STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2021AP1689-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DREAMA F. HARVEY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN JACKSON COUNTY CIRCUIT COURT, THE HONORABLE MARK L. GOODMAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

A jury convicted Dreama F. Harvey of one count of first-degree reckless homicide (delivery of heroin) and one count of delivery of heroin. The issue at trial was *who* delivered heroin to Bahr. Harvey's defense was she did not make the two deliveries, but that it was a third-party perpetrator named Michael Bearfield. The jury wasn't convinced.

On appeal, Harvey raises issues regarding the court's jury instructions and its sentence for Harvey's conviction of first-degree reckless homicide. Specifically, Harvey argues:

1. Under the court's jury instruction for first-degree reckless homicide, was there sufficient evidence to convict Harvey?

2. Did the jury instructions lower the State's burden of proof to convict and therefore deny Harvey a right to due process?

3. Is Harvey entitled to a new trial because the trial court "recast" the written jury instructions, even though the court expressly provided the parties an opportunity to object, and defense counsel responded, "No objection"?

4. Was the court's sentence for first-degree reckless homicide—which was 12 years of initial confinement followed by 8 years of extended supervision—unduly harsh, even though the maximum punishment Harvey faced was 40 years?

This Court should reject all of Harvey's arguments. The eye-witness and circumstantial evidence was sufficient to convict Harvey, the court's instructions did not lower the State's burden of proof, Harvey made the conscious decision not to object to the written jury instructions, and the court's sentence—which is well within the statutory maximum—is not unduly harsh.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication as this case can be settled by applying well-established legal principles to the facts of the case.

SUPPLEMENTAL STATEMENT OF THE CASE

The complaint and amended information

The State charged Harvey with one count of first-degree reckless homicide (delivery of heroin) for the death of Dustin K. Bahr. (R. 1.) By an amended information, it also charged Harvey with one count of delivery of heroin in an amount of three grams or less. (R. 88.) According to the complaint, on the evening of February 13, 2015, and into the early morning of February 14, 2015, Bahr was at a bar in Black River Falls with some friends. (R. 1:2.) Harvey's cousin, Michael Thomas Bearfield, told police that Harvey sold the heroin to Bahr that killed him. (R. 1:3.) Bearfield knew this, he told officers, because "he was there" and witnessed Harvey sell Bahr "a 1/10th of heroin" for $40.00. (R. 1:3.) Bearfield was specific about the sale: Harvey sold Bahr the heroin "in the dance club side of Murphy's pub at the table between the two pool tables." (R. 1:3.) Bearfield told officers that his friend Timothy Coupe and Bearfield's mom, Joyce McLevain, also witnessed the sale. (R. 1:3.) According to Bearfield, Bahr then took the heroin into the bar's bathroom, and Bearfield went with him. (R. 1:3.) Bearfield watched Bahr "snort" the heroin. (R. 1:3.)

At the end of the night and into the morning of February 14, 2015, Bahr, Bearfield, and others went back to McLevain's apartment. (R. 1:3.) Harvey also showed up, and she sold another 1/10th of heroin to Bahr. (R. 1:3; 88:1.) Coupe, McLevain and Bearfield also witnessed this second sale. (R. 1:3.)

Bearfield told police that Harvey buys heroin in Chicago from "Robert" and that Harvey "has been one of the main drug dealers" since 2006, selling "about 15 grams every other day." (R. 1:3.)

On May 31, 2015, officers placed Harvey under arrest. (R. 1:4.) She consented to the search of her home. (R. 1:4.) Harvey showed officers a scale that she kept, and they found a variety of cell phones. (R. 1:4.) Over $1,000 in cash was found on her person. (R. 1:5.) The officers took Harvey to the police department and interviewed her after she waived her *Miranda* rights. (R. 1:5.) The interview was both audio and video recorded. (R. 1:5.) During the interview, Harvey informed officers that the over $1,000 found on her person was from "working at a tax office, receiving income tax refund back in February, and other jobs." (R. 1:6.) She was not, however, employed when arrested. (R. 1:6.) Harvey admitted to selling drugs in past, but she denied "selling during Bahr's death." (R. 1:6.)

Rather, Harvey told police that she was with Michael Gates on the night of February 13, 2015, when she told Gates (outside of the bar) that Bahr was interested in buying drugs. (R. 1:5.) Gates and Harvey left to obtain heroin from Gates' trailer, and Harvey and Gates then went to McLevain's house. (R. 1:5.) At McLevain's house, Bahr paid Gates "$30 or $40 for the heroin." (R. 1:5.) When the interviewing officer told Harvey that it sounded like "she was basically the 'middle man,'" Harvey replied, "pretty much." (R. 1:5.)

Motion to introduce third-party liability

Harvey filed a motion to introduce evidence of third-party liability. (R. 36.) Specifically, she sought to introduce evidence "that Michael Gates is the person who sold/delivered heroin to Dustin Bahr." (R. 36:1.) The court held a hearing and ultimately granted Harvey's motion. (R. 70:15–16.)

The trial

Harvey pleaded not guilty (R. 172:33) and proceeded to trial.

Michael Bearfield testified that he is Harvey's cousin. (R. 183:209.) On the night of February 13, 2015, Bearfield was at Murphy's Pub with Bahr, Coupe, and McLevain; Bearfield was also at McLevain's apartment when Bahr died the next morning. (R. 183:209–11.)

Bearfield did not remember going to the police to make a statement and making a videotaped statement after Bahr's death. (R. 183:217–18.) The interview was then played for the jury. (R. 183:219.) In it, Bearfield told police that he voluntarily came in to make a statement because he was sick of the drugs. (R. 122:1.) According to Bearfield, Harvey served Bahr drugs twice. (R. 122:2.) The first time, Harvey sold Bahr the heroin for $40.00 at Murphy's Pub. (R. 122:2, 4.) After the sale, Bahr went to the bar's bathroom, and Bearfield watched Bahr snort the heroin. (R. 122:2–3.) The second time, Harvey sold Bahr the heroin in the tinfoil for $40.00 at Bearfield's mother's (McLevain) house. (R. 122:1–2.) Both times, Bearfield saw Bahr purchase the drugs *directly* from Harvey. (R. 122:2.)

Bearfield testified that during his interview, he was "pretty fucked up" and "under the influence." (R. 183:219–20.) He admitted, however, that he did *not* make up what he said. (R. 183:221.) He also did not want to see anything happen to Harvey in retaliation for Bahr's death. (R. 183:225.)

Kari Gomes, who was dating Bearfield, testified that on February 14, 2015, Bearfield called her to tell her that Bahr had died. (R. 183:237, 238.) Bearfield explained to Gomes that Bahr had overdosed and that "his cousin, Dreama, sold [Bahr] what he overdosed off of." (R. 183:239.)

Coupe testified that on the night before Bahr's death, he was at Murphy's Pub with Bahr, Stefanie White, Coupe's

friend Jessica, and one of Jessica's friends. (R. 183:318, 320–21.) Bearfield and McLevain were also at the bar. (R. 183:321.) While at the bar, Coupe saw Harvey walk in; she was there for about five minutes. (R. 183:324–25.)

When Coupe left around closing time, he gave Bahr, McLevain and Bearfield a ride to McLevain's place. (R. 183:326.) Coupe testified that Bahr "started to act a little different, kind of nodding out, in and out of conversation." (R. 183:328.) Bahr's "eyes [were] rolling around, his head kind of leaning forward." (R. 183:328.) Roughly an hour later, Harvey arrived at McLevain's, and she started talking to Bahr. (R. 183:330, 331, 336.) Bahr and Harvey "exchange[d] money, exchange[d] stuff." (R. 183:331.) Coupe clarified: Bahr gave Harvey $30.00, and Harvey gave Bahr a folded bag with a silver lining that was inside a plastic baggie. (R. 183:331–32.) Harvey then left, while Bahr was still "sit[ting] there and he's kind of in and out of talking, and counting money, and that sort of thing." (R. 183:331.) Coupe then also left McLevain's. (R. 183:336.)

On cross-examination, Coupe testified that he never saw Bahr or Harvey have any contact with each other while at Murphy's. (R. 183:340.) He admitted, however, that he wasn't "watching [Bahr] 100% of the time," but that he was talking to a lot of people at the bar. (R. 183:343–44.)

Jessica Lamp testified that she was at Murphy's Pub on February 13, 2015, and she saw Harvey and Bahr talking to each other "on the outskirts of the dance floor." (R. 183:358, 366.)

John Rose, who was incarcerated at the time of trial, testified that he knew Harvey because Harvey was his supplier of heroin. (R. 183:431.) In August of 2016, Rose spoke with Detective Adam Olson about Harvey approaching Rose and asking Rose to "get rid of" Bearfield. (R. 183:428–29.) By "get rid of," Rose took that to mean *kill* Bearfield. (R. 183:429.)

While she didn't offer Rose any money, Harvey "bonded [him] out of jail," which Rose took as a "[d]own payment." (R. 183:430, 432.)

Rebecca Davis, who is married to Rose (and was also incarcerated at the time of trial), testified that she was and still is good friends with Harvey. (R. 183:439–40, 443.) Rose told Davis that Harvey asked Davis to "off" Bearfield, and Davis was with Harvey when Harvey posted Rose's bond. (R. 183:444, 445.)[1]

Officer Andrew Noack of the Black River Falls police department testified that he and officer Allen Myren of the Eau Claire County's sheriff's office went to Harvey's house on May 31, 2015. (R. 183:192.) They retrieved three cellphones (R. 183:193), and Myren placed Harvey under arrest (R. 183:165).

Myren testified that when he searched Bahr's clothing after his death, he found a foil packet in his pocket. (R. 183:161.) This foil packet had a chunky light brown powder, which contained heroin. (R. 183:377.) Myren also testified that when he interviewed Harvey, he asked if she was "the middleman" and Harvey replied, "yeah, I guess." (R. 183:503.)

Vincent Tranchida, who performed Bahr's autopsy (R. 183:283), testified that Bahr's death was consistent with an opiate-induced overdose (R. 183:291–92, 295). Specifically, Bahr's cause of death "was an acute intoxication due to the combined effects of heroin, clonazepam, and the alcohol." (R. 183:306.) Heroin, specifically, "was a substantial factor" in Bahr's death. (R. 183:316.) "In the absence of the other substances, this concentration of heroin is capable of causing death." (R. 183:316.)

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[1] Bonnie Bertrang, who worked at the Jackson County jail, confirmed that Harvey posted Rose's bond on December 30, 2015. (R. 183:452.)

Mary Van Schoyck, a special agent with the Department of Justice division of criminal investigation, testified that she obtained phone call records from the Jackson County sheriff's office to see if possible numbers belonged to Harvey. (R. 183:526.) The sheriff's office provided Schoyck with about 160 recorded calls. (R. 183:528.) In every call, there was a male voice and always the same female voice. (R. 183:529–30.) One male voice that Schoyck recognized was Gates, whom Harvey referred to as "Cash" in the phone calls. (R. 183:533.) Schoyck testified that in some phone calls, Harvey referred to herself in the third person, "[s]o she would use her first name, Dreama. And then in some of the phone calls she identified her email which included the names Dreama Harvey." (R. 183:534.) Based on listening to all 160 calls and of what she knew about the case, Schoyck believed that the female voice on the calls was Harvey. (R. 183:534–35.)

The State introduced one "clip" of the recorded phone calls. (R. 183:535.) Schoyck believed that the male voice in the clip was Michael Gates. (R. 183:535.) In that clip, Harvey states: "they found dude talking about he saw me give buddy a sandwich bag. They talking about how they found foil." (R. 140:1.) When Gates asked, "Who is buddy?" Harvey replies, "Tim Coupe." (R. 140:1.)

Gates was also discussed in Harvey's written statement to police in March of 2015. (R. 139:1; 183:500–01.) After Bahr asked Harvey in Murphy's Pub if she knew "where he could get anything from," Harvey "told him yeah and [I] would be back." (R. 139:1.) Harvey's statement, which was introduced as an exhibit and read in front of the jurors (R. 183:500–01, 508), continued:

> I was with [Gates]. I walked outside and got in my car where [Gates] was [and] I told him what was going on. He said take him to the trailer where he lived so he

> could grab a P.[2] I did. We then went to [McLevain's] house where [Bahr] was. I got out [of] the car [and] went into [McLevain's] house. [Bahr] went outside to talk to [Gates]. When they got done talking [Bahr] went back in the house. I talked to [Bahr] and [Bearfield] for a minute then I went outside got in my car and me and [Gates] left.

(R. 139:1; 183:500–01.)

After Schoyck's testimony, the State rested; Harvey called no witnesses. (R. 183:549.)

Jury Conference and Instructions

At the jury instruction conference, the State requested that the court instruct the jury on party to a crime. (R. 183:553.) Harvey objected, arguing that no State witness testified "about [the] delivery from one person to another to then Dustin Bahr." (R. 183:554.) Rather "[t]he only evidence that came in was through Officer Myren about a statement saying Dustin Bahr had asked Ms. Harvey if she knew where he could get anything from." (R. 183:554.) The State disagreed. (R. 183:555.) It noted that in Harvey's written statement, "if her story is to be believed, she was the middleman." The State continued that according to Harvey's statement:

> [Bahr] came up to her and said he was looking for drugs. She went out to Michael Gates and told him he was looking for drugs and then she drove Mr. Gates to get the drugs and then she drove Mr. Gates to [McLevain's] apartment and then she says the hand-to-hand occurred between Gates and [Bahr]. . . .

(R. 183:555.) Therefore, "there is direct and circumstantial evidence that's consistent with this part of the instruction." (R. 183:555.)

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[2] Schoyck testified that a "P" refers to a tenth of a gram. (R. 183:525.)

While Harvey disagreed and argued that "[n]othing has been entered where it says Dreama Harvey got heroin from Michael Gates" (R. 183:558), the State replied that while there was "no direct evidence," there was circumstantial evidence (R. 183:558). The State then argued its theory of the case as to both Counts 1 and 2:

> [T]he 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.
>
> And then Count 2 is the delivery which is observed at Joyce McLevain's apartment and the foil found in [Bahr's] pocket when he's dead, the .073.

(R. 183:560–61.)

The court held that because there exists "competing inferences"—specifically, Harvey's statement that it was Gates who delivered the heroin on the second delivery and other witnesses who said it was Harvey who made the second delivery—"it's proper to give that instruction that if delivery is by more than one person because for that reason." (R. 183:561.)

Harvey objected again (R. 183:561–62) and argued that it did not present any evidence of third-party culpability of Gates (R. 183:565), but the State pointed out (1) "[i]f the jury chooses to believe Ms. Harvey's version, she assisted in the delivery," and (2) the instruction "also allows the jury to opt for whether [Harvey] directly committed the crime." (R. 183:564.)

The court read the jury instructions to the jury. (R. 183:572–90.) On the substantive jury instruction regarding

first-degree reckless homicide, it instructed the jury that the State would need to prove four elements beyond a reasonable doubt that "the Defendant" delivered the heroin that caused Bahr's death. (R. 183:576–77.) The court also instructed the jury that "[i]t is not required that the Defendant delivered the substance directly to Dustin Bahr." (R. 183:577.) Rather, "[i]f possession of the substance was transferred more than once before it was used by Dustin Bahr, each person who transferred possession of the substance has delivered it." (R. 183:577.)

The court also instructed the jury on PTAC as to first-degree reckless homicide. (R. 183:578–80.) Specifically, it instructed the jury that the State would need to prove four elements beyond a reasonable doubt, including that Harvey "or Michael Gates" delivered the heroin that caused Bahr's death. (R. 183:580–81.) The court did not instruct the jury on PTAC as to Count 2, the delivery of heroin. Harvey did not object.

In its written instructions, which Harvey also never objected to (R. 183:666), the court instructed the jury that regarding the count of first-degree reckless homicide, the State must prove that Harvey "or Michael Gates delivered a substance." (R. 144:3.) The written instructions also provided that "[i]t is not required that [Harvey] or [Gates] delivered the substance directly to [Bahr]. If possession of the substance was transferred more than once before it was used by [Bahr], each person who transferred possession of that substance has delivered it." (R. 144:3–4.) The court further instructed the jury on the elements of PTAC for first-degree reckless homicide. (R. 144:5–7.)

Regarding the second count (delivery of heroin), the court instructed the jury that the State must prove that Harvey "delivered a substance." (R. 144:9.) Like its oral instructions, the court did not instruct the jury on PTAC for this count. (R. 144:9–10.)

Harvey's defense and the State's theory

During opening statements, Harvey argued that she did not sell heroin to Bahr either at the bar on February 13th or at McLevain's on February 14, 2015. (R. 183:127.) During Harvey's closing arguments, defense counsel argued that there was a reasonable inference that *Bearfield*[3] delivered the heroin. (R. 183:627–28, 638, 650.) Defense counsel did not argue that *Michael Gates* was the individual who delivered the heroin.

Nor did the State. In its rebuttal closing, the State argued that Harvey's defense that *Bearfield* transferred the heroin to Bahr is "not in the evidence." (R. 183:656.) Rather, of the two deliveries, Bahr snorted one (in the bar), and the second delivery Coupe witnessed Harvey deliver to Bahr. (R. 183:656–57.)

The State also argued to the jury that it never said *Gates* was involved, but that it was Harvey who brought up Gates (in her written statement). (R. 183:657.) And, if the jury is to believe Harvey, then the "foil in [Bahr's] pocket is the only heroin that got delivered to [Bahr]." (R. 183:657.) The State did not believe this to be true. (R. 183:657.) Rather, the State's argument was that it was Harvey who "delivered the drugs that caused the death of Dustin Bahr and she delivered another set of drugs. That's the evidence." (R. 183:661.)

Verdict and sentence

The jury found Harvey guilty of both counts. (R. 141; 142.) The court sentenced Harvey to 12 years of initial confinement followed by 8 years of extended supervision on Count One. (R. 184:50.) On Count Two the court sentenced

[3] As previously indicated, pre-trial Harvey moved the court to introduce evidence that *Michael Gates* was the person "who sold/delivered heroin to Dustin Bahr." (R. 36:1.)

Harvey to three years of initial confinement followed by three years of extended supervision, concurrent. (R. 184:50.)

Harvey appeals her convictions and sentence.

ARGUMENT

I. Harvey is not entitled to a new trial on her claim that the jury instructions were erroneous.

Harvey argues that "multiple errors" in the court's jury instructions require reversal. Because she is incorrect, because any error was harmless, and because she failed to object to the written instructions, Harvey is not entitled to relief.

A. Standard of review

In *State v. Fonte,* 2005 WI 77, ¶ 9, 281 Wis. 2d 654, 698 N.W.2d 594, the supreme court articulated the standard for review regarding a challenged jury instruction as follows: "[A] circuit court has broad discretion in deciding whether to give a particular jury instruction. A court must exercise its discretion to 'fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" (Quoting *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996)). However, this Court independently reviews "whether a jury instruction is an accurate statement of the law applicable to the facts of a given case." *Id.* (citing *State v. Groth*, 2002 WI App 299, ¶ 8, 258 Wis. 2d 889, 655 N.W.2d 163). Additionally, whether a jury instruction from the circuit court deprives a defendant of his right to due process 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). Finally, whether there is sufficient evidence to support the giving of an instruction is a question of law which this Court reviews independently of the trial court. *State v. Head,* 2002 WI 99, ¶ 44, 255 Wis. 2d 194, 648 N.W.2d 413.

B. The jury instructions regarding first-degree reckless homicide and PTAC did not allow a conviction "upon insufficient evidence."

In this case, the State requested that the jury be instructed on PTAC, and the trial court granted the State's request. (R. 183:553, 561.) Harvey argues that the court's instruction on Count 1 "allowed for conviction upon insufficient evidence." (Harvey's Br. 19, 20–28.) Specifically, according to Harvey, it was "wholly appropriate" to instruct the jury on PTAC as to Count 2, but inappropriate for the court to instruct "if delivery by more than one person is involved" (R. 144:3; 183:561) when it instructed the jury on Count 1 and PTAC (Harvey's Br. 24). And, by adding the disjunctive "or Michael Gates" for Count 1, the court "added a theory of the crime that was not presented to the jury." (Harvey's Br. 25.) Meaning, the instructions "allowed the jury to convict Harvey if Gates had delivered the lethal dose to [Bahr] without Harvey's participation." (*Id*.) That "avenue of conviction," according to Harvey, is insufficient evidence to convict Harvey. (*Id*.)

Harvey is mistaken that the evidence was insufficient to convict her. While the State agrees that there was no evidence presented that another individual—be it Gates or Bearfield—delivered the first delivery of heroin to Bahr (Harvey's Br. 26)[4], there was sufficient evidence for the jury to conclude that *Harvey directly* delivered the heroin. This evidence includes Bearfield's interview with police where he states that he *witnessed* both deliveries from Harvey to Bahr. (R. 122.) It also includes Coupe's testimony that he saw Harvey at Murphy's Pub and that when he and Bahr left Murphy's Pub, Bahr "started to act a little different, kind of

[4] And because there was no evidence that another person made the first delivery, the jury could only have convicted if it believed Harvey made the first delivery.

nodding out, in and out of conversation." (R. 183:328.) Bahr's "eyes [were] rolling around, his head kind of leaning forward." (R. 183:328.) Finally, the evidence also includes testimony from Jessica Lamp that she saw Harvey and Bahr talking to each other at Murphy's Pub "on the outskirts of the dance floor." (R. 183:358, 366.) This is more than sufficient direct *and* circumstantial evidence to convict Harvey for first degree reckless homicide. Because the jury instructions provided that the jury could convict Harvey as a PTAC if she "directly committed" (R. 144:5) the crime of first-degree reckless homicide, the evidence was sufficient to convict her for being a direct actor in that crime.

