No. SC97229

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

DANIELLE ZUROWESTE,

Appellant.

Appeal from Warren County Circuit Court
Twelfth Judicial Circuit
The Honorable Wesley C. Dalton, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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ISSUES PRESENTED

Whether the State committed a discovery violation by disclosing a five-minute recording of a jail call Defendant made before she was even arraigned, when the prosecutor discovered the recording on the Thursday before the Monday trial and immediately contacted defense counsel in person the same day and provided the recording of the call by email?

Whether Defendant suffered fundamental unfairness from the allegedly late disclosure of the jail call when she articulated no specific harm to the defense, other than the fact that the call contained incriminating statements, and relies solely on the "reasonable likelihood" that such harm existed, and when the only relief sought by the defense at trial was the complete exclusion of the recording from evidence?

STATEMENT OF FACTS

Appellant (Defendant) appeals a Warren County Circuit Court conviction for one count of felony possession of methamphetamine. Defendant does not contest the sufficiency of the evidence to support the conviction. Viewed in the light most favorable to the verdict,[1] the evidence at trial showed the following:

Around 9 a.m. on September 21, 2015, a Foristell police officer went to an elementary school to investigate a child-custody issue. (Tr. 188.) After talking with people at the school, the officer began looking for Defendant; he had a description of her car and retrieved her photograph from the Department of Revenue database. (Tr. 188–89.) Just before noon that same day, the officer returned to the school and saw Defendant's vehicle parked in the parking lot. (Tr. 189.) The officer later followed Defendant as she drove from the parking lot. (Tr. 192–93.)

After following her for a short distance, the officer activated his emergency lights, and Defendant pulled over. (Tr. 194–95.) The officer watched as Defendant, who was alone in the car, reached over to the passenger side of

[1] *State v. Letica*, 356 S.W.3d 157, 161 (Mo. banc 2011).

the vehicle; Defendant's head was "moving a lot."[2] (Tr. 196, 215–17; State's Ex. 5.) The officer approached the driver's-side window and observed a small orange zipper-locked baggy lying on the driver's side floorboard near the center console; the baggy, which was only inches away from Defendant, had a white powdery residue inside it. (Tr. 197–98, 208.) In the officer's experience, such bags were used for drugs; it also appeared to the officer that someone had attempted to conceal the baggy. (Tr. 199–200, 206.)

Defendant appeared nervous while the officer talked to her. (Tr. 204.) After the officer went to his patrol car to run a computer check, he returned to Defendant's vehicle and arrested her; Defendant began crying after she was arrested. (Tr. 202–04.) The officer then searched Defendant's vehicle and recovered the orange baggy lying on the driver's floorboard. (Tr. 204–05.) He also seized two glass pipes that contained burnt marijuana. (Tr. 205, 209–10.)

Later testing of the baggy revealed that the white residue inside it was methamphetamine.[3] (Tr. 240, 242–43.)

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[2] A dashboard-camera recording of the traffic stop was admitted into evidence as State's Exhibit 5 and played for the jury. (Tr. 212–13.)

[3] The chemist who tested the residue and confirmed that it was methamphetamine testified that the residue was "clearly visible" when he began his analysis but that a "methanol rinse" employed during his testing had removed some of that residue. (Tr. 239–41.)

Defendant was charged in Warren County Circuit Court with one count of felony possession of methamphetamine and one count of misdemeanor possession of drug paraphernalia. (L.F. 19.) Defendant waived jury sentencing before trial. (Tr. 8, 21–24.) Immediately before trial began, Defendant pleaded guilty to the misdemeanor drug-paraphernalia charge. (L.F. 13; Tr. 34–36.) A jury found Defendant guilty as charged of possession of methamphetamine, and the court later sentenced Defendant to seven years' imprisonment with a 120-day callback under section 559.115, RSMo (Institutional Treatment Program). (Tr. 312, 335; L.F. 14, 51.)

ARGUMENT

The trial court did not abuse its discretion in failing to exclude from evidence, as a discovery sanction, a recorded call Defendant made from jail in which she made incriminating statements because: (1) the prosecutor personally contacted defense counsel and disclosed the recording as soon as he discovered it on the Thursday before the trial began on the following Monday; and (2) Defendant failed to show how the allegedly late disclosure resulted in fundamental unfairness in that she did not articulate any specific prejudice to the defense linked to the timing of the disclosure, other than the recording contained incriminating statements, and she sought only the exclusion of the recording from evidence instead of asking for less drastic relief, such as a continuance.

A. The record regarding this claim.

Defendant was arrested in this case on September 21, 2015, and the Foristell police officer who arrested her requested a warrant to hold her in the Warren County Jail until she made bond. (L.F. 1; Tr. 202–04, 275–76.) Five days later, on September 26, 2015, at 7:29 p.m., Defendant made a call from jail. (Tr. 249; State's Ex. 8.) A recording at the beginning of the call twice warned that the call was being recorded and was subject to monitoring.

(State's Ex. 8.) During the five-minute phone call, Defendant described a conversation that she had with her bail bondsman; she said that she did not want to remain in jail and that she had "learned [her] lesson." (State's Ex. 8.) She also said that someone named Ryan regretted introducing her to "it" and that she knew it was "wrong" and she shouldn't be doing "it." (State's Ex. 8.) She also said that she was "never doing it again," that she did not want to do this "sh*t anymore," that she was "f***ing done," and that she needed to be there for her kids. (State's Ex. 8.)

