

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-2048-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARILYN R. WHITERABBIT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: DANIEL S. GEORGE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 DEININGER, J. Marilyn Whiterabbit appeals a judgment, which convicted her of eight counts of theft by fraud, and an order denying postconviction relief from that judgment. She claims the State failed to prove her

guilt on six of the counts, and alternatively, that we should order a new trial on all counts in the interest of justice. We conclude that there was sufficient evidence before the jury to convict Whiterabbit on five of the six challenged counts, and we decline to exercise our discretionary authority to reverse and order a new trial on those charges. We conclude, however, that notwithstanding Whiterabbit's concession that the State produced sufficient evidence to convict her of a misdemeanor on Count 8, Whiterabbit's conviction on that count should be reversed because, with respect to that count, the real controversy was not fully tried. Accordingly, we reverse Whiterabbit's conviction on Count 8 of the information, and we affirm the appealed judgment and order in all other regards.

BACKGROUND

¶2 A seventy-six year old Catholic priest testified at trial that Whiterabbit had, over a six-month period, obtained over \$27,000 from him based on a series of stories she told him regarding her need for money and the anticipated windfalls that were about to come her way. Other State witnesses included a superior in the priest's order who described an audit of the accounts the priest administered that was undertaken when the fraud allegations came to light, two church employees who overheard some of Whiterabbit's requests for money, and a psychologist who testified regarding the priest's susceptibility to Whiterabbit's pleas. The State also called Whiterabbit's estranged husband and her daughter to establish the falsity of some of Whiterabbit's statements to the priest, and a local bartender who testified that Whiterabbit had offered him \$10,000 to give perjured testimony in her defense. Whiterabbit took the witness stand to give her version of her financial transactions with the priest, and she accused him of propositioning her on one occasion and exposing himself to her on another.

¶3 The State filed an information charging Whiterabbit with six counts of felony theft by fraud and two misdemeanor counts of the same offense. The eight counts alleged different dates or date ranges, some of which overlapped, and each count was identified in a separate verdict form as relating to different allegedly false representations made by Whiterabbit. Through the priest's testimony, and a number of exhibits consisting of IOUs and other writings relating to Whiterabbit's "loans," the State linked various sums and dates to the different counts and falsehoods. At the close of evidence, the trial court denied Whiterabbit's motion to dismiss which was grounded on the State's failure to prove the various counts beyond a reasonable doubt. During its deliberations, the jury sent out three different notes—two requested clarification of the charges, and one requested additional evidence which was not available because it had not been admitted.

¶4 The jury ultimately returned guilty verdicts on all eight counts, and the court sentenced Whiterabbit to a ten-year prison term on the first felony count, concurrent nine-month terms on the two misdemeanors, and it imposed fifteen years of concurrent probation on the remaining five felony counts. Whiterabbit moved postconviction for sentence modification, for a new trial on all counts and to vacate the convictions on Counts 4 and 8. The trial court denied these motions, and Whiterabbit appeals the judgment of conviction and the order denying her postconviction motions. We include additional background facts in our discussion of the evidentiary basis for the various counts which follows.

ANALYSIS

¶5 The supreme court in *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990), discussed the difference between a jury's obligation to acquit

unless the State has proven a defendant guilty beyond a reasonable doubt, and our standard for reviewing the sufficiency of the evidence to support a jury's verdict of guilty:

"The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.... The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted...."

Id. at 503-04 (citation omitted). The court explained that the "reasonable doubt standard of review" is thus 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.

Id. at 507 (citation omitted).

¶6 All eight counts in the information charged Whiterabbit with theft by fraud, in violation of WIS. STAT. § 943.20(1)(d) (1997-98),¹ which makes it a crime to “[o]btain[] title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made.” Under the statute, a “false representation” may include “a promise made with intent not to perform it if it is a part of a false and fraudulent scheme.” *Id.* The trial court instructed the jury that, in order to find Whiterabbit guilty of each count, it must be satisfied beyond a reasonable doubt that the State had proven six elements: (1) Whiterabbit had made a false representation to the priest; (2) she knew the representation was false; (3) she made the representation with intent to deceive and defraud the priest; (4) Whiterabbit obtained title to the priest’s property by the false representation; (5) the priest was deceived by the representation; and (6) the priest was defrauded by the representation. *See* WIS JI—CRIMINAL 1453. In addition, on the six felony counts, if the jury found the defendant guilty, it was asked to determine the value of the property obtained by fraud under that count.²

¶7 We have reviewed the testimony and exhibits the State produced during Whiterabbit’s three-day trial. Based on our review, and the application of the **Poellinger** standard, we conclude that the guilty verdicts on Counts 1, 4, 5, 6 and 7 must stand, but that Whiterabbit’s conviction on Count 8 should be

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

² *See* WIS. STAT. § 943.20(3), which classifies penalties for theft as follows: for property worth less than \$1,000, a class A misdemeanor; property worth between \$1,000 and \$2,500, a class E felony; and property worth more than \$2,500, a class C felony.

reversed.³ In the paragraphs which follow, we discuss the evidence presented to the jury to support each of these counts. Germane to all counts is the priest's testimony that, despite the "ridiculous" nature of some of Whiterabbit's stories, "her fabrication was so intricate that I went along with it. I believed her veracity that she was telling the truth." We begin our discussion of each count with a description of the particular charge as set out in the guilty verdicts returned by the jury.

¶8 **Count 1:** Whiterabbit "obtained money from [the priest] between 12/09/96 and 12/17/96 by a false representation that she had inherited real estate from her grandmother for which she would receive money from her tribe."

¶9 The priest testified Whiterabbit told her of the inherited land and of her need for \$7,000 to pay off a lien, and for another \$7,000 to pay off her sister in order to obtain title to the property. He also related that she told him her tribe would then give her \$48,000 "to establish a homestead," and she would repay the borrowed sums from that grant. The State introduced a canceled check for \$5,000, dated December 9, 1996, made payable to Whiterabbit, and the priest identified another \$4,000 cash payment to Whiterabbit on the same date, both of which the priest testified were given to her so that she could obtain the real estate she spoke of. A church employee testified to overhearing Whiterabbit tell the priest the story about needing \$7,000 to clear a lien from land willed to her by her grandmother. Whiterabbit later informed the priest that she would not be receiving the "inherited" land after all, that it would go instead to an Uncle Levi, but that she

³ Whiterabbit does not challenge the guilty verdicts on Counts 2 and 3, both being for theft by fraud of amounts between \$1,000 and \$2,500, constituting class E felonies.

would repay the loan in monthly installments. Whiterabbit's husband testified that Whiterabbit's Uncle Levi died "a long time ago."

¶10 The foregoing testimony and evidence, if believed by the jury, reasonably supports the jury's conclusion that, on or about the cited dates, Whiterabbit obtained at least \$9,000 from the priest by intentionally deceiving him with false representations regarding inherited real estate and an expected tribal grant, which she knew to be false, made with intent to defraud, and which did defraud the priest.

¶11 **Count 4:** Whiterabbit "obtained money from [the priest] between 02/23/97 and 03/11/97 by a false representation that she had been required to post a bond and pay fines as a result of an automobile accident on 02/24/97 and that she would repay him from the settlement received from her former husband."

¶12 The priest testified that Whiterabbit told him that she had been in an accident with another car and then left the scene of the accident. She asked him for \$4,000 to \$5,000 to post a bond for the accident because she had no automobile insurance, and for another \$1,500 to pay a fine for leaving the accident scene. She promised to repay the amounts given her from a settlement due her from her ex-husband. The priest identified a \$1,500 payment he made to Whiterabbit in March 1997, for the hit-and-run fine. He also testified that he gave her the \$4,000 or \$5,000 she requested for the damage bond, but could not "recall the exact amount." Later, the priest identified a \$5,000 cash withdrawal he made on February 24, 1997, from which he gave Whiterabbit \$4,000, but during this testimony, he could not specify to which of Whiterabbit's requests for money this payment related. Whiterabbit's husband testified that he had been separated from Whiterabbit for seven years, that they had not been divorced, and that he had never

agreed or informed her that he was going to give her \$40,000, as she had told the priest.

¶13 Although the evidence connecting Whiterabbit's hit-and-run bond and fine stories with specific amounts and dates of payment is weak, it is not nonexistent. And, "failure to prove the specific date of the offense is not fatal to the state's case against the defendant. The credibility of the victim's testimony and the conflict between the testimony of the ... witnesses ... was for the trier of fact to consider and resolve." *Thomas v. State*, 92 Wis. 2d 372, 386-87, 284 N.W.2d 917 (1979). The State's evidence supporting Count 4 is not "so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Poellinger*, 153 Wis. 2d at 507.

¶14 **Count 5:** Whiterabbit "obtained \$300 from [the priest] on 04/20/97 by a false representation that she would receive \$3,500 from her daughter's casino winnings, from which she would repay him for money advanced to her."

¶15 The priest testified that in April 1997, Whiterabbit told him that her daughter had won \$15,000 at the casino but could not collect it until a \$300 tax was paid because the daughter was from out of state. The priest gave her \$300, which was never repaid. The priest said Whiterabbit later told him that her daughter decided not to give her any of the winnings, although originally she had claimed to be receiving half. Testimony from Whiterabbit's husband and daughter established that Whiterabbit had only one adult daughter, who was a Wisconsin resident.

¶16 We conclude the State's evidence was sufficient to convict Whiterabbit on this misdemeanor count.

¶17 **Count 6:** Whiterabbit “obtained money from [the priest] between 01/06/97 and 03/26/97 for purchase of a mobile home and expenses and fines associated with moving the mobile home, by a false representation that she would receive \$40,000 from her former husband with which to repay him for money advanced to her.”

¶18 The priest testified that Whiterabbit told him she had an opportunity to purchase a mobile home for \$1,000, and that if he would “advance” her the purchase money she would give him the title to the mobile home and eventually repay the loan. He further testified that he gave her the \$1,000, plus an additional \$1,000 for furniture and another \$2,500 to cover transportation costs and fines relating to the transport of the mobile home. A housekeeper employed at the retreat center where the priest’s office was located testified that she encountered Whiterabbit on March 31, 1997, coming out of the office “flashing papers” and saying that “Father had loaned her money so she could keep her land and trailer.” The priest also testified he received neither a mobile home title nor repayment of these amounts from Whiterabbit, that Whiterabbit always promised repayment for his loans to her and described a source from which the repayment would come, and that Whiterabbit “repeatedly” cited the alleged \$40,000 property settlement as a source of repayment for the various funds she borrowed from him. Finally, as we have noted, Whiterabbit’s husband denied he had ever agreed or informed Whiterabbit that he would pay her \$40,000.

¶19 Again, we conclude after reviewing the record that a reasonable jury could find Whiterabbit guilty of obtaining more than \$2,500 by way of the fraudulent misrepresentations set forth in Count 6.

¶20 **Count 7:** Whiterabbit “obtained \$250 from [the priest] between 11/24/96 and 12/01/96 to pay for her daughter’s transportation from Los Angeles to Wisconsin Dells, by a false representation that her daughter would repay him for the money advanced to her.”

¶21 The priest identified a letter Whiterabbit wrote to him requesting money so her daughter, “Marcia,” could fly to Wisconsin from Los Angeles. In the letter, Whiterabbit recites that Marcia is “sitting at the L.A. airport” and wants “to come home today,” and requests the priest to “please help me to get her home.” The letter further recites that Marcia would obtain \$2,200 upon her arrival in Wisconsin and would “cash it and pay you back,” and in addition would “give you \$900 a donation from her Indian money too, tomorrow.” The letter requests the priest to “make a check for Pik-n-Save and I’ll see that you get it back.” In a postscript, Whiterabbit reduces her \$450 request to \$250, which she promised to “return to you tomorrow.”

¶22 The priest identified a check to Pick ‘N Save for \$250 which he gave to Whiterabbit on December 1, 1996. The administrator of the retreat center also testified that Whiterabbit had asked the priest to advance her \$250 in December 1996 so that a daughter could fly home from Los Angeles. Whiterabbit acknowledged writing the letter requesting \$250 for plane fare. She also admitted that she had no daughter named Marcia, but claimed she was referring to the daughter of a “friend.”

¶23 Coupled with the priest’s testimony that he believed Whiterabbit’s stories and that he was never repaid for any amounts he advanced to Whiterabbit, the evidence supporting Count 7 was more than sufficient to support a conviction on that count. In fact, the evidence supporting this count was probably the

strongest and most concrete put forward by the State in support of any of the specific counts.

¶24 **Count 8:** Whiterabbit “obtained money from [the priest] between 11/96 and 04/97 to pay for fines, by a false representation that she would repay him for the money advanced to her out of a \$40,000 payment she was to receive from her former husband.”

¶25 The State concedes the jury’s finding that Whiterabbit obtained more than \$2,500 from the priest on this particular count is not supported by the evidence it adduced at trial. It points, however, to the priest’s testimony that he gave Whiterabbit \$681 to pay a police ticket on November 30, 1996, as sufficient to support a misdemeanor conviction on Count 8. In her reply brief, Whiterabbit accepts the State’s concession, stating that she “agrees that this count need not be dismissed for a failure of proof,” but that the conviction should be reduced to a misdemeanor. These concessions resolve Whiterabbit’s sufficiency of the evidence challenge to Count 8.

¶26 Whiterabbit requests, however, if we conclude there was sufficient evidence to sustain the convictions she challenges, that we exercise our discretionary authority to grant her a new trial because, according to her, the State’s evidence and argument at trial were so garbled that the real controversy was not fully tried. *See* WIS. STAT. § 752.35. Although we agree that the case the State presented against Whiterabbit was not a model of lucidity, we conclude that the State presented sufficient evidence to permit the jury to find guilt on five of the six challenged counts, and we are not inclined to exercise our discretionary reversal authority to set those verdicts aside.

¶27 As we have noted, Whiterabbit now agrees with the State that it introduced evidence which would support her conviction for a misdemeanor on the final count. Nonetheless, we conclude that Whiterabbit's conviction on Count 8 should be reversed because the real controversy on that count was not fully tried. *See WIS. STAT. § 752.35.* Although Whiterabbit's indictment of the State's case as being "unintelligible" is overstated with respect to the entire prosecution, it is on the mark with respect to the State's effort to prove Count 8. Count 8 as set forth in the verdict form refers generically to "fines," encompasses the entire six-month duration of Whiterabbit's dealings with the priest, and cites the alleged settlement from Whiterabbit's husband as the represented repayment source. Thus, as set forth on the verdict forms given to the jury, Count 8 overlaps and potentially duplicates acts covered in the following counts:

Count 2: ("obtained money ... between 04/04/97 and 05/05/97 [for an unspecified purpose] by a false representation that *she would receive a payment of \$40,000 from her former husband from which she would repay the money advanced to her*");

....

Count 4: ("obtained money ... between 02/23/97 and 03/11/97 by a false representation that she had been required to post a bond and *pay fines* as a result of an automobile accident on 02/24/97 and that *she would repay him from the settlement received from her former husband*");

....

Count 6: ("obtained money ... between 01/06/97 and 03/26/97 for purchase of a mobile home and expenses *and fines* associated with moving the mobile home, by a false representation that *she would receive \$40,000 from her former husband with which to repay him for the money advanced to her*").

(Emphasis added.)

¶28 That the jury struggled with the question of what evidence was intended to support Count 8 is demonstrated by its question to the court regarding the charge: “Count #8—Are we to assume you want us to group together all fines during this time even though they have been part of other counts already covered[?]” To which the court, with both parties’ approval, replied: “Pursuant to your prior instructions, you must consider each count separately.” There is, of course, no way to know how the jurors interpreted this response. We can be quite certain, however, that they considered evidence well beyond the single \$681 payment on November 30, 1996, upon which the State now relies, given that the jury found that Whiterabbit obtained “more than \$2,500” from the priest under Count 8.

¶29 Not only is the evidence in support of Count 8 slight at best,⁴ the description of the count in the verdict form was imprecise and possibly multiplicitous. We are convinced that the jury was confused regarding what evidence it was to consider under Count 8, and we reverse Whiterabbit’s conviction on that count.⁵ *See Vollmer v. Luety*, 156 Wis. 2d 1, 21, 456 N.W.2d 797 (1990) (noting that discretionary reversal by an appellate court is appropriate “where the evidence was confusing to the jury”).

⁴ The priest’s single reference to the \$681 check came during his description of an exhibit detailing some twenty to thirty amounts he advanced to Whiterabbit on specific dates. The exhibit contains only dates and amounts and does *not* set forth the purposes for the payments or the represented repayment sources. No further mention of this payment was made by any witness, nor by the State during its closing arguments.

⁵ Should the State choose to retry Whiterabbit on Count 8, the prosecution will be limited to one count of misdemeanor theft based on the November 30, 1996 check for \$681, which the State concedes formed the only evidentiary basis for a conviction in its first prosecution on this count.

¶30 Whiterabbit also requests in her reply brief, if we do not reverse all of her convictions, that we “reduce the amount of restitution by the various amounts that the state has conceded were not proven at trial....” Since this request was first made in the reply brief, we do not have the benefit of the State’s position regarding the request. We note that the trial court conducted a restitution hearing at Whiterabbit’s request, and that the principal issue in dispute was the victim’s request for restitution of various collateral costs over and above the actual amounts of money the priest gave to Whiterabbit. We are unable to ascertain from the record whether our disposition, or the State’s concessions in this court, would impact on the amount of restitution originally ordered. We direct the trial court on remand, if Whiterabbit so moves, to consider whether the amount of restitution Whiterabbit is ordered to pay should be modified in any regard as a result of the proceedings in this court.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

