STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP2005-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARLAND DEAN BARNES,

Defendant-Appellant-Petitioner.

ON REVIEW FROM A DECISION OF
THE COURT OF APPEALS AFFIRMING A
JUDGMENT OF CONVICTION AND AN ORDER
DENYING A MOTION FOR POSTCONVICTION RELIEF,
BOTH ENTERED IN THE CIRCUIT COURT FOR
DOUGLAS COUNTY, THE HONORABLE
KELLY J. THIMM, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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INTRODUCTION

No jury trial is perfect, and the one underlying this appeal is no exception. Yet despite the litany of evidentiary issues Defendant-Appellant Garland Dean Barnes raised below, the only issues before this Court turn on established legal principles defining what hearsay is and whether a defendant should receive a new trial if testimonial hearsay is improperly admitted at his earlier trial.

The court of appeals correctly concluded that Barnes suffered no violation of his constitutional right to confront his accusers because the testimony he sought to exclude was not offered for the truth of the matter asserted. But even if this Court disagrees, Barnes still is entitled no relief because the alleged error was harmless; no jury would have acquitted Barnes when the rest of the State's evidence proved that he was the one who dealt drugs to a confidential informant and not the other way around.

ISSUES PRESENTED

1. Was Barnes's constitutional right to confront his accusers violated when a State witness testified that another officer, who Barnes moved to exclude at trial, had witnessed the drug transaction between Barnes and an informant?

The circuit court answered no.

The court of appeals answered no.

This Court should answer no.

2. If a violation of Barnes's right to confront his accusers occurred, was that error harmless?

The circuit court answered yes.

The court of appeals answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case for which this Court grants review, oral argument and publication are warranted.

SUPPLEMENTAL STATEMENT OF THE CASE

I. Pretrial proceedings

The State charged Barnes with delivering greater than fifty grams of methamphetamine to a police informant later identified as Charles Marciniak. (R. 2.) That alleged delivery occurred during a "controlled buy," in which police supplied Marciniak with $7200 to purchase four ounces of methamphetamine from Barnes. (R. 2:2–3.) The criminal complaint stated that officers from several local agencies coordinated the operation, including Agent Duane Clauer of the Division of Criminal Investigation. (R. 2:1–3.)

The circuit court scheduled Barnes's case for a jury trial and issued a scheduling order setting pretrial deadlines. (R. 45:1.) Pursuant to that order, the parties were required to file with the court and serve upon opposing counsel a list of anticipated trial witnesses no fewer than 13 days before the scheduled trial date. (R. 45:1.) In compliance with that order, the State filed a witness list 19 days before Barnes's trial, naming Agent Clauer as one of nine potential witnesses. (R. 48.)

One week before his jury trial was set to begin, Barnes filed a motion seeking to bar Agent Clauer's testimony from trial on the grounds that the State "failed to disclose within a reasonable time before trial that the State intended to call Duane J. Clauer to testify" and "failed to show any good cause for its failure to disclose Duane J. Clauer as a witness within a reasonable time before trial." (R. 53:1, 3.)

Despite the State's compliance with the pretrial order, Barnes insisted the State's delayed naming of Agent Clauer as a trial witness was unreasonable given the "ample time" it had to identify its witnesses earlier in such a long-pending case. (R. 53:4.) Barnes further insisted that the State could not show good cause for the delay since it "possessed Duane J. Clauer's arrest report for over two years and failed to provide a copy to the defense until June 18, 2015." (R. 53:5.)

The circuit court convened a hearing to address several pretrial motions, including Barnes's request to exclude Agent Clauer as a trial witness. (R. 168.) Defense counsel elaborated that he did not receive Agent Clauer's report until June 19, 2015, that the State provided him an additional report by Agent Clauer as he entered the courtroom for the motion hearing, and that the late disclosures "compromise[d]" his case and Barnes's defense. (R. 168:8–9.)

The prosecutor advised the court that the criminal complaint mentioned Agent Clauer as one of the police officers who assisted in the controlled buy, that defense counsel received discovery from the district attorney's office following his appointment, and that Agent Clauer's name was listed no fewer than five times in the provided police reports. (R. 168:11.) She also explained that, when she discovered that Agent Clauer was omitted from an earlier witness list, she filed a new witness list that included Agent Clauer, and she provided Agent Clauer's report at the same time. (R. 168:12.)

The prosecutor further conceded that she provided defense counsel an additional report by Agent Clauer that she received earlier that same day. (R. 168:13.) She explained there was nothing exculpatory in the report, which mirrored the contents of other officers' reports in discovery. (R. 168:13.) While she could not explain why Agent Clauer's reports were not provided by law enforcement to the district attorney's office earlier, she insisted that she turned them over to

defense counsel as soon as her office received them. (R. 168:14–15.)

The circuit court declined to rule on Barnes's motion immediately, instead taking it under advisement with plans to impose an appropriate sanction before trial. (R. 168:16–18.) In the interim, the court requested copies of Agent Clauer's reports, which the State provided the next day. (R. 60; 61.) In both reports, Agent Clauer claimed to observe the transaction between Barnes and Marciniak. (R. 60:7; 61:3–4, 6.)

Barnes subsequently filed an amended memorandum in support of his motion to exclude Agent Clauer's testimony. (R. 62.) In it, he renewed his substantive arguments that the court should bar Agent Clauer's testimony as a sanction for both the State's failure to identify him as a trial witness until three weeks before trial and the failure to disclose his reports until June 19 and July 1, 2015. (R. 62:2–5.)

