STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP000897-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAMONT DONNELL SHOLAR,

Defendant-Appellant-Petitioner.

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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1773
jurssh@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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I. Mr. Sholar Met His Burden to Show Ineffective Assistance of Counsel Such That He Is Entitled to a New Trial on All Counts.

A. ***Strickland*** does not permit a pure count-by-count weighing of the sufficiency of the evidence absent the error to evaluate prejudice in a multiple-count jury trial.

Though "[m]ulti-count cases are extremely common[,]" the State acknowledges there are no "published opinions" from either the U.S. Supreme Court or "other jurisdictions" addressing "whether a defendant can be prejudiced on one count supported by weak evidence and not others supported by overwhelming evidence[.]" (Response at 25,31).

The State asserts this absence "does not carry the persuasive force Sholar tries to impute to it." (Response at 25). On the contrary, it is significant that no court in the nation has directly held in the over thirty-years since ***Strickland***[1] was decided that prejudice may be divided count by count. It reflects that courts focus on the reliability of the *proceeding*, as ***Strickland*** directs. *See* 466 U.S. at 694.

The State suggests this absence is likely because the answer is so "apparent[.]" (Response at 25)(quoted source omitted). If so, why cannot the State point to a prior instance where a court has performed the type of division it asks this Court to affirm here? If so, why have Wisconsin appellate courts before now only engaged in *one* prejudice analysis in

[1] ***Strickland v. Washington***, 466 U.S. 668 (1984).

multi-count trials, even where the quality of evidence differs by count? *See, e.g.,* ***State v. Honig,*** 2016 WI App 10, 366 Wis. 2d 681, 874 N.W.2d 589.

The State argues it would be a windfall for defendants to hold that showing prejudice in a multi-count trial requires a new trial on all counts. (Response at 2).

Mr. Sholar appreciates this concern and the significance of finality. But our Constitution places certain interests above finality. A few points:

First, it is not a "windfall" for a defendant—having entrusted his freedom to his attorney—to learn that his attorney made so serious of an error to be considered constitutionally-defective in a way that undermines confidence in the outcome of his trial.

Second, when defense counsel fails to perform as counsel, it undermines our entire system of criminal justice. It means the State has "won" on the back of a constitutional violation.

This is why the Supreme Court rejected an outcome-determinative test. An outcome-determinative test "presupposes that all of the essential elements of a presumptively accurate and fair proceeding were present"; when counsel fails, "one of the crucial assurances that the result" is reliable is gone, "so finality concerns are somewhat weaker." ***Strickland***, 466 U.S. at 694.

Third, though not always true in ineffective assistance claims, it is often the case and true here that counsel's error involves a failure to prevent something the *State* initiated. The *State* admitted Exhibit 79 without any consideration for the inadmissible other acts evidence rampant throughout it; the State agreed to it being handed to the jury. (83:98,113; 92:Exhs.77,79;88:74-75).

The State is not "an ordinary party of controversy," but a "sovereignty" with an obligation to "govern impartially[.]" ***Berger v. U.S.***, 295 U.S. 78, 88 (1935). The prosecutor's role is "not that it shall win a case, but that justice shall be done." ***Id.***

Mr. Sholar recognizes that under our system of review the error and prejudice fall to counsel, but where ***Strickland*** focuses on fundamental fairness, and where the State asserts that a new trial on all counts would be a windfall, it is important to keep in mind the State's role in the injustice.

Fourth, the defendant's burdens to prove ineffective assistance are onerous. *See, e.g.* (Response at 15-16) (discussing the high burdens to prove deficient performance and prejudice). As such, they are rarely met. The high standards required to prove *any* deficient performance and prejudice already serve as gatekeepers to "windfalls."

Lastly, though the better rule would be to hold that showing any prejudice warrants a new trial on all counts, Mr. Sholar recognizes there may be times where the error was truly isolated. This is why he offers his test for evaluating such claims. To comport with ***Strickland***, such division may occur only where the deficiency is by its nature plainly isolated to a particular count. That is not the case here.[2]

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[2] The State asserts that Mr. Sholar incorrectly describes the issue of *deficient performance* below as whether counsel failed by not objecting to both Exhibit 79's *admission* and it being handed to the jury. (Response at 1,26,36). Mr. Sholar has argued throughout that counsel erred by failing to object both when the State admitted Exhibit 79 *and* by allowing it to go to the jury. (55:9-14);***Sholar I***, ¶ 18;***Sholar II***, ¶ 2,n.3;(Initial App.102,130).

The Court of Appeals in ***Sholar II*** explained that the question of *prejudice* focuses on the Exhibit being handed to the jury during deliberations. ***Sholar II***, ¶ 2, n.3;(Initial App.102). Mr. Sholar agrees that prejudice here focuses on Exhibit 79 being handed to the jury.

B. Prejudice may only be isolated where the deficiency itself is plainly count-specific and the defendant cannot prove spillover.

The State agrees that prejudice cannot be a sufficiency-of-the-evidence absent the error analysis. (Response at 16-19). In a sufficiency analysis, the State explains, evidence must be viewed most favorably to the conviction, which is not true with prejudice. (Response at 18). But ***Strickland*** goes even further: the Supreme Court rejected an *outcome-determinative* analysis. 466 U.S. at 694.

The rejected outcome-determinative standard is the same standard the Court of Appeals here applied and the State advances: How much evidence is there absent the error? *See* (Response at 16-20).

This cannot be the beginning and end of a prejudice analysis: "The result of a proceeding can be rendered unreliable…even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." ***Strickland***, 466. U.S. at 694.

Juxtaposing the nature and significance of the error against the strength of the evidence is indeed part of the prejudice analysis; but the ultimate question concerns reliability—fundamental fairness—not the result. *See* ***id.*** at 694-697.

The State notes that "[o]verwhelming evidence is usually sufficient to show that an error, even one of constitutional magnitude, was harmless beyond a reasonable doubt." (Response at 19). But again the State fails to recognize the difference between a harmless error-style analysis and prejudice: outside the alleged error, harmless error "presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in

the proceeding whose result is being challenged." *See* ***Strickland***, 466 U.S. at 694. The same is *not* true when a defendant shows that counsel performed deficiently; as such, the prejudice standard is "somewhat lower." ***Id.***

Consider a hypothetical: a state senator is charged with misconduct in public office under Wisconsin Statute § 946.12. At trial, his employees testify that he directed them to do campaign work with state resources. The State also admits emails into evidence which appear to show the defendant asking them to do campaign work.

The employees, however, further testify that the defendant battered his wife and had numerous affairs while in office. Defense counsel does not object.

Under the State's prejudice analysis, there would indeed be "overwhelming evidence" even without the improper other acts evidence. But are we confident in the reliability of the outcome? Are we confident that he received a fair trial? No.

The State posits that Mr. Sholar's proposed test for determining how and when prejudice may be divided in a multiple count trial is "cumbersome" and unnecessary. (Response at 29-32).

First, Mr. Sholar fails to see how his proposal would be any more cumbersome than the position the State advances. The State's position would require courts to *always* conduct separate prejudice analyses for every deficiency on every count in a multi-count trial. On the other hand, Mr. Sholar's proposed test would be less onerous on courts: unless the deficiency is plainly isolated to a particular count, the court need not divide prejudice.

Second, Mr. Sholar's proposal, unlike the State's position, would comport with ***Strickland***. The State asserts

that ***Strickland*** "plainly" allows for the division of prejudice and "clearly" sets forth a way to divide prejudice in a case such as Mr. Sholar's. (Response at 17,30).

The State does not address how—under its interpretation—a court determines which factual findings were "unaffected" by the error of handing the jury inadmissible other acts evidence. *See* 466 U.S. at 695-696.

Strickland requires a court to evaluate the "totality of the evidence" considering that "[s]ome of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways[.]" ***Id.*** at 695. Court must assess prejudice by "[t]aking the unaffected findings as a given, and taking due account of the errors on the remaining findings[.]" ***Id.*** at 696.

The only way we can know a finding was "unaffected" is if the error itself was by its nature isolated to a particular count. The error here was not.

C. The erroneous presentation of inadmissible other acts evidence, by its very nature, infected Mr. Sholar's entire trial. The prejudice of this error cannot be isolated to a particular count.

If this Court does not so wish, it need not articulate a test for how prejudice could be divided in future cases here, because prejudice resulting from the presentation of inadmissible other acts evidence about the defendant's character is something which, by its very nature, cannot be isolated to a particular count.

The State fails to consider why we generally exclude other acts evidence: the fear the jury will focus on the fact that the defendant is a "bad person" as opposed to whether the State met its burden on the charges. ***State v. Sullivan***, 216 Wis. 2d 768, 783, 576 N.W.2d 30 (1998).

Strickland explains that some errors will have a "pervasive effect on the inferences to be drawn from the evidence," while others will have an "isolated, trivial effect." 466 U.S. at 695-696.

Exhibit 79 proved that Mr. Sholar—for reasons *separate* from the charges—was indeed the violent, "bad" person who would pimp these women. The "pervasive effect" was not limited to the sexual assault charge. The jury had this damning information when considering the "inferences to be drawn from the evidence" on all of the charges.

Exhibit 79 threw a "skunk into the jury box"; we cannot pretend the jury did not smell it. *See* ***Dunn v. U.S.***, 307 F.2d 883, 886 (5th Cir. 1962).[3]

D. Even under an analysis of the prejudice of the deficiency on each count, Mr. Sholar has shown prejudice to entitle him to a new trial on all counts.

The State asserts that Exhibit 79 was "cumulative" to other evidence presented at trial. (Response at 26-29).

First, Exhibit 79 was not simply cumulative. For example, without it, the jury would not have heard that:

[3] The State does not contest that Mr. Sholar showed both deficient performance and prejudice as to the sexual assault charge. *See generally* (Response). The State nevertheless asserts that even if prejudice cannot be divided, this Court should still affirm his remaining convictions. (Response at 32-33). The State provides no support for how this Court could reach such contradictory holdings. If prejudice could not be divided, Mr. Sholar has met his burdens entitling him to a new trial on all counts.

1. Mr. Sholar would threaten someone with a gun. (92:Exh.79;56:PCM Exh.B, Message 536)[4]; this was important because the jury heard evidence that Mr. *Simmons* used a gun to sexually assault EC. (80:138,142).

2. Mr. Sholar dealt heroin and Percocet/Percodan (92:Exh.79;56:PCM Exh.B, Messages 148-149, 318-319,360,394); the State argues this was cumulative because the jury heard he sold marijuana; the far-different punishments for dealing heroin versus marijuana, however, demonstrate the difference. *Cf.* Wis. Stat. § 961.41(1m)(h) *with* § 961.41(1m)(d).[5]

3. Mr. Sholar had, by someone unknown person for an unknown reason, been reported to the Columbia County sheriff, with the next step being a "warrant"; (92:Exh.79;56;PCM Exh.B., Message 1359).

Second, even if the State were correct that Exhibit 79 was "cumulative"—it was "cumulative" to EC and SG's accounts. Their credibility mattered to the trafficking charges, and the jury had reasons to question their accounts given the State's high burden.

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[4] "Fo sho stopping to get my heat to teach him a lesson." A conversation ensued with this same unknown number; there is, for example, an incoming message stating: "I'm just saying if. You don't get yo money today then he ain't coming bacc he said he be here in 45 mintutes" (92:Exh.79;56:PCM Exh.B.,Messages 536,538,544-548,550-553,565-567).

[5] Possession with intent deliver two hundred grams or less of THC is a Class I felony; anything more than fifty grams of heroin is a Class C felony.

If, for example, Mr. Sholar was pimping EC and texting with her about her prostitution as she testified, why was neither his name nor number *anywhere* in her phone? *See* (80:121;83:38-39). If Mr. Sholar was pimping SG as she stated, then why were photos of her posted on Backpage *after* she testified she stopped working for him? *See* (80:187;83:85-88;84:32-33;87:35-42;92:Exhs.58-59).

Exhibit 79 filled the gaps in the State's evidence by making clear that Mr. Sholar was the very type of man who would pimp EC and SG.

The State argues that Exhibit 79 was less harmful than the error in ***Honig***, for example, because the erroneously-admitted statements in ***Honig*** were "offered as evidence in the case, unlike all of [E]xhibit 79." (Response at 24). How so? The jury here wanted to see particular messages during deliberations. (88:73). Without redaction or guidance, they were handed Exhibit 79. (88:73-75). To try and find the messages relevant to their question, the jury *had* to look through the Exhibit.

The State also suggests that the messages and photographs in Exhibit 79 were not "exceptionally inflammatory[.]" (Response at 30,n.8). The ***Machner***[6] court, for one, disagrees: "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; Initial App.212).

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

II. The State Forfeited Opportunity to Argue that Mr. Sholar Did Not Show Prejudice on All Counts When it Failed to File a Petition for Review Following ***Sholar I***.

The State's primary response is that the Court of Appeals does not make fact-findings. (Response at 33-38). Mr. Sholar agrees.

But the question of prejudice here required *no* fact-finding. That is plain from the issue: whether Mr. Sholar demonstrated a reasonable likelihood of a different outcome from evidence wrongly provided to the jury. That question had to be answered from a review of the already-existing trial record.

This is not, for example, a situation where a defendant alleges that counsel failed to call an alibi witness. There, if the circuit court denies the post-conviction motion without a ***Machner*** hearing, the Court of Appeals cannot decide prejudice, as the alibi witness has not yet testified. The Court of Appeals would have to decide whether, the allegations made in the motion, "if true," entitle the defendant to relief. *See* (Response at 34); ***State v. Love***, 2005 WI 116, ¶ 2, 284 Wis. 2d 111, 700 N.W.2d 62; *see also* ***State v. Jenkins***, 2014 WI 59, ¶ 50, 355 Wis. 2d 180, 848 N.W.2d 786 (assessing the prejudice of counsel's failure to call an alibi witness following the ***Machner*** hearing was "necessarily fact-dependent").

The same is not true here. There were no allegations the Court of Appeals had to accept as to prejudice—the only allegation concerned deficient performance (that there was no apparent strategic reason for counsel's failures). *See* (55:10-14). The State does not argue that prejudice here required any fact-finding on remand. *See* (Response at 33-38).

Thus, if, after reviewing the trial record in ***Sholar I***, the Court of Appeals concluded that Mr. Sholar could not meet his prejudice burden, it would have had no need to reverse. It did not have to accept his *arguments* about the record as true when assessing prejudice to decide whether a ***Machner*** hearing was required.

Mr. Sholar knows that the Court of Appeals clarified in ***Sholar II*** that it wanted the ***Machner*** court to decide prejudice. ***Sholar II***, ¶¶ 16-20;(Initial App.106-107). Again, though, we only know this because the State continued to litigate the question despite not filing a petition for review following the adverse decision.

In response to Mr. Sholar's argument that its failure to petition deprived him of notice and the ability to cross-petition to preserve his remaining issues, the State asserts: "Sholar's other claims that the court of appeals addressed were not ineffective assistance of counsel claims." (Response at 37).

First, the State is incorrect in part. Mr. Sholar did raise an additional claim of ineffective assistance—counsel's failure to argue that the interrogation recording should have been excluded because of improper other acts evidence. ***Sholar I***, ¶¶ 18-26;(Initial App.130-133).

Second, the State responds that Mr. Sholar's other claims did not require a ***Machner*** hearing, so it would not make sense that Mr. Sholar would address them at the ***Machner*** hearing following reversal. *See* (Response at 37-38). Mr. Sholar's argument is not that the other claims (beyond ineffective assistance) would have required a ***Machner*** hearing; his point is that by not seeking review of the claims he lost in ***Sholar I***, he forfeited his ability to continue to dispute those claims on remand. The State should be held to the same standard.

CONCLUSION

For these reasons and those in his Initial Brief, Mr. Sholar respectfully requests that this Court enter an order reversing the Court of Appeals' decision, vacating his convictions and sentences on Counts One, Two, Three, Four, and Six, and remanding this matter to the circuit court for a new trial.

Dated this 23rd day of January, 2018.

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1773
jurssh@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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 2,971 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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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 23rd day of January, 2018.

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1773
jurssh@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner