

STATE OF WISCONSIN

DANE COUNTY
BRANCH 7

CIRCUIT COURT

STATE OF WISCONSIN,

Plaintiff,

vs.

ANDREW SPEAR,

Defendant.

Case No. 2012 CF 1602

**MOTION FOR IN-CAMERA
INSPECTION**

TO: Mr. Matthew Moeser
Assistant District Attorney
3000 Dane County Courthouse
215 South Hamilton Street
Madison, WI 53703

Mr. Andrew Spear, appearing specially by his attorney, G. Brian Brophy of Sipsma, Hahn & Brophy, L.L.C., and reserving his right to challenge the court's jurisdiction, moves the court for an order requiring the state to produce, for the purpose of in-camera inspection, all medical, psychiatric, psychological and mental health records of Ms. Mary Spear from January 1, 2008 through the present. This motion is brought pursuant to secs. 971.31(2) and (5), 971.23(6m), Stats., on the grounds that there is a reasonable likelihood the sought after materials may contain relevant information necessary to a determination of guilt or innocence; Further, the records will likely reveal Mary Spear suffers psychiatric and/or psychological difficulties which affect her ability to truthfully and accurately relate events, suffers from severe anxiety which has caused her to engage in obsessive and compulsive behavior, particularly related to persons and things, and has a documented history of seizures followed by episodes of her removing her clothing when highly anxious, all of which the defendant has a due process right to discover before trial pursuant to sec. 971.23(1), Stats.; the 5th and 14th Amendments to the United States Constitution; article 1, section 8 of the Wisconsin Constitution; Pennsylvania v. Ritchie, 480 U.S. 39, 56-61 (1987); State v. Shiffra, 175 Wis.2d 600, 605, 499 N.W.2d 719 (Ct. App. 1993); State v. Migliorino, 170 Wis. 2d 576, 585-596, 489 N.W.2d 678 (Ct. App. 1992); State v. Green, 253 Wis.2d 356, 646 N.W.2d 298, 309-310 (2002).

AS FURTHER GROUNDS, counsel for the defendant asserts upon information and belief and as set forth in the attached affidavits referenced herein:

That the Complaint charges the defendant with Attempted First Degree Homicide, three counts of Misdemeanor Battery, False Imprisonment, Criminal Damage to Property and for good measure, two counts of Disorderly Conduct. (Criminal Complaint). All of the charges stem from an incident on August 16, 2012, in which the defendant is alleged to have confronted Mary Spear about an affair with her boss, Dennis Smith. Both Dennis Smith and Mary Spear have denied any affair. (State's Discovery, p. 54, 143-144).

BACKGROUND

The Attempted Homicide Charge is based on allegations that the defendant forced Mary Spear to take her clothes off, twice poured gasoline on her and then lit her on fire. (Complaint). At the preliminary hearing Det. Grann testified that Mary Spear told him the defendant poured gasoline on her three times, including over her head, and then lit her on fire with a lighter. (Preliminary Transcript p. 12 line 12 – p. 13 line 4, p. 15 line 18-23, p. 16 line 24 – p. 17 line 10). Inconsistent with that testimony, Det. Grann testified that Mary Spear was not burned. (Preliminary Transcript pg. 26 line 6 – 8).

The defendant told police that Mary Spear took her own clothes off, poured gasoline on the ground and lit the gasoline on fire. (State's Discovery p. 16). The defendant further explained to police that Mary Spear appeared to have some fire on or near her and that he smothered any flames on or near her and then used a fire extinguisher to put out the fire Mary Spear had lit and to ensure Mary Spear was not burned. (State's Discovery p. 13, 15). Consistent with the defendant's statement to police, according to emergency room records Mary Spear had only a small first degree burn on her lower leg. (Hospital Record - Exhibit A). First degree burns are typically caused by exposure to the sun or flash-burns.¹

The Spear's only child, a daughter, Leslie, was killed when the vehicle she was driving was hit by a drunk driver approximately four (4) years prior to the allegations in this matter on June 29, 2008. (Affidavit of Andrew Spear). Leslie was cremated. Mary Spear fell apart mentally and emotionally and has suffered numerous psychiatric and psychological ailments since that time. (Affidavit of Andrew Spear). She had threatened

1 "First-degree burns

In first-degree burns, minor epithelial damage of the epidermis exists. Redness, tenderness, and pain are the hallmarks of this injury. Blistering does not occur, and 2-point discrimination remains intact. Healing takes place after several days without scarring. Because the epidermal barrier remains intact, metabolic response and risk of infection are minimal. Most common causes of first-degree burns are flash burns and sunburns."

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suicide and did attempt suicide approximately 2 years ago. As a result there was talk of her having to be committed to a mental health facility. *Id.* The defendant is aware Mary Spear had engaged in continued psychiatric care with Dr. Stephen Vobach up to the time of this incident. He is aware she takes several medications related to her psychiatric and psychological difficulties. *Id.* He did have one of her old prescriptions bottles in the property released to him. That prescription was for Clonazepam (Klonopin), 0.5MG Tablets; Quantity 90; 2 refills until 04/14/2012.

Relevance and Materiality of Medical Records as related to Mary Spear's Claims that the Defendant Forced Her to Remove Her Clothing

Mary Spear has suffered recurring seizures since the death and cremation of the Spear's daughter. (Affidavit of Andrew Spear). The seizures were always preceded by tremors wherein her body and eyelids would flutter before she actually had a seizure. *Id.* After the tremors and eye-fluttering she would have a seizure and then pass out, sometimes for minutes, sometimes for hours. *Id.* When she revived from her seizures, she would come to and aggressively remove her clothing. *Id.* The defendant has taken Mary Spear to the emergency room and is aware she has seen other medical and psychiatric professionals regarding her seizures and her tearing at and removing her clothing. *Id.* The evidence to prove that she engages in this behavior is in her medical record.

The defendant has been told by Mary Spear that her doctors have opined that she tears her clothes off because she is envisioning their daughter being cremated. (Affidavit of Andrew Spear). The defendant has always reacted to Ms. Spear's seizures and her removal of her clothing with extreme compassion, rushing to her aid, trying to prevent her from hurting herself and attempting to sooth her. *Id.* He has taken her to receive medical aid and evaluation for the seizures. *Id.* He is not aware of medical professionals being able to find a medical reason or explanation for the seizures or her subsequent removal of her clothing. *Id.*

Mary Spear alleges that on August 16, 2012, the defendant, who stands 5'2" and weighs approximately 110 lbs, forced her, at 5'7" and 150lbs, to remove her clothing. (State's Discovery p. 3,15; Affidavit of Andrew Spear). To the contrary, the defense contends The evidence supports that Mary Spear thrashed about, faked a seizure and removed her clothing in order to garner the sympathy of the defendant and prevent him from calling her lover's wife.

Ms. Spear's records, showing that she has in fact experienced seizures and that she does take her own clothes off are highly exculpatory as they support and are necessary to a full understanding of the defendant's defense. They are material and relevant evidence which the defendant has a due process right to discover.

Likewise, the defendant expects there is information in Mary Spear's medical records indicating that her seizures, her removal of her clothes, suicide attempts and other actions occurred at times where she wanted his or others attention and may have an arguably manipulative element to them. Any record of the listed behavior is highly exculpatory, material and relevant.

The defendant reported to police his observation that Mary Spear poured a puddle of gas on the ground and subsequently actually lit the puddle of gas while standing to the side of it. Any psychiatric or psychological record relating to prior suicide threats or attempts is highly material and relevant in support of the defendant's observations to police.

AGGRANDIZED REPORTING

In relation to this particular event, Mary Spear told Mr. Shaun Knapp, a friend of both the defendant and Ms. Spear, that she was hit over the head and knocked unconscious, stripped naked, tied to a chair and had gas poured on her. She claims the defendant did not light her on fire but rather left her in the wood shop tied to the chair. She claimed the defendant then called her sister who subsequently came and picked her up. (Statement of Shaun Knapp). On a separate occasion, Mary Spear told Shaun Knapp that the defendant had tied her to a chair, poured gas on her and lit the gas on fire. She stated that she reacted by then going crazy and breaking free of her bonds. She reported that she and the defendant extinguished the flames together. *Id.*

It is expected that Ms. Spear discussed the events of this case with her psychiatrist. While the defense agrees that very minor inconsistencies between a report to a psychiatrist and reports to police may not be sufficiently material to justify invasion of the physician/patient relationship, substantial inconsistencies, like those told to Mr. Knapp, are entirely exculpatory and must be revealed to the defense.

FOR THE REASONS stated herein and through the attached supporting documents and affidavits, the defendant respectfully request the court conduct an in-camera inspection of Ms. Mary Spear's medical, psychiatric, psychological and/or counseling records to determine whether they contain relevant information necessary to a fair determination of guilt or innocence.

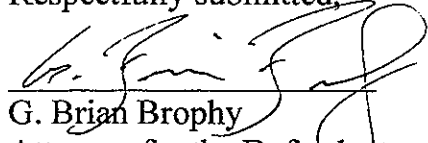
Mary Spear and her doctors have opined to the defendant that she is depressed, suffers anxiety and has been suicidal or, at the least made non-life threatening suicide attempts. Directly material to the defense, Mary Spear's doctors should have records of her taking her clothing off in response to stressful situations. Further, Mary Spear's psychological and psychiatric records are reasonably likely to contain a vastly different version of events than was told to the police. This is a case which tests credibility. Information in

Ms. Spear's psychological or psychiatric records concerning her treatment and past actions likely explain her behavior in a way that is otherwise not possible. See; State v. Robertson, 2003 WI App 84, 263 Wis. 2d 349, 366, 661 N.W.2d 105, 113.

The defendant prays the court conduct an in-camera inspection of Ms. Mary Spears' mental health, counseling and medical records to determine if there is evidence which may be relevant and material to his defense.

Dated at Madison, Wisconsin this 19th day of February, 2013.

Respectfully submitted,



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