A surety posted bond for Defendant, and she was presumably released from jail on October 5, 2015. (L.F. 2.) Defendant waived a preliminary hearing, and the State filed an information against Defendant on March 15, 2016. (L.F. 9.)

On June 10, 2016, five months before trial, Defendant filed a boilerplate request for discovery, which included a request for "[a]ny written or recorded statements and the substance of any oral statements made by the defendant…." (Supp. L.F. 1.)

At 4:40 p.m. on Thursday, November 10, 2016, four days before Defendant's November 14, 2016 trial date, the prosecutor sent Defendant's

counsel an email and attached the recording of Defendant's September 26, 2015 jail call.[4] (L.F. 26.)

On the day of trial, November 14, 2016, the prosecutor filed a motion to endorse a witness (Lt. Matt Schmutz of the Warren County Sheriff's Office) to lay a foundation to admit the jail-call recording. (Tr. 11, 18; L.F. 29.) Defendant's counsel filed a motion to exclude the recording as a discovery sanction under Rule 25.18; The only relief sought in Defendant's motion was the exclusion of the phone-call evidence. (L.F. 26–28.)

In arguing the motion to exclude, Defendant's counsel complained about the prosecutor's office providing late discovery in other cases, including one in which she "was forced to ask for a continuance at the last minute." (Tr. 13–14.) She described another situation in which the defense was provided with "information at the last minute," but that the parties "proceeded with trial anyway." (Tr. 14.)

Defendant also complained that only one call was disclosed, that there could be other calls that might contain "potential *Brady* material" or exculpatory evidence, and that she was prevented from being able to investigate that possibility by the late disclosure. (Tr. 14.)

[4] Friday, November 11, 2016 was the Veterans Day holiday.

The prosecutor responded that as soon as he discovered the recording, he disclosed it to the defense and informed defense counsel of the witness he wanted to endorse to lay a foundation for the call's admission. (Tr. 17–18, 20.) He said that he called and talked to Defendant's counsel, explained what the evidence was, and emailed the recording to Defendant's counsel to insure she had received it. (Tr. 17, 20.) The prosecutor further noted that Defendant herself was, of course, personally aware that the phone call had been recorded. (Tr. 20.)

The prosecutor also stated that as both the court and defense counsel were aware, "it's difficult to juggle the trial docket." (Tr. 16.) The prosecutor explained that he does not know what case is going to be tried until a few days before trial, and that the prosecutor's office will prepare a case for trial only to have the public defender seek a last-minute continuance, including in a case in which the defendant had previously filed a disposition of detainer. (Tr. 16.) The prosecutor described a "shell game" in which the prosecutor's office has to "prep multiple cases for trial" yet not know which one will be tried until days before "in part because of defense counsel's conduct." (Tr. 16.) The prosecutor also observed that Defendant's counsel had not articulated how the late disclosure impaired the defense strategy. (Tr. 15.)

In response to defense counsel's argument about other jail calls possibly having exonerating information, the prosecutor said no exonerating material was contained on the other calls, and he offered to make a disk of those calls immediately available to defense counsel. (Tr. 20–21.)

The court next conducted a *Frye*[5] hearing during which Defendant acknowledged that the State had offered her a plea agreement for drug court, the successful completion of which would result in the withdrawal of her guilty plea and dismissal of the felony drug charge. (Tr. 21–24.) The court granted a recess so Defendant could consult with counsel and reconsider the offer, but Defendant later informed the court that she would not plead guilty to the felony drug charge. (Tr. 24.)

The court sustained the motion to endorse the foundation witness (Matt Schmutz) and overruled Defendant's motion to exclude the recorded jail call from evidence. (Tr. 21.)

When the prosecutor mentioned Defendant's jail call during opening statements, Defendant objected. (Tr. 180.) When the prosecutor asked the arresting officer if he had listened to State's Exhibit 8, which contained the recorded jail call, Defendant objected. (Tr. 224–25.)

[5] *Missouri v. Frye*, 566 U.S. 134 (2012).

A lieutenant with the Warren County Sheriff's Department testified during trial that persons booked into the county jail are given an inmate number, which, along with a PIN they receive, allows them to make phone calls from the jail. (Tr. 247–48.) All the calls are recorded. (Tr. 247.) When an inmate initiates a phone call, a prerecorded message warns the caller that the phone call is being recorded and subject to monitoring. (Tr. 248.) The lieutenant then identified State's Exhibit 8 as a DVD containing a recording of a phone call made by Defendant on September 26, 2015. (Tr. 249; State's Ex. 8.) The court admitted State's Exhibit 8 over Defendant's objection, and it was played for the jury. (Tr. 250.)

Just before the State rested its case, the court asked defense counsel if Defendant had made a decision about testifying. (Tr. 254.) After discussing the matter with Defendant, counsel told the court that Defendant had decided not to testify. (Tr. 254–55.) Counsel did not complain about not having had sufficient opportunity to discuss this decision with Defendant or that Defendant was prevented from meaningfully considering this decision because of the jail-call disclosure.

During opening closing argument, the prosecutor mentioned the recorded jail call and argued that what Defendant was referring to during the call was her use of methamphetamine and that the call exhibited her consciousness of

guilt. (Tr. 288–90.) The prosecutor referred to the recorded call three other times during his opening closing argument. (Tr. 293, 295–96.) The prosecutor made another reference to the call during rebuttal closing argument and informed the jurors they could listen to the call again during deliberations. (Tr. 305.)

During deliberations, the jury asked to hear the recorded phone call (State's Exhibit 8) and to view a photograph the defense introduced into evidence. (Tr. 309.) The court permitted the jury to listen to the recorded call. (Tr. 309–11.)

Defendant included a claim regarding this matter in the motion for new trial. (L.F. 61–62.)

B. Standard of review.

"The determination of whether the State violated a rule of discovery is within the sound discretion of the trial court." *State v. Bynum*, 299 S.W.3d 52, 62 (Mo. App. E.D. 2009). Likewise, determining whether a sanction should be imposed for a discovery violation is within the court's discretion. *State v. Neil*, 869 S.W.2d 734, 738 (Mo. banc 1994). The decision to impose a sanction for a party's noncompliance with a discovery request lies within the sound discretion of the trial court. *State v. Kinder*, 942 S.W.2d 313, 338 (Mo. banc 1996). "In reviewing criminal discovery claims, [an appellate] [c]ourt

will overturn the trial court only if it appears that the trial court abused its discretion to the extent that fundamental unfairness to the defendant resulted." *State v. Taylor*, 944 S.W.2d 925, 932 (Mo. banc 1997) (citing *State v. Mease*, 842 S.W.2d 98, 108 (Mo. banc 1992)).

C. Discovery in criminal cases.

Rule 25.03 requires the State to disclose, among other things, the defendant's written and recorded statements that are within its *possession or control*:

> (A) Except as otherwise provided in these Rules as to protective orders, the state shall, upon written request of defendant's counsel, disclose to defendant's counsel such part or all of the following material and information *within its possession or control* designated in said request:
>
> * * * *
>
> (2) Any written or recorded statements and the substance of any oral statements made by the defendant or by a co-defendant, a list of all witnesses to the making, and a list of all witnesses to the acknowledgment, of such statements, and the last known addresses of such witnesses;

Rule 25.03(A) (emphasis added).[6] Requests for discovery "shall be answered within ten days after service of the request."[7] Rule 25.02. Parties have a

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[6] This brief cites to the discovery rules in effect when Defendant's case was tried in November 2016. The criminal discovery rules were recently revised effective July 1, 2018.

[7] An amendment to that rule has now extended that time to 14 days. Rule 25.02 (eff. 7-1-18).

continuing obligation to disclose additional information they later discover after responding to an initial discovery request:

> If subsequent to complying with a request for disclosure or order of court, a party discovers information which he would have been required to disclose under the request or order, he shall furnish such additional information to opposing counsel, and if the additions are discovered during trial, the court also shall be notified.

Rule 25.08. The rules do not provide a deadline for either the discovery or disclosure of "additional information."[8]

If the defense requests discoverable material that is possessed or controlled by "other governmental personnel," the rules require the State to make an effort to insure the material is made available to defense counsel:

> If the defense in its request designates material or information which would be discoverable under this Rule if in the possession or control of the state, but which is, in fact, in the possession or control of other governmental personnel, the state shall use diligence and make good faith efforts to cause such materials to be made available to the defense counsel, and if the state's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court, upon request, shall issue suitable subpoenas or orders to cause such material or information to be made available to the state for disclosure to the defense.

Rule 25.03(C).

[8] Rule 25.08, which requires the court to be notified if additional material is discovered during trial, apparently contemplates that additional information and disclosures may occur up to the day of, or even during, trial.

A party's failure to comply with discovery is dealt with under Rule 25.18, which gives the trial court the authority to remedy the violation by granting a continuance, excluding the evidence, or in any other manner "it deems just under the circumstances":

> If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to make disclosure of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances. Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

Rule 25.18.

The purpose of discovery is to permit the defendant an opportunity to prepare in advance for trial and to avoid surprise; the focus of the denial of discovery, therefore, is whether there is a reasonable likelihood that the denial of discovery affected the result of the trial. *Mease*, 842 S.W.2d at 108. Failure to comply with discovery does not mandate a reversal of a conviction, however. *State v. Davis*, 556 S.W.2d 45, 47 (Mo. banc 1977). Rather, the trial court must make a determination as to the effect of the noncompliance on the outcome of the case. *Id.* The discovery sanctions provided under Rule 25.18 are permissive, not mandatory. *State v. Petty*, 967 S.W.2d 127, 137 (Mo. App. E.D. 1998). The trial court is in the best position to assess the prejudicial

effect of the failure to disclose and to determine what remedy was necessary to alleviate any unfairness. *Id.*

"The trial court abuses its discretion when the fashioned remedy results in fundamental unfairness to the defendant." *Bynum*, 299 S.W.3d at 62. The failure of the trial court to take remedial action for a discovery violation will be considered an abuse of discretion only if the discovery violation resulted in "fundamental unfairness or substantively altered the outcome of the case." *Kinder*, 942 S.W.2d at 338. Fundamental unfairness occurs only when the late disclosure results in a defendant's "genuine surprise…*and* the surprise prevents meaningful efforts by the defendant to consider and prepare a strategy for addressing the state's evidence." *State v. Johnston*, 957 S.W.2d 734, 750 (Mo. banc 1997) (emphasis added).

Fundamental unfairness is not measured by the extent to which the evidence in question is prejudicial because any incriminating evidence is prejudicial. *State v. Petty*, 967 S.W.2d at 138. It must be shown that the outcome of the trial would have been different if defense counsel had been able to prepare to meet the evidence. *State v. Neil*, 869 S.W.2d at 738. "Disclosure of evidence shortly before trial does not result in fundamental unfairness as long as the defense is given adequate opportunity to review

such evidence before its introduction." *State v. Neverls*, 702 S.W.2d 901, 903 (Mo. App. E.D. 1985).

