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 Thomas J. McAdams, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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.

The State makes no attempt to respond to the many reasons why, under the principles of judicial efficiency, forfeiture, and fairness, it should not be allowed to re-litigate a question this Court has already decided in this case.

The State's only response is that, in its original opinion, this Court noted that, "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***[1] hearing'". (Response at 11; 94:11;Initial Brief App.128).

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

This Court indeed cited ***Allen***; however, this citation does not—as the State suggests—mean that this Court has not already determined that Mr. Sholar was prejudiced as a matter of law. *See* (Response at 11).

Rather, it means that this Court determined that Mr. Sholar's motion *did* show prejudice, and that his allegations with regard to deficient performance (namely, that counsel had no strategic reason for his failure to object), if true, would entitle him to relief. Hence, this Court's concluding explanation from its first decision:

> Without a ***Machner*** hearing we cannot determine whether counsel's decision not to object was a reasonable strategic choice. 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;Initial App.131).

Allen stands for the principle that a court may deny a request for an evidentiary hearing on a post-conviction motion if "all of the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief". 2004 WI 106, ¶12. This conclusion follows the longstanding rule that "when credibility is an issue, it is best resolved by live testimony". ***Id.***, ¶12, n.6.

Thus, if the allegations seem "questionable in their believability" but, if true, would warrant relief, the court *must* hold a hearing. ***Id.*** If, on the other hand, even accepting the allegations as true, the record demonstrates that the defendant would not be entitled to relief, no hearing is necessary. ***Id.***

The ***Allen*** principle is the reason why this Court and the Wisconsin Supreme Court in many cases affirm a circuit court's denial of a claim of ineffective assistance of counsel where no ***Machner*** hearing has ever been held: the appellate court determines the defendant has not met his burden to show prejudice. *See, e.g.,* ***State v. Roberson***, 2006 WI 80, ¶44, 292 Wis. 2d 280, 717 N.W.2d 11 ("[b]ecause we conclude that the record sufficiently establishes that Roberson was not prejudiced by his counsel's actions, we further conclude that the circuit court did not err in denying Roberson a hearing on his postconviction motion"); ***State v. Jacobs***, 2012 WI App 104, ¶¶ 3-33, 344 Wis. 2d 142, 822 N.W.2d 885 (holding that a ***Machner*** hearing was unwarranted because the record did not establish that he would have been prejudiced by the alleged deficient performance).

Unlike those cases, here this Court concluded that Mr. Sholar *did* meet his burden to show prejudice. Indeed, had this Court not reached that conclusion, it would not have reversed the circuit court's decision.

The only allegation in Mr. Sholar's post-conviction motion which required fact-finding on remand was the question of whether trial counsel had a reasonable strategy for not objecting to the admission and publication of the exhibit. *See* (55).

The question of prejudice, on the other hand, relied entirely on a review of the trial court record. *See* (55). This Court already conducted that review; it found that Mr. Sholar met his burden to show a reasonable likelihood of a different outcome at trial. The State did not petition for review from this decision, and should not have a second opportunity to

argue prejudice simply because the circuit court erred in denying a ***Machner*** hearing in the first place.

Ultimately, whether or not this Court should conclude that its prior prejudice determination is the law of the case and thus binding, the bottom line is that this Court has already analyzed the question of prejudice. The circuit court judge on remand—who did not preside over the trial—conducted the same analysis this Court already conducted to evaluate prejudice: a review of the trial record. (107:24-40;Initial App.171-187). This Court reviews *de novo* whether counsel's failure undermined the reliability of the proceeding. ***State v. Thiel***, 2003 WI 111, ¶ 24, 264 Wis. 2d 571, 665 N.W.2d 305. This Court need not and should not reconsider an analysis it has already performed.

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 State further fails to address Mr. Sholar's argument that this Court did not order remand on only one of five counts—rather, that it found that Mr. Sholar met his burden to show a reasonable likelihood that the "result of the *trial* would have been different." *See generally* (Response Brief); *see also* (94:14;Initial App. 131)(emphasis added).

The State also fails to point to any support for the notion that that a circuit court can lawfully parse out the prejudice of inadmissible other acts/character evidence on a count-by-count basis in a single, multiple-count trial. *See generally* (Response Brief). Instead, the State simply agrees with the circuit court that Mr. Sholar did not meet his burden to show a reasonable likelihood with regard to the five remaining counts. (Response Brief at 15-18).

Even if this Court should now hold that a circuit court may parse out prejudice on a count-by-count basis in evaluating the prejudice of other-acts character evidence, Mr. Sholar has met his burden to show a reasonable likelihood of a different outcome on all of the counts.

The State argues that the "overwhelming evidence from the victims and 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." (Response Brief at 18)(emphasis added).

But again, the question of prejudice is not the same as a review for the sufficiency of the evidence on each count. Prejudice asks whether there 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). Prejudice focuses on the "reliability of the proceedings". ***State v. Coleman***, 2015 WI App 38, ¶ 41, 362 Wis. 2d 447, 862 N.W.2d 190.

A central question at trial was whether Mr. Sholar or Mr. Simmons pimped EC and SG. The cell phone records were a central part of the jury's deliberations as demonstrated by their request to see specific text messages. Instead of the specific messages they requested, the jury was handed a 181-page exhibit rife with inadmissible, prejudicial other acts evidence painting Mr. Sholar as a violent, hardcore drug dealer.

We simply cannot be confident that the jury's all-guilty verdicts were not polluted by the horrible image of Mr. Sholar that exhibit portrayed. We simply cannot be confident that the jury's verdicts relied only on the evidence

properly in front of it and not on the inadmissible other acts evidence literally placed in their hands during deliberations. We simply cannot be confident that the jury did not "punish" Mr. Sholar "for being a bad person regardless of his" "guilt of the crime charged." ***State v. Sullivan***, 216 Wis. 2d 768, 782, 576 N.W.2d 30 (1998).

As the circuit court noted on remand: "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).

CONCLUSION

For these reasons and those set forth in his Initial Brief, 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 18th day of October, 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 1,481 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 18th day of October, 2016.

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