**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 2, 2007**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2006AP1147-CR** **Cir. Ct. No. 2004CF1096**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TIMOTHY A. RUPERT,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 NETTESHEIM, J. A jury found Timothy A. Rupert guilty of two counts of sexual assault of a child under the age of sixteen and one count of repeated acts of sexual assault of a child. Rupert appeals from the judgment of conviction as to the victim Kayla K., contending that the trial court erred by denying his motion for an in camera review of certain Kenosha County Social Services records. Rupert also challenges all three convictions, contending that the trial court erred by refusing to declare a mistrial when the jury heard other-acts evidence.

¶2 We hold that Rupert made a sufficient showing to warrant an in camera review of the records regarding Kayla. Therefore, we reverse the conviction as to Kayla, and remand for the trial court to conduct an in camera review of the records. If the review does not reveal relevant evidence necessary to a determination of guilt or innocence, the court shall reinstate the conviction. If the review does so show, we direct a new trial as to the Kayla allegation. However, we reject Rupert's argument that the trial court misused its discretion in denying the motion for a mistrial. Therefore, we affirm the judgment as to the convictions pertaining to the other two victims, Erica W. and April L.

*Introduction*

¶3 The State filed an information charging Rupert with two counts of sexual assault of a child under the age of sixteen and one count of repeated acts of sexual assault of a child. The counts involved three child victims, April, Kayla and Erica. Rupert pled not guilty to each charge. The jury found him guilty of all charges, and he appeals. We will present the relevant facts as we discuss each issue.

*In Camera Review*

¶4 Prior to trial, Rupert discovered a supplemental police report stating that Kayla had reported a further sexual assault of her by a "Tim Pruitt." The supplemental report also stated that Juvenile Crisis and Juvenile Intake were notified of Kayla's allegations. Rupert argues that those entities' internal policies and WIS. STAT. § 48.981(2) (2005-06)[1] require them to keep records of their investigation. Based on this discovery, Rupert moved for an in camera inspection of the social services investigation report.[2] The motion was supported by an affidavit of Rupert's attorney which recited this history and further stated that Rupert had been denied access to the confidential social services report. Rupert's motion asked the trial court to examine the social services records in camera in order to determine if they contained potentially exculpatory evidence of prior sexual abuse, a prior false allegation of sexual assault, or anything admissible under WIS. STAT. § 972.11(2).

¶5 In response, the trial court ruled that Rupert had not made the requisite preliminary showing to warrant an in camera inspection of the social services records or further police records. The court stated that the police officer simply may have understood Kayla, who named her alleged assailant when she was sobbing and intoxicated, to say "Pruitt" instead of "Rupert" and, further, Rupert had made no attempt to determine the existence of a "Tim Pruitt" in the

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Rupert's motion referenced "police and social services investigation records." Since he limits his appellate argument to social services records, we do likewise.

civil or criminal justice system. The court stated that, absent a more particular investigation, "it's simply a fishing expedition."

¶6 Thereafter, Rupert filed a further motion for an in camera inspection, this one detailing his futile efforts to discover the identity of "Tim Pruitt" as the perpetrator of a prior sexual assault against Kayla. Rupert asserted that an in camera inspection of the records remained the only reasonable alternative, and denying him the inspection would deprive him of due process by barring him from using potentially exculpatory information at trial.

¶7 At the hearing on the motion, Rupert argued that without access to the additional records, he could not know if Kayla was alleging that she was sexually assaulted on only one occasion by "Tim Pruitt" or if she was alleging multiple assaults, one by Pruitt and one by Rupert. Rupert contended that under ***State v. Green***, 2002 WI 68, ¶33, 253 Wis. 2d 356, 646 N.W.2d 298, he had shown that it was more than a mere possibility that the records contained evidence useful to him. The State responded that Rupert's motion was based on "wild speculation" because the facts stated in the complaint clearly showed that Rupert was the offender and that, while Kayla may have said "Tim Pruitt," she was a "15-year-old kid visit[ing] [her friend's] home" and "[a]ll she is doing is getting the name wrong."

¶8 Criminal defendants have a due process right to a meaningful opportunity to present a complete defense. ***State v. Shiffra***, 175 Wis. 2d 600, 605, 499 N.W.2d 719 (Ct. App. 1993). An in camera review of evidence achieves the proper balance between a defendant's rights and the State's interests in protection of its citizens. ***Id.*** To warrant an in camera inspection, a defendant must make a preliminary good faith showing of a specific factual basis demonstrating a

reasonable likelihood that the records are not cumulative to other available evidence and that they contain relevant information necessary to a determination of guilt or innocence. ***Green***, 253 Wis. 2d 356, ¶34. "Necessary to a determination of guilt or innocence" means information that "tends to create a reasonable doubt that might not otherwise exist." ***Id.*** The evidentiary showing must describe as precisely as possible the information sought and how it is relevant to and supportive of the particular defense. ***Id.***, ¶33. In conducting an appellate review of the matter, we review the trial court's findings of fact under the clearly erroneous standard, but whether a defendant has made the required preliminary showing presents a question of law because it implicates the defendant's right to due process of law. ***Id.***, ¶20. A defendant who makes the requisite showing on appeal is not automatically entitled to a remand for an in camera review unless he or she also shows the error was not harmless. ***Id.*** Where it is a close call, the court generally should provide an in camera review. ***Id.***, ¶35.

¶9 In its ruling, the trial court wondered aloud whether "Tim Pruitt" and "Tim Rupert" were one and the same, yet, in virtually the same breath, observed that the statement in the supplemental police report was exculpatory for Rupert in that it "seem[ed] to suggest there is a Tim Pruitt who sexually assaulted [Kayla]" and so could be used by him at trial. Nonetheless, because the four corners of the supplemental report did not directly point to the existence of a social services record, the court denied Rupert's request for an in camera review, labeling Rupert's request a "fishing expedition."

¶10 The State argues that the trial court's ruling was proper because it is illogical to believe that Kayla confused two separate assailants or incidents or falsely accused Rupert to cover up an earlier assault by "Pruitt." But this argument misses the mark because the whole point of an in camera inspection is to

resolve that sort of question. And, although ultimately denying Rupert's motion, the trial court pondered whether Pruitt and Rupert were one and the same person or, if not, whether the social services report might hold exculpatory information as to Rupert. We also deem it noteworthy that Kayla's report of a sexual assault by Tim Pruitt was not taken lightly by the police. To the contrary, the report prompted the police to issue a supplemental report and to refer the matter to Juvenile Crisis and Juvenile Intake for a social services investigation and, presumably, a report of the results of that investigation. *See* WIS. STAT. § 48.981(3)(c )5.[3]

¶11 In summary, an in camera review may have verified Pruitt's existence and shown that, for whatever reason, Kayla had not accurately reported the alleged assault by Rupert. If so, Rupert obviously would be entitled to use such information as a defense. Conversely, the review may have shown, as the State contends, that "Pruitt" simply was a misheard "Rupert." Even if this case is deemed "close," the supreme court has declared that the request should generally be resolved in favor of an in camera review. ***Green***, 253 Wis. 2d 356, ¶35. It would have taken little added time and effort for the trial court to have made that determination so as to safeguard Rupert's right to due process. We conclude that Rupert's evidentiary showing describes with sufficient precision the information sought and how it is potentially relevant to and supportive of his particular defense. *See* ***id.***, ¶34.

[3] We recognize that confidential records and reports may be disclosed to the subject of a report, WIS. STAT. § 48.981(7)(a)1., and "subject" includes the person suspected of abuse, § 48.981(1)(h)2. No one raised this argument, however— not the trial court, the assistant district attorney, or the assistant attorney general. We therefore address the arguments as the parties present them to us.

¶12 We also agree with Rupert that the error was not harmless. An error is harmless if there is no reasonable possibility that the error contributed to the conviction. ***State v. Ballos***, 230 Wis. 2d 495, 501, 602 N.W.2d 117 (Ct. App. 1999). Rupert could not have accessed the information from the confidential records any other way. Establishing or ruling out the existence of "Tim Pruitt" would have been relevant—and potentially beneficial—to Rupert's defense, and for but a small expenditure of the trial court's time.

¶13 We reverse and remand the conviction relating to Kayla. On remand, the trial court shall conduct an in camera examination of the social services records and/or report to determine whether they contain relevant information necessary to a determination of guilt or innocence. If so, we direct a new trial as to the Kayla conviction. If not, the Kayla conviction shall be reinstated.

*Mistrial*

¶14 One of the counts in the Information alleged that during the summer of 2003, Rupert repeatedly sexually assaulted then thirteen-year-old Erica W. Rupert contends the trial court should have declared a mistrial when the jury heard other-acts evidence during Erica's testimony.[4]

¶15 A trial court may declare a mistrial when, considering all the circumstances, there is a "manifest necessity" for it so that the ends of justice are not defeated. ***State v. Mattox***, 2006 WI App 110, ¶13, 293 Wis. 2d 840, 718

[4] Although this allegation of error arose during the testimony of Erica W., Rupert does not seek a new trial only as to the Erica W. conviction. Instead, he seeks a new trial as to all of the counts involving all of the victims.

N.W.2d 281 (citations omitted). A mistrial should be granted, however, only "with the greatest caution, under urgent circumstances, and for very plain and obvious causes." ***Id.*** (citation omitted). Whether to grant a mistrial is within the trial court's discretion, a decision we accord great deference. ***State v. Foy***, 206 Wis. 2d 629, 644, 557 N.W.2d 494 (Ct. App. 1996). Our review entails determining whether the court examined the relevant facts, applied the proper standard of law and engaged in a rational decision-making process. ***Id.***

¶16 Erica testified at the jury trial that Rupert, who lived with her, her younger sister and her mother, was a stepfather figure to her. She testified that she loved him "[b]efore anything happened" but that her feelings changed over time. The prosecutor then asked whether events in the summer of 2003 contributed to her changed feelings for Rupert. Erica responded: "Yeah. And the years before that one, too."

¶17 Defense counsel immediately requested a sidebar conference, followed by a discussion on the record outside the presence of the jury. Counsel argued that the jury had been poisoned by Erica's answer suggesting that Rupert sexually abused her before the summer of 2003. Counsel also conducted a brief voir dire of Erica during which Erica revealed that Rupert had molested her since she was six-and-a-half or seven-years old.

¶18 Rupert moved for a mistrial on grounds that there existed a high probability of taint and that the State had not brought appropriate pretrial motions to introduce the other-acts evidence. Rupert also noted that the trial court had not ruled on his pretrial motion in limine seeking to prohibit other-acts evidence.

¶19 The trial court denied the mistrial motion, explaining its reasoning at some length. The court observed that the State's questioning had properly focused

on the time frame alleged in the information, the summer of 2003. The court concluded that Erica's voluntary comment "the years before that one, too" was not fact-specific enough to connote anything more than the passage of time. We agree. In addition, the jury knew that Rupert also was charged with sexually assaulting then thirteen-year-old April in 2001 while April and her mother temporarily resided with Erica's family and Rupert. So the jury already had proper evidence of Rupert's sexual assault conduct prior to the summer of 2003, albeit involving a different victim.

¶20 Moreover, we disagree with Rupert that Erica's gratuitous comment necessarily implied earlier assaults by Rupert against her. Rather, a more reasonable inference is that Erica's feelings toward Rupert changed because he also had assaulted her friend in "the years before that one, too." Furthermore, the State did not so much as allude to Erica's comment in closing arguments. We conclude that Erica's unsolicited remark did not present an "urgent circumstance" or a "very plain and obvious cause" such that granting a mistrial rose to the level of a manifest necessity. *See* ***Mattox***, 293 Wis. 2d 840, ¶13. We see no misuse of discretion in the trial court's denial of Rupert's mistrial motion.

## CONCLUSION

¶21 The standard a defendant seeking an in camera review must satisfy is not meant to be unduly high. ***Green***, 253 Wis. 2d 356, ¶35. We conclude that Rupert made a sufficient specific preliminary showing that the social services records could contain noncumulative material necessary to his defense. We reverse the judgment for the trial court to conduct an in camera examination of those records and, depending on what they show, to then proceed as described above.

¶22 We see no error in regard to the denial of the motion for a mistrial. Although voir dire revealed that Rupert sexually assaulted Erica before 2003, the jury was unaware of that fact and her testimony could have other reasonable interpretations. We affirm the denial of the motion.

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

Not recommended for publication in the official reports.