STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD LEE GILBERT,

Defendant-Appellant.

APPEAL NO. 2016-AP-1852-CR
Milwaukee County Case No. 12-CF-626
Hon. Dennis Cimpl & Hon. Stephanie Rothstein, presiding

REPLY BRIEF FOR APPELLANT

QUARLES & BRADY LLP
Jeffrey O. Davis
(State Bar No. 1011425)
James E. Goldschmidt
(State Bar No. 1090060)
Zachary T Eastburn
(State Bar No. 1094676)

411 East Wisconsin Avenue
Suite 2400
Milwaukee, WI 53202
(414) 277-5000

Attorneys for Appellant
Ronald Lee Gilbert

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INTRODUCTION

The State's response to Gilbert's initial brief is an exercise in distraction. Whereas Gilbert has presented a compelling case that he was deprived of effective trial counsel, the State would have the Court look at anything but that. Rather than squarely addressing Gilbert's legal arguments, the State devotes pages to the most salacious aspects of Gilbert's trial (and some outside of it), evidently hoping the Court will agree that the unsavory picture painted by the State would have made it impossible for even an effective lawyer to save Gilbert.

That approach misses the mark. The whole point of this appeal is that Gilbert was denied the ability to show that the State's version of events was wrong. Indeed, the State's reliance on its own, one-sided version of the facts tips its hand: if Gilbert's legal arguments lacked merit, there would be no need to sidestep them as the State does.

Ironically, the State's approach makes Gilbert's argument for him: it is precisely the defendant facing serious but unsubstantiated allegations—or, worse yet, shocking allegations substantiated by flawed forensic evidence—who most needs the assistance of effective trial counsel. That Gilbert lacked such assistance is all the more compelling in light of the evidence the State recites.

At the same time, the State's response makes key concessions. It concedes that the jury heard inaccurate testimony regarding the location of Gilbert's cell phone—the only objective evidence against him, and thus a point the post-conviction court found would be highly prejudicial if misrepresented. It concedes that at a minimum, Gilbert was entitled to an evidentiary hearing on the question of juror bias. But again, it tells the Court to look the other way.

In doing so, the State commits the same error as Gilbert's trial counsel. The question presented on appeal is not whether Gilbert looks like a "scumbag," but whether trial counsel's errors prejudiced Gilbert's defense. They did, and the cumulative effect of those errors can only lead this Court to order a new trial. Short of that, those errors warrant a *Machner*[1] hearing calling trial counsel to account for his otherwise inexplicable trial decisions.

ARGUMENT

I. Trial counsel's deficient performance warrants a new trial, or at the very least a *Machner* hearing.

A. The State concedes critical errors in the cell tower evidence presented to the jury, but ignores the circuit court's prejudice analysis.

The only purportedly objective evidence presented against Gilbert at trial was Detective Dawn Jones' testimony that Gilbert's cell phone was "about 120 feet" from the Econolodge when Gilbert said he was not there. If true, this was powerful impeachment testimony.

But it wasn't true: Detective Jones, not an expert in cellular data, had confused the 120-*degree* sectors used in cell tower mapping with 120 *feet*, critically misinforming the jury. The State agrees Jones "twice testified" to this effect and "this testimony was inaccurate." (Resp. 18). And it concedes the post-conviction court failed to address this error in its analysis. (*Id.*)

Instead of addressing the error now, the State attempts to rehabilitate Jones' testimony on appeal by pivoting to post-conviction testimony never heard by the jury. In post-conviction proceedings, Officer Brousseau testified that the *maps* introduced

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

at trial were accurate. As such, says the State, Jones' inaccurate trial testimony is immaterial.

This argument fails for three reasons. First, it disregards that Jones' testimony *told the jury how to interpret the maps*. If that testimony was inaccurate, as the State now concedes, then so was the jury's understanding of the maps as instructed by that testimony. Effective counsel would have objected to both the testimony and the maps; Gilbert's counsel objected to neither.

Second, the State never addresses Gilbert's argument that the post-conviction court fundamentally misunderstood the evidence offered by Gilbert's own expert, Mr. O'Kelly. Instead, it doubles down on the court's error, emphasizing that O'Kelly's maps matched, and thus validated, Brousseau's. (Resp. 18). But *they were the same maps*, which O'Kelly had simply interpolated into one of the exhibits accompanying his testimony. (App. Br. at 17-18). Indeed, the State acknowledges "O'Kelly . . . did not prepare his own maps." (Resp. 18).

Nevertheless, the circuit court focused on the "match" between two sets of the same maps and ascribed particular significance to this fact, finding that the similarity between the State's and O'Kelly's exhibits "validat[ed] [the State's] analysis." (R.84:3). In conflating the State's maps and O'Kelly's exhibits of the State's maps, the court committed critical error. (App. Br. 18). This flawed premise was the basis of the court's conclusion that the State's cell tower evidence was accurate, which in turn led it to conclude Gilbert's trial counsel was not ineffective for failing to object to that evidence. (R.84:3).

Third, the maps *weren't* accurate, and the State fails to address either of O'Kelly's two fundamental criticisms: (1) it is "completely impossible" to use historical cell phone records to place a phone within 100 feet of a certain location, as Jones told the jury the State had done here, and (2) the State's failure to

account for or even acknowledge cell tower jumping to the jury made it misleading to use the maps to establish Gilbert's location.

Indeed, in post-conviction proceedings, Brosseau *agreed* with O'Kelly that the range of a cell tower is measured in miles, not feet. (R.106:32-33, 38, 95-96). In a case hanging upon the accuracy of evidence demonstrating physical location, it is telling that the State and defense experts both agree the State's lay witness trial testimony was wrong.

All of this was lost on the circuit court: once it concluded O'Kelly's maps matched Brousseau's, it saw no need to address these points. Conversely, once the court's threshold error in this regard is understood, these points become critical to the ineffective assistance analysis.

To summarize: (1) Jones' testimony to the jury was incorrect and misleading; (2) the maps shown to the jury do not rehabilitate Jones' testimony because the maps themselves were misleading and were necessarily interpreted in light of Jones' misleading testimony in any event; and (3) the post-conviction court's review of this issue was infected with error premised on O'Kelly's use of Brousseau's maps in his own exhibit.

In light of these errors in the State's testimony at trial, some of which the State now concedes, there can be no question that trial counsel was ineffective in failing to object to this evidence—so the only question is prejudice. The State brushes aside any prejudicial impact, complaining that Gilbert's prejudice argument is "undeveloped and conclusory." (Resp. 19. fn. 7).

The State ignores the circuit court's analysis of the prejudicial impact of erroneous cell tower evidence:

> The court does not conclude, however, that this evidence was "harmless" or inconsequential. This type of technical evidence certainly is of a type which supported the testimony of the

> state's witness, who put the defendant at the motel at a crucial moment in time. It buttressed their credibility—cell phone towers cannot be assailed as having a motive to lie.

(R.84:3, fn. 1). The circuit court understood this evidence was crucial: "the court finds that these cell phone site records are of consequence. The[y] are, if believed to be accurate, unbiased evidence which corroborates the eyewitness testimony." (R.84:2).

The upshot of the post-conviction court's analysis is that, if the cell phone evidence adduced at trial *was* erroneous, then it was necessarily prejudicial. If there is any remaining doubt on this point, it should be resolved in a *Machner* hearing.

B. The transcript of Gilbert's one-party consent call is inaccurate and was never admitted at trial, so the Court should disregard it.

In an effort to downplay the mishandled cell phone evidence, the State suggests this evidence was unimportant given the "overwhelming evidence" supporting the jury's verdict. (Resp. 19). As Exhibit A to this argument, the State points to a recorded call between Gilbert and Brandon Pratchet. (*Id.*)

At trial, the State only played an audio recording of this call. (R.99:34-35; Tr. Ex. 8). The jury heard less than four minutes of a conversation that was cryptic and largely inaudible. No transcript of the call was ever published to the jury or admitted into evidence at trial. (*Id.* at 57-58). Apart from asking Pratchet to verify that the *audio* was "a true and accurate recording," neither the State nor the defense asked any questions about the call. (R.99:35).

Recognizing the potential for misinterpretation and error, the trial court charged the State with preparing a transcript of the audio recording for the court's review. *Id.* If Gilbert's counsel disagreed with the State's transcript, he could submit another

version. *Id.* The court would make an ultimate determination as to which transcript was correct. *Id.*

The State never filed a transcript with the court. Only after Gilbert raised this issue in post-conviction proceedings did the State comply with the court's order. (R.45:5). By the time the transcript was filed, nearly two years had passed since Gilbert's conviction. (R.45:5; R.60). Notably, Gilbert has not stipulated to and contests the accuracy of the transcript.

An unverified transcript never published to the jury cannot now be a post hoc justification for convicting Gilbert. To the extent the one party consent call is at all relevant,[2] this Court should, as the jury did, only consider the audio recording. The jury listened to the call once. No follow-up or context was given.

Further, trial counsel's failure to conduct *any* cross-examination of Pratchet regarding the one-party consent phone call suggests he either never received or never reviewed the recording before trial. Had he, he would have been in a position to challenge the State's trial arguments regarding the call.

In spite of its inaccuracies, the transcript is hardly a smoking gun. The transcript *corroborates* Gilbert's testimony that he thought J.D.E. was 19 years old. (R.60:2). Beyond that, the State invites this Court to make inferences simply unsupported by the evidence. For instance, the State asserts:

> Gilbert's comments during the call also undermine his testimony that he simply intended to "chill" or "lay back" with JDE in a nonsexual way. (R.100:74). Gilbert complained to Pratchett that JDE wanted "to lay back with [him]." (R.60:3) Gilbert stated that he then sent her Pratchett's way (R.60:3). [...] The jury could reasonably infer that Gilbert gave up JDE

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[2] Gilbert argues the one-party consent phone call is irrelevant and highly prejudicial. (R.115:17).

> to Pratchett because JDE was more interested in "laying back" than making money for him through prostitution dates.
>
> (Resp. 20).

This entire argument hinges on a baseless understanding of "lay back" as referring to non-sexual behavior. The State did not offer any evidence at trial and provides no support now for its definition of "laying back," which could just as easily connote sexual conduct. And without a transcript, the jury would not have had the opportunity to consider, much less construct, the complex inferences proffered by the State today.

This and numerous other terms in the transcript of the one-party consent call are open to critical interpretive differences leading to materially different conclusions. But that analysis is unnecessary because the transcript is irrelevant. Indeed, the court should give little or no weight to the recording the jury *did* hear; again, the jury heard less than four minutes of the recording, which is indecipherable even when repeated. And the court should disregard the transcript: its unverified contents are speculative at best, the jury never saw it, and it didn't even exist until two years after Gilbert's trial.

C. Gilbert was prejudiced by trial counsel's failure to strike an impartial juror.

1. Juror bias is structural error.

Under Wisconsin law, the presence of a biased juror "taints the entire proceeding and requires automatic reversal." *State v. Tody*, 2009 WI 31, ¶ 44, 316 Wis. 2d 689, 764 N.W.2d 737, *abrogated on other grounds by State v. Sellhausen*, 2012 WI 5, 338 Wis. 2d 286, 809 N.W.2d 14. While tacitly acknowledging this precedent, the State asserts Justice Ziegler's concurring opinion in *Sellhausen* calls into question the continued viability of *Tody*'s holding that juror bias is *per se* prejudicial. (Resp. 35).

The State mischaracterizes Justice Ziegler's concurrences in *Tody* and *Sellhausen*. The lead opinion in *Tody* held that the trial judge's mother, serving as a juror, was objectively biased. *Tody*, ¶ 50. Justice Ziegler wrote separately, disagreeing that the case presented juror bias issues *at all*. *Id.* at ¶ 61 (Ziegler, J., concurring). In fact, the juror in question "exhibited no bias or prejudice so as to disqualify her on the basis of bias." *Id.* at ¶ 66. Justice Ziegler opined that the case should have been decided on abuse of discretion grounds instead. *Id.* at ¶¶ 62-67.

In *Sellhausen*, Justice Ziegler reaffirmed judges' broad discretion to "ensure the fair, efficient, and effective administration of justice." *Id.* ¶ 75 (Ziegler, J., concurring). According to Justice Ziegler, *Sellhausen*, like *Tody*, did not involve juror bias. *Id.* ¶ 76. Justice Ziegler's concurrences in *Tody* and *Sellhausen* do not challenge the underlying principle that juror bias is structural error warranting automatic reversal. In fact, a year after *Sellhausen*, *Tody* was cited favorably for its holding that juror bias is structural error. *State v. Neumann* 2013 WI 58, ¶ 153, fn. 91, 348 Wis.2d 455, 832 N.W.2d 560. Wisconsin law still holds that juror bias is *per se* prejudicial.

2. Juror 29 was subjectively biased and the State concedes the need for a hearing.

The State's argument on subjective bias can be summed up as follows: although Juror 29 admitted she could have "trouble being fair and impartial," her subsequent silence in response to other questions during *voir dire* definitively cleansed her earlier admission of bias. (R.96:97; Resp. 32-33). This argument runs counter to Wisconsin law.

In *State v. Lepsch*, seven jurors were charged with bias because of questionnaire responses indicating they would find a law enforcement witness more credible than a lay witness. 2017 WI 27, ¶ 27, 374 Wis. 2d 98, 892 N.W.2d 682. Five of the jurors were later questioned on this response and each unequivocally

affirmed their ability to set aside their beliefs. *Id.* The other two were asked whether there was any reason they could not remain impartial. *Id.* ¶ 28. Both expressly responded "no." *Id.* Unlike Juror 29, each *Lepsch* juror expressly affirmed their impartiality after offering statements indicating bias. *Id.* ¶¶ 27-28.

If mere silence can rehabilitate a prospective juror's earlier admission of bias, the State cannot explain why Juror 15 was dismissed despite verbally *assuring* the trial court of her ability to set aside her bias. The State emphasizes that when asked whether any jurors were unable "to be fair and impartial," no jurors responded. (Resp. 33). While Juror 29 was silent, *so was Juror 15*, whom the court and the parties readily acknowledged was biased. (R.96:102). And unlike the *Lepsch* jurors, Juror 29 gave no verbal assurances confirming her ability to remain impartial after conceding her bias.

The State asserts Gilbert did not affirmatively request a hearing with respect to the juror bias issue. (Resp. 35). On this point, the State is simply incorrect: Gilbert *did* request a hearing regarding juror bias. (R.115:13, 20).

The State further contends Gilbert should have done more to preview how he would prove his trial counsel's ineffective representation with respect to the juror issue. (Resp. 35, citing *State v. Koller*, 2001 WI App. 253, ¶15, 248 Wis. 2d 258, 635 N.W.2d 838). But that is what the requested evidentiary hearing is for. Unlike the defendant in *Koller*, Gilbert was denied such a hearing and thus lacked the necessary evidence to support his further request for a *Machner* hearing.

Ultimately, the State concedes that if Gilbert has adequately shown the possibility of juror bias, the Court should grant an evidentiary hearing. (Resp. 35). Gilbert agrees: at the very least, the Court should grant an evidentiary hearing with

respect to juror bias and a *Machner* hearing with respect to trial counsel's ineffective performance during *voir dire*.

D. Gilbert was prejudiced by trial counsel's failure to impeach the State's witnesses and his attacks on Gilbert's own credibility.

The State agrees that failure to impeach a witness with a prior statement constitutes ineffective assistance where trial counsel's actions were deficient and prejudiced the defendant. (Resp. 25-26). And while downplaying them as "isolated" and "trivial," the State concedes that Pratchet and J.D.E. offered numerous inconsistent statements. (Resp. 28).[3]

Again, the State sidesteps the material inconsistencies in both witnesses' testimony. (*See* App. Br. 28-30). The reality is that both witnesses' testimony changed and grew more closely aligned the longer they spent with police. Given that the cornerstone of the State's case was the credibility of these witnesses, trial counsel's failures to raise these inconsistencies prejudiced Gilbert.

Indeed, at trial, both the State and the defense recognized that this case is a credibility contest based on the competing testimonies of Gilbert, the alleged victim and the alleged co-actor. (R.102:43). This is all the more reason for the Court to conclude that trial counsel's repeated attacks on his client's integrity during closing arguments were prejudicial.

Context makes clear that trial counsel meant for the jury to think of Gilbert as a "scumbag," albeit one who should go free. (R.102:34). The State suggests counsel was referring to O.J. Simpson, not Gilbert. (Resp. 37; R.102:36). This only makes the

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[3] The State objects that Gilbert has identified more inconsistent statements on appeal than he did below. (Resp. 29). Having properly raised this legal argument in his post-conviction motions, Gilbert is not aware of any rule prohibiting him from identifying additional record support for that argument.

epithet *worse*, as many view Simpson as a guilty defendant the jury let get away. In a credibility contest such as this, one need not wander far into speculation to conclude what effect such an unfavorable comparison had on Gilbert's case.

CONCLUSION

For the foregoing reasons, this Court should vacate Gilbert's conviction and remand for a new trial or, at a minimum, order the requested evidentiary and *Machner* hearings.

Respectfully submitted this
1st day of December, 2017.

Jeffrey O. Davis
State Bar No. 1011425
jeffrey.davis@quarles.com
James E. Goldschmidt
State Bar No. 1090060
james.goldschmidt@quarles.com
Zachary T Eastburn
State Bar No. 1094676
zachary.eastburn@quarles.com

QUARLES & BRADY LLP
411 East Wisconsin Avenue
Suite 2350
Milwaukee, WI 53202-4426
(414) 277-5000

Attorneys for Defendant-Appellant
Ronald Lee Gilbert

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) § 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 3,000 words.

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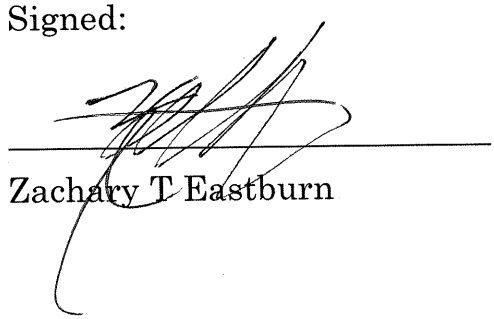

Zachary T Eastburn

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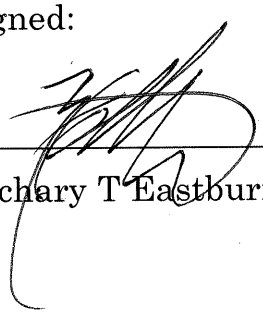

Zachary T Eastburn

CERTIFICATE OF MAILING

I hereby certify, pursuant to Wis. Stat. (Rule) § 809.80(4) that, on this 1st day of December, 2017, I caused three copies of the Reply Brief of Defendant-Appellant Ronald Gilbert to be mailed, properly addressed and postage prepaid, to each of the following individuals:

BRAD D. SCHIMEL
Attorney General
BY: DONALD LATORACCA
Assistant Attorney General
Department of Justice
Post Office Box 7857
Madison, WI 53707-7857

JOHN CHISHOLM
District Attorney
BY: KAREN LOEBEL
Assistant District Attorney
Safety Building
821 West State Street
Milwaukee, WI 53233

Signed:

Zachary T Eastburn