COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0657-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALBERT GERALD KOKKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.[1] Albert Gerald Kokke appeals from a judgment of conviction for fourth-degree sexual assault pursuant to WIS. STAT. § 940.225(3m). Kokke argues that the trial court erred when it barred his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

proffered character witnesses from testifying. We uphold the court's ruling and affirm the judgment.

FACTS

¶2 The controlling facts are not in dispute. The State filed a complaint charging Kokke with fourth-degree sexual assault of his daughter-in-law. Subsequently, the State charged Kokke with violating a court order to stay away from the victim and bail jumping. All of the charges were consolidated for purposes of jury trial.

¶3 At the jury trial, Kokke advised the trial court that he intended to call Linda Strelow "on the issue of character." The State objected because Kokke had not timely disclosed the witness. When the court asked for the substance of Strelow's testimony, Kokke's counsel responded:

> Well, she'll testify, an offer of proof would be I have known Al for, since 1993, former neighbor, they babysat my children, we continue to keep in touch and we don't live around each other but I know him to be a person of good character. That would be it, and she knows about this incident, this allegation.

¶4 In response to the trial court's question whether the character evidence would travel to truthfulness, Kokke's counsel responded, "Unless he testifies, it would simply be as to his character." Later, the court again asked, "What trait of character are we looking at here?" Counsel responded:

> Not that he is not a sexual offender obviously, I can't do that, but just as general good character according to these people who have known him and they find him to be of good character.

¶5 The trial court then asked Kokke's counsel about the extent, duration and nature of Strelow's acquaintance with Kokke. Counsel explained that Strelow had been Kokke's neighbor from 1993 to 1996 and that they continued to socialize.

¶6 The trial court then made the following statement:

> Now it seems to me it's kind of a two-edged sword here. I'm trying to look at the potential benefits, probative value versus the possible prejudice, and it seems to me that if she hasn't seen him or if she hasn't lived next door to him for some three or four years—he moved back in 1996 I believe from Delavan and she still lives in Delavan—you know, the State could argue that … the fact that they have to go out to Delavan to find somebody that can testify to his character that he hasn't really seen on a regular basis, four years ago, I don't think there's a great deal that's been lost here if the Court were to rule that she shouldn't be able to testify.

¶7 Kokke's counsel then advised the trial court that the testimony of his additional character witness, Jill Fell, would be essentially the same as Strelow's. Counsel concluded with the statement, "I will forego those witnesses …." In response, the court made the additional statement:

> [A]gain, character, that seems to be very broad in [§] 904.05, but it just seems to me that I don't know if he's a nice guy and these people feel that he's a nice guy, whether that, we're dealing with something here of a sexual nature that generally occurs, this type of offense frequently occurs when there's one-on-one type situations, and I don't know how these women would know or not know, be able to give any probative evidence on that kind of an issue…. If we're talking about, again, truthfulness, reputation, in that regard, we might be talking about something, but when we're talking about situations, particularly in the bedroom … sexual assaults … there are a lot of things especially of a sexual nature that the general public or even people who are somewhat close friends don't know about. Those are matters of privacy, and I just don't think that while there may be some probative value here, that it outweighs the prejudice ….

¶8 The jury found Kokke guilty of the sexual assault charge, but not guilty of the other charges. Kokke appeals from the ensuing judgment of conviction.

DISCUSSION

1. Waiver

¶9 The State first argues that Kokke has waived his appellate argument because the trial court never made a conclusive ruling on the evidentiary issue and because Kokke's counsel stated, "I will forego those witnesses …."

¶10 We appreciate that the trial court's ruling was couched in subjunctive terms. ("I don't think there's a great deal that's been lost if the Court were to rule that she shouldn't be able to testify.") Nonetheless, the court's dialogue with Kokke's counsel and the court's ultimate statements on the issue were in response to Kokke's proffer of the witnesses' testimony as admissible character evidence. A party must state its position on a question with sufficient prominence such that the trial court understands that it is called upon to make a ruling. *See* ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984). Here, Kokke sought to introduce the character evidence, and he debated the question of the admissibility of the evidence with the trial court. Given that scenario, we are satisfied that the court understood that it was required to make a ruling, and that the court's remarks constituted a ruling.

¶11 Since we view the trial court's remarks as a final and conclusive ruling, we reject the State's related argument that Kokke further waived the issue when his counsel stated that he would forego the witnesses. We construe the remark as counsel's indication that he would abide by the court's ruling.

2. Character Evidence

¶12 Kokke argues that the trial court erred by rejecting the testimony of Strelow and Fell as character witnesses. The admissibility of evidence is committed to the trial court's discretion. ***State v. Richard A.P.***, 223 Wis. 2d 777, 789, 589 N.W.2d 674 (Ct. App. 1998). In reviewing an evidentiary ruling, we look to see if the trial court's ruling is supported by a logical rationale, is based on facts of record and involves no error of law. ***Id***. at 791.

¶13 WISCONSIN STAT. § 904.04 addresses the admissibility of character evidence. In relevant part, the statute states:

> **(1)** CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> (a) *Character of accused.* Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same[.]

¶14 In ***Milenkovic v. State***, 86 Wis. 2d 272, 278, 272 N.W.2d 320 (Ct. App. 1978), the court of appeals addressed the general rule against character evidence as recited in WIS. STAT. § 904.04:

> American law has long recognized the weakness of an inference that a person necessarily acts in accordance with his character upon a particular occasion. That inference has been rejected in the general rule that character evidence is irrelevant and inadmissible to prove conduct upon a particular occasion. Sec. 904.04(1), Stats. However, *when the character of* the victim or *an accused is a consequential material proposition,* or character evidence is utilized for impeachment purposes, the ban on the circumstantial use of character evidence is inapplicable. (Emphasis added.)

¶15 We take particular note of the ***Milenkovic*** statement that the character evidence must relate to a "consequential material proposition" before the

rule against character evidence is relaxed. And it is on this point that we affirm the trial court's ruling.

¶16 Kokke's offer of proof and his counsel's ensuing dialogue with the trial court represented that the testimony of Strelow and Fell would speak to Kokke's "character," "general good character" or "good character." The general nature of this proffered testimony troubled the court. The court twice asked Kokke what particular trait the evidence would address. Both times, Kokke responded in terms of general character. In rejecting the proffered evidence, the court noted that if the evidence had been particularly focused, it might rule differently: "If we're talking about, again, truthfulness, reputation, in that regard, we might be talking about something."

¶17 We conclude that the trial court's hesitation on this point was well taken. As we have noted, ***Milenkovic*** requires that the character evidence speak to a "consequential material proposition." In addition, WIS. STAT. § 904.04(1)(a) requires that character evidence on behalf of an accused speak to a "*pertinent trait* of the accused's character." (Emphasis added.) The generalized nature of the proffered evidence did not focus on any pertinent trait of Kokke that was of a "consequential material proposition" in the case. Therefore, the evidence was not relevant under WIS. STAT. § 904.01. ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.")

¶18 A recognized commentator on evidence is in accord with our holding:

> Neither the defendant nor the prosecution may offer evidence of "general" good or bad character. To be relevant, it is necessary that evidence of character, good or bad, be confined to a particular trait of character, the existence or nonexistence of which would be relevant to the crime charged or the credibility of a witness.

1 WHARTON'S CRIMINAL EVIDENCE § 4.22, at 361 (15th ed. 1997).

¶19 Kokke also argues that the evidence was admissible under our decision in ***Richard A.P.*** We disagree. In fact, ***Richard A.P.*** supports the exclusion of the testimony. There, the defendant was charged with sexual assault of a child. ***Richard A.P.***, 223 Wis. 2d at 781. He sought to introduce expert testimony contending that he did not exhibit traits of any diagnosable sexual disorder such as pedophilia. ***Id.*** at 795. Unlike this case, the evidence in ***Richard A.P.*** was not generalized character evidence. Instead, it focused on the absence of a particular and pertinent trait of the defendant's psychological makeup, placing him in a category of people less likely to commit a sexual offense against a child. *See* ***id***. at 792.

¶20 Because Kokke's proffered character evidence was general in nature, it was not relevant. We uphold the trial court's ruling barring the evidence. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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