STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2014AP00971-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOSHUA BERRIOS,

Defendant-Appellant.

Appeal from a Judgment of Conviction,
Honorable Charles F. Kahn, Jr., Presiding, and
an Order Denying Postconviction Relief, Honorable J. D.
Watts, Presiding, Entered in Milwaukee County Circuit Court

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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1. Is a new trial necessary, in the interest of justice, because the State violated a pre-trial order dealing with the crucial issue of identification/eyewitness testimony by the victim, because defense counsel worsened the violation, and because the court, in response to a question from the jury, provided comment on the evidence that buttressed the victim's identification, where the court never informed the jury of the reasons to doubt that identification?

   The circuit court denied the postconviction motion making this claim.

2. Alternatively, is Mr. Berrios entitled to an evidentiary hearing to determine whether he received ineffective assistance of counsel?

   The circuit court also denied this postconviction claim.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

A published decision could guide the bench and bar when considering whether and how to reinstruct a jury when it asks a question during deliberations. The risk that any error will be prejudicial is arguably heightened because such re-instructions "enjoy a special place of prominence in the minds of jurors…" ***Blaine v. United States***, 18 A. 3d 766, 776 (D.C. App. 2011). Mr. Berrios believes oral argument could assist the court in addressing the issues.

STATEMENT OF THE CASE

The complaint charged that, on September 11, 2011, Mr. Berrios committed three offenses: First Degree Reckless Injury to Abimael Trevino, contrary to Wis. Stat. §940.23(10(a) (2011-12);[1] Second Degree Reckless Endangerment of Safety of Helen Sada, contrary to Wis. Stat. §941.30(1); and possession of a firearm as a felon, contrary to Wis. Stat. §949.29(2)(a). (2).

The case was tried to a jury, the Honorable Charles F. Kahn, presiding. (47-53). At the close of evidence, Judge Kahn directed an acquittal on the charge of recklessly endangering safety. (52:9-10). The jury found Mr. Berrios guilty of the other two counts. (53:6-7). The court imposed concurrent sentences totaling five years' initial confinement and four years on extended supervision. (54:29-31).

Mr. Berrios filed a postconviction motion, seeking a new trial in the interest of justice or based on ineffective assistance of counsel. (34). He requested an evidentiary hearing under ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). (34:12).

After ordering briefs, the Honorable J. D.Watts denied the motion without a hearing. (40, App. 101-105). Mr. Berrios appeals. (41).

[1] All statutory citations refer to the 2011-12 edition.

STATEMENT OF FACTS

Mr. Berrios had recently turned 18 years old on September 11, 2011. (2:1). As the sentencing court later remarked, he had "only one criminal conviction in the past, and frankly it was for a nonviolent offense of having so much marijuana … that it was likely to be distributed to others." (54:20-21).

As discussed presently, three younger teenagers testified at trial that they crossed paths in an alley with Mr. Berrios, another male, and a female. The teenagers testified that after Mr. Berrios' group provoked a physical altercation, they immediately reported it to family members gathered at a nearby house. A large group of family members went down the block to confront Mr. Berrios. The three teenagers and other family members gave testimony related to the State's theory, that Mr. Berrios fired a shotgun round that struck Abimael Trevino and endangered the safety of Helen Sada.[2] Mr. Trevino was hit in the face with what a detective described as "bird shot, several pellets." The pellets injured his left hand, arm and the left side of his neck and face. (51:18).

Pretrial Motions to Bar In-Court Identifications

Just before trial, the court heard motions to prohibit prosecution witnesses from making in-court identifications of Mr. Berrios. The court denied the request to bar identification testimony from the three teenagers, Dora T., Andrew H., and Elisandra H.,[3] who had the initial contact

[2] As noted above, the State ultimately failed to adduce Ms. Sada's testimony. At the close of evidence, the court dismissed the charge related to her. (52:9-10).

[3] The last names of these juveniles are redacted in this brief.

with Mr. Berrios. (48:13-14, 23). The court also rejected the challenge to identification testimony from Martin Garcia. (48:46-48).

As to Abimael Trevino and Helen Sada, the court asked the prosecutor whether it was true that, prior to trial, they had "never identified Mr. Berrios... As a matter of fact, they looked at his picture [in a photo array] and did not pick him out…" The prosecutor confirmed this was the case. (48:24-25, App. 111-112).

The court remarked:

> THE COURT: I mean, my goodness. They have been sitting here all day. I think they might have been here at some point when we brought Mr. Berrios into the courtroom in chains, and I'm not totally sure about that or brought him out in chains.
>
> This morning he was wearing jail clothing. He was sitting there and they were sitting here. … [48:25, App. 112].

The court ruled that the defense had made a sufficient initial showing that in-court identifications by Mr. Trevino and Ms. Sada would be tainted by unduly suggestive pretrial procedures. (48:27-28, App. 114-115). The court invited the State to present evidence to rebut the initial determination, but the prosecutor stated, "…I don't think we will be asking Ms. Sada or or Ms. [sic] Trevino to identify the defendant." (48:28, App. 115). The court emphasized that identification evidence from these witnesses was barred, and told the prosecutor to "see to it" the witnesses were aware of the restriction. (48:28-29, App. 115-116).

Testimony of Abimael Trevino

On the day of the incident, Mr. Trevino and a large group of his family members were gathered at his aunt's house because his aunt died the previous day. (50:10). His "little cousin" Dora told him that she and another relative, Andrew, "got into it with some dude down the street." (*Id.*).

Mr. Trevino and about 30 other family members went to confront the people responsible. (50:27). He admits being "very upset" but denied his group went "there to cause any trouble." (50:23, 25). Mr. Trevino testified that he had "[f]ive felonies" and was unemployed. (50:9).

Mr. Trevino got in his Ford Explorer and drove to the house to have the confrontation. (50:10-11).[4] From inside his vehicle—he testified he never got out of it—he saw "[a] guy with a shotgun." (50:12).

When Mr. Trevino was examined by the prosecutor, he said he could remember back to September 11, 2011 (from date of his testimony, July 10, 2012). (50:9-10). At no point in direct examination did he testify to memory problems. (50:9-16).

The following occurred during direct examination:

> Q. [by the prosecutor]. Now, do you recall what that individual [the guy with the shotgun] looks like?
>
> A. Yes.
>
> Q. Is that individual present in the courtroom today?
>
> [Defense counsel]: Your Honor, may I be heard.

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[4] The aunt's house was at Orchard and South 22nd Streets. (51:15). The shooting occurred at 1655 South 22nd Street. (2:1).

> THE COURT: Sure. Just a minute. Hold on a minute. Ladies and gentlemen, we'll be right back. Thanks.
>
> (Discussion held off the record in private.) [50:12].

As the State's post-conviction brief acknowledged, the prosecutor in this exchange "violated the court's pretrial ruling…" (36:2).

On cross-examination, Mr. Trevino remembered talking to police. However, he claimed he could not remember what he told the detective who saw him at the hospital soon after he was shot. (50:16-17). He did not remember telling the detective that he was shot by one of three Hispanic males who came, shooting, out of an alley adjacent to the house. (50:17). He believed his memory was "[a] little bit" better as he testified than it had been when he spoke to the detective on the day he was shot. (50:19). Defense counsel asked:

> Q. Is that how you recall it happening by three Hispanic males coming out of the alley adjacent to the house?
>
> A. No.
>
> Q. That's not—Did you see any Hispanic males come out of the alley?
>
> A. Yes.
>
> Q. Were they shooting?
>
> A. Yep.
>
> Q. You stated to the police—First of all, your testimony today is you never get out of your truck, is that right?
>
> A. Yes.

Q. But you told the police that after you saw the three Hispanic males come out of the alley that you ran back and get [sic] into his truck when he was shot by one of the males. Do you recall saying that?

A. No.

Q. You deny that you went back into the truck as you told the officers that day?

A. I don't remember too much what happened that day.

Q. Are you testifying based on your recollection or what you think happened today?

A. I am telling the truth what happened.

Q. When you told the police that you had to get in your truck, that means you were out of your truck, correct?

A. I don't remember when I was out of my truck. It just happened so fast. [50:17-18].

When defense counsel asked Mr. Trevino to identify an exhibit, he responded with the answers, "That's Joshua," "That's Joshua house, in front of his house," and, after defense counsel asked, "Who is Joshua?" Mr. Trevino responded, "The man sitting right there in front of me." (50:20).

Mr. Trevino further testified, "All I remember was this guy coming up to me." Defense counsel asked, "A guy coming up to you?" Mr. Trevino responded, "Joshua Berrios." (50:21).

Mr. Trevino also testified he saw "…Mr. Joshua Berrios … coming down the stairs [of the house next to the alley] aiming a shotgun at me and fired, and that's when I turned to my car and took off." (50:22).

Mr. Trevino testified that he did not know Mr. Berrios, but that he knew of him, and knew his nickname. Defense counsel asked a question suggesting that Mr. Trevino knew "that he [Mr. Berrios] had supposedly gotten into some physical altercation" with his three young family members. Mr. Trevino agreed he knew this. *(Id*.).

While defense counsel impeached Mr. Trevino with the suggestion he had a motive to get Mr. Berrios for the initial fight with the three youngsters, he did not:

- Impeach him with evidence that Mr. Trevino had failed to choose Mr. Berrios in a photo array, and was making his in-court identification after learning that Mr. Berrios had been charged. (48:24-25, App. 111-112).

- Buttress the impeachment with Mr. Trevino's statement to police that he was shot by one of three Hispanic males emerging from the alley, whom he could only identify as being in their twenties and having dark hair. (51:16).

Outside the jury's presence, the court noted that Mr. Trevino's in-court identifications of Mr. Berrios were "specifically and directly contrary" to its ruling to prohibit them, and suggested the prosecutor had not followed the court's instructions that it ensure Mr. Trevino was aware of the court's order. (50:65).

