RECEIVED
05-10-2021
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN THE SUPREME COURT
Appeal No. 18-2005-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARLAND DEAN BARNES,

Defendant-Appellant-Petitioner

PETITION FOR REVIEW OF AN UNPUBLISHED DECISION OF THE COURT OF APPEALS DISTRICT III

PETITION FOR REVIEW OF DEFENDANT-APPELLANT-PETITIONER, Garland Dean Barnes

---

COLE DANIEL RUBY
Attorney at Law
State Bar #1064819

Martinez & Ruby, LLP
620 8th Avenue
Baraboo, WI 53913
(608) 355-2000

Attorney for Petitioner

TABLE OF CONTENTS

PAGE

Issues Presented for Review 3

Reasons for Granting Review 7

Statement of the Case 8

Argument

I. Dismissal Is An Appropriate Remedy When The State Commits Repeated, Flagrant Discovery Violations, And The Violations In This Case Warrant Dismissal Or A New Trial 13

II. Defendants Cannot "Open The Door" To Evidence Violating The Right To Confrontation, Especially When That Evidence Was Excluded As A Discovery Sanction, And An Officer's Claim To Have Directly Witnessed The Defendant Commit The Crime Constitutes Testimonial Hearsay 19

A. Factual Background 19

B. Claims That Officer Clauer Witnessed Barnes Deliver The Methamphetamine Constituted Inadmissible Hearsay 21

C. Defendants Cannot Open The Door To Confrontation Violations, And Barnes Did Not Open The Door 22

III. This Court Should Accept Review Because Prejudicial Evidentiary Errors Deprived Barnes Of A Fair Trial 24

A. Repeated References To Prior Meth Deliveries Violated The Court's Order Excluding Other Acts And Warranted A Mistrial 24

B. Officers Lacked Foundation To Identify Barnes' Voice In Recorded Calls 27

C. Officers Lacked Personal Knowledge Or Foundation To Testify About Vehicle Search 29

D. The Court Improperly Excluded Testimony From Gerald Clark 31

E. All Of These Errors Prejudiced Barnes 32

IV. Failure To Properly Preserve Any Objections Raised Herein Constitutes Ineffective Assistance Of Counsel 36

Conclusion 38

Form and Length Certification 38

Certificate of Compliance with Rule 809.19(12) 39

STATE OF WISCONSIN

IN THE SUPREME COURT

Appeal No. 18-2005-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARLAND DEAN BARNES,

Defendant-Appellant-Petitioner

PETITION FOR REVIEW

Garland Barnes, defendant-appellant, hereby petitions the Supreme Court of the State of Wisconsin, pursuant to Wis. Stat. § 808.10 and Wis. Stat. § 809.62, to review the decision of the Court of Appeals, District III, in *State of Wisconsin v. Garland Dean Barnes*, appeal number 2018AP2005-CR, filed on March 16, 2021, and its order denying reconsideration filed on April 8, 2021.

ISSUES PRESENTED FOR REVIEW

1. Whether Barnes' 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.

The court of appeals agreed that recording was not exculpatory, and that the sanctions ordered by the court were appropriate. The court did not address whether dismissal was an available remedy.

2. (a) Can a defendant "open the door" to testimonial hearsay violating his confrontation rights, and which was excluded based on an "egregious" discovery violation, by challenging the quality of the police investigation?

(b) Can the claim that a non-testifying officer witnessed the defendant commit the crime be admitted over hearsay objections under the theory that it is admissible to show the course of investigation, not for the truth of the matter asserted?

The circuit court had initially excluded testimony from Officer Clauer based on an "egregious" discovery violation by the State, rendering Clauer unavailable to testify at trial, but admitted testimony from another officer that Clauer allegedly observed Barnes deliver the methamphetamine to the informant. The circuit court ruled that the defense opened the door to this testimony by challenging the lack of video surveillance of the controlled buy. Further, the court ruled this testimony went to the testifying officer's state of mind, and therefore was not hearsay. The circuit court never directly addressed whether this admission violated Barnes' confrontation rights.

The court of appeals agreed that the defense opened the door to this testimony, and that the evidence was not hearsay because it showed why the testifying officer took subsequent steps of arresting Barnes. The court of appeals

found that since the testimony was admitted for reasons other than the truth of the matter asserted, its admission did not violate Barnes' confrontation rights.

3. Whether prejudicial evidentiary errors denied Barnes a fair trial, and whether the circuit court erroneously exercised its discretion by:

a. Denying the defendant's motion for mistrial after repeated violations of the motion in limine to exclude other acts—specifically Marciniak's repeated references to prior methamphetamine deliveries with the defendant;

b. Permitting the State to present testimony from police officers identifying a voice on the recorded calls as Barnes, despite lacking any foundation to identify his voice;

c. Permitting the State to present testimony from police officers about the results of the initial search of Marciniak's vehicle, despite none of the testifying officers having participated in that search, thereby lacking personal knowledge; and

d. Excluding the testimony of defense witness Gerald Clark based on a discovery violation, despite some of the proffered testimony being legitimate rebuttal testimony.

The circuit court agreed that the testimony under (a) violated the court's pretrial order, but did not create a "manifest injustice," and therefore denied the mistrial motion. The court of appeals concluded the court did not erroneously exercise its discretion.

The court concluded that none of the issues raised in (b), (c), or (d) were errors, that the evidence was appropriately admitted or excluded, and the defendant wasn't prejudiced.

For issue (b), the court of appeals held that any error in admitting testimony from the officers identifying Barnes' voice without foundation was harmless.

For issue (c), the court of appeals held that the circuit court's "approach"—specifically, overruling the objection because there had already been significant unchallenged testimony regarding the vehicle search, was reasonable, and even if it was error, the error was harmless.

For issue (d), the court of appeals held that the circuit court reasonably exercised its discretion since most of the witness's information was not rebuttal, and since the court was concerned about the length of the trial—despite the fact that the State's discovery violations caused the trial to extend to the 2nd day.

4. Whether any non-preserved objections constituted ineffective assistance of counsel?

The trial court did not apply any procedural default, and did not find counsel was ineffective.

The court of appeals likewise did not apply any procedural defaults, and found no ineffective assistance.

REASONS FOR GRANTING REVIEW

This case is appropriate for review for several reasons. First, no Wisconsin case directly addresses whether dismissal is an appropriate remedy when the State commits repeated, egregious discovery violations. Review is therefore appropriate under Wis. Stat. sec. 809.62(1r)(c)1, because the case calls for the application of a new doctrine, and 809.62(1r)(c)2, because the question presented is novel.

Second, this case presents a real and significant question of federal constitutional law which is the subject of a case where the United States Supreme Court recently granted certiorari—whether and under what circumstances a criminal defendant can open the door to responsive evidence otherwise barred by the Confrontation Clause. *See* ***Hemphill v. New York,*** No. 20-637, cert. granted 4/19/21. The question raised by the petition in ***Hemphill*** notes that a defendant may open the door to otherwise inadmissible evidence under ordinary rules of evidence, but questions whether a defendant forfeits the protections of constitutional rules like the Confrontation Clause simply by raising factual "issues" that otherwise-excludable evidence might bear upon. Some federal courts hold that a defendant never "opens the door" to confrontation violations; *see* ***United States v. Cromer,*** 389 F.3d 662, 679 (6th Cir. 2004), while other jurisdictions like the state of New York, the respondent in ***Hemphill,*** hold that the government may introduce testimonial hearsay any time it may correct a "misleading" impression created by the defendant.

No Wisconsin courts have addressed this issue. It is squarely presented in this case. The circuit court excluded the testimony of an officer (Clauer) who supposedly witnessed Barnes deliver the methamphetamine to the informant because of what the court called an "egregious" discovery violation by the State for failure to disclose the officer's reports for over two years. But at trial, after the defense challenged the lack of video surveillance of the controlled

buy, the State was permitted to present testimony from another officer claiming that Clauer personally witnessed Barnes deliver the box of meth to the informant. The defense argued this was hearsay that nullified the discovery sanction, but the circuit court permitted it under the reasoning that the defense opened the door, and the Court of Appeals agreed, without addressing whether this was even possible for a confrontation violation.

The other basis for admitting this testimony was the circuit court's belief that it was not for the truth of the matter asserted, but to show the course of the investigation by explaining why police moved in to arrest Barnes. The Court of Appeals agreed, and found no confrontation violation since it was not hearsay if not for the truth of the matter asserted. But the defense argued that "course of the investigation" claims cannot include contested matters bearing directly upon guilt—such as the out-of-court statements that one officer allegedly observed the defendant commit the crime. The defense asks this court to adopt the multi-part test from ***United States v. Reyes***, 18 F.3d 65, 70-71 (2d Cir. 1994), assessing such evidence.

The remaining issues are fact-specific and controlled by existing precedent. To the extent that the issues involved do not independently meet the criteria for accepting a petition under Wis. Stat. sec. 809.62(1r), Barnes must nonetheless raise those claims here to preserve them for federal habeas review. See ***O'Sullivan v. Boerchel***, 526 U.S. 838 (1999).

STATEMENT OF THE CASE

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' 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).

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

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).

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). The court entered an oral ruling denying the motions (R180:75-85), and a written order consistent with that ruling (R132).

Barnes timely filed a notice of appeal from the judgment of conviction and the order denying post-conviction motions (R136).

The court of appeals affirmed. *State v. Garland Barnes,* Appeal No. 2018AP2005-CR, unpublished order (Wis. Ct. App. March 16, 2021) (App: 7-31). The court found no ***Brady*** violation because the undisclosed recording was ambiguous, and therefore not favorable to the defense, and because defense counsel impeached the officers at trial about false statements pertaining to the recording. *Id.*, ¶¶14-15. For the same reason, the court found no prejudice sufficient to

warrant a new trial based on a statutory discovery violation. *Id.*, ¶16. The court further concluded that the totality of discovery violations were reasonably addressed by the circuit court's sanction of excluding Bobbi Reed's testimony, and that it was not an erroneous exercise of discretion in denying the request for a new trial. *Id.*, ¶¶18-20.

The court of appeals concluded that the circuit court's denial of the motion for mistrial was not erroneous because, although Marciniak's testimony about prior deliveries violated the motion in limine, it was "innocuous" background information, and because the offer to give a curative instruction was reasonable. *Id.*, ¶¶26-28.

The court of appeals rejected all of the defendant's evidentiary challenges. The court held that even assuming it was error to admit testimony from the officers identifying Barnes' voice without foundation, the error was harmless. *Id.*, ¶43. The court held that on the issue of the officers lacking personal knowledge of the search of Marciniak's vehicle, the circuit court's decision to overrule the objection because there had already been significant unchallenged testimony regarding the vehicle search was reasonable, and even if it was error, the error was harmless. *Id.*, ¶45. Further, the court held that exclusion of witness Clark's information proper because it was not rebuttal, and that the circuit court's concern about the length of trial was reasonable. *Id.*, ¶¶47-49.

The court of appeals likewise affirmed the admission of testimony regarding Officer Clauer's alleged observations under the theories that it was not hearsay admitted for its truth because it explained Winterscheidt's actions, and because the defense opened the door by questioning whether the testifying officers observed the transaction. *Id.*, ¶¶31-35. However, its opinion repeatedly characterized the defense's claim as objecting merely to testimony identifying Clauer as the officer who "witnessed the transaction" or "observed the transaction." *Id.*, ¶¶31-34. The court observed in a footnote

that "the mere naming of the specific officer who claimed to have witnessed the transaction did not transform the testimony into a hearsay statement for purposes of the Confrontation Clause." *Id.*, ¶35, n.7.

Regarding the alternative argument that any non-preserved objections constituted ineffective assistance of counsel, the court of appeals noted that it had not applied "any kind of forfeiture rule" to any of Barnes' arguments. *Id.*, ¶50. The court noted issues where counsel could have taken alternative actions, and questioned whether those would be deficient under prevailing constitutional standards, but concluded none would be prejudicial. *Id.*, ¶¶51-52.

The defense filed a timely motion to reconsider, arguing the court of appeals' reasoning on admission of Officer Clauer's observations omitted key facts from its argument about the hearsay and confrontation violations—that he hadn't just "observed the transaction," but that he specifically claimed to have witnessed Barnes throw the box of methamphetamine into the informant's vehicle (App: 2-6). The court of appeals denied reconsideration, noting, "this court fully reviewed the challenged testimony, including the prosecutor's questions. Nothing in the materials presented by Barnes' motion for reconsideration alters this court's view" (App: 1).

Additional facts will be provided where appropriate.

ARGUMENT

I. Dismissal Is An Appropriate Remedy When The State Commits Repeated, Flagrant Discovery Violations, And The Violations In This Case Warrant Dismissal Or A New Trial

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). Similarly, Wisconsin's discovery statutes require a prosecutor to disclose, within a reasonable time before trial, "(a) Any written or recorded statement concerning the alleged crime made by the defendant," "(e) Any relevant written or recorded statements of a witness named on a list" and (h) "any exculpatory evidence." Wis. Stat. secs. 971.23(1)(a), (e),(h).

Traditionally, the remedy for a ***Brady*** or discovery violation is a new trial. However, 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). No Wisconsin case has addressed whether dismissal is an available remedy for such violations.

This is an appropriate case for dismissal—not just for the numerous discovery violations, which the circuit court called "disturbing," but also for the State's flagrant lies and misrepresentations throughout the proceedings.

Less than one week before trial, the defense moved to exclude Marcianiak's testimony because the State hadn't

disclosed consideration provided for his informant work (R55). The court agreed that a discovery violation had occurred and ordered disclosure of the consideration immediately, but denied exclusion (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, and the prosecutor offered no explanation (R168:8-9,14). Clauer's observations were critical—he was the only officer who claimed to personally observe the drug transaction (R126:13). 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 blatant falsehoods. First, on April 24, 2014, just over a year after Barnes' 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 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).

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

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 when Officer Tanski testified that an audio recording existed, and Marciniak's voice was audible on the recording (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). 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 Marciniak speaking to another male, in an ambiguous conversation where one asks if they're "good on that other one" (R181: 8:33-8:52).

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

The court concluded the record wasn't exculpatory, aside from 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).

The recording had more exculpatory value than the court acknowledged. Beyond just impeaching Winterscheidt's false testimony about the recording, the substance of the recording contradicted another lie from Winterscheidt. Earlier in the trial, 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, 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 what 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. 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. And the sanction of excluding Clauer's testimony was completely nullified by the court's admission of the key fact Clauer claimed to have seen—that Barnes threw the box of meth into Marciniak's vehicle.

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.

II. Defendants Cannot "Open The Door" To Evidence Violating The Right To Confrontation, Especially When That Evidence Was Excluded As A Discovery Sanction, And An Officer's Claim To Have Directly Witnessed The Defendant Commit The Crime Constitutes Testimonial Hearsay

A. Factual Background

Despite the circuit court's exclusion of Clauer for a discovery sanction, the State was still permitted to present the crucial fact from Officer Clauer—that he supposedly observed the defendant deliver the methamphetamine—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 court found that the defense opened the door when asking whether the investigators videotaped the transaction, and that it was not hearsay because it went to Winterscheidt's "state of mind" (R167:185). Winterscheidt testified he knew the transaction had been completed because "Other investigators observing the transaction notified me by radio" and 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 court overruled based on Winterscheidt's state of mind from getting told the transaction was done (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 for the officer's state of mind (R167:188). Winterscheidt answered that officer Clauer witnessed the hand-to-hand (R167:188).

Attorney Gondik subsequently argued that this ruling nullified the discovery sanction by allowing Winterscheidt to testify about what Clauer supposedly saw, and that it was hearsay that was offered for its truth (R167:203-04). The court disagreed, stating it's not "classic hearsay," and not prejudicial (R167:205). Though the court acknowledged the importance of Clauer allegedly observing "what happened between the defendant and Mr. Marciniak," it ruled that Gondik's questioning about lack of video surveillance opened the door, and that Winterscheidt's state of mind for "why he did what he did" was not hearsay (*see* R144:17,22-23; R180:79-80).

B. Claims That Officer Clauer Witnessed Barnes Deliver The Methamphetamine Constituted Inadmissible Hearsay

The circuit 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.

As the court of appeals observed, 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). But 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 were statements admitted to show Winterscheidt's actions in response; he testified his decision to move in to arrest Barnes was because other officers said "it went down, the deal is done" (R167:186).

Moreover, 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 a balancing test of weighing relevance against prejudice. ***Id.*** at 70-71. Since these statements pertained to the key contested issue at trial—who provided the box of methamphetamines—they clearly pertained to disputed matters and were hearsay.

C. Defendants Cannot Open The Door To Confrontation Violations, And Barnes Did Not Open The Door

The Sixth Amendment guarantees a criminal defendant's right "to be confronted with the witnesses against him." U.S. Const. amend. VI. This clause requires the prosecution to present its evidence through witnesses who testify in court subject to cross-examination, and prohibits the introduction of "testimonial" evidence at trial unless the declarant takes the stand. ***Crawford v. Washington***, 541 U.S. 36, 68 (2004). 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.

The lower court rulings that Barnes opened the door both failed to honor Barnes' confrontation rights, and were factually illogical. First, while this important question is now pending before the US Supreme Court,[4] some jurisdictions have held that a defendant cannot open the door to evidence that would violate confrontation rights. *See* ***United States v. Holmes***, 620 F.3d 836 (8th Cir. 2010) (as a matter of evidence law, the defendant may have "opened the door" to the admission of evidence responsive to his claim that he had no connection to a drug house, but this did not effectuate a forfeiture of his "constitutional challenge to the admission of the [confidential informant's testimonial] statements"); ***United States v. Cromer***, 389 F.3d 662 (6th Cir. 2004) (same). Others hold that a defendant can effectively waive confrontation rights by opening the door, but only when that waiver is 'clear and intentional—which is not the case here. *See* ***United States v. Lopez-Medina***, 596 F.3d 716, 733 (10th Cir. 2010).[5]

Additionally, 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

[4] Staying this case pending the decision in ***Hemphill v. New York,*** No. 20-637, may be appropriate under the circumstances.

[5] Five jurisdictions hold that the prosecution may introduce unconfronted testimonial hearsay if—and only if—the defendant has introduced a testimonial statement by the same witness, based on the rule of completeness or equitable principles. *See* ***United States v. Moussaoui***, 382 F.3d 453, 480-82 (4th Cir. 2004); ***State v. Prasertphong***, 114 P.3d 828, 830-35 (Ariz. 2005); ***People v. Vines,*** 251 P.3d 943, 967-69 (Cal. 2011); ***State v. Selalla***, 744 N.W.2d 802, 814-18 (S.D. 2008); ***State v. Brooks***, 264 P.3d 40, 51 (Haw. Ct. App. 2011). That exception is inapplicable here, as Barnes clearly did not introduce any portion of Officer Clauer's statements.

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.

This error was not harmless. Since resulting prejudice must be assessed for the cumulative impact of evidentiary errors, the defense will discuss the prejudicial impact of this evidence *infra*, Section III(E).

III. This Court Should Accept Review Because Prejudicial Evidentiary Errors Deprived Barnes Of A Fair Trial

A. Repeated References To Prior Meth Deliveries Violated The Court's Order Excluding Other Acts And Warranted A Mistrial

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).

The court of appeals acknowledged the reference to the "manifest injustice" standard was erroneous, as the correct standard was whether the claimed error was "sufficiently prejudicial to warrant a new trial." *State v. Barnes*, *id.* slip op., ¶¶25, 28. The court of appeals agreed with the circuit court that the errors were "innocuous" background information to explain why police targeted Barnes. *Id.* ¶27. But as discussed *infra,* the prejudice to Barnes was substantial considering the theory of defense, and was exacerbated by the numerous other evidentiary errors.

B. Officers Lacked Foundation To Identify Barnes' Voice In Recorded Calls

The recorded calls between Marciniak and another male setting up the meeting became an important part of the

State's case. Investigator Winterscheidt identified the voice of Barnes all four calls (R167:96-103). Call 3 was the most important, because that was the only call that allegedly referenced drugs; 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 which listed Barnes as participating in the call, noting that Barnes's voice was not on the recording (R167:101). The court overruled (R167:102).

During cross-exam, Winterscheidt acknowledged that only Marciniak's voice can be heard on Call 3, but 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).

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).

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 testimony should have been stricken.

C. Officers Lacked Personal Knowledge Or Foundation To Testify About Vehicle Search

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).

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 (and the court of appeals' decision affirming) 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, after initially claiming that "we" searched the vehicle, implying that he participated. The denial of these requests was erroneous, and the testimony should have been stricken.

D. The Court Improperly Excluded Testimony From Gerald Clark

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).

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, which the court of appeals found reasonable, were completely the fault of the State. The trial stretched into a second day because of the revelation that the State failed to disclose the wire recording and Winterscheidt had lied about its contents. This cannot possibly be a reasonable basis to restrict *defense* witnesses. The court's exclusion of Clark was erroneous.

E. All Of These Errors Prejudiced Barnes

The State has the burden of proving the errors were not harmless; an "error is harmless if the beneficiary proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***State v. Mayo,*** 2007 WI 78, ¶47, 301 Wis.2d 642, 734 N.W.2d 115. 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.[6]

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

[6] 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.

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 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 law enforcement's failure to control the transaction through video surveillance, 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 that Barnes provided meth to Marciniak. This 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. The State, as the beneficiary of this error, cannot prove it harmless beyond a reasonable doubt.

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, contrary to the findings of the lower courts that Marciniak's repeated references to prior deliveries constituted innocuous background information, 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 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.

Likewise, the evidentiary errors were not harmless, whether considered individually or, as the court must, for their aggregate impact. A new trial is warranted.

IV. Failure To Properly Preserve Any Objections Raised Herein Constitutes Ineffective Assistance Of Counsel

Barnes has alleged that attorney Gondik'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. For example, while attorney Gondik's objections to the testimony regarding Officer Clauer referenced hearsay, foundation, and nullification of the court's discovery sanction, he didn't specifically reference confrontation. Neither the circuit court nor the court of appeals concluded that the defense forfeited its right to object to the confrontation violation. However, in the event the court believes the objection is forfeited, attorney Gondik's failure to object on confrontation grounds was both deficient and prejudicial given the importance of this evidence, violating his Sixth Amendment right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

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.

Barnes 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.

Barnes also believes attorney Gondik sufficiently objected to law enforcement testimony identifying Barnes as the voice in the recorded phone calls based on foundation, and that he properly objected to the search evidence once Investigator Winterscheidt clarified that he hadn't actually participated in that search. However, if the court finds that Gondik raised these objections too late, the defense submits Gondik's failure to object was deficient.

Testimony at the *Machner* hearing showed these were not strategic errors on Gondik's part. His strategy was to keep out as much of this evidence as possible, so any errors allowing such evidence were not strategic.

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 which is controlling. The defendant hereby incorporates all arguments *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, and this court should accept review.

CONCLUSION

For the reasons stated above, the petitioner believes this case is appropriate for review, and respectfully requests that review be granted and that the Supreme Court reverse the decision of the Court of Appeals affirming the trial court's decision denying his post-conviction motions.

Respectfully submitted this 7th day of May, 2021.



COLE DANIEL RUBY
Attorney for Petitioner
State Bar #1064819
Martinez & Ruby, LLP
620 8th Avenue
Baraboo, WI 53913
(608) 355-2000

CERTIFICATION

In accord with Wis. Stat. § 809.19(8), I certify that this petition satisfies the form and length requirements for a petition for review prepared using a proportional font: minimum printing resolution of 200 dots per inch, 13 point

body text, 11 point text for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line and a length of 7,853 words.

Dated: May 7, 2021



COLE DANIEL RUBY
Attorney for Petitioner
State Bar #1064819

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.

Dated: May 7, 2021



COLE DANIEL RUBY
Attorney for Petitioner
State Bar #1064819