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 APPELLEE

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

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
BJORN BOYER
Assistant Attorney General
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
bjorn.boyer@mt.gov

MEGAN HANSEN
Sanders County Attorney
DANIEL M. GUZYNSKI
STEPHANIE ROBLES
Special Deputy County Attorneys
P.O. Box 201401
Helena, MT 59601

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

CHAD WRIGHT
Appellate Defender
KATHRYN G. HUTCHISON
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 4

General facts 4

CSLI testimony/homicide timeline 11

SUMMARY OF THE ARGUMENT 23

ARGUMENT 25

I. Standards of review 25

II. The district court properly instructed the jury on accountability 26

III. Wood failed to prove her counsel was deficient for not proposing a "mere presence" instruction 32

IV. The district court did not abuse its discretion by admitting CSLI evidence 36

A. The CSLI evidence was admissible under Rule 702 36

B. There was sufficient foundation for Ray's and Fegely's testimony and conclusions 45

C. Ray's and Fegely's testimony met the reliability threshold to be admissible 48

1. Neither Ray nor Fegely overpromised on the meaning of the data 48

2. The RTT data was admissible under Rule 702; *Daubert* did not apply 51

3. The district court did not abuse its discretion by allowing Fegely to present CSLI evidence using the TRAX software 52

4. If admitting the CSLI was error, such error was harmless 53

D. Fegely's video presentation did not violate Rules 403 or 702 55

V. The district court did not abuse its discretion by denying Wood's motion to exclude Exhibit 256 for a claimed discovery violation.....59

VI. The district court properly denied Wood's motion for a mistrial.....62

VII. The cumulative error doctrine is inapplicable 67

CERTIFICATE OF COMPLIANCE.....70

TABLE OF AUTHORITIES

Cases

Barmeyer v. Montana Power Co.,
202 Mont. 185, 657 P.2d 594 (1983) 37

City of Helena v. Frankforter,
2018 MT 193, 392 Mont. 277, 423 P.3d 581 34

Commonwealth v. Crumes,
630 S.W.3d 630 (Ky. 2021) 38

Cowles v. Sheeline,
259 Mont. 1, 855 P.2d 93 (1993) 56

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) ..... *passim*

Hulse v. DOJ, Motor Vehicle Div.,
1998 MT 108, 289 Mont. 1, 961 P.2d 75 ..... 36, 37, 38, 45

Ordway v. Commonwealth,
391 S.W.3d 762 (Ky. 2013) 63

People v. Profit,
187 N.E.3d 156, 164 (Ill. App. Ct. 2021) 29

People v. Fountain,
62 N.E.3d 1107, 1125 (Ill. App. Ct. 2016) 38

State v. Berry,
982 N.W.2d 746 (Minn. 2022) ..... *passim*

State v. Chafee,
2014 MT 226, 376 Mont. 267, 332 P.3d 240 ..... 25, 33, 34, 35

State v. Cunningham,
2018 MT 56, 390 Mont. 408, 414 P.3d 289 67

State v. Damon,
2005 MT 218, 328 Mont. 276, 119 P.3d 1194 25

State v. Daniels,
2011 MT 278, 362 Mont. 426, 265 P.3d 623 62

State v. Duncan,
247 Mont. 232, 805 P.2d 1387 (1991) 27, 28, 31

State v. Erickson,
2014 MT 304, 377 Mont. 84, 338 P.3d 598 26

State v. Favel,
2015 MT 336, 381 Mont. 472, 362 P.3d 1126 67

State v. Golder,
2000 MT 239, 301 Mont. 368, 9 P.3d 635 ..... 60, 61

State v. Green,
2009 MT 114, 350 Mont. 141, 205 P.3d 798, ... 32, 33, 34

State v. Hardy,
2023 MT 110, 412 Mont. 383, 530 P.3d 814 ..... 62, 67

State v. Harvey,
932 N.W.2d 792 (Minn. 2019) 40, 41, 43

State v. Johnson,
257 Mont. 157, 848 P.2d 496 (1993) 34

State v. Kaarma,
2017 MT 24, 386 Mont. 243, 390 P.3d 609 ..... 25, 26

State v. Longfellow,
2008 MT 343, 346 Mont. 286, 194 P.3d 694 26

State v. Makarchuk,
2009 MT 82, 349 Mont. 507, 204 P.3d 1213 ..... 62, 67

State v. Mercier,
2021 MT 12, 403 Mont. 34, 479 P.3d 967 53

State v. Miller,
2022 MT 92, 408 Mont. 316, 510 P.3d. 17 62

State v. Pope,
2019 MT 200, 397 Mont. 95, 447 P.3d 469 26

State v. Price,
2002 MT 284, 312 Mont. 458, 59 P.3d 1122 62

State v. Ramirez,
425 P.3d 534 (Wash. Ct. App. 2018) 38, 39, 52

State v. Sedler,
2020 MT 248, 401 Mont. 437, 473 P.3d 406 ..... 49, 56

State v. Sheriff,
190 Mont. 131, 619 P.2d 181 (1980) 34

State v. Sistrunk,
414 S.W.3d 592 (Mo. Ct. App. 2013) 29

State v. Smith,
2020 MT 304, 402 Mont. 206, 476 P.3d 1178 ..... 26, 67, 68

State v. Tower,
267 Mont. 63, 881 P.2d 1317 (1994) 27

State v. Ugalde,
2013 MT 308, 372 Mont. 234, 311 P.3d 772 33

State v. Van Kirk,
2001 MT 184, 306 Mont. 215, 32 P.3d 735 53

State v. Van Voast,
247 Mont. 194, 805 P.2d 1380 (1991) 59

State v. Villanueva,
2020 Wash. App. LEXIS 3290 (Wash. Ct. App. Dec. 17, 2020) 42

Strickland v. Washington,
466 U.S. 668 (1984) 32, 33, 35, 36

United States v. Clark,
980 F.2d 1143 (8th Cir. 1992) 29

United States v. Evans,
892 F. Supp. 2d 949 (N.D. Ill. 2012) 51

United States v. Hill,
818 F.3d 289 (7th Cir. 2016) 38, 44

United States v. Horton,
921 F.2d 540 (4th Cir. 1990) 29

United States v. Nelson,
533 F. Supp. 779 (N.D. Cal. 2021) 39, 52

Van Duser v. State,
796 P.2d 1322 (Wyo. 1990) 63

Other Authorities

Montana Code Annotated
§ 45-2-302(3) 27
§ 45-2-301 ..... 27, 31
§ 45-2-303 ..... 28, 31
§ 46-15-322(1)(c) 59
§ 46-15-329 59

Montana Rules of Evidence
Rule 403 ..... 55, 56, 57
Rule 702 ..... *passim*
Rule 1006 ..... 56, 57

STATEMENT OF THE ISSUES

1. Whether the district court properly exercised discretion by instructing the jury on accountability.

2. Whether Appellant met her burden of proving her counsel was ineffective for not requesting a "mere presence" jury instruction.

3. Whether the district court properly exercised discretion by admitting cell-site location information (CSLI) from Verizon Wireless (Verizon) related to two of Appellant's cellphones.

4. Whether the district court properly exercised discretion by allowing an expert witness to correct a mistake he made in a demonstrative exhibit that had previously been provided to Appellant.

5. Whether the district court properly exercised discretion by denying Appellant's mistrial motion based on claimed improper burden shifting.

6. Whether the cumulative error doctrine applies.

STATEMENT OF THE CASE

After a 10-month investigation, the State charged Matthew LaFriniere's (Matthew) ex-girlfriend, Appellant Danielle Wood (Wood), with deliberate homicide. (Doc. 4.) Wood and Matthew had a child together, S.L., who was

approximately ten years old. (Doc. 1 at 3; 1/14/21-1/29/21 Trial Tr.[1] (Tr.) 1062-63.) Matthew and Wood went through a bitter custody dispute that ultimately resulted in Matthew obtaining full custody, though he continued to let Wood spend time with S.L. (Doc. 1 at 3.)

In its charging documents, the State alleged that, just prior to Matthew's murder at his residence to the east of Thompson Falls, an anonymous female called 9-1-1 to report a disturbance miles away, to the west of Thompson Falls. (Doc. 1 at 4.) The call was an apparent attempt to divert law enforcement resources away from where Matthew would be murdered a short time later. (*Id.*) Investigators obtained records from Verizon for Wood's known cellphone and for the phone number used by the anonymous caller, which was determined to be a TracFone brand cellphone with the number 406-270-0063 (the "TracFone"). (*Id.* at 6-7, 11.) Mike Fegely (Fegely), an expert in CSLI, conducted an analysis of the Verizon records for both phones. (*Id*. at 11.) Fegely determined that Wood's known cellphone was always near the TracFone, suggesting that it was Wood who made the diversionary 9-1-1 call. (*Id*. at 12.)

Wood moved to exclude Fegely's testimony. (Doc. 57.) The court conducted a hearing where Fegely testified about his credentials and the reliability of the

[1] The trial spanned 11 days. The transcript of the proceedings continued in pagination from day to day.

CSLI evidence. (*See* 6/16/20 Hr'g Tr. (Mot. Tr.) at 31-117) The court found the evidence was admissible as "valid scientific data." (Doc. 156 at 2.)

Wood's attorneys insinuated during pretrial witness interviews that someone other than Wood might have pulled the trigger and moved Matthew's body to his final resting spot. (Tr. at 2473.) In response, the State filed an Amended Information, providing notice that it could also rely on the theory of accountability at trial. (Doc. 177.)

After the State rested, Wood moved to dismiss, alleging insufficient evidence. (Tr. at 2471.) Wood argued that alleging she was both the principal (i.e., she pulled the trigger) and an accomplice were mutually exclusive theories and that, because the State had alleged both, probable cause, therefore, existed for neither. (*Id.*) The court denied Wood's motion and instructed the jury on the theory of accountability. (Tr. at 2475-77; Doc. 401, Instrs. 18-20.)

Fegely prepared a demonstrative video exhibit that mapped the CSLI. (*See* Tr. 2199, Ex. 256.) Fegely inserted four text messages into the exhibit that were sent by either Wood's cellphone or the TracFone. (Tr. at 2242.) In the Verizon records, the text messages were listed in Pacific Standard Time instead of Mountain Standard Time. (*Id.* at 2168.) In his original exhibit, Fegely left the text messages in Pacific Standard Time, which made it appear as if the messages were sent an hour earlier than their actual send-time. (*Id.*) The day before Fegely

testified, the State provided Wood's attorneys with an updated version of the exhibit with the correct times for the text messages. (*Id.* at 2108.) The State did not advise the defense how the exhibit had changed. (*Id*.) Wood moved to exclude the evidence based on the late disclosure of Fegely's mistake. (*Id.* at 2113.) The court denied Wood's motion and allowed the State to use the demonstrative exhibit, subject to Wood cross-examining Fegely about the mistake. (*Id.* at 2122-23.)

The jury found Wood guilty of deliberate homicide. (Doc. 402.) The court sentenced Wood to 100 years at the Montana Women's Prison without parole. (Doc. 462.)

STATEMENT OF THE FACTS

General facts

On May 3, 2018, Matthew did not show up for his 8 a.m. shift at the Ace Hardware (Ace) store in Thompson Falls. (Tr. at 1190, 1198.) Theresa Sink (Sink), a manager at Ace, went to Matthew's residence that afternoon and found his body largely concealed under a piece of plywood, having been shot three to four times. (*Id.* at 1203-04, 1663.)

Wood and Matthew had "battled" for custody of S.L. for years before Matthew was awarded full custody due to Wood's alcoholism. (Tr. at 2407.) After

obtaining full custody, Matthew still afforded Wood visitation time because he wanted S.L. to have her mother in her life. (*Id.* at 1193-94.)

