NOT DESIGNATED FOR PUBLICATION

No. 106,104

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JERMEL FLEMING,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; SALLY D. POKORNY, judge. Opinion filed October 5, 2012. Affirmed in part and reversed in part.

Jeremiah Kidwell, of Kidwell & Conkright, of Kansas City, Missouri, and *Jonathan Sternberg*, of Jonathan Sternberg, Attorney, P.C., of Kansas City, Missouri, for appellant.

Mitch Peterson, legal intern, *Patrick J. Hurley*, assistant district attorney, *Charles E. Branson*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before PIERRON, P.J., BUSER and LEBEN, JJ.

Per Curiam: Jermel Fleming appeals his convictions for aggravated robbery, kidnapping, aggravated burglary, conspiracy to commit aggravated robbery, and theft. Fleming argues the trial court erred by allowing a police detective to give what he believes to be expert testimony about cell phone records, and that his convictions for aggravated robbery and theft were multiplicitous. We affirm the trial court's admission of the cell phone evidence and reverse the conviction for theft.

Fleming does not challenge the sufficiency of the evidence supporting his convictions. However, in terms of the prejudicial effect of the cell phone testimony raised in his first issue, Fleming argues that all the evidence identifying him as the ring-leader was presented by plea-accepting co-defendants who concocted a story to benefit themselves.

Around 10:30 p.m. on June 20, 2010, Joshua Beham was alone in his apartment. He heard a knock on his door and yelled "Come in." After a second knock, Beham got up to answer the door. He looked through the peephole and saw men wearing red bandanas over their faces. They rushed the door. Beham said that a short, stocky, black "kid" punched him. The kid shoved a sawed-off shot gun in his face and told him to shut up. Beham said there were four black assailants and three of them had red bandanas over their faces.

Beham said the men ransacked the apartment taking electronics and then asked him where he was hiding the drugs. Beham said they forced him back into his bedroom where he kept a quarter ounce of marijuana in his mini-fridge. They forced Beham back into the living room where the man with the gun told Beham to empty his pockets. Beham gave him $5 or $6 and his cell phone. Beham testified the men took a television, an Xbox, a laptop computer, and his roommate's shotguns. Beham called the police after they left.

Beham testified that earlier in the day he had received a text message from Dylan Flitcraft who had been to Beham's apartment several times. Flitcraft asked Beham if he could purchase some marijuana and Beham replied that he could only get Flitcraft an eighth of an ounce. Flitcraft asked Beham if he still lived in the same apartment. Beham did not reply. Beham found it "weird, sketchy" when Flitcraft texted him two more times asking if he still lived at the same apartment.

The Lawrence Police Department interviewed four suspects allegedly involved in the burglary: Tyler Jefferson, Dejuan Franklin, Adam Taylor, and Donta Tanner. At trial, each one of the suspects testified to his participation in the burglary and that Fleming was the mastermind of crime and had held the shotgun during the incident. Each one testified to the plea deal he received in exchange for his testimony against Fleming. Each one also testified that Fleming was sending text messages to Flitcraft to make sure they had the correct address/apartment for Beham.

Flitcraft testified he had purchased marijuana from Beham for as long as he had known him. Flitcraft said that on June 20, 2010, around 8 p.m., he received a text message from Fleming asking if he knew anybody that Fleming could rob for some marijuana. Flitcraft told Fleming that Beham had marijuana and gave him a general address of "Between Tennessee and Kentucky." Flitcraft testified that he was given immunity for his testimony at the trial.

The prosecution obtained Fleming's cell phone records and presented the testimony from the records custodian of Sprint Nextel Communications, Eric Tyrell, and the testimony of Detective M.T. Brown as to the location of the phone calls and texts made by Fleming at the time of the incidents in this case. Defense counsel objected to Detective Brown's testimony arguing it should have been considered expert testimony for which a pretrial designation was never made or the nature of Brown's expertise was never disclosed. However, a motion to admit the subpoenaed phone records had been held well over 3 months prior to trial. The trial court found that Brown was not an expert and his testimony regarding the cell phone records was nothing more than the officer drawing a map. Before the court permitted Brown to testify, the court allowed defense counsel to review the detective's PowerPoint presentation and all the accompanying records and consider them overnight.

The jury convicted Fleming as charged. The trial court sentenced him to 88 months' incarceration for aggravated robbery, and concurrent sentences of 32 months' incarceration for aggravated burglary, 59 months' incarceration for kidnapping, 32 months' incarceration for conspiracy to commit aggravated robbery, and 12 months in the county jail for theft.

