STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2021AP001689-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DREAMA HARVEY,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

Appeal from Judgment of Conviction
Jackson County Circuit Court,
Hon. Mark Goodman Presiding
Case No. 2015 CF 95

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1. Whether the jury instruction as to Count One allowed the jury to convict Harvey on a theory of prosecution not presented to the jury and for which there was insufficient evidence to convict.

2. Whether the erroneous jury instructions unconstitutionally lowered the burden of proof to convict Harvey by confusing and misdirecting the jury, thereby denying Harvey the due process of law.

3. Whether reversal is warranted because the circuit court cannot change the jury instructions without first informing counsel of those changes.

4. Whether Harvey's sentence of 12 years initial confinement was unduly harsh.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Dreama Harvey does not believe oral argument is necessary, absent the Court's desire for clarification. This case does not warrant publication pursuant to WIS. STAT. § 809.23(1)(b)(1) and (3). It is to be decided by a panel of three judges pursuant to WIS. STAT. § 752.31(1).

STATEMENT OF THE CASE

Initial Proceedings

On June 8, 2015, the state filed a complaint charging Harvey with one count of first-degree reckless homicide by delivery of heroin in violation of WIS. STAT. §§ 961.41 and 940.02(2)(a), and a second count of delivering heroin in violation of WIS. STAT. § 961.41 (R1). An Information was filed, which charged the same offenses. (R22).

Jury Trial

A three-day trial began on April 2, 2018. The state elicited testimony from several preliminary witnesses establishing that on or about February 14, 2015, D.B. was found dead in an apartment rented and occupied by Joyce McLevain and her son, Michael Bearfield. (R183:148). McLevain is Harvey's aunt, and Bearfield is Harvey's cousin.

Vincent Tranchida, the chief medical examiner of several counties who performed a forensic autopsy of D.B., testified that he concluded D.B. died of a heroin overdose. (R183:306). At the close of evidence, it was clear that the cause of death was not at issue. Rather, the issue was whether Harvey delivered the dose of heroin that killed D.B.

Lay Witness Testimony

The state's evidence on the ultimate issue of whether Harvey was the individual who delivered the two doses of heroin (one at Murphy's that killed D.B., and the second dose found in D.B.'s pocket) consisted of lay witnesses who were present at Murphy's Pub in Black River Falls the night that D.B. died. (R183:319). Michael Bearfield testified on direct examination that he could not remember the events of that night because he was under the influence of alcohol and/or drugs. (R183:223). He recalled that he, Tim Coupe and D.B. were all intoxicated at Murphy's. *Id.* He further testified that he did not even remember seeing Harvey at Murphy's that night. (R183:211). He also testified that when interviewed by Officer Cooper about the events of that night he was under the influence of alcohol and drugs. He conceded on direct examination, however, that he did not "make up" his answers to Officer Cooper's questions. (R183:221). But, on cross-examination, when asked if the jury could trust anything he said in Cooper's interview, Bearfield responded: "nope." (R183:224).

At the conclusion of his direct testimony, the state played a video of Bearfield's interview with law enforcement. (R183:218; R215:Ex.6; *see also* R122:Ex.7 a transcript of same). The video was recorded on April 3, 2015, some six weeks or so after D.B.'s death. In the video, Bearfield expressed that he was sick of "the drugs" and so he decided to speak with law enforcement. (R122:Ex.7). He told Off.

Cooper that he saw Harvey provide D.B. a tenth of heroin at Murphy's. Bearfield further claimed that he saw D.B. snort the heroin in the bathroom, and that Bearfield refused D.B.'s offer for Bearfield to use some of the heroin. *Id.* Bearfield told Cooper that he also saw Harvey sell another tenth to D.B. later that night at McLevain's apartment. *Id.* He claimed that Tim Coupe was also a witness to these events.

Tim Coupe testified he was with D.B. at Murphy's Pub the night D.B. died. (R183: 319). He also saw Bearfield, McLevain, and Harvey at Murphy's. (R183:321-23). He only saw Harvey at the bar for five to eight minutes. (R183:325). He did not see Harvey talk to or interact with D.B. at Murphy's. (R183:340). Coupe recalled that D.B. appeared drunk at Murphy's. (R183:340). By the time D.B. left Murphy's with Coupe, Bearfield, and McLevain to go to McLevain's apartment. D.B. appeared groggy. (R183:341). At McLevain's apartment, but before Harvey arrived there, D.B. was "nodding out, in and out of conversation." (R183:328). His eyes were rolling, and his head was leaning forward. *Id.* Later, Coupe saw Harvey arrive at McLevain's apartment. He testified that he saw D.B. hand her $30, and Harvey handed D.B. a plastic sandwich baggie with something silver in it. (R183:332). Coupe left a few minutes later.

Jessica Lamp was with Coupe for part of the evening at Murphy's. She testified that she saw D.B. at Murphy's. He bought some drinks for her, and she bought some for him. (R183:355). She

was drunk. (R183:359). She noticed that D.B. and Harvey talked "very briefly" at Murphy's. (R183:359).

Kari Gomes testified by phone. (R183:235). Gomes was dating Bearfield at the time D.B. died. She testified that at 9:00 a.m. the next morning, Bearfield called her on the phone. He told Gomes that D.B. died of an overdose at McLevain's apartment that night. (R183:237-39). He told her that he had heard D.B. breathing throughout the night. Bearfield was crying on the phone. He told Gomes Harvey sold D.B. the dose that killed D.B. (R183:239). But, Bearfield didn't call the police. Instead, he fled the apartment and called Gomes. His mother didn't call 911 for more than four hours later, at about 1:25 p.m. (R183:158).

Finally, John Rose testified that in August 2016, Rose was incarcerated and spoke with a detective. Rose was trying to provide information to law enforcement with the hope that charges against him would be dropped or some type of consideration. (R183:429-430). Rose told the detective that at some point in 2015 Harvey contacted him and asked him to "get rid of" Michael Bearfield. (R183:429). He claimed that Harvey posted his bond with that implied understanding. (R183:430).

Also entered into evidence was a written statement by Harvey. (R139, Ex.29). In it, Harvey stated that she went to Murphy's that night. She saw D.B. He asked Harvey if she knew where he could get heroin. She responded that she could. She left

Murphy's with Michael Gates, went to his trailer where he got heroin for D.B., and then they drove to McLevain's apartment. There, Harvey stated that she went into McLevain's apartment. D.B. went outside to talk to Michael Gates and came back inside where Harvey talked to him for a minute. Harvey then left with Gates. *Id.*

Law Enforcement Testimony/Physical Evidence

When law enforcement searched D.B.'s pockets for evidence, they found a piece of foil wrapped around suspected heroin (R183:161). They also found a piece of plastic wrapper that appeared to be the plastic wrapping around a cigarette pack (R183:184), a pill and a small amount of marijuana, and some other items that were not of evidentiary value. (R183:161).

Joseph Wermeling, a forensic scientist with the Wisconsin State Crime Lab, testified that a substance in the foil pack was recovered from D.B.'s pocket. The substance was confirmed as .073 grams of heroin. (R183:367). That amount was consistent with the packaging and amount Coupe said he saw Harvey sell to D.B. at the apartment for $30.

Kevin Scott, a DNA Analyst with the Wisconsin State Crime Lab testified that he tested and analyzed several items recovered from D.B.'s pocket. (R183:393). Specifically, the foil pack recovered from D.B. had a mixture of DNA from at least individuals. One of the two was a male contributor. (R183:406).

Scott was able to accomplish more with the swabs from the cigarette pack plastic wrapper. Scott was able to identify D.B. as the major contributor to the DNA profile. (R183:480-409). Interestingly, Michael Bearfield was included as a possible contributor to the mixture as well. (R183:409). Whereas Harvey was definitively excluded as a contributor. *Id.*

Jury Instructions

Following the close of evidence, the Court and parties had a jury instruction conference. As is relevant to this appeal, the first issue with the instructions objected to by defense counsel was to the inclusion of "Delivery by more than one person involved" for Count One. (R183:554; App.10). That entire provision states:

> If delivery by more than one person is involved, add the following: It is not required that the defendant or Michael Gates delivered the substance directly to Dustin Bahr. If possession of the substance was transferred more than once before it was used by D.B., each person who transferred possession of that substance has delivered it.

(R144:3-4). The defense argued that no witness testified about delivery from one person to another with respect to Count One. The only evidence on Count One was Bearfield's statement that Harvey directly distributed heroin to D.B. at Murphy's pub. There simply was no evidence supporting the addition of that instruction for reckless homicide.

The state disagreed. It argued that Harvey's statement suggested she was the middleman between Gates and D.B. and summarized her statement for the court. The state argued that Harvey's statement supported the instruction. (R183:555; App.10). Further, it argued that the jury could believe a portion of Harvey's statement and portions of other witness testimony "that Dustin was inside the apartment and that an exchange was made between D.B. and Dreama." (R183:555; App.12). And it argued that it was logical that the jury could find that heroin transferred from Harvey's hands to D.B.'s hands as observed by Coupe (again at the apartment after Murphy's). (R183:555; App.13). When the defense pointed out that the instruction in question only applied to Count One, the state accused the defense of attempting to splice the case into tiny little compartments. *Id.*

The circuit court reviewed a comment in the instruction, but then, just like the state, began reviewing the evidence for Count Two instead of Count One, which is what was at issue. (R183:560; App.16).

At that point, the state explained in clear terms its theory of the case. Specifically, it stated:

> Your Honor, the State's theory of the case is that the first delivery occurred at Murphy's Pub based on Michael Bearfield's testimony and the fact that Dustin Bahr died from heroin being in his system, which was Dr. Tranchida's testimony, and the evidence that he was exhibiting the effects Dr. Tranchida articulated what happened when a person

> induces an illegal dose. Tim Coupe testified when he said to get in the car to go to the apartment, he's exhibiting those symptoms. So that's Count 1, in the State's opinion.

(R183:561-62; App.15-16). In other words, the state's theory of prosecution, and the case it presented to the jury, was that Harvey personally delivered the lethal dose to D.B. at Murphy's Pub (Count One), and the second delivery, that Harvey essentially admitted to as party to a crime in her statement, involved the heroin found in D.B.'s pocket that was delivered at McLevain's apartment (Count Two).

The circuit court, however, concluded that because there were:

> competing inferences here, according to Ms. Harvey's statement, it was Cash or Mr. Gates who delivered the heroin; and according to the other witnesses in the case, the second delivery of heroin was made by Ms. Harvey at the apartment. So I think it's proper to give that instruction that if delivery is by more than one person because for that reason.

(R183:561; App.17). But the circuit court seems to have confused the fact that Harvey's objection to the instruction pertained only to Count One – the first alleged delivery of heroin to D.B. That error then permeates the balance of the instructions.

Second, the defense objected to the inclusion of Wis JI-Criminal 400, the instruction for party to a crime. (R183:562; App.18). The objection applied to its inclusion as to either count. But again, the state argued, erroneously, that if the jury believed Harvey's statement, she assisted "in the delivery" charged in Count

One. (R183:564; App.20). It again recounted the facts as to the second delivery but didn't address the appropriateness of party to a crime instruction for Count One.

The circuit court cited commentary for including the party to a crime instruction "where it is not charged but develops based on the evidence presented at trial." (R183:566; App.22). Citing that commentary, and again recounting the facts as to the second delivery in Count Two, the circuit court decided to keep the instruction. (R183:567; App.23).

The final jury instructions reflect the circuit court's obfuscation of the facts for the two separate counts. The written instructions as to the elements for Count 1 read in pertinent part:

1. The defendant *or Michael Gates* delivered a substance.
2. The substance was heroin.
3. The defendant *or Michael* gates knew or believed that the substance was heroin . . .
4. D.B. used the substance alleged to have been delivered by the defendant *or Michael Gates* and died as a result of that use.

(R144:3)(emphasis added). Despite including "or Michael Gates" the instructions as to Count One the court did not include the complete party to a crime instruction. The instructions as to Count One also included the "delivery by more than one person" provision as to Count One even though the state did not present evidence to that end as to Count One. (R144:3-4).

Further obscuring the instructions on reckless homicide, the final written instructions include Wis JI-Criminal 400 within the instructions for Count Two – the second delivery. That would have been wholly appropriate as to Count Two alone, given the state's theory of prosecution and evidence adduced at trial. However, on page six of the instructions, within the instructions for Count Two, the instructions begin talking about aiding and abetting *first degree reckless homicide* (Count One), and again on page seven and eight. The instructions then provide the elements of the offense to Count Two, but fail to include "or Michael Gates" as an alternate method of conviction pursuant to the theory of party to a crime.

Surprisingly, when the circuit court read the instructions for Count One to the jury, it didn't even mention "or Michael Gates" in the elements of the offense despite the written instructions' inclusion of Gates. The circuit court correctly noted for the jury that:

> [i]t is your duty to follow all of these instructions regardless of any opinion you may have about what the law is or what it ought to be. You must base your verdict on the law I give you in these instructions.

(R183:574; App.30). It then told the jury that before it could find Harvey guilty the jury must be satisfied that:

> Number one, the Defendant delivered a substance…Number two, the substance was heroin. Number three, the Defendant knew or believed that the substance was heroin… Number 4, D.B. used a substance alleged to have been delivered by the Defendant and died as a result.

(R183:576-77; App.32-33). Thus, the instructions, as spoken to the jury, differed from the written instructions provided to the jury for its deliberation. Curiously, after announcing the second count, and then reading the complete party to a crime instruction, the circuit court again read the elements for reckless homicide, and this time it *included* the "or Michael Gates" language. At that point, the court noted that it thought it was "getting a little bit repetitive" and then read the elements of delivery of a controlled substance *without* any reference to party to a crime or the "or Michael Gates" language. (R183:580-83; App.36-39). Harvey cannot reconcile those differences. They are entirely inconsistent with the evidence, the state's theory of the case, and are confusing.

After reading the complete set of instructions to the jury, but before the jury was excused to deliberate, the court told the jury:

> I will bring you the instructions momentarily. I had them reprinted because there were some things there that I read the a little bit differently.

(R183:666; App.40). The circuit court then sent the jury out and acknowledged to the parties that it read the instructions differently than they were written in order "to make them a little bit more smoother and the Instruction 400 kind of cut into the Instruction 6020. . . so I tried to have those recast, not really any changes but to make it flow more smoothly." (R183:667). As written, and as read, however, the instructions are entirely inconsistent with the evidence, the state's theory of the case, and are confusing.

After deliberation, the jury convicted Harvey on both counts.

Sentencing

In advance of sentencing, a PSI was prepared. The PSI suggested an initial term of confinement of nine to ten years followed by a term of supervision. As to Count Two, it suggested an initial term of confinement of three to four years to run concurrently with Count 1. (R154). The state argued for 12 and three years of initial confinement respectively.

The defense noted that the reckless homicide conviction did not contain malice or an intent to cause D.B.'s death. Harvey had a limited criminal history, with no prior felony convictions. (R184:31). And she had no history of any violence. It noted that probation was the default sentence, unless the court found that confinement was necessary to protect the public from further criminal activity. It argued that her lack of criminal history suggested that confinement was not necessary. (R184:32). Her overall risk potential, violent recidivism and general recidivism risks were low. (R184:33-34). The defense suggested that 12 years of confinement would be an undue punishment that would be inconsistent with *McCleary's* requirement that the sentence imposed should call for the minimum amount of confinement necessary. (R184:35). It suggested that if the court was not inclined to sentence Harvey to a probationary sentence that a term of three to five years initial confinement on Count One would be sufficient. (R184:38).

The court agreed that Harvey did not have a significant criminal history. (R184:44). It further noted that she was cooperative in the law enforcement investigation, and that police recovered no other contraband or drugs from her home. *Id.* And she had four minor children at the time of her arrest for whom she was the sole caretaker. (R184:45). But, considering the other factors involved in the case, and the tragic loss of D.B.'s life, the court concluded a sentence of 12 years of initial confinement on Count One was appropriate, along with three years concurrently on Count Two. (R184:50).

ARGUMENT

I.

HARVEY SHOULD RECEIVE A NEW TRIAL BECAUSE THE JURY INSTRUCTIONS WERE ERRONEUS.

Multiple errors in the jury instruction require reversal of Harvey's convictions. First, the written instructions for Count One, reckless homicide by delivery of heroin, as worded, allowed the jury to convict Harvey if it found that Michael Gates delivered the dose that resulted in D.B.'s death absent any involvement by Harvey. That allowed for conviction upon insufficient evidence. Second, the errors in the instructions unconstitutionally misled the jury. Third, the circuit court changed the instructions after the jury instruction conference and without informing counsel before it read the instructions to the jury. Each claim serves as a basis for a new trial.

A. The Jury Instruction as to Count One allowed the Jury to Convict Harvey on a Theory of Prosecution not Presented to the Jury and for which there was Insufficient Evidence to Convict.

1. Erroneous Instructions and Insufficient Evidence to Convict.

The Wisconsin Supreme Court has long held that a defendant cannot be convicted on a theory of a crime not presented to a jury. *State v. Wulff*, 207 Wis. 2d 143, 557 N.W.2d 813 (1997)(citing *Chiarella v. United States*, 445 U.S. 222, 236 (1980)); *see also State v. Williams*, 2015 WI 75, ¶ 6, 364 Wis. 2d 126, 867 N.W.2d 736. "Where jury instructions do not accurately state the controlling law, we will examine the erroneous instructions under the standard for harmless error, which represents a question of law for our independent review." *State v. Williams*, 364 Wis. 2d 126, ¶ 34. (quotations omitted). This analysis is not meant to discount the vital importance of correct instructions to the administration of justice. "The State has the burden of developing and presenting a theory of the crime to the jury. The State cannot second-guess its theory or theories after trial, and jury instructions must be expected to control juror's deliberations." *Id.* at ¶ 58. (citations omitted).

