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STATE OF WISCONSIN

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

DISTRICT I

Case No. 2021AP1227-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARTRELL ROMEL KIMBLE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND DENIAL OF A MOTION FOR POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. CONEN AND THE HONORABLE MICHELLE ACKERMAN HAVAS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

This case is about whether a defendant who repeatedly shot a semiautomatic handgun in a residential neighborhood—resulting in the death of one and injury of another—should receive a new trial because the prosecutor asked the jury to make the reasonable inference that the reason two witnesses recanted prior identifications of defendant was because of a fear of retaliation.

Evidence presented at trial established that two witnesses identified Kimble as the shooter and then, at trial, refused to identify him. One of the witnesses testified that he was "nervous" and spoke about his "fear." Law enforcement witnesses testified and confirmed the prior out-of-court identifications of Kimble as the shooter. When asked why the witnesses refused to identify Kimble as the shooter, a detective explained and that this "is very common in Milwaukee" because of a "recent history of retaliation" against witnesses which has "created a level of fear in the community."

In closing argument, the prosecutor asked the jury to make the reasonable inference that the reason the witnesses refused to identify Kimble as the shooter was due to a fear of retaliation. On appeal, Kimble claims this argument constituted plain error, demands a new trial, and argues his trial counsel was ineffective for failing to object to what he characterizes as improper vouching.

The circuit court correctly concluded that the prosecutor's closing argument was proper; it was a reasonable inference based on the evidence that the reason two witnesses recanted prior identifications was due to a fear of retaliation. Moreover, the court correctly concluded that Kimble was not

entitled to a *Machner*[1] hearing on his claim of ineffective assistance because the record conclusively established that the State's argument was not improper, and Kimble was not prejudiced.

Accordingly, this Court should affirm the judgment of conviction.

ISSUES PRESENTED

1. During closing argument, the prosecutor asked the jury to make the reasonable inference that the reason two witnesses recanted their prior identifications of Kimble as the shooter was due to a fear of retaliation. Did the prosecutor's closing statement constitute plain error such that Kimble is entitled to a new trial?

The circuit court said: No.

This Court should say: No.

2. Did the circuit court err when it denied Kimble an evidentiary hearing on his postconviction motion that alleged ineffective assistance for his trial counsel's failure to object to the prosecutor's closing statement?

The circuit court did not answer this question.

This Court should say: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary as the issues will be fully presented in the briefs. Publication is unwarranted as the issues can be decided by applying established legal principles to the facts of this case.

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[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

STATEMENT OF THE CASE

In 2012, two men covered their faces with white T-shirts, came through a gangway next to L.J.'s[2] home, and shot semiautomatic firearms at adults and children sitting on his front porch. (R. 1:3; 78:23–24.) L.J. tried to run away but was shot two times, once on the left side of his chest and once in his abdomen. (R. 69:31; 70:30.) He fell face down in the yard, and a responding officer unsuccessfully performed CPR. (R. 78:14–15.) L.J. died at the scene from his gunshot wounds. (R. 1:3; 70:28–32.) D.H., another person sitting on L.J.'s porch, was shot in the leg but managed to make it to a neighbor's home where the neighbor applied pressure to his leg wound. (R. 69:64; 1:4–5.)

Kimble was charged with first-degree intentional homicide as a party to a crime, use of a dangerous weapon against L.J. and first degree recklessly endangering safety as a party to a crime, use of a dangerous weapon. (R. 1:1–2.)

At trial, Detective James Hutchinson testified that he interviewed Cedrick Jennings two years after the shooting after receiving information that Jennings may have information about L.J.'s homicide. (R. 78:96–97.) According to Detective Hutchinson, Jennings told him that he saw the shooters immediately after the shooting and Jennings recalled that one of the shooters was "a person with a nickname of 'Trell.'" (R. 78:99.) At the time, Jennings described "Trell" as having "short hair" and was approximately "five eight, kind of a thin build younger black male." (R. 78:101.) Detective Hutchinson testified that Jennings identified Kimble in a photo array, and that Jennings "did not have any doubt" as to whether Kimble was the person he saw running after the shooting. (R. 78:108–09.) Detective Hutchinson's account was later corroborated by

[2] The State refers to the victims by initials only.

Detective Jeremiah Jacks, also present during Jennings's identification of Kimble, and who confirmed Jennings identified Kimble as one of the shooters. (R. 70:19–20.)

Cedrick Jennings testified that he was at a residence near the shooting, heard gunshots, and observed two people running through the gangway. (R. 78:61–66.) Jennings testified that he did not remember giving a statement to police in 2014 about the incident. (R. 78:66.) During his testimony, Jennings stated that he did not recall telling detectives in that 2014 statement that he recognized one of the shooters as someone he knew by the name of "Trell" based on the sound of the shooter's voice. (R. 78:67.) Not only did Jennings not remember providing police with a statement where he identified "Trell" as one of the shooters, but he also did not recall identifying Kimble in a photo array and signing the Photo Array Identification Form. (R. 76:68–70; 161.) He also did not remember initialing next to the photo of Kimble. (R. 164.)

Later in his testimony, Jennings indicated he did not remember anything about the shooting and it was, in fact, told to him by someone else. (R. 78:73–74.) He further explained he was "16 or something like that at the time" and he "was scared." (R. 78:74.)

Damian Hullum,[3] testified that on the night of the shooting he was taking out his trash and heard gunshots. (R. 80:6.) He testified that he saw two males running in "some dark-colored clothes." (R. 80:7.) He testified that he did not see either of their faces but as they passed one of the shooters called out "Blue," which was Hullum's nickname. (R. 80:8.) Hullum testified that hearing his name made him "cautious a

[3] Damian Hullum is referred to as Damian Hullum or Damian Hullman at various points in the record. The State relies on Mr. Hullum's testimony, for the correct spelling of his last name as "Hullum." (R. 80:5.)

little bit as to who could have said that." (R. 80:8.) After the shooter told him, "Don't say anything, Blue," Hullum confirmed that he told the shooters, "Put those guns away, my kids are out here." (R. 80:9.)

The State asked Hullum if he recalled telling police detectives that he had seen the shooters' faces and he responded, "I don't remember that part." (R. 80:10–11.) When pressed on whether he had told police that he had seen the front of the shooters and observed them with their masks pulled down, Hullum responded, "No." (R. 80:10–11.)

Based on his responses, the State asked Hullum if he worried for his safety because he was testifying in this case. (R. 80:11.) Hullum responded that he was "kind of nervous" because "[m]y life is important" and he has to "take care of my kids" and "feed them and make sure they're straight and watch over my back." (R. 80:11.) He explained that "if anything ever was to happen, you all go home, I will be in fear." (R. 80:11.)

Hullum further testified that L.J. was "somebody I really cared for" and that L.J. "died in my arms." (R. 80:27.)

Timothy Graham, Milwaukee Police Detective, testified that in his experience, in homicide cases, there is a tendency of witnesses "not wanting to be involved in a homicide investigation, not wanting to come forward, and most frequently not wanting their name associated with [an] investigation." (R. 80:52–53.) Detective Graham further explained this is "very common in Milwaukee" because of a "recent history of retaliation" against witnesses so "it's created a level of fear in the community" and a reluctance for witnesses to come forward. (R. 80:53–54.)

Detective Graham testified about his interview of Hullum. (R. 80:56.) Detective Graham testified that Hullum told him that he heard the gunshots and observed the shooters running toward him and that, upon seeing him, they

pulled up the masks over their faces. (R. 80:57.) Hullum told Detective Graham that both shooters were carrying handguns and that he yelled at them to put them away due to the presence of children. (R. 80:58.) Detective Graham confirmed that Hullum told him that one of the shooters told Hullum, "Don't say nothing, Blue." (R. 80:58.) According to Detective Graham, Hullum told him that he was able to get a good look at the shooters' faces and that he thought he could identify them since he recognized one of them not only by face but also by voice as someone he knew from the neighborhood. (R. 80:58.) Hullum told Detective Graham that the individual that told him, "Don't say nothing, Blue," was named "Trell," and Detective Graham confirmed that is Kimble's nickname. (R. 80:58–59.)

As to why Hullum had not come forward earlier or on his own, Detective Graham testified that Hullum told him that "he has three kids" and "has to continue to live in that neighborhood and deal with these people on a daily basis" and "for that reason he hadn't come forward." (R. 80:60–61.)

Detective Graham confirmed that Hullum had identified Kimble as the shooter and when Hullum saw Kimble's photo in the photo array "his immediate response was, 'That's him. That's [Kimble]. That's the one I saw running with the gun.'" (R. 80:65.) However, Detective Graham explained that Hullum refused to place his initials on the back because Hullum "indicated that he felt like he had done too much even making an identification because he didn't want to be involved." (R. 80:67.)

During the State's closing argument, it discussed both Jennings and Hullum's testimony. (R. 71:19–35.) The State acknowledged that both Jennings and Hullum recanted their identifications of Kimble as the shooter during their testimony, but the State explained that this made sense since "[n]either one of them wanted to come forward with this

information" as "[t]hey were very terrified and scared." (R. 71:29.)

As to Hullum's testimony, the State asked the jury to apply their "common sense" as to why a witness may recant on the witness stand. (R. 71:33.) The State stated, "You've got scared witnesses that don't want to be the person fingering a murderer in court." (R. 71:33.) The State referred the jury to both Hullum's statements on the stand as well as Detective Graham's testimony explaining why a witness may recant to conclude that "fear" is why someone would not want to identify the person that killed their best friend. (R. 71:34.)

At the close of the State's argument, it asked the jury to "think carefully about the motives one would have to recant . . . think about all the dynamics and safety concerns that they may have or could be at play." (R. 71:35.)

A jury convicted Kimble of first-degree recklessly endangering safety with use of a dangerous weapon as charged in Count 2 and acquitted on Count 1. (R. 81:10; 42.)

Kimble was sentenced to 12 years initial confinement and 5 years extended supervision, for a total of 17 years, to be served consecutively to Kimble's other sentences. (R. 76:22.)

Kimble filed a postconviction motion requesting a new trial and alleged that the prosecutor improperly vouched for the credibility of two witnesses' out-of-court identifications of Kimble as the shooter, and that Kimble's trial counsel was constitutionally ineffective for failing to object to the prosecutor's "improper closing argument." (R. 103:6, 10–11.) The State filed a response and argued that Kimble failed to show that the State's closing remarks were improper and, even if they were, any error was harmless. (R. 117:4.) As to whether Kimble's trial counsel was ineffective for not objecting to the State's closing remarks, the State argued trial counsel was neither deficient nor was Kimble prejudiced. (R. 117:10–11.)

The postconviction court denied Kimble's postconviction motion without an evidentiary hearing. (R. 120.) The court noted that Kimble's "plain error argument relie[d] only on generic citations and [was] unsupported by specific law on the issue of vouching." (R. 120:3.) The court agreed with the State that the prosecutor's closing comments did not constitute plain error and therefore any objection to the prosecutor's argument was forfeited. (R. 120:3.) The court further agreed that counsel was not deficient for failing to object to the prosecutor's closing statements and that Kimble was not prejudiced. (R. 120:3.)

Kimble appeals.

STANDARD OF REVIEW

An allegation of plain error due to improper vouching by the prosecutor affecting constitutional rights, including a defendant's due process rights, presents a legal question that this Court reviews de novo. *State v. Bell*, 2018 WI 28, ¶ 8, 380 Wis. 2d 616, 909 N.W.2d 750.

Whether a court may deny an evidentiary hearing for an ineffective assistance claim without an evidentiary hearing on record conclusively shows grounds presents a question of law. This Court independently decides questions of law. *State ex rel. Warren v. Meisner*, 2020 WI 55, ¶ 14, 392 Wis. 2d 1, 944 N.W.2d 588

ARGUMENT

I. The prosecutor's closing argument was proper and did not vouch for any witnesses.

A. A prosecutor may aid the jury in calmly and reasonably drawing just inferences from the evidence.

The plain error doctrine, as codified in Wis. Stat. § 901.03(4), allows a court "to review errors even when they

were not properly preserved at trial." *Bell*, 380 Wis. 2d 616, ¶ 12. A plain error is one that is so "obvious and substantial" and "so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." *State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77 (quoting *State v. Sonnenberg*, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984)). This Court employs the plain error doctrine "sparingly." *Bell*, 380 Wis. 2d 616, ¶ 12.

