right?

A That's correct.

Q And we've already established -- well, if something is not written down, it probably either didn't happen or it's not important. Right?

A That could be, yes.

Q And no where [*sic*] in your statement did you write that Mr. Dietrich asked for an attorney. Right?

A That's correct.

Q That's the sole reason for testifying he didn't ask for a lawyer?

A Yes.

Q Okay. But you also didn't write down that he waived his right to an attorney. Did you?

A That is correct. I did not write that down.

On redirect-examination, Wong testified that if a defendant asked for a lawyer during an interview, he would write that down and stop the interview.

¶8 Dietrich testified that he was a Milwaukee County sheriff's deputy when he was arrested. He told the circuit court that as a sheriff's deputy he was aware of his *Miranda* rights, including the right to a lawyer. According to Dietrich, Wong read his *Miranda* rights to him at the beginning of the interview and Dietrich "didn't say anything at that time." Dietrich testified that when Wong asked him how many times he had sex with B.T., Dietrich became "very offended" and asked "to speak to an attorney." Dietrich told the circuit court that he asked to talk to a lawyer four times during the interview and that each time the detectives ignored him. He testified that he assumed his requests for a lawyer were being recorded because he saw a sign on the wall which stated "video recording in progress."

¶9 Dietrich testified that he falsely confessed because he "just needed that interrogation to be over." He told the circuit court that he signed his name "in a few places" on the statement and Wong "snatched the paper from me." Dietrich admitted on cross-examination that after he confessed to Wong he wrote the letters to B.T.'s family and to the district attorney's office.

¶10 According to Dietrich, when the interview was over, he called his father and told him that he had asked for a lawyer, but was refused. Dietrich was then taken to the Milwaukee County Jail, where he spoke with a representative for the deputy sheriff's union, David Hutchins. Dietrich testified that he told Hutchins that he had asked for a lawyer several times but "they wouldn't give one to me." According to Dietrich, the next

morning a St. Francis police detective asked him if he wanted to make a statement. Dietrich testified that he asked for a lawyer and the detective left.

¶11 Dietrich's father testified at the suppression hearing that Dietrich called the night he was arrested and told him "they wouldn't let me go until I told them what I did." When asked by Dietrich's lawyer, Dietrich's father said that Dietrich told him the detectives "wouldn't let him make a phone call, wouldn't let him call an attorney":

Q Did Rob [Dietrich] ever say to you that he had asked for a lawyer, and they wouldn't let him have a lawyer?

A Yes.

Q What did he say?

A Well, he said he asked for a lawyer, and they wouldn't let him make a phone call, wouldn't let him call an attorney.

¶12 Hutchins testified that on the night of the arrest, Dietrich told him "they didn't let me make any phone calls." Hutchins told the circuit court he "assumed that to mean that he wasn't able to contact his family and/or lawyer." Hutchins did not, however, recall Dietrich ever telling him that the detectives would not let him talk to a lawyer.

¶13 In rebuttal, Carloni testified that Dietrich did not ask to speak to a lawyer at any time during the interview. He told the circuit court that if Dietrich had asked for a lawyer, the detectives "would have ceased the interview immediately."

¶14 The circuit court orally denied Dietrich's motion to suppress his confession, concluding that the State had met its burden to show that he was informed of and waived his *Miranda* rights. *See State v. Young*, 2009 WI App 22, ¶15, ___ Wis. 2d ___, ___, 762 N.W.2d 736, 741 (State has burden to show defendant was informed of, understood, and intelligently waived *Miranda* rights).

¶15 The case was plea bargained and, as we have seen, Dietrich pled guilty to one count of first-degree sexual assault of a child. At the sentencing hearing, the State called B.T.'s therapist, Mary Determan, to give her opinion on how the assaults had affected B.T. Dietrich objected, claiming that in light of his prior motion for an *in camera* inspection of B.T.'s mental health records it was not "fair to rely on the privilege at that point and now come in today without me never [*sic*] having seen these health care records. I have no way to challenge it or to rebut it or do anything." The circuit court overruled Dietrich's objection.

¶16 Determan told the circuit court that she had been B.T.'s primary therapist since B.T. had in the summer of 2006 disclosed the sexual abuse. She explained that B.T. had been diagnosed with post-traumatic stress disorder and experienced anxiety, nightmares, and daytime flashbacks. According to Determan, because B.T. personally knew and trusted the perpetrator, the abuse "negatively affected her relationships with others in her life. She is fearful and questions whether or not she will ever be able to trust anyone again." Determan told the circuit court that B.T.'s self esteem "dramatically changed" and that B.T. had been hospitalized "for suicidal ideation and self-mutilization, which was directly related to withholding trauma from others." According to Determan, B.T. failed her freshman year in high school due to "psychological and behavioral problems stemming from the unreported sexual abuse." Determan told the circuit court that B.T. was very

angry, felt alone and isolated, and "has missed out on the normal boy/girl developmental stages."

¶17 The circuit court also considered materials submitted on Dietrich's behalf, including a sentencing memorandum from Vicky Padway, a licensed social worker, and a psychological examination of Dietrich by Michael Kotkin, Ph.D. The circuit court sentenced Dietrich to twenty years of imprisonment, with an initial confinement of thirteen years, and seven years of extended supervision.

¶18 Dietrich filed a postconviction motion seeking discovery of B.T.'s mental health records. He claimed that his due-process rights had been violated because the circuit court relied on "apparently inaccurate information [from Determan] concerning B[T.]'s mental condition." The circuit court denied the motion, concluding that Dietrich had not met his burden to show that he had been sentenced based on inaccurate information. *See State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 192193, 717 N.W.2d 1, 7 (defendant claiming sentencing court relied on inaccurate information must show information was inaccurate and sentencing court actually relied on inaccurate information).

II.

A. Motion to Suppress

¶19 A circuit court's ruling on a motion to suppress evidence presents a mixed question of fact and law. *State v. Casarez*, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 668, 762 N.W.2d 385, 388. We will not reverse the circuit court's findings of fact unless they are clearly erroneous. *Ibid.*; WIS. STAT. RULE 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). Further the circuit court is the sole judge of the credibility of the witnesses testifying before the circuit court. RULE 805.17(2). We review the application of constitutional principles to those findings *de novo*. *See Casarez*, 2008 WI App 166, ¶9, 314 Wis. 2d at 668, 762 N.W.2d at 388389.

¶20 Dietrich claims that the circuit court's implicit finding that he did not invoke his right to counsel is contrary to the great weight and clear preponderance of the evidence. Specifically, he contends that the detectives' testimony that he did not ask for a lawyer is outweighed by "the mountain of direct and circumstantial evidence that Dietrich did invoke his right to counsel," including that: the detectives did not record the interview; Dietrich told his father that he was not allowed to speak to a lawyer; Dietrich asked a union representative about getting a lawyer; and Dietrich invoked his right to counsel when questioned by a St. Francis detective. We disagree.

¶21 "[T]he weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the trial court acting as the trier of fact." *Young*, 2009 WI App 22, ¶17, ___ Wis. 2d at ___, 762 N.W.2d at 741 (quoted source omitted). Accordingly, we will "not reweigh the evidence or reassess the witnesses' credibility, but will search the record for evidence that supports findings the trial court made, not for findings it could have made but did not." *Ibid.* (quoted source omitted); *see also State v. Echols*, 175 Wis. 2d 653, 672, 499 N.W.2d 631, 636 (1993) (implicit finding of fact sufficient when facts of Record support circuit court's decision).

¶22 The circuit court made factual findings sufficient to support its implicit determination that Dietrich did not invoke his right to counsel. In its oral ruling on Dietrich's motion to suppress, the circuit court acknowledged the conflict between Detectives Wong and Carloni's testimony that Dietrich did not ask for a lawyer and Dietrich's testimony that he did:

Law enforcement contends that he [Dietrich] never asked for an attorney and did a number of things in conformity with that, which they contend supports that position. Mr. Dietrich, however, indicates and argues that that's not what happened. That I was talking to them, that we went through and I did supply them information. We talked about the pedigree, and I gave them that information, and we were talking.

But at the point when they asked about inappropriate contact with B[T.], at that point he contends is the first time that he exercised his right and informed them as to the fact that he wanted to have an attorney present before going forward or that he wanted to talk to an attorney.

In assessing the credibility of this testimony, the circuit court acknowledged that Wong had "varying normal [interview] practices," but found the detectives' testimony that Dietrich did not ask for a lawyer consistent with one another. In contrast, it determined that Dietrich's testimony "appeared to have certain inconsistencies," noting that while Dietrich:

emphasiz[ed] the fact that he knew what his rights were and that he wanted a lawyer there seemed to be kind of a hundred and eighty degree turn wherein he changes a position and just decides for whatever reason to make a statement and not only make a statement to law enforcement, but writes other letters on his own and almost takes on, if you will, kind of a victim or victimization standpoint that I had asked for a lawyer, that they just won't give me one, so I'm just going to tell them something, anything to get out of here.

But that just doesn't seem to jive with then making additional statements or writing other documents. Because, presumably, the detective or detectives had what they wanted at that point in time. They had this confession. He signed off on it, even though he's saying they just stuck it in front of me. I didn't read it.

¶23 The circuit court also considered the evidence that Dietrich had asked for a lawyer when questioned by a St. Francis detective and Hutchins's testimony that Dietrich "wasn't able to contact [a] lawyer," but "put [this evidence] in its appropriate position," noting that Hutchins's "testimony was based on certain assumptions. He assumed certain things. Because there was never a statement or he never recorded that there was a statement that Mr. Dietrich was denied counsel." The circuit court also noted that at the time of Dietrich's interview the detectives were not required to record Dietrich's statements. *Cf.* WIS. STAT. § 968.073(2) (generally, "[i]t is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony"); 2005 Wis. Act 60, § 51(2) (Section 968.073 effective January 1, 2007). Finally, the circuit court found that Dietrich's father was not "very credible," explaining that "only after additional questioning by counsel did he indicate that he [Dietrich] asked for a lawyer."

¶24 After considering all of the evidence, the circuit court concluded that:

the State has met [its] burden with regards to the *Miranda* aspect; that is, that clearly Mr. Dietrich is in custody; clearly he was being interrogated; clearly his rights were given to him. And based upon all of the evidence the Court has before it, I do believe he waived his rights and made a statement both to Detectives Wong and Carloni.

(Italics and underlining in original.) The circuit court's findings that Dietrich was informed of, understood, and waived his *Miranda* rights, including his right to consult with a lawyer, are not clearly erroneous. *See Young*, 2009 WI App 22, ¶¶2021, ___ Wis. 2d at ___, 762 N.W.2d at 742 (circuit court's implicit finding that defendant did not request counsel sufficient where supported by Record). Accordingly, it properly denied Dietrich's motion to suppress his confession.

B. Due Process

¶25 Dietrich claims that the circuit court violated his due-process rights at sentencing because he contends that he did not have notice that Determan would address the circuit court or an opportunity to rebut her opinion that the sexual abuse caused B.T.'s psychological problems. We disagree.

¶26 A defendant has a due-process right to be sentenced on correct information. See *State v. Spears*, 227 Wis. 2d 495, 508, 596 N.W.2d 375, 380 (1999). "As part of the guarantee that he or she be sentenced on reliable information, a defendant has the right to rebut evidence that is admitted by a sentencing court." *Ibid.*; see also *State v. Damaske*, 212 Wis. 2d 169, 196, 567 N.W.2d 905, 917 (Ct. App. 1997) (cross-examination of those presenting evidence to sentencing court not required as long as defendant has opportunity to rebut evidence). Whether a defendant has been denied the right to due process is a question of law that we review *de novo*. *Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d at 185, 717 N.W.2d at 3.

¶27 Contrary to Dietrich's assertion, he was on notice that Determan would address the circuit court at sentencing. The presentence investigation report noted that B.T.'s therapist planned on speaking at Dietrich's sentencing.⁽²⁾ Significantly, Dietrich's lawyer told the circuit court at the sentencing hearing that both he and Dietrich had reviewed the presentence investigation report. Moreover, Dietrich was permitted to, and actually did, present information that B.T.'s psychological problems were caused by things other than the assaults. The sentencing memorandum from Padway described many problems B.T. had before the assaults, including that: B.T. had problems in school and did not have any "real friends"; B.T. felt rejected by her biological father; B.T.'s mother could be "cruel and ruthless"; and B.T.'s mother's boyfriend physically abused B.T. In sum, Dietrich's due-process rights were not violated at sentencing.

¶28 In a related claim, Dietrich contends that the circuit court violated his due-process rights when it denied his postconviction motion seeking discovery of B.T.'s mental health records. He claims that the records are material to his sentence because they "probably" contain information showing the "true *cause* of B[T.]'s emotional problems."⁽³⁾ (Italics in original.) See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (due-process right to disclosure of favorable evidence material to guilt or punishment). Again, we disagree.

¶29 The postconviction discovery of mental health records is governed by *State v. Robertson*, 2003 WI App 84, 263 Wis. 2d 349, 661 N.W.2d 105. See *id.*, 2003 WI App 84, ¶22, 263 Wis. 2d at 362, 661 N.W.2d at 111 ("defendant requesting confidential records during postconviction discovery should be required to meet the preliminary *Shiffra-Green* burden"). Under *Robertson*,

a defendant must set forth a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information that is necessary to a determination of guilt or innocence and not merely cumulative to evidence already available to the defendant. Mere speculation or conjecture as to what information is in the records is not sufficient. The *Shiffra-Green* test essentially requires the court to look at the existing evidence in light of the request for an *in camera* review and to determine "whether the records will likely contain evidence that is independently probative to the defense."

Robertson, 2003 WI App 84, ¶26, 263 Wis. 2d at 365, 661 N.W.2d at 113 (citations and quoted source omitted). Whether a defendant made a preliminary showing sufficient for an *in camera* review is a question of law that we review *de novo*. *Id.*, 2003 WI App 84, ¶24, 263 Wis. 2d at 364, 661 N.W.2d at 112.

¶30 In his postconviction motion, Dietrich claimed that he was entitled to the discovery of B.T.'s mental health records because:

[T]here is substantial reason to believe that many of B[T.]'s emotional problems were entirely unrelated to Dietrich. It is a virtual certainty that B[T.]'s extensive health-care records from only two months before contain no mention of Dietrich having sex with her. Doctors are mandatory reporters of claims by children that they have been sexually assault[ed]. In the case of B[T.], no such disclosure was reported by a doctor. Moreover, when the St. Francis police interviewed her in April, 2006, concerning attempts to harm herself she made no mention of being sexually assaulted by Dietrich. Instead, she told police she was depressed about the fact that her friends at school thought she had been involved in a bomb threat.

Dietrich did not provide a sufficient factual basis for an *in camera* review of B.T.'s mental health records. His claim that the records would show that the cause of B.T.'s psychological problems was "entirely unrelated" to the assaults is pure speculation. The mere fact that B.T. may not have reported the assaults to doctors or the police after her April of 2006 suicide attempt does not show that her problems were solely caused by things other than the assaults. See **Green**, 2002 WI 68, ¶37, 253 Wis. 2d at 382383, 646 N.W.2d at 310311 (mere assertion that counseling records may contain statements inconsistent with other reports insufficient to compel *in camera* review). Moreover, Dietrich did not show that B.T.'s mental health records contained non-cumulative information. As we have seen, Dietrich attached to his pretrial motion for an *in camera* review of B.T.'s records a report by the St. Francis Police Department that asserted that B.T. attempted suicide because her friends at school were being mean to her and accused her of making a bomb threat. Additionally, Padway's sentencing memorandum gave several alternate explanations for B.T.'s psychological problems. The circuit court did not violate Dietrich's due-process rights when it denied Dietrich's postconviction request for B.T.'s mental health records.

C. Sentencing Discretion

¶31 Dietrich claims that the circuit court erroneously exercised its sentencing discretion because he contends that it did not set out in detail the nexus between the sentencing factors and the length of the sentence. See **State v. Gallion**, 2004 WI 42, ¶43, 270 Wis. 2d 535, 558, 678 N.W.2d 197, 207 (sentencing court must "identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision"). We disagree.

¶32 Sentencing is within the discretion of the circuit court, and our review is limited to determining whether the circuit court erroneously exercised that discretion. **McCleary v. State**, 49 Wis. 2d 263, 277278, 182 N.W.2d 512, 519520 (1971); see also **Gallion**, 2004 WI 42, ¶68, 270 Wis. 2d at 569, 678 N.W.2d at 212 ("circuit court possesses wide discretion in determining what factors are relevant to its sentencing decision"). The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. **State v. Harris**, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). The circuit court may also consider the following factors:

"(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

Id., 119 Wis. 2d at 623624, 350 N.W.2d at 639 (quoted source omitted); see also **Gallion**, 2004 WI 42, ¶¶59-62, 270 Wis. 2d at 565566, 678 N.W.2d at 211 (applying the main **McCleary** factors--the seriousness of the crime, the defendant's character, and the need to protect the public--to Gallion's sentencing). The weight

given to each of these factors is within the circuit court's discretion. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

¶33 The circuit court considered the gravity of Dietrich's crime, noting that "both victims and families" of a sexual assault experience "unbelievable" frustration that goes "way beyond pain, way beyond hurt." It also considered Dietrich's character, including his age, education, "generally continuous" employment, lack of a criminal record, and supportive family. It found significant that Dietrich did not take full responsibility for his conduct and determined that he had rehabilitative needs "with regards to psychological issues that need to be pursued and explored":

[C]learly from this court's reading of certain documents that have been submitted I think there are some psychological issues that manifest themselves in the test results. [Dr. Kotkin's report] reflect[s] problems in intimate relationships.

In reference to the sexual contact with the 13-year-old [*sic*--she was twelve] girl he does place a certain amount of responsibility on her. He indicates that the offense wouldn't have happened had the child not been overly affectionate, promiscuous, encouraging and curious and interested in sex, and that talks about the perspective which is one of the aspects that I focused in on.

Conversely I have a 12-year-old who reports inappropriate sexual contact that ultimately culminated in sexual intercourse in various forms as defined by the law over a two-and-a-half month period of time, not just reflecting one moment or instant in time.

The circuit court also reflected that Dietrich had violated not only the trust of the community through his position as a law enforcement officer, but also the trust of B.T. and her family.

¶34 Finally, the circuit court found that "the public needs to be safe from this kind of behavior occurring": "[T]he victim[has a] continued need for protection not just for her but for other children similarly situated." It explained, based on all of the factors, that probation was not warranted and that the goals of its sentence included punishment and deterrence, to "send[] a message to you and other members of the community that this is not acceptable." The circuit court fully explained why it sentenced Dietrich as it did; it did not erroneously exercise its discretion.

By the Court.--Judgment and order affirmed.

Publication in the official reports is not recommended.

¹ A defendant may appeal the denial of a motion to suppress evidence even though he or she has pled guilty. *See* WIS. STAT. § 971.31(10).

² Of course, B.T. had a right to have the sentencing court consider how the sexual assaults psychologically affected her. *See* WIS. STAT. § 950.04(1v)(pm) (victim has right to provide sentencing court with "information pertaining to the psychological effect of the crime and have the information considered by the court"); *State v. Naydihor*, 2004 WI 43, ¶27, 270 Wis. 2d 585, 606, 678 N.W.2d 220, 231 (how the crime

affected the victim is a relevant sentencing consideration).

³ On appeal, Dietrich does not renew his claim that B.T.'s mental health records are relevant to show that she fabricated the assaults. Accordingly, we do not address it. *See Reiman Assocs., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issue not argued on appeal abandoned).

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