COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP814-CR **Cir. Ct. No. 2008CF3380**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO D. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Antonio D. Williams appeals the judgment entered on a jury verdict convicting him of four counts of first-degree intentional homicide, *see* WIS. STAT. § 940.01(1)(a), as party to a crime, *see* WIS. STAT. § 939.05. He also appeals the trial court's denial of his motion for postconviction relief. He argues

here that: (1) the trial court improperly limited cross-examination of the State's witnesses who testified as "cooperating" witnesses; (2) the trial court erred when it let the State use the contents of a letter found in Williams's jail cell to impeach his alibi witness; (3) the trial court should have granted his request for a mistrial made after the State asked a defense witness about seeing Williams with an assault weapon a year before these shootings; (4) the State violated ***Brady v. Maryland***, 373 U.S. 83 (1963), by not giving Williams a report listing names of people whose identification cards were scanned in at a bar where two State witnesses reported seeing one of Williams's co-actors the night of the shooting, because the report did not list the names of the co-actors and one of the witnesses; and (5) we should reverse under WIS. STAT. § 752.35 because the cumulative effect of all these errors prevented Williams from "fully and fairly" presenting the "real controversy." We affirm.

I.

¶2 On July 4, 2008, after midnight, Williams, Rosario Fuentez, and James Washington went looking for members of the "Murda Mobb" gang to take revenge on its members who had, about a week earlier, beaten up Williams and taken his watch. The three drove around looking for the gang, stopped at a hangout of the gang, Questions bar, and ended up finding their targets in the area of 28th Street and North Avenue. According to the criminal complaint, Williams had a SKS assault rifle and began firing it into a crowd of people, who had left Questions bar at closing time and gathered in the area of 28th and North. Washington also fired a semi-automatic assault rifle at the crowd, and Fuentez had a semi-automatic handgun that he fired at the crowd. Four people died.

¶3 During the police investigation, Williams and his lawyer came into the station for a "person of interest" interview. At this interview, Williams told a detective that on July 3, 2008, "he was at the Ark tavern," and "stayed there until closing time" and "was with no one there." After the Ark closed, Williams said "he went to the residence of his girlfriend" "Cherish Freeman" "spent the night at Cherish Freeman's residence" and "he woke up there in the morning of July 4th."

¶4 Fuentez confessed to police, named Williams and Washington as co-actors, and made a deal with the State to plead guilty to four counts of first-degree reckless homicide in exchange for testifying truthfully against Williams and Washington. In return, the State said that it would recommend a twenty-year sentence. The State charged both Williams and Washington with four counts of first-degree intentional homicide as party to a crime.

¶5 Williams was incarcerated before trial. During that time, police searched his jail cell, pursuant to a search warrant, for "Documents, Mail, Letters, Papers, Newspaper articles, Photographs, Compact discs, DVD's [*sic*] or any other electronic storage devices used to store photographs or documents" hoping to find pictures of the stolen watch that sparked the shootings. During their pat-down of Williams, detectives found a manila envelope marked "for my lawyer." Inside the envelope, the police found several handwritten letters thought to be relevant to the prosecution. One letter asked "Big Homie" to: "Tell buss it baby she got to stay sold and make sure A mothafucka **don't Break**. Under no type of pressure no matter what, my life is on the line." The letter then describes what the author wants "sanbony mama" to say happened the night of the shootings:

> I picked her up around 12 that night. I stopped at my house. Got her some weed and I went up to the ARK to get me a cup of liquor. We left there and went riding around. First we stopped at a gas station right off the

> highway to get some blunt wraps and something to drink. On 35th by Clybourn. I was talkin on my phone and I told somebody to meet me at a gas station but they never came then I met Zoe by Washington high school. I stood out the car for a few minutes and talked to him then we shook hands and left. She didn't see if anybody was in the car with him. It was a grey car. We was in the white car. We rode around [Questions bar] and caught the crowd. When [Questions bar] let out we rode around [Questions bar] for a while. Then at around 2:30 a.m. we met somebody around by [C]lybourn and I got some more weed for her. We went to my house fucked and then I took her home. I took her home at almost around 4 AM. She know what night it was because the next day she heard about what happened. Aw yeah I had three phones too. She had my 419 number. Not the 519. She didn't have a cell phone at the time and she called me from her house [phone]. She knew the 467 number too but I never really answered that phone. She think it was broken or something. Then tell her to understand that she can't break under the pressure. Put her game face on and [a]ct like a white girl type shit. Remember she was with me from around 12 until about 4 in the morning.

The trial court initially granted Williams's pre-trial motion to suppress this and the other letters found in the manila envelope, but later decided the "Big Homie" letter could be used for impeachment.

¶6 During Williams's trial, the State called seven witnesses who were in State or Federal custody and testifying as "cooperating" witnesses hoping that their testimony would earn them "concessions." During cross-examination of these witnesses, the trial court ruled that Williams's lawyer could not ask the cooperating witnesses about the maximum penalty each faced. Williams challenges the trial court's ruling with regard to five witnesses: (1) Xavier Turner; (2) Charlie Body; (3) Armando Hurtado; (4) Montrelle Johnson; and (5) Rosario Fuentez.