Ultimately, the court decided to exclude Agent Clauer's testimony as a sanction for the State's discovery violation. (R. 167:4–5.) Though it did not blame the assigned prosecutor for not providing the defense with reports before she received them, the court recognized that Barnes's case was pending for over two years, and Agent Clauer's reports should have been disclosed sooner. (R. 167:4–5.) Given what it deemed a discovery violation of an "egregious nature," yet recognizing that the State could proceed to trial despite the sanction, the court opined that witness exclusion was the only appropriate remedy. (R. 167:4–5.)

II. Barnes was convicted at trial

Barnes proceeded to a jury trial in July 2015, (R. 166; 167), where he argued Marciniak sold methamphetamine to him for his drug-addicted girlfriend and not the other way around, as the State alleged, (R. 166:202–03).

The State presented considerable evidence challenging Barnes's defense theory. To set the stage, the State first called Sergeant Paul Winterscheidt, who educated the jury about the investigative methods his department employed to catch local drug dealers, including using informants to conduct what he referred to as "controlled buys." (R. 167:89–90.) He explained that a controlled buy involved an informant first arranging a drug purchase from a known dealer. (R. 167:90.) Police would then "search the informant, fit [him] with a body wire," supervise the informant as he purchased the drug from the target dealer, and recover the purchased drug. (R. 167:90.)

Sergeant Winterscheidt identified one of his informants as Marciniak, who began assisting law enforcement in April 2013 after he was arrested for dealing methamphetamine. (R. 167:92–93.) In total, Marciniak helped police conduct four controlled drug buys, including one on August 21, 2013, which was prompted after he called Sergeant Winterscheidt to advise that a man he knew by the name "Dean" was willing to sell him methamphetamine. (R. 167:93–94.)

Based on that intelligence, Sergeant Winterscheidt assembled several local drug investigators to conduct a controlled drug buy at the nearby Temple Bar, including Officer Jayson Tanski, Sergeant James Madden, and a variety of investigators, including James Olson and Duane Clauer. (R. 167:94.) First, however, Marciniak made a series of recorded phone calls to "Dean," who police later identified as Garland Dean Barnes. (R. 167:95.)

The State presented the jury with audio recordings and transcripts of those calls. (R. 66; 73; 74; 75; 167:95–103.)

The first recording began with Sergeant Winterscheidt identifying the date and time, the names of the other police investigators present, and their plan to make a recorded call to "Dean." (R. 73.) On the recording of the first call, after Marciniak read the target's phone number aloud, Barnes

answered the call, "Hello." (R. 73.) Marciniak responded, "You've gotta be gettin' close," to which Barnes replied, "Yeah, about 40 minutes away." (R. 73.) After confirming the 40-minute arrival window, the parties ended the call. (R. 73.)

The State also introduced a recording of the second call, which Sergeant Winterscheidt identified as initiated by Barnes. (R. 167:98.) During the call, Barnes asked Marciniak to meet at his "little spot," which he identified as a motel. (R. 74.) Marciniak claimed that he was "in the midst of doing somethin' at the moment," and Barnes agreed to "just come all the way." (R. 74.) Shortly thereafter, Marciniak asked Barnes, "[H]ey what do you got then?" (R. 74.) The second phone call ended abruptly without Barnes's answering Marciniak's question, and Sergeant Winterscheidt interjected to restate the date and time as well as the names of the other police investigators present. (R. 74.) He explained that they "[j]ust received a phone call from Dean," and he asked Marciniak to restate Dean's phone number. (R. 74.)

Sergeant Winterscheidt identified the third call as also initiated by Barnes, this time contacting Marciniak to discuss "the quantity of methamphetamine that was expected to be delivered." (R. 167:100.) Sergeant Winterscheidt admitted on cross-examination that another investigator mistakenly plugged an earbud into the wrong audio jack during that third phone call, causing only one side of the conversation to be recorded. (R. 167:147.) Still, Sergeant Winterscheidt recalled hearing the conversation as it occurred and that he recognized Barnes's voice on the other end of the line. (R. 167:149.)

The recording of the third call began by Marciniak saying, "Hello." (R. 66.) Thereafter, Marciniak asked, "Two? Alright. I'll take 'em. You're gonna have to -- you're gonna have to run up again then maybe. You might have to see me sooner than next weekend. What's that? Right on. Well then, 4? Alright. Do that. Alright. Bye." (R. 66.) Immediately after the call ended, Sergeant Winterscheidt was recorded stating,

"I need that other 1800." (R. 66.) He explained that each ounce of the drug cost $1800, so four ounces cost $7200. (R. 167:105.)

Finally, Sergeant Winterscheidt identified the fourth and final call between Barnes and Marciniak, which took place on the date of the buy, where the two conferred about how long it would be until they could meet. (R. 167:103.) Barnes indicated that he would "be there" in seven or eight minutes. (R. 75.)

In preparing for the actual transaction, police searched Marciniak's person and vehicle for contraband and currency. (R. 67:103–04.) This included a thorough search of any places that Marciniak could hide his own currency or illegal drugs, such as inside his pockets, shoes, or hat. (R. 167:106–07.) This also included locked or unlocked containers in Marciniak's vehicle. (R. 167:107.) This search was conducted to ensure that Marciniak did not bring illegal drugs or contraband to the controlled drug buy. (R. 167:107.)

Finding neither drugs nor contraband, police outfitted Marciniak with a transmitting device and provided currency to purchase drugs from Barnes. (R. 167:104–05.) Sergeant Winterscheidt recalled that Marciniak initially believed he would be able to purchase three ounces of methamphetamine from Barnes. (R. 167:104.) After Marciniak learned from Barnes that he could purchase four ounces and not just three, he was given additional funds, for a total of $7200. (R. 167:105.) Police photographed the bills and recorded their serial numbers before placing them in a white plastic bag, which was provided to Marciniak. (R. 167:106.)

Thereafter, Sergeant Winterscheidt sent members of his team to the anticipated transaction site, including Agent Clauer and Sergeant James Madden. (R. 167:94, 108.) In another vehicle, Sergeant Winterscheidt, Investigator Jason Tanski, and Investigator James Olson followed Marciniak

from a distance as he proceeded to the transaction site. (R. 167:109, 219.)

Investigator Tanski could see Marciniak's parked truck, and he watched as a black truck approached Marciniak's vehicle, with both driver's side doors facing one another. (R. 167:220.) The black truck left "relatively fast," and he could hear over the police radio that other officers were attempting to stop the vehicle. (R. 167:220–21.)

Just as officers attempted to corner Barnes's vehicle and arrest him, Barnes placed his vehicle in reverse, struck a police vehicle, and fled from the scene with investigators in tow. (R. 167:109–10.) Barnes's vehicle was eventually stopped, and he was arrested with his girlfriend and passenger, Bobbi Reed. (R. 167:110–11.) On Barnes's person, police discovered several thousand dollars in unmarked currency. (R. 167:111.) On Reed's person, police found several grams of heroin and methamphetamine, as well as some pills. (R. 167:112.) In the front seat area of Barnes' vehicle, police also located the plastic bag of recorded buy money that had been provided to Marciniak. (R. 167:112.) A picture of the interior of Barnes's front seat area showed that the bag was found on the floor, stuck between the center console and the front passenger seat. (R. 77; 80.)

About five to ten minutes later, Sergeant Winterscheidt and Investigator Tanski proceeded to the Baywalk Motel parking lot, where they met Marciniak, who was still in his vehicle. (R. 167:117–18.) Police searched Marciniak's vehicle and his person, revealing no contraband or currency. (R. 167:117–18, 223–24, 230–34.) Marciniak advised that the methamphetamine he purchased from Barnes was in a black box with a red bow on his truck's passenger seat. (R. 167:118, 224.) The box was not "crumpled or mangled," nor did it contain any creases that might be present had it been "bent or shoved into any type of nook or cranny." (R. 167:252.)

Sergeant Winterscheidt located and opened the box, which enclosed two bindles of suspected methamphetamine weighing approximately four ounces. (R. 167:119.) The parties stipulated at trial that Billie Robbins of the Wisconsin State Crime Laboratory examined the contents of the black box and two knotted bags, determining that they contained "a total of 111.568 grams of off-white crystalline material" that tested positive for the presence of methamphetamine, a controlled substance. (R. 166:52–53.)

Sergeant Winterscheidt estimated that approximately five minutes elapsed between the time he arrested Barnes and met with Marciniak nearby. (R. 167:121.) He also recalled interviewing Marciniak, who described how he met Barnes in the Temple Bar parking lot, threw the buy funds into Barnes's truck, and received a box that Barnes threw into his truck before the two parted ways. (R. 167:122.) This was consistent with the audio recording from the Marciniak's transmitter. (R. 167:122.)

Marciniak openly confessed to the jury that he had a lengthy criminal history, which included 25 prior criminal convictions, nearly half of which stemmed from motor vehicle offenses such as driving without proof of insurance or with a revoked driver's license. (R. 166:65–66.) He also admitted that he was previously convicted of other felony charges, including burglary, receiving stolen property, an unidentified weapons offense, possession of controlled substances, and delivery of methamphetamine. (R. 166:66–67, 110–12.)

Marciniak agreed that he had used methamphetamine in the past, was arrested for dealing the drug, and had agreed to work with law enforcement as a confidential informant. (R. 166:68–69, 71, 102–03.) He also acknowledged that he knew how to make methamphetamine, though he did not make his own. (R. 166:106.) He insisted there were no promises made to him in exchange for his cooperation; his hope was that it would allow him to get out of the drug

lifestyle and open the door to a better life. (R. 166:69, 71.) Marciniak reported that as part of that effort, he had helped police conduct four total controlled drug buys. (R. 166:71.)

Marciniak recalled contacting Sergeant Winterscheidt on the day of the controlled buy. (R. 166:72.) He knew police were looking to coordinate a "bigger buy," and Marciniak knew he could do it. (R. 166:72.) He was aware of a "bigger fish" in the drug game—Barnes, a man he then knew as Dean, or Garland Dean Barnes. (R. 166:72–73.) And after getting a call from Barnes, Marciniak called Sergeant Winterscheidt to inform him of the potential drug deal. (R. 166:73.)

Marciniak met with Sergeant Winterscheidt before holding several phone calls with Barnes. (R. 166:76–78.) Regarding the third call, Marciniak explained that he said the number "two" in reference to the purchase of two ounces, but after informing Barnes that he would have to meet again soon, Barnes proposed the sale of four ounces. (R. 166:80.) He also recounted police providing him prerecorded buy funds after patting him down, checking inside socks and shoes for contraband, and searching his vehicle. (R. 166:84–85.)

Then, Marciniak drove to the Temple Bar, parked outside the laundromat, met Barnes's vehicle as it neared with both drivers' side doors facing each other, and threw the bag of money into Barnes's vehicle. (R. 166:87–88, 120–21, 133.) Barnes then threw a box of methamphetamine into Marciniak's truck. (R. 166:87–88, 120–21, 133.) Marciniak drove directly back to the motel and sat in his vehicle for fewer than ten minutes before investigators arrived. (R. 166:89–90.)

