

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 11, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-1858-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-CF-158**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MIKKEL J. GOFF,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Mikkel Goff appeals from a judgment of conviction and order denying his postconviction motion. The main issue is whether the court erred by allowing witnesses to state their opinion of the victim's character for truthfulness. We conclude that it was error to admit the evidence, but that the error was harmless. We therefore affirm.

¶2 The jury found Goff guilty of second-degree sexual assault of an unconscious victim. The allegation was that he assaulted one of his girlfriend's roommates while an overnight guest in their residence. During the trial, and over Goff's objection, the court allowed two of the other roommates to state their opinion of the victim's general character for truthfulness. Goff argued in his postconviction motion that this testimony should have been excluded under WIS. STAT. § 906.08(1) (1999-2000),<sup>1</sup> which allows a witness to give reputation or opinion evidence of another witness's character for truthfulness only after the character of the witness for truthfulness has been attacked. The trial court agreed that the evidence should have been excluded, but held the error harmless.

¶3 On appeal, the State argues that Goff waived this argument by failing to make an objection at trial with sufficient specificity. We note that while Goff's objection may have been deficient, the prosecutor supported the proposed testimony by relying on the evidence rule that Goff's objection should have identified. Therefore, we will assume, without deciding, that the issue of admissibility under WIS. STAT. § 906.08(1) was sufficiently before the court.

¶4 The test for deciding whether a witness's character has been attacked is that the trial court must believe that a reasonable person would consider the attack on the witness to be an assertion that the witness is not only lying in this instance, but is a liar generally. *State v. Eugenio*, 219 Wis. 2d 391, 404-05, 579 N.W.2d 642 (1998). This is a discretionary determination due the deference we normally award evidentiary rulings. *Id.* at 399. In the present case the trial court

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

allowed the evidence at trial, but then, in deciding the postconviction motion, later concluded that Goff's attack on the witness was primarily directed to the sexual assault itself, and not her general character for truthfulness. This raises the question of which decision we should defer to. In *Eugenio*, the court held that the trial court's decision of whether a witness's character for truthfulness has been attacked should be deferred to because of the difficulty of reviewing it "based on a cold record." *Id.* In this case the postconviction motion was decided by the same judge who presided at trial, and therefore the judge was not relying solely on a "cold record" in deciding the motion. We defer to that decision, and conclude that it was a reasonable exercise of discretion.

¶5 However, like the trial court, we also conclude that the error was harmless. The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). The two roommates, in addition to stating their opinion of the victim's character for truthfulness, provided other testimony that was suggestive and the victim's credibility, such as the victim's demeanor when she told them about this incident. In addition, the jury probably could infer, even without their saying so, that these witnesses thought their roommate and friend had a character for truthfulness. Furthermore, unlike cases in which the victim does not testify, here the victim herself testified, giving the jury an opportunity to make its own assessment of her credibility. Accordingly, we conclude that there is no reasonable possibility that this evidence contributed to the conviction.

¶6 Goff also argues that his counsel was ineffective because he failed to object to the above testimony on the ground that it violated the rule prohibiting one witness to comment on the truthfulness of another witness's statement or testimony. See *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App.

1984). In order to establish ineffective assistance of counsel, Goff must demonstrate both that his counsel's performance was deficient and that the deficiency was prejudicial to his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Goff's argument is based on the witnesses' use of phrases such as "I have never in all my years known [the victim] ... to be any type of a liar," and "I have absolutely no reason to doubt anything that she's ever told me or to take any of it as anything but the truth." He argues that because these witnesses were aware of the victim's allegations when they testified, the phrasing they used necessarily encompassed their opinion of these allegations. We disagree. The witnesses did not say they thought the victim was telling the truth in this case. Therefore Goff's counsel was not deficient in failing to object.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

