STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP2005-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARLAND DEAN BARNES,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN DOUGLAS COUNTY CIRCUIT COURT, THE HONORABLE KELLY J. THIMM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the circuit court erroneously exercise its discretion when it denied Garland Dean Barnes's request to dismiss the charges based on the State's discovery violations?

The circuit court answered no.

This Court should answer no.

2. Did the circuit court erroneously exercise its discretion when it denied Barnes's request for a mistrial based on the presentation of supposed other-acts evidence of his prior drug sales?

The circuit court answered no.

This Court should answer no.

3. Did the circuit court erroneously exercise its discretion when it made five evidentiary rulings against Barnes?

The circuit court answered no.

This Court should answer no.

4. Has Barnes demonstrated that, to the extent that any of his evidentiary claims are unpreserved, his trial counsel was ineffective for not adequately raising them in circuit court?

The circuit court answered no.

This Court should answer no.

5. Has Barnes demonstrated that this Court should reverse his conviction in the interest of justice?

The circuit court did not address this issue.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs will fully develop the issues presented, which can be resolved by applying well-established precedent.

INTRODUCTION

A jury convicted Barnes of selling methamphetamine to a police informant. On appeal, he challenges the circuit court's decisions (1) not to dismiss the case because of the State's discovery violations, (2) not to grant a mistrial based on what he contends was other-acts evidence of his prior drug sales to the informant, and (3) to admit or not admit five pieces of evidence. Barnes also claims that his trial counsel was ineffective in case he did not adequately preserve these claims for appellate review. Finally, Barnes argues that the circuit court's rulings justify a new trial in the interest of justice.

Barnes is not entitled to relief. None of the court's decisions amount to reversible error. So those claims, and Barnes's derivative ineffective assistance and interest of justice claims, all fail. This Court should affirm.

STATEMENT OF THE CASE

The State charged Barnes with selling four ounces of methamphetamine to an informant named Charles Marciniak. (R. 2.) Marciniak told police that he could buy methamphetamine from Barnes for $1800 an ounce. (R. 2:1.) Marciniak arranged to buy four ounces of methamphetamine from Barnes in a parking lot in Superior. (R. 2:1–2.) Police gave Marciniak $7200 in recorded money for the purchase. (R. 2:2.) After the transaction, police arrested Barnes. (R. 2:2.) He had the $7200 in his car. (R. 2:2.) Marciniak turned over four ounces of methamphetamine to police. (R. 2:2.)

Barnes went to trial. (R. 166; 167.) His defense was that he did not sell methamphetamine to Marciniak but, instead, bought it from him for his girlfriend, Bobbi Reed. (R. 166:202–03; 180:6.) Reed was with Barnes when he was arrested and had small amounts of methamphetamine and heroin in her possession. (R. 2:2–3.)

Barnes raised this defense by attacking, during cross-examination, gaps in law enforcement's control of the transaction. He maintained that police inadequately observed the transaction and emphasized that they had not tried to video record it. (R. 166:13–17; 167:131–40, 144, 234–39; 180:7, 30.) Barnes also noted that police had no contact with Marciniak after the transaction until they retrieved the methamphetamine from him at a motel five minutes later. (R. 166:25; 167:177–78, 239–40.) Based on this, Barnes argued that Marciniak got the four ounces of methamphetamine from somewhere else. (R. 166:202–06.) And, he claimed, Marciniak's motivation to frame him was leniency from the State on Marciniak's own charges for selling drugs. (R. 166:101–19; 206.)

The jury convicted Barnes of delivering more than 50 grams of methamphetamine. (R. 166:228–33.) Wis. Stat. § 961.41(1)(e)4.

Before sentencing, Barnes moved for a new trial based on three evidentiary decisions the circuit court had made during the trial. (R. 89.) He argued that the court had admitted testimony from Marciniak that violated its pretrial order barring evidence of prior drug transactions between the men. (R. 89:3–5.) Barnes also claimed that the court had improperly not allowed him to present Gerald Clark as a rebuttal witness. (R. 89:5.) Finally, Barnes maintained that the court had erroneously allowed one of the investigating officers to testify that another, nontestifying officer had seen the transaction. (R. 89:6.)

The court denied the motion. (R. 94; 144:15–23.) It sentenced Barnes to 15 years of initial confinement and 15 years of extended supervision. (R. 99; 143:35.)

Barnes moved for postconviction relief. (R. 125.) He raised six claims in his motion.

- First, that the circuit court had improperly admitted Marciniak's testimony about prior sales and the testimony about the nontestifying officer's observation of the transaction. (R. 125:1, 14–17.)
- Second, that the State had violated its discovery obligations by failing to disclose to him the contents of an audio recording of the transaction and then introducing false testimony about the recording. (R. 125:1, 8–12.)
- Third, that the court had admitted evidence of one of four telephone calls between Barnes and Marciniak setting up the sale that it had excluded before trial. (R. 125:1, 21–23.)
- Fourth, that the court had erroneously allowed law enforcement to testify without foundation about other phone calls between the men and about law enforcement's search of Marciniak's car before the sale. (R. 125:1, 23–25.)
- Fifth, that, to the extent any of his claims were not adequately preserved for postconviction review, his trial counsel had been ineffective for not raising them. (R. 125:2, 25–26.)
- Sixth, and finally, Barnes sought a new trial in the interest of justice. (R. 125:2, 26.)

The circuit court denied the motion after an evidentiary hearing. (R. 132; 180.) Barnes appeals. (R. 136.)

The State discusses additional facts relevant to Barnes's claims in the Argument section.

STANDARDS OF REVIEW

Whether the State violated its discovery obligations under Wis. Stat. § 971.23 is a question of law that this Court reviews de novo. *State v. Prieto*, 2016 WI App 15, ¶ 10, 366 Wis. 2d 794, 876 N.W.2d 154. This Court reviews the circuit court's choice of a remedy for a discovery violation for an erroneous exercise of discretion. *State v. Harris,* 2008 WI 15, ¶ 96, 307 Wis. 2d 555, 745 N.W.2d 397.

Whether the State violated its constitutional obligation to disclose exculpatory evidence is a question of law this Court reviews independently. *State v. Rockette*, 2006 WI App 103, ¶ 39, 294 Wis. 2d 611, 718 N.W.2d 269.

This Court reviews a circuit court's evidentiary rulings for an erroneous exercise of discretion. *State v. Nieves*, 2017 WI 69, ¶ 16, 376 Wis. 2d 300, 897 N.W.2d 363.

An ineffective-assistance-of-counsel claim presents this Court with a "mixed question of fact and law." *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Under this standard of review, the trial court's findings of fact will not be disturbed "unless they are clearly erroneous." *Id.* The ultimate issue of whether counsel was ineffective based on these facts is subject to independent appellate review. *State v. Balliette*, 2011 WI 79, ¶¶ 18–19, 336 Wis. 2d 358, 805 N.W.2d 334.

