COURT OF APPEALS DECISION DATED AND RELEASED

February 22, 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. 95-1331-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL G. BROSINSKI,

Defendant-Appellant.

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

SUNDBY, J. Defendant-Appellant Carl G. Brosinski appeals from a judgment entered on a jury verdict convicting him of two counts of misdemeanor battery.[1] The jury acquitted him of an additional count of misdemeanor battery, one count of felony battery, and one count of threatening injury. The charges arose out of events of June 14, 1994, when Brosinksi and his girlfriend, Janet Haugen, argued at a bar and returning home, he struck her.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS. "We" and "our" refer to the court.

Their versions of what happened differ. According to Brosinski, he accidentally hit Haugen when he tried to stop her from jumping from his moving car. Haugen claims that Brosinski attacked her without provocation.

Because the evidence against Brosinski was circumstantial, his guilt or innocence depended on who the jury believed. The jury's disposition of the charges shows that the jury did not believe all of Haugen's version. Brosinski argues that therefore the trial court should have allowed him to introduce evidence that Haugen was an inveterate liar. In view of the relations between the parties, the risk that Haugen sought to retaliate against Brosinski made Haugen's history of lying admissible to show that she was not credible.

In August 1993, Haugen culminated her five-year affair with Brosinski by leaving her family to live with him. When she realized that he did not intend to divorce his wife and marry her, their relationship deteriorated. On the evening in question, Haugen left when they arrived home but returned later. She told Brosinski that she was going to fix it so that he would never hit her again, and left. When she tried to call him, he would not apeak to her. Four days later, Haugen accused Brosinski of the assaults with which he was charged.

Defendant sought to show through his witnesses and cross-examination that: (1) on March 25, 1994, the state department of agriculture terminated Haugen's employment for falsifying records; (2) in 1993, Haugen falsely accused her father of sexually assaulting her over a long period of time; (3) in 1993, she requested a leave of absence because she had been raped; and (4) in August 1993, the arresting officer in this case filed a Statement of Emergency Detention of Haugen under ch. 51, STATS., based on information provided by Haugen's mother and sister that she had falsely accused her sister of stabbing her with a pitchfork and falsely claimed that she had been a victim of child abuse.

At the hearing on October 10, 1994, on defendant's motion *in limine*, Haugen admitted that she had filed false reports with her employer and had been discharged for that reason; admitted that her sister had not stabbed her with a pitchfork; admitted that she falsely accused her father of sexually abusing her; admitted that she had arranged for a blood test to determine

whether her father was the father of her child; and admitted that she had falsely represented to her employer that she had been raped.

The trial court denied defendant's motion because it concluded that this evidence that Haugen had been untruthful in other matters was not relevant to the question of her truthfulness as to the alleged assault by the defendant.

Brosinski argues that this evidence was admissible under § 904.04(1)(b), STATS., which provides:

> Except as provided in s. 921.11(2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor ....

Defendant claims that the evidence he seeks to introduce would show a pertinent character trait of Haugen--untruthfulness.

Brosinski also argues that evidence as to Haugen's persistent untruthfulness was admissible under § 906.08(2), STATS., which provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crimes as provided in s. 906.09, may not be provided by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

We need not consider whether defendant's evidence was admissible under § 906.08(2), STATS., because we conclude it was admissible under § 904.04(1), STATS. Haugen's persistent untruthfulness rose to the level of a trait of character. The trial court found that, even if relevant, the probative value of such evidence was outweighed by its prejudicial effect. Plainly, evidence that Haugen was a habitual and bizarre liar was prejudicial but the test is whether it is *unfairly* prejudicial. Two facts lead us to conclude that evidence as to Haugen's untruthfulness is not unfairly prejudicial. First, Haugen was the only witness to the incident. Second, defendant's evidence was not "other acts" evidence but showed a pervasive and persistent pattern of lying to retaliate against the object of her lies or to obtain some advantage from her lies. Her failed affair with defendant followed closely by her charges against Brosinski made those charges suspect. Had the jury heard the substantial evidence that Haugen would like to retaliate, the jury may well have reached a different verdict on all charges.

In view of our decision as to the statutory basis for admission of defendant's evidence, we need not reach defendant's constitutional contention.

By the Court.—Judgment reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.