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STATE OF MONTANA
Case Number: DA 21-0260

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0260

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANIELLE WOOD,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twentieth Judicial District Court,
Sanders County, the Honorable Deborah Kim Christopher, Presiding

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STATEMENT OF THE ISSUES

Issue I: Did the district court err when it allowed an accountability charge to go to the jury when the State failed to put on evidence that Danielle aided or abetted anyone else?

Issue II: Once accountability was instructed, was counsel ineffective for failing to offer a "mere presence" jury instruction?

Issue III: As the gatekeeper of expert testimony, did the district court err under Rule 702 by allowing proffered experts to interpret cellular records and give opinion testimony about the location of a Tracfone without vetting the qualifications of the witnesses or the reliability of the scientific analysis they employed?

Issue IV: Was it an abuse of the court's discretion to allow the State to use a demonstrative exhibit that reflected a major change to their expert witness's most important conclusion, which the State only obliquely disclosed the day prior to his testimony?

Issue V: Did the prosecution repeating a statement that "somebody" could have tested evidence collected at the crime scene after the district court already ordered it not to shift the burden of proof to Danielle warrant a mistrial?

Issue VI: Does cumulative error mandate reversal?

STATEMENT OF THE CASE

The State did not arrest anyone after Matthew LaFriniere was found dead at his home in Thompson Falls on the afternoon of May 3, 2018.

Ten months later, on March 19, 2019, Danielle Wood was arrested and charged with deliberate homicide. (D.C. Doc. 1.) Danielle, who shared a child with Matthew, had briefly been at his house the evening of May 2, 2018, looking for him. She was interviewed by law enforcement the day after Matthew was found, and her home was searched. The State later sought leave to amend its Information to include accountability to deliberate homicide. (D.C. Doc. 148.) Danielle objected to the amended Information, given she was the only person alleged to have been involved in Matthew's death, but the court permitted the added charge. (D.C. Docs. 159, 176.)

At the start of its investigation, through search warrants to both Google and Verizon, the State obtained cell phone data for Matthew's phone, Danielle's phone, and a third phone (a Tracfone), which was located in Thompson Falls and had been used to call 911 for a report of

loud noises on the evening of May 2, 2018. (1/14/2021-1/29/2021 Trial Transcript, "Tr." at 1957.) Both Danielle and Matthew had received text messages from this Tracfone as well. (State's Exhibits 254, 302.) The State was only able to obtain very limited call detail records (CDRs), from Verizon for the TracFone. (Tr. at 2221.) Unlike the Tracfone, the State obtained fairly extensive cellular data from both Google and Verizon for Danielle's phone including CDR, Wifi, and GPS location data. (State's Exhibits 253, 254.) Wifi "pings" represented the majority of the location data associated with Danielle's phone. (Tr. at 2151.)

The State noticed Mike Fegly, an employee of a company called ZetX, as an expert witness. The State hired ZetX to interpret the cellular data and draw conclusions about the historic locations of both Danielle's phone and the Tracfone. The proffered testimony involved Fegly's use of a proprietary CDR mapping application that ZetX developed called "TRAX."

Danielle filed a motion *in limine* to exclude the testimony under Mont. Rule Evid. 702. (D.C. Doc. 101.) She argued Fegly's testimony required analysis under *Daubert*[1] because ZetX's methodology for

[1] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, (1993).

interpreting the cellular data, including its reliance on TRAX, was untested novel science. Separately, the motion challenged the foundation for Fegly's testimony, arguing he lacked the knowledge and training to draw the conclusions he did from the cellular data. Alternatively, Danielle argued Fegly's conclusions would mislead the jury about the accuracy of the data and should be excluded under Rule 403. (D.C. Doc. 101.)

The State agreed Fegly's proffered testimony required analysis under Rule 702, and agreed some of it required the application of *Daubert*. (D.C. Doc. 105, Pg. 8.) The State requested the district court conduct a *Daubert* hearing. (D.C. Doc. 105, Pg. 7-8.)

The district court held an evidentiary hearing where both parties elicited testimony to test the reliability of the proffered expert testimony. (6/20/2020 Tr. 1-122.) The district court summarily denied Danielle's motion without explicitly applying Rule 702, *Daubert* or Rule 403. (D.C. Doc. 156; attached as Appendix A.) Instead, the district court merely found "the data is valid scientific data," but did not address the reliability of Fegly's methodology. The court simply reasoned the

testimony was, "based on the historic use of this data in other matters." (D.C. Doc. 156.)

The week of trial, the State provided the defense an updated copy of a 36-minute video Fegly planned to use to illustrate his conclusions. (State's Exhibit 256, admitted at Tr. 2199.) In the middle of trial, the State placed another copy of the video on the defense table, but never disclosed Fegly had changed his conclusions and significantly altered the video exhibit. When the defense found out, it requested the video be excluded as a discovery sanction. The district court denied the request. (Tr. at 2117-9, 2123-4; attached as Appendix B.)

At the end of the State's case in chief, together with the deliberate homicide allegation, the defense moved to dismiss the accountability charge as the prosecution had presented insufficient evidence that Danielle was legally accountable for the acts of some other person. (Tr. at 2471-7.) The State did not name any accomplice. Danielle argued both that the accountability charge should be dismissed as a matter of law and that the State should not be permitted to argue an accountability theory to the jury.

The district court denied the motion to dismiss and instructed the jury on accountability over Danielle's objection. (Attached as Appendix C.) After two days of deliberations, the jury returned a guilty verdict. (D.C. Doc. 402; Tr. at 2644.) The verdict form did not differentiate between deliberate homicide and accountability for deliberate homicide. Danielle was sentenced to life in prison without parole. (D.C. Doc. 462; attached as Appendix D.)

STATEMENT OF THE FACTS

On May 2, 2018, Danielle Wood hosted a Pampered Chef gathering at her house in Thompson Falls. (Tr. at 1130.) From about 6 p.m. until 9 p.m., Danielle and three other women were testing a new cookie recipe and baked several batches. (Tr. at 1131-33.) Danielle was spearheading a cancer awareness project for the group, and so the cookies had pink ribbons and white icing. (Tr. at 1144.) Ms. Wood's daughter S.L. was outside playing basketball with her older half-brother, Hunter. (Tr. at 1133.)

Danielle was expecting to drop S.L. off at her father, Matthew LaFriniere's house around 7:00-7:30 p.m. that night. (Tr. at 2407.) But at 7:07 p.m., Danielle received a text message from an anonymous

phone number, which said, "Held up in Trout Creek, just hang on to S.L., I'll call when I head back to town. matt." (Tr. at 1413.) One of the other women was in the room with Danielle and saw the text come in. (Tr. at 1150.)

About 7:30 p.m., Danielle decided to drive to Matthew's house to find out whether he was home, despite the odd text. (Tr. at 1132, 1154.) Danielle had been in custody battles with Matthew over their daughter and thought maybe he was setting her up to miss a scheduled drop-off. (Tr. at 1132.) Matthew had full custody of their daughter due to Danielle's struggle with alcohol addiction. He was allowing Danielle frequent visits with S.L. at that time, outside the official custody arrangement, and Danielle was concerned about keeping to the agreement so that would not change. (Tr. at 1132-33, 1155, 2374.) She did not take S.L. with her when she left. (Tr. at 1145.)

Danielle was away from her house a total of about 30-40 minutes. (Tr. at 1138.) Wifi location data obtained from Google for Danielle's cell phone confirmed her Pampered Chef guests' recollections: The Wifi data showed Danielle arrived at Matthew's house no earlier than 7:38:46 p.m. (Tr. at 2293). The State's cell phone expert confirmed that the Wifi

and GPS records also indicate she must have left this location no later than 7:49 p.m. or 7:50 p.m., because her phone was already quite far from Matthew's house by 7:53 p.m. (Tr. at 2293.)

When Danielle returned home, she resumed the cookie baking project with the others. (Tr. at 1138.) Danielle said she was upset because Matt was not home. Her guests remembered her clothing was the same, and she was not sweaty, breathing hard or noticeably distraught. (Tr. at 1136-8.) Danielle was wearing the same clothing she left in. Danielle had bought everyone pink, black and white leggings to wear as part of a cancer awareness promotion, which she was wearing. (Tr. at 1133, 1146.) Before the group left for the night, at about 9:20 p.m., they took a group picture wearing the leggings. (Tr. at 1145-6.)

After her Pampered Chef guests had left, at 9:32 p.m., Danielle texted both Matthew's phone and the Tracfone she had received Matthew's message from earlier, to say, "I am not sure what is going on. But, it is way past bed time. We'll snuggle on the couch and wait for your call. Hope I am doing the right thing." (Tr. at 1413.)

Danielle had tried calling Matthew several times after not being able to find him that evening; once right after she left his house, at 7:54

p.m., once when she returned home at 8:02 p.m., at 9:29 p.m. just before texting him, and again at 10:45 p.m. (Tr. at 1942-45.) Danielle's son, Hunter, called her while she was gone from the house, at 7:54 p.m., a call which lasted 27 seconds. (Tr. at 1942.)

The next day, May 3, Matthew didn't show up for work at the local hardware store. (Tr. at 1182.) A coworker went to his house to look for him, looked around, saw nothing amiss and decided he wasn't there. (Tr. at 1183-7.) Later that afternoon, another friend went to Matthew's house and found Matthew's body under a piece of plywood. There was a 2x6 and shovel on top of the plywood. (Tr. at 1203.) Some distance from where she found Matthew, she saw a cell phone in the driveway, next to a small pool of blood and a cigarette butt. (Tr. at 1209.)

Matthew had been shot three times, from the front and the back. Only one bullet was found, lodged in his hand. The lead investigator noted his wounds indicated the shots were taken from farther away, not close-range. (Tr. at 2002.) There were no eyewitnesses.

The State's blood expert was not able to conclude whether Matthew was dragged to where his body was found, or whether he was instead shot in the driveway at the first pool of blood and walked the

approximately 17 feet prior to falling where he was ultimately found. (Tr. at 2337, 2343.) There was no blood found between the pool of blood and where Matt's body was found. (Tr. at 2343.) The lead investigator felt only a rather strong person could have moved Matthew's body. (Tr. at 2003.)

When looking through his home, law enforcement noted that Matthew owned quite a few firearms, several of which were not secured. (Tr. at 1577-78.) Matthew kept a loaded handgun next to his bed on his nightstand. (Tr. at 1280.) Law enforcement took the plywood, 2x6 and shovel under which Matthew was found, but did not attempt to lift fingerprints from that evidence, or from the doorknob to Matt's house, a nearby chickencoop latch, or bar leaning against chicken coop. (Tr. at 1593-4.)

The State's case is based on circumstantial evidence and if true, would have had to have occurred on a very tight timeline. The following sets out the State's timeline.

Mark Riffle was the last person to see Matthew alive. (Tr. at 1126.) Mark was loading railroad ties from about 6:30 p.m. until 7:45 p.m. on Airport Road near the lumber mill when Matthew drove by and

stopped to chat. (Tr. at 1118-1121.) Mark said he chatted with Matthew for five to ten minutes at about 7:15 or 7:20 p.m., then Matthew got in his truck and left. (Tr. at 1120-21.) Mark did not see whether Matthew was driving away from or toward home. (Tr. at 1123.)

Lydia LaFriniere, Matthew's step-mother, saw Danielle at Matthew's house just prior to 7:40 p.m., consistent with the Wifi cellular data and with what Danielle told her Pampered Chef guests. Lydia had a job cleaning the lumber mill in Thompson Falls and passed by within 100 feet of Matthew's house just before entering the mill. (Tr. at 1067.) Danielle was walking back and forth in the driveway. (Tr. at 1069.) Lydia drove slowly by and watched Danielle for about three minutes, she said Danielle was always in Lydia's sight and was just walking in the driveway, with nothing in her hands. (Tr. at 1085.) The front gate at the lumber mill records when people enter. (Tr. at 1092, State's Exhibit 268.) The mill's records show Lydia arriving at the entrance gate at 7:40 p.m. (Tr. at 1093.) She left at 9:13 p.m. (Tr. at 1093.)

Megan Miho was in Thompson Falls on May 2 visiting friends. After dinner, she went on a walk with her two-year-old daughter and

their family friends who lived in the same area Matthew did. Between 7:25 p.m. and 7:42 p.m., she heard gunshots. (Tr. at 1034.) She was confident of the timing because Megan took a few pictures on her phone that night and she heard the gunshots after she took her first photograph but before she took a second. She is certain the shots came before she stopped to arrange a picture of her two-year-old daughter in a field with horses. (Tr. at 1032, 1055.) She remembered the shots happening "past 7:30 p.m. maybe into 7:35," a few minutes before arriving at the horses. (Tr. at 1055.) She remembers taking time to get her daughter, herself, and her friends' dogs set up for the posed photo. The posed photo was taken at 7:42 p.m. Megan repeatedly testified the shots came most likely about 7:35 p.m., but when the prosecution pressed her, she said she supposed it was possible the shots could have occurred as late as 7:41 p.m. at the very latest. (Tr. at 1055-7.) In its closing argument, the State repeatedly misstates Megan's testimony, saying she said the gunshots occurred at 7:43 p.m. (Tr. at 2557, 2590.)

The Cellular Data

The raw cellular data was admitted as business records. (State's Exhibits 253, 254; admitted at Tr. 1957, 1962.) The custodians of those

records from Google and Verizon testified remotely. Both witnesses testified that they have no knowledge of the accuracy of such data to show a person's location, they could attest only that their respective companies collect and keep this data about their customers in the course of business. (Tr. at 1886, 1931.) Both the Google and Verizon data comes with general disclaimers about the inherent inaccuracy of such data. (Tr. at 1886, 1931.)

Typically, when analysis of call detail records, CDRs, is admitted in criminal prosecutions as evidence of a person's location, the witness is using a methodology called "triangulation." Aaron Blank, *The Limitations and Admissibility of Using Historical Cellular Site Data to Track the Location of a Cellular Phone*, 18 Rich. J.L. & Tech. 3 at 41.

Triangulation was impossible here because there is only one cellular tower in Thompson Falls. Instead, Fegly mapped out the only data he had for the Tracfone, which was Verizon Real Time Tool ("RTT") distance estimates from just one cell tower. (Tr. at 2141.)

RTT is an approximation Verizon makes about the distance a phone may be from a cellular tower based on the time it took for a cellular signal to bounce off the device and return to the tower.

(6/16/2020 Tr. at 82-85; Tr. at 2057.) The accuracy of any single RTT distance estimate can be thrown off by geographic features such as mountains, rivers, and metal buildings. (Tr. at 2083.) Fegly acknowledged the only "very little amount of time it takes to throw that [RTT distance measurement] off by several hundred feet or even 50 yards at times." (Tr. at 2232.) He said, "go behind a metal building and you'll see, because that little bit of interference from the metal [it] takes longer for the signal to get to your phone and to get back to the tower. (Tr. at 2232.) For this reason, the RTT estimates are only an approximation of distance based on the time measurement recorded. (Tr. at 2075.)

By contrast, with triangulation, the RTT are mapped for at least three separate cell towers to which a phone has "pinged." Mapping RTT estimates from three separate towers somewhat reduces the inherent inaccuracies of this data. Aaron Blank, *supra.*

Verizon only uses RTT records for accounting and billing purposes. (6/16/2020 Tr. at 101-102; Tr. at 2075.)

Verizon's disclaimer for RTT estimates reads:

> **Verizon Wireless RTT Report and Round Trip Delay Disclaimer:**
>
> **The latitude and longitude measurements on the Real Time Tool "RTT" report are derived solely from the Round Trip Delay measurement. They are best estimates and are not related to any GPS measurement. Measurements with a high confidence factor may be more accurate than measurements with a low confidence factor, but all measurements contained on this report are the best estimates available rather than precise location.**

State's Exhibit 254.

The Tracfone in this case only has RTT data associated with it, not GPS or WiFi. ZetX's owner, Sy Ray, acknowledged the "important thing to understand" about testimony using RTT estimates is its "not precise." (Tr. at 2163). RTT measurements are not, "meant to put you on an X marks the spot." (Tr. at 2232.) According to Ray, RTT distance estimates can be off by about 0.1 of a mile, on average, a little more than two football fields. (Tr. at 2145.) He has seen it be off by a full mile. (Tr. at 2082.) Fegly admitted only a Verizon engineer would really know about the accuracy rate of RTT distances in general, and admitted he did nothing to test the accuracy of the estimates coming from the Thompson Falls cell tower. (6/16/2020 Tr. at 108.) Neither Fegly nor Ray consulted with anyone at Verizon about the tower servicing

Thompson Falls or about the accuracy of the distance measurements generated by that tower specifically. (6/16/2020 Tr. at 101-102.)

Fegly also explained an RTT line can only show that a phone is somewhere along 120-160 degrees of the radius of a circle; if an RTT estimate is 3.74 miles, then this is the radius size of the circle. (6/16/2020 Tr. at 48.) That is, any given RTT distance estimate gives only a very long arcing line, spanning a greater distance than the width of Thompson Falls, west to east. (Tr. at 2157.)

In sharp contrast to their testimony about the wide margins of error for RTT distance estimates, both Fegly and Ray gave very detailed opinion testimony specifically placing the Tracfone "right on top" of Danielle's phone on May 2 and on April 19, the only two dates where RTT data is available. Ray opined that the two phones, "perfectly track with each other" whenever the Tracfone was powered on. (Tr. at 2097.) Ray told the jury the phones were, "almost perfectly paired," and "they're always right on top of each other." (Tr. at 2085, 2088.) Ray said it was "mathematically impossible" for the phones not to be "in very close proximity." (Tr. at 2088.) He told the jury that when the Tracfone is first activated, Danielle's phone "is right on top of" an RTT distance

estimate for the TracFone. (Tr. at 2103.) He even concluded "it's clear that this phone's being used by a particular individual." (Tr. at 2101.)

Fegly said "the RTT matches" for the two phones at the time the TracFone is activated. (Tr. at 2171.) He also placed Danielle and the Tracfone together on May 2 when the Tracfone sent Danielle two text messages, one at 1:41 p.m. saying "Don't you get it. Quit calling them" and another at 7:07 p.m., the "Trout Creek" text from Matthew.

When pressed by the defense, Fegly admitted the limited Tracfone data meant very large swatches of Thompson Falls were included within the error range for the Tracfone's location and his conclusions were based on very limited data. (Tr. at 2,157, 2221.)

There are only twenty-two RTT distances estimates total for the Tracfone, between April 19 and May 2. (Tr. at 2148; State's Ex. 254.) The Tracfone was only operational for parts of three separate days, April 19, April 20, and May 2. (Tr. at 2139.) Much of the time that it was powered-on, it was not communicating its location with any cellular tower. (Tr. at 2170, 2182.) Although it was powered on sooner, the first mappable RTT distance since April 19 for the TracFone occurred at 1:33p.m., on May 2. (Tr. at 2233.)

The State relied on Fegly's and Ray's testimony to argue Danielle was the person sending text messages from the Tracfone to herself and Matthew, and that she used the Tracfone to call 911. The State said that the "don't you get it. Quit calling them" text message, sent from the Tracfone to Danielle's phone at 1:41 p.m. was sent "while they're together." (Tr. at 2583.) Then, at 7:14 p.m., "the TracFone is intersecting [Danielle's] residence." (Tr. at 2586.) At 7:28 p.m., these phones are "together on the RTT report," and when the 911 call is made a few minutes later, the Tracfone is "right on top" of Danielle's phone. (Tr. at 2581, 2586-7.) The State used this to argue Danielle used the Tracfone as a decoy. (Tr. at 2638.)

Based on more reliable Wifi data- not RTT distance estimates- Fegly testified that Danielle's phone arrived in Matthew's driveway at 7:38:46 p.m. (Tr. at 2294-95.) Wifi data shows that Danielle arrived no sooner than that time, but it could be slightly later. (Tr. at 2294-95.) Both Wifi and GPS reports show Danielle's phone quite far from Matthew's house by 7:53 p.m., indicating Danielle left by 7:49 p.m. or 7:50 p.m. (Tr. at 2593.)

Fegly's Cell Phone Exhibit

Fegly's used a 36-minute demonstrative video he created with TRAX software where he simply mapped the cellular data set as-is. (6/16/2020 Tr. at 82, 85.) So, while both Fegly and Ray testified RTT distances can only be used to predict a phone's location to be somewhere within the space of about two-football fields of any point on a long arc, for his video presentation, Fegly (using TRAX) marked these RTT approximations as a precise solid line. (Tr. at 2163; State's Exhibit 256.) Fegly eliminated data he considered inaccurate from view, showing only the data he decided was accurate.

Fegly used a green line for the Tracfone RTT estimates, and red for Danielle's phone. The colored lines themselves are 112 yards wide but appear more narrow in Fegly's video because of the scale of the map. (6/16/2020 Tr. at 83-84.) Therefore, the green Tracfone RTT line sometimes appears at Fegly's chosen scale as intersecting with Danielle's home, or with the red RTT line of Danielle's phone, but if one zooms in closer, the line does not touch Danielle's house or the RTT of Danielle's phone at all. (6/20/2020 Tr. at 56.) Both Fegly and Ray repeatedly testified that they could not say where specifically either

phone was at any given time, because the RTT lines cross all of Thompson Falls. ("I…can't say the devices are at the Eddy address [Danielle's house]" here, only that "in the event that those devices were at the Eddy address it's exactly what I would expect to see in the record." (Tr. at 2167).) Meanwhile, the demonstrative video zeroes in on Danielle's house, one possible location of many reflected by the underlying Verizon data.

The ZetX Witnesses' Qualifications

Ray is the founder of ZetX and a former police officer. (Tr. at 2044.) Ray developed knowledge about cellular data through trial and error when he was a police officer rather than specific training in radiofrequency engineering- the field of science that relates to a cellular phone's connection to cellular towers. Neither Fegly or Ray is an engineer. ZetX has no affiliation with either Google or Verizon, and neither Fegly nor Ray have received training from in-house engineers at either company. When Ray created TRAX, he said he just "got online and taught [him]self some basic coding and coded up a program." (Tr. at 2050.) Unlike any other competing company, ZetX will estimate the cellular coverage range for any cell tower, producing maps which place

a circle within which ZetX says a cellphone using that tower was likely located. (State's Exhibit 255, admitted at Tr. 2069.) Just how TRAX calculates the size of this circle is undisclosed proprietary information, but Ray claims it is accurate. (Tr. at 2060.)

Fegly and Ray's experience using TRAX often stems from instances that only require ruling-out certain locations, rather than producing the precise location estimates given in Danielle's case. For example, ZetX works with Montana in wildlife poaching cases to determine if someone claiming Montana residency really resides out of state. (Tr. at 2056.) To do so, ZetX will review a person's cell phone records to determine if most of their time is spent out of state, only visiting Montana during hunting season. (Tr. at 2056.)

Fegly and Ray's CDR interpretations and conclusions were based on personal experience using the data in other places. When asked about a scientifically tested accuracy rate for the RTT data, Fegly responded that instead, for him, "the accuracy rating's going to come from, you know, if there is a corroboration of the data." (6/16/2020 Tr. at 73.) That is, Fegly will compare RTT data to his client's other evidence, the prosecution in this case. If the data ZetX has mapped is able to line

up with other evidence in the case, then according to Ray and Fegly, the cell data has been "corroborated." Conversely, Ray said if he finds the cell phone data doesn't align with the State's other evidence in the case, "then we would absolutely start to challenge or question the accuracy of the data." (Tr. at 2158). Ray assured the jury that even if there are uncertainties with the data on its own, "[w]hen you go through [this] process of 'corroborating' the data, yes; it is reliable and it is accurate." (Tr. at 2153.)

Undisclosed Changes to the Video Exhibit

The morning prior to Fegly's testimony, the State placed a new video on the defense counsel's table. The video Fegly had provided to the defense at the start of trial indicated the "don't you get it. Quit calling them" text was sent at 12:41 p.m., a time when no RTT distance estimate existed for the Tracfone. (Tr. at 2240; *see*, State's Exhibit 256 original; *see also* State's 302.) Likewise, the "held up in Trout Creek…" text was sent at 6:07 p.m., when there was no available RTT data. At the last minute, he changed his conclusion for when these texts were sent. (Tr. at 2240.) Now, both texts were sent at times when the TracFone had a similar RTT distance as Danielle's phone. (Appendix B.)

The State did not tell the defense about the changes to the video, but counsel watched the second copy overnight. (Tr. at 2109-2110.) The next morning, the defense requested exclusion of the video exhibit as a discovery sanction. (Tr. at 2114.) The court declined to sanction the State. (Tr. at 2256.) The defense questioned Fegly on the changes, who said he misread the data initially. (Tr. at 2245.)

The Defense Motions for Mistrial

During its questioning of one of the investigators at the crime scene, the prosecutor told the jury a footprint on the plywood covering Matt's body was photographed for later comparisons by "anyone who wishes to do so." (Tr. at 1452.) Outside of the presence of the jury, the defense objected to the prosecution's suggestion that evidence is preserved so that "anyone" who wishes to test that evidence, may do so. (Tr. at 1460-8.) The court cautioned the prosecutor, "perhaps let's talk chain of custody and they're going [to the crime lab] as opposed to who could look at them later." (Tr. at 1463.)

Soon after, the prosecutor returned to questioning about who can access evidence at the crime lab. (Tr. at 1693-1696.) The court then addressed the State's line of questioning with the jury, instructing that

the State has the burden to prove its case and defense counsel may either "review any of the State's case if they choose to; [but] they may also rely on the failure of the State to meet their burden to the elements of the crime beyond a reasonable doubt." (Tr. at 1723, 2479, Jury Instruction 7.)

The defense moved for a mistrial. (Tr. at 1748-49.)

The prosecutor claimed his line of questioning was just because he wanted to make sure the jury was aware that the crime lab is an independent entity and "will do testing for a variety of different people." (Tr. at 1749.) The State contrasted this with, "If I were to get up in closing argument and make any inference at all that the defense had a burden here or that they should have got certain things tested…," "that would be improper for me to do and I think that at point the Court should grant a mistrial." (Tr. at 1750.)

The district court overruled the mistrial motion, but did impose a restriction on the State that, "from this point forward the State will not reference who can get the information from the crime lab… Mr. Guzynski, you cannot reference the accessibility [of the crime lab] to the defendant…I don't want to hear a question from counsel about how

other people can submit and request, get information from the crime lab again." (Tr. at 1752-1756.)

In closing argument, the State addressed the footprint on the plywood, and the investigator's decision not to test a shovel or a 2x6 found near Matt's body for fingerprints. The prosecutor returned to its theme that the crime lab is accessible to the defendant by saying, "ladies and gentlemen, these items were collected for testing. They could have been tested if somebody wanted them tested." (Tr. at 2574.)

The defense objected again, renewing its motion for a mistrial. (Tr. at 2574.) The district court denied the motion. (Tr. at 2599-03; attached as Appendix E.) The court reasoned that the prosecutor said "*someone* could have" tested the evidence, but he did not explicitly "mention the defendant in particular." (Tr. at 2599-03). The court reasoned that it believed the prosecutor was speaking in the context of the decisions the investigators made about what to test. The court said, it's "a very, very fine line" but despite its prior restriction on the State, let it go. (Tr. at 2603.)

The State's Theory at Trial and Settling Jury Instructions

The State charged both that Danielle committed deliberate homicide herself, and that she was legally accountable to someone else for causing Matthew's death. (D.C. Doc. 148.) But, the State made no factual allegation in its pleading that anyone else was involved. From its opening argument, the State told the jury it would present evidence that Danielle "had a plan" to kill Matthew and then outlined its theory of how she alone carried out that plan. (Tr. at 961-975.) The State emphasized in its opening that her boyfriend, Drew Stobie, knew nothing about Danielle's plan. (Tr. at 974.)

Drew testified for the State at trial. (Tr. at 2393.) He was at Danielle's house "for a while" after work on May 2. (Tr. at 2407-9.) He lived eleven miles east of Thompson Falls, about five miles east of the airport road, where Matthew's house is located. (Tr. at 2431, 2402.) Drew said Danielle was in poor physical health, recalling once she tried to help him load firewood but her ability to do so was "worse than poor." (Tr. at 2437.)

During the initial investigation of Matt's death, Drew voluntarily spoke with Agent McCarvel. Drew was well acquainted with firearms

and owned several. Drew did not know that Danielle owned a gun until May 6, four days after Matthew's death, and was shocked to find out because she didn't like guns or know how to use them. (Tr. at 2597.)

Drew told investigators that in the early evening of May 2, he went to Plains to drop off some sausage for a customer, stopping at a bar before arriving home about 6:30 p.m. (Tr. at 2410.) McCarvel decided that Drew didn't seem to have enough animosity toward Matthew to do him harm, said he never considered Drew a suspect, and did not verify his alibi. (Tr. at 1985, 2024-26.)

Following the close of the State's evidence, the defense moved to dismiss the accountability charge, arguing the State had not named any second suspect, and never presented the jury with evidence that Danielle contacted, aided or abetted anyone else. (Tr. at 2471-2.)

The State admitted, "accountability's been weak" in this case. (Tr. at 2503.) But, it responded it was entitled to put the accountability charge to the jury anyway. The State's position was that it didn't matter whether there was any evidence of accountability, having formally pled accountability to deliberate homicide was more than was necessary to

survive a motion to dismiss and warrant the accountability jury instruction: The prosecutor argued:

> " if I did nothing, if I did nothing, and never asked the Court to amend the Information and not provide that notice and not be up front with the Court and the parties, then I would still be in a position right now to ask for an accountability instruction." (Tr. at 2474.)

The court denied Danielle's motion to dismiss, deciding there was enough evidence of accountability because it had been "at least referenced" that Drew, not Danielle, was the one with the Tracfone. (Tr. at 2475-7.) There was also "discussion about how the body could get from one pool to the other pool and then how Ms. Wood is not physically fit. But obviously if [Drew's] rustling cows and butchering things that would certainly help…. so if you're talking about… a third chair that's empty, it looks relatively filled by possibly the defendant's boyfriend at the time." (Tr. at 2476.)

At the settling of jury instructions, the court noted a defense objection to the accountability jury instruction. (Tr. at 2502.)

In its initial closing, the State argued Danielle herself traveled to Matt's house and personally pulled the trigger to kill him; it did not

name or specifically argue she had an accomplice and never even inferred Drew could have been involved. (Tr. at 2551-98.)

The defense in turn argued that the State's timeline of events makes it nearly impossible to accomplish what the State says she did in that time. (Tr. at 2608.) The defense further argued Drew should have been considered an alternative suspect: his alibi- which was never even verified- lasted only until 6:30 p.m., prior to when Matthew was last seen alive. (Tr. at 2616.) Drew had the opportunity and the wherewithal to kill Matthew. (Tr. at 2616-20.) The defense outlined that Drew, not Danielle, could have been the user of the Tracfone in question. (Tr. at 2621.) Finally, the defense argued that the fact the State refused to identify anyone other than Danielle who took part in causing Matthew's death should create reasonable doubt. (Tr. at 2624-25.)

In rebuttal, the State said Danielle was reckless for claiming Drew was "a possible suspect." (Tr. at 2632-3.) The State argued "Drew Stobie wasn't there with Danielle with that TracFone. Drew Stobie wasn't at the Pampered Chef party." (Tr. at 2632.) The prosecution re-emphasized "[t]here's not one witness to ever suggest that Drew Stobie is with Danielle Wood the evening of May 2nd during that Pampered

Chef party. That TracFone is not with Drew Stobie; we know he's not there." (Tr. at 2628.) The prosecution said, Danielle should be ashamed for trying to implicate, "[s]omebody that was in a relationship with her for two or three years, saw himself having a future with this lady." (Tr. at 2631-2.) Danielle, the State claimed, is the only guilty party between the two.

STANDARDS OF REVIEW

Issues I, II

This court reviews for correctness the legal determinations a lower court makes when giving jury instructions, including whether the instructions, as a whole, fully and fairly instruct the jury on the applicable law. *State v. Lackman*, 2017 MT 127, ¶ 8, 387 Mont. 459, 395 P.3d 477. While a district court has broad discretion in formulating jury instructions, *State v. Spotted Eagle*, 2010 MT 222, ¶ 6, 358 Mont. 22, 243 P.3d 402, only legal theories that find support in the record will accurately and correctly state the law applicable in a case. *State v. Kaarma*, 2017 MT 24, ¶ 26, 386 Mont. 243, 390 P.3d 609. To constitute reversible error, any mistake in instructing the jury must prejudicially

affect a defendant's substantial rights. *State v. Ellerbee,* 2019 MT 37, ¶ 25, 394 Mont. 289, 434 P.3d 910.

