

IN THE MATTER OF COMPLAINT
AGAINST THE COLUMBIA COUNTY
DISTRICT ATTORNEY'S OFFICE,

Case No. 21-313

Respondent.

FINAL DECISION

1. The Crime Victims Rights Board (the "Board") finds that complainant TS¹ has shown by clear and convincing evidence that respondent Columbia County District Attorney's Office (the "DA's Office") violated TS's rights as a crime victim. *See Wis. Stat. § 950.04(1v)*.

BOARD PROCEDURE

2. TS filed a complaint with the Board on July 29, 2021.
3. Upon receipt of the complaint, the Board contacted the Department of Justice (DOJ) Office of Crime Victim Services, which verified that the substance of the complaint had been presented to DOJ and that DOJ had completed the informal complaint process as to the issues raised in the complaint. *See Wis. Admin. Code CVRB § 1.05(1), (4)*.
4. The Board gave a copy of the complaint to the DA's Office and invited it to answer the complaint. *See Wis. Admin. Code CVRB § 1.05(5)*. The DA's Office filed a response on October 4, 2021.

¹ This final decision uses the victim's initials to protect the victim's privacy.

5. At a meeting on January 20, 2022, the Board found probable cause. *See Wis. Admin. Code CVRB § 1.05(6).*

6. The Board notified the parties and DOJ of its conclusions through the issuance of a written probable cause determination. *See Wis. Admin. Code CVRB § 1.05(8).*

PROBABLE CAUSE DETERMINATION

7. The Board found probable cause that the DA's Office violated TS's rights to privacy, speedy disposition of the case, and reasonable advance notice of the sentencing hearing, which may have affected TS's ability to provide a meaningful victim impact statement. *See Wis. Stat. § 950.04(1v)(ag), (ar), (b), (g), (k); Wis. Const. art. I, § 9m(2)(b), (c), (d), (e), (g).* The Board found no probable cause as to the remaining three claims.

8. The Board ordered an investigation to gather more information about the allegations on which probable cause was found.

INVESTIGATION

9. The Board's operations director investigated and gathered the following documents and information: two Records Release Authorizations signed by TS on June 16, 2017 ("Records Releases"); an Informed Consent for Release of Confidential Mental Health Records signed by TS on March 7, 2018 ("Informed Consent"); eight court transcripts from relevant motion hearings and proceedings held between March 9, 2017 and February 4, 2020;

Defendant's Motion for In Camera Inspection filed on February 24, 2017; case event notes recorded by prosecutors in the DA's Office ("DA Case Log"); case event notes recorded by victim/witness staff in the DA's Office ("Victim/Witness Report").

HEARING REQUEST

10. On April 18, 2022, TS submitted a request for an evidentiary hearing, as permitted by Wis. Admin. Code CVRB § 1.07(1).

11. After reviewing the information gathered during the investigation, the Board finds that an evidentiary hearing is unnecessary because the Board has all the information it needs to resolve any material factual disputes and issue a final decision on the complaint.

FINDINGS OF FACT

12. The Board's evidentiary standard for resolving disputed factual questions is the "[c]lear and convincing evidence" standard. "Clear and convincing evidence' means evidence which satisfies and convinces the Board, because of its greater weight, that a violation occurred." Wis. Admin. Code CVRB § 1.07(7).

13. The burden of proof is on the complainant. This burden of proof is very important and can be the deciding factor in the Board's resolution of factual disputes. Where the evidence on a particular factual question is equally believable or plausible, the effect of the burden of proof is that the Board must

find that the complainant failed to prove the point by clear and convincing evidence.

14. TS was a victim of sexual assault as a child. She reported the crime as an adult.

15. On September 8, 2016, a criminal complaint was filed in Columbia County, charging the defendant with seven counts of first-degree sexual assault of a child. Shortly thereafter, TS received written information from the DA's office about the case and her rights as a crime victim.

16. TS indicated to the DA's Office that she wanted the defendant to be held accountable and that she wanted to participate fully throughout the process.

17. On February 24, 2017, the defendant filed a Motion for In Camera Inspection, also known as a *Shiffra-Green*² motion, for access to TS's confidential mental health records.

