STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2015AP1088-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

ROBERT LAVERN CAMERON,
Defendant-Appellant.

ON APPEAL FROM THE MARCH 26, 2013, JUDGMENT OF CONVICTION AND THE MAY 11, 2015, DECISION AND ORDER DENYING MOTION FOR NEW TRIAL, THE HONORABLE JEFFREY A. WAGNER, PRESIDING.

MILWAUKEE COUNTY CASE NO. 2012CF2457

DEFENDANT-APPELLANT'S BRIEF AND SHORT APPENDIX

Respectfully submitted:

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STATEMENT OF THE ISSUES

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Prior to trial, the State filed a witness list in which it named Rodriguez as an expert regarding cell phone tracking and cell tower data. No *Daubert*[1] hearing was conducted to determine the admissibility of Rodriguez's expert testimony. At trial, the State relied on Rodriguez to introduce both testimony and exhibits purporting to show where certain cell phones were located at the times certain calls were made. It then relied on that evidence to argue to the jury that Cameron was guilty.

Postconviction, Cameron asserted that the circuit court had erred by not requiring the State to prove Rodriguez's testimony admissible under Wis. Stat. § 907.02 and *Daubert*. The circuit court denied Cameron's motion, adopting the State's postconviction response brief as its decision.

II. WHETHER THE STATE'S CLOSING ARGUMENT CONSTITUTED PLAIN ERROR ENTITLING CAMERON TO A NEW TRIAL INSOFAR AS, DURING IT, THE PROSECUTOR VOUCHED FOR THE CREDIBILITY OF A KEY STATE'S WITNESS?

The State's case relied largely on the testimony of Nicholas Smith, a co-actor-turned-State's-witness.

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[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Smith had offered multiple versions of events to police during his interviews. During his testimony, the State commented on his final story—and the one he told at trial—as being the truthful one. It returned to that theme in closing, where the State argued that Smith's most recent version of events was truthful and he had told the truth in court. Cameron's trial counsel did not object, and thus no contemporaneous ruling issued.

Cameron asserted the issue as plain error in his postconviction motion. However, the circuit court denied relief for the reasons set forth in the State's postconviction response brief.

III. WHETHER CAMERON'S TRIAL COUNSEL PERFORMED INEFFECTIVELY BY:

a. FAILING TO CHALLENGE TO THE RODRIGUEZ EVIDENCE EITHER BY SUBJECTING IT TO A *DAUBERT* TEST OR PRESENTING THE TESTIMONY OF A DEFENSE EXPERT?

b. FAILING TO OBJECT TO THAT PART OF THE PROSECUTOR'S CLOSING ARGUMENT THAT VOUCHED FOR THE CREDIBILITY OF THE STATE'S KEY WITNESS?

Cameron alleged postconviction that his counsel should have made a *Daubert* challenge to Rodriguez's testimony, produced a competing expert, or both. He also contended that trial counsel should have objected to the State's comments on Smith's truthfulness. Again, the circuit court denied relief for the reasons set forth in the State's postconviction response brief.

IV. WHETHER THE REAL CONTROVERSY WAS NOT FULLY TRIED BECAUSE THE RODRIGUEZ EVIDENCE WAS ADMITTED, AND THUS WHETHER CAMERON SHOULD HAVE A NEW TRIAL TO ACCOMPLISH THE ENDS OF JUSTICE?

This issue was not presented to the circuit court; it is exclusively a matter of appellate court discretion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Cameron would welcome oral argument if it would assist the panel to understand the issue presented or answer any unanswered questions that may arise, unbeknownst to counsel, during the panel's review of the briefing.

Cameron believes the Court's opinion in the instant case will meet the criteria for publication because he argues an issue that has heretofore been undecided by Wisconsin's courts: whether a circuit court has a duty under the evidentiary code to ensure that a witness testifying as an expert is qualified to do so.

STATEMENT OF THE CASE

I. NATURE, PROCEDURAL STATUS, AND DISPOSITION BELOW

The State prosecuted Robert Lavern Cameron in the instant case for the armed robbery and intentional killing of R.J.S. and the attempted murder of his mother, L.S. (*See* 4.) The State also charged him with bail jumping and possession of a firearm by a felon, crimes derivative of his criminal acts against R.J.S. and L.S. (*Id.*) He went to trial with counsel.

At trial, the State presented the testimony of Angela Rodriguez, who it named as an expert on its witness list. (13:7, A-Ap 10.) She testified about the

location of cell phones possessed by Cameron and his co-actors on the night of the crime. (*See, e.g.,* 79:101.) The State utilized that evidence to show Cameron's involvement in the shooting. (82:21-22.) Rodriguez's testimony was not subjected to a *Daubert* challenge.

Additionally, the State presented the testimony of a co-actor, Nicholas Smith. (80:53-102.) He detailed the crime for the jury, including a description of Cameron's involvement. (*Id.*) In light of Smith's prior, inconsistent statements to the police, the State elicited testimony from him about the truthfulness of his in-court version. (*Id.*:102.) The State later told the jurors in closing that Smith had been truthful with them. (82:21-22.) Trial counsel did not object. (*Id.*)

Cameron was convicted on all counts. (15-19.) The court sentenced him to life in prison without the possibility of release. (23, A-Ap. 1-3.)

Cameron exercised his direct appeal rights (24) and filed a postconviction motion (42, A-Ap. 13). He therein challenged 1) the circuit court's allowance of expert witness testimony without subjecting it to the *Daubert* standard, 2) the prosecutor's statements in closing regarding a witness's truthfulness, and 3) his attorney's ineffectiveness related to the aforementioned errors. (*Id.*:2, A-Ap. 14.) He sought a *Machner*[2] hearing at which to test his ineffectiveness claim. (*Id*:20, A-Ap. 32.) The circuit court ordered briefing (43), and thereafter denied his motion without a hearing (54, A-Ap. 99). The court adopted in total the State's postconviction response brief as its decision. (*Id.*; *see also* 50, A-Ap. 81-98.)

Cameron appeals. (59.)

[2] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

II. STATEMENT OF RELEVANT FACTS

R.J.S. was shot dead outside of his mother's home in the early morning hours of April 29, 2012. Shortly before he arrived at her home, his mother—L.S.—had received a phone call from him advising that he was nearby. (77:8.) She was waiting for him at the back door of her residence when he pulled up across the street. (*Id.*)

As R.J.S. parked, a man with a gun approached him and started to rob him. (*Id.*:9, *id.*:13.) R.J.S. complied with the robber, turning over his keys and clothes. (*Id.*:13-14.) After taking R.J.S.'s property and "as R[.J.S.] [was] laying in the middle of the street in his boxers" the robber "walk[ed] past his feet, his waist and ben[t] down and sa[id] love you nigger and sho[t] him twice in the head." (*Id.*:15.) In shock, L.S. sought to retreat into her home. Before she could get inside, the robber "turn[ed] and opened fire[] on [her] between five and ten shots." (*Id.*) She was "hit twice in the foot," resulting in an injury that required "amputation." (*Id.*:16.)

L.S. was never able to identify the gunman; she "never got a good enough look at [him]." (*Id.*:11.) Nor did she see how the gunman fled after shooting at her. (*Id.*)

Prior to his death, R.J.S. had made arrangements with a woman—Dominique Hill-Scanlan—to meet him at his mother's house. (*Id.*:54.) The two met up at a gas station shortly before heading to L.S.'s house. (*Id.*:48-49.) At that gas station, Hill-Scanlan witnessed an unknown man speaking with R.J.S. (*Id.*:51.) That unknown man introduced himself to Hill-Scanlan as Rico (*id.*), a name that would become key to the police investigation after Hill-Scanlan shared it with them on the day R.J.S. was shot.

Rico was actually an individual by the name of Nicholas Smith. (78:8.) Video from the gas station showed Smith in the vicinity of R.J.S.'s truck. (*Id.*) The State's proof was significantly advanced when, after his arrest, Nicholas Smith gave an inculpatory statement to law enforcement. (*See* 42:Attached Ex. D.)

He said that Cameron began a conversation about robbing R.J.S. after they saw him at a club. (*Id.*) To advance that end, said Smith, Cameron called Kevin Pittman, who eventually brought a gun and gave it to Cameron. (*Id.*) After locating R.J.S., Smith followed him to the gas station, drove past, and then dropped Cameron off near L.S.'s house. (*Id.*) Smith then returned to the gas station where he had his encounter with R.J.S. and Hill-Scanlan. (*Id.*) When R.J.S. departed, Smith followed. (*Id.*) He parked his car some distance away from L.S.'s home, and was then able to see Hill-Scanlan's car parked behind R.J.S.'s truck. (*Id.*) Smith told police he saw Cameron shoot R.J.S. twice. Afterwards, Cameron shot at L.S. several times. (*Id.*)

Cameron was charged as a party to both the robbery and homicide offenses. (1.) He went to trial. (*See* 75.) The State argued to the jury that Cameron was the principal actor: he was the "man with the gun that pulled it while R[.J.S.] laid in the street." (82:14.)

Pretrial, the State filed a witness list in which it named Angela Rodriguez as a potential witness. As a summary of her testimony, the State informed Cameron and the court that Rodriguez would testify as an "Expert Witness as to Phone Tracking and Cell Phone Tower Data." (13:7, A-Ap. 10 (capitalization in original, bolding omitted)); *see also* Wis. Stat. § 971.23(1)(e) (prosecutor obligated to disclose "a written summary of the expert's findings or the subject matter of his or her testimony"). Pretrial, Cameron's attorney never requested that Rodriguez be vetted as

an expert pursuant to Wisconsin's expert witness statute, Wis. Stat. § 907.02, and the circuit court never exercised its gatekeeping function to mandate proof that Rodriguez's methods were reliable.

At trial, the State presented "a lot of phone evidence and a lot of circumstantial evidence." (*See* 74:3 (describing manner of proof in codefendant's trial and anticipating same)). In opening, the State informed the jury that it would present evidence regarding "cell phone site tower locations" to prove Cameron's guilt. (76:47.) True to its word, the State introduced seventy exhibits related to cell phone data, four of which were call logs; the remainder were maps purportedly showing the location from which various calls originated. (*See* 14:8-12.) All of those exhibits came in through Rodriguez. She explained that the call logs were generated from phone record data that she received from the phone company.[3] (*See* 79:79-80, *id.*:88-91.) The maps, however, were of her own creation. (*id.*:40.)

No one from the phone company testified about the phone records. However, Cameron stipulated the records' authenticity, thereby admitting that the "matter in question [was] what [the State] claim[ed]." *See* Wis. Stat. § 909.01 (authentication of evidence). Cameron's stipulation relieved the State only of its obligation to call a witness from the phone company to testify regarding the production of the records. It admitted nothing regarding the accuracy of the records' contents.

Rodriguez explained that she created the maps by "input[ing] [phone data] into [HIDTA's] pending system which is what [HIDTA] use[s] to analyze phone records and from that [she] map[ped] the calls." (*Id.*:79.) Mapping the calls entailed correlating each call to the cellular tower through which it was routed.

[3] Technically, the phone records were obtained first by the police department, which in turn gave the records to Rodriguez.

Rodriguez then explained the theory and science behind the conclusions shown in her maps. She said, "A cell sight tower is what cell phones draw their signal from. Each tower has three sectors to it. So depending on where the phone is in relation to that tower will determine what sector is going to draw a signal from." (*Id.*:81.) Sectors, she continued, have defined boundaries: each sector "looks kind of like a pie, like a third of a pie basically" (*id.*) and the "maximum distance" that a "signal from a cell tower can go" outward from the tower defines the sector's size (*id.*:83).

According to Rodriguez, a phone call placed outside of a sector's boundaries would not be serviced by the tower defining that sector. (*Id.*:83, *id.*:85.) Thus, if a cellular call was routed through a particular sector of a particular tower, one could know that the phone being used to make that call was somewhere "within that sector." (*Id.*:83.) Rodriguez also told the jury that a "cell phone is most likely going to hit off the nearest tower" and "the closer you are to the tower the more likely you're going to hit off that tower." (*Id.*:84.) At no time did she offer any explanation as to how she derived those conclusions; she merely uttered them as fact.

Through Rodriguez's testimony, the State introduced sixty-four maps purportedly showing the locations of individual cellular phones at the time that calls from those phones were routed through various cell towers in the Milwaukee area. (*See e.g.,* 79:101 (explaining that map "show[ed] that the phone was somewhere within that area" when call was placed).) That location evidence was derived from Rodriguez's assumptions that 1) every cell tower has a finite, defined service area, 2) calls made from cellular phones while inside the nearest tower's finite, defined service area will be routed through that tower and 3) calls made outside of a tower's finite, defined service area will not be routed through that tower. The trial

court did not demand proof of the reliability of Rodriguez's assumptions. And, trial counsel made no objection to Rodriguez's testimony or to the introduction of her maps, nor did he offer expert testimony to contradict the assertions she made.

The State also presented the testimony of Nicholas Smith. He identified Cameron in court (80:59-60), and detailed his version of events from the night of the shooting (*id.*:53-102). Smith explained the relationships between the men who he identified as involved in the shooting, including himself. (*Id.*:65-67.) He told the jury that Cameron "said he wanted to get [R.J.S.]" after having seen R.J.S.'s truck parked outside of a nightclub. (*Id.*:63-64.) According to Smith, Kevin Pittman provided a gun to Cameron while Cameron was in the backseat of Smith's car. (*Id.*:69.) Nonetheless, Smith denied any knowledge of a plan to rob R.J.S. until later when the men encountered R.J.S.'s truck parked outside a tattoo parlor. (*Id.*:69-71.) Smith then detailed how he and Anthony Perkins followed R.J.S. as he drove through the city. (*Id.*:72-81.) As part of that story, Smith explained the use of cellular phones by various participants. (*Id.*:74, 79.)

Ultimately, Smith told the jury that Cameron requested to be dropped off at 47th and Wright, near L.S.'s home. (*Id.*:76.) After leaving Cameron at that location, Smith said, he went to the gas station where R.J.S. was then located. (*Id.*:76-77.) When R.J.S. drove away from the gas station, Smith followed and parked his car "looking down Wright Street towards R[.J.S.]'s home." (*Id.*:81.) Smith then claimed to see Cameron shoot R.J.S. and shoot at L.S. (*Id.*) After the shooting, Smith said, he overheard conversations between Cameron and Pittman about getting rid of R.J.S.'s truck, which was stolen after the shooting. (*Id.*:84-85.) When Cameron eventually got back into Smith's car, he had with him clothes that matched the clothes R.J.S. had been wearing earlier that night. (*Id.*:87.)

Both the prosecutor and Cameron's defense attorney challenged Smith's believability in light of the proffer that he received from the State, as well as his prior statements to law enforcement denying any involvement in the offense. (*Id.*:92-95, *id.*:97-100, *id.*:105-06.) When questioning Smith, the prosecutor referred to Smith's inculpatory statement as his "truthful statement" and questioned Smith regarding the requirement in his proffer that he must "testify truthfully" or else risk that his "deal could go away if [he] lie[d]." (*Id.*:97, *id.*:102.) "You weren't honest with detectives at first," said the prosecutor, "but eventually you did tell them the truth, did you not?" (*Id.*:102.) Smith answered, "Yes." (*Id.*)

Cameron's defense was that he did not shoot R.J.S. and he was not involved in the crime at all. (76:49-50.) The shooting was, instead, done by someone else, and Smith was lying to protect himself and his friends. (82:50.) Cameron pointed to the testimony of a disinterested third party who had identified another person as having exited R.J.S.'s truck after it was driven away from the scene of the shooting. (79:28-37, *id.*:50, *id.*:52, 76:49-50, 82:29-30.) That testimony was relevant and helpful to Cameron because Smith testified that the person who shot R.J.S. jumped into his truck following the shooting and drove away. (80:117-18.) Finally, Cameron argued that there was no credible testimony showing his involvement as a party to the crime. (*Id.*:47.)

In closing argument, the prosecutor returned to the truthfulness of Smith's testimony. He told the jury that it could be sure that Nicholas Smith was being truthful:

> Ladies and Gentlemen, Nick Smith came in and he told you the truth. And it's true when he first was presented with an offer, a proffer agreement with no deals on the table he had to come in and tell us the truth. He didn't say at first. He didn't. He said he wasn't involved. He had to admit to his own involvement and eventually he did.

> And yes, a deal has been made and you have been told about every aspect of that deal. But the problem is, Ladies and Gentlemen, when you have a case like this and people like Robert Cameron and Kevin Pittman and Peewee Perkins and Nick Smith in a case like this, the phone evidence while it is corroboration and can tell you if someone is telling you the truth like it does with Nick Smith, you need a witness. And Ladies and Gentlemen, Nick Smith, yes he was given a deal but he told you the truth.

(82:21-22.)

Additional facts will be stated where relevant to the argument below.

ARGUMENT

As a threshold matter, Cameron believes it is necessary to recognize that the circuit court's wholesale adoption of the State's postconviction response brief as its decision constituted an erroneous exercise of discretion. (*See* 54, A-Ap. 99.)

This Court—indeed this very District—has before explained that a circuit court does not appropriately exercise its discretion when its decision is nothing more than the "wholesale adoption of the State's brief." *State v. McDermott*, 2012 WI App 14, ¶ 9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237.

In *McDermott*, "[t]he sum total of the circuit court's analysis denying" the defendant's postconviction motion was as follows: "'For all of the reasons set forth in the State's excellent brief, which the court adopts as its decision in this matter, the court denies the defendant's motion as well as the evidentiary hearing he requests.'" *Id.* (quoting circuit court decision). This Court agreed with McDermott that the circuit court's *in toto* adoption of the State's brief was an erroneous exercise of discretion: "[J]udges

must not only make their independent analyses of issues presented to them for decision, but should also explain *their* rationale to the parties and the public." *Id.* (emphasis in original).

In the instant case, the circuit court's decision is practically identical to the circuit court's decision in *McDermott*:

> The court concurs completely with the State's analysis of the issues and adopts its brief *in toto* as the court's decision in this matter. In addition, even if the court erred or counsel failed to object to the cell phone evidence from Angela Rodriguez, the testimony in this case was more than sufficient without it, and thus, any error was harmless and any failure on the part of counsel to object did not prejudice the defendant.

(54, A-Ap. 99.) Pursuant to *McDermott*, the circuit court's adoption of the State's postconviction response brief as its decision constituted an erroneous exercise of discretion. 2012 WI App 14, ¶ 9 n.2. Insofar as any of the claims set forth herein necessitate review of the circuit court's postconviction exercise of discretion, that exercise was erroneously done.

I. CAMERON SHOULD HAVE A NEW TRIAL BECAUSE THE CIRCUIT COURT ABANDONED ITS GATEKEEPING ROLE WHEN IT ALLOWED THE STATE TO INTRODUCE EXPERT WITNESS TESTIMONY WITHOUT SATISFYING THE DAUBERT TEST.

A. Wisconsin is a *Daubert* State; its Circuit Court Judges Have an Obligation to Ensure That Purportedly Expert-Witness Testimony Complies With Wis. Stat. § 974.02.

In 1993, the United States Supreme Court issued its seminal case on the issue of expert witness

testimony and the trial court's role in admitting it. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Daubert* concluded that Federal Rule of Evidence 702—the evidentiary provision governing expert witness testimony in the federal system—required federal district court judges to play a significant gatekeeping role in deciding whether to admit purported expert testimony. *Id.* at 592-93. In the twenty years since *Daubert*, numerous jurisdictions—both state and federal—have considered *Daubert*'s application to different expert witness scenarios. *See, e.g., State v. Porter*, 698 A.2d 739 (Conn. 1997), *Gayton v. McCoy*, 593 F.3d 610 (7th Cir. 2010).

Wisconsin, though, was not among those courts adopting *Daubert*. As recently as 2010, the Wisconsin Supreme Court rejected calls to conform Wisconsin's evidentiary rules to *Daubert* and its progeny. *State v. Fischer*, 2010 WI 6, ¶ 7, 322 Wis. 2d 265, 778 N.W.2d 629 ("We, therefore, decline to adopt a *Daubert*-like approach to expert testimony that would make the judge the gatekeeper."). The language of Wisconsin's evidentiary code did not then conform with Rule 702, and Wisconsin had long maintained an evidentiary standard for experts dissimilar to *Daubert*. *See id.* Wisconsin courts therefore saw no cause to apply *Daubert*'s principles to the state's evidentiary code. *Id.*

However, "[i]n late January 2011, the Wisconsin Legislature amended Wis. Stat. section 907.02 to adopt the reliability standard found in Federal Rule of Evidence 702 and embraced by a majority of states." Daniel D. Blinka, *The* Daubert *Standard in Wisconsin: A Primer*, Wisconsin Lawyer 14 (March 2011); *see also* 2011 Wis. Act 2. The playing field then shifted, and Wisconsin is now a *Daubert* state. *See State v. Kandutsch*, 2011 WI 78, ¶ 26 n.7, 336 Wis. 2d 478, 799 N.W.2d 865 (noting that "the Wisconsin Legislature amended Wis. Stat. § 907.02 to adopt the Daubert

reliability standard embodied in Federal Rule of Evidence 702").

Wisconsin courts interpreted the former Section 907.02 as giving "to the trial judge a more-limited role" than exists under the "federal system, where the judge is a powerful gatekeeper with respect to the receipt of proffered expert evidence." *State v. Jones*, 2010 WI App 133, ¶ 22, 329 Wis. 2d 498, 791 N.W.2d 390 (citing, *inter alia*, *Daubert*, 509 U.S. 579). The circuit court's obligation when deciding the admissibility of expert testimony under the old Section 907.02 was "'merely [to] require[] the evidence to be 'an aid to the jury' or 'reliable enough to be probative.'" *Id.* (quoting *State v. Walstad*, 119 Wis.2d 483, 519, 351 N.W.2d 469, 487 (1984)).

