STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2016
v	No. 326645 Ingham Circuit Court
KRISTOFFERSON TYRONE THOMAS, Defendant-Appellant.	LC No. 14-000507-FC

Before: FORT HOOD, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83, felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 2 years' imprisonment for the felony-firearm conviction, 28 to 60 years' imprisonment for the assault with intent to commit murder conviction, 10 to 15 years' imprisonment for the felonious assault conviction, and 10 to 15 years' imprisonment for the felon in possession of a firearm conviction. We affirm.

Defendant first argues that he was denied his right to a fair trial based on the admission of impermissible lay witness testimony. We disagree. Defendant objected to detective Brad St. Aubin's testimony that St. Aubin believed the purpose of one of defendant's jailhouse phone calls was to obtain an alibi. Defendant's remaining claims of error, including his due process claim, were unpreserved because defendant failed to object at trial. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). "Preserved evidentiary rulings are reviewed for an abuse of discretion." *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). "Unpreserved claims of evidentiary error are reviewed for plain error affecting the defendant's substantial rights." *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011). We also review unpreserved constitutional claims for plain error. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Lay opinion testimony, such as that at issue here, is permitted pursuant to MRE 701, which provides:

> If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are

(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Defendant first complains of St. Aubin's testimony regarding a phone call defendant made in jail, arguing that the testimony was not based on fact. During trial, St. Aubin testified that defendant told him that he was at a birthday party on the evening of the shooting, but he would not give St. Aubin the names of others at the birthday party or its location. Olympia Mack testified at trial that defendant was at her daughter's birthday party at the time of the offense, thereby providing an alibi for defendant. On rebuttal, St. Aubin testified regarding a phone call defendant made in jail where he spoke to a female, presumably his girlfriend Chanel Long. Defendant asked her to contact a person named "O," and "pull down on her." St. Aubin explained that "pull down on her" "can mean pull somebody off to the side to leverage them alone by themselves," or "[i]t could be threaten somebody," or that "[i]t could be just reach out to that person." St. Aubin thereafter testified that he believed "O" referred to Mack and that defendant was trying to obtain an alibi from Mack. Based on the record, we conclude that St. Aubin's testimony was rationally based on his perceptions and no error occurred. Additionally, St. Aubin made clear to the jury that he did not know for certain who "O" was and that his testimony was merely his opinion.

Defendant also argues that detective Lee McAllister's testimony regarding defendant's presumed phone number had no factual basis. During the course of investigation, police obtained Long's cellular telephone. Long had a phone number saved in her phone under defendant's name and photograph. While McAllister acknowledged that he did not know whether defendant had the phone on his person on the day of the offense, he obtained records for the number because it was associated with defendant based on the information obtained from Long's phone. Thus, McAllister's testimony that he associated that phone number with defendant was rationally based on his perception. Accordingly, defendant's claim fails. Further, defense counsel was not ineffective for failing to object to the officers' opinion testimony because any objection would have been futile. Defense counsel is not ineffective for failing to raise a meritless argument or futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant next argues that he was denied a fair trial based on the improper admission of McAllister's expert testimony pursuant to MRE 702. We disagree. Defendant did not object to McAllister's expert testimony at trial, so this issue is unpreserved. Again, we review unpreserved claims of evidentiary and constitutional error for plain error. *Benton*, 294 Mich App at 202; *Thomas*, 260 Mich App at 453-454.

Before trial, McAllister obtained detailed call records for the phone number associated with defendant.[1] The records "detailed the calls that were made to and from the phone and the

[1] On appeal, defendant stated that the records for Long's phone number were obtained and presented to the jury. However, as the prosecution points out, this is not an accurate summary of the record. The records were for the phone number listed under defendant's name and photograph in Long's phone.

location the phone was at the time those calls were placed." McAllister testified that he had received training from a software company on how to use call records to plot the calls on a map. He also received training from the Bureau of Alcohol, Tobacco, and Firearms in analyzing the specific information provided by the primary Michigan cellular service providers. McAllister had testified as an expert in this area four to five times previously. Based on his training, McAllister was admitted as an expert in telephone location plotting based on cell phone towers without objection. McAllister proceeded to explain that the call records showed the cell phone towers that were being used by a phone during a call. Using the coverage location of the cell phone tower being used, McAllister plotted the calls on a map. The data placed the phone in the area where the shooting occurred at the time it was committed. On appeal, defendant challenges the admissibility of this type of expert testimony.

MRE 702 governs the admissibility of expert testimony.

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The underpinning of MRE 702 is that the "trial court must ensure that all expert opinion testimony, regardless of whether it is based on novel science, is reliable." *People v Steele*, 283 Mich App 472, 481; 769 NW2d 256 (2009).

"When evaluating the reliability of a scientific theory or technique, courts consider certain factors, including but not limited to whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, and its rate of error if known." *People v Kowalski*, 492 Mich 106, 131; 821 NW2d 14 (2012). The trial court "acts as a gatekeeper and has a fundamental duty to ensure that the proffered expert testimony is both relevant and reliable[,]" but "[b]ecause there are many different kinds of experts and expertise, this inquiry is, by necessity, a flexible one, and a court determining the admissibility of expert testimony may consider reliability factors pertinent to the particular type of expert testimony offered and its connection to the particular facts of the case." *Id.* at 120, quoting *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 589, 594-595; 113 S Ct 2786; 125 L Ed 2d 469 (1993). "[T]he trial court's role as gatekeeper does not require it to search for absolute, to admit only uncontested evidence, or to resolve genuine scientific disputes." *Unger*, 278 Mich App at 217. Rather, the proper inquiry is whether the expert opinion is rationally derived from a sound foundation, not whether it is ultimately correct or universally accepted. *Id.*

Defendant's sole argument on appeal is that McAllister's testimony was not the product of reliable principles and methods pursuant to MRE 702. Defendant claims that McAllister's opinion that the exact location of a cell phone could be obtained was not based on any sound scientific principles, asserting that it was not tested against known measurements of distance, that McAllister relied on no publications or peer-reviewed articles, there was no known error

rate, there were no standards or controls, and there was no showing that the technique was accepted by the scientific community.

Initially, we note that defendant does not accurately represent the record regarding McAllister's testimony. McAllister did not state that he could determine a cell phone's exact location. In fact, he testified that the locations were an estimate and that he could not pinpoint an exact location of a cell phone.[2] Rather, the evidence showed the cell phone tower a phone was accessing during a call, which he opined provided an approximate location for the device. Further, contrary to defendant's claim, McAllister never testified, nor did his testimony presume, that a cellular phone would always use the closest tower to the device. In fact, he explained that the cell phone towers shown on the map were those accessed by the device, and he did not know if there were other towers that could have been used. He testified that tower use could change minute-by-minute, and can be impacted by any number of factors, including the weather.

Further, we do not agree that the testimony was not the product of reliable principles and methods pursuant to MRE 702. Here, the testimony was based on data provided by the cellular network. Defendant claimed that the information regarding what cell towers were being accessed by the phone was based on McAllister's "belief." That statement is not correct, as the information was obtained from the cellular service provider, and defendant does not challenge the accuracy of the data obtained. Relying on the data, McAllister used his training to analyze the information and compile a map of the cell phone tower locations. As defendant acknowledges, expert testimony need not be scientific in nature. Indeed, there are many kinds of experts and expertise, and the principles and methods depend on the type of expert testimony being presented. *Kowalski*, 492 Mich at 131. Here, where the evidence was primarily based on the data and McAllister's ability to understand and analyze the data, we disagree that lack of scientific testing would render the evidence unreliable. Further, although such evidence was unable to provide the exact location of a phone, the extent of the information and the limitations were explained to the jury. Finally, as both parties point out, this Court has been asked to review this issue several times, and has declined to hold that such evidence is unreliable per se pursuant to MRE 702. Indeed, defendant cannot direct this Court's attention to any Michigan case where cell phone tracking evidence presented by an expert witness has been rejected. Accordingly, we reject defendant's argument. We similarly reject defendant's argument that his trial counsel was ineffective for failing to object because any objection would have been futile. *Ericksen*, 288 Mich App at 201.

Defendant raises claims of ineffective assistance of counsel in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order 2004-6, Standard 4. To preserve a claim of ineffective assistance of counsel, a defendant must make a motion for a new trial or an evidentiary hearing with the trial court. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). Defendant never moved for a new trial or a *Ginther*[3] hearing in the trial court. Thus, this

[2] McAllister explained and distinguished the ability to determine the specific location of a phone, referred to as "pinging."

[3] See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

issue is unpreserved. Defendant filed a motion to remand for a *Ginther* hearing with this Court, which was denied.[4] "When a defendant did not move in the trial court for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent from the record." *Id*.

"To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice." *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013), citing *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different." *Nix*, 301 Mich App at 207. It is presumed that trial counsel used effective trial strategy, and a defendant has a heavy burden to overcome this presumption. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defendant first claims that his trial counsel was ineffective for failing to investigate or call as a witness defendant's sister Karen Allen. Allen sent a message to Mack that was deemed inadmissible hearsay at trial. The substance of this message was that defendant was not the shooter. Defendant claims that his counsel should have investigated the circumstances surrounding the message and called Allen as a witness to authenticate the evidence. Further, his counsel should have questioned Mack regarding the message. We do not agree that counsel's alleged failures illustrate that his performance fell below an objective standard of reasonableness. First, we agree with the prosecution that, even if Allen had testified, the evidence would likely have been inadmissible. There is nothing in the record or in defendant's arguments to suggest that Allen was a witness to the shooting or had any personal knowledge of the circumstances surrounding the shooting. Thus, the message merely sets forth Allen's unsupported opinion. MRE 701. Further, defendant fails to overcome the presumption of trial strategy. The message, while stating that defendant was not the shooter, does suggest that defendant was at the scene of the crime. Thus, the evidence actually undermines defendant's alibi defense. Trial counsel could have reasonably concluded that an alibi defense gave defendant the best chance for an acquittal. Accordingly, we reject defendant's claim.

Defendant next argues that trial counsel was ineffective because he failed to question witness Wayne Hobbs regarding prior convictions for illegally possessing firearms. Initially, we note that defendant has pointed to no evidence, other than his own affidavit, to demonstrate that Hobbs had prior criminal convictions. Indeed, Hobbs previously denied these allegations at the preliminary examination. Additionally, MRE 609(a) prohibits the impeachment of a witness through evidence of the conviction of a crime unless, at minimum, the crime contained an element of dishonesty, a false statement, or an element of theft. Illegal possession of a firearm would not satisfy MRE 609(a), and, thus, the evidence regarding the alleged conviction(s) would not have been admissible to impeach Hobbs. Defendant's claim fails.

[4] *People v Thomas*, unpublished order of the Court of Appeals, entered February 22, 2016 (Docket No. 326645).

Defendant additionally argues that trial counsel should have sought the admission of testimony from a Yolanda Love, who he claims would testify that she heard three or four gun shots on the night of the shooting. Defendant argues that a dispute over the number of shots fired could indicate that Hobbs also fired a weapon. Assuming Love would have testified as defendant represents, it is a non sequitur to move from this premise to the conclusion that Hobbs must have been armed. Further, Hobbs firing a weapon is irrelevant to the theory of defense pursued at trial, i.e., that defendant was elsewhere when the victim was shot.

Finally, defendant claims that he was denied effective assistance because of trial counsel's failure to investigate possible video camera footage from near the scene of the crime. We disagree. At trial, Officer Trevor Arnold testified that there was a City of Lansing video camera near the scene of the crime. However, Arnold stated that he did not review it because the city cameras do not work very well. On appeal, defendant bases his claim on a copy of Wilcox's police report. In the report, attached to defendant's brief, Wilcox stated that another officer checked the cameras and located Long's vehicle. Wilcox then told Long that her vehicle had been seen, and she admitted to being in the area earlier that day for an appointment. Defendant argues that trial counsel should have obtained the video in order to discredit the victim's testimony that Long's vehicle was used to flee the crime scene. Minimally, trial counsel should have called Wilcox to testify regarding the camera footage referenced in order to discredit Arnold and the investigation generally. We disagree.

The failure to conduct an adequate investigation can constitute ineffective assistance of counsel if it undermines confidence in the outcome of the trial. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Initially, we note that the police report does not definitively state that Long's vehicle was captured by the camera. Indeed, we agree with the prosecution that it seems as though the officers may have been bluffing in order to obtain incriminating information from Long. Regardless, even assuming the alleged camera footage did not reveal Long's vehicle, the evidence would likely not have impacted the outcome of trial given the witnesses' direct testimony that they saw Long's vehicle flee the crime scene. Further, police testimony that video evidence possibly existed but was not pursued likely cut against the prosecution's case. On the other hand, had the video revealed Long's vehicle, or had Wilcox testified that the video revealed Long's vehicle, it would have been harmful to defendant. While Wilcox's testimony may have impeached Arnold to some small degree, it also would have placed Long, defendant's known associate, at the scene of the crime, consistent with witness testimony. Accordingly, we do not believe that this claim of error merits relief.

Finally, defendant argues that reversal is required because of the cumulative effect of the alleged errors in this case. Any one error standing alone may not justify reversal, but the cumulative effect of several errors can cause sufficient prejudice to warrant reversal. *People v Gaines*, 306 Mich App 289, 321-322; 856 NW2d 222 (2014). To prevail, the defendant must establish actual errors at trial, and the aggregate of the actual errors must lead to unfair prejudice. See *People v LeBlanc*, 465 Mich 575, 591 n 12; 640 NW2d 246 (2002). Because defendant has failed to demonstrate aggregate errors that cumulatively deprived him of a fair trial, this claim of error fails.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Amy Ronayne Krause
/s/ Michael F. Gadola