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 I

December 5, 2013

To:

Hon. Jeffrey A. Wagner
Milwaukee County Circuit Court
901 N. 9th Street
Milwaukee, WI 53233

Benjamin J. Peirce
Attorney at Law
6650 W. State Street, Ste. D207
Wauwatosa, WI 53213

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

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

Karen A. Loebel
Asst. District Attorney
Milwaukee County Circuit Court
821 W. State Street
Milwaukee, WI 53233

Beatrice L. Johnson
5314 N. 83rd Street, #4
Milwaukee, WI 53218

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

2013AP58-CRNM State of Wisconsin v. Beatrice L. Johnson
(L.C. #2010CF1895)

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

Beatrice L. Johnson appeals from a corrected judgment of conviction for one count of felony theft by fraud, contrary to WIS. STAT. § 943.20(1)(d) (2011-12).[1] Appellate counsel,

[1] Although the underlying allegations date back to 2008 and 2009, the relevant statutory provisions are identical to the current version of the statutes, and therefore, all subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise indicated.

The judgment was corrected after Attorney Peirce notified the trial court that the offense was incorrectly designated as a Class G felony, which related to the crime Johnson was charged with (theft by fraud in excess of $10,000), instead of the Class I felony Johnson was found guilty of committing (theft by fraud in excess of $2500 but less than $5000).

Benjamin James Peirce, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, to which Johnson has not responded. We have independently reviewed the record and the no-merit report. After reviewing the no-merit report and conducting an independent review of the record as mandated by ***Anders***, this court concludes that further proceedings would lack arguable merit.

BACKGROUND

In April 2010, Johnson was charged in a criminal complaint with one count of theft by fraud (value exceeding $10,000), a Class G felony. The complaint alleged that Johnson participated in the Wisconsin Shares Program. As part of this program, the State provides reimbursement to child care providers who care for the children of custodial parents participating in the Wisconsin Works or W-2 Program. According to the complaint, Johnson billed the Wisconsin Department of Children and Families (DCF) for children who did not attend a day care she owned and operated, defrauding the State of Wisconsin by more than $10,000.

The no-merit report addresses two issues: (1) the sufficiency of the evidence; and (2) the trial court's exercise of sentencing discretion, which includes its order for restitution. In the context of addressing these issues, we also discuss whether there would be any merit to challenging the trial court's decision to impose the DNA surcharge.

DISCUSSION

A. Sufficiency of the Evidence

The following evidence, as set forth in counsel's detailed no-merit report and supported by the record, was presented at trial:

The [S]tate, through the testimony of Fraud Detection Chief Eri[k] Hayko established that Johnson owned and operated Bee's Day Care. Through her day[ ]care, Johnson participated in the Wisconsin Shares Program, a public assistance program, in 2008 and 2009, receiving money from the [S]tate for providing day[ ]care for eligible children.

Hayko testified that the Shares Program had two different types of authorization for day[ ]care providers: attendance-based and enrollment-based authorizations. With an attendance-based authorization, a day[ ]care provider is only paid for the hours children are actually in attendance[.] With an enrollment-based authorization, each child has a set authorization amount that a day[ ]care provider is paid for even if the child is in day[ ]care for a lesser amount as long as the provider provides accurate weekly attendance information for each child to the [S]tate. As an illustration, if a child had an authorization for 35 hours but during a particular week only attended day[ ]care for 30 hours, the day[ ]care provider would still be paid for 35 hours as long as they provided accurate attendance information (i.e., 30 hours) for that child to the [S]tate. If they provided incorrect information to the [S]tate (i.e., claimed the child attended the full 35 hours), that would be considered an overpayment of 5 hours, payment they were not entitled to receive. The day[ ]care provider provided this information to the [S]tate via a bi-weekly attendance reporting form along with daily sign-in/sign-out logs submitted to the county.

Hayko testified that during 2008 and 2009, Johnson's day[ ]care had a number of enrollment-based authorizations. Johnson submitted bi-weekly attendance reporting forms and daily sign-in/sign-out logs that incorrectly reflected the number of children that had been cared for at the day[ ]care and the number of hours each had been cared for [at the day care]….

The [State] offered a bi-weekly attendance reporting form submitted by Johnson for the period of 8/23/2009 – 9/5/2009 as exhibit 4A. The first bullet point on the form was read to the jury:

> I understand that I must enter the actual hours of attendance for each child in care on each child care attendance report form even if the authorization is based on enrollment.

The form had been signed by Johnson.

Special Agent Christina McNichol testified for the [S]tate that she reviewed Johnson's files, both publicly available and those seized via a search warrant. Agent McNichol testified that Johnson submitted attendance reporting forms indicating that she

> had provided day[ ]care for children on Saturdays, billing the [S]tate over $13,000 Saturdays alone. Agent McNichol testified how she spoke with … ten people who had children enrolled in Johnson's day[ ]care.[2] Many of them disputed Johnson's attendance reporting forms, stating that their children either never went to Johnson's day[ ]care or may have gone there but never on Saturdays.
>
> The [S]tate also called a number of the parents interviewed by Agent McNichol who stood by their earlier statements that either their older children did not go to Johnson's day[ ]care or that they never went there on Saturdays, despite any attendance reporting form that indicated otherwise.
>
> Johnson's only witness was a woman who was employed by Johnson for two or three months in 2009 as an administrative assistant. The woman testified that she was learning how to fill out the attendance reporting forms and scheduled activities, including field trips, for children on Saturdays.
>
> During closing arguments, Johnson's attorney argued that Johnson did not intend to defraud the Shares Program but was just trying to follow unclear administrative rules and that several of Johnson['s] former workers were liars and had a motive to make false accusations against Johnson.

(Record citations omitted.)

This and other evidence presented at trial supports the elements of theft by fraud. *See* WIS JI—CRIMINAL 1453B. The jury, which is the sole judge of credibility, was entitled to accept that evidence over Johnson's theory of defense. *See* ***State v. Burgess***, 2002 WI App 264, ¶23, 258 Wis. 2d 548, 654 N.W.2d 81, *aff'd*, 2003 WI 71, 262 Wis. 2d 354, 665 N.W.2d 124 ("[T]he jury is sole judge of credibility; it weighs the evidence and resolves any conflicts."). On the verdict form, the jury was instructed that if it found Johnson guilty of theft by fraud, it was also

[2] It appears this may have been a slight misstatement insofar as trial testimony subsequently referenced McNichol's interviews of nine different people who had children enrolled in Johnson's day care.

required to determine the amount of money she took. We note that instead of finding that she committed fraud in excess of $10,000, as the State argued, the jury concluded that she committed fraud in excess of $2500 but less than $5000. Thus, the jury appears to have weighed some of the evidence in Johnson's favor.

B. Sentencing Discretion

We also conclude 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, 678 N.W.2d 197, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

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, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. 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, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

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. Reflecting on punishment and rehabilitation, the trial court emphasized that Johnson had violated public trust and noted her lack of remorse. It followed the State's recommendation when it imposed and

stayed a thirty-month sentence comprised of twelve months of confinement and eighteen months of extended supervision. It placed Johnson on probation for three years with six months condition time in the House of Correction as additional punishment. Johnson had release privileges for work/education and child care.

The trial court went on to order $13,000 in restitution (minus any offsets), as requested by the State. In his no-merit report, counsel discusses whether Johnson could argue that the trial court erroneously exercised its discretion at sentencing because it set restitution at an amount greater than the amount the jury found Johnson had defrauded the State. The State's request was based on payments made to Johnson for care she allegedly provided for children of two of the State's witnesses. The witnesses testified that they had been employed by Johnson and had younger children who attended Johnson's day care from time to time. Johnson, however, also billed the State for the witnesses' older children who did not attend the day care.

