COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1235-CR **Cir. Ct. No. 2016CF37**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BOBBIE J. MARTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Reversed and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Bobbie Martz appeals a judgment convicting her of perjury as a party to a crime, and an order denying her postconviction motion. She challenges the sufficiency of the evidence to support the verdict. We conclude the State failed to present sufficient credible evidence of perjury. Accordingly, we reverse the judgment and order, and we remand the cause with directions to dismiss the case with prejudice.

¶2 The alleged perjury occurred at a preliminary hearing in a separate case where Martz's son was charged with multiple crimes arising out of his beating and strangling of Diane.[1] The State alleged Martz encouraged Adam Grendziak to make a false statement that he was with her son at the time the assault occurred. At the preliminary hearing, Grendziak testified as follows:

> Q: Did you see him [Martz's son] at all between the night of October 18 or the early morning of October 19?
>
> A: Yes.
>
> Q: And when did you see him?
>
> A: We were together pretty much the whole time.

¶3 At the trial on Martz's perjury charge, a police officer who investigated the assault testified that at the preliminary hearing Grendziak specifically denied stopping at Diane's residence. A transcript of the preliminary

[1] Pursuant to WIS. STAT. RULE 809.86(4) (2015-16), we use a pseudonym instead of the victim's name. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

hearing shows the officer was mistaken. Grendziak was not asked, and did not say, whether he and Martz's son went to Diane's residence.[2]

¶4 Whether the State presented sufficient evidence to support the verdict is a question of law subject to our independent review. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 158, 717 N.W.2d 676. A defendant seeking to overturn a verdict on the basis of insufficient evidence bears a heavy burden to show the evidence could not reasonably support his or her guilt. ***State v. Beamon***, 2013 WI 47, ¶21, 347 Wis. 2d 559, 830 N.W.2d 681. This court must affirm a verdict unless the evidence, viewed most favorably to the State and the conviction, is insufficient to establish all of the elements of an offense beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Martz cannot be guilty of being a party to the crime of Grendziak's perjury unless the State provided sufficient evidence that Grendziak committed perjury. An element of perjury is that the testimony was false when made. *See* WIS JI—CRIMINAL 1750 (2004).

¶5 We agree with Martz that, given all of the evidence submitted at Martz's perjury trial, a jury could not have reasonably concluded or inferred Grendziak's preliminary hearing testimony was false. The only actual testimony by Grendziak at the preliminary hearing that the State relied upon to prove perjury was Grendziak's testimony that he and Martz's son were "together pretty much the whole time." This testimony does not imply, much less aver, that Martz's son was never out of Grendziak's sight.

[2] Relatedly, the prosecutor told the jury during closing arguments that the preliminary hearing transcript reflected that Grendziak denied being at Diane's residence that night at issue. Martz's trial counsel did not object to the prosecutor's misstatements in this regard.

¶6 Perjury is not committed by a witness who speaks the literal truth, even if the witness succeeds in derailing the questioner or gives answers that are shrewdly calculated to evade. ***Bronston v. United States***, 409 U.S. 352, 360, 362 (1973). Any problems arising from the literally true answers must be resolved through further questioning by the attorneys, ***id.***, which, in this case, did not occur. Because the State presented no credible evidence that Grendziak's testimony—in particular his assertion that he and Martz's son were together "pretty much" the whole time—was not literally true, he did not commit perjury and Martz cannot be convicted of being a party to the crime of perjury.

¶7 When the State presents insufficient evidence to support a conviction, any retrial would constitute double jeopardy. *See* ***Burks v. United States***, 437 U.S. 1, 12-14 (1978). Therefore, the remedy is dismissal with prejudice. On remand, the circuit court is directed to vacate the judgment of conviction and dismiss the case.

By the Court.— Judgment and order reversed and cause remanded with directions.

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