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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARLAND DEAN BARNES,

Defendant-Appellant-Petitioner

On Review of a Decision of the Court of Appeals, District III, Affirming an Order of the Circuit Court for Douglas County, the Honorable Kelly J. Thimm, Circuit Judge, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER, Garland Dean Barnes

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A. State's Concessions

The State's brief concedes several points at issue, which narrows the discussion considerably. First, in response to the petitioner's argument that Agent Clauer was rendered an "unavailable" witness for the Confrontation analysis by the court's exclusion of Clauer's testimony based on the prosecution's discovery violation (Petitioner's Br.: 16), the State makes no argument to the contrary, thereby conceding the issue. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

The other concessions relate to the reasons provided by the Court of Appeals to conclude that the challenged statements were admitted for nonhearsay purposes. The Court of Appeals identified three purportedly nonhearsay purposes for admitting the statements:

(1) Sergeant Winterscheidt's state of mind, for how he knew the transaction had been completed to order officers to arrest Barnes;

(2) Agent Clauer's state of mind, to "show why he had taken subsequent investigative steps;" and

(3) The defense "opened the door" by challenging the quality of the investigation.

See State v. Garland Barnes, Appeal No. 2018AP2005-CR, ¶¶33-34.

The State now concedes that both (2) and (3), *supra*, are not valid reasons for admitting the challenged statements. The State acknowledges that, as a result of the United States Supreme Court's decision in ***Hemphill v. New York,*** 595 US ___, 142 S.Ct. 681 (2022), the Confrontation Clause does not permit the introduction of unconfronted testimonial hearsay against a defendant, and therefore Barnes could not have "opened the door" to Sergeant Winterscheidt's testimony describing what Agent Clauer saw (Respondent's Br: 19).

The State's brief also explicitly concedes that reason (2), *supra*, is not a valid nonhearsay basis for admitting the challenged statements. Specifically: "the State did not offer the information provided by Agent Clauer to Sergeant Winterscheidt to explain Agent Clauer's state of mind; 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." (Respondent's Br: 22).

Accordingly, since those issues are conceded (*see* ***Charolais, id.*** at 109), the only contested issues remaining are (a) whether the challenged statements were properly admitted for the nonhearsay purpose of showing the effect of those statements on Sergeant Winterscheidt; and (b) if admission of those statements was error, whether the error was harmless. Barnes will limit his arguments to those issues.

B. The Challenged Statements Were Not Properly Admitted To Show Their Effect On Sergeant Winterscheidt, And Therefore Constituted Testimonial Hearsay

The only nonhearsay purpose identified by the State as supporting admission of Sergeant Winterscheidt's testimony about Agent Clauer's alleged observations was to explain Winterscheidt's actions in instructing the other officers to move in and arrest Barnes (Respondent's Br: 20-26). To support this argument, the State attempts to inject an element

of mystery into the proceedings:

> The critical question that remained unanswered was why police pursued and arrested [Barnes].
>
> …
>
> 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.

(Respondent's Br: 21).

This argument is a red herring. There was no such mystery. Testimony from Sergeant Winterscheidt on direct exam made it perfectly clear that the goal of the controlled buy was to apprehend Garland Barnes for delivering methamphetamines to the informant, Chip Marciniak. Sergeant Winterscheidt testified that Marciniak claimed he could purchase methamphetamines from "Dean" (later identified as Barnes), so the task force arranged recorded calls between Marciniak and "Dean," provided Marciniak a white plastic bag containing pre-recorded buy money, and then followed Marciniak to the arranged location to meet Barnes (R167: 93-108). Sergeant Winterscheidt testified that the transaction occurred quickly, just as he arrived at the scene, and that when Marciniak was driving away Winterscheidt "heard on the radio that the transaction had taken place so I gave the order to take down the suspect" (R167: 109).

This presents a fairly self-explanatory sequence of events; law enforcement set up a controlled buy targeting a suspected drug dealer, the transaction *appeared* to occur as expected, so the police moved in to apprehend the suspect. No reasonable juror would conceivably be left confused as to why the police moved in to stop Barnes, considering the

officers assumed (based on Marciniak's claims) that Barnes was the one delivering the methamphetamines.

In addition to providing the general explanation for why law enforcement stopped Barnes, the State also argues that Agent Clauer's observations provided the specific explanation for why Sergeant Winterscheidt ordered the other officers to converge and stop Barnes. To support this, the State argues that Winterscheidt "did not quote the precise words that were said over the radio to let him know the transaction was done," and claims that part of the information Winterscheidt knew before giving the order was Agent Clauer's supposedly witnessing Barnes deliver the box containing meth (Respondent's Br: 21).

The record shows otherwise. On redirect, the prosecutor specifically asked Sergeant Winterscheidt how he knew the deal was done and what words were said:

> Q. How did you know that the transaction had been completed?
>
> A. Other investigators observing the transaction notified me by radio.
>
> Q. Okay. Do you recall what they said, if anything?
>
> A. I believe the words were something like, it went down, deal is done. Something like that.
>
> Q. Do you know who radioed that to you?
>
> A. I don't recall specifically who radioed that to me.

(R167: 186).

Note that Sergeant Winterscheidt testified to the approximate words he heard ("it went down, deal is done"), which include no reference to any officers witnessing Barnes or Marciniak deliver a box, or which one delivered it. Nor

does Sergeant Winterscheidt identify Agent Clauer as the person providing this information—in fact, Winterscheidt specifically did not recall who provided that information.

If the State's ultimate purpose was really to clear up the mystery of why Sergeant Winterscheidt ordered the other officers to converge and arrest Barnes, the quoted exchange served that purpose. Again, since the task force assumed Barnes was the drug dealer, once they believed the "deal is done," they had cause to apprehend Barnes.

But that wasn't the State's purpose, which is clear from the very next exchange, where the prosecutor asked a leading question designed to put the ultimate fact of guilt before the jury: "Are you aware of any specific officers who saw the transaction that Chip Marciniak described to you where *he tossed in the buy money and Garland tossed in the black box*?" (R167: 186) (emphasis added).

There was no clarification provided on *when* or *how* Sergeant Winterscheidt became "aware" of the information that Agent Clauer allegedly witnessed the actual meth delivery (R167: 186-88). Sergeant Winterscheidt never testified that he specifically became aware of that information prior to ordering the other officers to converge.

The prosecutor's subsequent question seemed design to *imply* that Winterscheidt was aware of that information at the time he gave the order:

> Q. With that information were you then given the code word that the transaction was completed?
>
> A. Yeah, it wasn't a code word. It was just common language to let us know the deal was done.

(R167: 188).

This exchange doesn't provide any real clarification on when or how Sergeant Winterscheidt learned about Agent Clauer's supposed observations.[1] His answer about common language letting him know the "deal was done" seems to refer back to his previous answer, "it went down, deal is done."

The State, as the proponent of the evidence, had the burden of demonstrating it was properly admitted for a nonhearsay purpose. The State therefore had the burden of establishing foundation—that Winterscheidt specifically knew about Agent Clauer's observations *before* giving the order, because otherwise anything Clauer observed logically could have no effect on Sergeant Winterscheidt's actions. The failure to provide this foundation negates any argument that Clauer's observations were admissible to explain what Winterscheidt did next.

The prosecutor's real purpose was clear: to cure the deficiency in the State's case caused by the fact that none of the testifying officers saw the hand-to-hand transaction and there was no video or photographic evidence of the actual transaction, the prosecutor placed before the jury the claim that a non-testifying officer supposedly witnessed Barnes deliver the box of methamphetamines. Any claim that this evidence impacted Winterscheidt's state of mind at the time he ordered officers to converge is simply disingenuous.

The State cites two cases, ***Hanson*** and ***Medrano,*** to support the proposition that out of court statements "touching upon guilt or innocence" can be properly admitted for purposes other than to prove the truth of the matter asserted (Respondent's Br: 23-24). Neither case is remotely comparable to the facts here, where the challenged statements involve one police officer claiming that a non-testifying

[1] Note that the court had already admitted Sergeant Winterscheidt's testimony about Agent Clauer allegedly making those observations prior to the prosecutor's question which attempted to imply Winterscheidt knew that information before giving the order to move in.

officer witnessed the defendant commit the charged crime.

The court in ***State v. Medrano***, 84 Wis.2d 11, 267 N.W.2d 586 (1978), found that a rape victim's statements to a doctor that she had been raped were admissible to show why the doctor performed the physical examination. Neither that statement, nor any of the other statements alleged to be hearsay, identified a perpetrator—they involved statements that the victims claim to have been raped. ***Id.*** at 19-20 ("None of the statements referred to any of the six defendants as a perpetrator of the crimes"). Moreover, the victim, initials D.K., actually testified at trial, and was subject to cross-examination. *See* ***Id.,*** 22.

The statements at issue in ***State v. Hanson***, 2019 WI 63, 387 Wis.2d 233, 928 N.W.2d 607, are also not comparable. ***Hanson*** involved a John Doe inquiry where the prosecutor questioned the defendant about whether his estranged wife (Kathy) had ever accused him of killing the victim, and about his knowledge that Kathy told police that Hanson had killed the victim. ***Id.,*** ¶21. Kathy died prior to the John Doe proceeding and trial, and could not testify against Hanson. ***Id.,*** ¶¶8-9. The Wisconsin Supreme Court found that the statements were admissible for the nonhearsay purpose of consciousness of guilt, because Hanson had told multiple people that his wife's death was the "best thing that ever happened" to him, creating an inference that Hanson was glad Kathy was dead so she could not testify that he killed the victim. ***Id.,*** ¶¶23-27. These statements also merely duplicated the testimony from two other witnesses that Hanson confessed the killing to Kathy, and another witness that Kathy told the police Hanson killed the victim. ***Id.,*** ¶14.

This case, by contrast, presents a situation that the 7th Circuit has repeatedly cautioned state courts against: admitting damning evidence from non-testifying witnesses ostensibly to explain why officers investigated a defendant:

> When the reasons for the police's actions are relevant, a witness can testify about what information prompted those actions. That is, when such a statement is offered only to show the effect it had on the police, it is used for a purpose other than the truth of its contents.
>
> …
>
> The problem, as we have explained time and again, is that the "course of investigation" gambit is so often abused and/or misunderstood that it is an evidentiary and constitutional minefield. … To convict a defendant, after all, the prosecution does not need to prove its reasons for investigating him. … When the prosecution offers out-of-court statements of nonwitnesses on the theory they are being offered to explain "the course of the investigation," it runs a substantial risk of violating both the hearsay rules of evidence and the Confrontation Clause rights of the defendant under the Sixth Amendment.

Carter v. Douma, 796 F.3d 726, 736-37 (7th Cir. 2015) (internal citations omitted).

Whereas most of the cases cited in ***Carter*** involved references to prejudicial information that informants provided to law enforcement about a defendant's *prior* conduct, the hearsay in this case is even more damaging because it involves the claim that a police officer—whom jurors would likely view as more credible than an informant—directly observed the defendant commit the charged crime. It is testimonial hearsay, and cannot legitimately be offered to show why police apprehended Barnes without violating his confrontation rights.

The potential remedies suggested by the State—that Barnes could have called Agent Clauer as a witness, or requested a curative jury instruction (Respondent's Br: 26)—are no remedies at all. The idea that the State can present evidence in violation of the defendant's confrontation rights, and the error can be cured by the defendant calling the

witness—an adverse witness, a law enforcement officer claiming to have witnessed the defendant commit the crime—is nonsensical. This is particularly true when the witness was excluded by the court as a sanction for the State's "egregious" discovery violation, itself a remedy for the defense which the State effectively negated by presenting Agent Clauer's hearsay observations.

Finally, no jury instruction limiting the purpose of the testimony could have been effective under the circumstances, where the entire controversy involved who delivered the box of meth, and the State presented evidence that a non-testifying officer observed the defendant deliver the box with meth. *See* ***Dunn v. United States***, 307 F.2d 883, 886 (5th Cir. 1962) ("It is better to follow the rules than to try to undo what has been done. Otherwise stated, one "cannot unring a bell;" alternatively, "if you throw a skunk into the jury box, you cannot instruct the jury not to smell it").

