COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1129-CR **Cir. Ct. No. 2009CF538**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARLENE K. FREDRICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA and MARY KAY WAGNER, Judges. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Marlene K. Fredrick appeals from a judgment of conviction and an order denying her motion for postconviction relief.[1] Fredrick contends that there was insufficient evidence to convict her of harboring or aiding a felon and perjury. She further contends that the circuit court erroneously exercised its discretion at sentencing. We reject Fredrick's claims and affirm the judgment and order.

¶2 In the early hours of May 31, 2008, David Hall shot and killed Kenya McEwen outside the B&S Lounge in Kenosha, Wisconsin. Fredrick owned the B&S Lounge and dated Hall. Following a jury trial, Fredrick was convicted of harboring or aiding a felon for efforts she took to get rid of evidence of McEwen's murder. She was also convicted of perjury for lying at the John Doe proceedings about the murder.

¶3 The circuit court sentenced Fredrick to two consecutive terms of one-and-one-half years of initial confinement followed by two years of extended supervision. Fredrick filed a postconviction motion in which she claimed there was insufficient evidence for her convictions and that the circuit court erroneously exercised its discretion at sentencing. The circuit court denied the motion. This appeal follows.

¶4 Fredrick first contends that there was insufficient evidence to convict her of harboring or aiding a felon and perjury. In reviewing the sufficiency of the evidence to support a conviction, this court may not substitute its judgment for that

[1] The Honorable Barbara A. Kluka presided over trial and entered the judgment of conviction. The Honorable Mary Kay Wagner entered the order denying the defendant's postconviction motion.

of the jury unless the evidence, viewed most favorable to the State and the conviction, "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, this court may not overturn a verdict even if we believe that the jury should not have found guilt based on the evidence before it. ***Id.***

¶5 To convict Fredrick of harboring or aiding a felon, the State was required to prove four elements: (1) Fredrick aided Hall; (2) Hall was a felon; (3) Fredrick knew that Hall had engaged in conduct which constitutes a felony; and (4) Fredrick aided Hall with the intent to prevent his apprehension. *See* WIS JI-CRIMINAL 1790; WIS. STAT. § 946.47(1)(a) (2007-08).[2]

¶6 With respect to the first element, jurors could have reasonably concluded that Fredrick aided Hall. They could have reached this conclusion from the testimony of Fredrick's sister, Betty Kent.

¶7 Kent testified that she heard about the shooting the morning of May 31, 2008. She tried calling Fredrick and then drove to the B&S Lounge. Kent did not see Fredrick but looked around the parking lot. There, she saw blood. She also saw a shiny piece of metal near the sewer that she identified as a bullet casing. Kent picked up the metal object, put it in a napkin, and took it.

[2] All references to the Wisconsin Statutes are to the 2007-08 version.

¶8 Kent subsequently called Fredrick and told her what she had found. Fredrick instructed Kent to "get rid of it." Kent testified that she did not remember what else Fredrick said. But the prosecutor questioned Kent about testimony she had given in the John Doe proceedings about McEwen's murder. He then quoted Kent as testifying that Fredrick told her to "discard" the casing "in the sewer" because it was "just going to complicate things." He also quoted Kent as testifying that she responded by asking Fredrick "how she could expect me to just do that and excuse that when somebody had died" and by telling Fredrick "[t]hat wasn't right."

¶9 Kent took the bullet casing to police despite Fredrick's request. Kent saw Fredrick at the police station. Kent initially testified that she did not know if Fredrick knew she had turned over the casing to police. But the prosecutor again asked Kent about the John Doe testimony in which she said she thought Fredrick "did assume" she turned over the casing to police because Fredrick approached her in the police department parking lot, appearing angry, and said "thanks a lot" and "[w]hat about when you needed me and I said I'm here for you."

¶10 With respect to the second element, jurors could have reasonably concluded that Hall was a felon. They could have reached this conclusion from the testimony of two fellow inmates—Jimmie Hoskins and DeAndre Blair.

¶11 Hoskins and Blair testified that Hall admitted to shooting and killing McEwen. The fact that Hall was not convicted of murdering McEwen at the time of Fredrick's assistance is irrelevant to the consideration of this element. *See* ***State v. Jones***, 98 Wis. 2d 679, 681, 298 N.W.2d 100 (Ct. App. 1980) ("We have no trouble holding that the legislature meant to define 'felon' in [WIS. STAT. §]

946.47 … as a person who engages in prohibited felonious conduct, whether convicted or not.").

¶12 With respect to the third element, jurors could have reasonably concluded that Fredrick knew that Hall had engaged in conduct which constitutes a felony. They could have reached this conclusion from the testimony of Daryl Moore, who provided security at the B&S Lounge and recounted the events surrounding McEwen's murder.

¶13 Moore testified that McEwen was thrown out of the B&S Lounge on May 26, 2008, after an altercation. Moore said that he met Hall, Fredrick, and another security guard at Fredrick's home to discuss the altercation. He also said that Hall "pulled out a gun at the end of the [B&S Lounge] parking lot and fired it into the air" twice the next time they worked together.

¶14 Shortly after the shooting on May 31, 2008, Moore saw Fredrick and Hall outside together by a red fence at the back of the B&S Lounge. Hall was leaning over the fence, with his arms hanging over it onto the other side. Moore estimated that Hall and Fredrick were by the fence for five to ten minutes and said that Hall's hands were over the fence the entire time. Police later found a small black nylon holster for a firearm along the fence line where Moore saw Fredrick and Hall.[3] This evidence, while circumstantial, provided jurors with a basis for concluding that Fredrick learned that Hall had shot McEwen before she asked Kent to discard the bullet casing. This is particularly true when considering

[3] An employee from Gander Mountain testified about a man and woman trying to return .22 caliber bullets for .25 caliber bullets in the early afternoon of May 27, 2008. The clerk also testified that the holster found by police was consistent with one sold around the same time as the .25 bullets. Finally, the clerk identified Fredrick as the female customer who bought the bullets.

Moore's testimony that he had previously met with Fredrick and Hall to discuss McEwen after McEwen's initial altercation at the B&S Lounge.

¶15 Finally, with respect to the fourth element, jurors could have reasonably concluded that Fredrick aided Hall with the intent to prevent his apprehension. The jury could have reached this conclusion from several witnesses.

¶16 At trial, several witnesses attested to Hall and Fredrick's close relationship. Moore testified that he thought Hall and Fredrick dated. Three fellow inmates of Hall's—Hoskins, Blair, and Jacque Buckley—also testified about Fredrick and Hall's relationship and how Fredrick tried helping Hall while he was in jail. This help included attempting to get witnesses to change their statements or not come to court. It also included putting money in Blair's and Buckley's prison accounts at Hall's request. All of this evidence supports the jury's conclusion that Fredrick helped Hall with the intent to prevent law enforcement from apprehending him.

¶17 To convict Fredrick of perjury, the State was required to prove five elements: (1) Fredrick "orally made a statement while under oath;" (2) "the statement was false when made;" (3) Fredrick "did not believe the statement to be true when made;" (4) "[t]he statement was made in a proceeding before a court;" and (5) "[t]he statement was material to the proceeding." *See* WIS JI-CRIMINAL 1750; WIS. STAT. § 946.31.

¶18 The circuit court explained in its postconviction order that Fredrick's perjury conviction was supported by evidence that Fredrick lied during the John Doe proceedings about McEwen's murder. The court observed:

> I think there were a couple of different things that the jurors could have concluded or rendered their guilty verdict on. One, that on both November 3rd and November 17th Ms. Fredrick testified, in essence, that she was, quote, not back there near the fence where the holster was later found. She denied telling Betty Kent to get rid of it after Kent called and said that she had found it. And she testified that she told Betty Kent to turn the casing over to the police.
>
> So, those—that evidence again sufficient on the—for the jury to conclude that she testified falsely at the John Doe proceedings in this case and it was again sufficient evidence to convict her on the perjury count.

¶19 The record does not include Fredrick's John Doe testimony.[4] Consequently, we must presume that it supports the circuit court's rulings and findings. *See* ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 638, 273 N.W.2d 233 (1979); ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

¶20 With respect to the first element, jurors could have reasonably concluded that Fredrick orally made a statement while under oath at the John Doe proceedings. This conclusion is supported by the nature of John Doe proceedings, the circuit court's ruling, and what was said on the record about Fredrick's John Doe testimony. It is further supported by our presumption that missing parts of the records support the circuit court's ruling. *See* ***Austin***, 86 Wis. 2d at 638; ***Fiumefreddo***, 174 Wis. 2d at 26-27.

¶21 With respect to the second element, jurors could have reasonably concluded that Fredrick's statements at the John Doe proceedings were false when made. As recounted by the circuit court, Fredrick's John Doe testimony

[4] Fredrick's John Doe testimony was read for the jury but not recorded by the court reporter.

contradicted Moore's and Kent's trial testimony regarding her presence at the fence and her instruction to "get rid of" the bullet casing.

¶22 With respect to the third element, jurors could have reasonably concluded that Fredrick did not believe her statements at the John Doe proceedings to be true when she made them. The statements at issue involved simple facts about which Fredrick was unlikely to be confused or mistaken. Accordingly, the jurors could have reasonably concluded that any errors in her John Doe testimony were misrepresentations. That, combined with the strength of Moore's and Kent's testimony and the evidence of Fredrick's close relationship with Hall and efforts she made to help him, gave jurors a reasonable basis for concluding that Fredrick lied.

¶23 With respect to the fourth element, jurors could have reasonably concluded that Fredrick gave her John Doe testimony in a proceeding before a court. Again, this conclusion is supported by the nature of John Doe proceedings, the circuit court's ruling, and what was said on the record about Fredrick's John Doe testimony. It is further supported by our presumption that missing parts of the records support the circuit court's ruling. *See* ***Austin***, 86 Wis. 2d at 638; ***Fiumefreddo***, 174 Wis. 2d at 26-27.

¶24 Finally, with respect to the fifth element, jurors could have reasonably concluded that Fredrick's statement was material to the proceeding. The purpose of the John Doe proceedings was to investigate McEwen's murder. The information about which Fredrick lied was central to that investigation. Consequently, we are satisfied that this last element was met.

¶25 Fredrick next contends that the circuit court erroneously exercised its discretion at sentencing. Specifically, she complains that the sentence of

imprisonment will serve no useful deterrent purpose, that she is not a future danger to society, and that the only rationale for rejecting probation was based on acts committed by someone other than her (i.e., Hall's murder of McEwen on her property).

¶26 Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We afford a strong presumption of reasonability to the circuit court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the defendant. ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76.

¶27 To properly exercise sentencing discretion, the circuit court must state on the record its reasons for selecting the particular sentence imposed. ***Gallion***, 270 Wis. 2d 535, ¶¶39-40. "The primary sentencing factors which a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public." *See* ***Ziegler***, 289 Wis. 2d 594, ¶23. The court may consider other factors such as the defendant's criminal record, history of undesirable behavior, demeanor, remorse, cooperativeness, educational background, employment record, and rehabilitative needs. *See* ***id.***

¶28 Here, the circuit court properly exercised its discretion by providing a rational and explainable basis for sentencing Fredrick to two consecutive terms of one-and-one-half years of initial confinement followed by two years of extended supervision. In doing so, the court considered everything Fredrick sets forth in support of a lesser sentence—her lack of criminal record or dependency issues and her productive, pro-social life up until these crimes. However, the court

ultimately determined that the gravity of her crimes warranted prison time. It noted the damage that her crimes caused society, particularly when done to interfere with a murder investigation. The court also expressed concern about Fredrick's failure to check on McEwen or try to help him or the investigation after the shooting on her property. Reviewing the circuit court's remarks, we see no reason to disturb its sentence.

By the Court.—Judgment and order affirmed.

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