As amended, Section 907.02 is now identical to Federal Rule of Evidence 702. Insofar as the language of Section 907.02 now mirrors that in Rule 702, the rules that govern its application should similarly mirror those adopted by the United States Supreme Court for the implementation of Rule 702. *See State v. Giese*, 2014 WI App 92, ¶¶ 18-20, 356 Wis. 2d 796, 854 N.W.2d 687 (quoting and citing federal cases relying on *Daubert*). *Daubert* was the Supreme Court's foundational case interpreting Rule 702's application, and thus its holding and the holdings of those cases that have followed it should guide the development of Wisconsin law in this area. *See, e.g., Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (recognizing application of *Daubert*'s principles to non-scientific expert testimony).

The legislature's changes to Section 907.02 changed the role Wisconsin's trial judges must play when expert witness testimony is to be presented. *Compare Giese*, 2014 WI App 92, ¶ 18 (noting that trial judges are now gatekeepers) *with Jones*, 2010 WI App 133, ¶ 22 (distinguishing circuit court's role under the old Section 907.02 from federal gatekeepers).

Wisconsin trial judges now bear the same gatekeeping responsibilities as their federal counterparts. *See Giese*, 2014 WI App 92, ¶ 18, *Kumho Tire*, 526 U.S. at 147 (explaining judge's obligation under *Daubert*).

Trial judges are thus responsible for vetting expert testimony before deeming it admissible. *Daubert*, 509 U.S. at 592-93. The Supreme Court has explained the judge's role as follows:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test.

Id. (footnotes omitted). A trial judge's gatekeeping responsibility is "a special obligation" purposed on "'ensur[ing] that any and all scientific testimony is not only relevant, but reliable.'" *Kumho Tire*, 526 U.S. at 147 (quoting *Daubert*, 509 U.S. at 589).

The *Daubert* rule requires trial judges to "engage in a difficult, two-part analysis." *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (*Daubert II*), 43 F.3d 1311 (9th Cir. 1995) (on remand after *Daubert*). Courts must "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597. To decide whether testimony is reliable, courts "must determine nothing less than whether the experts' testimony reflects 'scientific knowledge,' whether their findings are 'derived by the scientific method,' and whether their work product amounts to 'good science.'" *Daubert*

II, 43 F.3d at 1315 (quoting *Daubert*, 509 U.S. at 597). Proof of relevancy requires the proponent be able to demonstrate that the expert's testimony "fit[s]" the reasons for which it is adduced; that is to say, the evidence must "logically advance[] a material aspect of the proposing party's case." *Id.*

Accordingly, when faced with purported expert testimony, Wisconsin's trial judges must now determine whether the proposed evidence is: 1) reliable and 2) relevant to the issue at hand. Failure on either prong should result in exclusion. *See id.*, 43 F.3d at 1322 (testimony excluded because cannot meet relevancy requirement alone). "The court's gate-keeper function under the *Daubert* standard is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *Giese*, 2014 WI App 92, ¶ 18. A "district court abandon[s] its gate-keeping function by failing to make any findings regarding the reliability of [an expert's] testimony." *Mike's Train House, Inc., v. Lionell LLC*, 472 F.3d 398, 407 (6th Cir. 2006).

Previous Wisconsin cases dealing with expert witness testimony have stated, "The admissibility of expert opinion testimony lies in the discretion of the circuit court. We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard." *State v. Shomberg*, 2006 WI 9, ¶ 10, 288 Wis. 2d 1, 709 N.W.2d 370 (quotation marks and quoted authority omitted). However, that standard of review is tied to the old rule governing expert witness testimony. *See Martindale v. Ripp*, 2001 WI 113, ¶ 28, 246 Wis. 2d 67, 629 N.W.2d 698. Insofar as Wisconsin is now a *Daubert* state, its standard of review for expert testimony should accordingly change.

Like the Seventh Circuit and other federal circuits, Wisconsin's appellate courts should "review de novo whether the [circuit] court correctly applied

Daubert's framework, and [then] review the [circuit] court's decision to admit or exclude expert testimony for abuse of discretion." *Gayton*, 593 F.3d 610 at 616; *see also, e.g., United States v. Roach*, 582 F.3d 1192, 1206 (10th Cir. 2009) (espousing same mixed standard of review). Under that standard of review, the circuit court's decision in the instant is not reviewed for discretion—it never subjected Rodriguez's testimony to a *Daubert* analysis. Instead, this Court reviews de novo whether Rodriguez's testimony was admissible under *Daubert*.

In the instant case, the circuit court's failure to exercise its gatekeeping responsibility constitutes reversible error because Rodriguez's testimony was unreliable and key to the State's case against Cameron. Had the circuit court required the Rodriguez evidence to be subjected to the rigors of *Daubert*, it would have been excluded. The court's failure to fulfill its obligation under *Daubert* allowed the State to put before the jury crucial, inadmissible evidence that led to Cameron's conviction.

B. Rodriguez Testified as an Expert Insofar as her Testimony Presented to the Jury Specialized Knowledge that she Derived from her Training and Experience.

The consensus view amongst the federal circuits is that, "[i]f a witness has acquired 'specialized knowledge' on the basis of 'knowledge, skill, experience, training or education,' and presents that knowledge to a jury 'in the form of an opinion or otherwise,' that witness is testifying as an expert witness, Fed. R. Evid. 702, who is subject to the disclosure requirements for expert testimony." *United States v. Valdivia*, 680 F.3d 33, 60 (1st Cir. 2012) (Lipez, J., concurring) (explaining prevailing rule).

The rule should be the same in Wisconsin, given the similarities between Rule 702 and Wis. Stat. §

907.02, as well as this jurisdiction's adoption of the *Daubert* standard. Additionally, Wisconsin's Supreme Court has before expressed a similar opinion regarding when certain testimony necessitates an expert. *See Megal v. Green Bay Area Visitor & Convention Bureau, Inc.,* 2004 WI 98, ¶ 19, 274 Wis. 2d 162, 682 N.W.2d 857 (recognizing that "expert testimony is necessary when the trier of fact is to determine matters requiring knowledge or experience on subjects that are not within the common knowledge of mankind").

Under that rule, there can be no question that Rodriguez offered expert testimony. Rodriguez clearly had specialized knowledge in her role as a HIDTA analyst, which is directly apparent from her testimony. Before she could even convey to the jury the results of her "analysis," Rodriguez had to explain to it all of the following:

1. What "phone tolls" are (79:79),
2. What "cell sight towers" are (*id.*:81),
3. How cell sight towers operate (*id.*:83),
4. That different cellular companies use different towers (*id.*:85),
5. That cell towers have sectors (*id.*:81),
6. That "specific sector[s]" have a determined "signal strength" (*id.*),
7. That a "signal" has a "maximum distance" that it can travel from a tower (*id.*),
8. That certain sectors overlap (*id.*:84),
9. That the distribution of cell phone towers varies depending on the density of cell phones within the population (*id.*:85),
10. That certain calls will transition between cell towers during call (*id.*:84),
11. That such transition demonstrates that the phone is moving (*id.*),
12. That a "cell phone is most likely going to hit off the nearest tower" (*id.*),

13. That "text messages do not draw a signal from the tower" (*id.*:86), and
14. What in the functionality of cell phone transmission might explain "discrepancies" in the phone toll data (*id.*:7).

Only after Rodriguez detailed the above-enumerated information to the jury was she able to explain the results of her analysis, *viz.* that certain cell phones were in certain locations at certain times (*see, e.g., id.*:101). Her testimony on point was thus the result of specialized knowledge that she developed as a HIDTA analyst. As such, it was subject to Wis. Stat. § 907.02 and *Daubert*, and Rodriguez should not have been able to offer her testimony until it was shown that her opinions were reliably deduced from equally reliable data and methods. *See Clark*, 192 F.3d at 756.

C. Proof of Reliability Demands That an Expert's Conclusion be Reached by Application of the Scientific Method, Even When That Conclusion is the Result of Training or Experience.

"To decide whether an expert's analysis is reliable, the court must rigorously examine the data on which the expert relies, the method by which his or her opinion is drawn from applicable studies and data, and the application of the data and methods to the case at hand." *EEOC v. Beauty Enterp., Inc.*, 361 F. Supp. 2d 11, 14 (D. Conn. 2005). The Supreme Court has suggested four factors relevant to the reliability determination:

> Whether a "theory or technique can be (and has been) tested";
> Whether it "has been subjected to peer review and publication";
> Whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and

> Whether the theory or technique enjoys "general acceptance" within a "relevant scientific community."

Kumho Tire, 526 U.S. at 149-50 (quoting *Daubert*, 509 U.S. at 592, 594). The Court's list of reliability considerations is "helpful, not definitive," *Kumho Tire*, 526 U.S. at 151, and in certain situations courts may have to look beyond the *Daubert* factors to ascertain the reliability of expert testimony, *see* Fed. R. Evid. 702 Advisory Committee Notes (2000 amendment) ("No attempt has been made to 'codify' these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive.").

"[T]he reliability analysis applies to all aspects of an expert's testimony: the methodology, the facts underlying the expert's opinion, the link between the facts and the conclusion, et alia." *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 155 (3d Cir. 1999). "[A] district court is required to rule out subjective belief or unsupported speculation by considering whether the testimony has been subjected to the scientific method. An expert must substantiate his [or her] opinion; providing only an ultimate conclusion with no analysis is meaningless." *Clark v. Takata Corp.*, 192 F.3d 750, 757 (7th Cir. 1999) (quotation marks and quoted authority omitted). "[T]he *Daubert* factors are applicable [even] in cases where an expert eschews reliance on any rigorous methodology and instead purports to base his [or her] opinion merely on 'experience' or 'training.'" *Id.* at 758. Indeed, *Daubert* applies not only to expert testimony developed from scientific study, but also to experience-based expert testimony. The Court has

> conclude[d] that *Daubert*'s general principles apply to the expert matters described in Rule 702. The Rule, *in respect to all such matters*, "establishes a standard of evidentiary reliability." 509 U.S., at 590. It "requires a valid connection to the pertinent inquiry as a precondition to admissibility." *Id.*, at 592. And where such

> testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, . . . the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." 509 U.S., at 592.

Kumho Tire, 526 U.S. at 149 (emphasis added).

Thus, regardless of whether an expert's conclusions are developed from scientific study or from experience, the court's role is the same: "Under the *Daubert* framework, the district court is tasked with determining whether a given expert is qualified to testify in the case in question and whether his [or her] testimony is scientifically reliable." *Gayton*, 593 F.3d at 616.

When questioning an expert's qualifications, "[t]he question [to] ask is not whether an expert witness is qualified in general, but whether [the expert's] 'qualifications provide a foundation . . . to answer a specific question.'" *Id.* at 617 (quoting *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994)). "Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir. 1990).

And while expert testimony derived from experience is permissible, an expert's bald assertion of opinion, purportedly derived from experience, is insufficient to satisfy *Daubert*'s reliability standard. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) . "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *Id.* "[P]ersonal observation [is] not sufficient to establish a methodology based in scientific fact." *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 345 (7th Cir. 1994). Even an expert

who reaches a conclusion based on experience must be able to demonstrate that the conclusion is the result of applying the scientific method to the data. *Clark*, 192 F.3d at 757.

"It is axiomatic that proffered expert testimony must be 'derived by the scientific method[.]'" *Clark*, 192 F.3d at 756 (quoting *Wintz v. Northrop Corp.*, 110 F.3d 508, 512 (7th Cir. 1997)). Along with *Daubert*'s aforementioned reliability factors, "[t]he court should also consider the proposed expert's full range of experience and training in the subject area, as well the methodology used to arrive at a particular conclusion." *Gayton*, 593 F.3d at 616. "Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *Id.*

D. As the Proponent of the Rodriguez Evidence, the State had the Burden to Show That her Testimony was Scientifically Reliable; it did not and Could not do that.

Rodriguez offered no testimony demonstrating her qualifications to testify regarding how she reached the conclusions that the "maximum distance that [a] signal from a cell tower can go" or that "[a] cell phone is most likely going to hit off the nearest tower" or that "the closer you are to the tower the more likely you're going to hit off that tower." (79:83-84.) Nor did the State elicit any testimony from Rodriguez demonstrating that those conclusions were the result of applying scientific principles and methods.

Postconviction, Cameron retained Daniel W. van der Weide, Ph.D., to review Rodriguez's testimony and the trial exhibits introduced through her. (*See* 42:Attached Ex. B at B1.) Dr. van der Weide is a Professor of Electrical and Computer Engineering with courtesy appointments in Radiology, Biomedical

Engineering and Materials Science at the University of Wisconsin-Madison. (42:Attached Ex. A at A1, A-Ap. 33.) Dr. van der Weide has substantial education, training, and experience in the area of radio wave propagation—the manner by which cell phone transmissions occur. (*Id.*)

On review of Rodriguez's testimony, Doctor van der Weide explained that

> Intelligence Analyst Rodriguez has (perhaps understandably) limited knowledge of RF communications and radio wave propagation characteristics. Cell coverage, for example, is not the precise "piece of pie" depicted in Ex 193, nor can range be determined so precisely as "4.82 km". Even more surprising, however, is her assertion that text messages (SMS) do not use cell towers; in fact all mobile phone traffic (voice, SMS and data) uses the same antennas for a given mobile device in a given location (see e.g. http://www.mobilephoneforensics.com/cell-site-analysis.php).

(42:Attached Ex. B at B2, A-Ap. 70.) Dr. van der Weide additionally explained that

> [t]here is no conclusive evidence that a given mobile device is within a certain sector; the data only indicate that the strongest signal is associated with that sector. As mentioned above, the peculiarities of RF signal propagation can cause a different sector to receive greater power than one in which the device actually resides at a given time. Conclusions can be stronger when confirming data, such as the data from a co-residing mobile device, is used. . . . In the absence of such a sophisticated analysis, it is difficult to state with certainty that a given device was in a given sector. . . .
>
> RF signal propagation characteristics are not simply line-of-sight. Like visible light, the signals can reflect off structures, resulting in multiple pathways between the device and tower; this can cause interference fading (dropouts), which could

> in turn cause the system to attempt a hand-off to another sector with a stronger net signal.

(42:Attached Ex. C at C2-C3, A-Ap. 74-75.)

As Dr. van der Weide's report shows, Rodriguez's unqualified assertions are not consistent with applicable science. Expert testimony must be the result of the scientific method. *Clark*, 192 F.3d at 756. Nothing in *Daubert* or the rules of evidence requires admission of Rodriguez's opinion simply because she believes it to be correct. *Joiner*, 522 U.S. at 146. To admit her opinion, the State should have been required to show that Rodriguez's conclusions were reliably deduced from equally reliable data and methods. *Clark*, 192 F.3d at 756.

The circuit court's abandonment of its gatekeeping function meant that the State was not required to show that Rodriguez's expert testimony was admissible under *Daubert*. No evidence was introduced to show that the method by which Rodriguez was able to reach her conclusions was scientifically reliable. *Clark*, 192 F.3d at 758 (*Daubert* factors apply even when expert relies on training and experience). All that Rodriguez explained about her method was that she "inputted" "phone data, phone tolls" "into [HIDTA]'s pending system which is what [HIDTA] use[s] to analyze phone records and from that [she] map[ped] the calls." (79:79.) However, as demonstrated by the report of Dr. Van der Weide, a number of the principles on which Rodriguez based her testimony—*e.g.* the maximum transmission distance, the nearest tower assumption—are scientifically invalid.

The circuit court in the instant case should have acted as a gatekeeper and prohibited Rodriguez from testifying as an expert to the results of her analysis. Namely, she should not have been able to inform the jury that certain phones were in certain locations at certain times. The onus to exclude that evidence was

originally on the circuit court to demand, pursuant to its role as a gatekeeper, that the State satisfy the requirements of Wis. Stat. § 907.02 and *Daubert*. *See Daubert*, 509 U.S. 592-93 (explaining that when "[f]aced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset" whether the testimony satisfies the *Daubert* test). The circuit court's failure to exercise its gatekeeping responsibilities allowed otherwise inadmissible expert witness testimony to go to the jury. Cameron should be entitled to a new trial from which such testimony will be excluded because, as explained below, its inclusion was prejudicial.

E. The Rodriguez Evidence was key to the State's Case and its Inclusion Prejudiced Cameron.

The cell phone evidence was an important part of the State's case against Cameron. Starting with opening statements, the prosecutor told the jury that it would use "cell phone site tower locations" to prove Cameron's guilt. (76:47.) Then, over eighty-seven pages of transcript, the State used Rodriguez to introduce as exhibits sixty-six maps that purportedly showed the location of certain cell phones at certain times. (79:77-125, 80:5-41, *id.*:48-51.) The State questioned its witnesses about who had what phones at what times to prove to the jury which person was where at certain times.

In closing, the State relied on the cell phone evidence to demonstrate the believability of its key witness, Nicholas Smith: "[I]n a case like this, the phone evidence while it is corroboration and can tell you if someone is telling you the truth like it does with Nick Smith, you need a witness. And Ladies and Gentlemen, Nick Smith, yes he was given a deal but he told you the truth." (82:22.) To show how the cell phone evidence corroborated Smith's story, the State pointed to the tower connectivity evidence and the

conclusions that had been espoused by Rodriguez. (*Id.*:14-22.) The jury could be sure that people were in the areas that Smith had testified to because their cell phones were connecting to certain towers: "Robert Cameron's phone includes the homicide scene but not the gas station. Robert Cameron is in the cuff just like Nick Smith told you. Nick Smith's phone hits in the gas station. Kevin Pittman's phone hits in the gas station, and everybody agrees Peewee Perkins is right there." (*Id.*:20.) The jury could know that Cameron was the shooter and not with the other men at the gas station, said the State, because "[Rodriguez] showed [the jury] how if a phone moves while during a conversation . . . [i]t will move from tower to tower. This one never hits. It never hits in a sector including the gas station. It is always in this sector." (*Id.*) Thus, argued the State, Cameron was precisely where Nicholas Smith said he was: lying in wait at L.S.'s residence. (*See id.*)

Thus, the Rodriguez evidence permeated the State's case. It was not some minor piece of evidence, but rather a cornerstone to the State's proof of Cameron's guilt. If the Rodriguez evidence was omitted pursuant to *Daubert*, then the State would not have been able to rely on it to prove Cameron's guilt. Given the importance of the Rodriguez evidence and the State's reliance upon it, its inclusion was prejudicial to Cameron. He should have a new trial from which it is omitted.

II. THE STATE'S CLOSING ARGUMENT CONSTITUTED PLAIN ERROR ENTITLING CAMERON TO A NEW TRIAL.

Wisconsin's plain error doctrine is codified in Wis. Stat. § 901.03(4). It allows a court to "tak[e] notice of plain errors affecting substantial rights although they were not brought to the attention of the judge" by timely objection. Wis. Stat. § 901.03(4); *see State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754

N.W.2d 77 ("The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object."). No "bright-line rule" exists for discerning "what constitutes plain error. . . . Rather, the existence of plain error will turn on the facts of the particular case." *Mayo*, 2007 WI 78, ¶ 29. However, "[p]lain error is error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." *Jorgensen*, 2008 WI 60, ¶ 21 (quotation marks and quoted authority omitted). Though it should be sparingly used, the plain error doctrine "should be utilized" "where a basic constitutional right has not been extended to the accused." *Id.*

The content of proper closing argument is limited to the evidence admitted at trial and reasonable inferences that can be made therefrom. *State v. Nemoir*, 62 Wis. 2d 206, 213, 214 N.W.2d 297, 300-301 (1974). "The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence." *State v. Neuser*, 191 Wis. 2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995). "The prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors." *State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784, 789 (1979). However, "'[a]rgument on matters not in evidence is improper.'" *Neuser*, 191 Wis. 2d at 142, 528 N.W.2d at 54 (quoting *State v. Albright*, 98 Wis. 2d 663, 676, 298 N.W.2d 196, 203 (Ct. App. 1980)).

As the Wisconsin Supreme Court has before explained:

> The independent opinion of counsel is not evidence; it gives the lay jury the idea that the defense or prosecution has information not disclosed and leads it to speculate on what was not

> adduced as evidence in the trial. This is especially true when one acts in an official capacity such as the prosecutor.

Embry v. State, 46 Wis. 2d 151, 160-61, 174 N.W.2d 521, 526 (1970). That principle is widely accepted. Other courts have reiterated that "counsel may not state to the jury his or her personal belief about the veracity of a witness." *Bolden v. State*, 525 S.E.2d 690, 691 (Ga. 2000). The reasoning behind the rule is that "[s]uch expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position." *State v. Reynolds*, 824 A.2d 611, 721 (Conn. 2003).

When considering whether the prosecutor's improper remarks "rise to such a level that the defendant is denied his or her due process," the court must determine "whether those remarks so infected the trail with unfairness as to make the resulting conviction a denial of due process." *State v. Wolff*, 171 Wis. 2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992) (quotation marks and quoted authority omitted).

Wisconsin courts have long recognized that it is improper for attorneys, especially prosecutors who generally have the confidence of juries, to argue facts not in evidence. *See Embry*, 46 Wis. 2d at 160-61, 174 N.W.2d at 526.

In the instant case, the prosecutor's comments on Smith's truthfulness were not one passing reference. Instead, the prosecutor repeated to the jury that Smith was telling the truth. Without Smith's truthful testimony, argued the prosecutor, the State would have no case: "[I]n a case like this, . . . you need a witness. And Ladies and Gentlemen, Nick Smith, yes he was given a deal but he told you the truth." (82:22.) The State's closing argument thus called on the jury to reach its verdict based on something other than the evidence: namely the prosecutor's opinion of Smith's

truthfulness. The prosecutor's comments on Smith's truthfulness were "unsworn and unchecked testimony" that would have been "particularly difficult for the jury to ignore because of the prosecutor's special position." *Reynolds*, 824 A.2d at 721.

First, it is worth noting that the State's attorney clearly knew how to limit his argument to a deduction from the evidence. In more than one place, the State commented on the evidence and then pointed out that it matched with what Smith said. For example, when arguing that it had proven the involvement of all the different actors by the phone evidence, the State relied on Smith's testimony as corroboration: "You know that those people are in the position Nick Smith told you because phone evidence corroborates it." (82:20-21.) The State later argued that it had proven the elements of homicide:

> But [Cameron] continues. *And he does exactly what Nick Smith told you*. Yes, Isaiah, he said he saw Kevin Pittman and he picked him out. He didn't really know who KP and Rob was. He said he didn't even pick Rob out. He said he had never even saw him. That's true. He told you what he saw.

(*Id.*:23 (emphasis added).)

But unlike those clearly permissible instances in which the State used Smith's testimony to corroborate other evidence—and *vice versa*—the State also clearly spoke to the truthfulness of Smith's testimony absent any evidentiary corroboration. Those arguments are the ones to which Cameron takes exception.

That impermissible argument is most demonstrated by a paragraph in which the prosecutor is explaining to the jury how Smith lied at first and then later told the truth. (*See id.*:21-22.) That paragraph reads in total as follows:

> Ladies and Gentlemen, Nick Smith came in and he told you the truth. And it's true when he first was presented with an offer, a proffer agreement with no deals on the table he had to come in and tell us the truth. He didn't say at first. He didn't. He said he wasn't involved. He had to admit to his own involvement and eventually he did.

(*Id.*) No qualifying language prefaces those statements limiting them to the evidence or to a deduction from the evidence. (*See id.*) Instead, that is a straightforward argument that the first story that Smith told police was not the truth, and yet the second story he told—which was consistent with his trial testimony—was true. It is further an argument that Smith was telling the truth specifically because he had an agreement that necessitated his telling the truth—an offer that the State made in the first place. And while the prosecutor did not use the words "In my opinion," the absence of any evidentiary limitation or proposed deduction therefrom demonstrates that the jury would have heard that language as an expression of opinion, especially when juxtaposed against the earlier-quoted permissible argument, and the following statement which came thereafter:

> And yes, a deal has been made and you have been told about every aspect of that deal. But the problem is, Ladies and Gentlemen, when you have a case like this and people like Robert Cameron and Kevin Pittman and Peewee Perkins and Nick Smith in a case like this, the phone evidence while it is corroboration and can tell you if someone is telling you the truth like it does with Nick Smith, you need a witness. And Ladies and Gentlemen, Nick Smith, yes he was given a deal but he told you the truth.

(*Id.*:22.) Again, in that paragraph, the State rightly calls on the jury to assess Smith's testimony in light of the evidence, a limitation that was not earlier presented to the jury.

For those reasons, the prosecutor's assertion of belief in the veracity of Smith's testimony was prejudicial to Cameron given the admitted importance of that testimony to the State's case. Thus, Cameron's constitutional rights were violated, and he is entitled to a new trial as redress.

III. CAMERON'S ATTORNEY WAS INEFFECTIVE.

The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution, *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984), and Article One, Section Seven of the Wisconsin Constitution, *State v. Thiel*, 2003 WI 111, ¶ 11, 264 Wis. 2d 595, 665 N.W.2d 305. The rules governing ineffective assistance are well settled. *See State v. McDowell*, 2004 WI 70, ¶ 30, 272 Wis. 2d 488, 681 N.W.2d 500 ("A claim of ineffective assistance of counsel invokes the analysis set forth in *Strickland* . . .."). A defendant seeking to prove ineffective assistance must show both that counsel's performance was deficient and that the defendant was prejudiced by such deficiency. *Strickland*, 466 U.S. at 687, *McDowell*, 2004 WI 70, ¶ 30. To satisfy the first prong of the analysis, it must be shown that counsel's performance fell below "an objective standard of reasonableness." *State v. Franklin*, 2001 WI 104, ¶ 13, 245 Wis. 2d 582, 629 N.W.2d 289 (quotation and quoted authority omitted). The second prong requires proof of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* ¶ 14 (quotation and quoted authority omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694.

The Wisconsin Supreme Court has before explained,

> "Ineffectiveness is neither a judgment of the motives or abilities of lawyers nor an inquiry into

> culpability. The concern is simply whether the adversary system has functioned properly: the question is not whether the defendant received the assistance of effective counsel but whether he received the effective assistance of counsel. In applying this standard, judges should recognize that all lawyers will be ineffective some of the time; the task is too difficult and the human animal too fallible to expect otherwise."

State v. Felton, 110 Wis. 2d 485, 499, 329 N.W.2d 161, 167-68 (1983) (quoting David Bazelon, *The Realities of Gideon and Argersinger*, 64 Georgetown Law J. 811, 822-23 (1976)).

A. Cameron's Attorney Should have Challenged the Rodriguez Evidence by Objection or by Presentation of a Defense Expert; the Failure to do Either was Prejudicial.

Cameron argued above that the circuit court had a responsibility to demand that Rodriguez's expert testimony be subjected to *Daubert*, pursuant to its gatekeeping function. But, if the circuit court was not going to act to subject the evidence to *Daubert*, Cameron's counsel should have.

As argued above, the Rodriguez evidence would not have been admissible. If Cameron's counsel had challenged it pursuant to Wis. Stat. § 907.02, he would have successfully excluded it. The matter of deficiency cannot be fully argued to this Court because no *Machner* hearing was held on the matter. *Machner*, 92 Wis. 2d at 804, 285 N.W.2d at 908 ("[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies."). Nonetheless, Cameron can think of no reasonable strategic basis on which to have allowed the State to introduce the cell phone location evidence, including proof that Cameron's cell phone was in the

vicinity of the homicide. He therefore contends that his counsel's failure to have it excluded constituted deficient performance.

Additionally deficient was counsel's failure to obtain an expert to contest the conclusions that Rodriguez offered. As demonstrated by Dr. van der Weide's reports, it would have been easy to dispute the bases of Rodriguez's conclusions, on which the State relied to convince the jury of Cameron's involvement in the shooting. The failure to challenge that evidence was also deficient.

Cameron detailed above his argument regarding the prejudicial impact of the Rodriguez evidence. He will not here reiterate that argument. As relevant to the ineffective assistance claim, Cameron contends that omitting or challenging the Rodriguez evidence would create a reasonable probability of a different result on retrial.

B. Cameron's Attorney Should have Objected to the State's Improper Closing Argument; the Failure to do so was Prejudicial.

The failure of Cameron's counsel to object to the prosecutor's closing argument forfeited his right to complain of that error. *State v. Koller*, 2001 WI App 253, ¶ 25, 248 Wis. 2d 259, 635 N.W.2d 838 (defendant's "claims were waived and are, therefore, appropriately addressed in the context of ineffective assistance of counsel"). Thus, the propriety of the State's closing argument may be reviewed under the rubric of ineffective assistance of counsel. *Koller*, 2001 WI App 253, ¶ 25; *but see* Wis. Stat. § 901.03(4) (plain error exception).

As detailed above, the State's closing argument was error. Cameron can think of no objectively reasonable ground on which counsel would not have objected. The failure to object prejudiced Cameron, as

detailed above in the section regarding plain error. Thus, Cameron's counsel was ineffective, and he should have a new trial.

C. Cameron Sufficiently Pled his Ineffective Assistance Claim to Entitle him to an Evidentiary Hearing.

In *State v. Love*, the Wisconsin Supreme Court repeated the well-established standard for deciding when an evidentiary hearing should be held on a postconviction motion:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. We require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion."

2005 WI 116, ¶ 26, 284 Wis. 2d 111, 700 N.W.2d 62 (quoting *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433) (internal citations omitted). "[A] postconviction motion will be sufficient [to trigger a hearing] if it alleges within the four corners of the document itself 'the five "w's" and one "h"; that is who, what, where, when, why, and how.'" *Id.* ¶ 27 (quoting *Allen*, 2004 WI 106, ¶ 23). "[T]he motion must include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim.'" *Allen*, 2004 WI 106, ¶ 21 (quoting *State v. Bentley*, 201 Wis. 2d 303, 314, 548

N.W.2d 50 (1996)). To meaningful assess a defendant's claim, the court must be presented with "facts that are material to the issue presented to the court." *Id.* ¶ 22.

When assessing whether an evidentiary hearing is warranted, a reviewing court must assume true the defendant's factual allegations. *Allen*, 2004 WI 106, ¶ 12 n.6. Facts that appear to lack credibility or reliability do not scuttle a defendant's right to an evidentiary hearing. *State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis. 2d 195, 633 N.W.2d 207. Instead, if the defendant's factual assertions are "questionable in their believability, the circuit court must hold a hearing." *Allen*, 2004 WI 106, ¶ 12 n.6.

Cameron cited to the record and to extraneous information attached as exhibits to his postconviction motion to establish the who, what, when, where, why, and how of his ineffective assistance claim. (42:17-20, *id.*:Attached Exs. A-D, A-Ap. 29-80.) His allegations were not conclusory. For all those reasons, Cameron can satisfy the *Love* test and is entitled to a hearing. *See Love*, 2005 WI 116, ¶ 26.

IV. THE RODRIGUEZ EVIDENCE RESULTED IN THE REAL CONTROVERSY NOT BEING FULLY TRIED; CAMERON ASKS THIS COURT TO EXERCISE ITS DISCRETION AND GRANT HIM RELIEF.

Wis. Stat. § 752.35 grants this Court the express authority to "reverse the judgment or order appealed from" "if it appears from the record that the real controversy has not been fully tried." Granting relief under Wis. Stat. § 752.35 is an act of this Court's independent discretion. *State v. McConnohie*, 113 Wis. 2d 362, 374, 334 N.W.2d 903, 909 (1983) ("It is clear that discretionary reversals, under . . . sec. 752.35 . . . are indeed discretionary.").

The Wisconsin Supreme Court has recognized that Wis. Stat. § 752.35 discretionary relief may be appropriate "when the jury had before it evidence not

properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *State v. Wyss*, 124 Wis. 2d 681, 735-37, 370 N.W.2d 745, 770-71 (1985). When crucial evidence is improperly admitted, the defendant need not show "a substantial probability of a different result on retrial" to qualify for relief under Wis. Stat. § 752.35. *Id.* Instead, this Court has "the liberty in such situations to consider the totality of circumstances and determine whether a new trial is required to accomplish the ends of justice because the real controversy has not been fully tried." *Id.* In other words, all that need be shown is that a new trial is necessary to serve the interests of justice. *Id.*

Cameron argued above that the Rodriguez evidence was improperly admitted and crucial to the State's case against him. Indeed, it permeated the trial and, importantly, served to bolster the credibility of the State's snitch. Allowing Cameron's conviction to stand when it is the result of such impermissible evidence is unjust and "a new trial is required to accomplish the ends of justice," regardless of the likelihood of a different result. *Id.* Therefore, as an alternative to the grounds adduced above, Cameron asks this Court to grant him relief pursuant to its Wis. Stat. § 752.35 discretionary power.

CONCLUSION

The State proved Cameron guilty by heavily relying on the testimony of its expert witness and the asserted truthfulness of Nicholas Smith. Cameron's trial would have been completely different if the State had not been allowed to adduce as a scientific conclusion—based on Rodriguez's testimony—that certain cell phones were in certain places at certain times. That evidence allowed the State to bolster the credibility of its key witness—Nicholas Smith—and to thereby defeat Cameron's claimed lack of involvement. When the State reiterated its opinion of Smith's

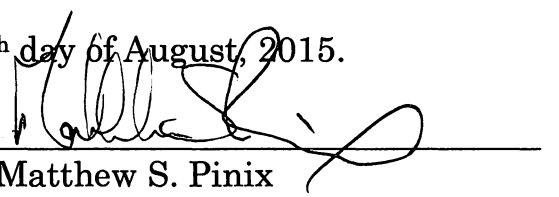
truthfulness in closing, it gave the weight of government approval not only to the believability of his testimony but also of the cell phone evidence. The errors in this case therefore shake confidence in the trial's outcome. Cameron should have a new one.

For all of the aforementioned reasons, Cameron asks this Court to hold that he is entitled to a new trial because the circuit court erroneously admitted prejudicial evidence at his trial, he was prejudiced by the prosecutor's illegal closing argument, or both.

Alternatively, he asks this Court to conclude that he is entitled to a *Machner* hearing and to remand to the circuit court for that purpose.

Finally, he asks this Court to exercise its discretion and grant him a new trial in the interests of justice.

Dated this 24th day of August, 2015.



Matthew S. Pinix
Attorney for Defendant-Appellant

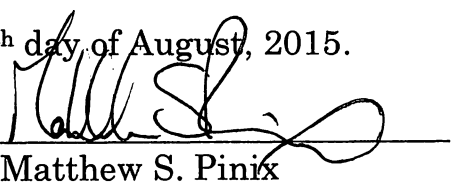
CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,077 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 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 24th day of August, 2015.



Matthew S. Pinix
Attorney for Defendant-Appellant

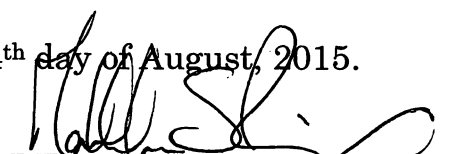
CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using 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 24th day of August, 2015.



Matthew S. Pinix
Attorney for Defendant-Appellant

CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Short Appendix will be delivered to a FedEx, a third-party commercial carrier, on August 24, 2015, for delivery to the Clerk of the Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin 53703, within three calendar days. I further certify that the brief will be correctly addressed and delivery charges prepaid. Copies will be served on the parties by the same method.

Dated this 24th day of August, 2015.

Matthew S. Pinix
Attorney for Defendant-Appellant