IN THE

COURT OF APPEALS OF INDIANA

No. 69A05-1101-PC-113

STATE OF INDIANA,	)	Appeal from the Ripley County
	)	Circuit Court
Appellant (Respondent Below),	)	Cause No. 69C01-0802-PC-001
	)	
v.	)	
	)	
STEVEN RAY HOLLIN,	)	The Honorable
	)	Carl H. Taul,
Appellee (Petitioner Below).	)	Judge.

APPELLEE'S BRIEF

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	)	**Carl H. Taul,**
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APPELLEE'S BRIEF

STATEMENT OF ISSUES

I. Whether the post-conviction court's conclusion that trial counsel provided ineffective assistance is clearly erroneous, where due to lack of knowledge of the law, counsel failed to impeach the credibility of the State's main witness with the terms of his plea agreement and his pending felony prosecution, and failed to object to inadmissible evidence of Hollin's prior theft convictions and prejudicial details of those convictions.

II. Whether the post-conviction court's conclusion that the State violated ***Brady v. Maryland*** is clearly erroneous, where the State failed to disclose that its main witness was facing two probation revocations and a felony prosecution when he first implicated Hollin and later testified against him, and the record is inconclusive as to when and what Hollin's trial counsel knew about the pending felony prosecution.

III. Whether the post-conviction court's conclusion that the prosecutor committed misconduct is clearly erroneous, where the prosecutor twice told the jury that the alleged accomplice-witness had no reason to falsely testify against Hollin because "his case is over with," despite his knowledge there was a pending petition to revoke the witness's probation in this case.

STATEMENT OF CASE

Hollin agrees with the State's Statement of the Case, with one exception. The State says Hollin was tried on charges of Theft and Conspiracy to Commit Burglary, and was found guilty of both charges. *Br. of Appellant* at 2. This is not correct. While Hollin was originally charged with Theft, this count was amended to Conspiracy to Commit Burglary prior to trial. [Ex. Vol. 428, 454-56]. Hollin was tried on one charge, Conspiracy to Commit Burglary. [Ex. Vol. 370].

STATEMENT OF FACTS

Hollin agrees with the facts relating to his conviction as set forth in ***Hollin v. State***, 877 N.E.2d 462, 463-64 (Ind. 2007) and quoted in the Brief of Appellant, with one exception. The Supreme Court opinion says, "Hollin and Vogel subsequently confessed." *Br. of Appellant* at 3. This is not correct. Hollin never confessed. He admitted entering the house with Nathan Vogel and waiting in the kitchen for Vogel to use the phone, but did not confess to any crime. [Ex. Vol. 232-34]. And while Vogel confessed to stealing items from the house, he did not indicate that Hollin was in on it. [Ex. Vol. 228-31].

The Ripley County Prosecutor charged Vogel with Burglary, a class B felony, and Theft, a class D felony. [Ex. Vol. 644]. He soon entered a plea agreement with the following terms: he would plead guilty to Theft as a class D felony; the Burglary charge would be dismissed; he would

be sentenced to 545 days with all time not already served suspended to probation; and his felony conviction would be reduced to a class A misdemeanor if he "successfully completes the term of probation." [Ex. Vol. 666]. Vogel was sentenced in accordance with the terms of the plea agreement on February 21, 2006. [Ex. Vol. 646].

On May 16, 2006, Vogel was charged in Decatur County with Battery With a Deadly Weapon, a class C felony. [Ex. Vol. 652]. As a result, petitions to revoke Vogel's suspended sentences were filed in both Ripley County and Decatur County, where he had been convicted of Theft pursuant to a plea agreement with terms virtually identical to his Ripley County case. [Ex. Vol. 636-43, 650-51].

In July, 2006, shortly after Hollin was charged with Conspiracy to Commit Burglary, Ripley County Deputy Prosecutor Ryan King met with Vogel at the Ripley County Jail. [P-Tr. 6; Ex. Vol. 234-35, 455]. For the first time, Vogel claimed Hollin had agreed with him to look for houses to break into and steal property. [Ex. Vol. 258]. King did not disclose this to Hollin's attorney, John L. Kellerman, II. [P-Tr. 9]. On August 2, six days before Hollin's trial began, King and a detective met with Vogel again. [Ex. Vol. 253-60]. Vogel's class C felony charge and the two petitions to revoke his probation were still pending at the time of Hollin's trial. [Ex. Vol. 103, 647, 653, 677].

In opening statement, Kellerman told the jury that if Vogel testified "that this was some kind of plan, this will be the first time he's come up with that story." [Ex. Vol. 120]. Vogel, wearing an orange jail jumpsuit, testified that he and Hollin had agreed the night before to find a home to burglarize. [P-Tr. 4-5; Ex. Vol. 129-30]. Vogel denied the prosecutor's suggestion that Hollin, who did not take anything from the house, was supposed to act as "the lookout." [Ex. Vol. 135]. Vogel testified that he pled guilty, but there was no mention of the nature of the offense, his plea agreement, or his sentence. [Ex. Vol. 143]. Vogel admitted he had been convicted of theft in

Decatur County after he and Hollin were arrested, but claimed he only pled guilty "to get it behind" him because he was now married and had a daughter. [Ex. Vol. 127, 154]. The jury was unaware of the pending petition to revoke Vogel's probation on that case, the pending petition to revoke his probation on the burglary, or his pending felony in Decatur County.

The State played a taped statement given by Hollin after his arrest. [Ex. Vol. 225-28]. Hollin told the detective that he and Vogel approached a house to use the phone, knocked on the back doors with no response, he followed Vogel through an unlocked side door and into the kitchen, waited there for about two minutes, Vogel came back with a little pack saying let's go, and they left. [Ex. Vol. 231-34].

Hollin's trial testimony was consistent with his taped statement. He added that he thought Vogel knew the residents of the house, and that Vogel did not respond when Hollin asked him what was going on as they left. [Ex. Vol. 276-79]. Hollin testified that he realized what had happened while they were walking away from the house, because Vogel flashed a stack of currency and his pack was obviously full of change. [Ex. Vol. 279-80]. Hollin denied having any kind of plan with Vogel to break into houses. [Ex. Vol. 287-88].

Immediately prior to cross-examining Hollin, the prosecutor argued that his three prior auto theft convictions were admissible under Ind. Evidence Rule 609, as well as under the intent exception of Ind. Evidence Rule 404(b) because he said he entered the house to use the phone. [Ex. Vol. 289]. Kellerman agreed. [Id.]. Kellerman admitted later he did not want the jury to know about Hollin's prior auto theft convictions, but did not object to their admission because he believed there was no legal basis for keeping them out. [P-Tr. 49, 53-54, 57, 90, 98].

The jury then heard evidence of Hollin's auto theft convictions, as well as the names of the victims, his attempt to flee from the police in one of the stolen cars, and one auto theft being

dropped to a misdemeanor. [Ex. Vol. 315-17]. Kellerman testified at the post-conviction hearing that he could not recall why he failed to object to this line of questioning, or whether he even realized there was a valid objection. [P-Tr. 78-79]. The prosecutor also repeatedly made the point that Hollin had been released from jail just seven days before his arrest:

Q This case occurs on November 8th, 2005?

A Yes it does.

Q So, how many days you been out of jail then?

A I was out seven (7).

Q Seven (7) days?

A Yes.

Q Seven (7) days and you are in someone's house, correct?

A Correct.

Q With no intent to steal anything, right?

A No.

[Ex. Vol. 317].

On redirect, Kellerman established that Hollin was 16 and 17 years old when he stole the cars, ended up admitting guilt each time, and fled on one occasion to avoid arrest. [Ex. Vol. 321-22]. Kellerman indicated at the post-conviction hearing that once the auto theft convictions came in, he tried to use them to Hollin's advantage as best he could. [Ex. Vol. 80, 83, 85-88, 90].

On recross, the prosecutor demonstrated that Hollin was prosecuted as an adult on his auto theft cases because of his poor juvenile record ("They just didn't waive you into adult court because you were a good boy, did they?"), and suggested that Hollin lied to police about being lost in order to avoid arrest, in conformity with his prior act of fleeing from police in a stolen car to avoid arrest.

[Ex. Vol. 330-31]. The prosecutor also continued to remark on Hollin being released from jail seven days earlier:

> Q And you just got out of jail for being a car thief for seven (7) days before you got picked up in this case, right?
>
> A Yes. Yes.

[Ex. Vol. 330]

> Q Now you had been out of jail for seven (7) days, right?
>
> A Yes.

[Ex. Vol. 332].

In closing argument, the State recognized that its case depended on Vogel's credibility:

> We are talking about the agreement, ladies and gentlemen, that's it. And we have heard a lot of evidence about the agreement. Number one, most importantly, comes out of Nathan Vogel, the co-defendant's mouth, he had no reason to come in here and lie, his case is over with.

[Ex. Vol. 345]. The prosecutor also argued that Hollin's recent release from jail was evidence of his intent and his agreement to commit burglary:

> What about his intent? The thing I find pretty persuasive as to his intent is the fact that he has three (3) prior convictions for stealing. That's pretty telling on someone's intent. Especially when they just got out of jail seven (7) days before. What kind of intentions does a guy like that have?

[Ex. Vol. 343].

> Ladies and gentlemen, there's just one thing that you have to decide. Did these two people act together, or was poor Stevie Hollin just completely oblivious and taken advantage of by Nathan Vogel. Tricked. Tricked him into going into that house. He had no idea what was going on. Someone that had just been released. Had no idea what was happening.

[Ex. Vol. 348]. The prosecutor noted Hollin's previous flight from police in a stolen car and argued that Hollin made up a story about being lost to avoid arrest in this case, "the same intent as he used in a previous case." [Ex. Vol. 361].

After Hollin was convicted of Conspiracy to Commit Burglary and exhausted his direct appeal remedies, a hearing was conducted on his Amended Petition for Post-Conviction Relief, which raised six grounds for relief:

(1) Ineffective assistance of trial counsel, for failing to discover and/or present evidence that would have impeached Vogel's credibility;

(2) Ineffective assistance of trial counsel, for conceding to the use of inadmissible evidence of Hollin's prior auto theft convictions under Evidence Rule 609;

(3) Ineffective assistance of trial counsel, for conceding to the use of inadmissible evidence of Hollin's prior auto theft convictions under Evidence Rule 404(b);

(4) Ineffective assistance of trial counsel, for failing to object to evidence and argument regarding inadmissible details of Hollin's prior criminal history pursuant to Evidence Rule 404(b);

(5) Denial of due process, for the State's failure to disclose the existence of pending proceedings to revoke Vogel's probation in both this case and another case, as well as a pending prosecution for a class C felony; and

(6) Prosecutorial misconduct, for the deputy prosecutor arguing to the jury that Vogel had no reason to lie about Hollin's guilt because his case was over with, despite knowledge of the pending petition to revoke Vogel's probation in this case. [P-App. 60-63].

At the post-conviction hearing, Deputy Prosecutor King admitted he knew about the petition to revoke Vogel's Ripley County probation [P-Tr. 13, 16], and that his pending Decatur County felony charge was "in all likelihood" discussed during their pretrial meetings. [P-Tr. 16]. King could not recall if he knew of the petition to revoke Vogel's Decatur County probation, but admitted it could also have come up during his pretrial meetings to prepare Vogel for trial. [P-Tr. 15]. The post-conviction court found that the State admitted King knew of the pending petition to revoke

Vogel's Decatur County probation due to its failure to answer Hollin's post-conviction petition. [P-App. 127]. The post-conviction court also found it "highly likely" that King learned of the Decatur County probation revocation during his pretrial meetings with Vogel. [P-App. 119].

Amy Streator, Kellerman's sister, helped him during the trial after she withdrew from representing Vogel on his Decatur County felony charge. [P-Tr. 101, 107]. Both Streator and Kellerman testified at the post-conviction hearing that Streator probably told Kellerman about Vogel's felony charge. [P-Tr. 92-93, 109]. Kellerman testified that he could not recall whether he first learned of the felony charge from Streator, or from Hollin during the trial. [P-Tr. 58-59].

The post-conviction court granted relief to Hollin on all six grounds raised in his petition for post-conviction relief. [P-App. 116-42].

SUMMARY OF ARGUMENT

I. The post-conviction court's conclusion that Steven Hollin's trial counsel provided ineffective assistance is supported by the record and is not clearly erroneous. Nathan Vogel's credibility was crucial to the State's case against Hollin, but counsel failed to use the terms of Vogel's plea agreement to impeach his credibility. Although it is not clear when counsel learned of Vogel's pending felony prosecution or how much he knew about it, he failed to use it to impeach Vogel's credibility. When Hollin testified and denied participating with Vogel in the charged conspiracy, counsel failed to prevent the use of his inadmissible prior auto theft convictions and prejudicial details of those convictions to impeach his credibility and invite the jury to convict him on the basis of his character. Counsel's errors were the result of his failure to understand the applicable law.

II. The post-conviction court's conclusion that the State violated ***Brady v. Maryland*** is supported by the record and is not clearly erroneous. The State failed to disclose that Vogel had two pending probation revocations and a pending felony charge when he first implicated Hollin in the charged conspiracy and later testified against him. While the record is inconclusive as to when counsel learned of Vogel's pending felony and how much he knew about it, it does not appear that he discovered it in time to use it to impeach Vogel's credibility or that he should have discovered it earlier through the exercise of reasonable diligence. This information was material because Vogel's credibility was crucial to the State's case against Hollin.

III. The post-conviction court's conclusion that the prosecutor committed misconduct is supported by the record and is not clearly erroneous. The prosecutor on two occasions emphasized to the jury that Vogel had no reason to falsely testify against Hollin because "his case is over with." When he made these statements, the prosecutor knew Vogel's case was not over with because there was a pending petition to revoke his probation, and the prosecutor was in a position to influence the outcome of Vogel's revocation proceeding.

STANDARD OF REVIEW

When the State appeals the grant of post-conviction relief, "the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." ***State v. Hammond***, 761 N.E.2d 812, 814 (Ind. 2002). The court on appeal neither reweighs the evidence nor determines the credibility of witnesses, but considers only the evidence that supports the judgment and the reasonable inferences to be drawn from that evidence. ***State v. Holmes***, 728 N.E.2d 164, 169 (Ind. 2000). The post-conviction court may be reversed only upon a showing of "clear error"—"that

which leaves us with a definite and firm conviction that a mistake has been made." ***Spranger v. State***, 650 N.E.2d 1117, 1119 (Ind. 1995).

ARGUMENT I

THE POST-CONVICTION COURT'S JUDGMENT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IS NOT CLEARLY ERRONEOUS

The Post-Conviction Court's Judgment

The post-conviction court concluded that trial counsel's performance was deficient for the following reasons:

> (1) Counsel failed to impeach Nathan Vogel's credibility as a witness by showing the jury the terms of his plea agreement and sentence [P-App. 128-29];
>
> (2) Counsel failed to prevent the State from using inadmissible evidence of Hollin's prior auto theft convictions to impeach his credibility as a witness under Ind. Evidence Rule 609 [P-App. 132-34];
>
> (3) Counsel failed to prevent the State from using inadmissible evidence of Hollin's prior auto theft convictions to show his intent under Ind. Evidence Rule 404(b) [P-App. 134-36]; and
>
> (4) Counsel failed to prevent the State from presenting inadmissible details of Hollin's prior criminal history to the jury [P-App. 136-37].

The post-conviction court also concluded that if counsel were aware of the following when Vogel testified, his failure to use it to impeach Vogel's credibility was deficient performance:

> (1) Vogel was facing a petition to revoke his suspended sentence in this case [P-App. 129-31];
>
> (2) Vogel was facing a petition to revoke his suspended sentence in Decatur County [P-App. 129-31];
>
> (3) Vogel was facing a prosecution for Battery With a Deadly Weapon, a class C felony, in Decatur County [P-App. 129-31]; and
>
> (4) Vogel did not implicate Hollin in the charged conspiracy until after the revocation petitions and felony charge were filed against him [P-App. 131].

Failure to show jury the terms of Vogel's plea agreement

Because Vogel was incarcerated when he testified that he pled guilty, the jury could only conclude he pled guilty to burglary and was serving his sentence. The jury did not know he was facing up to 23 years on his original charges of burglary and theft. *See* Ind. Code 35-43-2-1 and 35-50-2-5 (maximum sentence of 20 years for class B felony burglary) and Ind. Code 34-43-4-2 and 35-50-2-7 (maximum sentence of 3 years for class D felony theft). The jury also did not know Vogel was sentenced pursuant to a plea agreement with the Ripley County Prosecutor that contained extremely favorable terms: the burglary charge was dismissed, he pled guilty to class D felony theft, was sentenced to 545 days with credit for time served and the rest suspended to probation, and his felony conviction would be reduced to a misdemeanor upon successful completion of probation. [Ex. Vol. 646, 666]. Trial counsel did not use this impeachment evidence due to his erroneous understanding of the law. Counsel had the mistaken belief that by bringing up the terms of Vogel's plea agreement, he risked opening the door to evidence of Hollin's prior criminal history. [P-Tr. 68-69].

The State argues that Vogel's plea agreement was not admissible because there was no proof it was part of a deal for Vogel to testify against Hollin. The State has also misinterpreted the law. An accused is entitled to show the jury the potential penalties faced and actual benefits received by a witness pursuant to a plea agreement, regardless of whether there is evidence of an express deal. ***Hamner v. State***, 553 N.E.2d 201, 203-04 (Ind. Ct. App. 1990).

Hamner was tried for possession of marijuana and cocaine. 553 N.E.2d at 202. Like Vogel, Hamner's alleged accomplice testified against him after pleading guilty. ***Id.*** at 203. But all Hollin's jury knew was that Vogel pled guilty. Hamner's jury heard that the accomplice pled guilty to a class D felony, the possession of cocaine charge was dismissed, there was no agreement with the

State concerning his sentence, and the judge had the discretion to consider his conviction as a misdemeanor or a felony. ***Id.*** There was no evidence that the plea agreement was made in exchange for the accomplice's testimony against Hamner, and the only thing Hamner was prohibited from exploring was "the range of penalties for possession of marijuana both as a class D felony and as a misdemeanor." ***Id.*** at 204.

