COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2191-CR **Cir. Ct. No. 2002CF312**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARY KRUEGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Polk County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mary Krueger appeals a judgment, entered upon a jury's verdict, convicting her of first-degree intentional homicide as party to a

crime, contrary to WIS. STAT. §§ 940.01(1) and 939.05.[1] She also appeals the order denying her motions for postconviction relief. Krueger argues that the evidence at trial was insufficient to support her conviction and the trial court erroneously denied her postconviction motions for a new trial. Krueger additionally urges this court to grant a new trial in the interest of justice on grounds that there has been a miscarriage of justice. We reject Krueger's arguments and affirm the judgment and order.

BACKGROUND

¶2 In December 2002, Krueger was charged with first-degree intentional homicide, as party to a crime, arising from the shooting death of her husband, Rollie Krueger. After a trial, the jury found Krueger guilty. Krueger was convicted upon the jury's verdict and filed postconviction motions to change the jury's verdict or, alternatively, grant a new trial in the interest of justice. The motions were denied and this appeal follows.

DISCUSSION

¶3 Krueger argues that the evidence at trial was insufficient to support her conviction. Whether the evidence supporting a conviction is direct or circumstantial, we utilize the same standard of review regarding its sufficiency. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must uphold Krueger's conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id.*** If there is a possibility that the jury "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the verdict even if we believe that the jury "should not have found guilt based on the evidence before it." ***Id.*** at 507. It is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Thus, if more than one inference can be drawn from the evidence, this court will follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law." ***Poellinger***, 153 Wis. 2d at 506-07.

¶4 Here, the primary evidence that Krueger killed her husband came from the testimony of an eyewitness to the shooting, Sarah Johnson. At trial, Johnson testified that she knew Krueger and Roland for several years and had, on occasion, supplemented her income by having sex with Roland for money. Johnson testified that several days before Roland's death, Krueger confronted her about the sexual relationship she had developed with Roland. According to Johnson, Krueger threatened to tell Johnson's mother and children about her prostitution, but said that if Johnson "agreed to her [Krueger] taking the picture of me [Johnson] giving Roland oral sex, she would pay me $10,000 and not tell my mother and my children." Krueger planned to have Johnson come to Krueger's house the next morning before Krueger left for a 6:30 a.m. medical appointment. Johnson drove to the Krueger farm the next morning and performed oral sex on Roland. As Roland was tucking in his shirt, Johnson heard Krueger yell, "Get the fuck out of the way, Sarah." As Johnson "hit the floor," she heard a shot and then

saw Krueger eject and load a new round into a rifle. Johnson testified that as Roland lay on the floor, Krueger aimed the gun at his head and fired again.

¶5 Johnson further testified that after shooting Roland, Krueger threatened Johnson, telling her she was "going to help her make it look like a robbery." Johnson and Krueger then loaded two televisions and a tool box into Johnson's van. Krueger burned the clothes she was wearing, removed several guns from a gun cabinet and loaded the guns into Johnson's van. Krueger then instructed Johnson to drive her to her medical appointment, dropping her off three blocks from the hospital. Johnson's testimony, if believed by the jury, was sufficient to sustain Krueger's guilty verdict.

¶6 Krueger nevertheless argues her conviction should be overturned because there is no physical evidence linking her to the murder and Johnson's testimony was patently and inherently incredible because Johnson had mental problems and gave multiple inconsistent versions of what occurred. Johnson's credibility was challenged on cross-examination as defense counsel questioned her regarding both her mental illness and inconsistencies between her trial testimony and her prior statements. Inconsistencies in Johnson's statements do not render her testimony incredible as a matter of law. *See* ***Ruiz v. State***, 75 Wis. 2d 230, 232, 249 N.W.2d 277 (1977) (Glaring discrepancies in a witness's trial testimony do not necessitate concluding as a matter of law that a witness is wholly incredible.). Moreover, the jury was aware of these challenges to Johnson's credibility and nevertheless accepted her account of the incident. The jury determines credibility and reconciles inconsistencies in testimony. ***Toy***, 125 Wis. 2d at 222.

