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 REPLY BRIEF

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LEGAL ARGUMENT

I. Phillips properly argued the legal rationale behind the Trial Court's issue on the admissibility of expert opinion.

The State claims that Phillips did not properly argue to this Court the reason for the trial court's decision as to the expert testimony of Dr. David Nichols ("Nichols"). In essence, the State is making a waiver argument to this Court. The State is incorrect.

Procedurally speaking, the issue of Nichols' proposed testimony was first raised by the defense filing of Nichols' Curriculum Vitae ("CV") and disability report on January 4, 2012. R. 15 The State then filed a Motion for Hearing Pursuant to Wisconsin Statutes Section 907.02(1) ("the *Daubert* motion"). R. 23 The defense replied on March 7, 2012. R. 24. The issues addressed in the State's motion were not resolved by the trial court until the day of trial. (R. 86, pp. 4-14)

The State attacked the conclusions of Nichols as being unreliable in its *Daubert* filing. (R. 23, p. 3) Its argument was premised on the CV, the disability report and all of the attachments thereto in the defense filing. In a nutshell, the ***State*** raised the issue and argued that the defense filing as to the testimony of Nichols was insufficient on its face as to the opinions to be elicited by Nichols at trial. The trial court obviously agreed as it issued a ruling that the defense failed to file a report with an opinion that related specifically to Phillips' disability. (R. 86, p. 4) This decision was based entirely upon arguments made in the State's filing. The State now takes the position on appeal that this is not a *Daubert* issue but a discovery issue.

It is the State that has wholly failed to properly address the arguments put forth by Phillips in his Initial Brief. It is the State that has chosen to waive such an argument. The State has not even attempted to put forth a secondary argument to this Court should the Court find no problems with Phillips' claims on this issue. Perhaps the rationale for taking such a position is that the State has no meritorious argument to refute those already been made to the Court by Phillips

on this issue.

This is the first such contention made by the State that Phillips' claims were barred due to a discovery violation. The State argued as such in its *Daubert* filing but based its argument on the applicable statute and case law related thereto as to the *Daubert* issue. Since the State is now raising this argument for the first time on appeal, that argument is without merit. This contention, advanced for the first time in a brief before this court, is waived by the State, and this Court should respectfully decline to consider it. See *State v. Van Camp*, 213 Wis.2d 131, 144, 569 N.W.2d 577 (1997). As a general rule, an appellate court will not address issues for the first time on appeal. See *Perkins v. Peacock*, 263 Wis. 644, 650, 58 N.W.2d 536 (1953); see also *State v. Brown*, 96 Wis.2d 258, 291 N.W.2d 538, 541 (1980). The reason for this general rule is to give trial courts the opportunity to correct errors, thus avoiding appeals. See *Herkert v. Stauber*, 106 Wis.2d 545, 560, 317 N.W.2d 834 (1982).

II. Phillips properly established that his attorneys' performance was deficient and prejudicial

A. Pretrial Offer Issue – Deficient Performance

The State takes the position that Phillips struthiously ignores the rationale behind the trial court's ruling. Apparently, Phillips was unable to shake the sand from his hair when making his initial argument. He will do so now.

The State is once again in error in its analysis. Phillips did not choose to ignore the fact that the trial court found his testimony not credible. The trial court's finding that his testimony was not believed was quoted verbatim at Page 18 of his Initial Brief. That is hardly ignoring the ruling of the trial court. It is the antithesis of making such an omission.

Phillips had the burden to prove that his attorneys conduct was deficient and prejudicial. The State concedes that failure to tell a defendant about a plea offer would have been a gross deviation from accepted professional standards contrary to the presumption that attorneys act reasonably. *citing State v. Ludwig*, 124 Wis. 2d 600, 611, 369 N.W.2d 722 (1985). Accordingly, there is no dispute

that such an error would be reversible.

The State is using a smoke screen in its argument. The fact of Phillips' testimony not being deemed credible does not end the analysis. If such was true, then a trial court could simply deny every defense filing at a *Machner* hearing on credibility grounds. What the State fails to come to terms with is that neither of Phillips' trial court attorneys testified (1) that he conveyed the pretrial offer itself to Phillips nor (2) that he specifically followed his general routine or practice in this case. The routine practice claim made by the State was placed in general terms as to each attorney and was not raised specific to this case.

As stated in his Initial Brief, Attorney Novak testified as follows as to his normal practice:

> "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 testified on this issue by stating:

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.

Phillips had the burden to show that he was not conveyed the pretrial offer

by either of his attorneys. Even taking away his testimony as being incredible, the record before the trial court unequivocally proved that neither attorney specifically could remember giving Phillips the offer in this case. Phillips successfully made a record that neither of his attorneys could remember doing so or that the standard routine or practice was actually followed by them as to this client. What more of a record did Phillips need to make?

The State's argument appears to rest on the absence of evidence - - that being the absence of credible testimony by Phillips. However, it is not the absence of evidence by Phillips that controls as to this issue. It is the absence of evidence brought forth by the State at the *Machner* hearing to show to the trial court that Phillips did indeed receive such an offer.

Perhaps it is the State that is burying its head in the sand as to the evidence brought forth on the pretrial offer issue.

B. Pretrial Offer Issue – Prejudice

To determine prejudice, "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 v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The State argues that no prejudice came to Phillips based solely upon his testimony at the *Machner* hearing.

To the contrary, the trial court's ruling on the prejudice issue was against the great weight and clear preponderance of the evidence at to the prejudice prong. Phillips testified on direct and cross-examination as follows as to whether or not he would have accepted the offer if conveyed to him prior to trial:

> A: I would have accepted it, because if I had known it would have cut my time exposure by half, that would have —— I would have gotten less time with the plea agreement even if the Court sentenced me to the maximum than I got now. (R. 95, p. 16)
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> Q: You testified just now when Mr. Cherella asked you that if you had been aware of the State's offer that you would certainly have pled guilty to that offer; is that correct?

A. I would have pled to the plea offer, yes; that is correct.

Q. Okay. And would you have pled to that plea offer because you were, in fact, guilty?

(Objection made and overruled upon by the trial court)

Q: You stated when Attorney Cherella asked you, you said, if I had seen that offer letter, I would have pled guilty, correct?

A. Yes.

Q. Were you guilty of this crime?

A. I would have pled guilty because there were a couple of times where I have —— plus knowing that I went to prison for this before, I would have gotten time in prison any ways. That's why I would have pled guilty. (R. 95, p. 29)

The trial court's finding of "buyer's remorse" was unsupported by the evidence. Although Phillips went on to testify that he was not guilty (R. 95, p. 30), he stated in no uncertain terms that he would have accepted the offer regardless given the fact that it would have cut his exposure time in half even if the sentencing court gave him the maximum allowed by law as to the remaining charges. The State successfully brought out his position before trial as his position on the charges. However, the decision as to whether or not to proceed to trial obviously would have been much different had he received the pretrial offer.

Phillips' statement as to his guilt or innocence is not the controlling factor. There clearly would be a strong incentive to avoid even the possibility of several other felony convictions and time exposure had he been presented with the opportunity to accept the pretrial offer. The stigma and loss of rights attached to being a multiple convicted felon were substantial. In this case, as Phillips so testified, that incentive was strengthened further by the fact that he would have gained the potential for doing much less time in prison as a result of all of his felony convictions.

C. Phillips successfully showed that his attorney was ineffective for failing to object to evidence

1. The testimony of the mother of Phillips' child that several members

of Phillips' family tried to get her to lie to his attorney and testify falsely in court regarding injuries sustained in a 1989 automobile accident should have been objected to by trial counsel. The State argues that the testimony was "other acts" evidence, pursuant to sec. 904.04(2), Wis. Stats. and was admissible for a purpose other than to show that there was an attempt to suborn perjury. Even if true, the State failed to present these facts in its pretrial filing on the admissibility of "other acts" evidence filed on September 6, 2011. (R. 8)

The State's filing sought admission of the following evidence only:

1. Phillips' prior convictions for failing to support the child (R. 8, p. 4);
2. Any and all court fees, bail money, and/or traffic fines paid by Phillips during the charging period (R. 8, p. 8);
3. Evidence that Phillips was observed riding a bicycle during the charging period (R. 8, p. 9);
4. Evidence of Phillips' possession of drug paraphernalia and alcohol use during the charging period (R. 8, p. 9); and
5. Evidence of Phillips' driving record during the charging period (R. 8, p. 10).

The trial court rendered a ruling on these issues on November 11, 2011. (R. 82) The court did not entertain argument on the testimony of the mother as set forth herein. Thus, the defense had no knowledge in advance that such testimony of the mother would be elicited at the trial.

The State does not refute the assertions that such evidence was not timely raised by the State prior to a ruling on admissibility nor overly prejudicial. It once again relies on a waiver claim. As to the timeliness claim, it is well settled case law that issues as to the admissibility of "other acts" evidence must be raised by the proponent of the evidence prior to admission at trial. Our Supreme Court has held:

> "The proponent and the opponent of the other acts evidence must clearly articulate their reasoning for seeking admission or exclusion of the evidence and must apply the facts of the case to the analytical framework. The circuit court must similarly articulate its reasoning for admitting or excluding the evidence,

> applying the facts of the case to the analytical framework . . . Without careful statements by the proponent and the opponent of the evidence and by the circuit court regarding the rationale for admitting or excluding other acts evidence, the likelihood of error at trial is substantially increased and appellate review becomes more difficult. The proponent of the evidence, in this case the State, bears the burden of persuading the circuit court that the three-step inquiry is satisfied. *State v. Sullivan*, 216 Wis.2d 768, 774, 576 N.W.2d 30 (1998).

As to the admission of the testimony being overly prejudicial, the record is clear on its face. Obviously, there was the inherent risk that the jury would have inferred that if Phillips was working in tandem with his family that he too was a manipulative liar. The damage of such risk is plain as day.

2. The testimony elicited from the mother that Phillips' parents took her into a back room after she got pregnant and requested that she have an abortion was also not raised in the State's initial filing. As to the claim that Phillips' argument as to these facts went undeveloped, Phillips claimed in his Initial Brief that 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.