Marciniak stated that he did not leave his vehicle, talk to anyone, or pick up any additional methamphetamine from others. (R. 166:89–90, 96.) He also testified that he did not hide methamphetamine in a nearby motel room, in his truck, in his pants, or in his buttocks. (R. 166:96–97.) He claimed he

was "[o]ne-hundred percent" sure it was Barnes and not Barnes's passenger who tossed the drugs to him. (R. 166:97.)

Once Sergeant Winterscheidt and Investigator Tanski arrived and approached, Marciniak got out of his truck and allowed police to search his person and vehicle. (R. 166:90–91.) Seeing the earlier pursuit of Barnes also called him to break down crying while talking to officers, stating he was "done with this." (R. 166:92.)

The jury ultimately found Barnes guilty of delivering over 50 grams of methamphetamine. (R. 166:229–32.)

Before sentencing, Barnes moved for a new trial based on three evidentiary decisions the circuit court had made during the trial. (R. 89.) Relevant to the sole issue for which this Court has granted review, Barnes maintained that the court erroneously allowed Sergeant Winterscheidt to testify that Agent Clauer observed the drug transaction. (R. 89:6.)

The circuit court denied his motion. (R. 94; 144:15–24.) The court reasoned that Sergeant Winterscheidt's testimony regarding Agent Clauer's observation was not offered for the truth of the matter asserted but merely went to Sergeant Winterscheidt's state of mind. (R. 144:23.) Moreover, the court held that none of Barnes's alleged errors warranted a new trial. (R. 144:23.)

III. Postconviction proceedings

After sentencing, Barnes moved for postconviction relief, renewing some of the same claims the circuit court had previously rejected and advancing several new arguments. (R. 125.) Barnes argued again that his constitutional right to confront his accusers was violated by the admission of Sergeant Winterscheidt's testimony describing what Agent Clauer claimed to have observed during the drug transaction. (R. 125:19–21.) The circuit court denied Barnes's motion following an evidentiary hearing. (R. 132:2; 180:85.)

Barnes appealed, and the court of appeals affirmed. *State v. Barnes*, No. 2018AP2005-CR, 2021 WL 969235 (Wis. Ct. App. Mar. 16, 2021) (unpublished); (Pet-App. 9–33)[1]. The court rejected Barnes's claim that the circuit court improperly admitted inadmissible hearsay and that doing so violated his right to confront witnesses against him. (Pet-App. 22–24.) The court reasoned that "the circuit court could reasonably conclude that the testimony was not being offered to show that Clauer had, in fact, observed the transaction but, rather, to show why he had taken subsequent investigative steps." (Pet-App. 22.) In that same vein, the court recognized that "the right to confrontation does not extend to testimonial statements offered for purposes other than establishing the truth of the matter asserted." (Pet-App. 24.) Thus, the court concluded that its disposal of Barnes's hearsay claim resolved his interrelated confrontation argument. (Pet-App. 24.)

Barnes petitioned for review, which this Court granted.

STANDARDS OF REVIEW

Barnes argues that his constitutional right to confront his accusers was violated by the admission of evidence that identified which officer observed Marciniak toss a white plastic bag into Barnes's vehicle and Barnes toss a black box to Marciniak. (Barnes's Br. 24, 29.)

"Whether a Confrontation Clause violation has occurred is a question of law [that this Court] review[s] de novo." *State v. Keller*, 2021 WI App 22, ¶ 18, 397 Wis. 2d 122, 959 N.W.2d 343. Whether the admission of a statement in violation of the confrontation right is harmless error is also a question of law that is also reviewed de novo. *State v. Magett*, 2014 WI 67, ¶ 29, 355 Wis. 2d 617, 850 N.W.2d 42.

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[1] For all citations to the petitioner's initial brief and appendix, the State cites to the relevant electronic page numbers, not the page numbers listed at the bottom of each page of the documents.

ARGUMENT

Barnes argues that he is entitled to a new trial because his constitutional right to confrontation was violated during his trial and the alleged error was not harmless. He is wrong on both counts. The U.S. Supreme Court has provided valuable guidance since Barnes's trial, but that decision does not change the fact that the evidence he now challenges was not testimonial hearsay. Moreover, even if it were, any error in admission was harmless beyond a reasonable doubt. For those reasons, this Court should affirm.

I. The evidence Barnes challenges was not testimonial hearsay.

While the Supreme Court has now clarified that a defendant cannot open the door to evidence that would otherwise violate his right to confrontation, that does not help Barnes here. The evidence he challenges was not testimonial hearsay, so its admission did not violate his right to confront his accusers.

A. While unsettled at the time of Barnes's trial, the State now concedes that a defendant cannot open the door to evidence that violates his right to confrontation.

The United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. To that end, in *Crawford v. Washington*, the Supreme Court held that the Confrontation Clause prohibits the introduction of testimonial statements by a non-testifying witness unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. 36, 54, 68 (2004).

Still, a criminal defendant's Sixth Amendment right to confrontation is not absolute. For instance, a defendant may forfeit that right if he "wrongly procures [a] witness's unavailability by conduct designed to prevent the witness from testifying." *State v. Reinwand*, 2019 WI 25, ¶ 14, 385 Wis. 2d 700, 924 N.W.2d 184; *see, e.g., Davis v. Washington*, 547 U.S. 813, 833 (2006); *Crawford*, 541 U.S. at 62. Furthermore, if a defendant engages in disorderly and disruptive behavior during trial, the court may deem his removal from the courtroom necessary. *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

Additionally, prior to Barnes's trial, many state and federal courts agreed that a criminal defendant could "open the door" to testimony that would otherwise violate his Constitutional Clause rights. *See, e.g., United States v. Lopez-Medina*, 596 F.3d 716, 733 (10th Cir. 2010); *United States v. Holmes*, 620 F.3d 836, 843–44 (8th Cir. 2010); *United States v. Cruz-Diaz*, 550 F.3d 169, 178 (1st Cir. 2008); *United States v. Acosta*, 475 F.3d 677, 683–684 (5th Cir. 2007); *People v. Reid*, 971 N.E.2d 353 (N.Y. 2012), *abrogated by Hemphill v. New York*, 142 S. Ct. 681 (2022).

Based on that authority, it is easy to see why the circuit court and the court of appeals determined that Barnes opened the door to the offending testimony. (R. 167:185; Pet-App. 23.) Despite knowing that Agent Clauer observed the transaction between Barnes and Marciniak, defense counsel convinced the circuit court to bar Agent Clauer's testimony and then tried to exploit that decision during Sergeant Winterscheidt's cross-examination, blasting the lack of transaction surveillance while knowing full well that a State investigator was ready and willing to testify that he saw Barnes deliver the drugs to Marciniak. (R. 53; 61:3, 6; 167:130–40, 157–58.)

Since those decisions, the U.S. Supreme Court has since clarified that the Confrontation Clause does not allow for a court to admit unconfronted, testimonial hearsay against a defendant, even if deemed necessary to correct misleading impressions caused by the defendant's evidence or argument. *Hemphill*, 142 S. Ct. at 691–93. Bound by *Hemphill*, the State agrees that Barnes could not open the door to Sergeant Winterscheidt's testimony describing what Agent Clauer purportedly saw, even if that allowed defense counsel to suggest to the jury through disingenuous cross-examination that there were no witnesses or recordings of the transaction.

B. Testimony informing the jury that an investigator saw Barnes deliver drugs to an informant was not hearsay in the context it was offered.

Hemphill does not help Barnes, however, because the evidence he sought to exclude was not testimonial hearsay.

1. *Crawford*'s limits on the admission of testimonial hearsay

The Confrontation Clause bars the admission of testimonial *hearsay* statements unless (1) the declarant is unavailable, and (2) the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 54–55.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Wis. Stat. § 908.01(3). "[A] crucial aspect of the Sixth Amendment right to confrontation, pursuant to *Crawford*, is that it 'only covers hearsay, i.e., out-of-court statements "offered in evidence to prove the truth of the matter asserted."'" *State v. Hanson*, 2019 WI 63, ¶ 19, 387 Wis. 2d 233, 928 N.W.2d 607 (quoting *United States v. Tolliver*, 454 F.3d 660, 666 (7th Cir. 2006).

"A mere claim that a statement is not offered for its truth is not enough to overcome a hearsay challenge to its admissibility." *Hanson*, 387 Wis. 2d 233, ¶ 25. "The question is not whether the evidence might be inadmissible hearsay if it is offered to prove the truth of the matter asserted; rather, the question is whether the evidence is offered for a legitimate reason other than for the truth of the matter asserted." *Id.* (citation omitted). *Hanson* recognizes that the one piece of evidence could potentially serve both legitimate and illegitimate purposes, depending on how the evidence is used. In *Hanson*, the parties disputed whether certain out-of-court statements were offered not to prove the truth of the matter asserted but merely to show consciousness of guilt. *Id.* ¶ 26.

2. Barnes's right to confrontation was not violated because the jury heard no testimonial hearsay.

Barnes insists that Sergeant Winterscheidt's testimony, explaining that Agent Clauer observed Barnes deliver drugs to Marciniak, was improperly introduced because it was "clearly admitted for the truth of the matter asserted" and was "not proper 'course of investigation' or state of mind evidence." (Barnes's Br. 20.) This Court should affirm because the circuit court and the court of appeals both properly recognized that the offending testimony was offered not for the truth of the matter asserted but for the acceptable purpose of explaining why police took subsequent action in their investigation. (Pet-App. 22.)

The evidence Barnes challenges explained why police decided to pursue Barnes. The jury knew that police officers had organized a controlled drug buy, (R. 167:94), and that several drug investigators were sent to the scene to conduct surveillance, (R. 167:108). And given that Barnes was seen and apprehended immediately thereafter, there was no

question that he was at the scene of the transaction and immediately fled thereafter. (R. 167:110–11.)

The critical question that remained unanswered was why police pursued and arrested him. Here, jury heard Sergeant Winterscheidt explain that someone on the radio had advised that the transaction had occurred. (Barnes's Br. 17–18.) But Sergeant Winterscheidt did not quote the precise words that were said over the radio to let him know the transaction was done; he explained that he was not sure of the words that were said, but he recalled someone saying words indicating that the transaction "went down" and the "deal is done." (R. 167:186.)

That is not all he heard, however; he also knew that Agent Clauer saw Marciniak toss the bag of money to Barnes and Barnes toss the black box back to him—details that were provided to him along with "common language to let us know the deal was done," which compelled police to corner and pursue Barnes. (R. 167:187–89.)

Naturally, investigators would have little reason to pursue Barnes and not Marciniak if Marciniak were the one who dealt drugs to Barnes, and without hearing the information supplied to Sergeant Winterscheidt and his team, the jury would be left to speculate about why police chased Barnes. Sergeant Winterscheidt's testimony explained *why* several investigators decided to chase and arrest Barnes and not Marciniak after the drug deal. It was offered not for the truth of the matter asserted but to show why the listeners, *i.e.*, the investigators who pursued Barnes, went after him and not someone else.