ARGUMENT

I. Barnes has not demonstrated that the State's failure to disclose the wire recording's contents before trial justifies a new trial or dismissal.

Barnes first contends that this Court should either give him a new trial or dismiss his case because the State did not disclose the contents of an audio recording of the transaction before trial. (Barnes's Br. 13–23.) Barnes knew about the recording before trial, but the State told him that it contained

only background noise. During trial, the parties discovered that voices were audible on the recording. Barnes argues that this means that the State violated its duties under Wis. Stat. § 971.23 and the Constitution to disclose exculpatory evidence. (Barnes's Br. 19–23.) He further complains that the State introduced false testimony that the recording did not contain any voices. (Barnes's Br. 19–21.)

This Court should deny Barnes relief on this claim. Barnes has not shown that the State violated the discovery statute or the Constitution because it disclosed the recording to Barnes. Further, because the State did not introduce the recording at trial, Barnes received the remedy he was entitled to under the statute. Barnes also has not shown that the evidence was exculpatory such that the State had a constitutional obligation to disclose it to him.

A. Additional facts.

Barnes's trial counsel filed a discovery demand on April 11, 2014. (R. 12.) In response, the State acknowledged the demand and said that it had given counsel, on April 14, 2014, "police recordings of the alleged informant – defendant phone calls and charged delivery transaction." (R. 16:2.) The response also said that "[i]tems of physical evidence" were available for inspection and copying and that the State was unaware if Barnes's attorney had requested to view the evidence. (R. 16:2.)

The State submitted a witness and exhibit list on April 24, 2014. (R. 20.) It lists "[c]ompact discs containing recorded . . . drug delivery transaction" as one of the State's trial exhibits. (R. 20.)

On the first day of trial, July 7, 2015, Barnes moved to preclude the State from introducing "audio and/or surveillance tape of the exchange/transaction." (R. 65:1.) The court addressed the motion but did not grant or deny it.

(R. 167:7–9.) Instead, it explained that it understood "that there was no audio" of the transaction and, thus, nothing for the State to seek to admit. (R. 167:7–8.) The State clarified that "[t]he audio was running," but the recording contained "only background noises." (R. 167:8.) It also said that Duluth Police Investigator Jason Tanski would "testify to that" during the trial. (R. 167:8.) Barnes's attorney said that he had no objection. (R. 167:8.)

On the first day of trial, Barnes's counsel cross-examined Superior Police Sergeant Paul Winterscheidt about the recording. (R. 167:128–129.) Counsel asked why there was not any audio of the transaction, and Winterscheidt replied, "Well there actually is an audio recording. There are just no voices on the audio recording." (R. 167:128.) Winterscheidt said that the recording contained "just a lot of background noise." (R. 167:129.) Counsel asked Winterscheidt if he knew why the State did not give him or Barnes a copy of the recording so he could enhance it. (R. 167:128–29.) Winterscheidt replied that he did not know what the State had given to the defense. (R. 167:129.)

Barnes's counsel also cross-examined Tanski about the recording on the first day of trial. (R. 167:226–36.) Tanski said that he knew Marciniak had worn a recording device during the transaction. (R. 167:235.) But, when asked if he was "aware that nothing showed up on the — on the recording," Tanski replied, "There were words on the recording" and said that Marciniak's voice was audible. (R. 167:235–36.)

At the end of the first day of trial, the court ordered the State to give Barnes a copy of the recording. (R. 167:289.)

The next day, Barnes again brought up the recording, this time while cross-examining Douglas County Sheriff's Sergeant James Madden. (R. 166:9–10.) Madden said that he had listened to the audio and that Marciniak's and another person's voices were on it. (R. 166:10.)

The court and the parties later discussed the recording outside of the jury's presence. (R. 166:54–61.) The prosecutor acknowledged that the recording contained voices but said that she was not going to seek its admission. (R. 166:56.) She also said that she told Barnes's counsel that there was only background noise on the recording based on what law enforcement officers, including Tanski, had told her. (R. 166:55–56.)

Barnes's counsel said that "[p]robably all" of what the prosecutor had said was accurate but asked that the court dismiss the case. (R. 166:57–59.) He pointed to the State's late disclosure of the voices on the recording and Winterscheidt's incorrect testimony that there were none. (R. 166:57–58.) Counsel also asked the court to dismiss the case to discourage "this type of conduct in the future" that would "hurt the process and . . . hurt the system." (R. 166:59.)

The court determined that the State had violated its discovery obligations, though "it's not that she had — she kept it from the defense." (R. 166:54–55, 59–60.) It also concluded that the evidence was not exculpatory, nor had Barnes argued that it was. (R. 166:59.) The court declined to dismiss the case, saying that, instead, "latitude and cross-examination, along with a jury instruction would be the appropriate remedy." (R. 166:60.) It said that drafting the instruction would be up to the defense. (R. 166:61.) The court also ordered that witnesses not mention the recording, "even during cross-examination." (R. 166:61.)

Barnes did not request, and the court did not give, a jury instruction about the recording. (R. 166:211–24.)

Barnes had the recording enhanced after his conviction. (R. 129.) On it, a man can be heard asking, "How much dough" and another says something like, "We're good on that other one, right?" (R. 181, 8:33–8:52.)

In his postconviction motion, Barnes argued that the State's failure to disclose the recording warranted a new trial or dismissal. (R. 125:8–12.) He claimed that the recording was exculpatory evidence that the State needed to disclose under *Brady* and Wis. Stat. § 971.23(1)(h). (R. 125:8–12.) Barnes also maintained that the State needed to disclose the recording under section 971.23(1)(a) and (e) because it contained his and a witness's statements. (R. 125:12–13.)

The circuit court denied Barnes relief. (R. 180:75–77.) It concluded that the recording did not contain exculpatory evidence. (R. 180:76.) The court said that the defense should have had the recording sooner but noted that it had still effectively used it to impeach Winterscheidt. (R. 180:75–76.) The defense, it said, "got the best of both worlds" because not only was it able to use the recording's existence to undercut the State's case, but it also kept the jury from hearing it. (R. 180:75–77.)

B. Barnes cannot show that the State violated Wis. Stat. § 971.23 or its constitutional duty to disclose exculpatory evidence.

1. Barnes has not proven a violation of the discovery statute.

This Court should first conclude that Barnes has failed to show that the State violated its statutory discovery obligations for the wire recording.

Barnes contends that the State violated Wis. Stat. § 971.23(1)(a), (e), and (h). (Barnes's Br. 19–23.) These require the State, "[u]pon demand" and "within a reasonable time before trial," to disclose to the defendant or his attorney recorded statements of the defendant, witness statements that the State intends to use at trial, and exculpatory evidence. Wis. Stat. § 971.23(1)(a), (e), and (h). The State must also allow the defendant or counsel to inspect and copy these

materials if they are in the State's possession. Wis. Stat. § 971.23(1).

This Court reviews a claim that the State violated the discovery statute in three steps. *State v. Rice*, 2008 WI App 10, ¶ 14, 307 Wis. 2d 335, 743 N.W.2d 517. First, the court determines whether the State failed to make a required disclosure. *Id*. Second, the court considers whether the State had "good cause" for the failure. *Id*. "Absent good cause, the undisclosed evidence must be excluded." *Id*. *See also* Wis. Stat. § 971.23(7m). "Finally, if evidence should have been excluded under the first two steps, [this court] decide[s] whether admission of the evidence was harmless." *Rice*, 307 Wis. 2d 335, ¶ 14.

The State complied with the discovery statute because it disclosed the recording. According to the State's response to Barnes's discovery demand, it gave Barnes's counsel "police recordings of the alleged . . . charged delivery transaction" on April 14, 2014, which was more than a year before trial. (R. 16:2.) In addition, the discovery demand says that the State allowed Barnes's counsel to inspect and copy all the evidence it had. (R. 16:2.) And the State's exhibit list, also filed more than a year before trial, listed "[c]ompact discs containing recorded . . . drug delivery transaction." (R. 20.)

At the least, then, these documents establish that Barnes's counsel should have known about the recording and that it was available for copying before trial. And, at the most, these documents show that the State gave Barnes a copy of the recording before trial. Either way, the State complied with its obligations under Wis. Stat. § 971.23(1).

But even if the State failed to disclose the recording, Barnes cannot prove a violation of the statute because the State did not introduce it at trial. If the State fails to disclose evidence as required by Wis. Stat. § 971.23, it must show good cause for the nondisclosure. *Rice*, 307 Wis. 2d 335,

¶ 14. Otherwise, the evidence is excluded. *Id*. Barnes already received the remedy he was entitled to if he could prove a violation of the statute—the exclusion of the recording. There is thus no basis for this Court to grant him the additional remedy of a new trial.

Barnes's attempts to show a violation of the statute fall short. (Barnes's Br. 22–23.) He contends that the recording contained statements by him and Marciniak, so disclosure was required by Wis. Stat. § 971.23(1)(a) and (e). But subsection (e) requires disclosure of witness statements only if the State intends to use them at trial. And while there is no similar requirement for statements of a defendant in subsection (a) or exculpatory evidence in subsection (h), again, there can be no violation of Barnes's rights under the statute if the State does not introduce the statement.

Next, Barnes complains that the State did not establish good cause for its failure to disclose. (Barnes's Br. 22.) But there was no reason for the State to provide good cause because it decided not to introduce the recording. Barnes also points out that the State knew about the recording because it is mentioned in the discovery and on its April 24, 2014, witness list. (Barnes's Br. 22; R. 20; 126:14–15.) But Barnes does not allege that he did not receive these documents, and as argued, they prove that the State complied with the statute by disclosing the recording to Barnes well before trial.

Finally, Barnes argues that he was prejudiced because he was unable to impeach Winterscheidt's testimony that there were no voices on the recording or use the recording's ambiguity in his defense. (Barnes's Br. 22.) But the discovery statute and the case law interpreting it do not contemplate that a defendant can be prejudiced when nondisclosed evidence is not introduced at trial. The remedy for nondisclosure is that the State does not get to use the evidence. Barnes already received that remedy.

And, regardless, Barnes was not prejudiced. He established through other witnesses that Winterscheidt incorrectly testified that there were no voices on the recording. (R. 166:9–11; 167:235–36.) The court also allowed Barnes to recall Winterscheidt to question him about the recording. (R. 166:61–62.) Winterscheidt admitted that his testimony was inaccurate. (R. 166:159–63.)

And Barnes really does not develop his claim that there was helpful ambiguity in the recording, so this Court should not consider it. (Barnes's Br. 20, 22–23.) *See State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992). He contends that it is not clear on the recording who was the buyer and who was the seller. (Barnes's Br. 20.) But Barnes does not explain how the very brief snippets of conversation on the recording make that true. Nor does Barnes acknowledge that the jury likely would have understood who the speakers were had they heard the recording. The jury heard Marciniak testify in person and heard both men on recorded phone conversations setting up the deal. (R. 166:76–83.) Thus, the jury likely would have relied on other evidence to identify the speakers on the recording, and the jury would not have seen it as ambiguous.

In sum, Barnes has not shown that the State violated its obligations under Wis. Stat. § 971.23.

2. Barnes has not proven that the State violated his constitutional right to disclosure of favorable evidence.

This Court should also determine that Barnes has failed to show that the State violated its duty under *Brady* to disclose favorable evidence.

The Due Process Clause of the Fourteenth Amendment requires the State to disclose favorable evidence to the defendant, even if the defendant does not request it. *State v. Harris*, 2004 WI 64, ¶ 12, 272 Wis. 2d 80, 680 N.W.2d 737.

Evidence is favorable to the defendant if it is exculpatory or impeaching. *Id.*

To prove a violation of this duty, a defendant must show that the withheld evidence was favorable, the State suppressed it, and resulting prejudice. *Harris*, 272 Wis. 2d 80, ¶ 15. A defendant is not prejudiced unless the withheld evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* (citation omitted). Put another way, there is no *Brady* violation unless the evidence meets this standard. *Harris*, 307 Wis. 2d 555, ¶ 61.

The State did not violate *Brady*, first, because it disclosed the evidence. The record shows that the State informed Barnes and his counsel of the recording at least a year before trial. And the State's response to Barnes's discovery request says that the State turned over the recording. The response also shows that the recording was available for Barnes to inspect and copy. The State did not withhold the evidence from Barnes, so there is no *Brady* violation.

Barnes, though, claims that there is no question that the State failed to disclose the recording before trial. (Barnes's Br. 19.) This appears to be based on the prosecutor's acknowledgement during trial that she had just learned about the voices on the recording and the court's finding of a violation. (R. 166:54–56.) But just because the prosecutor learned about the voices during trial does not mean that the State did not disclose the recording earlier. A different prosecutor responded to Barnes's discovery request and filed the exhibit list in April 2014. (R. 16; 20.) The prosecutor who tried the case might have been unaware of the prior disclosure.

Further, Barnes's non-disclosure argument appears to be bound up with the prosecutor's inaccurate representation that there were no voices on the recording. But this also does not establish a *Brady* violation. Again, if the State disclosed the recording and made it available to Barnes's counsel, it complied with the Constitution. And this Court should reject any suggestion by Barnes now that the prosecutor knowingly misled Barnes and the circuit court. (Barnes's Br. 16.) Below, no one, including Barnes, said that the prosecutor did anything other than make an honest, good-faith mistake by relying on law enforcement's description of the recording. (R. 166:54–60.)

But even assuming that the State violated its *Brady* duty to disclose the recording, Barnes's claim still fails because the evidence was not material. Barnes has not shown a reasonable probability of a different result had the State disclosed the evidence.

Barnes contends that the evidence was favorable to him because it showed that Winterscheidt incorrectly testified that the recording contained no voices. (Barnes's Br. 19.) But this was undisputed because Barnes established at trial that Winterscheidt was wrong. Barnes proved that there were voices on the recording and got Winterscheidt to admit that his testimony was incorrect. Cumulative evidence is not material, particularly when it only gives an additional basis to impeach an already-impeached witness. *See Rockette*, 294 Wis. 2d 611, ¶ 41.

Next, Barnes argues that he was prejudiced because he could have used the recording to impeach Winterscheidt's testimony that Marciniak told him that he and Barnes did not speak during the sale. (Barnes's Br. 19–20; R. 167:122.) But Barnes did this. Barnes learned about the voices on the recording before Marciniak's testimony, and he was allowed to recall Winterscheidt to ask him about the recording. (R. 166:64, 160; 167:235–36, 289.) Barnes asked Marciniak

whether the men spoke to each other during the sale. (R. 166:119–20.) He also impeached Winterscheidt's testimony that there were no voices on the recording. (R. 166:161.). Barnes was able to use the recording as impeachment despite learning during trial that it contained voices. *See Harris*, 307 Wis. 2d 555, ¶ 63 (*Brady* requires disclosure of evidence in time for defendant to effectively use it, not pretrial disclosure).

Barnes also argues that he was unable to enhance the recording mid-trial to determine what was said. (Barnes's Br. 20.) He claims that the brief snippet of conversation is ambiguous about who was selling the methamphetamine and, thus, helpful to his defense. (Barnes's Br. 20.)

This Court should reject this argument. Evidence that could form the basis for further investigation is not necessarily material under *Brady*. *Harris*, 272 Wis. 2d 80, ¶ 16. And, as argued, Barnes has not developed an adequate argument showing how the recording's content was favorable to him. *Pettit*, 171 Wis. 2d at 646–47. He does not, for example, explain how the phrases "How much dough" and "We're good on that other one, right?" create ambiguity. And, again, the supposed ambiguity is limited given that the jury would have known who was speaking based on other evidence. The impeachment value of the voices was their existence, not what they said. Barnes has not shown otherwise.

Barnes last contends that dismissal, rather than a new trial, is required due to the egregiousness of this and other discovery violations by the State. (Barnes's Br. 20–21.) Barnes points to what he claims are the State's false statements about the recording. (Barnes's Br. 20–21.) But this contradicts the circuit court's finding and Barnes's own admission that the State did not intentionally misrepresent anything. (R. 166:54–60.) He also notes that the State failed to disclose the reports of one of the investigating officers and its consideration to Marciniak for his cooperation until the eve of

trial. (Barnes's Br. 20–21.) But the court did not allow the officer to testify, and Barnes was able to effectively impeach Marciniak about his cooperation. (R. 166:97–119; 167:3–6.) Finally, Barnes complains about Winterscheidt's testimony that there were no voices on the recording. (Barnes's Br. 20–21.) But, as argued, Barnes adequately showed at trial that this testimony was incorrect.

And Barnes is wrong that his case should be dismissed for the alleged *Brady* violation. He cites only federal cases for this proposition. (Barnes's Br. 21.) Barnes points to nothing in Wisconsin case law that authorizes such an extreme remedy in any case, let alone one like this where the defendant was able to take advantage of the State's mistakes. As the circuit court found, Barnes got the "best of both worlds" by keeping the recording's contents out of trial but also using them to impeach the State's witnesses. (R.180:75–77.) Barnes is not entitled to relief on his *Brady* claim.

II. The circuit court did not erroneously deny Barnes's request for a mistrial based on the admission of evidence suggesting that he had previously sold drugs to Marciniak.

Barnes next argues that the circuit court should have granted his request for a mistrial because the jury heard evidence that he had previously sold drugs to Marciniak. (Barnes's Br. 23–29.) Barnes contends that this violated the court's pretrial order barring admission of other-acts evidence that Barnes had previously sold Marciniak drugs. (Barnes's Br. 23–29.)

The circuit court did not err. The evidence, at best, minimally violated the court's order and did not warrant a mistrial.

A. Additional facts.

Before trial, Barnes moved to prohibit "[a]ny mention" of "previous drug transactions" between him and Marciniak. (R. 65:1.) The State said that it was not trying to admit any such evidence, so the court granted Barnes's motion. (R. 167:10–11.) The court told the State to instruct its witnesses not to discuss prior transactions. (R. 167:10–11.)

Barnes identifies seven instances of supposed violations of this order. (Barnes's Br. 24–26.)

The first was during the State's opening statement. The State said that police asked Marciniak where he gets his supply, and Marciniak named Barnes. (R. 167:83.)

The second was during the State's examination of Marciniak. The State asked Marciniak how he knew to meet Barnes at a specific bar in Superior. (R. 166:83.) Barnes responded, "Because that's where we always met." (R. 166:83.)

The third instance was also during the State's examination of Marciniak. The State asked him what he did after the transaction, and he replied, "We just usually go our separate ways and that's what we did that day." (R. 166:89.)

The fourth instance was during Barnes's cross-examination of Marciniak. Barnes asked Marciniak if he had a conversation with Barnes during the transaction. (R. 166:119–20.) Marciniak replied, "That I don't recall. There usually wasn't any other meeting when we met so I'm going to say probably not." (R. 166:120.)

The fifth instance was also during the cross-examination. Barnes challenged Marciniak's claimed lack of memory about how the men exchanged the drugs and money by reminding him that on direct, he had said they threw the items between their trucks. (R. 166:138–39.) Barnes said that he did not remember exactly what happened but added "that's

where we met before and usually just threw each other's stuff into the vehicle." (R. 166:139.)

The sixth instance was also during cross-examination. Barnes asked Marciniak if he had testified that the men threw the items into each other's trucks. (R. 166:139.) Barnes responded, "I did because that's what had happened in the past." (R. 166:139.)

The seventh instance was during the State's closing. When explaining how police came to target Barnes, it said that Marciniak told police about Barnes and described him as a "bigger supplier" and "the big fish." (R. 166:191.)

After the State rested its case, Barnes moved for a mistrial based on Marciniak's testimony. (R. 166:147–48.) The State explained that it had told Marciniak not to discuss his prior purchases from Barnes. (R. 166:149.) The court denied the motion but said that it would give a cautionary jury instruction if the parties wanted. (R. 166:150.) Barnes did not request an instruction.

Barnes reasserted this claim in his motion for a new trial and his postconviction motion. (R. 90:5–7; 125:14–17.) The court reiterated that it had been willing to give a cautionary instruction and said that the testimony was not serious enough to justify a mistrial. (R. 144:16–20; 180:77–79.) It also found that Barnes had opened the door to the testimony through his cross-examination of Marciniak. (R. 144:19.)

B. The circuit court properly exercised its discretion by denying a mistrial.

Whether to grant a mistrial is a matter for the circuit court's discretion. *State v. Doss*, 2008 WI 93, ¶ 69, 312 Wis. 2d 570, 754 N.W.2d 150. The court "must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." *Id.*

On appeal, the defendant must show that the court erroneously exercised its discretion in denying the mistrial request. *State v. Ross*, 2003 WI App 27, ¶ 47, 260 Wis. 2d 291, 659 N.W.2d 122. A court properly exercises its discretion when it has examined the relevant facts, applied the proper legal standard, and engaged in rational decision making. *State v. Bunch*, 191 Wis. 2d 501, 506–07, 529 N.W.2d 923 (Ct. App. 1995).

When exercising its discretion, the circuit court should always look to alternatives short of declaring a mistrial, including the use of cautionary instructions. *See State v. Moeck*, 2005 WI 57, ¶¶ 71–72, 78–79, 280 Wis. 2d 277, 695 N.W.2d 783; *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). This is because not all errors warrant a mistrial. *State v. Givens*, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998).

The circuit court did not erroneously exercise its discretion when it denied Barnes's motion for a mistrial. The court correctly recognized that the evidence suggesting that Barnes had previously sold Marciniak drugs was not, in the context of the entire trial, sufficiently serious to require a mistrial.

Marciniak's testimony and the State's comments were, in the circuit court's word, "innocuous." (R. 144:16; 166:149–50.) None of them revealed specific details about any prior transactions, such as the type or amount of drug, the sale price, or dates. Instead, the testimony and comments, at worst, give rise to an inference that, at some unknown time in the past, Barnes sold Marciniak an unspecified type and amount of drug in a Superior parking lot and that they did not talk much during the transaction. Without details, it is unlikely that the jury would draw the inference prohibited by Wis. Stat. § 904.04(2)—that Barnes sold Marciniak four ounces of methamphetamine in April 2013 because he had done something very similar in the past. Thus, even if the

comments and testimony were improper, they did not justify a mistrial.

The court's decision was also consistent with the almost-certain likelihood that the jury already believed that Barnes had previously sold drugs to Marciniak. The jury knew that Marciniak had given Barnes's name to police and worked with them to set up the sale. A reasonable inference from this information is that Marciniak knew that Barnes had sold methamphetamine and likely sold it to him in the past. It would have been almost impossible to keep the jury from inferring this given the nature of the crime. And because the State's comments and Marciniak's testimony did nothing more than vaguely suggest prior sales instead of giving details, there was no need for a mistrial.

In addition, the court was right to conclude that Barnes opened the door to evidence that he had previously sold drugs to Marciniak. The curative admissibility doctrine, also known as "opening the door," applies when one party "takes advantage of a piece of evidence that would normally be inadmissible." *State v. Dunlap*, 2002 WI 19, ¶ 14, 250 Wis. 2d 466, 640 N.W.2d 112. When this happens, the court may allow the opposing party to present otherwise inadmissible evidence to prevent unfairness. *Id.*

Here, Barnes opened the door to evidence that he had previously sold drugs to Marciniak by arguing that Marciniak was the seller. Barnes's defense was that Marciniak sold him drugs for his girlfriend. (R. 166:202.) Barnes called Marciniak a "confessed drug dealer" and pointed to his prior convictions for selling drugs. (R. 166:202.) He also suggested that Marciniak had access to a significant amount of methamphetamine that he could turn over to the police while claiming that he got it from Barnes. (R. 166:202–06.) Evidence that Barnes had previously sold drugs rebuts this defense by showing that Barnes was the seller, not the buyer, in his relationship with Marciniak. And other-acts evidence is

admissible to show identity, intent, and plan. Wis. Stat. § 904.04(2)(a).

The court did not articulate this rationale for denying Barnes a mistrial. But this Court is not bound by the circuit court's reasoning and may affirm a discretionary decision if there is any basis for it under the facts of record. *See State v. Davidson*, 2000 WI 91, ¶ 53, 236 Wis. 2d 537, 613 N.W.2d 606; *State v. Smiter*, 2011 WI App 15, ¶ 9, 331 Wis. 2d 431, 793 N.W2d 920. It was reasonable for the court to conclude that Barnes opened the door to the very limited testimony suggesting that he previously sold drugs to Marciniak.

The circuit court also did not erroneously exercise its discretion because it considered and offered Barnes the less-drastic option of a cautionary jury instruction. Such an instruction "can go far to cure any adverse effect attendant with the admission of the other acts evidence." *State v. Sullivan*, 216 Wis. 2d 768, 791, 576 N.W.2d 30 (1998) (quotation marks and brackets omitted). Jurors are presumed to follow such instructions. *State v. Grande*, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992).

The court instructed the jury that opening statements and closing arguments are not evidence. (R. 166:217; 167:81.) This presumably cured any potential prejudice from the State's comments. The court did not give a cautionary instruction about other-acts evidence, such as Wis. JI–Criminal 275, that would apply to Marciniak's testimony. But that is because Barnes did not accept the court's invitation to ask for one. Barnes's claim that the evidence required a mistrial rings hollow given his failure to accept the court's offered remedy.

C. Barnes has not shown that the court erred.

This Court should also reject Barnes's arguments that the circuit court erroneously exercised its discretion when it denied his mistrial motion.

Barnes first argues that he did not open the door to the evidence suggesting prior sales. He contends that he was not responsible because the first two references in Marciniak's testimony were on direct examination, and his testimony on cross-examination was nonresponsive to his questions. (Barnes's Br. 27.)

This argument ignores that this Court's review is whether the circuit court erred in light of the entire proceeding. *Doss*, 312 Wis. 2d 570, ¶ 69. Thus, whether Barnes opened the door depends on the whole record. In addition, by the time Barnes moved for a mistrial, he had already opened the door to this testimony in his cross-examination of the officers and Marciniak. And even if the court erred by finding that Barnes had opened the door, this does not mean it erroneously exercised its discretion by denying him a mistrial.

Next, Barnes contends that he adequately preserved his claims by filing a motion in limine. (Barnes's Br. 27.) The State does not challenge the adequacy of Barnes's objections in the circuit court.

Barnes also argues that he was prejudiced by references to the prior transactions. (Barnes's Br. 27–29.) But, as argued, the references contain no details about any transactions. And while they might suggest that the men had prior encounters involving drugs, the jury would have assumed that the men had such a past based on the nature of the case. Barnes also could have mitigated any risk that the jury would make the improper propensity inference from this evidence by taking the court up on its offer for a curative instruction. His failure to do so is, in effect, a concession the comments and the

testimony did not violate his rights. *See Doss*, 312 Wis. 2d 570, ¶ 83.

Finally, Barnes contends that the court applied the wrong legal standard when it held that Barnes had not shown a "manifest injustice" requiring a mistrial. (Barnes's Br. 28; R. 144:20; 166:150.) But this Court can affirm a discretionary decision if the record supports it. *Davidson*, 236 Wis. 2d 537, ¶ 53. As explained, the record here supports the court's decision to deny Barnes a mistrial.

III. Barnes is not entitled to a new trial based any of the claimed evidentiary errors.

Barnes next argues that five evidentiary decisions by the circuit court denied him a fair trial. The court either did not err, or its errors were harmless.

A. Barnes opened the door to the admission of testimony that Agent Clauer saw the transaction, which was not hearsay and did not violate his confrontation rights.

Barnes first argues that the circuit court improperly allowed Winterscheidt to testify that Division of Criminal Investigation Agent Duane Clauer saw the drug sale. (Barnes's Br. 30–35.) He contends that this testimony was hearsay and violated his confrontation rights. (Barnes's Br. 32–34.) Barnes also claims that the court erred by holding that he opened the door to the testimony. (Barnes's Br. 34–35.)

These arguments fail. The testimony was not hearsay because it not admitted for its truth. The testimony also was admissible as a present sense impression. Further, there was no confrontation violation because Clauer was available for cross-examination. Finally, the circuit court was right that Barnes opened the door to this testimony by repeatedly

suggesting that police had not adequately observed the transaction.

1. Additional facts.

Clauer said in a report that he saw the drug sale between Barnes and Marciniak. (R. 59:7.) Barnes moved before trial to exclude Clauer's testimony because the State failed to disclose his reports and list him as a witness. (R. 53:3–6; 62:1–6.) The court granted Barnes's motion. (R. 167:3–6.)

During trial, while cross-examining Winterscheidt, Barnes aggressively challenged law enforcement's failure to photograph, video record, or observe the transaction. (R. 167:131–40, 144, 158, 160, 163–64, 170–71, 173–74, 179–81.)

On redirect, the State asked Winterscheidt if he was aware of any officers who saw the transaction, and he said "Yes." (R. 167:185.) Barnes objected on foundation and hearsay grounds. (R. 167:185.) The State responded that Barnes had opened the door by asking whether the officers had video recorded the transaction. (R. 167:185.) It also indicated that it was offering the testimony to show Winterscheidt's state of mind. (R. 167:185.) The court overruled Barnes's objection. (R. 167:185.)

The State then asked Winterscheidt what the officers who saw the transaction said on the radio after it was over. (R. 167:186.) Winterscheidt said that they had said something like, "[I]t went down, deal is done." (R. 167:186.) He did not know which officer said this, though. (R. 167:186.)

Next, the State asked Winterscheidt if he knew whether any specific officers saw the transaction. (R. 167:186.) Barnes again objected on hearsay and foundation grounds. (R. 167:187.) The State said that it was offering the testimony to show Winterscheidt's state of mind, and the court overruled

the objections. (R. 167:187–88.) Winterscheidt testified that Clauer had seen the transaction. (R. 167:188.) He then explained what he did after learning the transaction had been completed. (R. 167:188.)

The court later explained that it thought Barnes had opened the door to the testimony about Clauer by "repeatedly asking about surveillances and wouldn't that be important to do video surveillance." (R. 167:202–03.) It also said that the testimony was not introduced for its truth but to show Winterscheidt's state of mind. (R. 167:203.) The court offered to give a limiting instruction to the jury about the testimony. (R. 167:203, 205.) Barnes did not ask for a limiting instruction.

The court reiterated its reasoning for overruling Barnes's objection when rejecting his motions for a new trial and for postconviction relief. (R. 144:22–23; 180:79–80.) It also said that it did not believe any error was serious enough to require a new trial. (R. 144:23; 180:79–80.)

2. The circuit court did not erroneously admit the testimony about Agent Clauer.

The circuit court properly allowed the State to elicit testimony from Winterscheidt that Clauer saw the transaction.

First, the court did not err by holding that Barnes had opened the door to the testimony. At trial, Barnes knew that Clauer had reported seeing the transaction. But Barnes had been able to prevent Clauer from testifying because the State failed to timely disclose him as a witness. Barnes then argued that law enforcement had inadequately surveilled the transaction despite knowing that Clauer had claimed to see it. Barnes defended himself with a theory that he knew was undermined by evidence that the court had ruled inadmissible. It was not error for the court to conclude that,

by doing so, Barnes had opened the door to the admission of that evidence.

Barnes contends that it is "illogical" that he opened the door because he attacked law enforcement's failure to video record or photograph the transaction, not its failure to observe it. (Barnes's Br. 34–35.) But there is no significant difference between law enforcement's not observing and not recording the transaction. Barnes argued that law enforcement had done a lousy job keeping track of its controlled buy. The court could reasonably conclude that Barnes opened the door with that argument.

Second, the court did not err because Barnes has not shown that the testimony about Clauer was inadmissible hearsay.

Barnes does not explain what he thinks was hearsay. Hearsay is an out-of-court statement offered for its truth. Wis. Stat. § 908.01(3). A statement is "an oral or written assertion" or "nonverbal conduct of a person, if it is intended by the person as an assertion." Wis. Stat. § 908.01(1). Barnes's brief does not identify what assertion Clauer made that Winterscheidt testified about. He has thus not shown that any testimony was hearsay.

Presumably, Barnes means to argue that the hearsay statement is Clauer's telling Winterscheidt that he saw the transaction. Or perhaps he is claiming that Clauer was the officer who said that the deal was done, even though Winterscheidt testified that he did not know who said this.

Assuming that these are the statements Barnes is complaining about, they are not hearsay. The statements were admissible, first, because the State did not introduce them for their truth. Instead, the State introduced this testimony to show the effect Clauer's statements had on Winterscheidt, specifically the actions he took in the investigation after hearing them. Statements introduced to

show the effect on a listener are not introduced for their truth, and thus, are not hearsay. *See State v. Wilson*, 160 Wis. 2d 774, 779, 467 N.W.2d 130 (Ct. App. 1991).

Second, these statements were not hearsay because they were present sense impressions under Wis. Stat. § 908.03(1). Statements describing an event made while the declarant is observing the event or immediately after are excluded from the hearsay rule. *Wilson*, 160 Wis. 2d at 779. Again, it is unclear precisely what statement Barnes thinks was hearsay. But if Barnes is complaining that Winterscheidt knew that Clauer had seen the transaction because he radioed that the deal was done, that is a present sense impression.

Barnes asks this Court to adopt federal case law governing the introduction of effect-on-the-listener statements to provide background information about criminal investigations. (Barnes's Br. 33–34 (citing *United States v. Reyes*, 18 F.3d 65 (2nd Cir. 1994)).) Barnes, though, offers no argument why this Court should follow *Reyes*.

Moreover, the case does not help Barnes. The *Reyes* court listed multiple factors for courts to consider in assessing whether background evidence is relevant. *Reyes*, 18 F.3d at 70. One of those factors is whether the defendant opened the door to the evidence. *Id.* Barnes opened the door here—had he not aggressively and disingenuously attacked the State's failure to observe the transaction, the evidence about Clauer would not have come in. Further, *Reyes* instructs that one factor for assessing whether the evidence was prejudicial is if a limiting instruction might prevent the jury from improperly relying on the testimony. *Id.* at 71. Here, Barnes declined the circuit court's offer of such an instruction.

Barnes also failed to prove that the admission of the testimony violated his confrontation rights. The Confrontation Clause prohibits the introduction of an

unavailable witness's testimonial hearsay statements unless the defendant has had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

The testimony's admission did not violate Barnes's confrontation rights for two reasons.

First, the testimony was not testimonial because the State did not introduce it for the truth of the matter asserted. Only the admission of testimonial hearsay violates the Confrontation Clause. *State v. Hanson*, 2019 WI 63, ¶ 19, 387 Wis. 2d 233, 928 N.W.2d 607.

Second, Clauer was not unavailable for cross-examination. The circuit court excluded Clauer's testimony because the State failed to list him as a witness. But nothing stopped Barnes from calling and cross-examining Clauer about his observations. Barnes asserts that the court's ruling made Clauer unavailable, but he cites no authority for that proposition. And none of the definitions of "unavailability as a witness" in Wis. Stat. § 908.04(1) even arguably apply to a witness who was excluded because of a discovery violation. Barnes thus could have cross-examined Clauer, but he chose not to. The court did not violate his right to confrontation.

B. The admission of phone call three did not violate the circuit court's pretrial order.

Barnes next contends that the circuit court erred by allowing the State to admit evidence of the third telephone call between him and Marciniak that set up the sale. (Barnes's Br. 35–38.) He claims that the court barred admission of the call in a pretrial order. (Barnes's Br. 35–38.) Barnes is wrong because the circuit court never precluded the admission of the call.

Police had recordings of four calls between the men setting up the transaction. The first, second, and fourth calls contained statements by Barnes, which the State successfully

moved to admit. (R. 47; 57; 73; 74; 75; 168:41–42.) The third call contained only Marciniak's voice because of a recording malfunction. (R. 167:147–48; 168:40.) At trial, the State was allowed to play the recording of the third call and introduce a transcript of it over Barnes's objection. (R. 167:99–102, 278–82.)

Barnes argues that the circuit court excluded call three in its pretrial order, so it erred by admitting it at trial. (Barnes's Br. 35–38.) This argument fails because, as the court explained when it denied Barnes's postconviction motion, the order did not bar admission of call number three. (R. 180:81.) The court said that the order addressed only the admission of Barnes's statements, and call three did not contain any. (R. 180:81.)

Barnes now claims that the circuit court erroneously interpreted its own pretrial order. (Barnes's Br. 38.) He contends that the court did not consider that the State's witnesses testified about call three as though his statements were on it. (Barnes's Br. 38.) But this ignores that the jury heard the recording of call three and officer testimony explaining that his voice was not on it. (R. 167:99–100.) And, as argued in the next section, if the testimony that Barnes's voice was on the recordings was admitted in error, it was harmless. This Court should reject Barnes's claim that the court violated its pretrial ruling by admitting call three.

C. Even if the officers lacked foundation to identify Barnes's voice on the telephone calls, admission of this evidence was harmless error.

Barnes also argues that the circuit court erroneously overruled his foundation objections to Winterscheidt's and another officer's testimony identifying his voice on the recordings of the phone calls. (Barnes's Br. 38–40.) He claims that neither officer could properly say that he was on

recording number three because that recording captured only Marciniak's voice. (Barnes's Br. 38–39.) And he contends that Winterscheidt improperly identified his voice on the remaining recordings because there was no evidence that he knew what Barnes's voice sounded like. (Barnes's Br. 39–40.)

Even assuming that this evidence was improper, its admission was harmless error. An error is harmless if its beneficiary proves beyond a reasonable doubt that the error did not contribute to the verdict obtained. *See Harris*, 307 Wis. 2d 555, ¶ 42. Alternatively stated, an error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *See id.* ¶ 43.

When determining whether an error is harmless, a reviewing court "consider[s] the error in the context of the entire trial and consider[s] the strength of untainted evidence." *State v. Thoms*, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999). In applying the harmless-error test, the court considers the nature and strength of the State's case and the defense, the importance of the erroneously admitted evidence, and whether the evidence is duplicative of untainted evidence. *State v. Norman*, 2003 WI 72, ¶ 48, 262 Wis. 2d 506, 664 N.W.2d 97.

Any error in allowing the officers to testify that Barnes's voice was on the recording was harmless. Regarding call three, the jury heard the recording, so it knew that only one of the participant's voices was captured. (R. 66; 167:102.) The jury also heard Marciniak testify, so it almost certainly concluded that the voice on the recording was Marciniak's. (R. 166:64–145.) In addition, the officers' testimony saying that Barnes was on call three was duplicated by Marciniak's proper testimony about the call. (R. 166:79–80.)

In addition, the testimony about all the calls was harmless given the remaining evidence at trial. The jury

would have still convicted Barnes even if the officers had not identified him as one of the calls' participants. The jury would have still learned through the officers' testimony and the calls that Marciniak and another person set up a drug deal. Marciniak would still have identified Barnes as that person. (R. 166:76–82.) The jury would have also still known that Marciniak and Barnes engaged in a drug deal later on the day of the calls. Barnes did not dispute that the deal happened, though he claimed to be buying, not selling, the drugs. The jury, though, would have rejected that defense even without the officers' testimony about the calls because police found the marked buy money in Barnes's possession and four ounces of methamphetamine with Marciniak after the sale. (R. 166:36; 167:112, 118.) The jury thus would still have convicted Barnes even had the court not allowed the officers to identify his voice.

D. Winterscheidt's testimony that police searched Marciniak's car before the sale did not lack foundation.

Next, Barnes argues that the circuit court should have struck Winterscheidt's testimony that "we"—meaning the officers—searched Marciniak's truck before the sale to make sure that it contained no money or contraband. (Barnes's Br. 40–41; R. 167:104–08.) Barnes contends that this testimony lacked foundation because Winterscheidt and two other officers did not conduct the search. (R. 167:108.)

Barnes has not shown any error. A witness may not testify about something unless the evidence shows that he has personal knowledge of it. Wis. Stat. § 906.02. Barnes's entire argument that Winterscheidt lacked knowledge of the search is Winterscheidt's testimony that he did not conduct it. (Barnes's Br. 41.) But just because Winterscheidt did not perform the search does not mean that he did not observe or otherwise know about it. Barnes does not argue that

Winterscheidt could not have gained personal knowledge about the search though his involvement with the controlled buy. This Court should thus reject his argument that Winterscheidt's testimony about the search lacked foundation.

E. The circuit court properly denied Barnes's request to call Gerald Clark as a witness.

Barnes's last claim of evidentiary error is that the circuit court erroneously denied his request to call Gerald Clark as a rebuttal witness. (Barnes's Br. 42–43.) The court did not err because Clark was not a rebuttal witness.

Barnes called two witnesses in his case-in-chief, Winterscheidt and Tanski. (R. 166:158–167.) He recalled both officers to ask them about the voices on the wire recording. (R. 166:158–167.) Barnes declined to testify. (R. 166:168–72.) He then indicated that he wanted to call Clark as a witness to "rebut what Chip Marciniak testified to" about what he did after the sale. (R. 166:174.) The court denied Barnes's request because Clark was not listed on Barnes's witness list and "[n]inety percent" of his testimony was not rebuttal but rather "case in chief stuff." (R. 166:177–78.)

The circuit court was right. A defendant has to turn over a list of witnesses to the prosecution, except those called for rebuttal or impeachment. Wis. Stat. § 971.23(2m)(a). Clark was not on Barnes's list. (R. 28; 40.) Barnes argues that Clark was a rebuttal witness. (Barnes's Br. 42–43) But his brief does not explain how Clark's proposed testimony would have rebutted anything in the State's case. He also does not acknowledge that his case-in-chief was still ongoing when he asked to call Clark. This Court should not consider this undeveloped argument. *See Pettit*, 171 Wis. 2d at 646–47.

And none of Clark's proposed testimony rebutted the State's case. Barnes says Clark would have testified that (1) he knew Marciniak for years, (2) he saw Barnes pick up a

box at a garage earlier on the day of the sale, (3) he saw the police pursuit after the sale, and (4) Marciniak told him later that he "set someone up." (Barnes's Br. 42; R. 166:174–75.)

This is not rebuttal evidence. The State never asked Marciniak about his relationship with Clark or suggested that Clark did not see the pursuit. The parties never mentioned Clark during the State's case-in-chief. Further, there is no question that Marciniak "set someone up" because he helped police arrest Barnes in a controlled methamphetamine buy. Finally, Clark's testimony about the box, which might have shown that Marciniak got the methamphetamine from someone other than Barnes, was something that Barnes needed to present in his case-in-chief since his theory of defense was that Marciniak got the drugs elsewhere. Clark was thus not a rebuttal witness.

Barnes also contends that Clark's proposed testimony would have rebutted Marciniak's testimony that he went right to the motel where he met with Winterscheidt after the sale. (Barnes's Br. 42.) The State fails to see how it would have done this, and Barnes provides no explanation. The circuit court properly denied Barnes's request to call Clark.

F. If the circuit court erred, it was harmless.

Finally, this Court should conclude that, if the circuit court erred regarding any of these evidentiary decisions, it was harmless.

The State presented evidence that Marciniak and Barnes set up a drug deal. Marciniak testified about the deal as did the officers that he worked with. Barnes's defense really did not dispute this. He admitted that there was a drug deal but claimed Marciniak sold the drugs to him. And, Barnes argued, Marciniak got the four ounces of methamphetamine that he turned over to police from somewhere else. Barnes, though, still needed to contend with

law enforcement's discovery of the marked buy money in his truck. Barnes did not have any explanation for that.

Given all this, the jury would still have convicted Barnes of selling the methamphetamine even had all the evidentiary challenges been resolved in his favor.

Winterscheidt's testimony about Clauer's observation of the transaction did not affect the jury's verdict because Barnes did not dispute that a drug deal took place. The testimony also did not matter to Barnes's argument that Marciniak sold him the drugs because Winterscheidt never said that Clauer had reported that he saw which person gave the drugs to the other. Rather, he said that Clauer said only that the deal had been completed. Again, that was not in dispute.

In addition, as explained section III.C, admission of the testimony about the phone calls was harmless. The State does not repeat the argument here.

Admission of Winterscheidt's testimony about the search of Marciniak's truck was also harmless. The jury knew that none of the testifying officers had searched the truck before the sale. This helped Barnes's defense that Marciniak already had the methamphetamine that he gave to police. But despite knowing that none of the officers had participated in the search and hearing Barnes's defense, the jury still convicted him because police found the buy money in his truck. The same thing would have happened even if Winterscheidt had been prevented from testifying about the search.

Finally, Clark's testimony would not have changed the jury's verdict. Clark's proposed testimony that he was friends with Marciniak, that he saw the police chase of Barnes, and that Marciniak later said that he set someone up would not have undermined the State's case or helped the defense. This testimony was not relevant to the matters in dispute.

Clark's testimony that he saw Marciniak with a box earlier in the day might have been relevant to Barnes's claim that Marciniak got the methamphetamine from somewhere else, but only marginally so. Possessing a box is an everyday event. Further, there is no indication that Clark would have testified that the box in any way resembled the distinctive black box with a printed red bow containing the methamphetamine that Marciniak turned over to police. (R. 166:88; 167:118–19, 194, 224–25, 288.) Without some indication that the boxes were the same or at least had some connection, the jury would have still convicted Barnes.

In sum, and error that the circuit court made on these evidentiary decisions was harmless.

IV. Barnes cannot show that his trial counsel was ineffective because all his underlying claims fail.

Barnes also argues that this Court should conclude that his trial counsel was ineffective. (Barnes's Br. 50–53.) He raises this claim in case this Court concludes that he did not adequately preserve any of the arguments in sections I through III, or if it concludes that his trial counsel opened the door to the testimony about Clauer's seeing the sale. (Barnes's Br. 51–52.)

Barnes is not entitled to relief. All of his claims fail on the merits. Thus, even if counsel might have deficiently not preserved a claim for appellate review or opened the door, Barnes cannot show that his trial counsel was ineffective. Counsel is not ineffective for failing to raise legal challenges that would have failed. *State v. Butler*, 2009 WI App 52, ¶ 8, 317 Wis. 2d 515, 768 N.W.2d 46.

V. Barnes is not entitled to a new trial in the interest of justice.

Barnes also seeks a new trial in the interest of justice under Wis. Stat. § 752.35. (Barnes's Br. 46–50.) He contends

that the real controversy was not fully tried because of the errors he alleges in sections I through III. (Barnes's Br. 46–50.) Because those claims all fail, discretionary relief in the interest of justice is not warranted. "Larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing; '[z]ero plus zero equals zero.'" *State v. Echols*, 152 Wis. 2d 725, 745, 449 N.W.2d 320 (Ct. App. 1989) (citation omitted).

CONCLUSION

This Court should affirm the circuit court's judgment of conviction and order denying Barnes's motion for postconviction relief.

Dated this 3rd day of October 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,164 words.

Dated this 3rd day of October 2019.

_____
AARON R. O'NEIL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 3rd day of October 2019.

_____
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