STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP2065-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RICHARD MICHAEL ARRINGTON,

Defendant-Appellant.

ON REVIEW OF A COURT OF APPEALS' DECISION REVERSING A JUDGMENT OF CONVICTION AND POSTCONVICTION ORDER ENTERED IN BROWN COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY A. HINKFUSS, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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I. Arrington fails to prove that counsel provided ineffective assistance.

A. Arrington fails to prove prejudice because every eyewitness to the shooting eviscerated his claim that he shot in self-defense.

Arrington argues that he was prejudiced because the State relied on the recordings "to destroy Mr. Arrington's claim that he shot in self-defense." (Arrington's Br. 11–12.) The State disagrees. There is not a reasonable probability that the jury would have acquitted Arrington had the jury not heard the recordings.

At trial, the jury listened to less than five minutes of recordings, which defense counsel told the jury were "muddled garbage" and "impossible to listen to." (R. 276:98.) While Arrington relies heavily on the transcript of the recordings in his brief, the *jury* did not have the benefit of a transcript. In contrast, what the jury heard was testimony showing that every eyewitness to the shooting destroyed Arrington's claim of self-defense:

- Craig Taylor testified that at no point did he see Shorty with a gun, and Shorty "never reached for nothing." Rather, Arrington shot immediately: "[a]s soon as [Arrington] sees him peek his head, [Arrington] started shooting into the doorway." (R. 271:60, 62, 63.)
- A.V.T. testified that Arrington "was waiting for [Taylor's] door to open." And after Shorty said, "What's good?" Arrington "just started shooting." When asked if she saw Shorty shooting back at the car, she replied, "No." There was "no way they were shooting back at that car." And, "[t]here was no gun came out that house." (R. 271:148–152.)

- Arrington's witness, Devin 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. Arrington fired two or three shots, and then "[w]e pulled off and we drove away." (R. 275:54, 59–61.)

And in addition to the eyewitnesses, the jury heard other evidence rebutting Arrington's self-defense story:

- James Allen testified that Arrington told him that Shorty had stabbed Arrington and that Arrington said, "I'm going to fuck [Shorty] up." (R. 274:198.)
- Howard testified that Arrington was "highly upset" when Shorty cut him, and that Arrington told Howard that "he was going to have to handle his business." (R. 274:206.)
- Brianna Brown testified that before the shooting, Arrington was upset about being cut by Shorty and he was "toting a MAC [10]." (R. 273:58–63.)
- Eugene Herrod told police that after the shooting, Arrington told him he had "fanned Shorty down." Eugene also told police that the next day, Arrington told him that he shot the wrong person, and that he would "get that [explicative] Shorty and finish the job." (R. 271:260, 263.)
- A.V.T. testified that when she told Arrington she wanted out of the car after the shooting, Arrington replied, "you on a murder case with me now, you ain't going nowhere." The next day Arrington took A.V.T.'s phone and threatened to kill her or her family if she told anyone. (R. 271:151, 158.)

The State also disagrees that Arrington was prejudiced because Miller was "unimpeachable." (Arrington's Br. 39.) Defense counsel impeached Miller's credibility through

Miller's admission that he had been convicted of a crime 18 times. (R. 275:29.)

Arrington fails to show he was prejudiced by counsel's decision not to object to the recordings' admission. This Court should reverse the court of appeals because it decides cases on the narrowest possible grounds. *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989).

B. Arrington fails to prove deficient performance because caselaw governing the use of informants was insufficiently clear to have raised a duty for counsel to object or move to suppress.

The State agrees with Arrington that "[t]he governing principles [of the right to counsel] have been in place for decades." (Arrington's Br. 11.) But there has not been a case, either Wisconsin or U.S. Supreme Court, with circumstances like this. Indeed, Arrington admits that none of the Supreme Court cases "involve[ ] a jail informant who police equipped with a recording device to memorialize statements elicited by the informant from an inmate whose right to counsel had attached." (Arrington's Br. 13.)

Relying on *Massiah v. United States,* 377 U.S. 201 (1964), *Maine v. Moulton*, 474 U.S. 159 (1985), *United States v. Henry*, 447 U.S. 264 (1980) and *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), Arrington argues that "reasonable counsel should have known enough to launch a challenge" to the State's use of the recordings. (Arrington's Br. 17.) But counsel is not required, and not deficient, for failing to "launch a challenge" when the law is unsettled. *State v. Breitzman*, 2017 WI 100, ¶ 49, 378 Wis. 2d 431, 904 N.W.2d 93.

As recognized in the State's opening brief, *Massiah*, *Moulton, Henry*, *Kuhlmann*, and *State v. Lewis,* 2010 WI App 52, 324 Wis. 2d 536, 781 N.W.2d 730, undoubtedly provide legal principles of the Sixth Amendment's right to counsel.

But these cases do not tackle the issue here: Did counsel have a duty to challenge recordings obtained by an unpaid jailhouse inmate, who approached police on his own initiative, with no prior formal agreement or promise of receiving consideration?

For example, Arrington relies on *Lewis*, but that case does not hold that allowing an inmate to record and providing a recording device is "the equivalent of direct police interrogation." (Arrington's Br. 28.) Here, the police did not tell Miller what to say or what to ask. It does not matter, as the court of appeals erroneously determined, that the police "*knew* that Arrington would talk to Miller about his case." (*Id.* (emphasis added).) What matters is that the police did "nothing to direct or control or involve themselves in the questioning of" Arrington. *Lewis*, 324 Wis. 2d 536, ¶¶ 1, 25.

Next, Arrington's assertion that "the record shows that consideration was contemplated and given" (Arrington's Br. 29) is beside the point. The relevant query is whether there was a "prior formal agreement"—or here, was there a "promise of consideration"? *Lewis*, 324 Wis. 2d 536, ¶ 1. There was no prior formal agreement or promise. Miller only had a *hope* that he would receive consideration. As the record shows, the State did not offer Miller consideration for his future trial testimony against Arrington until March 23, 2017—*over a year* after Miller recorded Arrington. (R. 237.)

The court of appeals pointed to no "prior formal agreement" or "promise of consideration." All it pointed to was that the detectives "knew" that Miller sought consideration. (Pet-App. 116–18.) Under *Lewis,* that is not enough: "[T]hat the government might know an informant 'hopes' to receive a benefit as a result of providing information does not translate into an implicit agreement between the government and the informant if the informant is thereafter placed into an environment where incriminating information can be

obtained." 324 Wis. 2d 536, ¶ 23. Like the jailhouse cellmate in *Lewis,* Miller was "promised nothing." *Id.* ¶ 11.

Here, the police testimony and uncontested findings of fact show (1) police never promised Miller any consideration; (2) police "made no promises to Mr. Miller that the fact that he was giving information would lead to a reduced sentence"; (3) "police never made any promise to Mr. Miller in terms of what he will receive for his cooperation"; and (4) "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*." (R. 278:41–42, 56; 247:4–6.) These findings are not clearly erroneous.

The State agrees with Arrington that the police in this case did "more than nothing." (Arrington's Br. 28.) They allowed Arrington to record, and they equipped him with a device. But like in *Lewis*, the detectives did nothing to direct, control, or involve themselves in Miller's questioning of Arrington. As the postconviction court found:

- Miller "voluntarily contribut[ed] information to the police which prompted the police to have a discussion with [Miller] about being a confidential informant."
- "The police never approached Mr. Miller about recording Mr. Arrington."
- 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."
- "Miller made requests to speak to law enforcement. Not vice versa."
- "Arrington began talking to Mr. Miller about his case without Mr. Miller prompting the conversation."
- "The police could not listen in on any conversation, and had not told what questions Mr. Miller should ask Mr. Arrington."
- "Arrington volunteered information to Mr. Miller without being prompted by him."

- Miller had an ability to turn off the recorder and was under "no obligation" to record.

(R. 247:4–6.) Arrington has never contested these findings, and, similarly, the court of appeals did not determine that any were clearly erroneous. These are the facts that Arrington must deal with on appeal. Defense counsel's failure to challenge was not outside the wide range of professionally competent assistance because it was a novel issue.

II. The plain error doctrine does not apply.

Arrington argues that the admission of the recordings warrants reversal as plain error. (Arrington's Br. 45.) But because (1) the error must be clear for the doctrine to apply, (2) there was no substantial error, and (3) any plain error was harmless, Arrington is not entitled to relief on this claim.[1]

A. The plain error is to be used sparingly.

"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. "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).

B. Arrington fails to show the error is clear.

The plain error doctrine requires that the error must be "obvious" or "clear." *State v. Nelson*, 2021 WI App 2, ¶ 48, 395 Wis. 2d 585, 954 N.W.2d 11. Here, whether defense counsel

[1] Contrary to Arrington's brief (Arrington's Br. 11, n.1), the trial court *did* address and rule on plain error. (R. 247:9.) It expressly adopted the State's arguments in its postconviction brief that any plain error was harmless error. (R. 247:9.)

had a duty to object was not sufficiently clear. While Arrington relies on both *Massiah* and *Henry* to argue that the violation of his right to counsel was obvious (Arrington's Br. 47–48), in *Lewis*, the court of appeals *expressly refused* to extend *Massiah*[2] and *Henry*[3] "to situations where an individual, acting on his [or her] own initiative, deliberately elicits incriminating information." *Lewis*, 324 Wis. 2d 536, ¶ 23 (quoting *United States v. Malik*, 680 F.2d 1162, 1165 (7th Cir. 1982).)

In *Lewis,* the inmate, Gray, obtained information from his cellmate (Lewis). *Id.* ¶ 4. After obtaining the information, Gray provided police Lewis's incriminating admissions. *Id.* ¶ 5. Police testified that Gray had come forward, and Gray "admitted that no law enforcement agency or officer ever promised anything to him in exchange for him providing information." *Id.* ¶¶ 8, 9. Gray testified that no one directed him to have a conversation with Lewis, and no one asked him to talk to Lewis in any way. *Id.* Finally, Gray testified "that Lewis volunteered the information without prompting by him." *Id.* ¶ 10.

