COURT OF APPEALS
DECISION
DATED AND RELEASED

April 18, 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(1), 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. 95-0370-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH R. ZIELINSKI,

Defendant-Appellant.

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

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. Kenneth R. Zielinski appeals from a judgment convicting him of sexual assault of and incest with his fifteen-year-old half sister. The issue is whether the trial court erroneously exercised its discretion in precluding opinion testimony from a police officer about the alleged victim's character for untruthfulness. Because the trial court exercised its discretion, we affirm.

A jury found Zielinski guilty of the second-degree sexual assault of a child, contrary to § 948.02(2), STATS., and incest with a child, contrary to § 948.06(1), STATS. There were no witnesses to the alleged assault and no physical evidence to support the State's case. Consequently, the credibility of Zielinski and the alleged victim, L.Z., were determinative jury issues.

If Zielinski put L.Z.'s character for truthfulness in issue, the State intended to call the investigating officers as rebuttal witnesses. Two family members opined that L.Z.'s character was untruthful.[1] Zielinski also proffered veteran Police Officer Stephen R. Fredock who would opine that L.Z.'s character was not truthful, based on his five or six contacts with her which were unrelated to this case. The trial court precluded that testimony to avoid rebuttal testimony from the investigating officers. These officers' opinions would be based on their prior contacts with L.Z., not on whether they believed her accusations in this case.

The trial court precluded all of the officers' testimony because it would invade the province of the jury and result in confusion. The trial court reasoned that:

> These officers are involved in an investigation, and I think it's a little bit of a different situation than it is when we're talking about the [family-member witnesses]. I don't--if I do that, then I think the State would be entitled to bring in the other officers to give their opinion as to truthfulness, and I really want to avoid that. I don't think that's appropriate. You're going to have the jury saying, "Well, we have one officer says she's untruthful; two officers say she's truthful. I guess the majority wins," and I don't think that's

[1] These witnesses were the mother of L.Z. and Zielinski, Viola, and Zielinski's wife, Diane. Viola and Diane testified that L.Z. was not staying at Zielinski's residence when the alleged assault occurred. On cross-examination, the prosecutor inquired about whether Viola held a grudge against L.Z. for disclosing the family's alcohol problem to a social services representative. Diane admitted that she did not believe L.Z.'s accusations against her husband.

> appropriate.... We have a jury to listen to the facts and determine the evidence from the facts ....

The parties agree that this evidentiary ruling is discretionary. *See, e.g.,* ***State v. Pharr,*** 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). "The question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Wollman,*** 86 Wis.2d 459, 464, 273 N.W.2d 225, 228 (1979). The trial court has not erroneously exercised its discretion if its ruling is a product of a rational mental process in which it applied the facts to the law to achieve a reasoned and reasonable determination. ***LaRocque v. LaRocque,*** 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987).

Zielinski challenges the exclusion of Officer Fredock's testimony under § 906.08(1), STATS.,[2] and ***State v. Cuyler,*** 110 Wis.2d 133, 138-39, 327 N.W.2d 662, 665 (1983). However, these authorities do not render this evidence automatically admissible. ***Id.*** at 139, 327 N.W.2d at 666. Although the testimony of the investigating officers is distinguishable from that of Officer Fredock, the trial court reasoned that it would be unfair to allow Officer Fredock to testify, but preclude the State from rebutting his testimony. While that is not the only conclusion that could be reached in ruling on this evidence, it is "reasoned and reasonable." *See, e.g.,* ***LaRocque,*** 139 Wis.2d at 27, 406 N.W.2d at 737. The investigating officers' opinions were based on their prior investigations of L.Z. as a sexual assault victim.[3] Because those assailants were

---

[2] Section 906.08(1), STATS., provides that:

> [T]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: a) the evidence may refer only to character for truthfulness or untruthfulness, and b), except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

[3] Zielinski asserts that the trial court's ruling encourages the State to threaten every

convicted, the Zielinski jurors could be unduly persuaded that L.Z. was truthful in those cases. This evidence, while arguably probative, is unfairly prejudicial because jurors could consider L.Z.'s otherwise irrelevant history with undue harshness or undue sympathy. *See* § 904.03, STATS. The trial court also was concerned that the jury would confuse the investigating officers' testimony about their prior experiences with L.Z. from their experiences with her in this case. Its characterization of this proffered testimony as encompassing "side issues" is reasoned and reasonable. *See, e.g.,* ***LaRocque,*** 139 Wis.2d at 27, 406 N.W.2d at 737.

The trial court precluded the officers' opinions on the alleged victim's character for truthfulness because it feared that those opinions would replace the jurors' personal observations of L.Z.'s demeanor and encroach upon their duty to gauge the truthfulness of her testimony.[4] *See* ***In re Estate of Dejmal,*** 95 Wis.2d 141, 151-52, 289 N.W.2d 813, 818 (1980). The trial court properly exercised its discretion because its decision to preclude that evidence was reasoned and reasonable.

By the Court.—Judgment affirmed.

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

(..continued)
criminal defendant with presenting the investigating officers' testimony to rebut evidence of the alleged victim's character for truthfulness. Police officers would not have the familiarity with most alleged victims for this type of rebuttal. Moreover, the trial court has the discretion to exclude that type of threatened retaliatory rebuttal.

[4] The trial court's fear that the jury could view these witnesses as "an opinion poll of the Plover Police Department to determine whether she's truthful or not," is not unwarranted.