STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP000270-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KIEUTA Z. PERRY, JR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable T. Christopher Dee Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The circuit court erroneously exercised its discretion in denying the motion for a mistrial.

The State argues that Mr. Perry's argument is defective because "[a] defendant must ask the circuit court for what he wants before he can complain to this Court about not getting it." (State's Br. at 8). The State alleges that Mr. Perry has raised novel claims on appeal and that the proper course of litigation in this case would have involved a postconviction motion alleging that trial counsel was ineffective in how he handled the motion for a mistrial. (State's Br. at 8).

This argument is a distraction. Trial counsel did a perfectly acceptable job of objecting and then asking for a mistrial. As Mr. Perry pointed out in his brief-in-chief, it was the circuit court's job to then adequately exercise its discretion. Mr. Perry has demonstrated numerous different ways in which that exercise of discretion was deficient, all of which go back to the central issue raised by trial counsel—prejudice to Mr. Perry. The State's proposed alternative—that Mr. Perry should have filed a motion alleging attorney ineffectiveness—is impractical, unworkable, and superfluous. This Court should not endorse it. By requiring defendants to have every single word written in an appellate brief to be first spoken aloud by the trial counsel at the time of the motion, this Court would impose an

intolerable burden on the circuit court and all other lower court actors.

The State also alleges that Mr. Perry has made improper use of the letter written by a juror. (State's Br. at 9). It is worth noting, however, that counsel previously moved this Court to admit the letter into the appellate record, including with that motion all relevant supporting documentation which would place the letter in context. (79). No objection was filed by the State. (80). This Court admitted the letter into the appellate record and AAG Clayton Kawski cooperated with that process. (80; 83).

Now the State wishes to object to the letter's use, calling it incompetent. (State's Br. at 9). Their objection would appear to be untimely, however, given the procedural history sketched above. In the brief, counsel made a good-faith argument as to why this letter should matter, as it is proof that "outside" information—information which, technically, was not a part of this trial because it was stricken from the record—infected the jury deliberations. Moreover, the State's use of a persuasive treatise would not appear controlling as a matter of law. And, even if this Court now disagrees and chooses to disregard the letter, the prejudicial import and probable impact of the highly prejudicial utterance is plain from the record. With or without the letter, Mr. Perry is entitled to a new trial.

That is, Mr. Perry disagrees with the State that "[c]ircumstances simply did not warrant a mistrial." (State's Br. at 11). It is frankly hard to think of an utterance—in context of a case involving a shooting—

that could be *more* prejudicial. Here, the jury was directly told that Mr. Perry—who they knew to have been a felon—shot someone in the head on a prior occasion. (70:63). Thus, it did not matter that the utterance was not repeated and that it did not "provide details" of the charged offenses, as the State argues. (State's Br. at 11). As Mr. Perry outlined in painstaking detail in the brief-in-chief, this was a highly damaging comment, the effects of which resonated throughout the entire trial. While the State attempts to minimize the damage, commonsense counsels against their position. Reasonable people would tend to remember such a gratuitously violent image and would naturally use that information to shape their impressions of Mr. Perry and his alleged actions in this case.

Mr. Perry also disagrees that the "the totality of the evidence also strongly supported Perry's guilt." (State's Br. at 11). This case was built on eyewitness testimony, a notoriously unreliable form of evidence.[1] M.R., the person with the most contact with the shooter, was incapable of making any identification and was inconsistent in the details of the incident she did testify to. (71:26-27; 71:33). And, while her friend did make an identification of Mr. Perry, this was a spontaneous in-court identification under highly

[1] According to the Innocence Project, mistaken identifications "contributed to approximately 71% of the more than 360 wrongful convictions in the United States overturned by post-conviction DNA evidence." https://www.innocenceproject.org/eyewitness-identification-reform/

suggestive circumstances. (71:39-40). That identification was undermined by evidence that she had previously told police the robbers wore hoods covering their faces and her total inability to describe any specific feature of Mr. Perry that made her certain she had identified the right man. (71:44; 71:46). I.G., meanwhile, made his identification several months after the shooting and reacted defensively when questioned about the integrity of that identification, making the prejudicial utterance at issue here. (70:50; 70:63). Most problematically, he may have attempted to favorably shade his testimony, initially telling the jury that his identification was more contemporaneously made. (70:49). And, as the verdict proves, the jury did not buy the State's evidence that Mr. Perry was the shooter, thereby rejecting the weak evidence at issue.

The State also points to the ballistics evidence, which is hopelessly weak—the bullets were fired from a gun recovered from an unidentified person who Mr. Perry knew. (State's Br. at 11). That is not overwhelming evidence, let alone very convincing circumstantial evidence.

As outlined in the brief-in-chief, the circuit court neglected to fulfill its duty of adequately considering all of the relevant facts and circumstances at issue. The State skates around those arguments, suggesting that Mr. Perry has forfeited his arguments on appeal. (State's Br. at 12). As with other discretionary determinations, however, it was incumbent upon the circuit court—once a proper objection was made—to give a sufficient explanation of its decision. Here, the circuit court

ignored many relevant considerations pertaining to the prejudice analysis, as pointed out in the brief-in-chief. It is therefore unclear why trial counsel—who was otherwise diligent in making the motion and preserving the record—should now be faulted for not doing the circuit court's job for it, as the State urges. (State's Br. at 13). The arguments made in the brief are obviously subsumed within trial counsel's prejudice argument and flow naturally from the requirement that this Court evaluate the trial court's ruling "in light of the whole proceeding." *State v. Bunch*, 191 Wis. 2d 501, 506, 529 N.W.2d 932 (Ct. App. 1995).

For those reasons—which are ignored by the State in favor of a rote assertion of the forfeiture doctrine—Mr. Perry asks this Court to meaningfully review the entire record and find that the circuit court's reasoning was plainly deficient.

II. The curative instruction was insufficient.

The State's arguments on this point focus almost entirely on the juror letter. (State's Br. at 13). They rail against the incompetent nature of the evidence, claiming that Mr. Perry has skirted these rules and omitted proper legal standards from his brief. (State's Br. at 14). Mr. Perry did discuss those standards, however, and has made an argument in good-faith that they should not apply to this letter, as outlined on page twenty-two of his brief-in-chief.[2] The

[2] Due to a clerical oversight, the statute is not listed in the table of authorities.

State also dismisses his arguments as "rank, partisan speculation," which while certainly a colorful turn of phrase, does not adequately respond to the arguments at issue. Finally, it is frankly unclear to counsel why Wis. Stat. § 906.02(2) forbids counsel from using the verdicts—which were inconsistent with the trial evidence—to show that something was "amiss" in this trial.

CONCLUSION

Mr. Perry therefore renews his request for a new trial in light of the arguments herein as well as those arguments made in the brief-in-chief.

Dated this 2nd day of July, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,309 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 2nd day of July, 2019.

Signed:

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CHRISTOPHER P. AUGUST
Assistant State Public Defender