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 I

July 24, 2018

To:

Hon. M. Joseph Donald
Circuit Court Judge
Felony Division
821 W. State St., Rm. 506
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Dennis Schertz
Schertz Law Office
P.O. Box 133
Hudson, WI 54016

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Amanda M. Ramirez 462604
Taycheedah Corr. Inst.
P.O. Box 3100
Fond du Lac, WI 54936-3100

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

2017AP1197-CRNM State of Wisconsin v. Amanda M. Ramirez (L.C. # 2015CF4219)

Before Kessler, P.J., Brennan and Dugan, 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).

A jury found Amanda M. Ramirez guilty of first-degree reckless homicide by delivery of a controlled substance. The circuit court imposed an evenly bifurcated ten-year term of imprisonment and ordered Ramirez to pay $6178 to the victim's mother. Ramirez appeals.

Ramirez's appointed appellate counsel, Attorney Dennis Schertz, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16).[1] Ramirez did not respond. This court has considered the no-merit report, and we have independently reviewed the record. We conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

The State alleged in an amended criminal complaint that on September 10, 2015, Ramirez went with her friend Kimberly Bohn to meet a man who had posted an ad on Craigslist looking for a woman to have sex with him and use drugs. The man, Richard Kolanowski, arrived at the meeting place, and the two women got into his car. Ramirez then made a telephone call and arranged to purchase cocaine and heroin. Kolanowski drove the two women to an intersection in Milwaukee, Wisconsin and gave Ramirez $300. She got into a dark vehicle, then returned to Kolanowski's car with both crack cocaine and heroin.

Kolanowksi next drove Ramirez and Bohn to a motel where he had rented a room, arriving at approximately 1:00 p.m. on September 10, 2015. There, the three smoked crack cocaine, Bohn injected heroin, and Ramirez inhaled heroin through a straw. After about an hour, Ramirez left Bohn and Kolanowski in the motel room. Bohn's lifeless body was discovered there at 8:49 p.m. that evening. The cause of death was acute drug intoxication.

The State charged Ramirez with first-degree reckless homicide by delivery of a controlled substance, a violation of WIS. STAT. § 940.02(2)(a). "First degree reckless homicide, as defined in [WIS. STAT.] § 940.02(2) ... is committed by one who causes the death of another

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

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." WIS JI—CRIMINAL 1021 (footnote omitted). The provisions of § 940.02(2) apply whether the victim dies as a result of using the controlled substance by itself or in combination with any other substance. *See* § 940.02(2)(a)1. Ramirez entered a plea of not guilty to the charge, and the matter proceeded to trial.

In the no-merit report, appellate counsel first considers whether the State presented sufficient evidence to sustain the conviction. When this court considers the sufficiency of the evidence presented at trial, we apply a highly deferential standard. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. We "may not reverse a conviction unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that ... no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

To prove that Ramirez violated WIS. STAT. § 940.02(2), the State presented testimony from Kolanowski describing how Ramirez took the money that he gave her and then purchased drugs that Bohn consumed in the hotel room. Dr. Brian Linert, a Milwaukee County medical examiner, testified that he conducted an autopsy of Bohn and determined to a reasonable degree of medical certainty that the cause of her death was "acute mixed drug intoxication," that the drugs involved were cocaine and heroin, and that heroin was "a substantial factor" in her death. A detective described seeing a white powdery substance on the nightstand in Kolanowski's motel room and how that substance was collected and inventoried. An analyst from the Wisconsin State Crime Laboratory described testing the substance and explained that the testing revealed the presence of cocaine and heroin. The State also presented Ramirez's recorded

custodial statement admitting that she purchased cocaine and heroin on September 10, 2015, and delivered the drugs to Kolanowski, who then distributed some of the drugs to Bohn.

The circuit court instructed the jury that before it could find Ramirez guilty of first-degree reckless homicide, the State was required to prove beyond a reasonable doubt that: (1) she delivered a substance; (2) the substance was heroin; (3) she knew or believed that the substance was heroin; and (4) Bohn used the substance that Ramirez allegedly delivered "and died as a result of that use. This requires that the use of the controlled substance was a substantial factor in causing the death." *See* WIS JI—CRIMINAL 1021. In light of the evidence presented to satisfy the foregoing elements, any challenge to the sufficiency of that evidence would be frivolous within the meaning of ***Anders***.

Appellate counsel examines whether Ramirez could mount an arguably meritorious challenge to certain rulings addressing evidentiary objections raised during the trial. Evidentiary decisions rest in the circuit court's sound discretion. *See* ***State v. Hammer***, 2000 WI 92, ¶43, 236 Wis. 2d 686, 613 N.W.2d 629. We will sustain a circuit court's exercise of discretion if a reasonable basis exists for the circuit court's decision and the circuit court '"exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record.'" *See* ***id.*** (citation omitted). We agree with appellate counsel's conclusion that none of the evidentiary rulings provides an arguably meritorious basis for postconviction litigation. Several of those rulings warrant discussion here.

The circuit court overruled Ramirez's objection to Linert's testimony that heroin was a substantial factor in Bohn's death. Ramirez asserted that the testimony constituted a "legal conclusion." The circuit court properly rejected this contention. Whether heroin was a

substantial factor in causing Bohn's death was a question of fact, not law. *See* WIS JI—CRIMINAL 1021; *see also* ***State v. Miller***, 231 Wis. 2d 447, 455-56, 605 N.W.2d 567 (Ct. App. 1999). Moreover, under WIS. STAT. § 907.04, an expert's opinion that is '"otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.'" ***State v. LaCount***, 2008 WI 59, ¶20, 310 Wis. 2d 85, 750 N.W.2d 780 (citation and one set of quotation marks omitted).

Ramirez objected to testimony about the chemical test results of the substance found in Kolanowski's motel room on the ground that the State did not present the testimony of the patrol officer who collected and inventoried the substance, and therefore a chain of custody for the substance was not established. The circuit court properly rejected the argument. The State presented testimony from the lead detective, who observed the substance in the room and directed an officer to collect and inventory the substance. The detective went on to explain the inventory system and to identify an exhibit as the envelope containing the substance that was taken from the motel room and inventoried as directed. The State then presented the testimony of the controlled substance analyst who received the inventoried substance and tested it.

> The law with respect to chain of custody issues requires proof sufficient to render it improbable that the original item has been exchanged, contaminated or tampered with.... The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. A perfect chain of custody is not required. Alleged gaps in a chain of custody go to the weight of the evidence rather than its admissibility.

State v. McCoy, 2007 WI App 15, ¶9 298 Wis. 2d 523, 728 N.W.2d 54 (citations, quotation marks, and footnote omitted). In light of the foregoing, there is no arguable merit to further pursuit of this issue.

Relatedly, Ramirez argued that she would suffer a violation of her Sixth Amendment right to confront the witnesses against her unless she had the opportunity to cross-examine the police officer who collected and inventoried the substance found in Kolanowski's motel room. The circuit court correctly rejected this argument. The Supreme Court has explained that the Sixth Amendment does not demand that a defendant have the opportunity to cross-examine everyone "whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device." *See* ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 311 & n.1 (2009). Rather, "'gaps in the chain of custody normally go to the weight of the evidence rather than its admissibility.' It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence." ***Id.*** at 311 n.1 (citation and brackets omitted). The Sixth Amendment requires, however, that those who do testify about the chain of custody be available for cross-examination. *See* ***id.*** Here, Ramirez had the opportunity to expose the flaws in the chain of custody by cross-examining the lead detective, and she had the opportunity to confront the analyst at the end of the chain who tested the substance. Further pursuit of this issue would lack arguable merit.

The circuit court sustained the State's objection to questions about whether Milwaukee police carry Narcan.[2] Ramirez argued that she was entitled to establish that, but for the failure to administer a potentially life-saving drug, Bohn "might be alive today." The circuit court determined that the inquiry was irrelevant. An arguably meritorious challenge to this decision cannot be raised. An allegedly negligent act that arguably contributes to a victim's death does

[2] Narcan is the brand name of a drug indicated for treating a narcotic overdose. *See* ***State v. Parisi***, 2016 WI 10, ¶7 n.3, 367 Wis. 2d 1, 875 N.W.2d 619.

'"not break the chain of causation between the defendant['s] acts and the consequent death."' ***State v. Below***, 2011 WI App 64, ¶30, 333 Wis. 2d 690, 799 N.W.2d 95 (citation and emphasis omitted).

Appellate counsel does not discuss Ramirez's decision not to testify. The circuit court conducted a colloquy with Ramirez regarding the decision. *See* ***State v. Weed***, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485. The colloquy reflects that Ramirez knowingly, intelligently, and voluntarily waived her right to testify after consultation with trial counsel. *See* ***id.*** Further pursuit of this issue would lack arguable merit.

We next consider whether Ramirez could pursue an arguably meritorious challenge to her sentence.[3] Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the

[3] The sentencing proceeding was preceded by Ramirez's guilty pleas to charges pending against her in another case, Milwaukee County case No. 2016CF2922, and the sentencing itself encompassed both cases. The judgment of conviction in case No. 2016CF2922 is not before us, and we discuss it no further.

defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court indicated that the goals of sentencing were punishment and rehabilitation, and the circuit court discussed the factors it deemed relevant to those goals. The circuit court considered the gravity of the offense, acknowledging the grief and loss that Bohn's family suffered as a result of Bohn's death. In considering Ramirez's character, the circuit court noted that Ramirez had struggled with addiction, and the circuit court accepted the information presented in her sentencing memorandum regarding other problems confronting her throughout her life, including a history of physical and sexual abuse. The circuit court addressed the need to protect the public, emphasizing the risk Ramirez posed in light of the charges she incurred while out of custody on bail for the instant matter. The circuit court concluded that the extent of Ramirez's treatment needs and the necessity for a punishment commensurate with the loss of a life all required a ten-year term of imprisonment.

The circuit court identified the factors that it considered in choosing a sentence in this matter. The factors were proper and relevant. Additionally, the sentence that the circuit court imposed was far below the statutory maximums—forty years of imprisonment and a $100,000

fine—that Ramirez faced. *See* WIS. STAT. §§ 940.02(2)(a), 939.50(3)(c). Accordingly, we cannot conclude that the sentence was unduly harsh or unconscionable. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. A challenge to the sentence would be frivolous within the meaning of ***Anders***.

The circuit court ordered Ramirez to pay $6178 in restitution. Ramirez stipulated to restitution in that amount at sentencing. *See* WIS. STAT. § 973.20(13)(c). Therefore, she could not mount an arguably meritorious challenge to the order. *See* ***State v. Leighton***, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 616 N.W.2d 126.

Finally, appellate counsel states in the no-merit report that, in his view, nothing in the record would support a claim that trial counsel was ineffective. To prevail on a claim of ineffective representation, a defendant must prove both that the lawyer's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We agree with appellate counsel's conclusion that the record reveals no basis for mounting such a claim. We have particularly considered whether a claim could be based on trial counsel's failure to pursue suppression of Ramirez's custodial statement, and the matter warrants a brief discussion.

Trial counsel told the circuit court on the record that he and Ramirez had discussed her custodial statement several times and did not dispute its voluntary nature. A recording of the statement is in the record, and the recording reflects that the officer who questioned Ramirez began the interview by giving her the warnings required by ***Miranda v. Arizona***, 384 U.S. 436,

478-79 (1966).[4] "'[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of ***Miranda*** are rare.'" ***State v. Ward***, 2009 WI 60, ¶61, 318 Wis. 2d 301, 767 N.W.2d 236 (citations omitted).

In this case, Ramirez stated during the interview that she had consumed heroin and Xanax earlier in the day, but she said that she was no longer under the influence of those drugs. Moreover, intoxication alone does not affect the admissibility of a confession absent proof that the suspect "was irrational, unable to understand the questions or [the] responses, otherwise incapable of giving a voluntary response, or reluctant to answer the questions posed by the authorities." *See* ***State v. Clappes***, 136 Wis. 2d 222, 241-42, 401 N.W.2d 759 (1987). The recording of the interview does not suggest the potential for such proof. Further, the circuit court questioned Ramirez about her decision to forego a challenge to the admissibility of her statement, and she agreed that the statement was freely and voluntarily made. Pursuit of a challenge to trial counsel's effectiveness for failing to seek suppression of Ramirez's statement would lack arguable merit.

[4] Before questioning a suspect in custody, officers must inform the person of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one. *See* ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of Amanda M. Ramirez on appeal. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals