No. COA25-336 DISTRICT THIRTY-ONE

NORTH CAROLINA COURT OF APPEALS

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| STATE OF NORTH CAROLINA | ) | |
| | ) | From Forsyth County |
| v. | ) | 22 CRS 052505–07 |
| | ) | 22 CRS 052297–99 |
| | ) | |
| | ) | |
| KRISTAN ALLEN, and | ) | |
| KEON RUSH | ) | |
| Defendants. | ) | |

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**DEFENDANT-APPELLANT'S BRIEF FOR KEON RUSH**

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**<u>DEFENDANT-APPELLANT'S BRIEF FOR KEON RUSH</u>**

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## <u>ISSUES PRESENTED</u>

**I. Did the trial court abuse its discretion in admitting Agent Putman's expert opinion because the State failed to prove that the expert's opinion was based upon sufficient facts or data or that the expert applied his methods reliably to the facts in this case?**

**II. Did the trial court err by failing to exclude the State's expert opinion testimony when the State violated its discovery obligations by failing to disclose its expert's opinion until the night before the expert testified?**

**III. Did trial counsel provide ineffective assistance of counsel when he did not review discovery and conduct basic investigation, prejudicing Mr. Rush?**

## STATEMENT OF THE CASE

On 10 October 2022 and 12 February 2024, a Forsyth County Grand Jury indicted Keon Rush and Kristan Allen for three counts of assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) and 11 counts of discharging a firearm into occupied property. (Rpp. 8–18, 23–33).

The State tried the case during the 20 May 2024 Session of the Forsyth County Superior Court, the Honorable Alyson Grine presiding. On 31 May 2024, the jury found Mr. Rush and Mr. Allen guilty of two counts of AWDWIKISI, one count of assault with a deadly weapon with intent to kill (AWDWIK), and seven counts of discharging a firearm into occupied property. (Rpp. 115–122).

The trial court sentenced Mr. Rush to three consecutive sentences, consisting of two 67-93 month sentences and a 23-44 month sentence. The trial court also sentenced Mr. Rush to a concurrent 23-40 month sentence, consolidating the 7 counts of discharging a firearm into occupied property. (Rpp. 137–146). The trial court sentenced Mr. Allen to three consecutive sentences, consisting of two 77-105 month sentences, and a 26-44 month sentence. The trial court also sentenced Mr. Allen to a concurrent 26-44 month sentence. (Rpp. 127–136). Mr. Allen and Mr. Rush gave oral notice of appeal on 5 June 2024 during their amended sentencing hearing. (T9 p. 7–8).

## STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Mr. Rush appeals from a final judgment in a criminal case pursuant to N.C.G.S. §§ 7A-27(b), 15A-1444(a), and N.C. R. App. P. 21(a)(1). Mr. Rush gave oral notice of appeal on 5 June 2024 during his amended sentencing hearing and the trial court created appellate entries, acknowledging Mr. Rush's notice of appeal. *See* 15A-1444(a). If this Court finds that Mr. Rush's notice of appeal is insufficient to preserve his appeal as of right, Mr. Rush requests review by writ of certiorari. Pursuant to Rule 21(a)(1), this Court is authorized to review the judgment by writ of certiorari. *E.g.*, *State v. Robinson*, 236 N.C. App. 446, 448 (2014) (reviewing criminal judgment by writ of certiorari pursuant to Rule 21 when defendant failed to enter notice of appeal in compliance with technical requirements of Rule 4), *aff'd as modified*, 368 N.C. 402 (2015).

## STATEMENT OF RELEVANT FACTS

On 25 March 2022, there was a drive-by shooting at Kermit's Hot Dog House. Two people were shot and another was injured. None of the State's witnesses could identify who the shooters were. None of the State's witnesses could identify who was in the car at the time of the shooting. None of the State's witnesses identified Mr. Keon Rush as being in the car at the time of the shooting. (Tpp. 210–211, 216, 437, 553).

The State also presented the testimony of Asia Baines, the girlfriend of co-defendant Kristan Allen. Ms. Baines claimed that Mr. Allen, Mr. Rush, Mr.

Elijah Staton, and Mr. Rahim Hauser got in a car together near the time of the crime. She said they were gone for 15 minutes and then Mr. Allen and Mr. Staton came back on foot, and they had not been dropped off by anyone. She did not see Mr. Rush or the car again. (Tpp. 331, 358). Ms. Baines did not know if the car had gone to Kermit's Hot Dog House. Ms. Baines did not know if the car she saw was involved in the shooting or if Mr. Rush was in the car at the time of the shooting. The State presented no evidence of any motive for the shooting. (Tp. 975).

On the record, trial counsel stated that the "theory of defense is going to be the identity of Mr. Rush in the vehicle, and identity of Mr. Rush at the time of the shooting." (Tp. 41). Trial counsel based his defense theory on the State's disclosures in discovery – specifically, that their expert could not show that Mr. Rush was at Kermit's Hot Dog House at the time of the crime based on cellphone location data. (Tp. 627). The State hired its expert in historical cell site data, FBI agent Harrison Putman, before trial. Agent Putman provided the State with an expert report which failed to place Mr. Rush at the crime scene at the relevant time. (State Exhibit 59, Slide 8, 2:16–2:30 pm). The State disclosed this expert report to defense counsel before trial and the State provided the underlying data for Agent Putman's expert opinion, which included over 3,000 pages of "voluminous" documents. (SE 72;[1] Tp. 729).

Relying on the State expert's disclosures, trial counsel made decisions on what defenses to pursue and what evidence to object to or not. For example, as the trial court recognized – and both the State and defense agreed – the State admitted cumulative evidence regarding the victim's injuries and had lay witnesses provide expert opinions. (Tp. 304). Yet the trial court stated that "the defense is not objecting and the Court[,] already having raised this issue with the parties, is assuming the defense just doesn't see it as hurting their theories regarding identity and absence of acting in concert." (Tp. 304).

However, the night before the State's expert testified, the State surprised defense counsel with a previously undisclosed expert opinion. (Tpp. 626, 711, 727). The State's expert testified that *after* he produced his expert report, the State asked him for a new expert opinion, specifically, his opinion on where the cellphone was located between 2:16–2:30 pm. (Tp. 729). The State's expert then reviewed cellphone handover records for this time period, which he claimed were consistent with Mr. Rush being at the crime scene at the relevant time. (Tp. 727). Because of this new expert opinion, the State could now argue that Mr. Rush was likely at the crime scene at the relevant time based on his cellphone data.

[1] All State Exhibits are abbreviated as "SE."

Defense counsel expressed his surprise regarding the State's undisclosed expert opinion, stating:

> Lastly, just yesterday I got an e-mail from [the trial prosecutor] where when the evidence is going to be presented to you it's going to show that there's a cell phone, that they're attributing to my client . . . . And I guess in their preparations in meeting with Agent Putman, they now have three or four different handoffs that is going to conveniently put him at a cell phone tower right next to Kermit's at like 2:22 or something.

(Tp. 626).

Moreover, defense counsel informed the court of the untimeliness of the disclosure and his inability to challenge it on such short notice, stating, "But that's information I didn't even have until yesterday. So, you know, again, there's no way for me to test if this information is accurate." (Tp. 626).

Trial counsel also informed the court of the gravity of the State's surprise disclosure and how much it affected his entire trial strategy, stating:

> Obviously if I'm looking at 2:16 and 2:31, and then my guy's nowhere near Kermit's, I'm a lot less concerned about that information. Then I find out this morning they're going to have an expert witness that's going to say there's a handoff at 2:20 something and he's next to Kermit's. You know, I definitely may have handled the case a lot differently had I known that.

(Tpp. 626–27).

The trial court refused to exclude Agent Putman's new expert opinion. The jury then heard Agent Putman's expert opinion and returned a guilty verdict. (Tp. 1009).

## ARGUMENT

The State hired an expert in cellphone location data to answer one question: was Mr. Rush at the crime scene at the relevant time? The first time the State's expert looked at the cellphone data, his answer was clear: No. Mr. Rush was not at the crime scene. When pressed by the State the night before his testimony, the State's expert changed his answer. Suddenly, Agent Putman claimed there was cellphone handover data – data that experts do not typically use – which supposedly placed Mr. Rush at the crime scene.

The core injustice in this case is simple: the defense was unfairly surprised by the State's new expert opinion the night before the expert testified. The unfair surprise was either because the State violated its discovery obligations or because defense counsel was ineffective. In either case, the introduction of a new expert opinion at the last minute – which was dispositive to the central issue of identity – unfairly prejudiced Mr. Rush.

### I. The trial court abused its discretion by admitting Agent Putman's expert testimony because the State failed to prove that the expert's opinion was based upon sufficient facts or data or that the expert applied his methods reliably to the facts in this case.

The State's case against Mr. Rush was far from overwhelming. None of the witnesses identified Mr. Rush as being at the crime scene. None of the State's surveillance footage showed Mr. Rush at the crime scene. The State then needed its expert, Agent Putman, to testify that the cellphone records were consistent with Mr. Rush being at the scene at the relevant time. Yet Agent Putman's testimony did not demonstrate that his expert opinion was based upon sufficient facts or data or that he reliably applied his methods to the facts in this case. In fact, Agent Putman admitted that Mr. Rush's cellphone records contained unreliable data as well as handover data that most cellphone providers do not keep and experts do not typically rely upon. This Court should therefore grant a new trial because Agent Putman's opinion was not admissible under prong one or prong three of Rule 702 and Mr. Rush was prejudiced by this testimony. Had the trial court properly excluded Agent Putman's inadmissible opinion testimony – which was the only evidence of Mr. Rush purportedly being at the crime scene at the relevant time – there is a reasonable possibility that the result of the proceeding would have been different.

**A. Standard of Review**

A court's ruling on the admission or exclusion of expert testimony is reviewed for an abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893 (2016). A trial court abuses its discretion when its "ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285 (1988).

Here, trial counsel timely objected to Agent Putman's testimony under Rule 702. (Tpp. 624–626, 637, 679–682, 696, 703). Trial counsel's objection was properly preserved, and this case should be reviewed under an abuse of discretion.

**B. Agent Putman's expert testimony did not satisfy the rigorous standards of Evidence Rule 702.**

Evidence Rule 702 permits the testimony of expert witnesses who are qualified by "knowledge, skill, experience, training, or education." However, the witness may not give an opinion unless all of the following apply:

(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.G.S. § 8C-1-702. The proponent of the expert evidence, here, the State, bears the burden of proving admissibility of the expert evidence under each of these three prongs. *State v. Ward*, 364 N.C. 133, 140 (2010). Failure to satisfy even one of these prongs renders the expert evidence inadmissible. *State v. McGrady*, 368 N.C. 880, 889 (2016).

By including these three prongs in Rule 702, our General Assembly aligned the North Carolina Rules of Evidence with the Federal Rules of

Evidence and formally adopted the standard for expert testimony under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *McGrady*, 368 N.C. at 884. Under *Daubert*, trial courts are obligated to ensure that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. In other words, trial courts "must now perform a more rigorous gatekeeping function when determining the admissibility of opinion testimony by expert witnesses than was the case under the prior version of Rule 702." *State v. Daughtridge*, 248 N.C. App. 707, 722 (2016).

In assessing reliability under Rule 702, courts consider a variety of factors, including whether the theory or technique has been tested, has been subjected to peer review, has a known or potential error rate, has standards controlling the technique's operation, or has achieved general acceptance in its field. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999).

Here, Agent Putman's expert opinion was not admissible because it did not satisfy the level of rigor now required under Rule 702. Specifically, his opinion testimony did not satisfy the first criteria under Rule 702 – that opinion testimony must be supported by sufficient facts or data. N.C.G.S. §8C-1, Rule 702(a)(1).

Strikingly, Agent Putman admitted, "the expert opinion does come into play *whether it's a reliable record or not*. For instance, the data sessions that are used in this case. There are data sessions that aren't reliable." (Tp. 667) (emphasis added). Agent Putman recognized that the AT&T cellphone records in this case "may lead you astray to say the phone was somewhere where likely it may not have been just because it would be an unreliable record." *Id.* Agent Putman then claimed he could tell what records were reliable based on his "training and experience," "testing," discussions with cellphone carriers, and time stamps. *Id.* Agent Putman did not describe his process of how he determined what constitutes a reliable record. And Agent Putman's vague answers did not thoroughly explain how he could determine in a stack of unreliable AT&T records, that there were somehow reliable records allegedly placing Mr. Rush at the crime scene. Likewise, Agent Putman admitted that he did not talk to anyone at AT&T about the reliability of the data in this case. (Tp. 668). He further conceded that AT&T keeps its provider data reports for billing purposes and not as a way to determine a person's location. (Tpp. 719–20).

Importantly, the State failed to prove the reliability of AT&T's handover data. Most providers keep only initiation data (the cell site on which a cell session initiates) and not handover data (subsequent handovers to other cell sites). (Tp. 700). Unlike T-Mobile and other cellphone providers, only AT&T keeps handover data. (Tp. 656). Undersigned counsel is unable to find any federal or state appellate case that considers the reliability of AT&T handover data under Rule 702, or that even mentions the use of such data. This is likely a case of first impression and it indicates that handover data, the only data that Agent Putman claimed to have placed Mr. Rush at the crime scene, is unusual data, perhaps rarely used by the state or federal government. In fact, Agent Putman did not testify to ever using handover data in prior cases. Moreover, Agent Putman did not include the handover data in his report or on his map. Only on the eve of the sixth day of trial, after already producing his report, did Agent Putman decide to look at the handover data. (Tp. 711). If handover data was typically used by experts, one would expect Agent Putman to have looked at this data before writing his report and well before the sixth day of trial. By Agent Putman's own actions, it is clear that experts typically do not rely on handover data.

Further, Agent Putman's testimony, particularly his omissions during his testimony, suggest that AT&T provided unreliable handover data. Agent Putman chose to testify only about the 2:20, 2:21, 2:22 and 2:26 pm handover data and chose *not* to testify about the 2:25 pm handover data from the same record. This is a significant omission given that the crime allegedly occurred at 2:25 pm. (Tp. 586; SE 53 – La'til Security Video). And it suggests that some of the handover data was unreliable. (SE 59; Tpp. 711, 724). Likewise, Agent Putman could not provide an error rate for the AT&T records and the State failed to present any evidence of a known or potential error rate for the data. (Tp. 667).

Agent Putman's expert opinion was also not admissible because it did not satisfy the third criteria under Rule 702 – that the expert applied his methodology reliably to the facts of the case. N.C.G.S. §8C-1, Rule 702(a)(3). Agent Putman never testified that he applied his methodology to the handover data. He did not prepare a report that applied his method to the handover data. (Tp. 711; SE 59). There is no evidence that he inputted the handover data into his software program. There is no map of the handover data. The record contains no evidence that Agent Putman applied his methodology to the handover data at all.

Therefore, the trial court should have excluded Agent Putman's testimony, which rested on insufficient facts and data and there was no evidence that Agent Putman applied his methodology reliably to the facts in this case.

**C. Agent Putman's expert testimony prejudiced Mr. Rush.**

Mr. Rush was prejudiced by the admission of Agent Putman's expert report. Here, the State's case was far from overwhelming. None of the witnesses identified Mr. Rush as being at the crime scene at the relevant time. None of the State's surveillance footage showed Mr. Rush in the car during the shooting. The only evidence allegedly placing Mr. Rush at the crime scene was Agent Putman's testimony regarding the cellphone location data. Without Agent Putman's testimony, the State had little to no evidence that Mr. Rush was at the crime scene and so the admission of this testimony was prejudicial. Accordingly, Mr. Rush is entitled to a new trial.

## II. The State violated its discovery obligations by failing to disclose their expert's opinion until the night before the expert testified, and the trial court erred by failing to exclude this opinion testimony.

North Carolina's discovery statute makes clear that the State has an obligation to disclose its expert's underlying data *and* its expert's opinions. N.C.G.S. § 15A-903(a)(2). The State cannot simply turn over underlying data and fail to disclose its expert's opinions. *Id*. Here, while the State disclosed the data its expert relied upon, namely 3,000 voluminous pages of cellphone records, the State failed to timely disclose its expert's opinion. The expert opinion regarding the cellphone handover data was not disclosed until the day before the witness testified, and well into trial. Such failure violates the State's statutory discovery obligations. The trial court therefore erred by failing to exclude this opinion testimony, prejudicing Mr. Rush.

### A. The trial court erroneously interpreted the discovery statute as not requiring the State to disclose its expert's opinions if it disclosed the expert's underlying data, and such incorrect statutory interpretation triggers de novo review.

Generally, a trial court's failure to impose discovery sanctions is reviewed for an abuse of discretion. *State v. Davis*, 368 N.C. 794, 797 (2016). However, when the trial court refuses to find a discovery violation based on a misunderstanding of the statute and consequently fails to exercise its discretion, the ruling is reviewed de novo. *Id*.

For example, in *State v. Davis*, the State failed to disclose its expert's opinions before trial. *Id*. at 808. Yet the trial court failed to find a discovery violation after incorrectly interpreting the discovery statute, believing the expert's statements did not qualify as opinions subject to disclosure under N.C.G.S. § 15A-903(a)(2). *Id*. at 796. The North Carolina Supreme Court held that because of this mistaken interpretation of the discovery statute, the trial court's decision was reviewable de novo. *Id*. at 797.

Like in *Davis*, here, the trial court erroneously interpreted the discovery statute. The trial court mistakenly believed that since the State disclosed its expert's underlying data to defense counsel, the State's failure to disclose its expert opinion could not trigger the discovery requirements under N.C.G.S. § 15A-903(a)(2). (Tpp. 626–32). Instead of recognizing the State's discovery violation, the trial court instead focused on defense counsel's ineffectiveness, stating, "And is it fair to say that, if you had taken the underlying data to an expert you might have learned about that interpretation independently and earlier?" (Tp. 632). As explained in the following claim, defense counsel was ineffective. But defense counsel's ineffectiveness did not remove the State's independent, statutory duty to disclose its expert's opinions before trial.

