

FILED
05-12-2022
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2021AP001689-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DREAMA HARVEY,

Defendant-Appellant.

REPLY 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
REPLY	4
I. HARVEY SHOULD RECEIVE A NEW TRIAL BECAUSE THE JURY INSTRUCTIONS WERE ERRONEUS.....	4
II. HARVEY’S SENTENCE IS UNDULY HARSH. . . .	10
CONCLUSION.....	11
CERTIFICATION.....	12

TABLE OF AUTHORITIES

WISCONSIN CASES

<i>Skoufis v. Schaefer</i> , 168 Wis. 2d 775, 486 N.W.2d 37, <i>unpublished opinion</i> (Ct.App.1992)	5
<i>State v. Kuntz</i> , 160 Wis. 2d 722, 467 N.W.2d 531 (1991)	4
<i>State v. Macemon</i> , 113 Wis. 2d 662, 335 N.W.2d 402 (1983)	10
<i>State v. Noll</i> , 2002 WI App 273, 258 Wis. 2d 573, 653 N.W.2d 895	10
<i>State v. Williams</i> , 2015 WI 75, 364 Wis. 2d 126, 867 N.W.2d 736.	7

WISCONSIN STATUTES

WIS. STAT. § 805.13(4)	6
WIS. STAT. § 809.19(8)(b) and (c)	12

REPLY

I.

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

A. Reversal is Warranted Because the Circuit Court Cannot Change the Jury Instructions without First Informing Counsel of Those Changes, and there were Material Variances between the Written and Oral Instructions.

The state suggests contorts Harvey's arguments regarding the circuit court's changes to the jury instructions without first informing the parties of its changes to suit its argument that Harvey failed to object to those changes. But the reality of the sequence of events in the record, and Supreme Court law, require reversal.

The Wisconsin Supreme Court has unambiguously pronounced that "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." *State v. Kuntz*, 160 Wis. 2d 722, 467 N.W.2d 531 (1991). The plain language of the Supreme Court's requirement states: "*following the instructions conference.*" Clearly, the implication of that requirement means that a court must do so *before* it instructs the jury. Yet here, the circuit court both orally instructed the jury before closing arguments *and* provided the jury with altered written instructions *before* it informed

the parties of any changes. (R183:666). There is no question the circuit court ran afoul of its obligation.¹

At the close of evidence, the parties and the court conducted a lengthy jury instruction conference in which Harvey objected to several important proposed instructions as outlined in Harvey's initial brief. Those objections included the instruction regarding delivery by more than one person as to Count One, and to the inclusion of a party to a crime instruction for either count. (R183:554-567; App.10-23). The circuit court ruled against those objections. The circuit court then read the entire instructions to the jury, the instructions that presumably had been the subject of the parties' deliberations and court's rulings in the jury instruction conference. The parties made their closing arguments with those instructions in place as the blueprint for the rules of deliberation for the jury. Just as the court was excusing the jury to deliberate did it state to 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). Only after the jury was sequestered to deliberate, the circuit court then inform the parties it

¹ 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. The state failed to address this issue in its brief.

had “redone” the instructions. The court didn’t ask whether the parties objected, it merely asked for comment. The instructions had already been apparently altered in some fashion, read to the jury, and the jury had been excused. The jury was instructed. Yet the state suggests Harvey waived her objection. She did not.

As the state concedes, 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. 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” in the written instructions without reviewing those changes with the parties. 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 differences and the materiality of those changes in her initial brief.

The jury instructions in this case, oral and written, were simply just a mess. And it was the circuit court’s obligation, after the jury instruction conference, to marry the oral and written instructions. Harvey was under no obligation to object after the court had altered the instructions and already submitted them to the jury for its deliberation. For this reason alone, Harvey’s conviction requires reversal.

B. 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.

The state argues that because there was sufficient evidence to convict Harvey for directly delivering heroin to Bahr, the jury instruction allowing the jury to convict Harvey if Michael Gates delivered the lethal dose to Bahr was not erroneous. (State's Br. 17). The state concedes that there was no evidence that Gates delivered the first dose to Bahr, and that it was not the state's theory of the case that anyone other than Harvey delivered that dose. *Id.* Why then would the court's instruction to the jury that it could convict Harvey if Gates had delivered the lethal dose not be erroneous? There simply was no basis in fact for that instruction (i.e., insufficient evidence) and yet the court allowed the jury to convict Harvey if it concluded Gates had delivered it and not Harvey. The instruction was erroneous.

To affirm a conviction based on an erroneous instruction, this Court must be convinced beyond a reasonable doubt that the jury still would have convicted Harvey of the charge had the correct instruction been provided. *State v. Williams*, 2015 WI 75, ¶ 59, 364 Wis. 2d 126, 867 N.W.2d 736. But the remaining evidence that Harvey delivered the dose at Murphy's is exceedingly thin. This Court should not conclude beyond a reasonable doubt that Michael

Bearfield's singular, inconsistent, and self-serving videotaped statement that Harvey delivered the dose at Murphy's is sufficient evidence to convict despite the erroneous jury instruction. Harvey's statement simply makes more sense – that Bahr asked her at Murphy's to get him heroin, she left to find Gates to make that arrangement, and then met up with him later at Bearfield's apartment. Why would Harvey deliver two separate doses of heroin to Bahr on the same night? It simply doesn't make sense. The state's evidence for a direct delivery by Harvey at Murphy's rests on Bearfield, and he is not a reliable witness to uphold the conviction when weighed against the clearly erroneous instruction.

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

The state is correct that Harvey challenges both the legal accuracy of the instructions, and that the instructions unconstitutionally misled the jury, which violated Harvey's Due Process rights. As Harvey outlined in her initial brief (see pages 29-31), the circuit court made multiple errors that resulted in legally inaccurate instructions. Contrary to the state's argument, the court did not accurately provide the PTAC law for Count One. The instruction allowed for conviction based on PTAC with the "or Michael Gates" disjunctive language, but the full PTAC instruction was only included in the instructions for Count Two. Compounding

this issue, the court's verbal instructions didn't include that language at all the first time it read it (R183:576;App.32), but then did include it when it read the elements for Count One a second time (R183:580;App.36-37). Moreover, as Harvey has detailed in her initial brief and again above in this brief, the instructions were factually flawed by including the "or Michael Gates" language for Count One because it was not the state's theory of the case that Gates delivered the first dose. Instructing the jury in that way lowered the burden of proof for convicting Harvey by allowing conviction for the illegal act of another person. This Court cannot conclude, as the state urges, that there is no reasonable likelihood that the instructions were applied in manner that denied Harvey a meaningful opportunity for consideration of her defense.

The state also contends that Harvey views the instructions in isolation and fails to assess the instructions as a whole. (State's Br.19). That couldn't be farther from the truth. Harvey has repeatedly argued that the instructions, as a whole, were full of errors and extremely confusing. The record reflects that the circuit court itself acknowledged that fact, but then just made matters worse by altering the instructions.

D. The Errors Were Not Harmless.

The state argues that the jury instruction errors were harmless and “did not contribute to Harvey’s verdict.” (State’s Br.21). But with all of the errors in the written instructions, that varied from the oral instructions, this Court cannot have confidence in the verdict. Both the facts and law as to Counts One and Two were obfuscated to the point where the circuit court felt the need to make changes on the fly, after the jury instruction conference, and even after it orally delivered a different set of instructions. And the final written instructions, which the parties didn’t see until after they were already provided to the jury, were legally and factually confusing.

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

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. It is well within this Court’s authority to make that determination.

Just because a sentence was well within the statutory maximum does not mean it is not unduly harsh. Court's must consider proportionality within the minimum and maximum sentencing range when imposing a sentence. The circuit court's sentence was significantly over the PSR's suggested sentence of nine years of initial confinement. As Harvey has argued, 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 the requirement that the sentence imposed should call for the minimum amount of confinement necessary.

CONCLUSION

For all of the reasons above, and those contained in her initial brief, 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, May 12, 2022.

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 1,712.

Electronically signed by: Richard Coad
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