COURT OF APPEALS
DECISION
DATED AND RELEASED

September 12, 1995

No. 95-0984-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANQUION JOHNSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

SCHUDSON, J.[1] Anquion Johnson appeals from the judgment of conviction, following a jury trial, for violation of domestic abuse injunction. He argues that: (1) the State did not have standing to object to release of the complaining witness's mental health records; (2) the trial court erred by not releasing the complaining witness's mental health records to the defense; and (3) the trial court should have granted a mistrial following violation of its orders

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

on motions *in limine*. This court agrees that Johnson's counsel should have been allowed to examine the mental health records. Therefore, while rejecting Johnson's other arguments, this court remands for further proceedings.

The State charged Johnson with violating a domestic abuse injunction by making several telephone calls to Verna Demuth on March 27, 1994. Demuth testified, describing the calls and identifying Johnson as the caller. Demuth's nineteen year-old daughter testified that she heard Johnson on a three-way phone hook-up with her mother and that he said, "'Why won't you talk to me?'" City of Milwaukee Police Officer Victor Beecher testified that when he arrived at the Demuth residence, he overheard three calls on Demuth's speaker phone "[a]nd the first two times I heard a male's voice saying, Verna, I ain't playing or, I ain't fooling around, something to that effect." Johnson testified, acknowledging that he received the injunction prohibiting his contact with Demuth, but denying that he made the phone calls.

In pretrial proceedings, the defense sought access to Demuth's mental health treatment records in an effort to support its challenge to Demuth's credibility. The State objected to disclosure of the records and the trial court[2] reviewed them *in camera*. The trial court denied the defense request, concluding:

> I found nothing which would in my view be ammunition on the part of the defense to challenge her credibility as a witness. There is evidence of depression, physical injury, percentages of disability, but in terms of her ability to function without resort to hallucinations and delusions, it's pretty much intact. So, consequently, to protect the privacy of the witness in this matter, I'm not going to permit the records to be turned over to the defense.

[2] Judge George W. Greene presided over the pretrial proceedings; Judge Elsa C. Lamelas presided over the trial.

Johnson first argues that the trial court erred in denying disclosure because Demuth did not object to the disclosure of her records and, therefore, the State had no standing to object because the privilege under § 905.04(3), STATS., is personal to Demuth. This court need not resolve this issue because, as the State correctly points out, Johnson never challenged the State's standing before the trial court. In fact, Johnson's counsel expressly agreed to the *in camera* examination the State proposed to the trial court.[3] Thus, Johnson waived his challenge to the State's standing. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-444, 287 N.W.2d 140, 145-146 (1980) (issues not raised before trial court generally not considered on appeal).[4]

Johnson next argues that the trial court's *in camera* review was inadequate because the judge did not look at every entry in the records, and that the trial court erred in denying defense "access to the psychiatric/medical records where it [sic] would have been used to show the mental and emotional state of the witness at or around the time of the alleged incident." Denying the defense motion, the trial court commented:

> Yes, I did at some length review the medical records. They're sitting on my desk. I will get them. I will be very candid with you that I reviewed discharge summaries. I did not look at every nurses' note.

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[3] In the pretrial proceedings of June 28, 1994 before Judge George W. Greene, the following exchange occurred:

> [Assistant District Attorney]: Judge, in the first place, I believe that the victim's psychiatric records ... would be irrelevant to this case. If the Court decides that they may be relevant, I believe the law requires an in-camera review of those records before any such evidence would be allowed at trial.
>
> THE COURT: I agree with that.
>
> [Defense Counsel]: I agree with that as well.

[4] Similarly, although Johnson now argues that the trial court's ruling seemed to address the relevance of the medical records to Demuth's competency rather than credibility, he made no such argument in the trial court and thus waived this issue as well. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-444, 287 N.W.2d 140, 145-146 (1980).

Based on review of the 674 pages of Demuth's health records sealed in the record, this court concludes that the trial court erred in denying defense access to the records.

As the supreme court has explained:

> Evidence of mental disorder or impairment may be relevant as affecting the credibility of a witness when it shows that his mental disorganization in some way impaired his capacity to observe the event at the time of its occurrence, to communicate his observations accurately and truthfully at trial, or to maintain a clear recollection of it in the meantime.

Chapin v. State, 78 Wis.2d 346, 355-356, 254 N.W.2d 286, 291 (1977). Findings of fact made by a trial court, following an *in camera* review, in determining whether a witness's mental health information is "material" or "relevant and may be necessary to a fair determination of guilt or innocence" are reviewed under the clearly erroneous standard. ***State v. Mainiero***, 189 Wis.2d 80, 88, 525 N.W.2d 304, 307 (Ct. App. 1994); ***State v. Shiffra***, 175 Wis.2d 600, 605-610, 499 N.W.2d 721-723 (Ct. App. 1993). "'[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" ***Mainiero***, 189 Wis.2d 80, 88, 525 N.W.2d 304, 307.

The trial court specifically based its decision, at least in part, on its finding that Demuth's "ability to function without resort to hallucinations and delusions, it's pretty much intact." That finding, however, is not necessarily consistent with the records. As but one example, on March 29, 1993, a social worker described Demuth as "present[ing] a history of both audio and visual hallucinations in the past and now states only on occasion seeing shadows, but nothing that bothers her.... [S]he states that she ... tends to be in a dreamlike confused state during the daytime." The records reflect that Demuth's physical and psychotherapeutic treatment continued for many years including the period of this case, and that she received medication and treatment for what were viewed as substantial mental health conditions.

Thus, the records suggest that Demuth's "mental disorder or impairment may be relevant as affecting [her] credibility," *see* ***Chapin***, 78 Wis.2d at 355-356, 254 N.W.2d at 291, and "may be necessary to a fair determination of guilt or innocence." *See* ***Mainiero***, 189 Wis.2d at 88, 525 N.W.2d at 307. Whether Demuth suffered "mental disorganization [that] in some way impaired [her] capacity to observe the event at the time of its occurrence, to communicate [her] observation accurately and truthfully at trial, or to maintain a clear recollection of it in the meantime," *see* ***Chapin***, 78 Wis.2d at 355-356, 254 N.W.2d at 291, is unclear based on the present record. What is clear, however, is that the defense was entitled to have access to the records in order to evaluate those possibilities. If, upon completion of its evaluation of the records, the defense deems Demuth's mental health history relevant to her credibility and necessary to a fair determination of the case, the defense may present an offer of proof to the trial court for its consideration of relevancy, materiality, admissibility, and, potentially, the need for a new trial.

Finally, Johnson argues that the trial court erred in denying his motion for mistrial. He contends that a mistrial was warranted because of: (1) Demuth's several testimonial "outbursts" when she spoke angrily about him or his counsel, and (2) Demuth's references to her nervous breakdown, medication, and mental illness, in alleged violation of the trial court's pretrial order that, Johnson maintains, precluded inquiry into such areas.

"The decision whether to grant a motion for mistrial lies within the sound discretion of the trial court. The trial court must determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial." ***State v. Bunch***, 191 Wis.2d 502, 507, 529 N.W.2d 923, 925 (Ct. App. 1995). The trial court's decision will be reversed "only on a clear showing of an erroneous exercise of discretion." ***Id.***

This court concludes that the trial court correctly denied Johnson's motion for mistrial. Johnson has failed to explain how Demuth's outbursts denied him a fair trial. If anything, her several non-responsive outbursts may have reduced her credibility in the estimation of the jury. Further, Johnson has failed to explain how Demuth's own references to her mental health problems denied him a fair trial, particularly given his desire to examine records that could lead to the presentation of evidence of her mental health history to challenge her credibility.

Accordingly, while rejecting Johnson's challenges in all other respects, this court remands the case to the trial court for defense counsel to be allowed to examine the sealed records, and for further proceedings as needed, consistent with this decision.

By the Court. – Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.