COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0453-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LEONARD L. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Leonard Davis appeals from a judgment convicting him on three felony counts, including first-degree sexual assault and one misdemeanor count. He contends that the trial court erred by refusing an *in camera* review of the victim's mental health records, and by denying a mistrial

motion when the victim referred to Davis's "jail sandals" in front of the jury. We affirm.

¶2 The State charged Davis with sexually assaulting and beating his girlfriend, Melodee V. Before trial, Davis asked the court to review Melodee's mental health records, for potential evidence that she misperceived consensual sex as an assault. He offered evidence that Melodee was an admitted drug addict and had repeatedly received treatment for her addiction. He further noted that Melodee admitted using cocaine and alcohol the night of the assault, and that she neglected to properly treat a thyroid condition and that her neglect might cause her perception problems. Finally, he noted that she was taking a prescription antidepressant at the time of the assault.

¶3 The trial court denied Davis's request and the matter proceeded to trial. Melodee testified, and while identifying Davis referred to the "jail sandals" he was wearing. Counsel subsequently moved for a mistrial. The trial court denied that motion, reasoning that the reference was "slight" and unintentional, and that the jury showed no reaction to it.

¶4 The defendant is entitled to the trial court's *in camera* inspection of the victim's privileged health records only upon showing that they are relevant and may be necessary to a fair determination of guilt or innocence. *See* ***State v. Munoz***, 200 Wis.2d 391, 398, 546 N.W.2d 570, 573 (Ct. App. 1996). Whether the defendant satisfies this standard is a question of law. *See* ***id.*** at 395, 546 N.W.2d at 572.

¶5 Davis failed to show adequate grounds to obtain an *in camera* inspection of the records. He did not need the records to prove that Melodee used stimulants and might not have taken her thyroid medication on the night of the

incident. Nor did he need them to show that her acts and omissions that night might have affected her memory and understanding of events. Beyond that, he did not adequately explain their usefulness. He did not allege that they contained evidence of a delusional illness, nor that they reported previous incidents where Melodee confused reality. In other words, even if Davis arguably had evidence that Melodee's actions on a particular night caused her to misperceive events, he offered nothing to show that her records showed a preexisting problem of that sort unrelated to those specific acts. Consequently, the records were neither relevant nor helpful to a fair determination on the charges.

¶6 Davis also contends that he did not have to make any showing of relevance and materiality with regard to certain of the records, because they were in the custody of various state and county agencies. He cites ***State v. Darcy N.K.***, 218 Wis.2d 640, 581 N.W.2d 567 (Ct. App. 1998), *review denied*, 219 Wis.2d 923, 584 N.W.2d 123 (1998), to support his contention. In ***Darcy***, the court conducted an *in camera* review because the records were in the possession of the prosecutor and a prosecutor is required to turn over evidence in his or her possession that is both favorable to the accused and material to the questions of guilt or punishment. *See* ***id.*** at 653, 581 N.W.2d at 573 (citing ***Pennsylvania v. Ritchie***, 480 U.S. 39, 57 (1987)). Here, none of the records at issue were in the prosecutor's custody, so there was nothing for the trial court to review under the rationale used by the trial court in ***Darcy***.

¶7 Furthermore, we conclude that the trial court properly denied Davis's mistrial motion. The trial court must declare a mistrial only if the claimed error so prejudices the defendant as to make a new trial a "manifest necessity." *See* ***State v. Bunch***, 191 Wis.2d 501, 507, 529 N.W.2d 923, 925 (Ct. App. 1995). We review the trial court's determination on that issue for an erroneous exercise of

discretion. *See* ***Johnson v. State***, 75 Wis.2d 344, 365, 249 N.W.2d 593, 604 (1977). Here, the trial court noted that the jury had no visible reaction to the passing reference to his footwear, and reasonably concluded on that basis that it was not prejudicial to Davis. Nothing in the record suggests otherwise, including the fact that the jury acquitted Davis on an attempted first-degree sexual assault charge.

By the Court.—Judgment affirmed.

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