STATE OF MINNESOTA

IN SUPREME COURT

A21-1310

Hennepin County

Gildea, C.J.

State of Minnesota,

Respondent,

vs.

Filed: December 21, 2022
Office of Appellate Courts

Cedric Lamont Berry,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Sarah Jane Vokes, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

Lisa M. Lopez, Acting Chief Public Defender Hennepin County, Paul Joseph Maravigli, Assistant Public Defender, Minneapolis, Minnesota, for appellant.

S Y L L A B U S

1. The district court did not err in admitting the State's cell-site location information (CSLI) evidence without holding a hearing on general acceptance in the relevant scientific community because the CSLI evidence is not novel, and even if the district court's failure to hold a hearing on foundational reliability was erroneous, the error was harmless

because trial testimony established that the CSLI evidence had foundational reliability in this case.

2. Defendant and his codefendant did not present antagonistic defenses, thus the district court did not err by joining their cases for trial, by denying defendant's motion to sever before trial, or by failing to sever defendant's and his codefendant's cases during trial.

3. Defendant suffered no prejudice from the denial of a peremptory challenge during alternate juror selection when the alternate jurors did not participate in the verdict.

Affirmed.

O P I N I O N

GILDEA, Chief Justice.

Appellant Cedric Lamont Berry appeals his convictions for first-degree premeditated murder, attempted first-degree premeditated murder, and kidnapping. Berry argues that the district court improperly admitted expert testimony and evidence about cell-site location information (CSLI) without holding a hearing to determine that the evidence was generally accepted in the relevant scientific community and had foundational reliability. He also challenges the fact that he and codefendant Berry Davis's cases were tried together. Finally, he asserts that the district court erroneously denied his request for an additional peremptory challenge.

Because the CSLI evidence is not novel, we agree with the State that the district court was not required to hold a hearing to determine whether that evidence was generally accepted in the relevant scientific community. We further conclude that any error in failing to hold a

hearing on the foundational reliability of the CSLI evidence was harmless because the record establishes that the evidence had foundational reliability. We also conclude that the district court did not err in trying Berry's and Davis's cases together. Finally, we conclude that Berry was not prejudiced by the denial of an additional peremptory challenge. Accordingly, we affirm.

FACTS

Berry was convicted of first-degree premeditated murder and kidnapping of Monique Baugh and attempted first-degree premeditated murder of her boyfriend Jon.[1] These crimes occurred on December 31, 2019, when Baugh was lured to a house in Maple Grove, kidnapped from that house, driven around Minneapolis in a rented U-Haul van, and later fatally shot in an alley behind a home on Russell Avenue North in Minneapolis. Baugh died of the gunshot wounds. Jon was shot at Baugh's mother's home while Baugh was being driven around in the U-Haul. Jon survived his injuries.

The State's theory was that the crimes were committed because of a falling out between Jon and Lyndon, a musician with whom Jon worked. Lyndon was also a drug dealer, and he was arrested in 2019 after his falling out with Jon. Lyndon believed that Jon was behind his arrest. According to the State's theory, to get back at Jon, Lyndon got Berry and Davis to commit the murder, attempted murder, and kidnapping. Berry did not have a direct connection to Lyndon, but Davis did, and Berry and Davis regularly worked together to sell drugs, even sharing a phone in the fall of 2019.

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[1] We refer to witnesses and the surviving victim by their first name to protect their privacy. *See* Minn. R. Pub. Access to Recs. of Jud. 8, subd. 2(b)(5).

The evidence at trial showed that 2 days before the murder, Berry bought a cell phone with a number ending in 2101 (the set-up phone). Video evidence from the cell-phone store shows Berry purchasing the set-up phone; Berry's other cell phone also connected to towers in the area. Lyndon's girlfriend then used the set-up phone to contact Baugh, who worked as a realtor, to schedule a showing of a house that was for sale in Maple Grove. They scheduled a showing of the Maple Grove house for the next day.

Baugh arrived at the Maple Grove house at approximately 11 a.m., the scheduled time. Another real estate agent also had a showing of the same house. The two agents chatted while they waited for their clients to arrive. Baugh's client never came to the showing. But while she was waiting, a car, which looked like the car registered to Berry's wife, was captured on video circling the block where the Maple Grove house is located. In addition, cell phones that Berry and Davis are known to have used connected to towers near the Maple Grove house from about 11–11:40 a.m.

Later that evening, Berry and Davis met Keith at a business park in Fridley. Keith testified that Berry asked him to rent a U-Haul for Berry in exchange for heroin. Keith told his girlfriend that Berry was moving to Maple Grove. They agreed to meet in the same place the next day for Berry to return the U-Haul. Berry's phone connected to towers around the business park during these events.

The next morning, December 31, 2019, Berry's phone again connected to towers around the business park where the U-Haul was parked. Surveillance cameras captured Berry's tan Buick entering the parking lot and the U-Haul and the Buick driving away. Berry admitted to being at the business park to pick up the U-Haul.

Meanwhile, Baugh had made an appointment for 3 p.m. that day to show the Maple Grove house, apparently to the unknown client who had failed to show the day before. Baugh left her children with Jon at her mother's house on the 4800 block of Humboldt Avenue North in Minneapolis.

Baugh used the key lockbox to access the Maple Grove house at 3 p.m. Video footage shows two men arriving at the house in a U-Haul truck shortly after 3 p.m. They parked the U-Haul in the driveway and entered the house through the front door. Later, two men came back out, and one of the men was shown on the video walking close to a third person. The three went to the back of the U-Haul, then one got in the cab and the U-Haul drove away.

From 3:12 p.m. to 3:21 p.m., Baugh's cell phone connected to the network near the Maple Grove house. At 3:25 p.m., her phone started moving east—toward Minneapolis. There are no outgoing communications from her phone after 3:21 p.m.

At 5:16 p.m., a camera captured the U-Haul driving north on the 4800 block of Humboldt Avenue North, in Minneapolis. The U-Haul drove around the area for about 40 minutes. Just before 5:40 p.m., video shows that someone entered Baugh's mother's house. Jon testified that he thought it was Baugh coming back, but instead, an assailant walked in and shot Jon. At 5:40 p.m., police received a call about a shooting at the house. They arrived to find Jon lying on the ground with several gunshot wounds. Police also found Baugh's key to the house lying on the floor near the door.

Between 2:32 and 5:52 p.m. on December 31, cell-site location information[2] (CSLI) placed Berry's phone and Davis's phone together near a house in Minneapolis which was occupied by Berry's cousin. The phones were not used during this time.

At 5:45 p.m. the U-Haul was captured on a license plate reader at 45th and Lyndale, just blocks north from the cousin's house. At 5:52 p.m. the phones of Berry and Davis began to move in concert. Berry's phone made a call to his wife's number. The U-Haul and Berry's tan Buick appear minutes later on a traffic camera just a few blocks south of Berry's cousin's house, at Fremont and Lowry. CSLI places their phones in the same place. For the next half hour, traffic camera photos place the U-Haul and Berry's Buick travelling through north Minneapolis, consistent with the location of their phones.

Video footage captured the U-Haul driving near the 1300 block of Russell Avenue around 6:30 p.m. A resident of the block saw a tan Buick parked in front of her house around this time. And CSLI places both Berry's and Davis's cell phones near the 1300 block of Russell Avenue at the same time as the video footage depicts the U-Haul in this area.

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[2] CSLI is distinct from global positioning system (GPS) data. *Cell Phone Location Tracking Primer*, Berkely Law & National Association of Criminal Defense Lawyers (NACDL) https://www.law.berkeley.edu/wp-content/uploads/2015/04/2016-06-07_Cell-Tracking-Primer_Final.pdf (last visited Dec. 13, 2022). CSLI refers to the data collected as a cell phone connects to nearby towers. *Id.* CSLI from towers can be used to approximate the cell phone's location using triangulation—an analysis of the phone's location based on the towers to which it connected. *Id.*

Minutes after the tan Buick drove away, the same resident heard gunshots near her home. The resident's report is consistent with a 6:37 p.m. ShotSpotter[3] alert for three gunshots in the alley behind homes on the 1300 block of Russell Avenue North. When officers arrived, they found Baugh lying in the alley. She died of multiple gunshot wounds.

A few days later, police arrested Cedric Berry on suspicion of committing the kidnapping and shootings. The arrest of Cedric Berry occurred at a hotel where he was staying with his wife, her brother, Berry Davis, and Davis's wife.

The State indicted Berry and Davis on charges of first-degree premeditated murder, Minn. Stat. § 609.185(a)(1) (2022), attempted first-degree murder, Minn. Stat. §§ 609.17, subd. 1 (2022), 609.185(a)(1), kidnapping to commit great bodily harm or terrorize, Minn. Stat. § 609.25, subd. 1(3) (2022), and first-degree intentional murder during a kidnapping, Minn. Stat. § 609.185(a)(3) (2022), all based on a theory of aiding and abetting liability, Minn. Stat. § 609.05 (2022). Berry and Davis pleaded not guilty and demanded a jury trial.

Before trial, the State moved for joinder of the trials. Berry and Davis opposed the motion. The district court considered the State's theory of the case and concluded that although there could be only one shooter, the State charged Berry and Davis on an aiding and abetting theory of liability, and the State intended to show that both defendants engaged in different aspects of preparing for and participating in these offenses. According to the court, it did not matter who the shooter was because Berry and Davis were present and

[3] ShotSpotter technology detects gunfire and pinpoints the location of the gunshots. The technology is employed by many police departments, including the Minneapolis Police. *See State v. Harvey*, 932 N.W.2d 792, 797 n.2 (Minn. 2019).

worked together to complete the crimes. Thus, the district court granted the State's motion to join the trials of Berry and Davis.

Before trial, Berry filed a written motion to sever his trial, asserting that because only Davis knew Lyndon, the sole motive the State could present for him was his relationship with Davis. Berry asserted that he planned to defend against the charges by arguing that he had no connection to Lyndon. He claimed that his only option would be to emphasize Davis's connection to Lyndon, making his defense antagonistic to Davis's. The district court denied the motion, concluding that Berry's proffered defense did not change anything about the joinder analysis.

During jury selection, the district court allotted 16 peremptory challenges to the defense side, 8 to each defendant to use independently. Berry requested that each defendant receive 15 challenges, but the court denied that request. The court sought to empanel 14 jurors: 12 to serve on the jury with 2 alternates. Berry exhausted his peremptory challenges between empaneling Juror 13 and 14, and consequently he had no peremptory challenges left to remove the 14th juror (the second alternate) from the jury. Berry then asked for an additional preemptory challenge. The court denied that request, and the second alternate juror was selected. Neither alternate participated in deliberation or in the verdict.

Several days into jury selection, Berry moved to suppress the CSLI data obtained from his and Davis's cell phones. CSLI data is location information generated and collected by the cellular carriers about which cell tower a phone connected to and from which sector of that cell tower. CSLI data from towers can be used to approximate the cell phone's location using triangulation—an analysis of the phone's location based on the pattern of

towers to which it connected. When a phone connects to one tower, there is a band of areas in which the phone could be located. Then when the phone connects to another nearby tower, there is a new band. The phone must be in the overlap of those areas. Timing-advance data is a particular type of CSLI data that estimates the distance from the tower to the phone based on how long it takes for the signal to travel between the two. CSLI evidence is based on an analysis of CSLI data to approximate a phone's location, which includes triangulation and timing-advance data analysis.

Berry moved to suppress the State's CSLI evidence or for a *Frye-Mack*[4] hearing on whether this evidence was admissible. Berry argued that because CSLI evidence was novel, the State needed to show that it was generally accepted in the relevant scientific community. He also contended that the State needed to establish—at a hearing outside the presence of the jury—that the evidence had foundational reliability.

The district court denied Berry's motion. Relying on *State v. Harvey*, 932 N.W.2d 792 (Minn. 2019), the court concluded that CSLI evidence is not novel, and a *Frye-Mack* hearing on general acceptance was not required. The court also determined that the State's expert would have to establish foundational reliability during his testimony before the CSLI evidence would be admitted at trial.

At trial, FBI Special Agent Richard Fennern—an expert in CSLI analysis—testified to the CSLI evidence in this case. He explained that he has personally witnessed the real-world accuracy of call-detail data by using it to find missing persons or fugitives based on

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[4] *Frye-Mack* comes from *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), and *State v. Mack*, 292 N.W.2d 764, 768 (Minn. 1980).

phone records. He testified that, in his experience, timing-advance data is reliable—the most accurate form of call-record data law enforcement can get from cell-service providers.

Fennern acknowledged that cell-service providers do not keep this data for law-enforcement purposes; they use it to manage their network and to better understand how many callers are in a specific area. This information allows cell-service providers to build more cell towers in optimal locations.

According to Fennern, CSLI analysis is now automated. He testified that he generally uses multiple software programs in his analysis, including checking his work using different software. He also explained that a colleague generally verifies the report and the findings, and that a colleague had reviewed at least some parts of his report for this case.

In investigating the case, Fennern performed CSLI analysis on phone records Minneapolis police identified as relevant. He used triangulation and estimated the distance from the phone to the tower using timing-advance data. His report presented the records, which come in Excel format, as maps showing the approximate location of the phones that were identified as relevant to the investigation.

When the State moved to admit Fennern's report, Berry's attorney objected. The court responded, "That's noted. Overruled," but made no further reference to foundational reliability.

The State then published the report. The report begins with background, stating that the report is based on the methodology of matching records from phone companies to cell-tower lists and then creating a visual depiction. Fennern relied on the report to testify about

the location of the phones that Berry and Davis were known to use on the days leading up to and of these crimes, as discussed above.

Berry testified in his own defense. After an arrest in fall 2019, Berry had agreed to work as an informant to implicate Davis in drug crimes. According to Berry, he would not have committed a kidnapping and shooting in December 2019 because he knew that police were watching him and Davis closely. Berry testified that Lyndon is not his friend, and that Davis was his connection to Lyndon. But Berry did not specifically contend that Davis committed the crimes.

Berry also explained that he rented vehicles to move drugs. He claimed that he asked Keith to get him the U-Haul so that he could move drugs. According to Berry, he left the U-Haul at the house of his wife's mother and left his phone in the Buick on December 31, 2019. Then he went out drinking, smoking, and selling drugs, so he could not have committed the kidnapping, murder, and attempted murder. He admitted that he owned the tan Buick, among other cars. But, he explained, the Buick was also parked at the house of his wife's mother on December 31, 2019.

The jury found Berry guilty on all charges. The district court entered convictions for premeditated first-degree murder, attempted first-degree murder, and kidnapping. The district court sentenced Berry to life in prison without the possibility of parole for the premediated first-degree murder conviction and concurrent sentences of 240 months and 158 months on the attempted first-degree murder and kidnapping convictions. This direct appeal follows.

ANALYSIS

On appeal, Berry argues that he is entitled to a new trial and reversal of his convictions or to a post-trial evidentiary hearing. First, he asserts that the district court erred by admitting CSLI evidence without a hearing. Second, he argues that the district court erred by trying his and Davis's cases together. Third, he argues that the district court committed reversible error by not granting his motion for an additional peremptory challenge during alternate juror selection. We address each argument in turn.

I.

Berry first argues that the district court should have held a *Frye-Mack* evidentiary hearing to evaluate whether the CSLI evidence was admissible. Berry raised two grounds in support of this claim, arguing that CSLI is novel or emerging and that a hearing is required to establish foundational reliability of scientific evidence.

Minnesota Rules of Evidence 702 governs the admission of expert testimony.[5] Under Minn. R. Evid. 702, expert testimony is admissible if: (1) the witness is qualified as an expert; (2) the expert's opinion has foundational reliability; (3) the expert testimony is helpful to the jury; and (4) if the testimony involves a novel scientific theory, the proponent

[5] Before 2006, Rule 702 had two prongs: the testifying expert needed to be qualified and the testimony needed to be helpful. Minn. R. Evid. 702 (2006) (amended July 18, 2006); *see also Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 165 (Minn. 2012) (discussing the prior version of Rule 702). Separate from the rule, the *Frye-Mack* standard added two additional requirements for scientific evidence: the proponent of novel scientific evidence needed to prove that the evidence was generally accepted in the relevant scientific community and that the scientific evidence in that case had foundational reliability. *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000). In 2006, Rule 702 was amended to incorporate the *Frye-Mack* standard. *Doe*, 817 N.W.2d at 165–66.

must show it is generally accepted in the relevant scientific community. Prongs 1 and 3 are not at issue here. But to address Berry's arguments, we must determine whether a hearing outside the presence of the jury was required on either prong 2 or prong 4 of Rule 702.

A.

We start with prong 4. Under this prong, district courts must consider whether the scientific evidence involves a novel scientific theory or technique. *State v. Garland*, 942 N.W.2d 732, 746 (Minn. 2020). A theory or technique is novel if it is new. *Harvey*, 932 N.W.2d at 807. If a technique is novel, a hearing is required to determine whether the technique is generally accepted in the relevant scientific community. *State v. Roman Nose*, 649 N.W.2d 815, 822 (Minn. 2002). We review a district court's finding that scientific evidence is not novel de novo. *See Harvey*, 932 N.W.2d at 806.

We recently held in *Harvey* that CSLI evidence is not novel because it is not new, and as a result, no hearing on general acceptance in the scientific community was required before the evidence was admitted. 932 N.W.2d at 807–08. *Harvey* is dispositive of the prong 4 question. Because CSLI evidence is not novel, a hearing is not required to assess its general acceptance.

But, Berry contends, *Harvey* is not controlling. He asserts that the proper inquiry is whether a scientific technique is "novel *or emerging*," and if the testimony involves a technique that is either novel *or emerging*, district courts must address whether the technique is generally accepted in the scientific community. As Berry explains it, although CSLI evidence is not new, it is still emerging because it is "growing and developing." We are not persuaded.

