COURT OF APPEALS
DECISION
DATED AND FILED

June 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1769-CR **Cir. Ct. No. 2011CF002120**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LANCE DONELLE BUTLER, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS J. CIMPL and GLENN H. YAMAHIRO, Judges. *Affirmed*.

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 BRENNAN, J. Lance Donelle Butler, Jr. appeals a judgment of conviction entered after a jury found him guilty of arson and two counts of first-degree recklessly endangering safety, and from the order denying his motion for

postconviction relief.[1] Butler argues the postconviction court erred when it denied his claim that his trial counsel was constitutionally ineffective for failing to object to the testimony of two police officers, who testified about mapping the locations of cell towers that the cell phone company records showed Butler's phone had used on the day of the arson. Butler claims an expert witness was required to give this information and the officers did not qualify as expert witnesses. Butler also argues that the officers could not give lay opinion testimony on this information because determining which tower a cell phone connects to requires scientific, technical or other specialized knowledge. We hold that the two police officers' testimony qualifies as lay opinion testimony because it involved simply taking the information provided by the cell phone provider and placing that information on a map; the officers did not independently decide which cell tower Butler's cell phone connected to—that information came from the cell phone provider. Accordingly, Butler's trial counsel's failure to object to this testimony was not ineffective assistance. Therefore, we affirm the judgment and order.

BACKGROUND

¶2 On February 20, 2011, Butler allegedly smashed a fire extinguisher through his ex-girlfriend's, M.L.'s, apartment window and patio door, presumably because he was angry she broke up with him. The windows were boarded up and M.L. spent the night elsewhere. M.L.'s car windows had also been broken. On the morning of February 21, 2011, at about 7:20 a.m., Butler started a fire in M.L.'s apartment. During the police investigation, Detective Elizabeth Wallich

[1] The Honorable Dennis R. Cimpl presided over the jury trial and entered the judgment of conviction, while the Honorable Glenn H. Yamahiro presided over postconviction proceedings and entered the order denying Butler's postconviction motion.

subpoenaed cell phone records from Verizon, who was the provider for Butler's cell phone. Verizon gave police a report listing all the calls Butler made on February 21, 2011, who he called at what time, the identification number of the cell tower Butler's calls connected to, the GPS coordinates of each of those cell towers, and which antennae section of the cell tower serviced Butler's calls.

¶3 According to the Verizon records, Butler's cell phone connected to cell towers at various locations in the City of Milwaukee on the day of the arson. At 5:40 a.m., Butler's cell phone used the tower near his uncle's residence to call the Milwaukee County Transit System automated route information number. At 6:57 a.m., Butler's cell phone called M.L.'s number but had moved north as this call used the cell tower near West Mill Road and 76th Street. At 7:28 a.m., Butler's phone called M.L.'s phone by connecting to the cell tower covering M.L.'s apartment. At 7:50 a.m., Butler's phone called M.L.'s phone again, this time by using the cell tower located at 7124 West Fond du Lac Avenue, which covers the area Butler would be near to transfer onto a bus that would take him to the home of his uncle's girlfriend, Melveretta Bradford, where they lived with her two children, Alante and Ashanti. Wallich concluded that text messages talking about the fire were sent to M.L. from Alante's and Ashanti's cell phones and that Butler was at Bradford's home using her children's cell phones the morning of the arson about ninety minutes after the fire. Police arrested Butler and charged him with arson and two counts of recklessly endangering safety.[2] The reckless endangering counts resulted because M.L.'s neighbor was trapped in the apartment building when the fire started and a fireman was injured in rescuing the neighbor.

[2] Butler was also charged with criminal damage to property for smashing M.L.'s apartment windows, but the jury could not reach a verdict on that charge.

¶4 Wallich gave the Verizon cell phone records to Police Officer Brian Brosseau, who took the information and pinpointed on a geographical map where the cell towers were located and at what time Butler's phone connected to each tower. The same map showed the bus route that Butler could take to go from his father's house, to M.L.'s apartment, and to Bradford's house, and where each residence was located in relation to the cell towers. On the day of the arson, the Verizon cell phone records showed Butler's phone starting near his uncle's place, travelling along the bus route up to M.L.'s apartment and then back along the bus route to his uncle's home. A second Police Officer, Eric Draeger, reviewed the Verizon records and the map Brosseau marked.

¶5 At trial, Brosseau testified generally about the Verizon cell phone data records the police received for Butler's phone, explaining the information in the columns, such as the time of the call, the number called, and which cell tower the call used. Brosseau also explained that cell towers typically emit a 360° signal, that Verizon has three antennae that divide that into three 120° sectors, and that Verizon records show which sector of the tower each cell phone call used. All of this is information Verizon gave to the police department. Brosseau shaded the sector on the map to show the 120° area the particular cell tower sector covered. He 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."

¶6 Brosseau then testified about the map he created using this information, explaining that he took the information from Verizon and plotted it on a geographical map, which showed what cell tower each of the calls used at what time:

- On February 21, 2011, the day of the arson, Butler's phone used tower 254 at 4:15 a.m. to call the bus company automated schedule phone number; tower 254 is located in the 15th and Wisconsin area. The map showed this tower covered his uncle's home.

- Butler's phone used tower 250 at 5:37 a.m. to again call the bus company schedule phone number; tower 250 is on east Juneau Avenue in downtown Milwaukee. The map showed this tower also near his uncle's home.

- At 5:40 a.m., Butler's phone pinged off of tower 251, and at 6:57 a.m., Butler's phone pinged off of tower 297; tower 251 covers the Marquette interchange and tower 297 is on the north side off 91st and Malone. The map shows these towers covering the area along the bus route that Butler would take to get to M.L.'s apartment.

- At 7:28 a.m., Butler's phone call to M.L. pinged off of tower 317, sector three, which covers the area of M.L.'s apartment.

- At 7:50 a.m. and 8:00 a.m., Butler's phone calls to M.L. pinged off of tower 288; then tower 262 at 8:23 and 8:32 a.m.; then tower 61 at 8:33 a.m. and 8:34 a.m.; then tower 226 at 8:34 a.m. and 8:35 a.m. putting the phone traveling south along the bus route, away from M.L.'s apartment and towards the home that Butler's uncle was staying in with the uncle's girlfriend, Bradford, and her two children.

Brosseau 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, but that a call will go to the tower with the strongest signal. Brosseau did not determine which cell tower Butler's cell phone connected to—this information was provided by Verizon.

¶7 At trial, Officer Draeger testified that he reviewed the cell phone records in this case, but he did not prepare the map. Wallich also testified about the cell phone records. In addition to subpoenaing cell phone records of Butler and M.L., she also got the cell phone records for Bradford's children because M.L. had received phone calls and text messages from those phones on the date of the arson beginning at 9:06 a.m. and continuing until 10:08 a.m. M.L. suspected the messages came from Butler using someone else's phone because the texts referred to the fire and her clothes burning. Bradford told Wallich that Butler was at her home the day of the fire and he was using her children's phones. Wallich told the jury that during the time Bradford's children's phones were texting M.L., there were no calls or texts at all from Butler's cell phone.

¶8 Two cell phone company employees also testified at trial about the cell phone records. One employee explained generally how cell phones connect to a cell tower—that the cell phone will connect to the cell tower with the strongest signal. He testified that most of the time, this is the closest cell tower, but sometimes, based on weather, terrain or cell traffic, the strongest signal may not necessarily be the closest tower. The second cell phone company employee testified specifically about the Verizon records produced in this case and explained what the information on the phone records meant. He testified that Verizon provided the requested records to police along with the database of each tower number and GPS location. He also told the jury that the phone call from Butler's

phone at 7:28 a.m. on February 21, 2011, connected to tower 317, and he talked about the three sectors on each tower—that the information Verizon provided to the police "will indicate which direction or what facing of the 360 degrees the tower is broadcasting at."

¶9 The jury convicted Butler on the arson and reckless endangering counts. Butler filed a postconviction motion claiming his trial counsel gave him ineffective assistance by not objecting to Draeger's and Brosseau's testimony on the "cellphone tracking." Butler argued that his trial counsel should have asked for a ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), hearing to determine whether the officers' testimony on the cell phone tracking was admissible. The trial court decided to hold a *nunc pro tunc* ***Daubert*** hearing. At the hearing, Draeger and Brosseau testified again.

¶10 Brosseau testified:

- He created the map tracking Butler's cell phone; he did this by taking the information from the cell phone provider and transferring that data to a map; he is "not changing anything," "not analyzing anything." He cannot say exactly where a person is based on this information; rather, he is just taking the information from the cell company and creating a visual aid of that information.

- He "cannot pinpoint the exact location of where the phone was when the call was made."

- The shaded part shows the "approximate range of service for that tower."

- Generally speaking each tower's range is about one and a half miles.

¶11 Draeger testified at the hearing:

- He did not prepare the cell tracking map used in this case;

- The map is "nothing more than a visual representation" of the information provided by the cell phone company.

- "Granulization," a technique used to locate a phone when two cell towers overlap, and to pinpoint a cell phone user's exact location, was not used in this case.

- Taking the information from the cell phone company and creating a map based on it has helped the police locate suspects when this is done "live," as opposed to after the fact, as was the case here.

¶12 The trial court ruled:

> the majority of the testimony offered by these two witnesses is clearly not expert testimony. It's lay opinion testimony under Section 907.01. …
>
> the officers' testimony revolved around plotting data on exhibit maps for the purpose of tracing a history of cell phone usage to and from the defendant in this case on the date in question. I don't find any of the recitation of the data which was provided by the cell phone company nor the mapping of it to involve expert testimony.
>
> ….
>
> They did not attempt to apply the theory of granulization to this case, i.e., the using of cell phone mapping to determine where a cell phone user was at the time of any given call.

> … in this case the detectives made only general statement about cell phone location. Never gave an opinion about the location of the defendant at the time the cell phone calls were made. Acknowledged they could not say where the cell phone was.[3]

The trial court then concluded that had Butler's trial counsel raised the ***Daubert*** objection at trial, these officers' testimony would still have been admitted and that Butler "was not prejudiced because the detectives did not give any opinion about where the phone was located when the calls were made."[4] It found this evidence to be admissible and therefore, Butler's trial counsel was not ineffective for failing to object. Butler appeals.

DISCUSSION

¶13 Butler alleges on appeal that the postconviction court erred when it denied his postconviction motion alleging his trial counsel gave him ineffective assistance by failing to object to Draeger's and Brosseau's testimony about mapping out calls from Butler's cell phone. Butler believes his trial counsel should have objected because the officers' testimony did not qualify as expert testimony or lay opinion. Because we conclude that Butler failed to show his trial counsel performed deficiently or that the lack of objection prejudiced him, we affirm.

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[3] The trial court also ruled: "to the extent that any testimony could be construed as expert testimony, that which was offered in addition to the mere translation of data received from the cell companies, the Court finds that the -- for that limited extent that the officers were experts based upon their testimony and their resumes -- vitaes." Because we conclude that expert testimony is not necessary to take the cell phone records and plot that information onto a map, we need not address this portion of the trial court's opinion.

[4] Although the trial court refers to Brosseau and Draeger as "detectives," the record shows they are officers.

A. *Standard of Review*.

¶14 A postconviction claim of ineffective assistance of counsel must show that counsel's performance was deficient and also that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. If a defendant fails to satisfy one prong of the ineffective assistance of counsel test, we need not address the other. ***Id.*** at 697. "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. Defendants must overcome a strong presumption that their counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Counsel's performance is not deficient if there is no objection to an issue that has no merit. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. Prejudice is proven when the defendant shows that his counsel's errors were so serious that the defendant was deprived of a fair trial and reliable outcome. *See* ***Strickland***, 466 U.S. at 687.

¶15 Whether a defendant has been denied the right to effective assistance of counsel presents a mixed question of law and fact. ***State v. Trawitzki***, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. The trial court's findings of historical fact will not be disturbed unless they are clearly erroneous. ***Id.*** The ultimate determinations based upon those findings of whether counsel's

performance was constitutionally deficient and prejudicial are questions of law subject to our independent review. ***Id.***

¶16 Butler's ineffective assistance claim is predicated on whether the officers' testimony qualified as expert testimony under WIS. STAT. § 907.02 (2013-14),[5] or lay opinion testimony under WIS. STAT. § 907.01. These statutes provide:

> **907.02 Testimony by experts. (1)** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.
>
> **(2)** Notwithstanding sub. (1), the testimony of an expert witness may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered.
>
> **907.01 Opinion by lay witnesses.** If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:
>
> **(1**) Rationally based on the perception of the witness.
>
> **(2)** Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
>
> **(3)** Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02(1).

[5] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted. Wisconsin adopted the ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), analysis for the admission of expert testimony by enacting WIS. STAT. § 907.02.

B. *Butler has not shown his trial counsel performed deficiently because Brosseau's and Draeger's testimony was properly admitted as lay opinion testimony*.

¶17 Butler argues that Brosseau and Draeger did not qualify as expert witnesses *and* that the information they provided *required* "scientific, technical, or other specialized knowledge," such that they could not give lay opinion testimony on the cell phone map. We conclude that a witness need not be an expert to take the information provided by a cell phone provider and transfer that information onto a map, which creates a visual aid from which a jury can more easily understand that information.

¶18 Brosseau testified that he took the information from Verizon and plotted it onto a map to make a visual representation of the information from Verizon. He did not change anything or analyze anything. He took the data from Verizon and marked a map with the cell tower Verizon said each of the calls from Butler's cell phone used. He marked the map with the time Verizon said the cell phone made the call, and he marked the map with the particular sector of the tower Verizon said the call used. This is information based on Brosseau's perception from looking at the Verizon records, and most definitely would be helpful to the jury in understanding the information. Brosseau did not need scientific, technical, or specialized training to make this map. Thus, his testimony was properly admitted as lay opinion. *See* ***United States v. Evans***, 892 F. Supp. 2d 949, 953 (N.D. Ill. 2012) (creating a map plotting cell towers a defendant's phone used does not require specialized knowledge and is admissible through lay opinion testimony).

¶19 Draeger testified that he did not create the map, but confirmed that the map Brosseau created did not involve granulization; rather, it simply created a

visual representation of the data Verizon gave to the police. This too was properly admitted lay opinion.

¶20 This case did not involve the more complex process of granulization, which does require expert testimony, and has been found by at least one court to be unreliable. *See* ***id.*** at 955-57; *but see* ***United States v. Jones***, 918 F. Supp. 2d 1, 5 (D.D.C. 2013) ("the use of cell phone location records to determine the general location of a cell phone has been widely accepted by numerous federal courts"); *see generally* ***United States v. Eady***, 2013 WL 4680527 *4 (D.S.C. 2013) ("While the law in this area is still developing, this court agrees that the overwhelming consensus of judicial authority favors a finding that methodology of the kind employed by [the] Special Agent [] is reliable."). Although ***Evans*** does not define "granulization," it suggests this involves "predict[ing] where the coverage area of one tower will overlap with the coverage area of another," ***id.***, 892 F. Supp. 2d at 952, to pinpoint exactly where the cell phone user is located.

¶21 Because the case before us does not involve the more complex issue of granulization, it is not necessary for us to address whether either officer qualifies as an expert witness on the topic of granulization. *See* ***State v. Cain***, 2012 WI 68, ¶37 n.11, 342 Wis. 2d 1, 816 N.W.2d 177 (cases should be decided on the narrowest grounds possible).

¶22 Both Brosseau and Draeger testified that the map created to help the jury was based solely on information provided from Verizon. There were no issues of overlapping cell towers or testimony by the officers that they were using this information to say exactly where Butler was at any point in time. Neither officer could say where Butler was or whether Butler himself was in possession of his cell phone when the calls were made. The trial court made the right call here

in concluding that the officers' testimony was admissible. Because the officers' testimony was admissible, Butler's trial counsel's failure to object to the officers' testimony was not deficient. *See* ***Wheat***, 256 Wis. 2d 270, ¶14 (An attorney is not ineffective for failing to raise a meritless issue.).

C. *Butler has not shown prejudice*.

¶23 Butler failed to show that he was prejudiced when his trial counsel did not object to the officers' testimony. First, even if his trial counsel had objected, it would have been overruled for the reasons we addressed earlier: these officers gave admissible lay opinions that were helpful to the jury to understand the cell phone data. Second, he admits there is no Wisconsin precedent on this issue. Absent controlling precedent on the subject matter, we decline to conclude his trial counsel performed ineffectively. Third, Butler did not object to the testimony by the cell phone company employees, who testified about how a call connects to the towers. So, any complaint about the officers repeating this information in their testimony could not cause prejudice as the jury heard this information from the cell phone company witnesses.

CONCLUSION

¶24 We conclude that no expert witness is required when testimony involves simply taking the information provided by a cell phone company and plotting that information on a map. The officers' testimony here regarded taking information in printed form and creating a visual aid of that information to help the jury better understand that information. This testimony was properly admitted as lay opinion testimony and any objection made at trial would have been overruled. Hence, Butler's claim of ineffective assistance on this basis fails. An

attorney cannot be ineffective for failing to make an objection that has no merit. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.