First, we agree with counsel's analysis of the differing burdens of proof that apply to a criminal verdict and a restitution order: a jury's determination of guilt is "'beyond a reasonable doubt'" and a sentencing judge's determination of "the amount of loss sustained by a victim [is] by a 'preponderance of the evidence.'" ***State v. Kennedy***, 190 Wis. 2d 252, 258, 528 N.W.2d 9 (Ct. App. 1994). Next, this court has held "that restitution is not limited by a jury's determination of the value of the stolen property for purposes of the criminal charge." ***Id.*** at 255-56. Rather:

> Restitution is an important element of the offender's rehabilitation because it may serve to strengthen his or her sense of responsibility and teach the offender to consider more carefully the consequences of his or her actions. The restitution statute, [WIS. STAT.] § 973.20, … reflects a strong equitable public policy that victims should not

> have to bear the burden of losses if the defendant is capable of making restitution.

Id. at 257-58 (citations omitted).

Insofar as Johnson might want to argue that the trial court failed to solicit any information about her ability to pay the ordered restitution, WIS. STAT. § 973.20(14)(b) clearly allocates the burden of proof on this matter to Johnson. *See* ***State v. Szarkowitz***, 157 Wis. 2d 740, 749-50, 460 N.W.2d 819 (Ct. App. 1990). She made no attempt to present evidence or arguments related to her ability to pay during the sentencing hearing. Additionally, we note that during the sentencing hearing, the trial court heard that Johnson was an intelligent woman who had been steadily employed since she was fourteen years old.

> Where a defendant has been given the opportunity, but fails to offer any evidence on the issue of his inability to pay amounts claimed as restitution, he has failed in his assigned burden of proof under sec. 973.20(14)(b), and the trial court is entitled to award restitution under sec. 973.20(13)(c). In such a case, the trial court need not make detailed findings with respect to factors two through four listed in sec. 973.20(13)(a)[[3]] because the defendant's inability to pay claimed restitution is not an issue before the court.

[3] WISCONSIN STAT. § 973.20(13)(a) provides:

> The court, in determining whether to order restitution and the amount thereof, shall consider all of the following:
>
> 1. The amount of loss suffered by any victim as a result of a crime considered at sentencing.
>
> 2. The financial resources of the defendant.
>
> 3. The present and future earning ability of the defendant.
>
> 4. The needs and earning ability of the defendant's dependents.
>
> 5. Any other factors which the court deems appropriate.

See ***Szarkowitz***, 157 Wis. 2d at 750. Based on the record before us, the lack of detailed findings with respect to Johnson's inability to pay would not create an issue of arguable merit.

In addition, the trial court ordered Johnson to provide a DNA sample, and—without elaboration—ordered her to pay the surcharge. Counsel did not address the trial court's imposition of a DNA surcharge. *See* ***State v. Cherry***, 2008 WI App 80, ¶8, 312 Wis. 2d 203, 752 N.W.2d 393. While under WIS. STAT. § 973.047(1f), providing the sample is required, the surcharge is not: in ***Cherry***, this court held that a sentencing court must exercise its discretion when determining whether to impose the DNA analysis surcharge under WIS. STAT. § 973.046(1g). ***Cherry***, 312 Wis. 2d 203, ¶¶9-10. To that end, we held that the court "should consider any and all factors pertinent to the case before it, and that it should set forth in the record the factors it considered and the rationale underlying its decision." ***Id.***, ¶9.

We recently explained that "***Cherry*** does not require a [trial] court to use any 'magic words'" and specifically declined to adopt a rule requiring a trial court to "explicitly describe its reasons for imposing a DNA surcharge." *See* ***State v. Ziller***, 2011 WI App 164, ¶¶2, 12, 338 Wis. 2d 151, 807 N.W.2d 241. The trial court's imposition of the DNA surcharge in this case, considered in connection with the remainder of the sentencing record, reveals an appropriate exercise of sentencing discretion. *See* ***id.***, ¶13. In ***Ziller***, given that the trial court found that the defendant had the ability to pay $10,000 in restitution, we held that there was no reason for the court to restate that the defendant had the ability to pay the $250 surcharge: "What is obvious need not be repeated." ***Id.*** Similar logic applies to the circumstances presented here where the trial court ordered the full amount of restitution requested and then proceeded to order Johnson to pay the DNA surcharge. We conclude there would be no arguable merit to challenging the trial court's exercise of its sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Benjamin James Peirce is relieved of further representation of Johnson in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals