

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 26, 2018**

Sheila T. Reiff  
Clerk of Court of Appeals

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**Appeal No. 2016AP1852-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 2012CF000626

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RONALD LEE GILBERT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Order affirmed in part; reversed in part and cause remanded with directions.*

Before Kessler, P.J., Brash and Dugan, JJ.

¶1 DUGAN, J. Ronald Lee Gilbert appeals from the judgment of conviction, following a jury trial, for trafficking of a child, second-degree sexual

assault of a child, and intentional child abuse. He also appeals the denial of his postconviction motions.<sup>1</sup>

¶2 On appeal, Gilbert contends that trial counsel provided ineffective assistance because trial counsel (1) did not challenge cellular phone data presented as impeachment evidence by the State; (2) did not obtain critical discovery before trial regarding the cellular phone data; (3) did not impeach witnesses with their prior inconsistent statements; (4) did not strike a biased juror;<sup>2</sup> and (5) made improper comments during closing argument. Gilbert maintains that he was prejudiced by each of the five deficiencies and by their cumulative effect. He asserts that the postconviction court should have reversed his conviction or, at a minimum, conducted an evidentiary hearing.

¶3 We conclude that, with the exception of the failure to strike the juror, Gilbert has alleged sufficient facts to warrant an evidentiary hearing and, therefore, we affirm the order in part, reverse the order in part, and remand this matter for a *Machner* hearing.<sup>3</sup>

¶4 The following background facts provide context for the ineffective assistance of counsel claim.

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<sup>1</sup> The Honorable Dennis R. Cimpl presided over Gilbert's trial, conviction, and sentencing. The Honorable Stephanie Rothstein issued several orders on the postconviction and supplemental postconviction motions. The issues Gilbert raises on appeal were decided by Judge Rothstein. We refer to Judge Cimpl as the trial court. We refer to Judge Rothstein as the postconviction court.

<sup>2</sup> Throughout his appellate filings, Gilbert refers to the juror as an "impartial" juror. We have corrected this inadvertent misnomer.

<sup>3</sup> See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

## BACKGROUND

¶5 On January 31, 2012, the State charged Gilbert with trafficking a child, second-degree sexual assault of a child, and physical abuse of a child. The charges involved a fourteen-year-old girl, J.D.E. Brandon Prachett was also charged with four felonies involving J.D.E., and was facing a global sentence of ninety-eight and one-half years in prison. However, prior to Gilbert's trial, Prachett entered into a plea agreement that required him to cooperate in the prosecution of Gilbert. Prachett's charges were reduced from one count of trafficking a child to one count of soliciting a child for prostitution and the other three counts were dismissed, but read in at sentencing.

¶6 Prachett pled guilty to the charge of soliciting a child for prostitution, which carried a maximum prison sentence of twenty-five years and was awaiting sentencing at the time of Gilbert's trial. Pursuant to the plea agreement, the State would leave Prachett's sentence to the trial court's discretion, but would request that the court consider Prachett's cooperation in Gilbert's prosecution as a mitigating factor.

¶7 Gilbert's case was tried to a jury from May 21 through May 24, 2012. Significant to this appeal, witnesses included J.D.E., Prachett, Detective Dawn Jones, and Gilbert.

¶8 During the trial, J.D.E. testified that on January 7, 2012, Gilbert picked her up at her home in Racine and brought her to his house in Milwaukee,

where they engaged in mouth-to-penis and penis-to-vagina sex.<sup>4</sup> Gilbert then took J.D.E. to his friend's house where he told her to get on "the hot line" to see if someone was willing to "pay to play," meaning pay to have sex with her. While at the friend's house, she and Gilbert also engaged in mouth-to-penis sex. J.D.E. reported that, before they left the friend's house, Gilbert told her to ask the friend if he would pay to have sex with her. Gilbert's friend and J.D.E. went into a back room and the friend pulled down his pants, but when J.D.E. asked for the \$60 that Gilbert told her to charge, the friend said he did not have the money, and he pulled his pants back up.

¶9 J.D.E. testified that the first time Gilbert took her to the Econo Lodge, Gilbert spoke with his friend, Prachett. While she was there, Gilbert and Prachett talked about putting her on "Backpage."<sup>5</sup> J.D.E. stated that they only stayed a few minutes and then left and went to Gilbert's sister's house.

¶10 After that, Gilbert took J.D.E. back to the Econo Lodge a second time. When they drove into the parking lot, Prachett came out and shook hands with Gilbert, and Prachett gave Gilbert some money and a silver piece of stereo equipment. Then, Gilbert told her to go into the Econo Lodge and she went to Prachett's room. J.D.E. later came to understand that Prachett paid Gilbert money and exchanged the stereo equipment for J.D.E. to become Prachett's prostitute.

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<sup>4</sup> J.D.E. later testified that she was not sure if they went to an Econo Lodge first or Gilbert's house first, but she was clear that they went to the Econo Lodge two times. Gilbert testified that they went directly to the Econo Lodge when they arrived in Milwaukee.

<sup>5</sup> Backpage.com is an online forum for classified ads sectioned by subject matter, including an "adult" section where ads for prostitutes are posted. *See Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015).

¶11 In support of the intentional abuse of a child charge, J.D.E. further testified that she saw Gilbert some time after he left her at the Econo Lodge. On that day, Gilbert came to the Econo Lodge and knocked on the door. When she opened the door, Gilbert grabbed her and said she was leaving with him. She tried to move out of the way and Gilbert punched her in the face twice.

¶12 Like J.D.E., Prachett testified that Gilbert was at the Econo Lodge twice on January 7, 2012. Prachett said that Gilbert arrived at the Econo Lodge with J.D.E. at 8:00 p.m. After asking Prachett to post a Backpage ad for J.D.E. and staying briefly, Gilbert left with J.D.E. Later, Prachett called Gilbert to ask what his intentions were with J.D.E. Gilbert said that he was going to try to make some money with her and, if he was not successful, he would call Prachett back. About thirty to forty-five minutes later, Gilbert returned to the Econo Lodge. Gilbert pulled in the driveway of the Econo Lodge and parked, Prachett walked up and shook hands with Gilbert, J.D.E. got out of the car, Prachett got in the car, and Prachett told J.D.E. to go to his room. Then, in the parking lot of the Econo Lodge, Gilbert and Prachett talked about how much money would be exchanged for J.D.E. They eventually agreed that Prachett would pay \$100 and give Gilbert a piece of stereo equipment in exchange for J.D.E. Prachett said that the idea of making the transaction was Gilbert's, not his. Gilbert also told Prachett that he had "sexual contact" with J.D.E. and she was good. Prachett interpreted this as meaning that "she was skilled at sex" and "nice for prostitution." He said that the transaction occurred late at night on January 7, 2012.

¶13 By contrast, Gilbert testified he took J.D.E. to the Econo Lodge when they arrived in Milwaukee. He stated that they just talked with Prachett and his girlfriend and "smoked some weed." There was no conversation about sex and no one engaged in any sexual acts at the Econo Lodge. Gilbert said that he stayed

at the Econo Lodge for approximately thirty minutes. After using the bathroom, he told J.D.E. that he wanted to get something to eat, but she said she did not want to go. Gilbert testified that he left and never returned.

¶14 Based on the conflicting testimony of J.D.E., Gilbert, and Prachett, the issue of whether Gilbert returned to the Econo Lodge a second time on January 7, 2012, became critical. Detective Jones addressed the issue in her rebuttal testimony, which relied on cellular data from Gilbert's cell phone. She testified that the cellular data showed that Gilbert's cell phone was within 120 feet of the Econo Lodge at the time he allegedly sold J.D.E. to Prachett. The State relied on that testimony and in closing argument, told the jury that the cellular data proved that Gilbert lied when he testified he did not return to the Econo Lodge. However, that testimony was inaccurate—the data did not indicate that Gilbert's cell phone was within 120 feet of the Econo Lodge at the time of the alleged sale of J.D.E. to Prachett. It is undisputed that cell phone mapping does not provide the location of a cell phone within feet.

¶15 The jury found Gilbert guilty of all three counts. He then filed a motion for postconviction relief. As germane to this appeal, that motion (1) challenged the admissibility of Jones' cellular phone data testimony and claimed that trial counsel was ineffective for failing to challenge that evidence at trial; (2) claimed trial counsel was ineffective for failing to demand and obtain all discovery before trial, including the cellular phone location maps; and (3) claimed that trial counsel was ineffective for failing to impeach J.D.E. with her prior inconsistent statement that confirmed Gilbert's version of the events. The postconviction court denied the motion without a hearing, except that it ordered an evidentiary hearing on the accuracy of the information presented to the jury on where Gilbert's cell phone was located. At the hearing, the postconviction court

heard testimony from an expert retained by Gilbert and the officer (not Jones) who created the cellular data maps that were used in Gilbert's case.

¶16 Subsequently, the postconviction court held that based on the testimony from the hearing, Gilbert failed to show that the information put before the jury was erroneous. However, the postconviction court did not address the issue of whether the cellular data placed Gilbert's cell phone within 120 feet of the Econo Lodge.

¶17 Later, Gilbert filed two supplemental postconviction motions, raising additional issues. As those issues relate to this appeal, Gilbert contended that trial counsel was ineffective for (1) failing to strike a biased juror; (2) failing to impeach the State's primary witnesses, J.D.E. and Prachett, with prior inconsistent statements; and (3) making improper statements in his closing. He also sought reconsideration of the court's earlier postconviction motion decisions. As relevant to this appeal, the postconviction court denied the motions.

¶18 We will recite further necessary facts as we address Gilbert's arguments.

## **DISCUSSION**

¶19 On appeal, Gilbert contends that trial counsel provided ineffective assistance because trial counsel (1) did not challenge cellular phone data presented as impeachment evidence by the State; (2) did not obtain critical discovery before trial regarding the cellular phone data; (3) did not impeach witnesses with their prior inconsistent statements; (4) did not strike a biased juror; and (5) made improper comments during closing argument.

## I. Standard of Review

¶20 “Wisconsin has adopted the United States Supreme Court’s two-pronged *Strickland* test to analyze claims of ineffective assistance of counsel.” *State v. Williams*, 2015 WI 75, ¶74, 364 Wis. 2d 126, 867 N.W.2d 736. *See also Strickland v. Washington*, 466 U.S. 668 (1984). “To prevail under *Strickland*, a defendant must prove that counsel’s representation was both deficient and prejudicial.” *Williams*, 364 Wis. 2d 126, ¶74.

¶21 A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief. *State v. Allen*, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. *See also State v. Wesley*, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232.

To establish deficient performance, the movant must show facts from which a court could conclude that counsel’s representation was below the objective standards of reasonableness.... To establish prejudice, the defendant must show facts from which a court could conclude that its confidence in a fair result is undermined.... If the motion raises such facts, the [postconviction] court must hold an evidentiary hearing.

*Wesley*, 321 Wis. 2d 151, ¶23. “This is a question of law that we review *de novo*.” *See id.* (italics added). “If, however, the record conclusively demonstrates that the movant is not entitled to relief, the [postconviction] court has the discretion to grant or deny a hearing.” *Id.*

¶22 Furthermore, “[w]hen a defendant alleges multiple deficiencies by trial counsel, prejudice should be assessed based on the cumulative effect of these deficiencies.” *State v. Coleman*, 2015 WI App 38, ¶21, 362 Wis. 2d 447, 865 N.W.2d 190. “[I]n 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*.” *Coleman*, 362 Wis. 2d 447, ¶41 (citation omitted; first set of brackets in *Coleman*).

## II. Gilbert Is Entitled to a *Machner* Hearing regarding the Cellular Data Issue

¶23 Gilbert asserts that trial counsel was ineffective for failing to challenge cellular phone data presented as impeachment evidence by the State through Jones’ testimony. He asserts that trial counsel was deficient in failing to object to Jones’ testimony that Gilbert’s cell phone was within 120 feet of the Econo Lodge at the time Gilbert allegedly sold J.D.E. to Prachet—close to midnight on January 7, 2012.

¶24 The postconviction court concluded that based on the testimony at the evidentiary hearing, Gilbert had not shown Jones’ testimony was inaccurate. On appeal, the State concedes that Jones’ testimony that Gilbert’s cell phone was within 120 feet of the Econo Lodge was inaccurate. As we will further explain, given the significance of this erroneous testimony in the context of this case, which otherwise rested on the witnesses’ credibility, we remand this matter for a *Machner* hearing.

¶25 We summarized J.D.E.’s testimony earlier. She testified that Gilbert was at the Econo Lodge twice on January 7, 2012, and that, during the second occurrence, Gilbert sold her to Prachett for prostitution. In the three days that followed, J.D.E. engaged in five prostitution dates. Later, J.D.E. realized that Prachett had purchased her from Gilbert. Like J.D.E., Prachett testified that Gilbert was at the Econo Lodge twice on January 7, 2012. He stated that the

second time occurred late at night on January 7, 2012. It was at that time he paid Gilbert \$100 and gave him a piece of stereo equipment in exchange for J.D.E.

¶26 Gilbert's testimony was markedly different than that of J.D.E. and Prachett. In a nutshell, Gilbert said that on January 7, 2012, he picked up J.D.E. in Racine at approximately 4:00 p.m., he brought her to Prachett's room at the Econo Lodge at around 5:00 p.m. or 5:30 p.m., he left before 6:30 p.m. without J.D.E., and he never saw J.D.E. again.

¶27 In rebuttal, Jones testified about Gilbert's cell phone location on January 7, 2012. Her testimony was based on computer-generated maps created by another officer that showed a circle divided into three sectors, one of which was highlighted in blue. Jones testified that the sector highlighted in blue was where the cell phone was located. Jones stated that each sector spanned an area of 120 feet.

¶28 Based on the map showing that sector one was highlighted in blue in the area of 18th and College, Jones testified that Gilbert's cell phone was in sector one when calls were made at 11:58 p.m. and 11:59 p.m. on January 7, 2012. The prosecutor asked whether the Econo Lodge was in sector one, and Jones responded, "yes." Then, the prosecutor asked Jones, "do you have any idea how many miles that sector encompasses?" Jones replied, "[i]t's about 120 feet." Trial counsel did not cross-examine Jones.

¶29 However, as the State concedes, Jones provided inaccurate testimony. There were three 120 *degree* sectors; not 120 foot sectors. In addition, it is undisputed that cell phone mapping does not provide locations of cell phones within feet.

¶30 Further, the prosecutor relied upon Jones' erroneous testimony in the closing argument stating,

He wants more, but he settles for 100 bucks and an amp; risk versus ability to make money....

And perhaps he's thinking, you know, maybe there will be a way if this girl does turn out to, you know, maybe we'll be able to work together, I'll get this money but there will be some interest I have here with this girl, with this property.

And so he sells her, *and actually it's at this point in time in the course of events when it actually becomes abundantly clear that the defendant, Mr. Gilbert, has lied to you. He has lied to you. He has lied to you about something really important.* I never went back to the Econolodge [sic], I left her there in the early evening hours of the 7th.... He shows up with her, I left.

...[S]he was calling me, but I left her, I didn't actually see her again, I left her with Prachett. I was up on the north side. I may have been some other place, I was likely—most of the time during this operative period of January 7th I was crashing at my place on the north side.

I didn't go to Econolodge [sic] at the very end of the day on the 7th of January when the deal goes down[.]

(Emphasis added.)

¶31 The prosecutor further argued, emphasizing Jones' erroneous testimony, what really happened was that:

Mr. Gilbert has to call Mr. Prachett to tell him he's there ... with the girl and to come down with the money and stereo equipment.... *At 11:58, 11:59 p.m. on the 7th Mr. Gilbert's phone is lighting up right next to the Econolodge [sic], within 100 feet or so we know, but given what we know from all of the testimony we heard he was right in the parking lot.*

(Emphasis added.) Moreover, in rebuttal, the prosecutor reminded the jury “[t]his is a case we knew from the beginning does rest on the credibility of the

witnesses,” and the prosecutor returned to the cellular data evidence telling the jury, “[a]nd one thing to remember with the phone maps is they only react when a phone is actively being used.... [T]here are a couple select moments when those phones were in action that were very telling[.]” (Emphasis added.)

¶32 As conceded by the State, erroneous evidence was presented by Jones and the prosecutor relied heavily upon that evidence as objective evidence, which could resolve the conflicting testimony of the witnesses as to where Gilbert was at approximately midnight on January 7, 2012, and hence, whether he had trafficked J.D.E. The cellular phone data was presented as objective evidence and the errors in Jones’ testimony were not exposed during trial.

¶33 The importance of the cellular data testimony in the trial was highlighted by the postconviction court’s statement that “cell phone towers cannot be assailed as having a motive to lie” and thus, “buttressed the credibility” of the State’s witnesses. While the court did not mention Jones’ erroneous statements that a sector spanned 120 feet, it recognized the importance of the cellular data evidence when it stated that it did not conclude that the evidence was harmless or inconsequential. Rather, it stated that “[t]his type of technical evidence certainly is of a type which supported the testimony of the [S]tate’s witnesses, who put the defendant at the motel at a crucial moment in time.”

¶34 Trial counsel did not address Jones’ erroneous testimony placing Gilbert at the Econo Lodge moments before midnight on January 7, 2012, when Gilbert allegedly trafficked J.D.E. Moreover, because the postconviction court found that Jones’ testimony was not erroneous, it did not analyze whether trial counsel was ineffective. Under these facts, Gilbert has established that he is

entitled to a hearing on this component of his ineffective assistance of counsel claim. Thus, we remand to the postconviction court to analyze this claim.

**III. Gilbert Is Entitled to a *Machner* Hearing on the Other Deficiencies of Trial Counsel, except for the Failure to Strike a Juror**

¶35 Gilbert raises several other deficiencies in trial counsel's representation, which he asserts are prejudicial. He contends that trial counsel failed to obtain pretrial discovery, including the cellular phone tower maps before trial and that, even if he had that discovery, he does not appear to have reviewed it. The issue of whether trial counsel had the pretrial discovery has been addressed in conflicting affidavits and is supported by letters and an email string. Taken as true, Gilbert has presented facts that entitle him to a hearing. *See Allen*, 274 Wis. 2d 568, ¶14. The conflicting facts presented involve credibility determinations and were improperly resolved without a hearing. Whether trial counsel obtained and reviewed the discovery materials, including the cellular data maps, is an important issue that is closely tied to the cellular data issue. This issue should be further considered by the postconviction court at the *Machner* hearing.

¶36 Gilbert also claims that trial counsel did not impeach J.D.E. and Prachett with their prior inconsistent statements. The postconviction court denied this claim because it was not reasonably likely to alter the outcome of the trial. We have considered this claim in the context of the entire case, the cellular phone data, and discovery issues. We conclude that Gilbert has presented sufficient facts that entitle him to a hearing on his claim and, given the important role of credibility in this trial, we direct the postconviction court revisit this issue as part of the *Machner* hearing.

¶37 Gilbert further claims that trial counsel was ineffective based on statements that he made in closing arguments. Specifically, he points out that trial counsel argued that, “[i]n this [c]ountry, you know, we would rather ... let some scumbags go free because we can’t find that person guilty if we don’t have enough evidence.” The postconviction court addressed this contention, stating that trial counsel did not specifically refer to Gilbert as a scumbag and that he was referring to other people. The record does not support that conclusion. While not referred to by name, the jury could reasonably understand that trial counsel was referring to Gilbert. Moreover, trial counsel also questioned Gilbert’s credibility, along with the credibility of other key witnesses when he stated,

[I]t’s about who you believe.

You have the victim. You have this co[-]factor fellow who took—made a deal with the State, and you have Mr. 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*. And I told you when I first started that your moral compass would need to be readjusted or recalibrated when listening to the testimony or reading all of the testimony. Maybe they get this, but morality is what’s missing here. There’s [sic] no good guys.

(Emphasis added.) This statement was not addressed by the postconviction court. On remand, the postconviction court should revisit the closing argument issue in the context of the entire case. Having trial counsel, who was supposed to be representing Gilbert’s interests, questioning his credibility and characterizing him as a scumbag presents questions of performance and prejudice that should be further addressed in the *Machner* hearing.

¶38 Gilbert also contends that trial counsel was ineffective because he did not strike Juror 29. During *voir dire*, Juror 29 initially said that she might have trouble being fair and impartial on a case that involved an assault charge, and then

said that “I can’t say. I haven’t heard the evidence.... I’m not going to say that I can honestly put it aside. I don’t know.” The postconviction court held that Gilbert had not shown subjective bias. “Subjective bias refers to ‘bias that is revealed through the words and the demeanor of the prospective juror.’” *State v. Lepsch*, 2017 WI 27, ¶23, 374 Wis. 2d 98, 892 N.W.2d 682 (citation omitted).

¶39 The postconviction court determined that Juror 29’s response reflected her fairness and demonstrated that she had not formed an opinion about the case because she had not heard the evidence at that point. An impartial juror is indifferent and able to render a verdict upon the evidence developed at trial. *See id.*, ¶21. Gilbert has not shown that the postconviction court’s factual finding that the juror was not biased is clearly erroneous. *See id.*, ¶23. Therefore, Gilbert has not shown that trial counsel was deficient and cannot show that he was prejudiced by trial counsel’s failure to strike the juror from the jury panel. *See id.*, ¶25.

## CONCLUSION

¶40 We conclude that, with the exception of the failure to strike the juror, Gilbert has alleged sufficient facts to warrant an evidentiary hearing. The next step is a postconviction evidentiary hearing on the four issues we have identified. We emphasize that we are not deciding that trial counsel was ineffective, only that Gilbert’s original and supplemental postconviction motions were sufficient to require that the postconviction court conduct an evidentiary hearing, applying the appropriate *Strickland* analysis.

*By the Court.*—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

