COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP843-CR **Cir. Ct. No. 2008CF5023**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TAMMI L. LAFAVE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Tammi L. LaFave appeals from an amended judgment of conviction for felony murder, as a party to a crime, contrary to WIS.

STAT. §§ 940.03 and 939.05 (2007-08),[1] and from an order denying her postconviction motion. LaFave argues that her motion to suppress her statement to detectives should have been granted and that the trial court erroneously exercised its sentencing discretion. We reject her arguments and affirm.

BACKGROUND

¶2 LaFave pled guilty, pursuant to a plea agreement, to felony murder for her involvement in the kidnapping and death of Haroon Khan. At the plea hearing, she stipulated that the facts in the criminal complaint supported her guilty plea. According to the criminal complaint, when LaFave was interviewed by police detectives she told them that she and her boyfriend, Travis Zoellick, drove to Milwaukee to meet Khan, who was selling a Mitsubishi vehicle. The complaint continues:[2]

> They drove to Milwaukee in a Saab vehicle. On the way to Milwaukee Zoellick stated that he was going to take the car from the guy and then he was going to get rid of the guy that was going to show him the Mitsubishi vehicle. He then told LaFave that he did not know if he was going to use a gun. At this point LaFave saw in Zoellick's left front pants pocket the handle of a gun. There was no specific plan. When they arrived in Milwaukee … where Khan lived … LaFave let Zoellick out of the Saab vehicle and arranged to meet him at a park…. [S]he then drove to a park at Locust and Humboldt. Approximately 5 minutes later she saw Zoellick driving a Mitsubishi Lancer Evolution with the man who was later identified as Khan in the front passenger seat. Zoellick then parked in the park … [and] got out of the car and came over and opened the

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] We have omitted first names and titles such as Mr. and Ms. from quoted sections of the criminal complaint.

> passenger side door of the Saab … and leaned in. Zoellick stated, "The guy said you should go for a ride." LaFave stated she did not want to go for a ride and she did not like what was going on. Zoellick then said, "Will you please go for a ride." LaFave then said fine and Zoellick said, "Grab the zip ties," referring to the black zip ties located in the center console. She then grabbed the zip ties and entered the back seat of the Mitsubishi Evolution. LaFave stated that she hid the zip ties in her left hand against her side.

¶3 Next, while LaFave sat in the back seat, Zoellick and Khan talked about the car. Then Zoellick "pulled out a gun and told Khan to put his hands up." Khan asked Zoellick not to shoot him and Zoellick said, "Give me the zip ties." LaFave gave the ties to Zoellick, "figur[ing] that Zoellick was going to tie up the hands of Khan."

¶4 LaFave exited the Mitsubishi and entered the Saab. Zoellick indicated that he would follow LaFave, who then proceeded to drive to Watertown, which was where Zoellick had said he would "get rid of the guy." LaFave started off leading, driving toward Watertown on the freeway. Then Zoellick passed her and she followed him to a storage facility just north of Watertown.

¶5 At the storage facility, Zoellick, with his gun visible, forced Khan into the back seat of the Saab. LaFave then drove them out of the driveway, following Zoellick's directions on where to drive. During the ride, Zoellick "leaned over and said, 'Maybe we should take him back to the shed.'" LaFave asked Zoellick, "Are you sure you want to do this?" and Zoellick indicated yes. LaFave then turned the car around and they drove back to the storage facility. During the car ride, Khan asked Zoellick and LaFave not to shoot him.

¶6 LaFave told the detectives that at this point, she "figured that Zoellick was going to kill Khan." She said that "the reason why she continued helping Zoellick was that she did not want to end the relationship with him and that she was making some stupid decisions at this time."

¶7 Back at the storage facility, LaFave parked the Saab behind the Mitsubishi. LaFave went into a nearby duplex and used the restroom. Then she returned to the Saab, where she called her mother. LaFave did not tell her mother what was happening.

¶8 Zoellick and Khan then walked toward the woods, with Zoellick pointing the gun at Khan as they walked. LaFave sat outside and waited for Zoellick to come back. After about twenty minutes, Zoellick returned, holding a bloody knife. Zoellick told LaFave to go see if Khan was dead. She refused at first, but then ran along with Zoellick into the woods. She saw Khan lying on his back, face up, with his hands tied and blood on his face. She thought Khan was dead.

¶9 LaFave and Zoellick returned to the car, where Zoellick smashed Khan's phone and GPS unit with an ax. Zoellick then drove the Mitsubishi into the storage facility. Then LaFave and Zoellick drove to Zoellick's mother's house and they all went to Wal-Mart. When they returned home, Zoellick told LaFave that he had killed Khan by slitting Khan's throat.

