COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP750-CR **Cir. Ct. No. 2009CF944**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEANDRE J. BERNARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 LUNDSTEN, J. Deandre Bernard appeals a judgment convicting him of first-degree intentional homicide as a party to the crime. He also appeals an order denying his motion for postconviction relief. Bernard's main arguments are that (1) trial counsel was ineffective by failing to investigate and use a

witness's mental health condition to impeach her, (2) trial counsel was ineffective by failing to request a jury instruction on accomplice testimony, (3) the circuit court should have suppressed a videotaped police interview of Bernard because it was a custodial interrogation conducted without ***Miranda*** warnings, and (4) playing the videotaped interview for the jury violated ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), because it showed a detective commenting on Bernard's truthfulness. We reject Bernard's arguments, and affirm.

Background

¶2 According to the criminal complaint, Karamee Collins was shot on the evening of June 9, 2009, and died from a bullet wound later that night. Statements from several witnesses implicated Bernard and another individual, Kendrick Briggs, in the crime. Specifically, Bernard and Briggs had access to a gun and planned to take revenge on Collins that night because of a previous incident between Collins and Briggs. Bernard and Briggs were each charged with first-degree intentional homicide as a party to the crime.

¶3 Bernard's case proceeded to a six-day jury trial. The witnesses included Briggs and other individuals who had been with Briggs and Bernard on the night of the shooting. Several of the witnesses, including Briggs, implicated Bernard as the shooter. We summarize some of the most pertinent testimony to provide context for Bernard's arguments.

¶4 Briggs testified that he belonged to a group of friends called the Cuddy Mac Boys. The group members included Bernard, Shaquille Curtis, and Xavier Fleming. Briggs denied that the group was a gang, but explained that the members "[h]ad each other's backs," meaning that, "[i]f one of [them] got into a

confrontation, [they] all got into a confrontation." The group tried to get back at Collins several times before the shooting, including by trying to "jump" him.

¶5 According to Briggs, Curtis obtained a gun from his stepfather's safe and sold it to Bernard. When Briggs encountered Collins on the evening of the shooting, Briggs called Fleming and asked Fleming to meet up with him and bring the gun.[1]

¶6 Briggs met up with Bernard, Curtis, and Fleming. Briggs and Bernard then separated from the others. Bernard gave Briggs the gun, and the two followed Collins. Briggs aimed the gun to shoot Collins, but "[c]ouldn't do it." Briggs returned the gun to Bernard, and together they continued to follow Collins. At some point, Bernard began running toward Collins, and Briggs "saw the flare" from the gun and heard eleven shots.

¶7 After the shooting, Briggs decided the gun should be taken to the home of a woman named Cheryl Masino, and he called Masino for a ride. When Masino arrived, Bernard was crying and told Masino that "he messed up." When they got to Masino's house, Briggs told someone else present that Bernard shot Collins.

¶8 Masino also testified. When called by the prosecutor as a witness, Masino testified that Bernard told her, "I think I killed a boy." Later, however, when Masino was recalled to the stand by Bernard's counsel, she recanted, denying that Bernard told her he killed someone. We discuss Masino's testimony

[1] Briggs's testimony is not clear as to why Briggs asked Fleming to bring the gun if Curtis had sold it to Bernard.

in more detail below in the course of addressing Bernard's claim that his trial counsel was ineffective because counsel failed to investigate Masino and use her mental health condition to impeach her.

¶9 Curtis testified that he took the gun from his stepfather's safe and that Bernard was "holding onto it." According to Curtis, on the night of the shooting Fleming said "we should go try and stop [Bernard]." Curtis and Fleming met up with Briggs and Bernard, and Curtis tried to talk Bernard into giving up the gun, but Bernard responded, "this boy [Collins] snaked my guy, so I'm going to do this." Curtis and Fleming then parted ways with Bernard and Briggs, and Curtis saw or heard gunshots. When the four of them met up again, Curtis saw Bernard pacing around and saying, "I messed up. I messed up." In addition, Curtis overheard Bernard on the phone saying, "I think I just killed my first person."

¶10 Fleming testified that, at some point that night before Collins was shot, Briggs called Fleming and asked Fleming to "'pop at somebody for me,'" meaning to "shoot" at somebody. Fleming refused to do this and instead, with Curtis, tried to talk Briggs out of it.

¶11 A fifteen-year-old girl named Erica Watson testified that, shortly before the shooting, she was with a group including Briggs and Bernard, who said they were "going to get" Collins. She told the jury that Briggs and Bernard left the group and that Bernard had a gun. Watson heard gunshots and then later saw Briggs and Bernard, at which time Briggs said, "We got him." Watson saw Bernard by some garbage cans crying and saying he "messed up."

¶12 Bernard did not testify. The jury was shown a videotape of most of a lengthy police interview of Bernard. There is no dispute that the interview is

inculpatory because it showed Bernard making statements connecting him to the crime, and changing his story as the interview progressed.

¶13 The jury found Bernard guilty. We reference additional facts as needed below.

Discussion

1. Alleged Ineffective Assistance Of Counsel—Failure To Investigate And Use Masino's Mental Health Condition To Impeach Her

¶14 Bernard first argues that his trial counsel was ineffective by failing to investigate and use Masino's mental health condition to impeach her. To prevail on an ineffective-assistance-of-counsel claim, the defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. ***State v. Roberson***, 2006 WI 80, ¶¶24, 28, 292 Wis. 2d 280, 717 N.W.2d 111. In reviewing such claims, we "'grant deference only to the circuit court's findings of historical fact. We review de novo the legal questions of whether deficient performance has been established and whether it led to prejudice ….'" ***Id.***, ¶24 (quoted source omitted).

¶15 We "may decide ineffective assistance claims based on prejudice without considering whether the [defendant's] counsel's performance was deficient." ***Id.***, ¶28. To show prejudice, the defendant must show there is a reasonable probability that, but for counsel's alleged errors, the result of the trial would have been different. ***Id.***, ¶29. "A reasonable probability is one sufficient to undermine confidence in the outcome." ***Id.***

¶16 As indicated in the background section above, Masino initially testified that Bernard told her, on the night of the shooting, "I think I killed a boy."

Later, however, when Masino was recalled to the stand by Bernard's counsel, she recanted this assertion. Despite Masino's recantation, her testimony was incriminating, and Bernard asserts that his counsel should have done more to effectively impeach her.

¶17 We understand Bernard to be arguing that what became apparent at the postconviction hearing—that Masino suffered from a mental condition that affected her perceptions and recollections—should have been apparent to Bernard's trial counsel earlier because counsel interviewed Masino several times prior to trial, or because counsel should have been aware of Masino's condition based on other available information. Based on these interviews and other information, according to Bernard, his trial counsel was ineffective by failing to investigate Masino's mental health background and seek disclosure of her mental health records by consent or under the court procedure set forth in ***State v. Shiffra***, 175 Wis. 2d 600, 605-08, 499 N.W.2d 719 (Ct. App. 1993), *modified by* ***State v. Green***, 2002 WI 68, ¶¶32-35, 253 Wis. 2d 356, 646 N.W.2d 298. The circuit court concluded that counsel was "probably" deficient in this regard, but that any deficiency was not prejudicial.

¶18 Assuming without deciding that counsel's performance was deficient, we agree with the circuit court and the State that Bernard fails to show prejudice. As we demonstrate below, even without additional impeachment, Masino's trial testimony revealed her to be a witness with serious credibility issues.[2]

[2] Our prejudice analysis makes it unnecessary to address whether trial counsel could have obtained Masino's mental health records under the procedure set forth in ***State v. Shiffra***, (continued)

¶19 Masino testified under cross-examination by defense counsel that she took a lot of medications that "affect[] a lot of things," but that she "d[id]n't know" if they affected her memory. She claimed that she clearly remembered the events on the night of the shooting. In subsequent trial testimony, however, she said the medications she was taking at the time of the shooting affected her memory.

¶20 Masino also admitted that she lied to police regarding Briggs's alibi:

> Q. You don't have any problem lying to the police, do you?
>
> A. Yep, I do.
>
> Q. Didn't seem to have a problem that morning [when giving police Briggs's alibi about playing Monopoly], did you?
>
> A. I was half asleep. I wasn't fully awake. I take a lot of medicine so —
>
> Q. In fact, you were just doing what [Briggs and another person] asked you to do, isn't that right?
>
> A. The part about the Monopoly, yes. The rest, no.
>
> Q. What's the rest?
>
> A. Whatever you're saying I'm lying about.

¶21 Later at trial, when defense counsel called Masino back to the stand and she recanted, Masino said her earlier assertion about Bernard's admission was not true and that she had included it because "that's what everybody else in the street had been saying." She explained that she realized her mistake after speaking

---

175 Wis. 2d 600, 605-08, 499 N.W.2d 719 (Ct. App. 1993), *modified by* ***State v. Green***, 2002 WI 68, ¶¶32-35, 253 Wis. 2d 356, 646 N.W.2d 298.

with an assistant state public defender who "got [Masino] to understand what had happened … and that's when I agreed that it was wrong."[3]

¶22 Under cross-examination by the prosecutor, Masino then partially recanted her recantation, or at least had difficulty distinguishing between what she might have heard from Bernard first hand and what she might have heard from others:

> Q … At the point at which you said that the defendant said to you, "I think I killed the boy," when you said that on the witness stand under oath, you thought that's what had happened didn't —
>
> A Yes.
>
> Q — it — wasn't you — didn't you?
>
> A Yes.
>
> Q So tell me what it is that [the assistant state public defender] said to you that convinced you that what you thought ... was the truth when you were on the stand and under oath wasn't the truth?
>
> A Pretty much, sometimes when you hear people talking outside, what they know is not always the truth.
>
> Q Okay. But when you were on the witness stand ....
>
> ....
>
> Q ... [Y]ou didn't say, well, what I heard on the street was that he had killed the boy, didn't you?
>
> A No.
>
> Q You said that he told you that he said, "I killed the boy," didn't you?
>
> A Yes.

[3] Bernard was represented by other assistant state public defenders at trial.

> Q And because that's what happened on the witness stand, right?
>
> A Right.
>
> Q And then [the assistant state public defender] told you that's not what really happened, didn't she?
>
> A Yes.

¶23 Given all of Masino's testimony, we see no reason why the jury would have perceived Masino's credibility much differently had it heard evidence that Masino suffered from a mental condition affecting her perceptions or memory. Accordingly, any failure to discover and use such evidence to impeach Masino was not prejudicial.

¶24 Bernard's argument to the contrary is not persuasive. Bernard argues that Masino's killed-a-boy testimony was "devastating" to the defense. But this argument rests on an incorrect premise: that, without Masino's testimony, there was little to implicate Bernard as the shooter. To the contrary, as described in the background section above, several other witnesses implicated Bernard as the shooter. Moreover, Bernard's argument overlooks the fact that he was charged with, and found guilty of, first-degree intentional homicide *as a party to the crime*. He does not explain why, in this circumstance, the State needed to provide convincing evidence that Bernard instead of Briggs was the shooter.

¶25 Accordingly, we conclude that Bernard has not demonstrated prejudice. Evidence of a mental condition affecting Masino's memory and perceptions would have been of marginal value, at best, to impeach her further.

¶26 Before turning to the second of Bernard's four main arguments, we briefly address two other arguments Bernard makes that relate to Masino's testimony.

¶27 Bernard argues that the circuit court erred in sustaining the prosecution's objection to defense counsel's attempt to cross-examine Masino further about her medications or mental health. We conclude, however, that any circuit court error in this respect would have been harmless for the reasons we have already provided in our prejudice analysis.

¶28 Bernard also argues that his counsel was ineffective by failing to move for a mistrial when the jury heard Masino recant her killed-a-boy testimony and attribute the recantation to a conversation with an assistant state public defender. Bernard does not address the standard for a mistrial, and we agree with the State that this argument is not well developed. Bernard argues that the need for a mistrial was "obvious" because the circumstances of the recantation destroyed the defense team's credibility and made the assistant state public defender who spoke with Masino an essential witness. We disagree that the need for a mistrial was obvious for these reasons, and we decline to address Bernard's mistrial argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments); *see also* ***State v. Ford***, 2007 WI 138, ¶29, 306 Wis. 2d 1, 742 N.W.2d 61 (circuit court has discretion to order mistrial after considering whether "in light of the entire facts and circumstances … the defendant can receive a fair trial").

2. Alleged Ineffective Assistance Of Counsel—Failure To Request Instruction On Accomplice Testimony

¶29 Bernard argues that counsel was ineffective when counsel failed to request a jury instruction on accomplice testimony. Bernard argues that Briggs, Masino, and Curtis each meet the definition of an accomplice for purposes of the instruction.

¶30 The pattern jury instruction on accomplice testimony provides:

> You have heard testimony from [name accomplice] who stated that (he) (she) was involved in the crime charged against the defendant. You should consider this testimony with caution and great care, giving it the weight you believe it is entitled to receive. You should not base a verdict of guilty upon it alone, unless after consideration of all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty.

WIS JI—CRIMINAL 245.

¶31 As Bernard points out, there is case law indicating that an accomplice instruction is required when the accomplice's testimony is not "corroborated" by other evidence. *See, e.g.*, ***Bizzle v. State***, 65 Wis. 2d 730, 734, 223 N.W.2d 577 (1974). At the same time, the level of corroboration needed to obviate the need for the accomplice instruction is "minimal." ***State v. Smith***, 170 Wis. 2d 701, 715, 490 N.W.2d 40 (Ct. App. 1992). The instruction "is chiefly aimed at the situation where the state's case against the accused consists of nothing more than the accomplice's testimony." ***Id.*** For the reasons below, we conclude that the failure to request the accomplice testimony instruction was not ineffective assistance of counsel and does not warrant a new trial.

¶32 We begin with Briggs. There is no dispute that Briggs was an accomplice.

¶33 Bernard argues that Briggs's testimony was not corroborated because Briggs was the only witness who could have been an eyewitness to whether Bernard was the shooter. However, regardless of whether there is corroboration for Briggs's testimony, we conclude there is no reasonable possibility that the accomplice testimony instruction would have significantly affected the jury's view of Briggs's credibility. Briggs testified that he thought he

had a lot to gain by testifying against Bernard, and that he had told other individuals that, by testifying, he hoped to receive a three-year sentence instead of a twenty-year sentence. In addition, the jury received the standard instruction on witness credibility. That instruction directs the jury to consider a number of factors in assessing a witness's credibility, including the witness's "interest or lack of interest in the result of this trial" and the witness's "possible motives for falsifying testimony." *See* WIS JI—CRIMINAL 300. Finally, defense counsel used closing arguments to highlight inconsistencies between Briggs's testimony and other witnesses' testimony and to assert that "[those other witnesses] don't have any reason to lie about what happened. But [Briggs], of course, has every reason to lie about what happened." Under these circumstances, the jury would have understood that Briggs had a motive to direct blame toward Bernard, and counsel's failure to request the accomplice testimony instruction for Briggs was not prejudicial.[4]

¶34 Our conclusion is supported by our reasoning in ***Smith***, 170 Wis. 2d 701. In ***Smith***, we said that, "[i]n considering whether Smith's conviction was swayed or influenced by omitting the accomplice instruction, we find significant whether the jury was otherwise made aware of [the accomplice]'s interests …, such as through direct examination, cross-examination, closing argument, or another jury instruction regarding witness credibility." ***Id.*** at 717 n.7. The situation here is similar.

[4] For the same reasons, any circuit court error in failing to give the instruction would have been harmless error.

¶35 Turning to Masino and Curtis, we question whether they are "accomplices" for purposes of the accomplice testimony instruction and, even if they were, whether the instruction would have mattered. Regardless, Masino's and Curtis's testimony was corroborated in pertinent respects by non-accomplices Fleming and Watson, as well as by Briggs. Therefore, the accomplice testimony instruction was not required as to Masino or Curtis, and counsel was not ineffective for failing to request it as to those witnesses.

3. Suppression Of Bernard's Videotaped Interview

¶36 Prior to trial, the defense sought suppression of Bernard's videotaped police interview. The interview lasted approximately five and one-half hours, starting around 6:00 p.m. and lasting until after 11:30 p.m. The circuit court allowed the first several hours of that interview to be shown to the jury, but suppressed the portion of the interview that occurred after 10:44 p.m., finding that the police tactics and the degree of restraint Bernard experienced changed markedly after that time.

¶37 Bernard argues that the entire interview should have been suppressed because the entire interview was a custodial interrogation conducted without ***Miranda*** warnings. The State contends that the circuit court correctly decided that Bernard was not in custody before 10:44 p.m. We agree with the State.

¶38 In reviewing the circuit court's decision, "we accept that court's findings of historical fact unless they are clearly erroneous; however, whether a person is 'in custody' for ***Miranda*** purposes is a question of law, which we review de novo based on the facts as found by the [circuit] court." ***State v. Morgan***, 2002 WI App 124, ¶11, 254 Wis. 2d 602, 648 N.W.2d 23.

¶39 The test for custody is based on the totality of the circumstances:

> In determining whether an individual is "in custody" for purposes of ***Miranda*** warnings, we consider the totality of the circumstances, including such factors as: the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint. When considering the degree of restraint, we consider: whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved.

Id., ¶12 (citations omitted).

¶40 The circuit court made numerous factual findings based on the suppression hearing testimony to support its conclusion that Bernard was not in custody for ***Miranda*** purposes before 10:44 p.m. In addition, the State points to additional suppression hearing testimony to support the court's conclusion. Bernard does not challenge any of the pertinent factual findings or testimony, which included all of the following:

- Police detectives approached Bernard in plain clothes;
- Bernard told police he was willing to come to the police station with the detectives to discuss the events of the night of the shooting;
- Bernard was not handcuffed when he was transported in the back seat of an unmarked squad car;
- The travel time to the police station where Bernard was initially taken was only two or three minutes from where police approached him;
- The two detectives accompanying Bernard in the squad allowed Bernard to get out of the car on the opposite side from them and did not do any "hands-on monitoring" of Bernard at the time;
- Bernard was initially put in a holding cell, and the door to the cell was left open while a detective asked him some basic questions;

- After asking the basic questions, the detective left the holding cell and left the door open;
- There were "instruments of arrest … like fingerprinting and photographs" in the area that Bernard could see, and Bernard was not being fingerprinted or photographed even though such equipment was available;
- Police asked Bernard if he was willing to go to another police station because of the shortage of interview rooms, and Bernard said he was willing to move to this location;
- After being transported to the second station, Bernard was taken directly to an interview room;
- Bernard was allowed to use the rest room repeatedly, and, although a detective took Bernard to the bathroom's location, the detective did not go into the bathroom or wait each time for Bernard to emerge, instead allowing Bernard to return unescorted to the interview room;
- While in the interview room unattended, Bernard took a call on his cell phone, and Bernard did not give the caller the impression that he was in jail or under arrest;
- Bernard asked where he would be going when "this was all done," and a detective told him that he would get a ride back to where the police had initially approached him.[5]

¶41 In arguing that he was in custody throughout the entire interview, Bernard points to the length of the interview, his initial placement in a holding cell, and a number of additional circumstances, including: evidence that police frisked him before allowing him into the squad car; that at least three detectives had contact with him by the time the interview started; that police at one point told him to stay in the interview room when they left him unattended; that he was constantly monitored during the interview; and that police sometimes told him to

[5] The detective testified that he said this because it was his "belief at the time [that] we would be taking [Bernard] back at the end of our conversation."

turn off his phone. He also points out that he was a juvenile (age 16) at the time of the interview.

¶42 While Bernard's interview was relatively lengthy and while the other circumstances that Bernard highlights weigh against the State, we conclude that they do not tip the balance to Bernard.[6] And, although neither Bernard nor the State provides a comparison of the facts in other cases with the facts here, our conclusion upholding the circuit court's suppression decision is consistent with our conclusion in a prior case, ***State v. Mosher***, 221 Wis. 2d 203, 584 N.W.2d 553 (Ct. App. 1998). In ***Mosher***, we concluded that a suspect was not in custody under circumstances with many similarities to those here. *See* ***id.*** at 206-07, 211-12, 219; *cf.* ***State v. Uhlenberg***, 2013 WI App 59, ¶13, 348 Wis. 2d 44, 831 N.W.2d 799 (suspect was in custody when he was taken to the police department in handcuffs, escorted into the booking area in handcuffs, placed in a locked interview room with little information about the reasons for the interview, and had a police escort in and out of the locked room to get water or use the bathroom).

¶43 Bernard also argues that the fact that the police recorded the interview "itself confirms" that there was custody. We fail to perceive the logic in this argument, and Bernard does not provide authority or develop a rationale for it. Accordingly, we reject this additional argument. *See* ***Pettit***, 171 Wis. 2d at 646-47.

[6] Some of the circumstances that Bernard cites occurred after 10:44 p.m. during the portion of the interview that the circuit court suppressed. We do not consider those circumstances because Bernard does not explain why they are relevant to whether there was custody at any point before 10:44 p.m.

*4. Alleged **Haseltine** Violation*

¶44 Bernard's fourth main argument is that showing the jury portions of the videotaped interview violated ***Haseltine*** because the interview showed the detective commenting on Bernard's truthfulness. ***Haseltine*** provides that "[n]o witness … should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Haseltine***, 120 Wis. 2d at 96. Bernard argues that the prosecutor's closing argument then compounded the ***Haseltine*** violation.

¶45 More specifically, Bernard asserts that the problematic detective comments included things like, "Your story is very different from everyone else's story," "10 people are telling us the same thing …. You're the outlier," and "We know you know more than you're telling us." The prosecutor's closing arguments included assertions that Bernard told a "bogus lie," "lied" about his whereabouts, "lied about the gun," and "lied about his friends." Bernard argues that, if these comments constituted a ***Haseltine*** violation, we should reverse because there was plain error or because the real controversy was not fully tried.

¶46 We agree with the State that there was no ***Haseltine*** violation. As the State points out, we rejected essentially the same arguments in ***State v. Miller***, 2012 WI App 68, 341 Wis. 2d 737, 816 N.W.2d 331. *See* ***id.***, ¶¶1, 11, 15-17. In ***Miller***, the jury saw a videotaped interview in which a defendant changed his story and a detective repeatedly told the defendant that the defendant was lying. ***Id.***, ¶¶4, 7-8. The prosecutor argued in closing that the videotape showed that the defendant was "not credible" and was "a liar." ***Id.***, ¶9.

¶47 As to the detective's statements, we explained in ***Miller*** that

> neither the purpose nor the effect of [the detective]'s statements in the video was to attest to Miller's truthfulness. Moreover, [the detective]'s statements present even less ***Haseltine*** concerns than the statements permitted in [another case] because [the detective]'s statements were not made as sworn testimony. As the trial court observed, [the detective]'s statements amounted to an unsworn "interrogation technique." The video showing this technique and Miller's responses to it provided the jury the necessary framework for understanding those responses.

Id., ¶15 (citation omitted). We concluded in ***Miller*** that, "because [the detective]'s statements were not made as sworn testimony providing his opinion regarding the truth of Miller's statements to the fact finder but were instead made in the context of a pretrial police investigation, the ***Haseltine*** rule was not violated and the trial court did not err by permitting the DVD to be played for the jury." ***Id.***, ¶16.

¶48 As to the prosecutor's comments in ***Miller***, we explained that "'a prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on evidence presented.'" ***Id.***, ¶20 (quoted source omitted). We concluded that "[t]his is what the prosecutor did." ***Id.***

¶49 Bernard argues that ***Miller*** is distinguishable because the jury in ***Miller*** received a special instruction that the detective's statements were not being played to show what was true but instead to provide "continuity" in the interview. *See* ***id.***, ¶¶8, 15. It is true that in ***Miller*** we referenced this instruction in our analysis of the detective's statements, *see* ***id.***, ¶15, but we agree with the State that the instruction was not important to our decision in that case. In ***Miller***, we twice summarized our conclusion and reasoning regarding the statements without referencing the instruction. *See* ***id.***, ¶11 ("We conclude that because the comments made by [the detective] on the video were made in the context of a pretrial police investigation and were not made as sworn testimony in court, the ***Haseltine*** rule was not violated."); ***id.***, ¶16; ("In short, because [the detective]'s statements were

not made as sworn testimony providing his opinion regarding the truth of Miller's statements to the fact finder but were instead made in the context of a pretrial police investigation, the ***Haseltine*** rule was not violated and the trial court did not err by permitting the DVD to be played for the jury."). And, we observe now that, regardless of any instruction, it would have been apparent to the jurors in ***Miller*** and, likewise, the jurors here that they were being shown the detectives' statements and questions simply to provide context for the statements of the suspects.

Conclusion

¶50 For all of the reasons stated above, we affirm the judgment of conviction and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.