COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2690-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT L. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Robert L. Johnson appeals from a judgment of conviction on one sexual assault count. The issue is whether a mistrial should have been declared because the prosecutor inappropriately commented during

closing argument on the fact that Johnson did not testify. We conclude that a mistrial was not required. We affirm.

¶2 The parties agree that the decision to grant a mistrial is discretionary with the trial court and that we affirm a discretionary decision if the court applied the correct law to the relevant facts of record and used a rational process to arrive at a reasonable result. The parties also agree that "[t]he test for determining whether remarks are directed to a defendant's failure to testify is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." ***State v. Johnson***, 121 Wis. 2d 237, 246, 358 N.W.2d 824, 828 (Ct. App. 1984) (citation omitted).

¶3 The statements by the prosecutor that Johnson objected to included the following: "I remind you again the only evidence of any sexual act between [the victim] and this defendant is the evidence in the record that she testified to, which was nonconsentual (sic)." We conclude that this statement and other similar statements are such that the trial court could reasonably conclude that the jury would not necessarily take it to be a comment on the absence of Johnson's testimony. They were more comments on the evidence, or lack of it. We agree with the trial court's observation that this type of comment is "risky," but a mistrial was not required under these circumstances.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).