STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD LEE GILBERT,

Defendant-Appellant.

APPEAL NO. 2016-AP-1852-CR
Milwaukee County Case No. 12-CF-626
Hon. Dennis Cimpl & Hon. Stephanie Rothstein, presiding

BRIEF FOR APPELLANT

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ISSUE PRESENTED FOR REVIEW

Should Gilbert's conviction be overturned and a new trial granted due to ineffective assistance of counsel, or, in the alternative, should the trial court have granted Gilbert's lesser request for an evidentiary hearing?

Answer below:

The circuit court denied Gilbert's request for an evidentiary hearing except with respect to a single issue involving the State's use of cell phone data at trial, and summarily denied Gilbert's post-conviction motions in all other respects.

STATEMENTS ON ORAL ARGUMENT AND PUBLICATION

Gilbert does not request oral argument in this matter, which appears to meet the statutory criteria for submission on briefs. Wis. Stat. (Rule) § 809.22(2).

Because, among other things, this appeal asks the Court to clarify the appropriate scope of lay testimony on reconstructive cell phone tracking in Wisconsin criminal cases, Gilbert requests publication of the opinion in this matter. Wis. Stat. (Rule) § 809.23(1)(a)1., 5.

STATEMENT OF THE CASE

Ronald Lee Gilbert appeals from felony convictions for trafficking of a child, second-degree sexual assault of a child, and intentional child abuse. The charges against Gilbert are serious, but so are the deficiencies in counsel's performance in representing Gilbert at trial. This appeal concerns those deficiencies and the prejudice resulting to Gilbert.

I. J.D.E.'s Version(s) of Events

On the morning of January 12, 2012, a Milwaukee police officer found a 14-year-old girl alone at the College Avenue Park-&-Ride, near Oak Creek. (R.97:103).[1] The girl, J.D.E., said she had been kicked out of a hotel room at a nearby Econolodge. (*Id.* at 48, 104-105). J.D.E. told the officer she "was being forced to have sexual relations with the occupant of the room, as well as being prostituted by this individual." (R.58, Ex. 3 at 6). She had engaged in prostitution dates for this man—"Woadie Mac"—and another individual—a woman named "Tish"—over a period of four days. (*Id.* at 7). J.D.E. had given all of the money from her "dates" to Woadie Mac. (*Id.*) J.D.E. said both Woadie Mac and Tish were still at the Econolodge. (*Id.*)

Police went to the Econolodge room with J.D.E. and found two individuals there: Brandon Pratchet and Natisha Shannon. (R.58, Ex. 3 at 7). These two individuals matched the descriptions of Woadie Mac (who also went by "P") and Tish, respectively. (*Id.*) While at the Econolodge, J.D.E. told police she had been brought there by another individual, whom she also called "P." (*Id.*) According to J.D.E., this individual invited her to Milwaukee for a meal and to go

[1] All citations to the record on appeal are denoted "R.#:#", where the number following "R." corresponds to the record number of the item and any numbers following the colon correspond to page numbers.

shopping at the mall. (*Id.*) He picked J.D.E. up from her home in Racine, dropped her off at the Econolodge, and left. (*Id.* at 7-8).

Despite initially stating she was "forced" to have sex with Pratchet, J.D.E. now admitted to having consensual sex with him once upon arriving at the hotel room. (R.58, Ex. 3 at 8-9). J.D.E. would later volunteer that she had sex with Pratchet *four* times, not just once. (*Id.* at 18). But when she attempted to leave, J.D.E. and Pratchet fought in the hotel lobby, where J.D.E. said Pratchet spit in her face. (*Id.* at 8). J.D.E. also added that Pratchet and Shannon had created a prostitution web posting for her on "Backpage.com." (*Id.* at 8, 12).

Pratchet denied prostitution was occurring in the hotel room. (R.58, Ex. 3 at 9). He stated he never went anywhere with J.D.E. and never had sex with her. (*Id.*) The contents of the room told a different story: police found cash, multiple unused condoms, used condom wrappers, "prostitution notes," a red wig, and a "teacher's pet" outfit in the room. (*Id.* at 9-10). Pratchet and Shannon were taken into custody. (*Id.* at 10).

Police interviewed J.D.E. a third time. (R.58, Ex. 3 at 11). During this interview, J.D.E. confirmed she was brought from Racine to the Econolodge by "P", whom she had met on a chat line. (*Id.*) Now, however, J.D.E. added a significant interlude involving this third individual, telling police for the first time that she *left* the Econolodge with P, went to his house and had consensual sex with him twice, then went to a friend's house and had consensual sex a third time there. (*Id.*) J.D.E. also believed P had taken her to his sister's home, but was unable to identify any of the locations in Milwaukee where she had been taken. (*Id.*) In this version, J.D.E. and P left his sister's house and headed back to the Econolodge. (*Id.*

at 12). When they arrived at the Econolodge, P did not go inside, but Pratchet came out of the hotel. (*Id.*) J.D.E. claimed she observed Pratchet give P cash and an object that looked like stereo equipment (*Id.*) J.D.E. then stayed at the hotel with Pratchet and Shannon. (*Id.*)

This version of J.D.E.'s story added yet another appearance by "P." J.D.E. now claimed that approximately halfway into her time at the Econolodge, P reappeared there—drunk and stating he was taking her back. (R.58, Ex. 3 at 14). When J.D.E. refused to go with him, P became angry and pushed her onto the bed, grabbing her neck. (*Id.*) When she attempted to get up, P struck her on her left cheek. (*Id.*) J.D.E. ran for the hotel door and P struck her again. (*Id.*) She fell to the ground and Pratchet intervened before P could do more. (*Id.*) P then left. (*Id.*)

From here, J.D.E.'s third interview rejoined her previous narrative. She told police she went on five "dates" while at the Econolodge and gave all of the money from these dates to Pratchet. (R.58, Ex. 3 at 12-13). Three days later, Pratchet took J.D.E. to the beauty store, where he bought her hygiene products. (*Id.* at 13). At this point, J.D.E. said, Shannon was angry with her because Pratchet and J.D.E. had been having unprotected sex. (*Id.*) The next day, J.D.E. took a call from another pimp. (*Id.*) Upon hearing the conversation, Pratchet became angry and kicked J.D.E. out of the hotel room, leading to her Park-&-Ride encounter with police. (*Id.* at 13-14).

II. Pratchet's Version of Events

On Tuesday, January 13, 2012, police interviewed Pratchet in custody. (R.58, Ex. 3 at 16). "I don't want my life going down for this," Pratchet told police eight minutes into the interview. (Tr. Ex. 8 at 8:15). Pratchet's interviewer suggested he cooperate: "If you have more information to give me regarding other people, I'm willing to take that and I'm willing to run with it." (*Id.* at 8:30). "Please," begged Pratchet. "I'll do anything." (*Id.* at 8:55). After further discussing the benefits of cooperation, Pratchet reiterated: "I don't want to go to court for this. I'm telling you, I will do anything—I will do *anything*—to get me off any crime I did." (*Id.* at 11:55).

Pratchet then admitted involvement in prostitution and identified the individual who had brought J.D.E. to the Econolodge as Ronald Gilbert. (R.58, Ex. 3 at 16). However, "he didn't work with me to bring her here," Pratchet clarified. (Tr. Ex. 8 at 10:15). "I didn't even know that he had her with him until he came through the door." (*Id.*) "As he was walking through the door, she was coming in behind him, and he's, 'Oh, I got my friend with me.'" (*Id.* at 10:55).

Later, however, Pratchet stated he gave Gilbert $100 and an "amp" in exchange for J.D.E. (R.58, Ex. 3 at 18). According to Pratchet, J.D.E. did *not* see this transaction. (*Id.*) Pratchet did not describe any further involvement by Gilbert. In Pratchet's telling, Gilbert never returned to the Econolodge after leaving J.D.E. there, and there is no mention of the physical confrontation between Gilbert and J.D.E. described by J.D.E. in her latest statement to police.

Pratchet contradicted other key elements of J.D.E.'s story. He said J.D.E. kept all of the money from her dates and spent it on clothes and other items for herself. (*Id.* at

17). Pratchet also contradicted J.D.E.'s recollection of her departure from the Econolodge, claiming that when she left, he did not spit in her face. (*Id.*)

III. Gilbert's Arrest and Preliminary Proceedings

Two weeks later, on January 24, 2012, J.D.E. identified P as Ronald Lee Gilbert out of a photo array. (R.58, Ex. 3 at 18). Police arrested Gilbert two days later, seizing an amplifier from his car. (R.99:69-70; R.98:78). On January 31, 2012, the State filed a criminal complaint charging Gilbert with trafficking of a child, second degree sexual assault of a child, and physical abuse of a child, contrary to Wis. Stat. §§ 948.051(1), 948.02(2), and 948.93(2)(b). (R.1).

Attorney Robert Taylor represented Gilbert at trial. (R.96:3).[2] Mr. Taylor was licensed in 1979. His license was summarily suspended following his conviction for felony theft from two clients, and was revoked on the same basis in 1987. As of 2003, Taylor's license had not been reinstated, but was revoked retroactively effective December 14, 1992 for numerous other violations, including neglect of a legal matter. Taylor's license to practice law was reinstated over OLR's objection in 2006, at which point Taylor still had not made restitution to his clients for the embezzlement resulting in his 1986 convictions.

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[2] The facts that follow are drawn from *Disciplinary Proceedings against Taylor*, 148 Wis. 2d 708, 436 N.W.2d 612 (1989), *Disciplinary Proceedings against Taylor*, 2003 WI 34, 261 Wis. 2d 45, 660 N.W.2d 686, and *Reinstatement of Taylor*, 2006 WI 112, 296 Wis. 2d 66, 720 N.W.2d 456. The Court may take judicial notice of these facts pursuant to Wis. Stat. § 902.01(6), as public records of judicial proceedings are "not subject to reasonable dispute" and are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonable be questioned." Wis. Stat. § 902.01(2)(b). *See also* Wis. Stat. § 902.01(4) (court must take judicial notice "if requested by a party and supplied with the necessary information").

On May 16, 2012, after making a plea deal in his own case and days before Gilbert's trial, Pratchet gave a new statement to police. (R.115, A-103). Portions of this statement confirmed Pratchet's initial version of events, but with more detail. For instance, in describing the alleged transaction for J.D.E., Pratchet said he kept the amplifier under his coat so no one could see the transaction. (*Id.*) Only after Gilbert told J.D.E. to get out of the car did Pratchet get in and give him the amp and the money. (*Id.*)

Other elements of Pratchet's statement contradicted the police's theory of the case. In particular, when police showed Pratchet a picture of the silver amplifier found in Gilbert's car upon his arrest, Pratchet said that was *not* the amp he had traded for J.D.E. (R.115, A-104). The State never introduced evidence of any other amplifier found in Gilbert's possession.

But Pratchet also added new elements to his story—elements that conveniently matched J.D.E.'s latest version of events. For the first time, Pratchet told police Gilbert returned to the Econolodge after dropping J.D.E. off there. (R.115, A-103). He claimed Gilbert punched J.D.E. in the head, then admitted he did not see this happen, but heard about it from J.D.E. afterwards. (*Id.* at A-103-104). Pratchet also claimed for the first time to have stopped Gilbert from kicking J.D.E. (*Id.* at A-104).

Closer to the time of trial, the State noticed the expert testimony of Detective Richard McKee, who may "testify as to what steps trained officers and technicians take in order to extract information from cellular phones … and discuss what information of relevance was obtained as a result of this process…" (R.11:1). The State also noticed Detectives Lynda Stott and/or Dawn Jones to testify with respect to "pimp subculture." (R.12:1).

IV. Jury Selection

Voir dire commenced on May 21, 2012.[3] During voir dire, the court asked whether anyone present felt they could not be involved in a sexual assault case. (R.96:17). Juror 15 responded, "I just—I just don't think I could be involved in a case that's involved rape." (*Id.*) The court asked whether Juror 15 could fairly listen to the evidence. (*Id.* at 17-18). Juror 15 responded, "I couldn't say positive, no." (*Id.* at 18). Later, the court asked whether Juror 15 "could set aside anything you know [about a previous case] and judge this case on the evidence as I define it for you and the law as I give it to you?" (*Id.* at 80). Juror 15 responded affirmatively. (R.96 at 80). Based on these answers, the court indicated to counsel for both parties that Juror 15 was among those who "have indicated that they can't be fair," and proposed striking her for cause. (*Id.* at 86-87). Counsel agreed, and Juror 15 was struck from the jury. (*Id.*)

Shortly thereafter, the State asked the remaining panel: "Is there anyone here who's a victim, who hasn't spoken up, who thinks that that experience makes it so they *can't be fair and impartial*?" (R.96 at 96) (emphasis added). One panelist raised her hand. (*Id.*)

The panelist, Juror 29, responded: "To be honest with you, I really don't know. I was the victim of an armed robbery at my place of employment." (*Id.*) The State asked Juror 29 again whether, because of that experience, she might have trouble being fair and impartial. (*Id.* at 97). She responded, "I might" and "Yes, I might," then added: "I—I can't say. I haven't heard the evidence. I can't—So I'm—I'm not going to say that I can honestly put it aside. I don't know." (*Id.*) Despite volunteering her inability to be fair and impartial,

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[3] The Honorable Dennis Cimpl presided over trial and sentencing proceedings. (R.95-105).

and even though the court struck Juror 15 for cause after equally unsettling responses, Juror 29 was seated as a juror at Gilbert's trial. (*Id.* at 127). Defense counsel made no objection.

V. Trial Evidence

Nine witnesses testified at trial for the State. (R.97-101). The State's primary witnesses, Pratchet and J.D.E., testified that on January 7, 2012, Gilbert introduced J.D.E. to Pratchet at an Econolodge near General Mitchell Airport. (R.98:6-30, 105-109). They further testified that Gilbert left with J.D.E. and returned a few hours later to sell J.D.E. to Pratchet for $100 and a piece of stereo equipment. (*Id.* at 30, 112-116).

When asked about the exchange for J.D.E., Pratchet—consistent with his pretrial police interviews—denied that J.D.E. saw the transaction. (R.99:47). On re-direct, perhaps recognizing this impeached J.D.E.'s testimony, the State pressed Pratchet to admit he was uncertain whether J.D.E. saw the exchange. (*Id.* at 50). But Pratchet remained adamant that J.D.E. left the car and immediately walked away. (*Id.* at 51). According to Pratchet, J.D.E. only knew about the exchange because:

> I believe that I once told her that I exchanged the money and another item to keep her, I believe that she may have believed when I shook hands with Gilbert through the driver's side window that I gave him money. *It's all made up.*
>
> (R.99:51-52) (emphasis added)

J.D.E. testified that after she initially met Pratchet, Gilbert drove her around Milwaukee, had sex with her, and attempted—unsuccessfully—to solicit her for prostitution. (R.98:6-30). Both J.D.E. and Pratchet testified that, three

days after J.D.E. joined Pratchet, Gilbert returned to the hotel to retrieve her. (*Id.* at 32-37; R.99:18-26). They testified that, when she refused to leave, Gilbert struck her in the head and attempted to kick her. (R.98:32-37; R.99:18-26).

An officer testified that an amplifier was seized from Gilbert's car at the time of his arrest and the jury was shown photos of this amplifier. (R.97 at 60; R.98 at 78; Tr. Ex. 1). The defense did not object to the introduction of these photos or make any attempt to elicit the fact that Pratchet had confirmed this was *not* the amplifier he had given Gilbert.