Barnes challenges that assessment, but his rationale is admittedly perplexing. For starters, the State does not contend that statements of a declarant's state of mind are not hearsay. (Barnes's Br. 21.) Such statements are still hearsay, but they are generally admissible under Wis. Stat. § 908.03(3)

so long as there is no confrontation issue. Here, the declarant was Agent Clauer, but again, the State did not offer Agent Clauer's statements for truth of the matter asserted. Thus, Wis. Stat. § 908.03(3) has no application in this case.

More relevant to the issue presented, Barnes concedes that statements presented for the purpose of showing the listener's state of mind or explaining why the listener took certain actions are not hearsay because they are not admitted for the truth of the matter asserted. (Barnes's Br. 21.) However, in a confusing turn, he insists that this rule does not apply here because Agent Clauer did not testify, was not the officer who directed other officers to make an arrest, and "[h]is state of mind, or the reason why he took certain actions, was irrelevant." (Barnes's Br. 21.)

Barnes improperly conflates many principles. To be clear, whether Agent Clauer testified had no bearing on whether his statement was admitted for its truth. As explained above, if his statement that he saw Barnes deliver drugs to Marciniak was offered not for the truth of the matter asserted but to show why his colleagues—the "listeners"—took certain actions afterward, that is not hearsay. In that same vein, the State did not offer the information provided by Agent Clauer to Sergeant Winterscheidt to explain Agent Clauer's state of mind; again, that would fall under Wis. Stat. § 908.03(3), which provides for the declarant's state of mind, and it has no bearing in this case. Nor does Agent Clauer's statement become hearsay just because he was not the one who ordered fellow officers to pursue Barnes. Agent Clauer's observations were relevant because of their effect on Sergeant Winterscheidt, who directed his team to pursue Barnes.

Barnes disputes that conclusion, insisting that Sergeant Winterscheidt's decision was not influenced by Agent Clauer's observations, (Barnes's Br. 21–22), but the record belies that position. Sergeant Winterscheidt did not quote what information was relayed to him before he directed

his fellow officers to pursue Barnes. However, his direct examination questions and answers suggest that he *did* receive that information from Agent Clauer before he made the call to arrest Barnes:

> [Prosecutor]: Sergeant, which investigator saw Chip Marciniak toss in a white plastic bag and Garland Barnes toss in a black box?
>
> . . .
>
> [Prosecutor]: What agent saw that?
>
> [Winterscheidt]: It was DCI Investigator Duane Clauer.
>
> [Prosecutor]: *With that information* were you then given the code word that the transaction was completed?
>
> [Winterscheidt]: Yeah, it wasn't a code word. It was just common language to let us know the deal was done.

(R. 167:187–88 (emphasis added).)

Given that Sergeant Winterscheidt quickly corrected the prosecutor about the use of code words but said nothing to suggest that he had not heard it from Agent Clauer as the prosecutor's question implied, it is reasonable to conclude that Sergeant Winterscheidt's decision to order fellow officers to pursue Barnes was spurred by Agent Clauer's observations, even if he did not come right out and say exactly that.

Barnes attempts to hedge his bets by arguing that, even if Agent Clauer's statements were properly offered to show their effect on Sergeant Winterscheidt, the evidence still should have been barred because such an exception "cannot extend to key facts of the controversy." (Barnes's Br. 22.) But such a rule would fly in the face of this Court's many decisions where the offending out-of-court statements touched upon guilt or innocence, even though it was offered for purposes other than to prove the matter asserted. *See, e.g., Hanson*, 387 Wis. 2d 233, ¶¶ 22–26 (defendant statements during John

Doe proceeding were properly offered at homicide trial to show consciousness of guilt and not for their truth); *State v. Medrano*, 84 Wis. 2d 11, 19–20, 267 N.W.2d 586 (1978) (victim statement advising treating physician that she was raped was properly offered at sexual assault trial to explain reason for subsequent examination and not for its truth).

Barnes encourages this Court to adopt a test from the Second Circuit's decision in *United States v. Reyes*, 18 F.3d 65 (2d Cir. 1994), which requires courts to first assess the relevance of the evidence before deciding "whether the probative value of th[e] evidence for its non-hearsay purpose is outweighed by the danger of unfair prejudice resulting from the impermissible hearsay use of the declarant's statement." *Reyes*, 18 F.3d at 70. The test then provides a list of factors that federal district courts may consider when conducting that balancing test. *Id.* at 70.

As to probative value, *Reyes* directs courts to consider whether the evidence "contribute[s] to the proof of the defendant's guilt," whether the evidence is important to the jury's understanding of the issues, whether the relevant background or statement of mind can be communicated through less prejudicial evidence or instructions, and whether "the defendant engaged in a tactic that justifiably opens the door to such evidence to avoid prejudice to the Government." *Reyes*, 18 F.3d at 70.

As to prejudice, courts may consider whether the evidence "address[es] an important disputed issue in the trial," whether the same information could be shown by other uncontested evidence, whether the jury would likely credit the statement as being made by a "knowledgeable declarant," whether the declarant will be available for cross-examination and will testify consistently with the out-of-court statement, whether the statement is otherwise admissible as a prior consistent or inconsistent statement, and whether a curative

instruction can protect against the alleged prejudice. *Id.* at 70–71.

Here, the court of appeals declined to adopt the *Reyes* test or mandate that circuit courts exercise their discretion in a certain way when deciding whether to admit out-of-court statements offered for purposes other than to prove the matter asserted. (Pet-App. 23.) Still, it recognized that at least two of the *Reyes* factors supported the circuit court's decision in Barnes's case as he was offered a curative instruction, and he opened the door to the testimony by attacking the quality of the investigation. (Pet-App. 23.)

This court has not adopted the *Reyes* test, but even under that test, the circuit court was still correct to admit the offending testimony. In fact, employing that test actually undercuts Barnes's claim that unconfronted, out-of-court, testimonial statements "cannot extend to key facts of the controversy." (Barnes's Br. 22.) Indeed, that is only one of the relevant factors that courts must consider under the *Reyes* test, *Reyes*, 18 F.3d at 70, yet Barnes tries to paint it as a singularly dispositive question, (Barnes's Br. 22).

But should this Court be so inclined to adopt and apply the *Reyes* test in this case, Barnes still loses. It cannot be disputed that the information Agent Clauer relayed to Sergeant Winterscheidt was important for many reasons. It may have inculpated Barnes, but it provided important context for the jury to understand why police did what they did when they did it. As already explained, without knowing that Barnes had delivered the drug to Marciniak and not the other way around, the jury would logically question why police would have pursued Barnes after the deal. *See supra* I.B.2.

And while leaving the jury with only testimony that "the deal is done" might have proven less prejudicial, the jury still knew investigators had surveilled the transaction. Simple logic dictates that no investigator would have relayed that the "deal is done" in real time unless he saw it. Thus, even a less specific explanation of the radio chatter, paired with the ensuing pursuit and arrest of Barnes, would have led the jury to reasonably infer that the transaction occurred and that the non-informant was culpable.

Hemphill is not to the contrary. That decision merely recognized that a defendant cannot open the door to evidence violating his right to confrontation; the Supreme Court did not suggest that a defendant's conduct could not be considered when assessing whether an out-of-court statement might be admissible under the *Reyes* test. *Hemphill*, 142 S. Ct. at 691–93. Here, defense counsel attempted to exploit a court ruling through disingenuous cross-examination, knowing police surveilled the controlled drug buy. That may not have opened the door to unconfronted, testimonial hearsay, but *Hemphill* says nothing about a defendant's conduct being totally off limits for any tests dealing with hearsay or confrontation.

Additionally, other *Reyes* factors demonstrate an insufficient level of prejudice warranting the testimony's exclusion. While the testimony undoubtedly addressed a disputed issue at trial, the State had no other uncontested evidence to offer as a substitute. *See Reyes*, 18 F.3d at 70–71. And the risk that the jury would be persuaded by a witness who did not even appear was minimum. And as far as his opportunity for cross-examination, nothing stopped Barnes from calling Agent Clauer as a witness, if he so desired. Finally, Barnes could have asked for a curative instruction that would have limited the jury's use of the evidence, but he requested none.

In short, whether or not this Court adopts some sort of test like that used in *Reyes*, the end result is the same: the evidence was not offered for the truth but to give context to the investigation and explain why Sergeant Winterscheidt ordered his colleagues to pursue and arrest Barnes. The jury heard no unconfronted, testimonial hearsay, and Barnes's right to confront his accusers was protected. Accordingly, the lower courts correctly decided that Barnes is not entitled to a new trial, and this Court should affirm.

II. Any error was harmless beyond a reasonable doubt.

A. Not all errors warrant reversal.

A violation of the Confrontation Clause "does not result in automatic reversal, but rather is subject to harmless error analysis." *State v. Stuart*, 2005 WI 47, ¶ 39, 279 Wis. 2d 659, 695 N.W.2d 259 (citation omitted). An error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Harris*, 2008 WI 15, ¶ 43, 307 Wis. 2d 555, 745 N.W.2d 397 (citation omitted).

When assessing whether a violation of a defendant's right to confrontation constitutes harmless error, this Court considers several factors, which include

> 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.

State v. Hale, 2005 WI 7, ¶ 61, 277 Wis. 2d 593, 691 N.W.2d 637 (citation omitted).

B. Because the remaining trial evidence did not support his defense theory, no reasonable jury would have acquitted Barnes even if the offending testimony were excluded.

Should it decide that the circuit court erred by allowing Sergeant Winterscheidt to testify that Agent Clauer witnessed the drug deal between Marciniak and Barnes, this Court should still affirm because it is clear, beyond a reasonable doubt, that the verdict would have been the same had no error occurred. *Harris*, 307 Wis. 2d 555, ¶ 43.

As a preliminary matter, the State agrees with Barnes that the "crux" of his case was who delivered drugs to whom. (Barnes's Br. 29.) The problem with Barnes's argument is that it assumes the jury would have questioned who delivered drugs to whom had Sergeant Winterscheidt not testified that Agent Clauer witnessed the transaction. (Barnes's Br. 32–33.) Given the strength of the State's case, there is simply no chance that would have happened.

In his closing argument, Barnes encouraged the jury to believe that he went to buy drugs from Marciniak for his "drug addicted girlfriend." (R. 166:202–03.) The jury heard no evidence supporting defense counsel's suggestion, but it was certainly undermined by evidence gathered before, during, and after the transaction occurred.

For starters, recorded phone calls between Barnes and Marciniak revealed the roles the two men played in the ensuing drug deal, and they did not support Barnes's defense theory. While their first call contained only innocuous references to Barnes's estimated arrival time, (R. 73), their second call ended with Marciniak asking Barnes, "[H]ey what do you got then," (R. 74).

In the context of an impending drug deal, the jury could reasonably interpret Marciniak's unanswered question in one

of two ways. If Marciniak planned to deal drugs to Barnes, asking him what he had could easily be understood as a question about how much money Barnes had to purchase drugs *from* Marciniak. But if the roles were reversed, and Barnes were indeed the dealer, Marciniak's question would suggest that he was merely asking about which drugs or drug quantities Barnes could sell to him that day.

Even without hearing Barnes's voice on the third call recording, Marciniak's responses made it quite clear that he was the buyer, not the seller. Recall that Marciniak answered that third call, "Hello," before confirming, "Two? Alright. *I'll take 'em*." (R. 66 (emphasis added).) If Marciniak were dealing to Barnes as suggested, in what context would he tell Barnes that he would *take* two of something? Two dollars? Two of some item in a trade? How would Marciniak's response make any sense if Barnes were purchasing drugs *from* him?

Marciniak's subsequent comments also fail to jive with Barnes's defense theory. After telling Barnes that he would "take 'em," Marciniak stated, "[Y]ou're gonna have to run up again then maybe. *You might have to see me sooner than next weekend*. What's that? Right on. *Well then, 4*? Alright. Do that." (R. 66 (emphasis added).) Again, those comments do not make sense coming from a drug *dealer*, as opposed to a drug *buyer*. If Barnes were purchasing from Marciniak, Marciniak would have no reason to tell Barnes when they needed to meet again; in that imagined scenario, Barnes would dictate when he needed a drug refill, not the other way around.

Taken together, the only rational interpretation of the third call between Marciniak and Barnes was that the latter was dealing the drugs and the former was buying them. This was also consistent with Marciniak's testimony, in which he explained that Barnes proposed the sale of four ounces because Marciniak suggested that two ounces would not be enough and would require Barnes to meet with him again before the following weekend. (R. 166:80.)

The evidence incriminating Barnes did not stop with a series of phone calls. Barnes was indisputably present in one of the two motor vehicles that met as part of the controlled drug buy. (R. 167:109–11.) And when police surrounded him in their squad vehicles, Barnes threw his truck into reverse, slammed into one of the surveilling investigators' vehicles, and took officers on a high-speed chase with lights and sirens in tow, stopping only when he was boxed in, (R. 167:265–67)—an odd behavior from someone who wanted the jury to believe he just stopped off to buy some drugs for his girlfriend.

Then there was the search of Barnes's vehicle and his person, which revealed thousands of dollars in cash in his pockets and the prerecorded buy money in his vehicle, wedged between the front passenger seat and the center console. (R. 77; 80; 167:111–16, 272–73.) As the court of appeals astutely recognized, Barnes's defense theory failed to account for his possession of prerecorded buy money. (Pet-App. 27.) Barnes contends that the discovery of those funds was "completely consistent" with his defense. (Barnes's Br. 33.) But that makes zero sense. If Barnes were a drug *buyer*, and not the drug dealer, he would not have ended up with the money given to Marciniak by the police.

Simply put, there is no chance that the jury would have acquitted Barnes had it not heard that Agent Clauer supposedly witnessed the drug transaction. *Harris*, 307 Wis. 2d 555, ¶ 43. The various factors this Court considers in assessing harmless error further support that conclusion. *Hale*, 277 Wis. 2d 593, ¶ 61.

First, the alleged error was infrequent. *Hale*, 277 Wis. 2d 593, ¶ 61. It happened only twice over the span of a two-day trial, first during redirect examination of the State's very first witness, (R. 167:188), and at the end of the trial, but not at the State's encouragement, (R. 166:162). Rather, the jury was only reminded when defense counsel recalled

Sergeant Winterscheidt as a witness to repeatedly ask him if any officer witnessed the entire transaction. (R. 166:162.)

And while the evidence's importance was significant, the State presented substantial evidence corroborating Agent Clauer's observations. *See Hale*, 277 Wis. 2d 593, ¶ 61. Recorded phone calls between Barnes and Marciniak revealed that Barnes was the dealer, Barnes was arrested with prerecorded buy funds and thousands of extra dollars in his pockets, and he engaged police in a high-speed chase in an effort to evade them. And that does not even consider the testimony from Marciniak, which reinforced all of the circumstantial evidence surrounding the controlled drug transaction. *See id.*

Pitting the nature and strength of the State's case against Barnes's defense, this Court can safely conclude that the jury's awareness of Agent Clauer's observations did not cause it to find Barnes guilty where it otherwise would have acquitted him. *See id.* Barnes's defense theory simply made little sense given the State's other evidence, especially Barnes's possession of the prerecorded buy funds.

In short, this Court should affirm the court of appeals' decision because it correctly recognized that Barnes suffered no violation of his right to confront his accusers. However, if it determines that a violation did occur, this Court should nevertheless affirm because it is clear, beyond a reasonable doubt, that no reasonable jury would have acquitted Barnes even if it had never heard that Agent Clauer witnessed the transaction. *Harris*, 307 Wis. 2d 555, ¶ 43.

CONCLUSION

This Court should affirm the court of appeals' decision that affirmed Barnes' judgment of conviction and the order denying postconviction relief.

Dated this 11th day of August 2022.

Respectfully submitted,

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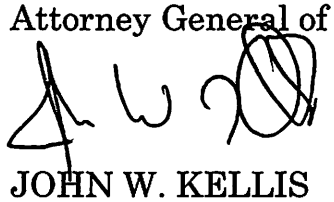

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,869 words.

Dated this 11th day of August 2022.

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I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12) (2019-20).

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.

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Dated this 11th day of August 2022.

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