STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 14AP2519-CR

BRADLEY WAYNE PHILLIPS,

Defendant-Appellant.

APPEAL FROM ORDERS OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS P. CIMPL, GLENN H. YAMAHIRO AND WILLIAM S. POCAN, PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant contends that oral argument and publication are not warranted in this case. The legal issues addressed herein are not factually difficult, and there is ample legal authority for this Court to issue a decision without the need for oral argument or publication.

ISSUES PRESENTED

ISSUE I: Did the trial court err as a matter of law in ruling that a defense expert could not render a particular expert opinion under the *Daubert* standard as to Phillips' employability?

ANSWERED BY THE TRIAL COURT: No. The Court ruled in an oral Order that the expert could not testify as to Phillips' non-employability in the work force.

ISSUE II: Did the trial court err in not granting Phillips' claim of ineffective assistance of counsel after a postconviction evidentiary hearing on the issue of whether he was properly conveyed a pretrial offer by his defense attorneys?

ANSWERED BY THE TRIAL COURT: No. The Court denied Phillips' claim.

ISSUE III: Did the trial court err in not granting Phillips a postconviction evidentiary hearing on other issues related to his ineffective assistance of counsel claims?

ANSWERED BY THE TRIAL COURT: No. The Court ruled that Phillips was not entitled to a hearing with respect to said issues.

ISSUE IV: Did the trial court err in not granting Phillips a resentencing hearing?

ANSWERED BY THE TRIAL COURT: No. The Court ruled that Phillips was not entitled to such a hearing.

STATEMENT OF THE CASE AND RELEVANT FACTS

The defendant-appellant, Bradley Wayne Phillips ("Phillips"), was charged in a Criminal Complaint filed on June 14, 2011 with six (6) counts of Failure to Provide Child Support, contrary to sec. 948.22(2), Wis. Stats. (R. 2)1 The allegations involved failure to support the same child, K.P., DOB 8/21/93, through her mother, Diane Thorsen, in Milwaukee County Case No. 94-PA-120949. (R. 2) More particularly, the allegations against Phillips were that on six different spans of 120 consecutive days between July 1, 2005 and March 1, 2011, he failed to pay support to Ms. Thorsen on behalf of his minor child. (R. 2)

A preliminary hearing was held on August 11, 2011 (R. 80), and Phillips waived his right to this hearing (R. 6). He was bound over before the circuit court for trial. (R. 80) An information alleging the same counts was also filed on that date. (R. 5)

Attorney Gregg H. Novack was appointed by the Office of the State Public Defender to initially represent Phillips. (R. 95, p. 42) He appeared with him at the Preliminary Hearing. (R. 80) Attorney Philip L. Atinsky appeared as retained counsel at the Scheduling Conference held on September 21, 2011 (R. 81, p. 2) and remained as counsel through the trial.

On September 6, 2011, the State filed a Motion to Introduce Other Acts

Evidence against Phillips. (R. 8) The State put the defense on notice that it intended to introduce five (5) other acts in its case-in-chief regarding Phillips' three (3) prior convictions for failing to pay support and two (2) other incidents where he paid off some court fines and costs on some previous traffic offenses. (R. 8) A hearing was held on November 11, 2011 with respect to this motion. (R. 82) After hearing arguments, the Court granted the State's request to introduce all of these other acts at trial. (R. 82) The Order was reduced to writing and filed on November 23, 2011. (R. 11)

On January 4, 2012, the State filed a Motion In Limine. (R. 12) No Motion In Limine was filed by the defense prior to trial. On January 4, 2012, the trial court took up the State's motion. (R. 84) One of the issues that came up at this hearing was whether the defense was going to bring in any evidence of other bad acts by Ms. Thorsen at trial. Defense counsel was questioned by the trial judge as to whether he intended to go into any bad acts of the victim or any witness at trial. The response provided by defense counsel was "I don't know at this point. I can't tell you that." (R. 84, p. 16). Given this response, the court ruled that no such evidence would be admissible at trial. *Id*. The court further instructed defense counsel to make an offer of proof if he intended at some point to introduce such evidence. *Id*.

On February 24, 2012, the State filed a motion pursuant to sec. 907.02(1) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) to exclude the

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1 All references to the record shall be cited as (R. 3, p.), where appropriate.

testimony of a defense expert, Dr. David Nichols. (R. 23) The reason for the filing resulted from defense counsel putting the State on notice prior to trial that it intended to raise the affirmative defense of being unable to pay child support due to having an organic brain disability. (R. 19) The State's motion challenged Dr. Nichols' qualifications as an expert and that his testimony would not be reliable at trial. (R. 23) The basis for this claim was that the only proof provided by defense counsel as to Dr. Nichols' qualifications as an expert was a single-page Curriculum Vitae (CV) that did not list him as a medical doctor, and his 6 page psychological report arrived at conclusions without scientific reliability. *Id*. Most importantly, the State claimed that the defense submissions contained no indication that he had any expertise in the area of brain damage, brain trauma or the physiology of the brain – yet, he was going to provide an expert opinion at trial that Phillips suffered from organic brain syndrome and was unemployable. *Id*. Defense counsel argued in his written response filed on March 7, 2012 that the documentation already provided met the statutory criteria. (R. 24)

The motion hearing on this issue was held on the first day of trial - March 12, 2012. Given the documentation put forth by the defense as to Dr. Nichols' qualifications, the trial court granted the State's request given its finding of a lack of foundation provided by defense counsel. (R. 86, pp. 1-14) Thus, it was ordered that Dr. Nichols was not allowed to testify at trial that Phillips was disabled, suffered from

organic brain syndrome, and for those reasons, was unemployable. *Id*. In essence, the affirmative defense intended to be used by Phillips' trial counsel was completely taken away as a result of the lack of documentation put forth as to the proposed expert.

Prior to the commencement of trial, an offer of resolution was conveyed to defense counsel by the prosecution. (R. 75, Exh. 1) The offer was for a plea to much less time than would have been received had the case progressed to trial. The issue as to whether this offer was actually conveyed to Phillips by either of his defense attorneys is in dispute as the case ultimately proceeded to trial.

Trial commenced on the afternoon of March 12, 2012. During the trial, several things were testified to by State's witnesses that were not objected to by defense counsel. The cumulative sum of the lack of objections amounted to an unfair trial for Phillips. Briefly stated, testimony was allowed with no defense objection into the following areas:

1. Ms. Thorsen testified on direct examination that several members of Phillips' family asked her to lie to his attorneys and in court regarding injuries he sustained in a car accident in 1989. (R. 87, pp. 101-102);
2. Ms. Thorsen testified on direct examination that the relationship with Phillips changed after she got pregnant and that his parents took her into a back room once they found out and requested that she have an abortion. (R. 87, pp. 102-

103);

3. Sergeant Brian Wall testified on direct examination of prior instances of conduct where he had come across Phillips several times in the past when he was intoxicated, and he was also arrested on one occasion where he was so intoxicated that he had to be released to a family member. (R. 88, p. 23);

4. Sergeant Brian Wall testified on redirect examination that there were prior instances of conduct where Phillips was the subject of a criminal investigation for damage to property, and he was detained by officers as a result of a possible fleeing an officer scenario. (R. 88, p. 29); and

5. On cross-examination of Phillips, the prosecutor questioned him at length about whether or not any of his attorneys on any of his prior Failure Pay Support prosecutions had ever raised a defense of having an inability to work. This entire colloquy, though irrelevant and damaging, went without objection from defense counsel. (R. 88, pp. 92-93)

On the second day of trial, the defense stated that it would be calling an additional witness in its case-in-chief by the name of Brandon Haley. The trial court denied the request by defense counsel. (R. 89, pp. 64-65) Defense counsel failed to request that he be allowed to put forth an offer of proof as to the witness' testimony. Thus, a potential witness for the defense was not allowed to testify on behalf of Phillips.

On the third day of trial, defense counsel called Jeffrey Phillips to the witness stand. Prior to trial, it was stipulated to by the parties that if called to the witness stand, this witness would testify that he had 5 prior criminal convictions. (R. 88, p. 10) If he correctly testified to the 5 priors at trial, then the prosecution could not get into the substance of his prior criminal record. *Id*. Unfortunately, when called to the stand, defense counsel asked him the following question: "Isn't it a fact that you have been convicted four times of a crime?". The witness answered in the affirmative. (R. 90, p. 25) Given that defense counsel's leading question mischaracterized the number of prior convictions, the State was able to bring in the substance of all 5 prior convictions on cross-examination. (R. 90, pp. 26-28)

Phillips was convicted on all 6 counts. His sentencing took place on May 25, 2012. Phillips received a sentence of 1 year initial confinement and 2 years extended supervision on each count, consecutive to one another, for a total sentence of 6 years initial confinement and 12 years extended supervision. (R. 94, pp. 70-71) A timely Notice of Intent to Seek Postconviction Relief was filed with the trial court. (R. 42)

Phillips filed a timely Motion for Postconviction Relief (R. 56) and Memorandum of Law in Support of the motion (R. 57) on December 6, 2013. The motion pertained to claims of ineffective assistance of counsel and request for resentencing. *Id*. The State responded on March 28, 2014. (R. 66) Phillips filed a Reply Memorandum on April 7, 2014. (R. 69) The Hon. Glenn H. Yamahiro was

initially assigned to the case and denied the defense motion in all respects with the exception of the issue related to the conveyance of the plea offer by either defense counsel to Phillips. (R. 70)

The case was then transferred by judicial rotation to the Hon. William S. Pocan. An evidentiary hearing was held on October 14, 2014, pursuant to *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct.App.1979). (R. 95) The witnesses that testified were Phillips, Attorney Novack and Attorney Atinsky. After hearing the testimony and reviewing the documents presented, Judge Pocan issued a written order dated October 15, 2014 denying the remainder of the postconviction filing. (R. 100)

A timely Notice of Appeal was filed with this Court. (R. 77) A briefing schedule has now been established by this Court.

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT THE DEFENSE EXPERT COULD NOT RENDER A PARTICULAR EXPERT OPINION UNDER THE DAUBERT STANDARD AS TO PHILLIPS' EMPLOYABILITY

A. Standard of Review

Ultimately, the determination of whether a witness is qualified to testify as an expert under WIS. STAT. § 907.02 is left to the sound discretion of the circuit court. *Green v. Smith & Nephew AHP, Inc,*. 2001 WI 109, ¶ 89, 245 Wis.2d 772, 629 N.W.2d 727. We will sustain a circuit court's discretionary determination so long as it

"examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion." *Id*. Thus, this Court must determine after review of the record whether or not the circuit court erroneously exercised its discretion when ruling on the admissibility of expert testimony.

B. <u>Dr. David Nichols was qualified to render a legal opinion on the issues of whether Phillips was disabled and unemployable</u>

The general facts on this issue have been laid out for the court. The State filed a motion attacking the defense expert's ability to render an expert psychological opinion on certain issues. (R. 23) The defense wished to call Dr. David Nichols ("Nichols") to render an expert opinion on Phillips' brain disability and that he was unemployable during the time frames in question. This was laid out for the Court in the defense's January 4, 2012 134-page filing (R. 15) and its March 7, 2012 69-page response to the State's motion.

The trial court did not take up the issue until the first day of trial because his calendar was too full at the final pretrial conference the week before. (R. 86, p. 3) In a nutshell, the court ruled after reviewing the submitted documents and briefs that:

(1) there was no need for a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) – ("*Daubert* hearing") (R. 86, p. 4);

(2) the psychological report submitted by the defense did not render an opinion with regard to whether Phillips was disabled (R. 86, p. 4);

(3) the submitted report did not state that Phillips was unemployable (R. 86, p. 6); and

(4) the doctor could not testify that Phillips was disabled, and therefore, not employable. (R. 86, p. 6)

The admissibility of expert testimony is governed by WIS. STAT. § 907.02 (2011–12). In 2011, the legislature amended § 907.02 to make Wisconsin law consistent with the *Daubert* reliability standard embodied in Federal Rule of Evidence 702.4 *See* 2011 Wis. Act 2; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579. The amended rule provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.
> Sec. 907.02(1).

Expert testimony is admissible if offered by "a witness qualified as an expert by knowledge, skill, experience, training, or education," and "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Daubert* at 597. The *Daubert* case thus laid the foundation for this rule, which was designed to ensure that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir.2000) (internal quotation marks omitted).

Our own appellate court explained in *State v. Giese*, 2014 WI App 92, ¶ 18, 356 Wis.2d 796, 854 N.W.2d 687, that the circuit court's gate-keeping function under the *Daubert* standard is to ensure that the expert's testimony is based on a reliable foundation and is relevant to the material issues. "The standard is flexible but has teeth. The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *Id.*, ¶ 19.

The reason for the proposed defense testimony was to utilize the statutory affirmative defense that Phillips was unemployable, and thus, unable to pay child support due to a disability. See Sec. 948.22(6), Wis. Stats. The State's motion attacked the heart of this defense. In ruling in favor of the State, the court eliminated this defense from being put before the jury.

The submissions put forth by the defense amply complied with the factors set forth above in deciding whether to admit the proposed expert testimony in this case. The *Giese* court made clear that the *Daubert* standard was to be flexibly applied. In essence, the main purpose behind the standard is for court's to make certain that some witch doctor does not get before a jury to render a medical opinion on a medical condition. To put it another way, courts do not want foot doctors rendering medical opinions in court on brain issues. The qualifications and proposed testimony of Nichols did neither.

Applying the factors set forth above, the proposed testimony of Nichols was

based upon "sufficient facts and data." His CV laid out in detail his educational experience and work history. The December 12, 2008 report laid out in painstaking detail the disabilities attendant to Phillips. It further set forth his mental health history and that he was "fired from his last job 2 years ago after 2 weeks because 'he screwed things up'." (R. 23, p. 12) The court itself noted that the report "gives a diagnosis on page seven of personality change due to head trauma, and then a Dysthymia . . . and then written in is; amnestic disorder due to head trauma." (R. 86, p. 4) Thus, albeit in general terms, all parties were made aware before trial of the specific type of disability attendant to Phillips and how it adversely affected his ability to work.

The second and third factors go hand-in-hand. The court had to first determine if the proposed testimony of Nichols was based upon reliable principles and methods and if such principles and methods were reliably applied to the facts of the case. The court did not take odds with either of these factors when making its ruling. The court specifically stated: "I think his methods are sound, he does what every other psychologist does. I am not going to reinvent the wheel and so he is going to be allowed to testify, but he can testify as to what he did and what his final diagnosis, but that is it." (R. 86, pp. 10-11) Accordingly, the court had absolutely no problem with the principles and methods utilized by Nichols or their application to the facts of Phillips' case.

Simply stated, the court took the rigid approach to assessing Nichols' proposed

testimony on the issue of Phillips' disability and his potential employability. There is no question that Phillips had disabilities. There is also no question that such disabilities adversely affected his employment potential. The defense submissions prove this. Unfortunately, because the court did not use a flexible approach in reviewing the submissions, Phillips was denied his ability to raise the statutory affirmative defense before the jury. This was not a situation of a foot doctor rendering a medical opinion on a brain injury. It was a psychologist rendering an opinion on a head disability – which is what these types of experts are employed to do.

The trial court erroneously exercised its discretion in limiting Nichols' testimony, and the case should be reversed and remanded for a new trial so that such testimony on employability can now be presented to a jury.

II. PHILLIPS WAS AFFORDED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL THAT WAS BOTH DEFICIENT AND PREJUDICIAL.

A. Standard of Review

A defendant in a criminal case has a right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984); *State v. Ludwig*, 124 Wis.2d 600, 606, 369 N.W.2d 722, 725 (1985). To establish ineffective assistance, a defendant must demonstrate that counsel's performance was both deficient and prejudicial. *Strickland*, 466 U.S. at 687, 104

S.Ct. at 2064; *Ludwig*, 124 Wis.2d at 607, 369 N.W.2d at 725.

An allegation of ineffective assistance based on failure to present a defense invokes the standard set forth in *Strickland* at 466 U.S. at 694 (1984). *State v. Wirts*, 176 Wis.2d 174, 180, 500 N.W.2d 317 (Ct. App. 1993). Counsel provides ineffective assistance when his or her performance is deficient and errors or omissions were prejudicial. *Strickland*, 466 U.S. at 694. Errors are deficiencies when they are outside of the wide range of professionally competent assistance. *State v. Pitsch*, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985). In making that assessment, the court keeps in mind that counsel's function is to make the adversarial testing process work. *Id*. Counsel's deficiencies are prejudicial when their presence undermines confidence in the outcome. *Id*. at 642. The court asks whether the trial's result is unreliable. Id. This is not an outcome determinative standard. *State v. Marcum*, 166 Wis.2d 908, 917, 480 N.W.2d 545 (Ct. App. 1992). When a defendant's constitutional rights are violated because of counsel's deficient performance, the adversarial process breaks down and confidence in the outcome is undermined. *Id*.

The United States Supreme Court has recognized that due to the vital role counsel plays to ensure that a trial is fair, "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). Whether counsel's assistance was ineffective is a mixed question of law and fact. *Strickland*, 466 U.S. 668, 104 S.Ct. at 2070. The trial court's determinations of

what the parties did, or did not do, and the basis for the attorney's challenged conduct are factual and will ordinarily be upheld unless they are against the great weight and clear preponderance of the evidence. *State v. Felton*, 110 Wis.2d 485, 504, 329 N.W.2d 161 (1983). "The ultimate conclusion of whether the attorney's conduct resulted in a violation of the right to effective assistance of counsel is a question of law," and deference to the trial court's determination is not appropriate. *Felton*, 110 Wis.2d at 505. Accordingly, the review taken to this appellate Court is de novo.

B. Counsel's performance was deficient and prejudicial on the Pretrial Offer issue

Prior to trial, an offer of resolution was conveyed by the State's attorney to defense counsel dated August 11, 2011. (R. 75, Exh. 1) The written offer was as follows: Plead guilty to Count 1 – 18 months initial confinement and 24 months extended supervision; Plead guilty to Count 2 – 12 months initial confinement and 24 months extended supervision consecutive to Count 1; Plead guilty to Count 3 – 18 months initial confinement and 24 months extended supervision concurrent to Counts 1 and 2; Dismiss and read-in Counts 4 – 6. The total offer of resolution was 30 months initial confinement and 48 months extended supervision.

The trial court granted Phillips an evidentiary hearing on this issue alone. (R. 70) As was required by law, both defense counsel appeared at the hearing. Phillips took the witness stand and testified that he was not made aware of the pretrial offer

resolution made to his defense attorney by the State's attorney prior to the trial commencing. (R. 95, pp. 14-15) The offer was made known to him after trial by his appellate counsel. (R.95, p. 15) When shown the written offer on the stand, he specifically stated that he was never shown the offer letter by Attorney Novack or Attorney Atinsky. (R. 95, p. 17) He further testified that had he been made aware of the offer prior to trial that he would have accepted it. (R. 95, pp. 17-18) He went on to testify that the reason why he would have accepted the offer is that it would have cut his exposure time in half (R. 95, p. 18) and that he would have received less time with the plea agreement than the Court having sentenced him to the maximum sentence that he received. (R. 95, p. 16)

Attorney Novack was the next witness to testify. He testified that he was initially appointed to represent Phillips by the Office of the State Public Defender. (R. 95, p. 42) When the offer letter was shown to Attorney Novack, he testified that he had no recollection of having previously seen the document. (R. 95, pp. 43-44) He further testified that he had no idea as to whether he had shown the document to Phillips or read the document to him. (R. 95, p. 44) On cross-examination and over defense objection, he testified as to his normal practice as follows:

> "Well, I guess it really depends. My normal practice, I can tell you what I do now is, when I receive discovery and an offer letter, I will make a copy of that, all the documentation, and hand that to my client. Whether I did that in this case or not, I honestly don't know." (R. 95, p. 46)

Attorney Atinsky next took the witness stand. He testified that he has been a

lawyer in the state of Wisconsin for 50 years. (R. 95, p. 48) When shown the offer letter, he testified that it looked familiar but that he couldn't positively say that he saw the particular letter before taking the witness stand on that date. (R. 95, p. 49) He further testified that he couldn't recall if he ever actually gave a copy of the letter to Phillips or read the contents of the letter to Phillips during his representation of him. (R. 95, p. 50) Lastly, he testified that he could not recall providing Phillips with the information contained in this letter during his representation of him. (R. 95, p. 50) On cross-examination by the State's attorney, the colloquy proceeded as follows (R. 95, pp. 50-51):

Q: Mr. Atinsky, if you received a copy of the offer letter, would you have given it to a defendant?

A: My practice normally would have been, I would have read it to the defendant and gone over it with him. But as I indicated, somehow, I don't recall whether I did or I didn't. But that would have been my practice.

Q: Is there any reason to think that this case is any different in terms of your communication and your ability to communicate with the defendant from any other case that you ——

Defense: Objection to this case as it relates to any other case.

Judge: I am going to allow it. If the witness can answer, he may.

A: There would have been nothing in particular about this case. But I just want to make it clear that I don't have an independent recollection of it.

Q: Is there any reason, if you received an offer letter, is there any reason why you would not give it to a client or read it to a client?

A: Really, none that I can think of.

The offer letter and Affidavit of Phillips was moved into evidence by the defense and accepted into evidence by the Court. (R. 95, p. 52) After hearing the testimony and arguments of counsel, Judge Pocan made a finding that the defense had failed to meet its burden of proof to show that the offer letter was not conveyed to Phillips by his either of his previous trial attorneys. (R. 95, p. 57) The Court stated that "both of the parties did testify that it was their general practice and there was no reason to think that they would not have done it. So, I think there is some indication here that the offer letter was conveyed." (R. 95, p. 57) The Court went on to state that even if it had determined that both defense counsel were deficient in their respective representations of Phillips that he "falls very far short of demonstrating prejudice in this case." (R. 95, p. 57). In so ruling, Judge Pocan stated: "I think that the defendant's testimony that he certainly would have pled guilty had he known about the offer, I think is lacking in credibility" (R. 95, p. 59) and characterized Phillips' testimony by stating "I think that what we have here is a very clear case of buyer's remorse." (R. 95, p. 60)

The Court denied the postconviction motion and concluded in its written Order that "(i) trial counsel did not fail to convey the State's plea offer to the defendant, and the defendant would not have been prejudiced if trial counsel had failed to convey the State's plea offer." (R. 100)

The United States Supreme Court has recognized that due to the vital role counsel plays to ensure that a trial is fair, "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d 763 (1970). Whether counsel's assistance was ineffective is a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674 (1984). The trial court's determinations of what the parties did, or did not do, and the basis for the attorney's challenged conduct are factual and will ordinarily be upheld unless they are against the great weight and clear preponderance of the evidence. *State v. Felton*, 110 Wis.2d 485, 504, 329 N.W.2d 161 (1983). "The ultimate conclusion of whether the attorney's conduct resulted in a violation of the right to effective assistance of counsel is a question of law," and deference to the trial court's determination is not appropriate. *Felton*, 110 Wis.2d at 505, 329 N.W.2d 161.

To determine prejudice, the *Strickland* court settled on the following test: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. 668, 104 S.Ct. at 2068. Moreover, "The decision to reject a plea bargain offer and plead not guilty is a decision for the accused to make. It would seem that, in the ordinary case, a failure of counsel to advise his client of a plea bargain would constitute a gross deviation from accepted professional standards." *State v. Ludwig*, 124 Wis. 2d 600, 611, 369 N.W.2d 722 (1985); quoting *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3rd Cir.1982). Accordingly, in Wisconsin, the failure by defense counsel to convey a plea offer to the client is both deficient performance and prejudicial as a matter of law.

First, the trial court's finding of a fact that the defense had failed to meet its burden of proof to show that the offer letter was not conveyed to Phillips by either of his previous trial attorneys is against the great weight and clear preponderance of the evidence (the standard as set forth above in *Felton*). This Court need only look to the four corners of the transcript from the *Machner* hearing. The evidence at the hearing is plain and clear. Phillips testified that he had never seen the offer letter by both attorneys and would have accepted it had it been conveyed to him. He gave valid reasons under oath as to specifically why he would have accepted the offer. Neither of his former attorneys disputed Phillips' testimony. Each testified that they had no independent recollection of having shown the letter to Phillips or read the contents of the letter to him. The only testimony in that regard was related to each attorney's

general practice with no testimony that their general practice was actually followed with this particular client.

Given the above facts, the only rational way to interpret this evidence is to make a finding that Phillips was not conveyed the offer prior to his trial by either of his trial attorneys. The finding by the trial court that the offer was conveyed does not fit with the clear evidence produced at the hearing. More importantly, the Court's finding was "I think there is some indication here that the offer letter was conveyed." (R. 95, p. 57) Although this may be true, it was based solely upon the testimony from both attorneys as to their normal practice with no direct evidence that the normal practice was followed in this situation by either of them. Accordingly, this Court should conclude that such finding that the offer was conveyed to Phillips is against the great weight and clear preponderance of the evidence produced at the hearing.

Assuming this Court agrees with the above analysis, it then follows that Phillips has met his burden of proof on both prongs of *Strickland*. By all accounts, he denied he was shown the letter prior to the start of trial, and no direct evidence was offered to dispute that fact. Further, the trial court's finding of a lack of prejudice is against the law in this state. It is well settled from the *Strickland* and *Ludwig* cases that prejudice applies if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Here, the uncontroverted testimony is that no trial would have been held, and Phillips would

have accepted the plea offer had it been made known to him prior to trial. That fact presents a reasonable probability that Counts 4 – 6 would have been dismissed by the State leaving much less exposure time and a better chance at a reasonable sentence to be obtained by Phillips.

Accordingly, the case should be reversed and remanded so that Phillips may now take advantage of the plea offer previously extended by the State and set forth herein. Alternatively, he requests that this Court grant him a new trial.

C. Phillips was entitled to an evidentiary hearing on the remaining issues raised with the trial court

Phillips requested an evidentiary hearing with respect to several other claims of ineffective assistance of counsel. Those remaining claims were denied without a hearing. The only statement provided by the Court was: "The court agrees with the State's analysis of the balance of the claims and his resentencing claim and adopts the State's brief as its decision on those issues." (R. 70, p. 2) Phillips claims that the trial court committed error by denying the claims without such a hearing.

The specific standard of review on this issue was set forth in *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis.2d 568, 682 N.W.2d 433, as follows:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. *[State v.] Bentley*, 201 Wis.2d [303,] 309-10 [548 N.W.2d 50 (1996)]. If the motion raises such facts, the circuit court must hold an evidentiary hearing. *Id*. at 310[, 548 N.W.2d 50]; *Nelson v. State*, 54 Wis.2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively

> demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *Bentley*, 201 Wis.2d at 310-11, 548 N.W.2d 50; Nelson, 54 Wis.2d at 497-98, 195 N.W.2d 629. We require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." *Nelson*, 54 Wis.2d at 498, 195 N.W.2d 629. See *Bentley*, 201 Wis.2d at 318-19, 548 N.W.2d 50 (quoting the same). We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard. *In re the Commitment of Franklin*, 2004 WI 38, ¶ 6, 270 Wis.2d 271, 677 N.W.2d 276; Bentley, 201 Wis.2d at 311, 548 N.W.2d 50.

Phillips' position is that the Judge Yamahiro committed error in not granting a hearing on the remaining issues. It is further his position that his postconviction motion contained an historical basis setting forth material facts that allowed the reviewing court to meaningfully assess his claims, as required by law. *Allen* at ¶¶ 18, 21-22. The *Allen* court contrasted mere conclusory allegations from assertions of those material facts, *Id*., ¶¶ 21, 29, which the court defined as "[a] fact that is significant or essential to the issue or matter at hand." Id., ¶ 22. The court proposed that a postconviction motion will be sufficient if it alleges within the four corners of the document itself "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." Id., ¶ 23. In order for this Court to assess whether Phillips' position is correct, he needs to simply restate these arguments in this forum for such an assessment to be made by this tribunal.

1. <u>Daubert Issue</u>

This issue is being addressed with full understanding that it will become a moot point should this Court find that the trial court erred in not allowing Dr. Nichols

to testify as previously argued above.

Pursuant to sec. 948.22(6), Wis. Stats., it is an affirmative defense to a charge of failure to pay child support if one does not have the ability, or means necessary, to pay this support. The statute provides that a person who raises this affirmative defense has the burden of proving it by a preponderance of the evidence.

Knowing the above, on January 4, 2012, trial counsel filed a CV of Dr. Nichols and a disability report from December 12, 2008. (R. 15) The reason for these filings was obviously to put the court on notice of his expert with a synopsis of his testimony (as required by statute). However, the main purpose of the filings was to assist in preserving testimony to nail down the defense that Phillips was unemployable during the time periods at issue in the 6 counts in order to convince the jury that he did not have the ability to provide support. This would have met the affirmative defense language under the statute.

The problem was that defense counsel either did not read the CV or the disability report before filing it or did not understand what was contained therein. The CV did not list Dr. Nichols as a medical doctor. More importantly, the disability report did not specifically state that Phillips was unemployable. Accordingly, the Court found that the proposed testimony of Dr. Nichols lacked sufficient foundation.

Defense counsel did not follow up with updating the CV or obtaining an updated disability report from Dr. Nichols at trial. It is clear from the record that each

of these could have been accomplished before trial. Also, it came out on the record before he testified that if questioned regarding Phillips' employability that he would have opined that in his opinion to a reasonable degree of medical certainty, Bradley Phillips was not employable during the time periods set forth in each of the 6 counts. (R. 86, p. 5) He was, however, not allowed to provide such testimony due to the lack of foundation laid in the expert witness notification documents. *Id*.

Given the above, defense counsel's performance was deficient. It was prejudicial as the jury was not able to hear crucial testimony on the affirmative defense of "inability to pay support." This obviously was weighing heavily on the jurors' minds as they came back with a variety of questions on this issue. (R. 91, pp. 92-93) At that portion of the transcript, the following was placed on the record by the trial court:

> "The last side bar we had was with the questions that were asked by one of the jurors for Dr. Nichols. Those questions read as follows: *Based upon your evaluation, do you feel Mr. Phillips is employable?* If so, for what types of jobs? What was your recommendation to the SSA? On what criteria does SS base their decision?
>
> Some of these questions he's not qualified to answer. His - - *Since his report didn't say whether or not he thought Mr. Phillips was employable and if so for what types of jobs, he was not allowed to answer those questions.* So I would not allow and I would not ask those questions." (emphasis supplied)

Accordingly, the trial court did not allow Dr. Nichols to opine as to Phillips' employability even though one of the jurors specifically wanted to know the answer to this question. Afterall, this went directly to the core of the affirmative defense as to whether Phillips had the ability to pay support. The jurors never got to hear this

evidence simply because defense counsel was deficient in not providing proper documentation to the court prior to trial. It was thus prejudicial in that Phillips was denied the ability to put forth relevant evidence as to his affirmative defense – evidence that was clearly available and would have greatly assisted such defense.

Concededly, trial counsel's strategic decisions will be upheld as long as they were founded on a knowledge of the law and the facts. *State v. Felton,* 110 Wis.2d 485, 502, 329 N.W.2d 161 (1983). A trial attorney may select a particular strategy from the available alternatives and need not undermine the chosen strategy by presenting inconsistent alternatives. *State v. Hubanks*, 173 Wis.2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992). In this case, however, counsel did not follow through with the selected strategy in that he clearly did not provide the trial court with necessary foundational information that was in existence and would have greatly helped his client as to the statutory affirmative defense.

2. <u>Lack of Objections</u>

There were several instances at the trial where the State elicited objectional testimony that went without objection by defense counsel. The testimony elicited was damaging and prejudicial to Phillips. The cumulative effect of the lack of objections was clear error, and not harmless, as it painted Phillips in an improper light to the jury. In essence, the jurors heard testimony that improperly damaged the character and reputation of Phillips.

The first instance occurred when Ms. Thorsen testified on direct examination that several members of Phillips' family asked her to lie to his attorneys and in court regarding injuries he sustained in a car accident in 1989. (R.87, p. 101-102) At that point in the trial, Ms. Thorsen was questioned at length by the prosecutor about a time when Phillips was in a car accident back in 1989. She stated that Phillips and his family members requested that she testify in court about him having memory loss and problems with daily tasks. She said that she didn't testify to these facts and that his family members requested that she lie in court about these matters so that he could receive a settlement from the car accident.

During this testimony, there was no objection by defense counsel. This testimony was clearly inadmissible under sec. 904.01, Wis. Stats., as not being relevant to any material issue of fact. Even if relevant, it was highly prejudicial and its probative value was substantially outweighed by the danger of unfair prejudice under sec. 904.03, Wis. Stats. It was inadmissible character evidence under sec. 904.04(2) as the State had not included this incident in its pretrial motion on the admissibility of other acts evidence.

The second instance occurred when Ms. Thorsen testified on direct examination that the relationship with Phillips changed after she got pregnant and that his parents took her into a back room once they found out and requested that she have an abortion. (R. 87, pp. 102-103) When asked by the prosecutor if her relationship

with Phillips changed after she got pregnant, her precise testimony she gave was as follows:

> "Thanks. Thank you. In 1992, when we told his parents that I was pregnant, they took me back into his room with him there as well and requested that I have an abortion. They did not want me to have - - They did not want me to have Kailynn, and I said that that would not be happening. That I would be having her."

This testimony was not objected to by defense counsel. On its face, this testimony gave the jury the impression that Phillips did not want her to have this child. The inference to be drawn from this testimony in the minds of the jury was that he was not going to care for or provide for a child for whom he did not want her to have in the first place.

This testimony was also inadmissible under sec. 904.01, Wis. Stats., as not being relevant to any material issue of fact. Even if relevant, it was highly prejudicial and its probative value was substantially outweighed by the danger of unfair prejudice under sec. 904.03, Wis. Stats. It was inadmissible character evidence under sec. 904.04(2) as the State had also not included this incident in its pretrial motion on the admissibility of other acts evidence.

The third incident was when Sergeant Brian Wall testified on direct examination of prior instances of conduct where he had come across Phillips several times in the past when he was intoxicated, and he was also arrested on one occasion where he was so intoxicated he couldn't even stand for the booking procedure and had to be released to a family member. (R.88, p. 23) No objection was made to this

testimony by defense counsel. What possible relevance was this testimony to any determinable issue of material fact in this case? The answer is that there was none. More importantly, the testimony was inadmissible under sec. 904.03 as being highly prejudicial and was also inadmissible character evidence under sec. 904.04(2). This incident was also not raised in a pretrial motion by the State.

The fourth incident occurred when Sergeant Brian Wall further testified on redirect examination that there were prior instances of conduct where Phillips was the subject of a criminal investigation for damage to property, and he was detained by officers as a result of a possible fleeing an officer scenario. (R. 88, p. 29) There was no objection to this testimony by defense counsel. This testimony was also inadmissible under sec. 904.01, Wis. Stats., as not being relevant to any material issue of fact. Even if relevant, it was highly prejudicial and its probative value was substantially outweighed by the danger of unfair prejudice under sec. 904.03, Wis. Stats. It was inadmissible character evidence under sec. 904.04(2) as the State had also not included this incident in its pretrial motion on the admissibility of other acts evidence.

The last major instance occurred where, on cross-examination of Phillips, the prosecutor questioned him at length about whether or not any of his attorneys on any of his prior Failure to Pay Support prosecutions had ever raised a defense of him having an inability to work. (R. 88, pp. 92-93) This entire colloquy, though irrelevant

and damaging, went without objection from defense counsel. The question and answer session went as follows:

Q: Is it your testimony that at no point during the criminal cases did any of your lawyers raise a defense of inability to work?

A: I don't understand the question.

Q: Did either of your lawyers in criminal court ever say, hey, Bradley Phillips, he can't work?

A: No, not that I know of, no.

Q: Did they ever say, hey, this guy may be brain damaged?

A: No.

Q: Did they ever say, there is something wrong with this guy?

A: No.

Q: Did they ever say anything to that effect at all?

A: No.

Q: Why do you think that is?

A: Because none of us knew it at that time.

How is anything contained in this colloquy relevant to any material issue of fact? More poignantly, how is this testimony not overly prejudicial to Phillips? Lastly, how could defense counsel sit idly by and allow this testimony to be ascertained in front of the jury without, at a minimum, objecting on grounds of

relevance and improper character evidence? It is as if the defendant were on the witness stand without having any legal counsel present.

The sum total of defense counsel's lack of objections to the evidence set forth in this section of the brief caused the defendant to be prejudiced from having a fair trial. The jury clearly heard prejudicial and harmful evidence that never should have been presented to it. Defense counsel sat idly by while evidence came into this trial that otherwise should not have been admitted. A simple objection to all of the evidence documented herein should have, and most likely would have, been sustained by the trial court judge.

3. **Failure to Provide an Offer of Proof as to Witness Testimony**

On the second day of trial, defense counsel informed the trial court that it would be calling a witness in its case-in-chief by the name of Brandon Haley. The State objected on grounds that it believed Mr. Haley would be rendering cumulative testimony at the trial and that the witness was the victim in a disorderly conduct prosecution against Phillips. Once informed that the prior incident took place in 2011, the trial court stated that he was "not going to allow the young man to testify." (R. 89, pp. 64-65) Defense counsel requested that he be allowed to testify, and it was refused by the trial court. The transcript indicates the following exchange:

Defense Counsel: Your Honor, give me the leeway to have him here and then see.

The Court: No. I'm not going to even subject him to coming in here and giving me an offer of proof so that he has to face this - - this gentleman.

Defense Counsel: Okay. All right.

An offer of proof by statement of counsel or in question and answer form (sec. 901.03(1)(b), Stats.) must be recorded (sec. 901.03(2), Stats.) out of the hearing of the jury whenever practicable (sec. 901.03(3), Stats.)." *Milenkovic v. State*, 86 Wis.2d 272, 284, 272 N.W.2d 320, 326 (Ct. App. 1978). "The offer of proof need not be stated with complete precision or in unnecessary detail but it should state an evidentiary hypothesis underpinned by a sufficient statement of facts, to warrant the conclusion or inference that the trier of fact is urged to adopt." *Id*. Generally speaking, Brandon Haley was going to be called to testify the activities of helping Phillips at his home when his mother was not there and how he assisted in taking care of Phillips at his home. This was made known to the trial court. (R. 89, p. 62) However, counsel never specifically informed the court of the activities that Mr. Haley assisted with at Phillips' residence.

The testimony of Mr. Haley would have provided the jury with some evidence as to how disabled Phillips was on a daily basis. Testimony that included assisting him making meals, getting dressed and getting from one place to another. This specific testimony was relevant to the issue of whether Phillips had the ability to work and thus pay child support. Obviously, if Phillips was unable to perform routine tasks

at home on a daily basis, then the jury would be able to infer that his claim of being disabled and not having the ability to work was credible. Unfortunately, defense counsel did not provide the court with the proper offer of proof for which to allow it to make an informed and rational decision as to this witness' testimony.

4. **Error as to a Witness' Prior Convictions**

Jeffrey Phillips was called as a witness on behalf of the defense. Prior to the trial, it was agreed that pursuant to sec. 906.09, Wis. Stats., if called as a witness, that Mr. Phillips would testify that he had 5 prior criminal convictions. (R. 88, p. 10) The Court stated that it didn't care if defense counsel used leading questions as to that line of questioning. So long as the witness testified to having 5 priors, the substance of these convictions would not be made known to the jury.

When called as a witness, defense counsel asked the following question of this witness: Isn't it a fact that you have been convicted four times of a crime? The answer provided by the witness was "yes." (R. 90, p. 25) Immediately on cross-examination, the prosecutor questioned the witness about the substance of his prior convictions for Unlawful Use of a Telephone, Operating While Intoxicated (2nd Offense), Possession of Marijuana, Disorderly Conduct and Operating While Intoxicated (3rd Offense). To make matters even worse, the prosecutor asked the following question: "So, would you agree that you have five prior convictions not four?" The witness also answered that question 'yes'. (R. 90, pp. 26-28).

There is no excuse for what happened at that stage of the trial. Defense counsel called a witness to the stand and blatantly misrepresented his prior record in a leading question. Only one of two things happened at that point in the trial – counsel made a mistake or counsel was simply unprepared. Either way, the error created a large credibility problem for the witness. The jury was not only privy to the substance of the witness' 5 prior criminal convictions, but the jury was made to believe that defense counsel tried to hide at least one conviction from them. The inference is that defense counsel was not being completely honest with the jury.

The error is clear on its face, and the prejudice to Phillips is abundant. A witness called to the stand to assist his defense turned out to be marked by the prosecution as a liar. All of this because of a blatant error by defense counsel. But for the error, none of this becomes an issue for the jury.

Based upon all of the alleged errors set forth above, Phillips requests that this Court reverse and remand the matter for an evidentiary *Machner* hearing on each of these issues. The basis for this request is the trial court judge erroneously exercised his discretion in not granting such a hearing. The decision that the Court was "adopting the State's brief" as its written order truly makes a mockery of the facts and arguments put forth by Phillips in his postconviction filing.

III. PHILLIPS IS ENTITLED TO RESENTENCING

A. Standard of Review

Although Wis. Stat. (Rule) § 809.30(2) and Wis. Stat. § 973.19 establish alternative methods for a defendant to seek sentence modification, both statutes require a defendant to file a postconviction motion for sentence modification in the circuit court before filing an appeal. See Wis. Stat. (Rule) § 809.30(2)(h) and § 973.19(1); see also *State v. Norwood*, 161 Wis.2d 676, 681, 468 N.W.2d 741 (Ct.App.1991). Both statutes embody the policy that it is better to give the circuit court, which is familiar with the facts and issues, an opportunity to correct any error it has made before requiring an appellate court to expend its resources in review. See *Spannuth v. State*, 70 Wis.2d 362, 365-66, 234 N.W.2d 79 (1975); *Whitmore v. State*, 56 Wis.2d 706, 717, 203 N.W.2d 56 (1973); *State v. Lynch*, 105 Wis.2d 164, 167, 312 N.W.2d 871 (Ct.App.1981) (explaining that this policy, recognized in *Spannuth*, survived the adoption of the current rules of appellate procedure).

