STATE OF WISCONSIN

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

DISTRICT II

Case No. 2020AP1157-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRY L. HIBBARD,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE PAUL V. MALLOY, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

A person commits first-degree reckless homicide contrary to Wis. Stat. § 940.02(2) when the person delivers heroin to another person and that person then dies from its use. A person aids and abets another person in the commission of a crime if the person intentionally acts with knowledge or belief that another person intends to commit the crime and knowingly assists the other person who directly commits the crime.

The trial evidence in this case showed that Terry L. Hibbard's daughter, Taralyn Joy Hibbard, asked Hibbard to drive her to meet Davion Poe for the express purpose of obtaining heroin. Hibbard did so. He drove Taralyn to meet Poe, and Poe then delivered heroin to Taralyn. Taralyn died the next day from a heroin overdose. The State charged, and the jury convicted, Hibbard of first-degree reckless homicide as a party to a crime (PTAC). Hibbard appeals.

1. Did the State present sufficient evidence to support Hibbard's conviction of first-degree reckless homicide as a PTAC? That is, did the State prove that Hibbard knew that Poe intended to deliver heroin to Taralyn, and that Hibbard intentionally assisted Poe by transporting Taralyn to the place where the delivery occurred?

The circuit court answered: Yes.

This Court should affirm.

2. Did Hibbard show that first-degree reckless homicide was void for vagueness as applied to Hibbard?

The circuit court held, No.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Like Hibbard, the State requests publication but does not request oral argument.

SUPPLEMENTAL STATEMENT OF THE CASE

The charge

The complaint alleged that Hibbard committed first-degree reckless homicide based on the allegation that Hibbard delivered heroin to Taralyn, who later died from the use of that heroin. (R. 1:1.) Following the arraignment, the State filed an amended information alleging that Hibbard committed the crime of first-degree reckless homicide as a PTAC. (R. 22:1.)

According to the complaint, a forensic pathologist reported to law enforcement officers that Taralyn died from an apparent opiate overdose. (R. 1:1.) Officers found evidence near her body associated with heroin and opiate use, including a syringe, hypodermic needles, cotton balls, a tourniquet, and Narcan (Naloxone), which is used to reverse the effects of an opioid overdose. (R. 1:1–2.) Hibbard told officers that Taralyn obtained the heroin from "Cheese," a person whom officers later identified as Davion Poe. (R. 1:2.) When asked how he knew that Taralyn got heroin from Poe, Hibbard stated, "because I took her." (R. 1:2.)

Hibbard told police that he picked up Taralyn at a gas station, that Taralyn contacted Poe, that Hibbard parked the car at a place where Poe and Taralyn arraigned to meet, and that Taralyn got out of Hibbard's car and into Poe's car. (R. 1:2.) Hibbard did not give money to Taralyn, but he knew that Taralyn purchased $60.00 worth of heroin from Poe. (R. 1:2.) Taralyn then gave Hibbard some heroin, and she kept the rest. (R. 1:2.)

The trial

Hibbard pled not guilty. (R. 109:2.) The evidence at trial showed that on the weekend of July 7, 2017, Taralyn was in Sullivan, Wisconsin, when she texted Hibbard about getting drugs. (R. 113:142–47.) Taralyn also communicated with Poe. (R. 113:148.) Poe agreed to sell Taralyn some heroin in Milwaukee when Taralyn returned on Sunday from her weekend in Sullivan. (R. 113:148–49.) On Sunday morning, Taralyn's ex-boyfriend drove Taralyn to a gas station in Milwaukee, where Hibbard was waiting for her. (R. 113:149.)

Hibbard also wanted drugs. (R. 113:145.) Before picking Taralyn up at the gas station, Hibbard was home in Grafton, Wisconsin, when he texted Taralyn to "bring some back. Dying here." (R. 113:145.) Taralyn texted back, "He won't, Dad. You will have to drive to Milwaukee to get me." (R. 113:145.) Hibbard responded, "Leaving now. Be in Milwaukee in 45 minutes." (R. 113:146.) Taralyn texted back, "Bring your pipe." (R. 113:146.) Hibbard then drove from Grafton to Milwaukee, met Taralyn at the gas station, and then drove Taralyn to meet Poe so she could buy the heroin. (R. 113:149.)