¶10 Zoellick showed the Mitsubishi to two friends the next day. Zoellick later told one of those individuals that he had killed Khan and asked the man to keep it a secret. The man went to the police and reported what Zoellick had said. The police then went to Zoellick's home. When Zoellick realized that the police

were entering the home, he shot himself in the head in front of LaFave. Zoellick later died from his injuries.

¶11 LaFave was taken to the Watertown Police Department, where she was interviewed by detectives from the Milwaukee Police Department for approximately six hours. During this interview, LaFave provided the detectives with the facts detailed above. Khan's body was subsequently recovered and LaFave was charged with felony murder.

¶12 LaFave filed a motion to suppress pursuant to ***Miranda v. Arizona***, 384 U.S. 436 (1966), and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). She asserted that her statement to the police detectives "was obtained through misrepresentations that overcame her free will to give a knowing, voluntary and intelligent statement and as a result, her statement was not voluntary."[3] Specifically, she asserted that when the detectives read her the ***Miranda*** warnings, she thought she was only being questioned about Zoellick's death. Thus, she argued, "she was 'tricked' or police used misrepresentations to cause her to give up or waive her ***Miranda*** rights."

¶13 At the motion hearing, the parties stipulated that the trial court could decide the suppression motion based on its review of the audio recording of the six-hour interview and a transcript of that interview. The parties clarified that LaFave was admitting that the ***Miranda*** warnings were properly given; at issue

[3] LaFave also argued that the detectives did not answer truthfully when LaFave asked whether she was "considered being arrested" and that the detectives downplayed the importance of the ***Miranda*** rights. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). These issues have been abandoned on appeal and will not be discussed.

was whether LaFave's statement was voluntary under ***Goodchild***. For reasons discussed later in this decision, the trial court denied the motion to suppress.

¶14 The parties subsequently reached a plea agreement, pursuant to which LaFave pled guilty to felony murder, with the underlying crime being kidnapping as a party to a crime. In exchange for LaFave's guilty plea, the State agreed to recommend "a period of substantial confinement" in prison. In addition, LaFave would not face additional criminal charges in Dodge County, where the murder took place.

¶15 LaFave pled guilty and a sentencing hearing was scheduled. Prior to that hearing, the trial court was provided with two presentence investigation reports: one written by a probation and parole agent from the Department of Corrections ("DOC") and one written by a social worker retained by LaFave. The maximum sentence the trial court could impose was forty-one years and three months of initial confinement and thirteen years and nine months of extended supervision. The DOC report recommended a sentence of twenty to twenty-five years of initial confinement and ten years of extended supervision, while the defense report recommended four years of initial confinement and six years of extended supervision.

¶16 At the sentencing hearing, the trial court noted that it had received forty-one letters, including twenty-six sent on Khan's behalf and fifteen sent on LaFave's behalf.[4] The trial court also heard statements from friends and relatives

[4] Many of Khan's family members asked the trial court to impose the maximum sentence, while LaFave's family members asked the trial court to show leniency, noting that LaFave's actions were completely out of character for her.

of Khan and LaFave, as well as LaFave herself. LaFave's two attorneys urged the trial court to impose a sentence consistent with that suggested in the defense's presentence investigation report, noting that LaFave had committed no prior crimes, was not the individual who actually killed Khan, had cooperated with the police and had accepted responsibility for her conduct.

¶17 The trial court sentenced LaFave to twenty years of initial confinement and five years of extended supervision. It discussed the relevant sentencing factors and then explained the reason for its sentence, stating:

> I don't think this is something you conjured up. That you planned. That you facilitated in structuring. But, Ms. LaFave, I characterize you and your involvement as callous indifference to what happened to this young man. By that I mean there were many opportunities … for you to exercise reasonable judgment.
>
> … [Y]ou knew what he was going to do….
>
> What's aggravating to me about this offense … is that you had many opportunities to change what happened on this date…. [That could have meant] saying, I don't want to go…. You said yes. And after you said "yes," you went there with him and you saw the gun. You could have [done] something then.
>
> … [Y]ou drove all the way to Watertown in a separate car with a cell phone. You could have called your mother, your father, your friends and explained to them I'm caught in this situation…. You did nothing…. Maybe you had no idea that he would actually kill Mr. Khan, but you did know this: Nothing good was going to happen to him. And then once you got to the area … [Zoellick] said, Let's go by the shed. You said, Do you really want to do this? And he said, Yes, he did. Then you knew the gravity of the situation. And then you talked to your mother on the phone. Told her nothing.