On May 2, 2018, S.L. went to Ace after school, where she would often hang out and do her homework while waiting for Matthew to finish his shift. (Tr. at 1191-94.) Matthew had agreed to let Wood spend time with S.L. that afternoon, so Wood came by to pick her up. (*Id.* at 1195.) Sink watched the exchange and noticed Wood was "very angry" with Matthew when she left. (*Id*.)

Wood was a director for Pampered Chef and had associates who sold products under her mentorship. (Tr. at 1141.) After picking S.L. up from Ace, Wood hosted a monthly Pampered Chef party, where she planned on baking a new cookie recipe with a few of her associates. (*Id*. at 1130-31.) The party lasted from approximately 6 p.m. to 9:20 p.m. (*Id*.) During the party, S.L. played basketball outside with her older half-brother, Hunter, and one of Hunter's friends. (*Id.* at 1133.) Wood was supposed to return S.L. to Matthew around 7 to 8 p.m. (*Id.* at 1142.)

However, Wood told at least two of her associates, Breyanna King (King) and Nicole Merritt-Savage (Merritt-Savage), that she got a weird text from an unknown number, which purported to be from Matthew. (*Id*. at 1131, 1142-43.) The text message came from the TracFone and stated that Matthew was held up in Trout Creek and that he would call when he was headed back to Thompson Falls.

(*Id.* at 1131.) Wood told King and Merritt-Savage that she was going to go over to Matthew's house to verify he was not there. (*Id.* at 1132.) While Wood traveled to Matthew's residence, S.L. stayed behind and continued playing basketball with Hunter. (*Id.* at 1133.) The Pampered Chef associates also stayed behind and baked two to three batches of cookies while Wood was gone. (*Id*.)

Wood did not call or text Matthew prior to going over to his residence. (Tr. at 2271-75.) King and Merritt-Savage estimated Wood was gone for at least 30 minutes. (Tr. at 1133, 1144.) Upon returning, Wood reported Matthew had not been home. (*Id.* at 1138.) Wood's associates did not notice anything amiss. (*Id.* at 1150-51.)

Two to three times per week, Matthew's stepmother, Lydia LaFriniere (Lydia), cleaned the office at the Thompson River Lumber Mill, which was near Matthew's residence. (*Id.* at 1064.) The road to the lumber mill skirted to the north of Matthew's property and Matthew's residence was visible from the road. (Tr. at 1065.) On May 2, 2018, Lydia slowed down as she drove past Matthew's property to see if she could see Matthew or S.L. outside to wave to them. (*Id.* at 1067.) Lydia saw Matthew's truck parked at the residence but did not see Matthew or S.L. (*Id.*) Instead, she saw Wood's vehicle parked next to Matthew's truck. (*Id*. at 1068.) Lydia saw Wood running back and forth between her car and Matthew's shop. (*Id.* at 1069.) Lydia continued driving until she reached the mill. (*Id.*)

The next day, Sink called Matthew several times when he did not show up for work. (Tr. at 1200.) At around 1:30 p.m., Sink went to his house. (*Id.*) Sink entered Matthew's residence, which was an apartment on the back side of his shop, and called out to him. (*Id.* at 1202.) Sink received no response, so she decided to go around to the other side of his residence/shop. (*Id.*) Matthew's dog was out and walked in front of Sink. (*Id.*)

On the opposite side of the shop from the backdoor entrance, Matthew's dog suddenly stopped and started "nuzzling" at a piece of wood. (Tr. at 1202-03; *see also* Tr. at 1420, Ex. 7.) Sink bent over to pet the dog and noticed Matthew's legs partially sticking out from underneath a piece of plywood, with a two-by-six board and a snow shovel on top of the plywood. (*Id*. at 1203-04; *see also id.* at 1495.) Sink removed the snow shovel, board, and plywood—describing the plywood as "very light." (*Id.* at 1204.) Upon seeing Matthew's face, Sink realized he was deceased. (*Id.*)

Department of Criminal Investigation (DCI) Agents Mark Hilyard, Mark Strangio, and Kevin McCarvel took over the investigation. (Tr. at 1320-22.) The agents located a puddle of dried blood and a cellphone that had been run over in the driveway approximately 17 feet from where Sink had found Matthew's body. (Tr. at 1292, 1485, 1990.) Dr. Sunil Prashar (Dr. Prashar), the pathologist who

performed Matthew's autopsy, opined that Matthew could have moved the 17 feet on his own volition after being shot. (*Id.* at 1666-67.)

On May 2, 2018, at approximately 7:28 p.m.,[2] an anonymous female called 9-1-1 using the TracFone to report a disturbance seven to eight miles west of Thompson Falls. (Tr. at 1166-68; Ex. 256 at 19:20.) When asked, the caller stated she was parked on Golf Street in Thompson Falls, which was miles away from the reported disturbance. (*Id.*) Wood's residence was at 105 Eddy Street, only a block south of the intersection of Golf and Eddy Streets. (Ex. 256 at 16:39.) At the time of the call, there were only two sheriff's deputies on duty in Sanders County. (*Id.* at 1172.) One of the deputies responded to the area of the reported disturbance but could not find anything. (*Id.* at 1167.) The other deputy attempted to locate the caller on Golf Street but was not successful. (*Id.* at 1169.)

On May 8, 2018, the DCI agents searched Wood's home and vehicle pursuant to a search warrant. (Tr. at 1452-53.) When Wood was about to leave the residence, she requested to take two cellphones and her purse with her. (Tr. at 1907.) Agent McCarvel told her she could not take those items and seized her personal cellphone and the other cellphone, which was a TracFone brand cellphone that Wood had for her role at the Chamber of Commerce. (*Id.*; *see also id*. at

[2] The dispatch logs indicated the call came in at 7:26 p.m., while cellphone records from the TracFone indicated the call was made at 7:28:20 p.m.

2011.) Investigators never found the TracFone used to make the 9-1-1 call. (*Id.* at 1952-53.)

Agent Strangio searched Wood's purse and located a receipt for the purchase of a firearm from Ronan Sports & Western. (*Id*. at 1909.) Investigators determined that Wood had purchased a Charter Arms .38 Special revolver on March 15, 2018, less than two months before Matthew's murder. (*Id.* at 1004-05, 1909-10.) In May 2018, Wood had been dating a man named Drew Stobie (Stobie) for approximately three years and the two had planned on "spending [their] lives together[.]" (*Id.* at 2413, 2416.) Stobie was an avid hunter and proficient with firearms. (*Id.* at 2404.) Despite their relationship and his interest in firearms, Wood never discussed purchasing the handgun with Stobie. (*Id.* at 2411.) Stobie only found out about the firearm after Matthew was murdered. (*Id.*)

Stobie described a conversation he had with Wood about the homicide investigation two to three days after Matthew's murder. (Tr. at 2411-12.) Stobie was concerned that he and Wood might be viewed as suspects. (*Id.* at 2411.) During the conversation, Wood told Stobie she had purchased a handgun for self-defense. (*Id.*) Stobie asked Wood what became of the gun. (*Id.* at 2412.) Wood responded that she had thrown the gun away. (*Id.*) Stobie was "livid" because he could not understand the "mentality somebody would have to" throw away a new

gun, especially when the $350 purchase price for the handgun was a considerable sum of money for Wood. (*Id.* at 2413.)

During his search of Wood's residence, Agent McCarvel located a note written on the mirror in Wood's bathroom. (Tr. 1910-11, Ex. 182.) The note stated: "you are worth it, she will be home soon." (*Id.*) Underneath that inscription were the words "for good" with an arrow pointing toward the first phrase. (*Id.*)

While Agent McCarvel searched Wood's house, Agent Hilyard searched her vehicle. (Tr. at 1454.) Agent Hilyard located a motivational religious book in the backseat. (*Id.* at 1455.) Agent Hilyard looked through the book and observed on page 118 a passage from the author that asked the reader: "In your wildest dreams, what would God accomplish in this situation? Respond in the margin." (Tr. at 1470, Ex. 292.) In the margin, the reader wrote: "Matt gone [S.L.] with me."

Agent Hilyard also processed Wood's vehicle for gunshot residue, obtaining samples from inside the driver's side and passenger's side doors and the steering wheel. (Tr. at 1473.) Stacey Wilson (Wilson), a forensic scientist at the crime lab, later tested the samples and concluded that gunshot residue was present in the vehicle, with more residue on the driver's side door and steering wheel than on the passenger door. (*Id*. at 1709-12.)

Dr. Prashar opined that Matthew had been shot three or four times. (Tr. at 1663.) Matthew was shot once in the right chest, once in the left chest, and once in

his left lower back. (*Id.*) All three shots passed through and exited out the opposite side. (*Id.*) Dr. Prashar recovered a jacketed bullet that was embedded in Matthew's left hand. (*Id*. at 1660.) Dr. Prashar concluded the bullet in Matthew's hand likely resulted from the shot to his back passing through his body and lodging into his hand. (*Id.* at 1663, 1679.) Dr. Prashar believed all the shots were fired from a distance greater than two to three feet from Matthew. (*Id.* at 1657-58.)

Forensic Scientist Lynette Lancon (Lancon) examined the bullet Dr. Prashar recovered. (Tr. at 1736.) Lancon opined the bullet was a .38 caliber and was consistent with having been fired from a .38 Special revolver. (*Id.*) Lancon further opined that the bullet was consistent with having been fired from the handgun Wood had purchased just before the murder. (*Id*. at 1739.)

CSLI testimony/homicide timeline

Agent McCarvel served warrants on Verizon to obtain the data records for Matthew's phone, Wood's cellphone, and the TracFone. (Tr. at 1957.) Agent McCarvel also served a search warrant on Google for the Google account linked to Wood's phone. (*Id.* at 1947-57.) Upon receiving the records from Verizon and Google, Agent McCarvel sent the data to Fegely. (*Id.* at 1957.)

Fegely works for ZetX, which is a company that provides software for analyzing and mapping data from cellphone records. (Tr. at 2044.) Fegely used the

various cellphone records to show that Wood's cellphone and the TracFone had a correlation of movements that showed the two phones were always near the same location at any given time when there was available data for both phones. (Doc. 105 at 5.) The data was consistent with the two phones being together on April 19, 2018, the date the TracFone was initially activated in Missoula, suggesting that it was Wood who purchased the TracFone. (*Id.* at 6.) The data was also consistent with the TracFone being with Wood's cellphone at the time the TracFone sent Wood the text message about Matthew being held up in Trout Creek and at the time of the diversionary 9-1-1 call. (*Id.*)

Wood moved to exclude Fegely's testimony, arguing that it was unreliable. (Doc. 57.) The court denied Wood's motion and, prior to admitting the evidence at trial, heard additional foundational testimony from Fegely and from ZetX owner, Sy Ray (Ray). (*See* Doc. 156; Tr. at 2044-2177.)

Fegely began his career as a game warden for Montana Fish, Wildlife and Parks (FWP). (Mot. Tr. at 31.) The last seven years of his career were as a criminal investigator. (*Id.* at 32.) Beginning in 2014, Fegely started using cellphone records in his investigations, and he took additional courses through ZetX. (Tr. at 2186.) In 2017, Fegely transitioned to working part-time for ZetX and started training law enforcement agencies around the country on using cellphone records in investigations. (*Id.*) Fegely retired from FWP in 2018 and went to work full-time

for ZetX as a subject matter expert. (*Id.* at 2186-87; Mot. Tr. at 31-32.) By the time of Wood's trial, Fegely had testified as an expert in approximately 25 cases in 11 states. (Mot. Tr. at 32.)

Ray began his career as a police officer and started using cellphone records in his investigations in the 1990s, a time when there was little training available on the subject. (Tr. at 2045-46.) Ray was ultimately promoted to homicide sergeant for the Gilbert Police Department (GPD) in Arizona, where his department investigated approximately 600 homicides during his tenure, almost all of which involved some type of cellphone evidence. (*Id.*)

In 2006, the GPD began using a "cell site simulator," which is a piece of equipment that is put into a vehicle to replicate a mobile cellphone tower. (*Id.* at 2046-47.) The GPD would travel with the cell site simulator to the last known area of a cellphone to see if they could get the simulator to make a connection. (*Id.* at 2047.) The GPD used the simulator extensively in search and rescue and kidnapping cases to find cellphones in real time. (*Id.*) Ray would often run "two or three missions a day for going out looking for phones" using the simulator. (*Id.* at 2048.) Ray equated the data he received from the simulator to the data he received from phone companies that could aid in tracking the general location of a phone at a given point in time. (*Id.*)

Due to his success in working with cellphone data and analytics, Ray was recruited by the United States Department of Defense to go to Afghanistan to implement his knowledge in tracking cellphones there. (Tr. at 2048.) Upon returning to the GPD from Afghanistan, Ray began working in "a full-time position . . . testing and evaluating processes and methods [to] get better and quicker at finding phones." (*Id.* at 2049.)

Ray became frustrated with the software that was available to analyze voluminous CSLI. (Tr. at 2050.) As a result, he taught himself coding and developed a program he thought would do it better. (*Id.*) In 2013, Ray had completed 20 years as an officer, so he decided to retire and take his retirement money and invest it in starting ZetX. (*Id.*) Ray hired experienced coders to rewrite his software. (*Id.*)

In the late 1990s to early 2000s, cellphone records might have included 10 to 20 data points per day. (Tr. at 2051.) However, as cellphone technology has advanced and cellphone usage increased, it is now common to have up to 9,000 connections between a cellphone and a tower per day. (*Id.*) While it was possible to manually analyze and map 10 to 20 data points, doing so became unfeasible as the data connections multiplied exponentially. (*Id.*) As a result, ZetX created a program called TRAX. (*Id.*) Using TRAX, a person can upload a massive amount

of CSLI and the software "will map it in a manner that [a user] can look at it on a map chronologically and [can] see patterns and movement . . . ." (*Id.* at 2051-52.)

At the time of trial, ZetX software was used by approximately 650 customers, including federal agencies such as the FBI, DEA, ATF, U.S. Marshals, Secret Service, Department of Defense, and state and local agencies in over 30 states. (*Id.* at 2059.) Ray had testified as an expert for ZetX approximately 60 times in federal and state cases. (Tr. at 2062.)

Modern cellphones constantly broadcast signals to determine what tower they should connect to. (Mot. Tr. at 38.) Each time a signal broadcasts between a tower and a cellphone, Verizon tracks the time the signal was sent, the sector of the tower that was used, and the round-trip time (RTT) it took for the signal to go from the tower to the cellphone and back to the tower. (*Id*. at 40, 47.) Most cellphone towers can be broken into three sectors with each sector responsible for approximately 120 degrees of coverage. (*Id.* at 40.) Thompson Falls has only one tower, so each sector of the tower covers a very large geographical area. (*Id.* at 41.)

RTT data is used to provide the distance from a tower for a cellphone along the approximately 120-degree sector. (Mot. Tr. at 48.) RTT data provides a radius from the tower, creating an arc from one side of the sector to the other, with the cellphone's approximate location at the time of the broadcast falling somewhere on the arc. (*Id.*) RTT data is not precise. (Tr. at 2082-83.) For example, environmental

factors, such as buildings or bodies of water, can cause interference with the signal and affect the precision of the RTT data. (*Id.* at 2083-84.) Absent significant environmental factors, RTT data is generally accurate within one-tenth of a mile if the phone is within 20 miles of the tower. (*Id.* at 2083-84.) Accordingly, RTT data cannot be used to say, with absolute certainty, that the data puts a cellphone in a precise location, like inside a specific house. (*Id.*)

RTT data is not dependent on making or receiving a call. (Tr. at 2085.) Rather, a cellphone may begin making connections with a tower just by turning it on. (*Id*.) Verizon uses RTT data to know which cell sites are providing coverage in any given area. (*Id*.) Verizon is invested in obtaining accurate data because it helps them increase the performance of their network by identifying where they have weak signal strength or dead zones. (*Id.*)

Wood's cellphone used an Android operating system. (Mot. Tr. at 57.) Google owns Android, so when someone purchases an Android-based phone, the person is required to attach a Google Gmail account to it. (*Id.*) Google uses various applications that collect location history when the application is in use. (Tr. at 2089.) Google makes billions of dollars by accurately selling a person's locations to advertisers so that specific advertising can target the person when they are in a specific location. (*Id.* at 2090.) For example, Google can use location history to

target a person shopping in the paint section of a Lowe's hardware store with an advertisement for Behr brand paint. (Mot. Tr. at 60.)

Google uses three methods to track location history. (Mot. Tr. at 58.) First, Google uses data from the phone connecting to various towers and aggregates the data with other Android users to estimate a person's location based on the data from signal strengths. (*Id.*) Google's location history using cellular data is the least accurate of the three methods. (*Id.*) The second way Google collects information is through the phone probing for WiFi. (*Id*.) Whenever an Android phone is within range of a WiFi router, it will send a "probe request" to the router, even if it does not connect to the WiFi. (*Id.*) Google will look at the signal strength from the router and aggregate data from other phones that have probed the same router to establish the location of the router and the distance between the phone and the router. (*Id.* at 59.) The third way Google tracks location history, and the most accurate method, is through GPS. (*Id.* at 60.)

Data from Google can be used to corroborate RTT data from Verizon. (Tr. at 2097.) In this case, the Google data for Wood's cellphone tracked with her RTT data, which cross-corroborated the data's accuracy. (*Id*.) The data was corroborated by external sources. (*See id.* at 2264-65.) For example, investigators obtained surveillance of Wood driving by a Phillips 66 oil depot, which was consistent with what the RTT data and Google location history were showing for the location of

her phone near the same time. (*Id.*) Moreover, the CSLI evidence showing Wood travelled to Matthew's residence was corroborated by Wood's own statements to her Pampered Chef associates that she intended on going there. (*See* Tr. at 1131-33; 1143.)

Fegely used the ZetX TRAX software to aggregate and map the RTT and Google data from Wood's cellphone and the RTT data from the TracFone. (Tr. at 2198.) Fegely used TRAX to compile the data into a video presentation showing the data points on a map between April 19, 2018, and May 3, 2018, which was admitted as a demonstrative exhibit at trial. (*Id.*; *see* Ex. 256.) Wood's cellphone was active throughout that time period, but the TracFone only contained a limited amount of data from April 19, 2018, and May 2, 2018, suggesting that it was not being used between those dates. (*Id.* at 2199-2200, 2221.)

Using the cellphone data, various witness statements, and video surveillance, the following timeline was established at trial.[3]

March 15

Wood purchased the .38 caliber revolver. (Tr. at 1000-04.)

April 19

10:11-10:41 p.m.: CSLI places Wood's cellphone near a shopping center on North Reserve Street in Missoula. (Tr. at 2212.) At 10:36 p.m., Wood's cellphone

[3] All dates are in 2018.

called the TracFone customer service number, which can be used to activate a TracFone. (Tr. at 2212, 2215.) At 10:41 p.m., the TracFone's first RTT data shows it on an arc consistent with the TracFone being at the same shopping center on North Reserve Street. (*Id.* at 2214, 2197-98; Ex. 256 at 7:30-8:45.)

April 20

12:48-1:23 a.m.: Google location history from Wood's phone places it near her residence at 105 Eddy Street. (Tr. at 2220-21.) Wood's cellphone again called TracFone customer service at 1:12 a.m. and 1:23 a.m. (*Id.*; Ex. 256 at 11:06-12:00.)

May 2

1:33-1:44 p.m.: CSLI from Wood's cellphone and the TracFone is consistent with the two phones being together on the west side of Thompson Falls. (Tr. at 2233-37; Ex. 256 at 12:49-14:35.) At 1:41 p.m., the TracFone sent Wood's cellphone a text message stating: "Don't you get it? quit calling them[.]" (Ex. 256 at 14:15.) At 1:44 p.m., the TracFone sent Matthew's phone a text message stating: "Ok, done . . . c u tonite[.]" (*Id*. at 17:15.)

Before 4:29 p.m.:[4] Wood picked S.L. up from Ace after arguing with Matthew. (Tr. at 1195-96.)

[4] This occurred after S.L. got off the bus at Ace and prior to Matthew going to the Town Pump.

4:29 p.m.: Video surveillance shows Matthew purchasing cigarettes and a corn dog at the Town Pump in Thompson Falls. (Tr. 1110-13.)

~6:00 p.m.: Wood's Pampered Chef associates arrived at her house. (Tr. at 1131, 1142.)

7:07 p.m.: The TracFone sent a text message to Wood's cellphone stating: "Held up in trout creek. Just hang on to [S.L.] ill call when i head back to town matt." (Ex. 256 at 16:31.)

~7:00-8:00 p.m.: King and Merritt-Savage reported Wood went to Matthew's residence for at least 30 minutes, leaving as early as 7:00 p.m. (Tr. at 1131-33, 1143.) Both stated Wood received the above Trout Creek text message prior to leaving. (*Id.*)

7:14-7:15 p.m.: CSLI from Wood's cellphone and the TracFone was consistent with both phones still being at Wood's residence. (Ex. 256 at 16:44-17:04.)

~7:15-7:20 p.m.: Mark Rifle (Rifle) loaded railroad ties onto his truck at the intersection of the railroad line and Airport Road, near Matthew's residence. (Tr. at 1121-22.) Rifle estimated that he was there between approximately 6:30 and 7:45 p.m. (*Id.* at 1118.) Rifle estimated that at approximately 7:15 to 7:20 p.m. Matthew drove by and briefly spoke with him. (*Id.* at 1123.)

7:28 p.m.: RTT data for Wood's cellphone and the TracFone is consistent with both phones being near the intersection of Golf Street and Highway 200, a short distance to the southeast of Wood's residence. (Ex. 256 at 18:38-18:57.)

7:28 p.m.: A female caller used the TracFone to make the diversionary 9-1-1 call, wherein she ultimately told dispatch that she was pulled over in her vehicle on Golf Street. (Ex. 256 at 19:20; Tr. at 1168.) After the 9-1-1 call, the TracFone did not record any additional RTT data. (*Id.* at 2264.)

~7:34 p.m.: Wood's vehicle is seen on video surveillance exiting Highway 200 onto Airport Road, going toward Matthew's residence. (Ex. 256 at 20:51-23:54.) CSLI from Wood's cellphone is consistent with it passing through the area around that time. (*Id*.)

7:25 -7:42 p.m.: Megan Miho (Miho) was in Thompson Falls visiting friends in a subdivision near Matthew's residence. (Tr. at 1020.) At 7:25 p.m., Miho took a photo on her cellphone while out for a walk, which recorded a timestamp for the photo. (*Id.* at 1028-31.) Miho took a second photo at 7:42 p.m., according to the time stamp on that photo. (*Id.* at 1032.) In between taking the two photos, Miho heard gunshots in the distance in the direction of Matthew's residence. (*Id.* at 1028-34.) Miho estimated hearing the gunshots at 7:35 p.m., but stated it could have been as late as 7:41 p.m. (Tr. at 1055.)

~7:37-7:52 p.m.: RTT data between approximately 7:37 and 7:52 p.m. is consistent with Wood's cellphone being near Matthew's residence. (Tr. at 2268-70; Ex. 256 at 24:04-27:29.)

Before ~7:40 p.m.: Lydia observed Wood walking or running between her car and Matthew's shop. (Tr. at 1069.) The timesheet from the lumber mill showed Lydia checking in at 7:40 p.m., though that might not have been a precise time because it was written down by the security guard who may have gotten the time from a wall clock. (*Id*. at 1093-95.)

7:53-7:54 p.m.: CSLI shows Wood's cellphone moving on Airport Road around the lumbermill toward Highway 200, indicating Wood had left Matthew's residence. (Tr. at 2269-70; Ex. 256 at 27:28-28:00.)

7:55 p.m.: Wood's cellphone called Matthew's cellphone for the first time that night. (Tr. at 2272-73.)

8:03-8:06 p.m.: CSLI from Wood's cellphone indicates she had likely arrived back at her residence, possibly as early as 8:03 p.m. (Tr. at 2275-77.)

9:32 p.m.: Wood's cellphone sent a message to the TracFone, stating: "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. Danielle" (Tr. at 2278; Ex. 256 at 35:24.)

Additional facts will be detailed as necessary below.

SUMMARY OF THE ARGUMENT

Even though the State proved beyond a reasonable doubt that Wood murdered Matthew, the district court did not abuse its discretion by instructing the jury on accountability. A court must instruct the jury on any theory that is supported by evidence. Here, there was sufficient evidence that, even if the jury believed Wood did not pull the trigger, Wood had the motive to kill Matthew and participated in ending his life by purchasing and disposing of the murder weapon and placing a diversionary 9-1-1 call to distract law enforcement away from the murder scene.

Wood fails to meet her heavy burden of proving her IAC claim. Wood's counsel was not deficient for failing to offer a "mere presence" instruction because the State did not argue that mere presence was enough to convict and because being present at the crime scene was inconsistent with Wood's defense theory—that, when she went to Matthew's residence on the night of May 2, 2018, it was for an innocent reason and she did not know it was, or would be, a murder scene. Wood claimed to have no knowledge about Matthew's murder. A "mere presence" jury instruction was not warranted.

The district court properly admitted the CSLI evidence. Neither the CSLI evidence nor the TRAX software was novel. *Daubert* did not apply. Both Ray and Fegely were qualified expert witnesses who laid an appropriate foundation for the

CSLI evidence to be admitted pursuant to Mont. R. Evid. 702. The evidence was reliable and similar evidence has been admitted and upheld by courts across the country.

The district court properly admitted Fegely's demonstrative mapping exhibit over Wood's objection to a claimed discovery violation. First, Wood had the underlying data, which had the correct times for the text messages. Fegely catching his mistake and providing an updated presentation with correct times for the text messages was not a discovery violation. Second, even if there was a violation, the court had a wide latitude to assess an appropriate sanction and did not abuse its discretion by declining to suppress the exhibit and instead allowing Wood to cross-examine Fegely about the change.

The district court did not abuse its discretion when it denied Wood's motion for a mistrial arguing the State had shifted the burden. The prosecutor did not shift the burden to Wood by asking witnesses whether the crime lab could test evidence for both parties or by rebutting Wood's assertions that additional testing could have proved someone else was involved and that the State secreted evidence so the testing could not be done. The court correctly instructed the jury that Wood did not need to prove her innocence.

Finally, the cumulative error doctrine does not apply to this case because the district court did not err. However, even if this Court were to find multiple errors,

Wood has failed to establish cumulative prejudicial impact. There was overwhelming cumulative evidence of Wood's guilt even without the CSLI evidence. Wood was also not prejudiced by any claimed errors of improper instructions or prosecutorial misconduct. Wood's conviction should be affirmed.

ARGUMENT

I. Standards of review

This Court reviews a district court's decision to give a jury instruction for abuse of discretion. *State v. Kaarma*, 2017 MT 24, ¶ 7, 386 Mont. 243, 390 P.3d 609. This Court analyzes "whether the instructions, as a whole, fully and fairly instruct[ed] the jury on the law applicable to the case." *Id.*

To the extent that ineffective assistance of counsel claims are record-based and reviewable on direct appeal, the claims present mixed questions of law and fact, and this Court will review de novo. *State v. Chafee*, 2014 MT 226, ¶ 11, 376 Mont. 267, 332 P.3d 240.

This Court leaves "the determination of the relevancy and admissibility of evidence to the sound discretion of the trial judge and [] will not overturn it absent a showing of abuse of discretion." *State v. Damon*, 2005 MT 218, ¶ 12, 328 Mont. 276, 119 P.3d 1194.

This Court reviews "a district court's decision regarding matters of discovery for an abuse of discretion" and will only overrule the district court if its ultimate decision is "arbitrary or unreasonable." *State v. Pope*, 2019 MT 200, ¶¶ 10, 18, 397 Mont. 95, 447 P.3d 469.

This Court reviews "a district court's ruling on a motion for a mistrial for abuse of discretion." *State v. Longfellow*, 2008 MT 343, ¶ 9, 346 Mont. 286, 194 P.3d 694.

This Court will reverse based on the cumulative error doctrine only "where numerous errors, when taken together, have prejudiced the defendant's right to a fair trial." *State v. Smith*, 2020 MT 304, ¶ 16, 402 Mont. 206, 476 P.3d 1178.

II. The district court properly instructed the jury on accountability.

A district courts is required to "instruct the jury on theories and issues that are supported by evidence presented at trial." *Kaarma*, ¶ 23. Even if conflicting evidence supports two disparate legal theories, "the district court must provide jury instructions on both theories supported by the evidence." *Kaarma*, ¶ 25. The trial court does not abuse its discretion by "giving an instruction if it is 'supported by either direct evidence or some logical inference from the evidence presented.'" *Id.* (quoting *State v. Erickson*, 2014 MT 304, ¶ 35, 377 Mont. 84, 338 P.3d 598).

A person may be held criminally liable for her own conduct or for being legally accountable for the conduct of another, or both. Mont. Code Ann. § 45-2-301. A person is legally accountable for a crime committed by another when "either before or during the commission of an offense with the purpose to promote or facilitate the commission, the person solicits, aids, abets, agrees, or attempts to aid the other person in the planning or commission of the offense." Mont. Code Ann. § 45-2-302(3).

Montana law does not distinguish between principal liability and accomplice liability. *State v. Tower*, 267 Mont. 63, 67-68, 881 P.2d 1317, 1320 (1994). Accordingly, "[c]riminal accountability is not considered a substantive separate offense, but merely a conduit by which to find a person criminally liable for the acts of another." *Id.* Moreover, distinct legal theories that a person either committed a murder or was legally accountable for the murder are not mutually exclusive. *See State v. Duncan*, 247 Mont. 232, 239-40, 805 P.2d 1387, 1392 (1991).

In *Duncan*, the defendant (Duncan) and another man, Joe Milinovich (Joe), were traveling together with Larry Beckwith (Larry) through Townsend in Larry's truck en route to Alaska. *Duncan*, 247 Mont. at 235, 805 P.2d at 1389. Outside of Townsend, Duncan and Joe had Larry pull over, where they ultimately beat him, shot him, and stole his wallet before leaving in the truck. *Duncan*, 247 Mont. at

235-36, 805 P.2d at 1389. There was substantial evidence that Duncan was the triggerman, including that he made confessions to friends and a cellmate that he was the one who shot Larry. *Duncan*, 247 Mont. at 239-40, 805 P.2d at 1392.

The State alleged in the Information that Duncan had "purposely or knowingly caused the death of Larry Beckwith by shooting him with a gun, or, with the purpose of promoting or facilitating the commission of such offense, aided or abetted Joseph Milinovich in the planning or commission of the offense of the deliberate homicide of Larry Beckwith[.]" *Duncan*, 247 Mont. at 239, 805 P.2d at 1392. This Court held that there was sufficient evidence to convict Duncan under either theory, noting the above evidence of his guilt as the triggerman, but also finding that "even if [Duncan] did not actually shoot Larry, [Duncan] aided and abetted Joe, the only other person, besides Larry present in Larry's pick-up that night, by giving Joe the .22 caliber FIE revolver." *Duncan*, 247 Mont. at 240, 805 P.2d at 1392.

A person is legally accountable for the conduct of another "upon proof that the offense was committed and that the person was accountable although the other person claimed to have committed the offense has not been prosecuted or convicted, has been convicted of a different offense, is not amenable to justice, or has been acquitted." Mont. Code Ann. § 45-2-303. The accountability statute does not require the State to identify the accomplice. *See id.*

Although no Montana case has addressed this issue, courts in several other jurisdictions have upheld convictions for accountability where the principal actor was unidentified. *See State v. Sistrunk*, 414 S.W.3d 592, 599 (Mo. Ct. App. 2013) (concluding that the "[d]efendant's assertion that the State is obligated to establish the identity of the accomplice or accomplices is without support"); *accord People v. Profit*, 187 N.E.3d 156, 164 (Ill. App. Ct. 2021); *see also United States v. Clark*, 980 F.2d 1143, 1146 (8th Cir. 1992); *United States v. Horton*, 921 F.2d 540, 543-44 (4th Cir. 1990).

Here, the State's theory of the case was that Wood traveled to Matthew's residence and shot him. Overwhelming evidence supported that theory. Notwithstanding the evidence, Wood's attorneys argued that Matthew's body had been moved and that Wood was incapable of doing so. However, even assuming Wood's arguments had merit and she was not the triggerman, there was other overwhelming circumstantial evidence that, if she did not pull the trigger, she aided and abetted the person who did.

Wood and Matthew had a long custody battle resulting in Matthew having sole custody of their daughter, S.L. Wood wanted Matthew out of the picture so she could parent S.L. Two months prior to the murder, Wood purchased a .38 caliber revolver, which the evidence showed was the gun used to shoot Matthew. Wood also told Stobie that she disposed of the handgun. Therefore, even if Wood

did not pull the trigger, there was sufficient evidence to instruct the jury on accountability for the theory that she provided some other triggerman with the murder weapon and got rid of it after the murder. There was also sufficient evidence that Wood was the anonymous 9-1-1 caller who placed the diversionary call to attract attention away from the murder scene. Providing the handgun for use in the murder, disposing of it, and distracting law enforcement from the murder location would have been sufficient acts, each standing alone, to aid and abet the murder.

Wood's motive only strengthened this evidence. The State presented evidence that Wood was angry at Matthew when she left Ace on the afternoon of May 2, as well as evidence that Wood had the motive to end Matthew's life. Investigators found a sticky note on the bathroom mirror and writing in a book in Wood's car establishing that Wood wanted Matthew out of the picture so she could be the sole parent of S.L.

The State also presented evidence about Wood's puzzling behavior during the Pampered Chef party. Wood went to great lengths to create a reason to leave her own party, without S.L., to purportedly go to Matthew's house, without calling first, to see if Matthew would want S.L. returned. Wood's bizarre behavior strengthened the evidence that the reason she left was to be involved in Matthew's

murder, even if her only involvement was to make a diversionary 9-1-1 call nearby and provide another triggerman with the handgun.

Therefore, this case is like *Duncan*, where this Court held there was sufficient evidence to find Duncan guilty on either the theory that he pulled the trigger or that, even if he did not pull the trigger, he was still guilty for his other acts that led up to Larry's murder. There was sufficient evidence to go to the jury on each of the above theories of accountability, even if they were not the State's primary arguments.

Furthermore, Mont. Code Ann. § 45-2-301 contemplates that the State can proceed on both principal and accountability theories simultaneously. The statute provides that a person is responsible for her own actions, the actions of another for whom the person is legally accountable, "or both." Mont. Code Ann. § 45-2-301. Theories of principal liability and accountability are not mutually exclusive.

Wood's argument that the State must identify an accomplice is also without merit. First, Mont. Code Ann. § 45-2-303 contemplates that a person can be accountable for the crime of another, even though another person is not prosecuted or even "amenable to justice." Wood attempts to insert a requirement into the statute that the accomplice must be identified. Nothing in the statute requires accomplice identification and other jurisdictions have rejected that argument.

Despite the overwhelming evidence against her, Wood seemingly argues that she could only be convicted if someone saw her pull the trigger or if the State identified a specific accomplice who pulled the trigger. Wood should not be allowed to raise the specter of an unknown triggerman when, even if her theory was believed in full, she still would have been guilty of the homicide because she was the one who wanted Matthew out of the picture, she was the one who purchased a gun weeks before the homicide that was consistent with the murder weapon, she was the one who admittedly disposed of the same weapon, and she was the one who created the diversion away from Matthew's house around the time of his murder. The State was entitled to use the accountability theory to rebut Wood's defense theory that she should be acquitted because no one saw her pull the trigger. Even if the jury had believed her theory, the State presented overwhelming evidence of Wood's involvement in Matthew's murder. Therefore, the district court did not abuse its discretion by instructing the jury on accountability.

