IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 19-0454
	)	
JACOB A. BOOTHBY,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR CLINTON COUNTY
HONORABLE NANCY S. TABOR, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 20th day of December, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to 7203 358th Avenue, Spragueville, Iowa 52074.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO DEPUTY SHCROEDER AS AN EXPERT WITNESS REGARDING BOOTHBY'S CELL PHONE SITE LOCATION?

Authorities

State v. Clark, 357 N.W.2d 532, 535 (Iowa 1985)

State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012)

Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984)

State v. Williams, 574 N.W.2d 293, 300 (Iowa 1998)

U.S. Const. amend VI

Iowa Const. art. I, § 10

Strickland v. Washington, 466 U.S. 668 (1984)

Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)

Schertz v. State, 680 N.W.2d 675, 679 (Iowa 1985)

A. An expert is needed to discuss cell phone transmission technology.

Ranes v. Adams Labs, Inc. 778 N.W.2d 677, 685 (Iowa 2010)

Iowa R. Evid. 5.702

Johnson v. Knoxville Community School District, 570 N.W.2d 633,637 (Iowa 1997)

Iowa R. Evid. 5.104(a)

State v. Garcia, No. 17-0111, 2018 WL3913668 (Iowa Ct. App. Aug. 15, 2018)

State v. Benson, No. 15-1895, 2016 WL7393891 (Iowa Ct. App. Dec. 21, 2016)

State v. Rendon, No. 15-1832, 2016 WL 6270092 (Iowa Ct. App. Oct. 26, 2016)

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James Beck, Christopher and Edward J. Inwinkelreid, The Use of Global Positioning (GPS) and Cell Tower Evidence to Establish a Person's Location – Part II, 49 No. 3 Crim. Law Bulletin ART 8 (Summer 2013)

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United States v. Hill, 818 F.3d 289, 295 (7th Cir. 2016)

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Ameritech Mobile Communications v. Dept. of Revenue, 571 N.W.2d 924 (Wisc. Ct. App. 1997)

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Nextel Communications of Mid-Atlantic, Inc. v. Town of Wayland Mass, 231 F.Supp.2d 396, 399 (D. Mass. 2002)

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In re U.S. for Historical Cell Site Data, 724 F.3d 600, 611-12 (5th Cir. 2013)

State v. Simmons, 143 A.3d 819, 825 (Me. 2016)

Collins v. State,172 So.3d 724, 739 (Miss. 2015)

State v. Johnson, 797 S. E.2d 557, 563 (W. Va.2017)

State v. Patton, 419 S.W.3d 125, 131-132 (Mo. Ct. App. 2013)

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B. Deputy Sheriff Schroeder does not qualify as an expert witness regarding Boothby's cell phone record location data.

State v. Clay, 824 N.W.2d 488, 496 (Iowa 2012)

State v. Vance, 79 N.W.2d 775, 789 (Iowa 2010)

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II. WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE CELL PHONE RECORDS AS INADMISSIBLE HEARSAY?

Authorities

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State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012)

Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984)

State v. Williams, 574 N.W.2d 293, 300 (Iowa 1998)

U.S. Const. amend VI

Iowa Const. art. I, §10

Strickland v. Washington, 466 U.S. 668 (1984)

Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)

A. Boothby's cellphone records did not meet the business record exception to the hearsay rule.

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State v. Newell, 710 N.W.2d 6, 18 (Iowa 2006)

Iowa R. Evid. 5.801(c)

State v. Lain, 246 N.W.2d 238, 242 (Iowa 1976)

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State v. Reynolds, 746 N.W.2d 837, 842-843 (2008)

State v. Plain, 898 N.W.2d 801, 811 (Iowa 2017)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of Case

This is an appeal from Defendant-Appellant Jacob Boothby from his jury trial conviction and sentence for Assault While Displaying a Dangerous Weapon, a class D felony, in violation of Iowa Code § 708.1 and Criminal Mischief-3rd Degree, a class D felony, a violation of Iowa Code § 716.5.

Course of Proceeding and Disposition in District Court

On February 15, 2019, the State filed a trial information charging Boothby with assault with a deadly weapon in violation of Iowa Code §708.1 and 708.2(3) and criminal mischief, 3rd Degree in violation of Iowa Code § 716.1 and 716.5. (Trial Info. p. 1)(App. p. 4).

On April 5, 2019, Boothby waived his right to a speedy trial. (Waiver)(App. p. 7). Boothby's jury trial began on February 25, 2019. (Tr. Vol. p. 1).

On February 25, 2019, Boothby was not present at the start of the second day of trial and defense counsel requested a continuance because Boothby was having chest pains and other issues. (Tr. p. 176, L6-12). The State resisted the continuance and requested the trial continue without the defendant. (Tr. p. 179, L8-15). The State denied the continuance and ordered the trial continue without Boothby present. (Tr. p. 175, L23-p. 181, L13).

Boothby was found guilty as charged on Monday, February 25, 2019. (Criminal Verdict)(App. pp. 12-13).

On March 20, 2019, Boothby motion for a new trial based on the Court's denial of a continuance due to Boothby not being present on the second day of trial. (Sent. Tr. p. 3, L18-p.4, L5). The Court denied the motion. (Sent. Tr. p.4, L12-18). Boothby on March 20, 2019 as follows:

On both Count 1 and Count 2 to the custody of Iowa Department of Corrections for an indeterminate term not to exceed two years to run concurrently. (Order of Disp.)(App. pp. 14-18).

Boothby filed a timely notice of appeal on March 30, 2019. (Notice)(App. p. 19).

Facts:

On November 14, 2017, Bernadette Chell was driving a Silver 2008 Chevy Trailblazer and her boyfriend Steve Duvall was a passenger in the vehicle. (Tr. p. 90, L16; p. 91, L1-2; p. 109, L19-21). Chell was traveling down a two-lane highway in Toronto, Iowa. (Tr. p. 91, L3-5, p.92, L18-19). Duvall noticed a 1999 or 2000 Silver Blazer vehicle coming toward them from the opposite direction. (Tr. p. 91, L12-13; p. 111, L1-3). The Blazer passed Chell and Duvall, then turned around then "came racing up" right behind them. (Tr. p. 92, L21-24; p. 110, L2-9). Chell slowed down so that the vehicle could pass, but the Blazer just "stopped and backed up" then

the vehicle struck the bumper of Chell's vehicle. (Tr. p. 92, L24-p.93, L2; p. 110, L7-9). Next, the vehicle backed off and struck Chell's bumper a second time harder. (Tr. p. 93, L3-11). After the second hit, Duvall called 911 and the Blazer turned and disappeared before the police arrived. (Tr. p. 113, L6-15; p. 95, L6-10). Neither Chell nor Duvall saw or knew the driver of the Blazer vehicle. (Tr. p.93, L17-19; p. 114, L6-10).

At 6 A.M. Deputy Scott Wainwright received a phone call concerning a hit and run in the Toronto, Iowa area. (Tr. p.141, L1-6). After Wainwright arrived at the scene of the accident, a nearby resident Shawn Barten walked to the scene and talked with both Wainwright, Chell, and Duvall. (Tr. p. 96, L24-p.97, L3; 114, L6-10, p. 141, L20-p. 142, L4; L142, L7-9; p. 142, L10-11).

Barten was a friend of Boothby's. (Tr. p. 119, L13-19). On November 13, 2017, the day before the accident Barten was with Boothby's on/off again girlfriend, Shalan Miller. (Tr.

p.120, L22-p. 121, L5; p. 121, l16-23). According to Barten, Boothby texted him several times on the evening of November 13, 2017 because Boothby was upset that Miller was at Barten's home. (Tr. p. 122, L17-25; p.123, L1-6). At some point that evening, Miller left Barten's home and borrowed Barten's Oldsmobile Bravado. (Tr. p. 123, L24-p. 124, L3). Miller was going to travel to Lowden and was supposed to return to Barten's home. (Tr. p.124, L16-18). Later that evening, before Miller returned, Barten heard tires squealing and saw two sets of headlights, so he decided to walk "down the road". (Tr. p. 124, L20-25).

When Barten arrived at the accident scene he saw a squad car, another vehicle, and a couple. Barten spoke with the officer on the scene and the couple. (Tr. p. 124, L20-25; P. 125, L24-p.126, L1). Barten informed Wainwright that he walked over to the scene of the accident because a friend of his did not return to his home. (Tr. p. 126, L8-10).

After speaking with Barten, Wainwright found out that Shalan Miller lived in Lowden, Iowa and Wainwright left the scene to travel to Lowden to check on Miller's welfare. (Tr. p. 143, L17-24). When Wainwright arrived at Miller's home she was not there. (Tr. p. 143, L22-24). Wainwrights involvement with the investigation ended after he attempted to locate Miller on November 14, 2017. (Tr. p. 144, L6-8).

Deputy Jessup Schroeder, a deputy sheriff with Clinton Co. Sheriff's Department, became involved in the investigation several days aft the incident on November 17, 2017. (Tr. p.149, L20-21; L151, L11-16). Schroeder attempted to locate Boothby and went to Boothby's last known address but did not find him. (Tr. p. 152, L1-6). On that day, Schroeder noticed a Silver Chevy Blazer parked in Boothby's driveway and saw that it had no front bumper. (Tr. p. 152, L13-15; Ex. 1-2)(App. pp. 8-9). Schroeder met with Boothby on December 7, 2017 at Boothby's residence. (Tr. p. 156, L9-16). Schroeder spoke with Boothby which was recorded on police

dash camera. (Tr. p. 156, L18-22; p. 182, L21-25; Ex. 13, Video). During the video interview, Boothby denied hitting any vehicle at any time. (Ex. 13, Video, 15:16-15:42). After his interview with Boothby, Schroeder drove away from the scene and received text a message from Boothby. (Tr. p. 184, L10-12). In the text message, Boothby stated:

> "I think Shawn's a snitch and both are on the human traffic and so I will give the lady the money, but I am not saying that I did it, but you're trying to give me way out and to stay away from them. No ticket and mail me a letter saying no back CCS and envelope so I can send the money. The end."

(Tr. p. 185, L12-18; Ex. 4)(Conf. App. p. 4). Following his conversation with Boothby, Schroeder wrote a warrant to obtain Boothby's cell phone records. (Tr. p. 163, L6-14). Schroeder received the records from the date November 13-November 14, 2017. (Tr. p.164, L1-3). Also following his conversation with Boothby, Boothby provided Schroeder with the bumper from this vehicle. (Tr. p. 161, L11-24; Ex.3)(App. p. 10).

Additional facts relevant to specific legal issues will be discussed below if necessary.

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO DEPUTY SHCROEDER AS AN EXPERT WITNESS REGARDING BOOTHBY'S CELL PHONE SITE LOCATION.

Preservation of Error: Error was not preserved and Boothby argues that his trial counsel was ineffective for failing to object to Schroeder's testimony. However, in a defendant's claim of ineffective assistance of trial counsel, may be reviewed on direct appeal. State v. Clark, 357 N.W.2d 532, 535 (Iowa 1985). Although ordinarily, ineffective assistance of counsel claims is preserved for post-conviction relief, the Court can consider the merit of the claim on direct appeal if the record is adequate. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004). Here, the court should find the record is adequate.

Standard of Review: Ineffective assistance of counsel claims are based on the Sixth Amendment. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012). The Court reviews claims of ineffective assistance of counsel de novo. Taylor v. State, 352

N.W.2d 683, 684 (Iowa 1984). Claims of violations of constitutional rights are reviewed de novo. State v. Williams, 574 N.W.2d 293, 300 (Iowa 1998).

Discussion: A criminal defendant is entitled to effective assistance of counsel. U.S. Const. amend VI; Iowa Const. art. I, §10; Strickland v. Washington, 466 U.S. 668 (1984). The test for determining whether a defendant received effective assistance of counsel is "whether under the entire record and totality of circumstances counsel's performance was within the normal range competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). When specific errors are relied upon to show the ineffective assistance of counsel, the defendant must demonstrate: (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. Id. The defendant must show that there is a reasonable probability that but for counsel's unprofessional errors the results of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984).

In determining whether counsel omitted an essential duty, the Court looks to the nature of the counsel's conduct and the reason behind it. The court requires the appellant show that "the counsel's performance was so deficient that counsel was not functioning as a counsel guaranteed by the Sixth Amendment." Schertz v. State, 680 N.W.2d 675, 679 (Iowa 1985). The failure to preserve error may be so egregious that it denies a defendant the constitutional right to effective assistance of counsel. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

A. *An expert is needed to discuss cell phone transmission technology.*

Iowa is generally "committed to the liberal view on the admissibility of expert testimony." Ranes v. Adams Labs, Inc. 778 N.W.2d 677, 685 (Iowa 2010). Our broad test for admissibility of expert testimony has two preliminary areas of judicial inquiry that must be considered before admitting the expert testimony. See Iowa R. Evid. 5.702.

First, this preliminary determination not only requires

the court to consider the existence of a reliable body of "scientific, technical, or other specialized knowledge, 'but it also requires the court to ensure the evidence is relevant in assisting the trier of fact." See Johnson v. Knoxville Community School District, 570 N.W.2d 633,637 (Iowa 1997)(stating that, to be relevant, the evidence must be reliable and reliability is an implicit requirement of admissibility under Iowa Rule of Evidence 5.702 because "unreliable testimony cannot assist the trier of fact.)

Second, the court must determine if the witness is qualified to testify "as an expert by knowledge, skill, experience, training, or education." Iowa R. Evid. 5.702. In all circumstances involving expert testimony, the proponent of the evidence has the burden of demonstrating to the court as a preliminary question of law the witness' qualifications and the reliability of the witness' opinion. Iowa R. Evid. 5.104(a); Ranes, 778 N.W.2d at 686. All expert witnesses must be qualified in the area of their testimony based on knowledge,

skill, experience, training, or education but a particular degree or type of education is needed. See Ranes, 778 N.W.2d at 687. Moreover, an expert does not need to be a specialist in the area of the testimony as long as the testimony is within the general area of expertise of the witness. See Id.

Boothby contends that trial counsel was ineffective for failing to object to Deputy Sheriff Schroeder's testimony regarding Boothby's U.S. Cellular cell phone records and location on November 13-14, 2017. The issue here is not only whether Schroeder qualified as an expert witness regarding cell site date, but whether an expert witness is needed to inform a jury about a defendant's historical cell site.

The issue has never been addressed by the Iowa Supreme Court. The Iowa Court of Appeals has decided several unpublished cases which concluded that Officer's training and experience qualified the officer to testify to historical cell site data. See e.g. State v. Garcia, No. 17-0111, 2018 WL3913668 (Iowa Ct. App. Aug. 15, 2018); State v. Benson, No. 15-1895,

2016 WL7393891 (Iowa Ct. App. Dec. 21, 2016); State v. Rendon, No. 15-1832, 2016 WL 6270092 (Iowa Ct. App. Oct. 26, 2016).

The courts have addressed whether testimony which purports to locate people based on cellular data is lay or expert testimony and the decisions have been divided. See Alexandra Wells, *Ping! The Admissibility of Cellular Records to Track Criminal Defendant*, 33 St. Louis U. Pub. L. Rev. 487 (2014); James Beck, Christopher and Edward J. Inwinkelreid, *The Use of Global Positioning (GPS) and Cell Tower Evidence to Establish a Person's Location – Part II*, 49 No. 3 Crim. Law Bulletin ART 8 (Summer 2013); Aaron Blank, Article, *The Limitations and Admissibility of Using Historical Cellular Site Date to Track the Location of a Cellular Phone*, 18 Rich. J.L. and Tech. 3 (Fall 2011).

