

No. 91331-5

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Division III
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32226-2-III

STATE OF WASHINGTON, Respondent,

v.

TROY J. WILCOXON, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Troy Wilcoxon and James Nollette were tried together for the burglary of Lancer Lanes Casino in Clarkston. Pretrial, Wilcoxon's attorney moved to sever Wilcoxon's case from Nollette's under CrR 4.4, arguing that introduction of statements made by Nollette concerning the involvement of his "friend" in the burglary would violate Wilcoxon's confrontation rights under *Bruton v. U.S.*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The trial court denied the motion to sever and, at trial, admitted Nollette's statement into evidence without redaction and without a limiting instruction to the jury that it could only consider Nollette's statement against Nollette, not Wilcoxon.

The trial court further denied multiple defense requests to continue the trial to obtain expert testimony concerning the ability to use cell tower data to identify the location of a cell phone placing a call, even though the State had not given notice of its intent to present expert testimony or identified its testifying officer as an expert until the day before trial. The trial court allowed the State to present irrelevant and misleading evidence about the location of the cell towers and the proximity of the callers to the tower without an adequate scientific basis.

Singly and cumulatively, these errors denied Wilcoxon a fair trial.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in denying Wilcoxon's motion to sever his trial from Nollette's trial.

ASSIGNMENT OF ERROR 2: The trial court erred in admitting statements inculcating Wilcoxon by a non-testifying co-defendant without a limiting instruction.

ASSIGNMENT OF ERROR 3: The trial court abused its discretion in admitting irrelevant and prejudicial cell tower location data.

ASSIGNMENT OF ERROR 4: The trial court erred in denying Wilcoxon's motion to continue the trial to obtain expert testimony.

ASSIGNMENT OF ERROR 5: Cumulative error deprived Wilcoxon of a fair trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: When a non-testifying co-defendant's statement implicating his "friend" are introduced at a joint trial, is *Bruton* implicated? YES.

ISSUE 2: Did the trial court erroneously enter its conclusion of law that introducing Nollette's statement in a joint trial would not significantly

impinge upon Wilcoxon's confrontation rights because the statement did not expressly name Wilcoxon, even though the statement directly implicated another defendant? YES.

ISSUE 3: Was the *Bruton* error harmless? NO.

ISSUE 4: Was the trial court obliged to instruct the jury *sua sponte* that Nollette's statements could not be used as substantive evidence against Wilcoxon? YES.

ISSUE 5: Did the instructional error affect Wilcoxon's substantive rights? YES.

ISSUE 6: Was the evidence of the locations of cell towers that serviced Wilcoxon and Nollette's phone calls on the night of the burglary relevant to any disputed issue in the case? NO.

ISSUE 7: Was testimony and argument about the locations of the individuals who placed the calls unduly prejudicial because it lacked sufficient scientific basis and was substantially more prejudicial than probative? YES.

ISSUE 8: Was the admission of misleading cell phone tower and location evidence harmless? NO.

ISSUE 9: Was Wilcoxon denied his constitutional right to present a defense, his right to effective assistance of counsel and his right to resources equivalent to those available to a non-indigent defendant when the trial court denied his motion to continue the trial to obtain expert testimony on cell phone data analysis? YES.

ISSUE 10: Did the cumulative effect of the multiple errors deprive Wilcoxon of a fair trial? YES.

IV. STATEMENT OF THE CASE

Police responded to Lancer Lanes Casino in Clarkston on the morning of May 23, 2013, to find lock boxes opened and just over \$29,000 cash taken from a drawer. A RP 85-88, 96.¹ Video surveillance at the casino captured a suspect entering through the back door at 1:56 a.m. and leaving at 2:08 a.m. A RP 95. The suspect was wearing a large black garbage bag over his body and went immediately to the basement upon entering, before approaching the lockboxes, entering the cage, opening the money drawer and removing the cash, and exiting from a side door. A RP 101, 105, 108, 110-11. At the time of the burglary, there was additional cash located in the count room, the keys to which were located

¹ The Verbatim Reports of Proceedings in this case are filed in four consecutively-numbered volumes identified as volumes A through D. Throughout this brief, for ease of reference, the reports will be referenced by volume and page number.

in the same area as the other keys. None of the cash in the count room was disturbed. B RP 381.