The defense presented no witnesses, other than Gilbert himself. (R.100 at 35). Gilbert said he met J.D.E. on a telephone chat line on January 7, 2012, where she claimed to be 19 years old. (*Id.* at 35-36, 39). After picking her up from Racine at her invitation, Gilbert drove to the Econolodge to meet up with Pratchet to smoke marijuana. Upon arriving at the hotel, Gilbert, J.D.E., Pratchet and Shannon all spent approximately half an hour together getting high. (*Id.* at 42). After using the restroom, Gilbert asked J.D.E. to leave with him to get some food. (*Id.* at 44). J.D.E. refused and said she wanted to stay at the hotel. (*Id.*) Gilbert then left the Econolodge and never saw J.D.E. again. (*Id.* at 44-46). Gilbert categorically denied having any sexual or other physical contact with J.D.E. and denied receiving any form of payment from Pratchet. (*Id.* at 45-47).

To impeach Gilbert's testimony on the basis of his cell phone records, the State called Detective Dawn Jones.[4] (R.101:3). Jones had been noticed for her knowledge of "pimp subculture" (R.12:1), but was not offered as an expert in cell phone tracing.

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[4] Detective Jones testified earlier about Gilbert's cell records, but limited her testimony to identifying the towers to which Gilbert's phone connected. (R.99:73-85).

Jones testified that she took Gilbert's cell phone records to a "fusion center" where another officer, Detective Brosseau, put the records into a "mapping program." (R.101:19-22). The program generated maps "to put [the records] into layman terms, easily understood." (*Id.* at 22). The State introduced ten maps purportedly generated from Gilbert's phone records. (*Id.* at 22; Tr. Ex. 15). The maps depicted circles divided into three equal sectors with a cell tower as the center point and one sector shaded. (*Id.* at 27).

Personally interpreting the maps, Jones told the jury that each sector spanned a mere "120 feet", which the prosecutor made a point of emphasizing:

> Q. Do you have any idea sort of the number of perhaps miles that this sector spans or not?
>
> A. It's about 120 feet.
>
> Q. Oh, okay. So it would be far less than miles then?
>
> A. Right.
>
> (R.101:27:20-25)

Jones also told the jury that one sector on each map was shaded blue "because that would be where the cell phone is." (R.101:27). Jones said the maps pinpointed the location of Gilbert's phone as it was being used to place or receive calls at specific times on January 7, 2012. (*Id.* at 27-39).

One map showed Gilbert's phone located in a shaded area that included the Econolodge around midnight that night. (R.101:38). Again, Jones told the jury this meant Gilbert's phone was within "about 120 feet" of the Econolodge at that time, entirely undercutting Gilbert's testimony. (*Id.* at 39). Attorney Taylor did not cross-examine Detective Jones and did not call any witness, expert or otherwise, in rebuttal. (*Id.* at 43).

VI. Closing Arguments

In closing arguments, the State told the jury the case rested on witness credibility. (R.102:43). The State argued Gilbert lied to the jury when he said he never went back to the Econolodge. (*Id.* at 19). As proof, the State pointed to the cell phone tower maps which showed Gilbert's phone "lighting up right next to the Econolodge, within 100 feet or so…" (*Id.*) The State also vouched for J.D.E. and Pratchet as more credible than Gilbert because their testimonies matched and they never had a chance to collude. (*Id.* at 48).

Attorney Taylor closed by arguing the jury could believe no one, including his client:

> You have the victim. You have this coactor fellow who took—made a deal with the State, and you have Gilbert. *I'm not sure I believe any of them*, to be quite frank. A little bit here, a little bit there, but *I'm not sure I believe any of them*. […] Maybe they get this, but morality is what's missing here. *There's no good guys*.
>
> (R.102:30) (emphasis added)

In further reference to his own client, Attorney Taylor told the jury:

> In this country, you know, we would rather—as bad as it may sound, it's true—*let some scumbags go free* because we can't find that person guilty if we don't have enough evidence.
>
> (R.102:34) (emphasis added)

On that note, the jury retired to deliberate.

VII. Gilbert's Conviction and Sentencing

The jury found Gilbert guilty on all three counts and the court entered judgment on the verdict. (R.103:2-3, 6-7). Shortly thereafter, Gilbert asked the circuit court for a new attorney. (R.27). Attorney Taylor joined Gilbert's request and withdrew as counsel of record. (R.28:2; R.104).

Attorney Michael Hicks was appointed to represent Gilbert at sentencing. (R.105). Attorney Hicks argued that Gilbert maintained his claim of innocence and informed the court that, in his professional opinion, the jury's verdict was unreliable because there were significant problems with the trial. (*Id.* at 18-20). Attorney Hicks highlighted the errors as he perceived them and recommended a time-served sentence. (*Id.* at 18-24). The court rejected that request and sentenced Gilbert to 22 years of initial confinement and 12 years of extended supervision. (*Id.* at 41).

VIII. Gilbert's First Post-Conviction Motion

Following sentencing, Gilbert timely filed a notice of intent to pursue post-conviction relief. (R.38). Attorney Michal Zell was appointed post-conviction counsel. (R.45).

Gilbert filed his first motion for post-conviction relief in November of 2013, alleging trial counsel was ineffective for failing to (1) object to the expert testimony of Stott and Jones on *Daubert* grounds; (2) obtain necessary pre-trial discovery; (3) object to the admission of undisclosed evidence; (4) object to improper other acts evidence; (5) impeach the victim with prior inconsistent statements; and (6) object to scientific "cell tower" evidence introduced without expert testimony. (R.45). As relevant here, Gilbert argued that Attorney Taylor did not obtain critical pieces of evidence before trial, including the cell-tower location maps

introduced by the State. (*Id.* at 15-16). Gilbert also attached the declaration of Michael O'Kelly, an expert in cell phone tower technology, which pointed out errors and distortions in the State's cell-tower maps. (*Id.* at 17-21).

The circuit court ordered briefs.[5] (R.47). In its response, the State disputed Gilbert's claims, but conceded Detective Jones was not qualified to testify as an expert witness. (R.58 at 16-17). However, the State argued an expert witness was not required to testify because the maps were produced by a computer program and did not require specialized knowledge to explain. (*Id.*)

Yet at the same time, the State attached a "Notice of Expert and Summary of Expert Testimony" of Milwaukee Police Officer Brian Brosseau, who now offered to opine on Gilbert's arguments regarding the cell tower records. (R.58, Ex. 4). The State also attached an affidavit from Attorney Taylor purporting to refute Gilbert's claim that he did not receive critical discovery in advance of trial. (R.58, Ex. 1).

Two weeks later, the State presented a supplemental affidavit from Attorney Taylor. (R.59:1-2). Taylor now stated he had had an opportunity to check his storage locker over the prior weekend and "did locate what appear[ed] to be the remainder of Ronald Lee Gilbert's file," which included "cell phone records and related materials." (*Id.*) Taylor claimed he had not previously provided this information to Attorney Hicks because he did not believe Hicks needed it for sentencing purposes. (*Id.*) Further, Taylor stated he would have provided these materials if Attorney Hicks had requested them. (*Id.*)

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[5] The Honorable Stephanie G. Rothstein presided over post-conviction proceedings.

Gilbert then filed a supplement to his post-conviction motion which included copies of emails between Attorneys Hicks and Taylor. (R.71:1-8). This submission confirmed that after receiving Gilbert's file from Taylor, Attorney Hicks met with Gilbert, and Gilbert informed Hicks there were contents missing from the file. (*Id.* at 5). After repeated requests from Hicks to obtain the missing files, Taylor responded three months later. (*Id.* at 5-8). Taylor told Hicks the State's attorney "would look into the matter and if there is such a CD, she would forward the same to you." (*Id.* at 8).

Once briefing was complete, the circuit court ordered an evidentiary hearing for the sole purpose of determining whether Detective Jones' testimony regarding the cell phone data "was erroneous or inaccurate, and if so, whether it prejudiced the defendant's case in any respect." (R.68:1-5). It denied the remainder of Gilbert's motion on the face of the pleadings and briefs. (*Id.* at 5).

IX. The Evidentiary Hearing

On August 7, 2014, the parties appeared for an evidentiary hearing. (R.106, R.107). Defense expert Michael O'Kelly opined that the State's cell phone tower maps were misleading for multiple reasons, of which two stand out.

First, O'Kelly explained, it is "completely impossible" to use historical cell phone records to place a phone within 100 feet of a certain location, as Detective Jones told the jury at trial. (R.106:47:22-48:6). That is because cell tower ranges are measured in miles, not feet. The underlying data provided by U.S. Cellular in this case showed that the cell towers at issue had radial ranges of three miles. (*Id.* at 32-33, 38). Officer Brosseau, the State's post-conviction expert, testified that in his personal experience, the effective range of cell towers in the Milwaukee metropolitan area was 1.1

miles. (*Id.* at 95-96). Either way, even Officer Brosseau agreed that "if you're getting a sector and a tower, you are not getting data within 100 feet or anything of that nature." (R.107:12:6-10).

Second, using historical cell phone records to prove Gilbert's location at a given time misled the jury. (R.106:21-22, 33, 51). O'Kelly observed that it "would be impossible to be accurate" based upon the data available to the State because, among other things, the State's maps failed to account for cell-tower "jumping." (*Id.* at 22, 46-47).

The State's analysis assumed phones automatically connect to whichever tower is closest. (R.106:52-53). But a phone connects to a particular tower depending on a variety of factors, like day of the week, weather, heavy traffic, and special events. (R.106:48-52). During periods of heavy traffic, for example, one sector of a cell tower may cover more area than usual, suggesting a phone is in an area where it is not. (*Id.* at 50-53). And in O'Kelly's expert experience, cell carriers prioritize signal clarity and strength before tower location. (*Id.* at 52-53).

As a result, cell phones can connect to a tower that is one or even two towers away, distorting the physical location of the phone. (*Id.* at 47). As such, it is misleading to say the "shaded area or non-shaded area is where the signal is or is not." (R.106:33).

The upshot of all this, explained O'Kelly, was that jurors at Gilbert's trial would have been misled into believing the State had proven his precise whereabouts using his phone records:

> Unfortunately, we've transitioned from the physical DNA to the electronic DNA so that when the jury does see these shaded areas, they think,

> oh, tag, you're it, you're in that area. It's a foregone conclusion. Yes, they will look at other evidence, but when they see this shaded area, they look at it, this is it, 100 percent accurate, we are done.
>
> (R.106:51-52)

On this point, the post-conviction judge would eventually agree, declining to conclude the evidence was harmless:

> This type of technical evidence certainly is of a type which supported the testimony of the state's witness, who put the defendant at the motel at a crucial moment in time. It buttressed their credibility—cell phone towers cannot be assailed as having a motive to lie.
>
> (R.84:3, fn. 1)

X. The Post-Conviction Decision

On March 31, 2015, having already rejected all of Gilbert's arguments *except* the one relating to his cell phone records, the post-conviction court issued a written decision rejecting that argument, too. (R.84). The court found that Detective Jones was not an expert witness when she testified at trial, but did not need to be an expert to explain the maps. (*Id.* at 2). The court also rejected O'Kelly's testimony generally, concluding that O'Kelly's maps "reveal the same geometric projections employing the same data as used by Brosseau thus validating his analysis." (*Id.* at 3).

This aspect of the court's ruling fundamentally misunderstood O'Kelly's testimony: O'Kelly did not create *any* maps (R.106:40:19-22), but introduced an exhibit (Exhibit 5, R.106:195-220) interpolating the *State's* maps (i.e., Trial Exhibit 15) with the corresponding provider data for the purpose of identifying specific errors in each map (R.106:39:17-40:4). The court compared "O'Kelly's maps"

with the State's maps, saw no difference (because they were, in fact, identical), and erroneously ruled on that basis.

Worse, the court did not address either of O'Kelly's two fundamental points: that (1) it is "completely impossible" to use historical cell phone records to place a phone within 100 feet of a certain location, as Detective Jones told the jury the State had done here, and (2) the State's failure to account for or even acknowledge cell tower jumping to the jury made it misleading to use the maps to establish Gilbert's location. Instead, the court merely concluded *no* independent expert could have "impugned or cast doubt upon the accuracy of the cell site information put before the jury." (R.84:3).

XI. Gilbert's Second Post-Conviction Motion and Appeal

Gilbert appealed. (R.89). Gilbert then sought leave to file a second post-conviction motion before proceeding to appeal. (R.109). On October 21, 2015, this Court granted Gilbert's motion to voluntarily dismiss his appeal for that purpose. (*Id.*)

In his supplemental post-conviction motion, Gilbert alleged trial counsel was ineffective for failing to (1) object to a biased juror; (2) introduce exculpatory evidence; (3) impeach Pratchet and J.D.E. with their prior inconsistent statements; and (4) object to portions of the State's closing arguments. (R.155:15). Gilbert also claimed trial counsel was ineffective for attacking Gilbert's credibility in closing arguments. (*Id.*)

The Court denied Gilbert's supplemental post-conviction motion without a hearing (R.125; R.130), and Gilbert timely appealed his underlying conviction and the trial court's denial of post-conviction relief. (R. 132).

STANDARDS OF REVIEW

Where ineffective assistance of counsel is claimed, the analysis of performance and prejudice presents a mixed question of law and fact. The trial court's findings of fact will be overturned if clearly erroneous. The ultimate determinations of whether counsel's performance was deficient and prejudicial are questions of law which this Court reviews independently, with no deference to the trial court. *State v. Johnson*, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990); *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

Whether a defendant's post-conviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 568. First, this Court determines 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, reviewed de novo. *Id.* If the motion raises such facts, the trial court *must* hold an evidentiary hearing. *Id.*

However, if as a matter of law 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 trial court has discretion to grant or deny a hearing. *Id.* In that case, this Court reviews the trial court's decision for erroneous exercise of discretion. *Id.*

ARGUMENT

The trial court should have granted Gilbert's motion for post-conviction relief and ordered a new trial. Counsel's errors were manifest and prejudiced Gilbert in several critical respects, each individually and cumulatively justifying a new trial.

Short of this, *at a minimum* the trial court should have granted Gilbert's request for an evidentiary hearing on unresolved factual issues because his motions met the threshold requirements for mandatory hearings under Wisconsin law.

I. The trial court erred in denying Gilbert's motion for a new trial on the basis of ineffective assistance of counsel.

Both the United States and Wisconsin constitutions guarantee criminal defendants the right to counsel. *State v. Carter*, 2010 WI 40, ¶ 20, 32 Wis. 2d 640, 782 N.W.2d 695 (*citing* U.S. Const. amend. VI; Wis. Const. art. I, § 7). The United States Supreme Court has recognized that "the right to counsel is the right to the *effective* assistance of counsel." *Id.* (emphasis added) (*citing Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

Strickland establishes a two-prong test for identifying ineffective assistance of counsel. First, representation must have been deficient. *Id.* at ¶ 21. Second, counsel's deficient performance must have prejudiced the defense. *Id.*

Gilbert's trial counsel was ineffective for a litany of reasons, five of which Gilbert emphasizes on appeal. Specifically trial counsel failed to: challenge cell phone data presented as impeachment evidence by the State; obtain

critical discovery before trial; impeach the State's primary witnesses with their prior inconsistent statements; and strike an impartial juror; while at the same time attacking Gilbert's credibility during closing arguments. Gilbert was also prejudiced by the cumulative effect of trial counsel's deficient performance.

A. Gilbert was prejudiced by trial counsel's deficient failure to challenge cellular phone data presented as impeachment evidence by the State.

Trial counsel's failure to object to inadmissible evidence constitutes deficient performance. *State v. Krueger*, 2008 WI App 162, ¶ 17, 314 Wis. 2d 605, 762 N.W.2d 114. Here, trial counsel was deficient in failing to object to lay testimony from Detective Jones purporting to place Gilbert within 120 feet from the Econolodge near midnight on January 7, 2012.

It is undisputed that Detective Jones was testifying as a lay witness, not an expert. The State never noticed Jones as an expert in cell tower mapping, and the post-conviction court agreed Jones was not an expert in this field. (R.84:2) ("The court concludes that the Detective was not offered as an expert"). But the court concluded no expertise was needed to testify as Jones did. This was error.

Courts around the country have held that a witness must be qualified as an expert to comment on the operation of cell phone networks. *U.S. v. Natal*, 849 F.3d 530, 536 (2d Cir. 2017); *U.S. v. Hill*, 818 F.3d 289, 296 (7th Cir. 2016); *U.S. v. Yeley-Davis*, 632 F.3d 673, 684 (10th Cir. 2011). Similarly, courts have found that a witness must be qualified as an expert to testify to a cell phone's general location when a call was placed. *Natal*, 849 F.3d at 536; *Hill*, 818 F.3d at

296; *Yeley-Davis*, 632 F.3d at 684; *U.S. v. Pembrook*, 119 F.Supp.3d 577, 596 (E.D. Mich. 2015); *State v. Edwards*, 156 A.3d 506, 526 (Conn. 2017); *Collins v. State*, 172 So. 3d 724, 743 (Miss. 2015).

This Court's precedent is not to the contrary, but does recognize a limited role for lay testimony: "a witness need not be an expert to take the information provided by a cell phone provider and transfer that information onto a map." *State v. Cameron*, 2016 WI App 54, ¶ 15, 370 Wis. 2d 661, 885 N.W.2d 611, *quoting State v. Butler*, No. 2014AP1769, unpublished slip op., 2015 WL 3550028 (June 9, 2015).

The witness at issue in *Cameron* was offered as an expert, not a lay witness. *Id.* ¶ 6. As such, the court's analysis in that case focused on Cameron's claim that even without an objection by counsel, the trial court should have exercised its gatekeeping function under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), to exclude the expert's testimony. *Id.* ¶¶ 12-14. The court rejected that claim, concluding that a trial court has no duty to undertake a *Daubert* analysis absent an objection from counsel. *Id.* ¶ 13. The court also emphasized that the testimony at issue centered primarily on stipulated phone records from cell service providers. *Id.* ¶ 14.

Given its focus on the *Daubert* question, and because lay testimony was not at issue in any event, the court in *Cameron* did not address what testimony a *lay* witness may offer before expertise is required—except insofar as it cited *Butler*. Thus it appears that *Butler* offers the best indication, albeit unpublished and non-authoritative, of this Court's views on the boundaries of permissible lay testimony on reconstructive cell phone tracing in Wisconsin.

The lay witness at issue in *Butler*—none other than Officer Brosseau—took cell phone records from Verizon and showed "on a geographical map where the cell towers were located and at what time Butler's phone connected to each tower." *Butler*, ¶ 4. To this extent, the lay testimony in *Butler* matches Detective Jones' testimony here. From here, however, the testimony upheld in *Butler* diverged from the testimony here in four key respects—all of which parallel flaws identified by Mr. O'Kelly's post-conviction analysis.

First, Officer Brosseau's testimony to the jury in *Butler* conceded key limitations on his analysis and the significance of the evidence. He specifically testified "that the phone does not have to be in the shaded area to use that tower, but has to be 'within the broad area facing that direction.'" *Id.* ¶ 5. And he "admitted that he could not say that every cell call made would connect to the closest tower because it depends on a variety of factors, like time of day, movement, weather and terrain." *Id.* ¶ 6.

In *Butler*, the jury also heard from two Verizon employees, who confirmed that a cell phone will connect to the cell tower with the strongest signal, not necessarily the closest tower. *Id.* ¶ 8. This testimony, combined with Officer Brosseau's own admissions, made clear to the jury the evidence's relevance and limitations.

If Officer Brosseau had testified here, he might have acknowledged the same limitations, including the possibility of cell tower jumping acknowledged in *Butler*. Instead, in a last-minute substitution for the State's noticed cell phone expert, Detective McKee (R.11), the jury heard lay testimony from Jones, who lacked McKee's *or* Brosseau's expertise and failed to note *any* of these limitations to the jury.

Second—and worse still—Jones' testimony contained a critical error that necessarily misled the jury. Not once but twice, she told the jury this evidence placed Gilbert within *120 feet* of the Econolodge on the night of the crime, squarely contradicting Gilbert's testimony (R.106:27, 39)—not three or more miles away, as the U.S. Cellular data showed (R.106:32-33, 38), nor even a mile and a half away, as Brosseau testified in *Butler* (2015 WI App. ¶ 10). Again, Brosseau himself testified in post-conviction that "you are not getting data within 100 feet or anything of that nature." (R.107:12:6-10). Yet the jury heard Detective Jones say Gilbert was within field goal range of the hotel.

Third, unlike in both *Cameron* and *Butler*, here Jones testified to the jury about the significance of maps *she had not made*. *Cf. Cameron*, ¶ 10 (Brosseau created the maps about which he testified at trial); *Butler* ¶ 14 (testifying witness had prepared maps). This likely accounted for the errors in her testimony, but in any event is an additional reason why Jones was not competent to offer lay testimony on the maps in the first place. *Cf.* Wis. Stat. § 906.02.

Finally, unlike in *Butler*, where the lay witness merely took information from the cellular provider and transferred it to a map (2015 WI App. ¶ 10), here Brosseau testified at the post-conviction hearing that in creating the maps shown to the jury, he had manipulated the U.S. Cellular data for the cell towers' radial distances, reducing them by a factor of 3, from three miles to 1.1 miles. (R.106:95-96).

The post-conviction court was untroubled by this modification, citing Brosseau's specialized knowledge of Milwaukee-area cell towers and their coverage patterns. (R.84:3). For his part, O'Kelly testified that "there would be nothing to support" this modification; it would be an "arbitrary decision." (R.106:77). But either way, these

manipulations to the data took the maps and Jones' related testimony outside the scope of the purely ministerial tasks for which no expertise was required in *Butler*. To confirm this point, the Court need look no further than the fact that the State offered Brosseau *as a post-conviction expert in this case* to clarify his manipulations to the data, as only an expert can do—and as Jones did *not* do for the jury.

For all of these reasons, Detective Jones' testimony at trial crossed the line separating lay testimony from expert testimony under *Butler* and *Cameron*, and should not have been admitted to the jury. No Wisconsin authority permits a lay witness to interpret cell phone records and express an opinion that a defendant was within 120 feet of a geographic location at a particular time on a particular date.

Indeed, other courts considering this question do not even permit an *expert* to opine with such specificity. As noted above, courts have found that cell tower mapping can be reliable to establish the "general location" of a cell phone. *Hill*, 818 F.3d at 298; *United States v. Banks*, 93 F.Supp.3d 1237, 1252 (D. Kan. 2015); *United States v. Jones*, 918 F.Supp.2d 1, 5 (D.D.C. 2013) (citing cases finding cell phone records reliable to establish the general location of a phone); *U.S. v. Machado-Erazo*, 950 F.Supp.2d 49, 56 (D.D.C. 2012). By "general location," courts appear to mean the full extent of a given cell tower's sector, i.e., one third of its radial range. *Machado-Erazo*, 950 F.Supp.2d at 55-56.

In contrast, cell tower analysis—expert or otherwise—is not admissible to pinpoint the precise location of a phone. *Cameron*, ¶ 26 (acknowledging critical limitation that "cell towers generally provide signals within a certain range, but do not provide the specific location of phone calls within the general range"); *United States v. Lewisbey*, 843 F.3d 653, 659-60 (7th Cir. 2016) (trial judge "appropriately recognized

the limits of this technique by barring the agent from couching his testimony in terms that would suggest that he could pinpoint the exact location of Lewisbey's phone"); *Banks*, 93 F.Supp.3d at 1254-55 (collecting cases noting "cell-site data's inability to pinpoint precisely the location of a phone"); *United States v. Evans,* 892 F.Supp.2d 949 (N.D. Ill. 2012) (rejecting expert testimony purporting to place a defendant in a particular building).

As such, Detective Jones' testimony should not have reached the jury by any avenue: it is impermissible for a lay witness to do more than "take the information provided by a cell phone provider and transfer that information onto a map" (*Cameron*, ¶ 15), and even if Jones has been qualified as an expert *and* noticed as such (neither of which occurred), her testimony placing Gilbert within 120 feet of the Econolodge still would have been unreliable and inadmissible.

There can be little doubt that trial counsel's deficient performance in failing to object to this testimony crippled Gilbert's defense. The post-conviction court acknowledged as much. (R.84:3, fn. 1). Had this testimony been excluded, there would have been no purportedly objective evidence and the case would have become pure credibility contest.

B. Gilbert was prejudiced by trial counsel's deficient failure to obtain critical discovery before trial.

Wis. Stat. § 971.23(1)(e) requires the State to identify any expert witness it intends to call at trial and provide either a report or a summary of the expert's testimony. If the State fails to disclose such information and its improper admission is prejudicial, then the defendant is entitled to a new trial. *State v. DeLao*, 2002 WI 49, ¶ 60, 252 Wis. 2d 289,

643 N.W.2d 480. Even if the State properly identifies an expert and the underlying factual support for an expert's testimony, trial counsel's failure to review critical discovery is well-recognized as deficient performance. *State v. Thiel*, 2003 WI 111, ¶ 37, 264 Wis. 2d 571, 665 N.W.2d 305.

Apart from its unreliability, Detective Jones' cell tower testimony should have been barred on procedural grounds: Jones was never disclosed as a cell tower expert prior to trial. The State provided expert notice of Detective Richard McKee (R.11), but McKee never testified or provided a report in discovery, and Jones exceeded the permissible scope of lay testimony, as discussed above. The State also apparently failed to disclose the cell tower maps introduced by Jones, which were the "results of any … scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial." Wis. Stat. § 971.23(1)(e).

In Gilbert's first post-conviction motion, counsel noted these discovery problems, including an incomplete record from trial counsel, which indicated trial counsel had not received all discovery from the State. (R.45:15-16). Gilbert told counsel that Attorney Taylor did not have the cell tower maps in his possession before trial began. (*Id.*) Taylor's response to these claims—representing that he had transferred Gilbert's entire file to successor counsel only to find more of it later in a storage locker—only cast more doubt on his truthfulness in this regard. *See* pp. 13-15, *supra.*

Trial counsel's failure to object to this evidence on procedural grounds was prejudicial for the reasons already discussed. Alternatively, even assuming the State did disclose the cell tower maps, Taylor does not appear to have reviewed them. Had he, he could have cross-examined Jones regarding the foundation of her testimony or the methods and principles used to create the cell tower maps. His

apparent failure to review this evidence permitted the jury to consider misleading maps purporting to be an objective indicator of Gilbert's guilt.

C. Gilbert was prejudiced by trial counsel's deficient failure to impeach the State's witnesses with their prior inconsistent statements.

Wisconsin courts recognize that a failure to impeach an alleged victim's credibility can constitute deficient performance. *State v. Coleman*, 2015 WI App 38, ¶ 33, 362 Wis. 2d 447, 865 N.W.2d 190.

In *Coleman*, the defendant was convicted of sexual assault of a minor. *Id.* ¶ 16. Trial counsel refused to question the victim regarding a prior statement inconsistent with the DNA evidence. *Id.* ¶¶ 33-35. At a *Machner*[6] hearing, counsel expressed discomfort with the optics of questioning a young girl about sexual assault before the jury. *Id.* ¶ 35. Further, counsel described a second witness' statement contradicting the victim's account as a "minor detail" and just a "little inconsistency" he did not wish to raise. *Id.* ¶¶ 36-37.

The court rejected counsel's explanation, pointing out that failure to impeach the victim with these inconsistencies constituted deficient performance. *Id.* ¶ 39. By themselves, these errors might have been minor, but "defense counsel called no witnesses and relied completely on his cross-examination of the State's witnesses, which made [the victim's] credibility the cornerstone of this case." *Id.*

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[6] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). Here, there was no *Machner* hearing.

The same is true here. Trial counsel failed to impeach J.D.E., whose statements were internally inconsistent. From the outset, J.D.E. offered conflicting statements regarding her time with both Gilbert and Pratchet. With respect to Pratchet (whom she referred to as "P"), she first told police she "was being forced to have sexual relations with the occupant of the [hotel] room, as well as being prostituted by this individual." (R.58, Ex. 3 at 6). In a second statement, J.D.E. admitted she had consensual sex with Pratchet once. (*Id.* at 8-9). In her fourth statement, she confessed to having sex with Pratchet *four times*. (*Id.* at 18).

It took J.D.E. three statements to police to finally "remember" that Gilbert—whom, to make matters more confusing, she also called "P"—returned to the Econolodge and beat her. In spite of J.D.E.'s graphic description of Gilbert's physical assault, J.D.E. failed to describe any injury. There is no police account of any injury and no record of police asking J.D.E. about visible injuries even though the assault allegedly happened two or three days before police found her. (R.58, Ex. 3 at 14). At trial, she claimed she had sustained no injuries from this graphic beating. (R.98:35).

The State presented no DNA evidence of physical or sexual assault. And as in *Coleman*, the defense called no witnesses. While the failure to impeach may have been less prejudicial in isolation, the lack of any defense witnesses made J.D.E.'s credibility the cornerstone of the case.

Equally as troubling was trial counsel's failure to impeach Pratchet—particularly where even a cursory review of Pratchet's custodial interview made clear he would do "anything" to avoid "going down for this." (Tr. Ex. 8). No effective trial attorney would miss the chance to play such statements to the jury.

Even setting aside Pratchet's demonstrably suspect motives, numerous aspects of his testimony were internally inconsistent and contradicted both J.D.E. and the State's theory of the case. In his initial statements to police, Pratchet never once corroborated J.D.E.'s assertion that Gilbert returned to the Econolodge and physically assaulted her. It was not until *four months* later—after he had made a plea deal in his own case—that Pratchet told police he had witnessed the physical altercation between Gilbert and J.D.E. (R.115, A-103).

At trial, Pratchet adamantly contradicted J.D.E.'s claim that she saw an exchange of a car amp[7] and cash. (R.99 at 47). When pressed about whether J.D.E. could have seen it without his knowledge, he rebuffed the State, stating that he told J.D.E. about the transaction and that her claim to have seen the transaction was "all made up." (R.99:51-52).

Pratchet also denied several more of J.D.E.'s claims: that he took J.D.E. to the beauty store (R.58, Ex. 3 at 9, 13); that he had sex with her (*id.* at 6, 8-9, 18); that he spit on her (*id.* at 8, 17); and that he took the money from J.D.E.'s prostitution dates (*id.* at 12-13, 17). These contradictions highlight the fact that Pratchet, J.D.E., or both lied in their accounts to police and at trial.

Trial counsel did not draw out any of these inconsistencies. While some of these details may appear minor in isolation or in the abstract, they cannot be considered so here, where the case rests on the credibility of J.D.E. and Pratchet. Apart from the suspect cell tower evidence, there is no other direct evidence in the case.

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[7] Though Pratchet unambiguously told police the amp found in Gilbert's car was *not* the one he had given Gilbert, the State nonetheless published photos of that amp to the jury at trial, with no objection from trial counsel. (R.97:60; R.98:78; Tr. Ex. 1).

D. Gilbert was prejudiced by trial counsel's deficient failure to strike an impartial juror.

The United States and Wisconsin constitutions guarantee criminal defendants the right to an unbiased jury. *State v. Koller*, 2001 WI App 253, ¶ 14, 248 Wis. 2d 259, 635 N.W.2d 838 ("The right to an impartial jury is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution as well as the principle of due process").

When juror bias is raised in the context of an ineffective assistance claim, the question is whether counsel's performance resulted in the seating of a biased juror. *Koller*, ¶ 14 (*citing State v. Traylor*, 170 Wis. 2d 393, 400-01, 489 N.W.2d 626 (Ct. App. 1992) *and State v. Lindell*, 2001 WI 108, ¶ 81, 245 Wis. 2d 689, 629 N.W.2d 223).

Within the *Strickland* framework, actual juror bias is dispositive on the question of prejudice: juror bias is structural error, and therefore per se prejudicial:

> [J]uror bias taints the entire proceeding and requires automatic reversal. Juror bias is a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. Juror bias seriously affects the fairness, integrity, or public reputation of judicial proceedings and is per se prejudicial.

State v. Tody, 2009 WI 31, ¶ 44, 316 Wis. 2d 689, 764 N.W.2d 737, *abrogated on other grounds by State v. Sellhausen*, 2012 WI 5, 338 Wis.2d 286, 809 N.W.2d 14.

Accordingly, the sole question here is whether Gilbert's trial counsel was deficient in permitting a biased juror to be impaneled on the jury. The answer to that

question is established by a comparison of Juror 15—whom the trial court and counsel for both parties readily agreed was biased—and Juror 29, who provided answers *more* troubling than Juror 15's but still was seated on the jury.

Again, Juror 15 testified that (1) she didn't think she could be involved in a case involving rape (which this case did not) and (2) that she "couldn't say positive" whether she could fairly listen to the evidence, but (3) *did* believe that she could set aside memories of a previous case and judge Gilbert's case on the evidence and the law. (R.96:17-18, 80).

By contrast, Juror 29 *volunteered* that she had been the victim of a violent crime and, because of that experience, could not be fair and impartial. (R.96:96). She was the only individual present at voir dire to do so. (*Id.*) On further questioning by the State about her experience, she reiterated: "I'm not going to say that I can honestly put it aside" and "Yes, I might" have trouble being fair and impartial. (*Id.* at 97.) Unlike Juror 15, Juror 29 never offered *any* assurance that she could issue a verdict based on the evidence before her.

The Wisconsin Supreme Court's decision in *State v. Lepsch*, 2017 WI 27, 374 Wis. 2d 98, 892 N.W.2d 682, is its most recent guidance on juror bias. It affirms that "[t]o be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial." *Id.* ¶ 21 (*quoting State v. Faucher*, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999)). Prospective jurors are presumed impartial, and the defendant bears the burden of rebutting this presumption and proving bias. *Id.* ¶ 22.

Wisconsin courts have recognized three types of bias: (1) statutory bias; (2) subjective bias; and (3) objective bias. *Lepsch*, ¶ 22. Gilbert's post-conviction motion alleged that Juror 29 was subjectively biased.

Subjective bias refers to "bias that is revealed through the words and the demeanor of the prospective juror." *Lepsch*, ¶ 23 (*quoting Faucher*, 227 Wis. 2d at 717). While a circuit court's factual finding on subjective bias is ordinarily upheld unless clearly erroneous (*id.*), here the trial court made no such finding because trial counsel deficiently failed to challenge Juror 29's impartiality. The post-conviction judge—who had *not* presided at trial and therefore was no differently situated than this Court in reviewing Gilbert's argument—found that Juror 29 was not subjectively biased. (R.125:4).

The court's ruling on this point was premised on a single statement by Juror 29: among all of the troubling comments above, she remarked: "I haven't heard the evidence." (R.125:4). The post-conviction court said this statement "attests to her fairness in and of itself and demonstrates that she had not formed an opinion about the case because she had not heard the evidence at that point." (*Id.*)

This comment hardly shows impartiality. If anything, it suggests that until she heard the evidence in *this* case, Juror 29 could not determine whether her prior experience as a victim of a violent crime—which she agreed was both "earthshattering" and "very traumatic"—would present a problem for her impartiality. (R.96:97). In other words, her *acknowledged* bias would remain with her *at least* until she was seated on the jury, with no assurance that it would change thereafter.

Contrary to the circuit court's post-conviction finding, this is prototypical subjective bias. And unlike the jurors at issue in *Lepsch*, each of whom individually confirmed they could base their decisions on the evidence (*id.* ¶ 31), Juror 29 offered no such reassurance. While *Lepsch* granted trial courts discretion to rely on some answers more than others when a juror contradicts herself in voir dire (*id.* ¶¶ 34-36), here there were no conflicting statements to resolve: *all* of Juror 29's answers confirmed her stated belief that she could not be fair and impartial. Because Juror 29 was subjectively biased, trial counsel's failure to strike her from the jury was deficient and per se prejudiced Gilbert's defense.

E. Gilbert was prejudiced by trial counsel's deficient closing argument.

Trial counsel's deficient performance continued into closing arguments, where he called his own client a "scumbag" and told jurors that no one who had testified (again, including his client) was to be trusted. These remarks amounted to an improper concession of guilt and abdicated trial counsel's role in the adversarial process, prejudicing Gilbert.

Under *Strickland*, counsel's choice to make these remarks during closing arguments is to be assessed under a standard of objective reasonableness. *State v. Gordon*, 2003 WI 69, ¶ 23, 262 Wis. 2d 380, 663 N.W.2d 765. As with any other choice at trial, the question is whether counsel's closing remarks amounted to a "reasonable tactical approach under the circumstances." *Id.* ¶ 26.

In some cases, a concession of guilt during closing arguments may be "the functional equivalent of a guilty plea, improper if done without [the defendant's] consent, and conclusively presumed to be prejudicial." *Gordon*, ¶ 24

(rejecting such a claim on different facts); *see also United States v. Cronic*, 466 U.S. 648, 656-57, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (if the trial process "loses its character as a confrontation between adversaries, the constitutional guarantee is violated"). In other cases, conceding that one's client is "technically guilty" of the charged offense is not deficient if there was a strategic reason for the concession with demonstrable potential benefits for the accused. *State v. Silva*, 2003 WI App 191, 266 Wis. 2d 906, 670 N.W.2d 385.

Here, it is impossible to divine any strategy in trial counsel's choice to inform the jury that after hearing all of the witnesses who testified at trial, including his own client, "I'm not sure I believe any of them"—an aspersion counsel cast not once, but twice. (R.102:30). "Morality is what's missing here," he told the jury. "There's no good guys." (*Id.*) And "[i]n this country, you know, we would rather—as bad as it may sound, it's true—*let some scumbags go free* because we can't find that person guilty if we don't have enough evidence." (R.102:34) (emphasis added). In short: my client may be guilty, and he's probably lying, and he's certainly a scumbag, but you should let him go.

The post-conviction court brushed past the "scumbag" reference with two sentences of analysis: "Trial counsel did not specifically refer to the defendant as a scumbag. He was referring to other people." (R.125:5). But a jury hearing this remark in context would have no doubt that counsel was including his client in that class of "scumbags" who should be allowed to prevail if the State fails to prove its case.

It is one thing to tell the jury that the State presented insufficient evidence of guilt to support a conviction. But counsel went further than that, expressly stating that his client was not to be trusted. This added aspersion could serve no incremental strategic purpose, and was further

compounded by the gratuitous reference to Gilbert as a "scumbag"—a description that necessarily layered guilt on top of untrustworthiness in the mind of the jury hearing these closing remarks. *Cf. Coleman*, ¶ 42 (defense counsel's opening statement that client was "not an angel" "gave the jury negative and prejudicial information that was not relevant to any element of the crime").

The prejudice inherent in these remarks should be conclusively presumed because they conceded Gilbert's guilt. But even short of that, there is clear prejudice to Gilbert in counsel's attacks on his credibility. Again, Gilbert's case was premised almost exclusively on witness credibility. Taylor's closing argument took as true the State's portrayal of Gilbert. To hear Gilbert's trustworthiness undermined by his own lawyer in closing would have remained some of the last words ringing in the jurors' ears as they began their deliberations. These circumstances are "sufficient to undermine confidence in the outcome," so counsel's insulting closing remarks were prejudicial. *Strickland*, 466 U.S. at 694.

F. Gilbert was prejudiced by the cumulative effect of counsel's deficient performance.

Each of the numerous deficiencies identified in the foregoing arguments cannot be viewed in isolation. Under Wisconsin law, "[w]hen a defendant alleges multiple deficiencies by trial counsel, prejudice should be assessed based on the cumulative effect of these deficiencies." *Coleman*, ¶ 21 (*citing State v. Thiel*, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305).

The prejudice analysis is cumulative because the focus of the inquiry "is not on the outcome of the trial, but on the reliability of the proceedings." *Coleman*, ¶ 41. "In

determining whether a defendant has been prejudiced as a result of counsel's deficient performance, [the Court] may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard for a new trial under *Strickland*." *Id.* (*quoting Thiel*, ¶ 60). "Just as a single mistake in an attorney's otherwise commendable representation may be so serious as to impugn the integrity of a proceeding, the cumulative effect of several deficient acts or omissions may, in certain instances, also undermine a reviewing court's confidence in the outcome of a proceeding." *Id.*

Critically, the right to counsel "is more than the right to nominal representation. Representation must be effective." *Coleman*, ¶ 21. Here, the cumulative effect of Attorney Taylor's missteps was to deprive Gilbert of his Sixth Amendment right to *effective* trial counsel:

- In a case so heavily reliant on eyewitness testimony, counsel failed to impeach either of the State's primary witnesses with available inconsistent statements, and called no witnesses on Gilbert's own behalf.

- In a case where the only *objective* evidence consisted of cell phone records purporting to show Gilbert lied about his whereabouts, counsel made no attempt to challenge the evidence on either procedural or substantive grounds, both of which were available, and made no effort to rebut the State's misleading use of this evidence with a witness of his own.

- Perhaps this was because counsel did not even obtain the State's cell phone evidence and exhibits before trial—a point not resolved in the factual record but with clearly prejudicial implications if true.

- In addition to all of this, counsel permitted a subjectively biased juror to be seated on Gilbert's jury and rounded off his deficient performance by expressing doubts about Gilbert's trustworthiness after he had taken the stand in his defense.

In short, just as in *Coleman*—another credibility case—"the combination of counsel's errors bolstered [J.D.E.'s] credibility by failing to present significant impeaching evidence," while "[t]he combination of counsel's other errors impugned [Gilbert's] character before the jury." With such a lawyer, one might ask, who needs a prosecutor? A cumulative review of trial counsel's performance cannot leave this Court with any confidence in the reliability of the proceedings, so Gilbert's conviction must be reversed and remanded for a new trial.

II. At a minimum, the trial court erred in denying Gilbert's request for an evidentiary hearing.

While trial counsel's deficiencies and the cumulative prejudice resulting therefrom meet *Strickland*'s standards for a new trial, at a minimum, the Court should remand this case to the trial court for an evidentiary hearing. The threshold for such an outcome is significantly lower than that for a new trial: under *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, the trial court *must* hold an evidentiary hearing if the movant has alleged sufficient facts that, if true, would entitle him to relief. *Id.* ¶ 9.

Here, while the post-conviction court granted an evidentiary hearing on the cell tower issue, it denied a hearing on three other issues which, under *Allen* and *Machner*, *supra*, should have triggered further proceedings.

First, Gilbert is entitled to an evidentiary hearing on whether his trial counsel in fact failed to obtain critical discovery before trial. On this point, there was a clear factual dispute, with Gilbert stating that trial counsel did not obtain the evidence and trial counsel stating that he did. Rather than setting a hearing to resolve the issue, the trial court improperly accepted trial counsel's self-serving affidavit at face value without further inquiry. (R.68:5). This was contrary to Wisconsin law. *See State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis. 2d 195, 633 N.W.2d 207 (when credibility is an issue, it is best resolved by live testimony); *Allen*, ¶ 12 fn. 6 ("If the facts in the motion are assumed to be true, yet seem to be questionable in their believability, the circuit court *must* hold a hearing") (emphasis added); *see also State v. Dalton*, No. 2016AP6-CR, unpublished slip op., 2016 WL 3909587 ¶ 11 fn. 7 ("The State fails to cite any law holding that in making the decision on whether a *Machner* evidentiary hearing is warranted, a court may rely upon an affidavit submitted by the State in opposition to the defendant's request for just such a hearing.")

Second, Gilbert is entitled to an evidentiary hearing on whether Juror 29 was subjectively biased. While Gilbert submits that bias is clear on the face of the voir dire transcript, if there is any doubt on that point, it must be resolved by a hearing. *Allen*, ¶ 12 fn. 6; *see also State v. Delgado*, 223 Wis. 2d 270, 588 N.W.2d 1 (1999) (post-conviction hearing conducted to determine whether juror was actually biased); *Koller*, ¶ 15 ("There is nothing unusual about this sort of retroactive determination of juror bias").

Third, and most importantly, Gilbert is entitled to a *Machner* hearing on trial counsel's reasons for the decisions challenged on this appeal, including the seemingly inexplicable decisions to (1) offer no objection or rebuttal to Detective Jones' testimony, (2) forego impeaching the State's

two primary witnesses with their prior inconsistent statements, (3) permit Juror 29 to be seated on the jury, and (4) attack Gilbert's credibility and call him a "scumbag" during closing arguments. Presently, the record can shed no light on these questions because Attorney Taylor has not been called upon to testify to any of them.

In light of these outstanding factual questions, it cannot be said that the record "*conclusively* demonstrates that [Gilbert] is not entitled to relief," the only possible basis for summarily denying a hearing where ineffective assistance of counsel is alleged. *State v. Curtis*, 218 Wis. 2d 550, 554-55 and fn. 3, 582 N.W.2d 409 (Ct. App. 1998). The facts alleged by Gilbert, if true, would entitle him to relief. The trial court therefore erred in denying him the modicum of process afforded under *Allen* before resolving his motion for a new trial.

CONCLUSION

For the foregoing reasons, Gilbert requests that this Court remand for a new trial or, failing that, for the evidentiary proceedings requested in his motion for post-conviction relief.

Respectfully submitted this
14th day of July, 2017.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for a brief and appendix produced with a proportional serif font. The length of this brief, including footnotes, is 10,962 words.

Zachary T Eastburn

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed as of this date.

Zachary T Eastburn

APPENDIX CERTIFICATION

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and (4) 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. This is not an appeal taken from a circuit court order or judgment entered in a judicial review of an administrative decision, and no portion of the record is required by law to be confidential.

Zachary T Eastburn

CERTIFICATION REGARDING ELECTRONIC APPENDIX

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2017, I caused three copies of this Brief and Appendix to be served upon each of the following persons via U.S. Mail, First Class:

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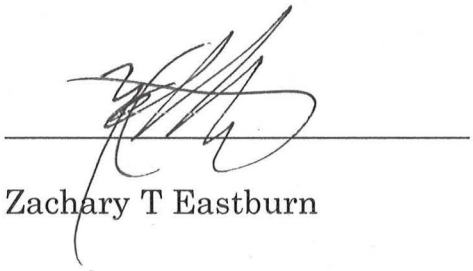

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