STATE OF WISCONSIN

COURT OF APPEALS DISTRICT I

Case No. 2021AP1227-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARTRELL ROMEL KIMBLE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. CONEN PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Whether the prosecutor's vouching during the closing argument violated the defendant-appellant's due process right to a fair and impartial trial.

2. Whether the circuit court erred in denying the defendant-appellant a right to a *Machner* hearing for his trial counsel's failure to object the prosecutor's vouching.

STATEMENT ON PUBLICATION AND ORAL ARUGMENT

Kimble does not request publication or oral argument. This case involves the application of well settled principles of law and the parties briefing with adequately address all issues.

STATEMENT OF THE CASE

Cartrell Romel Kimble ("Kimble") was acquitted of one count of first-degree intentional homicide and convicted of one count of first degree recklessly endangering safety as party to a crime while using a dangerous weapon after a jury trial in April of 2018. (R.81:10.)

The case is a result of a shooting that caused the homicide of Leneir Johnson on August 24, 2012 at 2555 North 50th street in Milwaukee. (R. 69:12.) Another person, DH[1] was also shot during the incident. (R. 69:22.) DH survived the shooting.

On August 24, 2012, Johnson and DH were sitting on the front porch of 2555 N. 50th street. (R. 69:40.) Two men ran from the alley abutting 2555 N. 50th street and started shooting at Johnson and DH. (R. 69:40.) Johnson was shot and pronounced dead at the scene. (R. 69:31.) DH was carried to a neighbor's house where he waited until medical personnel arrived. (R. 69:67.)

At the scene, the police recovered casings from two different firearms; .380 and .45 caliber pistols. (R. 69:42.) There was no DNA or fingerprint evidence that linked anyone to the shooting.

Thus, the State's case heavily relied on eye-witness testimony. The State called several witnesses that observed at least a portion of the shooting but could not identify either shooter. However, in 2014 (two years after the shooting) the police found two witnesses that identified Kimble as one of

[1] Pursuant to Rule 809.86(4), the defendant-appellant is using "DH" to refer to the second shooting victim in this matter.

the shooters. During Kimble's trial both of those witnesses recanted their identification of Kimble. Those witnesses were Damian Hullum and Cedrick Jennings. The State did not provide any in-court eye-witness identification of Kimble as one of the shooters.

Damian Hullum's Testimony

Hullum lived at 2554 North 51st street in Milwaukee. (R.80:6.) On August 24, 2012, Hullum heard several gunshots while he was taking out the garbage. (R. 80:6.) After the gunshots, Hullum observed two men wearing dark-colored clothing running toward him. (R. 80:7.) One of the men was armed with a gun and yelled "Blue" to Hullum. (R. 80:8.) "Blue" is Hullum's nickname. (R. 80:8.)

While the homicide occurred in 2012, it was not until 2014 that Milwaukee Police Detectives interviewed Hullum. According to Detective Timothy Graham, Mr. Hullum told police that he saw two masked individuals running towards him, both carrying handguns. (R. 80:58.) Hullum then told police that he believed one of the individuals to go by the name "Trell." (R. 80:66.) Hullum then picked "Trell" out of a photo array. (R. 80:66.) Trell was identified as Cartrell Kimble. During the trial, Hullum said he did not make eye contact with the men and did not recognize them. (R. 80:66.)

When asked about his previous identification of Kimble, Hullum claimed that he never told police that he recognized Kimble as one of the shooters. (R. 80:12.) Moreover, Hullum said he did not see the shooters' faces. (R. 80:14.) Hullum continually was adamant that he did not know who the subjects were. At one point he said " . . . I can't say who it was. I can't come forward and say it's somebody and I don't know." (R. 80:15.)

When explaining why he identified Kimble in a 2014 photo lineup Hullum said:

> When I seen the picture, it was more like I knew him from the neighborhood, you know. I didn't – from my recollection, I

> didn't say that that as him in the gangway. I was saying, like, I knew him from the neighborhood, and I circled that because of that. I didn't never point out that picture and say this is the man that I really, really seen. When I pointed him out, I was saying I know him from the neighborhood.

(R.80:11.)

Hullum was asked if he worried for his safety because of his testimony in this case. Hullum responded with the following:

> I mean, I'm kind of nervous because at the same time it's my life. My life is important before anybody in this court so that's why I'm in court today. My life is important. Everybody else, you all just looking and I have to live with this. I gotta still take care of my kids. I still gotta go out there and feed them and make sure they're straight and watch over my back. If anything ever was to happen, you all go home, I will be in fear. See, that's where everybody is misleading at, my life.

(R. 80:11.)

The prosecutor then implied that Hullum was "hesitant" to testify. (R. 80:17). Hullum responded, "I'm not hesitant. I said what I had to say and that was basically it, you know. Everything else is kind of like a force." (R. 80:17).

After Hullum testified, the State called Milwaukee Police Detective Timothy Graham to testify. (R. 80:51.) Detective Graham interviewed Hullum in 2014 and was called to impeach Hullum's testimony. Graham said that Hullum was cooperative and identified Kimble as one of the people he saw running through the gangway. (R. 80:58.) Graham also said Hullum identified the other shooter as Deron Berry-Williams. (R. 80:69.) Further, Detective Graham said that some witnesses in Milwaukee are afraid to testify in homicide cases because of the fear of retribution. (R. 80:53.) Graham did not however, testify that Hullum said he was afraid to make an identification in this case.

Cedrick Jennings Testimony

Cedrick Jennings was the other witness that had previously identified Kimble. Jennings was on a porch at a different house near the shooting when it occurred. (R.78:63.) Jennings heard gun shots and then saw two men running. (R. 78:64.) He was interviewed by police on April 9, 2014. (R. 78:65.) During his 2014 interview with police, Jennings told them that one of the people he saw running away from the scene was Kimble. (R. 78:70.)

Jennings recanted this identification at trial. In his testimony, Jennings said he did not remember telling detectives that he recognized one of the individuals he saw running through the gangway. (R. 78:67.) Jennings was shown the photo array that he signed and acknowledged that the signature on the document as his. (R. 78:68.) However, when shown the actual photograph in the photo array and asked whether he initialed the photograph he said no, that he did not initial the photograph. (R. 78:70.) Jennings was asked numerous times if Kimble was one of the two men he saw running through the gangway. (R. 78:67, 71-2, 75-8.) Every time he denied identifying Kimble. In fact, on cross-examination Jennings testified that he does not know Kimble. (R. 78:89-90.)

After being questioned numerous times about his 2014 statement to police, Jennings admitted that the information he told police in 2014 was information that someone else told him. (R. 78:73.)

At no time did Jennings state that he was afraid to testify. Further, Jennings testified that he did not have any problems with anyone regarding his testimony. (R. 78:92-3.)

Another State's witness, Demetrius Anderson, identified the co-defendant, Deron Berry-Williams as the other shooter. Anderson did not identify Kimble as one of the shooters.

During her closing argument the prosecutor said:

> And Mr. Hullam -- also not cooperative – but Mr. Hullam, I think his testimony was very powerful in a lot of regards. And Mr. Hullam tried to -- he did not want to identify this defendant in court because he was afraid. That was abundantly clear. Applying your common sense and looking at what motive an individual would have, say, for fabricating testimony, in this case, the testimony on the stand -- the recants – are the fabrication parts, not the statements to police.
>
> You've got scared witnesses that don't want to be the person fingering a murderer in court when they've got to live in that neighborhood still, when they've got to take care of their children still. They don't want to point out the person who did this crime. When they were in the comfort of just meeting with the police and it was just them and the detectives.
>
> . . .
>
> Why is it it that somebody wouldn't identify the person who killed his best friend? It's fear.

(R. 71:33-4.)

Kimble's trial counsel did not object to the prosecutor's argument that Hullum and Jennings were afraid to identify Kimble in court.

Previously, Hullum testified that he was not hesitant to testify. Rather, he said "I said what I have to say and that was basically it. . ." (R.80:17.)

The jury acquitted Kimble of the first-degree intentional homicide charge but convicted him of the first degree recklessly endangering safety while armed charge. (R. 42:1-2.) Kimble was sentenced to 17 years in prison, with 12 years of initial confinement and 5 years of extended supervision. (R. 76:22.)

Kimble filed a timely intent notice of intent to seek postconviction relief. (R. 52.) Subsequently, Kimble filed a motion for postconviction relief under § 809.30. (R.103.) Kimble sought a new trial because his due process rights were violated when the prosecutor improperly vouched for the credibility of Hullum and Jenning's out-of-court

identification of Kimble. (R.103.) Alternatively, Kimble requested the circuit court grant him a *Machner* hearing to determine whether his trial counsel was ineffective for failing to object to the prosecutor's vouching. (R.103.) The circuit court denied Kimble's motion in a written decision. (R.120.)

ARGUMENT

I. The defendant is entitled to a new trial because the prosecutor improperly vouched for the credibility of two witnesses' out-of-court identification of the defendant.

The prosecutor improperly argued that Hullum and Jennings's fear of retribution from Kimble was the reason that Hullum and Jennings did not identify Kimble in court. Hullum and Jennings never said they were afraid of Kimble or of any retribution for their testimony. The prosecutor vouched for the credibility of Hullum and Jenning's out-of-court identification of Kimble. Further, the prosecutor argued evidence that was not presented to the jury; that Hullum and Jennings were afraid to testify. This is a fundamental error that violated Kimble's due process rights. He must be awarded a new trial.

A. The prosecutor improperly vouched for the credibility of two witnesses' out of court identification of the defendant.

When a prosecutor vouches for a witness's credibility, it can undermine the legitimacy of the verdict and be grounds for a new trial. *See State v. Smith*, 2003 WI App 234 ¶26, 268 Wis.2d 138, 671 N.W.2d 854. The United States Supreme Court has held that due process necessitates a jury's verdict be based on evidence received in open court and not from outside sources. *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966); see also *Marshall v. United States*, 360 U.S. 310, 313 (1959); *Skilling v. United States*, 561 U.S. 358, 378-81 (2010).

When a defendant alleges that a prosecutor's statements constituted misconduct, the test applied is whether the statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process'. *State v. Davidson*, 2000 WI 91, ¶ 88, 236 Wis.2d 537, 613 N.W.2d 537, 613 N.W.2d 606.

Arguing matters not in evidence is improper. *State v. Albright*, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980). During a closing argument, a prosecutor's use of "[a]rtful subtleties, ill-case and expressed, may be occasion for error. *Smith*, ¶ 24.

The circumstances of each trial must be considered when determining whether a final argument was permissible. *Id*. at ¶ 23. "Whether the prosecutor's conduct during the closing argument affected the fairness of the trial is determined by viewing the statements in the context of the total trial. *Id*.

Case law suggest there are two forms of "vouching." The first form is "telling or hinting to the jury that the prosecutor has reasons unknown to it for believing that a government witness is telling the truth." *U.S. v. Edwards*, 581 F.3d 604 (7th Cir. 2009) (citing e.g., *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *United States v. Morris*, 498 F.3d 634, 642 (7th Cir. 2007); *United States v. Brown*, 508 F.3d 1066, 1075-76 (D.C. Cir. 2007)). The second occurs when a prosecutor expresses his or her personal belief in a witness' truthfulness "thus placing the prestige of the government behind the witness." *Id.*

Wisconsin recognizes both forms of vouching. Additionally, in Wisconsin a prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on the evidence presented. *See State v. Adams*, 221 Wis. 2d 1, 16-18, 584 N.W.2d 695 (Ct. App. 1998) (citing *United States v. Cornett*, 232 F.3d 570, 575 (7th Cir. 2000)).

In *Davidson*, the Court ruled the prosecutor improperly vouched for a witness in his closing argument. *Davidson*, ¶ 89. The prosecutor stated, "So what is the truth? We talked a

lot about the credibility of witnesses when we started this, and the bottom line is this, do you believe Tina as I do?" *Id* at 82. While the Court ultimately concluded that the defense waived any objection, the Court did state that these comments were improper. *Id* at 89. Moreover, the Supreme Court in *State v. Jorgensen*, 2008 WI 60, ¶ 26, 310 Wis.2d 138, 754 N.W.2d 77 affirmed that the comments in Davidson were improper vouching. *Jorgensen*, ¶ 26.

In Kimble's case, the prosecutor engaged in the first type of vouching by arguing that Jennings and Hullum were afraid to identify Kimble in court. There is no evidence in the record that Jennings or Hullum was afraid to identify Kimble in court. The prosecutor relied on evidence that was not in the record in order to bolster the witnesses' out-of-court identification of Kimble. This argument mitigated both witnesses' failure to identify Kimble in court.

The prosecutor used artful statements such as "scared witnesses" and "its fear" to explain away why both of the State's star witnesses did not identify Kimble as the shooter during the trial. This argument is improper because its not based on the evidence introduced at trial. If the prosecutor wanted to make this argument, the prosecutor needed to introduce some evidence that demonstrated Hullum and Jennings was fearful of retribution.

B. The improper vouching constituted plain error.

While it is true that trial counsel did not object to the vouching argument or ask for a mistrial, under certain circumstances, there is not a waiver. *State v. Rockette*, 2006 WI App 103, ¶ 29, 294 Wis.2d 611, 628-29, 718 N.W.2d 269. Wisconsin recognizes the plain error doctrine. *See Wis. Stat.* § 901.03(4) (2021-22). The plain error doctrine allows appellate courts to review errors that were otherwise waived. *See State v. Mayo*, 2007 WI 78, 301 Wis.2d 642, 734 N.W.2d 115.

A plain error is one that is so plain or fundamental that a new trial or other relief must be granted even though the error was not objected to a trial. *State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis.2d 138, 754 N.W.2d 77. "[T]he existence of a plain error will turn on the facts of the particular case." *Id* (quoting *Mayo,* ¶ 29). There is no bright line rule to determine whether a reversal is warranted. *Jorgensen*, ¶ 22. Thus, the evidence that was admitted and the seriousness of the error are particularly important. *Id*.

The plain error rule is particularly used when the defendant has been deprived of a basic constitutional right. *Id*. at ¶ 21 (citing *State v. Sonnenberg*, 117 Wis.2d 159, 177, 344 N.W.2d 95 (1984) (citing *Virgil v. State*, 84 Wis.2d 166, 195, 267 N.W.2d 852 (1978))).

The United States Supreme Court has long held that due process, applicable to the states through the Fourteenth Amendment, requires fair legal procedure including the requirement that the jury's verdict be based on evidence received in open court. *Sheppard*, 384 U.S. at 351. Due process requires that a jury make it's decision free from outside influences. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 553, 96 S. Ct. 2791 (1976). The defendant's right to a fair trial is dependent on the jury making its own decision, not one unduly influenced by the prosecutor. Thus, a prosecutor's vouching is a constitutional violation and is subject to the plain error rule. *See Jordan v. Hepp*, 831 F.3d 837 (7th Cir. 2016); *See also United States v. Young*, 470 U.S. 1, 18 (1985).

The prosecutor's comments during her closing argument constituted vouching and thus were improper. The prosecutor relied on evidence not in the record, but appeared to be within her personal knowledge: that Jennings and Hullum were afraid that Kimble or someone else associated with Kimble would do them harm if they identified Kimble in court.

During her closing argument, the prosecutor told jurors three separate times that Hullum and/or Jennings recantation was due to fear.

First she said: "[a]nd Mr. Hullam tried to -- he did not want to identify this defendant in court because he was afraid. That was abundantly clear." Then she said: "You've got scared witnesses that don't want to be the person fingering a murderer in court . . . ." Finally, she said: "[w]hy is it that somebody wouldn't identify the person who killed his best friend? It's fear."

While Hullum did say that "[i]f anything ever was to happen, you all go home, I will be in fear." He did not say he was afraid to identify Kimble. In fact, when asked if he was hesitant to testify, Hullum specifically said "I'm not hesitant." That answer does not indicate fear of testifying. Hullum did say he was "nervous" about testifying but nervous is far different from fearful. By arguing that the reason Hullum recanted his identification of Kimble was because Hullum was afraid of Kimble, the prosecutor conveyed the impression she had evidence the jury did not – namely that Kimble (or someone associated with Kimble) had threatened to harm Hullum.

Even assuming that one could construe Hullum's statements to show fear of testimony, there is literally no evidence that Jennings was afraid to testify. The prosecutor did not even question Jennings about fear of testifying. Yet, the prosecutor referred to "witnesses" when explaining why *the prosecutor* believed the witnesses recanted.

Thus, the prosecutor invited the jury to rely on evidence not in the record but that appeared to be within her own knowledge: that Hullum and Jennings were afraid to identify Kimble in court because they were afraid of him. Due process prohibits a prosecutor from urging a jury to rely on evidence that is not in the record. Rather, due process requires a jury to do its own analysis of each of the witness' respective credibility based on evidence that is in the record and then coming to its own conclusion.

The prosecutor's conclusion about the credibility of Jennings and Hullum's testimony should not have had a role in this trial. The conclusion that Jennings and Hullum recanted their identification because they were afraid of

Kimble was not supported by any evidence. In fact, Hullum contradicted that notion.

This argument is extremely important because the Hullum and Jennings out-of-court identification of Kimble is the only evidence that ties Kimble to the shooting. Without those identifications, there is no evidence to identify Kimble as the shooter. The seriousness of this error cannot be understated, it allowed the prosecution to argue evidence that was not before the jury. It is textbook vouching.

The prosecutor's statements "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Davidson*, 2000 WI 91, ¶ 88 (*citing State v. Wolff*, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992)).

The prosecutor's statements infected Kimble's trial. Without Hullum or Jenning's identification, the State had no evidence Kimble committed this crime. Thus, after both witnesses recanted their identification, the State was forced to provide an explanation for the recantation. The State's problem was that its explanation was not supported by any evidence. Thus, Kimble was denied due process and his conviction must be overturned.

C. Kimble's trial counsel was constitutionally ineffective for failing to object to the prosecutor's improper closing argument.

A defendant has a constitutional right to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 7 of the Wisconsin Constitution. *State v. Smith*, 207 Wis. 2d 259, 273, 558 N.W.2d 379 (1997).

Whether a circuit court properly granted or denied relief on an ineffective assistance of counsel claim presents a mixed question of fact and law. *State v. Jenkins*, 2014 WI 59, ¶36, 355 Wis. 2d 180, 848 N.W.2d 786. A circuit court's findings of historical fact—including its findings of the circumstances of the case and defense counsel's conduct—using the "clearly erroneous" standard. *Id.* at ¶ 38. However,

whether trial counsel's conduct constitutes ineffective assistance of counsel is a question of law, which is reviewed de novo. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must show (1) deficient performance, *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Deficient performance is shown where counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. Conduct that is part of a "reasonable trial strategy" is not considered deficient. *State v. Domke*, 2011 WI 95, 337 Wis. 2d 268, 805 N.W.2d 365. In an ineffective assistance of counsel claim, the circuit court must hold a hearing to allow trial counsel the opportunity to explain or deny the allegations. *Machner*, 92 Wis. 2d 797.

Prejudice is proven where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.* Reviewing courts should evaluate multiple allegations of deficient performance for their "cumulative effect." *State v. Thiel*, 2003 WI 111, ¶63, 264 Wis. 2d 571, 665 N.W.2d 305. The focus of this inquiry is not on the outcome of the trial, but on "the reliability of the proceedings." *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985).

A trial court must hold a *Machner* hearing if the defendant alleges facts which, if true, would entitle the defendant to relief. *See State v. Bentley*, 201 Wis.2d 303, 309, 548 N.W.2d 50 (1996). A circuit court does not need to hold a *Machner* hearing if the "motion does not raise facts sufficient to entitle the movant to relief, or presents conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. Importantly, an "evidentiary hearing is needed to resolve most credibility

issues." *State v. Reynolds*, 2005 WI App 222, ¶ 7, 287 Wis. 2d 653, 705 N.W.2d 900.

The trial court errored when it denied Kimble's motion for a *Machner* hearing. In his postconviction motion, Kimble identified sufficient facts, that if proven, would entitle him to relief. (R. 103:1-13). First, Kimble demonstrated that the prosecutor improperly vouched for the credibility of two witnesses' out-of-court identification of Kimble as a shooter. (R. 103:7-9.) Second, Kimble demonstrated that his trial counsel failed to object to the prosecutor's vouching prejudiced Kimble. (R. 103:11-12.)

Trial counsel's performance in this matter was constitutionally deficient. Counsel should have objected to the prosecutor's improper closing arguments. As was previously stated, Hullum and Jennings' out-of-court identification were the only identifications that placed Kimble at the scene. Without these out-of-court identifications, Kimble is surely not convicted. Thus, allowing the prosecutor to improperly argue that Hullum and Jennings were afraid to identify Kimble in court, was ineffective.

Moreover, the deficient performance prejudiced Kimble. The United States Supreme Court has stated that when a prosecutor improperly vouches for a witness's credibility, and the case is not otherwise a strong one, "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence. *Berger v. United States*, 295 U.S. 78, 88 (1935). Kimble has such a case.

Other than the out-of-court identifications, the State has virtually no evidence that links Kimble to the shooting. There is no DNA, no fingerprints and no other witnesses that identify Kimble as a shooter. Without Hullum and Jennings out-of-court identifications, the State could not even meet the probable cause standard to charge Kimble. Thus, the prejudice to Kimble from counsel's error is so highly probable that the Court cannot assume is nonexistence. At a minimum, Kimble has shown that he is entitled to *Machner* hearing.

These facts are sufficient, if proven, to demonstrate that Kimble would be entitled to a new trial because his trial counsel was constitutionally deficient. Thus, the trial court errored when it denied Kimble a *Machner* hearing.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests the court grant the defendant a new trial. Alternatively, the defendant requests the Court grant a *Machner* hearing on his motion.

Dated this 28th day of October, 2021.

Signed:

Electronically signed by Jeffrey J. Gueard

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 4,223 words.

Dated this 28th day of October, 2021.

Signed:

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