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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

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited PAGE

Statutes, Constitutions, and Other Authorities Cited

STATE OF WISCONSIN

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

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ARGUMENT

I. THE STATE VIOLATED ITS STATUTORY AND *BRADY* DISCOVERY OBLIGATIONS BY FAILING TO DISCLOSE THE WIRE RECORDING

A. The State Forfeited Arguments That The Wire Recording Was Disclosed, And Notifying The Defense That A Recording Exists While Misrepresenting The Recording's Contents Is Not "Disclosure" Within Sec. 971.23(1) Or *Brady*

The State advances numerous arguments against Barnes's discovery and ***Brady*** claims that are forfeited due to not being raised at the circuit court and, more importantly, are factually erroneous.

Arguments raised for the first time on appeal are deemed forfeited. ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis.2d 653, 761 N.W.2d 612. The forfeiture rule "gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection." ***Id.*** Forfeiture applies not just to

errors claimed by the defense, but to the State's failure to raise legal arguments against those errors. *See, e.g.*, ***State v. Van Camp,*** 213 Wis.2d 131, ¶¶25-26, 569 N.W.2d 577 (1997) (State's failure to challenge whether defendant's motion alleged sufficient facts waived the argument).

Accordingly, the State forfeited arguments that (1) the 4/24/14 discovery response shows a copy of the recording was provided to the defense, and (2) notifying the defense about the existence of the recording constituted compliance with sec. 971.23 and ***Brady*** (State's brief: 10,13-14). Neither argument was raised at trial or post-conviction, when both sides could have presented evidence on the issue. Post-conviction, the State acknowledged non-disclosure (R180:66). Any claim that the recording was disclosed is forfeited.

Further, these arguments are factually false. The record shows attorney Gondik never received the recording prior to trial, which is why he filed a motion in limine to exclude the recording (R180:11), and argued at trial it was a "clear discovery violation" being handed evidence mid-trial which he'd "been assured doesn't exist" (R166:58). ADA Ellenwood's statements confirm she'd learned before trial that Gondik didn't possess the wire recording, after which she spoke with law enforcement and then informed Gondik the recording contained only "background noises" (R166:55-56). When this proved false, Ellenwood agreed "that audio recording should have been turned over" (R166:56).

Thus the State's argument that merely notifying the defense of the existence of the recording complied with sec. 971.23 and ***Brady*** suffers from another flaw—that the prosecutor acknowledged having misrepresented the contents of that recording, and attorney Gondik relied upon that misrepresentation (R166:55).

Additionally, the circuit court determined the recording hadn't been disclosed and concluded, "obviously it's a discovery violation" (R166:54). This factual finding must be accepted by this court because it is not clearly erroneous. ***State v. Wayerski,*** 2019 WI 11, ¶35, 385 Wis.2d 344, 922 N.W.2d 468.

B. The State Introduced Evidence About The Recording's Substance

The State next argues that the remedy for a discovery violation is exclusion, and since the State didn't introduce the recording, Barnes already received that remedy (State's brief: 10-11). While the prosecutor didn't play the recording at trial, Investigator Winterscheidt still testified about its contents—asserting 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). Winterscheidt then testified he listened to the wire recording, and didn't hear anything inconsistent with Marciniak's statements (R167:122).

This testimony directly comments on the recording's substance. And the purpose was clear: the State wanted the jury to draw the inference that the wire recording supported Marciniak's claim that Barnes delivered the methamphetamines. Since the prosecution presented evidence of the recording's contents, disclosure was mandatory.

C. There Is No "Good Cause" For Non-Disclosure

The next question is whether the State had good cause for non-disclosure. The State offers none, claiming "there was no reason for the State to provide good cause" (State's brief: 11). Failure to argue good cause concedes the issue. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109,

279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

D. Non-Disclosure Prejudiced The Defense, Warranting Dismissal Or A New Trial

The State's first argument against prejudice repeats the claim that the caselaw doesn't contemplate that a defendant can be prejudiced when non-disclosed evidence is excluded from trial (*see* State's brief: 11). In addition to resting on a false factual assumption, *see Section B, supra,* this argument is contrary to law. Logically, the remedy for non-disclosure of ***Brady*** material or exculpatory material under sec. 971.23(1)(h) is not excluding favorable evidence. Nor is exclusion the only remedy available for non-disclosure of other statutorily discoverable evidence, such as a defendant's statements, *see* ***State v. Sturgeon***, 231 Wis.2d 487, 605 N.W.2d 589 (Ct. App. 1999); the probationary status of a State's witness; *see* ***State v. White***, 2004 WI App 78, 271 Wis.2d 742, 680 N.W.2d 362, or evidence to impeach the quality of the investigation; *see* ***State v. DelReal***, 225 Wis.2d 565, 593 N.W.2d 461 (Ct. App. 1999).

