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SUPREME COURT

STATE OF WISCONSIN

SUPREME COURT

Case No. 2019AP001597-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES LEE BALLENTINE,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

THOMAS B. AQUINO
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

ISSUE PRESENTED

Whether the trial court erroneously prohibited the defendant from introducing evidence of a prior instance of a cooperating witness hiding drugs from the police while being searched, when the defense at trial was that the cooperating witness had similarly hidden from the police drugs supposedly purchased from the defendant.

The circuit court only allowed the defendant to introduce evidence that the witness generally knew how to hide drugs, and prohibited admission of evidence of the details of the prior incident. The Court of Appeals held *sua sponte* that the defendant forfeited any argument concerning admission of the details of the prior incident.

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REASONS FOR GRANTING REVIEW

Courts and commentators alike have criticized appellate courts for resolving cases based on arguments not advanced by the prevailing party. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008); *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment); *Bartus v. Wisconsin Dep't of Health & Soc. Servs., Div. of Corr.*, 176 Wis. 2d 1063, 1073, 501 N.W.2d 419, 424 (1993); Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 273 (2002). *Sua sponte* decisions are antithetical to the conception of the court as a neutral arbiter that is fundamental to our adversarial system of law, lead to factual and legal errors due to the arguments being untested by the adversarial process, and further burden already busy courts.

Here, the Court of Appeals held *sua sponte* that the petitioner forfeited the evidentiary issue raised on appeal. The court's decision overlooks important factual and legal considerations that would have been raised by the petitioner if the State had raised forfeiture in response to the petitioner's appeal. For instance, the Court of Appeals did not recognize that the petitioner sought to introduce the evidence at issue with a motion in limine, or that forfeiture is a matter of judicial policy, not an immutable matter of law. Review is appropriate to address when the Court of Appeals should decide matters *sua sponte*, and when

the court should instead request briefing, hold oral argument, or just let the matter lie unaddressed.

Review is also warranted to address the proper application of the forfeiture doctrine in criminal cases. The Court of Appeals here applied forfeiture strictly. The trial court only partially granted the petitioner's motion in limine to introduce other act evidence of the state's cooperating witness. According to the Court of Appeals, the petitioner forfeited any argument that this limited ruling was inadequate, because the petitioner did not challenge the trial court's ruling after it was made.

The petitioner is unaware of the courts applying forfeiture in similar circumstances, and indeed the ruling seems contrary to prior cases holding that motions in limine preserve issues for appeal. *State v. Bergeron*, 162 Wis. 2d 521, 528, 470 N.W.2d 322, 324 (Ct. App. 1991). Thus, it appears that any claim that trial counsel was ineffective for failing to make such arguments in the trial court would fail. *State v. Lemberger*, 2017 WI 39, ¶ 18, 374 Wis. 2d 617, 628, 893 N.W.2d 232, 238. Accordingly, the petitioner is left without an avenue on appeal to challenge the trial court's decision. Review should be granted to address this gap in the law.

Finally, the petitioner is entitled to relief on the merits. The petitioner had filed a motion in limine seeking to introduce evidence of the complaining witness hiding drugs from the police while being searched, in order to suggest that when the witness

supposedly purchased drugs from the petitioner during a controlled buy, the drugs later given to the police had actually been hidden by the witness on his person before the police searched him and sent him to make the buy. The circuit court issued a compromise decision, allowing the petitioner only to ask the witness if he "knew how to hide drugs," and would not allow the petitioner to call witnesses about the details due to time considerations. However, those details were crucial to demonstrate the extent of the witness's knowledge, as well as the witness's actual ability to hide drugs from the police. The circuit court's ruling excluding the evidence was clearly erroneous.

STATEMENT OF THE CASE

The State filed a criminal complaint against the petitioner, James Lee Ballentine, on April 12, 2017, asserting five counts. (1).[1] Specifically, the State charged Ballentine with three counts of Delivery of cocaine (1-5g) on or near a youth center, Wis. Stat. § 961.41(1m)(cm)1r & 961.49(1m)(b)(5); one count of possession with intent to deliver cocaine (1-5 g) on or near a youth center, Wis. Stat. § 961.41(1m)(cm)1r & 961.49(1m)(b)(5), and one count of possession of THC. The complaint alleged that Ballentine, a youth center employee, delivered cocaine to a confidential informant on three separate occasions, and that police executing search warrants found additional cocaine in the youth center and marijuana at Ballentine's home. The State later disclosed that the confidential informant was Denmark James.[2] (13; 46:116).

Prior to trial, Ballentine moved to admit evidence of Denmark's ability to hide drugs from police officers despite being searched. (13). In 2015, Denmark had been arrested, searched, and brought to the Racine Police Department for questioning. (13:1-2). Denmark was taken to the bathroom during a break in the questioning, and surreptitiously dropped

[1] The complaint notes that it is a "reissue" of Racine County Case No. 2016CF604. This case no longer appears online on CCAP, under the policy of removing criminal cases two years after a dismissal.

[2] To avoid confusion with the petitioner, James Ballentine, Denmark James will be referred to in this petition by his first name.

drugs that he had hidden somewhere on his person. (13:1-3). Police later discovered the drugs in the hallway leading to the bathroom. (13:3). Denmark was subsequently charged with possession of heroin and THC, among other drug counts, in *State v. Denmark James*, Racine County Case no. 2015CF1565. (13:1)[3]

At a hearing on the motion, the trial court held that Denmark's knowledge of how to hide drugs was relevant. (44:35-37; App. 124-126). However, the court prohibited Ballentine from introducing evidence regarding the Racine Police Department incident, unless Denmark denied during cross-examination that he knows how to hide drugs. (*Id.*)

A jury was selected on September 19, 2017, and the trial was held the next three days. (45-48). The jury found Ballentine not guilty of one count of delivery and of possession of the THC, but found him guilty of the remaining three charges. The court sentenced Ballentine to four years of initial confinement and three years of extended supervision on one count, and on the remaining counts imposed and stayed ten year prison sentences for a period of five years of probation. The court issued a corrected judgment of conviction on February 14, 2018, clarifying that probation was to run concurrent to his prison sentence. (38; App. 127).

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[3] Ballentine's offer of proof in the motion in limine refers to the Racine County criminal case. (13:1). Ballentine asks the court to take judicial notice of the specific drug charges filed in that case and found on CCAP.

Ballentine appealed, and on January 20, 2021, the Court of Appeals issued a decision affirming the judgment. Ballentine filed a motion to reconsider, which the Court of Appeals denied on February 16, 2021.

The Court of Appeals decision largely states the facts necessary to decide this petition. Wis. Stat. § 809.62(2)(d). However, as discussed in context below, the decision does not address significant facts related to Ballentine's presentment and preservation of the relevant issue.

ARGUMENT

I. Review is warranted to address the extent to which the Court of Appeals may decide a criminal case on grounds not raised by the State.

"As a matter of Wisconsin constitutional law, the right to an appeal is absolute[.]" *State v. Perry*, 136 Wis. 2d 92, 98, 401 N.W.2d 748, 751 (1987) (*citing* Wisconsin Const., art. I, § 21(1)). In fact, "a thread runs through our entire jurisprudence that there not only be a right to appeal, but that the appeal be a meaningful one." *Id.* at 99.

An appellant does not have the benefit of a meaningful appeal when the court abandons the adversarial system that is at the heart of the Anglo-American legal tradition, and instead decides a case on an issue not raised or briefed by the prevailing party. "Our adversary system is designed around the

premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief. *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment).

There are at least three reasons for this Court to direct the Court of Appeals to eschew deciding cases *sua sponte*, and to instead order briefing or oral argument to address dispositive issues not addressed by the parties, or simply refrain from addressing the issue at all.

