STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP208-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH ALEXANDER BURKS,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND THE ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. CONEN, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

1. Did the circuit court properly deny Kenneth Burks' postconviction motion without a hearing because the record conclusively demonstrated that his trial counsel did not perform deficiently by not objecting to a witness's testimony or to the circuit court's sentencing remarks and that Burks was not prejudiced?

The circuit court answered yes.

This Court should answer yes.

2. Did the circuit court properly deny Burks' motion for resentencing because the court properly exercised its sentencing discretion and did not rely on an improper factor when it sentenced Burks to less than the maximum sentence and less than the State's recommended sentence?

The circuit court answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication, because the issues presented can be decided based on well-settled law, the record in this case and the briefs of the parties.

INTRODUCTION

Burks sold heroin to E.G., who shared it with her friend, Nicholas Karboski. A few hours after using the heroin, Karboski died. His body was found in his bed, fully clothed, with an empty syringe in his hand. Toxicology reports determined that the heroin contained a significant amount of Fentanyl, which is commonly added to heroin to make it even more addictive and to increase the profit for the supplier.

Based on text messages found on Karboski's and E.G.'s phones, police determined that Burks sold the narcotic to E.G. With E.G.'s cooperation, police set up a controlled drug buy from Burks and arrested him. The State charged Burks with one count of first-degree reckless homicide under the "Len Bias law," which allows prosecution of a drug supplier for the death of a person from the drug purchased from that supplier, and one count of possession with intent to deliver narcotics. After a three-day jury trial, Burks was convicted of both counts. The maximum sentence on both counts was 55 years. The circuit court imposed concurrent sentences totaling 25 years: 10 years of initial confinement and 15 years of extended supervision.

The circuit court properly denied Burks' postconviction motion seeking a new trial or resentencing without a hearing. Burks alleged that his trial counsel was ineffective for not objecting to testimony by a police detective who said that because E.G.'s account of Burks' sale of the heroin to her matched the text messages, he determined during the pretrial investigation that her story was "very believable." Burks further alleged that his trial counsel should have objected to the court's sentencing comments describing the severity of his offense by referencing the opioid epidemic and rampant addiction resulting from the over prescription of painkillers. Burks asserted that the court relied on this "inappropriate factor" when sentencing him. Burks is not entitled to relief. His counsel was not ineffective and he was not prejudiced because the overwhelming evidence against him ensured his conviction even if his counsel had objected to the detective's statement. Further, Burks is not entitled to resentencing because the court relied on appropriate factors and properly exercised its sentencing discretion. This Court should affirm.

SUPPLEMENTAL STATEMENT OF THE CASE

Criminal charges against Burks. In the early morning hours of Sunday, February 7, 2016, Karboski died of an overdose after using heroin laced with Fentanyl. Through an investigation, police identified Burks as the person who supplied the heroin. Accordingly, the State charged Burks in an amended complaint and information with one count of first-degree reckless homicide (delivery of drugs – Len Bias law) as party to a crime and one count of possession with intent to deliver narcotics. (R. 6, A-App. 107; 15.)

Jury trial. The first witness for the State, Officer Jeffrey Dufek, testified that police were called to Karboski's home on February 7, 2016, and when they arrived they found him deceased in his basement bedroom. (R. 118:40.) Detective Daniel Ditorrice, who works primarily in narcotics investigations, testified that he responded to Karboski's home on February 7 to investigate his death. (R. 118:58–59.) Detective Ditorrice saw Karboski's body, fully clothed, in his bed holding a used, uncapped syringe. (R. 118:60–61.) He found evidence of heroin and packaging that was taken to the crime lab for testing. (R. 118:62–70.) He also found a cell phone in Karboski's pocket. (R. 118:73.)

Detective Kurtz's testimony. Detective Todd Kurtz testified that he was a drug trafficking investigator who was called on February 7 to investigate the death of Karboski. (R. 119:18.) In Karboski's bedroom he found Suboxone pill bottles, which is a drug that "heroin addicts use to try to get off heroin." (R: 119:20.) Detective Kurtz testified that based on Karboski holding a needle in his hand, having a history of heroin use, and wearing his street clothes in bed, as well as his young age and no medical conditions, Kurtz immediately suspected that his death was an overdose. (R. 119:22.)

When Kurtz examined Karboski's cell phone messages, he found messages between E.G. and Karboski in the early

morning hours on February 7, which were the most recent text messages on his cell phone. Thus, E.G. was likely "the last person that he would have had contact with . . . while he's alive." (R. 119:27–28.) Detective Kurtz contacted E.G. later that day. Detective Kurtz asked her about the text messages with Karboski starting at 12:22 a.m. on February 7, and then told her that Karboski had died. (R. 119:31.) E.G. gave her consent to search her cell phone; her messages matched those that were on Karboski's cell phone. (R. 119:31–32.)

In the messages, Karboski asked E.G. if she would "pick up" drugs and she said "yeah." (R. 119:36.) Karboski asked E.G. if she had a heroin supplier that was willing to sell drugs that night and she said yes; E.G. said she had two drug dealers and one of them had "good drugs." Karboski then confirmed that he had a car. (R. 119:37.) After E.G. and Karboski made the plan to drive to get the drugs, E.G. first texted Burks, asking him if he was "still up" at 12:43 a.m. After 25 minutes, at 1:08 a.m., Burks responded "yes." (R. 119:37–38.) In the meantime, E.G. had also texted "K," the other drug supplier, at 12:45 a.m. to see if he was available, and he immediately responded. (R. 119:38–39.)

After Burks responded, E.G. texted Burks asking if she could "come meet up with" him and Burks responded to E.G. with a phone call at 1:29 a.m. (R. 119:39.) At 2:34 a.m., E.G. texted K and lied to him, telling him she could not meet him because "the guy [she] was with got taken in for warrants." (R. 119:42.)

After Detective Kurtz testified extensively about the series of messages and phone calls between E.G. and Burks and between E.G. and K, the prosecutor asked him if E.G. "essentially [told him] a story that comports with those text messages." Detective Kurtz responded, "Yes, she was very believable." (R. 119:43, A-App. 112.)

Based on the information provided by E.G. to police about her communications with Burks to purchase heroin from him, police set up a controlled buy between E.G. and Burks. Detective Kurtz testified that with the help of E.G., they arranged "to buy drugs from the phone number" belonging to Burks so that Burks would deliver the drugs and then they could arrest him. (R. 119:43–44.) Detective Kurtz testified that they set up the meeting the next day to buy heroin from Burks because "in dealing with heroin overdose deaths," the police have to "act quickly" to "catch the actual supplier." As soon as "word gets out that someone died, a heroin drug dealer will change their phone number" or "get a new phone." (R. 119:44.)

Kurtz testified that E.G. "admitted" to police "that she provided drugs to" Karboski, but she was not arrested because police were focused on finding "the heroin supplier, someone that makes money off of people that are addicted to heroin." (R. 119:47–48.) To assist police, E.G. made phone calls to Burks to arrange a drug deal at her workplace. (R. 119:48.) The recording of the phone calls, described below, was played for the jury and an accurate transcript of the phone calls was admitted into evidence. (R. 119:50–53.)

E.G. made the calls to Burks while she was with police in a car parked near her workplace, with many other police officers nearby, because this "buy bust" to order up heroin and arrest the supplier was "very dangerous." (R. 119:52.) During an initial call to Burks, E.G. asked him if he had "the same stuff he had during the previous transaction, or that Saturday night buy." Burks responded that "he had more of that good shit." (R. 119:56–57.) Burks agreed to come to E.G.'s workplace. (R. 119:57.)

Burks then called E.G. back. Burks asked E.G. if she "might wanna just buy a whole half so you can make money too. You can sell that to people that be wantin' to get some,"

thereby essentially "inviting [E.G.] to start selling drugs for money." (R. 119:58–59.)

Burks called E.G. a third time to tell E.G. that he had arrived in a red Grand Am and was pulling into a handicap parking spot; Officer Kurtz simultaneously observed a red Grand Am pull into a handicap parking spot. (R. 119:62.) Officer Kurtz saw Burks, who he recognized from a photograph, get out of the car. E.G. identified him as her "heroin supplier, the same person that we were calling to order heroin." (R. 119:64–65.) Police moved in to arrest Burks and he was taken into custody. (R. 119:65–66.)

Police collected evidence from the car, including two cell phones, one of which Detective Kurtz identified as "the dope phone." When Detective Kurtz dialed the same phone number E.G. used to set up the controlled heroin buy, the dope phone rang. (R. 119:69–72.) In that phone's contacts, police found E.G.'s name and phone number. (R. 119:73.) The call log of Burk's "dope phone" matched the phone calls between E.G. and Burks before police arrested Burks. (R. 119:74–75.) In the pictures in the "dope phone," police found several "selfies" or pictures of Burks, identifying it as his phone. In some of the photos, Burks was wearing a necklace and lanyards that were typically worn by a drug dealer. (R. 119:77–80.)

The parties stipulated to the admissibility of all of the cell phone records, including records from Karboski's phone, E.G.'s phone, and the "dope phone" used by Burks. (R. 119:83–86.) Although the "dope phone" was not listed as belonging to Burks, typically drug dealers use a different name for a "dope phone" because the dealer does not "want the police looking up your actual real name if you're selling heroin." (R. 119:86.)

On cross-examination, Burks' counsel, Attorney Kerri Cleghorn, asked Kurtz if he had asked E.G. about text messages from her phone indicating she purchased pills

earlier on February 6, the day before Karboski died. She also asked Kurtz if he asked E.G. if she bought drugs from another individual on that day. Kurtz said, "No" to both questions. (R. 119:93.) Detective Kurtz agreed that there was a text message from E.G. to Karboski that stated "I can't drive," although Kurtz testified that he thought that was because she did not have a car, not because she was high. (R. 119:95.) Attorney Cleghorn confirmed with Kurtz that the "dope phone" used to do the drug deal was not listed as belonging to Burks, and that the Grand Am also was not owned by Burks. (R. 119:96–97.) Attorney Cleghorn asked Kurtz if he was aware of another vehicle that Karboski's grandmother saw in the late morning outside of his house, before Karboski's mother discovered his body. Kurtz responded that he did not investigate that other vehicle. (R. 119:101.)

On redirect, Detective Kurtz testified that he did not investigate E.G.'s buying other drugs because she's "done lots of drug deals, she's a heroin addict" and he was "not interested in all these other drug deals." Instead, he was "interested in who delivered drugs" when Karboski died and was "following the chain of, this is where the heroin came from . . . as far as it goes." (R. 119:102–103.) Kurtz also clarified that after E.G. purchased heroin from Burks that evening, she never met up with the other drug dealer, K. Kurtz testified that "the text messages are clear when you read them all – all the way through, it's clear that she [bought] drugs, heroin, from Kenneth Burks." (R. 119:106–107.)

Detective Kurtz testified that E.G.'s text messages did not indicate that she was impaired by drugs. In fact, in his experience "they're pretty clear text message to read" compared to others he has read where "they're trying to disguise what they're talking about" or are impaired. (R. 119:107.) Based on the text messages, Detective Kurtz believed that E.G. bought heroin twice that night from Burks: once early in the evening and again with Karboski later that

night, as reflected in the texts and phone calls. (R. 119:108–110.)

E.G.'s testimony. E.G. testified at trial about her heroin addiction and her rehabilitation efforts, resulting in being sober for the past 10 months. (R. 120:10–12.) She also testified that she had not received any deals from the State protecting her from being criminally prosecuted in this case. (R. 120:13–14.) She stated that although she was under subpoena, she agreed to testify because of "Nick, his family, other people that are out there still addicted to drugs."(R. 120:14.)

E.G. identified Burks as someone that she had talked to more than 50 times to get drugs. (R. 120:17.) Burks would bring her drugs either at her home or at her workplace. (R. 120:18.) E.G. testified that the text messages she received from Burks came from the same number that she told Detective Kurtz belonged to Burks. (R.120:19–20.) On the night of February 6, E.G. texted Burks at that number while she was at work, about 8:00 p.m., asking him for some heroin. Burks delivered the heroin to E.G. at her workplace. (R. 120:21–25.)

E.G. testified that later, in the early morning hours of February 7, Karboski texted E.G. asking if she wanted to get some heroin, and Karboski said that he could drive. (R. 120:27–29.) E.G. then texted Burks to see if she "could still get some more stuff from him" and he did not respond immediately, so she texted her other dealer, K. (R. 120:29–30.) When Burks eventually did respond by calling E.G., they made a plan for Burks to deliver the drugs to E.G. at her house. (R. 120:32–34.) E.G. testified that she got the drugs from Burks, not from K. (R. 120:36–37.) E.G. and Karboski met Burks at E.G.'s house, where E.G. got into Burks' car, gave him money, and he gave her heroin. (R. 120:39–40.) Then, E.G. went back to Karboski's car, they split up the drugs, and Karboski left at about 2:00 a.m. with

the heroin that E.G. had purchased from Burks. (R. 120:42–43.) When E.G. used this heroin from Burks, it felt "a little stronger" than what she had used earlier that night and "was overwhelming." (R. 120:45.)

Later that same day, Detective Kurtz contacted E.G.; he told her that Karboski had died. (R. 120:45.) E.G. agreed to help the police identify the person who sold them the drugs that Karboski used. She called Burks at the same number she had called him to purchase the heroin the night before. (R. 120:45–47.) E.G. identified her voice on the recordings and testified that while she was with Detective Kurtz, she called Burks to purchase more heroin. (R. 120:48–49.)

On cross-examination, E.G. confirmed that Karboski told her he was heading home after they got the heroin from Burks. (R. 120:52.) E.G. also testified that when Detective Kurtz told her that Karboski had died from the heroin they purchased, she "asked him if [she] was responsible for" Karboski's death and "stated that [she] was aware that people who were involved in deaths via drug use could be put in jail." (R. 120:54.) E.G. was not arrested or charged with a crime. (R. 120:55.) E.G. testified that the effects of the heroin she purchased from Burks seemed "out of the ordinary" and "felt very, very different." (R. 120:58.)

After hearing all the testimony and the arguments of counsel, the jury found Burks guilty of both charges: first-degree reckless homicide and possession with intent to deliver narcotics. (R. 82; 122:5.)

Sentencing hearing. At the sentencing hearing, the court set forth the maximum sentence on both counts totaling 55 years. On the first-degree reckless homicide count, the maximum was 40 years: 25 years of initial confinement and 15 years of extended supervision. On the possession with intent to deliver narcotics count, the maximum was 15 years:

10 years of initial confinement and 5 years of extended supervision. (R. 107:3.)