3. The testimony of Sergeant Brian Wall ("Wall) as to Phillips' alcohol use, though raised in its pretrial filing, was ruled upon in error by the trial court. As was argued and developed in his Initial Brief, the testimony was not relevant to any determinable material fact in the case. The State has failed to argue otherwise.

4. The testimony of Wall with respect to prior instances of conduct where Phillips was the subject of a criminal investigation for damage to property along with his detention relating thereto was not raised before trial. For that reason alone, the testimony should have been objected to by defense counsel. It stands to reason that a jury hearing about a prior criminal investigation would prejudicially hold that against Phillips.

5. Phillips' theory on the cross-examination of him as to his prior prosecutions was properly developed in his Initial Brief. Any claims to the contrary are inaccurate.

D. Offer of Proof as to the testimony of Brandon Haley

The State asserts that a proper offer of proof was made by trial counsel. However, the record proves that trial counsel did not specifically inform the court as to the precise nature of Haley's proposed testimony. When firmly pressed by the court to provide specific examples of Haley's prior experiences with Phillips, counsel was ill-prepared to tell the court. The colloquy went as follows:

Counsel: And other examples. (*as to Haley's dealings with Phillips*)

Court: Such as?

Counsel: That he has - - You know, off hand I don't remember the specifics to be honest with you. I don't remember the specifics, but I know I've talked to him, and there were other things that were - - were not cumulative. It's - - It's some experiences he's had with him. (R. 89, p. 63)

Accordingly, the argument was properly made before this Court, and sufficient proof is contained in the record along with the pretrial motion filing to support this claim of ineffective assistance of trial counsel.

E. Error as to a witness' prior convictions

The State and Phillips simply disagree on the magnitude of this "mistake" made by trial counsel as to the number of prior convictions for Jeffrey Phillips when he testified at trial. There is no further reason to elaborate on this issue. Phillips relies upon the arguments contained in his Initial Brief as to the effect that such evidence had upon the outcome of the trial, in conjunction with the multiple other errors claimed herein.

III. Phillips is entitled to Resentencing

A. Deadbeat father comment

The State attempts to make a mockery out of appellate counsel's argument in this regard. By playing a word game with the terminology used by the trial court of "deadbeat father" and the dictionary definition of "deadbeat dad," the State appears to try to make this claim seem trivial on its face. The simple fact is that Phillips was being sentenced in a court of law. It is a place where civility of the highest form is the ultimate rule. We, as professionals, are taught to act with

candor and decorum. The comment made toward Phillips as being a deadbeat father was unquestionably contrary to these principles.

More importantly, the comment was not warranted in this case. As was stated in the first brief, Phillips stated in his allocution speech that he would like to work and pay restitution. 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)

Understanding that he was found guilty, the phraseology used by the trial court inappropriate and unwarranted in this case.

B. Minor settlement

The State concurs with Phillips that his mother received the $68,000 in proceeds as a result of a monetary settlement received from an automobile accident. The disagreement is associated with the trial court's statements related to Phillips not asking his mother to give him the money. The record is clear that none of this money was made available to Phillips when he turned the age of majority. Neither his mother nor any of his family members gave him any of it. Perhaps they spent it all and left none of it for him. Perhaps it was sitting in a coffee can in a hole in the ground. The record is void of any reason.

The truth is that the trial court had no knowledge as to what happened to this money. Yet, the court held it against Phillips that none of this money was provided to him upon reaching his 18th birthday. The court made the statement that he chose not to challenge his family for this money. (R. 94, p. 58)

The statements made on this issue were unsupported by the record. Since the court had no knowledge as to these funds, it was inappropriate to find that Phillips himself was somehow responsible for not gaining access to the money when he became an adult. Phillips then received the maximum sentence of 18 years in prison on all 6 counts.

C. Social security payments

The State claims that the record supports the fact that Phillips attempted to mislead the jury when he testified that he contacted the Social Security

Administration to inquire about garnishment of his wages. It relies upon a blanket statement made by the trial court prosecutor at sentencing. The prosecutor stated: "I was able to follow-up on that claim at trial, and Child Support Enforcement only found out about Mr. Phillips' Social Security income and garnished his checks after doing a search for income using the Social Security number at Diane Thorsen's request in 2011." (R. 94, p. 22) The prosecutor did not mention with whom she had spoken to when she obtained this information.

Even assuming that the above claim is accurate, that doesn't make Phillips' testimony incredible. There was nothing stated to the contrary to refute that he actually *did not* contact the administration prior to 2011. The fact that the child support office followed up on this issue does not make Phillips out to be a liar.

Government agencies have been known to make errors and mistakes in the past. That thought may have been lost at sentencing.

CONCLUSION

Phillips respectfully requests that this Court grant the relief previously requested in his Initial Brief.

Dated this 6th day of April, 2015

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BRIEF CERTIFICATION

I hereby certify that this brief does not conform to the rules contained in §809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of the brief is 3,567 words. A Motion for Enlargement of Reply Brief accompanies this brief. 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 6th day of April, 2015

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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 6thth day of April, 2015

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Attorney Christopher J. Cherella