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DISTRICT IV

April 16, 2020

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

2018AP800-CRNM State of Wisconsin v. Shana L. Brown (L.C. # 2017CM15)

Before Fitzpatrick, P.J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Shana Brown appeals a judgment of conviction for one count of disorderly conduct, entered after a jury trial. Brown's appellate counsel, Michael Herbert, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18) and ***Anders v. California***, 386 U.S. 738 (1967).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Brown was provided a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, I agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, I affirm.[2]

Brown was charged with disorderly conduct for her actions inside of a gas station toward its employees. The no-merit report addresses whether the evidence was sufficient to support the jury's guilty verdict. This court will affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Credibility of witnesses is for the trier of fact. ***Id.*** at 504.

Without attempting to review the evidence in detail here, the testimony of three of the gas station's employees who observed Brown's alleged conduct inside the station was sufficient to support Brown's conviction for disorderly conduct under WIS. STAT. § 947.01(1). The testimony of the employees was not inherently incredible and, if believed by the jury, was sufficient to meet all the elements of the charge. There is no arguable merit to this issue.

[2] This court previously placed this appeal on hold because the Wisconsin Supreme Court granted a petition for review in ***State v. Trammell***, 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018). The order noted that here, at trial, jury instruction WIS JI-CRIMINAL 140 was given to the jury, and that the supreme court granted review in ***Trammell*** to address whether the holding in ***State v. Avila***, 192 Wis. 2d 870, 532 N.W.2d 423 (1995)—that it is "not reasonably likely" that WIS JI-CRIMINAL 140 reduces the State's burden of proof—is good law; or should ***Avila*** be overruled on the ground that it stands rebutted by empirical evidence. The supreme court has now issued a decision in ***Trammell***, holding "that WIS JI-CRIMINAL 140 does not unconstitutionally reduce the State's burden of proof below the reasonable doubt standard." ***State v. Trammell***, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564.

In addition, any challenge to the circuit court's decision to admit other acts evidence would lack arguable merit. Here, the other acts evidence at issue was an incident involving Brown that occurred at the same gas station a few days prior to the charged conduct. During the prior incident, Brown had allegedly called one of the station employees a racial slur and uttered profanity at her.

The admissibility of evidence lies within the circuit court's sound discretion. *See* ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). When deciding whether to allow other acts evidence, courts must consider whether the evidence is offered for a proper purpose, whether the evidence is relevant, and whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Here, the circuit court ruled that the fact that that a prior incident had occurred and that Brown was not welcome at the station as a result was relevant and admissible. However, the court ruled that the specific details of the incident were not relevant and would not be admitted, as they had the potential to confuse or mislead the jury. Because the record reflects that the court applied the proper legal standard and reached a rational conclusion, I conclude that there would be no arguable merit to challenging the court's decision to admit the other acts evidence.

There also is no arguable merit to a claim that Brown was denied an impartial jury. Prospective jurors are presumed impartial, and the challenger to that presumption bears the burden of proving bias. ***State v. Louis***, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990). The circuit court excused a number of potential jurors for cause, and the defense did not object to any of the panel members who were ultimately chosen for the jury. I see no basis in the record for challenging the impartiality of the jury.

The no-merit report also concludes that there would be no arguable merit to any claim of ineffective assistance of trial counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficiency prejudiced the defense). I agree with counsel's assessment that nothing in the record or the no-merit report would support a non-frivolous claim of ineffective assistance of counsel.

Finally, the no-merit report addresses whether there would be any arguable merit to a claim that Brown's sentence was excessive. Review of a sentence determination begins "with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Disorderly conduct is a Class B misdemeanor for which Brown faced a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both. WIS. STAT. §§ 947.01(1), 939.51(3)(b). In imposing a sentence of eight days of jail time, the court considered the standard sentencing factors articulated in ***State v. Gallion***, 2004 WI 42, ¶¶40-44, 270 Wis. 2d 535, 678 N.W.2d 197. Under the circumstances, it cannot reasonably be argued that Brown's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Upon an independent review of the record, the court has found no other arguable basis for reversing the judgment of conviction. Any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Michael Herbert is relieved of any further representation of Shana Brown in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals