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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

May 28, 2014

To:

Hon. Rebecca F. Dallet
Circuit Court Judge
Branch 40
821 W State St
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Scott D. Connors
Law Office of Scott D Connors
10125 W. North Ave.
Wauwatosa, WI 53226

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Loteria Ln Harris
2564 N. 39th St.
Milwaukee, WI 53210

You are hereby notified that the Court has entered the following opinion and order:

2013AP1921-CRNM State of Wisconsin v. Loteria Ln Harris
(L.C. # 2010CF5604)

Before Curley, P.J., Fine and Brennan, JJ.

Loteria L. Harris appeals from a judgment of conviction for one count of being a felon in possession of a firearm, contrary to WIS. STAT. § 941.29(2)(a) (2009–10).[1] Harris's postconviction and appellate lawyer, Scott D. Connors, Esq., has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, to which Harris has not responded. We have independently reviewed the Record and the no-merit report as

[1] All references to the Wisconsin Statutes are to the 2011–12 version unless otherwise noted.

mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

According to the criminal complaint, police officers responding to a report of a fight outside a bar spoke with two private security guards about a gun they seized from a patron. One of the guards, Justin Fields, told the officers that during an altercation outside the bar involving a crowd of people, he noticed a woman—later identified as Harris—holding a firearm. The complaint states that "Fields drew his own weapon and ordered [Harris] to drop the firearm," which she did and then "walked quickly into the crowd." Fields was not able to immediately retrieve the gun and a man picked it up and took it. Fields and another security guard, Jovan Williams, saw Harris with the gun again. Williams ordered her to drop it and she did. Williams recovered the gun and turned it over to the police officers when they arrived.

Harris was charged with being a felon in possession of a firearm. At trial, the security guards' testimony was generally consistent with what was alleged in the complaint. Harris took the stand in her own defense and testified that she was one of the patrons leaving the bar as an altercation was occurring in the street. She said that as she and her cousin walked toward their car, Harris saw a man who "kept grabbing his waist at the side ... like he had a gun." Harris said that she and her cousin started to hurry toward their car and saw one of the armed security guards as they walked. Harris said she also saw a different man pass a gun to another man. Then, when Harris was "five or six feet" from her car, she saw a gun on the ground that she "believe[d]" was the same gun that she saw passed from one man to another. Harris testified that she picked it up and "was gonna try to just give it to [the security guard she had seen] so nobody wouldn't get hurt." Seconds later, Fields "was yelling and screaming" and Harris "didn't know what to do," so she "got nervous and tossed the gun." She denied ever possessing the gun again that night.

The defense asked the trial court to include jury instruction WIS JI—CRIMINAL 1343A, which is based on ***State v. Coleman***, 206 Wis. 2d 199, 556 N.W.2d 701 (1996), the case that recognized "a narrow defense of privilege" to the charge of being a felon in possession of a firearm, *see* ***id.*** at 210, 556 N.W.2d at 705. In the alternative, Harris's trial lawyer asked the trial court to instruct the jury on self-defense and defense of others, without specifying specific pattern jury instructions that would apply. The trial court determined that none of those instructions were appropriate under the facts and refused to give them.[2] The jury found Harris guilty and the trial court granted the State's motion for judgment on the verdict.

The trial court allowed Harris to remain out on bail pending sentencing, in part so that she could care for her ill child. The sentencing was subsequently delayed once at Harris's request because her child was in the hospital. Harris did not appear for the rescheduled sentencing. She ultimately returned to court over a year later, after being charged with new crimes in Racine County. The trial court sentenced Harris to one year of initial confinement and two years of extended supervision.

The no-merit report discusses the procedural history and trial evidence. It concludes that there would be no arguable merit to challenge: (1) the sufficiency of the evidence; (2) the trial court's discretionary decision not to instruct the jury using WIS JI—CRIMINAL 1343A; (3) the trial court's rulings on motions, including its decision to allow the jurors to examine the gun in the jury room; and (4) the trial court's exercise of sentencing discretion. We agree with the no-

[2] The trial court recognized that the standards for giving self-defense and defense-of-others jury instructions are "even harder to meet than [WIS JI—CRIMINAL] 1343A." The parties and the trial court focused the majority of their discussion on WIS JI—CRIMINAL 1343A.

merit report's discussion of those issues and its conclusion that there would be no arguable merit to pursuing those issues on appeal, and we will briefly discuss several of those issues below.

First, there would be no basis to challenge the sufficiency of the evidence. Harris stipulated that she was a felon and both Fields and Williams testified that they saw her holding the gun. Even Harris's own testimony supported the jury's finding that she possessed the gun, albeit for alleged safety reasons.

Second, we turn to the trial court's decision not to give WIS JI—CRIMINAL 1343A or, in the alternative, jury instructions for self-defense and defense of others. Whether to give a requested jury instruction is within the trial court's "broad discretion." ***Coleman***, 206 Wis. 2d at 212, 556 N.W.2d at 706. ***Coleman*** continued:

> [A] criminal defendant is entitled to a jury instruction on a theory of defense if: (1) the defense relates to a legal theory of a defense, as opposed to an interpretation of evidence; (2) the request is timely made; (3) the defense is not adequately covered by other instructions; and (4) the defense is supported by sufficient evidence.

Id. at 212–213, 556 N.W.2d at 706 (citations omitted).

Coleman recognized a "narrow defense of privilege" to being a felon in possession of a firearm that requires the defendant to prove the following in order to be entitled to the defense:

> (1) the defendant was under an unlawful, present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury, or the defendant reasonably believes he or she is under such a threat; (2) the defendant did not recklessly or negligently place himself or herself in a situation in which it was probable that he or she would be forced to possess a firearm; (3) the defendant had no reasonable, legal alternative to possessing a firearm, or reasonably believed that he or she had no such alternative; in other words, the defendant did not have a chance to refuse to possess the firearm

> and also to avoid the threatened harm, or reasonably believed that he or she did not have such a chance; (4) a direct causal relationship may be reasonably anticipated between possessing the firearm and the avoidance of the threatened harm; [and] (5) the defendant did not possess the firearm for any longer than reasonably necessary.

Id. at 210–211, 556 N.W.2d at 705–706 (footnote omitted). ***Coleman*** added:

> We emphasize that a defendant will be able to establish these elements "only on the rarest of occasions," because of the difficulty in proving that he or she did not have a reasonable legal alternative to violating the law, and that he or she possessed the firearm for a period of time no longer than reasonably necessary.

Id. at 211–212, 556 N.W.2d at 706 (citation omitted).

The trial court concluded that Harris did not establish all five ***Coleman*** elements, explaining:

> I don't think that there was an imminent threat. A gun on the ground is not, in this situation as described by [Harris and] the other witness as well … it's not imminent. There are also, as testified to by her and reasonably given the situation, she had numerous alternatives.[3] ***Coleman*** anticipates such a situation where those alternatives are not there. It's very clear…. ["N]o reasonable, legal alternative to possessing a firearm,["] or she reasonably believed that she had no such alternative. And I don't think her belief was reasonable. She testified to all the other things she could have done. Yelling that there is a gun on the ground is certainly one of them, going to her car, having … someone else pick it up who is not a convicted felon. I don't think this meets ***Coleman***.

[3] Harris admitted on cross-examination that instead of picking up the gun, she had the opportunity to: ask her cousin to pick up the gun, enter her vehicle, drive away from the scene, or yell out to the security guards. She said that she chose not to do those things because she "assumed … picking the weapon up and trying to diffuse what could have happened by the wrong person getting the gun, that I could help that way."

(Quoting ***Coleman***, 206 Wis. 2d at 211, 556 N.W.2d at 706; underlining omitted; bolding and italics added.) The trial court also found that the facts did not support giving instructions for self-defense or defense of others, noting that no one was interfering with Harris's cousin and that Harris did not have to "use or threaten to use force in self-defense."

We conclude that there would be no merit to challenging the trial court's discretionary decision not to give WIS JI—CRIMINAL 1343A or other instructions on self-defense or defense of others. At a minimum, Harris's own testimony demonstrated that neither she nor her cousin faced an imminent threat and that there were alternatives available to Harris besides personally picking up the gun.

The final issue we will address is the trial court's exercise of sentencing discretion. We agree that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606, 712 N.W.2d 76, 82, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 851, 720 N.W.2d

695, 699. The weight to be given to each factor is committed to the trial court's discretion. ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court noted that Harris "had a gun in [her] hand in [the] middle of an altercation" and that "somebody could [have] gotten shot because [she was] holding a gun." The trial court discussed Harris's criminal history, which included lying to the police. The trial court also commented on the fact that Harris did not appear for sentencing and did not contact the court to reschedule the sentencing hearing. The trial court said that Harris had shown that she is "not responsible" and "represent[s] a danger to the community." The trial court said that it needed "to deter [Harris] from future behavior" and punish her for her actions. The trial court said that imposing probation would "unduly depreciate[] how serious the case is" and chose to impose the minimum one-year term of initial confinement. It said that two years of extended supervision was "necessary to make sure that [she's] supervised in the community." Based on the trial court's discussion of the ***Gallion*** factors, there would be no merit to alleging that the trial court erroneously exercised its sentencing discretion.

With respect to the severity of the sentence, we note that Harris could have been sentenced to ten years of imprisonment. Her sentence does not shock the public's sentiment. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 108, 622 N.W.2d 449, 456 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). Given the facts under which she possessed a firearm and her failure to appear for sentencing for over a year, the sentence does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."

See ***Ocanas***, 70 Wis. 2d at 185, 233 N.W.2d at 461. For these reasons, we conclude that there would be no arguable merit to a challenge to the trial court's sentencing discretion and the severity of the sentence.

Our independent review of the Record reveals no other potential issues of arguable merit. For example, there do not appear to be any issues of merit associated with the jury selection or the presentation of testimony at trial. Finally, the trial court did not require Harris to pay the DNA surcharge, so there is no basis to raise a challenge pursuant to ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Scott D. Connors, Esq., is relieved of further representation of Harris in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals