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You are hereby notified that the Court has entered the following opinion and order:

2014AP271-CRNM State of Wisconsin v. Kevin S. Cobus (L.C. #2012CF331)

Before Curley, P.J., Kessler and Brennan, JJ.

Kevin S. Cobus appeals from a judgment of conviction, entered upon a jury's verdicts, on two counts of first-degree reckless homicide by delivery of a controlled substance, as party to a crime. Appellant counsel, Kevin M. Gaertner, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Cobus was advised of his right to file a response, but has not responded. Upon this court's independent review of

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On July 11, 2011, Jamie Hansen contacted Cobus and asked if he would go with Hansen's boyfriend to Milwaukee to obtain heroin. Cobus agreed, and picked up Hansen's boyfriend Kyle Obst at a gas station to complete the heroin purchase. Cobus called someone from whom he could purchase the drugs. Cobus obtained the drugs and gave them to Obst, who gave the drugs to Hansen. Cobus also provided Hansen with clean needles. Hansen died on July 12, 2011, from acute opiate intoxication.

On January 5, 2012, Cody Riggs contacted Cobus about going to Milwaukee to buy heroin. Riggs needed Cobus to call the dealer because Riggs had a new cell phone number and expected the dealer would not answer a number he did not recognize. Cobus agreed. He, Riggs, Riggs' brother Derek Langan, and a fourth man named Vincent Scrima went to Milwaukee. When they arrived at the purchase site, a runner brought the heroin to the car. Cobus distributed the bags. Cobus also provided Riggs with clean needles. Riggs died on January 6, 2012, from acute opiate intoxication.

Cobus gave statements to police, admitting he had helped his friends obtain heroin. He was arrested and charged with two counts of first-degree reckless homicide by delivery of a controlled substance as party to a crime. The matter was tried to a jury, which convicted Cobus on both counts. The circuit court sentenced him to two concurrent terms of twelve years' initial confinement and eight years' extended supervision.

Counsel identifies eight potential issues in the no-merit report, each of which he concludes lacks arguable merit. The first of these is whether the circuit court erred in denying a motion to suppress statements Cobus gave to police.[2]

Cobus was interviewed at his home on January 24, 2012, then again at the Waukesha County Sheriff's Department on January 26 and March 12, 2012. Although Cobus's motion sought to suppress all statements he gave to law enforcement, he acknowledged that the statements given at the sheriff's department, along with consent he gave to search his cell phone, were properly preceded by ***Miranda*** warnings,[3] and that he waived his rights before giving those statements and consent. That leaves only his challenge to the January 24 statement.

The State "may not use a defendant's statements stemming from custodial interrogation unless the defendant has been given the requisite [***Miranda***] warnings." ***State v. Morgan***, 2002 WI App 124, ¶10, 254 Wis. 2d 602, 648 N.W.2d 23. "Custodial interrogation generally means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way." ***State v. Fischer***, 2003 WI App 5, ¶23, 259 Wis. 2d 799, 656 N.W.2d 503.

Determining whether there was a custodial interrogation is the first step in assessing whether statements were obtained contrary to ***Miranda***, because ***Miranda*** warnings are only required for someone actually in custody. *See* ***Fischer***, 259 Wis. 2d 799, ¶23; ***Morgan***, 254

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[2] The discussion of this issue in the no-merit report is largely unhelpful as it contains no discussion of the relevant facts. It merely recites the standard of review and the trial court's ruling before concluding there is no meritorious issue.

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966).

Wis. 2d 602, ¶10. In determining whether someone was in custody, courts consider factors like the defendant's freedom to leave; the purpose, place and length of the interrogation; and the degree of restraint, which considers whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner of restraint, whether the subject is moved elsewhere, whether questioning took place in a police vehicle, and the number of officers involved. *See* ***Morgan***, 254 Wis. 2d 602, ¶12. "The relevant inquiry is how a reasonable person in the suspect's situation would understand the situation." ***Id.***, ¶10.

The trial court denied Cobus's motion to suppress because it concluded the January 24 interview was noncustodial. Cobus was interviewed at his home in the kitchen. Family members moved freely inside and outside the home during the interview. No weapons were drawn or physical restraints employed. The interview was "quite conversational," even though Cobus was aware of the reason for it. We defer to these factual findings, *see* ***id.***, ¶11, and agree that under the facts of this case, Cobus was not in custody. Therefore, ***Miranda*** warnings were not required and there is no arguable merit to a challenge to the denial of the motion to suppress.

The next issue counsel discusses is whether the trial court erred when it denied Cobus's motion to sever the homicide charges.[4] In his brief to the trial court, Cobus alleged the charges were not of sufficiently similar character and that the joinder would confuse the jury and likely prejudice Cobus.

Crimes may be joined for charging if they "are of the same or similar character." *See* WIS. STAT. § 971.12(1). "To be of the 'same or similar character' … crimes must be the same

[4] The discussion of this issue also fails to include any relevant facts.

type of offenses occurring over a relatively short period of time and the evidence as to each must overlap." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). The joinder statute is broadly construed in favor of an initial joinder of crimes. *See* ***State v. Linton***, 2010 WI App 129, ¶14, 329 Wis. 2d 687, 791 N.W.2d 222.

In the brief supporting the motion to sever, Cobus argued initial joinder was improper because the alleged offenses were six months apart, were committed in different jurisdictions,[5] involved different police investigators, had no common witness, and lacked the same *modus operandi*. The trial court, however, determined that the initial joinder was proper, involving crimes that were of "similar character" and part of a common scheme involving distribution of heroin by way of a ride to Milwaukee. The trial court also concluded some evidence overlapped and the events occurred over a relatively short period of time.

The record amply supports the trial court's determination. The incidents are clearly the same type of offenses as the resulting charge is identical as to each victim. *See* ***Hamm***, 146 Wis. 2d at 138. The evidence overlaps. *See* ***id.*** In both cases, the decedent contacted Cobus because of his ability to reach a heroin dealer and arrange a sale. In each case, Cobus went to Milwaukee with someone else driving. The transactions occurred on Concordia Avenue between Third and Seventh Streets. Cobus divided up the drugs, packaged in distinctive baggies, keeping a portion for himself as payment. Cobus also provided clean needles to Hansen and Riggs. Further, there is no *per se* rule for what constitutes a relatively short period. *See* ***id.*** at 139-40. Given the similarities between the two incidents, the six-month period between them is relatively

[5] Hansen died in Muskego and Riggs died in Delafield; both are within Waukesha County.

short. *Cf.* ***id.*** at 140 (where basic facts were "greatly similar" and overlapping evidence was substantial, fifteen-to-eighteen-month gap between offenses was relatively short).

"Even where joinder is proper, a defendant may move to sever the counts on the basis of prejudice." *See* ***Linton***, 329 Wis. 2d 687, ¶15; *see also* WIS. STAT. § 971.12(3). However, the defendant must establish substantial prejudice, and if the charges satisfy the criteria for initial joinder, a lack of prejudice is presumed. *See* ***Linton***, 329 Wis. 2d 687, ¶15. The trial court ruled that Cobus had not shown substantial prejudice would result. We agree with that conclusion and we conclude that the record offers no basis for a substantial-prejudice argument.[6] There is no arguable merit to a claim the trial court improperly denied the severance motion.

Counsel discusses whether a proper jury was selected. A single juror was excused for cause due to health issues. Both parties concurred with the dismissal. The record reveals no basis on which to challenge other jurors' selection or exclusion.

Counsel discusses whether there can be any challenge to the preliminary hearing or to the State's opening or closing arguments. He concludes that any challenge to the preliminary hearing is moot and that any challenge to the opening statement is waived. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991) ("[A] conviction resulting from a fair and errorless trial in effect cures any error in the preliminary hearing…. [A] defendant who claims error occurred at his preliminary hearing may only obtain relief before trial."); ***State v. Guzman***,

[6] Thus, there could be no arguable merit to a claim of ineffective assistance of trial counsel for a failure to adequately make such a showing.

2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717 (defendant must object and move for mistrial to preserve challenge to improper argument by State).

Counsel has not identified whether there were any issues that should have been raised but for his conclusions of mootness and waiver. A conclusion that issues have been waived is in the no-merit context, not necessarily the complete analysis of an issue. If there had been some error in the preliminary hearing or something objectionable in the State's arguments, those issues could have been reached through an ineffective-assistance claim or argument. *See* ***State ex. rel. Panama v. Hepp***, 2008 WI App 146, ¶27, 314 Wis. 2d 112, 758 N.W.2d 806. However, attorneys are not ineffective for failing to pursue meritless issues, *see* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987), and here we discern no basis for trial counsel to have pursued issues relating to the preliminary hearing or the State's arguments. We therefore agree with appellate counsel's ultimate conclusion that there are no arguably meritorious issues stemming from the preliminary hearing or from opening and closing statements.

Counsel next discusses whether there is any arguable merit to any claims that the circuit court erred in ruling on the myriad objections raised at trial. There are fifteen pages in the no-merit report where counsel has reproduced the transcript of various objections and, for each objection, provided a single-sentence summation (*e.g.*, "Here the State rephrased the question without any further objection." or "At this point [defense counsel] asked further questions without interruption."). The reproductions include rulings that were evidently *favorable* to Cobus (*e.g.*, "The defense's objections hearsay objection was sustained with no prejudicial effect."). These conclusory assessments are largely unhelpful and do not rise to the level of "identify[ing] anything in the record that might arguably support the appeal and discuss[ing] the reasons why each identified issue lacks merit." *See* WIS. STAT. RULE 809.32(1)(a).

In any event, evidentiary decisions are discretionary. *See* ***State v. Hammer***, 2000 WI 92, ¶43, 236 Wis. 2d 686, 613 N.W.2d 629. Based on our review of the record, we are satisfied that there is no arguably meritorious challenge to the circuit court's exercise of its discretion regarding objections to trial testimony.

Counsel discusses whether the circuit court properly denied Cobus's motion to dismiss at the close of the State's case, and reproduces six pages of the circuit court's decision, without any legal citations. "Át the close of the state's case … the defendant may move on the record for a dismissal." WIS. STAT. § 972.10(4). "A motion to dismiss is addressed to the proposition of whether the evidence taken most favorably to the prosecution is sufficient to support a finding of guilt beyond a reasonable doubt." ***Bere v. State***, 76 Wis. 2d 514, 523, 251 N.W.2d 814 (1977). The test for sufficiency of the evidence on a motion to dismiss is the same as the test on appeal. *See* ***State v. Duda***, 60 Wis. 2d 431, 439, 210 N.W.2d 763 (1973). Dismissal is not warranted unless the evidence, viewed most favorably to the State, is so lacking in probative value that no reasonable fact-finder could have found guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). As we will discuss below, the State presented sufficient evidence, so we are satisfied that the trial court properly denied the motion to dismiss.

Counsel discusses Cobus's waiver of his right to testify. The circuit court conducted a colloquy with Cobus. *See* ***State v. Weed***, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485. The colloquy reveals Cobus made a knowing, intelligent, and voluntary waiver of the right to testify.

Counsel did not discuss the sufficiency of the evidence to support the jury's verdicts. In reviewing the sufficiency of the evidence to support a conviction in circumstantial evidence cases, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found the requisite guilt. *See* ***Poellinger***, 153 Wis. 2d at 507. Therefore, if more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict. ***Id.*** at 506-07.

The jury is the sole arbiter of witness credibility. *See* ***id.*** at 506. We will substitute our judgment for the fact-finder's only if the fact-finder "relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

"First degree reckless homicide … is committed by one who causes the death of another human being by delivery of a controlled substance in violation of [WIS. STAT.] § 961.41 which another human being uses and dies as a result of that use." *See* WIS JI—CRIMINAL 1021 (footnote omitted); WIS. STAT. § 940.02(2). To prove Cobus committed this offense, the State had to show that he delivered a substance, that the substance was heroin, that Cobus knew or believed that the substance was heroin, and that the victims used the substances alleged to have been delivered by the defendant and died as a result of that use. *See* WIS JI—CRIMINAL 1021. It is not required that the defendant delivered the substance directly to the victim; if possession of the substance was transferred more than once before it was used by the victim, each person who transferred possession of that substance must have been a substantial factor in causing the death. *See* ***id.***

Cobus was charged as a party to a crime; the State contends that the defendant was concerned in the commission of the crime as a member of a conspiracy to commit that crime.

> A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime. A conspiracy is a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose. It is not necessary that the conspirators had any express or formal agreement, or that they had a meeting, or even that they all knew each other.

WIS JI—CRIMINAL 410 (footnote omitted).

There is no arguable merit to a challenge to the sufficiency of the evidence. There was evidence of Cobus's agreement to help Hansen and Riggs obtain heroin. Though Obst was the final deliverer of the heroin to Hansen, there was testimony that Cobus obtained the heroin from the dealer or the dealer's runner before giving it to Obst. Similarly, there was testimony that Cobus was responsible for dividing up the heroin in Riggs' car.[7] There was no dispute that the substance was, or that Cobus believed it to be, heroin.

There was some question raised by the defense about whether the heroin Cobus supplied was a "substantial factor" in either death. For Hansen, the medical examiner determined her death was consistent with a heroin overdose, but the absence of a particular heroin metabolite—because there was no urine sample to obtain from Hansen to test—meant she could not confirm

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[7] Trial counsel attempted to highlight the fact that others in what might be called the supply chain had not been charged in Hansen's or Riggs' death. While that might present an interesting policy discussion, it is irrelevant to Cobus's convictions.

Hansen had used heroin. However, there was adequate circumstantial evidence for the conviction. Aside from Obst's testimony, Hansen's stepfather discovered a used syringe next to her body, and police recovered empty heroin packets that matched the style Obst said they had gotten from Cobus's dealer.

With Riggs, the toxicology report confirmed heroin by presence of 6-monoacetylmorphine. But Riggs also tested positive for alprazolam (Xanax) and Oxycodone, both of which are central nervous system depressants like heroin. The alprazolam, however, was in an amount consistent with therapeutic, not fatal, levels. Further, the heroin did not have to be the only cause of death, just a substantial cause, and Riggs' morphine[8] level was more than twice the fatal level. There is no arguable merit to a challenge to the sufficiency of the evidence supporting the jury's verdicts.

The final issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7,

[8] Heroin breaks down into morphine rather quickly, so the toxicology tests look for morphine and other heroin metabolites, not heroin itself.

294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court noted several mitigating factors, like Cobus's lack of a prior record and his cooperation with the author of a presentence investigation report. However, the circuit court noted, any case involving a homicide is grave, and in this case, clearly nothing resonated with Cobus after Hansen's death that might have prevented Riggs' death. The circuit court observed that Cobus did not seem to fully understand or accept his role in these deaths, and it noted a strong need to protect the public. In its entirety, the circuit court's sentencing comments reflect consideration of appropriate factors and a proper exercise of discretion in setting the sentence length.

The circuit court ordered Cobus to pay $14,347.53 in restitution for funeral expenses. It left a period of time for Cobus to object after counsel reviewed the requests, but no objection was filed. Our review of the record satisfies us, however, that the award was proper.

The circuit court also required Cobus to pay the DNA surcharge with no explanation as to why. However, as Cobus had no prior record and, thus, had never provided a DNA sample or paid the surcharge, the record supports imposition of the surcharge. *See* ***State v. Ziller***, 2011 WI App 164, ¶¶10-11, 338 Wis. 2d 151, 807 N.W.2d 241.

Our independent review of the record reveals no other potential issues of arguable merit.[9]

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kevin M. Gaertner is relieved of further representation of Cobus in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[9] The circuit court determined Cobus was statutorily ineligible for the substance abuse and challenge incarceration programs. This determination was correct, but we note that the judgment of conviction does not indicate Cobus's ineligibility—both lines are blank, with neither eligibility box marked for either program. The Department of Corrections may default to "ineligible" if no box is marked, so it is not clear to us whether an amended judgment of conviction should be entered. Therefore, we do not order any correction at this time, we merely point out the omission.