The court assumed that, by not seeking a mistrial, defense counsel "made a strategic decision to waive that issue." The court noted that defense counsel was "wise and experienced." (50:66). The

court also stated that, while counsel could consult Mr. Berrios, any mistrial motion should be made as soon as possible. (50:66-67). Defense counsel subsequently stated that neither he nor Mr. Berrios wanted to seek a mistrial. (50:109).

Testimony of Detective Herb Glidewell

The State's direct examination was limited to eliciting Detective Glidewell's testimony that he was dispatched to the hospital the day of the shooting. (51:11). Defense counsel then pursued "a line of questioning that I would call him [for] as part of the defense. …" (51:12).

Detective Glidewell spoke to Mr. Trevino in the trauma room at the hospital. Mr. Trevino had been shot and was "in some intense pain." (51:13). Nonetheless, the detective elicited the following information from Mr. Trevino:

- One of his younger family members had been in a fight and had come home crying. (51:13).
- Mr. Trevino drove in a red Ford Explorer to "confront these people." (*Id*.).
- While Mr. Trevino "was there arguing with some Hispanic males on a porch, he told me some other—I believe three Hispanic males came out of an alley, I believe, and he was shot." (51:14).

Defense counsel gave Detective Glidewell a copy of his police report, Exhibit 13, to refresh his recollection. (51:14). It showed that Mr. Trevino had provided additional details:

- The confrontation was at a house on 22nd Street, near Mitchell Street. (51:15).
- Mr. Trevino stopped at the alley near the house. (51:15).
- He saw two Hispanic males on the porch and argued with them over his younger cousin's complaints. (51:15-16).
- One of these males warned Mr. Trevino, in the report's words, that "you don't want none." (51:15-16).
- By this time, about 30 family members were around the house. (51:16).
- "Trevino stated three Hispanic males who he could only describe as being in their 20's with dark hair came out of the alley adjacent to the house. Trevino stated he then ran back and got into his truck when he was shot by one of the males." (51:16).

Detective Glidewell acknowledged that his report attributed no statement to Mr. Trevino that he had been shot by a male on the porch holding a shotgun. While the detective did not recall Mr. Trevino telling him "exactly that," he pointed out, "You have to remember that I don't believe he could see me because of the trauma he was suffering, and I spoke to him just before he went into surgery…" (51:16).

Mr. Trevino was in "extreme pain" when Detective Glidewell spoke to him. He asked if he was going to die, and Detective Glidewell told him no. Although he gave that answer to provide comfort, the detective did not, in fact, think Mr. Trevino was going to die. (51:18).

Other Witnesses

The State presented four eyewitnesses in addition to Mr. Trevino, and the defense presented one—Mr. Berrios' sister. Their testimony is briefly summarized to aid this court's weighing of the impact of the circumstances connected with Mr. Trevino's testimony.

Dora T. testified that:

- She and two cousins were walking through an alley on September 11, 2011, returning to the home of her grandmother. (49:52-53).
- They encountered "three people in the alley, and a little more, but in the back." (49:53).
- One guy started "talking stuff" and a fight developed. A bald guy started fighting with one of her cousins, she saw another cousin getting beaten by a girl, and then a guy "came out of nowhere" and started hitting her. (49:54).
- She identified Mr. Berrios as a guy who fought with her cousin. (49:55).
- She saw Mr. Berrios go to the porch of a house next to a school. (49:57-58).
- She and the others told their family about the fight. Family members immediately went to

confront the people responsible. Dora saw the guy identified as Mr. Berrios, and another guy, on the porch. Her uncle, Martin Garcia, was arguing with them. (49:56). Mr. Garcia was challenging Mr. Berrios to come down and "fight like a man." (49:66-67).

- She heard 5 or 6 gunshots but did not see who fired them. (49:56). The shots came from the porch and sounded like they were from a "little gun." (49:56-57).

Andrew H. testified that:

- He was with his little sister Eli and their older cousin, Dora. (49:77).
- They encountered "[a] guy, his friend, and a lady. I don't know if she was a lady or younger. …" (49:77).
- He identified Mr. Berrios as one of those people. (49:77-78).
- Eventually, he and Mr. Berrios fought, but the guy and girl joined in, so Andrew had to curl up his body for protection as they kicked him. (49:79-81). He told Eli and Dora to run home. By the time he was walking home, his whole family was coming toward him, on their way to confront Mr. Berrios and the others. (49:81-82).
- Mr. Berrios was standing on the porch with a shotgun. It had a shoulder strap. Mr. Berrios told the girl and the other guy to leave the porch and go inside. (49:82-83).

- Andrew claimed he heard Mr. Berrios cock the gun. (49:84).

- Right when his cousin pulled up, Andrew heard the gun go off. People started running, and it went off again. (49:85).

- Andrew saw his cousin get shot. (49:86). However, he did not see Mr. Berrios shoot. (49:87).

- The first shots Andrew heard came from the alley, just as he told the police before trial. (49:87). When he heard the first shots from the alley, Andrew was looking at Mr. Berrios, so he knew Mr. Berrios had not fired them. (49:92). Andrew heard two more shots as he was running. He did not know where the shots came from. (49:89). It was possible that the shots from the alley were fired by a shotgun. (49:97).

Elisandra H. testified that:

- She, Dora and Andrew encountered two guys and a girl in an alley. She identified Mr. Berrios as one of the guys. (49:106-107).

- The two groups fought and then her group went to get other family members. (49:108).

- They went to a house where one of the guys was sitting on the porch with a gun. (49:108). That guy was Mr. Berrios. (49:111). Her uncle, Martin Garcia, argued with him and the other guy about why they jumped kids. (49:110-111).

- "…[T]hen a guy came down the alley shooting." (49:111). This caused people to run. (49:112).

- She saw Mr. Berrios start shooting. She took off running after he shot once. (49:112).

- She did not see a strap on the shotgun. (49:119).

- Elisandra testified that she was 13 years old. (49:105). Yet she opined that the guy in the alley was using just a little handheld gun, "Probably a nine or a twenty-two, yeah." (49:120). She admitted she spoke to her older relatives, Mr. Trevino and Martin Garcia, about what each of them was going to say at trial. (49:131-132).

- Answering a question suggested by a juror, Elisandra said she was a couple houses away from Mr. Berrios when she saw him shoot. (49:142).

Martin Garcia testified that:

- He was 35 years old and had 13 prior convictions. (50:34, 41).

- Mr. Berrios was on the porch. Mr. Garcia argued with him. Three other guys came from the alley, shooting. He heard six shots from handguns. (50:38-39).

- Then he heard one shot from a shotgun. He is not sure whether the gun jammed, but the

shotgun fired only once. (50:39).[5] Mr. Garcia claims he saw Mr. Berrios shoot but also saw Mr. Trevino get hit. (50:53; 50:39-40).

Martha Rojas testified for the defense:

- She is Mr. Berrios' older sister. She lived on Mitchell Street near 21st Street. She worked at Children's Hospital as a nurse. (50:73-74).

- Mr. Berrios was playing outside with her three sons. The sons came upstairs, crying. They told her a younger guy had approached Mr. Berrios and tried to fight with him. He defended himself but told the three sons to go inside. (50:74-75).

- She went to the alley next to her house. A sport utility vehicle came. People got out of the car and grabbed her by the arm, asking "where he was." (50:75).

- She saw Mr. Berrios across the street on the porch of a friend's house. Then additional SUV's pulled up, with "like a mob of 30 to 50 guys and girls, and they were threatening him, asking him to come down off the porch to fight. (50:78).

- She saw Mr. Berrios clearly. He did not have a gun. (50:79).

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[5] Andrew testified that he heard from his cousin, presumably Mr. Garcia, that the shotgun jammed. (49:84).

- She turned away to look at her son. By the time she turned back, "everyone was already scattered because shots had been fired…" (50:80). Mr. Berrios was unarmed and could not have armed himself in the short time when she turned away. (50:82-83).

Jury's Question During Deliberations

The jury asked, "Can we have the police report from Gigi [nickname for Abimael Trevino], Gigi's statement from the hospital admitted into evidence as [Exhibit] No. 13?" (52:66).

With the parties' agreement, the court redacted from the report information relating to the dismissed charge. The court then stated:

> We also, at the request of the district attorney, and for completeness, sent an additional page to the jury which included a cautionary reminder of some additional testimony of Detective Glidewell besides what was in the report; and the testimony was that Mr. Trevino was in extreme pain in the hospital trauma room and was asking the detective if he was going to die. [*Id*.].

The court's cautionary reminder and report are appended. (55, App. 106-108). Defense counsel and Mr. Berrios agreed to this procedure. (52:66-67).

Postconviction Decision

The Honorable J.D. Watts, successor to Judge Kahn's calendar, denied postconviction relief in a written order, without a hearing. (40, App. 101-105).

The court held that the record demonstrated trial counsel made a valid strategic choice to respond as he did to the State's violation of the pretrial order. (40:3, App. 103). Because the court found no showing that the outcome of any retrial would be any different, the court found no prejudice in trial counsel's failure to seek a mistrial. (40:3-4, App. 103-104). It reached a similar conclusion as to the failure to seek a curative instruction or to strike Mr. Trevino's testimony. It found none of these omissions would have mattered "given the testimony of the eyewitnesses." (40:4, App. 104).

ARGUMENT

I. The Interests of Justice Require a New Trial Because the Controversy Was Not Fully Tried.

A. Standard of review.

This court has discretion to order a new trial in the interest of justice when "it appears from the record that the real controversy has not been fully tried." Wis. Stat. §752.35.

Discretionary reversal is granted "infrequently and judiciously," ***State v. Avery***, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60. Nonetheless, it is appropriate "(1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue in the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried."

State v. Hicks, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

While discretionary reversal is not frequently appropriate, neither does it require an appellant to prove that the outcome of a new trial would be different. The required showing is "a reasonable probability" that a new trial would produce a different outcome. ***Avery***, 345 Wis. 2d at ¶25 (citation omitted). Examined through the prism, reasonable probability of a finding of reasonable doubt, there is no question the distorted picture concerning Mr. Trevino's ability to identify Mr. Berrios clouded the crucial issue: the identity of the shooter.

B. The extraordinary nature of the remedy sought is justified because the evidence, far from overwhelming, supports doubt.

Like courts around the country, the Wisconsin Supreme Court recognizes that "eyewitness testimony is often hopelessly unreliable." ***State v. Dubose***, 2005 WI 126, ¶30, 285 Wis. 2d 143, 162, 699 N.W.2d 582 (citation omitted). The circuit court found that Mr. Trevino could not give a reliable eyewitness account identifying Mr. Berrios. But he was later permitted to make that identification before the jury. It is a denial of due process to permit a witness to testify and make an identification tainted by undue suggestiveness. *See*, ***Simmons v. United States***, 390 U.S. 377, 384 (1968).

Mr. Berrios' jury:

- Had before it evidence not properly admitted: Mr. Trevino's testimony, in violation of the pretrial order, repeatedly identifying Mr. Berrios as the shooter.

- Was not given the opportunity to hear evidence showing the good reason for the pretrial order: Mr. Trevino not only failed to identify Mr. Berrios in the more neutral setting of a photo array, but made his in-court identification after seeing that Mr. Berrios was the person charged. (48:24-25, App. 111-112; 50:20-22).

- Exacerbating this unreliable evidence paired with being deprived of countervailing, reliable evidence, the jury was unduly influenced by the court's response to its request for the police report. (55, App. 106-108). The jury was never told that Mr. Trevino had been judged unable to reliably make an in-court identification. Yet the court's response to the jury's request effectively suggested that weaknesses in Mr. Trevino's account, apparent from the police report, should be weighed against evidence that he was in too much pain to give a clear account to the police. There is no suggestion Mr. Trevino was in similar condition when he failed to identify Mr. Berrios in the photo array. The jury was left in the dark about that.

The court's initial instructions to the jury were an "unobjectionable charge." ***Arroyo v. Jones***, 685 F.2d 35, 38 (2nd Cir. 1982). Notably, however, they did not include an extensive cautionary instruction on the pitfalls of eyewitness identification. While not mandatory, a "***Telfaire*** instruction" might have added perspective—at least to the incomplete knowledge the jury had about problems with Mr. Trevino's ability to identify Mr. Berrios. *See*, ***United States v. Telfaire***, 469 F.2d 552 (D.C. Cir. 1972).

In ***Arroyo***, the court held that the initial unobjectionable charge did not cure what it found to be a defective instruction given in response to numerous questions the jury asked in the final period of deliberations. The court noted:

> A supplemental charge must be viewed in a special light. It will enjoy special prominence in the minds of the jurors for several reasons. First, it will have been the most recent, or among the most recent, bit of instruction they will have heard, and will thus be freshest in their minds. Moreover, it will have been isolated from the other instructions they have heard, thus bringing it into the foreground of their thoughts. Because supplemental instructions are generally brief and are given during a break in the jury's deliberations, they will be received by the jurors with heightened alertness rather than with the normal attentiveness which may well flag from time to time during a lengthy initial charge. And most importantly, the supplemental charge will normally be accorded special emphasis by the jury because it will generally have been given in response to a question from the jury. [***Arroyo***, 685 F.2d at 38.]

Arroyo relied on ***Bollenbach v. United States***, 326 U.S. U.S. 607, 611-12 (1946): "Particularly in a criminal trial, the judge's last word is apt to be the decisive word."

In this case, the "initial charge" was innocuous: it did not discuss evidence or dictate how the jury should weigh it. The reinstruction was dramatic in that the court identified and favored discrete testimony—Mr. Trevino was in extreme pain and asking whether he might die. The judicial directive to consider this evidence impermissibly promoted the theory that his pain explained Mr. Trevino's failure to tell the detective the same account he gave in testimony. Surely, the State requested the reinstruction out of a desire that the jury

draw these very inferences. The judicial imprimatur should not have been affixed to pro-prosecution argument, merely because the prosecutor may not have liked the evidence the jury requested.

A reviewing court's restraint when considering the grant of a new trial is tempered by its duty. As to the jury instruction aspect of the claims presented, "A circuit court has broad discretion to instruct a jury. ***Nommenson v. Am. Cont'l Ins. Co***., 2001 WI 112, ¶50, 246 Wis.2d 132, 629 N.W.2d 301. That does not mean, however, that a jury instruction is insulated from review. …" ***Kochanski v. Speedway Superamerica***, 2014 WI 72, ¶10, __ Wis. 2d __, __ N.W.2d __, (No. 2011AP1956, Wis. July 17, 2014).[6]

While the post-conviction court believed the eyewitness testimony collectively dispelled risk of injustice, the other witness's accounts are hardly ironclad. This case presents a chaotic mosaic of witness accounts which overlap at some points and diverge and conflict at others.

It is, to say the least, no sure thing that Mr. Berrios is guilty. The nature of the wrongly-included and wrongly-excluded evidence bears on identification, the sole issue. These circumstances create the "reasonable probability" requirement for discretionary reversal. ***Avery***, 345 Wis. 2d at ¶25 (citation omitted).

This is so particularly because this court's task is not to itself weigh the credibility of witnesses. ***State v. Edmunds***, 2008 WI App 33, ¶18, 308 Wis. 2d 374, 746 N.W.2d 590. For example, it is not this court's task to determine whether

[6] Civil case law and statutes apply because the court's duties when instructing juries are the same in civil and criminal cases. Wis. Stat. §972.01.

the jury would have believed Mr. Trevino's testimony even if informed that he could not identify Mr. Berrios in a photo array. Instead, this court must determine whether there is a reasonable probability that, examining all the evidence it should have received, and only that evidence, the jury would have a reasonable doubt about Mr. Berrios's guilt. *See, id.*, ¶23.

The prosecution witness accounts are at once inconsistent and arguably the result of prior discussions among witnesses. Elisandra claims to have seen Mr. Berrios fire a gun. He had a shotgun with no strap. (49:119). Andrew saw Mr. Berrios with a shotgun that had a strap, but he did not see Mr. Berrios fire it. (49:82-83, 87). Martin Garcia's testimony suggests he simultaneously saw Mr. Berrios taking the shot and Mr. Trevino being hit by the pellets. (50:53; 50:39-40).

Two juvenile witnesses, Andrew and Elisandra, either admitted they consulted with others about their testimony, or gave sufficiently sophisticated opinions to suggest they had had discussions that could have influenced their perceptions. The adult witnesses, Messrs. Trevino and Garcia, had criminal records. Elisandra admitted she and the others discussed what they would say on the witness stand. It appears she may have learned about guns from older relatives. (49:131-132). Andrew learned from a cousin, presumably Mr. Garcia, the theory that the shotgun jammed after one round was fired. (49:84).

Dora heard multiple blasts, all from the porch. (49:56-57). Mr. Garcia heard more than one shot from the alley but a single shot—because, he thought the shotgun then jammed—that came from the porch. (50:38-39). Andrew, endorsing the "jammed gun" theory, also heard a single shotgun blast,

but he believed shots fired from the alley could also have come from a shotgun. (49:97). Elisandra also heard shots from the alley. (49:111). There is record support for the notion that more than one person (at least one person each) fired from the alley and the porch. That possibility, combined with the lack of physical evidence and other circumstances, caused the jury to get a murky picture. While it was free to credit the testimony of one witness over that of one or more other witnesses, the jury's verdict is on shaky ground because of the available evidence it did not get.

C. Incomplete and misleading evidence was emphasized, even as the jury was deprived of exculpatory evidence.

1. Trial counsel erred when he not only failed to enforce the pre-trial order barring Mr. Trevino from identifying Mr. Berrios, but furthered the violation of that order.

Even when defense counsel contributed to the error(s) at issue, a new trial may still be appropriate, so long as the errors were not deliberate attempts to manipulate the system, as happened in ***State v. Gove***, 148 Wis. 2d 936, 437 N.W.2d 218 (1989). As this court explained in ***State v. Harp***, 161 Wis. 2d 773, 782, 469 N.W.2d 210 (Ct. App. 1991), *abrogated on other grounds*, ***State v. Henley***, 2010 WI 97, ¶64, 328 Wis. 2d 544, 787 N.W.2d 350,[7] the defense in ***Gove*** plainly tried to game the system. "In ***Gove***, the defendant's strategy was to cause a crucial witness to be absent at trial

[7] ***Henley*** clarified that, while ***Harp*** correctly recognized circuit courts' authority to grant new trials in the interest of justice (on direct review under Wis. Stat. §809.30), the authority derived from inherent powers, not Wis. Stat. §805.15.

and then argue for reversal on grounds that his confrontation rights were violated by the witness's absence. The Supreme Court held that it was 'contrary to fundamental principles of justice' to allow defense counsel to take one position at trial and, after being sustained, argue error on appeal." ***Harp***, 161 Wis. 2d at 782, *quoting* ***Gove***, 148 Wis. 2d at 944.

In ***Harp***, where a new trial was ordered because of instructional error, the relevant "law was in flux." The parties and trial court were equally responsible for the error. ***Harp***, 161 Wis. 2d at 783.

In this case, the State was the precipitating cause of the problems undermining the reliability of the verdicts. First, the State violated the pretrial order by seeking to elicit Mr. Trevino's in-court identification. Defense counsel objected, but there was no mistaking, even then, that Mr. Trevino claimed Mr. Berrios was the shooter. (50:12). Trial counsel removed all doubt that Mr. Trevino intended to make an in-court identification. Mr. Trevino repeatedly testified during cross-examination that "Mr. Joshua Berrios" shot him. (50:20-22).

Second, after precipitating Mr. Trevino's improper in-court identification, the State exploited it after the jury asked for the police report. As the court noted, the "district attorney" requested the "cautionary reminder" that the jury consider the detective's testimony about Mr. Trevino being in pain and asking whether he was going to die. (52:66). This situation was not—and could not have been—created by the defense alone. Trial counsel's omissions should not foreclose Mr. Berrios from relief in the face of what may well be a wrongful conviction.

2. At a minimum, trial counsel should have ensured the jury was informed of the court's ruling that the identification Trevino made was unreliable.

Trial counsel took no steps, either to limit or strike the testimony, obtain a mistrial, or even obtain a curative instruction. Nor did trial counsel seek to disclose to the jury that Mr. Trevino failed to identify Mr. Berrios in a photo array, and/or that the court had ordered that he not make an in-court identification.

The postconviction court found valid strategy in these omissions. But strategic choices are those an attorney makes from among "alternatives that each have the potential for both benefit and loss ..." ***Profitt v. Waldron***, 831 F.2d 1245, 1249 (5th Cir. 1987). The defense had nothing to lose, and much to gain, from informing the jury that, while Mr. Trevino claimed certainty at trial, he had failed to choose Mr. Berrios from the photo array.

3. The reinstruction in response to the jury's question constituted an erroneous exercise of discretion, and trial counsel was wrong to stipulate to it.

The circuit court made two discretionary decisions after the jury requested the police report. First, it decided to send the report/exhibit, after redaction, to the jury room. Second, the court made a discretionary decision to select a portion of a witness's testimony and to instruct the jury to consider that testimony in connection with the information the jury had requested. (52:66).

When a jury seeks clarification, the court has broad discretion to determine the necessity, extent and form of

reinstruction. ***State v. Hubbard***, 2008 WI 92, ¶29, 313 Wis. 2d 1, 752 N.W.2d 839. As to whether an exhibit should be sent to the jury, the decision depends on (1) whether the exhibit would aid the jury in properly considering the case; (2) whether a party would be unduly prejudiced by sending the exhibit to the jury; and (3) whether the exhibit could be subjected to improper use by the jury. *See*, ***State v. Anderson***, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74, *overruled on other grounds*, ***State v. Alexander***, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126. *See also*, ***State v. Hines***, 173 Wis. 2d 850, 496 N.W.2d 720 (Ct. App. 1993).

When a court decides whether to send evidence to the jury room, it should take care not to encourage the jury to give that evidence more weight than other evidence. *See*, ***State v. Jensen***, 147 Wis. 2d 240, 260, 432 N.W.2d 913 (1988) (proper exercise of discretion to send defendant's confession to jury after court found that the confession had been quoted only in fragments during the trial, and would not necessarily overemphasize the defendant's confession over oral denial at trial). The jury heard, in a coherent re-direct examination of Detective Glidewell, the testimony that Mr. Trevino was in extreme pain. The court should not have used its influence to re-emphasize that testimony. The report, in contrast, had <u>not</u> been furnished until the jury requested it.

While the court sought to provide "completeness," it gave the jury woefully incomplete information. The defense was "prejudiced" under ***Anderson*** because the jury was told to consider a reason to discount the police report showing that Mr. Trevino's in-court identification differed from his testimony—testimony that, unbeknownst to the jury, Mr. Trevino was not supposed to have given.

The court's exhibit/reinstruction decisions distorted the already incomplete and misleading information the jury got about Mr. Trevino's ability to identify Mr. Berrios. Already deprived of judicially-determined reasons to exclude the identification (reasons the State chose not to dispute), the jury asked for a police report providing other problems with Mr. Trevino's account, only to receive judicial instruction to consider discrete reasons to prefer Mr. Trevino's trial testimony over the version he gave to Detective Glidewell. The jury was not reminded, for example, that Mr. Trevino was able to provide considerable detail of what happened, supporting the possibility that he was indeed shot by one of three Hispanic males in the alley while Mr. Berrios was on the nearby porch.

It appears the court granted the State's reinstruction request because the police report requested by the jury was helpful to Mr. Berrios. The prosecutor wanted, and the court provided, an instructional rebuttal or caveat to the report. The report showed that Mr. Trevino told Detective Glidewell he was shot by one of three men coming out of an alley, whereas Mr. Trevino testified he was shot by Mr. Berrios, who was on the porch. So the court instructed the jury to consider, in effect, that the police report was not as helpful to Mr. Berrios as they might think.

"[A] court is not obligated to provide a jury with information solely because the jury believes it is important to its decision." ***State v. Lombard***, 2004 WI App 52, ¶20, 271 Wis. 2d 529, 678 N.W.2d 338. If the court was not prepared to give the jury the requested report without commentary, it could have told the jury to rely on its collective memory. Instead, the court selected evidence offsetting the report's conclusions, and left out evidence supporting those conclusions.

The reinstruction error "affected" Mr. Berrios' "substantial rights" within the meaning of Wis. Stat. §805.18(2). Therefore, it was not harmless. While that section requires the reviewing court to evaluate any instruction that "misdirect[s]" the jury in the context of the whole record, the whole record in this case is that the jury got less than the whole story even before the court told the jury to consider the police report in light of Mr. Trevino's reasons, corroborated by the detective, for testifying contrary to that report. Under these circumstances, the court's reinstruction was not "appropriate" pursuant to the reinstruction authority conferred by Wis. Stat. §805.13(5).

II. Alternatively, This Court Should Require an Evidentiary Hearing to Determine Whether Mr. Berrios Received Ineffective Assistance of Counsel.

A defendant receives ineffective assistance if counsel's actions or omissions constitute deficient performance and cause him prejudice. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. An act or omission is deficient if it falls below an objective standard of reasonableness. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). It is prejudicial if the result of the proceeding might have been different but for the error. *Id*. at 694. However, this does not require a defendant to show that the outcome would likely have been different. ***Id***. at 693; ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985).

"The result of the proceeding can be rendered unreliable, and hence, the proceeding itself, unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." ***Strickland***, 466 U.S. at 694. There only has to exist a reasonable probability that, but for counsel's errors, the result of the proceeding

would have been different. *See* ***State v. Johnson,*** 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990).

Ordinarily, an allegation of ineffective assistance of counsel must be resolved at an evidentiary hearing. ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Mr. Berrios requested a ***Machner*** hearing. (34:12). He alleged that counsel should have moved for a mistrial, to strike Mr. Trevino's testimony, or to obtain a limiting instruction when the prosecutor violated the pretrial order. Counsel should not have cemented the violation by permitting Mr. Trevino to repeatedly identify Mr. Berrios. And counsel should not have agreed to the "cautionary reminder" suggesting the jury limit the importance it attached to the police report. (34:13).

Thus, the ineffectiveness claims raise the same issues as Mr. Berrios' request for a new trial in the interest of justice. (34:9-12). The difference, as a practical matter, is whether counsel had strategic reasons that save his acts or omissions from being "deficient."

At trial, the circuit court could only assume counsel made a "wise" strategic choice to not request a mistrial. (50:66-67). The court was informed that neither counsel, nor Mr. Berrios personally, after speaking with counsel, wished to seek a mistrial. (50:109). Mr. Berrios moved the postconviction court for a hearing to determine, in effect, why these decisions were made.

A ***Machner*** hearing is amply justified: Mr. Trevino plainly gave testimony barred for good reason by a pretrial order. The jury plainly requested a police report casting what should have been additional doubt on the improper testimony. While the jury got the report, it also got a judicial directive to

consider circumstances that buoyed the improper testimony. At a minimum, the record should show why this occurred.

This court should go further. Mr. Berrios respectfully submits that this record is sufficient to show deficient performance. There was no strategic need to weigh costs and benefits—because the defense would have incurred no cost—had trial counsel elicited Mr. Trevino's testimony that he failed to choose Mr. Berrios in the photo array.

The record sufficiently demonstrates prejudice as well. The jury plainly had concerns about the discrepancy between Mr. Trevino's statement to Detective Glidewell and his trial testimony. The court responded to the concerns without saying anything supportive of them, beyond providing the detective's report. Instead, the court directed the jury to consider evidence favorable to the State.

Under all the legal standards—those that apply to new trials in the interest of justice, instructional error and ineffective assistance—reviewing courts must evaluate the record as a whole.[8] Even if discrete choices—not to seek a mistrial, not to seek a curative instruction, not to move to strike testimony—are defensible, the totality of circumstances shows that counsel permitted Mr. Trevino's identification to get much more credence at trial than it deserved.

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[8] When determining whether the real controversy was not fully tried, courts are to consider aggregated, cumulative effects of all errors. ***State v. Harris***, ¶110, 307 Wis. 2d 555, 745 N.W.2d 39. Jury instructions "as a whole must not favor one side or the other…" ***Aetna v. Cas. & Sur. Co.***, 35 Wis. 2d 517, 529, 151 N.W.2d 113 (1967). Both prejudice and deficient performance are evaluated "under the totality of the circumstances." ***State v. Jenkins***, 2014 WI 59, ¶8, __ Wis. 2d __, __ N.W.2d __ (No. 2012AP46-CR, Wis. July 11, 2014).

The post-conviction court denied relief because Mr. Berrios made "no showing that a new trial would have produced a different result." (40:3, App. 103). To the contrary, Mr. Berrios made the required showing for a new trial, or at least a ***Machner*** hearing.

All the applicable legal standards are also consistent regarding the showing necessary for relief. Discretionary reversal, as discussed above, requires only the "reasonable probability" the jury would have found reasonable doubt. ***Avery*** 345 Wis. 2d, ¶25. Likewise, a defendant satisfies ***Strickland's*** prejudice requirement by showing a "reasonable probability" of a different outcome. "'[R]easonable probability'" does not mean "'more likely than not.'" ***State v. Jenkins***, 2014 WI 59, ¶72, __ Wis. 2d __, __ N.W.2d __ (No. 2012AP46-CR, Wis. July 11, 2014). (Crooks, J., concurring).

CONCLUSION

Mr. Berrios asks this court to reverse the judgment of conviction and order denying postconviction relief, and remand for a new trial. Alternatively, Mr. Berrios asks this court to reverse the order denying postconviction relief, and remand for a ***Machner*** hearing.

Dated this ___ day of July, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,306 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ___ day of July 2014.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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(Please Note: The names of juvenile witnesses are redacted to show only the first initials of last names)

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