18. Assistant District Attorney (ADA) Clifford Burdon notified TS of the motion on June 15, 2017, at 10:37 a.m., shortly before an 11:00 a.m. hearing

² A *Shiffra-Green* motion refers to the process by which a criminal defendant may trigger *in camera* review of a victim's health care records for the court to determine whether any records should be released to the parties for possible use at trial. *State v. Shiffra*, 175 Wis. 2d 600, 608, 499 N.W.2d 719 (Ct. App. 1993); *State v. Green*, 2002 WI 68, ¶ 32, 253 Wis. 2d 356, 646 N.W.2d 298. If the defendant makes the required showing and the victim refuses to release her records for *in camera* review, her testimony is suppressed to protect the defendant's right to a fair trial. *Shiffra*, 175 Wis. 2d at 612.

on the matter. (Victim/Witness Report 7.) ADA Burdon spoke with TS via telephone about having her records examined by the judge *in camera*. TS agreed to the inspection and agreed to sign a medical release form. (*Id.*)

19. At the hearing on June 15, 2017, Judge Alan White declined to make a finding on the *Shiffra-Green* motion, and instead determined that *in camera* review of the records was justified by the stipulation between the DA's Office and defense counsel and TS's agreement. (Hr'g Tr. 9:3–20, June 15, 2017.)

20. On June 16, 2017, TS signed the two Records Releases, giving two mental health providers permission to release her records to the DA's Office.

21. Judge White reviewed records from one of TS's providers. On August 1, 2017, he ordered that the records should not be distributed to the parties.

22. On November 27, 2017, according to electronic court records, TS's medical records from a second provider were received via facsimile, marked "confidential medical records" and stored in a "2016 criminal exhibit box."³

23. On February 14, 2018, Judge Martin De Vries revisited the *Shiffra-Green* motion regarding the records from the second provider. He found

³ The electronic records for *State v. Bontrager*, Case No. 16-CF-0433 (Columbia Cnty.), can be found on the Wisconsin Circuit Court Access website: <https://wcca.wicourts.gov/caseDetail.html?caseNo=2016CF000433&countyNo=11&mode=details>.

that the motion was sufficient to allow an *in camera* review. Judge De Vries asked whether TS had provided written consent for an *in camera* review, and ADA Crystal Long represented that TS had consented to the review when the matter was before Judge White. Judge De Vries indicated he would conduct the review within the next few weeks. (Hr’g Tr. 26:14–27:20, Feb. 14, 2018.)

24. On March 6, 2018, Judge De Vries distributed 39 pages of TS’s mental health records to the defense and the DA’s office via email without notice to, or consent from, TS. (DA Case Log 10.)

25. ADA Long immediately worked to get the records sealed, and victim-witness staff informed TS that her mental health records had been released. (*Id.*)

26. The next day, TS signed the Informed Consent, agreeing to the distribution of the 39 pages of mental health records that had already been circulated. Unlike the Records Releases used earlier in the case, the Informed Consent was three pages long and contained a detailed description of the conditions of release of her confidential records. The Informed Consent was specific about the limitations and consequences of providing consent and referenced the parties to whom records were being released, the case number, and the consequences of release beyond those to whom TS consented. (Informed Consent, Mar. 7, 2018.)

27. On March 12, 2018, the DA's Office sent TS via email the 39 pages the judge released. (Victim/Witness Report 22–23.) That same day, TS's Informed Consent form was filed with the court. (Informed Consent, Mar. 7, 2018.)

28. On August 31, 2018, Judge De Vries held a hearing on a defense motion to share TS's confidential mental health records with a defense expert. At the hearing, ADA Long informed the judge that the state and TS did not object to the release if the records were not distributed further. (Hr'g Tr. 3:4–8, Aug. 31, 2018.) TS had agreed on June 8, 2018, prior to the hearing, to allow the defense expert to view the records. (DA Case Log 11.)

29. On November 19, 2018, the trial was rescheduled to May 13, 2019.

30. On March 7, 2019, the trial was rescheduled to July 17, 2019.

31. On June 13, 2019, the trial was rescheduled to February 3, 2020.

32. On July 9, 2019, victim/witness staff and TS had a telephone conversation, during which they discussed objecting to further continuances and TS asked for a victim impact statement form. (*Id.* at 14.)

33. On August 22, 2019, District Attorney Brenda Yaskal ("DA Yaskal") filed a motion for a speedy disposition on TS's behalf.

34. On January 6, 2020, victim/witness staff, DA Yaskal and TS discussed the case and potential settlement offers prior to a motion hearing. According to the DA's Office's notes, TS was "fairly open to resolution other

than DPA [Deferred Prosecution Agreement].” (Victim/Witness Report 9.) That same day, DA Yaskal discussed a plea with the defendant’s attorney and made a note in the file that the defense attorney told her he did not think the defendant would accept any offer. (DA Case Log 15.)

35. On January 24, 2020, the DA’s Office had a trial preparation session with TS. (*Id.* at 16.)

36. Three days before the February 3, 2020, trial, the DA’s Office and the defendant reached a plea agreement, whereby the parties agreed to jointly recommend that the defendant plead guilty to one count of repeated sexual assault of a child (a class B felony), one count of exposing genitals (a class A misdemeanor), and one count of fourth-degree sexual assault (a class A misdemeanor). In exchange for those pleas, the parties agreed to jointly recommend a deferred prosecution agreement on the felony, while entering a judgment of conviction on the misdemeanors and placing the defendant on probation.

37. The same day, DA Yaskal contacted TS about the proposed plea agreement. DA Yaskal told TS that she needed TS’s approval before she would formally agree to the plea. DA Yaskal further explained that if TS wanted to proceed with trial instead, she would defer to TS’s preference. TS “agreed [to the plea] despite her deep reservations.” (Compl. 5.)

38. On February 3, 2020, TS traveled from her home in Minnesota to attend the plea and sentencing hearing. She read her victim impact statement at the hearing. The court accepted the defendant's plea but did not approve the deferred prosecution agreement. He ordered a pre-sentence investigation and adjourned the matter for a future sentencing date. (Hr'g Tr. 25:9–13, Feb. 3, 2020.)

39. Later that afternoon, Judge De Vries informed the parties that the court did not have legal authority over the deferred prosecution agreement as it was an agreement solely between defense and the state. He informed the parties that he would hold a sentencing hearing in two days. DA Yaskal asked for the sentencing to be held sooner, while TS was still in town, and the court agreed. (DA Case Log 17.)

40. TS attended the sentencing hearing on February 4, 2020. The defendant was sentenced to 9 months in jail and 2 years of probation. (Hr'g Tr. 1:20–21, 11:18–12:9, Feb. 4, 2020.)

VICTIM RIGHTS AT ISSUE

41. **Right to privacy.** A crime victim has a right to be “treated with . . . respect for . . . her privacy.” Wis. Stat. § 950.04(1v)(ag); *see also* Wis. Const. art. I, § 9m(2)(b).

42. **Right to a speedy disposition of the case.** A crime victim has a right to “a speedy disposition of the case in which they are involved as a

victim in order to minimize the length of time they must endure the stress of their responsibilities in connection with the matter.” Wis. Stat. § 950.04(1v)(k); *see also* Wis. Const. art. I, § 9m(2)(c), (d). A victim also has a right to “have his or her interest considered when the court is deciding whether to grant a continuance.” Wis. Stat. § 950.04(1v)(ar).

43. **Right to notice of hearings.** A crime victim has a right “[t]o attend court proceedings in the case” and “[t]o have reasonable attempts made to notify [her] of hearings or court proceedings.” Wis. Stat. § 950.04(1v)(b), (g); *see also* Wis. Const. art. I, § 9m(2)(e), (g).

CONCLUSIONS OF LAW

44. The Board concludes TS is a crime victim. TS was the victim of repeated sexual assault of a child, a class B felony, prohibited by Wis. Stat. § 948.025(1).

45. The Board concludes that the DA’s Office is a public agency subject to the authority of the Board. *See* Wis. Stat. § 950.09(2)(a).