III. Wood failed to prove her counsel was deficient for not proposing a "mere presence" instruction.

This court applies the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to analyze whether a defendant received ineffective assistance of counsel. *State v. Green*, 2009 MT 114, ¶ 16, 350 Mont. 141, 205 P.3d

798. Under the *Strickland* test, the defendant has the burden to show "(1) that counsel's performance was deficient; and (2) that counsel's deficient performance prejudiced the defense." *Chafee*, ¶ 19 (quoting *State v. Ugalde*, 2013 MT 308, ¶ 66, 372 Mont. 234, 311 P.3d 772).

This Court will "indulg[e] a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance." *Chafee*, ¶ 19 (quoting *Ugalde*, ¶ 75). To address a claim of ineffective assistance of counsel on direct appeal, the defendant must show that trial counsel had no plausible justification for his trial tactics. *Green*, ¶ 17.

This Court has held that defense counsel may be ineffective by failing to ask for a jury instruction that provides legal support for the defendant's theory of the case. *See Kougl*, ¶ 20; *Chafee*, ¶ 18. For example, in *Chafee*, "defense counsel argued to the jury that Chafee's mere presence at the scene was insufficient to support a conviction; however, he failed to offer the jury instruction that would have informed the jury that his argument was legally correct." *Chafee*, ¶ 18. Under those circumstances, there was no "plausible justification for the failure of defense counsel to offer the 'mere presence' jury instruction." *Id.* On the other hand, this Court has found that a district court does not err by refusing to instruct a jury on "mere presence" when the State has not argued that the defendant's mere presence

was sufficient to convict. *State v. Sheriff*, 190 Mont. 131, 137, 619 P.2d 181, 184 (1980).

Furthermore, defense counsel does not provide deficient performance by failing to offer an instruction that would be inconsistent with the defendant's theory of the case or does not otherwise benefit the defendant. *See Green*, ¶¶ 18-19; *accord State v. Johnson*, 257 Mont. 157, 163, 848 P.2d 496, 499 (1993) (*overruled on other grounds by City of Helena v. Frankforter*, 2018 MT 193, ¶ 14, 392 Mont. 277, 423 P.3d 581). In *Johnson*, this Court found that Johnson's counsel was not deficient for failing to propose an accomplice instruction because Johnson's theory of the case was that he was not involved at all in the crime. *Johnson*, 257 Mont at 163, 848 P.2d at 499. Johnson's counsel was not deficient because the instruction "could be considered inconsistent with that defense." *Id.*

Wood argues her counsel was deficient for not proffering a "mere presence" instruction. (Br. at 44-48.) The "mere presence" instruction states:

> Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant was involved in the crime. To be responsible, you must find beyond reasonable doubt that the defendant was a participant and not merely a knowing spectator.

Chafee, ¶ 15.

Here, the court instructed the jury that Wood needed to commit a voluntary act to be found guilty. (Doc. 401, Inst. 8.) The jury was further instructed on the

elements of deliberate homicide, which required that she purposely or knowingly caused Matthew's death or that she was legally accountable by purposely or knowingly aiding or abetting another who caused his death. (*Id.*, Instrs. 14, 18.)

Wood's defense theory was that she never knowingly went to a crime scene. (*See* Tr. at 986, wherein Wood's counsel argued "[t]here is a lack of evidence that she had committed and participated in or witnessed a murder"; *see also* Tr. at 2611, arguing that Wood could not have committed the murder and the State could not "even put [Wood] there when they believe the fatal shots were fired.") Therefore, this case is distinguishable from *Chafee*.

A "mere presence" instruction would have assumed, contrary to Wood's defense theory, that she was present at the time of the murder. Wood knowingly being present at the crime scene would have undermined her argument that she had an innocent explanation for going to Matthew's house and she knew nothing about his murder. Wood has not carried her burden under the *Strickland* deficiency prong because her counsel had a sound strategic reason for not offering the instruction.

Even so, Wood also failed to prove prejudice from the lack of a "mere presence" instruction. The State proved beyond a reasonable doubt that Wood had the motive to kill Matthew, purchased the murder weapon, disposed of the murder weapon, and made the diversionary 9-1-1 call. This evidence did not rely on her being at Matthew's residence. These acts were sufficient to convict Wood of

deliberate homicide by accountability. Therefore, Wood has not carried her burden to show prejudice under the second *Strickland* prong.

IV. The district court did not abuse its discretion by admitting CSLI evidence.

Wood advances several theories to argue the CSLI evidence should not have been admissible. Below, the State will first show why the evidence was admissible. The State will then address Wood's various arguments.

A. The CSLI evidence was admissible under Rule 702.

Expert testimony is required when the subject matter "is sufficiently beyond common experience [so] that the opinion of the expert will assist the trier of fact to understand the evidence or to determine a fact in issue." *Hulse v. DOJ, Motor Vehicle Div.*, 1998 MT 108, ¶ 48, 289 Mont. 1, 961 P.2d 75 (citations omitted). Expert testimony is governed by Mont. R. Evid. 702, which states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Mont. R. Evid. 702.

The rule sets forth two requirements. *Hulse*, ¶ 48. "First, the subject matter must be one that requires expert testimony" because it is "not within the range of ordinary training or intelligence. Second, the particular witness must be qualified

as an expert to give an opinion in the particular area of testimony." *Id.* Accordingly, to admit expert testimony, the proponent of the evidence must lay a foundation that the expert "has special training or education and adequate knowledge on which to base an opinion." *Id.* The trial court has broad discretion in determining whether to admit the testimony. *Id.*

In addition to the general Rule 702 standard, this Court has "imposed additional admissibility requirements upon expert testimony pertaining to scientific evidence." *Hulse*, ¶ 48. However, "[a]bsolute certainty of result or unanimity of scientific opinion is not required for admissibility" and it is "better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation." *Hulse*, ¶ 49 (quoting *Barmeyer v. Montana Power Co.*, 202 Mont. 185, 193-94, 657 P.2d 594, 598 (1983)).

Accordingly, the general Rule 702 admissibility requirements apply to scientific expert testimony unless the testimony concerns "novel" science. *Hulse*, ¶¶ 55-56. Where "novel" scientific testimony is proposed, this Court has adopted the *Daubert* standard to ensure the testimony is "premised on reliable methodology." *Hulse*, ¶ 53 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). The *Daubert* standard sets forth a list of non-exclusive

factors for a district court to consider before admitting novel scientific evidence, including:

> (a) whether the theory or technique can be and has been tested; (b) whether the theory or technique has been subjected to peer review and publication; (c) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and (d) whether the theory or technique has been generally accepted or rejected in the particular scientific field.

Hulse, ¶ 52 (citing *Daubert*, 509 U.S. at 592-95).

Courts across the country that have been asked "to decide whether to admit historical cell-site analysis have almost universally done so." *United States v. Hill*, 818 F.3d 289, 297 (7th Cir. 2016). Courts have also routinely held that "cell site location testimony is not novel; it is widely accepted throughout the country." *State v. Ramirez*, 425 P.3d 534, 543-44 (Wash. Ct. App. 2018); *see also State v. Berry*, 982 N.W.2d 746, 755 (Minn. 2022); *People v. Fountain*, 62 N.E.3d 1107, 1125 (Ill. App. Ct. 2016) (further compiling cases and stating "the use of cell phone location records to determine the general location of a cell phone is not 'new' or 'novel' and has been widely accepted as reliable by numerous courts throughout the nation").

"[C]ell site 'science is well understood' and cell site analysis 'has been subjected to publication and peer criticism, if not peer review[.]" *Commonwealth v. Crumes*, 630 S.W.3d 630, 638 (Ky. 2021) (quoting *Hill*, 818 F.3d at 297-98).

Furthermore, courts have also uniformly concluded that the various computer software programs used to map CSLI evidence are not novel and can be used reliably. *See Ramirez*, 425 P.3d at 544; *United States v. Nelson*, 533 F. Supp. 779, 797-98 (N.D. Cal. 2021); *Berry*, 982 N.W.2d at 758.

In *Berry*, the Minnesota Supreme Court analyzed arguments like those made by Wood in this case on similar facts. Berry was accused of kidnapping and murdering Monique Baugh. *Berry*, 982 N.W.2d at 750. Investigators used CSLI to track Berry's phone to the area where preparations were made for the kidnapping. *Berry*, 982 N.W.2d at 751. Investigators also used CSLI to track the movement of Baugh's phone after the kidnapping. *Id.* Video surveillance corroborated the CSLI. *Berry*, 982 N.W.2d at 751-52.

Berry moved to suppress the CSLI, including the "timing-advance data," which is "a particular type of CSLI data that estimates the distance from the tower to the phone based on how long it takes for the signal to travel between the two."[5] *Berry*, 982 N.W.2d at 753. Berry argued that CSLI was novel and not sufficiently reliable. *Berry*, 982 N.W.2d at 755.

The Minnesota Supreme Court rejected Berry's argument, holding that CSLI "is not novel because it is not new, and as a result, no hearing on general acceptance in the scientific community was required before the evidence was

[5] Timing-advance data is equivalent to RTT data.

admitted." *Berry*, 982 N.W.2d at 755 (citing *State v. Harvey*, 932 N.W.2d 792, 808 (Minn. 2019) (noting that the State's expert had been using CSLI evidence since 2003, that FBI agents alone had testified "on the technology in more than 1,000 trials," and that CSLI evidence had "been admitted in Minnesota courts for more than 10 years")).

The court in *Berry* then analyzed whether the State had laid a sufficient foundation for admitting the CSLI evidence pursuant to Minn. R. Evid. 702. *Berry*, 982 N.W.2d at 757. The Minnesota Supreme Court found that the State's expert, FBI Agent Richard Fennern, was an expert in CSLI evidence. *Id.* Fennern testified that he had personally used CSLI evidence and found it to be reliable. *Id*. Fennern also noted that the data was derived from the cellphone companies, which needed accurate "data to manage their network[.]" *Id.* Accordingly, the Minnesota Supreme Court rejected Berry's argument that the "State needed to offer data about accuracy, error rates, and peer-reviewed studies to establish foundational reliability[,]" concluding that CSLI had sufficient "foundational reliability without this type of evidence." *Id.* The Minnesota Supreme Court was also convinced that the evidence was reliable because other "evidence at trial corroborated Fennern's report as to the location of Berry's cell phone[,]" including video surveillance that placed him in the same area as indicated by the CSLI evidence. *Berry*, 982 N.W.2d at 758.

Consistent with *Berry*, the CSLI admitted in this case was not novel. Similar CSLI evidence has been almost universally accepted in courts around the country. One of the State's experts in this case, Ray, has been qualified as an expert and has testified related to CSLI at least 60 times. (Tr. at 2062.) Ray used CSLI in his investigations when he was in law enforcement dating back to the 1990s. (*See* Tr. at 2047-48.) Ray has personally observed the data to be reliable. (*Id.*) Fegely has testified as an expert approximately 25 times in 11 states. (Mot. Tr. at 32.)

At the time of trial, Ray's company, ZetX, had approximately 650 customers, including the FBI, DEA, ATF, U.S. Marshals, Secret Service, Department of Defense, and state and local agencies in over 30 states, all of whom depended on the technology to be reliable. ZetX is not the only company that relies on this type of data. As noted in *Harvey*, FBI agents have used their own software to testify about this type of evidence in over 1,000 trials. In sum, CSLI is not novel evidence. Nor is using software to map voluminous data points novel. Accordingly, the *Daubert* standard does not apply.

Pursuant to Rule 702, the State needed to show that Ray and Fegely were qualified by knowledge, skill, experience, training, or education to testify regarding scientific or technical knowledge. Both Ray and Fegely had years of experience utilizing cellphone records to estimate a cellphone's location. Both had testified extensively and had been qualified repeatedly as experts in the field. In

fact, at least one appellate court has recognized Fegely as an expert. *See State v. Villanueva*, 2020 Wash. App. LEXIS 3290, at *39-40 (Wash. Ct. App. Dec. 17, 2020). Prior to admitting the CSLI evidence, the State laid a sufficient foundation that Ray and Fegely were qualified and that the evidence was reliable.

Furthermore, the CSLI was corroborated by other evidence. When the TracFone was first activated, the arc showed it could be in the same general location as Wood's phone, as indicated by Wood's Google location history, which she admits is more precise. (Br. at 18.) Soon after the TracFone was first activated, Wood's cellphone called TracFone customer service, which was corroborating circumstantial evidence that Wood had just purchased the TracFone and, ergo, the two phones were in the same location. The TracFone and Wood's cellphone both provided data that was consistent with both phones being at Wood's house, which is also circumstantial evidence of the reliability of the data because, if Wood had possession of both phones, that is where common sense dictates they would be.

The last data provided by the TracFone was consistent with the TracFone and Wood's cellphone being near the intersection of Golf Street and Highway 200 in Thompson Falls. At the time the TracFone was generating data that was consistent with being at that location, the "anonymous" 9-1-1 caller using the TracFone told dispatch that she was parked on Golf Street.

The RTT data for Wood's cellphone was further corroborated by the video surveillance from the Phillips 66, which showed Wood's vehicle turning onto Airport Road going east toward Matthew's residence at the same time the CSLI showed Wood's cellphone passing through the area. Finally, Wood's RTT data was corroborated by Lydia, who saw Wood at Matthew's residence during the time frame the RTT data indicated she could be there.[6]

Furthermore, the State laid an appropriate foundation for admission of the CSLI evidence, even if *Daubert* applies. First, the reliability of CSLI, including RTT data and Google location history, is capable of and has been tested. As noted in *Berry* and *Harvey*, and consistent with Ray's and Fegely's testimony, RTT data is compiled by cellphone companies for billing and coverage purposes. Cellphone companies rely on the data to know where dead spots are in coverage. Cellphone companies have a "vested interest in maintaining accurate records" to ensure the best service in a competitive industry. *See Harvey*, 932 N.W.2d at 808. Google also has a vested interest in recording accurate information for a cellphone's location because it drives its multibillion-dollar advertising model. And Ray had tested the accuracy of similar data and methodology using a cell-site simulator.

[6] In her opening brief, Wood mistakenly claims that it was Google WiFi data placing Wood at Matthew's residence around 7:38 p.m. It was RTT data, not Google data, that placed Wood's cellphone near Matthew's residence. (Ex. 256 at 24:04-27:29.)

Although RTT data may not have been subject to peer review and publication in the historical sense of scholarly articles, the technology has been subject to "publication and peer criticism." *Hill*, 818 F.3d at 298. Accordingly, "[t]he advantages, drawbacks, confounds, and limitations of historical cell-site analysis are well known by experts in the law enforcement and academic communities." *Id.*

Both Ray and Fegely were careful to explain the limitations of the data and stressed that RTT data contained an error rate of up to one-tenth of a mile, depending on the terrain, distance from the tower, and other factors. Google also calculates an error rate that provides a confidence level for a cellphone's location. Simply because there is an error rate does not mean evidence should be excluded. Rather, the error rate provides fodder for cross-examination and the jury ultimately decides the weight to give the evidence. The error rate does not make the evidence inadmissible.

Finally, the theories used by Ray and Fegely are generally accepted in the scientific field. CSLI evidence is universally used across the country by federal, state, and local law enforcement agencies. CSLI evidence has been admitted in thousands of trials.

The district court did not abuse its discretion by admitting the CSLI evidence. The evidence was scientific in nature and appropriate for expert

testimony. Both Ray and Fegely were qualified expert witnesses. The State laid an appropriate foundation to show the reliability of the evidence, which was corroborated numerous times by other undisputed evidence. The district court correctly followed the requirements of Rule 702 to "admit [the] relevant scientific evidence . . . and allow its weight to be attacked by cross-examination and refutation." *Hulse*, ¶ 49.

B. There was sufficient foundation for Ray's and Fegely's testimony and conclusions.

Wood uses several law review articles to call into question the reliability of the CSLI evidence. (Br. at 52-54.) The articles question the reliability and error rates associated with RTT data. However, the fact that the data does not give a precise location for cellphones was conceded by the State. Both Ray and Fegely repeatedly testified that the evidence should not be used to put a cellphone in a precise location, such as inside a specific building, and that the error rate can be up to one-tenth of a mile, approximately 500 feet. However, this does not make the evidence inadmissible.

As stated above, this Court has repeatedly held that it is "best to admit relevant scientific evidence" and have it be subject to the crucible of cross-examination. *Hulse*, ¶ 49. In this case, both Ray and Fegely were subject to cross-examination. Wood also hired her own expert who reviewed the data and conferred with Wood's attorneys, but, for reasons not explicit in the record, Wood

elected not to call him to testify. (*See* Tr. at 2114-15.) This Court should not use the law review articles cited by Wood in her brief to substitute its judgment on the evidence for the expert testimony at trial that was weighed and found to be admissible by the district court. Unlike Ray's and Fegely's testimony in this case, Wood's law review articles were not subject to cross-examination at trial.

Wood also attacks what she claims to be the "scant cell tower" data for the TracFone. (Br. at 56.) Here, Fegely used approximately 20 RTT data points from the TracFone on which to base his opinion that the TracFone's location was always consistent with the location of Wood's cellphone. Wood's cellphone contained more data points because it was constantly powered on between April 19 and May 2, 2018. Although the TracFone had fewer data points, there was sufficient data to establish a pattern.

Ray conceded that if you isolated a single set of data points for both phones that showed they were the same distance from the tower at a specific time, it was "absolutely" possible that the phones were at different locations on the radial arc. (Tr. at 2087-88.) However, he opined that in looking at the "entire record set together[,]" the data always showed the phones at similar distances from the tower, that the arcs were "always right on top of each other." (*Id.*) An increasing number of datapoints suggested it would be "mathematically impossible" for the phones to always be on the same arc simply by coincidence. (*Id.*) In sum: once is chance,

twice is coincidence, three times is a pattern. Here, there was an undisputable pattern.

In her brief, Wood claims that neither Ray nor Fegely would be qualified to offer this opinion because neither had "radio-frequency expertise." (Br. at 58.) However, one does not need to have radio frequency expertise to determine that it would be "mathematically impossible" for two phones to have approximately twenty data points, on two different dates, in multiple different locations—both in Missoula and Thompson Falls—all fall on the same radial arc distance from the tower unless the phones were together.

Moreover, that conclusion was not made in a vacuum looking solely at the RTT evidence. The conclusion was supported by other evidence, such as the fact that Wood's cellphone called the TracFone customer service line soon after the TracFone was first activated, that the RTT data was consistent with being near Wood's residence, and that the TracFone's RTT data was consistent with it being on Golf Street at the time the 9-1-1 call was made, which is where the 9-1-1 caller reported herself to be. Accordingly, the district court did not err by admitting Ray's and Fegely's testimony.

/ / /

C. Ray's and Fegely's testimony met the reliability threshold to be admissible.

1. Neither Ray nor Fegely overpromised on the meaning of the data.

Fegely testified that the data from Wood's cellphone and the TracFone were "consistent with them traveling together." (Tr. at 2219, 2260.) On appeal, Wood argues that this testimony was "not supported by the underlying data." (Br. at 62.) Wood argues that because each arc has an error rate, which makes the data imprecise, one cannot conclude that the arcs were paired. However, this logic is flawed. If the measurements are as imprecise and flawed as Wood now claims, you would expect greater variability between the arcs if the phones were not together, not less.

For example, Wood now argues that the RTT estimates can be "thrown off significantly by signal interference caused by geographic features . . . ." (Br. at 62.) However, it is only logical that two cellphones in the same location would encounter the same interference. Conversely, cellphones only coincidentally on the same arc over repeated data points, but actually in different locations on the arc, would confront variable interference, which would presumably result in a greater variance between the arcs. Accordingly, the fact that the RTT data points mirrored each other for both cellphones over time lent to the credibility of the RTT data and Ray's and Fegely's opinion that the phones were "traveling together."

Again, both Ray and Fegely were clear that RTT data cannot be used to imply a precise location. (*See*, *e.g.*, Tr. at 2163.) For that reason, Fegely couched his testimony by saying that the data was "consistent with" the phones "traveling together." (Tr. at 2260.)

Furthermore, at trial, Wood never objected to the language Ray or Fegely used to describe how the data suggested the phones were together. Accordingly, the district court was not presented with the opportunity to limit Ray's or Fegely's testimony. Because their testimony was generally admissible as expert testimony, Wood was required to raise objections if their testimony went beyond what should have been allowed. Because Wood failed to do so, she has waived her argument on appeal to the specific language used by Ray and Fegely to describe the movement of the two cellphones. *See State v. Sedler*, 2020 MT 248, ¶ 10, 401 Mont. 437, 473 P.3d 406.

Ironically, it was Wood who argued at trial that the CSLI evidence was precise. (*See* Tr. at 2605.) Wood inaccurately used the CSLI evidence to argue that "[t]he earliest time [she] could have arrived at Matt's is 7:38 and 46 seconds." *Id.* Wood parroted this argument in her opening brief. (*See* Br. at 18.) Wood then argued she could not have committed the murder because Miho approximated that she heard the gunshots around 7:35 p.m., but no later than 7:41 p.m., and Wood did

not have time to commit the murder between her time of arrival and the time she was observed by Lydia prior to 7:40 p.m.

Not only does Wood's argument rely on her RTT data being precisely accurate, it also relies on an assumption that three varying time keeping mechanisms (Wood's cellphone, Miho's cellphone, and the lumber mill clock) were all perfectly synced. There was no evidence to support that assumption. Importantly, Lydia's arrival at Thompson River Lumber was an approximation.

Moreover, Wood's argument that the RTT data was precise and shows she could not have arrived before 7:38:46 p.m. was not correct. The RTT data was first consistent with Wood arriving at Matthew's residence as early as 7:36:55 p.m. (Ex. 256 at 24:07-25:08.) Accordingly, Wood could have arrived at Matthew's residence prior to 7:38:46 p.m., fired the shots heard by Miho, and been observed by Lydia thereafter, prior to Lydia continuing her short journey to Thompson River Lumber and checking in sometime around 7:40 p.m.

Wood cannot argue that the State overpromised on the evidence being "consistent with" her cellphone and the TracFone being together while contrarily arguing that it was so precise that Wood could not have arrived at Matthew's residence prior to 7:38:46 p.m. In sum, it was Wood, not Ray or Fegely, who argued that the RTT data was precise enough to put Wood in a specific place at a specific time. On the contrary, Ray and Fegely were careful to say that the

evidence could not put a person at a specific place at a specific time. Instead, due to consistent data points over time, it was only certain that Wood's cellphone and the TracFone were together.

2. The RTT data was admissible under Rule 702; *Daubert* did not apply.

Wood next argues that a *Daubert* hearing was required for the RTT data, even if it was not required for the other CSLI. (Br. at 63.) Wood does not cite any authority to support her position, other than a newspaper article for a case where it is not clear if RTT data was even used. (*See* Br. at 64.) However, in *Berry*, the Minnesota Supreme Court addressed "timing-advance data," which is synonymous with RTT data, and found that use of such evidence was not novel. *Berry*, 982 N.W.2d at 753-55. Ray has been using similar data, first in his investigations as a law enforcement officer and, later, as the owner of ZetX, for approximately 20 years. The district court did not abuse its discretion by admitting the RTT evidence.

Wood next attempts to liken RTT data to a "novel location technique called 'granularization.'" (Br. at 64.) As Wood points out, this theory has been disapproved of in at least one court case. *See United States v. Evans*, 892 F. Supp. 2d 949 (N.D. Ill. 2012). However, in his testimony at the motions hearing, Fegely explicitly stated that "granularization" was not used in this case. (Mot. Tr. at 53.) Therefore, this case is more like *Berry* and distinguishable from *Evans.*

3. The district court did not abuse its discretion by allowing Fegely to present CSLI evidence using the TRAX software.

The TRAX software simply takes CSLI and plots it on a map chronologically. (Tr. at 2051-52.) Fegely could have done the same by hand; however, doing so becomes time consuming with voluminous data points. (Mot. Tr. at 43.) TRAX maps can be corroborated by looking at the underlying CSLI provided by a cellphone company. (*Id*.)

Wood argues that TRAX is novel and its reliability has not been verified. (Br. at 69-72.) The defendant in *Nelson* made the same argument. *See Nelson*, 533 F. Supp. 3d at 797-98. There, the United States District Court for the Northern District of California rejected the argument because the reliability of the software was easily verifiable by doublechecking the underlying data to ensure the software was correctly mapping it. *Id.* Likewise, in *Ramirez*, the Washington Court of Appeals observed that "computer programs routinely generate maps that correspond to real-world data." *Ramirez*, 425 P.3d at 544. The court further noted that, although "the FBI has not shared its proprietary software for external validation, the assumptions on which the software operated were transparent and readily capable of testing and replication." *Id.*

Here, despite having all the data that Fegely put into the TRAX software, Wood did not seriously dispute the reliability of how TRAX mapped the data

points. Wood did not claim that TRAX had mistakenly plotted any of the CSLI. The mapping software is not novel and *Daubert* does not apply. The district court did not abuse its discretion by allowing Fegely to testify regarding the TRAX software and how it mapped the CSLI evidence.

Wood also faults Fegely for not conducting a "drive test." Failure to consider another test to ensure the accuracy of an expert's testimony is a subject matter for cross-examination. However, an expert not conducting a test that defense counsel believes might have been relevant, does not mean the expert's testimony should be excluded in whole.

4. If admitting the CSLI was error, such error was harmless.

This Court assesses trial errors that occurred during the presentation of a case to the jury for harmless error. *State v. Mercier*, 2021 MT 12, ¶ 30, 403 Mont. 34, 479 P.3d 967. Trial errors are "amenable to qualitative assessment by a reviewing court for prejudicial impact relative to the other evidence introduced at trial[.]" *Id.* (quoting *State v. Van Kirk*, 2001 MT 184, ¶ 38, 306 Mont. 215, 32 P.3d 735). Where an error led to the admission of improper evidence, this Court will assess the remaining admissible evidence to determine if there was cumulative evidence that proved the same facts as the tainted evidence. *Mercier*, ¶ 31. If an established error was preserved for appeal, then the State has the burden of showing the error was harmless beyond a reasonable doubt. *Mercier*, ¶ 31.

The CSLI in this case was used for two primary purposes. First, the evidence was used to corroborate that Wood used the TracFone to send herself a decoy message and then used it to make the diversionary 9-1-1 call. Second, the evidence was used to show Wood's cellphone traveling to and from Matthew's residence, showing a timeline that was consistent with the shots Miho heard coming from that direction.

However, the State offered sufficient cumulative evidence proving both points beyond a reasonable doubt. First, Wood's cellphone called TracFone customer service right as the TracFone was first activated. Later, the 9-1-1 caller using the TracFone stated she was making the call from Golf Street. The entirety of Golf Street is approximately five to six blocks and makes a half-circle around Wood's residence on Eddy Street. (*See* Ex. 256 at 16:00-16:51.) All of Golf Street is within a couple of blocks of Wood's residence. Golf Street is the logical street to exit from Wood's neighborhood onto Highway 200 to go toward Matthew's residence.

Both King and Merritt-Savage described Wood leaving her residence soon before the 9-1-1 call was made. It was never disputed that the 9-1-1 caller provided false information, which occupied the only two Sanders County sheriff's deputies on duty, in an apparent attempt to send them in the opposite direction from Matthew's residence. Just minutes later, Wood's vehicle was seen on video

traveling east toward Matthew's residence. This circumstantial evidence alone was sufficient to prove beyond a reasonable doubt that Wood was the 9-1-1 caller, thus linking her to the TracFone, independent from the CSLI. Accordingly, Wood was also linked to the TracFone for the purpose of proving that she sent herself the decoy message purporting to be Matthew saying he was held up in Trout Creek.

There was also cumulative evidence showing Wood was at Matthew's residence during the time frame Miho heard the gunshots. First, Wood told King and Merritt-Savage that she was going to Matthew's residence. The Phillips 66 video showed Wood exiting Highway 200 onto Airport Road at approximately 7:34 p.m. Miho heard the shots before 7:41 p.m., and Lydia saw Wood at Matthew's residence before 7:40 p.m. according to the imprecise sign-in sheet at the lumbermill. There was sufficient cumulative evidence to show that Wood traveled to Matthew's residence in a timeframe that was consistent with Miho hearing the gunshots. Accordingly, if admitting the evidence was error, it was harmless.

D. Fegely's video presentation did not violate Rules 403 or 702.

At trial, defense counsel moved to exclude Fegely's video presentation, arguing that the State had committed a discovery violation, which the State will address in more detail below. (Tr. at 2108-13.) However, after the district court overruled that objection, Wood did not further object to the admission of the

presentation, which was admitted as Exhibit 256. (*Id.* at 2197-98.) Now, for the first time on appeal, Wood argues that Exhibit 256 should have been excluded under Rules 403 and 702. This Court should reject Wood's argument as being raised for the first time on appeal. *See Sedler*, ¶ 10. However, even if the Court reaches the merits of the argument, Exhibit 256 was admissible.

Relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Mont. R. Evid. 403. "Demonstrative exhibits are admissible if they supplement the witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial." *Cowles v. Sheeline*, 259 Mont. 1, 12, 855 P.2d 93, 100 (1993). In *Cowles*, a witness made summaries of other exhibits admitted into evidence, which summaries the district court allowed to also be admitted as demonstrative exhibits. *Id.* This Court found that the evidence was "complex, confusing and incomplete" and, therefore, the demonstrative summaries were helpful to determine a factual issue. *Cowles*, 259 Mont. at 13, 855 P.2d at 100. The Court also held the summaries were admissible under Mont. R. Evid. 1006, which allows for "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court [to] be presented in the form of a chart, summary, or calculation." *Cowles*, 259 Mont. at 13, 855 P.2d at 100-01.

Here, the underlying CSLI was admitted into evidence. Exhibit 256 was merely a summary of the underlying voluminous CSLI. Furthermore, the CSLI is provided to investigators in Excel spreadsheets, which would be hard to visualize without plotting the data on a map. Accordingly, Exhibit 256 was admissible under Rule 403 because it was relevant and not overly prejudicial, under Rule 702 because it explained the scientific concepts Ray and Fegley were testifying to, and under Rule 1006 as a summary of voluminous data.

Wood raises several arguments to claim that Exhibit 256 was more prejudicial than probative. First, Wood argues that Exhibit 256 was deceptive because, at times, the presentation zoomed in on a specific portion of an arc to the exclusion of the rest of the arc. (Br. at 74.) The presentation zoomed in on certain points of the arc to show the arc in relation to a point of interest, such as Wood's or Matthew's residence. (*See*, *e.g.*, Ex. 256 at 15:44-15:52.) However, throughout the presentation, Fegely used a map showing the entirety of the radial arc as it passed through Thompson Falls. On many occasions, Fegely began with an expansive view of the map and arc and then zoomed in to show the same arc in relation to a point of interest. Taking the presentation as a whole, there was no possibility that the jury did not understand that Ray's and Fegely's testimony represented that the phones could be anywhere on the arc if only one isolated data point was taken into consideration.

Wood next argues that Fegely edited out of Exhibit 256 some of the text messages sent to or from the TracFone. (Br. at 74 citing Ex. 256, *compare* Ex. 302.) Wood is mistaken. Exhibit 302 depicts two messages sent from the TracFone to Wood's cellphone and one message from Wood's cellphone to the TracFone. All three of the text messages were included in Fegely's presentation. (*See* Ex. 256 at 14:18, 16:33, and 35:22.)

Wood further argues that inserting video surveillance from the Phillips 66 in between portions of the presentation that showed RTT data gave the "very distinct impression that the TracFone [was] in [Wood's] car." (Br. at 74.) However, the video surveillance only corroborated CSLI evidence from Wood's cellphone, not the TracFone. The last data from the TracFone indicated it was near the intersection of Golf Street and Highway 200 at the time of the 9-1-1 call. There is no evidence that the TracFone was in Wood's car when it passed near the Phillips 66. Rather, Exhibit 256 only shows CSLI for Wood's cellphone immediately before and after her passing by the Phillips 66.

Next, ironically, Wood argues that Fegely did not zoom in enough during his presentation because, once he zoomed in on a specific area, you could see that the arcs, at times, had separation between them. Wood first argues it was error to zoom in, then she argues it was error to zoom out. Neither was error.

By necessity, Fegely was required to pick a scale for the arc depicted on the map. When Fegely showed arcs for both the TracFone and Wood's cellphone at the same time, he always accompanied this with the corresponding data showing the distance to tower for both. (*See*, *e.g.*, Ex. 256 at 13:22.) Fegely accompanied the demonstrative presentation with testimony describing how far apart the data suggested the arcs were, with the caveat that his testimony also suggested an error rate of up to one-tenth of a mile. (*See*, *e.g.*, Tr. at 2235.) The district court did not abuse its discretion by admitting Exhibit 256.

V. The district court did not abuse its discretion by denying Wood's motion to exclude Exhibit 256 for a claimed discovery violation.

The State is required to provide "all written reports or statements of experts who have personally examined . . . any evidence in the particular case, together with the results of physical examinations, scientific tests, experiments, or comparisons[.]" Mont. Code Ann. § 46-15-322(1)(c). If the State violates this duty, the district court may impose sanctions, which may include granting a continuance, holding a party in contempt, precluding the State from offering certain evidence, or declaring a mistrial. Mont. Code Ann. § 46-15-329.

The district court has "the flexibility to impose sanctions commensurate with [the] failure to comply with discovery orders." *State v. Van Voast*, 247 Mont. 194, 202, 805 P.2d 1380, 1385 (1991). The proper "[i]mposition of sanction is a matter

best left to the sound discretion of the District Court[,]" the severity of which should depend on "whether the noncompliance was willful, the amount of prejudice to the opposing party, and any other relevant circumstances." *Id.* The defense cannot feign surprise about evidence it knew about but chose not to review or vet. *State v. Golder*, 2000 MT 239, ¶ 9, 301 Mont. 368, 9 P.3d 635.

Here, Fegely's original Exhibit 256 mistakenly put the time stamps for the text messages as one hour earlier than when they were sent. (Tr. at 2111.) Fegely made the mistake because the call records for the text messages were in Pacific Standard Time, and he did not update them to Mountain Standard Time in his presentation. (*Id.*) Wood's counsel admitted that they had the underlying data, which indicated the correct time, but argued that they were entitled to rely on Fegely's interpretation of the data rather than the data itself. (Tr. at 2110.)

The State had prepared at least two iterations of Fegely's exhibit and provided the final exhibit it intended to use the week before his testimony. (Tr. at 2108.) After that exhibit was provided to Wood's counsel, Fegely caught his mistake and prepared an updated exhibit, which was provided to defense the day before his testimony. (*Id.*) The time zone error did not change Fegely's opinion that the data from the TracFone and Wood's cellphone was consistent with the two being together. (*Id.* at 2112.) The court allowed the State to admit the new exhibit, subject to Wood's counsel cross-examining Fegely on the error. (Tr. at 2122-24.)

Not only were the correct times in the underlying data, they were also referenced during briefing on the CSLI. In its response to Wood's motion to exclude the CSLI, the State listed the text messages and provided the correct Mountain Standard Time zone times. (Doc. 105 at 3.) The State's response was filed on June 15, 2020, over six months before trial. Any confusion about the timing of the text messages could have been resolved by looking at the underlying data, which there is no dispute was timely provided to Wood's counsel.

Like in *Golder*, Wood's counsel could not ignore the fact that they were given notice of the timing of the text messages and then feign surprise by Fegely correcting his mistake. Here, the State provided the correct data to Wood in a timely manner and notified her of the correct times in court filings. There was no discovery violation. Fegely simply caught the mistake he made in his presentation and the State provided an updated version of Exhibit 256 as a result.

Even if the State had committed a discovery violation, the district court had wide latitude to fashion an appropriate sanction. The court was not required to suppress the presentation. Importantly, the mistake did not affect Fegely's overall opinion, which had been his opinion since the beginning of the case—that the data from the TracFone and Wood's cellphone was consistent with the two phones being together. Discovery sanctions do not mandate that a party be severely

punished for inadvertent mistakes that did not prejudice the other party. The district court here did not abuse its discretion by admitting Exhibit 256.

VI. The district court properly denied Wood's motion for a mistrial.

Wood asserts that the district court erred in denying her motion for mistrial based on her allegation that the State shifted the burden of proof to her through questions to witnesses and comments in its closing argument.

"A fundamental principle of our criminal justice system is that the State prove every element of a charged offense beyond a reasonable doubt . . . ." *State v. Daniels*, 2011 MT 278, ¶ 33, 362 Mont. 426, 265 P.3d 623. Accordingly, the State may not shift the burden to the defendant to disprove any element of the offense. *Id.* The burden is shifted when "the state requires the accused to prove that which, by virtue of the definition of the crime, the prosecution is required to prove beyond a reasonable doubt." *State v. Price*, 2002 MT 284, ¶ 36, 312 Mont. 458, 59 P.3d 1122.

A party may generally comment on or provide evidence to rebut assertions made in the defendant's opening statement or provide rebuttal to the defendant's theory of the case. *State v. Hardy*, 2023 MT 110, ¶ 56, 412 Mont. 383, 530 P.3d 814 (citing *State v. Miller*, 2022 MT 92, ¶ 28, 408 Mont. 316, 510 P.3d 17); *see also State v. Makarchuk*, 2009 MT 82, ¶ 24, 349 Mont. 507, 204 P.3d 1213

(holding that it was permissible for the prosecutor to point out facts at issue that could have been controverted by persons other than the defendant, but were not).

Although this Court has not addressed this specific issue, courts in other jurisdictions have held that a prosecutor does not shift the burden by asking witnesses about the defendant's ability to conduct testing through the crime lab. *See Van Duser v. State*, 796 P.2d 1322, 1324 (Wyo. 1990); *Ordway v. Commonwealth*, 391 S.W.3d 762, 796 (Ky. 2013). In *Van Duser*, the prosecutor asked two crime lab witnesses whether the defendant had requested that the crime lab test certain evidence. *Van Duser*, 796 P.2d at 1323-24. The witnesses responded that the defendant had not submitted evidence for testing but, if he had, they would have tested the evidence. *Id.* The Wyoming Supreme Court held that this line of questioning did not shift the burden of proof to the defendant. *Van Duser*, 796 P.2d at 1324. The court stated:

> Appellant in effect argues that any testimony which tends to show that a defense argument is not supported by evidence is improper, because it implies that appellant has the burden of proving his innocence. We disagree. It is permissible for a prosecutor to elicit testimony to demonstrate a lack of evidentiary support for a theory advanced by defense, so long as the prosecutor does not suggest that defendant must testify or that defendant bears the burden of proof.

Id.; *accord Ordway*, 391 S.W.3d at 796.

During his opening argument, Wood's counsel argued that the State should have tested items found at the crime scene for DNA, including cigarette butts, a

shovel, the two-by-six, and the plywood. (Tr. at 988.) Wood's counsel also faulted the State for not testing a shoe print that was on the plywood. (Tr. at 989.) Wood's counsel stated that if the shoeprints or "DNA were tested [or] analyzed," they could have come "back as someone else." (*Id.* at 989.)

Agent Hilyard explained during his testimony that he took photos of the plywood to preserve the shoe impression. (Tr. at 1451.) The prosecutor then asked if he documented the shoe impression so that it could be "analyzed later on by anyone that wishes to do so[?]" (*Id.* at 1452.) Agent Hilyard responded affirmatively. (*Id*.) During a break in the proceedings, Wood's counsel objected to this type of question, arguing that it shifted the burden to the defendant to conduct testing. (*Id.* at 1460.) The prosecutor responded that he was not suggesting Wood should have tested evidence but, rather, that "this jury should know that all parties have access, that the State is not secreting evidence, keeping it from anybody." (*Id*. at 1460-61.)

The court's ruling on Wood's objection was ambiguous. First, the court advised the State that it thought it would be better if the State stuck to questions about what evidence was collected and where it went after being collected as opposed to who could test the evidence. (Tr. at 1463-64.) However, the State then advised the court that it planned on asking witnesses from the crime lab about the independence of the crime lab and whether they would only test evidence for the

prosecution. (*Id.* at 1464-65.) The court advised the parties that it would allow that line of questioning, stating "[t]he crime lab can testify as to what their job is, what direction they've been given and their obligation to both parties with regard to the testing." (*Id.* at 1466-67.) Accordingly, Wood's assertion in her brief that the court admonished the prosecution to not ask such questions is incorrect. (*See* Br. at 78.)

During Agent Hilyard's cross-examination, Wood's counsel asked numerous questions to highlight Wood's perceived failure of the investigators to test certain evidence, such as the plywood, axe, shovel, and the two-by-six. (Tr. at 1498-99.) Agent Hilyard responded that the evidence had been collected and retained but had not been sent to the crime lab for further testing. (*Id.*) Wood's counsel continued this line of questioning with Agent McCarvel, faulting him for not sending certain items of evidence to be tested. (*Id.* at 1986-89.)

Consistent with the direction from the court, crime lab witness Wilson testified that the crime lab would conduct testing for both the prosecution and defense. (Tr. at 1696.) Following Wilson's testimony, Wood's counsel moved for a mistrial, relying on the same burden-shifting argument. (Tr. at 1747.) The court denied Wood's motion for a mistrial and declined to find that the State had committed an error. (*Id.* at 1753-54.) The court stated it did not believe the State was "burden shifting when in general we say the crime lab can receive requests from anyone." (*Id*. at 1754.) However, "in an abundance of caution," the court

ordered the State to not ask any additional questions from witnesses about who could obtain testing of evidence. (*Id.*) The State followed the court's admonition.

During closing arguments, the prosecutor rebutted Wood's theory that additional testing would have pointed to another suspect by stating that "all those items were collected for testing. They could have been tested if somebody wanted them tested." (Tr. at 2574.) The prosecutor clarified that the evidence had been collected by law enforcement and it remained available for testing; the State had not secreted evidence. (*Id.* at 2575.)

After the prosecutor concluded his closing argument, Wood's counsel again moved for a mistrial. (*Id.* at 2599-2600.) The court again denied the motion and declined to find the State had improperly shifted the burden, finding that it was a "fine line," but that the State was allowed to discuss "the fact that that information is available to both parties . . . ." (*Id.* at 2602-03.) During her closing, Wood repeatedly faulted the State for not conducting additional DNA testing on the plywood, shovel, two-by-six, and other pieces of evidence. (*Id*. at 2613-14.)

The State was properly allowed to rebut arguments from Wood that the evidence was collected but then secreted and not tested. The court instructed the jury that it was the State's burden to prove every element of the crime beyond a reasonable doubt. (Doc. 401, Instr. 14.) The court also instructed the jury that Wood could rely on the failure of the State to meet its burden and she had "no

burden to testify, offer any evidence, or conduct any investigation." (Doc. 401, Instr. 7.) The jurors are presumed to have followed these instructions. *See Hardy*, ¶ 70.

Furthermore, during his closing argument, the prosecutor stressed to the jury that the State had the burden of proving Wood guilty beyond a reasonable doubt. (*See* Tr. at 2555, wherein the prosecutor stated: "We have the burden. It's our burden to prove the defendant's guilt beyond a reasonable doubt, unanimously the 12 of you. That's our burden; we accept that burden.") Coupled with the court's jury instructions, the prosecutor's explicit reminder that the State alone shouldered the burden of proof was sufficient to prevent any perceived prejudice to Wood from the claimed burden shifting. *See State v. Favel*, 2015 MT 336, ¶ 28, 381 Mont. 472, 362 P.3d 1126; *Makarchuk*, ¶¶ 11, 26. The district court did not abuse its discretion by denying Wood's motion for a mistrial.

VII. The cumulative error doctrine is inapplicable.

This Court will reverse a conviction under the cumulative error doctrine only "where numerous errors, when taken together, have prejudiced the defendant's right to a fair trial." *Smith*, ¶ 16 (quoting *State v. Cunningham*, 2018 MT 56, ¶ 32, 390 Mont. 408, 414 P.3d 289). "A Defendant is entitled to a fair trial, not to a trial free from errors." *Id.* To establish cumulative error, the defendant must show

prejudice. *Id.* Prejudice may result from the cumulative effect of two or more individually harmless errors. *Id*. "[T]he cumulative effect of errors will rarely merit reversal . . . ." *Smith*, ¶ 17.

Here, the cumulative error doctrine does not apply because the district court did not err. However, even if this Court concludes there were multiple errors, Wood failed to prove she was prejudiced. First, even without the CSLI evidence, there was overwhelming circumstantial evidence of Wood's guilt. There was sufficient non-CSLI evidence to show that Wood left the pampered chef party, made a diversionary 9-1-1 call, travelled to Matthew's residence, shot him, and returned to her residence.

There was overwhelming evidence that Wood had the motive, means, and opportunity to kill Matthew. Matthew had sole custody of S.L. Wood wanted S.L. returned to her "for good." (Ex. 182.) Wood wrote in the margin of a religious book that this could only be accomplished with "Matt gone." (Ex. 292.) Wood purchased a firearm two months before the murder, did not tell anyone about it, and then inexplicably got rid of it. Even Stobie, her long-time boyfriend, was ignorant of the purchase until after the murder. The firearm was a .38 caliber revolver, a gun that was consistent with having fired the bullet found in Matthew's hand. There was gunshot residue in Wood's vehicle. As detailed extensively above, even without the CSLI, there was overwhelming evidence that Wood

traveled to Matthew's residence, consistent with the timeline in which Miho heard the gunshots. Accordingly, Wood was not prejudiced by the accountability instruction or by the lack of a "mere presence" instruction, even if the district court erred in giving or not giving those to the jury. The CSLI evidence was only cumulative of other evidence that proved the same facts beyond a reasonable doubt.

Wood was not prejudiced by the court admitting that evidence, by Fegely catching his mistake on the time zone error for the text messages, or by the prosecutor asking witnesses about the ability of other parties to test evidence. As Wood was not prejudiced by any claimed error, she is not entitled to relief under the cumulative error doctrine.

CONCLUSION

For the foregoing reasons, this Court should affirm Wood's conviction.

Respectfully submitted this 19th day of September, 2023.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Bjorn Boyer*
BJORN BOYER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 16,365 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Bjorn Boyer
BJORN BOYER

CERTIFICATE OF SERVICE

I, Bjorn E. Boyer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-19-2023:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Kathryn Grear Hutchison (Attorney)
P.O. Box 200147
Helena MT 59620
Representing: Danielle Wood
Service Method: eService

Naomi R. Leisz (Attorney)
Sanders County Attorney
P.O. Box 519
Thompson Falls MT 59873
Representing: State of Montana
Service Method: E-mail Delivery

Electronically signed by Janet Sanderson on behalf of Bjorn E. Boyer
Dated: 09-19-2023