

RECEIVED

STATE OF WISCONSIN

09-23-2016

COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT I

Case No. 2016AP897-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAMONT DONNELL
SHOLAR,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND
THE ORDER DENYING POSTCONVICTION RELIEF
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE THOMAS J. MCADAMS, PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-
Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 266-9594 (Fax)
murphyac@doj.state.wi.us

TABLE OF CONTENTS

	Page
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	2
SUPPLEMENTAL STATEMENT OF THE CASE	2
ARGUMENT	7
I. The circuit court properly interpreted this Court’s decision and order to require it to analyze both prongs of Sholar’s ineffective assistance of counsel claim.....	7
A. Relevant law and standard of review.	7
B. In accordance with this Court’s decision finding that Sholar’s allegations, if true, entitled him to a <i>Machner</i> hearing, the circuit court properly analyzed both whether counsel performed deficiently when he failed to object to the text messages, and if so, whether Sholar was prejudiced as to any of the charges against him.....	9
II. The circuit court properly determined that while Sholar’s trial counsel performed deficiently by not objecting to the admission of the text messages, Sholar was prejudiced only as to the sexual assault charge.	13
CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<i>State v. Allen</i> , 2005 WI 106, 274 Wis. 2d 568, 682 N.W. 2d 433	11
<i>State v. Carprue</i> , 2004 WI 111, 274 Wis. 2d 656, 683 N.W.2d 31	7, 8
<i>State v. Domke</i> , 2011 WI 95, 337 Wis. 2d 268, 805 N.W. 2d 364	7, 12
<i>State v. Erickson</i> , 227 Wis. 2d 758, 596 N.W.2d 749 (1999)	7
<i>State v. Jenkins</i> , 2014 WI 59, 355 Wis. 2d 180, 848 N.W.2d 786.	8, 18
<i>State v. Johnson</i> , 153 Wis. 2d 121, 449 N.W.2d 845 (1990)	8
<i>State v. Lukasik</i> , 115 Wis. 2d 134, 340 N.W.2d 62 (Ct. App. 1983)	8
<i>State v. Machner</i> , 92 Wis. 2d 797, 285 N.W. 2d 905 (Ct. App. 1979)	1
<i>State v. McMahon</i> , 186 Wis. 2d 68, 519 N.W.2d 621 (Ct. App. 1994)	7
<i>State v. Moffett</i> , 147 Wis. 2d 343, 433 N.W.2d 572 (1989)	8
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	7, 8, 12, 18

Statutes

Wis. Stat. § 805.17(2)	8
------------------------------	---

STATEMENT OF ISSUES ON APPEAL

I. In its decision remanding this case for a *Machner*¹ hearing on Sholar's ineffective assistance of counsel claim, did this Court conclude that Sholar was prejudiced and limit the circuit court to determining only whether Sholar's trial counsel performed deficiently by not objecting to the admitting into evidence and providing to the jury in full an exhibit containing Sholar's text messages?

Circuit Court answered: No. The circuit court interpreted this court's decision remanding for a *Machner* hearing to require it to examine both whether Sholar's counsel's performance was deficient and whether Sholar was prejudiced as to any of the counts against him.

If this court agrees that its order remanding the case for a *Machner* hearing charged the circuit court with determining both prongs of the ineffective assistance of counsel inquiry, then it should affirm the circuit court's analysis of Sholar's ineffective assistance claim.

II. Did the circuit court properly determine that Sholar's counsel performed deficiently by not objecting to hundreds of text messages being admitted into evidence and given to the jury, but that Sholar was prejudiced only with respect to his sexual assault conviction?

Circuit Court answered: Yes. The circuit court determined that Sholar had failed to show that his counsel's performance prejudiced him on five of his convictions: trafficking a child, soliciting a child, human trafficking and

¹ *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W. 2d 905 (Ct. App. 1979).

the two counts of pandering/pimping. Therefore, the circuit court denied his postconviction motion to vacate those convictions. The court also held that Sholar had shown he was prejudiced with respect to the sexual assault count and vacated his conviction and sentence on that count.

