STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2024AP2368-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SAMUEL R. OSORNIO,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN COLUMBIA COUNTY CIRCUIT COURT, THE HONORABLE TODD J. HEPLER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL J. CONWAY
Assistant Attorney General
State Bar #1134356

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8910
conwaymj@doj.state.wi.us

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INTRODUCTION

A jury found Samuel R. Osornio guilty of reckless homicide by heroin delivery. He raises two issues in this appeal. Neither claim entitles him to relief.

First, Osornio contends that the trial court erroneously admitted other acts evidence. The other acts witness, Gail Ryzner, testified that she bought heroin from Osornio five minutes before he sold heroin to the victim in the same location. He has only one preserved argument to challenge this evidentiary ruling—that the testimony's risk of unfair prejudice substantially outweighed its probative value. He cannot succeed. Ryzner's testimony was highly probative because it described a drug transaction with Osornio that occurred only five minutes before the victim's drug transaction with Osornio and in the same location. Her testimony's risk of unfair prejudice was minimal because her testimony was brief and of limited scope.

Second, Osornio argues that he is entitled to a new trial because of a multiplicity issue. He was inadvertently tried for multiplicitous offenses—reckless homicide by heroin delivery and the lesser included offense of heroin delivery. No one noticed until after the jury began deliberations. He contends that this oversight amounted to plain error, ineffective assistance of counsel, or a miscarriage of justice. He cannot satisfy any of those substantial burdens because he cannot show that this oversight affected the outcome of his trial. The trial court correctly recognized that the jury was never deadlocked on the reckless homicide offense. Moreover, the trial court belatedly provided a lesser included offense instruction that specifically allowed the jury to render a verdict only on the heroin delivery offense. Not only did the jury decline that invitation, but it deliberated for another hour and then issued its final verdict. Accordingly, Osornio's multiplicity-related claim does not entitle him to a new trial.

ISSUES PRESENTED

1. Did the trial court erroneously exercise its discretion in admitting testimony that provided background information and context?

The trial court answered: No.

This Court should answer: No.

2. Is Osornio entitled to relief because the trial court did not provide the lesser included offense instruction until after the jury began deliberating?

The trial court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case can be resolved by applying well-established law to the facts, which the parties' briefs adequately set forth.

STATEMENT OF THE CASE

A. Osornio sold the heroin to the victim that caused the victim's death.

The victim, Jared,[1] was found deceased in his bed on February 7. (R. 128:99–100, 107–08.) On a dresser next to the bed, police observed a rolled-up dollar bill, a plastic credit card, and a foil wrapper with an "off-white powdery substance." (R. 128:109.) Both the dollar bill and the foil wrapper tested positive for the presence of heroin residue. (R. 127:36–37, 39.) A rolled-up dollar bill is a common means of snorting a powder, and a credit card is a common tool used

[1] The State uses a pseudonym for the victim. *See* Wis. Stat. § (Rule) 809.86(4).

to break up clumps in the powder before snorting. (R. 128:161–62.) A bottle of vodka lay on the floor near the bed. (R. 128:113.) The police also found two cell phones. (R. 128:114, 122.) On one of the phones, the police found text messages between Jared and Osornio. (R. 128:163–64.)

The medical examiner concluded that Jared died from acute intoxication due to a combination of heroin and alcohol, both of which are depressants and, thus, can combine to shut down a person's central nervous system. (R. 127:18–19, 23.) The autopsy revealed that Jared died with alcohol, morphine, and 6-monoacetylmorphine in his blood. (R. 127:20–21.) Jared had a blood alcohol content of 0.197. (R. 127:22.) The morphine and 6-monoacetylmorphine revealed that Jared had ingested heroin because both substances are metabolites produced by the human body from processing heroin. (R. 127:21–22.) The concentration of both metabolites was high enough to cause a lethal overdose. (R. 127:23.) Jared was also constipated at the time of his death, a side effect of narcotics like heroin. (R. 127:20.) Jared did not have tetrahydrocannabinol (THC) in his system, which would have indicated that he had used marijuana. (R. 127:30.)

In an interview with police, Osornio admitted selling drugs to Jared in a Walgreens parking lot on February 6, the day before Jared's death. (R. 128:179.) A Walgreens surveillance camera captured the transaction. Surveillance footage showed Jared parking his white Infiniti next to Osornio's silver Jeep, Osornio entering Jared's car, and Osornio returning to his car one minute later. (R. 128:173–76.) Osornio entered Jared's car at approximately 11:43 a.m. (R. 128:176–77.) Text messages exchanged between Jared and Osornio showed that they had arranged to meet at Walgreens at approximately 11:30 a.m. for a "[$]25 bag[]." (R. 128:170–72.) Osornio mentioned that he had to "serve this chick" before Jared. (R. 128:171.) Once Osornio saw Jared's car in the

parking lot, he sent a text directing Jared to park next to his silver Jeep. (R. 128:172.)

While Osornio admitted to selling drugs to Jared in the Walgreens parking lot, he maintained that he sold marijuana, not heroin. (R. 128:179.) He claimed that he sold marijuana to a woman named Gail Ryzner in the Walgreens parking lot shortly before his sale to Jared. (R. 128:179.)

Osornio's text messages with Jared prior to February 6 belied his claim of selling only marijuana. Through cryptic text messages that nonetheless were consistent with drug transactions, Osornio arranged to sell drugs to Jared on February 3. (R. 128:166–68.) To initiate the February 6 transaction, Jared asked to buy the same product again, commenting, "I kinda like this shit." (R. 128:169.) Osornio confirmed that he could sell Jared more drugs but added, "I don't want u to get to [*sic*] deep into it bro." (R. 128:169.) Jared replied that "a lil goes a long ways," and compared the high to "doing vics." (R. 128:169.) The investigating detective knew from experience that "vics" referred to Vicodin, an opiate like heroin. (R. 128:170.) He also observed that Osornio's concern about Jared getting too "deep" into the drug would be consistent with heroin but not marijuana. (R. 128:180.)