Not every erroneous jury instruction is harmless. *Id.* at ¶ 59. To affirm a conviction based on an erroneous instruction, a court must be convinced beyond a reasonable doubt that the jury still

would have convicted the defendant of the charge had the correct instruction been provided. *Id.*

Here, the erroneous instruction for Count One created a theory of criminal culpability that was decidedly not presented to the jury. Indeed, during a discussion of the defense's objection to the inclusion of the language regarding "delivery by more than one person" for the reckless homicide instruction during the jury instruction conference, the state clearly articulated its theory of the case:

> Your Honor, the State's theory of the case is that the first delivery occurred at Murphy's Pub based on Michael Bearfield's testimony and the fact that Dustin Bahr died from heroin being in his system, which was Dr. Tranchida's testimony, and the evidence that he was exhibiting the effects Dr. Tranchida articulated what happened when a person induces an illegal dose. Tim Coupe testified when he said to get in the car to go to the apartment, he's exhibiting those symptoms. So that's Count 1, in the State's opinion.

(R183:561-62; App.15-16). In other words, the state's theory of prosecution for Count One, and the case presented to the jury, was that Harvey personally delivered the dose to D.B. at Murphy's Pub and that was the dose that killed him. Conversely, the second delivery, that Harvey essentially admitted to as party to a crime in her statement, occurred later at McLevain's apartment, involved the heroin found in D.B.'s pocket.

According to the totality of the evidence adduced at trial, only after Harvey had allegedly delivered the first dose to D.B. at

Murphy's Pub, and after Harvey left Murphy's Pub, did Michael Gates enter the picture as to Count Two. The only allegation by the state as to the delivery of the lethal dose at Murphy's was that Harvey delivered that dose.

Yet, when the defense objected to the inclusion of the "delivery by more than one person" language for Count One, both the court and the state erroneously referenced facts that under any reasonable inference only applied solely to Count Two. Specifically, in response to the defense objection, the state argued that the jury could have believed Harvey's statement that Michael Gates was in the car "and then they could believe a portion of the statement from the other witnesses that D.B. was inside the apartment and that an exchange was made between D.B. and Dreama." (R183:556; App.12). Again, those facts relate solely to the second delivery of heroin that was recovered from D.B.'s pocket unused. The state goes on to refer to the foil packet with heroin in it, arguing "it is logical that the jury could find that heroin transferred from Dreama's hands to D.B.'s hands that was observed by Tim Coupe." *Id.* Again, those facts relate solely to Count Two.

The circuit court then looked at the comments to Wis JI-Criminal 1021 and concluded that "regardless of whether the distribution or delivery is directly made to the human being who died. If possession of a controlled substance is transferred more than once prior to the death, each person who distributes it or delivers

the controlled substance is guilty." (R183:559; App.15). And again, the court then summarizes the facts relating to the delivery charged in Count Two. (R183:560; App.16). The court almost corrected itself, stating, "[n]ow, it's a little bit complicated because there's a second count, as well, in which it's alleged that – I suppose this is just the instruction for the reckless homicide, though." *Id.* But then the state interjected its theory of the case already referenced herein. After the state articulated its theory that Harvey delivered the dose at Murphy's Pub that killed D.B., the circuit court again incorrectly referred to the facts relating to Count Two and concluded that "it's proper to give that instruction that if delivery is by more than one person because for that reason." (R183:561; App.17).

The same exact mistake was repeated by the state and the circuit court when the defense objected to the inclusion of Wis JI-Criminal 400, party to a crime. The state argued that "if the jury chooses to believe Ms. Harvey's version, she assisted in the delivery. Michael Gates didn't walk to go get the drugs. She drove him. He got to Joyce's [McLevain] apartment because she drove him . . . So I think the jury should hear this instruction." (R183:564; App.20). Again, the state is referring to Harvey's statement about the second delivery, not the first. Harvey's statement denied having made any delivery at Murphy's Pub, which was the state's theory as to which delivery killed D.B. And again, the circuit court followed suit. It stated that although the state had not charged party to a crime in

either Count One or Count Two, it is nonetheless appropriate to give the instruction when it "develops based on the evidence presented at trial." (R183:566; App.22). The circuit court again referenced facts that solely related to the second delivery:

> And so, her statement says that she got the request from the decedent. She went out. Cash [Gates] is in the car. She lets him know what is up. They go to his mobile home. He gets the drugs. According to his statement, then they drive over to the apartment. She goes in. Mr. Bahr comes out. He comes back in. She leaves. And so certainly you can read that statement that she did assist in the delivery. So I am going to give instruction Number 400.

(R183:566-67; App.20-21). All of those facts summarized by the court, which it used to justify giving Wis JI-Criminal 400, occurred *after* the state contends Harvey had already delivered heroin to D.B. at Murphy's Pub. Harvey agrees that it was wholly appropriate to give instruction 400 as to Count Two given the evidence, including Harvey's statement about Count Two. But, given the state's theory of prosecution and evidence adduced at trial, it was erroneous to give the "delivery by more than one person" instruction in 2021 and the party to a crime instruction as to Count One.

The written instructions were just as confusing as the rationale for seemingly allowing those instructions as to Count One. The written instructions as to the elements for Count One read in pertinent part:

1. The defendant *or Michael Gates* delivered a substance.
2. The substance was heroin

3. The defendant *or Michael* gates knew or believed that the substance was heroin . . .
4. D.B. used the substance alleged to have been delivered by the defendant *or Michael Gates* and died as a result of that use.

(R144:3)(emphasis added). By adding "or Michael Gates" to the instructions for Count One, the circuit court added a theory of the crime that was not presented to the jury. As written, it allowed the jury to convict Harvey if Gates had delivered the lethal dose to D.B. without Harvey's participation. And that avenue of conviction is plainly insufficient evidence to convict Harvey. Adding "or Michael Gates" seems to have been an incomplete way of adding party to a crime liability to Count One. But the rest of the party to a crime instruction doesn't appear in the written instructions until the instructions for Count Two. There, the instructions explain to the jury what party to a crime is and how it works. But it is clearly within the instructions for Count Two and entirely left out of the instructions for Count One. Moreover, the instructions as to Count Two failed to include the "or Michael Gates" language in the first or third elements where it should have been.

Compounding this confusion, when reading the instructions to the jury, the court read them differently than as they were written, and as the parties had understood them to be. It initially read the instruction for Count One without the "or Michael Gates" language. Later, it read the elements as to Count One *with* the "or Michael

Gates" language. (R183:580-81; App.36-37). At that point, the court noted that it thought it was "getting a little bit repetitive" and then read the elements of delivery of a controlled substance *without* any reference to party to a crime or the "or Michael Gates" language. (R183:580-83; App.36-39).

Whatever the jury's confusion was at that point, the court correctly noted that it would give the jury the written instructions and those were what it should use to decipher what was the applicable law. (R183:572; App.28). And those written instructions as to Count One included a theory of the crime - - that it could find Harvey guilty if Michael Gates delivered the lethal dose to D.B. at Murphy's Pub - - that clearly was not presented to the jury. And such evidence, that another individual independently delivered the heroin without Harvey's involvement, is insufficient to convict her of the offense. The instruction was erroneous.

2. The Erroneous Instructions were not Harmless.

The state took full advantage of the confusing and erroneous instructions in its closing arguments. After obfuscating the facts related to the separate counts in the jury instruction conference, which resulted in the circuit court agreeing with the state on the instructions, the state again repeated its flawed logic to the jury to convict Harvey of Count One. It argued that Harvey's statement about Michael Gates's potential involvement as to Count Two could be used to convict Harvey on Count One. (R183:610-612).

Specifically, it told the jury: "So when you're deciding whether Dreama Harvey did this – and if some of you think, you know, I don't think it's the way Michael Bearfield said. I think it's the way Dreama said, she's still guilty." (R183:612). It concluded:

> If you believe that she's guilty either by assisting or by directly committing it, that's a guilty. So look at the instruction because it is important. And party to the crime can apply to *either charge.*

(R183:613)(emphasis added). That theory of the crime is a far cry from what the state professed its theory of the case to be at the jury instruction conference – that Harvey personally delivered the lethal dose to D.B. at Murphy's. But the circuit court's ruling on the jury instructions opened the door to this intentional obfuscation of the proof for the distinct acts and counts, and the decidedly new avenue of conviction for which there was insufficient proof.

Further, what's left of the state's proof of the delivery at Murphy's Pub, is Michael Bearfield's convenient testimony that he saw Harvey deliver the heroin to D.B., and that he then saw D.B. snort heroin in the bathroom after D.B. offered Bearfield some of the heroin. Bearfield, an admitted addict, claimed to have refused the offer. (R122:Ex.7). But those statements by Bearfield were only in his videotaped statement to Officer Cooper. His actual testimony at trial was that he did not recall even seeing Harvey at Murphy's that night and that the jury shouldn't rely on any of those statements because he was intoxicated when he made them. (R183:223-24). In fact, it is

Bearfield's DNA that was included as a possible contributor to the DNA on the plastic wrapper in D.B.'s pocket, not Harvey's. It is unsettling to contemplate such a serious conviction to be based upon such shaky evidence even with a correct jury instruction.

For these reasons, the erroneous instruction was not harmless. This Court cannot be certain, beyond a reasonable doubt, that the jury still would have convicted Harvey on Count One absent the erroneous instruction.

B. The Erroneous Jury Instructions Unconstitutionally Lowered the Burden of Proof to Convict Harvey Thereby Denying Harvey the Due Process of Law.

The circuit court acknowledged that the written instructions provided to the jury were confusing. (R183:666; App.40). But that was after it had already read the instructions, albeit differently than the final written instructions were worded. And the modifications made by the circuit court in its reading of the instructions to the jury were no clearer than the written instructions that were ultimately provided to the jury to rely on.

The instructions deprived Harvey of her right to due process. That is a question of law that this Court reviews *de novo. State v. Kuntz*, 160 Wis. 2d 722, 735, 467 N.W.2d 531 (1991). The due process clause of the fourteenth amendment to the United States Constitution protects the accused in a criminal trial against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which she is charged. *In re*

Winship, 397 U.S. 358, 364 (1970). This principle equally applies under Article 1 Section 8 of the Wisconsin Constitution. A constitutional challenge to a jury instruction requires the challenge to demonstrate a reasonable likelihood that the jury understood that the instructions allowed a conviction based upon insufficient proof. *State v. Trammell*, 2019 WI 59, ¶ 42, 387 Wis. 2d, 928 N.W.2d 564. If there is a reasonable likelihood that the jury was misled by the instructions and therefore applied potentially confusing instructions in an unconstitutional manner, then a new trial should be ordered. *Id.*

Harvey has already detailed above some of the confusing instructions, both written, and as delivered verbally by the court. Specifically, the written instructions included "or Michael Gates" in each element of the reckless homicide instruction. But the written instruction did not contain any of the other language and explanations of the party to a crime instruction that would have properly instructed the jury how to apply that instruction to Count One. Rather, that explanation was included in the instructions for Count Two, which began on page four of the instructions. But, further confusing the jury, additional language about reckless homicide was included in the instructions for Count Two on pages five, six, seven and eight, before switching back to the elements of delivering a controlled substance, which was the crime alleged in Count Two. Further, the elements listed for Count Two did not

include "or Michael Gates" in the first and third elements of the offense, which would have been proper given the circuit court's intention to include party to a crime liability in Count Two. The written instructions are entirely confusing.

The circuit court's attempt when reading the instructions to reorganize and clarify the instructions only made matters worse. The court initially read the instruction for the elements as to Count One without the "or Michael Gates" language. (183:576;App.32). Given the state's theory of the case and the evidence adduced at trial, that should have been the instruction. But, later, the court read the elements as to Count One a second time, and this time it included the "or Michael Gates" language, after it had read the explanation of the party to a crime instruction, effectively adding party to a crime liability to Count One. (R183:580-81; App.36-37). The written instructions for Count One, however, don't include the party to a crime instruction, only the addition of "or Michael Gates" to the elements. At that point, the court noted that it thought it was "getting a little bit repetitive" and then read the elements of delivery of a controlled substance without any reference to party to a crime or the "or Michael Gates" language. (R183:581-82; App.37-38). That effectively flipped the script on the correct instructions. The party to a crime instruction should have been read for Count Two but wasn't.

Evidence of the confusion is quite apparent after the court finished instructing the jury. At that point, the court commented:

> As I read those instructions, there were a few things, I think they kind of got in a misorder a little bit and so I had them redone to make them a little bit more smoother and the Instruction 400 kind of cut into the Instruction 620, and it just didn't flow very well so I tried to have those recast, not really any changes but to make it flow more smoothly. I don't know if you have any comments about that.

(R183:666). It is not clear exactly what the court meant by having the instructions "redone". We have only one set of final jury instructions. And we have how the court read the instructions, which differed significantly from the written instructions.

But both the written and oral instructions were utterly confusing. The jury was orally instructed one Count One twice; once with language allowing conviction of Harvey if the jury found that Michael Gates had delivered the heroin at Murphy's despite no evidence he was even in Murphy's, and once with language only listing Harvey as the distributor. Conversely, the written instructions, which are the operative instructions, only included the language with Michael Gates. The instructions were an unfortunate mess. They were confusing and misled the jury to allow conviction of Harvey even if it concluded that only Michael Gates delivered the dose at Murphy's that killed D.B. That is clearly insufficient evidence to upon which to convict Harvey, but the instructions instructed the jury that it was legally permissible to convict Harvey

on that basis. And it was an improper instruction given the evidence introduced by the state at trial.

Because of the errors, incomplete instructions, attempted corrections that only muddied the instructions further, and inconsistent oral and written instructions, there is a reasonable likelihood that the jury was misled. The convictions must be reversed.

C. Reversal is Warranted Because the Circuit Court Cannot Change the Jury Instructions without First Informing Counsel of Those Changes.

The Wisconsin Supreme Court has unambiguously pronounced that under its superintending authority under Article VII, Sec. 3(1) of the Wisconsin Constitution, "circuit courts of this state must inform counsel of changes they make to jury instructions following the instructions conference. We believe this rule is necessary to ensure that both parties are aware of the actual content of the jury instructions." *Kuntz*, 160 Wis. 2d 722, 735, 467 N.W.2d 531 (1991).

Here, after the circuit court had already read the entire instructions to the jury, it informed the jury: "I will bring you the instructions momentarily. I had them *reprinted* because there were some things there that I read them a little bit differently." (R183:666)(emphasis added). It is worth repeating here, that after the jury was sequestered to deliberate, the circuit court then informed the parties:

> As I read those instructions, there were a few things, I think they kind of got in a misorder a little bit and so I had them *redone* to make them a little bit more smoother and the Instruction 400 kind of cut into the Instruction 6020, and it just didn't flow very well so I tried to have those *recast*, not really any changes but to make it flow more smoothly. I don't know if you have any comments about that.

Id. (emphasis added). At that point, after the instructions had already been apparently altered in some fashion, read to the jury, and the jury had been excused, neither party objected. The court's attempts to clarify the instructions at the last minute were no doubt well intentioned. But it simply was not allowed to do so without informing the parties first.

It is unclear, aside from the circuit court orally instructing the jury differently from how the final jury instructions (R144) read, exactly what the circuit court "reprinted" and what the circuit court had "redone" and "recast." But the circuit court record has only one "Final Jury Instructions" docketed as No. 144. Certainly, there were significant, and substantive differences between what the court read to the jury, and how the final instructions were written - - at least those that are a part of the court record. And Harvey has detailed those difference above. What is clear, however, is that the circuit court unambiguously stated that it altered the jury instructions after the jury instruction conference, after it had already instructed the jury, and without informing the parties of its changes.

When a circuit court fails to follow a Supreme Court directive, reversal is required even if prejudice is not demonstrated. *See Skoufis v. Schaefer*, 168 Wis. 2d 775, 486 N.W.2d 37, *unpublished opinion* (Ct.App.1992)(citing In *re S.P.B.*, 159 Wis. 2d 393, 396-97, 464 N.W.2d 102 (Ct.App.1990))(App.40). Thus, the rule is prophylactic one, pronouncing a bright line that cannot be crossed. That line was crossed here, and the Court must reverse the conviction.

II.

HARVEY'S SENTENCE IS UNDULY HARSH.

Courts can review a sentence to determine whether it was unduly harsh. *State v. Macemon*, 113 Wis. 2d 662, 666 n.2, 668 n.3, 670, 335 N.W.2d 402 (1983); *State v. Noll*, 2002 WI App 273, 258 Wis. 2d 573, 653 N.W.2d 895. This Court reviews a claim that a sentence is unduly harsh for an abuse of discretion by the sentencing court. *McCleary v. State*, 49 Wis. 2d 263, 273, 182 N.W.2d 512 (1971).

Ultimately, the circuit court adopted the state's recommended sentence of 12 years initial confinement on Count One. The PSI was very thorough and suggested an initial term of confinement of nine to ten years followed by a term of supervision.

The defense suggestion of three to five years imprisonment was the most appropriate recommendation given the facts and circumstances of the case. The reckless homicide conviction did not contain malice or an intent to cause D.B.'s death. Harvey had a

limited criminal history, with no prior felony convictions. (R184:31). And she had no history of any violence. Harvey's overall risk potential, violent recidivism and general recidivism risks were low. (R184:33-34). Twelve years of confinement is an undue punishment that is inconsistent with *McCleary's* requirement that the sentence imposed should call for the minimum amount of confinement necessary.

CONCLUSION

For all of the reasons above, Harvey asks the Court to reverse her conviction and remand for a new trial. In the alternative, she asks the Court to remand for a new sentencing.

Dated at Madison, Wisconsin, February 11, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 6,914.

Electronically signed by: Richard Coad
Richard A. Coad