



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

March 10, 2026

To:

Hon. Jane M. Sequin
Circuit Court Judge
Electronic Notice

Caroline Brazeau
Clerk of Circuit Court
Marinette County Courthouse
Electronic Notice

John Blimling
Electronic Notice

Dennis Schertz
Electronic Notice

Brian A. Blasing 602346
Dodge Correctional Institution
P.O. Box 700
Waupun, WI 53963

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

2022AP2132-CRNM	State of Wisconsin v. Brian A. Blasing (L. C. No. 2020CF2)
2022AP2133-CRNM	State of Wisconsin v. Brian A. Blasing (L. C. No. 2020CF3)

Before Stark, P.J., Hruz, and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Brian Blasing appeals from his convictions for delivery of cocaine and first-degree reckless homicide by delivery of a controlled substance. Attorney Dennis Schertz has filed a no-merit report seeking to withdraw as appellate counsel. The no-merit report addresses whether the circuit court imposed excessive sentences upon resentencing Blasing and whether Blasing's postconviction attorney, Scott Lyon, provided Blasing ineffective assistance at the resentencing hearing. Blasing has filed a 54-page response to the no-merit report, alleging that the State engaged in prosecutorial misconduct by presenting false evidence; that Blasing's trial attorney,

Adam Raabe, provided Blasing ineffective assistance in multiple respects; that the circuit court erred by denying Blasing's motions for a mistrial; and that the judge from Blasing's original sentencing made an inappropriate appearance at Blasing's resentencing.

After Schertz filed an inadequate supplement to his no-merit report (to which Blasing filed two unauthorized responses), Schertz filed a second supplement at this court's direction addressing the sufficiency of the evidence to support the verdicts, the alleged evidence tampering, the claims of ineffective assistance of trial counsel, the mistrial motions, and the claim of judicial misconduct. Blasing then filed an additional, unauthorized, 47-page response to the second supplement.

Having independently reviewed the entire record as mandated by *Anders v. California*, 386 U.S. 738, 744 (1967), in addition to all of the filings by counsel and Blasing, we conclude that there are no arguably meritorious issues for appeal. Because the parties do not address potential issues in the same order, and counsel's no-merit report and supplements fail to address a number of potential issues, we will discuss potential issues in related groups, generally organized around when they arise in the record.

Joint Proceedings

We have before us consolidated appeals from two separate cases that were handled jointly in the circuit court for trial and sentencing. In Marinette County Circuit Court Case No. 2020CF2, the State charged Blasing with one count of delivery of one gram or less of cocaine, as a party to a crime (PTAC) with Chastity Denny, and as a repeat offender. That charge arose from a controlled drug buy with a confidential informant (CI) that occurred on January 28, 2019. In Marinette County Circuit Court Case No. 2020CF3, the State charged

Blasing with first-degree reckless homicide by delivery of a controlled substance, also as a PTAC with Denny, and as a repeat offender. That charge arose from a fentanyl overdose death that occurred on February 17, 2019.

A circuit court may order two or more criminal cases to be tried together if they could have been joined in a single complaint. WIS. STAT. § 971.12(4) (2023-24).¹ There is a two-step process for determining whether joinder is proper.

First, the circuit court must determine whether the statutory criteria have been satisfied. The statute permits joinder of two or more crimes that are “of the same or similar character,” that are “based on the same act or transaction[s],” or that are connected as “parts of a common scheme or plan,” regardless of whether the crimes were charged in one or more complaints. WIS. STAT. § 971.12(1). Crimes are of the same or similar nature when they are the same type of offense occurring over a relatively short period of time, with overlapping evidence. *State v. Hamm*, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). Crimes are considered part of a common scheme when they share common factors of substantial factual importance, such as time, place, or modus operandi. *Francis v. State*, 86 Wis. 2d 554, 560, 273 N.W.2d 310 (1979).

Second, even if joinder would be permissible under the statute, the circuit court may direct that the charges be tried separately to avoid prejudice to the defendant. WIS. STAT. § 971.12(3). The risk of prejudice is generally not significant when the evidence relating to each charge would be admissible at the trial on the other charge(s) as other-acts evidence. *State v. Bettinger*, 100 Wis. 2d 691, 696, 303 N.W.2d 585 (1981).

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

The charges at issue here were of a similar character and part of a common scheme because they both involved Blasing and Denny working together to sell drugs within a limited time frame. There was no prejudice from trying the cases together because the key facts related to each offense would have been admissible in the other case. The circuit court properly allowed the cases to be tried together.

Pretrial Issues

We do not see any irregularities at the initial appearance, arraignment, or preliminary hearing. In any event, a valid conviction cures any defects relating to bindover unless they were preserved by an interlocutory appeal. *See State v. Webb*, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991); *State v. Wolverton*, 193 Wis. 2d 234, 254, 533 N.W.2d 167 (1995). We similarly see no grounds to challenge the circuit court's decisions on any of the routine motions in limine that were filed.

Blasing filed a pro se speedy trial demand on August 20, 2020, by which time his case had already been pending for over eight months. Nonetheless, the circuit court found good cause to extend the trial date beyond 90 days from the date of Blasing's speedy trial request because Blasing had recently discharged his trial counsel with the full understanding that it would delay his case, and no new attorney had yet been found. The court's explanation satisfied the criteria for granting a continuance under WIS. STAT. § 971.10(3).

The circuit court conducted a colloquy prior to trial to ascertain that all plea offers had been communicated to Blasing. Blasing stated that he understood the current plea offer and confirmed that he wanted to proceed to trial.

Voir Dire

The circuit court excused over a dozen potential jurors for cause, and the defense did not object to any of the panel members who were ultimately chosen for the jury. We see no basis in the record for challenging the impartiality of the jury.

Jury Instructions

The only contested jury instruction was a defense request to include the following language: “[Y]ou are to search for the truth and give the defendant the benefit of any reasonable doubt after carefully considering all the evidence in this case.” The circuit court properly denied the request based upon recent precedent from the Wisconsin Supreme Court that upheld the pattern instruction as sufficient. *See State v. Trammel*, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564.

We further observe that the circuit court properly advised the jury that, to prove the delivery of a controlled substance charge, the State needed to provide evidence that Blasing: (1) delivered (i.e., transferred or attempted to transfer) to another person; (2) a controlled substance whose delivery is prohibited by law (i.e., cocaine); and (3) knowing or believing that the substance was a controlled substance. WIS. STAT. § 961.41(1); WIS JI—CRIMINAL 6020. To prove the reckless homicide charge, the State needed to provide evidence that Blasing: (1) delivered to a person; (2) a controlled substance (fentanyl); (3) knowing or believing the substance was a controlled substance; and (4) the person died as a result of using the fentanyl delivered by Blasing. WIS. STAT. § 940.02(2); WIS JI—CRIMINAL 1021. Because both offenses were charged as a PTAC, the State could alternatively prove the charges by showing that Blasing, acting with knowledge that Denny was committing or intended to commit a crime,

intentionally assisted Denny to commit the crime or was ready and willing to assist Denny to commit the crime and Denny knew of such willingness. WIS. STAT. § 939.05; WIS JI—CRIMINAL 400.

Sufficiency of the Evidence

We review the sufficiency of the evidence to support a criminal conviction by comparison to the instructions actually given to the jury, so long as those instructions conform to the statutory requirements of the charged offense. *State v. Beamon*, 2013 WI 47, ¶22, 347 Wis. 2d 559, 830 N.W.2d 681. As we have just explained, the circuit court properly instructed the jury. The test is whether “the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Zimmerman*, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)); *see also* WIS. STAT. § 805.15(1). We consider all of the evidence produced at trial, including evidence that the defendant challenges as being improperly admitted. *State v. LaCount*, 2007 WI App 116, ¶22, 301 Wis. 2d 472, 732 N.W.2d 29.

For the purpose of this opinion, we need not set forth every detail of the evidence produced over Blasing’s four-day trial. Consistent with our standard of review, we merely highlight the key evidence *supporting* the elements of the two offenses.²

² Blasing spends a considerable portion of his responses discussing evidence that he views as creating reasonable doubt as to his guilt. Under the standard of review we have just set forth, however, we do not weigh such evidence.

Detective Craig Kopatz of the City of Marinette Police Department testified that he gave a CI \$150 in documented bills to buy cocaine from Blasing in a controlled drug buy conducted on January 28, 2019. Kopatz listened over a “wire” recording device while the CI conducted the transaction with Blasing in the presence of Denny. Immediately following the transaction, the CI turned over to Kopatz the recording device and a baggie containing the purchased substance. The State introduced a copy of the recording, authenticated by Kopatz, which was later played for the jury.

Johnathan Block testified that he shared a trailer home with his girlfriend, Jacqueline Payette, and the overdose victim, Terry Westphal. Westphal introduced Blasing to Block. During the period from December 2018 through February 2019, Westphal would acquire heroin and methamphetamine and share it with Block a couple of times a week. In February 2019, Block himself obtained heroin from Blasing and methamphetamine from Blasing’s then-girlfriend, Denny.

On one occasion, about a week before Westphal’s overdose, Block overdosed on drugs that Blasing had shared with Block and Westphal in Block’s garage. Blasing referred to the drugs as “China white” and suggested that Block and Westphal “don’t do so much” and “better have Narcan” because the stuff was “good.” As a result of that incident, Payette gave Block an ultimatum that he would need to leave if he ever had drugs anywhere on the property again.

On the evening of February 16, 2019, Block was at home with Payette and Westphal. Block and Westphal were both feeling unwell from withdrawal symptoms, and there were no drugs in the house. Westphal obtained some Xanax from his sister to help with the symptoms.

Westphal also told Block that he was trying to get ahold of Blasing to obtain some heroin that Blasing had previously promised to provide in exchange for two of Westphal's welding tools.

At around 2:30 a.m. on February 17, 2019, Block received a text from Blasing stating that he was there and asking if Block and Westphal were awake. Block woke up Westphal, and the two of them went outside so that Westphal could get the heroin Blasing owed him. Block saw Blasing hand Westphal a Newport cigarette pack containing what Block believed to be heroin. Blasing also provided Westphal some Narcan and warned him that the drug in the cigarette pack was "very potent." Blasing and Westphal then left to go for a ride. Block returned to the trailer rather than doing drugs with Blasing and Westphal because he did not want to break his promise to Payette to stay clean. Block later heard Westphal come back in and lie down "real hard" in his bed at about 3:15 a.m.

Blasing's former girlfriend, Denny, testified that she and Blasing sold heroin and methamphetamine to support their own drug habits. Blasing had a source for obtaining heroin from Green Bay. Denny could tell that sometimes the heroin that Blasing was using and that they were selling had been cut with fentanyl because it was "good shit" or particularly potent. The heroin would typically be packaged in tinfoil, and Denny sometimes put the drugs she was selling into a Newport cigarette carton to disguise the transaction. Denny authenticated a series of Facebook messages in which she facilitated the sale of heroin by Blasing to Westphal in February 2019, and she expressed concern about Block's health after his overdose.

On February 16, 2019, into the early morning hours of February 17, 2019, Denny made arrangements to go with Blasing to Block and Westphal's residence to provide Westphal with the heroin that Blasing owed to Westphal in exchange for the welding equipment and also some

methamphetamine that Denny owed to Westphal. Denny testified that Blasing then obtained what she believed to be heroin from the same source who had provided the potent batch that Block had overdosed on a week earlier and that Blasing placed the drugs in a Newport cigarette pack for delivery.

Denny further testified that she and Blasing had picked up the purported heroin delivered to Westphal behind a CVS pharmacy in Green Bay around midnight, and they had their phones with them when they did so. Blasing used some of the purported heroin immediately after they picked it up, and Denny thought his level of impairment afterwards indicated that it was a more potent batch than usual.

Separately, Denny also confirmed that Blasing had earlier sold cocaine to the CI, after mistakenly purchasing some cocaine instead of methamphetamine. She identified Blasing's voice on the wire recording.

Payette testified that she discovered Westphal nonresponsive in his bed at around 8:00 a.m. on February 17, 2019, when she went to ask him if he wanted breakfast. Payette called 911, while Block performed CPR and administered Narcan.

Emergency Medical Technician Curtis Tisler testified that he responded with his crew to a call for a pulseless, nonbreathing male (later identified as Westphal) on the morning of February 17, 2019. Westphal's lips were a pale, bluish color, his pupils were nonreactive, and he was already cool to the touch, and he had no heart rhythm. The crew's attempts at resuscitation were unsuccessful, and Westphal was pronounced dead. Marinette County Deputy Medical Examiner Nancy Tessmer testified that she examined the body at the hospital and had it sent to Fond du Lac to be autopsied by forensic pathologist Dr. Adam Covach.

Doctor Covach testified that he performed an autopsy on Westphal and determined the cause of death to be fentanyl toxicity. Given the low levels of norfentanyl (a substance produced by the body as it breaks down fentanyl) in Westphal's blood, Covach further determined that Westphal died shortly after he took the fentanyl.

Meanwhile, Sergeant Randy Miller and Deputy Lee Posusta of the Marinette County Sheriff's Office were dispatched to Block and Payette's home to investigate Westphal's overdose. Block gave Miller the Newport cigarette pack, and he told Miller he believed that was how Westphal had received his drugs. While Miller took photographs of the scene, Posusta collected evidence from Westphal's bedroom and other areas of the trailer and the garage, including Westphal's phone, a syringe, a vial of Narcan, straws with a white residue on some of them, a foil wrapper, a spoon with residue on it, some marijuana pipes, and multiple pill bottles.

During the early morning hours of February 18, 2019, which was the day after Westphal's death, Officers Kendal Herwald and Taylor Carlson of the City of Green Bay Police Department arrested Blasing near a CVS pharmacy in Green Bay and recovered drug paraphernalia and a baggie containing an unknown substance from his person. Officers conducted field test on the substance for morphine, the results of which came back as inconclusive, because that is what Blasing said it was, and they then conducted tests for cocaine, the results of which were positive.

Evidence Technician Nathan Colinski of the City of Green Bay Police Department testified that he logged in .62 grams of a white powdery substance recovered at the time of Blasing's arrest. The substance was sent to the Wisconsin State Crime Laboratory in Wausau (the Wausau lab) on August 13, 2020. The Wausau lab returned the sample to the City of Green

Bay Police Department on October 13, 2020, under a listing of a “plastic bag containing powdered material,” without specifying the weight. When asked whether he was aware of whether the Wausau lab had tested the substance, Colinski testified that the lab would normally either send a report describing what tests had been performed or a letter stating that no tests had been performed, but he did not state whether the Wausau lab had sent either a report or a letter regarding the returned substance in this case.

On March 17, 2021, the City of Green Bay Police Department released the powdered substance recovered from Blasing’s arrest and returned by the Wausau lab to the Marinette County Sheriff’s Office. The Marinette County Sheriff’s Office then resubmitted the substance to the Wausau lab, under the description of a “plastic evidence bag containing whitish powdery substance” that was “recovered by Green Bay PD and submitted to the lab previously but was not tested due to [a] plea in their case.” The Wausau lab issued a receipt for a “sealed plastic evidence bag containing white powder in a bag with a Lab Case number on it from a previous submissi[on] W20-1344 (agency inv. #1).”

Michelle Fechhelm of the Wausau lab testified that the substance recovered in the controlled drug buy tested positive for cocaine; that the residue on one of the straws recovered from Westphal’s room following his death tested positive for both methamphetamine and fentanyl; and that the substance recovered from Blasing at the time of his arrest tested positive for fentanyl. Fechhelm’s report described the resubmitted substance recovered at the time of Blasing’s arrest as a “sealed plastic evidence bag containing one heat-sealed plastic bag with 0.398 gram \pm 0.004 gram of off-white powder.”

Kevin Scott of the Wisconsin State Crime Laboratory in Madison testified that analysis of a mixture of three DNA profiles recovered from the Newport cigarette pack could neither include nor exclude Blasing, Denny, or Westphal as contributors.

Lieutenant Barry Degnitz of the Marinette County Sheriff's Office extracted and examined data from Westphal's cell phone. The cell phone contained a series of Facebook messages between Westphal and Blasing and between Westphal and Denny in the months prior to Westphal's death that appeared to involve conversations about controlled substances.

Special Agent Justen Ragen of the Wisconsin Department of Justice Division of Criminal Investigations (DCI) testified that he obtained records from Facebook and confirmed that messages from Blasing, Denny, and Westphal introduced as exhibits came from their accounts. The messages included a text from Blasing to Westphal on February 16, 2019, stating, "Tell John on my way. My bad, was all fucked up and crashed hard, but here I come now." Westphal responded, "Let me know when you're close." Ragen did not identify any messages in the two months prior to Westphal's death in which Westphal was attempting to obtain heroin, specifically, from anyone other than Blasing or Denny, although Westphal did attempt to obtain other types of drugs from other people.

Senior Special Agent Dennis Carrol of the DCI testified that he mapped out the locations of Blasing's and Denny's cell phones using AT&T data. Both phones showed that they had traveled south from Oconto to Green Bay on the evening of February 16, 2019, then traveled back north in the early hours of February 17, 2019. Between 1:51 a.m. and 2:18 a.m., the phones were used to make and receive calls from Block in the same cell tower sector where Block and Westphal were residing. Between 2:30 a.m. and 3:00 a.m., the phones returned to Oconto.

Finally, Deputy William Swanson of the Marinette County Sheriff's Office testified that the trend over the last few years is that people often buy what they believe to be heroin, but the substance turns out to be either heroin mixed with fentanyl or straight fentanyl. A user therefore could not tell by looking at a substance how potent it was. In Swanson's experience, it was also common for people to ingest heroin (or fentanyl believing it to be heroin) using a straw and to reuse the straw.

Swanson explained that heroin is commonly referred to as "boy." Fentanyl is commonly referred to as "China white." Cocaine is commonly referred to as "coke," "powder," or "girl." Methamphetamine is commonly referred to as "Tina," "T," "crystal," "tweak," or "twack."

Swanson further testified that common weights of methamphetamine packaged for sale are a "point," which is a tenth of a gram and sells for about \$20; a "ball" or "eightball," which is an eighth of an ounce or about 3.5 grams; a half ounce, which sells for about \$50; and a "zip," which is one ounce and sells for about \$100. Common weights of heroin or fentanyl packaged for sale are a "pack," which is a tenth of a gram and sells for about \$50; half a "G" or a half gram, which sells for at least \$150; and grams, which sell for \$200 to \$300 each. Swanson also testified that it is uncommon for addicted drug users to stockpile drugs because doing so is too expensive.

Based upon these common terms and prices, Swanson interpreted messages from December 17, 2018, as Blasing offering to sell Westphal a gram or half a gram of heroin. Westphal's response indicated that he and Block would like to sample some of the product before committing to buy that much, and he would also like a "rig" (or syringe) and a "pan" (a tin cup to cook the heroin in). Blasing then said it's a "go go go. Now it's the white China shit,

but it's a—it's a like better than the last time you had it, no joke.” Westphal then gave a response that Swanson interpreted as Westphal offering to give Blasing some collateral so that Blasing would front the money to purchase the “China white” from Green Bay.

After the State concluded its case, the circuit court conducted a standard colloquy regarding Blasing's decision whether to testify. Blasing chose not to testify, and the court found that decision to be knowing and voluntary. Blasing did not present any additional witnesses or evidence.

The testimony of the officer who surveilled the controlled drug buy, in conjunction with the lab report confirming that the substance was cocaine, was sufficient to support all the elements of the cocaine delivery charge. The testimony provided by Block and Denny, in conjunction with the pathologist's determination of the cause of death, was sufficient to satisfy every element of the homicide charge if believed by the jury.

We note that much of Block and Denny's testimony was additionally supported by the Facebook messages and cell phone location data, as well as the test results from the Wausau lab. We disagree, however, with Blasing's assertion that the testing of the substance recovered from Blasing the day after Westphal's death was necessary to link him to the sale of fentanyl. The jury could determine beyond a reasonable doubt that Blasing and/or Denny had provided the fentanyl on which Westphal overdosed from the facts that: (1) Blasing had supplied “China white” or particularly “potent” heroin (which could be fairly inferred to contain fentanyl) to both Westphal and Block in the past; (2) fentanyl is commonly sold as if it were heroin, often without the buyer's knowledge; (3) Blasing and Denny made arrangements to deliver heroin to Westphal on the evening before and morning of his death; and (4) Westphal lay down “real hard”

on his bed at around 3:15 a.m. and was already nonresponsive when paramedics arrived later that morning (from which it could be fairly inferred that he collapsed and died shortly after Block observed Blasing provide Westphal with a substance in a cigarette carton).³

Although Blasing points to inconsistencies between Block and Denny’s trial testimony and what they previously told police, it was for the jury to resolve any alleged inconsistencies. Challenges to witness credibility generally do not provide a viable issue for appeal because the jury is the ultimate arbiter of credibility. See *Becker v. Crispell-Snyder, Inc.*, 2009 WI App 24, ¶20, 316 Wis. 2d 359, 763 N.W.2d 192.

Motions for Mistrial

During voir dire, the circuit court stated that it would take a recess so that the deputies could take Blasing to the bathroom and that any other men on the jury panel could use the bathroom after Blasing was done. Blasing moved for a mistrial, alleging that the court’s reference to having deputies escort Blasing had implied that Blasing was in custody. The court denied the motion, noting that Blasing was in street attire and that the normal implication for jurors was that the court wanted Blasing to be able to use the bathroom first, in a segregated manner.

During Denny’s testimony, the prosecutor asked her whether she had an agreement to provide “complete and truthful testimony against Mr. Blasing in his Marinette County and Oconto County—in—in Marinette County case.” Blasing moved for a mistrial on the grounds

³ Blasing confuses the time at which death was “pronounced” with the time that death actually occurred.

that he was prejudiced by the reference to an Oconto County case against him. The circuit court denied the mistrial motion because it viewed the statement as a misspoken sentence that, in context, the jury would have thought referred to a case that Denny had just testified that she had pending in Oconto County.

During Swanson’s testimony, he erroneously informed the jury that Blasing had taken a plea deal in Brown County related to the items seized at the time of his arrest. Blasing again moved for a mistrial on the grounds that the Brown County case was still pending and that the suggestion that he had affirmatively acknowledged having possessed a controlled substance in another case was prejudicial both in and of itself and cumulatively in conjunction with the prior “slip[] up[s].” The circuit court denied the mistrial motion and instead gave the jury a curative instruction. It told the jury: “What Deputy Swanson testified about just before the break as to a plea in a Brown County case was not accurate; therefore, you are to completely disregard that item of testimony.”

The circuit court’s decisions to deny Blasing’s motions for a mistrial based upon these three incidents were well within its discretion. *See State v. Debrow*, 2023 WI 54, ¶15, 408 Wis. 2d 178, 992 N.W.2d 114.

Prosecutorial Misconduct

Blasing contends that the prosecutor relied upon false or tampered-with evidence by presenting testimony and lab reports showing that the substance with which he was arrested the day after Westphal’s death was fentanyl. To support his contention, Blasing alleges: (1) the substance recovered at his arrest was field tested as cocaine by both a Reagent Modified test and a Nark cocaine ID swipe; (2) Blasing was charged in Brown County with possession of cocaine,

not fentanyl; (3) Blasing's attorney in the Brown County case told him that the recovered substance had tested positive as cocaine at the Wausau lab, but no one ever provided Blasing with a copy of the report; (4) no rational explanation was provided for why the substance was initially returned without testing; (5) the weight of the recovered substance was reported to be .62 grams when sealed into an evidence bag and first sent to the Wausau lab but later reported to be .398 grams when the evidence bag was opened for testing after being resent to the lab; and (6) the seizing officer reported the substance to be "white" in color, while the testing analyst at the lab described it as "off-white." Based upon the premise that the substance seized from his person on February 18, 2019, was not the same substance that was tested by the Wausau lab in April 2021, Blasing reasons that multiple law enforcement officers and the prosecutor must have been involved in presenting a false chain of evidence.

We are not persuaded that the facts cited by Blasing establish that any testimony or evidence presented to the jury was, in fact, false. First of all, no one actually testified as to whether the substance recovered from Blasing at the time of his arrest was tested the first time it was sent to the Wausau lab. Therefore, there could be no false testimony on that point.

As to the discrepancy between the weight of the substance that was sent to the Wausau lab the first time and the second time, it could be accounted for in several ways. The parties agreed during the argument on Blasing's third mistrial motion that Blasing had a plea and sentencing hearing scheduled in his Brown County case, but he had not yet entered a plea at the time of his trial in these cases. Blasing himself informed us in his response to the no-merit report that the Brown County case was ultimately dismissed on November 22, 2022.

It is possible that the Wausau lab took a sample of the substance in order to perform testing on it but then abandoned the testing process once the parties had reached a tentative plea agreement in the Brown County case, as suggested by the notation on the paperwork the Marinette County Sheriff's Office submitted with the substance when resending it to the lab. It is also possible that the Wausau lab did perform some testing on the substance, but it never sent a report due to an anticipated resolution of the Brown County case. The difference between describing the substance as "white" or "off-white" could be attributed to the differing perceptions of the people who made the observations.

Blasing draws alternative inferences that the Wausau lab performed testing but that the police departments and prosecutor failed to turn the results of the testing over to him, or that someone substituted a different substance before resending it to the lab. However, Blasing offers no actual evidence to support the likelihood of his inferences over the inferences discussed above.⁴ In particular, it seems improbable that the Marinette County Sheriff's Office would have resent the substance to the Wausau lab if it had any information that the substance had already been tested. If Blasing were to obtain additional evidence to support one of his theories that a report was created but not turned over, or that there was a substitution of the substance, he could potentially have grounds to seek a new trial based on newly discovered evidence. We conclude there is nothing currently in the record, however, to support a claim of prosecutorial misconduct.

⁴ Blasing argues that it makes no sense why neither the prosecutor nor defense counsel would ask about why the Wausau lab did not test the substance the first time it was sent to the lab. However, if the reason that the Wausau lab did not test the evidence was due to an anticipated plea deal (even if that plea deal never came to fruition), and the parties did not want to prejudice Blasing by referring to the anticipated plea deal (as evidenced by the mistrial motion), it would have made perfect sense to remain vague about why the substance was not tested the first time it was sent.

Assistance of Counsel

Blasing first contends that his trial counsel provided ineffective assistance by failing to challenge the chain of custody for the substance recovered at the time of Blasing’s arrest. This claim suffers from the same defect as the related claim of prosecutorial misconduct—namely, that Blasing has not identified any evidence that counsel could have presented that would substantiate Blasing’s theory. Blasing therefore cannot demonstrate prejudice.

Blasing next contends that his trial counsel provided ineffective assistance—and violated his Confrontation Clause rights under *Crawford v. Washington*, 541 U.S. 36 (2004)—by stipulating to Westphal’s toxicology report. We agree that if counsel had refused to make the stipulation, the preparer of the report would have needed to testify. Again, however, Blasing cannot demonstrate prejudice because he does not identify any evidence that trial counsel could have used on cross-examination to challenge the accuracy of the toxicology report.

Blasing similarly contends that his trial counsel provided ineffective assistance—and violated his Confrontation Clause rights under *Crawford*—by stipulating to the accuracy of the cell tower data provided by AT&T. Once again, though, Blasing cannot demonstrate prejudice because he does not identify any inaccuracies that counsel could have exposed if he had not entered the stipulation. In short, it is not ineffective for counsel to stipulate to matters that the defense has no factual basis to challenge.

Blasing also argues that his trial counsel provided ineffective assistance by failing to bring a *Denny* motion to present evidence that Westphal’s sister may have inadvertently provided him with the fatal dose of fentanyl. See *State v. Denny*, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (Ct. App. 1984) (discussing the “legitimate tendency” standard for admission of

evidence casting blame for a charged offense on a third party, which “asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime” (citation omitted)). Blasing asserts that there is a “fentanyl epidemic connected to ‘pressed pills’ associated with designer drugs,” such as the Xanax that Westphal obtained from his sister the day before his death. However, Block testified that he himself took three of the Xanax pills that Westphal’s sister brought over the day before Westphal’s death, and Block did not testify to having any adverse reaction from them. Absent any evidence that the pills Westphal’s sister provided were nonprescription “pressed pills” or actually contained fentanyl, defense counsel would not have been able to establish the direct connection needed to satisfy the *Denny* test.

Blasing next argues that his trial counsel provided ineffective assistance by failing to call Anthony Mork as a witness. Mork was a former cellmate of Blasing who would have testified that he was a friend of Block; that Block told Mork that Blasing and Denny had nothing to do with Westphal’s death; that Block knew what drugs had killed Westphal and where they had come from; and that Block had hidden the drugs in the garage before police were called. Blasing’s trial counsel informed his appellate counsel that the reason he did not call Mork was because parts of Mork’s statement could be easily disproved, and the risks of presenting a witness with such credibility problems outweighed the benefits. We agree with appellate counsel that trial counsel’s asserted reason for refusing to call Mork lies within an acceptable range of professional conduct, and it does not provide a factual basis for an ineffective assistance of counsel claim.

Blasing similarly argues that his trial counsel provided ineffective assistance by failing to call Roy Boucher (the father of Denny’s eldest son), Dawn Blasing (Blasing’s mother), Dean

Deboche (Blasing's father), and Savannah Smith (Blasing's sister) to testify about statements that Denny allegedly made to Smith and Boucher, which Boucher then relayed to Dawn Blasing and Deboche. Such statements would have been hearsay, however. Blasing cannot prove he was prejudiced by the failure to call these witnesses because he fails to identify any admissible evidence that any of those witnesses could have presented that would have provided a reasonable expectation of obtaining a different result at trial.

Blasing also contends that his trial counsel provided ineffective assistance by failing to introduce additional impeachment evidence against Denny to show that Denny was more involved in dealing heroin and Blasing was less involved in dealing heroin than her trial testimony would suggest and also that she may have cooperated with police as a CI. However, the jury was informed that Denny had at first lied to police, and she explained why at trial. The jury was also informed that Denny had received concessions in the cases against her in consideration for her testimony. Moreover, Blasing ignores the fact that he was charged as party to a crime with Denny. It is undisputed that Blasing drove himself and Denny to Green Bay to obtain the substance that was ultimately delivered to Westphal. In sum, Blasing cannot prove he was prejudiced because he has not identified any additional impeachment evidence about Denny that provides a reasonable expectation of obtaining a different result at trial.

Blasing next contends that his trial counsel provided ineffective assistance by failing to request a *Daubert* hearing or raise a lack of foundation objection regarding expert witness testimony provided by Swanson. See *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). However, Swanson testified extensively about the training and experience he had that would be sufficient to qualify him as an expert witness. Because Blasing cannot show that a challenge to Swanson's expertise would have been successful, he yet again cannot demonstrate prejudice.

Finally, Blasing contends that his trial counsel provided ineffective assistance by failing to advise him to accept a plea in the controlled delivery case and by advising him not to testify. However, both of those decisions were ultimately Blasing's decision to make after counsel provided his opinion. As discussed above, the circuit court conducted proper colloquies to ensure that both decisions were knowingly and voluntarily made.

Sentences

The original sentencing proceeding is not before us because Blasing filed a successful postconviction motion for resentencing. After the Honorable James Morrison recused himself, the Honorable Jane Sequin presided over a resentencing hearing.

At the resentencing hearing, the circuit court considered a presentence investigation report (PSI), an alternate PSI, a restitution summary, victim impact statements from Westphal's mother and sister, several letters in support of Blasing, Blasing's personal allocution, and the recommendations of the parties. The court then discussed sentencing factors associated with the gravity of the offense and the character of the offender, and it explained how they related to the court's primary sentencing goals of protecting the community and punishment, and its lesser goals of rehabilitation and deterrence. The court then sentenced Blasing to 2 years' initial confinement followed by 2 years' extended supervision on the cocaine delivery count and 13 years' initial confinement followed by 8 years' extended supervision on the reckless homicide count, with the counts to run consecutive to each other and with 889 days of sentence credit. The court also ordered restitution in the amount of \$13,935.90.

Blasing alleges that Judge Morrison inappropriately "threw open the courtroom door and stood there staring red-faced at Blasing and his family" during the resentencing proceeding.

Even if that were true, however, the record does not show that any such conduct by Judge Morrison had any impact on the sentences imposed by Judge Sequin. As we have just discussed, Judge Sequin properly exercised her discretion when she explained why she imposed the sentences. We further observe that the sentences imposed were well within the statutory maximums and were not unduly harsh or unconscionable. *See State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.

Our independent review of the record discloses no other potential issues for appeal. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders*. Accordingly, counsel shall be allowed to withdraw, and the judgments of conviction will be summarily affirmed. *See* WIS. STAT. RULE 809.21.

Upon the foregoing,

IT IS ORDERED that the judgments of conviction are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of Brian Blasing in these matters pursuant to WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals