



OFFICE OF THE CLERK
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 II

December 21, 2022

To:

Hon. Rebecca L. Persick
Circuit Court Judge
Electronic Notice

Andrew H. Morgan
Electronic Notice

Melody Lorge
Clerk of Circuit Court
Sheboygan County Courthouse
Electronic Notice

Joel Urmanski
Electronic Notice

Michelle Elizabeth Fischer
6552 N. 58th St.
Milwaukee, WI 53223

Winn S. Collins
Electronic Notice

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

2020AP1048-CRNM State of Wisconsin v. Michelle Elizabeth Fischer
(L.C. #2017CF428)

Before Gundrum, P.J., Grogan and Lazar, JJ.

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).

Michelle Elizabeth Fischer appeals a circuit court judgment convicting her of one count of battery to a law enforcement officer and one count of battery to an emergency rescue worker. Appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20)¹ and *Anders v. California*, 386 U.S. 738 (1967). Fischer was advised of her right to file a response but has not done so. Upon consideration of the no-merit report and an

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Fischer was charged with one count of battery to a law enforcement officer and two counts of battery to an emergency rescue worker. According to the criminal complaint, the charges arose after police officer Christopher Lemke was called to a tavern based on a report that Fischer was intoxicated, falling down, and had pulled the hair of two tavern employees. Lemke called for medical assistance after observing that Fischer had swelling on her face and scrapes on her hand and was having difficulty standing. Fischer was transported by ambulance to a hospital, where she was uncooperative and struck two members of emergency department staff. Fischer also punched Lemke in the face when Lemke was assisting medical staff with restraining her. While at the hospital, Fischer was determined to be incapacitated due to alcohol, and a protective custody report for her was signed. Fischer was sedated to facilitate a CT scan to determine whether she was suffering any life-threatening brain injury. Fischer was diagnosed with ethanol intoxication and acute head trauma and was discharged to her home.

At the preliminary examination and arraignment, Fischer's counsel informed the court that Fischer wished to enter pleas of not guilty by reason of mental disease or defect (NGI). The defense retained an expert witness, Dr. Richard Tovar, who filed a report with the circuit court. In the report, Tovar opined that Fischer's behavior at the hospital was the result of two causes: ethanol intoxication and head trauma from falling. The State objected to the admission of the defense's proposed expert testimony. The circuit court then held a *Daubert* hearing to determine whether Tovar would be allowed to testify in support of an NGI defense. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). The court ultimately ruled that Tovar

would not be allowed to testify. Fischer went on to enter no contest pleas to one count of battery to a law enforcement officer and one count of battery to an emergency rescue worker.

The no-merit report focuses mainly on whether there would be any arguable merit to challenging the circuit court's decision to exclude the defense's proposed expert testimony. Circuit courts "have broad discretion to admit or exclude evidence," and "we will upset their decisions only where they have erroneously exercised that discretion." *State v. James*, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. The admissibility of expert testimony is governed by WIS. STAT. § 907.02(1), which codifies the *Daubert* standard. A requirement under § 907.02(1) is that the proffered expert testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue[.]"

In this case, the circuit court excluded the defense's proposed expert testimony on the basis that it would not assist the trier of fact but, rather, would likely confuse the trier of fact. In its oral ruling on March 26, 2019, the court stated, "Dr. Tovar acknowledged that the defendant was drunk and that she had head trauma and that it was basically a combination of the two, could be either or both which contributed toward the behavior. And I don't think it would assist the trier of fact[.]" Admissibility of expert testimony lies within the discretion of the circuit court. *State v. St. George*, 2002 WI 50, ¶37, 252 Wis. 2d 499, 643 N.W.2d 777. "A circuit court properly exercises its discretion when it has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process." *State v. Bentley*, 201 Wis. 2d 303, 318, 548 N.W.2d 50 (1996). The record reflects that the circuit court did so here, such that any challenge to the circuit court's exercise of discretion in excluding the expert testimony would lack arguable merit.

The no-merit report also discusses the validity of Fischer's pleas. This court's independent review of the record reveals that the plea colloquy sufficiently complied with the requirements of *State v. Bangert*, 131 Wis. 2d 246, 255-73, 389 N.W.2d 12 (1986) and WIS. STAT. § 971.08 relating to the nature of the charges, Fischer's understanding of the proceedings and the voluntariness of the plea decision, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. Defense counsel stipulated on the record that there was a factual basis for the pleas. Nothing in the record or counsel's no-merit report establishes an arguably meritorious basis for plea withdrawal.

Any challenge to the circuit court's exercise of sentencing discretion also would be without arguable merit. The standards for the circuit court and this court on discretionary sentencing issues are well-established and need not be repeated here. See *State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The court imposed concurrent four-year terms of probation on each of the two counts, with thirty days of upfront jail time as a condition of probation. The court also imposed but stayed an additional eleven months of conditional jail time, to be served if Fischer violated the terms of probation. The record reflects that the circuit court considered appropriate factors, did not consider improper factors, and reached a reasonable result well within the statutory penalty ranges for each count. Any challenge to the circuit court's sentencing discretion would lack arguable merit.

Based upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that 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 Andrew H. Morgan is relieved from further representing Michelle Elizabeth Fischer in this appeal. *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