¶7 Turner identified Williams as a shooter. He testified that:

- He was in the crowd at 28th and North that was being fired upon.
- When "the shots stopped. And then I look up." And "I see [Williams] fixing there with his rifle." "And then he just took off through the back yards."

Turner testified that he did not immediately give police this information because "[f]our of my friends got killed in front of me, and I didn't want to talk then. I didn't want to cooperate." He thought "the streets would get Antonio Williams." Federal authorities arrested Turner in early 2009 and charged him with: (1) "interference with commerce by threat or violence"; and (2) "conspiracy to distribute a controlled substance": "five kilograms or more of cocaine." While in jail on the federal case, Turner told his lawyer he wanted to talk to police about the July 4th quadruple homicide; and, at that time, identified Williams as one of the shooters.

¶8 Several months later, Turner agreed to plead guilty to the cocaine charge in exchange for dismissal of the interference with commerce charge, and under federal sentencing guidelines, he faced ten years to life. According to Turner's federal lawyer, the plea bargain did not give him any credit "from either the State or the Federal Government" "as a result of his testimony" at Williams's trial. Turner's lawyer in the federal case told the trial court here: "When Mr. Turner started to give information regarding this case, it was made clear to him he wasn't going to get any consideration on this case [Williams's case] as it relates to his Federal case." "This was made clear to Mr. Turner, that the information regarding his testimony in this case will be made known to the judge

at the appropriate time at sentencing, and that's the only promise that Mr. Turner has."

¶9 When Turner testified at Williams's trial, he said he "hop[ed] to get a lesser sentence" but any benefit from his testimony was "vague" and he would have testified regardless because he "already told the family" "during the funerals" "that I was going to testify." "I already told my family and friends that I seen who did it and everything." And "I already was gonna come forth and testify."

¶10 Williams's lawyer wanted to cross-examine Turner about the maximum penalties he faced before entering into the plea bargain. The trial court ruled that the maximum penalties were off limits, reasoning:

> You can ask about the plea agreement, but you're not going through it piece by piece, it doesn't relate to this case.
>
> ….
>
> As it relates to penalties, there's a real issue here with getting into how that's all calculated, and I'm not going [to] have a trial within a trial about how we calculate Federal sentences based on guidelines. I mean, the Federal System is very different … you just can't label something as ten years to life when there are guidelines and the guidelines then give you another number and then you have downward departures from that number.
>
> But I'll not have a trial here about what kind of time this man is facing, nor do I think it's of any relevance since there has been no amount of time that has been promised to him that he will have his sentence reduced by, so what he starts at is irrelevant. … I'm not convinced at this point that the amounts of time that we're going to argue over here of what he may or may not be facing as a result of these charges is in any way relevant or is in any way prohibiting you from full cross-examination because the issues have to relate to the agreement and the affect of those agreements on his testimony.

> If there's no agreement as to what the amount is going to be reduced by, if they have said we'll reduce it by ten years, what he starts at is fully relevant and comes into effect. If there are no promises and all they're going to do is tell the judge that he did, in fact, testify here, which is what I understand the agreement to be, that he may later face a reduction of some kind, that that's a possibility he's been promised, you can certainly ask about that.
>
> But I don't see-- I do not want you to go down the road of well it's life, it's ten years, it's 131 months, I don't see how that at all-- That would take us off down a side road that will not help anyone and will be extremely confusing to the jury.

During the defense cross-examination of Turner, Williams's lawyer asked:

- "[Y]ou are getting a plea deal to testify, is that correct?"
- "[Y]ou have a pending serious criminal -- serious criminal case, is that correct?"
- "[Y]ou talked to the police because you wanted to get a better deal on your sentence on your criminal case?"
- "[I]f you don't testify today exactly how you told the police in your second interview with them, you won't get the deal, will you?"
- "[Y]ou don't know what your plea deal is … it's a vague plea deal?"
- "[Y]ou think it has something to do with how long you will be sentenced?"
- "[A]re you aware that you're facing some substantial time?"
- "[Y]ou pled" guilty to "that you knowingly and intentionally attempted to A, obstruct, delay, and affect commerce in the

movement of commodities by robbery in violation of Title XVIII of the U.S. Code Section 951-A, and that you possessed five kilograms or more of cocaine?"

- "Are you aware of the term 'downward departure'?"
- "Are you aware that by testifying you could get some substantial benefit for your testimony?"
- "[Y]ou're hoping to get a lesser sentence; is that correct?"
- "At the time of the arraignment, you were told what you were charged with, correct?"
- "And you were also told what the maximum penalties are?"

¶11 Williams's lawyer asked again about Turner's motivation for testifying:

- "[Y]ou're testifying today, you're hoping to get some kind of deal for this testimony?"
- "Did you think it was one of the parts of the job of your attorney to get you a good plea deal?"

¶12 The State next called Charlie Body to testify because he witnessed the Murda Mobb beat up Williams and steal his watch. Body also loaned Williams the red van that Williams used the night of the murders and told police that Williams confessed to Body some details about the shooting. Federal authorities arrested Body in December of 2008 for conspiracy to distribute cocaine, and in February of 2009, Body signed a "proffer letter" where he agreed

to cooperate with authorities and tell the truth about what he "did in the past and as far as anything that got to do with other people." At the time he testified against Williams, Body had an "agreement to cooperate" but no plea deal; he did not "even know how much time I am looking at right now." Body hoped to get some "consideration" on his federal sentence, but had not been promised anything specific.

¶13 Body testified:

- "[O]n or about June 28, 2008" Body and Williams were "hanging out, drinking and stuff" at "Club Phoenix" when Williams "got jumped." "[T]hey went in his pockets, and they took his watch and stuff." "He was beat up bad. His face was swelled and stuff."
- He let Williams borrow a "burgundy Caravan" in early July of 2008.
- Williams called him a couple days after the quadruple homicides and "asked me did I see the news." Body told Williams in that phone call: "Yeah, I knew when I seen the news, I [k]new that it was you all that did that shit."
- Williams told him: "'Yeah, I told you I was gonna go through there and sweat those niggas,'" and "'Man I think I blew the motherfucker's head off.'"
- Williams told him: the Murda Mobb got "what they had coming for taking his watch[,]" and that Williams was with "Zoe [nickname for Fuentez] and B.D. [nickname for Washington]" the night of the shooting.

- Williams told him that he used "a big ass machine gun," and "Zoe had a handgun."

¶14 Williams's lawyer wanted to cross-examine Body about the maximum penalties he faced but the trial court ruled that the maximum penalties were off limits, reasoning:

> The other thing we talked about was the proffer letter, that was the other sidebar. [Williams's lawyer] wanted to ask about the charges. [The prosecutor] objected. I allowed that to be asked. I again ruled that we weren't going to talk about penalty, but she could go into what the charges were, and she did, in fact, ask the witness what he was charged with, and he said conspiracy to distribute cocaine. So that was the essential substance of that.

¶15 Williams's lawyer asked Body during cross-examination:

- "You're getting a plea deal to testify today, is that correct?"
- "Has your lawyer told you you might get a plea deal for testifying today?"
- If he agreed to testify against Williams "in exchange for some kind of benefit in terms of your existing cases?"
- Why he did not give police this information to the police on one of the three times the police talked to Body in July of 2008.
- "[Y]ou were arrested on a federal case, is that correct?"
- "And you're currently in custody on that federal case?"

- "When you were arraigned … were you told the charges you had, the federal charges you had?" and the jury heard that Body had been charged with conspiracy to distribute cocaine.

- By testifying against Williams, "you thought that you were gonna get some kind of consideration on your federal sentence?"

- "[I]t was not until after you signed the proffer letter that you decided to tell the police about these statements that Mr. Williams allegedly said?"

- "Now, you're facing substantial time, is that correct?"

- "So testifying against Mr. Williams is probably gonna help you?"

- "If you don't testify today exactly like you told [the prosecutor] and the police said you were going to do, you are not going to get some kind of consideration in terms of your sentence like you previously described, is that correct?"

- "One last question regarding the February 27, 2009 [proffer] letter. The letter says, in exchange for Mr. Body fulfilling the requirements, State of Wisconsin will ask the federal government to give Mr. Body consideration in its federal charges. The amount of consideration would be based on the level of knowledge Mr. Body has and the corroboration of this evidence. Do you recall that as part of the proffer letter you signed?"

¶16 The State called Armando Hurtado to testify that: Willliams had confessed to Hurtado shortly after the homicides; Williams told Hurtado the

reason for the killings; and Hurtado gave Williams money to leave town after police arrested Fuentez. Federal authorities arrested Hurtado in April of 2009 for conspiracy to sell cocaine. After his arrest, Hurtado gave police the information he had on Williams, but the State did not promise him anything for the information or for testifying.

¶17 Hurtado told the jury that:

- Williams had "got beat up at a club" "a week before July 4th." "They beat him up pretty bad. Messed up his eye and stole his watch."

- Williams "said he was gonna go look for them guys that beat him up."

- Williams told him that Williams, Washington, and Fuentez "went and shot them people up." They "got off a van and ran through a gangway and [Williams] had a assault rifle, [Fuentez] had a handgun, and [Washington] had another assault rifle."

- Williams told him, "[t]hat they approached, it was a lot of people standing there, and they opened fire and they saw somebody fall."

- Williams shot at the crowd "[b]ecause he had got beat up really bad at the club and they stole his watch."

