STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP1088-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT LAVERN CAMERON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of the court's decision is warranted because one of the issues raised in this appeal – whether a circuit court must perform a *Daubert* analysis in the absence of an objection to an expert's testimony – has not been addressed in any published Wisconsin case.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Robert Lavern Cameron, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Cameron was convicted following a jury trial of first-degree intentional homicide as a party to a crime, armed robbery as a party to a crime, felony bail jumping, and possession of a firearm by a felon (23:1; A-Ap. 1). Those convictions resulted from the shooting death and robbery of R.S. and the non-fatal shooting of R.S.'s mother.

Cameron argues on appeal that the trial court erred by admitting expert testimony about the location of his cell phone without conducting a *Daubert*[1] analysis and that his trial counsel was ineffective for not challenging that evidence by objecting or presenting a defense expert. He further argues that the prosecutor's unobjected-to closing argument was improper and seeks reversal based on plain error and ineffective assistance of counsel.

Cameron's brief raises as a "threshold matter" the circuit court's "wholesale adoption of the State's postconviction response brief as its decision."

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

Cameron's brief at 11. That was an erroneous exercise of discretion, he argues, and "[i]nsofar as any of the claims set forth herein necessitate review of the circuit court's postconviction exercise of discretion, that exercise was erroneously done." *See id.* at 11-12.

Cameron's concern about the brevity of the circuit court's decision is reasonable. But he does not identify any issue on appeal that requires review of the postconviction court's exercise of discretion. While Cameron raises a legitimate concern, he does not explain why he is entitled to reversal on that basis. This court need not consider Cameron's undeveloped argument. *State v. Pettit*, 171 Wis.2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).[2]

For the reasons discussed below, Cameron's belated objections to the cell phone location

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[2]Cameron's argument relies on a footnote in *State v. McDermott*, 2012 WI App 14, ¶9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237. *See* Cameron's brief at 11. *McDermott*, in turn, relied in part on *Trieschmann v. Trieschmann,* 178 Wis. 2d 538, 504 N.W.2d 433 (Ct. App. 1993), for the proposition that it is improper for a circuit court to adopt *in toto* a party's brief. *See McDermott*, 339 Wis. 2d 316, ¶9 n.2.

In an unpublished authored decision that the State cites for its persuasive value pursuant to Wis. Stat. § (Rule) 809.23(3)(b), this court held that the trial court properly exercised its discretion when it adopted the State's brief in its entirety because "the State's brief properly set forth the facts it considered, the law it utilized, and, unlike the wife's brief in *Trieschmann*, logically reasoned to its conclusions." *State v. Crenshaw*, no. 2010AP1960-CR, slip op. at ¶47 (Ct. App. Aug. 2, 2011) (R-Ap. 121). The same is true of the State's thorough postconviction brief in this case (50:1-18; A-Ap. 81-98).

testimony and the prosecutor's closing argument are without merit. Accordingly, the court should affirm the judgment of conviction and the order denying postconviction relief.

I. BECAUSE CAMERON DID NOT OBJECT TO THE WITNESS'S TESTMIMONY, THE TRIAL COURT WAS NOT REQUIRED TO PERFORM A *DAUBERT* ANALYSIS.

One of the State's witnesses at trial was Angela Rodriguez, an intelligence analyst with the Milwaukee High Intensity Drug Trafficking Area (HIDTA) task force (79:77).[3] Rodriguez analyzed cell phone records of individuals involved in these crimes, including those of Cameron's phone (79:79, 89, 91; 80:28-34). She testified that based on the phone records, she mapped the location of those phones around the time of the offense (79:123-25; 80:5-41).

Cameron argues that he is entitled to a new trial because the circuit court "abandoned its gatekeeping role when it allowed the State to introduce expert witness testimony" about cell phone location "without satisfying the Daubert test." Cameron's brief at 12 (uppercasing omitted). Cameron has failed to preserve that issue for appellate review.

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[3]The Milwaukee HIDTA is a joint task force involving federal, state, and local law enforcement agencies (79:77). *See* https://www.ncjrs.gov/ondcppubs/publications/enforce/hidta2001/milwa-fs.html (last visited Oct. 23, 2015).

"In order to preserve the right to appeal on a question of admissibility of evidence, a defendant must apprise the trial court of the specific grounds upon which the objection is based." *State v. Tutlewski*, 231 Wis. 2d 379, 384, 605 N.W.2d 561 (Ct. App. 1999). "Contemporaneous objection gives the trial court an opportunity to correct its own errors, and thereby works to avoid the delay and expense incident to appeals, reversals and new trials which might have been unnecessary had the objections been properly raised in the lower court." *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (citations omitted). Even if evidence is inadmissible, it is not the trial court's duty to *sua sponte* strike that testimony. *State v. Mayer*, 220 Wis. 2d 419, 430, 583 N.W.2d 430 (Ct. App. 1998).

Cameron's brief ignores these principles. *See* Cameron's brief at 12-26. Instead, he argues that because Wisconsin is now a *Daubert* state, trial judges have an obligation to ensure that expert testimony complies with Wis. Stat. § 974.02. *See* Cameron's brief at 12. But while he cites cases that discuss the trial court's gatekeeping role under *Daubert*, *see id*. at 13-16, he does not cite any authority that holds that a trial court must conduct a *Daubert* analysis when there has been no objection to the testimony. This court does not consider arguments unsupported by references to relevant legal authority. *See Pettit*, 171 Wis. 2d at 646.[4]

[4]Cameron's brief quotes the Supreme Court's statement in *Daubert* that "'[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." Cameron's brief at 25 (quoting *Daubert*, 509 U.S. at 592). But the defendant

In any event, Cameron's position is wrong. Both federal and state courts have held that the "[f]ailure to raise a *Daubert* challenge at trial causes a party to waive the right to raise objections to the substance of expert testimony post-trial." *Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1113 (9th Cir. 2012); *accord*, *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996) ("the appropriate time to raise *Daubert* challenges is at trial. By failing to object to evidence at trial and request a ruling on such an objection, a party waives the right to raise admissibility issues on appeal"); *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409-10 (Tex. 1998) ("To preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial or when the evidence is offered.").

Courts have expressly rejected Cameron's claim that the trial court's obligation to act as a gatekeeper under *Daubert* requires it to conduct a *Daubert* admissibility analysis even if there is no objection to the testimony.

> It is without question that Rule 702 of the Federal Rules of Evidence imposes an obligation on trial courts to ensure that all expert testimony is reliable. The trial court, in

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in *Daubert* had objected to the expert evidence in question. *See Daubert v. Merrell Dow Pharm., Inc.*, 727 F. Supp. 570, 572 (S.D. Cal. 1989) ("The court should exclude inadmissible evidence objected to by either party prior to ruling upon the [summary judgment] motion."), *aff'd*, 951 F.2d 1128 (9th Cir. 1991), *vacated*, 509 U.S. 579 (1993). The Supreme Court's statement about the trial court's gatekeeping duties does not address the situation presented here, where there was no objection.

> performing its "gatekeeping" function, has discretion to choose the manner in which the reliability of an expert's testimony is appraised. However, the trial court has no discretion to abandon its role as gatekeeper. When a party objects to an expert's testimony, the court "must adequately demonstrate by specific findings on the record that it has performed its duty...." Absent an objection, the trial judge is not required to announce for the record that the expert witness's testimony is based on reliable methodology. A defendant must still make a timely objection to preserve error for appeal. If the defendant fails to object to the expert's testimony, then the defendant "waives appellate review absent plain error."

United States v. Bates, 240 F.3d 1073, unpublished slip op. at *3 (5th Cir. 2000); *see also McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1407 (8th Cir. 1994) ("To the extent that JCI is arguing that the district court was required to exercise its gatekeeping authority over expert testimony without an objection, we disagree.").

Because Cameron did not preserve his argument by making a timely objection, the court should reject his request to review the claimed error directly. "[T]he normal procedure in criminal cases is to address waiver within the rubric of the ineffective assistance of counsel." *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). Because Cameron argues that his lawyer was ineffective for failing to challenge the State's expert's evidence, *see* Cameron's brief at 32-33, the State will address his claim that the evidence was inadmissible within that context. *See infra*, pp. 15-23.

II. THE PROSECUTOR'S CLOSING ARGUMENT WAS PROPER.

Cameron next argues that he is entitled to a new trial based on improper closing arguments by the prosecutor. He acknowledges that he did not object to those remarks and that his objection is therefore forfeited. *See* Cameron's brief at 33; *see also State v. Guzman*, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717 (to preserve a claim of improper closing argument, a defendant must make a contemporaneous objection and move for a mistrial).

Cameron asks this court to review the prosecutor's closing argument for plain error. Although Wisconsin case law once restricted the plain error doctrine to evidentiary questions, *see, e.g., State v. Schumacher*, 144 Wis. 2d 388, 402-03, 424 N.W.2d 672 (1988); *State v. Seeley*, 212 Wis. 2d 75, 81 n.2, 567 N.W.2d 897 (Ct. App. 1997), in more recent cases the supreme court has applied the plain error doctrine to review claims of improper closing argument when no objection was made. *See State v. Jorgensen*, 2008 WI 60, ¶¶20-44, 310 Wis. 2d 138, 754 N.W.2d 77; *State v. Mayo*, 2007 WI 78, ¶42, 301 Wis. 2d 642, 734 N.W.2d 115; *State v. Davidson,* 2000 WI 91, ¶¶81-89, 236 Wis. 2d 537, 613 N.W.2d 606.

In this case, the prosecutor's remarks were well within the bounds of a proper closing argument. There was no error here, much less an error that rises to the level of plain error.

A. Applicable legal principles.

The supreme court has described the nature of plain error review as follows:

> Wisconsin Stat. § 901.03(4) (2003-04) recognizes the plain error doctrine. The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object. Plain 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.'" The error, however, must be "obvious and substantial." Courts should use the plain error doctrine sparingly. For example, "'where a basic constitutional right has not been extended to the accused,'" the plain error doctrine should be utilized. "Wisconsin courts have consistently used this constitutional error standard in determining whether to invoke the plain error rule."
>
> However, "'the existence of plain error will turn on the facts of the particular case.'" The quantum of evidence properly admitted and the seriousness of the error involved are particularly important. "Erroneously admitted evidence may tip the scales in favor of reversal in a close case, even though the same evidence would be harmless in the context of a case demonstrating overwhelming evidence of guilt." Thus, no bright-line rule exists to determine automatically when reversal is warranted.
>
> If the defendant shows that the unobjected to error is fundamental, obvious, and substantial, the burden then shifts to the State to show the error was harmless. To determine whether an error is harmless, this

> court inquires whether the State can prove "'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error [ ].'" . . . If the State fails to meet its burden of proving that the errors were harmless, then the court may conclude that the errors constitute plain error.

Jorgensen, 310 Wis. 2d 138, ¶¶21-23 (footnotes and citations omitted).

Accordingly, an unobjected-to error constitutes plain error only when the defendant demonstrates that the error satisfies the first prong – that it was fundamental, obvious and substantial – and the State fails to meet its burden on the second prong of demonstrating that the error was harmless. *See id*. at ¶23 & n.4. If the defendant does not satisfy the first prong, the court will not proceed to the second prong. *See id*. at ¶23 n.4.

A prosecutor's improper argument may rise to the level that the defendant is denied his or her due process right to a fair trial. *See State v. Wolff*, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App.1992). "When a defendant alleges that a prosecutor's statements constituted plain error, the test [appellate courts] apply is whether, in the context of the entire record of the trial, the statements 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Miller*, 2012 WI App 68, ¶19, 341 Wis. 2d 737, 816 N.W.2d 331 (quoting *Davidson*, 236 Wis. 2d 537, ¶88).

B. The prosecutor properly commented on witnesses' credibility based on the evidence.

Cameron argues that the prosecutor improperly told the jury in his closing argument that prosecution witness Nick Smith was telling the truth when Smith testified. *See* Cameron's brief at 28-31. The court should reject that claim because, when viewed in the context of the prosecutor's entire closing argument, the challenged statements were a proper comment on Smith's credibility based on the trial evidence.

Closing argument is the opportunity for the prosecutor to tell the jury how he or she views the evidence. *See State v. Adams,* 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). Counsel is given considerable latitude in closing argument. *See State v. Draize,* 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). "The prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him or her and should convince the jurors." *State v. Nielsen,* 2001 WI App 192, ¶46, 247 Wis. 2d 466, 634 N.W.2d 325. "The line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence." *Draize*, 88 Wis. 2d at 454.

A prosecutor may not ask the jury to find a witness credible based on the prosecutor's own

belief that the witness is credible, *see State v. Jorgenson*, 310 Wis. 2d 138, ¶26, nor may a prosecutor ask the jury to find a witness credible based on facts not in evidence, *see State v. Smith*, 2003 WI App 234, ¶¶25-26, 268 Wis. 2d 138, 671 N.W.2d 854. But "a prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on the evidence presented." *Adams*, 221 Wis. 2d at 17.

That is what happened here. Before making the statements to which Cameron objects, the prosecutor reviewed the evidence for the jury (82:14-21). He discussed Smith's testimony, the cell phone records that showed when calls were made between the various actors in relation to the events Smith described, security videos that showed Smith and others at a gas station shortly before the robbery, security videos that showed the movement of the vehicles after the robbery, and the cell phone location evidence that confirmed Smith's account of where various people were that night (*id*.).

After discussing that evidence, the prosecutor made the following remarks; the portions to which Cameron objects are italicized:

> *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.)

A prosecutor's argument must be viewed in context. *State v. Neuser,* 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). The prosecutor's argument that Smith told the truth came immediately after he outlined the evidence. When viewed in this context, the prosecutor was not stating a personal opinion of the witnesses' credibility or asking the jury to find Smith credible based on facts not in evidence, but was making appropriate comments on the credibility of Smith's testimony based on the evidence presented.[5]

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[5]In an unpublished opinion that the State cites for its persuasive value, the court of appeals rejected the argument that the prosecutor improperly expressed a personal opinion about the witnesses' honesty, noting that the prosecutor's statements came immediately after the prosecutor described their testimony. The court wrote:

> In his closing, the prosecutor stated that the deputies described what they saw "truthfully and honestly," without guessing at anything else. Viewed in context, however, these statements came immediately after the

Cameron contrasts the statements to which he objects to other statements in which the prosecutor "commented on the evidence and then pointed out that it matched what Smith said." Cameron's brief at 29. He appears to be arguing that any comment on a witness's credibility must be immediately linked to a statement about the evidence. That is not the law. *See Mayo*, 301 Wis. 2d 642, ¶43 ("the [prosecutor's] statements must be looked at in context of the entire trial"). And even if it were the law, the two statements to which Cameron objects came just before and after the prosecutor's statement that "the phone evidence . . . is corroboration and can tell you if someone is telling you the truth like it does with Nick Smith" (82:21-22).

When determining whether a prosecutor's closing argument warrants reversal for plain error, this court has "recognize[d] the import of the trial court's instructions to the jury that the attorneys' arguments, conclusions, and opinions are not evidence, that the jury is the sole judge of credibility, and that jurors should draw their own conclusions from the evidence and decide upon their verdict

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> prosecutor outlined the officers' testimony. The prosecutor then stated that the deputies' testimony made sense, and that it all ran together. When viewed in this context, the prosecutor was not stating a personal opinion of the witnesses' credibility, but was making appropriate comments on the credibility of their testimony based on the evidence presented.

