

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 19, 2007

David R. Schanker
Clerk of Court of Appeals

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Appeal No. 2006AP1103-CR

Cir. Ct. No. 2004CF247

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD A. KAMLAGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Nettesheim, J.

¶1 ANDERSON, P.J. Gerald A. Kamlager appeals from a judgment of conviction for first-degree intentional homicide, use of a dangerous weapon, in

violation of WIS. STAT. § 940.01(1)(a) (2005-06),¹ and one count of hiding a corpse in violation of WIS. STAT. § 940.11(2). He argues that the trial court erred when it denied his motion to suppress statements made after he had asserted his right to counsel and that the trial court erroneously exercised its discretion when it declined to use his requested instruction on circumstantial evidence and instead used the revised standard. For the purpose of our analysis we will assume error without deciding and exercise our appellate prerogative to conduct a harmless error analysis.² Upon review, we conclude that even if the trial court erred in suppressing the evidence, it was harmless error. Additionally, we conclude that the trial court did not err when it rejected Kamlager’s proffered jury instruction. Based on these conclusions, we affirm.

¶2 We first address Kamlager’s objection to the trial court’s chosen jury instruction. Kamlager argues that the newly revised circumstantial evidence instruction given by the trial court “failed to correctly and adequately express the rule in Wisconsin on the drawing of inferences by the jury when the prosecution relies on circumstantial evidence” and that therefore the trial court erred. The trial court’s rejection of Kamlager’s proffered instruction was not error because along with using the revised instruction,³ the court also gave the standard burden of

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² See, e.g., *State v. Koller*, 2001 WI App 253, ¶64, 248 Wis. 2d 259, 635 N.W.2d 838 (choosing not to resolve whether the trial court erred but instead we assumed trial court error for purposes of the decision and proceeded directly to a harmless error analysis), *modified on other grounds*, *State v. Schaefer*, 2003 WI App 164, ¶52, 266 Wis. 2d 719, 668 N.W.2d 760. See also, e.g., *State v. DeMars*, 171 Wis. 2d 666, 674, 492 N.W.2d 642 (Ct. App. 1992) (assuming “for the sake of discussion that the trial court’s rulings were error” we then concluded “any error was harmless ... because the state [proved] beyond a reasonable doubt that the error did not contribute to the verdict”).

³ WISCONSIN JI—CRIMINAL170, Circumstantial Evidence, states:

(continued)

proof and presumption of innocence instruction.⁴ When combined, the two instructions properly instruct the jury.

It is not necessary that every fact be proved directly by a witness or an exhibit. A fact may be proved indirectly by circumstantial evidence. Circumstantial evidence is evidence from which a jury may logically find other facts according to common knowledge and experience.

Circumstantial evidence is not necessarily better or worse than direct evidence. Either type of evidence can prove a fact.

Whether evidence is direct or circumstantial, it must satisfy you beyond a reasonable doubt that the defendant committed the offense before you may find the defendant guilty.

⁴ WISCONSIN JI—CRIMINAL 140, Burden of Proof and Presumption of Innocence, states:

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

Presumption of Innocence

Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent. This presumption requires a finding of not guilty unless in your deliberations, you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty.

State's Burden of Proof

The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.

Reasonable Hypothesis

If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty.

(continued)

¶3 That disposed of, we focus on Kamlager’s argument that the trial court erred as a matter of law when it denied his motion to suppress. Kamlager contends that his request for counsel during in-custody questioning on December 5, 2001, was not honored by police and that therefore all statements made after his request for counsel were statements obtained in violation of his Fifth, Sixth and Fourteenth Amendment rights to counsel and to remain silent. He concludes that his “right to due process of law required the [trial court] to suppress [his] statements for use as evidence.”

¶4 Again, for purposes of our analysis we will assume without deciding that the admitted evidence was admitted in error. The harmless-constitutional-error rule posits that not all trial errors which violate the federal or state constitution automatically call for reversal. *See Chapman v. California*, 386 U.S. 18, 22-23 (1967); *see State v. Harris*, 199 Wis. 2d 227, 252-55, 544 N.W.2d 545 (1996); *see* WIS. STAT. § 805.18(1).⁵

Meaning of Reasonable Doubt

The term “reasonable doubt” means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.

A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.

⁵ WISCONSIN STAT. § 805.18 **Mistakes and omissions; harmless error.**

(continued)

¶5 Reversal is appropriate when a trial error affected the substantial rights of the party. *See* WIS. STAT § 805.18(2). We thus conduct a harmless error analysis to determine whether the error affected the substantial rights of the party seeking to reverse or set aside the judgment. *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768. If the error did not affect the substantial rights of the party, the error is considered harmless. *Id.* The substantial rights of a party are affected only if there is a reasonable possibility that the error contributed to the outcome of the case. *Id.* A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome. *Id.* If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless. *Id.* In other words, if it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error, then the error did not contribute to the verdict, and it is therefore harmless. *State v. Kramer*, 2006 WI App 133, ¶26, 294 Wis. 2d 780, 720 N.W.2d 459 (citations omitted), *review denied*, 2007 WI 16, 298 Wis. 2d 95, 727 N.W.2d 34.

(1) The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.

(2) No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

¶6 In determining whether an error is harmless, the supreme court has articulated several factors that may be used to aid in the analysis, including:

the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case.

State v. Hale, 2005 WI 7, ¶61, 277 Wis. 2d 593, 691 N.W.2d 637.

¶7 We present the facts and our conclusions of law with the *Hale* factors in mind. *See id.*

¶8 **The nature of the State's case.** The following summarizes the State's case without the tainted evidence. On December 23, 2001, Wanda Greenlee's body was found covered with branches and brush in a secluded wooded area close to both Wanda's and Kamlager's homes in Walworth, Wisconsin. Wanda died as a result of gunshot wounds to the abdomen and blunt-force trauma to the head.

¶9 On May 26, 2004, a criminal complaint was filed charging Kamlager with one count of first-degree intentional homicide, use of a dangerous weapon, in violation of WIS. STAT. §§ 940.01(1)(a) and 939.63(1)(a), and one count of hiding a corpse in violation of WIS. STAT. § 940.11(2). Kamlager filed a motion to suppress statements obtained by police after his request for an attorney in his first in-custody interview on December 5, 2001. Detective Michael Banaszynski said that he had about twenty-five to thirty verbal or written communications with Kamlager that took place after the December 5 interview. Kamlager's

communications to Banaszynski are the essential statements Kamlager moved the trial court to suppress.⁶

¶10 At hearings on April 7 and May 13, 2005, the court took testimony on the suppression motion. Kamlager argued that these statements were obtained in violation of his Fifth, Sixth and Fourteenth Amendment rights to counsel and to remain silent.

¶11 The following facts are from the pretrial suppression hearings on this motion. On December 5, 2001, Kamlager was taken into custody because of a probation hold and a mental health emergency detention based on Kamlager being found attempting to commit suicide (i.e., he was found in his garage inhaling exhaust fumes from the tailpipe of his running truck). Banaszynski stated that he was the officer who transported Kamlager to the Walworth County Sheriff's Department and that during transport he read Kamlager his *Miranda*⁷ rights. Banaszynski stated that at the station, he did not talk to Kamlager but he did remain in the room while Detective David Fladten talked to Kamlager.

¶12 Fladten testified that he asked Kamlager if he could ask him some questions. Kamlager twice said, "I'm not saying anything. I want to talk to my lawyer." After the second time Kamlager said this, he pointed to Banaszynski and said, "I might talk to him down the road, but now I'm not saying anything." After

⁶ Specifically, with regard to Kamlager's statements, Kamlager's motion asked the trial court "for an order excluding as evidence all statements, oral or written, allegedly made by the Defendant to law enforcement officers or other governmental officials or their agents."

⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966).

that Fladten said he did not question Kamlager any further but “made statements” to him. Fladten explained:

I told [Kamlager] that we were interested in obtaining his help, at which point he became angry; and I talked about needing his help in finding Wanda. And that conversation probably lasted, after [Kamlager] had mentioned that he wouldn't say anything, he wanted to talk to his attorney, I would estimate the total conversation that I had with him lasted perhaps two minutes, three minutes, and it comprised primarily ... me making statements

Fladten ended the conversation because Kamlager “didn't appear to be willing to listen to me.”

¶13 The trial court found that though Kamlager invoked his right to counsel on December 5, he also indicated that he might speak with Banaszynski at a later date. The court found this to be an “invitation” that gave Banaszynski the right to try to explore that opening to obtain information about the victim. The trial court denied Kamlager's motion to suppress. The case went to a five-day jury trial.

¶14 At trial, Wanda's mother Phyllis Greenlee testified that her daughter disappeared on November 24, 2001. She said that they went out to dinner on Wanda's birthday, November 22, and that Kamlager was supposed to join them but never showed up. She also testified that Wanda had expected Kamlager to move in with her and the State introduced pictures of Wanda's closet, dresser and desk partially emptied.

¶15 Phyllis said that the day before Wanda disappeared, November 23, 2001, Wanda went with Kamlager to a dog track in Delavan. She said Wanda came home that same night and had said things did not work out with Kamlager that night. Wanda received a phone call the next morning, November 24, 2001,

and told her mother it was Kamlager who had called. Wanda then left the house after telling her mother she was going to meet Kamlager at Menards in Janesville.

¶16 Phyllis also testified that Kamlager had Wanda's cell phone in the fall of 2001. Phyllis said he would use it to call Wanda at their house and that after November 24, 2001, Kamlager never called the house again.

¶17 Deputy Richard Paquin testified that on November 27, 2001, he interviewed Phyllis and Wanda's brother Darrell⁸ at their home in response to the family's report that Wanda was missing. They showed him Wanda's checkbook, which indicated that the last entry made was a \$4000 check for cash. After learning from them about Kamlager's phone call to Wanda the morning of her disappearance and Wanda's plan to meet Kamlager at Menards that same morning, Paquin asked the Janesville Police Department to send a squad to check the Menards parking lot in Janesville. Upon checking, the police found Wanda's vehicle in the Menards parking lot. It was parked in the northwest corner at the entrance of the parking lot, not close to the entrance of Menards. After Paquin was notified that Wanda's vehicle was found at Menards, he went to Kamlager's home to follow up.

¶18 Paquin was able to make contact with Kamlager at his home and told him he was there because Wanda's family had reported her missing and had said that Kamlager would have been the last person to see her. According to Paquin, Kamlager did not appear to be upset or concerned with the news that Wanda was missing. Paquin asked Kamlager if he had any information as to Wanda's

⁸ Darrell Greenlee did not testify because he died before trial.

whereabouts. Kamlager said that he did not know where Wanda currently was, but that the last time he saw her was Friday, November 23, 2001, where he said he was with her at the Delavan dog track. Kamlager told Paquin that he and Wanda got into an argument at the dog track about their plans for that weekend. Paquin told Kamlager that Phyllis said that on November 24, 2001, Wanda told her she was supposed to meet Kamlager at Menards. Paquin also told Kamlager that Wanda's vehicle had been found in the Menards parking lot. Kamlager denied that he had plans to meet Wanda at Menards on that Saturday and said he did not know why Wanda's vehicle was parked at Menards.

¶19 After leaving Kamlager's residence, Paquin contacted Richard Bender, Kamlager's brother-in-law, because during their conversation Kamlager told Paquin that he had gone hunting with Bender on the Saturday that Wanda disappeared. After talking to Bender, Paquin contacted his sergeant and advised him that "something appeared suspicious with this ... since Mr. Kamlager did not know where Wanda was, and that the stories were different between Mr. Kamlager and what I was told at the Greenlee residence." Paquin said his sergeant instructed him to return to Kamlager's residence to ask him to come to the sheriff's department to do a more formal interview. Kamlager agreed and drove himself to the department. This interview was videotaped. The tape and the transcript were admitted into evidence without objection.

¶20 The jury viewed the video and was given a transcript of it to follow along. At the beginning of the interview, Kamlager was told three times that he was free to leave anytime and he was also told he was not under arrest. Paquin recapped the things he and Kamlager had earlier discussed at Kamlager's home. Paquin testified that during this interview he made it clear that he was "just trying to find [Wanda]." Kamlager first established that he met Wanda when they both

worked at Cotter TruServ and that he and Wanda were involved in a “five, six, seven[-]year[] ... [m]aybe longer” relationship up to the time she died. Kamlager told Paquin that the argument that he and Wanda had on the Friday night before she disappeared had something to do with Wanda wanting to go to Dubuque, Iowa, for the weekend. He said: “I pissed her off. Because, you know, we didn’t go away for the weekend. Cuz I was gonna hunt.” He said, “[W]e were arguing Friday night about me goin huntin. She wanted to go away.” Kamlager said he spoke to his brother-in-law, Richard Bender, about 7:00 p.m. Friday about going hunting in Richland Center on Saturday and that the plan was for Bender to pick him up at 3:00 a.m. on Saturday. Kamlager said he had all his hunting gear ready to go, “[p]acked in the truck.” Paquin asked: “Okay. And I assume you’d have your own weapon or shotgun[?]” Kamlager nodded his head up and down in the affirmative and said, “A .308.” Kamlager said he must have misunderstood Bender because he was up and waiting for him to come at 3:00 a.m. and Bender did not show. Kamlager said he then fell asleep and woke up again at 7:00 a.m.

¶21 Kamlager said he left after 8:00 in the morning to drive himself up to Richland Center to hunt with Bender. Kamlager said Richland Center is about a three-hour drive and that he arrived a little after 11:00 a.m. Paquin then asked, “Okay. Now did you bring your hunting gear at that time?”

[KAMLAGER]: “All the stuff was in the truck.”

[PAQUIN]: “Okay. So you had, you brought your rifle.”

[KAMLAGER]: “No I didn’t have my rifle. My rifle was at his house.

[PAQUIN]: “Okay. So [Bender] was suppose to bring the rifle?”

[KAMLAGER]: “Right. [Bender] was suppose, you know, bring his [.]308. It’s his dad’s gun. [.]308. I borrowed his dad’s [.]308.

¶22 Paquin asked Kamlager if he had “a weapon of his own as far as hunting?” Kamlager shook his head back and forth in the negative and said, “No.” Paquin then responded saying, “No. You don’t own any weapons?” At which point Kamlager again shook his head back and forth in the negative.

¶23 Kamlager said that he drove to Richland Center that morning without a rifle because he was planning on borrowing his father-in-law’s and Bender was supposed to have brought it up for him. After arriving at the deer stand, Kamlager said he and Bender argued for a little bit about “[w]ho was suppose to pick who up.” Kamlager said:

I was kinda pissed, you know ... so I drove back out in the front. Well, it’s like a mile into the woods. You know fourwheelin. I drove back out down the road. I said well ... I’m up here, I mind [sic] as well hunt. So I turned around back in. He had his shotgun with him. I used that ... for a rifle cuz you always take two guns when you’re deer huntin. I stayed in the stand. He walked around the other side. Then he started shootin. Said he claims he shot a buck or something.

Kamlager said that he and Bender then spent “four hours zig zaggin, lookin for blood and still didn’t find nothin.” Kamlager said he left for home around “2:30, 3 o’clock. The Badgers were on.” He said he stopped to get gas while in Richland Center and arrived home “around 6 [p.m.]”

¶24 Kamlager said that Wanda had mentioned to him that she and some girlfriends from work wanted to go to a million dollar give-away event at one of the casinos and he was not sure which casino or which weekend this was. But he thought “it was comin up.” Paquin asked whether Kamlager would have reason for concern over not talking to Wanda for a few days.

[PAQUIN]: [H]ow often do you [and Wanda] keep in touch?

[KAMLAGER]: I don't know. Talk about every third day or so.

[PAQUIN]: Okay. So a couple days not talking to her wouldn't seem odd or suspicious or just ...

[KAMLAGER]: No.

....

[KAMLAGER]: Cuz she works nights and she don't like callin the house with my wife around cuz the wife don't like her callin.

¶25 Paquin told Kamlager that Wanda's family realized that, before she left, Wanda wrote out a check for a substantial amount of money that her parents claimed Wanda should not have had in her checking account. Paquin asked if Wanda owed Kamlager money and he said no. He said Wanda "won trifecta and she won money." He said he did not know how much she won, but it had to have been over \$600 because she had to sign for tax purposes.

¶26 Paquin asked whether Kamlager owed Wanda any money. Kamlager responded: "I owed her ma a thousand dollars I borrowed a few months ago but nothing."

¶27 Paquin asked Kamlager about Wanda's cellphone:

[PAQUIN]: [I]s that common for [Wanda] to keep her cell phone on when she's out[?]

[KAMLAGER]: I wouldn't know that.

....

[KAMLAGER]: I never noticed if it's on or not.

[PAQUIN]: [I]f you are with [Wanda] ... when her cell phone rang and she ... answered it and talked with somebody, you can't remember that happening?

[KAMLAGER]: Not at the dog track, I wouldn't hear it....

....

[PAQUIN]: [T]hen you never saw her talking on the phone? Like it ... rang and she picked it up to answer it[?]

[KAMLAGER]: Not that I know, no.

¶28 Deputy Ken Brauer, who was present during the interview, asked Kamlager about how he and Wanda would arrange to see each other:

[BRAUER]: When you [and Wanda] were planning when you were going to get together, did she usually call you or did you usually call her to get together? Who usually set up the arrangements as far as if you were gonna go out?

[KAMLAGER]: It was different.

[BRAUER]: Have you, and when you did, have you called her in the past? Like do you call her at her residence? Do you call her on her cell phone?

[KAMLAGER]: I call, I call her

[BRAUER]: At the house.

[KAMLAGER]: At the house.

[BRAUER]: Have you ever called her on her cell phone at all?

[KAMLAGER]: I don't know the number to the cell phone.

....

[KAMLAGER]: She's always at home. Either that or call her work and page her.

¶29 The detectives then asked Kamlager if he would give them verbal permission to search his vehicle. He gave permission and his vehicle was searched that day.

¶30 Paquin testified at trial that he was present on December 5, 2001, when officers went to Kamlager's home to bring him into custody and at that time

he brought a warrant to search Kamlager's vehicle. He said that he found an empty cell phone box, "like [Kamlager] just purchased a new cell phone." He said that when he had searched the vehicle on November 27 the box was not there.

¶31 Deputy Gilbert Maas testified that he was assigned to surveillance of Kamlager on December 5, 2001, and that he observed Kamlager go into a Sprint cell phone shop. He then followed Kamlager to an off-track betting facility where he observed Kamlager using a cell phone. He stated that at some point he realized Kamlager knew he was being watched and Kamlager waved to him and also came up to him and said, "Hey, I'm going back to Wisconsin, let's go." He said that Kamlager left and he and another detective followed Kamlager in their squads and, at some point, Kamlager did a U-turn and began following the other detective. Eventually they lost surveillance of Kamlager.

¶32 Deputy Ken Brauer testified that on that same day, December 5, 2001, he was working second shift and received a call around 3:00 p.m. from Kamlager, who said, "[T]his is Kamlager. What the fuck is going on?" Kamlager swore at him again and wanted to know why there were numerous squad cars following him. Later that day, Brauer, along with Paquin and Banaszynski, went to Kamlager's home to take him into custody on a probation hold. Brauer said they pulled into Kamlager's driveway when they observed Kamlager's vehicle entering his garage. The garage door closed and Kamlager's vehicle was inside "revving very much." He said he thought Kamlager was going to drive through the garage door and try to escape so they positioned the squads parallel to the garage door to make it hard for him to do so. He said they tried to make contact with Kamlager and to gain entry into the garage but they initially could not so there was a lapse of time where Kamlager was in the garage and they did not know what was going on. They eventually gained entry into the garage and Kamlager's

vehicle was still running. They found Kamlager lying on the floor near his tail pipe exhaust breathing in the exhaust from the fumes.

¶33 Karen Greenlee, Wanda's sister-in-law, testified. She stated that on several occasions, Wanda told her that Kamlager was going to divorce his wife and move in with Wanda. She said that Wanda had packed a suitcase and had planned to go away with Kamlager the weekend of November 24, 2001, the weekend she disappeared.

¶34 Richard Bender, Kamlager's brother-in-law, testified. Bender stated that he talked to Kamlager on Friday, November 23, 2001, about going hunting the next day but it was never finalized. He affirmed his 2001 statement that Kamlager "showed up about 11:30 [a.m.]." Bender testified that Kamlager "had something on his mind other than coming up there deer hunting. I don't know what, but like I said, he just—yes, he was acting weird...." Bender said he has hunted with Kamlager for about seven years and that Kamlager usually wears insulated pants or some sort of orange pants and an orange jacket. Bender said Kamlager was wearing a Walworth rescue squad jacket that he recognized because it was a jacket he had given Kamlager. He said Kamlager did not bring a gun and borrowed his extra gun. He and Kamlager hunted for a while. He stated that he did not see Kamlager use a cell phone but that he could have used a cell phone and he would not have known it. Bender said Kamlager left around 2:30 or 3:00, asking him to call Kamlager's wife Bonnie "to say he was up there with me, and he'd be coming home." Bender said he did not call Bonnie because:

Um, why should I—I guess, why should I lie for him? [H]e wasn't up there hunting with me all day. He pretty much showed up for a couple of hours. And I know Jerry from years past, and he uses people for excuses a lot; so that's why I said I'm not going to get involved in it.

¶35 Bender testified that although he did not see a .22 rifle that day, he did know that Kamlager owned a Ruger .22 gun because he had seen it at Kamlager's home underneath the bed in the spare bedroom. Bender said he remembers the Ruger .22 because sometime before Wanda's disappearance, he and Kamlager had a conversation about it:

Like I said, we were looking at some guns that he actually, um, bought—a308 and a .243—and he was over there showing me those; and I just happened to see these other guns underneath there. And he said—You know, I don't know if he said he won them or whatever, and it just happened to be there; and I asked him if he wanted to sell it, and he said, no, I'm going to hang on to it for a little while.

Bender stated that in 2001 “after all this, um, happened,” he went back to his sister Bonnie's and Kamlager's residence and looked for the .22 Ruger gun and it was no longer there. He said he asked Bonnie what happened to it and she did not know.

¶36 Bender's wife, Barbara Nordmeyer-Bender, testified that at almost 9:00 a.m. on Saturday, November 24, 2001, she answered a collect call made to the Bender home and it was from Gerald Kamlager. Barbara talked to Kamlager who called to ask why Bender had not picked him up for hunting. Barbara said Kamlager wanted her to call Bender's cell phone and then call him back. Kamlager told her he was calling from a pay phone and gave her the pay phone number where he could be reached. Barbara did call Kamlager back and was able to reach him at this number. She told him she could not reach Bender but left a message. Barbara wrote the number down and later passed it on to the police. (Police were able to confirm that this number was the number of the pay phone located at the Mendards in Janesville.) Kamlager told Barbara: “I'm leaving right

now. I'm going to be heading up there." Barbara said Bender arrived home around 6:00 p.m. that evening.

¶37 Detective Gary Woodward testified that as part of the investigation he obtained Wanda's most recent cell phone bill and was able to determine that a call was placed from Wanda's cell phone to Wanda and Phyllis Greenlee's home at 8:09 a.m. Saturday, November 24, 2001, the morning of Wanda's disappearance. He was also able to determine that one more call was made that day at 1:42 p.m. to Amcore Bank, Telebank. Finally, he was able to determine that these two November 24, 2001 phone calls were the last calls ever made from Wanda's cell phone.

¶38 Kamlager's wife, Bonnie Kamlager, testified. Bonnie stated that she purchased a gun for Kamlager for Christmas but did not know what caliber or type of gun it was. She also stated that Kamlager told her that he had won two or three guns. She said that she never owned a cell phone and that Kamlager did not own his own cell phone that she knew of. She said that on Saturday, November 24, 2001, her husband left the house around 7:00 a.m. and that it was her understanding that he was going to do a painting job. She stated that Kamlager came home that night between 7:00 and 8:00 p.m. and she confronted him because she expected him home at 4:00 or 5:00 p.m. at the latest. Kamlager responded by saying nothing and gave her a "deer in headlights" look.

¶39 Bonnie testified that two days later, on Monday, November 26, 2001, she went to work as usual and Kamlager indicated that he was going to work but told her he would be taking a partial day at Cotter because he was going to get some things in line for a new job he was taking at Schneider Trucking. At this point in the testimony, both parties stipulated to the fact that Kamlager, in fact,

never had a job with Schneider Trucking. Bonnie testified that on Thursday, November 29, 2001, she called the police and reported Kamlager missing. She explained: “Well, he told me he would be probably driving for Schneider Truck, which that’s fine; but it got to be like 10:00 at night, and he still hadn’t been home.”

¶40 Wesley Bender, Kamlager’s father-in-law, testified. Wesley stated that on December 5, 2001, Kamlager called sometime before being picked up by the police and told Wesley to take care of Bonnie. Kamlager then told him, “The bitch wanted me to leave my Bonnie for her.” Wesley said Kamlager did not identify who he meant by “the bitch.”

¶41 The State introduced evidence of a ledger Wanda kept which documented that the total amount Kamlager owed to Wanda was approximately \$35,000 to \$36,000. The State also introduced promissory notes signed by Kamlager stating his promise to pay Wanda back.

¶42 Detective Craig Weber testified. He stated that he was assigned to authoring subpoenas, search warrants and following up with telephone record analysis. Weber found that there was only one ATM card issued for Wanda’s account. Weber obtained Wanda’s Amcore Bank ATM transaction log. The log showed that on Monday, November 26, 2001, approximately ten ATM withdrawals were made from Wanda’s checking account, five of which were made from an ATM at the Geneva Lakes Kennel Club. Weber also obtained surveillance video from the Geneva Lakes Kennel Club which depicted Kamlager in the area of the ATM on November 26, 2001. The log also showed that the ATM card was used at a location approximately one-half mile from where Wanda’s body was found.

¶43 Weber further obtained a record of calls made to Wanda's home and to her place of employment from a cell phone. Weber testified that this cell phone was owned by Wanda but used by Kamlager. Weber also obtained a record of calls made from Wanda's residence to the same cell phone. Weber introduced a graph made of these records reflecting the time span between June 17, 2001, and November 24, 2001. The graph showed spikes in calls between the cell phone and Wanda's home or place of employment. On, November 23, 2001, the day before Wanda went missing, there were fourteen calls made or received. On November 24, 2001, there were two calls: an 8:09 a.m. call made to Wanda's residence from the cell phone and a 1:42 p.m. toll-free call made from the cell phone to Amcore Bank's automated information system. After the 8:09 a.m. call on November 24, 2001, the phone record shows that there is never again a call placed from that cell phone to Wanda's home or place of employment.

¶44 Thomas York testified. He testified that his wife died in 2002 from multiple organ failure due to her alcoholism. He said in 2001, the police notified him that two checks had been issued out of his account and put into Wanda Greenlee's account. The checks were written for \$4600 and \$5875. He stated that he went in to talk to the police and that is when the officer looked through York's checkbook and discovered that two checks were missing from the middle of the checkbook. He said at that time he did not know that his wife was acquainted with Kamlager. He said later she did confide in him that she was having an affair with Kamlager. He said he learned later that his wife was picking up a child they were watching from a daycare center and had met Kamlager there. He said the police told him that they believed Kamlager took the missing checks from his wife the day she met him at the daycare center. He said the day after he learned about the stolen checks he went to the bank and filed an affidavit of forgery or fraud. On

this same day he found out the bank would cover the check amounts and he would not be out the money.

¶45 Forensic document examiner Jane Lewis testified. Kamlager's attorney stipulated to her findings that a portion of each of the Yorks' two stolen checks was written by Wanda Greenlee and a portion was written by Gerald Kamlager.

¶46 Ronald Witucki, a DNA expert, testified. He stated that he found three unfired cartridges in the pocket of Kamlager's hunting jacket, a jacket which had a 2001 deer tag on the back with Kamlager's name on it.

¶47 Reginald Templin, a firearm and tool mark examiner expert, testified that the three unfired bullets found in Kamlager's hunting jacket pocket were .22-caliber bullets. He verified that one of the bullets taken from Wanda's body was a fired lead .22 long-rifle bullet. The other bullet was in fragments and unidentifiable, though it was consistent with a .22.

¶48 Forensic pathologist, Dr. Jeffrey Jentzen, testified that Wanda's body was found on December 23, 2001, and the body's appearance was consistent with having been dead since around the date of her disappearance on November 24, 2001. He stated that in his opinion, "a month's period out of doors would basically destroy blood that was ... in that area, unless it ... had seeped into a position that was absolutely protected from outside climate and environment." He agreed that a month's period out of doors would affect forensic evidence at the scene, any offender DNA and trace evidence.

¶49 Michael Murphy, a Wisconsin prison system inmate, testified. He testified that the district attorney's office did not promise him anything in return

for his testimony. Murphy testified that he wrote a letter to Judge Kennedy regarding a conversation he had with Kamlager while the two of them were in prison together. He stated that he and Kamlager lived a few cells apart while they were in prison together and he knew him because they used to bet on football games every weekend. Murphy said that one day in 2002, he was playing handball with another inmate, David Stout, and he sprained his ankle so he went over to sit down on the bench that was right next to the handball court. He said Kamlager came over and asked him if he knew anything about the law. He said he told Kamlager “a little bit.” Murphy said that Kamlager proceeded to tell him about the checks that he was in jail for and that he felt he had gotten too much time for it. Murphy said he then asked Kamlager “where he had caught his case” and that Kamlager said Walworth county. Murphy said he told Kamlager: “Well, that’s where I caught my case too.” Murphy said they both were “pretty amazed by the fact that we both came out of the same county.”

¶50 Murphy said it was after the realization that he and Kamlager both were convicted of crimes out of Walworth county that Kamlager proceeded to tell him that he “killed somebody in Walworth County.” Murphy said he responded to Kamlager’s admission by asking: “Did anybody see you?” Murphy said Kamlager said no but that he was worried about it. Murphy said he told Kamlager: “Well, then you don’t have anything to worry about, do you?”

¶51 Murphy stated that at the time Kamlager told him he had killed someone, he did not believe him. Murphy said he gave Kamlager the name of a jailhouse lawyer he could talk with about the checks and that was the extent of their conversation. He also said that was the only time he and Kamlager talked about Kamlager killing someone. Murphy stated that he did not report what he had been told at that time. He said he came forward after he received a letter from

Stout, the inmate who had been in prison with him and Kamlager in 2001. He said Stout's letter informed him that Kamlager was charged with first-degree intentional homicide. He said after learning this, he wrote a letter to Judge Kennedy telling him what Kamlager had said.

¶52 Murphy testified that he provided information in the past that prevented an escape and also broke a drug ring within the prison system. This information is within the department of corrections records.

¶53 **The frequency of the error, the importance of the erroneously admitted evidence.** We now turn to the assumedly tainted evidence, which Kamlager asserts was heavily relied upon by the prosecution. In his brief, Kamlager specifically takes issue with the admission of statements he made to Banaszynski on April 29, 2003. Banaszynski testified that on April 29, 2003, he visited Kamlager in jail and that Kamlager admitted that he had seen Wanda on the day she disappeared, November 24, 2001. He said he met her at the Menards parking lot in Janesville and that she left her truck in the parking lot and got in his truck. He said they were going to go to Perkins to have breakfast but they had a fight and he returned her to her truck. He said that was the last he had seen of her.

¶54 Kamlager's main argument on appeal regarding this evidence is that it was "used as circumstantial evidence of guilt and to discredit [Kamlager]." Kamlager takes issue with the fact that these statements showed that he contradicted his previous statements to police that he had not seen Wanda on the day she disappeared. He explains:

One statement (made April 29, 2003, to [Banaszynski]) contradicted [Kamlager's] earlier statements to Detectives Paquin and Banaszynski that he did not see Wanda Greenlee after spending time with her on November 23rd.... In the April 29th statement, [Kamlager] admitted

he met with the victim on November 24, 2001 at Menards in Janesville, the date of her disappearance. That [Kamlager] gave one version to the detectives and later contradicted those statements was a principal theme of the State in closing argument.

¶55 In addition to this statement, Banaszynski testified regarding other relatively less important exchanges he had with Kamlager over the course of visiting him in jail. Banaszynski also testified that Kamlager wrote him letters from prison. Excerpts from five of the letters were read to the jury:

- On July 24, 2002, Kamlager wrote, “Should I ever receive a letter from Bonnie saying, I just got the truck back, cleaned ... and the computer ... I would be so happy that I might talk for weeks.”
- On August 25, 2002, Kamlager wrote: “Who knows, I might have something ... in my memory ... to help solve—solve different crimes. But the way I was treated ... for what I did.... When I saw a fight at the county, I asked someone important, ‘What do I say I saw?’ I knew I was going to prison, do I want to be labeled a snitch or not.”
- On October 6, 2002, Kamlager wrote that he does not care if he is charged because he has nothing more to lose. Again on November 15, 2002, he wrote that if the items he wanted back were returned he would be available “24/7”.
- Finally on December 9, 2002, Kamlager wrote that he would be available to meet anytime.

¶56 **The presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence.** Kamlager’s main issue with the erroneously admitted evidence is that he contends the prosecution relied on it in substantial part. The problem with this argument is that, even if Kamlager is correct in his assertion, the law is not whether the State relied in substantial part on tainted evidence. Rather, the law is whether, absent the tainted evidence, it is clear

beyond a reasonable doubt that a rational jury would have rendered the same verdict. See *Kramer*, 294 Wis. 2d 780, ¶26. If it is, then the error did not contribute to the verdict, and it is therefore harmless. *Id.*

¶57 Here, the State introduced untainted evidence that strongly corroborates the erroneously admitted evidence and leads us to conclude that any error in admission was harmless. This corroborating evidence is evidence from which a jury could rationally draw the same conclusion it could draw from the tainted evidence. From this corroborating evidence, a rational jury could reason that Kamlager met with Wanda on the day she disappeared and lied when he told the detectives that he had not.

¶58 A recap of that evidence is useful: Barbara Nordmeyer-Bender testified that at almost 9:00 a.m. on Saturday, November 24, 2001, she answered a collect call made to the Bender home and it was from Kamlager. Kamlager gave her the number he was calling from and Barbara passed it on to the police. The police were able to determine that the number Kamlager called from was the number of the payphone located at the Janesville Menards. Wanda's mother Phyllis said Wanda received a phone call on the morning of November 24, 2001, and Wanda told Phyllis it was Kamlager and that she was going to meet him at Menards. Wanda's most recent cell phone bill showed that a call was placed from Wanda's cell phone to Wanda and Phyllis Greenlee's home at 8:09 a.m. Saturday, November 24, 2001. Phyllis testified that Kamlager had Wanda's cell phone for his use during the fall of 2001, which included the weekend this call was placed to her home from that cell.

¶59 **The nature of the defense.** Kamlager's defense counsel did a thorough job defending his client. The fact that defense counsel was extremely

well prepared and professional gives this court additional confidence that the jury's verdict would not have been different had the tainted evidence not been introduced. The defense made a good effort to discredit some of the State's witnesses and to call into question some of the State's evidence. The jury chose to weigh the State's evidence more favorably. See *Day v. State*, 92 Wis. 2d 392, 400-01, 284 N.W. 666 (1979) ("It is the province of the trier of fact, in this instance the jury, to consider the credibility of witnesses and determine the weight given to their testimony."). The defense evidence did not raise a reasonable doubt in the jury's collective mind regarding Kamlager's guilt.

¶160 **The strength of the State's case.** It is not practical for this court to include the entire trial transcript but we have conveyed a thorough representation. From this representation, the strength of the State's case is evident. Absent the tainted evidence, a rational jury could adopt the State's theory of the case that Kamlager killed Wanda Greenlee; that he was a gambler who owed his girlfriend a lot of money, a man who had resorted to forgery and who was making promises to his girlfriend that he was leaving his wife and going to move in with her—promises he did not intend to keep, a man who had something to hide because he denied meeting his girlfriend on the day she disappeared even though there is phone record and testimonial evidence that strongly suggests he did meet Wanda that day. By the time the police brought Kamlager in for a probation hold, Kamlager was seemingly desperate because the police found him intentionally inhaling exhaust fumes from his vehicle's tailpipe trying to commit suicide. He had earlier that day made at least two phone calls: one was a hot-tempered phone call to the police when he realized he was under surveillance, the other was to his father-in-law in which he said, "That bitch wanted me to leave my Bonnie." The State's theory of a desperate man who killed his girlfriend, coupled with all the

supporting evidence offered by the State over the course of the five-day trial, is enough for a rational jury to convict. After careful review of the entire record, we are convinced beyond a reasonable doubt that given the overall strength of the State's case, a rational jury would have rendered the same verdict even if the tainted evidence had been suppressed. See *Kramer*, 294 Wis. 2d 780, ¶26. Therefore, any error in admitting evidence was harmless, and we reject Kamlager's request to set aside his conviction and grant him a new trial.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