- When Williams heard the police had "picked up Rosario Fuentez[,]" "[h]e was a little nervous and he was telling me that he was about to leave" and go "[t]o Atlanta" but "[h]e needed some money" so "I gave him $4800."

¶18 When Williams's lawyer told the trial court she "want[ed] to be able to ask [Hurtado] how much time he's facing and what he's expecting to get from this[,]" the trial court ruled:

> I'm going to make the same ruling, … for the same reasons. We are not going to get into a whole side trial on how much really -- you are really facing in federal court based on guidelines and all that other stuff, but I'm going to allow you to get into the substance of the agreement, and the nature of the charges, the fact that he's facing substantial time. All the things that I ruled previously you can get into with him.

¶19 On cross-examination, Williams's lawyer asked Hurtado:

- If the fact that you were facing federal drug conspiracy charges had anything to do with his decision to "come forward"?
- "[I]n fact, when you were questioned about the -- your activities in the federal drug conspiracy, you offered then to tell some information that you had about Mr. Williams. Right?"
- "And that was under a proffer, meaning you had been promised nothing that you said would be used against you."
- "And that if you gave useful information, it could be used to help you?"
- "And you've now pled guilty to that federal drug conspiracy?"
- "Fair to say you are looking at a lot of time?"
- "Fair to say you would rather not do a lot of time?"

- "And in fact your agreement with the federal government is a written agreement that says that if you cooperate in the federal case or any other related matters, that that information will be given to the sentencing judge at the time you are sentenced. Right?"

- "And what has this prosecutor told you or your lawyer if anything about what he's going to do for you if you testify?"

- "So you don't know that he has said that he would also tell any judge that you were in front of about your cooperation?"

- "Well, are you hoping that will happen?" "That this prosecutor or somebody from the State of Wisconsin comes to court -- your court -- your federal judge court who is going to sentence you and say he came to court and he helped us. Right?"

- "And you know that's likely to get you a better sentence?"

- "And so when you first heard -- you say Mr. Williams talking about [Fuentez] committing this murder, you didn't call the police right then and tell them. Did you?"

- It was not until after you were arrested "when you were telling the feds all about everything that they asked you and you wanted to ask that you started talking about Mr. Williams. Right?"

¶20 Williams's lawyer then asked Hurtado about his prior record, listed the federal crimes he pled guilty to, and asked him whether he had seen police reports about the quadruple homicides.

¶21 Montrelle Johnson also testified for the State and told the jury that while in the same prison pod as Williams, Williams tried to bribe Johnson to lie for Williams's benefit. Johnson had already been sentenced for his federal crimes but had a pending State charge. Johnson had not been given any specific plea bargain, but the State told Johnson that if he cooperated and gave truthful testimony, the State would "tell the court about his cooperation at the time of sentencing."

¶22 The trial court ruled that Williams's lawyer could ask Johnson what the federal court sentenced him to: "I think it is a different situation. He's already been sentenced, and we're not going to have an argument over what the maximum is. This is what he got. That is fine." With regard to the pending State case, the trial court ruled:

> If you don't know what the state is recommending as a sentence, I want to stick with my ruling so far that we're not gonna get the jury all wrapped up in penalty and amounts, especially if there's no specific sentence given here. … If we -- we don't have [a set recommendation], I think any discussion about penalty is in some random area of we don't know. We don't know what he's getting. We don't know what is being recommended. You know, it's not relevant then what he's facing. And I don't want to bring the jury again into this whole penalty discussion about how much these penalties are. So, you can ask him about if he is facing substantial time, what he expects to gain from testifying. The same questions you have been asking. And you can mention the charges in both cases that he is facing.

Johnson testified:

- Williams "asked me to talk to his attorney and give her a statement that I supposedly had heard about -- about two people regarding this situation."

- He wrote to Williams and said if Williams "put some money on my books" he "would lie for [Williams]."[1]

- Williams told him "that he wrote his girl and told his girl to come put the money on my books."

- After he told Williams he would lie for him "$40" showed up in his prison account.

¶23 On cross-examination of Johnson, Williams's lawyer asked:

- "[Y]ou've been locked up" "for 5 years[.]" "Right?"

- "[Y]ou are looking at right now a pending criminal case that's a very serious case. Right?"

- "It's a … [f]irst degree reckless injury, Count 1, and Count 2, felon in possession of a firearm. Right?"

- "You are looking at a lot of time in that case. True?"

- "Already doing a lot of time. True?"

- "Don't want to do any more time than you have to. Right?"

- "And you know that by testifying to all of this, you are looking at getting this [prosecutor] to help you on that new case."

[1] Putting "money on books" is when someone outside of a person's place of confinement sends money that is earmarked for the incarcerated person's account, which can then be used to buy things in the facility. *See* Alice Goffman, *On the Run: Fugitive Life in an American City*, 44 & n.9 (University of Chicago Press 2014).

- "[D]on't you think that" your cooperation "will be helpful? You hope it will be helpful. Don't you?"
- "And by helpful, you mean getting less time. Right?"
- "[T]he prosecutor … here is going to help you on your state case?"
- "So the only help you are looking for is on the first degree reckless injury and the felon in possession of a firearm?"

¶24 Rosario Fuentez testified for the State that he, Williams, and Washington went to 28th and Center after midnight on July 4, 2008, armed with semi-automatic weapons to get revenge on the Murda Mobb gang for beating up Williams and stealing his watch. The three men hid in the gangway between houses and then Williams jumped out and started firing at the crowd. The State agreed to a plea bargain with Fuentez—in exchange for his testimony, the State would let him plead guilty to four counts of first-degree reckless homicide and recommend a total sentence of twenty years.

¶25 The trial court ruled that Williams's lawyer could not ask Fuentez about the maximum penalty he would have faced if not for the plea bargain:

> I don't want any mention of the maximum penalty for the same reasons as the other defendants that I made the ruling. It's a slightly different reason I guess in this case, so I should put that on the Record. In the federal cases the big concern was the tangent we would go off on and the fact that it's unclear what these minimum/maximums truly are for each defendant. Here I think the bigger concern is, as I stated, putting out a penalty where the jury may be asked to determine whether the defendant is guilty of that offense, and they're gonna have that number in their minds, and it's not appropriate that they know that information or that they transfer it in any way to their deliberations on this defendant from the witness' testimony.

> So I am not gonna allow you -- and I also again do not feel that knowing a maximum penalty is what is -- I don't think that knowing a maximum penalty is necessary to full and fair cross-examination of the witness about plea agreement.
>
> ….
>
> Jurors are not allowed to consider penalty when determining … guilt or innocence. The concern … is that I am anticipating one or both of the counsel here is going to ask me for a lesser included instruction at the time in which I give those instructions. And that is going to be the same charge that this -- that Mr. Fuentez is facing. And any juror paying attention here is going to be able to figure out the amount of years that the defendant is facing and may make a decision of guilt or innocence based on that decision. They may decide that now that they know that it's 60 on each count, that they will either find him guilty of all four, or not guilty of two, or however that would play out, or not guilty of any based solely on the penalty. And that's not appropriate. And we would have no way of controlling for that.
>
> ….
>
> [Y]ou can say that on each count you're facing substantially more than 20 years. I mean, I think that accomplishes, if you say "substantially more than 20 years on each count," and there's four counts, you're already putting it at what is substantially more in their minds, that could be double, that could be triple, that could be quadruple."
>
> ….
>
> This might help you much more to do it this way than you realize, and it might hurt you much more to put out the numbers than you realize. But I think either way, to protect the record and to make sure that nothing else enters into the jury's deliberation that's inappropriate, I am gonna do it this way.

¶26 Fuentez told the jury:

- He and Williams were "close" friends.

- Williams wanted revenge on the Murda Mobb because on June 28, 2009, they had "beat [Williams] up real bad" and taken his watch.

- Williams said the Murda Mobb was "gonna accept everything that come with taking that watch."

- At about midnight on July 4, 2008, Williams came to the Ark Inn where Fuentez was and wanted him to "ride with him," but Fuentez had to take his mother home. Williams was driving a "red Caravan."

- Fuentez met Williams later at 44th and Meinicke. Williams gave Fuentez a handgun and said Fuentez should "follow him."

- Washington was driving the red van with Williams as a passenger.

- They were looking for the "Murda Mobb."

- Fuentez parked his car and got in the "red Caravan" with "Williams and Washington." They parked the van on "27th and Wright," and "go through the gangway." He had a handgun, and Williams and Washington had "SKS assault rifle[s]."

- Williams told him to "watch his back" and then Williams "steps out and starts firing" "shooting into the crowd."

- All three fired at the crowd for about "30 seconds" until "Washington comes back over and says he's out [of bullets], and we start going back to the van."

- Williams said, "[H]e think he shot a ho [a female] in the head."

¶27 Williams's lawyer asked Fuentez on cross-examination:

- "[Y]ou have negotiated in this case a plea bargain with" "the district attorney, right?"
- "Did you ever tell anybody that you were going to be testifying against Mr. Williams and you got a deal to do that?"
- "And what are you gonna plead guilty to?"
- "First degree reckless homicide. And what is gonna happen to you if you plead guilty?"
- "Well, in fact 20 years has been promised by the D[istrict] A[ttorney] as a recommendation, correct?"
- "And you don't consider his letter to your lawyer a promise that he's gonna recommend 20 years?"
- "And do you consider that a promise, to recommend 20 years?" "In exchange for your testimony, right?"
- "You think that's a good deal or not such a good deal?"
- "Do you know how much worse it could be?" "And it could be a lot worse, right?"
- "And the D[istrict] A[ttorney] is not recommending the maximum penalty on any of these cases, is he?"
- "And the maximum possible penalty on even one count of first degree reckless homicide is a lot more than 20 years, right?"

- "You don't really want to do 20 years, do you? "You sure don't want to do any more than that?" "And you'd like to get less than that, right?"

- "But your negotiation with the state through your lawyer is that if you testify, that if you plead guilty to all four counts, they're gonna recommend 20 years in prison?"

¶28 During the defense case, Williams called the mother of his child, Greta Young to testify. She gave Williams an alibi by saying she had been driving around with Williams on July 4, 2008, from 12:00 a.m. until 4:00 a.m. The State then cross-examined Young:

> Q … Now, has anyone talked to you and asked you or told you what to say?
>
> A No.
>
> Q Nobody?
>
> A No.
>
> Q Okay. You're unaware of any letters or any conversations with anybody discussing what your testimony was supposed to be like today?
>
> A That's correct.

¶29 And a short time later, the State asked again:

> Q Now, ma'am, no one has talked to you about what to say in this case?
>
> [Williams's lawyer objects as "asked and answered" but the trial court overrules the objection.]
>
> A No.

At this point, the prosecutor started using the contents of the "Big Homie" letter to impeach Young, although he never mentioned, marked, or identified the letter:

> Q … So no one told you: We rode around Questions and caught the crowd?
>
> A No.
>
> Q Did anyone say -- tell you to say when Questions let out we rode around Questions for a while, then at around 2:30 a.m. we met somebody?
>
> A We met someone? No.
>
> Q Nobody told you that?
>
> A No.
>
> Q Nobody specifically told you to say that you were at Questions at around this time?
>
> A No.
>
> ….
>
> Q So no one told you specifically to say that he didn't have a 519 [cell phone] number?
>
> A No.
>
> ….
>
> Q Do you know anyone by the name of Big Homie?
>
> A No.
>
> Q Did anyone ever tell you to make sure that what you're saying is in order and that you understand every detail?
>
> A No.
>
> Q And did anyone tell you that under no type of pressure, no matter what, you are not to break?
>
> A No. I haven't spoken to anybody about this.
>
> ….

> Q … Did anyone tell you to put your game face on?
>
> A No.
>
> Q Did anyone tell you to remember that you were with the defendant between 12:00 and 4 o'clock in the morning?
>
> A No.

¶30 The defense called Donyell Davis, Williams's cousin, to testify that at a July 4, 2008 picnic, he heard Fuentez rapping about "if you mess with my nigga you get the nickel. And something about it will be all bad for you. You will be on Fox 6 News." The prosecutor then cross-examined Davis:

> Q Okay. You've seen [Williams] with an AK before, haven't you?
>
> A No.
>
> Q On the date of 7-25-07 weren't you with [Williams] at Club Escape when he shot into Club Escape?
>
> A No, I wasn't.

¶31 At this point, Williams's lawyer objected, and asked for a mistrial. With the jury out, the trial court sustained the objection but denied the motion for a mistrial, ruling that the prosecutor could not question Davis "in that area" but this did not "rise[] to a level of mistrial given the answer that has been made." The trial court said that it would "instruct the jury to disregard the question and to disregard the answer, that they are not to consider it, they're not to consider anything that stems from it, they're to put it from their minds. I will instruct that. I have continued to do that. I believe that cures it." When the jury returned, the trial court told the jury:

> I want to start by informing you that the last question that was asked and the answer, you need to disregard both of those. And as I have instructed you before, when I sustain an objection, you have to disregard the question, disregard

> the answer, put it out of your minds entirely. Okay. So you need to do that for the last question and answer.

¶32 As we have seen, the jury found Williams guilty of all four counts, and the trial court sentenced him to life in prison on each count to run consecutively. After delays not pertinent to this appeal, Williams filed a postconviction motion in May of 2012. Williams argued that the State withheld a police report in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963). The police report included a printout listing all the names of people whose identification cards had been scanned upon entering Questions nightclub the night of the murders. The printout did not list co-actor Washington's name or State witness Timothy Nabors's name.

¶33 At trial, Nabors testified that on the night of the shooting, at about "10:30 [p.m.]" Nabors "entered the club … and shortly after that James Washington was one of the first people I seen in there" and that they "spoke briefly." The State called a second witness, Erica Warrens, who testified that she saw Nabors talking to Washington at Questions the night of the shootings. Warrens identified Washington from a photo as she did not know his name.

¶34 Williams claims that the absence of Washington's and Nabors's name on the printout made Nabors's and Warrens's testimony false and his lawyer could have used the printout to impeach their credibility. The trial court, noting that the State claims the report was in fact turned over "in the packet of discovery materials" ruled that the "use of the scan list for impeachment purposes is of 'small importance' given the overall evidence adduced at trial," and denied Williams's motion.

¶35 We turn to Williams's claims on this appeal.

II.

