COURT OF APPEALS
DECISION
DATED AND RELEASED

September 19, 1996

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

NOTICE

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

No. 95-2340-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LYLE I. DANK,

Defendant-Appellant.

APPEAL from a judgment of conviction of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Eich, C.J., Vergeront, J., and Paul C. Gartzke, Reserve Judge

PER CURIAM. Lyle I. Dank appeals from a judgment convicting him of two counts of second-degree sexual assault of a minor as a repeater, in violation of § 940.225(2)(a) and § 939.62, STATS.[1] Dank argues that the trial court

[1] Dank was also charged with two counts of furnishing alcoholic beverages to an underage person in violation of § 125.07(1)(a)(1)4(b), STATS., which he does not appeal.

erred by excluding certain testimony and denying a requested instruction. We conclude that the trial court did not erroneously exercise its discretion and affirm.

Each count of sexual assault involved a different minor female. The two victims, J.G. and A.F., testified that Dank had driven them to an isolated cabin. They testified that there, he lifted up their shirts and fondled and kissed their breasts. He broke A.F.'s brassiere, and he attempted to kiss J.G. and pull off her shorts.

Dank denied that he was with the girls that evening, and offered an alibi defense. There was additional testimony from J.G.'s sister and father, who stated that she was not always truthful, although she had never falsely accused someone of a crime.

During the trial, Dank called the principal of the local high school and the prosecution objected to his testimony. On voir dire, the principal stated that in his opinion, J.G. was not truthful about high school issues such as tardiness and truancy, although he had never known either of the victims to make a false accusation against any other student, teacher or member of the community.

The trial court excluded the testimony, stating:

> Whether they're truthful as to high school issues is not in any way relevant to this case ... [a]nd while its true that courts often allow evidence in even if it has very little probative value ... the court does have an obligation to exercise its discretion with regard to evidentiary matters....

The court also denied Dank's request for a pattern jury instruction entitled "Impeachment of Witness: Character for Truthfulness."[2] Instead, the

[2] WIS J I—CRIMINAL 330

court read the pattern "Credibility of Witnesses."[3]

We first consider the trial court's exclusion of the principal's testimony. Dank argues that his testimony was relevant and admissible. Evidentiary rulings are reviewed with deference to determine whether the trial court properly exercised its discretion in accord with the facts of record and with accepted legal standards. ***In the Interest of Michael R. B.***, 175 Wis.2d 713, 720, 499 N.W.2d 641, 644 (1993). The trial court's decision will not be reversed unless it is "wholly unreasonable." ***State v. Pittman***, 174 Wis. 2d 255, 268, 496 N.W.2d 74, 80 (1993).

We conclude the trial court's decision to exclude the testimony on the ground of relevance was reasonable. The court considered the principal's testimony during the voir dire examination. It applied the proper legal standard to the testimony, and reasoned that the victims' veracity on tardiness and truancy issues had low probative value. Specifically, it concluded that "whether they're untruthful as to high school issues is not in any way relevant to this case." Whether evidence is relevant is a discretionary definition. We conclude that a court could reasonably decide that a minor's lies about being absent or tardy from school are not relevant to the question of whether she is fabricating an act of sexual assault, or falsely accusing someone of a crime.

Even if we were to conclude that the testimony was relevant, any error would be harmless. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-232 (1985). The testimony concerned only one victim. There was testimony from that victim's family that she was generally not a truthful person, and had "a problem with maybe not telling the truth all the time to Dad." The jury therefore had a basis for doubting J.G.'s truthfulness even without the principal's testimony. In spite of that, the jury convicted Dank on both counts.

Dank next argues that the exclusion of the principal's testimony implicated his constitutional right to a defense. At the trial level, Dank argued only that the testimony was relevant as to opinion or reputation evidence. "We will not overturn a discretionary determination on a ground not brought to the attention of the trial court." ***State v. Foley***, 153 Wis.2d 748, 754, 451 N.W.2d 796, 798 (Ct. App. 1989).

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[3] WIS J I—CRIMINAL 300

Even if we were to consider this claim, Dank has no constitutional right to present the principal's testimony, as we have concluded that it was not relevant. *See* ***Pittman***, 174 Wis.2d at 275, 496 N.W.2d at 82-83 (1993).

We next address Dank's claim that the trial court erroneously exercised its discretion by declining to give the requested character instruction. A trial judge exercises wide discretion in issuing jury instructions based on the facts and circumstances of the case. ***State v. Vick***, 104 Wis.2d 678, 690, 312 N.W.2d 489, 495 (1981). "If the instructions given by the trial judge adequately cover the law, the reviewing court will not find error in the refusal to give a particular instruction, even though the refused instruction is not erroneous." ***State v. Kemp***, 106 Wis.2d 697, 706, 318 N.W.2d 13, 18 (1982).

The court listed for the attorneys the instructions it proposed to give, which included the standard instruction on "Credibility of Witnesses," WIS J I—CRIMINAL 300.[4] The court asked for comments and additions, and then informed counsel that it would take a break to consider them, and would then

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[4] WIS J I—CRIMINAL 300 provides:

> It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility of the witnesses and of the weight and credit to be given to their testimony.
>
> In determining the weight and credit you should give to the testimony of each witness, you should consider interest or lack of interest in the result of this trial, conduct, appearance, and demeanor on the witness stand, bias or prejudice, if any has been shown, the clearness or lack of clearness of recollections, the opportunity for observing and knowing the matters and things testified to by the witness, and the reasonableness of the testimony.
>
> You should also take into consideration the apparent intelligence of each witness, the possible motives for falsifying, and all other facts and circumstances appearing on the trial which tend either to support or to discredit the testimony, and then give to the testimony of each witness such weight and credit as you believe it is fairly entitled to receive.

hold a final instruction conference after the attorneys received the complete packet of instructions. When the court and attorneys reconvened, defense counsel requested the instruction entitled "Impeachment of Witness: Character for Truthfulness," WIS J I—CRIMINAL 330, which provides: "Evidence has been received regarding a witness' character for truthfulness. You may consider this evidence in weighing the testimony and determining credibility." In declining to give this instruction, the court stated: "I haven't read that instruction. I'm not inclined to give it. I think 300 ["Credibility of Witnesses"] adequately covers that issue." The court read the credibility instruction to the jury.

Dank argues that the court's statement shows it denied the requested instruction without knowing its contents. We disagree. We are satisfied that, when the court's statement is considered in context, it shows that the court was aware of the contents of the requested instruction.

In declining to give the "Impeachment of Witness" instruction, the court explained that the credibility instruction "adequately covers that issue." The only reasonable interpretation of this explanation is that the court knew that both instructions dealt with witness credibility, or lack thereof. In this context, "I haven't read that instruction" cannot reasonably be interpreted as meaning that the court had no idea of the content of the instruction. The court may have meant it had not read that instruction before to a jury and was not inclined to do so in this case. The court may have meant it had not read the instruction when it was preparing the instructions in this case. Either of these two interpretations are reasonable. The interpretation Dank offers is not reasonable because it ignores the sentence immediately following, which shows that the court was familiar with the contents of the instruction Dank requested.

Dank also claims that the instruction was reasonably required in light of the testimony of the victim's family that she was sometimes untruthful. Although the trial court could have given the requested instruction, it was not obligated to do so. Given the comprehensiveness of the credibility instruction, it was well within the trial court's discretion to determine that this more general instruction was adequate. *See* ***Kemp***, 106 Wis.2d at 706, 318 N.W.2d at 18. The credibility instruction directs the jurors to "scrutinize and weigh" testimony, and to determine the "weight and credit" to give to each witness. It also states that there may be "possible motives for falsifying," or "interest in the result of the trial." This instruction adequately informs jurors that they may consider evidence on the victim's lack of truthfulness in deciding whom to believe. We

conclude that the trial court acted within its discretion in denying the requested instruction.

By the Court.—Judgment affirmed.

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