STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2024AP002368-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SAMUEL R. OSORNIO,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief, Entered in the Columbia County Circuit Court, the Honorable Todd J. Hepler, Presiding

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BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the circuit court err when it allowed testimony from a witness who claimed Mr. Osornio sold her heroin even though it was not admitted for a permissible purpose and unfairly prejudiced Mr. Osornio?

The circuit court allowed the state to present the witness's testimony.

2. Is Mr. Osornio entitled to a new trial based on plain error, ineffective assistance of counsel, or in the interest of justice because he was charged with multiplicitous offenses that were not discovered to be so until after the jury reached a conclusion on the lesser charge and explained they could not reach a conclusion on the greater charge?

The circuit court decided that Mr. Osornio was not entitled to a new trial based on the ineffective assistance of counsel or in the interest of justice.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. It is anticipated that the issue will be sufficiently addressed in the briefs. Publication is not warranted because the issues raised involve the application of established legal principles to the facts of this case.

STATEMENT OF THE CASE AND FACTS

The state charged Samuel Osornio with two offenses in this case: first degree reckless homicide by the delivery of heroin, contrary to §§ 961.41 and 940.02(2)(a), Wis. Stats., and delivery of heroin, contrary to § 961.41(1)(d)1., Wis. Stats. The complaint alleged that Mr. Osornio provided an individual, J.B., with heroin in a Walgreens parking lot and that the individual died after ingesting a combination of that heroin and alcohol. (2).

Pretrial: "other acts" motion

Prior to trial, the state sought to allow the jury to hear from proposed witness Gail Ryzner that approximately five minutes before Mr. Osornio was alleged to have sold heroin to J.B., Mr. Osornio provided Ryzner with heroin in the Walgreens parking lot and that she had never purchased marijuana from him. (70). The state argued in its motion that such testimony would "provide[] proof of his intent to deliver the substance, provides context for the delivery, and specifically negates his claim that he sold [J.B.] marijuana." (70:2). The state explained that "[i]n that sense, the proffered evidence is NOT Other Act evidence but background or context evidence and 'part of the panorama of evidence needed to completely describe the crime that occurred.'" (70:2)(emphasis in original). The state closed its motion by reiterating that the proposed testimony should be admitted for these reasons:

> "for the Jury to have the full background and context of this case, and as relevant evidence of Osornio's intent to deliver heroin to [J.B.] on February 6, 2020, as charged in Count 2 of the information."

(70:2). The defense objected to the proposed testimony. (71).

At a hearing on the motion, the state explained that Ryzner's proposed testimony was not necessarily other acts evidence, but that it "gives context to the event that occurred here, especially if the defense is going to be something like I've never dealt heroin or I – you know, I don't deal heroin." (131:21; App. 8). The state did not mention using the proposed testimony to show intent. The state argued the testimony would not be overly prejudicial and that it would help give the jury "a fuller picture of what happened." (131:22; App. 9). The defense argued that it was not other acts evidence because it happened so close in time and that it was inadmissible propensity evidence. (131:22-23; App. 9-10). The defense requested a limiting instruction if the court decided to admit the proposed testimony so that the testimony would be limited to acceptable other acts evidence such as "motive or plan or preparation or modus operandi or things like that." (131:23; App. 10). The court stated that it would allow the testimony "for those purposes, motive, lack of mistake, and the permissible purposes." (131:23; App. 10). The court advised that a limiting instruction would be provided to the jury and asked the defense to draft it and have the state approve it prior to trial. (131:24; App. 11).

Jury trial

The case proceeded to a jury trial, during which the following evidence was presented.

On February 7, 2020, law enforcement responded to the report of an individual, J.B., found deceased in his bedroom. (128:107). While investigating J.B.'s bedroom, law enforcement found a number of items, including two cell phones, an empty bottle of vodka, a rolled-up dollar bill, a debit or credit card, and a foil wrapper containing an off-white powdery substance. (128:109, 112-114, 122-123).

J.B.'s cause of death was determined to be "acute intoxication" due to the combined effects of heroin and alcohol. (127:18-19). J.B. also had heart disease and showed signs of chronic alcohol abuse. (127:20).

On J.B.'s cell phone, law enforcement found communications between J.B. and Mr. Osornio that law enforcement interpreted as setting up an opportunity for J.B. to purchase some kind of drug from Mr. Osornio and that the two would meet at a local Walgreens on February 6, 2020. (128:166-172). A surveillance video from Walgreens showed a vehicle consistent with Mr. Osornio's park next to a vehicle consistent with J.B.'s and showed one individual get into the car of the other for approximately one minute. (128:176). Mr. Osornio told law enforcement that he sold J.B. marijuana during that transaction. (128:179).

Two types of powdery residue were found on items in J.B.'s bedroom. (127:36-37). The debit or

credit card had "brownish residue" and the foil had a white residue. (127:37). Both items tested positive for heroin. (127:39). Although both items contained heroin, it was undetermined whether the heroin on each item came from the same source. (127:46). DNA found on the foil wrapper included Mr. Osornio's, J.B.'s, and an additional unknown person's. (127:62-63).

Gail Ryzner testified that she purchased heroin from Mr. Osornio in a Walgreens parking lot on February 6, 2020. (128:151).

Mr. Osornio's girlfriend testified that detectives came to her work to talk to her about Mr. Osornio and she explained to them that some friends gave her some marijuana and that she asked Mr. Osornio to get rid of it. (127:84-85).

The court gave the jury instructions for both homicide by delivery of heroin and delivery of heroin. (127:96-99). Regarding Ryzner's testimony, the court instructed the jury that:

> Evidence has been presented regarding other conduct of the defendant for which the defendant is not on trial.
>
> Specifically, evidence has been . . . presented that the defendant provided heroin to Gail Ryzner. If you find that this conduct did occur, you should consider it only on the issue of context or background.

> You may not consider this evidence to conclude that the defendant has a certain character or certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.
>
> The evidence was received on the issue of context or background, that is, to provide a more complete presentation of the evidence relating to the offense charged.
>
> You may consider this evidence only for the purpose I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged.

(127:102-103; App. 17-18).

Jury deliberations

The trial lasted about a day and a half, and the jury began deliberations around lunch time on the second day.

At about 2:00 p.m., the jury sent out a note with a question: "Does the different colors of heroin mean two different sources?" After consulting with the parties, the circuit court sent a response to the jury explaining that "the jury must rely on its collective memory of the evidence presented." (127:139-140).

At 3:55 p.m., the circuit court went on the record after the jury sent out another note. The jury's note explained the following: "We have a conclusion on

Count Two. We cannot come to an agreement on Count One. How should [sic] we proceed?" (127:140; "[sic]" in transcript).

In response, the state requested "the 517 – or the *Allen* charge." (127:141-42).[1] Defense counsel requested that the court remove the term "obstinate" from the instruction but otherwise agreed it would be appropriate for the court to give the instruction. (127:141). The court brought the jury in, told the jury it had received the jury's note, and read the jury instruction as written and dismissed the jury to continue its deliberations. (127:144).

After the jury left, the court told the parties it "would be a good time to start thinking about what happens if the jury continues to be deadlocked on Count 1, and be prepared for how we would respond to

[1] The so-called "*Allen*" charge is derived from *United States v. Allen*, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528 (1896). Wisconsin's version is laid out in Wis. JI-Criminal 520. It instructs the jury as follows:

You jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues.

You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate; they should be open-minded; they should listen to the arguments of others, and talk matters over freely and fairly, and make an honest effort to come to a conclusion on all of the issues presented to them.

You will please retire again to the jury room.

that. So I would encourage you to do whatever research you need to do and think about how we proceed from there." (127:144-145).

At approximately 6:20 p.m., the parties went back on the record. Defense counsel explained that in researching the court's question of what to do if the jury remained deadlocked, they realized that the charge of delivery of a controlled substance was a lesser included offense to the charge of reckless homicide and the jury should have been instructed that it was a lesser included offense to the reckless homicide. (127:149; App. 19).

Defense counsel argued that if the jury had been instructed properly with the delivery as a lesser included offense to the reckless homicide, "we would have had our verdict at 3:50 because, with a lesser included offense, the jury would have been instructed...[with jury instruction 112]."[2] (127:149-

[2] Wisconsin JI-Criminal 112 is a jury instruction for lesser included offenses. It instructs the jury to find a defendant not guilty of the greater crime if the jury is not satisfied that the state has proven every element of the offense charged beyond a reasonable doubt. If the jury finds the defendant not guilty of that charged offense, the jury should then consider whether the defendant is guilty of the lesser-included crime. The jury is instructed it "should make every reasonable effort to agree unanimously on your verdict on the charge of (charged crime) before considering the offense of (lesser included crime). However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of (charged crime), you

150; App. 19-20). Defense counsel noted that if the jury returned two guilty verdicts in the case, it would be a double jeopardy violation because the three elements of delivery "wholly overlap." (127:150; App 20).

Defense counsel argued that if the jury had properly been given the lesser included jury instruction at the outset the court would not have needed to give the *Allen* instruction. (127:151; App. 21). Defense counsel requested that the court call the jury in, accept their verdict on Count 2, and excuse them. (127:151; App. 21).

The state conceded that Counts 1 and 2 were identical in fact and that Count 2 was a lesser included offense of Count 1. (127:151-152; App. 21-22). The state requested that the court bring the jury in and provide them with the lesser included instruction. (127:152; App. 22).

The circuit court decided to hold the request for the additional jury instruction in abeyance. (127:152;

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should consider whether the defendant is guilty of (lesser included crime)."

The jury instruction also instructs the jury that "You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant committed (charged crime), the offense charged in the information you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense(s) I have submitted to you. If you are not satisfied beyond a reasonable doubt that the defendant committed (either one) of the offenses I have submitted to you, you must find the defendant not guilty." (Wis. JI-Criminal 112).

App. 22). Defense counsel reiterated that they did not want to give the lesser included jury instruction. (127:153-154; App. 24).

The court explained that there was also a note from the jury asking to see a copy of the text messaging between Mr. Osornio and J.B. (127:152).

The court then denied defense counsel's motion that the court accept the guilty verdict on Count 2, saying "I'm going to have the jury continue to deliberate on Count 1 because I don't think they're deadlocked yet. They're still requesting information, and they're still deliberating on Count 1. So I don't think they have reached a final decision of deadlock on that yet." (127:156; App. 26).

Defense counsel objected that the jury was deliberating under improper instructions. (127:156-157; App. 26-27). Approximately twenty minutes later, the prosecutor explained that the state and the defense were now requesting that the court to read a section of the lesser included jury instruction to the jury. (127:157-158; App. 27-28). The defense clarified that this decision was based on the court's denial of the defense's request to accept the jury's initial conclusion. (127:158; App. 28).

The court brought the jury in and read the following portion of the lesser included jury instruction:

> You should make every reasonable effort to agree unanimously on your verdict on Count 1.

> However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on Count 1, you should sign your verdict on Count 2 and inform the Court of your verdict.

(127:159; App. 29). The jury was not instructed that it should reach a guilty verdict on only *one* of the charges as set forth in the full lesser included jury instruction. *See* Wis. JI-Criminal 112.

Shortly after 8:15 p.m., the jury came back with guilty verdicts on both charges. (127:160).

Defense counsel requested a judgment notwithstanding the verdict on Count 1, "Given the question that we raised earlier and basically renewing the motion that jury deliberations were completed when they sent the note up at approximately 3:50." (127:165).

The court denied the motion, noting that the jury had not finished its deliberations at that point and that after being asked to continue deliberations, they did and reached unanimous agreement. The court stated that "[t]his was even after the Court gave them the instruction that if they were not unanimous on Count 1, they could return a verdict on Count 2." (127:168; App. 28). The court continued:

> So they've had a chance -- if there was any question about that at that point, they had a chance to -- to rethink that and could have chosen not to find guilt on Count 1 if that's the way the

> jury felt. So I do -- don't believe they had previously come to a full decision. They got additional exhibits and had questions answered also, so that did help them arrive at a unanimous verdict. So for those reasons, the motion is denied.

(127:168; App. 28).

The court entered a guilty verdict only on Count 1, the reckless homicide charge. (117, 127:169; App. 3, 32). The court sentenced Mr. Osornio to 24 years in prison, with 12 years of initial confinement and 12 years of extended supervision. (117; App 3).

Mr. Osornio filed a postconviction motion arguing that his attorneys provided ineffective assistance of counsel when they failed to note that the charges were multiplicitious and, in the alternative, requesting that the circuit court order a new trial in the interest of justice. Following a hearing on the motion, the court denied the motion, finding that:

> While neither party has directly raised or responded to this issue, there was testimony about more than one incident in which the defendant allegedly delivered heroin, which could support the jury's verdict on both charges.
>
> There was testimony about delivery to both the decedent and delivery to Gail Ryzner on February 6, 2020 in the Portage Walgreens parking lot. April 25, 2022 Trial Transcript, pp. 149-153. Count 2 of the information did not specify that the February 6, 2020 delivery was to the decedent. Neither side addressed the Court's question about that issue, Id. at pp. 150-151.

(171:1; App. 5). The court also concluded that "there was ample evidence to support the jury's verdict and the jury had sufficient time to fully deliberate and reach a verdict after reviewing additional evidence and having time for additional deliberations." (171:3; App. 7).

This appeal follows.

ARGUMENT

I. The circuit court erred when it allowed the state to present testimony from a witness who claimed Mr. Osornio sold her heroin because it was not admitted for an acceptable purpose and unfairly prejudiced Mr. Osornio.

The court erroneously exercised its discretion when it allowed the state to present testimony from Gail Ryzner that she purchased heroin from Mr. Osornio. The court did not conduct the required analysis and failed to recognize that the potential for unfair prejudice substantially outweighed any probative value of the proposed testimony. Because the risk of unfair prejudice substantially outweighed any potential probative value, the testimony should not have been allowed at trial.

A. The circuit court erroneously exercised its discretion in allowing Ryzner's testimony because it failed to conduct any analysis regarding its admissibility.

Wisconsin law generally prohibits using evidence of other bad acts to prove a defendant has a certain character trait and acted in conformity with that trait. Wis. Stat. § 904.04(2).

The basis for excluding such evidence is to avoid the following dangers:

(1) The overstrong tendency to believe the defendant is guilty of the charge merely because he is a person likely to do such acts;

(2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses;

(3) The injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and

(4) The confusion of issues which might result from bringing in evidence of other crimes.

State v. Sullivan, 216 Wis. 2d 768, 782-83, 576 N.W.2d 30 (1998) *(*quoting *State v. Whitty*, 34 Wis.2d 278, 292, 149 N.W.2d 557 (1967)).

In spite of these concerns about other acts evidence, the rule allows such evidence "when offered for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Wis. Stat. § 904.04(2). Our supreme court has cautioned that "[e]vidence of prior crimes or occurrences should be sparingly used by the prosecution and only when reasonably necessary. Piling on such evidence as a final 'kick at the cat' when sufficient evidence is already in the record runs the danger, if such evidence is admitted, of *violating the defendant's right to a fair trial* because of its needless prejudicial effect on the issue of guilt or innocence." *Whitty*, 34 Wis. 2d 278, 297 (emphasis added).

Our supreme court set forth a three-part framework for determining the admissibility of other acts evidence. *Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, under Wis. Stat. § 904.01, meaning does the evidence relate to a fact or proposition that is of consequence to the determination of the action, and does the evidence have a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence?
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger

> of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence?

Id. at 772-773.

The standard for reviewing the admission of other acts evidence is whether the circuit court appropriately exercised its discretion. *Id.* at 781. An appellate court will sustain an evidentiary ruling if the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *Id.* at 780-81.

In this case, after hearing the parties' arguments about the proposed testimony, the court explained its ruling:

> All right. The Court is going to allow the testimony for those purposes, motive, lack of mistake, and the permissible purposes. I will ask Ms. Schmeiser to draft a proposed limiting instruction and to send that to Ms. Yaskal and see if you can agree on it beforehand, and if so, to file it. And otherwise, you can argue it and we'll -- the Court will make the decision if you're unable to agree on the appropriate limiting instruction.

(131:24; App. 11).

The court did not appropriately exercise its discretion because the court failed to examine the relevant facts and conducted no analysis of the proffered testimony. The circuit court did not reveal a

"demonstrative rational process," nor did it apply a proper standard of law. The circuit court said only that the evidence would come in "for proper purposes" without any explanation of what the proper purposes might be and made no reference at all to how the proposed testimony bore on any element of either charge. The court also failed to consider whether Ryzner's testimony provided sufficient probative value to substantially outweigh the danger of unfair prejudice to Mr. Osornio.

B. Ryzner's testimony was inadmissible as "context" or part of the "panorama of evidence."

The state's motion sought to have Ryzner's proposed testimony admitted to provide "direct context as proof of Count 2 of the Information." (70:2). The state argued that Mr. Osornio's alleged sale of heroin to Ryzner "less than five minutes before he met with [J.B.], provides proof of his intent to deliver the substance, provides context for the delivery, and specifically negates his claim that he sold [J.B.] marijuana, not heroin that date." (70:2). Although the state noted that the testimony could be used as proof of intent, the state generally characterized Ryzner's testimony not as other acts evidence but "background" or "context" evidence and part of the "panorama" of evidence needed to completely describe the delivery of heroin to J.B. (70:2). But because Ryzner's testimony was not proper context or panorama evidence, the court should have excluded it.

Evidence for purposes not listed in Wis. Stat. § 904.04(2) may be allowed when such evidence provides background or furnishes part of the "context" of the crime or case or is necessary to a full presentation of the case. *State v. Hunt*, 2003 WI 81, ¶58, 263 Wis. 2d 1, 666 N.W.2d 771 (2003). In *Hunt*, several victims and witnesses made, and then recanted, allegations about Hunt's abusive actions. *Id.* ¶¶2, 15. The court allowed evidence of their statements regarding Hunt's drug use and abusive actions to provide context in which the jury could understand the victims' and witnesses' fear of Hunt and to establish their credibility. *Id.*, ¶¶15, 58-59.

But Ryzner's testimony did not provide context for the sale of heroin to J.B., which was a wholly separate offense. Evidence that is allowed for context of a case is *part* of that case: such evidence helps the jury understand that case by explaining why witnesses in that case said what they said or did what they did. The evidence is permissible for context when it is "part of the corpus" of the alleged crime. *Hunt*, ¶15.

Separately, evidence is permissible "if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." *State v. Dukes*, 2007 WI App 175, ¶28, 303 Wis. 2d 208, 736 N.W.2d 515. In *Dukes*, for example, this court concluded that the fact that someone left Duke's home and was found with drugs was admissible as to show that Dukes was maintaining a drug house, as this was

an element of one of the charges and therefore relevant. *Id.*, ¶30. As to the prejudicial effect of the evidence, the court noted the state did not use improper means or "arouse a sense of horror or a desire to punish" in presenting the evidence. *Id.* at ¶31. The court concluded that any potential for unfair prejudice was further reduced when testimony about the drug purchase was cut short by the judge in response to a defense objection. *Id.*, ¶31.

But just as Ryzner's testimony did not provide context for Mr. Osornio's alleged sale of heroin to J.B., neither was it part of the panorama of the charges related to J.B. Far from being "inextricably intertwined" with that crime, this allegation was wholly separate and had nothing to do with the charged offense. Unlike in *Dukes*, the evidence did not provide one of the elements of the offense. Ryzner's testimony was neither proper "context" nor "panorama" evidence and should not have been admitted under either of these theories.

C. Even if Ryzner's testimony was potentially admissible to show intent under Wis. Stat. § 904.04(2) it should have been excluded because the danger of unfair prejudice substantially outweighed its probative value.

The state's motion also sought to have Ryzner's testimony admitted to prove Mr. Osornio's intent to deliver heroin to J.B. (70:2, 3). Proof of intent is one of the permissible purposes of other acts evidence.

Wis. Stat. § 904.04(2)(a). At the hearing on the motion, the state did not mention that it sought to use Ryzner's testimony as proof of intent, explaining that the proposed testimony was not "as straight as you would consider other acts" but that it would give "context" to the event. (131:21). In ruling on the state's motion, the circuit court stated it would allow Ryzner to testify for "the permissible purposes" but did not specify that the state could use the testimony as proof of Mr. Osornio's intent to sell heroin to J.B. Nor did the court instruct the jury that it could consider Ryzner's testimony to find that Mr. Osornio intended to sell J.B. heroin.

Given that the court never expressly concluded that the testimony could be used to show intent, and given that the jury was not instructed that it could use the testimony as proof of intent, this court should not find that the testimony was properly admitted under that basis.

But even if this court concludes that Ryzner's testimony was permissible other acts evidence, the proposed testimony still needed to be relevant to be admissible; that is, Ryzner's testimony still needed to have some tendency to make the existence of any fact that was of consequence to the determination of the action more probable or less probable than it would be without her testimony. *Sullivan* at 772.

To the extent Ryzner's testimony showed Mr. Osornio's intent to sell heroin, it was arguably relevant. But again, it was not actually offered for this purpose.

And, before admitting Ryzner's testimony, the circuit court was required to determine whether any probative value of Ryzner's testimony was substantially outweighed by the "danger of unfair prejudice, confusion of the issues or misleading the jury." Wis. Stat. § 904.03. "Unfair prejudice occurs when the evidence 'influence[s] the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.'" *State v. Gutierrez*, 2020 WI 52, ¶35, 391 Wis. 2d 799, 943 N.W.2d 870 (alteration in original; citation omitted).

The risk of the unfair prejudice Ryzner's testimony presented is perhaps best demonstrated by the circuit court's order denying Mr. Osornio's postconviction motion:

> While neither party has directly raised or responded to this issue, there was testimony about more than one incident in which the defendant allegedly delivered heroin, which could support the jury's verdict on both charges.
>
> There was testimony about delivery to both the decedent and delivery to Gail Ryzner on February 6, 2020 in the Portage Walgreens parking lot. April 25, 2022 Trial Transcript, pp. 149-153. Count 2 of the information did not specify that the February 6, 2020 delivery was to the decedent. Neither side addressed the Court's question about that issue, Id. at pp. 150-151.

(171:1; App. 5).

The circuit court's question about whether the jury could convict Mr. Osornio based on the allegation that he provided heroin to Ryzner originally arose when defense counsel explained its realization that the jury was improperly deliberating two charges relating to the delivery of heroin to J.B. (127:150; App. 20). The court asked why the jury could not consider the alleged sale to Ryzner as one of the charges. (127:150; App. 20). Both the state and the defense explained that the charges related only to the sale to J.B. and that the charges were, in fact, multiplicitous. (127:151-152; App. 20-21).

Given that the court itself—in spite of having given the jury a limiting instruction on how it could consider Ryzner's testimony—was confused by Ryzner's testimony and whether it could be used as the basis for finding Mr. Osornio guilty of delivery of heroin, this court should conclude the testimony should have been excluded because the danger of unfair prejudice substantially outweighed any probative value.

II. Mr. Osornio is entitled to a new trial based on plain error, ineffective assistance of counsel, or in the interest of justice because he was charged with multiplicitous offenses that were not discovered to be so until after the jury stated that they had reached a conclusion on the lesser charge and could not reach a conclusion on the more serious charge.

A. The charges were multiplicitous.

Multiplicitous charges violate the double jeopardy provisions of both the Wisconsin and United States Constitutions. *State v. Grayson*, 172 Wis. 2d 156, 159, 793 N.W.2d 23 (1992). Charges are impermissibly multiplicitous when a single offense is charged in more than one count. *State v. Ziegler*, 2012 WI 73, ¶59, 342 Wis. 2d 256, 816 N.W.2d 238.

"Whether a multiplicity violation exists in a given case is a question of law subject to independent appellate review." *State v. Multaler*, 2002 WI 35, ¶52, 252 Wis. 2d 54, 643 N.W.2d 437.

This court assesses a multiplicity claim using a two-pronged test. *Ziegler,* ¶60. First, the court must determine whether the offenses are identical in law and fact under the "elements-only" test outlined in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). *Ziegler*, ¶60. Crimes "are identical in law if one offense does not require proof of any fact in addition to those which must be proved for the other offense." *Id.* Crimes "are not

identical in fact if the acts allegedly committed are sufficiently different in fact to demonstrate that separate crimes have been committed." *Id.*

Second, this court determines whether the legislature intended to allow multiple punishments for the criminal conduct. *Id.,* ¶¶61-63. If the offenses are identical in law and in fact, this court should presume that the legislature did not authorize multiple punishments. *State v. Davison,* 2003 WI 89, ¶45, 263 Wis. 2d 145, 666 N.W.2d 1. But if the charged offenses are different in law or fact, there is a presumption that the legislature did intend to permit cumulative punishments. *Id.*, ¶44

The party arguing against the presumption may rebut it "only by a clear indication of contrary legislative intent." *Ziegler*, ¶61. In determining legislative intent, the court considers the following four factors: (1) all applicable statutory language; (2) the legislative history and context of the statutes; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments for the conduct. *Id.*, ¶63.

The charges here are clearly identical in law and fact. The state charged Mr. Osornio with first degree reckless homicide and delivery of heroin based on a single sale of heroin to J.B. in a Walgreens parking lot. (2). Both charges involve violations of § 961.41, Wis. Stats., the delivery of heroin. The elements of first-degree reckless homicide are:

1. The defendant delivered a substance;

2. The substance was heroin;

3. The defendant knew or believed the substance was heroin;

4. The victim used the heroin delivered by the defendant;

5. The victim died as a result of the use of the heroin.

(Wis. JI-Criminal 1021).

The elements of delivery of a controlled substance are:

1. The defendant delivered a substance;

2. The substance was heroin;

3. The defendant knew or believed the substance was heroin.

(Wis. JI-Criminal 6020).

A crime is considered a lesser-included crime if it "does not require proof of any fact in addition to those which must be proved for the crime charged." Wis. Stat. § 939.66(1). The focus is "on the statutes defining the offenses, not the facts of a given defendant's activity." *State v. Carrington*, 134 Wis. 2d 260, 264, 397 N.W.2d 484 (1986).

The offenses are identical in law because delivery of heroin does not require proof of any fact in addition to those which must be proved for reckless

homicide by delivery of heroin. In comparison, possession of a controlled substance is not a lesser included offense of reckless homicide because possession is not an element of reckless homicide, and a person could deliver a substance without ever having possessed it. *State v. Clemons,* 164 Wis. 2d 506, 476 N.W.2d 283 (Ct. App. 1991).

The offenses are identical in fact because they rely on the same act: the state charged Mr. Osornio with making one delivery of heroin at Walgreens on a specific date and time and alleged that it was this heroin that caused J.B.'s death.

Because these offenses are identical in law and fact, the second prong of the test creates a presumption "that the legislature *did not* intend to authorize cumulative punishments." *State v. Brantner*, 2020 WI 21, ¶25, 390 Wis. 2d 494, 939 N.W.2d 546, citing *State v. Patterson*, 2010 WI 130, ¶15, 329 Wis. 2d 599, 790 N.W.2d 909 (emphasis in original). That presumption may be rebutted "only by a clear indication of contrary legislative intent." *Brantner*, ¶25, citing *Ziegler*, ¶61. There is no indication that the legislature intended to authorize separate, cumulative punishments for the delivery of heroin and reckless homicide by that same delivery of heroin.

B. The circuit court erred when it did not accept the jury's initial conclusion and required the jury to continue its deliberations.

As explained above, the state could have charged Mr. Osornio with delivery of heroin or reckless homicide, but not both, based on the facts alleged in the complaint. If they had charged Mr. Osornio with only the reckless homicide, the jury might have heard the same evidence, but the state would have explained the case to the jury differently during its opening, and they jury would have gone into deliberations with different jury instructions. The jury would have been instructed on the elements of reckless homicide only and been told they must reach a unanimous decision on that charge.

Or, Mr. Osornio might have made the strategic decision to request an instruction on the lesser-included offense of delivery of heroin. *State v. Eckert*, 203 Wis. 2d 497, 509, 553 N.W.2d 539 (Ct. App. 1996). It is also possible that the state would have sought such an instruction. *See State v. Fleming*, 181 Wis. 2d 546, 555, 510 N.W.2d 837 (Ct. App. 1993) (noting that both the state and the defendant have a right to request that the court submit an instruction on a lesser-included offense).

If we assume the case had proceeded as it should have and the jury had been given the lesser included instruction at the outset, the jury would have been instructed prior to beginning its deliberations that

they should make every reasonable effort to agree unanimously on their verdict in the reckless homicide charge before considering the offense of delivery of heroin. They would have been instructed that if they concluded that further deliberation would not result in unanimous agreement on the charge of reckless homicide, they should consider whether Mr. Osornio was guilty of delivery of heroin. In either case, they would have been instructed that they could find Mr. Osornio guilty of only one of those offenses. *See* Wis. JI-Criminal 112. They were never so instructed.

After deliberating for about two hours, the jury sent out a note with a question: "Does the different colors of heroin mean two different sources?" (127:139). This was a reasonable question given the testimony that the DNA of three people was found on the items containing heroin. (127:61). The jury was told to rely on its collective memory and continue its deliberations. (127:140). About two hours later, the jury sent the circuit court the following note: "We have a conclusion on Count Two. We cannot come to an agreement on Count One. How should [sic] we proceed?" (127:140; "[sic]" in transcript).

Even though the jury tried to reach a decision on both offenses as instructed, the jury informed the court that they could not come to a unanimous agreement on the charge of reckless homicide but that they had reached a unanimous conclusion on the delivery of heroin. (127:140). This should have been the end of their deliberations.

But instead of the court confirming that this was the jury's verdict, which is what should have occurred if the case had proceeded properly, the court told the jury that they must continue to deliberate by reading them the "*Allen*" instruction:

> You jurors are as competent to decide the issues -- the disputed issues of fact in this case as the next jury that may be called to determine such issues.
>
> You are not going to be made to agree, nor are you going to be kept out until you do agree, but it is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate; they should be open-minded; they should listen to the arguments of others, and talk matters over freely and fairly, and make an honest effort to come to a conclusion *on all of the issues presented to them*.
>
> You will please retire again to the jury room at this point.

(127:144; emphasis added). The "issues" that the jury was told they must consider at that point was whether they could reach a unanimous decision on *both* the reckless homicide and the delivery of heroin. The jury ultimately found Mr. Osornio guilty of both charges.

If a person is convicted of multiplicitous charges, this court may vacate one or more of the convictions to avoid a double jeopardy violation. *State v. Church*, 233 Wis. 2d 641, 589 N.W.2d 638 (Ct. App. 1998). In this case, the circuit court entered a judgment of conviction only on the homicide charge. (117, 127:169;

App. 1, 32). But the circuit court's entry of a judgment of conviction on only the greater charge did not cure the error because the problem was not limited to the fact that Mr. Osornio was found ultimately guilty of multiplicitous charges. The fundamental issue is that after the jury reached its decision on the lesser charge it was told that it must continue to deliberate; only then was Mr. Osornio found guilty of both charges.

C. Mr. Osornio is entitled to a new trial due to plain error, ineffective assistance of counsel, or in the interests of justice, because the state brought multiplicitous charges and as a result the jury deliberated under the wrong jury instructions.

None of the parties recognized that the state brought multiplicitous charges against Mr. Osornio until after the jury reached a decision regarding the delivery of heroin charge and after the jury explained they were unable to reach a verdict on the reckless homicide charge. Although it was the state that erred in bringing multiplicitous charges, the claim can be reached as plain error or due to ineffective assistance of counsel. In the alternative, this court should grant Mr. Osornio a new trial in the interest of justice. Because the jury first found Mr. Osornio guilty only of delivery of heroin, Mr. Osornio is entitled to a new trial under any of these grounds.

1. Subjecting Mr. Osornio to multiplicitous charges at trial and the court's failure to accept the jury's initial decision regarding the charges was plain error, requiring a new trial without multiplicitous charges and with proper jury instructions

Some errors, such as occurred here, are so plain and fundamental that the court should grant a new trial despite the defendant's failure to preserve the error. *State v. Davidson*, 2000 WI 91, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606. Under the plain error doctrine in Wis. Stat. § 901.03(4)[3] a conviction may be vacated when an unpreserved error is fundamental, obvious and substantial. *State v. Jorgensen*, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. "[W]here a basic constitutional right has not been extended to the accused, the plain error doctrine should be utilized." *Id.*

Here, Mr. Osornio's constitutional right to be protected from double jeopardy was violated when he was made to stand trial for multiplicitous charges. *State v. Grayson*, 172 Wis. 2d 156, 159, 493 N.W.2d 23 (1992). If a defendant shows that an unobjected to error is fundamental, obvious and substantial, the

[3] The statute provides, "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." Wis. Stat. § 901.03(4).

burden shifts to the state to show beyond a reasonable doubt that the error was harmless. *Jorgensen*, ¶23.

This court has recognized that submitting multiplicitous charges to a jury may prejudice a defendant by improperly influencing a jury that a person is guilty. *State v. Kennedy*, 134 Wis. 2d 308, 324, 396 N.W.2d 765 (Ct. App. 1986). In *Kennedy*, this court found that submitting four negligent homicide charges with eight vehicular homicide charges was error. *Id. at* 325. The court ultimately concluded the error was harmless because there was "ample evidence" to convict Kennedy on the vehicular homicide charges. *Id.* at 325.

The state cannot prove that the error in charging was harmless beyond a reasonable doubt, given that the jury reached a conclusion in the lesser-included offense and explained to the court that they could not reach a conclusion as to the homicide charge. It was only after the court told the jury that they were required to continue deliberating—in spite of reaching a conclusion in this case—that the jury eventually found Mr. Osornio guilty of the homicide charge.

2. Counsel's failure to recognize that the two charges were multiplicitous deprived Mr. Osornio of the effective assistance of counsel.

If relief is not granted as plain error, this court should hold that counsel's failure to recognize that the state brought multiplicitous charges against Mr. Osornio violated his right to effective assistance of

counsel guaranteed by the Sixth Amendment and Article I, § 7. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305.

Whether counsel was ineffective is a mixed question of law and fact. *State v. Guerard*, 2004 WI 85, ¶19, 273 Wis. 2d 250, 682 N.W.2d 12. The circuit court's factual findings will not be disturbed unless clearly erroneous, but the ultimate issues of whether counsel's performance was deficient and prejudicial are reviewed independently. *Id.*

In order to find that counsel rendered ineffective assistance, the defendant must show that counsel's representation was deficient and that he was prejudiced by the deficient performance. *Thiel*, 264 Wis. 2d 571, ¶18, citing *Strickland*, 466 U.S. at 687. Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. *Id.*, ¶19.

Defense counsel's failure to recognize that the charges were multiplicitous until after the jury was deliberating constituted deficient performance. Counsel should have sought dismissal of the lesser included charge prior to trial. But defense counsel explained at the *Machner*[4] hearing that she did not consider whether delivery of heroin might be a lesser included of offense of reckless homicide by delivery of heroin. (164:6). It was only after the jury had reached

[4] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

a conclusion on the delivery charge that defense counsel discovered that the delivery charge was a lesser included offense of the reckless homicide charge.

Counsel's failure to recognize the charges as multiplicitous until after the jury had reached a conclusion on one of the charges is prejudicial if there is a reasonable probability that, but for the error, the result of the proceeding would have been different. *Thiel*, ¶20. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*, ¶20. "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" *Id.*, quoting *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985).

There is a reasonable probability that the outcome of Mr. Osornio's trial would have been different if counsel had realized prior to trial that the charges were multiplicitous. There can be no confidence in the outcome of Mr. Osornio's trial because the proceedings were problematic from the outset. Mr. Osornio was improperly charged, the case was improperly presented, and, as a result, the jury was improperly instructed.

The error could have been remedied if the court accepted the jury's initial result: the jury should only have been required to reach a result on one charge, and they did. But instead, the court required the jury to continue to deliberate and gave piecemeal instructions as the afternoon went on. Only then did the jury find Mr. Osornio guilty of both charges.

3. This case warrants a new trial in the interest of justice.

The court of appeals has the "broad power" of discretionary reversal under Wis. Stat. § 752.35. *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). Specifically, § 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

"This broad statutory authority provides the court of appeals with power to achieve justice in its discretion in the individual case." *Vollmer* at 19. The court may reverse a conviction in the interests of justice whenever it determines that: (1) the real controversy has not been fully tried; or (2) it is probable that justice has for any reason miscarried. *State v. Hicks*, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996).

Mr. Osornio recognizes that reversals under § 752.35 should be used only in exceptional cases. *State v. McKellips*, 2016 WI 51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258. "In an exceptional case, after all other claims are weighed and determined to be unsuccessful, a reviewing court may determine that reversal is nevertheless appropriate under Wis. Stat. § 752.35." *State v. Kucharski*, 2015 WI 64, ¶43, 363 Wis. 2d 658, 866 N.W.2d 697.

The court may reverse and remand for a new trial when "it is probable that justice has for *any reason* miscarried ...." Wis. Stat. § 752.35 (emphasis added). The statute grants the court authority to order relief, including a new trial, as "necessary to accomplish the ends of justice." Id. Before granting relief due to a probable miscarriage of justice, the court must find that there is a probability of a different result on retrial. *Vollmer* at 16. The court should make that finding in this case.

Here, the jury did not have the proper legal framework for analyzing the case before them. The only real controversy was whether Mr. Osornio delivered the heroin that caused J.B.'s death. (127:135). But the jury was instructed:

> It is for you to determine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the information. Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in

> one count must not affect your verdict on any other count.

(127:136).

This misstated the law. When the jury is to consider a lesser included offense, the jury is instructed that if the jury is not satisfied that the state has proved every element of the offense charged beyond reasonable doubt—here reckless homicide—they must not find the defendant guilty of that charge, and should then consider whether the defendant is guilty of the lesser included crime. *See* Wis. JI-Criminal 112. But the jury had not been provided this instruction when they began their deliberations.

Then, when the jury informed the court that they could not agree that the state had proved every element of the reckless homicide but had reached a conclusion on the delivery charge, they were instructed to continue deliberations, in part because the parties had not yet realized the charges were multiplicitous. (127:144). Once the defense made the realization, the defense asked the court to accept the jury's earlier verdict. (127:149; App. 19). The state asked that the jury be given the lesser included instruction but the court declined to do so at that point. (127:157; App. 27). Shortly after 7:00 p.m., the parties asked the court to instruct the jury as follows, which the court did:

> You should make every reasonable effort to agree unanimously on your verdict on Count 1. However, if after full and complete consideration

> of the evidence, you conclude that further deliberation would not result in unanimous agreement on Count 1, you should sign your verdict on Count 2 and inform the Court of your verdict.

(237:159; App. 29). At approximately 8:15 p.m., the jury returned with guilty verdicts on both charges.

An erroneous jury instruction warrants reversal when the error is prejudicial. *State v. Langlois*, 2018 WI 73, 382 Wis. 2d 414, 913 N.W.2d 812, citing *Dakter v. Cavallino*, 2015 WI 67, ¶33, 363 Wis. 2d 738, 866 N.W.2d 656. The error was prejudicial here because when the jury returned with a conclusion on the delivery charge and informed the court they could not reach a unanimous decision on the homicide charge, they were told they must continue to deliberate on both charges. If they had been properly instructed from the outset, they would have been told that if they could not reach a decision on the homicide charge they could then move to the lesser included charge of delivery. That is what they first did, and they were told to continue their deliberations.

The error was not harmless. A jury instruction error is harmless only "if it is clear beyond a reasonable doubt that a rational jury would have [nonetheless] found the defendant guilty. *State v. Harvey*, 2002 WI 93, ¶46, 254 Wis. 2d 442, ¶46, 647 N.W.2d 189. What is clear beyond a reasonable doubt is that the jury told the court that they could not reach a unanimous decision on the homicide charge but had reached a unanimous decision on the lesser included

charge. If they had been properly instructed, this would have been the result of the case. Instead, they were required to continue deliberating.

Due to the multiplicitous charges, the court did not provide the proper legal framework for analyzing the question before the jury, and the real controversy was not fully tried as a result. When this occurs, a new trial is warranted. *See State v. Austin*, 2013 WI App 96, ¶23, 349 Wis. 2d 744, 836 N.W.2d 833. Like in *Austin*, this court should exercise its discretionary authority and order a new trial in the interest of justice.

CONCLUSION

For the reasons set forth above, Samuel Osornio requests that this Court reverse the judgment of conviction and the decision and order denying postconviction relief, and remand for a new trial.

Dated this 5th day of February, 2025.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 8,695 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 5th day of February, 2025.

Signed:
Electronically signed by
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