First, we have an adversarial system of law, where the judge sits in equipoise between the parties, and not the inquisitorial system found in continental Europe where the "judge dominates the proceeding and often appears to move relentlessly toward a predetermined result of conviction." *In re S.M.H.*, 2019 WI 14, ¶ 28 & n. 13, 385 Wis. 2d 418, 438, 922 N.W.2d 807, 817 (citation and quotation marks omitted). This commitment to neutrality is one of the basic protections afforded by the due process clause. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009); *State v. Herrmann*, 2015 WI 84, ¶ 25, 364 Wis. 2d 336, 348, 867 N.W.2d 772, 778. *Sua sponte* decisions are similarly contrary to a defendant's due process rights "to be heard" and to "present a complete defense." *In re Termination of Parental Rights to Daniel R.S.*, 2005 WI 160, ¶65, 286 Wis.2d 278, 706 N.W.2d 269 (citation and quotation marks omitted).

For these reasons, the United States Supreme Court has explained its commitment to "follow[ing] the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). The Wisconsin Court of Appeals has also given voice to this principle, stating on more than one occasion "[w]e will not abandon our neutrality to develop arguments for the parties." *See, e.g., State v. Anderson*, 2017 WI App 17, ¶ 28, 374 Wis. 2d 372, 392, 896 N.W.2d 364, 373.

Here, however, the Court of Appeals did abandon its neutrality, by entirely developing a forfeiture argument not raised by the State. This creates an impression that the court was sitting not in equipoise between the parties, but searching for a reason to decide against Ballentine.

The second reason the Court of Appeals should refrain from developing its own legal arguments *sua sponte* is that it leads to mistakes. The parties will understand the record better than the courts, and courts benefit from the parties' development of the legal arguments. Indeed, for this very reason this Court has previously criticized *sua sponte* statutory interpretations by the Court of Appeals.

> Statutory interpretation is a complex task, requiring courts to weigh many variables before arriving at a balanced and reasonable construction of legislative intent. Unlike legal defects that can frequently be resolved without assistance from litigants, statutory interpretation

> is an area in which the courts usually should be willing to delay their determination until they have the assistance of briefs. The instant decision might not have required this review had the Court of Appeals permitted the parties to file supplemental briefs. We therefore urge the courts to exercise caution when determining an issue *sua sponte* without the assistance of supplemental briefs and to ask for briefs unless the matter is quite clear.

Bartus v. Wisconsin Dep't of Health & Soc. Servs., Div. of Corr., 176 Wis. 2d 1063, 1073, 501 N.W.2d 419, 424 (1993).

As detailed below, the Court of Appeals decision did not address several factual and legal issues related to forfeiture. For instance, the Court of Appeals criticized trial counsel for not arguing that the details of the prior incident were relevant and admissible, without acknowledging that (1) Ballentine filed a motion in limine seeking admission of these details and (2) the court's decision – that Ballentine could ask the cooperating witness only "if he knew how…" – was a compromise with the state's position that none of the evidence was admissible, and Ballentine did not have an opportunity to argue the compromise was inadequate. In addition, the Court of Appeals did not address an important legal aspect of the forfeiture doctrine, *i.e.* that it is a matter of policy that the court need not enforce.

The third reason for the Court of Appeals to refrain from developing one party's legal arguments independently is to promote judicial efficiency. The

courts are busy enough, and do not need to spend time developing arguments for the parties. Indeed, it took the court here 10 months from the end of briefing to issue a decision. Counsel is familiar with a termination of parental rights case where the Court of Appeals took eight months to issue a decision that was based on a *sua sponte* statutory interpretation; the *sua sponte* nature of the court's ruling, as well as its questionability on the merits, may have been factors in this Court subsequently granting review. *Eau Claire County Department of Human Services v. S. E.*, Appeal No. 2019AP000894.

The Court of Appeals should simply refrain from considering issues not raised by the parties. If, however, the court believes that justice requires it consider a significant issue missed by the parties, the court may order additional briefing or hold oral argument.

II. Review is warranted to address the proper application of the forfeiture doctrine in criminal cases.

The Court of Appeals took a strict view of the forfeiture doctrine. Even though Ballentine's counsel filed a motion in limine to introduce the details of the prior incident, the Court of Appeals held that Ballentine forfeited any argument that those details were admissible.

First, counsel filed a pre-trial motion explicitly seeking the introduction of the details of the incident as "other act" evidence. (R.13:1-2). The January 20

decision does not acknowledge that "[a] defendant who has raised a motion in limine generally preserves the right to appeal on the issue raised by the motion[.]" *State v. Bergeron*, 162 Wis. 2d 521, 528, 470 N.W.2d 322, 324 (Ct. App. 1991).

Second, the January 20 Decision does not acknowledge that the trial court's ruling was a compromise between the defense and prosecution positions, and that trial counsel did not have a real opportunity to explain why the compromise was inadequate before the court made its ruling. At the hearing on the motion, trial counsel again sought introduction of the details of the 2015 incident. (R.44:30). The trial court clarified that defense counsel's purpose in introducing the 2015 incident would be to demonstrate the CI's "capacity to conceal drugs on his person," not motive or bias. (R.44:30-31). In response, the prosecution argued that the "substance" of the 2015 incident was inadmissible, but did concede to the *trial court*'s point that the CI could be asked "you know very well how to conceal drugs on your person so that they won't be found in a cursory search." (R.44:33).

After a brief digression, the court returned to make a ruling on the "specific points" raised by defense counsel. (R.44:36). The trial court observed that the prosecutor "concede[s] you [can] ask him whether he knows how to conceal drugs on his person so that they wouldn't be found in [a] cursory search. And then you get the answer you get." (R.44:36). Later on in its ruling, the court stated "you can ask him the question.

If he says no, then I will admit this evidence." (R.44:36). Ballentine is unaware of any case law holding that trial counsel must make a specific argument as to why a trial court's compromise ruling is inadequate.

Third, the January 20 Decision misread two comments by defense counsel as indicating that he was only seeking introduction of the CI's general knowledge of how to conceal drugs on his person. (App. 109-10). When counsel states "that's the information I am seeking here," that is in response to a digression into whether defense counsel could question the CI about having a pending case at the time he cooperated against Ballentine, and the state conceding that he could. (R.44:34-35). When counsel states "That's what I'm looking for" after the court's ruling, it was not a comment about the substance of the ruling, but about the fact that the court was making a ruling. (R.44:36). Immediately before the court's ruling the prosecutor pointed out that "I think [defense counsel] is looking for a ruling on kind of specific points. Right?" (R.44:35).

Indeed, it is clear that the parties and the court understood that defense counsel wanted to introduce evidence of the details of the 2015 incident. The court ruled that defense counsel *could* get into the details, but only if the CI denied any knowledge of how to hide drugs on his person. (R.44:36). And during the trial itself, counsel observed that because the CI admitted this basic knowledge, "the Court wouldn't allow any further testimony as to the nature of what happened

or why he did it." (R.46:232). Counsel stated that he had witnesses under subpoena, "[b]ut I don't think the Court will permit me to go into that based on the ruling last week." (*Id*.)

Fourth, the January 20 Decision states that the trial court's ruling gave trial counsel more leeway to ask details. However, trial counsel's question tracked the trial court's ruling. The court ruled "you can ask [the cooperating witness] whether he knows how to conceal drugs on his person so that they wouldn't be found in a cursory search." (R.44:35). Hewing closely to the court's ruling, trial counsel asked the witness "in the past you have concealed drugs on your person so people can't find them. Right?" and "You know how to do that so they won't be found during a search of your person. Right?" (R.46:188).

Finally, the January 20 Decision does not acknowledge that the forfeiture rule "is one of judicial administration and does not limit the power of an appellate court in a proper case to address issues not raised in the circuit court. [An appellate] court has the power in the exercise of its discretion, to consider issues raised for the first time on appeal." *State v. Caban*, 210 Wis. 2d 597, 609, 563 N.W.2d 501, 506–07 (1997) (citation omitted). Indeed, strict application of the forfeiture doctrine in these circumstances will not promote judicial economy and may result in certain decisions in a criminal case unreviewable, with the defendant having to pay the price.

Application of the forfeiture rule here means that in addition to raising this claim on direct appeal, Ballentine should have filed a postconviction motion asserting that he was deprived of the effective assistance of counsel because defense counsel did not gainsay the trial judge after his ruling, and explain more fully why the details of the 2015 incident were relevant. However, "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). Indeed, "counsel's failure to raise a novel argument does not render his performance constitutionally ineffective." *State v. Lemberger*, 2017 WI 39, ¶ 18, 374 Wis. 2d 617, 628, 893 N.W.2d 232, 238 (cleaned up).[4] Thus, if a reasonably competent attorney would believe that an issue is preserved, but an appellate court concludes that it is not preserved, the defendant can neither argue that counsel was ineffective nor that the issue was preserved.

Review should be granted to address whether forfeiture should be applied under these circumstances.

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[4] "'Cleaned up' is a new parenthetical used to eliminate unnecessary explanation of non-substantive prior alterations." *United States v. Steward*, 880 F.3d 983, 987 (8th Cir. 2018).

III. The circuit court erroneously prohibited Ballentine from introducing evidence of the cooperating witness previously hiding drugs from police while being searched.

Ballentine's defense – "I was framed!" – may have seemed desperate and implausible to the jury. After all, it meant that Denmark was able to hide drugs somewhere in his clothes or on his body in a way that police could not find them before his meetings with Ballentine. The average jury would likely find it hard to believe that professional law enforcement officials, trained and experienced in searching people for drugs, would have missed drugs hidden on Denmark.

On the contrary, Denmark does have the knowledge and skill to hide drugs from police officers searching his person from drugs, as demonstrated by him successfully hiding drugs from Racine police officers after they arrested him for drug dealing. Although the court acknowledged that Denmark's knowledge and ability to hide drugs on his person was relevant, it unnecessarily and erroneously prevented Ballentine from bringing to the jury's attention the details of Denmark success in hiding drugs from the police. This handcuffed Ballentine's defense, and he is entitled to a new trial.

A. The circuit court erroneously exercised its discretion in holding that the probative value of the details of Denmark successfully hiding drugs from the police would be substantially outweighed by time considerations.

As a general rule, a party may not claim that a person has a particular character trait that caused the person to act in a given manner. Wis. Stat. § 904.04. "Other acts" by a person – that is, acts other than the acts that are the subject of the criminal or civil action – may illustrate the person's character and will offend the rule if offered for that purpose. However, other acts may be offered for myriad purposes other than to show the person's character, such as the person's knowledge, intent, *modus operandi*, etc. Wis. Stat. § 904.04(2).

In *State v. Sullivan*, 216 Wis.2d 768, 782-83, 576 N.W.2d 30 (1998), the court recognized that all "other act" evidence must pass three evidentiary rules. First, as discussed above, the other act evidence must be offered for an acceptable purpose, *i.e.*, not to show the person's "character." Wis. Stat. § 904.04(2)(a). Second, the other act evidence must be "relevant," i.e. it must actually tend to prove or disprove a fact at issue. Wis. Stat. § 904.01. Third, the probative value of the evidence cannot be substantially outweighed by the danger of unfair prejudice, time considerations, or similar factors. Wis. Stat. § 904.03.

When reviewing a decision to exclude other act evidence, "[a]n appellate court will sustain [the] ruling

if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Sullivan*, 216 Wis. 2d at 780–81. Each step of the *Sullivan* analysis is discussed in turn below.

1. Denmark's hiding of the drugs was offered for a proper purpose.

The court correctly determined that the evidence was being offered for a proper purpose: Denmark's knowledge and capacity to hide drugs from the search of a police officer. (44:35-36; App. 124-125).

Section 904.04 provides that

> evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Wis. Stat. § 904.04(2).

Ballentine did not offer the evidence to show any sort of character trait of Denmark. Instead, it was to demonstrate that he possessed the knowledge and skill to successfully hide drugs during a police search of his person. (44:30-31; App. 119-120).

Demonstration of a person's "knowledge" is explicitly listed as a proper purpose under section

904.04(2). A person's skill is similarly a proper purpose, rather than impermissible character evidence. It is one thing to know how a magician performs a trick or illusion; it is another matter entirely to have the skill to pull it off. *Johnson v. Misericordia Cmty. Hosp.*, 97 Wis. 2d 521, 550, 294 N.W.2d 501, 516 (Ct. App. 1980), *aff'd,* 99 Wis. 2d 708, 301 N.W.2d 156 (1981) (noting that evidence of doctor's "skill" was not impermissible character evidence).

Importantly, Ballentine was not offering this episode merely to show that Denmark had an untruthful character. A witness's untruthful character is one of the few exceptions to the anti-propensity evidence rule. Wis. Stat. § 904.04(1)(c). However, if a party wishes to attack a witness's character for truthfulness by pointing to "[s]pecific instances of … conduct," the party cannot use extrinsic evidence. Wis. Stat. § 906.08(2). The party is limited to questioning the witness about the specific instance on cross-examination. *Id.* There is no such limitation where, as here, the evidence is being offered to show knowledge, skill, etc., and not the person's "character."

2. Denmark's demonstrated ability to hide drugs from the police was relevant to his defense.

The circuit court correctly concluded that evidence that Denmark successfully hid the drugs was "relevant," *i.e.* that it had a "tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01.

Denmark had a *motive* to falsely implicate Ballentine as a drug dealer: Denmark had been arrested on drug charges, and the government promised him leniency if he produced evidence that Ballentine was a drug dealer. (46:112, 116). Evidence that Denmark had successfully hidden drugs from a police search of his person would demonstrate that he also had the *means* to falsely implicate Ballentine.

A juror would probably not expect that a person would be able to hide drugs from a searching police officer, and would find Ballentine's defense unlikely. However, Denmark's prior instance of hiding drugs from the police not only demonstrates that it is possible to hide drugs from the police, but that Denmark himself possesses the knowledge and skill to do so. This evidence thus makes Ballentine's defense "more probable" and thus relevant. Wis. Stat. § 904.01.

3. The court's determination that the probative value of Denmark's successful attempt to hide drugs from the police was substantially outweighed by time considerations was an erroneous exercise of discretion.

Where the court erred was in determining that the evidence should be excluded because "its probative value [was] substantially outweighed … by

considerations of … waste of time." Wis. Stat. § 904.03. The court's entire analysis is as follows:

> [The prosecutor] concede[s] you can ask [Denmark] whether he knows how to conceal drugs on his person so that they wouldn't be found in a cursory search. And then you get the answer you get. I will tell you if the guy says no, well then it seems to me that the probative value of this evidence far exceeds any prejudicial value that it may have and it comes in.
>
> …
>
> But to this point to some extent I am influenced by the fact that I don't know this evidence is particularly necessary. It seems like common sense to me that people can conceal drugs on their person such they would not be found in the cursory search. That may not be common sense to the jury. That's why you can ask him the question.
>
> If he says no, then I will admit this evidence. However, my analysis at this point is this. A, it's offered for [a] permitted purpose. B, does it tend to prove that. Yes. C., given that it's a fairly mundane area that I think probably falls within simple common sense[,] I don't see it compellingly probative unless, as we have discussed, the witness disputes it, at which point it becomes very probative. And it may in fact be gone into by you, A, by confronting him with it on cross-examination. Isn't it true on such and such a date. But B, I would then allow you to present witnesses to the other act as well. …
>
> That's my ruling. You can go into the area. It would be time wasting to present evidence on it if it's not in dispute. You will know that by the time you get to your case because you will have done your cross-examination. If he was conceding the

> point, we get your case, I won't let you waste time by introducing evidence on [a] conceded point.