At the jury trial, Deputy Sheriff Schroeder, an investigator with Clinton County, testified that he received Boothby's cell phone records from the dates of November 13-

14, 2017. (Tr. p. 164, L1-3). The cell phone records showed the date of cellphone calls made or received, the connection time of phone calls, and the duration of the calls if a connection was made. (Tr. p. 166, L10-14). The cell phone records also showed the original phone number of the calls, the number making the phone call, and numbers dialed by the person making the calls. (Tr. p. 166, L14-18; Ex. 10; Ex. 11)(Conf. App. pp. 5-31). Relying on the data provided by Boothby's cellular service provider by U.S. Cellular, Schroeder testified that there were numerous phone calls made from Boothby's cellphone and that all those calls utilized three towers in Toronto, Iowa. (Tr. p. 168, L19-23). Schroeder went on to testify that he was able to determine the physical location of the towers and what sectors the phone was using for each tower. (Tr. p. 168, L23 - p. 169, L2). Furthermore, Schroeder used this data to plot those sectors on a Google map to display the tower locations used by the cell phone. (Tr. p. 169, L10-18; Ex. 12)(App. p. 11). Schroeder's ultimate

determination after reviewing the cell phone records was that Boothby cell phone was in the area of the where the incident occurred at the time of the incident. (Tr. p. 174, L15-19). Schroeder's testimony inferred to the jury that Boothby was present during the incident, and thus Boothby was the perpetrator. Boothby's attorney failed to object to the testimony. During his testimony, the problem is Schroeder never testified about the coverage area of each cell phone tower or antenna or the general technology of cell site locations.

Schroeder did not testify as to his knowledge, skill, experience, training, or education related to the interpretation of cellular records. The only information in the records regarding Schroeder's background is his testimony that he has been in law enforcement for 24 years. (Tr. p. 149, L25-p.150, L6). Schroeder also testified to his experience investigating assaults, specialized training with cases involving internet crimes against children, and experience writing search

warrants. (Tr. p. 150, L14-p. 151, L10). No other information was elicited as to the basis for his testimony regarding Boothby's cell phone location.

A cell phone transmits and receives signals throughout a cellular network like a two-way radio. See United States v. Hill, 818 F.3d 289, 295 (7th Cir. 2016)(" A cell phone is essentially a two-way radio that uses a cellular network to the communicate."). Cell phone networks are divided into geographic coverage areas that are called "cell sites or towers" and each cell site contains an antenna that receives and transmits signals to the cell phone. See *In Re Application of U.S. for an Order for Prospective Cell Site Location Info on a Certain Cellular Telephone*, 460 F. Supp.2d 448, 450 (S.D.N.Y. 2006). "To connect with the local telephone network, the Internet, or other wireless networks, cell-phone providers maintain an extensive network of cell sites, or base stations, in the geographic areas they serve." State v. Earls, 70 A.3d 630, 637 (N.J. 2013).

Cell sites "are similar to traditional radio towers; however they emit frequencies with much lower power, which allows many people in a small area to communicate over the same frequencies without inferences." Adam Koppel, *Warranting A Warrant: Fourth Amendment Concerns Raised By Law Enforcement's Warrantless Use of GPS and Cellular Phone Tracking*, 64 U. Miami L. Rev. 1061, 1066 (2010). The size of the area served by a cell site will depend "upon a number of factors, including but not limited to the height of the antennas, topography of the land, vegetative cover, and physical obstructions." Nextel Communications of the Mid-Atlantic, Inc. v. Town of Brookline, Mass, 520 F. Supp.2d 238, 242 (D. Mass 2007). When a call is placed on a cell phone, the phone will connect to the cell site with the strongest signal. See Ameritech Mobile Communications v. Dept. of Revenue, 571 N.W.2d 924 (Wisc. Ct. App. 1997)("When a mobile unit owner wishes to a place a call, the mobile unit scans the signals sent out by the various cell sites and selects,

the strongest signal.")

"As a cell phone user moves from place to place, the cell phone automatically switches to the tower that provides the best reception." In re Application of U.S. for an Order of Disclosure of Telecoms Records and Authorizing the Use of Pen. Register and Trap and Trace, 405 F.Supp.2d 435, 436-37 (S.D.N.Y. 2005). See also Nextel Communications of Mid-Atlantic, Inc. v. Town of Wayland Mass, 231 F.Supp.2d 396, 399 9D. Mass. 2002)("As customers move throughout the service area, the transmission from the portable unit is automatically transferred to the closest Nextel facility without interruption in service provided that there is overlapping coverage from the cells.")

A cell phone can be tracked when it is "used to make a call, send a text message, or connect to the Internet or when they take no actions at all, so long as the phone is not turned off." Earls, 214 N.J. at 577, 70 A.3d at 637. There are three basic methods used to track cell phone signals: (1) global

positioning system (GPS) technology; (2) real-time cell site date; and (3) historical cell site data. Aaron Blank, *The Limitations and Admissibility of Using Historical Cellular Site Date to Track the Location of Cellular Phone*, 18 Rich. J.L. and Tech 3, 9 (2011). GPS is a satellite-based navigation system used to determine location, velocity, and time. Koppel, *Warranting A Warrant*, 64 U. Miami L. Rev. 487, 489-90 (2014)("[A]" receiver on the satellite picks up a signal delivered from a GPS chip in the cellular phone. The delivery speed is then converted into distance giving a very accurate reading of the cell phone location.")

The distinction between real-time cell site data and historical cell-site data has been described as follows:

> [B]oth real-time cell site data and historical cell-site data use cellular technology to locate the cell user. While they are extremely similar, they differ in the time the signal or "ping" received and recorded by a tower is observed. Real-time cell site data is obtained through viewing the cell phone's activity and signals in real time, meaning at that instant. Thus, this largely happens when police officers survey a particular cell phone's activity. On the other hand, historical cell site data is information

> obtained after the cell phone's activity is recorded using the cell companies' records of that activity.

Wells, *Ping!* 33 St. Louis U. Pub. L. Rev. at 490, See also United States v. Myles, No.5:15-CR-172-F2, 2016 WL1695076 at *6 9E.D.N.C. Apr. 26, 2016)("Historical cell site data refers to the acquisition of cell site data for a period retrospective to the date of the order…Real-time data, on the other hand,…shows where the phone is presently located through the use of GPS or precision location data." United States v. Jones, 908 F. Supp.2d 203, 207 (D.D.C. 2012)("The information is identical regardless of whether it is obtained historically or prospectively."(internal quotations omitted.))

In this case, the issue is only with Boothby's historical cell site data. As noted above, the cell phone service providers create and maintain records of cell phone interaction with cell phone towers. See United States v. Johnson, No. 14-CR-00412-TEH, 2015 WL5012949 at *6 (N.D.Cal. Aug. 24, 2015)("Carriers keep records of these connections **563 *586 for each customer…This is referred to as "historical cell site"

data and can be used to identify a customer's general location at a given time."). It has been observed that a "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." In re U.S. for Historical Cell Site Data, 724 F.3d 600, 611-12 (5th Cir. 2013). "That same information makes it possible to identify at least the general location of a cell phone at the time the phone connects to a tower." State v. Simmons, 143 A.3d 819, 825 (Me. 2016).

It has been recognized that "courts that have been called upon to decide whether to admit historical cell-site analysis have almost universally done so." United States v. Hill, 818 F.3d 289, 297 (US Ct. App. 2016). However, "the courts that have addressed whether the testimony which purports to locate people based on cellular data is lay or expert testimony are divided." Collins v. State,172 So.3d 724, 739 (Miss. 2015). In a majority of reported cases, lay testimony was

allowed in some circumstances. See State v. Johnson, 797 S. E.2d 557, 563 (W. Va.2017)(cites various cases from around the country that has addressed the issue of whether lay testimony or expert testimony is needed to provide evidence regarding historical cell site data.)

The Mississippi Supreme Court explained the necessity for requiring experts to inform the jury of historical cell site data:

> [W]hile the technology underlying cell identification is not extremely difficult to understand, utilizing cell identification to locate a person does require specialized knowledge regarding such technology-namely, knowledge regarding the various antennas on cell sites and the cell sites coverage range and how these interact to determine the entire area in which a cell phone use might have been located while making a cell phone call. Illustrating that cell identification requires specialized knowledge are the facts that Detective Sims had to take a sixteen-hour course on how to use cellular technology in law enforcement and that he used specialized software acquired at this course to determine the locations of Collins and Jenkins on the night of Jenkin's murder.

Collins,172 So.3d at 741. The Missouri Court of Appeals has also addressed the need for expert testimony to inform the jury

of historical cell site data as follows:

> A cell phone may be in range of several sites simultaneously, and a multitude of factors influence which site, geography, and the workings of the cell phone itself may result in connections from as far away as thirty miles or as close as thirty feet. Thus, knowing the location of the cell site to which a phone connects permits an expansive range of inferences as to where the phone actually is. We think that drawing such an inference without the aid specialized experience or knowledge in the field of cellular communications comes too close to mere speculation.
>
> Here, the State introduced evidence of the locations of the cell sites used by Patton's phone in order to place Patton near the crime scene at the time of the shootings…To narrow down the area in which Patton's phone must have been to have connected to a particular cell site –i.e. to proffer testimony actually probative of whether Patton was in one area rather than the other – required analysis of the many variables that influence cell site signals strength. Such analysis amounts to opinion testimony that is properly the province of an expert. This we hold that the trial court erred by failing to require an expert witness to testify as to the location of Patton's phone in relation to the cell sites to which it connected.

State v. Patton, 419 S.W.3d 125, 131-132 (Mo. Ct. App. 2013).

This Court should reject the minority approach to this issue because lay witness not only reads the records to the

jury, but they drew the ultimate conclusion that the records could show the caller was in a specific location. See Wells, *Ping!*, 33 St. Louis U. Pub. L. Rev. at 511; See also State v. Edwards, 156 A.3d 506, 525-526 (Conn. 2017)(police officer testifying about cell phone data must be qualified as an expert witness, as knowledge of how cell phone communicate through cell towers is not within understanding of average layperson). Therefore, this Court should hold a witness must be qualified as an expert under Rule 5.702 in order to present evidence of cell phone historical site data.

B. *Deputy Sheriff Schroeder does not qualify as an expert witness regarding Boothby's cell phone record location data.*

In this case, the record does not support a conclusion that Schroeder was qualified to testify about Boothby's location based on the cellphone tower records because the State presented no evidence of Schroeder's experience or knowledge in the area of cellular tower records because the State presented no evidence of Schroeder's experience or

knowledge in the area of cellular phone technology. Boothby's attorney breached a duty by failing to object to Schroeder's testimony on the issue. Under these circumstances, Boothby's attorney had a duty to know that expert testimony was needed for cell phone site historical data. See State v. Clay, 824 N.W.2d 488, 496 (Iowa 2012)(stating counsel has a duty to know the law); State v. Vance, 79 N.W.2d 775, 789 (Iowa 2010)(discussing information attorney should have discovered if attorney had researched the appropriate law); State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999)(noting counsel must exercise reasonable diligence in deciding whether issues is worth raising).

Boothby asserts he was prejudiced by his trial counsel. The state had no other means of placing Boothby at the scene except the cell phone data, which was based on inference taken from Schroeder's testimony. This testimony was needed for the State to identify Boothby as the perpetrator of the alleged crime.

Boothby did not receive a fair trial and the result of the trial may be have been different if a proper objection had been made to exclude Schroeder's testimony. Accordingly, the Court should vacate Boothby's conviction and remand for a new trial.

If this Court determines that the record is not adequate to address the aforementioned claims of ineffective assistance of counsel on direct appeal, Boothby requests that the Court preserve these claims for possible post-conviction relief proceedings. Iowa Code § 814.7.

II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE CELL PHONE RECORDS AS INADMISSIBLE HEARSAY.

Preservation of Error: Error was not preserved and Boothby argues that his trial counsel was ineffective for failing to object to Schroeder's testimony. However, in a defendant's claim of ineffective assistance of trial counsel, may be reviewed on direct appeal. State v. Clark, 357 N.W.2d 532, 535 (Iowa 1985). Although ordinarily, ineffective assistance of counsel

claims is preserved for post-conviction relief, the Court can consider the merit of the claim on direct appeal if the record is adequate. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004). Here, the court should find the record is adequate.

Standard of Review: Ineffective assistance of counsel claims are based on the Sixth Amendment. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012). The Court reviews claims of ineffective assistance of counsel de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). Claims of violations of constitutional rights are reviewed de novo. State v. Williams, 574 N.W.2d 293, 300 (Iowa 1998).

Discussion: A criminal defendant is entitled to effective assistance of counsel. U.S. Const. amend VI; Iowa Const. art. I, §10; Strickland v. Washington, 466 U.S. 668 (1984). The test for determining whether a defendant received effective assistance of counsel is "whether under the entire record and totality of circumstances counsel's performance was within the normal range competency." Snethen v. State, 308 N.W.2d 11,

14 (Iowa 1981). When specific errors are relied upon to show the ineffective assistance of counsel, the defendant must demonstrate: (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. Id. The defendant must show that there is a reasonable probability that but for counsel's unprofessional errors the results of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984). The failure to preserve error may be so egregious that it denies a defendant the constitutional right to effective assistance of counsel. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

A. *Boothby's cellphone records did not meet the business record exception to the hearsay rule.*

During Schroeder's testimony, the State introduced Boothby's cell phone from November 13-14, 2017. (Tr. 164, L1-3). The records were admitted without objection from Boothby's attorney. (Tr. p. 164, L17-20). Schroeder testified to the information contained in the records regarding Boothby's cellphone on November 13-14, 2017. Boothby

argues his trial counsel was ineffective for failing to object since the phone records were hearsay and not admissible under the business records exception contained in Rule 5.803(6).

Hearsay evidence is admissible unless permitted by another rule, statute or constitutional provision. Iowa R. Evid. 5.802; State v. Newell, 710 N.W.2d 6, 18 (Iowa 2006). "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). The information contained in State Exhibit 10 were "offered to prove the truth of the matter asserted." See State v. Lain, 246 N.W.2d 238, 242 (Iowa 1976)(finding a telephone bill was hearsay because it was offered to prove the telephone calls were made as the bill purported to show."

A court cannot admit to telephone record under the business record exception, without evidence and foundation in the record showing that it meets the requirements of the

exception. Lain, 246 N.W.2d at 242. An adequate foundation requires evidence that the phone records were made in the regular course of the cellular company's business, near the time the actual calls were made, or other evidence showing the sources of information used to generate the record. Id.

There is no such evidence in the record in this case. No one from U.S. Cellular was called to testify regarding the phone records. There was no evidence at trial on how the records were generated or how they were compiled. In fact, Schroeder testified that he could only attest to that the cell phone records were provided by U.S. Cellular and he could not testify to the accuracy of the records. (Tr. p. 188, L7-13).

Schroeder's testimony did not lay the foundation for these records to qualify under the business records exception. Schroeder did not explain the identification numbering system used by U.S. Cellular to record the origin and the destination of the cell phone data or phone calls. No explanation was

provided about how the company records the cell phone data. Schroeder also did not testify that the records were: (1) were made in the regular course of business; (2) were made by a person with knowledge; (3) were kept in the regular course of business activity; (4) the regular practice of that business activity was to make a record. Therefore, Schroeder's testimony did not qualify the phone records as a business records. See Iowa R. Evid. 5.803(6); State v. Reynolds, 746 N.W.2d 837, 842-843 (2008). Thus the State failed to lay proper foundation for the admission of the records. As such, trial counsel was ineffective for failing to object to this hearsay evidence.

Boothby argues that he was prejudiced by his attorney's errors and omissions. If hearsay evidence is erroneously admitted, this Court will presume prejudice unless the contrary is affirmatively established. See State v. Plain, 898 N.W.2d 801, 811 (Iowa 2017). The burden to affirmatively establish lack of prejudice is met "if the record shows the

hearsay evidence did not affect the jury's finding of guilt." Id.

A reasonable probability existed that but for counsel's unprofessional errors, the results of the proceeding would have been different if Boothby's trial counsel objected to the evidence. This evidence was the only evidence to establish Boothby was prejudiced by trial counsel's breach of duty for failing to object to the challenged evidence. Accordingly, this Court should vacate Boothby's conviction and remand for a new trial which challenged evidence shall not be admitted without the proper authentication or foundation.

CONCLUSION:

For all the reasons discussed above, Boothby respectfully requests this Court vacate his conviction and grant him a new trial.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $2.65, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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) because:

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