STATE OF WISCONSIN

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

DISTRICT III

Case No. 2020AP742-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LISA RENA LANTZ,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN BROWN COUNTY CIRCUIT COURT, THE HONORABLE JOHN ZAKOWSKI PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUES PRESENTED

1. Are Lisa Rena Lantz's convictions for conspiracy to deliver methamphetamine and solicitation to deliver methamphetamine multiplicitous?

The circuit court determined that the convictions were not multiplicitous.

This Court should affirm.

2. Was Lantz's trial counsel ineffective for not arguing that her convictions were multiplicitous?

The circuit court determined that counsel was not ineffective.

This Court should affirm.

3. Did the circuit court erroneously exercise its sentencing discretion?

The circuit court determined that it did not erroneously exercise its discretion.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs will fully develop the issues presented, which can be resolved by applying well-established precedent.

INTRODUCTION

Lantz pleaded no contest to one count of conspiracy to distribute methamphetamine and two counts of solicitation of delivering methamphetamine. The conspiracy took place from September 2015 to March 2016. The solicitation convictions were based on two acts Lantz committed on specific dates during that time. Lantz claims that this makes the

convictions multiplicitous and that her trial counsel was ineffective for not raising this claim.

This Court should reject these arguments. Lantz's convictions are not multiplicitous because they are different in law and fact, and Lantz has not rebutted the presumption that the Legislature intended to allow multiple punishments. In addition, because the convictions are not multiplicitous, Lantz's counsel was not ineffective for failing to argue that they were.

Lantz also argues that the circuit court erred by not considering mitigating information at sentencing. The court did not erroneously exercise its discretion.

STATEMENT OF THE CASE

The charges against Lantz, her pleas, and sentencing

The State charged Lantz with eight drug charges, most of which related to her possessing and selling methamphetamine. (R. 6; 11.)[1] Lantz pleaded no contest to four of the charges: one count of conspiracy to deliver methamphetamine, two counts of solicitation of delivery of methamphetamine, and one count of maintaining a drug house. (R. 54; 121:2–7.)

According to the complaint, which served as the factual basis for Lantz's pleas, Lantz worked as a midlevel

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[1] The State charged Lantz and others after law enforcement broke up a large drug trafficking operation. The circuit court sealed the probable-cause portion of the complaint, preventing the defendants from making its contents public to protect the privacy of those mentioned in it. (R. 9:1–2.)

The State does not believe that the court's order prevents it from citing the complaint in its brief since the order applies only to the defendants' trial attorneys. The State, though, limits its discussion of the complaint to information relevant to Lantz's multiplicity claim.

methamphetamine distributor in a drug-selling operation centered in Green Bay. (R. 6:1, 5–18; 122:6.) Lantz supported her methamphetamine addiction through this work. (R. 6:5–18.)

On the conspiracy charge, the State alleged that Lantz bought and resold more than 50 grams of methamphetamine between September 1, 2015, and March 22, 2016. (R. 6:1, 5–18.) An informant who once lived with Lantz told law enforcement that Lantz was purchasing one to four ounces of methamphetamine a week from a man named Bill Yang. (R. 6:7–8.) Lantz admitted to law enforcement that, from January 2, 2016, until her arrest in mid-March 2016, she had bought either 3.6 grams or 7.2 grams of methamphetamine from Yang three or four times a week and sold about half of it to others. (R. 6:14–15.)

The solicitation charges alleged that Lantz bought between three and ten grams of methamphetamine from Yang on February 27, 2016, and on March 13, 2016. (R. 6:1–2, 8–11.) These charges were based on phone calls and text messages between Lantz and Yang that law enforcement intercepted on a wiretap. (R. 6:8-11.) During the calls and messages, Lantz ordered methamphetamine from Yang to resell. (R. 6:8–11.)

After Lantz pleaded no contest, the circuit court sentenced her to four years of initial confinement and eight years of extended supervision on the conspiracy conviction, two years of confinement and four years of supervision on both of the solicitation convictions, and 18 months each of confinement and supervision on the drug-house conviction. (R. 50; 123:100.) The court ordered that she serve all four sentences consecutively. (R. 50; 123:100.)

Postconviction proceedings

After sentencing, Lantz filed a postconviction motion. (R. 86.) In it, she alleged that that her convictions for solicitation and conspiracy were multiplicitous because the solicitation charges were for acts that she also committed during the conspiracy. (R. 86:2, 19–28.) Lantz also alleged that her trial counsel had been ineffective for not arguing that the convictions were multiplicitous. (R. 86:29–31.) She further claimed that the circuit court erroneously exercised its sentencing discretion when it disregarded mitigating information about her background and ignored her periods of her sobriety when it said that she was unable to stay drug free. (R. 86:1, 11–18.)

The circuit court held a hearing on Lantz's claim. (R. 125.) At the hearing, Lantz's trial counsel testified that he did not challenge the solicitation and conspiracy convictions because he did not believe that they were multiplicitous. (R. 125:10.)

The circuit court denied Lantz's motion. (R. 98.) It determined that the conspiracy and solicitation charges were not multiplicitous because they were not the same in law and fact and the Legislature did not intend to prohibit multiple punishments for the crimes. (R. 98:8–11.) The court also held that counsel was not ineffective for not raising this argument. (R. 98:12.)

The court further rejected Lantz's argument that it had erroneously exercised its sentencing discretion. (R. 98:3–8.) The court explained that it had recognized that there were mitigating factors, but they were outweighed by the aggravating factors. (R. 98:3–5.) The court also concluded that it had not erred when it said Lantz could not stay drug free. (R. 98:5–7.)

Lantz appeals. (R. 103.) The State will address additional facts where relevant in the Argument section.

ARGUMENT

I. Lantz's convictions for solicitation and conspiracy are not multiplicitous.

Lantz contends that her two convictions for solicitation are multiplicitous because they encompass actions she was punished for in her conspiracy conviction. (Lantz's Br. 18–25.) Or, as she puts it, "the two solicitations were part of Lantz's single intent and design to further the conspiracy for which she was also punished." (Lantz's Br. 20.)

This Court should reject this argument. Lantz's conspiracy and solicitation convictions are different in law and fact, so this Court presumes that the Legislature authorized that Lantz could be punished under both statutes. And Lantz has not rebutted that presumption. Her convictions are not multiplicitous.

A. Lantz has the burden of establishing that the record demonstrates with certainty that her convictions are multiplicitous.

"Multiplicity arises where the defendant is [convicted of] more than one count for a single offense." *State v. Rabe*, 96 Wis. 2d 48, 61, 291 N.W.2d 809 (1980). These convictions can violate the state and federal constitutions' protections against Double Jeopardy. *State v. Brantner*, 2020 WI 21, ¶ 24, 390 Wis. 2d 494, 939 N.W.2d 546.

Convictions are multiplicitous when "the [L]egislature has not authorized multiple charges and cumulative punishments." *State v. Davison*, 2003 WI 89, ¶ 37, 263 Wis. 2d 145, 666 N.W.2d 1. If statutes authorize multiple convictions, then the convictions are not multiplicitous. *Brantner*, 390 Wis. 2d 494, ¶ 24.

Courts use a two-prong test to determine whether convictions are multiplicitous. *State v. Ziegler*, 2012 WI 73, ¶ 60, 342 Wis. 2d 256, 816 N.W.2d 238. The first prong considers whether two offenses are identical in law and fact. Crimes "are identical in law if one offense does not require proof of any fact in addition to those which must be proved for the other offense." *Id*. Crimes "are not identical in fact if the acts allegedly committed are sufficiently different in fact to demonstrate that separate crimes have been committed." *Id*.

The second prong of the multiplicity test considers legislative intent. *Id*. ¶¶ 61–63. The outcome of the first prong determines which of two presumptions a court will apply when analyzing the second prong. *Id*. ¶¶ 61–62.

If two offenses are identical in both fact and law, then a court presumes that the Legislature did not authorize cumulative punishments. *Ziegler*, 342 Wis. 2d 256, ¶ 61. The State must rebut that presumption by showing "a clear indication of contrary legislative intent." *Id*.

By contrast, if two offenses are different in fact or law, then a court presumes that the Legislature authorized cumulative punishments. *Ziegler*, 342 Wis. 2d 256, ¶ 62. Under those circumstances, "it is the defendant's burden to show a clear legislative intent that cumulative punishments are not authorized." *Davison*, 263 Wis. 2d 145, ¶ 45. And if the defendant succeeds in showing that the Legislature did not intend multiple punishments, she will have shown a due process violation, not a double jeopardy violation. *Ziegler*, 342 Wis. 2d 256, ¶ 62.

Lantz's pleaded no contest to the solicitation and conspiracy charges. By doing so, she forfeited her multiplicity claim unless this Court can determine with certainty that the record establishes are multiplicitous. *State v. Kelty*, 2006 WI 101, ¶¶ 46, 51, 294 Wis. 2d 62, 716 N.W.2d 886.

Whether charges are multiplicitous is a question of law that this Court reviews independently. *Brantner*, 390 Wis. 2d 494, ¶ 8.

B. Lantz's convictions are different in law and fact.

Lantz concedes that her solicitation and conspiracy convictions are different in law. (Lantz's Br. 20–25.) The State agrees.

"[T]he three elements of conspiracy are: (1) intent by the defendant that the crime be committed; (2) agreement between the defendant and at least one other person to commit the crime; and (3) an act performed by one of the conspirators in furtherance of the conspiracy." *State v. Peralta*, 2011 WI App 81, ¶ 18, 334 Wis. 2d 159, 800 N.W.2d 512; Wis. Stat. §§ 939.31, 961.41(1x).

Two elements must be shown to prove solicitation. They are (1) that the defendant intended a felony be committed, and (2) that the defendant advised someone to commit that crime under circumstances that indicate that the defendant intended the felony be committed. Wis. Stat. § 939.30(1).

These crimes are not the same in law. They have different elements, and each thus requires proof of some fact that the other does not. Both crimes required Lantz to intend that delivery of methamphetamine be committed. But the conspiracy charge required her to agree with another person to commit the crime and that one of the conspirators commit an act in furtherance of the conspiracy. Solicitation required Lantz to advise someone to commit a felony under circumstances that showed her intent that the felony be committed. Each crime requires proof of facts that the other does not, and they are not the same in law.

The convictions are also not the same in fact. Lantz was convicted of conspiring to deliver more than 50 grams of methamphetamine from September 2015 to March 2016. This conviction was based on Lantz's repeated purchases of methamphetamine from Yang during this time. Lantz was also convicted of soliciting the delivery of between three and ten grams of methamphetamine on February 27, 2016, and March 13, 2016. These convictions were based on phone calls and text messages between Lantz and Yang that law enforcement intercepted in which she requested that he provide her with methamphetamine. These actions are sufficiently different from each other to make them different in fact. This Court should conclude that Lantz's convictions are different in both law and fact.

C. Lantz has not met her burden of showing that the Legislature did not intend multiple punishments for solicitation and conspiracy to distribute methamphetamine.

Because Lantz's solicitation and conspiracy convictions are not the same in law and fact, she has the burden of rebutting the presumption that the Legislature intended multiple punishments for the crimes. This Court should conclude that she has not met her burden.

Courts look to four factors to discern the Legislature's intent. *Ziegler*, 342 Wis. 2d 256, ¶ 63. They are: "(1) all applicable statutory language; (2) the legislative history and context of the statutes; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments for the conduct." *Id*.

1. Lantz is wrong that the amounts of methamphetamine for her solicitation convictions are necessarily part of the amount in her conspiracy conviction.

Lantz addresses each of the four factors to determine legislative intent. (Lantz's Br. 22–25.) But underlying many of her arguments is an assertion that the amounts of methamphetamine for the solicitation convictions were part of the amount involved in the conspiracy conviction. (Lantz's Br. 20–25.) The conspiracy conviction involved more than 50 grams of methamphetamine between September 1, 2015, and March 22, 2016. The solicitation convictions involved between three and ten grams of methamphetamine on February 27, 2016, and on March 13, 2016—two dates within the conspiracy timeframe. Lantz contends that the solicitation amounts were thus necessarily part of the conspiracy amounts and that it is unfair to punish her twice for the acts underlying the solicitation convictions.