A substantial amount of Osornio's DNA was detected on the foil wrapper bearing heroin residue taken from Jared's dresser. The DNA analyst used "probabilistic genotyping" to analyze a relatively small amount of DNA taken from the foil. (R. 127:58–59, 75.) The foil had a three-person DNA mixture with Jared contributing 37 percent of the mixture, a second contributor providing 57 percent, and the third contributor providing far less than either Jared or the second contributor. (R. 127:62.) The DNA analyst compared two mutually exclusive scenarios about that three-person mixture. (R. 127:63, 77–78.) The first scenario posited that the mixture consisted of Jared, Osornio, and an unknown third person. (R. 127:63.) The second scenario posited that the mixture

consisted of Jared and two unknown individuals. (R. 127:62–63.) The first scenario including Osornio was one quadrillion[2] times more likely than the second scenario. (R. 127:63.)

The police located Gail Ryzner, the "chick" whom Osornio "served" in the Walgreens parking lot before Jared arrived. (R. 128:171, 193.) The Walgreens surveillance camera showed that Ryzner met with Osornio at 11:35 a.m. on February 6, 2020, about five minutes before Jared arrived. She stated that she purchased heroin from Osornio. (R. 128:152–153.) That was not the first time that she had purchased heroin from Osornio. (R. 128:151.) She had never purchased marijuana from Osornio. (R. 128:151.)

B. The trial court admitted Ryzner's testimony.

Prior to trial, the State moved to admit Ryzner's testimony either as background or contextual evidence under Wisconsin caselaw, or as other acts evidence under Wis. Stat. § 904.04(2), bearing on Osornio's intent. (R. 70:2–3; 131:21–22.) Osornio opposed this testimony as impermissible "propensity evidence" inviting the jury to infer that he has a character for heroin trafficking. (R. 131:22–23.) The trial court granted the State's motion, admitting Ryzner's testimony for "motive, lack of mistake, and the permissible purposes." (R. 131:24.) The trial court directed Osornio to draft a limiting instruction if he desired. (R. 131:24.) Before trial began, the parties agreed that Ryzner would testify only about one transaction and her general relationship with Osornio. (R. 128:6–7.) Ryzner's brief testimony complied with that limited purpose. (R. 128:149–58.)

[2] One quadrillion is one followed by 15 zeroes. (R. 127:64.)

The State agreed to Osornio's proposed limiting instruction for Ryzner's testimony, which adopted the pattern instruction provided by Wisconsin Criminal Jury Instruction 275. (R. 127:90; 128:6.) That instruction limited the jury to considering Ryzner's testimony as other acts evidence regarding "context or background":

> 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.

(R. 127:102.) The instruction forbade the jury from drawing a propensity inference from Ryzner's testimony about Osornio's character. (R. 127:102–03.) The instruction also reiterated that Ryzner's testimony "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." (R. 127:103.)

C. A jury found Osornio guilty of first-degree reckless homicide and drug delivery.

Osornio proceeded to a jury trial charged at Count 1 with first-degree reckless homicide by delivering heroin and at Count 2 with heroin delivery. (R. 26.) Those charges were multiplicitous. Legally, heroin delivery is a lesser included offense of reckless homicide by heroin delivery. The first three elements of the reckless homicide offense constituted the heroin delivery offense. (R. 127:97, 98–99.) At Osornio's trial, both charges were based on the same facts. Although the charges did not specify the drug transaction at Count 2 (R. 2:1; 26), the probable cause statement for the complaint recounted only Osornio's sale to Jared, (R. 2:1–3). Moreover, the limiting instruction for Ryzner's testimony expressly told the jury that Osornio was "not on trial" for "provid[ing] heroin

to Gail Ryzner." (R. 127:102.) Therefore, the charges were multiplicitous, but no one noticed until after the jury began deliberations. (R. 127:151–52.)

At his jury trial, Osornio staked his defense on two disputed issues of fact. First, while he conceded that he sold drugs to Jared, he argued that he sold marijuana, not heroin. (R. 127:122, 130.) Second, he argued that heroin was not a "substantial factor" in Jared's death because Jared would not have died absent his comorbid health conditions. (R. 127:124–25.)

In advancing his second argument, Osornio relied on facts elicited from the medical examiner. The medical examiner observed that Jared suffered from heart disease, high cholesterol, hypertension, and obesity. (R. 127:20.) The medical examiner also observed damage to Jared's body from years of chronic alcohol abuse, along with his high blood alcohol content at his death. (R. 127:20, 22.) On cross-examination, he confirmed that alcohol could be lethal, either from short-term or long-term use. (R. 127:26.) He acknowledged that some people could have survived the dose of heroin that caused Jared's death. (R. 127:28.) Even with these conditions, the medical examiner concluded that heroin constituted a substantial factor in Jared's death. (R. 127:23.)

The jury exited for deliberations at 12:30 p.m. (R. 127:138.) At 3:45 p.m., the jury sent a note to the trial court that read: "We have a conclusion on Count Two. We cannot come to an agreement on Count One. How should [*sic*] we proceed?" (R. 83:2; 127:140.) The parties agreed to answer this question with Criminal Jury Instruction 520, the so-called "*Allen*[3] instruction" that directs jurors to "make an honest and sincere attempt to arrive at a verdict." (R. 127:142, 144.) The trial court read the *Allen* instruction to the jury.

[3] *Allen v. United States*, 164 U.S. 492 (1896).

(R. 127:144.) The jury continued deliberations. Two-and-a-half hours later at 6:10 p.m., the jury asked to see the text messages between Jared and Osornio. (R. 83:3; 127:152.)

At 6:20 p.m., Osornio noticed the multiplicity problem and informed the trial court. (R. 127:149.) Osornio argued that the jury would have issued a verdict solely on Count 2 at 3:45 p.m. had it received the lesser included offense instruction—Criminal Jury Instruction 112. (R. 127:149.) Pursuant to Instruction 112, the jury would have been told to "make every reasonable effort to agree unanimously" on the reckless homicide charge at Count 1 before considering the drug delivery charge at Count 2. (R. 127:150.) If the jury decided that it could not reach a unanimous verdict on Count 1 "after a full and complete consideration of the evidence," then the instruction would have directed the jury to proceed to Count 2. (R. 127:150.) Osornio argued that the 3:45 p.m. jury note entitled him to a directed verdict because it allegedly conveyed that the jury could not unanimously agree on Count 1 and had proceeded to reach a verdict on Count 2. (R. 127:149–50.) The State agreed that the two counts were multiplicitous but opposed Osornio's remedy. (R. 127:151–52.)

The trial court denied Osornio's motion for a directed verdict. (R. 127:156.) The parties then agreed that the court should read the jury a modified, shortened version of the lesser included offense instruction. (R. 127:158.) At approximately 7:16 p.m., the trial court provided that instruction, as follows: "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 deliberations would not result in unanimous agreement on Count 1, you should sign your verdict on Count 2." (R. 127:159–60.)

After receiving the modified lesser included offense instruction, the jury deliberated for one hour. (R. 127:160.) The jury then issued its verdict at 8:16 p.m. finding Osornio

guilty of both Counts 1 and 2. (R. 127:160.) Osornio moved for judgment notwithstanding the verdict, and the trial court denied it. (R. 167:165, 168.)

The trial court subsequently imposed an evenly bifurcated sentence of 24 years. (R. 122:33.) The judgment of conviction corrected the multiplicity issue so that Osornio was convicted and sentenced only on Count 1, the reckless homicide offense. (R. 117:1.)

D. The trial court denied Osornio's postconviction motion.

In a postconviction motion, Osornio argued that the failure to provide the jury with the lesser included offense instruction before deliberations began entitled him to a new trial based on either the ineffective assistance of counsel or the interest of justice. (R. 156:6–14.) At a *Machner*[4] hearing, both of Osornio's trial attorneys testified that they did not notice the multiplicity issue until after jury deliberations began. (R. 164:7, 9, 19–20.)

The trial court denied Osornio's postconviction motion. It determined that Osornio's ineffective assistance claim failed for lack of prejudice. (R. 171:2.) It rejected Osornio's claim that the jury would have found Osornio not guilty of the homicide offense at 3:45 p.m. had it received the lesser included offense instruction prior to that point. (R. 171:2.) Rather, "it is equally plausible that the jury would not have reached a point of deadlock that would have permitted it to move on to the lesser included offense." (R. 171:2.) The trial court observed that "[t]here is no indication in the record that [the jurors] had exhausted all reasonable efforts to agree on the reckless homicide charge," as the lesser included offense instruction requires, after just over three hours of

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

deliberation. (R. 171:2.) To the contrary, the jury deliberated for nearly eight hours well into the evening. (R. 171:2.) Moreover, the jury eventually received the modified lesser included offense instruction and still issued a guilty verdict on the homicide offense after one hour of further deliberation. (R. 171:2.) Given these circumstances, Osornio failed to establish a reasonable probability of a different result as required to prove prejudice. (R. 171:2.) The trial court denied Osornio's interest-of-justice claim on the same basis. (R. 171:3.)

Osornio now appeals, challenging the ruling admitting Ryzer's testimony and arguing that the trial court's failure to read the lesser included offense before jury deliberations began constituted plain error, ineffective assistance, or a miscarriage of justice. He does not appeal the denial of his motions for a directed verdict or judgment notwithstanding the verdict.

ARGUMENT

I. The trial court properly admitted testimony from another person who purchased heroin from Osornio five minutes before the victim, and any error was harmless.

Osornio initially argues that the trial court erroneously exercised its discretion by admitting Ryzner's testimony. This claim is meritless. The trial court properly admitted the testimony, and any error was harmless.

A. Standard of Review

The circuit court's decision to admit evidence is reviewed for an erroneous exercise of discretion. *State v. Dorsey*, 2018 WI 10, ¶ 37, 379 Wis. 2d 386, 906 N.W.2d 158. The circuit court's ruling cannot be overturned if there is a reasonable basis for it, and if the trial court relied on accepted legal standards and relevant facts of record. *Id.* When

reviewing an exercise of discretion, "an appellate court may consider acceptable purposes for the admission of evidence other than those contemplated by the circuit court, and may affirm the circuit court's decision for reasons not stated by the circuit court." *State v. Hurley*, 2015 WI 35, ¶ 29, 361 Wis. 2d 529, 861 N.W.2d 174 (citation omitted). "Regardless of the extent of the trial court's reasoning, [a reviewing court] will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion." *Id.* (alteration in original) (citation omitted).

Further, "[a] circuit court's erroneous exercise of discretion in admitting evidence is subject to the harmless error rule." *State v. Mulhern*, 2022 WI 42, ¶ 18, 402 Wis. 2d 64, 975 N.W.2d 209. This Court decides whether an error is harmless de novo. *Id.*

B. The trial court admitted Ryzner's testimony as other acts evidence regarding context and background.

Osornio's argument challenging the admission of Ryzner's testimony proceeds from a false dichotomy. He argues that the testimony was inadmissible as "panorama" evidence of the crime (Osornio's Br. 25–27), which is distinct from other acts evidence. *See State v. Dukes*, 2007 WI App 175, ¶ 28, 303 Wis. 2d 208, 736 N.W.2d 515. He also argues that the testimony was inadmissible as other acts evidence bearing on his intent. (Osornio's Br. 27–30.) However, the trial court did not admit the testimony on either basis.

Instead, the trial court admitted Ryzner's testimony as other acts evidence that provided context and background. Jury "[i]nstructions are intended to reflect theories of law pertinent to the evidence, which a jury is required to follow in reaching a verdict." *Harrison v. State*, 78 Wis. 2d 189, 209–10, 254 N.W.2d 220. At Osornio's trial, the jury instructions

establish that the trial court admitted Ryzner's testimony for only one pertinent "theor[y] of law." *Id.* The trial court limited the jury to considering Ryzner's testimony as evidence of "other conduct of the defendant" that bore "only on the issue of context or background." (R. 127:102.) Accordingly, the instruction expressly stated that "[t]he evidence was *received* on the issue of context or background." (R. 127:103 (emphasis added.) Since Ryzner's testimony was "received" as other acts evidence regarding context and background, the trial court necessarily admitted Ryzner's testimony on that basis.

Osornio cannot contend that the trial court admitted Ryzner's testimony for any other purpose because he drafted the limiting instruction. (R. 128:6.) The trial court and State accepted his instruction as written. (R. 128:7–8.) Osornio cannot now argue that Ryzner's testimony was erroneously admitted for purposes expressly forbidden by his limiting instruction. The jury presumably followed that instruction. *State v. Truax*, 151 Wis. 2d 354, 362–63, 444 N.W.2d 432 (Ct. App. 1989). Osornio has not attempted to argue otherwise. (Osornio's Br. 28.) Therefore, to prevail on this evidentiary claim, Osornio must demonstrate that the trial court erroneously exercised its discretion by admitting Ryzner's testimony as other acts evidence regarding context and background.

C. *Sullivan* provides three steps for admitting other acts.

While "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith," other acts evidence may be admissible when offered for a proper purpose. Wis. Stat. § 904.04(2)(a). Courts apply a three-step analysis to determine the admissibility of other acts evidence pursuant to *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998).

First, the evidence must be offered for an admissible purpose. Wis. Stat. § 904.04(2)(a); *Sullivan*, 216 Wis. 2d at 772. Second, the evidence must be relevant under Wis. Stat. § 904.01. *Sullivan*, 216 Wis. 2d at 772. Third, the probative value of the evidence must not be substantially outweighed by the considerations set forth in Wis. Stat. § 904.03, including the danger of unfair prejudice. *Sullivan*, 216 Wis. 2d at 772–73. The proponent of the evidence must establish the first two prongs by a preponderance of the evidence. The burden shifts to the opponent on the third prong. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399.

Osornio has preserved only a challenge to Ryzner's testimony on the third step of *Sullivan* and forfeited arguments under steps one and two. A litigant forfeits a claim or arguments by failing to timely assert his or her rights. *State v. Ndina*, 2009 WI 21, ¶¶ 29–30, 315 Wis. 2d 653, 761 N.W.2d 612.

In the trial court, Osornio opposed the admission of Ryzner's testimony on only one basis. He argued that Ryzner's testimony constituted improper "propensity evidence." (R. 131:22–23.) "[P]ropensity evidence is, by its nature, relevant evidence." *State v. Hill*, 2024 WI App 51, ¶ 42, 413 Wis. 2d 572, 12 N.W.3d 561. "[T]he risk that the jury will draw an improper propensity inference against the defendant based on the other-acts evidence" falls under "*Sullivan*'s third prong." *Id.* ¶ 45. Because Ryzner's only argument concerned *Sullivan*'s third prong, Osornio forfeited arguments arising from *Sullivan*'s first and second prongs. *See Townsend v. Massey*, 2011 WI App 160, ¶ 25, 338 Wis. 2d 114, 808 N.W.2d 155 ("[T]he forfeiture rule focuses on whether particular arguments have been preserved, not on whether general

issues were raised before the circuit court.").[5] Osornio has not acknowledged this forfeiture, let alone provided a reason to ignore it. *See id.* ¶ 27.

The trial court did not erroneously exercise its discretion at *Sullivan*'s third step in determining that the probative value of Ryzner's testimony was not substantially outweighed by the risk of unfair prejudice. Ryzner's testimony had strong probative value and little risk of causing unfair prejudice.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01; *see State v. Hurley*, 2015 WI 35, ¶ 77, 361 Wis. 2d 529, 861 N.W.2d 174. This definition generates two inquiries: (1) whether the evidence concerns a fact of consequence; and (2) whether the evidence affects the probability of that fact of consequence. *Id.*

Ryzner's testimony concerned two facts of consequence. To determine whether other acts evidence pertains to a fact of consequence, "the court must focus its attention on the pleadings and contested issues in the case." *State v. Payano*, 2009 WI 86, ¶ 69, 320 Wis. 2d 348, 768 N.W.2d 832. Ryzner's testimony bore directly on one of the two primary factual disputes of Osornio's trial—whether he sold heroin or

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[5] Arguments regarding *Sullivan*'s first and second steps would also fail. For the first step, it is well-established that "[o]ther-acts evidence is permissible to show the context of the crime and to provide a complete explanation of the case." *State v. Hunt*, 2003 WI 81, ¶ 58, 263 Wis. 2d 1,660 N.W.2d 771; *see also* Wis. JI–Criminal 275 n.11 (2018) (collecting cases). The second step is effectively covered by the State's discussion of the third step, which requires comparing the relevance of the other acts evidence to its risk of promoting unfair prejudice. *See Sullivan*, 216 Wis. 2d at 772–73.

marijuana to Jared in the Walgreens parking lot. This key factual dispute encompassed three of the four elements of the reckless homicide charge, which collectively required proof that Osornio sold heroin to Jared. (R. 127:97–99.) Evidence bearing on an element of an offense is consequential. *State v. Gutierrez*, 2020 WI 52, ¶ 33, 391 Wis. 2d 799,943 N.W.2d 870. Moreover, Osornio argued that he truthfully told the police that he sold Jared marijuana. (R. 127:127–28; 128:179.) Ryzner's testimony, thus, related to Osornio's credibility, which "is always 'consequential' within the meaning of Wis. Stat. § 904.01." *Marinez*, 331 Wis. 2d 568, ¶ 34 (citation omitted).

Ryzner's testimony had a strong tendency to affect the probability of those two facts of consequence. The capacity of other acts evidence to affect the probability of a consequential fact "lies in the similarity between the other act and the charged offense." *Sullivan*, 216 Wis. 2d at 786. "There is no precise point at which a prior act is considered too remote, and remoteness must be considered on a case-by-case basis." *Hunt*, 263 Wis. 2d 1, ¶ 64. Ryzner's other acts evidence was not remote at all. It concerned a sale of heroin, the exact conduct for which Osornio was charged. (R. 128:152–53.) Ryzner's drug transaction with Osornio occurred only five minutes before Jared bought drugs from Osornio and in the same Walgreens parking lot. (R. 128:152–53, 176–77.) Ryzner's transaction even came up in the text messages between Osornio and Jared. Osornio texted Jared that he had to "serve this chick" before Jared arrived at the Walgreens. (R. 128:171.) This close proximity in time and place gave Ryzner's testimony a strong tendency to make it more probable that Osornio actually sold heroin to Jared and that Osornio lied to police about selling marijuana to Jared.

In contrast with its high probative value, Ryzner's testimony posed little risk of unfair prejudice. Evidence causes *unfair* prejudice if it "has a tendency to influence 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." *Sullivan*, 216 Wis. 2d at 789–90. A limiting instruction mitigates the risk of unfair prejudice because jurors are presumed to follow such an instruction. *Marinez*, 331 Wis. 2d 568, ¶ 41. "Close cases should be resolved in favor of admission." *Id.* (citation omitted).

Ryzner's testimony had no potential to cause unfair prejudice. Her testimony was brief, comprising less than ten transcript pages in total. (R. 128:149–58.) She simply described her transaction with Osornio in the Walgreens parking lot and stated that she had only ever purchased heroin from him. (R. 128:151–53.) She did not comment on Osornio's character. Ryzner's brief and sterile testimony could not inspire the jury to base its verdict on improper considerations. That minimal risk was effectively nullified by the limiting instruction that Osornio wrote. (R. 127:102–03.)

Thus, because Ryzner's testimony was highly probative on two consequential facts and presented virtually no risk of unfair prejudice, the trial court did not erroneously exercise its discretion in admitting it. Osornio's arguments to the contrary lack merit.

He argues that the trial court failed to exercise its discretion because it did not support its evidentiary ruling with sufficient on-the-record reasoning. (Osornio's Br. 24–25.) The trial court's brevity, however, reflected Osornio's lack of opposition. As previously mentioned, Osornio argued only that Ryzner's testimony constituted improper propensity evidence, which implicates only step three of *Sullivan*. *Hill*, 413 Wis. 2d 572, ¶ 45. Thus, Osornio effectively conceded prongs one and two, relieving the trial court of the necessity to address them.

The trial court sufficiently addressed prong three. It knew from the State's argument that Ryzner's testimony was limited to a single drug transaction that was extremely close in time and place to Jared's transaction with Osornio. (R. 131:21–22.) It adequately addressed the risk of unfair prejudice by limiting Ryzner's testimony to a permissible purpose and directing Osornio to draft a limiting instruction. (R. 131:24.) The trial court did not need to belabor this relatively easy evidentiary ruling. In any event, the record provides ample support for the trial court's decision. Even if the trial court's reasoning was too circumspect, this Court should still affirm the court's ruling because it is consistent with an appropriate exercise of discretion. *See Hurley*, 361 Wis. 2d 529, ¶ 29.

Osornio argues that the Ryzner's testimony presented a substantial risk of unfair prejudice because the trial court asked whether Ryzner's testimony could provide an independent basis for the jury to find Osornio guilty of heroin delivery. (Osornio's Br. 29–30.) This contention is a non sequitur. The trial court asked this question in an attempt to resolve the multiplicity problem after the parties raised it in the middle of jury deliberations. (R. 127:150.) If the heroin delivery could be based on the Ryzner transaction, then the charges would not be multiplicitous because they would be distinct in fact.[6] The trial court's reasonable question in the face of a surprising multiplicity problem does not establish that Ryzner's testimony was unfairly prejudicial. It certainly does not demonstrate that the high probative value of

[6] The trial court stated that the parties never answered this question. (R. 171:1.) The jurors could not find Osornio guilty of heroin delivery for the sale to Ryzner because the limiting instruction specifically told them that Ryzner provided testimony about conduct "for which [Osornio] is not on trial." (R. 127:102.)

Ryzner's testimony was substantially outweighed by the risk of unfair prejudice.

Osornio also argues that Ryzner's testimony could not have been probative background or context evidence because his heroin sale to Ryzner was "a wholly separate offense" from his sale to Jared. (Osornio's Br. 26.) However, other acts evidence regarding background and context does not have to be directly tied to the alleged criminal conduct to be admissible. Other acts evidence "is admissible '[t]o complete the story of the crime on trial by proving *its immediate context of happenings near in time and place*.'" *State v. Pharr*, 115 Wis. 2d 334, 348, 340 N.W.2d 498 (1983) (alteration in original) (emphasis added) (citation omitted). Ryzner's drug transaction was obviously "near in time and place" with Jared's drug transaction since they both took place with Osornio in the same location only five minutes apart. *Id.* (citation omitted).

