STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP2292-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONAVINN D. COFFEE,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE FREDERICK C. ROSA, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

AARON R. O'NEIL
Assistant Attorney General
State Bar #1041818

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 266-9594 (Fax)
oneilar@doj.state.wi.us

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ISSUES PRESENTED

1. Did Defendant-Appellant-Petitioner Donavinn D. Coffee forfeit his claim that the circuit court sentenced him based on inaccurate information when he failed to object to or challenge the information at the sentencing hearing?

The circuit court did not address this issue.

The court of appeals held that Coffee forfeited his claim.

This Court should conclude that Coffee forfeited his claim and that review of it is limited to a claim of ineffective assistance of counsel or plain error.

2. Did the circuit court violate due process by sentencing Coffee based on inaccurate information?

The circuit court concluded that any error was harmless.

The court of appeals did not address this issue.

This Court should conclude that the circuit court's reliance on the information was harmless error.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case this Court has accepted for review, both argument and publication are warranted.

INTRODUCTION

The main issue presented is whether Coffee has forfeited his claim that the circuit court sentenced him based on inaccurate information by failing to object at sentencing. Coffee argues that case law does not support applying the contemporaneous-objection rule to inaccurate-information

claims. He also contends that applying the rule does not promote the administration of justice.

This Court should conclude that inaccurate-information claims can be forfeited by a defendant's failure to object at sentencing. Case law supports applying forfeiture.[1] And Coffee is wrong that requiring an objection will hinder the administration of justice; the opposite is true. In addition, applying forfeiture will not always prevent review of unpreserved inaccurate-information claims. A court can still consider the claim in the context of ineffective assistance of counsel or plain error. And courts retain the discretion to overlook a forfeiture.

The other issue presents the merits of Coffee's inaccurate-information claim. The inaccurate information is that Coffee had been arrested previously for armed robbery, when instead, the arrest was for robbery. While the circuit court relied on this erroneous information when issuing its sentence, it was harmless error.

STATEMENT OF THE CASE

Coffee's crimes, conviction, and sentencing

Coffee and Antonio Hazelwood went on a robbery spree in Milwaukee on the morning of November 10, 2015. (R. 1:2–4.) The men robbed their first victim after blocking

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[1] Cases often use the term "waiver" to refer to the loss of the right to appellate review resulting from the failure to properly preserve a claim. As this Court has explained, this loss is more appropriately called a "forfeiture." *State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612. The State uses "forfeiture" rather than "waiver" throughout this brief, including when discussing cases that use "waiver."

his car in an alley with the SUV they were riding in. (R. 1:2.) Coffee demanded the victim's money and other possessions while pointing a shotgun at him. (R. 1:2.) Coffee took $50 from the victim, along with his wallet and cell phone. (R. 1:2.)

Minutes later, Coffee and Hazelwood attempted to rob their second victim, who was walking on the street. (R. 1:2–3.) Coffee got out of the SUV with the shotgun and told the victim that he "better not run." (R. 1:2.) The victim ran, and Coffee shot him. (R. 1:3.) The victim had six shotgun pellet wounds to his head and upper back. (R. 1:3.)

Milwaukee Police Officer Joseph Goggins was in the area at the time of the crimes. (R. 1:3.) He heard about the SUV over his radio and then saw it. (R. 1:3.) Goggins turned on his squad's lights and siren to try to stop the SUV, but it sped away. (R. 1:3.) The SUV stopped in a parking lot, and Coffee and Hazelwood fled on foot. (R. 1:3.) Police later arrested them, and they both confessed. (R. 1:3–4.)

Coffee pleaded guilty to one count each of armed robbery, attempted armed robbery, and first-degree recklessly endangering safety. (R. 41:2–8.)

At sentencing, the State noted that Coffee had prior convictions for "contact after [a] domestic abuse arrest" and carrying a concealed weapon. (R. 42:9.) It also said that Coffee had been arrested in October 2014 for a battery and in December 2011 for an armed robbery, neither of which the State prosecuted. (R. 42:9.)

The court started its sentencing decision by discussing the severity of the crimes. (R. 42:20–23.) It described the robbery that led to the shooting as "terrible" and the other robbery as "bad too." (R. 42:20.) The court noted the effect being robbed has on victims, saying that "they are never the same," and that "[i]t's something like apprehension that's

always on your mind." (R. 42:20.) And, it added, those feelings were "really amplified" for the victim Coffee had shot. (R. 42:20–21.) Coffee's robberies, the court said, seemed "like it was just as much for kicks, fun, enjoyment, thrill, whatever it was, for actually taking property from these particular individuals." (R. 42:22.)

Addressing Coffee's criminal record, the court noted:

> So you have got some misdemeanor cases; one successful probation, one unsuccessful probation. You have got a couple of police contacts; one significant concern because it sounds like it was an armed robbery which is what these offenses are.
>
> So you basically are engaging in behavior that is kind of getting more serious. Domestic violence by itself is natured as assaultive behavior, meaning violence against another human being.
>
> But these other things are violence and property crimes, and I don't know what else to call it. So that pattern or your behavior or undesirable behavior is escalating. I don't know what's going on in your head causing you to make these decisions.

(R. 42:22–23.)

The court also considered the need to protect the public. It placed Coffee's crimes within the greater problem of gun violence in Milwaukee. (R. 42:21.) It told Coffee that Milwaukee was Coffee and his family's community and that "they suffer consequences too" because they have to live with the violence. (R. 42:22.) And it discussed law enforcement's role in investigating gun crimes and protecting the public. (R. 42:24–25.)

Finally, the court addressed Coffee's personal characteristics. (R. 42:23–24.) It noted his family support, that he had a high school diploma, and some work history. (R. 42:23–24.) It mentioned Coffee's son and concluded that

he also would be a victim while Coffee was in prison and unable to take care of him. (R. 42:24.)

The court gave Coffee consecutive sentences totaling 13 years of initial confinement and nine years of extended supervision. (R. 42:26–27.)

Coffee's postconviction motion and appeal

Coffee filed a postconviction motion seeking resentencing. (R. 27.) He claimed that the court had sentenced him based on inaccurate information because his Criminal Information Bureau report did not list an arrest for armed robbery or any other crime in December 2011. (R. 27:1–7.) [2]

With its response to Coffee's motion, the State submitted police reports showing that Coffee had been arrested for "strong arm robbery" in December 2011. (R. 31:4–11.) The report indicated that the victim told police that Coffee, or "SUSPECT # 1," had taken his cell phone and punched him in the face. (R. 31:5–8.) Another person, "SUSPECT # 2," then took money from the victim's pants. (R. 31:5–8.) While he was with police, the victim saw the men who robbed him go into a house. (R. 31:5–8.) Police entered the house, found Coffee and the other man, and arrested them both for the robbery. (R. 31:5–8.) The victim saw the men's faces as police brought them out of the house. (R. 31:9–10.) Later that day, the victim told police that he no longer thought that the men were the men who robbed him. (R. 31:9–10.) The victim's brother, who had been with him during the robbery, also told police that Coffee and the other

[2] Coffee also sought sentence modification in his motion. (R. 27:8–9.) The circuit court denied his request. (R. 35:4–5.) Coffee does not renew this claim on appeal.

man were not the robbers. (R. 31:8, 10.) Neither the victim nor his brother identified Coffee or the other man in a photo array. (R. 31:9–11.) Police released Coffee from custody, and the State did not file charges against him. (R. 31:10–11.)

The circuit court denied Coffee's motion. (R. 35:3–5.) The court concluded that the information about Coffee's arrest was inaccurate. (R. 35:3–4.) It said that the State's description of Coffee's arrest being for armed robbery was "problematic" because the report showed that no weapon was alleged to have been used. (R. 35:3.) It added that "more significantly, [Coffee] apparently was not involved in the offense." (R. 35:3–4.) The court also acknowledged that it had considered Coffee's arrest when it sentenced him. (R. 35:4.)

Ultimately, though, the court concluded that its reliance on the information about the arrest was harmless error. (R. 35:4.) The court noted that its decision had "focused primarily on the defendant's conduct in *this* case, his contribution to the prevalence of gun violence that is threatening the fabric of our community, the impact of his crimes upon the victims and the greater community, his background and rehabilitative needs, and the need to protect the public." (R. 35:4.) It concluded:

> Even without information about the December 2011 police contact, the fact that the defendant used a weapon in the commission of the offenses in this case and that he shot one of his victims would have led the court to the same conclusion that he was "engaging in behavior that is getting more serious" and that his "pattern . . . of undesirable behavior is escalating."

(R. 35:4 (emphasis omitted) (quoting R. 42:22–23).)

Coffee appealed, raising his inaccurate-information claim. (R. 36.) The court of appeals affirmed. *State v. Coffee*,

No. 2017AP2292-CR, 2018 WL 5819588, ¶ 6 (Wis. Ct. App. Nov. 6, 2018) (unpublished) (per curiam). It agreed with the State's argument that Coffee had forfeited his claim by not contemporaneously objecting to the information. *Id.* ¶¶ 6–12. The court noted that Coffee and his attorney had at least three opportunities to object during the sentencing hearing. *Id.* ¶ 8. The failure to object, the court held, meant that it did not need to address the claim's merits. *Id.* ¶ 12.

The court also rejected Coffee's claim that inaccurate-information claims should not be subject to forfeiture. *Coffee*, 2018 WL 5819588, ¶¶ 9–11. It further explained that when a defendant forfeits a claim, review is usually limited to a claim of ineffective assistance of counsel. *Id.* ¶ 7. But because Coffee had not raised an ineffective-assistance claim, the court declined to address it in that context. *Id.* ¶ 8.

STANDARD OF REVIEW

Whether a defendant has adequately preserved a claim for appeal, whether a circuit court has sentenced a defendant based on inaccurate information, and whether an error is harmless are questions of law that this Court reviews de novo. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1; *State v. Corey J.G.*, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998); *State v. Ziebart*, 2003 WI App 258, ¶ 26, 268 Wis. 2d 468, 673 N.W.2d 369.

Claims of ineffective assistance of counsel are mixed questions of law and fact. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Under this standard of review, the trial court's findings of fact will not be disturbed "unless they are clearly erroneous." *Id.* The ultimate issue of whether counsel was ineffective based on these facts is subject to de novo review. *State v. Balliette*, 2011 WI 79, ¶¶ 18–19, 336 Wis. 2d 358, 805 N.W.2d 334.

Whether to review a forfeited claim under plain error is a matter for this Court's discretion. *See Bergeron v. State*, 85 Wis. 2d 595, 605, 271 N.W.2d 386 (1978).

ARGUMENT

I. Coffee forfeited his inaccurate-information claim by not objecting at sentencing to the information about his 2011 arrest for robbery.

A. Claims that a court relied on inaccurate information at sentencing should be subject to the forfeiture rule.

Coffee contends that the court of appeals erroneously concluded that he forfeited his inaccurate-information claim by not objecting at sentencing. (Coffee's Br. 11–32.) He argues that case law does not support applying the forfeiture rule to inaccurate-information claims. (Coffee's Br. 16–28.) Coffee also maintains that applying forfeiture to such claims does not promote the fair and orderly administration of justice. (Coffee's Br. 28–32.)

This Court should reject these arguments. Case law supports the court of appeals' forfeiture decision. Further, applying forfeiture does not undermine the fair and orderly administration of justice, it supports it.

1. To preserve an inaccurate-information claim, a defendant should have to object during the sentencing hearing.

The State proposes that, to preserve an inaccurate-information claim, a defendant must object to the information at some point during the sentencing hearing. This will allow the circuit court to avoid or correct any potential error which, in turn, will conserve judicial resources.

Defendants and their attorneys are given opportunities to address the court at sentencing and to address the information the court might rely on when imposing sentence. Wisconsin Stat. § 972.14(2) requires circuit courts to ask defendants, before pronouncing sentence, "why sentence should not be pronounced." The statute also requires courts to give the defendant and defense counsel "an opportunity to make a statement with respect to any matter relevant to the sentence." Wis. Stat. § 972.14(2). And the defendant has the right "to refute allegedly inaccurate information that the court might otherwise consider at sentencing." *State v. Frey*, 2012 WI 99, ¶ 106, 343 Wis. 2d 358, 817 N.W.2d 436. Moreover, courts usually ask the parties early in the sentencing hearing if they have reviewed the presentence investigation report and whether they have corrections to it. *See State v. Anderson*, 222 Wis. 2d 403, 408, 588 N.W.2d 75 (Ct. App. 1998).

Because defendants and their attorneys have these opportunities to address the court at sentencing, there is no reason not to expect them to challenge the presentation of inaccurate information at that time. For example, if there is inaccurate information in the PSI, defense counsel can point it out when asked. If the State provides inaccurate information in its sentencing argument, defense counsel or the defendant can challenge it during their opportunities to address the court. And if the court relies on inaccurate information when explaining its sentence, counsel can challenge the reliance after the court has finished.

Defense counsel also can preserve the claim by immediately objecting when the State discusses inaccurate information or when the court relies on it. But, admittedly, it is not unreasonable for counsel to be reluctant to interrupt opposing counsel or the judge at sentencing. Thus, the State believes that an objection during the sentencing hearing—

even after the court has pronounced sentence—is sufficient to preserve a claim.

As explained below, both case law and the general justifications for the forfeiture rule support the State's proposal.

2. Case law supports applying the forfeiture doctrine to inaccurate-information claims.

a. Wisconsin courts apply forfeiture generally to unpreserved claims and specifically to unobjected-to errors at sentencing.

Case law supports applying the forfeiture rule to inaccurate information claims. It is well-established law that a defendant forfeits appellate review of an error by not timely objecting to it. And this Court and the court of appeals have applied this principle to claims that circuit courts improperly relied on information at sentencing. Both the general rule and these specific applications of it show that forfeiture should apply to inaccurate-information claims.

"No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *United States v. Olano,* 507 U.S. 725, 731 (1993) (citation and internal quotation marks omitted).

The forfeiture rule is a fundamental and well-established rule of judicial administration. *See State v. Huebner*, 2000 WI 59, ¶ 11, 235 Wis. 2d 486, 611 N.W.2d 727. It is "not merely a technicality or a rule of convenience;

it is an essential principle of the orderly administration of justice." *Id.*

The rule's existence goes to "the heart of the common law tradition and the adversary system." *Huebner*, 235 Wis. 2d 486, ¶ 11 (citation omitted). The doctrine "facilitates fair and orderly administration of justice and encourages parties to be vigilant lest they lose a right by failing to object to its denial." *State v. Pinno*, 2014 WI 74, ¶ 56, 356 Wis. 2d 106, 850 N.W.2d 207. The forfeiture rule encourages attorneys to prepare. *Huebner*, 235 Wis. 2d 486, ¶ 12. And it discourages sandbagging, or deliberately failing to object and later claiming the error is grounds for reversal. *Id.* It also allows circuit courts "to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal." *State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612.

To preserve a claim, parties must object to an alleged error when it occurs. *Id.*; *State v. Torkelson*, 2007 WI App 272, ¶ 25, 306 Wis. 2d 673, 743 N.W.2d 511. "[T]he party must object in a timely fashion with specificity to allow the court and counsel to review the objection and correct any potential error." *Id.* (citation omitted).

Wisconsin courts have applied these forfeiture principles to claims that circuit courts considered improper matters when sentencing defendants. The courts do not always explicitly say that the defendant's actions forfeited appellate review. But regardless of how the courts describe it, they have repeatedly concluded that they do not need to consider the merits of a defendant's claim of sentencing error in the absence of a timely objection.

For example, this Court's decision in *Handel v. State* is consistent with a finding of forfeiture, though the Court did not describe it as one. Handel argued that the sentencing

court erred by considering his pending criminal charge. *Handel v. State,* 74 Wis. 2d 699, 701, 247 N.W.2d 711 (1976). The information about the charge was in the PSI. *Id.* at 704. This Court held that the sentencing court did not err by considering the charge, in part, because Handel had the chance to rebut the information in the PSI but did not. *Id.* This Court did not say that Handel forfeited his claim, but its decision is consistent with such a determination.

The court of appeals followed *Handel* in *State v. Johnson*, 158 Wis. 2d 458, 463 N.W.2d 352 (Ct. App. 1990), *abrogated on other grounds by State v. Harbor*, 2011 WI 28, ¶ 47 n.11, 333 Wis. 2d 53, 797 N.W.2d 828. Johnson claimed that his PSI inaccurately described his past convictions. *Johnson*, 158 Wis. 2d at 470. The court acknowledged that due process required defendants to be sentenced based on accurate information. *Id.* at 468. But, citing *Handel*, it held that Johnson had not proven any error because his counsel had reviewed the PSI before sentencing and "did not note any objection to it or point the court to any purported inaccuracies." *Id.* at 470. Again, the court's decision is consistent with a finding of forfeiture without calling it one.

The court of appeals reached a similar result in *State v. Mosley*, 201 Wis. 2d 36, 547 N.W.2d 806 (Ct. App. 1996). There, Mosley claimed on appeal that the court erred by relying on information in the PSI. *Id.* at 45–46. The court again stated that defendants have a right to be sentenced based on accurate information. *Id.* at 45. And, similarly to *Johnson*, it held that Mosley had not shown error because he had not said at sentencing that the information was inaccurate. *Id.* at 46. While Mosley "raised questions about the reliability" of the information, he also "explicitly stated that he was not saying the statements were untrue." *Id.* at 45. As in *Handel* and *Johnson*, the court effectively held that

the claim was forfeited because the defendant did not object at sentencing.

In *State v. Samuel*, the court of appeals took the next step from *Handel*, *Johnson*, and *Mosley* and specifically said that the defendant forfeited a sentencing-related claim by not making a contemporaneous objection. 2001 WI App 25, ¶¶ 41–43, 240 Wis. 2d 756, 623 N.W.2d 565, *rev'd on other grounds*, *State v. Samuel*, 2002 WI 34, 252 Wis. 2d 26, 643 N.W.2d 423. Samuel argued that the circuit court erred by considering CHIPS records at sentencing. *Id.* ¶ 41. He did not claim that the records were inaccurate but, instead, argued that due process required that he have access to them before sentencing. *Id.* The court determined that Samuel forfeited this claim by not objecting. *Id.* ¶ 42. Had he done so, the court said, "a solution could likely have been arrived at." *Id.*[3]

Similarly, in *State v. Leitner*, the court of appeals explicitly held that Leitner had forfeited his claim that the circuit court improperly relied on his expunged convictions when it sentenced him. 2001 WI App 172, ¶¶ 38–41, 247 Wis. 2d 195, 633 N.W.2d 207. Leitner's attorney had commented on the convictions, but he did not make clear whether he wanted the court to ignore them. *Id.* ¶ 41. Counsel also never objected when the State or the court

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[3] While the State is arguing that objecting during the court's explanation of its sentence is not necessary to preserve a claim, *Samuel* demonstrates that doing so is possible. The court rejected Samuel's argument that he could not have objected because he did not know the court was going to rely on the records until it began imposing sentence. *State v. Samuel*, 2001 WI App 25, ¶ 41, 240 Wis. 2d 756, 623 N.W.2d 565. The court of appeals said that Samuel "had as much right to object then as at any other time during the proceeding." *Id.* ¶ 42.

referred to the convictions. *Id*. Thus, the court held, *Leitner* forfeited his claim. *Id*.

Most recently, in *State v. Benson*, the court of appeals again held that a defendant had forfeited an inaccurate-information claim by not objecting to or correcting the information at sentencing. 2012 WI App 101, ¶ 17, 344 Wis. 2d 126, 822 N.W.2d 484. Benson's counsel had submitted the information—part of a medical report suggesting that Benson had an above-therapeutic level of a drug in his system when he killed someone in a car crash. *Id*. The court of appeals determined that Benson forfeited his claim that the court relied on inaccurate information at sentencing because counsel could have objected to or corrected the information in the report. *Id*.

Thus, case law supports the court of appeals' conclusion, and the State's argument, that the forfeiture doctrine applies to Coffee's inaccurate-information claim. While the cases do not always call it forfeiture, they all establish that, in the absence of a contemporaneous objection, appellate courts have no obligation to consider a claim that a circuit court relied on something improper at sentencing. This Court should apply this law here and affirm the court of appeals' conclusion that Coffee forfeited his inaccurate-information claim.[4]

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[4] In *State v. Grady*, this Court rejected the State's argument that the defendant had forfeited his claim that the court failed to follow its statutory obligation to consider the applicable sentencing guideline by not objecting at sentencing. 2007 WI 81, ¶ 14 n.4, 302 Wis. 2d 80, 734 N.W.2d 364. It stated that "a postconviction motion is a timely means of raising an alleged error by the circuit court during sentencing." *Id*.

Grady arguably supports Coffee's position, though he does not rely on it. This Court should not follow the decision. It

(continued on next page)

b. Coffee is wrong that case law does not support applying forfeiture to inaccurate-information claims.

Coffee contends that the foregoing case law does not support applying forfeiture to his claim. (Coffee's Br. 21–23.) He also argues that the court of appeals' application of forfeiture was inconsistent with other controlling case law. (Coffee's Br. 23–28.) This Court should reject these arguments.

Coffee tries to distinguish the cases discussed in the previous section. (Coffee's Br. 21–23.) But nothing he says undermines the State's point that these cases all consistently apply forfeiture principles to claims like Coffee's.

For example, Coffee critiques the State's and the court of appeals' reliance on *Leitner*, arguing that the underlying claim there was an issue of statutory construction rather than inaccurate information. (Coffee's Br. 21.) He is wrong. As the court of appeals explained, "Coffee reads *Leitner* too narrowly." *Coffee*, 2018 WL 5819588, ¶ 10. The claim in *Leitner* was that the court relied on an improper factor at sentencing. *Leitner*, 247 Wis. 2d 195, ¶ 39. While that claim depended on an interpretation of the expunction statute, it

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involves a court's failure to follow a statutory duty, not its consideration of something improper at sentencing. As argued, case law holds that such claims can be forfeited by a defendant's failure to object, and *Grady* did not address or say it was overruling those decisions. In addition, *State v. Gallion*, 2004 WI 42, ¶ 14, 270 Wis. 2d 535, 678 N.W.2d 197, which the Court relied on when rejecting the State's forfeiture argument, does not support the Court's decision. Forfeiture was not an issue in *Gallion*.

ultimately was an argument that the court considered something inappropriate at sentencing. *Id.* ¶¶ 39, 42–43. The claim in *Leitner* is not meaningfully different than Coffee's inaccurate-information claim.

Coffee next argues that *Benson* does not support a finding of forfeiture because there, defense counsel, not the State, submitted the information. (Coffee's Br. 21–23.) This distinction, he maintains, means that *Benson* does not establish that inaccurate-information claims should generally be subject to forfeiture. (Coffee's Br. 23.) Instead, Coffee contends that the decision is limited to cases where defense counsel presents the information. (Coffee's Br. 23.)

This argument fails because it ignores two things about *Benson*. First, defense counsel's being the source of the inaccuracy is not the whole reason the court found forfeiture. The court held that the inaccurate-information claim was forfeited not only because counsel submitted the inaccurate information, but also because counsel "failed to correct or object" to the parts of the report that were supposedly inaccurate. *Benson*, 344 Wis. 2d 126, ¶ 17. Counsel could have noted his or her disagreement with parts of the report despite being its source, and by doing so, would have preserved the claim for appellate review.

Second, Coffee is wrong to say that Benson's complaint was with his attorney, not the court. Benson raised claims challenging both: a due process argument that the court relied on inaccurate information and an ineffective assistance claim faulting counsel for submitting the report without correcting the information. *Benson*, 344 Wis. 2d 126, ¶ 16.

Thus, for the purposes of applying forfeiture, the inaccurate-information claim in *Benson* is not distinguishable from the one here. The court held that to

preserve an inaccurate-information claim, the defendant or counsel must say something at sentencing. And, under the court's decision, whether the State or defense counsel is the source of the inaccuracy is irrelevant to whether an objection is needed—one always is. *Benson* supports a conclusion that Coffee's claim is forfeited.

Coffee also tries to distinguish *Leitner*, *Samuel*, *Mosley*, *Johnson*, and *Handel* by arguing that they all "involved a due process challenge to sentencing on procedural or statutory grounds, rather than a constitutional challenge to the use of inaccurate information." (Coffee's Br. 21–22.) But the court of appeals described both *Mosley* and *Johnson* as involving inaccurate-information claims. *Mosley*, 201 Wis. 2d at 45; *Johnson*, 158 Wis. 2d at 468. And more to the point, in all the cases, the defendant raised claims that the court considered something at sentencing that it should not have. That, in its most basic sense, is also Coffee's claim. So, as in the other cases, it should be subject to forfeiture.

Next, Coffee points out that all these cases predate this Court's and the court of appeals' decisions in *Tiepelman*, which he contends both demonstrate that forfeiture should not apply to inaccurate-information claims. (Coffee's Br. 23–25.) Coffee raised a similar argument in the court of appeals, which rejected it. The court reasoned that, since the State did not assert forfeiture in *Tiepelman*, the courts did not address it, and the decision did not prevent application of the rule. *Coffee*, 2018 WL 5819588, ¶ 11.

Coffee has not shown that this conclusion was wrong. His point about this Court's *Tiepelman* decision is difficult to discern. He notes the Court's holding in the case, which was that defendants need to show actual, not prejudicial, reliance on inaccurate information to prove their claim. (Coffee's Br. 24–25.) *Tiepelman*, 291 Wis. 2d 179, ¶ 15. The State, though, does not understand what this has to do with

whether forfeiture applies to inaccurate-information claims, which, as noted, was not at issue in the case.

Coffee's argument about the court of appeals' *Tiepelman* opinion is clearer, but no more persuasive. Coffee relies on a footnote in the opinion in which the court suggested that forfeiture might not apply to inaccurate-information claims. (Coffee's Br. 25.) *State v. Tiepelman*, 2005 WI App 179, ¶ 6 n.1, 286 Wis. 2d 464, 703 N.W.2d 683. But the court of appeals did not conclusively resolve the issue, so the opinion does not really help Coffee. *Id.*

Coffee also relies on *State v. Groth*, 2002 WI App 299, ¶¶ 25–26, 258 Wis. 2d 889, 655 N.W.2d 163, which was the source of the court of appeals' suggestion in *Tiepelman* that forfeiture might not apply to inaccurate-information claims. (Coffee's Br. 25–27.) *Tiepelman*, 286 Wis. 2d 464, ¶ 6 n.1. But, like *Tiepelman*, *Groth* did not resolve whether these claims are subject to forfeiture. Rather, the court decided to overlook the forfeiture and addressed the claim's merits. *Groth*, 258 Wis. 2d 889, ¶ 26.

The last case Coffee points to is this Court's decision in *State v. Lechner*, 217 Wis. 2d 392, 576 N.W. 912 (1998). (Coffee's Br. 26–28.) *Lechner* says nothing about whether inaccurate-information claims can be forfeited. Coffee contends that this Court "declined the State's invitation to apply forfeiture and find the defendant at fault for failing to object." (Coffee's Br. 27.) But the Court never addressed the State's argument. And, anyway, as Coffee admits, the State did not specifically invoke forfeiture or urge the Court not to consider the claim's merits because of a failure to object. (Coffee's Br. 27.) Thus, *Lechner* does not help Coffee.

Finally, Coffee argues that the "courts were on the right track in *Tiepelman*, *Groth* and *Lechner*" and urges this Court to take the next step of concluding that inaccurate-

information claims are not subject to forfeiture. (Coffee's Br. 27–28.) But, as explained, none of these cases ever held that such claims cannot be forfeited. Instead, at best, they demonstrate the undisputed proposition that courts have the authority to overlook forfeiture and address a claim's merits. *See Leitner*, 247 Wis. 2d 195, ¶ 42. The case law thus does not establish that inaccurate-information claims are not subject to forfeiture.

3. Applying forfeiture to inaccurate-information claims promotes the fair and orderly administration of justice.

Applying the State's proposed rule would promote the administration of justice and the goals of the forfeiture doctrine. It would, for example, encourage vigilance. *Pinno*, 356 Wis. 2d 106, ¶ 56. Defendants and their attorneys would be more attuned to and likely to object to possible inaccuracies at sentencing lest they lose the opportunity to challenge them later.

The rule would also lead to better preparation. The facts here provide a good example. Both parties agreed not to have a PSI. (R. 41:9.) Thus, defense counsel should have known that the State would likely be the source of any information about Coffee's criminal history. Counsel could have prepared for sentencing by learning Coffee's arrest record. This would have allowed counsel to correct the State's information about Coffee's prior arrest. And knowing that the lack of an objection would forfeit the claim would have given counsel a better incentive to make sure he knew Coffee's history before the hearing.

Requiring an objection at sentencing would also allow the court to avoid or correct its errors. If a defendant objects to sentencing information, the parties and the court can correct it before the court imposes sentence. The court can

also decide to avoid any potential problem by not relying on the information at all. And even if the defense objects after the court has announced its sentence, the court can still correct any error and change its sentence, if necessary. A defendant would not have a legitimate expectation of finality in a sentence that was just announced and that he objected to. *See, e.g., State v. Robinson*, 2014 WI 35, ¶¶ 19–50, 354 Wis. 2d 351, 847 N.W.2d 352 (court's increasing defendant's sentence the day after sentencing based on court's realization that it was mistaken about defendant's prior record did not violate double jeopardy).

Coffee disagrees that requiring an objection at sentencing would promote the fair and orderly administration of justice. (Coffee's Br. 28–29.) He claims that, instead, applying the rule only denies him his constitutional rights. (Coffee's Br. 29.) But that is arguably true whenever the forfeiture rule is applied. There is no exception to forfeiture for constitutional claims. And sometimes the rule will block review of claim that would otherwise succeed. If the rule applied only to claims that would ultimately fail on the merits, it would be meaningless.

Similarly, Coffee contends that both the United States Supreme Court and this Court have stated that a sentence based on inaccurate information "cannot stand." (Coffee's Br. 29 (citing *Townsend v. Buke*, 334 U.S. 736, 741 (1948), and *State v. Travis*, 2013 WI 38, ¶ 17, 347 Wis. 2d 142, 832 N.W.2d 491).) This, though, is just an argument that due process rights at sentencing are too important to be subject to forfeiture. Many important constitutional rights can be forfeited by a failure to object. *See, e.g., Pinno*, 356 Wis. 2d 106, ¶ 57 (right to public trial); *Huebner*, 235 Wis. 2d 486, ¶¶ 10–11 (right to 12-person jury); *State v. Gove*, 148 Wis. 2d 936, 941, 437 N.W.2d 218 (1989) (right to confrontation); *State v. Lichty*, 2012 WI App 126, ¶ 23, 344 Wis. 2d 733, 823

N.W.2d 830 (right to enforcement of plea agreement). Coffee points to nothing unique about the right to be sentenced on accurate information that should exempt it from the general rule.

Next, Coffee argues that applying forfeiture to claims like his does not promote efficiency. (Coffee's Br. 30–32.) He claims that even had he objected, the circuit court would not have believed him, and he still would have needed to raise his claim later. (Coffee's Br. 30.) This is speculation. There is no reason to think that the court would have disregarded Coffee's objection rather than, say, trying to determine the details of his arrest or deciding that it should not rely on facts in dispute. And there is no basis to believe that all circuit court judges would not take a defendant's objection seriously or treat it fairly. Trial judge are used to requests from counsel. *United States v. Kwiat*, 817 F.2d 440, 448 (7th Cir. 1987). This Court should not presume that they "are so thin-skinned and vindictive" that parties should be able to forego objections. *Id*.

Coffee also claims that requiring an objection might cause delay if the court were to adjourn sentencing hearings so the parties and the court could sort things out. (Coffee's Br. 30–31.) But an adjournment would take far less time than the alternative—a postconviction motion and appeal. Had Coffee objected, the parties could have obtained the police reports that the State later submitted. While it is unclear how long that would have taken, presumably it would have been far less time than the nearly 14 months between Coffee's sentencing and his first asserting his inaccurate-information claim in his postconviction motion. (R. 27; 42.)

Finally, Coffee argues that requiring defendants to present forfeited claims in the ineffective-assistance context will also cause delay and inefficiency. (Coffee's Br. 31–32.)

This is undoubtedly true. But that is all the more reason for this Court to make clear that an objection is required to preserve an inaccurate-information claim for appeal. Giving circuit courts the opportunity to correct their errors immediately instead of months or even years later will do far more to preserve judicial resources and promote orderly justice than categorically exempting inaccurate-information claims from the forfeiture rule.

4. Coffee forfeited his claim by not objecting at sentencing.

This Court should further conclude that Coffee forfeited his inaccurate-information clam by not objecting at sentencing to the inaccurate information about his 2011 arrest.

The court of appeals correctly determined that Coffee had at least three opportunities to object to or correct the information. *Coffee*, 2018 WL 5819588, ¶ 8. "First, he or his attorney could have corrected the State when it mentioned the arrest" or during counsel's sentencing argument. *Id.* (citing R. 42:9). "Second, Coffee could have said something when he had a chance to address the court personally before it pronounced sentence." *Id.* ¶ 8 (citing R. 42:18). "Third, Coffee could have objected when the court discussed the arrest when explaining its sentence or at some point after." *Id.* ¶ 8 (citing R. 42:22).

It would have been appropriate for Coffee to challenge the information at any of these points during the sentencing hearing. Defendants have the right to rebut evidence presented to and considered by a sentencing court. *See State v. Spears*, 227 Wis. 2d 495, 508, 596 N.W.2d 375 (1999); *State v. Damaske*, 212 Wis. 2d 169, 196, 567 N.W.2d 905 (Ct. App. 1997). Coffee said nothing about his 2011 arrest. And he does not argue that he did something else to preserve his

claim for appellate review. He thus forfeited his inaccurate-information claim.

B. Appellate courts may review forfeited claims under ineffective assistance of counsel or plain error.

Because Coffee forfeited his inaccurate-information claim, he is not entitled to direct review of his claim's merits. Rather, he should have to show that his counsel was ineffective for not objecting to the information or, if such a claim is not possible, that the court's consideration of the information was plain error. While both of these legal theories place higher burdens of proof on a defendant than a directly reviewed inaccurate-information claim, imposing those higher standards is an appropriate consequence of his failure to properly preserve his claim. And, when reviewed under these theories, Coffee's claim fails.

1. Ineffective assistance of counsel

a. Ineffective assistance of counsel should be the preferred means of reviewing unpreserved inaccurate-information claims.

This Court should conclude that ineffective assistance of counsel is the primary method for courts to review forfeited inaccurate-information claims. It should also hold that, even though he has never raised one, Coffee would not be entitled to relief on an ineffective-assistance claim.

In general, in the absence of an objection, the "normal procedure in criminal cases" is to address a forfeited error in the rubric of ineffective assistance of counsel. *State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31 (citing *Erickson*, 227 Wis. 2d at 766). The same should be true for inaccurate-information claims. These claims are

usually forfeited because defense counsel failed to object to something either the State or the circuit court did. And these claims arise from sentencing proceedings, where defense counsel is given the opportunity to address the court and rebut the State's arguments. Thus, the lack of an objection is usually defense counsel's fault, and the ineffective-assistance rubric makes sense as a means of reviewing forfeited inaccurate-information claims.

Coffee maintains that his claim should not be reviewed in the ineffective-assistance context, but his arguments are unpersuasive. (Coffee's Br. 16–18, 31–32.)

Coffee contends that many cases have addressed inaccurate-information claims directly in the absence of a contemporaneous objection. (Coffee's Br. 17–18.) But none of these cases hold that such claims should not be reviewed through ineffective assistance of counsel.

In one of the cases, *United States v. Oliver*, 873 F.3d 601, 608–10 (7th Cir. 2017), the court found forfeiture and reviewed the claim for plain error. Thus, Coffee is wrong to say that the court overlooked the forfeiture in *Oliver*. Instead, the court enforced the forfeiture and applied a more stringent standard of review.[5]

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[5] Coffee suggests in a footnote that the Court in *Oliver* did not actually review the inaccurate-information claim under plain error because it applied the constitutional test when it addressed the claim. (Coffee's Br. 17 n.8.) Coffee is wrong. The court announced that it was reviewing all of Oliver's claims for plain error. *United States v. Oliver*, 873 F.3d 601, 607 (7th Cir. 2017). The court's reliance on the constitutional test in holding that there was no error does not change its conclusions that Oliver forfeited his claims and that it was reviewing for plain error. To show plain error, a defendant must first show an error, and whether one exists depends on the law governing the claim.

(continued on next page)

Coffee also cites *Tiepelman*, but as noted, forfeiture was never an issue in that case because the State never raised it. 286 Wis. 2d 464, ¶ 6 n.1. (Coffee's Br. 16–17.) Similarly, it does not appear that the parties ever addressed forfeiture in *Travis* or the two unpublished decisions that Coffee relies on. (Coffee's Br. 17–18.) Thus, it is not surprising that the courts did not discuss or apply forfeiture in these cases. Appellate courts have no obligation to consider issues that the parties do not raise. *See Waushara County v. Graf*, 166 Wis. 2d 442, 453, 480 N.W.2d 16 (1992).

Next, Coffee notes that *Carprue*, which the court of appeals relied for the principle that forfeited claims should be addressed as ones of ineffective assistance, predates *Tiepelman*. (Coffee's Br. 19 n.10.) He contends that had this Court wanted to enforce forfeiture and require an ineffective assistance analysis for forfeited claims in *Tiepelman*, it could have relied on *Carprue* to do so. (Coffee's Br. 19 n.10.)

Again, this ignores that *Tiepelman* did not address forfeiture. And Coffee's argument cuts both ways. If this Court was "undeniably well-versed with the issue of forfeiture" at the time it decided *Tiepelman*, it could have decided that inaccurate-information claims could never be forfeited. (Coffee's Br. 19 n.10.) This is particularly true

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Also, it is unsurprising that *Oliver* did not address the forfeited claim as one of ineffective assistance. (Coffee's Br. 17.) *Oliver* was a direct appeal. In the federal system, unlike Wisconsin, defendants generally may not raise claims of ineffective assistance on direct appeal. *See Massaro v. United States*, 538 U.S. 500, 504–05 (2003); *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 173, 517 N.W.2d 157. Instead, federal defendants present ineffective-assistance claims in a collateral challenge under 28 U.S.C. § 2255. *Massaro*, 538 U.S. at 504–05. Thus, a claim of ineffective assistance was not available in *Oliver*.

given the footnote in the court of appeals' *Tiepelman* decision suggesting that forfeiture might not apply. 286 Wis. 2d 464, ¶ 6 n.1. Thus, this Court's decision in *Tiepelman* is best viewed as having nothing to say about forfeiture.

Coffee further argues that reviewing forfeited claims as ones of ineffective assistance of counsel "will only cause further delay and inefficiency in the circuit courts" because of the need to hold *Machner* hearings. (Coffee's Br. 31–32.) But most of that inefficiency and delay will have been caused by the defendant's failure to object at sentencing, which would have allowed the court or the parties to immediately correct any error. And regardless of whether a forfeited inaccurate-information claim is reviewed in the context of ineffective assistance, the defendant will need to make the arguments in a postconviction motion. That, as much as an evidentiary hearing, will add significant delay to the judicial process.

In sum, ineffective assistance of counsel should be the preferred method of reviewing forfeited claims that a court sentenced a defendant based on inaccurate information.

b. Coffee is not entitled to relief on a claim of ineffective assistance.

This Court should also conclude that any ineffective assistance claim that Coffee could raise would not succeed.

Initially, Coffee has forfeited any claim of ineffective assistance that he could raise on appeal by not asserting it in his postconviction motion. (R. 27.) *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677, 556 N.W.2d 136 (Ct. App. 1996). Thus, Coffee did not adequately preserve an ineffective assistance claim for appellate review. *See Coffee*, 2018 WL 5819588, ¶ 8.

In addition, even had Coffee raised a claim, it would fail on the merits. To prove ineffective assistance of counsel, Coffee must establish both that his "counsel's performance was deficient" and that this performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To demonstrate deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

To satisfy the prejudice prong, the defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Coffee is inconsistent about whether an ineffective assistance claim is available to him. His arguments suggest that he thinks that it is impossible to for him prove that his counsel performed deficiently. *Strickland*, 466 U.S. at 687. Specifically, Coffee contends that it would be unreasonable to expect his counsel to have been prepared to object because information about his arrest was not easily discoverable. (Coffee's Br. 18–19 n.9). Coffee even claims that it was not reasonable to expect him to know the circumstances of his own arrest. (Coffee's Br. 18.) But, despite these arguments, Coffee also asks this Court, if it concludes that his claim should be raised in the context of ineffective assistance, to remand to the circuit court so he can add this claim to his postconviction motion. (Coffee's Br. 28.)

This Court need not resolve the tension in Coffee's argument because he cannot show prejudice. There is no reasonable probability of a different sentence had the circuit court not relied on the incorrect information about Coffee's 2011 arrest.

The only inaccuracy in the State's sentencing argument is that Coffee's 2011 arrest for robbery involved a weapon. Police reports from the arrest show that it was for robbery, not armed robbery. (R. 31:4–11.)

Coffee's sentence would have been the same had the court known that Coffee's prior arrest did not involve a weapon. The circuit court concluded that Coffee's prior convictions and arrests showed that he was "engaging in behavior that is kind of getting more serious." (R. 42:22.) Similarly, it noted that his "behavior or undesirable behavior is escalating." (R. 42:23.) This all remains true whether police previously arrested Coffee for robbing someone with or without a weapon. Coffee had been convicted of a domestic violence crime and carrying a concealed weapon. He was arrested for battery and robbery. The court was sentencing him for robbing two people at gunpoint and shooting one of them. Coffee's behavior was "escalating" and "getting more serious" whether his previous arrest was for armed robbery or robbery.

And Coffee's arrest was a small part of the court's overall explanation of its sentence. The court focused on the crimes' severity and effect on the victims. (R. 42:20–23.) It also discussed Coffee's personal characteristics, including his family support, education, and work history. (R. 42:23–24.) Finally, the court discussed the need to protect the public. (R. 42:24–25.) That Coffee was arrested for an armed robbery, as opposed to a robbery without using a weapon, was not critical to the court's sentence. The sentence would have been the same had the court known the correct details of Coffee's arrest. Thus, Coffee was not prejudiced by his counsel's failure to object, and there is no reason for this Court to remand for further proceedings on an ineffective assistance of counsel claim.

2. Plain error

Some unpreserved inaccurate-information claims might not fit into the ineffective-assistance mold. This Court should conclude that such claims are reviewable under the plain-error doctrine. But this Court should also determine that Coffee's claim does not rise to the level of plain error, so he cannot obtain relief on the merits.

The plain error doctrine, recognized in Wis. Stat. § 901.03(4), "allows appellate courts to review errors that were otherwise [forfeited] by a party's failure to object." *State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77 (citation omitted). A plain error is one that is "so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." *Id.* (citation omitted). The error must be "obvious and substantial," and courts should use the doctrine sparingly. *Id.* (citation omitted).

Whether an error is plain is not subject to a bright-line rule. *State v. Lammers*, 2009 WI App 136, ¶ 13, 321 Wis. 2d 376, 773 N.W.2d 463 (citing *Virgil v. State*, 84 Wis. 2d 166, 190–91, 267 N.W.2d 852 (1978). The existence of a plain error depends on the facts of each case. *Jorgensen*, 310 Wis. 2d 138, ¶ 22. The evidence properly admitted and the seriousness of the error are "particularly important" in determining whether an error is plain. *Id.* Plain error should be found "where a basic constitutional right has not been extended to the accused." *Id.* ¶ 21. (citation omitted).

"If the defendant shows that the unobjected to error is fundamental, obvious, and substantial, the burden then shifts to the State to show the error was harmless." *Jorgensen*, 310 Wis. 2d 138, ¶ 23.

There may be cases where the ineffective-assistance rubric does not allow for review of a meritorious but

unpreserved inaccurate-information claim. For example, if Coffee is correct that his counsel could not have reasonably learned about the details of the arrest before sentencing, then, arguably, it would be impossible for him to prove that his counsel performed deficiently by not objecting. Yet if Coffee could show that the court sentenced him based on inaccurate information, he would be left without any possible remedy.

In such circumstances, and where the defendant can show that the error is fundamental, obvious, and substantial, plain error allows appellate courts to address the error and afford defendants relief.

But here, Coffee's claim does not amount to a plain error. Admittedly, the court erred when describing Coffee's criminal history. But whether Coffee's 2011 arrest was for armed robbery or robbery was not important to the court's overarching point when it discussed the arrest—that Coffee was engaging in escalating criminal behavior. And while the court described the crime of the prior arrest as similar to Coffee's current offense, that remains true even if the previous arrest was for mere robbery. Both robbery and armed robbery involve stealing things from people by use or threat of force. Wis. Stat. § 943.32(1) and (2). The court's error was in the details, not its overall decision. It was not a substantial, fundamental, or obvious error.

In addition, the court's error was harmless. Again, the arrest and its details were a small part of the court's explanation of its sentence, which focused on Coffee's crime of conviction, his personal characteristics, and the need to protect the public. And the court could, of course, properly consider Coffee's arrest when sentencing him. *State v. Allen*, 2017 WI 7, ¶ 30, 373 Wis. 2d 98, 890 N.W.2d 245 (court may consider unproven charges at sentencing). Even had the court known that Coffee's arrest was for a robbery conducted

by punching the victim in the face rather than using a weapon, its sentence would have been the same.

In sum, Coffee forfeited his claim and this Court should decline to address it as a claim of ineffective assistance of counsel or plain error.

II. If this Court overlooks Coffee's forfeiture, it should conclude that the circuit court's reliance on Coffee's 2011 arrest was harmless.

Forfeiture is a rule of judicial administration that a court can choose not to apply. *Erickson*, 227 Wis. 2d at 766; *Leitner*, 247 Wis. 2d 195, ¶ 42. If this Court overlooks Coffee's forfeiture and addresses Coffee's claim directly—that is, not as an ineffective assistance claim or under plain error— it should conclude that any erroneous reliance by the circuit court on Coffee's 2011 arrest was harmless.

A defendant has a due process right to be sentenced upon materially accurate information. *Tiepelman*, 291 Wis. 2d 179, ¶ 9. A defendant seeking resentencing on the grounds that the circuit court used inaccurate information at sentencing must show, first, "that the information was inaccurate," and second, that the court actually relied on that information in forming its sentence. *Id.* ¶ 26.

If the defendant satisfies those requirements, the burden "shifts to the [S]tate to prove the error was harmless." *Tiepelman*, 291 Wis. 2d 179, ¶ 26. The State meets this burden by demonstrating that the court "would have imposed the same sentence absent the error." *Travis*, 347 Wis. 2d 142, ¶ 73.

For the reasons already explained, the circuit court's sentence would have been the same even had it not thought that Coffee's 2011 arrest was for armed robbery. Again, it was not error for the court to consider Coffee's prior arrest

even though it did not lead to a charge or conviction. *Allen*, 373 Wis. 2d 98, ¶ 30. Had the court received the correct information about the arrest, it still would have known that Coffee was arrested for a serious offense involving taking another person's property without consent and by threat of force. The court also would have still known that Coffee was not prosecuted for this crime. And, as argued, the arrest was a minor part of the court's sentencing decision. The court's mistaken belief at sentencing that Coffee's prior arrest had been for armed robbery was harmless error.

Coffee disagrees. He challenges the circuit court's finding of harmlessness, claiming that it misapplied the law by finding other facts in the record to support its sentence. (Coffee's Br. 35–36.)

The court did not err. It explained that the focus of its sentencing decision was on "the defendant's conduct in *this* case, his contribution to the prevalence of gun violence that is threatening the fabric of our community, the impact of his crime upon the victims and the greater community, his background and rehabilitative needs, and the need to protect the public." (R. 35:4.) It also said that the fact Coffee used a weapon in this case and shot one of his victims "would have led the court to the same conclusion that he was 'engaging in behavior that is getting more serious' and that his 'pattern . . . of undesirable behavior is escalating.'" (R. 35:4.) Thus, the court focused on the error's effect on its sentencing decision and concluded that there was none. It correctly applied harmless-error law.

Coffee also argues that the court's belief that his arrest had been for armed robbery was central to the court's application of the required sentencing factors. (Coffee's Br. 36–38.) He points specifically to the court's mentioning the arrest when it said that Coffee's current crime was part of

his escalating pattern of crimes. (Coffee's Br. 37–38; R. 42:22–23.)

But the court's comment shows just that it relied on the inaccurate information. It does not make the court's reliance prejudicial. As argued, the court got a detail of Coffee's 2011 arrest wrong. That detail mattered little to the court's sentence, which would have been the same had the court known the correct facts. The court's reliance on the incorrect information about Coffee's arrest was harmless.

CONCLUSION

This Court should affirm the court of appeals' decision.

Dated this 24th day of July 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

AARON R. O'NEIL
Assistant Attorney General
State Bar #1041818

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 266-9594 (Fax)
oneilar@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9222 words.

Dated this 24th day of July 2019.

_____
AARON R. O'NEIL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of July 2019.

_____
AARON R. O'NEIL
Assistant Attorney General