Ineffective assistance of counsel (IAC) claims present mixed questions of law and fact and are reviewed de novo. *State v. Chafee*, 2014 MT 226, ¶ 11, 376 Mont. 267, 332 P.3d 240.

Issues III-VI

The Court generally reviews a trial court's evidentiary rulings for an abuse of discretion. *State v. Lake*, 2022 MT 28, ¶ 23, 407 Mont. 350, 503 P.3d 274. To the extent the ruling is based on "an interpretation of an evidentiary rule or statute," review is de novo. *State v. Stewart*, 2012 MT 317, ¶ 23, 367 Mont. 503, 291 P.3d 1187. The burden of establishing the reliability of scientific and expert testimony is on the proponent of the evidence. *State v. Weldele,* 2003 MT 117, ¶ 58, 315 Mont. 452, 69 P.3d 1162.

Review of the denial of a motion for mistrial is whether trial court abused its discretion. *State v. Partin*, 287 Mont. 12, 951 P.2d 1002 (1997).

A district court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of

reason, resulting in a substantial injustice. *State v. Webber*, 2019 MT 216, ¶ 8, 397 Mont. 239, 448 P.3d 1091. Reversible error occurs when a substantial right of the appellant is affected, or when the challenged evidence affected the outcome of the trial. *State v. Reams,* 2020 MT 326, ¶ 9, 402 Mont. 366, 477 P.3d 1118.

SUMMARY OF THE ARGUMENT

Danielle Wood did not receive a fair trial when the State was allowed to instruct the jury it could find her guilty of deliberate homicide even if it decided she did not kill Matthew. Accountability didn't fit this case as the prosecution not only didn't present evidence that Danielle aided or abetted someone else, it refuted any suggestion that the only other person against whom there was a shred of evidence was involved. *State v. Tower* does not extend to situations like here, where the State fails to present sufficient evidence of an accomplice at trial to justify an accountability charge going to the jury.

Next, defense counsel was ineffective when it failed to ensure a "mere presence" jury instruction was given. In this case, the State proved that Matthew died, and that Danielle went to his house near in time to when the State argued his death occurred. Her counsel made a

significant error by not ensuring the jury knew Danielle could not be convicted of accountability to deliberate homicide on only these facts.

Next, the district court abused its discretion when it failed to apply Rule 702 to Fegly and Ray's testimony about the Tracfone's round trip delay cellular records. Applying Rule 702 and *Daubert*, state and federal courts alike regularly limit cell phone location testimony after assessing the expert's qualifications, the specific methodology they're using, and the precision with which the proffered expert wishes to opine. The State's witnesses were allowed to give far too specific conclusions about the location of the Tracfone than the underlying data could support. Their testimony and accompanying demonstrative exhibit could easily mislead jurors about the precision and accuracy of the science underlying it and violated both Rule 702 and Rule 403.

Finally, the district court committed additional trial errors by failing to exclude Fegly's demonstrative exhibit wherein the State failed to disclose he had changed his conclusions until the eve of his testimony. Additionally, the court erred by denying a motion for a mistrial after the State repeatedly suggested to the jury that Danielle could have proven her innocence by testing the State's evidence herself.

Cumulatively and separately these errors demand Danielle Wood receive a new trial, one where purported scientific testimony is properly vetted, discovery is fairly given, the burden of proof remains with the State, and the prosecution is required to prove every element of the charged crime beyond a reasonable doubt.

ARGUMENT

I. Without an accomplice, the district court erred when it instructed on accountability.

"A district court must only instruct the jury on those theories and issues which are supported by evidence presented at trial." *State v. Daniels,* 2011 MT 278, ¶ 42, 362 Mont. 426, 265 P.3d 623.

Article II, Section 17 of the Montana Constitution and the Due Process Clause of the United States Constitution protect the accused "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *State v. Davis*, 2012 MT 129, ¶ 11, 365 Mont. 259, 279 P.3d 162 (quoting *In re Winship*, 397 U.S. 358, 364, (1970)). Accountability is no exception: Yes, accountability is a "conduit by which to find a person criminally liable for the acts of another." *State v. Maetche*, 2008 MT 184, ¶ 16, 343 Mont. 464, 185 P.3d 980. But as for any offense,

if the State does not present evidence of guilt by accountability at trial, it is not entitled to such a jury instruction.

A. When the State presents no evidence of aiding or abetting another person the jury should not be instructed on accountability.

The State threw in an accountability charge because it was nearly impossible for Danielle to have shot and killed Matthew as the State claimed: She would have had to have done it after 7:38:46 p.m. and 7:41 p.m. at the very latest, but she couldn't have because Lydia Lafriniere had her eyes on Danielle nearly all that time.

This near impossibility raises reasonable doubt as to whether Danielle could have committed deliberate homicide, not occasion to add an accountability theory to a case where there was neither allegation nor evidence of an accomplice.

There is no other Montana case where the State was allowed an accountability jury instruction without ever putting on evidence that a defendant aided another person- a named other person- in carrying out the charged crime.

The State claimed *Tower* gave it authority for the instruction, but *Tower* concerns formal pleading requirements, not sufficiency of the

evidence. In *Tower*, the defendant was accused, together with his accomplice of collaborating to sell drugs to an undercover officer. *State v. Tower,* 267 Mont. 63, 66, 881 P.2d 1317, 1319 (1994). The Court considered whether statutory and constitutional due process *notice* requirements had been satisfied to permit an accountability jury instruction when accountability was not formally plead. *Tower,* 267 Mont. at 67-68, 881 P.2d at 1320. Under the specific facts, the majority held the State was not necessarily obligated to include a theory of accountability in the Information because the defendant was put on notice of the accountability theory through discovery, the State's opening argument, and the trial evidence. *Tower,* 267 Mont. at 68, 881 P.2d at 1320. The Court simply found Tower had adequate notice of the State's accountability theory to satisfy due process without formal pleading.

Adequate notice that the prosecution may pursue an accountability theory does not also mean the State is automatically entitled to an accountability jury instruction. Nothing in *Tower* permits an accountability instruction where there is no evidence of aiding and abetting someone else. Just like for affirmative defenses, a party must

do more than give notice they expect to pursue the theory. *See e.g.*, *Daniels*, ¶¶ 15-16, (in order to require a court to give a self-defense jury instruction, a defendant must do more than give notice of its intention to use the defense). To earn an accountability jury instruction, the State must present sufficient evidence to prove every element of accountability beyond a reasonable doubt.

Here, the State never named an accomplice and actively refuted any suggestion that Danielle acted in concert with Drew Stobie, the alternative suspect named by the defense. The district court would have allowed the State to argue Danielle and Drew carried out the murder together, but the State steadfastly refuted any suggestion Drew had any involvement in Matthew's death. In its opening, the State told the jury the evidence would show Drew was completely unaware of Danielle's "plan." Indeed, neither the State nor the defense proposed an accomplice jury instruction regarding Drew's testimony, implying neither viewed him as a potential accomplice.[2] In closing, the State

[2] Section 46-16-213, MCA ("A person may not be found guilty of an offense on the testimony of one responsible or legally accountable for the same offense ... unless the testimony is corroborated by other evidence that ... tends to connect the defendant with the commission of the offense.")

painstakingly rebutted the defense suggestion that Drew, not Danielle, was responsible, reminding the jury that "[t]here is not one witness to ever suggest that Drew Stobie is with Danielle." Then, the State attacked the defense for suggesting Drew could have killed Matthew or even been aware of Danielle's plan. The State said Danielle was reckless for "trying to create [the] narrative" that "[Drew] is possible suspect." (Tr. at 2633.)

The State itself admitted its accountability theory was "weak," but another word for it is nonexistent. In *Tower*, and all subsequent notice cases applying it, the State *named an accomplice,* and produced evidence through discovery, charging documents, opening arguments and trial that the accused collaborated with that person to commit the charged offense. In *State v. Tellegen*, 2013 MT 337,¶9, 372 Mont. 454, 314 P.3d 902, the Court found Tellegen had adequate notice of accountability charge when the defendant and her codefendants had been accused of acting together, and the State initially charged Tellegen with accountability, then amended to burglary and conspiracy to commit burglary. *In State v. Dobrowski,* 2016 MT 261, ¶¶ 13-16, 385 Mont. 179, 382 P.3d 490, the defendant had adequate notice of

accountability charge when the State presented evidence at trial indicating he and the owner of a property where a marijuana growing operation was discovered ran the operation together. And in *State v. Medrano,* 285 Mont. 69, 74-75, 945 P.2d 937, 940 (1997), the Court allowed an accountability instruction because two defendants had been accused of hitting and kicking a victim together and were charged individually and jointly for the victim's injuries.

Montana's accountability statutes, §§ 45-2-301 and 302 set forth "two theories of criminal culpability—personal wrongdoing and accountability." These concepts are distinct. *See*, *State v. Kline*, 2016 MT 177, ¶ 14, 384 Mont. 157, 376 P. 3d 132. In *Kline*, this Court explained, "[a]ccountability cannot be applied . . . where [a] participant is responsible for his or her own conduct and independently commits the offense." *Kline*, ¶ 21. Here, the State did not present evidence supporting a separate accountability theory. As in *Kline*, arguing that Danielle was "personally responsible for every element of" the offense without naming an accomplice in the alternative means she cannot be convicted of being legally accountable for that offense.

The State had a different strategy: It threw in accountability to ensure a conviction even if the jury had reasonable doubt. The State's argument absolves it of its burden of proof: if the jury thinks Danielle could not have killed Matthew as alleged, with accountability the jury can still convict if it thinks she was involved somehow but aren't sure how. Wifi data shows Danielle arrived at Matthew's house no earlier than 7:38:46 p.m., but Meghan Miho testified she heard gunshots between 7:30 p.m. and 7:35 p.m., and under no circumstances later than 7:41 p.m., when she took her posed photograph. Miho recalls she was walking when she heard shots. The shots would have needed to happen with enough time prior to 7:41 p.m. for everybody in her group to stop walking and arrange her two-year-old daughter in front of some horses first. Lydia Lafriniere's testimony negates the possibility that Danielle could have shot Matthew during the barely one minute between when Danielle first arrived at Matthew's house, (7:38:46 p.m.), and the last possible moment when Meghan Miho could have heard gunshots, (7:41p.m.) because she saw her in the driveway during that time, with nothing in her hands.

This timeline was troublesome for the State and could surely have spelled acquittal. There were other holes in the State's case too. Danielle did not have experience with guns but the investigator and the crime lab maintained whoever shot Matthew did so, accurately, from some distance away. Danielle was not physically fit. It would have been very difficult for her to drag a body even a short distance, or even move a sheet of plywood, a 2x6 and a shovel to cover a body in that short time with no outward signs of effort. Yet Danielle's Pampered Chef guests recall she was wearing the same clothes when she came back as earlier in the night and was not in any way disheveled or out of breath.

The accountability instruction simply made way for a conviction even if the jury didn't believe Danielle killed Matthew. That is exactly what the State asked the jury to do: in its rebuttal, the State told the jury if it had reasonable doubt about whether the State's allegation was true, it should still convict if it believed Matthew was killed by *someone*, and Danielle was involved, *somehow*. Adding accountability in these circumstances, without a specific argument that two people acted together, only unfairly diminishes the State's burden.

The district court abused its discretion when it gave an accountability jury instruction unsupported by evidence. As this Court cannot know whether the jury found Danielle guilty of deliberate homicide or the wrongly instructed accountability for deliberate homicide, her conviction must be reversed.

B. The possibility of an alternate suspect provides no grounds for the State's accountability instruction either.

The State amended its Information to add an accountability charge "because [the defense was] acting like there's another person involved, they have argued that." (Tr. at 2473-4.) Evidence of an alternative suspect is not the same as evidence of collusion between two people and does not justify an accountability jury instruction.

"Other suspect" evidence suggests someone else, someone other than the defendant, committed the charged crime. *State v. Giles,* 196 Wash. App. 745, 757, 385 P.3d 204, 211 (2016). "Other suspect" evidence is admissible because it introduces reasonable doubt. *Giles,* 196 Wash. App. at 757, 385 P.3d at 211. The district court said the jury could find Danielle aided Drew in killing Matthew. But it was the

defense not the prosecution who encouraged the jury to consider Drew, and not as an accomplice, but as an alternative suspect.

In a Washington Court of Appeals case, *State v. Fair*, the court examined the same issue. *State v. Fair*, No. 77180-9-I (Wash. Ct. of Appeals, Division One, 10/8/2018).[3] The State charged Fair with homicide and did not name any accomplice, but argued an accomplice jury instruction was nevertheless warranted because the defense had introduced evidence that someone else carried out the murder. The court disallowed the instruction, explaining that defense counsel was entitled to argue the evidence concerning a different suspect cast doubt on Fair's guilt without justifying an accomplice jury instruction. As the court put it, "When evidence of another suspect comes in, obtaining a conviction is likely to be more difficult, but that is not a reason to provide a jury instruction unsupported by the record." *Id.* at 9. An

[3] The *Fair* decision is unpublished, however, Washington State Court General Rule 14.1 (a), allows that "…unpublished opinions of the [Washington] Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

accomplice jury instruction was not warranted where the State had not put forth evidence that Fair and the alternative suspect acted together.

As the district court noted in denying Danielle's motion to dismiss, Drew was the one person the State could have argued Danielle could was legally accountable to. But the State chose not to pursue this theory, and at every chance, actively argued against it. The defense's argument that Drew, not Danielle, killed Matthew does not stand in for the State failing to argue they acted together. As the State explicitly fought to refute its only plausible accomplice for which there was even the slightest evidence in the record, it was not entitled to an accountability jury instruction.

The State did not present a case that warranted an accountability jury instruction. Danielle requires a new trial, one where the jury only decides accountability if the State presents affirmative evidence she aided or abetted someone else, rather than the absence of evidence that she could have acted alone.

II. Counsel was ineffective for failing to offer a "mere presence" jury instruction.

It is well-settled that "mere presence at the scene of a crime, even with knowledge and approval of the criminal intent or acts of others, is

not a crime and is insufficient alone to establish criminal accountability for a crime committed by another." *State v. Pierre,* 2020 MT 160, ¶22, 400 Mont. 283, 466 P. 3d 494.

The jury was not instructed that Danielle's "mere presence" at Matthew's house was not enough to find her accountable. Danielle herself told her Pampered Chef guests that she was going to Matthew's house at about 7:30 p.m. on May 2, approximately when the State argued he was killed. Considering, Danielle's right to effective assistance of counsel was violated by her counsels' failure to ensure the jury knew that this circumstance alone could not prove her guilt.

A defendant's right to effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and by Article II, Section 24 of the Montana Constitution. Ineffective assistance of counsel claims are governed by the two-part test established in *Strickland*. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *accord*, *State v. Kougl,* 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095. To establish ineffective counsel, an accused must (1) show that "'counsel's performance was deficient or fell below an objective standard of reasonableness'" and (2) "'establish prejudice by

demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.'" *Kougl*, ¶ 11.

The two things that are sure about this case are someone killed Matthew, and that Danielle was present at his house around the time the State says his death occurred. Under these circumstances, it was deficient performance to not offer a mere presence jury instruction. "[T]he failure to offer [a] potentially beneficial instruction, when that failure is not part of counsel's trial strategy, is an error so serious that it falls outside the range of competence required of attorneys in criminal cases." *Garrett v. State,* 2005 MT 197, ¶ 24, 328 Mont. 165, 119 P.3d 55. It is unnecessary to ask "why" counsel performed as he did if there is "no plausible justification" for defense counsel's inaction. *Kougl,* ¶ 15.

In *State v Chafee*, this Court reversed a conviction after defense counsel failed to seek a mere presence jury instruction. *State v. Chafee,* 2014 MT 226, 376 Mont. 267, 332 P.3d 240. There, the defendant was present at the crime scene, but the evidence suggested he may not have taken any action to aid or abet the completion of the offense. This Court found there was no plausible justification not to offer the mere presence

instruction because counsel had argued to the jury that Chafee's presence at the scene was insufficient; therefore, it was ineffective to not offer the jury an instruction that supported his defense. *Chafee,* ¶17.

Like in *Chafee*, here there is no plausible justification for why defense counsel did not seek a mere presence instruction. The defense did not deny that Danielle went to Matthew's house near the time the State said shots were fired. Danielle did not find Matthew there and left unaware of what happened to him. Counsel was ineffective because a mere presence instruction was consistent with this defense and would have decreased the jury's likelihood to convict.

Under *Strickland*, a party is required to show "a reasonable probability that, but for counsel's errors, the outcome would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome, but it does not require that a defendant demonstrate that he would have been acquitted." *Kougl*, ¶ 25.

There is a reasonable probability the jury would not have convicted Danielle had the court instructed it could not do so simply

because she went to Matthew's house the evening of May 2. Danielle's brief presence at Matthew's house, together with the fact that he was killed are the only sure facts in a case otherwise driven solely by circumstantial evidence. This Court has found such cases insufficient. *See e.g., State v. Cochran,* 1998 MT 138, ¶¶ 29-30, 290 Mont. 1, 964 P.2d 707 (felony assault conviction reversed when circumstantial evidence indicated that Cochran was in the trailer where assault occurred but did not prove that she committed the assault); *see also, State v. Johnston,* 267 Mont. 474, 480-81, 885 P.2d 402, 406(1994) (accountability for burglary conviction reversed when Johnston's presence at the crime scene was insufficient to show he aided or abetted the commission of the burglary).

Without a mere presence instruction there is a reasonable probability the jury convicted Danielle of accountability for deliberate homicide by finding she was merely at the scene around the time of Matthew's death. Having satisfied both *Strickland* prongs this Court should reverse Danielle's conviction for a new trial.

III. The district court failed to fulfill its obligation to screen out proffered expert testimony whose reliability didn't support the weight it was likely to be given by the jury.

A trial court is the gatekeeper of expert testimony, and must ensure only reliable testimony and evidence goes to the jury. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, (1993); *accord State v. Moore*, 268 Mont. 20, 41-42, 885 P.2d 457 (1994) *abrogated on other grounds by State v. Gollehon,* 274 Mont. 116, 906 P.2d 697 (1995). Expert testimony "can be both powerful and quite misleading." *Daubert,* 509 U.S. 579, 595 (1993). "[T]here is a natural propensity among jurors to accord greater weight to objective scientific evidence." *State v. Weldele,* 2003 MT 117, ¶ 58, 315 Mont. 452, P.3d 1162. "If the scientific evidence in question has no demonstrable accuracy or reliability… the error of its admission can have significant adverse consequences for the defendant." *Weldele,* ¶ 58. Once challenged, the State bears the burden of showing the scientific premise of an expert's opinion is reliable. *Moore,* 268 Mont. at 42, 885 P.2d at 471.

Rule 702's purpose is to "establish [ ] a standard of evidentiary reliability." *Daubert*, 509 U.S. at 590. In *Daubert*, the United States Supreme Court set forth a four-factor test to help determine whether a

field of scientific evidence is reliable. Those factors include whether the expert's "theory or technique":

(i) can be (and has been) tested,
(ii) has been subjected to peer review and publication,
(iii) has a high "known or potential rate of error," and
(iv) enjoys "'general acceptance' within a "relevant scientific community."

Daubert, 509 U.S. at 593-94.

This Court applies *Daubert* where novel scientific evidence is at issue. *Moore*, 68 Mont. at 42, 885 P.2d at 471, and has recognized that the U.S. Supreme Court extended *Daubert's* "gate-keeping function" to all expert evidence. *State v. Clifford*, 2005 MT 219, ¶ 29, 328 Mont. 300, 121 P.3d 489; *citing Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999).

Mont. R. Evid. 702 applies regardless of whether expert testimony is considered novel. *State v. Damon, 2005* MT 218, ¶ 19, 328 Mont. 276, 119 P.3d 1194. Rule 702 permits "a witness qualified as an expert by knowledge, skill, experience, training, or education" to testify "in the form of an opinion or otherwise" if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the

evidence or to determine a fact in issue." This rule requires testing an expert's reliability against:

> (1) whether the expert field is reliable,
> (2) whether the expert is qualified, and
> (3) whether the qualified expert reliably applied the reliable field to the facts."

Clifford, ¶ 28.

A district court must determine whether the field is reliable and whether the expert is qualified, but "[t]he last question is for the finder of fact." *McClue v. Safeco Ins. Co. of Illinois,* 2015 MT 222, ¶ 16, 380 Mont. 204, 354 P.3d 604.

Here, the district court failed to uphold its gatekeeper function when it summarily denied Danielle's motion *in limine* to exclude the State's proffered expert testimony. The court only considered the admissibility of raw cellular call record data under the business records hearsay exception, an issue unrelated to the novel use of the RTT data. Per Rule 702, the district court was obligated but failed to assess the reliability of the expert's methodology in interpreting the RTT data and determine whether the witness was qualified prior to admitting the proffered testimony. The court substantially erred when it summarily

dismissed Danielle's motion, concluding only that Fegly was using "valid scientific data" in his analysis.