Citing a number of Indiana decisions, ***Hamner*** noted that "exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination," and that it is "essential to the jury's fact finding role [that] any bias and prejudice of a witness be exposed so that the jury can weigh the witness's testimony and a fair trial is insured." ***Id.*** ***Hamner*** concluded it was error to preclude cross-examination of the accomplice regarding the potential penalties he faced:

> By limiting cross-examination, the jury was not adequately informed of Redd's motivation for testifying against Hamner. While the jury was apprised of the dismissal of the possession of cocaine charge and the discretionary sentencing arrangement, the jury had no way to adequately assess these benefits absent knowledge of the potential penalties for such crimes.

553 N.E.2d at 204.

Here, the jury was not merely ignorant of the potential penalty Vogel faced. They did not even know the charge to which he pled guilty. They could only presume he pled guilty to burglary or conspiracy to commit burglary, not theft. They were not told that his burglary charge was dismissed and he was sentenced to time served, given probation, and his felony conviction would be reduced to a misdemeanor if he successfully completed probation.

The State attempts to distinguish ***Hamner*** by claiming the accomplice was induced to testify by a deal. But there was no evidence of any agreement to testify in ***Hamner***. This aspect of ***Hamner*** was recently reaffirmed in ***McCain v. State***, 2011 Ind. App. LEXIS 894, *5-*12 (Ind. Ct.

App. May 23, 2011) (accomplice, her attorney, and prosecutor all denied that agreement to vacate her conviction was part of deal to testify, but "trial court erred by limiting discussion of . . . conviction and the possibility that it was set aside as additional consideration" for accomplice's testimony). The post-conviction court correctly relied on ***Hamner*** to find trial counsel should have presented Vogel's possible bias to the jury by advising them of the details of his plea agreement.

The State also argues that Vogel's favorable plea agreement was the result of its concern regarding the legality of the search. However, Vogel was not searched until after the officer saw him wearing a heavy winter coat despite the fact it was 66 degrees, he attempted to conceal a bag under his coat, and a tag on the bag identified it as belonging to a person the officer knew lived 500 yards away. [Ex. Vol. 462]. The trial court found the officer "had reasonable suspicion for the stop and eventually probable cause to believe that a theft had occurred[.]" [Ex. Vol. 463]. Regardless of the validity of the search, Hollin was entitled to have the jury know all relevant facts so they could make their own determination of how Vogel's testimony might be affected by the benefits he received. *See* ***McCain***, 2011 Ind. App. LEXIS 894 at *4, *12 (although State claimed accomplice's conviction was set aside to help her secure employment, "we believe it was within the province of the factfinder to decide whether the vacatur of [the] conviction was intended to sweeten her agreement with the State.")

Failure to prevent admission of Hollin's prior theft convictions under Evidence Rule 609

Hollin had three prior convictions for auto theft. None of these cases involved Hollin lying to anyone. [PCR Exhibits U, V, and W]. Although trial counsel did not want the jury to hear about these convictions, he conceded they were admissible to impeach Hollin's credibility as a trial witness under Ind. Evidence Rule 609 due to his lack of knowledge of the law.

Ind. Evidence Rule 609(a)(2) allows evidence of convictions for crimes "involving dishonesty or false statement" to attack the credibility of a witness. Theft convictions are presumed to be crimes involving dishonesty or false statement. ***Fletcher v. State***, 264 Ind. 132, 340 N.E.2d 771, 774 (1976). But not all theft convictions involve a "lack of veracity." ***Id.*** Sometimes conduct that amounts to the crime of theft "directly correlate[s] with the propensity of the witness for truth and veracity. In others, however, any relation between the offense and the witness's inclination to tell the truth is tenuous or nonexistent." 340 N.E.2d at 774-75. For this reason, ***Fletcher*** held that theft convictions arising from factual situations which do not indicate a "lack of veracity" on the part of the witness are not admissible to attack the credibility of a witness if "such facts (are made) known to the court through a pre-trial motion in limine, supported by appropriate affidavits." ***Id.*** at 775.

Hollin's auto theft convictions were not the types of theft that indicate a lack of veracity. Thus, they were not admissible under Evid. R. 609. Trial counsel's concession to their admission was based on his failure to understand the applicable law, and amounts to deficient performance.

The State criticizes the post-conviction court's statement that Hollin's auto theft convictions were "based on joyriding situations that do not indicate a lack of veracity" [P-App. 134]. The State posits that theft necessarily requires intent to deprive the owner of the value or use of his vehicle, while joyriding does not. This argument misses the point of ***Fletcher***, which is that the intent to deprive common to all thefts does not equate with a lack of veracity. In using the term "joyriding," the post-conviction court expressed that Hollin's prior convictions did not involve false statement. The act of stealing a car does not indicate a lack of veracity for purposes of ***Fletcher***.

The State attempts to dismiss this portion of ***Fletcher*** as mere "dicta" in a "pre-rule case." But "dicta" is something unnecessary to the opinion that lacks precedential effect. *See* **Black's Law Dictionary** 1100 (7th ed. 1999). ***Fletcher*** held that theft convictions were presumptively admissible to attack the credibility of a witness, but placed the onus on the parties to rebut the presumption when theft convictions "arise from factual situations which do not indicate a lack of veracity." 340 N.E.2d at 775. This holding has precedential effect, as evidenced by the Supreme Court's reliance on it to uphold the exclusion of a prior conviction because it was shown by affidavit that the disputed offense "was not the type of theft offense which bespeaks a lack of veracity." ***Sweet v. State***, 498 N.E.2d 924, 927 (Ind. 1986). And while ***Fletcher*** was decided before the Indiana Rules of Evidence were adopted effective January 1, 1994, Indiana permitted evidence of convictions for "crimes involving dishonesty or false statement" to impeach the credibility of a witness before ***Fletcher*** was decided. ***Ashton v. Anderson***, 258 Ind. 51, 279 N.E.2d 210, 216-17 (1972). Thus, the adoption of Indiana Evidence Rule 609(a)(2) did not alter ***Fletcher*** in any way. *See also* ***Brown v. State***, 703 N.E.2d 1010, 1018 (Ind. 1998) (Brown's conviction for entering automobile with intent to commit theft admissible for impeachment because he failed to make offer of proof pursuant to ***Fletcher*** to rebut presumption of admissibility).