A. *Limitation on Cross-Examination.*

¶36 As we have seen, Williams argues the trial court violated his Sixth Amendment right to confrontation when it limited the cross-examination of five "cooperating" witnesses who testified for the State hoping for "concessions." Every criminal defendant is guaranteed the right to confront the witnesses who are testifying against him. ***State v. Yang***, 2006 WI App 48, ¶10, 290 Wis. 2d 235, 243–244, 712 N.W.2d 400, 404 ("Every defendant in a criminal case is entitled to confront his or her accusers: In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him. U.S. CONST. amend. VI. This clause applies to the states as well as to the federal government. The Wisconsin Constitution also guarantees the right to confrontation: In all criminal prosecutions the accused shall enjoy the right … to meet the witnesses face to face. WIS. CONST. art. 1, § 7.") (internal quotation marks and case citations omitted; ellipses in ***Yang***). "'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'" ***Davis v. Alaska***, 415 U.S. 308, 315–316 (1974) (quoted source omitted).

¶37 The "right to confront and to cross-examine is not absolute," however, *see* ***Yang***, 2006 WI App 48, ¶10, 290 Wis. 2d at 244–245, 712 N.W.2d at 404–405, and trial courts "retain wide latitude insofar as the Confrontation Clause is concerned to impose limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant," ***Delaware v. Van Arsdall***, 475 U.S. 673, 679 (1986). We review a trial court's decision to limit cross-examination by analyzing whether the trial court

erroneously exercised its discretion. Thus, we will uphold the ruling if the trial court applied the correct legal standards to the pertinent facts "'and using a rational process, reached a reasonable conclusion.'" ***State v. Rhodes***, 2011 WI 73, ¶¶22–23, 336 Wis. 2d 64, 74–75, 799 N.W.2d 850, 855–856 (quoted source omitted). We review *de novo* whether the trial court applied the correct legal standards. ***Id.***, 2011 WI 73, ¶25, 336 Wis. 2d at 75, 799 N.W.2d at 856.

¶38 As we have seen, the trial court here considered all the pertinent facts, applied the correct legal standards and reached a careful and reasonable decision with respect to each of the five witnesses Williams complains about.

¶39 The trial court found a discussion on the maximum federal penalties these witnesses faced would be: (1) irrelevant, (2) confusing to the jury, and (3) a waste of time. This was well within the trial court's discretion. *See* WIS. STAT. RULE 904.03. Further, as we have also seen, the trial court gave Williams significant leeway in connection with all of the witnesses' expectations of receiving a *quid pro quo* for their testimony, including: (1) the actual charges; (2) the plea deal; (3) that each faced substantial time; and (4) that each hoped for a lesser sentence for testifying. The trial court did not by any stretch of the imagination erroneously exercise its discretion.

¶40 Williams argues that ***State v. Nerison***, 136 Wis. 2d 37, 401 N.W.2d 1 (1987), required the trial court to allow questions on the maximum penalty. We disagree. ***Nerison*** held:

> When the state grants concessions in exchange for testimony by *accomplices or co-conspirators* implicating a defendant, the defendant's right to a fair trial is safeguarded by (1) full disclosure of the terms of the agreements struck with the witnesses; (2) the opportunity for full cross-examination of those witnesses concerning the agreements and the effect of those agreements on the testimony of the

> witnesses; and (3) instructions cautioning the jury to carefully evaluate the weight and credibility of the testimony of such witnesses who have been induced by agreements with the state to testify against the defendant.

Id., 136 Wis. 2d at 46, 401 N.W.2d at 5 (emphasis added). Here, Williams concedes the trial court satisfied the first and third factors: "full disclosure of the terms of the agreements" and "instructions cautioning the jury" to weigh carefully "the testimony of such witnesses." Williams argues only that the trial court violated the second factor. As we have set out at length, that is simply not true: the trial court gave Williams, "the opportunity for full cross-examination of those witnesses concerning the agreements and the effect of those agreements on the testimony of the witnesses." The only limitation the trial court placed on Williams was to not allow him to explore the possible sentences the witnesses could have received, although, as we have seen, the trial court did permit his lawyer to get significant penalty information from Fuentez that might have affected Fuentez's credibility. Nevertheless, the trial court, as we have also seen, fully let Williams apprise the jury that the sentences that the State's witnesses faced were substantial. Further, the trial court's reason in connection with Fuentez was amply justified by its concern that the jury should not be aware of a defendant's possible penalty if convicted. This is fully in accord with Wisconsin law. *See* ***State v. Sugden***, 2010 WI App 166, ¶41, 330 Wis. 2d 628, 651, 795 N.W.2d 456, 468 (collecting cases).

B. *Use of "Big Homie" letter.*

¶41 Williams next claims use of the "Big Homie" letter to impeach his alibi witness violated his Sixth Amendment right to a lawyer because the letter came from inside an envelope marked "for my lawyer" and therefore the lawyer-client privilege attached to it. We disagree.

¶42 The Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel." WISCONSIN STAT. RULE 905.03(2) sets out the lawyer-client privilege:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: between the client or the client's representative and the client's lawyer or the lawyer's representative; or between the client's lawyer and the lawyer's representative; or by the client or the client's lawyer to a lawyer representing another in a matter of common interest; or between representatives of the client or between the client and a representative of the client; or between lawyers representing the client.

Kansas v. Ventris, 556 U.S. 586 (2009) held that "tainted evidence—evidence whose very introduction does not constitute the constitutional violation, but whose obtaining was constitutionally invalid—is admissible for impeachment." ***Id.*** at 556 U.S. at 594. Use of this evidence for impeachment may be necessary "'to prevent perjury and to assure the integrity of the trial process.'" ***Id.*** at 593 (quoted source omitted); *see also* ***Harris v. New York***, 401 U.S. 222, 223–226 (1971) (Prosecutor did not violate defendant's rights by introducing on cross-examination the defendant's statement to the police even though the defendant had not been warned of his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), because the defendant opened the door by denying matters he admitted in that uncounseled statement.).

¶43 Here, Williams asserts that the letter should have been protected by lawyer-client privilege because police found it in an envelope marked "for my lawyer." The letter, itself, however, clearly was not for Williams's lawyer. It was addressed to "Big Homie" and is telling his alibi witness what she should testify to. The letter was not protected by lawyer-client privilege, and its use to impeach

Young properly "'prevent[ed] perjury and [] assure[d] the integrity of the trial process.'" *See* ***Ventris***, 556 U.S. at 593 (quoted source omitted).

C. *Mistrial.*

¶44 The decision whether to grant a mistrial lies within the discretion of the trial court. ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 317, 659 N.W.2d 122, 134. "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***Ibid.*** Not every error warrants a mistrial; in fact, it is preferable to employ less drastic alternatives. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695, 702 (Ct. App. 1998). "A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." ***State v. Bunch***, 191 Wis. 2d 501, 506–507, 529 N.W.2d 923, 925 (Ct. App. 1995).

¶45 As we have seen, Williams sought a mistrial because the prosecutor asked Donyell Davis if he had seen Williams with an assault rifle a year before the shootings. The trial court did not see the need for a mistrial; instead, as we have seen, it gave a curative instruction that told the jury to "put it out of your minds entirely." We presume the jury followed the curative instruction. *See* ***State v. Johnston***, 184 Wis. 2d 794, 822, 518 N.W.2d 759, 768 (1994).

D. *Alleged Brady Violation.*

¶46 Williams argues that the State violated ***Brady***, 373 U.S. at 87, which held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment," by not giving him the police report with the Questions printout

listing all the names of the patrons whose identification cards had been scanned in on the night of the shooting. "To establish a ***Brady*** violation, the defendant must show that the State suppressed the evidence in question, that the evidence was favorable to the defendant and that the evidence was 'material' to the determination of the defendant's guilt or punishment." ***State v. Rockette***, 2006 WI App 103, ¶39, 294 Wis. 2d 611, 633, 718 N.W.2d 269, 279 (quoted source omitted). Our review is *de novo*. ***Ibid.***

¶47 The trial court found the missing printout immaterial because it did not affect the outcome of the trial. *See* ***id.***, 2006 WI App 103, ¶40, 294 Wis. 2d at 633, 718 N.W.2d at 280 ("Evidence is material for ***Brady*** purposes only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."). The printout would have been used solely to *impeach* Nabors and Warrens, who said they saw Washington at Questions. As we held in ***Rockette***:

> Evidence of impeachment is material if the witness whose testimony is attacked "supplied the only evidence linking the defendant(s) to the crime," or "where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case." … "Generally, where impeachment evidence is merely cumulative and thereby has no reasonable probability of affecting the result of trial, it does not violate the ***Brady*** requirement."

Rockette, 2006 WI App 103, ¶41, 294 Wis. 2d at 633–634, 718 N.W.2d at 280 (quoted sources omitted). Here, Nabors's and Warrens's testimony did not directly link Williams to the shootings, but rather put his co-actor at Questions the night of the shooting, presumably looking for the Murda Mobb. Further, the absence of Washington's and Nabors's names on the printout did not mean they were not at Questions that night. They could have been allowed in without identification, could have used a fake identification card, or could have snuck in,

and these matters, if fully explored, would have required a sort of mini-trial of how accurate Questions was in keeping tab of persons within its facility. Any attack on these witnesses' credibility would not have undermined the State's case. *See* ***ibid***.

E. *Real Controversy*.

¶48 Williams claims that "the real controversy" has not been fully tried because "the cumulative effect of the errors" "interfered with the jury's ability to properly determine credibility." He asks us to exercise our power of discretionary reversal pursuant to WIS. STAT. § 752.35. We have rejected each of his contentions individually; thus, putting them all together does not somehow create a reason to reverse. *See* ***Vollmer v. Leuty***, 156 Wis. 2d 1, 11, 456 N.W.2d 797, 802 (1990) (emphasizing that our power of discretionary reversal is reserved for only the exceptional case); ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752, 758 (1976) ("Zero plus zero equals zero.").

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.