46. The Board considered whether the undisputed facts demonstrate that the DA’s Office violated TS’s rights to privacy, speedy disposition of the case, and reasonable notice of court proceedings. *See* Wis. Stat. § 950.04(1v)(ag), (ar), (b), (g), (k); Wis. Const. art. I, § 9m(2)(b), (c), (d), (e), (g).

47. **Right to a speedy disposition of the case.** From the time the case was filed on September 8, 2018, to the sentencing on February 4, 2020,

there were three different prosecutors and multiple judges assigned to the case. The case was delayed on multiple occasions. The court initially scheduled trial for May 13, 2019, but that trial date was rescheduled twice, first to July 17, 2019, and then to February 3, 2020.

48. The DA's Office concedes that "this case took a long time to complete" and that "some adjournments were agreed to by the State without consulting with [TS]." (Response 2.) On August 22, 2019, after the second rescheduling, DA Yaskal filed a motion on TS's behalf, asking that the trial not be rescheduled again. And DA Yaskal has since instituted a policy requiring consultation with victims before agreeing to reschedule a trial date.

49. The Board concludes that there were unreasonable delays in this case that were, in part, attributable to the DA's Office. For example, the DA's Office agreed to several adjournments without consulting with TS. Although the DA's Office has since changed its practice, the Board finds that the DA's Office violated TS's right to a speedy disposition as provided by Wis. Stat. § 950.04(1v)(k) and Wis. Const. art. I, § 9m(2)(c), (d).

50. **Right to privacy.** There is no dispute that on two occasions the DA's Office did not object to motions for *in camera* reviews of TS's confidential mental health records. Records obtained during the Board's investigation show that the first *in camera* review was granted on a stipulation of all parties with the express permission of TS. Additional disclosures occurred with her

permission as well. While the DA's Office could have notified TS about the motion sooner and provided more comprehensive information about her rights, TS has not shown by clear and convincing evidence that the DA's Office violated her right to privacy. DA Yaskal reported that since she became DA, when a *Shiffra-Green* motion is filed, it is the practice of her office to notify the victim when the motion is filed and provide referrals for legal counsel if the victim does not want to consent to inspection.

51. The Board finds that TS's confidential mental health records were distributed without notice and without her consent on March 6, 2018, but concludes that this disclosure was not attributable to the DA's Office. In fact, ADA Long acted quickly to seal the records when she became aware of their release. She then provided TS with an informed consent form which included comprehensive written information about the consequences of consenting or refusing to consent to the release of records deemed relevant by the judge. TS signed the form and that guided the DA Office's treatment of TS's confidential records thereafter.

52. **Right to notice of hearings.** The Board concludes that when the trial unexpectedly converted to a plea and sentencing hearing, the DA's Office acted quickly to notify TS of the proceedings. The DA's Office had previously informed TS that the status of the case could change up until trial. The DA's Office had also notified TS of her right to make a victim impact statement

and provided her with information on completing a victim impact statement five months before the scheduled trial. Ultimately, TS made a statement at the plea hearing. The Board finds the abrupt change of course related to the sentencing hearing was not within the control of the DA's Office, and DA Yaskal asked the court to schedule the sentencing hearing on a day TS would still be in town. The Board concludes the DA's Office did not violate TS's right to reasonable and timely notice of the plea and sentencing or TS's right to make a victim impact statement.

ORDER

Based on the foregoing, it is hereby ORDERED:

1. That the complainant has shown by clear and convincing evidence that the respondent violated her rights as a crime victim.
2. That the Board declines to issue a sanction against the DA's Office because the DA's Office has voluntarily taken remedial action as indicated in the decision. *See Wis. Stat. § 950.09(2).*
3. That this is a final, appealable order of the Board, and as such makes final and appealable any previous non-final orders of the Board.
4. That judicial review of this final decision is governed by Wis. Stat. §§ 227.52–.59. *See Wis. Admin. Code CVRB § 1.10.*
5. That a copy of this final decision shall be provided to all parties in this proceeding and in accordance with Wis. Admin. Code CVRB § 1.05(8), as identified in the "Service List" below.

Dated this 22nd day of November 2022.



Chairperson Jennifer Dunn
Crime Victims Rights Board

SERVICE LIST

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