COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2521-CR **Cir. Ct. No. 2013CF004162**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHIRONSKI A. HUNTER,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Brennan and Bradley, JJ.

¶1 BRENNAN, J. Shironski A. Hunter appeals the judgment of conviction entered after a jury found him guilty of: being a felon in possession of a firearm; possession of a short-barreled shotgun (domestic abuse); intentionally pointing a firearm at a person (domestic abuse); battery with use of a dangerous

weapon (domestic abuse); and disorderly conduct with use of a dangerous weapon (domestic abuse)—all as a repeater. Hunter argues that: (1) the trial court erred in admitting certain statements from 911 calls made by the victim and her sister, as well as the initial statements the victim made to the responding officer, because Hunter believes the statements are inadmissible hearsay and admitting them violates the Confrontation Clause; (2) the evidence presented at trial was insufficient to support the firearm convictions; and (3) the trial court erred in admitting testimony from three witnesses who were not previously disclosed to the defense pursuant to WIS. STAT. § 971.23(1)(d) (2013-14).[1] For the reasons which follow, we affirm.

BACKGROUND

The Complaint

¶2 In September 2013, the State filed a complaint alleging that, a few days prior, Hunter struck the victim in the face with a closed fist while she was holding their two-month-old child. The victim's sister was able to take the baby from the victim. The victim then observed Hunter depart but return seconds later armed with a shotgun. Hunter pointed the gun at the victim and stated, "I'm gonna kill you bitch." The victim then observed Hunter discard the firearm in a crawl space of the home. When Hunter returned, he struck the victim in the leg with a screwdriver, leaving a puncture wound. The responding officer, Officer Martin Saavedra, stated that upon his arrival he found "a 12 gauge sawed off shotgun" measuring less than sixteen inches in length in a crawl space of the

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

home; police found Hunter hiding in the garage. Neither the victim nor her sister appeared to testify at trial.

Objection to Portions of the 911 Recording

¶3 Prior to trial, the State turned over to Hunter a recording of a series of 911 calls the victim and her sister made during, and immediately after, Hunter's attack. Hunter agreed that the initial statements made by the victim and her sister in the recording were admissible. However, he objected to the statements made by both the victim and her sister after the five minute and twenty second mark, on the grounds that they were "calmer" and discussing events that had already happened. As such, Hunter claimed the statements were inadmissible hearsay and their admission would violate the Confrontation Clause.

¶4 The trial court found that the 911 recording was admissible in its entirety because it fell under the excited-utterance and present-sense-impression exceptions to the hearsay rule and because the statements were not testimonial as required to violate the Confrontation Clause. More specifically, the court held that after the five minute and twenty second mark:

> The emergency was still ongoing. They keep calling back and it is evidenced by the calls.
>
> I don't think a person has to be screaming, hysterically crying for it to fall under excited utterance and I also think present-sense impression comes into play.
>
> As far as the [Confrontation Clause] issue, I don't believe that these remain for any other purpose other than emergency assistance.
>
> They are not made for purpose of testimony or even just 'cause you say something just happened and it is not currently happening at that exact moment doesn't mean it is testimonial, it is what the call is intended for and it is a cry for help by the people making the calls.

Objection to Testimony from the Initial 911 Operator

¶5 Two days before trial, Hunter objected to testimony from the initial 911 operator because the State failed to include her in the witness list it turned over to the defense pursuant to WIS. STAT. § 971.23(1)(d). The trial court told Hunter that he could interview the operator prior to trial. However, in the end, the State could not locate the initial 911 operator and chose not to call any of the three 911 operators who spoke to the victim and her sister the day of the attack.

Objection to Testimony from the State's Authenticating Witnesses

¶6 On the day of the trial, the State explained that because it could not locate the initial 911 operator, it intended to call Lydia Vasquez and Officer Derrick Vance to authenticate the recording of the 911 calls. According to the State, Vasquez was "a civilian employee of the M.P.D. [Milwaukee Police Department] in the Telecommunications Department" for twenty-eight years, at least thirteen or fourteen as a supervisor. The State told the court that Vasquez would "testify that anyone who calls 911 in Milwaukee County, that when the call listed to the M.P.D. dispatchers a recording is created, that the recording is created at that time, at the time of the call. … [and] can't be modified after it is created." The State further stated that Officer Vance "is an M.P.D. liaison to the District Attorney's Office in the domestic violence unit." The State told the trial court that:

> [Officer Vance] will testify that he down-loaded or dumped this particular 911 call from the M.P.D. system.
>
> He will testify that he actually listened to [the recording of the 911 calls] that [the State has] and it matches the copy that he down-loaded from the M.P.D. system, and that he didn't modify it either when he down-loaded it or when he put it on the C.D.