At sentencing, the State recommended a sentence of "23 to 25 years of initial confinement and 15 years of extended supervision." (R. 107:24.) In support of its recommendation, the State referenced the epidemic of fatal opioid overdoses, which is "getting worse and worse because of people like this defendant [who] are dealing this and they aren't really dealing good heroin. Fentanyl is more for profit, and more and more people are dying as a result." (R. 107:12.) The State argued that Burks sold this Fentanyl as heroin and "declined to accept any level of responsibility for his conduct." (R. 107:12–13.) The State also asserted that by using the excuse that he sold drugs because he was an addict, Burks was trying to paint himself "in the best light at sentencing," which reflected on his character and showed he was attempting to "manipulate the court." (R. 107:19–20.) The factors warranting a substantial jail sentence included that Burks was "a danger to the community;" he showed a "lack of remorse;" he attempted to "recruit [E.G.] to sell for him;" and he was dealing highly dangerous and potent drugs. (R. 107:23.)

Defense counsel Attorney Cleghorn stated that Burks understood that he would be sentenced to prison and that "a significant penalty is required in this case to send a message to the community" that "you will pay the price if you sell heroin in Milwaukee County." However, she asserted that the State's recommended sentence was "excessive for the needs of the community and the needs of" Burks. (R. 107:35.) The defense recommended an 18 year sentence, bifurcated into 10 years of initial confinement and 8 years of extended supervision. (R. 107:35–36.)

In its sentencing decision, the court began by discussing the seriousness of the offense, and focused most of its remarks on this factor. It indicated that Len Bias cases were "the most

stressful" because of the nature of the offense, where "both parties involved had some blame as to what went on." (R. 107:38, A-App. 114.) However, the intent of the Len Bias law "was to keep people who profit" as drug dealers "from taking advantage of other people." (R. 107:38–39, A-App. 114–15.) The court opined that in some cases, there had been "an overextension of what the law or the spirit of the law is." (R. 107:39, A-App. 115.)

The court also acknowledged that Karboski had a "very, very serious significant addiction. And it's the same addiction that many, many young people are suffering today." The court explained that such addictions can result from the over-prescription of painkillers "by doctors who look to make a buck out of prescribing serious addictive pain killers to people with no real regard for the outcome." (R. 107:40, A-App. 116.) The court acknowledged that while it did not "know exactly how Mr. Karboski ended up with his addiction," he "put himself into the position of needing the drugs and having to purchase the drug. That was his involvement." (R. 107:40–41, A-App. 116–117.) And, "[t]he other side of the coin is that Mr. Burks as well as many others in our community profit off this," which is "disturbing" because Burks "was bragging about the profits" and "how he had the best stuff around." Here, because the drugs involved were "opiates and heroin or in this case what was passed off as heroin, turned out to be Fentanyl, the best stuff around is also the most dangerous." (R. 107:41, A-App. 117.) Fentanyl "is a very cheap additive to heroin and increases the profit margin." (R. 107:41–42, A-App. 117–18.)

The court found that although Burks may have his own substance abuse problems, it was doubtful that Burks used his own drugs because "he wouldn't be alive to be here today facing these charges" had he used "this high percentage Fentanyl heroin mixture . . . it's only a matter of time before he OD'd." (R. 107:42, A-App. 118.) The court told Burks that

it understood that he "didn't go out there intending to kill anyone. So that is not in any way how I'm viewing this, but it is a cost of doing business, and it caught up with you." (R. 107:42–43, A-App. 118–19.)

The court was "quite sure that [Burks] knew what was in the stuff [he] was selling" and stated that this has "got to stop." Although the court noted that the larger problem had "nothing to do with Mr. Burks," the court emphasized that it was "addicted people who die from these substances" and that there needed to be "a closer eye on doctors who are over-prescribing." (R. 107:43, A-App. 119.) The court discussed "something that has bothered me for years about how these drugs that were supposed to assist people at the end of their lives" are "being passed around like candy by doctors" causing people to "become addicted." (R. 107:44, A-App. 120.)

As for Burks' case, the court determined that even if Burks had not sold heroin to Karboski, he still may have overdosed, but that "doesn't matter" because whoever sold him the drugs that killed him "would have been equally responsible for selling this dangerous drug." (R. 107:45, A-App. 121.) Burks was not "the main guy responsible for drug trafficking around here," which made the court's decision "so difficult." However, the court noted that "if you cut off the last end of the distribution you make it harder to get drugs" and if drugs are not available, "maybe some people end up living instead of dying from the overdose." (R. 107:46, A-App. 122.) In sum, the court determined that the severity of Burks' offense required punishment "for distributing this type of poison in our community" and to "make[] a point to the community." (R. 107:47, A-App. 123.)

The court also looked at Burks' character, finding that he "did not take full responsibility for his actions" and that it "can't give him credit for taking responsibility." (R. 107:47, A-App. 123.) Burks' record was "relatively minimal" and he had a family, but the court determined that he must have

"had some issues over the years otherwise he wouldn't be dealing drugs." (R. 107:47–48, A-App. 123–24.)

The court also found that there was a need to protect the public and "keep this from happening again." Importantly, "there needs to be some significant punishment to make sure that that is conveyed to the people who want to be big time drug dealers, aspiring heroin dealers." (R. 107:48, A-App. 124.)

After thoroughly examining the severity of the offense, Burks' character and protection of the public, the court sentenced Burks to a 25-year concurrent sentence. On the first-degree reckless homicide count, the court imposed 15 years of initial confinement and 10 years of extended supervision. On the possession with intent to distribute narcotics count, the court imposed a concurrent sentence of five years of initial confinement and five years of extended supervision. The court found that concurrent time was appropriate because the crimes "arose out of the same set of facts." (R. 107:49, A-App. 125.) The court entered the judgment of conviction reflecting the 25-year sentence. (R. 93, A-App. 101–102.)

Postconviction motion and appeal. Burks filed a postconviction motion, seeking a new trial or resentencing. Burks claimed that Attorney Cleghorn performed ineffectively because she "failed to object to the testimony of a Milwaukee police officer who testified that the statements of the State's star witness E.G. were 'very believable.'" (R. 99:1–2.) Burks also alleged that Attorney Cleghorn did not object at sentencing to the improper factor of "the systemic over prescription of narcotic painkillers," which Burks alleged was "a primary factor in determining [Burks'] sentence." (R. 99:2–3.) Based on his claim that his counsel's failure to object to Detective Kurtz's "impermissible vouching" was

"prejudicially ineffective," Burks sought a *Machner*[1] hearing on Attorney Cleghorn's performance. Burks also sought a new sentencing hearing because he alleged that the court relied on a "legally impermissible sentencing factor." (R. 99:11–12.)

The circuit court denied Burks' motion without a hearing. (R. 101; A-App. 103–106.) The court rejected Burks' claim that Attorney Cleghorn should have objected to Detective Kurtz's testimony that E.G.'s explanation to police of how she purchased heroin from Burks was "very believable" as "impermissible vouching." The court held that "taken in context with the entirety of his testimony, Detective Kurtz was referring to the process of his death investigation and the basis for his decision to rely on E.G.'s cooperation to track down the person who delivered the heroin to her." (R. 101:2–3, A-App. 104–105.) Thus, Kurtz's statement was not "vouching" and therefore was not objectionable. Moreover, Burks was not prejudiced because of the "overwhelming direct and circumstantial evidence of guilt." (R. 101:3, A-App. 105.)

The court also rejected Burks' claim that "the court relied upon irrelevant sentencing factors when it commented upon the over-prescription of opioids" because the court expressly stated that its comments about the magnitude of the addiction problem "had nothing to do with" Burks. (R. 101:3, A-App. 105.) Thus, Attorney Cleghorn was not ineffective for not objecting to the court's sentencing remarks and Burks was not entitled to resentencing. (R: 101:4, A-App. 106.)

Burks appeals from the decision denying his postconviction motion and from the judgment of conviction. (R. 102.)

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[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

STANDARD OF REVIEW

This Court independently reviews the legal questions of whether counsel acted deficiently and whether counsel's acts prejudiced the defendant, but reviews the circuit court's factual findings under a clearly erroneous standard. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115.

Whether a motion alleges facts which, if true, would entitle a defendant to relief and therefore the defendant is entitled to a hearing is a question of law reviewed by an appellate court *de novo*. *See State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion is deficient, the circuit court's decision to deny it without a hearing is reviewed under the deferential erroneous exercise of discretion standard. *Id.* at 310–11.

This Court generally reviews a circuit court's sentencing decision under the erroneous exercise of discretion standard. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. When the record demonstrates an exercise of discretion, an "appellate court follows a consistent and strong policy against interference with the discretion of the trial court in passing sentence." *Id.* ¶ 18 (citations omitted). "Accordingly, the defendant bears the heavy burden of showing that the circuit court erroneously exercised its discretion." *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409.

ARGUMENT

I. The circuit court properly denied Burks' postconviction motion without a hearing because the record conclusively demonstrated that trial counsel did not perform deficiently and Burks was not prejudiced.

A. Relevant legal principles.

Effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *See State v. Balliette*, 2011 WI 79, ¶ 21, 336 Wis. 2d 358, 805 N.W.2d 334 (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). To establish ineffective assistance of counsel, a defendant must prove both that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland,* 466 U.S. at 687. A claim of ineffective assistance fails if the defendant fails to prove either requirement. *State v. Williams*, 2006 WI App 212, ¶¶ 18–19, 296 Wis. 2d 834, 723 N.W.2d 719.

