Case No. 106104

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,

Plaintiff / Appellee,

v.

JERMEL FLEMING,

Defendant / Appellant.

Appeal from the District Court of Douglas County
Honorable Sally J. Pokorny, District Judge
Case No. 2010-CR-1201

BRIEF OF THE APPELLANT

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ORAL ARGUMENT REQUESTED

Preliminary Statement

This is a direct appeal in a criminal case. After a jury convicted Appellant Jermel Fleming of aggravated robbery, aggravated burglary, kidnapping, conspiracy to commit aggravated robbery, and theft, the trial court sentenced him to 88 months in prison.

On June 20, 2010, Joshua Beham was alone in his apartment in Lawrence, Kansas, when, as he described at trial and to police, four black "kids" wearing bandanas over their faces gained entry and robbed him at gunpoint, taking a television, a video game machine and games, a computer, some marijuana, and a shotgun. Within five days, the Lawrence Police Department had interviewed four black teenage Lawrence residents who all ultimately confessed to robbing Mr. Beham. All four, however, entered into plea bargains in exchange for testifying against a fifth person: Jermel Fleming. Mr. Fleming denied taking part in the robbery.

At trial, the four robbers told greatly inconsistent stories. In some of them, Mr. Fleming masterminded the robbery; in others, he did not. In some, he carried a sawed-off shotgun; in others, he did not. In some, Mr. Fleming was the first into the apartment; in others, he was not. In some, the five purposefully went to rob Mr. Beham; in others, they merely went to buy marijuana from Mr. Beham and wound up robbing him.

On the afternoon of the second day of trial, the State suddenly and without prior disclosure sought to endorse a police detective to testify he could conclude from technical cellular phone records that Mr. Fleming was in the immediate vicinity of the crime at the time it occurred. He produced a report (reproduced in part in the Appendix to this brief) purporting graphically to show as much. The State claimed that, because he was a police

officer, he was not an expert witness and thus did not have to disclose his existence or report before trial. Over the defense's objection, the trial court allowed his testimony.

This was reversible error. The detective plainly gave expert testimony: he was testifying based on specialized training in historical cellular site analysis, including a master's degree and professional certification, making conclusions that a layperson juror could not have drawn from the evidence based on normal life experience. Thus, the State had a duty at least 90 days before trial to disclose the detective's identity and expertise, as well as and the subject matter and substance of his opinions and a summary of the grounds for each. Its failure to do so misled, surprised, and prejudiced Mr. Fleming's defense, violating both Kansas's law of expert discovery and Mr. Fleming's constitutional right to Due Process. Indeed, courts in Maryland, Missouri, and Texas have reached this conclusion on this sort of evidence in virtually identical situations.

Without this evidence – the only evidence against Mr. Fleming that did not come from admitted criminals seeking to avoid the consequences of their crimes – it cannot be said that a reasonable juror would have found Mr. Fleming guilty beyond a reasonable doubt. This Court should reverse his conviction and sentence.

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Nature of the Case

This is a direct appeal in a criminal case.

On January 7, 2011, in case number 2010-CR-1202, a jury in the District Court of Douglas County, Kansas, found Appellant Jermel Fleming guilty of aggravated robbery (K.S.A. § 21-3427, level 3 person felony), kidnapping during commission of a crime (K.S.A. § 21-3420(b), level 3 person felony), aggravated burglary (K.S.A. § 21-3716, level 5 person felony), conspiracy to commit aggravated robbery (K.S.A. § 21-3427/con, level 5 person felony), and theft of value less than $1,000 (K.S.A. § 21-3701(b)(5), class A misdemeanor). On April 28, 2011, the District Court sentenced Mr. Fleming to 88 months imprisonment for aggravated robbery along with shorter sentences for the other offenses to be served concurrently therewith.

Mr. Fleming appeals the District Court's judgment of conviction and sentence.

Statement of the Issues

I. The District Court erred in allowing a police detective with specialized expertise to give expert testimony that he could conclude from cellular phone records that the defendant's phone was in the immediate area of the robbery at the time of the offense, because neither the detective's identity nor his investigation or report were disclosed to the defense before trial, in violation of K.S.A. §§ 22-3212(a)(2), 60-226(b)(6), and 60-237, and depriving the defendant of his right to Due Process under U.S. Const. amend. XIV.

II. The District Court erred in convicting and sentencing the defendant for the class A misdemeanor of theft, because this was multiplicitous with his conviction and sentence for aggravated robbery, in violation of his right to be free from double jeopardy under U.S. Const. amend. V and XIV. As the prosecution admitted at trial, theft is a lesser-included offense of aggravated robbery.

Statement of Facts

A. Robbery of Joshua Beham

On the night of Sunday, June 20, 2010, Joshua Beham was at home alone in the living room of his apartment at 930 Tennessee Street #3 in Lawrence, Douglas County, Kansas (Record Volume V at 214-17). Mr. Beham was a student at the University of Kansas who also worked in maintenance (R. V 214-15). 930 Tennessee was a "four-plex:" a building with four apartments, two on each floor, all with a common corridor (R. V 215). Mr. Beham's was the westerly apartment on the second floor, which he shared with a roommate who was not there that night (R. V 215-16).

Mr. Beham said that, earlier that day, he had received a text message from Dylan Flitcraft asking if Mr. Beham could find Mr. Flitcraft two ounces of marijuana (R. V 229, 231). Mr. Beham knew Mr. Flitcraft through one of his childhood friends, Shawn Brown, though they had not seen each other for some eight months (R. V 229-30, 235-36, 256, 259). Mr. Beham knew Mr. Flitcraft was a high school student in Lawrence (R. V 236-37, 243). Mr. Flitcraft said he had purchased marijuana from Mr. Beham for personal use about 20 times in the past (R. V 249). Mr. Beham said Mr. Flitcraft had come over to his apartment with Mr. Brown to smoke marijuana about five times (R. V 237). Mr. Flitcraft said he had come over only to buy marijuana from Mr. Beham, not to smoke it together (R. V 247, 259).

As to Mr. Flitcraft's text message, Mr. Beham said he responded he could not and would not obtain two ounces of marijuana because "that's a substantial amount" (R. V 230). Instead, Mr. Beham said he offered to find Mr. Flitcraft an eighth of an ounce of marijuana (R. V 231). He said that, at this, Mr. Flitcraft inquired whether he still lived in

the same place, but he did not respond because the question "seemed weird, sketchy" (R. V 231).

Mr. Beham said that, around 11:00 p.m., he heard a knock at the door (R. V 217). He said the door was unlocked and, assuming it was his neighbor with whom he played music, he called out, "Come in" (R. V 217-18). He said nobody opened the door and, instead, the knocking repeated (R. V 217). At that, Mr. Beham reported, he went to the door, looked through the peephole, and saw "red bandanas" (R. V 218). He stated, "The next thing I know," the door opened and "I'm getting hit in the face" in the doorway by a "shorter, stocky kid" who punched him, and he fell back onto the floor (R. V 218-19). Mr. Beham described this "kid" as black, around 5'7" tall, "somewhat stocky," with a "red bandana" covering his face (R. V 218-19).

Then, Mr. Beham said the "stocky kid" pointed a sawed-off, single-barrel shotgun in his face and told him, "Shut up, I'm going to shoot you" (R. V 219-20). He said "three other kids" entered the apartment along with the "stocky kid," for a total of "four of them" (R. V 220). He described the stocky kid as being shorter than the other three (R. V 232). Three of the "kids" wore red bandanas covering their faces and one did not (R. V 220-21). All four were black (R. V 221). Mr. Beham said that, though he regularly wore glasses that he did not then have on, he could see the "kids" anyway (R. V 220).

Mr. Beham reported he did what the four assailants demanded, was quiet, and moved back into his living room (R. V 222). He said he felt "very uncomfortable" (R. V 226). Mr. Beham said one of the four assailants sat him down on a chair and sat behind him with a gun to his head, reminding him to be quiet (R. V 222). He said that, meanwhile, the three others looked throughout the apartment, "grabbing things" while

asking him "multiple times where the shit was and money, et cetera" (R. V 222). He said he thought they were looking for drugs and money (R. V 223).

Mr. Beham had what he described as a quarter-ounce of marijuana in a mini-fridge in his bedroom (R. V 223). He said the assailants forced him to lead them to his marijuana and give it to them (R. V 223). Then, he said, they pushed him back into the living room, where one of the four told him, "Give me the shit in your pockets. Empty your pockets" (R. V 224). He said he emptied his pockets and gave them the few dollars he had on him, as well as his cell phone (R. V 223-24). After that, he reported, they left (R. V 224).

In the end, Mr. Beham said, the four assailants took a television, an Xbox, and a laptop computer from the living room, as well as his roommate's pump-action, 12-gauge shotgun (R. V 224-26). He said the television was worth more than $400, the Xbox was worth about $200, and the computer was worth about $800 or $900 (R. V 225). He said none of the stolen items ever were recovered (R. V 225). A few minutes later, Mr. Beham left the apartment, seeking someone with a phone; he found his neighbor, Chris Roach, and used Mr. Roach's phone to call the police (R. V 226, 235; VII 571, 578-79).

Mr. Roach lived at 926 Tennessee Street, Apartment 2, in a connected apartment house adjacent to Mr. Beham's (R. VII 565-66). On the night of June 20, 2010, he had been at home all night with his girlfriend (R. VII 565-66, 570). Mr. Roach knows Mr. Beham, though only in passing and through another neighbor (R. VII 566, 568). Mr. Roach said Mr. Beham came to his apartment around 8:45 p.m. or 9:00 p.m. and told him Mr. Beham had been robbed (R. VII 566-67). Mr. Roach admitted it could have been as late as 11:00 p.m. (R. VII 568). He observed Mr. Beham had been hit in the eye (R. VII

570-71). He said Mr. Beham told him he "knew the guys" who robbed him, and there had been four of them (R. VII 567). Mr. Beham denied he said he knew his assailants, but rather that he said one looked familiar (R. VII 579-81).

The police arrived within five minutes of Mr. Beham calling them on Mr. Roach's phone (R. VII 570). Lawrence Police Department Officer Michael Shanks was one of the officers who responded to the call (R. VI 411). After interviewing Mr. Beham and searching and surveying the scene, he wrote in his report that nothing in the apartment "appeared to be out of place or disarranged more than what appeared to be normal living" (R. VI 411-12). In the apartment, Officer Shanks found numerous pipes and other paraphernalia commonly used in the consumption of marijuana (R. VI 415).

Officer Shanks searched for fingerprints on everything Mr. Beham told him the assailants had touched, but did not find any, latent or otherwise (R. VI 415, 417-18). This included a glass jar that had held marijuana, which Officer Shanks seized and turned into the PD's evidence locker (R. VI 415, 419-20). Officer Shanks was trained in collecting DNA samples for testing, but did not attempt to do so in Mr. Beham's apartment, because there was no viable suspect at the time (R. VI 418). Officer Shanks also interviewed C.J. Armstrong, another of Mr. Beham's neighbors, who reported seeing four black males walking near 930 Tennessee sometime between 9:00 p.m. and 10:00 p.m., which Mr. Armstrong found "unusual" (R. VII 555).

Lawrence Police Department Detective John Hanson also responded and interviewed Mr. Beham at 1:00 a.m. after the robbery (R. V 264-65). He said Mr. Beham told him four black males had entered his residence and robbed him (R. V 273). He said

Mr. Beham also told him about Mr. Flitcraft (R. V 266). Thereafter, Detective Hanson obtained a search warrant and seized Mr. Flitcraft's cell phone (R. V 266-67).

B. Initial Investigation

Within five days, the Lawrence Police Department was interviewing four suspects for Mr. Beham's reported four assailants, all of whom ultimately confessed in exchange for plea bargains: Tyler Jefferson, Dejuan Franklin, Adam Taylor, and Donta Tanner (R. V 269; VI 291-93, 309-10, 316, 328-30, 343, 349, 352-53, 364-65, 366-67, 380). Mr. Jefferson, Mr. Franklin, and Mr. Tanner all were interviewed by the police on June 25, 2010 (R. V 269; VI 309-10, 316, 343, 380).

i. Tyler Jefferson's Story

Mr. Jefferson was the first to be interviewed (R. V 269-71). He already was under arrest for suspicion of automobile burglary (R. VI 292-93). Initially, Mr. Jefferson denied being involved in any robbery, but when the detective questioning him told him he was under arrest for aggravated robbery, Mr. Jefferson said he was involved (R. V 271, 273; VI 294, 304). For the first time, Mr. Jefferson raised the notion that *five* assailants were involved, rather than Mr. Beham's reported four: he named Mr. Tanner, Mr. Franklin, Mr. Taylor and another Lawrence high school student, Jermel Fleming (R. V 271; VI 294, 304).

Mr. Jefferson said he had known Mr. Fleming for "a couple years [*sic*]," was friends with him, and knew where he lived (R. VI 302-03). He said that on June 20, he, Mr. Tanner, Mr. Taylor, Mr. Franklin, and Mr. Fleming were at the house of a friend, Mason Coleman (R. VI 294-95). Initially, he told police they had not been there, which he said was to protect Mr. Coleman (R. VI 304, 306). Then, Mr. Jefferson said, Mr.

Fleming walked in and asked whether they all wanted to go rob somebody (R. VI 295). He said Mr. Fleming asked Mr. Coleman whether they could have a gun, and Mr. Coleman gave them a foot-long, sawed-off shotgun (R. VI 295-96). Initially, though, he told police they had retrieved the gun from another house, which he said also was to protect Mr. Coleman (R. VI 304, 306).

Thereafter, Mr. Jefferson recounted, he and the other four got in a car belonging to Brianne Myers, Mr. Franklin's girlfriend, and left; he said Mr. Franklin was driving (R. VI 296-97). He said that, during the ride, Mr. Fleming, who had the sawed-off shotgun, was text-messaging someone to find out the precise location of the house to rob (R. VI 297). He said he did not know at the time who Mr. Fleming was corresponding with, but later found out it was Mr. Flitcraft (R. VI 304, 306).

Mr. Jefferson recounted that the five of them went into an apartment complex off of Tennessee Street, went up to an apartment, and knocked on the door; he said Mr. Fleming opened the door, and they all rushed in (R. VI 298-99). Initially, however, he told the police that Mr. Tanner was the one who opened the door (R. VI 305). He said Mr. Fleming hit the person in the apartment in the face and pointed the sawed-off shotgun at him (R. VI 299). Initially, however, he told police he had not seen this (R. VI 305). At trial, he insisted he did not know why he told police that (R. VI 307).

Then, Mr. Jefferson said, the five assailants "just started grabbing stuff" (R. VI 299). He said he took an Xbox, which he later sold for $70 or $80 (R. VI 300). He said they also took a television, a laptop computer, some marijuana, and a shotgun (R. VI 300). He said that, when they left, Mr. Fleming took the shotgun from the apartment, having given the sawed-off one to one of the others (R. VI 301). He recounted that, after

that, they all returned to Mr. Coleman's house in Ms. Myers' car, and Mr. Fleming reminded them not to talk about the robbery (R. VI 302).

Ultimately, for his part in the robbery of Mr. Beham, Mr. Jefferson was charged with aggravated robbery, aggravated burglary, kidnapping, conspiracy to commit robbery, and theft (R. VI 291-92). He testified at Mr. Fleming's trial under a plea agreement giving him probation in exchange for his testimony (R. VI 291-93). The State also promised to dismiss pending, unrelated obstruction and automobile burglary charges against him (R. VI 292-93).

ii. Dejuan Franklin's Story

When Mr. Jefferson was interviewed by police on June 25, 2010, Mr. Franklin also already was in police custody under arrest for a suspected automobile burglary (R. VI 309-10). Detective Bronson Star interviewed Mr. Franklin alone regarding the robbery in which Mr. Jefferson reported he had been involved (R. VI 309-10, 316, 343). Detective Star also previously had responded to Mr. Beham's call (R. VI 309).

Detective Star recounted Mr. Franklin had told him that Mr. Fleming, him, and three others committed the robbery at 930 Tennessee on June 20 (R. VI 311-12). He said Mr. Franklin corrected him that there were actually five people who robbed Mr. Beham's apartment, not four (R. VI 312). Mr. Franklin, however, said that he only had mentioned Mr. Fleming after Detective Star asked him whether Mr. Fleming "was with him that past weekend" (R. VI 321, 343-44). Detective Star admitted he only knew of Mr. Fleming from his colleague's interview that same day of Mr. Jefferson (R. VI 324, 326). Mr. Franklin said he only mentioned Mr. Fleming after Detective Star told him "you can help yourself out" and then mentioned Mr. Fleming's name (R. VI 344).

Mr. Franklin said he recounted his "role in the crimes" to Detective Star (R. VI 331). He said he had known Mr. Fleming since fifth grade, and that they became close in ninth grade (R. VI 342). He said that he, Mr. Fleming, Mr. Tanner, Mr. Jefferson, and Mr. Taylor committed the robbery together (R. VI 332). He said that, on June 20, 2010, the five of them were at Mr. Coleman's house, along with Ms. Myers (R. VI 332-33). Mr. Franklin said Mr. Coleman is his cousin (R. VI 349). Initially, however, he told police the five of them had gone to another house to pick up a gun (R. VI 345).

Mr. Franklin recounted that Mr. Fleming said he had received a call from Mr. Flitcraft that there was a "dude over on 9th Street that had some weed" who the five of them could rob (R. VI 333-34). Initially, however, he had told police he went to Mr. Beham's apartment to buy marijuana (R. VI 348). He said that when the five of them left Mr. Coleman's house, Mr. Fleming had a sawed-off shotgun (R. VI 334).

Then, Mr. Franklin said, he and the four others got into Ms. Myers' car, and he drove them to an address around 9th Street and Tennessee Street to which Mr. Fleming directed them (R. VI 334-36). He said Mr. Fleming called and text-messaged Mr. Flitcraft, who directed them to the specific apartment (R. VI 336, 347-48).

Mr. Franklin recounted that the five of them went up to the apartment's door, and Mr. Tanner knocked on the door; all except Mr. Tanner had their faces covered (R. VI 337-38). He said a "white guy" of "average height" opened the door, motioned them in with his head, and asked, "How much do you want?" to which they responded "How much do you have?" (R. VI 338). He said Mr. Taylor closed the door and the others pushed past the man in the apartment; when the occupant started yelling, Mr. Fleming pulled out the sawed-off shotgun and told him to be quiet (R. VI 338-39).

Then, Mr. Franklin said, he and Mr. Fleming went into the back room, searched it, and took marijuana and a twenty-dollar bill (R. VI 339). He said Mr. Fleming kept the apartment's occupant sitting down (R. VI 339). He said that, in addition to the marijuana and the money, he and the four others took a shotgun, a laptop computer, some video games, and a television (R. VI 340). After this, Mr. Franklin recounted, they all drove back to Mr. Coleman's house, with Mr. Fleming carrying the computer and the shotgun from the apartment, with the sawed-off shotgun in his trousers (R. VI 340-41). Initially, however, he had told police they all returned to a different house (R. VI 345).

Ms. Myers – Mr. Franklin's girlfriend – echoed that, on June 20, 2010, which she remembered was Father's Day, she was at Mr. Coleman's house with Mr. Franklin, Mr. Tanner, Mr. Taylor, Mr. Jefferson, and Mr. Fleming (R. VI 382-83). She said Mr. Franklin asked to borrow her car, and she let him do so (R. VI 383-84). She said Mr. Franklin, Mr. Tanner, Mr. Taylor, Mr. Jefferson, and Mr. Fleming left together in her car and she fell asleep on the couch (R. VI 383-84). Eventually, she said, Mr. Franklin woke her up, though she did not remember the time (R. VI 384-86). She said that, after going to McDonald's with Mr. Franklin and returning to Mr. Coleman's house for a while, where the others were playing video games, she took Mr. Tanner home and dropped Mr. Fleming and Mr. Franklin off at Mr. Fleming's house (R. VI 384).

The State charged Mr. Franklin with aggravated robbery, aggravated burglary, kidnapping, conspiracy to commit aggravated robbery, and theft (R. VI 328-30). In exchange for pleading guilty to three of the felony charges and testifying at Mr. Fleming's trial, the State promised it would recommend he be sentenced to probation and would dismiss the other two charges (R. VI 330, 349).

iii. Donta Tanner's Story

Mr. Tanner also was interviewed on June 25, 2010, but he refused to talk to the police (R. VI 380). He met with the police again on September 27, 2010, by which time he had a plea agreement with the State (R. VI 381). He said he recounted his involvement in the robbery at Mr. Beham's apartment (R. VI 381).

Mr. Tanner said he and Mr. Fleming went to school together and had known each other since eighth grade (R. VI 379). He said that, on June 20, 2010, he, Mr. Jefferson, Mr. Franklin, and Mr. Fleming – four people – had been together at Mr. Coleman's house (R. VI 368). He said Mr. Fleming proposed they go out and steal some marijuana, because he "got this thing set up" through Mr. Flitcraft to do so (R. VI 369-71). That is, he said, Mr. Flitcraft gave Mr. Fleming an address for a "dude" that had marijuana they could steal (R. VI 372).

Then, Mr. Tanner said, the four of them left Mason Coleman's house and picked up Mr. Taylor (R. VI 368-69, 372). He said there was a sawed-off shotgun at Mr. Coleman's house, which Mr. Fleming grabbed on his way out and stuck in his trousers, though Mr. Fleming did not pull it out at any time during the evening (R. VI 371, 377). He said the five of them drove together in Ms. Myers' car, with Mr. Franklin driving, to an apartment house at 9th Street and Tennessee Street (R. VI 373). He said Mr. Fleming text-messaged Mr. Flitcraft to determine the specific apartment to go to (R. VI 373-74).

Mr. Tanner recounted that he knocked on the door (R. VI 375). He said everyone else had bandanas covering their faces, but not him (R. VI 375). He said the apartment's occupant said, "It's open" (R. VI 376). He said that when the occupant opened the door, Mr. Fleming and Mr. Franklin ran in past the occupant and he followed and ran to the

back room (R. VI 377). He said Mr. Fleming stood in front of the occupant, who was sitting in a chair, and asked, "Where's the stuff at? Where's the money?" (R. VI 377-78).

Mr. Tanner said he and the four others took marijuana, a television, an Xbox, and a shotgun from the apartment (R. VI 378). He said Mr. Fleming was carrying the shotgun on the way out (R. VI 377). He said he carried the television (R. VI 378). Then, Mr. Tanner said, they all left and returned together to Mr. Coleman's house (R. VI 378-79).

The State charged Mr. Tanner with aggravated robbery, aggravated burglary, kidnapping, conspiracy to commit aggravated robbery, and theft (R. VI 366-67). In exchange for his pleading guilty to robbery, aggravated burglary, and conspiracy to commit aggravated robbery and testifying at Mr. Fleming's trial, the State promised to dismiss the other two charges and recommend a sentence of 18 months imprisonment (R. VI 367).

iv. Adam Taylor's Story

Mr. Taylor first was interviewed by police on July 12, 2010; like Mr. Tanner, he initially told them he was not involved in any robbery and refused to talk (R. VI 364-65). He met with police again on August 26, 2010, however, by which time he had a plea agreement with the State (R. VI 364-65). He said that, at that point, he recounted his involvement in the robbery of Mr. Beham (R. VI 364-65).

Mr. Taylor said he had known Mr. Fleming for five years, having first met through sports, but did not know where he lived (R. VI 363-64). He said that, on June 20, 2010, he was at Mr. Coleman's house with Mr. Jefferson, Mr. Tanner, Mr. Franklin,

and Mr. Fleming (R. VI 354-56). He said they all got in a car belonging to Ms. Myers, and headed "to go buy weed from somebody" (R. VI 357).

Then, Mr. Taylor said, the five of them headed to around Tennessee Street, whereupon Mr. Fleming called Mr. Flitcraft on his cell phone for directions to a specific apartment (R. VI 358). He said Mr. Tanner walked up to the apartment and knocked on the door; once it opened, the others went in, and everyone had bandanas on their faces (R. VI 359). Mr. Taylor said he watched the others take things from around the apartment and press the occupant, who he described as a white male named Josh, to tell them where his marijuana was (R. VI 360-62).

In the end, Mr. Taylor recounted, he and the four others took a television, an ounce of marijuana, a laptop, a cell phone, a shotgun, and a video game from the apartment, and then left to return to Mr. Coleman's house (R. VI 362-63). Mr. Taylor stated that nobody had a gun with them at all until Mr. Fleming took the shotgun that had been in the apartment; he said he did not see Mr. Fleming with a gun except earlier in the evening at Mr. Coleman's house (R. VI 363-64). Mr. Taylor said the cell phone taken from the apartment was thrown out the window of the car after they drove away (R. VI 362).

The State charged Mr. Taylor with aggravated robbery, aggravated burglary, kidnapping, conspiracy to commit aggravated robbery, and theft (R. VI 352-53). In exchange for pleading guilty to robbery, aggravated burglary, and conspiracy to commit aggravated robbery and testifying at Mr. Fleming's trial, the State promised to recommend he be sentenced to 18-36 months imprisonment and dismiss the other two charges (R. VI 352-53).

v. Dylan Flitcraft's Story

Mr. Flitcraft was not charged with involvement in the alleged robbery of Mr. Beham on June 20, 2020 (R. V 244-45). Instead, he testified under a grant of immunity for marijuana offenses the State had given him several hours before trial (R. V 244-45). He was subpoenaed by the state and did not testify of his own volition (R. V 260). He has prior juvenile convictions for felony theft and conspiracy to commit robbery (R. V 261-62)

Mr. Flitcraft said he knew Mr. Fleming for "a year and a half" before trial (R. V 247). He said that, on June 20, 2010, around 8:00 p.m., Mr. Fleming sent him a text message stating, "Do you know anybody who I can rob for some marijuana" (R. V 250, 252-54, 256). He said he responded, "Yeah. Let me see. Hold on" (R. V 254). Then, he said, he sent a text message to Mr. Beham asking if he had any marijuana (R. V 254). Mr. Flitcraft said Mr. Beham did reply that he did have some marijuana, so Mr. Flitcraft relayed that information to Mr. Fleming, giving him Mr. Beham's name and general location, including describing a moped was out front of the apartment house (R. V 254-56). Mr. Flitcraft said he knew on his own that Mr. Beham was robbed that night, though he denied ever having discussed it with Mr. Fleming (R. V 257-58). Mr. Flitcraft said he did not know why he would have told Mr. Fleming he could rob Mr. Beham or why he would want to "help out" Mr. Fleming (R. V 258).

C. Cell Phone Records

Detective Hanson gave the phone he seized from Mr. Flitcraft to Lawrence Police Department Detective Robert Brown to process it and try to obtain an address book, phone numbers, and text messages (R. V 267-69; VI 392-94). Detective Brown has

experience performing these sorts of forensic analyses on computer devices, including cell phones (R. VI 391-92). He recounted that Mr. Flitcraft's phone was a black phone with number 785-424-0745 (R. VI 393, 478-79).

On June 29, 2010, Detective Brown checked the phone for text messages and contact listings (R. VI 394, 396-99, 479). He said the name "Jermel" was one of the contacts, and that the number listed for "Jermel" was 785-218-2785 (R. VI 400, 477-78). According to another officer, Mr. Fleming freely admitted that this was his phone number (R. V 275-77). Detective Brown could not tell the date the name "Jermel" was added into Mr. Flitcraft's phone (R. VI 480). He did not find any text messages from prior to June 27, 2010, and none of those he did find in the phone were related to this case (R. VI 480-81).

Before trial, the State subpoenaed records from Sprint Nextel Communications corresponding to phone number 785-218-2785 (R. VI 488; VII 545-46). These were admitted into evidence as State's Exhibits 7b, consisting of an event log for that number between June 19 and 27, 2010, and 7a, consisting of a listing of cell towers in the Kansas City Metropolitan Area, including Lawrence (R. VII 545-46; Appendix A17-18). Sprint's records custodian, Eric Tyrell, testified to the accuracy of the reports, and explained he had knowledge of Sprint's business practices as they relate to how the time stamps in Exhibit 7a were associated with both phone calls and text messages (R. VI 485-86).

Mr. Tyrell said that, when times are recorded for cell phone calls, they are logged in the time zone for the market in which the handset physically is located (R. VI 486). So, if a handset is being used in the central time zone, such as in Lawrence, Kansas, the

call will be logged as in the central time zone, even though no actual time zone notation appears on the record (R. VI 486-87). Mr. Tyrell explained, though, that text messages are different (R. VI 487). He said text messages route through one of two central gateways, either in Kansas City or Virginia and, depending on which one a given message goes through, the time stamp would be either central time or eastern time, but the record would give no way to know (R. VI 487).

On September 27, 2010, Mr. Fleming's counsel had propounded standard discovery requests, including "Any and all … results and reports of scientific tests or experiments made in connection with this case, including but not limited to case file, field notes, bench notes, diagrams, raw data; electronic data, … proficiency testing and background qualifications of analyst, [and] protocol and procedures for any tests performed …" (R. I 36-37). The defense received no such reports of any kind relating to cell phone records in general – or specifically how a handset's location can be determined from records of what cell tower received a call (R. VI 461-62).

At the end of the second day of trial, however, the State sought to endorse Lawrence Police Detective M.T. Brown to explain how he could determine from Sprint's records the given location of a cell phone at the time of a call (R. VI 453). Previously, as the trial court observed, Detective M.T. Brown only had been mentioned in the prosecution's file as someone who had interviewed a witness during the police investigation in the case (R. VI 464).

Mr. Fleming's counsel objected to Detective M.T. Brown's testimony (R. VI 461-62, 482-84; VII 495-98). First, counsel objected to the detective's testifying at all, as the detective was going to be testifying as an expert witness, but had not been lawfully

disclosed as such before trial so he could be deposed and the defense could procure a counter-expert (R. VI 461-62, 482-84; VII 495). Second, counsel alternatively objected that the court should declare a mistrial, as even if the detective were not giving expert testimony, none of the reports he gave at trial – including a detailed PowerPoint presentation, State's Exhibit 9, diagramming his findings and methodology in detail – were disclosed in discovery, and thus Mr. Fleming's right to due process was violated because counsel could not effectively cross-examine the witness or procure counter-evidence (R. VII 496-98). Indeed, the detective's PowerPoint presentation only was given to defense counsel on the evening of the second day of trial (R. VI 469, 484). The trial court overruled the oral motion *in limine* and the request for a mistrial (R. VI 469, 472, 484; VII 495-96, 506-07).

Outside the jury's presence, Detective M.T. Brown explained his expertise in the area of cell phone technology to the trial court (R. VI 453-54). He said he was trained in processing "cell phones for call records, contact lists" and "historical cell site information that you get on subpoenas and search warrants" (R. VI 454). He said that, in 2009, he had taken a "formal class" on "historical site analysis" such as that he had performed in the case (R. VI 454). He averred that his "master's thesis" from 2001 at Washburn University in "administration of justice" dealt with "cell phone technology … as it relates to the police department" (R. VI 454-55). He said that, while doing research for his thesis, he "conducted extensive tests of their reception in relation to cell phone towers, in relation to different parts of" Lawrence, through which he "delved into cell phone technology, as well as how it relates to cell phone sites and sectors and so on and so forth" (R. VI 455).

Detective M.T. Brown told the court he has a certificate "in cell phone recovery" from taking a four-day course in 2009 on "researching historical records, the different types of cell phone technology, how sectors work, plotting the cell phone data onto a map for court purposes" (R. VI 455-56). He claimed he "plotted cases about ten times," but this was "the first time that I'm testifying to it" (R. VI 456, 459). He said he had looked at Sprint records in the past to identify a specific tower (R. VI 458, 460).

Before the jury, Detective M.T. Brown testified he reviewed the State's Exhibits 7b and 7a (R. VII 509). He said he was asked to see if and how Mr. Flitcraft's phone number appeared in Mr. Fleming's records (R. VII 509-10). He said he found they do (R. VII 510).

Detective M.T. Brown then said he was asked to see if he could determine whether a particular call was associated with a particular cell phone tower in Douglas County, as well as the particular sector of that tower to which it corresponded (R. VII 510). The detective said that he previously had performed that analysis, called a "historical review," during his duties numerous times (R. VII 510-11). He said he was able to identify locations of towers and sectors according to the Sprint records (R. VII 512). He said some of the "phone events" between Mr. Fleming's number and Mr. Flitcraft's number on June 20, 2010, were calls, and some were text messages (R. VII 514). He said the ones with a duration – a "first cell" and a "last cell" notation – were calls, whereas the "ones with zeroes" in place of that notation were text messages (R. VII 515).

Detective M.T. Brown testified that the first contact between the two phones on June 20 was at 8:52 p.m. (noted as 20:52 in 24-hour time) and the last was at 11:50 p.m.

(R. VII 515-16). He said the contacts only involve five towers (R. VII 517). He explained that each tower has three sectors – that is, which direction the phone was from the tower (R. VII 519, 521-22). He said he personally verified each tower's existence (R. VII 520). He explained that Exhibit 7a details the latitude and longitude for each tower, too (R. VII 521).

Of the calls "at the time of the robbery," the detective said the first was a call at 10:49 p.m. for 89 seconds, from sector 1 of tower 329 (R. VII 524-25). He said the second was at 10:55 p.m. for 1103 seconds from sector 1 of tower 329 (R. VII 525-26). He said the third was at 11:07 p.m. for 16 seconds from sector 2 of tower 329 (R. VII 527). The detective testified that, between the first and second, there are text-messages between the two numbers; between the second and third, there are not (R. VII 528-29)

Detective M.T. Brown said 930 Tennessee, the location of the robbery of Mr. Beham, was within sector 1 of tower 329 (R. VII 531). In his PowerPoint presentation, the detective drew circles around each tower on a map, including tower 329, and attempted to show graphically that he could determine Mr. Fleming's phone was in the area of the robbery at the time of the robbery from the first two of the three calls he detailed (R. VII 531-35; Exhibit 9; Appx. 21-22). On cross-examination, however, the detective admitted he could not know that for certain, because did not know the range of the towers' coverage or signal strength; in fact, he had no basis whatsoever for the radius of the circles on his map (R. VII 537-42).

D. Proceedings Below

On July 28, 2010, the State charged Mr. Fleming by information with four felony counts: aggravated robbery, aggravated burglary, kidnapping, and conspiracy to commit

aggravated robbery (R. I 9-10). It also charged him with one count of misdemeanor theft, which the State admitted in the instructions conference was merely a lesser-included offense to the charge of aggravated robbery (R. I 10; VII 595). The information was amended on December 27, 2010 to change some details, but all the alleged offenses remained the same (R. I 67-68). Mr. Fleming pleaded not guilty.

The case was tried to a jury in the District Court of Douglas County over three days from January 5 through 7, 2011 (R. V 1, 282; VII 491). After approximately one hour and 45 minutes of deliberations, the jury returned unanimous verdicts of guilty on all counts (R. VII 707-11).

After obtaining an extension of time, Mr. Fleming filed motions for judgment of acquittal and for new trial (R. I 112-37). The trial court denied both (R. II 220).

On April 28, 2011, the court sentenced Mr. Fleming to a total of 88 months imprisonment: 88 months for aggravated robbery; 32 months for aggravated burglary, to be served concurrently; 59 months for kidnapping, to be served concurrently; 32 months for conspiracy to commit aggravated robbery, to be served concurrently; and 1 year in county jail for theft, also to be served concurrently (R. IV 66, 68). The court's journal entry of judgment reflects these active sentences for all five counts (R. II 205-20).

Mr. Fleming timely appealed to this Court (R. II 196-97, 236).

Argument and Authorities

I. The District Court erred in allowing a police detective with specialized expertise to give expert testimony that he could conclude from cellular phone records that the defendant's phone was in the immediate area of the robbery at the time of the offense, because neither the detective's identity nor his investigation or report were disclosed to the defense before trial, in violation of K.S.A. §§ 22-3212(a)(2), 60-226(b)(6), and 60-237, and depriving the defendant of his right to Due Process under U.S. Const. amend. XIV.

Standard of Appellate Review

"The admissibility of expert testimony is within the broad discretion of the trial court. A party claiming an abuse of trial court discretion bears the burden of showing abuse of discretion." *State v. Smallwood*, 264 Kan. 69, 80, 955 P.2d 1209 (1998). A "trial court's denial of a motion seeking to exclude the testimony of a witness who violated a discovery order in a criminal case is reviewed under an abuse of discretion standard if due process rights are not implicated by the violation." *State v. Johnson*, 286 Kan. 824, 832, 190 P.3d 207 (2008). If due process rights are implicated, review is *de novo*. *Id.*

* * *

At least 90 days before trial, the State must disclose to the defense the identity of any expert witness, as well as his expertise and the subject matter and substance of his or her facts or opinions and a summary of the grounds for each. If the State fails to do so and then misleads or surprises the defense with the expert, it is an abuse of discretion for the trial court to allow the expert to testify. In this case, the State failed to disclose a police detective with specialized expertise who testified he concluded from technical cellular phone records that the defendant's cell phone was in the immediate vicinity of the crime. Nonetheless, the trial court admitted his testimony. Was this error?

The purpose of an expert witness is to offer testimony based on specialized experience and training of opinions and conclusions derived from the evidence that an ordinary lay juror could not draw based on normal life experience and qualifications alone. Essentially, "The basis for the admission of expert testimony is necessity arising out of the particular circumstances of the case. To be admissible, expert testimony must be helpful to the jury." *State v. Smallwood*, 264 Kan. 69, 80, 955 P.2d 1209 (1998). Indeed, if "the normal experience and qualifications of lay persons serving as jurors permit them to draw proper conclusions from given facts and circumstances, expert conclusions or opinions are *inadmissible*." *Id.* (emphasis added).

In both criminal and civil cases, the law of Kansas sets strict requirements for the disclosure of one side's expert witnesses to the other. K.S.A. § 60-226(b)(6) mandates, in relevant part:

> A party must disclose to other parties the identity of any witness it may use at trial to present expert testimony. …
>
> Required disclosures. Unless otherwise stipulated or ordered by the court, if the witness is retained or specially employed to provide expert testimony in the case, or is one whose duties as the party's employee regularly involve giving expert testimony, the disclosure must state: (i) The subject matter on which the expert is expected to testify; (ii) the substance of the facts and opinions to which the expert is expected to testify; and (iii) a summary of the grounds for each opinion. …
>
> Time to disclose expert testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or court order, the disclosures must be made: (i) At least 90 days before the date set for trial or for the case to be ready for trial …

While this statute is in the Code of Civil Procedure, like most of the Code's discovery provisions, it long has been applied in criminal cases, too. See, e.g., *State v. Goodman*, 207 Kan. 155, 161, 483 P.2d 1040 (1971); *State v. Frideaux*, 207 Kan. 790,

792, 487 P.2d 541 (1971). Parties are obliged continuously to supplement this disclosure. K.S.A. §§ 60-226(e) and 60-237. "If a party fails to provide information or identify a witness as required by subsection (b)(6) … of K.S.A. 60-226 …, the party is not allowed to use that information or witness to supply evidence … at a trial, unless the failure was substantially justified or is harmless." K.S.A. § 60-237.

Failure to make this disclosure is deemed "substantially justified" or "harmless" only when doing so neither misled, surprised, nor prejudiced the opposing party. *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1028, 850 P.2d 773 (1993).

The criminal discovery rules, too, require that, upon request, the prosecution must disclose to the defense "results or reports of … scientific tests or experiments made in connection with the particular case, or copies thereof, the existence of which is known, or by the exercise of due diligence may become know, to the prosecuting attorney." K.S.A. § 22-3212(a)(2). These include relevant "reports, memoranda, and other internal government documents made by officers in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses." *Id.* at (b).

As with the general expert rule, if the State fails to disclose this evidence to the defense before trial, the defense has no prior knowledge of this evidence, it is inadmissible if he is "prejudiced in defending against them." *State v. Wacker*, 253 Kan. 664, 674, 861 P.2d 1272 (1993). If the defendant can show "actual prejudice" to his "ability to defend against the charges," the admission of the evidence is reversible error. *Id.*

In this case, the testimony of Detective M.T. Brown utterly violated these plain and simple guidelines, to Mr. Fleming's extreme surprise and prejudice. Based on his substantial and specialized experience, Detective Brown testified he could determine from technical cellular phone records that Defendant Jermel Fleming's phone was in the immediate vicinity of the crime when it occurred. This was the State's *only* supposed evidence that Mr. Fleming was "at the crime scene" that did not come from confessed criminals testifying in exchange for plea bargains.

The State, however, failed to disclose the identity or expertise of Detective Brown or the subject matter and substance of his testimony or the grounds for it until the afternoon of the second day of trial, in violation of § 60-226(b)(6). Although Detective Brown had prepared a detailed report, admitted into evidence (and published to the jury) as State's Exhibit 9, which the prosecution admitted it knew existed, it did not disclose this to the defense until the middle of trial, either, in violation of § 22-3212.

As a result of these gross failures, Mr. Fleming was left with the inability adequately to defend against Detective Brown's expert testimony. The defense had no time to produce an expert of its own to rebut his conclusions. Moreover, the defense's circumstantial case based on inconsistent testimony of criminals reaching plea deals in exchange for their testimony suddenly was bolstered by uncontested, seemingly-expert, forensic evidence that Mr. Fleming simply was not given the opportunity to counter. This error could not have been harmless.

Under these circumstances, it was fundamentally unjust and overtly prejudicial for the trial court to admit Detective Brown's testimony. This Court should reverse the judgment of conviction and sentence against Mr. Fleming.

A. Detective Brown was an expert witness and gave expert testimony.

At trial, when the defense objected to Detective Brown's improper, undisclosed, surprise expert testimony and report, the State sought to circumvent the expert discovery rules by claiming he was not an expert (Record Volume VI at 462-64). Initially, the State argued Detective Brown could not be an expert witness because he was merely a police officer testifying to "things within [his] particular training and experience," simply "apply[ing] his special training and knowledge … using his experience and expertise" (R. VI 462). Later, the State changed its tune and suggested "a junior in high school" or "cub scout" could reach the same conclusions as Detective Brown (R. VI 499).

These duplicitous arguments are without merit. Detective Brown plainly was an expert witness giving expert testimony. The State specifically needed his testimony to deduce from the evidence facts that a layperson juror could not possibly know from ordinary life experience.

The law of Kansas does not seem to define specifically who is an expert witness. Generally, however, an "expert" is "A person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder." BLACK'S LAW DICTIONARY 619 (8th ed. 2004). Similarly, "expert evidence" or "expert testimony" is "Evidence about a scientific, technical, professional, or other specialized issue given by a person qualified to testify because of familiarity with the subject or special training in the field." BLACK'S LAW DICTIONARY 597 (8th ed. 2004).

Essentially, based on its rules of admissibility and inadmissibility, the law of Kansas agrees with these traditional definitions. "To be admissible, expert testimony

must be helpful to the jury …. [If] the normal experience and qualifications of lay persons serving as jurors permit them to draw proper conclusions from given facts and circumstances, expert conclusions or opinions are *inadmissible*." *Smallwood*, 264 Kan. at 80 (emphasis added). Thus, expert testimony is that which the normal experience and qualifications of layperson jurors would not permit them to draw from given evidence.

Contrary to the State's protestations, Detective Brown's opinion was most certainly not something a layperson juror could draw from State's Exhibits 7a and 7b based on normal life experience. Indeed, Detective Brown only was able to derive his conclusions from these exhibits after extensive training and education. To perform the sort of "historical site analysis" he purported to do in this case, he had taken a four-day "formal class" several years earlier and, concomitantly, received a specialized certification (R. VI 454-56). The class included instruction on "researching historical records, the different types of cell phone technology, how sectors work, plotting the cell phone data onto a map for court purposes" (R. VI 455-56).

In fact, Detective Brown purported to base much of his ability to make his report in Exhibit 9 on his Washburn University "master's thesis" in "administration of justice" concerning "cell phone technology" (R. VI 454-55). As Detective Brown recounted, his expertise in "test[ing] … reception in relation to cell phone towers, in relation to different parts of" Lawrence, Kansas, derived from research on his thesis, especially "relat[ing] to cell phone sites and sectors" (R. VI 455). He claimed that, since then, he had "plotted cases about ten times," but this was "the first time that I'm testifying to it" (R. VI 456, 459). He said he had looked at Sprint records in the past to identify a specific tower (R. VI 458, 460).

The notion that Detective Brown was not an expert in cellular phone historical site analysis simply because he is a police officer is ludicrous and laughable. Police officers and other law enforcement officials who are experts in a particular scientific field regularly are held to the same standards as all other expert witnesses. *Kleibrink v. Mo.-Kan.-Tex. R.R. Co., Inc.*, 224 Kan. 437, 440, 581 P.2d 372 (1978); *Lollis v. Superior Sales Co.*, 224 Kan. 251, 263, 580 P.2d 423 (1978). Were it otherwise, the prosecution could avoid all expert disclosure rules simply by slapping a police badge on anyone it desired. Physician medical examiners regularly are employed by police departments. Does that mean they no longer should be considered expert witnesses in their field?

Indeed, Detective Brown's need to justify his opinions based on a master's degree and a technical certification in precisely the subject matter to which he was testifying belie any notion that he was not acting as an expert giving expert testimony. If this was something the jury could intuit naturally, why the need for a witness with a master's degree in that topic? Unsurprisingly, for these reasons, cell tower historical site analysis in criminal cases usually is made by an expert witness. See, e.g., *Francis v. State*, 781 N.W.2d 892, 897-98 (Minn. 2010); *Wilder v. State*, 991 A.2d 172, 197-98 (Md. App. 2010); *State v. Manzella*, 128 S.W.3d 602, 608-09 (Mo. App. 2004); *State v. Robinson*, 724 N.W.2d 35, 61-69 (Neb. 2006); *Wilson v. State*, 195 S.W.3d 193, 200-02 (Tex. App. 2006).

The Maryland Court of Special Appeals, the Missouri Court of Appeals, and the Texas Court of Appeals reached the same result in *Wilder*, *Manzella*, and *Wilson*, *supra* – that is, that in order to testify to whether and how a cellular phone attaches to a specific sector of a cellular tower, the witness must be qualified and disclosed as an expert. As

the Maryland court stated, "the better approach is to require the prosecution to offer expert testimony to explain the functions of cell phone towers, derivative tracking, and the techniques of locating and/or plotting the origins of cell phone calls using cell phone records. Other jurisdictions have adopted that procedure." *Wilder*, 991 A.2d at 198-99 (citing and discussing *Wilson*, 195 S.W.3d at 200-202; *Manzella*, 128 S.W.3d at 608-09). All three courts reversed trial courts for admitting expert testimony in the manner the trial court did in this case.

Plainly, Detective M.T. Brown's evidence was nothing less than the stuff of highly-specialized expert testimony, potentially challengeable by a defense expert if the defense were given the opportunity. He testified he reviewed the State's Exhibits 7b and 7a to see if and whether calls between Mr. Fleming and Dylan Flitcraft corresponded with a particular cell phone tower and particular sector location of that tower (R. VII 509-10). Noting that two of the calls corresponded to tower 329, Detective Brown testified that, based on his extensive training and specialized expertise, the location of the robbery was within sector 1 of tower 329 (R. VII 531).

In his report published to the jury as Exhibit 9, Detective Brown drew a concentric circle around the tower on a map, attempting to show the jury graphically that he could determine Mr. Fleming's phone was in the exact vicinity of the robbery at the exact time of the robbery (R. VII 531-35; Exhibit 9; Appendix 21-22). Later, though, he admitted he could not know that for certain, because did not know the range of the towers' coverage or signal strength; in fact, he had no basis whatsoever for the radius of the circles on his map (R. VII 537-42).

Unequivocally, Detective Brown was an expert witness offering expert testimony. His testimony is no different than that in the only cases on point in in *Wilder*, *Manzella*, and *Wilson*, *supra*, which held that such evidence plainly is expert evidence, not lay evidence.

This makes sense. Detective Brown was an expert: a "person who, through education or experience, ha[d] developed skill or knowledge in a particular subject, so that he or she may form an opinion that w[ould] assist the" fact-finder." His testimony was "expert evidence:" it concerned "a scientific, technical, professional, or other specialized issue given by a person qualified to testify because of familiarity with the subject or special training in the field." Under the State's theory, it was "helpful to the jury," specifically because it was not something that would permit the "normal experience and qualifications of lay persons serving as jurors … to draw proper conclusions from given facts and circumstances." *Smallwood*, 264 Kan. at 80.

As such, Detective Brown's testimony is subject to the same requirements as all other expert testimony. If its nondisclosure pursuant to law prejudiced Mr. Fleming and its admission was not harmless error, its admission constitutes a reversible abuse of discretion.

B. The State's failure to disclose Detective Brown's identity, opinions, and report prejudiced Mr. Fleming.

As Detective Brown was an expert witness giving expert testimony, K.S.A. § 60-226(b)(6) required the state to disclose to the defense his "identity," "[t]he subject matter on which [he was] expected to testify[,] the substance of the facts and opinions to which [he was] expected to testify[, and] a summary of the grounds for each opinion. …" at least 90 days before trial. As well, it required the State to disclose to the defense "results

or reports of … scientific tests or experiments made in connection with the particular case, or copies thereof, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney." K.S.A. § 22-3212(a)(2).

The State's failure to do this only could be excusable if it neither misled, surprised, nor prejudiced the opposing party. *Thompson*, 252 Kan. at 1028. Since Mr. Fleming's defense had no prior knowledge of Detective Brown's expert opinions, it would be inadmissible if Mr. Fleming were "prejudiced in defending against them." *Wacker*, 253 Kan. at 674. If Mr. Fleming suffered "actual prejudice" to his "ability to defend against the charges," the admission of Detective Brown's evidence is reversible error. *Id.*

Plainly, the State's failure to disclose this evidence before the afternoon of the second day of trial prejudiced Mr. Fleming's ability to defend himself. While the defense certainly knew that State's Exhibits 7b and 7a – the list of cellular towers and Mr. Fleming's call record – existed, they did not know until that time at the middle of trial that the State purported to have an expert who could determine from those exhibits that Mr. Fleming's phone was physically at the scene of the crime when it occurred.

Had the State made its required disclosure of its expert and his report, Exhibit 9, the defense would have sought its own expert to rebut the State's expert testimony (R. VI 437). As it stood, however, it could not (R. VI 437). Detective Brown ultimately admitted that the range of the towers in his report was entirely speculative and was without any actual basis whatsoever (R. VII 537-42). The defense's expert would have been able to show that, in fact, as in in *Wilder*, *Manzella*, and *Wilson*, *supra*, the radius of coverage around a cellular tower is up to *three miles*. Thus, even taking the rest of

Detective Brown's testimony as true, Mr. Fleming's phone could have been as much as three miles away from the scene of the crime and *still* be associated to the tower that Sprint's records said it was. As Detective Brown's own diagram showed, Lawrence is not a terribly huge city, and Mr. Fleming's own residence was within that distance of the tower (Ex. 9; Appx. A20).

Because of the State's willful non-disclosure, however, Mr. Fleming entirely was denied the opportunity to show this with his own expert. As in *Wilder*, *Manzella*, and *Wilson*, *supra*, the admission of the State's expert testimony as if it were not expert testimony prejudiced Mr. Fleming.

The few cases where the non-disclosure of expert testimony was found not to be prejudicial are inapposite. In *Wacker*, *supra*, on the sixth day of trial, the defense was given the report of a physician expert for the prosecution purportedly showing the defense was not mentally incompetent. 253 Kan. at 673-74. The Supreme Court held this was a violation of the expert discovery rules, but held it was not prejudicial because the State, too, had not received the report until then, the defendant already had the results of the physician expert's other tests, and the defendant himself had personal knowledge of the reports – having been examined for them. *Id.* Thus, he could not show actual prejudice to his ability to defend himself against the charges. *Id.*

Conversely, in this case, the State admitted it knew long before trial that Detective Brown would give the report he did. Mr. Fleming and his defense were caught entirely unawares. The defense had no opportunity whatsoever to bring in an outside expert to rebut the State's evidence.

In *Thompson*, the Supreme Court agreed that admission of the plaintiff's treating physicians' evaluation and testimony in the middle of trial without prior disclosure violated the expert discovery rules. 252 Kan. at 1025-26. The Court held, however, this was not an abuse of discretion, as the defense was not misled or surprised: it had deposed the physicians during discovery, and their testimony was presented to the jury in form of videotaped depositions from that discovery. *Id.*

Here again, however, Mr. Fleming had no opportunity to know that the State had Detective Brown waiting in the wings to give his report at trial until the second day of trial. Mr. Fleming and his defense had no warning otherwise of any kind. He had no opportunity of any kind to have an outside expert reevaluate and rebut the State's evidence and testify to that reevaluation.

The State willfully failed to disclose to the defense Detective Brown's specialized expertise in cellular tower historical site review, the substance of his expert testimony, or any summary of his grounds therefor. Mr. Fleming had no opportunity to rebut any of the State's expert evidence with his own. Just as in *Wilder*, *Manzella*, and *Wilson*, *supra*, the admission of the State's expert testimony prejudiced Mr. Fleming.

The trial court abused its discretion in admitting Detective Brown's expert testimony in unmitigated contravention of the rules the Legislature has set forth governing disclosure and admission of expert testimony. Its judgment should be reversed and Mr. Fleming discharged. Its holding otherwise perverted the law of Kansas and violated Mr. Fleming's right to Due Process of law under U.S. Const. amend. XIV.

C. The trial court's erroneous admission of Detective Brown's testimony was not harmless.

This Court's "review of the trial court's admission of evidence is a two-step process. First, it must determine whether the evidence was admissible or inadmissible. Then, if the evidence was improperly admitted, it must determine whether to apply the harmless error rule of review or the federal constitutional error rule to the erroneous admission of that evidence." *Smallwood*, 264 Kan. at 80-81. "Under the federal constitutional error rule, an error of constitutional magnitude is serious and may not be held to be harmless unless the appellate court is willing to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 81. Under the harmless error rule, the Court "must be able to declare beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial." *State v. Hebert*, 277 Kan. 61, 96, 82 P.3d 470 (2004). Thus, the two rules are very similar.

The error in this case was far from harmless. Here, outside the improper expert evidence detailed herein, the State's case that Mr. Fleming was not only at the scene of the robbery but, in fact, masterminded it, depended entirely on the testimony of four confessed criminals testifying against him in exchange for plea deals. Indeed, besides Detective Brown's undisclosed expert testimony, there was no forensic, scientific evidence of any kind, such as fingerprints, DNA, or recovered stolen goods (R. VI 415, 417-20).

The stories of the victim (an armed drug dealer) and the four admitted assailants (all prior criminals testifying in exchange for plea deals) were wildly inconsistent. The victim testified and told police there were four assailants. Within five days after the robbery, the police had those four assailants. To save themselves, the assailants fingered

Mr. Fleming – a fifth assailant, totally out of step with the victim's testimony and reports to police. Some of the four testified Mr. Fleming had a gun, some testified he did not. Some testified Donta Tanner was the first to approach Joshua Beham's apartment, some did not. Some said they went to Mr. Beham's apartment to buy marijuana, some said they went there to rob him. Some said they took cash, some did not.

All four admitted criminals' stories have one common vein: they were all trying their best to state what they were told by someone was Mr. Fleming's role in the robbery. Indeed, it was Tyler Jefferson who came up with the notion to suggest Mr. Fleming had some part in the robbery (R. V 271; VI 294, 304). Dejuan Franklin echoed this after prompting by police (R. VI 311-12, 343-44). The other two – with much different stories – followed suit, all after lucrative plea deals (R. VI 352-53, 366-67).

This evidence was not such that this Court can "declare beyond a reasonable doubt that the" trial court's error in admitting Detective Brown's evidence as to Mr. Fleming's purported location "had little, if any, likelihood of having changed the result of the trial." *Hebert*, 277 Kan. at 96. Had the jury not heard Detective Brown's testimony, the prosecution's case against Mr. Fleming entirely would have been from these confessed criminals.

As a result, the Court should reverse the judgment of conviction and sentence against Mr. Fleming and discharge him without remand. Absent Detective Brown's improper testimony, the State did not present sufficient evidence to prove Mr. Fleming guilty beyond a reasonable doubt. But if the Court has any doubt whether this testimony would have changed the result, at the very least it should remand this case for a new trial.

II. The District Court erred in convicting and sentencing the defendant for the class A misdemeanor of theft, because this was multiplicitous with his conviction and sentence for aggravated robbery, in violation of his right to be free from double jeopardy under U.S. Const. amend. V and XIV. As the prosecution admitted at trial, theft is a lesser-included offense of aggravated robbery.

Standard of Appellate Review

Whether convictions are multiplicitous is a question of law subject to unlimited review. *State v. Robbins*, 272 Kan. 158, 171, 32 P.3d 171 (2001). A claim of multiplicity may be raised for the first time on appeal when necessary to serve the ends of justice and prevent a denial of fundamental rights. *State v. Groves*, 278 Kan. 302, 303-04, 95 P.3d 95 (2004).

* * *

The Double Jeopardy Clause of the Fifth Amendment prohibits a defendant from being convicted and sentenced for both a primary offense and a lesser-included offense. It is reversible error to convict and sentence a defendant for both offenses, even if the defendant did not raise the issue before the trial court. In this case, as the State admitted at trial, misdemeanor theft is a lesser-included offense of felony aggravated robbery. Nonetheless, the District Court convicted and sentenced Mr. Fleming for both aggravated robbery and theft. Should his conviction and sentence for theft be reversed?

"Multiplicity is the charging of a single offense in several counts of a complaint or information." *State v. Schoonover*, 281 Kan. 453, 475, 133 P.3d 48 (2006). It "creates the potential for multiple punishments for a single offense in violation of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution and section 10 of the Kansas Constitution Bill of Rights." *Id.* (citations omitted).

Ordinarily, an objection that a prosecution or conviction was multiplicitous must be raised before the trial court to be preserved for appellate review. *State v. Groves*, 278 Kan. 302, 303, 95 P.3d 95 (2004). It is well-established, however, that the issue of multiplicity may be raised "for first time on appeal in order to serve the ends of justice and prevent a denial of the fundamental right," and this Court and the Supreme Court regularly hear it raised as such. *Id.* at 303-04 (citing *State v. Taylor*, 25 Kan.App.2d 407, 409–10, 965 P.2d 834, *rev. denied* 266 Kan. 1115 (1998); *State v. Dubish*, 234 Kan. 708, 718, 675 P.2d 877 (1984)). This is especially true where a multiplicitous conviction and sentence is readily apparent from the face of the record. See *id.*; *State v. Moody*, 35 Kan.App.2d 547, 567, 132 P.3d 985 (2006).

In "analyzing whether sentences relating to two convictions that arise from unitary conduct result in a double jeopardy violation, the test to be applied depends on whether the convictions arose from one or two statutes. … If the … issue arises from multiple convictions of different statutes, … the strict-elements test is applied." *State v. Appleby*, 289 Kan. 1017, 1027, 221 P.3d 525 (2009).

In this case, Mr. Fleming was multiplicitously convicted and sentenced for both aggravated robbery under K.S.A. § 21-3427 and theft under K.S.A. § 21-3701. Thus, because his argument "aris[es] from his convictions under two different statutes, the strict-elements test applies" in analyzing it. *Appleby*, 289 Kan. at 1027. The strict elements test asks "whether each offense requires proof of an element not necessary to prove the other offense. If so, the charges stemming from a single act are not multiplicitous." *State v. Patten*, 280 Kan. 385, 389, 122 P.3d 350 (2005).

For lesser-included offenses, this inquiry is governed by K.S.A. § 21-3107, which provides in relevant part:

> (1) When the same conduct of a defendant may establish the commission of more than one crime under the laws of this state, the defendant may be prosecuted for each of such crimes. Each of such crimes may be alleged as a separate count in a single complaint, information or indictment.
>
> (2) Upon prosecution for a crime, the defendant may be convicted of either the crime charged or a lesser included crime, *but not both*. A lesser included crime is:
>
> …
>
> (b) *a crime where all elements of the lesser crime are identical to some of the elements of the crime charged*; ….

(Emphasis added).

It is well-established that, in Kansas, theft is a lesser-included offense of robbery. *State v. Plummer*, 45 Kan.App.2d 700, 703-07, 251 P.3d 102 (2011) (discussing the history of this concept in detail). In this case, the State admitted this to the trial court during the jury instruction conference (Record Volume VII at 595-96). Simply put, "a criminal who starts out intending to be a thief may become a robber. If the thief's effort to obtain control of the property is immediately challenged or contested and he or she brandishes a weapon or resorts to the use of force to complete the taking, the crime becomes robbery or aggravated robbery." *Plummer*, 45 Kan.App.2d at 705-06.

This is reflected in the statutes governing these offenses. Theft is an act "done with intent to deprive the owner permanently of the possession, use or benefit of the owner's property," including "(1) Obtaining or exerting unauthorized control over property; (2) obtaining by deception control over property; (3) obtaining by threat control over property; or (4) obtaining control over stolen property knowing the property to have

been stolen by another." K.S.A. § 21-3701. "Robbery is the taking of property from the person or presence of another by force or by threat of bodily harm to any person." K.S.A. § 21-3426. Aggravated robbery "is a robbery … committed by a person who is armed with a dangerous weapon or who inflicts bodily harm upon any person in the course of such robbery." K.S.A. § 21-3427.

Thus, the one element of theft – obtaining control over the property of another with intent to deprive the owner permanently of the possession of his property – is also a necessary element of robbery and, thus, aggravated robbery. Robbery simply adds that the obtaining of the control is by force or threat of bodily harm, and aggravated robbery simply adds that person obtaining the control be armed with a dangerous weapon or inflict bodily harm. See *Plummer*, 45 Kan.App.2d at 703-07.

Thus, theft is a "lesser crime" "where all elements" "are identical to some elements of the" greater crime – aggravated robbery. K.S.A. § 21-3107(2)(b). As a result, Mr. Fleming can be convicted of either aggravated robbery or theft, "but not both." *Id.* at (2). Under the strict elements test, his conviction and sentence for both offenses is unconstitutionally multiplicitous.

As a result, the plain and unmistakable law of Kansas is that Mr. Fleming's conviction and sentence for theft, the lesser-included offense of aggravated robbery, "must be vacated." *Appleby*, 289 Kan. at 1033.

If the Court does not reverse Mr. Fleming's conviction and sentence as prayed for in Issue I, above, it still should vacate his conviction and sentence for theft.

Conclusion

This Court should reverse the trial court's judgment and discharge the appellant. Alternatively, the Court should reverse the trial court's judgment and remand this case for a new trial. And either way, the Court should vacate the trial court's judgment of conviction and sentence for theft.

Respectfully submitted,

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Certificate of Service

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Appendix