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STATE OF WISCONSIN
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DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD LEE GILBERT,

Defendant-Appellant.

APPEAL NO. 2019-AP-2182-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?

Answer below:

The circuit court denied Gilbert's request for a new 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 minor, second-degree sexual assault of a minor, 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.187:103).[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.72, Ex. 3:6). 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.72, Ex. 3:7). These two individuals matched the descriptions of Woadie Mac (who also went by "P") and Tish. (*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 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 she had consensual sex with him once upon arriving at the hotel room. (R.72, Ex. 3:8-9). 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).

Police interviewed J.D.E. a third time. (R.72, Ex. 3:11). 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.

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[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.

(*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.[2] (*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.*)[3] 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.72, Ex. 3:14). After a brief exchange between P and J.D.E, Pratchet entered the room. (*Id.*) P became angry and pushed J.D.E. 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.*)[4]

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.72, Ex. 3:12-13). 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).

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[2] These new allegations would become the sole basis for Gilbert's sexual assault charge.

[3] This was the first time J.D.E. suggested Gilbert had trafficked her.

[4] These new allegations would become the basis for Gilbert's intentional abuse charge.

II. Pratchet's Version of Events

Pratchet initially denied prostitution was occurring in the hotel room. (R.72, Ex. 3:9). 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).

On Tuesday, January 13, 2012, police interviewed Pratchet in custody. (R.72, Ex. 3:16). "I don't want my life going down for this," Pratchet told police eight minutes into the interview. (Tr. Ex. 8 at 8:15; *see also* R.169:10). 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.*). "Please," begged Pratchet. "I'll do anything." (*Id.*). After further discussing the benefits of cooperation, Pratchet reiterated: "I don't even want to go to court for this. I'm telling you, I will do anything—I will do *anything*." (*Id.* at 12).[5]

Pratchet then admitted involvement in prostitution and identified the individual who had brought J.D.E. to the Econolodge as Ronald Gilbert. (R.72, Ex. 3:16). However, Pratchet clarified that he did not work with Gilbert to bring her to the Econolodge: "I didn't even know that he had her with him until he came through the door." (R.169:10.) "As he was walking through the door, she come in behind him, and he [inaudible] my friend." (*Id.* at 11). Later, however, Pratchet stated he gave Gilbert $100 and an "amp" in exchange for J.D.E. (R.72, Ex. 3:18).[6] According to Pratchet, J.D.E. did *not* see this transaction. (*Id.*)

Pratchet initially denied twice that Gilbert ever returned to the Econolodge. (R.169:30). Only *after* reaffirming that he would give the police "anybody, anything [and] help [the police] with any

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[5] On at least *eight* distinct occasions during his custodial interview, Pratchet committed to doing "anything" to avoid punishment for himself or Natisha Shannon. (R.169 at 6:19-22; 9:20-21; 12:17-20; 23:8-10; 30:14-17; 87:17-20; 122:20-22; 124:21-24).

[6] This was the first time Pratchet gave any indication that Gilbert had trafficked J.D.E.

situation" and a prompt from the detective about whether Pratchet attempted to prevent Gilbert from "stomp[ing]" J.D.E. did Pratchet suddenly remember that Gilbert returned to the Econolodge. (*Id.* at 30-31). Pratchet stated that he "just came in" to the hotel room and witnessed Gilbert hit J.D.E. twice in the head. When asked about what Gilbert was saying, Pratchet could not remember. (*Id.* at 32:15-20).

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. (R.72:16-17). 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.*) He repeatedly referred to J.D.E. as a "liar" (R.169:48, 50) and warned that "[s]he was going to do this to somebody else." (*Id.* at 50).

Months later, 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.128, 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.128, 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 that contradicted both his original version and J.D.E.'s latest version. While J.D.E claimed Pratchet had been in the hotel room for the entire physical altercation with Gilbert, Pratchet now stated he did not witness Gilbert's first punch and only heard "tussling or wrestling" in the room while waiting outside the hotel room door. (R.128, A-103). Instead of entering the room of his own accord,

J.D.E. let Pratchet into the hotel room. (*Id.*). Pratchet never claimed to witness Gilbert grabbing J.D.E. by the neck and holding her down on the bed. According to Pratchet, he and J.D.E.—not Gilbert—left the hotel first. (*Id.* at A-104).

Still other new elements conveniently matched J.D.E.'s latest version of events. (R.128, A-103). Pratchet now claimed that when Gilbert returned to the Econolodge, he appeared drunk and was holding two bottles of liquor. Pratchet also claimed for the first time to have stopped Gilbert from kicking J.D.E. (*Id.* at A-104). Despite being unable to remember anything Gilbert said in his original statement to police, Pratchet now recounted a detailed dialogue between J.D.E., Gilbert and himself. (*Id.* at A-103-104).

III. Gilbert's Arrest and Preliminary Proceedings

Two weeks after the events at the Econolodge, on January 24, 2012, J.D.E. identified P as Ronald Lee Gilbert out of a photo array. (R.72, Ex. 3:18). Police arrested Gilbert two days later, seizing an amplifier from his car. (R.189:69-70; R.188:78). 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 948.03(2)(b). (R.1).

Attorney Robert Taylor represented Gilbert at trial. (R.186:3).[7] 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

[7] 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 35, 261 Wis. 2d 1, 660 N.W.2d 665, 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").

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. Since returning to practice, Taylor's criminal defense performance has been found prejudicially deficient at least once,[8] and has been the subject of at least two more evidentiary hearings ordered by this Court.[9]

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.13:1). The State also noticed Detectives Lynda Stott and/or Dawn Jones to testify with respect to "pimp subculture." (R.12:1).

IV. Trial Evidence

Nine witnesses testified at trial for the State. (R.187-R.191). 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.188:6-30, 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.189:47). 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:

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[8] *See State v. Coleman*, 2015 WI App 38, ¶ 33, 362 Wis. 2d 447, 865 N.W.2d 190.

[9] In addition to this matter, *see State of Wisconsin v. Belk*, No. 2019AP982-CR (April 21, 2020) (publication decision pending). In *Belk*, this Court held that the defendant was entitled to a *Machner* hearing regarding Taylor's apparent failure to investigate critical exculpatory facts. *Id.* at ¶ 23.

> 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.189:51-52) (emphasis added)

On cross-examination, Pratchet explained that the reason for his cooperation with the police (and trial testimony) was because he "wanted to do what was right" after learning J.D.E.'s real age. (R.189:45).

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.188:6-30). 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.189:18-26). They testified that, when she refused to leave, Gilbert struck her in the head and attempted to kick her. (R.188:32-37; R.189:18-26).

An officer testified that an amplifier was seized from Gilbert's car at the time of his arrest and photos of this amplifier were admitted to the jury. (R.187:60; R.188:78; Tr. Ex. 1, second file, photos 8-11). The defense did not object to the introduction of these photos, which were admitted without foundation, or make any attempt to elicit Pratchet's multiple prior statements that he had *not* given Gilbert this amplifier.

The defense presented no witnesses, other than Gilbert himself. (R.190:35). 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. (R.191:3). Jones had been noticed for her knowledge of "pimp subculture" (R.12:1), but was not offered as an expert in cell phone tracing.

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.191:19-22). 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.191:27:20-25)

Jones also told the jury that one sector on each map was shaded blue "because that would be where the cell phone is." (R.191:27). 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.191:38). 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, object to her testimony, or call any witness, expert or otherwise, in rebuttal. (*Id.* at 43).

V. Closing Arguments

In closing arguments, the State told the jury the case rested on witness credibility. (R.192:43). 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.192:30) (emphasis added)

Attorney Taylor also compared Gilbert to O.J. Simpson, perhaps America's most notorious acquittal, and 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.192:34) (emphasis added)

On that note, the jury retired to deliberate.

VI. Gilbert's Conviction and Sentencing

The jury found Gilbert guilty on all three counts and the court entered judgment on the verdict. (R.193:2-3, 6-7). Shortly thereafter, Gilbert asked the court for a new attorney. (R.39). Attorney Taylor joined Gilbert's request and withdrew as counsel of record. (R.40:2; R.194).

The court sentenced Gilbert to 22 years of initial confinement and 12 years of extended supervision. (R.193:41).

VII. Gilbert's First Post-Conviction Motion

Gilbert timely filed his first motion for post-conviction relief in November of 2013, alleging trial counsel was ineffective for, among other things, failing to (1) object to Jones' "expert" testimony on *Daubert* grounds; (2) impeach J.D.E. with prior inconsistent statements; and (3) object to scientific "cell tower" evidence introduced without expert testimony. (R.60). 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.[10] (R.61). In its response, the State disputed Gilbert's claims, but conceded Detective Jones was not qualified to testify as an expert witness. (R.72:16-17). 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.72, Ex. 4).

Once briefing was complete, the circuit court ordered an evidentiary hearing for the sole purpose of determining whether 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.82:1-5). It denied the remainder of Gilbert's motion on the face of the pleadings and briefs. (*Id.* at 5).

[10] The Honorable Stephanie G. Rothstein presided over all post-conviction proceedings, including on remand.

VIII. The Evidentiary Hearing

On August 7, 2014, the parties appeared for an evidentiary hearing. (R.196, R.197). Defense expert 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.196:47:22-48:6). 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.197:12:6-10).

Second, using historical cell phone records to prove Gilbert's location at a given time misled the jury. (R.196:21-22, 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.196:52-53). 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.196:48-52). 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). So it is misleading to say the "shaded area or non-shaded area is where the signal is or is not." (R.196:33).

The upshot of all this, explained O'Kelly, was that jurors at Gilbert's trial were 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.196:51-52)

On this point, the post-conviction judge would eventually agree, finding this evidence was not "'harmless' or inconsequential":

> 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.109:3, fn. 1)

IX. The First 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.109). 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.196:40:19-22), but introduced an exhibit (Exhibit 5,

R.196:195-220) 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.196:39:17-40:4). 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.109:3).

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

In a supplemental post-conviction motion, Gilbert alleged trial counsel was ineffective for failing to impeach Pratchet and J.D.E. with their prior inconsistent statements and for attacking Gilbert's credibility in closing arguments. (R.115.)

The Court denied Gilbert's supplemental post-conviction motion without a hearing (R.139; R.146), and Gilbert timely appealed his underlying conviction and the trial court's denial of post-conviction relief. (R. 148).

On appeal, Gilbert argued that trial counsel was ineffective for the reasons presented in this appeal. While the State conceded key points, including that Detective Jones erroneously testified that Gilbert's phone was within 120 feet of the Econolodge, it opposed granting any relief. This Court agreed that Gilbert had sufficiently alleged facts warranting a *Machner*[11] hearing and remanded to the trial court. *See State v. Gilbert*, 2018 WI App 45, ¶ 3, 383 Wis. 2d 600, 918 N.W.2d 127 (unpublished) ("*Gilbert I*").

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

XI. Gilbert's *Machner* Hearing

Gilbert's *Machner* hearing focused on three areas of Attorney Taylor's trial strategy: his failure to challenge the cellular tower impeachment evidence, his failure to impeach Pratchet and J.D.E. with their prior statements to police, and his closing remarks.

Regarding the cellular tower maps, Taylor conceded that he did nothing to determine their accuracy. (R.204:16). Taylor claimed he did not need to challenge the maps or any of the associated testimony because, as he recalled it, the phone they depicted did not belong to Gilbert. (*Id.* at 16-17). Taylor repeated this defense as his reason for failing to challenge Jones' testimony regarding the maps: "Mr. Gilbert expressly said he was not even there or even using that phone." (*Id.* at 19). This was flatly wrong: Gilbert had conceded the phone was his (*see* R.190:72, 75) making it critical to dispute its location.

Regarding his failure to challenge Jones' erroneous testimony that Gilbert's phone was within 120 feet of the Econolodge, Taylor responded that he did not want to give the State a chance to rehabilitate its witness. After all, "as a matter of fact, the phone wasn't registered to him." (R.204:27). When confronted with Gilbert's trial admission to owning the phone, Taylor doubled down: "My position is that Mr. Gilbert had informed me that he was not in that area. *That phone was not his.*" (R.204:31) (emphasis added).

Taylor also did not object to admission of the amplifier photos, introduced as evidence of the alleged transaction for J.D.E., despite Pratchet stating that it was not the correct amplifier. Nor did he attempt to elicit that statement from Pratchet to discredit the photos once they came in. Taylor stated that he wanted to avoid any discussion of the amplifier for fear of stirring up the jury's emotions: "the *fact* of the matter was the young lady was exchanged for an amplifier, and I would not have wanted to highlight that to the jury." (R.204:51) (emphasis added).

Regarding his failure to highlight any one of the eight times Pratchet volunteered to do "anything" to help the State, Taylor rested on the jury's knowledge that Pratchet had previously entered into a deal with the State in exchange for testimony. (R.204:54-58). To Taylor, that deal and Pratchet's involvement in the alleged crime afforded the jury sufficient basis to completely disregard his testimony; there was no need to introduce *any* impeaching evidence. (*Id.*)

Next, Taylor addressed his failure to impeach Pratchet with any of his inconsistent, self-serving statements about the alleged physical altercation between J.D.E. and Gilbert. Taylor explained that he did not pursue this evidence because he believed it to be "despicable" to the jury and opted instead to "gloss[] over it." (R.204:63-65).

Finally, Taylor addressed his closing argument. Taylor explained that when he said he "did not believe any of them," including his own client, he merely meant that the evidence presented was insufficient to convict. (R.204:67).

When asked about his strategy in equating his client with O.J. Simpson, Taylor said he meant to drive home that the evidence was insufficient to convict. (R.204:71-72). Taylor claimed his use of "scumbag" referred only to Simpson, but failed to explain why it made sense to invite *any* comparison between Gilbert and the "scumbags" we "let . . . go free."

At the conclusion of the *Machner* hearing, the court denied Gilbert's postconviction motion from the bench holding that Taylor had demonstrated a reasonable strategy with respect to (1) his closing argument remarks (2) the cell tower evidence and (3) his cross-examination of the State's witness. (R.174:119-131). As a result, his performance did not have cumulative prejudicial effect on Gilbert's trial. (*Id.*). Undersigned counsel was reappointed to pursue this appeal.

STANDARD 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).

ARGUMENT

The trial court should have granted Gilbert's motion for post-conviction relief and ordered a new trial. Counsel's errors were manifest, had no reasonable strategic basis, and prejudiced Gilbert in several critical respects, each individually and cumulatively justifying a new trial.

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 prejudicially ineffective in numerous ways, three of which Gilbert emphasizes on appeal. Specifically trial counsel failed to challenge cell phone data presented as impeachment evidence by the State or impeach the State's primary witnesses with their prior inconsistent statements, 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. Now that the *Machner* hearing has confirmed these deficiencies had no reasonable strategic basis, the Court should order a new trial.

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

A. Counsel's performance was deficient and prejudicial.

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.109:2) ("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*, 2015 WI App 58, 364 Wis. 2d 528, 868 N.W.2d 199 (unpublished table op.).

The witness in *Cameron* was offered as an expert, not a lay witness. *Id.* ¶ 6. As such, 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 Jones' testimony here. From here, however, the testimony upheld in *Butler* diverged from the testimony here in four key respects—all of which were identified by Mr. O'Kelly's post-conviction analysis.

First, Brosseau's testimony 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 a cell phone will connect to the cell tower with the strongest signal, not necessarily the closest tower. *Id.* ¶ 8.[12] This testimony, combined with Brosseau's own admissions, made clear to the jury the evidence's relevance and limitations.

If 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.13), 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.191:27, 39)—not three or more miles away, as the U.S. Cellular data showed (R.191:32-33, 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.197:12:6-10). Yet the jury heard Jones say Gilbert was within field goal range of the hotel.

Third, unlike in both *Cameron* and *Butler*, 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), Brosseau testified at the post-conviction

[12] Here, by contrast, a U.S. Cellular employee testified that a "cell phone would connect to the nearest tower." (R.189:65-66).

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.196:95-96).

The post-conviction court was untroubled by this modification, citing Brosseau's purported knowledge of Milwaukee-area cell towers and their coverage patterns. (R.109:3). But O'Kelly testified that "there would be nothing to support" this modification; it would be an "arbitrary decision." (R.196:77). 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 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; *U.S. v. Banks*, 93 F.Supp.3d 1237, 1252 (D. Kan. 2015); *U.S. 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"); *U.S. 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"); *U.S. v. Evans,* 892 F.Supp.2d 949 (N.D. Ill. 2012) (rejecting expert testimony purporting to place 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 had been qualified as an expert *and* noticed as such (neither of which occurred), her testimony placing Gilbert within 120 feet of the Econolodge was still unreliable, inadmissible, and—as the State has now conceded—false.

Apart from its unreliability, 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.13), but McKee never testified or provided a report in discovery, and Jones exceeded the permissible scope of lay testimony, as discussed above.

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.

B. Attorney Taylor's performance lacked any reasonable strategic basis.

An attorney's performance is deficient if, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *State v. Guck*, 170 Wis. 2d 661, 669, 490 N.W.2d 34 (Ct. App. 1992). The purpose

of a *Machner* hearing is to "determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies." *Machner*, 92 Wis.2d at 804. If a "reasonable trial strategy" is shown, the Court will not second-guess it, but it "may conclude that an attorney's performance was deficient if it was based on an irrational trial tactic or based upon caprice rather than upon judgment." *State v. Domke*, 2011 WI 95, ¶ 49, 337 Wis. 2d 268, 805 N.W.2d 364 (internal punctuation omitted).

At the *Machner* hearing, Taylor conceded that he failed to challenge the cellular tower evidence, including Jones' erroneous statements regarding the location of the phone. Instead of providing a reassuring justification for his inaction, his testimony revealed an irrational trial tactic based on a clear mistake of fact: Taylor saw no need to discredit this evidence because he thought Gilbert had previously testified the phone in question was not his.

Taylor is simply wrong. At trial, Gilbert *admitted* to owning the phone described in the records and maps shown to the jury. (R.190:72, 75). Without more, Taylor's performance was deficient.

Further, even if Gilbert *had* denied ownership of the phone, there was no rational basis to leave its location undisputed. The jury heard unchallenged testimony that the phone ascribed to Gilbert was within mere feet of the Econolodge. Taylor defended his inaction by claiming he did not want the State to correct its error. (R.204:27). But how would it possibly advance Gilbert's case to let this critical error stand?

Taylor later pivoted, asserting that even if Gilbert owned the phone, there was no evidence indicating that he was in *possession* of the phone when it was allegedly within feet of the Econolodge. (R.204:34). But if that was his theory, Taylor did nothing to advance it at trial. Instead, Taylor left the jury with no alternative to the State's theory: Gilbert admitted to owning the phone; uncontroverted testimony tied that phone to relevant cell towers; and maps of those cell towers purported to place Gilbert within feet of the incriminating location at the relevant time. Because Taylor did nothing to challenge these points, the only possible inference was that Gilbert had to be lying: he *was* within 120 feet of the Econolodge when it mattered most.

In short, Taylor's lone reason for failing to challenge the cellular tower evidence was a conscious gamble: that Gilbert's testimony, alone, would be enough to discredit *all* of the apparently objective, scientific cell phone evidence introduced by the State. Gilbert's defense should not have hinged on such a reckless wager.[13]

There can be little doubt that trial counsel's deficient performance in failing to do *anything* with the cell tower evidence crippled Gilbert's defense. The post-conviction court acknowledged as much (R109:3, fn. 1), and this Court echoed that observation. *Gilbert I*, ¶¶ 32-33. Had this evidence been excluded or effectively undermined, the case would have been reduced to a pure credibility contest. *Id.* ¶ 24 (noting "the significance of this erroneous testimony in the context of this case, which otherwise rested on the witnesses' credibility").

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

A. Counsel's performance was deficient and prejudicial.

Wisconsin courts recognize that a failure to impeach an alleged victim's credibility can constitute deficient performance. *Coleman, supra*, 2015 WI App 38, ¶ 33.

In *Coleman*, the defendant was convicted of sexual assault of a minor. *Id.* ¶ 16. Trial counsel—none other than Robert L. Taylor—refused to question the victim regarding a prior statement inconsistent with the DNA evidence. *Id.* ¶¶ 33-35. At a *Machner* hearing, Taylor expressed discomfort with the optics of questioning a young girl about sexual assault before the jury. *Id.*

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[13] Taylor also mistakenly presumed that the jury had specialized knowledge regarding the accuracy of cell tower mapping: "I was aware that the [cell tower] technology at that time was in a state of flux and they were trying to establish concretely that was the case and I thought it was not *and I thought the jury knew that it was not.*" (R.204:33) (emphasis added). Taylor offered no reasonable basis for this assumption.

¶ 35. Further, he 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.

This Court rejected Taylor'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 "[Taylor] 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.*

Precisely the same is true here. Taylor 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.72, Ex. 3:6). 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 consensual 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 just two or three days before police found her. (R.72, Ex. 3:14). At trial, she claimed she had sustained no injuries from this graphic beating. (R.188:35).

The State presented no DNA evidence of physical or sexual assault. And defense counsel followed the same playbook he used in *Coleman*, failing to call any witnesses on Gilbert's behalf. 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 troubling was Taylor'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." (R.169:10). 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. Indeed, Pratchet went so far as to call J.D.E. a "liar" and warned that she was going to "do this to somebody else." (R.169:48, 50). In his initial statements to police, Pratchet twice denied that Gilbert ever returned to the Econolodge. (*Id.* at 30). Pratchet "recalled" this episode only after the detective prompted him by asking whether he prevented Gilbert from assaulting J.D.E. (*Id.* at 30-31). And this was immediately after one of the eight times he offered to do "anything" to avoid punishment. (*Id.*). Then, *four months* later—after he had made a plea deal in his own case—Pratchet recounted a far more detailed narrative, now including elements that for the first time corroborated J.D.E.'s version of events. (R.128, A-103).

At trial, Pratchet adamantly contradicted J.D.E.'s claim that she saw an exchange of a car amp and cash. (R.189:47). 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.189:51-52).

In his pretrial statements, Pratchet also denied several more of J.D.E.'s claims: that he took J.D.E. to the beauty store (R.72, Ex. 3:9, 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). If elicited by trial counsel, this litany of contradictions would have caused the jury to question whether Pratchet, J.D.E., or both were telling the truth.

B. Attorney Taylor's performance lacked any reasonable strategic basis.

Taylor's overall (and only) trial strategy was that establishing conflicting statements of the witnesses, alone, would be enough to create reasonable doubt. (R.204:87) Another gamble. But even if that were a reasonable trial strategy, Taylor was nonetheless deficient: after all, he did not *raise* any of the witnesses' prior conflicting statements. Without drawing on the trove of impeachment evidence or in any way highlighting available inconsistencies for the jury, Taylor permitted the State to present the opposite of inconsistency: an unblemished narrative derived from carefully harmonized accounts of the alleged co-actor and victim. The jury would have had no reasonable basis to question Pratchet's (or J.D.E.'s) truthfulness or motives.

Chief among these was Taylor's failure to introduce any of Pratchet's prior statements casting doubt on his motive for testifying. When pressed on why he did not introduce even one of the eight times that Pratchet promised to "do anything" to avoid punishment, Taylor revealed yet another risky hand. These statements did not need to be "highlighted," he said, because Pratchet's cooperation with police, coupled with his prior convictions, was sufficient to undermine his testimony. (R.204:55-56).

Perhaps Pratchet's cooperation with police and prior convictions could have been a basis to disregard his testimony had Taylor shown the jury any inconsistencies in that testimony. Instead, his testimony aligned with J.D.E.'s. If establishing conflicting statements was truly his objective, Taylor had ample fodder to discredit Pratchet at the very least. He did not. To the contrary, the jury heard unchallenged testimony that Pratchet's testimony was motivated by unadulterated altruism: "Once I found out her — [J.D.E's] real age, I felt guilty. I wanted to do what was right, that is why before the deal even came I gave up information regarding Gilbert." (R.189:45).

Taylor's defense for omitting other critical impeachment evidence is no less concerning. At trial, the State presented evidence about an amplifier found in Gilbert's car upon his

arrest—the very amp that Pratchet had previously asserted was irrelevant. Not only did Taylor fail to exploit this particular inconsistency in cross-examining Pratchet, but he amplified it by letting irrelevant and highly prejudicial photos go to the jury. Although Pratchet unambiguously told police the amp found in Gilbert's car was *not* the one he had given Gilbert, the State nonetheless moved to admit photos of that amp into evidence, with no foundation or relevance objection from Taylor.

If Taylor had raised Pratchet's previous statement, the photos *and* testimony regarding this amplifier would have been excluded—or at a minimum discredited by the very witness claiming the transaction, with the jury witnessing the State making another critical mistake about a key piece of evidence. (R.187:60; R.188:78; Tr. Ex. 1). Instead, the jury heard uncontroverted testimony from Pratchet and J.D.E. about a transaction for a silvery piece of stereo equipment and police testimony about a matching amplifier found in Gilbert's car upon his arrest. That is, instead of impeaching Pratchet (and thereby J.D.E.), which would have resulted in no credible testimony (or at best conflicting testimony) and no objective proof of the transaction, Taylor allowed the State's witnesses to bolster each other *and* allowed inadmissible photos to corroborate the story.

These errors are central to Gilbert's trafficking conviction, and Taylor had no cogent explanation for any of them. To the contrary, he appeared to assume Gilbert's guilt: "the fact of the matter was the young lady was exchanged for an amplifier, and I would not have wanted to highlight that to the jury." (R.204:51). That the State did not even attempt to rehabilitate this point at the *Machner* hearing is telling.

If Taylor thought it was enough to show that his client's testimony conflicted with the State's evidence, then that strategy suffered from the same deficient premise underlying his failings with the cell tower evidence. It is one thing to establish that the State's witnesses' trial testimony conflicted with Gilbert's testimony *and* materially departed from their own prior statements; it is quite another to permit the State to present a unified narrative that conflicted with Gilbert's testimony *alone*. For Taylor to forgo *any* of numerous available impeachment

opportunities on the off chance that the jury would credit Gilbert lacks any reasonable strategic justification.

Otherwise, Taylor relied on the same disingenuous defenses he offered (and were rejected) in *Coleman*. While the allegations about the alleged physical altercation between J.D.E. and Gilbert certainly involved "despicable" conduct (R.204:63-65), Taylor's "decision not to pursue this evidence, apparently because he believed it was distasteful to the jury, was not a reasonable strategic decision given the facts in this record." *Coleman*, ¶ 35. In *Coleman*, the court found that Taylor's failure to present impeachment evidence by questioning the child victim's father was deficient. *Id.* ¶ 33. Here, Taylor failed to raise evidence that impugned the alleged co-actor, who had (and demonstrated) every motive to be dishonest. Just as in *Coleman*, Taylor's "performance in this aspect was deficient." *Id.* ¶ 35.

And the prejudice resulting to Gilbert is manifest. While some of these details may appear minor in isolation or in the abstract, they cannot be considered so here, where even the State argued in closing that the case rested on the credibility of the witnesses. Apart from the suspect cell tower evidence, there is no other objective evidence in the case. *Cf. Gilbert I*, ¶ 36 (noting "the important role of credibility in this trial").

III. 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 U.S. 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.192:34) (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.

Taylor's explanation for these remarks reveals no reasonable strategy, either. If the "thrust of [his] argument" was to highlight that the State witnesses' testimony was too unreliable to convict, Taylor could have left it at that. Instead, he told the jury that he did not "believe *any* of them," indisputably including his own client in the mix of unreliable witnesses. (R.204:67). 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, casting doubt on his client's credibility. *Gilbert I*, ¶ 37.

This added aspersion could serve no incremental strategic purpose, and was further compounded by the gratuitous references 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 (Taylor's opening

statement that his client was "not an angel" "gave the jury negative and prejudicial information that was not relevant to any element of the crime").

In *Gilbert I*, this Court found that the postconviction court had failed to address Taylor's comments questioning Gilbert's credibility, and rejected the court's conclusion that Taylor was "talking about other people," not Gilbert, when he referred to "scumbags." *Id.* ¶ 37. Accordingly, this Court directed the postconviction court to "revisit the closing argument issue in the context of the entire case." *Id.*

Instead, following the *Machner* hearing, the postconviction court reiterated its previous opinion that Taylor was referring to other people, disregarding this Court's ruling that "[t]he record does not support that conclusion." *Gilbert I*, ¶ 37. In doing so, the court did not address both uses of "scumbag," focusing solely on the first instance. (R.204:121-123). Yet it is the second instance where Taylor most directly refers to Gilbert. (R.192:34). Taylor told the jury that in this country, we "let some scumbags go free." *Id.* And the jury was deciding only one person's freedom.

On top of this, Taylor gratuitously analogized Gilbert to O.J. Simpson. Having already told the jury that Simpson was a "scumbag," Taylor's second use of scumbag only served to drive home a memorable thematic comparison. A jury hearing this remark in context would have no doubt that counsel was including his client in Simpson's class of "scumbags" who are probably guilty but juries let go free.

Notwithstanding his attempt, eight years later, to reinvent these remarks as an attenuation of the constitutional adage, "innocent until proven guilty," Taylor likened Gilbert's case to the checkered past of someone who many believe got away with murder. (R.204:69). Simply put, it is wholly unnecessary and objectively unreasonable to compare Gilbert's case to one of the most infamous cases of questionable acquittal and expect the jury to render a favorable verdict. "O.J. Simpson" and "scumbag" do not connote "innocence." If anything, they tacitly encourage the jury not to let O.J.'s acquittal happen again.

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, as Taylor concedes. Taylor's closing argument took as true the State's portrayal of Gilbert. His closing arguments were the converse of his opening remarks in *Coleman* and were objectively far worse: if it is prejudicial to describe your client as not a good thing (i.e., "not an angel"), then it is damning to suggest that your client is definitely a bad thing (a "scumbag"). 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.

IV. 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); *accord*, *Gilbert I*, ¶ 22.

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.

- In a case where both sides acknowledged that the verdict would be decided on a credibility contest, defense counsel went out of his way to undermine his own client's character, expressly vouching for his *in*credibility in closing arguments.

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.

CONCLUSION

For the foregoing reasons, Gilbert requests that this Court reverse his conviction and order a new trial.

Respectfully submitted this 10th day of June, 2020.

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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 10,969 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.

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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.

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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.

Zachary T. Eastburn

CERTIFICATE OF MAILING

I hereby certify that on this 10th day of June, 2020, 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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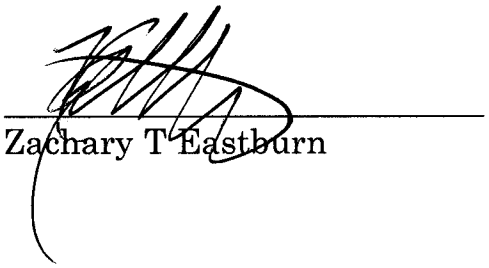

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