

FILED
01-12-2023
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2021AP1227-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARTRELL ROMEL KIMBLE,

Defendant-Appellant-Petitioner.

RESPONSE IN OPPOSITION TO
PETITION FOR REVIEW

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INTRODUCTION

The State of Wisconsin opposes Cartrell Romel Kimble's petition for review of the opinion and order of the Wisconsin Court of Appeals, *State v. Kimble*, No. 2021AP1227-CR (Wis. Ct. App. Nov. 29, 2022) (unpublished) (Pet-App. 48–65). The court of appeals affirmed Kimble's judgment of conviction after a jury found him guilty of first-degree recklessly endangering safety. Kimble argued on appeal that the prosecutor's unobjected-to closing comments constituted improper vouching. The court of appeals denied Kimble's claims of plain error and ineffective assistance of counsel because the prosecutor's comments were not improper. Kimble now asks this Court to review what he calls a significant question of constitutional law, but this case involves nothing more than the application of well-established law to the undisputed facts.

BACKGROUND

In August 2012, Kimble and a co-actor shot two men, one of whom was killed, in a shooting related to a drug deal. (Pet-App. 49.) Kimble was eventually tried in 2018 for first-degree intentional homicide and first-degree recklessly endangering safety, both as a party to the crime. (Pet-App. 49.) At trial, several witnesses testified about the shooting. (Pet-App. 50.) Two witnesses, "Cory" and "Derek,"¹ specifically identified Kimble as running from the scene right after the shots were fired.

Cory initially told police in a 2014 statement that he saw Kimble and his co-actor running away after the shooting. (Pet-App. 52.) He said he recognized one of the men as someone he knew named "Trell," then identified Kimble in a

¹ "Corey" and "Derek" are pseudonyms. The State uses the same pseudonyms used in the court of appeals' decision.

photo array. (Pet-App. 52.) At trial, however, he explained that he did not want to be there and was there only because of a subpoena. (Pet-App. 50.) He then claimed to have suddenly remembered while on the witness stand that rather than having actually seen Kimble, “somebody else told” him Kimble was involved. (Pet-App. 51.) Additionally, he claimed, a car accident in 2016 affected his memory of the incident. (Pet-App. 50.)

Derek similarly admitted that he did not want to be in court. (Pet-App. 52.) He said he was nervous for his safety. (Pet-App. 53.) He claimed that he did not remember identifying the two men running from the scene, nor whether they had guns. (Pet-App. 53.) However, a detective testified that he had interviewed Derek in 2014 and that Derek had been very cooperative. (Pet-App. 54.) Derek identified Kimble from a photo array in 2014 and stated he was “certain” of his identification. (Pet-App. 55.) However, he did not want to initial the identification because he felt he had “done too much even making an identification,” even though the deceased victim was his best friend. (Pet-App. 55.)

During closing argument, the prosecutor provided an “exhaustive” summary of the evidence, including the details of the shooting, the testimony of the other witnesses, and Kimble and his co-actor’s flight paths. (Pet-App. 55, 61.) The prosecutor also argued that neither Cory nor Derek wanted to be there because they were scared. (Pet-App. 56.) The prosecutor further argued that there was no reason to doubt what Cory and Derek had told the police in 2014. (Pet-App. 56.) The prosecutor then stated, “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.” (Pet-App. 56.) The prosecutor admitted there was no evidence Kimble

threatened anyone, but argued that the “culture of not snitching” may have come into play. (Pet-App. 57.)

The jury found Kimble guilty of first-degree recklessly endangering safety but not guilty of first-degree intentional homicide. (Pet-App. 57.)

Kimble appealed and alleged that the prosecutor’s comments constituted improper vouching for the reliability of Derek’s and Cory’s out-of-court identifications. (Pet-App. 57.) No objection was made at trial. (Pet-App. 57.) However, Kimble argued that the prosecutor encouraged the jury to rely on facts not in evidence, which he said was plain error. (Pet-App. 57.) He also argued that his counsel was ineffective for not objecting to the prosecutor’s closing argument. (Pet-App. 57.)

The court of appeals rejected Kimble’s arguments and affirmed the judgment of conviction. *State v. Kimble*, 2021AP1227-CR (Wis. Ct. App. Nov. 29, 2022), (Pet-App. 48–65). The court of appeals concluded that the prosecutor did not improperly vouch for Cory or Derek. (Pet-App. 61.) The prosecutor’s comments on Derek’s and Cory’s reluctance to testify was fairly based on their testimony. (Pet-App. 61.) Additionally, sufficient evidence was presented at trial (including Derek’s and Cory’s own testimony) to support the prosecutor’s argument that they feared retaliation. (Pet-App. 60–61.)

Because the prosecutor’s comments did not constitute improper vouching, there was no plain error, and counsel could not be deficient for not objecting. (Pet-App. 61, 63.) The court of appeals therefore affirmed the judgment of conviction. (Pet-App. 64.) Kimble now asks this Court to accept review.

KIMBLE'S PETITION DOES NOT SATISFY ANY OF THE CRITERIA FOR REVIEW

Kimble argues that this case satisfies the criteria for review because it presents a real and significant question of constitutional law. He asserts that it implicates his constitutional right to due process because it involves a claim of improper vouching, and he asserts that it implicates his constitutional right to effective assistance of counsel. (Pet. 2.) But this case does not involve a real and significant question of constitutional law; instead, it involves nothing more than the application of well-established law to the facts of the case.

With regard to the improper vouching claim, Kimble says this case “provides this Court with an opportunity to definitively state that a prosecutor cannot personally vouch for the credibility of a witness’s statement and cannot argue evidence not in the record.” (Pet. 20.) But both this Court and the court of appeals have already definitively stated these things. *See, e.g., State v. Davidson*, 2000 WI 91, ¶¶ 81–89, 236 Wis. 2d 537, 613 N.W.2d 606. No one involved in this case has disputed these propositions, nor does the court of appeals’ decision call them into question in any way. Rather, the court of appeals simply held that the prosecutor in this case did *not* personally vouch for the witnesses’ statements and did *not* rely on evidence not in the record. (Pet-App. 61.) No one ever thought the prosecutor was allowed to do these things, so there is nothing for this Court to clarify.

Further, this case would not even involve a direct review of this routine improper vouching claim. Kimble did not object to the prosecutor’s comments at trial, so it is reviewable only through plain error and/or ineffective assistance of counsel. (Pet-App. 49.) Because this case involves nothing more than the application of well-established law to the undisputed facts of the case, it does not present a real and significant question of constitutional law.

This case also does not present a real and significant question of constitutional law with regard to ineffective assistance of counsel. Kimble's ineffective assistance of counsel claim was based solely on his counsel's non-objection to the prosecutor's closing argument. (Pet-App. 61–64.) The circuit court denied a *Machner*² hearing because it concluded that an objection would have failed, as the prosecutor's comments were not objectionable. (Pet-App. 64.) Thus, this case involved nothing more than a routine application of the well-established standards for addressing ineffective assistance of counsel claims. *See, e.g., State v. Sholar*, 2018 WI 53, ¶ 50, 381 Wis. 2d 560, 912 N.W.2d 89. There is nothing about this particular ineffective assistance claim that warrants this Court's review.

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

CONCLUSION

This Court should deny Kimble's petition for review.

Dated this 12th day of January 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm), and 809.62(4) for a response produced with a proportional serif font. The length of this response is 1,294 words.

Dated this 12th day of January 2023.



NICHOLAS S. DESANTIS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic response is identical in content and format to the printed form of the response filed as of this date.

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

Dated this 12th day of January 2023.



NICHOLAS S. DESANTIS
Assistant Attorney General