

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 2006

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. 2005AP2566-CR

Cir. Ct. No. 2004CF234

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES D. KIELESZEWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
JOHN V. FINN, Judge. *Affirmed.*

Before Dykman, Vergeront and Deininger, JJ.

¶1 PER CURIAM. James Kieleszewski appeals from a judgment convicting him of one count of attempted first-degree sexual assault of a child. The dispositive issue is whether the circuit court erroneously exercised its

discretion in allowing the State to cross-examine Kieleszewski about his correspondence with the adult sister of the twelve-year-old victim. We affirm.

¶2 Kieleszewski was accused of sexually assaulting his wife's daughter. He testified on his own behalf at trial. During his testimony, he minimized his relationship with his wife's daughters, explaining that he had no relationship with the older three girls; his only relationship was with the youngest girl, L.R.R., the victim in this case. On cross-examination, the State sought to clarify Kieleszewski's relationship with the victim's sisters.

Q. And there are four daughters that [your wife] has?

A. Right.

Q. You stated that the only relationship you have is with [L.R.R.]

A. Right.

Q. You have no other relationship with [L.M.R.] or the other two?

A. No.

Q. What are the other two's names?

A. [L.M.R.], [L.K.R.], and [L.J.R.]

Q. So would you consider when you talk with them or have contact with them that you would be their dad?

A. No. I'm just a friend; their mom's boy friend.

....

Q. Isn't it true that you've written [L.M.R.] letters?

A. Yup.

Q. Isn't it true that those letters are signed "Dad"?

A. 'Cause she starts them out to me "Dad."

Q. And what kind of relationship do you have with her?

A. None, really.

Q. None.

A. Just a girl/guy relationship; two people writing to each other in, in the institutions.

Q. Do you recall what kind of things you've been writing her?

A. Oh, yeah.

Q. And this would be considered your step-daughter?

A. Not in my eyes. I haven't seen this child in seven years. And then when she wrote me first, I wrote her back.

Q. So someone you've never met that is your step-daughter who you originally said you had no relationship, is there any kind of sexual connotation between your relationship?

....

A. Just outside goofy talk.

Q. Outside goofy talk?

A. Yeah.

Q. And to this step-daughter that you have no relationship with, you want her to write you sex letters, correct?

A. Well, in a way she already was.

Q. Well, you were asking her to do that, were you not?

A. Well, it wasn't really for the benefit of me. It was for the other guys in the unit.

Q. It wasn't for the benefit of you?

A. No.

Q. So when you talked about her writing that so that you could masturbate to her letter, that didn't involve you at all?

¶3 Kieleszewski argues that the State should not have been allowed to cross-examine him about the letters because the State did not notify him before trial that it intended to use the letters. He argues that the letters were inadmissible “other acts” evidence due to their sexual content. He contends that the prosecutor acted in bad faith, a mistrial should have been granted, and retrial should be denied on double jeopardy grounds.

¶4 “Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’s credibility, other than a conviction of a crime ..., may not be proved by extrinsic evidence.” WIS. STAT. § 906.08(2) (2003-04).¹ “They may, however, ... if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness” *Id.* That is exactly what happened here. The State used the letters to impeach Kieleszewski’s testimony that he had no relationship with the victim’s sisters. The letters showed that he had a relationship with at least one of them, and thus had been lying while testifying. The trial court properly allowed the cross-examination under § 906.08(2) because Kieleszewski lied about his relationship with his wife’s daughters while testifying.

¶5 Kieleszewski next argues that the State should not have been allowed to cross-examine him about the letters because the probative value of the letters was substantially outweighed by the danger of unfair prejudice. *See* WIS.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

STAT. § 904.03. Kieleszewski did not ask the circuit court to prohibit cross-examination about the letters on this ground. The circuit court did not err in failing to weigh the probative value of the letters against the danger of unfair prejudice because it was not asked to do so. *McClelland v. State*, 84 Wis. 2d 145, 157, 267 N.W.2d 843 (1978).

By the Court.—Judgment affirmed.

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

