COURT OF APPEALS
DECISION
DATED AND FILED

April 5, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1623-CR **Cir. Ct. No. 2010CF5111**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMOND L. NIEVES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ and JEFFREY A. WAGNER, Judges. *Reversed and cause remanded for further proceedings*.

Before Curley, P.J., Kessler and Brash, JJ.

¶1 CURLEY, P.J. Raymond L. Nieves appeals a judgment of conviction for first-degree intentional homicide, as a party to a crime and with the use of a dangerous weapon, contrary to WIS. STAT. §§ 940.01(1)(a), 939.50(3)(a),

939.05, and 939.63(1)(b) (2009-10),[1] and attempted first-degree intentional homicide, as a party to a crime and with the use of a dangerous weapon, contrary to WIS. STAT. §§ 940.01(1)(a), 939.50(3)(a), 939.32, 939.05, and 939.63(1)(b) (2009-10). Nieves also appeals the order denying his postconviction motion.[2] On appeal, Nieves argues that: (1) the court erred when it denied, without a hearing, his postconviction motion asserting that his trial counsel was ineffective for failing to sufficiently investigate and present an alibi defense; (2) the trial court erred when it denied his pretrial severance motion; and (3) the trial court improperly admitted unreliable and prejudicial hearsay testimony at trial. Because we agree that the trial court erred in denying Nieves's motion to sever, and admitted unreliable and prejudicial hearsay testimony, we reverse and remand for a new trial.

BACKGROUND

¶2 This appeal arises from Nieves's convictions related to the April 11, 2009 shootings of victims Spencer Buckle and David.[3] Buckle was killed and David was injured but survived.

¶3 A criminal complaint was filed on October 9, 2010, charging Nieves and his co-defendant, Johnny Maldonado, with first-degree intentional homicide, as a party to a crime and with the use of a dangerous weapon, and attempted first-

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The Honorable Richard J. Sankovitz presided over the trial and entered the judgment of conviction. The Honorable Jeffrey A. Wagner denied the postconviction motion.

[3] The surviving victim has been assigned a pseudonym in accordance with WIS. STAT. RULE § 809.19(1)(g).

degree intentional homicide, as a party to a crime and with the use of a dangerous weapon.[4] The complaint alleged that on or about Saturday, April 11, 2009, Nieves and Maldonado were involved in a shooting in an alley near West Windlake Avenue in the City of Milwaukee that resulted in the death of Spencer Buckle and nonfatal injuries to David. Per the complaint, David told police officers that prior to the shootings, he and Buckle had been with Nieves and Maldonado, who had suggested they drive to Milwaukee to hang out with other Maniac Latin Disciple gang members. According to David, when they arrived in Milwaukee, he, Buckle, Nieves, and Maldonado exited the vehicle and began walking in an alley. David described to officers that while they were walking in the alley, he heard a gunshot and saw Buckle fall to the ground and that he then dropped to the ground and played dead when he heard more gunshots. David said that after falling to the ground, he felt a pain in his left hand and he realized he had been shot, and he also felt air pass through his hoodie as bullets went past his head. David told the officers that Nieves had shot Buckle and that he had been shot at by Maldonado.

¶4 Nieves and Maldonado were tried together as codefendants before a jury in March 2012. David testified at trial. According to his testimony, he, Buckle, Nieves, and Maldonado were affiliated with the Maniac Latin Disciple gang, and he also provided extensive testimony regarding the shootings that resulted in Buckle's death and his injuries. The trial court also allowed David to testify, over Nieves's objection, about a conversation he had prior to the shootings

[4] The file stamp and the Wisconsin Court System Circuit Court Access website indicate that the complaint was filed on October 9, 2010; however, the complaint is dated October 8, 2010, which is also the date that an arrest warrant was issued for Nieves.

with an individual identified only as "Boogie Man." According to David, "Boogie Man" had told him that Nieves and Maldonado were planning to kill him.

¶5 Ramon Trinidad, a "jailhouse snitch," also testified at trial. Trinidad spent time in jail with Nieves and Maldonado, and he testified as to conversations he had with both Nieves and Maldonado in which they each commented on their respective involvement in the shootings. The testimony at issue involves Trinidad's testimony as to conversations he had with Nieves's codefendant, Maldonado, concerning the alleged homicide of Buckle and the attempted homicide of David. Generally, Trinidad's testimony about what Maldonado told him used plural pronouns such as "they," suggesting that Maldonado had told him that there was at least one other individual involved in the shootings.

¶6 The jury returned guilty verdicts on both counts. Nieves thereafter filed a postconviction motion on December 12, 2013, in which he argued that: (1) the trial court had erred in failing to grant his motion to sever his trial from Maldonado's as required by ***Bruton***;[5] (2) the trial court erred in allowing David to testify about what "Boogie Man" told him because it was inadmissible hearsay; and (3) he had ineffective assistance of trial counsel. An order denying Nieves's postconviction motion was entered on June 24, 2014. Nieves appeals the judgment of conviction and the order denying his post conviction motion.

¶7 Additional facts are developed below.

[5] ***Bruton v. United States***, 391 U.S. 123 (1968).

ANALYSIS

¶8 Nieves appeals the judgment of conviction entered against him on the intentional homicide and attempted intentional homicide charges, as well as the order denying his postconviction motion. On appeal, Nieves raises the same arguments raised in his postconviction motion: (1) his trial counsel was ineffective and that he was entitled to a hearing on his ineffective assistance of counsel claim; (2) he is entitled to a new trial because the trial court erred in denying his motion to sever his trial from his codefendant's trial; and (3) the trial court erroneously admitted hearsay evidence at trial. Because we agree that the trial court should have severed the cases, we begin by addressing that issue. *See* ***State v. Rushing***, 197 Wis. 2d 631, 641, 541 N.W.2d 155 (Ct. App. 1995) (appellate court will decide case on narrowest possible ground).

I. The trial court erred in denying Nieves's motion to sever.

¶9 WISCONSIN STAT. § 971.12 governs joinder of defendants for trial. Defendants may be charged in the same complaint, information, or indictment based on participation in the same criminal act, *see* § 971.12(2), and "[i]f it appears that a defendant … is prejudiced by … such joinder for trial together, the court may … grant a severance of defendants or provide whatever other relief justice requires." Sec. 971.12(3). Importantly, "[t]he district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant." ***Id.***

¶10 The decision to sever codefendants in a joint trial is normally within the trial court's discretion. ***Cranmore v. State***, 85 Wis. 2d 722, 755, 271 N.W.2d 402 (Ct. App. 1978). We generally review the trial court's denial of a motion to

sever under the erroneous exercise of discretion standard. *See* ***id.*** The exercise of discretion cannot be based on an erroneous view of the law, *see* ***State v. Martinez***, 150 Wis. 2d 62, 71, 440 N.W.2d 783 (1989), and what constitutes an erroneous exercise of discretion depends upon the facts of each case, *see* ***State v. Brown***, 114 Wis. 2d 554, 559, 338 N.W.2d 857 (Ct. App. 1983). Moreover, whether the trial court's admission of evidence violates a defendant's confrontation rights is a question of law. *See* ***State v. Manuel***, 2005 WI 75, ¶25, 281 Wis. 2d 554, 697 N.W.2d 811. Nieves further argues that the trial court failed to recognize that aspects of Trinidad's testimony violated his confrontation rights, which is a question of law that we review *de novo*. *See* ***id.***

¶11 The Confrontation Clause of the Sixth Amendment grants criminal defendants the right to confront witnesses brought against them and is applicable to the states via the Fourteenth Amendment. ***Pointer v. Texas***, 380 U.S. 400, 403 (1965); *see also* ***Manuel***, 281 Wis. 2d 554, ¶36. Article I, § 7 of the Wisconsin Constitution also guarantees this right. *See* ***Manuel***, 281 Wis. 2d 554, ¶36. This guarantee includes the right to cross-examine the prosecution's witnesses. *See* WIS. CONST. art. I, § 7; *see also* ***Pointer***, 380 U.S. at 404. As such, in the context of a joint trial, the confession of one defendant is inadmissible against the other unless the confessing defendant testifies and is subject to cross-examination. *See* ***Bruton v. United States***, 391 U.S. 123, 126, 137 (1968). WISCONSIN STAT. § 971.12(3) provides a mechanism for complying with the ***Bruton*** requirement in the Wisconsin Statutes. *See* ***State v. King***, 205 Wis. 2d 81, 97, 555 N.W.2d 189 (Ct. App. 1996).

¶12 Two United States Supreme Court cases are particularly relevant to our analysis: ***Bruton***, 391 U.S. 123, and ***Richardson v. Marsh***, 481 U.S. 200 (1987).[6] In ***Bruton***, the Supreme Court held that a defendant's Confrontation Clause rights are violated when the confession of a codefendant that explicitly implicates the other defendant in the commission of a crime is admitted at their joint trial and the confessing codefendant does not testify. ***Id.***, 391 U.S. at 135-36. The ***Bruton*** court also concluded that a limiting instruction under such circumstances is insufficient to cure the confrontation violation. *See* ***id.*** at 137.

¶13 There are limited exceptions to ***Bruton***. *See* ***Richardson***, 481 U.S. at 211. In ***Richardson***, the prosecution introduced at trial a nontestifying codefendant's written confession that had been redacted to eliminate all references to the petitioner. ***Id.***, 481 U.S. at 203-05. The Supreme Court affirmed the confession's admission, explaining that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession *with a proper limiting instruction when, as here,* the confession is redacted to eliminate not only the defendant's name, *but any reference to his or her existence*." ***Id.*** at 211 (emphasis added).

¶14 Prior to trial in this case, Nieves filed a motion to sever on the grounds that a State witness, Ramon Trinidad, intended to testify about a

[6] This decision does not address the potential impact of another United States Supreme Court case, ***Crawford v. Washington***, 541 U.S. 36 (2004), which was not discussed in the appellate briefs and does not appear to have been raised before the trial court. After we issued our decision in this case, the State moved for reconsideration. The State explicitly acknowledged that it had forfeited its argument concerning ***Crawford*** by failing to raise it on appeal, but the State nonetheless asked this court to exercise its discretion to consider the issue. We denied the motion for reconsideration. In doing so, we recognized that "[p]resentation of new facts or alternate legal arguments is not appropriate on reconsideration." *See* WIS. STAT. § 809.24, Judicial Council Note, 2001.

confession Maldonado allegedly made to him concerning his (Maldonado's) involvement in the shootings of Buckle and David. Based on written statements of what Trinidad disclosed to the State, portions of Maldonado's alleged confession mentioned, or at least implicitly referenced, Nieves. The trial court held a motion hearing, and the State argued that severance was unnecessary because it could couch its questions of Trinidad concerning his conversation with Maldonado in a manner that would preclude any mention of Nieves. Nieves's trial counsel disagreed, pointing to multiple instances in Trinidad's statements where Maldonado referred to what "they" had been doing leading up to the shootings, including Maldonado's statement "that they were either at Nieves's mother's house or Nieves's baby mama's house in Kenosha."

¶15 The trial court disagreed that Maldonado's alleged statement about having been at Nieves's mother's or "baby mama's" house implicated Nieves contrary to ***Bruton***, even if that statement did implicate Nieves. The trial court went on to state that if it followed Nieves's argument, it would

> set a precedent that any time two co-defendants are step-by-step involved in the same crime, they could never be tried together because the coincidence of their steps, the comparison of their two steps tends to be reinforced if each were involved, because they took the same steps at the same time.
>
> But that's not the law. The law about severing cases has to do with when one codefendant makes a statement against the other codefendant. And that's not the case here.
>
> ….
>
> All Maldonado is saying is where he was. That's not saying Mr. Nieves was there. That's not saying Mr. Nieves was involved in the crime.

¶16 Trial counsel then pointed out instances in Trinidad's statement where Maldonado allegedly referred to "they" or to Nieves, and the trial court indicated that the State could simply ask Trinidad "what Mr. Maldonado said about what Mr. Maldonado did." After trial counsel attempted to point to more specific comments that Maldonado allegedly made about Nieves's involvement, the trial court cut counsel off and stated, without further argument, that it was denying Nieves's motion to sever and that Nieves could later "raise additional reasons why [the court] should sever [the trials] that aren't resolved by the proposal … to confine … questions to the informant to conversations that involve the defendant against whom those statements would be admissible as the statements of party opponent."

¶17 Nieves renewed his request to sever his trial from Maldonado's at the conclusion of *voir dire*. The trial court denied that request, stating that it was "satisfied with the State's offer to make sure they are not going to use the testimony against Mr. Maldonado against [Nieves] without giving [Nieves] an adequate opportunity to cross examine."

¶18 Trinidad testified at the joint trial.[7] During his testimony, Trinidad repeatedly used the word "they" while recounting his conversations with

[7] The State argues that Nieves forfeited his severance argument based upon Maldonado's actual trial testimony because his attorney failed to object to Maldonado's testimony during the course of the trial. We disagree, as Nieves's objections to Trinidad's testimony prior to trial are the same as they would have been after the introduction of Trinidad's trial testimony (*e.g.* that any reference to Nieves, such as use of the word "they" in referencing Maldonado's comments to Trinidad, was grounds for severance). The State admits this in its response brief, stating that "Nieves's objections to Trinidad pretrial and on appeal are the same – that his use of 'they' in recounting his conversations with Maldonado meant that Maldonado was implicating Nieves in the shooting …."

Moreover, although Nieves's trial counsel did not object to Trinidad's testimony during the trial, after the jury returned its verdict, but before the court entered the judgment of (continued)

Maldonado. As relevant to this appeal, the following exchange ensued between Trinidad and the State:

> [State]: And did Mr. Maldonado indicate whether or not the targets of this plan to kill the two shorties,[8] whether that was related to anything that happened in Illinois?
>
> [Trinidad]: Because he thought they were not going to hold any water.
>
> [State]: What does that mean?
>
> [Trinidad]: Like, they were not going to keep their mouths shut.
>
> [State]: So what was the plan that Mr. Maldonado was involved in [in] terms of these two shorties who he was afraid wouldn't hold water, wouldn't keep their mouths shut?
>
> [Trinidad]: Bring them to Wisconsin and kill them.
>
> [State]: And did he, in fact, talk about how that happened and what Mr. Maldonado's involvement was with either of these two shorties?
>
> [Trinidad]: *They* told *them* to come party or celebrate to Wisconsin. And *they* came to Kenosha, and then from Kenosha *they* came to Milwaukee.
>
> [State]: By "they," you mean Mr. Maldonado and the shorties?
>
> [Trinidad]: Yes.

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conviction, Nieves's trial counsel stated that she was reserving Nieves's right to file a postjudgment motion for a new trial. In any event, the problematic aspects of Trinidad's trial testimony as to Maldonado's alleged confession—the references to "they" that can readily be inferred to mean Maldonado and Nieves—mirror trial counsel's concerns in raising the pretrial motion to sever Nieves's trial. Because Nieves's pretrial concerns came to fruition during Trinidad's testimony, we consider Trinidad's trial testimony in our analysis.

[8] Trinidad explained that "shorties" referred to "[f]riends of [Maldonado's], shorties from his gang" and that a "shorty" is a young guy—a newcomer that is "not a sworn-in [gang] member pretty much."

> [State]: And after leaving Kenosha, they were going to go to Milwaukee, and what happened once they got to Milwaukee according to Mr. Maldonado?
>
> [Trinidad]: *They* brought them to a dark alley, if I'm not mistaken, and laid *them* on the ground. And then when he shot, he shot through the hoody. He thought he killed the victim, but it turned out to be that he played dead on him.
>
> ….
>
> [State]: Did he talk about, when he spoke of the period of time they were in Kenosha, where they were at where he was at with the shorties in Kenosha?
>
> [Trinidad]: I believe Mr. Nieves's mom's house or his baby mama house."

(Emphasis added.) Additionally, the following exchange occurred between Maldonado's attorney and Trinidad on cross-examination:

> [Attorney Hartley]: Okay. You are testifying today that Mr. Maldonado told you that once *they brought these other two guys* from Waukegan, *that they laid them* on the ground in the alley and then shot them; is that your testimony?
>
> [Trinidad]: Yes.

(Emphasis added.) During the course of the trial, the trial court did not give any limiting instruction to the jury explaining that Trinidad's testimony about Maldonado's statements could be used only against Maldonado.[9] *Cf.* ***Richardson***, 481 U.S. at 211 (no Confrontation Clause violation where nontestifying

[9] The only instruction that the trial court gave to the jury regarding Ramon Trinidad related to the fact that Trinidad agreed to testify at Nieves's and Maldonado's trial as part of an agreement with the State regarding Trinidad's sentencing in an unrelated matter and that the jury "should consider whether the agreement between the State and [Trinidad] affected the testimony and give the testimony the weight [the jury] believe[s] it is entitled to receive." Additionally, although Nieves points out in his reply brief that the trial court failed to provide a limiting instruction as to Trinidad's testimony concerning Maldonado's apparent confession, neither party addressed the impact of that failure on appeal.

codefendant's confession is redacted to omit reference to other defendant's involvement or existence *and* a proper limiting instruction is provided).

¶19 On appeal, Nieves argues that severance was required in this case under ***Bruton*** because the State planned to introduce—and did introduce—testimony that Nieves's codefendant, Maldonado, confessed to the shootings and that Maldonado's confession implicated Nieves by reference. Specifically, Nieves points to Trinidad's frequent use of plural pronouns in recounting what Maldonado told him. The State relies on ***Richardson***, arguing that it could question Trinidad in a way that would omit any reference to Nieves. *See* ***id.***, 481 U.S. at 211 (holding that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when … the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (footnote omitted)). The State also argues that Trinidad's multiple uses of "they" clearly referred only to Maldonado and the two victims and in no way implicated Nieves. We disagree.

¶20 As explained above, although the decision to sever codefendants in a joint trial is normally within the trial court's discretion, ***Cranmore***, 85 Wis. 2d at 755, that exercise of discretion cannot be based on an erroneous view of the law, *see* ***Martinez***, 150 Wis. 2d at 71. Having reviewed the record, we conclude that Nieves's Confrontation Clause rights were violated. We reach this conclusion based on both the trial court's pretrial denial of Nieves's motion to sever and Trinidad's trial testimony. We begin by discussing the trial court's pretrial ruling.

¶21 WISCONSIN STAT. § 971.12(3) requires a trial court to sever the trial of codefendants when the State intends to introduce the statement of one codefendant that implicates another defendant. ***Id.*** Here, the State intended to call

Trinidad as a witness to testify about the confession Maldonado allegedly made to him. At the pretrial hearing, Nieves's counsel pointed to multiple instances in a written statement of Trinidad's recitation of his conversations with Maldonado in which Maldonado used plural pronouns when discussing his involvement in the shootings of Buckle and David. Those statements included generally indirect references to Nieves's involvement in the shootings, primarily through Maldonado's use of the word "they," meaning Maldonado and at least one other individual. Maldonado also referenced Nieves by name when he told Trinidad that he had been at a home associated with Nieves.

¶22 The trial court apparently recognized that Maldonado's statement that he had been at a home associated with Nieves implicated Nieves in some way but nevertheless determined that Trinidad could testify as to Maldonado's statement about being at a home associated with Nieves during the relevant time period.[10] In reaching its decision to deny Nieves's motion, the trial court also relied on the State's assurance that it could present its questions to Trinidad about Maldonado's confession in a way that would refer only to Maldonado. Taken as a whole, this was in error, as the trial court failed to appropriately consider the ***Bruton*** problem. This is so because if Trinidad, regardless of how the State phrased its questions, testified that Maldonado had implicated Nieves in the crime and that Maldonado had also told him that he had been at a house associated with Nieves, Nieves would be unable to cross examine Maldonado on these statements that implicated him.

[10] In regard to Maldonado's apparent statement that he had been at Nieves's mother's house or Nieves's "baby mama['s]" house, the court said it was "sure it implicates Mr. Nieves because of the connection between Mr. Nieves and his family members, but that's not a ***Bruton*** kind of problem …."

¶23 We recognize that at the pretrial hearing, the trial court was faced with a factual scenario that falls somewhere between ***Bruton*** and ***Richardson***. Unlike in ***Bruton***, where a witness testified that one of the codefendants confessed that he and his codefendant committed the crime, *see* ***id.***, 391 U.S. at 124, the trial court here was faced with a scenario in which there was a possibility that Trinidad's testimony would reveal that Maldonado confessed that "they" had been involved in the shootings of Buckle and David. However, this case is also distinguishable from ***Richardson***, where the codefendant's confession was redacted to omit any mention of his codefendant or the codefendant's existence prior to trial, *see* ***Richardson***, 481 U.S. at 203-04, because the trial court here simply relied upon the State's assurance that it could question Trinidad about what Maldonado said only about Maldonado's involvement.

¶24 The problem with the trial court's approach is that even where the State takes precautions in posing its questions so that the *questions* only implicate the confessing codefendant, the witness's actual trial testimony may nevertheless violate ***Bruton*** because the State cannot control the witness's *responses*. Thus, in simply relying on the State's assurance that it could phrase its questions in a manner that would only reference Maldonado, the trial court did not account for the ***Bruton*** problem that would arise if Trinidad nevertheless responded in a manner that referenced Nieves's involvement, or at the very least, Nieves's existence, and Maldonado chose not to testify. This simply was not a situation like ***Richardson*** where a confession could be appropriately redacted prior to trial.

¶25 The trial court's error is particularly obvious in light of its indication that it did not see an issue with allowing Trinidad to testify about Maldonado's comments about Maldonado having been at a house associated with Nieves during the relevant time period. In light of that decision, it should have been clear to the

trial court that any inadvertent reference to Nieves's involvement or his existence during Trinidad's testimony concerning Maldonado's confession would give rise to a ***Bruton*** problem, and as Trinidad's testimony reveals, that is exactly what happened. Accordingly, we conclude that the trial court erred in failing to consider the ***Bruton*** implications that would arise if Trinidad testified that Maldonado told him that he had been at a location associated with Nieves and also referenced Nieves's involvement in the shootings in any way—explicitly or implicitly—in recounting Maldonado's confession.

¶26 We next consider Trinidad's trial testimony, as it highlights the trial court's error in failing to sever Nieves's case prior to trial. Unlike in ***Richardson***, where not only the defendant's name, but also her existence, was omitted from the nontestifying codefendant's confession, *see* ***id.***, 481 U.S. at 211, Trinidad repeatedly referred to "they" throughout his testimony regarding Maldonado's confession. While the State attempted to clarify in one instance that "they" referred specifically to Maldonado and "the shorties," that inference does not encompass the entirety of Trinidad's testimony concerning Maldonado's apparent confession.[11] For example, the testimony excerpted above indicates that "*[t]hey*

[11] The State sought clarification from Trinidad that "they" referred to the "shorties" in the following exchange:

> [Trinidad]: They told them to come party or celebrate to Wisconsin. And they came to Kenosha, and then from Kenosha they came to Milwaukee.
>
> [State]: By "they," you mean Mr. Maldonado and the shorties?
>
> [Trinidad]: Yes.

We do not believe this clarification is as clear as the State intended or suggests on appeal, particularly for ***Bruton*** and ***Richardson v. Marsh***, 481 U.S. 200 (1987), purposes, because there appears to be a discrepancy between "they" and "them" as used in the two sentences. The lack of (continued)

told *them* to come party to celebrate in Wisconsin" and that "*[t]hey* brought *them* to a dark alley … and laid *them* on the ground." (Emphasis added.) The State cannot reasonably argue that the use of "they" and "them" in these instances refers only to Maldonado and the two victims. To the contrary, the more reasonable inference is that "they" refers to Maldonado and Nieves—or at least Maldonado and a second actor—while "them" refers to the two victims, Buckle and David. That inference is bolstered by statements elsewhere in Trinidad's testimony, particularly his testimony that Maldonado told him that he was at "Mr. Nieves' mom's house or his baby mama house" while in Kenosha during the relevant time period.

¶27 Additionally, when Maldonado's attorney cross-examined Trinidad, he asked Trinidad if Trinidad was "testifying … that Mr. Maldonado told [him] that once *they brought these other two guys* from Waukegan, *that they laid them* on the ground in the alley and then shot them," (emphasis added), Trinidad responded "Yes." While Trinidad himself did not use the words "they" in this exchange, he nevertheless confirmed that it was his testimony that Maldonado had told him that "they" brought "these other two guys" to an alley and "they laid them" on the ground and shot them. As used in this exchange, "these two other guys" and "them" unquestionably refer to the victims, and the word "they" can refer only to Maldonado and a second perpetrator.

¶28 An example provided in ***Gray v. Maryland***, 523 U.S. 185, 193 (1998), a case in which a nontestifying codefendant's confession implicating the

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clarity on who "they" refers to becomes even more apparent when Trinidad's testimony is considered as a whole.

other defendant by name was redacted by use of blank spaces and use of the word "deleted," illustrates the problem with both the trial court's pretrial ruling on the severance motion and Trinidad's trial testimony:

> [A] jury will often react similarly to an unredacted confession and a confession redacted [by use of symbols or blank spaces], for the jury will often realize that the confession refers specifically to the defendant…. Consider a simplified but typical example, a confession that reads "I, Bob Smith, along with Sam Jones, robbed the bank." To replace the words "Sam Jones" with an obvious blank will not fool anyone. A juror somewhat familiar with criminal law would know immediately that the blank, in the phrase "I, Bob Smith, along with , robbed the bank," refers to defendant Jones. A juror who does not know the law and who therefore wonders to whom the blank might refer *need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer, at least if the juror hears the judge's instruction not to consider the confession as evidence against Jones, for that instruction will provide an obvious reason for the blank*….

Id.[12] (emphasis added).

¶29 We recognize that Trinidad's recitation of Maldonado's confession regarding the details of the shooting neither implicated Nieves by name nor included an obvious redaction evidenced by the use of a blank space or symbol as occurred in ***Gray***. However, Trinidad's recitation of Maldonado's confession *did* implicate a second unnamed shooter through the repeated use of "they," and under the circumstances—and particularly in light of Trinidad's testimony that Maldonado told him that he (Maldonado) had been at a location associated with

[12] In ***Gray v. Maryland***, 523 U.S. 185 (1998), the Supreme Court addressed the issue of whether a codefendant's confession that was redacted "by substituting for the defendant's name in the confession a blank space or the word 'deleted'" violated ***Bruton***. *See* ***Gray***, 523 U.S. at 188. The Supreme Court held that such substitution did violate ***Bruton***'s protective rule concerning admission of a codefendant's confession at a joint trial where the confessing codefendant did not testify. *See* ***Gray***, 523 U.S. at 188.

Nieves around the time of the shootings—the reasonable inference arising from Maldonado's apparent confession to Trinidad was that Nieves was the unnamed second shooter. That testimony gave life to the exact concern that trial counsel raised in Nieves's pretrial motion to sever.

¶30 Having concluded that the trial court erred in failing to sever Nieves's trial, we briefly consider whether that error was harmless. *See* ***State v. Mayhall***, 195 Wis. 2d 53, 62, 535 N.W.2d 473 (Ct. App. 1995) ("Generally, constitutional violations are subject to a harmless-error analysis."). The State, as the beneficiary of the error, carries the burden of establishing beyond a reasonable doubt that the error in failing to sever Nieves's trial did not contribute to the verdicts against Nieves in any way. *See* ***State v. Harris***, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397 (beneficiary of error may show that error was harmless if it is established beyond a reasonable doubt that the error did not contribute to the verdict obtained).

¶31 The State first argues that any failure to sever was harmless because "[a]t best, Trinidad made one improper reference that Maldonado implicated Nieves in the crimes." As previously explained, we disagree that there was only one improper reference. Second, the State points to Trinidad's testimony that Nieves himself confessed to Trinidad. While the record does reflect such testimony, this gives rise to the possibility that the jury may have given greater weight to Trinidad's testimony than it might have otherwise had it not heard that Maldonado's confession also implicated Nieves in the crimes.

¶32 Finally, in its most compelling argument, the State argues that David's testimony provided ample testimony as to Nieves's involvement in the crimes committed. While we agree with the State that David, the surviving victim,

provided compelling testimony as to Nieves's involvement in the crimes charged, we are not convinced that the State has established beyond a reasonable doubt that the error in failing to sever Nieves's trial in no way contributed to the verdicts obtained against Nieves.

¶33 Finally, as we previously pointed out, the trial court failed to give a limiting instruction as to Trinidad's testimony about Maldonado's confession. *See* ***Mayhall***, 195 Wis. 2d at 56 (finding that trial court erred when it did not give a limiting instruction regarding a nontestifying codefendant's out-of-court statements). Without a limiting instruction, there is no way of knowing whether the jury was even aware that Trinidad's testimony concerning Maldonado's confession could only be used against Maldonado. This is particularly concerning given the at least implicit references to Nieves's involvement in Trinidad's recitation of Maldonado's confession.

¶34 Accordingly, because we cannot conclude that the failure to sever Nieves's case was harmless error, Nieves is entitled to a new trial.

II. The trial court erred in allowing David to testify as to "Boogie Man's" comments.

¶35 While we generally do not address additional issues raised if a decision on one issue disposes of an appeal, we "may address other issues in the interest of judicial economy if the issues are likely to arise at a second trial." *See* ***Rushing***, 197 Wis. 2d 649-50, 541. Accordingly, we address Nieves's hearsay argument, as we believe it is likely that the same issue will arise during the new trial.

¶36 An appellate court generally reviews the trial court's decision to admit evidence under the erroneous exercise of discretion standard. ***Martindale v.***

Ripp, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Under this standard, we look to whether the trial court examined the relevant facts, applied a proper legal standard, and used a demonstrated rational process to reach a reasonable conclusion. *See* ***id.***, ¶¶28-29. If the trial court failed to provide a reasoning for its evidentiary decision, we will independently review the record to determine whether the trial court properly exercised its discretion. *See* ***id.***, ¶29.

¶37 During David's testimony, the State asked David about a conversation he allegedly had prior to the shootings with an individual identified only as "Boogie Man." David testified as follows:

> [State]: At some point in time, did other people come over that you had known from Waukegan?
>
> [David]: Yes.
>
> [State]: Was one of those individuals someone who had a nickname of Boogie Man?
>
> [David]: Yes.
>
> [State]: How do you know Boogie Man?
>
> [David]: I seen him around the neighborhood.
>
> ….
>
> [State]: Did you have a conversation with him?
>
> [David]: Yes.
>
> [State]: And did he say anything to you that caused you concern?
>
> [David]: Yes.
>
> ….
>
> [State]: So what was said that made you concerned?
>
> [David]: He said that they were planning on killing me, that Raymond Nieves and Maldonado were planning on killing me.

Prior to David's response to the question about what "Boogie Man" had told him that caused him concern, Nieves's trial counsel objected on hearsay grounds. The trial court overruled the objection, stating that it would "allow the jury to hear what this person said to [David] not because what the person said is true, if we need to hear what the truth is, we can hear from that person, but [David] can tell you what he said so you understand how he felt."

¶38 Nieves argues that such testimony was inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). "A 'statement' is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion." Sec. 908.01(1). "A 'declarant' is a person who makes a statement." Sec. 908.01(2). A statement that is hearsay "is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute." WIS. STAT. § 908.02. Nieves's trial counsel objected to David's testimony concerning what "Boogie Man" told him about Nieves's and Maldonado's alleged plan to kill David, and the trial court overruled the objection and allowed the testimony on non-hearsay grounds.[13] We agree that this testimony was inadmissible.

¶39 The trial court explained that it would allow David to testify that "Boogie Man" told him that Nieves and Maldonado had planned to kill him so that the jury could "understand how [David] felt." The State cites ***State v. Wilson***, 160 Wis. 2d 774, 779, 467 N.W.2d 130 (Ct. App. 1991), in support of its argument that "[a] court may properly admit statements not for their truth, but rather to show

[13] The State does not argue that any hearsay exception applies.

their effect on the listener's state of mind." The State's reliance on ***Wilson*** is misplaced.

¶40 In ***Wilson***, the defendant was charged with entering a residence with the intent to steal property belonging to John Herendon. ***Id.*** at 776. The defendant sought to introduce an out-of-court statement allegedly made to him by Herendon's roommate giving him consent to enter the residence to obtain property. ***Id.*** Neither party was able to serve the roommate prior to trial, and the trial court excluded evidence as to what the roommate had told the defendant as inadmissible hearsay. ***Id.*** On appeal, we concluded that the trial court had erred and remanded for a new trial. *See* ***id.*** We reached that conclusion because one of the elements of the crime charged—burglary—required lack of consent, and the defendant "sought to prove that *he believed* that [the roommate] had given him consent to enter the apartment in which she resided to remove certain items … thus negating at least the 'state of mind' element of intent to steal." ***Id.*** at 777.

¶41 Unlike in ***Wilson***, where the out-of-court testimony of the roommate was admissible as to the defendant's state of mind due to the elements of the crime charged, here, how *David* felt about what a third party identified only as "Boogie Man" told him about Nieves's and Maldonado's alleged plan to kill David is neither related nor relevant to whether *Nieves* committed the crimes charged. Such testimony should have been excluded. We can think of no legitimate reason that the State sought to introduce "Boogie Man's" out-of-court statement other than to establish that Nieves intended to—and did—commit the crimes charged. Accordingly, the trial court failed to apply a proper legal standard, and we therefore conclude that the trial court erred in allowing David to testify about what "Boogie Man" told him.

¶42 Moreover, even if we concluded that the testimony at issue was not inadmissible hearsay, it would remain inadmissible. Only evidence that is relevant is admissible: "All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible." WIS. STAT. § 904.02. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, …." WIS. STAT. § 904.03. As previously explained, how David felt about what "Boogie Man" told him is not relevant, and even if it was, allowing the jury to hear what an essentially unidentified third party who did not appear at trial allegedly told David was unfairly prejudicial.

¶43 Having already concluded that Nieves is entitled to a new trial on other grounds, we do not address whether the admission of David's testimony concerning what "Boogie Man" told him was harmless error. *See* ***State v. Britt***, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996) (evidentiary errors are subject to harmless error analysis). At Nieves's new trial, David may not testify as to what "Boogie Man" told him about any alleged plan on the part of Nieves and Maldonado to kill him, as such testimony is irrelevant, unfairly prejudicial and inadmissible hearsay.

¶44 Because Nieves is entitled to a new trial on remand, we do not address his claim that trial counsel was ineffective for failing to properly investigate a potential alibi defense. *See* ***Rushing***, 197 Wis. 2d at 650 (ineffective

assistance of counsel claim not addressed after concluding that other grounds for a new trial existed).

By the Court.—Judgment and order reversed and cause remanded for further proceedings.

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