STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP000897-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAMONT DONNELL SHOLAR,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Orders Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable Rebecca F. Dallet and Thomas J. McAdams, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

I. Trial counsel failed to object as an exhibit containing hundreds of text messages rife with references to violence and illegal drug dealing, prejudicial hearsay, and suggestive photographs was both admitted into evidence and then handed to the jury in its entirety during deliberations.

Did counsel's failures to object prejudice the outcome of Mr. Sholar's trial such that he is entitled to a new trial on all counts?

This Court previously concluded that Mr. Sholar met his burden to show prejudice due to counsel's failure to object as this exhibit was both admitted into evidence and handed to the jury in its entirety during deliberations. This Court remanded for the ***Machner*** hearing the circuit court erroneously denied, to allow the circuit court to assess whether counsel had any reasonable strategy. The circuit court concluded that counsel did not have any reasonable strategy and that Mr. Sholar therefore met his burden to show deficient performance. The circuit court, however, misunderstood this Court's prior decision and determined that Mr. Sholar only met his burden to show prejudice with regard to one of the six counts at trial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Sholar would welcome oral argument should this Court find it helpful. He does not seek publication.

STATEMENT OF FACTS AND CASE

A. Overview of the Procedural History

This is Mr. Sholar's second appeal. Following guilty verdicts on all six of the charged counts at jury trial, (90) Mr. Sholar filed a post-conviction motion. (55). Mr. Sholar raised a number of claims in that post-conviction motion, including multiple grounds of ineffective assistance of counsel. (55). The circuit court denied Mr. Sholar's post-conviction motion without a ***Machner***[1] hearing. (62;App.132-145).

Mr. Sholar appealed. This Court issued a decision reversing the circuit court's order on one of Mr. Sholar's claims of ineffective assistance of counsel—counsel's failure to object as an exhibit containing hundreds of text messages with repeated references to drug-dealing and other violent activity, suggestive photographs, and inadmissible hearsay was both admitted into evidence and provided in its entirety to the jury during deliberations. (94;App.118-131). This court remanded this matter for a ***Machner*** hearing for the circuit court to address "whether counsel's decision not to object was a reasonable strategic choice." (94:14;App.131).

Upon remand, the circuit court—a new judge now presiding—held the ***Machner*** hearing. (106).

The circuit court concluded that Mr. Sholar met his burden to show deficient performance. (107:25-40;App.172-187).

[1] 92 Wis. 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

The circuit court indicated that this Court's previous decision could be interpreted in different ways with regards to prejudice, and decided to address prejudice as well. (107:13-17;App.160-164).

The court concluded that Mr. Sholar only met his burden to show prejudice on Count 5 (the sexual assault charge), and entered an order vacating Mr. Sholar's sentence and conviction on Count 5 but denying his motion on the remaining counts. (107:24-25;App.171-172).

Mr. Sholar filed a second notice of appeal. (104). The State did not file a notice of cross appeal. Mr. Sholar then filed a motion for summary reversal. The State objected to summary reversal, and this Court entered an order denying his motion for summary reversal.[2] This appeal follows.

B. The Charges

The State charged Mr. Sholar with a total of six counts related to the alleged pimping of two women: 17-year old EC and 22-year old SG. The complaint further charged Mr. Sholar with the alleged sexual assault of SG.[3] (2).

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[2] *See* Wisconsin Supreme Court and Court of Appeals Case Access (noting filing of summary reversal, response, and order denying).

[3] The State charged Mr. Sholar with the following counts: (1) Trafficking of a Child, in violation of Wis. Stat. § 940.302(1), related to EC, (born 2/22/94); (2) Soliciting a Child for Prostitution, in violation of Wis. Stat. § 948.08, related to EC; (3) Pandering/Pimping, in violation of Wis. Stat. §944.33(2), related to EC; (4) Human Trafficking, in violation of Wis. Stat. § 940.302(2)(a), related to SG (born 9/16/89); (5) Second Degree Sexual Assault, in violation of Wis. Stat. § 940.225(2)(a); and (6) Pandering/Pimping, in violation of Wis. Stat. § 944.32(2), related to SG.

C. The Jury Trial

The circuit court, the Honorable Rebecca F. Dallet presiding, held a six-day jury trial. (78-89).

EC testified that she met Mr. Sholar through his alleged co-actor, Shawnrell Simmons. (80:87-93). She stated that she contacted Mr. Simmons to work for him as a prostitute, but he told her he already had women working for him and directed her to Mr. Sholar. (80:91-93). She stated that she worked for Mr. Sholar for a period of a few months and gave him money she made from prostituting herself. (80:87-165).

EC testified that provocative pictures of her were taken and uploaded to the website "Backpage." (80:96-106). She explained that Mr. Sholar rarely took pictures of her; instead, the girls working for Mr. Sholar and Mr. Simmons would take pictures of her. (80:96-99). She also stated that Mr. Sholar and Mr. Simmons drove her to-and-from hotels to perform sex acts. (80:106-110;146). EC further testified that on one occasion Mr. Sholar punched her several times. (80:112-14). She also explained that co-actor Mr. Simmons smacked, choked, and spit on her, and sexually assaulted her at gunpoint. (80:112-14).[4]

EC testified that she only told police about the pimping/prostitution after police arrested and questioned her about her involvement in an alleged burglary. (80:136-38,160). EC testified that at Mr. Sholar's direction, she helped take a number of items from her friend's apartment whose keys she had. (80:126-130). She testified that Mr. Sholar told her to leave when her friend returned. (80:126-130). EC admitted that she initially lied to police and claimed no knowledge of the burglary. (80:126-130).

[4] Mr. Sholar and Mr. Simmons were not tried together.

SG testified that she agreed to do private dances for money at Mr. Sholar's suggestion. (80:176-79). She explained that this turned into having sex with people for money for a period of roughly two weeks. (80:187-88). She testified that Mr. Sholar took pictures of her with his cell phone and would put them on the internet. (80:179-83). She testified that she believed he did this through the website "Backpage." (80:179-83).

S.G. stated that both Mr. Sholar and Mr. Simmons would drive her to locations to perform these acts, though mostly it was Mr. Sholar. (80:193-94,212). She acknowledged that it was her mother, not her, who first told police about her working for Mr. Sholar. (80:215-16).

With regard to the sexual assault charge, SG testified that one night Mr. Sholar wanted to have sex but she was tired and told him she "didn't feel like it." (80:198-219). She testified that as she stood up from the bed to go to the bathroom, he grabbed her arm, turned her around, and had vaginal sex with her. (80:198-219). When asked whether she remembered telling police that she did not believe she actually said the word "no," she stated: "I said it wasn't a good idea. I told him I didn't feel like it." (80:219). She testified that she had sex with Mr. Sholar multiple times after that and did not directly tell him no. (80:219).

SG stated that she stopped working for Mr. Sholar when her boyfriend got out of jail. (80:200-01). She explained that Mr. Sholar then started threatening her. (80:201-202). The State called SG's mother who testified that SG called her on one occasion because she was scared of Mr. Sholar, and that on another occasion he came to her house asking for a phone he had given SG, and parked outside her house later that evening. (83:40-53).

The State also presented evidence to show that Mr. Sholar rented rooms at an Econolodge motel, as well as data from the hotel's lobby computer showing an internet history of "Backpage" ads being posted and viewed. (83:62-72,89-96). The State introduced as exhibits a number of "Backpage" ads with pictures of women, including ones with a contact number the same as the phone number police testified was taken from Mr. Sholar. (80:100-106). The State also called detectives to introduce a number of phone records which included photographs and text messages. (82:14-37; 83:1-28). The State further presented photographs taken by police of items including condoms and lingerie, retrieved by hotel staff from a room in which the State alleged Mr. Sholar operated. (82:14-37).

The State also called NS as a witness, who testified that she worked independently as an escort at the Econolodge. She testified that she did not know SG. (82:60). She explained that she did know EC; however, she did not know whether EC worked for Mr. Sholar, and thought EC might have worked independently. (82:89). She also testified that she never saw any violence between Mr. Sholar and EC. (82:91).

Mr. Sholar testified that he stayed at the Econolodge with his son. (84:18). He met EC, SG and other women, and thought they were working for Mr. Simmons. (84:19). He testified that he did develop a friendship with EC, but did not work as a pimp. (84:20-23). He stated that he never had sex with EC and never punched or hit her. (84:24).

Mr. Sholar explained that he met SG through her roommate and he saw her at the Econolodge at some point but did not have further contact with her. (84:27-29). He testified that he never had sexual contact with her. (84:29-31). Once,

he did go to her mother's house to ask about a phone he believed she had, but did not return later that evening. (84:113-16).

He asserted that he never put ads up on "Backpage," and did not take any pictures of women for ads while at the hotel. (84:31-38). He further testified that the cell phone that he had on him at arrest belonged to Mr. Simmons, and he was using it because the screen on his own phone had cracked. (84:48).

With regard to the alleged burglary that preceded EC's allegations against him, Mr. Sholar testified that EC wanted him to sell her K2, an "over the counter" product akin to marijuana, and she told him to meet her at an apartment. (84:42-47). When he arrived, she told him that her friend was moving and wanted to sell items from the apartment. (84:42-47). He testified that he paid EC for the television she said was for sale. (84:44). He testified that when the owner returned to the apartment, the owner saw him carrying the television and asked him what he was doing; Mr. Sholar explained the situation and tried to help him find EC until police arrived, at which point he was arrested for the alleged burglary. (84:44-48).

D. Exhibit 79: Admitted into Evidence and Provided to the Jury in its Entirety During Deliberations in Response to a Jury Question

Both EC and SG testified that they had conversations with Mr. Sholar via text message about prostitution. (80:121,194). Detective McQuown testified that he extracted data from an iPhone police obtained from EC, and the State moved the data from this phone into evidence with no defense objection (80:48-49;83:5-6;92:Trial Exhs.69,70). He testified that he recovered 48 text messages including: "Hello Star.

I'm Rob. I'm cumin to Milwaukee for a conference. I will have a hotel room right at the airport"; "Hey there. I'm looking for some fun…Can you help me? I am 23 and white."; and "How many roses for Star and Sonya." (83:21,26;92:Tr.Exh.70). He stated that there were images showing "semi-sexually suggestive poses" on the phone. (83:26). He testified, however, that neither Mr. Sholar's name nor the number of the phone taken from Mr. Sholar appeared anywhere in the contacts or messages on this phone. (83: 38-39).

He also then testified that he examined the cell phone taken from Mr. Sholar upon his arrest. (83:82). He stated that he found pictures of women in suggestive poses, some of which appeared to be the same images as pictures from Backpage ads previously entered into evidence. (83:84-90).

The State, through Detective McKee, then moved into evidence Exhibit 79: a CD and printout of the 181 page report containing the contents of the phone taken from Mr. Sholar during his arrest, including 100 pages containing nearly 1400 text messages. (83:98,113; (92:Tr.Exhs.77,79)). Defense counsel did not object. (83:98,113).

During deliberations, the jury asked: "Can we request Lamont's phone records, 544 0125, looking for in—slash—out bounds regarding I got dollars text messages while with client." (88:73).

The court asked: "isn't it all contained in the one exhibit that Detective McKee had, has put in the one big thick one, would all those things be answered in there? Because I don't want to be parceling out. I just want to give them the exhibit that they seem to be requesting." (88:73-74). Both the State and trial counsel agreed to provide *all* of Exhibit 79 to the jury. (88:74-75).

The jury also asked for EC's phone records, and both the State and defense counsel agreed to provide Exhibit 70 (the report on the iPhone) to the jury. (90:3-4).

The 100 pages of text messages contained in Trial Exhibit 79 (the data from the phone recovered from Mr. Sholar), handed to the jury during deliberations with no objection, included conversations about violent behavior and the illegal drug dealing of a variety of narcotics. *See, e.g.,* (92:Trial Exh.79;56:PCM Exh.B, Text Messages 148-149, 318-319,360,394,536,750,924-925,1021,1141,1144,1146).

The text messages also contained numerous out-of-court statements made by unknown persons. For example, there is an incoming text message from a "Brit" stating: "the cop told me he's worried because s[][5] said u threatened rt kill her. Idk its all bs. I didn't give out ne info I'm all over it. But if I lose my house I'm moving in with u (: aha. And they asked me what u drove and I didn't tell them shit it isnttttt my issue but were getting fucked up tonight we better (;".(92:Trial Exh.79;56:PCM Exh.B, Text Messages 159-60).

The exhibit also contains hundreds of photographs of multiple women in lingerie in sexually suggestive poses. (92:Trial Exh.79:130-173).

E. Sentencing

The jury convicted Mr. Sholar on all counts. (90). The circuit court originally imposed a total length of sentence of forty-five years, divided into thirty years initial confinement and fifteen years extended supervision. (91).

[5] Counsel has redacted the name from this text message, but the name given is a shortened version of SG's first name.

F. Post-Conviction Motion

Mr. Sholar filed a post-conviction motion for a new trial, or, if the circuit court denied his request for a new trial, for sentence modification. (55). Mr. Sholar sought a ***Machner*** hearing on his motions of ineffective assistance of counsel. Following court-ordered briefing from the parties, the circuit court, the Honorable Rebecca F. Dallet again presiding, denied his post-conviction motion without an evidentiary hearing. (55-59;62;App.132-145).

G. This Court's Decision Reversing and Remanding

On June 30, 2015, this Court issued a decision reversing and remanding this matter on Mr. Sholar's claim of ineffective assistance of counsel with regard to the admission of Exhibit 79. (94;App.118-131). This Court affirmed the circuit court's order denying his other post-conviction claims. (94;App.118-131).

When analyzing Mr. Sholar's prejudice argument with regard to the admission and publication of this exhibit, this Court explained:

> In its decision denying his postconviction motion, the circuit court concluded that even if the text messages contained improper other acts evidence, Sholar had not demonstrated that he was prejudiced given the amount of evidence against him. We are not so sure. As Sholar points out, at the very least, the impact of this evidence could have been significant as to the sexual assault charge.

(94:10;App.127). This Court then quoted from Mr. Sholar's brief, and concluded: "Sholar's allegations in this regard, if true, are sufficient to entitle Sholar to a ***Machner*** hearing. Therefore, we reverse and remand on this issue." (94:10-11; App.127-128).

This Court explained:

> In summary, we conclude Sholar was entitled to a ***Machner*** hearing on his claim that counsel was ineffective for failing to object when hundreds of text messages were both admitted into evidence and provided to the jury during deliberations. Without a ***Machner*** hearing we cannot determine whether counsel's decision not to object was a reasonable strategic choice.

(94:14;App.131).

This Court explained that it believed Mr. Sholar's motion established a reasonable probability of a different outcome at his trial:

> With respect to prejudice, Sholar's motion establishes a reasonable probability that, had the text messages not been admitted into evidence and provided to the jury during deliberations, the result of the trial, at least to as to the sexual assault charge, would have been different. We therefore reverse that portion of the circuit court's order denying Sholar's claim that his attorney was ineffective for failing to object when hundreds of text messages were both admitted into evidence and provided to the jury during deliberations. We remand for the circuit court to conduct a ***Machner*** hearing on that claim.

(94:14;App.131).

H. The *Machner* Hearing and Post-*Machner* Briefing

Upon remand, the circuit court, the Honorable Thomas J. McAdams now presiding, held the ***Machner*** hearing on November 24, 2015. (106).

Defense counsel was the only witness to testify at the hearing. (106).

At the beginning of the hearing, counsel repeatedly stated that he did not believe that he likely had any strategic reason for not objecting to the admission of Exhibit 79, but instead thought it was more likely that he "just didn't think that there was any further objection to be made to the records at the time they were offered during trial" beyond the suppression motion he had previously filed.[6] (106:7-8,11-12, 18,20-22,57).

The State questioned counsel about whether perhaps counsel wished to have the entirety of Exhibit 79 in the record to "continue with the idea that this phone" belonged to Shawnrell Simmons, not Mr. Sholar. (106:23-44). Counsel gave an answer suggesting that the State was correct. (106:39).

Counsel, however, later testified that he "think[s] this evidence would have hurt our defense." (106:58). Counsel stated that if he thought there was a "valid objection" to keep "this stuff out," he "would have made it." (106:58-59). But after testifying to this, counsel later stated that he would have wanted the entire exhibit to go back to the jury. (108:81).

At the end of the ***Machner*** hearing, the State suggested that perhaps this Court's opinion had not conclusively decided the question of prejudice with regard to all counts, as this Court stated that Mr. Sholar had met his burden to show prejudice "at least as to the sexual assault charge". (106:115-116). The circuit court ordered supplemental briefing. (106:118-120).

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[6] Pre-trial, counsel filed a motion to suppress the phone records on grounds that the police exceeded the scope of the consent Mr. Sholar provided to look through the phone; the circuit court denied the suppression motion. (77:49-54).

In its post-hearing supplemental brief, the State again argued that this Court's "equivocal comments" in its reversal decision reflected that prejudice was still an open question for the circuit court to decide. (102:19-20).

Mr. Sholar, on the other hand, asserted that his burden had been to show a reasonable likelihood of a different outcome at his trial, and this Court had already concluded that he met that burden. Mr. Sholar maintained: "If the Court of Appeals had somehow believed that the charges could have been isolated, and wished to order a remand with regard to one count and one count alone, it would have done so in its order. It did not, and for this Court to do so would violate the Court of Appeals' order and directive to this Court." (100:1-2).

I. The Circuit Court's Post-***Machner*** Decision

The circuit court issued an oral decision following post-***Machner*** briefing. (107;App.148-189). The circuit court noted that it first needed to determine "what it is I'm here to decide." (107:13;App.160). The court noted that there are "at least four ways to read this Court of Appeals opinion." (107:13-15;App.160-162). The court concluded that "if there is ambiguity here, I think I should just try to cover all the bases." (107:15;App.162). The court determined that the best approach would be to rule on both the deficient performance and prejudice prongs. (107:13-17;App.160-164).

With regard to deficient performance, the court stated that it could not find any reasonable strategic reason to explain why counsel would have allowed for the admission and publication of the entirety of the exhibit. (107:25-40;App.172-187). The court concluded: "The messages and the pictures [in the exhibit] are in my opinion so

inflammatory that I think a jury then and there might have convicted him of virtually anything." (107:40;App.187).

The court determined that given the evidence presented at trial, the admission of the exhibit was "certainly not prejudicial" with regard to Counts 1, 2, 3, 4, and 6 "as the evidence on those counts was overwhelming." (107:24-25; App.171-172).

With regard to Count 5, however, the sexual assault charge, the circuit court found that "the defense clearly has shown deficient performance and prejudice". (107:27-40; App.174-187). The court noted that "there's much less evidence on that count". (107:25;App.172).

The circuit court issued an order vacating Mr. Sholar's conviction and sentence on Count 5, the sexual assault charge, but denying his motion to vacate his convictions and sentences on the other counts. (107:40;103;109;App.117,146-147,187).

J. Motion for Summary Reversal

Mr. Sholar filed a motion for summary reversal, arguing that the outcome of this appeal has already been determined by this Court's previous decision. The State filed a response, arguing that summary reversal was not appropriate. This Court entered an order denying Mr. Sholar's motion for summary reversal.[7] This second appeal follows.

[7] *See* Wisconsin Supreme Court and Court of Appeals Case Access (noting filing of summary reversal, response, and order denying).

ARGUMENT

The only question before this Court is one which this Court has already decided: whether Mr. Sholar met his burden to show prejudice at trial such that he is entitled to a new trial on all counts.[8]

In its previous decision reversing and remanding this matter, this Court found that Mr. Sholar *did* meet his burden to show prejudice entitling him to a new trial on all counts. The circuit court on remand simply misunderstood this Court's previous order.

But even if this Court concludes that its previous decision did not already decide the outcome of this appeal, Mr. Sholar still meets his burden to show prejudice entitling him to a new trial on all counts. The circuit court, in its oral decision after the ***Machner*** hearing, summed up very the reason why: "The messages and the pictures are in my opinion so inflammatory that I think a jury then and there might have convicted him of virtually anything." (107:40; App.187).

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[8] To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that counsel performed deficiently; and (2) that the deficient performance prejudiced his defense. ***State v. Artic***, 2010 WI 83, ¶ 24, 327 Wis. 2d 392, 768 N.W.2d 430.

Following this Court's previous order reversing and remanding, the circuit court held the ***Machner*** hearing and, after hearing the testimony, reviewing the record, and reviewing the supplemental briefing, concluded that Mr. Sholar met his burden to show deficient performance. (107:25-40;App.172-187). The court entered a written order reflecting its oral pronouncements. (103;App.146-147). The State did not file a cross appeal to challenge the circuit court's determination that counsel performed deficiently. *See* Wis. Stat. § 809.10(2)(b). Thus, the only question remaining before this Court is that of prejudice on the remaining counts.

I. The Outcome of Mr. Sholar's Trial Was Prejudiced By Counsel's Failure to Object as an Exhibit with Hundreds of Text Messages Containing Repeated Reference to Drug-Dealing, Violence, and Other Inadmissible Hearsay, as Well as Suggestive Photographs, Was Both Admitted Into Evidence and Handed in Its Entirety to the Jury During Deliberations. Mr. Sholar is Entitled to a New Trial on All Counts.

A. This Court has already decided that Mr. Sholar met his burden to show prejudice entitling him to a new trial on all counts. The circuit court simply misunderstood this Court's order.

This Court need not and should not re-evaluate what it has already decided: that Mr. Sholar met his burden to show prejudice entitling him to a new trial.

This Court previously held: "With respect to prejudice, Sholar's motion establishes a reasonable probability that, had the text messages not been admitted into evidence and provided to the jury during deliberations, the result of the trial, at least as to the sexual assault charge, would have been different." (94:14;App.131).

Mr. Sholar's burden was to 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." ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W. 2d 379 (1997) (citing ***Strickland v. Washington***, 466 U.S. at 694).

As this Court explained in its previous decision, Mr. Sholar had the burden to show a reasonable likelihood that "the result of the *trial* would have been different."

(94:14;App.131). (emphasis added). This Court concluded that Mr. Sholar met that standard. (***Id.***). [9]

"A decision on a legal issue by an appellate court establishes the law of the case that must be followed in all subsequent proceedings in the case in both the [trial] and appellate courts." ***State v. Casteel***, 2001 WI App 188, ¶ 15, 247 Wis. 2d 451, 634 N.W.2d 338.

The circuit court simply misunderstood this Court's previous decision. The circuit court acknowledged in its post-***Machner*** ruling that it might be misunderstanding this Court's order. (107:16-17;App.163-164). The court indicated that insofar as there was "ambiguity", it wished to "cover all the bases". (107:15-16;App.162-163). It noted that it did not "want further delay if [it was] wrong." (107:16;App.163).

i. This Court's prior holding reflects that Mr. Sholar is entitled to a new trial on all counts.

Upon remand, the State and in turn circuit court emphasized language in this Court's previous decision; language which the State argued was "equivocal" on the question of prejudice: "the circuit court concluded…Sholar had not demonstrated that he was prejudiced…*[w]e are not so sure*"; "the impact of this evidence *could have* been significant as to the sexual assault charge, "*at least* as to the sexual assault charge."" (102:19-20;94:10-11,14;App.127-128,131)(emphasis added).

[9] Indeed, had this Court not determined that Mr. Sholar met his burden to show prejudice, there would have been no basis for this Court to reverse for a ***Machner*** hearing on the question of deficient performance.

This language, however, was not "equivocal"; rather, it reflected the prejudice standard. The prejudice standard is not the same as a challenge to the sufficiency of the evidence. It does not demand absolutes.[10]

Mr. Sholar's burden was to 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." ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W. 2d 379 (1997) (citing ***Strickland***, 466 U.S. at 694).

Importantly, when assessing prejudice, the "focus of the inquiry is not on the outcome of the trial, but on the reliability of the proceedings"—whether the defendant received a "fair and reliable trial." ***State v. Coleman***, 2015 WI App 38, ¶ 41, 362 Wis. 2d 447, 862 N.W.2d 190 (internal quotations omitted).

While it is true that this Court highlighted Count 5 (the sexual assault count) as an example in its assessment of prejudice and conclusion that Mr. Sholar met his burden, this Court did not order remand on one count alone. *See* (94;App.118-131). Instead, it concluded that Mr. Sholar met his burden to show prejudice, and "reverse[d] that portion of the circuit court's order denying Sholar's claim that his

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[10] *Compare* ***State v. Hayes***, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203 (explaining that the standard of review on appeal for a challenge to the sufficiency of the evidence is whether the evidence, viewed in the light most favorable to the state, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilty beyond a reasonable doubt), *with* ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W. 2d 379 (1997) (citing ***Strickland***, 466 U.S. at 694).

attorney was ineffective for failing to object when hundreds of text messages were both admitted into evidence and provided to the jury." (94:14;App.131).

The State brought these charges in one single trial, and as this Court explained in its decision, Mr. Sholar had and met the burden to show a reasonable likelihood that "the result of the trial would have been different." (94:14; App.131). If this Court had somehow believed that the charges could have been isolated, and wished to order remand with regard to only one count, this Court would have done so. This Court did not.

ii. The analysis of the prejudice resulting from counsel's failures to object to Exhibit 79 involved a legal analysis of the already-existing the trial record; it did not require any additional fact-finding. This Court has already performed that analysis and should not do it again.

The question of ineffective assistance of counsel is of course a mixed question of fact and law. ***State v. Thiel***, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. This Court will defer to fact-findings made by the circuit court unless clearly erroneous. ***Id.*** This Court, however, reviews de novo whether "deficient performance has been established and whether it led to prejudice rising to a level undermining the reliability of the proceeding." ***Id.,*** ¶ 24.

Here, the question of prejudice with regard to the admissibility and publication of Exhibit 79 did not require additional fact-findings.

There are, to be sure, those situations in which the assessment of an attorney's failure would demand consideration of new facts beyond the trial record which would be established at a post-conviction evidentiary hearing. For example, if a defendant argued that he was denied the effective assistance of counsel because his attorney failed to call an alibi witness. In that circumstance, to assess prejudice, additional fact-findings (namely, what that witness's testimony would have been) beyond the trial record would be required. This is not such a case.

The circuit court was unsure about the holding of this Court's previous order, and in an effort to be complete, evaluated prejudice by doing the very thing this Court had already done: a review of the trial record. (107:3;App.150).[11]

In this case, the question of prejudice rested exclusively on a legal evaluation of the facts in the trial record. This Court has already completed that assessment. It found prejudice. That holding is the law of this case. *See* ***Casteel,*** 2001 WI App 188, ¶ 15.

The only reason this Court had to remand for further proceedings here, as opposed to remanding for a new trial, is because the circuit court *in error* denied Mr. Sholar's post-conviction motion without a ***Machner*** hearing. Case law is clear that allowing a defense attorney the opportunity to explain whether he or she had a strategic reason for what otherwise appears to be a prejudicial error is a "prerequisite" to a finding of ineffective assistance of counsel. ***Machner***, 92 Wis. 2d at 804. Thus, this Court remanded this matter to

[11] It is also worth noting that the circuit court judge who issued the post-***Machner*** decision was not the same judge who presided over the trial. As such, the post-***Machner*** circuit court judge was in no better position to assess prejudice from the trial record than this Court was when it issued its first decision in this case.

the circuit court to hold the hearing to assess whether counsel had any reasonable strategy for this apparent error.

Importantly, the State did not file a petition for review from this Court's previous decision concluding that Mr. Sholar met his burden to show prejudice. [12] It would therefore be contrary to principles of judicial efficiency, forfeiture, and fairness, to allow the State to have a second opportunity to challenge the question of prejudice simply because the circuit court erred. *See, e.g.,* ***Schill v Wis. Rapids Sch. Dist.,*** 2010 WI 86, ¶ 45, 327 Wis. 2d 572, 786 N.W.2d 177.

Stated differently, if—as this Court concluded it *should* have done—the circuit court had properly granted the ***Machner*** hearing prior to denying Mr. Sholar's post-conviction motion, the State would not have had two opportunities to argue the question of prejudice before this Court. This Court should not reconsider a legal question it has already decided.

B. Counsel's failure to object to the admission and publication of this damning exhibit in its entirety was sufficient to undermine confidence in every one of the guilty verdicts.

"The messages and the pictures are in my opinion so inflammatory that I think a jury then and there might have convicted him of virtually anything." (107:40;App.187).

This statement captures the very reason why counsel's failure prejudiced Mr. Sholar on all counts. Even with other evidence against him, this exhibit was so damning, so "inflammatory," that it indeed undermines confidence in the

[12] *See* Wisconsin Supreme Court and Court of Appeals Case Access for Appeal No. 14AP001945-CR.

outcome in the case. We simply cannot be confident that this shocking exhibit did not influence the jury's deliberations and decision to render guilty verdicts on all counts.

Therefore, even if this Court concludes that its prior holding does not control as law of the case, or that its prior decision did not necessarily mandate a new trial on all counts, Mr. Sholar is indeed entitled to a new trial on all counts.

Again, the prejudice prong of ineffective assistance of counsel standard in a multi-count trial is *not* a sufficiency of the evidence test on each count (looking at the evidence on each count in the light most favorable to the state and determining whether there is there a basis to affirm the verdict). Prejudice focuses on the "reliability of the proceedings" and whether the defendant received a fair trial. ***Coleman***, 2015 WI App 38, ¶ 41.

While Mr. Sholar could imagine a rare situation where an attorney's deficient performance could arguably show prejudice only to one of multiple counts—take, for example, a multiple-count trial where defense counsel failed to call a witness who would have provided an alibi to only one of the many counts—this is not that case.

Mr. Sholar recognizes that the quantum of evidence the State presented with regard to the charges related to the pimping and pandering of EC and SG (Counts 1, 2, 3, 4, and 6) was different than that presented with regard to the alleged sexual assault of SG. (Count 5). But this "inflammatory" exhibit was a central focus of the State's case on the charges related to pimping/pandering and trafficking. Exhibit 79 improperly presented to the jury that Mr. Sholar was very much the type of person who would engage in such illegal behavior.

First, the record shows that this Exhibit was central to the jury's deliberations: the jury explicitly asked to see specific text messages, and instead—with no objection from counsel—was handed the entire 181-page exhibit, with no explanation of where in that exhibit the text messages it wished to see were located. (88:73-75).

This damning exhibit was thus handed in its entirety to the jury during their deliberations in response to a specific question they felt needed to be answered in order for them to reach their verdicts.

Second, for the non-sexual assault counts, the central question at trial was not whether EC and SG worked as prostitutes; rather *who*, if anyone, they worked for: Shawnrell Simmons, Mr. Sholar, both, or neither.

Both women testified that they worked primarily for Mr. Sholar, but that Mr. Simmons also was involved. (80:96-99,106-110,112-114,146,193-194,212). But the jury also heard evidence which raised questions about the women's accusations:

- EC testified that she sought out work as a prostitute from Shawnrell Simmons. She stated that it was Mr. Simmons referred her to Mr. Sholar. (80:91-93).

- EC, however, only made the allegations against Mr. Sholar after she was arrested for being involved in a burglary and was being questioned about her involvement. (80:136-38,160). Mr. Sholar testified that EC set him up in this burglary: that she told him to meet her at an apartment, and indicated that her friend was moving and was selling items from the apartment; that he paid EC money for the

television, but that when the owner returned, he made clear that he did not give anyone permission to take his television. (84:44-48).

EC testified that the burglary was Mr. Sholar's plan, but she also admitted that she initially lied to police and claimed no knowledge of the burglary. (80:126-120).

- EC indicated that Mr. Sholar punched her multiple times on one occasion; however, she explained that she faced more severe violence at the hands of Mr. Simmons and that she was afraid of Mr. Simmons: that he smacked her, choked her, spit on her, and sexually assaulted her at gunpoint. (80:112-114).

- SG acknowledged that she did not first disclose her allegations against Mr. Sholar to the police; rather, it was her mother who first spoke to police. (80:215-216). She also testified that she stopped prostituting herself when her boyfriend got out of jail because she was afraid of how her boyfriend would judge her. (80:201-202).

- SG testified that she only worked for Mr. Sholar for two to three weeks in August of 2011. (80:187). She stated that while Mr. Sholar threatened her in September of 2011, her "working for him" ended "probably the beginning of September." (80:187).

  Yet, the State also presented into evidence photos of "Sonya,"—the pseudonym SG used on the website—which were posted on Backpage on September 23rd and September 27th—dates *after* she testified she had stopped

working for Mr. Sholar. In one of these photos she is posing with EC (80:32;84:32-33;82:33, 52;83:87;92:Trial Exhs.58-59).

Notably, for the two counts involving the pimping of SG (Counts 4 and 6), the State charged Mr. Sholar for acts occurring between August 20th and September 16th. (87:35-39).

- The State also called NS, who testified that she worked independently as an escort at the Econolodge, where the State alleged Mr. Sholar pimped EC and SG (82:60-91). NS testified that she did not know SG but did know EC; however, she thought EC might have worked independently and could not say that EC worked for Mr. Sholar. (82:89-91).

- NS further testified that after EC was arrested for the alleged burglary, it was Mr. Simmons, not Mr. Sholar, who called NS and wanted her to talk with EC (82:75-78).

The State presented evidence reflecting that Mr. Sholar rented rooms at the Econolodge motel; however, Detective O'Leary testified that hotel staff obtained items from one of these rooms which included bras, condoms, and cell phone receipt with the name "Jonathan *Simmons*" on it. (82:45) (emphasis added).

The State also presented data from the hotel lobby's computer showing an internet history of "Backpage" ads being posted and viewed. (83:62-72,89-96). Detective McKee, who examined the Backpage ads and computers, though, testified that he was unable to find any data

indicating who put the Backpage ads online other than an "email address with the name Candace" with regard to some of the photos. (83:111-112).

Mr. Sholar testified that he stayed at the Econolodge with his son. (84:18). He met EC, SG and other women, who he thought were working for Mr. Simmons. (84:19).

In light of all of this, the central piece of physical evidence which the State used to connect Mr. Sholar (as opposed to Mr. Simmons) to these women was the phone found on Mr. Sholar at the time of his arrest.

Thus, the jury—having to weigh evidence suggesting that Mr. Sholar pimped and trafficked EC and SG against evidence indicating that Mr. Simmons did so—then, during deliberations asks: "Can we request Lamont's phone records, 544 0125, looking for in—slash—out bounds regarding I got dollars text messages while with client." (88:73).

Instead of being handed what they asked for, they were handed *all* of the contents of this phone through Exhibit 79.

Insofar as there may have been portions of this exhibit which would have been properly admissible, those portions were engulfed by the damning inadmissible other acts evidence and hearsay.

This improperly-admitted evidence painted the picture to the jury of Mr. Sholar as a violent man and hardcore drug-dealer. A few of the many examples:

- An outgoing text message to an unknown number saying: "Fo sho stopping to get my heat to teach him a lesson;" (92:Trial Exh.79; 56:PCM Exh.B, Text Message 536);

- A later incoming text message from a "Brit" saying "Spencer invited me to go to the motel tonight too. Haha damn I shulda went I wanna see u break dudes legs (:"; (92:Trial Exh.79; 56:PCM Exh.B, Text Message 924).

- An outgoing text message that followed reading: "Ima made nigga out here and soon or later mfs gone no that the hard way this nigga scared shit". (92:Trial Exh.79;56:PCM Exh.B, Text Messages 925).

- An incoming text message from a "Brit" stating: "the cop told me he's worried because s[][13] said u threatened rt kill her. Idk its all bs. I didn't give out no info I'm all over it. But if I lose my house I'm moving in with u (: aha. And they asked me what u drove and I didn't tell them shit it isnttttt my issue but were getting fucked up tonight we better (;".(92:Trial Exh.79 ;56:PCM Exh.B, Text Messages 159-60);

- There is also a reference in outgoing text messages to having "beat" a case: an outgoing text message to a "T" saying "I beat my shit," and then a follow-up text message clarifying that this meant "my case" (92:Trial Exh.79; 56:PCM Exh.B, Text Messages 1141,1144, 1146).

- There is an incoming text message from "N/A" stating: "Come home on a bus. I have reported you to the Columbia county sheriff. Next step is

[13] Counsel has redacted the name from this text message, but the name given is a shortened version of SG's first name.

a warrant. I am done I am broke and bit taking it anymore. Goodluc". (92:Trial Exh.79;56:PCM Exh.B, Text Message 1359).

- There are repeated conversations concerning the buying and selling of "pills," specifically "percs," a slang term for the prescription drugs Percocet and Percodan.[14] (92:Trial Exh.79;56: PCM Exh.B, Text Messages 318-319,360,394).

- There are repeated references to "boy," a slang term for heroin[15], including an incoming text message from a "Brit" asking "Can u find boy?" and a response "Yea I can." (92:Trial Exh.79; 56:PCM Exh.B, Text Messages 148-149). [16]

The jury was literally handed 181 pages of phone records reflecting that Mr. Sholar was a bad, violent, drug dealer—that he was the type of person who would break the law to help himself; that he was the type of person who would engage in violence. Where the central question on the non-sexual assault counts was *who* EC and SG worked for

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[14] *See* University of Maryland Center for Substance Abuse Research, "Oxycodone," available at http://www.cesar.umd.edu/cesar/drugs/oxycodone.asp (last accessed 8/24/16)(explaining the slang term for Percocet/Percodan).

[15] *See* National Drug Intelligence Center, "Heroin Fast Facts," available at http://www.justice.gov/archive/ndic/pubs3/3843/#called (last accessed 8/24/16).

[16] These are but a small sample of the many text messages referring to improper other-acts evidence. A full list is detailed in Exhibit B to Mr. Sholar's original post-conviction motion. (56:PCM Exh.B). Mr. Sholar included as Exhibit B to his post-conviction motion the entire text message section of Exhibit 79 (pages 10-109 of the 181 page Exhibit), with stars placed next to each text message which involved improper, prejudicial other-acts evidence. (56:PCM Exh.B).

when engaged in prostitution, the other acts evidence and hearsay of Exhibit 79 improperly told the jury that Mr. Sholar was the very type of person who would commit these charged acts.

One of the fundamental reasons the law excludes other acts evidence is the "overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts"; the "fear that an invitation to focus on an accused's character magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." ***State v. Sullivan***, 216 Wis. 2d 768, 782, 576 N.W.2d 30.

"The messages and the pictures are in my opinion so inflammatory that I think a jury then and there might have convicted him of virtually anything." (107:40;App.187).

Mr. Sholar is entitled to a new trial on all counts.

CONCLUSION

For these reasons, Mr. Sholar respectfully requests that this Court enter an order reversing the portion of the circuit court's order denying his post-conviction motion for a new trial on Counts 1, 2, 3, 4, and 6, vacating his convictions and sentences on Counts 1, 2, 3, 4, and 6, and remanding this matter to the circuit court for a new trial.

Dated this 25th day of August, 2016.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,275 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 25th day of August, 2016.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 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 25th day of August, 2016.

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*Documents in the Appendix have been redacted to comport with rules of confidentiality. In addition to the names of the two women involved in the allegations in this case, counsel has also redacted the names of other non-law enforcement witnesses.