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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

REPLY BRIEF OF
DEFENDANT-APPELLANT

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
newmanj@opd.wi.gov

Attorney for Marqus G. Phillips

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ARGUMENT

While the state issues a personal and earnest apology for its role in the violation of the circuit court's sequestration order (State's Br. at 1-2), it nevertheless disputes whether the violation prejudiced Phillips (State's Br. at 2-7). In doing so, however, the state disputes neither the purpose of witness sequestration or the fact that no compelling evidence other than witness testimony supported the state's theory that Phillips operated a motor vehicle prior to his Kwik Trip interaction with Officers Schwartz and Pauer.

As argued in his brief-in-chief, Phillips' theory of defense was that reasonable doubt existed as to whether Phillips operated the vehicle despite the fact that he was seated in the driver's seat when officers confronted him at Kwik Trip. The defense attacked the investigation into Phillips and critiqued law enforcement's failure to even attempt to corroborate Phillips' straightforward explanation that the person who drove the vehicle to Kwik Trip was inside the store. Further, it is undisputed that the video evidence does not amount to "overwhelming" evidence that Phillips was the driver.

In the face of these facts, the state's case hinged on the testimony of Officers Schwartz and Pauer, who testified in lockstep that they kept eyes on the vehicle and saw no one exit the vehicle at Kwik Trip. Phillips was prejudiced by Officer Pauer's violation of the sequestration order because she was able to listen in

on Officer Schwartz's testimony, hear the leading questions asked by the state (*see* 68:75, 95), and at least have the opportunity to conform her testimony to the evidence the jury already heard.

The purpose of witness sequestration is to ensure a fair trial and prevent the *possibility* that a witness may conform their testimony to the testimony of prior witnesses. *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). In the cases cited by Phillips in his brief-in-chief, the possibility that a witness who violated a sequestration order may have conformed their testimony to the evidence already presented was so unlikely to result in no prejudice to the non-violating party. Here, the record demonstrates that the possibility was very real.

Further, witness sequestration recognizes that the goal served by preventing one witness from knowing what another witness testifies to is the defendant's right to a fair trial. Here, and as argued in Phillips' brief-in-chief, Phillips right to a fair trial was violated. Not only did Officer Pauer violate the court's sequestration order, but the jury heard her testimony and were never able to learn that she had been caught cheating. While the state relies on the circuit court's erroneous and vague statement that there was "overwhelming evidence," the state never responds to Phillips' argument that the jury never learned of Officer Pauer's violation.

Finally, while the state briefly quibbles over the semantics of Phillips' requested remedy (*see* State's Br. at 3), the state fails to address Phillips' argument that the only reason lesser remedies were not available to him, such as the issuance of a curative instruction or the declaration of a mistrial before the verdict, is because the court was not alerted to Officer Pauer's violation until after Phillips was sentenced. Another way to determine whether Phillips was prejudiced below is to ask whether some lesser remedy would have been appropriate had Officer Pauer's violation come to light before the jury returned their verdict. The answer is surely yes, and the state offers no clear rebuttal. Phillips cannot be deprived of a remedy for Officer Pauer's violation now, simply because the violation remained concealed until the point at which no remedy other than a new trial was available.

The ultimate question is whether Phillips' right to a fair trial was violated. Because it cannot be said that no reasonable jury could have been swayed by a substantive curative instruction regarding Officer Pauer's violation, Phillips was prejudiced and he is entitled to a new trial.

CONCLUSION

For the reasons argued above and as previously argued in his brief-in-chief, Phillips respectfully requests that this Court reverse and remand for a new trial.

Dated this 24th day of August, 2023.

Respectfully submitted,

Electronically signed by

Jeremy A. Newman

JEREMY A. NEWMAN

Assistant State Public Defender

State Bar No. 1084404

Office of the State Public Defender

Post Office Box 7862

Madison, WI 53707-7862

(608) 264-8566

newmanj@opd.wi.gov

Attorney for Marqus G. Phillips

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 708 words.

Dated this 24th day of August, 2023.

Signed:

Electronically signed by

Jeremy A. Newman

JEREMY A. NEWMAN

Assistant State Public Defendant