COURT OF APPEALS DECISION DATED AND FILED

JUNE 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals of Wisconsin

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No. 97-0974-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PETER G. TKACZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: ALLAN J. DEEHR, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Brown and Anderson, JJ.

ANDERSON, J. Peter G. Tkacz appeals from a judgment of conviction for party to the crime of first-degree reckless homicide by delivery of heroin in violation of §§ 940.02(2)(a), 939.05 and 161.14(3)(k), STATS., 1993-94; conspiracy to deliver heroin as a repeater contrary to §§ 161.14(3)(k), 161.41(1)(d)1, 161.41(1x) and 161.48, STATS., 1993-94; and an order denying his

motion for postconviction relief. We address the following issues Tkacz raises on appeal: (1) the convictions for both charges constitute double jeopardy; (2) he should have been permitted to explore through cross-examination any potential bargain between the State and one of its primary witnesses; (3) the trial court improperly excluded evidence of the probationary status of a State's witness; and (4) there was insufficient evidence to support a conviction for count one—party to the crime of first-degree reckless homicide by delivery of heroin.

We first conclude that the trial court properly limited cross-examination of the probationary status of a State's witness. However, we do agree that Tkacz's conviction for conspiracy to deliver heroin constitutes a lesser included offense of the conviction of party to the crime of first-degree reckless homicide by delivery of heroin and that the State's failure to disclose the plea agreement with its primary witness was not harmless error. Tkacz has also challenged his conviction on the homicide count based on the sufficiency of the evidence. Having reviewed the evidence as mandated by ***State v. Ivy***, 119 Wis.2d 591, 608-10, 350 N.W.2d 622, 631-32 (1984) (although reversal and a new trial were warranted because of an error in the jury instructions, court of appeals is still required to consider the merits of a sufficiency of the evidence challenge to the conviction), we conclude that there was sufficient evidence that a jury, acting reasonably, could be convinced of Tkacz's guilt. In sum, we dismiss the delivery conviction, and we reverse and vacate the homicide conviction based on the

State's failure to fully disclose the terms of a primary witness's plea agreement and remand for a new trial.[1]

In 1995, Tkacz, along with Jill Kunish-Wolff, was charged with one count of party to the crime of unlawfully causing the death of Laurie Karlin by the delivery of heroin, one count of unlawfully conspiring to deliver heroin, as a repeater, and one count of unlawfully conspiring to deliver cocaine, as a repeater.[2] At the preliminary examination, the trial court bound Tkacz over for counts one and two and dismissed count three. At the arraignment, Tkacz pled not guilty.

After a five-day trial, the jury returned a verdict of guilty on both counts. Tkacz was sentenced to prison for twenty years on count one and fifteen years on count two, consecutive, with 199 days of sentence credit; his operating privileges were suspended for six months; and a $140 mandatory surcharge was imposed. Tkacz filed a motion for postconviction relief which was denied. Tkacz appeals. Additional facts will be included within the discussion as necessary.

[1] Tkacz raises several additional arguments. Because we conclude that the conviction of conspiracy to deliver heroin is a lesser-included offense of the conviction of first-degree reckless homicide by delivery of heroin, it is not necessary to discuss Tkacz's assertions that his right to a unanimous jury verdict was violated or that the jury was permitted to find him guilty on an illegal conspiracy theory. And because we dismiss the delivery conviction and reverse the homicide conviction and order a new trial, we need not decide Tkacz's motion for a new trial based on his contention that he was required to have a joint trial with separate juries for he and codefendant Jill Kunish-Wolff. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (if a decision on one point disposes of an appeal, we will not decide other issues raised).

[2] Codefendant Kunish-Wolff, whom Tkacz lived with during the time in question, was charged separately; however, the two were tried together and both were found guilty. In a separate appeal, No. 97-0979-CR, Kunish-Wolff has sought review of her conviction as well.

DISCUSSION

Double Jeopardy

Tkacz first argues that his convictions for the two offenses constitute a double jeopardy violation—delivery of heroin is a lesser included offense of first-degree reckless homicide by delivery of heroin.[3] Tkacz does not question the validity of a prosecution for a drug offense which was not the basis for the reckless homicide conviction; however, he maintains that "this is not how the prosecutor chose to proceed." He insists that the time frame of the delivery charge, October through December 1993, includes the date of the alleged homicide and proof of the delivery count could have been the basis for satisfying the delivery element of the reckless homicide charge. We agree.

"The double jeopardy clause embodies three protections: 'protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense.'" ***State v. Lechner***, No. 96-

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[3] The State argues that Tkacz waived this claim by failing to raise it prior to the conclusion of trial. Tkacz cites to ***State v. Riley***, 166 Wis.2d 299, 302 n.3, 479 N.W.2d 234, 235 (Ct. App. 1991), in which the court held that a double jeopardy claim was not subject to waiver for the failure to raise it in the trial court. Tkacz's reliance on ***Riley*** is misplaced. The ***Riley*** holding relies on cases determining that a guilty plea does not waive a double jeopardy claim, *see* ***Menna v. New York***, 423 U.S. 61, 62, 63 n.2 (1975), and is therefore limited to cases in which the defendant enters a guilty plea and still seeks to raise double jeopardy on appeal. *See also* ***State v. Hartnek***, 146 Wis.2d 188, 192 n.2, 430 N.W.2d 361, 362 (Ct. App. 1988) (a plea of no contest does not waive the right to challenge on multiplicity grounds). Thus, where a defendant proceeds to trial, competing interests require that a multiplicity claim be raised before the conclusion of trial.

Recognizing that it is incumbent upon a defendant to raise a multiplicity claim before the end of trial so that the prosecution has an opportunity to develop those facts supporting multiple charges, *see* ***State v. Wolverton***, 193 Wis.2d 234, 255, 533 N.W.2d 167, 174 (1995), we nonetheless decline to apply waiver in this instance. We may address an issue subject to waiver in the interest of judicial economy, such as to avoid a later claim of ineffective assistance of counsel. *See* ***State v. Harrell***, 182 Wis.2d 408, 417 & n.5, 513 N.W.2d 676, 679 (Ct. App. 1994). We do so here.

2830-CR, slip op. at 7 (Wis. Apr. 30, 1998) (quoted source omitted). This case involves the third protection. Whether a defendant's convictions violate his or her double jeopardy rights involves a question of law which this court reviews de novo. *See* ***id.*** at 6.

"A defendant may be charged and convicted of multiple counts or crimes arising out of one criminal act only if the legislature intends it." ***Id.*** at 8. Wisconsin courts apply a two-part test to determine whether the legislature intended that multiple punishments be imposed on one defendant for the same offense arising from a single course of conduct. *See* ***id.*** We must consider: "(1) whether each offense is identical in law and in fact; and (2) whether the legislature intended to allow multiple convictions for the offenses charged." ***Id.*** at 8-9 (footnote omitted).

Thus, we must first determine whether the offenses of party to the crime of first-degree reckless homicide by delivery of heroin and conspiracy to deliver heroin are the same offense or are different in either fact or law. *See* ***id.*** at 10. Generally, one may be convicted of more than one offense where each offense is based upon different conduct or, if based on the same conduct, each offense requires proof of a fact not required by the other. *See* ***State v. Stevens***, 123 Wis.2d 303, 321, 367 N.W.2d 788, 797 (1985). For offenses to be the same within the meaning of the double jeopardy clause, they must comprise the same act and crime. *See* ***id.***

In determining whether the offenses are identical in law, we must decide whether the criminal statutes define one offense as a lesser included offense of the other. *See* ***id.*** Wisconsin employs the "elements-only" test set forth in ***Blockburger v. United States***, 284 U.S. 299, 304 (1932), to make this

determination. *See* ***Lechner***, slip op. at 11. An offense is a lesser included one only if all of its statutory elements can be demonstrated without proof of any fact or element except those proved for the greater offense. *See* ***id.***