(44:35-36; App. 125-126).

The court erroneously exercised its discretion in weighing whether the probative value of the evidence was substantially outweighed by considerations of time. The court did not "examine[] the relevant facts" and employ a "rational process." *Sullivan*, 216 Wis. 2d at 780–81.

First, the court's rumination that a person's ability to hide drugs from the search of a police officer is "fairly mundane" and "falls within simple common sense" is highly dubious. Perhaps a judge experienced in criminal law will have seen the many ways that drugs may be hidden from the search of a police officer. However, the common juror would likely expect that police officers know what they are doing, and are able to find drugs hidden on a person.

Second, the court's reasoning for why the evidence became more probative if Denmark denied knowing how to hide drugs is not rational. Ballentine is unaware of any cases holding that the probity of other act evidence depends on the actor admitting or denying the other act. Indeed, in criminal cases, a defendant's other acts are almost always introduced by someone other than the defendant, due to the defendant's Fifth Amendment right not to testify at all. Simply put, other act evidence is relevant because the other act occurred, not because the actor denies it occurred.

The court may have been reasoning that if Denmark makes a general admission of knowing how drugs can be hidden, nothing can be gained from evidence detailing Denmark's specific instance of hiding drugs from the police. However, Wisconsin courts have soundly rejected this view. A party's right to present a full case generally prevents the other party from attempting to avoid uncomfortable evidence by stipulating to certain elements.

> When a court balances the probative value against the unfair prejudicial effect of evidentiary alternatives, the court must also be cognizant of and consider a party's need for evidentiary richness and narrative integrity in presenting a case. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight. The persuasive power of a narrative story is an essential ingredient to the State's right to prosecute. Substituting concrete tangible evidence with abstract assertions is an unsatisfactory substitute for telling a complete story. …
>
> Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.

State v. Alexander, 214 Wis. 2d 628, 648–50, 571 N.W.2d 662, 670–71 (1997) (quotation marks and citations omitted). *Sullivan* itself held that the details of the other act evidence are what provides its probity. 216 Wis. 2d at 786-87.

The court's limitation of the evidence to the abstract point that Denmark knew how to hide drugs greatly reduced the rhetorical punch of this evidence. Hewing closely to the court's ruling, Ballentine limited his cross-examination of Denmark on this point to whether he had "concealed drugs on [his] person so people can't find them" and that he "know[s] how to do that so they won't be found during a search of [his] person." (46:188). Denmark answered affirmatively to both questions, so defense counsel could not delve further.

The court's ruling thus prevented the jury from hearing numerous relevant details beyond the abstract point that Denmark knew how to hide drugs.

First, Denmark knew how to hide drugs from the police, not just "people." Of course, it would be more difficult to hide drugs from a member of the lay public than a police officer.

Second, Denmark did not just "know" how to hide drugs from the police, he actually hid drugs successfully from the police. This demonstrates that he did not have just the know-how, but the skill to hide drugs.

Third, Denmark had hidden the drugs after being arrested and searched on suspicion of drug charges. Thus, the arresting officers would have been just as motivated to find drugs on Denmark as the supervising officer in this case, if not more so. Denmark's ability to hide drugs despite this fact further suggests a high degree of skill and knowledge.

Fourth, Denmark hid the drugs from the same police department, suggesting that he knew the specific methods the police department used to search for drugs.

Fifth, Denmark likely did not have much, if any, warning that he was going to be arrested. He thus had more time to hide the drugs before each controlled purchase.

Finally, the manner in which the drugs were found in the Racine Police Department refutes the State's suggestion that the only way to hide drugs from a police search is by inserting them anally. (47:75-76). The drugs were found in the hallway after Denmark had been escorted to the bathroom. (13:1-3). It is implausible that Denmark would have been able to extract drugs from his anus without the escorting officer noticing. This suggests Denmark had some other method of hiding drugs from the police that he could have used before the alleged controlled purchases.

All of these details give a weight and substance absent from a bare, abstract statement about Denmark's knowledge of how to hide drugs. The details more firmly establish Denmark's proven ability to hide drugs from the police, and make it more likely that he was able to hide drugs from the police when they searched him before he made the alleged controlled purchases from Ballentine.

Finally, the court failed to consider the "relevant facts" concerning how much time it would have taken

to question Denmark about the details of the prior incident. *Sullivan*, 216 Wis. 2d at 780–81. In order to properly assess whether the probative value of this evidence was "substantially outweighed by … considerations of time wasting," the court would necessarily have to consider how much time would actually be taken to introduce the evidence. Wis. Stat. § 904.03. The court made no such assessment.

Indeed, asking Denmark about the details of his prior instance of hiding drugs from the police would not have prolonged the trial in any significant way. The questioning would amount to perhaps a dozen additional questions, a paltry amount considering the three days of evidence heard during the trial. Plus, the court was prepared to allow Ballentine to call additional witnesses if Denmark *denied* knowing how to hide drugs. Surely, calling additional witnesses would have prolonged the trial more than asking Denmark additional questions on cross-examination.

In sum, there was no rational basis for the court to prohibit Ballentine from introducing the details of Denmark hiding drugs from the police only if Denmark denied knowing how to hide drugs during a search. The details increased the probity of this evidence, and would not be substantially outweighed by considerations of time.

B. The failure to admit the evidence was 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 (citation and quotation marks omitted). When determining whether an error is truly "harmless," the court considers the totality of the circumstances, including the nature of the defense. *State v. Beamon*, 2013 WI 47, ¶ 27, 347 Wis. 2d 559, 576, 830 N.W.2d 681, 690; *Mayo*, 2007 WI 78, ¶ 48; *see also Jensen v. Clements*, 800 F.3d 892, 903-06 (7th Cir. 2015) (granting federal habeas relief where harmless error analysis by state appellate court erroneously considered only evidence supporting conviction).

Denmark's ability to hide drugs from the police was central to Ballentine's defense. It provided an alternative explanation for how Denmark was able to provide the drugs to the police after he allegedly made the purchases from Ballentine. And while it may seem unlikely in the abstract that Denmark would be able to hide drugs from professional law enforcement officials, the fact that he had done so before in even more difficult circumstances demonstrates that he has the skill to pull it off.

Further, the video and audio recordings do not show actual drug transactions. Thus, the State's case depended on Denmark's credibility. However, the jury acquitted Ballentine of committing the first drug transaction, signaling that it had significant concerns about his credibility.

Consequently, there is a "reasonable probability" that the outcome of the trial would have been different if the evidence had been admitted.

CONCLUSION

For the reasons stated above, the court should grant the petition to review.

Dated this 18th day of March, 2021.

Respectfully submitted,

Thomas B. Aquino
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATIONS

I hereby certify that this petition conforms to the rules contained in § 809.19(8)(b) and (c) and § 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 5,504 words.

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12) and § 809.62(4)(b). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

I hereby certify that filed with this petition, either as a separate document or as a part of this brief, is an appendix that complies with § 809.62(2)(f) and that contains, at a minimum: (1) the decision and opinion of the Court of Appeals; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record

included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 18th day of March, 2021.

Signed:

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Thomas B. Aquino
Assistant State Public Defender

APPENDIX

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