Phillips did file such a motion with the trial court, and it was denied on the basis of arguments put forth by the State in its Response memorandum. (R. 70, p. 2) This Court's standard of review when reviewing a criminal sentence is whether or not the trial court erroneously exercised its discretion. *State v. Wagner*, 191 Wis.2d 322, 332, 528 N.W.2d 85, 89 (Ct.App.1995). There is a strong policy against an appellate court interfering with a trial court's sentencing determination and, indeed, an appellate

court must presume that the trial court acted reasonably. *State v. Thompson*, 146 Wis.2d 554, 564, 431 N.W.2d 716, 720 (Ct.App.1988).

B. Argument

At sentencing on May 25, 2012, Mr. Phillips was given 6 consecutive sentences of 1 year initial confinement and 2 years extended supervision for a total sentence of 6 years initial confinement followed by 12 years extended supervision. (R. 94, pp. 70-71) The State requested that Phillips "be sentenced to a total of 7 - 9 years of initial confinement and as much extended supervision as the Court sees fit." (R. 94, p. 19*)* Defense counsel requested that the trial court follow the Presentence Report recommendation of a withheld sentence with 1.5 years initial confinement and 2 extended supervision concurrent on all 6 counts. (R. 94, pp. 50-52)

The defendant is entitled to resentencing because the sentence actually imposed was based on inaccurate information. Sentencing is left to the discretion of the trial court. *State v. Harris*, 119 Wis.2d 612, 622, 350 N.W.2d 633 (1984). However, a defendant has a due process right to a sentence based on true and correct information. *State v. Borrell*, 167 Wis.2d 749, 772, 482 N.W.2d 883 (1992). Further, the court violated the defendant's due process rights when it sentenced him based on conclusions unsupported by facts of record. The remedy is resentencing. See *State v. Anderson*, 222 Wis.2d 403, 412, 482 N.W.2d 883 (Ct. App. 1992).

At sentencing, the trial court judge stated the following:

"Besides that restitution amount, I still have to punish you for what you haven't done, Mr. Phillips, since 2005. I have to send a message to you and *every other deadbeat father out there, because that's what you are*." (emphasis supplied). (R. 94, p. 56)

To call this gentleman a "deadbeat father" on the record was uncalled for, unwarranted and unprofessional of the trial court. Yes, the jury convicted Phillips of the 6 counts. However, in his allocution speech to the court, Phillips made it clear that he would like to work and pay restitution. He stated that he wanted to be independent one day and that he never intentionally didn't pay support. He poignantly stated that he simply didn't have the money. (R. 94, pp. 52-53) For the court to call him a deadbeat dad simply did not comport with his statements to the court or the true facts of the case against him.

The trial court also commented on the $68,000 minor settlement that he received in 1993. His defense attorney made it clear on the record that he did not receive this money, that it went to his parents and that he did not control any of these funds. (R. 94, p. 35) There was no statement or information to the contrary that came out at the sentencing hearing. However, the court turned these facts against him at the hearing when the judge stated:

> "I don't know what happened to the $68,000. It certainly wasn't turned over to you when you turned eighteen, it wasn't turned over to [you] when you were living with Ms. Thorsen, when you had Kailynn, when you separated from her. It simply wasn't done. And your family should have, shame on you. And you were never declared incompetent. You had the right this money, and you chose not to challenge

your family." (R. 94, p. 58)

Clearly, the trial court drew inappropriate conclusions as to the $68,000 settlement. The court opined that Phillips should have gone to his family and demanded this money from them; that he should have made certain to get this money and pay support out of the money. (R. 94, p. 58) However, there was no indication at the time of sentencing that any of this money was still in existence at the time that he was entitled to obtain it. For all anybody knew, since the money was given to his family, it may well have been inappropriately spent by them when he was entitled to take control of the money. Shame on his family for acting in such fashion. However, it was error for the trial court to personally hold Phillips accountable for the possible deceitful and wrongful actions of his immediate family members.

Lastly, the trial court stated that Phillips lied on the witness stand when he testified that he told the jury that he was the one that initiated the Social Security payments that were made to his daughter. (R. 94, p. 62) Defense counsel informed the court that such a statement was not supported by the facts. (R. 94, pp. 62-63) He specifically informed the trial court that Phillips indeed testified that he notified Social Security that he had a child and that's all. *Id.* This was a truthful statement by defense counsel based upon Phillips' testimony at trial. Even though it was a truthful statement, the trial court stated: "I characterize it as a lie, at the least it certainly was an attempt to mislead the jury." (R. 94, p. 63)

The trial court found that Phillips lied, or at a minimum, misled the jury at trial. This was not a correct interpretation of the facts. Factually, Phillips went to the Social Security Administration and told them that he had a child. (R. 89, p. 5) According to Phillips' trial testimony, the social security administration then considered this information in deciding on whether certain payments would be made to the minor child. (R. 89, pp. 10-11) It is abundantly clear from the record that Phillips' testimony under oath in this regard was a truthful statement. For the trial court to characterize it as otherwise was based upon no credible corroborating evidence on the record. What is evident is that the trial court took the testimony provided by Phillips at trial and inaccurately used it as a sword against him at his sentencing. When a sentencing is based upon inaccurate information, the defendant is entitled to be resentenced. See *State v. Borrell* at 772.

Accordingly, given the errors committed by the trial court as set forth herein, Phillips is entitled to be resentenced.

CONCLUSION

Based upon the arguments contained in this brief and all attachments, Phillips moves the Court to reverse and remand for either a new trial, the ability to accept the plea offer, a *Machner* hearing, or alternatively, for resentencing.

Dated this 30th day of January, 2015

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BRIEF CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 10,145 words. This brief was prepared using Microsoft Word word processing software. The length of the brief was obtained by use of the Word Count function of the software.

Dated this 30th day of January, 2015

_____

Attorney Christopher J. Cherella

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 sec. 809.19(12), Wis. Stats. I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 30th day of January, 2015

_____

Attorney Christopher J. Cherella

APPENDIX CERTIFICATION

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 s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) 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 30th day of January, 2015

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Attorney Christopher J. Cherella

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 14AP2519-CR

BRADLEY WAYNE PHILLIPS,

Defendant-Appellant.

APPEAL FROM ORDERS OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS P. CIMPL, GLENN H. YAMAHIRO AND WILLIAM S. POCAN, PRESIDING

DEFENDANT-APPELLANT'S APPENDIX

H. Post-*Machner* hearing Order dated October 15, 2014