IN THE SUPREME COURT OF IOWA
Supreme Court No. 18–1623

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY FRANK ERNST,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
THE HONORABLE MICHAEL J. SHUBATT, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

C.J. MAY III
Dubuque County Attorney

BRIGIT M. BARNES & RY ALLEN MEYER
Assistant Dubuque County Attorneys

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Rule

Other Authority

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Was the evidence sufficient to establish that Ernst was the person who broke into Wulfekuhle's house?

United States v. Dunkel, 927 F.2d 955 (7th Cir. 1991)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
State v. Allnutt, 156 N.W.2d 266 (Iowa 1968)
State v. Ary, 877 N.W.2d 686 (Iowa 2016)
State v. Banes, 910 N.W.2d 634 (Iowa Ct. App. 2018)
State v. Canal, 773 N.W.2d 528 (Iowa 2009)
State v. Cox, 500 N.W.2d 23 (Iowa 1993)
State v. Crowley, 309 N.W.2d 523 (Iowa Ct. App. 1981)
State v. Ellis, 578 N.W.2d 655 (Iowa 1998)
State v. Erving, 346 N.W.2d 833 (Iowa 1984)
State v. Garr, 461 N.W.2d 171 (Iowa 1990)
State v. Hall, 371 N.W.2d 187 (Iowa 1985)
State v. Maxwell, 743 N.W.2d 185 (Iowa 2008)
State v. Morelock, 164 N.W.2d 819 (Iowa 1969)
State v. Nitcher, 720 N.W.2d 547 (Iowa 2006)
State v. O'Connell, 275 N.W.2d 197 (Iowa 1979)
State v. Poyner, 306 N.W.2d 716 (Iowa 1981) 2
State v. Reeves, 670 N.W.2d 199 (Iowa 2003)
State v. Roby, 188 N.W.2d 709 (Iowa 1922)
State v. Rockingham, No. 15–0978, 2016 WL 6652350 (Iowa Ct. App. Nov. 9, 2016)
State v. Sanford, 814 N.W.2d 611 (Iowa 2012)
State v. Schrier, 300 N.W.2d 305 (Iowa 1981)
State v. Spies, 672 N.W.2d 792 (Iowa 2003)
Iowa R. App. P. 6.903(2)(g)(3)

II. Was Ernst's counsel ineffective for declining to object to historical cell site data, on the grounds that it was hearsay and/or that it could only be presented by an expert witness?

In re U.S. for Historical Cell Site Data, 724 F.3d 600 (5th Cir. 2013)
Strickland v. Washington, 466 U.S. 668 (1984)
United States v. Baker, 496 Fed.Appx. 201 (3d Cir. 2012)
United States v. Evans, 892 F.Supp.2d 949 (N.D. Ill. 2012)
Burnside v. State, 352 P.3d 627 (Nev. 2015)
Collins v. State, 172 So.3d 724 (Miss. 2015)
DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986)
GE Money Bank v. Morales, 773 N.W.2d 533 (Iowa 2009)
Gordon v. State, 863 So.2d 1215 (Fla. 2003)
Griggs v. State, No. 12–0057, 2013 WL 1223641 (Iowa Ct. App. Mar. 27, 2013)
Hutchison v. American Family Mut. Ins. Co., 514 N.W.2d 882 (Iowa 1994)
King v. State, 797 N.W.2d 565 (Iowa 2011)
Ledezma v. State, 626 N.W.2d 134 (Iowa 2001)
Nguyen v. State, 707 N.W.2d 317 (Iowa 2005)
People v. Holowko, 486 N.E.2d 877 (Ill. 1985)
Perez v. State, 980 So.2d 1126 (Fla. Ct. App. 2008)
State v. Armstead, 453 So.2d 837 (La. 1983)
State v. Benson, No. 15–1895, 2016 WL 7393891 (Iowa Ct. App. Dec. 21, 2016)
State v. Blurton, 484 S.W.3d 758 (Mo. 2016)
State v. Buller, 517 N.W.2d 711 (Iowa 1994)
State v. Coil, 264 N.W.2d 293 (Iowa 1978)
State v. Dalton, 674 N.W.2d 111 (Iowa 2004)
State v. Daniel, 57 N.E.3d 1203 (Ohio Ct. App. 2016)
State v. Finney, 834 N.W.2d 46 (Iowa 2013)
State v. Fleming, No. 106,104, 2012 WL 4794560 (Kan. Ct. App. Oct. 5, 2012)
State v. Garcia, No. 17–0111, 2018 WL 3913668 (Iowa Ct. App. Aug. 15, 2018)
State v. Hall, 976 S.W.2d 121 (Tenn. 1998)
State v. Kandutsch, 799 N.W.2d 865 (Wis. 2011)
State v. Keller, 760 N.W.2d 451 (Iowa 2009)

State v. McGuire, 572 N.W.2d 545 (Iowa 1997)
State v. Patton, 419 S.W.3d 125 (Mo. Ct. App. 2013)
State v. Plain, 898 N.W.2d 801 (Iowa 2017)
State v. Rendon, No. 15–1832, 2016 WL 6270092 (Iowa Ct. App. Oct. 26, 2012)
State v. Reynolds, 746 N.W.2d 837 (Iowa 2008)
State v. Richardson, No. 16–1235, 2017 WL 2461562 (Iowa Ct. App. June 7, 2017)
State v. Shorter, 839 N.W.2d 65 (Iowa 2017)
State v. Steele, 169 A.3d 797 (Conn. Ct. App. 2017)
State v. Wills, 696 N.W.2d 20 (Iowa 2005)
State v. Wyman, 107 A.2d 641 (Me. 2015)
Thompson v. State, 425 S.W.3d 480 (Tex. Ct. App. 2012)
Alexandra Wells, *Ping! The Admissibility of Cellular Records to Track Criminal Defendants*, 33 St. Louis U. Pub. L. Rev. 487 (2014)

ROUTING STATEMENT

Ernst requests retention to determine whether counsel always breaches a duty under *Strickland* by not objecting to presentation of historical cell site data without an expert witness. *See* Def's Br. at 15. But the record on direct appeal is not sufficient to resolve this claim. The witness who testified about the historical cell site data may have had additional training, such that any objection to his qualifications would only prompt the State to lay additional foundation. *See*, *e.g.*, *State v. Richardson*, No. 16–1235, 2017 WL 2461562, at *3 (Iowa Ct. App. June 7, 2017) ("[W]e cannot say whether counsel's lack of objection was ineffective assistance. If counsel had objected, it is possible the State would have asked another question or called another foundational witness and remedied the issue."). If amenable to resolution at all, it would be on Ernst's inability to show prejudice: his vehicle was indisputably placed near the Wulfekuhle residence by security camera footage, which established that his denials were lies without the need for any cell site data. *See* TrialTr.V1 162:10–163:21; TrialTr.V2 34:19–36:22; State's Ex. 15, 28; ExApp. 11, 23. Thus, this appeal can be resolved by applying settled principles, and should be transferred to the Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is Anthony Frank Ernst's direct appeal from a conviction for attempted burglary in the third degree, an aggravated misdemeanor, in violation of Iowa Code sections 713.2 and 713.6B (2017). Ernst was charged with burglary in the third degree, but a jury found him guilty on that lesser-included offense. *See* Verdict (7/12/18); App. 27. Ernst was sentenced to serve a two-year term of incarceration. *See* Judgment and Sentence (9/10/18); App. 37.

In this appeal, Ernst argues: **(1)** the evidence was insufficient to prove the elements of identity, attempted entry, and specific intent; and **(2)** his counsel was ineffective for failing to object to testimony about historical cell site data and to an exhibit containing that data.

Course of Proceedings

The State generally accepts Ernst's account of the relevant course of proceedings. Iowa R. App. P. 6.903(3); Def's Br. at 16–20.

Statement of Facts

Emily Wulfekuhle lived at 1473 McCabe Lane in Cascade, IA, with her husband (Jason) and two children. *See* TrialTr.V1 144:6–23. McCabe Lane is a long dead-end road in a rural area, with only a few residences and two businesses (one of which is Midwest Injection).

See TrialTr.V1 144:14–147:20. This was a very low traffic area, to the point where any unexpected vehicle would stick out to the residents. *See* TrialTr.V1 147:24–148:12; *see also* State's Ex. 13; ExApp. 9.

The Wulfekuhle family kept their garage side door locked with a "regular lock" on the doorknob, without an additional deadbolt. *See* TrialTr.V1 148:21–150:2. Both Emily and Jason checked that the garage door was locked before they left, every day. *See* TrialTr.V1 150:7–11. Other than the Wulfekuhles themselves, nobody else had any legitimate reason to enter their garage, nor permission to do so. *See* TrialTr.V1 150:20–151:17; TrialTr.V1 173:9–23.

Emily confirmed that she checked that garage door was locked before she left the house on August 21, 2017. *See* TrialTr.V1 151:18–152:2. So did Jason. *See* TrialTr.V1 170:20–171:9. But when Jason got home at 4:30 p.m., "[i]t looked like a pry bar pried the door open in the locked position, and it was open." *See* TrialTr.V1 171:10–172:19; State's Ex. 3–4; ExApp. 4–5. When Emily arrived home at 6:30 p.m., she made some similar observations:

> There was pry marks by the doorknob to the door. Weather stripping was torn by the doorknob itself where the pry marks were at. There was also torn weather stripping at the bottom of the door.

See TrialTr.V1 153:16–156:4; State's Ex. 3–4; ExApp. 4–5.

Nothing was missing from inside the garage or the house, and nothing else was out of place. *See* TrialTr.V1 166:14–22; TrialTr.V1 172:20–173:4; TrialTr.V1 174:20–176:15. Jason Wulfekuhle's truck had been parked in the garage, all day. *See* TrialTr.V1 175:17–24.

Emily called the Dubuque County Sheriff's Office, and her call was handled by Investigator William Grant. *See* TrialTr.V2 5:9–6:10. Grant observed pry marks and other damage to the garage door that was consistent with forced entry. *See* TrialTr.V2 11:9–13:8; State's Ex. 11–12; ExApp. 7–8. Midwest Injection was near the Wulfekuhle home, on McCabe Lane. *See* TrialTr.V1 145:16–24. Grant requested and obtained surveillance footage that was captured by Midwest Injection's exterior security cameras. *See* TrialTr.V2 13:9–15:17. One camera was pointed towards McCabe Lane, and it recorded all passing traffic. *See* TrialTr.V2 15;9–16:1. The traffic on McCabe Lane on August 21, 2017 was "very minimal," and almost every single vehicle was attributable to local residents or to nearby farming operations—except for one:

> [W]e identified it as a white Crown Victoria, police model. You could tell it was a police model because it had a spotlight, like a police vehicle would have.
>
> [. . .]
>
> It was missing a lot of paint, on the — on the back driver's side, the rear door, roof area.

See TrialTr.V2 16:2–18:5; State's Ex. 28; ExApp. 23; State's Ex. 29. That car passed Midwest Injection going south on McCabe Lane at about 10:31 a.m., at a very slow speed; it passed Midwest Injection going north at about 10:44 a.m., at around 20 miles per hour. *See* TrialTr.V2 18:6–22:14. Grant paused the video and magnified the image to get a clearer view of the vehicle in question—he could tell there was only one person in the vehicle, and he/she appeared to be wearing "a bright-colored shirt." *See* TrialTr.V2 22:15–30:3; State's Ex. 19–28; ExApp. 14–23. The missing paint on the vehicle was in a "very specific shape." TrialTr.V2 29:16–25; State's Ex. 28; ExApp. 23. Grant pulled registration records on Crown Victoria vehicles in the area—there were about 17 similar Crown Victoria vehicles that were registered to addresses that were within a 60-mile radius, and either Grant or another investigator assessed each one to see if it had similar markings. *See* TrialTr.V2 30:4–34:18. The one that matched was the car belonging to Ernst. *See* TrialTr.V2 34:19–36:22; *compare* State's Ex. 14–15; ExApp. 10–11, *with* State's Ex. 28; ExApp. 13.

Surveillance cameras in the city of Dubuque had footage from earlier that morning, showing that Ernst got into his vehicle and left Dubuque at about 8:55 a.m., wearing a "fluorescent-type shirt." *See*

TrialTr.V3 4:25–10:5; State's Ex. 17–18; ExApp. 12–13. Ernst returned to Dubuque, arrived at his house at about 12:20 p.m., and then went to the courthouse for a 2:00 p.m. hearing. *See* TrialTr.V1 143:11–22. He appeared to be wearing the same bright shirt throughout the rest of the day. *See* TrialTr.V3 11:2–14:25; State's Ex. 30–35; ExApp. 24–29.

Emily Wulfekuhle knew Ernst because she was a parole officer, and Ernst was one of the parolees whom she supervised. *See* TrialTr.V1 156:5–159:24. She knew that Ernst drove a distinctive Crown Victoria that was "missing paint on the driver's side rear end." *See* TrialTr.V1 162:10–163:5. When Grant showed Emily a picture of the car that was seen on McCabe Lane on August 21, 2017, she recognized it—she was "[a] hundred percent sure" it was Ernst's car. *See* TrialTr.V1 163:6–21.

Grant spoke with Ernst, who was "adamant that he had nothing to do with this." *See* TrialTr.V3 15:1–17; State's Ex. 39. Grant received a phone number from Ernst. Grant used that number, together with cell phone tower information (which was obtained pursuant to a search warrant), in order to "determine where [Ernst] may have been during a specific timeframe." *See* TrialTr.V3 15:4–16:9. It placed Ernst near the Wulfekuhle residence on the morning of August 21. *See* TrialTr.V3 16:12–24:14; State's Ex. 36, 38; CApp 6, ExApp. 30.

The parties stipulated to Ernst's whereabouts in the afternoon:

> On August 21st of 2017, Defendant Anthony Ernst appeared at the Dubuque County Courthouse for a hearing related to child support. The hearing was scheduled for 2 o'clock p.m. and Mr. Ernst personally appeared.

TrialTr.V1 143:11–22. Ernst had taken that entire day off work—so he was unaccounted for in the morning. *See* TrialTr.V1 178:1–179:10.

Grant spoke with Kim Kuntz, who denied that Ernst had spent any part of that morning with her. *See* TrialTr.V3 25:15–24; *see also* TrialTr.V3 40:7–14. Grant also spoke with Pamela Kuntz, who denied that Ernst had spent time with her on August 21, 2017. *See* TrialTr.V3 25:25–27:19. Both of those people said something different at trial: they both claimed that Ernst visited them at their residences on the morning of August 21, 2017, at locations that were near McCabe Lane. Pamela Kuntz was Ernst's mother, and her testimony about that day did not match the traffic camera footage. *See* TrialTr.V3 57:11–64:6. Kim Kuntz was Ernst's sister, and she claimed that she had known that Grant was calling because he was investigating Ernst for the attempted burglary at the Wulfekuhle residence—but she still did not claim to have seen Ernst that day during her conversation with Grant, until she changed her account at trial. *See* TrialTr.V3 69:12–79:16.

Additional facts will be discussed when relevant.

ARGUMENT

I. The evidence is sufficient to support conviction, and the weight of the evidence supports the verdict.

Preservation of Error

Ernst's motion for judgment of acquittal challenged the State's proof of the elements of identity, attempted entry, and specific intent. *See* TrialTr.V3 43:2–48:15. The trial court's ruling considered and rejected his motion on those grounds. *See* TrialTr.V3 48:16–54:18. That ruling preserved error to renew those claims on appeal. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Ernst raised a weight-of-the-evidence challenge in his motion for new trial. *See* Motion for New Trial (8/17/18); App. 28. The court considered and overruled that challenge. *See* PostTrialTr. (8/27/18) 6:18–7:22; Order (8/27/18); App. 35. That ruling preserved error for a weight-of-the-evidence claim. *See Lamasters*, 821 N.W.2d at 864.

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *See State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

The ruling denying the motion for new trial is reviewed for abuse of discretion. *State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006) (quoting *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003)).

Merits

The marshalling instruction that defined attempted burglary required the State to prove the following elements:

> 1. On or about the 21st day of August, 2017, the defendant attempted to enter a garage located at 1473 McCabe Lane in Cascade, Iowa.
> 2. The garage was an occupied structure as defined in Instruction No. 18.
> 3. The defendant did not have permission or authority to enter the garage.
> 4. The defendant did so with the specific intent to commit theft.

Jury Instr. 20; App. 26. "Where, as here, the jury was instructed without objection, the jury instruction becomes law of the case for the purposes of reviewing the sufficiency of the evidence." *State v. Banes*, 910 N.W.2d 634, 639–40 (Iowa Ct. App. 2018) (citing *State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009)).

A. Testimony that the Wulfekuhles had locked the garage door and found it open (but still locked), together with marks consistent with forced entry, were sufficient circumstantial evidence to show that someone attempted to enter the garage.

Ernst argues "the circumstantial evidence does not support a finding that the entry door to the garage was pried open." *See* Def's Br. at 41. Ernst is incorrect. The door was open *and still locked* when Jason returned, with marks indicating it had been pried open. *See*

TrialTr.V1 171:10–172:19; State's Ex. 3–4; ExApp. 4–5. Grant viewed the door and described the damage as consistent with forced entry. *See* TrialTr.V2 11:9–13:8; State's Ex. 11–12; ExApp. 7–8. Ernst offers alternative explanations, but the jury was not obligated to ignore the clear photographic evidence that the damage had been focused on the lip of the faceplate—the metal part of the frame that catches the latch and prevents the door from opening while locked. *See* State's Ex. 3; App. 4. This is clearly inconsistent with Ernst's speculation about "wind" or "an animal hitting the door"—and that damage could not have been inflicted unless the door was locked and opened by force, so there is no possibility that the Wulfekuhles "forgot to properly close the door when they left in the morning." *See* Def's Br. at 44.

Ernst asserts "[t]he most troubling for the State is that there is no eyewitness that saw any suspicious person on the Wulfekuhle's property on August 21, 2017." *See* Def's Br. at 41. This claim ignores the proof of Ernst's contemporaneous presence nearby. *See* TrialTr.V1 162:10–163:21; TrialTr.V2 34:19–36:22; State's Ex. 28; ExApp. 23. Moreover, "[f]or purposes of proving guilt beyond a reasonable doubt, direct and circumstantial evidence are equally probative." *See State v. O'Connell*, 275 N.W.2d 197, 205 (Iowa 1979).