The *Lewis* Court determined that "[t]he fact that the government might know an informant 'hopes' to receive a benefit as a result of providing information does not translate into an implicit agreement between the government and the

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[2] The central facts of *Massiah* concerned an agent who arranged a bugged meeting between codefendants who shared an interest in their pending prosecution, and the informant was instructed to, and did, converse about the pair's misdeeds. *Massiah v. United States,* 377 U.S. 201, 202–03 (1964).

[3] The central facts of *Henry* concerned FBI agents who reached out to a known, paid informant and had the informant, who was paid on a contingent-fee basis, give information to the FBI about Henry. *United State v. Henry,* 447 U.S. 264, 270 (1980).

informant if the informant is thereafter placed into an environment where incriminating information can be obtained." *Id*. ¶ 23. It 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*.

The State recognizes that *Lewis* does not concern a situation like the case at bar: a jailhouse inmate, acting on his own initiative in the hopes of receiving consideration, approaches police and asks if he should record an inmate who is represented by counsel, and the police provide the inmate with a recording device. But as the facts in *Lewis* show, it is the most like Arrington's case: like Gray, Miller came forward to police; like Gray, police never promised Miller anything in exchange for providing information; like Gray, the police did not direct Miller to have a conversation with Arrington, to ask Arrington any questions, nor did the police direct or control questioning.

Issuing numerous findings of fact and discussing all relevant cases, the circuit court concluded there was no Sixth Amendment violation. (R. 247:7.) Then, the court of appeals, without finding that any of the court's findings were clearly erroneous and relying on the same caselaw, concluded that there *was* a violation. (Pet-App. 120.) Considering this conflict and considering that no case has held that similar police conduct amounts to a Sixth Amendment violation, whether defense counsel erred when he did not challenge Miller's recordings is not "clear" or "obvious." Arrington fails to prove that defense counsel's failure to move to suppress or object on Sixth Amendment grounds was plain error.

C. Arrington fails to show the error was substantial.

Arrington also fails to show that it was a substantial error for defense counsel not to challenge Miller's recordings.

As noted above, even if defense counsel *had* challenged Miller's recordings, the circuit court would have overruled his objection: "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." (R. 247:6.) But even if defense counsel objected, and the court sustained his objection, the error was not substantial because *all* eyewitnesses contradicted Arrington's claim of self-defense. Taylor never saw Shorty with a gun during or before the shooting. (R. 271:62.) A.V.T. never saw Shorty with a gun. (R. 271:152.) Landrum, a defense witness, never saw Shorty with a gun. (R. 275:60–61.) Because of this damning eyewitness testimony, it was not a "substantial" error for defense counsel not to challenge Miller's recordings.

But Arrington argues that Miller's recordings amounted to a "surreptitious interrogation" of him. (*See* Arrington's Br. 46.) It didn't. Here, Arrington was not imposed upon, nor were his conversations with Miller the equivalent of interrogation. Arrington was free to keep quiet and consult with his attorney, but he chose to disclose incriminating information to someone that he mistakenly believed he could trust under non-coercive circumstances. What occurred here does not amount to "surreptitious interrogation."

D. Even if the plain error doctrine does apply, the error was harmless.

The circuit court was correct: the error was harmless. (R. 247:9.) "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[ ].'" *Jorgensen*, 310 Wis. 2d 138, ¶ 23 (citation omitted). An error is harmless if the State

introduced overwhelming admissible evidence of the defendant's guilt. *See Id.* ¶ 22. The State did so here. For the same reasons Arrington cannot show prejudice as shown in "Section I.A.", the State shows any error was harmless because of the overwhelming evidence of his guilt.

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

Finally, the error was harmless because (1) defense counsel was able to impeach Miller by having Miller admit that he had been convicted of a crime 18 times (R. 275:29); (2) the importance of the recordings was minimal because the incriminating statements on the recordings were corroborated by the eyewitnesses' testimony, including Landrum's, and (3) as the court of appeals recognized, even without Miller's recordings, Arrington was able to argue self-defense with other evidence.[4] (Pet-App. 121–22.)

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[4] The court of appeals found the following evidence supported Arrington's self-defense claim:

> An officer testified that he found bullet holes on or near the porch at foot level or below, which confirmed Arrington's testimony that he fired toward the foot area of the porch. Additionally, an

Any error in admitting the recordings was harmless.

CONCLUSION

This Court should reverse the court of appeals' decision that reversed Arrington's judgment of conviction.

Dated this 28th day of December 2021.

Respectfully submitted,

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> expert testified that although there was gunshot residue found on Gomez's jacket, she could not determine the distance from which the bullet that penetrated the jacket was fired.

(Pet-App. 121–22.)

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,995 words.

Dated this 28th day of December 2021.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court and Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 28th day of December 2021.

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