Appendix

State v. Garland Barnes, Appeal no. 2018-AP-2005-CR
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DISTRICT III

April 8, 2021

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

2018AP2005-CR State of Wisconsin v. Garland Dean Barnes (L.C. # 2013CF118)

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

Garland Barnes moves for reconsideration of the opinion and order issued by this court on March 16, 2021. He primarily argues this court "sanitized" Officer Winterscheidt's testimony regarding Officer Clauer having witnessed the transaction, and for this reason misapprehended the facts and the nature of his evidentiary and confrontation arguments. To the contrary, this court fully reviewed the challenged testimony, including the prosecutor's questions. Nothing in the materials presented by Barnes' motion for reconsideration alters this court's view as to the disposition of the appeal.

Therefore,

IT IS ORDERED that the motion for reconsideration is denied.

Sheila T. Reiff
Clerk of Court of Appeals

STATE OF WISCONSIN COURT OF APPEALS DISTRICT III

STATE OF WISCONSIN,
Plaintiff

vs. **Appeal no. 18-AP-2005-CR**

Garland Barnes,
Defendant

DEFENDANT-APPELLANT'S MOTION FOR RECONSIDERATION

The defendant-appellant, Garland Barnes, moves the court to reconsider the ruling issued on March 16, 2021. The defendant brings this motion pursuant to section 809.24 of the Wisconsin Statutes. In support, the defendant states as follows:

I. The Court's Ruling Finding Investigator Winterscheidt's Testimony About Officer Clauer's Observations Were Not Hearsay And Didn't Violate Barnes's Confrontation Rights Omitted The Key Facts Argued By the Defense, Thereby Committing A Material Error Of Fact Warranting Reconsideration

1. This court's decision affirmed Barnes's conviction and rejected all evidentiary challenges, including his arguments that the circuit court erroneously permitted hearsay testimony from Investigator Winterscheidt regarding observations allegedly made by Officer Clauer, which should have been barred from trial not only because they were hearsay and unduly prejudicial to the defense, but because they violated Barnes's right to confront witnesses. *State v. Garland Barnes,* Appeal No. 2018AP2005-CR, ¶¶31-35, unpublished order (Wis. Ct. App. March 16, 2021). However, that analysis omitted key facts discussed in both of the defendant's briefs, which greatly change the analysis.

2. The court's opinion summarized the facts on this issue as follows:

    a. Although Barnes successfully moved to exclude Clauer's testimony as a discovery sanction, the fact that Clauer witnessed the drug transaction nonetheless made it into evidence. The defense attacked the quality of the police investigation during Winterscheidt's cross-examination, including by eliciting testimony suggesting that none of the officers testifying at trial had personally witnessed the transaction. In response, and over Barnes' hearsay objection, the State elicited, on redirect examination, Winterscheidt's testimony that Clauer had witnessed the transaction and had radioed to the other officers that the "deal was done." *State v. Garland Barnes, id.,* ¶31.

3. This limited description of the relevant facts—characterizing the claimed erroneous testimony as merely that Officer Clauer "witnessed the transaction"—carries forward in subsequent paragraphs, affecting how the court analyzes each aspect of the claim. For example:

    a. "the circuit court could reasonably conclude that the testimony was not being offered to show that Clauer had, in fact, observed the transaction but, rather, to show why he had taken subsequent investigative steps." *Id.*, ¶32 (emphasis added)

    b. "As explained, here Barnes opened the door to Winterscheidt's testimony by attacking the quality of the police investigation on cross-examination, including specifically their failure to observe the transaction." *Id.*, ¶34 (emphasis added)

4. The erroneous nature of the court's characterization of the defendant's argument is made plain in footnote 7:

    a. "In his reply brief, Barnes appears to concede that most of the foregoing analysis is correct. Barnes' reply brief instead limits itself to arguing that only Winterscheidt's identification of Clauer as the officer who saw the transaction was admitted in error. We fail to perceive what difference Winterscheidt's naming of a specific officer could have made. Put another way, if Barnes concedes that Winterscheidt could properly testify that another officer notified him that the transaction was complete, the additional information of that specific officer's name is immaterial—the definition of harmless error. Moreover, the mere naming of the specific officer who claimed to have witnessed the transaction did not transform the testimony into a hearsay statement for purposes of the Confrontation Clause." *Id.*, ¶35, n.7 (emphasis added).

5. This analysis strips the defendant's argument regarding the erroneously admitted testimony of any harmful details. The problem wasn't simply admission of the claim that Officer Clauer supposedly witnessed the transaction; it was a sequence of questions and answers that elicited testimony that Clauer specifically observed Marciniak tossing the buy money and Barnes tossing the black box, later found to contain methamphetamines. Compare the sanitized version of the argument from the court's opinion, *supra,* to the arguments from Barnes's brief-in-chief:

    a. "The prosecutor asked Winterscheidt how he knew the transaction had been completed, and he answered, "Other investigators observing the transaction notified me by radio" (R167:186). Winterscheidt testified they said, "it went down, deal is done" (R167:186). The prosecutor then asked if Winterscheidt was aware of any specific officers who saw the transaction of Marciniak tossing the buy money and Barnes tossing the black box (R167:186). The defense objected to hearsay, and the State argued an exception based on the officer's state of mind from getting told the transaction was done (R167:187). The court overruled (R167:187). The prosecutor again asked which investigator saw Marciniak toss the bag and Barnes toss the black box, and the defense again objected to hearsay and lack of foundation (R167:187). The court overruled, asserting it wasn't for the truth of the matter asserted, but was admissible for the officer's state of mind (R167:188). Winterscheidt answered that officer Clauer witnessed the hand-to-hand (R167:188)." (Appellant's Brief-In-Chief: 31).

6. The reply brief made similarly specific arguments:

    a. "The second category crossed the line into inadmissible hearsay. After the testimony described above, the prosecutor asked if Winterscheidt was aware of specific officers who observed Marciniak tossing the buy money and Barnes tossing the black box (R167:186-87), and Winterscheidt identified Officer Clauer (R167:188). This category was not a present sense impression. Winterscheidt did not testify to hearing Clauer make specific statements about witnessing Barnes deliver the black box. In fact, Winterscheidt never indicated how he knew that Clauer, specifically, observed the transaction, or—more importantly—that Clauer specifically observed Barnes tossing the box containing the meth. Winterscheidt could have only learned that claim upon reading Clauer's report, manufactured two years after the fact. Nor was this category of statements admitted to show Winterscheidt's actions in response. Winterscheidt never indicated when Clauer made these statements, or what if anything Winterscheidt did in response. These statements were only used for their truth, to show Barnes delivered the box containing meth. Thus, they were both hearsay and testimonial." (Appellant's Reply Brief: 12-13) (emphasis added).

7. Perhaps the court's misapprehension pertains to distinguishing between the answers Winterscheidt gave, and the questions asked by the prosecutor. If the court's hearsay and confrontation only considers the answers given by Winterscheidt, then his testimony on these points would be limited to the following:

    a. "I believe the words were something like, it went down, deal is done. Something like that" (R167:186)

    b. "It was DCI Investigator Duane Clauer." (R167:188)

8. But the analysis on these points must include not just the answers given, but the questions asked by the prosecutor, and the facts assumed in those questions. Placing Investigator Winterscheidt's answers into the context of the questions asked by the prosecutor shows that his testimony went far beyond simply saying Officer Clauer observed the transaction; his answers responded to questions which incorporated the ultimate facts to be decided by the jury, specifically who delivered the methamphetamines:

    Q. Okay. Are you aware of any specific officers who saw the transaction that Chip Marciniak described to you where he tossed in the buy money and Garland tossed in the black box?
    A. Yes .
    Q. Who?

    (R167:186) (emphasis added)

    Q. (By Ms. Ellenwood, continuing.) Sergeant, which investigator saw Chip Marciniak toss in a white plastic bag and Garland Barnes toss in a black box?

    ...

Q. (By Ms. Ellenwood, continuing.) What agent saw that?
A. It was DCI Investigator Duane Clauer.

(R167:187-88) (emphasis added)

9. A proper hearsay and confrontation analysis cannot parse out the answers, eliminate the substance of the questions to which those answers respond, and then strictly assess those context-free answers for whether they constitute hearsay.

10. This also demonstrates clearly why the hearsay exceptions cited by the circuit court and accepted by the court of appeals are inapplicable—because the facts assumed in the prosecutor's questions (underlined, *supra*) went far beyond what would be admissible under those exceptions. For example, both courts concluded the challenged testimony was not hearsay because it "show[ed] why he had taken subsequent investigative steps." *State v. Garland Barnes, id.*, ¶34. But this fails to distinguish between what information Clauer actually conveyed to Winterscheidt before Winterschedit took that action (moving in to arrest Barnes), and additional details that Clauer did not convey.

11. As discussed *supra,* Winterscheidt's testimony about what was specifically said before they moved in to arrest Barnes was very limited in details: "I believe the words were something like, it went down, deal is done. Something like that" (R167:186). Winterscheidt never testified that Clauer specifically said that he observed Marciniak toss the buy money and Barnes toss the black box; yet the prosecutor's questions specifically assumed those facts. If Clauer didn't make those statements to Winterscheidt, then those statements cannot be used to explain any actions taken by Winterscheidt because they are not part of Winterscheidt's state of mind. The State's non-hearsay explanation logically fails to support admissibility of those extra details.

12. For the same reason, the claim that this testimony was admissible under the theory of curative admissibility because Barnes opened the door fails due to imprecision. Our supreme court has recognized that "opening the door" is a very limited theory of admissibility, interpreted narrowly. *See* ***State v. Dunlap***, 2002 WI 19, ¶32, n.3, 250 Wis. 2d 466, 640 N.W.2d 112:

    a. "We note that the curative admissibility doctrine also limits what evidence can come through the door, once the door has been opened. In general, the inadmissible evidence should be allowed "`only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence.'" ***United States v. Martinez***, 988 F.2d 685, 702 (7th Cir. 1993) (quoting ***United States v. Winston***, 447 F.2d 1236, 1240 (D.C. Cir. 1971))."

13. Assuming the defense theory opened the door to limited evidence regarding the quality of the investigation—that there was no need for video cameras because enough officers were in position to witness the transaction—may open the door to the fact that an officer allegedly witnessed the transaction, but it doesn't open the door to specific details the officer claims to have seen. The rebutting evidence is to say law enforcement didn't

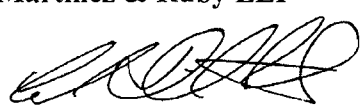
believe cameras were necessary because they had numerous officers in the area, and one did witness the transaction. The specific details that officer allegedly observed remain inadmissible hearsay, submitted for their truth.

14. Further, the analysis fails to account for the other objection raised by the defense—that admissibility of any information allegedly witnessed by Officer Clauer essentially nullified the circuit court's discovery sanction for the State's failure to timely disclose Clauer's police reports. The State's errors led the court to exclude any evidence from Clauer; nevertheless, the State was permitted to obviate that ruling through the backdoor by presenting the most crucial detail Clauer allegedly observed through Investigator Winterscheidt under the logically nonsensical claim that Clauer's supposed observations—including those that he did not convey to Winterscheidt—affected Winterscheidt's "state of mind."

15. And since the court's sanction for the State's error left Clauer unavailable to testify, the basis for his observations could not be challenged through confrontation. The detail that Clauer allegedly observed Marciniak tossing the buy money and Barnes tossing the black box was obviously testimonial; accordingly, the defendant's constitutional right to confront his accusers was violated. That detail went to the crux of the case and was not harmless. Reconsideration and reversal are warranted.