This circumstantial evidence is sufficient to support an inference that someone attempted to enter the garage—they pried the door open and broke it in the process, and it was still open when Jason returned later that day. *See* TrialTr.V1 153:16–156:4; TrialTr.V1 171:10–172:19; TrialTr.V2 11:9–13:8; State's Ex. 3–4; ExApp. 4–5. This is more than would be required under any approach to attempt. *See*, *e.g.*, *State v. Erving*, 346 N.W.2d 833, 836 (Iowa 1984) (discussing Iowa approach to attempt offenses and explaining "[i]t was not necessary, of course, for defendant to actually enter the pharmacy in order to commit *attempted* burglary"); *accord State v. Spies*, 672 N.W.2d 792, 798 (Iowa 2003) (quoting *State v. Roby*, 194 N.W.2d 709, 714 (Iowa 1922)) (finding evidence was sufficient to show attempt when it established "the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made"). Ernst's argument cannot overcome *Erving*, which determined that removing a glass panel to open a route of entry into a pharmacy was sufficient to establish attempted burglary. *See Erving*, 346 N.W.2d at 834–36. A rational jury could infer that someone pried open that locked door, and that nobody would do that unless they were attempting to enter the garage. Therefore, Ernst's challenge on this element fails.

B. Evidence that placed Ernst in his vehicle on McCabe Lane on August 21, 2017, together with his demonstrably false denials, were sufficient circumstantial evidence to prove that Ernst was the person who broke into the Wulfekuhle garage.

Ernst attacks the sufficiency of the State's proof that he was the person who broke into the Wulfekuhle garage. First, Ernst attacks the State's proof of motive—but motive is not an element of the offense and is not absolutely necessary to prove identity, especially in cases involving an attempt to commit burglary/theft where the "motive" to acquire money or property would be ubiquitous. The strongest proof of identity is that Ernst is the only person who had the *opportunity* to commit this attempted burglary—he was contemporaneously present on McCabe Lane with no explanation for his presence there, and all other vehicles on McCabe Lane during that period were attributable to local residents and farm operations. *See* TrialTr.V1 147:24–148:12; TrialTr.V2 16:2–18:5; *accord State v. Hall*, 371 N.W.2d 187, 190 (Iowa 1985) (finding sufficient proof to establish defendant's identity as the burglar, in part because "[t]he automobile defendant used to go to the bank could be found by the jury to have been the same car that drove by the location of the burglary twice during the period when the burglary took place"). Though circumstantial, this case is strong.

Ernst argues the State could not prove that he was the person driving the vehicle that was seen as it passed Midwest Injections. *See* Def's Br. at 53–54. But his vehicle had extremely distinctive markings because of the missing paint—and even if most Crown Victoria cars had problems with peeling paint, the specific pattern of peeling paint at those exact locations on his vehicle made it overwhelmingly clear that the vehicle caught on camera at Midwest Injections was Ernst's. *See* TrialTr.V2 16:2–18:5; *compare* State's Ex. 14–15; ExApp. 10–11, *with* State's Ex. 28; ExApp. 23. Grant investigated a number of other Crown Victoria vehicles that were part of the production run that was known to have problems with peeling paint—none of those vehicles displayed the specific constellation of peeling marks that was present on Ernst's vehicle and on the vehicle that showed up on Midwest Injections security footage. *See* TrialTr.V2 30:4–36:22. And when Emily Wulfekuhle saw the still frame from the security footage, she knew it was Ernst's—and she was "[a] hundred percent sure." *See* TrialTr.V1 163:6–21. Ernst was driving that vehicle earlier that day, when he departed from Dubuque. *See* TrialTr.V3 4:25–10:5; State's Ex. 17–18; ExApp. 12–13. Ernst was driving that car in Dubuque, later that day. *See* TrialTr.V3 11:2–14:25; State's Ex. 30–35; ExApp. 24–29.

That circumstantial evidence provided strong support for an inference that Ernst was driving that vehicle when it was seen on McCabe Lane during those intervening hours, where Ernst—by his own admission—had no reason to be. *See* State's Ex. 39 at 1:50–2:30, at 6:55–7:15.

Ernst also argues that "the fact [that he] may have been near the residence is insufficient to support a finding of his guilt." *See* Def's Br. at 54–55. But Ernst cites to *Schrier*, which establishes that presence at the scene of the crime *can* be sufficient to establish guilt, when it is presented together with opportunity evidence that narrows down a perpetrator's identity to include the defendant, and with statements from the defendant that misrepresent or hide relevant facts. *See State v. Schrier*, 300 N.W.2d 305, 309 (Iowa 1981). Ernst forcefully denied being present in that area, even though he was seen driving that car both *before* and *after* it was seen on McCabe Lane. *See* State's Ex. 39, at 11:11–12:10. If Ernst had not committed this crime, he would have no reason to deny the obvious fact that his vehicle had been seen on McCabe Lane. *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993) ("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt and the false story is relevant to show that the defendant fabricated evidence to aid his defense.");

accord State v. Crowley, 309 N.W.2d 523, 524 (Iowa Ct. App. 1981) ("[C]onsciousness of guilt may be inferred from attempted evasion, palpable falsehood, or suppression of the true facts by one suspected of crime."). And other than Ernst's car, all vehicle traffic was related to nearby residents and farm operations—which effectively narrows the solution set of possible perpetrators, such that Ernst's presence becomes extremely probative circumstantial evidence. *See* TrialTr.V1 147:24–148:12; TrialTr.V2 16:2–18:5; *accord State v. Poyner*, 306 N.W.2d 716, 718 (Iowa 1981) (finding sufficient evidence to convict the defendant of murder by stabbing, even when nobody witnessed the act, because "he alone had the opportunity to stab the victim"). Somebody broke into the garage, and Ernst was the only person who was observed in that area and had no legitimate reason to be there—and he subsequently denied being present, even though his unique and distinctive vehicle was caught on surveillance footage during a very specific timeframe, when Ernst was otherwise unaccounted for. From that, a reasonable juror could infer that Ernst was the person who broke into the garage, beyond a reasonable doubt.

Ernst argues that "other actual evidence contradicts these inferences that it was Ernst who committed this attempted burglary,"

in reference to testimony from Kim Kuntz and Pamela Kuntz. *See* Def's Br. at 50–53. But a sufficiency challenge is reviewed with the evidence taken in the light most favorable to the verdict—and jurors could reject both defense witnesses' testimony in its entirety. *See*, *e.g.*, *State v. Garr*, 461 N.W.2d 171, 174 (Iowa 1990) ("The jury is free to believe or disbelieve the testimony of the witnesses as it sees fit."). And their testimony would naturally be viewed with suspicion, given Ernst's vehement denial that he knew anybody who lived in that area. *See* State's Ex. 39, at 8:53–9:54. Pamela Kuntz's timeline about the time she spent with Ernst did not match the camera footage showing him driving around Dubuque and embarking/disembarking at his residence, by himself. *See* TrialTr.V3 60:16–64:6; *accord* TrialTr.V3 13:1–14:25; State's Ex. 30–31; ExApp. 25–26. Kim Kuntz's testimony was suspect because she had no plausible explanation for why she would decide to conceal exculpatory information from Grant—she knew that Grant was investigating Ernst's involvement in a burglary, and she denied seeing him during the period Grant was asking about. *See* TrialTr.V3 73:2–79:16; *accord* TrialTr.V3 25:15–27:19. Even in a weight-of-the-evidence analysis, Ernst cannot show any deficiency in the evidence showing that he must have been the would-be burglar.

C. The fact of forced entry into the garage is, itself, sufficient circumstantial evidence to support an inference of specific intent to commit a theft.

The last element that Ernst challenges is the specific intent to commit a theft. "[F]ailure to effect a completed breaking and entry will not negate the jury's ability to find an unlawful intent." *See Erving*, 346 N.W.2d at 836 (citing *State v. Morelock*, 164 N.W.2d 819, 822 (Iowa 1969)); *State v. Allnutt*, 156 N.W.2d 266, 271 (Iowa 1968); *accord State v. Rockingham*, No. 15–0978, 2016 WL 6652350, at *6 (Iowa Ct. App. Nov. 9, 2016) ("The intent to commit theft is not negated simply because nothing was stolen."). The jury can rationally infer that a person who pries open a locked door to a garage intends to steal something inside. And the State explained how the fact that nothing was stolen made sense, in light of known facts:

> [Ernst] wasn't necessarily expecting to see that truck, the red truck, Jason Wulfekuhle's work truck in that garage. He probably went in there, turned on the light, saw that red truck there, was [not] expecting Mr. Wulfekuhle's personal truck to be there since Mr. Wulfekuhle was at work, and he took off without making a whole lot of other efforts to get into that house some other way because there might be an adult man at home there inside that house that he wasn't expecting. Popped open the door, walked in, oops, there's a truck, took off. That's how you have entry, and that's how you have intent. And the circumstantial evidence is overwhelming for that.

TrialTr.V4 15:3–17. The jury could rationally conclude that Ernst pried the door open as part of an attempt to enter the garage with the intent to commit a theft inside—but then saw the truck, determined that somebody might be home, and fled. This explained the timeline established by the security camera footage of Ernst's vehicle—he left relatively soon after arriving, and departed at a greater speed. *See* TrialTr.V2 19:3–22:14; State's Ex. 29. Ernst was not at work, was not at court until the afternoon, and his alibi witnesses were not credible. His recorded denials were undermined by convincing evidence that his car was a perfect match for the unexpected visitor to McCabe Lane. *Compare* State's Ex. 15; ExApp. 11, *with* State's Ex. 28; ExApp. 23. The circumstantial evidence is conclusive, and Ernst's challenges to the sufficiency and weight of the evidence cannot succeed.

D. Ernst's weight-of-the-evidence challenge is not adequately briefed, and would be meritless.

"Unlike the sufficiency-of-the-evidence analysis, the weight-of-the-evidence analysis is much broader in that it involves questions of credibility and refers to a determination that more credible evidence supports one side than the other." *See Nitcher*, 720 N.W.2d at 559. Moreover, "[o]n a weight-of-the-evidence claim, appellate review is limited to a review of the exercise of discretion by the trial court, not

of the underlying question of whether the verdict is against the weight of the evidence." *See Reeves*, 670 N.W.2d at 203. Overruling Ernst's motion for new trial was only an abuse of discretion if "the evidence preponderates heavily against the verdict." *See id.* at 202 (quoting *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998)).

Ernst's minimal weight-of-the-evidence challenge seems to incorporate his arguments about the sufficiency of the evidence (and if it does not, it is deficient for failing to include citations to authority or to the record). *See* Def's Br. at 89; Iowa R. App. P. 6.903(2)(g)(3). But Ernst's arguments about sufficiency of the evidence cannot be cross-applied as a challenge to the weight of the evidence, which "essentially concedes the evidence adequately supports the jury verdict" and attacks the believability of that evidence when weighed against the evidence tending to support competing alternatives. *See State v. Ary*, 877 N.W.2d 686, 706 (Iowa 2016). The State will respond to the weight-of-the-evidence argument that it thinks Ernst is making, but this Court should decline to comb through Ernst's argument to disentangle his sufficiency- and weight-of-the-evidence challenges. *See, e.g.*, *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

The single best candidate for a weight-of-the-evidence challenge is Ernst's argument that jurors should have believed testimony from Pamela Kuntz and Kim Kuntz. *See* Def's Br. at 52–53. But, as noted, there were glaring problems with their testimony. Pamela Kuntz's testimony was contradicted by photo evidence of Ernst's activities. *See* TrialTr.V3 60:16–64:6; *accord* TrialTr.V3 13:1–14:25; State's Ex. 30–31; ExApp. 24–25. Kim Kuntz had no sensible explanation for why distrust of police would cause her to lie to Grant in a way that would destroy Ernst's alibi. *See* TrialTr.V3 73:2–79:16; *accord* TrialTr.V3 25:15–27:19; TrialTr.V4 19:22–21:17. This is not "the extraordinary case in which the evidence preponderates heavily against the verdict." *See Ary*, 877 N.W.2d at 706 (citing *State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008)); *accord Nguyen v. State*, 707 N.W.2d 317, 327 (Iowa 2005). Rather, the evidence preponderates heavily *in favor* of conviction, because there is no other plausible explanation for Ernst's absence from Dubuque at the moment when his vehicle was present on McCabe Lane, where it was the only vehicle that was out-of-place, on the very same day as this attempted burglary. Thus, the weight of the credible evidence supports the jury's verdict, and the court did not abuse its discretion in overruling Ernst's motion for new trial.

II. Ernst's trial counsel was not ineffective for declining to challenge the admissibility of historical cell site data.

Preservation of Error

Ineffective-assistance claims can proceed under an exception to the general rules of error preservation when failure to preserve error forms the basis for a claim. *See State v. Dalton*, 674 N.W.2d 111, 119 (Iowa 2004). As a general rule, Iowa courts may address these claims on direct appeal "when the record is sufficient to permit a ruling." *See State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005). Here, the record is not sufficient to address these claims because any objection could be met by laying additional foundation to remedy the alleged deficiency. *E.g.*, *Richardson*, 2017 WL 2461562, at *3 ("If counsel had objected, it is possible the State would have asked another question or called another foundational witness and remedied the issue."). Moreover, counsel may have had specific knowledge of Grant's qualifications or U.S. Cellular's typical document production that would foreclose the objections that Ernst identifies. Unless this Court can find a lack of *Strickland* prejudice, these claims should be preserved for further development in post-conviction proceedings. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978) (noting "[e]ven a lawyer is entitled to his day in court" and should have "an opportunity to respond").

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *See State v. Finney*, 834 N.W.2d 46, 49 (Iowa 2013).

Merits

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Both breach and prejudice must be proven, and failure to prove a single required element is fatal to the claim. *See Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

A. Even if Ernst could show breach, he cannot establish prejudice because photo evidence proved that he was driving his car, and his car was on McCabe Lane.

The State did not mention the historical cell site data in its argument on the sufficiency/weight of the evidence, because it was not necessary. Ernst was seen driving his distinctive vehicle in Dubuque, at various times before 9:00 a.m. and after 12:00 p.m. *See* TrialTr.V3 4:25–14:25; State's Ex. 17–18; ExApp. 12–13; State's Ex. 30–31; ExApp. 24–25. That same vehicle, with its distinctive markings, was seen at Midwest Injections between 10:30 a.m. and 11:00 a.m.—

and during that specific time period, it was *not* seen in Dubuque. *See See* TrialTr.V2 29:16–25; TrialTr.V2 34:19–36:22; State's Ex. 28; ExApp. 23; *accord* TrialTr.V3 9:9–10:5 ("The last [Dubuque] image I have is around 8:55. . . . I don't know where he went from there.").

Ernst is correct that historical cell site evidence was mentioned in the State's closing argument and rebuttal. *See* Def's Br. at 76. But it was not essential, and it was omitted from this encapsulation of the State's case against Ernst, which emphasized the vehicle match:

> Unique car that matches no other car in this area. Shows it to the guys at Finnin Ford. "Oh, yeah, that's a 2006 Crown Vic." But let's talk to the other guy too, the expert. "It's a 2006 Crown Vic. Could be up through 2011. Here's how the paint breaks away." The paint breakaway is unique in every vehicle. Investigator Grant confirms what Mr. Ernst's car looks like. Matches perfectly on McCabe Lane. Shows that Anthony Ernst was in possession of that vehicle on the 21st. Was in town. Left town in that vehicle.
>
> Look at the pictures. They look a lot better when you actually hold up the picture as opposed to on our projector, which doesn't capture all the detail. Match that up. Verified that there were no other cars like that in this area in spite of what Mr. Ernst said in his interview. There's tons — well, there's not tons of them. We know every one of them. That one is his. He was in that car. He left town that morning. He went to McCabe Lane. He popped open that door. He was going to try to steal something from Emily and Jason, both of whom he knew would not be home, and denied it in his interview. "Couldn't have been me. I'm never outside of Highway 20. I was never there. I don't know anybody there." He was there, all right. He was there. He went in there and popped open that door.

> That's all I have to prove. And the evidence is overwhelming. Circumstantial it may be. . . . Because if you do reasoning and analysis and you look at the facts and you watch his video and you consider what's going on here with the various statements from the Ernst and Kuntz family and you consider the work that law enforcement did to put him at that spot, tracking him all morning, match up those two stories, one makes sense: That he was there and he went in that garage.
>
> One doesn't make sense. None of the things that Mr. Ernst or either of the Ms. Kuntz witnesses said is consistent or reasonable with the evidence. Yet entering that garage to steal something sure is. And that's why I would ask you to return a guilty verdict. Thank you.

TrialTr.V4 21:18–23:19; *cf.* TrialTr.V2 30:4–31:11 ("[T]he paint would separate, causing all kinds of different random splotches, but no two cars would be identical. The paint would pop off in random spots."). The State's case did not rest on historical cell site data—it emphasized other evidence as independently sufficient proof of Ernst's presence on McCabe Lane, so Ernst cannot show any reasonable probability of a different result if the historical cell site evidence had been excluded. This would be the case even if such a challenge had been preserved through timely objection. *See*, *e.g.*, *State v. Plain*, 898 N.W.2d 801, 813 (Iowa 2017) (noting the State had "[t]he burden to affirmatively establish lack of prejudice" from erroneous admission of evidence, but finding that it had carried that burden because "[t]ainted evidence that is merely cumulative does not affect the jury's finding of guilt");

State v. McGuire, 572 N.W.2d 545, 548 (Iowa 1997) (finding record affirmatively established a lack of prejudice from evidence that was erroneously admitted over the defendant's timely objection because "substantially the same evidence was in the record through other sources without objection"). That must foreclose any possibility that Ernst could establish *Strickland* prejudice—Ernst would need to show the likelihood of a different result is "substantial, not just conceivable," and the strong evidence of the match between Ernst's vehicle and the Midwest Injections footage makes that impossible. *See King v. State*, 797 N.W.2d 565, 572 (Iowa 2011). Thus, even without developing the record on breach, these claims can be resolved on lack of prejudice.

B. Breach cannot be addressed on this record, and any of Ernst's ineffective-assistance claims that survive a prejudice analysis must be preserved for development in postconviction proceedings.

Ernst is correct that Grant said, self-effacingly: "I'm not an expert on cell phone towers"—just before providing an accurate and sophisticated explanation of how they work. *See* TrialTr.V3 15:18–16:3; TrialTr.V3 17:3–19; TrialTr.V3 18:7–25; TrialTr.V3 20:3–13; TrialTr.V3 22:17–24:10. Grant's view of his own level of expertise is not dispositive—he had some amount of training or experience with historical cell site data and may have qualified as a true "expert." *See,*

e.g., *State v. Buller*, 517 N.W.2d 711, 713–14 (Iowa 1994) ("Practical experience, in a proper case, will suffice to qualify an expert witness."); *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882, 888 (Iowa 1994) (quoting *DeBurkarte v. Louvar*, 393 N.W.2d 131, 138 (Iowa 1986)) (noting, for purposes of expert testimony, "knowledge from experience is every bit as good as that acquired academically"). Counsel may have known more about Grant's training and experience than appears in this record and may have made a strategic decision not to raise a meritless challenge to Grant's qualifications that would ultimately have no effect—other than to outline Grant's qualifications, bolster Grant's credibility, and undermine Ernst's defense. Similarly, counsel may have known that Grant would have been able to describe the data recording/collection methodology with even more specificity to foreclose concerns about hearsay. *See* Def's Br. at 78 (recognizing this data is not hearsay if there is "evidence in the record to establish that the information is computer-generated non-hearsay as opposed to computer-stored hearsay"). It is impossible, on this limited record, to determine whether Ernst's counsel had additional knowledge that would have led him to conclude these objections would be meritless, potentially counterproductive, and strategically unsound.

This could also be assessed as a question of prejudice: if the State would respond to a sustained lack-of-foundation objection by laying that missing foundation, then the outcome of the trial would not have changed and Ernst cannot show *Strickland* prejudice. *See Griggs v. State*, No. 12–0057, 2013 WL 1223641, at *3 (Iowa Ct. App. Mar. 27, 2013) (finding no prejudice from erroneous admission of cell phone records without proper foundation from "a person with special knowledge about the operation of the computer system," because "[h]ad trial counsel objected as to the foundation, the State could have elicited additional testimony from [its witness] to establish foundation, or called an employee of Iowa Wireless to provide it").

Therefore, if this Court determines that Ernst might be able to establish *Strickland* prejudice, it should preserve these claims for postconviction proceedings where the parties may develop the record on Grant's training, experience, and other relevant qualifications; on Grant's ability to establish the non-hearsay character of this data; and on counsel's awareness of the likely consequences of these objections. *See*, *e.g.*, *State v. Shorter*, 839 N.W.2d 65, 83 (Iowa 2017) (concluding "this claim cannot be resolved on direct appeal" because of "factual uncertainties surrounding the claimed ineffective assistance").

C. Historical cell site data is generated and collected by automated processes, not by a human sitting at a switchboard—so this cell site data is not hearsay. Any number-specific report is a business record.

When records are "created through a fully automated and reliable process involving no human declarant," those records are generally "not hearsay at all." *See State v. Reynolds*, 746 N.W.2d 837, 843 (Iowa 2008); *see also GE Money Bank v. Morales*, 773 N.W.2d 533, 537 (Iowa 2009) (citing *People v. Holowko*, 486 N.E.2d 877, 877 (Ill. 1985)) (pointing to connection records created when "a computer automatically records the telephone numbers of calls made" as an example of non-hearsay); *accord State v. Armstead*, 453 So.2d 837, 839–40 (La. 1983) ("Since the computer was programmed to record its activities when it made the telephone connections, the printout simply represents a self-generated record of its operations, much like a seismograph can produce a record of geophysical occurrences."); *State v. Hall*, 976 S.W.2d 121, 147 (Tenn. 1998); *State v. Kandutsch*, 799 N.W.2d 865, 878–79 (Wis. 2011). Ernst argues that "[t]here was no testimony that computers which generated the phone records are programmed to automatically log and compile a record of calls made to and from a certain number." *See* Def's Br. at 79. But Ernst cannot establish that Grant would not have been able to explain that point—

especially when extensive authority (including the cases collected in Ernst's brief) uniformly recognizes that cell site data collection is an automated process, and that number-specific reports on cell site data are routinely used by providers in the regular course of business. *See*, *e.g.*, *In re U.S. for Historical Cell Site Data*, 724 F.3d 600, 611–12 (5th Cir. 2013) ("The cell service provider collects and stores historical cell site data for its own business purposes, perhaps to monitor or optimize service on its network or to accurately bill its customers for the segments of its network that they use."); *State v. Steele*, 169 A.3d 797, 810 (Conn. Ct. App. 2017) ("Every time a cell phone sends or receives a communication the base station at the cell site automatically generates a call detail record."); Alexandra Wells, *Ping! The Admissibility of Cellular Records to Track Criminal Defendants*, 33 ST. LOUIS U. PUB. L. REV. 487, 499 (2014) (collecting authority and noting "[i]t is well established that cell phone records are recorded as the cell towers receive the information, and thus are contemporaneous records," and that "cellular companies have very legitimate business reasons for maintaining the information," such as "to bill customers properly and to track call volume"). Sustaining any hearsay objection would require a court to feign ignorance of reality.

D. Grant likely had the required level of training and experience to lay foundation to overcome any hearsay objection and to testify as an "expert."

The foundation required to overcome a hearsay objection could be laid by any witness with "knowledge about the operation of the computer system." *See Reynolds*, 746 N.W.2d at 843 (quoting *Hall*, 976 S.W.2d at 147). Some courts have held that "expert" qualifications are required for testimony about historical cell site data, but they have generally set the bar for those expert qualifications at a level where a police officer with relevant training and experience may meet it. *See, e.g.*, *State v. Fleming*, No. 106,104, 2012 WL 4794560, at *8–9 (Kan. Ct. App. Oct. 5, 2012) ("Because an analysis of cell phone records such as the one performed by Brown is relatively simple, the required degree of education, training, and experience was not extremely high."); *Thompson v. State*, 425 S.W.3d 480, 488–89 (Tex. Ct. App. 2012) ("Given the relative simplicity of the technique of interpreting phone records employed in this case and Rome's training in that regard, we cannot conclude that the trial court abused its discretion when it qualified him as an expert in interpreting mobile phone records."); *accord Collins v. State*, 172 So.3d 724, 744 (Miss. 2015) ("We do recognize that cellular technology is relatively simple and that the

expertise necessary to be qualified as an expert would not be so great as that required of, for example, a medical doctor. We do not mean to imply that the hurdles to qualifying as an expert in this field are unduly burdensome."). This matters because Grant, though humble, likely had the level of training and experience necessary to clear the low bar to qualify as an "expert" for the purposes of this testimony. *See, e.g.*, TrialTr.V3 17:3–19 (describing typical investigative practice: "U.S. Cellular gives you the data and then they give you the means to interpret what the data means"); TrialTr.V3 19:1–11 (explaining use of explanatory key that "phone companies provide in order to interpret this data," which is regularly provided in response to these requests); TrialTr.V3 20:3–16 (explaining that "the key that they give you tells you the radius of the signal that the tower looks for," implying that he has experience using keys for different towers). And both Grant and Ernst's counsel were aware of the biggest potential complication.

> **DEFENSE**: You indicated that you're not an expert on cell phones or cell phone towers; correct?
>
> **GRANT**: I have a basic understanding of it, but as far as the explanation, I'm not an expert.
>
> **DEFENSE**: In your basic understanding, sometimes or usually a cell phone is with the nearest tower but sometimes they'll go to one tower and another tower; is that correct?
>
> **GRANT**: Yes.

See TrialTr.V3 32:12–33:6; *accord* Wells, *Ping!*, 33 ST. LOUIS U. PUB. L. REV. at 492–93 (mentioning widespread misconception "that a call will ping to the tower that is closest to the cell phone," and explaining that "cell signals go to the tower with the strongest signal, which is not always the cell tower geographically closest to the cell phone").

Grant was especially likely to be able to qualify as an expert for this simpler type of data: locating cell towers on a map and labeling the tower and antenna that are listed in the carrier records for these calls. *See* TrialTr.V3 20:19–24:10. Many jurisdictions have found this type of testimony to be simple enough for lay witness testimony, because a competent layperson with the same raw data, tower addresses, and record-translation key could plot tower locations and label them with timestamps correlating to the record of the call. *See, e.g.*, *United States v. Baker*, 496 Fed.Appx. 201, 204 (3d Cir. 2012) (determining that federal agent's testimony as to his use of computer mapping software to create map of defendant's location from cell phone records did not involve expert testimony); *United States v. Evans*, 892 F.Supp.2d 949, 953 (N.D. Ill. 2012) (permitting lay testimony because creating maps showing location of specific cell towers used by cell phone did not "require scientific, technical, or other specialized knowledge");

Perez v. State, 980 So.2d 1126, 1131–32 (Fla. Ct. App. 2008) (citing *Gordon v. State*, 863 So.2d 1215, 1219 (Fla. 2003)) ("[T]he custodians factually compared the locations on the phone records to locations on the cell site maps. . . . This testimony constituted general background information interpreting the cell phone records which did not require expert testimony."); *State v. Wyman*, 107 A.2d 641, 648 (Me. 2015) ("A witness need not be an expert to explain that the timing column on a cell phone billing record refers to the time at which a call was made or received, or to explain that the 'origination' column refers to the location of the cell tower used by a phone to make or receive a call."); *State v. Blurton*, 484 S.W.3d 758, 772 (Mo. 2016) (quoting *State v. Patton*, 419 S.W.3d 125, 130 (Mo. Ct. App. 2013)) ("'[R]eading the coordinates of cell sites from phone records and plotting them on a map is not a scientific procedure or technique' because cell phone records are factual records and no special skill is required to plot these records."); *Burnside v. State*, 352 P.3d 627, 636 (Nev. 2015) ("The detective reviewed the cell phone records and cell site information and used that data to create a map showing the locations of the cell phone sites that handled calls from the cell phones registered to Burnside and McKnight during the time period relevant

to the murder. . . . We conclude that the map and the detective's testimony were not based on specialized knowledge or reasoning that can be mastered only by a specialist and therefore the State was not required to notice the detective as an expert witness."); *State v. Daniel*, 57 N.E.3d 1203, 1218 (Ohio Ct. App. 2016) ("In the instant matter, Wiles's testimony concerned (1) appellant's cell phone records, and (2) the location of the cellular towers used by appellant's phone in relation to other locations. . . . [T]his testimony is lay opinion testimony that does not require 'specialized knowledge, skill, experience, training, or education' regarding cellular networks.").

Iowa courts have rejected similar ineffective-assistance claims. *Compare State v. Garcia*, No. 17–0111, 2018 WL 3913668, at *1–2 (Iowa Ct. App. Aug. 15, 2018) (finding counsel was not ineffective for declining to object because "[t]he detective's training and experience qualified him to testify that cell phones communicated with 'the closest tower' and '[t]he cell phone will simply go to whatever the nearest tower it is or whatever is the clearest signal it can pick up'"), *with* TrialTr.V3 15:18–16:3 (Grant explaining that "[f]or you to get a signal, your phone has to reach out to the nearest tower, and then once a connection is made with the tower, that can be tracked");

accord State v. Benson, No. 15–1895, 2016 WL 7393891, at *3 (Iowa Ct. App. Dec. 21, 2016); *State v. Rendon*, No. 15–1832, 2016 WL 6270092, at *4 (Iowa Ct. App. Oct. 26, 2012). Just like the claimants in *Garcia*, *Benson*, and *Rendon*, Ernst cannot establish that Grant would fail to clear the low threshold for qualifications necessary to testify about this simple application of historical cell site data.

If Grant had attempted to use the strength of the cell signal to pinpoint the cell phone *within* the tower's covered area, then he may have needed expert qualifications to explain factors that could affect signal strength and triangulation calculations. *See, e.g.*, *Blurton*, 484 S.W.3d at 772 (distinguishing other Missouri cases, including *Patton*, where "lay witnesses improperly attempted to pinpoint the defendants' exact location within a small geographic area"). But Grant's testimony only pertained to "the progression of the cell phone towers to which [Ernst's] cell phone connected," and that explanation "did not require the special skill or knowledge of an expert." *See id.* As such, whatever approach Iowa takes, it is exceedingly likely that Grant would surpass the low threshold for qualifications to present this particular sort of testimony, specifically pertaining to his ability to read these records alongside the key that U.S. Cellular provided. *See* TrialTr.V3 19:1–11.

CONCLUSION

The State respectfully requests that this Court reject these challenges and affirm Ernst's conviction.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **7,978** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: June 7, 2019

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov