STATE OF WISCONSIN

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

DISTRICT III

Case No. 2019AP2065-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD MICHAEL ARRINGTON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN BROWN COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY A. HINKFUSS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

A jury convicted Richard Michael Arrington of first-degree intentional homicide and felon in possession of a firearm. At trial, Jason Miller testified that while he was in jail with Arrington, Arrington started talking to Miller about the homicide. Miller then approached police and asked if he should record Arrington, and the police said, Yes. Miller then recorded conversations with Arrington, and three audio excerpts were admitted at trial. Defense counsel informed the court he did not object to the admission of Miller's recordings. Further, during closing argument, defense counsel argued that one such recording was consistent with Arrington's version of events.

1. Did the State violate Arrington's Sixth Amendment right to counsel when it allowed Miller to record Arrington?

After a hearing where both the police and Arrington testified, the postconviction court determined, No. This Court should affirm.

2. Does defense counsel's decision not to object to the recordings constitute plain error, and, if so, is the error harmless?

The postconviction court adopted the State's argument that if there was an error, such error was harmless in light of the other evidence showing Arrington's guilt. This Court should affirm.

3. Did Arrington's trial counsel provide ineffective assistance when he failed to object to the admission of Miller's testimony and recordings?

Based on its decision concluding that there was no Sixth Amendment violation, the circuit court held, No. This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case has potential significance because it involves the application of this Court's decision in *State v. Lewis*, 2010 WI App 52, 324 Wis. 2d 536, 781 N.W.2d 730, with a different set of facts. However, this case can be resolved by the application of the well-established principles of harmless error, and therefore the State does not request either oral argument or publication.

STATEMENT OF THE CASE

1. The complaint

The State charged Arrington ("Swag") with first-degree intentional homicide and felon in possession of a firearm. (R. 2; 72.) The complaint alleged that on April 2, 2016, Arrington intentionally shot and killed Ricardo Gomez. (R. 2:1.) A.V.T. informed police that she and "Risco" were passengers in a car that Arrington was driving. (R. 2:2.) Arrington parked across the street from a yellow house. (*Id.*) Gomez and a man known as "Shorty"[1] were by the front door. (*Id.*) Arrington fired three shots towards the yellow house, and then Arrington drove away. (*Id.*)

According to A.V.T., it was clear that Arrington had planned the crime: "Swag and Risco knew what was going on and thought about this before we pulled up to the house." (R. 2:3.) The night after the homicide, Arrington called A.V.T. and stated, "My picture's on the news and I know they gonna be looking for you. If you say anything to them, I'm gonna kill your family and you. I don't give a fuck about none of that shit so anybody that is gonna get in my way . . . I'm gonna move them." (R. 2:3.)

[1] Shorty's real name is Rafeal Santana-Hermida. (R. 2:2.)

Arrington pled not guilty, and the case proceeded to trial. (R. 270–76.)

2. The jury trial

At trial there was no dispute that Arrington fired shots from the car towards the house where both Gomez and Shorty stood. (R. 275:96.) Arrington's defense was that he shot in self-defense, as he believed that Shorty was going to shoot him. (R. 275:94–97.) According to Arrington, it was *Shorty* who shot Gomez when Shorty was really trying to shoot Arrington. (R. 275:97–98, 146.)

The State presented testimony during the trial that included: (1) evidence about the events preceding the homicide; (2) testimony from people who witnessed the homicide; (3) evidence of Arrington's conduct after the homicide; (4) officer testimony; (5) testimony and audio from Miller; and (6) Arrington's statement to police.

Events leading up to the homicide:

The evidence at trial was undisputed that Arrington and Shorty had confrontations before the homicide, including a robbery and an assault. (R. 275:67, 81, 121.)

Craig Taylor testified that a couple of weeks before the shooting, Arrington robbed Shorty of Shorty's machine gun at Taylor's house. (R. 271:45, 48–49.)

Brittney Harris testified that about a week before the shooting, she was in a car with Arrington across the street from Taylor's house. (R. 273:123–24.) Shorty pulled up and attacked Arrington with a blade, cutting Arrington's lip. (R. 273:120–30.)

James Allen testified that days before the homicide, Arrington told him that he had robbed Shorty, and that Shorty had subsequently stabbed him in the mouth. (R. 274:196, 198.) Arrington "was pretty pissed off about it," and

Arrington told Allen, "I'm going to fuck [Shorty] up." (R. 274:198.)

Eugene Herrod ("Eugene") testified that Arrington told him about the robbery and the "drug deal gone bad" at Taylor's house. (R. 271:250.) Shorty had a gun, and a person with Arrington told Arrington to grab Shorty's gun, Shorty grabbed it back, and then Arrington took it again. (R. 271:252–53.)

Christopher Howard testified that he spoke to Arrington before the shooting. (R. 274:204–05.) Arrington told Howard that Shorty had stabbed him in the mouth and that Arrington was "highly upset" about it. (R. 274:206.) Arrington told Howard that he "was going to have to handle his business." (*Id.*)

Brianna Brown testified that a couple days before the shooting, she was at an apartment when Arrington arrived. (R. 273:61.) Arrington was mad because Shorty had cut him. (*Id.*) Arrington was walking around and "toting a MAC [10]," which looked like a machine gun. (R. 273:58–63.)

The homicide:

Taylor testified that on April 2, 2016, he, Shorty and Shorty's girlfriend were at Taylor's house around 1:30 p.m. when he looked out a window and saw Arrington getting out of a car across the street. (R. 271:50–52.) Taylor told Shorty that he saw Arrington outside and that he thought Arrington may have a gun. (R. 271:53.) Taylor told Shorty this because Taylor was afraid that their "ongoing problems could lead to a murder." (*Id.*) Shortly after, Lawrence Hawkins arrived at Taylor's house, but he left before the shooting. (R. 271:54.) Next, Shorty called the victim, Gomez, to come to Taylor's house to play video games. (R. 271:55.) Shortly before the call, Taylor saw Arrington "circling the block" with "Rico" and a female. (*Id.*) Arrington "just had that look in his eye like he wanted to kill something." (R. 278:57.)

Approximately 30 minutes later, Gomez arrived. (R. 271:57–58.) Gomez walked up to Taylor's front door and started talking to Shorty, who was in the open doorway. (R. 271:58–59.) Gomez told Shorty that "there's some guys outside looking for him." (R. 271:59.) Then, "shots started coming." (R. 271:60.) "[A]ll I seen was the bullets hit [Gomez] and he fell onto Shorty. I was right there when the bullets hit him. . . ." (*Id.*) At no point did Taylor see Shorty with a gun[2], and Shorty "never reached for nothing." (R. 271:62.) Rather, "[a]s soon as [Arrington] sees [Shorty] peek his head, he started shooting into the doorway." (R. 271:63.)

Hawkins testified that on the day of the shooting he was at Taylor's house. (R. 271:216.) When Hawkins left, he saw Arrington and another male inside a parked car across the street. (R. 271:216–17.) Arrington asked Hawkins if Shorty was inside Taylor's house. (R. 271:217–18.) Hawkins told Arrington he didn't know. (R. 271:218.) Once he walked away, Hawkins called Taylor and told him that Arrington was outside asking for Shorty. (R. 271:219.)

A.V.T. testified that she and a person that she believed was named "Risco" were with Arrington during the shooting. (R. 271:139, 143.) Arrington was driving, she was the front passenger, and Risco was in the backseat. (R. 271:143–44.) Arrington parked across from Taylor's house. (R. 271:144.) Gomez knocked on Taylor's door, and Shorty opened it. (R. 271:148.) According to A.T.V., Arrington "was waiting for that door to open." (*Id.*) Arrington rolled down A.V.T.'s window and said to Shorty, "What up?" and Shorty replied, "What's good?" (R. 271:147, 149.) Then, Arrington "just started shooting a gun right by my face." (*Id.*) A.V.T. testified, "Shorty tried to

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[2] Taylor additionally testified that "[n]obody in the house never had a gun. We --- the cops even did a thorough search." (R. 271:62.)

grab [Gomez] out of the way, but I guess he got hit anyways. . . .” (R. 271:150.)

A.V.T. testified that a “shell hit me in my head, and [Arrington] told me to shut up.” (R. 271:149.) When A.V.T. told Arrington she wanted out, Arrington replied, “you on a murder case with me now, you ain’t going nowhere.” (R. 271:150–51.)

When asked if she saw Shorty shooting at the car, A.V.T. replied, “No. If they was shooting at the car, if it was a shoot back and forth, I would have got hit. I was sitting right there.” (R. 271:151–52.) She continued, “There’s no way they were shooting back at that car. There was no bullets at that car. There was no gun came out that house, no.” (R. 271:152.)

Arrington’s actions after the homicide:

A.V.T. testified that Arrington drove off and eventually let her out of the car. (R. 271:153.) A.V.T. drove to Milwaukee and the next day Arrington found her there. (R. 271:154–55.) Arrington took A.V.T.’s phone and gave her a new one. (R. 271:157.) Arrington also threatened to kill her or her family if she told anyone about the shooting. (R. 271:158.)

A few days after the shooting, A.V.T. was in Green Bay and Arrington told her to bleach and burn her clothes. (R. 271:159.) When A.V.T. went back to Milwaukee that night, Arrington found her at a convenience store. (R. 271:163.) He rolled down the window of his vehicle, A.T.V. saw a gun on his lap, and Arrington told her that if she didn’t get in the car she was “gonna get iced.” (R. 271:164–65.) A.V.T. complied, and after driving for hours, she fell asleep. (R. 271:167, 208.) When she woke in the car the next morning, she was alone. (R. 271:168.) She ran away and escaped. (*Id.*)

Erica Herrod (“Erica”) testified that the night of the shooting, Arrington came to her home. (R. 271:224.) Arrington said he had “popped” someone and asked for bleach to wash up. (R. 271:225–26.) Arrington then rubbed his hands, face,

and hair with it. (R. 271:226.) Arrington needed a ride to Milwaukee, and Erica's brother, Eugene, took him. (R. 271:230.)

Eugene testified that he told police that on the night of the shooting, Arrington called and said he "fanned Shorty down." (R. 271:260.) Eugene also told police that the next day, Arrington called and told him that he got the wrong person, and that he would come back and "get that [explicative] Shorty and finish the job." (R. 271:263.)

***Officer testimony*:**

Officer Roman Trimberger testified that when he arrived at the scene, he saw Gomez laying on the ground inside the doorway, and he was unresponsive. (R. 271:123.) Gomez had a gunshot wound to the left side of his chest. (R. 271:124.) Trimberger "clear[ed] the house," and found no firearms in the residence. (R. 271:126.)

Officer Michael Knetzger testified that he did a "neighborhood canvas" and found three .45 caliber shell casings: two by the front of the residence and one on a grassy terrace. (R. 273:84.) Officer Luke Lansbach testified that he searched for weapons in Taylor's house and garage and found none. (R. 273:94.) Officer Eric Andrae testified that he scanned individuals in the house for weapons, and he also found none. (R. 273:100–01.)

Arrington's conversations with Jason Miller:

Jason Miller testified that he had conversations with Arrington when they were in the county jail. (R. 275:10.) Miller recorded three conversations between April 11–13, 2016. (R. 275:12.) Miller testified that "in the beginning [Arrington] asked me to read his Criminal Complaint, asked me to – did I think there was enough there." (R. 275:13.)

Miller testified that Arrington told him that he saw Gomez knock at Taylor's door, and Shorty opened it. (R.

275:17.) Arrington saw that Shorty noticed him and Shorty said to Arrington, "What's up?" (*Id.*) All Arrington could think about was Shorty stabbing him, and the next thing that happened is Arrington "just got to shooting." (R. 275:18.) Arrington told Miller that he "had a fucked-up aim," and that "when he got to shooting, Shorty jumped back, and when he jumped back, it hit [Gomez.]" (R. 275:18–19.) Miller asked Arrington if there was any gunshot residue, and Arrington replied that "he wiped it down, everything down." (R. 275:14.)

The State played three recorded excerpts from April 13, 2016. (R. 275:19.) As defense counsel noted for the jury during closing argument, those excerpts totaled "roughly five minutes." (R. 276:99.) These excerpts are detailed in Arrington's Brief, pages 9–13. In one excerpt, Arrington told Miller that he "dumped down on the crib," which Miller explained meant that Arrington kept shooting at Taylor's house. (R. 275:28.)

No objection to Miller's testimony or the audio recordings:

Before Miller testified, the State requested to play the audio excerpts. (R. 275:6–7.) Defense counsel acknowledged to the court that he had the excerpts "for quite some time" and had reviewed them "long before trial." (R. 275:7.) He told the court he had "no objection" to their admission. (*Id.*) He *did* object to providing a transcript to the jury, and the State agreed not to do so. (*Id.*)

Arrington's police statement:

Officer Brad Linzmeier testified that on April 13, 2017 he conducted a recorded interview with Arrington. (R. 274:100.) Arrington reviewed and signed a subsequent statement. (R. 274:100–02.) Arrington stated that he saw Gomez "walk up to the front door of [Taylor's] house and knock on the door. I heard him call for Shorty. The door then opened, and I saw Shorty step in the doorway. He was talking

with [Gomez] who was on the front porch." (R. 274:106.) According to Arrington, "Shorty then looked down at me and saw me sitting in the car. Shorty then started to reach for his gun to his right waistband. I did not see a gun at that time, he was just reaching." (*Id.*) Arrington confessed that he then grabbed his gun from inside the door panel, "raised my gun across towards Shorty and fired three shots out the front passenger open window. [A.V.T.] had ducked down. I knew I hit the front porch with my shots . . . ." (R. 274:106.) Arrington alleged that "Shorty ducked back inside the house, and after I shot, Shorty stepped out, pointed a black handgun down towards me, and fired one shot." (R. 274:107.) Arrington claimed Shorty killed Gomez: "Just as [Shorty] did this, [Gomez] was stepping into the house, and Shorty hit him point blank in the chest as [Shorty]was trying to shoot back at me. I seen [Gomez] fall into the house as I was pulling off." (*Id.*) Arrington denied going to Erica's house after the homicide and washing with bleach. (R. 274:113.)

Detective Linzmeier testified that this was the first time (which was a year since the homicide) that he ever heard *any* information about Shorty having a handgun and shooting Gomez. (R. 274:123.) At trial, when asked if he had seen his casefile and knew what all the witnesses had said before he provided a statement, Arrington answered, "Correct." (R. 275:159.)

Arrington's testimony and defense:

Arrington testified that he was a drug dealer and that days before the homicide, he was at Taylor's house trying to sell powder cocaine when Shorty was robbed of his gun. (R. 275:82, 119.) Arrington denied having anything to do with it. (R. 275:83.) Yet after the robbery, Arrington did not want any "bad tension," so he decided to give Shorty money. (*Id.*) When Arrington tried to give Shorty the money to "settle the dispute," Shorty "just reached in [to the car] and got to stabbing me." (R. 275:84.)

On cross-examination, Arrington testified that after Shorty had cut his lip, Arrington was not mad. (R. 275:128, 139.) Rather, Arrington forgave Shorty. (R. 275:138.) Arrington also testified that when he went to Brown's after Shorty cut his face, he was not mad and he did not, contrary to Brown's testimony, pace back and forth while holding a gun. (R. 275:129.)

Arrington testified that on the day of the homicide, he, A.V.T., and Devin Landrum drove to the house next door to Taylor's to "pick up some marijuana." (R. 275:90.) Arrington parked in front of Taylor's house, Landrum left the car to get marijuana, and A.V.T. stayed in the car with Arrington. (R. 275:91.) Arrington saw Gomez walk to the front porch of Taylor's house, and Shorty opened the front door. (R. 275:92, 135.) Shorty saw Arrington and, according to Arrington, Shorty "just start going crazy." (*Id.*)

Arrington testified the he thought he saw Shorty reach for a gun, but that he actually didn't see a gun. (R. 275:94.) Regardless, Arrington "reached into the side door and grabbed my gun from the side door," and "fired three shots out the window." (R. 275:95.) According to Arrington, he did not shoot directly at Gomez and Shorty, but he "shot at the porch area, feet area of the porch," and he did so that "nobody [would] be hurt." (*Id.*) As Arrington then drove away, he looked over his right shoulder "and what I seen was Shorty come around the door with the gun in his hand at the same time that [Gomez] was coming into the house, and what it looked like to me was that Gomez had been shot by [Shorty]." (R. 275:97.)

When asked if he called police after the incident, Arrington replied, "Not at all." (R. 275:101.) When asked what happened to the gun he used, Arrington said he didn't know, but that "[A.V.T.] could have got rid of [it]." (R. 275:98.)

Even though Erica testified that after the homicide Arrington (1) went to her place, (2) told her that he "popped" someone, and (3) asked for bleach (R. 271:225–26), Arrington denied all of this. (R. 275:98.)

Arrington testified on direct that instead of going to Erica's, he left for Milwaukee. (R. 275:102.) He informed the jury that when he got to Milwaukee, he changed his hair and his appearance so that law enforcement could not find him. (R. 275:103, 148.) While in Milwaukee, Arrington testified that he never kidnapped A.T.V., nor did he see A.T.V. or have any contact with her after the shooting. (R. 275:105.) When asked if A.T.V.'s testimony is "all lies," Arrington replied, "Yes, sir." (R. 275:148.)

With respect to Allen, Arrington denied that he told Allen that he was going to kill Shorty or implied that he was going to kill Shorty. (R. 275:105.) Regarding Howard, Arrington testified that he never talked to Howard about Arrington's dispute with Shorty; nor did he ever tell Howard that he was going to kill Shorty or imply that he was going to kill Shorty. (R. 275:106–07.)

When asked why Eugene testified that Arrington told him that he "got the wrong guy but I'm going to come back and finish the job and get Shorty," Arrington replied, "I don't know why Eugene told you guys that." (R. 275:142.) When questioned if he remembers asking Hawkins where Shorty was on the day of the shooting when Lawrence was outside of Taylor's house, Arrington replied, No. (R. 275:132.)

Finally, when the State asked, "So that sounds like a lot of people are making stuff up, right?" Arrington replied, "Yes." (R. 275:129.)

With respect to Arrington's jailhouse conversations with Jason Miller, Arrington said that he talked to Miller because he wanted to "get some information," and that Arrington "wanted [Miller's] outlook on things." (R. 275:107.)

According to Arrington, during those conversations, he was just "leading [Miller] to believe whatever he wanted to." (R. 275:108.) Because "if I told Jason Miller what happened, what really had happened, that would mean I would be snitching." (R. 275:109.)

Landrum also testified for Arrington. On the day of the shooting, Landrum testified that he was walking towards Arrington's car when he saw Taylor's house door open. (R. 275:48.) Landrum saw Shorty and "[i]t appeared that [Shorty] was reaching for a weapon." (R. 275:49.) Landrum testified, however, that he never saw Shorty with a weapon, never saw any weapon in Shorty's waistband, and never saw anyone shooting other than Arrington. (R. 275:59–61.) Rather, it was Arrington who fired two or three shots, and then "[w]e pulled off and we drove away." (R. 275:54.) When the State asked Landrum that if Arrington told police that Landrum had the gun, would Arrington be lying, Landrum replied that Arrington did not give him the gun. (R. 275:61.)

3. Verdict

The jury found Arrington guilty of both counts. (R. 276:143.) The court imposed a life sentence. (R. 277:65.)

4. Postconviction motion and hearing

Arrington, represented by new counsel, filed a postconviction motion alleging that the State violated his right to counsel when it used his statements that he made to Jason Miller in the recorded jail conversations. (R. 219:3.) Arrington also sought a new trial due to ineffective assistance of counsel or plain error or in the interests of justice. (R. 219:10, 12.)

The court held a hearing. Detectives Michael Wanta and Linzmeier testified, as well as Arrington and Arrington's trial counsel, Michael Hughes. (R. 278.)

Hughes testified that at no time before or during trial did he research or consider moving to suppress the recordings of Miller's conversations with Arrington. (R. 278:11.) Hughes testified that the State made a global offer to Miller on March 23, 2017 in consideration for his testimony. (R. 278:21.)

Detective Wanta testified that in early April 2016, Miller became an informant for him on a homicide case involving a suspect named Antwon Powell. (R. 278:29.) Wanta "became aware of Mr. Miller's request to speak with law enforcement" when Miller's attorney contacted the "the district attorney's office which passed it on to the police department." (*Id*.) Wanta then met with Miller at the jail. (R. 278:31.) Wanta testified that he was aware that Miller was seeking consideration, but that he was not involved because "[t]hat is done by the District Attorney." (R. 278:32.)

Miller told Wanta that "Arrington was talking with him and he believed that Mr. Arrington would tell him things about the case and he asked if he should record it." (R. 278:36.) According to Wanta, "and we said if you want to record the conversation you can." (R. 278:40.) So between April 13–16, police provided Miller with a digital recording device. (R. 278:38.) When asked, "Did you give any direction to Mr. Miller as to what type of questions to ask?" Wanta replied, "I did not." (R. 278:43.) When asked, "Did you ever direct Mr. Miller to speak with Mr. Arrington?" Wanta replied, "Mr. Miller approached us or myself about speaking with Mr. Arrington and we said it was okay or we said he could record conversations." (R. 278:46.) Finally, when asked if Miller ever received consideration for his recordings, Wanta replied, "I believe he did not receive the consideration." (*Id*.)

Consistent with Wanta's testimony, Linzmeier testified that Miller's involvement began when Miller's attorney contacted the district attorney's office, who then contacted the police. (R. 278:50.) "Miller informed us that Mr. Arrington was talking about his case. And . . . I recall Mr. Miller saying he

didn't know why Arrington felt comfortable speaking with him but he did and he asked if he should record any of those conversations." (R. 278:51.) Linzmeier told him, "Yes." (*Id.*) Like Wanta, Linzmeier testified that he did not give any direction to Miller to either question or speak to Arrington. (*Id.*)

Linzmeier's opinion of the recordings were similar to defense counsel's opinion; specifically, "they were very hard to understand. They were hard to listen to as far as decipher." (R. 278:53–54.) But, Linzmeier believed, "We had, you know, a lot of evidence. I guess I would explain it that way, a lot of eyewitnesses or witnesses." (R. 278:55.)