Respectfully submitted: April 5, 2021.

Martinez & Ruby LLP



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COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2021

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2018AP2005-CR Cir. Ct. No. 2013CF118

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARLAND DEAN BARNES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Douglas County: KELLY J. THIMM, Judge. *Affirmed.*

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

Per curiam opinions 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).

¶1 PER CURIAM. Garland Barnes appeals a judgment of conviction, entered upon a jury's verdict, for delivery of greater than fifty grams of

methamphetamine and an order denying his motion for postconviction relief. Barnes asserts he is entitled to dismissal of the criminal complaint or, alternatively, to a new trial based on the State's failure to disclose certain materials during discovery, violations of a pretrial order regarding evidence of prior transactions between Barnes and the police informant, and a bevy of alleged evidentiary errors. For the same reasons, he argues he received ineffective assistance of counsel and requests that we exercise our power of discretionary reversal in the interests of justice. We reject Barnes' arguments and affirm.

BACKGROUND

¶2 Barnes was charged with delivering greater than fifty grams of methamphetamine. The crime occurred during a controlled drug transaction using a confidential informant, Charles Marciniak, who was a former drug user and admitted criminal. Marciniak set up the transaction through several recorded telephone calls to Barnes. Police then outfitted Marciniak with a body wire, provided him with documented buy funds and sent him to the buy location, a bar parking lot.

¶3 Marciniak testified that he and Barnes parked their vehicles so that their driver's-side doors were facing one another. Marciniak threw the bag of buy money into Barnes' vehicle, Barnes threw the methamphetamine into Marciniak's vehicle, and then they went their separate ways. Officers were arriving at the scene just as the transaction was taking place, and there was no surveillance video of the exchange. Barnes and his girlfriend, Bobbi Reed, were apprehended in Barnes' vehicle after a brief chase, and the buy funds were located in the center console. Reed was found with several grams of methamphetamine and heroin

pills in her possession. A short time later, police reunited with Marciniak at an area motel and recovered methamphetamine from a box in his vehicle.

¶4 A jury convicted Barnes following a two-day trial, and he was sentenced to thirty years' imprisonment, consisting of fifteen years' initial confinement and fifteen years' extended supervision. Prior to his sentencing, Barnes filed a motion for a new trial. After sentencing, he filed a motion for postconviction relief. The motions alleged many of the same grounds, and collectively they asserted that the circuit court should have dismissed the criminal complaint as a sanction for discovery violations committed by the State. Alternatively, Barnes sought a new trial based on the State's alleged discovery violations, its alleged violations of an in limine order, and numerous allegedly prejudicial evidentiary errors. He also asserted that his trial attorney was constitutionally ineffective for failing to object to the errors. Finally, Barnes asserted that the cumulative effect of all the errors prevented the real controversy from being fully tried, warranting a reversal in the interests of justice.

¶5 The circuit court denied the motions. Although the court found discovery violations had occurred, it concluded that dismissal was not warranted as a sanction. The court reasoned that the recording of the drug transaction the State had failed to disclose was not exculpatory. Moreover, its absence had been used strategically by Barnes' trial counsel to bolster the defense case, which was that the police work on the case had been extremely shoddy and that Marciniak had actually sold methamphetamine to Barnes or Reed. Regarding the violation of the in limine order, the court found that Marciniak's mentioning during trial other drug transactions involving Barnes was an "innocuous reference" to past conduct and therefore not prejudicial. Finally, the court rejected Barnes' arguments regarding the alleged evidentiary errors, reasoning that Barnes' assertions were

either non-meritorious or there had been only harmless error. The court determined that the cumulative effect of any errors did not warrant a new trial, nor did Barnes receive constitutionally ineffective representation from his trial attorney. Barnes now appeals. Additional facts will be set forth in the discussion section as necessary.

DISCUSSION

I. Dismissal or New Trial for Discovery Violations

¶6 Barnes argues that the charge against him should have been dismissed or, alternatively, that he is entitled to a new trial as a result of the State's "numerous discovery violations and misrepresentations throughout this case." The circuit court thrice chastised the State for discovery violations, and, in two instances, imposed sanctions for the violations.

¶7 First, in response to a motion to exclude Marciniak as a witness based on the State's failure to disclose any promises, rewards or inducement he had been given for his assistance, the circuit court concluded the State should have identified such information "a year ago or more." The court declined to exclude Marciniak's testimony, however, preferring instead to fashion a jury instruction if the defense requested it.

¶8 Second, Barnes filed a pretrial motion to exclude officer Duane Clauer's testimony based upon the State's failures to disclose him as a witness and to provide his reports until days before trial. The circuit court concluded there had

been an "egregious" discovery violation under WIS. STAT. § 971.23 (2019-20),[1] and it excluded Clauer's testimony as a sanction.

¶9 Still, Barnes primarily focuses on a third alleged discovery violation regarding the contents of a wire audio recording made during the drug transaction. He argues this violation included not only a failure to disclose the recording itself, but also "numerous lies and misrepresentations" by State actors. Specifically, Barnes argues the prosecutor's representation in the State's discovery disclosures that Barnes' trial attorney had been given access to the police recording in April 2014 was false. Barnes also notes that both the prosecutor and police sergeant Paul Winterscheidt, who had made the recording, had stated repeatedly that there were no audible voices in the recording, only background noise. Winterscheidt's representation occurred during his cross-examination testimony at trial.

¶10 Following Winterscheidt's testimony, another officer was asked at trial about the lack of any voices on the wire recording, and he testified that, in fact, "[t]here were words on the recording" and that he could hear Marciniak's voice. The circuit court addressed this revelation at the end of the day's testimony and outside the presence of the jury, ordering the State to immediately disclose any audio recording from the wire. The next day, a third officer testified as follows about the wire recording: "There were voices on there, yes. The informant certainly and another person you can vaguely hear." Defense counsel repeatedly elicited the third officer's testimony that Winterscheidt's testimony the previous day had been false.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

¶11 On appeal, as to the alleged third discovery violation, Barnes first advances a due process claim under ***Brady v. Maryland***, 373 U.S. 83 (1963). For a defendant to prevail on a ***Brady*** claim, he or she must show three things: (1) the evidence at issue was favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) the evidence was material. ***State v. Wayerski***, 2019 WI 11, ¶35, 385 Wis. 2d 344, 922 N.W.2d 468; *see also* ***Brady***, 373 U.S. at 87. Materiality is measured by the same standard as prejudice in the ineffective assistance of counsel context—namely, whether there was a reasonable probability that the suppressed evidence would have produced a different verdict. ***Wayerski***, 385 Wis. 2d 344, ¶36. We accept the circuit court's findings of historical fact unless they are clearly erroneous, but we independently determine whether a due process violation has occurred. ***Id.***, ¶35.

¶12 The State argues no ***Brady*** violation occurred because the existence of the recording was disclosed well in advance of Barnes' trial, even though the prosecution erroneously believed the recording did not contain voices. We do not address this argument because, even assuming the evidence was suppressed by the State, Barnes has not shown the recording constituted evidence that was favorable to his defense or that it was material.

¶13 Specifically, Barnes argues the contents of the recording are "generally" favorable "because there is significant ambiguity in the discussion, with no clear indication of who is buying from whom." After trial, Barnes had the audio of the transaction enhanced, and it includes him and Marciniak "exchanging general pleasantries, before one male asks, 'How much dough?' and another makes a statement along the lines of[,] 'We're good on that other one, right?'" Barnes argues that the jury could draw an inference in his favor that Marciniak had

bought from Barnes, insomuch as the enhanced recording "fails to refute the theory of defense." Moreover, Barnes claims the recording was material because it contradicted Winterscheidt's and Marciniak's testimony and created "ambiguity in the transaction."

¶14 It is precisely this ambiguity that informs our conclusion that the recording was not favorable to Barnes. Barnes does not argue the contents of the recording directly supported his innocence; rather, the best he can argue is that the recording's contents were not inconsistent with his theory of defense. But when a fact finder might reasonably draw an inference of either guilt or innocence from an item of evidence, that evidence cannot be said to "make the difference between conviction and acquittal," and it is therefore not favorable to the accused. ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737 (citing ***United States v. Bagley***, 473 U.S. 667, 676 (1985)).[2]

¶15 To the extent Barnes argues that the contents of the recording were valuable as impeachment evidence, he accomplished his impeachment objectives at trial. Barnes was able to effectively impugn Winterscheidt's credibility, both during the testimony of other officers and when he recalled Winterscheidt, who admitted that his testimony the previous day about the recording's contents was "inaccurate" (or "false," to use the nomenclature of the defense question). Additionally, the record does not support Barnes' claim that the contents of the

[2] Moreover, as the State notes, defense counsel was able to use the existence of the recording to impeach Winterscheidt without having the contents admitted into evidence, which would have risked that the jury would have been able to discern the identities of the persons speaking. Depending on which individual the jury associated with a particular voice, presenting the recording at trial could have eroded the defense theory that Marciniak had sold drugs to Barnes, not vice versa.

recording impeached Marciniak himself. Marciniak testified after the defense became aware of the voices on the recording, and his testimony was that he could not recall one way or the other whether he and Barnes spoke to each other during the transaction.[3] Under these circumstances, we cannot conclude the contents of the recording were either favorable to Barnes or material, even assuming they were suppressed by the State.

¶16 Barnes further argues that even if the nondisclosure regarding the wire audio recording did not violate ***Brady***, a new trial is nonetheless required under Wisconsin's criminal discovery statute, WIS. STAT. § 971.23(1). Again, the State argues that it complied with the discovery statute because it disclosed the recording.[4] Assuming without deciding that the State failed to meet its disclosure obligations, Barnes has not demonstrated prejudice arising from that failure. The remedy for a discovery violation under § 971.23 is the exclusion of any witnesses or evidence not disclosed. *See* § 971.23(7m).

¶17 Here, the recording was not used at trial, and Barnes was able to nonetheless impeach one of the State's primary witnesses with the fact that he had testified inaccurately about the contents of the recording. Because the recording's contents were not used, there is no basis for us to conclude that a new trial is warranted. "A [discovery] violation is harmless when there is no 'reasonable

[3] Barnes takes significant liberties with Marciniak's testimony by claiming Marciniak "apparently said no words were exchanged." That was not Marciniak's testimony; he was quite clear that he could not remember whether he and Barnes said anything to one another, despite defense counsel's attempts to guide him toward testifying that he and Barnes had spoken during the transaction.

[4] Whatever the merit of this assertion—a matter we need not and do not reach—at a minimum, it fails to account for the State's repeated incorrect representation that no voices could be heard on the recording—a representation on which defense counsel apparently relied.

possibility' that the violation contributed to the conviction." ***State v. Rice***, 2008 WI App 10, ¶19, 307 Wis. 2d 335, 743 N.W.2d 517 (2007) (citation omitted).

¶18 Finally, Barnes asserts the circuit court erred by refusing to grant a new trial as a sanction for the totality of the discovery violations committed by the State. "[T]he imposition of a sanction for a discovery violation is addressed to the discretion of the trial court." ***State v. Martinez***, 166 Wis. 2d 250, 259, 479 N.W.2d 224 (Ct. App. 1991). A circuit court properly exercises its discretion when it "examine[s] the relevant facts, applie[s] a proper standard of law, use[s] a demonstrated rational process, and reache[s] a conclusion that a reasonable judge could reach." ***State v. Walters***, 2004 WI 18, ¶14, 269 Wis. 2d 142, 675 N.W.2d 778.

¶19 We conclude the circuit court did not erroneously exercise its discretion here. Although the court stated that the State's conduct was "disturbing," it noted that the wire recording was not exculpatory, and it preferred to view the matter as one of a witness testifying falsely. Accordingly, the court stated it would permit additional cross-examination and entertain a jury instruction on the issue of the wire recording's contents. Given the other discovery violations, the court stated it was "open … [to] limiting some of the [S]tate's evidence," and it ultimately did so, granting the defense's sanction request to exclude Reed as a witness.

¶20 In calibrating that sanction, the circuit court stated that it no longer viewed a jury instruction as sufficient given the numerous discovery violations "compound[ed] … together." The court reasoned the State needed to be punished above the exclusion of Clauer's testimony, and it found that Reed was a "key … witness" for the State, although not so much that her exclusion would "gut" the

State's case. The court found that this exclusion was an "adequate remedy" and that dismissal was not warranted. In short, the court based its remedy on the facts and the law, and it reached a reasoned and reasonable determination that we will not overturn on appeal.

II. Alleged Violation of In Limine Ruling

¶21 Next, Barnes argues that the circuit court erred by refusing to grant a mistrial for Marciniak's violations of the court's in limine ruling. The court granted Barnes' unopposed pretrial motion to exclude "[a]ny mention of 'other acts' evidence pertaining to previous drug transactions" between Marciniak and Barnes. The court stated such material was "not going to come in, and the [S]tate will certainly talk to their witness about not mentioning any prior drug transactions between the two."

¶22 Nonetheless, Marciniak made several allusions during his testimony to prior drug transactions with Barnes. During his direct testimony, he stated that he knew to meet Barnes in the bar parking lot because "that's where we always met." Marciniak also testified as follows, in response to a question about what he did after Barnes threw the box into his vehicle: "We just usually go our separate ways and that's what we did that day." During cross-examination, in the course of testifying that he could not recall whether he and Barnes had a conversation during the relevant exchange, Marciniak stated, "There usually wasn't any other meeting when we met so I'm going to say probably not." He additionally testified on cross-examination "that's where we met before and usually just threw each other's stuff into the vehicle," and he further stated he believed that is what occurred in this instance "because that's what had happened in the past."

¶23 Barnes also challenges certain of the prosecutor's comments during opening and closing arguments as violating the order. He contends the jury could reasonably infer from the prosecutor's statement during opening arguments that Marciniak knew he could get methamphetamine from Barnes and that Barnes had previously sold to Marciniak. Moreover, Barnes asserts the prosecutor's references during closing arguments to Barnes being a "bigger supplier" constituted "an indirect reference to prior deliveries."

¶24 Based on the foregoing statements, Barnes made an oral motion for a mistrial on the second day of trial. The circuit court denied the motion but stated it was willing to entertain a request for a cautionary instruction. Barnes subsequently raised the issue again in his postconviction motions.

¶25 Whether to grant a mistrial is a decision that lies within the circuit court's discretion. ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. "The circuit court 'must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. The denial of a motion for mistrial will be reversed only on a clear showing of an erroneous use of discretion' by the circuit court." ***Id.*** (quoting ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122). A circuit court properly exercises its discretion when it reaches a reasoned conclusion based upon an application of the proper legal standard to the relevant facts. ***State v. Bunch***, 191 Wis. 2d 501, 506-07, 529 N.W.2d 923 (Ct. App. 1995).

¶26 We cannot conclude the circuit court erroneously exercised its discretion based upon these facts. The court explicitly contemplated that a curative jury instruction would be sufficient to mitigate Barnes' concerns about any prejudice. Barnes does not contradict the State's assertion that he never

requested a curative instruction. The court's directive in this respect was consistent with the principle that "[s]ound discretion includes considering alternatives such as a curative jury instruction." ***State v. Moeck***, 2005 WI 57, ¶72, 280 Wis. 2d 277, 695 N.W.2d 783.

¶27 At the postconviction hearing, the circuit court again stated that a mistrial was not warranted. The court determined that the references to prior drug transactions were "innocuous" in the context of the entire body of evidence. Specifically, the jury likely would have inferred that Marciniak and Barnes had prior dealings based upon the information Marciniak provided to police and his efforts to set up the drug transaction at issue. The court essentially identified the testimony as background information, in which Marciniak was "explaining the situation." The challenged testimony did not concern the nature of the prior drug transactions, their frequency, or when they occurred—for all the jury knew, the transactions could have taken place years ago. The court explained reasonably well why it did not view the testimony as prejudicial. To the extent Barnes argues he was prejudiced by the prosecutor's opening and closing statements, the jury was properly instructed that the attorneys' arguments were not evidence.

¶28 Barnes' final argument regarding the "other acts evidence" is that the circuit court erroneously exercised its discretion because it applied the wrong legal standard. When addressing Barnes' various motions, the court occasionally used the phrase "manifest injustice." Again, the proper test for determining whether a mistrial is warranted is whether the claimed error was "sufficiently prejudicial to warrant a new trial." ***Doss***, 312 Wis. 2d 570, ¶69. Although the court used the wrong nomenclature, we do not perceive it to have been applying a materially different test. It is evident the court was assessing the prejudicial effect of the evidence in the context of the entire trial. Although Barnes obviously

disagrees with the court's assessment of prejudice, the court reached a reasonable determination based on the facts and law, one that we will not second guess on appeal.

III. Evidentiary Rulings

¶29 Barnes next challenges several of the circuit court's evidentiary rulings. We review a decision to admit or exclude evidence at trial for an erroneous exercise of discretion. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. On appeal, we do not decide whether we would have made the same decision as the circuit court but, rather, we focus on whether the circuit court's discretionary determination was made in accordance with accepted legal standards and with the facts of record. ***Id.***, ¶29.

¶30 Even if we conclude the circuit court erred, the defendant is not automatically entitled to a new trial. Both WIS. STAT. §§ 805.18(2) and 901.03(1) prohibit this court from reversing a judgment based on an evidentiary error unless the error affected the substantial rights of the party seeking relief. An error affects a party's substantial rights if there is a "reasonable possibility" that the error contributed to the outcome of the proceedings. ***Weborg v. Jenny***, 2012 WI 67, ¶68, 341 Wis. 2d 668, 816 N.W.2d 191. In other words, the error is harmless if the beneficiary of the error demonstrates beyond a reasonable doubt that the error did not contribute to the verdict. ***State v. Harris***, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397. Whether an error was harmless is a question of law that this court reviews de novo. ***Weborg***, 341 Wis. 2d 668, ¶43.

A. Winterscheidt's testimony about Clauer witnessing the transaction

¶31 Although Barnes successfully moved to exclude Clauer's testimony as a discovery sanction, the fact that Clauer witnessed the drug transaction nonetheless made it into evidence. The defense attacked the quality of the police investigation during Winterscheidt's cross-examination, including by eliciting testimony suggesting that none of the officers testifying at trial had personally witnessed the transaction. In response, and over Barnes' hearsay objection, the State elicited, on redirect examination, Winterscheidt's testimony that Clauer had witnessed the transaction and had radioed to the other officers that the "deal was done."

¶32 On appeal, Barnes first argues that testimony was hearsay and was therefore erroneously admitted. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). The State argues Winterscheidt's testimony was not hearsay, and we agree.

¶33 At trial, the State argued it was offering Winterscheidt's testimony about what Clauer had seen to show Winterscheidt's state of mind and what he had done after he was told the transaction had occurred. "Where a declarant's statement is offered for the fact that it was said, rather than for the truth of its content, it is not hearsay." ***State v. Wilson***, 160 Wis. 2d 774, 779, 467 N.W.2d 130 (Ct. App. 1991). The testimony had the convenient effect for the State of rebutting some of Barnes' attempts to impugn the quality of the investigation. But the circuit court could reasonably conclude that the testimony was not being offered to show that Clauer had, in fact, observed the transaction but, rather, to show why he had taken subsequent investigative steps. *See* ***State v. Hanson***, 2019

WI 63, ¶25, 387 Wis. 2d 233, 928 N.W.2d 607, *cert. denied*, 140 S. Ct. 407 (2019) ("The question is not whether the evidence might be inadmissible hearsay if it is offered to prove the truth of the matter asserted; rather, the question is whether the evidence is offered for a legitimate reason other than for the truth of the matter asserted.").

¶34 Barnes argues we should adopt the multifactor approach to "background" evidence discussed in ***United States v. Reyes***, 18 F.3d 65, 70-71 (2d Cir. 1994). We decline to mandate that circuit courts exercise their discretion in a particular manner on such issues. In any event, two of the factors ***Reyes*** discusses concerning the admissibility of "background" evidence are whether the defendant "opens the door" to such evidence and whether a jury instruction can cure any potential prejudice arising from the testimony. ***Id.*** As explained, here Barnes opened the door to Winterscheidt's testimony by attacking the quality of the police investigation on cross-examination, including specifically their failure to observe the transaction.[5] Moreover, the circuit court offered to provide a jury instruction regarding the purpose of the testimony; Barnes did not request one.

¶35 Second, Barnes argues that Winterscheidt's testimony violated his right to confront witnesses against him under both the United States and

[5] Barnes contends he did not open the door because he attacked only law enforcement's failure to video record or photograph the transaction, not its failure to observe it. This assertion parses the nature of Winterscheidt's cross-examination too thin, as it was clear Barnes was presenting a narrative that the police failed generally to keep track of the controlled buy. Accordingly, the circuit court could reasonably conclude that Barnes opened the door with that argument and line of inquiry.

Wisconsin constitutions.[6] *See* ***State v. Nieves***, 2017 WI 69, ¶18, 376 Wis. 2d 300, 897 N.W.2d 363. But the right to confrontation does not extend to testimonial statements offered for purposes other than establishing the truth of the matter asserted. ***Hanson***, 387 Wis. 2d 233, ¶19 (citing ***Crawford v. Washington***, 541 U.S. 36, 59 n.9 (2004)). And Barnes' right-of-confrontation argument is tied to his evidentiary assertions; he does not argue that his right to confront witnesses was nonetheless violated if Clauer's statement was properly admitted into evidence. Accordingly, our determination regarding Barnes' hearsay challenge also resolves his confrontation argument.[7]

B. Barnes' statements during one of the recorded telephone calls

¶36 Next, Barnes argues the circuit court erred by permitting testimony at trial regarding one of four recorded telephone calls between Barnes and Marciniak prior to the transaction. The recording and transcript of the call at issue, unlike those of the other three calls, did not contain any statements from Barnes because investigators had plugged a jack into the wrong port on the recording equipment and captured only Marciniak's side of the conversation.

[6] Whether a defendant's right to confrontation was violated is a question of constitutional law that we decide de novo. ***State v. Hanson***, 2019 WI 63, ¶16, 387 Wis. 2d 233, 928 N.W.2d 607, *cert. denied*, 140 S. Ct. 407 (2019). We generally apply United States Supreme Court precedents when interpreting the Sixth Amendment and analogous provisions under the Wisconsin Constitution. ***Id.***, ¶16.

[7] In his reply brief, Barnes appears to concede that most of the foregoing analysis is correct. Barnes' reply brief instead limits itself to arguing that only Winterscheidt's identification of Clauer as the officer who saw the transaction was admitted in error. We fail to perceive what difference Winterscheidt's naming of a specific officer could have made. Put another way, if Barnes concedes that Winterscheidt could properly testify that another officer notified him that the transaction was complete, the additional information of that specific officer's name is immaterial—the definition of harmless error. Moreover, the mere naming of the specific officer who claimed to have witnessed the transaction did not transform the testimony into a hearsay statement for purposes of the Confrontation Clause.

However, investigators could still hear the conversation between Barnes and Marciniak during that call, and they testified about it at trial. As even Barnes points out, Barnes and Marciniak clearly discussed a drug transaction during the call.

¶37 Barnes argues that, in response to a pretrial motion, the circuit court "exclud[ed] this recording and statements purportedly made during that call." Barnes asserts the court erred by denying his postconviction motion because, "[d]espite this clear order, at trial the State proceeded to present the recording of call 3, the transcript of call 3, and testimony claiming Barnes supposedly made incriminating statements during that call." In response to Barnes' postconviction motion, the court concluded that its pretrial ruling did not forbid any testimony about the call but, rather, merely rejected the State's assertion that it was entitled to admit, under WIS. STAT. § 908.01, the statements Barnes made, as reflected on the recording and transcript.

¶38 We agree with the circuit court that Barnes misapprehends the nature of the pretrial order in arguing that it functioned as an exclusionary ruling prohibiting any reference to the phone call. The State filed a pretrial motion specifically seeking to admit Barnes' statements to Marciniak during the calls as statements by a party opponent under WIS. STAT. § 908.01(4)(b)1. A few days later, at the hearing on the motion and after addressing other matters, the court stated, "That leaves us to the witnesses, the statements of the defendant to the two witnesses, Mr. Marciniak and [Bobbi Reed]." Barnes' counsel objected to Reed's testimony on the basis that it was "not statements of my client," and he also objected to the transcript of the phone call at issue as irrelevant because it contained only "unintelligible" statements by Barnes.

¶39 In response, the prosecutor conceded there were no statements by Barnes in the transcript of the call due to the recording error. As a result, the circuit court accepted the defense argument that, "[f]or this proceeding," the transcript was "not relevant" because there was no statement by Barnes to admit. The order subsequently entered concerned only the admissibility of three specific statements Barnes made during the other three phone calls, as well as the transcripts of those calls. Contrary to Barnes' assertions, the pretrial order did not prohibit reference to the call involving the recording error at trial, including the officers' descriptions of what was said during those calls. Likewise, the order did not prohibit the State from introducing the recording or the transcript at trial.

¶40 In any event, any error in admitting the evidence was harmless. Barnes challenges the admissibility of the recording and the transcript of the call that lacked any statements from him due to the recording error. But he does not challenge the testimony in which Marciniak stated that, during the call, he and Barnes discussed "[h]ow many ounces that [Barnes] was going to bring." Because the challenged evidence was duplicative of Marciniak's testimony, we cannot conclude there was a reasonable possibility that the recording and transcript contributed to the outcome of the trial.

¶41 Barnes does challenge the testimony of two officers who were listening to the phone call at issue. But those officers' testimony is ambiguous as to who was delivering drugs to whom.[8] Accordingly, their testimony was not

[8] One officer testified that during the relevant call, Barnes called Marciniak "and they were talking about the quantity of methamphetamine that was expected to be delivered." Similarly, another officer testified that during the call, "the amount of methamphetamine was changed from three ounces to four ounces."

inconsistent with Barnes' theory of defense, which was that it was Marciniak who was the drug dealer—not that a drug transaction had not occurred. As explained above, Marciniak's testimony specifically identifying Barnes as the dealer was far more damning than anything the officers testified to regarding the contents of the phone call involving the recording issue. Accordingly, we cannot conclude there is a reasonable possibility that the officers' testimony in this regard contributed to the outcome.

C. Officer testimony identifying Barnes' voice

¶42 Next, Barnes argues the officers lacked the necessary foundation to identify Barnes' voice on the recorded calls. He argues that one of the officers who testified about the content of the call with the recording issue had no basis to identify Barnes as a participant in that phone call. He also argues that Winterscheidt lacked any basis to testify that he could tell it was Barnes who participated in the phone calls with Marciniak.

¶43 Even assuming it was error to admit this testimony, we conclude the error was harmless. As explained above, Marciniak testified that he was speaking to Barnes during the phone calls. Barnes does not argue Marciniak lacked a basis to identify his voice. Because the officers' testimony was merely duplicative of Marciniak's, we cannot conclude there is a reasonable possibility that the officers' identification of Barnes' voice on the recordings contributed to the verdict. Moreover, the evidence as a whole—most notably, the fact that the buy money police had provided to Marciniak was found in the center console of Barnes' vehicle—supports our conclusion that, in the context of the trial, the officer identification was of insignificant value.

D. Winterscheidt's testimony about searching Marciniak's vehicle

¶44 At trial, Winterscheidt testified that after Barnes and Marciniak spoke during the various phone calls, officers searched Marciniak and his vehicle for any contraband or currency. Later, Winterscheidt described the purpose of such searches and what they entailed. After some additional testimony about the thoroughness of the vehicle search, Winterscheidt testified, "A thorough search was done. I didn't do it personally."

¶45 At this point, Barnes interposed an objection to the foundation for the question and moved to strike the answer. The circuit court overruled the objection, reasoning that the question had already been asked and answered. We conclude this was a reasonable approach, as there had already been significant unchallenged testimony regarding the vehicle search. Accordingly, the court did not erroneously exercise its discretion in overruling the objection. And, as with the issue regarding the officers identifying Barnes' voice, in the context of the entire body of evidence, any error arising from Winterscheidt's testimony about the adequacy of the search of Marciniak's vehicle was harmless.

E. The exclusion of rebuttal witness Gerald Clark

¶46 On the final day of trial, the defense sought to introduce the testimony of Gerald Clark, who had not been named on any witness lists. The defense stated Clark was intended as a rebuttal witness to counter Marciniak's testimony that, after the methamphetamine purchase, he went directly from the site of the transaction to the motel where he was staying. The defense made an offer of proof that Clark would testify that he was a friend of Marciniak's, that on the date in question he saw Marciniak pick up a box from a house or a garage, and that

Marciniak had made statements to Clark later that day about "set[ting] somebody up."

¶47 The circuit court excluded Clark's testimony. It concluded that "[n]inety percent" of what Barnes wanted Clark to testify about was not rebuttal testimony but, rather, evidence that belonged as part of Barnes' case-in-chief. In other words, the court determined that the vast majority of Clark's testimony was beyond the scope of rebuttal. Barnes does not challenge this determination, but he merely argues that the court should have permitted Clark to offer what little rebuttal testimony he could—namely, that Marciniak had not gone directly to the motel following the transaction, as he claimed to have done.

¶48 Again, we conclude the circuit court did not erroneously exercise its discretion when it prohibited Clark from testifying. The court stated it was not going to spend the time necessary to "parse" which portions of Clark's testimony Barnes should have introduced as part of his case-in-chief. The court clearly regarded Clark's purpose as providing the jury with an alternative theory of where Marciniak had gotten the methamphetamine later found in his possession after the controlled buy—an issue that should have been raised in Barnes' case-in-chief.

¶49 As Barnes notes on appeal, his attorney subsequently expressed a willingness to "tailor the questions I would ask Mr. Clark to just the issue discussed in chambers which is whether or not Mr. Marciniak went directly [from] the Temple Bar to the motel" after the transaction. The circuit court declined to revisit that issue, stating the effort was "too little, too late." The court expressed dismay that the parties had already extended what was supposed to have been a one-day trial into a second day, with the possibility of a third day looming. Again, we perceive a reasonable basis for the court to reject Clark's testimony under these

circumstances, where only a small portion could be properly considered rebuttal testimony. Witnesses that were not rebuttal or impeachment witnesses were required to be disclosed by the defense under WIS. STAT. § 971.23(2m)(a).[9]

IV. Ineffective Assistance of Counsel

¶50 Next, Barnes argues that although he believes his attorney's objections were sufficient to preserve issues for appellate review, to the extent we determine those objections were not sufficient and issues were forfeited, his trial attorney rendered constitutionally ineffective assistance. We have not applied any kind of forfeiture rule to Barnes' arguments pertaining to wire recording issues, to his mistrial request arising from the in limine order, or to any of the evidentiary issues Barnes raises. Accordingly, we perceive no basis to conclude trial counsel performed deficiently by failing to preserve issues for direct review.[10]

¶51 At most, we have identified a few instances in which Barnes' trial counsel could have taken a different course of action, such as by interposing an

[9] Even on appeal, Barnes fails to appreciate the circuit court's reasoning. Despite acknowledging that much of Clark's anticipated testimony fell outside the scope of rebuttal, Barnes nonetheless claims that his "rebuttal" testimony "could have provided an alternative source for Marciniak to obtain the box of meth—from a nearby garage, as Clark observed." The court's point was that this alternative theory was not proper rebuttal testimony but, rather, testimony to which the State should have been properly noticed. The State did not ask Marciniak about Clark's account during its direct examination, nor is there any indication that the box Clark would have testified about was similar to the box containing the methamphetamine that police recovered from Marciniak's possession after the transaction—even assuming Clark would have credibly testified that Marciniak had picked up something from a garage before heading to the motel.

[10] Whether a person has been deprived of his or her constitutional right to the effective assistance of counsel presents a mixed question of law and fact. ***State v. Hunt***, 2014 WI 102, ¶22, 360 Wis. 2d 576, 851 N.W.2d 434. Under that standard, we will uphold a circuit court's findings of fact unless they are clearly erroneous but we independently decide whether counsel performed deficiently in a manner that prejudiced the defendant. ***Id.***

objection earlier during Winterscheidt's testimony about the vehicle search, requesting a jury instruction regarding Marciniak's allusions to prior drug transactions with Barnes, or providing proper notice to the State about the intent to call Clark as a witness to support the defense's alternative theory. We question whether these instances constitute deficient performance under the applicable standard. We indulge in a strong presumption that trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. ***State v. Hunt***, 2014 WI 102, ¶39, 360 Wis. 2d 576, 851 N.W.2d 434. We will not conclude a trial attorney performed deficiently unless, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. ***Id.*** Barnes' brief generally restates his substantive arguments without separately considering whether his trial counsel acted within these norms, and his assertions of deficient performance are largely conclusory.

¶52 In any event, we are satisfied that none of the potential claims of error caused Barnes prejudice. A counsel's deficient performance is prejudicial only if the errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. ***Id.***, ¶40. The defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. Sholar***, 2018 WI 53, ¶33, 381 Wis. 2d 560, 912 N.W.2d 89. None of the potential errors here, whether considered individually or collectively, are sufficient to meet this standard. *See* ***State v. Myren***, 133 Wis. 2d 430, 441, 395 N.W.2d 818 (Ct. App. 1986) (noting that the harmless error analysis is substantively the same as the test for prejudice in the ineffective assistance of counsel context).

V. Reversal in the Interests of Justice

¶53 Barnes also requests that we exercise our power of discretionary reversal given the "combined effect of the discovery violations, perjured testimony, and evidentiary errors." This court has the statutory power to reverse a judgment "if it appears from the record that the real controversy has not been fully tried, or [if] it is probable that justice has for any reason miscarried." WIS. STAT. § 752.35. We exercise our discretionary reversal authority "infrequently and judiciously," and only in "exceptional cases." ***State v. Avery***, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 (citations omitted).

¶54 Here, Barnes asserts that the various alleged errors resulted in the real controversy—the identity of the person who delivered methamphetamine—not being fully tried. We generally conclude the real controversy has not been fully tried in two situations: "(1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue" that the issue was not fully vetted at trial. ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). Barnes appears to argue the latter was true here, asserting the "central dispute" in this case was "repeatedly clouded by improper propensity evidence, false testimony by law enforcement, foundationless testimony trying to plug holes in the State's case, and attempts to back-door hearsay testimony regarding the ultimate fact in the case in order to get around the State's blatant discovery violations."

¶55 We have addressed all of these claims of error and rejected them on their merits. The State was sanctioned for its discovery violations by excluding witnesses, the other acts evidence was de minimis (and largely inferable in any

event by Marciniak's conduct in setting up the controlled buy), and what few evidentiary issues arguably occurred were not likely to have made a difference in the context of the entire trial. In sum, we are satisfied that the real controversy was sufficiently before the jury.

¶56 In so holding, we do not ignore that law enforcement clearly made mistakes in the conduct of the investigation. However, these matters were exposed at trial by Barnes' counsel, who repeatedly and forcefully emphasized areas of the investigation that were deficient. Additionally, he impugned the credibility of the State's lead investigator by exposing Winterscheidt's initial testimony regarding the content of the wire recording as being false. Again, Barnes did not contend that no transaction occurred but, rather, that Marciniak was the seller and not the buyer—but this defense notably failed to account for the fact that the buy funds were located in Barnes' possession. Our review of the trial record confirms that the evidence before the jury was a proper basis upon which it could ascertain whether Barnes was guilty of delivering methamphetamine to Marciniak. As such, this is not a case in which the exercise of our discretionary reversal authority is warranted.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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Clerk of Court
Douglas County, WI
2013CF000118

DATE SIGNED: September 6, 2018

Electronically signed by Kelly J. Thimm
Circuit Court Judge

State of Wisconsin	**Circuit Court**	**Douglas County**
STATE OF WISCONSIN Plaintiff, vs. GARLAND DEAN BARNES DOB: 01/23/1965 Defendant.	DA Case No.: 2013DG000720 Court Case No.: 2013CF000118 **ORDER**	*For Official Use*

For the reasons stated fully on the record of the hearing held September 5, 2018, the defendant's motions are denied;

IT IS ORDERED:

I've heard the arguments.

First thing that I wanted to address is the request for dismissal based upon the late Discovery of the wire recording.

I mean, this is a situation where the Defense really had the best of both worlds.

The recording isn't getting played, but they can use it, and they used one officer against another officer because obviously Officer Winterscheidt wasn't being forthright when he said there's nothing on the recording.

So the Defense, from my perspective, gained significant advantage.

There's no doubt, Defense should have had this sooner. I mean, it was ridiculous that it waited until the first day or between the first and second day of trial for the Defense to get it, and that's ridiculous. The State shouldn't be in that practice. But that's what the Defense has. So the Defense has that. They get a copy of the recording.

Could they have tried to enhance it?

Sure, if they had more time.

But, at this point, they have a trial — well, let's look at context. And I think context is key. They have a key witness that's not allowed to testify or apparently a key witness that's not allowed to testify.

They have this recording that's not going to be allowed to be played. And the argument that one — one law enforcement says there is. One — one law enforcement says there isn't. I mean, a pretty good defense at that point.

And to call the recording exculpatory I think is incorrect. The content of the call wasn't exculpatory. The fact that there was a recording provides impeachment evidence, which the Defendant got and got to use in a very effective manner.

In fact, I think Mr. Gondik used it very effectively in his trial strategy. It all intertwined together with the entire strategy.

So the idea that somehow this late disclosure of the wire recording, while it's not ideal and — no trial is perfect, I think we can all agree that the trial wasn't perfect.

By the question is: Was — did this recording require dismissal?

My answer to that is no because I don't believe it's exculpatory in the nature of what's on the recording.

The flip — and I know the argument is, well, the fact that it existed is exculpatory because it shows one officer is not being truthful about it.

And the Defense got full advantage of that. Got even more advantage of it than as if the recording would have been supplied originally. I think they got the best of both worlds.

So any Motion to Dismiss for the failing to disclose the wire recording is denied.

And, again, I don't think that there's any prejudice in the Defense — should the Defense have gotten it?

Absolutely.

Did there end up being any prejudice because of it?

I don't believe so, and in my opinion, it was used very advantageously to the Defense.

So that — and I think if you look at the totality of the context of everything else, I still don't think it merits or in my mind it doesn't put the result of the trial in any — I guess any question in the Court's mind.

So then we look at these supposed prejudicial evidentiary matters, the Other Acts Evidence. And I — it's just you've got to look at the totality of the circumstances and the context.

Now, do some of these — starting first with the — these supposed Other Acts Evidence, as far as prior

things going on, was there some references?

Yes.

Was there — but does it say specifically that, yeah, when we would be dealing — when he would be dealing me drugs, this is what happened, it was innocuous in my opinion, this type of information. And I understand context, where they were talking about drug dealing. Well, I just — at the time and — and now, I just don't see how in the context that there's anything prejudicial about it. It's just explaining the situation. He's remembering — because he doesn't remember this specifically, that's what we usually did, I just — I just don't see how that's prejudicial to the Defendant. I — I just — and I just think it's more of an innocuous reference.

And if there wanted to be some type of Jury Instruction, I think the problem with the Jury Instruction which could have been ordered was the Jury Instruction maybe would have called more attention to it than what was particularly given.

And, quite frankly, the — the context of the argument kind of uses that by saying, you know, he's the drug dealer.

So you can look at it both ways. And I just don't see it being prejudicial. I see it more of an

innocuous reference.

You know, the next issue on the supposed errors was, you know, Clauer observing the transaction. I just — again, I think in a light weighing — I didn't allow that testimony. No doubt about it.

But, again, in — minds can disagree.

I think the door was opened to it based upon what was going on in trial, and it was this brief statement was allowed in.

Was that something that's so prejudicial that calls into question the outcome of the trial?

And I — I just don't think so.

Was it a perfect situation?

No.

But I just don't see it being overall prejudicial.

And that's looking at the context.

So let's assume that somehow that I ruled that it's — somehow there's a ruling, and we go back to where Mr. Barnes would have a new trial in — in the middle of trial or I rule on some type of mistrial. Now we're at a situation where we start over again.

So is Mr. Clauer allowed to testify at that next trial?

Maybe.

Is it the same jury?

Is this recording looked at and contain information that I didn't allow in but the Defense was able to use it to their advantage by not introducing it, is that going to come in in its entirety?

I mean, that's where you have to look at the whole context of the trial in getting a fair trial for the Defense.

And, you know, that — I just don't see it being so unduly prejudicial that it calls into question the outcome of the trial.

And I certainly don't think it's deficient performance when Mr. Gondik in his cross-examination is trying to hit the points he's hitting and just hits an extra point or goes a little bit too far. When you're doing a rigorous cross-examination as it was, sometimes those things happen. And just because the door got opened to this, in my opinion, kind of minor reference that the State was allowed to cure, and that's where, you know, we have case law that talks about it, that, you know, if there is something. That's the Dunlap case. I think that — I don't see that being prejudicial in the context of Mr. Gondik's performance, and I don't think it's deficient. He was vigorously cross-examining, making his points.

In a perfect case, would it have happened?

Maybe not.

But that's what — that's what we have here. It's not a perfect case.

So I don't see it being either deficient performance or prejudicial.

The — call No. 3, I mean, there's this misnomer — I mean, my Pretrial Ruling about 3 was the Defendant's statements. My intent behind it is whether any Defendant's statements being admitted, and that's why I have the Pretrial Ruling on these issues. There's no Defendant's case because I want to make sure Miranda's been complied with and Goodchild's been complied with. So that's my ruling — ruling behind it.

And maybe it didn't get on the record very clear, but it could be brought in for other purposes, and — and maybe I said that. I don't remember, and I didn't go back and look specifically at that transcript.

But the point being is the call No. 3 didn't violate any Pretrial Order because my Pretrial Order dealt with the issue of the Defendant's statements.

So I — I don't know where that came from, but I think that clears it up. My — it didn't violate any rules. So there can't be any prejudicial — prejudice or deficient performance or evidentiary hearing.

Regarding the voice, another interesting subject, because I think you run into that how much foundation do you want to lay? How much do you not want to lay to get it? Because then it — you could open the door to other issues on — on — as Mr. Gondik testified to.

In my opinion, I think there was enough evidence to support the identification, and I think it was effectively used against the persons hearing the voice in cross-examination.

So I — I don't see any prejudice nor was there any lack of foundation to have Mr. Barnes' voice identified. And it was identified, and then it was used as — it's more of a weight versus admissibility in my opinion.

So I just don't see how there's any problem with the foundation or the identification of the voice.

The inconsistencies regarding the informant's search, again, it's a situation where it was used effectively.

In fact, if that evidence wasn't presented, I think it's almost worse. I think it was better having those inconsistencies out there.

And, yeah, the officer says one thing; another officer says another thing. They conflict. It goes right into the Defense strategy, which, in my opinion, in my

opinion at the time, I thought was pretty effective.

As the case got — went on, in my opinion, it — the Defense case got better and better as time went on, just in my opinion.

And I don't remember exactly the words Mr. Gondik used, but he read my mind, because it didn't — at least to me, it didn't seem like the Defense had a very good case at the beginning and the State had a good case. But as time went by, the Defense case got better, and, in fact, to where I think the outcome — I mean, I think the outcome was what the outcome was. That's why we have jurors. I don't make those decisions.

The cumulative error as far as everything, again, assuming that there were errors, which I don't believe there were, I just don't think that the cumulative errors is here.

If there — these were errors in the context of this trial, to me they were just minor errors, if at all, and they don't mound up to something where the Defendant didn't get a fair trial or the real controversy was not tried.

And then, just like I said, looking at the overall effective assistance of counsel, in my opinion, Mr. Gondik overall was an effective advocate for Mr. Barnes. It just didn't turn out the way that

Mr. Barnes wanted it to nor Mr. Gondik wanted it to. It turned out with a conviction.

But — trying to remember the exact words I was trying to write down.

I did everything I would do as a reasonable attorney, or words to that effect that Mr. Gondik said, and I agree. Mr. Gondik did everything that a reasonable attorney would do, in my opinion, was effective in what his strategy was, and it's just the jury didn't believe the strategy for whatever reason or believe the Defendant's case and believed that the State had proved the case beyond a reasonable doubt.

So I — I just don't think that there was any ineffective assistance of counsel.

In my opinion, there's not a reasonable probability of a different outcome. I think the outcome was what it should have been, and I don't have any doubts about what the outcome of the trial was. Again, it is what it is.

Just because the Defendant loses doesn't mean that the Defense Attorney didn't do a great job, which, in my opinion, Mr. Gondik did an outstanding job at the trial with what he had to work with with the difficult case. He was able to have evidence suppressed, not used. He was able to use that recording to his advantage without having

to play it, which maybe playing it would have made it more advantageous to the State. I mean, there's a number of things. The cross-examination of the witnesses was effective.

So it just didn't come out the way that Mr. Barnes wanted it to come out.

So, in light of all those circumstances, I am going to deny the motion, first of all, for dismissal, and, second of all, for a new trial based upon ineffective assistance of counsel and any cumulative error effects. So the motion is denied.

Miss Wilson, would you do an Order consistent with this opinion?

ATTORNEY WILSON: Yes.

THE COURT: All right.

I think that's it for today.

I know I'm -- I'm backed up on hearings.

So I think if everybody could leave, I've got I think two hearings that are closed hearings so that I could get the matter going.

Thank you.

(End of proceedings.)

* * * *

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 1** **DOUGLAS COUNTY**

For Official Use Only

State of Wisconsin vs. Garland Dean Barnes

Judgment of Conviction

Sentence to Wisconsin State Prisons and Extended Supervision

FILED
10-08-2015
Clerk of Court
Douglas County, WI

Date of Birth: 01-23-1965

Case No. 2013CF000118

List Aliases: AKA Mahlon Scot Barnes

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	Manuf/Deliver Amphetamine(>50g)	961.41(1)(e)4	Not Guilty	Felony C	04-21-2013	Jury	07-08-2015

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	10-07-2015	State Prison w/ Ext. Supervision	30 YR	Department of Corrections	thirty (30) years WSP fifteen (15) years IC fifteen (15) years ES

Total Bifurcated Sentence Time

	Confinement Period				Extended Supervision			Total Length of Sentence		
Ct.	Years	Months	Days	Comments	Years	Months	Days	Years	Months	Days
1	15	0	0		15	0	0	30	0	0

Conditions of Extended Supervision:

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	☐ Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
1,112.50	163.00		1,402.38	153.24	92.00		250.00

Ct.	Condition	Agency/Program	Comments
1	Fine		fined $500 plus costs, DNA surcharge listed separately pay as required by DOC If probation is discharged with outstanding financial obligations, a civil judgment will be entered against the defendant in favor of restitution victims and/or governmental entities for the balance due. All available enforcement actions will be used to collect the debt. Per Wis Stat-Funds from prison accounts may be used for obligations in accordance with prison policy not to exceed 25% of gross.
1	Restitution		$1402.38 restitution to DCSD pay as required by DOC If probation is discharged with outstanding financial obligations, a civil judgment will be entered against the defendant in favor of restitution victims and/or governmental entities for the balance due. All available enforcement actions will be used to collect the debt. Per Wis Stat-Funds from prison accounts may be used for obligations in accordance with prison policy not to exceed 25% of gross.
1	Costs		
1	Drug Treatment		Chemical dependency evaluation and follow-thru.
1	Prohibitions		No contact with B R absolute sobriety
1	Other		Submit a DNA sample (if not done previously)

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Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:

The Defendant is ☐ is not ☒ eligible for the Challenge Incarceration Program.

The Defendant is ☐ is not ☒ eligible for the Substance Abuse Program.

IT IS ADJUDGED that **0** days sentence credit are due pursuant to §973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department.

BY THE COURT:

Distribution:

Kelly J Thimm, Judge
Daniel W. Blank, District Attorney
Richard S Gondik Jr, Defense Attorney
cc: DOC
Douglas County Jail
Transport

Electronically signed by Kelly J. Thimm
Circuit Court Judge/Clerk/Deputy Clerk

October 8, 2015
Date

Marciniak?

A. Yes.

Q. How did you give it to him?

A. It was stacked up in small bills and placed in a white plastic bag.

Q. Did you mark the money in any way? How did you identify it?

A. We photographed the bills and recorded serial numbers.

Q. Is that common for you to do that?

A. Yes.

Q. Why do you do that?

A. We do that so we can track buy funds when we later arrest a target and recover our buy funds and also serves as evidence that the purchase took place.

Q. Earlier you stated that you searched Chip's person and his vehicle. Why did you do that?

A. We wanted to make sure that he's not bringing any of his own unmarked currency to the transaction, and we wanted to make sure that he's not bringing any illegal drugs to the transaction.

Q. Sergeant, do you just do a cursory search or what does that process entail?

A. It's a thorough check. We check their pockets. Check any areas that you know would be obvious to

conceal that.

Q. If they have shoes on, do you make them take their shoes off?

A. Typically, yes.

Q. If they have a hat on, do you make them take that hat off?

A. Yes.

Q. If they have socks on, do you make them take their socks off?

A. No.

Q. Would you feel on their foot to see if they were hiding anything?

A. And we would look as well.

Q. With regards to the vehicle, how do you search their vehicle?

A. We go through compartments in the vehicle and any locked or unlocked containers in the vehicle.

Q. Would you say you do a thorough search --

A. Yes.

Q. -- of a confidential informant's vehicle?

A. Yes.

Q. Why is that?

A. We want to make sure they're not bringing any illegal drugs to the controlled buy.

Q. So on April 21st, did you do a thorough search of

Chip Marciniak's person?

A. Yes.

Q. Did you do a thorough search of Chip Marciniak's vehicle?

A. A thorough search was done. I didn't do it personally.

Q. Okay.

MR. GONDIK: Objection as to foundation. Move to strike.

THE COURT: Overruled. It's already been asked and answered.

Q. (By Ms. Ellenwood, continuing.) What kind of vehicle was Chip driving that day if you recall?

A. It was a pick-up truck.

Q. After Chip was searched, his vehicle was searched and he was given buy money, what happened next?

A. Well I had couple of investigators go over to the Temple Bar and close a gate to limit the number of exits from the lot, and then we proceeded to send Mr. Marciniak to that area under surveillance.

Q. Do you recall when Chip went to the Temple Bar?

A. Had to have been about 8:15 maybe. I'm sorry, 6:15.

Q. In the evening?

A. In the evening, yes.

A. That's correct.
Q. Are you aware of any specific officers that observed the transaction?
A. Yes.
Q. Who was that?
MR. GONDIK: Objection as to foundation, Your Honor, and hearsay.
THE COURT: Ms. Ellenwood?
MS. ELLENWOOD: He opened the door when he asked about did any investigators videotape this.
THE COURT: He opened the door but how does that respond to -- it might make it relevant but how does it make it not hearsay?
MS. ELLENWOOD: Again, it goes to the officer's state of mind at the time. I could lay further foundation for what he did after he was informed of seeing the transaction occur.
THE COURT: Okay, overruled then. You can lay foundation. Can you repeat the question?
Q. (By Ms. Ellenwood, continuing.) When officers surrounded the Temple Bar, were there officers who were able to maintain video -- excuse me, visual surveillance?
MR. GONDIK: Objection, Your Honor. He wasn't there after.

THE COURT: If he knows, he doesn't so overruled.

A. Yes.

Q. You know that there were officers who had visual surveillance on the parking lot at that time?

A. Yes, through our radio communications responding to that I was aware that officers had reported they were in a position at the Temple Bar.

Q. How did you know that the transaction had been completed?

A. Other investigators observing the transaction notified me by radio.

Q. Okay. Do you recall what they said, if anything?

A. I believe the words were something like, it went down, deal is done. Something like that.

Q. Do you know who radioed that to you?

A. I don't recall specifically who radioed that to me.

Q. Okay. Are you aware of any specific officers who saw the transaction that Chip Marciniak described to you where he tossed in the buy money and Garland tossed in the black box?

A. Yes.

Q. Who?

A. It was --

MR. GONDIK: Objection, Your Honor, this is hearsay.

THE COURT: Ms. Ellenwood?

MS. ELLENWOOD: Again, it goes to officer's state of mind from them getting told that the transaction was done is when officers then moved in to position to stop Garland Barnes.

THE COURT: I'm going to overrule the objection.

MR. GONDIK: Your Honor, can we approach?

THE COURT: You can but I can tell you what I'm going to say.

(Discussion held at the bench and off the record.)

THE COURT: The objection is overruled. Go ahead.

Q. (By Ms. Ellenwood, continuing.) Sergeant, which investigator saw Chip Marciniak toss in a white plastic bag and Garland Barnes toss in a black box?

MR. GONDIK: Objection, hearsay, lack of foundation.

THE COURT: Ms. Ellenwood, regarding hearsay?

MS. ELLENWOOD: Again, goes to the officer's state of mind.

THE COURT: So you're not asserting it for the truth of the matter?

MS. ELLENWOOD: No.

THE COURT: Then if it's not asserted for the truth of the matter, I'm going to overrule the objection. It's going to the state mind of the officer. If Mr. Gondik wants -- if you want to get a jury instruction on that substantively, I will certainly give it. Go ahead, Ms. Ellenwood.

Q. (By Ms. Ellenwood, continuing.) What agent saw that?

A. It was DCI Investigator Duane Clauer.

Q. With that information were you then given the code word that the transaction was completed?

A. Yeah, it wasn't a code word. It was just common language to let us know the deal was done.

Q. Once you knew the deal was done, what happened next?

A. After the transaction took place, I was just arriving on the scene. Mr. Barnes backed into the front of Sergeant Madden's vehicle and then proceeded out of the parking lot eastbound on Broadway Street.

Q. Were you eventually able to stop him after some time?

A. Yes.

MS. ELLENWOOD: No.

THE COURT: Mr. Gondik?

MR. GONDIK: Yes, Your Honor, I would like to make a record of this side-bar.

THE COURT: Yes.

MR. GONDIK: I would defer to Your Honor, if you want to do it from memory, if you would like to defer to me. I'll do my best.

THE COURT: I'm assuming you're talking about the DNA and also the issue with Mr. Clauer?

MR. GONDIK: Clauer.

THE COURT: Clauer. That's what you're talking about?

MR. GONDIK: Well I'm not so concerned about the DNA now. That testimony was completed and I don't think was harmful.

THE COURT: Okay.

MR. GONDIK: But most definitely feel strongly about the Duane Clauer coming in.

THE COURT: Okay, as far as Clauer goes, we did have a side-bar. I do believe Mr. Gondik objected to Mr. Winterscheidt testifying about other people seeing the transaction. I believe that Mr. Gondik opened the door to that based upon his cross-examination of Officer Winterscheidt in his repeatedly asking about

surveillances and wouldn't that be important to do video surveillance, and Officer Winterscheidt is saying not under these circumstances or words to that effect. That's why I thought the door was opened to it.

The other side of it is it wasn't being asserted for the truth of the matter but to go to the state of mind of the officer. So I think there can be a jury instruction quite frankly drafted that's going to deal with Mr. Gondik's concerns about that evidence because I did bar that witness from testifying because of the discovery requirement and egregiousness of the discovery violation. But, again, it concerns me when the door gets opened to it; and, again, it was limited purpose. It wasn't asserting that he actually saw the transaction, just that the officer thought that.

So I think it's very, in my opinion, limited but, Mr. Gondik, certainly you can make a little more of a record of that or however much of a record that you want on it.

MR. GONDIK: Thank you, judge. I respectfully and vehemently disagree with Your Honor's analysis. The Court previously ordered that Duane Clauer's testimony would not come in, nor would his report. The Court effectively undid that ruling when it allowed Officer Winterscheidt or Investigator

Winterscheidt to testify as to what Duane Clauer told him. That is hearsay. It goes to the heart and sole of this case and our defense, Your Honor, and that is in this counsel's opinion prejudicial or I understand that's maybe depending on how things -- an issue for another court to decide but that in my mind was hearsay. It certainly was offered for the truth of the matter. Why else would it have been offered?

So the state effectively was able to undo their wrong by just getting it in through another source which is called hearsay so I oppose it. I think it's going to turn out to be very influential in this case.

The jury has now heard from a person in law enforcement that a transaction occurred where my client got delivered a box with some meth in it and Chip Marciniak delivered it.

THE COURT: No, you've misstated it. You said your client got a box with meth in it.

MR. GONDIK: I'm sorry.

THE COURT: You misstated it but, Ms. Ellenwood, go ahead if you want to respond at all to that.

MS. ELLENWOOD: Again, I would just stand by my response to the objection. It went to the officer's state of mind by why he then ordered other officers to

move in to close the transaction. I don't believe it was being offered for the truth of the matter asserted.

THE COURT: It's not classic hearsay. Hearsay is an out-of-court statement asserted for the truth of the matter. In this case it was an out-of-court statement not asserted for the truth of the matter.

So as far as it being prejudicial, I just -- it's not even close. It's making a mountain out of a molehill, and I think that if the defense wants a jury instruction to say either generally because they don't want to touch upon it again or specifically that isn't being asserted for the truth of the matter just to describe why Officer Winterscheidt acted or going to his state of mind, I think it's perfectly appropriate, but I'll leave that in the realm of defense to draft an instruction if they want it. Quite frankly, I think it would be perfectly appropriate to have a general one, at least because there was many times where there were things I allowed in that would have been hearsay but going to the state of mind so I think that's a good instruction, but you guys are going to have to figure it out, what you want or how to craft it or at least, Mr. Gondik.

There was the other instruction I left

Q. Excuse me, Listed Call Number 3?
A. Yes.
Q. Do you see the parties identified at the top of that document?
A. Yes, I do.
Q. Okay. Do you recall what the nature of this phone call was for?
A. There was a phone call received by Charles Marciniak from Garland Barnes.
MR. GONDIK: Objection as to foundation, Your Honor.
THE COURT: Ms. Ellenwood?
MS. ELLENWOOD: I think foundation has been laid.
THE COURT: Do you know who it was from and to? I don't think so. Sustained.
Q. (By Ms. Ellenwood, continuing.) Sergeant Madden, who were the persons identified in this phone call?
A. Investigator Paul Winterscheidt, James Olson, Investigator Jason Tanski, and CRI Number 1, Charles Marciniak.
Q. Is the first person speaking on that transcript Charles Marciniak?
A. Yes.
Q. Do you know who he's speaking with?

MR. GONDIK: Objection. Same objection, speculation.

THE COURT: I think your last objection was foundation. So now you're saying speculation, two different things.

MR. GONDIK: Your Honor, let me correct that to the same objection as prior, foundation.

THE COURT: Ms. Ellenwood?

MS. ELLENWOOD: I'm asking if he knows who he's speaking with.

THE COURT: Okay, then it's overruled. If he knows, he knows. If he doesn't, he doesn't. If he knows, he can tell how he knows.

A. A common practice we do when we receive a phone call or make a phone call, before we make one we'll generally set it up. It's kind of like a time stamp on the recording. If we received a call, you can't -- you have to answer the phone so it's typically at the end of the recording and looking at the document that's Mr. Barnes, Recorded Call Number 3. The last line is from -- is Investigator James Olson saying the end of it. I just received a phone call from Dean.

MR. GONDIK: Objection, Your Honor, hearsay.

THE COURT: Ms. Ellenwood?

MS. ELLENWOOD: Again, it's not being

offered for the truth.

THE COURT: What is it being offered for?

MS. ELLENWOOD: At this time for the officer's state of mind.

THE COURT: Okay. And why is that important?

MS. ELLENWOOD: Sergeant Madden's testimony here today as to when the call was received of when the methamphetamine ounces changed. I'm laying the line of questioning for that.

THE COURT: Okay. Why does it matter who made the call and what Officer Olson said? Why does that matter in getting that?

MS. ELLENWOOD: I'm laying the foundation for the document.

THE COURT: I mean it's sustained. It's already been entered into evidence. I mean it's the transcript but as far as it going -- I guess it is hearsay. I don't understand how it's laying any foundation but it's already been admitted into evidence as far as I can tell. I have received it into evidence so I don't know how it's now being objected to, Mr. Gondik, but I also don't see how it goes to the state's point so it's been admitted that there's now a new objection that I'm not going to undo what I've already

done. So the exhibit is already admitted. It's already been testified to so overruled.

Q. (By Ms. Ellenwood, continuing.) Sergeant Madden, have you had a chance to review the contents of this document?

A. Yes, I have.

Q. Okay. Recorded Phone Call Number 3, does this appear to be the phone call where the amount of methamphetamine was changed from three ounces to four ounces?

A. Yes, it does.

Q. Okay. And at what time does the document, Exhibit 3 state that that phone call came in at?

A. At 1751.

Q. Okay.

A. Which is 5:51.

Q. 5:51?

A. P.M., correct.

Q. At 5:51 to when the transaction occurred, were you present in the courtroom when Investigator Winterscheidt stated he -- the transaction occurred around 6:15?

A. Yes.

Q. Okay. So 5:51 and 6:15, that's roughly 19 minutes?

(Jurors exit the courtroom.)

THE COURT: Please be seated. We are now outside the presence of the jury. The attorneys, Mr. Barnes is present. We wanted to take this break to address at least one issue. The issue came up and we spoke off the record regarding this during the control buy. There was testimony -- it's my recollection there was testimony from Officer Winterscheidt that there was no -- no voices or no audio voices besides I believe background noise when this transaction took place or alleged transaction took place, and it turns out, according to the Duluth Police Department Officer, he testified there was voices, and now the audio has been reviewed by both the prosecution and the defense and there are voices so this hasn't obviously been turned over to the defense in the past.

There was reliance upon Officer Winterscheidt that there was nothing or no voices, only background noise so that puts us in a little bit of a precarious situation. I'm trying to outline it, not trying to steal anybody's thunder. There was some off-the-record discussions of remedies.

I'm -- obviously it's a discovery violation. I'm not going to beat up on Ms. Ellenwood for it because I don't know that it's -- ultimately is it her

responsibility? Absolutely. But it's not that she had -- she kept it from the defense. It was something that apparently the Duluth Police Department had and never went to the sheriff's department or police department. Why nobody checked on it before now or checked with the Duluth police officer I don't know but brings us to an odd situation. I think that outlines the issue, but I'm not sure who wanted to speak first on it, Ms. Ellenwood or Mr. Gondik?

MS. ELLENWOOD: Well I'll be brief. I'm sure Mr. Gondik will be longer.

THE COURT: I'm sure he will.

MS. ELLENWOOD: I believe at our first motion hearing we, Mr. Gondik and I, had spoken about the recordings, made sure that he had them. I had indicated to him that I had just found out about two and a half weeks prior that there was another recording that was on the confidential informant, Charles Marciniak and that that recording didn't have anything on it. That was background noises. I conveyed that to Mr. Gondik. He said no problem and I, in good faith, communicated that to him after speaking with different officers about that.

I later followed up two days ago with Investigator Tanski again asking there's nothing on that

recording. He indicated to me, nope, just background noises; and I, again, conveyed that information to Mr. Gondik. Mr. Tanski got on the stand yesterday and stated, in fact, there was background noises but there also was some statements that was of surprise to me and after speaking with Mr. Tanski, afterwards he indicated he thought he understood what I was asking him and may have misspoke, but regardless I am in agreement that audio recording should have been turned over to Mr. Gondik.

I have had the chance to listen to it. There are statements made on there. They wouldn't be statements necessarily that or recording that I would enter into evidence. It's more -- it is background noise in that sense. There is some communication between what I believe to be Mr. Marciniak and the Defendant, Garland Barnes. I haven't played that recording, however, for Mr. Marciniak to verify if that is the case. That is just my understanding of the events and what I can put together.

THE COURT: You're not going to seek to admit it?

MS. ELLENWOOD: Absolutely not.

THE COURT: Mr. Gondik?

MR. GONDIK: Thank you, judge. Before I

address that specifically, I just want to put an agreement that the defendant and the state have in exchange for Mr. Barnes agreeing to Bobbie Robbins and Christine Wagner not being called, the stipulation that we talked about earlier, the state has agreed not to charge two counts of bail jumping which they have reports on.

THE COURT: Ms. Ellenwood, is that accurate?

MS. ELLENWOOD: That is correct.

THE COURT: Okay.

MR. GONDIK: Then, Your Honor, to the point here and to the audio, most of what Ms. Ellenwood said is accurate. Probably all of it but let me just say this. I wasn't aware who she was talking to. I just relied on Ms. Ellenwood. I'm not throwing her under the bus.

This system that we all partake in requires officers to be truthful and the state relied on an untruthful officer but nonetheless, that's not a violation of our creation. That is a discovery violation of law enforcement. It's very easy and in future cases and perhaps in past cases, law enforcement, unless this case is dismissed, is encouraged to play hide the ball and there's been a lot of hide the ball in this case, particularly the subject of what we're talking about

right now with this audio recording and this is more than beyond -- this is Officer Winterscheidt testifying there's nothing on the recording. We all rely on that. That's testimony under oath and he lied. There's no other way to put it. He was untruthful as Investigator Madden testified to, and I think that and that alone should be enough for the Court to dismiss the case.

It's not just a discovery violation. It's a clear discovery violation when you get handed something the evening after the first day of trial that you have requested back on April 11th, of 2014 and you've been assured doesn't exist. That's a problem, Your Honor, and that's a problem in this case.

And based on the late disclosure of that audio, the misrepresentations of law enforcement, particularly Investigator Winterscheidt, we're asking the Court to dismiss these charges. My request is based in part, Your Honor, of your pre-trial order dated November or file stamped November 20th, 2013 and June 11th, 2015 which state in part that parties and/or counsel who neglect, ignore, or disobey the terms and requirements of the scheduling order are subject to the sanctions. Goes on to state the sanctions, including dismissal of the action.

Now, again, our system has to rely on

truthfulness of officers, and I don't have any reason to dispute what Ms. Ellenwood is saying to the Court, but if it's not true there's -- and I know if this Court doesn't take action that's being sought by the defendant right now, that is, a dismissal, it's going to encourage this type of conduct in the future and it's going to hurt the process and it's going to hurt the system; and for those reasons, Your Honor, we ask that the case be dismissed.

THE COURT: Thank you, Mr. Gondik. Ms. Ellenwood, regarding remedy, do you have input?

MS. ELLENWOOD: Well this Court has already, you know, given a harsh remedy with not allowing Duane Clauer to testify. Again, the state is not seeking to admit any of the evidence that that recording purports to make. There is, as Mr. Gondik didn't allege, there is no exculpatory information on that video. It's not a Brady violation.

I think the remedy most applicable is either a jury instruction and/or allowing Mr. Gondik the chance to cross Mr. Winterscheidt yet again. I've made -- I've made Mr. -- Investigator Tanski also available again. Made sure that he was here in case the Court needed to address that further.

THE COURT: I have listened to the

arguments. Obviously it's disconcerting because now this is the second time that there's a pretty significant discovery violation. I think that by not providing the reports to the officer, I think the appropriate remedy in that case was obviously not allowing that officer to testify.

In this case, we have a situation where it's not exculpatory information and there's no allegation it's exculpatory. If it had been exculpatory, quite frankly wouldn't have survived or even if it was potentially exculpatory, that's not what we have. What we have is an officer that states something that is not true. Whether it was because of negligence, I'm not here to ascertain that. On the other hand, the most severe remedy that I can hand out is dismissal of the action.

In this particular circumstance, in this particular case, I think latitude and cross-examination, along with a jury instruction would be the appropriate remedy. I'm also leaving open the opportunity of limiting some of the state's evidence, depending on the circumstances. I'm not going to dismiss it, but I'm going to also keep a watchful eye of limiting some other evidence presentation by the prosecution if that may be appropriate to limit evidence. Again, to deter this

type of violation, it is disturbing and it's, you know, two strikes -- what should be, I would assume, a fairly straightforward one-count case. It just doesn't lend itself very well to going forward with very much confidence in what has happened here so far, but I'm going to direct a jury instruction be drafted. What I was doing is looking for -- I have given an instruction in the past with a case last year where there were several violations by Mr. Blank or Mr. Blank in his case, in that homicide case. I can't remember the instruction that I gave regarding that. I'm going to have to look at it and see what exactly I gave, but I'm going to leave it up to you, Mr. Gondik, to draft an instruction. Also, there's going to be latitude in cross-examination; and as far as the substance of what was said, it's not being sought to be admitted and quite frankly I'm going to direct it's not going to be admitted so the officers who are testifying need to be directed that they can't mention the substance of the conversation even during cross-examination. There could never be a door opened wide enough for me to allow that to be testified to.

So I think that's an adequate remedy. I hope it's an adequate remedy under the circumstances along with the jury instruction. And then, Ms. Ellenwood,

that, the other thing, Ms. Ellenwood, you need to do is these audio clips have to be made part of the record too. I don't know if you have them marked as exhibits 1a, 2a, 3a, 4a to show the audio vs. the transcript, but during -- at some point today you're going to have to do that.

MS. ELLENWOOD: Okay.

THE COURT: So we have a complete record. I'm assuming you haven't anticipated that yet?

MS. ELLENWOOD: No, but I can easily burn it 1, 2, 3, 4. That's no problem.

THE COURT: Perfect. Mr. Gondik, was there anything else?

MR. GONDIK: Just briefly, Your Honor, in the way of side-bar a while ago I approached and discussed the issue of Mr. Marciniak's reference to that's where we met before, words to that effect that has come out repeatedly in his testimony. And based upon that, based upon the Court's granting my motion on other acts, I am going to move for a mistrial or a dismissal. Prefer the dismissal, I'll take a mistrial. That was an egregious violation, one of many that's been made here. I'm not sure why that happened, nor am I really concerned about why it happened. I'm concerned that it happened and obviously the Court made a ruling

that that reference should not happen, and the Court issued an order excluding that from evidence and it's been done repeatedly.

And as the Court pointed out and I know it's good advice, every time I jump up for a side-bar, it just highlights the reference to that's where we met before but -- so that's why I didn't jump up or object because I didn't want to highlight it, but it's a clear violation of the Court's order, just one of many; but I know we have to take this in its totality and in its totality there's been so many errors and so many omissions and so many hide the balls that this case smells so bad.

I think the only thing the Court can do in the interest of justice is dismiss it in its entirety. Thank you, Your Honor.

THE COURT: Ms. Ellenwood?

MS. ELLENWOOD: Well the state I believe and Mr. Gondik have complied with the Court's order to not allow other acts evidence. I can't control what the witness says on the witness stand. Furthermore, these are questions that Mr. Gondik asked.

THE COURT: Wait, wait, wait. The first time it was mentioned was in response to your question. He said something to the effect that -- you asked him

why he went to the Temple Bar because there's nothing in the audio saying where he was going. He followed up and you asked why he knew that. He said because that's where we met before or words to that effect. That was the first. If you want to argue --

MS. ELLENWOOD: Okay.

THE COURT: -- violation of my order by itself. It seems relatively innocuous but addresses that. Obviously you are responsible for what your witnesses say, and you're responsible for telling them what they can and cannot say but maybe --

MS. ELLENWOOD: I can --

THE COURT: Go ahead.

MS. ELLENWOOD: I did speak with Mr. Marciniak before he got on the stand. I did indicate this Court's ruling to him, that we were not to talk about previous buys. That we were only to talk about April 21st of 2013. It's my understanding of the evidence in the case in chief is that the agreed upon location was the Temple Bar which was made outside of the presence of law enforcement on April 21st, 2013. That was the testimony that I was trying to elicit from Mr. Marciniak.

THE COURT: I've heard the arguments. The difficulty is I understand Mr. Gondik was put in a

difficult situation because I think the first time it was mentioned I looked at the jury, and nobody was writing anything down, not that that matters a heck of a lot, except that it looked more of an innocuous reference. Certainly context is everything and it could be taken as that's where we met to deal drugs before or that's where we had been together before. It's somewhat innocuous but then the problem is it's mentioned later times, both on cross-examination and I think at some point on redirect or re-redirect so it's mentioned throughout.

I don't think it's a manifest of injustice situation. I don't think under the totality of the circumstances, it somehow impeaches a jury's decision. I'm not going to grant a mistrial or a dismissal at this point. I certainly would be willing to give a cautionary instruction about the situation; but, again, Mr. Gondik runs into the problem of either highlighting it again, mentioning it again, but I'll leave that up to the parties to discuss whether a cautionary instruction is necessary or they're requesting it. Anything else, Mr. Gondik?

MR. GONDIK: Nothing further, Your Honor.

THE COURT: Ms. Ellenwood?

MS. ELLENWOOD: No.

THE COURT: Please be seated. We are back on the record. The parties and attorneys are present. Mr. Gondik, we had some issues. Mr. Gondik would like to call Gerald Clark as a witness. There was an objection to that by Ms. Ellenwood. I think we need to make a record on this issue and then proceed with our instruction conference/verdict form conference. Then we'll go right -- we're not going to take any more breaks. This is it. As far as that goes, Mr. Gondik, you wanted to call Mr. Clark?

MR. GONDIK: I did, Your Honor.

THE COURT: Can you make a record of what he's anticipating on testifying to? Actually I take that back because Mr. Clark is here and there's a sequestration order so maybe would you mind? Can you make a record, Mr. Gondik, of why you're calling Mr. Clark? Mr. Clark is not on any witness list so if you would like to make a record on that and then Ms. Ellenwood can give her argument, and I can make a decision.

MR. GONDIK: Thank you, Your Honor. We are calling Jerry Clark as a rebuttal witness to rebut what Chip Marciniak testified to as far as going directly from the site of the alleged transaction to the Baywalk Motel. That was his uncontroverted testimony that he

went directly from the buy/sell area to the Baywalk. Gerald Clark will testify that he's known Marciniak for a number of years and actually a friend of his and that he was at 12th and Hughitt or thereabouts and actually saw Chip roll into that location and pick up a box out of a house or a garage. I don't remember what and with little or no conversation headed off and it was shortly thereafter, and Clark wasn't able to put this together until afterwards that he observed a pursuit. At the time he didn't know who it was but it was Mr. Barnes being chased by some police officers.

Then he had some conversation later with Chip that same day of the buy bust, and Chip made some comments to him that led him to believe that he set somebody up.

THE COURT: All right, and that's quite a bit more than what was asserted to me off the record when we were discussing. Ms. Ellenwood?

MS. ELLENWOOD: Well the state admittedly denies that Mr. Clark is a rebuttal witness. I believe this is a tactic done by Mr. Gondik to thwart having to comply with discovery procedures, as well as this Court's pre-trial order.

Black's Law Dictionary defines rebuttal evidence as the following: Evidence which is offered by

a party after he has rested his case and after the opponent has rested in order to contradict the opponent's evidence. I think that we've gone back and forth on what rebuttal is.

THE COURT: I don't -- I don't need to be told what the black letter law is on a rebuttal witness because that doesn't apply to the defense under 971.23(2m)(a). It says that this paragraph does not apply to rebuttal witnesses and that's on the defense, and I know what you're saying, and I want you to make a good record of it, but I don't want to hear about -- that would mean that the defense has to disclose every potential witness they may call on rebuttal or otherwise. That's the hurdle that I'm looking at so talk about the case or something else, not the definition of rebuttal.

MS. ELLENWOOD: Mr. Gondik told me that the day of trial he was going to call Jerry Clark. He knew beforehand that apparently he was going to call him. He also listed a young gentleman, Darius Barnes which the state objected to because he wasn't on the witness list. This Court, I don't know if it made a ruling or not but --

THE COURT: I did.

MS. ELLENWOOD: Okay, to exclude his

testimony. I contend that Jerry Clark is the same thing. Mr. Gondik knew he was going to call him. This is beyond the scope of what he explained to us in chambers. I just, in the interest of justice, I guess I don't know how to word it correctly.

THE COURT: I've heard the arguments about it. The reality is some of what Mr. Gondik is talking about I think would be considered rebuttal evidence. Some of it wasn't. What was given to me or my information, at least off the record was that Mr. Clark would testify to the fact that the informant didn't drive directly from the place where this happened, the Temple Bar to the Baywalk. That was my understanding.

Now the fact that maybe Mr. Marciniak made some other statements, I don't think is rebuttal anymore. He wasn't given the opportunity to say or admit or deny he made those statements. That certainly is not rebuttal information and if you look at it in its entirety, there would be a little bit of what I would consider potentially rebuttal testimony and much of it wouldn't be rebuttal. Much of it would be case in chief. I don't know that we can start parsing what is what.

So based upon the record that I have, Mr. Clark is not going to testify. I believe that it is not

in the definition of rebuttal. Ninety percent of it is not rebuttal. It's case in chief stuff; and, therefore, I don't think I can pars it out. Therefore, he is not going to be allowed to testify at this proceeding.

Mr. Gondik, did you have any other witnesses?

MR. GONDIK: Judge, if I can be heard just on this issue for the record?

THE COURT: No, we're done. You've had your opportunity to be heard. I've made my ruling. I'm not hearing any more about it. Did you have any other witnesses, Mr. Gondik?

MR. GONDIK: Judge, we do not have any more witnesses, but I would like to make a brief offer of proof. I'm fully willing to tailor the questions I would ask Mr. Clark to just the issue discussed in chambers which is whether or not Mr. Marciniak went directly to the Temple Bar to the motel.

THE COURT: And what I can say is too little, too late. We've been -- we told the jury this was a one-day trial. It's turned into a two-day trial. Maybe we'll go into a third day. We've taken a lot of time trying to deal with this issue. Now I'm going to limit it. The opportunity was there and I'm not reconsidering what I'm doing. I was told what the

information was. Now I'm telling -- being told it's less than that. I am not going to reconsider that decision unless you want me to, Ms. Ellenwood?

MS. ELLENWOOD: No, thank you.

THE COURT: Okay. Then I'm going to let Mr. Clark know or he can be brought back. We need to go through instructions, and then we're going to bring the jury in, and you're going to give your opening or closing, and I'm going to give instructions.

Instruction 100, I'm sorry, I forgot to ask Ms. Ellenwood, were you going to do any rebuttal witnesses?

MS. ELLENWOOD: I am not. Thank you.

THE COURT: Instruction 100. If there's a problem with it, let me know. We can talk about it. I will also flag a couple that we have here. 103, 145, 110, 140, 6020, 6001. 147, that's the general improper. Plus, there's a particular spot that I ordered some testimony stricken and the jury to disregard. Ms. Ellenwood, is that how you want me to give it?

MS. ELLENWOOD: Yes, thank you.

THE COURT: Mr. Gondik?

MR. GONDIK: I think I advised previously I opposed that, the second paragraph.

THE COURT: Okay. I'm going to give it. I

CERTIFICATION - APPENDIX

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the court of appeals and the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed 5/7/2021

COLE DANIEL RUBY
State Bar No. 1064819