STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP1769-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LANCE DONELLE BUTLER, JR.,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLES DENNIS R. CIMPL AND GLENN H. YAMAHIRO PRESIDING, RESPECTIVELY

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

ARGUMENT

TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE WHEN HE CHOSE NOT TO OBJECT TO THE TESTIMONY OF OFFICERS BROSSEAU AND DRAEGER.

A. Introduction.

Butler claims that it constituted ineffective assistance of counsel when his trial counsel failed to object to the testimony of Officers Brosseau and Draeger. At trial, both Officers Brosseau and Draeger testified with respect to mapping and analyzing cell phone records provided by the cell phone companies (82:79). The cell phone company provided the number of the cell tower that received Butler's calls, the GPS coordinates for the tower, and the sectors or direction of the antenna. Officer Brosseau simply took this information and mapped the cell phone locations on an exhibit to be shown to the jury. (82:80, 83-85, 86, 87-88, 93, 104, 108-09; 89:9, 11, 12, 14, 27). As the prosecutor explained in the postconviction motion hearing:

> First of all, I don't think the officers really did anything other than take records that came in a data base as you saw on Exhibit 22 and geographically represent them on Exhibit 10. So in other words Tower 317 explained—this information is information that comes from the phone company. No one and no officer ever said based on Line 639 of Exhibit 22 Lance Butler was at the arson scene on this date at this time. That's not what they said at all, and as Mr. Hicks cleared with the officers they were never able to say who was in possession of this phone, things of that nature. What they said was we got these records. The Police Department obtained these records from Verizon and

> these records put onto a map for someone to understand what they mean based on data bases we get from Verizon about tower locations, et cetera and GPS coordinates are here on this map. GPS coordinates are in numbers that no juror can understand; negative 48 latitude, positive 36 longitude, things like that.
>
> . . . .
>
> . . . [W]hen you look at the totality of the circumstances in conjunction with the State's argument these officers assisted the jury by explaining into English what are otherwise columns of data from a cell phone company.

(89:32-33, 35.)

Butler now claims that his trial counsel should have objected to the officers' testimony for three reasons. First, he claims that the officers were not appropriately testifying as lay witnesses pursuant to Wis. Stat. § 907.01, because their testimony was based on scientific and technical knowledge. Butler's brief at 12. Second, Butler claims that the officers did not have the appropriate qualifications for experts on cell phone locations. Butler's brief at 12-13. Finally, Butler claims that the officers' testimony was not the "product of reliable principles and methods." Wis. Stat. § 907.02(1); Butler's brief at 13. Butler argues that his counsel should have objected to the officers' testimony, because it did not comport with the requirements of *Daubert v. Merrell Dow Pharmaceuticals Inc.,* 509 U.S. 579 (1993).

Butler recognizes that he has forfeited his right to direct review of his claim that the court improperly allowed the officers to testify concerning cell tower locations and operations.

His only recourse is a claim of ineffective assistance of counsel based on his counsel's failure to object to the testimony at trial. Butler's brief at 8.

The circuit court held a *nunc pro tunc Daubert* hearing to determine whether the trial court would have sustained counsel's objection to the officers' testimony, if the objection had been proffered at trial. The court concluded that counsel's performance was not deficient and that Butler had not been prejudiced by his counsel's failure to object to the officers' testimony. The court determined that counsel's objections would not have been successful. The officers properly testified as lay witnesses with respect to the plotting of cell phone towers on the exhibit map. Furthermore, the officers were qualified as experts to testify to the general operation of cell phone towers—that calls are picked up by the cell tower with the strongest signal, not necessarily the closest tower to the caller. Finally, officers did not testify to scientific matters outside their expertise or beyond reliable principles and methods in the field. Specifically, the trial court held:

> The majority of the officers' testimony revolved around plotting data on exhibit maps for the purpose of tracing a history of cell phone usage to and from the defendant in this case on the date in question. I don't find any of the recitation of the data which was provided by the cell phone company nor the mapping of it to involve expert testimony. Notwithstanding that, both officers have received extensive training. . . .
>
> . . . They did not attempt to offer the type of testimony that was offered in the *Evans* decision wherein Officer Raschke attempted to pinpoint within a limited area where the defendant's phone was at the time

> of the offense and by implication thereby where the defendant was at the time of the offense. The officers in this case were very clear that they were not suggesting that, they were not offering that, and to the extent that any testimony could be construed as expert testimony, that which was offered in addition to the mere translation of data received from the cell companies, the Court finds that the – for that limited extent that the officers were experts based upon their testimony and their resumes—vitaes.
>
> . . . .
>
> The officers that testified were qualified based upon their training and experience to testify about historical cell phone data and how cell phone networks operate. They did not attempt to apply the theory of granulization to this case, i.e., the using of cell phone mapping to determine where a cell phone user was at the time of any given call. That evidence was deemed unreliable in the *Evans* case. But in this case the detectives made only general statement about cell phone location. Never gave an opinion about the location of the defendant at the time the cell phone calls were made. Acknowledged they could not say where the cell phone was. So to the extent that the detectives touched on the granulization testimony generally, the defendant was not prejudiced because the detectives acknowledged they could not pinpoint any location where phone calls were made in this case.

(91:7-10.)

It is the State's position that the circuit court properly denied Butler's ineffective assistance of counsel claim. First, Butler has failed to prove that his trial counsel performed deficiently. Butler admits there are no published

Wisconsin decisions addressing application of Wis. Stat. §§ 907.01 or 907.02 to the plotting of cell phone activity. Butler's brief at 2. At the time of trial, the application of *Daubert* principles to Wisconsin trials was very new. In January 2011, the Legislature adopted a change to Wis. Stat. § 907.02, inserting language tracking the 2000 Rule 702, Fed. R. Evid. 702. 2011 Wis. Act 2. The new statutory language of Wis. Stat. § 907.02 codified the Supreme Court decision in *Daubert*. But, the amendments to Wis. Stat. § 907.02 apply to "actions or special proceedings" filed on or after February 1, 2011. 2011 Wis. Act 2, § 45(5). Butler committed his offense on February 21, 2011, the same month the *Daubert* law became effective. The State filed is criminal complaint three months later on May 12, 2011 (2:1, 4).

Because there is no precedent in Wisconsin supporting Butler's position, it cannot constitute deficient performance for trial counsel to fail to raise the issue at trial. It does not constitute deficient performance to fail to assert a legal claim that is not supported by precedent. Counsel's performance is not constitutionally deficient for failure to predict changes or advances in the law. "The Sixth Amendment does not require counsel to forecast changes or advances in the law." *Lilly v. Gilmore,* 988 F.2d 783, 786 (7th Cir. 1993). Consistent with this principle, this court has held that a criminal defense attorney "is not required to object and argue a point of law that is unsettled." *State v. McMahon*, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). Accordingly, "ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *Id*. at 85.

Moreover, the greater weight of the precedent from other jurisdictions does not support Butler's interpretation of the law. "The use of cell phone records to locate a phone has been widely accepted in both federal and state courts across the country." *United States v. Jones,* 918 F. Supp. 2d 1, 7 (D.D.C. 2013).

> On the whole, the Court is persuaded that Agent Eicher's proposed testimony is based on reliable methodology. Indeed, the use of cell phone location records to determine the general location of a cell phone has been widely accepted by numerous federal courts. *See, e.g., United States v. Schaffer,* 439 Fed. Appx. 344, 347 (5th Cir. 2011) (concluding that the field of "historical cell site analysis" was "neither untested nor unestablished"); *United States v. Dean,* 2012 WL 6568229, at *5 (N.D.Ill. December 14, 2012) (finding that expert testimony relating to cell site records was reliable and would assist the trier of fact to determine a fact at issue, and noting that "such testimony is generally accepted in the Seventh Circuit"); *United States v. Fama,* 2012 WL 6102700, at *3 (E.D.N.Y. Dec. 10, 2012) (noting that "[n]umerous federal courts have found similar testimony reliable and admissible" (internal quotation marks omitted)). In light of Agent Eicher's extensive experience in this well-established field, the Court agrees with the government that his testimony is based on reliable methods and principles.

