STATE OF WISCONSIN

COURT OF APPEALS DISTRICT I

Case No. 2021-AP-1227-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 CONEN AND THE HONORABLE MICHELLE ACKERMAN HAVAS PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. In her closing argument, the prosecutor improperly vouched for the credibility of two witnesses' out-of-court identification of the defendant.

The prosecutormade two improper arguments in the State's closing. First, the prosecutor argued that Hullum and Jennings's fear of retribution from Kimble was the reason that Hullum and Jennings did not identify Kimble in court. Second, the prosecutor introduced evidence that was not presented to the jury; that Hullum and Jennings were afraid to testify. These fundamental errors violated Kimble's due process rights. He must be awarded a new trial.

In its brief, the State argues that the prosecutor's arguments were not improper because attorneys are given "considerable latitude" in closing arguments to comment on the evidence introduced at trial and the prosecutor was simply making "reasonable inferences from the evidence in her closing argument. (Res. Br. 15-17.) These arguments fail.

A prosecutor's comment on a witness' credibility must be based on evidence in the record. *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)). Prosecutors are allowed to draw reasonable inferences about witnesses' credibility from the evidence presented to the jury. *State v. Burns*, 2011 WI 22, ¶ 49, 332 Wis.2d 730, 798 N.W.2d 166 (*citing United States v. Young*, 470 U.S. 1, 11 (1985)). However, prosecutors are not allowed to argue matters not in evidence or hint to the jury that the prosecutor has reasons unknown to the jury for believing that a government witness is telling the truth or not 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)); *State v. Albright,* 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980).

The prosecutor in this case did more than simply draw reasonable inferences from the evidence in the record. Instead, the prosecutor used artful statements such as "scared witnesses" and "its fear" to explain away why none of the State's witnesses made an in-court identification of Kimble.

The State further argues that the prosecutor's statements were supported by Hullum's testimony stating that he was "kind of nervous" and "[i]f anything ever was to happen, you all go home, and I will be in fear." (Res. Br. 18.).

No where in Hullum's testimony did he say that he feared Kimble. He said he was nervous. Yet, in the prosecutor's closing argument she said: "[a]nd Mr. Hullum tried to -- he did not want to identify this defendant in court because he was afraid. That was abundantly clear." (R. 71:33-4.)

Furthermore, even if we assume Hullum was scared of Kimble, the State still completely ignores Jennings. In her closing the prosecutor said: "[y]ou'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." *Id*. The prosecutor used plural "witnesses" in her closing to describe both Hullum and Jennings. Yet, there is nothing about Jennings ever being afraid to testify or that he had children to take care of.

When the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the

evidence. *State v. Smith,* 2003 WI App 234, ¶ 23, 268 Wis. 2d 138, 671 N.W.2d 854 (*citing State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979)). These are not "reasonable inferences" that the prosecutor is making from evidence in the record. Rather, the prosecutor tried to use factors outside of the evidence, namely that Kimble has threatened or otherwise coerced Hullum and Jennings into recanting their prior identifications. There is no evidence for this argument, and it was improper.

The State next argues that even if the prosecutor's argument was improper, any error was harmless. This argument also fails.

To determine whether an error is harmless, this court inquires whether the State can prove '"beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[].'" *State v. Jorgensen*, 2008 WI 60, ¶ 23, 310 Wis.2d 138, 754 N.W.2d 77 (*citing State v. Mayo*, 2007 WI 78, 301 Wis. 2d 642, P47, 734 N.W.2d 115)).

There are several factors this Court must consider when determining whether an error is harmless: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) the overall strength of the State's case. *Id*. If the State fails to meet its burden of proving that the errors were harmless, then the court may conclude that the errors constitute plain error. *Id*.

The prosecutor's improper argument was not harmless when looking at the relevant factors. First, the only way the State identified Kimble as the shooter was through Hullum and Jennings' out-of-court identification. Without that

identification, there was absolutely no way the State would have convicted Kimble. Thus, Jennings and Hullum's recantation of their initial identification was extremely important. Second, there was no corroborating or other evidence that pointed to Kimble as the shooter. Third, the recantation was extremely important to Kimble's defense. Kimble argued he was not shooter. Obviously, having a witness identify him as the shooter greatly harmed Kimble's defense. Conversely, having two witnesses recant their identification greatly helped Kimble's defense.

Finally, the State's case was extremely weak without Hullum and Jennings identifications. The shooting happened August 24, 2012, Hullum and Jennings were not interviewed until 2014 (R. 78:70 and R. 80:58.) and the case was not charged until April of 2017 (R. 1:1.) The amount of time between the shooting, the out-of-court identifications and the lack of corroborating evidence presented at trial indicate the State did not have a strong case without Jennings and Hullum's out-of-court identifications.

After analyzing the facts of the case with the factors this Court is required to consider, it is evident that the prosecutor's improper closing argument was not harmless.

II. The circuit court improperly denied Kimble's motion for a *Machner* hearing because Kimble alleged sufficient facts that if proven would entitle him to relief.

The State argues that Kimble was not entitled to a *Machner* hearing because Kimble did not allege sufficient facts to entitled him to a *Machner* hearing. (Res. Br. 21-23.) The State is in error.

In his postconviction motion, Kimble identified sufficient facts, that if proven, would entitle him to relief. (R.

103:1-13). As argued above, the prosecutor improperly vouched for the credibility of two witnesses' out-of-court identification of Kimble as a shooter. Further, Kimble's 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.

Kimble alleged sufficient facts in his postconviction motion that necessitated the circuit court hold a hearing pursuant to *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) to determine when Kimble's trial counsel was constitutionally ineffective.

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 December, 2021

Signed:

Electronically signed by Jeffrey J. Guerard

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19

I hereby certify that:

I hereby certify that this brief conforms to the rules contained in s. 809.19 (4) and (8) (a) (b), (bm), and (c) for a brief. The length of this brief is 1,383 words.

Dated this 28th day of December, 2021.

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