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 REPLY BRIEF

Respectfully submitted:

LAW OFFICE OF MATTHEW S. PINIX, LLC
1200 East Capitol Drive, Suite 220
Milwaukee, Wisconsin 53211
T: 414.963.6164
F: 414.967.9169
matthew@pinixlawoffice.com
www.pinixlawoffice.com

By: Matthew S. Pinix
State Bar No. 1064368
Attorney for Defendant-Appellant

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I. THE RODRIGUEZ EVIDENCE SHOULD HAVE BEEN OMITTED AND COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING IT.

A. The Circuit Court had an Obligation to act as a Gatekeeper, Even Absent Defense Counsel's Objection.

It is Cameron's position that a plain reading of *Daubert* demonstrates that a circuit court must act to ensure that only reliable expert testimony is presented to the jury, regardless of any objection. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993). Such sua sponte action is necessary to fulfill the court's role as a gatekeeper, which *Daubert* established and later Supreme Court cases have elucidated. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). Under that principle, argues Cameron, the circuit court erred in the instant case insofar as it unquestionably did not act as a gatekeeper when faced with expert witness testimony. *See Mike's Train House, Inc., v. Lionell LLC*, 472 F.3d 398, 407 (6th Cir. 2006).

The State takes the contrary position, arguing that an objection is necessary. St.'s Br. at 6-7. In support of its contention, the State points to *State v. Mayer*, 220 Wis. 2d 419, 430, 583 N.W.2d 430 (Ct. App. 1998). *Id.* at 5. But, *Mayer* is distinguishable; its rule was developed under Wisconsin's old expert-witness law, *see* 220 Wis. 2d at 429, 583 N.W.2d at 434, which was notably lax compared to the new rules, *see State v. Jones*, 2010 WI App 133, ¶ 22, 329 Wis. 2d 498, 791 N.W.2d 390

The new rules of evidence require a circuit court to play a more substantial role when it comes to expert testimony. *State v. Giese*, 2014 WI App 92, ¶18, 356 Wis. 2d 796, 854 N.W.2d 687. Circuit courts must now act as gatekeepers, subjecting purported expert

testimony to the rigors of a *Daubert* analysis. *See State v. Kandutsch*, 2011 WI 78, ¶ 26 n.7, 336 Wis. 2d 478, 799 N.W.2d 865. While it is true that *Mayer* concluded that a circuit court has no obligation to vet an expert's testimony absent an objection, 220 Wis. 2d at 430, 583 N.W.2d at 434, that holding is of limited value under Wisconsin's new evidentiary rubric, *cf. Jones*, 2010 WI App 133, ¶ 22 (describing difference between Wisconsin's old evidentiary rule and FRE 702). Given the revised Wis. Stat. § 907.02 and *Daubert*'s application in Wisconsin, *Mayer*'s analysis is not controlling.

The State's contention that Cameron's argument should be rejected simply because it is unsupported by legal authority rests on a faulty premise. *See* St.'s Br. at 5. The authority to which Cameron cited in support of his argument—*Daubert* itself—need not be supplemented with additional law. There is no higher court in the nation that the Supreme Court. That Court's articulation of the *Daubert* test and its application to the instant case is sufficient to demonstrate that the circuit court had an obligation to vet Rodriguez's testimony even absent an objection. Simply because lower courts from foreign jurisdictions have interpreted *Daubert* differently—as the State's brief argues[1]—is not determinative of the issue in Wisconsin. Instead, Cameron urges this Court to accept the proposition that a circuit court has an obligation to subject experts to *Daubert* regardless of counsel's objection.

[1] The State quotes an unpublished Fifth Circuit case to show that a party must object to preserve a *Daubert* challenge. St.'s Br. at 6-7 (quoting *United States v. Bates*, 240 F.3d 1073, unpublished slip op. at *3 (5th Cir. 2000). Under the rules of appellate procedure, *Bates* is of no relevance to this Court. Wis. Stat. § (Rule) 809.23(3)(a) ("An unpublished opinion may not be cited in any court of this state as precedent or authority . . .."). The State's reliance on it is misplaced.

B. Regardless of who was Required to Initiate *Daubert* Vetting, the Rodriguez Evidence Would not Survive the Challenge.

Determining the reliability of Rodriguez's testimony necessitates a rigorous examination of "the data on which [she] relie[d], the method by which [her] opinion [was] drawn from applicable studies and data, and [her] 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). In the instant case, Rodriguez offered no explanation as to whether her method of locating the cell phones "'can be (and has been) tested.'" *Kumho Tire*, 526 U.S. at 149-50 (quoting *Daubert*, 590 U.S. at 592, 594). She offered nothing to show that it "'has been subjected to peer review and publication.'" *Id.* She gave no answers regarding any "'known or potential rate of error'" or "whether there are 'standards controlling the technique's operation.'" *Id.* On the record before this Court, there is simply not enough evidence to show that Rodriguez's data, her method, or her application of that method to the data was reliable. Rodriguez's testimony did not "substantiate [her] opinion" regarding the location of the cell phones. *Clark v. Takata Corp.*, 192 F.3d 750, 757 (7th Cir. 1999). Instead, it constituted the provision of "only an ultimate conclusion with no analysis" and was therefore "meaningless" under *Daubert*. *Id.*

The State asserts that Rodriguez's testimony would survive *Daubert* because the use of cell phone records to determine the location of cell phones is well-established. St.'s Br. at 18.

Contrary to the State's suggestion, the reliability of using cellular call data records to establish the location of a cellular device—as was done in the instant case—is widely disputed. *See* Aaron Blank, *The Limitations & Admissibility of Using*

Historical Cellular Site Data to Track the Location of a Cellular Phone, 18 Rich. J.L. & Tech. 3, 13-14 (2011) (available at http://jolt.richmond.edu/v18i1/article3.pdf) ("[W]hen triangulation is not possible, the problem with using historical cell site records [to prove location] is that they '"were never intended to and do not indicate location of the [cell phone] in relation to any cell site."' (footnote omitted)), Matthew Tart, et al., *Historic cell site analysis – Overview of principles and survey methodologies*, 8 Digital Investigation 185, 191-192, 193 (2012) ("There are a range of factors which impact on the cell which a handset will select at a given location and therefore appear in the Call Data Record generated by a call at a specific location."), Michael Cherry, et al., *Cell Tower Junk Science*, 4 Nat'l Legal Aid & Def. Ass'n: Cornerstone Centennial 20 (2012) ("It takes simultaneous information from at least three different locations, to track a caller and determine his latitude and longitude."). The problems associated with using only tower connectivity data to locate a device were further detailed in Dr. van der Weide's report. The reliability of Rodriguez's conclusions—that particular phones were in particular locations at particular times—is not the forgone conclusion that the State suggests.

And, even so, merely because a thing is well-established does not mean that it is reliable. The use of forensic hair sample analysis was, for a long time, a well-accepted method by which to identify perpetrators. *See, e.g., State v. Hicks*, 202 Wis. 2d 150, 165-66, 549 N.W.2d 435 (1996). However, that well-accepted methodology has since been rejected as unreliable. *See* Nat'l Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 158-161 (Nat'l Acad. Press 2009). In 2009, the National Academy of Sciences recognized "the imprecision of microscopic hair analyses" and "found no scientific support for the use of hair comparisons for individualization in the absence of nuclear DNA." *Id.* at 161. Largely because of the NAS report, the FBI in

2012 reexamined thousands of closed cases in which a person was convicted based on hair sample evidence. Spencer S. Hsu, *U.S. reviewing 27 death penalty convictions for FBI forensic testimony errors*, Washington Post, July 17, 2013 (available at http://wapo.st/1qP20Lc). The FBI's "review of forensic evidence has [since] found widespread problems" including "flawed forensic testimony" claiming to match a suspect's hair and "a crime-scene sample before DNA testing of hair became common." Spencer S. Hsu, *Federal review stalled after finding forensic errors by FBI lab unit spanned two decades*, Washington Post, July 19, 2014 (available at http://wapo.st/1oIkydK). Simply because a forensic technique is well-established is not determinative of its reliability. Nor does it demonstrate that a particular expert's data, methods, or application of the method to the data is reliable.

In fact, as Cameron has explained, Rodriguez's testimony is unhinged from reliable methods and principles. Cameron's Br. at 22-25. She based her conclusions on unscientific and unsupportable assumptions about radio wave propagation. *Id.* She failed to properly understand the functionality of the very cellular network about which she was testifying. *Id.* And, she was mute about any testing she had done to establish the viability of her assertions. *Id.* As such, her testimony was unreliable and she was unqualified to offer it. *See Kumho Tire*, 526 U.S. at 149-50.

Relevantly, the State does not rebut Cameron's assertion that Rodriguez was not qualified to offer expert testimony. But, as the proponent of the evidence, it was the State's burden to establish Rodriguez's qualifications. A case from which the State quotes at length in its response is demonstrative of what was missing from Rodriguez's testimony. *See* St.'s Br. at 18-19 (quoting *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 (S.D.N.Y. 2006)). Across four paragraphs, the Southern District details facts about cellular telephone transmissions that were wholly absent from Rodriguez's testimony. *In re Application for Order*, 460 F. Supp at 450-51. As but one example, the court explains the fact that it is not the *nearest* tower to which a phone likely will connect, but rather the tower from which the phone is receiving the *strongest* signal. *Id.* Rodriguez's failure to note even that simple proposition is exemplary of her lack of qualification to testify as an expert about where certain phones were located at certain times.

Thus, on the record before this Court and pursuant to Wisconsin's evidentiary law, Rodriguez's testimony regarding the location of certain cell phones at certain times was improper expert testimony. It should have been excluded. As a gatekeeper, the circuit court should have prevented it from going to the jury.

Even if this Court does not agree that the circuit court had a duty to exclude Rodriguez's testimony absent an objection, then Cameron's counsel was deficient and prejudicial for not objecting because that inaction allowed improper evidence to go to the jury as a key component of the State's case.[2] *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984).

[2] Of course, before trial counsel can ultimately be deemed deficient, he would have to be offered an opportunity to explain why he did not object. *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). Cameron argued for a *Machner* hearing below, R.42:20, and again in his first brief to this Court, Cameron's 1st Br. at 34-35.

C. Even if the Rodriguez Evidence Would Have Survived a *Daubert* Challenge, Cameron's Counsel Should Nonetheless Have Attacked it.

Admissibility is not determinative of believability. Simply because evidence can be admitted does not mean that it cannot be diminished before the jury. Cameron's counsel should have attacked Rodriguez's testimony, even if it was admissible.

However, Cameron's attorney never presented any testimony regarding the problems inherent to Rodriguez's use of cell tower connectivity to opine on the location of a cellular device. In the absence of such testimony, the jury never heard about the limits of call record data to establish phone location. It never heard about the limits of radio wave propagation and the effect that an urban environment can have on cell tower connectivity. It never heard about cell towers becoming overloaded and not being able to service a call from a phone within range. It never heard that the strongest signal, not the nearest one, is determinative of connectivity. It never heard that even text messages get routed through a cell tower, despite Rodriguez's claim to the contrary. It never heard that the area serviceable by a tower is not so clearly defined as Rodriguez purported.

Instead, the jury was presented with only Rodriguez's unscientific and unsupportable assumptions about the connectivity of cellular devices and cell towers across a cellular network. Those assumptions formed the basis of Rodriguez's conclusions that certain phones were in certain places at certain times.

A defense expert like Dr. van der Weide could have explained the problems with Rodriguez's assumptions, detailed the limitations inherent to the method that she applied, and shot holes in the State's

claim that the call record data established that certain phones were in certain places at certain times. Diminishing the reliability of Rodriguez's methods and conclusions by testimony from a defense expert would have bolstered Cameron's defense by striking a blow to important evidence that the State used to argue the believability of its key witness. The failure to attack the Rodriguez evidence strikes any confidence in the outcome, and renders counsel's performance both deficient and prejudicial.[3]

Thus, even if the Rodriguez evidence could have been admitted, his counsel was ineffective in not rebutting it. *See Strickland*, 466 U.S. at 687, 694.

II. THE PROSECUTOR'S CLOSING ARGUMENT WAS PLAIN ERROR WARRANTING A NEW TRIAL, AND CAMERON'S ATTORNEY WAS INEFFECTIVE FOR NOT OBJECTING.

Cameron asserts error in the prosecutor's closing argument on grounds of both plain error and ineffective assistance for failure to object.

The State rightly points out that, in the plain error context, this Court must look to "the entire record of the trial" to ascertain whether "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 *State v. Davidson*, 2000 WI 91, ¶ 88, 236 Wis. 2d 537, 613 N.W.2d 606); *see also* St.'s Br. at 10.

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[3] Again, a hearing would be necessary to ultimately decide counsel's deficiency, and Cameron has argued for one. *See supra* at 5 n.2. But, as Cameron has alleged, either objecting or presenting an expert would have advanced his defense and there is nothing in the record to show counsel's failure to act reasonable. It is up to counsel's testimony to explain the reasonableness of his actions, and a hearing is thus warranted.

In the instant case, the record demonstrates that the prosecutor's attestation of belief in Mr. Smith's truthfulness was not limited only to closing. The prosecutor's direct examination of Smith was permeated with leading questions meant to establish before the jury the truthfulness of his inculpatory statement:

- "And you had to tell us the truth, correct?" (R.80:94);
- "And no deals were made at this time; you are basically told you got to come in and you got to tell us the truth; and then we'll decide if you get a deal?" (*Id.*:94)
- "Now, after this truthful statement, which is what you signed the agreement for . . .." (*Id.*:97);
- "Your deal is contingent upon truthful testimony, isn't it?" (*Id.*:102)
- "You weren't honest with detectives at first, but eventually you did tell them the truth, did you not?" (*Id.*:102)

Then, in closing, the prosecutor revived the same theme that he started by leading Smith through his direct examination. (R.82:21-22.) He told the jury that Smith was truthful only when he admitted his involvement in Cameron's crime. (*Id.*) The prosecutor repeated that opinion at least three times. (*Id.*) And, he juxtaposed the asserted truthfulness of Smith's inculpatory statement against the lie that was Smith's first statement, which denied any involvement in the crime. (*Id.*)

Thus, the prosecutor's comments in closing about Smith's truthfulness were not some isolated event. Instead, they were the culmination of a theme that the prosecutor began during Smith's direct examination. A full review of the record shows that the prosecutor's comments on Smith's truthfulness "so infected the trial with unfairness as to make

[Cameron's] conviction a denial of due process." *Miller*, 2012 WI App 68, ¶ 19 (quoted authority omitted). The comments were thus plain error and warrant a new trial.

But, even if the error in the prosecutor's comments is not plain, it was objectionable. Cameron's trial counsel should have objected; that he did not was both deficient and prejudicial.[4]

III. LACK OF SUCCESS ON THE MERITS OF CAMERON'S ALTERNATIVE CLAIMS IS A CONDITION PRECEDENT TO RELIEF IN THE INTERESTS OF JUSTICE.

The State argues that Cameron is not entitled to relief in the interests of justice because his alternative claims do not merit relief. St.'s Br. at 26. To the State, otherwise meritless claims cannot stand as a ground for relief in the interest of justice. *Id.* ("Larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing; zero plus zero equals zero." (quoted authority & alteration omitted)).

However, for this Court to properly exercise its discretion under Wis. Stat. § 752.35, it must first consider and determine any alternative claims "unsuccessful" before deciding "that reversal is nevertheless appropriate" in the interests of justice. *State v. Kucharski*, 2015 WI 64, ¶ 43, 363 Wis. 2d 658, 866 N.W.2d 697. Thus, simply because Cameron's alternative claims do not warrant relief does not dictate that interests of justice reversal is unavailable. *Id.* Instead, so holding is a condition precedent to interests of justice relief. *Id.*

Thus, even if this Court determines that Cameron's alternative claims lack merit, that alone does not elimintate his right to relief in the interests of justice. Instead, under *Kucharski*, so holding is

[4] *See supra* at 6 n.2 & 8 n.3.

required before Cameron can benefit from reversal in the interests of justice. *Id.*

CONCLUSION

For those reasons and the reasons stated more fully in his first brief, Cameron asks this Court to grant him a new trial. In the alternative, he asks this Court to remand his case for a hearing on his ineffective assistance claim.

Dated this 30th day of December, 2015.

Matthew S. Pinix
Attorney for Defendant-Appellant

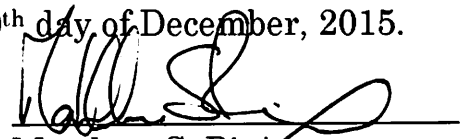
CERTIFICATION

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 2,982 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 30th day of December, 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 December 30, 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 30th day of December, 2015.

Matthew S. Pinix
Attorney for Defendant-Appellant