2017 IL App (1st) 14-1814-U

THIRD DIVISION
March 1, 2017

No. 1-14-1814

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellant,	)	of Cook County, Illinois,
	)	Criminal Division.
v.	)	
	)	No. 10 CR 14693
SHAWN SMITH,	)	
	)	The Honorable
Defendant-Appellee.	)	Mary Margaret Brosnahan,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Cobbs concurred in the judgment.

ORDER

Held: Trial counsel was ineffective for failing to challenge the State's failure to provide a proper foundation for the admission of lay opinion testimony regarding sophisticated surveillance technology used by the police to track and arrest the defendant. Absent a proper foundation, the remainder of the State's evidence was vacant of any probable cause or reasonable suspicion to arrest the defendant. As a result there is a reasonable probability that absent counsel's failure to object to the admission of the improperly introduced lay opinion testimony, the defendant's motion to quash would have been granted, and the State would have been without any evidence with which to proceed against the defendant at trial. Accordingly, the cause is reversed and remanded for a new motion to quash and suppress hearing and the defendant is appointed new counsel.

¶ 1 Following a jury trial in the circuit court of Cook county, the defendant, Shawn Smith,

was found guilty of armed robbery and aggravated battery with a firearm and was sentenced to consecutive terms of 26 years' and 20 years' in prison. On appeal, the defendant argues that the trial court erred when it denied his motion to quash arrest and suppress evidence, where the arresting officers had no warrant and no probable cause, and the State failed to offer any foundation for the police officer's expert testimony regarding the technology used to locate and identify the defendant prior to his arrest. The defendant argues that his trial counsel was ineffective for failing to object to the introduction of such improper testimony and thereby jeopardized his hearing on the motion to quash arrest and suppress evidence, as well as his trial. The defendant also contends that he was denied his right to a fair trial before an impartial judge where the judge repeatedly directed the prosecution, before, during and after the jury trial. In the alternative, the defendant asserts that under the one-act one-crime rule, this court should vacate his sentence for aggravated battery with a firearm where it arose from the same act as his armed robbery charge. For the reasons that follow, we reverse and remand with instructions.

¶ 2 I. BACKGROUND

¶ 3 For purposes of brevity we set forth only those facts that are relevant to the disposition of this appeal. On July 8, 2010, the victim Carl Morrison (hereinafter Morrison) was working as a delivery driver for Barney's Pizza. At around 5:20 p.m., he was assigned to deliver a pizza at 310 North Long Avenue. The telephone number used to place that order was recorded as 773-981-5292. Once at the address, Morrison called the telephone number, which was listed on the order receipt, and spoke to a man who was inside the house, and who indicated that he would be coming out. While Morrison, who had exited his car, got the order ready, the man came out of the house and asked "How much is it?" Morison walked to the rear passenger door of his car to check the price on the receipt, but when he turned back around, the man pointed a small black

revolver at his chest. Morrison pushed the gun down, and "it went off in [his] stomach." The man reached into Morrison's pocket, took about $20, and fled the scene. Morrison drove himself to the hospital, where he had surgery to repair the single gunshot wound. The bullet was not removed.

¶ 4 The defendant was arrested in connection with this incident on July 22, 2010, and charged with three offenses, attempt first degree murder, armed robbery with a firearm, and aggravated battery with a firearm.[1]

¶ 5 A. Pre-Trial Proceedings

¶ 6 1. Motion to Quash Arrest and Suppress Evidence

¶ 7 Prior to trial, the defendant filed a motion to quash arrest and suppress evidence. At the hearing on that motion, on April 4, 2013, the following evidence was adduced. The defendant testified that at about 2 p.m. on July 22, 2010, he was in the vicinity of 1210 South Wabash Avenue, in Chicago, Illinois. He was taking a customer service and financial literacy class at a nearby school of business. When his class ended at 1 p.m., the defendant remained in the area to socialize with his friends. At about 2 p.m., the defendant was walking on the sidewalk of Wabash Avenue towards Roosevelt Avenue heading to the subway station to go to work. He was with three other individuals (two girls from his class, and his teacher), and was wearing a crew cut shirt and cargo shorts.

¶ 8 The defendant testified that as he proceeded down Wabash Avenue talking to his friends,

[1] Although the indictment initially charged the defendant with unlawful use of a weapon by a felon and personal discharge causing great bodily harm, those charges were *nolle prossed* by the State prior to trial.

he was suddenly stopped by a police van. According to the defendant, a female police officer exited the van and grabbed him by the arm and said "Hold it." Immediately thereafter several other detective cars pulled up. The detectives grabbed the defendant, threw him to the ground, took off his shoes, and searched him roughly. The defendant heard one of the detectives ask "does he have a phone, where is his phone?" The defendant stated that he was placed in handcuffs as the search continued. Afterward, the police sat him down for a few minutes while more police vehicles arrived. After the police found the defendant's cell phone, he was taken to the police station.

¶ 9 The defendant testified that his cell phone was inside his front pocket, and that it had been there from the time he departed his class at 1 p.m. to when he was stopped by the police. The defendant stated that while he was in class he had turned the phone off, so that it would not ring, but that he turned it on when he exited the school. Since then, he did not remove the cell phone from his front pocket.

¶ 10 The defendant acknowledged that he has two prior criminal convictions: a 2007 conviction for possession of a controlled substance, and a 2005 conviction for attempt armed robbery.

¶ 11 On cross-examination, the defendant stated that he bought the cell phone only a couple of days before being stopped by the police. He averred that he purchased the telephone "in the street," on July 18, 2010, from James Williams (hereinafter Williams), an individual he knew from high school. The defendant stated that the cell phone did not work at first, and that he had to "get the bill paid" and register the telephone his own name before he could use it. The defendant stated that a friend paid that bill for him and that he registered the cell phone in his own name a day after he purchased it, at a U.S. Cellular store on 19th Avenue and North Avenue. The defendant was subsequently able to make telephone calls from the phone.

¶ 12 On cross-examination, the defendant acknowledged that when he was searched by the police, the police also found marijuana on his person. The marijuana was inside the same front pocket where the defendant's phone was. The defendant denied that he was placed under arrest after the marijuana and telephone were discovered, and maintained that he was placed in handcuffs during the search and before that discovery.

¶ 13 After the defendant's testimony, the State called Chicago Police Detective Anthony Reyes (hereinafter Detective Reyes). Detective Reyes testified that in June and July 2010, he was assigned to investigate a string of armed robberies that had occurred on June 1, June 11, July 7 and July 8, of that year. According to the detective, the four armed robberies had two things in common, a telephone number and the description of the offender. With respect to the telephone number, all four offenses involved an offender telephoning a restaurant to order food, from telephone number: 773-981-5292. Once the food was delivered the delivery driver was robbed at gunpoint for food and money, with the last robbery escalating as a result of a struggle and the victim being shot in the stomach. With respect to the offender, the descriptions given were of a male African American somewhere between 5' 5" and 5' 8" tall, and "approximately 17 to early 20s, 23 years old."

¶ 14 Detective Reyes testified that as part of his investigation into these armed robberies he drafted an affidavit[2] for an order that would allow the Organized Crime Division to follow up with a "pinging system" that allows them to "track this phone." The detective acknowledged that

[2] The affidavit was not admitted as an exhibit at the hearing on the motion to quash, nor at any later date in the proceedings.

in drafting his affidavit he included the facts of each case, noted that the same phone number was used, and included the physical description of the offender.

¶ 15 According to Detective Reyes, the affidavit was reviewed by the Assistant State's Attorney's Office, and then a judge determined that it was "sufficient to go forward and approved it." The judge's order was signed on July 12, 2010.[3] Upon the court's suggestion, the parties stipulated that the pin register number for that order and application was 2010 PR 098.

¶ 16 Detective Reyes testified that after this order was signed, it allowed the Chicago Police Department to "go up on a pen register, specifically trap and trace devices on telephone number 773-981-5292."

¶ 17 On cross-examination, Detective Reyes acknowledged that apart from the aforementioned general description of the offender and the phone number, he had no other information that would lead to the particular arrest in this case.

¶ 18 Chicago Police Sergeant Jason Brown (hereinafter Sergeant Brown) next testified that in 2010 he was assigned to the Gang Investigation Section of the Organized Crime Division. He testified that in his capacity as an officer in this division, he was familiar with the use of pen register and trap and trace devices. He explained that "generally speaking" a pen register and trap and trace device, is a "method by which" the police are able to "monitor activity to and from cellular phones." He averred that "depending upon the wording within the order," the police are permitted "different capabilities."

¶ 19 Sergeant Brown testified that on July 22, 2010, he was assigned to a separate and unrelated

[3] The order was not admitted as an exhibit at the hearing on the motion to quash, or in any subsequent proceedings.

federal wire investigation. He was, however, familiar with Sergeant Brian Roney (hereinafter Sergeant Roney), who was not on his team, but was involved with an armed robbery investigation. According to Sergeant Brown, Sergeant Roney was monitoring the pen register and trap and trace device related to phone number 773-981-5292, which was the subject of that armed robbery. When asked how Sergeant Roney was monitoring that cell phone, Sergeant Brown explained "there is a device that we utilize or I should say our tech service people utilize in order to track cellular phone[s] whereby they're able to determine the exact location and proximity to the device." He further explained that the "apparatus is quite large" and does not "just fit in a handbag necessarily," and that therefore Sergeant Roney had to drive a large SUV to monitor the cell phone in question. Sergeant Brown testified that he has been in that SUV before and is familiar with the "device" that was used.

¶ 20 Sergeant Brown further explained that "assuming different variables come together," when tracking a particular phone number, the police may be able to get a precise location of an individual with the cell phone associated with that number. He testified that "you need to know the exact region, specifically cell tower that the cellular phone is communicating with," and that "once that is able to be determined, you can then start narrowing your search," and at some point using the "device," obtain a precise location. Sergeant Brown explained:

> "The way the system works, it only gives you a two dimensional view of the world. So if somebody is in, let's say, a high-rise ***, you *might* be able to narrow the phone to that specific building. But you wouldn't be able to determine the exact floor without using a secondary device." (Emphasis added.)

¶ 21 Sergeant Brown further testified that at around 2 p.m. he was exiting the U.S. Attorney's

Office at 219 South Dearborn Avenue when he received a radio call for assistance from Sergeant Roney. Sergeant Brown spoke to Sergeant Roney who gave him a "very detailed" description of an individual he wanted stopped. When asked to provide that description, Sergeant Brown, however, stated that he could not recall it "at all," except that it was "very specific."

¶ 22 After speaking with Sergeant Roney, Sergeant Brown proceeded to the general location of Wabash and Roosevelt Avenues. At 1210 South Wabash Avenue, the sergeant observed an individual matching the description provided by Sergeant Roney walking alone on the street. He identified the defendant in court as the individual that he observed. Sergeant Brown exited his squad car and along with Sergeant Roney, who had by then "brok[en] his surveillance location," placed the defendant into custody.

¶ 23 Sergeant Brown testified that once the defendant was placed into custody, he was searched and a cell phone with number 773-981-5292 was recovered from his person. In addition, the defendant had "a misdemeanor amount of cannabis on his person."

¶ 24 On cross-examination, Sergeant Brown acknowledged that he did not know from where Officer Roney used the "pen register," monitoring the signals from the phone he was tracking, to precisely locate the defendant, or how close he was to the defendant when he sent his dispatch. On cross-examination, the sergeant further admitted that he could not recall: (1) the defendant's description; (2) whether the defendant was walking down the street alone or with other individuals; or (3) from which street or corner he initially identified the defendant as the offender based on Sergeant Roney's description.

¶ 25 On cross-examination, Sergeant Brown further admitted that prior to detaining the defendant he only knew that Sergeant Roney was involved in the monitoring of a pen register related to an armed robbery investigation, but above and beyond that he had no information about Sergeant

Roney's investigation. Any other information that he testified to at the hearing, he had learned from Sergeant Roney after the arrest.

¶ 26 Sergeant Roney testified that On June 22, 2010, he was a technician in the Organized Crime Division of the Chicago police, and as such was familiar with pen registers. He stated that a "pen register is monitoring of inbound and outbound traffic on a telephone."

¶ 27 Sergeant Roney testified that after he received a "court order for a pen register,"[4] on July 22, 2010, he proceeded to monitor telephone number 773-981-5259, as part of an investigation into a string of armed robberies. The pen register allowed him to watch "on a computer the activity of the cellular device of all calls coming in, all calls going out." Sergeant Roney stated that he initially did this from his office at a police station, but eventually "went out in the field and furthered along the investigation."

¶ 28 Sergeant Roney drove a large unmarked SUV, which contained a laptop that allowed him access to the "pen register." Sergeant Roney was able to watch all the calls coming in and going out, based on which he testified "there was specific information coming in saying that the phone was being used in that area." Sergeant Roney drove to the vicinity of Wabash Avenue and 15th Avenue, whereupon after driving around for a bit, the information that he was "monitoring" on the laptop informed him that the cell phone was nearby. Sergeant Roney gradually moved northbound on Wabash Avenue towards Roosevelt Avenue, until he "made a determination of seeing who [he] believed was in possession of the cell phone." He identified the defendant in court as that individual.

[4] We note again that the pen register order is not part of the record on appeal.

¶ 29 Sergeant Roney stated that he had a general description of the offender, as a male African American, "late teens, early 20s and about 5'6', 5'7 something like that." Sergeant Roney stated that as he was watching the pen register he saw the subject put his hand-held device to his head. The sergeant concluded that the cellular activity he was monitoring on his laptop was related to "the defendant reacting to answering or placing a phone call." Once he made that observation, he radio dispatched for assistance. After Sergeant Brown responded, Sergeant Roney described what the subject was wearing. As they communicated over the radio Sergeant Roney clarified which person he was talking about. The two sergeants met at the 1200 block of Wabash Avenue and approached and arrested the defendant. A cell phone matching the number tracked by Sergeant Roney was recovered from the defendant's person.

¶ 30 On cross-examination, Sergeant Roney was asked to explain how once he was in the area of Wabash Avenue and 15th Avenue, he knew that the telephone number he was searching for was nearby. He stated: "Based on the signal strength of the telephone the tower that it was hitting off of some other specific stuff just that the phone is the way the phone transmits." Sergeant Roney further explained that once he parked, the signal strength in the "pen register" was getting weaker, and as he began moving his vehicle north on Wabash Avenue, the signal got stronger. When asked how he was able to narrow the signal to one particular person, he stated by the "strength of the telephone and signal that it emits." He added that based on this he could tell what side of the street the person was on, and "to some point" that the person had crossed the street. Sergeant Roney, however, could not recall how many other persons were crossing the street, or how many other individuals may have been directly in the vicinity of the defendant at that time.

¶ 31 On cross-examination, Sergeant Roney was asked whether he had any weight description of

the perpetrator before he made an arrest, and he stated that "he might have."

¶ 32 After hearing all the testimony, the trial court denied the defendant's motion to quash arrest. In doing so, the trial judge stated that while she had heard about pen registers, this was the "first time" she had heard this type of testimony from the stand, *i.e.*, a pen register used so directly to find a suspect for a criminal offense. The court nonetheless concluded that because the police had obtained an appropriate pen register order for the phone used in the armed robberies, and then followed "it" and "it" took them to the defendant, there was overwhelming evidence in the case to place the defendant under arrest. The court noted that Sergeant Roney testified that he tracked that phone number with the pen register and then observed the defendant putting the cell phone to his ear, as he observed calls coming to the number on the pen register. In addition, the court noted:

> "I would suggest that even if the defendant was in a building and there was more than one person there [and] the officers were not able to tell which of those individuals it was that the phone was pinging on or come [*sic*] off of. They would have had the ability to conduct [a] protective pat, do an investigatory search to see who it was that had them. That's not the case here. I don't even have to go that far with any kind of analysis.
>
> While he is out there moving his car he gets closer and closer to the phone. [Sergeant Roney] actually sees the defendant making calls."

¶ 33 2. Subsequent Motions *In Limine*

¶ 34 Months after the trial court denied the defendant's motion to quash arrest and suppress evidence, the State sought leave to prevent the defendant from eliciting specific information about the pen register at trial, including the particular name or type of equipment used. The State explained that "when these pen registers are applied for, they do sign a protective order" that they

cannot "disclose the names of these devices." The court asked defense counsel if he intended on "getting into the names of the devices," and when counsel indicated he did not, the court granted the State's motion without objection.

¶ 35 Prior to trial, the court ruled on several other motions *in limine* of significance. First, the trial court granted, in part, the State's motion to introduce other crimes evidence at trial, permitting the State to bring in evidence of a separate July 7, 2010, armed robbery of a Chinese restaurant delivery driver, alleging the defendant's involvement. According to the State's motion during that armed robbery, the victim similarly proceeded to 310 North Long Avenue after an order was placed by an individual calling himself "Mike" and using phone number 773-981-5259.[5] During the hearing on this issue, the trial court *sua sponte* amended the State's motion on "its face," underlying, *inter alia*, the address of where the other crime occurred, and changing the RD numbers in the motion to reflect the proper "CR" case numbers, as these are "hard to follow."

¶ 36 The trial court then denied the defendant's three motions *in limine*: (1) his motion to suppress his lineup identifications; (2) his motion to bar the State's use of his two prior convictions (for attempt armed robbery and possession of a controlled substance) to impeach his credibility should he choose to testify at trial; and (3) his motion to admit evidence of an alternate suspect—Williams.

¶ 37 In that last motion, the defendant sought to present evidence that weeks after the armed robbery, and several days before his arrest on July 22, 2010, Williams sold him the cell phone that was used to call the victim to 310 North Long Avenue to be robbed. In addition, the motion sought to introduce evidence that on October 26, 2010, the police executed a search warrant at 219 North Long Avenue, which was in close proximity to where the instant crime occurred (only

[5] We note that the motion incorrectly lists the phone number as "773-981-529."

a block away), with Williams as the target and recovered a .22 caliber revolver that matches the description of the gun used in the instant robbery. In addition, the description of Williams, who was subsequently arrested on January 30, 2012, closely matches the description of the instant offender: male African American 23 years of age, about 5'7", 150 lbs. with black hair.

¶ 38 The motion further sought to introduce the defendant's testimony that he knew Williams from the neighborhood and that on one occasion in April 2010, he observed Williams committing a robbery of a food delivery driver near 219 North Long Avenue. The defendant also sought to inform the jury that because the victim was shot once, with the bullet remaining lodged in his body, he had requested that this bullet be tested to ascertain if it had been fired from the revolver recovered at 219 North Long Avenue in order to link Williams to the charged offense, but was informed by the State that the bullet could not be removed from the victim without endangering the victim's health.

¶ 39 B. Jury Trial

¶ 40 After the court denied the defendant's motions *in limine*, the parties proceeded with a jury trial where the following relevant evidence was adduced. The victim, Morrison, recounted the events of July 8, 2010, and identified the defendant as the individual who robbed and shot him that night. He further testified that as a result of his injuries he had to wear a colostomy bag for weeks. In addition, Morrison admitted to have three prior felony convictions.

¶ 41 Detective Reyes next briefly testified to his efforts in obtaining the pen register and trap and trace order. He also stated that the pen register and trap and trace allow the police to use their technological equipment to bounce or ping satellite towers in order to pinpoint the location for a particular phone. Detective Reyes admitted, however, that his job entailed only applying for a pen register and trap and trace order and that he did not have the "technical wherewithal" to use

the technology to find a particular phone. He explained that the Organized Crime Division was responsible for such efforts.

¶ 42 Sergeant Roney next testified consistently with his testimony at the motion to quash hearing as to how he used the pen register and track and trace device to locate the defendant. Sergeant Roney testified that a "pen register" is also known as a "trap and trace," and that it is a device that monitors inbound and outbound calls on telephones. He stated: "The purpose is to see numbers being dialed by a phone and numbers being dialed to that phone and *possibly* where the phone is at." (Emphasis added.) Neither Sergeant Roney, nor Detective Reyes was qualified to testify as an expert concerning cell phone surveillance technology.

¶ 43 Pursuant to the trial court's order permitting the State to introduce other crimes evidence, Chung Don (hereinafter Don) testified that he was robbed by the defendant in a similar manner to that described by Morrison. Don testified that on July 7, 2010, he worked as a delivery driver at See Through Kitchen Restaurant. On that day, he proceeded to 310 North Long Avenue to deliver an order that was placed from phone number 773-981-5292. Once at the address, Don telephoned the number and was told someone would come down. Two men approached Don's car, one on the passenger side and one on the driver's side. Don identified the defendant in court as the individual who approached on the passenger side. The passenger side window was open a crack and the defendant pointed his gun through the window and demanded Don's money and the food. Once Don obliged, the defendant left.

¶ 44 Don testified that on July 22, 2010, he identified the defendant from a lineup at the police station. On cross-examination he admitted that when he initially spoke to police about the incident he described the robber as a young black man, medium size, "not too tall, not too short,"

about 5' 6", 140 pounds with light skin color. He denied telling the police that the robber wore braids and that he had a yellow complexion and therefore may have been biracial.

¶ 45 Sergeant James McGovern (hereinafter Sergeant McGovern) testified that he conducted two separate lineups that were viewed by Don and Morrison. Both victims immediately identified the defendant from those lineups as the person who robbed them. The sergeant also testified that there was no physical evidence recovered in the case.

¶ 46 The parties stipulated that the records for the cell phone recovered from the defendant showed that it was a prepaid number not associated with any name, and that it was the same number that was used to call the restaurants that employed the victims, Morrison and Don, shortly before they were robbed.

¶ 47 Once the State rested its case, the defendant called Officer Alan Rogers (hereinafter Officer Rogers), who testified that on July 7, 2010, he was involved in the investigation of Don's robbery, and that he interviewed Don on the following morning. The officer stated that during that interview, Don told him that the robber had braids and was possibly biracial because of his light complexion. Officer Rogers, however, explained that this interview was conducted with the help of another person working at the restaurant and not through an official Chinese language interpreter.

¶ 48 Officer Jesus Vasquez (hereinafter Officer Vasquez) next testified for the defense that on July 8, 2010, he interviewed the victim Morrison at the hospital. While the officer remembered asking Morrison for a description of the shooter he could not recall whether Morrison indicated that the shooter had a low hair style.

¶ 49 The defendant also testified on his own behalf, stating that on July 7 and July 8, 2010, he was

living in Maywood with his father, and working as an overnight manager at the McDonald's Restaurant at Madison Street and Karlov Avenue. The defendant stated that he worked between 10 p.m. and 6 a.m. Tuesdays through Saturdays.

¶ 50 The defendant averred that he worked that same night shift both on July 7 and July 8, 2010, and that after he finished work, he took the bus to his aunt's house at 5837 Washington Boulevard because it was more convenient than returning to Maywood. The defendant stated that on both of these days, he arrived at his aunt's house at about 6:45 a.m. His aunt is a registered nurse and was working, so the defendant's brother, Michael Smith (hereinafter Smith), let him into the house. The defendant's mother was also there.

¶ 51 The defendant explained that he and his brother had a routine of taking their young cousins to school Tuesdays through Thursdays. After doing so they would return home at about 10 a.m. whereupon the defendant would eat breakfast and talk to his mother and then go to sleep until about 8 p.m., before heading back to work.

¶ 52 The defendant then testified consistently with the testimony at the hearing on his motion to quash arrest, regarding what transpired on July 22, 2010, when he was arrested by the police and the cell phone was retrieved from his person. The defendant explained that he had purchased the cell phone "off the street" a week before his arrest (around July 11 or 12), after he lost his old phone when he fell asleep on the bus one morning. The defendant stated that he ran into Williams near Long Avenue and Lake Street and Williams offered to sell him a "burn out" cell phone for $20. The defendant described Williams as 150 lbs., an inch taller than him, with braids and a lighter complexion.

¶ 53 The defendant's brother, Smith, next testified consistently with the defendant. He stated that

at about 6 or 6:30 a.m., on July 7, and July 8, 2010, he was at his aunt's house, and saw his brother there. Smith averred that together with the defendant he took his aunt's children to school and that he and the defendant returned to the house around 10 or 10:30 a.m. Smith testified that the defendant went to sleep until he woke him up around 6:30 to 7 p.m. While the defendant slept, Smith spent the day at the foot of the defendant's bed playing video games. Smith also testified that he was with his brother near the Green line station at Long Avenue when the defendant bought his cell phone "off the street."

¶ 54 On cross-examination, Smith acknowledged that he never told the police any of this before, but stated that he did tell the public defender.

¶ 55 In rebuttal, the State recalled Sergeant McGovern who testified to several inculpatory statements made by the defendant upon his arrest. Sergeant McGovern testified that the defendant initially denied committing any robberies, and told the police that he purchased the instant cell phone about three weeks prior to his arrest because he had lost his old phone running for the bus. The defendant told the police that three days prior to his arrest, a female friend of his had called his old telephone number and spoke with an unidentified male who indicated that he would return the defendant's cell phone to him for $20. The defendant stated that he met with this individual, paid the money, and retrieved his cell phone. The defendant also told the sergeant that he had seen a robbery and asked how he could stop someone who had a gun.

¶ 56 Sergeant McGovern testified that that during his second interview with the defendant, in the presence of Assistant Cook County State's Attorney (ASA) Patrick Waller, the defendant stated that he had lost his cell phone three weeks prior to his arrest and had reacquired it only three days before. The defendant also indicated that he was "out there" when the robbery occurred but did not have a gun, did not rob anyone and was not involved. When asked to elaborate, the

defendant stated that he was with some friends on Long Avenue and they asked to use his cell phone to call and rob a delivery driver. The defendant told police, however, that he did not know why they wanted to use his phone before he handed it over to them. The defendant did not identify any of his friends to the sergeant or ASA.

¶ 57 On cross-examination, Sergeant McGovern acknowledged that the defendant was never permitted to memorialize his statement either in writing, or by way of an audio or video recording.

¶ 58 After Sergeant McGovern's testimony, the State offered into evidence certified copies of the defendant's two prior convictions: (1) felony possession of a controlled substance (case No. 07 CR 0447001) on July 26, 2007; and (2) attempt armed robbery (case No. 05 CR 2487802) on July 19, 2005.

¶ 59 At this point in the trial, defense counsel requested surrebuttal. Upon the court's request of an offer of proof, defense counsel stated that the defendant would testify that he talked to the police officers and gave them the information that he had already testified to. The State responded that the testimony of the sergeant did not come in for impeachment but as a statement against penal interest and that recalling the defendant to the stand would not rebut the sergeant's testimony. The court ruled in favor of the State and prohibited the defendant from testifying further.

¶ 60 After closing arguments, the jury began its deliberations. About an hour into the deliberations, the jury requested the certified copies of the defendant's two prior convictions. The parties agreed to send back redacted versions of the convictions including only the names of the convictions, case numbers and dates of disposition. The jury subsequently found the defendant not guilty of attempt first degree murder and guilty of both armed robbery (including

that he personally discharged a firearm during the commission of the offense) and aggravated battery with a firearm.

¶ 61 C. Sentencing

¶ 62 After the defendant's motion for a new trial was denied, the parties proceeded with sentencing. At the outset, the trial court discussed the sentencing ranges for the relevant offenses. With respect to the aggravated battery conviction, the court *sua sponte* found that based on the testimony at trial regarding the severe nature of the bodily injury inflicted on the victim, consecutive sentencing was triggered. Specifically, the court noted that its finding of serious bodily injury was based upon the victim's testimony that he was shot in the abdomen, and that he had to wear a colostomy bag for weeks afterwards. With respect to the armed robbery conviction, the judge first noted that in its indictment the State initially alleged great bodily harm in the commission of that offense, but then voluntarily dismissed that allegation before trial and never presented the issue before the jury. Nonetheless, the trial court also found great bodily harm and, as a result, ordered the sentences to be served at 85% time. The defendant was ultimately sentenced to consecutive terms of 26 years' in prison for armed robbery and 20 years' in prison for aggravated battery with a firearm, for a total of 46 years' imprisonment. The defendant now appeals.

¶ 63 II. ANALYSIS

¶ 64 On appeal, the defendant first contends that his motion to quash arrest and suppress evidence should have been granted where the arresting officers had no warrant and no probable cause, and grossly misrepresented the manner in which the defendant was located. Specifically, the defendant asserts that since he was not a suspect in the robbery, and the officers only had a vague and generalized description of the offender, it is undeniable that the officers accomplished their

warrantless arrest entirely as a result of advanced cell phone surveillance technology, which they used to track the cell phone found on his person, and which they described as "a pen register." The defendant therefore maintains that the State was required to lay a proper foundation for the arresting officer's testimony concerning the use of this technology. The defendant contends that because neither arresting officer was qualified as an expert to testify about the use of the surveillance technology, and neither offered any testimony about the capabilities of the device used and its supposed ability to locate cell phones with precision, any testimony regarding the use of the "pen register" to locate the defendant was without a proper basis.

¶ 65 What is more, the defendant contends that the officers' testimony regarding the use of the "pen register" to locate the targeted cell phone on his person, does not square with the capabilities of "pen register" technology. Rather, citing to numerous state and federal court decisions, the defendant maintains that the only way his cell phone could have been tracked in the manner described by the officers was with the use of much more sophisticated cell site simulator technology, commonly referred to as a "Stingray," which the officers failed to disclose to the trial court.

¶ 66 In that vein, the defendant points out that both the highest federal courts and state courts throughout this country, have repeatedly described "pen registers" as having very "limited capabilities" that "disclose only the telephone numbers that have been dialed." See *e.g.*, *Smith v. Maryland*, 442 U.S. 735, 741-42 (1979); see also *People v. Edwards*, 337 Ill. App. 3d 912, 915 (2002) ("pen registers and caller identification trap and trace devices *** display numbers dialed to and from a telephone ***"); see also *State v. Lunsford*, 141 A. 3d 170 (N.J. 2016) (describing a pen register or a trap and trace device as a device capable of tracking calls made and received); see also *United States v. Terry*, 572 F. 3d 430 (7th Cir. 2009) ("pen registers and caller

identification trap and trace devices" display numbers dialed to and from a telephone and "compile only numerical data."); *People v. Larkin*, 194 Cal. App. 3d 650, 239 Cal. Rptr. 760, 762 (1987) (Equating a "pen register" which provides " information about outgoing and incoming calls" to "toll information in phone company records."); see also *United States v. Lambis*, 2016 WL 3870940 (S. D. N. Y. 2016) ("Pen register information is a record from the service provider of the telephone numbers dialed from a specific phone"). Similarly, the defendant points out that chapter 206 of Title 18 of the United States Code, which governs the use and limitation of pen register and trap and trace devices by federal law enforcement agencies, defines the term "pen register" as a device which records the numbers dialed by a particular number and the term "trap and trace" as a device which captures the numbers of calls made to the target phone. See 18 U.S.C. § 3127(3) ("the term 'pen register" means a device *** which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication ***"); 18 U.S.C. § 3127(4) ("the term 'trap and trace device' means a device *** which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication").

¶ 67 On the other hand, the defendant points out that numerous and very recent federal court decisions have illustrated the far broader capabilities of Stingrays in comparison to "pen register and trap and trace" devices, specifically including the ability to precisely locate a targeted cell phone within a specified area. See *e.g.*, *In re Application of U.S. for Warrant*, 2015 WL

6871289, at * 1 (N. D. Ill. 2015); *American Civil Liberties Union v. Department of Justice*, 2015 WL 3793496, at *15 (N.D. Cal. 2015) (Stingrays "are used to identify each phone's unique numeric identifier and location, or capture the communications content of targets and bystanders alike"); *United States v. Lambis*, 2016 WL 3870940 (S. D. N. Y. 2016) (a Stingray "is a device that locates cell phones by mimicking the service provider's cell tower (or 'cell site') and forcing cell phones to transmit 'pings' to the simulator. The device then calculates the strength of the 'pings' until the target phone is pinpointed."); see also *United States v. Patrick*, 842 F.3d 540 (2016) (a Stingray is used to pin down the location of a cell phone by "pretend[ing] to be a cell-phone access point and, by emitting an especially strong signal [that] induces nearby cell phones to connect and reveal their direction relative to the device"). Specifically, in *In Re Application of U.S. for Warrant*, the federal district court of the Northern District of Illinois recently described a Stingray in the following manner:

> "The device does exactly what the name describes: it simulates a cell site. And by simulating a cell site, the device causes or forces cell-phones in an area to send their signals—with all the information contained therein-to the cell-site simulator. Once the cell phones in the area send their signals to the [Stingray], the device captures a vast array of information, including, but not limited to, the cell phones' electronic serial number ***. A cell phone need only be on for the [Stingray] to capture the cell phone's [serial number] ***; the cell phone need not be in 'use.' The [Stingray] signals penetrate structures, just as cell phones' signals penetrate most structures.
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> * * *
>
> Armed with a [Stingray] a law enforcement officer can obtain a target's cell phone's [serial number] *** by taking the device near the physical location of the target's cell phone

and then activating the device. By activating the device, the cell phones in a geographical area will send their signals to the device, which in turn captures the information. This process can be repeated at a later time and different location so that the target's cell phone [serial number] can be identified among all other cell phone telephone information previously captured. (Basically, by process of elimination the target's cell phone number is identified.)." *In Re Application of U.S. for Warrant*, 2015 WL 6871289, at * 2.

¶ 68 The defendant further points out that federal courts have recently recognized law enforcement's apparent reluctance to reveal the use as well as the technology behind Stingrays. As the federal district court of Northern Illinois aptly described:

"Unfortunately, the manufacturer of [Stingrays] (a company called the Harris Corporation) is extremely protective about information regarding its device. In fact, Harris is so protective that *it has been widely reported that prosecutors are negotiating plea deals far below what they could obtain so as to not disclose cell-site simulator information*. [Citation]. Indeed, Harris requires law enforcement officers, and others, to sign non-disclosure agreements *** regarding the devices. [Citations.]" *In Re Application of U.S. for Warrant*, 2015 WL 6871289, at * 1.[6]

[6] In support of this position, the defendant also urges us to take judicial notice of a separate pending civil law suit against the City of Chicago in, *Martinez v. Chicago Police Department* (case No. 14 CH 15338) as well as several very recent newspaper articles revealing the city's decade-long clandestine use of Stingrays without proper court authorization. See *e.g.*, *Martinez v. Chicago Police Department* (case No. 14 CH 15338) (January 11, 2016) (in denying the City's motion to dismiss, the trial court rejected the city's argument that Stingrays are covered by pen register laws, explaining that because the Stingray's "capabilities are broader" "it is improper to

¶ 69 According to the defendant, the aforementioned case law makes clear that the testimony of the arresting officers that they used a "pen register and trap and trace" device, which they themselves averred only identifies the incoming and outgoing calls of a targeted cell phone, to pinpoint the defendant's location, in a crowded street in the South loop, on a week day and in broad daylight, was less than forthcoming. Therefore, the defendant contends the police officer's testimony should have been excluded as unreliable.

¶ 70 Before addressing the merits of the defendant's contentions, however, we must first address the State's position that the defendant has "affirmatively waived" this argument for purposes of appeal by failing to raise it before the trial court. See *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010) ("To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion.") (citing *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988)); see also *People v. Allen*, 222 Ill. 2d 340, 352 (2006) (noting that "even constitutional errors can be forfeited").

¶ 71 The defendant responds that he has not forfeited his argument because he raised the issues of the officer's lack of probable cause and warrant both in his motion to quash arrest and in his posttrial motion. The defendant contends that his argument regarding the State's failure to lay

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equate them to and treat them as pen registers and trap and trace devices."); see also Jason Meisner, "Judge to Review Police Records on Secret Stingray Cellphone Tracking System," *Chicago Tribune*, Jan. 11, 2016 ("Chicago police released limited records showing that since 2005 the department has been billed hundreds of thousands of dollars by the Florida-Based Harris Corp. for the [Stingray] cellphone tracking technology"). We need not however take judicial notice of these documents, since we are able to decide the merits of the issues before us without reference to them.

the proper foundation for the testimony of the officers regarding the surveillance technology used to track him and the officers lack of candor about their use of a Stingray, falls squarely within this issue, because the officers would have had no probable cause to arrest him if they had not used the surveillance technology to track and identify the cell phone that was on his person. What is more, the defendant asserts that he could not have raised this issue more directly before the trial court because the use of Stingrays by the Chicago police was not publicly known in 2013 when his trial took place, but rather has come to light very recently.

¶ 72 Alternatively, the defendant contends that even if he did not properly preserve the issue of the officer's lack of candor with respect to the technology used, we should review his forfeited claim under the plain error doctrine or as part of his claim of ineffective assistance of trial counsel for failure to make this argument below.

¶ 73 The plain error doctrine "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *Thompson*, 238 Ill. 2d at 613 (citing *People v. Averett*, 237 Ill. 2d 1, 18 (2010)). Specifically, the plain error doctrine permits "a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)); see also *Thompson*, 238 Ill. 2d at 613; see also *People v. Adams*, 2012 IL 111168, ¶ 21. Under either prong of the plain error doctrine, the burden of persuasion remains on the

defendant. *People v. Bowman*, 2012 IL App (1st) 102010, ¶ 29 (citing *People v. Lewis*, 234 Ill. 2d 32, 43 (2009)).

¶ 74 A defendant's claim of ineffective assistance of counsel is governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668, (1984); see also *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011); see also *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill.2d 504 (1984) (adopting *Strickland*)). Under the two-prong test set forth in *Strickland*, a petitioner must establish both: (1) that his counsel's conduct fell below an objective standard of reasonableness under prevailing professional norms; and (2) that he was prejudiced by counsel's conduct, *i.e.*, that but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. See *Lacy*, 407 Ill. App. 3d at 456; see also *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94); see also *People v. Domagala*, 2013 IL 113688, ¶ 36. Failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. See *People v. Henderson*, 2013 IL 114040, ¶ 11; see also *People v. Patterson*, 217 Ill.2d 407, 438 (2005).

¶ 75 The State cites to *People v. Hughes*, 2015 IL 117242, asserting that we need not review the defendant's claim under plain error because the defendant's arguments on appeal regarding why the motion to quash should have been granted are wholly distinct from the arguments he made before the trial court. The State asserts that as such the defendant has affirmatively waived these arguments and should be estopped from raising them on appeal. We disagree, and find *Hughes* inapposite.

¶ 76 In *Hughes*, a 19-year-old defendant had been apprehended by police in Michigan in connection with two shooting deaths in Chicago. *Hughes*, 2015 IL 117242, ¶¶ 6–7. The defendant remained handcuffed while the detectives drove him back to Chicago for

interrogation. *Hughes*, 2015 IL 117242, ¶ 7. The detectives questioned the defendant over the course of several hours during that drive, until he admitted to the shootings. *Hughes*, 2015 IL 117242, ¶¶ 8–9.

¶ 77 Prior to trial, the defendant moved to suppress his statements to the police. *Hughes*, 2015 IL 117242, ¶ 10. Although the written motion generally alleged that the defendant had been subject to "coercion," at the hearing on the motion to suppress, defense counsel made only two limited arguments as to why the defendant's statements were involuntary, namely because the detectives: (1) "[hand]cuffed [the] defendant too uncomfortably" during the drive from Michigan; and (2) questioned the defendant during that drive without first informing him of his *Miranda* rights. *Hughes*, 2015 IL 117242, ¶¶ 10-11. After the trial court denied the motion to suppress, the defendant's statements were used at his trial and he was convicted of both murders. *Hughes*, 2015 IL 117242, ¶¶ 15, 22.

¶ 78 On appeal, the defendant challenged the denial of his motion to suppress, arguing that his confession was involuntary. *Hughes*, 2015 IL 117242, ¶ 25. On appeal, however, the defendant asserted various grounds that had not been raised in the trial court, such as his age and lack of education, his lack of sleep and food during the prolonged interrogation, his emotional distress due to his grandfather's death, and that his substance abuse made him more "susceptible to suggestion" by the police. *Hughes*, 2015 IL 117242, ¶ 25.

¶ 79 On appeal, the State argued the defendant should be estopped from such claims as a result of his "affirmative waiver of these issues where he did not present these reasons at his motion to suppress in the trial court." (Internal quotation marks omitted.) *Hughes*, 2015 IL 117242, ¶ 26. The appellate court held that the admissibility of the defendant's confession was reviewable

under plain error and proceeded to find that the defendant's confession was involuntary, warranting a new trial. *Hughes*, 2015 IL 117242, ¶ 27.

¶ 80 The State appealed to our supreme court, contending that the defendant had "affirmatively waived those arguments raised on appeal that were not raised before the trial court" and that "intentional waiver" applies "when arguments are deliberately not made." *Hughes*, 2015 IL 117242, ¶ 33. The State argued that the situation was analogous to "the invited error rule, wherein a party cannot complain of error that it brought about or participated in." *Hughes*, 2015 IL 117242, ¶ 33.

¶ 81 Our supreme court agreed with the State, noting that the defendant's "reasons for suppression in the trial and appellate courts" were "almost wholly distinct from one another." *Hughes*, 2015 IL 117242, ¶ 33. The court explained that in the trial court the defendant had "presented no evidence and produced no argument as to sleep deprivation, food deprivation, the defendant's education, his age, his grief at the loss of his grandfather." *Hughes*, 2015 IL 117242, ¶ 41. The court noted that "[a]ll of this information was available to the defendant at the time of the suppression hearing, either through his own personal knowledge or his review of the interrogation video." *Hughes*, 2015 IL 117242, ¶ 41. Therefore, the *Hughes* court concluded that as a result of the defendant's own failure the trial court did not have "the opportunity to consider the bulk of these arguments" and "the State was never given the opportunity to present evidence or argument that the defendant's confession was voluntary even as against these challenges." *Hughes*, 2015 IL 117242, ¶ 44. Accordingly, the court held that the "defendant did not adequately preserve these claims," for review. *Hughes*, 2015 IL 117242, ¶ 45.

¶ 82 Unlike in *Hughes*, where the defendant had personal knowledge of the facts of his

interrogation, in the present case, the State was the only one who possessed knowledge of the actual surveillance technology (be it pen register and trap and trace device, Stingray, or something entirely different) used by the arresting officers to locate the defendant, and any failure by the State to lay the proper foundation for this technology, including the allegedly vague and grossly exaggerated capabilities of "pen registers" offered by the testimony of the arresting officers, would have prevented the defendant from possessing sufficient knowledge to adequately address this issue below. As the defendant correctly points out, the use of Stingrays by the Chicago police did not come to light publicly until very recently and long after the suppression hearing and the trial in this case. The defendant should not be punished for the State's failure to lay a proper foundation for the introduction of expert testimony solely within its control and certainly not for any lack of candor by the State's own witnesses. For these reasons, we find that *Hughes* would not preclude our review of the error in this case.

¶ 83 Under any circumstance, *Hughes* does not apply to bar our review of this issue under a claim of ineffective assistance of trial counsel, which the defendant has raised here.

¶ 84 We therefore turn to the merits of the defendant's claim in the context of his trial counsel's ineffectiveness. As already noted above to succeed on a claim of ineffective assistance of counsel, the defendant must establish both: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defendant. See *Domagala*, 2013 IL 113688, ¶ 36; see also *Lacy*, 407 Ill. App. 3d at 456; *Ward*, 371 Ill. App. 3d at 434 (citing *Strickland*, 466 U.S. at 687-94).

¶ 85 Under the first prong of *Strickland*, the defendant must demonstrate that counsel's conduct fell below an objective standard of reasonableness under prevailing professional norms. *Domagala*, 2013 IL 113688, ¶ 36. Although under this prong, counsel's conduct is afforded a

strong presumption that it was the result of sound trial strategy, a defendant may overcome this presumption by showing that no reasonably effective criminal defense attorney, confronting the circumstances of the defendant's trial, would engage in similar conduct. *People v. Fillyaw*, 409 Ill. app. 3d 302, 312 (2011)

¶ 86 In the present case, for the reasons that follow, we conclude that counsel's failure to object to the State's introduction of the police officer's lay opinion testimony regarding their use of complex surveillance technology to track, locate and ultimately link the defendant to the charged crime, without proper foundation, constituted ineffective representation.

¶ 87 In that respect, we note that the law is very clear that a lay witness who has not been qualified as an expert may not testify to "opinions or inferences which are *** based on scientific, technical, or other specialized knowledge ***." *People v. Thompson*, 2016 IL 118667, ¶ 39 (citing Ill. R. Evid. 701). Before such expert opinion evidence can be admitted, the proponent must lay an adequate foundation by showing: (1) that the proffered expert is qualified; and (2) that there is a valid scientific or technical basis for the expert's opinion. *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800 (2009). The foundation for the opinion is established by showing that "the information upon which the expert bases his opinion is reliable." (Internal quotes omitted.) *People v. Safford*, 392 Ill. App. 3d 212, 221 (2009). "To lay an adequate foundation for expert testimony, it must be shown that the facts or data relied upon by the expert are of a type reasonably relied upon by [experts] in that particular field in forming opinions or inferences." (Internal quotations omitted.) *People v. Smith*, 2012 IL App (1st) 102354, ¶ 70.

¶ 88 Additionally, when opinion testimony is based upon information derived from an electronic

or mechanical device, "the expert must provide some foundational proof that the device is functioning properly at the time it was used." *People v. Raney*, 324 Ill. App. 3d 703, 706 (2001); see also *People v. Bynum*, 257 Ill. App. 3d 502, 514 (1994). Such proof requires the expert to explain how the machine is maintained and calibrated and why the expert knows the results are accurate. *Raney*, 324 Ill. App. 3d at 708-10; see also *People v. Berrier*, 362 Ill. App. 3d 1153, 1160-61 (2006); *People v. DeLuna*, 334 Ill. App. 3d 1, 21 (2002). This foundational proof is necessary to ensure that the admission of expert scientific testimony based upon a mechanical device is both relevant and reliable. *Bynum*, 257 Ill. App. 3d at 514. Consequently, where an expert fails to testify that the mechanical device he used was working properly, does not indicate whether any testing was done to assess the operating condition of that device, and fails to explain how the device was calibrated, the expert does not lay a proper foundation for the admission of the results obtained from that mechanical device. *Raney*, 324 Ill. App. 3d at 708-10. If the required foundation is lacking, the expert's testimony is inadmissible. *Raney*, 324 Ill. App. 3d at 710.

¶ 89 In the present case, the record reveals that at the motion to quash hearing, in defending the propriety of the officer's warrantless arrest, the State relied solely on the testimony of three arresting police officers regarding their use of complex surveillance technology to locate the defendant on the basis of the cell phone number used in the robbery. However, in doing so the State failed to qualify any of those officers as experts in surveillance technology, or present any evidence regarding the capabilities of the technology used, how it was maintained and calibrated and whether it was functioning properly on the day it was used, so as to establish that the opinions of the three officers as to the result obtained--namely the location of the defendant--were reliable.

¶ 90 The record reveals that the officers' testimony about the surveillance technology was sparse, vague, obfuscating and at times incoherent. Specifically, Detective Reyes testified that once phone number 773-981-5259 was identified as having been used in a string of robberies, including the instant one, he drafted an affidavit for an order to allow the police to follow up with a "pinging system" that would permit them to "track this phone," and that once granted this order permitted the police to "go up on a pen register, specifically trap and trace devices on [the] telephone number." The detective was not asked, nor did he explain what the "pinging system" or the "pen register and trap and trace" device were, or how they allowed the police to track the defendant.

¶ 91 Sergeant Brown, who helped Sergeant Roney execute the defendant's arrest, but did not operate the surveillance technology used to locate the defendant, provided similarly vague testimony about the "pen register and trap and trace device" used to locate the defendant. He stated that he was familiar with the pen register "device" used by Officer Roney, and that the "apparatus" was inside a large SUV because it was "quite large" and did not "just fit in a handbag necessarily." Sergeant Brown further opined that "generally speaking" a "pen register" was "a method by which" the police were able to "monitor activity to and from cellular phones," and which, "assuming different variables c[a]me together," "*might*" provide the police with the precise location of a targeted cell phone number. He loosely explained that an officer operating the device needed to know the exact region (cell tower) that the cell phone was communicating with, so as to start narrowing the search and at some point get a precise location. The sergeant was not asked, nor did he explain how an officer would accomplish narrowing the search by using the "pen register" device.

¶ 92 Sergeant Roney, who was the only police officer to physically operate the surveillance

technology used to track the targeted cell phone to the defendant's person, was similarly elusive. While the sergeant explicitly testified to only using a "pen register" to locate the cell phone, he could not explain how "pen register" technology permitted him to determine the phone's precise location. The sergeant claimed that he obtained a "court order for a pen register" which allowed him to watch "on a computer the activity of the cellular device of all calls coming in, all calls going out." He initially did this from his office at the police station but eventually "went out in the field" in a large SUV, which had a laptop that allowed him access to the "pen register," so that he could watch all the calls coming in and going out. The sergeant nebulously averred that as he was driving around, based on the calls he was monitoring "there was specific information coming in saying that the phone was being used in that area." However, when asked to explain how the technology and device worked and how this information that he was receiving on his laptop conveyed that the phone was nearby, the sergeant incoherently testified: "based on the signal strength of the telephone the tower that it was hitting off of some other specific stuff just that the phone is the way the phone transmits." Sergeant Roney was not asked, nor did he explain how the "pen register" was calibrated on the date of the defendant's arrest.

¶ 93 Under this record, the evidence offered by the State at the motion to quash hearing painfully--indeed fatally—failed to provide any critical details about how the "pen register" technology that the officers testified to using operates so as to precisely locate a targeted cell phone, how it was calibrated and used on the date of the defendant's arrest, and how it specifically located the cell phone on the defendant's person in the vicinity of Wabash and Roosevelt Avenues prior to his arrest. This is particularly true in light of the myriad of case-law, cited to by the defendant, that unequivocally establish that "pen registers" are only capable of providing information about incoming and outgoing calls from a targeted phone number, and not a phone's location. See e.g.,

Smith, 442 U.S. at 741-42; *Edwards*, 337 Ill. App. 3d at 915; *Lunsford*, 141 A. 3d 170; *Larkin*, 194 Cal. App. 3d 650; see also 18 U.S.C. § 3127(3), (4); see also *Lambis*, 2016 WL 3870940, *1-3.

¶ 94 Consequently, we can fathom no reason for counsel's failure to object to the introduction of the officer's lay opinion testimony on the basis that it lacked foundation. See *Smith*, 2012 IL App (1st) 102354, ¶ 70 ("To lay an adequate foundation for expert testimony, it must be shown that the facts or data relied upon by the expert are of a type reasonably relied upon by [experts] in that particular field in forming opinions or inferences." (Internal quotations omitted.)); *Raney*, 324 Ill. App. 3d at 706 (when opinion testimony is based upon information derived from an electronic or mechanical device, "the expert must provide some foundational proof that the device is functioning properly at the time it was used."). The absence of any challenge to the introduction of the solitary evidence explaining the police's ability to locate, arrest and incriminate the defendant in the crime charged, cannot be explained away by trial strategy. "Sound trial strategy is made of sterner stuff. It embraces the use of established rules of evidence and procedure to avoid, when possible, the admission of incriminating statements, harmful opinions, and prejudicial facts." *People v. Moore*, 279 Ill. App. 3d 152, 159 (1996). "The constitutional guarantee of effective assistance of counsel requires a criminal defense attorney to use the applicable rules of evidence to shield his client from a trial based upon unreliable evidence." *People v. Fillyaw*, 409 Ill. app. 3d 302, 315 (2011). In the present case, counsel's performance was not objectively reasonable, and the defendant did not receive effective representation.

¶ 95 In coming to this decision, we reject the State's assertion that the testimony of Sergeant

Roney provided a sufficient foundation for his use of the pen register device to identify the cell phone on the defendant's person. In support of its argument, the State points out that Sergeant Roney testified that as he was monitoring the activity on the pen register, which allowed him to identify incoming and outgoing calls on the instant cell phone, he saw the defendant put his cell phone to his head, thereby concluding that the defendant was the individual he was after. Nonetheless, Sergeant Roney failed to explain how that same pen register (*i.e.*, a list of incoming and outgoing phone calls) allowed him to know what area to proceed to with his SUV, let alone how he used it to pinpoint the defendant's precise location, before seeing him put the cell phone to his face. In addition, although it is conceivable that the pen register would have permitted the officer to locate the defendant in a crowd, by dialing the defendant's phone number while watching the pen register to see if the dialing phone number appeared on the incoming log as the defendant answered his phone, the officer never testified to doing so. More importantly, Sergeant Roney never testified that the defendant was the only individual in the vicinity using a cell phone. In fact, he admitted that when he observed the defendant crossing the street with the cell phone to his face, he could not recall how many other individuals were also crossing the street or were in the direct vicinity of the defendant.

¶ 96 The State further argues that counsel was not ineffective for failing to object to the introduction of the aforementioned testimony because the pen register and trap and trace order obtained by the police was not limited to merely tracing ingoing and outgoing numbers for the phone, but also permitted them access to the location of the tracked cell phone number. In support, the State improperly attaches as an appendix to its brief a copy of the application and

"pen register order," [7] that the officers testified to obtaining, and cites to a portion of that order that requires the cellular provider to furnish the police with "cell site location."[8] However, that application and order are neither file-stamped, nor part of the record on appeal. What is more, the pin register number on the typewritten order attached appears to have been handwritten in, with a marker. Additionally, we find troubling that in its brief the State affirmatively stated that it would seek leave to supplement the record on appeal with these documents so as to permit us to review them properly, but has since inexplicably failed to do so. Accordingly, under these facts, we decline to consider the attachments provided. See *People v. Garvin*, 2013 IL app (1st) 113095 ("attachments to briefs not included in the record are not properly before the reviewing court and cannot be used to supplement the record.").

¶ 97 Nonetheless, even if we were to consider the pen register order attached and cited to by the State, we note that nothing in its language could cure the officer's failure to testify accurately and in detail about the actual surveillance technology they used to precisely locate the cell phone on the defendant's person. At the motion to quash hearing, the arresting officers never testified about using "cell site location" technology to track the defendant, but repeatedly and consistently claimed that they only used a "pen register and trap and trace" device to trace the defendant. If, in fact, the officers used something other than a "pen register and track and trace device" to precisely locate the defendant, they were required to testify to that at the hearing, and explain to the trial court how that surveillance technology was used to accomplish their goal.

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[7] We note that this attached order is signed by a different judge from the one presiding over the defendant's motion to quash hearing and trial.

[8] We note that "cell site location" is not the same as, and should not be mistaken for, "cell-site simulators" (*i.e.*, Stingrays). See *e.g.*, *Lambis*, 2016 WL 3870940, *1.

¶ 98 In addition, contrary to the State's position, the language referenced in the attached order, does not authorize the police to track anything. It merely instructs the cellular provider to furnish "call detail, including cell site location" and "precision location based on information queries from the above listed-telephone number." Without any testimony whatsoever from the officers about the capacity of "cell site location" technology to precisely track a cell phone number in real time, the court could not divine such ability, or use. This is particularly true, where courts have previously noted that "cell site location" information may not be precise enough to identify a targeted cell phone in a crowded area. See *e.g.*, *Lambis*, 2016 WL 3870940, *1 (noting that "cell site location" information was not precise enough to identify " 'the specific apartment building,' much less the specific unit in the apartment complexes in the area," requiring law enforcement officers to deploy a technician with a Stingray to an intersection to identify the building with the strongest "ping" and then enter the apartment building and walk the halls until he located the specific apartment where the signal was the strongest.); *U.S. v. Hill*, 818 F.3d 289, 295 (7th Cir 2016) (noting that an analysis of "cell sites" used by a telephone can merely "show with sufficient reliability that a phone was *in a general area*, especially in a well-populated one." (Emphasis added.))

¶ 99 Under these circumstances, we find that counsel's failure to object to the introduction of the testimony as it was offered at the motion to quash hearing was objectively unreasonable. Any ignorance on counsel's part about the actual technology used (be it cell site location or Stingray) would not excuse counsel's lack of knowledge about pen register technology (both under the law as it stood at the time of the hearing and as described in the testimony offered by the arresting officers), so as to justify counsel's failure to challenge its introduction as unreliable and inadmissible lay opinion testimony.

¶ 100 Since we conclude that counsel's performance was deficient we must next consider whether that deficient performance also prejudiced the defendant. See *Domagala*, 2013 IL 113688, ¶ 36. To meet the second prong of *Strickland*, the defendant must establish that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Domagala*, 2013 IL 113688, ¶ 36. In the context of a motion to quash hearing, the defendant "must show that a reasonable probability exists both that the motion would have been granted and that the outcome of the trial would have been different had the evidence been suppressed." (Internal quotations omitted.) *People v. Lundy*, 334 Ill. app. 3d 819, 830 (2002).

¶ 101 In the present case, there can be no doubt that but for counsel's failure to object to the introduction of the officers' lay opinion testimony, there was a high probability that the outcome of both the motion to quash hearing and the trial would have been different. In that respect, the record reveals that aside from the officer's testimony that they used surveillance technology to locate the defendant based upon a phone number used in the robbery, the remainder of the evidence presented at the motion to quash hearing only established that Sergeant Roney drove down Wabash Avenue until he saw a young black man holding a cell phone to his head. The sergeant testified that he arrested the defendant on sight based on a very general description of the offender-- including, to the sergeant's recollection, only race, approximate age and height. The officer, however, could not remember how many other individuals were on the street or in the defendant's vicinity at the time of the arrest. In addition, there was no testimony by any of the arresting officers, that apart from walking down the street with a telephone in his hand, the defendant was acting in any way to draw either suspicion or attention to himself. In fact, the defendant testified that he was merely walking down the street and talking with several classmates and his teacher, when he was stopped by police. Under this record, we find that but

for counsel's failure to challenge the introduction of the arresting officers' opinion testimony regarding their use of surveillance technology to track and locate the defendant, there was a reasonable probability that the trial court would have found that the police lacked both probable cause to arrest and reasonable suspicion to detain and search the defendant. See *People v. Hopkins*, 235 Ill. 2d 453, 472 (2009) ("Probable cause exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the person arrested has committed a crime."); see also *People v. Brown*, 343 Ill. App. 3d 617, 627 (2003) (holding that an anonymous tip with a description of the offender, standing alone, without corroboration, is insufficient to justify a *Terry* stop).

¶ 102 Since it is undisputed that every piece of inculpatory evidence offered by the State at the defendant's trial originated from the defendant's warrantless arrest (*i.e.*, the cell phone used in the robbery, the lineup identifications and the defendant's inculpatory statements), if the defendant's motion to quash had been granted, the State would have had no evidence with which to prosecute the defendant. *People v. Henderson*, 2013 IL 114040, ¶ 33 (citing *Wong Sun v. United States*, 371 U.S. 471, (1963)).

¶ 103 Under this record, we conclude that the defendant was denied his constitutional right to effective representation by counsel. *Domagala*, 2013 IL 113688, ¶ 36; *Strickland*, 466 U.S. at 687-94. Accordingly, we reverse the defendant's conviction, order that new counsel be appointed to represent him, and remand the matter for a new motion to quash hearing. See *People v. Patrick*, 2011 IL 111666, ¶ 35 ("The remedy for a valid claim of ineffective assistance of counsel should be tailored to the injury from the constitutional violation and should not unnecessarily infringe on competing interests").

¶ 104 In doing so, we must first consider the double jeopardy implications of remanding the cause

for a new suppression hearing and subsequently new trial. See *People v. Lopez*, 229 Ill. 2d 322, 366-67 (2008). To avoid any double jeopardy concerns we consider whether the evidence presented at trial was sufficient for the jury to find the defendant guilty. See *People v. Olivera*, 164 Ill. 2d 382, 393 (1995) ("retrial is permitted even though evidence is insufficient to sustain a verdict once erroneously admitted evidence has been discounted, and for the purposes of double jeopardy all evidence submitted at the original trial may be considered when determining the sufficiency of the evidence."). In this case, viewing, as we must, the evidence in the light most favorable to the State we conclude that any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. See *Lopez*, 229 Ill. 2d at 367; *Olivera*, 164 Ill. 2d at 393. The defendant was identified as the offender by two victims both in lineups and in court, the cell phone used in both robberies was found on his person, and after his arrest, the defendant made inculpatory statements to police, varying his explanations as to how and when he obtained that cell phone.

¶ 105 III. CONCLUSION

¶ 106 For all of the aforementioned reasons, we reverse the defendant's conviction and remand for a new hearing on the defendant's motion to quash arrest and suppress evidence. In doing so, we order that the defendant be appointed new counsel. In addition, because on appeal the defendant has charged the trial judge with bias, in the interest of propriety, we order that on remand the cause be assigned to a different judge.