STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD LEE GILBERT,

Defendant-Appellant.

APPEAL NO. 2019-AP-2182-CR
Milwaukee County Case No. 12-CF-626
Hon. Dennis Cimpl & Hon. Stephanie Rothstein, presiding

REPLY BRIEF FOR APPELLANT

QUARLES & BRADY LLP
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

The State's response to Gilbert's brief is an exercise in distraction. It would have the Court look at anything but whether Gilbert was deprived of effective trial counsel. 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 has already failed once: the Court rejected it in Gilbert's last appeal, ordering Gilbert's counsel to appear and explain himself. Now that trial counsel has utterly failed to do that, the result should be no different, and this time the Court should vacate Gilbert's conviction and order a new trial.

I. The State concedes critical errors in the cell tower evidence presented to the jury and that trial counsel did nothing to challenge it.

The only purportedly objective evidence presented against Gilbert at trial was Detective Jones' testimony that Gilbert's cell phone was "about 120 feet" from the Econolodge when he said he was not there. If true, this was powerful impeachment testimony. But it wasn't true: 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 concedes that this testimony was erroneous and that trial counsel, Robert Taylor, failed to counter it at all. But instead of addressing these errors directly, the State shrouds Taylor's lack of defense strategy in inapposite legal and factual diversions.

A. Failure to challenge unqualified lay witness testimony is not an "unsettled legal question."

Taylor failed to raise the unremarkable threshold question of whether Jones, a lay witness, should have been permitted to testify to cell phone location. There is nothing novel or unsettled about this issue. Jones was offering testimony a *lay witness* should not be permitted to offer. Taylor should have objected.

The State does not deny that a failure to object to inadmissible evidence (such as improper lay witness testimony) constitutes deficient performance. Instead, it attempts to reframe the issue by focusing on the *type* of evidence: cell tower mapping. The State argues that whether an expert was needed for the kind of testimony offered by Jones was an "unsettled legal question." (Resp. 20). As proof, the State rests on the fact that only one case cited by Gilbert pre-dated his trial.

This argument fails for at least two reasons. First, courts have invariably held that a witness must be an expert to offer the type of testimony offered by Jones at trial. (*See* App. Br. 18). Indeed, the undisputed case law indicates that courts do not allow even *experts* to testify as Jones did. (App. Br. 21). The State does not dispute these cases. Conversely, the State identifies no case law authorizing the type of lay witness testimony offered by Jones. If this issue was truly unsettled, the State would have identified contrary legal authority, demonstrating judicial disagreement on this issue. An unequivocally uniform position spanning courts from across the country at both federal and state levels indicates a conclusive standard of law.

Second, the State's own pre-trial conduct shows that it recognized the need for expert testimony on such matters: it originally noticed an *expert*, Detective Richard McKee to testify on cell tower analysis. (S*ee* App. Br. 7). Only after a last minute substitution did Jones offer her erroneous and unqualified testimony.

Taylor's testimony on this point does not show objectively reasonable performance. All he could say was that it was "not in my practice" to hire an expert to challenge historical cell tower mapping. (R.204:76). This is insufficient (Taylor did not need an expert to challenge Jones' testimony) and circular (Taylor's own practice cannot be the standard for his reasonableness). Worse, Taylor admitted the Milwaukee defense bar had a deep suspicion of "cell phone and mapping technology": "We all knew that just wasn't gonna work." (*Id.* 75–76). If defense counsel entirely distrusted cell phone location testimony, then failing to challenge a *lay* witness offering this testimony was particularly egregious.

B. At base, it was error for Taylor to fail to challenge the cell tower testimony and maps *at all*—a point the State does not contest.

Independent of failing to challenge Jones' impermissible lay testimony, Taylor's inaction was nonetheless deficient: even if Jones was somehow qualified to testify, Taylor did *nothing* to challenge her testimony once she was on the stand.

The State does not deny that Taylor failed to counter Jones' erroneous testimony. To the contrary, the State *reaffirms* that Jones' testimony contained a critical error of fact: that Gilbert's phone was within "120 feet" of the Econolodge. (Resp. 22, fn. 5). Tying Gilbert's location to within feet of the relevant location was the only purportedly objective feature of the State's prosecution and thus indisputably critical.

At the *Machner* hearing, Taylor presented no legitimate basis for failing to challenge this aspect of Jones' testimony. He offered two reasons, both of which, even if true, underscore a completely unreasonable trial strategy.

Initially, Taylor claimed he did not need to challenge this testimony because Gilbert disclaimed ownership of the phone at issue. Taylor is wrong. That Gilbert owned the phone is well established in the record. (*See* App. Br. 23.) Even the State concedes Gilbert admitted to owning the phone. (Resp. 22, fn. 6).

So the State relies heavily on Taylor's second reason, the "possession defense": Gilbert was not in *possession* of the phone at the incriminating time and location. This plainly was not Taylor's strategy at trial. That other people used Gilbert's phone was a fact only revealed during the State's cross-examination. (R.190:69). And even if this was Taylor's strategy, he did not reasonably pursue it. He could have (1) elicited testimony from Gilbert about whether he was in possession of the phone on the night in question, (2) cross-examined Jones on whether she could affirmatively state whether Gilbert was in possession of the phone as indicated in the maps, or (3) both.

Rather than doing any of these things, Taylor permitted the State to paint an undisputed narrative regarding Gilbert's possession of the phone during incriminating moments in the timeline. Just prior to Jones' cell tower testimony, the jury heard Gilbert admit: "Yeah, that is my phone." (R.190:72). This specific admission trumped Gilbert's prior vague and generalized statement about "numerous others" using his phone. (Resp. 22). With this concession fresh on jurors' minds, the State then recalled Jones so she could give testimony "regarding the phone number *that has been identified as Mr. Gilbert's phone number*…." (R.191:19–20) (emphasis added).

To accept the State's argument, Taylor's strategy was, at best, a reckless gamble: since Jones had testified a day earlier that she could not tell whether Gilbert was in possession of the phone, there was no need to further challenge the obvious inference drawn from the State's framing of the cell tower evidence: Gilbert was in possession of the phone at the incriminating time and place.

There can be no question that trial counsel was ineffective in failing to challenge this evidence—so the only question is prejudice. The State brushes aside any prejudicial impact, but this ignores the circuit court's conclusion that the erroneous cell tower evidence was not "harmless or inconsequential." (App. Br. 13). 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.109:2).

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. Taylor's failure to challenge this evidence, conceded by all parties as the only purportedly objective information in what was otherwise a pure credibility contest, is not only deficient, but prejudiced Gilbert.

C. The Court should disregard the one-party consent call because it is inaccurate and was never admitted into evidence.

The State's effort to downplay the mishandled cell phone evidence and the other errors discussed below leans heavily on a recorded call between Gilbert and Brandon Pratchet. (Resp. 23).

At trial, the State only played an audio recording of this call, which was an excerpt from Pratchet's custodial interview. (R.189:34–37; Tr. Ex. 8). The jury heard less than four minutes of a cryptic and largely inaudible conversation. 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. (*Id.* at 37).

Perhaps 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.* The State never did so. Only after Gilbert raised this issue in post-conviction proceedings did the State comply with the court's order. (R.60:5). By that time, nearly two years had passed since Gilbert's conviction. (R.60:5; R.74).

Gilbert has not stipulated to and contests the accuracy of the transcript, and the Court has every reason to reject it. Instead, it should look to the transcript of Pratchet's custodial interview, identified as Defense Exhibit 3 at the *Machner* hearing. (R.169:139–143). That transcript includes Pratchet's one-party consent calls with Gilbert, and the State concedes it is "substantially accurate." (R.204:38–40). Importantly, *none* of the four statements the State relies on in its unauthenticated transcript are present in the stipulated transcript. (*See* Resp. 23–24; *Compare* R.74:2–4 *with* R.169:139–143).

Without those statements, the State is left with nothing more than it had at trial: the "consistent" testimony between Pratchet and J.D.E. (discussed next) and other speculative evidence that indulges innuendo more than established fact.

II. The State does not contest that Taylor failed to use *any* of the available impeachment evidence or that his strategy was remarkably similar to the one offered—and rejected—in *Coleman*.

The State agrees failure to impeach a witness with a prior statement constitutes ineffective assistance where deficient and prejudicial. (Resp. 27). It acknowledges Taylor's self-described trial strategy was to establish conflicting statements of the witnesses. (R.204:87). And it concedes Taylor failed to raise *any* of the trove of materially inconsistent statements available to him. (Resp. 32).

Unperturbed, the State argues every omission served a master strategy of avoiding unintended consequences: had Taylor raised *any* of Pratchet's prior inconsistent statements or cast doubt on his motive to testify, it would have only "opened the door" for the State to utilize other statements allegedly consistent with his trial testimony. (Resp. 28–29). This argument fails.

First, this was *not* a reason Taylor gave at the *Machner* hearing; the State has invented it in briefing.

Second, that "door" had already been opened: it was the *State* that originally introduced Trial Exhibit 8—Pratchet's custodial interview—at trial. (R.189:34). With the State already relying on selective audio recordings from Pratchet's custodial interview, it was all the more unreasonable for Taylor to fail to raise Pratchet's inconsistent statements from the same. Indeed, immediately after Pratchet's second one-party consent call with Gilbert, he pleads with the detective: "I just hope this helps us because I don't want [Tisha] here anymore. I don't want her in this type of trouble. I don't want her to hurt no more than what she is." (R.169:160).

To accept the State's argument is to indulge the very same gamble Taylor ran at trial: that the risk of the State raising Pratchet's prior consistent statements is greater than the risk of failing to raise any inconsistent statements *at all*. Taylor's inaction permitted the State to engineer an artificial narrative that Pratchet, though flawed, was reliable.

This is objectively unreasonable, as the full measure of available (yet unused) evidence shows. The State does not dispute that Pratchet repeated his willingness to do "anything" to avoid punishment or that Taylor failed to share this with the jury. (App. Br. 4, fn. 5). Obviously, Pratchet's pleas are much more powerful than the sanitized references to cooperation offered by the State.

Regarding the amplifier, the State admits Taylor forfeited yet another opportunity to utilize plainly available evidence to exculpate his client: "It did not matter if the amplifier in the photos was the precise amplifier exchanged by Pratchet because Pratchet had already admitted he exchanged *an* amplifier." (Resp. 29) (emphasis in original). This is functionally equivalent to Taylor's assumption of Gilbert's guilt: "the fact of the matter was the young lady was exchanged for an amplifier, and I would not have wanted to highlight that to the jury." (R.204:51). The fact remains that if Taylor had cross-examined Pratchet on his prior statement that the amp pictured was not the one used in the transaction, this would have discredited key evidence in the State's case. (*See* App. Br. 27–28).

With respect to the interplay between JDE and Pratchet's testimony, again, the State sidesteps material inconsistencies in both witnesses' testimony, emphasizing their eventual similarity at trial. But that's precisely the problem: both witnesses' testimony changed and grew more closely aligned the longer they spent with police. (App. Br. 24–29). As the transcript of his custodial interview shows, Pratchet only began to offer up details consistent with JDE's narrative after repeated prompts from detectives. (*Id.* at 26). Effective trial counsel would have contrasted their "remarkably consistent" stories offered at trial with the many inconsistencies in their earliest versions of events *to make precisely this point*.

Gilbert was clearly prejudiced by Taylor's failure to raise critical impeachment evidence—particularly Pratchet's prior statements. The State concedes that he failed to use this evidence (Resp. 32), yet argues that Pratchet's prior convictions and

cooperation with police was sufficient to discredit him: there was no need to raise *any* of his (or JDE's) pretrial statements.

Yet again, this bet on outcome is, at best, fraught with unreasonably speculative risk: Pratchet's prior convictions and cooperation with police could very likely be (and was) trumped by the State's artificially harmonized narrative derived from the testimony of J.D.E. and Pratchet. This result was exclusively facilitated by Taylor's inaction.

Perhaps most importantly, the State does not contest that this Court has already concluded that Taylor acted deficiently in failing to impeach witnesses with prior statements in *State v. Coleman*, 2015 WI App 38, 362 Wis. 2d 447, 865 N.W.2d 190. Though the State attempted to distinguish Taylor's closing remarks here from the opening remarks he offered in *Coleman* (*see* Resp. 36), it makes no similar attempt to distinguish Taylor's failure to raise inconsistent statements in the two cases. (App. Br. 24–25, 29). That concession should be dispositive.

Far from having merely an "incremental[]" effect, Taylor's failure to raise prior inconsistent statements "kept the jury from hearing other important evidence that would have impeached" J.D.E. and Pratchet. *Coleman*, ¶ 40. While the facts of this case involved unsavory subject matter, "[e]ven distasteful facts favorable to the defense should be discussed, in a professional manner, if effective assistance of counsel is to be provided." *Id.* at ¶ 38. As in *Coleman*, the resulting prejudice is self-evident.

III. Gilbert was prejudiced by Taylor's attacks on his credibility.

The State acknowledges that trial counsel's remarks in closing arguments may constitute deficient performance, especially where they indicate a concession of guilt. (Resp. 33).

In an effort to rehabilitate the damaging effect of Taylor's closing remarks, the State paints a picture far from the facts. Taylor did not avoid disparaging J.D.E. (Resp. 34). Instead, he cast her as a "babbling idiot." (R. 192:30–32). To avoid any doubt, Taylor punctuated this aspersion with "that's for damn sure." *Id.*

Rather than address Taylor's concerning and disparaging remarks, the State offers the Court a false dichotomy: Taylor could have either "presented Gilbert as a law-abiding, naïve individual" or offered the remarks he did. (Resp. 35). These were not Taylor's only options. Accommodating Gilbert's testimony did not compel Taylor to compare him to O.J. Simpson. It did not leave him with no choice other than to call Gilbert a "scumbag." It did not authorize Taylor to expressly vouch for Gilbert's *in*credibility by stating he was not sure he "believed any of them," including his own client. (R.192:30).

As to the "scumbag" epithet, the State fails to show Taylor's use of the term referred to anyone other than Gilbert. Indeed, the State concedes that the post-conviction court failed to address the second use of this aspersion as directed by this Court. Regardless, that Taylor followed the second use of scumbag with a pointed reference to Gilbert only serves to *reinforce* Taylor's larger point: "though a scum bag, you should let Gilbert go free."

And if the Court accepts that both uses of "scumbag" refer to O.J. Simpson (Resp. 37), it only makes the 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. As this Court found in *Coleman*, referring to his client as a scumbag—especially in light of his analogy to O.J. Simpson—"gave the jury negative and prejudicial information that was not relevant to any element of the crime." *Coleman* ¶ 42. Taylor's *Machner* hearing testimony confirms that "[w]hile not referred to by name, the jury could reasonably understand that trial counsel was referring to Gilbert." *State v. Gilbert*, 2018 WI App 45, ¶ 37, 383 Wis. 2d 600, 918 N.W.2d 127, 2018 WL 3202044, at *6.

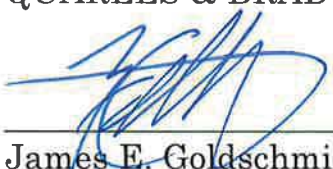
CONCLUSION

While any one of the above errors is sufficient to warrant a new trial, their cumulative effect underscores that Taylor completely abdicated his duty to defend Gilbert. Only a reversal and remand for a new trial will set right what is otherwise a complete breakdown of the adversarial system.

This Court should vacate Gilbert's conviction and remand for a new trial.

Respectfully submitted this 2nd day of November, 2020.

QUARLES & BRADY LLP



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

james.goldschmidt@quarles.com
zachary.eastburn@quarles.com

Attorneys for Appellant
Ronald Lee Gilbert

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for a brief produced with a proportional serif font. The length of this brief, including footnotes, is 3000 words.

Zachary T Eastburn

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed as of this date.

Zachary T Eastburn

CERTIFICATE OF MAILING

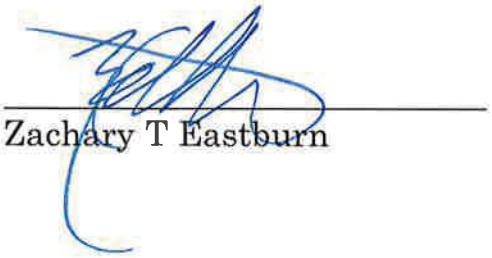
I hereby certify that on this 2nd day of November, 2020, I caused three copies of this Brief to be served upon each of the following persons via U.S. Mail:

JOSHUA L. KAUL
Attorney General
BY: DONALD V. LATORRACA
Assistant Attorney General
Wis. Dept. of Justice
Post Office Box 7857
Madison, WI 53707-7857

JOHN CHISHOLM
District Attorney
Milwaukee County DA Office
Safety Building Rm. 405
821 West State Street
Milwaukee, WI 53201

I further certify that I caused ten copies of this Brief to be filed By Hand with the Clerk of the Court of Appeals at:

Sheila T. Reiff, Clerk
Wisconsin Ct. Appeals
110 E. Main St., Suite 215
Madison, Wisconsin 53707



Zachary T Eastburn