

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2025AP953-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2022CF853

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRY T. CANADY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: TIMOTHY D. BOYLE, Judge. *Affirmed.*

Before Lazar, P.J., Gundrum, and Grogan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Terry T. Canady appeals from a judgment of conviction and an order of the trial court. For the following reasons, we affirm.

BACKGROUND

¶2 During a traffic stop, law enforcement officers seized cash from Canady, and after he was arrested and taken to jail, they seized marijuana from him. Based upon its previous and ongoing investigation of Canady, law enforcement obtained a search warrant for Canady's residence. While executing the search warrant, officers seized marijuana, cocaine, firearms, ammunition, and \$3,065 in cash. The State charged Canady with 17 counts of various drug, firearm, and bail-jumping crimes. A jury found Canady guilty on 15 counts.

¶3 Prior to trial, defense counsel asked to exclude evidence of law enforcement's initial investigation of Canady preceding the traffic stop, including several controlled buys with Canady, but with which Canady was not charged. The trial court agreed to exclude such evidence because the State never filed an other-acts motion. The prosecutor agreed and explained that the testifying officers were informed accordingly.

¶4 However, during the trial, the State played a body-camera video from the traffic stop and failed to stop it before footage of the officer discussing the controlled buys. Defense counsel objected and moved for a mistrial. The trial court denied the motion and stated:

There's been a motion for a mistrial based upon some information coming out through the video which failed to get stopped in a timely basis that referenced the term controlled buys. The [c]ourt listened to it on two different occasions and tried to get clarification as to what was said and how it was said in the totality. From the [c]ourt's perspective, the recording is not very clear. It's not clear where the language is being directed to and who it was being directed to. The conversation between the officer and Mr. Canady isn't really that clear, and I have to say that in order to determine whether or not there is a mistrial, the [c]ourt has to determine in light of the whole proceeding

today, and I'm saying the whole proceeding, the totality of the evidence that's presented, that the incident has to be so highly prejudicial that it would warrant a new trial. It does not rise to that level, and the reason I say that is also in light of an objection that was previously made by the State to evidence that was being elicited by the defense relative to issues that clearly from the [c]ourt's perspective would have been subject to an other-acts motion by the defense ...^[1] The [c]ourt instructed the jury at that time to disregard and struck that testimony, and the [c]ourt in this predicament will advise them to strike ... everything that's in that video that was just played and disregard it entirely in its totality.

¶15 In his postconviction motion, in relevant part,² Canady alleged two trial errors. First, he argued that the prosecutor repeatedly claimed that officers found \$2,520 on Canady during the traffic stop even though there was no testimony about the actual amount of money recovered. Canady asserted that the

¹ The trial court was referring to an occurrence during the testimony of Canady's father. Canady's father testified that Canady's uncle occasionally stayed at the residence and that his two sons would sometimes visit, and this exchange ensued:

[Defense counsel:] And you were aware that [Canady's cousins] engaged in drug activity?

[Canady's father:] Who?

[Defense counsel:] You were aware that [Canady's cousins] engaged in drug activity?

[Canady's father:] Yes, they --

At that point, the State objected to the testimony as "[o]ther acts." The trial court sustained the objection and held a sidebar. The court then instructed the jury that "although you may have heard" Canady's father attempting to answer the question, the evidence was stricken from the record and the jurors should not consider the evidence "in any way."

² Canady also argued that his convictions on two counts of possession of a firearm by a felon were multiplicitous. The trial court granted this motion and vacated Canady's conviction for a second count of possession of a firearm by a felon. The court also granted Canady's motion for resentencing as to two other counts due to its reliance on erroneous information. Neither issue is before this court.

prosecutor's comments about a fact not in evidence constituted plain error and that counsel was ineffective for failing to object to the prosecutor's comments about the amount. The trial court denied this claim after a *Machner*³ hearing. Second, Canady claimed he was entitled to a mistrial after the State inadvertently played a portion of a video clip that mentioned inadmissible other-acts evidence about Canady. The court also denied this claim.

DISCUSSION

¶6 On appeal, Canady asserts four claims: (1) that he is entitled to a new trial due to plain error for the prosecutor's repeated comments to the jury about "evidence not in trial" (that Canady possessed \$2,520 in cash at the traffic stop); (2) that he is entitled to a new trial because his trial counsel failed to object to the prosecutor's comments about evidence not admitted; (3) that the trial court erred by not ordering a mistrial after the State failed to stop playing a video that admitted excluded evidence about law enforcement's prior drug purchases from Canady; and (4) that he deserves a new trial in the interest of justice.

I. The prosecutor's comments about the amount of cash found on Canady during the traffic stop do not constitute plain error.

¶7 "This court independently reviews the [R]ecord to determine if a new trial is warranted due to plain error." *State v. Nelson*, 2021 WI App 2, ¶46, 395 Wis. 2d 585, 954 N.W.2d 11 (citation omitted). "The 'plain error' doctrine 'allows appellate courts to review errors that were otherwise forfeited by a party's failure to object.'" *Id.* (quoting *State v. Miller*, 2012 WI App 68, ¶18, 341 Wis. 2d 737, 816 N.W.2d 331).

³ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Plain error is “error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time.” The error, however, must be “obvious and substantial,” and courts should use the plain error doctrine sparingly. There is no bright-line rule for what constitutes plain error. Rather, the existence of plain error will turn on the facts of the particular case.

Miller, 341 Wis. 2d 737, ¶18 (citations omitted).

¶8 If an error occurred, the defendant bears the burden of showing that “the unobjected to error is fundamental, obvious, and substantial, [before] the burden then shifts to the State to show the error was harmless.” **State v. Jorgensen**, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77. Whether plain error exists depends on the facts of the case. **Miller**, 341 Wis. 2d 737, ¶18. When the plain error claim relates to a prosecutor’s statements, a reviewing court must determine “whether, in the context of the entire record of the trial, the statements ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” **Id.**, ¶19 (quoting **State v. Davidson**, 2000 WI 91, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606).

¶9 Canady argues that the prosecutor’s comments about facts not in evidence—that officers found \$2,520 on Canady’s person during the traffic stop—are plain error warranting a new trial. At trial, the State introduced evidence that officers seized cash from Canady during the traffic stop and from Canady’s bedroom when executing the search warrant. While officers testified that they recovered \$3,065 from Canady’s bedroom, no testimony was offered about the amount of money recovered during the traffic stop. The trial court found that while there was evidence that Canady “had a substantial amount of money on his person[,]” there was no evidence to support the prosecutor’s comments about the amount of money. Therefore, the prosecutor erred by arguing a fact outside the

Record. See **State v. Smith**, 2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854 (“Argument on matters not in evidence is improper.” (citation omitted)). Yet, we determine that the improper prosecutorial comments did not so infect the trial with unfairness as to make the resulting conviction a denial of Canady’s due process rights.

¶10 We conclude that in the context of the entire Record, the prosecutor’s comments that officers found \$2,520 on Canady during the traffic stop do not constitute any obvious or substantial error to render it plain error. While the prosecutor mentioned this amount during his opening statement and closing argument, neither the statement nor argument constitute evidence. The trial court cautioned the jury to base its decision on the evidence, and it defined the evidence to include only the witnesses’ sworn testimony, received exhibits, and stipulated facts. The court explicitly told the jury, “Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion.” The jury is presumed to follow the court’s instructions, including instructions “that it should base its decision on the ‘evidence’ and that the ‘arguments, conclusions and opinions’ of counsel are ‘not evidence.’” **Nelson**, 395 Wis. 2d 585, ¶59. Canady does not rebut this presumption.

¶11 In addition, officer testimony described the cash found on Canady during the traffic stop as “folded in half [with] some type of rubber band folding the money in half” and that the folded cash was separate from his wallet. The jury would have seen this when they viewed the body-camera video from the traffic stop. Officers described the \$3,065 found in Canady’s bedroom “bundled in what appeared to be what they would call stacks or thousand-dollar quantities ... [w]ith a rubber band.” When asked if there was anything that stood out about how the \$3,065 found in Canady’s bedroom was bundled, an officer testified that “[t]his

[wa]s consistent in the packaging of the money that [the officer] found on Mr. Canady during the traffic stop.” Based on the similarity as to how the money found on Canady at the traffic stop and in his bedroom were bundled, the jury could reasonably conclude that the officers found a significant quantity of cash on Canady’s person during the traffic stop and infer that it was not simply “pocket cash” as Canady repeatedly describes it.

¶12 Thus, we conclude that within the context of the entire Record, Canady fails to prove that the prosecutor’s references to the amount of \$2,520 during opening statement and closing argument constitute plain error, considering that the trial court instructed the jury that the prosecutor’s remarks do not constitute evidence and that the amount of cash found was substantial.

II. Canady did not prove that his trial counsel was ineffective for failing to object to the prosecutor’s comments about the amount of cash found on Canady’s person.

¶13 “An ineffective assistance of counsel claim presents a mixed question of fact and law.” *State v. Pico*, 2018 WI 66, ¶13, 382 Wis. 2d 273, 914 N.W.2d 95. We uphold “[t]he [trial] court’s factual findings, including [findings concerning] the circumstances of the case and trial counsel’s conduct and strategy, ... unless they are clearly erroneous.” *State v. Gutierrez*, 2020 WI 52, ¶19, 391 Wis. 2d 799, 943 N.W.2d 870. Whether counsel performed ineffectively presents a legal question that we review independently. *Id.*

¶14 A defendant alleging ineffective assistance of trial counsel must prove that his counsel’s performance was deficient and that his counsel’s performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶15 To prove deficient performance, “the defendant must show that [his] counsel’s representation fell below an objective standard of reasonableness” considering all the circumstances. *Id.* at 688. Accordingly, the defendant must demonstrate that specific acts or omissions of counsel fell “outside the wide range of professionally competent assistance.” *Id.* at 690. “We apply a ‘strong presumption’ that counsel act[ed] ‘reasonably within professional norms.’ We are ‘highly deferential’ to counsel’s decisions, provided they are objectively reasonable and strategic.” *State v. Mull*, 2023 WI 26, ¶35, 406 Wis. 2d 491, 987 N.W.2d 707 (citations omitted). Moreover, even when counsel’s performance is not exemplary, “a [reviewing] court still may not grant relief” unless the record reveals “that counsel took an approach that no competent lawyer would have chosen.” *Dunn v. Reeves*, 594 U.S. 731, 739 (2021).

¶16 To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced him. *Strickland*, 466 U.S. at 693. He must demonstrate “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. Although that is not as difficult a standard to meet as “a more-probable-than-not standard[,]” the difference matters “only in the rarest case.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 693, 697).

¶17 Canady argues that his trial counsel performed deficiently by failing to object to the prosecutor’s improper comments that officers found \$2,520 cash on Canady’s person during the traffic stop. At the *Machner* hearing, Canady’s trial counsel agreed that he should have objected to the prosecutor’s closing argument when he mentioned that Canady had \$2,520 on his person during the traffic stop. But Canady’s trial counsel’s failure to object to a fact not in evidence

does not necessarily render his performance deficient. “Counsel[’s performance] need not be perfect, indeed not even very good, to be constitutionally adequate.” *State v. Thiel*, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

¶18 Even if we assumed deficient performance based on Canady’s trial counsel’s failure to object to these comments by the prosecutor, Canady can prevail on his ineffective assistance of counsel claim only if he proves prejudice, which we conclude he cannot. He argues that the State relied on the \$2,520 amount “to prove the requisite intent—that Canady intended to deal drugs.” Yet, as stated by the trial court, “there was testimony that [Canady] had a substantial amount of money on his person and ... that it was wrapped and held, meaning stored in the same manner as the money that was in the house.” Based on the recovery of the \$3,065 in cash found in Canady’s bedroom that was bundled like the cash found on his person, the jury could reasonably infer that the officers found a substantial amount of money on his person during the traffic stop. Thus, even if the prosecutor had not referenced the amount of \$2,520, the jury could reasonably infer from the evidence that the money on Canady’s person and the \$3,065 found in his bedroom were proceeds from drug sales.

¶19 We therefore conclude that Canady did not prove that his counsel was ineffective for failing to object to the prosecutor’s statements that officers found \$2,520 on his person during the traffic stop.

III. The trial court did not err when it denied Canady’s motion for a mistrial when the jury accidentally heard a reference to prior controlled buys from him.

¶20 “A motion for mistrial is committed to the sound discretion of the [trial] court.” *State v. Ford*, 2007 WI 138, ¶28, 306 Wis. 2d 1, 742 N.W.2d 61.

Therefore, “[w]e review a [trial] court’s decision to grant or deny a motion for mistrial for an erroneous exercise of discretion.” *State v. Debrow*, 2023 WI 54, ¶15, 408 Wis. 2d 178, 992 N.W.2d 114. Our deference is due in part because “the [trial] court is in a particularly good ‘on-the-spot’ position to evaluate factors such as a statement’s ‘likely impact or effect upon the jury.’” *State v. Bunch*, 191 Wis. 2d 501, 510-11, 529 N.W.2d 923 (Ct. App. 1995) (formatting altered; citation omitted).

¶21 In deciding whether to grant a mistrial, “the [trial] court must decide, in light of the entire facts and circumstances, whether the defendant can receive a fair trial [by examining] whether the claimed error is sufficiently prejudicial to warrant a mistrial.” *Ford*, 306 Wis. 2d 1, ¶29. “[N]ot all errors warrant a mistrial and ‘the law prefers less drastic alternatives, if available and practical.’” *State v. Givens*, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998) (quoting *Bunch*, 191 Wis. 2d at 512). “Where the trial court gives the jury a curative instruction, this court may conclude that such instruction erased any possible prejudice, unless the record supports the conclusion that the jury disregarded the trial court’s admonition.” *State v. Sigarroa*, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894 (2003).

¶22 Canady’s trial counsel moved for a mistrial when the prosecutor did not stop the body-camera video footage from playing before the officer mentioned controlled buys, arguing that it was prejudicial against him by suggesting that Canady deals drugs. After adjourning the jury for a short recess, the trial court listened to the recording several times and found that the recording was not clear. Because the recording was not clear and required the court to replay it several times to identify the issue, the court could reasonably determine that the jury may not have even heard it or understood it. In addition, the court said, “[E]ven if the

jury heard this information, it's not a huge step beyond that which they have already heard [about law enforcement's drug investigations] and it's not beyond common sense if they think he may have been under investigation for drugs." The court could reasonably conclude, considering the totality of the evidence, that the clip and its unclear reference, even if audible, was not "so highly prejudicial that it ... warrant[ed] a new trial." Rather, the court decided to instruct the jury to disregard the entire video clip. Also, the court cautioned the jury before they deliberated, "During the trial, the [c]ourt has ordered certain testimony to be stricken. Disregard all stricken testimony." Canady has made no showing that the jury disregarded that curative instruction, and we "conclude that such instruction erased any possible prejudice[.]" See *id.*

¶23 Thus, we conclude that the trial court did not erroneously exercise its discretion in determining that a mistrial was not warranted under these facts.

IV. Canady's case is not an exceptional case that warrants this court's exercise of discretionary reversal authority.

¶24 Canady argues for a new trial in the interest of justice because, he says, "the real controversy was not fully tried" because the jury heard improper evidence about "\$2,520 pocket cash and the 'controlled buys[.]'"

¶25 WISCONSIN STAT. § 752.35 (2023-24)⁴ confers discretionary authority on this court to grant a new trial in the interest of justice when the real controversy was not fully tried or justice miscarried. *Vollmer v. Luety*, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990). That "the real controversy has not been fully tried" presents itself in two situations:

⁴ All references to the Wisconsin Statutes are to the 2023-24 version.

(1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue it may be fairly said that the real controversy was not fully tried.

State v. Trammell, 2019 WI 59, ¶63, 387 Wis. 2d 156, 928 N.W.2d 564 (citation omitted). “[R]eversals under ... § 752.35 are rare and reserved for exceptional cases.” *State v. Kucharski*, 2015 WI 64, ¶41, 363 Wis. 2d 658, 866 N.W.2d 697. “[O]ther claims of error must be addressed before moving to a consideration of whether a case is so exceptional it warrants reversal in the interest of justice.” *Id.*

¶26 Canady’s interest-of-justice claim is grounded in his other claims that he raises on appeal, i.e., the claims of plain error and ineffective assistance of counsel, as it relates to the prosecutor’s mentions of the amount of \$2,520 in cash and the mistrial claim as it relates to the playing of the body-camera video referencing controlled buys. Canady cannot use those arguments that failed on other grounds to support an interest-of-justice claim. An interest-of-justice claim must do more than “merely rehash[] contentions that we have already rejected.” *State v. Ferguson*, 2014 WI App 48, ¶33, 354 Wis. 2d 253, 847 N.W.2d 900. We therefore conclude that Canady’s claim that he is entitled to a new trial in the interest of justice is unsupported.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