The text of Rule 702 and our caselaw confirm that there is no merit to Berry's argument. At times, we have stated the standard for the fourth prong of Rule 702 as " 'novel or emerging.' " *Harvey*, 932 N.W.2d at 808 (quoting *State v. Hodgson*, 512 N.W.2d 95, 98 (Minn. 1994)); *Roman Nose*, 649 N.W.2d at 819; *see also State v. Jobe*, 486 N.W.2d 407, 419 (Minn. 1992) (referring to "emerging" techniques only). But the word "emerging" appears nowhere in Rule 702, and we have not treated "novel" and "emerging" as separate standards. *See Harvey*, 932 N.W.2d at 807–08 (holding that "CSLI data is not a novel or emerging form of scientific evidence" after analyzing only novelty); *Roman Nose*, 649 N.W.2d at 826 (holding that DNA test was not "new, novel, or emerging" because the test was widely used for several years); *Hodgson*, 512 N.W.2d at 98 (holding that bite-mark analysis is not "novel or emerging" because it is "routinely used" to show identity).

Because we previously held that CSLI evidence is not novel, the district court did not err when the court denied an evidentiary hearing to evaluate whether CSLI evidence is generally accepted in the relevant scientific community.

B.

Turning now to prong 2 of Rule 702, Berry asserts that the district court should have held a pretrial hearing to consider whether the CSLI evidence had foundational reliability. We review a district court's finding that evidence has foundational reliability for abuse of discretion. *Harvey*, 932 N.W.2d at 806. The district court did not require a hearing on foundational reliability outside the presence of the jury. Rather, the court permitted the State to attempt to prove foundational reliability during the expert's testimony before the jury. The court ultimately concluded, without any explanation, that the State established foundational

reliability. The court's failure to explain was error. *Garland*, 942 N.W.2d at 742 ("[T]he district court *must* analyze the proffered testimony in light of the purpose for which it is being offered . . . ." (emphasis added) (quoting *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 167–68 (Minn. 2012))).

But the district court's error is harmless because the record establishes that the CSLI evidence had the necessary foundational reliability. The district court's failure to hold a hearing, even if erroneous, is harmless for the same reason.[6] *State v. Ortlepp*, 363 N.W.2d 39, 44–45 (Minn. 1985) (noting that a harmless-error standard of review applies to a failure to hold a hearing and to prevail a defendant must show that the hearing would have benefitted

[6] Although we have discussed hearings to establish foundational reliability, we have never held that such hearings are required in every instance. For example, when discussing foundational reliability in *Jobe*, we stated that "[a] pre-trial hearing is held to determine whether the specific DNA results offered for admission as evidence were developed in compliance with appropriate standards and controls" 486 N.W.2d at 419. Similarly, in *Roman Nose*, a case where we considered whether a hearing was necessary to consider the general acceptance of a particular type of DNA testing, we stated, "the state bears the burden of establishing [the new method's] general acceptance and its foundational reliability by means of an evidentiary hearing before evidence obtained from the technique may be admitted." 649 N.W.2d at 821 n.7. But in each of these cases, the district court held a pretrial hearing on the issue of foundational reliability. *Jobe*, 486 N.W.2d at 413-14; *Roman Nose*, 649 N.W.2d at 818. As a result, we did not hold in either case that such a hearing is always required.

In *State v. Bailey*, we directed a district court to hold a *Frye-Mack* hearing on foundational reliability. 677 N.W.2d 380, 399–400 (Minn. 2004). The district court had already held a *Frye-Mack* hearing, yet we determined that factual disputes remained about the validation of operating procedures, and that the district court improperly shifted the burden away from the State, so additional analysis was necessary. *Id.* Although the *Bailey* court did not set rules for determining when a district court must hold a hearing on the second prong, the case makes clear that it is required in at least some circumstances. *Id.* Given this precedent, district courts should exercise caution in denying a hearing on foundational reliability under prong 2 of Rule 702, especially when, as is in this case, the scientific evidence is an important part of the State's case.

him); *see also State v. Burns*, 394 N.W.2d 495, 497 (Minn. 1986) ("[T]he lack of an admissibility hearing where one would normally be held does not automatically entitle a defendant to relief."). Our review of the record here convinces us that the foundational reliability prong is satisfied.

As the party offering the evidence, the State had the burden of showing that the CSLI evidence had foundational reliability. *See State v. Bailey*, 677 N.W.2d 380, 399–400 (Minn. 2004). An assessment of the foundational reliability of an expert's opinion begins by considering the purpose for which it is offered. *Doe*, 817 N.W.2d at 167–68. Next, "the court must consider the underlying reliability, consistency, and accuracy of the subject about which the expert is testifying." *Id.* at 168. Last, the party offering the evidence "must show that it is reliable in that particular case." *Id.*

The State offered CSLI evidence to show the location of Berry's phone when the assailants were preparing for and committing the crimes. Thus, the question is whether the CSLI analysis was sufficiently reliable evidence of the approximate location of Berry's phone. To conclude that it was, the State needed to show that CSLI is generally reliable, consistent, and accurate. *Doe*, 817 N.W.2d at 168. The record evidence confirms that the State met this burden.

Fennern testified at length about how CSLI analysis works and explained that it is reliable for identifying the location of a cell phone. He testified that CSLI has been reliable in his personal experience, and it is the most precise form of cell-phone-location analysis. He also explained that the cell-service providers keep this data to manage their network, not for law enforcement purposes. This testimony is very similar to the testimony we held

established foundational reliability in *Harvey*. *See* 932 N.W.2d at 808 (holding CSLI evidence had foundational reliability based on expert testimony that the data is reliable, that cell companies use the data to evaluate network coverage, that cell companies have a "vested interest in maintaining accurate records so that they can accurately bill customers for roaming services," and that "under law, cell phone service providers are required to provide a tower and sector for any 911 call placed within their network").

In urging us to reach a contrary conclusion, Berry asserts that the State needed to offer data about accuracy, error rates, and peer-reviewed studies to establish foundational reliability. We disagree. We concluded that the CSLI in *Harvey* had foundational reliability without this type of evidence. *See* 932 N.W.2d at 808.[7]

Finally, for the prong 2 analysis, the State established that the CSLI evidence had foundational reliability in this case. Specifically, evidence at trial corroborated Fennern's report as to the location of Berry's cell phone. Video from the T-Mobile store placed Berry with his phone consistent with CSLI analysis. Berry himself admitted that he was at the business park when the CSLI placed Berry's phone near there, and at the same time Keith

[7] In other contexts, an accuracy rate might be important to show foundational reliability. For example, in *Jacobson*, which Berry relies on to support his argument that error-rate evidence was required, we distinguished drug dog-sniff evidence from scientific evidence and explained that "[w]hen a dog's handler testifies regarding his dog's alert to drug odor, he offers an expert opinion as to the meaning of a particular set of behaviors displayed by a 'living, breathing, animate creature.' " *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 528–29 (Minn. 2007). We stated that "[a] *drug detection dog's* accuracy rate is also critical to establishing an adequate foundation." *Id.* at 529 (emphasis added). We did not conclude that evidence of an accuracy rate is required in every case to establish foundational reliability. *See id.* And this case involves expert testimony about data kept by cell-service providers and analyzed by computer programs, not about the meaning of an animal's behavior.

testified that Berry met him there to pick up the U-Haul. And traffic-camera footage, doorbell-camera video, and witness testimony placed the tan Buick in locations consistent with CSLI evidence on the day of the shootings. Berry testified that he left his phone in the Buick that day and that someone else must have been driving it, so this testimony also confirms foundational reliability even under Berry's theory of the case.

Moreover, Fennern testified that he followed the generally accepted method for CSLI analysis. *See State v. Traylor*, 656 N.W.2d 885, 893–94 (Minn. 2003) ("[I]n determining the foundational reliability . . . this court looks at 'whether the laboratory conducting the tests in the individual case complied with appropriate standards and controls.' ") (quoting *Roman Nose*, 649 N.W.2d at 819). His report states that it was based on analysis of cell records and that cell-tower, cell-sector, and timing-advance data were put into a mapping software to make the report. *See Bailey*, 677 N.W.2d at 398–99 (holding that a test that departed from the generally accepted method lacked foundational reliability). Berry does not argue that Fennern failed to apply CSLI analysis properly and nothing in the record shows that he failed to do so. The record gives us no basis to conclude anything other than that Fennern "reliably applied the underlying theories and methodologies in the particular case." *Garland*, 942 N.W.2d at 742.[8]

[8] Berry relies extensively on underlying data from T-Mobile and Sprint to contend that the State did not meet its burden to show foundational reliability. Specifically, he notes that the datasheets from T-Mobile and Sprint each include language stating that data might be inaccurate or incomplete. But this uncertainty about the underlying data goes to weight rather than admissibility. *See Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 824 (Minn. 2000) (holding that expert conclusion based on allegedly insufficient data "went to the weight, rather than to the admissibility of his testimony").

In sum, based on our review of the record, we reject Berry's contention that the admission of CSLI evidence entitles him to a new trial.

II.

Berry next asks us to order a new trial because the district court erroneously tried Berry and Davis together. Berry argues primarily that the cases should not have been joined pretrial. Specifically, Berry argues that the district court erred because he and Davis presented antagonistic defenses that presented a need for separate trials. We addressed this same claim in *State v. Davis*, A21-1309, ___ N.W.2d ___ (Minn. Dec. 21, 2022), decided today. In *Davis*, we concluded that the district court did not err when it granted the State's motion for joinder of Berry's and Davis's cases for trial. *Id.* Our decision in *Davis* compels the same conclusion here.

To the extent Berry separately argues that the district court erred when it denied motions to sever, we similarly conclude that there was no error. Under Minn. R. Crim. P. 17.03, subd. 2, courts consider four factors when considering pretrial motions to join and motions to sever: "(1) the nature of the offense charged; (2) the impact on the victim; (3) the potential prejudice to the defendant; and (4) the interests of justice." *See also Santiago v. State*, 644 N.W.2d 425, 444 (Minn. 2002) (holding that standard of Minn. R. Crim P. 17.03, subd. 2, which refers to joinder, also applies to a pretrial motion to sever). When we review severance motions, we make "an independent inquiry into any substantial prejudice to defendants that may have resulted from their being joined for trial." *State v. Hathaway*, 379 N.W.2d 498, 502 (Minn. 1985).

Berry moved to sever about 3 weeks before trial. Berry cited three pieces of evidence indicating that the victims did not know him and that he had no connection to Lyndon but that Davis did. Accordingly, Berry argued, the State was trying to implicate him in the crime through Davis. Berry also stated his intent to raise an alternate-perpetrator theory with Davis as the alternate perpetrator. The district court denied this motion to sever, concluding that the factors in the rule weighed the same as they when the court joined the cases. We agree with the district court.

The analysis of three of the Rule 17.03, subd. 2, factors—the nature of the offense charged, the impact on the victim, and the interests of justice—did not change between the district court's order granting the State's motion for joinder and Berry's motion for severance, so we need only consider the fourth factor: potential prejudice to Berry. Berry focuses his severance argument on his contention that he and Davis presented antagonistic defenses. Defenses are antagonistic when they "are inconsistent and when they seek to put the blame on each other" thereby forcing the jury "to choose between the defense theories advocated by the defendants." *Santiago*, 644 N.W.2d at 446. Antagonistic defenses result in substantial prejudice and require severance. *Id.*

Berry did not demonstrate that his defense was antagonistic to Davis's defense. This is so because the jury remained free to choose between the defendants' theories: it could find that Davis had a motive, Berry had a motive, or neither defendant had a motive. Thus, Berry's defense was not shifting the blame but clarifying the roles of the defendants, which is not antagonistic. *Compare id.* (holding that defendants had antagonistic defenses when they sought to shift the blame), *with State v. Powers*, 654 N.W.2d 667, 677 (Minn. 2003)

(holding that defenses were not antagonistic when defense counsel's questions sought to clarify the roles of the parties). The district court therefore did not err when it denied Berry's pretrial motion to sever.

The same is true for any midtrial motion to sever.[9] A higher standard applies to midtrial motions to sever than to pretrial motions to sever. *Santiago*, 644 N.W.2d at 448. But this standard—the "fair determination" standard—also requires that Berry show that he and Davis presented antagonistic defenses. *See id.* at 448–49. Berry's evidence at trial showed that Davis's connection to the motive for the crimes was stronger because Davis, not Berry, had a relationship with Lyndon.[10] And Berry took the stand and testified that he did not know Lyndon well. But, as explained above, Berry's defense was not inherently antagonistic to Davis's defense. To the extent there was prejudice from Berry's testimony, the prejudice would be to Davis, not to Berry. And as discussed at length in our opinion in Davis's appeal, there was also no prejudice to Davis.

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[9] Berry characterizes a colloquy with the district court during trial as a motion to sever. Berry argues that the district court erred in denying this motion, and that because the error was harmful, he is entitled to a new trial. We need not decide whether Berry made a midtrial motion to sever. Under either a harmful error analysis or a plain error analysis, Berry must show that the district court erred. *See Santiago*, 644 N.W.2d at 445–46, 450-51 (considering first whether district court erred by denying the defendant's motion to sever and then whether the denial of that motion was harmful); *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (stating the first prong of a plain error analysis is that there was an error). Because Berry has not shown that he was entitled to midtrial severance, he has not proven an error.

[10] Although Berry noticed an alternate perpetrator defense, he did not present evidence or argument that Davis committed these crimes.

Our analysis in *Powers* confirms our conclusion that the defenses here were not antagonistic for purposes of Rule 17.03. In *Powers* we held that there was no antagonistic defense at trial when the "closing argument . . . did not attempt to shift blame from one defendant to another," none of the codefendants moved to sever, and cross-examination was not antagonistic. 654 N.W.2d at 677. We acknowledged that cross-examination highlighted the appellant's role in the scheme but held that "when considered in light of the overwhelming evidence of a joint and common . . . scheme," highlighting one defendant's role did not create a prejudicial antagonistic defense. *Id.*

Berry asserts that this case is distinct from *Powers* because Davis moved to sever and because there was an attempt to shift blame. But although Davis's attorney moved to sever, Davis did not attempt to shift blame from Davis to Berry. Davis's attorneys did not even cross-examine Berry when he testified. Nor did Davis's attorney excessively point the finger at Berry in closing—Davis's attorney made one reference to CSLI analysis placing Berry and Lyndon together to refute Berry's contention that Davis knew Lyndon but that Berry did not. But beyond that, Berry's and Davis's closing arguments were compatible. Both Berry's and Davis's attorneys argued that Berry and Davis did not participate in the crimes, that the State did not present evidence of a motive, and that the State's DNA evidence was inadequate or lacking. One inconsistency does not create an antagonistic defense when there is overwhelming evidence of a common scheme. *See Powers*, 654 N.W.2d at 677. The compatible closing argument and lack of antagonistic cross-examination confirms that the defense theories were not antagonistic. *Id.* Based on

our analysis, we hold that the district court did not err by failing to sever Berry's and Davis's cases midtrial.

III.

Finally, Berry argues that he is entitled to a new trial because the district court denied his motion for an additional peremptory challenge. Minnesota Rule of Criminal Procedure 26.02, subdivision 6, provides that "[i]n cases punishable by life imprisonment the defendant has 15 peremptory challenges and the prosecutor has 9." Peremptory challenges "belong to a side, and not an individual defendant" so codefendants facing life sentences share the 15 peremptory challenges provided for in Rule 26.02. *State v. Jackson*, 773 N.W.2d 111, 120 (Minn. 2009). Berry and Davis were entitled to 15 peremptory challenges together. Thus, the district court did not abuse its discretion by allotting 16 peremptory challenges to the defense side.

Berry contends, however, that the district court improperly denied his motion for an additional peremptory challenge. A district court has discretion over how the defendants will exercise challenges and may allow more challenges. *Id.*; Minn. R. Crim. P. 26.02, subd. 6. We review a district court's denial of a request for additional peremptory challenges for abuse of discretion. *Jackson*, 773 N.W.2d at 120. We will only order a new trial if Berry has shown "that he exhausted all of his peremptory challenges" and "that there was actual prejudice or bias raised during voir dire." *Id.* at 121.

Berry exhausted all his peremptory challenges, but he suffered no actual prejudice from the district court's denial of his motion for an additional peremptory challenge. Juror 14—the only juror empaneled after Berry exhausted his peremptory challenges—did

not deliberate or participate in the verdict. Berry suffered no prejudice because he had peremptory challenges available and could have dismissed any of the 12 jurors who found him guilty. *See State v. Barlow*, 541 N.W.2d 309, 311–13 (Minn. 1995) (holding defendant faced no prejudice when he exhausted peremptory challenges during alternate selection when neither alternate participated in jury selection). In short, Berry is not entitled to relief on his claim that he should have been given an additional preemptory challenge.

CONCLUSION

For the foregoing reasons, we affirm the judgment of convictions.

Affirmed.

Cell Phone Location Tracking

*A National Association of Criminal Defense Lawyers (NACDL) Primer**

HOW IS A CELL PHONE'S LOCATION IDENTIFIED?

A cell phone's location can be detected through cell site location information (CSLI) or global positioning system (GPS) data. CSLI refers to the information collected as a cell phone identifies its location to nearby cell towers.[1] CSLI from nearby cell towers can indicate a cell phone's approximate location.[2] With information from multiple cell towers, a technique called "triangulation" is used to locate a cell phone with greater precision.[3] A cell phone's GPS capabilities allow it to be tracked to within 5 to 10 feet.[4] Cell phone location information can be "historical" or "prospective."[5] In addition to the location information cell phones ordinarily generate, a cell phone may be "pinged" to force it to reveal its location.[6]

HOW IS CELL PHONE LOCATION INFORMATION USED?

Cell phone companies store historical and prospective CSLI and prospective GPS data,[7] which law enforcement authorities can request from them through court processes.[8] Historical CSLI enables law enforcement to piece together past events,[9] for example, by connecting a suspect to the location of a past crime. Prospective location information, on the other hand, helps law enforcement trace the current whereabouts of a suspect, which can lead to arrest.[10]

JUDICIAL AUTHORIZATION

Law enforcement has relied on a variety of statutory regimes to obtain cell phone location information:

Regime	*Type of Information Sought*	*Legal Standard Applied by Court*
Order under 18 U.S.C. § 2703(d) (Stored Communications Act (SCA), 18 U.S.C. § 2701 *et. seq.*)	Historical location information[11] and, more rarely, prospective location information.[12]	"[S]pecific and articulable facts" showing that the information sought is "relevant and material to an ongoing criminal investigation."[13]
Order under "Hybrid" authority of the SCA and the Pen / Trap Statute, 18 U.S.C. §§ 3121 - 3127.[14]	Prospective location information.	The SCA standard above, combined with the the Pen / Trap Statute's requirement "that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency."[15]
Warrant under Fed. R. Crim. P. 41[16]	All location information.	Probable cause.[17]

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[1] Eric Lode, *Validity of Use of Cellular Telephone or Tower to Track Prospective, Real Time, or Historical Position of Possessor of Phone Under Fourth Amendment*, 92 A.L.R. Fed. 2d 1, *2 (2015).

[2] The accuracy of location information from a single tower varies from "a few blocks to several square miles." Jerry Grant, *Cell Site Analysis (Live Demo)*, Federal Public Defender's Office Training Materials, 10 (Mar. 7, 2015), https://www.fd.org/docs/training-materials/2015/tecm2014/plenary-materials/cell-site-analysis-%28jerry-grant%29/cell-site-analysis---grant.pdf?sfvrsn=6; *see also United States v. Davis*, 785 F.3d 498, 501-02 (11th Cir. 2015) (en banc).

[3] Grant, *supra* note 2; *see also In re Tel. Info. Needed for a Crim. Investigation*, 119 F.Supp.3d 1011, 1015 (N.D. Cal. 2015).

[4] Grant, *supra* note 2.

[5] Historical location information refers to "records stored by the wireless service provider that detail the location of a cell phone in the past (i.e.: prior to entry of the court order authorizing government acquisition)." Prospective location information refers to "all cell site information that is generated after the government has received court permission to acquire it." You may also come across the term "real time" location information. This is a subset of prospective location information, and "refers to data used by the government to identify the location of a phone at the present moment." *In re United States ex. rel. an Order Authorizing the Installation & Use of a Pen Register*, 402 F. Supp. 2d 597, 599 (D. Md. 2005).

[6] Stephanie K. Pell and Christopher Soghoian, *Can You See Me Now? Toward Reasonable Standards for Law Enforcement Access to Location Data That Congress Could Enact*, 27 Berkeley Tech. L.J. 117, 131-2 (2012) (explaining how cell phone companies and law enforcement can cooperate to generate ping data).

[7] Lode, *supra* note 1, at *2, *5. It is unclear whether phone companies store historical GPS information.

[8] *See infra* Judicial Authorization. Law enforcement can also obtain location information on its own, bypassing the phone companies, by using devices called cell site simulators. This capability is discussed in NACDL's Cell Site Simulators primer.

[9] *E.g.*, *Davis*, 785 F.3d at 501.

[10] *E.g.*, *United States v. Skinner*, 690 F.3d 772, 776 (6th Cir. 2012).

[11] *E.g.*, *United States v. Graham*, No. 12-4659, 2016 U.S. App. LEXIS 9797 (4th Cir. May 31, 2016) (en banc); *Davis*, 785 F.3d at 500, 502.

[12] *State v. Perry*, 776 S.E.2d 528, 534 (N.C. Ct. App. 2015) (collecting cases).

[13] 18 U.S.C. § 2703(d).

[14] *See In re United States of Am. for an Order Authorizing Prospective & Continuous Release of Cell Site Location Records*, 31 F. Supp. 3d 889, 899-900 (S.D. Tex. 2014) (collecting cases); *see also In re United States for an Order Authorizing the Use of Two Pen Register & Trap & Trace Devices*, 632 F. Supp. 2d 202, 205-6 (E.D.N.Y. 2008) (explaining the hybrid theory).

[15] 18 U.S.C. § 3122(b)(2).

[16] Office of the Federal Public Defender - Northern District of California, *Location and Cell Phone Tracking: Technology, Law, and Defense Strategy*, 28, http://www.ndcalfpd.org/2013_CJA/cell_phone_tracking.pdf (last visited Mar. 31, 2016).

[17] Fed. R. Crim. P. 41.

* This primer was prepared in partnership with the Samuelson Law, Technology & Public Policy Clinic at UC Berkeley, School of Law with the assistance of Bhairav Acharya, Richa Goyal, and Jaideep Reddy.

Order under federal (18 U.S.C. § 2510 *et. seq.*) or state wiretap statute[18]	Prospective location information.	Federal law requires, among other things, full and complete statements of the facts that the officer believes justify an order, and of why other investigative techniques are not appropriate.[19]

Significantly, some states prohibit the collection of location information without a warrant.[20]

POTENTIAL LEGAL ARGUMENTS

1. Discovery: If it is unclear how law enforcement located your client, or if it appears that your client's cell phone location was tracked, consider making detailed requests in discovery to ascertain the exact technique used against your client, as well as the actual data collected.
2. Exclusion: Consider the following arguments to exclude cell phone location information as they apply to your case:
   a. *Fourth Amendment Suppression*:[21]
      i. There is a reasonable expectation of privacy in information about a person's location.
         - Defendant had a subjective expectation of privacy in information about his or her location.[22]
         - Courts have recognized that this subjective expectation is objectively reasonable.[23]
         - Location tracking reveals a large amount of private, invasive, and precise information about a person.[24]
         - Location tracking reveals otherwise undiscoverable facts about constitutionally protected spaces.[25]
      ii. The third-party doctrine does not apply.
         - Defendant did not voluntarily consent to and was unaware of the cell phone company's collection of his or her location information;[26]
         - Cell phone data is "qualitatively different" from ordinary physical records as it reveals much more personal information than older technologies.[27]
   b. *State Suppression Remedies*: The collection of location information violated state statutory requirements regarding warrants and particularity.[28]
   c. *Admissibility*: A *Daubert*/*Frye*[29] hearing is required to ascertain the qualifications of expert witnesses and the reliability of their testimony on the location information,[30] especially if such testimony expresses a novel theory.[31]

SELECTED RESOURCES

1. Br. of the Electronic Frontier Foundation et al. as Amici Curiae, 2015 WL 5117969, in *Davis v. United States* (U.S. 2015) (supporting the petition for certiorari on the Fourth Amendment question, joined by NACDL and others).
2. Br. of the American Civil Liberties Union et al. as Amici Curiae, 2013 WL 3328019, in *United States v. Graham* (4th Cir. 2015) (providing a good example of the articulation of the Fourth Amendment arguments mentioned in the previous section).
3. Eric Lode, *Validity of Use of Cellular Telephone or Tower to Track Prospective, Real Time, or Historical Position of Possessor of Phone Under Fourth Amendment*, 92 A.L.R. Fed. 2d 1 (2015) (collecting and annotating cases on the topic until early 2015).
4. Office of the Federal Public Defender - Northern District of California, *Location and Cell Phone Tracking: Technology, Law, and Defense Strategy* (2013), http://www.ndcalfpd.org/2013_CJA/cell_phone_tracking.pdf.

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[18] E.g., *United States v. Barajas*, 710 F.3d 1102, 1107, 1111 (10th Cir. 2013).
[19] 18 U.S.C. § 2518.
[20] 18 states have warrant requirements, but with differing thresholds and variance according to the type of cell phone location information being sought. These states are California, Colorado, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, Tennessee, Utah, Virginia, Washington, and Wisconsin. Peter Cihon, *Status of Location Privacy Legislation in the States: 2015*, American Civil Liberties Union (last updated Oct. 13, 2015), https://www.aclu.org/blog/free-future/status-location-privacy-legislation-states-2015.
[21] *Graham*, 796 F.3d 332 at 344-345 (4th Cir. 2015), *rev'd en banc*, No. 12-4659, 2016 U.S. App. LEXIS 9797 (4th Cir. May 31, 2016) (finding a Fourth Amendment search when the government collects historical CSLI for an extended duration). *See also In re Application of U.S. for Historical Cell Site Data*, 724 F.3d at 629-30 (Dennis, J., dissenting); *Davis*, 785 F.3d at 539-41 (Martin, J., dissenting); *In re Tel. Info. Needed for a Crim. Investigation*, 119 F.Supp.3d at 1036; *United States v. Cooper*, 2015 WL 881578, at *6-8 (N.D. Cal. 2015); *In re United States ex rel. an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel.*, 849 F. Supp. 2d 526, 537-564 (D. Md. 2011). *But see United States v. Graham*, No. 12-4659, 2016 U.S. App. LEXIS 9797 (4th Cir. May 31, 2016) (en banc); *In re United States for an Order Directing Provider of Elec. Commc'n. Serv. to Disclose Records to the Gov't.*, 620 F.3d at 313; *Skinner*, 690 F.3d at 777; *In re Application of U.S. for Historical Cell Site Data*, 724 F.3d at 611-12; *Davis*, 785 F.3d at 511.
[22] Br. of the Electronic Frontier Foundation as Amicus Curiae at *4-6, *United States v. Davis*, 2014 WL 7006395 (11th Cir. 2015) (en banc); Mary Madden, *Public Perceptions of Privacy and Security in the Post-Snowden Era*, Pew Research Center, 36-37 (Nov. 12, 2014), http://www.pewinternet.org/2014/11/12/public-privacy-perceptions/ (50 percent of respondents believed location information was "very sensitive").
[23] *United States v. Jones*, 132 S.Ct. 945, 955, 964 (Sotomayor, J., and Alito, J., respectively); *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010).
[24] Br. of the American Civil Liberties Union et al. as Amici Curiae at *4-10, *United States v. Davis*, 2014 WL 7006394 (11th Cir. 2015) (en banc).
[25] *United States v. Karo*, 468 U.S. 705, 714-715 (1984); *Kyllo v. United States*, 533 U.S. 27, 36 (2001).
[26] *Graham*, 796 F.3d at 354-56 (reversed en banc); *In re United States for an Order Directing Provider of Elec. Commc'n. Serv. to Disclose Records to the Gov't.*, 620 F.3d at 317 ("A cell phone customer has not "voluntarily" shared his location information with a cellular provider in any meaningful way…").
[27] *Riley v. California*, 134 S. Ct. 2473, 2490-2491 (2014).
[28] Cihon, *supra* note 20 (listing state law regulating cell phone location tracking). Some states provide specific suppression remedies for the warrantless collection of location information. *See, e.g.*, Cal. Penal Code § 1546.4(a); Colo. Rev. Stat. §§ 16-3-303.5(5)-(6); 725 Ill. Comp. Stat. 168/20. California also provides a specific remedy for location information obtained without a particularized warrant or other legal process. Cal. Penal Code §§ 1546.1(d)(1) and 1546.4(c).
[29] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
[30] *See United States v. Yeley-Davis*, 632 F.3d 673, 684-85 (10th Cir. 2011); *Graham*, 796 F.3d at 365 (reversed en banc). *But see United States v. Gatson*, 2015 WL 5920931, at *5 (D.N.J. 2015) ("[a]fter reviewing the case law surrounding this type of [cell phone location] evidence, it is readily apparent that this form of testimony has been widely accepted across the country.").
[31] *See United States v. Evans*, 892 F. Supp. 2d 949, 955-57 (N.D. Ill. 2012).