D. No discovery violation occurred because the State disclosed the jail-call recording immediately upon discovering it four days before trial.

Defendant contends that a discovery violation occurred because her jail call was made and recorded in September 2015, Defendant filed a discovery request in June 2016 (five months before trial), and the State disclosed the recorded jail call and the foundational witness it wanted to use for its admission on the Thursday before the Monday trial began. Defendant's argument rests on the presumption that knowledge of the phone call—a call placed almost six months before the information was even filed—was imputed to the prosecutor on the day defendant's discovery request was filed. This presumption is not warranted in either fact or law. As explained below, the State did not possess or control the jail-call recording until the day the prosecutor discovered it and disclosed it to defense counsel.

The discovery rules require the "state" to disclose "material and information within its possession or control." Rule 25.03(A). The "state" referred to in this rule certainly includes the prosecutor and the particular law-enforcement agency or agencies that investigated the charges in the case being tried. *See State v. Smith*, 491 S.W.3d 286, 298 (Mo. App. E.D. 2016);

See also Kyles v. Whitley, 514 U.S. 419, 437 (1995) (For *Brady* purposes, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf *in the case*, including the police") (emphasis added). But the law-enforcement agency that recorded Defendant's call, the Warren County Sheriff's Department, was not the agency (The Foristell Police Department) that conducted Defendant's traffic stop, investigated her possession of methamphetamine, and arrested her. The recording of Defendant's jail call was not part of the investigation of her drug-possession charge. It was a routine, administrative act by the Warren County Sheriff's Office, which recorded the calls of every jail inmate. This recording was not made by the Sheriff's Department as an investigative arm of the prosecutor's office, but was undertaken as part of its administrative responsibility to the court system to hold persons accused of crimes.

The Court of Appeals has recognized that the "state" referred to in the discovery rules refers to the prosecutor, not to every governmental institution, such as a county jail:

> We acknowledge that "the State," if understood as an umbrella term for Missouri government institutions, might properly be said to embrace institutions such as a county jail; however, upon reviewing Missouri case law addressing discovery violations by "the State," we have found that such references in this area of the law are to the prosecutor as a representative of the State of Missouri, and not to any other state official or entity.

State v. Johnson, 513 S.W.3d 360, 366 n.3 (Mo. App. E.D. 2016).

Defendant nevertheless contends that knowledge of the jail call's existence must be imputed to the prosecutor in this case under *State v. Merriweather*, 294 S.W.3d 52 (Mo. banc 2009). *Merriweather* involved the State's appeal from a postconviction judgment declaring that the defendant was denied the right to a fair trial when the state failed to disclose that the complaining witness in a forcible-sodomy prosecution had a criminal conviction.[9] *Merriweather*, relying on Rule 25.03(C), states that the discovery rules "impose[ ] an affirmative requirement of diligence and good faith on the state to locate records not only in its own possession or control but also in the control of other governmental personnel" and that "the state has an affirmative duty to find even that evidence in the possession of 'other government personnel.'" *Id.* at 55–56. Defendant apparently relies on these statements to support her argument that under Rule 25.03, the prosecutor impliedly knew the jail-call recording existed on the date the discovery request was made. But this argument stretches the language of Rule 25.03(C) beyond its plain language.

[9] The failure to disclose apparently resulted from a computer glitch that occurred when the prosecutor ran a computerized criminal history check on the witness that did not reveal an out-of-state record showing the witness had a criminal conviction. *Id.* at 56–57.

Rule 25.03(C) does not impose an affirmative duty on the State to diligently investigate and discover material or information it does not know to exist. It simply demands that the State "use diligence and make good faith efforts" to insure that material and information it does know about, but which is possessed or controlled by another governmental agency, is made available to defense counsel. Moreover, the information at issue in *Merriweather*—criminal history records—is not uniformly available to defense attorneys. In *Merriweather*, the State violated the discovery rules by failing to disclose an accurate and complete criminal-history record—information to which it presumably had exclusive access—for the complaining witness in a case that turned solely on that witness's credibility.

The same is not true in Defendant's case because jail-call recordings made by other governmental personnel, in this case by a sheriff's office not involved in the investigation of Defendant's case, are not exclusively available only to the State.[10] Although the prosecutor's apparent request for Defendant's jail-call recordings may demonstrate that he was aware of the possibility that such a recording might exist, Defendant in fact knew that such a recording existed because she made the call. Moreover, Defendant's public defender

[10] Nothing in the record suggests that defense counsel was precluded from asking for a copy of her client's jail-call recordings.

was presumably aware that Defendant had been incarcerated in the county jail before she bonded out, that inmates have access to a phone, and that inmates sometimes make calls. Once the prosecutor became aware of the recorded call, he immediately disclosed it to defense counsel. It is disingenuous for Defendant to argue that the prosecutor should have sooner known about and disclosed a jail-call recording that the prosecutor was unaware of but that Defendant knew existed (and perhaps hoped that the prosecutor would not find).

In addition, "[t]here is substantial authority that the prosecutor cannot be cited for a discovery violation where the defendant had knowledge of the existence of the item that the State failed to disclose." *State v. White*, 931 S.W.2d 825, 832 (Mo. App. W.D. 1996). *See also State v. Cross*, 421 S.W.3d 515, 521 n.4 (Mo. App. S.D. 2013) (questioning whether a discovery violation occurred based on the prosecutor's failure to disclose jail-call recordings when "at the beginning of each phone call, a recorded voice warned [the defendant that] the calls were subject to recording and monitoring"). Defendant cannot claim *unfair* surprise when she had actual knowledge before trial that she made a phone call that had been recorded. *See Bynum*, 299 S.W.3d at 62 (holding that the defendant "cannot claim unfair surprise with regards to a [911] tape of which he had knowledge prior to trial yet chose not to locate");

State v. Holden, 278 S.W.3d 674, 679–80 (Mo. banc 2009) (holding that the no discovery violation occurred by the non-disclosure of registration forms the defendant personally completed).

