STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2014 AP 001053 - CR

TYRON POWELL,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION MOTION ENTERED IN CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE TIMOTHY G. DUGAN, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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TYRON J. POWELL,

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE ISSUES

Whether the circuit court erroneously ruled that the State could impeach Mr. Powell with Mr. Powell's lack of testimony regarding police brutality at a prior jury trial.

The circuit court ruled that at the third trial the State could impeach Mr. Powell with lack of testimony at the

second trial related to police brutality over the objection of the defense.

Whether the circuit court erroneously denied Mr. Powell's ineffective assistance claim without an evidentiary hearing.

The circuit court denied Mr. Powell's postconviction motion requesting an evidentiary hearing.

Whether the circuit court erroneously admitted testimony pertaining to the type and year of Mr. Powell's prior criminal convictions.

The circuit court admitted the testimony over the defense's objection.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither is requested.

STATEMENT OF THE CASE

This appeal stems from the trial court's Decision and Order Denying Motion for Postconviction Relief filed on April 23, 2014 (51:1) and from the trial court's Judgment of Conviction entered in this matter on February 18, 2013. (36:1). For purposes of this appeal, Defendant-Appellant, Tyron Powell, will hereinafter be referred to as "Powell" and the State of Wisconsin will hereinafter be referred to as "State."

On November 30, 2012, Powell was convicted at trial of one count of fleeing and eluding and one count of conceal carry weapon. (27:1; 28:1). Prior to this trial two mistrials occurred.

STATEMENT OF THE FACTS

On January 8, 2011, around 9:00 p.m. Milwaukee Police Officers Mickal Chemlick, William Esqueda and Christopher Randazzo, who were dressed in plain clothes and in their unmarked squad car at 13th Street and Lloyd Street in Milwaukee, received an anonymous tip from a female citizen that a person had a gun. (77:108).

The female came to their car and told them that she had seen a black man with a visible handgun. According to Officer Chemlick she said the gun was in the man's hand. (77:109). According to Officer Esqueda she said the gun was visible on the man's hip. (73:108). She told the officers that the man exited a black Mitsubishi car and walked into the house at 1913 North 13th Street. (77:79). According to officers the house was a known drug house. (77:79). She described the man as wearing black pants and a black hoodie. (77:108). The anonymous tip did not include any allegation of illegal activity according to officers. (66:40). The officers investigated the tip and located a black Mitsubishi at 1912 North 13th Street. (77:79).

The officers retrieved an undercover car and setup surveillance of the house within thirty minutes of receiving the anonymous tip. (73:87). The officers setup surveillance 60-70 feet away from the black Mitsubishi and on the same side of the 13th Street as the black Mitsubishi is parked. (77:91). Four other uniformed officers waited nearby in two marked MPD squad cars to stop the individual from the anonymous tip in case he exited the house. Officers Chemlick, Esquada and Randazzo watched the house until around midnight when four individuals exited the house. (77: 84). There was no activity at the house prior to this.

One of the four individuals, later identified as Powell, was wearing black pants, a black hoodie and a black hat. While Mr. Powell crossed from the house to his car Powell patted his right thigh with his right hand two times; the

officers did not see Powell with a firearm. (73:92-97; 76:89). Powell entered the black Mitsubishi with a passenger. Officer Esqueda testified that Powell patting himself indicated possibly that Powell had a firearm. (73:92). The officers in the undercover car then radioed to the uniformed officers waiting in the marked squad cars to stop Powell.

The marked squads approached Powell's car and activated their emergency lights and spot light and parked behind and adjacent to Powell's car because of a car parked behind Powell's car. (96:82). The officers also activated the squad's siren for one beep and turned on the squad's "brights." (94:19-22). The uniformed officers exited their squad car and approached Powell's car and drew their weapons. (94:27). Officers' saw Powell with a startled look on his face. (96:85)

As Powell is sitting in his idling car he sees a hand with a gun in it and hears someone saying put your hands up. (96:16). Powell thought someone was trying to rob him. (96:18). In response, Powell put his car in drive and drove off. (96:16). Powell drove straight ahead and went through a stop sign in an attempt to get away. (96:20).

Powell noticed red and blue lights in his rearview mirror and realized the police were stopping him. (96:22). Powell did have a gun with him and he placed the gun out the car window. (96:22). Powell put the gun out the window with the holster. (96:22). Powell testified, "I let them [law enforcement officers] see me place my gun out the window. Once I did that. I was driving myself away from the gun. I didn't want to jump out with the gun on me in a dark area and something, you know. I was afraid." (96:22). Then, Powell slowed down and found a safe well-lit place to park his vehicle. (96:25-26). Powell stopped his car at 12th Street and Lloyd Street, about three blocks from where the police initially tried to stop Powell. (94:54-55). In total, Powell traveled one and a half blocks on 13th street, then Powell turned right on to Lloyd street and traveled one block, then Powell turn left on to 12th street and stopped.

Police arrested Powell and recovered a bulletproof vest, a cell phone, and two gun ammunition clips. The gun magazines were entered into evidence at trial. (94:90). The bullet proof vest was also put before the jury. (90:8)

On January 12, 2011, as a result of this incident, the Milwaukee County District Attorney's office filed a criminal complaint charging Powell with one count of Attempting to Flee or Elude a Traffic Officer contrary to sec. 346.04(3), 939.50(3)(i) Wis. Stats. (2:1). An initial appearance was held on the same day. (54:1). A preliminary hearing was held on January 19, 2011, and Powell was bound over for trial. (55:1) An amended information was filed on December 29, 2011, adding one count of Carrying a Concealed Weapon contrary to sec. 941.23, 939.51(3)(a) Wis. Stats. (12:1).

No pretrial evidentiary motions were conducted in Powell's case, and Powell did not enter guilty pleas. The case resulted in three trials, the first two trials resulted in mistrials and the third trial resulted in a guilty verdict as to both counts.

The first jury trial began on January 9, 2012, and Attorney James Toran represented Powell. (64:1). On the morning of January 10, 2012, opening statements were conducted. (65:2). Attorney Toran, in his opening statement, talked about police brutality of Powell as a result of the underlying incident. (65:2). [1]

In response to defense's opening statement, the State argued surprise and that the defense had not adhered to the State's discovery request and applicable discovery statutes. (65:7-8).

The circuit court ruled that police brutality of Powell was relevant to Powell's defense. (65:7). The circuit court then ruled that any defense documents that were not previously turned over to the State and that were not self-

[1] The transcript related to the opening statements from the first trial are not part of the record on appeal.

authenticating would not be admissible at trial. (65:11). In response to the circuit court's ruling, the defense moved for a mistrial because Powell had not turned over the materials to Attorney Toran until the beginning of the trial. (65:12). The State did not object and the circuit court granted a mistrial. (65:19-20).

An investigation in to Powell's claim of police brutality was conducted, and the State obtained medical reports of Powell in anticipation of the second trial. (70:2). In addition, the defense had receipts for medical expenses. (65:13).

On May 31, 2012, the circuit court held the last final pretrial conference before trial. (71:1). At no point during the final pretrial conference did the defense exclude the possibility that the defense would not pursue police brutality of Powell as an issue at trial; in fact, the circuit court noted that with the additional witnesses the trial would be a "fully long week trial." (71:4).

The second trial began on June 4, 2012, and again attorney Toran represented Powell. (72:1). During the second trial Powell testified; however, the defense never presented any evidence of police brutality of Powell. (77:138). The second trial resulted in a hung jury and the circuit court declared a mistrial. (80:7).

On July 2, 2012, Mr. Toran withdrew as counsel for Powell. (81:1). Attorney Calvin Malone became new counsel to Powell. (82:1).

On October 3, 2011, the Stated filed a motion in limine, in which the State sought to prohibit the defense from bringing out any brutality of Powell by the police. (20:4). The circuit court held a final pretrial conference on November 21, 2012. (87:1; 88:1).

At the final pretrial conference the issue of police brutality of Mr. Powell presented it self. (87:54). The defense

could not rule out raising the issue at trial. The circuit court ordered that the defense could introduce testimony related to police brutality of Powell at trial. (87:61). The circuit court also ruled that if Powell testified about police brutality, then the State could elicit testimony from Powell that the Powell never testified about the issue at the second trial. (87: 61-62). Specifically, the circuit court stated, "The State can introduce his – Mr. Powell's testimony, can present that in this prior hearing that Mr. Powell never made that claim." (87:66).

The circuit court reasoned that if Powell testified about police brutality , then Powell's silence about the issue at the second trial could indicate a recent fabrication. (87:62).

Defense questioned the circuit court about who made the decision not to mention anything about brutality of Powell by police at the second trial, and the circuit court responded, "I don't care whose decision it was." (87:64).

Defense objected to the circuit court permitting the State to impeach Powell with his lack of testimony about police brutality at the second trial if it became an issue. (87:69). In addition, the defense moved for a preemptive mistrial. (87:73).

The parties stipulated that Powell had three prior convictions for purposes of impeachment if Powell testified. (87:9). The parties stipulated that Powell had convictions in: 1999 for Carrying a Concealed Weapon, 2002 for Obstructing an Officer and 2008 Carrying a Concealed Weapon, these were all misdemeanor convictions. (87:4-9). The circuit court suggested how Powell should testify in regards to the prior convictions. (87:9).

The third trial started on November 26, 2012. (89:1). Powell testified at the third trial. (95:48). During Powell's testimony he was asked if he had been convicted of a crime; Powell responded, "Of a crime, yes. Of a felony no." (95:53). Then Powell was asked whether he had been convicted three times, which Powell responded, "Yes." (95:53). Powell's

responded to the questions truthful.

Based on Powell's answers to the above two questions the circuit court permitted the State elicit testimony regarding Powell's prior convictions over defense's objection. (95:66). The circuit court reasoned that Powell improperly testified and opened the door to specific questions regarding his criminal convictions when he stated that he had not been convicted of a felony. (95:65).

In its reasoning the circuit court stated, "...the right answer was three. He went beyond it. He gave an answer that he wasn't supposed to give. He was advised at the final pre-trial, the questions are limited... He volunteered, 'no felonies'" (95:65).

The circuit court added "...and I can only point out to you that Mr. Powell in his earlier trial volunteers things. He volunteered that is a second trial for him, that this means so much to him, that he's – and I can't remember, a great expense, but he was trying to say and volunteer various was I'm innocent because it was credible testimony, and I take that as another move on his part to do it." (95:65-66).

On cross-examination the State did elicit testimony about the name and year of Powell's prior criminal convictions. (96:38). The circuit court instructed the jury that Powell's prior convictions were received into evidence solely because it bore upon his credibility as a witness and were not proof of guilt of the crimes now charged. (97:14).

The jury returned a verdict of guilty to both counts. On February 12, 2013, the circuit court sentenced Powell. (99:1). The circuit court imposed a maximum sentence on both counts consecutive to each other for a total of 27 months initial confinement and 24 months extended supervision. (99:31-32).

Powell filed a postconviction motion presenting three issues. (45:1). The State filed a response brief. (47:1). Powell filed a reply brief. (49:1). The circuit court denied Powell's postconviction motion. (51:3).

ARGUMENT

I. THE CIRCUIT COURT PREJUDICED POWELL WHEN THE CIRCUIT COURT ERRONEOUSLY RULED THAT THE STATE COULD IMPEACH POWELL WITH POWELL'S SILENCE AT A PRIOR TRIAL.

The circuit court's pretrial conference order that permitted the State to impeach Powell with his lack of testimony about police brutality at the second trial erroneously permitted the State to introduce irrelevant and prejudicial evidence.

The circuit court may admit or exclude evidence within its discretion. State v. Bauer, 238 Wis. 2d 687, 690, 617 N.W.2d 902 (Ct. App 2000). This Court should uphold a circuit court's evidentiary ruling if the Court finds that that the circuit court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." State v. Hunt, 263 Wis. 2d 1, 25; 666 N.W.2d 771 (2003).

If the circuit court fails to develop it's reasoning or misapplies the law, this Court should determine whether there is a proper legal analysis that supports the circuit court's conclusion. See Bauer, 238 Wis. 2d 687, 690; Hunt, 263 Wis. 2d 1; 666 N.W.2d 771.

Evidence that is not relevant is not admissible. Wis. Stat. § 904.02. Relevant evidence means 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.

In this case the circuit court ruled that the issue of police brutality was relevant at trial, and therefore, Powell could raise the issue in his defense. The circuit court also ruled that Powell's lack of testimony about police brutality at

the second trial was relevant to Powell's credibility if the issue was raised at the third trial. Defense objected to the circuit court's ruling and moved for a preemptive mistrial trial. The circuit court's reiterated that the evidence was relevant to Powell's credibility in the circuit court's order denying postconviction relief.

> "For each class of evidence, the trial court is required to balance the probative value of the proffered testimony against the prejudicial effect." State v. Ingram, 204 Wis. 2d 177, 186, 554 N.W.2d 833 (Ct. App. 1996); Wis. Stat. § 904.03

The circuit court erred in its ruling because Powell's lack of testimony about police brutality at the second trial is not relevant to Powell's credibility and therefore has no probative value.

The evidence does not make Powell's credibility more or less probable because defense counsel, not Powell, determined trial strategy at the second trial. SCR 20:1.2.

So, the strategic decisions made during the second trial, including whether to raise the issue of police brutality, are decisions that trial counsel made and have no bearing and are immaterial to Powell's credibility.

In addition, the circuit court stated that it did not care whose decision it was to not raise the issue of police brutality at the second trial. The circuit court's statement cannot be reconciled with the circuit court's pretrial order.

Ultimately, whether Powell raised the issues of police brutality at his second trial is immaterial and not relevant to whether police brutality actually took place. Powell's silence at the second trial does not make the existence of police brutality more or less probable.

The circuit court's pretrial order prejudiced Powell because if defense elicited the police brutality of Powell, then the State would have admitted irrelevant evidence. The admission of irrelevant evidence would confuse the jury. The

jury would believe, as the circuit court did, that Powell's prior lack of testimony actually did go to his credibility.

The circuit court's pretrial order was also prejudicial to Powell because the order invaded Powell's attorney-client privilege. Powell would be left to explain his lawyer's strategic decision. Powell would be forced to waive his attorney-client privilege and call his previous lawyer as a witness.

Finally, the circuit court's pretrial order was prejudicial to Powell because the order improperly undermined Powell's defense. The circuit court ruled that Powell, in his defense, could introduce evidence related to police brutality in order to attack the credibility of the officers. The circuit court's order improperly undermined Powell's defense by allowing the State to admit irrelevant and prejudicial evidence to refute Powell's defense, and thus further prejudiced Powell.

The circuit court erroneously ordered irrelevant and prejudicial evidence admissible; therefore, the Court should grant Powell a new trial.

II. THE CIRCUIT COURT ERRED IN DENYING THE DEFENDANT'S POSTCONVICTION MOTION FOR MACHNER HEARING.

Powell's postconviction motion requested a Machner hearing Powell and claimed that trial counsel had been ineffective because trial counsel failed to move to suppress evidence unlawfully gathered by police.

The circuit court denied Powell's postconviction motion for a Machner hearing ruling that based on a review of the alleged facts in the criminal complaint the officers acted lawfully and that a suppression motion would not have been successful. A postconviction hearing, or "Machner hearing," is necessary to sustain a claim of ineffective assistance of

counsel. State v. Machner, 92 Wis. 2d 797, 804; 285 N.W.2d 905 (Ct. App. 1979).

Powell must show that his attorney's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). The performance inquiry relates to whether the counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. The prejudice inquiry relates to whether, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. Strickland, 466 U.S. at 669.

After the first two trials in Powell's case trial counsel should have became aware that officers did not lawfully stop Powell.

Facts came to light through the trials about why officers stopped Powell. Specifically, officers received an anonymous tip that a black male wearing black pants and black hoodie possessed a gun that was visible to the anonymous tipster. The anonymous tipster did not inform the officers of any illegal activity. The anonymous tipster informed that officers that the male exited a black Mitsubishi car and went to the house at 1913 North 13th Street, which the officers believed was a drug house. The officers watched the house for over two hours. Then around midnight a group of men exited the house and walked across the house's yard towards the street. One of the men matched the anonymous tipster's description and the officers saw the man pat his right thigh twice. That man entered a car.

After the man got into his car, the officers then conducted a traffic stop of the car and the officers approached the car with their guns drawn. The man, scared, sped off. He disarmed himself and stopped his vehicle after traveling three blocks.

Trial counsel not filing a suppression motion based on these facts was not reasonable assistance of counsel because a

suppression motion would have resulted in suppression of evidence.

The officers did not have reasonable suspicion to stop Powell. For an officer to seize someone the officer needs to reasonably suspect that such person is committing, is about to commit or has committed a crime. Terry v. Ohio, 392 U.S. 1 (1968). A traffic stop constitutes a seizure. State v. Arias, 311 Wis. 2d 358; 752 N.W.2d 748 (2008).

The officers did not have reasonable suspicion to believe that Powell was committing a crime. First, the tip the officers received had no indicia of reliability; the tip contained no predictive information, but rather identified a person at a location. Reasonable suspicion requires that a "tip be reliable in its assertion of illegality not just in its tendency to indentify a determinate person." Florida v. J.L., 529 U.S. 266, 272 (2000). In addition, the tip the officers received never asserted any illegal activity.

Furthermore, Powell patting his thigh twice as he walked towards his car did not give reason for the officers to suspect that Powell was committing, about to commit or committed a crime. For all these reasons the officers lacked reasonable suspicion to stop Powell.

Also, Powell's eventual arrest three blocks later is not too attenuated from the initial lawless conduct of the police to "become so attenuated as to dissipate the taint." Wong Sun v. United States, 371 US 471, 487 (1963) (citing Nardone v. United States, 308 US 338, 341 (1939)).

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Wong Sun, 371 US at 488.

It is the case here that the officers' unlawful conduct

provoked Powell to flee. Powell was in his car at midnight on an empty street in a dangerous neighborhood not engaged in any illegal behavior. As a result of their unlawful conduct the officers recovered a gun from Powell. Because the gun was the fruit of the initial unlawful police conduct and came about because of that unlawful conduct, the evidence should be suppressed.

The State has argued that Powell was not seized when he discarded his gun and therefore the weapon should not be suppressed. Whether the police seize an individual depends on whether a person submitted to a police show of authority. State v. Young, 294 Wis. 2d 1, 717 N.W.2d 729 (2006).

The police showed their authority by turning on their emergency lights and siren. Powell disarmed himself and pulled over; thus, Powell acquiesced to the officers' show of authority. Therefore, Powell was seized. Because Powell was seized and the seizure was not based upon reasonable suspicion, the evidence gathered from that seizure should be suppressed.

Had trial counsel filed a motion to suppress evidence a reasonable probability exists that there would have been a different outcome, mainly, evidence would have been suppressed and the carrying a concealed weapon charge dismissed. Defense counsel failed to bring a motion to suppress evidence, and due to this oversight, evidence was not suppressed and the carrying a concealed weapon count was not dismissed. Therefore, the circuit court erred when it did not order a Machner Hearing.

III. THE CIRCUIT COURT PREJUDICED POWELL WHEN THE CIRCUIT ERRONEOUSLY ADMITTED TESTIMONY PERTAINING TO THE TYPE AND YEAR OF MR. POWELL'S PRIOR CRIMINAL CONVICTIONS.

Powell answered truthfully and accurately questions about his prior criminal convictions. Powell added that he has never been convicted of a felony. Based on Powell's answer, the State argued for permission to go into the specifics of Powell's prior convictions.

The same standard of review applies to this issue as the Court applied to the first issue.

Where a defendant has answered truthfully and accurately in response to questions concerning prior criminal convictions, further inquiry into the nature of the convictions is not permitted. State v. Hungerford, 54 Wis. 2d 744, 748; 196 N.W.2d 647 (Wis. 1972).

"The defendant controls the choice of whether or not past offenses will be mentioned by name. He can avoid such mention by truthfully acknowledging the fact and number of such convictions on direct examination. If he chooses not to do this, then he must face the risks involved in allowing such information to be brought out on cross-examination." Nicholas v. State, 49 Wis. 2d 683, 691; 183 N.W.2d 11 (1971).

The circuit court ordered that the State could ask specifics questions related to the three prior convictions reasoning that Powell had opened the door. The circuit court applied the curative admissibility doctrine, commonly referred to as "opening the door".

The circuit court applies the curative admissibility doctrine when one party accidentally or purposefully takes advantage of a piece of evidence that that would normally be inadmissible. State v. Dunlap, 250 Wis. 2d 466, 477, 640 N.W.2d 112 (2002). If this occurs, "the court may allow the opposing party to introduce otherwise inadmissible evidence if it is required by the concept of fundamental fairness to prevent unfair prejudice." State v. Dunlap, 250 Wis. 2d 466, 477, 640 N.W.2d 112 (2002) citing Bertrang v. State, 50 Wis. 2d 702, 706, 184

N.W.2d 867 (1971); Pruss v. Strube, 37 Wis. 2d 539, 543-44, 155 N.W.2d 650 (1968).

In its reasoning the circuit court stated, "...the right answer was three. He went beyond it. He gave an answer that he wasn't supposed to give. He was advised at the final pre-trial, the questions are limited... He volunteered, 'no felonies'".

The circuit court further added, "...and I can only point out to you that Mr. Powell in his earlier trial volunteers things. He volunteered that is a second trial for him, that this means so much to him, that he's – and I can't remember, a great expense, but he was trying to say and volunteer various was I'm innocent because it was credible testimony, and I take that as another move on his part to do it."

The circuit court did not balance the prejudicial effect of the evidence against the probative value of the evidence.

"For each class of evidence, the trial court is required to balance the probative value of the proffered testimony against the prejudicial effect." State v. Ingram, 204 Wis. 2d 177, 186, 554 N.W.2d 833 (Ct. App. 1996); Wis. Stat. § 904.03

If the circuit court had analyzed the prejudicial effect and probative value of the evidence, then the court would have determined that the evidence's prejudicial effect substantially outweighed its probative value.

First, the evidence is highly prejudicial. The evidence was the type to influence the outcome by improper means and cause the jury to base its decision on something other than the evidence offered in the case. "[W]here one or more of the past offenses is the same crime as that for which the defendant is presently on trial, then it may be highly prejudicial to have the jury hear them mentioned by name." Nicholas v. State, 49 Wis. 2d 683, 691; 183 N.W.2d 11 (Wis. 1971)

In Powell's case to have the jury hear his prior convictions mentioned by name was highly prejudicial. The jury would improperly conclude that Powell must now be guilty of conceal carry a weapon and fleeing an officer

because he had previously been convicted twice of conceal carry a weapon and once of resisting an officer.

Permitting the jury to hear of Powell's prior similar convictions improperly undermines Powell's credibility in this case and the jury instruction cannot fix this error.

Further, given the procedural history of Mr. Powell's case – a jury had previously deadlocked on whether the State had met its burden of proof as to both counts, resulting in a mistrial – and the evidence adduced at this trial, the evidence improperly tipped the scale.

Second, the evidence was not probative. Mr. Powell's truthful response did not require introduction of otherwise inadmissible evidence in order to prevent unfair prejudice to the State because Mr. Powell's answer did not paint only a partial picture of the facts surrounding Mr. Powell's prior convictions that prejudiced the State. Rather, Mr. Powell testified truthfully and simply added that he had none been convicted of a felony.

Because circuit court erred when it did not properly exercise its discretion in permitting the State to elicit testimony about Powell's prior convictions and the circuit court's error prejudicial to Powell, Powell requests a new trial.

CONCLUSION

The circuit court erred in denying Powell's postconviction motion for a Machner Hearing and a new trial.

Based on the reasons set forth within this brief Defendant-Appellant, Tyron J. Powell, respectfully requests the Court to order a new trial or, in the alternate, to order a Machner hearing.

Dated this 25th day of August, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4750 words.

Dated this 25th day of August, 2014.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 25th day of August, 2014.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of August, 2014.

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