State v. Stich, no. 2010AP2849-CR, slip op. at ¶13 (Ct. App. 2011) (R-Ap. 144).

according to the evidence." *Miller*, 341 Wis. 2d 737, ¶22. These instructions, which the court "presume[s] the jurors followed, alleviate the likelihood that jurors placed any significant weight on the prosecutor's comments other than the weight that came from their own independent examination of the evidence." *Id*. (footnote omitted).

In this case, the trial court instructed the jury that "[t]he remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion" (81:54-55). Cameron does not provide any reason to believe that the jury failed to follow that instruction.

The prosecutor's comments did not constitute error, much less plain error. Cameron is not entitled to a new trial based on the prosecutor's closing argument.

III. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A *DAUBERT* OBJECTION TO THE CELL PHONE LOCATION TESTIMONY.

Cameron argues that his trial lawyer was ineffective for not objecting on *Daubert* grounds to Intelligence Analyst Rodriguez's testimony about cell phone location mapping. Because any such objection would have been meritless, Cameron's

lawyer was not ineffective for failing to raise a *Daubert* objection.[6]

A. Applicable legal standards.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id.* at 690. The court "strongly presume[s]" that counsel has rendered adequate assistance. *Id*. A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687.

[6] In a recent authored unpublished decision, this court held that a police officer's testimony about a cell phone's location based on records provided by the phone company, which included a map prepared by the officer that showed which sector of a cell phone tower the phone used, was lay opinion testimony rather than expert testimony. *See State v. Butler*, no. 2014AP1769-CR, slip op. at ¶¶4-6, 16-18 (Ct. App. June 9, 2015) (R-Ap. 125-27, 132-33). In *Butler*, however, employees of the cell phone company rather than the officer testified about how cell phone connect to cell towers, *see id*. at ¶8, while in this case, as Cameron notes, Intelligence Analyst Rodriguez testified about those matters, *see* Cameron's brief at 18-19. For that reason, and because the State identified Rodriguez as an expert witness in its witness list (13:7), the State does not dispute that Rodriguez provided expert testimony under Wis. Stat. § 907.02.

To demonstrate prejudice, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Id*. at 693. The defendant cannot meet his burden merely by showing that the error had some conceivable effect on the outcome. *Id*. Rather, he must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Nielsen*, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. The trial court's findings of fact will be upheld unless they are clearly erroneous. *Id*. Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that an appellate court reviews without deference to the trial court's conclusions. *Id.*

A defendant is not entitled to an evidentiary hearing on an ineffective-assistance-of-counsel claim unless he "alleges facts which, if true, would entitle the defendant to relief." *State v. Bentley*, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996) (quoted source omitted). Whether a defendant does so is a question of law that the appellate court reviews *de novo*. *See id.* at 310.

B. Trial counsel was not ineffective for failing to raise a *Daubert* objection to the cell phone location testimony.

Cameron's brief treats Rodriguez's testimony about cell phone location mapping as though it were some novel and untested methodology. In fact, the principles underlying cell phone location mapping are well established. One court described the methodology involved as follows:

> Cellular telephone networks are divided into geographic coverage areas known as "cells," which range in diameter from many miles in suburban or rural areas to several hundred feet in urban areas. Each contains an antenna tower, one function of which is to receive signals from and transmit signals to cellular telephones.
>
> Whenever a cellular telephone is in the "on" condition, regardless of whether it is making or receiving a voice or data call, it periodically transmits a unique identification number to register its presence and location in the network. That signal, as well as calls made from the cellular phone, are received by every antenna tower within range of the phone. When the signal is received by more than one tower, the network's switching capability temporarily "assigns" the phone to the tower that is receiving the strongest signal from it. As a cellular telephone moves about, the antenna tower receiving the strongest signal may change as, for example, often occurs when a cellular phone moves closer to a different antenna tower. At that point, the cellular

> telephone, including any call in progress, is assigned to the new antenna tower.
>
> The location of the antenna tower receiving a signal from a given cellular telephone at any given moment inherently fixes the general location of the phone. Indeed, in some instances, depending upon the characteristics of the particular network and its equipment and software, it is possible to determine not only the tower receiving a signal from a particular phone at any given moment, but also in which of the three 120–degree arcs of the 360–degree circle surrounding the tower the particular phone is located. In some cases, however, the available information is even more precise.
>
> Often, especially in urban and suburban areas, the signal transmitted by a cellular telephone is received by two or more antenna towers simultaneously. Knowledge of the locations of multiple towers receiving signals from a particular telephone at a given moment permits the determination, by simple mathematics, of the location of the telephone with a fair degree of precision through the long established process known as triangulation.

In re Application of the United States for an Order for Prospective Cell Site Location Information on a Certain Cellular Telephone, 460 F. Supp. 2d 448, 450-51 (S.D.N.Y. 2006) (footnotes omitted).

There have been numerous *Daubert* challenges to testimony about the use of cell phone records to determine the location of cell phones. Those challenges have not succeeded. *See Jackson v. Allstate Ins. Co.*, 785 F.3d 1193, 1204 n.5 (8th Cir. 2015) ("We also reject Jackson's contention that evidence

regarding the use of historical cell phone data to identify the geographic area in which a phone was located at a given time is inherently unreliable. Federal courts have regularly admitted expert testimony regarding this type of evidence."); *United States v. Gatson*, 2015 WL 5920931, *2 (D.N.J. 2015); ("it is readily apparent that this form of testimony has been widely accepted across the country"); *United States v. Cervantes*, 2015 WL 5569276, *3 (N.D. Cal. 2015) ("the use of cell phone location records to determine the general location of a cell phone has been widely accepted by numerous federal courts") (quoted source omitted); *United States v. Fama*, 2012 WL 6102700, *3-4 (E.D.N.Y. Dec. 10, 2012) (noting that the defendant "fail[ed] to cite any case law in which a court has held this type of cell site analysis to be unreliable" and that "'[n]umerous federal courts' have found similar testimony reliable and admissible"); *United States v. Henderson,* 2011 WL 6016477, *5 (N.D. Okla. 2011) ("although Defendant suggests this type of testimony is not reliable, it has been accepted by numerous federal courts and the Court was unable to locate a case in which it was ruled inadmissible"), *aff'd*, 564 F. App'x 352 (10th Cir. 2014). Indeed, courts have found that the reliability of cell phone location mapping is so well established that they have concluded that an evidentiary hearing is not necessary to admit cell phone location testimony under *Daubert*. *See, e.g.*, *Gatson*, 2015 WL 5920931, *1; *United States v. Jones*, 918 F. Supp. 2d 1, 6-7 (D.D.C. 2013); *Fama*, 2012 WL 6102700, *4.[7]

[7]The only case that the State has found that has rejected cell phone location testimony under *Daubert* is *United States v.*

Cameron does not cite any case law to support his contention that cell phone location methodology is unreliable. Instead, he relies on two reports by Dr. Daniel van der Weide, a professor of Electrical and Computer Engineering. *See* Cameron's brief at 22-23. He cites those reports for their assertion that various factors can affect the accuracy of locating a cell phone based on cell tower information. *See id*. at 23-24. But nowhere in his reports does Dr. van der Weide challenge the general principles underlying cell phone location mapping; he merely points out the factors that can affect the precision with which a phone's location may be determined (42:Exhibit B, B1-4; Exhibit C, C1-4; A-Ap. 69-76).

There are two reasons why Dr. van der Weide's report does not support the conclusion that Rodriguez's testimony was too unreliable to be admitted under *Daubert*. First, Rodriguez did not claim that she was able to identify a cell phone's locations with specificity. To the contrary, she repeatedly acknowledged in her direct examination

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Evans, 892 F. Supp. 2d 949 (N.D. Ill. 2012), where the court excluded as unreliable an FBI agent's use of a "granulization theory" to determine cell phone location. *See id.* at 955-57. Other courts have distinguished *Evans* or rejected its reasoning and allowed cell phone location testimony under *Daubert*. *See United States v. Pembrook*, 2015 WL 4612040, *19 (E.D. Mich. 2015); *United States v. Eady*, 2013 WL 4680527, *4-5 (D.S.C. 2013), *aff'd,* 599 F. App'x 116 (4th Cir. 2015); *United States v. Davis*, 2013 WL 2156659, *5-6 (S.D. Fla. 2013); *State v. White*, 37 N.E.3d 1271, 1280-81 (Ohio Ct. App. 2015); *see also Butler*, slip op. at ¶20 (R-Ap. 134) (noting that *Evans* found that testimony about granulization to be unreliable but that the use of cell phone records to determine the general location of a cell phone has been widely accepted by federal courts).

that she could not (79:83; 80:7, 8, 15). Nor did she testify that a cell phone always will connect with the nearest tower; she testified only that it would most likely do so (79:84).

Second, "the mere existence of factors affecting cell signal strength that the expert may not have taken into account goes to the weight of the expert's testimony and is properly the subject of cross-examination, but does not render the fundamental methodology of cell site analysis unreliable." *Jones*, 918 F.Supp.2d at 5; *see also State v. Giese*, 2014 WI App 92, ¶23, 356 Wis. 2d 796, 854 N.W.2d 687 ("The mere fact that some experts may disagree about the reliability of retrograde extrapolation does not mean that testimony about retrograde extrapolation violates the *Daubert* standard.").

Dr. van der Weide also picks some nits in Rodriguez's testimony. Cameron quotes a portion of one of van der Weide's reports that says that cell coverage "is not the precise 'piece of pie' depicted in Ex 193." *See* Cameron's brief at 23 (quoting 42:Exhibit B, at B2; A-Ap. 70). But neither Cameron nor van der Weide explain the extent to which a wedge of cell tower coverage may deviate from a "precise" piece of pie or why that deviation renders location mapping so unreliable as to be inadmissible under *Daubert*.

Dr. van der Weide also faults Rodriguez's testimony about a cell phone's range, writing that the range cannot "be determined so precisely as '4.82 km'" (42:Exhibit B, at B2; A-Ap. 70). *See* Cameron's

brief at 23. Dr. van der Weide and Cameron overstate Rodriguez's testimony. She did testify that the outer edge of the cell phone sector shown on her map was 4.82 kilometers from the tower, representing "the signal strength for that specific sector" (79:83). But she explained that the basis for the 4.82 kilometer maximum range was the information the cell phone company provided to her (*id*.). She also testified that cell towers are not 4.82 kilometers apart; their coverage overlaps to prevent calls from dropping (79:83-84). And again, neither Cameron nor van der Weide explain why Rodriguez's use of the 4.82 kilometer range provided by the cell phone company renders her methodology so unreliable as to be inadmissible under *Daubert*.

A lawyer is not ineffective for failing to make a meritless objection. *See State v. Reynolds,* 206 Wis.2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996). Because Cameron has not shown that Rodriguez's testimony would have been excluded had counsel objected on *Daubert* grounds, his lawyer was not ineffective for failing to make that objection.

C. Trial counsel was not ineffective for failing to present a defense expert.

Cameron also claims that his lawyer was ineffective for failing to obtain an expert to counter Rodriguez's testimony. *See* Cameron's brief at 33. He argues that "[a]s 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." *Id*.

But, as discussed above, Dr. van der Weide's report does not call into question the general validity or reliability of cell phone location mapping. While he identifies issues that may affect how precisely a phone's location may be determined, Rodriguez acknowledged that she could not locate a cell phone with specificity (79:83; 80:7, 8, 15).

Moreover, Dr. van der Weide did not perform his own analysis of the cell phone locations (42:Exhibit B, B1-4; Exhibit C, C1-4; A-Ap. 69-76). Had he done so, and had that analysis shown that the phones might have been located somewhere significantly distant from where Rodriguez placed them, that could have been significant evidence to counter her testimony. But without that type of counter-testimony, Cameron cannot carry his burden of demonstrating that counsel's failure to present an expert had an adverse effect on the defense that undermines confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694. This court should conclude, therefore, that trial counsel was not ineffective for failing to call a defense expert on cell phone mapping.

IV. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S CLOSING ARGUMENT.

As an alternative to his plain error claim based on the prosecutor's closing statements, Cameron

argues that his trial lawyer was ineffective for not objecting to those statements. He does not develop a detailed argument on that point, arguing only that he "can think of no objectively reasonable ground on which counsel would not have objected" and that the failure to object prejudiced him "as detailed above in the section regarding plain error." Cameron's brief at 33-34.

Cameron's ineffective assistance claim fails for the same reasons as does his plain error argument. His lawyer did not perform deficiently because there was an objectively reasonable basis for failing to object to the prosecutor's closing argument: the argument was proper. *See supra*, pp. 11-15. "It is well established that an attorney's failure to pursue a meritless motion does not constitute deficient performance." *State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). Nor was Cameron prejudiced by the failure to object, because the objection would not have been sustained and because the jury was instructed that "[t]he remarks of the attorneys are not evidence" and that "[i]f the remarks suggested certain facts not in evidence, disregard the suggestion" (81:54-55). Accordingly, the court should reject Cameron's claim that his trial counsel was ineffective for failing to object to the prosecutor's closing argument.

V. CAMERON IS NOT ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE.

Finally, Cameron asks this court to grant him a new trial in the interest of justice. Under Wis. Stat. § 752.35, the court of appeals may order a new trial in the interest of justice on either of two grounds: "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." *State v. Cleveland*, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543. Cameron seeks relief under the "real controversy not tried" branch. *See* Cameron's brief at 35. To establish that the real controversy has not been fully tried, a defendant must demonstrate "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." *Cleveland*, 237 Wis. 2d 558, ¶21 (quoted sources omitted).

An appellate court will exercise its discretion to grant a new trial in the interest of justice "'only in exceptional cases.'" *Id.* (quoting *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983)); *see also State v. Avery*, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60. Cameron's request for a new trial in the interest of justice simply rehashes his meritless claims that the cell phone location evidence was erroneously admitted and that the prosecutor's closing argument was improper. "Larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing; '[z]ero plus zero equals zero.'" *State v. Echols*, 152 Wis. 2d 725, 745, 449

N.W.2d 320 (Ct. App. 1989) (quoting *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976)).

This is not a "truly exceptional case." *Avery*, 345 Wis. 2d 407, ¶57. Accordingly, the court should deny Cameron's request for a new trial in the interest of justice.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 23rd day of November, 2015.

BRAD D. SCHIMEL
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

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 6,316 words.

_____

Jeffrey J. Kassel
Assistant Attorney General

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WITH WIS. STAT. § (RULE) 809.19(12)

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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 23rd day of November, 2015.

_____

Jeffrey J. Kassel
Assistant Attorney General

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP1088-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT LAVERN CAMERON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justic
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

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APPENDIX CERTIFICATION

I hereby certify pursuant to Wis. Stat. § (Rule) 809.19(3)(b) 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.

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Jeffrey J. Kassel
Assistant Attorney General

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Dated this 23rd day of November, 2015.

_____

Jeffrey J. Kassel
Assistant Attorney General