C. The jury instructions did not deny Harvey of due process.

"There are two types of jury instruction challenges: those challenging the legal accuracy of the instructions, and those alleging that a legally accurate instruction unconstitutionally misled the jury." *State v. Burris,* 2011 WI 32, ¶ 44, 333 Wis. 2d 87, 797 N.W.2d 430. Harvey appears to raise a challenge that incorporates both types.

A jury instruction that incorrectly states the law violates due process if it has "the effect of relieving the State of its burden of proving beyond a reasonable doubt every element of the offense charged." *State v. Harvey*, 2002 WI 93, ¶ 23, 254 Wis. 2d 442, 647 N.W.2d 189. A jury instruction misleads the jury in a way that violates due process if "there is a reasonable likelihood that the instruction was applied in a manner that denied the defendant 'a meaningful opportunity for consideration by the jury of his defense.'" *Burris*, 333 Wis. 2d 87, ¶ 50 (quoting *State v. Lohmeier*, 205 Wis. 2d 183, 191, 556 N.W.2d 90 (1996)).

Here, the jury instructions accurately provided the PTAC law (R. 144:3–7), and so there is no due process violation on the basis that it relieved the State of its burden

of proof to convict Harvey. (Harvey's Br. 5, 29.) Also, because there was sufficient evidence to sustain Harvey's conviction (*see* Argument Section "I.B."), "there is no due process violation because there is no reasonable likelihood that the legally accurate instructions were applied in a manner that denied [Harvey] a meaningful opportunity for consideration by the jury of [her] defense." *State v. Langlois*, 2018 WI 73, ¶ 53, 382 Wis. 2d 414, 913 N.W.2d 812 (citing *State v. Ferguson,* 2009 WI 50, ¶¶ 9, 45, 317 Wis. 2d 586, 767 N.W.2d 187) (citing *Harvey*, 254 Wis. 2d 442, ¶ 46) (noting that an instructional error is harmless if "it [is] clear beyond a reasonable doubt that a rational jury would have [nonetheless] found the defendant guilty" (citation omitted)).

Finally, Harvey's approach views the court's instructions in isolation and fails to assess the court's instructions as a whole. *State v. McKellips*, 2016 WI 51, ¶ 30, 369 Wis. 2d 437, 881 N.W.2d 258. But here, the instructions as a whole informed the jury that the State was required to prove four elements of first-degree reckless homicide; and one way for the State to prove it—and the only way that the *evidence* introduced showed—was that Harvey directly committed the crime.

D. Any error with the jury instructions was harmless.

Harvey argues that any error in the jury instructions was not harmless. (Harvey's Br. 26.) "[T]he use of harmless error analysis is appropriate in . . . case[s] of an erroneous jury instruction." *State v. Tomlinson*, 2002 WI 91, ¶ 58, 254 Wis. 2d 502, 648 N.W.2d 367. Under the harmless error analysis, the test is whether it appears "beyond a reasonable doubt that the error complained of" contributed to the verdict. *Id*. ¶ 61 (citing *Harvey*, 254 Wis. 2d 442, ¶ 44).

Harvey argues that the error is not harmless because the State "took full advantage of the confus[ion]" and argued

that Harvey's statement about Gate's involvement as to Count 2 "could be used to convict Harvey on Count One." (Harvey's Br. 26.) Specifically, Harvey notes that the State argued during closing argument that PTAC "can apply to either charge." (Harvey's Br. 27 (citing R. 183:613).) This, according to Harvey, opened a "new avenue of conviction for which there was insufficient proof." (Harvey's Br. 27.)

Harvey's argument fails for several reasons. First, the prosecutor's closing argument does not go to *instructional* error. And here, the court informed the jury—twice—that closing arguments of the attorneys "are not evidence." (R. 183:587, 590.) Second, Harvey did not object contemporaneously to the prosecutor's argument during closing, and so she has forfeited any objection to it now.[5] Third, because Harvey has forfeited the argument, she can only raise it under the rubric of a claim of ineffective assistance of counsel.[6] Fourth, she has not raised an ineffective assistance of counsel claim. (Harvey's Br. 19–34.)

While Harvey argues that the only thing "left of the state's proof of delivery at Murphy's Pub" is Bearfield's "convenient testimony" (Harvey's Br. 27), Harvey is incorrect. First, there was more than just Bearfield's testimony (*and* police statement) directly linking Harvey to the first delivery. There was also circumstantial evidence from Coupe and Lamp. Coupe testified that he saw Harvey at Murphy's Pub

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[5] *See State v. Pinno*, 2014 WI 74, ¶ 56, 356 Wis. 2d 106, 850 N.W.2d 207 (providing: "Contemporaneous objections give judges the opportunity to remedy an error so that it does not fester beneath the proceedings and infect the judgment of the court." And: "Forfeiture 'prevents attorneys from 'sandbagging' opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.'" (citation omitted)).

[6] *State v. Smith*, 2003 WI App 234, ¶¶ 14–15, 268 Wis. 2d 138, 671 N.W.2d 854.

and that when he and Bahr left Murphy's Pub, Bahr "started to act a little different, kind of nodding out, in and out of conversation." (R. 183:328.) Bahr's "eyes [were] rolling around, his head kind of leaning forward." (R. 183:328.) Lamp testified that she saw Harvey and Bahr talking to each other at Murphy's Pub "on the outskirts of the dance floor." (R. 183:358, 366.) Second, as the court instructed, the credibility of each witness—including Bearfield—was for the jury to decide. (R. 183:588–89.) With this evidence, it is clear beyond a reasonable doubt that the error complained of did not contribute to Harvey's verdict. *Tomlinson*, 254 Wis. 2d 502, ¶ 61.

Here, there was both direct and circumstantial evidence from witnesses that Harvey directly delivered both deliveries of heroin to Bahr. Conversely, the *only* evidence that anyone other than Harvey—whether it be Gates and Bearfield—delivered either delivery came from Harvey's police statement and interview. (R. 183:500–03; 139.) And, Harvey did not argue to the jury that Gates delivered either delivery. (R. 183:565.) Any error in the court's jury instructions was harmless.

E. Reversal is not warranted because the court informed counsel that it had recast the written jury instructions and counsel chose not to object.

Harvey argues that the court changed the instructions after the jury instruction conference "without informing the parties of its changes." (Harvey's Br. 33.) Harvey's argument is not supported by the record.

Here, after the court had read the instructions to the jury, the court informed the parties that it had "recast" the written instructions to "make it flow more smoothy." (R. 183:666.) Importantly, the court asked the parties—*before* the written instructions were provided to the jury—if there were

any comments. (R. 183:666.) The prosecutor informed the court that she had no objection, and defense counsel also informed the court, "No. No objection." (R. 183:666.) So, while Harvey argues that "reversal is warranted because the circuit court cannot change the jury instructions without first informing counsel of those changes" (Harvey's Br. 32), the record shows that the court *did* inform defense counsel of the changes before those changes went to the jury, and defense counsel informed the court that he had "No objection." (R. 183:666.) If counsel was concerned that "there were significant, and substantive differences between what the court read to the jury, and how the final instructions were written" (Harvey's Br. 33), and that the "written instructions are entirely confusing" (Harvey's Br. 30), the court provided Harvey's defense counsel an opportunity to voice concerns or an objection. Harvey's counsel chose not to.

Also, the State recognizes that Wis. Stat. § 805.13(4) relieves a party of the obligation to object to a material variance between the written jury instructions and the way they are read to the jury. But here, any "variance" from the oral instructions to the written instructions was not material. This is because, as argued above, there was sufficient evidence for the jury to conclude that Harvey *directly* delivered the first delivery of heroin to Bahr that caused his death. This evidence includes Bearfield's interview (which the jury viewed) where he states that he witnessed both deliveries from Harvey to Bahr. (R. 122.) It also includes Coupe's testimony that he saw Harvey at Murphy's Pub, that Bahr "started to act a little different, kind of nodding out, in and out of conversation" and his "eyes [were] rolling around, his head kind of leaning forward." (R. 183:328.) It also includes testimony from Jessica Lamp that she saw Harvey and Bahr talking to each other at Murphy's Pub. (R. 183:358, 366.) This is more than sufficient direct and circumstantial evidence to

show that Harvey "directly committed" the crime of first-degree reckless homicide.

Further, as argued above in Section "I.D." (and incorporated herein to avoid redundancy), any error was harmless beyond a reasonable doubt.

II. The court's sentence is not unduly harsh.

The court sentenced Harvey to twelve years of initial confinement followed by 8 years of extended supervision on Count One (first-degree reckless homicide). (R. 184:50.) This sentence, which is well within the statutory maximum, is not unduly harsh.

A. Circuit courts have considerable discretion in fashioning sentences.

Circuit courts retain considerable discretion at sentencing. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. If the circuit court demonstrated a process of reasoning and came to a reasonable conclusion based on legally relevant facts and factors, this Court will not interfere with the sentencing decision. *State v. Cummings*, 2014 WI 88, ¶ 75, 357 Wis. 2d 1, 850 N.W.2d 915.

When fashioning a sentence, a sentencing court must consider the gravity of the offense, the need to protect the public, the defendant's rehabilitative needs, and any applicable aggravating or mitigating factors. Wis. Stat. § 973.017(2). The sentence should reflect the minimum amount of confinement necessary that is consistent with these factors. *Gallion*, 270 Wis. 2d 535, ¶ 44. The court may also consider the following: (1) the defendant's criminal history; (2) any history of undesirable behavior patterns; (3) the defendant's personality and character; (4) the presentence investigation results; (5) the vicious or aggravated nature of the crime; (6) the defendant's degree of culpability; (7) the defendant's demeanor at trial; (8) the defendant's age,

education and employment history; (9) the defendant's remorse, repentance and cooperativeness; (10) the need for rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. *Harris v. State*, 75 Wis. 2d 513, 519–20, 250 N.W.2d 7 (1977). The circuit court retains considerable discretion in determining which factors are relevant and most important to its sentencing decision. *Gallion*, 270 Wis. 2d 535, ¶ 68; *State v. Grady*, 2007 WI 81, ¶ 31, 302 Wis. 2d 80, 734 N.W.2d 364.

B. Circuit courts have limited authority to modify sentences.

A court may modify a sentence if it determines that the sentence was unduly harsh or unconscionable. *Cummings*, 357 Wis. 2d 1, ¶ 71 (citing *State v. Harbor*, 2011 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828). "A sentence is unduly harsh or unconscionable 'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *Cummings*, 357 Wis. 2d 1, ¶ 72 (quoting *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). A sentence "well within the limits of the maximum sentence . . . is presumptively *not* unduly harsh or unconscionable." *State v. Grindemann*, 2002 WI App 106, ¶ 32, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted).

C. Harvey's sentence was well within the statutory maximum, and it is therefore presumptively not unduly harsh or unconscionable.

Harvey argues that "[t]welve years of confinement is an undue punishment that is inconsistent with *McCleary's*[7] requirement that the sentence imposed should call for the minimum amount of confinement necessary." (Harvey's Br. 35.) Harvey is incorrect. First, in *McCleary*, the court imposed the *maximum* sentence on Richard McCleary—a first-time offender—for forging and uttering a $50 check. *McCleary v. State,* 49 Wis. 2d 263, 266–67, 283, 182 N.W.2d 512 (1971). Similar facts or sentence are not present here.

Second, Harvey does not argue that the court did not apply or that it unreasonably applied the appropriate *Gallion* factors. (Harvey's Br. 34–35.)

Third, as noted above, a sentence that is well within the limits of the maximum sentence—as is Harvey's[8]—is presumptively not unduly harsh or unconscionable. *Grindemann*, 255 Wis. 2d 632, ¶ 32. *See also State v. Scaccio*, 2000 WI App 265, ¶ 18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). Here, Harvey does not argue that this presumption does not apply ***or*** that she can overcome it. (Harvey's Br. 34–35.) And a sentencing court has no obligation to explain why it did not impose a less harsh sentence. *Gallion*, 270 Wis. 2d 535, ¶¶ 54–55.

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[7] *McCleary v. State*, 49 Wis. 2d 263, 273, 182 N.W.2d 512 (1971).

[8] A Class C felony, Harvey was facing a maximum punishment of 40 years. Wis. Stat. §§ 939.50(3)(c); 940.02(2)(a).

Harvey's sentence is not unduly harsh or unconscionable. Her actions led to a man's death. The court's sentence is not "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Cummings*, 357 Wis. 2d 1, ¶ 72 (quoting *Ocanas*, 70 Wis. 2d at 185).

CONCLUSION

This Court should affirm Harvey's judgment of conviction.

Dated this 27th day of April 2022.

Respectfully submitted,

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FORM AND LENGTH 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 6,012 words.

Dated this 27th day of April 2022.

Electronically signed by:

Sara Lynn Shaeffer
SARA LYNN SHAEFFER

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 27th day of April 2022.

Electronically signed by:

Sara Lynn Shaeffer
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