¶7 Krueger further contends Johnson's account was impossible given the time-frame established by a milk truck driver's trial testimony. The milk truck driver testified that he was at the Krueger farm between 5:45 a.m. and 6 a.m. on the morning of the murder and did not see Johnson's van. Based on that testimony, Krueger asserts either that Johnson did not arrive at the farm until after 6 a.m. or that Johnson and Krueger left the farm before 5:45 a.m. To the extent Krueger contends it was not possible for Johnson to arrive at the farm after 6 a.m., the State agrees because it is undisputed that Krueger arrived at a hospital in Osceola (an approximately seventeen-minute drive) at 6:20 a.m. Rather, the State argued to the jury that Krueger and Johnson left the farm before 5:45 a.m.

¶8 Claiming it is an undisputed fact that Johnson woke at 5 a.m., Krueger contends it was not physically possible for Johnson and Krueger to have left the farm before 5:45 a.m. Johnson testified that she woke at 5 a.m., smoked some cigarettes and marijuana, drank some soda, drove to the Krueger farm, had oral sex with Roland, watched Krueger kill Roland, helped Krueger make the scene look like a robbery and drove away with Krueger in her van. Krueger thus argues it was not possible for all that to have occurred in the forty-five minutes between Johnson's waking and the milk truck's arrival.

¶9 Although Johnson testified she awoke at 5 a.m., there was evidence that Johnson actually arrived at the farm by 5 a.m. Specifically, Johnson testified it was still dark when she got to the farm, and that daylight was "just breaking." Johnson further testified that the sun was not yet over the horizon when she and Krueger went to the burn pile after the murder. The State introduced evidence that twilight began at 4:59 a.m. on the day of the murder and that sunrise was at 5:35 a.m. That evidence, combined with Johnson's testimony about the lighting conditions allowed the jury to find that Johnson arrived at the Krueger farm by 5

a.m. and that the shooting occurred before the 5:35 a.m. sunrise. That would have left sufficient time for the events at the farm to have transpired before the milk truck driver arrived at 5:45 a.m.

¶10 To the extent Krueger claims that Johnson's waking at 5 a.m. was "an undisputed fact per the trial court's own finding at the sentencing hearing," the trial court was not the fact-finder in this trial—the jury was. Further, the record does not support the trial court's statement at sentencing that "[n]otwithstanding suggestions to the contrary, it was the unequivocal testimony of both Sarah Johnson and Charles Blanford that he woke Ms. Johnson up at 5 a.m. on [the day of the murder]." Johnson testified that when Blanford stumbled over her and woke her, he knocked a digital clock off the night stand. When she picked up the clock, she noticed that it said 5 a.m. There was no evidence, however, that the clock's display was accurate or that it was functioning correctly after being knocked on to the floor. Johnson's testimony thus established only that the clock displayed "5:00" when she picked it up, not that "5:00" was the actual time.

¶11 Even if Johnson and Blanford testified unequivocally that Blanford woke Johnson at 5 a.m., the jury would not have been bound by that testimony. Where time estimation plays a role, "[t]he jury was not obliged to accept this testimony as accurate to the minute or second," ***Murphy v. State***, 75 Wis. 2d 522, 527, 249 N.W.2d 779 (1977), especially where, as here, there was ample evidence from which the jury could have found that Johnson arrived at the farm before 5 a.m. Moreover, a jury need not accept a witness's testimony in its entirety. ***State v. Balistreri***, 106 Wis. 2d 741, 762, 317 N.W.2d 493 (1982). Because there was sufficient evidence from which a rational jury could have found that Johnson arrived at the Krueger farm early enough for the events at the farm to have

transpired before the milk truck driver arrived at 5:45 a.m., Johnson's account of the murder was not physically impossible.

¶12 Krueger nevertheless claims the trial court erred by denying her motion to change the jury's verdict or grant a new trial in the interest of justice on grounds that there was insufficient credible evidence to support the verdict and the verdict is otherwise against the weight of the evidence. Because we conclude there was sufficient evidence to support the jury's verdict, the trial court properly denied these motions.

¶13 Claiming there has been a miscarriage of justice, Krueger alternatively seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." To establish a miscarriage of justice, Krueger "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Caban***, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). Because we conclude there was sufficient evidence to support the jury's verdict, Krueger has failed to establish a miscarriage of justice.[2] Accordingly, we conclude there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Krueger a new trial.

[2] To the extent Krueger contends a new trial should be granted in the interest of justice because of "other errors" at trial, her argument is wholly undeveloped and unsupported by any reference to the record or trial testimony and thus not susceptible to meaningful appellate review. *See* WIS. STAT. RULE 809.19(1)(e).

By the Court.—Judgment and order affirmed.

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