STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1390

State of Minnesota,
Respondent,

vs.

Nicole Marie Forrester,
Appellant.

Filed July 6, 2010
Affirmed in part, reversed in part, and remanded
Klaphake, Judge

Mower County District Court
File No. 50-CR-07-1551

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; and

Kristen M. Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

Appellant Nicole Marie Forrester challenges her conviction of wrongfully obtaining assistance in excess of $2,500 under Minn. Stat. §§ 256.98, subd. 1 (2006),

609.52, subd. 3(2) (2006), between June 1, 2006 and September 30, 2006. Appellant also seeks reduction of a restitution order requiring her to reimburse Mower County $18,487.35 for amounts she wrongfully received in various types of assistance. We affirm her conviction because we conclude that the evidence was sufficient to prove that she wrongfully obtained more than $2,500 of public assistance during the period included in the charged offense, and the district court's erroneous reference in its findings of fact to evidence that it had previously ruled inadmissible did not violate appellant's right to a fair trial when there was other admissible evidence that provided strong proof of the same facts. But we reverse and remand as to the amount of restitution because the record does not show that the district court considered appellant's ability to pay restitution.

D E C I S I O N

1. Sufficiency of Evidence

Appellant claims that the state failed to prove that she wrongfully received more than $2,500 of public assistance from June 1, 2006 to September 30, 2006, the period of the charged offense. "The Due Process Clause of the [F]ourteenth Amendment to the United States Constitution requires the state, in a criminal case, to prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged." *State v. Otterstad*, 734 N.W.2d 642, 645 (Minn. 2007). Review on a claim of insufficient evidence "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the [fact finder] to reach the verdict which [it] did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). If the fact finder, while applying the proper

presumptions and standards of proof for criminal cases, "could reasonably conclude that a defendant was proven guilty of the offense charged," it must be affirmed. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted). When the judge is the fact finder, his or her credibility determinations are given the same weight as those of a jury and are entitled to deference. *State v. Fisler*, 374 N.W.2d 566, 569 (Minn. App. 1985), *review denied* (Minn. Nov. 18, 1985).

The state provided evidence from various sources to prove that D'Andre Newsome, the father of appellant's third child, lived in appellant's rent-subsidized apartment without permission, a fact which supported the state's claim that appellant wrongfully received assistance. The record also establishes that appellant knew that if Newsome resided in her apartment, she would be ineligible to receive assistance, and she attempted to hide the fact that he lived there in her assistance applications.

As to the amount of assistance she wrongfully received, child-care assistance worker Sandra Brandt testified that appellant received $39.22 in cash assistance and $1,855 in food stamps during the charging period. In addition, Brandt testified that appellant received approximately $6,000 for each of her three children for child-care assistance from July 2006 through August 2007, a period longer than the charging period. When asked by the court, Brandt stated that the amounts of all assistance appellant received during the charging period were "definitely more than $2,500." Viewing the evidence in the light most favorable to the court's decision, we conclude that the state met its burden to establish that appellant wrongfully received more than $2,500 in public assistance during the charging period because it offered evidence to show that appellant

received $1,894.22 in cash assistance and food stamps, as well as approximately $6,000 during the charging period for child-care assistance.

2. Erroneous Admission of Evidence

Appellant next contends that the district court erred by considering facts not in evidence. The district court's factual findings include the following statement:

> Austin Police Officer Chad Norman testified that he investigated an assault complaint on July 6, 2008, at [appellant's] apartment building in Austin and was advised by Mr. [Newsome] that he lived at that residence at that time.

Previously, the court had ruled this evidence inadmissible, and Officer Norman did not testify at trial.

A criminal defendant has a Sixth Amendment right to be tried by an impartial fact finder. *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005). Vindication of this right requires a judge sitting as fact finder to base its decision on facts in evidence and to refrain "from reaching conclusions based on evidence sought or obtained beyond that adduced in court." *Id.* at 249-50. An alleged violation of the constitutional right to a fair trial may constitute a "trial error" subject to harmless error analysis, or a "structural error" subject to immediate reversal. *Id.* at 252.

In *Dorsey*, the Minnesota Supreme Court concluded that a structural error meriting reversal of a criminal conviction occurred when a trial court, sitting as fact finder, showed partiality or bias mandating reversal of a criminal conviction by "openly questioning the veracity of a factual assertion made by a key defense witness,

independently investigat[ing] that fact and then report[ing] the results of her investigation to counsel." 701 N.W.2d at 253.

