

13-1898
Criminal

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

CHARLENE WANNA,

Defendant and Appellant.

Appeal from the United States District Court
for the District of South Dakota
Northern Division

The Honorable Charles B. Kornmann
United States District Judge

APPELLEE'S BRIEF

BRENDAN V. JOHNSON
UNITED STATES ATTORNEY
Kevin Koler
Assistant U.S. Attorney
325 S. 1st Avenue, Suite 300
Sioux Falls, SD 57104
Telephone: (605) 357-2354
Attorneys for Appellee

SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

Charlene Wanna appeals the denial of her motion for acquittal during her jury trial and the district court's¹ guidelines-range sentence of thirty-three months for Misapplication of Funds from an Indian Tribal Organization and Aiding and Abetting in violation of 18 U.S.C. §§ 1163 and 2. Wanna believes the trial evidence was insufficient to support the conviction, and she claims the district court abused its discretion when it did not downward depart, instead sentencing her at the low end of her advisory guidelines range.

The Government opposes Wanna's arguments. There was ample evidence to support the jury verdict, and her sentence was procedurally sound and substantively reasonable.

The Government respectfully submits that the facts and legal arguments are adequately presented in the briefs and record and that the decisional process would not be significantly aided by oral argument, and, therefore, does not request oral argument.

¹ The Honorable Charles B. Kornmann, United States District Judge, District of South Dakota.

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JURISDICTIONAL STATEMENT

Charlene Wanna appeals the sentence imposed on her by the district court following her jury conviction on one count of Misapplication of Funds from an Indian Tribal Organization and Aiding and Abetting, in violation of 18 U.S.C. §§ 1163 and 2. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The judgment and commitment was entered on April 17, 2013, and Wanna timely filed her notice of appeal on or about April 22, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT WANNA'S CONVICTION, DRAWING ALL INFERENCES IN SUPPORT OF THE JURY'S VERDICT.

United States v. Wilson, 565 F.3d 1059 (8th Cir. 2009)

United States v. Robertson, 709 F.3d 741 (8th Cir. 2013)

United States v. Hernandez, 301 F.3d 886 (8th Cir. 2002)

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY IMPOSING A SUBSTANTIVELY UNREASONABLE SENTENCE.

United States v. Feemster, 572 F.3d 455 (8th Cir. 2009) (en banc)

United States v. Shirley, 720 F.3d 659 (8th Cir. 2013)

United States v. MacInnis, 607 F.3d 539 (8th Cir. 2010)

STATEMENT OF THE CASE²

Wanna was indicted on April 4, 2012, charged with one count of misapplication of funds from a tribal organization and aiding and abetting in violation of 18 U.S.C. §§ 1163 and 2. DCD 1. She was one of four defendants alleged to have used their roles as elected executive board members of the Heipa/Veblen District to unlawfully acquire more than \$1,000 of funds belonging to the Sisseton Wahpeton Sioux Tribe. DCD 1 at pages 1-3. The other three defendant board members pled guilty.³

Wanna proceeded to a jury trial on November 26-27, 2012, with the Honorable Charles B. Kornmann, United States District Judge, presiding. Wanna moved for judgment of acquittal at the close of the government's case, and she

² References to individual docket entries in the district court clerk's record in the underlying criminal case are cited as "DCD" with the docket number and page number. References to the trial transcript are cited as "TR" with the appropriate page number. References to the sentencing transcript are cited as "ST" with the appropriate page number. References to the Presentence Investigation Report are cited as "PSR" with the appropriate page and paragraph number. References to the Appellant's Brief are cited as "AB" with the appropriate page number.

³ See Docket for *United States v. LaBelle et al.*, Case No. 1:12-10024 (D.S.D.). Judgment and Commitment Orders for Wanna's co-defendants can be found at docket entries 102 (Lloyd LaBelle, Jr.), 110 (Jacqueline Wanna), and 111 (Tammie Strutz). Each defendant, including Charlene Wanna, was ordered to pay \$345,965 in restitution, joint and several. The sentences ranged from five years of probation (Jacqueline Wanna), 18 months' imprisonment (Lloyd Labelle, Jr.), 24 months' imprisonment (Tammie Strutz), to 33 months' imprisonment (Charlene Wanna).

renewed the motion at the close of evidence, both of which were denied. TR at pages 116, 177. The jury convicted her of the charged count. DCD 76.

Wanna was sentenced on April 16, 2013. ST 24. Neither side objected to her guideline imprisonment range of 33 to 41 months. PSR at page 12, ¶ 54. In addition to joint and several restitution of \$345,965, she was sentenced to an imprisonment term of 33 months, at the bottom of her calculated range. ST 26. Wanna filed a timely notice of appeal on April 22, 2013. DCD 58.

STATEMENT OF FACTS

Charlene Wanna is an enrolled member of the Sisseton-Wahpeton Oyate Sioux Tribe, and during the relevant time period was an elected board member of the Heipa/Veblen District, serving as secretary. ST 118-119. The Heipa/Veblen District (the “District”) is one of seven districts into which the Lake Traverse reservation of the Sisseton-Wahpeton Oyate Sioux Tribe is divided. TR 24. The District is a chartered entity under the tribe, and the majority of its funds come from the tribe. PSR at page 4, ¶ 7; TR 25. It is governed by an elected executive board that consists of four members. PSR at page 4, ¶ 7; TR 25. Wanna was elected secretary in 2007 and re-elected two years later. TR 26.

In January 2007, the enrolled members of the District met, and a motion passed setting the pay for the executive board members. PSR at page 4, ¶ 8. Wanna was to be paid \$600 per month. *Id.* The written meeting minutes provided

that “...any meetings other than these must be brought back to the district meeting for approval to see if the district wants to pay additional meetings and board members must be paid once a month.” *Id.* Further details from the written minutes provided for \$150 for certain individuals, including Wanna, for “construction meeting.” *Id.*

Shortly after Wanna was re-elected to her second term as secretary, a new chairman of the executive board was put into place. TR 26. Despite having just run for office and having been re-elected, Wanna promptly resigned her position in January 2009. TR 27; ST 118, 174. Shortly after the new chairman took office, he ordered an audit of the District’s finances. TR 43. It was discovered that a large amount of money was missing. TR 27. The criminal investigation into Wanna and her co-defendants commenced after an outside auditor contacted the South Dakota Division of Criminal Investigation believing the board members had been significantly overpaid. PSR at page 4, ¶ 9.

The investigation showed that the co-defendants were paid at least \$433,815, when the approved monthly stipends totaled just \$76,800. *Id.* The excess was attributable to checks the co-defendants wrote to each other on District accounts. During the relevant time period, Wanna received about 437 checks, totaling \$117,715. PSR at page 5, ¶ 13. That exceeded the authorized amount by \$97,315. *Id.*

At trial, the government introduced the many checks made out to and cashed by Wanna during the relevant time period. TR 68; Tr. Exh. 4. The government also introduced hundreds of additional checks authorized or signed by Wanna and made out to each of her co-defendant board members. TR 68-70, Tr. Exhs. 5-7. The checks were mostly written out of a central account, the Heipa Administration Account, but there were additional checks written on other District accounts, such as a “Loan Repayment Account,” and a “Powwow Account.” TR 76-77. At times, Wanna cashed as many as four checks written to her on the same day. TR 77. The many payments to Wanna and her co-defendants also caused over \$20,000 in overdraft fees to the Administration Account. TR 87-88.

The audit that commenced shortly after Wanna resigned attempted in part to reconcile the many checks with records that offered some justification for the payments, such as meeting minutes or a check stub noting the reason for the checks. TR 85. Even disregarding all the checks for which there was some sort of documented justification, there still remained \$50,615 in payments to Wanna for which there was no documentation whatsoever. TR 85-87.

The government also introduced the January 2007 meeting minutes discussing board member compensation and the requirement to return to the District for approval for pay for additional meetings. TR 37-41, TR Ex. 3. Wanna was, incidentally, the secretary who prepared those meeting minutes. TR 41. The

District coordinator for the relevant time period also testified that she was not aware that Wanna and her co-defendants were using their check-writing authority to write each other hundreds of checks. TR 42. Binders that were supposed to contain records of check requests and a check ledger went missing around February 2007, at the outset of Wanna's and her co-defendants' tenure. TR 47-48.

Wanna's co-defendant and sister, Jackie Wanna, testified at trial. TR 94. Jackie testified that Charlene Wanna typically scheduled the many meetings. TR 95. They met at times at a tribal casino. TR 96. She testified that, at some of the meetings at the casino, the four of them got together and essentially just wrote each other checks without discussing any kind of business. TR 96-97. They would leave the meeting with their checks, cash the checks at the casino, and gamble away the money. TR 97. Jackie also testified that the check writing started after she had a phone conversation with Wanna. TR 98. Wanna indicated she learned that co-defendant Strutz had found a way to use a signature stamp to misappropriate \$10,000 from the District. *Id.* Wanna told Jackie that "if Tammie can do that, we can also do that." *Id.*

A casino worker testified at trial that she recalled Wanna and her co-defendants meeting in a conference room at the casino. TR 111. She corroborated part of Jackie's testimony, recalling that Wanna and the others would come out of the conference room, checks in hand dated that same day that they would bring to

her, and she would have to cash the checks at their request. TR 112. She stated that, as a member of the District herself, she found the experience of cashing those checks “kind of frustrating, but at the same time you feel powerless, because what can you do?” TR 113.

Wanna testified in her defense. TR 118. She argued that the extra checks written out to her were for compensation for her attendance at official meetings of various District sub-groups on which she served. TR 122-126. She claimed the authority for such payments was derived from the District members’ approval of periodic treasurer’s reports. TR 123. She admitted that she did not have any of those treasurer’s reports, that she did not know if they were maintained or not, and that she had never actually reviewed the treasurer’s reports herself. TR 134-35. She flatly denied Jackie’s testimony that (1) there were times she and her co-defendants just convened meetings to exchange checks, and (2) that she at one point engaged in a phone conversation about how co-defendant Strutz misappropriated funds and they should do the same. TR 138. She also claimed there were check request forms that she filled out that would fill in missing information about the checks for which there was no documentation, but she did not have those forms and she had no idea what happened to them. TR 139.

On cross-examination, Wanna confirmed that she cashed or deposited all the checks written out to her. TR 141. She also admitted that she signed or stamped a

large number of checks payable to her co-defendants, for which they had each pled guilty. TR 155-160. She explained that her prompt resignation in early 2009, just after seeking and winning re-election, was not because she feared new board members were going to discover the check writing scheme and the misappropriated funds. TR 152. Rather, she claimed she resigned because she thought the election she won was illegal because it was held in the wrong month. TR 152-154.

At sentencing, Wanna's counsel mentioned Wanna's health issues, referring to paragraphs in the pre-sentence report regarding her health. ST 15-16. The PSR reflected that Wanna is in poor physical health due to multiple allergies, asthma, high blood pressure, high cholesterol, diverticulosis, hepatitis, heart palpitations, seizure disorder, osteopenia, degenerative joint disease, rotator cuff injuries, sleep apnea, carpal tunnel syndrome, back injuries, and a kidney condition. PSR 9 at ¶¶ 41-43. Wanna made no mention of a request for a downward departure or variance at sentencing, and no motion was filed pre-sentencing.⁴

Before announcing her sentence, the district court detailed its reasoning. It noted that Wanna's crime was one in which she and her co-defendants made the decision to steal money many times repeatedly, from "people that are the most destitute in our country." ST 18. The district court noted that Wanna exhibited an

⁴ The PSR author included U.S. Sentencing Guidelines § 5H1.4 as a potential ground for departure in listed in the PSR. PSR at page 14, ¶ 67. The government objected before sentencing, stating it "will resist any requested departure or variance discussed based upon health concerns or otherwise." PSR ADD at 1.

attitude during trial that she was entitled to the money she stole, and she was a half hour late for court the second day of trial. ST 19-20. The court considered Wanna's age, but rejected the notion that 62 years of age makes her elderly. ST 22. Finally the court detailed Wanna's many medical conditions and discussed how she would likely receive very good medical care from the federal Bureau of Prisons. ST 23. Finally, the district court discussed the potential for a downward variance under 18 U.S.C. § 3553(a)(2)(D) and a downward departure pursuant to U.S. Sentencing Guidelines § 5H1.4 (2012), but rejected both of those bases for sentencing below the guidelines range. ST 24. Wanna was sentenced to 33 months' imprisonment, the low end of her guidelines range, followed by three years of supervised release, and she was ordered to pay joint and several restitution \$345,965. ST 25-26.

SUMMARY OF THE ARGUMENT

Ample evidence supported Wanna's conviction. Multiple witnesses testified to facts from which a reasonable jury could find her guilty beyond a reasonable doubt. Her appeal asks the Court to make a determination that Wanna's testimony was credible and that others' testimony was not. This Court has repeatedly held that it will not engage in second guessing a jury's credibility and fact-finding determinations.

The district court determined Wanna's sentence at the low end of her guideline range after considering various statutory sentencing factors and a potential downward departure that Wanna did not raise. The record reflects that the presumptively-reasonable sentence was the result of defendant-specific determinations that the district court was well-positioned to make. It should not be disturbed on appeal.

ARGUMENT

I. ACCEPTING ALL REASONABLE INFERENCES IN SUPPORT OF THE VERDICT, AMPLE EVIDENCE SUPPORTS THE JURY'S GUILTY VERDICT.

A. Standard of Review.

The standard of review for a defendant challenging the sufficiency of the evidence is formidable:

"We review the sufficiency of the evidence de novo, viewing evidence in the light most favorable to the government, resolving conflicts in the government's favor, and accepting all reasonable inferences that support the verdict." [Citation omitted.] This standard of review is strict; we will uphold the verdict if there is any interpretation of the evidence that could lead a reasonable-minded jury to find the defendant guilty beyond a reasonable doubt.

United States v. Hamilton, 332 F.3d 1144, 1148-49 (8th Cir. 2003) (quoting *United States v. Washington*, 318 F.3d 845, 852 (8th Cir. 2003)); see also *United States v. Jirak*, 2013 WL 4529499 at *3 (8th Cir. Aug. 28, 2013). This Court will "reverse only if no rational jury could have found the essential elements of the crime

beyond a reasonable doubt." *United States v. Wilson*, 565 F.3d 1059, 1070 (8th Cir. 2009) (quotation omitted).

B. Ample Evidence Supported the Verdict.

To prove a violation of 18 U.S.C. § 1163, the government was required to prove beyond a reasonable doubt that Wanna knowingly and willfully embezzled, stole or misapplied property or funds belonging to an Indian Tribal Organization, the value of which was greater than \$1,000. See 18 U.S.C. § 1163; *United States v. Robertson*, 709 F.3d 741, 744-45 (8th Cir. 2013). Wanna's appeal challenges only whether Wanna acted in good faith, which as a general principle, would provide Wanna with a defense if she acted in good faith such that it was inconsistent with willful criminal intent. See *Robertson*, 709 F.3d at 746-47.

When considering the sufficiency of evidence, this Court is not to evaluate witness credibility or determine what weight, if any, to give particular evidence. *United States v. Hernandez*, 301 F.3d 886, 889 (8th Cir. 2002). The "issue of witness credibility is virtually unreviewable on appeal because it is 'preeminently the job of the finder of fact.'" *United States v. Rayl*, 270 F.3d 709, 713 (8th Cir. 2001) (quoting *United States v. E.R.B.*, 86 F.3d 129, 130 (8th Cir.1996)). "As an appellate court, it is well-established that we do not second guess the jury's findings of fact." *United States v. Shirley*, 720 F.3d 659, 664 (8th Cir. 2013). In other words, this Court must accept that any evidence with more than one

interpretation was interpreted by the jury against Wanna, and that any inference that could be drawn from the evidence was drawn favorably to the verdict.

Despite Wanna's insistence at trial and now on appeal that she and the other board members were entitled to receive all the checks they wrote to themselves, there was ample contrary evidence. Wanna's jury made a clear credibility determination: Wanna's testimony—her side of the story—was less credible than the many witnesses (including her own co-defendant sister) who testified that Wanna was intimately involved and aware that she was writing and receiving unauthorized checks. Examples of such trial evidence include Wanna's sister's testimony that some of the so-called "meetings" were set up at Wanna's request, held at the casino, involved no business whatsoever, and consisted instead of the board getting together to write each other checks that they then cashed at the casino and gambled away. TR 96-97. The jury also heard from a witness who corroborated that the group met at the casino, walked out of a conference room with checks that they then cashed, and they then gambled with the money. TR. 110-113.

Wanna's sister also testified that, at one point, Wanna called her and discussed starting up the check-writing scheme because another of their eventual co-defendants found a way to misappropriate \$10,000 without getting caught. TR 97-99. Moreover, Wanna's claim that the checks were authorized was unsupported

by other witnesses or by any of the sort of documentary evidence that should exist if her version of events were true. Given the ample evidence, the district court did not err in denying her motion for acquittal. As the court stated at one point during Wanna's sentencing, "[the] evidence was overwhelming." ST 25

II. WANNA'S SENTENCE WAS SUBSTANTIVELY REASONABLE.

A. Standard of Review

Generally, when this Court reviews "the imposition of sentences, whether inside or outside the Guidelines range, we apply 'a deferential abuse-of-discretion standard.'" *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc) (quoting *United States v. Hayes*, 518 F.3d 989, 995 (8th Cir. 2008) (itself quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)). "Substantive appellate review in sentencing cases is narrow and deferential." *United States v. Waller*, 689 F.3d 947, 960 (8th Cir. 2012) (per curiam) (quoting *Feemster*, 572 F.3d at 464). Thus, "it will be the unusual case when we reverse a district court sentence – whether within, above, or below the applicable Guidelines range – as substantively unreasonable." *Feemster*, 572 F.3d at 464. A sentence like Wanna's, within the guidelines range, "is presumptively reasonable on appeal." *United States v. Shirley*, 720 F.3d 659, 666 (8th Cir. 2013) (quoting *United States v. Torres*, 552 F.3d 743, 747-48 (8th Cir. 2009)).

Here, the district court considered and rejected a guidelines departure, U.S. Sentencing Guidelines § 5H1.4, that Wanna appears to have not raised herself through a pre-sentencing motion or during the sentencing hearing. ST 15-17. Thus, she now appeals the district court's decision to deny a departure that the court raised *sua sponte*, presumably because it was listed in the PSR as a potential ground for departure. PSR at page 14, ¶ 67. When an alleged sentencing defect is unpreserved, plain error review applies. See *United States v. MacInnis*, 607 F.3d 539, 542 (8th Cir. 2010).

B. The District Court Considered the Proper Factors and Imposed a Reasonable Sentence.

When a sentencing court considers the § 3553(a) factors and does not clearly err in weighing and applying them, it does not abuse its discretion in imposing a sentence, especially one that is a presumptively-reasonable guidelines range term. See *Shirley*, 720 F.3d at 665. The record reflects that the district court imposed Wanna's sentence after considering various § 3553(a) factors. The court considered the nature and circumstances and the seriousness of the offense, noting that the crime involved Wanna stealing repeatedly from destitute people. ST 18-19. The court discussed the need to provide just punishment and deter others, reasoning that light sentences for large thefts might lead people to decide that it is worthwhile to commit these sorts of crimes. ST 21. The district court also discussed other defendants it had sentenced for large theft offenses, indicating its

mindfulness of the need to avoid unwarranted sentence disparities, pursuant to 18 U.S.C. § 3553(a)(6). ST 19-22. Finally, the district court stated explicitly that, in reaching its sentence, it was “required to take into account all the statutory factors set forth in 18 United States Code, Section 3553, and I am doing that.” ST 25-26. Given the careful consideration and guidelines-range result, Wanna’s sentence should not be disturbed.

The district court also did not plainly err in failing to grant a downward departure due to Wanna’s health issues. The record indicates that the district court considered Wanna’s health issues in detail. ST 23-24. The court discussed whether those issues rose to the level of presenting “an unusual degree and distinguishes the case from the typical case covered by the Guidelines.” ST 24. It held that Wanna’s issues did not present such an unusual case, and determined not to depart under U.S. Sentencing Guidelines § 5H1.4, reasoning that her health conditions would be well cared for by the Bureau of Prisons. ST 23-24. Thus the district court fully considered the potential for departure, applied the appropriate analysis under the language of the guidelines section, and made a well-reasoned determination.

It is evident from the record that the district court’s determination of Wanna’s sentence rested “on precisely the kind of defendant-specific determinations that are within the special competence of sentencing courts, as the

Supreme Court has repeatedly emphasized.”” *Feemster*, 572 F.3d at 464 (quoting *United States v. Gardellini*, 545 F.3d 1089, 1095 (D.C. Cir. 2008)). The 33 month sentence neither represents an abuse of the district court’s discretion, nor did the court plainly err in not applying a downward departure pursuant to U.S. Sentencing Guidelines § 5H1.4.

CONCLUSION

Ample evidence supported Wanna’s conviction. Under all the circumstances, her sentence was reasonable and it should be affirmed.

Dated this 3rd day of September, 2013.

BRENDAN V. JOHNSON
UNITED STATES ATTORNEY

/s/ Kevin Koler
KEVIN KOLINER
Assistant United States Attorney
325 S. 1st Avenue, Suite 300
Sioux Falls, SD 57104
605-357-2354
Kevin.koliner@usdoj.gov

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Eighth Circuit Rule 10.6.3, I certify that this brief was prepared using Microsoft Word 2010.

I further certify that I have provided the foregoing brief to the Court via electronic filing of a PDF version of the brief. The PDF file has been scanned for viruses using Trend Micro OfficeScan Corporate Edition 6.5 and is virus free.

I further certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 3,501 words.

_____/s/ Kevin Koler _____

KEVIN KOLINER

Assistant United States Attorney

325 S. 1st Avenue, Suite 300

Sioux Falls, SD 57104

(605) 357-2354

Kevin.koliner@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned attorney for Appellee United States of America hereby certifies that Appellee's Brief was filed electronically with the Clerk of the Eighth Circuit Court of Appeals on the 3rd day of September, 2013, and service was made upon Appellant's attorney by the following method:

Ronald A. Parsons, Jr. - via e-filing

_____/s/ Kevin Koler _____
KEVIN KOLINER
Assistant United States Attorney
325 S. 1st Avenue, Suite 300
Sioux Falls, SD 57104
(605) 357-2354
Kevin.koler@usdoj.gov