Based on the State's proffer, the trial court concluded that the recording of the 911 calls was admissible as a telephone call made to a place of business pursuant to WIS. STAT. § 909.015(6).

¶7 Hunter objected to the testimony of both Vasquez and Officer Vance, again on the grounds that the State failed to timely disclose the witnesses as it was required to do pursuant to WIS. STAT. § 971.23(1)(d). The trial court offered Hunter an adjournment to interview both Vasquez and Officer Vance, but Hunter declined. The trial court then concluded that although the State did not comply with § 971.23(1)(d), the State otherwise set forth good cause for not providing the names of the witnesses sooner because the State did not intend to call the witnesses until after discovering that the initial 911 operator was unavailable. Additionally, the trial court found that Hunter endured no prejudice in allowing the authentication witnesses to testify because Hunter had known that the State intended to introduce the 911 recording into evidence.

Objection to Testimony about the Victim's Statements to the Responding Officer

¶8 The State also sought admission of the victim's out-of-court statements to Officer Saavedra when he arrived at the scene. According to Officer Saavedra, he responded to the 911 calls "within minutes" and saw a female, later identified as the victim, who appeared "upset, very angry, very emotional," flagging him down in the middle of the street. While talking with Officer Saavedra, the victim identified Hunter as the suspect, stated that he was inside the house with a shotgun, and claimed that he had battered her and stabbed her in the leg with a screwdriver. Officer Saavedra observed visible injuries on the victim, saw that she was crying and frightened, and noticed that she was speaking rapidly.

¶9 Hunter objected to Officer Saavedra's testimony regarding the victim's initial statements to him on the grounds that they amounted to inadmissible hearsay and violated the Confrontation Clause. The trial court found that when Officer Saavedra arrived at the scene the emergency was ongoing because it did "not consider that that emergency is over when you're in the street yelling for help." Consequently, the court determined that the statements were admissible as present sense impressions and excited utterances and did not violate the Confrontation Clause because they were non-testimonial.

Trial

¶10 Following trial, the jury found Hunter guilty of all five counts, and the trial court entered judgment accordingly. Hunter appeals.

DISCUSSION

¶11 Hunter argues that: (1) the trial court erred in admitting certain statements from the 911 recording, and initial statements the victim made to Officer Saavedra on the scene, because they are inadmissible hearsay and violate the Confrontation Clause; (2) the evidence submitted at trial does not support his convictions for possessing a firearm while a felon, possessing a short-barreled shotgun, and intentionally pointing a firearm at a person; and (3) he is entitled to a new trial based on the State's failure to properly disclose its intent to call the initial 911 operator, Vasquez, and Officer Vance as witnesses pursuant to WIS. STAT. § 971.23(1)(d). We address each issue in turn.

I. The challenged statements are admissible as excited utterances and do not violate the Confrontation Clause.

¶12 Hunter first argues that the trial court erred in admitting into evidence: (1) statements the victim and her sister made to 911 operators after the

five minute and twenty second mark on the 911 recording; and (2) Officer Saavedra's testimony regarding what the victim told him when he arrived at the scene. Hunter believes both pieces of evidence contain inadmissible hearsay and violate his right to confront the witnesses against him. We disagree and affirm.

¶13 Both the "United States and Wisconsin Constitutions guarantee criminal defendants the right to confront the witnesses against them." ***State v. Hale***, 2005 WI 7, ¶43, 277 Wis. 2d 593, 691 N.W.2d 637. The Confrontation Clause "bars 'admission of testimonial statements of a witness who did not appear at trial unless he [or she] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" ***Davis v. Washington***, 547 U.S. 813, 821 (2006) (quoting ***Crawford v. Washington***, 541 U.S. 36, 53-54 (2004)).

¶14 The threshold question when determining whether evidence violates a defendant's confrontation right is whether the evidence is admissible under the rules of evidence. ***State v. Lenarchick***, 74 Wis. 2d 425, 433, 247 N.W.2d 80 (1976). If the evidence is inadmissible under the rules of evidence, our analysis ends. If the evidence is admissible, we next examine whether admitting the statements violated the defendant's right to confront his or her accusers. ***State v. Savanh***, 2005 WI App 245, ¶13, 287 Wis. 2d 876, 707 N.W.2d 549. We address each question in turn.

A. The statements, while hearsay, are admissible as excited utterances.

¶15 Hunter first claims the statements on the 911 recording after the five minute and twenty second mark, and Officer Saavedra's testimony about the victim's initial statements to him at the scene, are inadmissible hearsay. The trial court found both statements admissible under the present-sense-impression and

excited-utterance exceptions to the hearsay rule. Hunter argues that the statements do not fall under either exception because the events the women described occurred in the past. We disagree.

¶16 Here, the parties all agree that both the contested portions of the 911 recording and Officer Saavedra's testimony are hearsay. *See* WIS. STAT. § 908.01(3) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). As such, the only question before us is whether the trial court erred in admitting the evidence under the present-sense-impression and excited-utterance exceptions to the general rule prohibiting hearsay. *See* WIS. STAT. § 908.02 ("Hearsay is not admissible …."); WIS. STAT. §§ 908.03(1)-(2) (setting forth the present-sense-impression and excited-utterance exceptions). Because we conclude that the statements are admissible as excited utterances, we need not address whether they are also admissible as present sense impressions. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (appellate court should decide cases on the narrowest possible grounds).

¶17 The determination of whether hearsay is admissible pursuant to an exception to the general rule prohibiting hearsay is a question within the trial court's reasoned discretion. ***State v. Moats***, 156 Wis. 2d 74, 96, 457 N.W.2d 299 (1990). When reviewing an evidentiary decision, "'the question on appeal is … whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Manuel***, 2005 WI 75, ¶24, 281 Wis. 2d 554, 697 N.W.2d 811 (citation omitted). "A proper exercise of discretion requires that the trial court rely on facts of record, the

applicable law, and, using a demonstrable rational process, reach a reasonable decision." ***Id.***

¶18 An excited utterance is a "statement relating to a startling event … made while the declarant was under the stress of excitement caused by the event …." *See* WIS. STAT. § 908.03(2). A statement qualifies as an excited utterance if it meets three requirements. ***State v. Huntington***, 216 Wis. 2d 671, 682, 575 N.W.2d 268 (1998). "First, there must be a 'startling event or condition.'" ***Id.*** (citation omitted). Next, the out-of-court statement must relate to the startling event or condition. ***Id.*** Finally, the "statement must be made while the declarant is still 'under the stress of excitement caused by the event or condition.'" ***Id.*** (citation omitted); *see also* WIS. STAT. § 908.03(2).

¶19 Timing is a key consideration of the excited-utterance exception. "'The excited utterance exception ... is based upon spontaneity and stress' which, like the bases for all exceptions to the hearsay rule, 'endow such statements with sufficient trustworthiness to overcome the reasons for exclusion of hearsay.'" ***Huntington***, 216 Wis. 2d at 681-82 (citation omitted; ellipsis in ***Huntington***). The interval between the startling event and the utterance is key, and "time is measured by the duration of the condition of excitement rather than mere time lapse from the event or condition described." ***Christensen v. Economy Fire & Cas. Co.***, 77 Wis. 2d 50, 57, 252 N.W.2d 81 (1977). "The significant factor is the stress or nervous shock acting on the declarant at the time of the statement." ***Id.*** at 57-58. "The statements of a declarant who demonstrates the opportunity and capacity to review the [event] and to calculate the effect of his [or her] statements do not qualify as excited utterances." ***Id.***

¶20 The trial court determined that the statements the victim and her sister made to the 911 operators, even after the five minute and twenty second mark on the 911 recording, were all excited utterances. The court found that during the entirety of the recording, "[t]he emergency was still ongoing," as evidenced by the sisters' repeated calls to 911 and their requests for help. The court concluded that a person does not have "to be screaming, hysterically crying for it to fall under excited utterance." We agree.

¶21 Having listened to the challenged 911 recording in the record, it is clear that the sisters were calling 911 for help and were still under the stress of the startling event—Hunter's attack—even after the five minute and twenty second mark. The calls themselves were made within minutes of the attack. The victim is very emotional, yelling and cursing at the 911 operator to send help. And her sister cuts off the 911 operator saying, "Please, oh God, please, oh God, send someone." It is clear that the sisters are seeking help and have not had time to calculate the effect of their statements; they are obviously still under "the stress of excitement caused by the event." *See* WIS. STAT. § 908.03(2). In short, the trial court did not erroneously exercise its discretion in admitting the entirety of the 911 recording.

¶22 Similarly, the trial court found the victim's initial statements to Officer Saavedra, the responding officer, to be admissible as excited utterances. The court relied on Officer Saavedra's testimony that when he arrived at the scene, only minutes after the victim and her sister called 911, he observed the victim "flagging down [o]fficers in the street yelling and screaming." Officer Saavedra further testified that the victim appeared "upset," was "crying and frightened," and had visible injuries. The court noted that, at the time the victim first spoke with

Officer Saavedra, Hunter had "not been arrested, this is not over." The victim "is not being interrogated, and the purpose of her statement is to get the [o]fficers to go get him and get him out of the house." Again, we agree.

¶23 As the facts found by the trial court show, the statements made by the victim when Officer Saavedra arrived at the scene were clearly made under the stress of Hunter's attack, and their purpose was to apprehend Hunter. The victim's fear and her related desire for police to apprehend Hunter, strengthen the reliability of her statements. The victim was clearly under the stress of excitement caused by the attack; therefore, the trial court did not erroneously exercise its discretion in concluding the statements were admissible as excited utterances.

B. The challenged statements are not testimonial and therefore do not violate the Confrontation Clause.

¶24 Because we conclude that the trial court properly exercised its discretion in concluding that the challenged portions of the 911 recording and Officer Saavedra's testimony were admissible as excited utterances, our next step is to examine whether admission of the statements violated Hunter's right to confront his accusers. *See* ***State v. Tomlinson***, 2002 WI 91, ¶41, 254 Wis. 2d 502, 648 N.W.2d 367. Whether admission of hearsay evidence violates a defendant's right to confrontation presents a question of law we review *de novo*. ***State v. Weed***, 2003 WI 85, ¶10, 263 Wis. 2d 434, 666 N.W.2d 485.

¶25 In ***Crawford***, the United States Supreme Court held that a defendant's confrontation rights are violated if the trial court received evidence of out-of-court statements by someone who does not testify at trial if those statements are "testimonial" and the defendant had no prior opportunity to cross-examine the witness. ***Id.***, 541 U.S. at 51. The Supreme Court elaborated on the distinction

between testimonial and non-testimonial statements in ***Davis***, in which the Court stated:

> Statements are non[-]testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id., 547 U.S. at 822 (footnote omitted).

¶26 In ***State v. Rodriguez***, 2006 WI App 163, 295 Wis. 2d 801, 722 N.W.2d 136, we discussed the ***Davis*** decision, noting that "[i]nsofar as a victim's excited utterances to a responding law-enforcement officer encompass injuries for which treatment may be necessary, or reveal who inflicted those injuries, which may facilitate apprehension of the offender, they serve societal goals other than adducing evidence for later use at trial." ***Rodriguez***, 295 Wis. 2d 801, ¶23. We stated that:

> [an] out-of-court declaration must be evaluated to determine whether it is, on one hand, overtly or covertly intended by the speaker to implicate the accused at a later judicial proceeding, or, on the other hand, is a burst of stress-generated words whose main function is to get help and succor, or to secure safety, and are thus devoid of the "possibility of fabrication, coaching, or confabulation."

Id., ¶26 (quoting ***Idaho v. Wright***, 497 U.S. 805, 820 (1990)).

¶27 Hunter claims the challenged statements that the victim and her sister made to the 911 operator, as well as the victim's initial statements to Officer Saavedra, were not testimonial because they were describing past events. He

further argues that the statements were not meant to address an ongoing emergency because Hunter had fled. We disagree.