A defendant is guaranteed the right to due process under the United States Constitution and Wisconsin Constitution. U.S. Const. amend. XIV, § 1; Wis. Const. art. I, § 8; *see also Bell*, 380 Wis. 2d 616, ¶ 15. Not every "inappropriate statement[ ] [at trial] result[s] in a due process violation that gives rise to plain error." *Jorgensen*, 310 Wis. 2d 138, ¶ 41. To determine whether an improper comment violates due process, "the court must ask whether the statement 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id*. ¶ 40 (citation omitted). The defendant bears the burden of showing "that the unobjected to error is fundamental, obvious, and substantial." *Id*. ¶ 23.

Courts apply the above standard to determine whether a prosecutor's inappropriate statements resulted in a due process violation that gave rise to plain error. *Jorgensen*, 310 Wis. 2d 138, ¶¶ 40–41. The supreme court has cautioned that an improper comment "standing alone" should not be a basis for overturning a conviction, "for the statements or conduct must be viewed in context [and] only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *State v. Burns*, 2011 WI 22, ¶ 49, 332 Wis. 2d 730, 798 N.W.2d 166 (quoting *United States v. Young*, 470 U.S. 1, 11 (1985)). Thus, in assessing whether an improper comment denied a defendant due process, courts consider the "significance, timing, repetition, and manner in which the improper statements were presented to the jury"

and whether they occurred at "critical junctures of the trial." *Jorgensen*, 310 Wis. 2d 138, ¶ 44.

Kimble's plain error argument is premised on his assertion that the prosecutor improperly vouched for witness credibility during the State's closing argument. (Kimble's Br. 13.) "Improper vouching occurs when a prosecutor expresses her personal opinion about the truthfulness of a witness or when she implies that facts not before the jury lend a witness credibility." *United States v. Cornett*, 232 F.3d 570, 575 (7th Cir. 2000).

But "[c]ounsel is allowed considerable latitude in closing arguments, with discretion given to the trial court in determining the propriety of the argument." *Burns*, 332 Wis. 2d 730, ¶ 48. A "prosecutor may 'comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors.'" *State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) (citation omitted). Indeed, as the supreme court has long recognized, "the license of the advocate, and duty as well, permits him to say with the utmost freedom what the evidence tends to prove, and that it convinces him, and should convince the jurors as well, of the fact in issue." *Embry v. State*, 46 Wis. 2d 151, 161, 174 N.W.2d 521 (1970) (quoting *Fertig v. State*, 100 Wis. 301, 308, 75 N.W. 960 (1898)).

A prosecutor may comment on a witness's credibility provided that the comment is based on the evidence presented. *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). Thus, the "[u]se of the words 'liar' and 'lie' to characterize disputed testimony when the witness's credibility is clearly in issue is ordinarily not improper unless such use is excessive or is likely to be inflammatory." *United States v. Holt*, 817 F.2d 1264, 1276 n.10 (7th Cir. 1987) (quoting *United States v. Peterson*, 808 F.2d 969, 977 (2d Cir. 1987)), *cited with approval in State v. Johnson*, 153 Wis. 2d

121, 132–34 n.9, 449 N.W.2d 845 (1990). And prosecutors are allowed to "alert[ ] the jury to possible motives for the testimony given." *State v. Lammers*, 2009 WI App 136, ¶ 19, 321 Wis. 2d 376, 773 N.W.2d 463.

In sum, a "prosecutor should aim to 'analyze the evidence and present facts with a reasonable interpretation to aid the jury in calmly and reasonably drawing just inferences and arriving at a just conclusion upon the main or controlling questions.'" *Burns*, 332 Wis. 2d 730, ¶ 48 (citation omitted). What the prosecutor may not do is "suggest that the jury consider facts not in evidence." *Bell*, 380 Wis. 2d 616, ¶ 39.

When the defendant meets his burden of showing plain error, i.e., "fundamental, obvious, and substantial, the burden . . . shifts to the State to show the error was harmless." *Jorgensen*, 310 Wis. 2d 138, ¶ 23. "Harmless error analysis requires [the court] to look to the effect of the error on the jury's verdict." *State v. Hunt*, 2014 WI 102, ¶ 26, 360 Wis. 2d 576, 851 N.W.2d 434. An error is harmless if the State "prove[s] 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Jorgensen*, 310 Wis. 2d 138, ¶ 23 (citation omitted).

B. Kimble has not shown the prosecutor's comments constituted plain error or were otherwise improper.

Kimble contends that the "prosecutor improperly argued that Hullum and Jennings's fear of retribution from Kimble was the reason that [they] did not identify Kimble in court." (Kimble's Br. 13.) Kimble characterizes the prosecutor's closing statement as improperly "vouch[ing] for the credibility of [their] out-of-court identification of Kimble." (Kimble's Br. 7.) Because of that, according to Kimble, a "fundamental error [occurred] that violated Kimble's due

process rights" and he is "entitled to a new trial." (Kimble's Br. 7 (emphasis omitted).)

The State's closing argument was proper and Kimble's argument on vouching is unfounded and unsupported by applicable law.

The State reasonably asked the jury to consider why Jennings and Hullum might recant prior identifications of Kimble as the shooter during their testimony at trial. (R. 71:27–35.) The State pointed to Hullum's statements at trial and Detective Graham's testimony explaining why Hullum did not come forward earlier given that Hullum must continue to "live in [this] neighborhood" and take care of his kids. (R. 71:33.) As required, the prosecutor in this case aimed "to 'analyze the evidence and present facts with a reasonable interpretation to aid the jury in calmly and reasonably drawing just inferences and arriving at a just conclusion upon the main or controlling questions.'" *Burns*, 332 Wis. 2d 730, ¶ 48 (citation omitted). It is a reasonable inference based on the evidence, and appropriate to argue, that the reason Jennings and Hullum recanted prior identifications of Kimble as the shooter was because they were afraid of retaliation.

Moreover, the State's argument did not improperly vouch for the credibility of the prior out-of-court identifications. (Kimble's Br. 14.) Kimble confuses the issue by arguing both that the State vouched for the prior out-of-court identifications and that the "prosecutor engaged in . . . vouching by arguing that Jennings and Hullum were afraid to identify Kimble in court." (Kimble's Br. 13.)

But neither constitutes improper vouching for a witness's credibility. Here, the prosecutor did not "express[ ] her personal opinion about the truthfulness of a witness or . . . impl[y] that facts not before the jury lend a witness credibility." *Cornett*, 232 F.3d at 575. Instead, the prosecutor explained that the inconsistency in witnesses' out-of-court

identifications and in-court testimony (both of which were in evidence), was due to the witnesses' fear of retaliation. This explanation was supported by Hullum's own statements at trial that he was "kind of nervous" and that "[i]f anything ever was to happen, you all go home, I will be in fear." (R. 80:11.) Hullum's testimony certainly implied that he was in fear of repeating his out-of-court identification based on his comments that "[m]y life is important" and he has to "take care of my kids" and "feed them and make sure they're straight and watch over my back." (R. 80:11.)

The prosecutor's fear explanation was also supported by Detective Graham's testimony that witnesses in Milwaukee generally do not want to come forward or be involved in criminal prosecutions due to a "recent history of retaliation" that has "created a level of fear in the community." (R. 80:53–54.)

Based on this, the State asked the jury to make the reasonable inference that the reason Jennings and Hullum recanted their prior identifications of Kimble as the shooter was due to fear of retaliation. (R. 71:27–35.) Contrary to Kimble's assertion that the "prosecutor relied on evidence that was not in the record," (Kimble's Br. 9), there was sufficient evidence that would allow a reasonable jury to conclude that the witnesses recanted due to fear of retaliation. Accordingly, the prosecutor's statements were permissible based on the evidence before the jury, as they did nothing more than "alert[ ] the jury to possible motives for the testimony given," *Lammers*, 321 Wis. 2d 376, ¶ 19, based on the evidence at trial.

C. Even if this Court finds the State's remarks in closing argument improper, any error was harmless.

Even if this Court finds any of the prosecutor's comments improper, they were harmless beyond a reasonable

doubt. Generally, "[e]ven if there are improper statements by a prosecutor, the statements alone will not be cause to overturn a criminal conviction." *Lammers*, 321 Wis. 2d 376, ¶ 23. Such comments must be evaluated "in context of the entire trial." *Id.* For two reasons, any erroneous statements by the prosecutor were harmless.

First, the jury instructions ensured the jurors had no doubt about their role as the sole arbiter of the credibility of the witnesses. *See Lammers*, 321 Wis. 2d 376, ¶ 19 (noting jury instructions concerning witness credibility were sufficient to "dispel any potential[ ] harmful effects of the prosecutor's reference[ ] to truthful testimony"). Both before opening statements and closing arguments, the court properly instructed the jury by defining evidence and how the jury was to consider the attorneys statements and arguments. In its opening instructions, the court told the jury it was to decide Kimble's case, "solely on the evidence offered and received at trial." (R. 68:63.) Further, that the "jurors are the judges of the credibility of witnesses and of the weight of the evidence." (R. 68:64.) In evaluating credibility, the jurors were also instructed to consider "possible motives for falsifying testimony; and all other facts and circumstances during the trial which tend to support or discredit the testimony." (R. 68:65–66.) At the close the of the case, the court instructed the jury that "[r]emarks of the attorneys are not evidence. If the remarks suggest certain facts not in evidence, disregard the suggestion." (R. 71:15.) Therefore, the jurors had no doubt about their role and that the prosecutor's comments were not evidence to be considered in determining guilt. S*tate v. Truax,* 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) (juries presumed to follow instructions). Therefore, any comment from the prosecutor, if improper, was harmless beyond a reasonable doubt.

Second, the State's case was so strong that there is not a reasonable probability that, absent the alleged error, the

jury would have reached a different verdict. *See Lammers*, 321 Wis. 2d 376 ¶ 14 (strength of case an important factor in harmless error analysis). Detective Graham and Detective Hutchinson both testified that Jennings and Hullum had identified Kimble as the shooter. (R. 78:108; 80:65.) And Detective Graham explained that the reason witnesses may recant on the stand is due to a fear of retaliation. (R. 80:53–54.) The jury was able to evaluate their testimony as well as the testimony of other witnesses to the shooting and determined that Kimble was guilty beyond a reasonable doubt. The jury, as the ultimate arbiter of credibility, was in the best spot to evaluate the credibility of Jennings and Hullum and determine the motivations for their testimony. Accordingly, given the strength of the State's case, there is not a reasonable probability that the result of the proceeding would have been different absent the State's closing argument.

II. The circuit court properly denied Kimble's postconviction motion without a hearing because the record conclusively established that the State's closing argument was not improper.

A. A circuit court can deny a defendant's postconviction motion alleging ineffective assistance of counsel without a hearing if the record shows that the defendant is not entitled to relief.

A defendant cannot succeed on a claim that counsel was ineffective unless the circuit court first holds an evidentiary hearing to preserve counsel's testimony. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel.").

A defendant is not automatically entitled to an evidentiary hearing. To get one, the defendant must allege facts in a postconviction motion that "allow the reviewing

court to meaningfully assess the defendant's claim." *State v. Allen*, 2004 WI 106, ¶ 21, 274 Wis. 2d 568, 682 N.W.2d 433 (quoting *State v. Bentley*, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996)).

If the motion does not raise sufficient facts, if the allegations are merely conclusory, or if the record conclusively shows that the petitioner is not entitled to relief, the trial court can deny the motion without an evidentiary hearing. *Bentley*, 201 Wis. 2d at 309–10.

To show that counsel was ineffective, a defendant must establish both that trial counsel's performance was deficient and that this performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To demonstrate deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed to the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

B. The circuit court properly denied Kimble's motion without a hearing because the record conclusively established that his claim failed on the merits.

Kimble frames his argument on appeal as whether his trial counsel was "constitutionally ineffective for failing to object to the prosecutor's improper closing argument." (Kimble's Br. 12 (emphasis omitted).) But the question for this Court is not whether counsel was ineffective, it is whether the circuit court erred when it denied Kimble's motion without a *Machner* hearing. The circuit court properly denied Kimble's motion without an evidentiary hearing because the record conclusively established his claim failed on the merits.

Kimble argues that his postconviction motion alleged sufficient facts that entitled him to a hearing. (Kimble's Br. 14.) He alleged in his postconviction motion that the

prosecutor's closing statement constituted vouching for the witnesses out-of-court identifications of Kimble. (R. 103:6.) But, as argued above, the prosecutor's statements did not vouch for the credibility of either witnesses out-of-court identifications. As the postconviction court noted, Kimble's plain error argument relies only on "generic citations and is unsupported by specific law on the issue of vouching." (R. 120:3.) Moreover, the postconviction court correctly noted that Kimble's postconviction assertions "simply [are] not what happened here." (R. 120:4.) The postconviction court correctly found that "the inference [the prosecutor] asked the jury to draw was supported by specific testimony from Hullman [sic] and Detective Graham. This is [a] perfectly reasonable closing argument to make . . . ." (R. 120:4.) And, even had counsel objected, the court noted they would have overruled any objection. (R. 120:4.) Accordingly, because Kimble's assertions on their face did not demonstrate ineffective assistance, the court properly denied his motion for an evidentiary hearing.

This Court should also conclude that Kimble has not proven that the circuit court incorrectly rejected his ineffective assistance claim on the merits. The court's decision was, in effect, a determination that the record conclusively showed that Kimble was not entitled to relief. The circuit court was correct, and this Court should affirm.

The circuit court addressed both *Strickland* prongs in its decision. It held that counsel did not perform deficiently because the State's argument was not objectionable. (R. 120:3); *see State v. Butler*, 2009 WI App 52, ¶ 8, 317 Wis. 2d 515, 768 N.W.2d 46 (stating that a lawyer is not ineffective for making a motion that would have been denied). Specifically, the court concluded that the State was asking the jury to draw the inference that the reason the witnesses recanted their prior identification of Kimble was due to fear of retaliation, which was supported by specific testimony from Hullum and Detective Graham. (R. 120:4); *see State v. Mayo*,

2007 WI 78, ¶ 43, 301 Wis. 2d 642, 734 N.W.2d 115 ("[A] prosecutor may comment on the evidence, argue to a conclusion from the evidence, and may state that the evidence convinces him or her and should convince the jury.").

The court was correct. The State did not argue that any witness was telling the truth. Instead, the context of the State's argument demonstrates that it was asking the jury to draw the permissible inference that the reason Jennings and Hullum's testimony was inconsistent with their prior identifications of Kimble was due to fear of retaliation, which was supported by evidence admitted at trial. The State's argument was thus proper, and the circuit correctly determined that counsel's failure to object was not deficient.

The court further determined that Kimble was not prejudiced. (R. 120:4.) Specifically, the court pointed out that it had instructed the jury that "it was only to consider the evidence received during the trial and that the prosecutor's remarks in closing arguments are not evidence." (R. 120:4.) Juries are presumed to follow the court's instructions. *State v. Marinez*, 2011 WI 12, ¶ 41, 331 Wis. 2d 568, 797 N.W.2d 399. And jury instructions can render harmless improper statements in a prosecutor's closing argument. *See State v. Delgado*, 2002 WI App 38, ¶¶ 16–18, 250 Wis. 2d 689, 641 N.W.2d 490. The circuit court correctly concluded that Kimble was not prejudiced. (R. 120:4.)

* * * * *

The State asked the jury to make the reasonable inference that the reason Jennings and Hullum recanted prior identifications of Kimble as the shooter was due to a fear of retaliation. Accordingly, the circuit court correctly concluded that the prosecutor's closing argument was proper and denied Kimble's postconviction motion. This Court should affirm that decision.

CONCLUSION

This Court should affirm the judgment of conviction and order denying Kimble's postconviction motion.

Dated this 29th day of November 2021.

Respectfully submitted,

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Attorney General of Wisconsin

Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,254 words.

Dated this 29th day of November 2021.

Electronically signed by:

Loryn L. Limoges
LORYN L. LIMOGES
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 29th day of November 2021.

Electronically signed by:

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