STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2023AP000450 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARQUS G. PHILLIPS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction,
Entered in the Winnebago County Circuit Court,
the Honorable Barbara H. Key, Presiding

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> At Phillips' jury trial for allegedly operating a motor vehicle while intoxicated, the state called two police officers as witnesses. After the trial concluded, the court found that the second officer violated the court's witness sequestration order by listening to the first officer's testimony, but thereafter denied Phillips' motion for a mistrial.
>
> Whether the circuit court erred in its determination that despite the officer's violation of the sequestration order, Phillips suffered no prejudice and therefore was not entitled to a mistrial?

The circuit court held an evidentiary hearing, found a violation of the sequestration order, but denied Phillips' motion for a mistrial. This Court should reverse and order the case remanded to the circuit court for a new trial.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Phillips does not request oral argument or publication. The issue presented can be resolved on the briefs by applying settled law to the clear facts in this case. *See* Wis. Stat. § (Rule) 809.22(2)(b). This case is not eligible for publication. *See* Wis. Stat. §§ (Rule) 809.23(1)(b)4. and 752.31(2)(f).

STATEMENT OF THE CASE AND FACTS

Pretrial proceedings

On October 14, 2021, the state charged Marqus G. Phillips with operating a motor vehicle while intoxicated, as a third offense. (3). Prior to trial, Phillips filed a motion in limine, which requested the court to "order all witnesses, both for the prosecution and defense, to be excluded from the courtroom except when called to testify in this case, and order all witnesses to refrain from talking about this case to any other person but counsel for the State or for the defense during the pendency of this trial, except when testifying." (27:1).

At a final pre-trial hearing, the state did not object to Phillips' motion for witness sequestration, and the court, the Honorable Barbara H. Key presiding, granted the request. (44:2-3). The court later returned to the request: "So just basic witness sequestration on both sides. Is that being requested?" (44:6). The defense and prosecution each confirmed the request: "Yes." (44:6). Finally, the court reaffirmed the order for witness sequestration: "the only thing would then be the sequestration on both sides." (44:8).

The trial

Phillips' jury trial took place the next day, March 29, 2022. (68). Before the jury entered the courtroom, the state explained that "I wanted to just confirm that I told the officers everything I needed to about our pre-trial motions yesterday." (68:8-9). The

state called two witnesses: City of Oshkosh Police Officers Jacob Schwartz and Sarah Pauer. (68:2, 62-101).

Officer Schwartz testified first. (68:62). At the time of the trial, Officer Schwartz had been a City of Oshkosh police officer for two and a half years and he was on duty on May 29, 2021. (68:63). At about 3:40 a.m. he was dispatched to "320 Prospect" regarding "somebody in the caller's vehicle." (68:63). Officer Schwartz arrived at the scene and activated his body camera before making contact with Phillips, who was asleep in the front seat of a silver SUV parked next to the residence. (68:67-69).

Officer Schwartz testified that during his "brief interaction" with Phillips, he believed Phillips was intoxicated. (68:71). Portions of Officer Schwartz's body camera video were played for the jury. (68: 67-81; (129).[1] Officer Schwartz did not arrest Phillips, however, and Phillips "went on his way." (68:72).

Officer Schwartz later returned to the same address and found Phillips' wallet near the entrance to the residence. (68:72). Officer Schwartz noticed that Phillips' red vehicle, which had been parked close-by was no longer there. (68:67, 72). Officer Schwartz explained that he and Officer Pauer made

[1] Citations to the State's Exhibit 1 are to the first Certificate of Transmittal of Supplemental Record because, as of the filing of this brief, the index had not yet been updated to provide a record cite for the exhibit.

arrangements to return Phillips' wallet to Phillips' wife at a nearby Kwik Trip. (68:73-74).

Officer Schwartz testified that he "observed the vehicle that had been previously parked on Prospect Avenue pulling into Kwik Trip just before I did." (68:75). The state asked Officer Schwartz, "And, did you keep eyes on the vehicle, between the time that it parked and the time that you walked up to it?" (68:75). Officer Schwartz responded, "Yes," and that he did not see anyone "get in or out of the vehicle." (68:75). Officer Schwartz testified that upon approaching, Phillips was in one vehicle and his wife was in a vehicle to the left. (68:76-77). Officer Schwartz then arrested Phillips for OWI. (68:77).

After his arrest, Phillips was transported to the sheriff's office, during which time Officer Schwartz explained that Phillips was "just yelling at me throughout the entire transport." (68:78). According to Officer Schwartz, Phillips' position was that because he didn't see him driving, Officer Schwartz couldn't arrest him for OWI. (68:79).

On cross-examination, Officer Schwartz admitted that after his first interaction with Phillips, he told the officer that he wasn't going to drive and that he "left on foot." (68:83). Next, Officer Schwartz admitted the he never saw Phillips driving. (68:83). Instead, he clarified that he "observed the vehicle in motion" and that when he arrived, [Ms. Phillips] was already there. (68:83). As he approached on foot,

Phillips' car was parked straight and turned off. (68:84).

Next, Officer Schwartz testified that Phillips repeatedly told him he wasn't driving and that "the driver was in Kwik Trip." (68:84). Officer Schwartz admitted that he "never looked into or investigated the driver that he referenced in the Kwik Trip." (68:84). Moreover, Officer Schwartz admitted that Kwik Trip has surveillance footage, but that he never requested the footage. (68:84). Further, Officer Schwartz admitted that he observed no evidence of impaired driving, administered no field sobriety tests, and obtained no evidentiary breath or blood samples from Phillips. (68:85-87). On re-cross, Officer Schwartz stated that he was "less than a hundred feet" away from Phillips' vehicle when he observed the vehicle arrive at the Kwik Trip. (68:87).

Officer Pauer was the state's second and final witness. (68:88). Officer Pauer confirmed that she was also on duty on May 29, 2021, and she received a call for service at 320 Prospect. (68:88). As did Officer Schwartz, she wore a body camera that captured her interactions with Phillips. (68:89; 129). Officer Pauer stated that Phillips was "driving that red vehicle the next time [she saw] it." (68:90). Like Officer Schwartz, Officer Pauer opined that Phillips was intoxicated and not safe to drive during her initial encounter with him and that he walked away after the encounter. (68:93).

As did Officer Schwartz, Officer Pauer explained that she later arranged to return Phillips' wallet to Phillips' wife at Kwik Trip. (68:94). Asked if she observed "the defendant" pull into the Kwik Trip, Officer Pauer stated that she saw "the vehicle pull into the Kwik Trip, yes." (68:95). As it had with Officer Schwartz, the state asked Officer Pauer whether she had "eyes on the vehicle from the time that it stopped until you encountered it?" Officer Pauer said, "Yes," and agreed that no one entered or exited the vehicle and that she eventually observed Phillips in the driver's seat. (68:95).

On cross-examination, Officer Pauer agreed that Phillips was not in "any trouble" when he left on foot after her initial encounter with him. (68:97). Like Officer Schwartz, Officer Pauer agreed that Phillips' car was parked and turned off when she approached the vehicle at Kwik Trip. (68:97-98). Officer Pauer agreed that Phillips was "pretty angry and said he wasn't driving." (68:98). Like Officer Schwartz, Officer Pauer admitted that she observed no indication of impaired driving from Phillips, and obtained no breath or blood results as evidence of impaired driving. (68:99-100).

After Officer Pauer was released as a witness, the state rested and Phillips moved the court for a directed verdict. (68:101). Phillips argued that neither officer identified him as the driver of the vehicle in which he was later observed at the Kwik Trip. (68:101-102). "Both of them said they didn't see who was driving the vehicle. They just saw the vehicle."

(68:101). The court denied the motion, explaining that the evidence was "sufficient." (68:102). "The officer's (sic) testify they saw the vehicle go into the Kwik Trip parking lot, that there was no one else in the vehicle but the defendant, that they kept eye contact. So, I think that's sufficient -- if you want to call it -- circumstantial evidence." (68:

Phillips thereafter exercised his right to not testify and the parties proceeded to closing arguments. (68:104-105, 116). The state argued that "two officers testifying, independently, that they each saw the defendant drive into the parking lot -- well, they saw a car drive into the parking lot." (68:117). Phillips argued that "there are many steps, again, that need to be taken to guide you from innocence to guilt. However, today you heard the officers started with that guilt They started with those assumptions and then tried to back their way up." (68:120). Phillips argued that both officers admitted that "they didn't see [Phillips] drive." (68:121).

On rebuttal, the state sought to double down: "Two officers absolutely saw him driving. Could they see him...from the driver's seat, from their perspective? No. And they said they couldn't. But they saw the car come into the parking lot, go across the parking lot, park. Nobody got out. They walked up. Defendant's in the driver's seat. He was driving." (68:127-128).

The jury found Phillips guilty as charged, and the court accepted the verdict and entered a judgment of guilt. (68:129-135).

The case proceeded immediately to sentencing, and the court withheld sentence and placed Phillips on probation for 12 months and ordered him to serve 45 days in jail as a condition of probation. (68:135-143).

"Postconviction" proceedings

Less than an hour after the court sentenced Phillips, the court recalled the case and the parties returned to the courtroom. (68:143; App. 4). The court explained:

> The judicial assistant came up to the Court in the last ten minutes or five minutes -- I don't know -- to indicate that, during the testimony of Officer Schwartz, she observed Officer Pauer leaning her head against the door, just outside the -- where the witness stand is and told her she couldn't listen to the testimony, for which she put her head down and walked away.
>
> But there's a concern to this Court. I am notifying all parties. I will, at this point, if necessary, be glad to suspend the sentence until anyone wants to look into this any further.
>
> So I'll give counsel a chance to digest all that and decide what it wishes to do. Do you want to have five/ten minutes and I'll come back in here? If you want to take some time to talk to your client and -- I don't know what to say. It happened.

> Everybody has a right to know it, and we'll see what you want to do.

(68:143-144; App. 4-5). After a brief recess, counsel for Phillips argued that "this could be a basis for a mistrial in this case." (68:145; App. 6). The state responded:

> I have some of this responsibility...
>
> …
>
> I spoke with the witnesses. I gave them the list of the Court's pretrial orders, which I now realize included sequestration…
>
> …
>
> And I should have said sequestration. And, frankly, I would hope that the training of officers means that that doesn't need to be said, but all of that said, before this trial began, I obviously made the mistake of not relaying that … order but, also put on the record, this is the chance for me to tell the officers anything that they didn't know so I don't think there really -- there has been a violation of this sequestration order because that order didn't get to this witness.

(68:145-147; App. 6-8). At this point, the court interrupted the state and sought to clarify whether the state was arguing that there was no violation of the court's sequestration order because the state failed to specifically relay that order to the witnesses. (68:147; App. 8). The state agreed that the court clearly ordered sequestration of witnesses, but argued that because the state never informed the witness of this order so that mistake is on me." (68:147-148; App. 8-9).

The state continued by arguing that "I gave the defense a chance to hear what I told the officers and a chance for them to say, hey, you forgot about the sequestration order, which I did. (68:148; App. 9). Stated bluntly, the state blamed the defense for its failure because "I was not told to make sure the sequestration order was communicated." (68:148; App. 9). The state next argued that "the idea of contamination of [Officer Pauer's] testimony being conforming to [Officer Schwartz's] testimony is so unlikely as to not be a basis for a mistrial." (68:149; App. 10).

Phillips thereafter reaffirmed his oral motion for a mistrial, and the court stayed the execution of Phillips' sentence in order to give the parties some time to research the issue and file any necessary briefs in advance of a likely evidentiary hearing. (68:149-150; App. 10-11).

The court held an evidentiary hearing on May 6, 2022. (82; App. 17). As at Phillips' trial, the state called Officers Schwartz and Pauer. (82:2). Officer Pauer agreed that the state failed to relay the court's sequestration order to her. (82:4). Asked what she heard while in the hallway during Officer Schwartz's testimony, Officer Pauer stated that she heard "all the body worn camera footage that was played," and "all of the prosecution's questions and all of the defense's questions." (82:5). Officer Pauer stated that she "could hear Officer Schwartz talking but couldn't hear the exact answers that he was saying." (82:5). Officer Pauer confirmed that at one point she leaned

against the courtroom door. (82:5). Officer Pauer disclaimed that she did this in an effort to "specifically" hear what was going on in the courtroom. (82:6).

After Phillips' cross-examination of Officer Pauer, the court asked whether the officer thought she was outside the courtroom. In response, Officer Pauer stated that she knew she was not allowed inside the courtroom during trial, but that she "didn't think anything about listening outside because it was so loud." (82:16).

Next, the state called Officer Schwartz. (82:17). Officer Schwartz testified that before being called as a witness in Phillips' case, he sat outside the courtroom and he "could hear quite a bit of what was being said from the courtroom." (82:17).

Following the evidentiary portion of the hearing, the state argued that no violation of the court's sequestration order occurred, but that if a violation occurred, Phillips suffered no prejudice. (82:19-20). In response, Phillips argued that Officer Pauer clearly violated the court's sequestration order. (82:20). Moreover, Phillips argued that the theory of defense at trial was that the officers were not credible in their investigation and the assumptions they made about Phillips' guilt and that "[i]t was their word against my client's. So the fact that they would violate the sequestration order and listen in to each other's testimony is a clear violation, and it goes sincerely to the credibility and to the theory of defense." (82:20-21).

The court then made findings of fact and issued its decision. (82: 22-26; App. 18-22). After noting the purpose and practical logistics of standard witness sequestration, the court noted that "here it went deeper because of the officer putting that ear against the door… So I'm not necessarily going to find this -- and I don't have to find it to be egregious or that it was intentional, but do I think there was a violation of the sequestration order? Yes. When someone, an officer, is out in the hallway with their ear against the door listening to another officer testify. So was there a violation of the sequestration order? Yes, I think there was." (82:22-23; App. 18-19).

The court then turned to prejudice. (82:23; App. 19).

> I have gone back and looked at all of this. I have looked at the trial again, and I made notes right after the trial as well. There was overwhelming video evidence. And in terms of the officer's testimony, um, the only area where the Court could even think that there may be something where would it make sense that the officer -- that the officer violated the sequestration order to somehow hear the other officer's testimony to conform their testimony to some way bolster the case. That the only thing I can think would be possibly the issue of who was -- was the defendant the driver because that was certainly a significant issue in the case. And there was significant evidence that he was the driver, but the one issue was, well, both officers said as well nobody else got out of that vehicle and that was maybe the sealing factor on the case.

So Officer Schwartz testifies he didn't see anybody else come out of the vehicle, Officer Pauer testified that she didn't. I looked at even the timing here of the testimony and the timing of the testimony was such that when Schwartz was testifying as to that fact, it was -- let's see here. He testified -- Schwartz testified to that long before cross-examination. Looking at my own notes as well. He testified to that before the cross-examination. Cross-examination occurred starting at 11:00. The tape starts after 11:00. So Schwartz's testimony is in before the cross. So I don't see how there could be any prejudice given the fact that that's the only issue that was even there. There was compelling testimony, and not really testimony, it was video evidence. Video evidence throughout for which I don't think I can find prejudice on this when the officer's testimony was in, other than the cross, prior to the other witness being out in the hallway.

There have been other research on some of the cases on sequestration and this isn't the case in which there's been some type of -- and again, there have been other cases where there have been violations, cases in which just because there's a violation of sequestration orders in and of itself does not result in a finding of a mistrial. And again, the Court has to look at whether there is prejudice. And given the overwhelming video evidence, the Court's going to find that there has not been prejudice. And as such, the stay of the judgment will be lifted as to the jail credit -- I'm sorry, not jail credit, the jail sentence, and all other -- all other aspects of the judgment of conviction.

(82:23-25; App. 19-21). Thereafter, the court signed an order lifting the stay of Phillips' sentence. (75; App. 23).

This appeal follows.

ARGUMENT

The circuit court erred when it denied Phillips' motion for a mistrial despite finding that Officer Pauer violated the court's sequestration order.

The ultimate question this case presents is whether Phillips received a fair trial. While not every trial error or violation of a court order results in prejudice to a defendant, Officer Pauer's violation of the court's sequestration order prejudiced Phillips. The state's case ultimately rested on the credibility of its two witnesses. One witness violated the court's sequestration order and listened to another witness' testimony prior to testifying herself. This violation was not brought to Phillips' attention until after the jury's verdict. It cannot be said that no reasonable jury could not have come to a different decision had Officer Pauer's violation come to light prior to the jury's deliberations. Phillips is entitled to a fair trial and because he did not receive one, this Court should reverse.

A. Introduction and the standard of review.

A circuit court's authority to "sequester" witnesses is set forth in Wis. Stat. § 906.15. Subsection 906.15(1) provides that, upon the request of a party, or on the court's own motion, a court "shall order witnesses excluded so that they cannot hear the testimony of other witnesses." "The purpose of sequestration is to assure a fair trial," and specifically to prevent a witness from "shaping his [or her] testimony" based on the testimony of others. *See State v. Evans*, 2000 WI App 178, ¶6, 238 Wis. 2d 411, 617 N.W.2d 220; *Nyberg v. State*, 75 Wis. 2d 400, 409, 249 N.W.2d 524 (1977), *overruled on other grounds by State v. Ferron*, 219 Wis. 2d 481, 579 N.W.2d 654 (1998).

The remedies available for a violation of a witness sequestration order include preventing the violating witness from testifying at trial, striking the testimony from the record, offering a curative instruction to the jury, and declaring a mistrial. *See e.g. State v. Bembenek*, 111 Wis. 2d 617, 637, 331 N.W.2d 616. In order to be entitled to a new trial after a witness testifies in violation of a court's order for sequestration, the party seeking a new trial must "move for a mistrial as soon as prejudice became apparent." *State v. Simplot*, 180 Wis. 2d 383, 406-07, 509 N.W.2d 338 (Ct. App. 1993).

"A motion for a mistrial is committed to the sound discretion of the circuit court." *State v. Ford*, 2007 WI 138, ¶28, 306 Wis. 2d 1, 742 N.W.2d 61. In

exercising discretion, the circuit court must decide, "in light of the entire facts and circumstances," whether the claimed error is sufficiently prejudicial to warrant a mistrial. *Id.*, ¶29; *see also State v. Debrow*, 2023 WI 54, ¶15, 404 Wis. 2d 511, 979 N.W.2d 817. If no reasonable jury could fairly come to any other decision, then a trial error is not prejudicial. *State v. Debrow*, 404 Wis. 2d 511, ¶60 (Roggensack, J. concurring) (citing *Oseman v. State*, 32 Wis. 2d 523, 529, 145 N.W.2d 766 (1966)). An erroneous exercise of discretion may arise from an error in law or the failure of the circuit court to base its decision on the facts in the record. *Debrow*, 404 Wis. 2d 511, ¶15.

B. The circuit court erroneously exercised its discretion by denying Phillips' motion for a mistrial.

A circuit court erroneously exercises its discretion when it fails to base its decision on a reasonable application of the totality of the facts in the record. *State v. Davidson*, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606. Here, the court erred in three distinct ways.

First, the court's stated rationale that the video evidence was "overwhelming," is clearly erroneous. Second, the court's focus on the fact that Officer Pauer most deliberately violated the sequestration order after Officer Schwartz's direct-examination is also clearly erroneous. Third, the court's overall conclusion that Phillips was not prejudiced is clearly erroneous based on the totality of

the record, including consideration of the fact that no lesser remedy was available to Phillips short of the court declaring a mistrial. Individually and cumulatively, these errors establish that the court erroneously exercised its discretion in denying Phillips' motion for a mistrial.

First, and as noted by the circuit court when it issued its oral decision, the primary theory of defense, and a "significant issue" at trial, was that the officers conducted a flawed investigation and assumed Phillips was guilty in spite of never observing him operate a vehicle. (82:24; App. 20). With respect to that issue, the video evidence is absolutely *not* overwhelming or even sufficient to meet the state's burden of proof at trial. The video evidence does not establish that Phillips drove his vehicle into the Kwik Trip parking lot or support the testimony that no other individual existed the vehicle, contrary to what Phillips claimed. The evidence the jury had that Phillips was the driver came exclusively in the form of corroborating testimony from Officers Schwartz and Pauer that they kept eyes on Phillips' vehicle as it parked at Kwik Trip. (68:75, 95, 102).

This was not a standard OWI case where the state's allegation was supported by observed or documented impaired driving, poorly performed field sobriety tests, evidentiary blood results, or admissions from the defendant. The state's case hinged on the credibility and testimony of Officers Schwartz and Pauer. The court's factual finding that the video evidence was "overwhelming," and therefore

Officer Pauer's violation of the sequestration order, and the corresponding challenge to her credibility, did not prejudice Phillips' right to a fair trial is clearly erroneous. The fact that the state offered a substantial quantity of video evidence is not the same as the video evidence being "overwhelming" with regard to the "significant issue" of whether Phillips actually operated his vehicle while impaired.

Second, the court's focus on the timing of Officer Pauer's most obvious violation of the court's sequestration order ignored the totality of Officer Pauer's violation. Recall, the purpose of sequestration is to assure a fair trial and to prevent a witness from shaping her testimony based on the testimony of others. The court's order excluded Officer Pauer from the courtroom in order to prevent her from hearing the testimony of any other witness. *See* Wis. Stat. § 906.15(1).

At the evidentiary hearing, Officer Pauer admitted that she sat in the hallway for "three and a half hours" before she rose and leaned against the courtroom door. (82:5-6). During that time, Officer Pauer testified that she could hear essentially everything that was happening in the courtroom, including the state's questions to Officer Schwartz, the defense's questions to Officer Schwartz, and "Officer Schwartz talking." (82:5). Moreover, Officer Pauer disclaimed that she could hear what was happening inside the courtroom any better when she leaned against the courtroom door compared to when she was

sitting down for the previous three and a half hours. (82:6).

In other words, she heard Officer Schwartz's testimony, including his direct and cross-examination. As noted by the court, it was during Officer Schwartz's direct examination that the state asked whether he kept "eyes on the vehicle" and whether Officer Schwartz observed anyone exit Phillips' vehicle. (68:75; 82:24-25; App. 20-21). While Officer Pauer's violation of the sequestration order was first noticed while Officer Pauer was leaning against the courtroom door, the substantive violation occurred during the entire time she sat in the hallway directly outside of the courtroom and listened to Officer Schwartz's testimony.

As correctly observed by the court, the issue is not whether Officer Pauer's violation was knowing or intentional. (82:23; App. 19). Officer Pauer violated the sequestration order she listened to Officer Schwartz's testimony immediately before she testified to the same course of events. The court's misplaced focus is clearly erroneous.

Third, whether or not to grant a mistrial must usually be determined by asking whether other less severe remedies are available and sufficient to address the violation. For example, in *Nyberg v. State*, the defense made a motion for a mistrial *during trial* after a violation of the court's sequestration order came to light. 75 Wis. 2d at 409. The court took the motion under advisement and allowed the trial to proceed in

order to determine whether the defendant had been prejudiced by the violation. *Id.* The court alternatively could have disqualified the witness as a less drastic remedy that granting a mistrial. *Id.*

In other contexts, such as when improper evidence comes before the jury, the circuit court must decide whether a "less drastic" curative instruction is a sufficient alternative to granting a mistrial. *See State v. Sigarroa*, 2004 WI App 16,¶¶24-26, 269 Wis. 2d 234, 674 N.W.2d 894; *see also State v. Debrow*, 404 Wis. 2d 511, ¶45 (Roggensack, J. concurring).

Here, because Officer Pauer's violation was not brought to the court's or Phillips' attention until after Phillips had been convicted and sentenced, the only available remedy was for the court to declare a mistrial. Thus, Phillips was faced with an all or nothing remedy merely because of the delayed discovery of Officer Pauer's violation. Phillips had no opportunity to request the court to strike Officer Pauer's testimony or disqualify her as a witness. The jury could not have been given a curative instruction to either disregard her testimony or consider her testimony in light of the fact that she violated the court's sequestration order.

Thus, this is not a situation where Phillips requests a drastic remedy where other less severe remedies are available. His trial proceeded, and ended, on the basis of two witnesses, one of which listened to the other's testimony and then proceeded to testify in lock step with the first's. The prejudice

Phillips suffered was the jury being presented with two witnesses who testified consistently with one another, and contrary to Phillips' claims, that Phillips operated a vehicle impaired, despite no video proof and without anyone actually witnessing Phillips operate the vehicle. Had Officer Pauer's violation come to light immediately or at some point during trial, the court could have either disqualified her as a witness, leaving the state without any corroborating evidence of Officer Schwartz's testimony, or provided a specific curative instruction for the jury to consider Officer Pauer's testimony in light of the fact that she violated the court's sequestration order and listened to Officer Schwartz's testimony before taking the stand herself.

The fact that these less drastic remedies were not available to Phillips must be considered when determining whether Phillips was prejudiced by Officer Pauer's violation.

Individually or cumulatively, these errors demonstrate that the court erred when it denied Phillips' mistrial motion. Phillips is entitled to a fair trial where no witness had the opportunity to shape their testimony based on the testimony of others. In cases where courts have held that a violation of a sequestration order did not prejudice the defendant, the possibility that the violation resulted in the improper shaping of testimony was extremely remote and the availability of less drastic remedies was clear.

For example, in *State v. Bembenek*, the state's first expert witness told the state's second expert witness that the defendant's counsel had referred to a particular treatise on hair analysis during cross-examination. 111 Wis. 2d at 637-38. The court found that a violation of the sequestration order occurred, but refused to strike the testimony because there was no prejudice to the defendant. *Id.* at 638. Presumably, simply knowing that counsel for the defense referenced a specific treatise during cross-examination did not present any chance that the second expert would conform their testimony to the first's. Prejudice was all the less likely given that the second expert admitted during her testimony that she was familiar with the treatise specifically because the first witness told her that it came up during the first witness' cross-examination. *Id.*

In *Nyberg*, a violation of the court's sequestration order occurred when the prosecutor, the first witness, and the second witness discussed the first witness' testimony for 10 minutes before the second witness testified. 75 Wis. 2d at 408. On alert of the potential prejudice to the defendant, the court was able to observe the second witness' testimony before determining whether there was any evidence that the second witness was shaping his testimony to match the first's. *Id.* at 409.

Phillips' case is substantially different. Here, the state's case depended on the credibility of Officers Pauer and Schwartz. The video evidence does not corroborate their testimony. The record reveals

that their testimony lined up perfectly with regard to what they observed: neither officer observed Phillips driving, but they both testified that they kept eyes on his vehicle and that no one exited the vehicle after it parked at Kwik Trip. This testimony countered Phillips' claims that he was not the driver and that the driver was inside Kwik Trip.

Further, while it is impossible to prove Officer Pauer shaped her testimony to line up perfectly with Officer Schwartz's testimony, the opportunity for her to have done so is clear. Without knowing that Officer Pauer had listened to Officer Schwartz's testimony, and thereby violated the court's sequestration order, Phillips was unable to impeach Officer Pauer's testimony or attack her credibility during trial. Instead, he was left with the drastic remedy to request a mistrial based on the unknowable possibility that Officer Pauer had the opportunity to shape her testimony to line up with Officer Schwartz's.

Alternatively, another way to analyze whether Phillips was prejudiced by Officer Pauer's violation is to consider how the jury would have reacted to being informed, either before or after Officer Pauer's testimony, that she violated the court's sequestration order, that she listened to Officer Schwartz's testimony, and that her credibility should be assessed in light of her violation. Because Phillips did not have a trial where the state's witnesses complied with the court's sequestration order, prejudice can be assessed

by considering the impact that such an instruction would have had on the jury.

Whichever way prejudice is analyzed, the circuit court erred in its conclusion that Phillips was not prejudiced by Officer Pauer's violation of the court's sequestration order. In a trial that came down to two officer's credibility and corroboration of the other's testimony, the jury never learned that Officer Pauer listened to Officer Schwartz's testimony before testifying. Phillips was prejudiced because the jury had no reason to suspect that Officer Pauer had the opportunity to shape her testimony to match Officer Schwartz's. It cannot reasonably be said that Phillips was not prejudiced.

CONCLUSION

For the reasons set forth above, Marqus G. Phillips respectfully asks this Court to reverse his judgment of conviction and remand this case to the circuit court with directions to declare a mistrial and grant Phillips a new trial.

Dated this 10th day of July, 2023.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,394 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of July, 2023.

Signed:
Electronically signed by
Jeremy A. Newman
JEREMY A. NEWMAN
Assistant State Public Defender