¶28 The record shows that the statements the victim and her sister made to the 911 operators and that the victim made to Officer Saavedra when he arrived at the scene were intended to "enable police assistance to meet an ongoing emergency"; as such, they are not testimonial. *See* ***Davis***, 547 U.S. at 822. The trial court found that the emergency was still ongoing at the time the victim and her sister called 911 and when Officer Saavedra arrived at the scene. As we set forth in more detail above, the record strongly supports that conclusion: both sisters were highly agitated and emotional, they made repeated calls to 911 requesting police assistance, the victim was standing in the street screaming for help when police arrived, and Officer Saavedra observed visible injuries on the victim. Hunter may have fled, but he had done so only minutes before the statements were made and he was still at-large. The victim and her sister had no idea if he would return. The tone, tenor, and content of the statements makes it clear the victim and her sister were frightened and were seeking police and medical assistance when the statements were made. As such, the statements were not testimonial and Hunter's confrontation rights were not violated. *See* ***id.***

II. The evidence is sufficient to support Hunter's conviction of all three firearm charges.

¶29 Next, Hunter claims that the evidence provided at trial does not support his convictions for possessing a firearm while a felon, possessing a short-barreled shotgun, or intentionally pointing a firearm at a person, because he believes the evidence is insufficient to show he ever had actual possession of the short-barreled shotgun. We disagree.

¶30 When a defendant challenges the sufficiency of the evidence supporting a conviction, this court "may not reverse … unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). It is not this court's function to resolve conflicts in the testimony, weigh the evidence, or draw reasonable inferences from historical facts to ultimate facts; those duties belong to the trier of fact. ***Id.*** at 506. If there is any possibility that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we will not overturn the verdict, even if we believe the trier of fact should not have found guilt based on the evidence. ***Id.*** at 507. When faced with a historical record that supports more than one inference, we must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law. ***Id.*** at 506-07.

¶31 In order for the jury to conclude that Hunter was guilty of possessing a firearm while a felon, possessing a short-barreled shotgun, and intentionally pointing a firearm at a person, the State was required to prove, beyond a reasonable doubt and as relevant here, that Hunter possessed a firearm, specifically a short-barreled shotgun.[2] Both actual possession and constructive

[2] Hunter only challenges the element of possession common to all three claims.

In order for the jury to find that Hunter possessed a firearm as a felon, contrary to WIS. STAT. § 941.29(2)(a), the State was required to prove that: (1) Hunter "possessed a firearm"; and (2) Hunter had been convicted of a felony before the date of the attack. *See* WIS JI—CRIMINAL 1343.

(continued)

possession are sufficient to satisfy the "possession" requirement. ***State v. Peete***, 185 Wis. 2d 4, 16, 517 N.W.2d 149 (1994); *see also* WIS JI—CRIMINAL 920. However, here, the trial court only instructed the jury on actual possession. Actual possession means "actual physical control" over the item in question. ***Peete***, 185 Wis. 2d at 16; *see also* WIS JI—CRIMINAL 920. There is sufficient evidence in the record to support the jury's conclusion that Hunter had actual physical control over the short-barreled shotgun recovered by police.

¶32 Officer Saavedra told the jury that when he arrived at the scene the victim told him that during the attack Hunter "had armed himself with a sawed-off shotgun, had pointed it at her and had threatened to kill her." Officer Saavedra also testified that officers recovered a shotgun in the crawlspace near a hallway leading to the victim's bedroom and found Hunter hiding in the victim's garage. The jury was free to conclude that Officer Saavedra accurately conveyed the victim's statements to the jury and that the victim's statements at the scene were truthful. The victim's statements alone are sufficient to support the jury's conclusion that Hunter possessed the short-barreled shotgun.

¶33 Hunter claims that the evidence does not support the conclusion that he possessed the short-barreled shotgun because: he did not have the gun when the police searched him, he did not live at the property where the gun was found,

---

In order for the jury to find that Hunter possessed a short-barreled shotgun, contrary to WIS. STAT. § 941.28(2), the State was required to prove that: (1) Hunter "possessed a shotgun"; and (2) "[t]he shotgun was short-barreled." *See* WIS JI—CRIMINAL 1342.

In order for the jury to find that Hunter intentionally pointed a firearm at a person, contrary to WIS. STAT. § 941.20(1)(c), the State was required to prove that: (1) Hunter "pointed a firearm at or toward another"; and (2) Hunter "pointed the firearm at or toward another intentionally." *See* WIS JI—CRIMINAL 1322.

his fingerprints were not found on the gun, his voice is not heard on the 911 recording, and the officer who interviewed Hunter after his arrest testified that Hunter said that he did not step foot inside the victim's residence the night of the incident. However, it is the role of the jury to make credibility determinations and to choose among conflicting inferences from the evidence. *See* ***Poellinger***, 153 Wis. 2d at 506. Here, the jury credited Officer Saavedra and the statements the victim made to him at the scene. The jury's assessment of the evidence is not incredible as a matter of law simply because the evidence also supports another inference. *See* ***id.***

¶34 Consequently, we affirm Hunter's convictions for being a felon in possession of a firearm, possessing a short-barreled shotgun, and intentionally pointing a firearm at a person.

III. The State's alleged WIS. STAT. § 971.23(1)(d) discovery violations do not entitle Hunter to a new trial because Hunter suffered no prejudice as a result of the violations.

¶35 Finally, Hunter argues that he is entitled to a new trial because the State violated its discovery obligations pursuant to WIS. STAT. § 971.23(1)(d). More specifically, Hunter complains that the State failed, without good cause, to include on its witness list the 911 operator who took the victim's initial call, as well as Vasquez and Officer Vance, the two authenticating witnesses. We conclude that Hunter is not entitled to a new trial because, even assuming the State's discovery violations were without good cause, any error was harmless.

¶36 WISCONSIN STAT. § 971.23(1)(d) requires the State to provide a "list of all witnesses and their addresses whom the district attorney intends to call at the trial." ***Id.*** We analyze alleged discovery violations in three steps, each of which poses a question of law reviewed without deference to the trial court. ***State v.***

DeLao, 2002 WI 49, ¶¶14-15, 252 Wis. 2d 289, 643 N.W.2d 480. First, we decide whether the State failed to disclose information it was required to disclose under § 971.23(1). ***DeLao***, 252 Wis. 2d 289, ¶14. Next, we decide whether the State had good cause for any failure to disclose. ***Id.***, ¶51. Absent good cause, the undisclosed evidence must be excluded. ***Id.*** However, if good cause exists, the trial court may admit the evidence and grant other relief, such as a continuance. ***Id.*** Finally, if evidence should have been excluded under the first two steps, we decide whether admission of the evidence was harmless. ***Id.***, ¶59.

¶37 Here, it is undisputed that the State failed to include the initial 911 operator, Vance, and Officer Vasquez in its witness list, in violation of WIS. STAT. § 971.23(1)(d). Therefore, we look only to whether the State had good cause for the failure to disclose, and if not, whether the error was harmless.

¶38 First, and somewhat perplexingly, Hunter primarily contends that he was unduly prejudiced by the State's failure to properly disclose the identity of the initial 911 operator without good cause. Even if we assume, without deciding, that the State's failure to include the initial 911 operator on the witness list was without good cause, we fail to see how Hunter could have been prejudiced by the oversight because the State ultimately did not call the 911 operator to testify at trial.[3] As such, the State's failure to include her on its witness list was clearly harmless. *See* ***State v. Harris***, 2008 WI 15, ¶43, 307 Wis. 2d 555, 745 N.W.2d 397. (An error is harmless and produces no prejudice when it is "'clear beyond a reasonable doubt

[3] As part of his somewhat confused argument, Hunter actually claims that "the trial court erred in allowing the 911 operator *to testify* because the State's failure to disclose this witness ahead of trial prejudiced the defense." (Formatting altered; emphasis added.) It is clear from the record that the State could not locate the 911 operator and she did not testify at trial.

that a rational jury would have found the defendant guilty absent the error.'") (citation and footnote omitted).

¶39 Second, in a less developed argument, Hunter complains that the State failed to include Vasquez and Officer Vance on its witness list without good cause and that he was prejudiced by that failure. We disagree.

¶40 The trial court found that the State had good cause for failing to include Vasquez and Officer Vance on its witness list because it did not know they would be necessary until it was discovered that the initial 911 operator was unavailable. However, even if we assume, without deciding, that the State's failure to disclose the authentication witnesses was without good cause, Hunter cannot show he was harmed by the error. To begin, the trial court offered Hunter an adjournment to interview both Vasquez and Officer Vance, but Hunter declined. Furthermore, both Vasquez and Officer Vance limited their testimony to the authentication of the 911 recording; neither testified to the recording's contents. And Hunter was aware that the State would introduce the 911 recording into evidence. There is simply no possibility that the jury would have come to a different result had the State included Vasquez and Officer Vance on the witness list. *See* ***Harris***, 307 Wis. 2d 555, ¶43. Because any error by the State in failing to disclose its witnesses pursuant to WIS. STAT. § 971.23(1)(d) was harmless, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.