This Court should reject this argument because the record does not conclusively support Lantz's characterization of her crimes. Lantz pleaded no contest, so for this Court to grant her relief on her multiplicity claim, the record must clearly establish the violation. *See Kelty*, 294 Wis. 2d 62, ¶ 46. If the Court cannot "determine with certainty" that the convictions are multiplicitous, then it must reject the claim. *Id.* ¶ 51. Lantz's pleas preclude her from developing the facts further to prove her claim. *Id.* ¶ 2.[2]

The record does not show that Lantz's solicitation convictions are necessarily part of the conspiracy conviction. It is, of course, true that the dates of the solicitation convictions fall within the timeframe of the conspiracy. But that does not mean that the methamphetamine involved in

[2] Lantz does not request further fact finding and admits that her claim can be resolved on the record. (Lants' Br. 26–27.)

the solicitations is also part of the methamphetamine involved in the conspiracy.

The complaint, which served as the factual basis for Lantz's pleas, showed that Lantz obtained far more than 50 grams of methamphetamine from Yang even without the amounts involved in the solicitation convictions. The complaint alleged that a jail inmate told police that Lantz was getting between one and four ounces of methamphetamine from Yang every week. (R. 6:7.) An ounce is 28.35 grams. Lantz admitted getting 3.6 or 7.2 grams of methamphetamine three to four times a week from Yang during an 11-week period from January to March 2016. (R. 6:14–15.) If the inmate was correct that Lantz got at least one ounce from Yang a week, she would have obtained over 50 grams in just two weeks. Similarly, if Lantz obtained 7.2 grams four times a week, she also would have exceeded 50 grams in two weeks. If she continued to get similar amounts throughout the conspiracy, she thus would have obtained far more than 50 grams, even excluding the, at most, 20 grams involved in the two solicitation convictions. Thus, the record does not conclusively show that the solicitation amounts were necessarily part of the amount involved in the conspiracy.

The circuit court reached a similar conclusion. In its postconviction order, it explained, "This is not a situation where the same act produced two different charges." (R. 98:10.) The conspiracy and solicitation charges were separate offenses, it said, and the conspiracy alleging more than 50 grams of methamphetamine "could have been charged without the solicitation incidents." (R. 98:10.) This Court, like the circuit court, should recognize that the record supports a finding that the conspiracy and solicitation convictions were based on separate amounts of methamphetamine.

Lantz argues that the solicitation amounts were part of the conspiracy because the conspiracy charge aggregated her

purchases of methamphetamine to reach the amount of over 50 grams. (Lantz's Br. 20–25.) But, again, the record does not clearly establish that the amounts involved in the solicitation convictions were necessary to reach the more-than-50-grams amount in the conspiracy conviction. Instead, the record supports a conclusion that Lantz conspired to deliver more than 50 grams of methamphetamine between September 2015 and March 2016 and separately solicited delivery of between three and ten grams of methamphetamine on two dates in between. Lantz gave up her ability to develop facts that would show that the solicitation amounts were necessary to meet the 50-gram threshold in the conspiracy amount by pleading no contest. Thus, this Court cannot conclude that the solicitation amounts are necessarily a part of the conspiracy amount.

Further, even if the amounts of methamphetamine in Lantz's solicitation convictions are part of the amount in the conspiracy conviction, that does not make the convictions multiplicitous. Instead, the charges would be the same in fact. But, because the charges are not the same in law, Lantz still would have to rebut the presumption that the Legislature intended to allow multiple punishments. As shown in the next section, she has not done so.

2. None of Lantz's arguments about the four factors rebut the presumption that the Legislature intended multiple punishments.

a. Statutory language.

Lantz first addresses the statutory language. (Lantz's Br. 22–23.) But she does not discuss the conspiracy or solicitation statutes. Instead, she points to Wis. Stat. § 971.365(1), which permits the State to prosecute multiple drug crimes as a single crime if they were performed with a "single intent and design." (Lantz's Br. 22–23; Wis. Stat.

§ 971.365(1)(a)–(c).) Lantz notes that this is how the State prosecuted the conspiracy here, and says that "it is clear" that the State meant to punish her for the aggregate amounts of methamphetamine in both the conspiracy and solicitation charges. (Lantz's Br. 22.)

This statute, though, does not establish that the Legislature meant to preclude prosecution for both conspiracy and solicitation to distribute controlled substances, even for the same amounts of drugs. The State can, under Wis. Stat. § 971.365(1), aggregate charges if they have a "single intent and design." But it does not have to. Instead, the State can generally charge as many crimes as the facts allow. Wis. Stat. § 939.65. Here, the facts showed that Lantz both solicited and conspired to deliver methamphetamine. Moreover, as argued, the record does not clearly show that the methamphetamine for the solicitations was included in the amount for the conspiracy. Section 971.365(1) does not establish that the charges against Lantz or her convictions are inappropriate.

Lantz next notes that, when the State charges a crime under Wis. Stat. § 971.365(1), subsection two of the statute allows the State to later prosecute crimes for which no evidence was received at the original trial. (Lantz's Br. 22–23; Wis. Stat. § 971.365(2).) This, she says, means that the State cannot charge a person for conduct already prosecuted. (Lantz's Br. 22–23.) Lantz concludes that, since the Legislature does not permit successive prosecutions for controlled substance crimes, it also did not intend to allow multiple punishments for the same conduct in a single prosecution. (Lantz's Br. 23.)

Section 971.365(2) does not support Lantz's argument. The statute addresses only successive prosecutions, which is not the situation presented here. Multiple convictions for the same conduct in a single prosecution are generally permissible if, as here, the crimes are different in law because each "requires proof of a fact not required by the other." *State*

v. Eisch, 96 Wis. 2d 25, 33, 291 N.W.2d 800 (1980) (quoted source omitted); Wis. Stat. § 939.71. And, again, the record does not unequivocally establish that the conspiracy and solicitation convictions were for the same conduct. Section 971.365(2) does not show that Lantz's convictions are improper.

Lantz also points to Wis. Stat. § 961.45 which prohibits prosecution for controlled-substance crimes if the defendant has been convicted or acquitted in a different jurisdiction for the same act. (Lantz's Br. 23.) She says that this shows that the Legislature intended not to allow defendants to be punished for two drug crimes for the same act. (Lantz's Br. 23.) The statute, though, says nothing about multiple charges for acts that are different under Wisconsin law, like conspiracy and solicitation. Instead, the statute's purpose is to abrogate the dual-sovereignty doctrine in the context of drug crimes. *See State v. Hansen*, 2001 WI 53, ¶ 10, 243 Wis. 2d 328, 627 N.W.2d 195. Under that doctrine, a prosecution by one sovereign does not bar prosecution by another sovereign for the same act. *Id*. This is not a dual-sovereignty case. Further, as argued, Lantz cannot show that the same acts necessarily underlie her conspiracy and solicitation convictions. Section 961.45 does not show that the Legislature intended to prohibit Lantz's convictions for conspiracy and solicitation.

Finally, the State notes that, in Wis. Stat. § 939.72(1) and (2), the Legislature prohibited convicting a person of being a party to a crime and conspiracy or solicitation to commit that crime. This statute suggests that the Legislature did not intend to prohibit convictions for conspiracy and solicitation for the same act. Had the Legislature wanted to prohibit convictions for conspiracy and solicitation for the same act, it would have passed a statute like section 939.72. It did not, and the absence of one shows that the Legislature

did not intend to prohibit convictions for conspiracy and solicitation.

b. Legislative history and context.

Lantz next says that there is little legislative history addressing Wis. Stat. § 961.45. (Lantz's Br. at 24 (citing *Hansen*, 243 Wis. 2d 328, ¶ 19).) The State agrees, but reiterates that section 961.45 says nothing about the propriety of the Lantz's convictions.

Lantz also notes that an earlier version of the current controlled-substance conspiracy statute, Wis. Stat. § 961.41(1x), and Wis. Stat. § 971.365 were enacted by the same act of the Legislature. (Lantz's Br. 24 (citing 1985 Wis. Act. 328, §§ 9m, 22m).) Nothing in these statutes, though, addresses prosecutions for both conspiracy and solicitation, so their enactment at the same time likewise sheds no light on the Legislature's intent to allow convictions for both crimes.

c. Nature of proscribed conduct.

Next, Lantz contends that the nature of her acts shows that they should have been treated as one crime. (Lantz's Br. 24–25.) Her argument appears to be that because the State elected under Wis. Stat. § 971.365(1) to charge her with conspiracy by aggregating her acts from September 2015 to March 2016, it was inappropriate to also charge her with solicitation for two acts that she committed during that time period. (Lantz's Br. 24–25.)

This Court should reject this argument. Lantz's convictions are not improper because, as explained, the record does not conclusively show that the amounts of methamphetamine involved in the solicitation were a part of the amount involved in the conspiracy. Further, Wis. Stat. § 971.365(1) merely allows the State to aggregate drug crimes that are part of a "single intent and design." The statute does

not require that the State charge such crimes in the aggregate, nor does it prohibit the State from aggregating some of these crimes into one charge and charging others separately.

d. Appropriateness of multiple punishments.

Lantz contends that multiple punishments are inappropriate for her conduct, arguing, again, that the State should not be allowed to convict her of solicitation for acts that occurred within the conspiracy's timeframe. (Lantz's Br. 25.) But, as argued, the record shows that the amount of methamphetamine involved in the solicitations was not necessary to exceed the 50 grams involved in the conspiracy. Thus, Lantz's separate acts of soliciting delivery of methamphetamine justify separate convictions, even if she committed the acts during the conspiracy's timeframe. Multiple punishments were appropriate for her actions.

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Lantz's convictions are different in both law and fact. And she has not carried her burden of showing that the Legislature did not intend to allow multiple punishments for her actions. Lantz is thus not entitled to resentencing or to have her solicitation convictions vacated. . (Lantz's Br. 26–27.)

II. Lantz's trial counsel was not ineffective for not challenging her convictions as multiplicitous.

Lantz also argues that her trial counsel was ineffective for not raising a multiplicity challenge in the circuit court. (Lantz's Br. 27–29.) She raises this claim in case this Court determines that she forfeited the multiplicity issue. (Lantz's Br. 27.) *See State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31 (stating that normal practice for appellate

courts is to consider forfeited claims in the context of ineffective assistance of counsel).

This Court should reject this argument. Lantz's multiplicity claim fails on the merits, so counsel was not ineffective for failing to raise it. *See State v. Sanders*, 2018 WI 51, ¶ 29, 381 Wis. 2d 522, 912 N.W.2d 16 ("[c]ounsel does not perform deficiently by failing to bring a meritless motion.").

In addition, an attorney is not deficient for failing to raise an issue of unsettled law. *State v. Jackson*, 2011 WI App 63, ¶ 10, 333 Wis. 2d 665, 799 N.W.2d 461. Lantz suggests that her counsel was "ignoran[t] of a point of law that is fundamental to his case." (Lantz's Br. 29 (quoting *Hinton v. Alabama*, 571 U.S. 263, 271 (2014).) But no Wisconsin appellate court has issued a published opinion holding that convictions like Lantz's are multiplicitous. Counsel was not ineffective for not raising this claim.

Finally, Lantz's claim should fail because she does not explain exactly how or when counsel was supposed to litigate this claim and the consequences that would have followed if the claim was successful. "A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." *State v. Prescott*, 2012 WI App 136, ¶ 11, 345 Wis. 2d 313, 825 N.W.2d 515 (citation omitted). Was counsel supposed to challenge the charges as multiplicitous before Lantz pleaded no contest? If so, how would that have affected the case's resolution? Or should counsel have waited until after her pleas to raise the claim? If so, would that have allowed Lantz to withdraw her pleas? *See Kelty*, 294 Wis. 2d 62, ¶ 43. Lantz does not say, and this Court should reject her unexplained claim that trial counsel was ineffective.

III. The circuit court did not erroneously exercise its sentencing discretion.

Lantz's last claim is that the circuit court erred at sentencing by disregarding the presentence investigation's recommendation, treating mitigating information as aggravating, and ignoring that she had been able to stay drug free in the past. (Lantz's Br. 29–36.) The circuit court did not err.

A. Circuit courts have broad discretion at sentencing that cannot be reversed unless a defendant proves that it was erroneously exercised.

When issuing a sentence, the circuit court must consider three main factors: "(1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public." *State v. Williams*, 2018 WI 59, ¶ 46, 381 Wis. 2d 661, 912 N.W.2d 373. The court may also consider several secondary factors, including: the defendant's past criminal record; his "history of undesirable behavior pattern"; his personality and character traits; the results of any PSI; the viciousness of the offense; the defendant's culpability; the defendant's demeanor and expression of remorse or repentance; the defendant's age educational an employment background; the rights of the public; and length of any pre-trial detention. *Id.* ¶ 46 (citation omitted).

The sentencing court has discretion to determine what factors are most relevant to its decision. *State v. Echols*, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). It also has broad discretion in deciding the weight to give the factors. *State v. Douglas*, 2013 WI App 52, ¶ 20, 347 Wis. 2d 407, 830 N.W.2d 126. And the sentencing court has discretion to determine which sentencing objectives are of greatest importance in each case. *State v. Gallion*, 2004 WI 42, ¶ 41, 270 Wis. 2d 535, 678 N.W.2d 197. So long as a court explains the sentencing

objectives, the facts it considered, and provides a rational linkage between the objectives, facts, and sentence imposed, the court's exercise of discretion will be upheld. *Id.* ¶ 40.

Thus, "[w]hen a criminal defendant challenges the sentence imposed by the circuit court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue." *State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). This Court presumes the circuit court acted reasonably. *Id.* This is "because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." *State v. Borrell*, 167 Wis. 2d 749, 781–82, 482 N.W.2d 883 (1992).

A court properly exercises its sentencing discretion if the record shows that it "examined the facts and stated its reasons for the sentence imposed, 'using a demonstrated rational process.'" *State v. Spears*, 147 Wis.2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted).

B. Lantz has not shown that the circuit court erred.

Lantz complains, first, that the circuit court's sentence exceeded the recommendations of the PSI author and the parties. (Lantz's Br. 32–33.) But, as she acknowledges, the Court was not bound by the PSI's recommendation. *State v. Greve*, 2004 WI 69, ¶ 10, 272 Wis. 2d 444, 681 N.W.2d 479. It was also not required to follow the parties' proposed sentence. *State v. Smith*, 207 Wis. 2d 258, 281, 558 N.W.2d 379 (1997). Thus, Lantz correctly concedes that the court's exceeding the PSI's and the parties' recommendations is not grounds for finding an erroneous exercise of discretion. (Lantz's Br. 32.)

Instead, Lantz argues that the court's exceeding the recommendations "is an indicator of a sentence that discretion was erroneously exercised." (Lantz's Br. 32.) She contends that the reasons the Court gave for exceeding the

recommendations focused too much on the effect of methamphetamine in the community. (Lantz's Br. 32–33.) Lantz says the court's comments about the dangers of methamphetamine "cut both ways in this case" because of the effects the drug had on her. (Lantz's Br. 33.)

The court, though, did not ignore the effects that methamphetamine had on Lantz. (R. 123:96–100.) It recounted her history of drug abuse, its effect on her relationship with her daughter, and its contribution to her health problems. (R. 123:96–100.) The court concluded that Lantz had had many chances in her life yet "cho[se] to get right back into it again." (R. 123:98.) It also determined that she had unmet rehabilitative needs. (R. 123:99–100.) Thus, the court considered the effect methamphetamine had on Lantz, just not in the way she wishes it would have. This was not error since it was within the court's discretion how to consider the effects of Lantz's drug abuse.

The same is true for Lantz's claim that the court improperly focused on her actions during the time period of the conspiracy rather than examining her whole life. (Lantz's Br. 34–35.) The weight to assign these factors was for the court's discretion. *Douglas*, 347 Wis. 2d 407, ¶ 20. And the court did not err here. The court could decide to focus its decision on Lantz's behavior during the period of the conspiracy since it was sentencing her for those actions. After all, the court had to consider the severity of Lantz's offenses. *Williams*, 381 Wis. 2d 661. It could properly conclude that this was the most important factor.

And Lantz is wrong that the court ignored mitigating factors like her long history of drug abuse, sexual and physical abuse she experienced, and her physical and mental health problems. (Lantz's Br. 34–35.) The court considered all these things, but, again, not in the way Lantz wanted it to. The court discussed her addictions and how they negatively affected her life. (R. 123:91–92, 94–95, 97–98.) It noted the

effects that Lantz's drug use had had on her physical and mental health. (R. 123:98–99.) And it acknowledged the abuse Lantz had suffered, saying that "a lot of people have terrible things when they're growing up, but they don't turn to this lifestyle. They don't wreck other people's lives, they don't put other people at risk." (R. 123:98.)

Lantz contends that that the court's comment about her abuse was "cold." (Lantz's Br. 34.) She further argues that just because some abuse victims do not become drug addicts, it does not make her abuse an aggravating factor. (Lantz's Br. 34–35.) Her abuse and her addiction, Lantz contends, are "clearly mitigating." (Lantz's Br. 34.)

Again, Lantz has failed to show an erroneous exercise of sentencing discretion. The court did not have to consider Lantz's past abuse a mitigating factor. This is particularly true given that the Court noted that Lantz had been given many chances in her life after getting into trouble but kept returning to crime. (R. 123:98–99.) And the court did not consider Lantz's abuse itself to be aggravating. Rather, the court focused on her failure to address the issue and her drug addiction, despite many opportunities, and the harm she caused others as a result. That was a proper consideration.

Lantz next argues that the court was wrong to conclude that "when you're out in the real world you can't stay off the drugs." (R. 123:99–100.) The court, Lantz says, ignored the PSI's conclusion that she had been drug free for several years before her most recent period of addiction and had other "lengthy periods of abstinence." (Lantz's Br. 35; R. 40:14–15, 20) She similarly claims that the court erred when it said that Lantz's attempts at rehabilitation "haven't worked yet." (Lantz's Br. 35, R. 123:99.)

The court did not err. It was correct that Lantz's rehabilitation attempts had not yet worked; she was, at the time of her arrest, selling methamphetamine to support her

addiction. Further, as the court explained postconviction, even accepting that Lantz was drug-free for lengths of time, it was questionable whether she could permanently stay sober given her decisions to go back to drugs despite her many chances. (R. 98:5–6.) The PSI author had the same concern. (R. 40:20.) It was reasonable to question Lantz's commitment to remaining sober. Her drug problems began in her teens, and she was 52 years old at the time of sentencing. (R. 123:97–98.) The court did not err by concluding that Lantz's past attempts at rehabilitation had failed.

Finally, Lantz complains that the court did not explain why it gave her consecutive sentences. (Lantz's Br. 35–36.) Whether to give consecutive sentences is a matter for the circuit court's discretion. *State v. Ramuta*, 2003 WI App 80, ¶ 24, 261 Wis. 2d 784, 661 N.W.2d 483.

The court's sentencing decision shows why it gave Lantz consecutive sentences. It focused on the problems methamphetamine caused in the community, the severity of Lantz's crimes, and her history and character. (R. 123:86–100.) The court said that it was structuring Lantz's sentences to focus on her rehabilitation and to account for her inability to stay off drugs. (R. 123:99–100.) Its goal, which it felt "very strongly about," was to place Lantz "in a setting where you can utilize your talents and stay clean and not dirty up other people." (R. 123:100.) The court thus explained why it thought that it needed to give Lantz consecutive sentences. Lantz has not shown that the court erroneously exercised its sentencing discretion.

CONCLUSION

This Court should affirm the circuit court's judgment of conviction and its order denying Lantz's motion for postconviction relief.

Dated December 16, 2020.

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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 5836 words.

Electronically signed by:

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 16th day of December 2020.

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