Fleming appeals.

For his main argument, Fleming argues the trial court erred in allowing Detective Brown to testify about the cell phone records and should have held that the testimony was expert testimony for which Brown was never designated as an expert.

The admission of expert testimony generally lies within the district court's sound discretion, and its decision will not be overturned in the absence of an abuse of discretion. *State v. Johnson*, 286 Kan. 824, 831, 190 P.3d 207 (2008). A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011).

The admissibility of expert opinion testimony is governed by K.S.A. 60-456(b), which provides that such testimony "is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience, or training possessed by the witness." Our Supreme Court has held that expert testimony is permitted when it helps the jury understand subject matter that is beyond the normal experience of the average juror. But if the normal experience and qualifications of jurors permit them to draw proper conclusions from the given facts and circumstances, expert opinions are not warranted. *State v. Wells*, 289 Kan. 1219, 1236, 221 P.3d 561 (2009).

Defense counsel objected that Brown was an expert and was never designated as an expert and any reports or power points he prepared were never given to the defense in advance. Defense counsel argued the testimony violated Fleming's due process and confrontation rights.

The State countered that the defense had all the phone records early in this case and Brown was doing what any other layperson could do in mapping the calls/texts and cell towers. The State pointed out that instructions were provided with the cell phone records explaining how to read them and interpret the calls. The trial court had ordered the State to turn over Brown's report and PowerPoint to the defense and gave the defense the evening to examine them and cross-examine Brown the next morning.

However, defense counsel continued to object to allowing Brown to testify at all because he contended the defense must know of all experts 90 days before trial and the defense had no opportunity to hire an expert of its own. The trial court held that Brown was not providing expert testimony and it did not take an expert to prepare his map.

Brown testified he had performed a historical review of Flitcraft's phone records concerning phones calls and texts with Fleming. Brown physically verified each of the cell phone towers in Lawrence and coverage of the towers. Brown testified that around the time of the aggravated robbery on June 20, 2010, Fleming contacted Flitcraft at 10:49 p.m. for 89 seconds from sector 1 of tower 329. A second call was at 10:55 p.m. for 103 seconds from sector 1 of tower 329. The next call came at 11:07 p.m. for 16 seconds this time from sector 2 of tower 329. Brown testified that Beham's apartment is located within sector 1 of tower 329. Defense counsel cross-examined Brown on the range of the tower's coverage, overlapping coverage, and how cell phone towers hand-off to each other when a cell phone changes location.

Our first issue to be resolved is what the State's obligation was concerning providing Brown's testimony to the defense ahead of time.

On the afternoon of the second day of trial, the State disclosed the substance of Brown's testimony. Brown had been previously listed on the State's witness list and the phone records were made available to the defense upon receipt by subpoena. Fleming claims that if this evidence is expert evidence and testimony, K.S.A. 2011 Supp. 60-226(b)(6)(A)-(C) requires that a party disclose the identity of any expert witnesses at least 90 days before trial along with the subject matter on which the expert is expected to testify, the substance of facts and opinions, and a summary of the grounds for each opinion.

Generally, the civil rules of evidence apply in both criminal and civil proceedings where not addressed elsewhere. K.S.A. 60-402 states: "[T]he rules set forth in this article [60-400 *et seq.*] shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced."

Fleming argues that the failure to disclose that an officer would testify as an expert 90 days in advance of trial violated KSA 60-226(b)(6) and that the testimony shouldn't have been allowed under that statute and KSA 60-237.

We believe these civil discovery statutes concerning the timing of disclosures do not apply in criminal cases. The 90-day limit would make no sense in the criminal case, in which—if an in-custody defendant insists on a speedy trial—the trial must take place within 90 days of arraignment.

We believe the timing of discovery in a criminal case is determined by the criminal discovery statutes, KSA 22-3212 and 22-3213. If the civil discovery statutes generally applied in criminal cases, then a criminal defendant could request virtually any

document that might be potentially relevant, could subpoena third parties via the civil statutes for such documents, and could take depositions before trial. But no one makes those claims here or in actual practice.

KSA 22-3212(a)(2) allows inspection upon request of "results or reports of . . . scientific tests or experiments made in connection with the particular case." However,

> "[e]xcept as provided in subsections (a)(2) and (a)(4) [not applicable here], [KSA 22-3212] does not authorize the discovery or inspection of reports, memoranda or other internal government documents made by officers in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses, other than the defendant, except as may be provided by law."

Generally, then, the State has no obligation to turn over a witness statement or report from an investigating officer, even if that officer might be deemed an expert, unless the officer has conducted "scientific tests" and the defendant has requested them.

Here, Fleming filed a formal request for inspection of documents under KSA 22-3212 (and 22-3213), and his request included "lab test results and reports of scientific tests or experiments made in connection with this case." So *if* Brown made some tests on his own regarding the cell towers for the purposes of this case, those should have been produced before trial.

KSA 22-3213(1) provides that "no statement or report in the possession of the prosecution which was made by a state witness . . . shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination at the preliminary hearing or in the trial of the case." If the defendant asks for them (which occurred here), then KSA 22-3213(2) requires that they be produced after the witness has testified on direct examination. Thankfully, most prosecutors nowadays produce these in

advance of trial, not right after direct examination, but earlier production generally cannot be required under KSA 22-3213(1).

In *State v. Brooks*, No. 103,774, 2011 WL 2793303, at *8 (Kan. App. 2011) (unpublished opinion), *petition for review granted* December 19, 2011 (on other issues), our court recognized that "the rules of criminal procedure have no . . . expert disclosure requirement" like those found in KSA 60-226. Although our court made no definitive ruling on this point (finding that even if the State should have provided some advance notice, the court still had discretion to admit the testimony), it did say: "[Defendant] has cited no authority supporting his position that the civil expert disclosure rule should be applied in criminal cases. Unlike civil cases, where the ultimate determination of legal theories and issues is unsettled until after discovery has been completed, the defendant in a criminal case knows the exact theory under which he is being prosecuted from the outset . . . ." 2011 WL 2793303, at *9. The court also noted the criminal provisions for discovery, KSA 22-3212 and 22-3213, and the criminal provision requiring the endorsement of witnesses, KSA 22-3201(g).2011 WL 2793303, at *9. Our court has also held that the expert-disclosure requirements of KSA 60-226(b) do not apply in proceedings under KSA 60-1507. *LaPointe v. State*, 42 Kan. App. 2d 522, 549, 214 P.2d 684 (2009).

Although outside the presence of the jury on January 6, 2011, the State elicited some testimony from Brown that he had done some of his own checks of cell towers by making 911 calls himself, the State did not present that testimony to the jury on January 7, 2011. Instead, the State mostly had Brown explain what had already been admitted into evidence through Sprint records.

Fleming contends that "like most of the [Civil Procedure] Code's discovery provisions, [KSA 60-226] long has been applied in criminal cases, too," citing two cases from 1971: *State v. Goodman*, 207 Kan. 155, 161, 483 P.2d 1040 (1971), and *State v.*

Frideaux, 207 Kan. 790, 487 P.2d 541 (1971). Neither case dealt with disclosure requirements.

The trial in *Goodman* occurred prior to the advent of the new rules of criminal procedure, so the court did not consider the criminal-discovery provisions now found at KSA 22-3212 and 22-3213. In *Goodman*, the district judge authorized the taking of a deposition of a Kansas prison inmate who "answered only those questions he desired to answer," which "absolve[d the defendant] of the crimes." 207 Kan. at 160. At trial, the defense attorney asked to admit the deposition under KSA 60-226(d). The district court refused. The *Goodman* court found that even "[a]ssuming, without deciding, [that] the use of depositions at the trial in criminal cases was controlled by the new code of civil procedure (K.S.A. 60-226[d]) prior to July 1, 1970, the appellant was not 'unable to procure the attendance of the witness by subpoena,'" which is required for admission under K.S.A. 60-226(d). 207 Kan. at 161. The inmate was still in a Kansas penitentiary, but the defendant had not subpoenaed him. So the rule at issue in *Goodman* was not a disclosure rule, and the court simply assumed that the civil-procedure rule on the admission of a deposition into evidence applied.

In *Frideaux*, a case involving the charge of attempting to aid an inmate escape, an inmate witness "gave two statements in 'deposition' form—which were entirely contradictory in substance." 207 Kan. at 792. The deposition transcript was not read or signed by the inmate, and he then was transferred to California. The *Frideaux* court said there was "no compliance with the provisions of K.S.A. 60-230(e), (f) relating to the taking and use of depositions," and that there was no attempt "to comply with the provisions of K.S.A. 60-226(d)(3)." 207 Kan. at 792. The court affirmed the district court's decision not to admit the deposition. Once again, no disclosure rules were at issue—only procedures for doing something like issuing a subpoena or reviewing a deposition (*i.e.*, witness review and signature).

The other question on this general issue is whether the trial court abused its discretion in finding that Brown was not providing expert testimony.

Fleming argues that cell tower historical site analysis in criminal cases is usually made by an expert witness. See *Wilder v. State*, 191 Md. App. 319, 991 A.2d 172 (2010); *Francis v. State*, 781 N.W.2d 892, 897-98 (Minn. 2010); *State v. Manzella*, 128 S.W.3d 602, 608-09 (Mo. App. 2004); *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006); *Wilson v. State*, 195 S.W.3d 193, 200-02 (Tex. App. 2006).

In *Manzella*, the defendant appealed from a conviction for first-degree murder. The prosecution introduced the defendant's cellular telephone records and produced a "radio frequency performance engineer" from Cingular "to identify [defendant's] location" at the time he placed a cell call on the morning of the crime. The defendant sought to rebut the expert's testimony through his own personal "knowledge regarding cellular towers." 128 S.W.3d at 608-09. The trial court permitted the defendant to "testify about certain aspects of his cellular bill, such as telephone calls made and received and charges." 128 S.W.3d at 608-09. But, the trial court refused to permit the defendant to offer rebuttal testimony because the defendant "was not qualified to discuss the portion of the record referring to cellular towers." 128 S.W.3d at 608-09. The Missouri intermediate appellate court affirmed the trial court's exclusion of this testimony, concluding, as did the trial court, that "[d]efendant did not demonstrate how his experiences as a Cingular customer qualified him to testify about cellular towers." 128 S.W.3d at 608-09.

In explaining its better practice rule of requiring an expert for admission of evidence of this nature, the court in *Wilder* stated:

> "We recognize that cellular telephone technology has become generally understood. See e.g., *Pullin v. State*, 272 Ga. 747, 534 S.E.2d 69, 71 (2000) (noting expert opinion that 'basic properties of cellular technology are well understood' and judicial acceptance of 'basic principles

of cellular technology'). Moreover, the use of telephone company cell phone records for investigative purposes has been noted in Maryland cases. See, e.g., *Whiting v. State*, 389 Md. 334, 338, 885 A.2d 785 (2005) (police traced calls using subpoenaed records of victim's cell phone); *Pantazes v. State*, 141 Md. App. 422, 435, 785 A.2d 865 (2001) (records suggested that call from victim's phone to defendant's phone not made from victim's house), *cert. denied*, 368 Md. 241, 792 A.2d 1178 (2002). Cf. *Ragland v. State, supra*, 385 Md. at 710, 870 A.2d 609 (police used cell phone records to confirm calls made from pay telephones under surveillance); *Triggs v. State*, 382 Md. 27, 30 n. 1 & 32 n. 2, 852 A.2d 114 (2004) (use of records to establish number of calls made to victim). It may well be that information in a cellular phone record about when a call was placed, and whether it was from or to the subscriber's cell phone, could readily be discerned by a juror familiar with his or her own cell phone bill. But, as Professor McLain has pointed out, '[n]o longer need the subject matter be so far "beyond the ken of laymen" that the finder of fact could not have any understanding of the particular issue without expert help.' *McLain, supra*, Maryland Evidence § 702:3 at 735–36 (footnotes omitted).

. . . .

"Following *Ragland*, the [Maryland] Court of Appeals reiterated that 'opinions based on a witness's "training and experience . . . should only [be] admitted as expert testimony, subject to the accompanying qualifications and discovery procedures."' *Johnson*, 408 Md. at 225, 969 A.2d 262 (quoting *Ragland*, 385 Md. at 709, 870 A.2d 609). Hanna's description of the procedures he employed to plot the map of Wilder's cell phone hits was not commonplace. Because his explanation of the method he employed to translate the cell phone records into locations is demonstrably based on his training and experience, we conclude that he should have been qualified as an expert under Md. Rule 5–702, and that the State was obliged to fulfill its discovery obligations under Md. Rule 4–263(b)(4)(2006). The trial court ought not have permitted Hanna to offer lay opinion testimony about the cell site location, and to describe the map created based on the cellular telephone records." 191 Md. App. at 367-68.

See also *Tetso v. State*, 205 Md. App. 334, 45 A.3d 788, (2012) (Police detective analyzed telephone records, testified as a witness for the State and was accepted as an expert in the field of cellular telephone ["cell phone"] tower linking and mapping.); *People v. Stevens*, No. A119073, 2012 WL 758035 (Cal. App. 2012) (A radio frequency expert testified for the prosecution about the pattern of defendant's cell phone calling and the area he was likely in at the time of the calls.); *Thompson v. State*, ____ S.W.3d ___,

2012 WL 668937 (Tex. App. 2012) (Given the relative simplicity of the technique of interpreting phone records employed in this case and Rome's training in that regard, court could not conclude that the trial court abused its discretion when it qualified him as an expert in interpreting mobile phone records); *Saenz v. State*, No. 3-10-00216-CR, 2011 WL 578757, at *3 (Tex. App. 2011) (unpublished opinion) (finding that 3-day course on cellular phone tracking and 12 prior occasions performing such analyses were sufficient training and experience to qualify officer to interpret phone records); *Wilson v. State*, 195 S.W.3d 193, 200–02 (Tex. App. 2006) (finding that testimony of a cellular company employee who had general understanding of cellular phone technology and who frequently performed record analyses was properly admitted).

Courts across the land are not in agreement about the level of expertise necessary to testify about cell phone calls and locations of cell phone towers. Similar to the trial court below, some courts hold that expert testimony is not necessary in this situation. In *Perez v. State*, 980 So. 2d 1126 (Fla. App.), *rev. denied* 994 So. 2d 305 (Fla. 2008), *cert. denied* 556 U.S. ___, 129 S. Ct. 1618, 173 L. Ed. 2d 1003 (2009), the defendant asserted that the trial court abused its discretion by permitting custodians of cellular telephone records to testify about the relative locations of cell phone callers and the cell phone tower that was identified with those calls. Perez contended that such testimony was beyond the expertise of the records custodians. The *Florida* court rejected that argument:

> "We find that the testimony of . . . the records custodians from Sprint–Nextel and Metro PCS, did not constitute expert testimony under section 90.702, Florida Statutes (2007), and therefore was properly admitted. As in *Gordon v. State*, 863 So.2d 1215, 1219 (Fla. 2003), the record demonstrates that Plasmir 'simply factually explained the contents of phone records.' As in *Gordon*, the custodians factually compared the locations on the phone records to locations on the cell site maps. Plasmir testified that a typical cell site covered an area of one to three miles. She then stated that the record for a particular cell phone details the actual cell tower off of which the call bounces. This testimony constituted general background information interpreting the cell phone records which did not require expert testimony. It did not reveal the precise location within

that one to three mile radius from which the calls were generated. It only served to explain the concept of a cell site and how it generally related to cellular telephone company records. Moreover, there was no direct evidence presented by the defendant to dispute these generalized facts or question their validity. Compare *United States v. Sepulveda*, 115 F.3d 882 (11th Cir.1997) (holding that scientific cell site analysis is necessary to determine liability for unauthorized use of cellular air time). A juror's own knowledge, experience and familiarity with the addresses of the receiving cell towers themselves as shown on the site map coupled with the familiarity of the location of the origin of the calls were sufficient for each juror to determine the location of the tower without the need for expert testimony. See *McGough v. State*, 302 So.2d 751 (Fla.1974). Therefore, the trial court did not abuse its discretion in overruling the defendant's objections and denying the defendant's motion for mistrial where the cell phone records and accompanying testimony were properly introduced." 980 So. 2d at 1131–1132.

See also *U.S. v. Beilharz*, Nos. 1:11cv122, 1:09cr 105, 2012 WL 2153157 (E.D. Va. 2012) (unpublished opinion) (court held that police lieutenant did not testify as to the technical aspects of cell phone operation, but merely how he compiled the summary chart, and his testimony was properly admissible as generally relevant evidence under Fed. R. Evid. 401); *Woodward v. State,* ___ So. 3d ___, 2011 WL 6278294 (Ala. Crim. App. 2011) (a layperson could plot the locations of the towers on a map and draw the same inference; therefore, the testimony did not require specialized knowledge as contemplated by rules of evidence and the trial court did not err by allowing the testimony).

The court in *U.S. v. Henderson*, No. CR 10-17BDB, 2011 WL 6016477, *5 (unpublished opinion) (N.D. Okla. 2011) stated:

"There appears to be conflicting authority as to whether testimony such as that provided by Kerstetter should be considered expert testimony or simply well-informed lay testimony. . . . It is the Court's view that testimony such as Agent Kerstetter's, while requiring a minimal level of training and specialized knowledge, does not rise to the level of expert testimony. A reasonably competent layperson, given a small amount of information, could easily examine a cell-phone

> record and determine the identity of the cell tower that handled a particular call. That same layperson, given a map of cell towers in the area, could identify the approximate location of the cell phone at the time the call was made or received. Thus, the Court agrees with the *Feliciano* opinion [*United States v. Feliciano*, 300 Fed. Appx. 795, 801 (11th Cir.2008)] rather than *Kale's* suggestion that this type of testimony should be provided by an expert."

Our Supreme Court has held that expert testimony is permitted when it helps the jury understand subject matter that is beyond the normal experience of the average juror. But if the normal experience and qualifications of jurors permit them to draw proper conclusions from the given facts and circumstances, expert opinions are not warranted. *State v. Wells*, 289 Kan. 1219, 1236, 221 P.3d 561 (2009); see also *Lollis v. Superior Sales Co.*, 224 Kan. 251, 580 P.2d 423 (1978) ("'Expert testimony should be received only where the subject-matter is complicated and embraces matters not elementary or of common knowledge.'"); *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 203 (4th Cir. 2000) (That cell phones send signals to towers, thereby indicating the user's general location, does not qualify as expert testimony "beyond the realm of common experience and which require[s] the special skill and knowledge of an expert witness.").

We do not find the trial court abused its discretion in allowing Brown to testify and the evidence he provided regarding Fleming's cell phone was not expert testimony. We agree with the trial court's conclusion. Interpreting cell phone data and locating calls within a particular geographic area on a map based on the location of the cell towers used in those calls is not complex, but a relatively simple process. It requires little more than understanding that cell phones generally connect to the nearest tower location and then applying that principle to facts supplied by the cell phone provider.

Because an analysis of cell phone records such as the one performed by Brown is relatively simple, the required degree of education, training, and experience was not extremely high. Brown's qualifications included a master's degree in the administration of

justice, with a thesis in cell phone technology and certification in cell phone technology after a 4-day course. He had plotted about 10 cases, but this was his first time testifying about any mapping he did of cell phone contacts. He had looked at Sprint records in the past and identified a particular tower for a call. Brown's background was sufficient to allow him to assist the trier of fact to understand and interpret the phone records, expert or not.

Brown did not provide expert testimony. His testimony was neither conclusive nor dispositive. Brown did not purport to identify Fleming's precise whereabouts based on the cell phone records; rather, he merely explained that Fleming's cell phone was in the vicinity of the crime scene at the time of the burglary. Moreover, there was ample other evidence tying Fleming to the crime, raising notions of harmless error.

Nevertheless, even if the trial court erroneously admitted Brown's testimony and this type of evidence requires admission as expert testimony, it was still not reversible error in the case at bar. As noted, Fleming did not object to the testimony on the basis of Brown's lack of qualifications, or the reliability of the analysis he employed; he objected on the ground that he should have been provided notice of the proposed testimony.

Fleming claims prejudice in the State's failure to properly disclose Brown as an expert witness. He argues the State's disclosure of Brown's expert qualifications and purported testimony on the afternoon of the second day of trial prejudiced his ability to defend himself and to obtain his own expert witness to counter Brown's testimony that Fleming's phone was in the vicinity of the crime when it occurred.

Fleming distinguishes a couple of cases that held the nondisclosure of expert testimony was not prejudicial. In *State v. Wacker*, 253 Kan. 664, 674, 861 P.2d 1272 (1993), the court found no prejudice where defense counsel obtained a psychological report the same day of trial as did the prosecutor, defense counsel had received results of

other tests, and defense counsel was allowed to review the report to prepare for cross-examination. In *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1028, 850 P.2d 773 (1993), the defense was not misled or surprised by the admission of plaintiff's treating physician's evaluation and testimony. Fleming argues that contrary to *Wacker*, the State knew about Brown's expertise, his purported testimony, and his proposed maps, and yet never disclosed this to the defense negating the defense's ability to defend against it resulting in a complete ambush.

In *State v. Burnison*, 247 Kan. 19, Syl. ¶ 1, 795 P.2d 32 (1990), we noted that in a criminal case, evidence not disclosed to the defendant before trial is not suppressed or withheld by the State if the defendant has personal knowledge thereof or if the facts become available to him during trial and he is not prejudiced in defending against them. Actual prejudice to the defendant's ability to defend against the charges must be shown in order to reverse the trial court. Prejudice is not presumed. 247 Kan. at 27; see also *Wacker*, 253 Kan. 664 (defendant failed to show actual prejudice).

Fleming argues that Brown testified he could determine from the cell phone records that Fleming's phone was in the immediate vicinity of the crime when it occurred. Fleming argues this was the only evidence that he was at the scene other than the testimony of the confessed co-felons. Fleming argues he was unable to adequately defend against Brown's testimony in terms of producing an expert for rebuttal and the effect of Brown's testimony was "uncontested, seemingly-expert, forensic evidence" bolstering the accusations of his accomplices.

Any error by the trial court, if any, in admitting Detective Brown's testimony concerning the cell phones was harmless. If a district court abuses its discretion in admitting expert testimony, the error is subject to harmlessness analysis. *State v. Carapezza*, 286 Kan. 992, 1005, 191 P.3d 256 (2008). K.S.A. 60-261 requires the court to find an erroneous admission of evidence to be harmless unless it "affects the

defendant's substantial rights." 286 Kan. at 1005. Recently in *State v. Ward*, 292 Kan. 541, 565-66, 256 P.3d 801 (2011), the Kansas Supreme Court confirmed that the standard for harmlessness of nonconstitutional error is whether the court is persuaded that there is no reasonable probability that the error affected the outcome of the trial. The burden of demonstrating harmlessness of a nonconstitutional error is on the party benefiting from the error. See *State v. McCullough*, 293 Kan. 970, Syl. ¶ 9, 270 P.3d 1142 (2012).

Fleming states that Beham testified and told the police there were only four assailants. Fleming argues the co-felons' testimony conflicted on who had a gun, who approached Beham's apartment first, whether they went to buy marijuana or commit the burglary, and whether they took cash. Fleming maintains that without Brown's cell phone testimony, the entire case was based on the testimony of confessed criminals and we should declare beyond a reasonable doubt that had the trial court not erred in admitting Detective Brown's cell phone testimony the result of his trial court have changed. We disagree.

Fleming points out that besides Detective Brown's "undisclosed expert testimony," there was no forensic or scientific evidence (finger prints, DNA, recovered stolen goods) placing him at the scene. He classifies the evidence of his co-conspirators as extremely biased and self-serving. He argues the stories of Beham and the four co-felons were "wildly inconsistent." Even so, the defense was able to bring the bias to the attention of the jury and challenge it on cross-examination. We are convinced any error in the trial court's admission of Detective Brown's testimony, if any, was harmless beyond a reasonable doubt. We also note that Fleming does not contend or present any evidence that the cell phone mapping evidence was incorrect.

Fleming also argues his convictions for aggravated robbery and theft are multiplicitous and his theft conviction should be reversed. We agree.

Fleming did not raise the multiplicity issue below, but Kansas appellate courts may consider multiplicity for the first time on appeal to serve the ends of justice or prevent a denial of fundamental rights. *State v. Dubish*, 234 Kan. 708, 718, 675 P.2d 877 (1984); *State v. Hankerson*, 34 Kan. App. 2d 629, 632, 122 P.3d 408 (2005), *rev. denied* 281 Kan. 1380 (2006). "The fundamental right of a defendant to a fair trial under the 5th and 14th Amendments to the Constitution of the United States would be violated by a multiplicitous conviction." *Dubish*, 234 Kan. at 718.

Multiplicity is the charging of multiple offenses arising out of a single transaction or occurrence. To determine whether two crimes are multiplicitous, the court must engage in a two-part test. First the court must determine whether the convictions arise from the same conduct. Second, the court must determine whether there are two separate offenses by statutory definition. *State v. Schoonover*, 281 Kan. 453, 496, 133 P.3d 48 (2006). Whether crimes are multiplicitous is a question of law subject to unlimited review. 281 Kan. at 462. If the crimes are committed separately and severally, there is not a multiplicity violation. 281 Kan. 496–97.

In pertinent part, theft requires an act "done with intent to permanently deprive the owner of the possession, use or benefit of the owner's property or services . . . [by] [o]btaining or exerting unauthorized control over property or services." See K.S.A. 2011 Supp. 21-5801(a)(1). "Robbery is knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person." K.S.A. 2011 Supp. 21-5420(a). Aggravated robbery requires that, in addition to a robbery, it be committed by a person armed with a dangerous weapon, or someone who inflicts bodily harm upon any person during the robbery. See K.S.A. 2011 Supp. 21-5420(b).

The jury instructions indicate that Fleming was charged with aggravated robbery for intentionally taking a cell phone from the person or presence of Beham. The jury instruction for theft was stated in very general terms and agreed upon by the prosecution

and defense. The theft instruction informed the jury that Fleming was charged with theft "of property of some value" when he obtained or exerted unauthorized control over the property and "intended to deprive Joshua David Beham permanently of the use or benefit of the property."

The State argues that under a purely elements-based *Schoonover* test, the convictions are not multiplicitous because the elements do not match up. The State argues that by statutory definition, the crime of theft can only be committed when the element is satisfied that a person acts with the intent to deprive the owner permanently of the possession, use, or benefit of the owner's property. The State contends that robbery does not contain this element. Therefore, the crime of theft requires an element not required to commit the crime of robbery and multiplicity is not a concern because each offense proscribes other distinct conduct. See *Schoonover*, 281 Kan. at 499. However, caselaw, even post-*Schoonover* caselaw, dictates otherwise.

The State's cites to *State v. McKissack*, 283 Kan. 721, 156 P.3d 1249 (2007), and that court's differentiation of theft and criminal deprivation of property based on the permanent or temporary nature of the taking appears as the supporting authority of the State's argument that a similar permanent or temporary taking differentiates theft and robbery. This would lead to the conclusion that robbery is only a temporary taking of the owner's property. We do not agree and the State has not provided any relevant authority in support of this analysis.

This court has traditionally held that theft is a lesser-included crime of robbery. This is the case under an elements test in K.S.A. 2011 Supp. 21-5109(b)(2) identical to the elements test in *Schoonover*. See K.S.A. 2011 Supp. 21-5109 (b)(2) (lesser included crime is a "a crime where all elements of the lesser crime are identical to some of the elements of the crime charged"). In *State v. Scott*, 28 Kan. App. 2d 418, 422, 17 P.3d 966, *rev. denied* 271 Kan. 1041 (2001), the defendant was charged, in part, with robbery

for entering a car with the victim inside, grabbing her, and, after she escaped his grasp and fled the car, driving the car from the scene. At trial, Scott testified he intended only to obtain a ride home and took the victim's car in a panic. Following his conviction of robbery (after the jury was also instructed on the lesser included offense of theft, pursuant to K.S.A. 21–3107[a][1]), Scott appealed the district court's failure to give a lesser included offense instruction of deprivation of property.

In affirming Scott's aggravated robbery conviction, our court stated:

> "In this case, the trial court accepted Scott's proposed theft instruction without objection from the State, but we have concluded that the giving of even this lesser included instruction was unwarranted by the evidence. As stated above, robbery is a person and property felony, whereas theft is only a property felony. [Citation omitted.] *When a taking is accomplished by violence to a victim, more than a mere theft or criminal deprivation has occurred. The offense is at least a robbery and possibly an aggravated robbery.*" (Emphasis added.) 28 Kan. App. 2d at 424.

See also *State v. Sandifer*, 270 Kan. 591, 601, 17 P.3d 921 (2001) ("'Theft' is not committed where there is evidence the thief has used force to gain possession of the property.' [Citation omitted.]").

As pointed out by the parties, this court has recently affirmed the position that theft is a lesser-included offense of robbery. The parties cite *State v. Plummer*, 45 Kan. App. 2d 700, 704, 251 P.3d 102 (2011), where the court stated:

> "Despite some differences in the strict elements of theft and robbery, the appellate courts continue to treat theft as a lesser offense for purposes of instructing juries. *Simmons*, 282 Kan. at 742; *State v. Boyd*, 281 Kan. 70, 94, 127 P.3d 998 (2006) (Theft entails a lesser degree of the generic crime of larceny, while robbery presents an enhanced form of the crime.). That determination squares with K.S.A. 21–3107(2)(a), which provides that a defendant may be convicted of the crime charged or a lesser degree of the same crime."

There was no evidence presented in this case that any of the property taken from Beham's apartment or from his person was done at a time when Beham was not being held at gunpoint by Fleming. In the instant case, the aggravated robbery was committed by Fleming threatening Beham with a sawed-off shotgun. The aggravated robbery subsumes the theft as it is the precise act that needed to be committed to constitute the aggravated robbery. The act of taking the property in the apartment and ordering Beham to empty his pockets encompassed a single encounter or criminal enterprise. Fleming cannot be convicted of both theft and aggravated robbery under the facts of this case. The theft charge was multiplicitous with the aggravated robbery charge.

Affirmed in part and reversed in part.