The burglary appeared to law enforcement to be similar to an attempted burglary that had occurred a week before at the casino; it occurred at about the same time, the suspect in the prior attempt entered through the same door and went immediately to the basement, was covered in a large plastic garbage bag, and walked in a similar manner. A RP 112-14, 115. On the prior occasion, the burglar pulled a breaker switch that provided power to the video surveillance system. A RP 116; B RP 345. The previous burglary was interrupted by a casino employee, Eric Glasson, who was sleeping there that night, causing the burglar to leave without taking anything. A RP 115.

Troy Wilcoxon was employed as a dealer at the casino at the time of the burglary. A RP 130. He had worked in the counting room on a couple occasions. B RP 387. He continued to come to work after the burglary until he failed to show up for a scheduled shift. B RP 351-52.

In the course of the investigation, law enforcement obtained video footage from a bikini bar in Lewiston called the Candy Store showing Troy Wilcoxon, Eric Glasson, and others entering and leaving the bar on the night of the burglary. A RP 118, 120. Wilcoxon invited Glasson to go

and gave him a ride. B RP 360-61. They arrived shortly before midnight. A RP 121. They played some pool and Wilcoxon paid for Glasson's entry fee as well as one of his drinks. B RP 360-61. The co-defendant, James Nollette, arrived a few minutes later and another casino employee came about half an hour later. A RP 122. Wilcoxon left the bar with Nollette at about 12:49 a.m.; Nollette returned a few minutes later, but Wilcoxon did not. A RP 126-27. Wilcoxon offered Glasson a ride back to the casino, but Glasson declined. B RP 368. At 2:02 a.m., Nollette left the bar talking on his cell phone and returned at 2:17 a.m. A RP 127. Nollette, Glasson and the others with them left within a few more minutes. A RP 127. They went to a party at another person's house until about five a.m. B RP 362-63.

Police interviewed Wilcoxon, who told them he had spent the day with Nollette watching a basketball game before going to the casino sometime between 10:00 p.m. and midnight. A RP 129, 131. He wanted to go drinking that night so he invited a group of people that he worked with at the casino to go to the Candy Store. A RP 132-33. He stated that he left because his girlfriend worked there and she was flirting with other men. A RP 133. After leaving, he went to his sister's house in Lewiston and denied returning to Clarkston. A RP 134. Later, he also went to the house of another friend, Eric Bomar, in Lewiston, and stayed there until

the sun came up. A RP 134-35. At some point, Nollette also went to Bomar's house that same morning. A RP 135. Wilcoxon also told police that shortly after the burglary, he and Nollette went on a trip to Las Vegas to play in a poker tournament, where he won \$5,000 in an event. A RP 136-37, 138. The casino owner later confirmed that Wilcoxon had asked for the time off well in advance. B RP 379.

When police confronted Wilcoxon that information could be available on his cell phone, his demeanor changed and he grabbed the phone back from the desk where he had placed it. A RP 146. Police obtained a search warrant for phone records for Wilcoxon and Nollette, which showed numerous calls between the two on the night of the burglary. A RP 159, 166-67.

James Solem, who occasionally played cards with Nollette, described a conversation he had with Nollette in which Nollette reported talking to a friend about robbing Lancer's Lane because the security was poor. B RP 297, 299, 301. Nollette then told Solem that his friend had broken into the casino while Nollette was at the Candy Store, and he got a phone call from his friend in the middle of the burglary. 2 RP 304. Nollette told Solem that his friend owed \$15,000 and his mom was behind

in bills. 2 RP 305. Solem advised Nollette to go to the police and share his involvement and Nollette said he would. 2 RP 306.

Wilcoxon was arrested on a warrant at his home. C RP 550-52. The State charged him with second degree burglary, first degree theft, and conspiracy to commit burglary. CP 1-3. The State subsequently filed notice of its intent to seek an exceptional sentence based upon aggravating factors found in RCW 9.94A.535(3)(d) (major economic offense) and RCW 9.94A.535(3)(n) (position of trust). About four weeks before trial, Wilcoxon's privately retained attorney withdrew with leave of the court, and new counsel was appointed to represent him. CP 21-22.

Wilcoxon moved to sever his trial from Nollette's trial based in part upon violation of his confrontation rights resulting from introducing Nollette's statements to Solem against Wilcoxon. CP 23, 26. The State opposed the motion on the grounds that Nollette's statement did not expressly name Wilcoxon as the "friend" who called him. CP 33. The State further argued that Nollette's statements were admissible as statements contrary to penal interest under ER 804(b), an exception to the hearsay rule. The trial court denied Wilcoxon's motion to sever and entered findings of fact and conclusions of law acknowledging that Nollette's statements implicated a third party, concluding that admission

of Nollette's statements "would not significantly impinge upon the Defendant's confrontation rights" because Nollette did not directly name the person who committed the robbery. CP 35.

Wilcoxon also moved in limine to exclude testimony that would purport to identify the location of an individual's cell phone from cell tower data. CP 37, 44-46. The trial court initially granted the motion as to testimony that the calls were made from the vicinity of the casino. A RP 64. However, the trial court allowed the State to present testimony about the location of the cell phone towers that serviced the calls, while acknowledging that which tower serviced the call "doesn't necessarily mean anything." A RP 64-70. At trial, the police analyst testified that the cell tower that serviced a call from Wilcoxon to Nollette was located right across the street from the casino. A RP 167, 175. A different cell tower was identified as servicing an attempted call from Nollette to Wilcoxon; otherwise, no additional cell tower data was available. A RP 175; B RP 226. Despite the ruling *in limine*, a second witness for the State was allowed to testify that the phone would generally seek the closest tower to connect a call, although there were many factors that could affect which tower would connect. C RP 469-70. Pretrial and during trial, Wilcoxon's attorney moved for a continuance to identify an expert and obtain

testimony to respond to the State's cell tower testimony. A RP 65-70, C RP 466-68. The motion was denied. A RP 69; C RP 468.

The police also testified that there was a similar pattern of multiple phone calls between Wilcoxon and Nollette on the night of the prior unsuccessful burglary on May 14th. A RP 183-84. An investigating officer testified over Wilcoxon's hearsay objection that he had heard Wilcoxon owed a friend \$15,000. B RP 212-13.

Investigators subpoenaed Bomar's bank records and noted suspicious cash deposits occurring in June 2013 that totaled nearly \$15,000. B RP 211. Bomar testified that the deposits were gambling winnings. C RP 511-12. The State presented testimony from a Washington State Gambling Commission agent who testified that Bomar's statements about the money were inconsistent, but he could not identify the source of the cash deposited in his account and he could not say whether the cash did or did not come from gambling. C RP 565-66, 569.

Bomar, who saw Nollette and Wilcoxon in the early morning hours after the burglary, initially denied knowing anything and asked to consult with an attorney before speaking with police. C RP 502, 515-16. At trial, Bomar described Nollette and Wilcoxon as "agitated" or "excited" when they arrived. C RP 503. Bomar also remembered Troy mentioning the

casino and saying something about “getting away with it.” C RP 503-04. Bomar assumed he was talking about the burglary at the casino, because Wilcoxon and Nollette had previously talked about how easy it would be to break in and steal the money, although they had made those comments generally and not as part of any specific plan. C RP 506, 522. Bomar acknowledged that lots of casino employees talked about poor security and the possibility of break ins. C RP 522. Wilcoxon described to Bomar entering through the back door, going downstairs and killing the security cameras, and going into the cage to get the money. C RP 507. A few days later, Wilcoxon gave Bomar \$1,000. C RP 510. Bomar denied knowing anything about Wilcoxon or Nollette owing any money to other people. C RP 515. Bomar also testified that he was told he would be charged and go to jail if he did not cooperate with law enforcement when he initially requested an attorney. C RP 531.

For the defense, Kevin Nollette, brother of James, testified that he was the employee in charge of surveillance at the casino at the time of the burglary. C RP 593. It was commonly known around the casino that the person who had broken in on the first occasion wore a garbage bag. C RP 595-96. The video revealed only a brief view of the face of the intruder, who appeared to be somebody with a thick goatee. He recognized the face

as a person named Greg Hernandez, a relative of a casino employee with whom he was familiar. C RP 597, 606-07.

Tanya Routt, a casino employee, also testified for the defense. D RP 616-17. She was in charge of locking the casino door and did so on the night of the burglary, but the door was not forced open. D RP 619. She knew Wilcoxon to gamble and saw him win large amounts of money. D RP 619. Routt confirmed Kevin Nollette's testimony that the casino employees knew the intruder in the first burglary attempt had worn a garbage bag and talked about it with each other. D RP 620. Routt believed that the burglar was a man named Tony Padron because he had just quit after working at the casino for years. D RP 623-24.

Stephanie Marsh, a dealer at the casino and the mother of Nollette's child, testified that she also knew Wilcoxon and Bomar, and she dealt cards to Bomar a lot over the years. D RP 625-27. The lockboxes in the cage where the keys were kept were visible from a common area accessible to employees and customers. D RP 633. The boxes containing the keys were labeled to indicate what the keys inside belonged to, such as surveillance, or cage box. D RP 634. Marsh testified that Wilcoxon was an advanced poker player who could win close to \$5,000 in one sitting, and that a dealer could make between \$1,000 and \$1,600 in tips on a good

night. D RP 638. The night before the burglary, Marsh testified that Wilcoxon won close to \$600 and also received between \$500 and \$600 in tips, and he was very excited. D RP 639.

Lastly, Michelle Wilcoxon, Wilcoxon's sister, testified that he had gone to her house at about 2:15 or 2:20 a.m. the morning of the robbery. D RP 647-48. He was upset about a girl and did not stay for very long. D RP 653. She further stated that she was arriving at Wilcoxon's house on the morning he was arrested and as he was coming outside, law enforcement officers approached and told him to get down, and he did. D RP 649. She denied that he was running out of the house. D RP 650.

In closing, the defense relied upon inconsistencies in clothing and the timing of Wilcoxon's phone calls with Nollette compared to the video of the burglar's activities in the casino to argue that the burglar was not Wilcoxon. D RP 699. Defense counsel also argued that Bomar's testimony was coerced by police. D RP 700-01. Lastly, he identified other suspects ruled out by the police after a nominal investigation. D RP 703-04.

In its instructions to the jury, the trial court gave no limiting instruction concerning the jury's inability to use Nollette's statements

against Wilcoxon. CP 49-79. In closing, the State relied upon Nollette's statements to Solem to argue the guilt of both defendants, stating,

They're going over to Mr. Bomar's; they're going to meet up. They're – and that's exactly what happens. He meets the guy who – remember, he told Mr. Solem, my friend committed the burglary; he called me while the burglary was being committed.

D RP 689. And later,

And the big thing: only one person called Mr. Nollette. Mr. Nollette said he got a call from the burglar during the commission of the crime. There's only one person that called Mr. Nollette during the time of the burglary.

D RP 734. The prosecutor later argued,

And, again, I submit, so if this isn't an inside job, then now does Mr. Nollette, who told – tells him that he discussed it with his friend, who ultimately committed the crime – how would Mr. Solem know about the VHS?

D RP 736. And later,

June 9, he suddenly has something he needs to get off his chest. Not the night of, not the night after, but after he gets back from Las Vegas with his friend. What doesn't he say to Mr. Solem? He doesn't talk about the four calls. He tells – says I got a call from my friend while he was committing the burglary. He doesn't say I called him back four times. He doesn't say I met up with him later that night. He doesn't say we gave a guy money. And he doesn't really tell him about – about going to Vegas; that comes up later.

D RP 744.

The State also relied heavily in closing upon the cell tower data, arguing that the cell tower data tended to show the locations of the defendants:

We know – P-15 – we know that by 1:04 his first call is bouncing off this cell tower right there and that his calls continue to bounce off that cell tower until his last call at 2:23 to Mr. Nollette. When he's where? That's the cell tower; here's his sister's house. 2:23; he's at – he's at his sister's house . . . What cell tower is he bouncing off when he makes the call to Mr. Nollette? He makes another call at two seconds during the same minute still bouncing off that 203 Fair Street tower. And then he makes a 211-second call – for almost 4 minutes at 2:24 that starts at the tower at 223 and finishes at the Southway 700 block, 16th Avenue cell tower. He's moving headed home.

D RP 684-85. And later,

By that time, again, where's Mr. Wilcoxon? Up there – his service – his call is being serviced by that tower. Where's Mr. Wilcoxon – or, ah, Nollette? Well, he's at the Candy Store and we know that because he's on video. But where's his cell call being serviced? Well, it's that one, the light orange sticker. That's the (inaudible) Sprint because, remember, Mr. Nollette has Sprint, so he's there – calling from there. That's the nearest cell tower for him.

D RP 688. And again,

The cell phone experts; we heard the testimony of – of Officer Bryon Denny. Calls will be made from the cell phone to the tower nearest because that's going to be your strongest signal and especially in the Valley where we have contour changes and – and elevation changes. Ah, you can look at the phone records; you can see the travel; you can see, ah, generally, where they are and whether they're –

whether or not Mr., ah, Wilcoxon was not at his sister's house when he left the Candy Store.

D RP 741.

The jury convicted Wilcoxon on all counts and answered "yes" to both of the aggravating circumstances. D RP 769-71. The jury was unable to reach a verdict as to Nollette, and a mistrial was declared. D RP 765-69, 771. The trial court imposed an exceptional sentence of 24 months. D RP 790; CP 89, 91. Wilcoxon timely appeals. CP 118.

V. ARGUMENT

I. Because Nollette's statements implicated Wilcoxon and were not redacted to eliminate reference to Wilcoxon's existence, the failure to grant Wilcoxon's motion to sever his trial from Nollette's violated Wilcoxon's rights under the Confrontation Clause.

In a joint trial, admission of one defendant's statement implicating another defendant violates the non-confessing defendant's Sixth Amendment right to confront accusers, when the confessing defendant does not testify at the trial to be cross-examined. *See generally Bruton v. U.S.*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); *see also State v. Medina*, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002). To avoid the constitutional implications thus resulting from joint trials, CrR 4.4(c)(1)

provides that a defendant's motion for severance on the basis of inadmissible statements of co-defendant "shall be granted" unless the prosecuting attorney elects not to offer the statement, or the statement is redacted to eliminate prejudice to the moving defendant resulting from its admission. The rule addresses those narrow circumstances "in which an out-of-court statement by a codefendant expressly or by direct inference from the statement incriminates his fellow defendant." *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982) (quoting *State v. Ferguson*, 3 Wn. App. 898, 906, 479 P.2d 114 (1970)).

Prejudice to the defendant's Sixth Amendment rights can be ameliorated when the co-defendant's statement is redacted "to eliminate not only the defendant's name, but any reference to his or her existence." *Medina*, 112 Wn. App. at 49 (quoting *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 294 (1998)). In *Gray v. Maryland*, 523 U.S. 185, 192, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998), the U.S. Supreme Court considered whether a redaction that did not name the co-defendant but acknowledged the existence of a co-defendant was subject to *Bruton's* holding and concluded it was. In contrasting the outcome of *Richardson*, the *Gray* Court observed that the confession in *Richardson* had been redacted to omit any reference to Marsh's participation in the crime, stating only that the declarant and another named person discussed

the murder in the car on the way to the victim's house. In *Richardson*, Marsh testified at trial that she was present in the car, which, considered in concert with the co-defendant's confession, would have tended to show she had knowledge of the murder. *Gray*, 523 U.S. at 190-91. Because the statement at issue in *Richardson* was not "incriminating on its face" and did not expressly implicate the co-defendant, the Supreme Court upheld the admission of the co-defendant's confession in *Richardson*. *Gray*, 523 U.S. at 191.

By contrast, the confession introduced in *Gray*, while redacted to state "deleted" rather than naming the defendant directly, still referred directly to the existence of a non-confessing defendant. 523 U.S. at 192. The *Gray* Court reasoned that the jury would "often realize that the confession refers specifically to the defendant," stating, "A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer." *Id.* at 193. Moreover, statements that point directly to another perpetrator and are generally accusatory are precisely the kinds of statements that create a need for cross-examination, whether the defendant is expressly named or not. *Id.* at 194. Unlike in *Richardson*, where the confession did not directly accuse another person at all, the *Gray* court acknowledged that the redacted confession that failed

to name but still acknowledged the existence of the co-defendant gave rise to inferences “that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.” *Id.* at 196.

In the present case, the State argued that Nollette’s statements to Solem were admissible because they did not name Wilcoxon directly, but merely referred to him as Nollette’s “best friend.” CP 39. The State’s assertion that this statement would not directly implicate Wilcoxon as the subject of the statement was incorrect for precisely the reasons the *Gray* and *Richardson* Courts recognized – the statement referred to the existence of and directly accused another defendant, which the jury would immediately assume was the person sitting next to Nollette at the defense table. The State’s argument further failed to acknowledge the *Gray* court’s recognition that nicknames and descriptions fall within *Bruton*’s protection, even though a confession using a nickname would still require inference to know that it referred to the co-defendant. *See* 523 U.S. at 195 (“This Court has assumed, however, that nicknames and specific descriptions fall inside, not outside, *Bruton*’s protection”) (*citing Harrington v. California*, 395 U.S. 250, 253, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969)).

Under *Richardson* and *Gray*, introduction of a co-defendant's statement that refers to the existence of another defendant violates the Sixth Amendment rights of the non-confessing defendant. Here, the trial court abused its discretion when it denied Wilcoxon's motion to sever his trial from Nollette's trial to preserve Wilcoxon's confrontation rights. "Once there has been a *Bruton* error, the prosecution has the burden of showing that the error was harmless beyond a reasonable doubt." *U.S. v. Peterson*, 140 F.3d 819, 822 (9th Cir. 1998). Here, Nollette's statement implicating his "friend" in the burglary comprised a substantial part of the State's case against Wilcoxon. Further compounding the error, no limiting instruction was given that precluded the jury from using Nollette's statement as evidence of Wilcoxon's guilt. *See, e.g., Richardson*, 481 U.S. at 211 ("We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.") (emphasis added). Moreover, in its closing argument, the State relied upon Nollette's statement to argue for Wilcoxon's guilt, reminding the jury that Wilcoxon and Nollette had called each other during the time frame of the burglary and Nollette had told Solem that "his friend" called him while committing the burglary. D RP 689, 734, 736.

Under these facts, it cannot be said that the *Bruton* error did not affect the outcome of the trial. The conviction should be reversed and the case remanded for a new trial.

II. The trial court's failure to give the jury a limiting instruction that Nollette's statement could not be used as evidence of Wilcoxon's guilt was plain error.

Limiting instructions are frequently necessary to reduce the prejudicial effect of joinder. *U.S. v. Sauza-Martinez*, 217 F.3d 754, 760 (9th Cir. 2000). In *Sauza-Martinez*, the Ninth Circuit Court considered the admission of a co-defendant's out-of-court statements implicating the defendant to impeach the co-defendant. *See* 217 F.3d at 758-59.

Although the government had represented to the court in opposition to severing the trials that it would propose a limiting instruction, it did not do so and defense counsel did not object or request a limiting instruction at the time the statements were introduced. *Id.* at 759. In applying the plain error standard, the *Sauza-Martinez* Court held that the court was obligated to give a limiting instruction *sua sponte* that the co-defendant's statements were not admissible as substantive evidence against the defendant. *Id.* at 760.

The facts of the present case fall under the *Sauza-Martinez* rule that the trial court must instruct the jury *sua sponte* when it admits statements of a co-defendant inculcating the defendant. The State's only proffered grounds for admitting Nollette's statements against Wilcoxon in spite of the hearsay rule is ER 804(b)(3). But Nollette's statements, by and large, do not tend to inculcate Nollette; they tend to inculcate Wilcoxon. While statements Nollette made tending to incriminate himself (such as having discussed the security shortcomings at the casino with Wilcoxon) may have been admissible, non-self-inculpatory portions of his statement are not automatically admissible simply because they were made in proximity to self-inculpatory statements. *See Williamson v. U.S.*, 512 U.S. 594, 600-01, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994) ("In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.") Moreover, the State only nominally argued this basis for admissibility and did not establish any factual basis to show trustworthiness as required under the rule.

Under *Richardson*, a limiting instruction is plainly required when admitting a co-defendant's statement to ensure it is not used as substantive evidence of the defendant's guilt in contravention of the defendant's

confrontation rights. Consequently, under *Sauza-Martinez*, the court was required to give the limiting instruction *sua sponte* to the extent the State sought to introduce the statements as substantive evidence against Nollette. Moreover, the evidence against Wilcoxon, absent Nollette's statement, was not so overwhelming as to warrant a conclusion that Wilcoxon's substantial rights were not affected. *See Sauza-Martinez*, 217 F.3d at 760-61. Absent Nollette's statement, the strongest evidence against Wilcoxon was Bomar's testimony that Wilcoxon had told him about the burglary. But Bomar also testified that he was threatened with prosecution if he did not speak to police when he requested an attorney, and Bomar was independently investigated by the Washington State Gambling Commission. A jury could have found ample reason to believe that Bomar had a motive to implicate Wilcoxon either due to coercive pressure from law enforcement or to divert suspicion from himself.

Under the facts of this case, as in *Sauza-Martinez*, failure to give an appropriate limiting instruction is reversible error. Wilcoxon's convictions should be vacated and his case remanded for a new trial.

III. The trial court abused its discretion in admitting testimony about the location of cell towers that processed the calls between Wilcoxon and Nollette.

Under ER 402 and 403, evidence is only admissible when it is relevant, and even then only when its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less likely. ER 401. The trial court acts as the gatekeeper in weighing the admissibility of the evidence, and its determination will not be overturned absent a showing of abuse. *State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984).

At issue in the present case are two pieces of evidence: (1) data showing the location of the cell towers that serviced the calls between Wilcoxon and Nollette on the night of the burglary; and (2) testimony that the location of the defendants could be established from the location of the towers servicing the calls. The trial court granted Wilcoxon's motion to exclude the second, but admitted the first, stating, "[T]o me it goes to weight and not admissibility, ah, to show that it pinged off a nearby cell tower . . . [I]t's up to you all to – to – through your witnesses or cross to

explain to the jury what that means or doesn't mean." A RP 64-65.

However, during the presentation of the State's case, the trial court reversed its ruling on the location of the caller without explanation and permitted the State to introduce the evidence. C RP 464-68.

The trial court's ruling was in error because the location of the cell tower was only relevant if it tended to show the location of the individuals participating in the call. But as pointed out in defense counsel's briefing on the motion, proximity to a tower is not the determinative factor in which tower services a call. Factors including signal strength, tower height, elevation, wattage of output, range of coverage, angle of coverage, presence of obstructions, call traffic and other variables affect cell tower connectivity. CP 45-46; *see also U.S. v. Evans*, 892 F.Supp.2d 949, 953 (N.D. Ill. 2012). Without these factors being explained to the jury by a qualified expert, there is a plainly evident risk that the jury will infer that the tower closest to the caller is the one that will connect. This is especially the case because there is no other possible relevance to evidence that Wilcoxon's calls were routed to Nollette through a tower that was close in proximity to Lancer Lanes Casino.

Thus, the cell tower locations in and of themselves are not relevant under ER 401 and should not have been admitted. To the extent the State

sought to admit the cell tower location to show the locations of Wilcoxon and Nollette during the time of the burglary, the evidence was substantially more prejudicial than probative because it invited the jury to use it to infer location even though, as the trial court acknowledged, it “doesn’t necessarily mean anything.” A RP 70.

Moreover, the State did not identify its testifying officer as an expert and the trial court did not appear to recognize him as one. A RP 68, 69-70. While there is some authority that expert testimony on historical cell site analysis is admissible, counsel has been unable to locate any authority that cell tower location data is admissible in the absence of expert testimony to analyze it and explain its significance to the jury. *See, e.g., U.S. v. Sepulveda*, 115 F.3d 882, 890 (11th Cir. 1997). Nor did the State proffer the kind of methodological analysis that has been accepted in courts to show the sector within which the cell phone can reliably be placed. *See, e.g., U.S. v. Machado-Eraza*, 950 F.Supp.2d 49, 55-56 (Dist. Col. 2013) (describing methodology); *Evans*, 892 F.Supp.2d at 954 (describing how expertise is needed to understand cell phone’s ability to connect to a particular tower); *U.S. v. Jones*, 918 F.Supp.2d 1, 3 (Dist. Col. 2013) (describing admissible cell tower sector evidence).

Unlike the expert testimony presented in the federal cases, in the present case, the cell tower location evidence was introduced without explanation as to its significance or the extent of the inferences that could validly be drawn from it. As such, the proffered evidence substantially misled the jury by suggesting the defendants' locations could be inferred by the location of the cell towers that processed their calls alone. The evidence minimized the scientific complexity of evaluating a cell phone tower's coverage as well as its limitations, and was not based on the rigorous scientific analysis deemed acceptable by the federal courts. Because the only probative value of the evidence was its tendency to suggest improper inferences, the trial court erred in admitting the evidence because its potential for prejudice substantially outweighed its nominal (if any) probative value.

Evidentiary errors not of constitutional magnitude are reviewed to determine whether the outcome of the trial reasonably would have been different but for the error. *State v. Jackson*, 102 Wn.2d 689, 685, 689 P.2d 76 (1984). Here, absent the cell tower location information and the hearsay statements of Nollette, both improperly admitted, the remaining case against Wilcoxon is less than overwhelming. Besides the circumstantial facts that Wilcoxon worked at the casino and invited Glasson to the Candy Store before leaving, the remaining evidence

inculcating Wilcoxon is Bomar's testimony, which, as discussed above, is problematic in many respects due to the coercive circumstances in which it was obtained.

In addition, the State relied repeatedly upon the location data in its closing argument, using the location of the towers to trace the defendants' whereabouts and to dispute Wilcoxon's claim that he had been at his sister's house in the early morning hours when the burglary occurred. D RP 684-85, 688, 741. It is reasonable to assume that the inferences the State drew from the location data affected the jury's decision in light of the emphasis placed on the evidence by the State.

In light of the evidence presented in this trial, it is very likely that the cell tower location evidence that purported to demonstrate to the jury where the participants were during the course of the night had a very real and practical outcome on the trial. Because the error likely affected the outcome, the conviction should be reversed and the case remanded for a new trial.

IV. The trial court deprived Wilcoxon of due process of law when it denied Wilcoxon's motion to continue the trial to obtain expert cell analysis testimony, although the State had not previously identified its testifying officer as an expert and Wilcoxon's attorney had been appointed only four weeks before trial.

Ordinarily, the decision to grant or deny a continuance is within the sound discretion of the trial court, reviewed for abuse. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). However, under the circumstances of some cases, denial of a continuance can deprive a defendant of due process of law by rendering the right to present a defense "an empty formality." *State v. Cadena*, 74 Wn.2d 185, 189, 443 P.2d 826 (1968), *overruled on other grounds in State v. Gosby*, 85 Wn.2d 758, 767, 539 P.2d 680 (1975) (*quoting Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)). In *State v. Williams*, 84 Wn.2d 853, 856, 529 P.2d 1088 (1975), denial of a continuance to obtain transcripts was determined to violate the indigent defendant's right to obtain the basic tools of an adequate defense. Likewise, in *State v. Brett*, 126 Wn.2d 136, 222, 892 P.2d 29 (1995), denial of a continuance to obtain an expert evaluation into mitigating factors in a capital proceeding violated the defendant's constitutional right to present evidence of circumstances justifying leniency. And in *State v. Edwards*, 68 Wn.2d 246, 258, 412

P.2d 747 (1966), denial of a continuance to allow the defense to locate witnesses who had been subpoenaed to trial but failed to appear was held to violate the defendant's right to compulsory process.

Here, the State did not identify its testifying officer as an expert witness until the day before trial. A RP 68. Defense counsel was appointed just four weeks before trial. CP 22; A RP 80. There is no indication that defense counsel failed to act diligently, and both the surprise and the short time counsel had to prepare for trial weigh in favor of the continuance. As in *Williams*, Wilcoxon sought to obtain the types of services necessary for counsel to provide effective assistance and present an adequate defense to the inferences the State sought to raise through its cell tower location evidence. Moreover, a defense expert could have provided the scientific rigor to the cell tower location evidence that the State's presentation sorely lacked. Assuming the defense could have presented the same kind of generally accepted analysis described in *Machado-Erazo* and *Jones*, it would have mitigated the likelihood that the jury would draw unfair inferences from the cell tower location evidence and would have further limited the prejudicial impact of the evidence by allowing the defense to illustrate to the jury the precise outer limits of where the parties could have been located in order to have their calls serviced by the towers at issue. Without such expert testimony, it remains

entirely unclear how the defense could have possibly done as the trial court suggested and “utilize the witnesses that are already in the case to, ah, make what use of that you can.” A RP 70.

The denial of the continuance, in this case, effectively deprived Wilcoxon of his right to present a defense with access to the same types of resources available to non-indigent defendants. For the reasons already described above, the error was not harmless and should result in a new trial.

V. Cumulative error deprived Wilcoxon of a fair trial.

The doctrine of cumulative error holds that, when numerous errors are not harmful standing alone, they may be improperly prejudicial in their cumulative effect. *State v. Korum*, 157 Wn.2d 614, 652, 141 P.3d 13 (2006); *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). If the errors, in total, have a prejudicial effect, the remedy is reversal. *Id.*

In the present case, the trial court’s denial of severance, admission of Nollette’s unredacted statements without a limiting instruction, improper admission of unscientific and misleading cell tower data (including its unexplained reversal of its own ruling excluding testimony inferring the location of the caller from the location of the tower), and

failure to grant a reasonable continuance to allow Wilcoxon to secure adequate means of defense, combined to result in an unfair trial. Because of the multiple errors, Wilcoxon was unable to effectively confront adverse witnesses against him and was unable to effectively rebut the State's unsound inferences about Wilcoxon's location at the time of the burglary. Collectively, this evidence comprised the overwhelming bulk of the State's case against Wilcoxon and unfairly tainted the proceedings against him. Even if no individual error standing alone warrants reversal, under the facts of this case, the multiplicity of errors requires that Wilcoxon receive a new trial.

VI. CONCLUSION

For the foregoing reasons, Wilcoxon respectfully requests that the court REVERSE the judgment of conviction and sentence and remand the case for a new trial.

RESPECTFULLY SUBMITTED this 21st day of July, 2014.



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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 21st day of July, 2014 in Walla Walla, Washington.


Andrea Burkhart