STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP2519-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRADLEY WAYNE PHILLIPS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDERS OF THE CIRCUIT COURT FOR MILWAUKEE COUNTY, DENNIS P. CIMPL, GLENN H. YAMAHIRO AND WILLIAM S. POCAN, JUDGES

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

ARGUMENT

I. Phillips has not shown that there was anything wrong with the circuit court's reason for not allowing his expert witness to give an opinion about whether he was employable.

This appeal does not present any issue involving the so-called "*Daubert*" rule, as codified in Wis. Stat. § 907.02(1) (2013-14).

The circuit court did not exclude any expert testimony or opinion of Dr. David Nichols, a psychologist who examined the defendant-appellant, Bradley Wayne Phillips, because Dr. Nichols' testimony was not based on sufficient facts or data, or because his testimony was not the product of reliable principles and methods, or because he did not apply the principles and methods reliably to the facts of the case. *See* Wis. Stat. § 907.02(1).

To the contrary, in making its evidentiary ruling at the start of the trial the circuit court expressly stated, "I am not going to prohibit [Dr. Nichols] from testifying under Daubert. I think that his methods are sound, he does what every other psychologist does" (86:10-11, A-Ap:F8-9).

As the court kept repeating in response to defense counsel's continuing arguments, the only evidence that was excluded was Dr. Nichols' opinion that Phillips was not employable (86:5-11, A-Ap:F3-9). And the only reason this opinion was excluded was that it was not included in the report of Dr. Nichols that was provided to the state during discovery, so that the prosecutor had no notice that Dr. Nichols would give any such opinion at the trial (86:5-11, A-Ap:F3-9). This single opinion was excluded exclusively because of the failure to comply with the court's discovery order (86:8, A-Ap:F6).

Following Dr. Nichols' testimony, the jury submitted questions inquiring whether Nichols felt that Phillips was employable and what Nichols recommended to the Social Security Administration regarding Phillips' employability (91:92-93).

The court did not allow these questions to be asked because Dr. Nichols' report did not state whether or not he thought Phillips was employable (91:93). The court said that Dr. Nichols would have been permitted to give his opinion on whether Phillips was employable if this opinion had been stated in his report (91:95-96).

Even though it is absolutely clear from the record that the circuit court did not exclude Dr. Nichols' opinion regarding Phillips' employability because of any "*Daubert*" defect, but only because of a discovery deficiency, Phillips does not address the question of whether the court might have erred in excluding this opinion because of his failure to provide adequate discovery.

Arguments not refuted are deemed admitted. *State v. Kramer*, 2006 WI App 133, ¶ 14, 294 Wis. 2d 780, 720 N.W.2d 459; *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). The same rule holds true when an appellant ignores the ground on which the circuit court ruled. *DNR v. Bldg. and Structures Encroaching on Lake Noquebay Wildlife Area*, 2011 WI App 119, ¶ 11, 336 Wis. 2d 642, 803 N.W.2d 86; *Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). So by failing to address the circuit court's rationale, Phillips has conceded the validity of the court's decision. *See Bldg. and Structures Encroaching on Lake Noquebay Wildlife Area*, 336 Wis. 2d 642, ¶ 11; *Schlieper*, 188 Wis. 2d at 322.

In any event, a reviewing court will uphold a circuit court's discretionary decision to exclude evidence as long as that court examined the facts of record, applied a proper legal standard, and rationally reached a reasonable conclusion. *Spanbauer v. DOT*, 2009 WI App 83, ¶ 6, 320 Wis. 2d 242, 769 N.W.2d 137; *Martindale v. Ripp*, 2001 WI 113, ¶ 28, 246 Wis. 2d 67, 629 N.W.2d 698.

Phillips does not argue that the relevant facts of record, i.e., the discovery he provided regarding his expert witness, were not properly examined by the circuit court, or that the legal standard actually applied by the circuit court to exclude an opinion of his expert, i.e., deficient discovery, was improper in any way, or that the circuit court's conclusion, that his failure to provide adequate discovery should preclude him from presenting evidence of which the state did not have proper notice, was unreasonable.

This court should not make those arguments for Phillips.

A court cannot serve as both advocate and adjudicator to develop and decide claims that are not adequately presented by a party. *Cemetery Serv., Inc. v. DRL*, 221 Wis. 2d 817, 830-31, 586 N.W.2d 191 (Ct. App. 1998); *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

So when a party's arguments fail to cite factual or legal authority, or to develop themes reflecting legal reasoning, but rely instead only on general assertions of error, the court may decline to consider them. *State v. West*, 179 Wis. 2d 182, 195-96, 507 N.W.2d 343 (Ct. App. 1993), *aff'd*, 185 Wis. 2d 68, 517 N.W.2d 482 (1994); *Pettit*, 171 Wis. 2d at 646-47; *State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980). An issue not briefed or argued on appeal is abandoned. *State v. Pozo*, 2002 WI App 279, ¶ 11, 258 Wis. 2d 796, 654 N.W.2d 12; *Reiman*

Assoc., Inc. v. R/A Advertising, Inc., 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

Since Phillips has not argued that the circuit court erroneously excluded any expert opinion about his employability because of his failure to provide adequate discovery, this court should affirm the circuit court's discretionary decision to exclude the evidence in the absence of any reason to believe it was an erroneous exercise of discretion.

II. Phillips failed to establish that the attorneys who represented him in the proceedings leading to his conviction were ineffective.

A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305; *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719; *State v. Taylor*, 2004 WI App 81, ¶ 14, 272 Wis. 2d 642, 679 N.W.2d 893.

To prove that his attorney's performance was deficient the defendant must overcome a strong presumption that counsel acted reasonably, and establish that counsel's representation fell below an objective standard of reasonableness. *State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115; *Thiel*, 264 Wis. 2d 571, ¶ 19; *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986). The reasonableness of an attorney's acts is judged deferentially on the facts of the particular case viewed from counsel's contemporary

perspective to eliminate the distortion of hindsight. *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583; *Johnson*, 133 Wis. 2d at 217.

Deficient performance is prejudicial when it is so reasonably probable that the result of the proceeding would have been different without the error that a court cannot have confidence in the reliability of the existing outcome. *Allen*, 274 Wis. 2d 568, ¶ 26; *Thiel*, 264 Wis. 2d 571, ¶ 20.

It is not enough for a defendant to speculate on what the result of the proceeding might have been if his attorney had not erred. *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999); *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994); *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). When the defendant alleges that his attorney was ineffective for failing to take some action, he must show with specificity what that action would have accomplished if it had been taken, and how its accomplishment would have probably altered the result of the proceeding. *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477; *Flynn*, 190 Wis. 2d at 48.

On appeal the circuit court's findings of fact will be upheld unless they are clearly erroneous. *State v. Balliette*, 2011 WI 79, ¶ 19, 336 Wis. 2d 358, 805 N.W.2d 334; *State ex rel. Flores v. State*, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). *See Thiel*, 264 Wis. 2d 571, ¶ 23. Findings are clearly erroneous when they are contrary to the great weight and clear preponderance of the credible evidence supporting a different finding. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983).

Whether counsel's performance was deficient and/or prejudicial to the defense are questions of law which are determined independently. *Thiel*, 264 Wis. 2d 571, ¶ 23.

A. Phillips failed to prove that his attorneys were ineffective for failing to communicate a plea offer to him.

1. Phillips failed to prove that his attorneys performed deficiently by not telling him about the plea offer.

Again, Phillips struthiously ignores the basis for the circuit court's ruling, this time on his claim that his attorneys were ineffective for failing to communicate a plea offer to him. He completely ignores the fact that the court found his testimony on this issue to be incredible.

At the postconviction *Machner* hearing, Phillips testified that neither of the attorneys who represented him at the time told him about a plea offer made by the state (95:14-16).

Neither of the attorneys could specifically remember whether they told Phillips about the offer, but both stated that their normal practice would have been to advise a client about such an offer (95:44-46, 49-51).

Despite Phillips' testimony, the circuit court found that no one really remembered what happened (95:69). The court said it had no reason to believe that Phillips would remember not being told about the plea offer (95:69).

This was a finding of credibility. If there was no reason to believe that Phillips remembered not being told about the plea offer then there was no reason to believe that he was not told about the plea offer.

A court's rejection of testimony as incredible will not be questioned unless the finding was based on caprice, an erroneous exercise of discretion or an error of law. *Johnson v.*

Merta, 95 Wis. 2d 141, 152, 289 N.W.2d 813 (1980); *Sensenbrenner v. Sensenbrenner*, 89 Wis. 2d 677, 700-01, 278 N.W.2d 887 (1979); *Posnanski v. City of West Allis*, 61 Wis. 2d 461, 465-66, 213 N.W.2d 51 (1973).

Here, the court had good reasons to reject Phillips' testimony that something did not happen early in the proceedings because he consistently claimed he had serious memory problems, including an inability to remember things that did happen later in the proceedings, and because it was hard to believe that attorneys would not follow their normal practice of advising a client about a plea offer (95:68-70).

There is reason to doubt that a person who does not remember anything well and does not remember things that did happen during the criminal proceedings would remember that something did not happen.

Moreover, failure to tell a defendant about a plea offer would have been a gross deviation from accepted professional standards, *State v. Ludwig*, 124 Wis. 2d 600, 611, 369 N.W.2d 722 (1985), contrary to the presumption that attorneys act reasonably. And since evidence of a routine practice is relevant to prove that a person's conduct on a particular occasion was in conformity with this practice, Wis. Stat. § 904.06 (2013-14), the court had evidence, contrary to Phillips's contention, that his attorneys did perform professionally by telling him about the plea offer.

Testimony that is not believed cannot prove facts and therefore cannot meet the defendant's burden of proof. *State v. Kivioja*, 225 Wis. 2d 271, 289-92, 592 N.W.2d 220 (1999); *State v. Canedy*, 161 Wis. 2d 565, 585-86, 469 N.W.2d 163 (1991). When a defendant fails to meet his burden of proof his claim fails as a matter of law. *See State v. Ludwigson*, 212 Wis. 2d 871, 876-77, 569 N.W.2d 762 (Ct. App. 1997); *Canedy*, 161 Wis. 2d 586; *State*

v. Saternus, 127 Wis. 2d 460, 479, 381 N.W.2d 290 (1986); 9 John Henry Wigmore, Wigmore on Evidence § 2485 (Chadbourn rev. 1981). *See generally State v. Moederndorfer*, 141 Wis. 2d 823, 831, 416 N.W.2d 627 (Ct. App. 1987) (whether party has met burden of proof is matter of law).

Moreover, on appeal, there is no need to review the sufficiency of the evidence when the appellant's testimony was not believed. *Posnanski*, 61 Wis. 2d at 466. When the trier of fact makes a finding of credibility on which a finding of fact depends, the factual finding cannot be contrary to the great weight and clear preponderance of the evidence. *Gerner v. Vasby*, 75 Wis. 2d 660, 664, 250 N.W.2d 319 (1977).

Because Phillips' contentions about his attorneys' actions were not found to be credible, Phillips failed to prove that his attorneys performed deficiently.

2. Phillips failed to prove he would have been prejudiced even if his attorneys had failed to tell him about the plea offer.

Phillips testified at the postconviction *Machner* hearing that he would have accepted the plea offer if he had known about it (95:16-18).

The circuit court also found this testimony incredible (95:71). The court found that Phillips had "buyer's remorse," and merely decided that the plea offer looked good in hindsight compared to the sentence he received after a trial (95:71-72).

The court also had good reasons for finding this testimony incredible.

At the postconviction hearing Phillips maintained that he was not guilty and that he had a defense to the charges, i.e., a disability that made him unable to work (95:30-31, 36, 72). He stated that he did not want to go to prison (95:37).

There is reason to doubt that a person who thought he was not guilty and had a good defense, and who did not want to go to prison, would accept a plea offer that would have required him to abandon his defense, admit his guilt, and go to prison.

If Phillips would have turned down a plea offer that had been conveyed to him he would not have been prejudiced by any failure to convey it. *State v. Winters*, 2009 WI App 48, ¶ 36, 317 Wis. 2d 401, 766 N.W.2d 754.

In the absence of any credible evidence that Phillips would have accepted the plea offer, so that the result of the proceeding would have been different, Phillips failed to prove that he would have been prejudiced even if his attorneys had failed to tell him about the offer. *See State v. Krawczyk*, 2003 WI App 6, ¶ 29, 259 Wis. 2d 843, 657 N.W.2d 77.

B. The record conclusively shows that Phillips was not prejudiced by his attorney's failure to adequately provide pretrial discovery regarding an opinion of his expert witness.

No evidentiary hearing is required on a claim of ineffective assistance if the defendant's motion does not allege facts sufficient to warrant relief, or if the record conclusively shows that the defendant is not entitled to relief. *Balliette*, 336 Wis. 2d 358, ¶ 18; *Allen*, 274 Wis. 2d 568, ¶ 15.

Even assuming that Phillips' attorney performed deficiently by failing to provide adequate pretrial discovery regarding an opinion of his expert witness that Phillips was unable to work, the record conclusively shows that Phillips was not prejudiced by this omission.

Although Dr. Nichols was prohibited from expressly stating this opinion at the trial, he said enough to clearly imply that he believed Phillips was unable to work.

Doctor Nichols testified that he examined Phillips for the purpose of determining whether Phillips was eligible for social security disability benefits (91:17-18, 58).

Doctor Nichols recounted that Phillips had a personality change as a result of a significant brain injury (91:26-27, 42). Doctor Nichols said Phillips had a memory disorder, mild depression, and borderline intellectual functioning with an IQ of 77 (91:29, 43). The doctor offered his opinion that Phillips was not capable of managing his own benefits, could not relate appropriately to supervisors or coworkers, and had difficulty carrying out simple instructions on a consistent basis (91:45).

These reasons why Phillips would have difficulty holding a job were corroborated by evidence that Phillips was actually unable to keep jobs because he was unable to follow directions or because he had personality conflicts (89:19-20).

Combined with evidence that Phillips was in fact receiving social security disability benefits (88:99; 89:47), the inevitable inference was that following his examination Dr. Nichols had come to the conclusion that Phillips was unable to work so as to make him eligible for these benefits.

In addition, two other witnesses testified that the Social Security Administration, for whom the doctor performed his

eligibility examination, had found that Phillips was disabled and unable to work (88:73-74; 89:50).

Phillips was not prejudiced by the exclusion of Dr. Nichols' testimony that he believed Phillips was unable to work because the jury was plainly made aware that Dr. Nichols had formed that opinion.

C. Phillips failed to show that his attorney was ineffective for failing to object to evidence.

1. There was no reason for Phillips' attorney to object to the testimony of the mother of Phillips' child that Phillips tried to get her to testify falsely in court that he was having problems with memory and performing daily tasks when she did not observe anything to make her think that Phillips had any mental or cognitive problems (87:101-02).

Evidence of an attempt to suborn perjury is relevant and admissible to show consciousness of guilt. *State v. Amos*, 153 Wis. 2d 257, 272-74, 450 N.W.2d 503 (Ct. App. 1989). In this case, the evidence was admissible to show that Phillips was conscious of the fact that he was not actually having such problems with memory and performance as could create a legal defense to the charge of failing to support his child.

Evidence of Phillips' attempt to suborn perjury was not inadmissible character evidence because it was admissible for a proper purpose other than to show Phillips had a bad character. *Amos*, 153 Wis. 2d at 274.

Phillips asserts that the probative value of this evidence was outweighed by the danger of unfair prejudice, but does not develop this argument, which may therefore be ignored. *West*,

179 Wis. 2d at 195-96; *Pettit*, 171 Wis. 2d at 646-47; *Shaffer*, 96 Wis. 2d at 545-46.

Phillips' assertion that the subornation evidence was not admissible because the state did not include it in its pretrial motion to admit other acts evidence may be rejected because Phillips cites no reasoning or authority to support it. *Shaffer*, 96 Wis. 2d at 545-46.

2. There was no reason for Phillips' attorney to object to the testimony of the mother of Phillips' child that Phillips did not want her to have the child and tried to get her to have an abortion (87:102-03).

It is not a crime to fail to support a child unless the failure is intentional. Wis. Stat. § 948.22(2) (2013-14). Therefore, intent not to support is an essential element of the offense that must be proved by the state to convict the defendant. Wis. JI-Criminal 2152 (2006).

Evidence that Phillips did not want the child he fathered to be born was relevant to prove that his failure to support the child after she was born was intentional. As Phillips notes in his brief, "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." Brief for Defendant-Appellant at 28. Indeed, it could be inferred that Phillips felt no obligation, and had no intent, to support a child who needed support only because of the unilateral decision of the child's mother which was contrary to his expressed desire that there should never be a viable child he would have to support.

This was not inadmissible character evidence because it was admissible for a proper purpose, i.e., to prove intent. *See Amos*, 153 Wis. 2d at 274; Wis. Stat. § 904.04(2) (2013-14).

Phillips' undeveloped assertions that the probative value of the evidence was outweighed by the danger of unfair prejudice, and that the evidence was inadmissible because it was not included in a pretrial motion to admit other acts evidence, can be ignored. *West*, 179 Wis. 2d at 195-96; *Pettit*, 171 Wis. 2d at 646-47; *Shaffer*, 96 Wis. 2d at 545-46.

3. The admissibility of the testimony of Sgt. Brian Wall that he observed Phillips drunk on several occasions was raised and litigated in the state's pretrial motion to admit other acts evidence (82:2, 8-12).

Phillips' attorney objected to the admission of this evidence (82:8-12). Having clearly objected prior to trial, counsel was not required to repeat his objection when this evidence was introduced at the trial. *Caccitolo v. State*, 69 Wis. 2d 102, 113, 230 N.W.2d 139 (1975); *Maxcy v. Peavy Pub. Co.*, 178 Wis. 401, 406, 190 N.W. 84 (1922).

Phillips' attorney could not have been ineffective for failing to object to Sgt. Wall's testimony when he adequately objected to it.

4. Phillips does not develop any of his completely conclusionary assertions that Sgt. Wall's testimony regarding his law enforcement contacts with Phillips was irrelevant, that it was prejudicial, that its probative value was outweighed by the danger of unfair prejudice, and that it was character evidence.

In the absence of any discussion of why this evidence, which was introduced on redirect examination, would not have been proper rebuttal of evidence introduced on cross-examination by the defense, all these assertions can be ignored. *West*, 179 Wis. 2d at 195-96; *Pettit*, 171 Wis. 2d at 646-47; *Shaffer*, 96 Wis. 2d at 545-46.

5. Phillips does not develop any of his completely conclusionary assertions that the evidence showing he did not raise any claim of inability to work in either of his two prior criminal prosecutions for nonsupport was irrelevant, that it was prejudicial, and that it was character evidence.

Expressions of outrage cannot substitute for reasoned legal analysis of why this evidence would not have been admissible to show that Phillips' present defense of inability to work was a recent fabrication. Therefore, all these assertions can be ignored. *West*, 179 Wis. 2d at 195-96; *Pettit*, 171 Wis. 2d at 646-47; *Shaffer*, 96 Wis. 2d at 545-46.

D. Phillips failed to show that his attorney was ineffective for failing to make an adequate offer of proof regarding the testimony of Brandon Haley.

Jean Jenner, the woman Phillips lived with at the time of the trial, testified that he would get lost easily, that he would neglect his hygiene like brushing his teeth, that he would forget to flush the toilet, that he would walk away after he started cooking things causing the house to fill with smoke, that he would get agitated when he was corrected, that he would forget what he was going for when he went to the store, that he had problems doing the laundry, that he had to be taken to appointments, that he was not allowed to go anywhere by himself, that he needed assistance getting dressed in the morning, that he had to be reminded to brush his teeth, take a shower, and use deodorant, that he had to be reminded to eat meals, that he did not complete household tasks he started, and that everyday living was a struggle for him (89:33, 36-41, 44).

After Jenner testified, Phillips' attorney named Brandon Haley, Jenner's teenage son who also lived with Phillips, as one of the remaining witnesses he intended to call (89:61-62).

When asked by the court what Haley would testify about, counsel said he would testify similarly to his mother about Phillips' problems with daily living (89:62). Counsel said Haley would testify regarding some specific problems that were not cumulative to his mother's testimony, but could not recall offhand just what that additional testimony would be (89:63).

Phillips now faults his attorney for not making a more specific offer of proof which would have included a statement that Haley would testify regarding "assisting him making meals, getting dressed and getting from one place to another." Brief for Defendant-Appellant at 32.

But any such testimony would have been completely cumulative to the comprehensive testimony of Haley's mother.

Phillips does not attempt to explain how simply repeating some testimony the jury had already heard in far greater detail could have possibly changed the result of his trial. Thus, Phillips has not shown how he could have possibly been prejudiced by his attorney's failure to make a more specific offer of proof regarding the cumulative testimony that might have been given by Haley.

E. Phillips failed to show that his attorney was ineffective for mistakenly asking a witness the number of his prior convictions.

Phillips' attorney mistakenly asked Jeffrey Phillips whether he had four prior convictions when in fact Jeffrey Phillips had been convicted five times (88:10; 90:25).

This was not a blatant misrepresentation of Jeffrey Phillips' prior record. It was simply an error with respect to one conviction.

This little mistake did not create a large credibility problem for the witness. When the prosecutor asked him whether he had actually been convicted of five specific crimes, the witness readily admitted all five convictions (90:26-28).

No reasonable juror would have thought that the witness was trying to hide the fact that he had five criminal convictions instead of four. No reasonable juror would have thought that the witness would have had any reason to hide a single additional conviction when he admitted he had been convicted multiple times, especially when the convictions were for minor crimes like drunk driving and possessing marijuana (90:26-27) which many ordinary and otherwise credible people have.

Any reasonable juror would have thought that the witness was just initially mistaken about the correct number of his prior convictions.

Similarly, no reasonable juror would have thought that defense counsel was deliberately being dishonest instead of simply mistaken about the single additional conviction.

In any event, Phillips does not attempt to explain how the result of his trial could have possibly been different if his

attorney had correctly asked the witness if he had five convictions instead of four. Thus, Phillips has not shown how he could have possibly been prejudiced by his attorney's failure to ask the witness if he had the correct number of convictions.

Phillips totally failed to show that either of both of his attorneys were ineffective in any way.

III. Phillips failed to show that he was sentenced on the basis of any incorrect information.

1. The state concedes that the circuit court erred when it called Phillips a "deadbeat father" at the sentencing (94:56).

The correct term is "deadbeat dad," defined as a man who avoids paying child support. The New Oxford American Dictionary 434 (2d ed. 2005). And that term accurately describes Phillips who was convicted three different times of failing to support his child, the most recent time of six separate felony counts (32-37; 43; 87:113-17; 94:5-6).

Phillips never adequately supported his child during the entire time of her minority, paying less than $1000 a year on average from the day she was born, against his wishes, until she turned eighteen (94:24, 59). Instead of learning from his first two convictions, things got even worse. From July 2005 to May 2011 Phillips contributed less than $400 total to support his child (87:140). At the time Phillips was sentenced, he was $28,000 in arrears on his support payments, almost two-thirds of the very modest amount he was ordered to pay, and owed more than $50,000 with interest (94:2-3).

That is a deadbeat dad.

Phillips does not develop his argument that the court should have sentenced him on the basis of his claim that he was

not guilty instead of the jury's finding of guilt. Phillips does not suggest any reason why the court might have been required to accept as fact any of the claims he poignantly stated at the sentencing that he did not intentionally fail to pay child support but simply did not have the money, but would like to work and pay restitution, when the jury unanimously found these facts against him beyond a reasonable doubt. Moreover, Phillips does not suggest how a court should sentence a person who must be considered to be not guilty of the crime for which he is being sentenced. This argument may be ignored. *West*, 179 Wis. 2d at 195-96; *Pettit*, 171 Wis. 2d at 646-47; *Shaffer*, 96 Wis. 2d at 545-46.

2. The circuit court did not hold Phillips accountable for any actions of any of his family members, but for his own failure to act to try to obtain money that could have been used to support his child.

The court correctly recognized that Phillips' mother never turned over to him the $68,000 settlement he received for the automobile accident he was in as a minor (94:58). The court correctly faulted Phillips for not asking his mother to give him the money that rightfully belonged to him when he became an adult (94:58).

The record indicates that at least some of this money was still available when Phillips' child was born after he turned eighteen (94:32-35).

But whether there was money left or not was not the critical consideration. The court's concern was not that Phillips did not obtain this money but that he did not even try to obtain any money there might have been. Phillips showed no interest in using his money to support his child.

3. The circuit court correctly found that Phillips lied, or at least tried to mislead the jury, by suggesting in his

testimony at the trial that he initiated the payments Social Security eventually made to his child (94:62-63).

At the trial, Phillips did not merely testify that he notified Social Security that he had a child and that's all. The record shows Phillips testified that he contacted the Social Security office in Racine in 2009 and asked them if they would send money to support his daughter (89:9-10).

In fact, Phillips' social security payments were garnished to pay child support only when the county child support enforcement agency found out about his social security income after doing a search at the request of the child's mother in 2011 (94:22).

Phillips' sentence was not based on any incorrect information.

CONCLUSION

It is therefore respectfully submitted that the judgment and orders of the circuit court should be affirmed.

Dated: March 25, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,142 words.

Dated this 25th day of March, 2015.

_____

Thomas J. Balistreri
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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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 March, 2015.

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Thomas J. Balistreri
Assistant Attorney General