Applying the "elements-only" test of ***Blockburger*** to the offenses involved in this case, we conclude that conspiracy to deliver heroin is a lesser included offense of party to the crime of first-degree reckless homicide by delivery of heroin. The elements of conspiracy to deliver heroin are: (1) the defendant delivered (or conspired with another to deliver) a substance, (2) the substance was heroin, and (3) the defendant knew or believed the substance was heroin. *See* WIS J I—CRIMINAL 6020. Similarly, the elements of party to the crime of first-degree reckless homicide by delivery of heroin are: (1) the defendant delivered or aided and abetted the delivery of a controlled substance, (2) the controlled substance was heroin, (3) the defendant knew or believed the substance was heroin, and (4) the recipient victim used the heroin and died as a result of that use. *See* WIS J I—CRIMINAL 1021.

A comparison of the elements reveals that the two offenses contain the same elements. In order to prove the offense of party to the crime of first-degree reckless homicide by delivery of heroin, the State had to prove all of the elements of conspiracy to deliver heroin. Likewise, the delivery charge did not require any proof beyond that which is required for the first-degree reckless homicide charge. "Because a lesser included offense requires no proof beyond that which is required for conviction of the greater offense, '[t]he greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included in it.'" ***Stevens***, 123 Wis.2d at 321-22, 367 N.W.2d at 797 (quoting ***Brown v. Ohio***, 432 U.S. 161, 168 (1977)). Under the elements-only test,

conspiracy to deliver heroin is a lesser included offense of party to the crime of first-degree reckless homicide. The two crimes are the same in law.

As charged in the complaint, the two crimes are also the same in fact. "Under Wisconsin law, offenses which are the same in law are different in fact if those offenses are either separated in time or are significantly different in nature." ***Id.*** at 322, 367 N.W.2d at 798. "'Crimes are different when the evidence necessary to establish one differs from that required to establish the other.'" ***State v. Eisch***, 96 Wis.2d 25, 34, 291 N.W.2d 800, 804 (1980) (quoted source omitted).

The problem in this case is the manner in which the State chose to charge the conspiracy to deliver heroin count. The State generally alleged that the delivery took place between October and December 1993, but did not specify the individual or individuals who allegedly received the heroin or specifically when the alleged delivery took place. Karlin died on December 27, 1993. By virtue of the indefinite delivery allegations of the State, a reasonable conclusion is that the delivery of heroin to Karlin which ultimately caused her death was also the conduct the State believed constituted the conspiracy to deliver heroin count.

Our analysis would be different if the two counts had been different in fact—if the delivery count had not encompassed the date of Karlin's death or the delivery had been to other individuals. *Cf.* ***Stevens***, 123 Wis.2d at 323, 367 N.W.2d at 798. (The offenses were not the same in fact because they were separated by a significant period of time—the intent to deliver charge related to the possession of drugs on December 29th, whereas the simple possession charges stemmed from the defendant's continued possession of drugs on December 30th after his possession of the larger quantity of drugs had been terminated by police confiscation.) However, it appears that the conspiracy to deliver charge stems

from the fatal delivery to Karlin on December 27, 1993. The two offenses are the same in fact; therefore, Tkacz's conviction for the two offenses violated the double jeopardy clause.

That Tkacz is charged as a party to the crime in the greater count and as a conspirator in the lesser count is of no consequence to our analysis. The manner of Tkacz's participation in the two counts is not an essential element of either count. *See* ***Holland v. State***, 91 Wis.2d 134, 140, 143-44, 280 N.W.2d 288, 291, 292-93 (1979) (the basis of the offense is participation and the elements of the crime are the same regardless of the manner of participation). Therefore, we dismiss Tkacz's conviction for conspiracy to deliver heroin in violation of §§ 161.14(3)(k), 161.41(1)(d)1, 161.41(1x) and 161.48, STATS., 1993-94.

Sufficiency of the Evidence

Even though we have concluded that Tkacz's delivery conviction must be dismissed, he raises several questions on the homicide conviction as well. Tkacz first claims that there was insufficient evidence on the homicide charge. Although this court is to decide cases on the narrowest possible ground, if we conclude that a new trial is required, double jeopardy considerations require us to review Tkacz's claim that his conviction was not supported by sufficient evidence. *See* ***State v. Rushing***, 197 Wis.2d 631, 641, 541 N.W.2d 155, 159 (Ct. App. 1995) (citing to ***Ivy***, 119 Wis.2d at 609-10, 350 N.W.2d at 631-32). We therefore address Tkacz's claim that there is insufficient evidence to support his conviction.

Tkacz was charged with party to the crime of first-degree reckless homicide by delivery of heroin in violation of § 940.02(2)(a), STATS., 1993-94.[4] The essential elements are: (1) the defendant delivered or aided and abetted the delivery of a controlled substance, (2) the controlled substance was heroin, (3) the defendant knew or believed that the substance was heroin, and (4) the recipient, Karlin, used the heroin and died as a result of that use. *See* WIS J I—CRIMINAL 1021. The aider and abettor need not be present at the crime scene. *See* ***Roehl v. State***, 77 Wis.2d 398, 407-08, 253 N.W.2d 210, 214 (1977).

"The burden of proof in a criminal case is on the State to prove every essential element of the crime charged beyond a reasonable doubt." ***Rushing***, 197 Wis.2d at 641, 541 N.W.2d at 159. The standard of review for a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See* ***id.*** In order for this court to reverse, the evidence must be in conflict with "'fully established or conceded facts.'" *See* ***id.*** at 641-42, 541 N.W.2d at 159 (quoted source omitted). "These principles are the same regardless of the extent to which the conviction rests on circumstantial evidence." *See* ***id.*** at 642, 541 N.W.2d at 159.

Tkacz concedes that the State's theory is sound—because Tkacz was involved in purchasing the heroin codefendant Kunish-Wolff gave to Karlin, he is guilty of causing Karlin's death. Nevertheless, Tkacz insists that the evidence is

[4] Section 940.02(2)(a), STATS., 1993-94, prohibits causing death by manufacturing or delivering a controlled substance that another person uses and then dies as a result of that use. The law has been coined the "Len Bias Law." *See* WIS J I—CRIMINAL 1021 n.1.

insufficient to prove that Karlin obtained the heroin from Kunish-Wolff or Tkacz. We disagree.

The evidence suggests that Karlin did not have or use heroin before she arrived at Kunish-Wolff and Tkacz's apartment. Jody Kunish, a close friend of Karlin, explained that she and Karlin were out drinking from approximately 6:30 to 8:45 p.m. on December 27, 1993. She noted that Karlin had six or seven doubles of "7 and 7." Karlin dropped Jody off at her home and stated that she was going to stop by Kunish-Wolff and Tkacz's apartment to see if they had anything to help her sleep. Jody was emphatic that Karlin had not taken any drugs such as heroin before or while they were together because she knows how Karlin reacts to such drugs—"[she's] seen it before."

The evidence that Tkacz (through Kunish-Wolff) was the supplier, or aided and abetted the supplying of heroin, included the testimony of James Brown, who allegedly supplied heroin to Kunish-Wolff and Tkacz. He testified that the two often came to buy drugs together, but that Tkacz always went with Brown to purchase the drugs. Brown recalled that Karlin had been to his house three times, twice with Kunish-Wolff and Tkacz, and that he never sold heroin directly to her, but that she may have used heroin he sold to others. Brown also testified that on December 27, 1993, Tkacz came to Milwaukee and bought four bags of brown heroin and eighteen bags of white heroin. Brown "distinctly recall[ed] asking him why was he getting so much dope, and [Tkacz] told [Brown] he had to sell it to pay his rent." Brown received one bag each of brown and white heroin as payment and Tkacz used some of the brown heroin before returning to Manitowoc with the rest.

In addition, there was evidence that Kunish-Wolff and Tkacz had supplied heroin to others. Rose Krist testified that on December 25, 1993, she asked Kunish-Wolff and Tkacz to buy her a ten-dollar bag of heroin from Milwaukee. They arranged to drop it off later that evening. Krist stated that Kunish-Wolff and Tkacz delivered the heroin as promised and that Tkacz injected the heroin for her. Krist, a longtime user, also explained how the injection affected her and why she believed it was in fact heroin. We conclude that there was sufficient evidence for the jury to conclude that Tkacz was the supplier, or aided and abetted the supplying, of heroin to Karlin.

Tkacz also maintains that there was inadequate evidence to prove that Karlin died from an overdose of heroin. The evidence suggests otherwise. Again, the evidence included testimony that Karlin had not used heroin while out drinking; that Tkacz had purchased a large quantity of heroin on December 27 and that numerous tins of heroin likely remained in his possession; and that Tkacz was willing to inject others with heroin as he had injected Krist days before Karlin's death.

Additional evidence supports a heroin overdose. Kunish-Wolff reported to the police that Karlin was drunk when she arrived at her apartment. The physical condition and appearance of Karlin's body as related by medical personnel and officers at the scene were, according to the medical experts, consistent with an overdose of heroin. The medical examiner found that death was caused by a mixed drug overdose, predominantly morphine, with alcohol as a substantial contributing factor. Medical tests found concentrations of both morphine and alcohol in Karlin's blood. The medical evidence disclosed that the morphine substance could result from the metabolism of heroin and that alcohol increases the impact of heroin and in many cases is fatal. Additional medical

testimony was that Karlin manifested physical symptoms which were consistent with a heroin overdose. The testimony revealed that Karlin was admitted with adult respiratory distress syndrome which only occurs with intravenous narcotics—"classic for IV heroin use." There was sufficient evidence for a reasonable jury to conclude that Karlin died from an overdose of heroin.

It is not significant that neither a syringe with heroin residue was located nor that the syringes that were found contained traces of a drug not found in Karlin's blood. Tkacz is not charged with administering the fatal dose of heroin; rather, he is charged with aiding and abetting the delivery of heroin that resulted in death. The aider and abettor need not be present at the crime scene. *See* ***Roehl***, 77 Wis.2d at 407-08, 253 N.W.2d at 214.

Moreover, "'when the question of the sufficiency of the evidence is presented on appeal in a criminal case the only question for this court is whether the evidence adduced, believed and rationally considered by the jury, was sufficient to prove the defendant['s] guilt beyond a reasonable doubt.'" ***Smith v. State***, 69 Wis.2d 297, 305-06, 230 N.W.2d 858, 863 (1975) (quoted source omitted). "'The test is not whether this court is convinced of the [defendant's] guilt … but whether this court can conclude the trier of facts could, acting reasonably, be convinced to the required degree of certitude by the evidence which it had a right to believe and accept as true.'" ***Id.*** at 306, 230 N.W.2d at 863 (quoted source omitted). We conclude that the test has been satisfied in this case and that the jury, acting reasonably, could be convinced of Tkacz's guilt of party to the crime of first-degree reckless homicide by delivery of heroin.

Evidentiary Issues

Tkacz next raises two evidentiary issues relating to two State witnesses: the State's failure to fully disclose Brown's plea agreement and the trial court precluding inquiry into Krist's probationary status. The question of the admissibility of evidence lies within the sound discretion of the trial court. *See* ***State v. Pepin***, 110 Wis.2d 431, 435, 328 N.W.2d 898, 900 (Ct. App. 1982). When we review a discretionary decision, we examine the record to determine if the trial court logically interpreted the facts and applied the proper legal standard. *See* ***State v. Rogers***, 196 Wis.2d 817, 829, 539 N.W.2d 897, 902 (Ct. App. 1995). We will address each issue in turn.

Rose Krist

Tkacz disputes the limited questioning as to Krist's probationary status. At trial, Krist testified that she bought heroin from Tkacz and Kunish-Wolff two days before Karlin's overdose. She admitted that when she initially spoke with the police detectives she did not discuss the sale; however, in a later interview she implicated both Tkacz and Kunish-Wolff in the drug sale. On cross-examination, defense counsel revealed that in between Krist's two interviews she was placed on probation. At that point, the State objected on relevancy grounds, and arguments were made outside the presence of the jury. The trial court rejected defense counsel's arguments of bias and impeachment concluding that an inquiry into the number of convictions, if any, was allowed, but that an inquiry relating to probationary status was impermissible.

The scope of cross-examination for impeachment purposes is within the sound discretion of the trial court. *See* ***State v. McCall***, 202 Wis.2d 29, 35,

549 N.W.2d 418, 420 (1996). We must defer to the trial court's determination if a reasonable basis exists for it. *See **id.*** at 36, 549 N.W.2d at 421. It is the duty of the trial court to "curtail any undue prejudice by limiting cross-examination, including the exclusion of bias evidence which would divert the trial to extraneous matters or confuse the jury by placing undue emphasis on collateral issues." ***Id.*** at 41-42, 549 N.W.2d at 423. Even the constitutional right to confront witnesses is not absolute and does not restrict the trial court's latitude to impose reasonable limits on cross-examination based on concerns about prejudice, confusion or relevancy. *See **id.*** at 43-44, 549 N.W.2d at 424.

At the postconviction hearing, the trial court explained that Krist's probation had expired prior to trial and that there were no ramifications for her in testifying one way or another or in refusing to testify because her discharge had occurred. It noted that the statements she gave to the officers were not inconsistent with her testimony and the statements would not be used in the trial. The court also disagreed that her probationary status constituted other crimes evidence which could be used to establish intent, motive or identity. The court pointed out that it never foreclosed questions about Krist's failure to be forthcoming about the drug sale. It found that Krist's probationary status was collateral and to explore it further would cause undue delay.

We agree; there was ample impeachment evidence and further questioning about Krist's probationary status would have been cumulative. Krist indicated that she had five prior convictions, a history of drug use, and she admitted to lying to her husband and daughter about her purchase and use of heroin on Christmas day. Discrepancies with her prior testimony were explored on cross-examination. Krist also denied receiving threats from the police if she

failed to cooperate with them. We conclude that the trial court properly exercised its discretion in limiting the cross-examination of Krist.

James Brown

Tkacz also questions the State's failure to fully disclose the terms of Brown's plea agreement. He first raised the question during the trial. The prosecutor stated that: "James Brown entered his plea to some charges and we told him we'd read in everything else, and we have made no additional assurances in terms of his testimony here. At this point—actually he's a writted witness because his cases are closed." The prosecutor explained that Brown pled to three felonies, and numerous potential charges involving drug transactions with a list of potential codefendants were read in. Brown was also told that if there were other defendants he would be called back to testify. The prosecutor also agreed to provide Brown with the transcript of his preliminary hearing when Tkacz's trial was over.

During Brown's testimony, Tkacz's counsel asked if he was getting anything in return for his testimony and Brown responded "no." Brown discussed his prison sentence, probation, parole eligibility and mandatory release dates, and he acknowledged that certain charges of delivery were dropped in exchange for his guilty plea in Manitowoc county. Brown stated he was told by his attorney that a second-degree reckless homicide charge was not issued because he pled guilty to the drug charges. Brown conceded that his testimony might serve him well with parole authorities, and he indicated that the prosecutor promised to provide him with a copy of his preliminary hearing transcript for his testimony. After both parties rested and out of the presence of the jury, the trial court marked and received, on its own motion, Exhibit 10, the minutes of Brown's plea hearing

which generally outlined the terms of the plea agreement.[5] The exhibit was not explained to the jury.

At the postconviction motion hearing, the trial court disagreed with Tkacz that Brown gave false testimony relating to his plea agreement or that the State had an obligation to correct any of the testimony given by Brown, with one exception. The court believed the State should have corrected Brown's statement that he "[wasn't] allowed any read-ins or anything." However, "once the Court recognized that Mr. Brown had testified falsely, the Court interjected itself and … did introduce Exhibit No. 10." The court concluded that "in light of the State's failure to disclose more … than just the fact that there had been a plea that had been entered into, I don't see any reasonable probability that the result of the trial in the case of either defendant would have been any different."