This court should affirm the circuit court's order vacating Sholar's sexual assault conviction but denying his motion to vacate the other five convictions.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication, as the issues can be resolved based on well-settled law, the record in this case, and the briefs of the parties.

SUPPLEMENTAL STATEMENT OF THE CASE

Criminal complaint, trial, and postconviction motion. The State charged Sholar with one count of trafficking of a child, one count of soliciting a child for prostitution, two counts of pandering/pimping, one count of human trafficking, and one count of second-degree sexual assault. (2; 4.) In the same criminal complaint, Sholar's co-actor Shawnrell Simmons was charged with one count of first-degree first degree sexual assault. (2.)

During the six-day jury trial on the six charges against Sholar, both victims, 17-year-old EC and 22-year-old SG, testified against Sholar. Sholar testified on his own behalf. (78; 79; 80; 81; 82; 83; 84; 85; 86; 87; 88; 89; 94:2-4.) Sholar testified that the cell phone in his possession at the time of his arrest belonged to Simmons and that he was using it because the screen on his phone was cracked. (94:4.) During its deliberations, the jury requested the cell phone

records from the phone in Sholar's possession. The State and defense counsel agreed to provide the jury with Exhibit 79 containing the phone records, including approximately 1400 text messages. (94:5, 9.)

Sholar was convicted on all six charges and sentenced to forty-five years, with thirty years of initial confinement and fifteen years of extended supervision. (28; A-App. 101–104.) Sholar filed a postconviction motion. (55.) As relevant here, Sholar alleged that his trial counsel was ineffective for agreeing to the admission of the text messages in Exhibit 79 into evidence and allowing them to be given to the jury. (55:4-15.)

In a written order, and without a hearing, the circuit court denied the motion. (62, A-App. 132-145.) The circuit court found that Sholar was not prejudiced by the admission of the text messages contained in Exhibit 79 because the evidence against Sholar “was overwhelming [and] the jury would have still found [him] guilty without the improperly admitted evidence, be it other acts evidence or hearsay.” (62:8, A-App. 139.) It explained:

The defendant testified about drug dealing, specifically weed and K2. Thus, the jury was aware without the text messages that the defendant sold drugs. Further, the State's evidence against the defendant was very strong. Victims EC and SG both testified against the defendant. Their narratives were corroborated by [other witnesses]. Further, the defendant corroborated aspects of EC and SG's testimony, although he denied the actual offenses. Forensic and physical evidence further corroborated EC and SG's testimony, including evidence found on Sholar's phone, on EC's phone, in the Econolodge room that the defendant rented, on the Econolodge lobby computer, and in the ads on Backpage.com. Given the amount of evidence in this case against the defendant, there is no reasonable probability

that the result of the proceeding would have been different had the exhibits not been introduced at trial or provided to the jury during their deliberations.

(62:9, A-App. 140.) Sholar appealed from the decision and order and the judgment of conviction. (64.)

Decision of this Court remanding for a Machner hearing. This Court reversed the circuit court's order denying the postconviction motion, finding that he was entitled to a *Machner* hearing "with respect to his trial attorney's failure to object when hundreds of text messages were both admitted into evidence and provided to the jury during its deliberations." (94:1-2, A-App. 118-19.) After reviewing Sholar's argument why his attorney performed deficiently for failing to object to the text messages and whether he was prejudiced, this Court found that that "at the very least, the impact of this evidence could have been significant as to the sexual assault charge." (94:10.)

In support, this Court referred to Sholar's allegations in his postconviction motion that the text messages influenced the jury on the sexual assault charge because they "suggest[ed] that he is the type of person who threatens violence against others and is involved in the dealing of multiple hardcore narcotics." (94:11, A-App. 128.) Sholar also alleged that there was "more than a reasonable likelihood that the one-hundred pages of text messages containing improper, irrelevant other acts evidence and hearsay evidence affected the jury's decision to convict him of forcible sexual assault." (94:11, A-App. 128.) This Court concluded that "Sholar's allegations in this regard, if true, are sufficient to entitle Sholar to a *Machner* hearing." (94:11, A-App. 128.)

As such, this Court remanded the case to the circuit court for a *Machner* hearing solely on Sholar’s claim that his trial counsel “was ineffective for failing to object when hundreds of text messages were both admitted into evidence and provided to the jury during deliberations.” (94:14.) This Court explained that “[w]ithout a *Machner* hearing we cannot determine whether counsel’s decision not to object was a reasonable strategic choice.” (94:14, A-App. 131.) Therefore, this Court ordered that the circuit court hold a *Machner* hearing because “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.)

Machner hearing, circuit court order and appeal.

The circuit court held a *Machner* hearing, at which Sholar’s trial counsel testified. (106.) The circuit court vacated Sholar’s conviction and his sentence for second-degree sexual assault, but denied Sholar’s motion to vacate his convictions on the other counts. (103, A-App. 146–47.)

In its decision, the circuit court stated that it had reviewed all the evidence, including the trial transcripts and exhibits, as well as the testimony from the *Machner* hearing. (107:3, A-App. 150.) In order to determine what it was “here to decide,” (107:13, A-App. 160), the circuit court reviewed this Court’s decision remanding for a *Machner* hearing. It concluded that the decision charged it with “conduct[ing] a *Machner* hearing and rule on both prongs” of Sholar’s claim: deficient performance and prejudice. (107:16, A-App. 163.) In support of this conclusion, the circuit court noted that “appellate courts are usually error-correcting courts and leave the fact finding to the trial courts” and that “[i]t would be unusual . . . for an appellate court to

essentially order or direct a verdict on a legal issue before a trial court hears it.” (107:16, A-App. 163.)

After reviewing all the evidence related to Sholar’s convictions, including the testimony from the victims, the circuit court concluded that “[g]iven the circumstances, I believe there was no chance of a different result on the trafficking counts. So as to the trafficking counts which would be Counts 1, 2, 3, 4 and 6 I find that the performance was certainly not prejudicial as the evidence on those counts was overwhelming.” (107:25, A-App. 72.) However, as to count five for second-degree sexual assault, the circuit court found that there was much less evidentiary support: “no corroborating witness, no physical evidence, no DNA, and . . . inconsistent versions” from the victim. (107:25–26, A-App. 172-73.) Therefore, the circuit court determined that solely as to the sexual assault count, the text messages were prejudicial because they affected the trial’s outcome and “the defense clearly has shown deficient performance and prejudice.” (107:29, A-App. 176.)

The circuit court entered a written order on its decision. (109.) Sholar appeals. (104.)²

² In the Notice of Appeal, Sholar purports to also appeal from the decision and order denying postconviction relief entered on August 7, 2014 in Milwaukee County Circuit Court, the Honorable Rebecca F. Dallet presiding. However, this was the order he appealed that led this Court to reverse and remand for the *Machner* hearing. This appeal is therefore not an appeal from the circuit court’s August 7, 2014 decision and order, which was the subject of the previous appeal. Rather it is an appeal from the order entered after the *Machner* hearing, and the judgment of conviction.

ARGUMENT

I. The circuit court properly interpreted this Court's decision and order to require it to analyze both prongs of Sholar's ineffective assistance of counsel claim.

A. Relevant law and standard of review.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth the elements of ineffective assistance of counsel. Wisconsin “follows the two-part analysis for ineffective assistance of counsel claims established by the Supreme Court in *Strickland*.” *State v. Carprue*, 2004 WI 111, ¶ 48, 274 Wis. 2d 656, 683 N.W.2d 31. The defendant has the burden of proving both prongs of the ineffective assistance analysis to be entitled to relief: (1) that counsel's performance was deficient and (2) that such deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687, *State v. Domke*, 2011 WI 95, ¶ 1, 337 Wis. 2d 268, 805 N.W. 2d 364.

The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. *Strickland*, 466 U.S. at 689. To establish prejudice, a defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Id.*; see also *State v. Erickson*, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). This means that the conviction is fundamentally unfair or unreliable. *State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). The prejudice analysis is fact-dependent and must be reviewed under the totality of the circumstances at trial.

State v. Jenkins, 2014 WI 59, ¶ 50, 355 Wis. 2d 180, 848 N.W.2d 786. Further, “[i]n making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.” *Strickland*, 466 U.S. at 695.

Both prongs of the *Strickland* test constitute mixed questions of law and fact. *State v. Moffett*, 147 Wis. 2d 343, 352, 433 N.W.2d 572 (1989). On review, this Court will not reverse the circuit court’s findings of fact unless they are clearly erroneous. *Id.* at 352–53; Wis. Stat. § 805.17(2). However, whether counsel’s performance was deficient and whether that deficiency prejudiced the defense are questions of law which this court decides without deference to the circuit court. *Moffett*, 147 Wis. 2d at 353.

A defendant must prove ineffective assistance of counsel to a level of clear and convincing evidence. *State v. Lukasik*, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983). When reviewing a claim of ineffective assistance of counsel, the reviewing court may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice. *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990) *See also Carprue*, 274 Wis. 2d 656, ¶ 49 (“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed”) (citations omitted)).

B. In accordance with this Court’s decision finding that Sholar’s allegations, if true, entitled him to a *Machner* hearing, the circuit court properly analyzed both whether counsel performed deficiently when he failed to object to the text messages, and if so, whether Sholar was prejudiced as to any of the charges against him.

On appeal, Sholar argues that this Court definitively determined the prejudice prong of the ineffective assistance claim; that on remand, the circuit court was only able to determine whether Sholar’s trial counsel performed deficiently; and therefore, that “[t]he 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.” (Sholar’s Br. 15.) The State disagrees that this Court’s decision remanding for a *Machner* hearing limited the circuit court to making the deficient performance inquiry. If this Court had wanted to instruct the circuit court that it had to find prejudice as a matter of law, then its remand decision would have clearly stated that the only issue on remand was whether trial counsel performed deficiently. But, in fact, this Court did not find that Sholar’s attorney’s failure to object to the text messages, if it was deficient performance, was prejudicial to the outcome of the trial on all six charges as a matter of law. Therefore, the State asserts that the circuit court properly examined both prongs of the ineffective assistance of counsel analysis under *Strickland*: deficient performance and prejudice.

On remand, the circuit court carefully interpreted this Court’s decision and order to direct it to “conduct a *Machner* hearing and rule on both prongs” of the ineffective assistance analysis. (107:16, A-App. 163.) Specifically, the circuit court

found that it was “appropriate here to make a charge-specific decision” on Sholar’s ineffective assistance claim, and indicated several reasons for its determination, including:

- This Court’s decision at “paragraph 32 suggests analyzing the claims here on that basis”;
- This case involved “a number of counts and counts involving more than one victim”;
- “[J]udicial economy would be furthered by not wasting resources retrying counts for which the result would be no different” and “it would waste the time and effort of the parties to redo a five-day trial based on things that only affect one out of six charges;
- The “totality of the circumstances analysis” as set forth in *Strickland* and *Jenkins* means that the circuit court has “to look at specific facts and specific charges.”
- A verdict that is “only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.”

(107:37–38, A-App. 184–85.)

On appeal, Sholar argues that this Court remanded for a *Machner* hearing solely for the purpose of determining whether Sholar’s counsel performed deficiently because this Court “already decided that Mr. Sholar met his burden to show prejudice.” (Sholar’s Br. 16.) Sholar is wrong. In paragraph 32 and 33 of this Court’s decision, on the issue of whether Sholar had shown that he was prejudiced, this Court found that, although the circuit court had determined in its first decision denying the postconviction motion that he had not demonstrated that he was prejudiced “given the amount of evidence against him,” this Court was “not so sure. As Sholar points out, at the very least, the impact of this evidence could have been significant **to the sexual**

assault charge.” (94:10, A-App. 127.) (emphasis added). This Court then cited Sholar’s allegations that his trial counsel’s failure to object to the admission of the text messages “affected the jury’s decision to convict him of the forcible sexual assault” and, based on Sholar’s allegations, determined that his “allegations in this regard, if true, are sufficient to entitle Sholar to a *Machner* hearing.” (94:11, A-App. 128.)

Significantly, this Court did not determine that these allegations established that Sholar was prejudiced as a matter of law. Instead, this Court remanded for a *Machner* hearing because, under *State v. Allen*, 2004 WI 106, ¶ 12, 274 Wis. 2d 568, 682 N.W. 2d 433, “[w]e must accept the allegations in Sholar’s postconviction motion as true for purposes of determining whether Sholar was entitled to a *Machner* hearing” (94:11, n.5, A-App. 128.) Therefore, this Court accepted Sholar’s allegations as true for purposes of ordering a *Machner* hearing, but left it up to the circuit court to determine after the hearing whether, under the totality of circumstances, Sholar had shown both that his attorney performed deficiently and that he was prejudiced as to all six counts against him.

Sholar’s argument that “[t]he circuit court simply misunderstood this Court’s previous decision” (Sholar’s Br. 17) is belied by a careful reading of this Court’s decision. The circuit court correctly understood that by remanding for a *Machner* hearing on Sholar’s ineffective assistance claim, this Court did not take away the fact-finding function from the circuit court but instead, in accordance with *Strickland*, charged the court with determining both prongs of the ineffective assistance of counsel analysis. This Court’s decision, finding that Sholar “could” have been prejudiced “at least as to the sexual assault charge” did not make

findings of fact on whether Sholar was prejudiced. (94:10, 14, A-App. 127, 131.). Instead, it accepted Sholar's allegations as true as it was required to do under *Allen*, and remanded for a *Machner* hearing to give Sholar the opportunity to prove his ineffective assistance claim. This Court determined that Sholar had, in his postconviction motion, made sufficient allegations to warrant a *Machner* hearing and therefore, this court reversed and remanded "on this issue" (95:11, A-App. 128): whether Sholar's counsel was ineffective, which necessarily involves a determination of both deficient performance and prejudice, considering "the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 698. This Court did not conclude that Sholar had proven his counsel was ineffective.

Although this Court found that Sholar had shown that he was entitled to a *Machner* hearing, on remand Sholar still had the burden of proving both deficient performance and prejudice. *Strickland*, 466 U.S. at 687, *Domke*, 337 Wis. 2d 268, ¶ 1. Sholar argues that the circuit court was not required to make findings of fact by reviewing the record with respect to whether Sholar was prejudiced because this was "the very thing this Court had already done" and that this Court's "assessment" of prejudice was "the law of this case." (Sholar's Br. 20.) Therefore, Sholar argues that the only thing that this Court instructed the circuit court to do on remand was "to hold the hearing to assess whether counsel had any reasonable strategy" for not objecting to the admission of the text messages. (Sholar's Br. 20-21.) Sholar misinterprets this Court's decision. Because this Court found only that Sholar's allegations of prejudice, **if true**, were sufficient to entitle him to a *Machner* hearing (94:11, A-App. 128), this Court charged the circuit court on remand to determine both whether Sholar had proven that his counsel performed deficiently and whether he was prejudiced.

Therefore, the circuit court properly conducted a *Machner* hearing on whether Sholar's attorney had a reasonable trial strategy for not objecting to the admission of the text messages **and** whether Sholar would still have been convicted on all counts if Sholar's counsel had objected to the evidence. In accordance with this Court's directive, the circuit court examined the entire record and found that Sholar's counsel performed deficiently by not objecting to the text messages, but that Sholar was prejudiced solely on the sexual assault count. For the reasons set forth below, this Court should affirm the court's order.

II. The circuit court properly determined that while Sholar's trial counsel performed deficiently by not objecting to the admission of the text messages, Sholar was prejudiced only as to the sexual assault charge.

After this Court remanded this case for a *Machner* hearing based on Sholar's allegations of ineffective assistance of counsel as a result of his trial counsel not objecting to Exhibit 79, the circuit court, after exhaustively reviewing the record in this case, determined that Sholar had met his burden to prove deficient performance, but had only met his burden to show that he was prejudiced as to the sexual assault charge. (107:39–40, A-App. 186–87.) On appeal, Sholar argues that because his attorney's performance was deficient, that he was prejudiced on all counts against him and thus is entitled to a new trial on all counts. (Sholar's Br. 22–29.) However, because the record in this case supports the circuit court's finding that Sholar was only prejudiced on the sexual assault count—in particular, the overwhelming evidence against him on the trafficking counts including the testimony of both victim in this case—Sholar received a fair and reliable trial on the trafficking counts and was not prejudiced as to those counts. Therefore,

Sholar's claim that he is entitled to a new trial on all counts fails.

The circuit court properly held a *Machner* hearing as directed by this Court and conducted an exhaustive review of the record in this case, including the transcripts of the six-day jury trial. In its decision, the circuit court found that that the “distinction . . . between the five trafficking charges and the one sexual assault count is justifiable,” and that this Court had directed it to make a “charge-specific decision” on whether Sholar had been prejudiced by his counsel's failure to object to the text messages. (107:37, 39.) On the deficient performance prong of its ineffective assistance of counsel analysis, the circuit court concluded that Sholar's trial counsel's “decision not to object or to edit the exhibit before going to the jury was deficient performance and not part of any reasonable trial strategy.” (107:39, A-App. 186.)

With respect to the prejudice prong, the circuit court found that Sholar had not shown that this deficient performance was prejudicial as to the trafficking of a child, soliciting a child for prostitution, pandering/pimping and human trafficking charges because

as to Counts 1, 2, 3, 4 and 6 the State has convinced me that the evidence there was overwhelming. I make that conclusion based upon my review of the transcripts, and upon examining the totality of the circumstances I am not persuaded that but for trial counsel's errors as to Exhibit 79 the result there would have been any different.

(107:39–40, A-App. 187.) However, as to count five, the sexual assault charge, the circuit court found that “there was much less evidence” in support of this charge and that therefore, Sholar had met his burden of showing “that there

is a reasonable probability of a different result” and therefore, “vacat[ed] the conviction as to Count 5 and Count 5 only.” (107:40, A-App. 187.) As such, the circuit court found that based on the totality of the evidence, Sholar was prejudiced only on the sexual assault conviction.

Sholar argues that on remand, he did not have to show that he was prejudiced as to every count even though he “recognizes that the quantum of evidence the State presented with regard to the [trafficking] charges . . . was different than that presented with regard to the alleged sexual assault of SG.” He also argues that he was prejudiced as to all counts because the text messages were “inflammatory” and “central to the jury’s deliberations” about whether Sholar was involved in trafficking and pimping the victims. (Sholar’s Br. 22–23.) Sholar asserts that he is entitled to a new trial on all counts because the text messages “improperly told the jury that Mr. Sholar was the very type of person who would commit these charged acts.” (Sholar’s Br. 29.)

Sholar is not entitled to a new trial on the five trafficking counts. The circuit court correctly held that Sholar was prejudiced only with respect to the sexual assault charge. (107:39–40.) The circuit court focused on the testimony from the victims, concluding that on the five trafficking and pimping counts, there was no chance of a different result and that Sholar was therefore not prejudiced on those counts because “the evidence on those counts was overwhelming.” (107:24–25, A-App. 171–72.)

Indeed, the evidence against Sholar at trial included the graphic and detailed testimony of both victims that they were trafficked and pimped by Sholar. EC, who was 17 years old at the time, testified that she first met Simmons, along with three of her friends who were also all under 18 at the

time, and he told her that he wanted her to prostitute for him but because he already had two of her friends working for him, she starting working for Sholar. (80:86, 89, 91–92.) EC testified that Sholar took suggestive pictures of her and of the other victim, SG, and posted them on the internet with Sholar’s phone number. (80:99–100, 104–106.) EC explicitly testified that she worked for Sholar by taking money from men and engaging in sex acts at homes and at hotels, that this happened at least 200 times, that Sholar would scare her and make her think he wanted to hurt her and “bruised” and “punched” her several times and threatened her if she left him. (88:108–115.) She further testified that she would take a call from someone who wanted sex, Sholar would set the price, she would meet the person, take their money first and secure it, engage in sex, and when the person was gone, she would contact Sholar and give him the money. (88:118–122.)

SG testified that Sholar forced her to engage in sex acts with men for money by threatening to harm her and her family. (88:179–80, 184, 186.) Like EC, she testified that Sholar took suggestive pictures of her and posted them on the internet, gave her a cell phone to received calls and texts from people who wanted sex for money and was forced to do many different sex acts, including some she graphically described as “weird.” (80:180, 194–196.)

Several other witnesses corroborated the testimony of EC and SG. Nicole Sredynski, who testified that she was an “escort” who performed sex for money and knew Sholar, EC and SG, confirmed the testimony of both EC and SG about Sholar’s involvement with Simmons in the prostitution operation out of the Econolodge. (82:58–67.) The State also introduced testimony from Detective Richard McQuown, who was trained to examine cell phones and human trafficking evidence, that text messages on EC’s cell

phone were used to arrange meetings consistent with human trafficking. (83:20–21.) The manager of the Econolodge testified and identified Sholar as having rented more than one room at a time at the hotel on at least two occasions. (83:62–72.)

Sholar testified on his own behalf that he knew that Simmons was pimping girls for prostitution, including the victims EC and SG, but that he did not have any girls working for him doing prostitution, although he “developed a friendship” with 17-year old EC. (84:18–20.) He further testified that he knew Simmons was pimping and identified SG, EC and multiple other prostitutes working for Simmons in pictures from the internet, but stated that he was not pimping. (84:29–38.)

Based on its review of the trial transcripts, the circuit court found that Sholar’s testimony was “incredible” and recognized that the trial judge at sentencing called his testimony “ridiculous.” (107:21, A-App. 168.) The circuit court further found that the testimony of the victims about drug use, threats, burglary, potential car theft, fetishes and group sex parties was “overwhelming” and that as to the trafficking counts, the deficient performance by Sholar’s trial counsel was not prejudicial because there was no chance of different result:

I think Mr. Sholar gets convicted regardless of the contents of the phone going back to the jury, and the law is that a defendant fails to demonstrate prejudice if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

I have no doubt here the defense has not carried its burden as to that prong.

(107:25, A-App. 172.)

In contrast, because the evidence was much weaker on the sexual assault charge, the circuit court found that the impact of the text messages on the jury's decision to convict Sholar on that charge was prejudicial. (107:29, A-App. 176.)

The circuit court correctly determined that the strength and disturbing nature of the testimony from the victims and others at trial was found to be credible and outweighed Sholar's self-serving testimony, in which he denied trafficking although admitted close involvement with Simmons and the victims in this case. The overwhelming evidence from the victims and the corroboration from other witnesses were more than sufficient to convict Sholar of the trafficking counts without the text messages from his phone being admitted into evidence and provided to the jury.

Sholar's argument on appeal that the circuit court improperly determined that Sholar was prejudiced only as to the sexual assault charge completely disregards the circuit court's fact-finding function at an evidentiary hearing to determine both the performance and prejudice prongs and *Strickland's* instruction that "[i]n making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. The prejudice prong analysis is fact-dependent and must be reviewed under the totality of the circumstances. *See Jenkins*, 355 Wis. 2d 180, ¶ 50. Therefore, the circuit court properly reviewed the totality of the evidence and found that Sholar was prejudiced solely as to the sexual assault charge. The circuit court's order vacating Sholar's conviction on count 5 for second degree sexual assault, but denying Sholar's motion to vacate his convictions on the remaining five counts, should be affirmed.

CONCLUSION

The circuit court properly interpreted this Court's decision remanding for a *Machner* hearing and after reviewing and analyzing the facts and the law, entered an order vacating Sholar's conviction for sexual assault but denying the remainder of the postconviction to vacate the remaining five convictions and order a new trial. For all the foregoing reasons, the circuit court's order and the judgment of conviction should be affirmed.

Dated this 23rd day of September, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-
Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 266-9594 (Fax)
murphyac@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 4,822 words.

Dated this 23rd day of September, 2016.

ANNE C. MURPHY
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:

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 23rd day of September, 2016.

ANNE C. MURPHY
Assistant Attorney General