C. The Violation Of Barnes' Confrontation Rights Was Not Harmless

A violation of the defendant's confrontation rights is only harmless if the beneficiary (the State) can prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***State v. Stuart,*** 2005 WI 47, ¶40, 279 Wis.2d 659, 695 N.W.2d 259, citing ***Chapman v. California***, 386 U.S. 18, 24 (1967).

The State acknowledges that the importance of Agent Clauer's observations was "significant," but argues that the error was harmless because it occurred infrequently (Respondent's Br: 31). The State further argues that the error was harmless beyond a reasonable doubt "[b]ecause the remaining trial evidence does not support his theory," and points to evidence supporting guilt that it deems convincing (Respondent's Br: 28-31). Of course, the jury need not accept a defendant's theory of innocence to acquit; it need only have

a reasonable doubt about the State's evidence of guilt. And the evidence relied upon by the State leaves ample room for reasonable doubt.

First, the State points to two recorded phone calls, the second and third calls arranged by the task force. The 2nd call, which the State acknowledges is mostly "innocuous," ends with Marciniak asking, "[H]ey, what do you got then"—a question the State acknowledges is ambiguous, and could support either the theory that Barnes was selling to Marciniak, or the defense theory that Barnes was buying drugs from Marciniak (Respondent's Br: 28-29). Further, Marciniak agreed he asked that question "[a]fter the phone is hung up" (R166: 127). This call adds nothing to the analysis.

The State places greater emphasis on the 3rd recorded call, the only one which allegedly contains any discussion of drugs (R166: 127-28), and specifically the statements Marciniak makes during that call (Respondent's Br: 29). Since the defense alleged that Marciniak was setting Barnes up, creating the *appearance* that he was buying from Barnes, the fact that Marciniak is recorded making such statements is not inconsistent with the defense theory. More importantly, Barnes is not recorded making *any* statements during that call, leaving the jury to rely on the recollections of Marciniak and Sergeant Winterscheidt.

Considering Marciniak had 25 prior criminal convictions and became an informant specifically to work off his charges of delivering meth (R167:92-93,156), had received an extremely lenient plea deal involving probation and one day of jail for his own delivery charges (R166:45-46;115-16), and admitted under oath that "I'll do everything to get out of [jail]" (R166:108), his credibility was virtually non-existent. And Sergeant Winterscheidt had demonstrably lied under oath *in this trial* about the wire recording. Thus the State's strongest corroborating evidence leaves plenty of room for reasonable doubt.

The presence of the prerecorded buy money on the passenger-side floor of Barnes' vehicle is completely consistent with his theory of defense that Marciniak was setting him up—to complete the setup and make police believe Barnes was the seller, Marciniak tossed the money (provided to him by the police, not his own money) into Barnes' vehicle. Similarly, the facts that Barnes was present in the vehicle at the time of the stop, and that he attempted to flee from the officers (Respondent's Br: 30), are both consistent with the defense theory that Barnes was present to purchase illegal drugs for his girlfriend and would not want to be stopped by police.

The other applicable factors weigh heavily in favor of the error not being harmless, including the nature of the defense, the nature of the State's case, and whether the erroneously admitted evidence duplicates untainted evidence. *See* ***Stuart,*** ¶41. Since the entire controversy was whether the State could prove Barnes delivered the box containing meth, the erroneous admission of hearsay testimony about Agent Clauer supposedly witnessing Barnes deliver the box containing meth is material to the nature of the defense and the State's case. And the fact that none of the testifying officers witnessed the transaction, nor was there any video or photographic surveillance to capture it, means Agent Clauer's observations did not duplicate any untainted evidence. No other witnesses directly corroborated Marciniak's claim about Barnes delivering him the meth.

The error was not harmless beyond a reasonable doubt, and Barnes is entitled to a new trial.

CONCLUSION

For the reasons stated above, Barnes respectfully asks the court to reverse the decisions below and grant a new trial.

Respectfully submitted: September 7, 2022.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,997 words.

Signed September 7, 2022.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and will be served on all opposing parties.

Signed September 7, 2022.

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