Id. at 5.

Second, Butler has failed to prove that he was prejudiced by his counsel's failure to object to the officers' testimony. The circuit court determined that, if counsel had objected, there is no reasonable probability that the trial court would have sustained the objection. The officers'

testimony would have been admitted despite counsel's objections.

Additionally, Butler does not object to the testimony of the two cell phone company employees. Both those witnesses testified that cell phones connect with the tower emitting the strongest signal. That tower may also be the closest tower to the cell phone. But sometimes the signal from the closest tower is not the strongest signal, because it is obstructed by buildings or geography and sometimes a signal is weakened by cell phone traffic near a particular tower (80:75-76, 100-101). This testimony was identical in substance to the officers' limited testimony with respect to how cell phone towers operate (82:89-90; 83:5). Thus, if the officers' testimony had not been admitted, the jury would have heard the same information from the cell phone company employees.

B. Legal principles concerning ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that his trial counsel's performance was deficient in the sense that it fell below an objective standard of reasonableness, and that this performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The standard for the performance prong of the test is whether trial counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. *State v. Pitsch*, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711

(1985). A court must review trial counsel's performance with great deference, and the defendant must overcome the strong presumption that counsel acted reasonably within professional norms. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). As the supreme court has noted, "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305.

The standard for the prejudice prong of the test is whether the alleged deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. The defendant cannot meet this burden by simply showing that an error had some conceivable effect on the outcome. *Id.* at 693. Instead, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

In analyzing an ineffective assistance claim, the court may choose to address either the deficient performance component or the prejudice component first, and conclude that an inadequate showing with respect to that component dooms the claim. *State v. Williams*, 2000 WI App 123, ¶ 22, 237 Wis. 2d 591, 614 N.W.2d 11.

C. Butler failed to prove his trial counsel performed deficiently.

If trial counsel had objected to the officers' testimony, the court would have admitted the

testimony over counsel's objections. It does not constitute deficient performance to fail to raise issues that lack merit.

1. Background of the revised Wis. Stat. § 907.02.

In January 2011, the Legislature adopted a change in Wis. Stat. §§ 907.01 and 907.02. The Legislature's amendment of § 907.01 limits lay opinion. Lay opinions must be "rationally" based on the witness's perception and helpful to a clear understanding of the witness's testimony or to the determination of a factual issue, requirements which existed under prior law. Wis. Stat. § 907.01 (2009-10); *Town of Fifield v. State Farm Mut. Auto. Ins. Co.*, 119 Wis. 2d 220, 233-34, 349 N.W.2d 684 (1984). Lay opinions cannot be based on "specialized knowledge." Wis. Stat. § 907.01(3). Opinions based on "specialized knowledge" must meet § 907.02's reliability requirements. *See* 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 701.1 at 94 (3d ed. Supp. May 2013).

The language inserted in § 907.02 tracks 2000 Rule 702, Federal Rules of Evidence (Federal Rule 702). 2011 Wis. Act 2. Prior to the amendment of Wis. Stat. § 907.02, the statute required that expert testimony assist the trier of fact to understand the evidence or to determine a fact in issue and that a witness be qualified as an expert. *See In re Commitment of Watson*, 227 Wis. 2d 167, 186-91, 595 N.W.2d 403 (1999). The amended language added that expert opinion must now also (1) be based upon sufficient facts or data, (2) be the product of reliable principles and methods, and (3) the witness must have applied

the principles and methods reliably to the facts of the case. Wis. Stat. § 907.02(1).

The new statutory language of Wis. Stat. § 907.02 codifies three United States Supreme Court cases: *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. Ltd. v. Carmichael,* 526 U.S. 137 (1999). The rule "establishes a standard of evidentiary reliability." *Daubert,* 509 U.S. at 590. The trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." *Id.* at 592; *Lauzon v. Senco Products, Inc.*, 270 F.3d 681, 686 (8th Cir. 2001). Federal Rule 702 codified the trilogy and case law in 2000.

Federal Rule 702 envisions a "flexible" inquiry by the trial judge, who is charged with "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 594, 597. The list of factors the *Daubert* Court mentioned was meant to be helpful, not definitive. *Kumho Tire*, 526 U.S. at 151. *See also* Fed. R. Evid. 702 advisory committee note (2000 amendment) (Rule 702 committee note) ("No attempt has been made to 'codify' [the] factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive."). The rejection of expert testimony is the exception rather than the rule. Federal Rule 702 committee note.

The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. Federal Rule 702 committee note. The focus of the trial court's

inquiry "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. It is not the role of the trial court to evaluate the correctness of facts underlying an expert's testimony. *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1392 (Fed. Cir. 2003). "*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance." *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998).

2. The circuit court properly determined that the mapping of coordinates supplied by phone records was appropriate lay testimony.

The vast majority of federal courts addressing the issue have determined that officers may testify as lay witnesses, if the officers are simply interpreting data provided by cell phone companies.

> The court agrees that using Google Maps to plot these locations does not require scientific, technical, or other specialized knowledge and that these exhibits are admissible through lay opinion testimony under Rule 701.
>
> . . . .
>
> . . . Special Agent Raschke may therefore provide lay opinion testimony concerning (1) the call data records obtained for Evans's phone and (2) the location of cell towers used by Evans's phone in relation to other locations relevant to the crime. . . .

United States v. Evans, 892 F.Supp.2d 949, 953-54, (N.D.Ill. 2012); *see also, United States v. Henderson,* 2011 WL 6016477, 87 Fed. R. Evid. Serv. 16 (N.D. Okla. 2011):

> [T]he Tenth Circuit has held that at least some types of cell-tower testimony should be considered expert testimony subject to the requirements of Rule 702. *See United States v. Yeley-Davis,* 632 F.3d 673, 684 (10th Cir. 2011).[1] The *Yeley-Davis* case involved testimony that a cell phone tower under some circumstances will assign a different phone number to a cell phone, so that the different phone number will show up on a person's cell-phone records even though the call was actually made from the original number. The Court agrees that this type of evidence, which appears to contradict common sense, should be considered expert evidence. *See id.* However, that is not the type of testimony provided by Agent Kerstetter in this case. He simply reviewed Defendant's cell-phone records with the knowledge that one column of those records identified the cell tower that was nearest to the location of the cell phone at the time a particular call was made or received. . . . He also created and testified about a map showing the alleged location of Defendant's cell phone when it made or received calls. . . .
>
> . . . It is the Court's view that testimony such as Agent Kerstetter's, while requiring a minimal level of training and specialized knowledge, does not rise to the level of expert testimony. A reasonably competent layperson, given a small amount of information, could easily examine a cell-phone record and determine the identity of the cell tower that handled a particular call. That same layperson, given a map of cell

[1]Butler relies on this case for his contention that the officers' testimony was not properly admitted as lay testimony. Butler's brief at 12.

> towers in the area, could identify the approximate location of the cell phone at the time the call was made or received.

Id., **4-5.

Here, the majority of the officers' testimony involved explanation of an exhibit, wherein Officer Brosseau plotted the location of the cell phone towers, which connected with calls made by Butler around the time of the arson. The cell phone company provided the number of the cell tower, which received Butler's calls, the GPS coordinates for the tower, and the sectors or direction of the antenna. Officer Brosseau simply took this information and mapped the cell phone locations on an exhibit to be shown to the jury. (82:80, 83-85, 86, 87-88, 93, 104, 108-09; 89:9, 11, 12, 14, 27). The circuit court properly determined that such testimony was properly admitted as lay testimony.

> The majority of the officers' testimony revolved around plotting data on exhibit maps for the purpose of tracing a history of cell phone usage to and from the defendant in this case on the date in question. I don't find any of the recitation of the data which was provided by the cell phone company nor the mapping of it to involve expert testimony.

(91:7.)

3. The officers were qualified to testify as to how cell phone towers operate to the limited extent they did at trial.

Contrary to Butler's arguments in his brief, the officers did not assume that a call would always go to the closest tower. Butler's brief at 15,

17, 19, 21. In fact, the officers acknowledged that they did not have the information or expertise to render a definitive opinion on the location of Butler's phone when he made the calls in question (82:89-90, 94, 108-09). The officers presented very limited testimony concerning how cell phones connect to towers. The officers indicated that cell phones connect with the tower emitting the strongest signal. This may also be the closest tower. But sometimes the signal from the closest tower is not the strongest signal, because of a physical obstruction or heavy cell phone traffic (82:89-90; 83:5). This testimony was identical in substance to that provided by the cell phone employees (80:75-76, 100-101).

The officers' training and experience qualified them to testify as experts in this limited manner on the operation of cell phone towers. At the postconviction motion hearing, Officer Brosseau explained that he had, at the time of Butler's trial, participated in cell phone criminal investigations for four years (89:7). He had received training from the Wisconsin Department of Justice Division of Criminal Investigations and from a government communication corporation (89:8-9). He also attended training in cell phone mapping from the North American Technological Investigator's Association (89:9). With respect to Officer Draeger, at the time of Butler's trial, he had been since 2008 a tech analyst specifically dealing with telecommunications and cell phone records (89:23). Officer Draeger had attended several multiple-day seminars, which covered analyzing information from cell phone companies (89:24-25). Officer Draeger had also participated in training from the Wisconsin Division of Criminal Investigations and the American Technical Investigator's Association. He was also

a member of the Law Enforcement Technical Forum, an FBI sponsored roundtable concerning the telecommunications industry (89:25).

The text of Federal Rule 702 and Wis. Stat. § 907.02 expressly contemplates that an expert may be qualified on the basis of experience and training alone. *Kumho Tire*, 526 U.S. at 156 ("[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience."); *United States v. Markum*, 4 F.3d 891, 896 (10th Cir. 1993) ("Experience alone can qualify a witness to give expert testimony."); *State v. Robinson*, 146 Wis. 2d 315, 332-35, 431 N.W.2d 165 (1988) (Sexual assault advocate with six years experience and dealings with seventy to eighty victims qualified as an expert).

In certain fields, experience is the predominant, if not the sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones*, 107 F.3d 1147, 1161 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail). The practice of medicine and the related practice of nursing are such fields. *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 247-48 (5th Cir. 2002) (reversing the exclusion of an opinion based on experience and personal observations by a physician specializing in infectious diseases); *McCullock v. H.B. Fuller Co.,* 61 F.3d 1038, 1043-44 (2d Cir. 1995) (the district court, in the sound exercise of its discretion, properly admitted physician's opinion testimony based on his clinical experience); *Rodriguez v. State*, 635 S.E.2d 402, 404-05 (Ga. App. 2006) (SANE nurse qualified to

give an opinion that reddened vaginal area and small abrasions at the entry to the vaginal vault observed during examination were consistent with injuries that might occur from the penetration of an adult finger).

Specifically to this case, a police officer's training and experience have been accepted in other jurisdictions under the *Daubert* standard with respect to how a cell phone connects to a given tower. *See Evans,* 892 F. Supp.2d at 955.

> Here, testimony concerning how cellular networks operate would be helpful because it would allow the jury to narrow the possible locations of Evans's phone during the course of the conspiracy. Although Special Agent Raschke is not an engineer and has never worked for a network provider, he has received extensive training on how cellular networks operate and is in regular contact with network engineers. He also spends a majority of his time analyzing cell site records, which requires a thorough understanding of the networks themselves. The court concludes that his testimony on this subject is reliable.

Id.; *see also Jones,* 918 F. Supp.2d at 4 (qualifying the officer as an expert on cell phone site analysis based on similar training and experience).

4. The officers' opinions were based upon reliable principles and methods.

The State reiterates that the officers did not render an opinion as to the exact location of Butler's cell phone; they did not testify that the nearest tower received the call. Butler's brief at 21. To the contrary, the officers testified that the

tower with the strongest signal would pick up the call. This might not be the tower nearest to the caller, because of geographical obstructions or cell phone traffic. Thus, Butler's argument that there is no reliable method for ensuring the exact location of the caller based on which cell tower received the call is inapposite. Butler was "free to solicit on cross examination factors other than proximity that may have caused [Butler's] phone to connect with that particular tower." *Evans,* 892 F. Supp.2d at 955 n.6.

Moreover, the greater weight of the precedent from other jurisdictions does not support Butler's interpretation of the law. "The use of cell phone records to locate a phone has been widely accepted in both federal and state courts across the country." *Jones,* 918 F. Supp. 2d at 7.

> On the whole, the Court is persuaded that Agent Eicher's proposed testimony is based on reliable methodology. Indeed, the use of cell phone location records to determine the general location of a cell phone has been widely accepted by numerous federal courts. *See, e.g., United States v. Schaffer,* 439 Fed. Appx. 344, 347 (5th Cir. 2011) (concluding that the field of "historical cell site analysis" was "neither untested nor unestablished"); *United States v. Dean,* 2012 WL 6568229, at *5 (N.D.Ill. December 14, 2012) (finding that expert testimony relating to cell site records was reliable and would assist the trier of fact to determine a fact at issue, and noting that "such testimony is generally accepted in the Seventh Circuit"); *United States v. Fama,* 2012 WL 6102700, at *3 (E.D.N.Y. Dec. 10, 2012) (noting that "[n]umerous federal courts have found similar testimony reliable and admissible" (internal quotation marks omitted)). In light of Agent Eicher's extensive experience in this

> well-established field, the Court agrees with the government that his testimony is based on reliable methods and principles.

Id. at 5.

D. Butler failed to prove that he was prejudiced by counsel's failure to object to the officers' testimony.

Butler has failed to prove that he was prejudiced by his counsel's failure to object to the officers' testimony. As explained earlier, the circuit court determined that, if counsel had objected, there is no reasonable probability that the trial court would have sustained the objection. The officers' testimony would have been admitted despite counsel's objections. Specifically, the court held:

> [T]he Court finds that the detectives would not have been precluded from testifying based upon the *Daubert* case. They were qualified to testify and also gave lay testimony based upon their specialized training and experience. The defendant has not come forward with any expert opinion to challenge the detectives' testimony concerning their interpretation of the cell phone data. And again because the detectives did not give an opinion about granulization, they did not cross the line into unreliable opinion evidence under the *Daubert* case.

(91:10.)

Additionally, Butler does not challenge the testimony of the two cell phone company employees. Both those witnesses testified that cell phones connect with the tower emitting the

strongest signal. This may be the closest tower. But sometimes the signal from the closest tower is not the strongest signal, because it is obstructed by buildings or geography and sometimes a signal is weakened by cell phone traffic near a particular tower (80:75-76, 100-101). This testimony was identical in substance to the officers' limited testimony with respect to how cell phone towers operate (82:89-90; 83:5). Thus, if the officers' testimony had not been admitted, the jury would have heard the same information from the cell phone company employees.

CONCLUSION

The State asks this court to affirm Butler's judgment of conviction and the circuit court's order denying postconviction relief.

Dated this 18th day of December, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,858 words.

_____

Eileen W. Pray
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 18th day of December, 2014.

_____

Eileen W. Pray
Assistant Attorney General

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

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INDEX TO SUPPLEMENTAL APPENDIX

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 first names and last initials 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 18th day of December, 2014.

_____

Eileen W. Pray
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 18th day of December, 2014.

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Eileen W. Pray
Assistant Attorney General