When considering deficient performance, "a court looks to whether the attorney's performance was reasonably effective considering all the circumstances." *Balliette*, 336 Wis. 2d 358, ¶ 22. A strong presumption exists that counsel acted properly within professional norms, and the defendant must demonstrate that his attorney made serious mistakes that could not be justified in the exercise of objectively reasonable professional judgment, deferentially considering all the circumstances from counsel's contemporary perspective to eliminate the distortion of hindsight. *Strickland,* 466 U.S. at 689–91. A court must review trial counsel's performance with great deference, and the defendant must overcome the strong presumption that counsel acted reasonably within professional norms. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

"Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305.

The standard for the prejudice prong of the test is whether the alleged deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. The defendant cannot meet this burden by simply showing that an error had some conceivable effect on the outcome. *Id.* at 693. Instead, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). Showing prejudice means showing that counsel's alleged errors *actually* had some adverse effect on the defense. *State v. Koller*, 2001 WI App 253, ¶ 9, 248 Wis. 2d 259, 635 N.W.2d 838 (emphasis added). Moreover, notwithstanding any alleged errors, no prejudice exists when overwhelming evidence supports the verdict. *State v. Manuel*, 2005 WI 75, ¶ 75, 281 Wis. 2d 554, 697 N.W.2d 811.

A properly pleaded claim of ineffective assistance of trial counsel triggers an evidentiary hearing at which counsel testifies regarding his challenged conduct. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979); *see also State v. Curtis,* 218 Wis. 2d 550, 554–55, 582 N.W.2d 409 (Ct. App. 1986), *review dismissed,* 584 N.W.2d 125 (1998) (reaffirming *Machner* hearing as condition precedent for reviewing claim of ineffective assistance of trial counsel).

However, a defendant is not automatically entitled to an evidentiary hearing on a postconviction motion. A circuit court may deny a defendant's postconviction motion without a hearing unless the motion alleges sufficient material facts, that if true, would entitle a defendant to relief. *State v. Allen*,

2004 WI 106, ¶ 2, 274 Wis. 2d 568, 682 N.W.2d 433; *see Bentley*, 201 Wis. 2d at 310; *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). If the defendant's motion on its face fails to allege sufficient facts to raise a question of fact, or if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the circuit court may summarily deny the motion. *See Allen*, 274 Wis. 2d 568 ¶ 2; *Bentley*, 201 Wis. 2d at 309–10, *Nelson,* 54 Wis. 2d at 497–98. Even when a postconviction motion alleges sufficient, nonconclusory facts, the circuit court may still deny a hearing when the record as a whole conclusively demonstrates that a defendant is not entitled to relief. *State v. Sulla*, 2016 WI 46, ¶ 29, 369 Wis. 2d 225, 880 N.W.2d 659.

B. Burks failed to allege sufficient facts to entitle him to a hearing on his claim that Attorney Cleghorn provided ineffective assistance.

Burks alleges that Attorney Cleghorn was "prejudicially ineffective" when she did not object to Detective Kurtz's testimony that E.G.'s explanation during the police investigation of how she purchased heroin from Burks was "very believable." Burks claims that this was "impermissible vouching" so that when the jury heard E.G.'s testimony they had already heard "that E.G.'s story was true." (Burks' Br. 9.) The circuit court rejected this argument, finding that Burks had failed to state sufficient facts to support his claim because "taken in context with the entirety of his testimony, Detective Kurtz was referring to the process of his death investigation and the basis for his decision to rely on E.G.'s cooperation to track down the person who delivered the heroin to her." (R. 101:2–3, A-App. 104–105.) Thus, because Kurtz "was not testifying to the truthfulness of her statements in and of themselves or commenting generally on her believability as a witness . . . had counsel objected to the

detective's testimony as vouching, the court would have overruled the objection." (R. 101:3, A-App. 105.) The circuit court was correct.

In support of his claim, Burks relies on *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) for the proposition that "no witness, expert or other[wise, should be permitted] to give an opinion that another mentally and physically competent witness is telling the truth." (Burks' Br. 9.) However, this rule is inapplicable where, as here, the police officer testified about an interview as part of a pretrial investigation. A police officer's testimony explaining the circumstances of an interview and what he or she believed at the time does not have the purpose or effect of attesting to the witness's credibility at trial and therefore does not violate *Haseltine*. *State v. Snider*, 2003 WI App 172, ¶¶ 25–26, 266 Wis. 2d 830, 668 N.W.2d 784; *State v. Smith*, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App. 1992).

Here, Detective Kurtz testified extensively about E.G.'s explanation of the texts and phone calls between her and Karboski and between her and Burks to arrange to purchase heroin. (R. 119:30–42.) After this lengthy testimony, Kurtz stated that E.G.'s explanation or story comported with the text messages and phone calls and thus was "very believable." (R. 119:43, A-App. 112.) Detective Kurtz's testimony about his interview with E.G. as a part of his pretrial investigation of Karboski's death provided the context for his statement that her story was believable and that therefore police could rely on it to proceed with a controlled buy of heroin with the purpose of arresting Burks. Kurtz did not offer this statement to opine on the truth of E.G.'s trial testimony. Therefore, it did not violate *Haseltine*. *See State v. Miller,* 2012 WI App 68, ¶ 15, 341 Wis. 2d 737, 816 N.W.2d 331. Thus, because Detective Kurtz's statement did not violate *Haseltine*, Attorney Cleghorn did not perform deficiently, nor was Burks prejudiced, by Cleghorn's failure to raise a meritless objection.

See State v. Wheat, 2002 WI App 153, ¶ 23, 256 Wis. 2d 270, 647 N.W.2d 441.

Moreover, Burks was not prejudiced because of the plethora of evidence at trial that led to his conviction. This uncontradicted evidence included the cell phone records, toxicology reports about Karboski's cause of death and the Fentanyl found in the drug that killed him, Detective Kurtz's and E.G.'s testimony about the sale of heroin to E.G. that Karboski used before he died of an overdose, and the controlled buy of the "same" drug from Burks the next day. Thus, even if Kurtz's statement "could be construed as improper vouching," Burks was not prejudiced "because there is no reasonable probability that it affected the outcome of the trial based upon the State's presentation of overwhelming direct and circumstantial evidence of guilt" (R. 101:3, A-App. 105.) Burks failed to allege sufficient facts entitling him to a hearing on his claim that Attorney Cleghorn was ineffective for not objecting to Kurtz's statement.

Finally, Burks has failed to allege sufficient facts that Attorney Cleghorn was ineffective for not objecting to the court's sentencing remarks. The circuit court properly rejected Burks' claim because it did not rely on "irrelevant sentencing factors when it commented upon the over-prescription of opioids." The court expressly stated that its comments regarding over-prescription "had nothing to do with" Burks and "did not figure into the court's sentencing calculus in determining an appropriate punishment for his crimes." Instead, the court's general comments about addiction related to Karboski being "a known addict." While the court did not blame Burks for Karboski's addiction, it held Burks "responsible for profiting off the market of addiction." (R. 101:3, A-App. 105) Attorney Cleghorn did not perform deficiently by not objecting to these comments and Burks was not prejudiced because the comments did not factor into the sentence. (R: 101:4, A-App. 106.)

In sum, Burks' claim that his trial counsel was ineffective is devoid of merit. Because the record conclusively demonstrated that Burks is not entitled to relief, the circuit court properly denied his claim without a hearing.

II. Burks is not entitled to resentencing.

A. Relevant legal principles.

Sentencing is committed to the trial court's discretion. *Gallion*, 270 Wis. 2d 535, ¶ 17. In exercising its sentencing discretion, the circuit court must identify the objectives of its sentence, including protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. *Id.* ¶ 40. Circuit courts should impose the minimum amount of confinement consistent with the gravity of the offense, the character of the defendant, and the need to protect the public. *Id.* ¶ 44. Circuit courts may consider a variety of factors in making this assessment. *Id.* ¶ 43 n.11. The circuit court decides which factors are relevant and how much weight to give to any particular factor. *State v. Stenzel,* 2004 WI App 181, ¶ 16, 276 Wis. 2d 224, 688 N.W.2d 20. A circuit court may further clarify its sentence when a defendant raises a postconviction challenge to its exercise of sentencing discretion. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

A circuit court erroneously exercises its sentencing discretion when it relies on inaccurate information or an improper factor. *State v. Alexander*, 2015 WI 6, ¶ 17, 360 Wis. 2d 292, 858 N.W.2d 662. This Court uses a two-step framework to determine whether the circuit court erroneously exercised its discretion based on inaccurate information or an improper factor. *Id.* ¶¶ 17–18. First, it must decide whether the information was inaccurate or an improper factor. Second, it must decide whether the circuit court actually relied on inaccurate information or the improper factor. *Id.* "A defendant bears the burden of proving, by clear and

convincing evidence, that the [circuit] court actually relied on irrelevant or improper factor." *Id.* ¶ 17.

B. The circuit court properly exercised its discretion and did not rely on an improper factor when sentencing Burks.

On appeal, Burks alleges that the trial court improperly exercised its discretion when it sentenced him to 25 years, bifurcated into 10 years of initial confinement and 15 years of extended supervision, because it "considered and relied upon" what Burks asserts is an improper factor. Specifically, Burks claims that the court relied on "its need to blame defendant for the failings of the drug industry, the AMA, and the over prescription of drugs," and "devoted only a small portion of its sentencing comments to discussing the facts as they related to Mr. Burks." (Burks' Br. 11.) Burks is incorrect. The circuit court addressed all the sentencing factors, exercised its discretion to impose an individualized and appropriate sentence, and did not rely on anything improper in its sentencing decision.