The relevant inquiry in determining whether a discovery violation occurred is when the State came into possession of the recording in relation to when the recording was disclosed to defense counsel. Here, the same day the prosecutor apparently discovered the recording, which was four days before trial, he immediately contacted defense counsel and sent a copy of the recording to her by email. The prosecutor thus fulfilled his duty under the discovery rules to supplement the discovery disclosure when he became aware of the previously unknown information and material.

Defendant's relies on *State v. Johnson* to support her argument that the disclosure of the jail-call recording on the last business day before a three-day holiday weekend immediately before trial was by itself a discovery violation. But *Johnson* is inapposite because the Court of Appeals in that case treated the disclosure has having occurred on the day of trial in light of the fact that the prosecutor disclosed the jail calls by sending 24 hours of recordings to the Public Defender's office on a Friday holiday when the office was closed and

then failed to notify defense counsel of the delivery.[11] *Johnson*, 5113 S.W.3d at 363. Moreover, the prosecutor in *Johnson* admittedly knew about the recordings before they were disclosed (the record does not reveal how long) but delayed the disclosure to see whether the defendant might make additional jail calls in the days immediately before trial. *Id.* at 365.[12]

E. Defendant has failed to establish that the timing of the disclosure resulted in fundamental unfairness.

Even if the State violated the discovery rules by making a late disclosure, Defendant has failed to establish that the trial court abused its discretion in refusing to grant the only relief Defendant sought, which was the complete

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[11] The *Johnson* opinion repeatedly states that the prosecutor "waited until the morning of the first day of trial" to disclose the jail-call recordings. *Id.* at 365, 367.

[12] In finding a discovery violation and fundamental unfairness, the court in *Johnson* placed substantial emphasis on the prosecutor's culpability in deliberately delaying disclosure of the jail-call recordings. While this has been considered a factor in determining whether a discovery violation occurred, the discovery rules seem to distinguish between a discovery violation and counsel's willful violation of the discovery rules. *See* Rule 25.18 ("Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court."). The trial court's remedy for the untimely discovery disclosure in *Johnson*—precluding the State from introducing the jail calls unless the defendant testified—was arguably not an abuse of discretion. Whether that remedy was transformed into an abuse of discretion resulting in fundamental unfairness solely because the prosecutor acted in bad faith by deliberately delaying the disclosure is not a clear-cut result under the rules as written.

exclusion of the jail-call recording from evidence, or that she suffered "fundamental unfairness."

Defendant has failed to adequately explain how the allegedly late disclosure of the jail-call recording resulted in fundamental unfairness. Defendant does not identify how the timing of the disclosure affected her defense strategy or how she would have dealt with this evidence differently if she had known about it earlier. Defendant rests her claim of fundamental unfairness on essentially three grounds: (1) an unspecified claim that she was unable to prepare a defense to the recording; (2) that she had insufficient time to decide whether to testify or plead guilty; and (3) that she was unable to investigate whether other jail calls existed and possibly contained exonerating information. None of these claims establishes fundamental unfairness. Defendant has thus failed to demonstrate that the trial court abused its discretion in not imposing the draconian sanction of completely excluding otherwise relevant evidence, or that the failure to exclude the evidence resulted in fundamental unfairness.

Defendant does not explain what she might have otherwise done to prepare a defense at trial to the statements she made during the jail call. The defense strategy was to argue that the State had failed to prove knowing possession of the baggy of methamphetamine residue found on the floorboard.

(Tr. 299-302.) The defense had essentially four days to devise a defense strategy to deal with the call. Defendant does not explain how any additional time to investigate the statements she made during the call would have changed the result of trial.

This leads to Defendant's second claim, which is that she had insufficient time to decide whether to testify or plead guilty. Again, Defendant had four days to make that decision; many defendants do not make a final decision on whether to testify until the State has presented its case-in-chief. Defendant simply had an unpleasant choice to make: to either exercise her right not to testify and let the jury decide what to make of her statements or to testify in an effort to minimize what she had said. Defendant obviously wanted to avoid that choice by arguing solely for the exclusion of her incriminating statements. Simply because evidence is unfavorable to the defense—even if disclosed in the days before trial—does not establish fundamental unfairness. *See State v. Robinson*, 298 S.W.3d 119, 125 (Mo. App. E.D. 2009) (holding that while the defendant's untimely disclosed "inculpatory statement was damaging in that it contradicted [the defendant]'s claim of self-defense,…a defendant is not entitled to exclude evidence simply because it hurts his case").

Defendant's claim that she had insufficient time to decide whether to plead guilty is also without merit. Even assuming that this might qualify as proof of fundamental unfairness, the record shows that Defendant had four days after disclosure of the jail to consider the State's previous offer of attending drug court, the successful completion of which would result in the dismissal of the possession charge. Defendant rejected that plea offer just before trial began for unrelated reasons. More importantly, she did not complain that her ability to consider the plea offer was in any way hampered by the allegedly late disclosure of her jail call.