Regarding whether he spoke to Miller about any consideration he would receive for recording Arrington, Linzmeier testified "that's not what we do in our position. That is through the attorneys." (R. 278:58.) Finally, Linzmeier testified that Miller never received any payment for his help. (R. 278:59.)

Arrington testified that he believed he asked Attorney Hughes if there was a way to keep the recordings out of evidence, and Hughes told him "that the recordings really didn't matter because they didn't – he couldn't really hear much on 'em." (R. 278:75.) When asked if *he* could hear what was on the recordings, Arrington admitted, "Not really." (*Id.*)

Regarding their first recorded conversation, Arrington testified that Miller approached his cell and asked Arrington if he wanted to read a magazine. (R. 278:64.) Arrington then asked Miller to look at the criminal complaint. (R. 278:65.) Arrington admitted that he "asked [Miller] for guidance." (*Id.*) Regarding the second and third recorded conversation, Arrington testified that Miller called Arrington over to talk. (R. 278:66.)

5. Postconviction court's decision

The postconviction court concluded that Miller was not acting as an agent for the State when he recorded his conversations with Arrington. (R. 247:3.) Therefore, Arrington's Sixth Amendment right to counsel was not violated. (*Id.*) The court provided nine reasons. (R. 247:3–7.)

First, "[t]he State did not put Mr. Miller and Mr. Arrington together in [the same jail pod]. It was a coincidence." (R. 247:3.)

Second, Hughes approached the district attorney's about Miller "voluntarily contributing information to the police which prompted the police to have a discussion with [Miller] about being a confidential informant." (R. 247:4.) "The police never approached Mr. Miller about recording Mr. Arrington." *(Id.)*

Third, Miller "voluntarily asked the police if he should record any information from Mr. Arrington, and the detective informed him that he could record such conversations." (*Id.*) Citing *State v Lewis*, 2010 WI App 52, ¶ 25, 324 Wis. 2d 536, 781 N.W.2d 730, the court concluded, "when a person offers assistance to the police, we do not think the police must try to stop the person from providing assistance." (*Id.*) And, "it is not the government's burden to protect a defendant from their own 'loose talk.'" (*Id.*) In this case, "Miller made requests to speak to law enforcement. Not vice versa." (*Id.*)

Fourth, police "made no promises to Mr. Miller that the fact that he was giving information would lead to a reduced sentence." (R. 247:4–5.)

Fifth, "Arrington began talking to Mr. Miller about his case without Mr. Miller prompting the conversation." (R. 247:5.) "The police could not listen in on any conversation, and had not told what questions Mr. Miller should ask Mr. Arrington." (*Id.*) Further, "Arrington volunteered information to Mr. Miller without being prompted by him." (*Id.*)

Sixth, Arrington was not the target of the investigation, which shows "a lack of intent to make Mr. Miller a police agent." (R. 247:6.) The court again noted that "Miller voluntarily asked the police on his own initiative if he should record Mr. Arrington, and he was under no obligation to do so." (*Id*.) "Further," the court found, "the police never made any promise to Mr. Miller in terms of what he will receive for his cooperation." (*Id*.) Rather, "Miller was acting with the hope that the prosecutors in his case would give him a more lenient sentence which is very similar to the confidential informant in *Lewis*, a primary source of law on this issue in Wisconsin, who was found to not be an agent of the State." (*Id*.)

Seventh, "the police did not even use the taped conversation of Mr. Arrington until approximately one year had passed." (*Id*.) And, "[o]ne would think if the recorded conversation by Mr. Arrington was so important, the police would have listened right away no matter the circumstances. This lack of review goes to police intent." (*Id*.)

Eighth, "the use of 'CI' does not indicate agency." (R. 247:6.)

Finally, the police had "no affirmative duty to keep Mr. Miller away from Mr. Arrington when they knew Mr. Miller was assisting with another case." (*Id*.) It is "not the government's job to protect defendants from their own 'loose talk.'" (R. 247:7.)

In sum, the court determined that Arrington's Sixth Amendment right to counsel was not violated because Miller was not an agent of the State. (*Id*.) Rather, Miller "was acting on his own initiative and approached the police to help in Arrington's case." (*Id*.) He "voluntarily asked to record Mr. Arrington." (*Id*.) The court determined that while *individually* the nine points "might not be enough to show

that Miller was not an agent," that "all the points together certainly show that Mr. Miller was not an agent." (*Id.*)

With respect to Arrington's argument that the error was plain and not harmless error, the court "adopted" the State's arguments "on the issue of harmless error." (R. 247:9.)

Finally, the court concluded that there was "no ineffective assistance of counsel based on my decision about the sixth amendment." (*Id.*)

This appeal follows.

ARGUMENT

I. The State did not violate Arrington's Sixth Amendment right to counsel.

Arrington's Sixth Amendment right to counsel was not violated because Miller was not an agent of the State, nor did he deliberately elicit statements from Arrington. The State begins its discussion with an overview of Sixth Amendment caselaw.

A. Applicable Supreme Court case law, Wisconsin case law, and this Court's standard of review.

1. Supreme Court caselaw

There are four main United States Supreme Court cases that establish a general framework for determining when the use of government informants violates an accused's Sixth Amendment right to counsel. The first case is *Massiah v. United States,* 377 U.S. 201 (1964). In *Massiah,* the Supreme Court considered a case where a government agent deliberately elicited information from a criminal defendant. An ally of a defendant—who was on bail and had obtained legal representation—agreed to allow federal authorities to place a radio transmitter in the front seat of the defendant's car. *Id.* at 202–03. The authorities sat in a car down the street

and listened to the conversation, during which the defendant "made several incriminating statements." *Id.* at 203. These incriminating conversations were introduced into evidence at trial. *Id.*

The Supreme Court held that the conversations were inadmissible. *Id.* at 207. According to the Court, the defendant was denied the protections of the Sixth Amendment right to counsel by use of his own incriminating words, "which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.* at 206.

Three other Supreme Court decisions have specifically addressed the government use of informants to allegedly circumvent the Sixth Amendment right to counsel: *Kuhlmann v. Wilson,* 477 U.S. 436 (1986); *Maine v. Moulton,* 474 U.S. 159 (1985); and *United States v. Henry,* 447 U.S. 264 (1980).

In *Henry,* FBI agents reached out to Nichols, a paid informant, who was being held in the same jail as Henry. 447 U.S. at 266. Henry had been indicted for armed robbery, and the facts were not clear whether the government contacted Nichols for information about the robbery more generally or asked for information specifically about Henry. *Id.* Nichols told the agents that he was on the same cellblock as several federal prisoners including Henry, and "[t]he agent told him to be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery." *Id.* After Nichols' release from jail, the same FBI agent contacted him, and Nichols gave the agent information that Henry had revealed to Nichols. *Id.* The government paid Nichols for the information, Nichols testified at Henry's trial, and Henry was convicted. *Id*. at 266–67. The arrangement between Nichols and the agent was on a contingent-fee basis; Nichols was to be paid only if he produced useful information. *Id.* at 270. The Supreme Court concluded, "By intentionally creating a situation likely to

induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Id.* at 274.

The Court reached a similar conclusion in *Moulton*. There, a co-defendant agreed to cooperate with law enforcement in return for a promise of no further charges against him. *Moulton*, 474 U.S. at 163. After the indicted accused asked the informant co-defendant to meet with him to discuss the charges against them, the co-defendant agreed to law enforcement's request that he wear a recording device for the meeting. *Id*. Statements that the defendant made during the meeting were admitted at the defendant's trial. The Court observed that "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." *Id*. at 176. In that case, however, the Court held that the State had deliberately elicited the statements by "knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Id*.

Finally, in *Kuhlmann* detectives reached an agreement with the defendant's cell mate to be an informant. 477 U.S. at 439. The detectives instructed the informant to ask no questions about the crime but merely to listen to what the defendant said. *Id*. at 440. The trial court determined that the informant obeyed the instructions and only listened and made notes regarding what the defendant said. *Id.* The Supreme Court held that the Sixth Amendment does not forbid "admission in evidence of an accused's statements to a jailhouse informant who was 'placed in close proximity but [made] no effort to stimulate conversations about the crime charged.'" *Id.* at 456 (quoting *Henry,* 447 U.S. at 271 n.9.) Unlike the defendants in *Henry* and *Moulton*, Kuhlmann did not "demonstrate that the police and their informant took

some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Id.* at 459.

2. Wisconsin caselaw: *State v. Lewis*, 2010 WI App 52, 324 Wis. 2d 536, 781 N.W.2d 730.

The *Lewis* case involves circumstances most similar to the instance case. *Lewis* involves an inmate, Gray, who had been an informant for the federal government. 324 Wis. 2d 536, ¶ 5. Gray was not equipped with any recording device, but, like this case, he obtained information from his cellmate, Lewis. *Id.* ¶ 4. After obtaining the information, Gray went to law enforcement regarding the admissions Lewis made to him. *Id.* ¶ 5.

After the jury returned guilty verdicts, Lewis moved for postconviction relief, arguing that the State had violated his right to counsel. *Id.* ¶ 7. At a hearing, an investigator testified that *Gray* had come forward, offering to provide information. *Id.* ¶ 8. At that same hearing, Gray "admitted that no law enforcement agency or officer ever promised anything to him in exchange for him providing information." *Id.* ¶ 9. Gray also "testified that no one from law enforcement directed him to have a conversation with Lewis and no one ever asked him to listen to or talk to Lewis in any way." *Id.* Finally, Gray "said that Lewis volunteered the information without prompting by him." *Id.* ¶ 10.

In its decision, this Court noted that "Gray was never under the direction or control of the government, and there was no evidence that Gray received instructions from the government about Lewis or anyone else in the Waukesha county jail. Nor was he ever a paid informant." *Id.* ¶ 20. This Court concluded: "If there is just 'hope' and nothing else, then the informant cannot be construed to be a government agent, eliciting a statement in violation of the Sixth Amendment." *Id.* ¶ 23. This Court "refuse[d] to extend the rule of *Massiah*

and *Henry* to situations where an individual, acting on his [or her] own initiative, deliberately elicits incriminating information." *Id.* (citation omitted).

This Court also quoted *United States v. Surridge*, 687 F.2d 250, 255 (8th Cir. 1982), where the Eight Circuit determined that police need not turn away an informant seeking to cooperate:

> [W]e do not think the police have a duty to bar visits with potential informants; indeed such a requirement would be unfair to prisoners. Also, when a person offers to assist the police, we do not think the police must try to stop the person from providing assistance. *As long as the police do nothing to direct or control or involve themselves in the questioning of a person in custody by a private citizen, such questioning does not violate the [F]ifth or [S]ixth Amendments.*

Lewis, 324 Wis. 2d 536, ¶ 25. The *Lewis* Court concluded, "[t]he italicized portion says it all and is the holding of this court." *Id.*

Finally, *Lewis* also recognized that "[l]aw enforcement is prohibited from using a surreptitious government agent (e.g., a fellow jail cellmate) to deliberately elicit incriminatory statements, by investigatory techniques that are the equivalent of direct police interrogation, in the absence of counsel or a valid waiver of counsel." *Id.* ¶ 1. "We hold that this requires evidence of some prior formal agreement—which may or may not be evidenced by a promise of consideration—plus evidence of control or instructions by law enforcement." *Id.*

3. Standard of review

"In deciding whether a person is a government informant or agent for purposes of this Sixth Amendment analysis, the determination regarding the relationship or understanding between the police and the informant is a factual determination." *Lewis,* 324 Wis. 2d 536, ¶ 16. "Once

these historical findings have been ascertained, it is a legal question whether the relationship or understanding found by the trial court is such that the informant's questioning has to be considered government interrogation." *Id*.

B. The circuit court properly found Miller was not an agent of the State and that his conversations with Arrington do not constitute government interrogation.

1. The circuit court's factual determinations in this case are not clearly erroneous.

Applying the standard of review of factual determinations, *Lewis*, 324 Wis. 2d 536, ¶ 16, there is more than enough evidence in the record to say that the trial court's findings are not clearly erroneous.

The trial court acknowledged that "the seminal issue" in this case is whether Miller was an agent of the State. (R. 247:3.) The court then made factual determinations on this issue that included the following: (1) "The State did not put Mr. Miller and Mr. Arrington together in [the same jail pod.] It was a coincidence"; (2) "Miller's attorney had spoken to the District Attorney's office about him voluntarily contributing information to the police which prompted the police to have a discussion with him about being a confidential informant. The police never approached Mr. Miller about recording Mr. Arrington"; (3) "[B]efore making any recordings, Mr. Miller voluntarily asked the police if he should record any information from Mr. Arrington, and the detective informed him that he could record such conversations"; (4) "Miller made requests to speak to law enforcement. Not vice versa"; (5) "[E]ven though the police were aware Mr. Miller was seeking consideration from the District Attorney's office, they made no promises to Mr. Miller that the fact that he was giving information would lead to a reduced sentence"; (6) "Arrington

began talking to Mr. Miller about his case without Mr. Miller prompting the conversation"; the police did not tell "what questions Mr. Miller should ask Mr. Arrington"; (7) "Miller voluntarily asked the police on his own initiative if he should record Mr. Arrington, and he was under no obligation to do so"; (8) "police never made any promise to Mr. Miller in terms of what he will receive for his cooperation. Mr. Miller was acting with the hope that the prosecutors in his case would give him a more lenient sentence"; and (9) The police did not use the recording until a year had passed, and "[o]ne would think if the recorded conversation by Mr. Arrington was so important, the police would have listened right away no matter the circumstances. This lack of review goes to police intent." (R. 247:3–7.) In light of these factual determinations, the court determined that Miller was not acting as an agent of the State. (R. 247:7.)

But Arrington argues that the court's findings were clearly erroneous. (Arrington's Br. 22.) First, Arrington challenges only *one* court finding as clearly erroneous. (*Id.*) Specifically, he challenges the court's finding that "Arrington was not the target of the investigation." (*Id.*) First, it is undisputed that Miller's original target was not Arrington. (*See* Arrington's Br. 22 ("Although Powell and Moore were the initial targets, Arrington became a target when the detectives expressly authorized Miller to also record conversations with Arrington.").)

Second, and more importantly, the postconviction court *explained* this finding: that even if Miller was an agent for other individuals who were "originally the target of the investigation," it did not make Miller an agent with respect to *Arrington* because: (1)"Miller voluntarily asked the police on his own initiative if he should record Mr. Arrington"; (2) Miller was not "under any obligation or follow orders when he recorded Mr. Arrington"; and (3) "police never made any promise to Mr. Miller in terms of what he will receive for his

cooperation. Mr. Miller was acting with the hope that the prosecutors in his case would give him a more lenient sentence." (R. 247:6.)

Third the postconviction court made numerous other findings that Arrington does not challenge on appeal as clearly erroneous. And, as the postconviction court specifically acknowledged, while *individually* its findings might not be enough to show that Miller was not a State agent, "all the points together certainly show that Mr. Miller was not an agent." (R. 246:7.)

Therefore, applying *Lewis's* standard of review to the court's factual determinations, 324 Wis. 2d 536, ¶ 16, the evidence in the record shows that the court's findings are not clearly erroneous.

2. Miller's conversations with Arrington do not amount to government interrogation because there was no "prior formal agreement" and no "evidence of control or instructions."

Following this Court's decision in *Lewis*, the remaining legal issue for this Court is "whether the relationship or understanding found by the trial court is such that the informant's questioning has to be considered government interrogation." 324 Wis. 2d 536, ¶ 16. The answer is, No.

In *Lewis*, this Court provided that "[l]aw enforcement is prohibited from using a surreptitious government agent . . . to deliberately elicit incriminatory statements, by investigatory techniques that are the equivalent of direct police interrogation, in the absence of counsel." *Id.* ¶ 1. It then held that this "requires" evidence of (1) "some *prior* formal agreement—which may or may not be evidenced by a promise of consideration", and (2) "evidence of control or instructions by law enforcement." *Id.* (emphasis added). Neither

requirement is present here, and therefore there is no Sixth Amendment violation of Arrington's right to counsel.

a. No prior formal agreement

In this case, it is undisputed that Miller made the recordings with Arrington in the hopes of getting consideration, but that Arrington was not told of any contemplated consideration until well *after* the recordings were made. (Arrington's Br. 24.) There was therefore no "prior formal agreement." *Lewis*, 324 Wis. 2d 536, ¶ 1.

While Arrington argues that "[t]he record is clear that the detectives knew Miller was making the recording *with the expectation* that he would receive consideration" (Arrington's Br. 24 (emphasis added)), under *Lewis*, an "expectation" of consideration is not enough. *Lewis*, 324 Wis. 2d 536, ¶ 1. There must be a "some *prior* formal agreement."[3] *Id*. (emphasis added). It does not matter that "*[s]ubsequently*, the state offered Miller a plea agreement[4] dismissing multiple charges and making a specific sentencing recommendation contemplating 'a full debrief and testimony on Powell and Arrington.'"[5] (Arrington's Br. 24 (emphasis added).)

As the postconviction court provided, "Miller was cooperating with the government because of a hope that he would receive a reduced sentence, and the government was under no obligation to turn him away when he asked to help." (R. 247:7.) He was "the classic entrepreneur, seeking to

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[3] There is no claim by Arrington that this Court incorrectly decided *Lewis*.

[4] This plea agreement offer was memorialized in a global offer memo dated March 23, 2017, almost a year after the recordings. (R.237.)

[5] While this point *also* does not matter under *Lewis*, Arrington conceded that because of a breach of a plea agreement, "Miller did not ultimately receive the consideration." (R. 246:6.)

market his information without any advance arrangement." *See State v. Marshall,* 882 N.W.2d 68, 101(Iowa 2016).

Because Arrington fails to meet the requirements of providing evidence of a prior formal agreement, *Lewis*, 324 Wis. 2d 536, ¶ 1, this Court need not consider his Sixth Amendment claim further.

b. No evidence of police control or instructions

The burden of proving deliberate elicitation rests with the defendant. *See Kuhlmann,* 477 U.S. at 459. The postconviction court, citing both *Lewis*, *Henry*, and *Surridge,* concluded there was no evidence of control or instructions from the police to Miller to deliberately elicit incriminatory statements from Arrington. (R. 247:7–9.) This Court should affirm.

The postconviction court noted that in *Lewis*, the informant "was never under the direction or control of the government, and there was no evidence that [the informant] received instructions from the government about Lewis or anyone else in the Waukesha county jail." (R. 247:8.) The same is true in this case. At the postconviction hearing, Detective Wanta was asked, "Did you give any direction to Mr. Miller as to what type of questions to ask?" Wanta replied, "I did not." (R. 278:43.) When asked, "Did you ever direct Mr. Miller to speak with Mr. Arrington?" Wanta replied, "Mr. Miller approached us or myself about speaking with Mr. Arrington and we said it was okay or we said he could record conversations." (R. 278:46.)

This testimony is consistent with Detective Linzmeier's testimony. He testified that "Miller informed us that Mr. Arrington was talking about his case. And . . . I recall Mr. Miller saying he didn't know why Arrington felt comfortable speaking with him but he did and he asked if he should record any of those conversations." (R. 278:51.) Linzmeier told him,

"Yes." (*Id.*) Like Detective Wanta, Limzmeier testified that he did not give any direction to Miller to either question or speak to Arrington. (*Id.*)

Justice Powell's concurrence in *Henry* makes clear that "the Sixth Amendment is not violated when a passive listening device collects, but does not induce, incriminating comments" and that "the mere presence of a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations would not necessarily be unconstitutional." *Henry,* 447 U.S. at 276 (Powell, J., concurring)[6]. And, as provided in *Kuhlmann,* the Sixth Amendment does not forbid "admission in evidence of an accused's statements to a jailhouse informant who was 'placed in close proximity but [made] no effort to stimulate conversations about the crime charged." 477 U.S. at 456 (quoting *Henry,* 447 U.S. at 271 n.9).

While Arrington argues that Miller "stimulated" the conversations with him (Arrington's Br. 25–27), he offers no evidence that the police ordered or instructed that he "stimulate" the conversations, which *Lewis* requires. *Lewis*, 324 Wis. 2d 536, ¶ 1. As this Court provided: "As long as the police do nothing to direct or control or involve themselves in the questioning of a person in custody by a private citizen, such questioning does not violate the [F]ifth or [S]ixth Amendments." *Id.* ¶ 25 (quoting *Surridge*, 687 F.2d at 255).

Here, Arrington fell prey to the self-interest of Miller, not State interference with his right to counsel. This is not a case where the State acted "to circumvent the right to the assistance of counsel." *Moulton,* 474 U.S. at 176. As the postconviction court noted, "Miller was acting on his own

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[6] It is Justice Powell's concurrence that the Supreme Court cited in *Kuhlmann* and *Moulton* when discussing the deliberate-elicitation element. *See Kuhlmann*, 477 U.S. at 459; *Moulton*, 474 U.S. at 176.

initiative and approached the police to help in Arrington's case." (R. 247:7.) The police did not create a situation by directing or controlling any questioning that would likely induce Arrington to incriminate himself without benefit of counsel. In *Lewis*, this Court "refuse[d] to extend the rule of *Massiah* and *Henry* to situations where an individual, acting on his [or her] own initiative, deliberately elicits incriminating information." 324 Wis. 2d 536, ¶ 23 (citation omitted). It should continue to do so today.

Without some direction or instruction from the government, *see Lewis*, 324 Wis. 2d 536, ¶ 1, it cannot be said that in this case, Arrington's right to counsel was violated.

II. Defense counsel's decision not to object to the admissions of the recordings does not constitute plain error, but even if it does, such error was harmless.

Arrington next argues that because trial counsel "failed to seek suppression or otherwise object to Miller's testimony," this Court should determine that it amounts to plain error. (Arrington's Br. 29.) There is not plain error, but if there is, it is harmless.

A. Principles of plain error and harmless error

"The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object." *State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77. "The error, however, must be 'obvious and substantial.' Courts should use the plain error doctrine sparingly." *Id.* (citations omitted). "If the defendant shows that the unobjected to error is fundamental, obvious, and substantial, the burden then shifts to the State to show the error was harmless." *Id.* ¶ 23 (citation omitted). "To determine whether an error is harmless, this court inquires whether the State can prove 'beyond a reasonable doubt that a rational

jury would have found the defendant guilty absent the error[ ].'" *Id.* (alteration in *Jorgensen*) (citation omitted).

B. There is no plain error.

In this case, Arrington argues that defense counsel should have objected or moved to suppress Miller's testimony. (Arrington's Br. 29.) But Arrington fails to show that the State's alleged misconduct in this case is "obvious." *See Jorgensen*, 310 Wis. 2d 138, ¶ 21. While Arrington argues it is "obvious" by citing three Supreme Court cases (Arrington's Br. 32), he is silent as to *this* Court's decision—and most applicable decision— on the issue: *Lewis,* 324 Wis. 2d 536. And, as argued in Section I, applying *Lewis* not only demonstrates that any "State's conduct" did not amount to a Sixth Amendment violation, but that it also did not amount to an "obvious" Sixth Amendment violation. And Arrington's own brief confirms the error cannot be plain because describes it as novel: "The issue as to whether this conduct violates the right to counsel . . . is novel given that there is only one reported case in this state involving statements obtained by a jail informant." (Arrington's Br. 2.)

Second, there is no plain error here because the admission of the recordings was not an issue that defense counsel overlooked or waived. *See Jorgenson*, 310 Wis. 2d 138, ¶ 21. Rather, defense counsel acknowledged to the trial court that he had the excerpts "for quite some time," and he had reviewed them "long before trial." (R. 275:7.) He had no objection to their admission, only to the admission of a transcript. (*Id*.) And, he used the recordings to support Arrington's defense during his closing argument.

During closing, defense counsel stressed how Jason Miller's recordings of his conversations with Arrington were "muddled garbage" and that they don't "change anything." (R. 276:98.) According to defense counsel "when you try to discern what the recording does or doesn't say, when you try to figure

it out for yourself, we heard it, it's variably impossible to listen to." (*Id.*) Noting that the three recordings totaled "roughly five minutes," he argued that those recordings have "almost no evidentiary value." (R. 276:99.)

But more importantly, defense counsel argued that Arrington's statement about "dumping down on a crib" was "*consistent*" with Arrington's concession that he shot three times at Taylor's house. (*Id.* (emphasis added).) According to defense counsel, "[t]hat's not a difference. That's not Mr. Arrington lying." (*Id.*) In other words, defense counsel argued that *that* recording actually helped Arrington's defense.

Defense counsel's decision not to object to the admission of the audio recordings does not amount to plain error.

C. Even if there was plain error, that error was harmless.

Should this Court determine that defense counsel's failure to object amounts to plain error, such error is harmless. An error is harmless, and thus not plain error, if the State introduced overwhelming admissible evidence of the defendant's guilt. *See Jorgensen*, 310 Wis. 2d 138, ¶ 22. It did so here.

In this case, the State introduced overwhelming admissible evidence that Arrington shot and killed Gomez. The State meets this burden with the testimony of the witnesses:

- Taylor testified that a couple of weeks before the shooting, Arrington robbed Shorty of Shorty's machine gun. And, on the day of the shooting, Taylor saw Arrington "circling the block" and that Arrington "just had that look in his eye like he wanted to kill something." Taylor also saw the bullets hit Gomez and Gomez fall into Shorty. At no point did Taylor see Shorty with a gun, and Shorty "never reached for

nothing." Rather, he saw Arrington shoot immediately: "[a]s soon as Swag sees him peek his head, [Swag] started shooting into the doorway." (R. 271:45, 48–49, 55, 57, 60, 62, 63.)

- Hawkins testified that when he left Taylor's house before the shooting, Arrington asked him if Shorty was inside Taylor's house. And, that once he was away from the vehicle, Hawkins called Taylor and told him that Arrington was outside asking for Shorty. (R. 271:217–19.)
- Allen testified that he spoke to Arrington days before the homicide and that Arrington told him that he had robbed Shorty. Arrington also told Allen that Shorty had stabbed him and that Arrington said, "I'm going to fuck [Shorty] up." (R. 274:196, 198.)
- Howard testified that Arrington was "highly upset" when Shorty cut him, and that Arrington told Howard "he was going to have to handle his business." (R. 274:206.)
- Brown testified that days before the shooting, Arrington was walking around an apartment upset about being cut by Shorty and "toting a MAC [10]." (R. 273:58–63.)
- A.V.T. testified that when Gomez knocked on Taylor's door, Arrington "was waiting for that door to open." And after Shorty said to Arrington, "What's good?" Arrington "just started shooting a gun." When asked if she saw Shorty shooting back at the car, she replied, "No," and that there was "no way they were shooting back at that car. There was no bullets at that car. There was no gun came out that house, no." (R. 271:147–49, 151–52.)
- Erica testified that the night of the shooting, Arrington came to her house, told her he "popped" someone, and asked for bleach to wash up. (R. 271:225–26.)

- Eugene testified that he told police that on the night of the shooting, Arrington called and said he "fanned Shorty down." Eugene testified that he also told police that the next day, Arrington called and told him that he got the wrong person, and that he would "get that [explicative] Shorty and finish the job." (R. 271:260, 263.)
- Arrington's witness, Landrum, testified that he never saw Shorty with a weapon, never saw any weapon in Shorty's waistband, and he never saw anyone else shooting other than Arrington. Rather, Arrington fired two or three shots, and then "[w]e pulled off and we drove away." (R. 275:54, 59–61.)

In sum, the State presented ample testimony from many witnesses besides Miller, countering and disproving Arrington's claim of self-defense.

But in addition to the State's overwhelming evidence, the jury also heard Arrington's incredible testimony. This included: (1) Arrington's claim that he had nothing to do with robbing Shorty, (2) that he wanted to give Shorty money even though he did not rob him, but that Shorty just "got to stabbing me," (3) that he was never mad at Shorty for stabbing him, but instead forgave him, (4) as he drove away after he fired the shots he thought he saw Shorty shoot Gomez, (5) that he didn't know what happened to the gun, but that A.V.T. could have disposed of it, (6) that he never went to Erica's house after the shooting, (7) that he never had *any* contact with A.T.V. after the shooting and that her testimony is "all lies", (8) that Allen was lying, (9) that Howard was lying, (10) that Eugene was lying, and (11) that a lot of people are making stuff up. (R. 275:83, 84, 97, 101, 105, 128, 129, 142, 148.)

Finally, the error is harmless because defense counsel was able to impeach Miller by having Miller admit that (1) he

has been convicted of a crime *18* times; and (2) he told Arrington that if he (Miller) would have done the shooting, he would have done it alone "so it won't be no witnesses against me." (R. 275:29–31.)

Because of the overwhelming evidence of Arrington's guilt, Arrington's incredible testimony, and because defense counsel was able to impeach Miller, any error in admitting Miller's testimony and recordings was harmless.

III. Trial counsel did not provide ineffective assistance of counsel.

Arrington next argues that "counsel's failure to seek suppression or otherwise object to admission of Miller's testimony and recordings violated Mr. Arrington's right to effective assistance of counsel." (Arrington's Br. 38.) The State agrees with the postconviction court (R. 247:9) that Arrington fails to prove ineffective assistance.

A. A defendant bears a heavy burden of proving ineffective assistance of counsel.

A defendant who asserts ineffective assistance of counsel must show that (1) counsel performed deficiently and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id.* at 689. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* A court judges an attorney's performance based on "an objective test, not a subjective one." *State v. Jackson*, 2011 WI App 63, ¶ 9, 333 Wis. 2d 665, 799 N.W.2d 461. "So, regardless of defense counsel's thought process, if counsel's conduct falls within what a reasonably competent

defense attorney could have done, then it was not deficient performance." *Id.*

To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a defendant fails to prove one prong of the *Strickland* test, a court need not consider the other prong. *Id.* at 697.

"A claim of ineffective assistance of counsel is a mixed question of fact and law." *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. A reviewing court "will uphold the circuit court's findings of fact unless they are clearly erroneous." *Id.* "However, the ultimate determination of whether counsel's assistance was ineffective is a question of law, which [this Court] review[s] de novo." *Id.*

B. Arrington fails to prove that his counsel rendered ineffective assistance when he did not object to Miller's testimony and recordings.

Arrington cannot show deficient performance or prejudice. In this case, the postconviction court determined that there was "no ineffective assistance of counsel based on my decision about the sixth amendment." (R. 247:9.) Because the court determined that there was no Sixth Amendment violation, any objection by defense counsel to the admission of Miller's testimony and evidence would have been overruled. As a result, Arrington fails to show that counsel was ineffective for failing to object. *See State v. Ziebart*, 2003 WI App 258, ¶ 14, 268 Wis. 2d 468, 673 N.W.2d 369 (providing, "a claim predicated on a failure to challenge a *correct* trial court ruling cannot establish either [deficient performance or prejudice.]" *See also State v. Jackson,* 229 Wis. 2d 328, 344,

600 N.W.2d 39 (Ct. App. 1999) (counsel's failure to present legal challenge is not prejudicial if defendant cannot establish challenge would have succeeded). In this case, the postconviction court correctly determined that there was "no ineffective assistance of counsel based on my decision about the sixth amendment." (R. 247:9.)

Should this Court agree with Arrington that there *was* a Sixth Amendment violation, Arrington still cannot show that counsel was ineffective.

1. No deficient performance

As Arrington notes in his brief, Attorney Hughes was in possession of the audio recordings "for quite some time," and had reviewed them "long before trial." (Arrington's Br. 39.) He did not object to their introduction, and his decision not to was not deficient.

Arrington claims that "[c]ounsel had no strategic reason for not seeking to exclude the statements and recording; he just missed it." (Arrington's' Br. 40–41.) But at the hearing, Arrington never asked Hughes what his trial strategy was with respect to the allowing the admission of the recordings. (R. 278:5–15, 24–26.) Two things make clear that any failure to object to the admission of the recordings was not the result of deficient performance: (1) Hughes' initial decision not to object to their admission and his statements during closing argument, and (2) Arrington's admission at the postconviction hearing that even *he* couldn't really hear what was on the recordings.

First, counsel made the conscious decision not to object to the excerpts' admission (R. 275:7), and then he incorporated his decision into his trial strategy during closing arguments. As argued in the State's plain-error argument in Section II, during closing argument Attorney Hughes stressed how Miller's recordings were "muddled garbage." (R. 276:98.)

He also argued that the "roughly five minutes" of recordings have "almost no evidentiary value." (R. 276:99.) But he also argued that Arrington's statement about "dumping down on a crib" was *consistent* with Arrington's concession that he shot three times at Taylor's house. (*Id.*) Defense counsel argued, "[t]hat's not a difference. That's not Mr. Arrington lying." (*Id.*)

The postconviction court elaborated on this point. It opined that "it could be argued that the conversation[s] . . . on April 11, April 12 and April 13, 2016, supported the theory of self defense for Arrington." (R. 247:9.) The court explained that the conversation between Arrington and Miller was consistent with Arrington's version of events because Arrington's statement that "Shorty acted like 'a gorilla'" and his testimony that he "dumped the crib down cuz I don't know if he gonna come back and dump me down" could be argued that the reason he "dumped the crib down" was because Shorty was acting confrontationally. (R. 247:9–10.) And, Arrington's testimony that Shorty "ducked away" was consistent with Arrington's "explanation that he thought that Shorty was going for a gun." (R. 247:9–10.) Therefore, the court opined that "[t]he statements bolster [Arrington's] self-esteem claim." (R. 247:10.)

Again, Arrington never challenged or asked Attorney Hughes about his trial strategy at the postconviction hearing. But he now claims that Hughes was deficient for not objecting to the recordings. This is a prime example of impermissible second-guessing and Monday-morning quarterbacking by successor counsel. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (*per curiam*). "[I]t is the considered judgment of trial counsel that makes the selection among available defenses, not the retroactive conclusion of postconviction counsel." *Kain v. State*, 48 Wis. 2d 212, 222, 179 N.W.2d 777 (1970). That is why "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690

Second, Arrington testified at the postconviction hearing that he asked Attorney Hughes if there was a way to keep the recordings out, and Hughes replied that the recordings didn't really matter because "he couldn't really hear much on 'em." (R. 278:75.) When asked, "could you hear what was on the recordings," Arrington admitted, "Not really." (*Id.*) So while Arrington now argues that "[t]he reality is that the recordings spoke volumes" (Arrington's Br. 45), that is inconsistent with his own testimony.

Finally, while Arrington argues that "had the statements been suppressed, it likely would have altered Arrington's decision about whether to testify at trial given that the jury would not have been able to hear those statement at all if he did not testify" (Arrington's Br. 40), Arrington's own words at the postconviction hearing defeat this argument. When asked if *his* "decision to testify was based on what Jason Miller had said in court the day before?" Arrington replied, "Not only that, it was a lot of – a lot of testimonies that was like as far as the attacking my credibility or as far as my character, I mean." (R. 278:69–70.) When asked if his decision to testify also had to do with combatting witnesses other than Jason Miller attacking his character, Arrington replied, "Yes." (R. 278:70.) Arrington's argument that "the jury would have been able to hear Arrington's version of what occurred without him having to testify" (Arrington's Br. 41) is inconsistent with his own testimony.

Arrington fails to meet his burden of proving that Hughes' representation was deficient.

2. No prejudice

Finally, there is no prejudice here. Confidence in the trial's outcome was not undermined by allowing Miller's testimony or recordings. *See Strickland*, 466 U.S. at 694. As detailed in the State's harmless-error argument in Section II,

the State presented overwhelming of Arrington's guilt through the testimony of Taylor, Hawkins, A.V.T., Allen, Erica, Eugene, Howard, Brown, and even defense witness Landrum—all who undermined Arrington's self-defense theory.[7]

While Arrington argues only 4 of the 42 witnesses at trial witnessed the shooting (Arrington's Br. 43), each of those witnesses testified that they did not see Shorty with a gun. While Arrington also argues that he was prejudiced because Miller's statements were "unimpeachable," and that defense counsel "had no credible way to attack Miller's credibility" (Arrington's Br. 44–45), that is not so. As argued above, Attorney Hughes was able to get Miller to acknowledge that he had been convicted of a crime 18 times, and that he told Arrington that if he would have committed the crime, he would have done so alone "so it won't be no witnesses against me." (R. 275:29–31.)

Arrington fails to show that there is a reasonable probability that, but for counsel's failure to file a motion to suppress Miller's statements and recordings, "the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 694. There is no prejudice. Arrington fails to meet both prongs of his ineffective assistance of counsel claim.

[7] For lack of repetition, the State incorporates the evidence provided in its harmless-error argument, above. For the same reasons that the admission of the evidence is not harmless, it is also not prejudicial.

CONCLUSION

This Court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 22nd day of May 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,924 words.

Dated this 22nd day of May 2020.

SARA LYNN SHAEFFER
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 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.

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Dated this 22nd day of May 2020.

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