Here, appellant makes no claim of judicial partiality or bias; it appears that the district court's error was a simple mistake. Further, the record includes strong evidence to prove that Newsome lived in appellant's rent-subsidized apartment without permission, a fact which supported the state's claim that appellant wrongfully received assistance. There is other strong evidence to establish that Newsome resided with appellant, including testimony from appellant's apartment manager that Newsome lived at her apartment, appellant's representations on her apartment lease application, and testimony from a county investigator, who stated that Newsome received his mail at appellant's address and that the house in which Newsome claimed to be living was vacant. Under these circumstances, any error in admission of the evidence was not a structural error, and was harmless. *See Washington v. Recuenco*, 548 U.S. 212, 218, 126 S. Ct. 2546, 2551 (2006) (noting strong presumption that most constitutional errors are subject to harmless error rule if defendant had counsel and was tried by impartial judge); *see also State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004) (stating that harmless error test is satisfied if verdict is surely unattributable to the error).

3. Restitution

At sentencing, a district court may order a criminal offender to pay restitution, including "*any* out-of-pocket expenses" to the victim. Minn. Stat. § 611A.04, subd. 1 (2008) (emphasis added). In setting the amount of restitution, the court "shall" consider

"the amount of economic loss sustained by the victim as a result of the offense," and "the income, resources, and obligations of the defendant." Minn. Stat. § 611A.045, subd. 1(a) (2008). The district court's decision "must provide a factual basis for the amount awarded by showing the nature and amount of the losses with reasonable specificity." *State v. Thole*, 614 N.W.2d 231, 234 (Minn. App. 2000). We will affirm a district court's restitution decision, even when an offender claims a current inability to pay, if the district court considered the offender's ability to pay and the restitution was ordered in installments that were within the offender's ability to pay. *State v. Maidi*, 537 N.W.2d 280, 285 (Minn. 1995). The district court's restitution decision is discretionary and subject to an abuse of discretion standard of review. *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999).

While appellant claims only that the district court erroneously ordered her to pay restitution for a period that was outside the charging period of the offense, we do not address that particular restitution issue because we conclude that the district court erred initially by failing to consider whether appellant had the ability to pay restitution. *See* Minn. R. Crim. P. 28.02, subd. 11 (permitting appellate court to review any matter "as the interests of justice may require"). The district court's restitution order permitted appellant to make arrangements with the county to pay restitution, stating, "If [appellant] is unable to pay the [full] amount . . ., she may set up a payment plan based upon her income and assets." Other than this reference, neither the restitution hearing transcript nor the district court's findings consider, or even mention, whether appellant had the ability to pay restitution. *See* Minn. Stat. § 611A.045, subd. 1(a) (stating that the court

"shall" consider the "income, resources, and obligations of the defendant in determining whether to order restitution"); *see also* Minn. Stat. § 609.52, subd 4 (2008) (requiring district court to consider at sentencing that person convicted of wrongfully obtaining public assistance "will be disqualified from receiving public assistance as a result of the person's conviction"). The only factual reference to appellant's ability to pay restitution is in the presentence investigation report, which demonstrates that appellant is impoverished and provides the primary financial support for her three young children. Further, at the restitution hearing, county financial worker Mary Lang also indirectly acknowledged appellant's limited ability to pay restitution by noting that appellant might not be able to afford to work if she did not receive child-care assistance. Because the record suggests that appellant has little ability to pay restitution, other than a very nominal amount, and the district court did not consider this issue as required by Minn. Stat. § 611A.045, subd. 1(a), or consider that appellant would be disqualified from receiving public assistance because of her conviction, we reverse the restitution award and remand for consideration of appellant's ability to pay restitution.[1] Consideration of appellant's ability to pay restitution is especially important in the context of wrongful receipt of public assistance, where the underlying facts strongly imply an inability to pay restitution, and net out-of-pocket costs to the county could actually increase if an offender

[1] In many cases involving claims of inability to pay restitution, appellate courts of this state have affirmed restitution orders that involve harsh circumstances for the restitution payor, but we note that in those cases the district court fully considered the offender's ability to pay, which was not done in this case. *See, e.g.*, *State v. Lindsey*, 632 N.W.2d 652, 664 (Minn. 2001) (affirming $32,682.93 restitution order for funeral expenses as proper exercise of court discretion when court specifically addressed offender's ability to pay).

is unable to meet her monthly expenses. We also note that while the statute does not require specific factual findings to be made on the factors that the district court "shall" consider in ordering restitution, without such findings, appellate review is difficult.

Affirmed in part, reversed in part, and remanded.