When Hibbard arrived at the place where Taralyn and Poe agreed to meet, he pulled over, and Taralyn got out of the car and into Poe's. (R. 113:149.) Taralyn purchased heroin from Poe, returned to Hibbard's car, and they drove home to Grafton. (R. 113:149.)

Taralyn died of an overdose the next day. (R. 39:1–2; 113:116, 118.)

Hibbard's motion to dismiss

When the Sate rested its case[1], Hibbard moved to dismiss, arguing that the State had not "made a prima facie case." (R. 113:197–98.) Specifically, Hibbard argued that the

[1] Hibbard called no witnesses.

State did not prove that *Hibbard* delivered anything, and that there was no evidence that Poe "was aware or knew of anybody's willingness to assist" in the drug transaction with Taralyn. (R. 113:199.) Therefore, according to Hibbard, the State failed to prove that Hibbard aided and abetted the crime. (R. 113:199.) The State responded that the facts are undisputed that Hibbard took Taralyn to meet Poe to get the drugs. (R. 113:201.) And, if "[y]ou remove [Hibbard's] conduct from what happened here, Taralyn doesn't become possessed of these drugs on this fact. It's a key point to the transaction." (R. 113:201.) Poe, the State argued, cannot "commit the crime of delivering to Taralyn unless [Hibbard] aids him by bringing [Taralyn] there to pick it up. It's - - [Hibbard] clearly acted. He aided and abetted. He was concerned in that commission of the crime of delivery." (R. 113:202.)

The court determined that its "inclination is this case goes to the jury at a minimum, and we'll see where we end up with it."[2] (R. 113:208.)

Closing arguments and jury instructions

During closing argument, the State told the jury that the case "is going to boil down to the concept of aiding and abetting because there's no doubt that [Hibbard] is not the one that handed Taralyn the drugs, but under the law he doesn't have to be so long as he was concerned in the commission of the crime." (R. 114:35.) And, the State argued, the evidence proved that Hibbard assisted the commission of the crime when he drove Taralyn to Poe so that Poe could deliver heroin to her. (R. 114:37.) "[T]his delivery," the State argued, "does not happen without Terry Hibbard driving Taralyn to the meet-up so that the deal can be consummated." (R. 114:37.) And, if you remove Hibbard from the equation,

[2] Hibbard interprets the court's ruling as never explicitly ruling on the issue. (Hibbard's Br. 9.)

"Taralyn Hibbard doesn't get these drugs, she doesn't consume these drugs, and on this date on these facts she does not die." (R. 114:37.)

The court instructed the jury on PTAC as follows:

> The State contends that the defendant was concerned in the commission of the crime of first degree reckless homicide by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.
>
> A person intentionally aids and abets the commission of a crime when, acting with the knowledge or belief that a person is committing or intends to commit a crime, he knowingly either assists the person who commits the crime or is ready and willing to assist the -- to assist, and the person who commits the crime knows of the willingness to assist.

(R. 114:24–25.)

The verdict and sentence

The jury found Hibbard guilty of first-degree reckless homicide as PTAC. (R. 114:62.) The court sentenced Hibbard to six years of initial confinement, followed by four years of extended supervision. (R. 115:42–43.)

Postconviction proceedings

Hibbard moved for postconviction relief. (R. 86.) He claimed that the evidence was insufficient to show that he aided and abetted Poe. (R. 86:7, 11.) He alternatively claimed that the Len Bias statute is void for vagueness as applied to him. (R. 86:13.)

The court held a hearing where it then denied Hibbard's motion. (R. 116.) With respect to Hibbard's first claim, the court determined that Hibbard "was aware of the fact that a crime was being committed, and participated in its

perpetration by driving Taralyn." (R. 116:23.) Hibbard "enabled Poe to deliver the drugs. Without [Hibbard's] participation and assistance to Taralyn to getting there, she wouldn't get the heroin." (R. 116:23.)