Finally, Defendant's argument that she suffered fundamental unfairness because she was unable to investigate whether other jail calls contained exonerating information is also unavailing. Defendant overlooks the fact that even if there were other calls containing exonerating statements or material—a claim she did not advance either at trial, in the motion for new trial, or on appeal—those calls would not have been admissible. "A defendant cannot create exculpatory evidence by introducing self-serving, hearsay statements which are not part of the offense's res gestae." *State v. Beishline*, 920 S.W.2d 622, 626-27 (Mo. App. W.D. 1996). *See also State v. Sweet*, 796 S.W.2d 607, 614 (Mo. banc 1990) (holding that testimony showing that the defendant had denied committing the crime was properly excluded as a "self-

serving declaration"); *State v. Wilkerson*, 616 S.W.2d 829, 834 (Mo. banc 1981) (holding that the trial court did not err in excluding the defendant's self-serving oral and written statements made to police); *State v. Shire*, 850 S.W.2d 923, 932 (Mo. App. S.D. 1993) (the trial court did not err in excluding the defendant's diary from evidence because it constituted an inadmissible self-serving act or declaration) *State v. Cooksey*, 787 S.W.2d 324, 328 (Mo. App. E.D. 1990) (affirming the trial court's exclusion from evidence of medical records containing the defendant's statements because they constituted "self-serving, out of court hearsay"); *State v. Stevens*, 757 S.W.2d 229, 233 (Mo. App. E.D. 1988) (the trial court properly excluded a police officer's testimony regarding exculpatory statements the defendant made after arrest on the ground that the statements "constituted self-serving hearsay... when offered by the defendant").

Defendant's case is similar to *State v. Pitchford*, 514 S.W.3d 693 (Mo. App. E.D. 2017), which involved the State's disclosure—on the morning of trial—of the defendant's jail-call recordings. *Id.* at 698. Although the discovery claim was not preserved for appellate review, the Court of Appeals determined that no discovery violation occurred based, in part, on the trial court's determination that the prosecutor disclosed the recordings to the defense as soon as the prosecutor became aware of them. *Id.* at 699–700. The *Pitchford*

court found that this case was distinguishable from *State v. Johnson*, in which the court held that the defendant suffered fundamental unfairness from the late disclosure of jail-call recordings because the prosecutor in *Johnson* "intentionally withheld its possession of and intent to use recorded inmate conversations until the morning of trial with the express purpose of surprising the defense." *Id.* at 699.

The Court of Appeals in *Pitchford* held that it would "decline to impose a bright-line rule upon the trial court that it must continue the trial upon the late discovery by the State of relevant evidence within a certain number of days before the start of trial, where, as here, there was no evidence of the State attempting to intentionally surprise the defendant." *Id.* at 700. If no bright-line rule exists mandating a continuance for disclosures that occur on the eve of trial, the law certainly should not require the complete exclusion of relevant evidence disclosed several days before trial, especially when the defense does not seek a continuance.

To support the argument that she suffered fundamental unfairness, Defendant relies on *State v. Henderson*, 410 S.W.3d 760 (Mo. App. E.D. 2013). But *Henderson* is distinguishable because there the prosecution failed to disclose evidence until after the trial had started, and the undisclosed evidence effectively eviscerated the chosen defense strategy, which was not

revealed until after the State had begun presenting evidence during its case-in-chief.

The defendant in *Henderson* was charged with unlawful possession of a firearm by a felon after a rifle was found in the defendant's presumed residence. *Henderson*, 410 S.W.3d at 762–63. The defendant had told officers that he kept the rifle for home protection, and paperwork found in the house was addressed to the defendant at the house where the rifle was found. *Id.* After it became apparent following the first day of trial that the defense theory was that the defendant did not reside in the house when the rifle was found, the prosecutor obtained the booking form the defendant had signed in which he had listed as his address the house where the rifle was found. *Id.* at 763. The trial court allowed the booking form to come into evidence over objection after giving defense counsel an opportunity to talk to the detective who prepared the form; the detective said that the defendant had given him the information he put in the form. *Id.*

The Court of Appeals held that admission of the untimely disclosed booking form had resulted in fundamental unfairness because defense counsel had not merely formulated a trial strategy to defend the case but had already put that strategy into play before the jury when the State disclosed the booking form on the second day of trial:

> [T]he booking form was the State's *most damning* documentary evidence that he actually lived at the residence where police found the rifle. By the time the State disclosed the booking form, the defendant had already committed in his opening statement to the jury to the theory of defense that he did not live at the residence where police found the rifle. The State was in the middle of its case-in-chief. The timing crippled the defendant's theory of defense and left defense counsel with no time to investigate and employ another strategy.

Id. at 766 (emphasis added).

Here, on the other hand, the prosecutor disclosed the recording four days before trial began. Defendant never complained at trial that the timing of the disclosure "crippled" the defense. Defendant simply argued that she did not have sufficient time to find other recordings or consider whether to plead guilty or testify at trial. Although a continuance could have remedied these latter concerns, Defendant, in what appears to be a trial-strategy decision, chose not to ask for a continuance but decided on an all-or-nothing approach in an effort to completely exclude the jail-call recording from evidence.

Defendant's case is also unlike other Missouri cases in which courts have found the failure to disclose evidence resulted in fundamental unfairness.

In *State v. Willis*, 2 S.W.3d 801 (Mo. App. W.D. 1999), the prosecutor in a manslaughter case involving an infant intentionally failed to disclose, until the day of trial, letters that the defendant had written to his wife following his arrest in which he admitted that he had dropped the infant. *Willis*, 2

S.W.3d at 803–04. The existence of these letters was first revealed to the defense on the day trial began when during a motion-to-suppress hearing, the defendant claimed that he had lied to police when he admitted dropping the victim in order to protect his wife. *Id.* Although the letters were admitted during the suppression hearing, defense counsel objected to their use at trial based on their untimely disclosure. *Id.* The prosecutor justified her failure to disclose the letters by saying that she had no intention of using them unless the defendant testified. *Id.* The trial court overruled defense counsel's objections and allowed the letters into evidence. *Id.*

On appeal, the defendant contended that the late disclosure of the letters "crippled his defense," because the defense strategy had been for him to testify that he had lied to police to protect his wife; this, of course, would not have explained why he admitted in the letters to his wife that he had dropped the infant. *Id.* at 804. The defendant argued that his only option after learning of the letters was to abandon his pretrial decision to testify, but since he had no other option he went ahead and testified anyway. *Id.*

The Court of Appeals held that the trial court had abused its discretion by relying, in part, on the fact that the letters directly contradicted the defense the defendant had planned to present. *Id.* at 805. The court also rejected the argument that any prejudice was ameliorated by the fact that the letters

were cumulative to other evidence because the "letters were not cumulative" and "contradicted the core of [the defendant]'s defense." *Id.* at 808. Finally, the court held that the failure to disclose the letters resulted in fundamental unfairness because their use likely affected the outcome of the case. *Id.* The letters were a "substantial portion" of the State's case, and the prosecutor made substantial use of the letters during both her cross-examination of the defendant and her closing argument. *Id.*

Again, as with *Henderson*, Defendant's case is distinguishable. Even if the disclosure in Defendant's case was untimely, the recording was still disclosed before trial with ample time for Defendant to consider this evidence in formulating a defense strategy.

In *State v. Scott*, 943 S.W.2d 730 (Mo. App. W.D. 1997), although the prosecutor disclosed the existence of witnesses to whom the defendant made inculpatory statements, the prosecutor nevertheless intentionally withheld statements the defendant made to these witnesses on the ground that he was not obligated to disclose them. *Id.* at 733–35. The defense attorney objected that the disclosure was untimely and that use of the evidence "more or less shoots my theory of defense all to hell." *Id.* at 734. The *Scott* court held that the nondisclosure resulted in fundamental unfairness. *Id. See also State v. Harrington*, 534 S.W.2d 44, 47 (Mo. banc 1976) (the trial court abused its

discretion in denying a continuance when the defendant's trial strategy was self-defense and the defendant's statement to the FBI, which was disclosed only at trial, asserted accident); *State v. Kehner*, 776 S.W.2d 396 (Mo. App. E.D. 1989) (the State hid evidence and failed to endorse a witness who testified that the defendant admitted the crime on the ground that the witness was called in rebuttal in the retrial of case in which the jury hung after the first trial); *State v. Varner*, 837 S.W.2d 44 (Mo. App. E.D. 1992) (abuse of discretion when the trial court refused to grant a continuance after the prosecution disclosed on the day of trial the existence of statements made by the defendant to a store security guard in which the defendant gave a "crow name"); *State v. Childers*, 852 S.W.2d 390 (Mo. App. E.D.1993) (the trial court abused its discretion in refusing a continuance when the prosecution disclosed on the day of trial the existence of defendant's statement to a security guard in which he asked the guard to "give me a break"); *State v. Buckner*, 526 S.W.2d 387 (Mo. App. K.C.D. 1975) (prosecution failed to disclose written and signed statement of its only witness and had disclosed only an unsigned one); *State v. Perkins*, 710 S.W.2d 889 (Mo. App. E.D. 1986) (the State failed to disclose the defendant's alibi statement until after the trial had begun and the evidence that the State intended to present conflicted with the defendant's alibi); *State v. Scott*, 479

S.W.2d 438 (Mo. banc 1972) (the defendant sought disclosure of the substance of an oral statement both before and during trial but neither the police report nor the detective's notes were ever provided).

Defendant relies on *Johnson* to argue that she must show only a reasonable likelihood that a timely disclosure would have affected the result of the trial. But *Johnson* cites no case supporting this proposition. *See Johnson*, 513 S.W.3d at 367. In the cases described above in which courts have found fundamental unfairness, the defendant demonstrated that the untimely disclosure crippled the chosen defense strategy and left no time for the formulation of a different strategy. Here, Defendant had four days to consider this evidence, and she made no showing that her defense was crippled and that no time existed to formulate a new one. Defendant's handling of the discovery dispute was focused on using the claimed discovery violation as a sword to exclude highly probative, but incriminating, evidence.

Defendant cannot create fundamental unfairness by claiming that the evidence was overly incriminating without showing how the timing of the disclosure affected the result of the trial. In other words, the record shows that the result of the trial would not have changed even if the State had disclosed the jail-call recording on the day Defendant's discovery request was

served or at some other earlier date before the prosecutor actually discovered it.

Defendant complains that she should not have been required to seek a continuance as a prerequisite to demonstrating fundamental unfairness. This argument should be rejected on two grounds. First, the focus of the inquiry is whether the trial court abused its discretion in declining to completely exclude relevant evidence from trial based on an alleged discovery violation. And, second, Defendant's choice not to seek a continuance is a relevant factor to consider in determining whether fundamental unfairness actually existed.

A defendant may waive a claim that the trial court erred in responding to the discovery dispute when the *only* remedy sought is the complete exclusion of the material or information from evidence, rather than a less-drastic remedy, such as a continuance. *See Bynum*, 299 S.W.3d at 62 (holding that the defendant "could have requested the less-drastic remedy of a continuance as an alternative to the [911] tape's exclusion"). "A defendant's failure to ask for a continuance 'can be properly considered by the appellate court in determining whether the trial court abused its discretion." *Id.* (internal quotation marks omitted). *See also Hutchison*, 957 S.W.2d at 764 (holding that a defendant's "[f]ailure to seek a continuance leads to the inference that the late endorsement [of a witness] was not damaging to the complaining

party"); *State v. Ivy*, 531 S.W.3d 108, 119 (Mo. App. E.D. 2017) (holding that the defendant could have "potentially removed the prejudice" from an allegedly late disclosure of discovery by asking for a continuance and that defendant's failure to do so supported a finding that the trial court did not abuse its discretion in refusing to declare a mistrial).

As mentioned above, the record suggests that Defendant's decision to seek only the exclusion of the jail-call recording from evidence rather than the lesser, or alternative, remedy of a continuance was a matter of trial strategy. Defendant's counsel complained more about a pattern of allegedly untimely discovery disclosures by the prosecutor's office in other cases instead of explaining how the disclosure in this case harmed the defense. The record suggests that defense counsel knew the recording was prejudicial to the defense and that Defendant would have no way of ameliorating its effect even if a continuance were granted.[13] Instead, defense counsel decided on an all-or-nothing strategy of seeking only the exclusion of the recording from evidence. If successful, the State would have been denied the use of highly relevant and

[13] Although defense counsel complained that the late disclosure impaired the defense's ability to investigate other calls, she presented no evidence during the hearing on the motion for new trial showing how other calls could have assisted the defense if they had been further investigated.

probative evidence. If unsuccessful, Defendant had a potential claim of error that could be asserted on appeal in the event of a conviction.

The record also shows that Defendant sought several continuances during the course of this case and that she was out on bond when the case was tried. (L.F. 1–2, 10–11.) Defense counsel also mentioned to the court that she had declined to seek a continuance in a different case after an allegedly untimely discovery disclosure. It was obvious that defense counsel knew she could seek a continuance, yet she chose not to do so here. Defendant would not have been prejudiced by a continuance—if one were truly needed—since she had been released on bond pending trial.

Defendant has also not shown that the trial court abused its discretion by not excluding the recording from evidence as a discovery sanction. The exclusion of "relevant and material" evidence as a discovery sanction is a drastic remedy "that should be used with the utmost caution." *State v. Mansfield*, 637 S.W.2d 699, 703 (Mo. banc 1982), overruled on other grounds by *State v. Clark*, 652 S.W.2d 123, 127 n.4 (Mo. banc 1983); *see also State v. Smothers*, 605 S.W.2d 128, 131–32 (Mo. banc 1980) (holding that the trial court is not required apply the drastic remedy of mistrial because of noncompliance by State with discovery rule); *State v. Rippee*, 118 S.W.3d 682, 685–86 (Mo. App. S.D. 2003) (holding that the trial court did not abuse its

discretion in refusing to impose the "drastic remedy" of excluding the State's untimely disclosed evidence because the defendant's "failure to move for a continuance discredits his claim that he suffered prejudice" from the admission of the evidence and supports a finding that the trial court did not abuse its discretion).

In a similar context, this Court has identified four factors generally used to determine whether a trial court has abused its discretion in allowing the late endorsement of a witness shortly before trial: "(1) whether the accused waived the objection; (2) whether the state intended surprise or acted deceptively or in bad faith, intending to damage the accused; (3) whether the accused was surprised and suffered any disadvantage; and (4) whether the type of testimony given might readily have been contemplated." *State v. Hutchinson*, 957 S.W.2d at 763. Applying these factors here to the allegedly late disclosure of the five-minute jail-call recording, Defendant waived any objection by seeking only the exclusion of the evidence rather than less-drastic relief such as a continuance. Second, nothing in the record suggests that the State intended surprise or acted in bad faith. Third, Defendant could not have been "surprised" because she made the call and was warned it was being recorded. Defense counsel also presumably knew that Defendant was incarcerated for a period of time before she bonded out. Defendant has not

identified any specific disadvantage from the late disclosure, other than the discovery of incriminating evidence that was previously unknown to the State. Finally, although Defendant's incriminating statement was obviously known to her, defense counsel might have contemplated the existence of a jail-call recording knowing that Defendant had been in pretrial incarceration.

Moreover, the defense had essentially four days to investigate the recording. This was sufficient to ameliorate any effect from an untimely disclosure, especially considering that the call was only five minutes long. *See State v. Carlisle*, 995 S.W.2d 518, 520 (Mo. App. E.D. 1999) (holding that the trial court's granting of a half day "continuance" so the defense could investigate the defendant's written confession, which the prosecutor disclosed on the morning of trial after jury selection, was not an abuse of discretion and did not result in fundamental unfairness); *State v. Merrick*, 677 S.W.2d 339 (Mo. App. E.D. 1984) (holding that even though the State violated the discovery rules by disclosing a police report on the day of trial, the trial court did not abuse its discretion in imposing discovery sanctions and the defendant did not suffer fundamental unfairness when the court granted a one-day continuance so defense counsel could investigate the report).

Defendant has not established that the trial court abused its discretion in failing to exclude the recording from evidence or that she suffered fundamental unfairness under the circumstances of this case.

CONCLUSION

The circuit court committed no reversible error, and Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 9,016 words, excluding the cover, certification, signature block, and appendix, if any, as determined by Microsoft Word 2010 software.

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