

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 9, 2011

A. John Voelker
Acting 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. 2010AP2177-CR

Cir. Ct. No. 2006CF108

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KYLE R. GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Kyle Green appeals a judgment convicting him of one count of repeated sexual assault of Amber J. He also appeals an order denying his postconviction motion for a new trial. Green argues that the trial court erroneously allowed four witnesses to testify regarding Amber's character for

truthfulness or vouch for her credibility and his trial counsel was ineffective for failing to call several witnesses to contradict Amber's testimony regarding some details of her story. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 Green was charged with two counts of repeatedly sexually assaulting Amber. The jury convicted him of the first count in which she alleged sexual assaults when she was eleven to twelve years old, and acquitted him of the second count alleging crimes when Amber was thirteen to fourteen years old.

¶3 Amber testified regarding several incidents when she was eleven and twelve years old. She testified that she would often ride an all-terrain vehicle with Green around his father's property. He would sit behind her and his hands would repeatedly slide up under her bra and hold her breasts. On some occasions, they would stop and Green would turn his back to her and perform an action resembling masturbation. She further testified that Green once massaged her inner thigh and the side of her vagina. Green danced with her and commented that slow dancing was just like having sex. On several occasions, Green asked her to massage his thigh and she noticed a hard bump on his thigh which she eventually realized was his penis. She also testified that Green made her touch his penis when he drove her to a friend's house. When she was twelve, Green convinced her to sleep in his bed with him. He had her rub his inner thigh. After some time, Amber turned away and tried to sleep, but Green got on top of her.

¶4 Amber also testified to other incidents that occurred at a later date. When she told her mother about the later incidents, her mother kicked Green out of the house. She allowed him to return a few days later when she learned that Amber had lied about not smoking, and believed that Amber was therefore lying

about Green's actions, as retaliation for not being allowed to date an older boy. After Green returned to the house, Amber did not come home from school and was eventually found in an arcade where she told police about the sexual contact with Green. Amber later met with a social worker and sheriff's deputy Rochelle Krapf at school where she told them about the incidents with Green.

¶5 At trial, Amber's sisters and her best friend testified that Amber was truthful. Krapf testified that Amber had a "genuine" emotional state and "had this relief of being able to finally talk about" what happened to her.

DISCUSSION

¶6 Green argues that Amber's sisters and friend should not have been allowed to testify to Amber's reputation for truthfulness because Amber's character for truthfulness had not been attacked. Whether to allow evidence of a truthful character is committed to the trial court's discretion. *State v. Eugenio*, 219 Wis. 2d 391, 399, 579 N.W.2d 642 (1998). Under WIS. STAT. § 906.08(1) (2009-10),¹ evidence of Amber's truthful character could not be admitted merely because she was accused of lying in this instance, but it is admissible because her truthfulness was more generally attacked.

¶7 In its opening statement, defense counsel argued that Amber fabricated all of the incidents with Green because of a conflict with her mother. This defense continued during cross examination by suggesting that all of the details about Green's sexual contact with her were not included in the initial

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

allegations. Amber's mother accused her of lying about smoking. Contrary to Green's assertion, the attack on Amber's credibility was not a singular attack on one instance of lying, but rather a broad allegation that Amber was untruthful about years of her life and had manufactured her entire testimony. Therefore, the trial court properly exercised its discretion when it admitted evidence from Amber's sisters and friend to rehabilitate her character for truthfulness.

¶8 Green also argues that the trial court erred by admitting Krapf's testimony that Amber's demeanor was "genuine" and that Amber "had this relief of finally being able to talk about." While no witness can give an opinion that another mentally and physically competent witness is telling the truth, *see State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), it is proper for an officer to describe the demeanor of a person the officer interviews. *State v. Davis*, 199 Wis. 2d 513, 521, 545 N.W.2d 244 (Ct. App. 1996). Krapf's description of Amber's demeanor as "genuine" was not necessarily a comment on Amber's credibility. In the context of the question and the entire answer, Krapf appeared to use "genuine" to describe Amber's demeanor as "one that is not forced but arises naturally." *See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY*, 948 (unabr. 2002). Krapf's statement that Amber appeared relieved constituted a permissible comment on Amber's emotional state and did not usurp the jury's function of determining Amber's credibility.

¶9 Finally, Green argues that his trial counsel was ineffective for failing to call family members who would have contradicted Amber's statements that she drove the all-terrain vehicle with Green sitting behind her and that they rode for hours, sometimes all day. Green's relatives would have testified that he usually drove and the trail could be traversed in only fifteen minutes. They also would

have testified that Amber was comfortable being around Green throughout the time she claims the sexual assaults occurred.

¶10 Green has not established either deficient performance or prejudice from his counsel's failure to call these witnesses. Green himself admitted to police that he often rode behind Amber with his arms around her waist and he would accidentally touch her breasts when they rode over bumps. He also admitted that he asked her to massage his legs and thigh. The length of the trail does not necessarily contradict Amber's assertion of the amount of time they spent on the vehicle and does not contradict her claims of sexual assault on the vehicle or elsewhere. Regarding her feelings about Green, Amber testified that she loved and cared for Green. Relatives testifying about her fondness for him would not have contradicted her own testimony. Reasonably competent counsel would choose not to present testimony that contradicted his own client's statements and that would have had little appreciable impeachment value on nonessential details.

By the Court.—Judgment and order affirmed.

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

