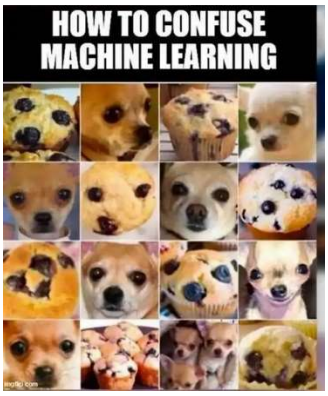
**Sheri's Sidebar Edition # 28 4/5/2024**

**Happy Friday everyone.**

**I am back again with things I wish I had known during practice, things that have changed, interesting tidbits, and random tips for practice. Welcome back to:**

# SHERI'S SIDEBAR

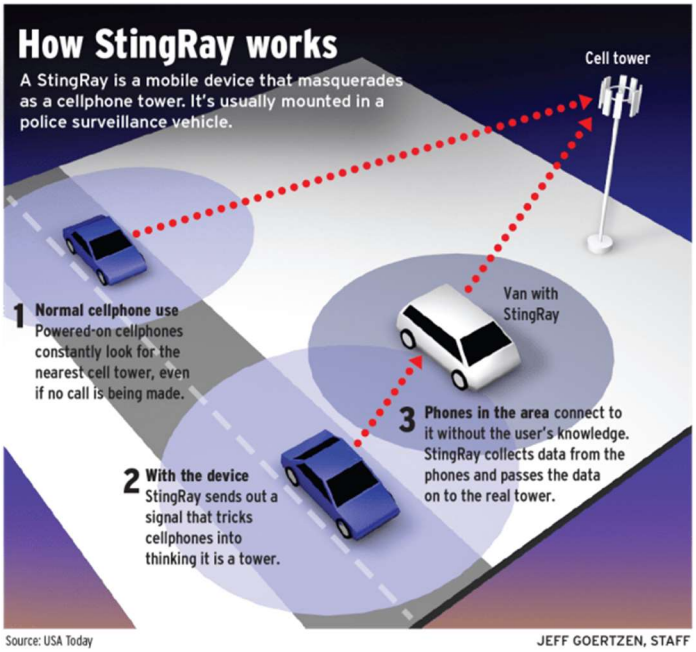
1. **Are you aware that some counties in WA have started using AI to review and summarize JAIL CALLS for evidence and charging decisions?**
    - What does that mean you should do? Watch police reports which give a summary/narrative saying the police officer reviewed a jail call(s). It could be AI reviewed them. Although there is a facial recognition statute (RCW 43.386), I am not aware of any law or requirements specific to AI use in other ways except marketing of candidate under RCW 42. So, **police do not have to tell defense yet when it has been used.**
        - Immediately demand the actual recordings.
        - AI will make mistakes!
        - Common mistakes include:
            - misunderstanding tone and emotion;
            - misunderstanding context;
            - misunderstanding context in a foreign language changes the entire word or meaning – like in Spanish




**AI IS LIKE** Audio can't be much better...

2. **WDA has also been alerted that some police agencies in WA have begun using Sting Ray and other cell site simulators to intercept, listen to and potentially record and store cellphone calls.**

NO THEY CAN'T! You are correct, they cannot do that without a warrant!




RCW 9.73.260(1)(f)

RCW 9.73.260

**Pen registers, trap and trace devices, cell site simulator devices.**

(1) As used in this section:

(f) **"Cell site simulator device" means** a device that transmits or receives radio waves for the purpose of conducting one or more of the following operations: (i) Identifying, locating, or tracking the movements of a communications device; (ii) intercepting, obtaining, accessing, or forwarding the communications, stored data, or metadata of a communications device; (iii) affecting the hardware or software operations or functions of a communications device; (iv) forcing transmissions from or connections to a communications device; (v) denying a communications device access to other communications devices, communications protocols, or services; or (vi) spoofing or simulating a communications device, cell tower, cell site, or service including, but not limited to, an international mobile subscriber identity catcher or other invasive cell phone or telephone surveillance or eavesdropping device that mimics a cell phone tower and sends out signals to cause cell phones in the area to transmit their locations, identifying information, and communications content, or a passive interception device or digital analyzer that does not send signals to a communications device under surveillance. A cell site simulator device does not include any device used or installed by an electric utility, as defined in RCW 19.280.020, solely to the extent such device is used by that utility to measure electrical usage, to provide services to customers, or to operate the electric grid.

(2) No person may install or use a pen register, trap and trace device, or cell site simulator device **without a prior court order issued** under this section except as provided under subsection (6) of this section or RCW 9.73.070.

- If any order is granted under the exception for the warrant, it is basically an exigent circumstances with PC exception, they still have to get a warrant, and they have to file documentation with the court. The documentation has to indicate how many times they have done this, and how many times they did or did not get the warrant after the fact. Obviously if they did not get the warrant after the fact, the evidence is fruit of the poisonous tree and should be excluded.
- I would argue that the exception violates potentially some US Supreme Court case law I would try to find, as well as the Fourth Amendment and Art. 1 § 7 of the WA Constitution which holds stronger protections that the Fourth Amendment.

### 3. Did you know the State and its so-called experts on cases where they use a cellphone to establish our client's location being "at or near" the scene of the crime at the time the crime occurred based on the tower their cellphone pinged off of has not been accurate this entire time?

- Cellphones do not always ping off the closest tower. WHAT?! That is what every expert witness the State puts on the stand says: We know your client was here because their cell phone pinged off of this tower right here.
    - First, how do you know my client was with their phone? But even if s/he was with the phone…

- If a cellphone tower is too busy, if it is blocked from your client's signal, or if your client's phone is picking up a stronger signal from another tower, their phone will ping and jump to making/receiving calls from another tower, not the tower closest to their location.

**Brad Cooley**
Sr. Data Scientist,
Computer Forensic Expert

**2021 Investigator Virtual Conference**
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# How Does a Phone Choose a Tower?

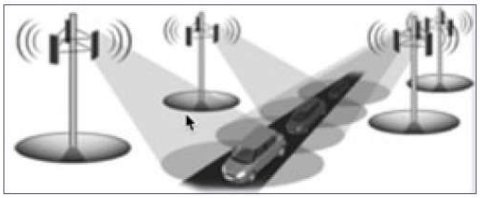
Usually, a cell phone will be within range of multiple towers

So how is the tower assignment made?

It Depends on several variables at the time of request:

- *Distance* to various alternative towers
  - (if equidistant, no way to know)
- *Range* of Towers
- *Capacity* of Towers
- *Azimuth* of Towers
- *Occlusions* (obstructions)
- Local Conditions

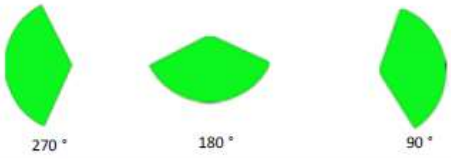
# Cell Tower Spacing



- In practice, cell towers are grouped in densely populated regions to better cater to most of their company's subscribers. Cellular traffic through a single site is limited by the base station's capacity. This capacity limitation is usually the factor that determines the spacing of cell towers.
- In suburban areas, cell towers are commonly spaced **1-2 miles** apart.
- In dense metropolitan cities, towers may be as close as **0.25-0.5 miles** apart.
- Terrain
  - For a flat terrain, it may be possible to space towers out between **30-45 miles**.
  - When the terrain is hilly, the working range can drastically shrink to as low as **3-5 miles**.

## Cell Tower Range

- *Working Range* - range within which mobile devices can connect reliably to the cell tower. However, this range is not a fixed figure. It will depend on several factors, including:
  - The **height** of the antenna.
  - The **frequency** of the signal in use
  - The rated **power** of the transmitter
  - Ambient **weather** conditions around the cell tower
  - **Reflection/absorption** of radio energy by nearby buildings
  - The rated uplink/downlink **data rate** of the subscriber's mobile device
- *Azimuth* - The Antenna Azimuth is the direction that the antenna is pointing. For most towers, this direction centers a 120° span

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- So, you could be right next to a tower with the antennae facing the opposite direction and potentially not link to that tower at all.
- Something to consider next time you have a client in this circumstance.

**4. Are you sufficiently aware of the evidence rules and objections to stack them in order to admit or exclude the same evidence on multiple bases?**

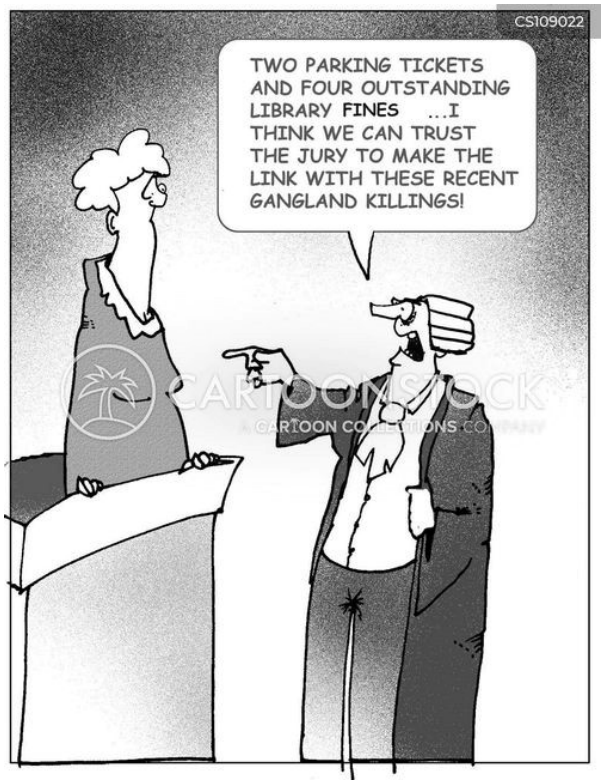
*See e.g. State v. Jasper*, 174 Wn. 2d 96, 271 P.3d 876 (2012) Over defense objection at trial the State entered a certified affidavit from the records custodian of driving records stating the driving status of Mr. Jasper, arguably because it is allowed as an exception to hearsay under Evidence Rule & RCW 5.45.020.

However, merely because a piece of evidence is admissible under a hearsay exception, does NOT make it automatically admissible. Evidence still must be admissible under every other rule and right. In Jasper, the State failed to bring a witness to testify, thereby violating the defendants right to confrontation, violating *Crawford* because the driving status was testimonial evidence.

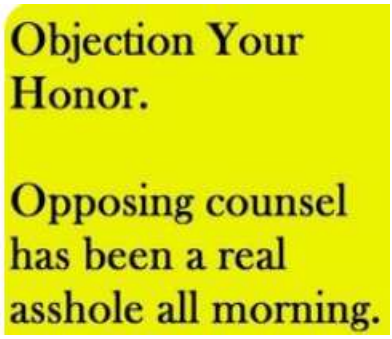
- That did not get ruled upon until appeal. However, it could have been objected to at trial under the Confrontation Right. Almost always if there is a

hearsay objection, if you lose that, you have a Confrontation Right objection also.

5. **How many object when a police officer testifies to things like "As I was approaching the vehicle I notice the defendant making 'furtive movements';" or "I pulled her over at 3am and approached her vehicle, noting she appeared nervous." And similar other phrases and terms used to prejudice the jury?**




Absolutely do it!




- I also like to ask them to define "furtive movements" on the stand. It's hilarious. They can't do it. Typically they say something along the lines of, "Well, its, um…really rushed, rapid movements, like trying to hide something." Then I ask them if they are aware the Oxford English Dictionary actually defines it as attempting to avoid notice, secretive.

Regardless, the point is caselaw supports your objection.

**"It is common to see law enforcement characterize ordinary, innocent behavior as suspicious:**
Gilding the lily, the officer testified that he was additionally suspicious because when he drove by Broomfield in his squad car before turning around and getting out and accosting him he noticed that Broomfield was "star[ing] straight ahead." Had Broomfield instead glanced around him, the officer would doubtless have testified that Broomfield seemed nervous or, the preferred term because of its vagueness, "furtive." Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. **Such subjective, promiscuous appeals to an ineffable intuition should not be credited.** *United States v. Jones,* 269 F.3d 919, 927-29 (8th Cir.2001); *United States v. Moreno-Chaparro,* 180 F.3d 629, 632 (5th Cir.1999); see also *United States v. Sigmond-Ballesteros,* 285 F.3d 1117, 1123 n. 4 (9th Cir.2002); cf. *United States v. Troka,* 987 F.2d 472, 474 (7th Cir.1993)."

Footnote 13
U.S. v. Broomfield, 417 F.3d 654, 655 (7th Cir. 2005).

6. **You know how the Prosecutor often waits until the week of trial readiness before asking the officers for their schedule, then comes to TR and cancels the scheduled trial due to their lead officer being on vacation? Are you aware that although there is an exception which allows resetting a trial for witnesses being on vacation, there are requirements of the State to have performed due diligence, along with other factors before the State can get the good cause trial resetting?**

    - Despite the prosecutor stating an officer is going to be gone on vacation during the trial date, the prosecutor must also clearly indicate:
        - When the state found out.
            - MANY POLICE AGENCIES REQUIRE OFFICERS TO SCHEDULE VACATIONS 1-6 months in Advance
            - WSP is usually 10-12 months in advance
        - The higher court has also ruled that being on vacation does not make an officer unavailable to testify if they are in or near the jurisdiction still.
            - "A scheduled vacation from work duties does not necessarily equate to unavailability to testify at a short trial. We hold that there was insufficient basis for the trial court to find that Palmer's anticipated unavailability was unforeseeable and unavoidable." *State v. Peres-Sanches*, 84 Wn. App. 1050 (1996)(unpublished)
        - The higher courts require the State must have sent a subpoena out for the witnesses. This is part of the due diligence requirement.

- Prosecutors often send subpoenas by email to officers and do not send them out until after TR. So, if they do not have subpoena's filed with the court at TR and try to get a reset for an "unavailable" witness without a filed subpoena, bring with you to every TR a list of cases indicating the requirements the State must have done to get any continuance.

- The Absence of the witness must have been beyond the control of the court or the parties. CrR 3.3(d)(8).
  - This rule goes with the subpoena also, as well as the good faith and due diligence on the State's part. See e.g. State v. Wake, 56 Wn. App. 472, 475, 783 P.2d 1131 (1989) (continuance due to unavailability of State's crime lab witness was an abuse of discretion where the State knew that witness would be unavailable and failed to issue a subpoena or make alternate arrangements).


7. **Finally, on a positive note, are you aware that as of April 1, 2024 WSH is close to consistent compliance with 7 day wait times for inpatient hospital admissions**

**for restoration services? NO APRIL FOOLIN'! Per plaintiff's counsel.**


**"Since you insist on defending yourself, I feel April first would be an appropriate trial date."**

Get some much needed rest this weekend everyone…there is a rumor that Spring might come this year despite that lying ground hog.


Phil needs pro bono counsel if anyone knows someone interested....

HAPPY WEEKEND ALL!
Sheri