In arriving at its sentence, the circuit court succinctly stated why it considered Burks' crimes to be so serious and detrimental to the community. To that end, the court discussed and described the urgent societal issue of opioid addiction and how Burks' crime of selling heroin, which contained a large amount of the deadly narcotic Fentanyl, fed that epidemic and in this case, killed the 22-year-old Karboski. (R. 107:41–46, A. App. 117–122.) The court focused on the aggravating factor that Burks profited from selling this dangerous narcotic and was "bragging about the profits he was making, how he had the best stuff around" when the "best stuff" — in this case, heroin laced with Fentanyl—is "the most dangerous." (R. 107:41, A-App. 117.) The court specifically found that the devastating effects on society that resulted from the distribution of this dangerous narcotic explained the

court's "whole take on the seriousness of this offense" and the need for punishment "for distributing this type of poison in our community." (R. 107:47, A-App. 123.)

In addition to examining the seriousness of the offense, the court also addressed Burks' character. The court noted Burks' motivation to profit off the sale of this "high percentage Fentanyl heroin mixture," which the court "highly doubt[ed]" that Burks would have used himself. (R. 107:42, A-App. 118.) The court also found that Burks "did not take full responsibility for his actions." (R. 107:47, A-App. 123.) Further, although Burks' record was "relatively minimal" and he had a family, he obviously had "issues over the years otherwise he wouldn't be dealing drugs." (R. 107:47–48, A-App. 123–24.)

Stemming from both the seriousness of Burks' crimes, resulting in the death of Karboski, and Burks' character as a self-serving, profiting drug dealer, the court determined that there was a need to protect the public from him, and from others who would act similarly, to attempt to "keep this from happening again." Importantly, "there needs to be some significant punishment to make sure that that is conveyed to the people who want to be big time drug dealers, aspiring heroin dealers." (R. 107:48, A-App. 124.) Because the circuit court fashioned an individualized sentence based on all the sentencing factors and considerations relevant to Burks' case, the circuit court properly exercised its discretion.

On appeal, Burks argues that court's sentencing comments about the over prescription of narcotics leading to the epidemic of opioid addiction indicate that it improperly relied on this factor when sentencing Burks and thus the court erroneously exercised its sentencing discretion. (Burks' Br. 11–12.) Burks has failed to demonstrate that the circuit court's discussion about the over-prescription of narcotics leading to the opioid addiction epidemic was an improper

factor, much less one that the court actually relied on when it sentenced him.

The circuit court's observations regarding addiction did not detract from its proper consideration of all the sentencing factors and its rational decision to impose a 25-year sentence. While it is a lengthy sentence, it was well below the 38 to 40 years that the State recommended and the 55-year maximum. Further, Burks has not shown that the circuit court actually relied on its comments about addiction when it sentenced Burks. Indeed, the court specifically stated that its discussion of the over-prescription of narcotics leading to addiction had "nothing to do with Mr. Burks." (R. 107:43, A-App. 119.) The circuit court appropriately discussed the issue of the opioid epidemic and commented on how addiction can result from the over-prescription of narcotic painkillers, but did not rely on this when fashioning an individualized sentence for Burks.

In denying the postconviction motion, the court emphasized that it expressly stated at sentencing that its comments "had nothing to do with" Burks and "did not figure into the court's sentencing calculus in determining an appropriate punishment for his crimes." (R. 101:3, A-App. 105.) Instead, the court's general comments about addiction related to Karboski being "a known addict" and that this type of addiction is rampant in our society. While the court did not blame Burks for Karboski's addiction, it held Burks "responsible for profiting off the market of addiction." The court found that while Burks didn't intend to kill Karboski, "he assumed the risk by engaging in this kind of illegal behavior." The court imposed a sentence "intended to punish" Burks "for *his* behavior, to remove him from the chain of distribution and to deter others from preying upon the community in this fashion." (R. 101:3, A-App. 105.) Thus, the

court determined that it sentenced Burks "for *his* conduct, and although the sentence imposed is significant, it is *far* less than what the State asked for (i.e. 23 to 25 years of initial confinement and 15 years of extended supervision.)" (R. 101:3–4, A-App. 105–06.)

The circuit court was correct. The court sentenced Burks to concurrent sentences totaling 25 years, well below the State's recommendation and the maximum Burks faced. The circuit court's sentence was the product of an individualized sentencing determination that considered Burks' character, the seriousness of the crime, and the need to deter others from selling heroin, and to protect the community. On this record, Burks has failed to demonstrate by clear and convincing evidence that the circuit court erroneously exercised its discretion by actually relying on its general comments about the devastating problem of opioid addiction in our society. Because the court sentenced Burks appropriately and properly exercised its discretion, Burks is not entitled to resentencing.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that this Court affirm the circuit court's order denying Burks' postconviction motion without a hearing, and the judgment of conviction.

Dated this 23rd day of May, 2018.

Respectfully submitted,

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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 7,444 words.

Dated this 23rd day of May, 2018.

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ANNE C. MURHPHY
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).

I further certify that 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 23rd day of May, 2018.

_____
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