Proper analysis of the proffered expert testimony would have resulted in exclusion of Fegly and Ray's repeated conclusion that the Tracfone was "right on top of" Danielle's phone on April 19 and May 2. Courts rarely allow such specific cellular location testimony, as RTT data is inherently inaccurate, but especially here where the Tracfone data was extraordinarily limited and the methodology Fegly and Ray used was both highly uncommon and not tested by the scientific community. The court's error significantly prejudiced Danielle's defense, as this testimony is the only evidence connecting Danielle to the Tracfone.

A. The State failed to demonstrate an adequate foundation under Rule 702 for Fegly or Ray to testify the TracFone was "right on top of" Danielle's phone.

Call detail records "are merely records used by cellphone companies 'for the purpose of financial transactions such as generating bills to the subscriber and . . . settling accounts with other carriers.'" Victoria Saxe, *Junk Evidence: A Call to Scrutinize Historical Cell Site Location Evidence*, 19 U.N.H. L. Rev. 133, 142 (2020). CDRs themselves

"contain limited information," and don't have "documented error rates or validation methodologies." *Id.* "Analyzing cell tower connections is the least accurate method[] of locating a cell phone, yet this method is consistently used to convict and imprison criminal defendants." Thomas J. Kirkham, *Rejecting Historical Cell Site Location Information as Unreliable Under Daubert and Rule 702*, 50 U. Tol. L. Rev. 361 (2019). Identifying cell location based on CDRs has "glaring deficiencies," particularly the absence of "peer review or error rates." Andrew McQuilkin, *Sleeping Gate-Keepers: Challenging the Admissibility of Cell-Phone Forensic Evidence Under Daubert*, 11 J. High Tech. L. 365, 399–402 (2011).

State and federal courts almost universally agree that testimony analyzing historical cell-site data is scientific testimony beyond the knowledge of a common juror. *See, E.g., United States v. Reynolds*, 626 F. App'x 610, 614 (6th Cir. 2015); *United States v. Natal*, 849 F.3d 530, 533 (2d Cir. 2017); *United State v. Hill*, 818 F.3d 287, 295-96 (7th Cir. 2016); *Ex parte George,* No. 1190490, 2021 WL 68997, at *18 (Ala. Jan. 8, 2021). "[It] is a complicated and scientific process by which a signal

from a cellular telephone actually connects to a specific antenna on a cellular tower." *Ex parte George,* 2021 WL 68997, at *18.

The geographic characteristics of the specific area covered by a cell tower impacts the precision of that site's location information. *Carpenter v. United States*, 138 S. Ct. 2206, 2211-12 (2018). Cell phone data is less reliable in locations with mountains, buildings, and dense forestry, which all cause interference. *See generally* Kolesk, *At the Intersection of Fourth and Sixth: GPS Evidence and the Constitutional Rights of Criminal Defendants*, 90 S. Cal. L. Rev. 1299 (2017). A cellular telephone does not always select the tower that is nearest to the person making the call. *See*, Wells, Alexandra, *Ping! The Admissibility of Cellular Records to Trace Criminal Defendants*, 33 St. Louis U. Pub. L. Rev. 487 (2014). *See also, United States v. Evans*, 892 F. Supp. 2d 949, 956 (N.D. Ill. 2012) (noting calls are not always routed to the nearest tower). Nor does a phone always connect to the antenna facing the direction of the phone user. *Ex parte George* 2021 WL 68997, at *18. (sectored antennas are "not a very good indication in regard to direction," the radiation pattern of a phone sometimes "goes to the rear of the antenna... or the 'back lobe' for that particular antenna."). For all

of these reasons, scientific analysis applying reliable methodology based in radio frequency engineering is needed to reach accurate conclusions as to where a phone was likely located based on the CDR data that cell phone companies generate. *United States v. Jones,* No. 3:21-CR-89-BJB, 2022 WL 17884450, at *5 (W.D. Ky. Dec. 23, 2022); *Ex parte George,* 2021 WL 68997, at *17. An expert witness is needed to explain the deficiencies and inaccuracies of using CDRs to estimate a person's location, and knowledgeable enough to allow for adequate cross examination about the limitations of the location technique they are using. *See, Wilder v. Maryland*, 991 A.2d 172, 197-98 (Md. Ct. Spec. App. 2010).

The State's proffered testimony went beyond simply recounting call-detail records and the location of the cellular tower servicing Thompson Falls. Fegly and Ray's testimony drew conclusions as to whether the CDR data could locate Danielle's phone and the Tracfone, and how precisely, something only they- not either the Verizon or Google representative was willing to do.

This is especially true of the Tracfone, which had only a small number of RTT distance estimates, and no Wifi or GPS data, associated

with it. Verizon gave no representations of the accuracy of the data in this case, the location evidence came solely from Fegly's assessment of the raw data. As to the RTT data, Fegly chose a 12-160-degree arc to represent his opinion of the possible locations of the Tracfone while in Thompson Falls. (6/16/2020 Tr. at 48.) Fegly admitted this range for the RTT data is not necessarily accurate. (6/16/2020 Tr. at 101.) Fegly also isolated out the data from Google and Verizon that he personally considered reliable, and eliminated data that in his opinion was inaccurate. He then decided whether the remaining data points could show the two phones in proximity to where the State believed them to be. This was no small task, as an opinion about the location of the Tracfone depended upon a very limited number of RTT estimates, and these scant cell tower connection points were the sum total of the phone's location information. (Tr. at 2221.)

On numerous occasions this Court has held a State's proffered expert was not qualified to explain a scientific basis for their conclusion and thus not qualified to draw an ultimate conclusion. In *Hulse v. State*, this Court found that while the State's witness was trained to administer an HGN test, he did not have adequate knowledge

qualifying him to explain the correlation between alcohol consumption and nystagmus. *Hulse v. State, Dep't of Just., Motor Vehicle Div.,* 1998 MT 108, ¶ 70, 289 Mont. 1, 961 P.2d 75. This Court reversed because the district court's failure to consider the foundation for the reliability of such testimony was an abuse of discretion. *Hulse,* ¶¶ 70-72. Subsequent cases have followed suit. In *Weldele,* this Court again rejected expert testimony when the State failed to present an adequate foundation to demonstrate the accuracy and reliability of PBT tests prior to using the test results as proof of intoxication. *Weldele*, ¶ 58. The holding was repeated in *State v. Chavez-Villa,* 2012 MT 250, ¶ 16, 366 Mont. 519, 289 P.3d 113, 116 and *State v. Michaud,* 2008 MT 88, ¶ 33, 342 Mont. 244, 252-53, 180 P.3d 636, 642, resulting in the exclusion of proffered expert testimony.

Here, the conclusion that the Tracfone was "right on top" of Danielle's phone at critical times on April 19 or May 2 required expert qualifications neither Fegly nor Ray had. Like the law enforcement officer in *Hulse*, these witnesses' training and experience was as former cops using CDR data to try to locate people in the field, not in radio-frequency engineering. Fegly testified that he decides whether CDR

data is accurate based on whether it is "corroborated" by the State's other evidence in the case, not on any radio frequency science. His analysis creates confirmation bias, not reliable science. Fegly's and Ray's experience mirrors the officer in *Hulse* who was trained to administer a HGN test in the field, but did not have adequate training to explain the scientific basis for the correlation between alcohol consumption and nystagmus. The officer in *Hulse* was not permitted to testify that HGN tests are a reliable means by which to decide whether someone is drunk nor that, in his experience, people who fail an HGN test have had too much alcohol to drive. Likewise, Fegly and Ray did not have the radio-frequency expertise needed to conclude that their method of determining that the two phones were "right on top" of each other and "traveling together" was scientifically reliable.

Neither Fegly nor Ray should have been permitted to use their law enforcement background to testify that plotting single Verizon's RTT estimates was a scientifically reliable way to show the Tracfone's location because they did not have the radio-frequency expertise to make such a conclusion. Had the district court assessed the foundation

for Fegly and Ray's testimony, it would have found its scientific basis inadequate and inadmissible.

B. Courts across the country regularly put limitations on the admission of cell phone record evidence.

The admissibility of an expert's testimony about cellular records depends on the different methodologies used and the specificity of the conclusions drawn. *United States v. Hill,* 818 F.3d 289, 295-96 (7th Cir. 2016). "The admission of historical cell-site evidence that overpromises on the technique's precision—or fails to account adequately for its potential flaws—may well be an abuse of discretion." *Hill,* 818 F.3d at 299. Courts have widely limited opinion testimony about a person's location to general areas rather than specific locations. *Hill,* 818 F.3d at 298. Courts have excluded the testimony altogether when an expert's conclusions are based on untested methodology. *See, Evans,* 892 F.Supp.2d at 956 (admitting traditional historical cell-site analysis, but rejecting testimony which relied on novel and "wholly untested" theory of "granulization").

Analysis of a proffered expert's specific proposed testimony is necessary first to determine whether it meets the reliability threshold of Rule 702. That is why "[n]o federal court of appeals has yet said

authoritatively that historical cell-site analysis is admissible to prove the location of a cell phone user." *Hill,* 818 F.3d at 297. Fegly's and Ray's conclusions as to the location of the Tracfone did not meet this reliability threshold.

1. Fegly and Ray overpromised on the meaning of the data.

Fegly's conclusion that the two phones were "traveling together" was inadmissible as it was neither based on reliable science nor adequate facts. In *Hill*, the 7th Circuit Court of Appeals acknowledged expert testimony based on historic cell site analysis could pose problems under Rule 702 as well as Rule 403.

Trying to prove too specific a location is generally problematic and inadmissible. *Hill,* 818 F.3d at 298. In *United State v. Jones*, the government sought to have a witness use the same TRAX generated program maps as a visual aid to his location testimony. *United States v. Jones,* No. 3:21-CR-89-BJB, 2022 WL 17884450, at *2 (W.D. Ky. Dec. 23, 2022). The testimony was meant to use the maps to "rule-in" the location of five robberies which Jones was accused of carrying out. The witness planned to represent these locations with a TRAX animated illustration of the purported location of the defendant's phone on a

Google Earth Pro map. Jones challenged the witness's qualification to give such testimony and the reliability of his planned use of the TRAX animated maps. The court examined both (1) the witnesses' understanding of the underlying methodology and information, and (2) the degree of precision with which he proposed to convey his opinions to the jury. The court sided with Jones, barring the witness's use of the TRAX animations, because the presentation failed to incorporate the necessary disclaimers and variability factors. The court required the witness to submit a new map based instead on only the basic information reflected in the T-Mobile phone records themselves. *Jones,* 2022 WL 17884450, at *8-9. The court reasoned that the mismatch between the over-precise representations in the TRAX video and the imprecise science underlying it failed to satisfy the standards for reliable expert opinion testimony under Rule 702. *Jones,* 2022 WL 17884450, at *2. The court summarized the prejudice by saying, "[t]he proposed presentation was precise and compelling. Too much so, as it turned out." *Jones,* 2022 WL 17884450, at *2.

In *United States v. Nelson*, a federal district court cautioned about the expert's slides making an express statement that two defendants

were "traveling together." *United States v. Nelson,* 533 F. Supp. 3d 779, 801-02 (N.D. Cal. 2021). After a *Daubert* analysis, the court permitted the expert's other testimony, but found her conclusion the phones, and therefore the defendants, were "traveling together" problematic as it "suggests a degree of concerted action that may not be supported by the underlying data." *Nelson,* 533 F. Supp. 3d at 801-02. The court said the assertion could be excluded either under Rule 702 for lacking an adequate factual basis or under Rule 403 as likely to mislead the jury. *Nelson,* 533 F. Supp. at 801-02.

Like in *Jones* and *Nelson*, here, Fegly's and Ray's portrayal of the Tracfone being "right on top" of and "perfectly paired" with Danielle's phone conveys a level of precision not supported by the underlying data. The Tracfone's dataset contains only twenty-two RTT estimates. Fegly admitted the single RTT distance estimates can be thrown off significantly by signal interference caused by geographic features such as forests, mountains, rivers and buildings. On average, the margin of error is the distance of two football fields. Their testimony that the phones "perfectly track with each other" suggests a degree of precision that the data cannot support.

The district court failed to assess Fegly's and Ray's testimony under Rule 702, and consequently allowed a degree of precision to their conclusions regularly rejected by courts countrywide. CDR data is inherently inaccurate. The district court abused its discretion by failing to test this evidence prior to admission.

2. An analysis under *Daubert* was required.

The method used to interpret cell site data will determine its accuracy. Aaron Blank, *supra* at 41. Some methods of historical cell site analysis can be and have been tested by scientists- namely triangulation and GPS. *See*, Victoria Saxe, *supra* at 137. ("GPS records are often seen as the most accurate cell-location method.") Neither of those methods were used to analyze the location of the TracFone.

The State provided no evidence to show Fegly's method of estimating the Tracfone's location by plotting single RTT distance estimates had any scientific validity. Verizon itself does not inspire confidence in this number, it warns RTTs, along with the latitude and longitude estimates derived from them, are a "best estimate available rather than precise location." This disclaimer has been the basis for

reversal of at least one high-profile criminal conviction, even when triangulation is used.[4]

Fegly's method of mapping single RTT estimates to show the Tracfone's location was novel and required an analysis under *Daubert,* the State failed to show otherwise. The situation is like *State v. Cline*, where this Court held that although fingerprint evidence in general was not novel scientific evidence, the more specific issue of whether it is possible to determine the age of a fingerprint utilizing magnetic powder was. *State v. Cline*, 275 Mont. 46, 55, 909 P.2d 1171, 1177 (1996). There, this Court determined *Daubert* should have applied because the fingerprint aging techniques specifically at issue was novel scientific evidence.

An Illinois federal district court's examination of a novel location technique called "granulization" in *United States v. Evans* is instructive. There, an FBI agent was going to testify about his estimated range of coverage for each of several cellphone towers. *United States v. Evans,*

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[4] *The Guardian*, "Serial's Adnan Syed: Doubts Over Cell Phone Evidence Central to Retrial" (found at: https://www.theguardian.com/tv-and-radio/2016/jul/01/serial-adnan-syed-new-trial-hae-min-lee-murder#, last checked 4/26/2023.)

892 F. Supp. 2d 949 (N.D. Ill. 2012).[5] The *Evans* court reviewed "granulization" under *Daubert*, and found it had not been subject to scientific testing or formal peer review, and was not generally accepted in the scientific community. Like here, the FBI agent had relied on his law enforcement training and experience instead of scientific calculations to estimate the coverage overlap of two different cell towers. He assumed the defendant's phone used the towers closest to it at the time of the calls. The FBI agent acknowledged various factors that may cause interference with a phone's connection to a tower, such as obstruction from a building, but he did not ultimately apply that error rate in his analysis. The court concluded the government had not demonstrated the FBI agent's methodology to be reliable and excluded the witness's exhibits derived from this process. *Evans,* 892 F. Supp. 2d at 955-7. The court limited the FBI agent to giving only lay testimony that did not contain the questionable ranges of coverage.

[5] In fact, Fegly employed a similar method to draw cell tower coverage areas in Missoula and Thompson Falls in Danielle's case, and this was part of how he estimated the Tracfone's location in Missoula on April 19. *See*, State's Exhibit 256.

The process by which Fegly and Ray concluded the Tracfone was in very close proximity to Danielle's phone when it sent text messages to both Danielle and Matt, and later when it called 911, was premised on similar errors as those in *Evans.* Fegly and Ray did not use established methods- like triangulation- for estimating a person's location from cellular data. They couldn't, their data was limited to Verizon RTT estimates from a single tower. Like *Evans*, the State failed to show Fegly's method of plotting single RTT estimates as-is, and drawing highly precise conclusions as to the Tracfone's location from that was tested anywhere in the scientific community. As novel science the RTT location should have been analyzed under *Daubert.*

3. Applying *Daubert*, Fegly and Ray's novel methodology is unreliable.

TRAX has not faired well under *Daubert* scrutiny; its accuracy, reliability and methodology has been called into question by both engineering experts and courts alike. *See*, *Jones,* 2022 WL 17884450, at *3. In *Colorado v. Christopher Jones*, a Colorado state district court applied *Daubert* to Sy Ray's proffered testimony and found a "sea of unreliability," causing the court to grant the defendant's motion *in limine* and exclude all TRAX generated maps from the trial. *Colorado*

v. Christopher Jones, Case No. 2022CR196 at 20, (Colorado District Court, Larimer Co., September 2022).

Applied here, under *Daubert*, the district court should have examined 1) whether Fegly's and Ray's techniques can and have been tested, and 2) whether there is a known error rate.

The State failed to make a showing that Fegly's and Ray's practice of mapping single Verizon RTT distance estimates to only one tower was at all reliable. But, there is a way to test the accuracy of CDR data that the witnesses here never used. A "drive test" is a process that has regularly been approved by courts as a reliable means of testing the accuracy of CDR data in a given location. *See*, *Nelson*, 533 F. Supp. 3d at 786 (Cell tower surveys and drive tests have been "utilized over the past ten years by [FBI] agents to verify the accuracy of theoretical illustrations"—*i.e.*, those generated solely from CDR information.); *United States v. Reynolds*, No. 1:20-cr-24, 2021 WL 3750156, at *3 (W.D. Mich. Aug. 25, 2021) (drive testing can bolster reliability of CSLI testimony under *Daubert*). The process simply requires driving to a location in question, and checking how far off the RTT data is from one's actual location.

Not testing the CDR data with a drive test makes location conclusions less reliable. *See e.g., Hill,* 818 F.3d at 298 (impact to reliability noted where "[agent] did not perform any tests of that cell tower's area of signal coverage").

Fegly and Ray did not conduct a drive test in Thompson Falls or inspect the lone cell tower. (6/16/2020 Tr. at 78, 86.) Instead, they gave a very general estimate for the variability of RTT estimates based on their experience in other locations (*i.e.*, the length of two football fields). Neither actually applied even this general estimated error rate to their analysis. If they did, they could not have concluded that the phones were "right on top" of or "perfectly paired" with each other, only that they might have been within two football fields distance. Without a drive test, Fegly and Ray had no way of knowing whether their average variance for Verizon's RTT data was remotely accurate for the Thompson Falls tower, or based on its location in dense forest and along a river, those RTT estimates were even farther off. Combined with the already very large swath of Thompson Falls that each RTT data point includes, their claims of precision were even less reliable.

Fegly's testimony about the known error rate of his technique did not satisfy *Daubert*. Fegly merely testified that he has used TRAX to map CDR's before, and it has worked for him. In *Evans*, the federal court rejected an investigator's similar anecdotal assurances that he and other FBI agents had used their proffered methodology with a "zero percent rate of error." *Evans,* 892 F. Supp. 2d at 956. This type of testimony about the successful use of a cell phone location method by law enforcement personnel is "precisely the sort of *'ipse dixit* of the expert' testimony that should raise a gatekeeper's suspicion." *Reynolds*, 626 F. App'x 610, 614 (6th Cir. 2015).

A Michigan federal district court in *United States v. Reynolds* found Sy Ray's assurances of a "95% accuracy rate" in TRAX mapping unavailing because, as here, there was "no supporting evidence that substantiated Ray's claim..." *Reynolds*, 2021 WL 3750156, at *8. Both *United States v. Jones* and *Colorado v. Christopher Jones* also rejected Ray's accuracy claims. The known error rate factor weighs against reliability as well.

The next two *Daubert* factors ask courts to assess whether the expert's methodology has been peer reviewed and whether it is accepted

in the scientific community, that is "whether the proffered scientific theory has been subjected to the scientific method." *Chapman v. Maytag Corp.,* 297 F.3d 682, 688 (7th Cir.2002). This is a "very significant *Daubert* factor." *Id.* "The scrutiny of the scientific community ... increases the likelihood that the substantive flaws in methodology will be detected." *Daubert,* 509 U.S. at 593.

TRAX mapping has not been accepted in the scientific community. Here, the district court confused acceptance of general cellular information with scientific rigor. "Judicial acceptance is not relevant; what matters is general acceptance in the relevant expert (scientific or otherwise) community." *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 148, (1997). The scientific community has accused ZetX of presenting CDR interpretations of cellular data that are not based on legitimate radio-frequency engineering science. One scientific article describes TRAX's mapping as a "profoundly flawed practice" and noted there is no correlating practice used by radiofrequency engineers. *See,* Vladan M. Jovanovic & Brian T. Cummings, *Analysis of Mobile Phone Geolocation Methods Used in US Courts*, 10 Inst. Elec. & Elecs. Eng'rs Access 28037, 28044, 28051 (2022).

Ray's TRAX methodology for mapping cellular tower coverage ranges has also never been peer reviewed. *See*, *Reynolds,* WL 3750156, at *3-4 (finding Sy Ray's assertions of peer review "not compelling"). Other courts have recognized that ZetX in fact shields its methodology from scientific scrutiny. *See People v. Valdez*, No. C087046, 2022 WL 556833, at *19 n.24 (Cal. Ct. App. Feb. 24, 2022) ("exactly what TraX does" to map coverage areas of particular towers "was not clear"). The peer review *Daubert* factor is not satisfied either.

Fegly's and Ray's testimony about the Tracfone's location fails *Daubert*. Fegly mapped the limited RTT data set, as-is, without a clue as to how accurate that data was. His method, unlike triangulation, has not been validated by any scientific community and Tracfone location testimony should not have come into Danielle's trial.

4. The erroneously admitted cellular evidence was not harmless.

Fegly and Ray's testimony that the Tracfone was "right on top" of Danielle's phone is the only evidence connecting her to that phone. Under this Court's harmless error analysis, when inadmissible evidence is improperly admitted, the State must show that given the quality of the inadmissible evidence, there is no reasonable possibility that it

contributed to the verdict. *State v. Van Kirk,* 2001 MT 184, ¶ 44, 306 Mont. 215, 32 P.3d 735. The State cannot make that showing here. As the lead investigator said, the cell phone evidence was the "needle on the compass" of this case. (Tr. at 1551.) The prosecution used Fegly and Ray's testimony that the two phones were together to argue Danielle had the Tracfone, and she used it on May 2 both to send decoy messages to herself and to call 911 prior to killing Matthew. The State will not show that without this testimony, it had any case against Danielle at all.

C. Fegly's demonstrative video was inadmissible under Rule 702 and unfairly misleading under Rule 403.

While the State agreed Fegly's testimony was subject to Rule 702, it fought for his TRAX generated demonstrative video to be somehow exempted from Rule 702 and Rule 403. (D.C. Doc. 105, Pg. 9.)

In *United State v. Nelson*, a California federal district court found that a similar witness slideshow portraying cellular CDRs was part of the witness's opinion testimony subject to Rule 702, disagreeing with the government's assertion that the slides, maps, and displays were simply a "visual depiction" of her substantive testimony. *Nelson,* 533 F. Supp. 3d at 797. The court reasoned "[i]nsofar as the…PowerPoint

presentation convey inferences drawn from the underlying CDRs, they remain subject…to Rule 702's requirements that her methodology be reliable and that it rest on an adequate factual basis. *See* Fed. R. Evid. 702." *Nelson,* 533 F. Supp. 3d at 797. Fegly's video distilled his conclusions into a 36-minute visual aid. (State's Exhibit 256.) As in *Nelson*, the representations Fegly made in the video was part and parcel of his opinion testimony and required review under Rule 702 and Rule 403.

Under Rule 403, even otherwise admissible evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or danger of misleading the jury. Mont. Evid. R. 403. Demonstrative exhibits are admissible if they supplement witnesses' spoken description of transpired event, clarify some issue in case, and are more probative than prejudicial. *Cowles v. Sheeline,* 259 Mont. 1, 855 P.2d 93 (1993). A video exhibit may prejudice the jury by overemphasizing one of a number of equally probable scenarios. *See*, *State v. Ingraham,* 1998 MT 156, ¶ 132, 290 Mont. 18, 966 P.2d 103.

As in *Nelson*, here, Fegly created an easily digestible illustration that suggested far more precise location conclusions than the

underlying data could support. The demonstrative video misled the jury by focusing-in on very precise possible locations for the Tracfone, to the exclusion of the remainder of the data. Each RTT line for the Tracfone covers a very broad swath of Thompson Falls, from west to east. Yet, the TRAX video rarely shows the full radius arc for the Tracfone. Instead, the video regularly zooms up close to precise locations, such as Danielle's phone and Danielle's house, eliminating from view the vast majority of the arc on which the Tracfone could have been located.

Fegly's video includes some of the text messages the Tracfone sent to either Danielle or Matthew, but only the messages which reflect similar RTT data as Danielle's phone, it omitted the text messages where the RTT data didn't match. (Compare State's Exhibit 256 with State's 302.) At one point, there is surveillance video -presumably of Danielle's car- driving east on the highway that then flashes to a still photograph of Danielle's car in her driveway before splicing back to a representation of an RTT line intersecting the highway. This created a very distinct impression that the Tracfone is in that car, when in reality, it could be anywhere along a wide RTT line spanning the majority of Thompson Falls.

The scale of Fegly's video was also misleading. As Fegly admitted in the pretrial hearing, at times the RTT lines for the Tracfone only overlap with Danielle's because of the scale he chose. If you zoom in, you can see that the green Tracfone line and the red line for Danielle's phone don't overlap at all. Yet, the State relies on the scale of Fegly's demonstrative video to argue the green and red RTT lines are so close together when the Tracfone texts Danielle they become one line. (Tr. at 2582.) Fegly's video is highly misleading as it presents undisputedly imprecise data on a Google map as though it was concrete fact and as such violates Rule 403.

IV. The State's last-minute discovery violation prevented the defense fair notice of perhaps the most significant evidence in the case.

"Montana requires broad pretrial disclosure by the prosecution." *State v. Torres,* 2021 MT 301, ¶ 24, 406 Mont. 353, 498 P.3d 1256. Montana Code Annotated § 46-15-322 sets forth the prosecution's affirmative disclosure duties. These statutory requirements include all written reports or statements of experts who have examined any evidence in the case, together with the results of scientific tests and comparisons. Mont. Code Ann. §46-15-322(1)(c). The prosecution's

obligation of disclosure extends to material and information in the possession of persons outside the prosecutor's office who have participated in the evaluation of the case. Mont. Code Ann. §46-15-322(4).

"The policy behind § 46-15-322, MCA, is to provide notice and prevent surprise." *State v. Stewart*, 2000 MT 379, ¶ 22, 303 Mont. 507, 16 P.3d 391. If the prosecution fails to disclose any evidence pursuant to discovery statutes, then the defendant may request sanctions, including exclusion of the evidence. *State v. District Court of Eighteenth Judicial Dist. of Montana,* 2010 MT 263, ¶ 49, 358 Mont. 325, 246 P.3d 415. The trial court has discretion over what sanctions to impose but should consider the reason why disclosure was not made, whether noncompliance was willful, and the amount of prejudice to the opposing party. *State v. Pope*, 2017 MT 12, ¶25, 386 Mont. 194, 387 P. 3d 870.

The district court erred by allowing the State to use Fegly's newly changed video exhibit. Fegly's changes implicated perhaps the most significant pieces of evidence in the State's case: whether text messages from the Tracfone were sent while Danielle's phone was in service, and the Tracfone was out of range- as Fegly's first exhibit concluded- or they

were sent when the two phones were both within range and in arguably close proximity- as the final exhibit concluded. Up until the morning prior to Fegly's testimony, the State's decoy text argument would have been nearly impossible to make. Danielle's defense team was left to scramble.

Neither was there an adequate explanation for the State's failure to disclose the changes. The State's comments indicate that it knew about the changes some time prior to their disclosure but withheld it. (Tr. at 2244.) The State provided no explanation for why it withheld Fegly's newly developed conclusions, telling the court only it "apologized" for its failure to disclose sooner. (Tr. at 2244.) Given the magnitude of the changes, and the lack of explanation by the State, the district court abused its discretion when it denied the defense request to exclude Fegly's newly changed demonstrative video.

V. A mistrial was necessary after the State was warned then repeated the statement that "somebody" other than the prosecution could have tested evidence from the crime scene.

The burden of proof in a criminal case never changes - it rests with the State from beginning to end. *Sandstrom v. Montana*, 442 U.S. 510, 520 (1979). "The prosecutor is the representative of the State at

trial. . . [and] a prosecutor's improper suggestions and assertions to a jury are apt to carry much weight against the accused when they should properly carry none." *State v. Lawrence*, 2016 MT 346, ¶ 20, 386 Mont. 86, 385 P.3d 968 (emphasis added).

In reviewing whether a district court abused its discretion in denying a defendant's motion for a mistrial this Court will first consider whether the prosecutor's conduct was improper; if so, determine whether the improper conduct prejudiced the defendant's right to a fair trial. *State v. Erickson,* 2021 MT 320, ¶ 19, 406 Mont. 524, 500 P.3d 1243.

The district court told the prosecution, twice, to stop commenting to the jury that "other people can submit, request and get information from the crime lab." The prosecutor's comments to this effect were improper, clearly so, as the district court forbade the State from repeating them. But in its closing, the prosecutor repeated if "somebody" wanted the objects found near Matthew's body tested, they could have done so.

The State itself told the district court a mistrial would be warranted if the prosecution were to make any inference that the

defense had a burden to get anything at the crime scene tested. This is exactly what the prosecutor then did, when he said "somebody" could have tested the evidence if they wanted. In context, Danielle was clearly that "somebody."

The prosecution's repeated comments suggested to the jury that Danielle's guilt could be determined, in part, based on her failure to utilize the collected evidence to prove her innocence. This effectively undermined Danielle's constitutional right to the presumption of innocence as secured by the due process guarantee of the Montana Constitution. *See, State v. Favel,* 2015 MT 336, ¶¶ 25-26, 381 Mont. 472, 362 P.3d 1126. When the prosecutor told the jury in closing that "somebody" could have tested the evidence if she wanted to, the district court had already forbidden the State from making any further comment on who can have evidence tested at the crime lab. The State's refusal to follow the court's order, together with the thrice repeated burden shifting comment warrants a mistrial.

VI. Cumulatively and separately, the trial errors compromised Danielle's right to a fair trial.

The cumulative error doctrine requires reversal of a conviction where a number of errors, taken together, have prejudiced a defendant's

right to a fair trial. *State v. Cunningham,* 2018 MT 56, ¶¶ 32-33, 390 Mont. 408, 414 P.3d 289. Here, the multiple errors were mutually exacerbating and prejudiced Danielle's right to a fair trial.

First, the accountability instruction was not warranted, and giving it lessoned the State's burden to prove the offense, making the erroneously admitted cell phone testimony and burden shifting arguments more prejudicial.

Unchecked by Rule 702, the State was able to use unreliable science to bolster the State's argument that Danielle did more than merely drive to Matthew's house to look for him. Fegly and Ray's testimony that the two phones were "right on top" of each other created the illusion of a far stronger connection between Danielle and the Tracfone than the underlying RTT cellular data actually supported. If the State's request for an accountability instruction had been properly denied, the prejudicial impact of the erroneously admitted cell phone testimony would be lessoned because the State would have had to prove all the elements of deliberate homicide without leaving to guess if somebody helped Danielle with the things she could not do because of time, skill or physical ability.

Subtracting the erroneously admitted cell phone testimony, the admissible evidence that remained showed only that Matthew died, and that Danielle went to his house around the time the State alleged he was killed. However, Danielle's counsel failed to offer the "mere presence" instruction, so the jury did not know this was insufficient to convict.

Then, the State's discovery violation implicated the very conclusions that were so dubious under Rule 702: Fegly told the jury the Tracfone was "right on top of" Danielle's phone when it sent text messages to her on May 2 even though this was a change in his conclusions that the State withheld until the eve of his testimony. The defense could not fully prepare to refute this evidence, which was the only thing to connect Danielle to the Tracfone. Thus, the over-precise cell phone location testimony was doubly prejudicial as it was both inadmissible under 702 and the worst of it was withheld in violation of the discovery statutes until the middle of trial.

The errors in Danielle's trial compromised her right to a fair trial separately and taken together. Danielle is entitled to a new trial where accountability is not included when there was no alleged accomplice,

where expert cell phone location testimony is properly vetted under Rule 702, the discovery laws are followed, and the burden of proof is entirely on the State. This Court should reverse and remand for a new trial.

Respectfully submitted this 26th day of May, 2023.

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APPENDIX

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 16,368, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kathryn Hutchison
KATHRYN HUTCHISON

CERTIFICATE OF SERVICE

I, Kathryn Grear Hutchison, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-26-2023:

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