Defense counsel candidly conceded that he received the underlying data (Tp. 637); however, as a matter of law, this disclosure of the data did not satisfy the State's discovery obligations with respect to its expert. Mr. Rush should not be deemed to have waived his earlier objection because his attorney was confronted with the trial judge's erroneous interpretation of the discovery statute. Therefore, this claim should be reviewed de novo.

However, to the extent this Court deems necessary, this Court may also exercise its discretion under N.C. R. App. 2 to review the issues in this case. *See* N.C. R. App. 2 (allowing suspension or variance of the Rules of Appellate Procedure where a party may experience manifest injustice). Allowing Mr. Rush's convictions to stand where the State violated the discovery statute would be a manifest injustice.

B. The State violated its discovery obligations by failing to disclose its expert's opinion until the night before its expert testified.

Before trial, the State voluntarily disclosed its discovery pursuant to N.C.G.S. § 15A-902. The court then granted the State's reciprocal discovery order after finding that the State had complied with N.C.G.S. § 15A-902 and 903 and turned over its discovery to the defense. (Rpp. 101–101). At the beginning of the trial, the prosecutor told the court, "The State has turned over all discovery that's in our possession. I just wanted to put that on the record." (Tp. 20).

The State's theory of the case was that the shooting at Kermit's Hot Dog House happened around 2:25 pm. (Tp. 586; State Exhibit 53 – La'til Security

Video). However, the State's expert in historical cell site data, Agent Putman, submitted a report which showed that Mr. Rush was not near the crime scene during this relevant time, specifically between 2:16–2:30 pm, based on his cellphone data. (SE 59; Tp. 627). The report was disclosed to the defense in advance of trial.

The State then met with Agent Putman the day before his testimony. (Tpp. 627–28). The State decided it wanted a new expert opinion from Agent Putman and for the first time, asked him what was happening between 2:16–2:30 pm. (Tp. 729). Agent Putman testified that only after the State asked for this new expert opinion, did he decide to review more of the cellphone records. (Tp. 711). He then claimed that, now in his opinion, between 2:22 and 2:26 pm, the cellphone records were consistent with Mr. Rush being at the crime scene at the relevant time. (Tpp. 711, 727). Nowhere in Agent Putman's expert report does he mention the times 2:22 and 2:26 pm for Mr. Rush's cellphone or opine that Mr. Rush was near the crime scene. (SE 59).

The State knew before trial that the crime happened around 2:25 pm. (Tp. 586; State Exhibit 53 – La'til Security Video). The State also knew at least a month before trial that in Agent Putman's expert opinion, Mr. Rush was not near the crime scene during the relevant time. (SE 59; Tp. 627). If the State wanted their expert to give an opinion about the time between 2:22–2:25 pm, they could have asked their expert about this at any reasonable time before trial and yet the State failed to do so. Instead, the State waited until the night before their expert's testimony to obtain a new expert opinion.

The State therefore violated North Carolina's discovery statute by failing to disclose its expert's opinion until the night before their expert testified. Under N.C.G.S. § 15A-903(a)(2), the State's failure to timely disclose their expert's opinion is a discovery violation regardless of whether the State provided its expert's underlying data. N.C.G.S. § 15A-903(a)(2). A discovery violation may occur even if the State acted in good faith. *Id.*; *see also State v. McClary*, 157 N.C. App. 70, 75 (2003) (finding that the State had violated the discovery statute by failing to disclose its witness's statements until the day of trial and granting a continuance even though the State acted in good faith).

The purpose of the discovery statute is to protect the defendant from unfair surprise. *Davis*, 368 N.C. at 798. Defense counsel informed the court that he was unfairly surprised by the State's new expert opinion the night before the expert's testimony. (Tp. 626). He asked the court to exclude the expert's new opinion, but the trial court failed to do so. (Tp. 627).

C. <u>Mr. Rush was prejudiced by the State's failure to disclose its expert's opinion and the trial court's refusal to exclude this testimony.</u>

Prejudice resulted from the State's failure to disclose its expert's opinion and the trial court's failure to exclude this testimony.

As the North Carolina Supreme Court has recognized, the State's failure to timely disclose its expert's opinions prejudices a defendant because "had such information been turned over in discovery, defendant would have been able to prepare a possible defense or counterpoint to the expert opinion testimony offered by the State." *Davis*, 368 N.C. at 798. Here, defense counsel did not receive the State's new expert opinion until the night before the expert's testimony and, as defense counsel stated, since "that's information I didn't even have until yesterday[,] . . . . there's no way for me to test if this information is accurate." (Tp. 626).