With respect to Hibbard's void-for-vagueness claim, the court concluded that the Len Bias statute, Wis. Stat. § 940.02(2)(a), is not unconstitutional "in terms of what it allows a reasonable person to discern about their conduct approaching criminal conduct." (R. 116:26.) "[Y]ou have to look at [the] presumption of constitutionality when you construe a statute. And when you read that, it's clear what is prohibited." (R. 116:26.)

After the hearing, the postconviction court entered a written order denying Hibbard's motion. (R. 99:1.) The court determined that the evidence was sufficient to support Hibbard's conviction and that the Len Bias statute is not void for vagueness as applied to Hibbard. (R. 99:1.)

Hibbard appeals.

STANDARDS OF REVIEW

Whether evidence was sufficient to sustain a jury's verdict is a question of law reviewed independently. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410. In reviewing the sufficiency of the evidence, this Court gives great deference to the factfinder's determinations, examining the record to find facts that uphold its guilty verdict. *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203.

Whether Hibbard's act of transporting Taralyn to meet with Poe so that Poe could deliver heroin to Taralyn constitutes aiding and abetting in the commission of first-degree reckless homicide under Wis. Stat. §§ 939.05 and 940.02(2)(a) presents a question of statutory interpretation. "The interpretation and application of . . . statutory provisions are questions of law that [this Court] review[s] de novo." *State*

v. Alexander, 2013 WI 70, ¶ 18, 349 Wis. 2d 327, 833 N.W.2d 126. Statutory interpretation is undertaken to determine the statute's meaning, which this Court is to assume is expressed in the language chosen by the legislature. *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 20, 309 Wis. 2d 541, 749 N.W.2d 581. If the meaning of the statute is clear from the plain language, this Court is to give effect to that language. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

Whether a statute violates due process because it is void for vagueness presents a legal question that this Court independently reviews. *State v. Lasecki*, 2020 WI App 36, ¶ 11, 392 Wis. 2d 807, 946 N.W.2d 137.

ARGUMENT

I. The State presented sufficient evidence to show that Hibbard aided and abetted Poe in the delivery of heroin to Taralyn, which caused her death.

Hibbard asserts that the State presented insufficient evidence to prove that he aided and abetted in the commission of first-degree reckless homicide based on Poe's delivery of heroin to Taralyn, which resulted in her death. (Hibbard's Br. 12, 13.) The State discusses the legal standards guiding sufficiency of the evidence, first-degree reckless homicide by delivery of a controlled substance under Wis. Stat. § 940.02(2), and PTAC liability. It will then show how Hibbard fails to meet his burden that the evidence was insufficient to sustain his conviction.

A. Defendants have a high burden when they challenge the sufficiency of the evidence.

Defendants bear a "heavy burden" when challenging the sufficiency of the evidence. *State v. Beamon*, 2013 WI 47, ¶ 22, 347 Wis. 2d 559, 830 N.W.2d 681. Appellate courts

consider the evidence "in the light most favorable to the State and reverse the conviction only where the evidence 'is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" *Smith*, 342 Wis. 2d 710, ¶ 24 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). "[I]f there is any reasonable hypothesis that supports" the conviction, courts uphold it. *Smith*, 342 Wis. 2d 710, ¶ 24. If more than one inference can be drawn, a reviewing court must follow the inference supporting the verdict unless the evidence was incredible as a matter of law. *State v. Alles*, 106 Wis. 2d 368, 376–77, 316 N.W.2d 378 (1982).

B. A person can be charged with first-degree reckless homicide by delivery of a controlled substance.

"First-degree reckless homicide by delivery of a controlled substance [as proscribed under Wis. Stat. § 940.02(2)] was created as a specific type of criminal homicide to prosecute anyone who provides a fatal dose of a controlled substance." *State v. Patterson*, 2010 WI 130, ¶ 37, 329 Wis. 2d 599, 790 N.W.2d 909 (referencing the history of the origins of Wisconsin's Len Bias law). Wisconsin Stat. § 940.02(2)(a) provides, in relevant part, that:

> Whoever causes the death of another human being under any of the following circumstances is guilty of a Class C felony:
>
> (a) By . . . delivery, in violation of s. 961.41, of a controlled substance included in schedule I or II under ch. 961 . . . if another human being uses the controlled substance . . . and dies as a result of that use.

Id.

The Len Bias law applies only if the substance that caused death is a Schedule I or II controlled substance. Heroin is a Schedule I controlled substance. Wis. Stat. § 961.14(3)(k).

As defined, "'Deliver' or 'delivery,' unless the context otherwise requires, means the actual, constructive or attempted transfer from one person to another of a controlled substance or controlled substance analog, whether or not there is any agency relationship." Wis. Stat. § 961.01(6).

Thus, to prove a violation of Wis. Stat. § 940.02(2), the State must demonstrate the following elements: (1) the defendant delivered a substance; (2) the substance was a prohibited controlled substance; (3) the defendant knew or believed that the substance was a prohibited controlled substance; and (4) the victim used the substance and died from that use. *See* Wis. JI–Criminal 1021 (2011).

C. A person can also be charged with aiding and abetting first-degree reckless homicide by delivery of a controlled substance.

Wisconsin Stat. § 939.05(1) provides, in part, that "Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it." A person is concerned in the commission of a crime, whether the person directly commits the crime, intentionally aids and abets its commission, or is a party to a conspiracy with another to commit the crime. Wis. Stat. § 939.05(2). While the jury must unanimously agree that a defendant participated in the crime, it need not agree as to the theory of the defendant's participation, i.e, whether the defendant directly committed the crime, aided and abetted its commission, or conspired with another to commit it. *Holland v. State*, 91 Wis. 2d 134, 143, 280 N.W.2d 288 (1979).

The issue in Hibbard's case is whether he "intentionally aided and abetted" Poe, who committed first-degree reckless homicide through the delivery of a controlled substance (heroin), to Taralyn, which resulted in her death. To establish that a person aided in the commission of a crime, the State

must prove "that a person (1) undertakes conduct . . . which as a matter of objective fact aids another person in the execution of a crime, and further (2) he consciously desires or intends that his conduct will yield such assistance." *Hawpetoss v. State*, 52 Wis. 2d 71, 78, 187 N.W.2d 823 (1971). Said another way, "where one person knew the other was committing a criminal act, he should be considered a party thereto when he acted in furtherance of the other's conduct, was aware of the fact that a crime was being committed, and acquiesced or participated in its perpetration." *Roehl v. State*, 77 Wis. 2d 398, 407, 253 N.W.2d 210 (1977).

"[I]intent may be inferred from the defendant's conduct itself." *State v. Hecht*, 116 Wis. 2d 605, 623, 342 N.W.2d 721 (1984). And one who intentionally aids and abets in a crime's commission "is responsible not only for the intended crime, if it is in fact committed, but as well for other crimes which are committed as a natural and probable consequence of the intended criminal acts." *State v. Asfoor*, 75 Wis. 2d 411, 430, 249 N.W.2d 529 (1977).

The supreme court recognizes two ways PTAC liability can attach. Both require a showing that the aider and abettor knows or believes that another person is committing or intends to commit a crime, and the aider and abettor "knowingly either (a) renders aid to the person who commits the crime, or (b) is ready and willing to render aid, if needed, and the person who commits the crime knows of his willingness to aid [the person]." *State v. Charbarneau,* 82 Wis. 2d 644, 651, 264 N.W.2d 227 (1978) (quoting Wis. JI–Criminal 400(A) (1962)); *see also State v. Sharlow*, 110 Wis. 2d 226, 238–39, 327 N.W.2d 692 (1983) (noting supreme court's longstanding approval of the standard party-to-a-crime jury instruction).

The current jury instructions related to aider and abettor PTAC liability use language that the supreme court

has previously approved. Wisconsin JI–Criminal 400 and 405 (2005), provide in part that:

> A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:
>
> • assists the person who commits the crime; or
>
> •is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

Id. Here, the trial court's jury instructions—which are not challenged on appeal—track this language. (R. 47:3; 114:24–25, 45.)

D. The State presented sufficient evidence to convict Hibbard of first-degree reckless homicide as a PTAC because Hibbard intentionally aided and abetted Poe's delivery of heroin to Taralyn.

In this case, defense counsel informed the jury that Poe directly committed the crime of first-degree reckless homicide. (R. 113:103.) Poe was "charged," "convicted," and "sentenced," and Poe was "the one who supplied the [heroin] that killed Taralyn." (R. 113:103.) Poe's direct involvement of this crime is not disputed.

What *is* disputed is whether the State introduced sufficient evidence to show that Hibbard was guilty as a PTAC to this crime. It did. Here, the court instructed the jury that one way it could find Hibbard guilty of first-degree reckless homicide is if, as a PTAC, he aided and abetted its commission. (R. 47:3; 114:25, 44–45.) And, at trial, the State presented evidence that Hibbard knew that Poe intended to deliver heroin to Taralyn, and that Hibbard intentionally assisted Poe by transporting Taralyn to the place where the delivery occurred. (R. 113:146–49.) This is sufficient evidence for a jury to convict Hibbard as an aider and abettor of first-

degree reckless homicide. *See* Wis. Stat. § 939.05(2)(b); Wis. JI–Criminal 400 and 405 (2005). (R. 114:24–25.)

While Hibbard argues that *State v. Smith,* 189 Wis. 2d 496, 525 N.W.2d 264 (1995) and *State v. Hecht*, 116 Wis. 2d 605, 342 N.W.2d 721 (1984), provide guidance as to whether a participant in a drug exchange can be liable as a PTAC in a Len Bias case (Hibbard's Br. 14–16), Hibbard's reliance on these cases is misplaced.

Smith involved a conspiracy charged under then Wis. Stat. § 161.41(1x) (1991-92). The *sole* issue that the supreme court considered was whether an agreement between a buyer and a seller—the defendant—for the delivery of a small amount of a controlled substance for personal use by the buyer constituted a conspiracy to deliver a controlled substance. *Smith*, 189 Wis. 2d at 501. The court concluded that "the legislature did not intend a buyer-seller relationship [involving] a small amount of cocaine for the buyer's personal use [only] to be a conspiracy." *Id.* The court reasoned that because "there was no claim or proof that the buyer intended to further deliver the cocaine. . . . the most the buyer could have been guilty of was the misdemeanor of possession." *Id.* at 501–02. Here, there was no evidence of a conspiracy, the State did not proceed under the conspiracy theory, and the jury was not instructed that they could find Hibbard guilty as PTAC under the conspiracy theory.

Also, unlike the situation in *Smith*, Hibbard has not pointed to *any* evidence of a legislative intent that would support his position that "a person involved exclusively with the buyer's side of a drug deal *cannot* be liable for the seller's crimes." (Hibbard's Br. 17.) Finally, the statute involved in *Smith*, Wis. Stat. § 161.41(1x) (1991-97)[3], is distinctly

[3] That statute provides: "Any person who conspires, as specified in 939.31, to commit a crime under sub. (1)(c) to (h) or

different than Wis. Stat. § 939.05. *Smith* is not a guidepost and does not establish a bright-line rule that individuals involved in procuring narcotics for another cannot be prosecuted as aiders and abettors of the seller's criminal conduct.

Hecht also does not support Hibbard's argument that he cannot be liable as an aider and abettor. (*See* Hibbard's Br. 15–17.) In *Hecht* the defendant argued that he could not be guilty as PTAC of possession with the intent to deliver because he merely directed an agent to a potential source of cocaine. 116 Wis. 2d at 620. The supreme court rejected this argument, finding that his participation was much more than that. *Id*. at 620–21. Rather, the defendant's actions satisfied "this court's criteria of aiding and abetting as set forth in *Sharlow*[4]." *Id*. at 622. It noted that "to be found guilty of aiding and abetting in the commission of an offense, it is not necessary that all defendants be present at the scene of the crime." *Id*. at 624 (citing *Sharlow,* 110 Wis. 2d at 240). The *Hecht* court continued, "This court has also held that aider and abettor liability extends to the natural and probable consequence of the intended acts, as well as any other crime which, under the circumstances, was a natural and probable consequence of the intended crime." *Id*. *Hecht's* language does not suggest that liability as an aider and abettor attaches *only* "when used to punish a buyer for a seller's wrongdoing." (Hibbard's Br. 17.)

Further, for PTAC purposes, an aider and abettor must "knowingly" render aid in the "commission of a crime." *Charbarneau,* 82 Wis. 2d at 651(quoting Wis. JI–Criminal 400(A) (1962)). As noted in *Sharlow*, in *Hawpetoss*, 52 Wis. 2d 71, the supreme court "pointed out that, where one person

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(1m)(c) to (h) is subject to the applicable penalties under sub. (1)(c) to (h) or (1m)(c) to (h)." Wis. Stat. § 161.41(1x) (1991-92).

[4] *State v. Sharlow*, 110 Wis. 2d 226, 327 N.W.2d 692 (1983).

knew the other was committing a criminal act, he should be considered a party thereto when he acted in furtherance of the other's conduct, *was aware* of the fact that a crime was being committed, and acquiesced or participated in its perpetration." 110 Wis. 2d at 240 (quoting *Roehl*, 77 Wis. 2d at 407). This language above clearly supports the conclusion that Hibbard knowingly rendered aid in the commission of the crime of the delivery, a delivery he knew was taking place. In sum, Hibbard aided and abetted the perpetration of Poe's delivery of a controlled substance to Taralyn.

While Hibbard argues that he was "involved only with the *buyer* side of the drug deal" and therefore he is not an aider and abettor (Hibbard's Br. 17 (emphasis added)), he is wrong. As argued and shown above, Hibbard did not just "help[ ] [Taralyn] . . . effectuate the drug that led to her overdose." (Hibbard's Br. 18.) He was not just "on the buying side of the transaction." (*Id.*) Hibbard helped *Poe*. Had it not been for Hibbard driving Taralyn to a place where Hibbard knew Poe would deliver the heroin, Poe would have been unable to make the delivery of the heroin. Poe could not have committed the crime of delivering the heroin to Taralyn unless Hibbard aided and abetted him by bringing Taralyn to the delivery spot. Hibbard's actions are clearly aiding and abetting in the commission of the crime of the delivery. (R. 113:202.) Hibbard consciously intended that his conduct would yield Poe's delivery of heroin. *See Hawpetoss*, 52 Wis. 2d at 78. Taralyn expressly informed Hibbard that he "will have to drive to Milwaukee to get me" in order to consummate the narcotics transaction with Poe. (R. 113:145.)

Hibbard next argues that because Chapter 961 shows that the legislature intended "to treat buyers and sellers differently," Hibbard's "buyer-side conduct" is not a Len Bias violation. (Hibbard's Br. 18.) This argument fails for multiple reasons.

First, the statutes in Chapter 961 do not use the terms "buyers" and "sellers."[5] Wis. Stat. § 961.001(1r), (2). Second, as argued above, Hibbard was not just involved in the "buyer-side conduct" (Hibbard's Br. 18), he aided *Poe* with Poe's delivery of the heroin by driving Taralyn to the delivery location. Third, there is no legislative history that Chapter 961 treats persons like Hibbard—who knowingly transports another person to a location where the delivery of a controlled substance is to occur—as someone who does *not* violate Wis. Stat. § 940.02. (*See* Hibbard's Br. 18.)

There is also no "ambiguity" or "uncertainty" as whether the Len Bias statute applies to Hibbard's conduct. (Hibbard's Br. 18.) It is not a mutually exclusive statute that applies only to "buyers." The statute is unambiguous:

> Whoever causes the death of another human being under any of the following circumstances is guilty of a Class C felony:
>
> (a) By . . . delivery, in violation of s. 961.41, of a controlled substance included in schedule I or II under ch. 961 . . . if another human being uses the controlled substance . . . and dies as a result of that use.

Wis. Stat. § 940.02(2)(a). The plain language of the statute simply makes no exception for "buyer-side" conduct that leads to an overdose death. But finally, again, this is not just "buyer-side" conduct. (Hibbard's Br. 18.) Hibbard aided and abetted *Poe,* who could not have committed his crime without Hibbard's assistance.

The postconviction court was correct. It did not apply a "but-for causation" test, and there's nothing "faulty" about the court's interpretation of the applicable law. (Hibbard's Br. 19,

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[5] Nor do the statutes in Chapter 961 use the terms "users" and "dealers." (*See* Hibbard's Br. 12 ("Wisconsin's drug laws, codified in Chapter 961, draw a line between users and dealers.").)

20.) In reviewing the laws of PTAC liability and the Len Bias statute, the court correctly concluded that Hibbard was an active participant of the crime: "He is the one that drove down there, and he is the one that kind of put the wheels to further this transaction in process." (R. 116:22.) He "did things that put this deal, that enabled Poe to deliver the drugs." (R. 116:23.) He "was aware of the fact that a crime was being committed, and [he] participated in its perpetration by driving Taralyn." (R. 116:23.) Hibbard "enabled Poe to deliver the drugs." (R. 116:23.)

In viewing the evidence most favorable to the jury's conviction, this Court should affirm. The State presented sufficient evidence that Hibbard was guilty of first-degree reckless homicide as an aider and abettor.

II. Alternatively, Wis. Stat. § 940.02(2) is not void for vagueness as applied to aiders and abettors like Hibbard.

Hibbard next argues that the Len Bias statute, Wis. Stat. § 940.02(2), is void for vagueness as applied to him. (Hibbard's Br. 20.) He's incorrect. The statute provides sufficient notice that his conduct is prohibited.

A. Hibbard bears the burden of showing that Wis. Stat. § 940.02(2) is void for vagueness.

Statutes are generally presumed to be constitutional. *Tammy W–G. v. Jacob T.*, 2011 WI 30, ¶ 46, 333 Wis. 2d 273, 797 N.W.2d 854. As the party challenging the constitutionality of the statute as impermissibly vague, Hibbard bears the burden of proving that the statute is unconstitutional beyond a reasonable doubt. *Id.* "Every presumption must be indulged to sustain" the constitutionality of a statute and every doubt "must be resolved in favor of constitutionality." *State ex rel.*

Hammermill Paper Co. v. La Plante, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973).

"Procedural due process's 'void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Lasecki*, 392 Wis. 2d 807, ¶ 11 (quoting *Beckles v. United States*, 137 S. Ct. 886, 892 (2017)). Courts apply a two-part "analysis for determining whether a statute is void for vagueness: first, the statute must be sufficiently definite to give persons of ordinary intelligence who seek to avoid its penalties fair notice of the conduct required or prohibited; and second, the statute must provide standards for those who enforce the laws and adjudicate guilt." *State v. McManus*, 152 Wis. 2d 113, 135, 447 N.W.2d 654 (1989).

"The first prong of the vagueness test is concerned with whether the statute sufficiently warns persons 'wishing to obey the law that [their] . . . conduct comes near the proscribed area.'" *State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993) (quoting *State v. Tronca*, 84 Wis. 2d 68, 86, 267 N.W.2d 216 (1978)). "The challenged statute, however, 'need not define with absolute clarity and precision what is and what is not unlawful conduct.'" *Id.* at 276–77 (quoting *State v. Hurd*, 135 Wis. 2d 266, 272, 400 N.W.2d 42 (Ct. App. 1986)). "A statute is not void for vagueness simply because 'there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease.'" *Id.* at 277 (quoting *State v. Courtney*, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976)). Nor is a statute unconstitutionally vague "simply because it is ambiguous." *State v. Smith*, 215 Wis. 2d 84, 92, 572 N.W.2d 496 (Ct. App. 1997). Rather, the ambiguity must be such that "one bent on obedience may not discern when the region of proscribed conduct is neared." *Courtney*, 74 Wis. 2d at 711.

The second prong, which relates to standards for enforcement, "provides an objective standard for those applying the law" and requires those enforcing the law to "do so without creating or applying their own standards." *Pittman*, 174 Wis. 2d at 277. Said another way, "A statute should be sufficiently definite to allow law enforcement officers, judges, and juries to apply the terms of the law objectively to a defendant's conduct in order to determine guilt without having to create or apply their own standards." *State v. Popanz*, 112 Wis. 2d 166, 173, 332 N.W.2d 750 (1983).

B. The statute provides sufficient notice.

Hibbard argues that the Len Bias statute does not provide sufficient notice to aiders and abettors like him. (Hibbard's Br. 22–23.) The postconviction court rejected this argument, concluding that the statute "allows a reasonable person to discern about their conduct approaching criminal conduct." (R. 116:26.) And, one has "to look at [the] presumption of constitutionality when you construe a statute. And when you read that, it's clear what is prohibited." (R. 116:26.) This Court should affirm.

As previously indicated, the Len Bias statute provides in relevant part:

> Whoever causes the death of another human being under any of the following circumstances is guilty of a Class C felony:
>
> (a) By . . . delivery, in violation of s. 961.41, of a controlled substance included in schedule I or II under ch. 961 . . . if another human being uses the controlled substance . . . and dies as a result of that use.

Wis. Stat. § 940.02(2)(a). The definition of "delivery" includes "actual, *constructive* or attempted transfer from one person to another." Wis. Stat. § 961.01(6) (emphasis added). The PTAC statute, Wis. Stat. § 939.05(2) provides that a "person is

concerned in the commission of the crime if the person . . . [i]ntentionally aids and abets the commission of it." Finally, *Tronca,* 84 Wis. 2d at 85, provides that Wis. Stat. § 939.05 applies to *all* statutes unless the legislative intent clearly indicates otherwise.[6] In this case, Hibbard was on notice that his intentional constructive delivery of heroin, which led to Taralyn's death, is a Class C felony. Wis. Stat. § 940.02(2)(a).

Here, the statutes and caselaw define exactly what is prohibited, putting aiders and abettors like Hibbard on notice. Hibbard simply believes that the statute *shouldn't* include his conduct in this case. But that's a policy argument best directed to the legislature; it does not establish unconstitutional vagueness.

In this case, the jury did not convict Hibbard as an aider and abettor to first-degree reckless homicide because it found that he was a "drug *recipient*" or because he was on the "*receiving* end of a drug deal." (*See* Hibbard's Br. 23.) It convicted him because it determined there was sufficient evidence that Hibbard aided and abetted Poe in the *delivery* of the controlled substance, which led to Taralyn's death. (R. 47:3; 114:45.)

Hibbard fails to meet his burden of proving that the Len Bias statue does not provide sufficient notice.

C. The Len Bias statute paired with the PTAC statue is sufficiently definite to allow fact-finders to apply the law to aiders and abettors like Hibbard.

Finally, Hibbard argues that the Len Bias and PTAC statutes undermine objective enforcement if "they encompass Hibbard's buyer-side conduct." (Hibbard's Br. 24.) But again, Hibbard was not convicted for his "buyer-side" conduct. He

[6] Hibbard provides no such legislative history.

was convicted for aiding and abetting the delivery of heroin. (R. 47:3; 114:45.) The Len Bias and PTAC statues—and the trial court's uncontested jury instructions that mirrored them—allowed the jury in this case to apply the law objectively to Hibbard's conduct to determine his guilt, without the jury having to "create or apply their own standards." *Popanz*, 112 Wis. 2d at 173. The statutes are not "impermissibly imprecise" about what conduct qualifies as aiding and abetting a fatal drug delivery. (Hibbard's Br. 24.) The clear language of the statues provide that a person can be liable for aiding and abetting the delivery of a controlled substance which causes the death of another human being. Wis. Stat. §§ 939.05; 940.02(2)(a).

While Hibbard may not like the consequences of the statutes' prohibition on aiding and abetting the delivery of a controlled substance that leads to a fatal overdose, those consequences do not make the statutes unconstitutionally vague.

Hibbard has failed to meet his burden to show beyond a reasonable doubt that the Len Bias statute paired with the PTAC statute is unconstitutionally vague as applied to him.

CONCLUSION

This Court should affirm Hibbard's conviction and the postconviction court's order denying relief.

Dated this 3rd day of December 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,612 words.

Dated this 3rd day of December 2021.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 3rd day of December 2021.

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