¶18 After sentencing, the DOC pointed out that pursuant to WIS. STAT. § 973.01(2)(b)10. (2007-08), the term of initial confinement could not exceed seventy-five percent of the total length of the bifurcated sentence. The trial court

then amended the sentence to eighteen years and nine months of initial confinement and six years and three months of extended supervision.

¶19 LaFave did not challenge the reduction in sentence, but she filed a motion for postconviction relief alleging that the trial court had imposed a sentence that was unduly harsh, given that LaFave did not personally kill Khan, had accepted responsibility for her actions and did not present a "significant concern" to the public. The trial court denied the motion in a written order. This appeal follows.

DISCUSSION

¶20 LaFave presents two arguments on appeal: (1) her statement to police should have been suppressed; and (2) the trial court erroneously exercised its sentencing discretion. We consider each issue in turn.

I. Suppression motion.

¶21 As noted, the parties waived their right to have an evidentiary hearing on LaFave's suppression motion and instead asked the trial court to base its ruling on its review of an audio recording of the six-hour police interview and a transcript of that interview. Neither the audio recording nor the full transcript of the interview has been provided to this court on appeal, as the State noted twice in its appellate brief. It was LaFave's responsibility, as the appellant, to present a complete record for the issue she asks this court to review, and "we assume that any missing material that is necessary for our review supports the [trial] court's determination." *See* ***Manke v. Physicians Ins. Co. of Wisconsin, Inc.***, 2006 WI App 50, ¶60, 289 Wis. 2d 750, 712 N.W.2d 40.

¶22 At the hearing where LaFave waived her right to testify concerning the suppression motion, the parties told the court that numerous facts were undisputed. First, the parties agreed that the ***Miranda*** warnings were properly read to LaFave. Second, they agreed that the transcript was an accurate statement of the words that were said at the interview. Third, LaFave admitted that she understood the words that were said to her and indicated that she did not have any mental infirmities that would make her unable to understand the words. As trial counsel explained: "There is no issue of competency. She is educated in the sense that she has gone to high school. She was taking college courses. She was employed."

¶23 The issue identified for resolution by the trial court was a "***Goodchild***" issue: whether LaFave's statement was voluntary. Specifically, the trial court was asked to determine whether alleged misrepresentations by the detectives concerning the scope of the interview caused LaFave's statement to be involuntary.

¶24 A defendant's statements are voluntary if they are "'the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist.'" ***State v. Ward***, 2009 WI 60, ¶18, 318 Wis. 2d 301, 767 N.W.2d 236 (citation omitted). When considering voluntariness, courts look at the totality of the circumstances. ***Id.*** "[M]isrepresentations by police 'do not necessarily make a confession involuntary'; rather, they are a relevant factor in the totality of the circumstances." ***Id.***, ¶27 (citation omitted).

¶25 On appeal of a trial court's determinations concerning voluntariness, appellate courts will "uphold a [trial] court's findings of historical fact unless they are clearly erroneous," but will "independently review the application of constitutional principles to those facts." ***Id.***, ¶17.

¶26 In this case, after reviewing the transcript and audio recording of the interview, the trial court held a hearing at which it announced its decision. The trial court noted that its factual findings were based on what occurred starting at a particular page of the interview transcript, at the point in time just before the ***Miranda*** warnings were given. The trial court then read that portion of the interview transcript out loud. The following is how the interview appears in the record:

> And Detective Heier, H-E-I-E-R, says, Okay. You've never been arrested before? Ms. LaFave responds, No. Detective Heier: Okay. We got so much about you and [Zoellick's] background and stuff, but we weren't in the house. We didn't talk to you initially. Okay? Response by Ms. LaFave, Yeah. Detective Heier: And this whole thing about shooting and stuff like that-- Ms. LaFave: Yeah? Detective Heier: Whatever we talk to you-- Whenever we talk to someone or somebody, especially when we're out of town like this, we always read them their rights. Okay? Ms. LaFave: Okay. Detective Heier: And we do that to everyone we talk to under these circumstances. I'm going to emphasize that. I'll read it again. And we do that to everyone we talk to under these circumstances. Ms. LaFave, and there's a quotation mark by the transcriber, sounds like, does this consider being arrested? That's in parentheticals. Detective Heier responds, We don't have, dash, We're not arresting you, I guess, in Watertown. Ultimately, are you coming down to Milwaukee? That's a possibility in the big picture. Ms. LaFave: Okay. Detective Heier: Okay. You might be coming down there? Ms. LaFave: Okay. Detective Heier: Okay. After this whole thing, but right now, I don't know how we're going to handle this whole mess. Ms. LaFave: Okay. Detective Heier: Okay. But if we talk to you, and then in parentheticals, sounds like, not being in the house and not, closed parentheticals, when someone gets shot, we

> have to look and say, Well, did you shoot him, question mark. Ms. LaFave: Right. Yeah, I understand that. Detective Heier: And that's why we have to cover everything before we talk to you about something like that, and then also when we start talking to you, and you indicate that this is what happened. Ms. LaFave: Yeah. Detective Heier: We just want to make sure that we're, in parentheticals, sounds like, doing it, closed parentheticals, but regardless, witnesses and so forth, we do this. As far as the arrest thing, we're going to have to work with that. Okay? Ultimately, you've never been arrested before? Ms. LaFave: No. Detective Heier: Okay. Sounds like you--Okay. That's what Detective Heier says, and then in parentheticals, it says sounds like, colon, you got the card with you, closed colon, ellipses. Detective Goldberg: Mmhmm. It's got M-M-H-M-M. Detective Heier: Okay. And then we're going to go into the background about how you met this guy and so forth. Okay? If you got any questions, let us know. Only, sounds like because, you haven't been arrested before. You haven't been through this. No, we work in Milwaukee, so we talk to a lot of different people that have been through the system before and so forth. So that's why, clearly, if you have any questions, just let us know. Ms. LaFave: Okay. Detective Heier: Otherwise, we'll go into more background and [Zoellick's] whole story and, ellipses, update, seriously, as far as we know he was taken to the hospital… And, again, if we have any information, we'll be sure to pass it on. Ms. LaFave: Okay.
>
> And then Detective Heier reads her the rights.

¶27 The trial court then discussed the totality of the circumstances. The trial court found as follows:

> [P]art of my record will be actually listening to the tape as it relates to these pages because you have to hear the tape to really get the gist of how this communication went. And the relationship between the detectives and Ms. LaFave was amicable, friendly throughout. No coercive nature whatsoever. In fact, they were reassuring to her. She was talking to them. They were talking back and forth. I, from those tapes, found no indication of any coercive behavior by either detective. And certainly Ms. LaFave's reaction to them was calm and appropriate.
>
> Based on the totality of the circumstances, I'm finding that there was no coerciveness, no intent to

> misrepresent to Ms. LaFave. The rights were properly given, no coercive tactics used.

¶28 On appeal, LaFave does not challenge the trial court's findings of fact. Instead, she argues that based on the undisputed facts, her confession was not voluntary because "she was 'tricked' or police used misrepresentations." She explains:

> [T]here are three factors that are important as to whether or not [LaFave] was voluntarily waiving her rights. First off, LaFave had no prior contact with police other than one minor traffic offense. Second, she just witnessed Zoellick shoot himself in the head. Lastly, she was told that she was being questioned for the shooting of Zoellick. Therefore, the police misrepresentation that she was being questioned about a matter, to wit: the shooting of Zoellick, that caused her to overcome her free will to give a voluntary, knowing and intelligent statement. As a result, she waived her right to remain silent in order to benefit and/or protect herself as it relates to the shooting death of Zoellick.

(Record citations omitted.)

¶28 In response, the State argues that the detectives did not make any affirmative representations and were not required to tell LaFave every topic they might discuss at the interview. The State's argument is based on ***Colorado v. Spring***, 479 U.S. 564 (1987), which held that "mere silence by law enforcement officials as to the subject matter of an interrogation is [not] 'trickery' sufficient to invalidate a suspect's waiver of ***Miranda*** rights." *See* ***Spring***, 479 U.S. at 576.

¶29 LaFave also cites ***Spring***, noting that in a footnote, the Supreme Court stated:

> In certain circumstances, the Court has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege.... In this case, we are not confronted with an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation and do not reach the

> question whether a waiver of ***Miranda*** rights would be valid in such a circumstance.

See ***Spring***, 479 U.S. at 576 n.8. LaFave argues that ***Spring*** "left open the question of whether or not a waiver of ***Miranda*** rights would be valid in the face of an affirmative misrepresentation by law enforcement as to the scope of the interrogation." She continues:

> LaFave submits that in this matter the transcript reflects that law enforcement in this matter did not inform LaFave as to the complete scope of their interrogation. Therefore, there was an affirmative misrepresentation by law enforcement as to the questioning by law enforcement as it relates to the scope of the questioning.

¶30 The State disagrees with LaFave's suggestion that there were any affirmative misrepresentations, asserting that "[t]here is nothing in the [trial] court's recitation of the statement transcript which can be said to be an affirmative representation that police intended to limit the scope of the questions to Zoellick's self-inflicted gun shot." Indeed, the State points out, one detective told LaFave that they would talk about "this whole thing about shooting and stuff like that."

¶31 We agree with the State's analysis. We have reviewed the limited portion of the transcript that the trial court made part of its oral ruling. The detectives did not make affirmative misrepresentations concerning the scope of the interview, such as telling LaFave that they would not discuss Khan's kidnapping and death. Rather, the detectives made clear that they would talk to LaFave about Zoellick, including "the background about how [LaFave] met this guy and so forth," and did not mention Khan. The detectives' silence about Khan's kidnapping and death was "mere silence by law enforcement officials as to the subject matter of an interrogation," and was therefore not "'trickery' sufficient to invalidate [LaFave's] waiver of ***Miranda*** rights." *See* ***Spring***, 479 U.S. at 576.

¶32 The transcript does not support LaFave's assertion that her statement was involuntary. None of the words that the detectives said were improper. Further, the trial court's findings concerning the tone and tenor of the interview are supported by the limited transcript we have been provided, and in the absence of the full transcript and audio recording we will assume that those materials support the trial court's finding that LaFave's statement was voluntary and not the product of coercion. *See* ***Manke***, 289 Wis. 2d 750, ¶60.

II. Sentencing.

¶33 The second issue LaFave raises is whether 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. At sentencing, a 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 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. *See* ***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 court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

¶34 The sentencing court is generally afforded a strong presumption of reasonability, and if our review reveals that discretion was properly exercised, we follow "'a consistent and strong policy against interference'" with the trial court's sentencing determination." ***Id.***, ¶18 (citation omitted). We review an allegedly

harsh and excessive sentence for an erroneous exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). A sentence is unduly harsh when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶35 LaFave does not allege that the trial court failed to consider any of the requisite sentencing factors, and she acknowledges that sentences are rarely overturned on the basis of an improper exercise of discretion. Nonetheless, she contends that the length of the sentence imposed was unduly harsh. She argues that she "did not 'kill' Haroon Khan." She explains:

> The only actual event that she engaged in was the handing over of the zip tie. However, she did not call anyone while she was traveling out to Watertown or while she was [at] the Zoellick residence…. If she would have called someone, we have no idea whether or not Haroon Khan would be alive. Therefore, her failure to call can be a factor that the trial court could use in its decision to impose a sentence. But based upon the record in this matter, it is really the only factor that the court used to justify the imposition of the twenty five year sentence.

LaFave contends that a shorter sentence was justified because she: (1) did not orchestrate the crime; (2) never believed Zoellick was going to kill Khan;[5] (3) had no prior criminal record; (4) had a positive family life; (5) took responsibility for her actions; and (6) was remorseful.

[5] This assertion appears to contradict statements in the criminal complaint, to which LaFave stipulated, indicating that by the time LaFave arrived at the storage facility the second time, she knew Zoellick was going to kill Khan.

¶36 We are not convinced that the sentence imposed was unduly harsh. It is undisputed that LaFave undertook numerous actions that assisted Zoellick, including: going to Milwaukee with Zoellick, driving to the park, handing Zoellick the zip ties, driving the Saab to Watertown while Zoellick drove in the Mitsubishi with Khan, driving Zoellick and Khan away from and then back to the storage facility and confirming that Khan was dead. Not only did LaFave assist Zoellick, she did nothing to prevent Khan's death, despite having multiple opportunities to do so, including times when she was not with Zoellick. The serious and aggravated nature of the crime and LaFave's involvement were appropriate factors for the trial court to consider and, in its discretion, afford greater weight. *See* ***Ocanas***, 70 Wis. 2d at 185 (weight to be given to main sentencing factors is within trial court's discretion).

¶37 Further, we note that the period of initial confinement that the trial court imposed was less than half of what it could have ordered. This is further indication that the sentence was not unduly harsh. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.").

¶38 For these reasons, we reject LaFave's argument that her sentence should be overturned because it is unduly harsh. The trial court did not erroneously exercise its sentencing discretion when it sentenced LaFave to eighteen years and nine months of initial confinement for her role in Khan's death.

By the Court.—Judgment and order affirmed.

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