These cases demonstrate why the inability to use the recording prejudiced Barnes. The benefit of the recording wasn't simply to show Winterscheidt lied about the lack of voices. It would have shown the above testimony about not being inconsistent with Marciniak's description of Barnes delivering the methamphetamine was extremely misleading, because the recording was also completely consistent with Marciniak delivering to Barnes. This ambiguity inures to Barnes's benefit because the State had to prove beyond a reasonable doubt that Barnes was the seller, and a key piece of physical evidence could be viewed to support Barnes's defense.

Further, the recording was inconsistent with Marciniak's description of him and Barnes "part[ing] company

without speaking any words" (R167:122). Thus, not only was Winterscheidt's testimony about the substance of the recording misleading, it was also factually wrong.

The State argues that the jury would have been able to determine which voice was the buyer/seller and which was Barnes or Marciniak based on listening to the recording (State's brief: 12). However, as argued *infra,* the jury had no basis to know Barnes's voice, since he never testified and none of the officers had foundation to identify his voice. And as this court will find when reviewing the audio, the wire recording is of such poor quality that identifying which voice says what is impossible. The recording therefore ambiguous as to Barnes's role in the transaction, which supports reasonable doubt as to his guilt.

Due to the egregious nature of this violation and the prejudice that resulted, a new trial is the minimum remedy. Dismissal is more appropriate given the repeated violations and misrepresentations by the State. As summarized previously, the totality of violations include (1) the State's 4/24/14 discovery response falsely claiming it had disclosed the wire recording; (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 lies under oath; (6) the prosecutor falsely telling the court she'd "just learned" about the recording around the time of the motion hearing, when the police reports mentioned it twice, and (7) non-disclosure of the recording itself.

The State argues dismissal is not an available remedy without Wisconsin cases authorizing such a remedy (State's brief: 16). The dearth of published authority in Wisconsin doesn't mean such a remedy is unavailable. ***Brady*** is based on

the violation of a federal constitutional right, and federal courts have interpreted it to permit dismissal in egregious cases.

Further, the court's scheduling order required enforcement of statutory discovery requirements, and provided dismissal as a sanction for non-compliance (R45:3). The State fails to respond, and thus concedes, that the court's own order provided dismissal as a remedy for discovery violations. *See* ***Charolais Breeding Ranches, id***. The record supports dismissal, or at a minimum, a new trial.

II. REPEATED REFERENCES TO EXCLUDED PRIOR DRUG DELIVERIES WARRANTED A MISTRIAL

The State downplays the significance of repeated references to prior drug deliveries, saying such testimony only "vaguely suggest[ed] prior sales," and focusing on the lack of "details" such as type or quantity of drugs, sale price, or dates (State's brief: 19-20). When viewed in context, however, the references were sufficiently detailed and extremely prejudicial.

Marciniak's testimony cannot be viewed apart from the State's arguments. The State's opening argument indicated police told Marciniak, "we want to get the bigger fish. Where do you get your supply?" and Marciniak responded, "I can purchase methamphetamine from" the defendant (R167:82-83). That argument has only one inference: Barnes was a large-scale meth dealer who previously supplied Marciniak.

Thus, when Marciniak said he knew to meet Barnes behind the Temple Bar "[b]ecause that's where we always met" (R166:83), the clear inference is that's where he met Barnes to purchase meth. When Marciniak testified they "just usually go our separate ways" (R166:89), and "[t]here usually wasn't any other meeting when we met" (R166:120), he was clearly referencing prior meth transactions.

The next reference was even more obvious, with Marciniak asserting, "that's where we met before and usually just threw each other's stuff into the vehicle" (R166:39). For good measure, Marciniak explained "that's what had happened in the past" (R166:139).

The combination of arguments and testimony gave the jury all the prejudicial details it needed—Barnes was Marciniak's meth supplier, they always met behind the Temple Bar, Barnes usually threw the meth into Marciniak's truck and Marciniak threw money into Barnes's vehicle, and then they'd go their separate ways. References to "usually" and "always" suggested it had happened many times before.

The absence of references to specific quantities or dates is irrelevant; the prejudice inures from the fact of who was the dealer. Wis. Stat. sec. 904.04(1) precludes character evidence for propensity, i.e. proving "the person acted in conformity therewith on a particular occasion." That's the exact danger here, that the jury assumes Barnes delivered meth to Marciniak on this date because he allegedly delivered meth to Marciniak previously.

The State's next argument—that the jury likely assumed this was the case, so there's no prejudice in letting the jury hear such evidence (State's brief: 20)—completely devalues any concerns of a fair trial for defendants. The jury's potential assumptions are part of why propensity evidence is so dangerous, and cannot possibly justify its admission.

The argument that the defense opened the door through cross-examination (State's brief: 18) ignores the context yet again. The first reference occurred in the State's opening argument. The next two occurred during direct examination of Marciniak. By then, it was already too late. And all of the

instances on cross-examination occurred prior to argument that Marciniak had sold to Barnes.

This court should give no deference to the trial court's decision denying the mistrial motion because the trial court applied a "manifest injustice" standard (R166:150; R144:20), a higher legal standard than whether the error was sufficiently prejudicial to warrant a new trial. In the context of the entire trial, repeated references to prior drug deliveries and Barnes as the "bigger fish" constituted devastating propensity evidence, and were sufficiently prejudicial to warrant a new trial.

III. PREJUDICIAL EVIDENTIARY ERRORS DEPRIVED BARNES OF A FAIR TRIAL

A. Testimony That Officer Clauer Observed Barnes Deliver The Box Was Hearsay And Violated Barnes's Confrontation Rights

Investigator Winterscheidt's testimony about other officers witnessing the transaction falls into two distinct categories. The first category, testimony that "[o]ther investigators observing the transaction notified me by radio," and said, "it went down, deal is done" (R167:186)—constitutes admissible evidence. His quotations of hearing what specific officers said as it occurred constitute present sense impressions. Wis. Stat. sec. 908.03(1). Further, they were not admitted for their truth, because Winterscheidt testified that was how he knew the transaction was complete, so officers moved in (R167:186).

The second category crossed the line into inadmissible hearsay. After the testimony described above, the prosecutor asked if Winterscheidt was aware of specific officers who observed Marciniak tossing the buy money and Barnes tossing the black box (R167:186-87), and Winterscheidt identified Officer Clauer (R167:188).

This category was not a present sense impression. Winterscheidt did not testify to hearing Clauer make specific statements about witnessing Barnes deliver the black box. In fact, Winterscheidt never indicated how he knew that Clauer, specifically, observed the transaction, or—more importantly—that Clauer specifically observed Barnes tossing the box containing the meth. Winterscheidt could have only learned that claim upon reading Clauer's report, manufactured two years after the fact.

Nor was this category of statements admitted to show Winterscheidt's actions in response. Winterscheidt never indicated when Clauer made these statements, or what if anything Winterscheidt did in response. These statements were only used for their truth, to show Barnes delivered the box containing meth. Thus, they were both hearsay and testimonial.

The State argues there was no confrontation violation because Clauer was available for cross-examination, even though he was excluded due to an "egregious" discovery violation (State's brief: 28). Wis. Stat. sec. 908.04(1) is not all-inclusive, and logically extends to witnesses excluded due to a party's error. The alternative advanced by the State is absurd, implying that if the State improperly admits hearsay testimony from its own witness excluded as a discovery sanction, the defendant's only recourse is to call the witness—which is what the State wanted anyway. This would completely undermine the sanction. Clauer was legally unavailable.

The defense did not open the door to Clauer's alleged observations. The defense never argued the surveillance was insufficient due to an insufficient number of officers, or because no officers observed the transaction; the defense questioned Winterscheidt's decision not to have documentation through surveillance video, which was made during the planning stage. The State's attempt to argue there

was no need because Clauer saw the hand-to-hand is merely a post-hoc rationalization, a back-door attempt to admit evidence excluded due to an egregious discovery violation.

Since Barnes did not open the door, and since testimony about Clauer's observation was primarily admitted for its truth on the ultimate question—who delivered the meth—admission of such testimony despite Clauer's unavailability due to the discovery sanction was inadmissible hearsay and violated Barnes's confrontation rights.

B. Testimony That Barnes Discussed The Quantity Of Meth On Call #3 Violated The Court's Order

The court precluded admission of any statements allegedly from Barnes on Call 3 because his voice wasn't audible (R168:40). Regardless, Investigator Winterscheidt identified the voices on the call as Barnes, Marciniak, and Investigator Olson (R167:100). Significantly, Winterscheidt testified Barnes had called Marciniak "and they were talking about the quantity of methamphetamine that was expected to be delivered" (R167:100). Sergeant Madden also testified that Call 3 involved Marciniak and Barnes changing the amount of meth to four ounces (R167:282).

Clearly this testimony was inadmissible, as it indirectly indicates Barnes made statements discussing the quantity of meth. The State's only response to this point was that the jury heard the recording and subsequent testimony that Barnes's voice wasn't on it, so this was harmless (State's brief: 29). But Winterscheidt also testified he could still hear the "conversation," even if the recording didn't catch it (R167:47). The danger here is the jury assumes Winterscheidt heard Barnes making statements about the quantity of the methamphetamine—statements not recorded or disclosed to the defense under sec. 971.23(1)(b), and therefore inadmissible.

C. The State Concedes The Officers Lacked Foundation To Identify Barnes's Voice

The State's brief never argues the officers had foundation to identify Barnes's voice in the recordings, only whether the error was harmless (State's brief: 29-31). Accordingly, this error is conceded. *See* ***Charolais Breeding Ranches, id***.

D. None Of The Testifying Officers Had Foundation To Testify About The Initial Search Of Marciniak's Vehicle

The State argues that, although none of the testifying officers conducted the initial search of Marciniak's vehicle, testimony from Winterscheidt about that search's results search did not lack foundation (State's brief: 31-32). The State speculates Winterscheidt may have learned the results of the search another way, but fails to identify any evidentiary basis for this claim. As the party presenting the evidence, the State had the burden of establishing foundation. Without foundation, the testimony should have been stricken.

E. The Court Improperly Excluded Clark

On direct, Marciniak testified that after the controlled buy, he drove directly back to the motel, did not get out of the vehicle, and did not make any stops to pick up other meth (R166:89-90). Gerald Clark's proposed testimony would have impeached that because while the police were pursuing Barnes, Clark observed Marciniak stop into a garage and retrieve a box at the time police were pursuing Barnes (R166:174-75). Since that was the first time Marciniak testified about that, Clark's proposed testimony was proper impeachment, regardless of whether it could have been case-in-chief evidence. ***State v.***

Konkol, 2002 WI App 174, ¶¶18-19, 256 Wis.2d 725, 649 N.W.2d 300.

F. The Errors Were Not Harmless

These errors, combined with the repeated references to prior meth deliveries, prejudiced key areas of Barnes's defense. The State's argument that Winterscheidt never said Officer Clauer reported seeing which person delivered the drugs is directly contradicted by the two questions Winterscheidt answered indicating Clauer observed Barnes deliver the black box (R167:186-87). Testimony about Call #3 was prejudicial because it was the only call explicitly referencing meth. The jury heard testimony that Marciniak's vehicle was contraband-free long before it heard none of the testifying officers performed that search. And Clark's proposed testimony observing Marciniak retrieve a box after the controlled buy provided a plausible alternative source for his possession of a single box containing meth when the police searched him. The State cannot prove these errors harmless.

IV. THE REAL CONTROVERSY WAS NOT FULLY TRIED

Barnes incorporates by reference all previous arguments on why the real controversy was not fully tried.

V. BARNES WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Barnes incorporates by reference all previous arguments on why counsel was ineffective.

CONCLUSION

For the reasons already discussed, Barnes requests that the court vacate the judgment and order a new trial.

Respectfully submitted: November 4, 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 2,999 words.

Signed November 4, 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 November 4, 2019:

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