COURT OF APPEALS
DECISION
DATED AND RELEASED

March 5, 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. 95-1236-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ORLANDER ISABELL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: RAYMOND E. GIERINGER, Reserve Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Orlander Isabell appeals from a judgment of conviction, following a jury trial, for welfare fraud (failure to report receipt of income/failure to report a change in circumstances), contrary to §§ 49.12(9) & (1), STATS.[1] She argues that the evidence was insufficient to support the jury's

[1] We note that the judgment of conviction lists Isabell as having violated § 943.20(3)(c), STATS., applicable when a defendant's welfare fraud exceeds $2,500, and the penalty provision cross-

finding that she failed to notify her caseworker of a change in circumstances within the statutorily prescribed ten-day reporting period. She also argues that the trial court improperly excluded the testimony of one of her witnesses. Because we conclude that the evidence was sufficient to support Isabell's conviction and that the trial court did not erroneously exercise its discretion in excluding the testimony of the witness, we affirm.

Isabell worked for Milwaukee County as an economic support specialist (caseworker) for several years. Her primary duties consisted of determining applicants' eligibility for public assistance. In the summer of 1992, she took a medical leave of absence from her job and began receiving public assistance. On September 29, 1992, she stopped by the office to let her supervisors and co-workers know that she would be returning to work on October 1. She then worked daily, and routinely saw James Seymour, who had been her caseworker when she was receiving benefits. Isabell, however, illegally continued to receive welfare benefits until December of 1992.

Section 49.12(9), STATS., provides:

> If any person obtains for himself or herself, or for any other person or dependents or both, assistance under this chapter on the basis of facts stated to the authorities charged with the responsibility of furnishing assistance and fails to notify said authorities within 10 days of any change in the facts as originally stated and continues to receive assistance based on the originally stated facts such failure to notify shall be considered a fraud and the penalties in sub. (1) shall apply. The negotiation of a check, share draft or other draft received in payment of such assistance by the recipient or the withdrawal of any funds credited to the recipient's account through the use of any other money transfer technique after any change in such facts which

(..continued)
referenced by § 49.12(1), STATS. Because the amount of Isabell's fraud was $1,234.00, § 943.20(3)(c) is inapplicable. Therefore, we order that the judgment be amended.

> would render the person ineligible for such assistance shall be prima facie evidence of fraud in any such case.

Further, § 49.12(1) provides:

> Any person who, with intent to secure public assistance under this chapter, whether for himself or herself or for some other person, wilfully makes any false representations may, if the value of the assistance so secured does not exceed $300, be required to forfeit not more than $1,000; if the value of the assistance exceeds $300 but does not exceed $1,000, be fined not more than $250 or imprisoned for not more than 6 months or both; if the value of the assistance exceeds $1,000 but does not exceed $2,500, be fined not more than $500 or imprisoned for not more than 5 years or both; and if the value of the assistance exceeds $2,500, be punished as prescribed under s. 943.20 (3) (c).

On November 18, 1992, while Isabell was working and still receiving public assistance, Seymour received a sanction regarding Isabell's case. He took it to her and, according to his trial testimony, requested that she write him a note indicating that her case should be closed. Isabell complied with Seymour's request. Seymour testified that if Isabell had notified him of her return to work within ten days of October 1, Isabell would have been ineligible to receive the November and December checks totalling $1,234.00. Eventually, Isabell's benefits were terminated and welfare fraud charges were brought against her.

The crux of this case was whether Isabell gave Seymour sufficient notice of her change of circumstances under § 49.12(9) & (1), STATS. Isabell maintains that given Seymour's knowledge that she had returned to work, the evidence could not prove that she intentionally failed to notify the authorities of the change in her circumstances within ten days. The State, however, argues that under § 49.12(9) & (1), Isabell had to affirmatively inform Seymour of her

return to work, her expected future monthly income, and that she was receiving paychecks.

Our standard of review is as follows:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably 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. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-758 (1990) (citations omitted). Where there are inconsistencies within testimony, it is the trier of fact's duty to determine the weight and credibility of the testimony. ***Thomas v. State***, 92 Wis.2d 372, 381-382, 284 N.W.2d 917, 922 (1979). We will substitute our judgment for that of the trier of fact when the fact-finder relied on evidence that was "inherently or patently incredible" -- that kind of evidence which conflicts with nature or with fully established or conceded facts. ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

In support of her argument that she gave direct notice to Seymour on September 29 and, thus, that the jury lacked sufficient evidence to convict her, Isabell points to Seymour's testimony on cross-examination when Seymour acknowledged that he testified at the preliminary hearing that it might have been "possible" that Isabell stated that she would return to work on October 1. Seymour further testified, however, that while that might have been "possible," he did not recall Isabell informing him of her return date. In fact, Seymour testified that despite seeing Isabell around the office, he did not know of her exact return date, the amount of hours she was working, or her wages. Despite

Isabell's protests to the contrary, Seymour's testimony was not so contradictory or "so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt."

Additionally, Isabell never reported to Seymour that she had begun receiving paychecks. Isabell also left blank the section of the September monthly report form which required her to report future income for the upcoming month despite the fact that she completed the form on October 9, and despite the fact that she had been back at work since October 1 and thus knew what her income would be. The evidence was sufficient to support Isabell's conviction.

Isabell also argues that the trial court improperly excluded the testimony from a former caseworker, James Haller, who would have supported Isabell's contention that her case should have been retrospectively budgeted. The State presented four witnesses who discussed what would have been the proper method of calculation in this case. Isabell argues that Haller's testimony would have supported her claim that she wrongfully "secured" only $177 instead of $1,234. The trial court excluded Haller's testimony explaining:

> I believe the entire testimony would involve the law. It's the duty of the Court to instruct on the law, not to get laymen's opinion as to what the law is and why the law could be misinterpreted. It's not the function of a witness to come forth and testify as to what the law is and how it could be mistaken. That's not the function of a witness. So, therefore, it would serve no purpose because the law is the law and the law is only one way, so it will be absolutely cumulative, it would not be the proper grounds to testify—what would the words be—testimony for the witness to testify about, because he's testifying on the law. Period. So we'll proceed without him.

In welfare fraud cases involving more than $100, as in theft cases, the jury must make a finding of the value of the amount of public assistance fraudulently secured. *See* comment 3 to WIS J I—CRIMINAL 1850 (cross-

referenced by WIS J I—CRIMINAL 1854). "While the value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established 'beyond a reasonable doubt.'" ***Id.***

We conclude that even if exclusion of Haller's testimony was wrong, it was harmless. In light of the substantial evidence presented regarding how public assistance benefits would have been calculated if Isabell had complied with the ten-day reporting period of § 49.12(9), STATS., admission of Haller's testimony would not have changed the outcome of the proceedings. *See* ***State v. Dyess***, 124 Wis.2d 525, 543-545, 370 N.W.2d 222, 231-232 (1985). Therefore, we affirm the judgment.[2]

By the Court. – Judgment affirmed.

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

[2] Isabell also raises the defense of mistake under § 939.43(1), STATS., for the first time in her reply brief. Thus, we will not address this argument. ***In re the Estate of Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981).