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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-1048
)	
SUSAN R. MOORE,)	Honorable
)	Joseph G. McGraw,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for first-degree murder is reduced to involuntary manslaughter; however, the involuntary manslaughter conviction is vacated under one-act, one-crime principles as it is secondary to defendant's conviction for drug-induced homicide. Remanded for a new sentencing hearing on defendant's drug-induced homicide and delivery convictions.

¶ 2 Defendant, Susan R. Moore, allegedly gave prescription medication containing morphine to 14-year-old Tanner Groth, who died thereafter. After a jury trial, defendant was convicted of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2010)), drug-induced homicide (720 ILCS 5/9-3.3(a) (West 2010)), delivery of a controlled substance to a minor (720 ILCS 570/407(a)(1) (West 2010)),

and delivery of a controlled substance (less than one gram of morphine) (720 ILCS 570/401(d)(i) (West 2010)). The trial court entered all four convictions, and, as is most relevant here, the written judgment sentenced defendant to concurrent terms of 25 years' imprisonment for first-degree murder and 30 years' imprisonment for drug-induced homicide.

¶ 3 Defendant appeals, arguing that the evidence was insufficient to establish the *mens rea* necessary for first-degree murder and, therefore, that her conviction for first-degree murder should be reduced to involuntary manslaughter. Alternatively, defendant argues that she was denied a fair trial on the first-degree murder charge where the elements of and burden of proof for that offense were misstated and where the jury was inadequately instructed on those points. Finally, defendant argues that she was denied a fair trial because the admission of other-crimes evidence was not balanced by jury instructions specifying the exact purposes for which that evidence could be considered.

¶ 4 For the following reasons, we agree with defendant that the evidence was insufficient to support her first-degree murder conviction, and we reduce that conviction to one for involuntary manslaughter. However, as only one conviction may be entered for Tanner's death, the Class X, drug-induced homicide conviction stands and the involuntary manslaughter conviction, which is a lower, Class 3 felony, must be vacated. We remand for a sentencing hearing on the drug-induced homicide and delivery convictions. Our ruling renders moot defendant's argument alleging errors in the burden of proof and element instructions regarding first-degree murder. Finally, we reject defendant's argument that she was denied a fair trial due to the improper admission of and deficient instructions regarding other-crimes evidence.

¶ 5

I. BACKGROUND

¶ 6 For context, we note that a person is guilty of first-degree murder where he or she, with knowledge that his or her acts create a “strong probability of death or great bodily harm,” kills another. 720 ILCS 5/9-1(a)(2) (West 2010); *People v. DiVincenzo*, 183 Ill. 2d 239, 249-50 (1998). “Knowledge” is statutorily defined as existing when one is consciously aware that “the result is practically certain to be caused by his [or her] conduct.” 720 ILCS 5/4-5(b) (West 2010).

¶ 7 A person is guilty of involuntary manslaughter if he or she unintentionally kills another by recklessly performing acts that are likely to cause death or great bodily harm. 720 ILCS 5/9-3(a) (West 2010); *DiVincenzo*, 183 Ill. 2d at 250. “Recklessness” is statutorily defined as when a person “consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow *** and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation.” 720 ILCS 5/4-6 (West 2010). “A defendant acts recklessly when he [or she] is aware that his [or her] conduct might result in death or great bodily harm, although that result is not substantially certain to occur.” *DiVincenzo*, 183 Ill. 2d at 250.

¶ 8 Thus, the mental state for first-degree murder is knowledge; the mental state for involuntary manslaughter is recklessness. *People v. Weeks*, 2012 IL App (1st) 102613, ¶ 34.

¶ 9

A. Events of April 2, and April 3, 2010

¶ 10 On April 2, 2010, defendant’s 13-year-old daughter, Alyssa, and Alyssa’s friend, Shaylee, were together at the two-bedroom duplex where defendant and Alyssa lived. Shaylee often stayed with Alyssa on the weekends. Tanner, who was dating Shaylee, came over later in the evening. The three minors watched television and listened to music. Defendant was home but was in her bedroom, where she had spent most of the day. Throughout the evening, defendant left the bedroom

and the house on two or three occasions for 15 to 20 minutes at a time. When defendant was gone, Alyssa, Shaylee, and Tanner smoked marijuana. Earlier in the evening, Alyssa asked defendant for alcohol and, so, the final time defendant left the house, she returned with a 12-pack of Bud Light beer and one half-pint of peppermint Schnapps. Defendant returned to her bedroom. Alyssa and Shaylee each drank about five bottles of Bud Light. Tanner drank the entire bottle of Schnapps.

¶ 11 In her police statement, Alyssa recounted that, at around 7 p.m., she saw Tanner speaking with defendant. At trial, Alyssa testified that, in contrast to her statement that she witnessed defendant and Tanner speaking, Tanner *told* Alyssa that he and defendant had a conversation. Tanner came over to the couch with pink pills. Alyssa had previously seen the pink pills and knew them to be defendant's 60-milligram Kadian morphine pills. As of April 2, 2010, defendant was taking an 80-milligram dose of Kadian morphine in the form of a peach-colored pill. Alyssa stated that defendant kept the 60-milligram pills in her bedroom closet. However, at another point in her testimony, Alyssa clarified that defendant kept the 80-milligram Kadian pills in her bedroom closet and kept the 60-milligram pills in the kitchen. Alyssa testified that it was not Tanner's first time at her house, and that "everyone" knew defendant took prescription morphine, as well as where she kept it.

¶ 12 The three minors drank the rest of the night; before midnight, Alyssa got sick from drinking and passed out in the living room. Tanner and Shaylee slept in Alyssa's room. The next day, Shaylee came out to the living room, and she and Alyssa could hear Tanner snoring loudly in the bedroom. Shaylee and Alyssa went into the bedroom and observed Tanner sleeping with his mouth open and snoring loudly. Defendant joined them and wrote "Lightweight" with green highlighter on Tanner's leg. They left the room to let Tanner sleep, but checked on him approximately every

15 to 30 minutes. Alyssa said they did not think anything was wrong. Eventually, when they were calling “Tanner, wake up; Tanner, wake up,” and he did not do so, they thought something was wrong. Around 1:30 p.m., they noticed that Tanner was getting cold, it appeared that mucous was coming out of his mouth, and his lips were turning blue. The girls ran to get defendant, who tried to rouse Tanner and keep him from choking. Defendant “kept his head up and like held a garbage [can] right there and like tried to wake him up, and she was telling him, ‘Tanner, wake up; Tanner, wake up; Tanner, Tanner, Tanner, wake up,’ and he still wouldn’t wake up. And then she pulled him into the bathroom and tried to get some water on him so he could wake up, and he still didn’t wake up.” Alyssa telephoned her cousin, Angela Vince, who is a medical assistant and nursing student and who lived one block away. Alyssa testified that, before calling Angela, she said to defendant that they should call 911, and defendant said “Okay, okay, do it.” Defendant did not stop Alyssa from calling 911. Alyssa testified that, when defendant realized Tanner was in trouble, defendant was “hysterical.”

¶ 13 In her police statement, Alyssa said that defendant gave Tanner the pills. At trial, she testified that she did not know where Tanner got the pills and that, although she saw defendant and Tanner speaking that night, she did not see Tanner with the pills immediately thereafter. Alyssa explained that, in the written police statement, she had assumed that defendant gave Tanner the pills because defendant kept them in the closet and (contrary to her testimony that everyone knew where defendant kept the pills) Tanner would not have known that.

¶ 14 Shaylee testified that, at the time of the incident, she was 13 years old and Tanner was her boyfriend of five months. Early in the evening, Alyssa, Tanner, and Shaylee asked defendant if she could get them some alcohol, and defendant replied, “we’ll see.” Shaylee testified that she, Tanner,

and defendant smoked marijuana. The three minors listened to music in Alyssa's room, and defendant went to her bedroom. Later, the minors came out of Alyssa's bedroom, and defendant told them they could drink what they wanted from the alcohol that had just arrived. Defendant returned to her bedroom and shut the door while the minors drank. Shaylee testified that she was "wasted," but not to the point where she would not remember anything.

¶ 15 Shaylee testified that she remembered Tanner saying something about his back hurting, but that he "wouldn't even take an aspirin" if offered. She agreed, however, that Tanner drank alcohol and smoked marijuana that evening. At some point, she and Tanner were sitting on the couch when defendant called Tanner to her bedroom. Shaylee heard defendant and Tanner talking and then, after the bedroom door closed, she could no longer hear them. Approximately five minutes later, Tanner came out of the bedroom and slipped into his pocket a cellophane package containing two morphine pills. Shaylee said she had previously seen morphine pills in defendant's room and knew they were kept in the closet; no one was allowed into defendant's room when she was not there, and, according to Shaylee, neither she nor Tanner ever previously took any of defendant's morphine pills without her permission. Shaylee testified that defendant followed Tanner out of the bedroom and said "Ha-ha, don't tell Shaylee. Shaylee doesn't need to know. It will bother her all night."

¶ 16 At around 8:30 p.m., Tanner opened one morphine capsule and poured the contents onto his tongue. Shaylee never again saw the other morphine pill. Around 9 p.m., Shaylee went to the bathroom to assist Alyssa, who was vomiting. Afterwards, Shaylee returned to the living room, where Tanner was eating ice cream. Shaylee and Tanner hung out for awhile, watched a movie on the living room couch, and then fell asleep. Around midnight, defendant woke them up and told them they could move to Alyssa's bed.

¶ 17 Shaylee and Tanner moved to the bedroom, where they had a minor argument. Tanner seemed “fine,” and had been in a happy, cheerful mood. Shaylee awoke around 12:30 p.m. the next day and noticed that Tanner’s heart was racing. She tried to wake him up by tapping on his chest and calling his name, but he appeared to be sleeping. Tanner was sweaty. When Shaylee saw defendant, she asked defendant to check on Tanner. Defendant said “I told him not to take them all at one time.” Shaylee did not report this comment in her written police report. Defendant checked on Tanner, propped up his pillow, and told Shaylee that he would be fine and that they should leave him alone.

¶ 18 Around 10 minutes later, they returned and defendant waived the peppermint Schnapps bottle near Tanner and said “This will wake him up.” Shaylee testified, “we thought he was sleeping.” Next, with a marker, defendant wrote “Pussy Lightweight” on Tanner’s leg and put a clip on Tanner’s nose, saying “This will wake him up.” Shaylee took a photograph of the clip on Tanner’s nose because she thought he was sleeping. Defendant took the clamp off of Tanner’s nose and said “just leave him alone, he’s just sleeping, he’s really — he’s messed up, don’t ruin his buzz.” Shaylee had a “gut feeling” and returned a few more times to check on Tanner. Around 2 or 3 p.m., Shaylee noticed that Tanner had a greenish, mucous-like substance coming out of his mouth; she tried to revive him and clear his throat so that he would not choke. Alyssa helped Shaylee prop Tanner into a sitting position. Shaylee told defendant “come here, come here,” and, when defendant walked in and saw Tanner, “she just kind of freaked out” and said “we got to get him in the shower, we got to get him to wake up.”

¶ 19 Shaylee and Alyssa helped defendant carry Tanner into the bathroom. Defendant put Tanner under a cold shower and, half in the shower herself, was “smacking his face” telling him to wake up.

They removed Tanner from the shower, and defendant said “Call Angie, Call Angie.” Defendant dialed and, when Angela arrived, Alyssa and Shaylee called 911 and Angela grabbed the phone to speak to the 911 operator. Shaylee testified that defendant did not suggest calling 911. When asked, “did [defendant] tell you not to call 911,” Shaylee replied, “Yeah. She kept saying, ‘Call Angie, Call Angie, Call Angie.’ ” Shaylee further testified that, while Angela was working on defendant and before the paramedics arrived, defendant called Alyssa and Shaylee into her bedroom and said, “You don’t know what happened. He didn’t get the pills from me; you don’t know anything.” Shaylee took defendant’s comments to mean that defendant did, in fact, give Tanner the pills.

¶ 20 Shaylee testified that she was not completely truthful with the police when she first spoke to them. Shaylee initially said that she did not see Tanner take anything unusual, and she left out the fact that defendant gave Tanner pills because defendant told her to and Shaylee was scared. Shaylee later told an officer that she had a feeling that defendant had given Tanner some pills, but she did not see her do so. Shaylee did not, in her written statement, report that Tanner smoked marijuana that evening; she explained that she told the truth in the statement, but was upset and “scrambled up,” and had a hard time even remembering which days were which. Further, when an assistant State’s Attorney met with Shaylee and showed her some 60-milligram Kadian pills, she first stated that they were not the pills she saw Tanner take.

¶ 21 Angela Vince testified that defendant is her aunt. At around 3 p.m. on April 3, 2010, Alyssa telephoned Angela’s cell phone. She was crying and sounded scared and nervous; she asked Angela to come to defendant’s house. Angela asked to speak with defendant. When defendant took the phone, she asked Angela to bring her medical bag and come over immediately because Tanner took some pills and she could not wake him. Angela went to defendant’s home, where she found “Tanner

on the floor in the bathroom and everybody was hysterical.” Angela explained that the girls were “bawling,” and that she could not understand them. Defendant was “hysterical,” crying and screaming. Angela asked defendant what happened. Defendant told her that she could not wake Tanner, so she tried putting him in the shower to wake him. Tanner was on the floor by the bathtub and was wet. Defendant, too, was soaked from head to toe and was trying to revive Tanner. Angela told defendant to step outside of the bathroom so that she would have room to work on Tanner, and defendant complied. Angela told Alyssa to call 911, and defendant said “No, don’t call the police.”

¶ 22 Angela began CPR on Tanner and, when Alyssa had the 911 operator on the phone, she handed the phone to Angela, who explained the situation as best she could. Angela asked whether anyone knew what pills Tanner had taken, and they replied that they did not. The ambulance arrived, and the paramedics worked on Tanner and took him out on a stretcher.¹ While the paramedics were in the home, everyone, including defendant, watched them work. Defendant appeared nervous and scared. After the paramedics took Tanner to the ambulance, defendant, who was sitting at the kitchen table, took a beer from her refrigerator and began drinking it. She seemed very nervous and anxious. Angela knew that defendant had been prescribed morphine. A police officer asked defendant to get her prescriptions. Defendant went to her bedroom and, when she returned, put pill bottles on the kitchen table, including one containing pink capsules.

¶ 23 A tape of the 911 call was played for the jury. The tape reflected that the persons on the phone recounted that they did not know what pills Tanner took but that, as there were no pills nearby, Tanner must have taken pills the previous night. The 911 operator testified that the phone

¹Tanner was transported to the hospital, where he remained in a coma-like state until April 5, 2010, when he was removed from life support and pronounced dead.

call received on April 3, 2010, at 4:01 p.m., was placed by persons who sounded “excited, scared, very hard to get information out of them, talking very fast.” The callers reported that a young man had taken some medication and was unconscious and possibly not breathing.

¶ 24 John Brazones, a captain with Rockford’s fire department, responded to the call of an overdose at defendant’s house. When Brazones arrived, Tanner had no pulse and was not breathing, so the responders began working to revive him. Brazones asked defendant to give him information about what Tanner took and when he took it, but the response “was not really very good.” Brazones could not get any “logical information” from defendant, who was wet, appeared agitated, was drinking a beer and smoking, and kept walking around. He asked defendant to get every pill in the house; he wanted a list of every medication in the house. Defendant walked away. At some point, Brazones reviewed a handwritten list of medications, but he did not notice who handed it to him.

¶ 25 Joseph Sester, an officer with the Rockford police department, was dispatched to defendant’s home for a reported overdose. When he arrived, emergency personnel were working on Tanner who was on the living room floor. Alyssa and Shaylee were upset and crying. Sester spoke with Shaylee and asked her what substances Tanner took; Shaylee replied that Tanner smoked a little “weed,” but that she did not see him take anything unusual. Defendant was pacing back and forth with a piece of paper in her hand that she was trying to give the paramedics. Defendant was “frantically trying to show the paramedics this piece of paper that she had in her hand.” The piece of paper was a list of medications. Defendant also placed pill bottles on the kitchen table. Sester did not see where she obtained the bottles, but did see her leave the room to do so. He assumed she went into her bedroom. Sester assisted with a subsequent search of the house and found two more bottles of prescription pills in the bedroom, one in the closet and one on the floor under the window.

¶ 26 Nicholas Weber, an officer with the Rockford police department, arrived at the scene. Everyone was upset; the two young girls were crying and defendant was crying and pacing back and forth, she was moving erratically and speaking very quickly. Weber spoke with defendant, who told him that she was in her bedroom when Shaylee and Alyssa came to get her, saying something was wrong with Tanner and they could not wake him up. Defendant told Weber that she went to check on Tanner and he was blue and not responding when she tried to wake him. She tried to revive him in the shower and stood in the shower with him for about 10 to 15 minutes. When that did not revive him, she called her niece Angela, who was a certified nurse assistant. Weber asked defendant why she did not call 911, and she replied she did not know. Weber located two pill bottles in defendant's bedroom. In addition, a glass pipe commonly used for smoking crack cocaine and "corner baggies" that typically package narcotics were found in defendant's bedroom, and a brass and wood pipe commonly used to smoke marijuana was found in the home.

¶ 27 Sean Welsh testified that he is an officer with the Rockford police department. He arrived at the scene and eventually brought defendant into his squad car, where he obtained her consent to search the house. In addition, he asked defendant about Tanner being in her bedroom, and she replied that Tanner had spent a short time in her bedroom that night, but that, the entire time he was in the bedroom, she was there. Welsh brought defendant to the police station interview room.

¶ 28 Detective Kevin Nordberg testified that he interviewed defendant on April 3, 2010, at 9:35 p.m. Defendant was agitated, "fidgety," could not sit still; her speech was very hard to understand and he could not communicate with her. Defendant was lying on her back on a table with her feet on a chair because she was in pain from a back injury. Nordberg asked defendant to read aloud a sheet of *Miranda* rights; she attempted to read a few of them but could not focus on the sentences,

so Nordberg read them to her. Defendant was “just not really functioning at a normal level,” and, after about 10 minutes, the questioning terminated.

¶ 29 On April 6, 2010, Nordberg learned that Tanner died after being removed from life support. That same day, Nordberg again interviewed defendant. A DVD of the interview was shown to the jury, and a redacted transcript of the interview was presented. In that interview, defendant stated that she had been taking multiple prescription medications and, on the night of April 2, 2010, she smoked “quite a bit” of cocaine in her bedroom. Defendant did “not really remember most of” what happened that evening. She explained that “everyone,” including Tanner, Shaylee, and Alyssa, knew she kept pills in her bedroom closet, and that she left the house on a few occasions to buy more cocaine. On multiple occasions throughout the interview, Nordberg asked defendant whether she gave Tanner pills or whether it was possible that she gave him pills. Defendant replied that she did not know, did not recall, and that she did not think she would do something like that. Defendant did not recall speaking or having a conversation with Tanner that night. Nordberg noted for defendant that, since she and Tanner were approximately the same weight, giving Tanner two pills was not a big deal and “I’m not talking about anything that could have caused him to have a medical condition, to overdose or anything like that.” Nevertheless, he told defendant, he needed to know what Tanner was given and Alyssa and Shaylee had told him that defendant gave Tanner the pills. Defendant replied that, “if my daughter told you that, maybe it’s true. I don’t know.” Defendant repeated that she had never done anything like that before and did not think she would, but she did not know.

¶ 30

B. Other Witnesses

¶ 31 David Lehne is a pharmacist with a CVS Pharmacy in Rockford. Lehne testified that the pharmacy had filled multiple prescriptions for defendant, including cyclobenzaprine, amitriptyline, ibuprofen (800 milligrams), gabapentin, alprazolam. In addition, the pharmacy filled defendant's prescriptions for Kadian Extended Release (ER) in 60- and 80-milligram dosages. Lehne testified that Kadian contained the controlled substance morphine, and that the 60-milligram Kadian pills were hot pink. Lehne testified that the Kadian labels stated that "alcohol intensifies effect," "taking more than recommended may cause breathing problems," and "caution, federal law prohibits the transfer of this drug to any person other than the person to whom it is prescribed." In addition, Lehne explained that, when a patient picks up his or her medication, inserts, called monographs, with use instructions, precautions, warnings, and storage information are provided. He identified a monograph for 60-milligram Kadian ER with defendant's name on it. The monograph would have been provided to defendant when she picked up the medicine, and it included a warning that the medicine, as an extended release prescription, should not be chewed or crushed before swallowing. It further stated that overdose or death may be caused if taken by a person who has not been regularly taking narcotic medication. Lehne explained that the Kadian ER is available in 10-, 20-, 30-, 50-, 60-, 80-, 100-, and 200-milligram dosages. Lehne testified that a 60-milligram dosage would be considered a "medium" dose. However, for someone who had never before taken them, a 60-milligram dosage would probably suppress respiration. Finally, based on his education, training, and experience, Lehne testified that, if amitriptyline and morphine were ingested together, amitriptyline would increase the morphine's impact on respiration, blood pressure, and alertness. Accordingly, if the two medications will be used concurrently, reduced dosages are recommended.

¶ 32 Curt Lesher, Rockford Memorial Hospital's pharmacy director, testified that the term "LD-50" refers to a dose of medication that would be lethal for 50% of the general population. With morphine, the lethal dose is "very dependent upon the individual." The LD-50 for morphine is 400 milligrams per kilo, but "it's so dependent on the patient." According to Lesher, morphine's effect on one who had not previously taken it would also depend on the method of ingestion. For example, a 60-milligram dose administered intravenously would be significantly high for someone who had never before taken it. In the case of time-released Kadian capsules, crushing or chewing the pellets that are contained within the capsule would produce an immediate release of the drug and could be toxic. However, opening the capsule, pouring the pellets on the tongue, and swallowing them would not significantly increase the speed of absorption into the bloodstream; in fact, that method is sometimes used for patients who have difficulty swallowing.

¶ 33 Robert Restuccia, the hospital physician who treated Tanner, testified that, for a person of Tanner's weight who was not already taking morphine, an appropriate prescribed dosage would be 4 to 5 milligrams.

¶ 34 Mark Peters, the forensic pathologist who performed Tanner's autopsy, testified that cannabis, morphine, and amitriptyline were found in his system. The pathology reports also stated that "it was learned that Tanner does have a history of drug overdoses" and "past medical history includes drug abuse with past overdoses," although those statements did not influence Peters' conclusions. Peters testified that Kadian ER is meant to provide 24-hour coverage to persons who had already been taking morphine; thus, the drug does not reach its peak effect until about eight hours after it is ingested. Peters explained that amitriptyline has a high LD-50, so one would have to ingest "a lot," even "a considerable amount" to cause death. When asked how the LD-50 of

morphine compared with that of amitriptyline, Peters testified that, to reach the LD-50 of morphine, one would take “slightly less, [than the LD-50 of amitriptyline] but probably not much less.”

¶ 35 C. Instructions, Convictions, and Sentence

¶ 36 In the State’s closing argument, the assistant State’s Attorney informed the jury that defendant “knew or should have known” that morphine was a deadly drug to give to a 14-year-old and, further, “that is first-degree murder, knew or *should have* known.” (Emphasis added.) Defendant’s objection to the State’s misstatement was overruled. The jury was instructed on involuntary manslaughter, as well as the original four charges. However, although the jury was given an instruction defining recklessness (relevant to involuntary manslaughter), it did *not* receive one defining knowledge (relevant to first-degree murder). The jury was instructed that the other-crimes evidence could be considered on the issues of defendant’s knowledge, intent, motive, and consciousness of guilt.

¶ 37 The jury convicted defendant of first-degree murder, drug-induced homicide, and the two charges of delivery of a controlled substance; it did not convict defendant of involuntary manslaughter. The court denied defendant’s motion for a new trial. At sentencing, the parties agreed with the court that the offenses for which defendant was convicted merge, such that one sentence should be imposed, not consecutive sentences. The court announced its sentence as follows:

“I’m going to sentence you to 25 years in the Department of Corrections on the murder charge. If I were sentencing you on the drug-induced homicide, I would sentence you to 30. If I was sentencing you separately on the Class 2 [delivery of a controlled substance], I would sentence you to 14. If I was sentencing you to []the other Class 2, I would sentence you to 14. Obviously, all these merge into one sentence.”

¶ 38 Nevertheless, the common-law record reflects that a judgment of conviction was entered on all four charges. The sentencing order reflects that defendant was sentenced to 25 years for first-degree murder, 30 years for drug-induced homicide, and 14 years for each delivery conviction. The order states that defendant shall serve 100 % of the first-degree murder sentence (25 years), and 75% of the drug-induced homicide sentence (22.5 years).² The order also states that the sentences for drug-induced homicide and the delivery counts merge into the murder sentence. Defendant appeals.

¶ 39

II. ANALYSIS

¶ 40

A. First-degree Murder Conviction

¶ 41 Defendant argues first that the evidence was insufficient to establish beyond a reasonable doubt that, when she gave Tanner pills, she possessed the *mens rea* required for first-degree murder. Defendant argues that we should reduce her first-degree murder conviction to involuntary manslaughter and remand the cause for resentencing. The State disagrees that the evidence was insufficient to sustain defendant's first-degree murder conviction, but agrees that, if we reduce the conviction to involuntary manslaughter, remand for resentencing is necessary.

¶ 42 When reviewing a challenge to the sufficiency of the evidence, we consider whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). We will not retry a defendant when considering the sufficiency of the evidence; the trier of

² The written order actually refers to defendant serving 75% on count 3 (delivery) not count 2 (drug-induced homicide). However, we believe this to be an error on the order. Indeed, at sentencing it was noted that defendant would serve 75% on the drug-induced homicide convictions, but with day-for-day credit on the delivery convictions.

fact is best equipped to judge the credibility of witnesses. *Id.* However, a fact finder's decision is neither conclusive nor binding, and a conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Id.*

¶ 43 As previously mentioned, a person is guilty of first-degree murder where he or she, with knowledge that his or her acts create a "strong probability of death or great bodily harm," kills another. 720 ILCS 5/9-1(a)(2) (West 2010). Here, we agree with defendant that, even when viewed in the State's favor, the evidence was insufficient to establish beyond a reasonable doubt that, when defendant gave Tanner the pills, she knew that her conduct was "practically certain" to cause him death or great bodily harm. See 720 ILCS 5/4-5(b) (West 2010). As knowledge requires a conscious awareness that one's conduct is practically certain to cause a particular result (*id.*; *DiVincenzo*, 183 Ill. 2d at 250), and as there was simply no evidence here that defendant was aware that, by giving Tanner pills, he was practically certain to suffer great bodily harm or death, the evidence was insufficient to sustain the first-degree murder conviction.

¶ 44 The critical issue is what defendant knew *when* she gave Tanner the pills. The only evidence the State points to in support of its argument that, when she gave Tanner the pills, defendant *knew* that her acts created a "strong probability of death or great bodily harm," is that, when defendant picked up her prescriptions, she received information, instructions, and warnings about the drugs. The warnings accompanying Kadian stated that: (1) morphine "may" create a high risk for severe and possibly fatal breathing problems; (2) taking more than the recommended dose "may" cause breathing problems; (3) the strengths of the medication "may" cause overdose and even death to a person who has not been regularly taking narcotic medication; (4) taking crushed, chewed or

dissolved forms of time released morphine “could” cause overdose; and (5) if a child swallows the drug, one should get emergency medical help right away. However, there was no evidence establishing that defendant ever read the warnings (let alone when she last reviewed them or that she understood them). More importantly, even if defendant *did* read and understand the warnings, the warnings are framed as *possibilities*, not probabilities, and, accordingly, are not in and of themselves sufficient to establish that defendant knew (*not* “should have known,” as the State concedes it incorrectly stated in closing argument), that, when she gave him the medicine, Tanner was practically certain to die or be seriously harmed. The evidence further reflected that the lethal dose of morphine is “very dependent upon the individual” and the method of ingestion, and may be exacerbated by the ingestion of other drugs that may interact with the morphine. There is no evidence that defendant knew that Tanner: (1) who was apparently about her same size and weight, would likely be seriously harmed or would die by ingesting a pill of a lower dosage than what she herself took; or (2) had also ingested amitriptyline, a substance that can exacerbate morphine’s effects.

¶ 45 We find *People v. Jones*, 404 Ill. App. 3d 734 (2010), instructive. There, the victim died from asphyxiation as a result of the defendant putting pressure on the victim’s neck with his foot. The defendant was convicted of first-degree murder. On appeal, the court noted that, unlike cases where the intentional use of a deadly weapon is accompanied by a presumption that the actor knows that his or her acts create a strong likelihood of death or great bodily harm, *i.e.*, the mental state of knowledge can be inferred based upon the fact that death or great bodily harm is the natural and probable consequence of using the weapon or choking a victim with one’s hands for several minutes, knowledge could not be inferred by the defendant’s use of his foot to put pressure on the victim’s neck. *Id.* at 745-46. The court noted that the defendant deliberately placed his foot in the area of

the victim's neck to hold him down, but the evidence did not establish that a layperson such as defendant would know that applying a specific amount of pressure for a specific amount of time, even if not directly on the jugular vein, would cause a person to asphyxiate. *Id.* at 747. Further, the circumstances surrounding the death reflected that, when the defendant left the victim, the victim was still breathing, a circumstance “inconsistent with the mental state for first-degree murder” and reflecting that the defendant, when he left the victim, had no reason to believe that the victim was going to die or that he had suffered great bodily harm. *Id.* at 749. The court found that the evidence reflected that the defendant had acted with recklessness, consistent with an involuntary manslaughter conviction, but did not establish, beyond a reasonable doubt, the knowledge required to sustain the first-degree murder conviction. *Id.* at 750.

¶ 46 Here, similar to *Jones*, the evidence did not establish beyond a reasonable doubt that defendant knew that Tanner would die or suffer great bodily harm upon taking the pills she gave him, nor did Tanner experience any apparent ill effects from the drug until a significant period after defendant gave them to him. Further, we disagree that defendant's mere receipt of medication warnings sufficiently reflects knowledge that providing them to Tanner would be practically certain to cause him death or great bodily harm. In fact, the *only authority* the State cites to support its argument that the warnings are sufficient to establish knowledge is the significantly distinguishable out-of-state case of *People v. Jennings*, 50 Cal. 4th 616 (Cal. Sup. Ct. 2010). The State notes that, in *Jennings*, the court upheld a first-degree murder by poison conviction and found relevant that the defendant-father had access to the instructions that accompanied the sleeping pills he had given to his child. *Jennings*, 50 Cal. 4th at 641-42. Significantly, however, and unlike here, access to the warnings was not the sole evidence establishing the defendant's knowledge that his actions of giving

his child medications would likely kill him. Indeed, the five-year-old victim died after the defendant hit him in the head with a fireplace shovel. Upon his death, it was established that, prior to administering sleeping pills, vicodin and valium, the defendant had also beaten, tortured, and starved the child. *Id.* at 627-33.

¶ 47 Further, California law provides that a defendant may be found guilty of first-degree murder if there is proof of “implied malice,” *i.e.*, when the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life. *Id.* at 639-40. The court held that the evidence was sufficient to establish that the defendant consciously disregarded the risks of giving the drugs to the child, in light of the warnings on the drug that it was for adults only; however, it also noted that the evidence reflected that the defendant had commented about wanting to kill the child, had discussed different methods of doing so, and had discussed the adverse effects that the drugs caused him when he, an adult, had ingested them. *Id.* at 641. As such, the evidence in *Jennings* reflecting that the defendant intended to kill the child when he administered the medication far exceeds that presented here.³

¶ 48 Finally, we further disagree with the State that defendant’s actions after Tanner overdosed reflect a consciousness that she knew, when she gave him the medication, that he was likely to die or suffer harm. The evidence reflected that defendant initially treated the inability to rouse Tanner

³We also note that, in addition to the factual distinctions, the *Jennings* decision reflects that California law permits conviction for first-degree murder when one consciously disregards the risks of harm. *Jennings*, 50 Cal. 4th at 639-40. In Illinois, a conscious disregard of a risk may constitute only reckless conduct, whereas first-degree murder requires knowledge that a result is practically certain to cause death or serious injury.

in a casual manner, joking about his “buzz,” writing on his leg, etc. When defendant realized the severity of the situation, she tried to wake him in the shower, started “freaking out,” was crying and acting in an agitated and restless manner, and undertook “frantic” efforts to provide emergency personnel with a written list of the medications present in the house. We agree with defendant that this evidence is not consistent with one who knew that an overdose was practically certain to occur. Rather, defendant’s actions (including her comments to Shaylee and Alyssa: “you don’t know what happened. He didn’t get the pills from me; you don’t know anything,” and “don’t call the police”) reflect that the overdose was unexpected and a realization that it was a consequence of her own actions.

¶ 49 Accordingly, we agree with defendant that the evidence was sufficient to establish only that her actions in giving Tanner prescription morphine were reckless, *i.e.*, that she “consciously disregard[ed] a substantial and unjustifiable risk that circumstances exist or that a result will follow *** and that disregard constitute[d] a gross deviation from the standard of care that a reasonable person would exercise in the situation.” 720 ILCS 5/4-6 (West 2010). As such, we agree with defendant that her first-degree murder conviction must be reduced to involuntary manslaughter.

¶ 50 B. Sentence

¶ 51 We disagree with the parties that, based upon our reduction of the first-degree murder conviction, the cause must be remanded for a new sentencing hearing on involuntary manslaughter. Our conclusion that the evidence does not support the first-degree murder conviction does not alter the fact that defendant was also convicted of drug-induced homicide. “Multiple convictions are improper if based upon the same physical act,” and only one homicide conviction may be entered for a single death. *People v. Boand*, 362 Ill. App. 3d 106, 136 (2005). Thus, while this court may

reduce defendant's first-degree murder conviction to one of involuntary manslaughter, the one-act, one-crime rule would preclude the entry of both involuntary manslaughter and drug-induced homicide convictions because only one person was killed. *Id.* at 137. Moreover, "because drug-induced homicide is a Class X felony (720 ILCS 5/9-3.3(b) (West [2010])) and involuntary manslaughter is only a Class 3 felony (720 ILCS 5/9-3(d)(1) (West [2010])), a conviction could be entered on only the drug-induced homicide charge, which is the more culpable offense." *Id.*

¶ 52 As to drug-induced homicide, we note that defendant does not appeal that conviction.⁴ However, she argues that, if this court, upon reversing the first-degree murder conviction, determines that the drug-induced homicide conviction should be "reinstated,"⁵ we should remand for a new sentencing hearing on that charge. Defendant notes that the trial court sentenced her to 30 years' imprisonment for drug-induced homicide under the belief that she was also guilty of first-degree murder. "Strangely," defendant asserts, the court sentenced her on the low end of the sentencing range for first-degree murder (which, generally, carries a maximum sentence of 60 years), "the most serious offense one can be convicted of and one that carries the most culpable mental state," but imposed the highest possible sentence (*i.e.*, 30 years) for drug-induced homicide. Thus, defendant

⁴Drug-induced homicide requires no *mens rea* regarding the *result* of one's actions; it simply requires that the defendant *knowingly give* a controlled substance to another and, if the person dies as a result of taking that substance, the defendant is responsible for that person's death. *Boand*, 362 Ill. App. 3d at 141-42.

⁵The term "reinstated" is inaccurate in that the drug-induced homicide conviction and sentence were (albeit mistakenly or improperly) entered and, therefore, do not need to be reinstated.

suggests, the court's belief that she committed first-degree murder might have influenced its sentencing decision on the drug-induced homicide conviction. We agree.

¶ 53 We note first, however, that, although the written judgment of conviction entered a 30-year sentence for drug-induced homicide, the written order actually conflicts with the court's oral ruling, which stated only that *if* it were imposing a sentence on that charge, it *would* impose 30 years. When an oral ruling and written order conflict, the oral ruling controls. See, e.g., *People v. Whalum*, 2012 IL App (1st) 110959, ¶¶ 42-43. The oral ruling clearly reflects that the court intended to sentence defendant only on the first-degree murder conviction, with the remaining three sentences being announced only hypothetically. As we have vacated the first-degree murder conviction, no other sentence was properly entered. Accordingly, the written judgment must be amended to vacate the sentences for drug-induced homicide and the two delivery convictions. Further, as the oral ruling controls, and as no sentence for defendant's drug-induced homicide or delivery convictions was properly entered, remand for sentencing on those charges, in the first instance, is necessary.⁶

⁶As to defendant's characterization of the court's oral pronouncements at sentencing as "strange" on the basis that the drug-induced homicide sentence would *exceed* that imposed for first-degree murder, defendant ignores that, pursuant to section 3-6-3(a)(2)(v) of the Unified Code of Corrections (730 ILCS 5/3-6-3(a)(2)(v) (West 2010)), defendant is entitled to receive 7.5 days of good conduct credit for each month of her drug-induced homicide sentence (hence the written sentencing order's recognition that defendant will serve 75% of the sentence for drug-induced homicide). Accordingly, a sentence of 30 years' imprisonment for drug-induced homicide would result in 22.5 years actually served, which is less, not more than, the 25-year sentence imposed for first-degree murder and for which defendant would serve 100%.

¶ 54 Further, even if we were to consider the fact that we know, from the oral ruling and written order, that the trial court viewed 30 years as the proper sentence for defendant's drug-induced homicide conviction, a new sentencing hearing would remain appropriate. In *People v. Mitchell*, 105 Ill. 2d 1, 15-16 (1984), our supreme court allowed a remand for re-sentencing in arguably similar circumstances. There, the defendant was convicted of two counts of attempted murder and two counts of aggravated battery. The trial court imposed concurrent 14-year sentences on all four charges. The supreme court vacated the attempted-murder convictions. Then, despite the fact that there were already sentences in place for the two lesser, remaining convictions, the court remanded for re-sentencing on those convictions, noting that, when it had imposed the 14-year (maximum) sentences on the lesser convictions, the trial court had noted the exceptionally brutal/heinous behavior involved therein. The supreme court acknowledged that the trial court might again wish to impose the same sentences on remand, but noted that, because the most serious convictions were vacated "and in these circumstances[,] ***defendant is entitled to have her sentences reconsidered." *Mitchell*, 105 Ill. 2d at 16.

¶ 55 Here, as in *Mitchell*, we know (from the court's oral ruling at sentencing) the sentence the trial court deemed appropriate for defendant's drug-induced homicide conviction. However, the court, when announcing it would, if sentencing defendant on that charge, impose the maximum sentence for the drug-induced homicide conviction, might have been influenced by the fact that the jury found defendant guilty of first-degree murder. As defendant notes, the court at sentencing (when entering its sentence for the first-degree murder conviction) noted that it gave conclusive effect to the jury's finding that defendant gave Tanner the pills knowing what would happen, and, further, it stated that the public needed to be aware that it is first-degree murder to give someone

drugs in such a manner. While we have concluded that the jury's findings regarding first-degree murder must be vacated, the trial court might have considered those findings when announcing its hypothetical view of an appropriate sentence for the drug-induced homicide conviction. We acknowledge, as did the court in *Mitchell*, that the trial court might, after a new hearing, wish to impose a 30-year sentence for the drug-induced homicide conviction. Nevertheless, we conclude that defendant, given the circumstances, is entitled to at least have that sentence decided in a hearing where first-degree murder is no longer a consideration.

¶ 56 In sum, we reduce defendant's first-degree murder conviction to a conviction for involuntary manslaughter. As it is now less serious than the drug-induced homicide conviction, the involuntary manslaughter conviction is vacated. Finally, the written judgment is amended to vacate the sentences on drug-induced homicide and the two delivery convictions. We remand for a sentencing hearing on those three remaining convictions. is unnecessary and the 30-year sentence for drug-induced homicide, for which defendant will serve 75% or 22.5 years, remains.

¶ 57 B. Other Issues on Appeal

¶ 58 Our resolution of defendant's argument that her first-degree murder conviction should be vacated renders moot her alternative argument that, because the elements of and instructions regarding first-degree murder were stated inaccurately, she was denied a fair trial.

¶ 59 We briefly address and reject defendant's argument that she was denied a fair trial where the jury was allowed to consider evidence of defendant's other misconduct as it pertained to the issues of defendant's knowledge, intent, motive and consciousness of guilt. Defendant argues that evidence regarding her: (1) providing alcohol to minors; (2) smoking marijuana and/or cocaine; and (3) telling her niece not to call the police, did not bear on the issues for which the court instructed the jury they

were to consider the evidence, *i.e.*, knowledge, intent, motive, or consciousness of guilt. Further, defendant argues that, because the jury instructions did not provide any direction regarding which conduct could be considered for which of the aforementioned limited purposes, the other crimes evidence could have led the jury to convict her simply because it believed she was a bad person. Defendant notes that this issue was raised in her posttrial motion only with respect to her videotaped statement; however, she argues we should review the issue for plain error. The State does not respond to defendant's assertion that we should review the issue for plain error, but disagrees generally that there was any error regarding the other-crimes evidence and instructions.

¶ 60 The plain-error doctrine permits a court of review to consider error that has been forfeited when either: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Adams*, 2012 IL 111168, ¶ 21 (quoting *People v. Herron*, 215 Ill. 2d 167, 187 (2005)). Even assuming, *arguendo*, that there was error regarding the other-crimes evidence, defendant cannot satisfy either prong of the plain-error test.

¶ 61 As to the first prong, the evidence was not close. We note that defendant does not even appeal the sufficiency of the evidence regarding her three remaining convictions: drug-induced homicide, delivery of a controlled substance to a minor, and delivery of a controlled substance (less than one gram of morphine). Indeed, the evidence that defendant gave Tanner the Kadian was overwhelming. Shaylee's testimony that defendant called Tanner to her bedroom and that he returned with Kadian pills, coupled with the evidence that defendant kept the pills in her bedroom closet, was in her bedroom most of the night, that the minors were not allowed into her room without permission, and that defendant told the girls, when Tanner overdosed, "you don't know what happened. He didn't get the pills from me; you don't know anything," constitutes overwhelming

evidence that Tanner obtained the pills from defendant. Accordingly, the evidence was not so closely balanced that any error regarding the other-crimes evidence threatened to tip the scales against defendant. *Id.*

¶ 62 As to the second prong, any error was not so serious as to affect the fairness of the trial or to impact the integrity of the judicial process. *Herron*, 215 Ill. 2d at 187. Other-crimes evidence is admissible if it is relevant for any purpose other than to show propensity to commit crimes. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 47. Further, such evidence has been permitted “where necessary to explain the circumstances of the crime which would otherwise be unclear or improbable.” *People v. Cross*, 96 Ill. App. 3d 268, 272 (1981) (citing *People v. Cole*, 29 Ill. 2d 501 (1963)). Here, the court’s decision to admit the other-crimes evidence did not constitute an abuse of discretion (*Walker*, 2012 IL App (1st) at ¶ 47) because it provided the narrative of the circumstances leading up to Tanner’s ingestion of prescription medication and his ultimate death. Moreover, we note that defendant relied on some of the other-crimes evidence in her defense; for example, she suggested that the evidence that Tanner was drinking alcohol and smoking marijuana rendered it possible that he, on his own, would have taken prescription medication. Along the same lines, she suggested that the fact that she left the house on a few occasions to buy cocaine gave Tanner an opportunity to obtain the Kadian from her bedroom without her assistance. Further, the evidence that defendant smoked cocaine and marijuana on the night in question was relevant to her contention that, when giving Tanner the pills, she did not possess the *mens rea* necessary to support a first-degree murder conviction. Finally, the evidence that she told Angela not to call the police (if, in fact, this can be considered evidence of other misconduct, since it is related to the charged conduct) was not completely un rebutted; the evidence on defendant’s efforts to seek assistance was

mixed, with Alyssa testifying that defendant did not stop anyone from calling 911 and it undisputed that defendant sought help from her niece, a nursing student and medical assistant.

¶ 63 Defendant notes that the jury was not instructed that it should consider the other-crimes evidence only for the limited purpose of showing a narrative of events. Further, defendant argues that the instructions did not direct the jury as to what acts could be considered for what specific purpose and, thus, allowed the jury to consider this evidence for improper purposes. Nonetheless, even if that amount of detail were required by the instructions, limiting instructions *were* provided and the error was not so serious that it “ ‘affected the fairness of the defendant’s trial and challenged the integrity of the judicial process.’ ” *Adams*, 2012 IL 111168, ¶ 21 (quoting *Herron*, 215 Ill. 2d at 187).

¶ 64

III. CONCLUSION

¶ 65 Accordingly, for the foregoing reasons, the judgment of the trial court of Winnebago County is reversed in part, vacated in part, and remanded. We reduce defendant’s first-degree murder conviction to involuntary manslaughter and vacate that conviction. The written judgment is amended to vacate the sentences for drug-induced homicide and the two delivery convictions. We remand for a sentencing hearing on those three remaining convictions.

¶ 66 Reversed in part and vacated in part; cause remanded.