Accordingly, the trial court did not erroneously exercise its discretion by admitting Ryzner's testimony as other acts evidence regarding context and background.

D. Any error in admitting Ryzner's testimony was harmless.

If the trial court erroneously admitted Ryzner's testimony, the error was harmless. An error is harmless unless it "affected the substantial rights" of Osornio. Wis. Stat. § 805.18(2); *State v. Magett*, 355 Wis. 2d 617, ¶ 29, 850 N.W.2d 42 (2014). In practice, "the harmless error inquiry is whether it is beyond a reasonable doubt that the jury would have come to the same conclusion absent the error." *Id.*

The admission of Ryzner's testimony would be harmless because the evidence established beyond a reasonable doubt that Osornio sold heroin to Jared without it. The State had multiple, compelling sources of evidence independent of Ryzner that established that Osornio sold heroin to Jared.

Most prominently, the jury had DNA evidence that supported finding that Osornio sold heroin to Jared. The foil wrapper on the dresser next to Jared's bed had heroin residue. (R. 127:37, 39.) This foil had a three-person DNA mixture. Jared was the first contributor, accounting for 37 percent of the mixture. (R. 127:62.) The second contributor provided 57 percent of the mixture, and the third contributor provided a negligible amount. (R. 127:62.) It was one quadrillion times more likely that Osornio was the second contributor and an unknown individual was the third contributor than it was that two unknown individuals were the second and third contributors. (R. 127:63.) This massive statistical likelihood that Osornio contributed 57 percent of the DNA to the DNA mixture on the foil provided the jury powerful evidence with which to conclude that Osornio sold Jared heroin.

Osornio's text messages with Jared buttressed the reliable DNA evidence. Jared explicitly compared the high derived from the drugs sold by Osornio to "vics," which a detective explained was shorthand for Vicodin. (R. 128:169–70.) Vicodin is an opiate like heroin. (R. 128:170.) The jury could infer that Jared's specific comparison to an opiate made it more probable that Osornio sold heroin to Jared. Moreover, Osornio texted that he did not want Jared to get "to [*sic*] deep into it." (R. 128:169.) The investigating officer explained that he had never seen anyone express that kind of concern for the use of marijuana, but it was a reasonable concern for someone using heroin. (R. 128:180.) The jury could determine from this evidence that Osornio sold heroin, not marijuana, to Jared.

The jury also knew that there was no evidence that Jared had possessed or consumed marijuana prior to his death. The police found a foil wrapper with heroin residue, a rolled-up dollar bill with heroin residue, and a plastic credit card—all of which were consistent with Jared snorting heroin. (R. 127:36–40; 128:161–62.) He was constipated, which is a side effect of narcotics. (R. 127:20.) The police found no

evidence of marijuana or marijuana paraphernalia. (R. 128:109–14.) Osornio had no traces of THC in his body upon his death. (R. 127:30.) Thus, while the jury had substantial and concrete evidence that Osornio possessed and ingested heroin, it had no such evidence that Osornio possessed or ingested marijuana.

In sum, the jury had substantial evidence from which to find that Osornio sold heroin to Jared. It was a practical certainty that Osornio was the primary contributor of DNA to a three-person mixture on the foil wrapper bearing heroin residue on Jared's dresser. Osornio's messages with Jared were consistent with heroin trafficking, not marijuana. The evidence recovered from Jared's room and the results of the autopsy firmly established that Jared used heroin while providing no evidence that he even possessed marijuana. Considering this evidence collectively, any error in admitting Ryzner's testimony was harmless.

II. Osornio is not entitled to a new trial because the trial court did not provide the jury with the lesser included offense instruction before the jury began deliberations.

Osornio argues that he is entitled to a new trial because of the multiplicity issue at his trial. (Osornio's Br. 38.) Osornio acknowledges that he was not convicted of or sentenced on multiplicitous charges (Osornio's Br. 37), and that the trial court later provided the jury a modified version of the lesser included offense instruction, (Osornio's Br. 45–46.) Nevertheless, he contends that it was plain error, ineffective assistance, or a miscarriage of justice for the jury to have begun deliberations without receiving the lesser included offense instruction. (Osornio's Br. 39, 41–42, 46–47.)

All three claims fail because they rely on the same erroneous premise. Osornio claims that, had the jury received the lesser included offense instruction before beginning

deliberations, it would have acquitted him of the homicide offense at 3:45 p.m. when it informed the trial court that it had reached unanimous agreement on the heroin delivery charge but not the reckless homicide charge. (Osornio's Br. 35–38; *see* R. 127:140.) According to Osornio, the jury had exhausted all reasonable efforts to agree on the reckless homicide offense at that point, so it would have proceeded to consider and issue a verdict on only the heroin delivery offense. (Osornio's Br. 36.) Osornio's premise does not withstand scrutiny. Therefore, the three claims relying on that premise must be rejected.

A. The jury would not have acquitted Osornio of homicide after three hours of deliberation had it received the lesser included offense instruction prior to deliberations.

The crux of Osornio's argument turns on a section of the lesser included offense instruction entitled, "Make Every Reasonable Effort to Agree." Wis. JI–Criminal 112 (2000). Under that section, the trial court instructs the jury to "make every reasonable effort to agree unanimously on [the] verdict on the charge of (charged crime) before considering the offense of (lesser included crime)." Wis. JI–Criminal 112 (2000) (footnote omitted). The instruction then directs the jury on how to proceed if it cannot reach unanimous agreement on the greater crime: "[I]f 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 should consider whether the defendant is guilty of (lesser included crime)." Wis. JI–Criminal 112 (2000). As applied to Osornio's trial, the instruction would have directed the jury to "make every reasonable effort to agree unanimously" on the reckless homicide offense at Count 1. Wis. JI–Criminal 112 (2000). If the jury concluded that it could not reach unanimous agreement on Count 1, then it

would proceed to consider the heroin delivery offense at Count 2.

Osornio contends that the jury effectively communicated that it had not agreed unanimously on Count 1 but had reached a verdict on Count 2 through its 3:45 p.m. note. (Osornio's Br. 36; R. 83:2.) In that note, the jury wrote: "We have a conclusion on Count Two. We cannot come to an agreement on Count One. How should [sic] we proceed?" (R. 127:140; *see* R. 83:2.) Osornio theorizes that the jury would have simply submitted a verdict on Count 2, alone, at 3:45 p.m. had the jury received the lesser included offense instruction. (Osornio's Br. 36–37.)

Osornio errs, however, because he ignores the lesser included offense instruction's admonition for the jury to "make every reasonable effort to agree unanimously" on the greater offense, *i.e.*, the reckless homicide offense. Wis. JI–Criminal 112 (2000) (footnote omitted). Because the trial court did not provide the lesser included offense instruction, it did not provide that admonition, either. No other jury instruction provided the same direction. Rather, it was not until the trial court issued the *Allen* instruction—with the consent of both parties—that the jury was instructed to "make an honest effort to come to a conclusion on all of the issues." (R. 127:144.)

In light of this key directive, the trial court recognized that "it is equally plausible that the jury would not have reached a point of deadlock that would have permitted it to move on to the lesser included offense," (R. 171:2), had it received the instruction to "make every reasonable effort to agree unanimously," Wis. JI–Criminal 112 (2000) (footnote omitted). In fact, the remainder of the jury's deliberations confirm that it had not exhausted those efforts. After the *Allen* instruction, the jury deliberated for two-and-a-half hours before requesting at 6:10 p.m. to see the text messages between Jared and Osornio. (R. 83:3; 127:152.) The trial court

correctly surmised that this question signaled continued deliberations on the reckless homicide offense. (R. 127:156; 171:2.) At approximately 7:16 p.m., the trial court issued a modified lesser included offense instruction, formally instructing the jury to "make every reasonable effort to agree unanimously" on Count 1. (R. 127:159.) If the jury could not agree unanimously on Count 1, the instruction specifically allowed the jury to simply "sign [its] verdict on Count 2." (R. 127:159.) However, the jury did not immediately return a verdict on Count 2. Rather, it deliberated for another hour and then delivered its verdict on both Counts 1 and 2. (R. 127:160.)

In this light, the trial court correctly determined that "[t]here is no indication in the record that [the jurors] had exhausted all reasonable efforts to agree on the reckless homicide charge after deliberation of about three hours." (R. 171:2.) Had the jury truly exhausted its efforts to reach unanimity on Count 1 at 3:45 p.m., it would not have deliberated for over four more hours following the *Allen* instruction. At the very least, the jury would have promptly returned a verdict solely on Count 2 after receiving the modified lesser included offense instruction. Instead, the jury took each opportunity to continue deliberating. It follows that the jury would have continued deliberating at 3:45 p.m. rather than sending the trial court its question had it received the lesser included offense instruction before beginning deliberations.

Osornio also invests the jury's 3:45 p.m. note with meaning that it does not have. He uncritically reads the note as the jury's formal pronouncement that it could not agree on the reckless homicide by drug delivery offense. (Osornio's Br. 36.) For that reason, he contends that any error could not be harmless. (Osornio's Br. 46–47.) However, in light of the overlapping elements for heroin delivery and reckless

homicide by heroin delivery, Osornio's interpretation is unreasonable.

For the jury to find Osornio guilty of heroin delivery, it had to find that the evidence established beyond a reasonable doubt the following three elements:

> One, [Osornio] delivered a substance.
>
> . . . .
>
> Two, the substance was heroin. . . .
>
> Three, the defendant knew or believed that the substance was heroin.

(R. 127:98–99.) The homicide offense consisted of these three elements and just one additional element. (R. 127:97.) That fourth element required the jury to find that "[Jared] used the substances alleged to have been delivered by the defendant and died as a result of that use." (R. 127:97.)

Given the overlapping elements of the two charged offenses, the jury's 3:45 p.m. note does not invariably lead to the conclusion that the jury gave up on reaching unanimity on reckless homicide as Osornio contends. Rather, the note just as likely reveals that the jury had unanimously agreed that the State satisfied its burden on the first three elements of reckless homicide, recognized that these three findings compelled a verdict of guilty for heroin delivery, and disagreed about the fourth element.[7] This interpretation is not just possible but the most likely since the jury deliberated for more than four hours after the 3:45 p.m. note—including one hour after receiving the modified lesser-included offense instruction. (R. 127:160.) Accordingly, Osornio's assertion that the 3:45 p.m. note establishes that the jury was

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[7] As Osornio's trial counsel acknowledged at the *Machner* hearing, the jury could not have unanimously agreed to acquit on Count 2 without also unanimously agreeing to acquit on Count 1. (R. 164:24.)

hopelessly deadlocked on reckless homicide is unavailing. The note demonstrated only that the jury had yet reached a unanimous decision on the fourth element of reckless homicide, not that the jury was incapable of unanimously agreeing on that offense.

The jury's debate over the fourth element was consistent with the trial dispute over whether the heroin provided by Osornio caused Jared's death. Jared died from a combination of heroin and alcohol with a high blood alcohol content. (R. 127:18–19, 22.) Police found a bottle of vodka on the ground by his bed. (R. 128:113, 123.) The medical examiner recounted Jared's several comorbid conditions, which included internal damage from chronic alcoholism. (R. 127:20–22.) The medical examiner admitted on cross-examination that alcoholism could be lethal and that other individuals could have survived the dose of heroin that proved fatal to Jared. (R. 127:26, 28.) Relying on all of that evidence, Osornio argued in closing that even if the jury found that he gave Jared the heroin, the State had not proven that the heroin caused Jared's death. (R. 127:124–25.) It would not have been unreasonable for jurors to express differing opinions about the significance of this evidence, which would have led to disagreement on the fourth element of the reckless homicide offense.

In sum, if the jury had been instructed on heroin delivery as a lesser included offense before beginning deliberations, it would not have acquitted Osornio of reckless homicide at 3:45 p.m. To the contrary, it would have simply continued deliberating, just as it did after both the *Allen* instruction and the modified lesser included offense instruction. Those continued deliberations reflected reasonable uncertainty about one of the two primary factual disputes at trial—whether the heroin caused Jared's death. The jury's recognition that three of the four elements of reckless homicide by heroin delivery constituted all the

elements of heroin delivery was not equivalent to the jury declaring that it had no chance of reaching a unanimous verdict on reckless homicide.

B. Without his essential premise, all three of Osornio's theories of relief must fail.

Because Osornio cannot show that the jury would have issued a verdict solely on Count 2 at 3:45 p.m. had it received the lesser included offense instruction, all three of his claims depending on that premise must fail.

First, Osornio cannot show that the omission constituted plain error. (Osornio's Br. 39–40.) An error is "plain" only if it "is fundamental, obvious, and substantial." *State v. Jorgensen*, 2008 WI 60, ¶ 23, 310 Wis. 2d 138, 754 N.W.2d 77. Courts apply this doctrine "sparingly." *State v. Bell*, 2018 WI 28, ¶ 12, 380 Wis. 2d 616, 909 N.W.2d 750. The defendant bears the burden of showing that "the unobjected to error is fundamental, obvious, and substantial, [before] the burden then shifts to the State to show the error was harmless." *Jorgensen*, 310 Wis. 2d 138, ¶ 23.

The initial omission of the lesser included offense instruction was not fundamental, obvious, and substantial. As previously explained, it did not meaningfully alter the jury's deliberations. Had the jury received the instruction initially, it would have simply continued deliberating, which is what it did for several hours after receiving the *Allen* instruction. More fundamentally, the jury *did* receive the lesser included instruction eventually and opted to continue deliberating for one hour. (R. 127:159.) Because the trial court rectified the initial error before the jury completed deliberations, the error can hardly be fundamental, obvious, and substantial.

For the same reasons, any error was also harmless. Osornio brought the omission to the trial court's attention before the jury finished deliberating. (R. 127:149–51.) The

trial court ultimately read a modified version of the lesser included instruction, and the jury chose to deliberate for another hour. (R. 127:159.) Since the jury did eventually receive formal permission from the trial court to reach a verdict only on Count 2 and obviously declined the invitation, the error in not initially instructing the jury on the lesser included offense was harmless.

Second, Osornio cannot prove prejudice to support his claim of ineffective assistance. (Osornio's Br. 40–42.) To establish ineffective assistance, a defendant must prove both: (1) "that counsel's performance was deficient"; and (2) "that such performance prejudiced the defense." *State v. Roberson*, 2006 WI 80, ¶ 24, 292 Wis. 2d 280, 717 N.W.2d 111 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Failure on one prong dooms the entire claim. *State v. Savage*, 2020 WI 93, ¶ 25, 395 Wis. 2d 1, 951 N.W.2d 838. To prove prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Carter*, 2010 WI 40, ¶ 37, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting *Strickland*, 466 U.S. at 694).

The harmlessness of the error under the plain error standard precludes Osornio from prevailing under the ineffective assistance standard. The harmless error test is the same as *Strickland*'s prejudice test but with the burden imposed on the State. *State v. Harvey*, 2002 WI 93, ¶ 41, 254 Wis. 2d 442, 647 N.W.2d 189. Thus, since the State can prove that any error was harmless, Osornio cannot prove that the error prejudiced him under *Strickland*.

Third, the error does not entitle Osornio to a new trial in the interest of justice under Wis. Stat. § 752.35. (Osornio's Br. 43–47.) Under that statute, this Court may "reverse judgments 'where unobjected-to error results in either the real controversy not having been fully tried or for any reason justice is miscarried.'" *State v. Zdzieblowski*, 2014 WI App

130, ¶ 24, 359 Wis. 2d 102, 857 N.W.2d 622 (citation omitted). Discretionary reversal is a "formidable power" used "sparingly and with great caution." *State v. Wery*, 2007 WI App 169, ¶ 21, 304 Wis. 2d 355, 737 N.W.2d 66 (citation omitted). "In order to grant a discretionary reversal for a miscarriage of justice, there must be a substantial probability of a different result on retrial." *Id.*

Osornio cannot show that his case presents the rare situation in which the interest of justice requires reversal. Because the error was harmless and because Osornio cannot show a reasonable probability of a different result under *Strickland*, it necessarily follows that he cannot establish a "substantial probability of a different result on retrial." *Id*. Accordingly, Osornio has not shown that he is entitled to discretionary reversal.

CONCLUSION

This Court should affirm.

Dated: April 2, 2025

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
Assistant Attorney General
State Bar #1134356

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8910
conwaymj@doj.state.wi.us

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 8117 words.

Dated: April 2, 2025

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
Assistant Attorney General

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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated: April 2, 2025

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
Assistant Attorney General