STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP814-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTONIO D. WILLIAMS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY, THE HONORABLE REBECCA F. DALLET, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE, FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the State will present additional facts in the "Argument" portion of its brief.

ARGUMENT

WILLIAMS RECEIVED A FULL AND FAIR TRIAL, WHICH INCLUDED THE OPPORTUNITY TO EFFECTIVELY CROSS-EXAMINE AND CONFRONT HIS ACCUSERS. THE CIRCUIT COURT'S DISCRETIONARY ACTS IN CONTROLLING THE TRIAL WERE WELL WITHIN BOUNDS, AND ANY ERRORS WERE HARMLESS.

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN LIMITING CROSS EXAMINATION TO THE TERMS OF THE PLEA AGREEMENTS BETWEEN WITNESSES AND THE STATE, AND NOT ALLOWING DISCUSSION OF PENALTIES ASSOCIATED THEREWITH.

A. Applicable Legal Principles and Standards Of Review Regarding Witness Bias/ Confrontation Rights.

The Sixth Amendment of the United States Constitution and Article I, § 7 of the Wisconsin Constitution guarantee a criminal defendant the

right to cross-examine and confront the witnesses against him. *Delaware v. Van Arsdall,* 475 U.S. 673, 678 (1986); *State v. Rhodes*, 2011 WI 73, ¶ 28, 336 Wis. 2d 64, 799 N.W.2d 850. An appellate court reviews a challenge of same *de novo*. *See State v. Weed*, 2003 WI 85, ¶ 10, 263 Wis. 2d 434, 666 N.W.2d 485. As our supreme court articulated in *Rhodes*:

> Limiting cross-examination is limiting the introduction of evidence. A circuit court's decision to admit or exclude evidence will be viewed as a proper discretionary determination so long as it was made "in accordance with accepted legal standards and in accordance with the facts of record." To this end, we consider whether the circuit court "reviewed the relevant facts; applied a proper standard of law; and using a rational process, reached a reasonable conclusion."
>
> In the context of a constitutional challenge to limitations on cross-examination, the United States Supreme Court has observed, "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose limits on cross-examination." In keeping with this holding, we review such decisions for an erroneous exercise of discretion.

Rhodes, 336 Wis. 2d 64, ¶¶ 22-23 (citations omitted).

The confrontation clause does not guarantee cross-examination "in whatever way, and to whatever extent, the defense might wish." *Id*. ¶ 37 (citing *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).

"A reviewing court may not substitute its discretion for that of the circuit court. An appellate court may, however, review the record

independently to determine whether there is any reasonable basis for the circuit court's discretionary decision." *Rhodes*, 336 Wis. 2d 64, ¶ 26 (citation omitted). Indeed, "[n]o erroneous exercise of discretion will be found if a reasonable basis exists for the [circuit] court's determination." *State v. Ross*, 2003 WI App 27, ¶ 43, 260 Wis. 2d 291, 659 N.W.2d 122.

Finally, violations of a defendant's confrontation rights can be harmless error. *Rhodes*, 336 Wis. 2d 64, ¶¶ 32-33.

B. Application Of Principles And Standards To Facts Of This Case.

The State will address those witnesses whose testimony Williams' highlights in his brief, beginning with Xavier Turner (Williams' brief at 7-11). There are several other witnesses against whom Williams makes the same claim, but the broader discussion of the degree to which defense counsel could cross-examine those witnesses was discussed largely during Turner's testimony.

Xavier Turner

Xavier Turner testified that he was at Questions on July 4, 2008, that he was present when the shooting began, and that he saw Williams "fixing . . . his rifle" (114:101-07). Turner testified that there was no question that it was Williams (114:109).

Following this, the defense was able to cross-examine Turner about his hope that the State would help him with his "serious pending criminal case" which "probably" has something to

do with the length of what his sentence might be (114:109-11).

Defense counsel was prohibited from going into Turner's pending federal case, which had no connection to the state case as far as a plea agreement is concerned (114:112; 115:6-15). The circuit court properly recognized the holding of *State v. Nerison*, 136 Wis. 2d 37, 401 N.W.2d 1 (1987) (115:6-7), in ruling that the defense could not go into details about the federal case plea bargain because it had no connection to the state case, and because it would turn Turner's testimony into a mini-trial about the federal case, federal guidelines and sentencing structure, and maximum penalties for the pending state court case (115:15-17, 32, 36-37). The circuit court exercised its discretion and allowed the defense to bring up the charges Turner was facing in federal court (115:23-24), and to question Turner about the substantial period of incarceration he could face (115:24-30). The circuit court concluded:

> I've looked at the case law, and there's nothing magic about the maximum penalties that somehow provides you with a full and fair ability to cross-examine or takes it away if it's not mentioned. The key part is that you're able to full[y] and fairly cross-examine about the plea agreement and the effects of those agreements . . . .
>
> . . . .
>
> . . . It's under the same reasoning I'm not letting you read word for word from the plea agreement. Just because you get the right to do this doesn't mean I don't also have the

> right to control information that could be confusing, that could take us down another path, all of those things.

(115:29-30).

Defense counsel subsequently questioned Turner regarding his plea in federal court, where he acknowledged that he was facing substantial time (115:40-44). As to any state charges and plea agreements, Turner denied that the severity of the charges motivated his testimony, saying that it had "nothing to do with it" (115:46; *see also* 115:48-49).

Charlie Body

Charlie Body testified that he'd been friends with Williams since middle school, that he was aware of the June 28, 2008 incident in which Williams' watch was taken (116:138-45). Body testified that he got a call from Williams while Williams was in Atlanta, asked if Body had seen the news, and Williams said, "Yeah, I told you I was gonna go through there, sweat those niggas" (116:146). Body also testified that Williams said, "Man I think I blew the motherfucker's head off" (116:147). Body testified that Williams said that "they had [it] coming for taking [my] watch" and that he, Rosario Fuentez and James Washington were responsible for the shooting (116:147). Body also testified that Williams said they had used "choppers" or a "big ass machine gun" (116:148). Body testified that he understood Williams to have used his red minivan in the shooting (116:152).

Body was then cross-examined regarding his plea deal with the State (116:153-56, 164). Body was also cross-examined regarding the charges he was facing in federal court (116:158-60).

Armando Hurtado

Hurtado testified that Williams called him in Mexico to tell him he'd been beaten up and someone had taken his watch (117:74-77). Hurtado also testified that Williams told him he, Rosario Fuentez, and James Washington had shot some people up with two assault rifles and a handgun (117:77-80, 88). Hurtado also testified that Williams told him he had to get out of town and go to Atlanta when Williams found out Fuentez had been arrested, and Hurtado lent him $4,800 to do so (117:81-83). Once in Atlanta, Hurtado testified that Williams called him and said (about the murders) "stuff wasn't supposed to go down like that" (117:85).

Hurtado was cross-examined regarding his plea deal (117:89-94). When prompted why he was testifying, Hurtado said that Williams had killed four people, and testifying was "the right thing to do" (117:98).

Rosario Fuentez

Before Rosario Fuentez took the stand, the parties addressed his plea agreement with the State, which included a specific recommendation that the circuit court ruled the defense could address (118:4-5). Again, the circuit court was concerned about jurors knowing the maximum penalties associated therewith, because the jury could end up considering the same charge (first degree reckless homicide) for Williams (118:5-7, 10-17).

Fuentez, who was a co-defendant, testified to the same story as previous witnesses: that Williams had been beaten up, and wanted revenge (118:29-32). Fuentez also testified that Williams

said, "They gonna accept everything that come [sic] with taking that watch" (118:32).

Fuentez testified that the night of the murders Williams called him and came to find him in a red Caravan (118:36). Later on, the two met up along with James Washington and Williams gave Fuentez a handgun (118:39). Fuentez (driving himself) follows Williams and Washington in the red Caravan to Questions, looking for the "Murda Mobb" and their white SUV (118:41-42). Williams told Fuentez that his plan was to go up to the white SUV and spray it with the SKS assault rifle (118:43). Fuentez said Williams and Washington each possessed an SKS, and after a few minutes, all three started shooting rapidly into the crowd in front of Questions (118:47-53). After the three returned to the Caravan, Fuentez testified that Williams said "[I] think [I] got a ho in the head" (118:54).

On direct, Fuentez testified that he told police the truth prior to any plea agreement, because he didn't want to kill anybody (118:58; *see also* 118:104). On cross-examination, defense counsel was able to question Fuentez about his plea bargain, and what he hoped to gain from it (118:67-71).

Montrelle Johnson

Prior to Montrelle Johnson's testimony, the parties discussed what aspects of the plea agreement could be discussed (119:6-12). As it did throughout the trial, the circuit court ruled that the defense could ask about the terms of the agreement, what the witnesses hoped to get out of testifying, and discuss the severity of the charges currently pending against Johnson without getting into the specific penalty associated

therewith (119:9-12). Once again, the State was concerned that a discussion of possible penalties might impermissibly impeach the witness's character (119:11-12).

On direct, Johnson testified that he was in classes in prison with Williams, and that Williams asked Johnson to give a false statement to Williams' attorney on July 20, 2009 (120:11-12). Johnson said that Williams promised to put some money onto his "books" if he did so (120:13). Williams also drafted several notes directing Johnson to get in touch with his friends and possible witnesses, and in exchange, Williams deposited $40 into Johnson's prison account (120:15-17).

On cross-examination, defense counsel was able to establish that Johnson had pending cases (120:18). Defense counsel then followed up on those cases by asking what Johnson hoped to get out of testifying, knowing that he was facing several serious charges (120:41-42). Further, the State called Johnson's trial counsel, Attorney Marcella DePeters to testify as to exactly what charges Johnson was facing (120:72-73).

Respectfully, as to all of the above witnesses, the circuit court properly exercised its discretion in limiting cross-examination regarding penalties and possible deals not made with the State because *Nerison* mandates only that:

> When the state grants concessions in exchange for testimony by accomplices or co-conspirators implicating a defendant, the defendant's right to a fair trial is safeguarded by (1) full disclosure of the terms of the agreements struck with the witnesses; (2) the opportunity for full cross-examination of those witnesses concerning the agreements

> and the effect of those agreements on the testimony of the witnesses; and (3) instructions cautioning the jury to carefully evaluate the weight and credibility of the testimony of such witnesses who have been induced by agreements with the state to testify against the defendant.

Nerison, 136 Wis. 2d at 46 (citations omitted).

All three requirements were satisfied here. First, full disclosure of the terms of the agreements were made known to the jury. Second, the circuit court ruled only that the defense could not go into the speculative penalties associated with the crimes each witness was facing and the unrelated agreements with federal prosecutors, but allowed full cross-examination regarding the existence of the agreements and the witness's incentives to testify on behalf of the State. Third, the circuit court instructed the jury to evaluate the effect of the agreements on the witness's testimony (*see* 124:87).

Thus, Williams' trial counsel was able to and did fully address the relationship with the State and the testifying witnesses, and to demonstrate the propensity for bias as a result. The only limitation was the discussion of penalties and any agreements to which the State was not a party and which therefore did not create the risk of bias. This, the circuit court concluded in an exercise of discretion, would be confusing and result in mini-trial on non-relevant issues. *See Rhodes*, 336 Wis. 2d 64, ¶ 38 ("the right to cross-examination extends only to evidence that is relevant"). *See also id.* ¶ 48 ("we have consistently balanced a defendant's right to cross-examination under the confrontation clause against the circuit court's discretionary authority to exclude evidence

that may lead to confusion of the issues or confusion of the jury"); 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 607.05 at 467 (3d ed. 2008) ("This allows the evidence to be used for the limited purpose of showing a witness's stake in the case while reducing the danger that the jury will use it to draw impermissible character inferences about the witness.").

Harmless Error

Violations of a defendant's confrontation rights can be harmless error. *Rhodes*, 336 Wis. 2d 64, ¶¶ 32-33. Our supreme court has explained: "An error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *State v. Hale*, 2005 WI 7, ¶ 60, 277 Wis. 2d 593, 691 N.W.2d 637 (citation omitted).

In determining whether an error is harmless, an appellate court may consider some or all of the following factors: the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case. *Hale*, 277 Wis. 2d 593, ¶ 61.

If there was error, it was harmless because of the overwhelming evidence of Williams' guilt, and because the circuit court's limitation only extended to the penalties associated with the crimes charged, but still allowed full cross-examination regarding the nature of the

agreements, their terms, and what the defendants hoped to get out of testifying.

All of the State's witnesses testified to virtually the same story: that Williams had been beaten up and had his watch stolen from him, and wanted to exact revenge against the people who did it.

State's witness Timothy Nabors, who was not testifying pursuant to an agreement with the State, testified to the same story: that Williams had been beaten up on June 28, 2008, several days prior to the July 4, 2008 shooting, and had his watch taken (114:80-84). Nabors further testified that he saw co-defendant James Washington at Questions the night of the shooting (114:88-91), which is consistent with the State's theory that Washington was there to survey the crowd and see if the people Williams wanted to attack were present.

State's witness Bernard Dudley also testified that Williams had been beaten up on June 28, 2008, and had his watch taken (114:93-95). Significantly, Dudley identified two of the people who had beaten Williams up as Kendrick Jackson and Jacoby Claybrooks, two victims of the July 4, 2008 shooting (114:95). The record also reflects no deal with the State in exchange for his testimony.

The same is true of State's witness Demetrius Murrell, who testified that Williams had been beaten up and had his watch and car keys taken (115:93-101). Significantly, Murrell, who was Williams' long-standing friend, testified that Williams asked him to store/hide two larger type assault rifles and ammo (a banana clip) at his home, 4268 West Highland (115:106-07). The day

after the shooting, Murrell testified, he ran into Williams, and when a conversation about the murders came up, Williams "just smiled and said that was fucked up" like he (Williams) didn't care (115:109-12). Later that same day, Murrell observed Williams gesturing like he was shooting, and Williams saying "[I] sprayed them" (115:112-14). Murrell testified that he told police Williams said he and Zoe (Rosario Fuentez) "lit the crowd up" with a "chopper," which is an assault rifle (115:116-17). Murrell testified that Williams said they had "got[ten] the drop on them" and that people were "trembling" after being shot (115:119, 123). While telling Murrell this, Williams was laughing (115:119-20). Finally, Murrell testified that Williams was driving a red van on the day of the shooting, the same one which others identified as a getaway vehicle (115:121). Again, the record reflects no deal with the State in exchange for this testimony.

State's witness Michael Terry testified that Williams brought a black duffel bag with a semiautomatic handgun and two rifles over to his house in late June 2008, and stored them in Terry's garage (117:9). On the early morning hours of July 4, 2008, right before the shooting, Williams called Terry and asked him to bring him the bag (117:10). Terry complied, and Williams grabbed the duffel bag with the weapons in it and headed toward a red or maroon van (117:11). Later that day, Williams said to Terry "[t]hem scary ass niggers don't know what to do . . . and there was a price. They thought it was sweet for taking the watch" (117:12). Terry also testified that Williams told him to tell police or anyone asking that he was with a girl named Taneea on the night of the murders (117:14, 51). In exchange, Williams offered Terry $7,000 (117:15, 50-51).

Later on, while in jail together, Williams asked Terry if they were still on the same page regarding his story (117:17).

Following the incident, and Fuentez's arrest, Williams fled the state to Atlanta, and then to Illinois, where he was later picked up hiding from police in a crawlspace (119:55-57).

Detective Shelondia Tarver who executed a search warrant at 4268 West Highland Boulevard, testified that she found ammunition there, including a magazine clip and bullets for an SKS "automatic rifle-type weapon" (115:58-59). Detective Tarver also testified that a piece of notebook paper with Williams' nickname ("Cheem") and other individuals being sought in the investigation was found at the property (115:59-60).

State witness Aquilla Lacy, an employee at Ricky's on State, a club frequented by Williams and other co-defendants, whom had also been in a relationship with co-defendant James Washington, testified that on the night of the murders, Washington said he could not pick her up because something had happened at Questions (115:73-78; *see also* 115:81-82). Lacy testified that Washington parked his truck in back of the hotel they were staying at that night, but that he customarily parked it out in front (115:78-79). Lacy also testified that Washington got a lot of calls the day after the murder, and that his demeanor was "[j]ust quiet" (115:79).

In addition, in the minivan which was referenced several times, officers found a CD labeled "Cheem" and a latent print taken from it matched Williams (116:178, 194-96).

Finally, the State put on undisputed forensic evidence which showed Williams' cell phone to have made several calls to his co-defendants right before the shooting, silence during it, and then more activity afterward (120:113-17; 121:9-21). The State was also able to triangulate Williams' cell phone location, which placed him at the scene of the crime at the time the crime was committed (120:117-20; 121:24, 33, 39).

II. THE SEARCH AND SEIZURE OF WILLIAMS' CELL WAS CONSISTENT WITH APPLICABLE CONSTITUTIONAL PRINCIPLES AND THE DEPARTMENT OF CORRECTIONS ADMINISTRATIVE CODE, WHICH EXPRESSLY ALLOWS FOR WHAT HAPPENED HERE

A. Applicable Legal Principles And Standards Of Review Regarding Cell Search And Seizure Of The Letter.

The United States Supreme Court has held that the Fourth Amendment does not apply to searches of a prison cell because a prisoner has no reasonable expectation of privacy. *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). "A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." *Id.* at 527-28.

A search warrant's execution must be conducted reasonably, and the search and seizure must be limited to the scope that is permitted by the warrant. *State v. Andrews*, 201 Wis. 2d 383, 390, 549 N.W.2d 210 (1996). Whether a seized item is properly within the search warrant's scope depends on the search warrant's terms and on the nature of the items that were seized. *Id.* at 390-91. A premises warrant generally "authorizes the search of all items on the premises so long as those items are plausible receptacles of the objects of the search." *Id.* at 389. "'A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search.'" *Id.* at 389-90 (citation omitted).

B. Application Of Principles And Standards To Facts Of This Case.

Williams contends that the reference to a letter in which he advised Greta Young, Williams' former romantic partner and mother to his child, to testify falsely at trial violated his Sixth Amendment right to counsel (Williams' brief at 12-14, A-Ap. 25-27). The letter was discussed (though not identified specifically) when Young testified that no one had told her what to say, or how to testify, and denied speaking with Williams at all about the case (123:164-81). Specifically, Young was asked if anyone had told her what to say in the case, or that when she testified, everything should be in order and Young should not "break" (123:174, 180).

The letter was obtained pursuant to a search warrant (*see* 178:21-24), executed on December 18, 2008 by Detectives Keith Kopcha

and Tim Heier (98:23-31). Detective Kopcha testified that another inmate, Dexter Ewing, alerted prison staff that Williams had pictures of the watch that was the motivation behind the killings (98:26-27, 178:23-24). The terms of the search warrant include items such as: "Documents, Mail, Letters, Papers, Newspaper articles, Photographs, Compact discs, DVD's, or any other electronic storage devices used to store photographs or documents . . . ." (178:21); all of which are items which would reasonably be expected to be found in a large manila envelope.

The officers escorted Williams to an interview room, read him the search warrant, and conducted the search which included an envelope marked "for my attorney" or "for my lawyer" (98:27-29). Detective Kopcha testified that he

> examined the documents [to see] if I recognized them to be police reports or any other documents that were pertaining to discovery. I did not look at them. I put them back in the envelope. I did find five such documents that did not appear to be for his attorney or even written by him that appeared to be written by other people. Therefore, I confiscated them because I believe they were evidence that could lead in this crime.

(98:28).

Lieutenant Heier testified that he also executed a search of Williams' cell, in which a photo of the watch at issue in this case was discovered as well as several alphanumeric codes which could be used to disguise correspondence (120:5-6).

This search was not only conducted pursuant to a warrant, it was also consistent with DOC regulations. As noted above, Detective Kopcha suspected that there were pictures of Williams' watch in his cell, which easily could have been inserted into the manila envelope, which had been in Williams' cell with him. Wis. Admin. Code § DOC 306.16(5), "Search of inmate living quarters" makes clear that "Staff shall read only that part of the inmate's legal materials as necessary to determine that the item is legal material and does not contain contraband." That is precisely what Detective Kopcha testified that he did. In addition, as to the alphanumeric codes discovered in Williams' cell, Wis. Admin. Code § DOC 303.48(3)(c), "Unauthorized use of the mail" states: "Any inmate who does any of the following is guilty of an offense: . . . Uses a forged, counterfeit, or altered document . . . ."

Therefore, because the above search and seizure was conducted pursuant to a search warrant in an arena where Williams had no reasonable expectation of privacy (Williams had kept the envelope which he brought with him in his cell), there was no Fourth Amendment violation. *Cf. Palmer*, 468 U.S. at 525-28 ("A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.").

Likewise, there was no Sixth Amendment violation. Respectfully, placing contraband inside an envelope in Williams' prison cell does not imbue that contraband with Sixth Amendment protections, especially in light of a judicial authorized search warrant which sought evidence

(pictures of the watch) which could reasonably be expected to be found in that envelope. As the United States Supreme Court has said:

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached.

Maine v. Moulton, 474 U.S. 159, 176 (1985). The Court has likewise observed that:

> simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."

Bell v. Wolfish, 441 U.S. 520, 545-46 (1979) (citation omitted).

Indeed, even if there were a Sixth Amendment violation, the reference to the letter was acceptable because it was only used to impeach Young. The circuit court allowed the impeachment following the United States Supreme Court decision in *Kansas v. Ventris*, 556 U.S. 586 (2009) (106:44). Williams argues that

the impeachment was not of the defendant himself but of another witness (Williams' brief at 13-14).

Respectfully, the holding of *Ventris* is not based solely upon its facts. Indeed, the Supreme Court made clear that "[w]e have held in *every other context* that tainted evidence--evidence whose very introduction does not constitute the constitutional violation, but whose obtaining was constitutionally invalid--is admissible for impeachment." *Ventris*, 556 U.S. at 594 (emphasis added).

Therefore, if there was a violation of the Sixth Amendment (and the State maintains none occurred), the evidence may be still used to impeach a witness who perjures himself or herself. As the court wrote, "the game of excluding tainted evidence for impeachment purposes is not worth the candle. The interests safeguarded by such exclusion are 'outweighed by the need to prevent perjury and to assure the integrity of the trial process.'" *Id.* at 593 (citation omitted). That is precisely what the circuit court ruled here (106:44).

Harmless Error

If any error occurred in allowing Young to be impeached with the letter, that error was harmless. Most constitutional errors are subject to harmless error analysis. *State v. Martin*, 2012 WI 96, ¶ 44, 343 Wis. 2d 278, 816 N.W.2d 270. These include the admission of evidence obtained in violation of the constitution. *Id.*

Here, the evidence was harmless for two reasons. First, as set forth above, because of the overwhelming evidence which implicated Williams, including the testimony of a

co-defendant who described exactly what Williams did. Second, because reference to the letter was only made on cross-examination as impeachment evidence, not as evidence offered on direct. Thus, reference to the letter only occurred because Young testified that she had not been in contact with Williams about the case, and because she denied that Williams told her to testify falsely.

III. THE STATE DID NOT IMPROPERLY INTRODUCE ANY EVIDENCE WHICH IS *WHITTY/ SULLIVAN* EVIDENCE, THE CIRCUIT COURT DID NOT ADMIT SAME, AND THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE MISTRIAL MOTION.

A. Applicable Legal Principles And Standards Of Review Regarding Granting Or Denying A Motion For Mistrial.

A motion for a mistrial should not be granted unless, in light of the entire proceeding, the basis for the motion is sufficiently prejudicial to warrant a new trial. *State v. Bunch*, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). Not all errors warrant a mistrial; "the law prefers less drastic alternatives, if available and practical." *Id.* at 512.

Whether to grant a mistrial is a matter left to the trial court's discretion. *State v. Foy*, 206 Wis. 2d 629, 644, 557 N.W.2d 494 (Ct. App. 1996). This court "will reverse the trial court's

mistrial ruling only on a clear showing of an erroneous exercise of discretion." *Bunch*, 191 Wis. 2d at 506. Moreover, if the circuit court's exercise of discretion isn't adequately explained, this court "may still search the record to determine whether it provides a basis for the court's decision . . . not to grant a . . . mistrial." *Foy*, 206 Wis. 2d at 647.

A circuit court's factual findings made in the course of deciding the mistrial motion are accepted by an appellate court unless they are clearly erroneous. *State v. Kettner*, 2011 WI App 142, ¶ 25 n.6, 337 Wis. 2d 461, 805 N.W.2d 132.

In considering alternatives to granting a requested mistrial, the circuit court must "consider[ ] alternatives such as a curative jury instruction." *State v. Moeck*, 2005 WI 57, ¶ 72, 280 Wis. 2d 277, 695 N.W.2d 783. Further, "[w]here the [circuit] court gives the jury a curative instruction, [an appellate] court may conclude that such instruction erased any possible prejudice, unless the record supports the conclusion that the jury disregarded the trial court's admonition." *State v. Sigarroa*, 2004 WI App 16, ¶ 24, 269 Wis. 2d 234, 674 N.W.2d 894.

B. Application Of Principles And Standards To Facts Of This Case.

There was no error and no mistrial was warranted for two independent and alternative reasons.

First, the question posed by ADA Williams to defense witness Donyell Davis did not elicit a

response which constitutes *Whitty*[1]/*Sullivan*[2] "other acts" evidence. Such evidence would involve substantive, other prior bad acts of the defendant which the State introduced to show motive, opportunity, intent or other acceptable purposes as discussed in Wis. Stat. § 904.04(2). *Cf. State v. Marinez,* 2011 WI 12, ¶ 18, 331 Wis. 2d 568, 797 N.W.2d 399 (other acts evidence is substantive evidence admitted against the defendant for an acceptable purpose under Wis. Stat. § 904.04(2)).

Here, the State instead impeached a testifying witness (Davis) who was not the defendant about a police report in which that witness had allegedly said that he saw Williams with an assault rifle at Club Escape on July 25, 2007 (123:123). The State argued that the defense had opened the door because Davis denied ever seeing Williams with an AK 47 (123:127-29). Thus, the State was only able to raise the issue because Davis testified inconsistently with a prior report, which the State was then able to impeach Davis about on cross-examination. *Cf. Boller v. Cofrances*, 42 Wis. 2d 170, 184, 166 N.W.2d 129 (1969), *overruled on other grounds by State v. Williquette*, 190 Wis. 2d 677, 526 N.W.2d 144 (1995) (cross-examination is wide open). And the subject would not have come up had the witness not given testimony which was arguably inconsistent with the statement in the police report.

Second and independently, even if the impeachment of Davis with his prior inconsistent

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[1] *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967).

[2] *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

statement could be considered "other acts" evidence, the circuit court needed only to show that it properly exercised its discretion in denying the motion for mistrial. This court "will reverse the trial court's mistrial ruling only on a clear showing of an erroneous exercise of discretion." *Bunch*, 191 Wis. 2d at 506.

The circuit court began:

> All right, I don't agree that [the question has] no basis. I don't think there is anything that's been done by the state to taint the jury or to cause a mistrial intentionally, so I am not gonna make any kind of finding like that. The question that has been asked is whether the defendant was ever seen with an AK47. The answer was no. It was out there. I believe that I can cure anything that's been heard. . . .
>
> . . . At this point there is nothing prejudicial for your client. I mean, if I order the jury to strike it, I tell them to strike it, I continue to tell them to strike all answers and all questions that are sustained. There is an instruction that I am gonna read them later. I have been consistent with admonishing them with that. I don't think the question in itself causes a mistrial in itself. I am not going to allow you to go into that area. I do think we are into a very prejudicial ground that -- especially if he is denying, now you are gonna want to impeach him with that denial, and we're in an area that I am not gonna allow.[3]

(123:131-32; *see also* 123:133).

[3] Defense counsel argued that Davis was not the same person referenced in the police report, but the issue was never clearly settled (123:129-30, 136-38).

Defense counsel then asked for a curative instruction at the close of evidence (123:138). More immediately the circuit court instructed the jury to strike the question and answer, and to disregard both (123:142). Then, at the close of evidence, the circuit court gave a curative instruction as requested by defense counsel (124:83). *Cf. Sigarroa*, 269 Wis. 2d 234, ¶ 24 ("Where the [circuit] court gives the jury a curative instruction, [an appellate] court may conclude that such instruction erased any possible prejudice, unless the record supports the conclusion that the jury disregarded the trial court's admonition.").

Therefore, the circuit court properly exercised its discretion in denying a motion for mistrial. First, it concluded that the State did nothing to "taint the jury or to cause a mistrial intentionally" (123:131). *See Kettner*, 337 Wis. 2d 461, ¶ 25 n.6 (A circuit court's factual findings made in the course of deciding the mistrial motion are accepted by an appellate court unless they are clearly erroneous.). Second, it concluded that any error did not warrant a mistrial, but rather that striking the question and answer, and admonishing the jury was the appropriate remedy. *See Bunch*, 191 Wis. 2d at 512 (Not all errors warrant a mistrial; "the law prefers less drastic alternatives, if available and practical.").

Harmless Error

As set forth above, the circuit court did not err in denying Williams' motion for mistrial, and directed that the question and answer be struck. Thus, the impeachment evidence was not admitted, and the jury was expressly told to disregard it.

However, if this Court concludes the circuit court erred in allowing the question to be asked and answered, that error was harmless because of the overwhelming other evidence which already made it clear that Williams possessed two assault rifles, asked for them in the early morning hours of the shooting, and was seen using them to commit the crime. *See State v. Gary M.B.*, 2003 WI App 72, ¶ 28, 261 Wis. 2d 811, 661 N.W.2d 435 (wrongly admitted evidence of other acts is subject to harmless error analysis), *aff'd*, 2004 WI 33, 270 Wis. 2d 62, 676 N.W.2d 475. Thus, there was already substantial evidence in the record that Williams had possessed an assault rifle, and the State's question and answer, had it been allowed, would only have further strengthened that evidence. *Cf. Bunch*, 191 Wis. 2d at 506 (A motion for a mistrial should not be granted unless, in light of the entire proceeding, the basis for the motion is sufficiently prejudicial to warrant a new trial.).

IV. THE ALLEGED POLICE REPORT IS NOT *BRADY* EVIDENCE, AND EVEN IF IT WERE, IT WOULD NOT CREATE A REASONABLE PROBABILITY OF A DIFFERENT RESULT WHICH WOULD UNDERMINE CONFIDENCE IN THE OUTCOME OF THE TRIAL.

A. Applicable Legal Principles And Standards Of Review Regarding Disclosure Under *Brady v. Maryland*.

The due process right to a fair trial requires the disclosure of exculpatory evidence and impeachment evidence. *See State v. Harris*, 2004 WI 64, ¶¶ 12-15, 272 Wis. 2d 80, 680 N.W.2d 737 (summarizing relevant case law); *Brady v. Maryland*, 373 U.S. 83 (1963). And, as our supreme court has noted: "'[U]nder the Due Process Clause, prosecutors are required to disclose evidence that is material to either guilt or punishment. A defendant's request for *Brady* Material, however, does not require a prosecutor to wade through all government files in search of potentially exculpatory evidence.'" *Harris*, 272 Wis. 2d 80, ¶ 15 (citation omitted).

As this court observed in *State v. Chu*, 2002 WI App 98, 253 Wis. 2d 666, 643 N.W.2d 878:

> The prosecution's duty to disclose evidence favorable to the accused includes the duty to disclose impeachment evidence as well as exculpatory evidence. *Strickler v. Greene,* 527 U.S. 263, 280 (1999). Such evidence is material, however, only if there is

> "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 473 U.S. 667, 682 (1985). A reasonable probability of a different result is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. *See Kyles v. Whitley,* 514 U.S. 419, 434 (1995). On appeal, this court independently applies the *Bagley* constitutional standard to the undisputed facts of the case. *See State v. DelReal,* 225 Wis.2d 565, 571, 593 N.W.2d 461 (Ct. App. 1999).

Id. ¶ 30.

Evidence is favorable to the accused when "if disclosed and used effectively, it may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985); *see also Harris*, 272 Wis. 2d 80, ¶ 12.

The remedy for any such violations, however, is far from automatic. Rather, as our supreme court observed in *State v. DeLao*, 2002 WI 49, 252 Wis. 2d 289, 643 N.W.2d 480:

> When evidence that should have been excluded under § 971.23 is not excluded, the defendant is not automatically entitled to a new trial. If the defendant is to receive a new trial, the improper admission of the evidence must be prejudicial. "The penalty for the breach of disclosure should fit the nature of the proffered evidence and remove any harmful effect on the defendant."

Id. ¶ 60 (citations omitted).

Indeed, the United States Supreme Court has observed that "strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure

was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999), *cited with approval in Harris*, 272 Wis. 2d 80, ¶ 14.

The interpretation and application of Wis. Stat. § 971.23(1)(h) presents a question of law that is reviewed independently of the circuit court but benefiting from its analysis. *State v. Harris*, 2008 WI 15, ¶ 15, 307 Wis. 2d 555, 745 N.W.2d 397. If an appellate court concludes that the State violated its statutory discovery obligation, the court must then determine "whether the State has shown good cause for the violation and, if not, whether the defendant was prejudiced by the evidence or testimony." *Id.* These issues are also questions of law to be reviewed independently of the circuit court but benefiting from its analysis. *Id.*

B. Application Of Principles And Standards To Facts Of This Case.

Williams contends that computer printouts which purport to show who entered Questions on July 4, 2008 is *Brady* evidence because they tend to show that State's witnesses Timothy Nabors and Erica Warrens were not present at Questions that night (Williams' brief at 19-20).

The circuit court concluded that, even assuming that this information was not in a

packet[4] turned over to the defense, "[t]he evidence against the defendant was overwhelming, and there is not a reasonable probability that the absence of Washington's name on the print-out would have made a singular difference in the outcome of the trial" (156:2).

The circuit court's conclusion is correct for two reasons. First, given the overwhelming evidence, from multiple sources and in multiple forms (direct testimony, forensic, circumstantial) as articulated in Section I.B., the absence of testimony which placed Washington inside of Questions was not dispositive. Given that there was testimony from other witnesses and cell phone forensic evidence which not only placed Williams at Questions that night but also which described in detail how he conducted the shooting, there is not a reasonable probability that the "result of the proceeding would have been different." *Chu*, 253 Wis. 2d 666, ¶ 30; *Bagley*, 473 U.S. at 682.

Second, those police reports would only provide an additional reason to question Nabors' and Warrens' credibility. As this court observed in *State v. Rockette*, 2006 WI App 103, 294 Wis. 2d 611, 718 N.W.2d 269:

> Impeachment evidence is *not* material, and thus a new trial is *not* required "when the suppressed impeachment evidence merely furnishes an additional basis on which to

[4] Before the circuit court, the State made clear its efforts to supply the defense with all information in its possession, including reports which would appear to include the computer printouts referenced on appeal (*see* 145:14-17; 146:1-3). Further, when the issue came up at co-defendant James Washington's trial, Tim Nabors testified that Questions does not card everyone; especially the "regulars" (145:21).

> impeach a witness whose credibility has already been shown to be questionable." In sum, "Generally, where impeachment evidence is merely cumulative and thereby has no reasonable probability of affecting the result of trial, it does not violate the *Brady* requirement."

Id. ¶ 41 (citations omitted).

V. THE CUMULATIVE EFFECT OF THE ALLEGED ERRORS DOES NOT WARRANT DISCRETIONARY REVERSAL.

A. Applicable Legal Principles And Standards Regarding Discretionary Reversal.

Under Wis. Stat. § 752.35, the court of appeals may exercise discretion to determine whether reversal is warranted in either of two situations: when the real controversy has not been fully tried, or when it is probable that justice has for any reason miscarried. *See Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). The principal difference between these two standards is that in the "real controversy" situation, unlike the "miscarriage of justice" situation, "it is unnecessary for an appellate court to first conclude that the outcome would be different on retrial." *Id.*

Application of the "real controversy" prong of the interest-of-justice test has been limited, however, to evidentiary errors, where either: (1) "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case;" or (2) "the jury had before it evidence not properly admitted which

so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

The "real controversy" test is not designed to supplant claims of ineffective assistance of defense counsel in criminal cases, lest it render *Strickland*[5] a nullity. *Cf. State v. Flynn*, 190 Wis. 2d 31, 49 n.5, 527 N.W.2d 343 (Ct. App. 1994) ("[Wisconsin Stat.] § 752.35 'was not intended to vest [the court of appeals] with power of discretionary reversal to enable a defendant to present an alternative defense' that may have not been advanced by trial counsel at the first trial whose representation is alleged to be ineffective because of that failure.") (citation omitted).

This discretionary power is formidable and should be exercised sparingly and cautiously, its use reserved for exceptional cases. *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719; *Morden v. Continental AG*, 2000 WI 51, ¶ 87, 235 Wis. 2d 325, 611 N.W.2d 659.

B. Application Of Principles And Standards To Facts Of This Case.

Williams restates the discreet claims made above, concluding that those claims prohibited the jury from properly assessing the witnesses' credibility, and argues that they warrant a new trial (Williams brief at 21-22).

Because each discreet claim has been addressed above, and because their total impact

[5] *Strickland v. Washington*, 466 U.S. 668 (1984).

cannot be greater than the sum of their parts, the State will not individually address those issues again. However, the State will simply reiterate that the jurors were fully informed as to existence of any and all plea agreements and their terms, the number of convictions (if any) for each witness, and that cross-examination was not limited in any material way regarding same.

CONCLUSION

For the foregoing reasons, this court should affirm Williams' judgment of conviction and order denying his motion for postconviction relief.

Dated this 22nd day of November, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,537 words.

_____
Robert G. Probst
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of November, 2013.

_____
Robert G. Probst
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