STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2018AP2005-CR

GARLAND DEAN BARNES,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND ORDER DENYING POST-CONVICTION MOTIONS, ENTERED IN THE DOUGLAS COUNTY CIRCUIT COURT, THE HONORABLE KELLY THIMM PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether Barnes's due process and discovery rights were violated by (a) the State's failure to disclose the wire recording of the alleged drug transaction until the middle of trial, and (b) the flagrant misrepresentations both prior to trial by the prosecutor, and during trial by the lead investigator? Do these violations warrant a new trial, or does the combination of these and other egregious discovery violations committed by the State in this case warrant dismissal?

The circuit court concluded that although a discovery violation occurred, no ***Brady*** violation occurred because the recording wasn't exculpatory, and that sanctions it ordered during trial were a sufficient remedy.

2. Whether the court erroneously denied Barnes' request for a mistrial after the State presented testimony referencing prior drug deliveries, violating the court's *in limine* order excluding such evidence?

The circuit court agreed that the testimony violated the

court's order, but did not create a "manifest injustice," and therefore denied the mistrial motion.

3. Whether prejudicial evidentiary errors denied Barnes a fair trial, including:

a. The State presented inadmissible hearsay testimony through Investigator Winterscheidt establishing that Officer Clauer allegedly observed the hand-to-hand drug exchange, effectively nullifying exclusion of Clauer's testimony due to the discovery violation, and violating Barnes's confrontation rights;

b. The State's presentation of the defendant's alleged statements in recorded call #3 violated the court's pretrial ruling excluding that call and any such statements;

c. The officers lacked foundation to identify the voice of Garland Barnes on the recorded calls;

d. Since none of the testifying officers participated in the initial search of informant Marciniak's vehicle, Investigator Winterscheidt's testimony about that search lacked foundation and should have been stricken; and

e. The Court erroneously excluded the rebuttal testimony of Gerald Clark

The court concluded that none of these were errors, that the evidence was appropriately admitted or excluded, and the defendant wasn't prejudiced.

4. Whether a new trial was required in the interest of justice because the combined impact of the discovery violations and prejudicial evidentiary errors prevented the real controversy from being fully tried?

The court implicitly concluded the real controversy was fully tried.

5. Whether errors by trial counsel prejudiced the defense and constituted ineffective assistance of counsel?

The court held counsel did not perform ineffectively.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate and requested in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a).

Publication likely is justified under Wis. Stat. (Rule) 809.23. Several of the issues present questions of first impression. No Wisconsin case directly addresses whether dismissal is an appropriate remedy when the State commits repeated, egregious discovery violations. Likewise, the defense is unaware of any Wisconsin cases directly addressing the scope of Wis. Stat. sec. 908.01(3) in the context of evidence allegedly presented to show the "course of the investigation," and whether that can include contested matters bearing directly upon guilt. The defense asks the court to adopt the multi-part test from ***United States v. Reyes***, 18 F.3d 65, 70-71 (2d Cir. 1994), assessing such evidence.

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2018AP2005-CR

GARLAND DEAN BARNES,

Defendant-Appellant.

STATEMENT OF FACTS

Garland Barnes was convicted by a jury of delivering over 50 grams of methamphetamines on April 21, 2013 (R71:1-2). The transaction was arranged by drug task force officers from multiple agencies in Douglas County, Wisconsin, and was to occur behind the Temple Bar in the city of Superior (R167:94). The task force outfitted an informant, Charles Marciniak, with a recording device (R167:104). Marciniak had 25 prior criminal convictions and was working as an informant after having been arrested for multiple deliveries of methamphetamines (R167:92-93,156).

After Marciniak made multiple phone calls with the intended target, police gave him $7,200 in pre-recorded currency to purchase four ounces of meth (R167:95,104-06). Marciniak drove to the pre-arranged location, a parking lot where several officers were positioned to conduct surveillance and block off possible escape routes (R167:108). However, lead investigator Paul Winterscheidt hadn't parked by the time an exchange was over, and didn't personally witness the transaction (R167:108,172-73).

As Marciniak drove away, Winterscheidt heard over dispatch that the transaction occurred, so he ordered officers to converge (R167:109). Police attempted, unsuccessfully, to corner the suspect vehicle, a black Chevy Tahoe, in the parking lot, resulting in a brief chase before police stopped the vehicle (R167:109-13). The white bag with recorded buy funds was located on the floor near the front console of the vehicle, near passenger Bobbi Reed (R167:112). Reed was found in possession of several grams of meth (R167:112). The driver, Garland Barnes, had no drugs or recorded money on his person, but had unmarked money in his pockets (R166:49; R167:111).

Subsequently, investigator Winterscheidt met up with Marciniak, who provided him a black box containing four ounces of methamphetamine (R167:118-19). Marciniak told Winterscheidt that he'd thrown the buy money into Barnes's vehicle, and Barnes handed him the box of meth (R167:122). Marciniak testified Barnes sold him the meth (R166:88).

The defense argued Marciniak had actually sold meth to Barnes or Reed, not the other way around (*see* R166:202-03). No photographs or video surveillance captured the actual transaction (R167:131,136). No DNA or fingerprint testing was done on the box containing meth (R167:166-68). None of the three testifying officers witnessed the actual transaction (R166:23; R167:172-73,229). Marciniak knew how to manufacture meth (R166:106). There were areas on his person or in his truck he could have concealed meth (*see* R167:140-43). Marciniak was out of surveillance for 5-10 minutes after the alleged transaction (R167:176-78;238-39).

Further, the defense attacked Marciniak's motive to set up Barnes to avoid prison for his own drug dealing. Marciniak received an extremely lenient plea agreement—probation, one day in jail, and dismissal of a 2nd meth delivery (R166:45-

46;115-16). When asked if he wanted to go to prison, Marciniak testified, "Absolutely not" (R166:113), and admitted "I'll do everything to get out of [jail]" (R166:108).

On the second day of trial, the defense moved for dismissal based upon the mid-trial revelation that the undisclosed wire recording contained voices from the transaction (R166:57-58)—contrary to the prosecutor's claims before trial (R167:8), and the lead investigator's testimony (R167:128,130,161). The court acknowledged this was the second "pretty significant discovery violation," but denied the dismissal motion in lieu of other sanctions (R166:60-61).

The defense subsequently moved for mistrial after Marciniak repeatedly referenced allegations that Barnes delivered methamphetamines to him on previous occasions, in violation of the defense motion to exclude such testimony (R166:147-48). The court agreed the excluded other-acts were mentioned "throughout" Marciniak's testimony, but denied the mistrial motion because the violations didn't create a "manifest injustice"[1] (R166:150).

The jury found Barnes guilty (R166:229).

Prior to sentencing, the defense filed a motion for new trial based on (1) Marciniak's repeated references to other-acts violating the court's pretrial order; (2) the Court's erroneous exclusion of the defendant's rebuttal witness, Gerald Clark; and (3) the Court's erroneous admission of Officer Clauer allegedly observing the actual drug exchange, through the hearsay testimony of Investigator Winterscheidt, after the court excluded such testimony as a discovery violation (R90:3). The court orally denied the motion (R144:15-23), and entered a written order to that effect (R94).

[1] As discussed *infra*, the court applied the wrong legal standard for denying a defendant's motion for mistrial.

The court sentenced Barnes to 30 years in prison, with 15 years initial confinement and 15 years extended supervision (R99:1).

By new counsel, Barnes filed post-conviction motions seeking dismissal or a new trial based on the same errors alleged in this appeal (R125). The State submitted a response brief (R127), and the defense submitted an addendum (R128). The court held an evidentiary hearing with testimony from attorney Gondik and his son (R180). At the conclusion of the hearing, the court entered an oral ruling denying the motions (R180:75-85). The court entered a written order denying the motions based on the reasons given during its oral ruling (R132).

Barnes timely filed a notice of appeal from the judgment of conviction and the order denying post-conviction motions (R136). Additional facts, including the court's reasoning for denying the motions, will be provided where appropriate.

ARGUMENT

I. THE STATE'S FAILURE TO DISCLOSE THE WIRE RECORDING BEFORE TRIAL, COMBINED WITH FLAGRANT MISREPRESENTATIONS DURING TRIAL TESTIMONY, VIOLATED BARNES'S DUE PROCESS AND DISCOVERY RIGHTS, AND WARRANT DISMISSAL OR A NEW TRIAL

A. Standard of Review

Disclosure of favorable or exculpatory evidence is required by amendments VI and XIV to the United States Constitution. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the

prosecution." ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). Evidence favorable to the accused encompasses both exculpatory and impeachment evidence. ***Strickler v. Greene***, 527 U.S. 263, 281-82 (1999).

To establish a ***Brady*** violation, the defendant must, also demonstrate that the withheld evidence is "material." ***Giglio v. United States***, 405 U.S. 150, 154 (1972). Evidence is material "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).

Similarly, Wis. Stat. sec. 971.23(1)(h) requires the district attorney to disclose, within a reasonable time before trial, "any exculpatory evidence." This section requires, at a minimum, that the prosecutor disclose evidence that is favorable to the accused if nondisclosure of the evidence undermines confidence in the outcome of the judicial proceeding. ***State v. Harris***, 2004 WI 64, ¶27, 272 Wis.2d 80, 680 N.W.2d 737. Wis. Stat. section 971.23(1) also requires a prosecutor to disclose "(a) Any written or recorded statement concerning the alleged crime made by the defendant," and "(e) Any relevant written or recorded statements of a witness named on a list…" Wis. Stat. secs. 971.23(1)(a) and (e).

Reviewing courts independently determine whether a due process violation occurred, but accept the trial court's findings of historical fact unless clearly erroneous. ***State v. Sturgeon***, 231 Wis.2d 487, 496, 605 N.W.2d 589 (Ct. App. 1999). The interpretation and application of Wis. Stat. sec. 971.23(1) to a given set of facts presents a question of law reviewed independently of the circuit court. ***State v. Harris***, 2008 WI 15, ¶15, 307 Wis.2d 555, 745 N.W.2d 397. If the court concludes 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. ***Id.***

B. Factual Background

The State committed numerous discovery violations and misrepresentations throughout this case. Less than one week before trial, the defense moved to exclude Marcianiak's testimony because the State hasn't disclosed any promises or consideration for his informant work (R55). The court denied the request to exclude, but ordered disclosure of the consideration immediately (R168:6-8). The court also agreed a discovery violation had occurred, asserting that information should have been disclosed a year earlier (R168:6-8).

The defense also moved to exclude testimony from Officer Duane Clauer based on late disclosure of his reports (R53). Although Clauer participated in the original investigation from April 2013, his reports weren't disclosed until June-July 2015 (R168:8-9). Clauer's observations were critical—he was the only officer who claimed to personally observe the drug transaction (R126:13). The prosecutor acknowledged Clauer's reports had not been provided to the defense, and she had no explanation for why (R168:14). The court excluded Clauer's testimony due to "the egregious nature of the violation" (R167:4-5).[2]

Arguably even more egregious was the State's handling of the wire recording, which included not just failure to disclose, but also numerous lies and misrepresentations. First, on April 24, 2014, just over a year after Barnes's arrest, the State's response to attorney Gondik's discovery demand asserted Gondik made a "verbal and/or email discovery request—and received on 4/14/14—police recordings of the

[2] As will be discussed *infra*, however, the key substance of Clauer's purported observations was still admitted at trial through another officer.

alleged informant–defendant phone calls and charged delivery transaction" (R16:2) (emphasis added). This was false; the State didn't disclose the delivery recording as claimed.

The second misrepresentation came after the defense moved *in limine* to exclude any recorded audio of the controlled buy due to nondisclosure (R65:1). When the court commented that it was his understanding there "was no audio," the prosecutor clarified the "audio was running," but "no audible voices are heard. It's only background noises" (R167:7-8).

The third series of misrepresentations consisted of perjured testimony by Investigator Winterscheidt, who provided the audio recording to the State (R167:128). Winterscheidt confirmed he'd listened to the recording, and testified there are "no voices on the audio recording," and instead "just a lot of background noise" (R167:128-29). In response to further questioning, Winterscheidt again claimed, "there was no spoken words" (R167:130), and "There is an audio recording. Just no words were spoken" (R167:161).

This testimony was exposed as false during Officer Jason Tanski's testimony:

Attorney Gondik:	Are you aware that nothing showed up on the—on the recording?
Officer Tanski:	What do you mean? What is your definition of nothing?
Attorney Gondik:	I'm sorry, no words.
Officer Tanski:	There were words on the recording, yes.
Attorney Gondik:	At the exchange?
Officer Tanski:	You can hear Mr. Marciniak talking on the recording, yes.

Attorney Gondik:	You're sure there is audio on that audio recording of the exchange with Mr. Marciniak's voice on it, is that right?
Officer Tanski:	Yes.

(R167:235-36).

The court subsequently ordered the State to disclose any audio of the controlled buy to the defense (R167:286-89).

The next day Sergeant James Madden testified he'd listened to the audio, and concluded, "There were voices on there, yes. The informant certainly, and another person you can vaguely hear" (R166:10). When asked if Investigator Winterscheidt's testimony about the recording having only background noise was truthful, Madden answered, "It's not truthful" (R166:10-11).

The court addressed the recording outside the jury's presence, noting both sides had reviewed the audio recording, there were voices, and it hadn't previously been disclosed to the defense (R166:54). The court concluded, "obviously it's a discovery violation" (R166:54).

In response, the prosecutor explained that at the last motion hearing, she informed attorney Gondik she'd "just learned there was another recording on the informant," and the recording only had background noise (R166:55). However, the prosecutor's claim that she'd "just learned" about the recording was false. Investigator Winterscheidt's report, which existed in the file from the beginning of the case, specifically indicated "I fitted CRI1 with a concealed electronic recorder/transmitter device" (R126:14). Winterscheidt's report also stated he "copied the audio files to the case file" (R126:15). Clearly the State knew of the recording before the July 1, 2015 hearing.

Attorney Gondik argued the discovery violation and Investigator Winterscheidt's false testimony warranted dismissal pursuant to the court's scheduling order, which subjected parties to sanctions including dismissal for noncompliance (R166:57-58; R45:3).

The court agreed this was a "pretty significant discovery violation," but declined to dismiss because the recording purportedly contained no exculpatory information (R166:60). Significantly, the court stated, "If it had been exculpatory, quite frankly wouldn't have survived or even if it was potentially exculpatory, that's not what we have here" (R166:60). The court instead permitted additional cross-examination, suggested a jury instruction be drafted, and considered the request to exclude Bobbi Reed (R166:60,63). The court lamented that this issue "just doesn't lend itself very well to going forward with very much confidence in what has happened here so far" (R166:61).

Subsequently Reed expressed willingness to testify and the court purged her contempt order (R166:151-53). The defense, noting it wasn't waiving its motions for mistrial or dismissal, moved to exclude Reed as a discovery sanction (R166:153-54). The court granted the request, concluding, "This isn't something where there was one violation, but there's a number of violations repeatedly" (R166:155-56).[3]

Post-conviction, the defense obtained a copy of the wire recording, and had the audio enhanced by an expert (R129:1-2). In addition to containing voices of Marciniak and the officers, the recording includes voices of both Marciniak and the defendant during their meeting (R181: 8:33-8:52). The recording includes the two 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,

[3] The State made no offer of proof as to the proposed substance of Reed's testimony.

right?" (R181: 8:33-8:52). The defense argued the recording's contents were exculpatory, for reasons discussed *infra*.

