

Testimony about Tracking

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Categories : [Evidence](#), [Uncategorized](#)

Tagged as : [cell site location information](#), [expert testimony](#), [gps](#), [jackson](#), [tracking](#)

Date : October 22, 2013

More and more criminal cases involve electronic tracking. Sometimes the defendant is tracked using GPS, other times using cell site location information. Either way, interesting evidentiary questions arise. May an officer who knows how to use a tracking device testify about tracking, even if she doesn't know much about how the underlying technology works? Who can testify about cellular towers and how cellular telephones connect to them? Is such testimony lay witness testimony or expert testimony?

GPS tracking. The recent case of *State v. Jackson*, __ N.C. App. __, 748 S.E.2d 50 (2013), provides helpful guidance regarding GPS tracking. The defendant in that case sexually assaulted a woman on the street. He was wearing an ankle bracelet, apparently as a condition of pretrial release on other charges. At trial, the supervisor of the Charlotte-Mecklenburg Police Department's electronic monitoring unit testified about the ankle bracelet and introduced a video tracking the defendant's movements during the time period in question. On appeal, the defendant contended that "the State failed to establish a proper foundation to verify the authenticity and trustworthiness of the data" and needed to verify the accuracy of the data before it could be admitted, but the court ruled that the officer's "testimony established a sufficient foundation of trustworthiness." The court also stated that the officer's testimony was admissible as lay witness testimony based on his review of the tracking data, rather than as expert testimony. Both the fact that the court approved of testimony from an officer – rather than a scientist or an engineer – and the fact that the court deemed the testimony lay testimony are significant.

As an aside, *Jackson* makes an interesting contrast to *State v. Meadows*, 201 N.C. App. 707 (2010), where the court of appeals ruled that an officer could not testify as an expert regarding the use of the NarTest machine to identify controlled substances, because there was insufficient evidence of the machine's reliability and the officer had no training in chemistry to allow him to assess the functioning of the machine.

Cell site tracking. I'm not aware of a North Carolina appellate case addressing the evidence issues surrounding cell site tracking testimony. However, there are some relevant cases from appellate courts around the country. Some cases involve officer witnesses, while others involve witness from telecommunications service providers. Let's look at those cases separately.

Testimony by officers. Several courts have allowed officers to testify as lay witnesses regarding at least basic cell site tracking procedures. See, e.g., *United States v. Feliciano*, 300 Fed. Appx. 795 (11th Cir. 2008) (unpublished) (holding that a trial judge did not abuse his discretion in allowing an officer to testify "about cell tower sites"; the officer "simply reviewed the cellular telephone records . . . which identified cellular towers for each call, and based on his personal knowledge concerning the locations of certain cellular towers, testified that, at the time of the call [a specific phone was not near a specific location]"); *United States v. Evans*, 892 F.Supp.2d 949 (N.D. Ill. 2012) (holding that an officer would be allowed to testify as a lay witness regarding the location of cell towers and regarding which towers the defendant's cell phone used at what time, and that the officer would be allowed to plot the towers on a map without qualifying as an expert; however, any testimony about how cellular networks work and "granulization theory" would require qualification as an expert). On the other hand, *Wilder v. State*, 991 A.2d 172 (Md. Ct. App. 2010), ruled that "the use of cell phone site location evidence and the accompanying testimony of a law enforcement officer who explain[s] its use require the qualification of the sponsoring witness as an expert." It seems to me that the more technical and complicated the

tracking procedure is, the more likely a court would be to require an officer to qualify as an expert in order to testify about it.

Testimony by employees of telecommunications service providers. Courts have also considered testimony from employees of cellular service providers. Most courts seem to have allowed relatively low-level employees to testify as lay witnesses about cell site tracking. *See, e.g., Gosciminski v. State*, __ So.3d __, 2013 WL 5313183 (Fla. Sept. 12, 2013) (a Nextel engineer testified during a murder case regarding “maps of the cell towers, the coverage areas of the towers, propagation information, and specific cell phone calls made or received by [the defendant]” and introduced diagrams regarding tower locations and sector information; this was properly admitted and did not require that the engineer be qualified as an expert because “such information is understood by the average juror who owns a cell phone”); *Woodward v. State*, __ So.3d __, 2011 WL 6278294 (Ala. Ct. Crim. App. Dec. 16, 2011) (lay witnesses employed by cell phone company were properly allowed to testify that cell phone records “indicated the locations of the callers at certain times”; the testimony did not require specialized knowledge and was limited to information regarding “cell towers used during certain phone calls”); *Malone v. State*, 73 So.3d 1197 (Miss. Ct. App. 2011) (cell phone company employees properly testified as lay witnesses regarding cell phone records, tower locations, tower coverage information, and tower usage; none of this was “so complex or technical as to render it expert testimony”). Again, the more complex the testimony is, the stronger the argument for requiring the witness to qualify as an expert.

Conclusion. The evidence issues surrounding tracking technology may prove difficult to settle. In part, this is because tracking technology itself changes so rapidly that decisional law struggles to keep up. But it is also because the line dividing lay and expert testimony is unstable. A witness must testify as an expert if the witness’s testimony involves “scientific, technical or other specialized knowledge,” N.C. R. Evid. 702, that is beyond the experience of a typical juror. But a typical juror today knows far more about GPS satellites and cellular towers than a typical juror a decade ago. And of course, tomorrow’s jurors likely will know even more.