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[5] At Brown's plea hearing, his trial counsel reiterated his understanding of Brown's plea agreement:

> It's my understanding that in exchange for the plea on 94-CF-131 and 94-CF-205, that the State will be moving to dismiss 94-CF-91. That the State will also be in agreement not to prosecute Mr. Brown in any matter related to the death of Lori Karlin, or any matter related to delivery of conspiracy of heroin or illegal substances in Milwaukee County, specifically with the [45] names that were set forth, but in addition any things we're not aware of related to illegal substances in Milwaukee County.
>
> A joint recommendation on the sentences as were set forth, that being a 10 year prison sentence on 94-CF-131, to run concurrent with the four year prison sentence he received in the Milwaukee County charges, which have been brought to the Court's attention. 94-CF-205 would be a joint recommendation of a two 10 year consecutive sentences to 94-CF-131, but that those will run concurrent to his outstanding imposed and stayed sentences in the Milwaukee County case.
>
> Mr. Brown will also be providing and agrees to testify in matters related to these conspiracies for the Manitowoc District Attorney's Office, and to give truthful and accurate testimony therein, and also to testify in the present John Doe proceedings.

Brown affirmed this understanding of the agreement.

On appeal, Tkacz insists his "rights were denied by the failure to expose the prosecution's bargain to obtain the testimony of a crucial witness." Tkacz argues that: (1) the prosecutor failed to disclose the terms of the agreement and failed to correct false testimony of a government witness, (2) the trial court stymied the defense's efforts to learn whether Brown was receiving a benefit for his testimony and it curtailed cross-examination of Brown, and (3) defense counsel was ineffective for failing to examine Brown's file or Exhibit 10.

It is undisputed that both Tkacz and Kunish-Wolff made demands for discovery from the prosecution. Section 971.23(1) and (7), STATS.,[6] imposes a continuing duty on the prosecution to disclose exculpatory evidence after the request is made. *See also* ***State v. Ruiz***, 118 Wis.2d 177, 196-97, 347 N.W.2d 352, 361 (1984). There is only one way for a prosecutor to respond to a request

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[6] Section 971.23, STATS., provides in relevant part:

> (1) WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall … disclose to the defendant or his or her attorney … all of the following materials and information … [in] control of the state:
>
> ….
>
> (e) Any relevant written or recorded statements of a witness … that the district attorney intends to offer in evidence at trial.
>
> ….
>
> (h) Any exculpatory evidence.
>
> ….
>
> (7) CONTINUING DUTY TO DISCLOSE. If, subsequent to compliance with a requirement of this section, and prior to or during trial, a party discovers additional material … the party shall promptly notify the other party ….
>
> (7m) SANCTIONS FOR FAILURE TO COMPLY. (a) The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance.

for exculpatory evidence such as the terms of a plea agreement of a State's witness—full and complete disclosure. *See* ***id.*** We conclude that the prosecutor's failure to fully disclose the terms of the plea agreement reached with Brown in this case constitutes error. *See* ***id.***; *see also* ***State v. Nerison***, 136 Wis.2d 37, 46, 401 N.W.2d 1, 5 (1987).

The sanction for a party's failure to comply with the disclosure statute includes exclusion of the witness or evidence; the court may grant the opposing party a recess or a continuance; or the court may advise the jury of any failure or refusal to disclose material or information required to be disclosed or of any untimely disclosure of material or information required to be disclosed. *See* § 971.23(7m), STATS. Here, the trial court did none of the above. Instead, the court instructed Tkacz's counsel to conduct a search of Brown's record himself. Not only did the trial court ignore the fundamental duty of the prosecutor to provide this information, *see* § 971.23(1)(h) and (7), but it improperly placed the burden on the defense to search the records for exculpatory evidence, *see* ***State v. Randall***, 197 Wis.2d 29, 37, 539 N.W.2d 708, 712 (Ct. App. 1995). We conclude that the trial court committed error when it failed to order the prosecutor to respond to Tkacz's request for exculpatory evidence.

The State nevertheless maintains that these errors were harmless. Our review of a claimed discovery violation under § 971.23, STATS., is subject to a harmless error analysis. *See* ***State v. Koopmans***, 202 Wis.2d 385, 396, 550 N.W.2d 715, 720 (Ct. App. 1996), *aff'd,* 210 Wis.2d 671, 563 N.W.2d 528 (1997). The supreme court recently restated the test for harmless error:

> The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. The conviction must be reversed unless the court is certain the error did not influence the jury.

> The burden of proving no prejudice is on the beneficiary of the error, here the State. The State must establish that there is no reasonable possibility that the error contributed to the conviction.

State v. Sullivan, 217 Wis.2d 768, 792, 576 N.W.2d 30, 41 (1998) (citations omitted).

The State argues that "[t]he jury was fairly informed about [Brown's] plea agreement with the State." The State posits that "the jury heard the full extent of potential incentives for [Brown] to testify favorably for the state, and [Tkacz] cannot show either that he was denied due process by any acts or omissions of the prosecutor or the trial court or that his counsel was ineffective."

However, the burden of proving no prejudice is on the beneficiary of the error, here the State. *See* ***id.*** The State simply has not met its burden of proof. The evidence reveals that Karlin was drunk when she arrived at Tkacz's apartment; Kunish-Wolff admitted using heroin earlier in the day; Karlin asked her for heroin; and there was medical testimony that the physical symptoms exhibited by Karlin were consistent with a heroin overdose. The evidence linking Tkacz to Karlin's death was from Brown's testimony (as outlined in the sufficiency of the evidence discussion).[7]

The State nevertheless maintains that Brown's testimony was corroborated by other witnesses. The State insists that the jury could have inferred Tkacz's involvement in the death of Karlin from other evidence—including Krist's testimony that the codefendants gave her heroin two days before Karlin's

[7] Additional evidence tying Tkacz to Karlin's death consisted of Kunish-Wolff's John Doe testimony that they procured heroin as a "unit"; however, the jury was instructed that testimony from one codefendant could not be used against the other codefendant.

death and the testimony of Lonnie Klein, a drug user, that he saw the codefendants together at Brown's place in Milwaukee.[8]

Even with this "corroborating" evidence, we simply cannot say that the State's failure to disclose the terms of Brown's plea agreement did not influence the jury. The State's case was based on circumstantial evidence—either no one witnessed or participated in Karlin's death or any witnesses or participants were not cooperating. Brown's testimony brought all of the parties together for an alleged purchase of heroin on December 27, 1993—the day Karlin died. The credibility of the witnesses, in particular Brown, was a major issue in the case. Yet the jury was not provided with full disclosure of information which may have bore on that issue. *See* ***State v. Cuyler***, 110 Wis.2d 133, 142, 327 N.W.2d 662, 667 (1983).

The details of Brown's plea agreement—and thus any potential motive for his testimony—were not provided to the jury. For example, the jury was not informed that one of the charges to which Brown pled was conspiracy to deliver heroin with Tkacz and Kunish-Wolff; that there was a joint sentence recommendation; that Brown indicated he would testify truthfully; and that the State agreed not to bring charges for forty-five possible deliveries or for Karlin's death. Although the trial court supplemented the record with Exhibit 10, the relevance of the document and what it represented were never presented to the jury. The jury cannot search for the truth if the trial court erroneously prevents the jury from considering relevant and admissible evidence on a critical issue in the

[8] The State also maintains that Kunish-Wolff's admission that she used heroin that day and that she and Tkacz bought heroin as a unit corroborates Brown's testimony. Again, any admission by a codefendant could not be considered by the jury to convict the other codefendant.

case. *See* ***id.*** Because there is a reasonable probability that the error contributed to the conviction, the error was not harmless. Accordingly, we reverse the conviction for first-degree reckless homicide by delivery of heroin and remand for a new trial.[9]

By the Court.—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.

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[9] Because we conclude that there was reversible error, we need not address Tkacz's allegation of ineffective assistance of counsel. *See* ***Sweet***, 113 Wis.2d at 67, 334 N.W.2d at 562.