A central purpose of having timely discovery is to allow the defense to look at the State's expert report and determine if the defense needs to retain its own counter expert. If the State had timely given Agent Putman's opinion that Mr. Rush was at the crime scene before trial, then defense counsel could have readily determined that he needed an expert. Instead, the State's late disclosure denied the defense this opportunity.

Moreover, defense counsel needed an expert to test whether Agent Putman's new opinion was accurate because, as the State's own expert admitted, AT&T provided unreliable records for Mr. Rush's phone in this case. (Tp. 667). Further, defense counsel relied on the State's claim that it had provided all discovery, including the disclosure of its expert's opinions, when forming his theory of defense. As explained below, defense counsel proceeded to trial on an identity theory of defense and so failed to object to improper cumulative and emotional evidence that he did not perceive as affecting the identity theory. (Tpp. 41, 304).

Had the trial court properly excluded Agent Putman's opinion testimony – which was the only evidence of Mr. Rush allegedly being at the crime scene during the relevant time – there is a reasonable possibility that one or more jurors would not have agreed to convict Mr. Rush.

## III. Trial counsel provided ineffective assistance of counsel when he did not review discovery and conduct basic investigation, prejudicing Mr. Rush.

Defense counsel knew that the State's only possible evidence linking Mr. Rush to the crime scene was cellphone location data. Yet defense counsel failed to review the cellphone location data. Instead, defense counsel pursued an identity defense based on the mistaken belief that the cellphone records showed Mr. Rush was "nowhere near" the crime scene. (Tp. 627).

Only on the sixth day of trial, did defense counsel realize he had failed to review the cellphone location data that allegedly placed Mr. Rush at the scene. By then it was too late – defense counsel had never hired an expert to test the reliability of the cellphone data or challenge the State's expert. Further, defense counsel had failed to object to improperly cumulative and emotional testimony as well as improper opinion testimony in service of his identity theory – a theory that defense counsel decided to pursue without reviewing discovery. An attorney's decision to pursue a certain theory of defense without reviewing discovery first or completing adequate investigation cannot be strategic. Thus, but for defense counsel's deficient performance, there is a reasonable probability the result of the proceeding would have been different.

A. Standard of Review

Ineffective assistance of counsel claims are reviewed de novo. *State v. Wilson*, 236 N.C. App. 472, 475 (2014). This Court may decide an ineffective assistance of counsel claim on direct appeal when "the cold record reveals that no further investigation is required." *State v. Thompson*, 359 N.C. 77, 122–23 (2004). In the present case, the cold record is sufficient to demonstrate both the deficient performance of counsel and the prejudice to Mr. Rush, and no further investigation is required. If this Court will not find the cold record sufficient for this IAC claim, Mr. McClean would request that his IAC claim be dismissed without prejudice to his right to reassert it in an appropriate subsequent proceeding. *State v. Fair*, 354 N.C. 131, 167 (2001).

A defendant has the constitutional right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, § 23 of the North Carolina Constitution. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Braswell*, 312 N.C. 553, 561 (1985). A defendant proves ineffective assistance of counsel by showing that (1) counsel performed deficiently, meaning below an objective standard of reasonableness, and (2) prejudice resulted, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S at 688, 694.

B. Trial counsel performed deficiently by failing to review discovery that was essential to this case.

Mr. Rush's trial counsel fell below an objective standard of reasonableness. First, if this Court finds that Mr. Rush's argument in Claim II is not preserved due to defense counsel's possible failure to comply in full with the discovery statute or to preserve an objection to the discovery violation, then defense counsel provided ineffective assistance of counsel. There is no legitimate explanation for defense counsel's failure to comply in full with the discovery statute.

Second, defense counsel provided ineffective assistance of counsel by failing to move for a continuance after the State's late discovery disclosure. Once the State provided its last-minute expert opinion with its expert opining on handover data for the first time, defense counsel should have retained its own expert to interpret the handover data, which counsel could have only done with a continuance. The prejudice because of defense counsel's failure to request a continuance and retain an expert is explained in the subsequent section.

Third, trial counsel provided ineffective assistance of counsel when he failed to review discovery. The Sixth Amendment right to effective assistance of counsel mandates, that "defense counsel . . . undertake reasonable steps to investigate all open avenues of defense." *Wood v. Zahradnick*, 578 F.2d 980, 982 (4th Cir. 1978); *See, e.g.*, *Strickland*, 466 U.S. at 691 (holding that counsel must conduct reasonable investigations). Likewise, the American Bar Association (ABA) guidelines, which the United State Supreme Court has endorsed, state, "defense counsel has a duty to investigate in all cases" and "the duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt . . . or statements to defense counsel supporting guilt." ABA Guidelines 4.1.1.A–B; *Rompilla v. Beard*, 545 U.S. 374, 375 (2005) (endorsing ABA Standards as guides to determining what is reasonable).

While "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up," here, all defense counsel had to do was review discovery. *Rompilla*, 545 U.S. at 383. Discovery, particularly the cellphone location data, was critical in this case. Defense counsel knew that no eyewitness identified Mr. Rush at the crime scene and so the only way the State could place Mr. Rush at the scene was with cellphone location data. (Tp. 41). Yet defense counsel did not review the cellphone data. Trial counsel only realized near the end of trial that he had received discovery with cellphone location data that allegedly placed his client at the crime scene. (Tpp. 632, 636).

In *Rompilla*, the Court found that trial counsel performed deficiently when he knew the State would use evidence of the defendant's prior conviction against him but failed to review the defendant's prior conviction file. *Rompilla*, 545 U.S. at 389. As the Court held, while defense counsel does not have to look "for a needle in a haystack[,]" "looking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell defense counsel something about what the prosecution can produce." *Id.* at 389.

Like in *Rompilla*, here, trial counsel knew that the State would use Mr. Rush's cellphone records against him. The State had filed notice of its cellphone location expert and produced an expert report about the cellphone records. (Rp. 102; SE 59). Yet like Rompilla's counsel, trial counsel failed to look at the State's file – here, the expert's underlying data. (Tpp. 632, 636). As in *Rompilla*, defense counsel's failure to conduct basic investigation and review discovery constitutes deficient performance.

Moreover, the United States Supreme Court has been clear: counsel cannot make strategic decisions if he fails to conduct reasonable investigation. *Wiggins v. Smith*, 539 U.S. 510, 521–22 (2003). Because while "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *Strickland*, 466 U.S. at 690, counsel is deficient when his "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526. Here, trial counsel's decision to pursue only an identity defense at Mr. Rush's trial was not strategic. (Tp. 41). Instead, trial counsel's failure to investigate the cellphone location data resulted from inattention; counsel had the underlying cellphone data, but failed to review it. (Tpp. 632, 636). Counsel therefore decided to pursue an identity defense without having reviewed the data that purportedly identified his client and placed him at the scene, although "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Wiggins*, 539 U.S. at 525.

For example, in *Wiggins*, trial counsel argued that they made a strategic decision to focus on the defendant's direct responsibility and to not investigate the defendant's background, including his diminished mental capacity. However, the United States Supreme Court held that "as we have made clear, counsel were not in a position to make a reasonable strategic choice as to whether to focus on Wiggins' direct responsibility, the sordid details of his life history, or both, because the investigation supporting their choice was unreasonable." *Id.* at 536.

The North Carolina Supreme Court has similarly held that trial counsel's decision to pursue one defense at trial is not strategic if they have not conducted an adequate investigation beforehand. For example, in *Allen*, the court found that "[e]ven if trial counsel chose to pursue a 'strategy' of focusing on [a witness's] lack of credibility, counsel's failure to adequately investigate the crime scene could still be unreasonable." *State v. Allen*, 378 N.C. 286, 301 (2021). Like in *Wiggins* and *Allen*, because trial counsel unreasonably failed to review and investigate the cellphone location data, he could not make a strategic decision about whether to present an identity defense.

Trial counsel has already acknowledged that had he conducted basic investigation and reviewed discovery, he would have pursued a different defense. (Tpp. 626–27). Thus, trial counsel's failure to review discovery fell far below an objective standard of reasonableness, especially when the cellphone location data was central to his theory of the case.

C. Prejudice resulted.

Counsel's deficient performance prejudices the defendant if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" considering the "totality of the evidence before the judge or jury." *Id.* at 694–95. A defendant need not establish that counsel's deficient performance "more likely than not altered the outcome in the case." *Id.* at 693. A "reasonable probability" of a different outcome is a threshold lower than the preponderance of evidence. *See id.* at 694. ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.”).

Trial counsel has already acknowledged that had he reviewed the cellphone location discovery, he would have conducted this case differently. (Tpp. 626–27). That is because trial counsel pursued an identity defense based on the mistaken belief that the State had no evidence placing his client at the crime scene. In fact, trial counsel said he believed the State’s evidence meant “my guy’s nowhere near Kermit’s [the crime scene]” at the relevant time and so he was “a lot less concerned about that information.” (Tp. 627). When trial counsel realized the State had evidence allegedly placing Mr. Rush at the crime scene, it was too late, and the trial was nearly over.

As the court noted, had defense counsel reviewed discovery, he could have sought the appointment of a defense expert prior to trial. (Tp. 632). Cellphone location data is far from infallible. A cellphone may connect with a cell site that is farther away from the user’s actual location based on which cell site has the best signal. (Tp. 718). The closest cell site may also be offline, forcing a user’s cellphone to connect with a cell site that is farther away from the user’s actual location. (Tp. 730).

Defense counsel needed an expert to test Agent Putman’s new opinion, which he formed the night before he testified, that the cellphone records were consistent with Mr. Rush being at the crime scene. (Tp. 727). Without a defense expert, trial counsel could only take Agent Putman's word that the cellphone records supported his opinion. (Tp. 637). Yet there was a need to test the State's opinion and the cellphone records themselves because, as the State's own expert admitted, AT&T provided unreliable records for Mr. Rush's phone in this case. (Tp. 667). And handover data is not typically used by experts which further evidences its unreliability. With AT&T providing unreliable data for Mr. Rush's phone, the State's expert failed to explain why he believed the records that allegedly placed Mr. Rush at the crime scene were reliable. (Tpp. 667–68). Defense counsel therefore failed to hire an expert to ensure the reliability of the evidence against Mr. Rush and subject the State expert's opinions to rigorous testing.

Likewise, Mr. Rush was prejudiced by defense counsel's failure to object to improper cumulative and emotional evidence that he did not perceive as affecting his identity theory. (Tpp. 41, 304). Again, under *Wiggins*, defense counsel's decision to pursue a certain theory of defense at trial is not strategic if counsel failed to properly investigate the case, as happened here. Consequently, in service of this nonstrategic decision to pursue an identity defense, counsel allowed, without objection, the State's presentation of cumulative evidence; six firefighters, Ross Flynt, Justin Grubbs, Christopher Smalls, Tommy Smith, Scott Dixon, Ronald Groce, recounted the exact same incident, repeating the victim's emotional dying declaration multiple times, and describing the victim Flynt's injuries one after the other, along with an EMS provider, Renee Bridges, and medical doctor, R. Darrell Nelson, who again described the same injuries to Flynt. (Tpp. 108–271, 290–303, 387–406). Along with the six firefighters and two medical providers, the State called five other people to describe the same incident – officer Jasmine Stephens, victim Pastor Miranda, waitress Tamara McDaniel, and paramedic Charles Durham. (Tpp. 271–289, 434–448, 454–466). The State also presented emotional and unduly inflammatory victim impact evidence during the State's case in chief. (Tpp. 107, 133, 206, 209–10, 226, 229, 252–53, 256, 287, 301–02, 448).

Both the court and the State acknowledged the cumulative presentation of the State's evidence with the court stating:

> The Court noted that the evidence is trending towards the cumulative, in terms of the injury to firefighter Flynt. The parties all agreed with that. The State communicated that was part of the reason that they cut out some of their witnesses that they otherwise might have called today. The Court noted that Captain Bridges testified to some matters the Court would consider proper for an expert but the defense is not objecting and the Court already having raised this issue with the parties, is assuming the defense just doesn't see it as hurting their theories regarding identity and absence of acting in concert.

(Tp. 304).

Therefore, defense counsel failed to review discovery and pursued a nonstrategic and ultimately unworkable defense theory. Due to counsel's nonstrategic theory, defense counsel invited error by failing to object to improperly cumulative and emotional testimony and improper opinion testimony. The jury was likely swayed by this emotional and improper testimony. Moreover, defense counsel let the State's expert and unreliable cellphone records go untested by a defense expert. Thus, but for defense counsel's deficient performance, there is a reasonable probability the result of the proceeding would have been different.

## CONCLUSION

For the foregoing reasons and authorities, Keon Rush, the Defendant-Appellant herein, respectfully requests this Court to reverse his convictions.

Respectfully submitted this, the 6th day of June, 2025.

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**<u>CERTIFICATE OF COMPLIANCE WITH RULE 28(J)(2)</u>**

I hereby certify that Defendant-Appellant's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Microsoft Word, the program used to prepare the brief.

This, the 6th day of June 2025.

Electronically Submitted
Kailey Morgan

## CERTIFICATE OF SERVICE

I hereby certify that the original Defendant-Appellant's Brief has been duly filed, pursuant to Rule 26, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the foregoing Brief has been served upon J. Blake Norman, Assistant Attorney General, by sending it electronically to the following current email address, jnorman@ncdoj.gov.

This, the 6th day of June 2025.

Electronically Submitted
Kailey Morgan