The court disagreed, essentially concluding that only the existence of the recording with statements (as opposed to the recording's contents) impeached the officer's false testimony, which attorney Gondik already did (R180:75-76). The court argued the defense got the "best of both worlds," impeaching Winterscheidt regarding the recording, without the recording being admitted (R180:75-76). While the court agreed the mid-trial disclosure was "ridiculous," it denied dismissal or a new trial, concluding the defense wasn't prejudiced (R180:75-77).

C. The Non-Disclosure Of The Exculpatory Wire Recording Violates *Brady* And Sec. 971.23(1)(h), And The State's Egregious Violations Warrant Either Dismissal Or, At Minimum, A New Trial

There is no question whether the State suppressed evidence; both the State and the court acknowledged this (R166:54,56). Timeliness is also not an issue; the recording wasn't disclosed before trial. Thus the questions are whether the evidence was favorable/exculpatory, and material.

First, the wire recording is favorable to the defense because it demonstrates Investigator Winterscheidt gave false testimony about the supposed lack of voices, which was already demonstrated.

Second, the recording's contents contradict another portion of Winterscheidt's testimony not previously challenged at trial. Before his other lies had been exposed, Investigator Winterscheidt testified that after the controlled buy, he interviewed Marciniak, who "said he threw the buy funds into the truck as Garland Barnes threw the black box with the red bow into his truck, and they parted company without speaking any words" (R167:122) (emphasis added).

Winterscheidt then testified he listened to the wire recording, and didn't hear anything inconsistent with Marciniak's statements (R167:122).

The recording contradicts this testimony, because it was inconsistent with Marciniak's claim—Barnes and Marciniak did have a discussion during the exchange. Had the defense been provided this recording, the defense could have used it to impeach both Winterscheidt and Marciniak regarding this lie.

Third, expert enhancement of the audio—which Gondik couldn't do mid-trial (R180:14)—reveals the contents of the recording are favorable to the defense generally because there is significant ambiguity in the discussion, with no clear indication of who is buying from whom. Accordingly, the recording fails to refute the theory of defense, and creates a favorable inference.

This evidence was material because the defense had substantially attacked the quality of the investigation and the veracity of the lead investigator, demonstrated numerous aspects of this transaction were not "controlled," and identified both motive and means for Marciniak to set Barnes up. Additional evidence contradicting the claims of Winterscheidt and Marciniak, or creating ambiguity in the transaction, would have further supported reasonable doubt.

More importantly, this non-disclosure was one of several egregious discovery violations, and flagrant factual misrepresentations by both the prosecutor and law enforcement. As discussed *supra*, the State's violations include: (1) falsely claiming on April 24, 2014 that it had disclosed the wire recording to Gondik; (2) failing to disclose Officer Clauer's reports for over two years; (3) failing to disclose consideration offered to Marciniak until the eve of trial; (4) the prosecutor falsely telling the court the wire recording had no voices; (5) Winterscheidt's numerous lies

under oath about the recording; (6) the prosecutor falsely telling the court she'd "just learned" about the recording around the time of the motion hearing, and (7) non-disclosure of the recording itself.

The court's sanction of excluding the testimony of Bobbi Reed couldn't offset the prejudice of these errors. Since the State made no offer of proof on Reed's proposed testimony, this court has no way of evaluating how detrimental—if at all—Reed's testimony would have even been to the defense.

Under the circumstances described *supra,* the appropriate remedy here is not just a new trial, but dismissal.

The court's scheduling order, which required "strict adherence," provided dismissal as a sanction (R45:3). Further, federal courts have recognized that dismissal of charges may be an appropriate remedy for "flagrant" discovery violations. *See* ***United States v. Chapman***, 524 F.3d 1073, 1086 (9th Cir. 2008). Dismissal is warranted when the government acts in "reckless disregard for [its] constitutional obligations." ***Id.*** at 1085; *see also* ***Gov't of the Virgin Islands v. Fahie***, 419 F.3d 249, 256 (3d Cir. 2005). Similarly, courts may dismiss charges under their supervisory powers "for violations of recognized rights" and "to deter illegal conduct." ***Fahie***, 419 F.3d at 258; *see also* ***Chapman***, 524 F.3d at 1087; ***United States v. Ramming***, 915 F. Supp. 2d 854, 867-68 (S.D. Tex. 1996) (granting dismissal after ***Brady*** violations and factual misrepresentations).

Dismissal is warranted to correct the prejudice suffered, as well as to deter the government from withholding evidence, lying to cover it up, and presenting the false testimony of law enforcement at trial. At minimum, these violations warrant a new trial.

D. The Non-Disclosure Alternatively Violates Sec. 971.23(1)(a)&(e), And Warrants A New Trial Due To Lack Of Good Cause

Even if evidence is not exculpatory, non-disclosure can warrant a new trial if the State was required to disclose the evidence pursuant to Wis. Stat. sec. 971.23(1), the State lacks "good cause" for the non-disclosure, and the defendant was prejudiced. ***State v. Harris,*** 2008 WI 15, ¶15. Thus, if this court finds the recording is not exculpatory, the non-disclosure may still warrant a new trial based on a statutory violation. *See* ***State v. Martinez***, 166 Wis.2d 250, 479 N.W.2d 224 (Ct. App. 1991) (failure to disclose wire recording violated sec. 971.23(1)(a); remanded for hearing on whether State had good cause for non-disclosure).

The controlled buy audio includes recorded statements of both Barnes and Marciniak. Thus disclosure was mandated by Wis. Stat. secs. 971.23(1)(a) and (e).

No good cause was offered for the non-disclosure. The prosecutor knew about the recording, which was referenced in discovery (R126:14-15). The State had even filed an "Exhibit List" indicating an intent to present "Compact discs containing recorded phone calls and drug delivery transaction" as a trial exhibit (R20:1).

Non-disclosure prejudiced the defense in numerous ways. As discussed *supra*, it was unable to impeach Winterscheidt's false testimony about the recording being "consistent" with how Marciniak described the transaction, when Marciniak apparently said no words were exchanged, but the recording shows a discussion occurred (R167:122).

Nor was the defendant able to use the ambiguity in the recording to his benefit. As discussed *supra,* statements in the recording could have created an inference consistent with the

theory of defense, that Barnes was there to buy meth for Bobbi Reed. That would have provided one more piece of objective evidence that did not support the State, and therefore contributed to reasonable doubt. Instead of lacking video, lacking photographs, and lacking audio, there would be no photographs, no video, and ambiguous audio which did not refute the theory of defense.

Barnes is entitled to a new trial because the State cannot demonstrate "good cause" for the non-disclosure of the recording, which prejudiced the defense.

II. THE COURT ERRONEOUSLY DENIED BARNES' MISTRIAL MOTION AFTER REPEATED VIOLATIONS OF THE *IN LIMINE* ORDER EXCLUDING PRIOR DRUG DELIVERIES

A. Standard of Review

Whether to grant a mistrial lies within the sound discretion of the trial court. ***State v. Sigarroa***, 2004 WI App 16, ¶24, 269 Wis.2d 234, 674 N.W.2d 894. The court "must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***Id.*** The denial of a mistrial motion will be reversed only on a clear showing of an erroneous use of discretion. ***Id.***

B. Factual Background

The defense moved *in limine* to preclude "Any mention of "other acts" evidence pertaining to previous drug transactions between CRI 1 and the defendant" (R65:1). After no objection from the State, the court granted the request, and instructed the prosecutor to "talk to their witness about not mentioning any prior drug transactions between the two" (R167:10-11).

Despite this ruling, references to prior deliveries littered the State's case presentation from start to finish. In opening arguments, when describing Marciniak working with police, the prosecutor argued, "They asked him where he gets his supply. Chip Marciniak named Dean – can get meth from man named Dean (R167:83) (emphasis added). This argument has only one reasonable inference—Barnes previously sold meth to Marciniak.

The next violations of the court's order came when Marciniak was asked questions about what happened during the charged incident, and he instead responded with what "usually" or "always' happened in the past. The first two references came on direct exam:

Prosecutor:	So how do you know that you were going to go to the Temple Bar?
Marciniak:	Because that's where we always met.

(R166:83).

…

Prosecutor:	What did you do after he threw a black box with a bow into your truck?
Marciniak:	We just usually go our separate ways and that's what we did that day.

(R166:89).

Marciniak made three additional references to prior deliveries during cross-examination, none of which were

responsive to defense counsel's questions, which only asked about the offense in question:

Attorney Gondik:	Can you tell this jury that there was or was not conversation between you and Garland Barnes at the scene of this transaction on April 21st, 2013?
Marciniak:	That I don't recall. There usually wasn't any other meeting when we met so I'm going to say probably not.

(R166: 116-17)

…

Attorney Gondik:	Well you remembered it a few minutes ago when you were under oath, and you said Dean threw something in your truck, and you threw something [in] his truck?
Marciniak:	It was one or the other. It's been awhile and I don't recall exactly how it was. If it was - - that's where we met before and usually just threw each other's stuff into the vehicle.

(R166:139)

…

Attorney Gondik:	You testified under oath that the items were thrown into each other's vehicles, right?
Marciniak:	I did because that's what had happened in the past.

(R166:139).

The defense moved for mistrial based on Marciniak's repeated violations (R166:147-48). The court opined that the first reference seemed "innocuous," not necessarily referring to drug dealing, but "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" (R166:150). Regardless, the court denied the motion, finding no "manifest of injustice" situation (R166:150).

During closing arguments, the prosecutor again made an indirect reference to prior deliveries, by arguing why police targeted Garland Barnes: "So on April 21st, 2013 [Marciniak] testified that he knew investigators were looking for a bigger fish. Somebody they could get who was a bigger supplier. Well, who was that bigger supplier? That was Dean Barnes, Garland Dean Barnes. He's the big fish, ladies and gentlemen, and that's the fish that law enforcement took down" (R166:191) (emphasis added).

The court's decisions denying the defendant's subsequent motions expounded upon why it found no "manifest of injustice" for a mistrial or new trial based on prior deliveries testimony, asserting (1) the defense opened the door on cross-exam; (2) the issues were waived at the time for lack of contemporaneous objection; and (3) some of the references were "innocuous" (R144:15-19). When denying the post-conviction motion citing both Marciniak's testimony and the opening and closing arguments, the court again asserted the references were "innocuous" and therefore non-prejudicial (R180:77-79).

C. Repeated References To Prior Drug Deliveries Warranted A Mistrial, And The Court Applied The Wrong Legal Standard

The record doesn't support the court's reasoning for denying mistrial for these violations. First, the defense didn't open the door, as Marciniak's first two violations occurred during the State's direct exam (R166:83,89). The court acknowledged this when Gondik moved for mistrial (R166:148). And each of the three references on cross-exam were non-responsive to the questions (R166:119-20,139). Attorney Gondik only asked Marciniak what happened on that date; Marciniak repeatedly testified he couldn't recall, and then volunteered what happened in the past.

Second, by obtaining an *in limine* ruling excluding prior deliveries, the defense preserved for appellate review any objection to such evidence, and wasn't required to make additional objections at trial. *See* ***State v. Eison***, 2011 WI App 52, ¶20, 332 Wis.2d 331, 797 N.W.2d 890. And while attorney Gondik didn't object to each individual violation of the *in limine* order, his motion for mistrial at the close of Marciniak's testimony preserved the issue (R166:147-48).

Although Gondik's mistrial motion didn't reference the prosecutor's opening argument, and he made no contemporaneous mistrial motion after closing arguments, the *in limine* order excluding other-acts should also preserve the error regarding those arguments. *See* ***Eison,*** 2011 WI App 52, ¶20. If this error is not preserved, it can still be addressed within the framework of ineffective assistance of counsel. *See infra,* Section V.

Third, Marciniak's repeated references to prior drug deliveries clearly prejudiced the defense. Some of Marciniak's statements are arguably innocuous when taken out of context (e.g. R166:83,119-20). However, others more clearly indicate he's testifying about prior meth deliveries, when viewed in context of the questions. For example, the statement "We just usually go our separate ways and that's what we did that day" was made in response to the question, "What did you do after

[Barnes] threw a black box with a bow into your truck?" (R166:89).

Similarly, Marciniak's statement, "that's where we met before and usually just threw each other's stuff into the vehicle" (R166:139) could only be describing prior deliveries, considering he'd already testified repeatedly that they'd thrown drugs and money into each other's vehicles (e.g. R166:88). When viewed in context of Marciniak's entire testimony, it is clear that even the more oblique statements cited above were referencing prior drug deliveries.

The prosecutor's opening and closing remarks solidified that context for the jury. In opening, she stated it plainly—the police asked Marciniak where he gets his meth supply, and he told them he got it from Dean [Barnes] (R167:83). That clearly implies prior meth deliveries. The prosecutor's closing argument crossed the same line, referring to Barnes as the "bigger fish" and the "bigger supplier" (R166:191). While indirect, the argument clearly implies prior drug deliveries, and large quantities.

The court's reasoning denying the mistrial motion was flawed because it applied the wrong legal standard, asserting the violations did not create a "manifest injustice situation" (R166:150; R144:20). The test for a mistrial on a defendant's motion is not manifest injustice,[4] but rather "whether the claimed error was sufficiently prejudicial to warrant a new trial" in light of the whole proceeding. ***Sigarroa***, *supra*, ¶24.

The prejudice of such evidence is substantial, both generally and specifically to Barnes' case. Other-acts evidence referencing prior drug deliveries create a substantial danger of prejudice based on the inference of propensity and the jury's

[4] The court may have been referring to the higher "manifest necessity" test applied in order to grant a mistrial over the defendant's objection. *See* ***State v. Mattox,*** 2006 WI App 110, ¶12, 293 Wis.2d 840, 718 N.W.2d 281.

instinct to punish a defendant based on prior crimes. *See, e.g.*, ***United States v. Simpson***, 479 F.3d 492, 497–498 (7th Cir. 2007) (reversing cocaine delivery conviction based on improper propensity evidence and arguments). Referring to Barnes as the "bigger supplier" suggested Barnes was a drug dealer selling substantial quantities of methamphetamines prior to this incident, and he hadn't been caught. Clearly this provokes an instinct to punish, and creates a propensity inference that if Barnes delivered meth before, he likely acted in accordance with his past actions on this occasion.

The danger of prejudice was even more substantial considering the theory of defense was Marciniak sold to Barnes rather than vice versa. The State tainted the jury against Barnes from the beginning by repeatedly referencing allegations that Barnes was Marciniak's meth supplier. Marciniak repeatedly, both on direct and cross-exam, answered questions about the underlying incident by referencing prior deliveries. And in closing arguments, after the court denied Gondik's mistrial motion based on those references, the prosecutor again argued Barnes was the "bigger fish" or "bigger supplier." All of these violations were highly prejudicial, and warranted mistrial.

III. PREJUDICIAL EVIDENTIARY ERRORS DEPRIVED BARNES OF A FAIR TRIAL

A. Standard of Review

The admissibility of evidence is discretionary. When reviewing an evidentiary decision, the question on appeal is whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. ***State v. Manuel***, 2005 WI 75, ¶24, 281 Wis.2d 554, 697 N.W.2d 811. "A proper exercise of discretion requires that the trial court rely on facts of record, the applicable law, and, using a demonstrable rational process, reach a reasonable decision." ***Id.***

B. Testimony That Officer Clauer Observed The Transaction Was Hearsay, Effectively Nullifying Exclusion Of Clauer's Testimony Due To The Discovery Violation, And Violating Barnes's Confrontation Rights

1. Background

As discussed *supra,* the court excluded Officer Clauer's testimony based on an "egregious" discovery violation (R167:4-5). Despite that exclusion, the State was still permitted to present the crucial fact from Officer Clauer—that he supposedly observed the hand-to-hand transaction—through Investigator Winterscheidt. The reasons offered to support presenting this evidence were erroneous.

During cross-examination of Investigator Winterscheidt, attorney Gondik repeatedly challenged the quality of the investigation, including the lack of photographs or video surveillance (R167:131-40,163-64). Gondik also asked about the fact that none of the three testifying officers, Winterscheidt, Tanski, and Madden, had personally observed the transaction (R167:173-74).

On redirect, the prosecutor asked Winterscheidt, "Are you aware of any specific officers that observed the transaction?" to which Winterscheidt answered "Yes." (R167:185). When the prosecutor asked who, the defense objected to foundation and hearsay (R167:185). The State argued the defense opened the door when asking whether the investigators videotaped the transaction (R167:185). The court agreed, but asked about hearsay exceptions (R167:185). The prosecutor argued it went to the officer's state of mind (R167:185). The court instructed the prosecutor to lay foundation (R167:185).

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).

Subsequently the court elaborated on its rulings, indicating Gondik had opened the door by repeatedly asking about lack of surveillance (R167:202-03). Attorney Gondik argued that this ruling nullified the discovery sanction by allowing Winterscheidt to testify about what Clauer supposedly saw (R167:203-04). The defense reiterated that it was hearsay, it went to the heart of the defense, and it was offered for its truth (R167:204). The court disagreed, stating it's not "classic hearsay," and not prejudicial (R167:205).

At a post-trial motion hearing, the court acknowledged the importance of Clauer's observations, because he allegedly "saw what happened between the defendant and Mr. Marciniak" (R144:17). The court again asserted that the defense opened the door to Winterscheidt's testimony about

Clauer's observations based on attacking the lack of video surveillance (R144:22). The court concluded that since this evidence went to Winterscheidt's state of mind on why he did what he did, rather than the truth of the matter asserted, any error was not significant enough to warrant a new trial (R144:23).

When denying the post-sentencing new trial motion, the court reiterated its belief that Gondik's questioning opened the door, and the testimony wasn't sufficiently prejudicial to warrant a new trial (R180:79-80). The court didn't directly answer whether the testimony violated Barnes's confrontation rights.

2. Testimony About Clauer's Observations Violated Both Confrontation And Hearsay Rules, And Attorney Gondik's Questioning Logically Could Not Open The Door

The United States and Wisconsin Constitutions guarantee defendants the right to confront witnesses. U.S. Const. amend. VI; Wis. Const. art. I, §7; ***State v. Hale,*** 2005 WI 7, ¶43, 277 Wis.2d 593, 691 N.W.2d 637. The Confrontation Clause bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination. ***Id.,*** ¶¶44-45. The statements of Officer Clauer, made during a police investigation, are plainly "testimonial." The State's own discovery violation rendered him "unavailable," and the defense had no prior opportunity to question him. Evidence of Clauer's observations violated Barnes' confrontation rights.

Further, the court's application of the hearsay statutes was erroneous. The plain language of the state of mind hearsay exception permits statements regarding the declarant's then-existing state of mind, not the listener's state of mind. Wis.

Stat. sec. 908.03(3). Officer Clauer was the declarant, not Investigator Winterscheidt. Winterscheidt's state of mind is irrelevant to this exception.

Statements presented for the listener's state of mind and to explain what the listener does can qualify as not for the truth of the matter asserted, and therefore are not hearsay. Wis. Stat. sec. 908.01(3). However, this type of "state of mind" exception, showing the course of investigation and why an officer does something, is narrowly construed and cannot extend to key facts of the controversy. *See, e.g.*, ***Jones v. Basinger***, 635 F.3d 1030, 1046 (7th Cir. 2011); ***United States v. Silva***, 380 F.3d 1018, 1020 (7th Cir. 2004).

As the Second Circuit explained in ***United States v. Reyes***, background information can be admissible to show an officer's state of mind so the jury will understand the agent's subsequent actions when that evidence clarifies "noncontroversial matter without causing unfair prejudice on significant disputed matters." ***Id.,*** 18 F.3d 65, 70 (2d Cir. 1994). The ***Reyes*** court offered the following balancing test of weighing relevance against prejudice:

> Questions involved in the determination of the relevance and importance of such evidence include: (i) Does the background or state of mind evidence contribute to the proof of the defendant's guilt? (ii) If so, how important is it to the jury's understanding of the issues? (iii) Can the needed explanation of background or state of mind be adequately communicated by other less prejudicial evidence or by instructions? (iv) Has the defendant engaged in a tactic that justifiably opens the door to such evidence to avoid prejudice to the Government?
>
> …
>
> Questions involved in the assessment of potential prejudice include: (v) Does the declaration address an important disputed issue in the trial? Is the same information shown by other uncontested evidence? (vi)

> Was the statement made by a knowledgeable declarant so that it is likely to be credited by the jury? (vii) Will the declarant testify at trial, thus rendering him available for cross-examination? If so, will he testify to the same effect as the out-of-court statement? Is the out-of-court statement admissible in any event as a prior consistent, or inconsistent, statement? (viii) Can curative or limiting instructions effectively protect against misuse or prejudice?

Id. at 70-71.

The defendant urges this court to adopt the ***Reyes*** factors for evaluating such testimony.

Applying those factors here demonstrates that Officer Clauer's observations should not have been admissible, and their admission violated Barnes's confrontation rights. The statement pertained to the key contested issue at trial—who provided the box of methamphetamines. Officer Clauer did not testify due to the State's discovery violation. The reason for Investigator Winterscheidt's actions (moving in to arrest Barnes) was amply explained by other evidence, specifically his testimony that other officers notified him by radio "it went down, deal is done" (R167:186). There was no need for him to explain that one officer claimed to have observed the hand-to-hand and that Barnes produced the meth—a fact Winterscheidt didn't even learn until later.

Finally, any claim that the defense opened the door to this testimony through attacking the lack of photographic or visual surveillance is illogical. Attorney Gondik repeatedly challenged Winterscheidt's decision not to obtain video or photographic surveillance. The reasoning behind that decision couldn't possibly be affected by the subsequent claim that when the transaction occurred, Officer Clauer personally witnessed the hand-to-hand. At the time Winterscheidt decided not to obtain that type of surveillance evidence, he didn't know whether any officer would actually see the transaction. Thus

this claim became a post-hoc rationalization, offered only to suggest police didn't need surveillance because they had sufficient evidence of guilt due to Clauer's observation.

Since Clauer was excluded from trial and his observations couldn't be offered for their truth, permitting Winterscheidt to testify about Clauer's observations only served to shore up a deficiency in the State's case through improper means.

Because resulting prejudice must be assessed from the cumulative effect of all errors, Barnes addresses that cumulative effect in Section III(G), *infra*.

C. Presentation Of Barnes's Alleged Statements In Recorded Call #3 Violated The Court's Pretrial Ruling

1. Background

Before trial, the State moved to admit the purported statements of Barnes in four recorded phone calls with Marciniak, which allegedly arranged the drug transaction. At a pretrial hearing, the State presented both the recordings and transcripts of the four calls (R168:35-41). The court found admissible the recordings and transcripts for calls 1, 2, and 4, as well as three statements purportedly made by Barnes: "I'm a ways out," "I think I've got three," and "I won't be there for awhile/I'll be there in 40" (R168:44). The court entered a written order to that effect (R126:19).

The court specifically found call 3 irrelevant because Barnes's voice could not be heard, and therefore the State had no statements of his to admit from that call (R168:40). The court's written order admitting statements excludes any reference to call 3, the transcript or recording of that call, or any statements from that call (R126:19).

Despite 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. After briefly describing calls 1 and 2 (R167:96-98), Investigator Winterscheidt was asked about Exhibit 3, and Winterscheidt testified it "appears to be a transcript of Barnes Recorded Call Number 3" (R167:99). The defense immediately requested a sidebar, and a discussion was held off the record (R167:99).

The State then proceeded to question Winterscheidt about the recording, and he identified the voices in the recording as Barnes, the informant, and Investigator Olson (R167:100). When asked about the nature of that call, Winterscheidt testified, "It was a phone call that Mr. Marciniak received from Garland Barnes while we were setting up the deal, and they were talking about the quantity of methamphetamine that was expected to be delivered" (R167:100) (emphasis added).

The defense objected to hearsay, and to admission of the transcript, and noted Barnes's voice was not on the recording (R167:101). The court overruled the hearsay objection, declaring it was not offered for its truth, but to show the course of the investigation (R167:102). The court made no reference to its previous ruling excluding this recording and statements purportedly made during that call.

Sergeant James Madden was also questioned about call 3, and testified that Exhibit 3 was a true and accurate copy of that recorded phone call (R167:278). Madden identified it as a call received by Marciniak from Barnes (R167:279). That time, attorney Gondik objected to foundation, and the court sustained regarding who the call was to and from (R167:279). When the prosecution asked who Marciniak was speaking with, the defense objected to foundation and speculation

(R167:279-80). The prosecutor claimed she was just asking if he knew the answer, so the court overruled (R167:280).

Rather than answering the question asked, Madden testified to what the transcript said—"looking at the document that's Mr. Barnes, Recorded Call Number 3. The last line is from - - Investigator James Olson saying the end of it. I just received a call from Dean" (R167:280). The defense objected to hearsay, to which the State again claimed it was being offered for the officer's state of mind (R167:280-81). The court initially sustained, and questioned how it was laying foundation, but noted it was already admitted into evidence and the court didn't know how it was objected to now, so it overruled (R167:281-82).

Sergeant Madden was then asked about the contents of the call, and testified call 3 appears to change the amount of meth to four ounces (R167:282).

Call 3 was presented a third time through Marciniak, and the recording was again played for the jury (R166:79). Marciniak testified he was speaking with Dean [Barnes] during that call (R166:80).

2. Presentation Of The Recording Of Call 3 And The Alleged Statements Of Barnes Were Erroneous

The alleged statements in call 3 were significant, because they were the only statements clearly discussing a drug transaction. Before trial, the court held a hearing on admissibility where it excluded call 3 and statements supposedly made during that call. The court's written order (R126:19) couldn't be clearer.

Regardless, the State presented the recording, the transcript, and testimony about statements made during call 3

at trial, through multiple witnesses. The defense objected on various grounds—hearsay, foundation, lack of Barnes's voice in the recording—yet somehow the State was permitted to present the previously excluded call. None of this evidence should have been admissible, and it prejudiced the defense.

Post-conviction, the court found the State's presentation of this evidence was not improper, because the court's pretrial order only pertained to the defendant's statements (R180:81). The court clarified Call 3 and its recording were admissible for other purposes (R180:81).

This ruling ignores the fact that the State explicitly presented this call as being from Barnes, and had witnesses testify that Barnes made incriminating statements during the call—such as Winterscheidt saying that Barnes and Marciniak were talking about the quantity of methamphetamine to be delivered (R167:100). The State cannot obviate the court's ruling, or its disclosure requirements for a defendant's statements under section 971.23(1)(a)&(b), by generally describing a conversation and attributing the statements to both parties.

These "statements" were inadmissible and prejudiced the defense. The prejudice from this and other errors will be addressed in Section III(G), *infra*.

D. The Officers Lacked Foundation To Identify Barnes's Voice On The Recorded Calls

1. Background

As discussed *supra*, Sergeant Madden identified one of the callers in Call 3 as Barnes (R167:100,279-80). However, Madden's identification appears to be only based on the fact that the written transcript for Call 3 lists Barnes as one of the callers (R167:279-80). Further, when attorney Gondik

objected to foundation, the court indicated it didn't know how the testimony laid foundation, but noted the evidence had previously been presented so it was too late to undo what had been done (R167:281-82).

The court's ruling referred to the testimony of Investigator Winterscheidt, who identified the voice of Barnes in not just Call 3, but all four calls (R167:96-103). Subsequently, when cross-examined about Call 3, Winterscheidt testified he couldn't hear "the words that were spoken. I could just hear the voice and I could tell it was Garland Barnes on the end of that line" (R167:149). However, when pressed further how he knew Barnes's voice, Winterscheidt admitted he'd never spoken to Barnes before (R167:175-76).

2. Both Officers Lacked Foundation To Identify Barnes's Voice, And Their Identification Testimony Should Have Been Stricken

The State presented no foundation for either officer to be able to identify the voice of Barnes. In order to satisfy authentication or identification requirements under Wisconsin's evidence code, the witness must be able to establish some sort of prior familiarity with the voice. See Wis. Stat. sec. 909.015(5); *see also* ***State v. Sarinske***, 91 Wis.2d 14, 45, 280 N.W.2d 725 (1979) (allowing police officer to identify the defendant's voice based on the officer's numerous previous conversations with the defendant).

Post-conviction, the court found no problem with foundation, asserting "I think there was enough evidence to support the identification" (R180:82). The court failed to identify what evidence provided foundation for such testimony. Neither officer testified to having any prior familiarity with Barnes's voice. Despite claiming he "could tell" it was Barnes on the line, Winterscheidt had no prior

familiarity with Barnes's voice. Madden offered no foundation whatsoever for voice identification. Simply looking at a document that says Barnes was speaking is not sufficient foundation to identify who was speaking.

This foundationless identification testimony should have been stricken. The prejudice from this and other errors will be addressed in Section III(G), *infra*.

E. Since None Of The Testifying Officers Participated In The Initial Search Of Marciniak's Vehicle, Winterscheidt's Testimony About That Search Lacked Foundation And Should Have Been Stricken

1. Background

Similarly lacking in foundation was testimony regarding the initial search of Marciniak's vehicle. Investigator Winterscheidt testified, "We searched the informant for any contraband or currency, and we searched the informant's vehicle for any contraband or currency. None was found" (R167:104) (emphasis added). When asked why he searched Marciniak's person and vehicle, Winterscheidt answered, "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 he's not bringing any illegal drugs to the transaction" (R167:106). Winterscheidt described the searches as "thorough," and explained the search included "compartments in the vehicle any locked or unlocked containers in the vehicle" (R167:106-08).

However, when asked if he performed a thorough search of Marciniak's vehicle, Winterscheidt answered, "A thorough search was done. I didn't do it personally" (R167:108). The defense objected to foundation and moved to strike, but the court overruled, saying "It's already been asked

and answered" (R167:108). Subsequently, when asked about the search of Marciniak's vehicle, Winterscheidt stated they'd "have to ask Investigator Tanski about that" (R167:143).

Except that when Officer Tanski was asked about the search, Tanski testified he didn't search Marciniak's vehicle initially, and believed that was Investigator Winterscheidt (R167:218). When asked to clarify his role in the searches, Tanaski testified he only performed the "end search," or second search after the controlled buy (R167:230,240).

The only other officer to testify was Sergeant Madden, who wasn't involved in the searches of the informant or his vehicle (R166:24).

2. Since Winterscheidt Didn't Perform The Search, His Testimony Lacked Foundation And Should Have Been Stricken

While Investigator Winterschedit's testimony initially suggested he participated in the search, his subsequent testimony revealed that he didn't, and lacked foundation because he had no personal knowledge. *See* Wis. Stat. sec. 906.02. Attorney Gondik's objection to foundation and motion to strike were proper. The court's denial of those motions because it had "already been asked and answered" neglected the fact that it was only Winterscheidt's subsequent testimony that revealed the lack of foundation. The denial of these requests was erroneous.

The court's post-conviction ruling made not attempt to address the propriety of the ruling, instead discussing whether the testimony was prejudicial (R180:82-83). The prejudice from this and other errors will be addressed in Section III(G), *infra*.

F. The Court Improperly Excluded Rebuttal Witness Gerald Clark

1. Background

The defense requested to present Gerald Clark, who was not listed as a witness, to rebut Marciniak's claim of going directly from the transaction to the Bayport Motel. As an offer of proof, Gondik indicated Clark would testify to the following:

- Clark had been friends with Marciniak for years;

- The day of the incident, Clark was at a nearby intersection and observed Marciniak pick up a box from a garage;

- Clark also observed a police pursuit, but didn't realize until later it involved Barnes; and

- Later that day he spoke with Marciniak, who made comments implying he set someone up.

(R166:174-75).

The court barred the testimony, noting the proffer contradicting Marciniak's claim of going directly from the Temple Bar to the Baywalk Motel would be rebuttal, but the portion about Marciniak's statements would not (R166:177-78). Gondik offered to tailor his question to just Clark's observations about whether Marciniak went directly from the Temple Bar to the Baywalk Motel, but the court refused because of concerns over the trial's length (R166:178-79).

2. Despite Recognizing Some Of Clark's Proffered Testimony Was Proper Rebuttal, The Court Improperly Barred His Testimony

Rebuttal evidence is proper when it becomes necessary and appropriate to rebut new facts put in by an opposing party's case-in-chief. *See* ***State v. Konkol***, 2002 WI App 174, ¶18, 256 Wis.2d 725, 649 N.W.2d 300. The court acknowledged Clark's proffer contradicting Marciniak's claim of going directly to the Baywalk was proper rebuttal (R166:177). Regardless, the court barred Clark's testimony because other aspects would not be rebuttal—even after the defense offered to restrict Clark's testimony to rebutting facts only (R166:177-79).

The court identified no rational reason to exclude that limited testimony. The court's concerns over the trial going from a one-day to two-day trial—prompted by the revelation that the State failed to disclose the wire recording—could not reasonably be used to restrict the defense presentation of evidence. The court erroneously exercised discretion in barring Clark's testimony.

G. The Errors Were Not Harmless And Caused Prejudice To Barnes's Defense

The errors described *supra* entitle Barnes to a new trial unless the State can carry its burden of proving the errors were harmless beyond a reasonable doubt, e.g., ***State v. Mayo,*** 2007 WI 78, ¶47, 301 Wis.2d 642, 734 N.W.2d 115 (An "error is harmless if the beneficiary proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained") (citation omitted).

In assessing whether errors are harmless, reviewing courts consider 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. ***Id.***, ¶48. When assessing the impact of the errors, the court must assess the cumulative effect of all errors. ***Id.,*** ¶64 & n.8, ¶66.[5]

Reversal is required in this case because the errors were frequent, affecting some of the most important issues in the case, and because the State's case was not strong, having been infected with false testimony and deficiencies in the supposedly "controlled" buy. Assessing those deficiencies, and how the identified errors improperly bolstered the State's case against Barnes, demonstrates clearly the errors were not harmless.

The defense argued that Marciniak actually delivered the meth found in the possession of Bobbi Reed, and that Marciniak set Barnes up regarding the other meth. This put a premium on two categories of evidence: the credibility of Marciniak, and the objective circumstances of the "controlled" buy corroborated by police.

As a 25-time convict who'd previously been convicted of methamphetamine delivery, Marciniak's credibility was obviously questionable (R166:65-67). Further, Marciniak knew how to manufacture meth (R166:106). Marciniak was working as an informant because he'd been arrested for two methamphetamine deliveries, and wanted to avoid jail or prison at all costs (R166:68,108,113). Ultimately he received a substantial deal, involving complete dismissal of one charge, probation and a single day of jail on the other (R166:115-16).

Since Marciniak's credibility was subject to attack, the corroborating circumstances were extremely important. The main witness who could corroborate the objective

[5] Accordingly, this harmless error analysis includes the prejudice of the repeated other-acts violations referring to prior meth deliveries from Section II, in addition to the evidentiary errors identified in Section III.

circumstances, Investigator Winterscheidt, was exposed to have lied to the jury about the wire recording.

The evidentiary errors identified above each impact the corroborating evidence in some way. For example, the first key piece of evidence against Barnes was the recorded phone calls, purportedly between Barnes and Marciniak, for the purpose of arranging a methamphetamine delivery. However, the only evidence provided by the State to link those calls specifically to Barnes was the testimony of officers Winterscheidt and Madden identifying Barnes as the other person on the phone. However, since the officers lacked foundation to identify Barnes's voice, that identification evidence should have been inadmissible.

The 3rd recorded phone call was the most significant, since the discussion in the other calls is relatively ambiguous, but Winterscheidt testified Call 3 is where Barnes changed the amount of methamphetamine to be delivered (R167:100). However, the court had previously excluded any statements attributed to Barnes from Call 3. None of that evidence should have been admitted.

The first search of Marciniak's vehicle was an important aspect of controlling the transaction, to make sure Marciniak didn't have any narcotics hidden prior to the buy (R167:106). Accordingly, the testimony showing police searched Marciniak's vehicle and found no drugs was a significant part of the State's evidence challenging the theory of defense. But that testimony should have been stricken, since none of the testifying officers performed that search, and Winterscheidt's testimony about that search lacked foundation.

Rebuttal testimony from Gerald Clark could have provided an alternative source for Marciniak to obtain the box of meth—from a nearby garage, as Clark observed. The court barred this crucial testimony without any rational basis.

The defense attacked officers' failure to control the transaction through video or photographic evidence, and the fact that none of the testifying officers saw the hand-to-hand. The State fixed this deficiency by presenting hearsay from Investigator Winterscheidt that Officer Clauer personally observed the transaction, and that it was Barnes providing meth to Marciniak. The claim that Clauer physically observed the transaction was highly prejudicial, creating a substantial danger that the jury used it for its truth, because it went to the heart of the controversy. The importance of this evidence is simple: if the jury believed Clauer personally witnessed Barnes deliver meth to Marciniak, that alone was enough to convict.

Investigator Winterscheidt's hearsay testimony provided a convenient end-around for the State's egregious discovery violation, allowing the State to present the most important fact Clauer would have provided. Conveniently for the State, this also deprived the defense of the opportunity to confront Clauer to challenge his supposed observations, or how his reports miraculously arrived just before trial to shore up the lack of any officers observing the transaction.

Finally, the improper other-acts evidence exacerbated the many, many evidentiary errors by completely undermining the defense argument that Marciniak was selling to Reed, by suggesting Barnes previously sold to Marciniak. Considering the repeated violations of the motions in limine, the repeated presentation of foundationless evidence, the weaknesses in the State's case, and the highly prejudicial other acts, the State cannot possibly prove the errors were harmless beyond a reasonable doubt. Reversal is required.

IV. THE REAL CONTROVERSY WAS NOT FULLY TRIED

Regardless of whether other errors independently justify relief, the combined effect of the discovery violations, perjured testimony, and evidentiary errors justifies reversal in the interests of justice because these factors resulted in the real controversy not being fully tried. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 456 N.W.2d 797 (1990). The Court's discretionary authority to reverse in the interests of justice furthers its obligation to do justice in an individual case. ***Id.,*** 156 Wis.2d at 15.

A. Legal Basis For Finding The Real Controversy Was Not Fully Tried

The Court of Appeals may grant defendants a new trial in the interest of justice when the real controversy was not fully tried, "regardless of whether the proper motion or objection appears in the record." Wis. Stat. sec. 752.35.

Situations in which the controversy may not have been fully tried include (1) when the jury was 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 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 defendant need not make a showing of a substantial probability of a different result on retrial before the court may reverse when the real controversy has not been fully tried. ***Hicks, id.***

B. The Real Controversy Not Fully Tried Due To Flagrant Discovery Violations, False Testimony, And Improperly Admitted Evidence

1. Discovery Violations And False Testimony

When witness credibility is a primary issue, improper or false evidence unfairly affecting the credibility determination may warrant a new trial in the interest of justice. *See* ***State v Penigar***, 139 Wis.2d 569, 578, 408 N.W.2d 28 (1987). Failure to disclose exculpatory evidence can also warrant a new trial in the interest of justice. *See* ***State v. Stanislawski***, 62 Wis.2d 730, 216 N.W.2d 8 (1974).

As discussed in Section I, *supra*, the prosecution committed several egregious discovery violations, the worst of which involved the wire recording. The State and law enforcement suppressed that recording for over two years. The prosecution submitted false documents indicating the recording had already been provided to the defense. At the start of trial, the prosecutor misrepresented the recording's contents to justify why it wasn't being presented or disclosed to the defense. Investigator Winterscheidt committed perjury regarding the recording's contents.

The State ultimately only disclosed the recording when ordered by the court, after Winterscheidt's perjury had been exposed, and in the middle of trial when the defense lacked sufficient time to analyze it. Now that the recording has been examined, the defense has discovered additional exculpatory value, and that it demonstrates other false testimony provided by Winterscheidt that went unchallenged during trial.

2. Evidence The Jury Should Have Heard

In addition to the wire recording which could have supported the defense, the jury was improperly deprived of hearing testimony from Gerald Clark. Clark would have contradicted Marciniak's claim of going straight back to the motel to wait for police, and identified a possible location where Marciniak obtained the meth to set up Barnes.

3. Improper Evidence And Arguments The Jury Should Not Have Heard

As discussed *supra*, the jury heard substantial evidence and arguments that were improper and clouded the real controversy, which warrants a new trial. To summarize, the jury heard: (1) improper testimony and arguments regarding prior allegations of meth delivery by Barnes to Marciniak; (2) hearsay observations of Officer Clauer supposedly witnessing the hand-to-hand exchange; (3) evidence regarding a phone call which officers claimed involved Barnes setting up a meth transaction, which the court had excluded before trial; (4) foundationless testimony identifying the voice of Barnes on all the recorded phone calls; and (5) foundationless testimony that Marciniak's vehicle had been thoroughly searched and no contraband was found before the controlled buy. None of this evidence should have been admitted.

C. The Real Controversy Was Not Fully Tried

The central controversy in this case was who provided the methamphetamines on April 21, 2013, and whether the State had enough evidence to prove it was Garland Barnes. The defendant submits the errors identified *supra* prevented the real controversy from being fully and fairly tried.

There is no exact standard for determining at what point the controversy has not been fully tried. The question boils down to fairness to the defendant. The Wisconsin Supreme Court has held the real controversy was not fully tried in ***Hicks*** when improperly admitted evidence "so clouded a crucial issue." 202 Wis.2d at 160. The court determined that reversal was necessary because "[w]e cannot say with any degree of certainty that the [improperly admitted] evidence used by the State during trial played little or no part in the jury's verdict." ***Id.*** at 153.

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. As discussed previously in Sections I(C), II(C), and III(G), *supra*, these errors prevented the jury from fully and fairly resolving the decisive issues at Barnes's trial. The interests of justice warrant a new trial.

V. BARNES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

Barnes was denied the effective assistance of counsel at trial. U.S. Const. amends. VI; Wis. Const. art. I, §7. The specific instances of ineffectiveness are discussed below. Barnes submits that there was no legitimate tactical basis for the identified conduct or failures of counsel, that such conduct or failures were unreasonable under prevailing professional norms, and the errors prejudiced his defense.

A. Standard For Ineffectiveness

The defendant must show trial counsel's representation was deficient and that he was prejudiced by counsel's errors. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. ***Id.*** at 688. When evaluating counsel's performance, courts are to be "highly deferential" and must avoid the "distorting effects of hindsight." ***Id.*** at 689.

The defendant need not show total incompetence of counsel; a single unreasonable error may be sufficient. ***State v. Thiel,*** 2003 WI 111, ¶60, 264 Wis.2d 571, 665 N.W.2d 305. Likewise, the cumulative effect of several deficient acts or omissions may, in certain instances, also undermine a

reviewing court's confidence in the outcome of a proceeding. ***Id.***. Therefore, in determining whether a defendant has been prejudiced as a result of counsel's deficient performance, the court may aggregate the effects of multiple deficient acts in determining whether the overall impact satisfies the standard for a new trial under ***Strickland***. ***Id.***

The second prong requires establishing prejudice. "The defendant is not required to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***Strickland***, 466 U.S. at 693. Instead, the question is "whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.***, 466 U.S. at 694. "Reasonable probability," under this standard, is defined as a "probability sufficient to undermine confidence in the outcome." ***Id.***

B. Trial Counsel's Performance Was Deficient

The defendant has alleged *supra* that counsel's objections to improper evidence were sufficient and preserved those issues for appellate review. However, if the court finds those objections were not sufficient and that the issues were forfeited, attorney Gondik performed deficiently by failing to object.

Specifically, the defendant believes that by moving *in limine* to preclude other-acts evidence of prior drug deliveries, attorney Gondik preserved all objections to such evidence and arguments. Further, Gondik's motion for a mistrial after Marciniak repeatedly referenced other-acts evidence preserved that objection. However, if attorney Gondik did not specifically object to Marciniak's violations or the prosecutor's arguments referring to Barnes as Marciniak's supplier or the "bigger fish," then counsel's failures to object were deficient.

The defendant believes Gondik sufficiently objected to the testimony of Officer Clauer, as well as the State's attempts to present Clauer's hearsay observations through Investigator Winterscheidt. To the extent that attorney Gondik did not specifically object on confrontation/6th amendment grounds (in addition to hearsay and discovery violations), and the court finds that objection is forfeited, the failure to object is deficient.

Likewise, if this court finds Gondik opened the door to Clauer's observations, that failure is deficient. *See* ***Harding v. Sternes***, 380 F.3d 1034, 1045 (7th Cir. 2004) (Inadvertently opening the door to damaging evidence is deficient). The point of counsel's questions—to demonstrate law enforcement performed a shoddy investigation—could have been more effectively addressed through argument, without opening the door to improper evidence.

The defendant believes attorney Gondik sufficiently objected to law enforcement testimony identifying Barnes as the voice in the recorded phone calls based on foundation. However, if the court finds that Gondik raised this specific objection too late, and didn't preserve it during Investigator Winterscheidt's testimony, the defense submits Gondik's failure to object was deficient.

For each of these claims, the defendant hereby incorporates the factual discussions *supra*, Sections II-III.

C. Trial Counsel's Deficient Performance Prejudiced Barnes

As already demonstrated *supra*, there can be no reasonable dispute that the improperly presented evidence prejudiced Barnes's defense and that, but for those errors, there exists a reasonable probability of a different result at trial in this case. If counsel's failure to object waived one or more of those errors, that deficiency prejudiced Barnes.

Given the importance of the other acts evidence and arguments, Officer Clauer's hearsay observations claiming to have witnessed the transaction, and the testimony of officers claiming Barnes was the voice on the recorded phone calls, any of those errors individually would be sufficient to cause resulting prejudice. However, ineffectiveness of counsel must be assessed under the totality of the circumstances. It is thus the cumulative effect of counsels' errors and other errors in the case, as demonstrated in Section II-III, *supra*, which is controlling. *See* ***Thiel***, 2003 WI 111, ¶¶59-60. The defendant hereby incorporates the arguments from the harmless error discussion, Section III(G), *supra,* to explain how these errors prejudiced Barnes. Due to the combined prejudice that resulted from counsel's errors, and the close nature of the evidence in this case, the defendant is entitled to a new trial.

CONCLUSION

For the reasons discussed in this brief, Barnes respectfully requests that the court vacate the judgment of conviction and remand for a new trial.

Respectfully submitted: July 16, 2019

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,974 words.

Signed July 16, 2019

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CERTIFICATE OF COMPLIANCE WITH 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 s. 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.

Signed July 16, 2019:

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