Finally, the State argues that even under ***Fletcher***, Hollin's prior convictions were admissible because he failed to establish they were not "crimes of dishonesty." This is incorrect, because ***Fletcher*** does not require that Hollin's auto thefts be "crimes of dishonesty" in order to be admissible – it requires that they involve "false statement" or "lack of veracity." "[A]ll crimes have some element of dishonesty in the broad sense of moral depravity. The word dishonesty as used in ***Ashton*** was not used in such a broad sense, and our holding here should not be construed as granting approval for such a reading." 340 N.E.2d at 775. The post-conviction court correctly

found that by submitting the probable cause affidavits from his prior convictions, Hollin established that they "arose from factual situations which do not indicate a lack of veracity[.]" ***Id.***

Failure to prevent admission of Hollin's prior theft convictions under Evidence Rule 404(b)

Because Hollin's intent at the time he entered the home was not relevant to his intent the night before when he allegedly agreed with Vogel to commit a burglary, his prior auto theft convictions were not admissible under Indiana Evidence Rule 404(b) to impeach his testimony that he thought they were entering to use the phone. Trial counsel conceded they were admissible for this purpose due to his misunderstanding of the law. [P-Tr. 53-54].

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith, but is admissible in some instances to show intent. Ind. Evidence Rule 404(b). The Indiana Supreme Court has adopted a "narrow construction" of the intent exception. ***Wickizer v. State***, 626 N.E.2d 795, 799 (Ind. 1993). It is available only when the defendant "goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent." ***Id.*** When this occurs, the State may respond by offering evidence of his prior acts, but only "to the extent genuinely relevant to prove the defendant's intent at the time of the charged offense." ***Id.***

Hollin was charged with conspiracy to commit burglary: "agreed with Nathan Vogel to commit the crime of Residential Burglary with the intent to commit the crime of Residential Burglary, and Hollin and/or Vogel performed an overt act in furtherance of the agreement." [Ex. Vol. 456]. Thus, the "time of the charged offense" was when the agreement was made.

Vogel testified that Hollin agreed with him to commit burglary the night before. [Ex. Vol. 129-30]. Hollin testified that he did not agree with Vogel to commit burglary at all, but followed Vogel into the house because he thought Vogel was going to use the phone. [Ex. Vol. 287-88].

Hollin did not admit that he agreed to commit residential burglary but had a "particular contrary intent." Hollin denied that he committed the charged act of agreeing to a burglary at all. He did not put his "intent at the time of the charged offense" at issue by testifying that he entered the house to use the phone. Therefore, his testimony did not open the door to evidence of his prior auto theft convictions under Evid. R. 404(b).

The State argues that the post-conviction court erred due to its "incorrect belief that intent to commit theft inside the house was not an element of conspiracy to commit burglary." *Br. of Appellant* at 13. The State is mistaken, because the post-conviction court never indicated this. Instead, the court correctly found that the intent to commit theft inside a house had to exist at the time of the charged offense which, under ***Wickizer***, is the time of the agreement, not the time of the entry. The State's attempt to substitute Hollin's intent when he entered the house for his intent at the time of the alleged agreement does not comport with ***Wickizer***'s "mandate that the intent exception be narrowly construed." ***Lafayette v. State***, 917 N.E.2d 660, 665 (Ind. 2009). Hollin's intent at the time he entered the house would have been admissible if the State had not dismissed the original burglary charge and substituted conspiracy to commit burglary. This amendment likely reflected the fact that, unlike Vogel, Hollin did not steal anything from the residence.

Hollin could not be guilty of the charged conspiracy unless he agreed with Vogel to commit burglary and intended to commit burglary at the time of the agreement. The post-conviction court correctly found Hollin did not put his intent at the time of the alleged offense at issue, and that trial counsel's concession to the use of his prior convictions under the intent exception of Evidence Rule 404(b) was based on his failure to understand ***Wickizer***.

Failure to prevent admission of prejudicial details of Hollin's prior theft convictions

During cross-examination of Hollin, the State elicited prejudicial details of his three prior auto theft convictions, including the victims' names, that he resisted arrest by fleeing, he pled down to a misdemeanor once, and had been released from jail just seven (7) days before he was charged with this offense. Trial counsel failed to object due to his misunderstanding of the law. [P-Tr. 78-79]. Counsel attempted to mitigate the damage by showing on redirect examination that Hollin was young when he committed the auto thefts, did not take property from the vehicles, and resisted by fleeing because he knew he had broken the law. But in doing so, counsel opened the door to further cross-examination showing that Hollin was waived into adult court due to his poor juvenile record, and suggesting that Hollin acted in conformity with his prior act of fleeing from the police by lying to the police in this case about being lost. The State also twice more reminded the jury that Hollin was released from jail for being a "car thief" just seven (7) days before the burglary.

A witness may be questioned only about whether he had previously been convicted of a particular crime that is admissible for impeachment; the details of the prior convictions may not be explored. ***Banks v. State***, 761 N.E.2d 403, 405 (Ind. 2002). The post-conviction court correctly found that even if Hollin's prior convictions had been admissible, trial counsel's failure to object to the State using details related to the convictions to show his bad character and action in conformity therewith in violation of Evid. R. 404(b) was deficient performance. [P-App. 136-37]. Particularly egregious were the repeated references to the fact that Hollin had been released from jail for only seven (7) days before he was arrested.

Counsel's failure to prevent admission of prior conviction evidence was not trial strategy

The State claims trial counsel made a strategy decision to allow evidence of Hollin's prior convictions to come into evidence, but cites just one page of his post-conviction testimony that fails

to support this contention. *Br. of Appellant* at 14-16 (citing P-Tr. 81). Counsel never claimed that this was a strategic decision.

Trial counsel was attempting to defend the portion of his redirect examination of Hollin in which he had Hollin explain that he fled to avoid arrest in the prior case, after the State brought out the fact of his flight on cross-examination:

> Well, I think that at that point what I probably was trying to do was to make the point that, okay, I've done bad stuff in the past. I've stolen things, I've fled from the police and the fact that, the fact that his previous convictions had already come out at this point, whereas our defense, Mr. Hollin's defense was this time I didn't have any bad intent. I wasn't trying to do anything wrong. And when I saw the police outside the house, I didn't run away. I went up and talked to them. I think that was the point of that whole line of questioning.

[P-Tr. 80-81]. Counsel went on to claim that he might have had Hollin admit he fled from the police if the State had not beaten him to it, to show he knew when he was doing bad things. [P-Tr. 81]. But the fact that counsel did not do this in his direct examination of Hollin was grounds for the post-conviction court to reject his credibility on this point.

Further, even if this were a legitimate strategy for showing the jury Hollin had fled from police to avoid arrest, trial counsel never claimed that he purposely permitted the State to introduce evidence of Hollin's three prior auto theft convictions as a defense tactic. In fact, when the State asked the court after opening statements to rule that Hollin's auto theft convictions would be admissible, counsel successfully argued that they not be admitted. [Ex. Vol. 122-24]. Counsel conceded at the post-conviction hearing that he did not want the jury to know about Hollin's prior convictions, but he did not realize he could keep them from coming in.

> Q Would you agree that you did not want the jury to hear about Steve's prior auto theft convictions, if you could have helped it?
>
> A I agree with that.

[P-Tr. 49].

Q And again as you, the same with, we've talked about earlier with ***Fletcher***, if you could have kept, if you felt there was a way to keep the jury from hearing about Steve's prior auto theft convictions under the intent exception to Evidence Rule 404(b), you would have tried to keep the jury from hearing that mentioned?

A That's correct.

[P-Tr. 53-54].

Q And your testimony is that, if you could have kept the evidence of his auto theft convictions out, under the intent exception to rule, to Evidence Rule 404(b), you would have done so. But you don't think that there was any way to do that. Is that right?

A That's correct.

[P-Tr. 57].

A Steve and I talked before the trial even started about the fact that we felt like we weren't going to be able to keep his past record out of this, and that our argument was going to be, look, I know when I am committing crimes. This isn't one of those times.

[P-Tr. 90].

Trial counsel did not have a strategy to allow the jury to hear about Hollin's prior convictions. And even if he tried to make lemonade out of Hollin's prior convictions once they came in, this cannot hide the fact that the only reason they were admitted at all was because counsel mistakenly believed they were admissible. A strategy based on ignorance of the law is not reasonable. *See* ***Smith v. State***, 272 Ind. 216, 218-19, 396 N.E.2d 898, 900 (1979) (counsel's ignorance of law that defendant could not be forced to attend trial in jail clothing was reason for failure to object; counsel ineffective under prior "mockery of justice" standard); *see also* ***Palmer v. State***, 573 N.E.2d 880, 880 (Ind. 1991) (counsel ineffective for failing to object to erroneous instruction due to ignorance of law); ***Pemberton v. State***, 560 N.E.2d 524, 526-27 (Ind. 1990) (counsel's failure to object to evidence at trial after losing pretrial motion to suppress stemmed from ignorance of law, not tactical decision).

The record supports the post-conviction court's conclusion that Hollin's prior convictions came in due to trial counsel's failure to understand the law, and not because of a trial strategy that they would somehow be beneficial to Hollin's defense.

Failure to use Vogel's pending felony and probation proceedings as evidence of bias

When Vogel testified against Hollin, he had a class C felony prosecution pending in Decatur County, a petition to revoke his theft probation pending in Decatur County, and another petition to revoke probation pending in Ripley County. Vogel did not implicate Hollin in an agreement to commit burglary until after these three proceedings had been initiated. The post-conviction court found that if trial counsel were aware of Vogel's pending cases and their relationship to the timing of his accusation of Hollin, his failure to use them as evidence of Vogel's potential bias was deficient performance. [P-App. 131].

It is not clear whether trial counsel knew of Vogel's pending felony case when he testified on the first day of Hollin's trial. Both Kellerman and his sister testified that he probably did know about it at some point. [P-Tr. 96, 109]. However, counsel also testified that he may have first learned about it during the trial from Hollin. [P-Tr. 58-59]. An exchange between counsel and Hollin on the second day of trial indicates that any knowledge they may have had regarding Vogel's pending charge was quite vague:

Q Do you know what Nathan Vogel's legal status is?

A No.

Q Do you know whether he has still got charges pending over him?

A I do believe so.

Q Do you know it though?

A No.

Q Do you know what is going to be the result if there are?

A No.

Q Do you know what he might have to gain by changing his story?

A No I don't.

[Ex. Vol. 322-23].

Both Kellerman and his sister testified that they probably did not know about Vogel's pending probation revocation in Decatur County. [P-Tr. 74, 106]. Kellerman testified that he did not know of Vogel's probation revocation proceedings in Ripley County. [P-Tr. 69-70].

The State argues that evidence of Vogel's pending cases was not admissible as to his bias because there was no evidence that his testimony "was purchased or influenced by any implicit or explicit deal with either county." *Br. of Appellant* at 17. This is not the law. The State attempts to distinguish ***Smith v. State***, 721 N.E.2d 213, 218-20 (Ind. 1999), because the defendant was prohibited by the trial court from exploring the witnesses' pending charges, as opposed to Hollin being prevented from exposing Vogel's pending cases due to either his attorney's deficient performance or the State's failure to disclose. As here, the State argued in ***Smith*** that the evidence was inadmissible because there were no actual offers of leniency given to either witness. 721 N.E.2d at 218. The Supreme Court disagreed, holding that the constitutional right of confrontation permitted Smith to question both witnesses about their possible bias in light of their pending charges. ***Id.*** at 219-20. The record here indicates trial counsel did not know he was entitled to question Vogel about his possible bias in light of his pending felony charge.

The State fails to address the primary case relied upon by the post-conviction court, ***Davis v. Alaska***, 415 U.S. 308, 94 S.Ct. 1105 (1974). ***Davis*** held the trial court's refusal to allow cross-examination of the key prosecution witness to show possible bias and prejudice because he was on

probation for a juvenile delinquency adjudication denied Davis his constitutional right to confrontation, despite the absence of any evidence of a "deal":

> (T)he jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided a "crucial link in the proof" . . . . The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer. . . . (D)efense counsel should have been permitted to expose to the jury the facts from which the jurors, as sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

415 U.S. at 317-18, 94 S.Ct. at 1111 (citations and footnotes omitted).

The State also does not mention counsel's failure to show the jury that Vogel did not implicate Hollin in a burglary agreement until after the Decatur County felony and the two probation revocations had been filed against him. Because the prosecutor never disclosed it, counsel did not know until the second day of trial that Vogel first accused Hollin of planning a burglary with him on July 24, 2006, two months after the felony charge and probation revocations were filed against him, and two weeks before Hollin's trial began. [Ex. Vol. 234-35; P-Tr. 9-12]. If counsel knew of Vogel's felony charge, he should have shown the jury that Vogel never said anything about Hollin being part of a burglary conspiracy until after the charge was filed against him.

Hollin was prejudiced by trial counsel's deficient performance

The State argues Hollin was required to show that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Br. of Appellant* at 18. Although Hollin may well have demonstrated this, it is not the proper standard for prejudice in an ineffective assistance of counsel case. In fact, Hollin "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." ***Strickland v. Washington***, 466 U.S. 668, 693, 104

S.Ct. 2052, 2068 (1984). He need only show a "reasonable probability" that the result would have been different. ***Id.***, 466 U. S. at 694, 104 S.Ct. at 2064.

Due to counsel's deficient performance, Hollin's jury:

> Did not know Vogel was originally charged with burglary, a class B felony, and theft, a class D felony, which subjected him to a possible sentence of 23 years;
>
> Did not know Vogel pled guilty only to theft;
>
> Did not know that under Vogel's plea agreement, the B felony burglary charge was dismissed;
>
> Did not know that pursuant to the plea agreement, Vogel was sentenced to 545 days with credit for time served and the rest suspended to probation;
>
> Did not know that under the plea agreement, Vogel's class D felony would be reduced to a misdemeanor if he successfully completed probation;
>
> Did not know there was a pending class C felony charge against Vogel in Decatur County;
>
> Did not know that Vogel never implicated Hollin in the charged offense until after the new felony charge and both probation revocations had been filed;
>
> Knew Hollin had three prior auto theft convictions;
>
> Heard prejudicial details about Hollin's prior auto theft convictions;
>
> Knew Hollin had a significant juvenile record;
>
> Heard the prosecutor suggest that, just as Hollin had fled from the police in one of his auto theft cases, he lied to the police in this case in order to avoid arrest;
>
> Heard the prosecutor remind them seven (7) times that Hollin had been released from jail just seven (7) days before his arrest [Tr. 268, 281, 283, 294, 299].

The post-conviction judge, who also presided over the trial, was in a superior position to conclude there was a reasonable probability Hollin would not have been convicted of conspiracy to commit burglary but for trial counsel's deficient performance.

The State argues that any prejudice from Hollin's criminal history was negated by an instruction that evidence of his involvement in other crimes should only be considered as to his credibility and intent. But because Hollin testified and denied any agreement with Vogel to commit burglary, his credibility was of paramount importance to his defense. His prior convictions should not have been considered at all in determining his credibility. Similarly, the State argued that Hollin's prior convictions, and especially his recent release from jail, should be considered in determining his intent at the time he entered the house. This evidence was not admissible for this purpose, or for deciding whether Hollin agreed with Vogel to commit burglary.

The State also complains there can be no prejudice in light of the "implausibility" of Hollin's testimony. This is nothing more than an invitation for this Court to reweigh the evidence and determine witness credibility. The State says both Vogel and Hollin "had stolen items on (them)," but fails to tell the whole story. *Br. of Appellant* at 19. Vogel had a stolen camera bag, a zoom lens, a large whiskey bottle, and over $600 in currency and change. [Ex. Vol. 182, 186]. Hollin had one stolen item, a fake three-dollar bill. [Ex. Vol. 171, 191]. However, the owner of the home testified that he kept the fake bill in a jewelry case in his bedroom [Ex. Vol. 161-64, 171-72], and Vogel admittedly went into the bedroom alone while Hollin stayed in the kitchen. [Ex. Vol. 135]. This is consistent with Hollin's testimony that Vogel handed him the fake bill after they left the residence. [Ex. Vol. 284]. Hollin did not take anything from the house, a strong indication that any burglary plan was Vogel's alone.

ARGUMENT II

THE POST-CONVICTION COURT'S JUDGMENT OF A *BRADY* VIOLATION IS NOT CLEARLY ERRONEOUS

The Post-Conviction Court's Judgment

The post-conviction court concluded that the State violated ***Brady v. Maryland***, 373 U.S. 83, 83 S.Ct. 1194 (1963), by failing to disclose to Hollin that Vogel was facing pending proceedings to revoke his probations in Ripley and Decatur Counties, and a pending class C felony charge in Decatur County. [P-App. 127, 131-32].

The Brady violation

Notwithstanding the State's claims to the contrary, the post-conviction court did not make inconsistent findings concerning the State's failure to disclose Vogel's pending criminal proceedings. There is no question that the State did not disclose any of these proceedings to Hollin's counsel. [P-App. 127, 131-32]. There is no question that counsel was unaware of Vogel's pending probation revocation cases. [P-App. 119]. The only question is what counsel knew about Vogel's Decatur County felony case, and when he knew it.

Although the post-conviction court found no evidence that trial counsel knew of the pending felony "at the time of trial," there actually was evidence that he knew something about it by the end of the trial. Kellerman and his sister testified that they probably discussed the Decatur County felony, but Kellerman also testified he may have first heard about it from Hollin during the trial. [P-Tr. 58-59]. Hollin's testimony on the second day of trial indicated that he suspected Vogel had "charges pending," but did not "know it." [Ex. Vol. 322-23]. Counsel also told the jury in closing argument that he did not know whether Vogel had any pending cases. [Ex. Vol. 350]. Based on the record as a whole, the post-conviction court was justified in concluding that counsel did not know

about Vogel's pending Decatur County felony until it was too late in the trial to do anything about it.

The State argues it is unclear what the Ripley County Prosecutor knew about Vogel's pending felony and probation proceedings. But the record is clear enough. First, the State effectively admitted that Deputy Prosecutor King knew about both pending probation revocation proceedings by failing to answer Hollin's petition. [P-App. 127]. In addition, King conceded at the post-conviction hearing that he knew about the Ripley County probation revocation [P-Tr. 13] and the Decatur County felony [P-Tr. 16]. He said he could not recall if he knew about the Decatur County probation revocation, but acknowledged that Vogel might have told him about it during their pretrial meetings. [P-Tr. 15]. This evidence led the post-conviction court to find it "highly likely" that King learned of Vogel's pending Decatur County probation revocation during their two meetings to prepare Vogel for testifying against Hollin. [P-App. 119].

The State argues that even if King knew about Vogel's Decatur County probation proceedings, there was no ***Brady*** violation because Kellerman could have found out about it through the exercise of reasonable diligence. The State relies on ***State v. Hollars***, 887 N.E.2d 197, 203 (Ind. Ct. App. 2008), where the evidence in question was a page of Hollars' own medical records. The State fails to explain why Kellerman should be expected to have conducted a fishing expedition in Decatur County for any proceedings involving Vogel.

In addition, ***Hollars*** did not involve an alternate claim of ineffective assistance of counsel. This case does. Hollin is entitled to relief regardless of whether his attorney could have obtained information regarding Vogel's pending cases through the exercise of reasonable diligence. The important point is that the jury was forced to assess Vogel's credibility without knowledge of his pending felony prosecution. Whether this was the result of trial counsel's failure to act or the

State's failure to disclose, the effect on Hollin's trial was the same, and the question under either ***Strickland*** or ***Brady*** is the same – was there a reasonable probability that the result would have been different? ***United States v. Agurs***, 427 U.S. 97, 104, 96 S.Ct. 2392, 2397 (1976) (***Brady*** materiality standard); ***Strickland***, 466 U.S. at 694, 104 S.Ct. at 2068 (adopting ***Brady*** materiality test for determining ineffective assistance of counsel prejudice).

ARGUMENT III

THE POST-CONVICTION COURT'S JUDGMENT OF PROSECUTORIAL MISCONDUCT IS NOT CLEARLY ERRONEOUS

The Post-Conviction Court's Judgment

The post-conviction court determined that the deputy prosecutor committed misconduct by arguing to the jury that Vogel had no reason lie about Hollin's guilt because Vogel's Ripley County case was finished, despite his knowledge that Vogel was facing a petition to revoke his probation in that case. [P-App. 127, 140-41].

The prosecutorial misconduct

Deputy Prosecutor King twice made the false claim that Vogel's Ripley County case was "over and done with." First, he cross-examined Hollin as follows:

Q You are the one that has something to gain by your testimony, correct?

A Correct.

Q Mr. Vogel's case is over and done with, right?

A That case, yes.

Q Yet Mr. Vogel is the one that can't tell the truth, right?

A Right.

[Ex. Vol. 318]. King made the same point to the jury in closing argument:

> And we have heard a lot of evidence about the agreement. Number one, most importantly, comes out of Nathan Vogel, the co-defendant's mouth, he had no reason to come in here and lie, his case is over with.

[Ex. Vol. 345].

The State urges this was not misconduct because it only suggested that Vogel had pled guilty, Vogel's pending probation revocation gave him no reason to lie because the prosecutor did not control the outcome of that proceeding, and Hollin's counsel did not object to the argument.

The post-conviction court was justified in disagreeing. By arguing "his case is over with," King implied to the jury that Vogel pled guilty to burglary, was serving a sentence for a class B felony, was not facing the prospect of revocation of his suspended sentence, was not facing the prospect of losing the opportunity to have his felony conviction dropped to a misdemeanor, and implicated Hollin before the petition to revoke his probation was filed. King knew that all of these things were not true.

As for claiming that the Ripley County Prosecutor was helpless in Vogel's probation revocation proceeding, King testified that "the prosecutor's office does not control what the ultimate resolution of the case on a probation violation is" [P-Tr. 20], hardly a surprising revelation, and that the prosecutor could only make "recommendations." [P-Tr. 18]. The hope that the prosecutor would make a recommendation on his behalf would give Vogel ample reason to "curry the prosecutor's favor" by testifying against Hollin.

Similarly, there is no support for the State's claim that trial counsel's failure to object to King's argument is proof that it did not mislead the jury. Counsel testified that he did not object because he did not realize the argument was misleading or that Vogel's case was not over with, and he rarely objected during closing argument anyway. [P-Tr. 73, 77-78].

CONCLUSION

The post-conviction court's conclusion that Steven Hollin is entitled to relief due to the ineffective assistance of his trial counsel, the State's violation of ***Brady v. Maryland***, and prosecutorial misconduct, is supported by substantial evidence and is not clearly erroneous. Therefore, the judgment of the post-conviction court should be affirmed.

Respectfully submitted,

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IN THE

COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant,	)	
	)	
v.	)	**No. 69A05-1101-PC-113**
	)	
STEVEN RAY HOLLIN,	)	
	)	
Appellee.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have, this 3rd day of June, 2011, served upon Greg Zoeller, Attorney General of Indiana, pursuant to Ind. Appellate Rule 24(C)(1), by personal service to his office at IGCS, 5th Floor, 302 W. Washington Street, Indianapolis, Indiana, 46204, two (2) copies of the above and foregoing **APPELLEE'S BRIEF** filed in the Indiana Court of Appeals in the above-captioned cause of action.

Respectfully submitted,

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